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GOLDEN PARACHUTES: EXECUTIVE EMPLOYMENT CONTRACTS

In response to the recent increase in corporate takeovers,¹ boards of directors are protecting key executives with "golden parachute" employment contracts (golden parachutes).² Golden parachutes are special employment contracts between a corporation and a limited number³ of the cor-

¹ See Steyer, *Deals of the Year*, FORTUNE, Jan. 24, 1983, at 48, 49 (summary of top 50 mergers and acquisitions of 1982). Merger specialists maintain that 1982 marked a high point in hostile corporate takeovers. *Id.*; see Ward Howell International, Inc., Survey of Employment Contracts and "Golden Parachutes" Among the FORTUNE 1,000, (Sept. 27, 1982) (available from Ward Howell International, Inc., 99 Park Ave., New York, N.Y. 10010) (executive recruitment firm's study of golden parachute contracts). Although the number of mergers is below the record levels of the 1960s, the total number of hostile takeovers and the size of corporate takeovers have increased. *Id.* at 9; see Steyer, *supra* (top 50 corporate deals of 1982 surpassed \$48 billion).

² See Ward Howell International, Inc., *supra* note 1, at 1. Ward Howell surveyed the proxy statements of 665 Fortune 1,000 companies. *Id.* at 1, 2. According to the survey, golden parachute clauses are becoming increasingly prevalent in executive employment contracts. *Id.* at 6, 9. The survey results reveal that golden parachute clauses appeared in 27% of the executive employment contracts dated 1979 or earlier, 37% of the 1980 contracts, 47% of the 1981 contracts, and in 53% of the contracts examined from the first nine months of 1982. *Id.* at 6. The Ward Howell study attributes the growth in the popularity of golden parachute agreements to the recent wave in unsolicited takeovers. *Id.* at 1, 2, 6, 9; see *supra* note 1 (current hostile merger wave); see also McLaughlin, *The Myth of the Golden Parachute: What Every Dealmaker Should Know*, 17 MERGERS & ACQUISITIONS 47, 47 (1982) (trend toward golden parachutes understandable in light of increase in merger activity); Morrison, *Compensation: Those Executive Bailout Deals*, FORTUNE, Dec. 13, 1982, at 82, 82 (as a result of increased merger activity more and more golden parachute clauses are appearing in executive employment contracts); Klein, *Controversial Perk: A Golden Parachute Protects Executives, But Does It Hinder or Foster Takeovers?*, Wall St. J., Dec. 8, 1982, at 56, col. 1 (merger boom explains increase in golden parachutes); Moore, *Golden Parachute Agreements Shelter Displaced Executives*, Legal Times of Wash., Oct. 25, 1982, at 1, col. 1 (golden parachute agreements have prospered in era of hostile takeovers) [hereinafter cited as *Golden Parachutes*].

³ See McLaughlin, *supra* note 2, at 47 (companies extend golden parachutes to only a handful of senior executives); Morrison, *supra* note 2, at 86 (critics contend only key executives receive golden parachute protection); Klein, *supra* note 2, at 56, col. 2 (most golden parachute plans cover one to six executives); Ward Howell International, Inc., *supra* note 1, at 2 (golden parachute plan at "typical" corporation covers two to five executives); see also Lewis v. Anderson, No. 6505 (Del. Ch. Oct. 8, 1982) (Conoco's golden parachute covered nine senior executives); Plaintiff's Verified Complaint at 2, Zimmerman v. Bell, No. 882-2658 (D. Md.) (Martin Marietta Corporation's golden parachutes covered 28 key executives); BENDIX CORPORATION, NOTICE OF SPECIAL MEETING OF STOCKHOLDERS, Dec. 14, 1982, at 14 (Bendix golden parachutes covered 22 key employees); BENEFICIAL CORPORATION, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS, April 30, 1982, at 9 (Beneficial offered 250 key officers golden parachute employment contracts); GULF RESOURCES & CHEMICAL CORPORATION, FORM 10-Q: QUARTERLY REPORT UNDER SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934, June 30, 1982, at 8 (Gulf Resources entered into golden parachute agreements with 21 senior executives in 1981); PENNZOIL COMPANY, FORM 10-Q: QUARTERLY REPORT UNDER SECTION 13

poration's senior executives.⁴ Golden parachutes differ from traditional employment contracts in that golden parachutes do not operate until trig-

OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934, Sept. 30, 1982 (Pennzoil authorized golden parachute agreements for 11 of Pennzoil's senior executives).

⁴ See McLaughlin, *supra* note 2, at 47. Golden parachute employment contracts insure executives against the risks incident to corporate takeovers. *Id.* Following a successful corporate takeover, the acquiring corporation normally fires a considerable number of the target corporation's senior executives. See Gelfond & Sebastian, *Reevaluating The Duties Of Target Management In A Hostile Tender Offer*, 60 B. U. L. REV. 403, 420 n.121 (1980) (successful corporate takeover normally spells dismissal for senior target corporation management); Perham, *Surge In Executive Job Contracts*, Dunn's Bus. Monthly, Oct. 1981, at 86, col. 1 (study revealed that 52% of target corporation's senior executives are no longer with firm in third year following major takeover); Hayes, *Hayes/Hill Incorporated: Study of Executive Employment* (1981) (study revealed that only 42% of target corporation's senior executives are still with acquired corporation five years after successful takeover). Golden parachutes insure executives against the risk of abbreviated tenure associated with corporate takeovers by guaranteeing executives that a change of control will not alter either their particular position and responsibilities or their respective salaries. See McLaughlin, *supra* note 2, at 47-48 (golden parachutes guarantee target executives specific positions, particular salary ranges, or lump-sum cash bonuses); Master, *Execs' 'Golden Parachutes' Await First Court Challenges*, Legal Times of Wash., Nov. 2, 1981, at 10, col. 1 (golden parachutes generally guarantee that target executives will continue to receive their salaries following takeover or will receive lump-sum payoff should change of control result in their dismissal); Ward Howell International, Inc., *supra* note 1, at 3 (golden parachutes guarantee executives' income, position and responsibilities following change of control).

Corporate proxy materials, distributed to shareholders in advance of a corporation's annual meeting of stockholders, often contain the specific provisions of golden parachute employment contracts between the corporation and certain of its senior executives. Ward Howell International, Inc., *supra* note 1, at 2. For example, Acme-Cleveland Corporation's notice of annual meeting of shareholders provides in part:

If the executive is terminated by the Corporation without cause during the three-year period immediately following any "change in control", and, his base salary, incentive award, and benefits and service credits under the Corporation's employee benefit plans will be continued for the remainder of the period, but in no event for less than 24 months following termination of employment.

ACME-CLEVELAND CORPORATION, NOTICE OF ANNUAL MEETING OF SHAREHOLDERS, Dec. 23, 1982, at 11. Allied Corporation's proxy material, on the other hand, provides in part:

Allied has adopted changes in employee benefits that would come into effect for certain senior executive employees in the event such an employee terminated his employment with Allied within a period of two years following an acquisition of Allied by another company, as a result of which Allied ceased to be an independent, publicly owned corporation. The specified employees would be entitled to two years' severance pay in an annual amount equal to the employee's highest year's compensation (consisting of salary and awards under Allied's Incentive Compensation Plan). They would also be entitled to the full vesting of certain life insurance and retirement benefits; the continuation in effect during the two-year severance period of certain other employee benefits; and payments in lieu of awards under Allied's Incentive Compensation Plan and any unvested account under Allied's Stock Purchase and Savings Plan.

ALLIED CORPORATION, NOTICE OF SPECIAL MEETING OF SHAREHOLDERS, Dec. 14, 1982, at 99-100. Bendix Corporation also disclosed the terms of the corporation's golden parachute employment contracts in the corporation's notice of special meeting of stockholders. BENDIX CORPORATION, *supra* note 3, at 14. Bendix's notice to shareholders provides in part:

gered by a change of control in an executive's corporation.⁵ Once triggered, golden parachutes provide executives with lucrative severance

[B]endix employment agreements . . . provide for certain payments following the termination of employment by Bendix, or by the employee following a diminution in compensation or position, following a Change in Control . . . of Bendix, including, among other things, a continuation of base salary and incentive compensation payments (against which will be offset such compensation received from a subsequent employer after 18 months following termination of employment with Bendix) for the period ending on the earlier of (i) 4 years from the date of a Change in Control (6 years in the case of William M. Agee) or (ii) 3 years from the date of termination of the key employee's employment with Bendix (5 years in the case of Mr. Agee).

Id. Finally, Beneficial Corporation's notice of annual meeting of stockholders provides in part:

The employment contracts will be operative for a three-year period if a change of control occurs. They will provide key employees (a) compensation during the employment period at a rate equal to that existing immediately prior to the change in control, adjusted through such period to reflect increases based upon the Company's prior practices, and (b) continued eligibility during such period under the Company's employee benefits plans. A key employee's good faith determination that the nature and scope of his or her duties has been limited following a change of control would entitle the employee to terminate employment with the Company. In that event or the event of a termination of employment by the Company other than for cause, most components of such compensation and benefits would continue through the remainder of the three-year period.

BENEFICIAL CORPORATION, *supra* note 3, at 9.

⁵ See Ward Howell International Inc., *supra* note 1, at 3. A change of control in an executive's corporation triggers the executive's golden parachute. *Id.* The exact circumstances that constitute a change of control sufficient to trigger a golden parachute differ among agreements. *Id.*; McLaughlin, *supra* note 2, at 47. Golden parachute definitions of change in control include the accumulation of a certain percentage of a corporation's stock by one party, a change in the directors constituting a majority of the board, the replacement of a top executive in the corporation, or the delisting of the company's stock from a major stock exchange. Ward Howell International Inc., *supra* note 1, at 3; see, e.g., Lewis v. Anderson, No. 6505, (Del. Ch. Oct. 8, 1982) (Conoco golden parachute define change of control as accumulation of 20% or more of Conoco stock by one party or delisting of Conoco stock from New York Stock Exchange).

Corporations occasionally include a definition of the exact circumstances that constitute a change of control sufficient to trigger the corporation's golden parachute employment contracts in the corporation's proxy material. Ward Howell International, Inc., *supra* note 1, at 2. For example, Acme Cleveland Corporation's annual notice to shareholders provides in part:

For the purpose of the agreements, a "change in control" will be deemed to take place if, as a result of a tender offer or other acquisition of securities of the Corporation, or a merger, consolidation, or sale of assets of the Corporation, or any combination of these transactions (a "Transaction"), either (a) the persons who were Directors of the Corporation immediately before the Transaction cease to constitute a majority of the Board of Directors of the Corporation or (b) the employment of the person employed as Chief Executive Officer of the Corporation on the operative date terminates involuntarily (other than for cause). If within five years of the Transaction (1) such a change in Directors takes place during any twenty-four month period or (2) the Chief Executive Officer's employment so terminates, the change or termination will be deemed to result from the Transaction. In addition, the election at anytime of two or more Directors whose election

packages,⁶ which can include cash settlements in excess of several times an executive's yearly income.⁷ Like traditional employment contracts,⁸ the scope and provisions of golden parachutes differ among agreements.⁹

is opposed by a majority of the Board then in office will be deemed, in itself to be a "change in control."

ACME-CLEVELAND CORPORATION, *supra* note 4, at 10-11. Bendix Corporation's special notice to stockholders, on the other hand, provides in part:

The agreements define Change in Control as (i) the acquisition by any person, directly or indirectly, of securities of Bendix representing 51% or more of the combined voting power of the then outstanding securities of Bendix or (ii) a change in the composition of a majority of the Board of Directors of Bendix within twelve months after any person acquires, directly or indirectly, securities of Bendix representing 25% of the combined voting power of the then outstanding securities of Bendix.

BENDIX CORPORATION, *supra* note 3, at 115; see also Profusek, *Executive Employment Contracts in the Takeover Context*, 6 CORP. L. REV. 99, 105-07 (1983) (examples of golden parachute trigger definitions).

⁶ See Masters, *supra* note 4, at 10, col. 1. Golden parachutes normally guarantee executives that a change of control will not effect their salary or position. *Id.*; *supra* note 4 (golden parachutes insure executives against risks incident to corporate takeovers). Accordingly, a golden parachute employment contract guarantees an executive's salary and benefits for a specified number of years following a change of control or stipulates a lump-sum payment to the executive in the event of dismissal or downgrading of the executive's position or responsibilities following a change of control. Ward Howell International, Inc., *supra* note 1, at 2; see also *supra* note 4 (compensation guaranteed executives by golden parachute contracts).

⁷ See Morrison, *supra* note 2, at 82 (survey and analysis of golden parachute contracts with *Fortune* 1,000 corporations). *Fortune* scrutinized the proxy statements of 155 companies that had adopted golden parachute employment contracts. *Id.* The *Fortune* survey revealed 15 corporations with golden parachute agreements that, if triggered, would provide a departing chief executive with a \$2.5 million or more severance package. See *id.* at 85 (*Fortune* estimates potential value of American Family Corporation's chief executive officer's (CEO) golden parachute at \$7.8 million, GK Technologies' CEO's golden parachute at \$7.3 million, Conoco's CEO's golden parachute at \$4.1 million, Thiokol's CEO's golden parachute at \$4.0 million, Allied's CEO's golden parachute at \$3.9 million, Pennzoil's CEO's golden parachute at \$3.7 million, American Medical International's CEO's golden parachute at \$3.1 million, Time Inc.'s CEO's golden parachute at \$3.0 million. Celanese Corporation's CEO's golden parachute at \$2.5 million).

