TRANS UNION, BUSINESS JUDGMENT, AND NEUTRAL PRINCIPLES

BY WILLIAM T. QUILLEN*

INTRODUCTION

Certain reactions were predictable as soon as the reversal in the Trans Union case1 hit the street. Daniel R. Fischel, professor of law at the University of Chicago, would write a learned article critical of the decision from the perspective of a free market economist.2 Bayless A. Manning, former dean of the Stanford Law School, would pontificate wisely, and perhaps somewhat cynically, about the judicial process adding pragmatic insight for reflection and testing.3 Leo Herzel, dean of the Chicago corporate bar, would give a thoughtful, conservative lawyer’s perspective to a political climate.4 All of this leaves a somewhat empty feeling that there is little that can be added, especially by one who had, prior to the opinion, already drafted an article on the business judgment rule on the assumption that the opinion of the Delaware Court of Chancery would be affirmed. Even the clear factual response to the opinion was eloquently stated by Arthur M. Borden, nationally recognized professor-practitioner, in a publication released within a month of the supreme court opinion.5 The commentary has been harsh, and damage has been caused by the wake of the Trans Union case. Extensive comment invariably leads to more comment. But, when


5. Borden, First Thoughts on Decision in Delaware on Trans Union, N.Y.L.J., Feb. 25, 1985, at 1, col. 3 [hereinafter cited as Borden, First Thoughts].

(465)
invited, it is hard not to make an effort at contribution, especially with the opportunity for a broad retrospective look.

Even if one views the Trans Union decision as an egregious error, it is important to put it in perspective in terms of both the immediate and long-term effects. Except for the severe personal and financial agony suffered as a result of the supreme court's holding that the trial court committed reversible error in applying the business judgment rule, there is little lasting legal significance to the Trans Union case. Trans Union remains primarily a fact case. To the extent that critics see legal mistakes, they are largely in areas of application; and, in one major instance, a legitimate and significant fear has already been relieved in a subsequent case. To the extent that critics see legal mistakes, they are largely in areas of application; and, in one major instance, a legitimate and significant fear has already been relieved in a subsequent case. To the extent board procedures cause legal concern, much can be avoided by simple advance planning, albeit at some expense which many might consider needless. The point is that Trans Union does pale and does not loom large in the long term nor even from a vantage point only several months later. While the case has impact, it appears to be destined to be distinguished factually more than it will be relied upon legally.

Initially, it is important to temper critical comment in light of the magnitude of the problems faced by the courts in deciding complex corporate cases. The Delaware Court of Chancery, and increasingly the Supreme Court of Delaware, are faced with corporate cases of vast proportion. Often there is little time for the luxury of deliberation, let alone any reflection. It is often forgotten that the need for a decision is almost as important as the decision itself. It is amazing that the Delaware courts find time to hear, let alone decide, the issues placed before them. Certainly no other state system is taxed in the same degree. And, I submit, no other trial and appellate system functions as well. Our chancellors and justices work hard and their product is excellent. It is doubtful that, on the whole, second-guessing commentators do any better—this one included. Nevertheless, reflective thought ought to be given the lingering furor still surrounding the Trans Union case. And some effort ought to be made to analyze the cases from the current year in terms of legal principles relating to business judgment.

It is, of course, customary to judge these corporate battles in journalistic terms of result, either promanagement or antimanage-

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6. See Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); see also text accompanying infra note 74.
ment, victory or defeat. In this sense, a case is important as long as it is newsworthy and the subject of public reaction. But for lawyers, and to an extent greater than is generally realized, for businessmen as well, that standard of judgment is simply inadequate. For lawyers, it is the difference between temporary emotions and permanent values. Winning is vital, but principle does count.

I am surprised to find that reflection on Trans Union takes me back twenty-six years to Herbert Wechsler and "neutral principles." Wechsler himself indicated that he only stated the obvious. But there is rich reward in his simplicity:

An attack upon a judgment involves an assertion that a court should have decided otherwise than as it did. Is it not clear that the validity of an assertion of this kind depends upon assigning reasons that should have prevailed with the tribunal; and that any other reasons are irrelevant? . . . I revert then to the problem of criteria as it arises for both courts and critics—by which I mean criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will.

Wechsler dismissed those who perceive in law only the element of fiat as well as those who make virtue the test of legal interpretation. To these ad hoc evaluations, he stated:

The man who simply lets his judgment turn on the immediate result may not, however, realize that his position implies that the courts are free to function as a naked power organ, that it is an empty affirmation to regard them, as ambivalently he so often does, as courts of law . . . .

Then with simple grace, Wechsler elevated us to a noble calling:

I put it to you that the main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved . . . A principled decision, in the sense I have in mind, is one that rests on reasons

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8. Id. at 11.
9. Id. at 12.
with respect to all the issues in the case, reasons that in
their generality and their neutrality transcend any immediate
result that is involved.\textsuperscript{10}

Taking our clue from Wechsler's "neutral principles," how do
we evaluate \textit{Trans Union} and other recent cases and place them in
immediate and long-term perspective?

\textbf{I. \textit{Trans Union}: Essence and Excess}

Turning first to the fundamentals of \textit{Trans Union},\textsuperscript{11} I need to take
one presumptuous step for my thesis. The forty-one pages of the
published opinion must be summarized. In \textit{Trans Union}, the justices
of the supreme court basically expressed two views of the role of the
board: the majority view and the dissenting view of Justice Mc-
Neilly.\textsuperscript{12} But, at only mild risk of oversimplification, the essence of
each view can be summarized in a single somewhat generalized
sentence.

The majority said a board of directors, without any significant
particularized internal or external advanced study, and without prior
agenda notice, cannot rely on the protection of the business judgment
rule in approving a $700 million sale of 100\% of the corporation
in a two hour meeting.\textsuperscript{13}

Justice McNeilly said an unusually knowledgeable board, com-
posed of half inside and half outside directors, who are acutely aware
of the company and its prospects, and fresh from a general review
of a five year forecast and a consultant's study, is "more than well
qualified to make on the spot informed business judgments concerning
the affairs of [the company] including a 100\% sale of the corpo-
racion," and that the directors are entitled to the protection of the business
judgment rule in so doing.\textsuperscript{14}

\textsuperscript{10} \textit{Id.} at 15, 19 (emphasis added). This theory of "neutral principles" serves
as a theme throughout this article. It also forms part of the article's title.

\textsuperscript{11} Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

\textsuperscript{12} See \textit{id.} at 893-99 (McNeilly, J., dissenting). No slight is intended to Justice
Christie's single paragraph dissent based on scope of review. \textit{Id.} at 898 (Christie,
J., dissenting). Indeed, it may be the best opinion of all since it is based on well-
established principles of appellate review. But, largely because of its admirable
appellate restraint, the Christie opinion does not directly state a policy position on
board activity. It does, however, clearly permit the trial court to adopt the McNeilly
view.

\textsuperscript{13} \textit{Id.} at 874.

\textsuperscript{14} \textit{Id.} at 899 (McNeilly, J., dissenting). Justice McNeilly stressed the prag-
matic realities of the world in which these professional businessmen dealt.
I confess a clear preference for the McNeilly decision. It seems to me that it is essential, even in major business judgment decisions, to permit knowledgeable directors, especially when acting under imposed time deadlines, to apply their general knowledge of the corporation's business and affairs to a specific transaction. In a real sense that is precisely why they are paid. The record is undisputed that the Trans Union directors involved in this case were unusually knowledgeable.\(^{15}\) Such directors may well be the most knowledgeable people in the world on the business and affairs of the corporation. It also seems that to suggest that any two-day study of the problem by others, whether internal or external, would add meaningfully to the knowledge of such directors, is to place form over substance and to add what is primarily window dressing.\(^{16}\)

But, having disclosed this bias, further disagreement with the essence of the decision adds little. The majority view has been severely criticized for its "dotting the is, crossing the ts" procedural approach and for its lack of deference to business managers. However, one must wonder, if the majority opinion had merely consisted of a one sentence statement such as suggested above, whether it would have caused all the furor. In short, it is worth exploring whether it is the opinion rather than the decision which has created the depth of the criticism.

If the majority had confined itself to the essence of its decision, the decision itself, whether absolutely right or egregiously wrong, would have been better supported by principled reasoning.\(^{17}\) If my summary of the majority opinion is fair and accurate, the principled defense of the majority opinion could even be expressed in the following more generalized and neutralized manner.

In the modern public corporation, the process of decision mak-

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15. See the recitals of the board members' qualifications in both the majority opinion and in Justice McNeilly's dissent. Id. at 868, 894-95. The five inside directors had collectively been employed by Trans Union for 116 years of combined experience as directors. The five outside directors had 53 years of cumulative service as Trans Union directors.

16. The majority noted that none of the directors "was an investment banker or trained financial analyst." Id. at 868. But the court has previously been properly alert to the limitations of the value of investment advice given in a short time frame. See Weinberger v. UOP, Inc., 457 A.2d 701, 712 (Del. 1983). Nor do experienced business people generally yield or defer at all to a short look by investment bankers, even investment bankers with familiarity with the business.

17. The concept of principled decision making in this article is defined by Wechsler. See Wechsler, supra note 7, at 15, 19. The concept focuses only on reasoning and assumes total propriety by the decision maker.
ing, as well as the quality of the decision, is important. Therefore, in order to receive the protection of the business judgment rule, and as a part of its duty of care, a board, regardless of its general background, must focus, particularly through advance specific investigation, on the precise proposition at issue before making a major corporate decision.

Such a principle is defensible. The rule is applicable generally and is even pragmatic since its application eliminates dependence on a particularized case-by-case examination of the knowledge of each board member, either individually or collectively. At one point in the opinion, the reader senses a neutral, principled approach, but the court seems strangely uncomfortable in relying on it as if it were insufficient. In general, it is not the approach taken by the majority. If the resolution of the major issue in the case is defensible as principled, one should inquire specifically why the opinion has failed to garner support for that end result. The reason seems clear.

