DELAWARE'S RETREAT: EXPLORING DEVELOPING FISSURES AND TECTONIC SHIFTS IN DELAWARE CORPORATE LAW

JAMES D. COX[*] & RANDALL S. THOMAS[**]

TABLE OF CONTENTS

---

[*] Brainerd Currie Professor of Law, Duke University.
[**] John S. Beasley II Professor of Law and Business, Vanderbilt University.

This article was presented at the Francis G. Pileggi Lecture in Law at the Widener University Delaware Law School. The authors wish to thank the participants who attended the lecture for their comments and questions. We also thank Professors Lawrence Hamermesh and Paul Regan for their comments. The paper benefitted greatly from the research assistance of Mr. Yash Ranade and Ms. Victoria Romvary.

I. INTRODUCTION

The 1980s is appropriately considered the Golden Age of Delaware corporate law.[1] During that era, the Delaware courts won international attention, not just by erecting the legal pillars that frame today's corporate governance discourse, but by interjecting a fresh perspective on the rights of owners and the prerogatives of managers. Within a melodious chorus of great decisions are four cases we refer to as the "Golden Quartet," which fundamentally changed Delaware's judicial review of important recurring questions that both delineate the obligations of managers and define the owner-manager relationship: *Revlon v. MacAndrews & Forbes Holding,*

[1] The lasting effect of the landmark decisions, regarding corporate issues coming out of Delaware's courts during this period, was readily apparent and recognized, even as the state's jurisprudence was developing. *See, e.g.*, *Takeover Turmoil Represents Law's 'Golden Age,' Corporate Counsel Told*, 17 SEC. REG. & L. REP., Oct. 18, 1985, at 1831 (quoting Bayliss Manning, the former Dean of Stanford Law School, describing the mid-1980's as a "golden age of corporate law").

Inc. ("Revlon");[2] *Unocal Corp. v. Mesa Petroleum Co.* ("Unocal");[3] *Weinberger v. UOP, Inc.* ("Weinberger");[4] and *Blasius Indus., Inc. v. Atlas Corp.* ("Blasius").[5] From inception each of the cases was rightly viewed as creating vigorous fiduciary responsibilities for directors and officers to act in the best interests of their company's shareholders.

No student emerges from a law school's business organization class today without a deep familiarity with these Delaware precedents. Yet, as is often the case with the common law, the meaning of these cases has evolved over time. Changes in the world of corporate governance have affected directors' and officers' roles in the modern corporation, including the rise of the independent director,[6] the increased concentration of the shareholder ownership stakes,[7] and the development of hedge fund activism,[8] to name a few.

One particularly critical development has been the recent explosion of disclosure-related deal litigation. In the past few years, more than 96% of publicly disclosed mergers have attracted shareholder litigation in a wide variety of venues.[9] Faced with this avalanche of cases, Delaware has struggled to find ways to reduce the flood to a trickle. In a fit of radical innovation, forum selection bylaws designed to funnel these cases back to the Delaware courts have been developed with strong initial judicial support that ultimately culminated in broad legislative authority.[10] Once the mechanics for adopting those unilaterally board-approved bylaws were in place, the Delaware Court of Chancery announced in *In re Trulia* that it

---

[2] Revlon, Inc. v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173 (Del. 1986) (addressing the scope of protection of shareholders in sale of control transactions).

[3] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (embracing a two-step, process-oriented test that management must meet when defending control against an unwanted suitor).

[4] Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (en banc) (establishing the template for examining self-dealing acquisitions).

[5] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (examining the foundations of the director-shareholder relationship).

[6] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1468 (2007) ("The move to independent directors, which began as a 'good governance' exhortation, has become in some respects a mandatory element of corporate law.").

[7] Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 523-24 (1990) (discussing how a "shareholder voice holds more promise for process and structural issues than for company-specific concerns.").

[8] Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. OF FIN. 1729, 1730 (2008) (discussing how "hedge funds are better positioned to act as informed monitors than other institutional investors" such as mutual funds and pension funds).

[9] Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 604 (2018).

[10] James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 257–58 (2015).

would no longer approve disclosure-only settlements without a strong showing by the plaintiff of plainly material nondisclosures or omissions.[11] The flood of disclosure-only cases quickly dropped to more manageable levels, although there was some evidence of flight to the federal courts.[12]

But even as these important roadblocks to shareholder deal litigation were being erected, as developed below, the Delaware courts have persisted in temporizing, in important ways, the scope of the Golden Quartet of cases that so defined the 1980s. Even though they still shape all manner of corporate discourse, this article shows that these cases have been hollowed out by the recent jurisprudence of the Delaware Supreme Court. As developed more fully below, central to the judicial constrictions of *Revlon*, *Weinberger*, *Unocal* and *Blasius* is the obeisance the Delaware Supreme Court repeatedly accorded to what it believes are the natural disciplining forces of informed shareholder consent and competitive markets for corporate control.[13] As will be developed later, this growing deference has coincided with the rise of hedge fund activist investors. Despite these considerations, we offer other explanations for why each of the components of the Golden Quartet have been substantially muted.[14]

Should we applaud these changes or wring our hands in despair? While some commentators have applauded these judicial moves, arguing that private enforcement of these fiduciary duties has run amok,[15] others have pointed out that these cutbacks will weaken shareholder monitoring of corporate management and potentially increase the incidence of director

---

[11] *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 887 (Del. Ch. 2016).

[12] Cain et al., *supra* note 9, at 608.

[13] In future work, we intend to focus on the strengths and weaknesses of shareholder ratification votes and their appropriate role as a monitoring device. In particular, we will explore the problems inherent in bundled votes when the shareholders are asked to approve a transaction simultaneously with approval of potential director misconduct as well as the overall rationale for shareholder ratification.

[14] A related paper by one of the authors is Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, forthcoming in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (Steven Davidoff Solomon and Randall S. Thomas eds., University of Chicago Press 2018). Another related recent working paper by Professor Korsmo discusses some of the issues related to the changes made to the *Revlon* and *Weinberger* doctrines. Charles R. Korsmo, Corwin v. KKR *and the Retreat of Judicial Scrutiny of Mergers* (Working Paper 2017). Professor Korsmo concludes that business judgment review is not warranted under these doctrines when a merger has been approved by independent directors and a stockholder vote. *Id.* at 6.

[15] *See* Sean J. Griffith, *Correcting the Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1 (2015); Theodore N. Mirvis, *Delaware Court Guidance on Merger Litigation Settlements*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 26, 2016), [https://perma.cc/3NVB-DFB6] (discussing the implications of *In re Trulia*).

misconduct.[16] In this article, we seek to take a middle road—acknowledging that the Delaware courts are weakening judicial and shareholder oversight of directors' and officers' fiduciary duties, while also recognizing important substantive issues not fully considered in each of the members of the Golden Quartet such that correction or restraint naturally followed in the years of their application. Moreover, such correction was to be expected in light of the growing presence of institutional activism and those shareholders' use of Institutional Shareholder Services as a third party voting advisor service. Shareholder monitoring can occur in a variety of ways, and the current vitality of hedge fund activism—some would say excessively so—may provide a good justification for weakening the mechanisms for investor monitoring via litigation.[17] However, should Delaware move to restrict hedge fund activism, we would have to revisit the need for stronger shareholder litigation in order to insure adequate shareholder monitoring of corporate management.

We proceed as follows: the initial four parts of the article examine how the bite of each of the Golden Quartet has been seriously defanged overtime. In the fifth part, we explore explanations unique to each of the cases constituting the Golden Quartet that will likely show why the Delaware courts have chosen to retreat from the ground claimed in the 1980s. Part I examines the evolving content of *Revlon*. We document the shifts over time in the meaning of judicial review under this standard, showing how its expansive beginnings in two bidder cases led to its overuse in one bidder transactions. This in turn led the Delaware courts to cut back on the doctrine. Nonetheless, as developed below, the Delaware Supreme Court's most recent evisceration of *Revlon* in *Corwin v. KKR Financial Holdings, LLC,*[18] portends a shift in corporate law that is more momentous than was *Revlon* itself.

Weinberger's degradation is examined in Part II. Again, a pattern of expanding shareholder litigation seems to have pushed the Delaware courts to cut back on the scope of judicial review. The Delaware Supreme Court's decision in *Kahn v. M&F Worldwide*[19] surely accomplished that goal but we point out the costs associated with that opinion.[20]

---

[16] *See* Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Litigation as a Tool for Reform*, 72 BUS. LAW. 632 (2017).

[17] *See e.g.,* Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?*: *A Flesh-and-Blood Perspective on Hedge Fund Activism and our Strange Corporate Governance System*, 126 YALE L. J. 1870, 1883 (2017).

[18] Corwin v. KKR Fin. Holdings, LLC, 125 A.3d 304 (Del. 2015) (en banc).

[19] Kahn v. M&F Worldwide, 88 A.3d 635 (Del. 2014) (*M&F II*) (en banc).

[20] *See infra* Part II.

Unocal's weakening is the focus of Part III where the Delaware Supreme Court initially appeared to be filling an important regulatory gap in the market for corporate control, but ultimately rejected the legal standard set forth in *City Capital Associates Ltd. Partnership v. Interco, Inc.* ("Interco") that would have given shareholders a choice in deciding whether to tender into a hostile takeover.[21] Backtracking furiously, the court has now intentionally withdrawn almost completely from any role in regulating the market for corporate control in favor of judicial deference to independent directors' decisions.

Among the Golden Quartet, *Blasius* had the greatest potential for a much needed rethinking of boundaries between shareholder rights and management prerogatives. However, as set forth in Part IV, among the four areas studied here, *Blasius* had the shortest life, perhaps reflecting the potential profundity of its insights. In Part V we explain the multiple forces that contributed to the now weak-to-nonexistent voice of the Golden Quartet. We conclude that existing market forces and shareholder oversight are sufficient to curtail managerial misconduct but that the watchful eye of judicial review may need to be revived if those vehicles for shareholder oversight are curtailed.

II. *REVLON* AND *CORWIN*: WHAT'S LEFT OF JUDICIAL REVIEW OF DIRECTOR FIDUCIARY DUTIES IN A SALE OF CONTROL?

Revlon is a corporate law icon standing for the broad proposition that, in Delaware, and about half the jurisdictions presented with similar issues, the board of directors has the burden of proving their independent and good faith pursuit of the *best offer* whenever control of the company is being sold.[22] As so stated, the board does not enjoy the same deference courts regularly accord to director decisions regarding the company's affairs for which there is a high presumption of propriety embodied in the business judgment rule.[23] In this section, we trace the major developments

---

[21] City Capital Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787 (Del. Ch. 1988).

[22] *See* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2012–18 (2009) (collecting cases following and diverging from Delaware law on takeover-related issues).

[23] *See* Unocal Corp.,493 A.2d at 953–54 ("From this it is now well established that in the acquisition of its shares a Delaware corporation may deal selectively with its stockholders, provided the directors have not acted out of a sole or primary purpose to entrench themselves in office."); *see also* Hanson Trust PLC, v. ML SCM Acquisition, Inc., 781 F.2d 264, 273 (2d Cir. 1986) ("[I]n other jurisdictions, directors may not enjoy the same presumptions per the business judgment rule.").

in the *Revlon* doctrine. In recent decisions, we find that *Revlon*'s bark is today greatly muffled and its bite largely nonexistent.

A. Revlon Creates a New Standard of Review

Revlon was a conglomerate company run by an urbane and sophisticated Frenchman, Michel Bergerac.[24] Its suitor, Ronald Perelman, backed by Drexel Burnham's newly created junk bond financing juggernaut, attempted to initiate a friendly transaction, but was "rebuffed, perhaps in part based on Mr. Bergerac's strong personal antipathy to Mr. Perelman."[25] Perelman responded by launching a hostile tender offer for Revlon, which in turn implemented a poison pill and a defensive stock repurchase.[26] The stock repurchase efforts involved an issuance of notes in exchange for shares of the company's stock.[27] Among the notes' protective provisions were serious limitations on Revlon incurring additional debt; however, a majority of the independent directors on the Revlon board could waive these provisions.[28]

Perelman made a series of escalating bids and eventually the Revlon board entered into an MBO with the Forstmann Little leveraged buyout firm (joined by some of Revlon's senior management) at a price of $56 cash per share.[29] Perelman raised his tender offer price to $56.25 in response to the Forstmann Little bid.[30] Forstmann Little and Revlon then made a new deal at $57.25 cash per share, conditioned on Revlon agreeing to three deal protections: a crown jewel lock-up, a $25 million cancellation fee and a no-shop provision.[31] As part of this deal, Forstmann Little agreed to support the value of the notes whose value had plummeted after the announcement of its initial MBO.[32] Perelman then raised his bid to $58 cash per share and filed suit to enjoin the deal protections.[33]

The Delaware Supreme Court approved Revlon's initial use of its defensive tactics, pointing out that they benefited shareholders by forcing Perelman to raise his bid and keeping him from buying the company at an inadequate price and then busting it up.[34] However, once Revlon's board authorized its management team "to negotiate a merger or buyout with a

---

[24] 506 A.2d 173, 175–76 (Del. 1986).
[25] *Id.* at 176.
[26] *Id.*
[27] *Id.* at 177.
[28] *Id.* at 178.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 178–79.
[33] *Id.* at 179.
[34] *Id.* at 181.

third party . . . [it] was a recognition that the company was for sale."[35] The *Revlon* court reasoned that because the company was being sold in a bust-up transaction that rendered the use of defensive tactics moot, as "the directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[36] As a result, the court determined that it needed to engage in enhanced scrutiny of any preferential treatment given by Revlon to Forstmann Little and that scrutiny was to be guided by whether Revlon's board acted as "auctioneers" in the sense of pursuing the best offer.[37]

In the Delaware Supreme Court's decision, the court noted that at trial, the Court of Chancery was troubled that the facts strongly supported the view that the Revlon directors favored Forstmann Little because they feared personal liability to the note holders that participated in the stock repurchase.[38] Upon announcement of Forstmann Little's offer and the Revlon's board's waiver of the notes' provision restricting additional debt, the notes lost value.[39] The note holders therefore sued the directors alleging fraud in the notes' issuance; the gravamen of their complaint is that the board failed to disclose the high likelihood that the board would seek another bidder and would waive the notes various protective provisions to obtain the cooperation of its White Knight.[40]

There was also a whiff of management self-interest arising from the officers' planned participation in the initial MBO offer and the obvious animosity between Bergerac and Perelman.[41] With the scent of managerial conflict of interest in the air, the court went on to conclude that when "dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced . . . duties by playing favorites with the contending factions."[42] Furthermore, the court said that "under all the circumstances the directors allowed considerations other than the maximization of shareholder profit to affect their judgment."[43] Therefore, the court struck

---

[35] *Id.* at 182. The management team initially negotiated to join with Forstmann Little in an MBO transaction that would have similarly resulted in a bust-up of the company. *Id.* at 178.

[36] *Id.* at 182.

[37] *Id.*

[38] *Id.* at 179 (citing MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc., 501 A.2d 1239, 1249–50 (Del. Ch. 1985), *aff'd* 505 A.2d 454 (Del. 1985) (decision without published opinion)).

[39] *Id.* at 177.

[40] *Id.* at 183.

[41] *Id.*

[42] *Id.* at 184.

[43] *Id.* at 185.

down the three deal protections the Revlon board had provided Forstmann Little.[44]

At its inception, *Revlon* imposed a heightened degree of judicial scrutiny on boards of directors; albeit in a case that involved two bidders, where the company put itself up for sale and in the aftermath of that decision discriminated unfairly between the competing bidders for the company. Importantly, *Revlon* embraces the standard that the objective of the board is to obtain the best offer reasonably available for the shareholders.[45] The court's decision in the case nonetheless appears to have been influenced by the directors' perceived conflicts of interest in favoring Forstmann Little. Finally, the case left open important questions about when the court would apply this new doctrine and how directors would need to behave when it did apply. Subsequently, these issues were addressed in other two bidder cases.

B. Revlon*'s Reach and Duties Are Clarified*

Since *Revlon* was decided, there have been hundreds of cases where the Delaware courts have considered its application. Given the wealth of case law interpreting *Revlon*, it is difficult to isolate the crucial turning points in the doctrine. While there is certainly plenty of room to debate the fine points, almost everyone agrees that *Paramount Communications, Inc. v. QVC Network, Inc.* ("QVC") was a key decision in the evolution of Delaware's *Revlon* jurisprudence.[46]

QVC involved an attempt by Paramount Communications, Inc. ("Paramount") to engage in a friendly merger with Viacom, Inc. ("Viacom") and its controlling shareholder Sumner Redstone.[47] After extensive negotiations, Paramount and Viacom reached agreement on the terms of an $8 billion dollar cash and stock merger that included some formidable deal protections, including an uncapped stock option that permitted Viacom to purchase 19.9% of Paramount's stock.[48] However, shortly after the deal was publicly announced, QVC Network made an unsolicited proposal to buy Paramount at a significantly higher price; its offer was subject to, among other things, the elimination of the deal

---

[44] *Id.*

[45] *See id.* at 184 ("[T]he shareholders' interests necessitated that the board remain free to negotiate in the fulfillment of that duty.").

[46] 637 A.2d 34 (Del. 1993).

[47] *Id.* at 36. Paramount had been searching for a merger partner ever since its earlier unsuccessful effort to buy Time, Inc. in a hostile transaction. *See generally* Paramount Commc's, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).

[48] *QVC*, 637 A.2d at 39.

protections in the Paramount-Viacom merger.[49] In each one of the subsequent rounds of bidding, Paramount's board favored Viacom's bids; ultimately the Delaware Supreme Court was called upon to determine the validity of the deal protections.[50]

The threshold issue addressed by the court is what "triggers" *Revlon* duties.[51] In an earlier decision, the court had offhandedly approved the "change of control" litmus.[52] In *QVC*, the court applied that test to hold that a stock-for-stock merger that leads to the creation of a post-deal controlling shareholder in the newly merged companies constitutes a *Revlon* sale of control.[53]

Having found that the initial proposed Paramount-Viacom merger constituted just such a sale of control, the court went on to impose important fiduciary obligations on Paramount's directors that were subject to enhanced Revlon scrutiny in a two-part analysis. The court stated:

> The key features of an enhanced [Revlon] scrutiny test are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.[54]

The court further specified the directors' specific obligations under the first part of this test a few pages further into the opinion:

> [T]he Paramount directors had the obligation: (a) to be diligent and vigilant in examining the Paramount-Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain, and act with due care on, all material information reasonably available, including information necessary to compare the two offers to determine which of these transactions, or an alternative course of action, would provide the best value reasonably available to the stockholders; and

---

[49] *Id.* at 38.
[50] *See id.* at 36.
[51] *See id.* at 47.
[52] Paramount Commc's Inc. v. QVC Network Inc., 637 A.2d 828 (Del. 1993) (unpublished table decision), *aff'g* 635 A.2d 1245 (Del. Ch. 1993).
[53] QVC, 637 A.2d at 48.
[54] *Id.* at 45.