⁸ See generally G. WASHINGTON & V. ROTHSCHILD, *COMPENSATING THE CORPORATE EXECUTIVE* (3rd ed. 1962) (examples of traditional executive employment contracts).

⁹ See McLaughlin, *supra* note 2, at 47. Ranging from the moderate to the extreme, golden parachute agreements differ among corporations. Herzel, *Golden Parachute Contracts: Analysis*, Nat'l L.J., Feb. 15, 1982, (special section), at 20, col. 1 [hereinafter cited as *Analysis*]. Golden parachute contracts differ in terms of the number of executives covered, the number of years of coverage, the potential costs, the specific circumstances that constitute a change of control, and the particular circumstances that entitle an executive to receive benefits under the agreement after a change of control has occurred. See McLaughlin, *supra* note 2, at 47-48 (examples of golden parachute contracts); Profusek, *supra* note 5, at 112-15 (same); *Analysis*, *supra* at 20, col. 1 (same); *supra* notes 3-5 (same).

For example, a golden parachute can provide an executive with an unconditional cash bonus following a change of control in the executive's corporation. *Analysis*, *supra*, at 20, col. 1. Ordinarily, a change of control in an executive's corporation triggers the executive's golden parachute employment contract. See *supra* note 5. Once triggered, cash bonus golden parachutes, on the one hand, provide the executives who voluntarily leave the acquired

Although golden parachutes are increasing in popularity,¹⁰ the propriety

corporation, after determining in good faith that the change of control will prevent them from effectively discharging their duties, with unconditional cash bonus golden parachute benefits. *Analysis, supra*, at 20, col. 1. Conditional golden parachutes, on the other hand, only provide golden parachute benefits to the executives whom an acquiring corporation dismisses or subjects to adverse consequences following a change of control. *Id.*

Conoco Inc.'s golden parachutes with Conoco's CEO is an example of an unconditional cash bonus golden parachute. *Analysis, supra*, at 20, col. 1; see also *infra* note 38 (Burnup & Sims' CEO received unconditional cash bonus golden parachute). Conoco's board of directors authorized Conoco's CEO's cash bonus golden parachute following an unsuccessful tender offer for 20% of the common stock of Conoco by Dome Petroleum, Ltd. Brief of Appellees at 4, *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982); see *Analysis, supra*, at 20, col. 1 (corporations generally authorize cash bonus golden parachutes in response to hostile takeovers); *infra* notes 75-79 and accompanying text (golden parachutes may operate as defensive measure to hostile takeover). Several days after Conoco's board authorized the cash bonus golden parachute, Seagram Company, Ltd., Mobil Corporation, and Dupont all initiated cash tender offers for control of Conoco. Brief of Appelles at 4., *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982). The cash bonus golden parachute guarantees Conoco's CEO a lump-sum payment equivalent to the present discounted value of the CEO's monthly salary and benefits through March 1989. *Analysis, supra*, at 20, col. 2. The only condition to Conoco's CEO's receipt of the lump-sum payment is a change of control in Conoco and a good faith determination by Conoco's CEO that he cannot continue to work for the new corporation. *Id.*

In addition to authorizing a cash bonus golden parachute for Conoco's CEO, Conoco's board authorized conditional golden parachute employment contracts for eight other senior Conoco executives. *Id.* The Conditional golden parachutes differ from the cash bonus agreement granted Conoco's CEO in that the conditional golden parachutes allow parachute benefits only if Conoco undergoes a change of control and the new corporation fires the executive, downgrades the executive's position, reduces the executive's salary, fails to increase the executive's salary annually in accordance with an established procedure, fails to maintain the executive's benefit plans, or requires the executive to relocate. *Id.* The conditional golden parachute employment contracts, if triggered, also only provide Conoco executives with the right to receive monthly payments equal to 1/12 of annual base salary plus 1/12 of the executive's highest previous annual award under Conoco's incentive compensation plan. *Id.* Conoco's board authorized the conditional golden parachutes in response to a corporate takeover. Corporations, however, generally do not authorize conditional golden parachutes in response to hostile corporate takeovers, but rather draft conditional golden parachute provisions into executive employment contracts when the corporation first hires an executive. *Id.*; See *infra* notes 59-69 and accompanying text (golden parachute employment contracts may allow corporations to hire and retain experienced corporate executives); see also *infra* notes 81-90 and accompanying text (shareholder derivative suit challenging Conoco golden parachute).

According to the Ward Howell study of executive employment contracts with *Fortune* 1,000 companies, golden parachute contracts generally guarantee an executive's salary and benefits for five or more years following a change of control or stipulate a lump-sum payment to executives in the event of dismissal or downgrading of the executive's position or responsibilities following a change of control. Ward Howell International, Inc., *supra* note 1, at 2. The Ward Howell study revealed that the golden parachute agreement at the "typical" corporation protects two to five executives for more than the five years following a change of control at a potential cost to the corporation of \$1 to \$5 million. *Id.*; see also Klein, *supra* note 2, at 56, col. 1 (most golden parachute plans protect one to six executives by providing executives with two or three years salary and benefits should executives lose jobs following change of control).

¹⁰ See McLaughlin, *supra* note 2, at 47 (one of every three public companies is considering golden parachute agreements for senior executives); Klein, *supra* note 2, at 56, col. 1 (golden

of these agreements is still the subject of considerable debate.¹¹

To the critics, golden parachute agreements constitute corporate waste¹² and are tantamount to common-law fraud¹³ or theft of corporate assets.¹⁴ Allegations of corporate waste arise when a corporation gives something of value to another without receiving fair consideration in return.¹⁵ Since golden parachute agreements often dictate the payment

parachutes are hottest new executive-suite perk; Ward Howell International, Inc., *supra* note 1, at 8 (golden parachutes protected executives involved in six of ten largest mergers of 1981); *see also* Morrison, *supra* note 2, at 82 (as result of increased merger activity more and more golden parachute clauses are appearing in executive employment contracts); Masters, *supra* note 4, at 10, col. 1 (prevalence of golden parachute employment contracts is increasing in proportion with increase in hostile takeovers); *supra* note 2 (statistics on increasing prevalence of golden parachute clauses in executive employment contracts).

¹¹ *See generally* Cooper, *The Spread of Golden Parachutes*, INSTITUTIONAL INVESTOR, Aug. 1982, at 65; McLaughlin, *supra* note 2, at 47; Perham, *supra* note 4, at 86; Profusek, *supra* note 5, at 99; Hudson, *SEC Is Forming Industry Panel to Suggest Changes in Regulation of Tender Offers*, Wall St. J., Feb. 8, 1983, at 3, col. 2; Klein, *supra* note 2, at 56, col. 2; Lewin, *Business and the Law: Using Golden Parachutes*, N.Y. Times, Nov. 30, 1982, at ____, col. ____; *Golden Parachutes*, *supra* note 2, at 1, col. 1; Herzel & Colling, *Controversial 'Golden Parachutes' Offer Protection*, Legal Times of Wash., Aug. 23, 1982, at 10, col. 1; Klainfield, *'Golden Parachutes' For Ousted*, N.Y. Times, Apr. 6, 1982, at ____, col. ____; *Analysis*, *supra* note 9, at 20, col. 1; Masters, *supra* note 4, at 1, col. 1; Ward Howell International, Inc., *supra* note 1, at 1.

¹² *See* Lewis v. Anderson, No. 6505 (Del. Ch. Oct. 8, 1982) (suit brought by dissident Conoco shareholder alleging Conoco's golden parachutes are improper, illegal, fraudulent, and waste of corporate assets); Plaintiff's Verified Complaint at 3, Zimmerman v. Bell, No. B82-2658 (D. Md.) (dissident Martin Marietta shareholders alleged Martin Marietta's golden parachutes are improper, illegal, wasteful, a gift of corporate assets without business purpose); Masters, *supra* note 4, at 10, col. 3 (golden parachutes authorized on eve of takeover that grant unconditional payments to executives can constitute corporate waste); *infra* notes 15-33 and accompanying text (golden parachutes constitute corporate waste). *But see infra* notes 109-33 and accompanying text (carefully drafted golden parachutes do not facilitate corporate waste).

¹³ *See supra* note 12 (actions challenging Conoco's and Martin Marietta's golden parachutes as fraudulent); *Golden Parachutes*, *supra* note 2, at 5, col. 1 (golden parachutes attacked as common-law fraud on shareholders); *infra* notes 34-42 and accompanying text (golden parachutes constitute common-law fraud on shareholders since agreements benefit executives to detriment of shareholders). *But see infra* notes 134-46 (properly designed golden parachutes do not constitute common-law fraud on shareholders).

¹⁴ *See infra* notes 44-47 and accompanying text (critics assert that golden parachutes may constitute theft of corporate assets); *supra* note 12 (actions challenging Conoco's and Martin Marietta's golden parachutes as illegal); *see also Golden Parachutes*, *supra* note 2, at 5, col. 1 (critics view certain golden parachutes as outright theft of corporate assets). *But see infra* notes 100-62 and accompanying text (carefully drafted, properly authorized, and adequately disclosed golden parachutes will survive judicial scrutiny).

¹⁵ Cohen v. Ayers, 596 F.2d 733, 739-41 (7th Cir. 1979) (shareholder derivative suit challenging executive stock ownership plan). Adequate consideration must support executive compensation arrangements. *Id.* at 739; *See* Ash v. Brunswick Corp., 405 F. Supp. 234, 240-41 (D.D.C. 1975) (validity of stock option plan depends on whether terms of plan are likely to facilitate contemplated benefit to corporation); Beard v. Elster, 39 Del. Ch. 153, ____, 160 A.2d 731, 736 (1960) (stock option plan must contain consideration passing to corporation); Lieberman v. Becker, 38 Del. Ch. 540, ____, 155 A.2d 596, 598 (1959) (plan for addi-

of extravagant cash settlements to executives dismissed following a change of control in the executives' corporation,¹⁶ critics maintain that corporations do not receive adequate consideration in return for the payments extended to executives under the agreements.¹⁷ Corporations already com-

tional compensation of executives valid only if consideration passes to corporation at time plan is put into effect); *Gottlieb v. Heyden Chem. Corp.*, 33 Del. Ch. 82, ___, 90 A.2d 660, 664-65 (1952) (consideration must support granting of stock options); *Kerbs v. California E. Airways, Inc.*, 33 Del. Ch. 69, ___, 90 A.2d 652, 656 (Del. 1952) (validity of stock option plan depends upon transfer of consideration to corporation). Corporate expenditures made pursuant to executive compensation plans must also manifest a reasonable relation between the value of the benefit conferred by the plan on an executive and the value to the corporation of the executive's services. *Lieberman v. Becker*, 38 Del. Ch. 540, ___, 155 A.2d 596, 598 (1959); *See infra* note 22 and accompanying text (executive compensation must bear reasonable relation to value of executive's services to corporations).

Executive compensation plans that do not reflect adequate consideration to corporations or that provide compensation in excess of the reasonable value of an executive's services to a corporation facilitate corporate waste. *Cohen v. Ayers*, 596 F.2d 733, 739-40 (7th Cir. 1979); *Ash v. Brunswick Corp.*, 405 F. Supp. 234, 240-41 (D.D.C. 1975); *Michaelson v. Duncan*, 407 A.2d 211, 217 (Del. 1979); *Kerbs v. California E. Airways, Inc.*, 33 Del. Ch. 69, ___, 90 A.2d 652, 656 (Del. 1952). Shareholders possess the right to have executive compensation plans that manifest corporate waste declared invalid through shareholder derivative suits. *See Rogers v. Hill*, 289 U.S. 582, 591 (1933) (shareholders possess right to challenge executives' salaries as constituting corporate waste); *Heller v. Boylan*, ___ A.D. ___, ___, 29 N.Y.S.2d 653, 672 (1941) (if corporate officers receive excessive compensation then equity court will order restoration at suit of minority stockholder); *Gallin v. National City Bank*, 152 Misc. 679, ___, 273 N.Y.S. 87, 117 (1934) (executive compensation expenditures, which constitute corporate waste, are voidable at option of corporate shareholders).

The retention or acquisition of competent corporate executives constitutes adequate consideration for executive compensation plans. *See Ash v. Brunswick Corp.*, 405 F. Supp. 234, 241 (D.D.C. 1975) (retention of key executives constitutes sufficient consideration for stock options plan); *Wyles v. Campbell*, 77 F. Supp. 343, 348-49 (D. Del. 1948) (executive's promise to remain with corporation for specified number of years constituted adequate consideration for grant of stock option plan); *Beard v. Elster*, 39 Del. Ch. 153, ___, 160 A.2d 731, 736 (1960) (adequate consideration for stock option plan includes retaining services of valued employees or gaining of services of new employee); *Lieberman v. Becker*, 38 Del. Ch. 540, ___, 155 A.2d 596, 598 (1959) (retention of services of valued employee is sufficient consideration for corporate plan for additional compensation of executives).

¹⁶ *See supra* note 7 (*Fortune* estimates of lucrative golden parachute severance agreements).

