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THE SHAREHOLDER'S DERIVATIVE SUIT—A SOLUTION TO THE POLLUTION PROBLEM?

INTRODUCTION

Urbanization, industrial development and the growth of transportation have given rise to one of society's most serious and urgent problems—pollution.¹ While the gravity of the pollution problem has been recognized for many years,² legislative and private attempts to attack this problem have been largely ineffective.³ This ineffectiveness has been caused primarily by the rapid increase in the sources of pollution and society's continued failure to accept responsibility for coping with the problem.

If a corporation is polluting the air and water, its shareholders may play an important role in restraining this contamination. Assume X has been a hypothetical shareholder of the Midville Public Service Company for 15 years. During this time the company has expanded its

1. I now turn to a subject which, next to our desire for peace, may well become the major concern of the American people in the decade of the '70's.

   The great question of the '70’s is: Shall we surrender to our surroundings, or shall we make our peace with nature and begin to make reparations for the damage we have done to our air, to our land, and to our water?

   Clean air, clean water, open spaces—these should once again be the birthright of every American. If we act now, they can be.

   Message to the Congress of the State of the Union by President Richard M. Nixon, Jan. 22, 1970.


   As early as 1845 the state of Illinois recognized that harm might result from pollution and made it a public offense to pollute the waters and highways of Illinois. Act of Mar. 3, 1845, § 145 [1845] Ill. Laws 173.

3. The legislative and private attempts to attack the pollution problem have been discussed in the following: Bylinsky, The Limited War on Water Pollution, FORTUNE, Feb., 1970, at 103; Delogu, Legal Aspects of Air Pollution Control and Proposed State Legislation for Such Control, 1969 Wis. L. Rev. 886; Esposito, Air and Water Pollution: What To Do While Waiting for Washington, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 32 (1970); Hagevick, Legislating for Air Quality Management: Reducing Theory to Practice, 33 LAW & CONTEMP. PROB. 369 (1968); Jurgensmeyer, Control of Air Pollution Through the Assertion of Private Rights, 1967 DUKE L.J. 1126; O'Fallon, Deficiencies in the Air Quality Act of 1967, 33 LAW & CONTEMP. PROB. 275 (1968); Pollack, Legal Boundaries of Air Pollution Control—State and Local Legislative Purpose and Techniques, 33 LAW & CONTEMP. PROB. 331 (1968); Reitze, Pollution Control—Why Has It Failed?, 55 A.B.A.J. 923 (1969); Rheingold, Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere, 33 BROOKLYN L. REV. 17 (1966); Schmitz, Pollution, Law, Science and Damage Awards, 18 CLEV. STATE L. REV. 456 (1969); Note, Air Pollution as a Private Nuisance, 24 WASH. & LEE L. REV. 314 (1967).
facilities and has had increased earnings. As a result of the company's growth, X's dividends have yielded an above average rate of return on his investment. X has discovered, however, that the company in which he has had so much faith and pride is one of the major contributors to both air and water pollution in his community. He has learned that the Midville Company does not have adequate pollution control plans for its present or future facilities. The purpose of this note is to suggest that a shareholder such as X may bring a derivative suit against the directors of a given corporation to force them to take the necessary steps to insure adequate pollution control.

**INDUSTRY'S RESPONSIBILITY FOR POLLUTION CONTROL**

The shareholder must first determine whether the corporation has any duty to control the pollution from its facilities before he can proceed with a derivative suit against its directors. In states which prohibit pollution by statute, the extent of the corporation's legal duty is measured by legislative regulations. In states which do not specifically prohibit pollution by statute, it is arguable that there still exists a social duty to the community not to pollute. Since the judiciary may be hesitant to recognize this social duty without some attendant legal responsibility, it becomes incumbent upon the shareholder to convince the court that this social duty is deserving of recognition and enforcement. The effects of pollution are equally detrimental with or without regulations, and therefore the existence of legislative sanction should not be conclusive of the question of relief. If the legislature will not act or does not act in a responsive manner, the courts may have to take the initiative to adapt existing theories of law, such as the common law public nuisance doctrine, to contend with this serious problem. Restraining action must be swift

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4. See Appendix.
7. It is sobering to remember that for almost two hundred years the courts have generally balanced the equities in favor of industrial exploitation of the environment. In a statement distinguished for its candor if not for its wisdom, one judge has said: '... one's bread is more important than the landscape or clear skies. Without smoke, Pittsburgh would have remained a pretty village.'

It is time for the courts to abandon this brand of Judicial Merchantilism and to set out to redress the imbalance of the last two hundred years.