> (d) to negotiate actively and in good faith with both Viacom and QVC to that end.[55]

Applying this test to the facts of the case, the court concluded that the Paramount directors had breached their fiduciary duties in conducting the sale process; the court therefore affirmed the lower court order that enjoined all the deal protections given to Viacom.[56] The directors were faulted for not giving sufficient attention to the impact of the "draconian" deal protections in the original merger agreement and for not attempting to negotiate away those obstacles to the sale process at subsequent points in the negotiations with Viacom.[57]

QVC clarified how *Revlon* defines change of control transactions. It also clarified that, in at least the two bidder setting, when a sale occurs, the acquired company's directors' actions are subject to enhanced scrutiny and adjudged against the best offer criterion. Two bidder cases, however, typically are decided on motions for preliminary injunctions and do not generally involve post-closing damage actions. This is important because in an injunction setting, the duty of care operates freely without the constraints of exculpatory provisions in corporate charters pursuant to section 102(b)(7) of the Delaware General Corporation Law (the "DGCL").[58]

Furthermore, many of the two bidder cases involve extreme favoritism of one bidder over another bidder, favoritism that often appears motivated by obvious and not so obvious conflicts of interest such as existed in *Revlon*. In other words, two bidder cases present a full range of duty of care and duty of loyalty issues for a court to decide, making them a potential rich area for mining under traditionally defined fiduciary doctrines of care and loyalty. However, two-bidder contests, such as arose in *Revlon* and *QVC*, are quite rare.[59]

C. The Fracturing of Revlon *in One Bidder Cases:* Lyondell, Corwin *and* C&J Energy Services

The *Revlon* doctrine was created and its broadest commands were developed in two bidder cases. However, because two bidder cases arise infrequently, and *Revlon* has, thus far, not been limited to such instances,

---

[55] *Id.* at 48.

[56] *Id.* at 51.

[57] *Id.* at 50.

[58] DEL. CODE tit. 8 §, 102(b)(7) (authorizing articles of incorporation to include provisions that shield directors from liability except in certain purposeful misconduct).

[59] One important exception is Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988), where the Delaware Supreme Court clarified the boundaries of target companies' differential treatment of competing bidders.

Revlon's daily fare is the more common single bidder cases. In these cases, *Revlon* complaints abound where the target company has entered into a friendly transaction with significant deal protections attached and no other bidders sought to top the initial deal with a higher competing offer. Many one bidder deals involve cash for stock deals with the consequential effect that they constitute a change of control transactions under *Revlon*. Pre-sale auctions, where a company solicits bids from a large number of potential bidders, but ultimately chooses only a single bidder, routinely result in an agreement that includes significant deal protections that may deter alternative bids. Such transactions also trigger *Revlon* even though they rarely involve a post-auction second bidder or even the hint of a such a bidder.

In this setting, it is often difficult for a plaintiff to pursue the directors individually because most Delaware corporations have exculpatory provisions under section 102(b)(7) of the DGCL that eliminate a director's money damage liability for breach of the duty of care. Thus, even the most flagrant breaches of the duty of care will only provide grounds for injunctive relief against target firm directors under *Revlon*.[60] Since these cases generally wind up as post-closing damage actions, as illustrated below, duty of care claims typically drop out of them.[61]

Duty of loyalty claims held more promise until the Delaware Supreme Court issued its opinion in *Lyondell Chemical Co. v. Ryan*.[62] In that case, a strategic bidder made an unsolicited all cash bid for Lyondell Chemical.[63] In the course of one week, the Lyondell board negotiated and agreed to a sale of the company after a small number of meetings, a relatively cursory effort to extract a higher bid, and without making any effort to seek an alternative transaction.[64] In the end, the board agreed to

---

[60] Beyond the protection of the immunity shield are advisors, such as investment bankers, who can incur liability as aiders and abettors. *See In re* Del Monte Foods Co. S'holder Litig., 25 A.3d 813 (Del. Ch. 2011) (granting a preliminary injunction against deal protection provisions after finding substantial likelihood that transaction's advisor had engaged repeatedly in prejudicial misconduct). As the preliminary injunction was winding down, the parties settled the matter in one of the largest settlements in the history of Delaware. *In re* Del Monte Foods Co. S'holder Litig., No. 6027-VCL, 2011 WL 6008590 (Del. Ch. Dec. 1, 2011) (Order and Final Judgment).

[61] While injunctive relief may be initially sought in these cases, there is no competing offer on the table and hence the Court of Chancery is reluctant to enjoin the bid out of concern that the target shareholders will lose the only offer on the table. Thus, these cases ultimately become post-closing damage actions.

[62] 970 A.2d 235 (Del. 2009) (en banc).

[63] *Id.* at 237–38.

[64] *Id.* at 241.

the $13 billion dollar deal with a $385 million dollar break-up fee.[65] A shareholder suit was filed claiming that the directors failed to obtain the best available price under *Revlon*.[66]

The Delaware Supreme Court began its analysis by stating that *Revlon* "did not create any new fiduciary duties . . . [but] simply held that the 'board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise.'"[67] While the trial court had found that the plaintiffs might be able to prevail on a duty of care claim that the directors had breached their *Revlon* duties,[68] Lyondell's charter contained an exculpatory provision under section 102 (b)(7), which eliminated director liability for money damages for those potential breaches.[69] Turning to the duty of loyalty, the court found that the directors were independent, and not motivated by self-interest or ill will, leaving only a claim that the directors had acted in bad faith in violation of their *Revlon* duties.[70] To prevail on this claim, however, the shareholders would need to establish that the Lyondell directors intentionally disregarded their fiduciary duties, by "knowingly and completely fail[ing] to undertake their responsibilities," under *Revlon*.[71] In other words, the lower court's "inquiry should have been whether those directors utterly failed to attempt to obtain the best sale price."[72]

In the aftermath of *Lyondell*, little evidence of director effort is required to satisfy this extremely low standard. Absent a competing bidder, it is difficult to frame a breach of loyalty complaint except in the very unusual circumstance of self-dealing by the target directors. Since a high percentage of Delaware corporations have exculpatory provisions for duty of care liability, and the duty of loyalty standard for money damage liability is very high for independent directors, it is not surprising that most shareholder litigation shifted its focus from directors failing to conduct an auction to the much easier to formulate allegations of disclosure violations by boards in proxy materials sent to shareholders. As we shall see below, this may have ultimately led to an enormous increase in disclosure-focused litigation.

---

[65] *Id.* at 238.
[66] *Id.* at 239.
[67] *Id.*
[68] It is important in understanding Delaware's retreat in this area that the *Lyondell* Court observed that *Revlon* requires only that "[d]irectors' decisions be reasonable, not perfect." *Id.* at 243.
[69] *Id.* at 239.
[70] *Id.* at 239–40.
[71] *Id.* at 243–44.
[72] *Id.* at 244.

Lyondell illustrates how *Revlon*'s broad command invited litigation as there is little in *Revlon* that permits an ex ante determination of whether the facts support a finding that the directors conducted an auction. *Lyondell* is an example of the ad hoc inquiry that flows naturally from *Revlon*'s overbreadth. Some commentators suggest that one potential mechanism to address such uncertainty is by expanding the doctrine of shareholder ratification to curtail post-closing damage actions.[73] However, the Delaware Supreme Court precedent placed significant barriers in the way of this type of initiative: first in *In re Santa Fe Pacific Corp. Shareholder Litigation*[74] and later in *Gantler v. Stephens*.[75] Of these two opinions, *Gantler* more clearly explained the law when it stated:

> [W]e hold that the scope of the shareholder ratification doctrine must be limited to its so-called "classic" form: that is, to circumstances where a fully informed shareholder vote approves director action that does *not* legally require shareholder approval in order to become legally effective. Moreover, the only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve.[76]

In other words, under *Gantler* and *Santa Fe*, a merger vote that is statutorily required has no ratification effect whatsoever. Instead, if the defendants want to ratify any claims made against them for breach of fiduciary duties in agreeing to the deal, they must hold a second shareholder vote: one in the "classic" form, and one to specifically ask shareholders to approve only the ratification of the alleged misconduct. The virtue of presenting shareholders with separate votes is that it avoids "bundling" the two decisions and obscuring shareholders' true preferences.[77]

Recently, however, in a highly significant decision, the Delaware Supreme Court revisited the validity of these cases in *Corwin v. KKR*

---

[73] *See, e.g.*, J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443 (2014).

[74] 669 A.2d 59, 68 (Del. 1995).

[75] 965 A.2d 695, 713 (Del. 2009) (en banc).

[76] *Id.* (emphasis in original) (noting that the *Santa Fe* decision in 1995 had the same effect).

[77] James D. Cox, et al., *Quieting the Shareholders' Voice: Empirical Evidence of Pervasive Bundling in Proxy Solicitations*, 89 S. CAL. L. REV. 1175, 1178 (2016) ("[T]he joinder of unrelated substantive items causes shareholders to approve items that they might not otherwise want implemented and also robs the directors of awareness of the shareholders' views on each bundled proposal.").

Financial Holdings LLC.[78] The case involved a stock-for-stock merger between a limited partnership (KKR & Co. L.P., or "KKR") and a limited liability company (KKR Financial Holdings LLC., or "Financial Holdings"), although oddly the case was briefed as though it involved two corporations.[79] The merger was subject to the approval of a majority of the disinterested shareholders of Financial Holdings.[80]

The plaintiffs argued on appeal that the case should be reviewed under the *Revlon* standard.[81] The Delaware Supreme Court applied *Revlon* even though the plaintiffs had not raised the *Revlon* issue in the Court of Chancery.[82] *Corwin* held that in an arms-length M&A transaction a fully informed non-coerced vote of approval by the disinterested stockholders displaces *Revlon* and invokes the business judgment rule.[83] The court stated that its holding was not in conflict with the earlier decision in *Gantler*, arguing both that *Gantler*'s requirement of a separate vote in ratification situations was dictum, and that it would not have overruled other Delaware ratification precedent without expressly mentioning it.[84]

The court offered policy arguments in response to plaintiffs' claims that allowing ratification of *Revlon* and *Unocal* claims would "expose stockholders to unfair action by directors without protection."[85] First, the court stated that *Unocal* and *Revlon* were not "designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available."[86] This observation has far-reaching implications as it appears to confine *Revlon* duties to equitable relief, except where there is egregious misconduct. Second, the court noted that without full disclosure, ratification would be ineffective.[87] Third, the court

---

[78] 125 A.3d 304 (Del. 2015) (en banc).

[79] *Id.* at 306 n.3.

[80] *Id.* at 305; *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 988 (Del. Ch. 2014), *aff'd sub nom*.

[81] *Corwin*, 125 A.2d at 306–308. Plaintiffs also argued that KKR was the controlling shareholder of Financial Holdings and therefore the transaction was subject to the entire fairness standard of review. The Supreme Court rejected that argument, upholding the Court of Chancery's earlier determination that KKR did not have voting power or management control of Financial Holdings that were sufficient to constitute effective control under Delaware law. *Id.* at 308.

[82] *Id.* at 308 (It is well-settled Delaware law that parties must raise all issues in the court below or they will have waived their right to raise them on appeal).

[83] *Id.* at 308–09.

[84] *Id.* at 311.

[85] *Id.* at 312.

[86] *Id.* (referencing Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)).

[87] *Id.*

unqualifiedly embraced the protective effects of a fully informed, uncoerced vote:

> When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to the stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.[88]

We therefore see that the Delaware Supreme Court has provided a procedural route to provide ex ante certainty that *Revlon* is satisfied—a fully informed uncoerced shareholder vote.

D. Corwin*'s Costs and Benefits*

Corwin's significance occurs on two important fronts. First, and most obviously, it allows stockholder approval to supplant *Revlon*, provided the transaction is not one that otherwise triggers an entire fairness inquiry because it is with a related party. Second, and of great significance to corporate law, *Corwin* holds that the shareholder vote, compelled by statute for the transaction to be duly undertaken, can also serve as a vote ratifying any lapse under *Revlon* or for that matter any other fiduciary principle. While there is a good deal of interconnection between these two facets of *Corwin*, each has distinct implications.

Corwin's impact on *Revlon* can be illustrated by revisiting the court's precedent and asking how it would be affected today. For example, in *C&J Energy Services v. City of Miami General Employees' & Sanitation Employees' Retirement Trust* ("C&J Energy Services"), the Delaware Supreme Court observed that "*Revlon* does not require a board to set aside its own view of what is best for the corporation's stockholders and run an auction whenever the board approves a change of control transaction."[89] The court held that evidence of a market check is required, but it need "not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept

---

[88] *Id.* at 312–13.

[89] C&J Energy Servs. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014) (en banc).

the higher-value deal."[90] A fully independent board's judgment regarding whether the circumstances permit a market check is—in the court's view—entitled to great deference. It thus held the Court of Chancery erred in holding that *Revlon* required that the company be able to solicit competing bidders.[91] The court emphasized that the board, while not able to actively solicit competing bidders, had negotiated a broad fiduciary out provision that enabled the board over the next five months to accept a competing bid, albeit an unsolicited one, as the company was subject only to a relatively modest $65 million dollar termination fee.[92]

With respect to the first of *Corwin*'s effects, compare the approach taken in *C&J Energy Services*, where the court's belief and focus was on the freedom the board had to accept a competing offer.[93] To the court, because the transaction would not close for over five months, the termination fee was relatively small, and the board had negotiated for the right to accept a better offer (a fiduciary out clause), the board's action appeared a reasonable means to passively test whether a better offer was possible.[94] Presumably, if the deal closure was sooner and the termination fee larger, the board's reasonableness would be viewed as more suspect.

Enter *Corwin*. A suitor, and the target board, can be expected to prefer the more certain outcome of a shareholder vote over the ex post uncertainty that a judge would find that the board had taken steps reasonably designed to meet the board's *Revlon* duties. We can expect, post *Corwin*, the antidote for a *Revlon* inquiry will itself be an approving vote of the stockholders, at least when there is a single suitor. Note that *C&J Energy Services* itself would appear to protect the directors' choice of ratification over steps to pursue an active or passive market check.[95] If this occurs, we can expect that auction-like mechanisms, such as passive market checks, will become passé among dealmakers.[96]

The second facet of *Corwin*—that the statutorily mandated vote for the transaction can also serve to displace *Revlon*—is more troubling. Recall that *Corwin* requires that the vote be uncoerced.[97] Because

[90] *Id.* at 1070 (The court further observed that the ability of the stockholders "to freely accept or reject the board's preferred course of action is also of great importance.").

[91] *Id.* at 1067–68.

[92] *Id.* at 1070.

[93] *Id.* at 1053.

[94] *Id.*

[95] *See id.* at 1071.

[96] Of course, the Delaware Court of Chancery is a court of equity and when confronted with evidence of obvious wrongdoing can fashion an equitable remedy. This principle could be at work in cases where the shareholder vote approving the transaction was subject to "structural coercion," such as where the vote was structured in a way that it may be seen as "driven by matters extraneous to the merits of the transaction." Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418–VCG, 2017 WL 2352152, at *2 (Del. Ch. May 31, 2017).

[97] Corwin v. KKR Fin. Holdings, LLC, 125 A.3d 304, 312-13 (Del. 2015) (en banc).

termination fees are ubiquitous, there will always be claims that shareholder approval was not without compulsion as failure to secure the requisite vote could trigger the company's requirement to pay the disappointed suitor. Further, the shareholder vote post *Corwin* assumes such significance, being the disciplining force for pursuit of the best offer. Therefore, courts can expect to give even greater attention to the termination fee and other features of the deal that may bear on whether the shareholder vote was sufficiently free of external threats.

More significantly, allowing, as *Corwin* does, the shareholder vote to approve the transaction also to excuse any failure under *Revlon* on the part of the board, invokes the classic problem of shareholders being confronted with a distorted choice. Included within *Corwin*'s specter would be the instance of a single acquiring firm's offer joined with a candid statement that the board had little time to pursue other suitors, perhaps because of the aggressiveness of the first suitor. In such a case, shareholders collectively are poorly positioned to assess whether a better deal with the suitor or with another suitor could have been obtained. Voting against the transaction means the firm offer, likely with a premium to market, would disappear. There would also be great uncertainty regarding the consequences of a negative shareholder vote. Moreover, with that rejection, the shareholders could not expect any recovery against the directors (and perhaps outside advisors), since damages would turn on speculation of what offer or offers would have been forthcoming had the board fulfilled its duties under *Revlon.*

But the greatest uncertainty is just what the positive vote communicates. Bundling the certainty of a deal, but perhaps not an optimal one, with disclosure of board laxity in pursuing the best deal reasonably available, hardly sends a clarion image of unwavering approval of each. In contrast, requiring a separate vote on the transaction and ratification of the directors' handling of the transaction avoids these problems.[98]

---

[98] *See* Cox et al., *supra* note 77; *see also Sciabacucchi*, 2017 WL 2352152, at *4 (finding structural coercion where two substantially unrelated items were bundled in a single resolution submitted to the shareholders).

III. FROM *WEINBERGER* TO *M&F WORLDWIDE*: WRITING THE CONTROLLING SHAREHOLDERS' PLAYBOOK FOR MINORITY SQUEEZE-OUTS[99]

Controlling shareholders have many motivations for squeezing out the minority shareholders in companies they control such as, seeking to gain access to target assets, eliminating the costs of public ownership, capturing gains from synergies in operating the target company, or eliminating future concerns for self-dealing by placing all operations under a single entity, to name a just a few.[100] In eliminating public shareholders from the company, some of the controllers' actions may benefit all shareholders of the company on a pro rata basis, while others lead to gains that are disproportionately appropriated by the controller. In the former situation, the law defers to the self-interest of the controlling shareholder because its actions bestow proportionate gains to all of the investors. However, where the controller engages in self-dealing conduct, resulting in it getting more than its fair share of the benefits from its actions, then the controlling shareholders' fiduciary duties are triggered and the court will review the fairness of the underlying transaction.[101] This standard has been widely adopted by courts but *Weinberger* stands out for applying it to minority shareholder squeeze-outs in Delaware corporations.

A. Weinberger *Endorses the Fairness Standard of Review for Squeeze-Out Mergers*

Weinberger v. UOP, Inc. involved a controlling shareholder squeeze-out of a large block of minority shareholders in UOP, Inc.[102] The Signal Companies Inc. ("Signal") held 50.5% of UOP's stock that it had acquired several years earlier in an arm's length transaction, in part

---

[99] The concerns raised in this section may extend more broadly to any self-dealing merger as the entire fairness test would likely be applied by the Delaware courts even in a stock-for-stock transaction in these circumstances.

[100] *See generally* RONALD J. GILSON AND BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS, 1238–47 (2d ed. 1995). These types of transaction have been thought to have great potential for abuse. Victor Brudney & Marvin Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354 (1978) (closely analyzing a range of potential abuses to shareholders and suggesting procedural mechanisms as a meaningful prophylaxis). At the time *Weinberger* was decided, fears of such abuses were sufficient to prompt an ABA-sponsored committee to provide guidance for such transactions. ABA Committee on Corporate Law, *Guidelines on Going Private*, 37 BUS. LAW. 313, 315–16 (1981).