¹⁷ *See* Plaintiffs' Verified Complaint at 3, *Zimmerman v. Bell*, No. B82-2658 (D. Md.) (shareholder derivative suit challenging Martin Marietta's golden parachute agreements). The Martin Marietta complaint charges that the golden parachute agreements granted 28 of the corporation's senior executives were unnecessary since all of the senior executives receive substantial compensation and benefits for all the services the executives render to Martin Marietta. *Id.* at 2-3. The complaint further charged that the golden parachutes were unnecessary since the various key executives were under either employment agreements or fiduciary duties to remain in the employ of Martin Marietta. *Id.* But *see infra* notes 59-69 and accompanying text (proponents assert that golden parachutes enable corporations to hire or retain key executives); *infra* notes 70-74 and accompanying text (proponents maintain that golden parachutes allow target corporation executives to consider takeover proposals objectively); *infra* notes 75-79 and accompanying text (proponents contend that golden parachutes operate as defensive measure to hostile takeovers).

pensate senior corporate executives handsomely for services rendered to the corporation.¹⁸ In addition to lucrative salaries, most senior executives receive elaborate stock ownership plans in return for their services.¹⁹ Critics, therefore, maintain that the cash settlements paid executives under golden parachute contracts are without consideration and hence entail a waste of corporate assets.²⁰

Critics also contend that golden parachutes waste corporate assets by overcompensating executives.²¹ Corporate expenditures made pursuant to executive compensation arrangements must bear a reasonable relation to the value of an executive's services to the corporation.²² Executive com-

¹⁸ See *ALLIED CORPORATION*, *supra* note 4, at 95 (Allied's CEO received in excess of \$700,000 in compensation in 1981); *BENDIX CORPORATION*, *supra* note 3, at 111 (Bendix's CEO received in excess of \$800,000 in salary and bonuses in year ending Sept. 30, 1982); *ESMARK, INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS*, (Jan. 24, 1983) (Esmark's CEO received in excess of \$800,000 in salary and bonuses in fiscal 1982).

¹⁹ See *Morrison*, *supra* note 2, at 86 (many companies employ stock option plans to compensate key executives).

²⁰ See *supra* note 15 (executive compensation plans that provide compensation in excess of reasonable value of executives' services to corporation facilitate corporate waste). *But see infra* notes 59-79 and accompanying text (advocates of golden parachutes contend that agreements facilitate bona fide corporate objectives and hence do not entail corporate waste); *infra* notes 109-33 and accompanying text (carefully drafted golden parachutes do not facilitate corporate waste).

²¹ See *Morrison*, *supra* note 2, at 86 (critics assert that golden parachutes can overcompensate inefficient executives); *Klein*, *supra* note 2, at 56, col. 1 (critics maintain that golden parachutes are another example of executive "nest feathering").

²² See *Rogers v. Hill*, 289 U.S. 582, 589-91 (1933) (shareholder derivative suit challenging reasonableness of executive compensation). Corporate executives possess the right to share in corporate profits. *Id.* at 590; see *Berkwitz v. Humphrey*, 163 F. Supp. 78, 90 (N.D. Ohio 1958) (corporate shareholders do not possess exclusive claim to corporate profits as against corporate executives whose labor, skill, ability, judgement and effect have made profits available); *Gallin v. National City Bank*, 152 Misc. 679, ___, 273 N.Y.S. 87, 114 (1934) (same). Executive compensation arrangements, however, cannot facilitate the misuse or waste of corporate funds. *Rogers v. Hill*, 289 U.S. 582, 590 (1933). Executive compensation, therefore, must bear a reasonable relation to the value of an executive's services to a corporation. *Id.* at 591; see *id.* at 591-92 (bonus payments unrelated to value of executive's services to corporation constitute gift or waste of corporate assets); *Claimitz v. Thatcher Mfg. Co.*, 158 F.2d 687, 692 (2d Cir.) (incentive compensation must bear reasonable relation to value of services compensation is paid to obtain), *cert. denied*, 331 U.S. 825 (1947); *Heublein v. Wright*, 227 F. 667, 677-79 (D. Md. 1915) (executive compensation must be in proportion to executive's ability, services, time devoted to company, difficulties involved, responsibilities assumed, success achieved, amounts under jurisdiction, company earnings, increases in volume or quality of business or both, and all other relevant facts); *Ash v. Brunswick Corporation*, 405 F. Supp. 234, 241 (D.D.C. 1975) (executive's services and value of stock options granted must constitute fair exchange); *Glenmore Distilleries Co. v. Seideman*, 267 F. Supp. 915, 919 (E.D.N.Y. 1967) (executive's compensation should relate to executive's ability, time devoted to corporation, and corporate earnings during executive's tenure); *Berkwitz v. Humphrey*, 163 F. Supp. 78, 90 (N.D. Ohio 1958) (authorized compensation must reasonably equate to value of employee's services to company); *Wyles v. Campbell*, 77 F. Supp. 343, 348 (D. Del. 1948) (stock option plan must evidence reasonable relationship between value of employee's

pensation in excess of the reasonable value of an executive's services constitutes corporate waste.²³ Since golden parachute agreements normally provide payments only to executives dismissed following a change of control,²⁴ critics assert that only the inefficient or incompetent executives whom an acquiring corporation dismisses following a successful takeover will receive golden parachute benefits.²⁵ An acquiring corporation in a successful takeover, on the other hand, may retain and even promote the efficient and competent executives from the target corporation.²⁶ Critics, therefore, conclude that golden parachutes facilitate corporate waste since the amounts awarded under the agreements may bear no reasonable relation to the value of an executive's services to the target corporation.²⁷

Consideration of the market effect that a corporate takeover has on

services to corporation and value of additional compensation accorded executives by plan); *McQuillen v. National Cash Register Co.*, 27 F. Supp. 639, 653 (D. Md. 1939) (same); *Michelson v. Duncan*, 407 A.2d 211, 223 (Del. 1979) (same); *Lieberman v. Becker*, 38 Del. Ch. 540, ___, 155 A.2d 596, 598 (1959) (additional compensation of executives is valid provided reasonable relationship exists between value of executives services to corporation and value of compensation received); *Kerbs v. California E. Airlines, Inc.*, 33 Del. Ch. 69, ___, 90 A.2d 652, 656 (1952) (same); *Mann v. Luke*, 277 A.D. 19, ___, 68 N.Y.S.2d 313, 318 (1947) (executive compensation must be in proportion to executive's ability, services, time devoted, difficulties involved, responsibilities assumed, success achieved, amounts under jurisdiction, company earnings, increases in volume or quality of business or both, and all other relevant facts); *Heller v. Boylan*, ___, A.D. ___, ___, 29 N.Y.S.2d 653, 668 (1941) (executive compensation must bear reasonable relation to value of executive's services and must not constitute misuse or waste of corporate funds, or gift to favored few, or scheme to distribute profits under guise of compensation).

²³ See *supra* note 15 and accompanying text (executive compensation that lacks adequate consideration or bears no reasonable relation to services rendered constitutes corporate waste).

²⁴ See *supra* notes 4 & 6 (golden parachutes generally guarantee that target executives will remain employed by surviving corporation in successful takeover or will receive lump-sum payoff should change of control result in executive's dismissal).

²⁵ See *Morrison*, *supra* note 2, at 86 (inefficient executives whom acquiring corporation dismisses following change of control will receive golden parachute benefits).

²⁶ See *id.* (successful acquiring corporations often retain efficient executives from target corporation); *Ward Howell International, Inc.*, *supra* note 1, at 8 (many acquiring corporations in successful corporate takeovers attempt to retain target management and may even compensate them at higher rate than existing employment contracts stipulate). But see *supra* note 4 (successful acquiring corporations in corporate takeovers normally fire considerable number of senior target corporation executives).

²⁷ See *supra* notes 15 & 22 and accompanying text (corporate waste). Assuming that acquiring corporations in successful corporate takeovers only fire the inefficient and incompetent target corporation executives, then golden parachutes may facilitate corporate waste since golden parachute agreements will provide payments to the incompetent target executives while the competent target executives will not receive any golden parachute benefits under the agreements. *Id.*; see *Moore, Congress Takes Dim View of Golden Parachutes*, *Legal Times of Wash.*, Oct. 25, 1982 at 5, col. 2 (during speech to Senate, Senator Slade Gorton cited golden parachutes as form of executive "incompetence insurance") [hereinafter cited as *Congress*]. But see *infra* notes 131-33 and accompanying text (corporations should offer golden parachute employment contracts only to corporations most valued executives).

the value of a corporation's stock²⁸ also supports the criticism that golden parachutes overcompensate executives.²⁹ Corporate takeovers normally elicit a substantial increase in the market value of a corporation's stock.³⁰ Since most senior executives receive elaborate stock ownership plans from corporations in return for services rendered,³¹ corporate takeovers may provide executives with substantial returns on their target corporation's stockholdings.³² Critics, therefore, maintain that golden parachutes may overcompensate executives who receive a stock ownership plan as part of their compensation arrangement with a particular corporation since the executives' target corporation stockholdings will insure the executives adequately against the risks attendant to corporate takeovers.³³

The doctrine of common-law fraud provides another avenue for attacking golden parachute employment contracts.³⁴ Corporate directors owe shareholders a fiduciary duty of honesty, loyalty, and good faith.³⁵ The

²⁸ See W. GRIMM & T. SIMIC, HANDBOOK OF MERGERS, ACQUISITIONS, AND BUYOUTS, (S. Lee & R. Colman eds. 1981) (49% premium over market paid on average for target stock during corporate takeovers in 1979); Bradley, *Interfirm Tender Offers and the Market for Corporate Control*, J. BUS. 345-76 (1980) (49% premium over previous market price of stock during month of announcement of tender offer); Chatlos, *The SEC vs. Investors on Tender Offers*, 56 HARV. BUS. REV. 6, 7 (1978) (target shareholders on average receive 72% premium above market on shares tendered during hostile tender offer); Dodd & Ruback, *Tender Offers and Stockholder Returns: An Empirical Analysis*, J. FIN. ECON. 351-73 (Dec. 1977) (target stock experienced average premium above market of 20.58% during month successful tender offer was announced).

²⁹ See Morrison, *supra* note 2, at 86 (executives with stock option rights in corporations may not need golden parachute employment contracts since market price of corporation's stock may increase during corporate takeover providing executives with added resources).

³⁰ See *supra* note 28 (market price of corporation's stock increases during corporate takeovers).

³¹ See *supra* note 19 and accompanying text (most senior executives receive stock option plans as part of executives' compensation arrangements with corporations).

³² See Morrison, *supra* note 2, at 86 (CEO of Reliance Corporation received \$3.8 million for his stock and options in Reliance when Exxon acquired Reliance).

³³ See *id.* (almost all top executives have stock in their companies that will appreciate during takeover and provide executives with added resources). Critics also question why executives need any takeover protection at all. *Analysis, supra* note 9, at 23, col. 1. Efficient and competent executives, according to critics, do not need protection against corporate takeovers because effective corporate executives always can find new and equally or more attractive employment. *Id.*; see Morrison, *supra* note 2, at 86 (although incompetent corporate executives stand to benefit from golden parachute employment contracts, critics assert that inefficient executives do not deserve golden parachutes). But see *infra* notes 59-69 and accompanying text (golden parachutes enable corporations to hire or retain executives).

³⁴ See *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982) (shareholder derivative suit challenging Conoco's golden parachutes as fraudulent); Plaintiff's Verified Complaint at 3, *Zimmerman v. Bell*, No. B82-2658 (D. Md.) (shareholders derivative suit charging that Martin Marietta's golden parachutes benefitted executives at expense of corporation and shareholders); *Golden Parachutes, supra* note 2, at 5, col. 1 (some attorneys view golden parachutes as outright common-law fraud on shareholders).

³⁵ See *Pepper v. Litton*, 308 U.S. 295, 306-07 (1939). Corporate directors stand in a fiduciary relationship with corporate shareholders. *Id.* at 306; see *United States v. Gates*, 376 F.2d 65, 77 (10th Cir. 1967) (corporate directors occupy fiduciary relationship to cor-

fiduciary duty running from directors to shareholders mandates that directors manage corporations in light of the best interests of corporate shareholders.³⁶ A board of directors' authorization of golden parachute agreements may constitute a breach of directors' fiduciary duty to shareholders because the agreements ultimately may benefit corporate executives to the detriment of shareholders.³⁷ For example, if a twenty percent change in the ownership of a corporation's stock triggers a golden parachute, then the remaining target shareholders are left bearing eighty percent of the costs of the golden parachute agreements in the form of a reduced return on their investment in the surviving corporation.³⁸

poration and corporate shareholders); *accord* Perlman v. Feldmann, 219 F.2d 173, 175 (2d Cir. 1955); Seagrave Corp. v. Mount, 212 F.2d 389, 396 (6th Cir. 1954); Lachman v. Bell, 353 F. Supp. 37, 41 (S.D.N.Y. 1972); Johnson v. American Gen. Ins. Co., 296 F. Supp. 802, 809 (D.D.C. 1969); Petty v. Penntech Papers, Inc., 347 A.2d 140, 144 (Del. Ch. 1975). Corporate directors, therefore, must manage corporations in light of the best interests of corporate shareholders. *See* Gottlieb v. McKee, 34 Del. Ch. 537, ___, 107 A.2d 240, 243 (1954) (while technically not trustees, corporate officers and directors stand in fiduciary relationship to corporation and owe shareholders undivided and unselfish loyalty); Litwin v. Allen, 25 N.Y.S.2d 667, 677 (Sup. Ct. 1940) (corporate officers and directors must exercise extreme measure of candor, unselfishness, and good faith in dealings with corporation and corporate shareholders). *See generally* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 127.02-127.10 (1982).

