2013

Revisiting Omnicare: What Does Its Status 10 Years Later Tell Us?

Megan Wischmeier Shaner, *University of Oklahoma Norman Campus*

THE JOURNAL OF CORPORATION LAW

VOLUME 38 ♦ NUMBER 4 ♦ SUMMER 2013

REVISITING *OMNICARE*: WHAT DOES ITS STATUS 10 YEARS LATER TELL US?

Megan W. Shaner

THE UNIVERSITY OF IOWA COLLEGE OF LAW

Revisiting *Omnicare*: What Does Its Status 10 Years Later Tell Us?

Megan W. Shaner*

I. INTRODUCTION

In the late 1970s and early 1980s, corporate law entered a period that was dominated by hostile takeover activity. In connection with (and most likely in response to) the prevalence of this hostile activity, there was also an increase in the use of deal protection devices in mergers and acquisitions.[1] These deal protection devices involved "any measure or combination of measures that [were] intended to protect the consummation of a merger transaction."[2] They were economic in form, structural in form, or both. In a

---

*Associate Professor, University of Oklahoma College of Law. This Article was prepared for and presented at the Journal of Corporation Law Symposium: Ten Years After *Omnicare*: The Evolving Market for Deal Protection Devices, which was held at the University of Iowa College of Law. Thank you to Donald Bussard, Steven M. Davidoff, Lawrence Hammermesh, Blake Rohrbacher, Hillary Sale, and John Mark Zeberkiewicz for their comments in the development of this Article.

1. *See* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory & Evidence*, 53 STAN. L. REV. 307, 310 (2000) (explaining the prominence of lock-ups and other deal protection devices in merger and acquisition deals).

2. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 933–34 (Del. 2003). Examples of deal protection devices include terminations fees, force-the-vote provisions, voting agreements, lack of fiduciary out provisions, no-shop provisions, matching rights, and go-shop provisions.

series of decisions, the Delaware courts began to express skepticism with respect to the increased use of deal protection devices in mergers and acquisitions (M&A). In the context of hostile takeover transactions, the Delaware Supreme Court in *Unocal Corp. v. Mesa Petroleum Co.* held that enhanced judicial review, and not the deferential business judgment rule, should apply to defensive measures, which could include deal protection devices.[3] Similarly, in the change-in-control context, the Delaware Supreme Court in *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* held that enhanced judicial review should apply to a board's actions, which could include approval of deal protection devices where a corporation had effectively put itself up for sale.[4]

In 2003, the Delaware Supreme Court was asked to address the proper use of, and standard of review for, deal protection devices in the context of a friendly, non-change-in-control transaction. *Omnicare, Inc. v. NCS Healthcare, Inc.*[5] involved a challenge to the proposed merger of NCS Healthcare, Inc. and Genesis Health Ventures, Inc.[6] The challenge specifically focused on three elements of the proposed merger that were intended to protect the transaction: (i) a force-the-vote provision that required the transaction be put to a vote of the NCS stockholders; (ii) the absence of a fiduciary out provision allowing the NCS board to terminate the merger in the event of a superior proposal; and (iii) a voting agreement that obligated two of NCS's stockholders, who collectively held over a majority of the corporation's voting power, to vote in favor of the Genesis merger and against any competing transaction.[7] The Court of Chancery rejected claims by NCS stockholders and competing bidder Omnicare, Inc. that approval of the merger's deal protection devices violated the NCS board's fiduciary duties, but the Delaware Supreme Court reversed.

In a rare split decision, the Delaware Supreme Court invalidated the NCS–Genesis merger agreement.[8] In so doing, the court set forth three highly criticized holdings. First, the majority of the court held that enhanced judicial scrutiny per *Unocal* applies to a board's approval of deal protection devices.[9] Second, applying that enhanced scrutiny, the majority held that the specific combination of deal protection devices in the NCS–

3. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985); *see* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373–78 (Del. 1995) (analyzing whether enhanced judicial scrutiny was applicable to the target's defensive measures); *see also* Stephen M. Bainbridge, *Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 J. CORP. L. 1, 23–26 (2003) (discussing the Delaware courts' review of deal protection devices); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law & Governance From 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1454 (2005) ("*Unocal* represented the sea change in takeover jurisprudence of the mid-1980s, although *Van Gorkom*, *Moran*, and *Revlon*, all decided in that watershed year, 1985, were also landmark cases that live with us daily, well into the twenty-first century.").

4. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

5. Omnicare, Inc. v. NCS Healthcare Inc., 818 A.2d 914 (Del. 2003).

6. *Id.* at 918.

7. *Id.* at 925–26.

8. *Id.* at 939.

9. *Id.* at 914. The majority stated, "A board's decision to protect its decision to enter a merger agreement with defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover contest." *Omnicare*, 818 A.2d at 932. Thus, the "omnipresent specter" identified in *Unocal* is also present where a board has adopted deal protection devices to protect a merger, and enhanced scrutiny is accordingly the proper standard of review. *Id.* at 930.

Genesis merger failed to satisfy this heightened review and were invalid under *Unocal*.[10] Finally, the majority invalidated the NCS–Genesis merger agreement on alternative grounds, holding that completely locked-up transactions violate a board's fiduciary duties and thus are per se invalid.[11]

Beginning with the two separate dissenting opinions, the majority's opinion in *Omnicare* garnered an immediate and widespread negative reaction from the legal community. The decision has been labeled by many as a troubling one—contrary to both precedent and common sense—and one that would "[f]undamentally [a]lter the [m]erger [i]ndustry."[12] The criticism and concerns surrounding the *Omnicare* decision fall into two broad categories: (i) doctrinal faults in the majority's holdings and rationale and its poor normative implications; and (ii) pragmatic concerns regarding the impact the majority's decision would have on M&A activity.

This Article reviews corporate law decisions and transactions from the past ten years to determine whether this controversial decision has had the detrimental impact that jurists predicted. In reviewing merger activity over the past decade, it appears that the concerns about *Omnicare*'s impact on the M&A market did not come to fruition. This finding should not be surprising in light of subsequent cases in the Delaware Court of Chancery and other jurisdictions expressing hostility to the *Omnicare* majority's opinion and its holdings. Indeed, while the decision has not been overruled, decisions of the Court of Chancery addressing *Omnicare*-based challenges have sought to avoid its application by distinguishing the facts before it.[13] These decisions indicate the willingness of Delaware's lower court to limit the reach of *Omnicare*. As a result, the number of scenarios where the decision may still have a direct impact is small. Finally, in re-evaluating the decision ten years later, this Article asks, and seeks to answer the following question: In reflecting on *Omnicare*, what does its status today tell us about the decision?

II. THE REACTION TO *OMNICARE*: CRITICISMS AND CONCERNS[14]

The *Omnicare* decision has been described as one of the most controversial decisions to come out of the Delaware Supreme Court.[15] Joining the ranks of *Smith v.*

10. *Id.* at 935–36. The majority found the deal protection devices in the NCS–Genesis merger to be both preclusive and coercive and not a proportionate response to the perceived threat. *Id.*

11. *Id.* at 936–39. In so holding, the majority required a fiduciary-out provision in a merger agreement for it to be enforceable. *Omnicare*, 818 A.2d at 936–39.

12. Brian C. Smith, Comment, *Changing the Deal: How* Omnicare v. NCS Healthcare *Threatens to Fundamentally Alter the Merger Industry*, 73 MISS. L.J. 983, 997 (2004); *see* Sean J. Griffith, *The Costs & Benefits of Precommitment: An Appraisal of* Omnicare v. NCS Healthcare, 29 J. CORP. L. 569, 623 (2004) (describing the decision as "bad law, bad economics, and bad policy"); Wayne O. Hanewicz, *Director Primacy,* Omnicare, *and the Function of Corporate Law*, 71 TENN. L. REV. 511, 529 (2004) (criticizing *Omnicare*); Thanos Panagopoulos, *Thinking Inside the Box: Analyzing Judicial Scrutiny of Deal Protection Devices in Delaware,* 3 BERKELEY BUS. L.J. 437, 450 (2006) (advocating for the reversal of *Omnicare*).

13. *See infra* Parts III.A–C (discussing the *Orman*, *Optima*, and *OPENLANE* decisions).

14. For a more detailed discussion of the critiques of *Omnicare*, see Megan W. Shaner, *How "Bad Law, Bad Economics and Bad Policy" Positively Shaped Corporate Behavior*, 46 AKRON L. REV. (forthcoming 2013) (manuscript at 13–29), *available at* http://works.bepress.com/megan_shaner/14/.

15. *See, e.g.*, Steven Davidoff, *The Long Slow Death of Omnicare*, N.Y. TIMES DEALBOOK, Aug. 28, 2008, http://dealbook.nytimes.com/2008/08/28/the-long-slow-death-of-omnicare ("The Delaware Supreme

Van Gorkom,[16] *Williams v. Geier*,[17] and *Brehm v. Eisner*,[18] *Omnicare* is also one of the rare non-unanimous decisions issued by the court. The dissenting justices in *Omnicare* were the first to criticize the decision, expressing (i) disagreement with the doctrinal foundation for the majority's holdings and rationale and (ii) concerns regarding the practical negative impact the decision would have on M&A activity.[19] Many corporate scholars, practitioners, and jurists have followed suit, building upon the dissenting justices' critique of *Omnicare*.

First, a considerable amount of scholarship has been written about the *Omnicare* majority's misplaced reliance on, improper application of, or lack of support in Delaware jurisprudence to support its holdings and rationale. Critics of *Omnicare* disagree with the majority's first holding—that *Unocal*-enhanced judicial scrutiny applies to a board's decision to adopt defensive devices[20]—contending that the more deferential business judgment rule is the correct standard of review. This is because, as Chief Justice Veasey explained in his dissent, the merger before the court was a friendly merger, so there was no threat to which the board was acting in a defensive, self-interested manner, as was the case in *Unocal*.[21] Corporate scholars have further faulted the majority's application of enhanced judicial scrutiny in that the majority classified all merger deal protection devices as defensive and thus always triggering enhanced scrutiny.[22] This is improper because the policy rationale for applying *Unocal*'s enhanced scrutiny—the inherent conflicts and entrenchment motives of a board in hostile takeover situations—is not present in friendly negotiated mergers like the one in *Omnicare*.[23]

In addition, even assuming, *arguendo*, that *Unocal* enhanced review was the proper

---

Court's *Omnicare* ruling was arguably the most controversial mergers and acquisitions decision of this decade."); Griffith, *supra* note 12, at 623 (discussing the controversial nature of *Omnicare*); Robin Sidel, *Merger Business Has New Order with Court Ruling on "Lockups,"* WALL ST. J., Apr. 7, 2003 at C4 (suggesting that *Omnicare* was among the most controversial corporate cases decided in twenty years); Veasey & Di Guglielmo, *A Retrospective*, *supra* note 3, at 1458 ("In 2003, the Supreme Court faced the deal protection question in an unusual and highly controversial case: *Omnicare v. NCS Healthcare*.").

16. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

17. Williams v. Geier, 671 A.2d 1368 (Del. 1996).

18. Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

19. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939–50 (Del. 2003).

