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M&A FIDUCIARY DUTIES: DELAWARE’S MURKY JURISPRUDENCE

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I. Introduction

Mergers and Acquisitions have become the end-game in corporate practice,¹ with one textbook calling them the “sexiest topic”² in that area of law. They have also been

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The article is dedicated to two lovely ladies, the author’s aunts Frances and Ramona Carroll.

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¹ Franklin A. Gevurtz, Corporations Law (2ed. 2010) at 661.

heralded as “the most important corporate-level strategies in the new millennium.”

Entire businesses there become objects of commerce and just like other pieces of property in a market economy trade freely among those who place different values on their productive uses. These changes of corporate control are crucial events in the lives

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5 A key issue, as in all market transactions, is how much the buyer is willing to pay. Purchasers therefore often seek the advice of investment bankers on the financial value of the firms they want to acquire. Hazen, supra, note * at 647. But see infra notes ** and accompanying text on recent cases involving double dealing by those financiers.

Money of course, is not the only consideration in much of our decision-making. See Michael Sandel, What Money Can’t Buy, (2012). That is a value to keep in mind, given the human costs of some of these deals in terms of things like worker displacement and their negative impact on communities. See infra note * and accompanying text.


As one author commented on the motives of acquisitions, “[S]easoned executives and entrepreneurs have always searched for efficient and profitable way to increase revenues and gain market share.” Sherman, supra note *, at 1.

One distinguished author gives this description of the economic motivation of the buying firm. “The decision to invest rests upon the expectation that the future returns to existing shareholders, discounted to present value at a rate which reflects the risks, will exceed the amount presently invested.” Bratton, supra note *, at 965. Correspondingly he says this of the seller’s interests. “From the point of view of the acquired corporation, the initial inquiry also concerns care—whether enough is being received for the value given up…and whether synergistic or other gains are being appropriately divided.” Id. at 966.
of companies and their employees, often carried out in dramatic fashion “with high-powered take-over ploys and ingenious defensive gambits.”

Beginning in the 1960s, when M&As first became a major factor in the economy, commentators have engaged in lengthy debates about their overall value to society. One study by a leading accounting firm found that 83% of them fail to produce any benefit for their shareholders and over half actually destroy value. Workers at target firms are impacted most immediately—often with lay-offs and force reductions. On the other

A more jaundiced view of mergers and acquisitions holds that they are empire-building exercises benefiting only the managers of bidding companies. Dean Clark thus described the questionable desires that may drive those decisions. “As bosses of bigger companies, they will acquire greater power and prestige. Perhaps they expect to obtain greater executive compensation, another often alleged correlative of company size.” Robert Clark, Corporate Law, 537 (1986).

Delaware case-law provides good descriptions of those anti-takeover moves as they have evolved. See infra notes ** and accompanying text.

For more recent comment on the questionable efficacy of certain mergers see, Andrew Sorkin, AT&T to Buy T-Mobile USA for $39 Billion, N.Y. Times, Mar. 20, 2011; Nicholas Jackson, Maybe a Second AOL-Time Warner Marriage Would Work Better, The Atlantic, Aug. 11, 2011.


The recent Stanley-Black & Decker merger of two long-established companies is a good recent example. In that $4.5 billion deal 4,000 workers were laid off world-wide, 250 from Black
hand, top management, board members, and bankers are substantially enriched by them.\textsuperscript{11} This has led to periodic calls that they should only be allowed if they can be shown to be beneficial to society as a whole.\textsuperscript{12}

Mergers and Acquisitions can be accomplished in several different ways—generally either by friendly\textsuperscript{13} or hostile purchases\textsuperscript{14} of the shares of a target company or by buying its assets.\textsuperscript{15} But despite continuing controversy,\textsuperscript{16} these gigantic corporate

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\textsuperscript{11} The take-over phenomenon over the last several decades has contributed to the rising income inequality in our country. As of 2007, the top 1% owned 34.6% of America’s assets and the next 19% owned 50.5% of them. Just 1/5 of our citizens therefore controlled over 85% of its wealth. William Domhoff, \textit{Who Rules America?} Sociology (May 2, 2011) http://sociology.ucsc.edu/whorulesamerica/wealth/power.html.

\textsuperscript{12} See infra notes ** and accompanying text.

\textsuperscript{13} There the target’s board and management are receptive to the takeover and recommend shareholder approval. Usually the acquiring company offers the target’s shareholders a premium over the current price of their shares. Donald DePamphilis, \textit{Mergers, Acquisition, and Other Restructuring Activities: An Integrated Approach to Process, Tools, Cases, and Solutions} 740 (5\textsuperscript{th} ed. 2010). The corporate statutes of various states establish procedures for these combinations. See e.g. Del. Corp. Code §§ 251-66. \textit{See also} Hazen, \textit{supra} note *, at 651-55.

\textsuperscript{14} This occurs when a bidder’s initial approach to purchase a company is unsolicited and unwelcome by the target’s management. It therefore contests the takeover. The bidder then seeks to circumvent management and achieve control by acquiring more than half of the target’s shares. It may make a direct offer of cash or stock for them (a hostile tender offer) or it may buy shares in a public stock exchange (an open market purchase). See DePamphilis, \textit{supra} note *.

\textsuperscript{15} This involves the purchase of the selling company’s property—facilities, vehicles, equipment, stock, and inventory. One important difference between an asset acquisition and a
deals have come in waves and remain a dominant part of today’s business world. The stock purchase is that in the former the buyer can specify the liabilities it is willing to assume and leave others behind. In the latter, however, the consolidated company will assume all the selling company’s obligations. 19 Am. Jur. 2d Corporations §2170 (2012).

The 2012 presidential candidacy of Mitt Romney has made this an even more prominent issue. Romney has claimed that he created over 100,000 jobs through companies he helped grow while a principal at the private equity firm, Bain Capital. At some companies that Bain Capital bought and sold however the workforces were reduced through downsizing or totally eliminated when the firms went bankrupt. The jobs that were lost as a result of those deals were much better compensated than the ones that replaced them. Paul Krugman, Bain, Barack and Jobs, N.Y. Times Jan. 5, 2012.

But see Kimberly A. Strassel, Vampire Capitalism? Please, Wall St. J., May 18, 2012 at A11 which discusses a Kansas City steel company acquired by Bain that is featured in an Obama television ad critical of Romney. The company eventually went bankrupt but the piece argues that Bain actually rescued the company by infusing new capital into it. It was then profitable for several years until it became a victim of international competition.

Before now, the most recent merger surges have been in the 1980s when many were hostile acquisitions in the oil and gas, banking and pharmaceutical industries and in the mid to late 1990s when many were inspired by globalization, deregulation, and telecommunications. The former were funded by debt, the notorious junk bonds, while the latter involved mostly equity financing, the so-called “private equity” deals. Economy Watch, History of Mergers and Acquisition, July, 2010. http://www.economywatch.com/mergers-acquisitions/history.html

Another author gave this vivid description of those waves.

The 1980s featured swashbucklers and the use of aggressive tactics to gain control over targets. The 1990s were equally dynamic in rollups, divestitures, and consolidations, but focused on operational synergies, scale efficiencies, increase in customer bases, strategic alliances, market share, and access to new technologies. This period, however, came to a crashing end with the bursting of the tech bubble and the global recession that followed. Sherman, supra note *, at xii.

See also Bratton, supra note *, at 971-73.

The 90s merger wave subsided when the high-tech market went bust in 2000. It picked up in late 2003, only to crest in 2006 and then fall flat again with the 2008 financial meltdown. Recovery began in 2010. Bratton, supra note *, at 972-73.


In 2011, the value of merger and acquisition in the U.S. topped $1 trillion—the highest since 2008 and a 15% increase over 2010. With much cash on hand and favorable interest rates,
way they are accomplished can present major issues of unfairness and conflicts of interest. This is particularly true when public companies are put into play, either voluntarily or involuntarily.\(^{19}\) With such high dollar figures involved, the wealth of those firms is ripe for misappropriation through abusive tactics. This may be truer today than ever in an era of recurrent corporate scandals\(^{20}\) and exorbitant executive compensation.\(^{21}\) A Gold Sachs executive recently called the Wall Street culture “as toxic and destructive as I have ever seen it.”\(^{22}\)

Occasions for such wrong-doing exist most prominently in public companies because control of those enterprises is separated from their ownership.\(^{23}\) There a board of

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\(^{19}\) See infra notes ** and accompanying text.


\(^{21}\) While the average American worker earned $46,742 in 2010, the mean compensation of S&P CEOs was $12 million. Gary Strauss, Stock Options Help CEOs Cash In, U.S.A. Today, July 8, 2011 at 1. The perceived injustice of that disparity helped fuel the Occupy Wall Street movement in fall, 2011. George Packer, All the Angry People, New Yorker, Dec. 5, 2011, at 32.


\(^{23}\) See infra notes ** and accompanying text.

Even one of the earliest and most ardent proponents of capitalism noted the mischief that could arise from such an arrangement.
directors is empowered to manage the business for the numerous and widely-scattered shareholders who have the ultimate claim on its worth. 24 This has given management (the officers and directors) and their allies (bankers, lawyers, analysts, accountants, etc.) a great opportunity to enrich themselves at the expense of the shareholders and other stakeholders in the company (employees, consumers, communities, and society at large). The latter group of course has a legitimate interest in the honest and effective operation of their corporations and can be hurt by wrongdoing there. 25

The law has attempted to constrain those corrupting tendencies by imposing special, fiduciary duties on these insiders and their allies. 26 And because of their unique role in American corporate jurisprudence, 27 the obligation to determine whether

24 Delaware’s statute is typical here. Section 141(a) of the Delaware Corporate Code provides: “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.” Accord § 801(b) of the Model Business Corporations Act (MBCA).

25 See supra notes ** and accompanying text.

26 See infra notes ** and accompanying text.

27 Even though large corporations operate in many states and a number of countries, basic American corporate law is created not by the federal government but by the states, specifically the jurisdiction where a particular company has been incorporated. This is known as the Internal Affairs Doctrine.
controlling managers and their allies have acted fairly and in good faith has fallen on the Courts of Delaware.\textsuperscript{28}

Some have ascribed this anomaly to federalism, \textit{See} Mark J. Roe, Takeover Politics, \textit{in} The Deal Decade (Margaret M. Blair ed. 1993). \textit{See also}, Frederick Tung, \textit{Before Competition: Origins of the Internal Affairs Doctrine}, 32 J. Corp. L. 33 (Fall, 2006), who argues that the doctrine’s inception was not owing to competition among the states. Instead its origins depended on “a fortuitous sequence of events, driven by ideology, interest group influences and institutional inertia.”

The Internal Affairs Doctrine therefore prescribes that the essential rights and duties of corporate actors are set by the states of their incorporation. As the U.S. Supreme Court put it:

\textit{The beneficial free market system depends at its core upon the fact that a corporation—except in the rarest of situations—is organized under, and governed by the laws of a single jurisdiction, traditionally the corporate law of the State of its incorporation…It is thus an accepted part of the business landscape in this country for states to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares.} CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 89-91 (1987).

American statesmen from James Madison to 20\textsuperscript{th} century presidents like Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Franklin D. Roosevelt have disdained this jurisprudence. As early as 1787 Madison foresaw that someday companies would grow so large that they “would pass beyond the authority of a single state, and would do business in other states.” He therefore urged that the federal government should “grant charters of incorporation in cases where the public good may require them, and the authority of a single state may be incompetent.” Alex Marshall, \textit{How to Get Business to Pay Its Share}, N.Y. Times, May 4, 2012, at A23.

Since the 1930s, however, the federal government has regulated public companies, although in an indirect way, by the federal securities laws. The focus of those statutes is by and large disclosure, not rules of substantive conduct for the governance of corporations. Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977); \textit{See generally}, Choper, \textit{supra} note *, at 299-304.

Delaware’s predominant position in corporate law came about in the first part of the 20\textsuperscript{th} century. As that entity became the dominant legal form for large firms, the story goes, states began competing with one another to gain the fees that would come with chartering them. Many have said this created an unseemly “race to the bottom,” with states vying to be the most lax in regulation. Delaware allegedly won that inglorious contest. \textit{See} William L. Cary, \textit{Federalism and Corporate Law: Reflections upon Delaware}, 83 Yale L. J. 663 (1974).

