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1. DGCL §262.
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**CLASS 1 ACQUISITION TECHNIQUES**

Share purchase, asset purchase and merger.

* Involve negotiations between BoDs and often require supermajority because of “*fundamental corporate change*”
* In merger, only A corporation survives (normally A, but can be T)
* If A survives, there will be a merger agreement
  1. Negotiated agreement, not hostile, both BoDs have to agree (**DGCL § 251(b)**), includes SH consideration
* T SHs always get right to vote
* Big difference is that the merger is government thing, so all of T is merged legally into A
* **DGCL § 251(c)**: Both SHs have to vote; exceptions
  1. **251(f)**: If you meet 3 things, no A SH vote (intuition is small scale so SHs don’t want to vote)
     + 1) Doesn’t amend certificate of incorporation
     + 2) A stock identical post transaction
     + 3) Less than 20% of stock used
  2. **253**: If parent owns more than 90% of subsidiary and wants to merge, minority SHs only have appraisal rights .Used Post-TO

**-** **DGCL § 251(h)**: Permits short form merger when the parent controls a majority of the stock under certain circumstances

**Asset Purchase**

* ***Gimbel v. The Signal Companies*** (1973 Del Ch.)
  1. Held: If sale is of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation, then it is beyond the power of the BoD. Quantitatively and qualitatively ‘all or substantially all’ of Signal’s assets were not sold to Burma and only part of Signal’s assets namely Signal Oil was sold.
* ***Katz v. Bregman*** (1981 Del Ch.)
  1. Held: Shift from producing metal drums to selling Quebec division and building plastic drums “represents a radical departure from Plant’s historic operations”
     + Quebec is also more than 51% of assets and 45% of net sales – substantially all. Sale of ‘all or substantially all’ assets must have shareholder vote. Sale must not be an ‘unusual transaction but must be made in the regular course of business of the seller’
* ***Hollinger Inc. v. Hollinger International*** (Del Ch. 2004)
  1. No SH vote is required where the sale involves a business that was one of two approximately equal in size, accompanied by other assets remaining in the business that were no more than 10% of total assets
  2. Says that ***Gimbel*** is clear support of equity in situations, not bright-line and that the purpose of the statute is to prevent the “destruction of the means to accomplish the purpose or objects for which the corporation was incorporated and actually performs”
  3. Quantitative prong – includes qualitative elements to see if it “substantially affects existence and purpose of the business”
  4. Qualitative prong focuses on the *economic quality* and whether the transaction leaves the stockholders with an investment that *in economic terms is qualitatively different than the one they now possess.*

**CLASS 2**

Williams Act § 13(d) periodical and other reports- disclosure by acquirer.

2 kinds of mandated early warning disclosure

**§ 13(D)**: If you acquire more than 5% beneficial ownership of a class of equity securities you must, within 10 days, inform the SEC, the relevant securities exchange and the target issuer with the following information:

* + - **Schedule 13D**:
      * Identity of acquirer,
      * Source of funds,
      * Any plan to take control or liquidate or merge target,
      * Number of shares owned,
      * Any agreements with others with respect to shares
    - During 10 day build up period people go HARD IN THE PAINT

**14(d)(1)**: Disclosure of intent to Tender Offer for more than 5% of the company’s shares

* + - Requires a ton of shit, but big signals are who is the acquirer and what are
* **Procedural Protections**
  1. Commencement: **Rule 14d-2** Summary announcement in the Wall Street Journal
     + Under **Rule 14d-5** demand to Target to assist in transmission of TO to SHs
  2. SEC Staff Review
  3. SHs Tender shares to paying agent with letter of transmittal
     + Notice of guaranteed delivery
  4. Target Firm
     + **Rule 14e-2** notice (recommends acceptance or rejection; neutral; unable to take a position) within 10 days of date that TO is given
     + **Schedule 14d-9** (Target’s recommendation)
  5. Substantial shit to know below
  6. **Duration** (Time for SHs to think and others to start a bidding war)
     + **Rule 14e-1(a)**: 20 business days
     + **Rule 14e-1(b)**: If offer is changed, must keep open for at least 10 more days from the date of change
  7. **Withdrawal Rights** (Purpose: encourages competition)
     + **Rule 14d-7**: May withdraw as long as period is open
       - In case another better offer
  8. **Equal Treatment**
     + **Rule 14d-8**: Pro rata rationing to entire length of offer
       - If more than desired amount of shares tender, you have to accept them all pro rata
         * Prevents the stampede by saying only first 60% get it
       - You are allowed to pay cash for fractional shares
     + **Rule 14d-10(a)(1)**: Offer must be open to everyone
     + **Rule 14d-10(a)(2)**: Everyone must be paid the same best price
     + **Rule 14e-5**: Cannot purchase shares of target corporation other than pursuant to tender offer.
     + Essential Elements of Filing 13D
     + 13(d)(3): Person: When two or more persons act as a partnership etc. for the purpose of acquiring securities the syndicate shall be deemed a person
     + Prevents warehousing and snakery
     + Explained in ***GAF v. Milstein*** where family collectively held 10% and considered person
     + Personhood depends on having plans to do something and voting together
     + Specifying purposes of acquisition
     + Defining beneficial ownership: VERY BROAD – includes options to buy shares
     + Calculating 5% of a class
     + Specifying the required disclosures
     + Rule 13d-1: Mandates disclosure at 5% ownership
     + Exception in 13(d)(1)(b): Some institutions can file a 13G if it was in ordinary course of business and not going to cause a change in control – think pension funds, government institutions
     + (c): not for purpose of influencing control etc. except you must file within 10 days and cannot be over 20%
     + 13G has much simpler disclosure requirements
     + 13(d)(2): Any material change in ownership or purpose means you have to update Schedule 13D
     + 13(d)(6): Requires disclosure of any plans or arrangements with respect to any of the class of securities in question
     + **TENDER OFFERS AND SCHEDULE 14D-1 FINDINGS**
     + Requires filing Form TO with more extensive disclosure than Form 13D
     + 14d-3 provides that TO must be filed with SEC and delivered to target and other bidders
     + SHs only need tender offer and not Form TO as per 14d-4(A)(2)(ii)
     + his plans

***Wellman v. Dickson* (2nd Cir, NY, 1979)**

8 key elements in defining a Tender Offer – CHARACTERISTICS not a definition

1. Active and widespread solicitation of public shareholders for the shares of an issuer
2. Solicitation made for a substantial percentage of the issuers stock
3. Offers to purchase made at a premium over the prevailing market price
4. Terms of the offer are firm rather than negotiable
5. Offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchase
6. Offer open only a limited period of time
7. Offeree subjected to pressure to sell his stock
8. Whether the public announcement of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company’s securities.

Active and widespread solicitation was involved.

Holding- Sun is liable for violating William’s Act Sec 14(d) for making tender offer without the required pre-acquisition filing.

* ***Hanson Trust PLC v. SCM Corporation* (2nd Cir, 1985)** 
  1. Looks to the question of What is a private offering as opposed to a public one
  2. Factors from ***Wellman*** are useful but unnecessary to create a bright line test – court prefers statuary purpose to protect ill-informed solicitee.
  3. Turns on whether viewing the transaction in the light of the totality of the circumstances, there appears to be a likelihood that unless pre-acquisition filing structures of that statute are followed there will be a substantial risk that solicitees will lack information to make a carefully considered appraisal of the proposal before them
  4. HELD: Not a tender offer because only 6 SHs contacted who were sophisticated parties; no pressure to sell stock; nothing active or widespread; price is NOT a premium; NOT contingent; No time limit
  5. Rule 14e-5 passed in 1999 making this illegal
* Private Placement Exemption: Do not need to register sales if it is in a transaction not involved in a public offering.

***CSX Corp. v. The Children’s Investment Fund,*** 654 F.3d 276 (2d Cir. 2011)

**FACTS:**  The Children’s Investment fund (TCI) along with 3G are two hedge funds who entered into total return equity swaps contract with CSX shareholders. They later sought to elect minority board members. CSX filed suit alleging that the group failed to make disclosures under Section 13(d) of the Williams Act. TCI proposed leveraged buyout of CSX, but CSX refused. TCI then decided to wage a proxy contest and started looking for buyers. TCS and 3G communicated between themselves and made Sec 13 (d) disclosures after several months. They disclosed that they had formed a group and were considering purchase and transactions with CSX.

**ISSUE:** Whether TCI and 3G formed a group for the purpose for acquiring shares of CSX and disclosure was needed.

**PROCEDURAL HISTORY:** The district court held that the group needed to make Section 13(d) disclosure.

**JUDGEMENT:** Remanded and find whether defendants formed group for the purpose acquiring CSX.

**HOLDING:** Thus, on remand the District Court will have to make findings as to whether the Defendants formed a group for the purpose of "acquiring, holding, voting or disposing," 13d-5(b)(1), of СSХ shares owned outright, and, if so, a date by which at the latest such a group was formed. Only if such a group's outright ownership of CSХ shares exceeded the 5 percent threshold prior to the filing of a section 13(д) disclosure can a group violation of section 13(d) be found

**REASONING:** Although the District Court found the existence of a group "with respect to CSX securities," the Court did not explicitly find a group formed for the purpose of acquiring CSX securities. Even if many of the parties' "activities" were the result of group action, two or more entities do not become a group within the meaning of section 13(d)(3) unless they "act as a ... group for the purpose of acquiring ... securities of an issuer."

**RULES:** Section 13(d) provides that if a person directly or indirectly becomes a beneficial owner of more 5% of such class of shares, shall disclose to the SEC all information that SEC under its rules desires.

When two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this subsection.

Section 13(d)-5(b)(1) provides that for the purposed Sec 13(d) disclosure applies to these ‘groups’ aggregates and holdings as well.

A group of such sorts exists under Section 13(d)(3), the courts will have to see whether there is sufficient direct or circumstantial evidence to support the inference of a formal or informal understanding between [members] *for the purpose of acquiring, holding, or disposing of securities.'*

**CONCURRENCE:** In my view, cash-settled total-return equity swaps do not, without more, render the long party a "beneficial owner" of such shares with a potential disclosure obligation under Section 13(d). However, an agreement or understanding between the long and short parties to such a swap regarding the short party's purchasing of such shares as a hedge, the short party's selling of those shares to the long party upon the unwinding of the swap agreements, or the voting of such shares by the short parties renders the long party a "beneficial owner" of shares purchased as a hedge by the short party.

Under Section 13(d)-3(a) beneficial owner is one who has voting power and investment power.

A swap agreement which allows the short parties to act in their self-interest does not necessarily confer beneficial ownership to the long parties.

There must be a sufficient nexus between the sale of short parties’ hedged shares and the long parties’ controlling ambitions.

Under section 13(d)-3(b) if a person prevents the vesting of beneficial shares, that requires disclosure under Section 13(d).

Here the two funds could not persuade CSX to change its policies and had to purchase CSX shares at market rates.

The rule does not encompass concerted action to be disclosed.

***In the Matter of Cooper Laboratories Inc****.* SEC Release 34-22171 (1985)

**FACTS:** Cooper acquired 4.9% of Frigitronics shares and negotiated for a leveraged buyout but frigitronics refused. Later on 9th August 1984, Cooper acquired more shares and totally it owned 11.1% of Frigitronics shares. It made filed 13D Schedule on August 20th 1984. Cooper bought certain shares in Frigitronics its rival that later amounted to 11%. It then sold 1% of its share in the market and did not promptly amend its 13D Schedule. From August 29th to September 6th, Cooper sold around 1% of Frigitronics shares that it owned and make a disclosure under Section 13(d)(2). On 13th September, Cooper filed an amended 13D with SEC.

**ISSUES:** This matter concerns whether Cooper promptly amended a Schedule 13D filed with the Commission on August 20,1984, relating to Cooper's acquisition of 11.1% of the common stock of Frigitronics between May 22 and August 9, 1984.

**HOLDING:** Cooper failed to amend the 13D Schedule thereby failing to comply with Section 13(d)(2) requirements of the Exchange Act

**JUDGEMENT:**. Order of settlement is accepted in the interest of public interest.

**REASONING:** Since Cooper failed to file the required amendment until after if had sold its holdings of Frigitronics stock, persons who purchased Frigitronics stock in the marketplace between the time after which Cooper should have amended its Schedule 13D and September 13, 1984, did not have all of the information which should have been disclosed under Rule 13d–2 concerning Cooper's position in Frigitronics' stock. The disclosure of Cooper's sale of 1% of its position would have affected the market price for the stock at a time when Cooper still held approximately 10% of Frigitronics' outstanding common shares.

Thus, in the case at hand, ‘promptly’ meant less than the five business days (seven calendar days) which elapsed between when Cooper's amendment obligation arose, and when Cooper actually amended its August 20 Schedule 13D. It appears that it would have been reasonably practicable for Cooper to have filed an amendment by September 7, 1984.

**RULES:** Section 13(d) of the Exchange Act was enacted as part of the Williams Act. Generally, the legislative purpose behind Section 13D was to provide a regulatory scheme to alert investors to a potential change in corporate control.

Rule 13d–2 [17 C.F.R. § 240.13d–2] provides, inter alia, that such amendments shall be filed ‘promptly’. Rule 13d–2 also provides that any material change in facts set forth in a Schedule 13D including ‘any material increase or decrease of the class [of equity security] beneficially owned’ by a reporting person requires the person to file an amendment disclosing the change. The Rule states that ‘[a]n acquisition or disposition of beneficial ownership of securities in an amount equal

to one percent or more of the class of securities shall be deemed ‘material’ for purposes of this rule'.

The ‘promptness’ of the disclosure will be decided from the facts of the case as no bright line has been made.

**CLASS 3 – Wednesday, September 21, 2016**

**Pre-Acquisition Agreement Process**

**Chapter 3 – An Overview of Deals (Pages 46-50)**

* Acquisition transactions may get started in the following ways:

a. Sale of business run by its founders whenever the time comes for them to retire or if estate taxes create such a big burden that it is better to sale the business then to pass ownership along to the next generation.

b.                  Buyer seeking for privately or publicly owned potential targets, provided that in case of horizontal acquisitions buyer will probably have more information regarding target as it is one of its competitors.

c.                  Brokers may be hired by bidders in order to identify likely targets for acquisitions.

d.                  Through M&A department of brokerage firms.

* The sources of information when the target is a public company are better, since such companies have to annually file with the SEC the Form 10-K, which includes several important financial and business information.
* Once the target of an acquisition transaction has been identified, both parties will probably employ legal and financial advisers. The financial adviser will give advice regarding valuation, which is a problem that requires expert advice – even in public companies it may not be easy to reach an agreement on the valuation once parties have to agree on the “control premium” if the entire company is put to sale.
* Deal structure depends on tax impacts.
* Target usually requests bidder to sign a confidentiality agreement and if the transaction involves the exchange of bidder’s stock, the confidentiality agreement will probably be reciprocal, once target will also need to investigate bidder’s finance and business.
* In case target is a publicly held company, it will probably also ask for a “stand-still agreement” that establishes that bidder will not unilaterally make an offer directly to target’s shareholders without first presenting such offer to management.
* Target’s management usually plays significant role in acquisition transactions. In publicly-held companies, management knows that upon conclusion of the transaction is that it will probably lose its job or have its powers restricted. Management is required to inform shareholders of its position regarding the bid, in accordance with Rule 14e-2 adopted under the Williams Act.
* Management defense includes:

a.                  Resisting the bid in order to obtain highest possible price.

b.                  Eliminating the sting of two-tier bid (when a bidder acquires control of the company and after becoming the controlling shareholder acquires the remaining outstanding shares for a much lower price) by asking shareholders to amend bylaws in order to make it more difficult for bidder to undertake a cash-out merger after he has obtained control of the company at a price below the tender offer price.

c.                  Poison pill: involve issuance by the board of the right to purchase additional share at a much lower price, therefore, reducing the value of bidder’s acquired shares.

d.                  White knights: seek for preferred buyers for the company.

e.                  Repurchase of shares by the company with borrowed money in order to drive shares prices above the tender offer price.

