Comments

MINING THE SAFE HARBOR? THE BUSINESS JUDGMENT RULE AFTER *TRANS UNION*

I. INTRODUCTION

Traditionally, actions taken by corporate directors have been protected by the courts' application of the business judgment rule. This rule entitles boards of directors, who act in good faith, to "a presumption of sound business judgment."[1] The effect of this rule is to place the burden on the challeng ing party to rebut the presumption of the propriety of directors' actions.[2] The standard by which directors' duty of care is measured, as established by the Delaware Supreme Court in *Aronson v. Lewis*,[3] is gross negligence. This standard provides directors with a greater degree of latitude in their decision— making than would be permissible under a simple negligence standard.[4] Accordingly, the lenient standard and pre-

1. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). Directors' decisions "will not be disturbed [by the courts] if they can be attributed to any rational business purpose." *Id. See also* Miller v. American Tele. & Tele. Co., 507 F.2d 759, 762 (3d Cir. 1974) ("The sound business judgment rule . . . eschew[s] intervention in corporate decision-making if the judgment of directors and officers is uninfluenced by personal considerations and is exercised in good faith."); Shlensky v. Wrigley, 237 N.E. 776 (Ill. 1968) (directors acting in good faith are not personally liable for mere errors of judgment or lack of prudence); Ruder, *Reconciliation of the Business Judgment Rule with the Federal Securities Laws*, 6 DEL. J. CORP. L. 529, 529 (1981) ("[B]usiness decisions made by independent directors will not be subject to court scrutiny if they are made in good faith after careful investigation of the underlying facts.").

2. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). *Cf. Sinclair Oil Corp.*, 280 A.2d at 720. In regard to the presumption of directors acting in good faith, the court stated, "A court . . . will not substitute its own notions of what is or is not sound business judgment." 3A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1039 (rev. perm. ed. 1975) ("Bad judgment, without bad faith, does not ordinarily make officers individually liable.").

3. 473 A.2d 805 (Del. 1984).

4. The business judgment rule protects directors unless there is proof of abuse of discretion, fraud, self-dealing, or other improper action. *Id.* at 812. *See* Gimbel v. Signal Cos., 316 A.2d 599, 609 (Del. Ch. 1974), *aff'd per curiam*, 316 A.2d 619 (Del. 1974); Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971); Warshaw v. Calhoun, 221 A.2d 487, 492-93 (Del. 1966). *See also* Note, *The Propriety of Judicial Deference to Corporate Boards of Directors*, 96 HARV. L. REV. 1984 (1983) ("courts accord great deference to board approval of an action as long as

sumption of propriety have heretofore effectively sheltered corporate directors from challenges by their constituent shareholders.[5]

The safe harbor afforded directors by the business judgment rule has been threatened recently as a result of the Delaware Supreme Court's decision in *Smith v. Van Gorkom.*[6] In this case, the court held that the directors of Trans Union Corporation were not shielded from personal liability for improperly approving the merger of their corporation without informing themselves of all pertinent facts prior to their decision.[7] The plaintiffs, shareholders of Trans Union, alleged that they were being cashed-out at an unfair price and that the defendant directors had been grossly negligent in approving the merger. The allegations were based on the fact that the merger was approved after only two hours of consideration and without reliable evidence as to the intrinsic value of the corporation. This approval occurred at a meeting called the previous day without prior notice.[8] The court held that the directors had breached their duty of care by failing to take affirmative steps to inform themselves fully as per the standard established in *Aronson.*[9] This decision serves as a stern warning to boards of directors that the business judgment rule does not provide an impenetrable shield, and that their duty of care is subject to critical examination by the courts.[10]

---

no corporate manager had a conflict of interest, but they review for 'fairness' any action involving such a conflict'').

5. *See, e.g.*, Veasey & Manning, *Codified Standard— Safe Harbor or Uncharted Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law,* 35 BUS. LAW. 919, 919 (1980) [hereinafter cited as Veasey & Manning] (''[M]ost [directors] will assume that the business judgment rule provides a safe harbor if they believe management to be honest and expert, if board members act in good faith, if they read all the materials supplied by management, and if they abide by the recommendations of the *Corporate Directors' Guidebook.*''); Arsht & Hinsey, *Codified Standard—Safe Harbor but Charted Channel: A Response,* 35 BUS. LAW. 947, 958 (1980) (''The essence of the business judgment rule says that a director who had no personal interest in a matter and had no reasonable cause to believe it was unlawful when voting, will not be held personally liable for his decision . . . if he acted in good faith . . . and believed on a reasonable basis that the matter was in the best interests of the corporation.'').

6. 488 A.2d 858 (Del. 1985), *reh'g denied* (Mar. 14, 1985) [hereinafter referred to as *Trans Union*].

7. *Id.* at 864.

8. *Id.* at 866, 874.

9. *Id.* at 872-73 (quoting *Aronson,* 473 A.2d at 812).

10. For timely views on the potential impact of the *Trans Union* decision, see Borden, *First Thoughts on Decision in Delaware on Trans Union,* N.Y.L.J., Feb. 25, 1985, at 1 [hereinafter cited as *First Thoughts*]; Schwartz & Wiles, *Business Judgment Rule Clarified by Delaware's Trans Union Decision,* 7 NAT'L L.J. 42 (July 8, 1985);

II. FACTS OF THE CASE

Trans Union, a publicly-held corporation, became involved in this action as a result of its directors' efforts to remedy financial problems. Despite a favorable cash-flow position, Trans Union was experiencing difficulties in making use of large investment tax credits due to low taxable income.[11] Several options were considered, including a leveraged buy-out using the corporation's assets as security for loans to be repaid through the corporation's future cash-flow.[12] Trans Union's chief financial officer, Donald Romans, had prepared a preliminary report on a leveraged buy-out using figures of $50 per share and $60 per share.[13] However, no conclusion was reached on the basis of these "rough" studies.[14]

As an alternative to the proposed solutions, Trans Union's chairman of the board and chief executive officer, Jerome W. Van Gorkom, privately considered the sale of Trans Union to a company with high taxable income.[15] Accordingly, Van Gorkom contacted a social acquaintance, Jay A. Pritzker, an experienced corporate takeover specialist.[16] At a meeting with Pritzker on September 13, 1980, Van Gorkom discussed a sale of Trans Union to a Pritzker-controlled company at a price of $55 per share.[17] Pritzker expressed interest, but no definite agreement was reached at that time.

On September 20, 1980, Van Gorkom presided over a meeting of Trans Union's senior management.[18] After hearing of the plan,

---

Middleton, *Merger Decision— Lawyers See Warning in Court's View of Business Judgment Standard*, 7 NAT'L L.J. 8 (Feb. 18, 1985); *On the Boards—Directors Face Tougher Scrutiny*, TIME, Feb. 11, 1985, at 69.