[101] Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("When the situation involves a parent and a subsidiary, with the parent controlling the transaction and fixing the terms, the test of intrinsic fairness, with its resulting shifting of the burden of proof, is applied.").

[102] 457 A.2d 701, 702–703 (Del. 1981) (en banc).

through a public tender offer at a substantial premium over the market price.[103] Following that transaction, Signal appointed several of its employees to the UOP board and two of them, Arledge and Chitiea, later prepared a memo that included a valuation of UOP, which they put together using UOP information.[104] They shared the memo with the Signal board but did not share it with the non-Signal members of the UOP board.[105] Ultimately, the transaction was hastily approved by both companies' board of directors, but there was no evidence that UOP's board attempted to negotiate the deal price, and the speed of the transaction led the UOP investment bankers to hurriedly prepare their fairness opinion.[106] Nevertheless, a majority of the minority shareholders voted to approve the transaction, albeit without full disclosure of the above facts.[107]

The Delaware Supreme Court held that the governing standard of judicial review was the "entire fairness" standard that applies to self-dealing.[108] It found that Signal did not meet this standard because it failed to show fair price and fair dealing in connection with the cash-out merger.[109] The case was remanded to the Court of Chancery to determine what price entire fairness demanded. The result, however:

> [C]ould have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm's length . . . . Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.[110]

The court's holding regarding the effects of a majority of the minority shareholder vote on the burden of proof in a controlling shareholder squeeze-out was less noticed. Drawing on *Michelson v. Duncan*, the *Weinberger* court held that such a vote would have shifted the burden of proof onto the plaintiffs to show the transaction was unfair.[111]

---

[103] *Id.* at 704.
[104] *Id.* at 705.
[105] *Id.* at 707.
[106] *Id.* at 708.
[107] *Id.*
[108] *Id.* at 710.
[109] *Id.* at 711–12.
[110] *Id.* at 709 n.7.
[111] *Id.* at 703 (citing Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979)). Interestingly, *Michelson* did not involve a controlling shareholder squeeze-out, but rather a

However, the court found the vote to be uninformed and therefore ineffective.[112]

Although there are other important aspects of the decision,[113] *Weinberger*'s application of the entire fairness standard of judicial review in squeeze-outs, its suggestion that controlled companies employ independent special committees, and its holding that a majority of the minority shareholder vote approving the transaction would result in a burden shift, became the template for considering post-*Weinberger* squeeze-out transactions.

B. Kahn v. Lynch*: Burden Shifting from the Use of a Special Committee*

Just a little over a decade later, in *Kahn v. Lynch Communications Systems, Inc*. ("Lynch I"), the Delaware Supreme Court further clarified the effect of using a special committee of independent directors on the appropriate standard of review to be used in a controlling shareholder squeeze-out.[114] Alcatel held a sizeable block of shares in Lynch Communications, which along with the power that they exercised over Lynch's board, made them in the eyes of the court a controlling shareholder.[115] Lynch's board deployed a special committee of independent directors that rejected Alcatel's suggestion that Lynch acquire one of its subsidiaries, leading Alcatel to propose a squeeze-out of the remaining publicly held shares.[116] Lynch decided to use the same special committee to assess the Alcatel offer.[117] After some negotiations over the price to be paid in the transaction, Alcatel made its final offer accompanied by the threat that if the special committee did not accept this offer, it would move forward with a hostile tender offer at a lower price.[118]

The Court was confronted with the question of how much significance it should attach to the use of the Special Committee in negotiating the terms of the transaction.[119] After reviewing *Weinberger*'s

---

waste claim that was brought challenging the issuance of executive stock options. *Michelson*, 407 A.2d at 216.

[112] *Weinberger*, 457 A.2d at 710, 712 (noting that majority stockholders have a duty of complete candor in this context and are required to disclose all information germane to the transaction to the minority stockholders (citing Lynch v. Vickers, 383 A.2d 278, 279, 281 (Del. 1977)).

[113] For example, the court eliminated the business purpose requirement that it had earlier adopted as a condition for approving mergers and adopted a more liberal valuation standard for appraisal actions after declining to follow the Delaware block method. *Id.* at 713–15.

[114] 638 A.2d 1110 (Del. 1994).

[115] *Id.* at 1112.

[116] *Id.*

[117] *Id.* at 1113.

[118] *Id.*

[119] *Id.* at 1116.

holding that courts should apply the entire fairness test to control shareholder squeeze-outs, the court noted the burden shifting effects of an informed vote by the majority of minority investors,[120] and observed that the use of a properly empowered special committee should have a similar effect in the entire fairness analysis.[121] However, the court qualified this observation, holding that before any burden shift can occur, the court must carefully scrutinize the "special committee's real bargaining power."[122] The court decided that there was sufficient evidence pled to support a claim that the Special Committee did not exercise real bargaining power and, therefore, its recommendation did not shift the burden of proving entire fairness from Alcatel.[123]

Although the court was not presented with the question of what impact it would ascribe to the use of both a special committee and a majority of the minority vote on the standard of review for the transaction, its discussion of the rationale for retaining fairness review is telling. At one point, the court stated "[e]ntire fairness remains the proper focus for judicial analysis in examining an interested merger, irrespective of whether the burden of proof remains upon or is shifted away from the controlling or dominating shareholder, because the unchanging nature of the underlying 'interested' transaction requires careful scrutiny."[124] The Court further discussed the policy rationale for applying the entire fairness standard, pointing out that "[e]ven where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder[,]" such as stopping dividend payments, or pursuing a later cash out merger at a lower price.[125] This form of inherent coercion is not eliminated just because either a special committee and/or a majority of the minority vote is employed. *Kahn* therefore applied the entire fairness standard to the merger.

[120] *Id.* at 1116–17 ("[A]pproval of a merger . . . by an informed vote of a majority of the minority stockholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs." (quoting Rosenblatt v. Getty Oil, 493 A.2d 929, 937 (Del. 1985))).

[121] *Id.* at 1117.

[122] *Id.* at 1117–18.

[123] *Id.* at 1120–21. *Lynch I*'s clarity was muddied by the Delaware Supreme Court's subsequent decision in the same litigation, where it affirmed the Court of Chancery's grant of judgment in favor of the underlying defendant company. Kahn v. Lynch Commc'n Sys. Inc., 669 A.2d 79 (Del. 1995) ("Lynch III"), *aff'g* Kahn v. Lynch Commc'n Sys., Civ.A. No. 8748, 1995 WL 301403 (Del. Ch. Apr. 17, 1995) ("Lynch II") (hereinafter collectively with preceding litigation "Lynch").

[124] *Lynch I*, 638 A.2d at 1116.

[125] *Id.* at 1117 (quoting Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990)).

So long as the court employs the entire fairness test in analyzing control shareholder squeeze-outs, *Weinberger* has teeth. A good illustration is the decision by then Chancellor Strine in *In re Southern Peru Copper Corp*.[126] In that case, Grupo Mexico, the controlling shareholder of Southern Peru Copper, asked Southern Peru to purchase Minera Copper, a privately held corporation in which Grupo Mexico owned 99.15% of the stock.[127] Southern Peru formed a special committee, but it was empowered only to consider the offer that was put on the table; i.e., it did not have the power to seek alternative terms or other suitors.[128] The court found that the special committee did not engage in effective bargaining, and that the deal was not conditioned on the approval of a majority of the minority Southern Peru shareholders (even though a majority of them did actually vote to approve the deal).[129] The court therefore held that it would not shift the burden of proof in the fairness analysis onto the plaintiffs.[130] In fact, the court found that the defendants did not carry their burden of demonstrating the deal was fair to the minority shareholders and awarded the shareholders $1.347 billion in damages.[131]

However, giving *Weinberger* teeth also gives frivolous shareholder plaintiffs' claims traction in the litigation settlement process. In the wake of *Weinberger* and *Lynch,* where the bare existence of a control relationship triggered an entire fairness inquiry, defendants have great difficulty getting one of these cases dismissed in pre-trial motion practice.[132] As we develop more fully below, defendants have claimed that this leads to many meritless suits challenging control shareholder squeeze-outs because of the prospect that even bad cases will result in a favorable settlement.

C. Kahn v. M&F Worldwide*: Business Judgment Review Returns*

Lynch did not resolve an important question: if a controlling shareholder conditions completion of a squeeze-out merger on a combination of a majority of the minority shareholder vote, and the

[126] 52 A.3d 761 (Del. Ch. 2011), *aff'd sub nom.* Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2015).
[127] *Id.* at 765–66.
[128] *Id.*
[129] *Id.* at 791–92.
[130] *Id.* at 793.
[131] *Id.* at 819.
[132] *See In re* Cox Commc'ns, Inc., 879 A.2d 604, 605 (Del. Ch. 2005) (stating that "[b]ecause [the] standard [set forth in *Lynch*] makes it impossible for a controlling stockholder ever to structure a transaction in a manner that will enable it to obtain dismissal of a complaint challenging the transaction, each *Lynch* case has settlement value, not necessarily because of its merits but because it cannot be dismissed.").

approval of the transaction by an empowered special committee, will this prompt the court to apply the highly deferential business judgment standard of review? Even though *Lynch* expressed concern about the implicit coercive effect of a controlling shareholder on a special committee or a majority of the minority vote, would the Delaware courts set that concern aside for self-dealing squeeze-outs accomplished by a menu of governance steps that in combination present an appearance, if not the reality, of independence? This idea was floated in 2005, when then-Vice Chancellor Strine suggested that:

Delaware law would improve the protections it offers to minority shareholders and the integrity of the representative litigation process by reforming and extending Lynch . . . [t]he reform would be to invoke the business judgment standard of review when a going private merger with a controlling stockholder was effected using a process that mirrored both elements of an arm's length merger: 1) approval by disinterested directors; and 2) approval by disinterested shareholders.[133]

To simulate these two things in a controlled corporation, then-Vice Chancellor Strine proposed requiring the approval of an empowered special committee and approval by a majority of the disinterested shareholders.[134] Ten years later, this approach was ultimately embraced by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.* ("MFII").[135] MacAndrews and Forbes Holdings Inc. was a controlling

---

[133] *Id.* at 606.

[134] Then-Vice Chancellor Strine opined:

> [W]hen a merger with a controlling stockholder was: 1) negotiated and approved by a special committee of independent directors; and 2) conditioned on an affirmative vote of a majority of the minority stockholders, the business judgment standard of review should presumptively apply, and any plaintiff ought to have to plead particularized facts that, if true, support an inference that, despite the facially fair process, the merger was tainted because of fiduciary wrongdoing. This reform to *Lynch* would not permit a controller to obtain business judgment rule protection merely by using a special committee or a majority of the minority vote; in that case, *Lynch* in its current form would still govern. To invoke the business judgment rule standard of review, the controller would have to replicate fully both elements of the arms-length merger process.

Id.

[135] Kahn v. M&F Worldwide Corp. (*M&F II*), 88 A.3d 635 (Del. 2014) (en banc), *aff'g In re* MFW S'holders Litig. (M&F I), 67 A.3d 496 (Del. Ch. 2013) (Strine, C.) (hereinafter collectively "M&F Worldwide"). Shortly before the *M&F II* opinion was handed down, Strine left the Court of Chancery and was appointed as Chief Justice of the Supreme Court. Tom Hals, *Leo Strine confirmed as chief justice of Delaware's Supreme Court*, REUTERS (Jan. 29, 2014, 7:05 PM), https://tinyurl.com/y9roapzz. Strine did not participate in the review of his underlying

shareholder of M&F Worldwide Co. ("MFW").[136] It made a proposal to take the company private contingent upon two procedural protections: the resulting merger would have to be negotiated and approved by an independent special committee of MFW directors and the merger would need to be approved by a majority of the minority shareholders of MFW.[137] MFW formed a special committee and empowered it to negotiate on behalf of the company.[138] The committee members were found by the court to be independent.[139] The court also found that the special committee had engaged in a lengthy investigation of the offer and the company's options, and negotiated an increase in the initial offering price.[140] The special committee's independent investment banker deemed the offer to be fair and the special committee approved the deal.[141] Subsequently, a fully informed vote of the majority of the minority investors also approved the merger.[142]

The parties disagreed over the impact of this process. The defendants' position was that they had succeeded in simulating the same structure that exists in an arm's length merger: the special committee was like a disinterested board of directors in an arm's length merger and the majority of the minority vote was like the shareholder vote in an arm's length merger.[143] Since both board and shareholder approval were functionally equivalent to those in an arm's length deal, the defendants believed that the business judgment standard of review should apply.[144] Plaintiffs claimed that this was not the case—they argued that a special committee of independent directors in a controller acquisition is comprised of directors that have been appointed by the controller and are therefore unlike directors at a non-controlled company.[145] Furthermore, as the Delaware Supreme Court had said in the past, a majority of the minority vote suffers from inherent coercion, [146] which is to say that the minority shareholders know that they may experience future retribution if

opinion in *M&F I*. Karlee Weinmann, *Del. High Court Affirms MFW Ruling In Win For Boards*, LAW360 (Mar. 14, 2014, 12:10 PM).

[136] *M&F II*, 88 A.3d at 640.

[137] *Id.* at 638.

[138] *Id.* at 641.

[139] *Id.* at 650.

[140] *Id.* at 653.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 639–40.

[144] *Id.* at 639–40.

[145] *Id.* at 639.

[146] Kahn v. Lynch Commc'n Sys. Inc. (Lynch I), 638 A.2d 1110, 1115–16 (Del. 1994) (finding that because of the threat of inherent coercion, a protective device, such as a majority of the minority vote, cannot alter the standard of judicial review).

they succeed in stopping a bad squeeze-out merger, even if there is no explicit threat by the controller to do so.[147]

Weighing these arguments, the Delaware Supreme Court ruled for the defendants and applied the business judgment standard of review, stating:

> [I]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[148]

D. The Pluses and Minuses of M&F Worldwide

While it is still early to forecast the long-term impact of the *M&F Worldwide* litigation, undoubtedly it will bring about a significant decrease in the number of shareholder suits challenging the terms of controlling shareholder squeeze-outs. Calculating controllers will be careful to follow the steps outlined in the court's opinion and receive the desired dismissal of any investor challenges. Predictably, the Court of Chancery has shown the way for such dismissals to occur at an early stage in the proceedings, cutting off discovery for plaintiffs that cannot show obvious defects in the transaction based on public disclosures.[149]

---

[147] *See id.*

[148] *M&F II*, 88 A.3d at 645 (emphasis in original).

[149] *See* IRA Trust FBO Bobbie Ahmed v. Crane, C.A. No. 12742–CB, 2017 WL 7053964, at *9 (Del. Ch. Dec. 11, 2017) ("Although [M&F I] itself was decided after discovery on a motion for summary judgment, its framework has been applied at the pleadings stage as well."); *see also In re* Books-A-Million, Inc. S'holders Litig., C.A. No. 11343-VCL, 2016 WL 5874974, at *60 (Del. Ch. Oct. 10, 2016) (citing *M&F I* with approval and invoking the business judgment rule to dismiss the plaintiff's claim that a merger constituted waste). "[It is] logically difficult to conceptualize how a plaintiff can ultimately prove a waste or gift claim in the face of a decision by fully informed, uncoerced, independent stockholders to ratify the transaction." *Books-A-Million*, 2016 WL 5874974, at *60 (quoting Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 901 (Del. Ch. 1999), *reprinted in* 25 DEL. J. CORP. L. 931). "For purposes of applying the *M&F Worldwide* framework on a motion to dismiss, the standard of review for measuring compliance with the duty of care is whether the complaint has alleged facts supporting a reasonably conceivable inference that the directors were grossly negligent." *Id.* (quoted in *Crane*, 2017 WL 7053964, at *12 n.102 (dismissing plaintiff's claim that a committed formed

However, some other, less desirable, effects seem likely too. First, plaintiffs who believe they suffered an injury from the transaction will seek an alternative forum to present their cases.[150] The current upsurge in appraisal litigation is likely, at least in part, due to this effect.[151] Deal litigation is likely to migrate from Delaware state courts to alleging disclosure violations in federal courts.[152] Second, controllers, safe from the prying eyes of plaintiffs' lawyers, are likely to be less careful about protecting the interests of minority shareholders in squeeze-outs. If they carefully follow the process requirements laid out in the *M&F* litigation, why should they agree to pay high premiums as well? After all, once the steps of *M&F* are at least facially complied with, why would a rational plaintiffs' attorney file suit in a low premium deal? Once deal premiums adjust to lower levels, investors will be less excited about buying minority interests in controlled companies and stock prices in these companies will decline.

IV. *UNOCAL* AND ITS DECLINE

The number of hostile M&A transactions doubled from 1968 to 1975.[153] As hostile deals became more important, so did the perception that the market for corporate control had run amok. Commentators identified a variety of alleged evils arising out of hostile takeovers.[154] Some argued that the takeover market was myopic and therefore

---

to review and approve conflicted transactions "breach[ed] of its duty of care in negotiating a fair price" by failing to demand a fairness opinion)).

[150] *See* Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U.L. REV. 1753, 1779 (2012).

[151] *See* Wei Jiang et al., *Reforming the Delaware Appraisal Statute to Address Appraisal Arbitrage: Will It Be Successful*, 59 J.L. & ECON. 697 (2016) (showing a rise in appraisal actions over the 2002–2014 period).

[152] Cain, et al., *supra* note 9, at 608.

[153] GILSON AND BLACK, *supra* note 100, at 26.

[154] See, e.g., John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer*, 84 COLUM. L. REV. 1145, 1199-216 (1984); Edward S. Herman & Louis Lowenstein, *The Efficiency Effects of Hostile Takeovers*, in KNIGHTS, RAIDERS AND TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 211 (John C. Coffee, Louis Lowenstein & Susan Rose-Ackerman eds., 1988); Louis Lowenstein, *Pruning Deadwood in Hostile Takeovers: A Proposal for Legislation*, 83 COLUM. L. REV. 249 (1983); WALTER ADAMS AND JAMES W. BROCK, MERGER-MANIA: AN EMPIRICAL CRITIQUE IN HOSTILE TAKEOVERS: ISSUES IN PUBLIC AND CORPORATE POLICY 37–38 (David L. McKee, ed., 1989); Harvey L. Pitt, *On the Precipice: A Reexamination of Directors' Fiduciary Duties in the Context of Hostile Acquisitions*, 15 DEL. J. CORP. L. 811 (1990); William Proxmire, Symposium, *The Risks and Rewards of Regulating Corporate Takeovers: What's Right and Wrong about Hostile Takeovers?* 1988 WIS. L. REV. 353 (1988); Morgan Shipman, Symposium, *Regulating Corporate Takeovers: The Case for Reasonable State Regulation of Corporate Takeovers: Some Observations Concerning the Ohio Experience*, 57 U. CIN. L. REV. 507, 533–37 (1988).

companies were being sold for too little.[155] Others claimed that takeovers inflicted great costs on companies' stakeholders, such as employees and customers.[156] Another theory was that takeovers forced directors and managers to focus on short-term results instead of maximizing long-term value creation.[157] A fourth hypothesis was that takeovers contributed to inefficiency as leveraged buyouts forced acquirers to reduce expenses and investment to increase cash flow in the short-term, and corporations that are highly leveraged have less ability to weather economic downturns.[158] Finally, the disciplinary effects of takeovers were claimed to be overstated, especially when compared to the diseconomies produced by takeovers.[159]

Delaware judges perceived that takeovers posed a corporate governance issue.[160] In a retrospective article chronicling the history of the 1985 *Unocal* decision, former Delaware Supreme Court Justice, Andrew G.T. Moore II, wrote that the court (which he was sitting on at the time) relied heavily on the argument that boards of directors should be permitted to resist inadequate hostile bids.[161] The court, he observed, was concerned with corporate "raiders who employed coercive tactics to acquire control with cheap, undervalued bids."[162] As a result, they decided

---

[155] MICHAEL T. JACOBS, SHORT-TERM AMERICA: THE CAUSES AND CURES OF OUR BUSINESS MYOPIA 114 (1991); Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 109–10 (1979); Herman & Lowenstein, *supra* note 154 at 214–16.