Delaware was apparently motivated to become the top state of incorporation because of the large payments that small state could garner from that process. In the first part of the last decade it was raking in over $600 million in franchise fees for a jurisdiction with a population of only 796,000. This revenue constitutes a large percentage of the state’s budget. Lucian Arye
This Article will therefore begin in Part II by discussing the seminal Delaware cases that established those duties. It will describe how they evolved, in common law form, from the general rules governing the obligations of corporate managers. Parts III and IV will focus more particularly on opinions from the 1980s and 1990s that made new application of those principles. Courts developed many of them in cases that dealt with

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Delaware was therefore “said to have a bad name, as a haven for incumbent management.” Yet in recent years things may have turned around, with a belief that the Courts there “have become more sensitive to the wishes of big shareholders.” *Barbarians in the Valley*, The Economist, June 28, 2003 at 61, 62.


Others have argued that Delaware has justly earned its preeminence as the nation’s business tribunal. As one noted authority put it, “Corporations often prefer to litigate issues in Delaware rather than elsewhere because of the knowledge, expertise, sophistication and experience of the Chancellor and the four Vice Chancellors on corporate matters.” Hamilton, supra note *, at 147. On the efficiency of Delaware in adjudicating corporate claims, see Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years after Professor Cary’s Polemic*, 71 Colo. L. Rev. 497 (2000).

In any event Delaware is currently the state of incorporation for more than 50% of all U.S. publicly traded companies and 63 percent of companies on the Fortune 500 list. Hamilton, at 148. With some understatement, therefore, the then Vice-Chancellor and now Chancellor of Delaware commented that his state has “some modest importance in the American scheme of corporate governance.” Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 Del. J. Corp. L. 499, 501 (2002).

See infra notes ** and accompanying text.

defensive tactics invented to discourage the hostile takeovers that were surging during those decades.

Part V will next assess how those fiduciary standards have formed the basis for decisions in several recent and very significant opinions. Those cases have come from the increased acquisition activity as the economy rebounds from the financial meltdown of the last decade.31 Delaware’s Chancellor and Vice-Chancellors have been apt at finding instances of unfairness and self-dealing in those cases.32 Yet they have been less successful, I will argue, in fashioning effective remedies for that wrongdoing.

Part VI of this Article will thus sum up with an assessment of Delaware’s fiduciary jurisprudence in this area. As the title of this Article states, it is murky because the jurists of that small state struggle with competing considerations. And because of quirks in our jurisprudence their tribunals have the ultimate supervisory power over corporate directors.

On the one hand, they must hold them to faithful execution of their responsibilities, policing against corrupt insider profits and inefficient entrenchment—making sure directors are ultimately accountable to their shareholders and the financial markets. To that end I will urge that they should make more use of that great tool of

31 See infra note * and accompanying text.
32 See infra notes ** and accompanying text.
Equity, the injunction, to stop mergers and acquisitions outright where corrupt activity is evident and to fashion ancillary relief to prohibit its recurrence.  

On the other hand, the Delaware courts have also been keenly aware that the profitability and sustainability of each business is committed to the care of its directors. They therefore want to give directors sufficient latitude to manage their firms according to their best judgments. This has resulted in an unwillingness to second guess corporate strategy—particularly when it can plausibly inure to the long-term benefit of the overall enterprise.

Delaware courts will thus continue to walk that line, often perhaps by condoning or reproving board decisions on grounds that may not be obvious from their opinions. In doing that, I will argue, judges are expressing the ambivalence that most Americans feel about our economic system—respecting its potential for productivity, but distrustful of the damage it can cause when short-term profit-maximization is its guiding principle. It is an open question whether the approach administered by the Courts of Delaware is best serving the interest of society. I will therefore conclude by proposing a more effective tribunal for those concerns.

II. Fiduciary Duties of Officers and Directors

A. Early Notions of Corporate Fiduciary Duties

33 See infra notes ** and accompanying text.
Prohibitions on conflicts of interest are as old as the Scriptures.\textsuperscript{34} In English jurisprudence Courts of Equity developed the law of trusts to prescribe the responsibilities of those who held legal title to property on behalf of others.\textsuperscript{35} Equity called those special obligations fiduciary duties\textsuperscript{36} and under its “No Further Inquiry”\textsuperscript{37} rule any arrangement that violated them was voidable even if it was fair to the beneficiaries of the trust. Corporate law adopted those obligations to regulate the activity of boards of directors that managed companies for their shareholders who provided the entrepreneurial capital.\textsuperscript{38}

Yet the nature of fiduciary standards for corporate officers and directors developed over time. Early decisions showed a judicial distrust of almost any dealings

\begin{footnotesize}
\begin{enumerate}
\item “No man can serve two masters,” Matt. 6:24.
\item As Chancellor Strine and his co-authors put it almost poetically, “Tracing this doctrine back into the womb of equity, whence it sprang, the foundation becomes plain. Wherever one man or a group of men entrusted another man or group with the management of property, the second group became fiduciaries.” Leo J. Strine, Lawrence A. Hamermesh, R. Franklin Balotti, Jeffrey M. Gains, \textit{Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law}, 98 Geo. L. J. 629, 643. (2010).
\item From the Latin word “fides” meaning faith. Strine \textit{supra} note * at 645. Delaware Justice Randy Holland made the same point commenting on the Latin adjective “fidelis” meaning loyal or faithful. Randy J. Holland, \textit{Delaware Directors’ Fiduciary Duties: The Focus of Loyalty} 11 U. of Penn. J. of Bus. Law 675 (2009).
\item Unif. Trust Code §802(b); \textit{See infra} notes ** and accompanying text.
\item The Lord Chancellor of England first ruled on that in 1742 holding that corporate directors are both agents and trustees and must act with “fidelity and reasonable diligence.” Charitable Corp. v. Sutton, 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742).
\item As the U.S. Supreme Court put it, “Directors and managers, if not technically trustees, occupy positions of a fiduciary nature,” Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 549 (1949).
\end{enumerate}
\end{footnotesize}
that management had with their companies and made them voidable by the shareholders.\textsuperscript{39} That absolutist approach however eased over time as it became apparent that some of these related party transactions were beneficial to corporations.\textsuperscript{40} The law thus shifted to allow them if they were ratified in good faith by disinterested directors\textsuperscript{41} or shareholders\textsuperscript{42} or if they could be shown as fair to the corporation.\textsuperscript{43}

B. The Changing Realities of Corporate Control

As corporations evolved, the dynamics of their ownership also developed. In the early years, large shareholders typically served as the directors of their corporations.\textsuperscript{44} As stock was sold broadly in public offerings, however, share ownership became widely


That may have reflected a skeptical viewpoint best expressed by Justice Louis Brandeis. That renowned jurist wrote most compellingly about the inherent potential for misuse that comes when financial stewards are entrusted with wealth owned by others. Louis Brandeis, \textit{Other People’s Money and How the Bankers Use it} (1914).

\textsuperscript{40} Hamilton, \textit{supra note *}, at 745.

\textsuperscript{41} Del. Code Ann. Tit. 8 § 144(a)(1) (West 2012); \textit{Accord} MBCA § 8.61(b)(1).

\textsuperscript{42} Del. Code Ann. Tit. 8 § 144(a)(2) (West 2012); \textit{Accord} MBCA § 8.61(b)(2).

\textsuperscript{43} Del. Code Ann. Tit. 8 § 144(a)(3) (West 2012); \textit{Accord} MBCA § 8.61(b)(3).


As two noted scholars have recently put it, “...industrialists such as John D. Rockefeller, Cornelius Vanderbilt, Andrew Mellon, and Andrew Carnegie ruled empires that rivaled whole countries in their size and scope—and power. The companies had public shareholders, but the men who built them held huge stakes to back their stewardship.” Robert A.G. Monks and Nell Minow, \textit{Corporate Governance}, (5\textsuperscript{th} ed. 2011) at 120.
diffused. The resulting separation of corporate ownership from control was definitively documented in a study by Professors Berle and Means in 1932.

The authors there found that in the largest corporations it was rare that one shareholder owned even 1% of the outstanding stock. Stockholders of big publicly-held firms, those legally entitled to their residual profits, had thus lost the power to run their companies. It had gone to a managerial class that formally perpetuated its power by soliciting shareholder proxies to elect its nominees for the board.

Looking back, a leading contemporary corporate scholar summed up those landmark insights. A little over fifty years ago, Berle and Means reported that the separation of ownership and control in the modern corporation had left shareholders effectively powerless, as manager could neither be ousted from office by shareholders who were widely dispersed and therefore incapable of coordinated action, nor disciplined effectively by the capital market—at least so long as managers could rely on internal cash flow to finance corporate expansion. John C. Coffee, Jr., Shareholders v. Managers: The Strain in the Corporate Web, 85 Mich. L. Rev. 1, 15. (1986).

A reverse trend has arisen in recent years that would once again concentrate corporation ownership in large holders of stock such as mutual funds, pension funds and other institutional investors. See Monks supra note * at 154-237.


Monks, supra note * at 125 attributes this “disenfranchisement” of shareholders to “…management’s vastly superior access to the proxy, both procedurally (in terms of resources) and substantively (in terms of appropriate subject matter).”

But see Ben Protess and Katherine Reynolds Lewis, Changing Face of Investor Activism, N.Y. Times, June 8, 2012 at B1 which describes renewed recent efforts of mainstream shareholders to assert power in the governance of their corporations.
Berle and Means went on to define the large issues arising from that new reality.

The surrender of control over their wealth by investors has effectively broken the old property relationships and has raised the problem of defining these relationships anew. The direction of industry by persons other than those who have ventured their wealth has raised the question of the motive force back of such direction and the effective distribution of the returns from business enterprise.  

The year before, however, one of the book’s authors had set out his own theory of how corporate law should deal with the fear that corporate managers would channel the wealth of their businesses into their own pockets. The title of Professor Berle’s piece said it all, Corporate Powers as Powers in Trust. He analogized corporate directors to trustees who are given wide latitude in managing the property of their beneficiaries so long they do so as fiduciaries. Every corporate act, therefore, had to not only be executed in technical compliance with the law but also had to be judged “with a view toward discovering whether under all the circumstances the result fairly protects the interests of the shareholders.”

Berle went on to illustrate those principles as they would be applied to five “absolute” corporate powers (emphasis his)—issuing stock, declaring dividends, acquiring stock in another corporation, amending the corporate charter, and effecting

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49 Berle, supra note *, at 4.

50 44 Harv. L. Rev. 1049 (1931).

51 Id.

52 Id. at 1074.

53 Id. at 1050.
mergers. He defined the latter as broadly encompassing any transfer of the corporate enterprise.\textsuperscript{54}

He then cited recent cases that had moved the law from a concern that those maneuvers were only made in formal compliance with the law to one where fairness to minority shareholders was the ultimate standard.\textsuperscript{55} He concluded that even though “business situations demand more flexibility than the trust situation,” the rules of corporate governance should nevertheless become in substance a branch of that body of law.\textsuperscript{56}

C. Foundational Cases on the Duties of Corporate Management

Just a few years after Berle and Means’s groundbreaking work, the Delaware Supreme Court followed Berle’s theory of trusteeship in its seminal decision on corporate fiduciary duties, Guth v. Loft.\textsuperscript{57} Guth was the president of a company named Loft that operated a chain of candy stores using Coca-Cola syrup. When Coke raised its prices, he

\textsuperscript{54} \textit{Id.} at 1070.

\textsuperscript{55} \textit{Id.} at 1070-73.

\textsuperscript{56} \textit{Id.} at 1074.

\textsuperscript{57} 5 A.2d 503 (Del. Sup. 1939);

The Delaware Supreme Court had already expressed its view that directors owe fiduciary duties to their shareholders. Bodell v. Gen. Gas & Elec. Corp., 132 A. 442 (Del Ch. 1926) \textit{aff’d} 140 A.2d 246 (Del. 1927).
asked a vice-president of Loft to investigate buying the company that produced Pepsi-Cola which was then in bankruptcy and for sale.

Loft had ample funds to buy Pepsi. But without offering the opportunity to Loft, Guth bought the company secretly himself through another firm that he owned. He even had the soft drink produced at Loft’s facilities. In doing that, the Court said, Guth furthered his personal interests in a way that was “incompatible with the superior interests of the corporation.”\(^\text{58}\) The Court therefore found that his breach of loyalty to Loft showed “gross violations of legal and moral duties”\(^\text{59}\) and ordered that he account to Loft’s shareholders for his profits in Pepsi.

In a later, significant case, Levien v. Sinclair Oil Corp,\(^\text{60}\) where the controlling shareholder was another corporation, the Delaware High Court elaborated on this duty of loyalty and distinguished it from situations where it would defer to a board’s business judgment. The plaintiff there was a minority shareholder in Sinven, a corporation that

\(^{58}\) Guth v. Loft, 5 A.2d at 282.

