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Fiduciary Duties of Corporate Directors in Uncertain Times

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About the Paper

This paper was commissioned by the Millstein Center at the request of participants in the Center's General Counsel Corporate Governance Summit and as a part of the Center's ongoing efforts to advance board excellence.

Directors addressing new political uncertainties, a host of heightened challenges and asserted "best practices" from many sources may understandably ask whether their fiduciary duties have changed as well. This paper synthesizes the latest decisions of the Delaware courts on the standards of conduct for directors and the standards by which their conduct is reviewed. While directors should expect uncertainty to be a fact of corporate life for the foreseeable future, this paper emphasizes that neither the fiduciary duties of directors nor the protections afforded them have changed. Disinterested and independent directors acting in good faith continue to have broad protections under the business judgment rule. The legal framework thus enables and, indeed, encourages directors to act proactively and make hard choices when they need to do so.

This paper includes flowcharts illustrating how the standards of judicial review apply to various categories of business decisions that directors may be called upon to make. It concludes with practical suggestions of steps that directors and General Counsels can take to lay the foundation for board decisions to be entitled to business judgment rule protection or, where applicable, withstand more stringent standards of review.

In an accompanying article, former Delaware Chief Justice E. Norman Veasey and Ira M. Millstein elaborate upon how directors, under existing law, are both empowered and have the freedom to make decisions they deem in the best interests of the corporation. The article urges directors, in reliance on this framework, to have the courage to work towards securing the long-term future of their corporations.

The Millstein Center would like to thank the paper's authors, Ellen J. Odoner, Stephen A. Radin, Lyuba A. Goltser, and Andrew E. Blumberg, and the firm Weil, Gotshal & Manges LLP, for their contributions.

Fiduciary Duties of Corporate Directors in Uncertain Times

By Ellen J. Odoner, Stephen A. Radin, Lyuba A. Goltser, and Andrew E. Blumberg*

> *It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way . . .* [1]

While perhaps not rising to the level of turbulence Dickens described, these are uncertain times for decision-making by boards of directors. The outcome of the US Presidential election, combined with Brexit and other political developments abroad, has called into question—and may ultimately upend—trade policy, regulatory policy, energy policy, tax policy, healthcare policy, immigration policy and other key external policies on which corporate strategies rest. These new political uncertainties exacerbate challenges with which boards have already been grappling, among them oversight in the post-financial crisis environment, cybersecurity, climate change, the lightning impact of social media (even before Presidential tweets), corporate ethics, the conflicting priorities and time horizons of stockholders and the appropriate role of the corporation in addressing social concerns.

Fortunately for directors confronting a complex, unsettled environment as they weigh risks and make decisions concerning corporate strategy and other key issues, bedrock corporate law principles and protections for directors have not changed. It is a "fact of corporate life" that "when faced with difficult or sensitive issues, directors often are subject to suit, irrespective of the decisions they make."[2] Under most circumstances, however, decisions made by informed and financially disinterested and independent directors are protected by the business judgment rule—a "powerful"[3] presumption that directors are "faithful to their fiduciary duties"[4] that is "[a]t the foundation"[5] and "[a]t the core"[6] of corporate law. The business judgment rule presumes 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"[7] and, therefore, the courts give great deference to the decision. Other sources of protection for directors are charter provisions exculpating directors from liability for violations of their duty of care; broad charter, bylaw and contractual provisions affording directors indemnification and advancement of litigation expenses; and director and officer (D&O) liability insurance.

The business judgment rule and these additional protections take on special importance at times of elevated risk and uncertainty. By insulating directors from personal liability when they follow an appropriate process (and sometimes even when they do not), the legal framework encourages directors to act proactively and make hard choices.

This paper focuses on the law of Delaware—the home of more than 50% of all US publicly traded corporations and 60% of the Fortune 500, and of a court system viewed as "the Mother Court of corporate law."[8] The discussion speaks primarily in the voice of the Delaware Supreme Court and Court of Chancery.

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I. Fiduciary Duties

It is a "cardinal precept" of the law that "directors, rather than shareholders, manage the business and affairs of the corporation."[9] In doing so, directors owe the corporation and its stockholders fiduciary duties of care and loyalty[10] and must act "on an informed basis, in good faith and in the honest belief" that their actions are "in the best interests of the company."[11] As we discuss in more detail below, "[i]n essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests."[12] "Directors owe fiduciary duties to all stockholders"—even where appointed to the board by a particular stockholder.[13]

Duties to the Corporation and Its Stockholders

"In the standard Delaware formulation, fiduciary duties run not only to the corporation, but rather 'to the corporation and its shareholders.'"[14] "The conjunctive expression 'captures the foundational relationship in which directors owe duties to the corporation for the ultimate benefit of the entity's residual claimants.'"[15]

Most corporations, however, have a multi-faceted stockholder base encompassing a wide range of priorities and views on strategies and time horizons for maximizing returns and on how their corporation should address environmental, social and governance issues. As noted in April 2017 by the Court of Chancery, "[i]n a world with many types of stock—preferred stock, tracking stock, common stock with special rights, common stock with diminished rights (such as non-voting common stock), plain vanilla common stock, *etc.*—and many types of stockholders—record and beneficial holders, long-term holders, short-term traders, activists, momentum investors, noise traders, *etc.*—the question naturally arises: which stockholders [are owed fiduciary duties]?"[16] The court's answer: "the stockholders in the aggregate in their capacity as residual claimants, which means the undifferentiated equity as a collective, without regard to any special rights."[17] This principle applies, for example, to board decision-making with regard to a proposed transaction with a controlling shareholder or other related party. It also applies to board decision-making with regard to an activist shareholder's proposal for a change in strategic direction such as a sale or break-up of the company or a change in the company's capital allocation policy to emphasize substantial buybacks or dividends over reinvestment.

Non-Stockholder Constituencies

In Delaware, "'stockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end.'"[18] For example, it is "'accepted that a corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently.'"[19] "'They may do so, however, because such activities are rationalized as producing greater profits over the long-term'" for the corporation and its stockholders.[20] "Decisions of this nature benefit the corporation as a whole, and by increasing the value of the corporation, the directors increase the quantum of value available for the residual claimants."[21] "Nevertheless, 'Delaware case law is clear that the board of directors of a for-profit corporation . . . must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.'"[22]

In contrast with Delaware, many other states have adopted statutes that allow, and in a few cases even require, a board to consider the interests of non-stockholder constituencies, especially in the context of a potential change in control.[23] While Delaware does not permit traditional corporations to consider non-stockholder constituencies, in 2013 it authorized a new type of for-profit corporation—a public benefit corporation—"to produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[24] The statute expressly requires the directors of a public benefit corporation to balance three sets of competing interests: the pecuniary interests of stockholders, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in the corporation's charter.[25] It remains to be seen how prevalent public benefit corporations become, and how directors reconcile these interests in practice.

