TRANS UNION: A NAILED BOARD

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I. INTRODUCTION

The Delaware Supreme Court has dramatically confirmed that even an experienced board of directors that has taken action on a merger proposal over a span of three board meetings and presented the agreement to shareholders for their consent cannot take for granted that at day’s end the business judgment rule will be available to provide shelter. In Smith v. Van Gorkom, the court held that the action of the directors of Trans Union corporation approving a cash-out merger was not an informed business judgment, and that as a consequence the bulwark of the business judgment rule was not available as a refuge from liability. Moreover, the normally curative effect of a favorable shareholder vote was vitiated by a finding that the board had violated its duty of candor by inadequate proxy statement disclosures.

This article reviews the elements of the business judgment rule and the duty of candor under Delaware law. It analyzes the Trans Union court’s application of those elements to the actions taken or omitted by the Trans Union Board. In the course of this analysis, the article examines the treatment that fairness opinions of investment bankers have received in recent decisions by Delaware courts. In addition, in the context of the proxy rules promulgated under the Securities Exchange Act of 1934, it considers the effect on deficiencies in the board’s prior judgment of shareholder ratification of the merger agreement. It also examines the right, which Trans Union puts into question, of a board to revise a prior recommendation to shareholders to approve a merger agreement. The article then sets forth guidelines which, if followed, should enable a board of directors whose action has been challenged to demonstrate that its judgment was an informed one. In the absence of fraud or self-dealing, the protections of the business judgment rule will then be available.


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1. 488 A.2d 858 (Del. 1985).
II. The Business Judgment Rule

The business judgment rule gives "recognition and deference to directors' business expertise when exercising their managerial power under § 141(a)" of the Delaware General Corporation Law. It is "primarily a tool of judicial review," and the availability and application of the rule have frequently been the subject of review by the Delaware Supreme Court. As a result, the rules governing application of the business judgment rule under Delaware law are well-established. The business judgment rule is a presumption that the directors of a corporation "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company when making a business decision." Only "disinterested directors" who have properly fulfilled their "duty to inform themselves, prior to making a business decision" and acted "with requisite care in the discharge of their duties" may avail themselves of the protection of the business judgment rule. Under the rule, "director liability is predicated upon concepts of gross negligence," and the party challenging action taken by a board of directors carries the burden of rebutting the presumption in favor of the challenged action.

The Trans Union court did not depart from the established rules. It simply applied them to a factual record from which there are lessons to be learned. The plaintiffs in Trans Union contended that the decision of the Trans Union Board to approve the sale of the

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3. Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981). Section 141(a) of the Delaware General Corporation Law provides:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.


6. Aronson, 473 A.2d at 812.

7. Id.

8. Id.
company was “uninformed.” The court recognized that the business judgment rule presumes that the board of directors acted on an “informed basis.” It drew upon the “gross negligence” standard of Aronson v. Lewis and ruled that to overcome the presumption and establish the basis for liability, the plaintiffs had to show that the directors had been “grossly negligent” in failing to inform themselves “of all material information reasonably available to them” when deciding to approve the merger agreement.9

III. The Trans Union Case

The Trans Union plaintiffs filed their class action lawsuit in December of 1980 after Trans Union’s Board had approved the sale of the company to a wholly-owned subsidiary of Marmon Group, Inc. in a cash-out merger. The defendant directors argued that their approval of the merger agreement was entitled to protection under the business judgment rule. After trial, the court of chancery concluded that the board had acted in an informed manner so as to be entitled to the rule’s protection, and that the shareholders who approved the merger had been “fairly informed.”10 The Delaware Supreme Court in a 3-2 split decision, after reviewing the events and circumstances preceding and following the board’s approval of the merger agreement, disagreed. The majority found the chancellor’s rulings “clearly erroneous.”11 Two justices authored dissenting opinions.12

Trans Union’s Board first voted to accept the merger agreement in a specially called meeting held on September 20, 1980. Prior to that Saturday meeting, the board had never considered the sale of the company on either a going concern basis or in a liquidation. Indeed, prior to the meeting, only Van Gorkom, Trans Union’s chairman and chief executive officer, and one other officer-director, Bruce Chelberg, the company’s president, knew that the sale of Trans Union was to be discussed.13 Without consulting the board or any member of senior management, save the company’s controller (who was asked to make a calculation of a leveraged buy-out at a price of $55 per share, and on assumptions picked by Van Gorkom),

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9. Trans Union, 488 A.2d at 872.
11. Trans Union, 488 A.2d at 864.
12. Justices McNeilly and Christie filed dissenting opinions. Id. at 893, 898.
13. Id.
the chief executive initiated the sale negotiation. This occurred at a meeting he orchestrated with Jay Pritzker (Pritzker), a representative of the prospective acquiror, at Pritzker’s home on September 13, 1980—one week before the board meeting.14 No document or other paper concerning the sale of the company was made available to the directors prior to the meeting, nor is there any clear evidence that any writing was presented to them at the meeting. An outside attorney whom Van Gorkom had retained the day before to advise Trans Union had a draft of the merger agreement at the meeting, but the record is at best unclear as to whether the directors were even permitted to review the draft at that time.15

Van Gorkom opened the September 20 meeting with a twenty minute oral presentation of the merger proposal. He described his negotiations with Pritzker and the terms of the cash-out merger proposal.16 He stated that: (1) a company Pritzker controlled would pay $55 in cash for all outstanding shares of Trans Union stock; (2) the merger proposal was subject to Pritzker’s obtaining any necessary financing by October 10, 1980; (3) Trans Union would be required to sell one million newly-issued shares of common stock at $38 per share, upon Pritzker’s exercise of an option that Trans Union would be obliged to grant to him as part of the deal, if Pritzker satisfied or waived the financing contingency; (4) Trans Union could receive, but not solicit, competing offers for ninety days following approval of the merger proposal (the “Market Test Period”); (5) the company could not furnish such competing offerors with nonpublic information about Trans Union; and (6) the board had to act upon the proposal by the following evening.17