Several state corporation statutes codify the standard of care directors owe corporate shareholders. *See generally* W. KNEPPER, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 5.02 (3d ed. 1978 & Supp. 1982). For example, the New York Business Corporation Act requires directors to perform their duties in good faith and with the degree of care that an ordinary prudent person in a like position would use under similar circumstances. N.Y. BUSINESS CORPORATION LAW § 717 (McKinney 1963 & Supp. 1982-1983). The Pennsylvania corporate statute, on the other hand, sets forth that directors shall stand in a fiduciary relation to the corporation, and shall discharge the duties of their respective positions in good faith and with the diligence, care and skill that ordinary prudent men would exercise under similar circumstances. PA. STAT. ANN. tit. 15, § 1408 (Purdon 1967 & Supp. 1982-1983). Other states have adopted the standard of care required of directors as set forth in the Model Business Corporation Act (Model Act). MODEL BUSINESS CORP. ACT § 35 (1978); *accord* CAL. CORP. CODE §§ 300 et seq. (West 1977 & Supp. 1982); DEL. CODE ANN. tit. 8, § 141 (rev. 1974 & 1982 Supp.). Section 35 of the Model Act requires directors to manage corporations with such care as an ordinary prudent person in a like position would use under similar circumstances and in a manner the director reasonably believes to be in the best interests of the corporation. MODEL BUSINESS CORP. ACT § 35 (1978). *See generally* Arsht, *Fiduciary Responsibilities of Directors, Officers and Key Employees*, 4 DEL. J. CORP. L. 652 (1979); Veasey, *Directors' Standard of Care Under Section 35 of the Model Business Corporation Act*, 4 DEL. J. CORP. L. 665 (1979).

³⁶ *See supra* note 35 (directors must manage corporations in light of shareholder best interests).

³⁷ *See infra* notes 38-42 and accompanying text (golden parachutes benefit corporate executives at expense of corporate shareholders).

³⁸ *See* BURNUP & SIMS INC., FORM 10-Q: QUARTERLY REPORT UNDER SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934, Oct. 31, 1982 [hereinafter cited as BURNUP & SIMS, INC.: *Form 10-Q*]. Burnup & Sims, Inc., the nation's largest telecommunications service company, entered into a cash bonus golden parachute employment contract with the corporation's CEO. *Id.* at 5; *see supra* note 9 (comparison of cash bonus and conditional golden parachutes). Burnup & Sims' proxy statement for the company's August 24, 1982 annual

Critics further assert that target corporation shareholders may bear the costs of golden parachutes even when a raiding corporation successfully acquires one hundred percent of a target's stock through an unsolicited tender offer to target shareholders.³⁹ Critics maintain that a raiding corporation may reduce the price offered to target shareholders for their shares in an effort to compensate for the added liability presented by the golden parachute agreements.⁴⁰ Thus, the target corporation shareholders may bear the costs of the agreements in the form of a reduced price for their tendered shares. In addition, golden parachute agreements may affect adversely target shareholders' interests even when the target's board authorizes the agreements after the announcement of an unsolicited tender offer. Since golden parachutes may dissuade another corporation from entering the quest for the target corporation,⁴¹ the agreements may preclude shareholders from obtaining the potential premiums a bidding contest for the target corporation might bring to the price of target shares.⁴²

meeting of stockholders described the terms of the CEO's golden parachute. BURNUP & SIMS INC., ANNUAL MEETING OF STOCKHOLDERS, Aug. 24, 1982, at 4 n.3. Under the terms of the agreement, Burnup & Sims' CEO became eligible to receive a lump-sum severance payment equal to 300% of his base compensation plus various stock option rights should a shareholder or group of affiliated shareholders acquire 29% or more of Burnup & Sims' common stock. *Id.* On September 14, 1982 Summit Systems, Inc. increased its holdings of Burnup & Sims' common stock to 30.8% of the then outstanding common stock of Burnup & Sims. BURNUP & SIMS INC.: *Form 10-Q*, *supra*, at 6. Pursuant to the terms of the golden parachute agreement, Burnup & Sims' CEO tendered his resignation and Burnup & Sims paid him \$4,022,000 in cash. *Id.* The net effect of the transaction was to increase Burnup & Sims' general and administrative expenses for the quarter ending Oct. 31, 1982 by \$3.5 million. *Id.* Plaintiffs have initiated several lawsuits challenging the CEO's golden parachute as fraudulent. *See* Greenfield v. Riley, No. 6933 (Del. Ch.); Stotland v. Burnup & Sims Inc., No. 6956 (Del. Ch.); Kames v. Sims, No. 82-6627-CIV-EBD (S.D. Fla.). In addition, Summit Systems, Inc. has obtained a temporary restraining order preventing Burnup & Sims' CEO from dissipating his personal assets below \$5,275,000 and is litigating the legality of the cash bonus golden parachute. *See* Summit Sys., Inc. v. Sims, No. 82-1973-CIV-JE (S.D. Fla. Sept. 20, 1982) (temporary restraining order); *see also* Summit Sys., Inc. v. Caporella, No. 82-1973-CIV-JE (S.D. Fla. Sept. 30, 1982) (memorandum opinion affirming temporary restraining order).

³⁹ *See* Klein, *supra* note 2, at 56, col. 2 (costs of golden parachute employment contracts may accrue to shareholders).

⁴⁰ *See* Plaintiff's Verified Complaint at 3, Zimmerman v. Bell, No. B82-2658 (D. Md.). The complaint filed against Martin Marietta Corporation and its officers and directors alleges that Martin Marietta's golden parachutes affect the corporation's public shareholders directly by impacting upon any proposed price an acquiring corporation might offer in a future tender offer. *Id.*; *see* Small, *The Business-Judgment Rule: Director's Responsibilities In Acquisitions*, in PLI, TWELFTH ANNUAL INSTITUTE ON SECURITIES REGULATION 23, 29 n.16 (A. Fleischer, M. Lipton, R. Mundheim & R. Santoni eds., 1981) (procedure acquiring corporations use in evaluating worth of target corporations includes review of target corporations potential liabilities).

⁴¹ *See infra* notes 75-79 and accompanying text (golden parachute employment contracts may represent defensive measure to hostile takeovers). *But see infra* note 75 (whether golden parachutes deter corporate takeovers is subject to debate).

⁴² *See* BENDIX CORPORATION, *supra* note 3, at 15. Bendix Corporation's notice of special meeting of stockholders classifies Bendix Corporation's golden parachute employment con-

In addition to allegations of common-law fraud,⁴³ critics assert that golden parachutes may facilitate the outright theft of corporate property since the agreements may dictate the payment of extravagant cash bonuses to executives following a change of control in the executives' corporation.⁴⁴ Although conditional golden parachute employment contracts provide benefits only to target corporation executives who suffer adverse consequences following a change of control, cash bonus golden parachutes provide target corporation executives with unconditional cash bonuses following a change of control.⁴⁵ Cash bonus golden parachute employment contracts, hastily authorized by interested directors⁴⁶ in anticipation of a potential takeover by outside interests, may constitute a theft of corporate property since the interested directors, in effect, would be appropriating corporate property to themselves without a valid business justification.⁴⁷

Finally, critics contend that golden parachutes encourage the separation of ownership from control in corporations.⁴⁸ Corporate shareholders

tracts as "anti-takeover" devices within the meaning of Securities Exchange Act Release No. 15230 (Oct. 13, 1978). *Id.*; see *Anti-Takeover Proposals*, S.E.C. Release No. 15230 (Oct. 13, 1978), [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81, 748, at 80,984; *infra* note 77 (description of SEC release No. 15230: Anti-Takeover Proposals). According to Bendix's notice to shareholders, the corporation's golden parachutes represent an antitakeover provision since the agreements may discourage a corporate takeover by increasing the potential cost of a future acquisition. BENDIX CORPORATION, *supra* note 3, at 15; see also *supra* note 28 (shareholders receive premium above market on shares tendered during hostile takeover).

⁴³ See *supra* notes 34-42 and accompanying text (golden parachutes may constitute common-law fraud on corporate shareholders since agreements may benefit executives at expense of corporate shareholders).

⁴⁴ See *Golden Parachutes*, *supra* note 2, at 5, col. 1 (some attorneys view golden parachutes as outright theft of corporate assets).

⁴⁵ See *supra* note 9 (comparison of cash bonus and conditional golden parachute employment contracts).

⁴⁶ See *Maldonado v. Flynn*, 597 F.2d 789, 793 (2d Cir. 1979) (interested director is director with financial stake in transaction under consideration); see also *Falkenberg v. Baldwin*, [1977-1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,086, at 91,911 (S.D.N.Y. 1977) (disinterested directors lack financial stake in transaction under consideration).

⁴⁷ See *infra* notes 94-99 and accompanying text (Gulf Resources Corporation refuses to honor golden parachute agreements granted 21 executives prior to change in majority of Gulf Resources' board of directors since interested board originally authorized golden parachutes). Critics maintain that corporate executives who double as corporate directors may, in anticipation of an upcoming takeover, straddle themselves with lucrative golden parachute employment contracts. Since golden parachutes may provide executives with lucrative severance packages conditioned solely upon a change of control and a determination by the executive that he can no longer work for the corporation, the agreements may facilitate the theft of corporate assets. See *supra* note 9 (cash bonus golden parachutes); *supra* note 6 (lucrative severance packages provided executives under golden parachute employment contracts).

⁴⁸ See *Congress*, *supra* note 27, at 5, col. 2 (Congress is critical of golden parachute employment contracts). Senator Slade Gorton (R. Wash.) stated that golden parachutes represent a "form of executive incompetence insurance." *Id.* Although the Senator admitted that he had no solution to the problem of golden parachute employment contracts, Senator Gor-

are the beneficial owners of corporate property.⁴⁹ Corporate executives, on the other hand, control and manage corporate property.⁵⁰ Corporate executives, like corporate directors, owe shareholders a fiduciary duty of honesty, loyalty, and good faith.⁵¹ The fiduciary duty running from executives to shareholders dictates that executives manage corporate property in the best interests of corporate shareholders.⁵² In addition to the threat of a shareholder suit for breach of fiduciary duty,⁵³ market forces, including the threat of a corporate takeover, encourage executives to manage corporations in the best interests of corporate shareholders.⁵⁴ Critics contend that the threat of a corporate takeover, and the attendant risk of job loss to target corporation executives,⁵⁵ may limit an executive's incentive to act contrary to shareholders' best interests.⁵⁶ Since golden parachutes insure executives against the risks attendant to corporate

ton suggested that the Senate "should explore the legal relationships between the shareholder, who is the owner and ultimate risktaker, and the corporate management, which should work for the owners, to see if a means can be found to make their interests better coincide." *Id.* See generally A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933) (separation of ownership from control in modern corporation); J. GALBRAITH, *THE NEW INDUSTRIAL STATE* (3d ed. 1979) (technostructure and separation of ownership from control in modern corporate enterprises). But see *infra* notes 70-74 and accompanying text (golden parachutes may allow target corporation executives to consider shareholders' best interests in corporate takeovers).

⁴⁹ See D. VAGTS, *BASIC CORPORATION LAW*, 371 (1979) (shareholders are indirect owners of corporation's property).

⁵⁰ See *Maldonado v. Flynn*, 413 A.2d 1251, 1255 (Del. Ch. 1980) (directors and officers, not shareholders, manage business affairs of corporation); *Harden v. Eastern States Pub. Serv. Co.*, 14 Del. Ch. 156, ___, 122 A. 705, 706-07 (1923) (control and management of corporate property rests in officers and directors).

⁵¹ See *supra* note 35 (fiduciary duty standard).

⁵² See *id.* (fiduciary relationship between corporate officers and shareholders).

⁵³ See *supra* note 15 (shareholders' right to petition courts to have executive compensation plans that constitute corporate waste declared invalid); see also *infra* notes 80-93 and accompanying text (dissident shareholders of Martin Marietta and Conoco have initiated suits challenging golden parachutes).

⁵⁴ See *infra* notes 55-58 and accompanying text (threat of job loss through corporate takeover encourages executives to manage corporate property in best interests of corporate shareholders). In addition to the threat of job loss through corporate takeovers, corporations may replace inefficient executives with more effective managers. Executive employment markets, therefore, constitute another market force that tends to encourage executives to manage corporate property efficiently and in shareholders' best interests.

⁵⁵ See *supra* note 4 (acquiring corporations usually dismiss considerable number of target corporation executives following successful takeover).

⁵⁶ See Manne, *Mergers And The Market For Corporate Control*, 7 J. OF POL. ECON, 110, 112-13 (1965). Correlating corporate managerial efficiency with the market price of a corporation's stock, Manne maintains that the threat of corporate takeovers disciplines corporate managers into acting in shareholders' best interests. *Id.* According to Manne, if corporate executives are inefficient then the corporation's stock will not yield a competitive return to the corporation's stockholders. *Id.* Economically rational investors, therefore, will sell their stock holdings in the corporation in an effort to earn a competitive return with another investment. *Id.* The combination of a subcompetitive yield on the corporation's stock with sales of the corporation's stock by rational investors will tend to reduce the market

takeovers,⁵⁷ critics maintain that the agreements negate a market force that otherwise may tend to equate shareholder and executive interests.⁵⁸

In rebuttal to the criticism leveled against golden parachutes, proponents assert that the prevalence of the agreements has increased so much that corporations that refuse to offer golden parachute employment contracts may experience difficulty hiring and retaining key executives.⁵⁹ Proponents contend that golden parachutes enable corporations to hire and retain experienced executives.⁶⁰ Executive turnover in the upper echelons of corporate hierarchy has increased in recent years.⁶¹ To hire new or retain existing executives, corporations must keep pace with current trends in executive compensation markets.⁶² According to proponents, the

price of the corporation's stock, making the corporation more susceptible to a takeover. *Id.* Since corporate takeovers normally entail dismissal for target corporation executives, Manne maintains that the market for corporate control protects shareholders' interests by providing shareholders with some assurance of competitive efficiency among corporate managers. *Id.*; see *infra* note 58 (significance of market for corporate control in protecting shareholder interests).