Short v. Long Time Horizons

Corporate strategy is at the center of the board's responsibilities. This includes striking the right balance between actions intended to enhance stockholder value in the short-term and actions intended to enhance growth and profitability over a longer time horizon, and the appropriate allocation of corporate resources between these potentially competing objectives. The Delaware Supreme Court stated in 1989 that Delaware law authorizes a board "to set a corporate course of action, including time frame, designed to enhance corporate profitability" and thus that "the question of 'long-term' versus 'short-term' values is largely irrelevant because directors, generally, are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon."[26]

More recently, the Court of Chancery has stated that directors owe fiduciary duties to "short-term as well as long-term holders,"[27] but also that the "corporation, by default, has a perpetual existence," "[e]quity capital, by default, is permanent capital," and "[i]n terms of the standard of conduct, therefore, the fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment."[28] Under this view, directors "owe a duty to shareholders as a class to manage the corporation . . . in a way intended to maximize the long run interests of shareholders."[29]

Of course, "a duty to maximize long-term value does not always mean acting to ensure the corporation's perpetual existence."[30] A director "might readily determine that a near-term sale or other shorter-horizon initiative, such as declaring a dividend, is value-maximizing even when judged against the long-term," "[a] trade bidder with access to synergies . . . may offer a price for a corporation beyond what its standalone value could support," and directors might for other reasons "conclude that continuing to manage the corporation for the long-term would be value destroying because of external market forces or other factors."[31] When "considering whether to pursue a strategic alternative that would end or fundamentally alter the stockholders' ongoing investment," directors must "seek an alternative that would yield value 'exceeding what the corporation otherwise would generate for stockholders over the long-term.'"[32] "What the fiduciary principle requires in every scenario is that directors strive to maximize value for the benefit of the residual claimants."[33]

Duty of Care

The duty of care requires directors "to inform themselves, prior to making a business decision, of all material information reasonably available to them."[34] A board "does not need to know every fact. Rather, the board is responsible for considering material facts that are reasonably available, not those that are immaterial or out of the board's reasonable reach."[35]

Reliance

In exercising their duty of care, directors are "fully protected" if they rely in good faith upon "the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the [director] reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation."[36] The right to rely "applies to the entire range of matters for which the board of directors is responsible."[37] "[T]he amount of information that it is prudent to have before a decision is made is itself a business judgment."[38]

Delegation

The duty of care also permits directors to delegate managerial duties to corporate officers.[39] As noted in a recent decision:

> In a modern corporation, the board is not expected to be involved in every decision, or even most decisions. "Few modern corporations could function effectively if that was the norm. In fact, it is the rare corporation that is actually 'managed by' the board; most corporations are managed 'under the direction of' the board."
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> "[A]lthough ultimate responsibility for the direction and management of the corporation lies with the board, the law recognizes that corporate boards, comprised as they traditionally have been of persons dedicating less than all of their attention to that role, cannot themselves manage the operations of the firm, but may satisfy their obligations by thoughtfully appointing officers, establishing or approving goals and plans and monitoring performance. While it is the elected board of directors that bears the ultimate duty to manage or supervise the management of the business and affairs of the corporation, the duties of a board that oversees professional management ordinarily entail the obligation to establish or approve the long-term strategic, financial and organizational goals of the corporation; to approve formal or informal plans for the achievement of these goals; to monitor corporate performance; and to act, when in the good faith, informed judgment of the board it is appropriate to act."[40]

Duty of Loyalty

The duty of loyalty "mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director . . . and not shared by the stockholders generally."[41] As stated in the seminal decision *Guth v. Loft, Inc.*:

> Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its shareholders . . . . The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or

> damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.[42]

Disinterestedness and Independence

The duty of loyalty is implicated where directors are "interested in the outcome of a transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders."[43] A director is interested where he or she "appear[s] on both sides of a transaction [or] expect[s] to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[44] A director lacks independence where he or she is "beholden" to the interested director "or so under their influence that their discretion would be sterilized."[45] Typically, a director lacks independence if the director has a "close personal or familial relationship" with an interested director or the interested director "has the unilateral power . . . to decide whether the director" whose independence is being assessed "continues to receive a benefit, financial or otherwise, upon which the director is so dependent or is of such subjective material importance to him that the threatened loss of that benefit might create a reason to question whether the director is able to consider the corporate merits of the challenged transaction objectively."[46]

Good Faith

The duty of loyalty includes a duty to act in good faith.[47] A director acts in bad faith where, for example, he or she takes action: (1) "with the intent to harm the corporation;" (2) in a "state of mind affirmatively operating with furtive design or ill will;" (3) "with a purpose other than that of advancing the best interests of the corporation;" or (4) "with the intent to violate applicable positive law"[48]—even if the director "believes that the illegal activity will result in profits for the entity."[49] A director also acts in bad faith where he or she "intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[50] "The presumptive validity of a business judgment is rebutted in those rare cases where the decision under attack is 'so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.'"[51]

Contextual Duties

The conduct required to fulfill the fiduciary duties of care and loyalty "will change in the specific context of the action the director is taking with regard to either the corporation or its shareholders."[52] Key contextual duties include the duty to oversee and monitor, the duty of disclosure, duties when selling the company, duties with regard to corporate opportunities, and duties when the company is insolvent.

Oversight/Monitoring

Directors owe a "duty to monitor," which "stems from the core fiduciary duties of care and loyalty."[53] The duty to monitor requires directors to implement "information and reporting systems . . . in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."[54] Where an information and reporting system is in place, directors are required to "monitor or oversee its operations."[55]

Disclosure

The duty of disclosure, sometimes referred to as the duty of candor, also derives from the duties of care and loyalty. Directors owe a duty of disclosure to the corporation's stockholders. "When stockholder action is requested, directors are required to provide shareholders with all information that is material to the action being requested and 'to provide a balanced, truthful account of all matters disclosed in the communications with shareholders.'"[56] "A board can breach its duty of disclosure . . . in a number of ways—by making a false statement, by omitting a material fact, or by making partial disclosure that is materially misleading."[57] An omitted fact is considered material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[58] "Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[59]

"Omitted facts are not material simply because they might be helpful."[60] By way of example, in the context of seeking shareholder approval for an M&A transaction, where the board relies on the advice of a financial advisor, stockholders are entitled to receive in the proxy statement "a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely."[61] "A fair summary, however, is a *summary*"—"not a cornucopia of financial data, but rather an accurate description of the advisor's methodology and key assumptions."[62]

Directors also owe a duty of disclosure to their fellow board members. A director breaches this duty where he or she fails "to disclose material information under circumstances in which full disclosure" is "obviously expected."[63] Candor is particularly important when the board needs to assess whether a director has a relationship or other interest that would detract from a director being considered disinterested with respect to a matter under consideration.