"If lawyers and their clients are willing to ask for less than the impossible, the
and effective in order to control the corporate polluter.

Courts have continually adhered to the principle that a corporation's primary responsibility is to be profit-motivated. Contemporary social attitudes, however, indicate that business must also be responsive to the problems and needs of the community. At present, fewer than two hundred of the nation's corporations make up the "central switchboard of the nation's economy;" by virtue of their influential status, they have placed themselves in a position of social responsibility. To elucidate the impact of business upon society, one writer has stated:

As a significant social and economic force in our economy, business possesses the ability and the power to accomplish or hinder social goals as well as determine the structure of our economy...

The power and pervasiveness of business no longer raises the question of whether business will affect our society but only how it will do so.

The present-day advocate of the private enterprise and laissez-faire philosophies should agree that business must accept a social responsibility at least commensurate with its economic influence if it is to operate with a minimum of interference and regulation. Business, as well as the individual, has the responsibility of being a good citizen.


12. Business is in significant measure responsible for the social conditions in question and therefore has a special responsibility to solve the problems it has created. It is suggested that in its own self-interest, business must act in order to prevent adverse public and governmental reaction. Under this view, so-called social responsibility is no more than self-correction of the underlying business operation that produced the adverse social effect in the first place.


The events surrounding Ralph Nader’s recent shareholders’ campaign against General Motors is illustrative of how the public can force business to recognize greater leadership and responsibility.\textsuperscript{14} Although “Campaign GM” failed in its goal of placing three representatives of the public on General Motors’ board of directors, it was successful in forcing the giant corporation to consider the effect of its operations on the general public and the environment. James M. Roche, chairman and chief executive of General Motors, stated after the assault by the Nader group: “I don’t think we won a victory. We won a vote of confidence. We could lose that vote of confidence very quickly unless we respond in the way our shareholders expect us to.”\textsuperscript{15} Other individuals have also initiated programs in which they hope to use stockholder proxies to make large corporations more responsive to present social problems.\textsuperscript{16}

Recent reports indicate that industries and public utilities are substantial contributors to atmospheric and aquatic pollution.\textsuperscript{17} Industry contaminates the air and water either directly by emitting solid or gaseous wastes or indirectly by manufacturing various products, such as automobiles, which themselves contribute to the problem. Therefore, many contend that industry should assume a proportionate share of the responsibility for pollution control.\textsuperscript{18}

Once the shareholder has determined that there is a legal and/or social duty on the part of his corporation to control its pollution, his next step is to examine whatever legal principles are necessary to enforce this duty.

**Grounds For A Shareholder’s Derivative Suit**

Shareholders traditionally do not have a direct power of control over a company’s internal operations;\textsuperscript{19} however, they do have the right


\textsuperscript{16} Wall St. J., Apr. 7, 1970, at 38, col. 1; Corporations—Proxies for Protesters,\textsuperscript{17} Time, Jan. 26, 1970, at 69.

\textsuperscript{17} Subcommittee on Environmental Improvement, Committee on Chemistry and Public Affairs, American Chemical Society, Cleaning Our Environment—The Chemical Basis for Action 58-59, 64, 139 (1969).

\textsuperscript{18} Community sentiment toward this problem was reflected in a survey reported by Newsweek in 1966. The survey reported that 90 percent of Americans thought that business should assume the leadership and responsibility of attacking the pollution dilemma. What Americans Really Think of Business,\textsuperscript{19} Newsweek, May 2, 1966, at 85.

\textsuperscript{19} “The business and affairs of a corporation shall be managed by a board of directors except as may be otherwise provided in the articles of incorporation.” ABA-ALI Model Bus. Corp. Act § 35 (1969).
to institute suit on behalf of the corporation if the directors are derelict in their duties. The two grounds upon which the courts have allowed shareholder interference are: 1) negligent management of the corporation and 2) actual or threatened violation of law or public policy.\(^\text{20}\) While it is recognized that a shareholder must cope with numerous technical and possibly defeating procedural requirements,\(^\text{21}\) the remainder of this note will be limited to a discussion of the substantive grounds on which a derivative suit may be brought, the procedural defenses available to defendant directors and the remedies available to shareholders.

**Negligent Management by Directors or Officers**

Despite their reluctance to interfere with the internal operations of a corporation,\(^\text{22}\) courts have granted relief where the shareholder can establish that the directors have negligently or willfully breached their fiduciary duty\(^\text{23}\) to the corporation and that this breach has or will...