\(^{59}\) Id.

In its opinion, the Guth Court gave this classic statement of about management’s duty of loyalty.

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or to enable it or make in the reasonable and lawful exercise of its powers. Guth v. Loft, 5 A2d at 510.

\(^{60}\) 280 A.2d 717 (Del. 1971).
operated solely in Venezuela. 97% of Sinven was owned by Sinclair which named all of its directors.

Because of this parent-subsidiary relationship, the Court said, Sinclair owed Sinven a fiduciary duty. It further noted that such a special obligation is particularly relevant when the parent is on both sides of a transaction and can therefore receive something from the sub to the detriment of its minority shareholders. The Court then discussed two questioned transactions, one where it found the parent had not acted improperly and the other where it had breached its fiduciary duty to the sub.

In the first, Sinclair caused Sinven to pay out large dividends, distributing the lion’s share of them to the parent. Sinven’s minority shareholders however received their pro rata portion of those payments. Even though the plaintiff claimed the large dividends left Sinven without resources to expand, the Court deferred to the directors’ business judgment as to how the company’s resources should be used. It thus found that there had been no improper self-dealing.

In the second transaction, however, Sinven’s minority shareholder was able to convince the Court that Sinclair had treated Sinven unfairly. There Sinclair made Sinven agree to sell another Sinclair sub its crude and refined oil at specific prices. Sinclair however had the purchasing sub breach that contract by failing to pay for the oil on time and in the minimum amounts stipulated. The relationship was thus unfair to Sinven’s
minority shareholders. Sinclair was able to enrich itself at their expense and in doing so it breached its duty of loyalty to them.61

When Delaware’s jurisprudence involving duties of loyalty does not control, however, directors have only to use due care and have a rational basis for their actions. Under the business judgment rule,62 then, Courts will defer to their choices. A leading case, Aronson v. Lewis,63 explains that distinction, but the opinion itself is puzzling because the transaction under question had all the earmarks of self-dealing.

It involved a lucrative consulting agreement and interest free loan that the board had given a 75 year old retired director who owned 47% of the company’s stock. A shareholder brought a derivative suit64 charging that those payments had “no valid

61 In another significant parent-subsidiary case a decade later, Weinberger v. U.O.P., 457 A.2d 701 (Del. 1983), the Delaware Supreme Court also found that a parent company had breached its fiduciary duties to the minority shareholders of its sub. There the parent, who had acquired majority interest in the sub and controlled over half of its board, planned to give the sub’s minority shareholders cash for their shares in a take-out merger, a practice allowed under Delaware law when the boards of both companies approve.

The parent charged two of its officers, who were also directors of the sub, to do a secret feasibility study about the price the parent could profitably pay for the sub’s shares. The figure they came up with was much greater than what the parent ultimately paid the minority shareholders. It was also supported by a hastily prepared fairness opinion by an investment banker hired by the parent. The Court again found this self-dealing to be a breach of the duty of loyalty that the parent company owed to the minority shareholders of its sub because it failed to give them fair value for their shares.

62 One commentator has cleverly called that principle “a rule that is not a rule.” As that distinguished corporate scholar put it, “Most generally, the business judgment rule acts as a presumption in favor of corporate managers’ actions. Stronger still, the rule provides a safe harbor that makes both directors and their actions unassailable if certain prerequisites have been met.” Douglas M. Branson, The Rule that isn’t a Rule—The Business Judgment Rule, 36 Val. U. L. Rev. 631, 632 (2002).


64 Derivative suits are legal mechanisms whereby shareholders can bring an action on behalf of their corporation against officers and directors who have wronged it. The Supreme
business purpose”65 because the aged director performed “little or no services.”66 The situation presented an obvious conflict because a director and dominant shareholder was entering into financial dealings with his corporation where the company may not have been getting fair value.

Following accepted practice, however, the Court held that whether a wronged corporation should bring an action for its alleged injury was a decision for the board. A shareholder thus has to make demand on the board under Chancery Rule 23.167 to initiate the suit unless she can show such action will be futile. To do that a stockholder will have to demonstrate that there existed a reasonable doubt that “the directors were disinterested and independent and the challenged transaction was other than the product of a valid business judgment.”68

Surprisingly in this situation the Court found no such grounds to excuse demand even though a 47% shareholder is usually able to control a board. In addition, it was

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65 Aronson v. Lewis, 473 A. 2d at 809.
66 Id.
67 Accord FRCP 23.1.
68 Id. at 814.

In a later case, the Supreme Court explained that these prongs are in the disjunctive. If either is satisfied, demand is excused. Brehm v. Eisner, 746 A.2d 244, 256 (Del. 2000).
questionable whether the director receiving those high payments could render services to the corporation justifying them. Nevertheless the Court found no conflict and deferred to the board’s business judgment dismissing the suit.

But just when it seemed that Delaware would give directors a free pass on any corporate decision that did not involve their personal interests, its High Court issued a startling opinion, Smith v. Van Gorkom. In Aronson, the court had seemingly reaffirmed its traditional deference to management with comments like this, “A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose.” But just a year after Aronson it found directors liable in Van Gorkom for gross negligence in the approval of a merger.

Jerome Van Gorkom, the chairman and chief executive officer of a public company, negotiated a sale of the firm on his own and then called a special meeting of his board on one day’s notice—keeping it in the dark about the agenda. Only when the directors gathered did he finally tell them of his deal for the company, a cash-out merger that would give its shareholders a premium over the market price of their stock. Even then Van Gorkom furnished his directors no documents about the transaction.

In support of his assertion that the merger price was a good deal for the shareholders, Van Gorkom offered only an internal study finding that a leveraged buyout of the company would be feasible at a comparable cost. He provided the board no

69 488 A. 2d 858 (Del. 1985).
70 Aronson v. Lewis, 473 A.2d at 812.
opinion about the merger’s fairness from an outside expert. Yet he urged that the directors immediately approve it which they did.

Even though there were provisions in the merger agreement that allowed for the solicitation of competing offers, the Court found they were too restrictive to establish any true market test for Van Gorkom’s deal. It therefore held that even though the directors had not personally profited from the questioned transaction, the business judgment rule would not protect their decision. Instead, they had breached their fiduciary duties to make an informed and deliberate decision about this matter of ultimate importance for their company. 71

Alarmed that this would open corporate management to wide-spread second-guessing of their activities, the Delaware legislature quickly added section 102(b)(7) to its Corporate Code. 72 It became known as the “raincoat” 73 because the provision offered protection from monetary liability to the management of any company that adopted it. A firm had only place an exculpatory statement to that effect in its certificate of incorporation.

71 Smith v. Van Gorkom, 488 A.2d. at 893.

For a good commentary that Van Gorkom is really about a board’s duty to search for the true worth of a company and thus a prelude to the Revlon rule, infra notes ** and accompanying text, see Black and Kraakman, Delaware’s Takeover Law: The Uncertain Search for Hidden Value, 96 Nw. U. L. Rev. 521 (2002).

72 The provision was adopted by the Delaware legislature in 1986 in response to a purported liability insurance crisis for corporate officers and directors brought on by Van Gorkom. Malpie de v. Townson, 780 A2d. 1075, 1095 (Del. 2001).

Certain improper activities however were exempt from that blanket absolution. Chief among them were breaches of duties of loyalty, actions undertaken in bad faith and those which involved intentional misconduct or knowing violation of the law. Also excluded were any transactions from which a director received an improper personal benefit.  

Delaware cases then started talking about a “triad” of fiduciary duties owed by directors to their corporations and shareholders, due care, good faith, and loyalty. Commentators followed with elaborate dissections of the differences between those three obligations and how their standards for fulfillment might vary. But one thing was now certain. Directors could not be liable for mere breaches of the duty of care, even gross negligently ones such as in Van Gorkom.

Yet directors could still be held to answer for conduct so wrongful that it was undertaken in “bad faith” and two cases decided in 2006 fleshed out what that term meant. One, Stone v. Ritter, involved a derivative suit charging that directors had failed to exercise oversight of employees who did not file proper reports under bank secrecy

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75 See e.g. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993); Malone v. Brincat, 722 A. 2d 5, 10 (Del. 1998).
77 Malpiede v. Townson, 780 A.2d at 1094.
and anti-money laundering laws. The Court held that for bad faith liability to be predicated on such inactivity it had to be almost deliberate—“where directors knew they were not discharging their fiduciary duties.” The Court then ruled that the board would not be liable in Stone because it had acted to assure the existence of “a reasonable information and reporting system” and no “red flags” indicating impropriety appeared to call the directors’ good faith into question.

The other case, Brehm v. Eisner, involved a cause celebre in the entertainment business. The Disney Company hired famed talent agent Michael Ovitz as its president but fired him only a year later. That cost Disney approximately $130 million in severance payments. Shareholder plaintiffs charged that the actions of Disney’s board were so improvident that they constituted bad faith.

In response, the Court first defined that term holding that it does not necessarily require a showing of spiteful or malevolent intent. It can also be satisfied by “an intentional dereliction of duty, a conscious disregard for one’s responsibilities.” Yet even though the Court found that the directors did not follow best practices in

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79 Charges that directors have breached their fiduciary duties by failing to monitor employees are called Caremark claims. The term comes from a Chancery Court decision upholding the settlement of a derivative suit alleging such violations. In re Caremark Intern, Inc. Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).

80 Stone v. Ritter, 911 A. 2d at 372.

81 Stone v. Ritter, 911 A.2d at 373.

82 906 A.2d 27 (Del. 2006).

employing and terminating Ovitz\textsuperscript{84} their conduct did not reach the level of wrongdoing that would constitute “bad faith.” They thus had not breached their fiduciary duties and their decision was entitled to the protection of the business judgment rule.\textsuperscript{85}

It seemed after Disney that Delaware Courts would be willing to tolerate high levels of wrongful conduct when directors were charged with careless actions. A ruling from Chancellor Chandler however reaffirmed that the standard for misconduct there is not inordinately high. In a 2009 decision,\textsuperscript{86} he refused to dismiss a waste claim involving compensation paid to Citigroup’s CEO Charles Prince. Mr. Prince was given $67 million in severance upon leaving the company after the collapse of the housing market.

After stating the general authority of boards to set executive compensation, the Chancellor made this telling comment.

It is also well settled in our law, however, that the discretion in setting executive compensation is not unlimited. Indeed, the Delaware Supreme Court was clear when it stated that there is an outer limit to the board’s discretion to set executive compensation, at which point a decision of the directors on executive compensation is so disproportionately large as to be unconscionable and constitute waste.\textsuperscript{87}

\textsuperscript{84} The first part of the title of a fine article sums up Disney’s ill-considered action. Marc. I Steinberg and Matthew D. Bivona, Disney Goes Goofy: Agency, Delegation, and Corporate Governance, 60 Hastings L. J. 201 (2008).

\textsuperscript{85} Two Circuit Court opinions however appear to take a broader view of director liability than Disney for corporate wrongdoing that is not protected by §102(b)(7). In re Abbott Laboratories Derivative Shareholder Litigation, 325 F.3d 795 (7\textsuperscript{th} Cir. 2003); McCall v. Scott, 239 F.3d 808 (6\textsuperscript{th} Cir. 2001).

\textsuperscript{86} In re Citigroup Inc. S’holder Derivative Litig., 964 A. 2d 106 (Del. Ch. 2009).

\textsuperscript{87} Id. at 138.
The Chancellor went on to examine the allegations that Mr. Prince’s large payments were improper, particularly since he was allegedly responsible for huge losses suffered by the company in the financial meltdown. The Chancellor found that they raised a reasonable doubt that Citi’s board was well-informed, careful, and rational in approving that compensation plan.

The next year Delaware’s current Chancellor, Leo J. Strine, co-authored an article on that point with several other scholars of that state’s corporate jurisprudence. They argued that good faith is closely akin, if not rooted, in the ideal of loyalty. That, they said, “is the obligation to act in good faith to advance the interests of the corporation and its stockholders”\(^8\) as defined by the law creating that entity. Conscious disregard of one’s duties is thus really disloyal conduct, a point that had been made earlier by other scholars.\(^9\)

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\(^8\) Strine, \textit{supra note *}, at 643.

\(^9\) As two law and economics scholars put it,

It is conventional to draw a sharp distinction between the duty of care…and the duty of loyalty….The usual explanation for this dichotomous treatment is that the decisions tainted by a conflict of interest are entitled to less judicial deference than those that are not. Some have argued that the differences between the duty of care and the duty of loyalty are so fundamental that the latter should be strengthened and the former abolished.