11. *Trans Union*, 488 A.2d at 864-65. Trans Union's tax dilemma was accentuated by the fact that its accelerated depreciation deductions had further decreased its available taxable income. This situation prompted Van Gorkom to consider a buy-out of Trans Union by a company with high taxable income and few corresponding deductions or tax credits. *See id.* at 865-66.

12. *Id.* at 865. Other alternatives considered included: (1) stock repurchase, (2) dividend increases, (3) a program of acquisitions, and (4) a combination of the preceding plans. *Id.*

13. *Id.* Romans' calculations of figures for a leveraged buy-out were considered "rough" and strictly "preliminary." *Id.*

14. *Id.*

15. *See supra* note 11.

16. *Trans Union*, 488 A.2d at 866.

17. It is important to note that Van Gorkom proposed that Pritzker offer $55 per share. *Id.* Thus, the merger price arose from Van Gorkom's subjective feeling for what Trans Union was worth, and was based on calculations for a leveraged buy-out rather than a merger. *Id.*

18. One day prior to this meeting, Van Gorkom, Pritzker, and Bruce S.

management's reaction was negative. Even Romans, who had earlier calculated rough buy-out prices, opposed the proposition. Romans thought the price was too low and that the proposal was a "lock up" rather than an offer.[19] Despite management's objections, Van Gorkom proposed the transaction at a board meeting later that day. He presented the proposal in a twenty-minute oral presentation that was unsupported by any accompanying written materials.[20]

The details of the proposal called for a merger of Trans Union into New T, a newly formed company wholly-owned by Pritzker. The terms of the merger were as follows: (1) Trans Union could receive, but not actively solicit, competing offers for ninety days; (2) competing bidders could be given only published information; (3) Pritzker's offer had to be acted on by the next evening; (4) the offer was subject to Pritzker's obtaining the necessary financing by October 10, 1980; and (5) if Pritzker obtained the financing, he had the right to purchase one million shares of Trans Union at $38 per share.[21] After considering it for two hours,[22] the board agreed to the plan subject to certain modifications which were later approved by Pritzker. Thereafter, a press release was issued on September 22, 1980 to announce that a "definitive" agreement had been reached to merge Trans Union into a subsidiary of Marmon, a Pritzker holding company.[23]

On October 8, 1980, Van Gorkom obtained the board's approval of the modifications to the merger agreement—without the board ever having seen any written materials.[24] The board also authorized

---

Chelberg (Trans Union's president and CEO) consulted a bank in order to arrange the necessary financing for the merger. These arrangements were made outside of the knowledge of Trans Union's other directors and its legal department. *Id.* at 867.

19. *Id.* at 867-68.

20. *Id.* at 868. In addition to the fact that the board meeting was conducted without a written merger agreement being presented for consideration, there is no evidence that a written agreement ever existed. The court noted that a written agreement had "never been produced by the defendants, notwithstanding the plaintiffs' several demands for production before as well as during trial," and that "[n]o acceptable explanation of this failure to produce documents has been given to either the Trial Court or to this Court." *Id.* at 878.

21. *Id.* at 868.

22. *Id.* at 874. The *Trans Union* court noted that at the time the decision was reached, the board was "uninformed as to the intrinsic value of the Company." *Id.*

23. *Id.* at 869.

24. *Id.* The defendant directors claimed that those modifications to the merger agreement provided Trans Union with the right to solicit competing bids and to

the investment banking firm of Salomon Brothers to seek competing bids.[25] On October 9, 1980, Trans Union issued a second press release stating that Pritzker had obtained the requisite financing and had exercised his option to purchase one million shares of Trans Union at $38 per share. In addition, the release specified that Trans Union had retained Salomon Brothers to seek competing bids, but that if none were received by February 1, 1981, Trans Union's shareholders would be asked to vote on the Pritzker transaction.[26] On October 10, 1980, Van Gorkom actually drafted the amendments that the board had already agreed upon at the October 8 meeting.[27]

On December 19, the plaintiffs commenced this class action suit. Van Gorkom, however, proceeded with the merger plan. A shareholder meeting was set for February 10, 1981, and proxy statements were mailed to the shareholders on January 21 and 27, 1981. At the meeting, the shareholders approved the plan overwhelmingly.[28]

Despite shareholder approval, the plaintiffs sought to enjoin the merger on the ground that the directors had negligently failed to inform themselves of all the facts pertinent to the merger before approving it. The plaintiffs claimed this constituted a breach of the directors' duty of care, precluding application of the business judgment rule.[29] In addition, the plaintiffs contended that the shareholder vote did not serve as proper ratification of the directors' actions because the shareholders had not been fully informed of all material information in accordance with the standard established in *Lynch v. Vickers Energy Corp.*[30]

After trial in the chancery court,[31] the chancellor held in favor of the defendant directors.[32] The Delaware Supreme Court, in a landmark decision, reversed the decision and held that the directors

---

accept such a bid if it exceeded Pritzker's offer. *Id.* at 879. For further discussion of the modifications, see *infra* text accompanying notes 104-111.

25. *Trans Union*, 488 A.2d at 869-70.

26. *Id.* at 870.

27. *Id.*

28. The results of the shareholder vote were: 69.90% voted in favor of the merger; 7.25% voted against it; and 22.85% did not vote. *Id.*

29. *Id.* at 871.

30. 383 A.2d 278 (Del. 1977). The *Lynch* court held that a majority shareholder owed a fiduciary duty to a minority share holder to disclose all the facts and circumstances surrounding a transaction with "complete candor." *Id.* at 279. The *Trans Union* court applied this rule to the defendant directors in the instant case. *Trans Union*, 488 A.2d at 890.

31. Smith v. Pritzker, No. 6342 (Del. Ch. Jul. 6, 1982).

32. *Id.* at 15. Chancellor Marvel based the court's decision on two main

were not entitled to the protection of the business judgment rule.[33] Both the length of the majority opinion[34] and its tenor[35] suggest strongly that the court was sending the message to corporate directors generally that the business judgment rule is not an impregnable defense against attacks by dissatisfied shareholders.

III. ANALYSIS

The supreme court's decision to reverse the lower court was based on three findings. First, the court held that the defen dants had failed to make an informed business decision in approving the merger. Secondly, the board's efforts to amend the merger agreement were ineffectual and, therefore, did not cure the original wrongful action. Lastly, the defendants had failed to disclose all material facts to the shareholders prior to the shareholders' vote on the proposed merger.[36]

The court began its analysis by pointing to the statutory source of the business judgment rule, namely, section 141(a) of the Delaware General Corporation Laws, which states that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."[37] This principle serves not

---

findings. First, the court held that the defendant directors had "not act[ed] recklessly or improvidently in determining on [sic] a course of action which they believed to be in the best interest of the stockholders of Trans Union." *Id.* at 14. Secondly, the court concluded that the shareholders had been "fairly informed" prior to voting on the proposed merger. *Id. See also Trans Union*, 488 A.2d at 864 (supreme court recited, and rejected, chancery court's findings).