[156] Proxmire, *supra* note 154, at 359–60; Lipton, *supra* note 155 at 109–10; Pitt, *supra* note 154 at 840.

[157] Jacobs, *supra* note 155 at 126; Pitt, *supra* note 154 at 840 n.110; Harold M. Williams, *It's Time for a Takeover Moratorium: The Tactics Used by Raiders and Managers of Target Companies are Undermining Shareholder Rights*, FORTUNE, July 22, 1985, http://archive.fortune.com/magazines/fortune/fortune_archive/1985/07/22/66154/index.htm.

[158] *See* Jacobs, *supra* note 155, at 130, 137–38.

[159] *See* Coffee, *supra* note 154, at 1153. These diseconomies included the wealth transfer effects of takeovers, the riskier behavior managers engaged in to avoid becoming takeover targets, excessive deterrence leading to demoralization, and the adverse effect on managerial labor markets. *Id.* at 1156–1159.

[160] Steven Davidoff Solomon and Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards* (European Corporate Governance Institute (ECGI) - Law Research Paper No. 329/2016; Vanderbilt Law and Economics Research Paper No. 16-24), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2830257.

[161] Andrew G.T. Moore II, *The Birth of* Unocal*–A Brief History*, 31 DEL. J. CORP. L. 865, 870, 881 (2006) (citing Lipton, *supra* note 155; Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities: An Update*, ABA NATIONAL INSTITUTE ON THE DYNAMICS OF CORPORATE CONTROL (Dec. 8, 1983), reprinted in 40 Bus. Law. 1403 (1985)). In *Unocal Corp v. Mesa Petroleum Co.*, the Delaware Supreme Court stated that directors could consider the interests of creditors, customers, employees and perhaps the general community in determining how a takeover bid will affect the corporation. *Id.* at 884 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).

[162] Moore II, *supra* note 162, at 881.

against the arguments made by many law and economics scholars that the board of directors should remain passive in response to a hostile bid.[163]

A. Unocal: The Promise of Enhanced Judicial Review for Takeover Defenses

Unocal caused the above concerns to come to a head and presented a vehicle for the Delaware Supreme Court to address them. The case involved a hostile takeover attempt by T. Bone Pickens, a well-known takeover specialist, who had previously engaged in greenmail at several companies.[164] In April of 1985, he launched a "two-tier, 'front loaded' cash tender offer" for a controlling stake in Unocal Corporation, where the consideration in the front end of the tender offer was significantly more valuable than what was to be paid to non-tendering shareholders in the planned second step merger.[165] The effect of this two-tiered structure was to coerce shareholders into tendering into the front end tender offer, thereby helping to ensure that Pickens was successful in gaining control of Unocal.[166] The Unocal board, with the assistance of its investment banks, closely examined the offer, ultimately concluding that the price offered by Pickens was "inadequate," because it was below the value that the board believed it would receive in a sale of the company.[167]

Unocal sought to offset this coercion, and to ensure that its shareholders received an adequate price for their shares if the company was to be sold, by implementing a discriminatory self-tender offer (which excluded Pickens) for all of its shares that would be outstanding if Pickens completed the front end of his offer.[168] Although initially this self-tender was conditioned on Pickens's completion of the front end of his offer, subsequently Unocal's board made its self-tender offer unconditional.[169] The net effect of the self-tender was to force the company to take on large quantities of debt and to sell assets in order to finance the repurchase of its stock from all of its shareholders except Pickens.

The Delaware Supreme Court reasoned that "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is

---

[163] *Id.*

[164] *Unocal*, 493 A.2d at 956. "The term 'greenmail' refers to the practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover." *Id.* at n.13.

[165] *Id.* at 949.

[166] *Id.* at 953.

[167] *Id.* at 950.

[168] *Id.* at 951.

[169] *Id.*

an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."[170] In particular, the court detailed a two part test that it would apply in an enhanced review of target defensive measures. The first part of the test required the board to show that they had acted independently and in good faith in having reasonable grounds for believing that "a danger to corporate policy and effectiveness existed because of another person's stock ownership."[171] The second part of the test required that the defense implemented must be "reasonable in relation to the threat posed."[172]

The Delaware Supreme Court applied this new test to uphold the validity of Unocal's discriminatory self-tender offer.[173] The court found that Pickens's offer was both inadequate and coercive, and that the Unocal self-tender offer addressed both of those threats.[174] Furthermore, the Unocal board was justified in excluding Pickens from the self-tender because it did not need to subsidize his attempted takeover of the company and because Pickens was the cause of the threat to the company in the first place.[175]

The upshot of *Unocal* is that the court appeared willing to uphold strong defensive tactics in the face of a significant threat posed by a hostile tender offer to the corporation and its shareholders, such as a coercive and inadequate tender offer by a bidder with an unsavory reputation. However, the court left much unsaid: how broadly would it define what constituted a threat under the first part of the test? Furthermore, the *Unocal* left the question of how much judicial scrutiny would be involved in the reasonableness analysis that formed the second part of the judicial inquiry unaddressed. Given the substantial number of takeovers involving Delaware corporations and the ensuing litigation in the Court of Chancery, it was only a question of time before the Delaware courts would need to more fully articulate their vision of *Unocal*'s test.

B. Interco–*Making Room for Shareholder Choice in Defensive Battles*

The Court of Chancery's initial effort to clarify the reach of *Unocal* occurred in the context of a poison pill.[176] In May of 1988, the Rales brothers began acquiring stock in Interco, a conglomerate with twenty-one

---

[170] *Id.* at 954.
[171] *Id.* at 955 (citing Cheff v. Mathes, 199 A.2d 548, 554–55 (Del. 1964).
[172] *Id.* at 955.
[173] *Id.* at 958.
[174] *Id.*
[175] *Id.* at 959.
[176] *See generally* City Capital Assocs. v. Interco, Inc., 551 A.2d 787 (Del. Ch. 1988).

different businesses in four major business areas.[177] Upon learning of the unusual trading activity in the company's stock, Interco adopted a new poison pill and launched a major restructuring of the company.[178] Shortly thereafter, the Rales filed a Schedule 13D disclosing that they owned a substantial block of Interco stock and offered to purchase all remaining shares at a premium price, over the market price, in a friendly transaction. Interco's board of directors determined that the Rales' offer was inadequate and elected instead to explore management's restructuring plan as an alternative.[179] Despite the Rales increasing their offer twice, the Interco board steadfastly refused to remove its poison pill and continued to proceed with steps to implement the proposed restructuring plan.[180] The Rales sought an order requiring the Interco board to redeem its poison pill so as to give its shareholders a choice between their tender offer and the proposed restructuring, as well as to issue an order restraining Interco from moving forward with the sale of one of its main divisions, Ethan Allen furniture.[181]

Chancellor Allen examined the two types of threats identified by courts in prior case law: (1) threats to voluntariness (i.e., coercive)[182] and (2) threats from inadequate but noncoercive offers.[183] While the Rales'

---

[177] *Id.* at 791.

[178] The court articulated:

> To combat this perceived danger, the Company adopted a common stock rights plan, or poison pill, in late 1985, which included a "flip-in" provision . . . In broad outline, the "flip-in" provision contained in the rights plan adopted on July 11 provides that, if a person reaches a threshold shareholding of 30% of Interco's outstanding common stock, rights will be exercisable entitling each holder of a right to purchase from the Company that number of shares per right as, at the triggering time, have a market value of twice the exercise price of each right.

Id. at 791–92.

[179] *Id.* at 792.

[180] *Id.* at 793–94.

[181] *Id.* at 794.

[182] *Id.* at 797 (citing Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)).

[183] *Id.* at 797 ("We have held that a board is not required simply by reason of the existence of a noncoercive offer to redeem outstanding poison pill rights.") (citing Doskocil Cos. Inc. v. Griggy, CIV. A. No. 10,095, 1988 WL 105751 (Del. Ch. Oct. 7, 1988), *reprinted in* 14 DEL. J. CORP. L. 682; Nomad Acquisition Corp. v. Damon Corp., CIV. A. Nos. 10173, 10189, 1988 WL 96192 (Del. Ch. Sept. 16, 1988) (revised and superseded by Nomad Acquisition Corp. v. Damon Corp., CIV. A. Nos. 10173, 10189, 1988 WL 383667 (Del. Ch. Sept. 20, 1988), *reprinted in* 14 DEL. J. CORP. L. 814); Facet Enters., Inc. v. Prospect Grp., Inc., 1988 WL 36140 (Del. Ch. Apr. 15, 1988), *reprinted in* 14 DEL. J. CORP. L. 310).

offer was not coercive, the board asserted that it was inadequate.[184] The Chancellor reasoned that the board of a target company is not generally required to redeem a poison pill when faced with a noncoercive offer, because in such a situation the board may be able to negotiate a higher price, or an alternative transaction that provides greater value for shareholders.[185] Nonetheless, the Chancellor found, "there may come a time when a board's fiduciary duty will require it to redeem the rights and permit the shareholders to choose."[186] Even though a board's conclusion that an offer is inadequate will justify leaving a pill in place for a time in order to negotiate with the bidder or to arrange an alternative transaction, Chancellor Allen reasoned that that period of grace is not without limit.[187] Once such time is up, "the legitimate role of the poison pill in the context of a noncoercive offer will have been fully satisfied[,]" so that thereafter the pill will operate solely to preclude the shareholders from choosing a different transaction than the one favored by the board.[188] Given the closeness of the values ascribed to the Rales' tender offer and value believed to follow the management restructuring, any threat posed by the shareholders' mistakenly selecting the wrong option was a mild threat.[189]

In the end, the Chancellor determined that in this final period, when the poison pill had served its function of forcing a hostile bidder to raise its price substantially, and where management was seeking to implement an alternative transaction to the tender offer, protecting that transaction further was not reasonable.[190] He thus concluded that the pill should be withdrawn so the shareholders could freely choose between the two offers.[191] The Chancellor ordered the company to redeem the poison pill, although he allowed the company to move forward with the sale of Ethan Allen, a crucial part of the restructuring plan.[192] Thus, per *Interco*, management could rely on the certainty provided their control offered by the pill, but not indefinitely; at some point the craft they were taxying must leave the protective ground, provided by the pill, and confront the uncertain turbulence of the headwinds created by the bidder. Subsequently, Interco appealed this decision, but because the Rales

---

[184] *Id.* at 798.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 798–99.
[190] *Id.* at 799.
[191] *Id.*
[192] *Id.* at 800.

decided to drop their tender offer, the appeal became moot.[193] We thus see that *Unocal*'s second step is not just context specific, but it permits the court to engage in close analysis of a poison pill's *on-going* efficacy in obtaining a fair offer for the company's shares.

C. Time, Inc.*–The Delaware Supreme Court Overrules* Interco *and Moves Toward Business Judgment Review*

Not long after *Interco*, in *Paramount Communications, Inc. v. Time, Inc.* ("Time, Inc."),[194] the Delaware Supreme Court faced a choice about the future of judicial review of hostile tender offer defensive tactics: should it embrace the logic of *Interco* or move in a different direction? Once the board had a fair opportunity to develop alternative transactions, and to fully negotiate with a hostile bidder, *Interco* had potentially opened the door to shareholder choice about the decision to accept an unwanted tender offer. Should the justices endorse that doctrinal development, or instead permit the target company board of directors to decide the future of the company irrespective of the wishes of their current shareholders?

The underlying transaction was a friendly stock-for-stock merger between Time and Warner Communications that contemplated them coming together as part of Time's long-term business strategy of becoming a fully integrated international media company.[195] Shortly before the shareholder vote on the merger, Paramount Communications made a cash tender offer for all of the Time shares at a significant premium above the price of Time shares that reflected the terms of the Time-Warner transaction.[196] Time responded by dropping the merger agreement and making a tender offer to acquire Warner.[197] Paramount and some Time shareholders sued, claiming, among other things, that Time's use of the poison pill and other defenses precluded Time shareholders from tendering into Paramount's offer and violated *Unocal*.[198]

Relying on lower court decisions including *Interco*, the plaintiffs argued that an all cash, all shares tender offer at a premium price had been found to raise only two potential threats, neither of which arose in *Time, Inc.*: (1) the threat of coercion that comes out of a two tiered offer and raises the spectrum of unequal treatment of shareholders, and (2) the threat

---

[193] Interco Inc. v. City Capital Assocs. Ltd., 556 A.2d 1070 (Del. 1988) (unpublished table decision).

[194] 571 A.2d 1140 (Del. 1990).

[195] *Id.* at 1145–46.

[196] *Id.* at 1147.

[197] The tender offer was to be followed by a second step merger using stock as consideration. *Id.* at 1148.

[198] *Id.* at 1149.

of inadequate value from an offer at a price below what the target company board believes in good faith to be the present value of its shares.[199] The Delaware Supreme Court flatly rejected that argument, holding that the threats protectable by *Unocal* were not limited to price inadequacy or coercion.[200] The court reasoned that the threat in the Time-Warner context included the risk that some Time shareholders might mistakenly tender into the Paramount offer in ignorance of the benefits of the strategic combination with Warner; that there were conditions on the Paramount offer that made its completion uncertain; and that the timing of Paramount's offer was designed to confuse the Time shareholder vote.[201] The court also manifested great deference to the board's decision about the nature of the threats posed by an unwanted tender offer, eschewing meaningful judicial review of the directors' claim that a threat exists.[202] In essence, the court expanded the scope of threats to control to encompass all manner of items historically within the presumptive protection of the business judgment rule; as such the first part of *Unocal*'s bulwark against managerial self-interest places only a light burden of explanation for the board resisting an unwanted suitor.

Moreover, the Delaware Supreme Court adopted the lower court's finding that Time's switch from a merger, requiring a shareholder vote to a tender offer, was a reasonable response to these threats because it was not "cramming down" a management sponsored alternative transaction but rather just carrying forward a pre-existing transaction in an altered form.[203] Finally, the proposed combination, if effected, did not preclude the future possibility that Paramount could make an offer for the combined Time/Warner entity.[204] As a result, the court concluded that the *Unocal* standard had been satisfied.[205]

Time, Inc. greatly broadened the potential range of threats that could be used to justify defensive action under *Unocal*, giving target boards great

---

[199] *Id.* at 1152.

[200] *Id.* at 1150, 1153 (the court also rejected the plaintiff shareholders' argument that the Time/Warner merger agreement triggered judicial review under *Revlon*)..

[201] *Id.* at 1153.

[202] *See Id.* at 1153 ("[I]n our view, precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the relative merits of a long-term versus a short-term investment goal for shareholders. To engage in such an exercise is a distortion of the Unocal process . . . ."); *see also* Jeffrey N. Gordon, *Corporations, Markets and Courts*, 91 COLUM. L. REV. 1931, 1943 (1991) ("*Paramount* appears to leave no place for the court's independent assessment of the board's assertion that a hostile bid presents a series of threats that warrant a preclusive response.").

[203] *Time, Inc.*, 571 A.2d at 1154–55.

[204] *Id.* at 1155.

[205] *Id.*

leeway in how they choose to deploy their poison pill as a defensive tactic against unwanted tender offers. In doing so, it ended meaningful judicial review as part of the first step in the *Unocal* analysis since *Time Inc.* expanded the meaning of "threat" to include a change in business policy or practices. More broadly, as one of the authors wrote (close to the time of the decision), *Time, Inc.* potentially marked "the collapse of heightened judicial scrutiny for takeover defensive tactics against hostile tender offers and a retreat to their deferential review under the business judgment rule."[206]

D. Unitrin*'s Weakening of* Unocal*'s Second Step*

Unocal's two-part inquiry may well be illustrative of an idiosyncratic holding as the facts of that case fit so perfectly the court's approach so that its application beyond *Unocal*'s special set of facts is problematic, at least with respect to the "reasonable relationship" standard. The first part of the test, essentially the high scrutiny test Delaware customarily applies to self-dealing transactions, was easily met by Unocal's board being dominated by outside directors who, at various points, deliberated and voted without corporate insiders being present and who were advised by a bevy of legal and financial advisors independent of Unocal's management. Moreover, their deliberations were measured and thorough. What sets *Unocal* apart is the defensive maneuver–a non-pro rata issuer tender offer that was substantially above the hostile bidder's price. Where the perceived threats were, as they were in *Unocal*, an inadequate price and coercion, the natural antidote is an uncoerced opportunity for shareholders to obtain a fair price, *ergo*, the defensive maneuver did bear a reasonable relationship to the threat posed.

Unocal's "reasonable relationship" requirement necessarily invites similar weighing of threat against response, but once outside the non-pro rata issuer tender offer response it becomes extremely problematic. *Time, Inc.* disingenuously ventured into this factual thicket by concluding that Time's defensive maneuver—switching from an acquisition that required shareholder approval, to one that did not—was a reasonable response to the threat its shareholders could not fully appreciate—the long-term benefits of combining with Warner. Missing from this thinking is clear evidence that the great bulk of Time shares were already in the hands of arbitragers who purchased these shares at a substantially higher value reflecting the Paramount offer rather than the value the market accorded to Time in the Time-Warner combination. They knew exactly what they were doing.

---

[206] Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When is Using a Rights Plan Right?*, 46 VAND. L. REV. 503, 517 (1993).