Ultimately, though, there is no sharp line between the duty of care and the duty of loyalty. What is the difference between working less hard than promised at a given level of compensation (a breach of the duty of care) and being compensated more than promised at a given level of work (a breach of the duty of loyalty)? Both are agency costs, conflicts of interest in an economic sense that reduce shareholders’ wealth. The existence of a conflict of interest, therefore, cannot explain the distinction between the duties of care and loyalty. Frank H. Easterbrook and Daniel R. Fischel, \textit{The Economic Structure of Corporate Law}, 103 (1996).
One commentator rephrased this as “Under the current law, the duty of loyalty prohibits not only self-interested transactions but also knowing breaches of the duty of care, and more importantly actions that are illegal even when they are intended to benefit the corporation and maximize profits.” That broad concept of loyalty might even buttress the ethic of corporate social responsibility, as that commentator argued. It would see “the moral corporation as a necessary ingredient of civil society” and include the interests of all its stakeholders in that fiduciary obligation.

Chancellor Strine and his co-authors implied as much. Just because the actions of directors are intended to maximize profits they will not be in the best interests of shareholders if they are inimical to society as a whole.

Chancellor Strine and his co-authors also had no problem turning aside charges that their all-encompassing duty of loyalty made other explicitly-stated obligations of directors redundant. They called such re-emphasis a “pervasive presence in statutes and contracts” and a “belt and suspenders protection against unintended consequences.” The “new categories” of non-exculpatory conduct provided in Section 102(b)(7) thus hardly created any additional fiduciary duties.

For instance one could take an extremely narrow reading of the duty of loyalty as only the negative obligation not to profit at the expense of the corporation. Yet even then

91 Id. at 103.
92 Strine, supra note *, at 653.
93 Strine, supra note *, at 660.
the new prohibition to not receive “any improper personal benefit” could only be
distinguished from that at great difficulty. It could very well be just a re-enforcement of
the obvious principle that directors should not loot their corporations.\textsuperscript{94}

\section*{III. Applying Management’s Duties to M&A}

\subsection*{A. The Time of Hostile Take-Overs}

The era of tender offers played out against this background of developing
fiduciary principles. It began in the mid-1960s with aggressors trying to gain controlling
interest of companies by making public proposals to purchase their shares. Those offers
stated the buyers’ willingness to pay shareholders of target companies a premium in cash
over the market price of their stock.\textsuperscript{95} Up until then, those maneuvers had an unsavory
reputation among the corporate establishment. They were something that was only done
by “raiders” intent on looting viable companies.\textsuperscript{96}

When Congress began considering a legislative response to the new phenomenon
it was thus first with the intent of protecting established companies from such “corporate

\footnotesize
\textsuperscript{94} Id.

\textsuperscript{95} Hamilton, \textit{supra}, note * at 1003.

\textsuperscript{96} J.C. Wine, \textit{Private Litigation under the Williams Act: Standing to Sue, Elements of a

Just what constituted “looting” however could be a tricky question. See Perlman v.
Feldman, 219 F.2d 173 (2d Cir. 1955) that involved a premium for control given for the ability to
sell steel produced by the company.
piracy.” But a new justification for tender offers was emerging supported by law and economics jurisprudence. Hostile take-overs were really a form of shareholder empowerment—a response to Berle and Means’s classic criticism of unaccountable corporate management.

Stock prices, as that theory went, decline when management is inefficient in deploying its firm’s resources to their most profitable uses. Such underpriced companies attract bidders who want to gain controlling interest in the corporation’s shares. They can then dismiss the underperforming incumbent officials and restructure the company to achieve its most gainful ends.

In such scenarios everyone supposedly benefited except the managers who were replaced. Selling shareholders received a premium for their stock, remaining investors had their wealth enhanced, and the bidder profited by the difference it paid for the controlling shares and the new, higher value of the restructured company. Most importantly, the economic well-being of society as a whole advanced because of a more productive use of its scarce resources. Even the threat of a hostile take-over, it was

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97 In 1965 Senator Harrison Williams spoke of “proud old companies” that were beset by “white collar pirates.” 111 Cong. Rec. 28, 257.


100 In an editorial from the era that Wall Street Journal wrote, Capitalist structures need to evolve and we certainly are not willing to leave the evolution solely to incumbent managements that represent the old order. We
said, disciplined management to be more attentive to maximizing their firm’s earnings for fear of being replaced if its stock was undervalued.\textsuperscript{101}

Federal legislation when it took final form in the Williams Act of 1968 therefore adopted a neutral position vis-a-vis the regulation of tender offers. It didn’t aim to stop them, but to just make sure that tendering shareholders received fair treatment. \textsuperscript{102} The legal action then shifted to the legitimacy of responses that incumbent management could undertake either in anticipation of tender offers or in answer to them.

Other viewpoints, however, not at all as sanguine as those of the law and economics school, challenged those assumptions. As Chancellor Allen described that contrary outlook:

In the financial setting of the 1980s, dramatically higher stock prices could often be achieved by sharply increasing the debt of the corporation and reducing or eliminating certain operations. But increasing debt

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\textsuperscript{102} The Williams Act thus requires that bidders make appropriate disclosures on such subjects as their goals and the sources of their funds. It also slows down the process so that the offeree shareholders can use that information to make knowledgeable decisions about whether to tender their shares. The Act contains other provisions as well to protect the tendering shareholders by giving them the ability to withdraw their shares during the offer, to have them purchased on a pro rata basis with all other tendering shareholders, and to receive the highest price in the offering. To that end the Act adds sections 13(d), 13(e), 14(d), 14(e), and 14(f) to the Securities Exchange Act of 1934 and empowers the SEC to make regulations to implement them. \textit{See generally} Gevurtz, \textit{supra} note *, at 736-50.
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For an early article by two SEC lawyers highly critical of defensive tactics to impede shareholders’ rights to tender see Gary G. Lynch and Marc I. Steinberg, \textit{The Legitimacy of Defensive Tactics in Tender Offers}, 64 Cornell L. Rev. 761 (1979).
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substantially made the enterprise riskier and thus reduced the value of the corporation’s bonds and restricting operations injured workers and management who were thrown out of work.\textsuperscript{103}

According to Chancellor Allen, the surge of hostile tender offers in the 1980s therefore forced Courts to confront an issue they had “papered over” during the previous decades.\textsuperscript{104} Was the corporation to be primarily run to maximize profits for shareholders? Yes said the “Property” view, best exemplified by holdings from some early 20\textsuperscript{th} century cases\textsuperscript{105} No, responded the “Equity” theory which maintained that the corporation rather should be seen as an institution with a range of loyalties to many members of society.\textsuperscript{106}

The author wrote a trilogy of law review articles during that time which covered the controversy and the significant legal decisions it produced.\textsuperscript{107} Because of their continuing relevance to the topic of this Article, this segment will summarize the salient issues of that era and the holdings of the major cases that followed in their wake.

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\textsuperscript{104} Id. at 272.
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\textsuperscript{105} Chief among them was Dodge v. Ford Motor Co, 170 N.W. 668 (Mich. 1919).
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\textsuperscript{106} For an expostulation of that view, as it emerged in the 1930s, see E. Merrick Dodd, Jr., \textit{For Whom are Corporate Managers Trustees?}, 45 Harv. L. Rev. 1145 (1932).
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B. Questions about Defensive Tactics

Observers quickly noted that board actions to forestall hostile takeovers were quite different from decisions directors made in routine commercial matters. The latter would be protected from judicial review by unproblematic applications of the business judgment rule. Unfriendly tender offers on the other hand challenged not just the quality of the directors’ management decisions but their very right to be in those positions.

Because of that inherent tension, unsolicited tender offers posed a direct conflict of interest for a board. Some commentators therefore urged that legal tactics which contested them raised issues of loyalty, not care. This structural bias might even infect outside directors who would not only empathize with their colleagues employed by the target company but would also lose their own privileged offices if a hostile takeover was successful.

C. Early Legal Responses Condoning Defensive Tactics

Nevertheless cases from Delaware and the federal appellate courts during this first wave of hostile takeovers generally accepted various tactics undertaken by management to ward them off, turning aside claims that they constituted breaches of the directors’

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108 See Jennifer J. Johnson and Mary Siegel, Corporate Mergers: Redefining the Role of Target Directors, 136 U. Pa. L. Rev. 315 (1987) who proposed that only independent directors be empowered to enter into mergers and only then with prior shareholder approval.

109 This perspective gave rise to a spate of articles urging that boards remain passive in the face of a hostile tender offer. See e.g. supra note * and accompanying text.

110 For a more lengthy commentary written by the author during that time period, see Morrissey, supra note *, 53 Tenn. L. Rev. at 124.
duty of loyalty. Many of those involved the sale of stock by the board to either placate a hostile bidder or to fend one off.

An early example of the former was Cheff v. Mathes\textsuperscript{111} where the directors bought back shares from a potential hostile bidder at a premium over the market price, a tactic which would later be called “greenmail.”\textsuperscript{112} Even though just the year before the Delaware Court had placed the burden on directors to justify any strategy that might be undertaken to maintain their control,\textsuperscript{113} it now held that such an action is not the same type of “self-dealing” as when a director sells property to the corporation. It then upheld the repurchase as necessary to quell unrest among key employees and safeguard the firm from liquidation.\textsuperscript{114}

Several subsequent cases from the federal circuits illustrated the latter defensive tactic—selling shares to friendly groups to forestall a hostile bidder. In two cases from the 2\textsuperscript{nd} Circuit decided in 1980, Treadway Companies v. Care Corp.\textsuperscript{115} and Crouse-Hinds Co. v. Internorth, Inc.,\textsuperscript{116} the target companies sold shares to such a “White Knight” to discourage hostile bidders. In both situations the Courts disregarded the patent self-interest of boards and approved the tactic under the business judgment rule so long as a

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\item \textsuperscript{111} 199 A.2d 548 (Del. 1964).
\item \textsuperscript{112} Gevurtz, supra note *, at 708.
\item \textsuperscript{113} Bennett v. Propp, 187 A.2d 405 (Del. 1962).
\item \textsuperscript{114} Cheff v. Mathes, 199 A.2d at 556-57.
\item \textsuperscript{115} 638 F.2d 357 (2d Cir. 1980).
\item \textsuperscript{116} 634 F. 2d 690 (2d Cir. 1980).
\end{enumerate}
plausible argument could be made that the take-over would be harmful to the corporation and its shareholders.\textsuperscript{117}

D. Unocal and the Poison Pill

Then in 1985, at the height of that decade’s tender offer fervor,\textsuperscript{118} the Delaware Supreme Court decided two landmark cases that endorsed a target board’s power to resist

\textsuperscript{117} At about the same time, cases from both the 3\textsuperscript{rd} and 7\textsuperscript{th} Circuits also ruled in favor of incumbent managers against charges that certain of their actions were designed only to retain control of the firm. In the former, Johnson v. Trueblood, 629 F. 287 (1980), the majority shareholder refused to raise funds that the company needed by selling shares to minority shareholders because the majority would then have lost control to the minority. The Court applied the business judgment rule to dismiss the suit saying that it was appropriate to defer to management absent a showing that impermissible motives predominated.

In the latter case, Painter v. Marshall Field & Co., 646 F. 2d 271 (1981), the target company adopted a number of “shark-repellant” tactics to create anti-trust problems for a hostile bidder. When the bidder withdrew its offer and the company’s stock dropped considerably, shareholders sued. The Court however dismissed claims that the defensive tactics were unwarranted as “just the sort of Monday morning quarterbacking that the business judgment rule was designed to protect.” It found justification for the board’s actions in “the desire to build value within the company, and the belief that such value might be diminished by an offer.”

In a later case from the Second Circuit, however, Norlin Corp. v. Rooney Pace, Inc., 744 F. 2d 255 (2d Cir. 1984), the Court refused to allow a defensive tactic where a target’s board issued additional shares to two entities that it controlled. The board would then have voting power of almost a majority of the company’s shares. Not only was that action taken without the required approval by the NYSE and the firm’s other shareholders, but the company’s chairman admitted in a letter that he had taken it to fend off a hostile takeover. With those facts the Court refused to condone the maneuver finding that the board’s self-interest overruled the normal presumptions of the business judgment rule.

\textsuperscript{118} The signature statement from that epoch, “Greed is good,” was made at a business school commencement speech by financier Ivan Boesky shortly before he was indicted for insider trading. Patrick Dillan & Carl M. Cannon, Circle of Greed 108 (2010). It was the template for Gordon Geicko’s famous speech of that title in Oliver Stone’s 1987 movie, Wall Street (20th Century Fox Film Corp.). Michael Douglas won an academy award for that role.

