

ISSN 1936-5349 (print)
ISSN 1936-5357 (online)

HARVARD

JOHN M. OLIN CENTER FOR LAW, ECONOMICS, AND BUSINESS

RINGLING BROS.-BARNUM & BAILEY
COMBINED SHOWS V. RINGLING:
BAD APPOINTMENTS AND EMPTY-CORE
CYCLING AT THE CIRCUS

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Discussion Paper No. 610

01/2008

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This paper is also a discussion paper of the
John M. Olin Center's Program on Corporate Governance.

Forthcoming in CORPORATE LAW STORIES
(New York: Foundation Press, 2008)

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**Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling:
Bad Appointments and Empty-Core Cycling at the Circus**

By J. Mark Ramseyer*

Abstract: The Ringling case presents itself as an irrational spat over board seats among spoiled investors. It is not.

The investors were not fighting over board seats; they were fighting instead over corporate offices. Neither were they irrational. Although Edith Ringling pushed her incompetent son and Aubrey Haley her inappropriate husband, they did so to their private advantage. Although the circus cycled from one management team to another, the investors always promoted the new teams for private gain.

The root of the Ringling dispute lay not in irrationality but in the inability of the law to enforce duty-of-loyalty standards. The duty does not just mandate "fairness." If enforced, it promotes corporate performance (and the aggregate welfare of all investors) by removing the incentive to appoint less able kin, and the tendency of management teams to cycle. The Ringling circus did not degenerate into the chaos in which it found itself because the investors were spoiled or irrational. It degenerated because the law could not enforce the duty of loyalty.

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Through dogged hard work and almost outrageous innovation, five brothers built a massive, thriving entertainment empire. They ran it as a partnership: each worked, each managed, and each collected an equal return. Several of them passed their partnership interests to their heirs, and decades later those heirs incorporated the firm. A widow, a daughter-in-law, and a nephew now held equal shares of the stock, but the nephew ran the show. He ran it well.

Despite the nephew's obvious talent, the two women opted to entrust the firm to the decidedly less able men in their lives. To maximize their representation on the seven-member board (the firm used cumulative voting), they agreed to vote together. To bind them, their lawyer drafted them a vote pooling agreement. With their new power, they named the widow's son president.

In time, the women quarreled. The daughter-in-law abandoned the widow (her first husband's aunt), and sided with the nephew (her first husband's cousin) instead. When the time came for the annual shareholders' meeting, their lawyer told them to adjourn it, and settle their differences first. The daughter-in-law refused, ignored the vote pooling agreement, and voted in ways that left the widow with two board seats. Since the widow would have had three if the daughter-in-law had followed the agreement, she sued.

The widow won. Left with four seats instead of five, the daughter-in-law appealed. The state Supreme Court declared the vote pooling agreement legal but unenforceable, jettisoned the daughter-in-law's votes entirely, and gave the two factions three directors each.

Why did the women expel the demonstrably successful nephew? With a minority of board seats whether she won or lost, why did the aunt sue? With a majority either way, why did the daughter-in-law appeal? And other than demonstrate once again how effectively spoiled children can use litigation to burn through their inheritance, what might the case show about anything?

To put it thus is to miss the point, for the women were not suing over the number of directors they controlled. They were suing over the board meeting that followed the shareholders' meeting -- a meeting at which the daughter-in-law and nephew fired the widow's lackluster son. The widow had wanted her son in control to freeze-out the other two. The daughter-in-law had wanted her second husband in office for the same reason. And the firm had cycled through one administration after another because the chance to freeze-out rivals prevented its investors from forming a stable alliance. When the law works as it should, fiduciary duties perform two functions: they remove the incentive to appoint corporate officials by kinship rather than ability, and prevent the "empty core"

cycling that would otherwise plague so many close corporations. Here they performed neither.

I. John Ringling

The circus mesmerized, recalled the Ringling brothers. When it came to their small Iowa town in 1870, wrote brother "Alf T," the "sight of the spectacle ... so affected [them] that they stood riveted to the spot, clasping each other's hands in speechless ecstasy."¹ By another (perhaps equally apocryphal) account, they fell in love with it when they visited circus-man "Popcorn George" Hall who had stiffed their harness-maker father on a repair bill.²

Theirs was a family of eight children: seven brothers and one sister, the oldest (brother Al) born in 1852 and the youngest (sister Ida) in 1874 (see Table 1). By 1884, five of the brothers ran a small circus in Wisconsin. They started touring by train six years later, and their business boomed.³

[Insert Table 1 (family members) about here.]

"[T]he reason of this phenomenal success," explained Alf T, lay in their "harmonious management" -- in the "absolute harmony [that] prevailed at all times in the management of the Ringling brothers' show."⁴ Of course, Alf T also claimed the brothers "avoided all connection with any man who would even touch a dishonest dollar."⁵ Crucially, however, they ran the circus as a partnership. They disdained a formal agreement, and made each partner "an equal owner in the show."⁶ By one account reported in *Fortune*, they did not even "bother to count profits before dividing them. They were content to fill, haphazardly, five small potato sacks with bank notes of similar denomination."⁷

In the turn-of-the-century Midwest, the brothers faced a panoply of circus rivals. To dampen competition, they fixed prices and divided territories. When one of their rivals balked at a formal trust, they settled for a deal (in 1905) with their principal competitor Barnum & Bailey. Two years later, they bought it outright.⁸

To be sure, there is and was the Sherman Act. Faced with the Ringling tactics, by 1931 the government had launched an antitrust investigation. One of the few remaining rivals had filed a private antitrust suit.⁹ But in the circus histories, both claims become

¹ Alfred Ringling, *Life Story of the Ringling Brothers* 26 (Chicago: R.R. Donnelley & Sons, 1900).

² See David C. Weeks, *Ringling: The Florida Years, 1911-1936*, at 7 (Gainesville: University Press of Florida, 1993).

³ See Robert Lewis Taylor, *Center Ring* 40-42 (Garden City: Doubleday, 1956); Weeks, *supra* note, at 9-11.

⁴ Ringling, *supra* note, at 239.

⁵ Ringling, *supra* note, at 214.

⁶ Ringling, *supra* note, at 240.

⁷ "Ringling Wrangling," *Fortune*, July 1947, at 114, 114.

⁸ See Richard Thomas, *John Ringling* 95-102 (New York: Pageant Press, 1960); Weeks, *supra* note, at 12-13.

⁹ See Thomas, *supra* note, at 236, 241.

lost in the circus' torrent of litigation. "There were," recalls sister Ida's son Henry North, "at least a hundred law suits pending against my uncle [John Ringling] when he died."¹⁰

Master impresarios the brothers were, but mortal too. Death came for the first of them (Otto) in 1911. By the last years of the decade, only three remained: Alf T (born 1863), Charles (born 1864), and John (born 1866). In the early days, each of the five had filled a distinct role.¹¹ By 1918, Alf T mostly kept the uneasy peace between the quarrelsome Charles and John.

Upon his death in 1919, Alf T Ringling bequeathed his one-third interest in the circus to son Richard.¹² The statement misleads, of course, for heirs do not inherit partnership interests. Instead, the death of a partner dissolves the partnership (as an analogy, see the Uniform Partnership Act [UPA], § 31(a), first published in 1914). Like anyone else, an heir becomes a partner only upon the unanimous vote of the others (UPA, § 18(g)).

As a result, when Alf T died Richard would have had two options: (a) take the cash value of his father's stake (UPA, § 37), or (b) take an on-going interest in the circus' profits (UPA, § 42). Absent John and Charles' consent, he would not have had a right to participate in management. When brothers Al and Henry died in 1916 and 1918, for example, the others did not admit any heirs to the partnership.¹³ But when Alf T died in 1919, John and Charles apparently changed course. Promptly, they voted Richard into the partnership.

