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OMNICARE'S SILVER LINING

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Fashion dictates that Omnicare [1] be criticized. The majority opinion provoked two vigorous dissents, and commentators echoed them in a chorus of denigration. [2] One of the ***796** dissenters famously predicted that Omnicare would have "the life expectancy of a fruit fly." [3] But 11 years later, a geriatric fruit fly flaps on.

Perhaps it is time to realize that like people, problems, and broken hearts, Omnicare isn't all bad. Although saying anything good about Omnicare smacks of heresy, four aspects of the decision deserve positive reinforcement. First, Omnicare made a helpful contribution to Delaware law by confirming that enhanced scrutiny applies to deal protection devices, regardless of the form of merger consideration. Second, the decision properly separated the elements of coercion and preclusion from the question of overarching reasonableness. Third, the timing of the majority's fiduciary analysis has been overly criticized. Finally, from a policy standpoint, the decision gave target directors greater bargaining leverage, particularly in distressed situations, by establishing a pre-commitment rule against majority voting lockups. There is still plenty to disagree with, but Omnicare does have a silver lining. [4]

I. The Litigation Path

Omnicare involved a bidding contest for NCS Healthcare, Inc. between two rival health care companies, Genesis Health Ventures, Inc. and Omnicare, Inc. The health care industry was rapidly consolidating because of changes in government and third party medical reimbursement policies, and the regulatory changes had hit NCS hard. Its stock had traded at $20 per share in January 1999, but by the end of the year, its stock hovered around $5. NCS also carried approximately $350 million in debt, comprising $206 million in senior bank debt and $102 million in convertible subordinated debentures. [5]

In early 2000, the NCS board of directors decided to explore strategic alternatives and tapped a financial advisor for assistance. [6] The board had four members: Boake Sells, Richard Osborne, Jon Outcalt, and Kevin Shaw. Osborne and Sells were outside directors. Outcalt and Shaw founded NCS and were its two senior officers. They also controlled a majority of NCS's stockholder voting power by virtue of owning the high-vote shares under NCS's dual class structure. To state the obvious, the board did not have a majority of independent, outside directors, and management's positional influence and informational advantages were backed up by hard voting control and founder status.

***797** NCS's effort to develop strategic alternatives generated little interest. Despite contacting over 50 parties, NCS received only one indicative response, and that party proposed consideration below the face value of the company's senior bank debt. In December 2000, NCS terminated its process.[7]

By the beginning of 2001, NCS's financial condition had deteriorated further. In April, NCS received a formal notice of default on its debentures, and the holders of the debentures organized a Noteholders Committee to protect and enforce their rights.[8] With the threat of bankruptcy looming, the board began discussing a pre-packaged bankruptcy plan with various investors. The trading range for NCS's common stock fell to $0.09-$0.50 per share.[9] Under the scenarios being considered by the board, the common stockholders would have been wiped out and the creditors unlikely to be made whole.

In this environment, Omnicare expressed unsolicited interest in acquiring NCS. In summer 2001, one year after NCS's process of exploring strategic alternatives, Omnicare proposed to acquire the company in a bankruptcy sale for $225 million.[10] In August, Omnicare increased its proposal to $270 million.[11] Both offers were below the value of the company's debt and would not have generated any return for the common stockholders.

In October 2001, NCS representatives met with Omnicare to pitch a merger outside of bankruptcy.[12] Omnicare rejected the idea and went silent for three months. During this period, Omnicare secretly communicated with the Noteholders Committee. Then, in February 2002, Omnicare reopened the lines of communication with NCS, again proposing to purchase the company out of bankruptcy for approximately $313 million.[13] During the same period, the Noteholders Committee reached out to Genesis, a company that had recently confronted, successfully, the same financial troubles facing NCS.

At this point, the landscape began to change. By March 2002, NCS's financial condition was improving.[14] It was now two years after the company's earlier effort to explore alternatives. Recognizing the company's changed circumstances, the board formed an independent committee composed of Sells and Osborne to consider potential transactions. Authority to approve any transaction remained vested in the full board.

On June 25, 2002, Genesis proposed a merger that contemplated full repayment of the NCS senior debt, an exchange or purchase of the debentures at par, and consideration consisting of Genesis common stock worth $20 million for NCS's stockholders.[15] On June 26, Genesis increased the stock portion to $24 million, but asked NCS to enter into an exclusivity agreement.[16] The next day, Genesis provided a draft exclusivity agreement, a draft voting agreement for Outcalt and Shaw, and a proposed merger agreement. The Genesis negotiators made no bones about why Genesis wanted the voting ***798** agreement: they expected that Omnicare would bid as soon as Omnicare heard about the deal.

On July 3, 2002, the committee considered the Genesis proposal.[17] The directors knew that Genesis wanted exclusivity because of the threat of a topping bid from Omnicare. The directors also knew that Genesis was particularly concerned about an Omnicare overbid because Genesis had recently lost a different acquisition target to Omnicare.

Although it seemed likely that Omnicare would compete, and although NCS's exploration of alternatives was now two years in the past, the committee executed the exclusivity agreement and agreed not to enter into discussions with another bidder until July 19. NCS continued to negotiate the terms of the Genesis merger agreement through July.[18] The exclusivity period was automatically extended to July 26, and then voluntarily extended to July 31.[19]

On July 26, 2002, after hearing rumors that NCS was in discussions with Genesis, Omnicare made another unsolicited proposal--effectively bidding against itself.[20] The new offer would pay off NCS's debt and provide $3 in cash for each share of NCS common stock.[21] The total consideration for the equity was $71 million, nearly three times the value of Genesis' proposal at the time.[22] Omnicare's proposal was conditioned on due diligence, as unsolicited proposals often are. When NCS management responded, they pushed back on the due diligence condition, but Omnicare declined to make an unconditional proposal--at least at that time. After the NCS-Genesis transaction was announced publicly, Omnicare would drop the due diligence condition.

The next day, July 27, 2002, Genesis submitted an improved proposal with a deadline for acceptance of midnight on July 28.[23] The proposal offered NCS stockholders one share of Genesis stock for every ten shares of NCS common stock. The exchange ratio valued NCS common stock at approximately $1.60 per share based on Genesis' then-current trading price.[24] The total consideration for the equity was $38 million, just over half the Omnicare proposal.[25] The Genesis draft merger agreement included (i) a force-the-vote provision; (ii) a no-talk provision prohibiting NCS from third party acquisition discussions unless presented with a proposal likely to result in better terms ***799** than the Genesis merger; and (iii) a $5-6 million termination fee. Proposed voting agreements continued to require that Outcalt and Shaw vote for the merger. Genesis said it was its best and final bid, but like Omnicare's insistence on due diligence, that would turn out to be a negotiating position. After the Delaware Supreme Court's decision re-opened the bidding contest, Genesis would increase the proposed exchange ratio to offer stock worth $3.50 per NCS share. Omnicare would then win the contest with a bid of $5.50 per share in cash, plus a payment of $22 million to Genesis. But on July 28, 2002, the committee could not foresee those developments.

Facing the midnight deadline from Genesis, the committee decided not to pursue further negotiations with Omnicare in light of the uncertainty the due diligence condition created and the perceived risk to the Genesis bid. The committee reviewed the terms of the Genesis proposal and voted to recommend it to the full board. The full board met thereafter. Like the committee, the board regarded the Omnicare proposal as insufficiently definite because of the due diligence condition and concluded that the Genesis transaction presented the best available alternative for the company.

The board then voted on and approved three items. First, the board authorized the voting agreements for purposes of Section 203 of the Delaware General Corporation Law (DGCL).[26] Second, the board considered and approved the merger agreement.[27] Third, the board recommended the transaction to NCS's stockholders.[28]

The day after execution of the Genesis merger agreement, Omnicare contacted NCS to reiterate its July 26 proposal.[29] Omnicare also issued a press release disclosing its terms.[30] On August 1, Omnicare filed a lawsuit to enjoin the merger and launched a hostile tender offer at $3.50 per share, more than double the value of the Genesis stock to be received under the Genesis merger agreement.[31] The NCS board met to consider the Omnicare tender offer but was unsure whether it constituted a Superior Proposal under the terms of the Genesis merger agreement.[32] Genesis waived the Superior Proposal condition, permitting NCS to enter discussions with Omnicare.[33]

On October 6, 2002, Omnicare dropped the conditions to its proposal and agreed irrevocably to purchase all shares of NCS common stock at $3.50 per share.[34] At that point, the NCS board withdrew its recommendation of the Genesis proposal and recommended in favor of the Omnicare proposal.[35] Those actions had no effect because the combination of the force-the-vote provision in the Genesis merger agreement together with Outcalt and Shaw's voting agreements ensured consummation of the Genesis deal.[36]