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20. "For the courts to intervene there must be actual or threatened acts which are ultra vires, fraudulent, and injurious, and are an abusive power, and are acts of oppression on the part of the Corporation or of its officers." Golden v. St. Joseph Milk Producers’ Ass’n, 420 S.W.2d 31, 33 (Mo. Ct. App. 1967). See also 3 FLETCHER CYC. CORP. § 990 (perm. ed. 1965).

21. The following factors may play an important role in the shareholder’s derivative suit: 1) in most jurisdictions the shareholder must satisfy the requirement of "contemporaneous ownership," that is, the plaintiff-shareholder must have been a shareholder at the time of the wrong about which he complains; 2) a prerequisite to a shareholder’s derivative suit is a demand by the shareholder on the board of directors and the other shareholders for redress of the wrong against the corporation except where such a demand would be futile; 3) some jurisdictions require that shareholders with less than prescribed holdings give security for the corporation’s litigation expenses; 4) the directors and officers of the corporation may be indemnified for the litigation expenses which they may incur in defending against the suit; and 5) the plaintiff may be reimbursed by the corporation for his attorney’s fees and other reasonable expenses. For a further discussion of these factors, see H. HENN, THE LAW OF CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS §§ 352-83 (1961); Bishop, *Indemnification of Corporate Directors, Officers and Employees*, 20 BUS. LAW. 833 (1965); Hornstein, *The Counsel Fee in Stockholder’s Derivative Suits*, 39 COLUM. L. REV. 784 (1939); Note, *Demand on Directors and Stockholders as a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746 (1960); Note, *Security for Expenses’ Requirement in Stockholders’ Derivative Actions*, 42 ILL. L. REV. 667 (1947).

22. Within the limits of their authority officers and directors possess full discretionary power and in the honest and reasonable exercise of such power they are not subject to control by the stockholders or by the courts, at the instance of a stockholder. In the absence of usurpation, fraud, or gross negligence, courts of equity will not interfere at the suit of dissatisfied stockholders, merely to overrule and control the discretions of directors on questions of corporate management, policy, or business . . . .


23. [A director or officer] owes loyalty and allegiance to the corporation— a loyalty that is undivided and an allegiance that is influenced in action by no consideration other than the welfare of the corporation. Any adverse interest of a director will be subjected to a scrutiny rigid and uncompromising.
cause damage to the corporation.  

The standard of care that is required of directors and officers in their fiduciary relationship to the corporation has been subject to various interpretations. Many jurisdictions have provided by statute that directors and officers are required to exercise "that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." In jurisdictions which lack this statutory standard, an analogous duty is enforced by application of the "business judgment rule." This rule provides that directors should not be liable for "mere errors of judgment" in their daily management of the corporation as long as they act in good faith.

In a case involving pollution control, a shareholder would be justified in interfering with the internal affairs of his corporation if the directors have not exercised the proper diligence, care and skill in evaluating and implementing the corporation's pollution control plan. The following are a few factors which an ordinarily prudent director should take into consideration:

1) the adequacy of the company's pollution control efforts for existing and proposed facilities;
2) the acceptance by the community of the corporation's pollution control efforts;
3) the demands imposed by the various state and federal pollu-

He may not profit at the expense of his corporation and in conflict with its rights; he may not for personal gain divert unto himself the opportunities which in equity and fairness belong to his corporation. He is required to use his independent judgment. In the discharge of his duties a director must, of course, act honestly and in good faith . . . .


24. It is important that in a negligence action there exist either actual damage or the imminent threat of damage to the corporation. Without the important damage element, there will not be any basis for relief—either compensatory or injunctive. See H. Henn, The Law of Corporations and Other Business Enterprises § 235, at 367 (1961); Comment, Equity and the Eco-System: Can Injunctions Clear the Air?, 68 Mich. L. Rev. 1254 (1970).


27. The "business judgment rule" has been stated as follows:

The director who diligently attends to his duties and exercises his best business judgment on the questions facing him will not be considered negligent even if his judgment is faulty.

Dyson, The Directors' Liability for Negligence, 40 Ind. L.J. 341, 369 (1965).

28. Even though a corporation may take the necessary steps to comply with statutory pollution standards by the date prescribed, such efforts may be inadequate. If the community demands that the corporation comply with the standards at an earlier date, the directors must consider that failure to satisfy the community demands may adversely affect the the corporation's goodwill.
tion control standards and deadlines;
4) the pressures exerted by successful litigation against similar companies;\(^{29}\)
5) the present and projected future installation cost of pollution control devices;\(^{30}\)
6) the ability of the corporation to transfer the cost of pollution control to the consumers;\(^{31}\)
7) the existence of economic incentives for pollution control;\(^{32}\)
8) the availability of corporate retained earnings for pollution control investment; and
9) the present and projected future interest rates in the financial market.\(^{33}\)

In most cases, it would be difficult to prove that directors had improperly considered any one of these factors. In some instances, however, the negligence of the directors could be shown by their apparent disregard of these factors and their failure to take corrective measures.