The majority’s approach appears to many to be unprincipled, that is, without generality and neutrality transcending the immediate result. One critic harshly commented that “the decision seems to reflect nothing but the court’s need to force haphazardly chosen defendants to repent for the state of Delaware’s pro-business ways.” The problem is that the opinion does not point to essence and is burdened by overkill and by needless, and often erroneous, legal and factual excess.

The legal and factual criticism is not easy to catalogue briefly.

18. See Trans Union, 488 A.2d at 877-78, where the majority stated: None of the directors, Management or outside, were investment bankers or financial analysts. Yet the Board did not consider recessing the meeting until a later hour that day (or requesting an extension of Pritzker’s Sunday evening deadline) to give it time to elicit more information as to the sufficiency of the offer, either from inside Management (in particular Romans) or from Trans Union’s own investment banker, Salomon Brothers, whose Chicago specialist in merger and acquisitions was known to the Board and familiar with Trans Union’s affairs. The majority felt compelled by this finding to conclude that the board lacked adequate valuation information at its September 20 meeting. Therefore, the board could not have reached an informed business judgment that $55 per share was a fair price for the sale of the company.

19. Herzel, supra note 4, at 14, col. 4. One reason for this impression was the majority’s unnecessary insistence that every major point in the opinion below be overturned. Since the majority’s chief focus was on the September 20 board meeting, it was not necessary to negate every action thereafter. In short, the majority, having chosen its own attack, did not have to play the game plan laid out by the chancellor. See particularly, Borden, First Thoughts, supra note 5, at 4, col. 2-4, on the market test and October 10 amendment.
But it generally falls within three categories: (1) legal doctrine, (2) market knowledge, and (3) argumentative tone. It is useful to touch briefly on all three with emphasis on the first both to illustrate and test the criticism. The critics certainly do have a point.

To emphasize only selected items involving primary legal doctrine, the majority opinion can be subjected to legal criticism on three specific matters: (1) relying erroneously on *Gimbel v. Signal Cos.* to pierce the business judgment methodology standard, (2) disregarding appellate review standards established by *Levitt v. Bouvier* to engage in appellate fact-finding; and (3) ignoring long-standing federal disclosure standards set forth in *TSC Industries, Inc. v. Northway, Inc.* to deny the effectiveness of stockholder ratification. These three legal criticisms are significant in terms of principled decision making.

The reliance on the chancellor’s opinion in *Gimbel* is perhaps ultimately unimportant because the supreme court is of course free to disregard what the then-chancellor said or did. But, giving all deference, even the supreme court should not be free to miscite what the chancellor said or what he did to justify what it is now saying and doing. The chancellor in *Gimbel*, in the context of a limited preliminary injunction affidavit record, was openly wrestling with the potential relationship of a “hasty method” and a tentatively “shocking” result. He was indeed playing in the *Trans Union* ballpark. But plainly the chancellor concluded that considerations of method did not “raise at this stage a reasonable probability that the plaintiff would be able to pierce the ‘business judgment’ standard” and did not “justify the conclusion that the ‘directors acted so far without information that they can be said to have passed an unintelligent

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21. 287 A.2d 671 (Del. 1972). This case is heavily relied on in both the majority and dissenting opinions.


23. Other legal matters subject to criticism, such as the majority’s erroneous reliance on the hearsay rule, and the majority’s objection to the failure of a lawyer to testify “even though his firm participated in the defense of this action” seem to be unnecessary argumentative props. See *Trans Union*, 488 A.2d at 880. In some other disputed instances, such as the majority view that a board must continue to recommend a merger or rescind it, the majority is merely making a statutory interpretative choice within the court’s province. See id. at 888; see also infra note 78 and accompanying text.

and unadvised judgment." 25 The question therefore became one of value, whether the sale price was "shocking," indicating a "gross disparity" from a fair market price, and thus "reckless" action. In short, far from piercing the business judgment methodology standards for being informed, the chancellor assumed such standards governed the Gimbel case. 26

The supreme court in Trans Union turned this approach upside down by quoting the chancellor's statement of the question, whether the board was permitted "the opportunity to make a reasonable and reasoned decision," 27 rather than his resolution of the issue presented at the preliminary injunction stage. So the case, and really the only holding, which is cited to support the piercing of the business judgment rule due to a decision by an uninformed board, actually supports the contrary proposition. Under any critical standard, such use of precedent fails the test of principled decision making.

There has been, in particular, much criticism of the Trans Union decision for appellate fact-finding. Under Delaware law, as the majority said, "[i]t is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact." 28 It would be overly burdensome to review all of the examples of alleged appellate fact-finding. Two examples are particularly noteworthy as they seem to do violence to the "clearly erroneous" rule at two levels. One is a basic factual finding—that of the intention of the contracting parties, and the other is an ultimate factual finding—that of fairly informed stockholders.

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25. Id. (quoting Mitchell v. Highland-Western Glass Co., 19 Del. Ch. 326, 329-30, 167 A. 831, 833 (1933)). It is submitted that the Mitchell test gives directors broader leeway than the Trans Union result.

26. Id. The chancellor wrote: "The method does not appear so bad on its face as to alter the normal legal principles which control."

27. Trans Union, 488 A.2d at 880 (quoting Gimbel, 316 A.2d at 614-15).

28. Id. at 871 (quoting Levitt, 187 A.2d at 673). While Delaware trial courts have not adopted Fed. R. Civ. P. 52, the "clearly erroneous" standard has been effectively adopted. See Levitt, 287 A.2d at 673. The Trans Union majority applied the Levitt standard to the trial court's findings in this case and held that they were "not the product of a logical and deductive reasoning process." Trans Union, 488 A.2d at 871. Speaking generally, it should be noted that, for the client constituency, and perhaps the lawyer constituency as well, nothing affects the perception of principled decision making more than fact finding. For precedential purposes the facts are what the court says they are. But, for the litigants in the battle of an individual case, the "true facts" are perceived on a personal, and not a deferential, basis. Thus, no function reflects more favorably on respect for the courts than accurate and circumspect fact finding.
First, the directors contended that at the meeting of September 20, two conditions were attached to the merger agreement, one of which reserved to Trans Union the right to accept and recommend to the shareholders any better offer that was made during the market test period, and another which permitted Trans Union to distribute information to competitive bidders. The supreme court, acting as fact-finder, obviously did not accept the fact that the two modifications were made. In its rejection, the court disregarded the testimony of all the witnesses on the point. But more curious than that was the way the majority dealt with the express acknowledgment in the agreement itself that the directors "may have a competing fiduciary obligation to the stockholders under certain circumstances." This language in the agreement clearly related to the board recommendation of approval to the stockholders. All of the opinions dealing with the point—the majority opinion, Justice McNeilly's dissent, and the chancellor's opinion in the lower court—looked to extrinsic evidence to interpret the quoted language. The chancellor relied on the testimony of the opposite party to the contract, Mr. Pritzker, to show an intent to provide the board of Trans Union with the right to recommend to its stockholders that a higher bid be accepted if one was forthcoming. Justice McNeilly said the evidence was clear "that the intention underlying that language was to make specific the right that the directors assumed they had, that is, to accept any offer that they thought was better and not to recommend the Pritzker offer in the face of a better one."  

The majority opinion, expressly contrary to the finding of fact below, held that the Trans Union Board was not justified in concluding that the Pritzker offer could be rejected in favor of a sub-

29. Trans Union, 488 A.2d at 879. The majority was clearly bothered by the absence of a contemporary record.
30. Id. at 880. The court stated, "[N]otwithstanding what several of the outside directors later claimed to have 'thought' occurred at the meeting, the record compels the conclusion that Trans Union's Board had no rational basis to conclude . . . that the Board's acceptance of Pritzker's offer was conditioned on [the two modifications]." Id.
31. Id. at 879.
32. Thus, Delaware courts clearly do not find that the "fiduciary obligation" language is facially self-explanatory.
34. Trans Union, 488 A.2d at 895. This is a pivotal factual difference between the majority opinion and Justice McNeilly's dissent. Although Justice McNeilly agreed with the majority's analysis of the business judgment rule, he concluded that it was "the application of that rule to these facts which is wrong." Id. at 897.
sequent higher offer.\textsuperscript{35} With regard to the express language in the agreement, the majority, on appeal, said the logical witness to call concerning the construction of the clause was Trans Union’s outside attorney. Since he was not called, “the logical inference” was permitted that “his testimony would not have been helpful” to Trans Union.\textsuperscript{36} Thus, the majority, from an appellate perch, rejected all the express testimony on the contract construction issue, including the testimony of both sides to the contract as to its construction, and the finding of the trial judge, in favor of a permissible inference based on its unsubstantiated appellate view that a missing witness was the logical one to confirm the construction of the clause. Such a factual finding does not generate confidence in the existence of principled decision making.

Secondly, as to an ultimate finding: the chancellor found that the stockholders of Trans Union were fairly informed as to the pending merger;\textsuperscript{37} Justice McNeilly concluded “that the proxy materials adequately complied with Delaware law in informing the shareholders about the proposed transaction and the events surrounding it.”\textsuperscript{38} Justice Christie, also in dissent, said on appeal “that the record supports a conclusion that the defendants acted with the complete candor required by \textit{Lynch v. Vickers Energy Corp.}”\textsuperscript{39} The majority, however, found a breach of fiduciary duty of candor for failure to make true and correct disclosures.