20. *See id.* at 930–34 (holding that the "defensive devices adopted by the board . . . must withstand enhanced judicial scrutiny under the *Unocal* standard of review, even when that merger transaction does not result in a change of control" (citing Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1151–55 (Del. 1989)).

21. *Id.* at 943 n.102 (Veasey, C.J., dissenting). In his separate dissent, Justice Steele expressed a similar objection to the application of *Unocal*, stating that "Delaware law mandates deference under the business judgment rule to a board of directors' decision that is free from self interest, made with due care and in good faith," and the actions of the NCS board were just that. *Id.* at 947 (Steele, J., dissenting).

22. *See, e.g.*, Griffith, *supra* note 12, at 588–89 (disagreeing with the fact that the majority equated "deal protection devices" with "defensive devices" and thus applied enhanced scrutiny); Smith, *supra* note 12, at 991 (same); *but see* Shaner, *supra* note 14 (manuscript at 11) (discussing the rationale and support for applying enhanced scrutiny under *Unocal* to a board's approval of deal protection devices).

23. *See* Hanewicz, *supra* note 12, at 534–35 ("[The] omnipresent specter of *Unocal* and its progeny is not the omnipresent specter identified by the Omnicare court."); *see also* Andrew D. Arons, *In Defense of Defensive Devices: How Delaware Discouraged Preventive Measures in* Omnicare v. NCS Healthcare, 3 DEPAUL BUS. & COM. L.J. 105, 120–21 (2004) (stating that *Omnicare* incorrectly applied the law); Griffith, *supra* note 12, at 588 (asserting that "[t]he policy rationale underlying the application of the *Unocal* proportionality test to hostile takeovers . . . does not apply with equal strength to the friendly deal protections at issue in *Omnicare*.").

standard to apply to a board's approval of deal protection devices, the dissenting justices and corporate commentators object to the manner in which the majority applied that standard. In particular, the majority has been criticized for (i) its incorrect application of the concepts of "coercive" and "preclusive" under *Unocal* as preempting any proportionate balancing inquiry,[24] and (ii) finding that the combination of deal protection devices in the NCS–Genesis merger was preclusive and coercive and thus failed to pass muster under *Unocal*.[25] Rather, critics assert, not only were the defensive devices at issue in *Omnicare* neither preclusive nor coercive, they were also a reasonable, proportionate response to the threat posed.[26] Accordingly, the challenged deal protection devices satisfied scrutiny under *Unocal* and should have been upheld.

The holding that has garnered the harshest criticism, however, is the per se rule announced by the majority invalidating completely locked-up transactions and requiring a fiduciary-out provision in merger agreements.[27] This bright-line rule established by the majority has been attacked as unsupported by Delaware case law: as summarized by dissenting Chief Justice Veasey, "We know of no authority in our jurisprudence supporting this new rule, and we believe it unwise and unwarranted."[28] Moreover, critics point out that the majority's per se rule is overly rigid because it eliminates the factual, case-by-case analysis of deal protection devices for which the Delaware courts are known,[29] as well as the potential for the rule to be applied broadly to precommitment devices outside of the merger context.[30]

---

24. *See Omnicare*, 818 A.2d at 942–45 (Veasey, C.J., dissenting) (stating that the majority misapplied the concepts of coercive and preclusive under *Unitrin*); Daniel C. Davis, Omnicare v. NCS Healthcare*: A Critical Appraisal*, 4 BERKELEY BUS. L.J. 177, 197 (2007) (arguing that the *Omnicare* rule is inconsistent with precedent); Smith, *supra* note 12, at 994 (stating that "[t]his bifurcated test applied by the majority in analyzing the proportionality prong of *Unocal* is a deviation from the traditionally fact-specific body of Delaware corporate law.").

25. *See* Davis, *supra* note 24, at 194 (noting the unusual *Unocal* analysis by the majority in *Omnicare*); Hanewicz, *supra* note 12, at 541 (stating that shareholders were not coerced by protection measures; they were coerced by their minority shareholder status); Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It's Equitable to Take That Action: The Important Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 900–01 (2005) (disagreeing with the *Omnicare* majority's *Unocal* analysis and conclusions regarding the NCS board's actions).

26. *See Omnicare*, 818 A.2d at 945 (Veasey, C.J., dissenting) ("Indeed, it is clear to us that the board action . . . was reasonable in relation to the threat, by any practical yardstick.").

27. *Id.* at 936–39.

28. *Id.* at 945; *see also* Griffith, *supra* note 12, at 590 (faulting the majority for misplacing reliance on *Paramount Communications Inc. v. QVC Network Inc.* to support its holding); Panagopoulos, *supra* note 12, at 466–67 (same). Chancellor Strine has also critiqued the *Omnicare* per se holding as contrary to Delaware law in that it violates the "law-equity divide" that exists in Delaware. Strine, *supra* note 25, at 902–03. In establishing a rule that invalidates all merger agreements that are completely locked-up, even if those deal protection devices are permitted under Delaware corporate statutes, the majority was acting in a legislative function, "plac[ing] itself clearly on the law side of the law-equity divide." *Id.* at 903.

29. *See Omnicare*, 818 A.2d at 950 (Steele, J., dissenting) (expressing concern about the inflexible rule adopted by the majority); Panagopoulos, *supra* note 12, at 441, 469–70 (discussing the flaws in a per se invalidation of complete lock-ups).

30. *See* Hanewicz, *supra* note 12, at 561–62 (discussing the uncertain validity for other precommitment strategies beyond the merger context); Jay H. Knight, *Merger Agreements Post-*Omnicare, Inc. v. NCS Healthcare, Inc.*: How the Delaware Supreme Court Pulled the Plug on "Mathematical Lock-Ups,"* 31 N. KY. L. REV. 29, 49–50 (2004) (discussing the uncertainty in the application of the *Omnicare* holding going forward); Smith, *supra* note 12, at 997 (discussing the potential for uncertainty in the merger process after

Further, separate and apart from specific holdings of the *Omnicare* majority, the decision has been criticized as an example of improper judicial second-guessing of a board's business decision. Such second-guessing is in clear contravention of Delaware law, which provides that it is not the role of the courts to evaluate a board's decision with the benefit of hindsight.[31] The *Omnicare* majority did just that though, evaluating the NCS board's approval of the deal protection devices in light of later events—the later Omnicare bid—and not based on the information that was reasonably available at the time the board made its decision. Applying hindsight in this manner to second-guess a board's decision, critics point out, was improper.[32]

The second main category of criticism of *Omnicare* centers around the impact the decision may have on M&A activity. Judges, scholars, and practitioners all feared that *Omnicare*'s prohibition on completely locked-up transactions would lead to a decrease in the number of potential bidders for a target and/or lower offers for target corporations.[33] Critics have explained that the ability to precommit in mergers and acquisitions has important value.[34] Indeed, the ability for a target to provide deal certainty to a bidder can

---

Omnicare).

31. *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994) (stating that courts should not second guess the board); Auriga Capital Corp. v. Gatz Props., 40 A.3d 839, 854 (Del. Ch. 2012) (avoiding second guessing); *see also* Stuart R. Cohn, *Demise of the Director's Duty of Care: Judicial Avoidance of Standards & Sanctions Through the Business Judgment Rule*, 62 TEX. L. REV. 591, 607 (1983) ("The issue in duty of care litigation is the process, not the merits, of decision making. Courts do not make business decisions.").

32. *See Omnicare*, 818 A.2d at 940, 947–48 (Veasey, C.J., dissenting) (stating that the Court should respect the board's decision); Orman v. Cullman, No. Civ. A. 18039, 2004 WL 2348395, at *8 n.98 (Del. Ch. Oct. 20, 2004) ("As formulated, the test [in *Omnicare*] would appear to result in judicial invalidation of negotiated contractual provisions based on the advantages of hindsight."); Strine, *supra* note 25, at 901 n.99 (criticizing the court's use of hindsight); Clifford E. Neimeth & Cathy L. Reese, *Locked & Loaded: Delaware Supreme Court Takes Aim at Deal Certainty*, M & A LAW., June 2003, at 16, *available at* http://www2.gtlaw.com/pub/articles/2003/neimethc03a.pdf ("We believe that if *Omnicare* is followed in its most broad sense, the decision may entirely subjugate the 'real time' validity and reasonableness of that process to the occurrence of unforeseen (post-decisional) economic events."); Panagopoulos, *supra* note 12, at 441 (asserting that "the Delaware Supreme Court has yet to demonstrate a proven commitment to analyzing a target board's decision to agree to deal protection devices . . . at the time it was made rather than in light of subsequent events").

33. *See* Arons, *supra* note 23, at 130 (discussing lower bids in mergers); Griffith, *supra* note 12, at 614 (discussing the valuation of uncertainty in mergers); Tamara Loomis, *Beware Delaware: The State's Recent Supreme Court Decisions Make Waves*, 229 N.Y. L.J. 5, 5 (2003) (quoting Robert Profusek, a partner at Jones Day, New York) ("There are real life cases in which bidders turn away because they didn't get lockup protection. . . . It's a classic case of bad facts making bad law."); Christopher J. Moceri, Comment, *M&A Lockups: Broadly Applying the* Omnicare *Decision to Require Fiduciary Outs in All Merger Agreements*, 2004 MICH. ST. L. REV. 1157, 1166–67 (2004) (citing Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539, 1544 (1996)) (discussing the effect of lockups).

34. *See, e.g.*, Davis, *supra* note 24, at 199 (discussing the value of precommitment); Griffith, *supra* note 12, at 605 (discussing precommitment strategies as sources of value in merger negotiations); Hanewicz, *supra* note 12, at 559 (discussing the higher prices buyers may be willing to pay in exchange for a completely locked-up offer); Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315, 365 n.170 (1987) (stating that "[a]n acquiring company predicates its offering price upon (1) the value of the target, and (2) risks involved in attempting the acquisition."); Michael J. Kennedy, *The End of Time? Delaware's Search for the Fiduciary GUT*, M & A LAW,, Oct. 2003, at 21 ("[A]s any economist will tell you, a[] [fiduciary out] option has a price, and because such a target will not actually pay money to a buyer for the option the economic price for the option will be paid for by the target shareholders in the form of a *lower*

have both negotiating and economic value. As summarized by Chief Justice Veasey, "[s]ituations will arise where business realities demand a lock-up so that wealth-enhancing transactions may go forward. Accordingly, any bright-line rule prohibiting lock-ups could, in circumstances such as these, chill otherwise permissible conduct."[35] The majority's elimination of a board's ability to precommit to a merger is thus detrimental to target corporations and their stockholders, and critics were concerned that it would negatively impact the M&A market.