The breach of corporate duty by directors is not sufficient of itself to to justify judicial interference.\(^{34}\) A shareholder who initiates a derivative suit must establish that a dissipation or waste of the corporation's tangible or intangible assets has resulted from the wilful or negligent failure of the directors to take appropriate steps to control pollution.

Damage to tangible assets may result if the directors have continually delayed the installation of pollution control devices in present

\(^{29}\) If private citizen's groups have successfully enjoined a corporation from disposing of waste material in a lake, it would seem that corporations guilty of similar practices should voluntarily cease polluting before they too are sued and suffer from the adverse publicity thereby created.

\(^{30}\) A director should certainly consider that the costs of labor, material and pollution control equipment may increase in subsequent years so that a delaying of installation could cost the corporation additional sums of money.

\(^{31}\) Companies in many industries may be able to spend the necessary money for pollution control and then increase the price of their customer products. Some companies would not be able to pass along the cost to their customers because it would affect their competitive standing with other companies in the industry and even with foreign companies. Although public utility companies do not have to concern themselves with competition, they must have rate increases approved by an appropriate governmental agency.


Other economic incentives which have been suggested include: effluent fees, effluent payments and equipment tax credits. Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 Mich. L. Rev. 1254, 1258 n.27 (1970).

\(^{33}\) If "tighter" money and higher interest rates are predicted by economists for future years, a prudent director may demand that his corporation borrow the necessary funds now.

\(^{34}\) See notes 23-25 *supra* and accompanying text.
facilities or the design of such devices for future facilities. The costs of pollution control under a "crash program" to meet statutory deadlines will undoubtedly be greater than the costs under a program which is planned and launched well in advance of a deadline date. Inaction by directors may also subject the corporation to large fines for violation of pollution laws. If directors do not take advantage of economic incentives devised by the government to induce earlier or more effective pollution control, they could be held liable for the resulting loss of corporate profit. While the above discussion is not comprehensive, it is illustrative of the kind of damage a corporation might sustain.

In addition to the waste of tangible assets, the courts, under proper circumstances, have held the directors and officers liable for damage to goodwill when the damage resulted from their mismanagement. For example, in *Sessinghaus Milling Co. v. Hanebrink*, it was alleged that the general manager had manufactured and sold inferior flour which he knowingly allowed to be represented as a finer grade of flour which the company also produced. The court held that the corporation could recover damages from the general manager for injuries to its reputation and goodwill since these were valuable and real assets of the corporation.

A shareholder may show that the directors' failure to take the appropriate steps to control pollution has resulted in damage to corporate goodwill. Damage to goodwill may be evidenced by many facts such as public opposition in rezoning and eminent domain hearings, loss of employee loyalty to the corporation or loss of corporate sales and profit. The Commonwealth Edison Company, for example, was ranked first among Chicago's air polluters by the Chicago Department of Environmental Control. Citizens and customers have become so agitated with Commonwealth Edison that various groups have been organized to exert pressure upon it. One Chicago group encouraged members of the public to pay their electric bills into a trust fund until the company curtailed

35. *See* note 33 *supra* and accompanying text.
36. Good will is defined as:
   The advantage or benefit which is required by an establishment, beyond the mere value of the capital, stocks, funds, or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill or influence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

37. 247 Mo. 212, 152 S.W. 354 (1912).
38. *Id.* at 222, 152 S.W. at 357.
its sulfur oxide emissions.\textsuperscript{40} Another group, the Committee Against Pollution, waged a proxy battle at Commonwealth Edison’s annual stockholders’ meeting in an effort to pass various antipollution resolutions.\textsuperscript{41} The company also encountered public opposition to a request for a 6.1 percent rate increase. Subsequently, the Illinois Commerce Commission granted only a 4.5 percent increase and demanded that the company spend $200 million during the next few years to control pollution or face the loss of half of the increase.\textsuperscript{42} It is apparent that public dissatisfaction with Commonwealth Edison’s pollution control efforts has caused the company’s management to counteract the assaults on its goodwill. In an attempt to maintain a favorable image, Commonwealth Edison sent to its stockholders an eight-page brochure and published advertisements in a Chicago newspaper\textsuperscript{43} to explain its plans for pollution control. As a practical matter, any corporation—whether it is a public utility, a steel producer or an automobile manufacturer—should be carefully managed in order to protect its goodwill.