***800 A. The Court of Chancery Decision**

Omnicare and representatives of the NCS stockholders sought to enjoin the Genesis merger agreement. On November 22, 2002, the Court of Chancery denied the injunction application. [37] The court held that the Genesis merger did not trigger enhanced scrutiny under Revlon [38] because it was not a change of control, a sale for cash, or the culmination of a decision by the board to put the company up for sale. The court held that when a controlling stockholder sells a company, the common stockholders do not have control either before or after the transaction, making Revlon inapplicable. [39] The court also dismissed the plaintiffs' argument that the NCS board actually embarked on a sale process, noting that the "very lack of an active auction process" formed the basis for the plaintiffs' claims. [40]

Having determined that enhanced scrutiny did not apply, the court reviewed the directors' actions under the business judgment rule. [41] Unsurprisingly, they passed muster under this deferential standard. [42] The court noted that the board, operating in the zone of insolvency, owed fiduciary duties to all stakeholders including its creditors. [43] Two claims were evaluated: (i) the board's decision to not pursue a transaction with Omnicare when the independent committee was first formed, and (ii) the failure to respond after Omnicare submitted the July 26 proposal. [44]

After evaluating the first claim, the court found that Omnicare's continued insistence on purchasing NCS through a bankruptcy sale rendered the board's conduct reasonable. [45] The court noted that none of the proposals before July 26 would have occurred outside of the bankruptcy context nor have provided a complete recovery for the company's creditors, let alone anything for the stockholders. [46] Under the circumstances, the decision to negotiate exclusively with Genesis was informed and represented a good faith attempt to pursue a desirable transaction. [47] The court also found that the board's conduct after receiving Omnicare's July 26 offer passed muster. The board's conduct was rational given the uncertainty the due diligence condition created and the fact that the board leveraged Omnicare's offer in negotiations with Genesis. [48] The court even held that the board's conduct would have satisfied enhanced scrutiny under Revlon, if that standard ***801** were applicable. [49]

The court next analyzed the deal protection devices in the Genesis merger agreement using enhanced scrutiny under Unocal. [50] The court held that the deal protections were reasonable in relation to the threat posed because the force-the-vote provision and voting agreements were given by a target on the brink of bankruptcy in response to an acquirer insisting on transaction certainty. [51] The board therefore acted reasonably to preserve the "only proposal reasonably available." [52] The Court of Chancery did not address the issues of coercion or preclusion.

B. The Delaware Supreme Court Majority Opinion

In a rare 3-2 split decision, the Delaware Supreme Court reversed. [53] The majority opinion first affirmed the Court of Chancery's decision to apply enhanced scrutiny to the deal protections in the NCS-Genesis merger. [54] The majority opinion described the Unocal test as requiring the defendant directors to show that the deal protections were both (i) not "draconian (preclusive or coercive)," and (ii) fell within a "range of reasonableness." [55] The majority defined a preclusive defensive measure as one that "deprives stockholders of the right to receive all tender offers or precludes a bidder from seeking control." [56] The majority defined a coercive measure as one that "forc[es] upon stockholders a management-sponsored alternative to a hostile offer." [57] The majority stated that when such measures are taken

against an existing bidder . . . the latitude a board will have in either maintaining or using the defensive measures it has adopted to protect the merger it approved will vary according to the degree of benefit or detriment to the stockholders' interests that is presented by the value or terms of the subsequent competing transaction. [58]

The majority also explained that when defensive measures are "inextricably related," they must "be scrutinized collectively as a unitary response to the perceived threat." [59]

Having outlined the Unocal standard, the majority applied it to the combination of the force-the-vote provision and the Outcalt and Shaw voting agreements. The majority nominally accepted the Court of Chancery's factual conclusions, singling out the finding that the deal protections had completely "lock[ed] up" the merger.[60] The majority disagreed with the legal conclusion that the provisions satisfied Unocal.[61] In the majority's view, the combined measures were both "designed to coerce the ***802** consummation of the Genesis merger and preclude the consideration of any superior transaction."[62] The voting agreements were coercive because they "predetermined the outcome . . . without regard to the merits of the Genesis transaction at the time the vote was scheduled to be taken."[63] The deal protections were preclusive because they rendered the deal "a fait accompli."[64] The combination therefore failed Unocal and called for the entry of a preliminary injunction.[65]

The majority next analyzed the board's failure to advocate successfully for a fiduciary out in the merger agreement. The majority observed that actions which are "legally possible" do not necessarily comport with the "fiduciary responsibilities of directors in all circumstances."[66] The majority then noted that Genesis bargained for measures to "completely protect[] its transaction"[67] precisely because of an anticipated 11th-hour bid from Omnicare. Given the board's knowledge of the likelihood of this eventuality, by failing to guarantee itself a fiduciary out, the board acted unreasonably by "disabl[ing] itself from exercising its own fiduciary obligations at a time the board's own judgment is most important, i.e. receipt of a subsequent superior offer."[68]

C. The Dissents

Chief Justice Veasey and then-Justice, now Chief Justice, Steele dissented.[69] The dissenters differed with the majority on both the facts and the law.[70] Chief Justice Veasey focused on the "peculiar facts" of the case: (i) a board "secure[d] what appeared to be the only value-enhancing transaction available for a company on the brink of bankruptcy"; (ii) "no other viable bid [for NCS] had emerged" before that point; and (iii) the terms of the merger agreement resulted from "a lengthy search and intense negotiation process in the context of insolvency and creditor pressure. . . ."[71] This view of NCS's situation differed from the factual recitation in the majority opinion, which cited NCS's stabilized financial condition, the two-year time lag between NCS's earlier exploration of strategic alternatives and the negotiations with Genesis, and the unsolicited proposal from Omnicare that arrived before NCS agreed to exclusivity.[72] Moving to the law, Chief Justice Veasey argued that a "confluence of board and stockholder action" should not have constituted a breach of fiduciary duty.[73] The Chief Justice disavowed the majority's application of enhanced scrutiny to invalidate joint board and stockholder action, and he disagreed with the application of the elements of coercion and preclusion.[74]

Chief Justice Veasey also observed that for the majority to rely on Omnicare's ***803** subsequent topping bid allowed the judicial outcome to "turn[[] on . . . ex post felicitous results" when a "real-time review of the board action" should have been outcome determinative.[75] The Chief Justice contended that the board had to accept Genesis' demands, otherwise "there would have been no Genesis deal!"[76] The lockup, therefore, was the acceptable outcome of an informed and deliberative board process. Advancing a proposition that has been widely endorsed by critics of the majority decision, the Chief Justice observed: "Certainty itself has value. The acquirer may pay a higher price for the target if the acquirer is assured consummation of the transaction. The target company also benefits . . . because losing an acquirer creates the perception that a target is damaged goods. . . ."[77]

The Chief Justice also criticized what he regarded as a per se rule requiring fiduciary outs in merger agreements.[78] As he saw it, fiduciary outs and other provisions are negotiated and included, or not included, depending on the relative leverage of the parties.[79] Because of Genesis' strong "negotiating position," it was able to reject a "fiduciary out" as "not acceptable."[80] The Chief Justice objected to the majority permitting "a court to second-guess the risk and return analysis the board must make" and requiring the directors to "weigh the value of the only viable transaction against the prospect of an offer that has not materialized." [81]

Justice Steele joined the Chief Justice's dissent and added a separate dissent emphasizing the financial peril facing NCS and the lengthy discussions that were "necessary in order to save the company from financial collapse, repay creditors, and provide some benefits to NCS stockholders." [82] He observed that "the NCS board had thoroughly canvassed the market in an attempt to find an acquirer" and "did so in the face of silence, tepid interest to outright hostility from Omnicare." [83] In these respects, Justice Steele's description of the facts differed from the majority's recitation, which included the improvement in NCS's financial condition, the time lag since NCS's earlier exploration of strategic alternatives, and Omnicare's unsolicited proposal after hearing a rumor about NCS-Genesis discussions. [84]

On the law, Justice Steele argued that the business judgment rule should be the operative standard of review. [85] He also argued that Delaware law should "not encourage proscriptive rules that invalidate or render unenforceable precommitment strategies negotiated between two parties to a contract who will presumably, in the absence of conflicted interest, bargain intensely over every meaningful provision of a contract after a careful cost benefit analysis." [86] In his view, by prohibiting the merger parties from locking up their deal, the majority prevented the parties from contracting for certainty, a ***804** concept that he believed "adds value to any rational business plan." [87]

D. The Response

Omnicare generated immediate backlash, and its critics embraced the dissenters' view that "[c]ertainty itself has value." [88] One scholar suggested that if certainty was taken off the table, bidders "may balk at putting their best offer--or any offer--on the table." [89] The public reaction quickly turned into a one-sided debate. [90] It was difficult, if not impossible, to find voices that supported the majority's holdings soon after the opinion issued. Ten years later, perhaps emotions have cooled enough for a more nuanced, less black-and-white assessment.

