

## 21 Health Matrix 189, \*

company, and came back to the market with substantially improved safety mechanisms. Such forthright conduct was widely credited with helping the firm to quickly regain its market share after the crisis. See Lisa Hope Nicholson, *Culture is the Key to Employee Adherence to Corporate Codes of Ethics*, 3 J. BUS. & TECH. L. 449, 453 n.27 (2008). Johnson & Johnson had made good on its much ballyhooed credo of putting the health of its customers first among its corporate priorities. This credo, which was crafted by company founders before the firm went public in 1943, explicitly puts the interest of consumers ahead of those of shareholders: "We believe our first responsibility is to the doctors, nurses and patients, to mothers and fathers and all others who use our products and services. In meeting their needs everything we do must be of high quality. We must constantly strive to reduce our costs in order to maintain reasonable prices." Our Credo, JOHNSON & JOHNSON INC., <http://www.jnj.com/wps/wcm/connect/c7933f004f5563df9e22be1bb31559c7/our-credo.pdf?MOD=AJPERES>. Only after reviewing the firm's obligations to other stakeholders, including "employees" and "communities," does the credo in its concluding paragraph state, "Our final responsibility is to our stockholders. Business must make a sound profit. . . . When we operate according to these principles [of the credo], the stockholders should realize a fair return." *Id.*

Nevertheless, the cyanide-in-the-Tylenol case notwithstanding, there is plenty of other evidence that manipulation and exploitation has also been an important part of the firm's overall pursuit of profits. For example, Johnson & Johnson recently agreed to an \$ 81 million settlement with the federal government in connection with alleged civil and criminal violations of statutory prohibitions against the marketing of prescription drugs for treatments not approved by the Food and Drug Administration. This off-label marketing practice was purportedly undertaken through corporate subsidiaries of Johnson & Johnson, Inc. The firms allegedly marketed drugs that were approved only for the treatment of epilepsy as also useful in the treatment of obesity, a use which may have put patients at risk for serious health problems. See Press Release, Department of Justice, *Two Johnson & Johnson Subsidiaries to Pay Over \$ 81 Million to Resolve Allegations of Off-Label Promotion of Topomax* (Apr. 29, 2010) available at <http://www.justice.gov/opa/pr/2010/April/10-civ-500.html>.

n37 See Olaf Weber, Marco Mansfeld, & Eric Schirrmann, *The Financial Performance of SRI Funds Between 2002 and 2009* (June 25, 2010) (unpublished) (on file with HEALTH MATRIX), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1630502>. Then again, "sin stock" funds-comprised of firms trading in alcohol, tobacco, weapons, and pornography-also have outperformed the S&P 500. See Charles Sizemore, *Why Good Investors Like "Bad" Stocks*, MINYAVILLE MEDIA, INC. (Aug. 31, 2010, 3:15 PM), <http://www.minyaville.com/investing/articles/sin-stock-vice-fund-playboy-stock/8/31/2010/id/29891>.

n38 See Claire A. Hill, *Why Financial Appearances Might Matter: An Explanation for "Dirty Pooling" and Some Other Types of Financial Cosmetics*, 22 DEL. J. CORP. L. 141, 186 n.156 (1997):

According to a famous, but perhaps apocryphal, story, a University of Chicago economist and a student were walking together. The student saw \$ 20 on the floor, and pointed it out to the economist, remarking 'Look! There's \$ 20 on the floor. Aren't you going to pick it up?' The economist's response, purportedly, was to say 'Naah; there can't be a \$ 20 bill on the floor. Somebody would have picked it up,' and continue walking, without even glancing down.

Lisa Fairfax argues that corporations in the last ten years have engaged in historically unprecedented levels of "rhetoric" regarding corporate social responsibility. The impressive empirical investigation she undertook seems largely to show that there is little connection between such rhetoric and socially responsible corporate conduct. Fairfax, *supra* note 26, at 789-92. Fairfax states:

62% of Fortune 100 companies are not included in the Domini 400 Social Index . . . only seventeen companies in the Fortune 100 appear on the list of the top 100 Best Corporate Citizens, a list which comprises the public companies that best serve stakeholders, including stockholders, employees, customers, the community, and the environment. . . . The fact that only 17% of Fortune 100 companies appear on this list while 98% of such companies embrace rhetoric suggesting a responsibility towards stakeholders reflects a seeming divergence between corporate rhetoric and reality.

*Id.*

n39 See *The Public Choice Problem in Corporate Law*, *supra* note 8.

n40 Because of their size, narrow interests, technical skills, and wealth, corporations enjoy collective action advantages over workers and consumers in the competition for regulatory favor. Thus, corporations can regularly stymie the development of external regulations on which shareholder primacy theory relies for its coherence. See *The Public Choice Problem in Corporate Law*, *supra* note 8.

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