Sale of the Company

Once it becomes "apparent to all that the break-up of the company [is] inevitable," the board's duty changes from "the preservation of [the company] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."[64] This so-called "*Revlon*" duty to seek the highest price reasonably available to stockholders is not limited to a break-up transaction in the technical sense but rather applies "in at least the following three scenarios: (1) 'when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company,' . . . ; (2) 'where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company' . . . ; or (3) when approval of a transaction results in a 'sale or change of control.'"[65] This duty does not apply, however, where, as a result of a merger, "'[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.'"[66] Nor do "*Revlon* duties . . . arise simply because a company is 'in play.'"[67] Thus, when a company receives a takeover proposal, "the directors . . . have the prerogative to determine that the market undervalues its stock and to protect its stockholders from offers that do not reflect the long term value of the corporation under its present management plan."[68]

Where *Revlon* duties do apply, directors' duties are "not independent duties but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty."[69] "[T]here is no single blueprint that a board must follow to fulfill its duties"[70] because, in each instance, directors "will be facing a unique combination of circumstances, many of which will be outside their control."[71] Rather, "directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end."[72]

Corporate Opportunities

The duty of loyalty is implicated when a director learns of a business opportunity that might be of interest to the director, but also is in the corporation's line of business. In such a situation, a director may take the business opportunity for him or herself only if: "(1) the opportunity is presented to the director or officer in his individual and not his corporate capacity; (2) the opportunity is not essential to the corporation; (3) the corporation holds no interest or expectancy in the opportunity; and (4) the director or officer has not wrongfully employed the resources of the corporation in pursuing or exploiting the opportunity."[73] A corporation may "[r]enounce, in its certificate or by action of its board of directors, any interest or expectancy of the corporation in, or in being offered an opportunity to participate in, specified business opportunities or specific classes or categories of business opportunities that are presented to the corporation or 1 or more of its officers, directors, or stockholders."[74] This "permits the corporation to determine in advance whether a specified business opportunity or class or category of business opportunities is a corporate opportunity of the corporation rather than to address such opportunities as they arise."[75]

Insolvency

"When a solvent corporation is navigating in the zone of insolvency, the focus for . . . directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners."[76] When a corporation becomes insolvent, "directors continue to have the task of attempting to maximize the economic value of the firm,"[77] but fiduciary duties are at this point owed "to the corporation for the benefit of all of its residual claimants, a category which now includes creditors."[78] "The directors of an insolvent firm do not owe any particular duties to creditors" and need not "shut down the insolvent firm and marshal its assets for distribution to creditors, although they may make a business judgment that this is indeed the best route to maximize the firm's value."[79]

II. Standards of Review and Liability

"Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal legal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability."[80] When determining whether directors have satisfied their fiduciary duties, however, "corporate law distinguishes between the standard of conduct and the standard of review."[81] The standard of conduct establishes what directors are expected to do—that is, as discussed in Part I, to comply with the duties of loyalty and care. The standard of review, on the other hand, establishes how a court evaluates whether directors have met the standard of conduct. While no director wants a judicial ruling finding—or even suggesting—that his or her conduct fell below the standard of conduct, "the standard of review is more forgiving of directors and more onerous for stockholder plaintiffs than the standard of conduct."[82]

Tiers of Review

"Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness."[83] The standard of review depends upon the relationship of the directors to the particular matter at hand, varying with whether members of the board:

- "were disinterested and independent (the business judgment rule);"
- "faced potential conflicts of interest because of the decisional dynamics present in particular recurring and recognizable situations (enhanced scrutiny);" or
- "confronted actual conflicts of interest such that the directors making the decision did not comprise a disinterested and independent board majority (entire fairness)."[84]

"The standard of review may change further depending on whether the directors took steps to address the potential or actual conflict, such as by creating an independent committee, conditioning the transaction on approval by disinterested stockholders, or both."[85] These steps can shift the standard of review from entire fairness or enhanced scrutiny to business judgment, or shift the burden of proof from defendants to plaintiffs.

Impact of Exculpatory Provisions

Most state corporation laws authorize corporations to adopt a charter provision that exculpates their directors from liability for monetary damages for a breach of the duty of care—even where a stockholder plaintiff is able to rebut the business judgment rule presumption. Due to the widespread adoption of exculpatory charter provisions, "due care liability is rarely . . . available"[86] as a remedy for stockholder plaintiffs.

Director-by-Director Assessments

Director liability is assessed on a director-by-director basis, with each director "considered individually when the directors face claims for damages in a suit challenging board action."[87] "The liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are exculpated from liability for that breach, can vary for each director."[88] As a result, "even if a plaintiff has pled facts that, if true, would require the transaction to be subject to the entire fairness standard of review, and the interested parties to face a claim for breach of their duty of loyalty, the independent directors do not automatically have to remain defendants."[89] Rather, "plaintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director protected by an exculpatory charter provision, or that director will be entitled to be dismissed from the suit." [90]

The Business Judgment Rule
(see Flowchart A on page 18)

The business judgment rule is both a *presumption* and the "default standard of review."[91]

In the context of decisions by directors, the business judgment rule is a powerful "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."[92] In the overwhelming majority of circumstances, plaintiff stockholders are not able to rebut the presumption. When plaintiff stockholders are not able to rebut the presumption, the business judgment rule standard of review applies and "the Court gives great deference to the substance of the directors' decision and will not invalidate the decision, will not examine its reasonableness, and 'will not substitute [its] views for those of the board if the latter's decision can be 'attributed to any rational business purpose.'''"[93] If, however, plaintiff stockholders are able to rebut the presumption by sufficiently alleging "that the directors breached their fiduciary duty of care or of loyalty"[94] and the claim is not exculpated (in the case of a duty of care claim), the more stringent entire fairness standard of review applies, as discussed below.

Impact of Stockholder Approval

Except in the context of certain transactions involving controlling stockholders, as discussed below, when decisions are approved "by fully informed, uncoerced, [and] disinterested stockholders," the business judgment rule standard of review applies.[95] This is the case even if, had the decision been made by directors without stockholder approval, it "might otherwise have been subject to the entire fairness standard" of review due to a lack of care, disinterestedness, independence or good faith by decision-making directors.[96]

The Waste Exception

The business judgment rule does not protect a board's decision amounting to corporate waste. This is "a corollary of the proposition that where business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'"[97] A transaction constitutes waste where the consideration received by the corporation in the transaction is "'so inadequate in value that no person of ordinary, sound business judgment would deem it worth that which the corporation has paid.'"[98] Where stockholders approve a transaction, however, "the vestigial waste exception has . . . little real-world relevance, because it [is] understood that stockholders would be unlikely to approve a transaction that is wasteful."[99]

"Fraud on the Board"

The business judgment rule also does not protect board decisions "'in the face of illicit manipulation of a board's deliberative processes by self-interested corporate fiduciaries.'"[100] Examples are where there is a "failure of insiders to come clean to the independent directors about their own wrongdoing, the wrongdoing of other insiders, or information that the insiders fear will be used by the independent directors to take actions contrary to the insiders' wishes."[101] Where a financial advisor or other "third party knows that the board is breaching its duty of care and participates in the breach by misleading the board" or failing to disclose material information to the board, the financial advisor or other "third party can be liable for aiding and abetting" a breach of fiduciary duty even where the directors are protected by an exculpatory charter provision.[102]

Enhanced Scrutiny

(see Flowchart B on page 19)

"Enhanced scrutiny is Delaware's intermediate standard of review."[103] Enhanced scrutiny applies "when a board adopts defensive measures in response to a hostile takeover proposal that the board reasonably determines is a threat to corporate policy and effectiveness . . . , even in the absence of an immediate threat" ("*Unocal*" enhanced scrutiny). Enhanced scrutiny also applies "when the board enters into a merger transaction that will cause a change in corporate control, initiates an active bidding process seeking to sell the corporation, or makes a break up of the corporate entity inevitable" ("*Revlon*" enhanced scrutiny).[104] The enhanced scrutiny standard of review requires that the directors "'bear the burden of persuasion to show that their motivations were proper and not selfish' and that 'their actions were reasonable in relation to their legitimate objective.'"[105]