Van Gorkom did not inform the board that he had proposed the $55 per share price to Pritzker or that he had selected that price because he believed it was one at which a leveraged buy-out of the company was financially feasible18—that is, that cash flow generated from operations and dispositions of assets would, on the assumptions he used, service debt and pay down borrowings at a rate that would

14. Id. at 866. The court pointedly observed that Van Gorkom owned 75,000 shares of company stock and was approaching mandatory retirement. Id. at 865.
15. Id. at 868 n.7.
16. An hour before the board of directors’ meeting, Van Gorkom met with Trans Union’s senior executives and informed them of his negotiations with Pritzker regarding the sale of the company. The court characterized the executives’ reaction as “completely negative.” Id. at 867.
17. Id. at 868.
18. Id.
persuade potential purchasers of the company that the selected price was supportable.19

Chelberg, Donald Romans, the chief financial officer of Trans Union, and James Brennan, the lawyer retained the day before, also spoke about aspects of the proposed transaction during the September 20 meeting. Chelberg, who had participated with Van Gorkom in some of the negotiations with Pritzker, supported Van Gorkom’s presentation and representations.20 Romans told the board that he had not participated in any of the negotiations with Pritzker and had only learned of the proposal that morning. He told the board that he had done some “studies” on the feasibility of conducting a leveraged buy-out of Trans Union at prices ranging from $50 to $65 per share, but that the studies were not intended to value Trans Union or derive a fair price for its sale.21 Romans did inform the board that he considered the $55 price to be “‘in the range of a fair price,’ but ‘at the beginning of the range.’ ”22 Brennan advised the board that a failure to accept the offer might lead to the directors’ being sued and that a “fairness opinion” was not required as a matter of law.23 In fact, according to the court, apart from the company’s historic stock market price (which the board “‘knew’ to be “undervalued”) and Van Gorkom’s long association with the company, “‘the record [was] devoid of any competent evidence that $55 represented the per share intrinsic value of the Company.’”24

The September 20 meeting lasted approximately two hours. The court characterized the record upon which the board acted as “‘nothing more than Van Gorkom’s statement of his understanding of the substance of an agreement which he admittedly had never read, nor which any member of the Board had ever seen.’”25 At the meeting’s conclusion, the board voted to accept the merger proposal. The $55 price constituted a 48% premium over the last available closing price of Trans Union stock and a 39% premium over the highest price

19. Id. at 865.
20. Id. at 869.
21. Id.
22. Id. At the senior executives’ meeting earlier in the day, Romans had objected that “the price was too low in relation to what he could derive for the company in a cash sale, particularly one which enabled us to realize the values of certain subsidiaries and independent entities. Romans apparently did not share this view with the Board.” Id. at 867 n.6.
23. Id. at 868.
24. Id. at 866.
25. Id. at 874.
at which the stock had traded at any time during the preceding six years. On the evening of September 20 Van Gorkom executed the merger agreement, still unread by him or any other director of Trans Union. On Monday, September 22, the company issued a press release announcing that it had entered into a “definitive” merger agreement. Within ten days of this announcement, dissent among senior management at Trans Union had become widespread and many threatened to resign. To quell the unrest, Van Gorkom and Pritzker agreed to several modifications to the merger agreement. On October 8, 1980, Trans Union’s Board approved the proposed amendments—this time the text was not only unseen, but it had not yet been drafted. The amendments, when signed two days later, proved to be “considerably at variance” from Van Gorkom’s representations to the board and “placed serious constraints on Trans Union’s ability to negotiate a better deal and withdraw from the Pritzker agreement.” At the October meeting, the board also authorized Salomon Brothers, Trans Union’s investment banker, to solicit other offers for the company during the remaining portion of the Market Test Period.

On October 9, a Trans Union press release announced: (1) all financing commitments necessary for consummation of the merger had been obtained; (2) Pritzker had exercised his option to acquire one million shares of Trans Union common stock; (3) Trans Union was now permitted to solicit competing offers for the company and had retained Salomon Brothers for that purpose; and (4) if a more favorable offer was not received prior to February 1, 1981, Trans Union’s shareholders would thereafter meet to vote on the Pritzker merger proposal.

As noted above, the shareholder suit which resulted in the opinion under discussion was commenced in mid-December of 1980. On January 21, 1981, Trans Union’s proxy statement for a February 10 shareholders’ meeting was mailed. Five days later, on January 26, Trans Union’s Board met for the first time since the suit had been filed. There was testimony that at this meeting the board “went back from the beginning. Everything was examined and reviewed.”

26. Id. at 869 n.9.
27. Id. at 869.
28. Id.
29. Id. at 870.
30. Id.
31. Id. at 887 n.31 (quoting testimony by defendant-director William B. Johnson).
The board unanimously confirmed its recommendation of the Pritzker merger to the shareholders.

Trans Union did not receive a more favorable offer prior to February 1, and on February 10, 1981, the Trans Union stockholders approved the Pritzker merger proposal. Of the outstanding shares, 69.9% voted in favor of the merger, 7.25% voted against it, and 22.85% were not voted.

The court held that the board's decision to accept the merger proposal was "uninformed" and not entitled to the protection of the business judgment rule. This holding was based on its finding that the directors: (1) were "uninformed as to the intrinsic value of the company"; (2) did not adequately inform themselves of Van Gorkom's role in forcing the sale of the company and establishing the $55 per share price; and (3) were, therefore, "grossly negligent" in approving the proposal "upon two hours consideration, without prior notice, and without the exigency of a crisis or emergency." The court also rejected the defendant-directors' arguments that either the January 26 board review or the February shareholders' approval of the merger exonerated the board of any wrongdoing. The court concluded that the proxy statement and supplemental statement distributed to the shareholders failed to disclose all material facts. Therefore, the shareholder vote was not an informed one.

IV. Unmasking an Uninformed Decision

The court ruled that Trans Union's directors had no information other than the company's stock market price "on which to base a determination of the intrinsic value of Trans Union as a going
concern."  