II. Good Doctrine: Enhanced Scrutiny For Deal Protection

Omnicare made at least one substantial and valuable contribution to Delaware law: it confirmed that enhanced scrutiny applies to deal protections in a negotiated acquisition, regardless of the form of consideration. This holding was, in my view, indisputably correct. Deal protection devices are defensive measures deployed by a board unilaterally to protect a chosen transaction from interlopers during the period before the stockholder vote. Enhanced scrutiny applies quintessentially in settings where a board exercises power unilaterally, in circumstances where potential conflicts lurk, and in contexts where the decisions of independent directors can be infected with or undermined by subtle cognitive and behavioral biases. A negotiated acquisition implicates each of those concerns, making enhanced scrutiny the appropriate standard. Score one for Omnicare.

Before Omnicare, commentators debated the standard of review that governed deal protections in merger agreements. Some argued that, under Time, [91] the business judgment rule applied to deal protections incorporated in a stock-for-stock merger agreement that did not result in a change of control. [92] This interpretation drew on the ***805** Delaware Supreme Court's statement that the "original plan of merger . . . was subject only to a business judgment rule analysis." [93] Commentators who endorsed this view argued that if "only" the business judgment rule applied to the "original plan of merger," then the business judgment rule also must apply to any deal protection devices in the original merger agreement. [94] These commentators contrasted the Delaware Supreme Court's treatment of the "original merger agreement" with the recasting of the transaction as a purchase of Warner by Time. The Court of Chancery found that the latter structure was "defense-motivated and designed to avoid the potentially disruptive effect Paramount's offer would have had on . . . a shareholder vote," [95] and the Delaware

Supreme Court agreed that the Chancellor correctly applied the Unocal standard to the re-worked deal.[96] Pro-business-judgment-rule commentators contended that but for the defensive nature of the recast transaction, the defensive measures in the recast acquisition agreement would have been subject to the business judgment rule as well.[97]

Others argued--more persuasively in my view--that Time specifically addressed the deal-protection devices in the original merger agreement and held that enhanced scrutiny governed.[98] In a footnote, the Delaware Supreme Court commented on the defensive ***806** measures, including a "no-shop" clause and "dry up" agreements with several banks to not finance third-party acquisition efforts.[99] The Delaware Supreme Court stated:

> Although the legality of the various safety devices adopted to protect the original agreement is not a central issue, there is substantial evidence to support each of the trial court's related conclusions. Thus, the court found that the concept of the Share Exchange Agreement predated any takeover threat by Paramount and had been adopted for a rational business purpose: to deter Time and Warner from being "put in play" by their March 4 Agreement. The court further found that Time had adopted the "no-shop" clause at Warner's insistence and for Warner's protection. Finally, although certain aspects of the "dry-up" agreements were suspect on their face, we concur in the Chancellor's view that in this case they were inconsequential. Rather, as the Chancellor stated, such devices are properly subject to a Unocal analysis.[100]

The Time decision actually said that Unocal applied.

Two Court of Chancery decisions from 1999 added fuel to the fire by interpreting Time differently. In ACE Ltd. v. Capital RE Corp.,[101] then-Vice Chancellor Strine, now Chancellor, held that enhanced scrutiny under Unocal was the appropriate standard of review for a "no talk" provision in a stock-for-stock merger agreement that would not result in a change in control.[102] Two days later, then-Vice Chancellor Steele, now Chief Justice, applied the business judgment rule to deal protections, including a similar no-talk provision, in a stock-for-stock merger between IXC Communications and Cincinnati Bell, Inc.[103] The IXC decision espoused the view that "neither the termination fee, the stock option agreements nor the no-solicitation provisions [we]re defensive mechanisms instituted to respond to a perceived threat."[104]

ACE and IXC generated much practitioner commentary,[105] and then-Vice ***807** Chancellor Strine weighed in with an article that argued for enhanced scrutiny as the operative standard.[106] He also issued another decision calling for Unocal review of deal protections in stock-for-stock agreements.[107]

In Omnicare, the Delaware Supreme Court settled the matter, holding squarely that enhanced scrutiny would apply to all defensive measures regardless of deal structure.[108] The majority reviewed the Time opinion and dispelled the notion that deal protections in the original merger agreement with Warner were subject to review under the business judgment rule.[109] Citing the Time footnote, the Delaware Supreme Court confirmed that the deal protections in the original Time-Warner merger agreement were subject to enhanced scrutiny.[110]

The Delaware Supreme Court also provided a coherent policy-based analysis for applying enhanced scrutiny under these circumstances. The court explained that the conflicts inherently created by defensive measures warrant Unocal enhanced scrutiny regardless of whether a competing bidder actually has emerged at the time the merger agreement is executed.[111] "A board's decision to protect its decision to enter a merger agreement with defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover context."[112] The court went on to say that "[t]hese competing considerations require a threshold determination that board-approved defensive devices protecting a merger transaction are within the limitations of its statutory authority and consistent with the directors' fiduciary duties.” [113]

This is precisely correct. Transactional planners can think at least one move ahead. They can build anticipatory or pre-emptive defensive measures into merger agreements and are not limited to reacting in response to an actual bid once it emerges. Deal protection devices are placed in transaction agreements to protect the existing deal by deterring competitors. They have this purpose and effect regardless of whether an actual competing bid has been made at the time the merger agreement is signed. Indeed, deal protections function optimally if they deter any competing bid from ever appearing.

Critics of Omnicare, echoing the dissenters, [114] have observed that the potential ***808** conflict of interest that animated Unocal is not present when a board sells the company. [115] This contention resurrects one of the reasons the Court of Chancery offered shortly after Revlon for disregarding that decision's call for heightened scrutiny in the sale context and maintaining the business judgment rule. [116]

The claim that negotiated acquisitions do not give rise to concerns similar to those in Unocal rests on a simplistic interpretation of that landmark decision as concerned solely with entrenchment. The enhanced scrutiny standard is more flexible and nuanced than that. It applies not only to hostile bids, but also to other recurring and readily identifiable situations in which fiduciaries face potential conflicts of interest and boards confront a heightened risk of structural and cognitive bias. As the Delaware Supreme Court held in Revlon, a negotiated acquisition is one such situation. [117] In Liquid Audio [118] and Stroud v. Grace, [119] the Delaware Supreme Court held that director elections are another. In my view, the dismissal of a derivative action by a special committee is best viewed as a third. [120]

***809** Numerous decisions recognize the potential conflicts of interest that plague negotiated acquisitions. The El Paso decision explains that “[a] s Revlon itself made clear, the potential sale of a corporation has enormous implications for corporate managers and advisors, and a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisers to be less than faithful” to stockholder interests. [121] The Dollar Thrifty case notes that “[m]ost traditionally, there is the danger that top corporate managers will resist a sale that might cost them their managerial posts, or prefer a sale to one industry rival rather than another for reasons having more to do with personal ego than with what is best for stockholders.” [122] Consequently, as the Toys “R” Us decision observes, the “paradigmatic context for a good Revlon claim . . . is when a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sales process for reasons inimical to the stockholders' desire for the best price.” [123] This was one of the factors at work in the original Revlon decision: the Delaware Supreme Court was concerned that “Revlon's CEO, Michel Bergerac, rebuffed Pantry Pride's acquisition overtures in part because of the ‘strong personal antipathy’ felt by Bergerac towards Pantry Pride's CEO, Ron Perelman, who was an upstart from Philly and not someone whom the Supreme Court believed Bergerac wanted running his storied company.” [124]

As scholars frequently have observed, these actual and potential conflicts of interest arise because “[a] negotiated corporate acquisition is a paradigmatic example of a final period problem.” [125] Economists use this term to refer to a recurring setting in which ***810** humans struggle with self-interest.

[I]n a situation where parties expect to have repeated transactions, the recognition that a party who cheats in one transaction will be penalized by the other party in subsequent transactions reduces the incentive to cheat. However, when a transaction is the last (or only) in a series--that is, the final period--the incentive to cheat reappears because, by definition, the penalty for doing so has disappeared. [126]

“Such incentives are manifest in a number of our commonly held intuitions regarding human behavior, including the landlord's suspicion that tenants may skip out on their final month's rent and the possibility that temporary or short term employees may shirk.” [127] The last period describes a time when even well-meaning and conscientious individuals can fall prey to self-interest.

When a corporation operates in the ordinary course of business, the ability of managers to shirk or self-deal ordinarily is constrained not only by legal duties, but also by a range of markets, including the product markets, capital markets, employment markets, and the market for corporate control. [128] These markets react to and penalize decisions inconsistent with corporate interests. But when managers are in their final period, market constraints lose traction:

> Target management is no longer subject to shareholder discipline because the target's shareholders will be bought out by the acquirer. Target management is no longer subject to market discipline because the target, by definition, will no longer operate in the market as an independent agency. As a result, management is less vulnerable to both shareholder and market penalties for self-dealing. [129]

The weakening of extra-legal checks creates a need for greater judicial oversight.