Courts applying enhanced scrutiny under *Unocal* or *Revlon* "must decide 'whether the directors made a *reasonable* decision, not a *perfect* decision.'"[106] "Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule," enhanced scrutiny "contemplates a judicial examination of the reasonableness of the board's decision-making process."[107] "Thus, although the level of judicial scrutiny under *Revlon* [and *Unocal* are] more exacting than the deferential rationality standard applicable to run-of-the-mill decisions governed by the business judgment rule, at bottom *Revlon* [and *Unocal* are] test[s] of reasonableness."[108]

Defensive Measures (*Unocal*)

Where a board adopts defensive measures, "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."[109] As a result, directors bear the burden of demonstrating: (1) that they had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed," and (2) that the defensive measure they adopted was "reasonable in relation to the threat posed."[110]

The first prong focuses on "'the reasonableness of their investigation, the reasonableness of their process and *also of the result that they reached*,'" and "the 'process' has to lead to the finding of a threat."[111] The second prong, "the reasonableness of a board's response," is "determined in relation to the 'specific threat.'"[112] "[I]f the board of directors' defensive response is not draconian (preclusive or coercive) and is within a 'range of reasonableness,' a court must not substitute its judgment for the board's."[113] "A defensive measure is preclusive where it 'makes a bidder's ability to wage a successful proxy contest and gain control either 'mathematically impossible' or 'realistically unattainable'" and "[a] coercive response is one that is 'aimed at 'cramming down' on its shareholders a management-sponsored alternative.'"[114] If the board satisfies its burden under *Unocal*, "the board is accorded the protection of the business judgment rule"[115] presumption unless stockholders have approved the defensive measure, in which event the business judgment rule standard of review will apply.

Change in Control Transactions (*Revlon*)

Due to similar concerns,[116] where a board approves a transaction that results in a change in corporate control, "directors have the burden of proving that they were adequately informed and acted reasonably"[117] to "maximiz[e] . . . the company's value at a sale for the stockholders' benefit."[118] "[T]here is no single blueprint that a board must follow to fulfill its [*Revlon*] duties."[119]

"[D]irectors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there."[120] "No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control."[121]

If the board satisfies its burden under *Revlon*, "the normal presumptions of the business judgment rule will apply,"[122] unless stockholders have approved the transaction resulting in the change of control, in which event the more forgiving business judgment rule standard of review will apply. If the board does not satisfy its burden under *Revlon*, it will be deemed to have "violated its situational duty . . . to take reasonable steps to attain the best value reasonably available to the stockholders"—but will not be held liable for money damages unless a breach of the duty of care or loyalty is established in the manner required in other circumstances.[123]

Application to Director Liability

The applicability of the *Unocal* and *Revlon* enhanced scrutiny standard in actions seeking to impose liability on directors—as opposed to challenges to consummation of the transaction itself—is uncertain, as "*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind."[124]

Entire Fairness

(see Flowchart C on page 20)

"Entire fairness, Delaware's most onerous standard, applies when the board labors under actual conflicts of interest"[125]—either a financial interest, a lack of independence, or a lack of good faith. Once entire fairness applies, the defendants must establish "to the court's satisfaction that the transaction was the product of both fair dealing *and* fair price."[126] Fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[127] Fair price "relates to the economic and financial considerations of the proposed [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[128] An "honest belief that the transaction was entirely fair" does not establish entire fairness; rather, "the transaction itself must be objectively fair, independent of the board's beliefs."[129] Where entire fairness applies, directors who breach their fiduciary duties are "subject to damages liability for the gap between a fair price and the deal price."[130]

Impact of Stockholder Approval

Obtaining approval by a majority of the disinterested shareholders "acts as a safe harbor in situations where directors' potentially conflicting self-interests are at issue."[131] Even if the transaction would otherwise have been subject to the entire fairness standard because the board labored under actual conflicts of interest, "a fully informed, uncoerced vote of the disinterested stockholders invoke[s] the business judgment rule standard of review."[132]

Director Compensation

"Like any other interested transaction, directorial self-compensation decisions lie outside the business judgment rule's presumptive protection, so that, where properly challenged, the receipt of self-determined benefits is subject to an affirmative showing that the compensation arrangements are fair to the corporation."[133] Thus, where "directors make decisions about their own compensation, those decisions presumptively will be reviewed as self-dealing transactions under the entire fairness standard rather than under the business judgment rule."[134] Directors, however, may gain the protection of the business judgment rule where compensation is issued pursuant to a stockholder-approved compensation plan that specifies "a limit applicable (or 'meaningful') to directors specifically—as opposed to a generic limit applicable to a range of beneficiaries with differing roles."[135]

Controlling Stockholder Transactions

The entire fairness standard also governs corporate transactions involving a controlling stockholder where "'the controller . . . engage[s] in a conflicted transaction.'"[136] "[T]hose situations [generally] fall into one of two categories: (a) transactions where the controller stands on both sides; and (b) transactions where the controller competes with the common stockholders for consideration."[137] Where the entire fairness standard of review governs, "approval of the transaction by an independent committee of directors *or* an informed majority of minority shareholders shifts the burden of proof on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff."[138] But the business judgment rule standard of review, and not the entire fairness standard of review, applies where an independent committee of directors *and* an informed majority of minority approve the transaction *and* the following conditions are met "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority."[139]

III. Oversight Claims Following Corporate "Trauma"

Recent years have seen a proliferation of actions brought "in the midst of or directly following 'corporate trauma' of some sort or another."[140] "The claim is that the directors allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in so doing they violated a duty to be active monitors of corporate performance."[141] "The list of corporate traumas for which stockholders theoretically could seek to hold directors accountable is long and ever expanding: regulatory sanctions, criminal or civil fines, environmental disasters, accounting restatements, misconduct by officers or employees, massive business losses, and innumerable other potential calamities."[142]

"[P]roving liability for a failure to monitor corporate affairs is 'possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment.'"[143] "In bringing these actions, 'plaintiffs seem to hope the Court will accept the conclusion that since the Company suffered large losses, and since a properly functioning risk management system would have avoided such losses, the directors must have breached their fiduciary duties in allowing such losses.'"[144] The "courts consistently have rejected 'such general ipse dixit syllogisms.'"[145] In such cases, directors will not be held liable unless: "(a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations."[146] This means that scienter is required.[147] "'Utterly failed' is a linguistically extreme formulation."[148] "'Utterly' means 'carried to the utmost point or highest degree; absolute, total.'"[149]

Recent cases dismissing director liability claims on this ground at the motion to dismiss stage, before discovery, include claims arising out of the hacking of Home Depot customers' personal financial data,[150] financial institution exposure to subprime mortgage market risks in the midst of the 2008 financial crisis including at Citigroup[151] and AIG,[152] allegations concerning violations of international antitrust laws at Qualcomm,[153] violations of anti-money laundering laws at Capital One,[154] General Motor's ignition switch failures,[155] alleged oversight failures at JPMorgan Chase with respect to Bernard Madoff's Ponzi scheme[156] and "London Whale" credit default swaps,[157] solar panel manufacturing defects by First Solar, Inc.,[158] investments in mortgage-backed securities by U.S. Bank National Association,[159] US Mine Safety and Health Administration safety violations by Hecla,[160] and violations of state and federal laws regulating the transportation and delivery of cigarettes by United Parcel Service.[161]

IV. What to Do in Uncertain Times: Recommendations for Directors and their Counselors

Directors should expect uncertainty to be a fact of corporate life for the foreseeable future. In light of this, we offer the following recommendations for directors and their counselors.