III. POST-*OMNICARE* DECISIONS: "THE LONG SLOW DEATH OF *OMNICARE*"?[36]

Given the harsh criticism from the bench, bar, and academia, one would expect the court to overturn or moot *Omnicare* in some manner. This result would not be unusual given past instances where the Delaware legislature or courts took action to reverse or moot the impact of arguably incorrect decisions.[37] Indeed, the dissenting justices in *Omnicare* expressly stated their hope that later decisions of that court and the Court of Chancery would confine the decision to its facts.[38] In the decade since its issuance, three notable Delaware decisions have provided that opportunity: *Orman v. Cullman*, *Optima International of Miami, Inc. v. WCI Steel, Inc.* and *In re OPENLANE, Inc. Shareholder Litigation*.[39] While all of the decisions have come out of the lower Court of Chancery, and thus have limited effect on *Omnicare*, together they have prompted the question of what, if anything, is left of the majority's opinion.[40]

A. Orman v. Cullman

Approximately one year after *Omnicare*, the Court of Chancery faced a challenge from stockholder plaintiffs arguing that they too had been impermissibly coerced into

initial deal price.").

35. *Omnicare*, 818 A.2d at 942 (Veasey, C.J., dissenting).

36. Davidoff, *supra* note 15.

37. *See, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2013) (adopted in response to the court's controversial *Smith v. Van Gorkom* decision).

38. *Omnicare*, 818 A.2d at 946 (Veasey, C.J. , dissenting); *see also* David Marcus, *Man of Steele*, D&O ADVISOR, Sept. 2004, at 16 (quoting Justice Steele as stating, "While I don't suggest that you rip the *Omnicare* pages out of your notebook. . . . I do suggest that there's the possibility, one could argue, that the decision has the life expectancy of a fruit fly."); Janine M. Salomone & David B. DiDonato, *In re* OPENLANE *Bolsters* Omnicare *& Sheds New Light on* Revlon, BUS. L. TODAY (Dec. 30, 2011) ("The dissent in *Omnicare* fervently advocated for a narrow interpretation of the majority holding, and most academics and practitioners, who thereafter commented on the decision agreed.").

39. Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002); Optima Int'l of Miami, Inc. v. WCI Steel, Inc., C.A. No. 3833–VCL (Del. Ch. June 27, 2008), *available at* http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf; *In re* OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).

40. *See* Davidoff, *supra* note 15 ("All in all, the actions of the Chancery Court here provide a nice picture of how Delaware works: how the court responds to decisions perceived by its constituencies (lawyers, corporations, even stockholders) to be wrong."); Salomone & DiDonato, *supra* note 38; Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence & Implications*, 63 BUS. LAW. 729, 758 n.118 (2008) (stating that *Omnicare* "is perceived to be weak precedent among practitioners, academics, and even other judges"); Daniel E. Wolf, *Noble Prose: Sound Bites on Public M&A*, HARV. L SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Oct. 26, 2011, 9:33 AM), http://blogs.law.harvard.edu/corpgov/2011/10/26/noble-prose-sound-bites-on-public-ma/ (stating that many question *Omnicare*'s vitality).

voting for a merger. In *Orman v. Cullman*,[41] Swedish Match AB sought to purchase a 64% equity stake in General Cigar Holdings, Inc. ("General Cigar") in a transaction that included (i) a no-shop provision that permitted General Cigar's board to entertain *bona fide*, unsolicited, acquisition proposals from other potential acquirers if they would be more favorable to the General Cigar stockholders than the Swedish Match transaction; (ii) a fiduciary out provision permitting the General Cigar board to withdraw its recommendation of the Swedish Match merger if the board's fiduciary duties so required; and (iii) a majority of the minority approval requirement, with members of the Cullman family agreeing to vote their shares of the Class A common stock pro rata in accordance with the vote of the Class A minority stockholders.[42] In addition, Swedish Match required that members of the Cullman family enter into a voting agreement requiring them to agree not to sell their shares of stock and to vote all their shares of Class B common stock (which constituted a majority of the voting power of General Cigar) in favor of the merger and against any alternative acquisition proposal.[43] The voting agreement included a tail provision that, in the event of termination of the Swedish Match merger, subjected the Cullmans to certain restrictions for a period of 18 months following termination.[44]

Plaintiff Joseph Orman challenged the Swedish Match transaction, alleging, in pertinent part, that the General Cigar directors had breached their fiduciary duties in negotiating the transaction. The Court of Chancery first rejected Orman's claims regarding the voting agreement, citing his misplaced reliance on *Paramount Communications, Inc. v. QVC Network, Inc.*[45] and *Omnicare*.[46] The court found that both of these decisions were distinguishable from the voting agreement before it because the Cullmans had entered into the agreement in their capacity as stockholders and not as directors.[47] Then, turning to the merger agreement, the court pointed out that *Omnicare* was approved by only "[a] bare majority of the Supreme Court," with vigorous dissents that argued that the business judgment rule, and not the enhanced scrutiny from *Unocal*, should be the standard for reviewing deal protection devices.[48] Nonetheless, the court followed *Omnicare* and applied the two-step *Unocal* analysis, finding that the board's actions satisfied this heightened review.[49]

In reaching its conclusion, the court carefully distinguished the dispute before it

41. Orman v. Cullman, C.A. No. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004).

42. *Id.* at *2–3.

43. *Id.*

44. *Id.*

45. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

46. *Orman*, 2004 WL 2348395, at *5.

47. In contrast, in both *Paramount* and *Omnicare*, the court had found that "the challenged action was the directors' entering into a contract in their capacity *as directors*. . . . This factual distinction from *Paramount* and *Omnicare* is meaningful." *Id.* at *5. While the *Orman* court relied, in part, on this factual distinction, neither the Court of Chancery nor the Delaware Supreme Court in *Omnicare* found that the majority stockholders were acting in their capacity as NCS directors in entering into the voting agreements. To the contrary, the court viewed Outcalt and Shaw as having entered into the voting agreements in their capacity as stockholders. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 926 (Del. 2003) ("Outcalt and Shaw, in their capacity as NCS stockholders, entered into voting agreements with Genesis."); *see also* Davis, *supra* note 24, at 187 (noting the counterfactual distinction made by the court in *Orman*).

48. *Orman*, 2004 WL 2348395, at *6 n.71.

49. *Id.* at *6–8 (internal quotations omitted).

from *Omnicare*.[50] The court pointed out that the General Cigar board had retained a fiduciary out that was both meaningful and effective, which allowed it to consider superior alternative proposals and recommend against the Swedish Match transaction. Moreover, unlike the deal protection devices in *Omnicare*, the provisions in the merger agreement and voting agreements did not amount to a mathematical certainty that the transaction would be approved.[51] Of particular importance, the Swedish Match merger required approval of a majority of the minority stockholders, thus vesting them with the power to approve or reject the deal on its merits.[52] The merger was thus not the "*fait accompli*" that so worried the *Omnicare* majority. Finally, unlike *Omnicare*, there was no other suitor trying to enter into a transaction with General Cigar.[53] Accordingly, under the *Orman* court's holding and rationale, so long as it is theoretically possible for an alternative transaction to be considered and approved by the target's stockholders, invalidation under *Omnicare* would not apply. This holding has been characterized as the court's first limitation on the reach of *Omnicare*.[54]

B. Optima International of Miami, Inc. v. WCI Steel, Inc.

In the second significant *Omnicare*-related decision, *Optima International of Miami, Inc. v. WCI Steel, Inc.*,[55] the Court of Chancery issued a bench ruling denying the plaintiffs' request to preliminarily enjoin a merger that had been approved by the board of directors of WCI Steel Inc. ("WCI") and adopted by WCI's stockholders by written consent later that same day.[56] After emerging from bankruptcy in March 2006, WCI continued to suffer from liquidity problems and began searching for a potential acquirer.[57] After initially soliciting 22 potential buyers, only two bidders remained—Optima International of Miami, Inc. ("Optima") and OAO Severstal ("Severstal").[58] Following a period of negotiations with both suitors, WCI's board ultimately approved a merger agreement with Severstal.[59] Suits by Optima and WCI stockholders challenging the transaction quickly followed.

In addressing the plaintiffs' claims, the court noted that "somewhat like in *Omnicare*, WCI . . . was under pressure to complete a deal or face the prospect of another bankruptcy."[60] The factual similarities between the two cases ended there, however, and, in rejecting the plaintiffs' claims, the court held *Omnicare* inapplicable. The court rejected the plaintiffs' claim that a merger agreement provision requiring the delivery of

---

50. *Id.* at *8–9 ("In sum, the argument that *Omnicare* applies in the circumstances here is misplaced.").

51. *Id.* at *8.

52. *Id.*

53. *Orman*, 2004 WL 2348395, at *8.

54. *See* Veasey & Di Guglielmo, *supra* note 3, at 1461 ("Nevertheless, *Orman* indicates a possible trend toward limiting the majority holding in *Omnicare* to its facts."). Former Chief Justice Veasey has cautioned that "*Orman* cannot be seen as ushering in a definite sea change, nor should it be seen as a trailblazing decision; rather, it was decided in a different contextual milieu that was quite unusual, as was *Omnicare*." *Id.*

55. Transcript of Oral Argument, Optima Int'l of Miami, Inc. v. WCI Steel, Inc., C.A. No. 3833–VCL (Del. Ch. June 27, 2008), *available* at http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf.

56. *Id.* at 126–27, 142.

57. *Id.* at 119.

58. *Id.* at 120–21.

59. *Id.* at 121–22.

60. Transcript of Oral Argument at 120, *Optima*, C.A. No. 3833–VCL.

stockholder approval by written consent within 24 hours of board approval of the agreement was a form of lock-up that either exceeded the board's power or was a breach of its fiduciary duties.[61] Citing *Omnicare*, the plaintiffs had argued that the immediate stockholder consent provision "improperly contracted away [the board's] fiduciary [duties]."[62] Noting that "*Omnicare* is of questionable continued vitality,"[63] the court nevertheless went on to distinguish the facts of the WCI–Severstal transaction from those in *Omnicare*.[64] The court held that the WCI–Severstal merger agreement's restrictive provisions and short time frame for stockholder approval did not constitute the functional equivalent of the coercive and preclusive deal structures that were invalidated in *Omnicare*.[65] As the court pointed out, "[n]othing in the Delaware General Corporation Law requires any particular period of time between a board's authorization of a merger agreement and the necessary stockholder vote."[66] Thus, the approval of the merger agreement by stockholder consent, "although quickly taken, was simply the next step in the transaction as contemplated by the statute" and did not result in a breach of the board's fiduciary duties.[67] The fact that the merger agreement permitted termination of the transaction if the requisite written consents were not obtained within the required time frame was important to this holding.[68] Thus, the board could abandon the merger, and it was not a forgone conclusion like that invalidated in *Omnicare*.

While the court ably distinguished the sign-and-consent structure of the WCI–Severstal merger agreement from that in *Omnicare*, the decision in *WCI* also adopted reasoning consistent with that of the *Omnicare* dissenters.[69] For instance, in upholding the WCI board's approval of the merger, the court noted that "a clear majority [of the WCI stockholders] were in favor of the board acting in such a way as to be sure not to lose the Severstal bid."[70] Further, in holding that the WCI board had not breached its *Revlon* duties in approving the lower, though more certain Severstal merger, as opposed to Optima's higher, though more risky offer, the court stated, "I don't substitute my judgment for that of the board or my business judgment for the board's judgment. My job is to look at what the directors did and determine whether the actions they took are within

---

61. *Id.* at 126–28.