* In some cases target will not allow bidder to start its due diligence without giving indicative price and form of payment for the transaction.
* Preliminary agreement of the parties regarding price and structure of the transaction is usually formalized in a term sheet or letter of intent, which normally is non-binding. Such documents may contain a provision that seller will not engage in negotiations with other buyers for a certain period of time (“no-talk” clause).
* Definitive agreement will usually contain several representations of sellers (in a cash deal) or of seller and buyer (in an exchange of securities deal) and if any of those representation are found to be untrue after the closing, the other party can bring suit either for damages for false representations or in some cases rescission. It is important to note, however, that the value of any representations and warranties expires with the expirations of the corporate life of the selling corporation (once the seller has merged into buyer, there is no one to go after for indemnification).
* Once due diligence and definitive agreements are concluded, the next step is to obtain board approvals for the transaction.

**Chapter Six – The Target Board’s Duties in Reacting to Bids (Pages 427-429)**

**White Knights, Confidentiality and Standstill Agreements**

* Confidentiality Agreements:

o   All information revealed in the course of inspecting seller shall be treated as confidential and if negotiations break down they shall be returned.

o   May contain provision that information is property of target.

o   Usually all of bidder’s advisers shall agree to its terms.

o   In order to avoid use of confidential information by bidder in its own interest, the Securities Exchange Act Rule 10b5-2 provides that the “duty of trust or confidence” exists whenever a party commits to maintain information in confidence.

o   To avoid employee raiding, confidentiality agreements will usually have “no poach” provisions that preclude bidder from hiring target’s employees during a certain period.

* Standstill agreements: requires bidder not to purchase additional shares or begin tender offer without target approval. In a transaction where several bidders are being approached, it avoids one bidder to jump the gun by beginning a tender offer before the bid deadline.
* White Knights: a prospective buyer that does not want to obtain control. Sometimes these type of buyers are thought by the company to be better, however, it is not possible to assure that in the future they will not want to gain control of the company.

***MARTIN MАRIETTA MATERIALS, INC., Plaintiff and Counterclaim— Defendant Below, Appellant,***

***v.***

***VULCAN MATERIALS COMPANY, Defendant and Counterclaim— Plaintiff Below, Appellee* (Del. 2012) Jacobs, J**

**FACTS:** Nye, CEO of Martin started discussion with Don James, CEO of Vulcan in 2010 and signed a Non-Disclosure Letter Agreement (NDA) and a Joint Defense and Confidentiality Agreement (JDA) not to disclose any terms of Evaluation Materials but for purpose of transactions (para 2) and the non-disclosure of merger negotiations or other documents should unless ‘legally required’ (para 3) of the NDA.

After signature, Vulcan provided Martin with confidential non-public information about the company which Martin used and started a proxy contest by disclosing the details of negotiation with third parties without Vulcan’s permission.

**ISSUES:** (i) whether the agreement between the two companies was a standstill agreement or a confidentiality agreement (ii) whether Martin violated the JDA (iii) whether Martin violated the NDA.

**PROCEDURAL HISTORY:** The Court of Chancery entered a final judgment and order after a trial in this action initially brought by Martin Marietta Materials, Inc. ("Martin") against Vulcan Materials Company ("Vulcan"): Granting judgment against Martin on Vulcan's counterclaims, the Court of Chancery enjoined Martin, for a four month period, from continuing to prosecute its pending Exchange Offer and Proxy Contest to acquire control of Vulcan. That injunctive relief was granted to remedy Martin's adjudicated violations of two contracts between Martin and Vulcan: a Non-Disclosure Letter Agreement (the "NDA") and a Common Interest, Joint Defense and Confidentiality Agreement (the "JDA") (iv) remedy

**JUDGEMENT:** Affirmed for the defendant.

**HOLDING:** The Chancellor committed no legal error or abuse of discretion, and correctly concluded *(inter alia)* that: (i) the JDA prohibited Martin from using and disclosing Vulcan Confidential Materials to conduct its hostile bid; (ii) the NDA prohibited Martin from disclosing Vulcan Evaluation Material without affording Vulcan pre-disclosure notice and without engaging in a vetting process; (iii) Martin breached the use and disclosure restrictions of the JDA and the disclosure restrictions of the NDA; and (iv) injunctive relief in the form granted was the appropriate remedy for those adjudicated contractual violations.

**REASONING:** (i) The agreement signed between Martin and Vulcan was not standstill agreement but a confidentiality agreement as there was no specific prohibition on hostile takeover but a prohibition on sharing of confidential information except as provided in the agreement.

(ii) The disclosure in JDA was only permitted in ‘for the purposes of transactions’ meant only friendly transaction or merger as discussed between Vulcan and Martin and not to proxy contest or hostile take overs. The use of this information did not include hostile takeovers.

(iii) Paragraphs 2, 3, and 4, both internally and when read together, unambiguously permit a party to the NDA to disclose "legally required" Evaluation Material. But, that may be done *only* if an External Demand for such information has first been made, and *only* if the non-disclosing party is then given prior notice of any intended disclosure and (where applicable) an opportunity to vet the information sought to be disclosed. That interpretation is compelled by the text of these NDA provisions, their relationship to each other, and by the canon of construction that requires all contract provisions to be harmonized and given effect where possible. That also is the only interpretation that is consistent with the found facts relating to the NDA's overall purpose and import, and the parties' reasons for negotiating the specific language of the disputed NDA provisions.

The NDA also clearly distinguishes Evaluation Material from the disclosable information covered by Paragraph 3. Paragraph 4 addresses the disclosure of "any of the other party's Evaluation Material *or* any of the facts, the disclosure of which is prohibited under paragraph (3) of this letter agreement." The disjunctive "or" plainly contradicts Martin's claim that Evaluation Material falls within the purview of Paragraph 3.

The only reasonable construction of the NDA is that Paragraph 4 alone permitted the disclosure of Evaluation Material, and even then only if triggered by an External Demand and preceded by compliance with Paragraph 4's Notice and Vetting Process. The Court of Chancery found that Martin disclosed Evaluation Material in the course of conducting its hostile bid, without having received an External Demand and without having engaged in the Notice and Vetting Process. Martin breached the NDA's disclosure restrictions.

**RELEVANT RULES:**(i) A standstill agreement expressly prohibits specific conduct by a contracting party to acquire control of the other contracting party. Typically, а standstill agreement will prohibit а hostile bid in any form, including a hostile tender offer to acquire stock control of the other contracting par-y and/or a proxy contest to replace all or some of its directors. Standstill prohibitions do not require, or in any way depend upon, a contracting party's use or disclosure of the other party's confidential, non-public information. Rather, a standstill agreement is intended to protect a contracting party against hostile takeover behavior, as distinguished from the unauthorized use or disclosure of the other party's confidential nonpublic information.

A confidentiality agreement, in contrast, is intended and structured to prevent a contracting party from using and disclosing the other party's confidential, nonpublic information except as permitted by the agreement. In that respect it is qualitatively distinguishable from a prohibition that precludes a party categorically from engaging in specified hostile takeover activity. Thus, a confidentiality agreement will not typically preclude a contracting party from making a hostile bid to acquire control of the other party, so long as the bid does not involve the use or disclosure of the other party's confidential, nonpublic information. A confidentiality agreement is intended to protect a contracting party's non-public information, not its corporate ownership and control.

**Letters of Intent**

***United Acquisition Corp. v. Banaque Paribas***

**Facts:** United Acquisition Corp. (UAC) tried to buy all of the stocks of United Refining Inc. (URI) from Paribas, which was the owner of URI together with Paribas Swiss and Royal Bank. John Catsimatidis, a manager at UAC approached the manager of URI and offered to buy URI. He wrote a letter offering to buy the company for 2.5 million dollars. The sides debated the price for a while until Catsimatidis agreed the URI’s demand of $4 million and his lawyer prepared a contract. Because of a misunderstanding, Catsimatidis did not wire the money on time and the company was sold to a different firm, for the same price.

**Procedural history:** UAC alleges there is a contract between the sides, and Catsimatidis filed a motion to stop the sale of URI’s to the other side. This is a trial court and a full trial took place.

**Issue:** Is there a binding contract between the sides?

**Judgment:** No. The plaintiff did not prove the parties agreed to be contractually bound by anything except a final written contract.

**Rule:** Sometimes a formal agreement is imperative to an argument that a contract exists, the intent of the sides is the test. When a party gives reasonable signals it means to only be bound by a written agreement- the court will recognize that intent, even where final drafts had been prepared.  The sale of all the stocks and transfer of a control of a company usually requires a written contract as risk allocation between the parties needs to be negotiated and because such transactions are governed by the Statute of Fraud. The oral agreement was only about the price and that is not enough is such a transaction.

There are four factors to look for when deciding if a party has an intent to be bound only by a written contract: 1. If a party explicitly said it 2. If a party partially performed and that performance is accepted by the other party, it means there is no need for writing 3. When there is nothing to negotiate and the only thing left to do is sign 4. When it is a complex agreement in a way it is the norm to demand it would be in writing.

**Rationale:** The court will put emphasis on intent rather than form. The intent is paramount. Catsimatidis asked his lawyer to prepare an agreement so he showed he believed an agreement should be signed. Even in his original letter of intent he said the sides should sign an agreement. There were also a lot of substantial matters left to negotiate.

**Pages 593-596**

During negotiations on merger or acquisition deal, the sides might sign on a *letter of intent* (“Letter”), which is basically a document that summarizes the main points, or basic terms, of the deal. The Letter is usually prepared by the purchaser’s attorney and might state that it is not binding. A Letter of intent is not necessary, but common if it is a complex deal or if there is a delay in closing and the purchaser wants to simplify the offer in one document. Courts are split on the question whether Letters are binding, and advise parties to explicitly mention in the Letter if it is binding or not in a very clear language, as vague language has been deemed insufficient.

If the Letter is binding, it is called *an agreement with open terms* and the parties are assumed to continue negotiating open terms. When the Letter is not binding, it is unclear if the parties are compelled to negotiate terms. Courts are split on that point as well.

The NY law has added a fifth factor to the 4 factors presented in Paribas: 5. If the intent to be bound (by the Letter) was revealed by the language of the agreement. The NY court also added that agreements with open terms would not be easily found as binding.

If parties don’t want to be bound by a letter of intent (or any preliminary agreement) they usually say so and the courts respect that intent. What are reasons for parties to not include a provision in the letter that states it is not binding? The book suggests it’s a matter of form, trying to avoid excess language, and mainly to make the seller more committed to the deal. There is a fear the seller will not feel compelled to finalize the deal if the Letter or other preliminary agreement will say explicitly there is no obligation to close until a final contract is signed.

Letters of intent can be very useful in complex deals and may also create a sense of obligation with the seller. The Delaware Supreme Court even held that an obligation to negotiate in good faith arises from the Letter which includes making any reasonable effort to close the deal. However, the case law is unclear and the language of the letter usually is overlooked, as the court examines the behavior of the parties so there is always a risk the Letter will not be binding.

**CLASS 4—Wednesday , September 28, 2016**

Carney pg 213-222 Pallavi Chandrasekhar

Selected Issues in Acquisition Agreements

**Material Adverse Effect**

***IBP v. Tyson Foods*** 789 A. 2d 14 (Del. Ch. 2001)

**FACTS:** IBP was the leading beef and pork packer and distributor and Tyson was the leading chicken distributor. In 1998 IBP purchased a specialty business and owner Zahn was given to stay on with IBP in its new business called DFG within IBP. DFG was a small part of IBP accounting for less than 1% of the sales. When Zahn left with a sizeable earn out in 2000, it was later discovered that he had falsified accounting for around $108 million to get a good earn out.

Later, IBP was frustrated with the market valuation of its stock and proposed a leveraged buy out. Tyson competed with Smithfield and finally won the bid for $30 half cash and half stock offer.

The agreement provided for amongst other things that there were no undisclosed material liabilities except for DFG food in the third quarter of 2000 and certain representation and warranties.

In mid January of 2001, Tyson’s board of directors and shareholders approved of the merger. At the same time, IBP informed Tyson that restatement of 1999 earnings was required. Meanwhile Tyson started getting cold feet regarding the merger and terminated the merger regarding the breach of warranty that the 1999 financial statements were true.

IBP filed a suit for specific performance of merger agreement in the Delaware Chancery Court and Tyson raised problems with financial statement and evidence of material adverse effect.

**ISSUE:** Whether there was evidence of material adverse effect.

**JUDGEMENT:** For plaintiff

**HOLDING:** Vice Chancellor awarded a decree of specific performance to IBP.

**REASONING:** Vice Chancellor Strine rejected Tyson’s argument about warranted financials as Tyson was willing to bear the risk of DFG problems.

Regarding the issue of material adverse effect he said that to a short term speculator, the failure of a company to meet analyst’s quarterly earning would be highly material but not to a long term acquirer who was seeking to purchase the company. For a long term acquirer material adverse effect would be whether the company has suffered over a commercially reasonable period which would be measured I years not in months.

He says that merger agreements are negotiated to cover a large number of specific risks explicitly. Material Adverse Effect would be best read in the background that to protect the acquirer from occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally specific manner or viewed from a long term perspective for a reasonable acquirer.

Price Terms

Carney Supp pg 4-8

***Lazard Technology Partners, LLC v. Qinetiq N. Am. Operations LLC 2015 Del. LERIS 201 (Del. 2015)***

**FACTS:**This is an appeal in an earn-out dispute arising from a merger. The appellant represents former stockholders of Cyveillance, Inc., a cyber technology company (the "company"), whom we refer to as the "seller" for the sake of clarity. The appellee (the "buyer") paid $40 million up-front to the company and promised to pay up to another $40 million if the company's revenues reached a certain level.

The seller also argued that the buyer violated the merger agreement's implied covenant of good faith and fair dealing by failing to take certain actions that the seller contended would have resulted in the achievement of revenue sufficient to generate an earn-out.

The Court of Chancery found that the merger agreement's express terms were supplemented by an implied covenant. But as to whether conduct not prohibited under the contract was precluded because it might result in a reduced or no earn-out payment, the Court of Chancery held that, consistent with the language of Section 5.4, the buyer had a duty to refrain from that conduct only if it was taken with the intent to reduce or avoid an earn-out altogether.

**PROCEDURAL HISTORY:** The Court of Chancery held for the defendant i.e. the buyer. The appellant appealed to the Appeals Court of Delaware.

**ISSUES:** Whether the buyer had an intent to avoid the earn-out.

**JUDGEMENT:** Affirmed for the defendant.

**HOLDING:** The Court concluded that the seller's appeal was without merit and that the judgment of dismissal entered for the buyer should be AFFIRMED**.**

**REASONING:**The seller seeks to avoid its own contractual bargain by claiming that Section 5.4 used a knowledge standard, preventing the buyer from taking actions simply because it knew those actions would reduce the likelihood that an earn-out would be due. As Section 5.4 is written, it only barred the buyer from taking action specifically motivated by а desire to avoid the earn-out. Contrary to the sellers argument, the Court of Chancery never said that avoiding the earn-out had to the buyer's *sole* intent, but properly held that the buyer's action had to be motivated at least in part by that intention.

Section 5.4 specifically addressed the requirements for an earn-out payment and left the buyer free to conduct its business post-closing in any way it chose so long as it did not act with the intent to reduce or limit the earn-out payment.

Therefore, the Court of Chancery correctly concluded that the implied covenant did not inhibit the buyer's conduct unless the buyer acted with the intent to deprive the seller of an earn-out payment.

**RULES:** Section 5.4 of the merger agreement prohibited the buyer from "tak[ing] any action to divert or defer [revenue] with the intent of reducing or limiting the Earn-Out Payment."

Pages 227-235

**Best effort clauses:**

·         There are two types of best efforts clauses, the typical one requires target board to use best efforts to secure shareholders’ approval of mergers and sales (with due regard to their fiduciary duties) and another setting is clauses that require buyer to use best efforts to secure third-party approvals (antitrust authorities, for example). Sellers may also commit to use best efforts to obtain third party approvals, such as from creditors.

***US Airways Group v. British Airways***

* + - Best Efforts: requires that a party pursue all reasonable means for obtaining the promised goal – question of fact
    - Discretion does not mean discretion to use reasonable efforts to gain regulatory approval
    - Should be judged by specific company’s capabilities
    - Cannot be read to impose limitations on the conduct of the company’s business and its control of divisions.
    - BA made conscious decision never to complete the transactions contemplated in the Agreement.
    - All claim against BA are dismissed, except breach of contract.

Note on Best Effort Clauses:

·         Are amongst the most difficult clauses for courts to deal with. Some courts have taken the position that they are illusory promises and others that it is a matter of fact and jury shall decide on it.