As one author wrote of that era of massive corporate change, “During the 1980s, nearly half of all U.S. companies were restructured, more than 80,000 were acquired or merged, and
them. Both bowed to the directors’ traditional authority to manage a corporation as sanctioned by the business judgment rule.

The first, Unocal Corp. v. Mesa Petroleum,\(^{119}\) involved a discriminatory stock repurchase. T. Boone Pickens, a notorious hostile bidder of that day, made a “two-tier” “front-end-loaded” tender offer for Unocal proposing to buy enough of that company’s stock for $54 in cash and then exchange subordinated debt valued at that amount for the remainder.

To counter, Unocal offered to exchange high quality debt securities valued at $72 for each of its common shares. Pickens however who then owned 13% of the company’s stock was specifically excluded from the deal. The Court found that tactic was reasonable given the board’s view that Pickens’s offer was coercive and inadequate.\(^{120}\) It described the directors’ role in a tender offer as that of a gatekeeper--almost like their statutory duty to approve a merger or a sale of a firm’s assets before they are submitted to shareholders for ratification.

The *Unocal* Court however circumscribed its holding by noting that it found reasonable justification for the company’s defensive maneuver. It said, “[a] corporation does not have unbridled discretion to defeat any perceived threat by any Draconian

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\(^{119}\) 493 A.2d 946 (Del. 1985).

\(^{120}\) Exchange Act Rule 13e-4(f)(8)(i) promulgated under authority given the SEC in the Williams Act now requires that tender offers be open to all security holders of the class subject to the tender offer.
means available.” It spoke of an “enhanced duty”\textsuperscript{121} in such a situation where directors must show that they have “reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person’s stock ownership.”\textsuperscript{122}

The second major Delaware opinion of 1985 followed \textit{Unocal} rapidly in time and faithfully in logic. It was \textit{Moran v. Household Int’l Inc.},\textsuperscript{123} the poison pill case. \textit{Moran} officially condoned that most effective defense against hostile takeovers—shifting the balance of power to management in the 80s wave of M&A deals.

The pill approved in \textit{Moran} involved rights issued to the company’s common shareholders to purchase $100 worth of its preferred shares. They were not valuable when issued but when someone made a tender offer for a substantial amount of the company’s stock, a “flip-over” provision came into play.

In the event of a merger, it gave the preferred stockholders the ability to purchase $200 of the acquiring company’s stock for $100, making Household prohibitively expensive for any hostile buyer. That burdensome obligation however would not encumber a friendly bidder because Household’s board retained the ability to redeem the rights for a small amount any time before they became exhcisable.

Given its ruling in \textit{Unocal} it was no surprise that the Delaware High Court tolerated Householder’s use of the pill. It appeared even more appealing to the Court because it was “pre-planned,” not enacted in response to a particular hostile attack. The

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\item \textsuperscript{121} \textit{Unocal Corp. v. Mesa Petroleum}, 493 A.2d at 954.
\item \textsuperscript{122} \textit{Id.} at 955.
\item \textsuperscript{123} 500 A.2d 1346 (Del. 1985).
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Court also noted that the board had the authority under the Delaware statutes to issue the preferred shares with the flip-over rights. Acceding to the directors’ business judgment it held that Householder’s directors adopted the pill in good faith to protect against a coercive tender offer.

Even while approving the pill, however, the Court added a caveat. Under the appropriate circumstances, a bidder might make a tender offer conditioned on the board’s redemption of the rights. The Court indicated in such a case it would not permit an arbitrary refusal of that demand.

E. The Revlon Qualification and Its Aftermath

In the later 1980s, the Delaware Supreme Court handed down two other major cases on board fiduciary duties that dealt with the limits on their discretion to oppose M&As. One came a year after Unocal and Moran and the other was decided in 1989 as the takeover surge of that era drew to a close. The first, Revlon, Inc. v. MacAndrew & Forbes Holdings124 began with a $45 per share tender offer for Revlon’s shares by Pantry Pride. Revlon’s board responded by adopting a poison pill. Pantry Pride raised its offer and after some other defensive moves by Revlon Pantry Pride countered with an even higher bid.

Revlon’s board then entered into a friendly merger with the Forstmann group that would buy all the company’s stock for $56 per share and agree to some other actions that would benefit the company’s noteholders. When the Forstmann merger was

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124 506 A.2d 173 (Del. 1980).
announced Pantry Pride raised its offer to $56.25. Forstmann however outbid it when given financial data that Pantry Pride did not receive. Revlon also sweetened its deal with Forstmann. It gave Forstmann an option to purchase one of its divisions at a substantial discount if another bidder got 40% of the company’s shares. It also put a no shop provision in its agreement with Forstmann by which Revlon agreed not to seek other offers.

When Pantry Pride sued, the Delaware High Court upheld the original poison pill as a legitimate response by Revlon. The Court however ruled that things changed when the friendly suitor entered the picture. Since it then became apparent that the Company would not survive in its current form, “The directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders.”

Nor could the “auction ending” deal with Forstmann be defended as a way to safeguard the interests of the noteholders. Like all creditors their rights were protected by contract law. By the lockup arrangement with Forstmann, Revlon’s directors therefore breached their duty of loyalty to obtain the highest price for their shareholders.

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125 Revlon v. McAndrews, 506 A.2d at 182.

126 Id.

But immediately after Revlon, the High Court, per Justice Moore, affirmed a defensive strategy under Unocal principles. That case Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987) involved another takeover bid by T. Boone Pickens. He secretly
In the second case, however, *Paramount Communications, Inc. v. Time, Inc.*[^127^] Delaware qualified its *Revlon* rule. Time was set to consummate a merger by a share exchange with Warner when Paramount announced a $175 cash tender offer for all of Time’s stock. Time’s board responded that Paramount’s price was inadequate even though it was substantially above what its shares were trading for in the open market.

Time also claimed that Warner was a more appealing business partner because it would respect its journalistic integrity. Time then restructured its arrangement with Warner in a way that would not require shareholder approval. In turn, Paramount raised its offer to $200 per share and sought to enjoin the Time-Warner deal.

Chancellor Allen however refused to halt the merger rejecting Paramount’s argument that *Revlon* required Time to accept its higher bid. The Time-Warner merger, said the Chancellor, was not an outright sale of control because ownership of the new firm remained in publicly traded shares. In addition, the Time-Warner combination was a legitimate corporate strategy and the business judgment rule allowed management some

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[^127^]: 571 A.2d 1140 (Del.1989).

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Newmont responded by selectively paying a dividend to a 26% shareholder who would respect the company’s independence. The stockholder then increased its ownership in Newmont to 49.9%. Thwarted in his bid, Pickens sued to enjoin the dividend, but the Court deferred to Newmont’s business judgment and dismissed the suit. Justice Moore pointed to Pickens’s secret and coercive tactics and said they fit his “typical modus operandi.” *Ivanhoe Partners v. Newmont Mining*, 535 A.2d at 112.

Yet two years later however the Delaware Supreme Court followed *Revlon* to find that a target board had mismanaged a bidding process that was “tilted” in favor of one of the potential purchasers. The board there was deceived by management about the auction but was also culpably negligent itself by failing in its duty of oversight, particularly since insiders were involved in the process. *Mills Acquisition Co. v. Macmillan, Inc.* 559 A 2d 1261 (Del. 1989).
discretion in long term planning even at the expense of short term gain for shareholders.

On appeal, the Delaware Supreme Court affirmed the Chancellor’s ruling.\textsuperscript{128}

IV. Fiduciary Duties in the New Wave of Mergers


During oral argument after listening to Time’s counsel discuss other cases where the Court had differed to directors’ long-term strategies Justice Moore signal his approval. From the bench the author of both \textit{Unocal} and \textit{Revlon} said with exasperation, “How many times does the court have to speak on this?” \textit{Id}.

The High Court’s lengthy opinion affirmed its tradition of deference to a board’s business judgment. Paramount Communications, Inc. v. Time, Inc. 571 A.2d 1140 (Del. 1989). It there stated, “…absent a limited set of circumstances under \textit{Revlon}, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term.” Paramount Communications v. Time, 571 A2d at 1150. The Court also ruled that by entering into the merger deal with Warner Time had not “put itself up for sale.” \textit{Id}. There was thus no \textit{Revlon} event. A noted commentator expressed dismay at the opinion stating, “In Delaware today, shareholder protection is all too often largely rhetorical, lacking in substantive comments.” Marc I. Steinberg, \textit{Nightmare on Main Street: The Paramount Picture Horror Show}, 16 Del. J. Corp. L. 1 (1991).

A few years after its disappointing bid for Time, Paramount found itself on the other side of a takeover. It entered into a friendly merger arrangement with Viacom that would give Viacom’s CEO controlling interest in the new company. The agreement also contained several provisions designed to make a competing bid more difficult. Despite those barriers, QVC came in with a higher offer after the Viacom-Paramount merger was announced. The Paramount board rebuffed it and a bidding war ensued. When QVC requested “auction procedures,” however, Paramount’s board continued to resist, holding fast to its preferred deal with Viacom.

QVC then sued asking the Delaware Court to apply the \textit{Revlon} and \textit{Unocal} principles to Paramount’s anti-takeover actions. That posed two significant questions. Was the proposed merger of Viacom-Paramount a \textit{Revlon} event demanding a process to secure the best price for the company’s shareholders? If so, then were the defensive measures of the merger agreement justified under \textit{Unocal}?

The Supreme Court answered “yes” to the first question and correspondingly “no” to the second. The controlling interest in Paramount was such a valuable asset, said the Court, that its potential sale to Viacom’s CEO brought \textit{Revlon} into play. When that happened, the enhanced standard of \textit{Unocal} kicked in, negating the business judgment presumption that would favor Paramount’s defensive actions.

Even though unlike \textit{Revlon} no break up of Paramount was likely to result from its merger to Viacom, the Court distinguished the QVC matter from the earlier \textit{Time} situation. After the merger there, control of the new company would remain fluid in publicly-held shares. After the Paramount-Viacom merger, however, the CEO of Viacom would become the dominant shareholder of a new consolidated company. Paramount then, the Court found, was effectively put up for sale when it made the preliminary merger agreement with Viacom. That, the Court said, triggered the board’s \textit{Revlon} duties to realize optimum value for their shareholders. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).
A. The Rise of New Takeover Techniques

The merger surge of the 1980s died out for a short spell in the early 1990s but quickly resumed and strengthened as the high tech boom of that decade accelerated. By then sophisticated anti-takeover techniques, most prominently the poison pill, had taken hold and presented a formidable barrier to simple cash tender offers. So a new generation of takeover strategies was appearing to deal with that impregnable defense which seemed to allow target boards to “Just Say No.”

A prominent one was present in the case of Unitrin, Inc. v. American General Corp where a bidder sought to have its own directors elected so they could neutralize a poison pill. The target Unitrin first adopted the pill in response to what it deemed was an inadequate tender offer. And then to head off a proxy fight it announced a plan to repurchase its shares for a premium over their market price.

Unitrin’s directors already owned 23% of its outstanding shares and the repurchases would increase their holdings. That along with a supermajority provision in

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129 Several events gave rise to that pause. The included stronger anti-takeover defenses and state anti-takeover statutes, (like the provisions affirmed by the U.S. Supreme Court in CTS v. Dynamics requiring shareholder approval of unfriendly takeovers, see supra note *). The Gulf War and a recession played their part as well. See EconomyWatch, supra note *. But perhaps the chief reason was the criminal conviction of junk bond financier Michael Milliken. Almost single-handedly Milliken’s firm Drexel, Burnham, had raise huge amounts of capital to make large hostile take-overs possible and his imprisonment put an end to that stream of financing. See Predator’s Fall, Time, Feb. 26, 1990.

130 See Hamilton supra note *, at 997; See also Bratton, supra note *, at 972.

131 Gevurtz, supra note *, at 706.


133 651 A.2d 1361. (Del. 1995).
the company’s certificate of incorporation would enhance the ability of Unitrin’s management to frustrate the bidder from electing its own directors in a proxy contest.

When shareholders sued to challenge the stock repurchase, Chancery first found that no Revlon event had occurred. The poison pill was therefore a proper reaction to a perceived inadequate hostile bid. The lower court however enjoined the stock repurchase plan because it might deter the bidder from waging a proxy fight to elect its own directors to defuse the pill.