The last period is also a time when non-financial considerations are particularly likely to come into play. As Chancellor Allen observed in the RJR Nabisco case,

Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation. [130]

Enhanced judicial scrutiny helps police against the temptation of such influences.

Lastly, even for well-meaning fiduciaries who strive to fulfill their duties, the final ***811** period "signals a time when otherwise common behavioral biases may lead to serious deviations from the welfare of the corporation and its shareholders." [131] These include familiar cognitive biases such as anchoring, overconfidence, excessive optimism, groupthink, reactive devaluation, confirmation bias, and in-group/out-group thinking. [132] As Chancellor Allen recognized, the human psyche has a powerful ability "to rationalize as right that which is merely personally beneficial." [133] Chancellor Chandler similarly understood that "[h]uman judgment can be clouded by subtle influences like the prestige and perquisites of board membership, personal relationships with management, or animosity towards a bidder." [134] The overlay of enhanced scrutiny frames the decision-making process in a manner that guards against these common behavioral biases.

The potential conflicts of interest that arise in a negotiated acquisition, and the concern that the decisions of even disinterested and independent directors could be undermined by the decisional context, give rise to the loyalty issues that call for applying enhanced scrutiny to the deal protections in a stock-for-stock merger agreement. I have no quarrel with this aspect of Omnicare. It is the decision's silver lining.

III. Good Doctrine, Bad Application: Coercion And Preclusion

In addition to making clear that enhanced scrutiny applies to all deal protections, Omnicare appropriately separated the issues of "coercion" and "preclusion" from the overarching inquiry into "reasonableness." [135] Combining the inquiries into a single, overarching reasonableness test would have implied that under some circumstances, a board could coerce a stockholder vote or preclude stockholders from having any alternative other than the board's chosen transaction. By separating these elements, Omnicare correctly recognized that Section 251 of the DGCL gives stockholders a separate and independent right to approve a merger, [136] and a board oversteps its statutory authority if it attempts to coerce stockholders into voting a particular way or to eliminate stockholder choice by precluding alternative outcomes. [137] My praise is tempered, however, because I find unpersuasive the way in which Omnicare applied the elements of coercion and preclusion to the facts of the case. Score a half-point here.

Under Section 251 of the DGCL,[138] a merger requires two separate approvals from two distinct corporate decision-makers: first the board, then the stockholders. A board of a corporation that desires to merge must "adopt a resolution approving an agreement of ***812** merger or consolidation and declaring its advisability."[139] Next, the agreement must be "submitted to the stockholders . . . for the purpose of acting on the agreement."[140] As then-Vice Chancellor Strine observed in 2001:

[a] merger agreement that requires the assent of stockholders is not the same as a business decision a board has the unilateral power to undertake. Because the stockholders must vote to approve the merger, there is obviously a limit to the deal protections that directors can place in the merger contract.[141]

The Delaware Supreme Court held in Williams v. Geier that, to be effective, the stockholder vote must be "meaningful and voluntary."[142] "Stockholders have the right to vote yes or no without being, in essence, compelled or coerced."[143] A board that acts to coerce the stockholders into voting a particular way has overstepped its authority and interfered with the decisional right granted to stockholders by statute. A board similarly oversteps its authority if it precludes any viable alternative to its chosen transaction so as to eliminate the stockholders' practical ability to choose. Coercion and preclusion cannot be part of a reasonableness analysis because a board cannot reasonably coerce a stockholder vote or preclude stockholder choice. The issues of coercion and preclusion are separate from and logically prior to an assessment of reasonableness.

Separating coercion and preclusion from reasonableness was consistent with precedent. Six years earlier, in Unitrin,[144] the Delaware Supreme Court analyzed coercion and preclusion separately from reasonableness when examining how defensive measures affected a proxy contest launched in support of a hostile bid.[145] The Omnicare court correctly recognized that, just as stockholders are given the right to vote for directors, stockholders also are given the right to vote on a merger.[146] The concepts of coercion and preclusion should apply similarly to both votes.

Although the Omnicare majority got the doctrine right, the opinion stumbled when applying the law to the facts. As to coercion, the Omnicare majority cited the standard set forth in Williams v. Geier,[147] which held that wrongful coercion may be found "where the board or some other party takes actions which have the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of that transaction."[148] The majority then reasoned that because Outcalt and Shaw's voting agreements "predetermined the outcome . . . without regard to the merits of the Genesis transaction at the time the vote was scheduled to be taken,"[149] they coerced the minority stockholders into voting for the deal.[150]

For me, that is a non sequitur. Except for Outcalt and Shaw, the NCS stockholders ***813** could vote freely against the deal. There was no penalty or consequence for voting a particular way. The minority stockholders' votes simply had no practical effect on whether the transaction was approved, which is a consequence of being in the minority. They still could vote "no," and with legal effect. Because Genesis had agreed that dissenting stockholders could seek appraisal rights,[151] an NCS minority stockholder could vote against the transaction and seek appraisal. To my mind, transaction provisions that render a stockholder vote a nullity but otherwise do not penalize stockholders for voting a particular way could be preclusive, but they are not coercive. Ideally, the majority opinion would have said that.

As to preclusion, I believe that enhanced scrutiny is designed to focus on unilateral board action. In Williams v. Geier, the Delaware Supreme Court held that enhanced scrutiny is the appropriate standard when a board acts unilaterally.[152] Ordinarily, the defensive measures in a merger agreement can readily be viewed as having been adopted unilaterally by the board because they operate during the period after board approval and before the stockholder vote. In Omnicare, however, holders of a majority of the outstanding voting power agreed at the time of signing to vote in favor of the board's chosen transaction.[153] In the merger context, the point of a preclusion analysis is to protect the ability of holders of a majority of outstanding voting power to decide whether to proceed with a merger. The inquiry looks to whether the board has interfered impermissibly with the ability of the holders of a majority of the voting power to exercise a decisional right conferred upon them by statute. The Omnicare preclusion analysis held that the voting agreements themselves were preclusive when combined with the force-the-vote provision and absence of a fiduciary out.[154] It seems circular to hold the majority's approval invalid for the purpose of protecting the majority's right to approve.

My criticism of the preclusion analysis differs from the dissenters, whose analysis implied there was no role for the board in overseeing the voting agreements.[155] The Omnicare majority did itself a disservice on this issue by stating that "[t]he stockholders with majority voting power, Shaw and Outcalt, had an absolute right to sell or exchange their shares with a third party at any price."[156] With this concession, there seemed to be little reason for the board to involve itself in Shaw and Outcalt's transaction. Without any role for the board, it becomes more difficult to see how the directors could have breached their fiduciary duties by proceeding with a transaction that the controlling stockholders had committed themselves to approve.

For a breach of fiduciary duty analysis to work, two conditions must be met. First, there must be a legal distinction between a majority stockholder agreeing contractually to vote for a merger and a majority stockholder actually voting in favor of a merger. Second, there must be a mechanism that gives the board a role in connection with a voting agreement such that the directors could be charged with breaching their fiduciary ***814** duties by permitting the voting agreement to be executed. There is such a distinction, and there are two such mechanisms, although neither was discussed in the majority opinion: Section 203 of the DGCL and a stockholder rights plan.[157]

Under Section 203, the holder of shares representing greater than 15% of the outstanding voting power of the corporation does not have "an absolute right to sell or exchange their shares with a third party at any price."[158] By statute, one consequence of such a sale is that unless exempted under Section 203(a), the purchaser becomes an "interested stockholder" and cannot engage in a "business combination" with the corporation for a period of three years.[159] The concept of "ownership" is defined broadly under Section 203 and includes "any agreement, arrangement, or understanding for the purpose of acquiring, holding, voting . . . or disposing of such stock with any other person that beneficially owns . . . such stock."[160] The principal means of exempting a transaction from the restrictions of Section 203 is to obtain board approval before the transaction.[161] Voting, by itself, is not a Section 203 transaction.[162] The statute both distinguishes between a voting agreement and the act of voting and establishes a role for board oversight in the interested stockholder transaction.[163]

The voting agreements that Outcalt and Shaw entered into with Genesis triggered Section 203 and would have precluded Genesis from consummating a business combination with NCS for a period of three years unless an exemption applied.[164] As part of the transactional approval process, the NCS board granted an exemption from Section 203 that allowed Outcalt and Shaw to enter into the voting agreements with Genesis without triggering Section 203.[165] To bring the board and its fiduciary duties into the analytical picture, the Omnicare majority could have focused its legal analysis on the board's role in granting the Section 203 approval and held that the directors were obligated at that point to consider whether to permit Outcalt and Shaw to lock up the transaction.[166] Like any other board decision, a Section 203 waiver could give rise to a ***815** breach of fiduciary duty.[167] In Digex, Chancellor Chandler found a reasonable probability of success on the merits of a claim that the board breached its fiduciary duties in granting a Section 203 waiver.[168]