And yet, Richard did not help run the circus anyway. As Henry North put it, "Uncle John and Uncle Charlie simply ignored him." Richard was a "two-bottle man -- two bottles of whisky a day."¹⁴ When his father earlier bought him a small circus to run, he ran it into the ground in half a season.¹⁵ He did not want to help run the big Ringling circus, and John and Charles did not want him to try.

Charles died in 1926, and control passed to John Ringling. The circus was popular as never before, and John now ran it alone. In three-and-a-half weeks in New York, it played to a million people. A decade earlier, John had already reported on his tax return circus income of about \$300,000. The circus now earned even more. John took that annual stream of income, and parlayed it into a broad portfolio of investments.

¹⁰ Henry Ringling North & Alden Hatch, The Circus Kings: Our Ringling Family Story 249 (Garden City: Doubleday, 1960). The litigation included criminal suits. When John Ringling died, the government claimed \$13.5 million in unpaid income and estate taxes (see id., at 249), a claim eventually settled for \$850,000. See Ernest J. Albrecht, A Ringling by Any Other Name: The Story of John Ringling North and His Circus 48-50 (Metuchen, NJ: Scarecrow Press, 1989); North & Hatch, supra note, at 251. Although the government never showed that John Ringling himself engaged in tax fraud, in 1936 it did successfully obtain prison sentences on tax evasion charges for six senior circus officials.

¹¹ See Jerry Apps, Tents, Tigers and the Ringling Brothers ch. 6 (Madison, WI: Winconsin State Historical Society Press, 2007); Ringling, supra note, at 238-42; Thomas, supra note, at 61-62.

¹² See David Lewis Hammarstrom, Big Top Boss: John Ringling North and the Circus 35 (Urbana: University of Illinois Press, 1992); North & Hatch, supra note, at 174; Thomas, supra note, at 138.

¹³ See Thomas, supra note, at 118, 126.

¹⁴ North & Hatch, supra note, at 173.

¹⁵ See North & Hatch, supra note, at 174.

In that same tax return, he had reported oil income equal to his circus income, and enough dividends and interest to bring the total to \$1 million.¹⁶

Upon Charles' death, John and Richard Ringling apparently voted his widow Edith (born 1869) an equal partner as well.¹⁷ Unlike Richard, however, Edith wanted to help run the circus. Upon Richard's death in 1931, John and Edith made his widow Aubrey (born 1894) a partner too.¹⁸ Like Edith, she wanted a say.

By then, John Ringling was losing his touch. In 1929, he had played disastrous brinksmanship with the Madison Square Garden. For over 50 years the Barnum & Bailey or Ringling circus had opened in the Garden. That August, John returned from Europe to find that the Garden had changed the terms it would offer for 1930. When it scheduled a meeting to discuss their differences, he simply skipped it.¹⁹

Stood up by John Ringling, the Garden offered its location to the American Circus Corporation (ACC). To stiff the Garden was one thing. To let a rival open there in its stead was quite another. John had earlier negotiated an option to buy the ACC. To prevent it from usurping his place at the Garden, he exercised the option and bought it for about \$1.8 million.²⁰ Lacking the cash, he borrowed \$1.7 million from the Central Hanover Trust Co. That debt then passed to a group of investors that included his long-time friend Samuel Gumpertz (born 1869).²¹

In ordinary times, the ACC purchase might have made sense. The ACC did own five functioning circuses, 150 railroad cars, and 2,000 animals. To retire the Central Hanover loan, John Ringling planned to incorporate the circus and sell stock to the public. Investment bankers assured him the issue would sell.²²

Yet these were not ordinary times. Come October, the stock market crashed. The economy spiraled into depression, and circus revenues plummeted. John Ringling himself suffered a blood clot, and retired to Gumpertz' Coney Island hotel.²³

But Gumpertz was ambitious, and not quite the honorable man John Ringling had in mind. While John was still recuperating from illness in 1932, an installment came due

¹⁶ See Hammarstrom, *supra* note, at 24-25; Weeks, *supra* note, at 76-77.

¹⁷ Birth year estimated from "Mrs. Ringling, 84, Circus Owner, Dies," *New York Times*, Sept. 24, 1953.

¹⁸ See "Aubrey Ringling Haley," *New York Times*, January 6, 1976.

¹⁹ See generally Hammarstrom, *supra* note, at 29; North & Hatch, *supra* note, at 207, 218-19; Weeks, *supra* note, at 217-18; Thomas, *supra* note, at 210.

²⁰ See generally Hammarstrom, *supra* note, at 29; Thomas, *supra* note, at 210; North & Hatch, *supra* note, at 219; Weeks, *supra* note, at 219.

²¹ See generally Hammarstrom, *supra* note, at 31; Weeks, *supra* note, at 219, 234; Albrecht, *supra* note, at 29. For the details of the various transactions, see *Am. Circus Joint Venture v. Commissioner*, 39 B.T.A. 605 (1939); see also *In re New York Investors, Inc.*, 79 F. 2d 182 (2d Cir. 1935); *In re Allied Owners Corp.*, 79 F.2d 187 (2d Cir. 1935).

Appropos of nothing in this particular dispute but relevant to the typical Corporate Law class, Gumpertz was responsible for convincing John McGraw (of *McQuade v. Stoneham*, 263 N.Y. 323 (1934) fame) to hold spring training for the N.Y. Giants in Sarasota (where he and John Ringling spent their winters). See Weeks, *supra* note, at 86.

²² See North & Hatch, *supra* note, at 219.

²³ See North & Hatch, *supra* note, at 222; Weeks, *supra* note, at 232.

on the now-\$1,017,000 debt. John defaulted, and Gumpertz convinced Edith and Aubrey that he had lost his grip. To discuss the crisis, they assembled the creditors and partners.

It was everyone against John Ringling. John having defaulted, the creditors could credibly threaten to repossess the property he had pledged. They would desist, they announced, only if (a) the circus were incorporated as a Delaware corporation, (b) they received 1/10 of the stock (Edith, Aubrey and John would each receive a third of the rest), and (c) the \$1,017,000 debt were assumed by the corporation and secured by John's personal assets.²⁴

John Ringling agreed, and at the first shareholders' meeting Gumpertz took control. Although the other shareholders (Edith, Aubrey, and the creditors) did elect John president, they made it clear they named him only to a titular post. Gumpertz as general manager would run the company, and Edith and Aubrey would serve as vice presidents. When John continued to recruit new circus talent, Gumpertz ordered him to stop. Desist, he warned by telegram, or "we will hold a stockholders' meeting and turn you out."²⁵

In 1932, John Ringling suffered coronary thrombosis. Wheelchair-bound, he increasingly withdrew, and died four years later. Observed Henry North: "He had \$311 in the bank. His estate was officially appraised at \$23,500,000."²⁶

II. John Ringling North

Anything but circumspect in their own private lives, the Ringling brothers demanded the strictest propriety of their younger sister Ida (born 1874). Shortly after high school, she fell in love with an older railroad engineer named Henry North. Divorced, North was unacceptable to her Evangelical Lutheran brothers. At their insistence, she agreed in 1902 to marry a younger and more respectable man instead. With the invitations in the mail, she eloped -- with North.²⁷ The next year, she bore him a son. Perhaps to recover family approval (a "diplomatic coup," one biographer put it),²⁸ she named him after brother John.

About young John Ringling North's earliest ties with his uncle John Ringling, accounts vary. The young North was "Uncle John's pet boy," wrote the nephew's biographer. He was "the son his uncle never had."²⁹ Hardly, claimed the granddaughter of another brother. North "never [got] on well with his Uncle John." John simply "did not like him."³⁰

²⁴ See North & Hatch, *supra* note, at 224; Weeks, *supra* note, at 236; Hammarstrom, *supra* note, at 31.

²⁵ North & Hatch, *supra* note, at 225-36; see Weeks, *supra* note, at 241; Hammarstrom, *supra* note, at 32. At least under modern law, the tactic would raise obvious questions of lender liability. See *A. Gay Jensen Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285 (Minn. 1981).