62. *Id.* at 127.

63. *Id.* It should be noted that Vice Chancellor Lamb issued both the ruling in *Optima* and the decision in *Omnicare* that was overturned by the Delaware Supreme Court.

64. *Id.* at 127.

65. Transcript of Oral Argument at 127–28, *Optima*, C.A. No. 3833–VCL.

66. *Id.* at 127.

67. *Id.* The court also found nothing that called into question the reasonableness of the board's overall decisional process. *Id.* at 127–28. This deal structure—the use of written consent (in lieu of a stockholder meeting) to approve a merger—had been raised post-*Omnicare* as a possibility that would provide increased deal certainty and protect against an interloper's superior offer without running afoul of the majority's holding. *See, e.g.*, Hanewicz, *supra* note 12, at 542 n.188 ("An interesting question might be the extent to which controlling stockholders might try to use Delaware General Corporation Law section 228 . . . to circumvent the court's *Omnicare* decision."); Neimeth & Reese, *supra* note 32 (same).

68. Transcript of Oral Argument at 127, *Optima*, C.A. No. 3833–VCL.

69. *See* Eleonora Gerasimchuk, *Stretching the Limits of Deal Protection Devices: From* Omnicare *to* Wachovia, 15 FORDHAM J. CORP. & FIN. L. 685, 717–18 (2010) (stating that the reasoning of the court in *Optima* refers to the approach advocated by the dissenting justices in *Omnicare*).

70. Transcript of Oral Argument at 138, *Optima*, C.A. No. 3833–VCL.

the range of reasonableness."[71] This language is similar to the view encouraged by the dissent with respect to the NCS board's actions in *Omnicare*—that a board's weighing of the risk versus return of agreeing to deal protection devices, and its ultimate determination based on that weighing, should be granted judicial deference.[72]

C. *In re* OPENLANE, Inc. Shareholders Litigation

In *In re OPENLANE, Inc. Shareholders Litigation*, the Court of Chancery again upheld the sign-and-consent merger structure.[73] The proposed merger of OPENLANE, Inc. ("OPENLANE") and a wholly-owned subsidiary of KAR Auction Services, Inc. ("KAR") followed a process by OPENLANE to locate potential acquirers.[74] The merger agreement approved by the OPENLANE board of directors contained (i) a stringent no-solicitation provision with no fiduciary out; (ii) a condition to closing the merger that at least 75% of the outstanding shares adopt the merger agreement (which was waivable at the option of KAR); and (iii) a requirement that OPENLANE's stockholders adopt the merger agreement by written consent within 24 hours of signing or the OPENLANE board could terminate the agreement.[75] The holders of a majority of OPENLANE's stock approved the merger by written consent within the 24-hour period following execution of the merger agreement.[76]

An OPENLANE stockholder sought to preliminarily enjoin the merger asserting, among other things, that the OPENLANE board breached its fiduciary duties by failing to undertake an adequate sale process in violation of *Revlon* and *Omnicare*.[77] Similar to *Omnicare*, the plaintiff asserted that the OPENLANE board had breached its fiduciary duties by agreeing to deal protection devices that impermissibly locked up the deal. Specifically, the plaintiff alleged that "[t]he no-solicitation clause and the lockup of the shareholder vote through the combined voting power of OPENLANE's directors and executive officers [who together held 68.46% of the stock] are 'preclusive and coercive' in the absence of a fiduciary out provision."[78]

The Court of Chancery disagreed, declining to enjoin the merger and distinguishing it from the improper combination of deal protection devices in *Omnicare*. In *Omnicare*, the stockholder voting agreements that guaranteed approval of the merger, coupled with the force-the-vote provision and the lack of a fiduciary out, rendered the transaction an "impermissible *fait accompli*."[79] In contrast, the OPENLANE merger agreement, despite containing a no-solicitation provision with no fiduciary out, was not accompanied by a

---

71. *Id.* at 138.

72. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 945 (Del. 2003) (Veasey, C.J., dissenting); *id.* at 948 (Steele, J., dissenting); *see also* Gerasimchuk, *supra* note 69, at 718 (asserting that the court's decision in *WCI* "clearly evidences more judicial deference to the board's business judgment," as was advocated by the *Omnicare* dissenting justices).

73. *In re* OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2011 WL 4599662, at *10 (Del. Ch. Sept. 30, 2011).

74. *Id.* at *2.

75. *Id.* at *3.

76. *Id.*

77. *Id.* at *3–4.

78. *In re OPENLANE*, 2011 WL 4599662, at *4 (internal quotations omitted).

79. *Id.* at *9.

stockholders' voting agreement that locked up the stockholder vote. While the directors and executive officers of OPENLANE held over a majority of shares, planned to, and quickly did provide consents approving the merger, the court found nothing in the record to suggest that this was part of a voting agreement entered into in connection with the merger.[80] Citing *Optima*, the court emphasized that "[i]f stockholders wish to submit their consents soon after the board has approved a transaction, they may do so. The Merger Agreement neither forced a transaction on the shareholders, nor deprived them of the right to receive alternative offers."[81] In addition, the no-solicitation provision was "of little moment" because if the merger agreement was not approved within the specified 24-hour period, the OPENLANE board could terminate the agreement without paying a termination fee.[82] Thus, the Court of Chancery again limited *Omnicare* by finding it inapplicable where the challenged merger, while providing almost complete deal certainty, was not a true "*fait accompli.*"

D. Non-Delaware Cases

Discussion of the applicability, and thus the vitality, of the *Omnicare* decision has not been limited to the Delaware courts. *Omnicare*-based challenges have been brought against locked-up transactions in several other jurisdictions.[83] Like *Omnicare*'s many critics, however, courts in other states have been skeptical of these arguments. Some have outright rejected this type of argument, finding *Omnicare* to be inapplicable under the laws of their jurisdiction.[84] Indeed, in declining to recognize *Omnicare*'s application, a California court specifically noted the Court of Chancery's criticism of the controversial opinion.[85] Other courts, while recognizing the decision, have found it distinguishable from the case before it and thus inapplicable.[86]

---

80. *Id.* at *9 n.48.

81. *Id.* at *10.

82. *Id.*

83. *See, e.g.*, Monty v. Leis, 123 Cal. Rptr. 3d 641, 646–47 (Cal. Ct. App. 2011) (citing *Omnicare* for the argument of breach of fiduciary duty in approving deal protection provisions); Litwin v. OceanFreight, Inc., 865 F. Supp. 2d 385, 400 (S.D.N.Y. 2011) (citing *Omnicare* when challenging the validity of deal protection devices); Shaper v. Bryan, 864 N.E.2d 876, 887–88 (Ill. App. Ct. 2007) (citing *Omnicare* in challenging the validity of a termination fee provision).

84. *See, e.g.*, *Monty*, 123 Cal. Rptr. 3d at 646 (noting that the decision had been criticized by the Delaware courts, the court specifically declined to follow *Omnicare*); *see also* Edward D. Herlihy, *Court Holds No Duty to Include a "Fiduciary Out" in Extra-ordinary Transaction Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Apr. 18, 2011, 8:56 AM), http://blogs.law.harvard.edu/corpgov/?s=Court+Holds+No+Duty+to+Include+a+"Fiduciary+Out"+in+Extra-ordinary+Transaction+Agreements&submit=Go (discussing the *Monty* case). In *Monty*, for example, the California Court of Appeals affirmed that under California law a board of directors has "no duty" to include a fiduciary out provision and may lawfully commit to a merger or other extraordinary corporate transaction that prohibits the board from negotiating or accepting competing offers. *Monty*, 123 Cal. Rptr. 3d at 646–47. In so holding, the court rejected the plaintiff's argument that the board of directors had breached its fiduciary duties by failing to include a fiduciary out provision. *Id.* at 647.

85. *See Monty*, 123 Cal. Rptr. 3d at 646 (citing *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1016 n.68 (Del. Ch. 2005)) ("But *Omnicare* has been criticized even by Delaware courts.").

86. *See, e.g.*, *Litwin*, 865 F. Supp. 2d at 400 (finding the voting agreement at issue to be distinguishable from that in *Omnicare* and holding that none of the deal protection devices individually, or in combination, were preclusive or coercive under *Unocal*); *Shaper*, 864 N.E.2d at 888–90 (finding the case distinguishable on

Moreover, in recent transactions involving government-supported mergers during the financial crisis that began in late 2007, non-Delaware courts have rejected *Omnicare*'s enhanced scrutiny when reviewing deal protection devices, opting instead to apply the more deferential business judgment rule. For example, when reviewing the strong deal protection devices in the 2008 stock-for-stock merger involving J.P. Morgan Chase & Co. ("J.P. Morgan") and the Bear Stearns Companies Inc. ("Bear Stearns"), the New York Supreme Court, applying Delaware law, declined to apply the enhanced scrutiny under *Unocal/Unitrin*,[87] holding that in the absence of a hostile threat to corporate control, *Unocal* is inapplicable when reviewing deal protection devices.[88] Rather, "the deal protection measures are reviewable only under the business judgment rule." [89] Similarly, the North Carolina Superior Court afforded great deference to the Wachovia Corporation ("Wachovia") board's decision to agree to strong deal protection devices in its merger agreement with Wells Fargo & Company ("Wells Fargo").[90] Instead of applying *Unocal* to the challenged provisions as *Omnicare* would dictate,[91] the court held that North Carolina's formulation of the business judgment rule applied absent a showing that there was interference with stockholder voting rights or the board's statutory duties.[92] While the holdings in each of these cases may be explained by their unique circumstances—occurring during times of financial emergency as well as deference where there is government involvement[93]—the courts' rejection of *Omnicare*'s

its facts from *Omnicare* and stating that even if *Omnicare* did apply, the deal protection measures at issue were neither preclusive, coercive, nor disproportionate and thus would pass muster under *Unocal*).

87. *In re* Bear Stearns Litig., 870 N.Y.S.2d 709, 732–34 (N.Y. Sup. Ct. 2008). In the merger, J.P. Morgan was granted (i) an option to purchase certain assets of Bear Stearns if the stockholders voted down the merger; (ii) a no-shop provision subject to a fiduciary out; and (iii) a related share exchange agreement whereby J.P. Morgan would purchase 39.5% of Bear Stearns common stock at $10 per share. *Id.* at 722–23. In so holding, the court found no evidence of bad faith or self-interest on the part of the Bear Stearns board in agreeing to the merger, and stated that the board's actions would have survived enhanced scrutiny had it applied. *Id.* at 718, 730. The court held *Revlon*'s scrutiny was inapplicable because J.P. Morgan was not becoming a majority stockholder; "[r]ather the public stockholders retained ultimate control" of the corporation. *Id.* at 733–34. Even under *Revlon*, the court noted, the Bear Stearns directors had acted reasonably and their decision would survive enhanced scrutiny. *Id.* at 732.

88. *In re Bear Stearns*, 870 N.Y.S.2d at 733. In support of its holding, the court referred to pre-*Omnicare* cases, ignoring *Omnicare* altogether. *Id.* at 731 n.9, 734 n.15.