·         Important cases: Bloor v. Falstaff Brewing Corp. (court took a middle ground and decided that Falstaff’s best efforts should not be judged by what would be “best efforts” of a national brewer, but in light of Falstaff’s capabilities), Wayne Wurtsbaugh v. Banc of America Securities LLC (courts rejected best efforts arguments stating that the clause required both parties to use best efforts) and Sonoran Scanners, Inc. v. PerkinElmer, Inc.

·         Steps to avoid liability under a best efforts clause:

o   When earn-outs are involved, buyer should limit its obligation by imposing a loss-cap or providing specific minimum expenditures that will satisfy requirement

o   Where third-party consents are required and payments are expected to be made to obtain them, buyer should cap the payments

o   If antitrust approval is required, buyer shall specify if divesting is expected and maximum extent of divestitures

o   Where governmental filings are required, parties shall establish a timeframes

o   Establish if efforts will be measures by promisor’s circumstances or by industry standards.

Pages 261-270

**Hexion Speciality Chemicals, Inc. v. Huntsman Corp.**

|  |  |
| --- | --- |
| **Parties** | ·         Huntsman (target)  ·         Hexion (buyer) |
| **Facts** | Buyer and its parents were very eager to be the winning bidder in a competitive bidding and agreed to pay a substantially higher price and to commit to no “financing out”, which means that if buyer is unable to obtain financing he is not excused from performing the contract.  During due diligence seller reported disappointing results and buyer wanted to get out of the deal. This process began by trying to figure out if seller had suffered a MAE. Buyer obtained an opinion that the combined entity resulting from the merge would be insolvent and, therefore, buyer wouldn’t be able to obtain financing for closing the deal. In accordance with the agreement, Hexion should have notified Huntsman within 2 business days of its concern regarding insolvency, which it didn’t. |
| **Issue** | Whether buyer’s liability to seller for failing to close is limited to $325 million or if it is uncapped. To answer the question it is important to figure out if buyer committed an intentional breach of any of its covenants that caused damages in excess to the above mentioned limit. |
| **Procedural History** | Trial court found that seller did not suffer a MAE and that buyer had intentionally breached several covenants of the agreement, therefore, granting seller’s request for an order to enforce buyer’s contractual obligations. Court also rejected buyer’s argument regarding insolvency. |
| **Reasoning** | Mistake of law never excuses a violation of law and, therefore, Hexion’s contention that he had to have actual knowledge that such actions breach the covenant and that negligence or a mistake of law or fact will not suffice to establish a knowing breach were not accepted by the court.  A knowing and intentional breach is the taking of a deliberate act.  The fact alone that Hexion did not notify Huntsman of itself insolvency concerns is sufficient to find that Hexion had knowingly and intentionally breached its covenants under the merger agreement. In addition, Hexion breached its covenant to do nothing without Huntsman’s consent that could harm the timing of the financing. |
| **Holding** | Huntsman cannot force Hexion to consummate the merger, but Huntsman is entitled to a judgment ordering Hexion to specifically perform its other covenants and obligations |

\*After this case buyer became fearful of unlimited liability. As of 2010, reverse termination fees have grown, regardless of the cause for termination. In some cases buyers agree to two-tier reverse termination fees, with lower percentage if buyer is unable to obtain financing and higher fee for any “knowing and intentional” or “willful” breach of the obligations to close.

***Williams Cos. Inc. v. Energy Transfer Equity***, \_Del. Ch.\_ LEXIS (June 24, 2016)

Condition precedent of the merger agreement of having a tax free transaction was not met.

Commercially reasonable best efforts to achieve the 721 Opinion, the Partnership necessarily submitted itself to an objective standard—that is, it bound itself to do those things objectively reasonable to produce the desired 721 Opinion, in the context of the agreement reached by the parties.

[1]-Plaintiff's request to enjoin defendants from terminating or otherwise avoiding their obligations under a merger agreement between plaintiff and a partnership, on the basis that the partnership's tax attorneys had failed to deliver an I.R.C. § 721(a) opinion pursuant to a condition precedent to close, was improper; because the tax attorneys, as of the time of trial, could not in good faith opine that tax authorities should treat the specific exchange in question as tax free under § 721(a), and because plaintiff failed to demonstrate that the partnership had materially breached its contractual obligation to undertake commercially reasonable efforts to receive such an opinion from the tax attorneys, the partnership was contractually entitled to terminate the merger agreement.

**CLASS 5**

Duty of Care

***Smith v. Van Gorkam***

* Develops concept of gross negligence for informed decision making method of overcoming BJR
  1. BJR Presumption that board acted on (1) informed basis, (2) in good faith, (3) in best interest of company (loyalty), (4) no illegality, (5) no fraud
  2. Challenge here is that BoD did not make informed decision: Court uses concept of gross negligence to evaluate
  3. HELD: Board breached its Duty of Care due to insufficient process that was deemed grossly negligent
  4. Court looks at board PROCESS at meeting to determine gross negligence
     + No prior notice, no written documentation, no disclosure of valuation methodology, only 2 hour meeting, no one read the agreement, no tough questions were asked, no outside investment advice
     + Board’s Defense
       - Reliance on CEO and CFO, large premium, expertise, reliance on legal advice, reliance on SH ratification
       - **DGCL § 141(e)**: A member of the BoD…shall, in performance of duties, be fully protected in relying in good faith on records of corporation and upon information, opinions, reports or statements presented by officers or employees, or committees of BoD, or anyone with expert competence and who has been selected with reasonable care by/on behalf of corporation
         * Unable to rely on this b/c neither the CEO nor CFO read the agreement they presented, meaning that there could be no Good Faith
       - Shareholder ratification is normally acceptable – falls into entire fairness – but here, it was NOT an informed ratification because they did not know the BoD was grossly negligent in process
     + **Choi’s View**: Process is theatre and they would have come to the same conclusion regardless
  5. AFTERMATH **DGCL § 102(b)(7)** – Basically undid ***Van Gorkum***
     + Permits corporations to limit the liability of directors for monetary damages for violations of the fiduciary duty of care, but not violations of the duty of good faith or loyalty
     + Not all companies opt in
     + P can get around by characterizing claim as breach of loyalty
     + Avoid monetary damages by directors (not injunctive); does not protect against federal securities law
  6. Duty of Loyalty Question for per se liability: Am I benefitting disproportionally from the Shareholders?
     + In this case, **NO** – BoD did not benefit more than SHs because they all got same share price
     + Distinction is **DIFFERENT COMPENSATION**

**Duties of care**

**Allen and Kraakman**

**8.2 – the duty of care and the need to mitigate director risk aversion.**

A director need to not only pursue the corporation’s interest in good faith, she also needs to do what a reasonable person would do in overseeing the corporation’s operations. The foundations for the duty of care of directors were landed in England in 1742 when the court ruled directors must operate with reasonable diligence.

A corporate director needs to perform his duties in: 1. In good faith. 2.  A way he reasonably believes is best for the corporate interest. 3. A way that a reasonable prudent person would believe is appropriate to do in like situation and circumstances (what a prudent person would do). The duty of care is not simply a negligent rule. The reason is that directors deal with other people’s money, so they don’t benefit from high risk decisions. If directors would be liable like in any other negligent rule, combined with the very low incentive to take risk- the directors would not take risks, that are usually good for the company. So the no liability rule is intended to let the directors think what is best for the company without the fear of personal liability. An example:

* **Gagliardi v. Trifoods**
* A Delaware case. In the absent of facts showing self-dealing or an improper motive, a corporate officer or director is not liable for losses of the corporation that resulted in a decision a director approved in good faith. Shareholders don’t want directors to be risk averse. The shareholders don’t gain from risky decision so it is right to not let them be liable when a risky decision ended up being a wrong one. The protection from liability is in the interest of the shareholders. The first protection is the Business Judgement Rule: if a director is disinterested and independent there will be no liability for corporate loss unless no person could possibly authorize such transaction while working in good faith.
* **Rethinking Judicial Review of Director Care**
* Under the DGCL [§141(a)] the corporation is under the supervision and direction of the directors. In this sense, the corporation is under the directors’ care, meaning the board “take care of” the corporation’s business and affairs. Any time a director neglects to perform his duties- he is not “taking care” of the business. The board also “care for” the corporation’s interests and the interests of its shareholders. A director acting out of self-interest (disloyalty) or an improper motive (bad faith) fails to take care of the right interests. Care for the corporation’s interests and the shareholders’ interest is the foundation for the duties of good faith of loyalty. Another meaning of care is to act “with care” or “in a careful manner”. Each one of the three meaning of care above can exist separately and represent a different mindset of the person taking action. Care in corporate law is a rich and primal concept. As long as directors are informed loyal and act in good faith, the first two concepts of care are usually fulfilled. For this reason, judicial review is usually focuses on the manner in which directors acted in because the duty of due care is a duty to conduct oneself in a careful manner.

Duty of Loyalty

***In Re The Walt Disney Co. Derivative Litigation***

**Facts:** After a series of accidents, Disney had to find a new president. They offered Ovitz a very generous deal with a “no fault termination” clause under Ovitz will get approximately $130 million if his employment will end prematurely without his fault, as described in the employment agreement. This term exceeded Disney’s and corporate America’s standards. Ovitz agreed to the proposal, a celebration was held, and Disney’s board of directors voted unanimously to hire Ovitz.  After only 1 year, Disney decided they want to get rid of Ovitz and fired him, although they had no cause to do so, and therefore had to pay him the no fault termination (NFT) fee. Eisner, Disney’s CEO made the decision to terminate Ovitz’s employment in this way, even though it was costly. The board did not vote on it, but they all supported the decision after it was made. Although it was very costly. Disney paid Ovitz all that it owed him, and one month after, the plaintiffs filed this action, claiming a breach of fiduciary duties. They claim the employment agreement and the NFT are breach of the duty to act with due care and in good faith, and that it constitutes waste. They also filed a suit against Ovitz, claiming that signing the employment agreement with the NFT was a breach of his fiduciary duty as president of the company. The plaintiffs also attacked the fact Ovitz was hired, as a negligent act that was not in good faith.

**Issue:** 1. Did the board and the compensation committee breach its fiduciary duties by hiring Ovitz and offering Ovitz the NFT? 2. Did Ovitz breach his fiduciary duties by signing his own employment agreement?

**Holding:**

1.     The committee and board did not breach their fiduciary duties by approving the employment agreement and the NFT, even though they did not use “best practice” in approving them.

Rule: The law allows for the court to assess gross negligence (lack of due care) in order to decide whether the business judgement rule (BJR) applies. Directors fulfil the information requirement (in making a decision) if they rely on multiple sources in good faith and persons chosen by the corporation that the directors believe the matter is in their professional expertise. Even if a board didn’t use “best practices”, they didn’t necessarily breach their duty of care if they were informed enough about a transaction.

There are three categories for “bad faith”. The first one – subjective bad faith which is an intentional motivation to harm. The second category is lack of due care, mostly negligent acts with no malicious intent. Gross negligent on its own (without something more) is not bad faith. The third category is a conscious disregard to one’s responsibilities.

Rationale: The fiduciary duty to act with care and the fiduciary duty to not act in bad faith are completely different and separate duties.  The DGCL 102(b)(7) provides protection to directors for the breach of duty of care (gross negligence) but not for the acting in bad faith.

In this case, the directors of Disney acted in good faith.

***Stone v. Ritter***

**Facts**: The Stone couple, shareholders, filed a derivative suit against the directors of AmSouth without making a pretrial demand. AmSouth is a banking firm. In 2004 AmSouth was forced to pay $50 million in fines and penalties due to its employees’ violations of the federal bank secrecy act. The board of directors didn’t know about the employees’ wrong doing.

**Procedural history**: This is an appeal from the trial court. The trial court dismissed the suit because the plaintiffs did not make a pre suit demand.   

**Issue:** Did the directors breach their fiduciary duty of loyalty (to act in good faith) because they didn’t know about the employees’ misconduct?

**Judgement:** Affirmed

**Holding:** No, the directors are not liable.

**Rule:**When there isa claim for liability for employee's acts that cause liability and the directors are unaware of, only a sustained or systematic failure to exercise oversight, an utter failure to assure a reasonable information and reporting system will establish a lack of good faith, that is necessary to liability.A failure to act in good faith is more than just gross negligence.The failure to act in good faith can result in liability because it is a breach of the duty of loyalty. Good faith does not result in liability directly, only as a through the duties of care and duties of loyalty. If a director doesn’t operate with a belief her acts are in the corporation’s best interest- she is not working in good faith and breaching her duty of loyalty. Directors need to know they are discharging their responsibility to act to for breach of their fiduciary duty of loyalty. Good faith in the context of oversight must be tested by the directors’ actions.

**Rationale:** The board of directors had a reasonably effective system for reporting. A claim that directors are personally liable for employee’s failure is possibly the most difficult theory in corporation law. The test of utter failure is hard to achieve, but it is beneficial for the shareholders because difficult test for liability are more likely to result in better directors that give better service. Bad outcomes can happen even when the directors practice in good faith, and as long as there are no “red flags” – it doesn’t mean the directors acted in bad faith.

Overview of Review Standards in Mergers

***Kamin v. American Express Company***

Supreme Court of New York

383 N.Y.S.2d 807 (1976)

Rule of Law: Courts will not interfere with a business decision made by directors of a business unless there is a claim of fraud, bad faith, or self-dealing.

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| --- | --- |
| **Parties** | ·         Kamin, et al. (plaintiffs)  ·         American Express (defendant) |
| **Facts** | American Express (defendant) authorized dividends to be paid out to stockholders in the form of shares of Donaldson, Lufkin and Jenrette, Inc. (DLJ). Kamin, et al. (plaintiffs), minority stockholders in American Express, brought suit against the directors of American Express, alleging that the dividends were a waste of corporate assets in that the stocks of DLJ could have been sold on the market, saving American Express about $8 million in taxes. The American Express directors filed a motion to dismiss the case. |
| **Issue** | Can a stockholder maintain a claim against the directors of a corporation if the stockholder alleges only that a particular course of action would have been more advantageous than the course of action the directors took? |
| **Holding** | No. Courts will not interfere with a business decision made by directors of a business unless there is a claim of fraud, bad faith, or self-dealing. An error of judgment by directors, as long as the business decision was made in good faith, is not sufficient to maintain a claim against them. |
| **Reasoning** | In the present case, the plaintiffs do not allege any bad faith on the part of the directors. The only wrongdoing that the plaintiffs claim is that the directors should have done something differently with the DLJ stock. This allegation without more is not sufficient to maintain a claim. Consequently, the directors’ motion to dismiss is granted. |

**Entire Fairness**

***Weinberger v. UOP, Inc*.**

Delaware Supreme Court

457 A.2d 701 (Del. 1983)

Rule of Law: Minority shareholders voting in favor of a proposed merger must be informed of all material information regarding the merger for the merger to be considered fair.

|  |  |
| --- | --- |
| **Parties** | ·         Weinberger, et al. (plaintiffs)  ·         Stockholders of UOP, Inc’s (defendant) |
| **Facts** | The Signal Companies, Inc. (Signal) acquired 50.5 percent of UOP, Inc.’s (UOP) (defendants) outstanding stock. Signal elected six members to the new board of UOP, five of which were either directors or employees of Signal. After the acquisition, Signal still had a significant amount of cash on hand due to a sale of one of its subsidiaries. Signal was unsuccessful in finding other good investment opportunities for this extra cash so it decided to look into UOP once again. Charles Arledge and Andrew Chitiea, two Signal officers who were also UOP directors, conducted a “feasibility study” for Signal and determined that the other 49.5 percent of UOP would be a good investment for Signal for any price up to $24 per share. The study found that the return on investment at a purchase price of $21 per share would be 15.7 percent, whereas the return at $24 per share would be 15.5 percent. Despite this small difference in return, the difference in purchase price per share would mean a $17 million difference to the UOP minority shareholders. This information was never passed along to Arledge and Chitiea’s fellow UOP directors or the UOP minority shareholders. The UOP board agreed on a $21 per share purchase price. The UOP minority shareholders subsequently voted in favor of the merger. Weinberger, et al. (plaintiffs) were UOP minority shareholders and brought suit, challenging the merger. The Delaware Court of Chancery found in favor of the defendants. The plaintiffs appealed. |
| **Issue** | Is a minority shareholder vote in favor of a proposed merger fair if the shareholders were not given information on the highest price that the buyer was willing to offer for the shares? |
| **Holding** | No. The “entire fairness” of a merger is comprised of fair dealing and fair price. |
| **Reasoning** | Minority shareholders voting in favor of a proposed merger must be informed of all material information regarding the merger for the dealing to be fair. Failure to provide the minority shareholders with all material information is a breach of fiduciary duty. Here, although Arledge and Chitiea had prepared their study for Signal and were actually Signal officers, they still owed a duty to UOP because they were also UOP directors. The feasibility study and, more specifically, the possible sale price of $24 per share and the resulting $17 million difference in amount paid to the UOP minority shareholders clearly constitute material information that the shareholders were entitled to know before voting. Arledge and Chitiea’s failure to disclose that information was a breach of their fiduciary duties and their actions thus cannot be considered fair dealing. In terms of fair price, to determine whether the price of a cash-out merger was fair, a court is to consider “all relevant factors,” something that the Delaware Court of Chancery did not do. On remand all relevant factors concerning the value of UOP should be considered in determining whether the price was fair. As a result of the foregoing, the Delaware Court of Chancery’s findings that the circumstances of and price paid for the merger were fair are reversed and the case is remanded. |

**CLASS 6**

* ***Rosenblatt v. Getty***
  1. Getty owned 80% of Skelly and wanted to go private without offending ***Weinberger***
  2. Both G and S create independent special committees; disagreed on valuation and got expert to mediate the price decision
  3. Held: They did a great job of remaining within the bounds of ***Weinberger***
  4. Getty has no obligation as Majority SH of Skelly to the minority SHs of Skelly, it just cannot stand on both sides of the table (report it had commissioned but didn’t share is fine).
  5. Here there is no indication that the decreased earnings projections would have materially affected the exchange ratio negotiations.
  6. The merger agreement in Weinberger was exclusively conditioned on approval of majority of minority shareholders of UOP, here that was not the case.
  7. The majority shareholder need not disclose the top bid to the minority under all circumstances. This was so in Weinberger because the board was the same on both sides of the deal. Thus in Weinberger they had violated their duty of loyalty.