Because of the natural intrusiveness on the prerogatives of the board of any "reasonable relationship" standard, it is not surprising that the Delaware Supreme Court soon diluted *Unocal* in *Unitrin, Inc. v. American General Corp*.[207] *Unitrin* reversed the Court of Chancery's application of Unocal's proportionality review because it "focus[ed] upon whether the Repurchase Program was an 'unnecessary' defensive response."[208] The permissiveness of this standard is underscored by the result reached in its application in *Unitrin*. Unitrin's articles of incorporation required a vote of 75 percent of its common shares for any merger with a holder of more than 15 percent of its stock.[209] When American General announced an all cash tender offer for all Unitrin's stock, the Unitrin board, whose members collectively owned 23 percent of the stock, adopted a poison pill and announced the company would buy back shares with the consummate effect of killing American General's ultimate plan to merge with Unitrin since with the buyback the Unitrin directors would surely have a veto under the charter supermajority vote provision.[210] For this reason, the Chancellor held *Unocal*'s reasonable relationship standard was violated.[211]

Announcing a different formulation for *Unocal*'s second part, the Delaware Supreme Court reversed and remanded for further consideration on whether the repurchase was within the range of reasonable defensive steps.[212] It refocused the test requiring that courts consider whether the defensive maneuver "was draconian, by being either preclusive or coercive and; second, if it was not draconian, upon whether it was within a range of reasonable responses to the threat . . . posed."[213] Applying the reformulated standard, the Delaware Supreme Court concluded that the repurchase was neither preclusive, nor coercive, in light that the record's finding that American General's tender offer posed a threat of substantive coercion because of the risk, like that embraced earlier in *Time, Inc.*, that Unitrin's shareholders were ignorant of the long-term value of current management's policies.[214] After *Unitrin*, delicate or even clumsy weighing of the threat and the particular defensive step are not part of the inquiry.

---

[207] 651 A.2d 1361 (Del. 1995), *rev'g In re* Unitrin Inc., S'holder Litig., Civ. A. Nos. 13656, 13699, 1994 WL 698483 (Del. Ch. Oct. 13, 1994).

[208] *Id.* at 1367 (citing Paramount Commc'ns. v. QVC Network, 637 A.2d 34, 45–46 (Del. 1994)).

[209] *Id.* at 1377.

[210] *Id.* at 1368, 1370, 1377.

[211] *Id.* at 1386, 1391.

[212] *Id.* at 1391.

[213] *Id.* at 1367.

[214] *Id.* at 1384–85.

E. Airgas *and the Costs and Benefits of* Unocal *Today*

After the *Time, Inc*. and *Unitrin* decisions, the use of hostile tender offers declined markedly.[215] In their wake, a series of important decisions clarified the reach of *Unocal-Unitrin*, further refining the judicial test,[216] but largely showing deference to target management's use of defensive tactics to stop unwanted transactions. The key issue that continued to attract attention though was whether a target company board could continue to refuse to redeem an outstanding poison pill with the consequence that it would permanently preclude its shareholders from accepting a hostile tender offer (the so-called "Just Say No" defense). While commentators had for years speculated that such a defense was permissible under *Unocal*,[217] it was not until Chancellor Chandler issued his final opinion as a Delaware judge in *Air Products and Chemicals, Inc. v. Airgas, Inc.* ("Airgas III"),[218] that the Delaware Court of Chancery unambiguously (if dispiritedly) embraced this view.

Delaware's jurisprudence on poison pills arose out of the Delaware Supreme Court's seminal decision in *Moran v. Household International, Inc.*, which validated the creation of the poison pill under Delaware law, but left its use subject to the application of the *Unocal* test focusing on the board's decision not to redeem the pill. [219] One crucial aspect of that decision, especially after *Airgas III*, is that hostile bidders can seek to overcome the pill by launching a proxy contest for corporate control to unseat the incumbent directors and to replace them with directors that are willing to redeem the pill and permit shareholders to accept a pending tender offer.[220] The proxy contest was a viable takeover approach in that case because, among other things, the board of Household International was not classified and therefore all directors stood for election each year.

However, in *Airgas III*, the court was confronted by a situation where the target company was determined to keep its poison pill intact and

---

[215] GILSON AND BLACK, *supra* note 100, at 15.

[216] *See, e.g.*, Williams v. Geier, 671 A.2d 1368 (Del. 1996) (holding that *Unocal* only applies to defensive tactics that are adopted unilaterally by the board of directors).

[217] *See e.g.*, Lipton, *supra* note 155 (arguing as one of the earliest commentators to advance the propriety of the "just say no" approach). At the other end of the spectrum are commentators favoring absolute management passivity in the face of a takeover bid. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1194–204 (1981) (arguing passivity is necessary as defensive maneuvers reduce shareholder value).

[218] Air Products and Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011). Earlier portions of this litigation discussed *infra*, Part IV.C.

[219] Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).

[220] *Airgas III*, 16 A.3d at 96.

had the advantage of also having a classified board in place.[221] The bidder challenged this combination of defenses as violating *Unitrin*'s ban on preclusive defensive tactics.[222] In rejecting this argument, the Chancellor quoted the Delaware Supreme Court's decision just four months earlier in *Versata Enterprises v. Selectica*: "the combination of a classified board and a Rights plan do[es] not constitute a preclusive defense."[223] Recognizing this point, the Chancellor concluded in his final opinion that "the poison pill's limits remain to be seen."[224]

As the capstone on a long line of cases permitting boards to make full use of the poison pill against unwanted tender offers, *Airgas III* is the most dramatic example of upholding the "Just Say No" defense. While it is consistent with *Time, Inc.*'s evisceration of the *Unocal* threat analysis, and *Unitrin*'s retreat from judicial review of the second prong of *Unocal*, it puts an exclamation point on the collapse of *Unocal* review of a target board's use of the poison pill.

V. *BLASIUS*: MODERATING THE SPHERE OF A BOARD'S AUTHORITY

Modern corporate statutes mirror the DGCL's provision that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors," unless the corporate statute or the articles of incorporation otherwise provide.[225] Articles rarely qualify this broad grant of authority and corporate statutes condition only a handful of actions on a concurring vote of the stockholders. Indeed, even changing the articles of incorporation, the most fundamental document in the relationship between owners and managers, cannot be initiated by the shareholders; any change in that organic document must be initiated by the board of directors.[226] Thus, the shareholder's prerogative, their franchise, is tightly limited to qualified inspection rights, voting on matters submitted by the board for their approval, nominating directors and suing for

---

[221] *Id.* at 62.

[222] *Id.* at 113. Data supports the claim that the poison pill coupled with a classified board adds greatly to the pill's potency. *See* Lucian Ayre Bebchuk, et. al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 Stan. L. Rev. 887, 930–31 (2002) (finding that classified boards raise the likelihood of a company remaining independent from thirty-four percent to sixty-one percent over a company having only a poison pill).

[223] *Airgas III*, 16 A.3d at 114 (quoting Versata Enters. v. Selectica, 5 A.3d 586, 604 (Del. 2010)).

[224] *Id.* at 126.

[225] DEL. CODE tit. 8, § 141(a); s*ee also* Model Bus. Corp. Act anno. § 8.02 *cmt.* (2013) (collecting statutes state jurisdictions addressing qualifications of directors and delegations to the board).

[226] *See, e.g.*, DEL. CODE tit. 8, § 242(b)(1); Model Bus. Corp. Act anno. §10.03(a).

misconduct or failures to comply with statutory or internal requirements for action. This narrow limit of powers reflects the well-recognized virtue of the corporate entity, centralization of authority over the company's affairs.

A. Blasius Industries *and the Divide of Authority Between Management and Shareholders*

Against this tapestry, *Blasius Industries, Inc. v. Atlas Corp*. ("Blasius"),[227] projects a bright light on the divide between the board's and the shareholders' spheres of authority, and how, just as the prerogatives of the board to act within its broad sphere of influence are protected, the limited domains within which shareholders are permitted to act are also protected by equity. *Blasius*'s facts are relatively straightforward. Upon learning that a substantial block holder was engaged in a written consent solicitation to expand the Atlas board and fill the resulting eight vacancies, the Atlas directors themselves pre-emptively added two directors to its staggered board.[228] By filling these two positions, Atlas' board temporarily blocked Blasius Industries' quest to grab control of Atlas Corporation.[229]

Chancellor Allen, despite holding that the Atlas board acted in good faith in defending control, found that the board's actions were beyond the protection of the business judgment rule.[230] The Chancellor reasoned that by filling the vacancies the Atlas directors were not acting solely to manage the company's business but were instead taking action that impacted the boundaries of the relationship between principal and agent "with respect to a matter of internal corporate governance."[231] In his eyes, the well-established presumptions of propriety that directors enjoy when acting with respect to their management and oversight of the corporation's affairs did not carryforward to the directors' intrusion into the principal-agent relationship.[232] The *Blasius* court therefore required the Atlas directors to make a stronger showing than acting in a good faith belief about what was in the best interest of the corporation; instead the court required the directors to bear the burden of proving a "compelling

---

[227] 564 A.2d 651 (Del. Ch. 1988).

[228] *Id.* at 654–55.

[229] *Id.* at 655. Atlas had classified its board so that only one-third of the directors stood for election in any year. Under the DGCL, directors of a classified board can only be removed "for cause," see DEL. CODE tit. 8 § 141(k) (i), so this provision prevented a majority vote of the Atlas shareholders from removing a sufficient number of directors to change control.

[230] *Id.* at 660.

[231] *Id.*

[232] *See id.*

justification" for thwarting the on-going shareholder efforts to elect or nominate directors.[233] Significantly, the justification that must be advanced by the board is not a purpose narrowly focused on whether the *corporation's interest* is advanced by management's unilateral interdiction; the required compelling justification instead must be anchored by how, under the circumstances, the board's action furthers the shareholders' franchise.[234] Allen reasoned:

> A board's decision to act to prevent the shareholders from creating a majority of new board positions and filling them does not involve the exercise of *the corporation's power* over its property, or with respect to *its* rights or obligations; rather, it involves allocation, between shareholders as a class and the board, of effective power with respect to governance of the corporation . . . . Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and a shareholder majority. Judicial review of such action involves a determination of the legal and equitable obligations of an agent towards his principal. This is not, in my opinion, a question that a court may leave to the agent finally to decide so long as he does so honestly and competently; that is, it may not be left to the agent's business judgment.[235]

Blasius's facts underscore the dichotomy between the board's prerogatives to *manage* the corporation and restrictions on the board's acts that intrude beyond that sphere and into that of the shareholders' limited prerogatives. As stated earlier, Chancellor Allen *held* that the Atlas board acted in good faith as their defensive steps were to further what the board believed was best for Atlas, namely to continue the ongoing business plan and not undergo the leveraged recapitalization plan being championed by Blasius Industries.[236] Despite this finding, the Chancellor held that a legitimate corporate purpose was not by itself sufficient to justify the

---

[233] *Id.* at 661–62.

[234] *See id.* at 663.

[235] *Id.* at 660. In a subsequent opinion, Chancellor Allen appeared to erode the significance of *Blasius* by explaining it merely reflects "the high value that prior cases had placed upon the exercise of voting rights and the inherently particularized and contextual nature of any inquiry concerning fiduciary duties" so that it did not represent new law. Stahl v. Apple Bancorp Inc., 579 A.2d 1115, 1122 (Del. Ch. 1990), *reprinted in* 16 DEL. J. CORP. L. 909.

[236] *Blasius*, 564 A.2d at 663.

board's actions that had the correlative effect of impacting the franchise of shareholders.[237]

Blasius adhered to the wise observation that "agents whose interests may materially diverge from the interests of their principals should not have the power to unilaterally determine or materially vary the rules that govern those divergences of interests."[238] It is beyond question that within the principal-agent sphere, their relationship and the methods for selecting and controlling the agent are defined by the principal and not the agent. This is a central tenet of the law of agency. As seen above, the board's authority with respect to "[t]he business and affairs of every corporation"[239] arises from the corporate statute, and not from the shareholders; hence, the non-corporate business and affairs necessarily rest, as *Blasius* holds, on policies that underlie the principal-agent relationship. To this end, as *Blasius* illustrates, managerial actions that impact the owners' ability to pursue the limited powers owners have to discipline managers—sell, suffrage, or sue—are not just of a different order of magnitude, they are within an entirely different sphere of corporate law, namely governance, and beyond the fiduciary constraints that pertain to the board's management or oversight of "[t]he business and affairs of every corporation."[240] As concluded in *Blasius,* when the board acts not within its managerial sphere, but within the franchise naturally arising from the principal-agent relationship, the board's actions must be regarded jealously.[241] Accordingly, *Blasius* judged the Atlas board's actions by a very different standard than applies to questions of management's stewardship of the firm's business.

Even though the specific areas of the shareholder franchise are quite limited–to vote, to nominate, to inspect corporate records, and to sell shares–*Blasius*'s unvarnished holding had the great potential to strengthen shareholder protection in each of these areas. As developed below, *Blasius* never achieved its potential as the Delaware courts not only cabined its scope, but did so quickly by ignoring its powerful insights that distinguish board actions over corporate matters and those that intrude into the realm of shareholder rights.

---

[237] *Id.* at 658–63.

[238] *See, e.g.*, Melvin Aron Eisenberg, *The Structure of Corporation Law,* 89 COLUM. L. REV. 1461, 1474 (1989); *see also* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 709–10 (2007) ("[I]t is necessary to constrain board-adopted election bylaws that opt out of the provided default arrangement to make it more difficult to replace incumbent directors."). We share the position of Professor Bebchuk in concluding there should be less scrutiny whenever a bylaw that impacts the shareholder franchise is approved by the shareholders.

[239] DEL. CODE tit. 8, § 141(a).

[240] *Id.*

[241] *Blasius*, 564 A.2d at 662-63.

B. The Delaware Courts Quickly Contain Blasius

The Delaware Supreme Court bluntly cabined *Blasius* in *Stroud v. Grace* [242] and *Williams v. Geier,*[243] in which it restricted *Blasius* to unilateral action by a board that interfered with but a single franchise enjoyed by shareholders, that is, the right to vote.[244] Other traditional areas of the shareholder franchise, examined more closely below–the right to sue, to obtain information and to sell shares–are unprotected by *Blasius.* Nonetheless, *Blasius*'s reach is potentially extensive not just because voting is a regular event in the corporate setting but because voting-linked issues are central to legal skirmishes in change in control settings. However, even these potential areas of regulation by *Blasius,* circumscribed by *Blasius*'s self-imposed requirements that the board must act for the primary purpose [245] of thwarting[246] the voting franchise[247] and do so when the shareholder is exercising the right,[248] have in combination limited the protections *Blasius* can provide. Nonetheless it continues to

---

[242] 606 A.2d 75 (Del. 1992).

[243] 671 A.2d 1368 (Del. 1996).

[244] Corporate actions that adversely impact the voting franchise following a board recommendation are beyond *Blasius* when approved by the shareholders. *See e.g., Stroud,* 606 A.2d 75 (involving advance notice bylaw proposed by board and approved by shareholders).

[245] *See* Johnston v. Pedersen, 28 A.3d 1079, 1083 (Del. Ch. 2011) (pending election contest "loomed like the sword of Damocles . . . ." over the directors engineered loan transaction that conferred greater voting power to themselves); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 330–31 (Del. Ch. 2010) (purpose in adopting pill was to protect shareholders from inordinate influence of two funds who were rapidly accumulating shares and not for purpose of disenfranchising the funds), *aff'd*, 15 A.3d 218 (Del. 2011) (unpublished table decision).

[246] *See, e.g., In re* MONY Group, 853 A.2d 661 (Del. Ch. 2004) (delaying the record date for approval of a merger so as to enfranchise more recent shareholders outside *Blasius*); H. F. Ahmanson & Co. v. Great W. Fin. Corp., CIV. A. 15650, 1997 WL 305824 (Del. Ch. June 3, 1997) (holding advancement of the stockholder meeting date did not to interfere with shareholders' ability to oppose the action), *reprinted in* 23 DEL. J. CORP. L. 633. Similarly, board action that delays shareholder action is likely to be upheld under *Blasius* as delay is not sufficient frustration of shareholder action. *See, e.g.,* Kidsco, Inc. v. Dinsmore, 674 A.2d 483, 496 (Del. Ch. 1995) (upholding board amending bylaw that delayed special meeting at which hostile bidder would seek to remove directors).

[247] There are numerous characterization issues inherent to *Blasius*'s focus on voting. Thus, refusal to re-nominate a director does not trigger *Blasius.* Dolgoff v. Projectavision, No. Civ.A. 14805, 1996 WL 91945 (Del. Ch. Feb. 29, 1996) *reprinted in* 21 DEL. J. CORP. L. 1128. A defensive maneuver to place a block of voting shares with a supporter is not seen as intruding into the shareholder voting franchise but instead directed toward impacting the marketplace for control and not voting at a meeting. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278 (Del. Ch. 1989).

[248] *See, e.g., In re* Gaylord Container Corp. S'holder Litig., 753 A.2d 462 (Del. Ch. 2000) (adopting supervoting rules when there was no contest for control on going escapes *Blasius* scrutiny).

have a role, albeit one heavily circumscribed, in control contests, although the courts' rhetoric is more likely to denigrate than to venerate the decision.

The most revealing of the unease with *Blasius* appears in an article co-written by the opinion's author, Chancellor William Allen. The article argues that the *Blasius* inquiry is but an extension of the reasonableness inquiry embraced by *Unocal-Unitrin* so that there is no justification for layering onto that standard a demanding "compelling justification" showing.[249]

> *Blasius* reaffirmed the traditional view that director actions primarily motivated to effect a disenfranchisement have a dim chance of being sustained . . . . [P]ost-Blasius experience has shown that presentations to the court were not made clearer, nor were helpful analytical solutions . . . by the addition of a *Blasius* argument to a brief that already included a *Unocal* argument. The reason is that after *Unitrin*, it is difficult to unearth or even imagine a case that would be decided differently if the analysis were conducted under the *Blasius* rather than the *Unocal* standard.[250]

Allen and his coauthors suggest that *Blasius* is but a subpart of the already greatly weakened *Unocal* analysis.[251] To consider *Blasius* as subtext to *Unocal* robs it of its special focus of protecting the limited areas in which the shareholders' franchise exists. The authors' oversight is confounding board actions that impede the shareholder franchise with board actions over the corporation's affairs.

Consistent with the above quote, Delaware courts have generally folded *Blasius*'s review into *Unocal* review.[252] Lost in the decanting of

---

[249] William T. Allen, et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1312–16 (2001). For earlier evidence of reducing the effect of *Blasius*, *see* Chesapeake Corp. v. Shore, 771 A.2d 293 (Del. Ch. 2000) (then-Vice Chancellor Strine holds after extensive analysis that parallels much of the article published a year later that the preferred approach is to examine alleged disenfranchisement under *Unocal* and proceed to *Blasius* only if the board's action violates *Unocal* so that if there is a compelling justification, the board's action would be upheld).

[250] Allen, *supra* note 249 at 1311–12.

[251] The article was co-authored with Allen by former Chancellor and current Delaware Supreme Court Chief Justice Leo E. Strine, Jr., and Jack B. Jacobs, former Vice-Chancellor and former Delaware Supreme Court Justice.