²⁶ North & Hatch, *supra* note, at 238, 228 ; see Weeks, *supra* note, at 234-42; Hammarstrom, *supra* note, at 32.

²⁷ Pat Ringling Buck, *The Ringling Legacy* ch. 9 (privately printed, 1995); Hammarstrom, *supra* note, at 5.

²⁸ Hammarstrom, *supra* note, at 5.

²⁹ Hammarstrom, *supra* note, at 7.

³⁰ Buck, *supra* note, at 56.

Whatever his uncle may have thought, John North saw his future in the circus, and himself as his uncle's successor. After two years at Yale (underwritten by his uncle John), he spent several years trading Florida real estate for his uncle. Eventually, he moved to a Wall Street brokerage firm. When Gumpertz and the creditors besieged the circus, he returned. Aggressively, he intervened to hold them at bay.³¹

In May 1934, John Ringling drafted a will. By its terms, he gave his Sarasota mansion and art museum to the state of Florida, and everything else to his sister Ida North. John North suggested a change. With estate taxes as high as they were, he explained, his mother would not keep much of the property anyway. Why not give half the residual estate to Florida as well? John Ringling did exactly that, and named John and Ida North executors of the estate, and John and his brother Henry trustees on the Florida trust.³²

Over the next two years, something ruptured relations between John Ringling and his North nephews. By most accounts John Ringling did not like the lawyer that nephew John North had recommended. By some accounts he discovered that North had cheated him on a sale of 300 cases of whiskey.³³ By one account he found that North "was attempting to gain title to some real estate holdings."³⁴ And by Henry's account, he "was tired and sick and a prey to suspicions, ... fanned by the jealous people who surrounded him."³⁵

Whatever the cause, John Ringling severed contact with his nephews, and in late 1935 explicitly disinherited them. Toward that end, he ordered his lawyer Eugene Garey to draft a codicil:³⁶

I hereby revoke, annul, and make void any and all legacies and bequests in my last will and testament to both my nephews John Ringling North and Henry Ringling North. For reasons good and sufficient to me I have determined that neither of such nephews shall receive anything whatsoever in any form, shape or manner from my estate.

Not having written the original will, Garey protested. He could not properly draft a codicil to a will he had not read, he complained. John Ringling would not wait.³⁷ He ordered Garey to draft it, and Garey did. His first instincts, however, were the right ones. John Ringling could not disinherit his nephews, because he had not bequeathed them anything anyway. He had left it all to Florida and Ida.

³¹ See Hammarstrom, supra note, at 22; Albrecht, supra note, at 22-24.

³² See North & Hatch, supra note, at 247-48; Hammarstrom, supra note, at 22; Thomas, supra note, at 264.

³³ Hammarstrom, supra note, at 33-34. If so, it was nothing new. When working as ticket sellers in their youth, according to the New Yorker, John and Henry North fell "in with the traditional ticket sellers' slogan of 'three for the management and one for me,' and cheerfully skinned Uncle John into late adolescence." Taylor, supra note, at 15.

³⁴ Buck, supra note, at 57-58.

³⁵ North & Hatch, supra note, at 248.

³⁶ Quoted in Albrecht, supra note, at 37-38.

³⁷ See Weeks, supra note, at 251.

But if the good that John Ringling did was not quite interred with his bones, his evil did not quite live after him either. He had named John and Ida North his executors, and John and Henry his trustees. Not only did this give John North a sizeable executor's fee. It also gave him control over the estate's assets, and those assets included 30 percent of the circus stock. John North now had a say in circus management equal to that of Edith and Aubrey.

John North immediately set about taking control. To do so, he first had to eliminate the current, crudely manipulative set of creditors. With their security interests in circus assets, these creditors could block any major changes he might want to make. And with \$850,000 of John Ringling's \$1.7 million debt still outstanding, he could eliminate them only with a large sum of money.³⁸

To obtain the cash, John North (in 1937, now 33 years old) went to the Manufacturers Trust Bank. To the New Yorker, he would later stress the flamboyance of it all:³⁹

He bought a two-hundred-dollar suit and some elegant accessories and paid a visit to the Manufacturers Trust Company, of New York, asking to see one of the officers. When a vice-president came out and inquired what he wanted, North said, "If you have a moment, I'd like to borrow a million dollars."

Like his uncle John Ringling, John North did appreciate expensive suits⁴⁰ -- but his feat involved a bit less extravagance than he claimed, and a bit more strategy than he admitted. In fact, bank President Harvey Gibson was his friend, and the bank's attorney Leonard Bisco also represented the circus.⁴¹ Gibson was favorably disposed toward his loan application, and so was Bisco.

As a condition for the loan, North and Gibson agreed that he (North) would run the circus: no control to North, no loan, and no reprieve from the crippling security interests. To give North that control, Edith and Aubrey would place their stock in a voting trust. Such trusts separated the economic incidents of stock ownership from the vote, and let the original stockholders keep the money while the trustee (presumably named by the bank) obtained some control (it depended on the terms of the trust) over the vote. Provided the trusts did not exceed ten years, they were good under Delaware law (Rev. Code Del. 1935, § 18; currently Del. Gen. Corp. L., § 218). In the case of the Ringlings, the trust would last no longer than the debt itself. Pay off the Manufacturers Trust, and Edith and Aubrey would recover their votes.

Even in place, the trust did not disenfranchise Edith and Aubrey entirely. Rather, it gave them three of the seven directors. It gave John North another three directors, and let the Manufacturers Trust put its vice president William Dunn on the board.⁴²

³⁸ See Hammarstrom, supra note, at 37; North & Hatch, supra note, at 252-53.

³⁹ Taylor, supra note, at 33.

⁴⁰ See Time, May 12, 1952.

⁴¹ Of Newman & Bisco. The firm would eventually merge into Simpson Thatcher & Bartlett. Bisco would also represent John Ringling's estate. See generally North & Hatch, supra note, at 250-53, 325; Albrecht, supra note, at 48.

⁴² See Henry S. Cohn & David Bollier, The Great Hartford Circus Fire 19 (New Haven: Yale University Press, 1991); see North & Hatch, supra note, at 255; Albrecht, supra note, at 47.

By most accounts, John North was the quintessential circus man, the spitting image of his uncle John Ringling in his prime. Under the management of John and Henry North, the circus thrived. The year 1940 was the best since 1929, and by 1942 -- when 4 million people saw the show -- the circus had repaid the note.⁴³

To insure that success, the North brothers innovated relentlessly. Elephants parade prominently in circuses, of course. But the Norths did not just parade elephants. They hired George Balanchine to choreograph them a ballet, and Igor Stravinsky to compose them a polka.⁴⁴ A "show of extraordinary beauty," effused the *New York Times*:⁴⁵

The "Ballet of the Elephants" ... was breathtaking. ... The cast included fifty ballet girls, all in fluffy pink, and fifty dancing elephants. They came into the ring in artificial, blue-lighted dusk, first the little pink dancers, then the great beasts. The little dancers pirouetted into the three rings and the elephant herds gravely swayed and nodded rhythmically. ... In the central ring, Modoc the Elephant, danced with amazing grace, and in time to the tune, closing in perfect cadence with the crashing finale."

Or perhaps it depends on what one thinks of Stravinsky. According to another account, the circus band "hated every note of the score," and so did the elephants.⁴⁶ "If we didn't have one of their old numbers just before the ballet," the elephant trainer complained to the *New York Post*, "we'd never get 'em into the arena, and if we didn't give 'em another old favorite after the ballet we'd never get 'em out."⁴⁷

Yet just as Edith resented John Ringling's single-handed management in the 1920s, she resented John North's flamboyant touch in the late 30s. She had not wanted John Ringling running the circus, and she did not want John North running it either. Never mind that he ran it fabulously well. She wanted her son Robert running it. In time, Aubrey would want her new husband James Haley (hired by North to untangle the John Ringling estate)⁴⁸ running it too. Trouble was, neither Robert nor James was a "circus man." James was an accountant. Robert mostly sang baritone at the opera.⁴⁹

Nevertheless, to place James Haley and Robert Ringling in circus management, in 1941 Edith and Aubrey signed a "vote pooling agreement," also known as the "Ladies Agreement":⁵⁰

⁴³ Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Ringling, 29 Del. Ch. 610 (1947); see Taylor, *supra* note, at 34; Hammarstrom, *supra* note, at 75, 495.