***Kahn v. Lynch***, 638 A.2d 1110 (Del. 1994)

Facts: Alcatel purchased 43% of Lynch’s stocks, and appointed half of the board and the compensation committee, and 2 out of 3 members of the executive committee. The certificate of incorporation required 80% majority for business decisions. The original lynch group and the Alcatel group had a disagreement about future for the business. Each group wanted to merge with a different company but needed the other one for the super majority.  Alcatel wanted to buy more shares to have 57% of the shares. Eventually the merger was approved for the price of $15.5 per share. Kahn claim Alcatel breached its fiduciary duty.

Issue: 1. was Alcatel a controlling shareholder? 2. Who bears the burden to prove the entire fairness?

Holding: 1. Yes. 2. Alcatel

Rule: 1. Only controlling shareholders owes a fiduciary duty to a corporation. Minority shareholders are not controlling shareholders unless they have something more that makes them controlling. A controlling dominating party standing on both sides of a transaction bears the burden to prove its entire fairness, as one can never be sure that a merger with a controlling shareholder is truly independent. 2. There’s a two-part test to see if the burden of proof should be swayed from the controlling shareholders: first the controlling shareholder must not dictate the term of the merger, second- the special committee must have real bargaining power over the majority shareholder on an arm’s length basis. Directors must refuse a price that isn’t unfair, even if it is the best offer of a certain fiduciary and even if there are no alternatives. Unless the controlling shareholder can demonstrate that it not only formed an independent committee but also replicated a process as though each of the contending parties had in fact exerted its bargaining power at arm’s lengths, the burden of proving entire fairness will not shift.

Rationale: 1. The directors of lynch deferred to Alcatel because of its strong hold on the board. Alcatel dominated the board and made her decisions go through, it also threatened the management and eventually fired it. 2. Alcatel threatened Lynch to make a hostile takeover if Lynch will not accept the 15.5 offer. This is the reason the independent committee recommended to take the offer.  That threat impacted the committee’s ability to negotiate at arm’s length.

Avoiding Entire Fairness

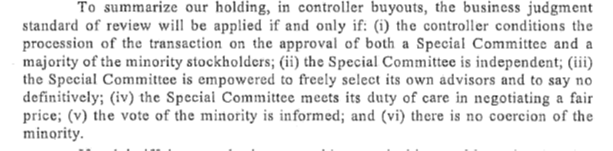
***Kahn v. M+F Worldwide Corp.(*Del. 2014*)***

Facts: M&F was a 43% shareholder of MFW, and in 2011 it purchased the remaining of the common stock of MFW. The merger was examined by a special committee, and voted on only by minority shareholders. The appellants claim M&F and MFW’s directors breached their fiduciary duty.

Issue: What standard of review should should apply to a controller merger that applied both conditions to shift the burden of proof.

Rule: the basic rule is that the standard of review is entire fairness and the burden of the proof is on the defendant, unless the transaction was approved by either an independent committee or by a majority of the minority shareholders. Price is the most important factor. When there’s a case of a merger between a controlling shareholder and its subsidiary, and the merger is conditioned from the beginning with both approval of an independent committee and an informed vote of a majority shareholders – the standard of review is BJR.

Directors are deemed independent unless they are beholden to the controlling party or heavily influenced by it. Being friends or colleagues isn’t enough. Need to show material ties that subjectively will impair the director’s impartiality.

Most imp

Rationale: entire fairness is the highest standard of review and substitute a disinterested transaction, but the two protections mimic independence as well. The dual protection merger structure protects the minority shareholders. It makes sense because the Delaware law gives supremacy to the vote of informed impartial directors. It will give incentive to companies to use the dual protection procedure. If the majority of the minority vote is fully informed and uncoerced, it’s enough.

**CLASS 8 intermediate standards**

Defensive Measures to Keep the Company Independent

Intermediate Standards I – Application to Defensive Board Measures  
  
A.Defensive Measures to Keep the Company Independent  
  
The Role of Takeover Defenses

Before the 1980s, whenever a board sought advice from legal counsel within the course of negotiating a transaction the lawyers would advise the board that as long as it acted in good faith and without conflict of interest their decision would be protected under the business judgment rule. However, two important changes took place in the 1980s that changed this scenario. First, Delaware courts began to analyze directors’ decision with more scrutiny and second, the development of takeover defenses mechanisms made directors and lawyers work more closely in devising strategies in order to protect the board or maximize value to the shareholders.  
When a director has sufficient economic interest in a transaction his decision is considered to be inflected by conflict of interest and if such a decision is not approved by independent decision makers the board will have the burden of proving entire fairness of the transaction. If, on the other hand the decision does not involve a conflict of interest, then the BJR will be applied.  
  
Standards of Judicial Review

Courts of Delaware have long recognized that directors have a strong interest in retaining their positions and to achieve such goal sometime they do not observe their duty of loyalty and good faith to the corporation and its shareholders.  
In some earlier cases involving “greenmail” the courts held that if directors were able to prove reasonable grounds that the acquisition of control represented a threat to the corporation they would have satisfied their burden of proof and the decision of the board would be subject to the BJR standard of review. In this sense, it seemed that a good faith belief of directors would be enough to rebut the inference of a conflict of interest and shift the burden to plaintiffs to overcome the strong presumption of the BJR.  
As the author mentions criticizing such decisions, such approach allowed boards to use powerful defense mechanisms as long as they could reasonably claim that investor welfare might be threatened and because that claim was easy to be made it seemed that the Delaware courts were closing their eyes to questions of management disloyalty.   
In this sense, in Johnson v. Trueblood the court ruled that directors that use defense mechanisms to maintain control will not have the burden of proving entire fairness if the course of action they took can be attributed to a rational business purpose. In other words, the plaintiff will have the burden of proving that the directors’ decision involved some type of bad faith in order to shift the burden and rebut the BJR.  
Furthermore, in Panter v. Marshall Field & Co. the majority of the court decided that directors are not truly fiduciaries because they inevitably have a conflict of interest of protecting their position and, therefore, board is entitled to a presumption of good faith if their actions are arguably taken for the benefit of the corporation. In order to rebut such presumption the plaintiff shall show that selfish motives dominated their decision. The dissent argued that this type of ruling has the effect of immunizing corporate boards from liability if they hire experts to advise them and who find any business rationale for their actions and, therefore, in such cases the courts should be less deferential to management.  
The decisions mentioned above were heavily criticized because they ignore the real motivation of directors in control battles.     
  
***Unocal Corporation v. Mesa Petroleum Co.***Delaware Supreme Court  
493 A.2d 946 (Del. 1985)  
  
Rule of law: A board of directors may repurchase stock from a selected segment of its stockholders in order to defeat a perceived threat to the corporation’s business so long as the board’s selection of which stockholders to repurchase from is reasonable in relation to the threat and not motivated primarily out of a desire to effectuate a perpetuation of control.  
  
Parties • Mesa Petroleum Co. (Mesa) (plaintiff)  
• Unocal Corporation (defendant)  
**Facts** Mesa Petroleum Co. (Mesa) (plaintiff) owned 13 percent of Unocal Corporation’s (Unocal) (defendant) stock. Mesa submitted a “two-tier” cash tender offer for an additional 37 percent of Unocal stock at a price of $54 per share. The securities that Mesa offered on the back end of the two-tiered tender offer were highly subordinated “junk bonds.” With the assistance of outside financial experts, the Unocal board of directors determined that the Mesa offer was completely inadequate as the value of Unocal stock on the front end of such a sale should have been at least $60 per share, and the junk bonds on the back end were worth far less than $54 per share. To oppose the Mesa offer and provide an alternative to Unocal’s shareholders, Unocal adopted a selective exchange offer, whereby Unocal would self-tender its own shares to its stockholders for $72 per share. The Unocal board also determined that Mesa would be excluded from the offer. The board approved this exclusion because if Mesa was able to tender the Unocal shares, Unocal would effectively subsidize Mesa’s attempts to buy Unocal stock at $54 per share. In sum, the Unocal board’s goal was either to win out over Mesa’s $54 per share tender offer, or, if the Mesa offer was still successful despite the exchange offer, to provide the Unocal shareholders that remained with an adequate alternative to accepting the junk bonds from Mesa on the back end. Mesa brought suit, challenging Unocal’s exchange offer and its exclusion of Mesa.   
Procedural History:The Delaware Court of Chancery granted a preliminary injunction to Mesa, enjoining Unocal’s exchange offer. Unocal appealed.

Issue: May a board of directors repurchase stock from its stockholders selectively?

Holding: Yes. Although in cases where a corporation purchases shares with corporate funds to remove a threat to control the burden is on the directors to prove that their actions were reasonable, the business judgment rule kicks in when the directors prove a good faith and reasonable investigation resulted in the purchase.   
It is therefore upheld under the business judgment rule and the Delaware Court of Chancery is reversed.

Reasoning: Thus, a board of directors may repurchase stock from its stockholders selectively in order to defeat a perceived threat to the corporation’s business so long as the board’s selection of which stockholders to repurchase from is reasonable in relation to the threat and not motivated primarily out of a desire to effectuate a perpetuation of control. In the case at bar, Unocal’s board’s selective tender offer to the exclusion of Mesa was reasonable in relation to the threat posed by Mesa. Mesa’s two-tiered tender offer to Unocal stockholders was inadequate on both the front and back ends. The offer’s purpose was to force stockholders to accept the undervalued $54 per share offer so they could avoid being stuck with accepting junk bonds on the back end of the offer. Unocal was thus entitled to attempt to provide its stockholders with a viable alternative and it did so by offering $72 per share. This alternative would have effectively been thwarted if Mesa was included in the $72 per share offer as this would have subsidized Mesa’s continuing efforts to buy Unocal stock. In addition, Unocal’s selective exchange offer was designed to protect its stockholders from Mesa’s tender offer, and Mesa certainly would not qualify in the class of stockholders being protected from its own offer. Accordingly, the selective exchange offer was reasonable in light of the threat posed to Unocal by Mesa’s tender offer.   
Additional comments It is well established that under Delaware law a corporation may deal selectively with its stockholders provided that directors have not acted solely with the purpose of entrenching themselves in office.  
BJR is applicable in the takeover context.  
Before the protections of the BJR are conferred, there is an enhanced duty which calls for judicial examination as to whether the majority of the board acted in good faith, the board exercised due care in taking a decision (was well informed) and the decision was made in the best interest of the company. In case the decision involves a conflict of interest, the directors shall prove that there are reasonable grounds to believe that the new controller poses a threat to corporate policies, it conducted good faith investigations and the decision was approved by a majority of disinterested directors.

A further aspect to be taken into consideration is whether the decision taken is appropriate to the threat posed.

Therefore, unless plaintiffs show that the decision of the board was made in order to perpetuate the directors in their office, the BJR shall apply. Unocal standard of review: reasonableness of the defensive measures vis a vis the threat and proportionality of the defensive measures.  
  
Doron Nov 2nd

***In re Unitrin Inc. Shareholders Litigation***

Fact: a motion brought by American General (AG) and Unitrin’s shareholders against Unitrin and its directors.  AG publicly proposed to merge with Unitrin buying its shares for a price representing a 30% premium over the market price. Unitrin considered the offer and decided to reject it. As a response to AG’s buying proposal they started buying 10 million of its own shares and adopted a shareholder’s rights plan (poison pill). Unitrin’s directors owned 23% of the stocks and the repurchase program would have increased that percentage. Unitrin’s shareholders objected the repurchase and filed a motion to stop it.

Procedural history: The lower court ordered Unitrin to stop the stock purchase by applying the proportionality standard.

Issue: Whether the repurchase plan was an adequate defensive measure and what was the right legal standard to examine it by.

Holding: the lower court erred in deciding the repurchase plan is “unnecessary”.   It’s reversed and remanded.

Rule: A court applying enhanced judicial scrutiny should decide whether the directors made a reasonable decision and not the best decision. The court should be careful to not replace its business judgement with the judgement of the board. A repurchase plan is a reasonable proportioned response to the threat of a merger. Defensive measures that are preclusive or coercive are draconian and forbidden. If it is not draconian, the court then need to move to the reasonability test. The board is allowed to defend the corporation in a non-coercive and non-preclusive ways.

Reasoning: the lower court did not determine if the decision to make the repurchase fell within a range of reasonableness.  It is okay for the board to make distinction between types of shareholders (long term and short term). A limited nondiscriminatory self tender is not inherently coercive. Unitrin is a public corporation and all shareholders could sell their stocks to the company if they wanted to.

Pallavi Chandrasekhar Class 8 Carney 359-68

***Moran v. Household Int’l, Inc.,*** 500 A.2d 1346 (Del. 1985)

**FACTS:** Board of Directors of Household adopted the Rights Plan. The Rights Plan provides that Household common stock holders are entitled to issuance of one Right per common stock under certain triggering conditions.

Household adopted the Rights Plan as a preventive mechanism to ward off future advances.

Moran one of the directors of Household also started taking steps for a leveraged buy out.

Household secured services of investment bank and law firm to advice it on the environment of lot of hostile takeovers.

Moran filed the suit in the court of Chancery.

**ISSUES:** a) Whether the directors were authorized to adopt the Rights Plan.

b) Whether the Rights Plan altered the fundamental structure of the company by stockholders losing their right to accept and receive tender offers.

c) Whether board was unauthorized to restrict stockholders right to conduct proxy contest.

d) Whether business judgement rule would be applicable for the adoption of the Rights Plan.

**PROCEDURAL HISTORY:** The court of Chancery upheld the Rights Plan as a legitimate exercise of business judgement of Household Moran.

**JUDGEMENT:** Affirmed.

**HOLDING:** The Household Board received the benefit of the business judgement rule while enacting the Rights Plan as they acted in good faith to the perceived threat.

**REASONING:** The case is different from *Unocal* and others as the Rights Plan was adopted to ward of future advances and not a specific threat.

* 1. The board has sufficient authority under 8 Del. C. §157, and inherent powers of the board conferred under 8 Del. C. § 141(a) concerning management of the business and affairs, the Board had the authority to enact the Rights Plan.
  2. The Rights Plan is not absolute. When Household Board is faced with a tender offer and a request to redeem the Rights, they will not be able to arbitrarily reject the offer. They will be held to the same fiduciary standards any other board of directors would be held to originally approving the Rights Plan. There is little change in the structure of the company. The Board does not have unfettered discretion in refusing to redeem the Rights. There would also be numerous methods to successfully launch a hostile tender offer despite the continuance of the Rights Plan.
  3. The effect on proxy contest was minimal. Evidence suggests that many proxy contests are won by an insurgent ownership of less than 20%. The key variable in proxy contest success is the merit of an insurgent’s issues not the size of his holdings.
  4. There were no allegations that the directors acted in bad faith. The Rights Plan was enacted as a reaction to the threat perceived in the market place of coercive two-tier tender offers.