While the majority purported to act under the “clearly erroneous” standard,\textsuperscript{40} it concluded its discussion of this portion of the opinion with the following conclusion: “The burden must fall on defendants who claim ratification based on shareholder vote to establish that the shareholder approval resulted from a fully informed electorate. On the record before us, it is clear that the Board failed to meet that burden.”\textsuperscript{41}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 880. \textit{See also supra} note 30.
\item \textit{Trans Union}, 488 A.2d at 879.
\item Smith, No. 6342, slip op. at 14.
\item Id. at 890. See also \textit{infra} notes 42, 43 and accompanying text.
\item \textit{Trans Union}, 488 A.2d at 890.
\item Id. at 893 (citing \textit{Weinberger}, 457 A.2d at 703; \textit{Michelson v. Duncan}, 407 A.2d 211 (Del. 1979), \textit{aff’d in part and rev’d in part}, 386 A.2d 1144 (Del. Ch. 1978)).
\end{enumerate}
\end{footnotesize}
If the majority said the factual proxy issue was documentary and it would view the matter de novo, one could still debate the appellate legal standard—but one would better understand the holding. It may be that the word “clear” permits an argument that the majority was holding true to a proper appellate standard of review, but the overall tenor of the language surely sounds like that of a trial court. And however one views the proxy discussion, it is difficult to conclude on the Trans Union record that the judgment of three judges—the chancellor, Justice McNeilly, and Justice Christie—was without the bounds of reason. The point, of course, for principled decision-making is obvious. It is not sufficient merely to cite the applicable principle; one must also apply it. This, it appears, the court failed to do.

Finally, and potentially most significant for substantive precessional purposes, the portion of the opinion on ratification offered little reasoning capable of being generalized and thus made neutral beyond authoritarian fiat and subjective virtue. To the majority’s credit, it did not stop, as some opinions have, by isolating only the “complete candor” language from Lynch.42 That standard is absolutely meaningless in terms of principled decision making and useful only to buttress a result—any result—as perhaps the holding on the facts in Lynch itself demonstrated.43 The Trans Union majority was careful to note that a “germane” fact for disclosure under Delaware law was equivalent to a “material” fact.44 But then the majority went on to say that “germane” was defined in Lynch as “all ‘information such as a reasonable stockholder would consider important in deciding whether to sell or retain stock.’”45 It is significant that the word “all” does not appear at that point in either Lynch or TSC.46 And,

42. Lynch, 383 A.2d at 279. See also supra note 39 (discussion of context of Lynch “complete candor” standard).
43. It is interesting to recall that the court in Lynch reached its decision before the belated modification of the opinion for publication, and it was in the modification that the incorporation of the federal materiality standards of TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976), occurred. Lynch, 383 A.2d at 281. The Trans Union majority did not cite TSC, and the decision gave rise to considerable concern whether Delaware was employing a stricter disclosure standard. See Rothschild & Sattesahn, “All Germeane Facts with Complete Candor”—Delaware’s Disclosure Duty, Delaware Law for Corporate Lawyers & Recent Developments 342-44 (Practicing Law Institute 1985) [hereinafter cited as Rothschild & Sattesahn].
44. Trans Union, 488 A.2d at 890.
45. Id. (quoting Lynch, 383 A.2d at 281).
46. See Lynch, 383 A.2d at 281; TSC Indus., 426 U.S. at 449. Lynch does
if one returns to TSC, the unqualified addition of the word "all" takes on added significance, because the United States Supreme Court said that for an omission to be deemed material "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." Thus, the broad principle of TSC takes a rather balanced view which was lost in Trans Union.

Almost equally important was the majority's absolute failure to note any of the sub-principles of proxy law that are commonly used by the federal courts and the court of chancery, i.e., no requirement of self-flagellation or no need to declare that matters were not properly considered when the directors thought they had been properly considered.

These judicial omissions and alterations, seemingly stylistic, arguably proved substantive in result. It would serve no useful purpose to review the "material [disclosure] deficiencies" found by the court. The reader may review readily the factual disclosure portion of the opinion. It is submitted that a failure to glean comprehensively the operating disclosure principle at the broadest level led to a decision based on half a principle. Half a principle, at least on occasion, can be contrary to the whole. It is also submitted that a failure to generalize in terms of neutral sub-principles led to a decision that cannot transcend the immediate result. Fear resulted that the court was on an undisciplined frolic of its own.

The two other factors contributing to the controversy surrounding the Trans Union opinion are more subjective and less legal but worthy of brief mention because of their impact on the constituency of opinion readers.

First, it has been written repeatedly that the court demonstrated that it was not well informed about the corporate world. Borden writes that "one has to wonder if . . . confidence [in the court's own experience] has been misplaced." Herzel cites "the court's

require disclosure of "all germane facts" but that follows the definition of germane. Lynch, 433 A.2d at 281.

47. TSC Indus., 426 U.S. at 449.
48. See generally Rothschild & Sattesahn, supra note 43 (discussion of the realities faced by boards of directors in regard to the Trans Union case).
49. See Trans Union, 489 A.2d at 890-93. The majority was also bothered by statements it viewed as false and misleading. Id.
50. Borden, First Thoughts, supra note 5, at 5, col. 1.
desire for the grand gesture, a dangerous temptation for all appellate courts.\textsuperscript{51} Fischel's whole thesis is that the court does not understand what is in stockholders' best economic interest.\textsuperscript{52} Of the numerous remarks available, perhaps the gentlest word is Herzel's "naive."\textsuperscript{53}

Unfortunately, there is peripheral discussion in the opinion upon which critics can feed. The court's discussion of the premium over market makes a simple concept difficult;\textsuperscript{54} and there is no feeling throughout the opinion that the court has grasped the dynamics of the marketplace.\textsuperscript{55} At some points one gets the feeling that a feasible leveraged buy-out does not even qualify as one measure of price.\textsuperscript{56}

Certainly, principled decision making, as the opinion illustrates in its holding, must have an informed forum. But, in retrospect, the real question which should be asked is whether the criticism is so surprising. It is amazing the courts do as well as they do. Few people, even those directly involved through daily occupational experience, understand all that is going on in the corporate market. Lawyers trained in corporate law, but not actually practicing in that area, have been shocked to learn that corporations, particularly in cash-out mergers, can treat different stockholders with different consideration. Corporate practitioners in daily contact are constantly learning about, as well as contributing to, the corporate development. Even the easy questions can change. For example, is it important from an investment point of view, and not just a suffrage point of view, for a corporate raider to hold a large interest in the target company? In short, there is no substitute for experience, and in the fast changing corporate world, fresh experience and fresh inquiry are especially needed. To some extent, ignorance on the part of everyone should be anticipated.

In a growing age of specialization, the general point to be gleaned retrospectively is that education and not criticism is the answer.

\textsuperscript{51} Herzel, supra note 4, at 15, col. 4.
\textsuperscript{52} Fischel, supra note 2, at 1454-55.
\textsuperscript{53} Herzel, supra note 4, at 14, col. 4.
\textsuperscript{54} If the court had stopped with its first statement that "the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price," a lot of unnecessary confusion would have been avoided. \textit{Trans Union}, 488 A.2d at 875.
\textsuperscript{55} In particular, there is no feeling of a first offer creating the game by putting the company in play on the market.
\textsuperscript{56} See, e.g., \textit{Trans Union}, 488 A.2d at 877, 891-92. The court was focusing here on its findings that the board did not make proper inquiry and misled shareholders in describing the basis for Van Gorkom's suggested price of $55 per share. \textit{Id.} at 891-92.
Judges should not be embarrassed to plead ignorance and inquire for knowledge. Lawyers, for their own education as well as the court's, should not be hesitant to produce evidence of the general field as well as the specific case. *Trans Union* illustrates a specialization problem that goes well beyond the corporate area. Too much should not be assumed if there is to be an adequate basis for principled decision making. A corollary point is that none of us should say too much because general exposition, even if logical, can well become inapplicable in a specialized field. Education for all is the answer.

But perhaps the chief criticism of the majority opinion arises not from the decision, or from the legal analysis, or from the factual background, but from the tone of the writing. As Justice McNeilly said: "The majority opinion reads like an advocate's closing address to a hostile jury." 57 There is merit to this criticism. No one would suggest that the court be "political" by not saying what it intends. But, in an opinion destined to be read by directors nationwide, at least it would have been tactful and consistent with principle in a jurisdiction that has traditionally given wide discretion to directors, for the court not to have engaged in language hostile beyond its holding or indeed beyond the law of the state. 58 For example, a

57. *Id.* at 893. Interestingly, this is the first sentence of his dissenting opinion.

58. In an apparent principled effort to belittle defense counsel's argument that individual defendant directors might be subjected to a multimillion dollar class award without any claim of personal gain, self-dealing, or bad faith, the court made reference to the "*ad hominem* argument." *Id.* at 889. But that reference ignores some principles as well. The United States Supreme Court has expressed the same concern about the tremendous potential liability for relatively small, unintentional fault. *See TSC Indus.,* 426 U.S. at 449. The ultimate policy criticism of the *Trans Union* decision is the fear that directors will be "too timid to make important decisions for stockholders for fear of personal liability." *Herzel, supra* note 4, at 15, col. 4. The American Law Institute, as part of its principles of corporate governance study, has considered a proposal in duty of care cases to limit director liability through some relationship with salary. The Delaware Supreme Court's own preference for the appraisal remedy shifts the burden of economic risk from the directors to the corporation. *See Weinberger,* 457 A.2d at 713-15. *Compare* Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985). Indeed, perhaps the most significant crisis currently existing in corporate law, aggravated by the wake of *Trans Union,* is the unavailability of liability insurance for corporate directors and officers.

The *Trans Union* majority's failure to perceive the argument in a broad policy perspective unnecessarily and harshly gave an anti-director tone that is contrary to the state's law and policy. As Borden wrote:

Durocher, it appears, was right ("Nice guys finish last").