89. *Id.* at 734.

90. Ehrenhaus v. Baker, 08 CVS 22632, 2008 NCBC LEXIS 21, at *36, *41–45 (N.C. Super. Ct. Dec. 5, 2008). The deal protection provisions at issue in *Ehrenhaus* included a no-shop provision, a force-the-vote provision, and the failure to allow the Wachovia board to terminate the merger agreement for a higher third-party bid. *Id.* at *15–16. The companies also entered into a share exchange agreement, which gave Wells Fargo aggregate voting rights of 39.9% in Wachovia and prohibited redemption of such shares of stock for 18 months following a vote on the merger agreement, regardless of whether the merger was consummated. *Id.* at *2, *18 n.14.

91. While applying North Carolina law, the court noted that it "look[ed] to Delaware for guidance on questions of corporate governance because of the special expertise and body of case law developed in the Delaware Chancery Court and the Delaware Supreme Court." *Id.* at *27 n.19.

92. *Id.* at *31–32. Because no such showing was made, the transaction was upheld. *Ehrenhaus*, 2008 NCBC LEXIS 21, at *41. The court did, however, invalidate the 18-month prohibition on redemption of the Wells Fargo-owned shares of Wachovia stock in the share exchange agreement as being in violation of the Wachovia board's fiduciary duties. *Id.* at 52–53.

93. *See In re* Bear Stearns Litig., 870 N.Y.S.2d 709, 722–23, 730, 735 (N.Y. Sup. Ct. 2008) ("The financial catastrophe confronting Bear Stearns, and the economy generally, justified the inclusion of the various

requirement of enhanced scrutiny and upholding of aggressive deal protection devices is consistent with the treatment the rule has received in Delaware—application in extremely limited circumstances, but more often distinguished or ignored altogether.[94] Thus, courts outside of Delaware further question *Omnicare*'s applicability.

IV. POST *OMNICARE* TRANSACTIONS: WERE THE CRITICS RIGHT TO BE CONCERNED?

Given prior scholarship finding that the merger and acquisition market reacts, and sometimes overreacts, to decisions of the Delaware courts, one would expect to find immediate effects on the number, structure, and value of corporate transactions following *Omnicare*.[95] There was concern that *Omnicare* had effectively turned Delaware into an option contract state, which meant that a trumping bid could come at any time up until full consummation of a merger.[96] This, many feared, would lead the potential universe of bidders to shrink or disappear and/or lower prices being offered to target corporations, causing a decline in merger activity.[97] In reviewing corporate mergers over the past decade, however, these concerns do not appear to have been validated.[98]

After *Omnicare* there does not appear to have been a marked decline in M&A activity. In 2003, 101 U.S. mergers involving public target corporations were announced.[99] From 2004 to 2007, the number of U.S. public target deals climbed from

---

merger protection provisions intended to increase the certainty of the consummation of the transaction with JPMorgan."); *Ehrenhaus*, 2008 NCBC LEXIS 21, at *121–22 (noting the extraordinary circumstances facing the Wachovia board including the potential liquidation of the company's banking assets as well as the "presence of the 800-pound gorilla in the Wachovia board room, in the form of the U.S. government's pervasive regulatory oversight over bank holding companies"); *see also* Steven Davidoff, *Puzzled by the Government's Response to the Financial Crisis?*, HARVARD L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG., http://blogs.law.harvard.edu/corpgov/?s=Puzzled+by+the+Government's+Response+to+the+Financial+Crisis%3F&submit=Go (Dec. 6, 2008, 12:42 PM) ("From Bear to AIG to Wachovia, dealmakers have been pushing and testing the limits of deal protection devices to lock-up these government sponsored deals safe in the assumption that Delaware is unlikely to intervene. Much of these new-found devices are likely justifiable on insolvency grounds."); Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 484–91 (2009) (describing the role of government during this period).

94. *See also* Gerasimchuk, *supra* note 69, at 704–05 (discussing post-*Omnicare* cases and asserting, in light of *Bear Stearns* and *Ehrenhaus*, where a change of control is not involved, courts will review deal protection provisions under the business judgment rule, thus narrowing *Omnicare*'s holding).

95. *See, e.g.*, Coates & Subramanian, *supra* note 1, at 326–36 (reviewing effects on lock-up types); *see also* Neimeth & Reese, *supra* note 32 ("In that we live in a prevailing corporate and market environment replete with buyer hesitation and hypercaution, it would be most unfortunate if overreaction to the *Omnicare* decision increases buyer recalcitrance and precludes a motivated buyer from putting its very best deal and price on the table . . .").

96. *See* Griffith, *supra* note 12, at 595 (explaining that *Omnicare*'s denial of the ability to precommit was a move towards the rule in the *ConAgra, Inc. v. Cargill, Inc.* decision by the Nebraska Supreme Court).

97. *See Omnicare*, 818 A.2d 914, 946 (Del. 2003) (Veasey, C.J., dissenting) (acknowledging the potential effects of deterring bidders); Davidoff, *supra* note 15 ("Some even asserted that bidders may no longer attempt to bid as frequently since they could no longer get the certainty they required in agreeing to acquisitions."); Neimeth & Reese, *supra* note 32 (discussing potential implications of the decision).

98. *See* Davidoff, *supra* note 15 (stating that "[t]his parade of horribles did not come to pass."). This concern also begs the question: "Why should Delaware care if there is a decline in merger activity?" Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1935 (2003).

99. This number is based on data on mergers and acquisitions available on www.mergermetrics.com and was reached by running a search for mergers announced in 2003 (i.e., announced on or after Jan. 1, 2003

285 to 453.[100] With respect to Delaware public target corporations specifically, 72 mergers were announced in 2003, the year that *Omnicare* was decided.[101] From 2004 to 2007, the number of Delaware public target corporations announcing a merger went from 173 to 240.[102] These numbers do not indicate, at least facially, that there has been the detrimental impact on M&A activity (at the national or state level) predicted by critics following *Omnicare*.[103] Rather, merger activity increased in the years following the decision.

Relatedly, *Omnicare* also does not appear to have the negative impact on the use of any individual deal protection provision as critics speculated it might have. In particular, the critics thought that there might be a potential decrease in the use of force-the-vote provisions and voting agreements following the court's decision.[104] Looking back at the

through Dec. 31, 2003) where the target corporation was public. FACTSET MERGERS, http://www.mergermetrics.com (last visited May 9, 2013).

100. *See* Michael Benkert, *Unfriendly M&A Deal Activity Through 2011*, FACTSET MERGERS (Jan. 6, 2012), https://www.mergermetrics.com/marequest?an=dt.getPage&st=1&pg=/pub/rs_20120106.html&Unfriendly_M&A_Deal_ Activity_Through_2011&rnd=48863 (detailing the trend of public M&A deals). Merger activity involving public target corporations for the period 2003 through 2011 was reported as follows:

Year:	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of public M&A deals:	101	285	373	444	453	301	216	299	251

Id. The decline in U.S. public transactions after 2007 has largely been attributed to the financial crisis that began in late 2007. *Id.*

101. This number is based on data on mergers and acquisitions available on www.mergermetrics.com and was reached by running a search for mergers announced in 2003 (i.e., announced on or after Jan. 1, 2003 through Dec. 31, 2003) where the target corporation was public and incorporated in Delaware. FACTSET MERGERS, *supra* note 99.

102. *Id.*

Year:	2003	2004	2005	2006	2007	2008	2009	2010	2011
Number of public M&A deals:	72	173	207	242	240	191	148	190	147

103. It would, however, be an overstatement to say that the decision had no impact on mergers and acquisitions. No doubt there were (and are) some transactions where a buyer held back a higher price (or refrained from bidding in the first place) due to the inability to completely lock-up the transaction and obtain deal certainty. Rather, it appears that *Omnicare* did not have the significant negative impact that had worried critics.

104. "[I]t will be interesting to see in practice if the use of such a covenant (irrespective of whether it is combined with other non-lock-up deal protections) will become even less prevalent than their use today." Neimeth & Reese, *supra* note 32, at 6. This was a valid comment, as Professors John C. Coates IV and Guhan Subramanian had previously found that use of lock-up provisions is "responsive—indeed, 'overresponsive' in a sense—to Delaware case law." Coates & Subramanian, *supra* note 1, at 313. With respect to fiduciary out provisions, prior to *Omnicare*, Delaware practitioners had noted that almost every merger agreement involving a publicly held target included a fiduciary out provision. *See* John F. Johnston & Frederick Alexander, *Fiduciary Outs & Exclusive Merger Agreements—Delaware Law & Practice*, INSIGHTS, Feb. 1997, at 18–19 (noting the prevalence of fiduciary out provisions in public merger agreements). Thus, because they were already prevalent, one would not expect a huge change in drafting to comply with the majority's holding

use of force-the-vote provisions, it does not appear that *Omnicare* had a chilling effect on their use in mergers involving Delaware public corporations. In 2003, approximately 20.83% of mergers involving public target corporations incorporated in Delaware contained a force-the-vote provision.[105] For the years following, the percentage of these mergers that had force-the-vote provisions was:[106]

Year	2003	2004	2005	2006	2007	2008	2009	2010	2011
Mergers with force-the-vote provisions	20.83%	20.23%	16.43%	12.81%	9.17%	7.33%	12.16%	10.53%	6.8%

While over the past decade there appears to be a decline in the use of the force-the-vote provision, there does not seem to be a dramatic drop in the years immediately following *Omnicare* that would suggest that the decision had the predicted negative effect. Also, the use of force-the-vote provisions over the years in transactions involving Delaware target corporations tracks the use of those provisions in transactions involving all U.S. public target corporations.[107] Because *Omnicare* would not, as a technical matter, be binding on corporations in these other jurisdictions, the similar trends in Delaware and among all U.S. public corporations suggests that the decision did not have a specific, significant impact on the use of force-the-vote provisions.

Omnicare has not prevented the continued use of voting agreements either. In the years following the decision, Delaware practitioners became comfortable with the idea that so long as the percentage of voting power subject to a voting agreement was not a controlling interest, the agreement would not run afoul of *Omnicare*. Specifically, "Delaware lawyers began to speak about the 40 percent rule, so long as the lock-up was not for 40 percent or more of the company it passed muster under *Omnicare*."[108]

requiring a fiduciary out.

105. These percentages are based on data on mergers and acquisitions available on www.mergermetrics.com. FACTSET MERGERS, *supra* note 99 (raw data generated by running a search for mergers announced in 2003 (i.e., announced on or after January 1, 2003 through December 31, 2003) where the target corporation was public and incorporated in Delaware). In reaching these percentages, the use of force-the-vote provisions affecting the target corporation where the target was a public corporation incorporated in Delaware was compared to the total number of mergers each year involving Delaware public target corporations that were subject to force-the-vote provisions. *Id.*

106. *Id.*

107. With respect to all U.S. public corporations (not just limited to those incorporated in Delaware), the use of force-the-vote provisions affecting target corporations was:

Year:	2003	2004	2005	2006	2007	2008	2009	2010	2011
Mergers with force-the-vote	23.76%	19.23%	16.67%	13.74%	9.49%	7.31%	11.11%	10.70%	8.89%

Id. (raw data generated by running a search for mergers announced each year from 2003–2011 (i.e., announced on or after January 1 of each year through December 31 of each year) where the target corporation was public).