Although the $55 price greatly exceeded Trans Union’s stock market price, the court minimized the significance of this disparity as a validation of the fairness of the merger price. "The record is clear that before September 20, Van Gorkom and other members of Trans Union’s Board knew the market consistently undervalued the worth of Trans Union’s stock . . . ." The court also ruled that the existence of a premium alone was insufficient to demonstrate that the board’s decision had been “informed.”

The court recognized that under section 141(e) ‘‘directors are fully protected in relying in good faith on reports made by officers.’’

[37. Id. at 876. Although not expressed in these terms, what the court presumably means is a price which “fairness opinions” of investment bankers typically describe as ‘‘fair from a financial point of view.”

38. Id. The court’s rejection of the stock market price as an adequate basis for measuring the size of the premium is contrary to the growing acceptance in the courts and among the commentators of the efficient market theory. See, e.g., Sussman v. Lincoln Am. Corp., 578 F. Supp. 1041, 1058 & n.39 (N.D. Ill. 1984); Blackie v. Barrack, 526 F.2d 891, 907 (9th Cir. 1975), cert. denied, 429 U.S. 816 (1976); Mills v. Electric Auto-Lite Co., 552 F.2d 1239, 1247 (7th Cir.), cert. denied, 444 U.S. 922 (1977); Seaboard World Airlines, Inc. v. Tiger Int’l, Inc., 600 F.2d 355, 361-62 (2d Cir. 1979); Reingold v. Deloitte, Haskins & Sells, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,880, at 90,381 (S.D.N.Y. 1984). See also Gilson & Kraakman, The Mechanisms of Market Efficiency, 70 VA. L. REV. 549 (1984); Fischel, Use of Modern Finance Theory in Securities Fraud Cases, 38 BUS. LAW. 1 (1982). Under the efficient market theory, the stock market price of publicly traded companies is presumed to reflect all available information about the company, including its future prospects. Proponents of the efficient market theory maintain that the price at which a public company’s stock trades is the best estimate of value because it is based upon the market’s evaluation of all available information that may impact upon the stock’s market price. The theory is in fact embodied in dissenters’ rights statutes in many states, but it is not part of the fabric of Delaware’s statute as it applies to cash-out mergers. See Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). Had Trans Union been incorporated in Ohio, for example, where the Ohio appraisal statute, OHIO REV. CODE ANN. § 1701.85 (Page 1985), rejects the “intrinsic value” measure of Weinberger and adopts a market value approach, see, e.g., Vought v. Republic-Franklin Ins. Co., 117 Ohio App. 389, 390-91, 192 N.E.2d 323, 333-34 (Franklin Co. 1962); Parton v. Pure Oil Co., No. 9023, slip op. at 17 (Ohio Ct. App., Franklin Co., July 1, 1969), the efficient market theory could not easily have been cast aside.

39. Trans Union, 488 A.2d at 878. The court also rejected the directors’ argument that the adequacy of the $55 per share price was conclusively established during the Market Test Period. Rather than viewing the fact that no bids were submitted to the board during this period as validating the $55 per share price, the court concluded: “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 Trans Union’s Merger Agreement with Pritzker as amended October 10, 1980.” Id. at 885.

40. Id. at 874. Section 141(e) provides in pertinent part:

A member of the board of directors . . . shall, in the performance of
It concluded, however, that the defendants' contention, that Van Gorkom's and Romans' presentations at the September 20 board meeting were section 141(e) reports upon which they justifiably relied to support the $55 price, was erroneous. The court recognized that previously it had construed the term "report" in section 141(e) to include oral presentations of "informal personal investigations by corporate officers." The court questioned, however, whether Van Gorkom's or Romans' presentation could properly be deemed a section 141(e) report and concluded, in any event, that the section's "good faith" reliance requirement had not been met. The court ruled:

Considering all of the surrounding circumstances—hastily calling the meeting without prior notice of its subject matter, the proposed sale of the Company without prior consideration of the issue or necessity therefor, the urgent time constraints imposed by Pritzker, and the total absence of any documentation whatsoever—the directors were duty bound to make reasonable inquiry of Van Gorkom and Romans . . . .

The court not only found that "reasonable inquiry" had not been made, but also that if it had been, the board would have recognized the inadequacy of the factors on which it relied in approving the merger at the September 20 meeting. It ruled that "the record

his duties, be fully protected in relying in good faith upon the books of accounts or reports made to the corporation by any of its officers, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the board of directors . . . , or in relying in good faith upon other records of the corporation.


41. Cheff v. Mathes, 199 A.2d 548, 556 (Del. 1964) (reports of informal discussions with contacts in the business and financial community relating to another company's reputation as a liquidator).

42. Trans Union, 488 A.2d at 874-75. The court criticized Van Gorkom's presentation as "lack[ing] substance because [he] was basically uninformed as to the essential provisions of the very document about which he was talking." Id. at 875. It termed Romans' presentation "irrelevant to the issues before the Board since it did not purport to be a valuation study." Id.

As Justice McNeilly took pains to point out in his dissent, however, Trans Union's directors had reviewed a newly prepared five-year forecast at the July 1980 board meeting and, at the August 1980 meeting, "[t]he results of a comprehensive study of Trans Union made by The Boston Consulting Group" had been presented to them. Id. at 895. There is nothing in the opinions to suggest that either of these was discussed at the September 20 meeting, but surely the board was aware of both. Each was a "record" of the type encompassed by § 141(e).

43. Id. at 875 (emphasis added).
compels the conclusion that on September 20 the Board lacked valuation information adequate to reach an informed business judgment as to the fairness of $55 per share for sale of the Company."