To lay the foundation for board decisions that will be entitled to the protection of the business judgment rule or, where applicable, withstand more stringent standards of review:

- In approaching decision-making on all but a limited number of issues, recognize that the business judgment rule, augmented by exculpatory and indemnification provisions and D&O insurance, affords powerful protection against personal liability as long as decisions are made following an appropriate process—regardless of outcome.
- At the outset, identify and disclose any actual or potential self-interest or lack of independence with respect to the matter in question so that a thoughtful determination can be made by the board about which directors should participate in the decision-making and which, if any, should recuse themselves from discussions and/or a vote.
- Identify and obtain the information that will be relevant to the decision. Consider the need for expert advice.
- Ensure that the minutes carefully document independence determinations, the process by which the decision was reached, the time spent, the information considered, the risks and benefits weighed and the ultimate basis for the decision.
- If stockholder approval will be sought or a discussion of the transaction is otherwise to be sent to stockholders, ensure that these matters are also described in the proxy or information statement.

To help the company avoid both the underlying calamity and the impact on stockholder value that come from corporate trauma:

- Probe how risk is incorporated into corporate strategy and be vigilant about potential harm to the company's reputation.
- Ensure the board's agenda provides ample time, on a regular basis, for oversight of the framework, processes and resources (both internal and external) that management is using to identify, evaluate and mitigate risk. Oversight should include how well risk management efforts are keeping pace with changes in the company's operations and in the political, business and regulatory environment.
- As part of setting the appropriate tone at the top, emphasize—throughout the organization—the importance of upholding ethical values and adhering to risk management and compliance initiatives. Promote a culture that fosters speaking up and healthy debate so that concerns can be surfaced and addressed before they escalate into trauma. Keep a watchful eye on the culture by monitoring the types and frequency of concerns coming through the organization's hotline and other internal reporting mechanisms, and management's analysis and response.
- Study special committee reports and other analyses to see what has gone wrong at other companies, including ethical failures and compensation structures that may have encouraged excessive risk-taking rather than sustainable growth. Seek to understand how, with twenty-twenty hindsight, these traumas

might have been avoided or, at least, identified at an earlier stage. Work with senior management to take advantage of lessons learned.

- Regularly reassess and look for ways to strengthen the board's own risk management oversight activities. Ensure the allocation of responsibility among the board and board committees covers the waterfront of risks. Focus on the quality of risk management oversight as part of board and board committee self-evaluations. Consider the need for competencies in critical company-specific risk areas as part of the process of refreshing the composition of the board.
- Most important, don't hesitate to ask the tough questions or request more information of management or your fellow board members.

Appendix

Flowcharts Illustrating the Application of the Standards of Review

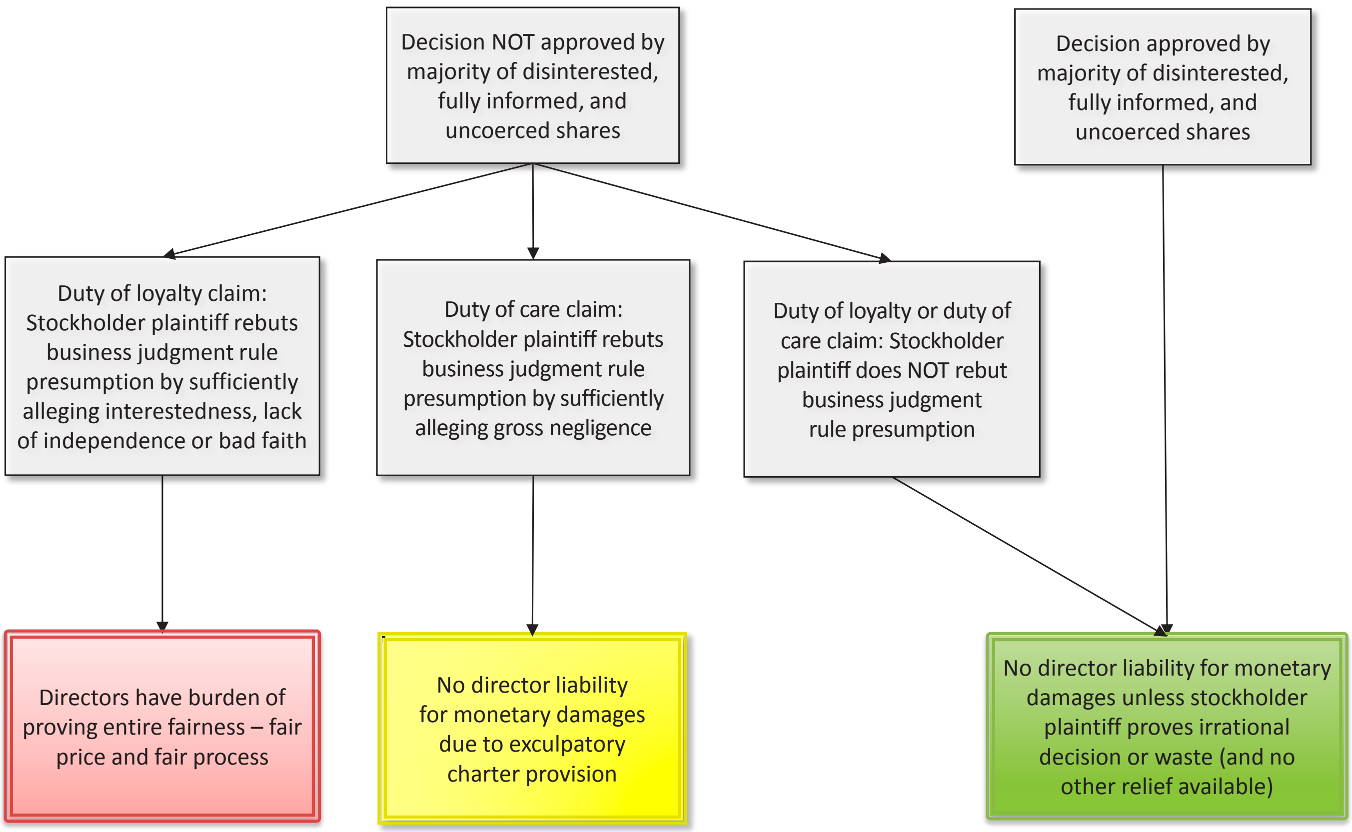
A. ***Fiduciary Duty Cases: Business Judgment Rule Presumption***