33. The Delaware Supreme Court remanded the case to the chancery court for an evidentiary hearing to determine the amount of damages, if any, to be awarded to the plaintiffs. *Id.* at 893. The court noted that the evaluation should be conducted according to the standards set forth in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). The *Weinberger* court abandoned the exclusive use of the traditional "Delaware block" weighted average method in favor of any generally accepted financial accounting technique. *Id.* at 712. Thus, the Trans Union shareholders would be entitled to an award of damages "to the extent that the fair value of Trans Union exceeds [the cash-out price of] $55 per share." *Trans Union*, 488 A.2d at 893.

34. The majority opinion, authored by Horsey, J., and joined in by Herrmann, C.J., and Moore, J., was 30 pages long. McNeilly and Christie, J.J., filed dissenting opinions.

35. The strongly worded majority opinion was criticized by Justice McNeilly as reading "like an advocate's closing address to a hostile jury." *Trans Union*, 488 A.2d at 893 (McNeilly, J., dissenting).

36. *Id.* at 864.

37. DEL. CODE ANN. tit. 8, § 141(a) (1983). This section of the Delaware General Corporation Laws constitutes the primary statutory authorization for the actions and powers of directors.

only to empower boards of directors but also to protect directors' exercise of that power. The business judgment rule is a derivative of this statutory authority,[38] and it "exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors."[39] While section 141(a) is viewed as a grant of power to a board of directors, the business judgment rule generally operates only as a defense to a challenge of a board's authority.[40] Thus, directors' actions are presumed to be informed and made in good faith and the burden is on the challenging party to prove otherwise.[41]

Although there is a rebuttable presumption of a director's good faith, it is important to note that a director stands in a fiduciary relationship to the corporation he serves. The standard of care by which his actions are measured under the business judgment rule is, therefore, less exacting than that of simple negligence.[42] As the *Trans Union* court stated, "[A] director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty."[43] This duty of care can be measured against a spectrum of standards, ranging from simple negligence to gross

---

38. The business judgment rule essentially is a common law judicial construction. Despite its lack of explicit statutory basis, the rule remains one of the most important doctrines in corporate law. In addition, interpretations of the rule by Delaware courts are accorded great weight. *See* Veasey, *New Insights into Judicial Deference to Directors' Business Decisions: Should We Trust the Courts?*, 39 BUS. LAW. 1961, 1962 (1984) ("Delaware courts are often the focal point of major corporate battles, and the decisions of the Delaware Court of Chancery and the Supreme Court of Delaware are regarded as the most authoritative national word on corporate law.").

39. *Trans Union*, 488 A.2d at 872. *See also* Zapata v. Maldonato, 430 A.2d 779, 782 (Del. 1981) ("[T]he 'business judgment' rule evolved to give recognition and deference to directors' business expertise when exercising their managerial power under §141(a)."). *Cf.* Morris & Henry, *The Aftermath of Zapata Corp. v. Maldonato: What is Left of the Business Judgment Rule?*, 88 DICK. L. REV. 411, 411 (1984) ("The business judgment rule evolved to enable competent people to serve as fiduciaries without the potential of liability arising from a mistake of judgment or an unpopular business decision.").

40. *Zapata*, 430 A.2d at 782. For a discussion as to the defensive nature of the business judgment rule, see Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 128 (1979) [hereinafter cited as Arsht, *Rule Revisited*] (business judgment rule "should not apply where [directors] judgment is brought to bear only as an ex post factor justification for action taken primarily for personal reasons").

41. *See* Arsht, *Rule Revisited, supra* note 40, at 131 ("[W]here the plaintiff attacks the availability of the business judgment rule because of self-dealing or personal interest, the presumption is overcome when the plaintiff introduces credible evidence upon which to base a conclusion adverse to that of the individual defendants.").

42. *Aronson*, 473 A.2d at 812 n.6.

43. *Trans Union*, 488 A.2d at 872-73.

negligence to intentional wrongdoing.[44] In *Aronson*, the supreme court examined the bases for various business judgment holdings and concluded that as to the duty of requisite care, "director liability is predicated upon concepts of gross negligence."[45] The *Trans Union* court accepted this standard in terms of the business judgment rule's applicability vis-a-vis the directors' duty to make informed decisions.[46]

In examining the issue of whether the defendants were properly informed, the court paid particular attention to the information considered by the defendants at the time of each individual decision, rather than to post hoc reflection.[47] Thus, the court evaluated the defendant directors' knowledge at each stage of the transaction, including the board meetings on September 20 and October 8, 1980, and January 26, 1981.

The court offered several reasons for holding that the board's initial decision to sell the corporation at the September 20 meeting was grossly negligent. First, the directors had failed to inform themselves adequately of Van Gorkom's role in the Pritzker deal or of the origin of the price offered.[48] The court noted that the board had received neither supporting written documentation nor a copy of the merger agreement. Rather, it was "required to rely entirely upon

---

44. For an analysis of the spectrum of liability standards, see Veasey & Manning, *supra* note 5, at 926-30.

45. *Aronson,* 473 A.2d at 812. In a short survey of business judgment rule cases, the *Aronson* court pointed out several earlier cases whose standards seemed to indicate general acceptance of a gross negligence standard. *Id.* at 812 n.6 (citing *Sinclair Oil Corp.*, 280 A.2d at 722 (directors' liability based on fraud or gross overreaching)); Penn Mart Realty Co. v. Becker, 298 A.2d 349, 351 (Del. Ch. 1972) (directors may breach their fiduciary duty . . . being grossly negligent") [where does it start?]; *Warshaw*, 221 A.2d at 492-93 (directors liable for "bad faith . . . or a gross abuse of discretion").

46. *Trans Union*, 488 A.2d at 873.

47. In rejecting the directors' argument that the cumulative effect of their consideration should take precedence over the degree to which they were informed at each stage, the court may have been acting to prevent the type of situation reported by Irving Janis, where Alfred Sloan, former chairman of General Motors Corporation, announced: "Gentlemen, I take it we are all in complete agreement on the decision here . . . . Then I propose we postpone further discussion of this matter until our next meeting to give ourselves time to develop disagreement and perhaps gain some understanding of what the decision is all about." I. JANIS, VICTIMS OF GROUPTHINKING 9 (1972), *cited in* Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1, 35 (1981) [hereinafter cited as Haft, *New Board]*.

48. *Trans Union*, 488 A.2d at 874. The court considered it significant that Van Gorkom suggested the $55 per share price to Pritzker instead of waiting for an initial offer from Pritzker. *Id.* at 866.