The Trans Union court’s "reasonable inquiry" formulation may be harmonized with the chancery court’s application of section 141(e) in Kaplan v. Goldsamt. The Goldsamt court ruled that section 141(e) "fully protects" directors who rely "in good faith on reports made by an appraiser selected with reasonable care." Arguably, neither Van Gorkom nor Romans qualified as "appraisers selected with reasonable care" because they devoted only limited efforts to determine in a different context a fair price for Trans Union. However, insofar as the Goldsamt view of "good faith" is concerned, Trans Union may have narrowed the scope of the Goldsamt court’s statement that "[i]n the area of valuation, wide discretion is allowed to directors and as long as they appear to act in good faith, with honest motives, and for honest ends, the exercise of their discretion will not be interfered with by the courts."

The Trans Union court did not question the honesty or good faith of the Trans Union directors. Yet the court appeared to limit the discretion accorded to the Trans Union directors in the valuation of the company. Objective and tangible factors were given significantly more weight than was accorded to the judgment of a board of directors having approximately 120 years of combined experience as directors, access to the company’s most recent five-year forecast with its projection of income and cash flow for the next succeeding five years, and the business experience and judgment amassed in their individual careers.

In Goldsamt, unlike in Trans Union, the defendant directors had commissioned and received the opinions of two nationally known investment banking firms to support the price paid to acquire 550,000 shares of the company’s stock from a single shareholder. The Trans Union court did not, however, rule out the possibility that internally prepared valuations could serve as proper section 141(e) reports:

44. Id.
45. Id. at 878 (footnote omitted).
46. 380 A.2d 556 (Del. Ch. 1977).
47. Id. at 568 (emphasis added).
48. Trans Union, 488 A.2d at 875.
49. Goldsamt, 380 A.2d at 568.
50. But see supra note 13.
51. Trans Union, 488 A.2d at 893-98.
We do not imply that an outside valuation study is essential to support an informed business judgment; nor do we state that fairness opinions by independent investment bankers are required as a matter of law. Often insiders familiar with the business of a going concern are in a better position than are outsiders to gather relevant information; and under appropriate circumstances, such directors may be fully protected in relying in good faith upon the valuation reports of their management.\textsuperscript{52}

V. THE MEASURE OF A FAIRNESS OPINION

The \textit{Trans Union} court's comment about investment banker opinions may have a significance extending beyond the facts of the case. The suggestion that investment banker fairness opinions are not required as a matter of law to support an informed business judgment, while literally correct, should be viewed in the context of the recent hostility exhibited toward such opinions by the Delaware courts.\textsuperscript{53}

In \textit{Weinberger v. UOP, Inc.},\textsuperscript{54} the Delaware Supreme Court concluded that the majority shareholder tender offeror had not dealt fairly with the minority shareholders because, \textit{inter alia}, no disclosures were made concerning the circumstances under which Lehman Brothers, the investment banker retained by the target company, prepared and rendered its fairness opinion.\textsuperscript{55} The \textit{Weinberger} court criticized the speed with which Lehman Brothers prepared its opinion. The court attributed the reason for the speed to the timetable established by the majority shareholder, and it found that the Lehman Brothers' opinion was based on "rather cursory preparation."\textsuperscript{56}

The \textit{Weinberger} court held that the failure to disclose the circumstances under which the fairness opinion was prepared—so that "the impression was given UOP's minority that a careful study had been made, when in fact speed was the hallmark"—constituted a

\textsuperscript{52} \textit{Id.} at 876.
\textsuperscript{53} See \textit{Weinberger v. UOP, Inc.}, 457 A.2d 701 (Del. 1983); Joseph v. Shell Oil Co., 482 A.2d 335 (Del. Ch. 1984).
\textsuperscript{54} \textit{Weinberger}, 457 A.2d at 701.
\textsuperscript{55} \textit{Id.} at 712.
\textsuperscript{56} \textit{Id.} Lehman Brothers was retained on February 28, 1978, to render its fairness opinion. It delivered the opinion on March 6, 1978—four business days later. \textit{Id.} at 706.
breach of the duty of fair dealing owed by the majority shareholder to the minority. In reaching this conclusion, the Weinberger court appeared to discount entirely Lehman Brothers’ familiarity with UOP which had resulted from its having acted as UOP’s investment banker “for many years.” In its evaluation of the quality of the fairness opinion, the court also seemed to disregard the fact that the Lehman Brothers’ partner in charge of the firm’s preparation of its fairness opinion was a long time director of UOP.

What is particularly disturbing is that the Weinberger court measured the depth of the opinion by the length of the opinion writing process. The court either did not understand or refused to recognize that delivery of an opinion by a reputable firm is an affirmation that the firm believes it has done everything necessary to justify its conclusion. When it puts its name on the line, it does the same with its reputation. If it intends to limit the scope of its opinion for any reason, it will include qualifying language to indicate the caveat. The disclosures concerning the preparation of the opinion that the court mandated could only be “material” or “germane” if there were a demonstrable basis for contending that the quality of the opinion had been impaired as a result of “the rush imposed on Lehman Brothers.” Lehman Brothers, however, had not qualified its opinion in any manner because of the time constraint. The court’s “second-guessing” of Lehman Brothers’ ability to prepare its opinion in the time available to it opened the door not only to judicial examination of the time expended in an investment banker’s preparation of its fairness opinion, but also to examination of the type and quality of analysis the investment banker undertook in reaching its opinion. If “fairness opinions” of investment bankers are to be measured by a stopwatch, it is reasonable to suppose that legal opinions and opinions of geologists and other “experts,” although not necessarily within the scope of section 141(e), should be judged by the same standard.

57. Id. at 712.
58. Id.
59. The Trans Union court stated: [W]e are satisfied that in an appropriate factual context a proper exercise of business judgment may include, as one of its aspects, reasonable reliance upon the advice of counsel. This is wholly outside the statutory protections of 8 Del. C. § 141(e) involving reliance upon reports of officers, certain experts and books and records of the company.