108. Davidoff, *supra* note 15; *see* Marcel Kahan & Edward B. Rock, *How to Prevent Hard Cases from*

Moreover, where bidders sought voting power in excess of 40% to be locked-up in a voting agreement, Delaware practitioners have built-in mechanisms to ratchet back the percentage of voting power committed in these agreements in the event that the target board changes its recommendation of the merger. These mechanisms operate so that upon a change of recommendation, the percentage of voting power locked-up decreases to a certain threshold (generally, no higher than 35%) and any shares above that threshold will be voted in proportion to how the minority stockholders vote.[109] This means that a bidder can obtain a high level of deal certainty, and, in the event that an *Omnicare*-type situation arises where the board seeks to change its recommendation of the merger, the ratcheting down in the voting percentage protects the merger from invalidation. Thus, in adapting to the post-*Omnicare* legal landscape, creative lawyering has allowed targets and bidders to still use the deal protection devices scrutinized in *Omnicare* to achieve a measure of certainty without the risk of the courts invalidating the agreement.

V. WHAT DOES THIS TELL US ABOUT *OMNICARE*?

Analyzing M&A activity over the past ten years as well as subsequent Delaware decisions provides additional insight that we can use to re-evaluate the *Omnicare* decision. Do these post-*Omnicare* developments tell us anything new about the decision, rebut prior scholarship discussing the decision, or merely reaffirm what has already been said? The decisional and transactional developments from the past decade seem to do all three. Subsequent case law has provided some new insight into the way that the Court of Chancery can act to narrow the scope of a decision that it views as incorrect. Post-*Omnicare* merger activity disproves prior concern and predictions about the impact the controversial decision would have on the M&A market. Finally, the easy circumvention of *Omnicare*'s application, and the Court of Chancery's enforcement thereof, reaffirms prior scholarship that questioned the doctrinal footing and efficacy of the majority's opinion.

A. The Court of Chancery Acting to Limit the Supreme Court's Decision

While the Delaware Supreme Court has yet to readdress *Omnicare*, the decisions in *Orman*, *Optima*, and *OPENLANE* indicate a limited application going forward, leading many to question the majority opinion's continuing effect. In *Orman*, the Court of Chancery held that it was permissible under Delaware law for a buyer and a controlling stockholder group to enter into a transaction containing a lock-up on the stockholders'

Making Bad Law: Bear Stearns, Delaware & the Strategic Use of Comity 20 (Scholarship at Penn Law. Paper 241, 2008), *available at* http://lsr.nellco.org/upenn_wps/241. Even the Delaware judiciary has recognized the practice of drafting voting agreements in this manner as a response to the *Omnicare* decision. *See, e.g.*, *In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1030 n.37 (Del. Ch. 2012) (describing the structure of a voting agreement and, in particular, the percentage of voting power under the agreement as "[a]n *Omnicare* move, no doubt").

109. *See, e.g.*, Adams Golf, Inc., Current Report (Form 8-K), Ex. 99.1, 3–4 (Mar. 19, 2012) (providing that in the event of change in recommendation, the stockholder will only be required to vote shares equal to 30% of the total voting power in favor of the merger); Edgar Online, Inc., Current Report (Form 8-K), Ex. 99.2, 3–4 (May 23, 2012) (setting forth a voting agreement with similar terms); NaviSite, Inc., Proxy Statement (Schedule 14A), Annex D-1 (Mar. 1, 2011) (reducing voting power to 32% upon a change in recommendation).

voting interests, including a standstill upon the termination of the transaction.[110] This meant that even though the target board could exercise its fiduciary out to terminate the current transaction in favor of a later, higher bid, the target and the bidder would have to wait 18 months for the stockholder agreement's standstill to expire and enable them to close the deal, which is as a significant deterrent to subsequent bidders.[111] This was not enough to invalidate the deal protection devices. So long as the combination of deal protection devices does not lock-up a transaction such that it is mathematically impossible for a board and the stockholders to consider a later, superior offer, *Omnicare* will not apply. The language in the court's decision in *Orman* suggests that Delaware courts will uphold strong deal protection devices so long as there is some limitation that, at least in theory, allows consideration of a later bid.[112] While it has been cautioned that *Orman* perhaps should not be read so broadly as to indicate "a definite sea change,"[113] the attention given by the court to distinguishing the transaction structure from that in *Omnicare*, thereby seeking to limit the majority's holding to its facts, is telling.[114]

Although addressing a different transaction structure than was presented in *Orman*—the sign-and-consent structure—the Court of Chancery in *Optima* and *OPENLANE* used similar reasoning to distinguish and limit *Omnicare*.[115] Indeed, in *Optima*, the court expressly voiced doubt about the precedential validity of *Omnicare*.[116] Nonetheless, the court addressed *Omnicare*, holding the decision to be inapplicable to the merger agreement's restrictive provisions and immediate approval requirement because they did not constitute the functional equivalent of the type of completely locked-up, preclusive deal structure invalidated in that case.[117] The court's *OPENLANE* decision, citing to *Optima*, reaffirmed corporations' ability to require approval of a merger by stockholder written consent within 24 hours of signing without running afoul of *Omnicare*.[118]

110. Orman v. Cullman, No. Civ. A. 18093, 2004 WL 2348395, at *9 (Del. Ch. Oct. 20, 2004).

111. *See id.* at *2–3 (describing the facts of the negotiation).

112. *See id.* at *7–8 (distinguishing *Omnicare*); Veasey & Di Guglielmo, *supra* note 3, at 1460 ("*Orman* also suggests the continued viability of certain deal protection devices, at least when used in the right combination and with the right limitations.").

113. Veasey & Di Guglielmo, *supra* note 3, at 1461 ("*Orman* cannot be seen as ushering in a definitive sea change, nor should it be seen as a trailblazing decision; rather, it was decided in a different contextual milieu that was quite unusual, as was *Omnicare*.").

114. *See id.* ("Nevertheless, *Orman* indicates a possible trend toward limiting the majority holding in *Omnicare* to its facts."); STEVEN M. DAVIDOFF, GODS AT WAR: SHOTGUN TAKEOVERS, GOVERNMENT BY DEAL, AND THE PRIVATE EQUITY IMPLOSION 235 (2009) (stating that the "Chancery Court strictly construed the scope of *Omnicare* in *Orman v. Cullman*, sharply reducing its impact"); Cliff Neimeth, *After* Omnicare*: Delaware Chancery Court Denies Injunction Against Target Merger Agreement*, DEALLAWYERS.COM BLOG (Oct. 2, 2008, 5:20 AM), http://www.deallawyers.com/blog/archives/000944.html (characterizing *Orman* as the most notable decision prior to *Optima* "to distinguish and take a slice out of *Omnicare*").

115. *See also* Davidoff, *supra* note 15 (describing what happened in *Optima* and characterizing it as yet "another hole in [the *Omnicare*] opinion"); Neimeth, *supra* note 114 (stating that "*Optima v. WCI* is the latest decision (*Orman v. Cullman* being the most notable prior decision) to distinguish and take a slice out of *Omnicare*").

116. Transcript of Oral Argument at 127, Optima Int'l of Miami v. WCI Steel, Inc., C.A. No. 3833–VCL (Del. Ch. June 27, 2008), *available at* http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf ("First, it's really not my place to note this, but *Omnicare* is of questionable continued vitality.").

117. *Id.*

118. *See also* Theodore Mirvis, *Delaware Court Recognizes Need for Flexibility in Reviewing Sales*

Similar to *Orman*, in both *Optima* and *OPENLANE*, the court relied heavily on the distinction between the mathematically impossible *Omnicare* structure and the other theoretically possible transaction structures when upholding the strong deal protection devices. Emphasizing this distinction, in particular where the court acknowledged that the intent (and practical effect) of the devices was to lockup the deal, suggests that this was not a meaningful distinction by the court.[119] Rather, these cases (as well as *Orman*) indicate that the Court of Chancery has been acting to narrow the scope of a decision with which it disagrees.[120]

Additionally, post-*Omnicare* decisions such as *Optima* seem to reflect greater judicial deference to a board's decision-making with respect to deal protection devices than the court gave in *Omnicare*.[121] Subsequent decisions of the Court of Chancery have either expressly or implicitly declined to apply the *Unocal* standard of review pursuant to *Omnicare*, instead using the arguably more deferential *Revlon* scrutiny (if triggered), when reviewing deal protection devices. Where a board triggers *Revlon* scrutiny, the Court of Chancery has applied a "range of reasonableness" test,[122] which the dissenters and critics have asserted was missing in the *Omnicare* majority's analysis, and extended greater judicial deference to the business decisions of the board in approving deal protection devices.[123] For example, in *In re Toys "R" Us, Inc. Shareholder Litigation*, the court refused to apply "the type of close examination of reasonableness . . . that is contemplated by . . . *Unocal* [and *Omnicare*]" to the deal protection devices, choosing instead to apply *Revlon*.[124] In its analysis, the court stated that the majority's approach in *Omnicare* represented an "aberrational departure" from the "range of reasonableness" test espoused in *QVC* and cited to the dissent, rather than the "controversial majority opinion," for support.[125] Similarly, the Court of Chancery's willingness to uphold strong deal protection devices under *Revlon* in *In re Topps Co. Shareholders Litigation*[126] is an

Processes, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Oct. 25, 2011, 9:42 AM), http://blogs.law.harvard.edu/corpgov/2011/10/25/delaware-court-recognizes-need-for-flexibility-in-reviewing-sales-processes/ ("Vice Chancellor Noble's decision indicates that Omnicare does not bar stockholders from locking up a deal through written consents immediately after the execution of a merger agreement, and it confirms that the Delaware courts will respect the reasonable decisions of a non-conflicted, informed board—even if they depart from customary practice.").

119. *See In re* OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2011 WL 4599662, at *9–10 (Del. Ch. Sept. 30, 2011) (acknowledging that all parties in *OPENLANE* fully expected approval of the merger to occur immediately so as to achieve transaction certainty but upholding the structure as distinguishable from *Omnicare*'s "impermissible *fait accompli*," and thus permissible).

120. *See supra* note 45 (discussing the Court of Chancery decisions addressing *Omnicare*).

121. *See supra* Part III.B.

122. *See, e.g.*, *In re* Topps Co. S'holders Litig., 926 A.2d 58, 87 (Del. Ch. 2007) (discussing the reasonableness of the board's actions); *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 97 (Del. Ch. 2007) (noting that "there is no evidence that that decision adversely affected the overall reasonableness of the board's efforts to secure the highest possible value"); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1016 (Del. Ch. 2005) (applying a *QVC* reasonableness standard); *see also In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 595 (Del. Ch. 2010) (stating that "at bottom *Revlon* is a test of reasonableness").