B. ***Fiduciary Duty Cases: Enhanced Scrutiny***

C. ***Fiduciary Duty Cases: Controlling Stockholder Transactions***

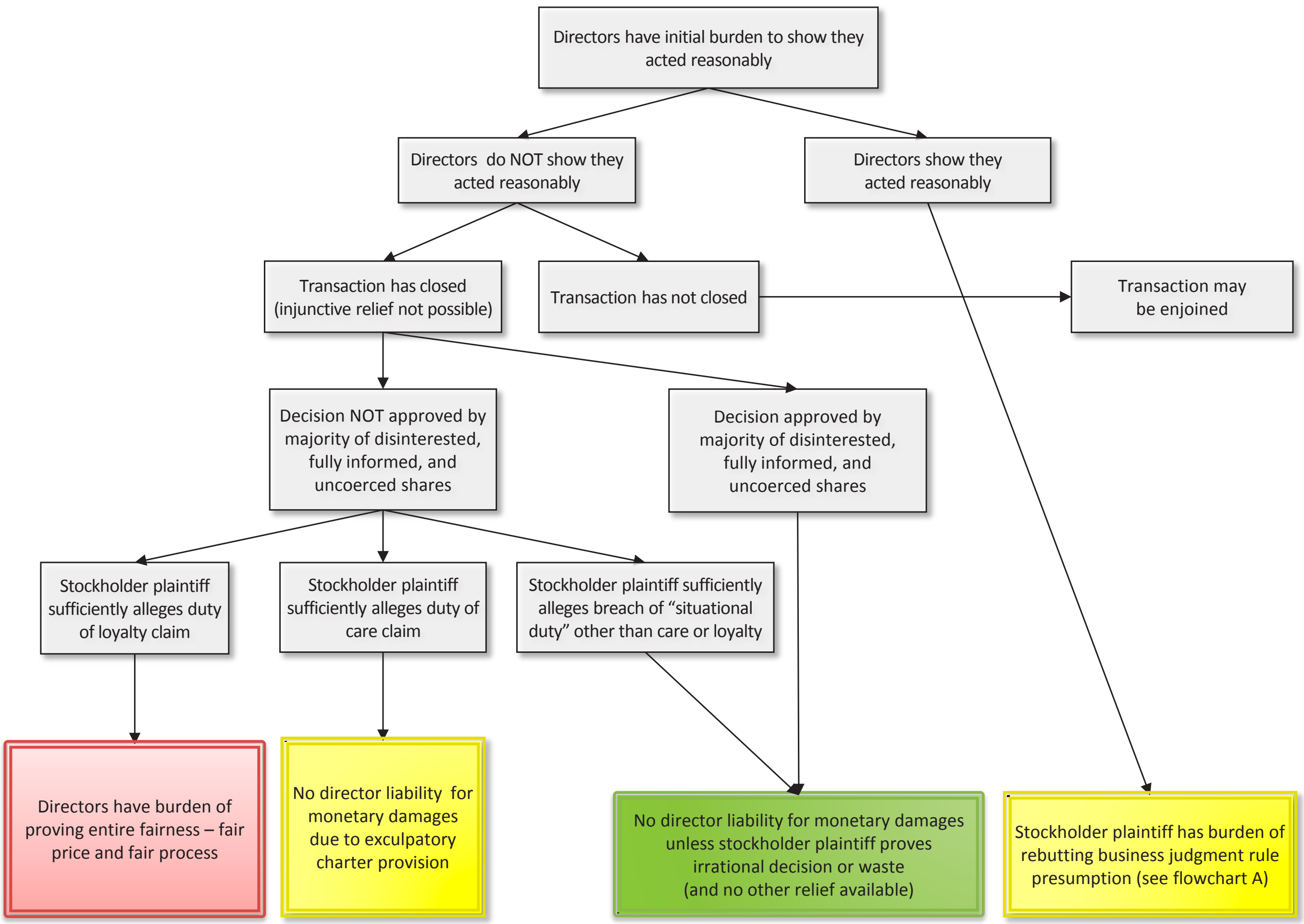
Flowchart A

Fiduciary Duty Cases: Business Judgment Rule Presumption (Assuming Corporation Has Exculpatory Charter Provision)



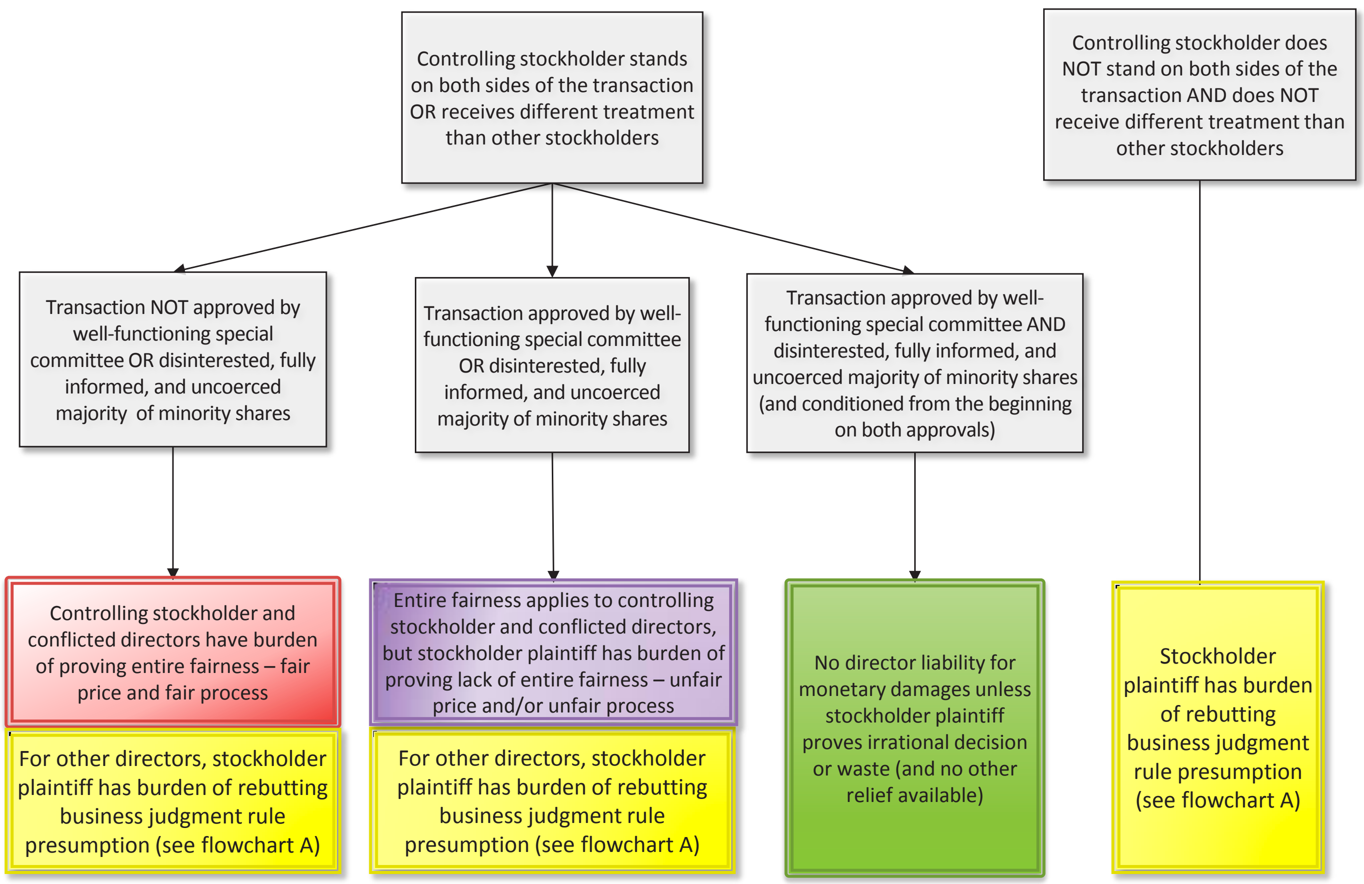
Flowchart B

Fiduciary Duty Cases: Enhanced Scrutiny (Assuming Corporation Has Exculpatory Charter Provision)