But the Delaware Supreme Court was not so sure of that. The share repurchases were not inherently coercive, it said. In conjunction with the other defenses they therefore might not be so draconian that they would preclude the bidder’s efforts. The High Court thus remanded the matter to Chancery to determine whether the defensive measures were reasonable under the Unocal standard.134

B. “Dead Hands” and “No Hands”

One traditionally acceptable but weak measure to forestall hostile takeovers is to classify or stagger the terms of the target’s directors.135 Since only one-third of a board will then be up for election each year, it will take a bidder with a majority of the shares

134 Delaware had earlier allowed a target to sell shares to a management friendly ESOP when it would thwart a sale to a bidder for an unfairly low price. Shamrock Holdings, Inc. v. Polaroid Corp. 559 A.2d 257 (Del. Ch. 1989).

135 Del. Corp. Code §141(d), accord MBCA §8.06.
two years to gain control of the company. That tactic can thus delay but not ultimately prevent the acquirer’s success.\footnote{136}

After \textit{Unitrin} directors of potential target companies devised a stronger way to entrench directors. These were the so-called "dead hand" and "no hand" provisions that would prohibit or greatly delay newly installed boards from neutralizing poison pills. Proxy contests then to replace boards, even if successful, would be futile because pills would still be there to make any unfriendly acquisition prohibitively expensive. Two Delaware cases in 1998, however, struck down both versions of that strategy.

In \textit{Carmody v. Toll Brothers, Inc.}\footnote{137} shareholders challenged a "Continuing Director" provision in a pill-like rights plan that stipulated it could be removed only by the incumbent board. A bidder who won a proxy contest would thus find its own directors powerless to redeem the rights. The Chancery therefore held that "dead hand" provision invalid as a preclusive measure that disenfranchised the firm's shareholders.\footnote{138}

\textit{Quickturn Design System, Inc. v. Shapiro} featured a like defensive strategy that was not quite so radical.\footnote{139} There the target's board adopted two features to deter a hostile takeover. It amended the firm's by-laws to provide that any special shareholder meeting

\begin{itemize}
\item The incumbent directors may also feel psychological pressure to resign rather than oppose the new majority shareholder, thus limiting that defense. Gevurtz, supra note *, at 705.
\item Of late, the number of shareholder proposals to eliminate these classified boards and have all directors stand for election annually has shot up significantly. Ben Protess and Katherine Reynolds Lewis, \textit{Changing Face of Investor Activism}, N.Y. Times June 8, 2012 at B1.
\item Earlier Delaware cases had taken a hard line against strategies that disenfranchised shareholders, Stroud v. Grace, 606 A.2d 75 (1992) and Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 652 (Del. Ch. 1988).
\item 721 A.2d 1281 (Del. 1998).
\end{itemize}
could only take place 90 days after it had been requested. Any unwelcome bidder who
won a proxy contest would therefore have to wait three months before it could elect new
directors.

The board also originally had a "dead-hand" pill removal feature like Carmody’s. It replaced it however with a possibly more acceptable delayed redemption provision. That required newly elected directors to wait at least six months before they could bring about any transaction like a merger with an entity that had elected them.

The Chancery Court upheld the 90 day waiting period. The Delaware Supreme Court however focused on the "no-hand" delayed redemption feature and found it invalid. Section 141(a) of the Delaware Corporate Code provides that a board has the ultimate responsibility to manage a corporation unless there are limits to its authority set out in the firm’s certificate of incorporation.

No such restrictions existed here and the “no-hand” feature made it impossible for the newly elected directors to remove the pill for six months. They therefore could not exercise their judgment to defuse that defensive measure and allow a tender offer to proceed. The "no-hand" provision was thus just as impermissible as a "dead-hand" one.140

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140 Three years later a North Carolina Court stated its exasperation on these issues. It found Delaware’s various standards for defensive tactics confusing and called for a “refocus on the relationship between shareholders rights and directors duties to make informed decisions.” It found support for that more straightforward position in an article by then Delaware Vice-Chancellor (now Chancellor) Leo J. Strine, Contractual Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements, 56 Bus. Law. 919 (May, 2001).

The case itself involved what the Court called a “numb hand” provision in a merger contract that extended it five months beyond a shareholder vote disapproving the deal. The Court struck it down because it violated the duties of the target company’s directors and the rights of its shareholders. First Union Corp. v. Sun Trust Banks, Inc. 2001 WL 1885686 (N.C. Bus. Ct. Aug. 10, 2001).
C. Disclosure and Due Care

A significant case at the end of that era established that directors can also violate their fiduciary duties by misrepresenting material facts to shareholders to gain their approval for a merger. That can result in courts scrutinizing the “entire fairness” of the transaction, losing directors the presumptions of the business judgment rule and subjecting them to monetary damages. The case, Emerald Partners v. Berlin,\textsuperscript{141} involved a merger between May Petroleum Company (May) and 13 corporations owned by Craig Hall. At that time Hall owned over half the stock of May as well.

The proxy statements sent to shareholders soliciting their approval contained misstatements about the thoroughness of the merger process and Hall’s holdings in some of the companies. The transaction was also allegedly unfair to the minority shareholders of May because the price paid for Hall’s companies was too high. The Chancery Court dismissed the case against all of May’s directors except Hall because it found at most they had only breached their duty of care and could not be liable under §102(b)(7).\textsuperscript{142}

\textsuperscript{141} 726 A.2d 1215 (Del. 1999).

Partial disclosure can also be misleading. Arnold v. Society for Saving Bancorp, Inc. 650 A2d 1270, 1280 (Del. 1994).

A recent study has shown that there is litigation in almost every acquisition of U.S. public companies valued over $100 million. These typically allege disclosure violations and many claim that the target’s board did not conduct a sales process to maximize shareholder value. The Harvard Law School Forum on Corporate Governance and Financial Regulation, Developments in M&A Shareholder Litigation, Cornerstone Research, Mar. 4, 2012.

\textsuperscript{142} See supra notes ** and accompanying text.
But dismissal was premature, said the Supreme Court. Given the substantial disclosure violations, the entire fairness of the transaction had not been shown. Lacking that, the defendant directors had the burden to show that they had only violated their duties of care and not their duties of loyalty or good faith. When on remand the Chancery Court still failed to make that finding, the Supreme Court again sent the case back down holding that “exculpation of the defendants could only be done in the context of a completed judicial analysis that resulted in a finding of unfairness.”143

D. Locks Up and Go Shops in the 2000s

In several more merger cases during the last decade, the Delaware Supreme Court continued to define the duties of directors to seek the best value for their shareholders.144 One, Omnicare, Inc. v. NCS Healthcare, Inc.,145 began with an offer by Omnicare for NCS, a struggling company. NCS’s board turned it aside and found better merger terms from Genesis. NCS’s directors then agreed to submit that bid to their shareholders regardless of whether a higher one came along. Two large shareholder-directors of NCS

143 787 A.2d 85, 98 (Del. 2001).

144 For a fine article exploring the nuances of that issue, see Christina M. Sautter, Shopping During Extended Store Hours: From No Shops to Go Shops, 73 Brooklyn L. Rev. 525 (2008). For a good discussion of how boards can best satisfy that duty see Guhan Subramanian, Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications, 63 Bus. Law 729 (2008).

145 818 A. 2d 914 (Del. 2003).
who owned a majority of the stock in the company also committed to vote their shares for the deal.

Even when Omnicare came back with a better bid, NCS’s shareholders thus had no choice but to accept the Genesis merger. Without a “fiduciary out”\textsuperscript{146} that would have allowed Omnicare’s directors to abrogate the deal if they found a better one for their shareholders, the merger was a \textit{fait accompli},\textsuperscript{147} both preclusive and coercive. The Court said that Omnicare’s board had therefore acted like the Paramount directors in QVC who breached their duty with the “no-shop” provision with Viacom. Both boards had improperly prevented their shareholders from getting a superior bid.\textsuperscript{148} Two justices dissented.\textsuperscript{149}

\textit{In re Topps Company Shareholder Litigation}\textsuperscript{150} was also a situation where the Court found that a target’s management engaged in a number of improper activities to favor one bidder over another. Among them, the directors solicited proxies for a merger with the favored suitor without making full disclosure of an arrangement that would have allowed them to remain in control of the company. They also appeared to be manipulating the financial analysis in those documents to make the deal they were recommending look more attractive.

\textsuperscript{146} Omnicare, Inc. v. NCS Healthcare, Inc., 818 A. 2d at 936.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} at 931, 937.

\textsuperscript{149} \textit{Id.} at 939.

\textsuperscript{150} 926 A.2d 58 (Del. Ch. 2007).
In addition, in exchange for furnishing a potential acquirer some confidential information, the target’s management had secured a so-called standstill agreement from that bidder that it would hold off making its offer. By refusing to waive that provision, however, the Court found that the target’s management had breached its fiduciary duty to permit its shareholders to entertain a better proposal and to receive useful information that was critical of the deal favored by the board.

In the last year of the decade, in a case called Lyondell Chemical Company v. Ryan, the Delaware Supreme Court once again came back to the Revlon and Van Gorkom issues. Upon careful analysis and with supportive outside opinions the board there accepted an attractive merger offer that was ratified by an overwhelming percentage of shareholders. A dissident claimed however that unless the board could show it had “impeccable knowledge of the market” it violated its Revlon duties and acted in bad faith by not seek competing bids.

The High Court however held that Revlon only required that directors use reasonable judgment to secure the best price for the company. And the evidence in this case indicated that they did. They were aware of the value of their company, received an expert opinion that the bidder had offered a “blowout” price, and even placed a “fiduciary out” in the merger agreement in case a better offer came along. There was thus no “bad faith” or “breach of loyalty” in their action that would be unprotected from liability by the company’s §102(b)(7) exculpatory clause.

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151 970 A.2d 235 (Del. 2009).
152 Id. at 243.
153 Id. at 244.
V. Mergers After the Meltdown

A. More on Boards’ Duties to Maximize Value

As confidence began returning to the M&A market a few years after the financial collapse of 2008 Delaware decisions appeared that added new twists to that state’s law of fiduciary duty. In two significant ones, the Court reached different results based on the disparate relationship the targets’ boards had with their shareholders.

In re OPENLANE, Inc. S’holder Litig. involved a board that actively managed its company and knew it well. In addition, 68% of the firm’s stock was held by its officers and directors. As a result of a lengthy search for potential acquirers, the company chose to merge with KAR because it offered shareholders the best value. The situation however almost seemed like a reprise of Omnicare because the merger agreement contained no “fiduciary out” and did not allow OPENLANE to solicit other bids.

Unlike that earlier case, however, the Court did not find this arrangement preclusive or coercive. Since OPENLANE’s board could terminate the agreement if shareholder approval was not received in 24 hours, the Court held that the deal was not a fait accompli. The active pre-merger market test also led the Court to find that the arrangement was well-considered. That conclusion was additionally strengthened because the deal was approved by a knowledgeable board whose holdings gave it a personal interest in maximizing shareholder value. The Court therefore refused to

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block the merger which would have denied the shareholders the ability to profit by the transaction.

In re Southern Peru Copper Corporation S’holder Derivative Litig.\textsuperscript{156} concerned an acquisition where the controlling shareholder’s interests were not so well aligned with those of the other stockholders. The questioned transaction involved Southern Peru’s agreement to purchase another mining company, Minerva, from Southern Peru’s majority owner, Grupo Mexico.

The deal had been proposed by Grupo and the sale price was to be paid in Southern Peru shares. Because of that obvious conflict, Southern Peru formed a special committee to consider the offer. It was comprised of 4 directors who were independent from Grupo and disinterested in the transaction. But a financial advisor retained by the Special Committee to evaluate the offer raised a significant concern. It found that under the terms proposed by Grupo it would get Southern Peru stock worth substantially more than Minerva. Before the deal closed Southern Peru’s stock rose even higher making that price imbalance even more lopsided in Grupo’s favor.

Despite those facts, the special committee and Southern Peru’s shareholders approved of the Minerva purchase. When dissident stockholders sued, Grupo’s conflict was obvious and the parties agreed the acquisition had to be tested by the “entire fairness” standard. The Court however placed the burden to prove that on the defendants since the special committee despite its independence was not “well-functioning.” It had

\textsuperscript{156} 30 A.3d 60 (Del. Ch. 2011) \textit{revised and superseded by} 2011 WL 6440761 (Del. Ch. Dec. 20, 2011).
no authority to negotiate with Grupo or to investigate alternatives to its proposal to sell Minerva to Southern Peru.