[252] *See, e.g.*, Third Point LLC v. Ruprecht, C.A. No. 9469–VCP, 2014 WL 1922029, at *16 (Del. Ch. May 2, 2014) (rights plan adopted in response to rapid increase in stock ownership by hedge funds not examined under *Blasius* so long as proxy contest remains a viable option); Kallick v. Sandridge Energy, Inc., 68 A.3d 242 (Del. Ch. 2013) (*Blasius* deemed an unhelpful review standard so that in evaluating "proxy put" granted bondholders, *Unocal* is a more

Blasius is its prescience: there is a difference of spheres of authority between a board acting within clear areas of authority it enjoys, such as issuing stock, proposing action for shareholders to approve that affects their voting power, and setting meeting dates that facilitate shareholder voice, and actions that are taken with the transparent purpose of thwarting an ongoing exercise of the shareholder to nominate or seek the election of directors. Contrary to the judges' thesis, *Blasius* can hardly be viewed as redundant to a *Unocal-Unitrin* analysis. Recall that Chancellor Allen, while striking down the Atlas board's defensive actions in *Blasius*, nevertheless upheld those same actions under *Unocal*. Furthermore, as seen earlier, *Unitrin* weakened *Unocal*'s standard; it is therefore illogical to believe that *Blasius*'s holding on whether *Unocal* was satisfied would have been decided differently today in light of *Unitrin*.

As is the case with any specialized duty, courts must grapple with difficult characterization questions in determining what review standard is to be applied. This task is not unique to *Blasius.* We find post-*Blasius* decisions clarify that *Blasius* is not invoked when the challenged board action has only an incidental impact on voting.[253] For example, a rights plan that prevented a single holder from accumulating more than twenty percent of the total voting power is not judged by the *Blasius*' compelling justification standard.[254] It is the requirement that the board's actions have as their primary purpose interfering with a then on-going effort to nominate or elect directors that sets *Blasius* apart and as such has had the greatest limiting effect on its scope. The litmus regarding purpose and whether there is an on-going effort to nominate or vote are inherently

---

appropriate standard), *reprinted in* 38 DEL. J. CORP. L. 677; Keyser v. Curtis, C.A. No. 7109–VCN, 2012 WL 3115453, at *12 (Del. Ch. July 31, 2012) (*Blasius* is mere reiteration of *Unocal*), *aff'd sub nom.* Poliak v. Keyser, 65 A.3d 617 (Del. 2013) (unpublished table decision); Yucaipa Am. All. Fund II, L.P. v. Rigio, 1 A.3d 310 (Del. Ch. 2010) (*Unocal* and not *Blasius* applied in adoption of poison pill in the face of two individuals acquiring significant holdings in company); Mercier v. Inter-Tel, Inc., 929 A.2d 786, 810–13 (Del. Ch. 2007) (compelling justification requirement applied only if the board's action in postponing vote on merger was outside the protection unreasonable and precluded shareholders from voting); Aquila, Inc. v. Quanta Servs., 805 A.2d 196 (Del. Ch. 2002) (rejecting *Blasius* and applying *Unocal* to uphold board allocating approximately ten percent of the voting shares to an employee trust in the face of a hostile bid); Hills Stores Co. v. Bozic, 769 A.2d 88, 103–04 (Del. Ch. 2000) (adoption of severance agreements in the face of takeover are reviewed under *Unocal* and *Revlon* and there is no need to layer that analysis with *Blasius*), *reprinted in* 26 DEL. J. CORP. L. 365.

[253] Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1123 (Del. Ch. 1990) (the interference must be on a scale that interferes or impedes the effective exercise of voting), *reprinted in* 16 DEL. J. CORP. L. 909. Thus, most challenges to changing, particularly delaying the date for a shareholder vote, are beyond *Blasius*. *See e.g.*, *In re* MONY Group, Inc. S'holder Litig., 853 A.2d 661 (Del. Ch. 2004).

[254] Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310 (Del. Ch.), *aff'd*, 15 A.3d 218 (Del. 2011) (unpublished table decision).

factual, but no more so than what is coercive, preclusive, or within a range of reasonable defensive maneuvers. Thus, lamenting that *Blasius* poses difficult factual issues appears to ignore that these factual inquiries goes to the very heart of the standard itself, namely a necessary protection of the voting franchise of shareholders.

C. Blasius*, Advance Notice Bylaws and Alternative Judicial Approaches*

Blasius's regulatory absence, due to the primary purpose litmus, is most glaring in the ever-expanding area of advance notice bylaws. Generally, stockholders are not required to give advance notice in order to introduce business or nominate directors at an annual meeting, unless the corporation has explicitly imposed such a requirement via an advance notice bylaw.[255] In the case of director nominations, such bylaws also often require that shareholders provide certain specified information about the nominees.[256] Advance notice bylaws have now become a standard fixture within U.S. companies.[257] They are frequently upheld by both Delaware courts[258] and courts of other jurisdictions, and have been for many years.[259]

Advance notice bylaws have two purposes: to ensure the orderly functioning of shareholder meetings[260] and to be used as a defensive strategy against activist shareholders.[261] The former is achieved by ensuring that shareholders can prepare and inform themselves prior to a

---

[255] JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 344 (Del. Ch. 2008) (citing DEL. CODE tit. 8, § 222(a)), *reprinted in* 33 DEL. J. CORP. L. 565, *aff'd*, 947 A.2d 1120 (Del. 2008) (unpublished table decision); Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd., 924 A.2d 228, 238 (Del. Ch. 2007).

[256] *Openwave Sys. Inc.*, 924 A.2d at 238–39.

[257] *E.g.*, *Id.* at 238–39 (citing Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 43 (Del. Ch. 1998), *aff'd on other grounds sub nom*. Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998)) (noting that advance notice bylaws are "commonplace" in Delaware corporations); Lawrence A. Hamermesh, *Commentaries on Delaware's Choice: Director Nominations*, 39 DEL. J. CORP. L. 117, 136 (2014).

[258] *See*, *e.g.*, *Openwave Sys. Inc.*, 924 A.2d at 239 ("Advance notice bylaws are often construed and frequently upheld as valid by Delaware courts." (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 n. 38 (Del. 1995))); Stroud v. Grace, 606 A.2d 75, 95 (Del. 1992) (ruling that the advanced bylaws were valid); Accipiter Life Scis. Fund, L.P. v. Helfer, 905 A.2d 115, 127 (Del. Ch. 2006) (ruling that the ten day advance notice provision of the bylaws was valid).

[259] Hamermesh, *supra* note 257, at 137.

[260] *Openwave Sys. Inc.*, 924 A.2d at 239.

[261] *See* AARON RACHELSON, *Management's Defensive Strategy: Prior to Commencement of A Proxy Contest-Revise the Corporation's Bylaws*, *in* CORPORATE ACQUISITIONS, MERGERS AND DIVESTITURES § 1:161 (2017) (suggesting that corporate management consider amending bylaws to include a notice requirement as a defensive strategy).

vote.[262] The latter is achieved by allowing the incumbent board time to mount a defensive strategy against insurgents.[263] Because they deal with a shareholder's voting franchise, they should fall within *Blasius* at least whenever the advance notice bylaw is adopted when a shareholder is in the process of exercising that right.

In an era where the prevalent theme within corporate law is private ordering in which the bylaws are the medium for fulfilling that objective, Delaware courts have thus far avoided taking an exclusively contractual focus when considering challenges to advance notice bylaws. Courts pursue a blended approach considering both contract interpretation principles and equitable circumstances in judging the applicability and validity of advance notice bylaws. Surprisingly, in most cases, *Blasius* is not a focal point, even when the board acts unilaterally. For example, in *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.*, the court upheld a ninety day advance notice bylaw that had been adopted unilaterally by the target's board of directors in response to Mentor Graphics' tender offer; before the amendment, Quickturn's bylaws, while authorizing holders of ten percent of the company's shares to convene a special stockholders' meeting, were unclear regarding who would set the meeting date and how quickly such a meeting would be convened.[264]

Mentor Graphics challenged the board-adopted bylaw under *Blasius* as well as *Unocal*. The challenge was rebuffed as Vice-Chancellor Jacobs upheld the bylaw, believing the board's response was a reasonable step to avoid having a special shareholders meeting convened with insufficient time for the shareholders to adequately inform themselves regarding the action proposed to be taken at the meeting.[265] While finding this explanation reasonable, *Mentor Graphics* did not separately evaluate the bylaw under the *Blasius* compelling justification standard.[266] *Mentor Graphics* clearly illustrates Delaware courts shunning *Blasius* by essentially substituting the more permissive *Unocal* standard for the more probing protections of the shareholder franchise to vote.

Indeed, Delaware's protective veil for the shareholder franchise in the context of advance notice bylaws largely occurs independently of *Blasius.* Rather than invoke *Blasius*, courts narrowly construe the scope of a challenged advance notice bylaw so as not to unnecessarily erode the

---

[262] *Openwave Sys. Inc.*, 924 A.2d at 238–39.

[263] RACHELSON, *supra* note 261, § 1:161.

[264] *See* Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25 (Del. Ch.), *aff'd on other grounds sub nom.* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998).

[265] *Id.* at 40–43.

[266] *Id.* at 44.

shareholders' voting rights. Thus, in *JANA Master Fund, Ltd. v. CNET Networks, Inc.* the plaintiff ("JANA") informed the board of defendant CNET Networks, Inc. ("CNET") that it wished to solicit proxies for its director nominees and various proposals.[267] CNET's notice bylaws required a shareholder seeking to nominate directors, or to propose other business at the annual meeting, to have beneficially owned $1,000 of common stock for not less than one year.[268] Because JANA had only acquired its shares eight months prior to the expected date of the meeting, CNET contended that JANA's planned proxy solicitation was in violation of the bylaws.[269] The notice bylaw also stated that notice must "comply with the federal securities laws governing shareholder proposals a corporation must include in its own proxy materials."[270] The court held that this language clearly indicated that the bylaw only applied to proposals and nominations that are to be included in the company's proxy materials.[271] Since JANA intended to finance the proxy mailings itself, the court concluded that the bylaw was inapplicable.[272]

Another approach that avoids *Blasius* scrutiny or even a review that is premised on the importance of protecting the sanctity of the shareholder franchise is by courts more ambiguously basing their decision on the ground that directors acted inequitably in their steadfast invocation of an advance notice bylaw when there has been a material change of circumstances after the advance notice bylaw deadline has passed.[273] In such cases, the board has a duty to waive the advance notice requirement, and a failure to do so means that the bylaw has been "applied inequitably."[274] For example, in *Hubbard v. Hollywood Park Realty Enterprises, Inc.*, the original shareholder-plaintiff, dissatisfied with management and wanting to change the direction of the company, sought to enjoin two sister-companies from enforcing their respective advance notice bylaws.[275] Following the suit's initiation, the dissatisfied shareholder and the board of one of the companies reached an agreement settling their differences; the board expanded and nominated a committee whose members supported a change in the firm's direction.[276] In response,

---

[267] 954 A.2d 335, 337 (Del. Ch.), *reprinted in* 33 DEL. J. CORP. L. 565, *aff'd*, 947 A.2d 1120 (Del. 2008) (unpublished table decision).

[268] *Id.* at 337–39.

[269] *Id.* at 337.

[270] *Id.* at 340.

[271] *Id.* at 346.

[272] *Id.* at 343.

[273] Hubbard v. Hollywood Park Realty Enters., Inc., Civ. A. No. 11779, 1991 WL 3151, at *12 (Del. Ch. Jan. 4, 1991), *reprinted in* 17 DEL. J. CORP. L. 238.

[274] *Id.*at *12–13.

[275] *Id.* at *1.

[276] *Id.* at *3.

the directors of the sister company moved for an injunction to restrain the company from enforcing the advance notice bylaw as to them.[277] The court found that the post-deadline agreement constituted a material change in circumstances and noted that generally, such changes would "foreseeably generate controversy and shareholder opposition."[278] The court thus concluded that, under such circumstances, "considerations of fairness and the fundamental importance of the shareholder franchise dictated that the shareholders be afforded a fair opportunity to nominate an opposing slate, thus imposing upon the board the duty to waive the advance notice requirement of the bylaw."[279] The court described its holding and its finding of a duty as "purely equitable" even though the board "has acted in good faith and took no steps overtly to change the electoral rules themselves."[280]

As *Hubbard* suggests, when determining whether factual issues qualify as a material change in circumstances in the context of advance notice bylaws, the guiding inquiry is whether the change is a fundamental deviation from the company's prior position that, if known before the deadline, would have foreseeably generated controversy and led to the nomination of a dissident slate.[281] Thus, a court will only find such a material change in circumstances in extraordinary cases.[282]

Another example of such an extraordinary situation is *Icahn Partners v. Amylin Pharmaceuticals, Inc.*, where a shareholder sought to enjoin the board from enforcing an advance notice bylaw, when after the time set forth in the bylaw, the board had summarily rejected a proposed acquisition that would have resulted in a significant premium for shareholders.[283] The court concluded that the proposed acquisition and the board's lack of consideration constituted a material change in circumstances sufficient to impose upon the board a duty to waive the bylaw requirements.[284] The court's rationale was that the stockholders

[277] *Id.* at *10.
[278] *Id.* at *12.
[279] *Id.*
[280] *Id.*
[281] *See id.*; Icahn Partners L.P. v. Amylin Pharm., Inc. ("Icahn"), C.A. No. 7404–VCN, 2012 WL 1526814, at *2 (Del. Ch. Apr. 20, 2012).
[282] *See* Accipiter Life Scis. Fund, L.P. v. Helfer, 905 A.2d 115, 125–26 (Del. Ch. 2006) (granting defendant company's motion for summary judgment on the basis that plaintiff could have preserved its nomination rights with reasonable diligence by simply reading a press release, which was both issued publicly and filed as an attachment to Form 8-K announcing the annual meeting, thus triggering the advance notice requirements, and noting that those facts fall short of the types of inequity evident in the cases on which plaintiff relied, all of which were based on "extraordinary facts").
[283] *Icahn*, 2012 WL 1526814, at *2.
[284] *Id.* at *3.

might have forever lost the opportunity to sell their stock at such a large premium if they did not have the opportunity to elect a different board.[285] In other words, the waiver was necessary as the shareholders would have otherwise been "denied the opportunity to exercise their voting rights at an arguably critical time."[286]

Hubbard and *Icahn* each required waiver of an advance notice bylaw because of a material development that occurred after the date, which the bylaw required the shareholder seeking action at an upcoming meeting to give notice. Absent such intervening facts, the bylaw's application turns on rules of construction that Delaware has developed for advance notice bylaws. The starting point is whether the bylaw is clear in its scope and requirements. This inquiry, as stated earlier, historically was founded on a firm protection of the shareholder franchise by narrowly construing the scope of the bylaw.[287] As illustrated in *JANA Master Fund* discussed earlier, plaintiffs benefit by courts strictly construing the scope of the advance notice bylaw.[288] *JANA Master Fund*, by virtue of the bylaw's casual reference to the federal proxy rules, held that advance notice was not necessary when the shareholder would not resort to management's proxy statement as a means to reach other shareholders.[289]

---

[285] *Id.*

[286] *Id.*; *Cf.* Sherwood v. Chan Tze Ngon, C.A. No. 7106–VCP, 2011 WL 6355209, at *14 (Del. Ch. Dec. 16, 2011) (noting, in the context of board's removal of a current board member from its slate of nominees after issuance of proxy and the advance notice deadline, that "[t]he board should have foreseen that acting in this manner would generate controversy" and that the shareholders "would lose the opportunity to express their fully informed views on that controversy in a fair election" unless actions were taken to alleviate the effects of the board's decision, and consequently granted plaintiffs TRO request).

[287] Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd., 924 A.2d 228, 234–35 (Del. Ch. 2007) ("in construing bylaws Delaware law requires interpretation in favor of shareholder rights"). *Openwave Systems* involved two bylaws that each mandated a different deadline for shareholders to give notice of their actions at an upcoming meeting. *Id.* The court viewed the bylaws as poorly drafted and held that being sensitive to the shareholder franchise compelled it to hold plaintiff need comply with only one of the two specified deadlines. However, the plaintiff did not prevail since the plaintiff took no steps under either bylaw. *Id.* at 243–44.

[288] JANA Master Fund, Ltd. v. CNET Networks, Inc., 954 A.2d 335, 340 (Del. Ch.) *reprinted in* 33 DEL. J. CORP. L. 565, *aff'd*, 947 A.2d 1120 (Del. 2008) (unpublished table decision).

[289] *Id.* at 345–45; *see also* Levitt Corp., v. Office Depot, Inc., C.A. No. 3622-VCN, 2008 WL 1724244 (Del. Ch. Apr. 14, 2008), *reprinted in* 33 DEL. J. CORP. L. 579. Office Depot, Inc. had sent a proxy statement and notice of annual meeting to the shareholders informing them that twelve directors were to be elected at the meeting. *Id.* at *1. Levitt Corp. filed its own proxy materials with the SEC, but did not give advance notice to Office Depot of its intention to nominate directors. *Id.* at *2. The issue before the court was whether Office Depot's bylaw that required advance notice of "business" to be brought before the annual meeting prevented Levitt from achieving its objectives at the forthcoming meeting. *Id.* at *6. The court concluded that, even though the term "business" includes the nomination of directors, the bylaw did not prevent Levitt from nominating directors and voting for its nominees because Office Depot had fulfilled

Similarly, the Delaware Supreme Court held that the "plain meaning" of a bylaw requiring nominations be made by "the date" specified in the notice of the meeting, required a specific date be identified and was not triggered by notice that the shareholder meeting would occur "on or about a particular date."[290]

Some tension exists between the shareholder franchise and obeisance to private ordering in Delaware's contemporary handling of advance notice bylaws disputes where the bylaw scope is ambiguous. The historical-franchise protective approach to such ambiguity was to accord the ambiguous bylaw a construction that favors the voting franchise. However, developments in addressing bylaw disputes that do not involve advance notice bylaws are now influencing the courts' construction of advance notice bylaws. In resolving the scope of bylaw disputes involving orthodox matters, courts have allowed the parties to introduce extrinsic evidence on the intended meaning and scope of the particular bylaw. This historically has not occurred with advance notice bylaws. However, more recently Delaware courts have expressed a greater willingness to find bylaw language ambiguous and consider extrinsic evidence of meaning. The shift is most apparent in the Delaware Court of Chancery and Delaware Supreme Court involving *Airgas, Inc. v. Air Products & Chemicals, Inc.* ("Airgas I" & "Airgas II," respectively) decisions.[291] In that dispute, shareholders adopted a bylaw amendment to hold the plaintiff corporation's annual meeting seven months earlier than it had been traditionally held.[292] The courts considered whether the amendment was validly adopted under the corporation's charter and whether the amendment itself impermissibly cut short some directors' "full term" on a staggered board as established by the charter and Delaware law.[293] Both issues turned on the proper interpretation of "full term," "annual," and "year."[294] Departing from the reluctance of earlier courts to find ambiguity

---

the bylaw requirement by itself giving notice of this business to be conducted at the meeting. *Id.* at *6-7.

[290] Hill Int'l Inc. v. Opportunity Partners, L.P., 119 A.3d 30, 39 (Del. 2015). In *Hill*, a proxy statement was issued stating the company's annual meeting was "*anticipated*" to occur "on or about June 10, 2015." *Id.* at 34 (emphasis in original). The court held that the approximate time frame did not satisfy the "prior public disclosure of the date" requirement pursuant to the bylaws. *Id.* at 39–40.

[291] Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182 (Del. 2010), *rev'g*, Civil Action No. 5817-CC, 2010 WL 3960599 (Del. Ch. Oct. 8, 2010). Although not directly *advance notice* bylaw cases, these decisions address how bylaws may affect shareholder electoral rights and apply the same principles of construction. Later portions of this litigation discussed *supra*, Part III.E.