Alternatively, the Omnicare majority could have cited the board's authority to adopt a stockholder rights plan that would block the controllers' ability to enter into the voting agreements. The court could have then considered whether the directors breached their duties by failing to adopt such a plan. In Hollinger, Chancellor Strine, then Vice Chancellor, approved the deployment of a rights plan against a particularly aggressive controlling stockholder to prevent the controller from selling his control block to a third party, and the Delaware Supreme Court affirmed the decision. [169] In a later decision involving the same controlling stockholder, Chancellor Strine wrote:

> The reality is that controlling stockholders have no inalienable right to usurp the authority of boards of directors that they elect. That the majority of a company's voting power is concentrated in one stockholder does not mean that that stockholder must be given a veto over board decisions when such a veto would not also be afforded to dispersed stockholders who collectively own a majority of the votes. Like other stockholders, a controlling stockholder must live with the informed (i.e., sufficiently careful) and good faith (i.e., loyal) business decisions of the directors unless the DGCL requires a vote. That is a central premise of our law, which vests most managerial power over the corporation in the board, and not in the stockholders. [170]

As in Hollinger, the Omnicare majority could have focused on the power of the NCS board to use a rights plan to prevent Outcalt and Shaw from entering into the voting agreements and locking up the vote.

When boards take action in the face of transient stockholder majorities that form during tender offers or proxy contests, the Delaware courts consistently recognize the principle of director primacy. As Chancellor Allen eloquently observed,

the financial vitality of the corporation and the value of the company's shares is in the hands of the directors and managers of the firm. The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm. [171]

***816** In my view, Delaware law must be careful to preserve its consistency by adhering to board-centric principles not only when disaggregated stockholders comprise the majority, but also when a controlling stockholder or group holds majority voting power. Delaware Supreme Court decisions consistently recognize the authority of a board to exercise its authority under Section 141(a) in the face of a disaggregated stockholder majority favoring a different course. [172] To elevate stockholder authority over the board's when a controller is involved would substitute a power-centric regime for a board-centric one. In my view, Delaware should maintain a consistently board-centric approach. [173]

If the Omnicare majority had engaged on either the Section 203 issue or the potential use of a pill, the majority could have used the opportunity to discuss whether it felt there was reason to be concerned about the incentives of Outcalt and Shaw. Presumably, the majority had reason to believe that Outcalt and Shaw's interests were not aligned with those of the stockholders as a whole, even though they were receiving the same merger consideration. One scholar has posited that because Outcalt and Shaw held such a large equity stake in NCS (20% of the company), they could be regarded as non-diversified investors who faced unsystematic risk peculiar to NCS, leading their risk preferences to be more conservative than optimal for diversified public stockholders. [174] If so, Outcalt and Shaw would have favored the bird-in-the-hand over a riskier competitive bidding contest, even if the latter course yielded a greater expected value. Outcalt and Shaw may have had other reasons to favor Genesis over Omnicare, such as the potential for different roles in the post-transaction entity depending on the acquirer, or a belief that a Genesis acquisition better fit with their vision as founders. If Outcalt and ***817** Shaw had divergent personal interests, then the decisional dynamic on the four-person NCS board could have been problematic. As noted, Outcalt and Shaw were the senior executives, founders, and controlling stockholders of NCS. Their considerable influence would undercut the ability of the two outside directors to act independently, and a two-two split would create a deadlock on issues such as waiving Section 203 or adopting a pill. Had the majority explored these issues, it might have been able to explain why the NCS board could be faulted for not taking, or being unable to take, action to block a preclusive lockup.

Unfortunately, the majority opinion lacks any discussion of diverging interests. The Court of Chancery, by contrast, found that "[t]he history of negotiations between NCS and Omnicare negates any suggestion that the NCS Directors bore any animus toward Omnicare or had any personal reason to prefer Genesis to Omnicare." [175] The trial court also noted that "Omnicare was always explicit that, after a transaction, it desired to continue the employment of Outcalt and Shaw should they so wish." [176] If the majority accepted these facts as true, one has to wonder why Outcalt and Shaw's preference for the Genesis merger was not a positive factor for the deal and devoid of any self-interest to which the other directors might have needed to respond.

The majority opinion could have addressed the factual issues. Because it was an appeal from a ruling on a preliminary injunction, the Delaware Supreme Court did not have to accept the Court of Chancery's factual findings. [177] At times, the majority decision gives the reader a sense that the majority saw the facts differently than the trial court. [178] There is certainly a stark tonal contrast between the majority's and the dissenters' views of the facts, particularly over whether NCS's financial condition had improved, the sufficiency of the process of exploring alternatives that NCS conducted two years earlier, and the credibility of Omnicare's pre-signing bid. Perhaps evidence existed in the record that supported the majority's implicitly different take. To date, the briefing and record in the case remain under seal, so except for hints in the majority ***818** opinion, the corporate community has yet to see how Omnicare and the stockholder plaintiffs portrayed the transaction. What remains problematic analytically is for the majority opinion to have adopted the Court of Chancery's factual findings, then analyzed the transaction as if there was a need to protect the minority from Outcalt and Shaw.

The Omnicare approach to preclusion and coercion is therefore a mixed bag. I agree with the doctrinal framework, but not with the application of the principles to the facts. I am not troubled at all by a board having a role in overseeing voting agreements by controlling stockholders. Section 203 and Moran v. Household International, Inc. [179] took Delaware across that bridge long ago. I am troubled by the majority's failure to delve into potential loyalty issues or to explain why Outcalt and Shaw were not positioned to identify and select the best transaction reasonably available. The preclusion and coercion analysis is part of Omnicare's silver lining, but tarnished in the application.

IV. Good Thinking, Bad Drafting: Directors As Soothsayers

A third aspect of Omnicare's enhanced scrutiny analysis has served as a target for extensive criticism. As argued originally by the dissenters, [180] and echoed by subsequent commentators, [181] the Omnicare opinion at times appears to suggest that whether directors breached their fiduciary duties when entering into a merger agreement will depend on how subsequent events unfold, and that because of this fact, Omnicare creases a fiduciary "third rail." The passage from the opinion that most strongly conveys this impression states that:

> The latitude a board will have in either maintaining or using the defensive devices it has adopted to protect the merger it approved will vary according to the degree of benefit or detriment to the stockholders' interests that is presented by the value or terms of the subsequent competing transaction. [182]

But Omnicare did not expressly overrule any of the Delaware precedents that require a court to review director action as of the time the directors made their decision and based on circumstances then existing. Nor did Omnicare expressly overrule any of the Delaware precedents, which hold that if directors validly approve a contract, then that contract will be enforced. As a judge who inevitably makes errors in his written work, I have a vested interest in the charitable reading of opinions. Taking Omnicare as a whole, ***819** and giving the opinion a charitable reading, the majority did not attempt to change the point in time at which directors' decisions are measured for compliance with their fiduciary duties. Omnicare does not require directors to be soothsayers, nor does it create a "fiduciary put." [183]

The Delaware courts have repeatedly held that whether a board of directors has complied with its fiduciary duties is determined based on the facts and circumstances that face the directors at the time the decision is made. [184] Decisions are not judged by hindsight.

One necessary result of this analytical framework is that if a board does not breach its fiduciary duties at the time it enters into a contract, the contract is binding on the board and the corporation. The fact that directors are fiduciaries does not magically confer on the board a right to escape a contract by virtue of their fiduciary status. If the directors breached their fiduciary duties when entering into the agreement, then it is possible that the agreement could be invalidated or some other remedy awarded, but events that arise after the board made its decision cannot provide a basis for attacking the decision retrospectively. Smith v. Van Gorkom [185] definitively settled this aspect of Delaware law in a less well-known aspect of that famous decision that has never been modified or overruled. [186] Consequently, "Delaware entities are free to enter into binding contracts ***820** without a fiduciary out [to take a better offer] so long as there was no breach of fiduciary duty involved when entering into the contract in the first place." [187]

In Van Gorkom, the directors of Trans Union Corporation argued that they acted appropriately when approving a merger agreement with the Pritzker group because they had the right to accept a better offer at any time before the stockholder vote. [188] The Delaware Supreme Court refused to recognize an inherent fiduciary termination right and instead examined the merger agreement for language that might have permitted the directors to terminate. The only possible provision was Section 2.03, which stated:

> The Board of Directors shall recommend to the stockholders of Trans Union that they approve and adopt the Merger Agreement ('the stockholders' approval') and to use its best efforts to obtain the requisite votes therefor. [The acquirer] acknowledges that the Trans Union directors may have a competing fiduciary obligation to shareholders under certain circumstances. [189]

The Supreme Court held that "[c]learly, this language on its face cannot be construed as incorporating . . . either the right to accept a better offer or the right to distribute proprietary information to third parties." [190] In other words, these rights were not found in the Trans Union directors' "competing fiduciary obligation[s] to the shareholders." [191] The contract governed.