Trans Union, 488 A.2d at 881 n.22.
More recently, in *Joseph v. Shell Oil Co.*,\(^6\) the Delaware Court of Chancery faulted disclosures made by a majority shareholder about a fairness opinion for a failure to disclose the time in which the opinion was prepared and the circumstances surrounding its preparation.\(^6\) But this time the review of the fairness opinion, delivered by Morgan Stanley & Co. (Morgan Stanley) in the context of another majority shareholder tender offer, did not stop with the clock. The *Joseph* court determined that the opinion Morgan Stanley delivered to the majority shareholder was deficient because "essential information needed by the appraiser if his appraisal was to have any meaning" was withheld by the majority shareholder.\(^6\) The court found that Morgan Stanley was "prevented from doing its job" because of the majority shareholder’s failure to provide it with, in the court’s view, necessary data.\(^6\) Morgan Stanley, however, did not complain that it was unable to render a meaningful fairness opinion on the basis of the information available. Although the opinion did indicate that it was based on publicly available information, Morgan Stanley did not otherwise qualify its opinion. Moreover, the Morgan Stanley opinion did value the very assets that the court concluded could not have been valued because of the information withheld. The *Joseph* court enjoined the majority shareholder tender offer until Morgan Stanley, a non-party, reviewed the data relating to the fairness of the tender price and, based upon such review, reissued its fairness opinion.\(^4\)

\(^{60}\) 482 A.2d 335 (Del. Ch. 1984).
\(^{61}\) Id. at 345.
\(^{62}\) Id. at 341.
\(^{63}\) Id. at 344.
\(^{64}\) Id. at 345. Following Morgan Stanley’s review of the data previously withheld, it concluded that its earlier opinion was correct and again opined that the tender offer price was fair. N.Y. Times, June 27, 1984, at D6, col. 1. Thereafter, the majority shareholder completed its tender offer and proposed a short-form merger. These actions did not go unchallenged. Recently, however, the Delaware Court of Chancery approved the settlement of class action lawsuits challenging the tender offer and proposed merger. *Joseph v. Shell Oil Co.*, No. 7450 (Del. Ch. Apr. 19, 1985). Under the settlement, tendering shareholders are entitled to an additional $2 per share and nontendering shareholders who waive their appraisal rights in connection with the proposed merger are entitled to $2 per share plus the merger price. *Id.* at 4. The merger price will be equal to the tender offer price of $58 per share. The court estimated that the class of tendering shareholders is entitled to receive approximately $155 million and the nontendering shareholders approximately $33 million under the settlement. *Id.* In addition, the defendants agreed to pay up to $15 million for attorneys fees and expenses. *Id.*
In view of the strict scrutiny given to the investment banker fairness opinions considered in the *Weinberger* and *Joseph* opinions, the *Trans Union* court's comment that it was not stating that fairness opinions by independent investment banks are required as a matter of law may be perceived by some as an invitation to companies involved in mergers or acquisitions to proceed without retaining an investment banker to render a fairness opinion. On the other hand, the result in *Trans Union* clearly indicates the importance of a responsible board's having some basis for evaluating the "intrinsic value" of an enterprise in reaching an "informed judgment" as to the appropriateness of a proposed business combination.

Given the "under the gun" timetable imposed by Pritzker (the board was given a thirty-six hour deadline) and *Trans Union*'s willingness to meet it, and accepting that a proper fairness opinion perhaps could not have been produced overnight, one may speculate as to whether the *Trans Union* court would have come to a different result had the *Trans Union* directors sought a postponement, failed in the effort, and reconvened the next day with an investment banker, generally familiar with the company, in attendance and offering "comfort." The directors' rush to capture the 48% premium over market that Pritzker offered might then have been transformed from a "vice" to a "virtue."

VI. UNINFORMED JUDGMENT—A DISEASE WITHOUT A CURE

The *Trans Union* directors raised a variety of arguments to the effect that the presumptions of the business judgment rule should protect them from liability even if they were uninformed as to the value of *Trans Union* when they approved the merger proposed on September 20, 1980. Although the court agreed that an originally

66. Id. at 887. In order for the participation of the hypothetical investment banker to provide "comfort," the banker's contribution would have to be judged from the vantage point of its impact on the directors' "informed" judgment rather than from the perspective of the quality of the banker's "work product."
67. Depending upon the method of calculation, the premiums may have been as little as 39% or as much as 62%.
68. These included the board's approval of amendments to the merger agreement in October of 1980; its efforts to attract other offers for the company during the market test period; its comprehensive review at the January 26 board meeting of the entire sequence of events from Van Gorkom's initiation of negotiations with Pritzker; and shareholder ratification by their February approval of the merger agreement. Id. at 882-88.
uninformed decision could be "timely cured so as to become informed and deliberate," it rejected each such argument.

A. Mea Culpa and the Duty of Candor

The last of these rejected "cures" will be discussed first. The final argument that the defendant-directors raised to avoid liability was that the shareholders' vote approving the merger agreement had the effect of "curing any failure of the Board to reach an informed business judgment in its approval of the merger." The court agreed that the board's failure to reach an informed business judgment in approving the merger was a voidable, rather than a void, act which would be cured by the vote of a majority of fully informed shareholders. The court concluded, however, that the merger vote did not "cure" the board's actions because Trans Union's stockholders were not fully informed of all facts material to their vote on the merger.

The court applied the disclosure rule established in Lynch v. Vickers Energy Corp. in reaching its conclusion that the shareholder vote was not informed. That rule, which has been frequently applied and is easily stated, requires "disclosure of all germane facts to the transaction at issue in an atmosphere of complete candor." The Lynch court defined "germane" as all "information such as a reasonable stockholder would consider important in deciding whether to sell or retain stock." The disclosures required under the duty of candor have been viewed as substantially equivalent to those required by the federal securities laws. Indeed, the definition of "germane" information was modeled on the United States Supreme Court's definition of "material" information under the federal securities laws as information to which "there is a substantial