⁵⁷ See *supra* note 4 (golden parachutes insure executives against risks incident to corporate takeovers).

⁵⁸ See *supra* note 48 and accompanying text (golden parachutes encourage separation of ownership from control). Market forces that tend to encourage corporate executives to manage corporate property in terms of shareholders' best interests take on added significance in light of the difficulties plaintiffs face in vindicating shareholders' rights through lawsuits against corporate managers. See Manne, *supra* note 56, at 113 (market for corporate control plays significant role in ensuring managerial efficiency). The potential court costs and attorney's fees involved in bringing a lawsuit combined with the presumption courts accord the sound business decisions of corporate directors may reduce the viability of a suit for breach of fiduciary duty as a means of encouraging executives to manage corporate property in shareholders' best interests and correspondingly increase the importance the market for corporate control plays in protecting shareholders' interests. See *id.* (since business judgment rule precludes judicial inquiry into actions by directors taken in good faith, only market for corporate control assures shareholders of competitive efficiency of corporate executives); *infra* note 107 (business judgment rule).

⁵⁹ See Morrison, *supra* note 2, at 83 (golden parachute employment contracts are so common that corporation which refuses to offer golden parachutes might lose key executives to competitors).

⁶⁰ See *id.* (golden parachutes enable companies to hire and retain key executives); Klein, *supra* note 2, at 56, col. 1 (golden parachutes may enable corporations that might be takeover targets to hire and retain senior executives); Ward Howell International, Inc., *supra* note 1, at 2 (golden parachutes enable companies that may become takeover targets to hire and retain top executive talent); see also ACME-CLEVELAND CORPORATION, *supra* note 4, at 10 (Acme-Cleveland entered into golden parachute agreements to retain senior executives and provide corporation with continuity of management in the event of change of control). BENDIX CORPORATION, *supra* note 3, at 114 (one objective advanced in support of Bendix golden parachutes was to assure that senior Bendix officers would remain with Bendix during pendency of offers for control of Bendix).

⁶¹ See Ward Howell International, Inc., *supra* note 1, at 9. Executive turnover from causes unrelated to mergers has increased dramatically. *Id.* During the 1960's, corporations dismissed fewer than 25% of their CEOs. *Id.* In the last five years, however, corporations have dismissed or let go 50% of their CEOs. *Id.*

⁶² See Winkelman v. General Motors Corp., 44 F. Supp. 960, 969-70 (S.D.N.Y. 1942) (since

increasing prevalence of golden parachute contracts reflects, in part, a realization by corporations that golden parachute contracts are necessary for hiring and retaining senior executives.⁶³

Proponents maintain, for example, that golden parachutes enable corporations subject to or the likely target of a corporate takeover to retain senior level executives.⁶⁴ Since a change of control normally entails dismissal for target corporation executives,⁶⁵ target corporation executives may anticipate the possibility of dismissal following a change of control.⁶⁶ Anticipating dismissal, target corporation executives may commence a search for more secure employment upon the announcement of a corporate takeover.⁶⁷ Target corporations, therefore, may need to offer executives added security to prevent senior executives from leaving the target corporation for other employment during a corporate takeover.⁶⁸ Proponents assert that the added security golden parachutes provide executives encourages executives of corporations subject to or the likely target of a corporate takeover to remain in the employ of the target corporation and

competitors of General Motors were pirating key executives from General Motors management team, General Motors had to hold out attractive financial benefits to prevent further loss of valuable executives). See generally G. WASHINGTON & V. ROTHCHILD, *supra* note 8.

⁶³ See *infra* notes 64-69 and accompanying text (golden parachutes enable corporation subject to, or likely target of, corporate takeover to acquire and retain key executives).

⁶⁴ See Brief of Appellees at 4, *Lewis v. Anderson*, No. 343, (Del. Sup. Ct. 1982) [hereinafter cited as Brief of Appellees]. Following an unsuccessful cash tender offer for 20% of Conoco common stock by Dome Petroleum Ltd., Conoco Inc. authorized golden parachute employment contracts for nine of Conoco's senior executives. *Id.*; see *supra* note 9 (terms of Conoco's cash bonus and conditional golden parachutes). Conoco maintains that the purpose behind the golden parachutes was to provide stability for Conoco and security for the company's senior executives in the event of future takeover attempts and also to provide an incentive for the nine senior executives to remain in Conoco's employ. Brief for Appellees, *supra*, at 4; see also *Ward Howell International, Inc.*, *supra* note 1, at 1 (golden parachutes enable companies that may become takeover targets to hire top executive talent).

⁶⁵ See *supra* note 4 (acquiring corporations dismiss considerable number of target corporation executives following successful takeover).

⁶⁶ See *BURNUP & SIMS INC.*, *supra* note 38, at 1. After an outside interest had acquired approximately 30.8% of Burnup & Sims' common stock, 17 of the company's officers and subsidiary presidents voluntarily tendered their resignations. *Id.*; see also *supra* note 38 (17 company officers and subsidiary presidents tendered their resignations following Burnup & Sims' CEO's resignation). In an effort to forestall the resignations of the 17 key executives, Burnup & Sims' board of directors authorized golden parachute employment contracts for the key executives. *BURNUP & SIMS INC.*, *supra* note 38, at 1. Burnup & Sims' board maintained that the golden parachutes were necessary to induce the executives to remain in Burnup & Sims employ. *Id.*

⁶⁷ See *supra* note 66; see also *Analysis*, *supra* note 9, at 22, col. 4 (without tender offer protection for key executives, reputedly vulnerable target corporation may experience difficulty hiring high level employees during tender offers); *Masters*, *supra* note 4, at 10, col. 2 (companies ripe for takeover may need to offer senior executives added security to prevent senior executives from looking for new employment).

⁶⁸ See *Profusek*, *supra* note 5, at 99-112 (senior executives of target corporations may seek more secure career opportunities unless offered some form of employment security arrangement).

thereby provide the target corporation with stability and continuity of management.⁶⁹

Advocates also assert that golden parachutes allow executives to weigh objectively merger proposals without fear that a change of control might jeopardize the executive's income.⁷⁰ Corporate takeovers present a potential conflict of interest between management and shareholders of target corporations.⁷¹ A successful takeover generally presents target shareholders with the opportunity to receive a substantial premium above the market price for shareholders' target corporation stock holdings.⁷² Target corporation executives, on the other hand, often can expect dismissal following a successful takeover.⁷³ Proponents maintain that the financial security golden parachutes provide executives diminishes any conflict of interest between executives and shareholders and insures that target corporation executives will not oppose arbitrarily takeovers that might reward target corporation shareholders.⁷⁴

One final argument proponents advance in support of golden parachutes is that the agreements operate as a defensive measure to a

⁶⁹ See ACME-CLEVELAND CORPORATION, *supra* note 4, at 10 (Acme-Cleveland authorized golden parachute agreements to retain senior executives and provide corporation with continuity of management in the event of change of control); BENDIX CORPORATION, *supra* note 3, at 114 (one perceived benefit of Bendix golden parachutes was that senior Bendix officers would remain with Bendix during pendency of offers for control of Bendix).

⁷⁰ See McLaughlin, *supra* note 2, at 48 (some attorneys argue that golden parachutes take panic out of takeovers and give executives more objectivity in evaluating acquisition offers); Morrison, *supra* note 2, at 82 (golden parachutes provide executives with financial security necessary for striking best deal for corporate shareholders in takeover negotiations); Klein, *supra* note 2, at 56, col. 1 (golden parachutes ensure that executives will weigh merger or acquisition proposals objectively without fear that change of control might jeopardize executives' income); Ward Howell International, Inc., *supra* note 1, at 1 (golden parachutes enable executives to consider shareholders' interests objectively during takeover battles by obviating executives' concern over personal finances).

⁷¹ See Gelfond & Sebastian, *supra* note 4, at 403, 419-20 (corporate takeovers present conflict of interest between management and shareholders).

⁷² See *supra* note 28 (corporate takeovers normally elicit premium above market price for target corporation stock).

⁷³ See *supra* note 4 (acquiring corporation normally fires considerable number of target corporation executives following successful takeover).

⁷⁴ See *Analysis*, *supra* note 9, at 23, col. 2. Herzl maintains that golden parachute employment contracts may benefit target corporation shareholders by increasing executive independence in a takeover situation. *Id.* By insuring executives against the risks of corporate takeovers, golden parachutes, may, arguably eliminate a potential conflict of interest between executives and corporate shareholders and allow executives to weigh shareholder interests objectively. *Id.*; see Morrison, *supra* note 2, at 83 (golden parachute provided Reliance Electric's CEO with degree of independence that enabled CEO to negotiate favorable merger terms with Exxon when Exxon acquired Reliance); *supra* note 4 (golden parachutes insure executives against risks incident to corporate takeovers); *supra* notes 70-71 and accompanying text (unfriendly takeover presents conflict of interest between target corporation executives and shareholders since takeover normally entails premium price for shareholders' stockholdings and dismissal for target corporation executives).

hostile takeover.⁷⁵ In corporate takeovers, the costs attendant to golden parachute agreements accrue to surviving corporations.⁷⁶ Golden parachutes, therefore, may discourage complete corporate takeovers by increasing the costs of a proposed takeover.⁷⁷ If, however, an acquiring corpora-

⁷⁵ See *Panter v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981). Corporate management possesses not only a right but the duty to oppose corporate takeovers that are detrimental to the corporation or the corporation's shareholders. *Id.*; see *Heit v. Baird*, 567 F.2d 1157, 1161 (1st Cir. 1977) (management has duty to resist corporate takeovers that might harm corporation); *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F. Supp. 390, 408 (N.D.N.Y. 1980) (target corporation management can resist corporate takeover provided target management concludes, after reasonable deliberations, that corporate takeover is not in best interests of target corporation); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712-13 (N.D. Ill. 1969) (corporate managements' responsibility is to oppose corporate takeovers that in managements' best judgment are detrimental to corporation or corporate shareholders); see also *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 381 (2d Cir. 1980) (directors' decision to oppose corporate takeover involves exercise of directors' business judgment). Employment contracts that provide executives with accelerated benefits in the event of a change of control in the executive's corporation constitutes a defensive measure to a corporate takeover. See *Anti-Takeover Proposals*, S.E.C. Release No. 15230 (Oct. 13, 1978), [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 81,748, at 80,984 (executive employment contracts that provide executives with accelerated benefits upon change of control in executive's corporation constitutes antitakeover device); *Wachtell, Special Tender Offer Litigation Tactics*, 32 BUS. LAW 1433, ____ (1977) (same); BENDIX CORPORATION, *supra* note 3, at 15 (Bendix Corporation's notice of special meeting of stockholders classified Bendix Corporation's golden parachute employment contracts as antitakeover devices); *infra* notes 76-79 and accompanying text (golden parachutes discourage corporate takeovers by raising acquiring corporation's costs); see also E. ARANOW & H. EINHORN, *TENDER OFFERS FOR CORPORATE CONTROL* 219-76 (1973) (defensive measures to hostile takeovers); E. ARANOW, H. EINHORN & G. BERLSTEIN, *DEVELOPMENT IN TENDER OFFERS FOR CORPORATE CONTROL* 193-206 (1977) (same); Cary, *Corporate Devices Used to Insulate Management from Attack*, 25 BUS. LAW 339-50 (July 1970) (same); Panel, *Defending Target Companies*, 32 BUS. LAW 1349-64 (May, 1977) (same).

Whether golden parachute employment contracts actually deter corporate takeovers remains the subject of considerable debate. See *Morrison*, *supra* note 2, at 86 (plethora of golden parachutes may deter proposed takeover by making takeover more expensive for acquiring corporation); Klein, *supra* note 2, at 56, col. 2 (some companies advance golden parachutes as antitakeover measures); Masters, *supra* note 4, at 10, col. 3 (golden parachutes may discourage some corporate takeovers since certain golden parachutes provide valuable target corporation executives with incentive to leave acquired corporation and acquiring firm may not desire target corporation without target corporation's senior executives); Ward Howell International, Inc., *supra* note 1, at 2 (golden parachutes may discourage takeovers by increasing costs of takeover to acquiring corporation). But see *McLaughlin*, *supra* note 2, at 48 (since golden parachutes do not increase appreciably costs of corporate takeovers, golden parachutes do not deter corporate takeovers); Profusek, *supra* note 5, at 101 (golden parachutes do not deter corporate takeovers since costs involved in acquiring control of public corporation vastly exceed costs of golden parachute agreements); Herzel & Collins, *supra* note 11, at 10, col. 1 (dollar amounts involved with golden parachute employment contracts are not large enough to deter corporate takeovers); *Analysis*, *supra* note 9, at 22, col. 2 (same).

⁷⁶ See Klein, *supra* note 2, at 56, col. 1 (golden parachutes settlements are payable by acquired corporation); see also *supra* notes 37-42 and accompanying text (acquired corporation and or target corporation shareholders bear costs of golden parachutes depending upon terms of change of control).