Other directors entrench themselves with poison-pill preferreds; rebuff highly attractive third-party offers; pay extravagant prices to greenmailers; instigate lock-up protected LBOs which convert their minimal shareholdings
negative inference appears to have been drawn from the chairman’s desire to retire and, inconsistently, because he was not included in an alternative proposal involving other senior management members. No inferences are drawn from the continuing employment interests of senior management, and negative inferences are drawn from superficial facts—such as the presence or absence of documents or the execution of documents at a social event. The absence of senior management members from a board meeting is relied upon when one would not expect their presence beyond those who attended. Numerous other reflections convey tone, including those noted in Justice McNeilly’s dissent. It is unfortunate that the tone of the opinion can give the wholly unwarranted perception of a lack of neutrality in the broadest sense. The majority pleads a case more than it reflects on ultimate policy.

The court in Trans Union said much more than was necessary and, in its excessive extension, it gave rise to concerns far beyond those required for the decision. Whether in legal doctrine, in background information, or in hostile tone, the immediate concerns of the legal and business communities had a legitimate basis. Fortunately most of the emotional concerns seem transitory, and most of the policy concerns can be met by planning—a deliberate board pace with particularized advance preparation, expert investment advice, orchestrated document review, and a thorough contemporaneous corporate record.

II. Trans Union in Perspective

If the perception of Trans Union “seems to reflect nothing but the court’s need to force haphazardly chosen defendants to repent into control of the companies they manage, and make megadollar offers for other companies after hasty briefing by investment bankers on the prowl for a white knight—all with apparent impunity. Meanwhile, the directors of Trans Union (“TU”) 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.

Borden, First Thoughts, supra note 5, at 1, col. 3.
59. Trans Union, 488 A.2d at 866.
60. Id. at 884, 895 n.27.
61. Id. at 867.
62. Id. at 868, 874.
63. Id. at 869. But see id. at 883 n.25 (court does not suggest that a board read in haec verba every document it approves).
64. Id. at 874.
for the State of Delaware’s pro-business ways,”65 the Delaware Supreme Court itself has moved quickly to dispel any such notion. Certainly litigation in the spring of 1985, when treated as a whole, is open to no such interpretation. Indeed quite the opposite is true. The business judgment rule is enjoying unprecedented substantive growth.

It should be remembered that Trans Union was primarily a procedural business judgment case, having to do with the extent to which directors have informed themselves. I will focus on only two cases decided after Trans Union: Rosenblatt v. Getty Oil Co.66 and Unocal Corp. v. Mesa Petroleum Co.67 Procedural considerations were presented in each, but in neither were procedural aspects even deemed important. This clearly suggests that Trans Union is viewed by the court as a far-out isolated factual situation.68

Rosenblatt, an opinion that is carefully crafted and should stand well the test of time, is by far the most underpublicized opinion of 1985. In particular, for Trans Union critics, Rosenblatt should be a healthy breath of fresh air. The class action on behalf of minority stockholders of Skelly Oil Company dealt with a stock-for-stock merger of Mission Corporation (89.73% owned by Getty Company and owner of 72.6% of Skelly) and Skelly (7.42% owned directly by Getty) into Getty. Given the fact that Getty stood on both sides of the transaction, the Rosenblatt negotiators took care to proceed at arm’s length through independent representatives including investment bankers on each side. The court had no problem with the procedure and suggested that in reviewing the question of fairness, the arm’s-length nature of the transaction “may give rise to the proposition that the directors’ actions are more appropriately measured by business judgment standards” than by “the test of complete fairness.”69

65. Herzel, supra note 4, at 14, col. 4.
67. 493 A.2d 945 (Del. 1985).
68. At the time of preparation of this article, the “poison pill case”, Moran v. Household Int’l, Inc., 490 A.2d 1059 (Del. Ch. 1985), was pending decision on appeal in the Supreme Court of Delaware. The decision in Moran sheds light on the relationship of the business judgment rule to the statutory power of directors and the fundamental rights of stockholders. Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985). See infra note 93.
69. Rosenblatt, 493 A.2d at 937-38, 934. More recently, in another context, the court has been careful not to impose a legal obligation to create an independent bargaining structure. See Rabkin v. Phillip A. Hunt Chem. Corp., 498 A.2d 1099, 1106 n.7 (Del. 1985).
The highlight of the year was the Unocal-Mesa battle which received national prominence.\textsuperscript{70} The supreme court’s expansive opinion on business judgment made it clear that, if the perceived threat is great enough, a board can decide to make a selective tender offer to its own stockholders and exclude its largest stockholder, the corporate raider.\textsuperscript{71}

It is interesting to note that in both \textit{Rosenblatt} and \textit{Unocal}, the court seemed impressed by the fact that independent directors acted separately. In \textit{Rosenblatt}, the Skelly independent directors voted first while three directors, Getty and Mission officers, left the room, later to return and concur.\textsuperscript{72} In \textit{Unocal}, prior to the board action, the eight outside directors, a majority, met separately with Unocal’s financial advisors and attorneys and “unanimously agreed to advise the board that it should reject Mesa’s tender offer as inadequate, and that \textit{Unocal} should pursue a self-tender to provide the stockholders with a fairly priced alternative to the Mesa proposal.”\textsuperscript{73}

Even though \textit{Rosenblatt} and \textit{Unocal} were primarily substantive, they reflect the court’s attitude toward business and therefore relate particularly to \textit{Trans Union} and to the vehement criticism of the decision. How the later decisions themselves will fare when tested in terms of Wechsler’s principled decision making presents an additional interesting question.

In one respect, \textit{Rosenblatt} completely obliterates \textit{Trans Union} and takes a giant step into principled decision making. In the proxy area, the court has left no doubt that Delaware embraces federal TSC materiality standards completely.\textsuperscript{74} Moreover, there is no question that the alleged proxy omission in \textit{Rosenblatt}, the delegation of the subsurface asset valuation to an independent expert with confidentiality of the expert’s methods, was infinitely more significant than any of the delinquencies found material in \textit{Trans Union}. And yet the supreme court found such omission not material in that it would not have significantly altered the “total mix” of information made

\textsuperscript{70} Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). There was also a prior oral decision on May 17, 1985, which was transcribed and is widely quoted.

\textsuperscript{71} Id. at 957-58.

\textsuperscript{72} Rosenblatt, 493 A.2d at 939.

\textsuperscript{73} Unocal, 493 A.2d at 950. The board then reconvened and rejected Mesa’s tender offer.

\textsuperscript{74} Rosenblatt, 493 A.2d at 944-45.
available.\textsuperscript{75} The total principle, one capable of pragmatic application, has been embraced. One would hope that Rosenblatt would replace Lynch as Delaware's comprehensive statement on proxy disclosure.

Independent of the proxy disclosure, the substantive aspect of the delegation point in Rosenblatt is interesting in light of another aspect of Trans Union. The Rosenblatt opinion may have overplayed the importance of the delegation. While it is true that the negotiators agreed to be bound by a figure supplied by the independent expert, neither board had committed itself in advance to vote for the final negotiated result, that is, a result influenced by the factor supplied by the expert. Moreover, presumably both parties had a chance to test the expert's conclusions by internal means without the necessity of knowing the expert's methodology.

But, having said all of that, the upholding of the delegation is interesting especially when compared to the court's decision in Trans Union. The Trans Union majority said the board, having approved the merger, was bound to continue to recommend it and could not recommend against it. In addition, the board could not take a noncommittal position leaving the decision to the stockholders.\textsuperscript{76}

The result appears to be that a board can delegate a significant decision leading to a statutory duty but cannot vote favorably in a merger, a statutory prerequisite, if the purpose of the affirmative vote is to let the stockholders decide whether they wish to sell their corporation or not. Put another way, directors cannot submit a merger to stockholders unless the directors are, and continue to be, in favor of the merger. The only remedy if the board changes its mind is to withdraw its approval of the merger and risk a breach

\textsuperscript{75} Id. at 945. Alternatively, the Rosenblatt court found that disclosure was made but, if the Trans Union language was "artful," the Skelly proxy disclosure was master art. The court clearly has retreated from impossible demands of both Lynch and Trans Union and put Delaware on the realistic federal standard.

\textsuperscript{76} Trans Union, 488 A.2d at 887-88. It should be noted that the supreme court in Trans Union apparently did not factually accept the proposition that the board had contractually reserved the right not to recommend the Pritzker transaction to Trans Union's stockholders. See id. at 878-80, 888. This conclusion has been one of the most criticized appellate factual findings and is simply wrong. See, e.g., Borden, supra note 5, at 4, col. 4:

[T]he court's solution, not at all supported by the record, was to maintain that in fact there was no market test and that the Board was grossly negligent in not ensuring that the contract did permit such a test. As noted, this resolution misstates the issue, misreads the agreement and misunderstands the realities of market exposure.
of contract suit. Such a rule may be debatable but it is not unprincipled. It comes not only from contract morality but also from the statutory requirement that the board "adopt a resolution approving an agreement of merger."77

There is another area where Rosenblatt makes a strong, if not a new, step towards principled decision making. It relates to the damage hearing remand in TRANS Union. Ever since Weinberger78 directed that the Delaware block method "no longer exclusively" controlled valuation, and that "a more liberal approach must include proof of value by any techniques or methods which are generally considered acceptable in the financial community,"100 and which pass general admissibility standards, lawyers and trial judges have seemed uncertain as to their duty. Rosenblatt makes it clear that no admissible valuation technique is excluded and that Weinberger "did not abolish the block formula, only its exclusivity as a tool of valuation."81 Thus, the trial court under Rosenblatt does not abuse its discretion in accepting any admissible valuation method. This clear statement of the discretion of the trial court is welcome and wholly consistent with the letter and spirit of Weinberger. Of course, witnesses, counsel, and chancellors will be well advised to state why one method of valuation was chosen over another, and habit, presumably, will not suffice. But Rosenblatt is welcome both in its yielding to board discretion and trial court discretion.