In summary, a shareholder who brings a derivative suit on the grounds of negligent management will encounter several obstacles. First, a shareholder must present a case which will warrant interference by the courts. There should be a clear indication of actual or threatened damage to the corporation. Secondly, proof of injury to the corporation will be difficult because the damages in some instances, though real in nature, may be economically speculative. Thirdly, it will be difficult to prove that a director or officer has breached the required standard of care. However, as the courts recognize the seriousness of pollution and develop standards for directors in the area of pollution control, such considerations should become less problematic.

\textit{Violation of Law or Public Policy}

A shareholder may also contend that when corporate pollution occurs the directors and officers are conducting the corporation in a manner which is contrary to public policy and in violation of the law. The violation of law or public policy as the basis for a derivative suit is not a new concept. One area of law in which the derivative suit has been successfully employed is the field of antitrust law.\textsuperscript{44} In one antitrust

\begin{itemize}
\item \textsuperscript{40} Chicago Today, Jan. 31, 1970, at 61, col. 3.
\item \textsuperscript{41} N.Y. Times, Apr. 28, 1970, at 61, col. 1.
\item \textsuperscript{42} Wall St. J., July 13, 1970, at 2, col. 2.
\item \textsuperscript{43} Chicago Today, Dec. 8, 1969, at 13; \textit{Id.}, Feb. 9, 1970, at 13; \textit{Id.}, Mar. 9, 1970, at 39.
\item \textsuperscript{44} Brill \textit{v.} General Indus. Enterprises, 234 F.2d 463 (6th Cir. 1956); Granchon \& Marcho, Inc. \textit{v.} Paramount Pictures, 202 F.2d 731 (2d Cir. 1953); American Crystal Sugar Co. \textit{v.} Cuban-American Sugar Co., 152 F. Supp. 387 (S.D.N.Y. 1957); Gomberg
\end{itemize}
case, the officers of a Montana copper mining corporation had sold their shares and agreed to operate the company subject to the demands of another corporation which was attempting to create an unlawful monopoly. The plaintiff, a shareholder of the Montana corporation, brought a derivative suit against the officers to compel them to abandon the unlawful combination and to operate the corporation by lawful means. In holding for the plaintiff, the court stated:

The officers of a corporation are trustees; by their acts in engaging in an unlawful enterprise, and making the corporation a party to it, they are guilty of a breach of trust, and both they and the corporation can be held to account by a court of equity.

The court further maintained that if the shareholders were not allowed to seek appropriate redress in a court of equity, the continued violation of law by the corporation and its management might cause the property rights of the corporation and its shareholders to be forfeited or imperiled. Similarly, if the directors or officers allow a corporation to operate in violation of pollution laws, the corporation may be subjected to severer penalties and possibly to a court order closing the facilities which are operating in violation of law.

Shareholders have also been allowed to bring derivative suits where directors or officers have ordered actions which violate state law. In Moore v. Keystone Macaroni Manufacturing Co., the plaintiff-shareholder brought a bill in equity to enjoin the defendant corporation from making further payments to a widow of a former officer. The court determined that these payments did not qualify as a pension, compensation for past service or a charitable contribution and were therefore unlawful under the Pennsylvania Business Corporation Law. The court stated that

46. Id. at 429, 75 P. at 90-91.
47. Id. at 430, 75 P. at 92.
48. Id.
51. Id.
52. The court made this determination pursuant to PA. STAT. ANN. tit. 15, § 1301 (1967).
[w]here the action of a board of directors . . . is an abuse of discretion, or is forbidden by statute or is against public policy . . . or will result in waste, dissipation or misapplication of the corporate assets, a court of equity has the power to grant appropriate relief.58

The directors were accordingly enjoined from making any further payments to the widow.54

Abrams v. Allen55 further illustrates the willingness of the courts to allow shareholders to bring a derivative suit to enjoin conduct which is unlawful or against public policy. In Abrams various shareholders of Remington Rand, Inc. alleged that "the directors had caused the dismantling and removal of corporate plants and the intentional curtailment of production solely to discourage, intimidate and punish the corporation's employees."56 The plaintiffs further alleged that these actions were taken solely because of the personal prejudices of the president, James Rand, Jr., regarding labor policies.57 The New York Court of Appeals reversed an earlier dismissal of the derivative suit and held that the shareholders should be allowed redress in the courts since the public policy of the state and nation was clearly opposed to the closing or removal of factories for the purposes alleged by the shareholders.58