In addition, one of the special committee members was potentially compromised. He was employed by a 14% stockholder of Southern Peru that needed Grupo’s consent to register its Southern Peru shares for public sale. The Court also found that the shareholder vote was not informed because the proxy materials failed to disclose questions about Minerva’s value. With all that in the mix, the Court could not be convinced that the transaction was entirely fair to the shareholders of Southern Peru. It ordered Gupo to pay Southern Peru over $1.3 billion in damages—the difference between the market value of the shares Southern Peru gave for Minerva and the true worth of that company.157

B. Another Look at the Pill

During the post-meltdown recovery, Delaware also had occasion to revisit the poison pill, more than a quarter century after it first condoned that most formidable and durable of defensive tactics.158 The opinion in Air Products and Chemicals, Inc. v. Airgas, Inc.159 was written by a long-time veteran of Delaware corporate litigation Chancellor William Chandler shortly before he left the bench.


158 See supra notes ** and accompanying text.

159 16 A.3d 48 (Del. Ch. 2011).
He saw the case as posing the ultimate issue of corporate governance—“the allocation of power between shareholders and directors.”160  “When, if ever, will a board’s duty to its corporation and shareholders require it to abandon concern for long-term values (and other constituencies) and enter a current shareholder maximizing mode?”

The Chancellor’s answer was that directors might have to do that at some point, but not under the facts of the case before him, however compelling. Air Products had made a public tender for all of Airgas’s stock, ultimately raising its bid to $70 per share. With the support of several outside opinions by financial experts, Airgas’s board held fast, maintaining that its stock was worth at least $78. When it refused to remove its pill, Air Products waged a proxy fight and was able to secure three seats on Airgas’s staggered board.161  But then surprisingly even those directors agreed with the remaining board members that Air Products’s offer was inadequate.

The tender offer battle had gone on for over a year, longer than any litigated poison pill in Delaware history, and Airgas’s shareholders were fully told about its directors’ opinion on the inadequacy of Air Product’s bid. That led Chancellor Chandler to express his personal view that the rights plan had served its purpose.  Airgas’s directors however were well-informed and acting in good faith to prevent their

160  Id. at 54.

For another important recent opinion by Chancellor Chandler, see supra note * and accompanying text.

161  The Chancellor used that as evidence that it was not impossible for Air Products to run a successful proxy contest, take over the company, and redeem the pill. The Delaware Supreme Court had recently found that an important factor in upholding a pill, Selectica, Inc. v. Versata Enterprises, Inc., 5 A3d. 586 (Del. 2010).
shareholders from tendering into an inadequate offer. Under prevailing precedent the Chancellor therefore felt constrained to hold that Airgas’s directors were still entitled to maintain the pill.

C. Putting the Focus on Investment Banks

Large financial institutions typically act as advisors to both purchasers and sellers in M&A transactions. Traditionally their duties are defined by contract. One earlier case\textsuperscript{162} however where the bank also acted as a financier of the deal held that they may have fiduciary duties in those situations as well.\textsuperscript{163} Two recent decisions involving major Wall Street firms present a window on some of their continuing, unseemly practices in these large corporate dealings.

The first, in re Del Monte Foods Company S’holder Litig.,\textsuperscript{164} involved the $5.3 billion leveraged buyout of Del Monte by a group of private equity firms led by Kohlberg, Kravis, and Roberts (KKR). From this sale the shareholders of Del Monte would get $19 per share in cash, substantially more than the trading value of the

\textsuperscript{162} In re Daisy Sys. Corp., 97 F.3d 1171 (9th Cir. 1996).


Additionally, in Weinberger v. UOP, supra note *, there were allegations that an investment banker rendering a fairness opinion in a take-out merger breached its fiduciary duties to the minority shareholders. See Carol B. Haight, \textit{Note: The Standard of Care Required of an Investment Banker to Minority Shareholders in a Cash-Out Merger}: Weinberger v. U.O.P., 8 Del. J. Corp. L. 98 (1983).

In the wake of the financial meltdown, Goldman Sachs paid a record fine for engaging in conflicted transactions in the derivative market. \textit{Goldman Sachs to Pay Record $550 million to Settle SEC Charges Related to Subprime CDO}, SEC Release No. 2010-123 (July 15, 2010).

\textsuperscript{164} 25 A. 2d 813 (Del. Ch. 2011).
company’s stock. Some stockholders however sought a preliminary injunction to stop the deal alleging that Del Monte’s directors had failed to provide proper oversight of the company’s financial advisor, Barclays. The shareholders claimed that because of Barclay’s double-dealing they had been prevented from getting the best price for their stock.

Barclays had been a long-time advisor to Del Monte. When it was for sale, Barclay’s met with KKR and another private equity firm to get them to make bids for the company. When the other firm made the first bid Del Monte hired Barclays to advise it. Barclays however did not tell Del Monte that it would profit from that purchase by providing financing to the buyer.

Barclays did represent to Del Monte that it was encouraging other bids for the company (one of which was by KKR) and that it would secure price competition in the process by not allowing buyers to team up in their offers. At first, Del Monte’s board rejected all the offers that came from those solicitations. But then several months later, Barclays again worked with KKR and another firm that had originally outbid it for Del Monte to produce a team bid for the company.

Barclays and KKR then approached Del Monte with the new offer, keeping their “team bid” a secret. When Del Monte then hired Barclays as its financial advisor with the goal of getting the highest bid from KKR, Del Monte came back with what the court called “two unsavory requests.” Barclays for the first time asked Del Monte to allow KKR’s team bid with a firm that might offer more for Del Monte on its own. Then

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165 In re Del Monte Foods Co. S’holder Litig., 25 A.3d at 813.
Barclays also asked if it could provide some of the financing for KKR even though Del Monte and KKR had not yet agreed on a price and Barclays was supposed to be getting the best price for Del Monte.

Because of Barclays’s dual role, Del Monte had to pay another advisor $3 million for a fairness opinion on KKR’s offer. Then when Del Monte provisionally accepted KKR’s bid, it engaged Barclays in another conflicted role by having it solicit competing offers for 45 days. Not surprisingly, since Barclays would benefit by the KKR deal, no other bids were forthcoming.

The Court found that Barclays, aided by KKR, “secretly and selfishly” manipulated this sales process. It did not disclose its efforts to put Del Monte in play in a way that would allow the bank to profit twice, both as the company’s advisor and as KKR’s financier. It compounded its disloyalty by engineering KKR’s team offer that may have prevented Del Monte’s shareholders from getting more than they did by that collusive bidding.

Since the company’s directors had a duty to maximize the value of Del Monte for its shareholders, they should have better supervised this process so that Barclays could not engage in its double dealing. Even though the Court found that the directors were less culpable than Barclays because Barclays had misled them, they had still breached their fiduciary duties to the shareholders.

Given Delaware’s 102(b)(7) provision allowing directors to be exonerated from liability for mere breaches of their duty of care, the Vice-Chancellor was unsure if the board could be held liable for monetary damages. He did however enjoin the sale of Del
Monte for twenty days to see if any additional bidders would emerge who would top KKR’s offer. None did and the merger took place. But despite the Vice-Chancellor’s comments about the unlikelihood of monetary relief, Barclays and Del Monte settled with the shareholders by paying $67 million in damages after legal fees of over $20 million.\(^{166}\)

The second case, In re El Paso Corp. S’holder Litig.,\(^{167}\) also involved perfidious conduct by an investment bank, Goldman Sachs, that had been a long-time advisor of the target company. When Kinder Morgan offered El Paso shareholders a package of stock and cash that was a substantial premium over the market price of their shares, El Paso sought advice from Goldman. El Paso knew that Goldman owned 19% of Kinder’s stock and had two seats on its board. The leading Goldman banker advising El Paso however did not disclose to his client that he personally owned $340,000 of Kinder stock.

After a deal was negotiated and renegotiated between El Paso and Kinder, Goldman advised El Paso to take it. El Paso’s board did, instead of pursuing an earlier strategy of selling off one of its two divisions that did exploration. Foshee, El Paso’s CEO, negotiated the deal with Kinder but he did not tell El Paso’s board that he wanted to lead a group to buy the company’s exploration business from Kinder after the merger closed. Of course that raised all kinds of questions about whether Foshee was negotiating the best deal for El Paso’s shareholders or was just taking a lesser amount from Kinder so that it would sell him the exploration business for a favorable price.

\(^{166}\) Michael J. De La Merced, Del Monte and Barclays Settle Investor Lawsuit for $89.4 Million, N.Y. Times, Oct. 6, 2011.

Goldman was also compromised in its advice to El Paso by its own large stake in Kinder and the shares held by its lead partner. The bank may have thus been willing to recommend a deal where Kinder paid a suboptimum price for El Paso. That taint was hardly removed when Goldman brought in Morgan Stanley as a supposedly neutral advisor because Morgan Stanley only got paid its $35 million fee if the total Kinder deal got approved.

In his review of the case, Chancellor Strine forcefully expressed his disapproval of the conduct of both Goldman and Forshe saying “The kind of troubling behavior exemplified here can result in substantial wealth shifts to insiders that are hard for the litigation system to police if stockholders continue to display a reluctance to ever turn down a premium-generating deal when that is presented.”

Yet unlike Del Monte, the Chancellor in El Paso refused to enjoin a shareholder vote on the sale. He strangely did not even discuss the Del Monte decision which had occurred just a year earlier. Instead he commented that equitable remedies like injunctions might not offer much real protection to shareholders in situations like the El Paso merger. In fact he stated his belief that they might actually make it harder for them to sell their stock at a premium if they eventually frustrated a buyout.

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168 Id. at 30.
VI. Delaware’s M&A Fiduciary Jurisprudence

A. Accountability for Corrupt Activities

"The rules in Equity vary with the length of the Chancellor's foot,"\(^{169}\) goes the hoary legal maxim. From an historic perspective Delaware’s apparent inconsistency on fiduciary duties may bear that out. The small state along the Atlantic seaboard was once thought to be a haven for derelict corporate officials--letting them neglect their shareholders’ interests with impunity.\(^ {170}\)

Then along came *Guth*\(^ {171}\) and *Sinclair*\(^ {172}\) establishing baseline obligations that insiders not steal business from their corporations and treat their minority shareholders with a modicum of fairness. *Van Gorkom*,\(^ {173}\) although modified by statute,\(^ {174}\) issued a like wake-up call to directors that they must make informed, deliberate decisions on important corporate matters. Yet Delaware’s rulings on the fiduciary duties of directors do not exhibit much of a thematic unity. They might best be characterized as episodic, ad hoc responses to flagrant corporate misconduct.

\(^ {169}\) Table Talk of John Seldon, 43 (1927).

\(^ {170}\) See supra notes ** and accompanying text.

\(^ {171}\) See supra notes ** and accompanying text.

\(^ {172}\) See supra notes ** and accompanying text.

\(^ {173}\) See supra notes ** and accompanying text.

\(^ {174}\) See supra notes ** and accompanying text.
When it comes to mergers and acquisitions, whether friendly or hostile, the Delaware Courts have shown a propensity to step back and let boards make those decisions. This tolerance exists so long as management is not ultimately disenfranchising its shareholders or blocking them from profiting when their firm is up for sale. Yet if insiders and their allies engage in self-dealing, enriching themselves unfairly at the expense of their shareholders and other corporate stakeholders, the Delaware Courts have progressively shown a willingness to intervene.

That trend appears to be gaining momentum. As two observers put it recently, “The year 2011’s most important corporate law decisions…included significant victories in Delaware for investors asserting fiduciary duty claims.” Following on that, the tongue lashing that Chancellor Strine gave the El Paso insiders in early 2012 was a fitting rebuke for their deceitful conduct.

“I’m glad somebody is cracking down on this corruption,” may seem like an appropriate response. With Madoff-like scams going undetected for decades and the government’s weak prosecution of crimes from the financial meltdown, it seems like the Delaware Chancery is at least one place when corporate malefactors will have their day of reckoning. Such an effective tribunal is needed now more than ever. As shown

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175 See supra notes ** and accompanying text.
176 See supra notes ** and accompanying text.
177 See Paul D. Brown, supra note *.
178 For the author’s take on these substantial short-coming in white collar criminal prosecution see Daniel J. Morrissey, After the Meltdown, 45 U. of Tulsa L. Rev. 393, 398-405 (2010).
by Greg Smith’s high profile protest against the greed and malfeasance in the financial community, it appears deceitful conduct on Wall Street is now worse than ever.\textsuperscript{179}

So, of late, the Chancery Courts in Delaware, spurred on by investor advocates, have been doing something to keep the conscience of corporate America. Yet one could certainly wish for more. They have made too sparing use of that “strong arm of Equity,”\textsuperscript{180} the injunction. As Chancellor Strine lamented in \textit{El Paso}, much of the wrongful activity in M&As may never be stopped because shareholders are reluctant to turn down deals, no matter how flawed, that give them a premium over the market price of their stock.