⁴⁴ See Albrecht, *supra* note, at 127.

⁴⁵ "Circus Opens Amid New Brilliance," *New York Times*, Apr. 10, 1942.

⁴⁶ Albrecht, *supra* note, at 128. And according to the *New Yorker*, "Stravinsky cranked out a number, filled with whistles, gargles, and moose calls, that everybody said was among his best works, but there was never any evidence that the elephants understood it." Taylor, *supra* note, at 43-44.

⁴⁷ See Albrecht, *supra* note, at 129.

⁴⁸ See North & Hatch, *supra* note, at 250.

⁴⁹ "Robert E. Ringling, Circus Chairman," *New York Times*, Jan. 3, 1950.

⁵⁰ Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Ringling, 29 Del. Ch. 610 (1947); Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, 29 Del. Ch. 318, 322-23 (Ch. Ct. 1946); see North & Hatch, *supra* note, at 321; Hammarstrom, *supra* note, at 98.

2. In exercising any voting rights ..., each party will consult and confer with the other and the parties will act jointly in exercising such voting rights in accordance with such agreement as they may reach

3. In the event the parties fail to agree ..., the question in disagreement shall be submitted to Karl D. Loos, of Washington, D.C. as arbitrator and his decision thereon shall be binding upon the parties hereto.

Edith and Aubrey saw the agreement as a way to recover control from the North brothers, and recover it they did. Their goals clear, John asked them to sell some of their stock, but they refused. They wanted the circus. With the Manufacturers debt retired, the hated voting trust giving John control was gone. Now they could enforce their vote pooling agreement instead, and they did. At the April 1943 stockholders' meeting they voted in five of the seven board members.⁵¹ So it was, lamented Henry North, that:⁵²

[T]he management of The Greatest Show on Earth was entrusted to Robert, who had made his career in opera; a certified public accountant who had never ridden a circus train; a banker; and to two matriarchs who actually owned control of it.

III. Precautions

Canvas burns, patrons smoke, and crowds attract arsonists. With cigarettes, cooking fires, flammable tents, and arsonists, circuses fires were a constant risk. In retrospect, the ousted North brothers had every reason to stress their fear of fires. And stress them they assuredly did. "Oh, my God, we were terrified all the time," cried Henry in 1979. "We were understaffed. We had fire watch constantly under the tent. We were on the lookout for everything, of course. Those were perilous times."⁵³

Perilous indeed. In 1901, a Ringling sideshow tent had burned in Kansas City; in 1910, the Barnum & Bailey big top caught fire in Schenectady (but was safely evacuated); in 1912, the Ringling big top burned (while empty) in Sterling; in 1914 43 Ringling railroad cars caught fire in Cleveland; and in 1916 a Ringling baggage stock tent burned and killed 80 horses in Huntsville.⁵⁴ In 1942, a fire in the Ringling menagerie tent in Cleveland killed 65 animals.⁵⁵ And in the summer of 1944, small but troubling fires (troubling in the way they suggested an arsonist on staff) stalked the Ringling circus from Philadelphia, to Portland, to Providence.⁵⁶

In this decidedly flammable world, fire-proofing was not an option. The technology did exist in 1944, but it was new and by wartime exigencies the government arrogated the materials to itself. Under John and Henry North, the early-1940s circus had

⁵¹ Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, 29 Del. Ch. 318, 323 (Ch. Ct. 1946); see North & Hatch, *supra* note, at 321; Albrecht, *supra* note, at 141; Hammarstrom, *supra* note, at 98.

⁵² North & Hatch, *supra* note, at 324.

⁵³ Hammarstrom, *supra* note, at 98.

⁵⁴ See Stewart O'Nan, *The Circus Fire 9-11* (New York: Doubleday, 2000).

⁵⁵ See North & Hatch, *supra* note, at 317; O'Nan, *supra* note, at 1-8; Hammarstrom, *supra* note, at 94 (40 animals).

⁵⁶ See Don Massey & Rick Davey, *A Matter of Degree* 23-27 (Simsbury, CT: Willow Brook Press, 2001).

combined three more primitive strategies instead. On the big-top, it applied a "fire-resistant" treatment. It placed fire extinguishers under the bleachers. And it surrounded the tent with a ring of pumping trucks, engines running and fully manned.⁵⁷

Unfortunately, these strategies presented other problems. Fire resistant canvas leaked -- it kept out some fire, but let in some rain. Surrounding the tent with manned pumping trucks required a large staff -- but with the country at war, young men were scarce. In most years, the Ringling circus had employed 1,600; in 1942 it made do with 1,200.⁵⁸

As the new year opened in 1943, John and Henry North decided to wait out the war. Chronically short-handed, the circus presented too serious a risk of fire. But it was not just fire. The government regulated the railroads in ways that complicated any move from town to town. And it levied taxes at rates that made it hard to keep any profits they made anyway.

At the January 1943 board meeting, John North outlined two options. Convert to a non-profit basis for the duration of the war, and perform for the government at military installations and USOs. Possibly, the government would then give the circus the priority it needed in transportation, fire-proofing supplies, and personnel. Alternatively, shut down and wait for peace.⁵⁹ By January 1943, the tide had already turned anyway. The Soviets had repelled the Nazis and launched their counter-offensive, the Japanese had lost the battle of Midway, and the Doolittle Raiders were bombing Tokyo.

John North presented the choice to a board of seven. Henry and circus treasurer George Woods voted with him to shut down the circus. Edith, Robert, and Aubrey balked and voted to continue as is. Dunn, representing the Manufacturers Trust, voted with the women -- and the circus continued as is.⁶⁰

John promptly resigned as president, and the board elected Robert in his stead. A shareholders' meeting followed in April, and (as explained above) Edith and Aubrey used the "Ladies' Agreement" to name five of the seven directors. Robert then replaced Bisco (who had helped John obtain the Manufacturers loan) with Loos (who had drafted Edith and Aubrey's agreement) as legal counsel to the circus.⁶¹

IV. Fire

It was over in minutes. According to the American Red Cross:⁶²

The performance was well under way. The wild-animal acts had just been concluded. The aerialists were taking their positions on the platform for

⁵⁷ See North & Hatch, supra note, at 317, 327; Massey & Davey, supra note, at 26; Cohn & Bollier, supra note, at 7.

⁵⁸ See Massey & Davey, supra note, at 37; Cohn & Bollier, supra note, at 7 (staff of 424 doing work of 1000).

⁵⁹ See North & Hatch, supra note, at 322; Hammarstrom, supra note, at 98; Albrecht, supra note, at 142; Taylor, supra note, at 34.

⁶⁰ See North & Hatch, supra note, at 323. The voting trust would terminate in a few months.

⁶¹ Ringling Bros.-Barnum & Bailey Combined Shows Inc. v. Ringling, 29 Del. Ch. 610 (1947); see North & Hatch, supra note, at 324-25; Taylor, supra note, at 34.

⁶² American National Red Cross, Hartford Circus Fire, July 6, 1944 2-3 (Washington, D.C.: American National Red Cross, 1946).

the next act. Suddenly a small flame appeared along the side wall near the main entrance. At first there was no panic, only haste and anxiety, as people started to leave for the exits. Pandemonium soon broke loose, however, for the canvas, soaked in gasoline and paraffin to repel water, blazed high like burning celluloid.

Within a few minutes, the entire tent was a flaming mass[, and the temperature within soared to 1,600 degrees].⁶³ ... Within an hour, all that remained of the "Greatest Show on Earth" were twisted metal poles which had fallen one by one as the supporting guy ropes burned away, the metal animal runways and exhibition cages, and the charred bleacher seats.