It would appear that the above cases provide some precedent to sustain a shareholder's derivative suit to enjoin a corporation from the actual or threatened violation of state and federal pollution laws.59 Where it is found that a corporation is operating in violation of these laws, the shareholder's derivative suit could provide the necessary pressure to force a corporation to comply with pollution laws. While all states have not prescribed specific pollution standards, the legislatures of numerous states have made it clear that pollution is against public policy.60 Therefore, a shareholder may attack a corporate polluter solely

54. The court also ordered that if the widow did not repay all of the money which was unlawfully paid to her, the directors would be personally responsible for reimbursing the corporation for any deficiency. Id. at 179, 87 A.2d at 299.
55. 297 N.Y. 52, 74 N.E.2d 305 (1947).
56. Id. at 53, 74 N.E.2d at 306.
57. Id.
58. Upon remand the complaint in the Abrams case was dismissed on the ground that the plaintiff had failed to establish that the defendant directors had caused the plants to be dismantled and removed solely as a means to defeat a strike. Abrams v. Allen, 113 N.Y.S.2d 181 (Sup. Ct. 1952).
59. For a compilation of the various state pollution statutes, see the Appendix.
60. The discharge into the ambient air of air contaminants so as to cause or contribute to air pollution is contrary to the public policy of Missouri.
on the grounds that it is operating contrary to a state's public policy.

**Procedural Defenses**

Although the scope of this note does not include a discussion of all the procedural and substantive defenses to a derivative suit, there are two common defenses which, if sustained, would be grounds for dismissal of the shareholder's complaint. The following discussion will examine these defenses.

*Propriety of the Suit by the Shareholder*

Corporate directors may argue that enforcement of pollution laws is the duty of pollution control agencies and not the duty of shareholders. This argument was rejected by the Second Circuit in a suit involving an alleged violation of antitrust law. A shareholder had brought a derivative suit to enjoin the directors of the corporation from engaging in an interlocking directorate with competing corporations. The defendant directors maintained that enforcement of antitrust policies under the Clayton Act was the task of the Federal Trade Commission and not that of the shareholders. The court, however, allowed the shareholders to maintain a derivative suit to enjoin violation of the Clayton Act. Since the Act did not limit enforcement to the Federal Trade Commission, the court ruled that the availability of private actions would augment the enforcement of the antitrust policy. This same reasoning was espoused by the Supreme Court in *J. I. Case Co. v. Borak*. The *Borak* case held that shareholders had the right to enforce the provisions of section 14(a) of the Securities and Exchange Act of 1934. The Court declared that one of the general purposes of the section was the protection of investors and concluded that this implied the availability of judicial relief through

and in violation of this chapter. It is the intent and purpose of this chapter to maintain purity of the air resources of the state to protect the health, general welfare and physical property of the people, maximum employment and full industrial development of the state. The commission shall seek the accomplishment of this objective through the prevention, abatement and control of air pollution by all practical and economically feasible methods. Mo. Rev. Stat. § 203.030 (1959). Many states also have public nuisance statutes. For a compilation of various public nuisance statutes, see Appendix.

61. *See note 22 supra* and accompanying text.

62. Schechtman v. Wolfson, 244 F.2d 537 (2d Cir. 1957).

63. A collateral point decided in the case was that the plaintiff could be reimbursed by the corporation for his attorneys' fees only if there was some ultimate benefit to the corporation. *Id.* at 540.

64. *Id.* at 539.


a private right of action. Since shareholders are damaged as a group by violation of the section, "[t]o hold that derivative actions are not within the sweep of the section would therefore be tantamount to a denial of private relief. Private enforcement of the proxy rules provides a necessary supplement to Commission action." It is submitted, therefore, that even though various governmental agencies have been granted the power to enforce the standards of various pollution laws, shareholders should not be denied the right to police their corporations for violations of law.

**Benefit of the Suit to the Corporation**

The purpose of a shareholder's derivative suit is to enforce a corporate right for the benefit of the corporation. Directors may argue that a shareholder's suit initiated to force compliance with pollution laws creates no economic benefit for the corporation and that paying private claims and statutory fines is less expensive than installing and operating costly pollution control facilities. 