123. *See* Gerasimchuk, *supra* note 69, at 728–29 (synthesizing Delaware cases in applying *Revlon* review to deal protection devices and describing the court's deference to the approval of deal protection devices).

124. *In re* Toys "R" Us, 877 A.2d at 1016. The court rejected the plaintiffs' suggestion that the *Unocal*/*Unitrin* standard applied, stating only that the provisions at issue were not draconian. *Id.* at 1021.

125. *Id.* at 1016 n.68, 1018 n.70.

126. *In re Topps Co.*, 926 A.2d at 61.

example of the court granting greater credence to the proverbial "bird in hand" (and the protection thereof) than did the *Omnicare* court.[127] The Court of Chancery's decision in *In re Lear Corp. Shareholder Litigation*[128] has been cited as another instance in which the court "showed great deference to the board's business logic and business judgment" when agreeing to deal protection devices, contrary to the approach of the *Omnicare* majority.[129] These cases indicate the court's willingness to limit the application of the *Omnicare* majority's use of *Unocal* when reviewing deal protection devices in the *Revlon* context, instead extending greater judicial deference to a board's decision. As the Court of Chancery explained in *Ryan v. Lyondell Chemical Co.*:

> One might read *Omnicare* to suggest that deal protection measures must withstand the enhanced judicial scrutiny test prescribed by *Unocal*. The better reading of *Omnicare*, however is that the Delaware Supreme Court reconfirmed that enhanced judicial scrutiny, regardless of the particular analytical framework, is the appropriate test for this Court to apply when reviewing a board's decision to grant deal protections. *Unocal* is but one formulation of enhanced scrutiny that might be applied; it is not, however, the only test, nor is it necessarily appropriate in all circumstances.[130]

Finally, in providing guidance on the necessity of a fiduciary out provision following *Omnicare*, the Court of Chancery has indicated that it may not be an absolute requirement, thereby softening the majority's controversial per se holding. In *OPENLANE*, while cautioning that one could read the *Omnicare* decision to require a fiduciary out in every merger agreement, the court expressed doubt that it should automatically enjoin a merger agreement that lacked a fiduciary out in the absence of a superior offer.[131] The *OPENLANE* court noted that in *Omnicare* the invalidation of the Genesis merger agreement allowed the NCS board to consider Omnicare's superior offer. The court then asked, "[i]f, however, a merger agreement lacks a fiduciary out, and no better offer has emerged why should the Court enjoin the merger?"[132] The *OPENLANE* court thought it should not, stating that "[e]njoining a merger when no superior offer has emerged is a perilous endeavor because there is always the possibility that the existing deal will vanish, denying shareholders the opportunity to accept any transaction."[133] Thus, the Court of Chancery, at least in dicta, has recently echoed prior sentiments regarding a limited reading and application of *Omnicare* going forward.[134]

---

127. *See* Gerasimchuk, *supra* note 69, at 713.

128. *In re Lear Corp.*, 926 A.2d at 97.

129. *See* Gerasimchuk, *supra* note 69, at 715.

130. Ryan v. Lyondell Chem. Co., C.A. No. 3176–VCN, 2008 WL 2923427, at *16 n.96 (Del. Ch. July 29, 2008), *rev'd on other grounds*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).

131. *In re* OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2011 WL 4599662, at *10 n.53 (Del. Ch. Sept. 30, 2011).

132. *Id.*; *see also* Knight, *supra* note 30, at 50 (citing Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936 (Del. 2003)) ("In essence, it was not the merger agreement coupled with the voting agreement that was held invalid. Rather, it was the fact that when a better offer came along (*Omnicare* launching a tender offer), the directors had no way of fulfilling their duty to prevent the merger or, at the very least, letting the stockholders have a *meaningful* vote.").

133. *In re OPENLANE*, 2011 WL 4599662, at *10 n.53.

134. *See also* Veasey & Di Guglielmo, *supra* note 3, at 1461 (noting, "the courts are likely to limit and not expand the reach of *Omnicare*"). Another view, based on Energy Partners, Ltd. v. Stone Energy Corp., Nos.

B. Omnicare *Did Not Impact the M&A Market*

As discussed in Part IV, *Omnicare* does not appear to have had a noticeable impact on M&A activity.[135] Indeed, in the years following the majority's controversial opinion, merger activity involving Delaware public corporations actually increased. Additionally, the use of the types of deal protection devices at issue in *Omnicare* has not seen a marked decline.[136] There likely are many reasons for these findings. First, the potential for profitability such as synergies and other gains in these types of transactions may override any negative effect from *Omnicare*. As described by well-known corporate attorney Martin Lipton, "mergers are an integral part of market capitalism."[137] Whether one can purchase a target corporation at a below-market price may, in fact, be the most important factor in a potential acquirer's decision to bid.[138] A desire to increase revenue or market power or diversify one's business by way of expansion can also drive potential acquirers regardless of the ability to obtain deal certainty.[139] Moreover, factors such as globalization, regulatory changes, and changes in the market may also be important drivers of M&A activity. As a result, the certainty of a completely locked-up deal may not be so crucial given the totality of factors that drive bidders such that its absence alone can deter M&A activity.

Second, the structure of mergers and acquisitions, and the lawyers tasked with drafting them, continue to adapt as the legal rules of the M&A game have changed over the years so that deal certainty is still available, to a large extent, to acquirers.[140] The

---

Civ.A. 2402–N, Civ.A. 2374–N, 2006 WL 2947483 (Del. Ch. Oct. 11, 2006), suggests that the Delaware courts may also be hesitant to take the severe step of invalidating deal protection provisions that do not satisfy *Unocal/Unitrin*, as was the case in *Omnicare*. Rather, the court may attempt to interpret or reform offending provisions so that they are enforceable before resorting to striking them altogether. *See* Amy Y. Yeung & Charles B. Vincent, *Delaware's "No-Go" Treatment of No-Talk Provisions: Deal-Protection Devices After* Omnicare, 33 DEL. J. CORP. L. 311, 322 (2008) ("The implication of this analysis [in *Energy Partners*] is that the original holding of *Omnicare* may now be seen by the Delaware Court of Chancery as too broad when placed in the application of today's corporate mergers and acquisitions.").

135. Of course, this does not necessarily mean that *Omnicare* has not shaped mergers and acquisitions. *See* Shaner, *supra* note 14 (manuscript at 36–60) (asserting that *Omnicare* has had a positive normative impact on corporate law).

136. *See supra* Part IV (describing critics' concern over post-*Omnicare* transactions); *see also* Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. LAW ___ (2013) (attributing lock-up creep to *Omnicare* and the subsequent Court of Chancery decisions responding to *Omnicare*).

137. Martin Lipton, *Predicting Future Merger Activity*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Mar. 16, 2012, 9:43 AM), http://blogs.law.harvard.edu/corpgov/2012/03/16/predicting-future-merger-activity/#more-26763.

138. *See* Christopher J. Moceri, Comment, *M&A Lockups: Broadly Applying the* Omnicare *Decision to Require Fiduciary Outs in all Merger Agreements*, 2004 MICH. ST. L. REV. 1157, 1180 (2004) (describing risks verses rewards).

139. *See* Lipton, *supra* note 137.

140. *See* ROBERT W. HAMILTON & RICHARD A. BOOTH, BUSINESS BASICS FOR LAW STUDENT: ESSENTIAL CONCEPTS & APPLICATIONS 21–31 (3d. ed. 2002) (discussing the fact that from the late 19th century, mergers and acquisitions have adapted as times have changed). Immediately following the majority's decision, commentators discussed structuring alternatives to provide deal certainty, to the extent possible, under the new *per se* rule. *See, e.g.*, Alexander B. Johnson & Roberto Zapata, Optima *is Optimal: Sidestepping* Omnicare *in Private Company M&A Transactions*, DEAL POINTS: NEWSL. COMMITTEE ON MERGERS & ACQUISITIONS (Summer 2009) (describing how companies can effect expeditious company mergers); Neimeth & Reese, *supra* note 32.

majority was careful in its opinion to make clear that it was not invalidating the use of deal protection devices generally, but only when a combination thereof resulted in "*a fait accompli*."[141] Thus, practitioners began drafting alternative combinations of deal protection devices to provide the maximum amount of certainty possible while avoiding invalidation under *Omnicare*. In transactions involving mainly private corporations, a sign-and-consent structure emerged as an alternative—requiring written consents approving the merger agreement to be delivered a short time after signing (generally 24 hours).[142] Under this structure, stockholder approval of a merger is obtained almost immediately after the agreement is signed, thus minimizing the window in which an interloper may submit a superior offer[143] and providing increased deal certainty for a bidder. To date, the Delaware Court of Chancery has upheld locking up a transaction using this structure, rejecting *Omnicare*-based challenges and finding it distinguishable from the invalid NCS–Genesis merger.[144] Thus, following *Omnicare*, practitioners have successfully devised alternative transaction structures with a high level of certainty that are valid and enforceable.[145]

In reviewing post-*Omnicare* transactions in combination with post-*Omnicare* cases, however, perhaps the more accurate explanation for the minimal, if any, impact *Omnicare* had on the M&A market is that the decision was never really given a chance to do so. The Court of Chancery's decisions in each of *Orman*, *Optima*, and *OPENLANE* upheld strong deal protection devices while rejecting *Omnicare*-based challenges. In particular, the court in *Optima* and *OPENLANE* upheld the sign-and-consent merger structure. The result following these two decisions is that *Omnicare* applies only in those circumstances where a controlling stockholder cannot act by written consent to

---

141. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938–39 (Del. 2003); *see also* Veasey & Di Guglielmo, *supra* note 3, at 1460 ("*Omnicare* does not preclude the use of deal protection devices in the future.").

142. *See* Johnson & Zapata, *supra* note 140, at 3 ("Of these alternatives, the written consent approach has generally been the most used"); *supra* Parts III.B–D. (detailing recent cases involving mergers with written consent provisions). Recent examples of corporations taking advantage of the sign-and-consent structure include Verizon Communications Inc.'s purchase of Hughes Telematics Inc. in June 2012 for $612 million and Tempur-Pedic International Inc.'s purchase of rival Sealy Corp. on September 27, 2012 for $1.3 billion. David Marcus, *Express Written Consent*, THE DEAL PIPELINE, (Oct. 12, 2012, 2:00 PM), http://pipeline.thedeal.com.

143. Not only can a private target take advantage of the sign-and-consent merger structure to provide deal certainty, the lack of publicly available information in the private merger context minimizes the likelihood that a third party would know that a private corporation has entered into a merger agreement, let alone that the corporation was "for sale" in the first place. Thus, to the extent that the majority in *Omnicare* sought to preserve the ability of a target corporation to receive and accept subsequent, superior offers, this aspect of the decision is of little import for private corporations.

144. *See* Transcript of Oral Argument at 141–42, Optima Int'l of Miami, Inc. v. WCI Steel, Inc., C.A. No. 3833–VCL (Del. Ch. June 27, 2008), *available at* http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf (denying a motion for a preliminary injunction regarding a merger agreement with a stockholder vote provision); *In re* OPENLANE, Inc. S'holders Litig., C.A. No. 6849–VCN, 2001 WL 4599662, at *3, *16 (Del. Ch. Sept. 30, 2011) (denying a motion to enjoin a merger agreement with a written consent provision).