The fire in the Ringling tent on July 6, 1944, killed at least 168 people. Given the condition of some of the bodies, the death toll was never more than an estimate. Of the dead, 56 were under ten years old.⁶⁴

The immediate cause of the fire remains unsettled. Substantial evidence (including a confession) pointed to a mentally retarded runaway named Robert Segee.⁶⁵ Segee had joined the circus that summer, and came (in retrospect) with a long trail as a compulsive arsonist. Others found Segee's account not credible. Some observers quoted a man in the bleachers: "That dirty son-of-a-b---- just threw a cigarette butt!"⁶⁶ Others claimed that "a monkey or chimpanzee jumping around in the upper portions of the tent, perhaps as part of an act, was carrying a lit cigar."⁶⁷

But whatever the immediate cause, the Hartford police quickly attacked circus management. Because the North brothers' fire-retardant canvas leaked in the rain, Robert had abandoned the technology and resurrected the old waterproofing method -- dissolve melted paraffin in gasoline, as the Red Cross explained, and sweep it into the canvas. Touch a flame, and the canvass ignited violently, raining flaming paraffin like napalm on the crowd below.⁶⁸ Robert also ignored the manpower shortage -- pressed for time, the workers left the fire extinguishers undistributed, the water pumping trucks unmanned, and two of the exits blocked:⁶⁹

[T]here were no telephones, fire alarms, or fire hydrants to deal with an emergency; the closest hydrant was 300 yards down the street [and its couplings did not match circus equipment anyway].⁷⁰ Of nine exits from the big top, one was obstructed by animal wagons and equipment vehicles,

⁶³ See Davey & Massey, supra note, at 63.

⁶⁴ See ANRC, supra note, at 10; North & Hatch, supra note, at 329; Cohn & Bollier, supra note, at 14.

⁶⁵ See generally Davey & Massey, supra note.

⁶⁶ See "Report of Commissioner of State Police as State Fire Marshal to State's Attorney For Hartford County Concerning the Fire in Hartford on July 6, 1944" 10-11 (unpublished).

⁶⁷ See Cohn & Bollier, supra note, at 17.

⁶⁸ See "Report," supra note, at 10; North & Hatch, supra note, at 318, 326; Albrecht, supra note, at 150; Davey & Massey, supra note, at 26; Hammarstrom, supra note, at 107-09.

⁶⁹ Cohn & Bollier, supra note, at 98-99; see Karen Goldberg, *The Hartford Circus Fire of 1944*, *Concord Review*, 1990, at 35, 38; "Report," supra note, at 8, 13; Davey & Massey, supra note, at 45, 103.

⁷⁰ See Davey & Massey, supra note, at 45, 60; North & Hatch, supra note, at 326.

another by a fence protecting the victory gardens. ... There were a few items of equipment: fourteen pails labeled "for fire use only," a few fire extinguishers, and four mobile water trucks. But the extinguishers had not been distributed, and the water trucks had been used to get water to the animals and performers and to hose down the dusty grounds, not to fight fire.

The audience never had a chance.

Given this scope to the malfeasance, the police arrested six circus officials for involuntary manslaughter. At a New York dentist on the day of the fire, Robert escaped prosecution. Not so James. Along with five other senior circus officials, he pleaded nolo contendere, and the judge sentenced him to a year and a day.⁷¹

The Hartford bar quickly filed civil suits. The circus considered filing for bankruptcy, but the auction would have given John North a chance to buy its assets. Rather than take that chance (among other reasons), it negotiated an arbitration agreement. In exchange for the plaintiffs' submitting their claims to an arbitrator, it agreed not to contest liability, and to pay the damages out of future earnings. By 1950, it had paid \$3.9 million.⁷²

James Haley's prison term gave John North the opening he needed. Robert Ringling walked, while James Haley served time. Worse, Robert did not fight for Haley at the trial, did not visit Haley in prison, indeed did not even write.⁷³ Haley had taken the fall for Robert's catastrophic mismanagement, and Robert refused to acknowledge it.

In truth, James Haley did not like John North either, but North saw the chance to divide his enemies. Toward that end, he tried repeatedly to visit Haley in prison. Initially, Haley refused even to see him, but eventually he relented. No one observed what they discussed. Everyone would soon see what Haley decided to do.⁷⁴

V. Denouement

On Christmas Eve, 1945, James Haley walked. He had served 8 months 17 days, released early for good behavior.⁷⁵ The shareholders would next meet in April, 1946. Aubrey Haley was bound by the Ladies Agreement to vote as agreed with Edith Ringling or -- if they could not agree -- as dictated by Loos.

Edith Ringling and Aubrey Haley each held 315 shares. Three hundred shares they had owned from the circus' incorporation in 1933. When the circus repaid John Ringling's debt in 1937, his former creditors had sold Bisco the 100 shares they had obtained in 1933, and Bisco had resold 15 shares each to Edith and Aubrey. He sold the

⁷¹ See Albrecht, *supra* note, at 152; O'Nan, *supra* note, at 295. On the responsibility of the municipal authorities, see "Report of the Municipal Board of Inquiry on the Circus Disaster" (Hartford, CT: Nov. 1944)(unpublished).

⁷² See Cohn & Bollier, *supra* note, at 67; Albrecht, *supra* note, at 151.

⁷³ See O'Nan, *supra* note, at 300; Cohn & Bollier, *supra* note, at 58-59; Albrecht, *supra* note, at 153-54.

⁷⁴ See O'Nan, *supra* note, at 300; Albrecht, *supra* note, at 153-54.

⁷⁵ See O'Nan, *supra* note, at 301; Albrecht, *supra* note, at 156; Hammarstrom, *supra* note, at 111.

other 70 shares to John North. In addition, North voted 300 shares as executor of the John Ringling estate.⁷⁶

Under the terms of the Ringling corporate charter, each year the shareholders elected seven directors by cumulative voting. Following standard cumulative voting practice, each share entitled the owner to the number of votes equal to the number of director seats at stake. As Edith and Aubrey each had 315 shares, they each could cast $315 \times 7 = 2,205$ votes. With 370 shares, North could cast $370 \times 7 = 2,590$ votes.

Shunned by Robert Ringling despite serving prison time for Robert's mismanagement, James Haley had no sympathy for Edith and Robert, and neither did Aubrey. Instead, they sided with the North brothers. Obviously, Edith and Aubrey could no longer agree about how to vote. That disagreement threw the decision to Loos. Placed in an impossible situation, he told the women to stay with the original purpose behind their agreement: minimize John North's seats on the board.

James attended the meeting in Aubrey's stead. With Aubrey still siding with John, Edith moved to adjourn. As arbitrator under the Ladies' Agreement, Loos ordered James to vote to adjourn. James refused, the motion to adjourn failed, and the meeting continued. Loos then ordered Edith and James to cast their votes as given in Panel A of Table 2.

[Insert Table 2 (shareholder votes) about here.]

James again refused, and voted as given in Panel B. John and James counted James' votes as legally cast, held a meeting of the directors so elected, and replaced Robert with James as Ringling president. John and James had cut a deal: James would serve for one year (effectively rehabilitating himself after his stint in prison), and then resign in favor of John.

This account raises the first of the obvious puzzles. As Abram Chayes put it:⁷⁷

[N]one of the many lawyers in attendance has ever explained why Haley refused to follow the arbitrator's direction. Perhaps, although he was an accountant by profession, it escaped him that 2 Haleys + 2 North directors = 4, who could have outvoted Mrs. Ringling, Robert, and Dunn on the seven-man board.

Perhaps indeed. But because the Haleys refused to comply with the vote pooling agreement, Edith had only two votes on the board: herself and Robert. If James had voted as Loos ordered, she would have had Dunn besides. In Delaware court, she sued -- raising the second puzzle:

Five can out-vote two, but four can as surely out-vote three. Left with two rather than three, why sue?