Here the Board had made an informed decision by hiring an investment bank and a law firm and Moran’s views served as a knowledgeable critique of the plan.

**RULES**: a) § 151 and § 157 of Delaware General Corporation Law.

‘Anti-destruction’ clauses generally ensure holders of certain securities of the protection of their rights of conversion in the event of a merger by giving them the right to convert their securities into whatever securities are given to replace the stock of their company. The fact that the rights here have their purpose the prevention of coercive two-tier tender offers does not invalidate them.

c) The relationship between a proxy and a grantor is that of agency and revocable by the grantor anytime.   
Therefore the owner of a proxy is not a beneficial owner of the stock. As a result, the mere acquisition of the right to vote 20% of the shares does not trigger the Rights.

d) The business judgement rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. The business judgement rule applies to the adoption of defensive mechanism but the initial burden will lie with the directors. The directors must show that they had reasonable grounds for believing that a danger to corporate policy and its effectiveness existed and the defensive mechanism in relation to the threat posed.

To see whether business judgement reached by board was informed one, we determine whether the board was grossly negligent (see *van gorkam case)*

**POISON PILL SLIDES**

BACKGROUND: It is done in the environment of hostile take overs or environment which is not in the best interests of the company. It is done when there is a perceived threat and directors have a fiduciary duty while considering the Rights Plan.

RIGHTS PLAN: It reduces the risk of stockholder towards the perceived threat. While it is in place it helps in capping beneficial ownership at a specified threshold and preventing acquisition of control. It helps the board to control the timing evaluation and increases the likelihood that the hostile bidder would negotiate a deal.

Rights Plans are not preclusive of hostile takeovers, replacement of the entire Board, or successful activist campaigns.

The Board can remove the Rights Plan at any time without notice. It does not prevent the stockholders from criticizing the Board.

ADOPTION: It can be adopted without stockholder vote. The Company distributes to its stockholders as of the “record date” a dividend of one “Right” for each outstanding share of Common Stock Company enters into Rights Agreement with its transfer agent, as rights agent.

Rights initially paired with shares of stock and are "invisible" - Prior to the occurrence of a triggering event: there is no dilution, the cost of the plan is negligible, and the plan does not impede trading or impact financial reporting in any way.

Flip-in feature: Right to purchase additional stock of the Company at a substantial discount

Flip-over feature: If rights are triggered and Company subsequently merges, Rights “flip-over” into right to purchase stock of the combined company post-takeover.

A Rights Plan works by diluting the ownership of the acquiror - if the Rights Plan is triggered, everyone but the acquiror is able to buy stock at 50% of the market price

The Exchange Provision– In the event the flip-in is triggered, the proposed Rights Plan gives the Board the authority to instead exchange each outstanding Right (other than those owned by the acquirer or its transferees) for one share of Common Stock.

Termination, Redemption and Amendment– The proposed rights plan will permit the Board to terminate the Rights Plan in its entirety, redeem the Rights for a nominal price, or amend the Plan to make it inapplicable without any payment, at any time until the flip-in provision is triggered.

Expiration dateTypical term is no more than 10 years. Issuers increasingly adopt one-year terms.

Rights plans have conventionally provided that a rights plan can be triggered if a “group” (under SEC Rule 13(d) beneficially owns in excess of the trigger threshold. For this purpose, a group is formed *“when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer .*

**CLASS 9**

Dead Hand” and “Slow Hand” Pills

***Carmody v. Toll Brothers, Inc*** 723 A 2d. 1180 (Del. Ch. 1998) Jacobs, J

**FACTS:** Toll Bros. adopted the Rights Plan with no specific takeover proposal or threat. It was announced that the Rights Plan was adopted to protect stockholders from coercive or unfair tactics to gain control over the company.

The Rights Plan provided that only specific group of directors namely the ‘Continuing Directors’ could redeem the Rights.

The ‘dead hand’ provision in the Rights Plan operates to prevent any directors except those who were in office at the date of the Rights Plan adoption or their designated successors from redeeming the Rights until they expire.

The ‘dead hand’ has two fold effect- i) it eliminates proxy contest or unsolicited offer as even if acquirer wins the contest, the newly elected board will not be able to redeem the Rights. ii) It disenfranchises all the shareholders from any choice except to vote for the incumbent board of directors.

**ISSUES:** a) Whether the ‘dead hand’ provision in the poison pill was ultra vires. b) Whether there was a breach of fiduciary duty.

**JUDGEMENT:** For the plaintiff.

**HOLDING:** The complaint states legally sufficient claims against the ‘dead hand’ provision of the Toll Bros. Rights Plan violates 8 Del. C. §§ 141 (a) and (d).

**REASONING:** a) The ‘dead hand’ deployed by the directors of Toll Bros. prevented all proxy contest altogether.

Vesting the redemption of the poison pill exclusively in the hands of the continuing directors transgresses the statutorily protected shareholder right to elect the directors who would be so empowered. The redemption of Rights Plan is nowhere found in the certificate of incorporation of Toll Bros.

The inability to redeem the Rights Plan makes it legally impossible for a newly elected board’s future ability to achieve a business combination without consent of the ‘continuing directors’. This would interfere in the board’ power to protect the corporation’s interest.

b) Since the ‘dead hand’ provision disenfranchises the shareholder, it is sufficient to claim that it was coercive. Since it also eliminates all proxy contests and thereby hostile takeovers, the Toll Bros. violated their fiduciary duty towards their shareholders.

**RULES:** a) The ‘dead hand’ strategy proved successful only where the purpose of its deployment was to delay the process to enable the board to develop alternatives to the hostile offer. The strategy was largely unsuccessful where the aim was to stop proxy contest altogether. The target board could not erect defenses that would either preclude a proxy contest altogether or improperly bend the rules to favour the board’s continued incumbency.

The Rights Plan confers power only on some and not all directors. But under §141(d) the power to create voting distinctions among directors exists only where there is a classified board, and where those voting power distinctions are expressed in the certificate of incorporation.

Secondly, §141(d) mandates that the right to elect one or more directors who shall have such ‘greater’ voting power is reserved to the stockholders and not to the directors or a subset thereof.

§141(a) mandates that 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 provided in this chapter or in its certificate of incorporation.

b) The duty of loyalty claim has two prongs- i) The ‘dead hand’ exclusively interferes with the shareholder voting franchise without compelling justification and is therefore unlawful under the *Blasius.* ii) The ‘dead hand’ provision is disproportionate defensive measure because precludes or materially abridges the shareholder’s right to receive tender offer.

*Blasius* fiduciary duty claim- The validity of an anti-takeover measure is usually evaluated under the *Unocal/Unitrin* standard. But where the defensive measure disenfranchises the shareholders, it would be measured by a more strict *Blasius* standard.

It states that a board’s unilateral decision to disenfranchise its shareholders cannot be sustained without a ‘compelling justification.’

If the majority of the shareholders prefer a hostile takeover which the board does not, their recourse would be the ballot box. The shareholder vote is primary to corporate governance.