145. *See supra* Parts III.B–D (detailing deal protections that have been upheld); *see also* Johnson & Zapata, *supra* note 140 (explaining that written consent is now an often used deal protection). However, as former Chief Justice Veasey has cautioned, "a disingenuous attempt to use some transparently artificial measure that is too-clever-by-half in order to get around *Omnicare* in a superficial way while maintaining an ironclad lockup with no realistic wiggle room is inviting trouble." Veasey & Di Guglielmo, *supra* note 3, at 1461–62.

immediately approve the transaction.[146] This is uncommon, however, in transactions where the parties are seeking to lock up a deal involving a controlling stockholder (e.g., mergers involving private corporations). Thus, *Omnicare* may only really come into play where (i) approval of the merger must occur by stockholder vote at a meeting (typically a publicly-held corporation);[147] (ii) there is a required minimum period of time between the signing of the merger agreement and the stockholder meeting during which a superior offer could be made (again, typically mergers involving public corporations);[148] and (iii) a controlling stockholder or group of stockholders is involved. Generally, this is a rare situation.[149] Alternatively, *Omnicare* may apply to an extreme situation such as that recently involving Bear Stearns, "where a board [of directors] attempt[ed] to pass control to an unaffiliated third party without a stockholder vote."[150] Again, however, this is a rare situation and one where the courts have seemed unwilling to apply *Omnicare*. The result is that *Omnicare*, at least as a practical matter, seems to be of limited applicability in Delaware.[151] In sum, because *Omnicare* was quickly undercut by the Court of

146. Davidoff, *supra* note 15; *see also* Wolf, *supra* note 40 ("For targets where written consent by shareholders is permitted, *Omnicare* may be dead in practice, even if not in law.").

147. Generally, many public corporations do not permit stockholders to act by written consent. Even if permitted, however, it is nearly impossible to obtain the required consents to approve a merger in a public corporation because of the typically widespread universe of stockholders.

148. While the average number of days it takes to complete a merger has been decreasing, the average for 2009 was 111.85 days. Jim Mallea, *Timing to Close—Tender Offers vs. Mergers,* FACTSET MERGERS (Feb. 24, 2010), https://www.mergermetrics.com/marequest?an=dt.getPage&st=1&pg=/pub/rs_20100224.html&Timing_to_close_Tender_Offers_vs_Mergers&rnd=476844; *see also* Coates & Subramanian, *supra* note 1, at 310 (noting that "compliance with disclosure and other rules regulating the process of obtaining target shareholder acceptance or approval entails delay, ranging from a minimum of thirty days up to six months in some situations").

Section 251 of the DGCL requires certain steps to approve a merger including that notice of the stockholder meeting to vote on the merger be given to all holders of record at least 20 days prior. DEL. CODE ANN. tit. 8, § 251(c) (2013). In addition to state law requirements, federal securities regulations and stock exchange rules also require certain steps regarding notice and approval of a merger involving a publicly-traded corporation. *See, e.g.*, Michael A. Stanchfield, *Fiduciary Duties in Negotiated Acquisitions: Questioning the Legal Requirements for "Outs,"* 27 WM. MITCHELL L. REV. 2261, 2264 n.6, 2264–65 (2001) (describing the timing and possible delays involved in public acquisitions and the SEC's review process); Celia R. Taylor, *"A Delicate Interplay": Resolving the Contract & Corporate Law Tension in Mergers*, 74 TULSA L. REV. 561, 575 (1999) (discussing the shareholder approval process). Finally, federal antitrust review may delay a stockholders' meeting even further.

149. *See* Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1267 (2009) ("In the United States and the United Kingdom, most public companies do not have a controlling shareholder."); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471, 491–93 (1999) (stating that most public corporations in the United States are widely held). *But see* Dirk Schlimm et al., *Corporate Governance and the Impact of Controlling Shareholders*, 18 CORP. GOVERNANCE ADVISOR 1, 2 (Jan.–Feb. 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1494429 (stating that controlling stockholders "exist[] to a significant degree in the United States, where such firms make up a significant number, though a minority, of the Fortune 500").

150. Davidoff, *supra* note 15 (citing *In re* Bear Stearns Litig., 870 N.Y.S.2d 709 (N.Y. Sup. Ct. 2008)).

151. *See id.* (discussing *Optima* and stating that "[t]he result is a win for the opponents of *Omnicare* and another hole in that decision"); DAVIDOFF, *supra* note 114, at 235 (discussing how the *Optima* decision "even further restricted *Omnicare* to almost meaninglessness"); Salomone & DiDonato, *supra* note 38, at 2 (stating that "certain commentators have characterized the *OPENLANE* decision as another step toward burying *Omnicare*"); Wolf, *supra* note 40 (suggesting that "[f]or targets where written consent by shareholders is permitted, *Omnicare* may be dead in practice, even if not in law."). However, these decisions can also be read

Chancery, it never had the opportunity to actually affect the M&A market in the first place.

C. Omnicare*'s Questionable Doctrinal Footing and Efficacy*

Post-*Omnicare* transaction structures, like the sign-and-consent merger approval, and the Court of Chancery's enforcement of those strong deal protection devices support prior scholarship questioning the doctrinal footing and efficacy of the majority's decision. In its opinion, the *Omnicare* majority stated that its intent was to protect minority stockholders and hold boards of directors accountable for their decisions.[152] However, as pointed out by critics of the decision, by invalidating the NCS–Genesis merger, the majority actually deprived stockholders—those holding a majority of the voting power—from exercising their statutory power to control how the sale of the corporation should proceed through the use of a voting agreement.[153] The apparent ease with which *Omnicare* can now be circumvented with the sign-and-consent merger structure highlights this inherent flaw in the decision.

Allowing stockholder(s) who hold a majority of the voting power to dictate the outcome of a merger process is precisely the framework established by the Delaware statutes.[154] And whether such power is exercised through the use of a voting agreement, as was the case in *Omnicare*, or through the use of quickly obtaining stockholder approval via written consents, as was the case in *Optima* and *OPENLANE*, the effect on minority stockholders is the same. The fact that stockholders acting through a voting agreement has been deemed unenforceable by the *Omnicare* court, but stockholders acting through immediate written consents has been upheld by the Court of Chancery in *Optima* and *OPENLANE* where the purpose (providing deal certainty) and result (approving a merger without the need for minority stockholder approval) of each is the same, supports prior scholarship questioning and critiquing the doctrinal coherence and basis for the *Omnicare* majority's decision.[155]

Further, in upholding the sign-and-consent structure, the Court of Chancery created what can be argued is an unprincipled dichotomy between corporations that can act by written consent and those who cannot. Where written consent is permitted, *Omnicare*

---

as fully consistent with *Omnicare*. Indeed, a key to the *Orman*, *Optima* and *OPENLANE* decisions was the fact that it was possible for an alternative transaction to be considered and approved by the board of directors and stockholders of the target corporation, which, of course, directly addresses the concerns expressed by the *Omnicare* majority. *See* Salomone & DiDonato, *supra* note 38 (explaining that *Omnicare*'s ruling "protects the stockholders' right to receive alternative offers before they approve the merger").

152. *Omnicare*, 818 A.2d 914, 930, 934–35, 938–39 (Del. 2003).

153. *See* Hanewicz, *supra* note 12, at 541 ("The court's ruling can be explained as an attempt to advance [the] goal [of shareholder wealth maximization] by requiring the controlling shareholders to decide whether to vote in favor of the merger at a time when they are more likely to vote in a manner consistent with the interests of the public stockholders."); Davis, *supra* note 24, at 198 ("[T]he public shareholders were clearly not denied their ability to approve or disprove the transaction by virtue of the voting agreements or any other deal protection devices."); Strine, *supra* note 25, at 900–01 (noting a free and non-conflicted shareholder choice had taken place when the majority approved the transaction).

154. *See* DEL. CODE ANN. tit 8, § 251 (2013) (requiring a "majority" of outstanding stock to approve a merger).

155. This inconsistent result also raises the question whether the *Omnicare* decision is really about precommitment.

presents little to no impediment to a truly locked-up deal, as *Optima* and *OPENLANE* attest. On the other hand, if a corporation's certificate of incorporation prohibits action by written consent, the target corporation must go through a much more careful and onerous process in negotiating and agreeing to more tailored deal protection devices (structuring a voting agreement capped at a particular threshold, including a ratcheting-down provision, etc.). While more careful negotiation of deal protection devices is a positive aspect of corporate governance, it is difficult to credibly argue that this difference in approving deal protection devices is merely a logical, foreseeable consequence of a certificate provision prohibiting action by written consent. This result, again, suggests that the doctrinal coherence of *Omnicare* is questionable.

VI. CONCLUSION

At the time of the *Omnicare* decision and the years immediately following, there was much scholarship evaluating the court's decision and predicting its impact on corporate law. Indeed, *Omnicare* has largely been described as bad law and a normatively bad decision. Critics also predicted that *Omnicare*'s ban on complete lock-ups in mergers would have a negative effect on merger and acquisition activity. Now, with the benefit of a decade of hindsight, this Article re-evaluated this controversial decision, asking: Were the critics right to be concerned about *Omnicare* and its impact? Would merger and acquisition activity suffer from *Omnicare*'s elimination of complete lock-ups? And what do post-*Omnicare* developments tell us about the decision today?

Post-*Omnicare* cases illustrate that the Court of Chancery and courts outside of Delaware disagree with the majority's opinion. These decisions have upheld strong deal protection devices and rejected *Omnicare*-based challenges. In so doing, the analysis applied by the courts is very similar to that advocated by the *Omnicare* dissenting justices. The subsequent Court of Chancery decisions, in particular, have limited the application of *Omnicare* going forward. In addition, the ease with which *Omnicare* has been circumvented by alternative transaction structures, such as the sign-and consent merger provisions, and the fact that the Court of Chancery has upheld these structures, highlight the doctrinal problems with the *Omnicare* decision.

In looking at post-*Omnicare* transactions, it does not appear that the decision had a negative impact on merger activity or the use of deal protection devices. In fact, after *Omnicare*, the number of mergers involving public corporations increased. This could be attributable to several factors; however, in light of the Court of Chancery decisions that almost immediately undercut *Omnicare*, it is likely that the M&A market was not affected by *Omnicare* because it was never given a chance to have an impact.

Thus, in reviewing post-*Omnicare* developments, there are several takeaways. The first of these is that subsequent case law has provided new insight into how the Court of Chancery has acted to narrow the scope of a decision that it views as incorrect as well as the resulting vitality (or lack thereof) of *Omnicare*. Second, merger activity over the past ten years rebuts prior predictions by critics that *Omnicare* would fundamentally change the merger market. Finally, the easy circumvention of *Omnicare*'s application, coupled with the Court of Chancery's upholding of these alternative transaction structures, reaffirms prior scholarship that has questioned and critiqued the doctrinal foundation and efficacy of the majority's opinion.