Van Gorkom's 20-minute oral presentation of the proposal."[49] Although directors are normally entitled to rely on the reports of other directors or officers,[50] the court held that the circumstances in the instant case made the directors "duty bound to make reasonable inquiry of Van Gorkom and Romans" as to the factors behind the offer.[51] In light of Van Gorkom's insistence that Pritzker sought the board's decision by the next day, though no emergency necessitating such drastic action existed, the board members should have been on notice that something was suspicious. Thus, the court concluded that had the directors made reasonable inquiry into the bases of the proposal, "the inadequacy of that upon which they now claim to have relied would have been apparent."[52]

As part of their defense, the directors pointed out that Pritzker's offer of $55 per share was substantially higher than Trans Union's then current market price of about $38 per share.[53] However, the court pointed to an inherent flaw in this argument: without a reliable valuation of the corporation's worth, the directors had no "adequate basis upon which to assess the fairness of [the] offering price."[54] Although Trans Union's chief financial officer, Romans, had performed calculations on potential buy-out prices, the board had neither requested that he perform a valuation study of Trans Union's worth nor that he evaluate thoroughly the $55 per share offer.[55] At a minimum the board should have been alerted to the possible inadequacy of the price offered since Romans had stated at the September 20 board meeting that $55 per share was "in the range of a fair price [but] at the beginning of the range."[56] Thus, the court

49. *Id.* at 874.

50. *See* DEL. CODE ANN. tit. 8, § 141(e) (1983) ("A member of the board of directors of any corporation . . . shall . . . be fully protected in relying in good faith upon the books of account or reports made to the corporation by any of its officers."). *Accord* Michelson v. Duncan, 386 A.2d 1144, 1156 (Del. Ch. 1978) ("[D]irectors are fully protected in relying in good faith on reports made by officers."); Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963) ("Directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong.").

51. *Trans Union*, 488 A.2d at 875.

52. *Id.* The court's conclusion follows directly from the reasoning in *Graham*, 188 A.2d at 130, in that the terms of proposal should have put the directors "on suspicion," thereby negating their defense of justified reliance on the reports from Van Gorkom and Romans.

53. *Trans Union*, 488 A.2d at 875.

54. *Id.*

55. *Id.* at 877.

56. *Id.* at 869.

held that the board acted irresponsibly in not heeding its chief financial officer's judgment and in not ordering a thorough and reliable evaluation of the proposed transaction.[57]

In addressing the board's lack of information concerning the fairness of the offer, the court noted that the directors were not entitled to rely solely on Van Gorkom's representation that $55 per share was a fair price. Since there was no documentation, the directors should have inquired into the background of the offered price. Had they done so, the directors would have discovered that: (1) Van Gorkom had arrived at the price "alone, and subjectively"; (2) the price was based on a leveraged buy-out, not a sale; and (3) "Van Gorkom had suggested the $55 price to Pritzker."[58] The directors then would have realized that the transaction was based on incomplete information. Since the directors had a duty to uncover these facts, they were not entitled to the good faith protection of section 141(e) of the Delaware General Corporation Laws.[59]

The second board meeting, on October 8, was convened primarily as a result of several disagreements about the details of the merger terms as discussed on September 20. Senior management of Trans Union had opposed the plan strenuously,[60] and there were questions concerning Trans Union's ability to receive competing bids. Van Gorkom again met privately with Pritzker, and Pritzker agreed to let Trans Union actively solicit competing bids and to postpone the shareholder's meeting from January to February 1981. In return, Van Gorkom agreed to persuade Trans Union's senior management to remain for at least six months following the merger.[61]

At the October 8 board meeting, Van Gorkom described the negotiations with Pritzker and referred to the offer solicitation amend-

---

57. The court's conclusion that the board acted irresponsibly was due to the following findings:

> No director sought any further information from Romans. No director asked him why he put $55 at the bottom of his range. No director asked Romans for any details as to his study, the reason why it had been undertaken or its depth. No director asked to see the study; and no director asked Romans whether Trans Union's finance department could do a fairness study within the remaining 36-hour period available under the Pritzker offer.

Id. at 877.

58. *Id.*

59. *Id.* at 889. For the relevant text of § 141(e), see *supra* note 50.

60. The court described the reaction of *Trans Union*'s senior management as being an "en masse revolt." *Trans Union*, 488 A.2d at 882.

61. *Id.*

ment as a "market test" by which the fair price of Trans Union would be determined through an open, competitive market.[62] However, several facts indicate that competing bids were not only undesirable but were actively discouraged. First, a press release was issued by Trans Union on October 9 announcing that Pritzker had obtained the necessary financing and, accordingly, had exercised his option to purchase one million shares of Trans Union at $38 per share.[63] Although the press release also stated that Trans Union was free to seek other offers, and had retained Salomon Brothers for that purpose, the overall impact of the release clearly suggested that the merger transaction was *a fait accompli*. In addition, the investment firm of Kohlbert, Kravis, and Robertson and Co. (KKR) had expressed serious interest in purchasing Trans Union and had, in fact, made an offer of $60 per share contingent upon completion of financing arrangements.[64] However, Van Gorkom never explored this offer seriously and even refused to issue a press release describing KKR's bid.[65] Thus, Trans Union was effectively locked into the Pritzker transaction as a result of Van Gorkom's machinations and the board's failure to inquire into the financial facts.[66] The court concluded that the directors' conduct at the October 8 meeting was grossly negligent as it "exhibited the same deficiencies" as their conduct at the earlier board meeting.[67]

In defense of their actions, the directors also contended that the meeting on January 26, 1981, at which they voted on final approval of the merger, constituted a cure for any pre-existing defects in their review of the transaction. However, the court rejected this argument

---

62. Van Gorkom told the board that the "free market will have an opportunity to judge whether $55 is a fair price." *Id.* at 868.

63. *Id.* at 870. The price paid by Pritzker for the one million shares of Trans Union, $38 per share, was only 75¢ above the market price at that time. *Id.* at 883.

64. *Id.* at 884. Although KKR did make an offer of $60 per share, the offer was withdrawn three hours after it was made due to an internal dispute among KKR's officers. *Id.* at 896 n.1.

65. *Id.* at 885. The KKR offer arose through the efforts of Romans and other senior officers. The evidence indicated that Van Gorkom never seriously considered this possibility, and the court described his attitude toward the KKR proposal as "completely negative." *Id.* at 884.

66. *See id.* at 884. The court stated that "confirmation of the appropriateness of the Pritzker offer by an unfettered or free market test was virtually meaningless in the face of the terms and time limitations of" the amended merger agreement. *Id.* at 885.

67. *Id.* at 884.

as deficient on both factual and legal grounds.[68] Essentially, the court rejected the directors' claim that the board had three options regarding the merger proposal: (1) a recommendation to the shareholders that the proposal be accepted; (2) a recommendation that the shareholders vote against the plan; and (3) a noncommittal position on the plan.[69]

The court held that the second and third options were not available to the board; therefore it was legally committed either to recommend shareholder approval of the merger or rescission of the agreement entirely. According to section 251(b) of the Delaware General Corporation Laws,[70] a board of directors seeking to merge a corporation with another must "adopt a resolution approving an agreement of merger or consolidation."[71] Thus, a board cannot submit a merger proposal to the shareholders if it has not been approved by the board. The court also noted that Trans Union could have faced a lawsuit by Pritzker for breach of contract had the board attempted to rescind the agreement.[72] Therefore, the board was not free to accept or reject Pritzker's offer at the January 26 meeting despite a review of all events up to that time. Consequently, the meeting did not cure any prior defects as to the informed nature of the board's decision.