⁷⁷ See *Anti-Takeover Proposals*, S.E.C. Release No. 15230 (Oct. 13, 1978) [1978 Transfer

tion proposes to accomplish a corporate takeover by acquiring the minimum amount of target corporation stock necessary to effectuate a change of control, then the remaining target shareholders will bear part of the costs of the agreements.⁷⁸ Even though an acquiring corporation will not bear the total cost of golden parachute agreements in the latter case, golden parachute employment contracts still may tend to discourage takeover attempts since the agreements, if triggered, tend to infringe on the profitability of the surviving corporation and hence the desirability of a proposed takeover.⁷⁹

Although no court as yet has ruled on the merits of golden parachute employment contracts,⁸⁰ plaintiffs have challenged the propriety of these agreements.⁸¹ A dissident shareholder of Conoco brought suit in Delaware Chancery Court challenging the legality of golden parachute agreements between Conoco and nine of its senior executives.⁸² Conoco's board⁸³

Binder] FED. SEC. L. REP. (CCH) ¶ 81,748, at 80,984. The Securities Exchange Commission (SEC) classifies costly employment contracts designed to make the dismissal of corporate executives following a change of control expensive to an acquiring corporation as "anti-takeover" provisions. *Id.* at 80,985 n.3. Pursuant to Securities Exchange Act Release No. 15230 (Oct. 13, 1978), Bendix Corporation's proxy material classified Bendix's golden parachutes as "antitakeover" provisions since the agreements may, by increasing the potential costs of an acquisition, tend to discourage corporations from attempting to acquire Bendix. BENDIX CORPORATION, *supra* note 3, at 15; *see supra* notes 37-42 and accompanying text (by increasing costs of corporate takeover, golden parachutes may discourage other corporations from entering quest for target corporation and hence preclude shareholders from obtaining premium on target stockholdings that bidding contest might bring).

⁷⁸ *See supra* notes 37-40 and accompanying text (costs of golden parachutes accrue to target corporation shareholders under certain circumstances).

⁷⁹ *See* Small, *supra* note 40, at 29 n.16 (procedure acquiring corporations use in evaluating worth of target corporation includes review of potential liabilities of target corporation); *supra* note 38 (triggering of Burnup & Sims' CEO's cash bonus golden parachute increased Burnup & Sims' quarterly administrative expenses by \$3.5 million). Proponents also assert that golden parachute employment contracts may encourage senior corporate executives to leave target corporations since cash bonus golden parachute benefits will enable executives to double their income by leaving the target corporation for other employment. Masters, *supra* note 4, at 10, col. 3. By providing senior corporate executives with an incentive to leave target corporations following a change of control, cash bonus golden parachutes may operate as a defensive measure to corporate takeovers because the acquiring corporation may consider the target corporation's management team a valuable asset of the target corporation and refuse to proceed with the takeover without reasonable assurances that the target corporation's management team will stay on. *See id.* (an acquiring corporation "could well invest a great deal in a company and have the whole baseball team gone").

⁸⁰ *See* Morrison, *supra* note 2, at 84 (to date, no court has ruled on validity of golden parachute employment contracts); Profusek, *supra* note 5, at 102 (no published judicial decisions address validity of golden parachute employment contracts).

⁸¹ *See infra* notes 82-99 and accompanying text (Conoco, Martin Marietta, Gulf Resources are litigating validity of golden parachute employment contracts).

⁸² *See* Lewis v. Anderson, No. 6505 (Del. Ch. Oct. 8, 1982) (dissident shareholder's suit challenging Conoco's golden parachute agreements); *supra* note 9 (Conoco's golden parachute agreements).

⁸³ *See* Brief of Appellees at 4, Lewis v. Anderson, No. 343 (Del. Sup. Ct. filed Jan. 19, 1983) (Conoco's compensation committee, consisting entirely of outside directors, recom-

authorized the golden parachutes after an unsuccessful tender offer by Dome Petroleum Ltd.⁸⁴ Following authorization of the agreements, Seagram Company, Mobil Corporation, and DuPont de Nemours and Company commenced a bidding contest for control of Conoco.⁸⁵ DuPont eventually prevailed and merged Conoco into DuPont Holdings, Inc.⁸⁶ The dissident shareholder's complaint charges that the golden parachute agreements were improper and illegal, a fraud upon the corporation⁸⁷ and a waste of corporate assets without a bona fide business purpose.⁸⁸ The Delaware Chancery Court granted the defendants' motion to dismiss on the ground that the plaintiff lost his standing to sue since DuPont had succeeded in taking over Conoco in its entirety.⁸⁹ The case is pending before the Supreme Court of Delaware on the standing issue.⁹⁰

In a similar proceeding, dissident shareholders of Martin Marietta Corporation have brought suit in Maryland district court challenging the propriety of golden parachute agreements between Martin Marietta and twenty-eight of the corporation's senior executives.⁹¹ The complaint charges that the golden parachute agreements were improper and illegal, a gift of corporate assets without a valid business purpose.⁹² The complaint further charges that the golden parachutes adversely affect shareholder interests by reducing the value shareholders might receive for their shares in a future tender offer.⁹³

mended golden parachute contracts to Board and disinterested directors of Conoco's full board authorized the golden parachutes).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982); *supra* notes 34-42 and accompanying text (golden parachutes may constitute common-law fraud on corporate shareholders).

⁸⁸ See *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982); *supra* notes 15-33 and accompanying text (golden parachutes may facilitate corporate waste).

⁸⁹ See *Lewis v. Anderson*, No. 6505 (Del. Ch. Oct. 8, 1982) (Delaware Chancery Court granted defendants' motion to dismiss since dissident Conoco shareholder lacked standing to contest golden parachute agreements). In the shareholder derivative suit challenging Conoco's golden parachutes, the Delaware Chancery Court granted defendant's motion for dismissal because the plaintiff had failed to lodge an objection to the golden parachute agreements with Conoco's board of directors prior to the merger. *Id.*; see *Golden Parachutes*, *supra* note 2, at 5, col. 3 (in Delaware after *Lewis v. Anderson*, dissident shareholders may lose standing to contest golden parachute employment contracts by not protesting golden parachutes prior to consummation of merger).

⁹⁰ *Lewis v. Anderson*, No. 343 (Del. filed Jan. 19, 1983).

⁹¹ See Plaintiff's Verified Complaint at 2, *Zimmerman v. Bell*, No. B82-2658 (D. Md.) (dissident shareholders' complaint contesting propriety of Martin Marietta's golden parachute agreements).

⁹² *Id.*; see *supra* notes 15-33 and accompanying text (critics contend that golden parachutes facilitate corporate waste).

⁹³ See Plaintiff's Verified Complaint at 2, *Zimmerman v. Bell*, No. B82-2658 (D. Md.); *supra* notes 39-42 and accompanying text (golden parachutes may affect adversely target shareholder interests by reducing price offered for target shareholders' stock holdings in future tender offers).

In another pending case, Gulf Resources and Chemical Corporation is litigating the propriety of golden parachute agreements.⁹⁴ In 1981, Gulf Resources entered into golden parachute employment contracts with twenty-one of the company's senior executives.⁹⁵ Following a proxy contest which resulted in a change in the majority of the board of directors in 1982,⁹⁶ Gulf Resources' new board of directors refused to honor the golden parachute agreements because the chairman of the committee that previously ratified the golden parachutes also was the recipient of a lucrative golden parachute employment contract.⁹⁷ Shortly thereafter, eighteen of the twenty-one executives covered under the golden parachute agreements instituted a declaratory judgment proceeding against Gulf Resources seeking a court order that the golden parachute agreements are valid and enforceable contracts.⁹⁸ Gulf Resources, however, contends that the conflict of interest present on the board that ratified the golden parachute agreements invalidates the board's authorization and hence relieves Gulf Resources of any obligations with respect to the agreements.⁹⁹

In light of the arguments advanced for and against the propriety of golden parachute employment contracts,¹⁰⁰ the legality of a particular agreement will turn on the purposes behind the agreement,¹⁰¹ the specific provisions contained in the agreement,¹⁰² and the manner in which the corporation adopts the agreement.¹⁰³ Only golden parachute agreements

⁹⁴ See *Allen v. Gulf Resources & Chem. Corp.* (D. Tx.); see also *Colonial Sec. Corp. v. Allen* (Del. Ch.) (lawsuit challenging Gulf Resources golden parachutes).

⁹⁵ See *GULF RESOURCES & CHEMICAL CORPORATION*, *supra* note 3, at 8.

⁹⁶ *Id.*

⁹⁷ See Klein, *supra* note 2, at 56, col. 3 (Gulf Resources' executives initiated declaratory judgment proceeding after dissident director waged successful proxy fight for control of Gulf Resources).

⁹⁸ See *id.* (Gulf Resources refuses to honor its golden parachute agreements because board that originally authorized agreements did not possess necessary independence and disinterestedness).

⁹⁹ *Id.*; see *supra* notes 43-47 and accompanying text (golden parachutes authorized by interested directors may constitute theft of corporate assets); *infra* notes 147-50 and accompanying text (only disinterested directors should authorize golden parachute employment contracts).

¹⁰⁰ See *supra* notes 12-79 and accompanying text (arguments advanced for and against use of golden parachute employment contracts).

¹⁰¹ See Profusek, *supra* note 5, at 100 (directors must articulate clearly purposes behind golden parachute employment contracts if agreements are to fall within business judgment of corporation's directors); see also *supra* notes 59-69 and accompanying text (golden parachutes enables corporations to hire and retain senior executives); *supra* notes 70-74 and accompanying text (golden parachutes allow executives to weigh merger proposals objectively without fear that change of control might jeopardize executives' income); *supra* notes 75-79 (golden parachutes operate as defensive measure to hostile corporation takeovers).

¹⁰² See *Golden Parachutes*, *supra* note 2, at 5, col. 1 (specific provisions of golden parachute employment contracts can affect outcome of judicial challenge); see also *supra* note 9 (specific provisions of golden parachute employment contracts differ among agreements).

¹⁰³ See Masters, *supra* note 4, at 10, col. 4 (legality of golden parachute may turn on manner in which board originally authorized agreement); see also *supra* notes 43-47 and

that advance bona fide corporate objectives will survive judicial scrutiny.¹⁰⁴ The fiduciary duty running from directors to shareholders prohibits directors from authorizing corporate expenditures that do not advance legitimate corporate objectives.¹⁰⁵ Maintaining an experienced senior management team, however, is a principal concern of all corporations.¹⁰⁶ In fact, courts have held that reasonable corporate expenditures devoted to the retention or acquisition of competent corporate executives are valid and within a board of directors' power to authorize.¹⁰⁷ Golden parachutes designed to acquire prospective or retain existing senior executives, therefore, manifest a bona fide corporate objective.¹⁰⁸

accompanying text (cash bonus golden parachutes authorized by interested directors in anticipation of change of control constitutes theft of corporate assets).

¹⁰⁴ See notes 49-52 and accompanying text (fiduciary duty directors owe shareholders requires that directors manage corporate property in best interests of corporation and shareholders).

¹⁰⁵ See *supra* note 35 (corporate directors owe shareholders a fiduciary duty of honesty, loyalty, and good faith).

¹⁰⁶ See D. VAGTS, *supra* note 49, at 332 (corporate goals and executive compensation arrangements).

¹⁰⁷ See *supra* note 15 (corporate directors possess power to authorize reasonable corporate expenditures for retention or acquisition of competent corporate executives). Corporate directors possess the right to fix compensation of executive officers for services rendered to the corporation. See *Cohen v. Ayers*, 449 F. Supp. 298, 305 (N.D. Ill. 1978) (corporate directors possess power over matters of executive compensation), *aff'd*, 596 F.2d 733 (7th Cir. 1979); *Koplar v. Warner Bros. Pictures, Inc.*, 19 F. Supp. 173, 188 (D. Del. 1937) (directors have power to award just compensation to executives); *Gallin v. National City Bank*, 152 Misc. 678, ___, 273 N.Y.S. 87, 114 (Sup. Ct. 1934) (corporate directors acting as body in good faith possess right to fix compensation of corporate executives for services rendered to corporation). Absent a showing of fraud, oppression, or bad faith, courts will defer to the sound business judgment of directors on matters of executive compensation. *Heller v. Boylan*, ___, A.D.2d ___, ___, 29 N.Y.S.2d 653, 671 (Sup. Ct. 1941); *Gallin v. National City Bank*, 152 Misc. 679, ___, 273 N.Y.S. 87, 117 (Sup. Ct. 1934).

The conclusive presumption courts accord the business decisions of corporate directors is better known as the business judgment rule. See generally 3A W. FLETCHER, CYCLOPEDIA OF CORPORATIONS §§ 1039, 1040 (M. Wolf ed. 1975 rev.); E. FOLK, THE DELAWARE GENERAL CORPORATION LAW, 75-81 (1972); H. HENN, LAW OF CORPORATIONS § 242 (2d ed. 1970); Note, *Corporate Director's Guidebook*, 33 BUS. LAW. 1595, 1604 (1978). The business judgment rule precludes judicial inquiry into actions of directors taken in good faith and in honest pursuit of bona fide corporate objectives. *United States Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917); *Galef v. Alexander*, 615 F.2d 51, 57 (2d Cir. 1980); *Abramowitz v. Posner*, 513 F. Supp. 120, 125 (S.D.N.Y. 1981) *aff'd* 672 F.2d 1025 (1982); see also *Heller v. Boylan*, ___, A.D.2d ___, ___, 29 N.Y.S.2d 653, 672 (Sup. Ct. 1941) (shareholders challenging executive compensation plans must show oppression, fraud, abuse, bad faith, or other breach of trust on part of corporate directors that authorized plan); *Gallin v. National City Bank*, 152 Misc. 679, ___, 273 N.Y.S. 87, 117 (Sup. Ct. 1934) (shareholders alleging excessive executive compensation must bring case within exceptions predicated on breach of legal duty by directors with consequent damage to corporation).