The directors next argued that they validly amended the merger agreement to permit a "market test." [192] The Delaware Supreme Court agreed that the amendment authorized outgoing solicitation, but held that it also eliminated Trans Union's ability to terminate the merger agreement to pursue an offer:

> The most significant change was in the definition of the third-party "offer" available to Trans Union as a possible basis for withdrawal from its Merger Agreement with Pritzker. Under the [amendment], a better offer was no longer ***821** sufficient to permit Trans Union's withdrawal. Trans Union was now permitted to terminate the Pritzker Agreement and abandon the merger only if, prior to February 10, 1981, Trans Union had either consummated a merger (or sale of assets) with a third party or had entered into a "definitive" merger agreement more favorable than Pritzker's and for greater consideration--subject only to stockholder approval. [193]

The amendment thus "imposed on Trans Union's acceptance of a third party offer conditions more onerous than [before]." [194] It "had the clear effect of locking Trans Union's Board into the Pritzker Agreement" and "foreclosed Trans Union's Board from negotiating any better 'definitive' agreement." [195]

Having held that Trans Union continued to be bound by an exclusive merger agreement with Pritzker, the Delaware Supreme Court turned to the "legal question" of the options available to the board when the directors met three months later to ratify their prior decisions. Counsel advised that the directors had "three options: (1) to 'continue to recommend' the Pritzker merger; (2) to 'recommend that the stockholders vote against' the Pritzker merger; or (3) to take a noncommittal position on the merger and 'simply leave the decision to [the] shareholders." [196] The Delaware Supreme Court emphatically rejected this analysis:

[T]he Board was mistaken as a matter of law regarding its available course of action. . . . Options (2) and (3) were not viable or legally available to the Board under 8 Del. C. § 251(b). The Board could not remain committed to the Pritzker merger and yet recommend that its stockholders vote it down; nor could it take a neutral position and delegate to the stockholders the unadvised decision as to whether to accept or reject the merger. Under § 251(b), the Board had but two options: (1) to proceed with the merger and the stockholder meeting, with the Board's recommendation of approval; or (2) to rescind its agreement with Pritzker, withdraw its approval of the merger, and notify its stockholders that the proposed shareholder meeting was cancelled. [197]

The second option, the Supreme Court stressed, "would have clearly involved a substantial risk--that the Board would be faced with suit by Pritzker for breach of contract." [198] Referencing its prior holdings on the lack of any contractual termination right, the Supreme Court reiterated that "the Board was not free to turn down the Pritzker proposal." [199] The notion that the Trans Union board had a free-standing right as fiduciaries to terminate the merger agreement was "contrary to the provisions of § 251(b) and basic principles of contract law." [200]

After Van Gorkom, it was clear that if a board did not breach its fiduciary duties when entering into a merger agreement, the contract was binding on the board and the ***822** corporation. Directors did not have an inherent fiduciary right to escape or terminate a merger agreement that was not the product of a breach of fiduciary duty at the time of approval. Consequently, target directors and their counsel began routinely insisting on a clear and explicit contractual right to explore and, if appropriate, accept a superior proposal precisely because those rights otherwise would not exist. But for the contractual out, directors who believed themselves obligated to pursue a different alternative would face precisely the same dilemma that confronted the Trans Union board. If Van Gorkom had turned out differently and authorized a so-called "fiduciary put," the contractual innovations would not have been necessary.

This critical aspect of Van Gorkom has never been overruled; although, the Delaware Supreme Court's failure in both Paramount Communications Inc. v. QVC Network Inc. [201] and Omnicare to acknowledge the implications of Van Gorkom has created uncertainty in this area. However, as leading Delaware practitioners have explained, the Delaware Supreme Court's opinion in QVC did not overrule Van Gorkom and create a fiduciary termination right. [202] In my view, nor did Omnicare.

In QVC, the Delaware Supreme Court affirmed the Court of Chancery's issuance of an injunction barring Paramount Communications, Inc. and its merger partner Viacom Inc. from complying with or enforcing a no-shop provision and a stock option lockup and expanded the injunction to include the termination fee. As in Omnicare, language in QVC could be interpreted, contra Van Gorkom, to impose an ongoing, post-contracting fiduciary obligation on boards that could result in a breach of duty materializing when a superior proposal later emerges. [203] For example, the opinion described the Paramount board as having a "continuing obligation," which "included the responsibility, at the ***823** October 24 board meeting and thereafter, to evaluate critically both the QVC tender offers and the Paramount-Viacom transaction." [204] The Delaware Supreme Court remarked that after the emergence of the QVC overbid, "[u]nder the circumstances existing at that time, it should have been clear to the Paramount Board that the Stock Option Agreement, coupled with the Termination Fee and the No-Shop Clause, were impeding the realization of the best value reasonably available to the Paramount stockholders." [205] In addressing the no-shop clause, the QVC decision distinguished between whether the provision "could validly have operated here at an early stage" and whether it could later "prevent the Paramount directors from carrying out their fiduciary duties in considering unsolicited bids." [206] In addressing the stock option lockup, the Delaware Supreme Court held that under "[t]he circumstances existing on November

15," the option "had become 'draconian.'" [207] In responding to the director defendants' argument that "they were precluded by certain contractual provisions . . . from negotiating with QVC or seeking alternatives," the QVC opinion stated that "[s]uch provisions . . . may not validly define or limit directors' fiduciary duties under Delaware law or prevent the Paramount directors from carrying out their fiduciary duties." [208]

Faced with this language and its tension with Van Gorkom, Delaware practitioners might have tried to distinguish QVC as a Revlon case. But the transaction in Van Gorkom was a cash deal, so if Van Gorkom had not pre-dated Revlon by 16 months, Revlon indisputably would have applied. [209] Moreover, the Delaware Supreme Court held in 1989 ***824** that Revlon applied retroactively because the doctrine was "derived from fundamental principles of corporate law" and "did not produce a seismic shift in the law governing changes of corporate control." [210] Without an easy doctrinal distinction, practitioners had to address the apparent conflict between Van Gorkom and QVC and contend with the seemingly post hoc nature of the QVC analysis. Both issues were finessed with artful aplomb: Delaware commentators reiterated the importance of Van Gorkom, stressed the inadequacies of the Paramount board's conduct at the time of contracting, cited the statement in the QVC decision that "[i]t is the nature of the judicial process that we decide only the case before us," [211] and gave a charitable reading to any contrary language in the decision. [212] In contrast to the vituperation showered on Omnicare, Delaware practitioners did not rise up against the QVC opinion or condemn it as fundamentally wrong.

As with QVC, I would give the Omnicare majority the benefit of the doubt. A charitable reading of the majority opinion would suggest that, as in QVC, the majority perceived a breach at the time when the merger agreement was initially approved. In Omnicare, for example, the majority concluded based on its independent review of the facts that "[t]he record does not . . . support the Court of Chancery's conclusion that the defensive devices adopted by the NCS board to protect the Genesis merger were reasonable and proportionate to the threat that NCS perceived from the potential loss of the Genesis transaction." [213] The majority then discussed extensively why the NCS board should have recognized at the time the merger agreement was approved that the combination of defensive measures being adopted necessarily "accomplished a fait accompli." [214] In the majority's view, the board should have understood at the time of contracting that a force-the-vote provision combined with irrevocable voting agreement would make it "'realistically unattainable' for . . . any other proposal to succeed, no matter how superior the proposal." [215] As the majority put it, "the NCS board had no authority to execute a merger agreement" that the directors should have known at the time of approval would "subsequently prevent [the board] from effectively discharging its ongoing fiduciary responsibilities." [216] The board instead should have understood at ***825** the time that it was precluding other bidders because (i) Omnicare already had proposed a transaction involving nearly double the increased consideration Genesis was offering, albeit conditioned on due diligence; (ii) Omnicare had a history of bidding vigorously against its archrival; and (iii) the exploration of strategic alternatives previously conducted by the board was two years stale and conducted at a time before the company's condition substantially improved. [217]

Admittedly, the Omnicare opinion contains language that is less than clear on this point. As noted above, the majority opinion states that the board's ability to maintain defensive measures "will vary according to the degree of benefit or detriment to the stockholders' interests that is presented by the value or terms of the subsequent competing transaction." [218] Although one can read this passage as suggesting that a board decision that did not constitute a breach of fiduciary duty at the time it was made could be transformed into a breach based on the emergence of a "subsequent competing transaction," one can also read it as an infelicitous paraphrasing of earlier decisions, including Mills Acquisition Co. v. Macmillan, Inc. [219] and Moran. [220]

The Omnicare majority cited Macmillan in support of the controversial "subsequent competing transaction" concept. [221] The pertinent language from Macmillan describes the showing that a board must make to justify granting favorable treatment to a particular bidder under the enhanced scrutiny test:

> In the face of disparate treatment, the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's actions must be reasonable in relation to

> the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly ***826** poses to stockholder interests.[222]

The Macmillan court was referring to the board's analysis at the time of the disparate treatment.