In final defense of their actions, the defendant directors contended that the shareholder approval of the merger on February 10, 1981, exonerated them from liability for any deficiencies in their decision-making procedure. This defense is grounded on the principle that wrongful acts of corporate directors may be voidable, not void, and are subject to ratification by a majority vote of the shareholders.[73]

---

68. The defendant directors relied upon the principle expounded in Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973), that a business decision made by an initially uninformed board of directors may, subsequently, be cured so as to be considered informed. The *Trans Union* court agreed with this principle in general, but rejected it in the instant situation. *See Trans Union*, 488 A.2d at 885-86. *Cf.* Pease, Aronson v. Lewis: *When Demand is Excused and Delaware's Business Judgment Rule*, 9 DEL. J. CORP. L. 39, 83 (1984) [hereinafter cited as Pease] (discusses court's approval of timely cure in principle, but rejection here on facts).

69. *Trans Union*, 488 A.2d at 887-88.

70. DEL. CODE ANN. tit. 8, § 251(b) (1983).

71. *Id.*

72. *Trans Union*, 488 A.2d at 888. The court added that "in reality, the Board was not 'free to turn down the Pritzker proposal'" (referring to trial court's holding). *Id.*

73. *See* Michelson v. Duncan, 407 A.2d 211 (Del. 1979) (ratification by majority vote of shareholders is possible for directors' acts that do not reach level

This argument also was rejected by the court. In order for voidable acts to be ratified by shareholder vote, the shareholders must have been properly informed of all material information relevant to the issue.[74] The court examined the shareholders' knowledge in terms of the standard established in *Lynch v. Vickers Energy Corp.*[75] In dealing with a majority shareholder's tender offer for the minority's shares, the *Lynch* court held that the majority owed a fiduciary duty to the minority to disclose all material facts with "complete candor."[76] The *Trans Union* court applied the *Lynch* standard and determined that the shareholders had not been fully informed of all material facts relevant to the Pritzker deal prior to the February 10 vote.[77]

Although Trans Union's Board sent two proxy statements to the shareholders before the February 10 meeting, neither statement revealed the true bases for the directors' recommendation of the proposal. The board did not disclose that it "had no reasonably adequate information indicative of the intrinsic value of the Company."[78] Instead, the court determined that the board "cloaked" the absence of such vital information through "artful drafting."[79] The court illustrated this misleading action with excerpts from the original and supplemental proxy statements. The original proxy statement claimed that the directors regarded "the intrinsic value of the Company's assets to be significantly greater than their book value," and that "the prices at which the Company's common stock has traded in recent years have not reflected the inherent value of the

---

of waste, fraud, or *ultra vires*; unanimous shareholder approval required for aforementioned acts).

74. *See* Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 82, 90 A.2d 660 (1952), *reargument denied in part*, 33 Del. Ch. 177, 91 A.2d 57, *adhered to*, 33 Del. Ch. 283, 92 A.2d 594 (1952) ("[T]he entire atmosphere is freshened . . . where formal approval has been given by a majority of independent, fully informed stockholders." *Id.* at 180, 91 A.2d at 59.).

75. 383 A.2d 278 (Del. 1977).

76. *Id.* at 279. *Accord Weinberger*, 457 A.2d at 710.

77. *Trans Union*, 488 A.2d at 890. In addition to explicitly employing the *Lynch* standard of disclosure, the court implicitly adopted the standard established by the United States Supreme Court for evaluating federal proxy rules violations. The court held that the defendant directors had breached their fiduciary duty to their shareholders by failing "to disclose all material information such as a reasonable stock holder *would* consider important in deciding whether to approve the Pritzker offer." *Id.* at 893 (emphasis added). This "would" standard was adopted by the Supreme Court instead of the less stringent "might" standard. *See* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976).

78. *Trans Union*, 488 A.2d at 890.

79. *Id.* at 890-91.

Company." [80] The court held this to be inadequate disclosure because, in reality, the board had not even attempted to determine the inherent value of the corporation.[81]

The court held the supplemental proxy statement to be "false and misleading" because it advised shareholders that Romans had prepared a preliminary report which reflected that "the value of the Company was in the range of $55.00 to $65.00 per share."[82] The proxy statement failed to inform the shareholders that Romans' rough calculations were not the basis of this transaction but were prepared in the context of a leveraged buy-out by Trans Union's management. Although the defendants pointed out that the supplemental proxy statement did reveal certain details of the merger that were, theretofore, undisclosed,[83] the court held that this did not cure the deceptive nature of the price information. Interestingly, the court added in dicta that even a subsequent candid disclosure of information long known or readily available to the board might not have been sufficient to exonerate the directors from their inequitable conduct.[84]

In summary, the court held that the defendant directors were not entitled to protection under the business judgment rule because: (1) they had failed in their duty to properly inform themselves of all relevant facts prior to their approval of the merger proposal; (2) their subsequent conduct did not cure the original deficiencies; and (3) the shareholder approval did not exonerate the directors because they had failed to disclose the information necessary for the shareholders to make an informed decision.[85] The court placed great emphasis on the fact that the requisite information was available to the directors and that they had the obligation to take affirmative measures to obtain the information prior to making their decision.

---

80. *Id.* at 891 (quoting original proxy statement).

81. *See supra* note 57 and accompanying text.

82. *Trans Union*, 488 A.2d at 891 (quoting original proxy statement).

83. Several facts disclosed in the supplemental proxy statement of January 27, 1981, were that: (1) Van Gorkom had discussed the transaction with Pritzker without Trans Union's management's knowledge; (2) Van Gorkom suggested the $55 per share price to Pritzker; (3) the board had never sought an independent fairness opinion; and (4) Romans had stated on September 20, 1980, that the price might be inadequate and that he could not advise the board as to whether or not $55 per share was unfair. *Id.* at 892. The court held these admissions to be insufficient to cure the board's "continued lack of candor." *Id.* 84. *Id. Cf.* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971). The supreme court, per Justice Herrmann, stated that "inequitable action does not become permissible simply because it is legally possible."

85. *Trans Union*, 488 A.2d at 893.