¹⁰⁸ See *supra* notes 59-69 and accompanying text (golden parachutes enable corporations to advance corporate objective of hiring and retaining experienced corporate executives). In addition to enabling corporations to hire or retain senior executives, proponents assert that golden parachutes allow executives to consider merger proposals objectively without concern over personal finances and operate as a defensive measure to hostile takeovers.

Golden parachutes designed to acquire prospective or retain existing senior executives, however, will not survive judicial scrutiny unless corporations carefully draft the agreements.¹⁰⁹ Golden parachute agreements differ in terms of the number of executives covered,¹¹⁰ the amount of benefits guaranteed,¹¹¹ and the particular set of circumstances that entitle an executive to receive benefits under the agreement after a change of

Supra notes 70-79 and accompanying text. Corporate directors possess the duty to institute measures to deter corporate takeovers that are not in shareholders' best interests. *Panther v. Marshall Field & Co.*, 646 F.2d 271, 288 (7th Cir.), (*cert. denied*, 454 U.S. 1092 (1981)); *Crouse-Hinds Co. v. Internorth, Inc.*, 518 F. Supp. 390, 408 (N.D.N.Y. 1980); *supra* note 75. Before directors may authorize defensive measures to a hostile takeover, however, directors must determine, after reasonable deliberations, that a proposed takeover is not in either the corporation's or shareholders' best interests. *Treadway Cos. v. Care Corp.*, 638 F.2d 357, 381 (2d Cir. 1980); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712-13 (N.D. Ill. 1969); *supra* note 75. Assuming golden parachutes do represent a defensive measure to a hostile corporate takeover, corporate boards of directors must conclude that a corporate takeover is not in the corporation's or shareholders' best interests before a board may authorize defensive golden parachute employment contracts. *Supra* note 75. Boards of directors, consequently, cannot authorize defensive golden parachutes designed to deter corporate takeovers prior to the announcement of a corporate takeover since the law predicates directors' right to take defensive measures to corporate takeovers on directors' good faith conclusion that a takeover is not in the corporation's or shareholders' best interests. *Id.*; *see supra* note 9 (directors authorize cash bonus golden parachutes in response to hostile corporate takeovers). Provided golden parachutes actually operate as a defensive measure to hostile corporate takeovers, then golden parachutes reasonably designed to deter hostile corporate takeovers not in the corporation's or shareholders' best interests manifest a bona fide corporate objective. *But see supra* note 75 (whether golden parachutes operate as deterrent to hostile takeovers remains subject of considerable debate).

Golden parachute employment contracts designed to ensure management objectivity during corporate takeovers, on the other hand, do not advance a legitimate corporate objective. *See Morrison, supra* note 2, at 83 (golden parachutes designed to increase management objectivity during takeovers provide senior executives with gifts for acting in a fashion that executives' fiduciary duty already requires). The fiduciary duty corporate officers owe shareholders requires officers to manage corporate property in shareholders' best interests. *See supra* notes 49-52 and accompanying text. Golden parachutes designed to ensure management objectivity during corporate takeovers, therefore, do not manifest a legitimate corporate objective because the fiduciary duty that corporate officers owe shareholders already necessitates management's objectivity during corporate takeovers. *Compare supra* notes 48-58 and accompanying text (golden parachutes may provide senior executives with so much security of tenure as to cause separation of ownership from control) *with supra* notes 70-74 and accompanying text (golden parachutes allow executives to weigh objectively merger proposals).

¹⁰⁹ *See Golden Parachutes, supra* note 2, at 5, col. 1 (recommended provisions for carefully drafted golden parachute employment contract); *infra* notes 110-33 and accompanying text (only carefully drafted golden parachutes will survive judicial scrutiny).

¹¹⁰ *See supra* notes 3, 4, & 9 (number of executives offered golden parachute employment contracts differs among corporations).

¹¹¹ *See supra* note 9 (number of years of protection and amount of benefits golden parachute employment contracts provide executives differs among agreements); *supra* note 7 (*Fortune* estimates of potential costs of several golden parachute employment contracts); *see also* Profusek, *supra* note 5, 112-16 (examples of golden parachute employment contracts); *supra* note 4 (same).

control has occurred.¹¹² Therefore, to avoid allegations of corporate waste, corporations must exercise care in drafting golden parachute employment contracts.¹¹³

A carefully drafted golden parachute agreement should ensure that a corporation receives adequate consideration in return for the grant of golden parachute employment contracts.¹¹⁴ Plans for additional compensation of corporate executives must reflect adequate consideration to corporations.¹¹⁵ Executive compensation arrangements that fail to reflect adequate consideration to corporations facilitate corporate waste.¹¹⁶ Courts, however, have held that the retention of existing executives, or the acquisition of prospective executives, represents adequate consideration to justify plans for additional compensation of corporate executives.¹¹⁷ Consequently, to avoid allegations of corporate waste, carefully drafted golden parachutes must guarantee a corporation an experienced senior management team by providing for the retention of existing, or the acquisition of prospective, senior executives.¹¹⁸

Corporations, therefore, should not provide executives with cash bonus golden parachutes since the agreements may not guarantee corporations the continued services of corporate executives.¹¹⁹ Cash bonus golden parachutes provide target corporation executives with unconditional benefits following a change of control.¹²⁰ Conditional golden parachutes, on the other hand, provide benefits only to target corporation executives who suffer adverse consequences following a change of control.¹²¹ By limiting golden parachute benefits to executives who suffer adverse con-

¹¹² See *supra* note 9 (golden parachute agreements differ in terms of exact circumstances that entitle executive to receive benefits after change of control has occurred).

¹¹³ See *supra* notes 15-20 and accompanying text (golden parachutes may facilitate corporate waste since amounts awarded executives under agreements may lack consideration); *supra* notes 21-27 and accompanying text (golden parachutes may facilitate corporate waste since amounts awarded executives under the agreements may bear no reasonable relation to value of executive's services to target corporation); *supra* notes 28-33 and accompanying text (golden parachutes may facilitate corporate waste since the agreements may overcompensate executives).

¹¹⁴ See *supra* note 15 (adequate consideration must support executive compensation arrangements).

¹¹⁵ *Id.*

¹¹⁶ See *id.* (executive compensation plans that fail to reflect adequate consideration to corporations facilitate corporate waste).

¹¹⁷ See *id.* (retention or acquisition of competent corporate executives constitutes adequate consideration for executive compensation plans).

¹¹⁸ *Id.*

¹¹⁹ See Masters, *supra* note 4, at 2, col. 3 (corporate counsel are concluding that golden parachute employment contracts are legal provided contracts do not grant departing executives unconditional cash bonus golden parachute benefits).

¹²⁰ See *supra* note 9 (Conoco's CEO's cash bonus golden parachute employment contract); *supra* note 38 (Burnup & Sims' CEO's cash bonus golden parachute employment contract).

¹²¹ See *supra* note 9 (Conoco's executive's conditional golden parachute employment contracts).

sequences following corporate takeovers, conditional golden parachute plans reflect adequate consideration to corporations since the plans provide for the retention of senior executives.¹²² Cash bonus golden parachutes, in contrast, may not reflect adequate consideration to corporations since the agreements may not guarantee corporations the continued services of corporate executives.¹²³ On the contrary, cash bonus golden parachutes, which provide executives with unconditional benefits following a change of control, may provide executives with an incentive to leave target corporations following corporate takeovers. An executive under an unconditional cash bonus golden parachute, in effect, can double his income by leaving the target corporation with golden parachute benefits and acquiring new employment with another corporation.¹²⁴ Carefully drafted golden parachutes designed to advance the corporate objective of maintaining an experienced senior executive team, therefore, should not provide executives with unconditional cash bonuses.¹²⁵

A carefully drafted golden parachute agreement also should not provide executives with severance packages more generous than executives could have expected to receive in salary and benefits absent a change of control.¹²⁶ Boards of directors establish the amount of compensation paid

¹²² See *supra* note 15 (retention or acquisition of competent corporate executives constitutes adequate consideration for executive compensation plans).

¹²³ See *Masters, supra* note 4, at 10, col. 3 (cash bonus golden parachutes may not guarantee corporations the continued services of key executives).

¹²⁴ *Id.* By providing for the offset of direct remuneration received from new employment against amounts due under an executive's golden parachute contract, corporations can eliminate an executive's incentive to leave the target corporation following a change of control by eliminating an executive's opportunity to double his income by leaving the acquired target corporation with golden parachute benefits and acquiring new employment elsewhere. See *Golden Parachutes, supra* note 2, at 5, col. 1 (carefully drafted golden parachute employment contract should contain offset provision reducing parachute benefits by amount of earnings executives may garner at new job); see also *Profusek, supra* note 5, at 109 (most golden parachutes contain mitigation of damage and offset provisions); *supra* note 4 (Bendix's golden parachutes contain offset provisions).

¹²⁵ See *Masters, supra* note 4, at 10, col. 3 (cash bonus golden parachutes that provide unconditional benefits to executives may constitute corporate waste); *supra* notes 119-25 and accompanying text (same). Instead of providing unconditional cash bonus benefits, carefully drafted golden parachutes should provide executives with conditional benefits. See *supra* note 9 (comparison of Conoco's conditional and cash bonus golden parachutes). Accordingly, a carefully drafted golden parachute designed to maintain a senior management team should provide executives with benefits only under circumstances in which the acquiring corporation, following a change of control, dismisses or reduces the responsibilities or income of the target corporation executive. See *supra* note 9 (Conoco's conditional golden parachute employment contracts limit benefits to executives who suffer adverse consequences at hands of acquiring corporation following change of control).

¹²⁶ See *Golden Parachutes, supra* note 2, at 5, col. 1 (carefully drafted golden parachute employment contract should contain compensation and benefits clause providing departing executives with amount of compensation executive could expect to receive during duration of employment contract absent change of control); *Profusek, supra* note 5, at 103 & 108-09 (most golden parachutes should withstand judicial scrutiny if contracts do not materially alter compensation and benefits that executives reasonably could expect to receive during

executives in terms of the reasonable value of the executive's services to the corporation.¹²⁷ Executive compensation expenditures in excess of the reasonable value of an executive's services to a corporation constitute corporate waste.¹²⁸ Golden parachute agreements that provide executives with severance packages more generous than executives could have expected to receive in salary and benefits absent a change of control, therefore, may facilitate corporate waste.¹²⁹ Consequently, corporations should limit the benefits paid to departing executives under golden parachute employment contracts to that amount which the executive could have expected to receive in salary and benefits absent a change of control for the duration of the employment contract.¹³⁰

Finally, a carefully drafted golden parachute agreement should cover only the senior executives who, in the sound business judgment of a corporation's board of directors, represent the corporation's most valued executives.¹³¹ Corporate expenditures made pursuant to golden parachute agreements that cover more than the corporation's most valued executives may facilitate corporate waste since the agreements may benefit only the less competent target corporation executives whom an acquiring corporation fires following a change of control.¹³² Offering golden parachute employment contracts only to a corporation's most valued executives and gearing golden parachute benefits to executives' salary and bonuses ensures

duration of employment contract period absent change of control). Golden parachute employment contracts which provide executives with lump-sum severance payments will survive judicial scrutiny if the lump-sum payment represents the present discounted value of the executive's salary and benefits for the duration of the golden parachute employment contract. *Id.*; see also *Analysis*, *supra* note 9, at 22, col. 2 (right to receive lump-sum benefits can be important strategically to executives since lump-sum payment eliminates concern over disputes with acquiring corporation following corporate takeovers).

¹²⁷ See *supra* note 107 (boards of directors establish executive compensation); *supra* note 22 (executive compensation must bear reasonable relation to value of executive's services to corporation).

¹²⁸ See *supra* notes 15 & 22 (executive compensation expenditures that bear no reasonable relation to value of executive's services to corporation constitute corporate waste).

¹²⁹ See Profusek, *supra* note 5, at 103, 108-09 (to avoid allegations of corporate waste, golden parachute employment contracts should provide executives with salary and benefits executives reasonably could expect to receive during duration of contract employment period absent change of control).

¹³⁰ See *Golden Parachutes*, *supra* note 2, at 5, col. 1; Profusek, *supra* note 5, at 103, 108-09; *supra* notes 15 & 22 (executive compensation and corporate waste); *supra* note 126 (most golden parachutes should withstand judicial scrutiny if contracts do not materially alter compensation and benefits that executive could expect to receive absent change of control).

¹³¹ See *supra* note 3 (only select few of corporation's key executives receive golden parachute employment contracts); *infra* notes 132-33 and accompanying text (if corporation only offers golden parachute employment contracts to corporation's most valued executives, corporation will avoid allegations of corporate waste).