[292] *Airgas I*, 2010 WL 3960599, at *1.

[293] *Id.*

[294] *Id.* at *6.

in bylaws, both courts found the language was ambiguous.[295] The Delaware Court of Chancery and the Delaware Supreme Court, however, diverged on their approaches.[296] After concluding that the corporation's charter and the words' ordinary meanings did not resolve the ambiguity, the Chancellor held that, because shareholders had voted for the amendment, the proper construction was that which allowed the amendment to be upheld.[297] As a result, the court upheld the bylaw amendments and found in favor of the defendants.[298] In contrast, the Delaware Supreme Court moved even farther away from earlier decisions by consulting extensive extrinsic evidence, such as industry practice, the ABA's *Model Forms and Commentary*, and early twentieth century corporate literature.[299] Each of these sources indicated that corporations with staggered boards typically intended directors' terms to last a full three years and that the industry followed the same interpretation the plaintiffs were advancing.[300] The court determined this "overwhelming and uncontroverted extrinsic evidence" resolved the ambiguity in favor of the plaintiff, and thus it rejected the Chancellor's pro-shareholder construction.[301]

Additionally, in *Sherwood v. Chan Tze Ngon*, the plaintiff sought to enjoin a corporation from holding its annual meeting until shareholders had adequate time to consider the plaintiff's slate of nominees and corrections to earlier disclosures.[302] While deciding the case on other grounds, the court signaled in dicta that the advance notice bylaw's failure to state whether postponement of the annual meeting reset the notice period made the bylaw "at least ambiguous"[303] and reviewed extrinsic evidence on industry practice that might help resolve the ambiguity.[304]

---

[295] *Id.* at *7; *Airgas II*, 8 A.3d at 1189.

[296] *Airgas II*, 8 A.3d at 1189 ("We agree with the Court of Chancery that the relevant Charter language is ambiguous. But as more fully discussed below, there is overwhelming extrinsic evidence that under the Annual Meeting Term Alternative adopted by Airgas, a term of three years was intended.").

[297] *Airgas I*, 2010 WL 3960599 at *13–14.

[298] *Id.*

[299] *Airgas II*, 8 A.3d at 1190–92.

[300] *Id.*

[301] *Id.* at 1194.

[302] C.A. No. 7106–VCP, 2011 WL 6355209, at *1 (Del. Ch. Dec. 20, 2011).

[303] *Id.* at *11.

[304] The Court explained:

> For example, Hewlett–Packard Co.'s notice bylaw states expressly that "[i]n no event will the public announcement of an adjournment or postponement of a stockholders meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above." The conspicuous absence of similar language from [the corporation's] bylaw suggests that [the bylaw] is at least ambiguous.

Finding omitted language to constitute ambiguity represents a departure from earlier decisions.[305]

Notwithstanding the shifts in *Airgas* and *Sherwood*, courts have not fully abandoned the tendency to find language unambiguous in ways that favor shareholder-plaintiffs. For example, in *Hill International, Inc. v. Opportunity Partners L.P.*, the Delaware Supreme Court upheld the plaintiff's nominations holding that, as used in the applicable advance notice bylaws, "the date" could only mean a specific day.[306] The bylaws required that shareholders submit nominations sixty to ninety days prior to the annual meeting unless the notice or prior public disclosure "of the date of the meeting" was given fewer than seventy days prior to the meeting, in which case shareholders could submit proposals within ten days of the announcement.[307] Defendants announced that its 2015 meeting would occur "on or about June 10" more than a year in advance but did not announce the actual date of the meeting until April 30, and plaintiffs submitted nominations on May 7.[308] Finding the plaintiff's nominations to be valid, the court held that the plain meaning of "the date" means a specific day and thus only the April 30 announcement triggered the advance notice bylaw.[309] Notably, unlike earlier decisions, the *Hill* Court did not expressly consider what construction favored shareholder rights when determining the bylaws' unambiguous meaning.[310]

From the above we see how limited a role *Blasius*'s "compelling justification" standard has today, even in matters such as advance notice bylaws that directly impact the voting franchise. Delaware courts have instead substituted interpretative tools developed in the realm of contract law with the natural effect of ignoring the larger question of the board's authority to circumscribe the shareholder prerogatives. There appears to be little of *Blasius* that remains.

VI. LIKELY CAUSES FOR DELAWARE'S RETREATS AND RECALIBRATIONS

Each of the decisions that comprise the Golden Quartet stands substantially qualified today. The bulwark each initially erected against

---

Id.

[305] *See e.g.*, Levitt Corp. v. Office Depot, Inc., C.A. No. 3622-VCN, 2008 WL 1724244, at *6 n.43 (Del. Ch. Apr. 14, 2008), *reprinted in* 33 DEL. J. CORP. L. 579 (holding that election unambiguously includes nomination if a bylaw and Annual Meeting Notice do not define the scope of "elect").

[306] 119 A.3d 30, 39 (Del. 2015).

[307] *Id.* at 33–34.

[308] *Id.* at 32–33.

[309] *Id.* at 39, 40.

[310] *Id.* at 38.

overreaching managers, directors and control stockholders is more penetrable today than when first built. Indeed, we believe that *Revlon* and *Weinberger* are now relegated to being historical markers whose value is to show from where the law has traveled. Even though defensive maneuvers continue to be subjected to heighted scrutiny akin to self-interested behavior in other areas, *Unocal* has faded in importance too as the hostile takeover has become an increasingly endangered species. Today, *Blasius*'s sphere is so narrowly defined that its regulatory space is miniscule, so that it can at best reach only the most egregious intrusions on the shareholders' voting prerogatives. In this section, we examine possible explanations for why the Golden Quartet's once uplifting prelude has now become so flat.

A. Revlon*: The Deal Litigation Explosion*

As is true in other commercial areas, cries of a litigation explosion, abuse of the judicial system and fears of lack of competitiveness in global markets have political salience. Nearly all the retrenchments and qualifications reviewed above coincided with a dramatic and very public upswing in the incidence of deal litigation. Such class action suits are customarily brought on behalf of the shareholders of the acquired firm and allege a range of misconduct, such as the target company board failing to obtain a better price, or directors making disclosure violations in seeking stockholder approval. Corporate law is not immune to such concern. Considering that in 1999 and 2000 around 10% of deals produced litigation.[311] In that era most of the deal litigation not only involved Delaware firms but also took place in Delaware.[312] Suits in that era were consequential because firms that were sued experienced a statistically significant higher incidence of deals that did not close, while litigated deals that closed yielded their shareholders increased returns. Hence, the deal-focused suits in that former era could be seen, on the whole, as positive.

Times have since changed. Beginning in 2009, there was a significant increase in the percentage of deals being challenged by shareholder litigation. Many of these cases were filed not only in Delaware, but also in other jurisdictions, leading to a big jump in the volume of multi-jurisdictional litigation. One study found that by 2013: (1) a very high percentage of large M&A transactions were subjected to litigation, reaching 96% of deals; (2) over three-quarters of those cases

---

[311] C.N.V. Krishnan, et al., *Shareholder Litigation in Mergers and Acquisition*s, 18 J. CORP. FIN. 1248, 1250–54 (2012).

[312] *Id.* at 1251.

resulted in settlements and over three-quarters of those settlements were disclosure-only settlements; and (3) median attorneys' fees awards in the disclosure only settlements reached $450,000, which while substantial in itself, was less than 20% of the fee awards in substantive settlements.[313]

Fear that such litigation is not driven by merits, but rather by the quest for a quick settlement, is fed by a study finding no correlation between the premium shareholders receive as a consequence of the merger and the likelihood of there being a fiduciary class action claim.[314] The supposition is that shareholders sue when they believe they are not receiving a fair price for their shares due to the board's misconduct; a merger that produces a handsome premium would thus be less likely to prompt complaint.

Concern that the merits are not driving such deal litigation is the focus of a study by Professors Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon.[315] They reviewed 453 firms during the period 2005–2012, of which 319 experienced litigation and resulted in 191 transactions involving the above-type of remedy.[316] The authors examined three types of relief flowing from challenged mergers: (1) amendment of the terms of the merger agreement, (2) disclosure only settlement, and (3) increase in merger consideration.[317] They found amendment settlements and disclosure only settlements do not have an impact on ultimate shareholder vote and there is only weak evidence that an increase in consideration impacts the shareholder vote.[318] They also tested other variables, finding that transaction value and position of proxy advisors had significant effect.[319]

In response to this deluge, the Delaware courts and the General Assembly took action. In 2015, the Delaware General Assembly approved amendments to the DGCL to permit Delaware corporations to adopt forum selection bylaws.[320] These bylaws could be approved by directors without

---

[313] Cain, et al, *supra* note 9, at tables 2, 3. Another study similarly reported that 93 percent of acquisitions in excess of $100 million attracted at least one fiduciary duty class action in 2012. ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS (2013).

[314] *See* Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L. J. 829, 836, 876–77 (2014).

[315] Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and A Proposal for Reform*, 93 TEX. L. REV. 557 (2015).

[316] *Id.* at 579.

[317] *Id.* at 560–61.

[318] *Id.* at 561.

[319] *Id.* at 582.

[320] S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015) (enacted) (amending the DGCL to prohibit fee shifting provisions in bylaws or articles of incorporation (codified as amended at

shareholder consent. They permitted corporate boards to force shareholder litigation into the Delaware Court of Chancery for resolution. Within a year, they had been widely adopted by companies as a potential solution to the multijurisdictional litigation problem. More recently, in response to what was believed to be too aggressive a use of appraisal, Delaware amended its appraisal statute to require petitioners seeking appraisal of publicly traded shares to own one percent of the outstanding shares.[321]

The Delaware courts also responded to widely-held concerns of abusive litigation. Disclosure-only settlements recently garnered special attention by Chancellor Bouchard in *In re Trulia, Inc. Stockholder Litigation*.[322] The complaint in *In re Trulia* alleged that the directors breached their fiduciary duties in approving a merger with a single bidder that allegedly failed to obtain the highest exchange ratio for the shareholders.[323] Soon after the complaint was filed, an agreement was reached that the company would make several supplemental disclosures to its proxy statement and that the company would not oppose a fee request that did not exceed $375,000.[324] In return, the plaintiff class broadly released any claims that could conceivably arise from the merger (except such claims that may have existed under specified antitrust laws).[325] The merger was ultimately approved by 79.52 percent of the shares entitled to vote (99.15 percent of the votes cast).[326] Following the merger's completion, the parties sought approval of the settlement.

Chancellor Bouchard closely examined the supplementary disclosures, each of which dealt with distinct features of the valuation process used by the investment bank in its fairness opinion to the board.[327] He concluded they were not meaningful in light of all the other information the company disclosed regarding the valuation process.[328] Because he did not believe the settlement produced any benefit, he rejected the settlement and therefore left the suit where it had started, a pending bald accusation of breach of fiduciary obligation.[329] He went on to say:

DEL. CODE. tit. 8, §§ 102, 109) and to authorize forum selection bylaw provisions (codified as amended at DEL. CODE tit. 8, § 115)).

[321] *See* Jiang, et al., *supra* note 151 (reviewing the new provisions that condition appraisal on the petitioner holding either 1% or $1 million of the company's shares).

[322] 129 A.3d 884 (Del. Ch. 2016).

[323] *Id.* at 888.

[324] *Id.* at 888–90.

[325] *Id.*

[326] *Id.* at 889.

[327] *Id.* at 900.

[328] *Id.* at 896–97.

[329] *Id.* at 907.

> [D]isclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than the disclosure claims and fiduciary duty claims concerning the sale, if the record shows that such claims have been investigated sufficiently. In using the term "plainly material," I mean that it should not be a close call that the supplemental information is material as that term is defined under Delaware law. Where the supplemental information is not material, it may be appropriate for the Court to appoint an *amicus curiae* to assess the Court in its evaluation of the alleged benefits of the supplemental disclosures given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing.[330]

Coupled with the widespread adoption of forum selection bylaws, *In re Trulia* had a devastating impact on shareholder litigation in Delaware. By 2016, there had been a sharp drop in the percentage of deals being challenged by shareholders, an increase in the percentage of deal lawsuits that were dismissed by the Delaware courts, a concurrent large drop in the number of such suits that were settled, significant drops in attorneys' fee awards that were approved by the Delaware courts, and a rapid shift in deal litigation filings out of Delaware and into the federal courts.[331] Each of these seems well-connected to *In re Trulia*'s holding.

We note that one effect of *In re Trulia* can be seen as driving litigation out of the Delaware state court system to forums not adopting such a skeptical view of disclosure only settlements. Such a migration is not a welcome development for Delaware as the state's economy clearly benefits from corporate litigation in its courts as one of the bases for its lucrative legal practice. The twin antidotes for this are the wide adoption of forum selection clauses and altering legal doctrine. If litigation is to occur, per a forum selection clause the defendant corporation's board can select a forum informed by *In re Trulia*. And, so as not to drive off the lucrative incorporation and advisement business elsewhere, Delaware's doctrines, such as *Revlon*, have been tweaked to moderate the Golden Quartet so that they place much more limited litigation targets on common transactions. However, we believe there are many other explanations for the changes that have occurred to the Golden Quartet.

---

[330] *Id.* at 898–99.
[331] Cain, et al., *supra* note 9, at 608-609.

Delaware's retreat from *Revlon* can be understood as righting a legal doctrine that had listed dangerously against the public interest in view of the contemporary concern that shareholder litigation attending acquisitions had reached a near epidemic scale. That is, *Revlon*'s journey, as recounted above, may well reflect the pitfalls that arise with establishing a novel doctrine, e.g., the directors' mission is to pursue an auction of the firm in certain instances, instead of simply invoking a conventional approach to a problem, proscribing self-interested conduct. The peril of adopting a new standard for conduct is the inherent uncertainty of how that standard will be applied in later cases. This uncertainty is necessarily great where courts eschew a well-worn path and proceed to blaze a new trail.

Revlon was just such a case. As observed earlier, Revlon's suitor was Pantry Pride for whom Revlon had a distinct distaste.[332] After initiating a series of aggressive defensive maneuvers, the board opted for a friendly acquisition by Forstmann Little.[333] This posed classic self-dealing problems as Revlon's senior management used funds from their lavish golden parachutes to become owners in the entity to acquire Revlon.[334] To facilitate Forstmann Little's financing the transaction, Revlon's board waived the note covenants restricting Revlon and any successor from incurring additional debt; the notes had been issued just a few weeks earlier and upon announcement of the waiver of the protective covenants the value of the notes declined substantially.[335] The note holders sued the Revlon directors alleging they had not disclosed that they would seek a white knight and likely waive the protective covenants.[336] Further self-dealing occurred when Revlon management withdrew from participating in a buyout, but simultaneously granted Forstmann Little a deal-ending lockup option with no material change in the price offered for Revlon shares.[337] Transparently they made these changes in exchange for Forstmann Little agreeing to support the price of the notes (thereby shielding Revlon's board from an otherwise viable securities fraud class action).[338] Whether or not the Revlon board acted as auctioneers, their conduct reeked of garden-variety self-interested conduct.

Instead of pursuing well-established doctrines developed for self-interested misconduct, the Delaware Supreme Court embraced a very new, but ill-defined, doctrine. The doctrine on its face appears innocuous enough, namely that the directors when selling control should take steps

---

[332] Revlon, Inc. v. Macandrews & Forbes Holdings, Inc., 506 A.2d 173, 175 (Del. 1986).
[333] *Id.*
[334] *Id.* at 178.
[335] *Id.* at 179.
[336] *Id.* at 183.
[337] *Id.* at 178.
[338] *Id.* at 178–79.

to garner the best offer for the shareholders.[339] *Revlon* is celebrated for installing the directors' affirmative role as auctioneer in those limited instances when there is a sale of control. We might puzzle whether the auctioneer paradigm is the pervasive North Star that guides director behavior on a wide range of matters they might address. This anointment is all the more curious in the post-*Revlon* rhetoric, such as *C&J Energy Services,* where the court observes that *Revlon* does not call for perfection as an auctioneer but that the directors merely take steps they reasonably believe consistent with a passive auction.[340] What is odd about this formulation is whether it says anything about what the directors' mission is outside sales of control. If the board undertakes to dispose of a subsidiary, a division, or a single piece of real estate, there is reason to believe the formulation of the board's duty, or its expectations for those carrying out the task, would not be at odds with processes contemplated by *Revlon.* If this is so, what then is introduced by *Revlon*?

What changed in *Revlon* is the burden of proving reasonable action consistent with the directors' wealth-maximizing North Star. This is of course a very plaintiff friendly standard. That standard has since become much less formidable, as *Lyondell* illustrates, with the wide adoption of immunity shields whereby today the *Revlon* complaint must allege more than directorial bumbling or somnolence. *Revlon*'s facts today would most assuredly be unaffected by an immunity shield; in today's legal environment, single bidder cases are unlikely to prevail. Thus, developments such as *C&J Energy Services* and *Corwin* are unsurprising returns to the bedrock of corporate law. We might therefore see the practical effect of both decisions as cabining *Revlon* to self-dealing and self-interested acquisitions similar to *Revlon* itself, rather than installing a new over-arching guide for directors.

Corwin likely also reflects the Delaware courts' increasing comfort with both the sophistication of public shareholders and the efficient operation of securities markets.[341] As quoted earlier, *Corwin* eagerly elevated the non-judicial scrutiny of a fully-informed non-coercive shareholder vote to supplant an ad hoc heightened judicial scrutiny. This predisposition toward non-judicial mechanisms is evident in *C&J Energy Services,* where the court concluded the board had met the auctioneering model by a sufficiently delayed closing and only mild deal protective

---

[339] *Id.* at 180.

[340] C&J Energy Servs. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014) (en banc).

[341] J. Travis Laster, *Changing Attitudes: The Stark Results of Thirty Years of Evolution in Delaware M&A Litigation*, in RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION, 39–45 (forthcoming).

measures so that if the bid in hand was inadequate the court believed this would be corrected by another bidder stepping forward. This predisposition required faith that there was indeed a dynamic trading market in which control could be transferred.

Further evidence of the prevailing faith in capital markets is the recent holding in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, where the Delaware Supreme Court scolded the trial court for assigning in an appraisal proceeding only one-third weight to a public company's market price.[342] Instead the court found that the deal price should be accorded a strong presumption of being fair value in light of the faith that could be accorded freely established market prices.[343]

In sum, neither *Corwin*'s nor *C&J Energy Service*'s approaches would have much salience except in a world which public ownership and trading are dominated by sophisticated institutional investors. Thirty years after *Revlon* there is a deep appreciation that public markets are institutional markets, but this was not the case when the Golden Quartet was decided. Thus, the growing and hence rising role of powerful institutional shareholders has also has contributed significantly to changes in *Revlon*.