At trial, the Vice-Chancellor held the agreement valid and enforceable ("the Agreement constitutes the willing party to the Agreement an implied agent possessing the irrevocable proxy of the recalcitrant party for the purpose of casting the particular vote"),

⁷⁶ See North & Hatch, *supra* note, at 254; Albrecht, *supra* note, at 49.

⁷⁷ Abram Chayes, "Madame Wagner and the Close Corporation," 73 *Harv. L. Rev.* 1532, 1540 (1960).

and ordered a new election.⁷⁸ Left with four rather than three, North and Haley appealed. The third puzzle follows:

Four can still out-vote three, exactly as Chayes observed. Who cares?

The Delaware Supreme Court held the agreement legal but unenforceable. It contained, the court explained, "no express delegation or grant of power" to Loos to enforce his orders. Never mind that the agreement provided that Loos' "decision thereon shall be binding upon the parties hereto." As the parties did not delegate, the agreement was not enforceable.⁷⁹ But the agreement was still legal, and James had flouted it. As he had not voted the shares legally, he had not voted them at all. His votes simply did not count. Edith had elected three directors, John had elected three, and James had elected none.

In fact, by the time of the Supreme Court arguments in March 1947, the Haley-North alliance was already unraveling anyway. James Haley had defected from the Ladies' Agreement in exchange for John North's promise to let him (James) become the first president. John had agreed to his (James') presidency in exchange for James' promise to resign after one year. With the year almost up, James now decided he liked his job too much to quit.⁸⁰

John North shifted strategy. So what if James Haley would not resign the presidency, and would not sell his stock? John would buy his stock elsewhere. He first turned to the state of Florida. The state named a high price for its stock, but after tortured negotiations he agreed. He now owned -- not just voted, but owned -- 37 percent.⁸¹

John North then returned to Edith Ringling. Robert Ringling had never been a healthy man, but after a stroke in the summer of 1947 he lost his enthusiasm for family feuds. What is more, John was suing him for mismanagement. Although duty-of-care suits are hard to win, John could point to the criminal convictions and millions in civil damages. By mid-1947, he had won at trial. Robert appealed the verdict, but John offered simply to drop the suit if Edith would vote her stock as he (John) instructed.⁸² Edith agreed.

John North now had voting control, and Aubrey and James promptly capitulated. They sold 140 of their shares to John, and 175 to Robert. Thereby, John acquired 51 percent of the firm, and Edith and Robert 49 percent.⁸³ John was delighted. "Fifty-one percent is enough," he bragged to Time magazine. "If you have 51% of a thing nobody can tell you what to do. ... You tell them."⁸⁴

⁷⁸ Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, 29 Del. Ch. 318, 323, 325 (Ch. Ct. 1946).

⁷⁹ Courts do routinely enforce vote pooling agreements. E.g., Ramos v. Estrada, 10 Cal. Rptr. 2d 833 (Cal. App. 1992); see Stephen M. Bainbridge, Corporation Law and Economics 805 n.24 (New York: Foundation, 2002).

⁸⁰ See Cohn & Bollier, supra note, at 60; Albrecht, supra note, at 160.

⁸¹ Time, May 12, 1952; see North & Hatch, supra note, at 341; Albrecht, supra note, at 161.

⁸² See Cohn & Bollier, supra note, at 60; O'Nan, supra note, at 310; North & Hatch, supra note, at 336-37.

⁸³ See O'Nan, supra note, at 310; Hammarstrom, supra note, at 122; North & Hatch, supra note, at 336-38; Albrecht, supra note, at 162.

⁸⁴ Time, May 12, 1952.

* * *

James Haley turned to politics. He won a seat in the Florida House of Representatives in 1948, and moved to the U.S. House of Representatives (Democrat; Florida) in 1953. His wife Aubrey died in 1976, and he resigned his seat in 1977. He died four years later.⁸⁵

Robert Ringling suffered another stroke, and died in 1950. Noted one obituary: "His close associates said he never cared much for the circus."⁸⁶

John North and Edith Ringling continued with their 51-49 split, but as many Corporate Law exams illustrate, 51 percent does not mean "nobody can tell you what to do." Minority shareholders sue over duty-of-loyalty claims, and sometimes win. Edith died in 1953, but by 1957 her heirs (her daughter Hester and grandson Stuart) had filed a duty-of-loyalty suit against North for \$20 million.

In truth, the suit went nowhere. Hester and Stuart had retained dubious (at best) counsel. Their lawyers, wrote one observer, "were as shady as the old Ringling ushers. One ended up in a penitentiary; another two were disbarred."⁸⁷ Nor were Hester's aims very clear. At a 1957 party, she apparently charmed John North's sister Salome with an "And how is dear Johnny?" "What do you mean 'dear Johnny,'" retorted Salome. "You're suing him for twenty million dollars." "That's only business," Hester assured her. "I still love him dearly."⁸⁸ Whatever their perplexing intent and whatever the merits, the plaintiffs dropped the suit the next year.

Working with John North in the late 1950s, rock-concert impresario Irvin Feld shifted the circus from tents to indoor arenas. With his family, he then bought the circus in 1967. John Ringling North died in 1985, and his brother Henry in 1993.⁸⁹

And the state of Delaware? A decade after Ringling, the state Supreme Court faced another vote pooling agreement. This time it adopted an argument it had rejected in Ringling: the vote pooling agreement constituted a failed voting trust.⁹⁰ By 1981, however, it had veered again toward a more accommodating approach. The current Delaware code explicitly allows vote pooling agreements (§ 218(c)),⁹¹ and Model Business Corporation Act declares such agreements specifically enforceable (§ 7.31(b)).

VI. Implications

Why litigate? Why did James Haley ignore Karl Loos' instructions? Why did Edith Ringling contest the election? And having lost at trial, why did Aubrey Haley appeal? As explained above, none of them could rationally have cared about the board

⁸⁵ "Aubrey Ringling Haley," New York Times, Jan. 6, 1976; "Haley, James Andrew, (1899-1981)," Biographical Directory of the United States Congress.

⁸⁶ Quoted in O'Nan, supra note, at 312.

⁸⁷ Hammarstrom, supra note, at 246; see id., at 244; North & Hatch, supra note, at 375-79.

⁸⁸ Quoted in North & Hatch, supra note, at 375.

⁸⁹ "Henry Ringling North, 83, Dies," New York Times, Oct. 3, 1993.

⁹⁰ Abercrombie v. Davies, 130 A.2d 338 (Del. 1957); see Bainbridge 801; Clark, 778-79. The MBCA § 7.31(a) explicitly rejects this approach.

⁹¹ Lehrman v. Cohn, 222 A.2d 1 (Del. 1981); see Bainbridge, supra note, at 801; Robert Charles Clark, Corporate Law 778-79 (Boston: Little, Brown, 1986).

seats themselves. Whether or not Aubrey (and James) could ignore Loos, Edith took a minority of board seats. If Loos could bind Aubrey, she obtained three of seven. If he could not, she obtained two. Either way, she lost any vote at the board. Why would Edith and Aubrey have cared?

They probably did not care. But the day's proceedings did not stop with the election at the shareholders' meeting of the board. They continued to a meeting of that new board. There, the board turned to the selection of "officers and the election of an executive committee and the fixing of salaries" -- and fired Robert. Edith denominated her suit not just as a challenge to the shareholders' meeting but also to the selection of the "officers of the corporation" and sued everyone "whose title to office is brought into question by this proceeding."⁹² The president collected a salary. He enjoyed an elaborate array of perquisites. And he decided when, where, and what the circus performed. Since 1943, Robert Ringling had held the job. Edith Ringling wanted him to keep it, Aubrey Haley wanted it for James, and John North wanted it for himself.