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| --- | --- | --- | --- |
| ***Quickturn Design Systems, Inc. v. Shapiro*(Del. 1998)**  Facts:  Mentor is a corporation and a hostile bidder for Quickturn, the target corporation. Mentor made a tender offer and proxy contest to change the board of Quickturn and gain control over it. In response Quickturn’s board brought about two defenses:  a change of the bylaws to postpone general meetings and a tool called: a Delayed Redemption Provision – DRP).  Procedural history: Mentor challenged the legality of the DRP and the change in bylaws. The court of Chancery held that the DRP is illegal and that the change of the bylaws is legal. Quickturn appealed.  Holding+ judgement: affirmed: the supreme court held that the DRP is invalid in Delaware.  Issue: Whether the DRP is permitted according to Delaware law.  Rule: The board has a right to enact a Rights Plan, but that right is not absolute. When the corporation is faced with a tender offer and a request to redeem the right, the board can’t arbitrarily reject the offer. The board is held to the same fiduciary standards they were held to when thet originally approved the Rights Plan and any defensive mechanism. The boards can’t limit the power of a new boards to manage the company as it’s a violation of its fiduciary duty to the company and to the shareholders.  The delayed redemption provision will limit in a substantial way the freedom of a newly elected director and therefore violates the duty of that director to exercise his best judgement on matters coming before the board. No defensive measure can be sustained if it breaches the directors fiduciary duty.  Rationale: one of the most basic principles of Delaware law corporate law is the freedom of the board to manage the company. The DRP however, will prevent a newly elected board from managing the company for 6 months. It only limits the board’s power in one area but it’s a fundamental area – a possible sale of the corporation.  Fiduciary Limits on Board’s Continuing Use of a Pill  Air Products and Chemicals, Inc. v. Airgas, Inc.  Delaware Court of Chancery  2011 WL 806417    Parties  · Air Products (plaintiff)  · Airgas, Inc. (defendant)  Facts  Air Products and Chemicals, Inc. (Air Products) (plaintiff) attempted a hostile takeover of Airgas, Inc. (Air Gas) (defendant). Air Gas had both a poison pill, which is a corporate strategy to defend against hostile takeovers, and a classified board of nine directors. Three directors were up for reelection each year. At Air Gas’s 2010 annual meeting, three individuals that Air Products supported were elected as directors. However, after learning more about Air Gas, these three directors agreed with the other six directors that the offer from Air Products for Air Gas was inadequate. Air Gas’s board had refused to redeem the poison pill. Air Gas’s charter stated that a 33 percent shareholder could call a special meeting and remove the entire board by a vote of 67 percent. Air Products, however, did not seek to invoke this provision. Rather, Air Products brought suit in the Delaware Court of Chancery, arguing that Air Gas’s defensive mechanisms — specifically the classified board’s refusal to redeem the poison pill — were illegal.  Issue  Is a defensive measure preclusive if it makes gaining control of a corporate board not realistically attainable in the short term, but allows for gaining control of the board over the long term?  Holding  No. Defensive measures cannot be preclusive or coercive. A defensive measure is preclusive only if it makes gaining control of a board not realistically attainable at some point in the future, if realistically attainable means something more than a theoretical or mathematical possibility.  Reasoning  Defensive measures that make it effectively impossible to gain control of a board in the short term only do not constitute preclusive measures. Accordingly, a combination of a poison pill and a classified board does not constitute a preclusive defensive measure, because such combination makes gaining control of a board not realistically attainable only in the short term. As an initial matter, it is clear in this case that Air Gas’s defensive measures are not coercive, as the Air Gas board is simply attempting to maintain the status quo. And the defensive measures are not preclusive either, because although Air Products’ ability to gain control of the Air Gas board is not realistically attainable in the short term, it is reasonably possible at some point in the future. There are two methods by which Air Products could gain control of the Air Gas board: (1) using the provision in Air Gas’s charter stating that a 33% shareholder could call a special meeting and remove the entire board by a vote of 67% or (2) obtaining a majority of the board through annual board elections. In terms of the 33% provision, the evidence does not establish that a 67% vote would be realistically attainable at any point in the future. However, the second method through which Air Products could obtain a majority is possible. Three directors on the Air Gas board come up for reelection each year. So, although Air Products cannot take control over the board in one year, it realistically could take control in two years if the elections went in its favor. Because this is realistically attainable, Air Gas’s defensive measures are not preclusive. In addition, the Air Gas board’s response to Air Products’ hostile takeover attempt is within the “range of reasonableness” because the board believes in good faith that Air Products’ offer is wholly inadequate. As a result, the court finds in favor of Air Gas.  Rule of Law  A defensive measure is preclusive if it makes gaining control of a corporate board not realistically attainable at some point in the future.   |  | | --- | | **CLASS 10**  Poison Pills as a Defense Against an “Activist*”*  ***Third Point v. Ruprecht (SOTHERBY’S) (*2014 Del Ch*.***)  Activism of Third Point and other firms forced board to make cash distribution and adopt a 2-tier posion pill   * + - 13(g) can acquire up to 20% if intent is to be a passive investor     - 13(d) can acquire only 10%   Real question here is whether the activists desire to put the company into debt and sell real estate is the kind of threat to corporate plan that should invoke *Unocal*  *Unocal* is ALWAYS the proper mode of analysis for the poison pill   * + - *Blasius* is not mutually exclusive, drawn into the second prong of *Unocal* when the primary purpose of the board’s action is to interfere with or impede the exercise of SH franchise and the SHs are not given full and fair opportunity to vote effectively   Held: Rights’ Plan is upheld BOTH at adoption and at continuance   * + - Adoption: Prong 1) Creeping control is valid threat, plan is not coercive or preclusive so it is within range of reasonableness; looming proxy contest is not “realistically unattainable” Prong 2) Threat IDed is creeping control (aka with no control premium) and rights plan is good defense of that – 10% cutoff achieves company’s needs     - Revocation: Prong 1) *Effective Negative Control* is reasonable and legally cognizable threat because 20% would be biggest SH by a lot paired with demeanor of Loeb in interactions could lead to influence sufficient to control certain operations   IF it had gotten past *Unocal*, Third point’s reduced odds of winning proxy contest would have been a threat of irreparable harm  ***Schnell v. Chris Craft Indus., Inc***.  285 A.2d 437 (Del. 1971)    Rule of law: Corporate directors may not act with the sole purpose of obstructing shareholder action, even if the methods are legally permissible.    Parties  · Dissident shareholders of Chris-Craft Industries, Inc. (plaintiff)  · Chris-Craft Industries, Inc. (defendant)  Facts  Some dissident shareholders of Chris-Craft Industries, Inc. wished to replace the existing directors at the next annual meeting, scheduled in the bylaws for January 11, 1972. The directors employed various tactics to make the contest more difficult for the dissidents. They refused to turn over their list of shareholders and hired proxy solicitors to work on their behalf. At the October 18, 1971 board meeting, the directors invoked a new provision of the Delaware Corporate Law to advance the date of the annual meeting by a month, to December 8, 1971. This change made it virtually impossible for the dissident shareholders to wage a successful proxy contest to unseat the incumbent directors.  Procedural History  The dissident shareholders petitioned the court to enjoin the board from changing the meeting date. The trial court denied the petition, and the shareholders appealed.  Issue  May corporate directors take action solely for the purpose of obstructing shareholder objectives?  Holding  No. Directors of a corporation are bound to act in the best interest of the shareholders. They may not take steps designed to perpetuate their own power at shareholder expense, even if the maneuvers used are technically permitted by statute.  Reasoning  Shareholder elections are particularly important events and may not be manipulated by directors for their personal gain. In this case, the Delaware Corporate Law permitted the directors to reschedule the annual meeting. The result of the date change, however, would be the total obstruction of the dissident shareholder’s efforts to unseat existing management. Because the directors’ purpose was inequitable, the rescheduling was improper. Therefore, the decision of the trial court is reversed, and the trial court is ordered to reinstate January 11, 1972 as the date of the annual meeting.  Additional comments  Delaware chancery court is a court of equity (discretion of the chancellor). Notwithstanding board having complied with the provisions of law, the court decided that an action is not legally permissible just because it is possible. Perpetuating itself on its office is a non-equitable action of the board.    ***Blasius Indus. Inc. v. Atlas Corp.***  Court of Chancery of Delaware  564 A.2d 651 (1988)    Rule of Law: A board generally cannot undertake action with the primary purpose of interfering with shareholder voting, even if it acts in the good faith pursuit of the corporation’s best interest.    Parties  Blasius Industries, Inc. (plaintiffs)  Atlas Corp. (defendant)  Facts  Blasius Industries, Inc. holds 9% of the stock of Atlas Corp. Blasius proposed that Atlas sell off some of its assets, issue bonds, and distribute a large one-time dividend to shareholders. The directors of Atlas believed this was not in the company’s best interest and rejected the idea. On December 30, 1987, Blasius formalized their proposal and also requested the election of 8 new board members. This would increase the size of the board from 7 to 15, the maximum allowed under the corporate charter. Fearing a takeover by Blasius, the board held an emergency meeting the next day and amended the bylaws to add 2 additional board members. This move was designed to prevent Blasius from seizing an 8 to 7 advantage on the board at the next election. Blasius sued Atlas, seeking to void the board’s December 31, 1987 action as inequitable.  Issue  May a board, acting on its good-faith view of the corporation’s best interest, take steps with the primary purpose of interfering with shareholder voting?  Holding  No. Despite the general deference to the board’s decision-making under the business judgment rule, any board action that interferes with shareholder voting will be closely scrutinized.  Reasoning  The shareholder franchise is the source of the board’s power. When the board restricts shareholder voting, it changes the allocation of power between the board and the shareholders. Ordinarily, agents cannot unilaterally determine the scope of their power vis-à-vis their principal. Therefore, while the board is given broad discretion in making most business decisions, they are far less free to restrict shareholder voting. In this case, the Atlas board genuinely believed that Blasius’ plans would harm the corporation. Its decision to expand the board by 2 members was technically permissible under the Delaware Corporation Law. Under the circumstances, however, the action was inequitable and improper. The express motive for the expansion was to prevent Blasius from acquiring control of the board in the immediate future. The board could have spent corporate funds to educate shareholders on the possible negative effects of Blasius’ proposals, in the hopes of persuading shareholders not to support Blasius’ candidates. The board was not permitted, however, to deliberately restrict the shareholder’s opportunity to place Blasius in power. The directors’ December 31, 1987 expansion of the board is therefore set aside as void.  *Kalick v. Sandridge*, 68 A.3d 242 (Del. Ch. 2013)  ISSUE: Whether the board breached its fiduciary duty by failing to approve the TPG slate due to the proxy put option.  REASONING: A corporate board deciding whether to approve directors for the purposes of a proxy put cannot act consistently with its fiduciary duties by simply failing to approve any director candidates who run against the incumbent slate; rather, the incumbent board must respect its primary duty of loyalty to the corporation and its stockholders and may refuse to grant approval only if it determines that the director candidates running against them posed such a material threat of harm to the corporation that it would constitute a breach of the directors’ duty of loyalty to the corporation and its stockholders to pass control to them.  To prevail on a motion for preliminary injunction, a plaintiff must prove that: (1) he is  likely to succeed on the merits of his claims; (2) he will suffer imminent, irreparable harm if an injunction is not granted; and (3) the balance of equities weighs in favor of issuing the  injunction.  Court of Chancery would apply intermediate standard of review (unocal) to determine whether preliminary injunction was appropriate, in stockholder’s action alleging board of public energy corporation had improperly refused to make a decision on whether to approve particular slate for purposes of proxy put; such a flexible standard was explicitly designed to give court ability to use equitable tools to protect stockholders against unreasonable director action that had defensive or entrenching effect.  **CLASS 11**  The *Revlon* Review Standard   * ***Revlon v. MacAndrews*** (1985)   1. Pantry Pride launches all cash all shares hostile takeover of Revlon (no structural coercion)   2. Frostman arrives as alternate buyer and defenses set up WHITE NIGHT      + Self-Tender Offer (using notes as consideration)        - Carried out: some shares traded for higher value notes, driving down the value of the corporation        - Notes include covenant against taking on more debt or assets, and thus blocks leveraged buyout      + Note Purchase Rights Plan (poison pill) – later redeemed      + Frostman Conditions:        - Lock-Up ($100-$175 undervaluation) “Crown Jewel”        - No-Shop Clause        - Termination Fee ($25 million)      + White Night: Done with friendly buyer to keep mgmt. in tact   3. As the price goes up and up, pointing to inadequate price becomes less and less effective   4. **Holding**: BoD permitting management to negotiate merger/buy-out with third-party is a recognition that the company was for sale. The duty of the board had thus changed from preservation of Revlon as a corporate entity to maximization of the company’s value at a sale for the SHs benefit. New responsibilities. The directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the SHs at a sale of the company      + Change away from the long-term corporate policy and can’t say “people don’t know our plans”      + A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the SHs. However, it is inappropriate when an auction among active bidders is in progress and the object is no longer to maintain corporate entity, but maximize scrilla for SHs   5. **CHOI**: Break-up merger is noticeable, but less important than recognition of inevitable sale   6. **CHOI**: Revlon is an *affirmative duty to do something*, to what extent is there a disfirmative duty? * Justifiable D tactics are those that help weak bidders out to drive up overall price with bidding contest * **Enhanced Scrutiny**: ***Revlon***/***Unocal*** approach – falls at intermediate point on spectrum b/w BJR and Entire Fairness * Is ***Revlon*** a subset of ***Unocal*** or a separate thing?   Subset: Limits what BoD can point to short-term, as opposed to *corporate bastion* in ***Unocal***   * ***Paramount Communication v. QVC***   1. Paramount is target of stock-for-stock merger with Viacom (owned by Summer Redstone   2. ) where CEO of Paramount would stay on and Redstone would be primary owner      + QVC launches competitive hostile 2-stage bid      + Defensive tactics are put in place to favor Viacom        - Poison Pill        - No-Shop Clause        - Termination Fee ($100 million)        - Stock Lock-Up (19.9% at $69.14) [deters hostile offer because higher compelling bid goes the more Viacom gets as consolation] – Hurts SHs   3. **Held @ Supreme Court**: Reviewed under ***Revlon*** (objective of which is “the best value reasonably available to the SHs”)      + Just like ***Time***, this does not trigger either of the first 2 ***Revlon*** triggers      + **NEW TRIGGER**: Change in control        - Selling to Viacom changes from a *fluid aggregation of unaffiliated SHs* to a controlling SH        - **Lose** the ability to sell the corporation for a control premium FOREVER        - There is ALSO a change in control when you are **cashed out**          * No clean line…***Revlon*** applies at 50%, but not at 1/3   4. Jacobs @ Chancellory: Rationale is consideration of the concerns that underlie ***Revlon*** – BoD mae a *reasonable* decision and be *reasonably* informed of what the options were      + Here, the board blinded itself and did not make reasonable efforts to learn about the key feature of the higher big and did not try to negotiate problems away (Duty of Care violation) * ***In re TOPPS Company Shareholder Litigation*** (2007)   1. TOPPS has deal with Eisner in place: 40 day Go Shop Period; match right; 4.3% termination fee; superior offers allowed to come in after 40 days      + Eisner has value as bird in hand; this is a reasonable value maximization process   2. Upper Deck makes higher offers, but due to anti-trust considerations and fear that UD is trying to blow up deal, TOPPS board does not respond with concerns and loses right to make UD an Excluded Party who can keep bidding   3. In Eisner bid, management stays on and they don’t want to sell to rival – conflict of interest   4. HELD: “An apparent failure to undertake diligent good faith efforts at bargaining with UD”      + Also made misrepresentations about UD in public while holding UD to standstill that prevented them from replying – TOPPS rejected UD request to release standstill   5. Granted a preliminary injunction releasing standstill agreement so they can make the Tender Offer described * ***In re Dollar Thrifty Shareholder Litigation*** (2010)   1. Lawsuit for injunction because DT didn’t conduct pre-signing auction, signing agreement only with modest premium and agreeing to termination fee and matching rights      + Only two potential bidder; got price way up; company stock way up; Avis refuses to add a reverse termination fee   2. HELD: No injunction, DT acted in an exemplary fashion      + “When directors who are well motivated, have displayed no entrenchment motivation over several years, and who diligently involve themselves in the deal process choose a course of action, this court should be reluctant to second-guess their action as unreasonable”      + Even if they weren’t reasonable, the risks of an injunction outweigh the benefits to the SHs – no extra leverages, just delay and uncertainty      + Avis has no reverse termination fee, so if deal fails, TD could end up with nothing * ***In re Family Dollar Stores*** (2014)   1. Family decides to negotiate solely with Tree because of risk that General will not be interested   2. Tree offers $74 with no anti-trust concern; General offers $80, but won’t add “hell or high water” clause   3. HELD: 100% OF $74 =$74; 40% of $80 = $32, so the Tree bid is better      + Family board behaved correctly when General asked if it was negotiating a deal and it declined to respond in following with the NDA for fear of hostile bid      + Taking lower, but more sure price is an acceptable tactic, especially when advised to by financial advisors      + Note: SHs also have to approve deal and were fully informed about the anti-trust risk, so they are able to hire their own experts and make the decision for themselves * **How to Deal with DGCL § 102(b)(7)?**   1. Get an **Injunction** before the merger takes place   2. In a squeeze-out merger there is **self-dealing** and **loyalty** problem – ***Weinberger***   3. Appraisal rights are the only remedy for short-form mergers   ***C&J Energy Services v. City of Miami****,* 107 A.3d 1049 (Del. 2014)  Reversed Court of Chancery’s decision as it had misapplied Revlon. Here the board had met its fiduciary duties, it had a ‘fiduciary out’ option. Revlon does not say that board should set aside its own views and conduct an active auction as there was no single blue print laid down to fulfill its duties to shareholders under Revlon. Revlon allows board to proceed towards transaction that provides best deal to shareholders as long as there was an effective market check wherein an interested bidder may have a reasonable opportunity to provide a high value alternative and the board has flexibility to opt for it. The ability of stockholder to actively accept or reject the bid is also important. All this was done here. Board was well informed about C&J’s value. The board took steps to mitigate the change of control by including 2/3rd voting to amend the bylaws including the pro rata premium to shareholders. There was no material barrier to prevent competing bidder to provide a superior price.  **CLASS 12**  Friendly Deal Protections (Including No-Shops, Break Fees , Voting Agreements) And Enforcement of standstills  ***Ace Limited v. Capital Re Corp****.,* 747 A.2d 95 (Del. Ch.1999) | |  | |  |   **FACTS:**  Ace entered into a ‘Merger Agreement’ with Capital Re which had a ‘No-Talk’ and ‘fiduciary out’ provision. If the merger was voted upon, Ace would likely succeed as it had entered into voting agreements with several shareholders. The only method of opting out of the “Merger Agreement” was to terminate it on the conditions given in the contract. The ‘fiduciary out’ provision meant that Capital Re could cancel the ‘Merger Agreement’ if it got a written advice from outside legal and financial advisors that the third party offer was a ‘superior proposal’ in comparison to Ace’s offer. In doing so, the Board must act in ‘good faith’. The ‘No-Talk’ provision provided that Capital Re or its agents could not solicit or provide information to third parties unless certain conditions are met.  Ace’s stock fall after the announcement of the merger and XL Capital makes an offer to Capital Re at a price higher ($12.5/share) than Ace’s share (then trading at less than $10/share). XL later raised the bid to $13/share, in response Ace raised its bid to $13/share as well, to which XL raised the bid to $14/shares. Instead of matching the price, Ace decided to sue Capital Re for breach of contract.  **ISSUES:** i) Whether Capital Re had a fiduciary duty towards its shareholders to get the highest price for shares despite there being a ‘merger agreement’ with Ace. ii)Whether breach of fiduciary duty was higher duty than performance of Ace’s contract.  **JUDGEMENT:** For the defendant, dismissed.  **HOLDING:** The risk of protecting Capital Re’s shareholders outweighs the need to protect Ace from irreparable harm.  **REASONING:** The circumstances in this case seem that if the board agrees with Ace’s contract regarding third party deals, it is precluding the shareholders from considering another offer. The *QVC* case does not say that directors have no fiduciary duty when they are in ‘*Revlon-*land.’  *QVC* does not say that a board in all circumstances can continue to support a ‘Merger Agreement’ when- i) the board negotiated merger agreement was tied to voting agreements ensuring consummation if the board does not terminate it. ii) the board no longer believes that the merger is a good transaction for the stockholders; iii) the board believes that another available transaction is more favorable to the stockholders. Just because the board has no Revlon duties does not mean the board can allow an unfavourable transaction brought about by its own actions.  When a board accepts the conditions in a merger agreement that act as a defensive barrier to other transactions in this no-change of control context not sought out by the board, the Unocal standard of review might be implicated. If the court was to read the clause as alleged by Ace, it would amount a non-redeemable poison pill.  The Capital Re board was required to exercise its duty of care and loyalty when it entered into the “Merger Agreement.” When the board is negotiating decisions that affects shareholder voting rights, it must retain certain amount of flexibility to ensure that stockholders are not coerced to accept less than optimal exchange for their shares.  “No-Talk” clauses are troubling because they prevent a board from meeting its duty of an informed judgement with respect to even considering the offer of a third party.  Further the transaction between Ace and Capital Re had not reached that stage that it would be unfair for Ace to give up its contract rights at the cost of Capital Re’s shareholders.    **RULES:** Restatement (second) of Contract § 193 provides that a “promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on the grounds of public policy.” The comments to that states that directors of a corporation act in fiduciary capacity and are subject to this section.  *Paramount v. QVC* states that a ‘lock up’ option cannot preclude a target board from entering into a more valuable transaction or prevent a target board from exercising its fiduciary responsibilities.  Professor Regan states that are four major factors that have to be applied to agency and contract law to determine whether to enforce a contract that violates the fiduciary duty:-   1. Whether the acquirer knew or should have known of the target board’s breach of fiduciary duty. 2. Whether the transaction remains pending or is already consummated at the time judicial intervention is sought. 3. Whether the board’s violation of fiduciary duty relates to policy concerns that are specially significant. 4. Whether the acquirer’s reliance interest under the challenged agreement merits protection in the event the court were to declare the agreement unenforceable.   No shop provisions can’t limit the fiduciary duties of the directors.  When a board engages in a change of control transaction it must obtain the highest value reasonably available.  Even when there is no change of control, a board can’t blindly support an inferior offer, in the face of a better offer. It must at least consider it. However, an obligation to not solicit or look for better offers is completely understandable.  Flexibility is an aspect of the duty of care. No talk provisions might prevent the board from making an informed decision. |
|  |
|  |

***Phelps Dodge Corporation vs. Cyprus Amax Minerals Company*** 1999 WL 1054255 (Del. Ch. 1999)

A board must be fully informed of all materially available information. The defendant rightly argues that they are under no obligation to negotiate in a no transfer of control merger as it was held under the Time Warner case. But even a decision not to negotiate must be an informed one.

No talk provisions are troubling because it prevents a board from performing its duty of even considering the offer of a third party.

Here despite the presence of publically traded information, the no talk provision has prevented Cyprus and Asacro from dealing with Phelps in non-public dialogue with Phelps. They should not have completely foreclosed the opportunity to do so.

When self-help measures such as voting on Thursday is clearly available to parties, and all means have been used to fully inform the shareholders, it is not for the courts to interfere and come to their rescue.

An injunction may delay the voting to gather more information which the shareholders maybe in favour of. The risk of the transaction already on the table outweighs the de minimis harm that Phelps claims. Thus the injunction is denied.