IV. EVALUATION

The major impact of the *Trans Union* decision lies in its message to corporate directors that they may be held personally liable for their actions absent substantial proof that they were thoroughly informed prior to making business decisions. This message is especially intimidating because the court specifically distinguished directors' duty of care from their duty of loyalty.[86] The court stated that there was no question of bad faith present, so that the directors' loyalty was not in issue.[87] Previously, this finding would have been sufficient to trigger the defense of the business judgment rule.[88] However, the court focused on the directors' affirmative duty to make informed decisions and held that the circumstances surrounding their decision to approve the merger indicated a degree of haste and lack of proper information, which constituted grossly negligent action.[89]

A. *Extent to Which Board was Informed*

In a dissenting opinion that rivals the majority opinion for stridency, Justice McNeilly pointed out the vast collective business experience of the Trans Union directors and the unlikely possibility that they could be duped by a "fast shuffle" by Van Gorkom and Pritzker.[90] Justice McNeilly disputed the majority's determination that the directors had been inadequately informed. He pointed out that the board had been reviewing Trans Union's financial problems for months prior to the merger proposal, and it was, therefore, in a position to be aware of all the relevant financial facts.[91] He con-

---

86. *Id.* at 872-73. *See also supra* text accompanying note 42.

87. *Trans Union*, 488 A.2d at 873.

88. *See* Arsht, *Rule Revisited, supra* note 40, at 116 (referring to the duty of loyalty, "unless the plaintiff proves personal interest of the required character, the director will have the benefit of the business judgment rule defense").

89. *Trans Union*, 488 A.2d at 874. The court also stated:

> [F]ulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here.

Id. at 872.

90. *Id.* at 894 (McNeilly, J., dissenting). Justice McNeilly pointed out that the five inside directors of Trans Union had been employed by the corporation for a total of 116 years, of which 68 years had been spent on the board. All five outside directors also had extensive business background, and all had served, or were serving, as directors of other large corporations. *Id.*

91. *Id.* at 895. *See also supra* text accompanying notes 11-15.

cluded that the directors "were more than well qualified to make on the spot informed business judgments concerning the affairs of Trans Union including a 100% sale of the corporation."[92] Although not stated explicitly, the implication here is that the two-hour consideration time was not indicative of a lack of due care in light of the board's prior history of dealing with the very facts critical to the merger proposal.

The majority acknowledged the directors' collective business knowledge and experience but determined that this factor was negated by the substantial evidence of gross negligence.[93] The court relied on the decision in *Gimbel v. Signal Cos.*,[94] where a parent-subsidiary merger was enjoined based on the chancery court's finding that Signal's management, which had arranged the merger, had not given its board adequate notice to evaluate the proposal properly. The *Trans Union* court analogized the problem it faced to that in *Gimbel* and determined that, as in *Gimbel*, the competence and experience of the board was "outweighed by evidence of gross negligence."[95]

The *Trans Union* court's reliance on *Gimbel* may have been misguided in this instance. In *Gimbel*, Chancellor Quillen[96] indicated that the injunction was issued despite the lack of "a reasonable probability that the plaintiff [would] be able to pierce the 'business judgment' standard" at trial.[97] He determined that the key issue in *Gimbel* was the "gross disparity between the fair market value of Signal Oil . . . and, what the Board of Directors were willing to sell the company for . . . ."[98] Thus, to a large degree, the decision was based on factual rather than legal grounds.[99]

In *Trans Union*, the situation differed somewhat from that in *Gimbel* because the court never actually addressed the issue of whether

---

92. *Trans Union*, 488 A.2d at 895. The dissent also stressed that the directors "were acutely aware of the historical [tax] problems facing Trans Union" and had "discussed these problems *ad nauseum.*" *Id.* at 897.

93. *Id.* at 880.

94. 316 A.2d 599 (Del. Ch. 1974), *aff'd per curiam*, 316 A.2d 619 (Del. 1974).

95. *Trans Union*, 488 A.2d at 880.

96. Chancellor Quillen later served as an associate justice of the Delaware Supreme Court.

97. *Gimbel*, 316 A.2d at 615.

98. *Id.*

99. *See* Arsht, *Rule Revisited, supra* note 40, at 125. "What led the [*Gimbel*] court to interfere was not the absence of the exercise of business judgment, but a state of facts that, if proved, would demonstrate that the value of the property being sold so far exceeded the agreed sale price that the directors' judgment constituted an abuse of discretion."

$55 per share was a fair price. Instead, the court focused on whether the board members were in a position to determine if this price was fair. Thus, their scrutiny of the directors' actions never rose beyond a threshold determination that the directors were not sufficiently informed to evaluate the merger proposal properly.[100]

B. The Market Test

The majority may also have been off the mark in its outright rejection of the board's market test of the merger proposal. Such a test has been recognized as one indicium of directors' proper business judgment.[101] Although Van Gorkom did not actively pursue the short-lived KKR offer, the fact that an offer existed suggests that there was a potential market for Trans Union.[102] Also, as the dissent points out, Salomon Brothers prepared a brochure and contacted 150 corporations during its solicitation campaign.[103] The fact that no serious bids developed does not automatically render the market test inval id.[104]

The majority rejected the directors' assertion that they had insisted on amending the merger agreement to include: (1) Trans Union's right to accept competing offers, and (2) Trans Union's right to supply competing bidders with proprietary information.[105] The court stated that "[n]o reference to either of the so-called 'conditions' or of Trans Union's reserved right to test the market appears in any notes of the Board meeting or in the Board Resolution accepting the Pritzker offer or in the Minutes of the meeting itself."[106] The court also supported its conclusion by pointing out that the press release issued by Trans Union announcing the Pritzker offer

---

100. *Trans Union*, 488 A.2d at 880.

101. *Gimbel*, 316 A.2d at 610. *See also* Marks v. Wolfson, 41 Del. Ch. 115, 124-25, 188 A.2d 680, 686 (1963) (referring to a sale of assets, court remarked that free market test involved bargaining between "a willing buyer who was not required to buy and a willing seller under no real compulsion to sell").

102. *See First Thoughts, supra* note 10, at 4, col 4 ("Court paid no mind to the fact that the KKR offer itself demonstrated that the agreement was not a lock-up").

103. *Trans Union*, 488 A.2d at 896.

104. In his dissent, Justice McNeilly stated that "it is interesting to note that at no time during the market test period did any of the 150 corporations contacted by Salomon Brothers complain of the time frame or availability of corporate records in order to make an independent judgment of [Trans Union's] market value." *Id.* at 896 n.1.

105. *Id. at 879.*

106. Id.

did not include any statement regarding Trans Union's rights with respect to competing bids.[107]

The court's reasoning may have omitted important information contained in the merger agreement itself. The supplemental agreement, executed by Trans Union's Board and Pritzker, contained the following clause: "It is the present intention of the Board of Directors of Trans Union to recommend the approval of the Merger Agreement to the stockholders, unless another offer or proposal is made which in their opinion is more favorable to the stockholders than the Merger Agreement."[108]

The implication of this language is that the board could accept a competing bid if it were higher than the Pritzker offer (i.e., more favorable to the stockholders). However, the court ignored this significant language and instead focused on two other points. First, the court held that since the amendments agreed upon by the directors at the October 8 meeting were not actually drafted by Van Gorkom until October 10, there was no direct evidence that the directors ever saw the amendments in writing.[109] Secondly, the court held that the effect of the amendments was to limit the board's acceptance of competing offers because the Pritzker agreement was terminable "only if, prior to February 10, 1981, Trans Union had either consummated a merger (or sale of assets) with a third party or had entered into a 'definitive' merger agreement more favorable than Pritzker's . . . subject only to stockholder approval."[110]

One commentator described the court's approach to this issue as "altogether ignor[ing] the right to recommend against the Pritzker proposal if a better offer or proposal was received in the long interval between October 10 and February 10 . . . ."[111] The court rejected

---

107. *Id. See also supra* text accompanying notes 63-65.