Clearly the most interesting case from the standpoint of principled decision making is Unocal.52 And, if it is not considered the most difficult, it is because the petit intricacies of design do not dominate. Unocal is not a clever "poison pill" brought forth from the legislative word processors of learned lawyers. It might have that aspect. But Unocal is basically raw power, blatantly displayed on

77. TRANS Union, 488 A.2d at 888.
78. DEL. CODE ANN. tit. 8, § 251(b) (1983). The Delaware courts do not generally engage in broad construction to avoid policy set by the legislature. The best recent corporate example of this is Plaza Sec. v. O’Kelly, No. 7932 (Del. Ch. Mar. 5, 1985), where the chancellor held the stockholder consent procedure, outlined in DEL. CODE ANN. tit. 8, § 228 (1983), was applicable to a public corporation in the strict language of the statute notwithstanding the court’s feeling as to policy. The supreme court affirmed. Datapoint Corp. v. Plaza Sec. Co., No. 79, 1985 (Del. Mar. 8, 1985—bench ruling); 496 A.2d 1031 (Del. 1985).
80. Id. at 712-13.
82. 493 A.2d 946 (Del. 1985).
both sides. It is money versus money. For those who like spectator sports, Unocal is in the first rank.

The other interesting aspect of Unocal is the division between the vice-chancellor and the supreme court. They each became advocates, not in the narrow factual sense of the Trans Union majority, but in a broader conceptual sense of legal power. Their views are simple to state.

The vice-chancellor said a corporation must show a proper corporate purpose for a selective tender offer and also must show that the offer is fair to all the stockholders. The vice-chancellor viewed the business judgment rule as inapplicable and the selective tender legally impermissible because it was unfair to Mesa.

The supreme court said the board, having made a good faith determination that there had been an unfair, coercive two-tier tender offer by Mesa, "a corporate raider with a national reputation as a 'greenmailer,'" could, in its business judgment, decide to exclude Mesa as a stockholder for selective tender offer purposes.

The split between the courts in the narrow preliminary injunction context leaves one with a sense of malaise—to borrow Jimmy Carter's disastrous remark. One longs for an economic analysis on a full trial record to provide insight. There is little expansive discussion of principle in either decision and much flat in both. And it is understandable, for a satisfactory judicial answer is elusive.

It is very unsatisfactory to hold a board helpless in the face of a good faith determination of a harmful raid. One does not like to owe fiduciary duties to one's enemies. And it is not totally satisfactory to say a board must limit itself to means less direct and more devious than a power play in the open market. On the other hand, there is something unsatisfactory about deliberately harming your largest stockholder, one with a billion dollar investment in your corporation, when that stockholder has done nothing illegal. After all, the payment of greenmail had been well sanctioned by the supreme court itself. And, if we rely on "Big Brother to stop Boone Pickens" in violation of normal fiduciary concepts, who is next?

84. Id. at 20.
85. Unocal, 493 A.2d at 956. Greenmail in this case seemed to be based on the perceived reputation of Mr. Pickens rather than any finding by the Unocal Board. This undercuts the business judgment analysis. Moreover, the word greenmailer, insofar as it suggests that the raider always initiates the buyout, is of course a misnomer; it is the incumbent board that frequently initiates the buyout deal.
86. E.g., Cheff v. Mathes, 199 A.2d 548 (Del. 1964).
87. This phrase was attributed to Joseph Perella, managing director of First
Thus, the problem is interesting because the solution is not apparent. The effective result of *Unocal* is that Mesa, as a large stockholder bidding for majority control and not in the exercise of any corporate power, has a fiduciary duty to make a fair offer to its fellow stockholders. And, if its offer is deemed unfair by an unfriendly board acting in good faith (the inherent conflict), that board can take Mesa’s property, its market investment in the corporation, and give it to the other stockholders. And it can do so with the protection of the business judgment rule so that no court even passes *de novo* judgment on whether the Mesa offer was unfair or not.

At the risk of unintentionally dredging up the discredited concept of federal standards, principled decision making on a narrow issue brings to mind none other than the late Professor William L. Cary. There was a premise to the *Unocal* theater, perhaps most authoritatively stated by the supreme court in a procedurally strange, two-justice advisory order that came after the vice-chancellor’s temporary restraining order and before her preliminary injunction, which goes as follows:

It is a well established principle of Delaware law that in the acquisition of its own stock a corporation may deal selectively with its shareholders provided the directors have not acted solely or primarily out of a desire to perpetuate themselves in office. This right derives from the general powers conferred upon a Delaware corporation under 8 Del. C § 160 to deal in its own stock.88

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88. Unocal Corp. v. Mesa Petroleum Co., No. 152, 1985 (Del. May 2, 1985) (order) (citing Cheff v. Mathes, 199 A.2d 548, 554 (Del. 1964); Bennett v. Propp, 187 A.2d 405, 408 (Del. 1962); Martin v. American Potash & Chemical Corp., 92 A.2d 295, 302 (Del. 1952); Kaplan v. Goldsamt, 158 A.2d 136, 140-41 (Del. Ch. 1960)). Mesa, in the preliminary injunction stage, argued this authority offered no support for the supreme court result and indeed compelled the opposite conclusion. Realistically, and perhaps in principled terms as well, it was the best advocacy available. Noting that the American Potash case relied on a House of Lords decision, British & Am. Trustee & Fin. Corp. v. Couper, [1894] A.C. 399, Mesa showed selective purchases were not permitted to be unfair and that a 56% premium per share to a 86.4% stockholder interest at the expense of one stockholder holding 13.6% was both quantitatively and qualitatively different from the precedent. Precedent merely permitted the beneficial removal of a dissident with the dissident’s consent at a defensible modest premium. See Plaintiff’s Opening Brief in Support of Their Motion for a Preliminary Injunction, No. 7997, slip op. at 53-65 (Del.
It will be recalled, in an admittedly different time, that Professor Cary was critical of Delaware's alignment with management in the take-over context and particularly critical of the now landmark case of Cheff v. Mathes. In discussing how management foreclosed a contest for control of the Holland Furnace Company, Cary wrote the following:

Of course, the subsequent disastrous history of Holland Furnace Company is not proof of a judicial mistake but it does raise questions whether the status quo is always best or even respectable. The raider may sometimes be a better manager than the "raidee." As Israel states, "Cheff seem[s] to stand clearly for the proposition that directors of a Delaware corporation, once convinced that control is threatened by an outside interest which arguably would advocate some change classifiable with any verisimilitude as 'policy,' can decide a priori that such change would not be in the best interests of all the shareholders. Having so decided, they may with impunity proceed to make substantial expenditures of corporate funds to acquire at premium prices sufficient shares to assure that the general body of shareholders will be deprived of all opportunity effectively to exercise their franchise."

One must wonder in retrospect if the Unocal cases did not offer an unusual opportunity to review the law. The Unocal result—the answer to greenmail is more greenmail—hardly seems conducive to principled decision making by a board. And yet the vice-chancellor's view, given the prior legalization of greenmail through the selective buy-out of a raider, does not lend itself happily to ready approval either.

Maybe in this instance, Professor Cary was right. The answer to greenmail is no greenmail. Rather, the answer lies in the free market and the stockholder vote. And, if there is general agreement that the two-tier tender offer is an unfair, coercive market, then

Ch. May 5, 1985). The comparative economics and the economic consequences of the selective Unocal purchase make a compelling case in support of the vice-chancellor's conclusion.

89. 199 A.2d 548 (Del. 1964).
maybe the answer is to have some generally applicable, but specifically directed, control at the state level to eliminate it or make it fair. In short, one has to wonder if the *Unocal* cure is worse than the disease, especially if there is an alternative route to health.

It seems a pity, albeit an understandable one, that these points were not raised in *Unocal*. *Unocal* was a good case to test the legal sanction of greenmail precisely because greenmail had not been paid. Comment could have been prospective. Thus, there would have been no hardship caused by proper reliance on the prior judicial sanction of greenmail. And yet greenmail was in the case because it was the *Cheff* principle, selective tender, which underlay the supreme court decision. That principle, which probably crept into our law as a necessary evil in more simple times, is now labeled in positive terms as "well established." And it is so labeled by a court highly critical of greenmailers. The real question should be: is this evil necessary? If not, how do you eliminate it while recognizing its limited value?

The overall issue becomes one of line drawing. Since *Unocal* is a power case, and since the supreme court warned of limits but did not draw them, *Unocal*’s principled base is even more shaky. Boards have been cautioned that they do not have "unbridled discretion to defeat any perceived threat by any Draconian means available." But the post-*Unocal* question is whether the court can give any principled definition to the limitation on its own substantive expansion of the business judgment rule.

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91. The unfairness is a matter of continuing debate as the amicus curiae brief of the Securities and Exchange Commission demonstrates in Moran v. Household Int’l, Inc., 490 A.2d 1059 (Del. Ch. 1985), aff’d, 500 A.2d 1346 (Del. 1985). The commission supported reversal of the court of chancery decision upholding the Household “poison pill.” There is unfairness in a two-tier tender offer situation when stockholders are unable to act in concert. On the other hand, such a tender offer frequently appears to be the only way for the individual stockholder to achieve a substantial premium over market.

92. *Unocal*, 493 A.2d at 955. *See also Unocal*, oral slip op. at 10.

93. The final chapter of the immediate “war” may well have been written in the supreme court’s decision in Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985). It is interesting to see how the court treated the problem posed by the take-over deterrent “right” to buy preferred stock with the “flip-over” provision permitting a purchase of an acquiror’s stock at half price. On the one hand, it is difficult to say that the structure of corporate law in general, and Del. Code Ann. tit. 8, § 157 (1983), in particular, were intended to create a “right” which is by design imposed not to be exercised but is, rather, to serve primarily as a take-over blockade. On the other hand, in terms of economic impact, it is hard to contemplate a result any more severe than in *Unocal*. The resolution in favor of the directors’ power to act under the business judgment umbrella shows the substantive growth of the rule even at the expense of the traditional residue of stockholder powers, i.e.,
The immediate 1985 context (Trans Union, Rosenblatt, and Unocal) hardly suggests a weakening of the business judgment rule. In fact, Rosenblatt is an excellent brake to fears of a Trans Union erosion. Concern should be elsewhere. The question for the immediate future is not the procedural emphasis of Trans Union. This concern, for the most part, possibly at unnecessary expense, can be reduced to essence and prospectively handled. The real outstanding issue is the substantive expansion of "business judgment" and identifying at what point that expansion interferes with principles of equity and property and concepts of corporate law.