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69. Id. at 881.
70. Id. at 889.
71. Id. at 890.
72. 383 A.2d 278 (Del. 1977).
73. Trans Union, 488 A.2d at 890 (citing Lynch, 383 A.2d at 281).
74. Lynch, 383 A.2d at 281.
75. See, e.g., Sussman v. Lincoln Am. Corp., 578 F. Supp. 1041, (N.D. Ill. 1984) (disclosures required under Delaware duty of candor are substantially identical to disclosures required under Rule 10b-5); Bershad v. Curtiss-Wright Corp., No. 5827 (Del. Ch. Oct. 25, 1982) (Delaware duty of candor and federal securities law disclosure standards are "essentially the same").
likelihood that a reasonable shareholder would consider it important in deciding how to vote."77

The Trans Union court appeared to affirm the substantial equivalence of the two standards, stating, "In reality, ‘germane’ means material facts."78 Immediately after advertizing to the identity of the tests, the Trans Union court proceeded to ignore the rulings of a number of federal disclosure cases by holding that the shareholder vote was uninformed because, inter alia, the Trans Union Board did not disclose that its decision approving the merger agreement had been uninformed (i.e., grossly negligent) and, thus, improperly taken.79 As both federal courts and Delaware state courts have previously recognized, disclosure of this type of information is not required under the federal securities laws.79 Not only do securities law claims based upon nondisclosures of alleged director breaches of duties owed to shareholders fall before the rule of Santa Fe Industries v. Green,80 but the federal courts rejecting these claims also appear to recognize the futility of requiring these disclosures:

[It] is bemusing, and ultimately pointless, to charge that directors perpetrated a “material omission” when they failed to (a) discover and adjudge faithless motives for their actions and (b) announce such a discovery in reporting the products of their managerial efforts and judgment. The securities laws, while their central insistence is upon disclosure, were

77. Trans Union, 488 A.2d at 890.
78. Id. at 890-91. The Court found the board’s disclosures deficient and in breach of the duty of candor because, inter alia, the board never disclosed to the shareholders that when it approved the merger it totally lacked any relevant valuation information; had not made any studies of the value of the company; had never before even discussed the inherent value of Trans Union; and did not assess the merger price offered under any valuation technique other than premium over market price. Id.
never intended to attempt any such measures of psycho-
analysis or reported self-analysis. The unclean heart of a
director is not actionable, whether or not it is "disclosed,"
unless the impurities are translated into actionable deeds
or omissions both objective and external.81

More recently and more succinctly, the Second Circuit made
the same point this way, stating, "The disclosure required by the
Act is not a rite of confession or exercise in common law pleading.
What is required is the disclosure of material objective factual
matters."82

No board is likely to disclose in a public document distributed
to shareholders that action it has previously taken was in violation
of its duty to shareholders. Under Trans Union, such a "confessional"
or "self-flagellating" disclosure will always be required to "cure" a
prior uninformed business judgment. Thus, ability to cure such a
judgment is more illusory than real.

B. The Effect of a Contract on Fiduciary Duty

Perhaps the most troublesome aspect of Trans Union is the court’s
disagreement with the board’s contention that its determination at
the January 26 board meeting to continue to recommend the merger
proposal to the shareholders cured its earlier uninformed decision
accepting the proposal. The court reasoned that at the time of the
January 26 meeting the board could not reverse its decision to
recommend to the shareholders that they vote in favor of the merger
proposal, or rescind the merger agreement, because it had already
executed the merger agreement.83 According to the court, by the
time of the January 26 meeting, the board had no choice but to
reaffirm the merger proposal. The directors contended that whatever
information the board lacked to make an informed judgment at the
September and October meetings was fully divulged to the entire
board on January 26 when the Pritzker merger was again approved.
The court acknowledged the principle "that a business decision by
an originally uninformed board of directors may, under appropriate
circumstances, be timely cured so as to become informed and de-

881, 887 (S.D.N.Y. 1969)).
82. Data Probe Acquisition Corp. v. Datatab, Inc., 722 F.2d 1, 5-6 (2d Cir.
83. Trans Union, 488 A.2d at 887-88.
liberate.” However, it held that the post-September conduct did not effect a cure because “the Board was mistaken as a matter of law regarding its available courses of action on January 26” and did not understand or give consideration to the only “legally viable” alternative to proceed on its earlier course. As the court formulated this alternative, it was to rescind the merger agreement, withdraw approval of the merger, and cancel the shareholder meeting. However, immediately after articulating this option, the court cancelled it out. It did so by narrowing the scope of the language of the October 10 amendment, which permitted a release from the merger agreement should a more favorable opportunity with a third party eventuate. The court concluded:

[I]n reality, the Board was not “free to turn down the Pritzker proposal” . . . . Indeed, short of negotiating a better agreement with a third party, the Board’s only basis for release from the Pritzker Agreement without liability would have been to establish fundamental wrongdoing by Pritzker. Clearly, the Board was not “free” to withdraw from its agreement with Pritzker on January 26 by simply relying on its self-induced failure to have reached an informed business judgment at the time of its original agreement.

It is instructive to examine the case cited by the Trans Union court to support its conclusion. In Wilmington Trust Co. v. Coulter, liability attached for the failure of the Trust Company to exercise proper care and judgment, first in negotiating a particular agreement to sell stock constituting the principal asset of a trust estate; second, in not withdrawing from that agreement

when it could legally have done so and when it became apparent that the shares in question could be sold at a

84. Id. at 885-86 (citing Muschel v. Western Union Corp., 310 A.2d 904 (Del. Ch. 1973)).
85. Id. at 887.
86. Id. at 886. The October 10 amendment to the Pritzker merger agreement included the following sentence: “It is the present intention of the Board of Directors of TU 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.” Id. at 886 n.29.
87. Id. at 888.
88. 200 A.2d 441 (Del. 1964).
much higher price, and, third, in failing to notify its Co-
Trustee . . . after [the date of execution of the contract]
and prior to receipt of his necessary written consent to the
agreement that a substantially higher price could be obtained
for the shares from a different purchaser."