But the Chancellor and his colleagues are themselves too indulgent of such wrongdoing by not permanently enjoining those corrupt transactions for fear of depriving shareholders of some temporary gain. To extend President Theodore Roosevelt’s

\textsuperscript{179} The recent $2 billion loss by J.P. Morgan in its derivative trading raised new concerns about improvident and highly speculative practices on Wall Street. It also may have violated various regulations requiring banks to hold sufficient reserve capital. Mark Scott, \textit{Regulators Looking Into JP Morgan Trading Activities before $2 Billion Loss}. N.Y. Times May 11, 2012.

J.P. Morgan’s chairman Jamie Dimon has admitted that his firm was “sloppy” and “stupid” in making those trades. Yet J.P. Morgan has spent $20 million over the last three years on lobbying and campaign contributions urging less government regulation. Dana Milbank, \textit{Banks Pay, Regulations Suffer}, Spokesman-Review, May 24, 2012 at A13.


\textsuperscript{180} Bonaparte v. Camden & A.R. Co, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830 (No. 1,617); see also James L. High, \textit{Treatise on the Law of Injunctions} 36 (4\textsuperscript{th} ed. 1905).
shareholders are not innocent if by their greedy desire for short term profits they are passive accomplices to corrupt activity.

Damage suits may provide shareholders some remedy, but that monetary relief rarely comes from the personal pockets of culpable corporate officials. Instead it is usually paid from insurance purchased with shareholder money to protect them from personal liability. Since “Equity delights to do justice and not by halves” the Delaware Courts must therefore give a fully effective remedy for this deceitful conduct.

To stop such corrupt activity dead in its tracks the Courts should permanently enjoin any transactions brought about by secret double-dealing. They would then be true to the historic origins of fiduciary jurisprudence as it sprang from the law of trusts. There the “No Further Inquiry” doctrine makes all transactions where trustees have breached those duties voidable regardless of whether the results are fair to their beneficiaries. It also levies meaningful sanctions against trustee self-dealing that

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183 Story, Eq.Pl. § 72.

184 Unif. Trust Code § 802(b)
include rescission, disgorgement of gain and consequential damages. All those are available as ancillary remedies in injunctive actions.

If the Delaware Courts, through their piecemeal approach, cannot adequately police questionable M&A activity, sterner tribunals can be created. Two decades ago, at the end of the 80s wave of mergers this author, among others, called for such reforms. To combat some of the harmful financial excesses that surfaced during that era and continue to this day, a national authority such as the SEC could be empowered to pre-clear all M&A activity.

To that end the Williams Act could be amended to add this additional provision. “It shall be unlawful for any person to purchase any shares in a tender offer unless the Securities and Exchange Commission finds that they are fair to the selling shareholders and in the public interest.” To make such adjudication fully-informed all bidders for public companies would have to file a “public impact statement” in advance detailing the social and economic consequences of their acquisitions.

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186 As one commentator put it, “Traditionally courts of equity have had the power to shape full relief, taking into account the interests of the parties affected and the goals to be pursued, once their jurisdiction is properly involved.” James R. Farrand, Ancillary Remedies in SEC Civil Enforcement Suits, 89 Harv. L. Rev. 1779, 1781 (1976) citing 1 J. Pomeroy, Equity Jurisprudence §§ 114-15, 181, 231, 236(a), 239(a) (5th ed. 1941).

B. Revlon and the Business Judgment Rule

Air Products is the most recent evidence that Delaware will continue to afford target management substantial latitude in opposing hostile takeovers. Unocal does hold, however, that boards are not given carte blanche authority there. Their actions must be reasonable and proportionate to the threat. Yet the business judgment rule is available to give a board considerable support in resisting a bid that can be deemed inadequate.

On the other hand, “dead hand” or “no hand” provisions that prohibit the removal of pill-like defenses will not be permitted.\(^{188}\) Target directors will also not be allowed to make sweetheart deals with certain suitors that will allow them to remain in power at the expense of their shareholders\(^ {189}\) or to prematurely lock up transactions with favored bidders.\(^{190}\)

Most significantly Revlon comes into play when a company is effectively put up for sale. Management, in Justice Moore's intriguing phrase, cannot then keep defending “the corporate bastion.” Surrender is warranted, one that will maximize value for the firm's entrepreneurial risk takers, the shareholders.

The Revlon decision is puzzling, however, in several ways. First, when do its duties kick in? In other words, what constitutes a Revlon event? Change of control is the touchstone there—according to QVC. Revlon came into play there, the Court said, because the new acquirer would have a dominant shareholder. In Paramount v. Time,

\(^{188}\) See supra notes ** and accompanying text.

\(^{189}\) See supra notes ** and accompanying text.

\(^{190}\) See supra notes ** and accompanying text.
however, there was no *Revlon* event because after the merger control would remain fluid in publicly-held shares. Was that a significant difference? Perhaps Warner’s respect for Time’s journalistic integrity was the factor that influenced the Court *sub rosa* to allow Time’s board to favor it over Paramount.

Second, *Revlon’s* duty is to secure the best price for shareholders once a company is on the auction block. If part of the compensation, however, is to be paid in securities whose value is dependent on the future success of the new entity, as it was in *QVC*, doesn’t the board still have a role to play? Shouldn’t it be able to block a deal that it honestly believes will not return the best value for its shareholders?¹⁹¹

Third, what is this heightened scrutiny that *Revlon* seems to demand that goes beyond routine deference to the board’s business judgment? In *Lyondell*, the bidder came to the company with a very good offer that, with appropriate advice, it accepted. Yet a disgruntled shareholder claimed that the board should have sought competing bids unless it had perfect knowledge that it was receiving top dollar for the firm. The Delaware Supreme Court rejected that approach. With those facts, at least, the Court found no bad faith and was fine acceding to the board’s business judgment.

C. Fiduciaries for Whom?

¹⁹¹ For a good analysis here, see Gevirtz, *supra* note 4, at 716.

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Two decades ago Chancellor Allen identified the issue of “purpose” as the fundamental question of corporate law. To answer it, he said, required much more than reference to a static set of legal rules. Corporate law, rather, comes from the shared insights of our common legal culture that we continually recreate through interpretation.¹⁹²

Conventional corporate wisdom once held that directors must run their corporations primarily to make profit for their shareholders. In the hostile takeover era, that outlook re-emerged as an attractive antidote to charges that management constituted an entrenched class, more concerned about protecting its own privileged positions than putting their firms’ resources to their most profitable uses.¹⁹³ That still exercises a powerful, if not predominant, influence in our system of free enterprise where private capital funds businesses on the hope of getting the best possible returns.

However broader views also have popular support. Communal and team approaches see board duties in a larger context. As two scholars put it, directors are

…a mediating hierarchy overseeing team production…[T]he “firm” can be understood as a nexus of firm-specific assets that have been invested by a variety of groups, including most obviously shareholders, bondholders, managers, and employees. The board of directors acts as a fiduciary for the firm meaning that it seeks to maximize the total value of these combined economic interests.¹⁹⁴

¹⁹² William Allen, supra note * and accompanying text.
¹⁹³ See generally supra notes ** and accompanying text.
For the last several decades, that outlook has been finding guarded support in important opinions and comments by leading Delaware jurists. First were the anti-takeover decisions of the 80s, most famously *Unocal* and *Moran*, where the Court under Justice Moore’s leadership upheld defenses against tender offer onsloughts by highly-leveraged bidders such as T. Boone Pickens.

Next came the important remark by Chancellor Allen in *Paramount*, embraced by the Delaware Supreme Court, that directors are not required to manage their firms to maximize short-term profit. Among other things, there may have been Time’s claim that Warner would be more respectful of its journalistic integrity—indicating that companies have responsibilities to society beyond making the most money in the quickest amount of time.

Most recently we have the comments by two of Chancellor Allen’s successors, William Chandler and Leo Strine, who have also acknowledged those broader corporate duties. Chancellor Strine, along with his co-authors in their Georgetown piece, indicated that the duty of loyalty has broad communal implications because the moral corporation is a necessary ingredient in civil society. In *Air Products*, we also have Chancellor Chandler’s parenthetical nod to the duties of directors to "constituents" as well.

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195 *Paramount Communications v. Time*, 571 A.2d at 1150.

196 *See supra note * and accompanying text.

197 The Delaware Chancery has been called the “center of the corporate universe,” and the Chancellor there has been compared to the Chief Justice of the United States. D. Gordon Smith *Chancellor Allen and the Fundamental Question*, 21 Seattle U. L. Rev. 576, 577 (1998) *also quoting* Professor Lynn Stout.

as shareholders.\textsuperscript{199} A further step to achieve that goal would be a governmental review as discussed above of all M&A activity in public companies.\textsuperscript{200}

VII. Conclusion

The Delaware Courts thus reflect the mixed feelings most Americans have about our economic system.\textsuperscript{201} They understand that the basic capitalist rules of our society

\textsuperscript{199} Air Products v. Airgas, 16 A.3d at 54. \textit{But see} North American Catholic Educational Programming Foundation Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) where the Delaware Supreme Court ruled that directors owe their fiduciary duties to shareholders only, not creditors, when a corporation is in the “zone of insolvency.”

Although neither one is part of its Corporate Code, two types of laws passed by other states may have influenced Delaware’s judicial decisions, anti-takeover and constituent statutes. In the first, states regulate takeovers for their corporations by a number of means. A popular one, the \textit{control share} statute, prohibits a bidder not approved by the target board from voting its newly-acquired shares without a favorable vote of the remaining shareholders. The U.S. Supreme Court found that constitutional in \textit{CTS v. Dynamics Corp}, 481 U.S. 69 (1987).

In the second, directors are empowered to consider the effects of their actions on a number of stakeholders in the firm such as employees, suppliers, customers, and communities where the businesses are located. Typical is Section 5/8.85 of the Illinois Business Corp. Act, Illinois-Smith-Hurd Ann. 805 ILCS 5/8.85.

Just in the last couple of years some states have enacted legislation allowing the incorporation of so-called “Benefit” corporations. In addition to making profit they explicitly acknowledge that they have other purposes as well such as making a positive impact on society and the environment. \textit{See generally} Rakhi I. Patel, \textit{Facilitating Stakeholder-Interest Maximization: Accommodating Beneficial Corporations in the Model Business Corporation Act}, 23 St. Thomas L. Rev. 135 (2010); Dana Brakman Reiser, \textit{Benefit Corporations—A Sustainable Form of Organization}, 46 Wake Forest L. Rev. 591 (2011).

\textsuperscript{200} \textit{See supra} note * and accompanying text.
have generally served us well. When businesses are operated for profit they are the most productive and furnish the goods and services that assure our material well-being. Yet noted social philosophers like Michael Sandal point out what moral thinkers have long maintained; maximum material prosperity is not an absolute value—particularly if it is not evenly shared. Short-termism in business, like in the rest of human relationships, can have devastating costs. In a civilized society, the "creative destruction" of capitalism and its “animal spirits” must be tempered.

Delaware’s language about fiduciary duties displays the best in the Equitable tradition—a balancing of concerns, a moral dimension, and a fact-sensitive decision making process. Yet their decisions often come up short with murky distinctions, lacking the real bite of permanent injunctions or heavy monetary damages. If Delaware courts are going to hold the trust of the American community in regulating corporate

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201 As one leading academic has put it, “The modern American business corporation has been a subject of wonder and horror for much of the past century.” Lawrence E. Mitchell, Corporate Irresponsibility 1 (2001).

202 Even Professor Bakan calls the corporation “a remarkably efficient wealth-creating machine.” Bakan, supra note *.

203 See supra note * and accompanying text.

204 Lynn Stout, supra note * and accompanying text.

205 Because of Equity’s need for discretion in administering its particular brand of justice, the chancellor never considered himself bound by precedent like common law judges. F. W. Maitland, Equity: A Course of Lectures (2ed. 1949) at 8.

206 Since early chancellors had to be members of the medieval literary class, they were most often clergymen. Such persons might be deemed best able to advise the king about matters of conscience. Owen Fiss & Doug Rendelman, Injunctions 61 (2 ed. 1984).

207 Equity always offered flexible remedies particularized to the situation of the actual parties before them. See generally, Peter Charles Hoffer, The Law's Conscience 8 (1990).
conduct they still have work to do. If they cannot assume that responsibility, other measures as outlined in this Article will be necessary.