108. *Trans Union*, 488 A.2d at 886 & n.29.

109. *Id.* at 883.

110. *Id.*

111. *First Thoughts, supra* note 10, at 4, col. 3. This article also points out that the court did "not dispute the obvious proposition that the Pritzker agreement would not have been approved by shareholders if the Board, instead of recommending the Pritzker agreement, had recommended another offer or proposal . . . ." *Id.* However, there is no certainty that the board's recommendation would have influenced significantly the shareholder's decision in light of the substantial premium above market value being offered. *See, e.g.*, Friedenberg, *Jaws III: The Impropriety of Shark-Repellant Amendments as a Takeover Defense*, 7 DEL. J. CORP. L. 32, 33 (1982). In reference to the disclosure requirements of the federal proxy rules, it was stated that "[f]or most shareholders, the tender offer premium will have a greater impact on decision making than management's negative advice."

the inference of a market test from the supplemental merger agreement and emphasized the fact that there was no corroborative evidence of the two conditions. [112] Thus, it appears that the court's conclusion was based on the absence of explicit writings rather than on an analysis of the implicit meaning of the writings which did exist.

C. *Board's Lack of Disclosure*

The court determined that the directors' voidable acts were not ratified by the subsequent shareholder vote due to their lack of disclosure of material facts.[113] The court emphasized that the key to shareholder ratification is the degree to which shareholders were informed of relevant information.[114] Relying on the decision in *Lynch v. Vickers Energy Corp.*,[115] which was reaffirmed in *Weinberger v. UOP, Inc.*,[116] the court held that the directors' degree of disclosure of material facts to the shareholders, prior to the vote, did not satisfy the *Lynch* standard of "complete candor."[117] The court's holding on this issue is interesting from both legal and factual standpoints.

From a legal perspective, the application of the *Lynch* complete candor standard to the *Trans Union* situation represents an extension of the principle's original scope. *Lynch* and *Weinberger* both involved parent-subsidiary mergers in which the majority shareholders were attempting to eliminate, or freeze-out, the minority shareholders.

In *Lynch*, Vickers Energy Corporation, the majority share holder of TransOcean Oil, Inc., made a tender offer to TransOcean's minority shareholders in order to consolidate its interest in the company.[118] The plaintiff, a minority share holder of TransOcean, originally tendered her shares but later filed a class action suit against Vickers claiming breach of fiduciary duty for failure to disclose the true value of TransOcean's assets as reflected in a private company

---

112. *Trans Union*, 488 A.2d at 883 n.25. The court stated that "to successfully absolve itself from charges of the type made here, there must be some credible contemporary evidence demonstrating that the directors knew what they were doing, and ensured that their purported action was given effect." *Id.*

113. *Id.* at 890.

114. *Id.* The court referred to Gerlach v. Gillam, 139 A.2d 591, 593 (Del. Ch. 1958), where the settled rule was pronounced that the actions of "even interested directors" may be ratified by "a majority of fully informed stockholders."

115. 383 A.2d 278 (Del. 1977).

116. 457 A.2d 701 (Del. 1983).

117. *Trans Union*, 488 A.2d at 890.

118. *Lynch*, 383 A.2d at 279.

report.[119] The Delaware Supreme Court held that Vickers, as the majority shareholder, had a fiduciary duty to the minority shareholders to disclose all germane information relating to the tender offer with complete candor.[120]

In *Weinberger*, a minority shareholder of UOP, Inc. filed a class action suit against, *inter alia*, the directors of Signal Companies, Inc., UOP's majority shareholder, for breaches of fiduciary duty relating to the merger of UOP into Signal.[121] The plaintiff alleged that a financial report prepared by common directors of Signal and UOP had not been disclosed to the shareholders prior to a vote on the merger. Also claimed to be improper was the fact that the valuation study of UOP released to the shareholders had been hastily, and perhaps inadequately, prepared.[122] The Delaware Supreme Court held that these acts constituted breaches of Signal's fiduciary duty to the minority shareholders under the *Lynch* standard of disclosure.[123]

Since *Lynch* and *Weinberger* both involved majority-minority relationships, the main issue facing the court was that of duty of loyalty.[124] As the *Weinberger* court stated, "[t]here is no 'safe harbor' for such divided loyalties in Delaware."[125] This situation stands in direct contrast to that in *Trans Union* because there was no majority-minority distinction nor any question as to the directors' loyalty. In fact, by approving the merger agreement, the directors were effectively putting themselves out of office.[126] In contrast to *Weinberger*, where common directors stood on both sides of the transaction, Trans Union directors had not engaged in any self-dealing. Thus, the level of judicial scrutiny is substantially lower, and the presumption of propriety afforded by the business judgment rule operates in favor of the directors.[127]

---

119. *Id.*

120. *Id.*

121. *Weinberger*, 457 A.2d at 703.

122. *Id.* at 712.

123. *Id.*

124. The *Weinberger* court cited the classic loyalty case of Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939), in stating that "[t]he rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Weinberger*, 457 A.2d at 770 (quoting *Guth*, 5 A.2d at 510).

125. *Weinberger*, 457 A.2d at 710.

126. *See First Thoughts*, *supra* note 10, at 1, col. 3 (noting the irony in the situation in which "the directors of Trans Union who vote themselves out of office to take advantage of what they believe to be an attractive offer, stand exposed to a staggering claim of personal liability").

127. In cases involving self-dealing, courts apply the higher standard of the

On a factual level, the *Trans Union* court may have been too harsh in its analysis of the degree of disclosure made to Trans Union's shareholders in the proxy materials. The court held that the board had no "reasonably adequate information" as to the true value of Trans Union, and that this fact should have been disclosed to the shareholders.[128] The court criticized the valuation estimate range listed in the supplemental proxy statement as being misleading because it was based on figures for a leveraged buy-out rather than the actual worth of Trans Union's shares.[129] In addition, the court held that the references to a substantial premium being offered were misleading due to the lack of a firm estimate of Trans Union's worth.[130]

The court may have been overly critical in this instance because, in fact, the Pritzker offer represented a premium in excess of forty percent over Trans Union's then current market price.[131] Additionally, since the directors had mentioned in the original proxy statement that the company's true value probably was not reflected in its market price,[132] the share holders were on notice as to the likelihood that their shares were undervalued.