The written consent of the co-trustee, like the approval of shareholders
to a merger agreement, was a condition to the consummation of
the transaction. To be sure, there were additional grounds on which
the Wilmington Trust Company could have withdrawn from the
commitment; and there was clearer evidence there than in Trans
Union that a better deal was possible. Nevertheless, in response to
the Trust Company’s argument that withdrawal would have subjected
it to the possibility of suit, the Wilmington Trust Co. court found that
until the co-trustee consented, the Trust Company ‘‘was not bound
to a valid contract but could have withdrawn from any commitment
during that period, if not with impunity against suit, certainly with
impunity against liability for breach of contract.’’"

Given the ongoing nature of the proxy solicitation process under
the proxy rules, the provisions of the merger agreement, the
requirement of Delaware law that an informed shareholder electorate
approve the proposed merger, and the fact that the shareholder
meeting date, February 10, was more than two weeks away, the
Trans Union Board did have a choice on January 26. If the board
had, in fact, concluded at that time that it could no longer continue
to recommend the merger, the failure to report such a change of
heart to the shareholders would, at the very least, raise serious doubts
about the directors’ compliance with the continuing solicitation pro-
cess of the federal securities laws. Delaware law conditions a share-

89. Id. at 443.
90. See Horvitz v. Southwest Forest Indus., Inc., No. CV-R-84 467-ECR
(D. Nev. Mar. 20, 1985) (‘‘The board possesses discretion to negotiate the terms
of a proposed merger agreement, although the ultimate decision whether to accept
or reject it rests with the stockholders.’’); Jewel Cos. v. Payless Drug Stores
Northwest, 741 F.2d 1555 (9th Cir. 1984); Conoco, Inc. v. Seagram Co., 517 F.
Supp. 1299, 1303 (S.D.N.Y. 1981), aff’d without opinion, 661 F.2d 907 (2d Cir.
91. Wilmington Trust, 200 A.2d at 454.
92. Justice McNeilly’s dissent recognizes that ‘‘when additional information,
which is a reasonable shareholder would consider important in deciding how to
vote, comes to light, that information must be disclosed to stockholders in sufficient
time for the stockholders to consider it.’’ Tran Union, 488 A.2d at 898.
93. See supra note 86 and infra note 96.
94. See SEC Exchange Act Release No. 34-16343 (Nov. 27, 1979), reprinted in
holder vote on the adoption of a board resolution "approving an agreement of merger." This is simply not relevant, however, to the question of whether, on the hypothetical propounded, a proxy statement that continued to recite a subsequently recanted recommendation would or would not be materially misleading.

This element of the Trans Union decision implied that a board of directors may contract away its fiduciary duty to advise shareholders whether to accept or reject a merger proposal at the time it signs a merger agreement. The validity of this implication is questionable. The Restatement (Second) of Contracts recites the familiar doctrine that "[a] promise by a fiduciary to violate his fiduciary duty . . . is unenforceable on grounds of public policy." Moreover, the Trans Union court did not, in this context, even consider the effect of the express contractual reference to a "competing fiduciary obligation to the shareholders" in section 2.03 of the merger agreement. In Jewel Cos. v. Pay Less Drug Stores Northwest, the Ninth Circuit found no breach of fiduciary duty under California law for a board, having decided that a proposed merger transaction is in the shareholders' best interests, to agree to refrain from entering into competing contracts until shareholders could consider the merger proposal. The focus of the court's analysis was that:

shareholders retain the ultimate control over the corporation's assets. They remain free to accept or reject the merger

95. Restatement (Second) of Contracts § 193 (1979).
96. Section 2.03 of the merger agreement provided in pertinent part: "The Board of Directors shall recommend to the stockholders of Trans Union that they approve and adopt the Merger Agreement . . . GL acknowledges that Trans Union directors may have a competing fiduciary obligation to the shareholders under certain circumstances." This language was cursorily dismissed in the context of the court's discussion of the "Market Test Period" on the ground that it did not provide a basis for either acceptance of a better offer or distribution of proprietary information to third parties. Trans Union, 488 A.2d at 879. To the extent that the court considered the language of the October 10 amendment, it did so only in the context of whether it provided a ground for release from the Pritzker merger agreement. See supra note 86. The court did not consider the effect of the amendment on the "competing fiduciary obligation" referred to in § 2.03 as such obligation relates to the board's responsibility to continue or withdraw its recommendation to shareholders. Justice McNeilly's dissent, after pausing to state that the language "is not artfully drawn," notes that the clear intention was to make specific the right the directors assumed they had to accept a better offer "and not to recommend the Pritzker offer in the face of a better one." Trans Union, 488 A.2d at 895.
97. 741 F.2d 1555 (9th Cir. 1984).
98. Jewel Cos., 741 F.2d at 1563.
proposal presented by the board, to respond to a merger proposal or tender offer made by another firm subsequent to the board's execution of exclusive merger agreement, or to hold out for a better offer. Given the benefits that may accrue to shareholders from an exclusive merger agreement, we fail to see how such an agreement would compromise their legal rights."  

However, in arriving at this conclusion, the *Jewel Cos.* court first observed that "[e]ven after the merger agreement is signed a board may not, consistent with its fiduciary obligations to its shareholders, withhold information regarding a potentially more attractive competing offer."  

It also added the following significant footnote: "We do not decide the question whether upon the unsolicited receipt of a more favorable offer after signing a merger agreement the board still must recommend to its shareholders that they approve the initial proposal." This footnote should be read together with two prior observations made by the court: (1) "We do, of course, recognize that a board may not lawfully divest itself of its fiduciary obligations in a contract"; and (2) to permit a board of directors to decide that a proposed merger transaction is in the best interest of its shareholders at a given point in time, and to agree to refrain from entering into competing contracts until the shareholders consider the proposal, does not conflict in any way with the board's fiduciary obligation.  

Viewing the open question in this context invests the footnote with an additional level of portentousness.