Abrams v. Textile Realty Corp. discussed the merits of this argument in a shareholder's suit seeking to enjoin the consummation of a transaction alleged to be ultra vires under the corporation's reorganization plan. The defendant directors argued that the suit should be dismissed because the corporation might have benefited from the agreement if it had been fully executed. In rejecting this argument, the court stated:

[T]here is no relevance in an argument that this suit created no fund or property for Textile or its security holders, or that they or any of them would have been better off if the ultra vires act had been performed. The law cannot refuse to recognize as beneficial full observance of the law. The law cannot

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68. Id.
69. A derivative action is one in which the grievance to be redressed has been suffered primarily by the corporation and normally it should institute the action. But where it fails or refuses to act after demand, the shareholder's ultimate interest in the corporation is sufficient to warrant the prosecution of a "propulsive" action ultimately to effect recovery for the corporation of the rights or property of which it has been deprived by the wrongdoer. Reed v. Norman, 152 Cal. App. 2d 892, 896, 314 P.2d 204, 207 (1957).
70. The plant manager of an aluminum plant responded to a question regarding fluoride controls as follows: "It is cheaper to pay claims than it is to control fluorides." Reynolds Metals Co. v. Lampert, 324 F.2d 465, 466 (9th Cir. 1963).
71. In an interview with Dr. A. D. Brandt, manager of Environmental Quality Control, Bethlehem Steel Corporation, in Burns Harbor, Indiana, on November 20, 1969, Dr. Brandt stated that corporate polluters are reluctant to spend large sums of money for pollution control because it is generally a non-profit producing activity.
72. 97 N.Y.S.2d 492 (Sup. Ct. 1949).
73. Id. at 496.
hold that corporate interests are better served by action outside rather than within the law.78

An application of the court's reasoning to the area of pollution control would appear to sanction the shareholder's derivative action and preclude the directors from defending on the grounds that non-compliance is economically beneficial.

THE PROBLEM OF RELIEF

Assuming that a shareholder can establish grounds entitled him to relief, the burden will ultimately be placed upon the courts to determine appropriate relief. Several of the problems and factors involved in granting the various forms of relief should be discussed.

A shareholder may request that the court order the directors to take immediate steps to abate the pollution created by their facilities. The difficulty with this form of relief, however, is that the court probably lacks the technical knowledge necessary to formulate an appropriate pollution control program for the company. For this reason, the court may request that the plaintiff and pollution control agencies submit adequate control plans for implementation by the corporation pursuant to the court order. The court may then order the shareholder to report periodically to the court if he discovers that the corporation is not satisfactorily complying with the approved plan. William J. Scott, the present Attorney General of Illinois, in recognizing the present limitations of court personnel and the problems involved in proper enforcement of court orders, has suggested that a special court be established to handle pollution cases.74 It would appear that Scott's proposal would provide the best solution to the problem.76

As another possible remedy, a shareholder may petition the court to order the directors and officers to reimburse the corporation for the fines paid and for the damages which have resulted from the dissipation and waste of assets.76 Relief in this form, however, has several inherent drawbacks. First, the remedy would be of limited effectiveness if the charter of the corporation or the laws of the state in which it is in-

73. Id.
74. Chicago Today, Nov. 24, 1969, at 8, col. 2. The proposition that a special pollution court be established in Illinois was also considered at the Illinois Constitutional Convention. See Chicago Sun-Times, July 2, 1970, at 13, col. 1.
75. It would seem evident that a court which specializes in pollution control would be more capable of dealing with the complex problems inherent in pollution controversies than a court of general jurisdiction.
76. See notes 51-54 supra and accompanying text.
corporated provide for the indemnification of directors and officers.\textsuperscript{77} Secondly, since the main goal of the shareholder is to prohibit further polluting and not to recover money lost, such an order, although having a limited restraining effect on the directors, would not produce the result desired. Thirdly, it is questionable whether a court would hold a director personally liable for every violation of the law unless the statutes had specifically provided for such liability.\textsuperscript{78} It is highly unlikely that directors and officers would continue in their positions if they faced personal liability for every corporate violation of law.\textsuperscript{79}

A court could conceivably restrict dividend payments so that earnings could be used for the implementation of pollution control plans. This action could be justified on the grounds that shareholders have benefited in the past from dividends and minimum expenditures for pollution control and therefore the shareholders, rather than the consumers, should bear the cost of this control.\textsuperscript{80} One difficulty with restricting dividend payments, however, is the reluctance of most courts to interfere with the dividend policy of a corporation.\textsuperscript{81} Courts may be forced, however, to reevaluate their policy of not interfering with dividend payments if a non-interference policy would permit corporations to escape their duty in the area of pollution control.