* ***In re IXC Communications*** (1999)
  1. Held: Where P fail to show that IXC SHs are either inadequately informed or are misinformed about either the terms of the merger or the process by which it came to be, and the vote will be a valid and independent exercise of SH franchise, without any specified preordained result that precludes them from rationally determining the fate of the proposed merger, the court has no basis for intervention
  2. IXC acted correctly:
     + No-Talk provision came late in the process, had a fiduciary out and was retracted anyways
     + Assertion that willful blindness came from it is unpersuasive
     + There was no interest from other people and no superior offer
     + No Talk provisions are customary, especially late in the game
* ***Omnicare***
  1. BOTH JACOBS AND LEWKOW DISAGREE
  2. NCS is big bag of shit with debt outstripping assets and thus little to no equity
     + They are having a fire sale mentality like something about JON MOI to get cash for assets
  3. Omnicare is a dick and offers to buy all the assets in bankruptcy sale, but leave NOTHING for equity SHs
     + NOTE: As you move towards bankruptcy, the residual claimant becomes debtors
     + SHs say GO FUCK YOURSELF
  4. Genesis proposes merger and offers to pay off most of creditors, provide substantial recovery for holders of NCS notes and give NCS SHs a small return on investment
     + Deal Protections:
       - Termination Fee of $6 million;
       - **DGCL § 251(c)** provision [submit Genesis deal to a SH vote even if the board withdrew recommendation and it goes against their fiduciary duties];
       - No shop clause
       - SH Lockup
         * Dual class stock; two insiders w/ class B stock controlled majority of voting power
         * Homies promised to vote YES AND signed **§ 251(c)** [SHITS BEEN REPEALED THO]
     + Hands Tying Agreement: Commit to deal and T1 for T2 – have to put to a vote and voters promise to vote yes
       - Policy: Maybe get a better offer OR maybe lose the good bidder
         * Omnicare already pulled some shit and Genesis required conditions for good bid
  5. HELD: Standard of Review: ENHANCED SCRUITNY in cases where deal protection devices take steps that may prevent/reduce the likelihood of a higher bid, like a defensive situation, so the court finds this needs to be reviewed under ***Unocal***
     + Informed Decision
     + Reasonable Decision
       - If ***Revlon*** then best efforts for best real reasonably available to SHs
       - If not, then ***Unocal*** applies:
         * BoD must show threat to corporate policy
         * Response must not be coercive or preclusive [must be reasonable in relation to threat]
  6. **Held**: Given BJR, not ***Revlon*** because there is no cash or control change
     + The Modern ***Unocal*** Test – ***Unitrin*** Digression
       - First, must show that response was NOT coercive or preclusive; then that it was within a “range of reasonable responses”
         * A response is coercive if it is aimed at forcing upon SHs a management-sponsored alternative to a hostile offer
         * A response is preclusive if it deprives SHs of the right to receive all tender offers or preclude a bidder from seeking control by fundamentally restricting proxy contests or otherwise
         * Both **§ 251(c)** and stock lock-up clauses are VOID under Unocal because NCS board “was required to contract for an effective fiduciary out to exercise its continuing fiduciary responsibilities to the minority SHs.
  7. Notes from Lewkow and Jacob
  8. DGCL § 146 can force the target to have the SH vote and if the SH approve the vote, then it will be effective even if the BoD no longer approves it
  9. Note: The fiduciary Out has multiple applications
     + Sometimes: means to terminate the agreement (as in ***Omnicare***)
     + Sometimes: people mean exception to the duty to recommend the merger agreement
  10. Technical Decision: cannot preclude a decision that gets around the process of requiring the SH to vote, but by leveraging § 228, then you can get around the need to put it to a vote and slowing down the deal
  11. ***Revlon*** does not apply so long as Board first gets to the point where they believe there is no more money on the table
* 1) How do deal protection devices actually get negotiated
* 2) After ***Omnicare*** how do you protect the deal, without a fiduciary out, and still pass ***Omnicare***?

Koehler v. NetSpend Holdings, 2013 WL 2181518 (Del. Ch. 2013)

Parties

· Stockholder of NetSpend Holding (plaintiff)

· NetSpend (defendant)

Facts

The largest shareholders of NetSpend expressed interest in selling their equity in the company. Concerned that selling a large amount of stock in the market would depreciate the stock price of the company, NS’ board decided to aid JLL to sell its share privately to one buyer. The board made it clear that the whole corporation was not for sale.

Independent board members then executed confidentiality agreements with 2 private equity funds. Such agreements contained a standstill provision that prevented the PE funds to seek to acquire or merge with NS for a certain period following the agreement, as well as don’t-ask-don’t-waive clause that provided that none of the parties could ask NS to waive or amend any provision of the agreement.

At the same time the confidentiality agreements were signed, the board began to explore a possible sale of NS to TSYS.

NS received an offer from one of the PE funds to acquire 20% of one the largest shareholders (JLL) for $12 per share and a few days later an offer from TSYS to acquire 100% for $14.5 per share. JLL informed it was no longer interested in selling his shares to the PE fund, considering the higher offer made by TSYS.

The TSYS was conditioned to completion of due diligence and to the retention of key employees.

TSYS requested a 6 week exclusivity period. The board declined the exclusivity request and decided not to contact any other potential acquires fearing a leak of information regarding sale of the company.

NS considered whether it had the obligation to seek other bidders for the company and after not getting any answer from a potential buyer it figured that there was a lack of market interest in the company.

Another evidence of NS’ intent to seek another buyer was the effort to include a go-shop provision in the merger agreement with TSYS. However TSYS’ lawyers said that they could not accept such provision.

TSYS submitted a revised version of its offer, increasing the offered price for the shares to $15.25. A director of TYSY had made it clear that they would not reach the price of $17. NS’ board instructed management that it would be willing to accept an offer of $16.75 per share and a go-shop provision, but they did not make a research to whether such price was fair to the shareholders.

For several times the board stood by its decision not to shop around the company (among other reasons they thought that there would be no other interested buyers and that fact would make them lose leverage in the negotiations with TSYS).

Parties agreed to final terms of the merger agreement which were the following: price of $16 per share, a no shop provision (with a fiduciary out in case of a higher offer), a termination fee.

Procedural History

Plaintiff asked injunctive relief to enjoin an acquisition of NetSpend by Total System Services on the grounds that the sales process was no designated to obtain the best price for the shareholders, once the deal had been negotiated with only one potential bidder, the fairness opinion was weak and there was an agreement to forgo a post-agreement market check and deal protection devices, including a “don’t ask don’t waive” provision.

The preliminary injunction was denied.

Issue

Is a sale process unreasonable if it does not provide proper market check?

Holding

Despite plaintiff having met her burden to show that she faces threatened irreparable harm in the absence of an injunction, she has failed to establish the magnitude of the harm that she and other stockholders face as a result of the inadequate sale process.

Although the directors did not make a market check before the transaction with TYSY, between signing and closing no other bidders seemed to show interest in buying the company.

Reasoning

Although the strategy chosen by the board not to seek other potential bidders seemed to be reasonable, the court also based its analysis of whether the board’s actions were reasonable in light of the board’s awareness that it had no external market check on the remainder of the sale process, including the reliance on the fairness opinion which evidence confirms was weak and did not substitute a market check, the deal protective devices.

With regard to the voting agreement the court concluded that it did not represent a credible barrier for other bidders.

Regarding the DADW provision, it was reasoned that such provision was entered in the context of a minority sale and once the board determined that the entire company was for sale, the directors’ Revlon duties applied. In agreeing to keep the DADW clause the board blinded itself from any further interest from the PE funds. Nothing in the record shows that the decision to keep the DADW provision after negotiations began with TYSY was informed and reasonably designed to maximize value to the shareholders.

The sale process reviewed as a whole was considered unreasonable.

**CLASS 13**

The role of advisers

**Note re *Toys“R”Us***

This case involves conflict of interest of financial advisors rendering fairness opinions, as well as addressing whether advisors conflicts tainted the board’s decision. In general, it is advisable that investment banks that represent sellers, not create the impression that they desire “buy-side” work, especially if they are more likely to be selected for this role by buyers.

**Note re *Del Monte***

Facts: In this case the investment bank (Barclays) played both sides (sell and buy) from the beginning, and didn’t disclose it to the Del Monte board at all. Barclays secretly solicited companies to bid for Del Monte’s stock, while Del Monte was Barclays’ client and was not for sale. Barclays also joined two bidders- limiting competitive bids and solicited bidders even after Del Monte told him to tell bidders it is not for sale. Barclays actions were only revealed in a shareholders class action suit during discovery.

Rule: because of the central role  investment banks play in all aspects of strategic alternatives the court requires full disclosure of the bank’s compensation and potential conflicts. The bank’s conflict can taint the director’s process. This is especially prominent when the board is inexperienced in this kind of transaction. Barclays withholding of information was misleading, deceptive and constitutes fraud upon the board. The bank did not act reasonably in connection with the sale process.

***Re Atheros***

In this case, 98% of the Investment Bank’s compensation was contingent on the success on the closing of the proposed transaction. The investment bank told Artheos that “a substantial portion” of its fee is contingent.

Rule: The court held that not disclosing this to the client in the proxy material was inadequate. For the board to make an informed decision  and have confidence in the fairness opinion, the conflicts or perverse incentives of the bank must be fully and  fairly disclosed. The investment bank should have disclosed the amount of the fee that is contingent, especially when the percentage of the contingent fee is so high and so much more than the fee that will be paid regardless to the closing. The court rules 98% is more than what is considered as substantial . Such a big portion of the fee is contingent that it raises doubts about the independence and objectivity of the bank about the proposed deal. This incentive is too big to not disclose it to the board (although there is nothing wrong in the contingent fee if it’s disclosed).

***In re El Paso Corp. Shareholders Litigation***

41 A.3d 432 (Del. Ch. 2012)

Rule of Law: A corporate fiduciary breaches its duty to shareholders when its decisions are motivated by a consideration of its own financial or personal self-interests rather than by an evaluation of the risks and benefits to shareholders.

Parties

· El Paso’s stockholders (plaintiffs)

· Kinder Morgan, Goldman Sachs and certain executives (defendants)

Facts

Doug Foshee, CEO of El Paso Corporation (El Paso), was solely responsible for negotiating the sale of El Paso to Kinder Morgan, Inc. (Kinder). Foshee did not disclose to the El Paso board that he had an interest in purchasing a portion of the El Paso business back from Kinder. El Paso used Goldman, Sachs & Co. as its financial advisor for the transaction. Goldman owned 19% of Kinder stock and had 2 principals on the Kinder board, who owed fiduciary duties to Kinder. The lead Goldman banker advising El Paso personally owned $340,000 worth of Kinder stock. Although Morgan Stanley, an investment bank, was brought in to wall off Goldman from the transaction in an effort to avoid Goldman’s conflicts, Goldman continued to advise El Paso on the merger. Goldman also persuaded El Paso to agree to pay Morgan Stanley’s $35 million advising fee only if El Paso adopted the strategy for selling to Kinder that Goldman was proposing. El Paso’s board did not seek any other bidders or attempt to make Kinder bid publicly. The board also allowed Kinder to back out of an agreement to pay a certain price and eventually agreed to a deal at a lower price. Under the merger agreement entered into by the parties, El Paso could not solicit higher bids and was required to pay a $650 million termination fee to Kinder if El Paso accepted a better proposal from another party. Some of El Paso’s stockholders (plaintiffs) sought a preliminary injunction to enjoin a stockholder vote on the merger.

Issue

Does a corporate fiduciary breach its duty to shareholders when its decisions are motivated by a consideration of its own financial or personal self-interests rather than by an evaluation of the risks and benefits to shareholders?

Holding

Yes. A corporate fiduciary breaches its duty to shareholders when its decisions are motivated by its own financial or personal self-interests.

Reasoning

To obtain a preliminary injunction, a plaintiff must show: (1) a reasonable probability of success on the merits, (2) that the plaintiff will suffer irreparable harm if the injunction is not issued, and (3) that the balance of equities favors granting an injunction. Here, the stockholders have a reasonable likelihood of success in proving that the merger was tainted by disloyalty, selfish motivations, and breaches of fiduciary duty. Foshee had a personal interest in selling El Paso for a low price. Goldman had several conflicts of interest, and Morgan Stanley’s involvement was insufficient to wall off those conflicts. The El Paso board also made a number of questionable decisions. In addition, there is a likelihood of irreparable injury to the shareholders if the merger is not enjoined. However, there is no other bid available, the stockholders have the ability to turn down the merger, and a monetary damages claim would provide at least some remedy. The balance of equities therefore does not favor the granting of a preliminary injunction. Despite the disturbing behavior leading to the terms of the merger, the stockholder’s motion for a preliminary injunction is denied.

***RBC Capital Markets v. Jervis****,* [A.3d] [2015 WL 7221882] (Del. 2015)

**FACTS:** RBC was the financial advisor of Rural Corporation in addition to Moelis being the secondary financial advisor. Rural provides ambulance and fire protection services. Initially Rural wanted to acquire EMS Corporation, but when its competitor CD&R acquired EMS and put conditions on Rural to acquire it, Rural through its financial advisor RBC sought other bidders.

All this while, RBC was also looking at its own interests in these deals of gaining the buy side business of these bidders. Later when Warburg lost the bid of EMS, it bid for Rural.

RBC also started negotiating with Warburg to get its buy side business, this was not disclosed to Rural’s board or the Special Committee set up. It made favourable presentation of Warburg’s deal to the board and the Special Committee. The board accepted Warburg’s deal.

A suit was brought against RBC and Rural’s board for breach of fiduciary duties.

**ISSUES:** (i) whether the board violated its fiduciary duty of care under the enhanced scrutiny of *Revlon,* (ii)whether the board violated its fiduciary duties of disclosure by making material misstatements in the proxy statement and (iii) whether RBC aided and abetted breach of fiduciary duty.

**PROCEDURAL HISTORY:** The Delaware Chancery court held that RBC aided and abetted breach of fiduciary duty by former board of directors of Rural in connection with its sale to Warburg.

**HOLDING:** Any failure on part of financial advisors to prevent a board from breaching its duty of care leads to the claim of aiding and abetting a breach of duty of care. The scienter for aiding and abetting is difficult to prove. But it was done so in this case.

**JUDGEMENT:** Affirmed.

**REASONING:**  (i) The board’s conduct fails Revlon scrutiny because it failed to get the most valuable deal possible in the circumstances for the shareholders. There was no proper market check in which any bidder who is willing to pay more had an opportunity to do so. The Rural board was unaware of RBC’s design to get financial services from Warburg.

(ii) A board maybe be free to accept certain conflict of interest, but the directors must be active and reasonably informed when identifying sale including responding to actual of potential conflicts of interest. Because the conflicted advisor may alone possess all material information, the board must insist on disclosure of all ongoing material information that might have some impact on the deal.

Rural’s directors were also not fully informed about Rural’s value as they were acting in information vacuum created by RBC. The merger with Warburg did not generate the best possible value for Rural’s shareholders due to RBC’s faulty design that prevented competitive bidders to realize the price of the company.

The "consensus" range given by RBC and Rural’s board was artificial and misleading, and that the information that RBC provided for the Proxy Statement about its precedent transaction analysis was material and false.

(iii) RBI knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum.

The manifest intentionality of RBI's conduct—as evidenced by the bankers' own internal communications is demonstrative of the advisor's knowledge of the reality that the Board was proceeding on the basis of fragmental y and misleading information. Propelled by its own improper motives, RBI misled the Rural di-rectors into breaching their duty of care, thereby aiding and abetting the Board's breach of its fiduciary obligations

**RULES:** (i)"When a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal," a court will have difficulty determining that such board violated its *Revlon* duties.

When disinterested directors themselves face liability, the law, for policy reasons, requires that they be deemed to have acted with gross negligence in order to sustain a monetary judgment against them. That does not mean, however, that if they were subject to *Revlon* duties, and their conduct was unreasonable, that there was not a breach of fiduciary duty.

(ii) *Pfeffer v. Redstone,* we stated that "corporate fiduciaries can breach their duty of disclosure under Delaware law ... by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading." We also observed that, "to state a claim for breach by omission of any duty to disclose, a plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials."

"omitted facts are material `if there is a substantial likelihood that a reasonable stockholder would con-sider [them] important in deciding how to vote.' " Materiality "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote[,]" only that such reasonably avail- able information would have impacted upon a stockholder's voting decision. But "[o]mitted facts are not material simply because they might be helpful."

(iii) In *Maipiede v. Townson,* this Court de-scribed the elements of aiding and abetting breaches of fiduciary duty as: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach.

It is the aider and abettor that must act with *scienter.* The aider and abettor must act "knowingly, intentionally, or with reckless indifference"~ that is, with an "illicit state of mind." To establish *scienter,* the plaintiff must demonstrate that the aider and abettor had "actual or constructive knowledge that their conduct was legally improper.

***Singh v. Attenborough*, 2106 WL 2765312 (Del. May 6, 2016 (order)**

The Delaware law usually do not impose liability on advisors. There is “defendant-friendly standard” that requires plaintiffs to prove advisors knew that they help to breach a fiduciary duty. Advisors are usually don’t have a due care liability.

However - if an advisor acts in bad faith, and these actions causes its board client to breach their fiduciary duties that Revlon imposes in a change of control transaction, the advisor will be liable for assisting.

The advisor will be liable even if his client was relying on his advice in good faith, if this advice was misleading, incomplete or disloyal.

This is still a higher standard for liability that requires “knowing”, unlike most standards that impose liability on negligence as well.

**Class 14**

Pre- and Post-Closing *Revlon* Litigation—the Impact of Shareholder Approval

***Corwin v. KKR Financial Holdings, Inc.*, 125 A.3d 304 (Del. 2015)**

**FACTS:** KKR was majority shareholder in Financial Holdings and was structured in such a way that limited its value maximization.

**ISSUES:** Whether BJR was the appropriate standard of review in the case.

**PROCEDURAL HISTORY:** The Court of Chancery held that the business judgment rule is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders

**JUDGEMENT:** Affirmed.

**HOLDING**: The Court of Chancery Correctly Held That The Fully Informed, Uncoerced Vote Of The Disinterested Stockholders Invoked The Business Judgment Rule Standard of Review.