The challenge to the courts is severe. Lawyers, as part of corporate planning, dream up more ingenious boardroom schemes that result, at least incidentally, in the perpetuation of management and the limitation of stockholder choice. This substantive business judgment battle is interesting because of its breadth. Ultimately, the question that must be asked is whether the Delaware Corporation Law is a concept, passed as a statute in Dover, Delaware, and constrained by general equitable principles, or whether it should be spit out of a word processor in a corporate law firm conforming only to some vague form without underlying principle. It is of course true that "[m]erely because the General Corporation Law is silent as to a specific matter does not mean it is prohibited." But neither does the silence of a conceptual statute mean that every specific matter is automatically authorized merely because it is not expressly prohibited. Flexibility is one thing; anarchy another.

Make no mistake, the subject is heavy and worthy of weighty consideration. No final answers are apparent. But two modest conclusions seem appropriate. First, Trans Union is not a trend setter. If anything, the business judgment rule has more vitality than ever. Second, there is a need for Wechsler's inquiry. Raw power is not a satisfactory alternative.

III. Business Judgment: Review and Analysis

Whatever substantive limitation battles might loom for the business judgment rule in the immediate future, there is a more mundane permanent arena concerning the elements of the rule itself. The Trans

selling and voting. See Moran, 500 A.2d at 1353. Viewing the management power of directors under Del. Code Ann. tit. 8 § 141 in such plenary terms does not end the game, but it sure changes the rules.

94. Unocal, 493 A.2d at 957.
Union case is helpful in isolating the business judgment rule and in encouraging review and analysis of the elements of the basic doctrine.

Although not demonstrated by the verbiage on the subject, the business judgment rule relating to corporate directors should not be complex in either theory or operation. Indeed its usefulness depends on its simplicity. A concise descriptive statement of the rule, not usually found in the patchwork of case law, is a helpful starting point. One prominent Delaware lawyer-commentator, E. Norman Veasey, has helpfully formulated the rule in its customary defensive setting as follows: "[D]irectors will not be held liable for honest mistakes of judgment if they acted with due care, in good faith, without a disabling conflict, and in furtherance of a rational business purpose."95

Trans Union helps to highlight the business judgment rule for at least three reasons. First, the case contained no allegations and no proof of fraud, bad faith, or self-dealing by the directors.96 There was no question of a disabling conflict on the part of the directors and no question involving the integrity of the directors. Moreover, while the case in a sense involved a change in corporate control, it did not involve the concepts that arise when a majority is cashing out a minority. The fairness issues that ensue from such special fiduciary responsibility were not present.97 Rather, this particular transaction was an arm's-length transaction between Trans Union and the Pritzkers. All stockholders of Trans Union, other than the Pritzkers and including the directors, were treated in the same fashion. In short, the directors were free to act as business managers without any inhibitions or any disabilities. There were no threshold loyalty problems.98

Second, as to the cashed out majority, the merger, in effect, amounted to the sale of the corporation. It was not a routine corporate

95. Veasey, *Seeking a Safe Harbor from Judicial Scrutiny of Directors' Business Decisions—An Analytical Framework for Litigation Strategy and Counseling Directors*, 37 Bus. Law. 1247, 1249 (1982) [hereinafter cited as Veasey]. In Aronson v. Lewis, 473 A.2d 805 (Del. 1984), the court stated that the rule "is a presumption that in making a business decision 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." *Id.* at 812.
96. *Trans Union*, 488 A.2d at 873.
98. See *Trans Union*, 488 A.2d at 872-73, where directors' duty of care was distinguished from their duty of loyalty. The former was at issue; the latter was not.
decision customarily performed on a daily basis by the officers or directors of the corporation. It was an extraordinary transaction and one that required stockholder approval. The magnitude of the transaction sharpens the focus on the directors' safe harbor.

Third, the business judgment rule was raised in its traditional limited defensive sense. Although there was a continuing prayer for rescission, after the denial of preliminary injunctive relief, the real question was whether Trans Union directors were liable personally for money. In Veasey terminology the defense was that the directors should be insulated from liability even if, judged retroactively, there was a mistake in judgment because they acted with due care, in good faith, without any conflict of interest, and in the furtherance of a rational business purpose.100

The issue, as seen by the supreme court, was simple. It was the threshold factual question of whether the directors exercised due care by informing themselves of the pertinent facts necessary to make a decision and by reflecting upon such facts with sufficient deliberation. Since the issue in Trans Union was simple, a return to fundamentals is appropriate.

The first and most important feature about the business judgment rule in Delaware is its statutory basis. Many commentators seem to ignore this essential element and treat the whole area as judge-made law. But the supreme court has been giving the statute increasing emphasis.101 Without qualification, Delaware General Corporation Law section 141(a) does provide that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ."102 The directors' business decision is respected because the Delaware statute provides it is theirs to make. As Zapata Corp. v. Maldonado103 indicates, that focus has affirmative as well as defensive implications.

100. See Veasey, supra note 95.
102. Del. Code Ann. tit. 8, § 141(a) (1983). This of course leaves open the question of whether and to what extent the management power of directors is restricted by the stockholder contract under a general corporation law and a specific corporate charter.
103. 430 A.2d 779 (Del. 1981). The supreme court has broadly construed the
The reason why the directors' business decision is not absolutely respected is simple. Directors are fiduciaries. It is true that the risk taking responsibility of a business corporate director is materially different from the asset preserving responsibility of a personal trustee. But the fiduciary concept is so strong that the trust analogy continues to exact judicial tribute. The supreme court recently used language somewhat more circumspect and more accurate due to its careful imprecision.

But, however circumspectly stated or analogously overstated, the point is simple. The directors' business decision receives qualified respect because it is made for the benefit of others. Thus, the business judgment defense is based on statutory authority with a fiduciary limitation. Formulations and analyses of the rule should be directed to the underlying legitimate power and to the purpose of the limitation on that power.

With the two fundamental principles in mind, let us look at the workmanlike Veasey formulation. As one would anticipate, the elements in the formulation have solid support in Delaware law—as a sampling of Delaware cases will attest. With such consistent

power of an independent board committee to terminate a derivative suit, another instance of the substantive expansion of board power under the business judgment rule. Kaplan v. Wyatt, 499 A.2d 1184 (Del. 1985).

104. For example, the following two quotations span decades of time:

(1) "Directors of a corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing, especially where their individual interests are concerned." Lofland v. Cahall, 13 Del. Ch. 384, 386, 118 A. 1, 3 (1922).

(2) "Clearly directors of a corporation stand in a position of trustees with the stockholders. The utmost good faith and fair dealing are required of them, especially where their individual interests are concerned." Petty v. PennTech Papers, Inc., 347 A.2d 140, 143 (Del. Ch. 1975) (citing Lofland v. Cahall, 13 Del. Ch. 384, 118 A. 1 (1922), and Bowen v. Imperial Theaters, Inc., 13 Del. Ch. 140, 115 A. 918 (Del. Ch. 1922)).

105. See Aronson, 473 A.2d at 811, where the court said that "[a] cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation," and "[t]he existence and exercise of this power carries with it certain fundamental fiduciary obligations to the corporation and its shareholders."

106. See Veasey, supra note 95 and accompanying text.

judicial underpinnings over such a significant period of time, one must conclude that the essential elements of the business judgment rule are, to say the least, properly stated in the Veasey formulation. But, notwithstanding its proper sanction, the formulation in practice has two basic weaknesses, one specific and one general, that need to be focused upon realistically.

There is a need to particularize how the statutory power is tempered by fiduciary duty, that is, by the duty of loyalty and the duty of care. The problem is not complex. But, arguably, we lawyers, with the aid of the courts, have failed to describe adequately what is in fact the case, for fear the definition will somehow be, or appear to be, harmful to a much coveted business constituency. Moreover, a failure consistently to assign words an everyday meaning, and a failure consistently to assign words the same everyday meaning, has not reflected sufficient stability in the law. As to the former, the business constituency is done an injustice by a lack of candor and by an underrating of its intelligence. As to the latter, we do ourselves a disservice by being inadequate lawyers.

Let me try to illustrate. Beside the threshold requirement of no "disabling conflict," all the concepts—"honest mistake," "good faith," and even "a rational business purpose"—seem to relate, giving normal meaning to the English language, more to a good heart rather than a sound mind. The phrases all emphasize a duty of loyalty rather than a quality of judgment. And yet, the latter is implicit in the duty of care, the fiduciary responsibility pinpointed by the discussion in Trans Union. 108

Moreover, there can be no question that for years the courts have in fact reviewed directors' business decisions to some extent from a quality of judgment point of view. Businessmen do not like it, but courts do it and are likely to continue to do it because directors are fiduciaries. This basis of court intervention is not adequately

v. Highland-Western Glass Co., 167 A. 831, 833 (Del. Ch. 1933); in good faith—Gimbel, 316 A.2d at 609; Cole v. National Cash Credit Ass'n, 156 A. 183, 188 (Del. Ch. 1931); Robinson v. Pittsburg Oil Ref. Corp., 126 A. 46, 48 (Del. Ch. 1924); Butler v. New Keystone Copper Co., 93 A. 380, 382 (Del. Ch. 1915); without a disabling conflict—Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 491 (Del. Ch. 1923); and in furtherance of a rational business purpose—Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); Bodell, 140 A. at 267.