Companies have delayed pollution control because of the potential

\textsuperscript{78} The Clayton Act provides:
That whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violations shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction thereof of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court.
\textsuperscript{79} Comment, \textit{Factors That Limit the Negligence Liability of a Corporate Executive or Director}, 1967 U. ILL. L.F. 343.
\textsuperscript{80} It should be noted that over the past 20 years nine of the larger companies in the iron and steel industry paid approximately 21 billion dollars in dividends. \textit{See generally} Moody's \textit{Industrial Manual} (1969) for the following companies: Armco Steel Corp., Bethlehem Steel Corp., Inland Steel Corp., Jones and Laughlin Steel Corp., Kaiser Steel Corp., National Steel Corp., Republic Steel Corp., U.S. Steel Corp., Youngstown Sheet and Tube Co. It may well be contended that the time has arrived for the nation's corporations and their shareholders to begin making reparations for damage to society's environment.
\textsuperscript{81} Lattin has stated:
The general rule recognized by all courts is that it is within the sole discretion of the directors to declare or not to declare a dividend when a legal fund is available and, barring an abuse of discretion, the court will not interfere.

obsolescence and inefficiency of control devices presently available. A
court, however, might demand that immediate use be made of devices
presently on the market despite their cost or degree of efficiency. A
public utility power plant, therefore, could be required to burn natural
gas rather than low cost, high-sulfur-content coal. Although this
requirement would place a financial burden on the company, many
courts have ignored the cost of pollution control where present technology
can be implemented to reduce the amount of contamination and the
damages resulting from it.82 Apparently, some courts are satisfied with
the old maxim that something is better than nothing.

An additional remedy available to the courts is the "cease and desist"
order. However, where immediate compliance is impossible,83 it would
have limited usefulness because the issuance of such an order would
obviously result in a facility's closing. In the case of a public utility, the
use of a cease and desist order under such circumstances would be un-
tenable because a segment of the public would be forced to forego heat and
electricity. Although a court may be justified in closing a steel mill, the
probable adverse effect on employment would have to be seriously con-
sidered before the issuance of such an order. As the pollution problem
becomes more critical, it is possible that use of this extreme remedy may
be justified.

The problems presented by cease and desist orders are less serious
when a facility is still in the construction stage. If a company has begun
construction on a new facility and it is determined that the plans do not
include a pollution control system which will satisfy present standards,
the court may order that construction be halted until adequate plans
are presented. The Commonwealth Edison Company has encountered
this type of opposition to the construction of a nuclear power plant in
the Chicago area.84 Although the plant would eliminate most problems of
air and water pollution, construction has been delayed because the
operation of the plant would require the discharge of large quantities
of warm water into Lake Michigan. Ecologists feared that this process

ordered pollution control devices to be installed within one year even though they were
very costly and partially ineffective); Herring Motor Co. v. Walka Co., 409
Pa. 126, 185 A.2d 565 (1962) (court ordered that defendant install appropriate equip-
ment to stop emissions of damaging vapors or be enjoined from further operation
despite high costs); Rode v. Sealtite Insulation Mfg. Corp., 3 Wis. 2d 286, 88 N.W.2d
345 (1958) (court ordered that nuisance be terminated in 90 days despite claim by
defendant that nuisance could not reasonably be abated within that time).
83. Compliance may be impossible where pollution equipment cannot be acquired
or installed before statutory deadlines.
would raise the water temperature to a point where the lake's ecological balance would be upset. As evidenced by the pressure being exerted on Edison, the public appears willing to reject technological advancement until adequate environmental safeguards are provided.

A Prospective Look at Pollution and the Derivative Suit

A protestor's sign bearing the words "Water May Be Hazardous To Your Health" or "Air Pollution Is A Dirty Word" may become a familiar sight to Americans in the years ahead.

Pollution control must be made a national priority in the 1970's. A mere awareness of the pollution problem will not clean up the air and water for the 1980's. The problem necessitates immediate action from all segments of society. As this note has suggested, the shareholder's derivative suit could possibly provide the pressure necessary to "fill the gaps" left open by the inadequate attack on pollution through governmental and private efforts. The many problems involved in litigating the derivative suit in the complex area of pollution control should not be allowed to obscure the important prospects of such a suit. The derivative suit may be used to supplement the enforcement of pollution laws as it has in the enforcement of antitrust laws. More importantly, the derivative suit might play a significant role in forcing the business community to accept a greater responsibility for solving a problem which threatens the very existence of the society upon which it depends.

85. Id. See also Edwards, Legal Control of Thermal Pollution, 11 NAT. RESOURCES J. 236 (1968); Jost, Cold Facts on Hot Water: Legal Aspects of Thermal Pollution, 1969 Wis. L. REV. 253.
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## State Pollution Statutes

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No applicable statute
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| **Michigan Water Pollution Control Law**  
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| New Jersey Water Pollution Control Laws  
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| Ohio Air Pollution Control Law  
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South Carolina Pollution Control Act

South Dakota Clean Air Act
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Tennessee Air Pollution Control Act
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Texas Water Quality Act
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No applicable statute

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