Flowchart C

Fiduciary Duty Cases: Controlling Stockholder Transactions (Assuming Corporation Has Exculpatory Charter Provision)



ENDNOTES

1. Charles Dickens, *A Tale of Two Cities* (1859), portraying the turbulence of the late 18th Century.
2. *Smith v. Van Gorkom*, 488 A.2d 858, 881 (Del. 1985).
3. *Rales v. Blasband*, 634 A.2d 927, 933 (Del. 1993).
4. *Beam v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004).
5. *Disney v. Walt Disney Co.*, 2005 WL 1538336, at *4 (Del. Ch. June 20, 2005).
6. *In re CompuCom Sys., Inc. S'holder Litig.*, 2005 WL 2481325, at *5 (Del. Ch. Sept. 29, 2005).
7. *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984).
8. *Kamen v. Kemper Fin. Servs., Inc.*, 908 F.2d 1338, 1343, *rev'd on other grounds*, 500 U.S. 90 (1991).
9. *Aronson*, 473 A.2d at 811 (citing 8 *Del. C.* § 141(a)).
10. *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).
11. *Aronson*, 473 A.2d at 812.
12. *Shoen v. SAC Holding Corp.*, 137 P.3d 1171, 1178 (Nev. 2006).
13. *In re Nine Sys. Corp. S'holder Litig.*, 2014 WL 4383127, at *36 (Del. Ch. Sept. 4, 2014) (emphasis in original).
14. *Frederick Hsu Living Trust v. ODN Hldg. Corp.*, 2017 WL 1437308, at *17 (Del. Ch. Apr. 24, 2017) (quoting *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 80 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015)).
15. *Hsu*, 2017 WL 1437308, at *17 (quoting *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36–37 (Del. Ch. 2013)).
16. *Id.*
17. *Id.*
18. *Id.* at *17 n.14 (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 147 n.34 (2012) [hereinafter *For-Profit Corporations*]).
19. *Allen v. El Paso Pipeline GP Co., L.L.C.*, 2014 WL 2819005, at *8 (Del. Ch. June 20, 2014) (quoting *For-Profit Corporations*, *supra*, at 147 n.34).
20. *Hsu*, 2017 WL 1437308, at *17 (quoting *For-Profit Corporations*, *supra*, at 147 n.34).
21. *Id.*
22. *Id.* (quoting *For-Profit Corporations*, *supra*, at 147 n.34).
23. *See* 1 James D. Cox & Thomas Lee Hazen, *Treatise on the Law of Corporations* § 4:10 (3d ed. 2016).
24. 8 *Del. C.* § 362(a).
25. 8 *Del. C.* § 365(a).
26. *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).
27. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 129 (Del. Ch. 2011).
28. *Hsu*, 2017 WL 1347308, at *18.
29. *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (quoted in *Rural Metro*, 88 A.3d at 80 n.4 and *Trados*, 73 A.3d at 37 n.5).
30. *Hsu*, 2017 WL 1347308, at *19.
31. *Id.*
32. *Rural Metro*, 88 A.3d at 80–81 (quoting *Trados*, 73 A.3d at 37).
33. *Hsu*, 2017 WL 1347308, at *20.
34. *Aronson*, 473 A.2d at 812.
35. *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 179 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006).
36. 8 *Del. C.* § 141(e).
37. Model Bus. Corp. Act § 8.30 Official Comment at 8–189 (2013).
38. *In re RJR Nabisco, Inc. S'holders Litig.*, 1989 WL 7036, at *19 (Del. Ch. Jan. 31, 1989).
39. *Grimes v. Donald*, 1995 WL 54441, at *8 (Del. Ch. Jan. 11, 1995), *aff'd*, 673 A.2d 1207 (Del. 1996).
40. *Obeid v. Hogan*, 2016 WL 3356851, at *14 (Del. Ch. June 10, 2016) (citation omitted).
41. *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993).
42. 5 A.2d 503, 510 (Del. 1939).
43. *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).
44. *Aronson*, 473 A.2d at 812.
45. *Rales*, 634 A.2d at 936.
46. *Orman*, 794 A.2d at 25 n.50.
47. *Stone*, 911 A.2d at 370.
48. *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 64 n.102, 67 (Del. 2006) (internal quotation marks omitted) (citations omitted).
49. *Metro Commc'n Corp. BVI v. Advanced Mobilcomm Techs., Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004).
50. *Walt Disney*, 906 A.2d at 67 (citation omitted).
51. *Parnes v. Balley Entm't Corp.*, 722 A.2d 1243, 1246 (Del. 1999) (quoting *In re J.P. Stevens & Co., Inc.*, 542 A.2d 770, 780–81 (Del. Ch. 1988)).
52. *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998).
53. *Beam v. Stewart*, 833 A.2d 961, 971 n.16 (Del. Ch. 2003).
54. *In re Caremark Intern. Inc. Deriv. Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996).
55. *Stone*, 911 A.2d at 370.
56. *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223 (Del. 1999) (citation omitted).

[57] *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 376 (Del. Ch. 1998), *aff'd in part and rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[58] *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), adopted as Delaware law in *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985).

[59] *TSC Indus*, 426 U.S. at 449.

[60] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000).

[61] *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 900 (Del. Ch. 2016) (quoting *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 449 (Del. Ch. 2002)).

[62] *Trulia*, 129 A.3d at 900–01.

[63] *Waddell & Reed Fin., Inc. v. Torchmark Corp.*, 337 F. Supp. 2d 1243, 1252 (D. Kan. 2004).

[64] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[65] *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994) (citations omitted).

[66] *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 47 (Del. 1994) (citation and emphasis omitted).

[67] *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (citation omitted).

[68] *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1376 (Del. 1995) (quoted in *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 112 (Del. Ch. 2011)).

[69] *Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001).

[70] *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989).

[71] *Lyondell*, 970 A.2d at 242.

[72] *QVC*, 637 A.2d at 44.

[73] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148, 155 (Del. 1996).

[74] 8 *Del. C.* § 122(17).

[75] *Id.* L. '00 Synopsis of Section 122.

[76] *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101 (Del. 2007).

[77] *Prod. Res. Gp., L.L.C. v. NCT Gp., Inc.*, 863 A.2d 772, 791 (Del. Ch. 2004).

[78] *Quadrant Structures Prods. Co., Ltd. v. Vertin*, 115 A.3d 535, 546–47 (Del. Ch. 2015).

[79] *Id.*

[80] *Brehm*, 746 A.2d at 256.

[81] *Quadrant Structures Prods. Co., Ltd. v. Vertin*, 102 A.3d 155, 171–72 (Del. Ch. 2014).

[82] *Trados*, 73 A.3d at 36.

[83] *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011) (quoted in *Trados*, 73 A.3d at 43).