The Macmillan citation implies that what the Omnicare majority found problematic was the NCS board's disparate treatment of Genesis in the form of a fully locked-up deal at a time when the board had information indicating that superior bids were available. To reiterate, Omnicare already had made a bid offering nearly twice the consideration in the Genesis offer, both Genesis and the NCS directors believed that Omnicare would bid further if NCS announced a deal with its archrival, and the board's earlier market canvass was two years stale and pre-dated the company's incipient recovery. As the majority noted, "the NCS board should have been alert to the prospect of competing offers or, as eventually occurred, a bidding contest."[223] Although the majority spoke of a "subsequent competing transaction," the real problem was the NCS board's decision at the time it was made. Absent further guidance from the high court, it seems preferable to interpret the Omnicare language in this fashion, which is consistent with Van Gorkom and QVC.

Even if accepted at face value, the concept of evaluating defensive measures in the face of a "subsequent competing transaction" is not wholly alien. It harkens back to Moran, where the Delaware Supreme Court held that defensive measures must be considered not only at the time they are adopted, but also at the time they are used. The Moran decision upheld the adoption of a rights plan by the board of Household International, but cautioned that "[t]he ultimate response to an actual takeover bid must be judged by the [d]irectors' actions at that time, and nothing we say here relieves them of their basic fundamental duties to the corporation and its stockholders."[224] The Moran principle applies equally to measures deployed in the deal context, such that a board could be obligated to take discretionary action such as waiving a standstill if its fiduciary duties so require.[225]

Generally speaking, therefore, it was accurate for the Omnicare court to describe the NCS directors' fiduciary duties as "continuing" and to hold that the board had an obligation to determine how to respond to a competing bid.[226] Fiduciary duties don't go away.[227] But as Van Gorkom teaches, a board's ability to act may be constrained by contracts that were not themselves the product of a breach of duty. In other words, when a board later responds to an event like the emergence of a subsequent bid, its freedom of action will be limited by the contractual commitments it has validly undertaken.[228]

***827** Read in this manner, Omnicare does not change the time for measuring directors' compliance with their fiduciary duties. A director decision is reviewed as of the time it was made and based on the information then available to the board. Omnicare does not require directors to be soothsayers.

Equally important, recognizing that Omnicare can be interpreted as a case in which the breach of duty occurred when the board approved the merger agreement makes clear why the court enjoined the Genesis merger agreement and blunts yet another recurring objection that the dissenters first articulated: the assertion that in lieu of fact-specific reasoning, the opinion identified "a judicially-created 'third rail' that now becomes one of the given 'rules of the game,' to be taken into account by the negotiators and drafters of merger agreements."[229] This rule is said to provide that a merger agreement that "locks up stockholder approval and does not contain a 'fiduciary out' provision, is per se invalid when a later significant topping bid emerges."[230]

Although it is possible to read the majority opinion in this fashion, it is also possible to read the decision as resting on three key facts, each known to the NCS board before it approved the merger agreement with Genesis: (i) Omnicare's unsolicited June 26 proposal for a transaction that would both pay off NCS's debt and provide $3 per share of NCS common stock, representing consideration for the equity worth three times the value of Genesis' then-current proposal and nearly twice the value of Genesis' increased proposal; (ii) Omnicare's history of bidding vigorously against Genesis; and (iii) the fact that the terms of the Genesis bid would prevent any competing bid. In holding that the NCS board should have insisted on a fiduciary out, the Court stressed that its holding was based on "the circumstances presented in this case." [231]

Like QVC, one can read Omnicare as a fact-specific holding in which a board failed to negotiate with a known bidder offering greater consideration and instead locked up a lower-valued transaction. It was that decision, based on the knowledge that the board had at the time when the decision was made, that was preclusive and failed to satisfy enhanced scrutiny. I would give the Omnicare majority the benefit of the doubt on this issue.

V. Good Policy: A Pre-Commitment Rule For Directors

Perhaps the most vehement and recurring argument against Omnicare starts with the refrain that "deal certainty adds value," makes the claim that Omnicare prevents boards from granting deal certainty in exchange for a higher price, and concludes that Omnicare perversely harms stockholder interests. [232] The Omnicare dissenters argued that a board should be able to commit irrevocably to a transaction, regardless of subsequent events, as ***828** a means of obtaining the best value reasonably available. Then-Chief Justice Veasey wrote that an "acquirer may pay a higher price for the target if the acquirer is assured consummation of the transaction." [233] Then-Justice Steele wrote, "Lockup provisions attempt to assure parties that have lost business opportunities and incurred substantial costs that their deal will close. I am concerned that the majority decision will remove the certainty that adds value to any rational business plan." [234] Scholars and practitioners have echoed this view. [235]

The concept of a board granting "deal certainty" to extract value for stockholders sounds laudable, but it founders initially on the twin approval requirement in Section 251 of the DGCL. [236] A merger cannot close unless the stockholders approve. By statute, a board cannot unilaterally deliver "deal certainty" to an acquirer. The transaction remains subject to the outcome of the stockholder vote.

The prospect of using "deal certainty" to extract value also falls short when tested against the work of experts in bargaining and auction theory. Professor Brian Quinn has helpfully surveyed the scholarly literature in this area and critiqued the "certainty adds value" claim. As he explains,

Negotiated acquisitions are, in principle, bargaining problems. Bargaining over price represents a division of the economic surplus between the buyer and the seller. The economics literature shows that, in expectation, a seller in a bilateral negotiation will not do better than a 50-50 split of the surplus unless it can find a way to force the buyer to reveal private information about its valuation of the seller. However, parties to a negotiation have a difficult time credibly setting limits or signaling their private valuations to the other side. [237]

Translated into everyday terms, the potential buyer of a house can tell the seller, "I think it's only worth $250,000, and that's all I will pay," but the seller must evaluate whether to take the buyer's statements at face value. It is entirely possible, even likely, that the buyer is bluffing. Perhaps a mind reader would discover that the buyer actually believes the house is worth $300,000, plans to flip it for that amount, and would pay up to $290,000. The non-psychic seller has no way to discover these facts or test the buyer's statements. Without actual or threatened competition, the seller only can say "no" and engage in a game of chicken. Even when the buyer has said "I absolutely will not pay $1 more," the seller has no means of testing the buyer's commitment except by rejecting the transaction.

Being able to commit irrevocably to a transaction "does not help sellers capture more of the surplus than they might otherwise expect to receive." [238] The value that a buyer expects to get from a bid is a function of the profit the buyer expects to earn on the deal discounted by the chance of getting the deal, less the costs of bidding. The lower the ***829** price paid, the greater the profit to the buyer, giving the buyer an incentive to make a lower bid. However, if there is competition, a lower bid reduces the likelihood of the buyer getting the deal, which means the buyer suffers a loss equal to the cost of bidding. To counter these risks, the buyer can either raise his price or insist on greater deal certainty.

Although the seller can give the buyer greater deal certainty in exchange for a higher price, this trade does not give the seller any additional information about how much the buyer is actually willing to pay or how much the increased certainty is worth.[239] Returning to the hypothetical negotiation, assume the seller counters by saying to the buyer, “In return for committing to the transaction irrevocably, I want you to pay $260,000.” The seller can simply reiterate that he believes the house is only worth $250,000, revealing nothing about what he really thinks of the house and returning the parties to the game of chicken, or the buyer could take the offer, leaving the seller to wonder whether more might have been extracted in return for transactional certainty.

Perversely, the fact that a seller can commit irrevocably to a transaction is likely to cause buyers to lower their initial prices precisely because the availability of deal certainty allows buyers to obtain protection against competition. By offering a lower initial price, the buyer can agree to a nominal price increase in return for obtaining deal certainty. “Consequently, sellers should have no reason to expect that bulletproofing transactions will help them increase their expected share of the surplus when negotiating with buyers.”[240] For a buyer, a higher price and deal protections are substitutes. If the bidder gives or gets more on one, the bidder does not have to give or get as much of the other. This is precisely the opposite dynamic that critics of Omnicare see as omnipresent, in which a buyer seeks to trade a higher price in return for greater deal certainty.

Rather than certainty, it is competition, or the threat of it, that causes sellers to increase their price. As Quinn explains:

> a standard English auction with N + 1 bidders will always yield higher expected revenue than a negotiation with only N bidders. . . . [A]n auction with N + 1 bidders is superior to any mechanism involving only N bidders. . . . The two key insights are that competition, or the threat of competition, will lead to a price closer to the buyer's reservation price and that the price effect of one additional competitor is greater than the price effects attributable to bargaining.[241]

This does not mean that the competition has to occur upfront, through an auction process.