**REASONING:** The entire fairness standard did not apply as it was approved by uncoerced informed minority shareholders’ vote.

First, *Unоcаl* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & А decisions in real time, before closing. They were not tidig designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gоrkоr,* and with the prevalence of exculpatory charter provisions, due care liability is rarely even available.

Second and most important, the doctrine applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked.27 Here, however, all of the objective facts regarding the board's interests, KKR's interests, and the negotiation process, were fully disclosed.

**RULES:** when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced voluntary vote of the disinterested stockholders, the business judgment rule applies.

When a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of а transaction for themselves. There are sound reasons for this policy. When the real parties in interest—the disinterested equity owners---can easily protect themselves at the ballot box by simply voting no, the utility of а litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them. 28 The reason for that is tied to the core rationale of the business judgment rule

In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.

DISCLOSURE LITIGATION

***Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977)**

**FACTS:** Plaintiff shareholder filed a class action suit against Trans Ocean Oil Inc. Corporation. Vickers a controlling shareholder of Trans Oil Inc. made a tender offer for remaining outstanding shares. Plaintiff tendered her shares and alleged in the suit that the defendants violated their fiduciary duty by not maing full and frank disclosure of its assets to the shareholders.

**ISSUES:** Whether Trans Ocean had a fiduciary duty to plaintiff which required complete candour to disclose all facts and circumstance surrounding the tender offer.

**PROCEDURAL HISTORY:** Trial court ruled for the defendants stating that plaintiff failed to prove actionable coercsion or fradulent misrepresentation.

**JUDGEMENT:** Reversed and remanded.

**HOLDING:** In our view, the tender offer failed to disclose fully two critical facts: (1) that a"highly qualified" petroleum engineer, who was a member of Тrans Оcean's management, had calculated the net asset value to be worth significantly more than the. minimum amount disclosed in the offer; and (2) that Vickers' management had authorized open market purchases of Translcean's stock during the period immediately preceding the $12 per share.tender offer for bids up to $15 per share

**REASONING:**  In suit involving sufficiency of disclosure in connection with tender offer made by majority shareholder in corporation for minority's outstanding shares, trial court should not have weighed merits of conflicting evidence as to actual value of company's assets, but should instead have examined information possessed by makers of tender offer and measured such information against what was given to minority stockholders in tender offer itself.

Where management of corporation whose majority shareholder was making tender offer for outstanding minority interest was in possession of two estimates from responsible sources as to value of corporation's assets, one using "floor" approach defining value in terms of its lowest worth and the other a more `optimistic" approach defining value in terms of its highest worth, complete candor required disclosure of both estimates in tender offer.

In judging adequacy of information disclosed in majority stockholder's tender offer to minority for their stock in corporation, court incorrectly substituted "disclosure of adequate facts" standard for correct standard, which required disclosure of all germane facts

**RULES:** Where corporate majority shareholder in another corporation sought to acquire remaining outstanding shares in such corporation via tender offer, it owed fiduciary duty to minority shareholder which required complete candor in discussing fully all facts and circumstances surrounding tender offer.

***Loudon v. Archer-Daniels-Midland*, 700 A.2d 135 (Del. 1997)**

**FACTS:** Archer Daniels Midland (ADM) is supposedly the ‘supermarket to the world’ as it engages in collection, transportation etc. of agricultural products. Plaintiff is stockholder of ADM and entitled to vote in for the board. FBI with its mole in ADM found that ADM was indulging in market manipulation and price fixation. ADM set up a Special Litigation Committee to oversee the allegations and law suits, and elected a new director onto the board. One of the old directors Mr. Buffet had resigned and the FBI mole was fired with allegation of misappropriation of funds. Later ADM issued proxy statement regarding the FBI investigation, the class action suits and existence of Special Litigation Committee. In the shareholder meeting, certain directors were elected unopposed by overwhelming majority. Plaintiff filed suit alleging that circumstances was director resigned and method of election of SLC was not disclosed in proxy statement.

**ISSUES:** Damages from defective proxy statement.

**PROCEDURAL HISTORY:** Trial court ruled that circumstances of resignation was not material. Any order of court to force disclosure would violate federal proxy rules. The trial court on election of SLC found that no specific fact was mentioned for disclosure in the plaintiff’s claim.

**JUDGEMENT:** Affirmed and remanded to replead the claim.

**HOLDING:** We hold that under Delaware law there is no *per se* rule that would allow damages for all director breaches of the fiduciary duty of disclosure.

**REASONING:** Since shareholder meeting is over, and the directors have been elected, an injunction regarding solicitation of votes through proxies cannot be granted.

Absent any adjective describing the activity in a pejorative light, the relatively uncontroversial act of meeting with representatives of other market participants would not be of any' importance to a stockholder faced with the directorial ballot. Similarly, the payment of bonuses to ADM officers is not particularly noteworthy, absent wеll pleaded facts alleging that the bonuses were improper. Thus, the' trial court correctly concluded that this portion of the complaint failed to state a legally cognizable claim.

Damages will be available only in circumstances where dis-closure violations are concomitant with deprivation to stockholders' economic interests or impairment of their voting rights. In every case, a plaintiff stating a clam against di-rectors for violation of the duty of disclosure must set forth in a well-pleaded complaint allegations sufficient to warrant the remedy sought.

**RULES:** General duty of directors to disclose to stockholders all material information reasonably available when seeking stockholder action. Whether or not a failure to fulfill that duty will result in personal liability for damages against di-rectors depends upon the nature of the stock-holder action that was the object of the solicitation of stockholder votes and the misstated or omitted disclosures in connection with that solicitation.

An omitted fact is material if there is a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote.' To prevail on a claim of material omission, a plaintiff must demonstrate that substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable stockholder. There must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the "total mix" of information made available.`

A timely complaint, properly pleaded and supported by proof sufficient to invoke preliminary equitable relief, could result in an early injunction or the imposition of corrective disclosures before the complained-of corporate activity had been consummated. There may also be a potential damage remedy where the misstatement or omission implicates the stockholders' economic or voting rights. But there is no *per, se* doctrine imposing damage liability on directors in a dis-closure case absent these elements.

As this Court held in *Stroud,* "a board is not required to engage in `self-flagellation' and draw legal conclusions implicating itself in a breach of fiduciary duty from surrounding facts and circumstances prior to a formal adjudication of the matter." Thus, even where material facts must be disclosed, negative inferences or characterizations of misconduct or breach of fiduciary duty need not be articulated.

Plaintiffs allegations need not be pleaded with particularity. Nevertheless, some factual basis must be provided from which the Court can infer materiality of an identified omitted fact. This is inherently a requirement for a disclosure claim.

Disclosure-Only Settlements

***In Re Trulia Inc. Shareholder Litig***., 129 A.3d 884 (Del. 2016)

**FACTS:** Truilia and Zillow entered into merger negotiation where trulia’s shareholders claim that directors failed to get maximum value for shareholders. The parties reached settlement and truilia’s shareholders voted in favour of the settlement. The type of settlement is called a disclosure settlement.

**ISSUES:** whether disclosure settlement should be allowed.

**PROCEDURAL HISTORY:**

**JUDGEMENT:** Approval is dendied

**HOLDING:** The materials supplied in the disclosure settlement were not material.

**REASONING:** During acquisition of a public corporation, there is a flurry of litigation and most often it is frivolous. The shareholders end up getting nothing and plaintiff attorneys get their fees from the settlement amount. The most common currency used for settlement is production of additional disclosures to make shareholders better informed. Many times there is such an expedited deal settlement, with relatively less discovery and motion practice that the court is unable to decide whether the settlement was fair or not.

It is many times seen the supplemental disclosures make no difference to shareholders voting.

Disclosure settlements would be met with enhanced judicial scrutiny unless the parties can demonstrate that the disclosure supplements were truly material. When it is not material, the court may appoint an amicus curiae to assist the court in evaluating the benefits of the disclosed materials.

Parties may choose other forums to get settlement but Delaware courts can enact forum selection bylaws to address this concern.

**RULES:** Under Court of Chancery Rule 23, the Court must approve the dismissal or settlement of a class action: Although Delaware has long favored the voluntary settlement of litigation, the fiduciary character of a class action requires the Court to independently examine the fairness of a class action settlement before approving it. "

Outside the settlement context, disclosure claims may be subjected to judicial review in at least two ways. One is in the context of a preliminary injunction motion, in which case the adversarial process would remain intact and plaintiffs would have the burden to demonstrate on the merits a reasonable likelihood of proving that "the alleged omission or misrepresentation is material. In other words, plaintiffs would bear the burden of showing "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available”.

A second way is when plaintiffs' counsel apply to the Court for an award of attorneys fees after defendants voluntarily decide to supplement their proxy materials by making one or more of the disclosures sought by plaintiffs, thereby mooting some 1\*8971 or all of their claims. In that scenario, where securing a release is not at issue, defendants are incentivized to oppose fee requests they view as excessive; Hence, the adversarial process would remain in place and assist the Court in its evaluation of the nature of the benefit conferred *(Le.,* the value of the supplemental disclosures) for purposes of determining the reasonableness of the requested fee.

Under Delaware law, when directors solicit stockholder action, they must "disclose fully and fairly all material information within the board's control.""' Delaware has adopted the standard of materiality used under the federal securities laws. Information is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. In other words, information is material if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it "significantly alter[sj the 'total mix' of information made available.

When the board is making decision on financial adviser’s advice, the stockholders are entitiled to a fair summary of that advice.The essence of a fair summary is not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions. In my view, disclosures that provide extraneous details do not contribute to a fair summary and do not add value for stockholders.

**Appraisal Rights**

**Delaware Appraisal Results Are More Predictable Than They Seem** by Gail Weinstein, Christopher Ewan and Steven J. Steinman, New York Law Journal October 31, 2016

Right to Appraisal in Delaware- A stockholder of a Delaware corporation who opposes the price of an all cash merger can petition in the court of chancery to determine the fair price of her shares as long as she has fulfilled certain criteria. For doing this the court must look at 1) all relevant factors and 2) cannot include any value that arises from the ‘merger price.’

Apparent uncertainty of result in appraisal cases- the fair value determination of the court varies from 14% below the merger price, to the merger price to 258% more than the merger price. The average is about 45% above the merger price as premium.

Factors that have led to uncertainty

1. Use of Discount Cash Flow Methodology- This is method mostly used in the past. But it is unpredictable as it relies on many subjective factors including the management’s on projections. Many times it has been seen that using the same DCF method, the petitioners and respondents have come to very divergent results.
2. Judge’s role as a financial analyst- Judges are not well trained to analyze the best price given their training in the law and reliance on burden of proof.
3. Apparently unpredictable use of the merger price- In recent years courts have started relying on merger price leading many to believe that appraisal price would become more certain. The courts have stated that 1) merger price is usually decided by a market check and hence merger price can determine the fair value of stock and 2) the available company financial projections including those used for DCF are unreliable and hence merger price provides a better fair value. It is also upto the court to decide the premium or deduction over the merger price.

In the authors’ view uncertainty has been overstated because-

1. First, appraisal is sought in only a small percentage of appraisal eligible transactions- Appraisal petitions are filed in a relatively small appraisal eligible transactions. The court’s reliance on merger price on non-interested transactions will make appraisal rarely sought.
2. In the authors’ view the results of the court's appraisal jurisprudence have been broadly consistent- In interested transactions the appraisal price has usually been above the merger price. In interested transactions where there was no market check the premium has been around 138%. In interested transactions where there has been some sort of market check, the premium has been around 22%. In non-interested transactions with sufficient market check the appraisal price has been almost same as the merger price and non-interested transaction with insufficient market check the appraisal price has been about 10-15% above the merger price.

The three 2016 appraisal decisions have been viewed as creating uncertainty, but in the authors’ view have been consistent with the Court of Chancery's past jurisprudence.

1. *Dell*—interested transaction (with a market check): The court did not rely on merger price despite there being competitive bidding and market check. This is because the majority controlling shareholder was doing going private management buyout and the presence of same person on the buy-side and sell-side of the deal made the courts look at the transaction as an interested one. It valued the appraisal price about 26% above the merger price.
2. *ISN Software*—interested transaction (without a market check): was an "interested transaction" without any market check. The controlling stockholder, in a merger, cashed out some but not all of the two minority stockholders' shares. The controller determined the price; there was no financial advisor or fairness opinion. Based on a DCF analysis, the court determined fair value to be 258 percent above the merger price.
3. *DFC Global*—non-interested transaction (with a market check), but unusual business uncertainty: Although it was a non-intersted transaction with market check, the court rejected the sole reliance on merger price because of uncertainty of the regulatory environment. This led the merger price and DCF method unreliable. The court relied on on merger price DCF and comparable analysis and came at a fair value of 8.5% above the merger price.

CONCLUSION- In the authors’ view the appraisal price is predictable, despite the perception being otherwise. for a "non-interested transaction" with meaningful competitive bidding, an appraisal award is not likely to significantly exceed the merger price. For an "interested transaction" without a market check, there will be a meaningful risk of an appraisal award above the merger price.

For transactions that fall between these two extremes, appraisal risk should approximate the extent to which the transaction is or is not "interested," and has or has not included a meaningful market check.

Certain factors may undermine the reliability of the merger price:-

1. the buyer viewed the timing of the purchase as particularly opportune.
2. the seller solicited only financial buyers and no strategic buyers.
3. Post announcement, preclosing developments significantly affected the value of the company.
4. Post closing developments suggest that the merger price severely undervalued the company.

Some problems with relying on the DCF model include:-

1. Not prepared by management in ordinary course of business
2. Modelled either aggressively or pessimistically.
3. Extreme uncertainty regarding company’s future.
4. Company’s record projected versus the actual projection was not reliable.

Parties to transactions, when considering merger price and sale process issues, will want to factor into the calculus the risk associated with appraisal. Target company stockholders, when deciding whether to seek appraisal, will want to consider whether the transaction was "interested" or not, the nature and extent of the market check in the sale process, and the additional factors noted above that may influence appraisal decisions.

**Analysis of Amendments to Delaware General Corporate Law**

The 2016 amendment to DGCL concerns the appraisal arbitrage.

§ 262 Appraisal rights- shareholders who do not vote for the merger are entitled to go to court to obtain fair value for their shares. Due to this opportunistic appraisal seekers threaten appraisal proceedings for settlement money despite their being no merit to the claim. The 2016 amendment has sought to rectify this matter.

Section 262 sets a default interest rate of 5% over the Federal Reserve discount rate.6 Interest accrues from the date of the merger through the date of payment of the appraisal award and compounds quarterly.

Amended Section 262(h) addresses this concern by allowing corporations to defray interest accrual on appraisal awards through prepayments of cash amounts, which will be deducted from the ultimate fair value award for purposes of determining the interest owed. Any prepayment is optional and not required. The synopsis of Section 262(h) states that there is no inference or requirement that the prepayment is equal to, greater than or less than the fair value of the shares. The synopsis also notes that if a corporation, in good faith, contests an appraisal seeker's entitlement to appraisal, the corporation can elect to make prepayments "only to those stockholders whose entitlement to appraisal is uncontested." Amended Section 262(h) does not provide a mechanism for a corporation to recover any of the amount paid to defray the interest in the event that the appraisal award exceeds the amount prepaid.

In another change to Section 262, the 2016 amendments imposed a ban on de minimis appraisal claims that might otherwise impose disproportionate defense costs on corporations. Appraisal ac-tions can be costly to defend. Certain practitioners have highlighted a concern that appraisal seekers might make non-meritorious claims to force a settlement of the claims because a corporation will be incentivized to offer a settlement that is less than the estimated defense costs. Amended Sectìon 262(g) addresses this concern by denying stockholders appraisal rights for publicly listed stock where (i) the appraisal demands represent 1% or less of the stock outstanding and (ii) the total value of the demands (as implied by the merger price) is $1 million or less. The synopsis of Section 262(g) notes that, as a result of the amendments, "appraisal rights are essentially precluded unless the dispute with regard to valuation is substantial and involves little risk that the petition for appraisal will be used to achieve a settlement because of the nuisance value of discovery and other burdens of litigation." This ban on de minimis claims does not apply to short-form mergers effected pursuant to Section 253 or 267.