As intensely as Edith Ringling and Aubrey Haley cared about the presidency, however, legally they could not include it in the Ladies' Agreement.⁹³ By a long line of cases, courts had banned non-unanimous agreements among shareholders about who served in which office at what pay.⁹⁴ Unable to include it, they promised instead to negotiate. Presumably, they negotiated not just about how to vote their stock, but about whom to appoint president. Although neither could enforce any agreement they reached in court, so long as they reached a mutually advantageous arrangement they would not need court enforcement.

Come 1946, Edith and Aubrey fundamentally disagreed about who should run the circus. As president, Robert had killed 168 people, incurred millions in projected liabilities, and sent James to prison. He wanted to keep the job anyway, and Edith wanted him to want it. James and John wanted it for themselves.

As the annual meeting opened, Edith and Aubrey still disagreed: would it be Robert, or would it be James? They had fought the night before until nearly midnight.⁹⁵ Loos now made a last-ditch attempt to reopen the talks. Adjourn the meeting, he ordered. Return to the negotiations.

But Aubrey and James Haley no longer needed Edith. Once John North offered to vote James president for a year, they did not need her votes. Blithely, they ignored Loos' instructions to vote for adjournment. They ignored his instructions to vote for Dunn. And in the board meeting that followed, they fired Robert and appointed James.

⁹² Ringling v. Ringling Bros., 29 Del. Ch. at 320, 324.

⁹³ Though in fact the parties may have treated it as binding their votes as directors as well. A biographer to John North reports that Loos also arbitrated disagreements between Edith and Aubrey at a 1947 board meeting. See Hammarstrom, supra note, at 119. In their agreement, the parties recided that they intended "to continue to act jointly in all matters relating to their ... interest" in the circus. Ringling v. Ringling Bros., 29 Del. Ch. at 322.

⁹⁴ E.g., McQuade v. Stoneham, 263 N.Y. 323 (1934); Clark v. Dodge, 269 N.Y. 410 (1936); Galler v. Galler, 32 Ill.2d 16 (1964). James Haley's agreement to resign in favor of John North after one year, for example, may not have been enforceable.

⁹⁵ Ringling v. Ringling Bros., 29 Del. Ch. at 322.

Edith sued. Although the court focused (as do most Corporate Law classes) on the board seats, her suit went to the presidency itself. If Loos could bind Aubrey, the shareholders' meeting never happened; instead, the shareholders adjourned it at the outset. If the shareholders' meeting never happened, the directors never held the board meeting that followed. If they never held the board meeting, they never ousted Robert. If they never replaced Robert, then James had no claim (other than in quantum meruit) to what by the time of the Supreme Court decision was a year's worth of salary, a year's worth of elaborate perquisites, and a year's worth of changes to circus management. And indeed, once the Supreme Court cut the Haley-North faction to three votes, Robert promptly sued for back pay and an order reinstating him to the presidency.⁹⁶

Why fight? Yet why did even the presidency matter? Why did the shareholders fight so bitterly and endlessly to put themselves or their relations in office? Posit a world where the circus paid its officers their market salary, and returned investors their proportional share of the profits. If Robert ran the circus, he earned the market rate for managers in the entertainment industry with his skill set. If a decent baritone, he perhaps earned more at the opera (though perhaps not: he sang with the Chicago Civic Opera, which collapsed under the pressures of the Depression in 1932).⁹⁷ He earned no premium for running his mother's circus. Edith, in turn, earned a return on her shares that varied with the talent of the person running the circus. She earned no premium for being the president's mother. In such a world, Edith, Aubrey, and John would care about the president's ability. They would not care about his kinship.

Yet Edith, Aubrey, and John did care about kinship. They cared about it more than managerial talent, and they probably cared because the circus let its senior officers collect more than their market salary. In the process, it returned controlling investors more than their proportional share of company profits, and other investors less. Given this dynamic, investors had an incentive to favor less talented relations over more talented strangers. And because no inter-investor alliance dominated all others, any promise a shareholder made to one shareholder could always be trumped by a promise to the other.

At stake are the incentives to appoint appropriate officers, and the potential for "empty core cycling" among management teams. Scholars routinely explain the case law against freeze outs as a policy to protect minority shareholders. The law does indeed protect minority shareholders. But as the chaos at the circus illustrates, it also reduces the incentive to replace able managers with incompetent kin, and helps investors commit to more stable management teams.

Preliminarily, consider circus compensation practices. During the season, senior officers (or partners, before 1933) traveled with the circus. They attached private cars to the end of the circus train, and lived the life of a circus impresario. According to contemporaneous accounts, they lived profligately appointed lives. Although the

⁹⁶ See Hammarstrom, *supra* note, at 119; Albrecht, *supra* note, at 161. Stephen Bainbridge notes that a majority of four would not be sufficient to insulate any vote electing John or James president from conflict-of-interest claims, since the four include John and James themselves. See Bainbridge, *supra* note, at 804 n.19, applying Del. Gen. Corp. L. § 144.

⁹⁷ Search Amazon.com and one will quickly find Jean Tennyson (of *Bayer v. Beran*, 49 N.Y.S. 2d 2 (N.Y. Sup. 1944), fame) recordings; one will not find Robert Ringling recordings.

accounts do not detail the accounting, we can assume that they charged these lavish room, board, and travel expenses to the circus.

Off season, senior officers scoured Europe for new talent. Again, contemporaneous reports detail flamboyant travel arrangements. Take the New Yorker's account of John and Henry North's trips:⁹⁸

The Norths en route through Europe have evoked memories of Edward VII, whose trips on the Continent established high-water marks of conviviality. They take a custom-built Cadillac over with them, and, landing at Le Havre, pick up their French chauffeur Henri, and their European agent, Umberto Bedini. ... The Norths' first stop of importance is Paris, where they put up at the Ritz. The journey around Europe is exhausting, and John, a determined gourmet, likes to store up energy by eating rich foods before setting out. He visits, in turn, Maxim's, Larue, Fouquet's, L'Escargot, Le Relais de la Belle-Aurore, and La Tour d'Argent, and then tries some of the smaller places, in side streets. By this time, he is beginning to have premonitions of acute indigestion, and he heads for a Turkish bath.

And again, we can assume they billed these expenses to the circus.

Worse, however, the officers who traveled with the circus could also skim door receipts off the top. Under the arbitration agreement with its tort creditors, the post-fire circus agreed to devote its revenues to their claims. Unfortunately for the creditors, they did not travel with the circus. After 1946, John Ringling North did. Impatient with John's payments (or lack of payments), the creditors sent the Pinkertons to investigate. They found that the circus under-reported attendance, and generated "[i]ncome loss [of] over \$3,000 a day."⁹⁹

All told, senior circus officers took a significant portion of their compensation as perquisites that came with the job, and probably skimmed a substantial amount of cash. Necessarily, they "froze out" those investors working elsewhere. The more mundane case of Wilkes¹⁰⁰ illustrates the dynamic. Four investors bought equal shares in a nursing home. Initially, each of the four worked at the home. The firm paid no dividends, but because each apparently obtained any return to his investment as above-market salary, none cared.

When three of the investors fired Wilkes (the fourth; the maintenance man), he did indeed care. Although he no longer collected the market value of his work as salary, that was not the problem. Robert could always teach voice; Wilkes could always clean other nursing homes. The market value of his services he could obtain by working elsewhere. What he could not replicate was the above-market component of his salary at the firm. With him gone, the other three could continue to pay themselves above-market salaries -- effectively, pay dividends to themselves as salary, and skip the dividends to Wilkes entirely.

At the circus, the problem first presented itself when John and Charles admitted Alf T's son Richard as a partner. So long as the original five brothers lived, each invested

⁹⁸ Taylor, supra note, at 36-37.

⁹⁹ Cohn & Bollier, supra note, at 63-64.

¹⁰⁰ Wilkes v. Springside Nursing Home, Inc., 370 Mass. 842 (Mass. 1976).

in the circus, and each worked. Although they obviously contributed services of different value, at least they each had access to any returns the circus might distribute informally. Because they each traveled with the circus, they could also cabin the risk that any one of them would pocket cash for himself. Once Richard (then Edith, and finally Aubrey) became a partner, some partners worked and others did not.