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99. Id. at 1564.
100. Id. See also Horwitz, slip op. at 5 ("Even after a proposed [merger] agreement has been negotiated by the board, its fiduciary obligation to its shareholders requires the providing to them of information regarding competing offers.").
102. Id. at 1564. See also Ray v. Homewood Hosp., 223 Minn. 440, 442, 27 N.W.2d 409, 411 (1947) (The court held that directors "may not agree to abstain from discharging their fiduciary duty"; and that "[a]n agreement by which individual directors, or the entire board, abdicate or bargain away in advance the judgment which the law contemplates they shall exercise over the affairs of the corporation is contrary to public policy and void . . . ").
103. Jewel Cos., 741 F.2d at 1563 (emphasis added).
104. See also Great W. Producers Coop. v. Great W. United Corp., 613 P.2d
Whatever the enforceability may be of an agreement to refrain from executing a competing agreement, the flip side of which raises questions as to tortious interference with the merger agreement,"\textsuperscript{106} neither 
Jewel Cos. nor any other case has specifically resolved the proxy solicitation question that 
Trans Union so blithely subsumes. If the court is wrong in its view that the Trans Union Board had no real choice on January 26 but to reaffirm its earlier approval of the merger agreement, its conduct at the January meeting takes on an entirely different cast. A supplemental proxy statement was in fact mailed on or about January 27. The solicitation period was at best less than a week old, the original proxy statement having been mailed under date of January 21. The emphasis which the court put on what the board did not know on September 20 may, therefore, have been misplaced. The court's "throw away" comments that "in an appropriate case, an otherwise candid proxy statement may be so untimely as to defeat its purpose of meeting the needs of a fully informed electorate,"\textsuperscript{106} and "in an appropriate case, a completely candid but belated disclosure of information long known or readily available to a board could raise serious issues of inequitable conduct,"\textsuperscript{107} would have assumed substantially greater importance if closer attention or more sympathetic consideration had been given to what the board knew by January 27 when the supplemental proxy material was distributed. 
Trans Union might then have been the "appropriate case" in which to address those issues.

Although Whittier could not have had Trans Union's directors

\textsuperscript{873, 878-79 (Colo. 1980), where the Supreme Court of Colorado, in interpreting § 271(a) of Delaware's General Corporation Law, also concluded that contract rights do not override the fiduciary duty of directors. It held that the parties to a contract for the sale of all or substantially all of the assets of defendant United "did not intend that the 'best efforts' clause would impose on United's board of directors any obligation which would conflict with the directors' legal duties to the corporation's security holders . . . ." It therefore concluded that the clause did not bind United's board of directors to recommend security holder approval of the purchase agreement when, subsequent to the execution of the agreement and the directors' initial determination under § 271(a), the directors inquired into changed circumstances and determined, pursuant to the exercise of their independent good faith judgment, that the terms of the purchase agreement were no longer in the security holders' best interests. 105. Cf. Belden Corp. v. InterNorth, Inc., 90 Ill. App. 3d 547, 413 N.E.2d 98 (1980). 106. Trans Union, 488 A.2d at 893 (emphasis added). 107. Id. (emphasis added).}
in mind, his words are apt: "For of all sad words of tongue or pen, The saddest are these: 'It might have been!'" 103

VII. INFORMED DECISION-MAKING

"Might have been" aside, even if Trans Union fails to enunciate startling new black letter exceptions to the business judgment rule, it does illuminate the importance of directors' possessing and documenting the factual predicate upon which their action is based so as to be able to rebut a challenge that their decision was "uninformed." The recognition of a limited number of "guidelines" should ensure that the Trans Union standard is satisfied.

First, when the board is asked to approve a substantial transaction, the underlying documents relating to the transaction should, if practicable, be distributed prior to the meeting and, if this is not feasible, should be distributed and reviewed at the meeting. Where it is not possible even to distribute documents prior to (or at) the meeting, management should distribute a memorandum describing the important terms of the transaction. Even if such a memorandum is distributed, the director should fully investigate at the meeting the history of negotiations resulting in the proposal before them—being careful to ascertain the genesis of the important terms."

Second, when the board is asked to approve a business combination or the sale of the company (or a substantial part of the company), it should be furnished with all valuations of the company that management has prepared or commissioned that may have relevance to what a willing buyer is prepared to pay."

In addition, the basis for each valuation and the significant underlying assumptions should be explained. If, as with Trans Union, the company has no such current valuations, the board should give affirmative, on-the-record consideration to postponing its decision as to whether to accept a merger proposal until valuation information is available. If the decision is made to proceed without delay, the reasons for

108. J. WHITTIER, MAUD MULLER 12 (1867).
109. Part of the history should, when a meeting is called without "reasonable" prior notice of the reason for the meeting, include an explanation by (or inquiry of) management at the meeting as to why "reasonable" prior notice of the subject matter was not given. Similarly, if the board is asked to act upon a substantial proposal in a short period of time, management should state at the meeting why prompt action is required. The minutes should reflect the reasons given.
110. But see supra note 38 (jurisdictions where appraisal rights are measured by market values).
doing so should be persuasive and should be documented. Consideration should be given to obtaining an opinion of counsel to support a determination not to wait.

Third, each director should review the proxy statement (or at least a late draft) before it is mailed to shareholders and should confirm, perhaps in response to a questionnaire prepared by the company, that he knows of nothing material that has been misstated or omitted. Of course, the director should also bring his judgment to bear on any other aspect of the disclosure documents that his familiarity with the company and the transaction puts into question.

VIII. Conclusion

The Trans Union decision suggests that a board of directors' reliance on management in approving a proposal resulting in the sale of the company will be subjected to varying degrees of judicial scrutiny depending on the surrounding circumstances. More thoroughness and care will be expected from a board if its decision is made in the absence of a "crisis or emergency." The court's decision not to afford the protection of the presumptions of the business judgment rule on the facts before it does not signal a material narrowing of that rule. Although the decision did clarify the standard that a board of directors will be held to if its decision is challenged as uninformed, it did not alter the scope of the business judgment rule. Only where a board of directors has been "grossly negligent" in failing to inform itself of all material information reasonably available to it, will it be denied the protection of the business judgment rule on the ground that its decision was uninformed. Such a showing is not likely to be made if the board of directors adheres to the guidelines set forth above as an aid in its decision-making process.