B. Weinberger*: Finishing the Portrait*

While the deal litigation explosion may have played a non-exclusive role as well in the retreat from *Weinberger*, we offer a second, very different, additional explanation of the Delaware court's retreat from *Weinberger* and *Lynch*. *M&F Worldwide* may best be regarded as merely completing the legal mosaic for the treatment of self-dealing acquisitions for which most of the important pieces had already been laid in place. Earlier Delaware Supreme Court holdings excused the controlling stockholder from having to meet the entire fairness standard when undertaking a cash tender offer for the minority's shares[344] and also when the control was used to cash out the minority through a short-form merger.[345] The latter holding reasoned that by the General Assembly providing a mechanism for anyone whose holdings are ninety percent or more to effect a merger necessarily meant the transaction would not be further conditioned on the transaction meeting the entire fairness test.[346]

---

[342] *See* DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017), *rev'g*, *In re* Appraisal of DFC Global Corp., C.A. No. 10107–CB, 2016 WL 3753123 (Del. Ch. July 8, 2016).

[343] *Id.* at 388–89.

[344] *See* Solomon v. Pathe Commc'ns. Corp., 672 A.2d 35 (Del. 1996).

[345] *See* Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).

[346] *Id.* at 247.

This logic set the stage for the Delaware General Assembly to amend the DGCL by adding section 251(h) to authorize a "streamlined back-end merger" procedure whereby a merger that quickly followed a friendly tender offer, and accepted by at least of a majority of the shares, could be put into effect without a shareholder vote.[347] Moreover, the merger carried out in the second step is not subject to an entire fairness inquiry. As reasoned in *In re Volcano Corp. Stockholder Litigation*:

> When a merger is consummated under Section 251(h), the first-step tender offer essentially replicates a statutorily required stockholder vote in favor of a merger in that both require approval—albeit pursuant to different corporate mechanisms—by stockholders representing at least a majority of a corporation's outstanding shares to effectuate the merger. A stockholder is no less exercising her "free and informed chance to decide on the economic merits of a transaction" simply by virtue of accepting a tender offer rather than casting a vote. And, judges are just as "poorly positioned to evaluate the wisdom of" stockholder-approved mergers under Section 251(h) as they are in the context of corporate transactions with statutorily required stockholder votes . . . .
>
> . . .
>
> I conclude that the acceptance of a first-step tender offer by fully informed, disinterested, uncoerced stockholders representing a majority of a corporation's outstanding shares in a two-step merger under Section 251(h) has the same cleansing effect . . . as a vote in favor of a merger by a fully informed, disinterested, uncoerced stockholder majority.[348]

Each of these developments reflect the reasoning advanced in cases such as *In re Pure Resources, Inc. Shareholders Litigation*, where the court held that the entire fairness standard did not apply to any part of a two-step transaction undertaken by a controlling stockholder whereby a cash out merger follows its tender offer; provided both transactions occur

---

[347] DEL. CODE tit. 8, § 251(h).

[348] 143 A.3d 727, 744-47 (Del. Ch. 2016), *aff'd sub nom.* Lax v. Goldman, Sachs & Co., 156 A.3d 697 (Del. 2017) (unpublished table decision).

close in time, at the same price, a majority of the independent shareholders accept the tender offer, and there is no coercion or retributive threats.[349]

More generally, we might well view developments such as *M&F Worldwide* being the fairly straight-forward adherence to the Delaware General Assembly's long-established template for addressing self-dealing transactions.[350] In Delaware, consistent with approaches taken in other states, a transaction that involves a conflict of interest between a corporation and its officers or directors is regulated by statute.[351] In broad overview, the presumption of the business judgment rule disappears when there is a transaction between the corporation and an officer or director; however, pursuant to section 144, good faith approval by *either* non-conflicted directors *or* the shareholders, following full disclosure, restores the protective presumption of the business judgment rule.[352] Indeed, when compared to this provision, *M&F Worldwide* is more demanding in its requirements than how the Delaware General Assembly addresses conflict of interest transactions by a company's officers or directors.[353] *M&F Worldwide* conditions restoration of the business judgment rule on both board and shareholder action being independent; whereas section 144 restores the business judgment rule upon approval by either body.[354]

But the analogy to section 144 may be less than perfect because a controlling stockholder's influence can be expected to be greater than that of say a senior officer, or even a particular group of directors, so that something more than the traditional procedures for addressing a director or officer's conflict of interest are required. In any case, *M&F Worldwide* appears very consistent with Delaware's overall approach in other contexts where an acquisition is challenged on the ground of being a conflict of interest with a dominant stockholder and is also consistent with the more particularized officer or director conflict of interest expressly addressed by the DGCL. The refinements to *Weinberger* are thus unexceptional in that they reflect judicial and statutory developments that have opted for governance processes over ad hoc entire fairness adjudications.

---

[349] 808 A.2d 421, 445–46 (Del. Ch. 2002).

[350] For a skeptical view of the value of the majority of the minority vote in a control shareholder squeeze-out, see Edward B. Rock, *MOM's Approval in a World of Activist Shareholders* (Eur. Corp. Governance Inst., Working Paper 2017, at 15). Zohar Goshen offers a much more positive perspective in Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 402 (2003).

[351] *See* DEL. CODE tit. 8, § 144.

[352] *Id.*

[353] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644–45 (Del. 2014).

[354] *Compare*, *id.* at 644 *with* DEL. CODE tit. 8, § 144.

C. Unocal*'s Increasing Irrelevance*

It is not easy to judge whether *Time, Inc.* or *Unitrin* had the biggest limiting effect on *Unocal*'s impact on board discretion. We believe that the Delaware Supreme Court, by broadening the range of items that can pose a threat in *Time, Inc.*, fundamentally changed the assessment of defensive maneuvers. Threats that management claims are coercive, or offered too little money, can be better assessed pursuant to a proportionality standard that existed pre-*Time, Inc.* But once threats were changed to existing or proposed business practices or policies, there is hardly any space between that inquiry and the traditional realm of the business judgment rule. All that distinguishes the debate whether management's policies or practices constitute waste, and whether shareholder value would be enhanced by policies or practices that would follow a change of control, is the specter of self-interest in the latter. Thus, the real bite of *Unocal*-*Unitrin* is the imposition of a heightened scrutiny standard that Delaware has regularly applied in situations rife with the possibility of self-interested behavior; but it's an inquiry guided by a standard that heavily favors the target board.

The Delaware Supreme Court's movement of *Unocal* in the direction of the traditional deferential business judgment rule inquiry may also be explained by the courts growing comfort with the level of sophistication of the shareholder base with the rise of institutional investors. Similar to the reasoning in *Corwin*, shareholder voice to ultimately mediate whether there should be a change of control can be seen preferable to ex-post judicial interference. Delaware's deference to the ballot box and the proxy contest, as opposed to the tender offer, appears to be a clear illustration of this thinking.[355]

If this is what is occurring, and we believe it is, then the Delaware courts appear to be accommodating the activist shareholder movement. As aggressive tactics of putting the "odor of money" in the air to gain control have become passé, activist investors have sought to increase shareholder value via a variety of tactics short of the hostile tender offer. These tactics range from communicating with management or seeking board representation after a friendly request, to more hostile techniques such as making a shareholder proposal or publicly criticizing target

[355] This deference is apparent in both *Selectica* and *Airgas* where the Delaware courts found that the combination of the poison pill and the classified board is not preclusive under the *Unocal* test. *See* Versata Enters. v. Selectica, 5 A.3d 586, 604 (Del. 2010); Air Prods. and Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).

management.[356] If none of these opening gambits produces the desired result, the hedge fund may threaten/bring a proxy contest, threaten/sue the company's board of directors, or seek to force a change of control transaction of the targeted company, such as a sale to a friendly third party.[357] Aggressiveness matters as in the post-financial crisis world the most aggressive hedge funds have been the most successful amongst them.[358]

Unocal is poorly suited to mediate the changing dynamics that accompanies the fray between the activist fund and management. For one thing, traditional antitakeover defenses such as the classified board and the poison pill are ineffective against most hedge fund interventions. For example, poison pills are largely ineffective because their trigger levels are for the most part set at a minimum of 10%,[359] which usually exceeds the amount held by an activist hedge fund (median level around 6 to 7%).[360] Classified boards, which combined with the poison pill are lethal to hostile tender offers, have little impact on hedge funds since if the funds choose to run a proxy contest, they invariably seek only a minority of the board seats that are up for election using a so-called short slate contest.

Situations where corporate management is resisting a counselled course of action while continuing to engage the activist investor would appear to fall outside *Unocal* and well within the protective ambit of the business judgment rule. As activists eschew the hostile takeover model, and resort to other mechanisms to engage management, there would seem to be less need for resort to *Unocal*. We thus believe there is a strong connection between the declining frequency of hostile takeovers, and the weakening of *Unocal*, namely the ubiquity of the poison pill. The proxy contest, and not the tender offer, is the vehicle for changing the firm's direction and, as seen above, this shifts the role of courts to the more deferential business judgment rule paradigm.

D. Blasius*'s Frustrated Promise*

Within the Golden Quartet, *Blasius* harbored the greatest potential for profound change in well-entrenched corporate law doctrines. Where

[356] Brav, et al., *supra* note 8, at 1743–46.

[357] *Id.*

[358] *See* C.N.V. Krishnan, et al., *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout and Expertise,* 40 J. CORP. FIN. 296, 300 (2016) (showing that hedge funds that take largest positions in target firms and engage in most aggressive forms of activism have been the most successful funds in the post-financial crisis time period).

[359] An exception for NOL pills was blessed by the Delaware Supreme Court in *Versata Enters. v. Selectica, Inc*., 5 A.3d 586, 606 (Del. 2010).

[360] Brav et al, *supra* note 8, at 1747.

the other cases dealt with particularized standards to be met in their respective arenas–sale of control, self-dealing acquisitions and defensive maneuvers–*Blasius* articulated a high standard of review with the consequent effect of substantially limiting the areas in which boards may act without meeting the substantial burden of establishing a compelling justification to do so.[361] *Revlon* permitted directors to transfer control so long as their conduct in doing so was consistent with getting the best offer.[362] Similarly self-dealing acquisitions could proceed subject to an entire fairness inquiry.[363] And control could be defended under even *Unocal* so long as the defensive measure was deemed proportional.[364] But *Blasius* conditioned director actions that thwarted shareholders exercising their limited prerogatives on a much higher showing of reasons for their interdiction.[365] We therefore conclude that *Blasius*'s early containment is responsive to the great promise it provided to strengthen the rights of stockholders. Had *Blasius* not been cabined, a wide array of practices common today would not be permissible without stockholder approval. This we believe explains Delaware's retreat from *Blasius*. That is, its reach called not only for a wholesale reexamination of many established areas of corporate law but they were areas central to any adjustment in doctrine that would necessarily weaken the prerogatives of management.

Consider how the poison pill interferes with shareholders' freedom to sell their shares. Central to every poison pill is the financially disastrous consequences for the bidder whose share purchases do not conform to the limits set forth in the poison pill. This necessarily, indeed intentionally, is for the purpose of removing from the target company's shareholders the opportunity to sell shares at a price they believe advantageous. Were *Blasius* to apply, the company's board of directors would have to demonstrate a compelling justification for not redeeming the firm's rights to thereby enable shareholders to consider the bidder's offer.[366] This inquiry very much has resonance with Chancellor Allen's consideration, discussed earlier, of the Interco board's refusal to redeem its outstanding pill.[367] And, unlike *Unocal-Unitrin*'s focus on whether not redeeming the pill is preclusive or coercive, the board's decision not to redeem the pill

[361] *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

[362] Revlon v. MacAndrews & Forbes Holding, Inc., 506 A.2d 173, 185 (Del. 1986).

[363] *Id.*

[364] *Id.*

[365] *Blasius Indus., Inc.*, 564 A.2d at 663.

[366] With one exception, poison pills have not been vulnerable to *Blasius* because shareholders can exercise their right to change the board's composition by voting; the exception to this escape is the dead-hand poison pill. *See* Carmody v. Toll Bros., 723 A.2d 1180, 1193 (Del. Ch. 1998) ("[T]he 'dead hand' provision purposefully interferes with the shareholder voting franchise without any compelling justification, and is therefore unlawful under Blasius.").

[367] *See supra*, Part.III.B.

would be tested, as the Atlas board's actions were, by whether there was a compelling justification to thwart further shareholder sales because doing so would have been in their interest. An argument by the target board that the pill is necessary to protect the shareholders from accepting too low a price is counter to respecting the shareholder franchise that envisions the right of shareholders to make that decision individually. Moreover, it is counter to what occurs outside of the change of control context, namely shareholders are accorded the right to sell at prices they believe sufficient for the transaction. Just why should that right be qualified in the change of control context? *Blasius*'s great hope was to open this area to analysis so that much needed insight could be developed on the purpose and content of the shareholder franchise to sell. Regrettably, the Delaware courts have quickly, and without analysis, closed this area for thoughtful analysis.

Another component of the shareholder franchise is shareholders' power to sue managers for their misconduct. Such suits regularly occur either as individual claims or derivative claims. This component of the shareholder franchise now is deeply qualified in Delaware as a result of recent Delaware decisions. The Delaware Court of Chancery in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.* held that the board could unilaterally adopt a bylaw that permitted the corporation to choose the forum in which a shareholder-initiated suit would be maintained.[368] The *Boilermakers* Court reasoned that a corporation's bylaws are part of the web of relationships within the modern corporation that form the "contract" shareholders have with their corporation, so that the board's authority to amend the bylaws conveys on the board the power to at least qualify, if not alter, the shareholders' rights.[369] Shortly after *Boilermakers*, the Delaware Supreme Court employed similar reasoning in *ATP Tour, Inc. v. Deutscher Tennis Bund*,[370] to uphold a board-adopted bylaw that abandoned the long-maintained American Rule (whereby each litigant bears her own litigation costs) to instead assign the suit's defendant's expenses to the plaintiff if the suit proved unsuccessful.[371] It is easy to imagine a range of other ways that the bylaws could qualify or

[368] 73 A.3d 934, 939–41 (Del. Ch. 2013).

[369] *Id.* at 958.

[370] 91 A.3d 554, 557–58 (Del. 2014) (en banc).

[371] Since these decisions, the Delaware General Assembly has Solomon-like entered the area expressly authorizing forum-selection bylaws such as the one upheld in *Boilermakers* but prohibiting any charter or bylaw provision that would shift fees to the unsuccessful plaintiff. S.B. 75, 148th Gen. Assemb., Reg. Sess. (Del. 2015) (enacted) (amending the DGCL to prohibit fee shifting provisions in bylaws or articles of incorporation (codified as amended at DEL. CODE. tit. 8, §§ 102, 109) and to authorize forum selection bylaw provisions (codified as amended at DEL. CODE tit. 8, § 115)).

eliminate shareholder litigation in the courts such as mandating suits occur through arbitration.[372] Were *Blasius*'s reach not limited to the shareholder franchise of voting, the board's power to unilaterally restrain or limit shareholder suits would be subject to a "compelling justification" inquiry.

As seen earlier, the core of *Blasius*'s holding is that corporate statutes, while broadly enabling of the board of directors, nonetheless assess the board's exercise of discretion differently when the board thwarts an on-going exercise of a matter within the shareholders' franchise. So understood, *Blasius* is affronted when the board unilaterally amends the bylaws, as occurred in both *Boilermakers* and *ATP Tour,* to either qualify or eliminate a right particular to the principal-agent relationship. Similar affronts occur, as it does with the board's adoption of a poison pill, by boards unilaterally acting to prevent the free transfer of shares to a bidder. Thus, an undiluted *Blasius* would have viewed these developments not through the lens of contracting, or even *Unocal*[373] but rather whether the unilateral action was supported by a compelling justification.

Simply stated, a general grant of authority to the board of directors to adopt, amend, and repeal bylaws is a weak basis for concluding such authority extends to altering the rights or protections shareholders customarily enjoy. Just as the Atlas board could not have prevailed by amending the bylaws to change the board's size without meeting the compelling justification standard, the Atlas board should not be able absent a compelling justification to amend the bylaws to condition any suit thwarting the shareholder franchise to vote on that shareholder meeting certain bylaw-mandated standing requirements. Each invades the shareholders' sphere as it is unrelated to "[t]he business and affairs of . . . [the] corporation"[374] so that it cannot be viewed other than central to the principal-agent relationship.

VII. CONCLUSION

Given the enormous changes that have occurred in the past thirty years, it is not surprising that commentators have split over the significance and value of these changes. In our view, there are reasons to be concerned that private enforcement of director fiduciary duties has spiraled out of control, but at the same time, it is important to remember

---

[372] *See e.g.,* Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration in Corporate Charters and Bylaws*, 104 GEO. L. J. 583 (2016).

[373] One of the authors of this paper has separately written that the board's unilateral actions in this area cannot be justified under contract law. *See* Cox, *supra* note 10.

[374] As prescribed by section 141(a) of the DGCL and other corporate statutes. *See* text accompanying n.224, *supra* Part.IV.

that the new cutbacks by the Delaware courts and the state's General Assembly will weaken shareholder monitoring of corporate management and potentially increase the incidence of director misconduct. We try to take a middle road by acknowledging that the Delaware courts are weakening shareholder oversight of directors' and officers' fiduciary duties, while also recognizing the underlying motivations that prompted them to relax their scrutiny of corporate management. We argue that the reductions in shareholder monitoring associated with reduced levels of private enforcement are offset by institutional shareholder activism, improved market efficiency and especially increased hedge fund activism.

In corporate governance, shareholder monitoring can occur in a variety of ways. In recent years, many hedge funds have engaged in shareholder monitoring, often with the support of quieter institutional investors.[375] They target undervalued firms that may be suffering from poor management.[376] The filing of an activist hedge fund's Schedule 13D generates positive average abnormal returns from 7% to 8%.[377] While hedge funds have critics who claim that they pursue short term gains at the expense of long term profits,[378] they have strong supporters as well who argue that they increase value in both the long and the short term.[379] Whichever view one subscribes to, everyone agrees that hedge fund activism has lit a fire under corporate managers and is subjecting their every action to close investor scrutiny.

At present, the vitality of hedge fund activism provides a strong force to keep corporate management strongly aligned with the interests of investors so that other forms of monitoring, particularly expensive ones, may be less important. However, we finish with a note of caution: Delaware should be careful about restricting alternative forms of monitoring, such as hedge fund activism, unless it is willing to restore private enforcement actions via shareholder litigation as a means of aggressive shareholder monitoring.

* * *

---

[375] Ronald Gilson & Jeffrey Gordon, *The Agency Costs of Agency Capitalism, Activist Investors and Revaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013); Paul H. Edelman, Randall S. Thomas, & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359 (2014).

[376] Alon Brav et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008).

[377] *Id.* at 1731.

[378] Martin Lipton, *Deconstructing American Business II*, in DECONSTRUCTING AMERICAN BUSINESS II AND SOME THOUGHTS FOR BOARDS OF DIRECTORS IN 2007 1 (National Legal Center for Public Interest ed., 2006).

[379] Lucian A. Bebchuk, *The Myth that Insulating Boards Serves Short-Term Value*, 113 COLUM. L. REV. 1637, 1637 (2013).