The court's criticism of the board's failure to perform a formal valuation study also is inconsistent with their conclusion that an outside valuation study by an investment banker is not necessary to support the defense of an informed business decision.[133] Although the court acknowledges that directors may, under "appropriate circumstances," rely on the valuation study performed within the corporation,[134] it held that this was not such a case. One of the factors influencing the court's decision was that the proposed price was at the low end of the $55-$65 range disclosed in the proxy materials.

---

intrinsic fairness test, in which the burden shifts to the directors to prove the propriety of their actions. *See, e.g., Weinberger*, 457 A.2d at 710 ("where [a director] stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts"); *Sinclair Oil Corp.*, 280 A.2d at 718 (intrinsic fairness standard applied only when party having fiduciary duty engages in self-dealing); Arsht, *Fiduciary Responsibility of Directors, Officers and Key Employees*, 4 DEL. J. CORP. L. 652, 663 (1979) ["The Intrinsic Fairness Rule is applicable to self-dealing transactions only, and hence comes into play only in cases where the Business Judgment Rule is by definition inapplicable.").

128. *Trans Union*, 488 A.2d at 890.

129. *Id.* at 891-92.

130. *Id.* at 892.

131. *Id.* at 866. *See also First Thoughts, supra* note 10, at 4, col. 1.

132. *See supra* text accompanying note 80.

133. *Trans Union*, 488 A.2d at 876.

134. *Id.* at 876-77.

However, this conclusion ignores the fact that an investment banker's report is only an estimate, and that even investment bankers may differ in their valuations of a company.[135] Therefore, since an outside valuation is not mandatory, and given the board's disclosure of a range of reasonable values, it is arguable that the board did, indeed, fairly disclose the material facts to the shareholders in conformance with the complete candor standard.

D. *Message to Corporate Directors*

In evaluating the court's decision, it is important to take notice of the current general corporate climate. Courts' decisions are not rendered in a vacuum, but rather are a reflection of the society within which the courts are operating. Thus, the *Trans Union* decision must also be evaluated against the prevailing state of extensive corporate merger activity. In this light, the *Trans Union* decision represents not only a decision on the particular facts, but also the court's statement to corporate officers in general that their actions will be subject to stricter scrutiny than in the past.[136]

Through this message to corporate boards of directors, the court really is laying down social policy rules. This is consistent with the Delaware Supreme Court's recent trend towards expanding shareholder rights.[137] In a sense, *Trans Union* supplied the court with a situation in which it could reaffirm its commitment not only to the Trans Union shareholders, but to the shareholders of all the major businesses incorporated in Delaware.[138]

---

135. *See, e.g.*, Joseph v. Shell Oil Co., 482 A.2d 335, 341 (Del. Ch. 1984) (recognizing that different investment bankers could arrive at different valuation opinions after analyzing the same data). *See also First Thoughts, supra* note 10, at 4, col. 2 (criticizing the court's decision that the directors' valuation disclosure and market test were inherently unsound and stating that "[a]fter all, isn't an investment banker's opinion simply a guess as to what result the banker believes the market will produce?").

136. *See* Pease, *supra* note 68, at 84 (concluding that in light of *Trans Union*, there is a great risk that directors may not be protected by the business judgment rule if they do not obtain enough information to explain their votes adequately).

137. Nowhere is the trend towards shareholder rights more evident than in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), which stands as a landmark case in the protection of minority shareholders from unfair practices by majority shareholders. *See also* Comment, *Protection of Minority Shareholders in Parent-Subsidiary Tender Offers*: Joseph v. Shell Oil Co., 9 DEL. J. CORP. L. 731 (1984) (discussing application of *Weinberger* cash-out merger fairness rules to tender offers as evidence of expansion of shareholder rights).

138. See *First Thoughts, supra* note 10, at 1, col. 4, where the current hyperactive

The *Trans Union* decision did not break new ground or introduce radical theories. Rather, it followed the basic standards for the application of the business judgment rule established in *Aronson v. Lewis;*[139] namely, that the defense afforded by the rule will be lost if the directors do not act to inform themselves properly prior to making business decisions.[140] The directors' duty of care, evaluated under the standard of gross negligence, permits continued operation of the business judgment rule defense through that portion of the spectrum of standards consisting of simple negligence. *Trans Union* differs, however, in its application of the gross negligence standard to directors' actions that, hitherto, undoubtedly would have remained sheltered within the safe harbor. As this note has discussed, the actions of the Trans Union directors may have been deficient in certain areas. However, it is arguable as to whether their actions were as egregious as the court concluded.

The majority's meticulous dissection of the facts lead the dissent to comment that "[a]n overview of the entire record, rather than the limited view of bits and pieces which the majority has exploded like popcorn, convinces me that the directors made an inform[ed] business judgment which was buttressed by their test of the market."[141] Notwithstanding this comment, the *Trans Union* decision stands as a stern warning to corporate directors that the court will be paying increased attention to the degree to which they inform themselves prior to making business decisions, and that the safe

---

state of corporate merger activity is offered as a partial explanation for the *Trans Union* decision:

> One suspects that in these circumstances the [Delaware Supreme] Court has been anxious to identify a case which would permit it to reaffirm its standards and impose restraint on what it must view as a broad sacrifice of fiduciary obligation to market pressures. Thus, when a case, [*Trans Union*], came along presenting a large company put up for sale apparently at the whim of its CEO, where Board approval was forthcoming after a two-hour meeting, and where the paperwork seemed not always clearly to conform to the Board's intention, the Court may well have decided that a fine opportunity for corrective action was at hand.

139. 473 A.2d 805 (Del. 1984). *Accord* Pogostin v. Rice, 480 A.2d 619 (Del. 1984) (following the *Aronson* interpretation of the business judgment rule in the context of a corporate takeover).

140. The *Trans Union* decision implicitly comports with the recommendation of at least one commentator who has urged courts to "provide legal incentives to encourage the new board to adopt one or more of the empirically confirmed 'stop-and-think' procedures." *See* Haft, *New Board, supra* note 47, at 43.

141. *Trans Union*, 488 A.2d at 897 (McNeilly, J., dissenting).

harbor within the defense of the business judgment rule no longer remains sacrosanct.

V. Conclusion

The decision in *Trans Union* represents a forceful statement to corporate directors that the business judgment rule is not an impenetrable shield. Although it remains a viable defense to many actions, the rule does not confer immunity to corporate directors who do not make good faith efforts to acquire the information necessary to make informed business decisions.

The *Trans Union* decision does not alter the legal standard by which directors' duty of care is measured. That standard remains gross negligence. Consequently, ordinary business decisions which were reasonable, but proved to be incorrect, are still protected under the business judgment rule. However, the court has indicated that in the future it will examine the factual circumstances surrounding boards' decisions with a higher degree of scrutiny. Thus, corporate directors are on notice that Delaware courts expect decisions to be made on a fully informed basis, and that the safe harbor of the business judgment rule does not render their positions inviolable.

Steven F. Mones