108. Trans Union, 488 A.2d at 872-73.
stated on the face of the Veasey formulation. Yet review of the quality of judgment element in business decisions also has its solid support in Delaware law as evidenced by various language used in the cases as a standard of judicial intervention. In Aronson v. Lewis, the Supreme Court of Delaware recently spoke directly on this subject and held that “gross negligence” was the applicable standard by which directors’ acts are measured. It is interesting to note that on the same page that the “gross negligence” standard was rather formally adopted, the Aronson court also used an “abuse of discretion” standard. And just to add to the semantic confusion, at least one Delaware case has used a “negligence or a gross abuse of discretion” standard. But it is clear that “gross negligence” is now the test to be applied.

The simple point to be derived from all of this is that there exists a quality of judgment element in the judicial review of business judgments, supported by an abundance of case law, that we lawyers do not want to articulate in undisguised form. The legal commentators’ semantic difficulty in refusing to formulate in statement what clearly has been the case in fact persists because it is intentional. One can analogize with a tough minded prosecutor who does not want the phrase “mental illness” substituted for the phrase “insanity” in criminal law, even if the definition remains the same, for

110. Id. at 805 (Del. 1984).
111. Id. at 812. The Aronson court stated that: to invoke the [business judgment] rule’s protection directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties. While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence. Id. at 812-83 (citations and footnote omitted). The omitted footnote cites a number of cases and various standards to support the proposition “that director liability is predicated on a standard which is less exacting than simple negligence.” Id. at 812. It is very useful for reference.
112. Id. at 812.
fear that juries will more readily permit the defense if the label is changed.

The label that the lawyer defenders of corporate management are trying to preserve as a prerequisite for director liability is fraud. The label also appears explicitly in some cases as if the judges find themselves more comfortable with fiction than with fact. "'[I]nadequacy of price will not suffice to condemn the transaction as fraudulent, unless the inadequacy is so gross as to display itself as a badge of fraud.'" Thus, there is a merging of two factors, the taint factor and the decision factor. "Honest mistakes" are contrasted with decisions made so recklessly as to carry a dishonest badge. There is nothing unique about the concept of constructive fraud. A constructive contract is not a contract, a constructive trust is not a trust, and constructive fraud is not fraud. But we are dealing with fictions. It would be better if we dealt in truth.

And the point to note about the well documented, but necessarily selective, Veasey formulation is that we are still dealing in fictions. Thus, we lawyers speak in reinforcing defensive concepts of "honest mistakes of judgment" (i.e., not dishonest), of "good faith" (i.e., not the taint of bad faith), and of "a rational business purpose" (i.e., not a deceitful, self-serving purpose harmful to the corporation). The theme is that the defendants are not crooks, committed no fraud, and therefore have no liability.

All of this is perhaps harmless, so long as we realize, as for example, in a sale situation, that "'[t]here are limits on the business judgment rule which fall short of intentional or inferred fraudulent misconduct and which are based simply on gross inadequacy of price.'" To some limited degree, the absence of court intervention due to a business judgment defense is related to the rationality of the business decision. Lawyers should articulate the quality of judgment factor openly.

The obvious response to this critical comment is the "'furtherance of a rational business purpose'" factor. And this language has a direct link to Chief Justice Wolcott's language in Sinclair Oil Corp. v. Levien, stating that a board's "'decisions will not be disturbed if they can be attributed to any rational business purpose.'" But the rationality

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115. Gimbel, 316 A.2d at 610.
117. Id. at 720.
of the purpose and the rationality of the decision are not the same. Indeed, qualifying the word "purpose" by the word "business" would seem to express only activity rationally in the business line of the corporation. If the Veasey and Wolcott language were changed to "if they acted rationally in furtherance of a business purpose," a judgmental limitation unrelated to a fraudulent fiction would be more clearly attached. This formulation would more accurately reflect the composite case decisions. And a simpler and more meaningful overall definitional formulation would result from the open recognition of a quality of judgment element.

This discussion of a specific flaw leads naturally to a more general problem relating the whole judicial approach to the business judgment rule. Mr. Veasey noted that the case language indicating the protected business decision should be "made for purposes that the directors 'believed to be in the best interests of the corporation'" is perhaps redundant of the good faith test. It may be somewhat redundant of the "honest mistake" test and the "disabling conflict" test as well. The general problem is that we frequently have used words and phrases full of integrity and goodness but without assigning them a consistent function. It is left to the whim of the individual judicial commentator to assign the high sounding words of his choice to the evil being perceived.

The problem exists in part because of the nature of equity. The approach is to a case as a whole, based on all the relevant circumstances, rather than the elemental approach employed, for example, in the criminal law. There is of course merit in the chancellor's discretion, as well as snob appeal. But, to speak heresy, maybe a more consistent and codified elemental approach is needed. In the modern business world, directors are asked to make significant business decisions swiftly. For simple self-defense, are they not entitled to a clear legal standard by which to measure, at the time of decision, their personal liability for the necessary business risk attached to their occupation?

There is a rising consensus that the directors are so entitled. As Herbert Wechsler, Director of the American Law Institute, noted with regard to the Institute's Corporate Governance project, and particularly in relation to the tentative draft of principles relating to the business judgment rule:

118. Veasey, supra note 95, at 1252.
[T]here is a school of thought that holds it unwise to try to state the content of the business judgment rule, taking the view that the inherent tendency of such articulation is to point toward narrowing its exculpatory scope. This position is not without adherents in the Consultants and Advisers and in the Council but it has been decisively rejected by the votes that have been taken on the issue. The preference for an invisible law on this important subject thus far has not prevailed. Moreover, it is not believed that the protective function of the rule is impaired in any way by the formulation in this Draft.119

Unfortunately, drafting by committee, as with groups associated with the American Law Institute and the American Bar Association, sometimes leads to more complication than simplification. If the concept of business judgment is going to be a working concept in the corporate boardroom as well as in the courtroom, simplicity is a value to be cherished.

Moreover, with regard to Wechsler’s comment that the protective function of the rule is not impaired by the proposed American Law Institute’s formulation, one should ask whether an excessive protection given in any statement enhances the director’s protection in fact. Even if one assumes a director is aware of the rule, would not his protection be greater if he clearly knew in advance his business decision, not just his business purpose, might have to be defended, for example, as rational?

Courts do not have much trouble with excessively protective labels and, if they are offended by what the director did, it is not difficult to label the action "reckless," "grossly negligent," or a "gross abuse of discretion." Unfortunately, this only reflects adversely on the integrity of the process as well as adversely on predictability of result. It might be a safer harbor, and certainly a more honest one, to make the verbal formulation of protection more limited, especially if the standard is one to which the director could reasonably relate. It certainly does no good to have a formulation which ignores an element based on which courts frequently interfere with directors’ business decisions.

If we accept the proposition that a simple formulation, defined

to reflect accurately considerations used by courts rather than to enhance artificially a paper protection, is desirable, then we should focus on the elements of such a formulation and a meaningful definition of each element. Again it is useful to return to fundamentals, and to remember that we are dealing with two fundamental principles: the duty of loyalty and the duty of care.

The duty of loyalty subdivides into two elements; (1) a threshold determination of an absence of disabling conflict, (2) followed by honest performance of fiduciary duty. The duty of care subdivides into two elements as well, highlighted, fortunately, by the supreme court’s language in Aronson and also by the Trans Union opinion. There is a threshold element of the directors’ “duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.”120 And then again there is the performance review, whether directors acted “with requisite care in the discharge of their duties.”121 It is worth taking a fresh look at all four elements.

As to duty of care, it is now clear that the Delaware courts have embraced “gross negligence” as the standard of liability both as to the decision itself122 and as to the threshold issue of whether the board was informed.123 Any standard has multiple problems and “gross negligence” is no exception. But the court’s decision to embrace a single descriptive label as a standard is clearly a step forward in the evolution of the law. Moreover, that label is liberated from any language of constructive fraud. One suspects, however, as one should expect, that the evolution has not come to rest.

First, an overall comment seems necessary. Even if one assumes that negligence law is the proper pigeonhole for director liability—a most questionable assumption at least at the decisional level—the concept of “gross negligence” has been expressly rejected by the better tort scholarship as practically meaningless.124 Therefore its recent adoption in corporate law would appear, in some respects, to

120. Aronson, 473 A.2d at 812; Trans Union, 482 A.2d at 872.
121. Aronson, 473 A.2d at 812. Trans Union is also helpful in noting the dual requirements of the duty of care. See Trans Union, 488 A.2d at 872-73. The duty of loyalty was not a problem here.
122. Aronson, 473 A.2d at 812.
123. Trans Union, 488 A.2d at 873.
124. See discussion in W. Prosser, HANDBOOK OF THE LAW OF TORTS § 34, at 180-84 (4th ed. 1971). Prosser says, “[M]ost courts consider that ‘gross negligence’ falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, not in kind.”Id. at 183.
be an analytical step backwards. Second, one should ask if the same test is appropriate at both the threshold and decisional stages.

Turning to the detail of the threshold duty of care, several questions arise in the wake of Trans Union. The Trans Union majority rightly and helpfully separates the threshold duty of information gathering and the performance duty of decision making. But theory and fact sometimes differ. If the price in Trans Union had been $110 instead of $55, then most reasonable decision makers would have been comfortable with less information. The same is of course true with a $55 cash in hand price instead of a $45 price. Thus the particular decision option facing the decision maker has some bearing on the threshold issue. This connection plus the presumed business expertise of the director suggest that the duty of inquiry should have both an objective and a subjective nexus with need or desirability. The "all material information reasonably available" test of Trans Union puts the emphasis on access rather than need or desirability.

Next, Trans Union presents the perfect case to argue the unprincipled nature of the "gross negligence" test. Gross negligence, unlike ordinary negligence or recklessness, has no ready or consistent frame of reference in recent tort law. It is hard to tell "gross" from "simple" from "mere." And, whatever anyone thinks of the directors' activity in Trans Union, most commentators have not viewed the activity as grossly negligent after considering the substantial premium over market, the directors' general knowledge of the company, and their specific knowledge of the leveraged buy-out figures.