Inappropriate appointments. As the circus came to include working and non-working partners, the freeze-out risk presented itself in full force. Suppose the circus continued to distribute its profits through (presumably) supra-market perquisites. Suppose further that the partner traveling with the circus never enters a fifth of the receipts on the books. Other partners could fully share in the profits only if they played a senior managerial role. Exclude them from management, and a partner could exclude them the money.

The circus could have mitigated this problem by selling stock to the public as planned in 1929. Although controlling officers could still pay themselves supra-market salaries (a problem potentially presented in Eisner),¹⁰¹ unhappy shareholders would at least have a market for their stock. They might have to sell at depressed prices, but at least they could sell. With the stock closely held, circus shareholders instead had an incentive to take control. Control did not just give them the chance to shape policy. It gave them access to resources other investors could not have.¹⁰²

Most perversely, investors had an incentive to fight for control over the circus even when they could not properly run it -- and had that incentive because the law did not effectively enforce the duty of loyalty. The point is not that the courts failed the Ringling investors in a specific dispute. Until Hester in the 1950s, they did not even try to use the law. Instead, the point is that courts do a better job of enforcing fiduciary duties in some industries than in others -- just as shareholders and directors do better at monitoring officers in some industries than others.¹⁰³ Perhaps the circus was simply an industry where accurate enforcement was hard.

Had courts effectively enforced the duty of loyalty, managers would receive only the market value of their services, and investors would earn returns proportional to their interests. Investors would look for work at the firm where they could contribute the most -- not where they invested the most. They would try to appoint to the presidency the man or woman best suited for the job -- not the closest blood relative.

Should the law fail to enforce that duty of loyalty, however, investors will fight for their kin. Like Edith Ringling, they will push incompetent Roberts over more talented Johns. With less able executives, the firm indeed will earn a lower return. Provided the executive's relations can appropriate more than their share of the fall in firm profits,

¹⁰¹ *Brehm v. Eisner*, 746 A.2d 244 (Del. Sup. Ct. 2000) (en banc).

¹⁰² Studies of minority oppression are legion. See, e.g., Brian R. Cheffins, *An Economic Analysis of the Oppression Remedy: Working Toward a More Coherent Picture of Corporate Law*, 40 *U. Toronto L.J.* 775 (1990); Deborah A. DeMott, *Oppressed but not Betrayed: A Comparative Assessment of Canadian Remedies for Minority Shareholders and Other Corporate Constituents*, 56 *L. & Contemp. Prob.* 181 (1993); Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 *Bus. Law.* 699 (1993).

¹⁰³ Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership*, 93 *J. Pol. Econ.* 1155 (1985).

however, they gain. Aubrey will push her accountant husband. Edith will push her opera-singer son. And the big top will burn.

Empty-core cycling. Not only will the lack of an enforceable duty of loyalty lead investors to appoint inappropriate officers, it may cause them to cycle through inappropriate management teams endlessly. When two of three investors (or three of five, four of six) can appropriate the profits due the odd man out, (under plausible conditions)¹⁰⁴ no alliance between any two investors will be stable. Whatever the terms of their alliance, the third will be able profitably to offer one of the others a better deal. No alliance will dominate all others, and in the language of game theory the "game" will have an "empty core." As Varouj Aivazian and Jeffrey Callen put it: "in a world of zero transaction costs, the inherent instability of all coalitions could result in endless recontracting among firms."¹⁰⁵

Recall Ringling Brothers. Robert knew nothing about running a circus, and neither did James. Not to worry. Edith improved her welfare by pushing Robert into management, and Aubrey by pushing James. If Edith and Aubrey could out-vote John, however, Aubrey and John could outvote Edith. John and Edith could out-vote Aubrey, and Edith and Aubrey could out-vote John.

Take a simple example. Suppose the circus earns annual profits of 900 if managed cooperatively by appropriate officials, but only 800 if run by quarrelsome owners. Suppose further that John, Edith, and Aubrey own equal shares. If Edith and Aubrey cooperate, if they entrust the circus to John, and if John be honest, then Edith, Aubrey and John will each earn a return of 300. Yet although the circus as a whole thereby earns the highest returns, Edith and Aubrey do better individually by appointing Robert or James. Total circus profits will fall over 10 percent, but they can pay each other 350 and leave John 100.

But if Edith and Aubrey commandeer the circus, can they keep it? Suppose John approaches Aubrey. Even if circus returns stay at the inefficient 800, he can still profitably recruit her to his team. If she earned 350 under the Edith-Aubrey alliance, he can offer her 400. He will raise his own return from 100 to 300, and slash Edith's take to 100.

Yet this John-Aubrey alliance will remain no more stable than the one it replaced. Suppose Edith now approaches John. She can raise his returns from 300 to 350, and her own from 100 to 350. Aubrey will now take home 100. Aubrey will then approach Edith, John will approach Aubrey, and so on. No alliance will dominate all others, and the instability will continue indefinitely.

One of the investor pairs could draft a legally enforceable agreement, of course. After the Ringling debacle, their lawyers should know how. But the agreement can concern only the composition of the board, where the investors need to settle the corporate officers. Sometimes, the investors can incorporate rest of their deal in a set of

¹⁰⁴ Note, for example, that in the example below control cycles only if the firm under quarrelsome management generates aggregate returns greater than 600.

¹⁰⁵ Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 *J. Law & Econ.* 175, 179 (1981).

employment contracts for their officers (though sometimes not). Only then, however, will they be able to stop the cycling by contract.

Crucially, this cycling occurs only when the law does not enforce a duty of loyalty. Should the law give each investor a return proportional to his or her interest in the firm (300, in the example above), investor alliances will not cycle. Not only will investors not appoint inept kin, management will not cycle from alliance to alliance. The law does not just help insure appropriate appointments. It helps insure stable management as well.

VII. Conclusions

The Ringling case presents itself as an irrational spat over board seats among spoiled investors. It was not.

The investors were indeed spoiled, but they were not fighting over board seats; they were fighting instead over corporate offices. Neither were they irrational. Although Edith Ringling pushed her incompetent son and Aubrey Haley her inappropriate husband, they did so to their private advantage. Although the circus cycled from one management team to another, the investors always promoted the teams for private gain.

The root of the Ringling dispute lay not in irrationality but in the failure of the law effectively to enforce duty-of-loyalty standards. The duty does not just mandate "fairness." If effectively enforced, it promotes corporate performance (and the aggregate welfare of all investors) by removing the private incentives to appoint less able kin, and the tendency of management teams to cycle. The Ringling circus did not degenerate into the chaos in which it found itself because the investors were irrational. It degenerated because the law could not enforce the duty of loyalty.

**Table 1: The Ringling Family
(Relevant Members and Information Only)**

Alfred (Alf T) (d. 1919)
 m. Della Andrews ----- Richard (d. 1931)
 m. Aubrey Black
 m. James Haley (m. 1943)

Charles (d. 1926)
 m. Edith Conway ----- Hester (b. 1893)
 m. Louis Lancaster ----- Stuart
 Robert (b. 1897)

John (d. 1936)

Ida (d. 1950)
 m. Henry North ----- John Ringling North (b. 1903)
 ----- Henry Ringling North (b. 1909)
 ----- Salome (b. 1911)

Table 2:
Stockholder Votes at the Ringling Annual Meeting

A. As Directed by Loos:

Candidates	Votes		
	Edith	Aubrey	Total
Edith R	882		882
Robert R	882		882
Aubrey H		882	882
James H		882	882
Dunn	441	441	882
Griffin			
North			
Wood			
Total:	2205	2205	4410

B. As Actually Cast:

Candidates	Votes			
	Edith	Aubrey	North	Total
Edith R	882			882
Robert R	882			882
Aubrey H		1103		1103
James H		1102		1103
Dunn	441			441
Griffin			864	864
North			863	863
Wood			863	863
Total:	2205	2205	2590	7000