¹³² See *supra* notes 21-27 and accompanying text (golden parachutes may facilitate corporate waste since amounts awarded under agreements may bear no reasonable relation to value of executive's services to corporation).

that the amount of compensation paid executives pursuant to the agreements bears a reasonable relation to the value of the executives' services and enables corporations to avoid allegations of corporate waste.¹³³

Golden parachute employment contracts carefully drafted to advance the corporate objective of maintaining a senior management team do not constitute a common-law fraud on corporate shareholders since the agreements represent an essential element of an efficient executive compensation plan.¹³⁴ In theory, an efficient executive compensation plan will accord the minimum amount of compensation necessary to hire and retain experienced corporate executives.¹³⁵ The amount of risk associated with an executive position in a particular corporation is one of the variables that determines the minimum or equilibrium rate of compensation.¹³⁶ One of the principal risks associated with an executive position in a particular corporation is the threat of abbreviated tenure.¹³⁷ In theory, therefore, an executive's equilibrium rate of compensation should increase, *ceteris paribus*, in direct relation with increases in the risk of the executive's dismissal. Assuming senior corporate executives are risk averse and that corporate takeovers increase an executive's expectation of the risks of abbreviated tenure, then corporations subject to or the likely target of a corporate takeover may need to increase the equilibrium compensation

¹³³ See Profusek, *supra* note 5, at 112-15 (sample golden parachute contracts); *supra* note 4 (Acme Cleveland's, Allied's and Bendix's golden parachute agreements gear benefits to executive's salary and benefits); *supra* note 3 (Bendix, Gulf Resources and Pennzoil offered golden parachute employment contracts to only select few of key senior executives). But see *id.* (Beneficial offered golden parachute employment contracts to 250 executives).

¹³⁴ See *infra* notes 135-46 and accompanying text (properly designed golden parachute employment contracts represent most efficient response to increased risks corporate takeovers pose to corporate executives).

¹³⁵ See D. VAGTS, *supra* note 49, at 332. Designing the most efficient executive compensation "package" is a matter of considerable concern to corporations. *Id.* An efficient executive compensation plan would, in part, attract and hold desired executives as against competitive offers at the minimum cost to the corporation. *Id.* See Generally G. WASHINGTON & V. ROTHCHILD, *supra* note 8.

¹³⁶ See Herzel & Colling, *supra* note 11, at 10, col. 3 (golden parachutes represent market response to growing risk of displacement by corporate takeovers faced by competent senior executives of publicly held companies). Employment markets for senior corporate executives traditionally have included some adjustment for the risks associated with an executive position in a particular corporation. *Id.* For example, executive positions in the television and motion picture industries have commanded higher salaries than executive positions in manufacturing industries since the risks of abbreviated tenure associated with an executive position in the former industry exceed those of the latter. *Id.* at 12, col. 3; see also *Analysis*, *supra* note 9, at 22, col. 4 (golden parachutes represent market response to increased risk of displacement by corporate takeovers faced by senior executives).

¹³⁷ See Herzel & Colling, *supra* note 11, at 10, col. 3 (motion picture and television executives traditionally have received salaries in excess of salaries received by executives in manufacturing industry since risks of abbreviated tenure in motion picture and television industry exceed risks of abbreviated tenure in manufacturing industry); *Analysis*, *supra* note 9, at 22, col. 4 (same).

rate of senior executives to retain or acquire executives' services.¹³⁸

Despite potential for abuse,¹³⁹ golden parachute contracts carefully drafted to advance the corporate objective of maintaining a senior management team represent the most efficient means of compensating senior executives for the increased risks attendant to corporate takeovers.¹⁴⁰ Conditional golden parachutes designed to guarantee an executive's position and salary following a change of control in the executive's corporation allow corporations to compensate senior executives for the increased risks associated with takeovers without upsetting the compensation differentials existing between various levels of executives within a given corporation. Compensation differentials are an important consideration in any corporate compensation plan.¹⁴¹ Compensation committees composed of outside directors carefully deliberate long and hard in arriving at equitable compensation levels for corporate executives ranging from lower management to senior executive officers.¹⁴² To the extent that golden parachutes allow corporations to accommodate the increased risk a corporate takeover poses

¹³⁸ See Herzel & Colling, *supra* note 11, at 10, col. 3 (risks of abbreviated tenure and executive compensation); *Analysis*, *supra* note 9, at 22, col. 4 (same); see also *supra* notes 59-69 and accompanying text (target corporations may need to offer executives some added security to prevent senior executives from leaving target corporation for other employment during unfriendly takeover).

¹³⁹ See *supra* notes 100-33 and accompanying text (improperly drafted golden parachutes may facilitate corporate waste). Golden parachute agreements that provide executives with unconditional cash bonus payments following corporate takeovers may facilitate corporate waste. See *supra* notes 119-25 and accompanying text. In addition, golden parachute agreements that provide executives with severance packages more generous than executives could have expected to receive in normal salary and benefits absent a change of control or that cover more than the corporation's most valued executives may also facilitate corporate waste. See *supra* notes 126-33 and accompanying text.

¹⁴⁰ See *infra* notes 141-46 and accompanying text (since properly designed golden parachutes do not upset corporations' existing compensation infrastructure and do not impose unjustified costs on target corporations, properly designed golden parachutes represent most efficient response to increased risks that corporate takeovers pose to target corporation executives). Corporations possess three alternative responses to the increased risks corporate takeovers pose to senior level executives. First, a corporation may decide to ignore the increased risks posed senior executives by corporate takeovers and run the risk of losing key executives. See *supra* notes 66-68 and accompanying text (anticipating dismissal, target corporation executives, upon announcement of unfriendly takeover, may commence search for new employment). Another alternative corporations may adopt in response to the increased risks corporate takeovers pose to senior executives would be to give senior executives a straight increase in their salaries upon the announcement of an unfriendly takeover in an effort to induce senior executives to remain with the target corporations. Finally, a corporation may adopt golden parachute employment contracts to insure senior executives against the risks of abbreviated tenure associated with corporate takeovers. See *supra* note 4 (golden parachute employment contracts insure executives against risks incident to corporate takeovers).

¹⁴¹ Interview with Robert E.R. Huntley, Director of Phillip Morris Corporation and Best Corporation, in Lexington, Virginia (Feb. 25, 1983).

¹⁴² *Id.*

to senior level executives without doing violence to the existing compensation infrastructure of a given corporation, golden parachute employment contracts represent an efficient response to the increased risks corporate takeovers present to senior executives.¹⁴³ In addition, no costs accrue to the corporation under a carefully drafted golden parachute contract unless the corporation actually undergoes a change of control and the acquiring corporation dismisses or reduces the responsibilities or position of the target corporation executive.¹⁴⁴ A straight salary increase for senior executives,¹⁴⁵ on the other hand, would compensate executives for the increased risks but also would impose immediate costs on the corporation regardless of whether the corporation actually undergoes a change of control with the senior executive suffering adverse consequences. Carefully drafted golden parachute employment contracts, therefore, represent the most efficient response to the increased risks corporate takeovers pose to senior corporate executives.¹⁴⁶

Corporations, in addition to carefully drafting golden parachute agreements, should exercise care to ensure that directors authorize the agreements properly. Only disinterested directors should take part in the review and authorization of golden parachute contracts.¹⁴⁷ Courts are reluctant to interfere with the business affairs of corporations and normally will defer to the sound business judgment of directors on matters of executive compensation.¹⁴⁸ When an interested director takes part in the authorization of a corporate expenditure, however, courts will not defer to the business judgment of the directors but rather will require the directors to establish the business justifications supporting the expenditure.¹⁴⁹

¹⁴³ See *supra* note 140 (corporations possess three alternative responses to increased risks corporate takeovers pose to target corporation executives).

¹⁴⁴ See *supra* note 125 (carefully drafted golden parachutes employment contracts should provide benefits only to executives that suffer adverse consequences following change of control).

¹⁴⁵ See *supra* note 140 (corporations possess three alternative responses to increased risks corporate takeovers pose to target corporation executives).

¹⁴⁶ See generally Herzel & Colling, *supra* note 11, at 10, col. 3; *Analysis, supra* note 9, at 22, col. 4.

¹⁴⁷ See Masters, *supra* note 4, at 10, col. 4 (only disinterested directors should review and authorize golden parachute employment contracts); see also Klein, *supra* note 2, at 56, col. 3 (Gulf Resources refuses to honor company's golden parachute agreements since board that originally authorized agreements did not have necessary degree of disinterestedness).

¹⁴⁸ See *supra* note 107 (absent showing of fraud or bad faith, courts defer to sound business judgment of corporate directors).

¹⁴⁹ See *Cohen v. Ayers*, 596 F.2d 733, 739-40 (7th Cir. 1979). Ordinarily, corporate expenditures made pursuant to executive compensation plans do not constitute a waste of corporate assets as long as corporations receive fair consideration in return. *Id.*; see *supra* note 15 (adequate consideration must support executive compensation payments.) Courts normally defer to the sound business judgment of directors on matters concerning the adequacy of consideration that corporations receive for executive compensation expenditures. *Id.*; see *supra* note 107 (business judgment rule). When interested directors authorize corporate expenditures, however, courts will require directors to establish the entire fairness of the corporate expenditures. *Id.*

Therefore, to ensure that courts will defer to a board's conclusions on the propriety of golden parachute employment contracts, only disinterested directors should authorize the agreements.¹⁵⁰

Finally, corporations must disclose golden parachute plans to stockholders if the agreements are to survive judicial scrutiny.¹⁵¹ Federal securities law requires the disclosure of material information to security market participants.¹⁵² Securities Exchange Commission (SEC) rules require disclosure of the compensation paid to the five most highly compensated executive officers whose cash and cash equivalent forms of remuneration exceed \$50,000.¹⁵³ In addition, SEC rules require the disclosure of any remunerative plans or arrangements in excess of \$50,000 that result or will result from the termination of employment.¹⁵⁴ Federal law, therefore, mandates the disclosure of golden parachute employment contracts in a corporation's annual proxy statement provided the potential costs of a particular plan meet or exceed \$50,000.¹⁵⁵

Since golden parachute employment contracts may facilitate bona fide corporate objectives,¹⁵⁶ corporate counsel can expect the growth in the popularity of these special employment contracts to continue.¹⁵⁷

¹⁵⁰ See Masters, *supra* note 4, at 10, col. 4 (if interested directors authorize golden parachute employment contracts then reviewing court may require directors to establish intrinsic fairness of golden parachute plan).

¹⁵¹ See Profusek, *supra* note 5, at 110-11 (SEC disclosure requirements of golden parachute employment contracts).

¹⁵² See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-80 (1977) (federal law requires disclosure of material information while state law codifies director's fiduciary duties).

¹⁵³ See 17 C.F.R. § 229.402 (1982) (management remuneration and transactions). Item 402 of SEC REGULATION S-K requires a corporation to disclose in the proxy statement to shareholders all remuneration paid to the five most highly compensated executive officers, whose cash and cash equivalent forms of remuneration exceed \$50,000. *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* Item 402 of SEC REGULATION S-K requires corporations to disclose executive employment contracts between corporations and the five most highly compensated executives, if their remuneration exceeds \$50,000 in the corporation's proxy statement, Form 10-K reports, or in the corporation's registration statements. *Id.*; see also *supra* note 77 (golden parachute employment contracts may constitute antitakeover provisions and hence require explicit disclosure as such in corporation's proxy statement).

¹⁵⁶ See *supra* notes 104-08 and accompanying text (golden parachutes carefully designed to acquire prospective or retain existing senior executives manifest a bona fide corporate objective). But see *supra* note 108 (golden parachutes designed to deter hostile corporate takeovers may not advance legitimate corporate objective since golden parachutes actually may not operate as deterrent to hostile corporate takeovers); *id.* (golden parachutes designed to increase management objectivity during takeovers do not manifest bona fide corporate objective since executives' fiduciary duty already necessitates executives' objectivity during hostile takeovers).

¹⁵⁷ See *supra* notes 3 & 10 (statistics on increasing prevalence of golden parachute provisions in executive employment contracts). As long as the United States securities markets continue to undervalue the price of corporate securities, the highly valued senior executives of major corporations will continue to labor under the threat of a corporate takeover, and the popularity of golden parachute employment contracts will continue to increase. Profusek, *supra* note 5, at 99-100; Ward Howell International, Inc., *supra* note 1, at 9.

However, like all executive compensation arrangements, golden parachute agreements are subject to abuse.¹⁵⁸ Therefore, only the carefully drafted,¹⁵⁹ properly authorized,¹⁶⁰ and adequately disclosed¹⁶¹ golden parachute agreements will survive judicial scrutiny.¹⁶²

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¹⁵⁸ See *supra* note 139 (golden parachute employment contracts are subject to abuse).

¹⁵⁹ See *supra* notes 109-33 and accompanying text (carefully drafted golden parachute employment agreement provides corporation's most valued executives with conditional benefits that do not exceed executive's normal salary and benefits).

¹⁶⁰ See *supra* notes 147-50 and accompanying text (disinterested directors must authorize golden parachute employment contracts).

¹⁶¹ See *supra* notes 151-55 and accompanying text (federal law mandates disclosure of golden parachute employment contracts).

¹⁶² See Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 9 (1934). The late Justice Stone, referring to abuses in the area of executive compensation arrangements, once stated: [T]here is little to suggest that the Bar has yet recognized that it must bear some burden of responsibility for these evils. But when we know and face the facts we shall have to acknowledge that such departures from the fiduciary principle do not usually occur without the active assistance of some member of our profession, and that their increasing recurrence would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interests to take account of these events of profound import or to sound the warning that the profession looks askance upon these, as things that "are not done".

Id.