These comments renew an old dispute. If the court is not going to grant business judgment protection in Trans Union, then perhaps we should not mislead directors with still overly protective labels. Perhaps we should say straight out that, on the threshold duty of care issue, the standard should be "reasonable care under the circumstances" as some argued all along. If that flexible standard includes all factors, e.g., director expertise, time pressures, price,

125. See Trans Union, 488 A.2d at 872-73. It is clear that the majority made no decision as to the board's judgment on price. Id. at 889, 893.
126. Id. at 872. The court quotes Kaplan v. Centex Corp., 284 A.2d 119, 124 (Del. Ch. 1971), in support of the "reasonably available test." The language of the test comes from Aronson, 473 A.2d at 812.
127. See Arsht & Hinsey, Codified Standard—Same Harbor But Charted Channel: A Response, 35 Bus. Law. 947, 951 (1980) ("[G]iven the connotation 'gross negligence' carries, more is to be gained by telling directors that they must use such care as an ordinarily prudent person would use than by telling them that they must avoid gross negligence.").
and cash, as well as depth of inquiry, then one suspects the results probably would not radically change, but the judicial focus would be to a keener negligence standard and emphasis more on the qualitative nature of the varying circumstances.

If anything, the problem is worse when one turns from the threshold stage to the decisional stage. As Bayless Manning has argued for years, the whole negligence context of the duty of care breaks down on the judgment of whether directors acted "with requisite care in the discharge of their duties." 128 There is a right-wrong aspect of fault in negligence law, a law which has as its prime frame of reference automobile accidents, that simply is inapplicable to business risk-taking. In addition, there is a natural reluctance to define in terms of aggravated negligence the standard of behavior which insulates fiduciaries from liability to their beneficiaries.

The basic problem is in the negligence concept of an objective standard—the care of the reasonably prudent man. This pattern, designed for personal injury litigation, simply does not fit into the business director context. Ideally, business directors are chosen not for ordinary prudence but for unusually wise risk taking. It is just hard to place the decision to build the Edsel or the decision to refinance Chrysler on the scale that measures the behavior of the ordinarily prudent man, even the ordinarily prudent business director. Business directors are chosen to make their peculiar individual judgments.

The new word that seems to be gaining acceptability is the word "rational." There are numerous rationales as to why "rational" is better than the word "reasonable." But basically it is probably because "rational" suggests to more people a wide spectrum of permissible choices, while "reasonable" can either suggest a more narrow spectrum or a correct-incorrect choice.

Moreover, the word "rational" is not bad. If the decision is rationally defensible, that gives fair recognition to the quality of judgment factor on which the courts rely frequently. Stating the requirement in a positive vein, i.e., a rational act, sits better than measuring the director's act in an extremely negative vein, i.e., recklessness or even gross negligence. This is so even if "rational"

is defined in terms of what it is not, i.e., reckless, and even if in result it does not differ significantly from a gross negligence test. "Rational" says more of what we are about. Examining the rationality of a decision makes the focus on directors' activities, including expert business risk taking, more realistic than that created by the artificial negligence focus. Obviously, the rational element should be stated to guarantee that in most situations there are many rational courses of business action, a wide spectrum, and not just a two-dimensional spectrum. The area of director discretion is enlarged in a positive vein, not limited by negative description.

All this leads again to a principled decision-making problem. How do you keep "rational" from being a conclusory label subject to judicial whim? That in turn leads to a definition of the narrower part of the total spectrum, that part which is not rational. One can conclude that, while the language of negligence may not belong to the director decision making arena, the language of recklessness is not so bad. A rational decision is not one that is made with "conscious indifference" to the rights of the stockholders. In short, the concept of recklessness may be easier to transfer to the business arena because the usual definition has meaning in that fiduciary context, albeit a different concept than the same language in tort law. "Conscious indifference" can put a limit on risk taking, a more subjective enterprise, where our reasonable man held to objective standards may seem out of place.

Thus, in information gathering, a negligence standard without the superlatives may be appropriate so long as courts recognize that "circumstances" vary. Such a standard would not be materially different in result than the "gross negligence" standard of Trans Union and would certainly be a more accurate description of the test on the Trans Union facts. But, at the decisional level, directors in their duty of care and judgmental function should be given the widest latitude, the bounds of rationality, with liability attaching at a conscious indifference to stockholder interest.129

Having said all of that favoring the management side, it seems that integrity would also require that the rationality element be

129. The rational spectrum standard (recklessness) at the decisional stage might lead to consideration of a modification of the Delaware indemnification statute. Cf. Del. Code Ann. tit. 8, § 145(a) (1983) (indemnification now permitted if director "acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation"). Indeed, the statutory coverage is not always clear now under the "gross negligence" test.
isolated as a separate duty of care factor and not related to duty of loyalty, such as good faith, honest performance, or even furtherance of a business purpose. We should call it what it is—a limited judgmental review of the directors’ business decision by the court. And directors as fiduciaries should know that they will be subjected to such review.

Turning to the duty of loyalty, there are potential complicating problems on the horizon. There has been a tendency by the Delaware Supreme Court, particularly in cases involving the question of necessity of a demand on a board before a stockholder can commence a derivative case, to narrow the ground for excusing demand to cases of a direct pecuniary interest.\textsuperscript{130} That context may prove too narrow for precedential purposes in other areas.\textsuperscript{131}

The concept of “interest” for determining a disabling conflict for business judgment purposes is surely worthy of more attention than the cases have given it. Here, too, the need of directors for certainty in a complex and inter-connected world arises. The codification issue again is being hotly debated. And there are subtleties beyond even the apparent complexities of “interest.” In \textit{Unocal},\textsuperscript{132} board members received a benefit that Mesa did not. In \textit{Moran},\textsuperscript{133} directors were structurally assuming power at the expense of stockholders. One cannot help but think that these interest issues cannot be treated in summary fashion or that the duty of loyalty debate over them will cease. Nor, in the area of performance loyalty, has evidentiary attention to the factual issue of entrenchment been exhausted.\textsuperscript{134} Nor can one believe that the concept of independence of

\begin{footnotesize}
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\item\textsuperscript{130} See, \textit{e.g.}, Aronson v. Lewis, 473 A.2d 805 (Del. 1984).
\item\textsuperscript{131} The American Law Institute’s Corporate Governance Project will probably suggest that the standard for dismissal of a derivative suit on motion of an independent committee of the board be unrelated to the necessity for a demand at the earlier pleading stage.
\item\textsuperscript{132} 493 A.2d 946 (Del. 1985).
\item\textsuperscript{133} 490 A.2d 1059 (Del. Ch. 1985), aff’d, 500 A.2d 1346 (Del. 1985).
\item\textsuperscript{134} I do not suggest a change in the rules on burden of proof. But it should be realized that the plaintiff faces a difficult burden. He must show by evidence to the court’s satisfaction that entrenchment was the sole or primary motivation. Kors v. Carey, 158 A.2d 136, 140-42 (Del. Ch. 1960). The defendants, on the other hand, only have to show that they themselves had reason to believe that plaintiff’s acquisition of stock is not in the best interests of the corporation. \textit{Unocal}, 493 A.2d at 954. The vice-chancellor in \textit{Unocal} pointedly stated: “Good faith beliefs are not sufficient justification to discriminate against [Unocal’s largest shareholder].” Mesa Petroleum Co. v. \textit{Unocal Corp.}, No. 7997, slip op. at 19 (Del. Ch. May 13, 1985).
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outside directors has seen the end of detailed factual analysis.\textsuperscript{135} Perhaps some of these issues will become more complex. But, for the moment, the management side enjoys the best of these issues, the detailed analysis of which is mercifully beyond the scope of this endeavor.

Directors are needed and policies that relate to them should be clear and fair. It is suggested, therefore, that it would be helpful if, in evaluating his protection under the business judgment rule, the director could ask himself the following four relatively simple questions:

1. Am I free from a disabling conflict?
2. Am I exercising due care under the circumstances in informing myself of the pertinent facts necessary to make this decision?
3. Am I acting in good faith by honestly performing my fiduciary duty in the best interest of the corporation?
4. Am I acting on a rational basis?

There is a nice symmetry in the four elements. Each serves a readily ascertainable independent purpose. Two of the elements, no disabling conflict and due care, are threshold issues. The final two, good faith and rationality, are directed to the moment of decision. One of the threshold issues, no disabling conflict, relates to the duty of loyalty and one of the threshold issues, due care under the circumstances in self-informing, relates to the duty of care. One of the performance elements, good faith, relates to the duty of loyalty, and the other performance element, rationality, relates to the duty of care. While the four questions may be preferable to a descriptive statement of the rule, in tribute to orthodoxy, it is probably necessary to attempt a formulation. The following is suggested:

A director will not be liable for a business decision if he acted without a disabling conflict (threshold loyalty), and with due care under the circumstances in informing himself of the pertinent facts necessary to make the decision (threshold care), and if his decision was made in good faith by the honest performance of his fiduciary duty in the best interest of the corporation (performance loyalty), and if he had a rational basis for the decision (performance care).

The formulation is admittedly more lengthy than the dictates of simplicity require. But once the purpose of each element is established, it can be shortened: "A director will not be liable for a business decision if he acted without a disabling conflict and with due care and good faith and if he had a rational basis for the decision."

**Conclusion**

The anxiety created by the *Trans Union* opinion should subside in light of analysis of the essence of the decision for prospective application and in light of other Delaware cases decided in the same year. The emphasis has switched from procedure to substance. The major issue for the moment in the business judgment area is whether there are any substantive legal limitations on the exercise of board power when such exercise affects the traditional residue of stockholder power, rights, and choice—particularly as they relate to selling and voting. As to the basic elements of the business judgment rule in its traditional defensive setting, there is reason to hope that the courts and commentators are gradually developing a simple, consistent formula which will be prospectively helpful to directors.