[84] *Trados*, 73 A.3d at 36.

[85] *Id.*

[86] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 313 (Del. 2015).

[87] *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173, 1182 (Del. 2015).

[88] *In re Emerging Commc'ns, Inc. S'holder Litig.*, 2004 WL 1305745, at *38 (Del. Ch. May 3, 2004).

[89] *Cornerstone*, 115 A.3d at 1176.

[90] *Id.* at 1179.

[91] *Quadrant*, 102 A.3d at 183.

[92] *Aronson*, 473 A.2d at 812.

[93] *Paramount*, 637 A.2d at 45 n.17 (Del. 1994) (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985) and *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

[94] *Walt Disney*, 906 A.2d at 52.

[95] *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 750 (Del. Ch. 2016), *aff'd*, 2017 WL 563187 (Del. Feb. 9, 2017).

[96] *Larkin v. Shah*, 2016 WL 4485447, at *1 (Del. Ch. Aug. 25, 2016).

[97] *Walt Disney*, 906 A.2d at 74 (citation omitted).

[98] *Grobow v. Perot*, 539 A.2d 180, 189 (Del. 1988) (citation omitted).

[99] *Singh v. Attenborough*, 137 A.3d 151, 152 (Del. 2016).

[100] *City of Miami Gen. Empls. & San. Empls. Ret. Trust. v. Comstock*, 2016 WL 4464156, at *19 (Del. Ch. Aug. 24, 2016) (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989)), *aff'd*, 2017 WL 1093185 (Del. Mar. 23, 2017).

[101] *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 807 (Del. Ch. 2009).

[102] *Rural Metro*, 88 A.3d at 97.

[103] *Trados*, 73 A.3d at 43.

[104] *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (referring to *Unocal*, 493 A.2d 946 and *Revlon*, 506 A.2d 173).

[105] *Trados*, 73 A.3d at 43 (quoting *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007)).

[106] *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.'*, 107 A.3d 1049, 1067 (Del. 2014) (quoting *Unitrin*, 651 A.2d at 1385–86).

[107] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 192 (Del. Ch. Mar. 14, 2007).

[108] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 595 (Del. Ch. 2010).

[109] *Unocal*, 493 A.2d at 954.

[110] *Id.* at 955.

[111] *Airgas*, 16 A.3d at 92 (quoting *Chesapeake Corp. v. Shore*, 771 A.2d 293, 301 n.8 (Del. Ch. 2000)).

[112] *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 606 (Del. 2010) (citing *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985)).

[113] *Unitrin*, 651 A.2d at 1388 (citing *QVC*, 637 A.2d at 45-46).

[114] *Versata Enters.*, 5 A.3d at 601.

[115] *Unitrin*, 651 A.2d at 1373.

[116] *See Dollar Thrifty*, 14 A.3d at 597.

[117] *QVC*, 637 A.2d at 45.

[118] *Revlon*, 506 A.2d at 182.

[119] *Barkan*, 567 A.2d at 1286.

[120] *Dollar Thrifty*, 14 A.3d at 595-96.

[121] *Lyondell*, 970 A.2d at 242.

[122] *Mills*, 559 A.2d at 1288.

[123] *RBC*, 129 A.3d at 857.

[124] *Corwin*, 125 A.3d at 312 (quoted in *RBC*, 129 A.3d at 857 n.139, *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *6 (Del. Ch. Jan. 5, 2017), and *Comstock*, 2016 WL 4464156, at *17).

[125] *Trados*, 73 A.3d at 44.

[126] *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995) (internal quotation marks omitted) (citation omitted).

[127] *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

[128] *Id*.

[129] *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006).

[130] *In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 489 (Del. Ch. 2013) (internal quotation marks omitted) (citation omitted).

[131] *Solomon v. Armstrong*, 747 A.2d 1098, 1115 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000).

[132] *Singh*, 137 A.3d at 151.

[133] *Telxon Corp. v. Meyerson*, 802 A.2d 257, 265 (Del. 2002).

[134] *Espinoza v. Zuckerberg*, 124 A.3d 47, 54 (Del. Ch. 2015).

[135] *Calma v. Templeton*, 114 A.3d 563, 585 (Del. Ch. 2015).

[136] *Gamco Asset Mgmt. Inc. v. iHeartMedia Inc.*, 2016 WL 6892802, at *15 (Del. Ch. Nov. 29, 2016) (quoting *In re Crimson Exploration Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014)).

[137] *Crimson*, 2014 WL 5449419, at *12.

[138] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (emphasis added).

[139] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014). *See also In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, --- A.3d ---, 2017 WL 3568089, at *2 (Del. Ch. Aug. 18, 2017) (holding that when the controller is not the acquirer, but receives disparate consideration in the transaction, the business judgment rule standard of review applies where the conditions are put in place before the controller "be[gins] to negotiate for consideration over and above what would be paid to the other stockholders").

[140] *Horman v. Abney*, 2017 WL 242571, at *5 (Del. Ch. Jan. 19, 2017).

[141] *Caremark*, 698 A.2d at 967.

[142] *La. Mun. Police Emps' Ret. Sys. v. Pyott*, 46 A.3d 313, 340 (Del. Ch. 2012), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013).

[143] *Horman*, 2017 WL 242571, at *7 (quoting *Caremark*, 698 A.2d at 967).

[144] *Id*. at 343-44 (quoting *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 129 (Del. Ch. 2009)).

[145] *Id*. at 344 (quoting *Citigroup*, 964 A.2d at 129).

[146] *Stone*, 911 A.2d at 370.

[147] *Horman*, 2017 WL 242571, at *7.

[148] *Id*. at *8 n.46 (citation omitted).

[149] *Id*. (citation omitted).

[150] *In re The Home Depot, Inc. S'holder Deriv. Litig.*, 2016 WL 6995676 (N.D. Ga. Nov. 30, 2016).

[151] *Citigroup*, 964 A.2d 106.

[152] *In re Am. Int'l Grp., Inc. Deriv. Litig.*, 700 F. Supp. 2d 419 (S.D.N.Y. 2010), *aff'd*, 415 Fed. Appx. 285 (2d Cir. 2011).

[153] *Melbourne Mun. Firefighters' Pension Trust Fund v. Jacobs*, 2016 WL 4076369 (Del. Ch. Aug. 1, 2016), *aff'd*, 2017 WL 836928 (Del. Mar. 3, 2017).

[154] *Reiter v. Fairbank*, 2016 WL 6081823 (Del. Ch. Oct. 18, 2016).

[155] *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724 (Del. Ch. June 26, 2015).

[156] *Cent. Laborers' Pension Fund & Steamfitters Local 449 Pension Fund v. Dimon*, 638 Fed.Appx. 34 (2d Cir. 2016).

[157] *In re JPMorgan Chase & Co. Deriv. Litig.*, 2014 WL 1297824 (S.D.N.Y. Mar. 31, 2014).

[158] *In re First Solar Deriv. Litig.*, 2016 WL 3548758 (D. Ariz. June 30, 2016).

[159] *Iron Workers Mid-S. Pension Fund v. Davis*, 93 F. Supp. 3d 1092 (D. Minn. 2015).

[160] *South v. Baker*, 62 A.3d 1 (Del. Ch. 2012).

[161] *Horman*, 2017 WL 242571.

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