The uncertainty created by leaving a transaction open to potential competition generates an incentive on the part of a bidder to bid as if it were in competition against an aggressive bidder because the only way a bidder can improve its ***830** odds of winning the target is by raising its bid.[242]
“When a seller leaves a transaction open to potential topping bids, the result will be an increase in the price that the seller will be able to negotiate,” compared to the price that could be negotiated in a fully locked-up transaction.[243]

Research into go-shops supports the proposition that buyers pay for certainty, as well as the related proposition that competition drives value. Go-shop transactions produce higher initial deal prices than transactions in which a market canvass results in a deal protected by a no-shop.[244] “A typical [[private equity] buyer, with no source of private value in the auction, has a 3% chance of winning [in a market canvass] and only a 6% chance . . . after due diligence.”[245] In a post-signing go-shop process, the same private equity buyer has an 86% chance of closing the deal, assuming management is neutral as to all bidders.[246] The higher prices paid in go-shops suggest that private equity buyers recognize the value of increased deal certainty. At the same time, the threat of competition during the go-shop period prevents the acquirer from underpaying because otherwise a better bid likely would emerge during the go-shop period.[247]

Academics are not the only authorities who endorse the benefits of competition. Dealmakers understand these principles intuitively.

Martin Lipton . . . has contrasted the effects of adding another interested party at the front end of corporate acquisition negotiations with the effects of simply negotiating more effectively with your initial counterpart at the back end of the process. Lipton even roughly quantified the added value of adding a competing negotiator relative to greater negotiating skill in the initial two-party deal: “The ability to bring somebody into a situation is far more important than the extra dollar a share at the back end. At the front end, you're probably talking about 50%. At the back end, you're talking about 1 or 2 percent.”[248]

To gain the benefits of competition, “[i]t is not unknown for sellers to create phantom bidders or for a private seller to raise the prospect of a competing IPO in order to raise the level of uncertainty and force bidders to increase their offering prices closer to their valuations.”[249] Conversely, when a controlling stockholder seeks to acquire the minority, the controller routinely states that they it will consider an acquisition and will not consider a sale or any alternative transaction, thereby narrowing the options available in a ***831** bilateral negotiation.[250] Warren Buffett, one of the world's most successful serial acquirers, has a simple rule: “We don't participate in auctions.”[251]

The conclusions of auction scholars and the observations of mergers and acquisitions (M&A) professionals should resonate with more mundane experience. Someone buying a car does not extract the best price from the dealer by saying that they would like to negotiate price but are ready to fully commit to a transaction with that salesman at that particular dealership. Leverage comes from creating the impression you can buy elsewhere. Pre-commitment is the salesperson's technique. The salesman is the one who asks whether you will buy today if you can agree on price, hoping to get an early “yes.”

Theory and practice provide ample reason to question a blanket statement that “certainty adds value.” Certainty could add value, or it could insulate a below-market deal. In the corporate setting, these alternatives lead to the problem of agency costs. As previously discussed, potential conflicts of interest and the threats of cognitive and structural bias are endemic to negotiated acquisitions. As Chancellor Strine has written, “[b]ecause of the importance of merger transactions and their profound effects on management's future, deal protection measures that protect management's favored deal tend to give a stock-for-stock merger agreement the flavor of an interested transaction.”[252] Professor Stephen Bainbridge has observed that in light of the potential conflicts and biases present during the negotiation of an acquisition, there is “good reason to be skeptical of management claims to be acting in the shareholders' best interests.”[253] When management locks up its favored transaction and insulates it from market competition, there is likewise good reason to question whether management used the grant of “deal certainty” to secure the best price. These concerns are heightened in a setting where the selling board lacks bargaining leverage, such as when a corporation is distressed. Management will be risk-averse in such a setting. If the alternative is bankruptcy, a board may feel that it has no ability to push back, even if it seems likely that another bidder could emerge if a transaction were announced.

The facts in Omnicare suggest that all of these factors were in play. Because of the threat of bankruptcy, the NCS board had little leverage in the face of Genesis' demand for a locked-up deal. Even though Omnicare had already offered nearly twice the consideration, and although both Genesis and NCS believed that Omnicare would become a far more aggressive bidder once it knew that Genesis was in the hunt, the NCS board lacked the ability to insist that Genesis agree to deal terms that would permit a competitive process.

By holding that a majority lockup is preclusive, the Delaware Supreme Court gave ***832** target directors a pre-commitment rule that addresses agency costs and bargaining leverage concerns. As scholars critical of Omnicare have argued, pre-commitment rules (like fully locked-up merger agreements) can have value because they “can be viewed as devices to protect against flagging self-control.”[254]

Children drop coins into porcelain piggy banks. Governments create social security programs, and firms establish mandatory pension plans. Dieters throw out chocolate and ice cream. Adults ask, at the beginning of an evening, not to be served a second drink when they later request one, or alternately, they surrender their keys upon entering the party.[255]

The Omnicare pre-commitment rule operates similarly by taking away the board's ability to agree to an absolute lockup in a context where the board is unlikely to be able to resist.

Had the Omnicare case gone the other way, I suspect majority voting lockups would have proliferated. In his dissent, then-Chief Justice Veasey stated that "the peculiar facts presented render this case an unlikely candidate for substantial repetition."[256] On the contrary, corporate deal-planners are wonderful mimics. Think of the corporations that developed distinctive corporate cultures after Time. Consider also the degree to which the terms of the Paramount-QVC deal were structured in reliance on that earlier decision. Or ponder the frequency with which bidders open by seeking a termination fee in the high four percent or low five percent range, the target counters with two percent, and the parties end up in the mid-threes. Also, contemplate the canned justifications routinely trotted out for stapled financing, such as the greater familiarity with the transaction of the banker working on the deal (always true) and a desire to minimize potential leaks by having fewer banks involved (easily invoked).

Genesis' reasons for insisting on exclusivity were not terribly unique. A Genesis representative simply took the position that
if [NCS] wished us to continue to try to move this process to a definitive agreement, that they would need to do it on an exclusive basis with us. We were going to, and already had incurred significant expense, but we would incur additional expenses . . . both internal and external, to bring this transaction to a definitive signing.[257]
That justification applies universally. Genesis' rationale for wanting a fully locked-up deal is similarly ubiquitous: a desire to avoid a post-signing bidding contest.[258] The dilemma facing NCS was equally commonplace: a target always will fear that rejecting a demand for exclusivity could result in losing the bid.

Had the Omnicare justifications been deemed sufficient for a fully locked-up deal, they could have easily been replicated. The next logical step in deal evolution would have been for bidders to demand that targets provide them sufficient voting power to vote the ***833** deal through, or at least get a leg up, something easily accomplished through the issuance of additional common shares (given authorized capital) or through shares of preferred stock (given blank check authority).[259] If a board could justify a full lockup by citing the acquirer's demand and risk of losing the existing deal, as the dissenters argued, it is not clear why Delaware law would reject a create-your-own-stockholder-lockup strategy.

Reasonable minds can debate the policy implications and empirical consequences of allowing bidders and targets to readily lock up their deals, but for Delaware to take such a step would have run counter to our law's traditional concern about conflicts in negotiated acquisitions. In my view, the Omnicare majority correctly ruled on the facts of the case that the NCS board lacked sufficient justification at the time of contracting to agree to a fully locked-up deal given the company's strengthened financial position, Omnicare's significantly higher offer, and the high likelihood of further bidding.

VI. Conclusion

When the acorn fell on Henny Penny's head, she feared the sky was falling. With Omnicare, the reaction was similar, with both the dissenters and practitioners predicting the end of the world for friendly deals. A decade later, we know better. M&A continued, even bubbled. Nor was its demise a rational prediction. At most, Omnicare affected only absolute majority lockups. It did not limit the ability of deal planners to agree to a range of other common protective measures, such as termination fees, no-shop provisions, match rights, or even voting agreements covering a lesser percentage of shares. These features give an initial bidder a significant leg up and provide ample reasons for a potential acquirer to want incumbent merger-party status.

No judicial decision is perfect (certainly none of mine are), and there are a number of valid criticisms that can be leveled at the Omnicare case. But the opinion was not all bad. It made several important contributions to Delaware law, most notably by applying enhanced scrutiny to defensive measures in negotiated acquisitions, regardless of the form of consideration. Instead of treating Omnicare as a punch line and greeting its mention with smugly knowing smiles, let's recognize that the decision has a silver lining.

Footnotes

a1 Vice Chancellor, Delaware Court of Chancery.

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

2 See Andrew D. Arons, In Defense of Defensive Devices: How Delaware Discouraged Preventative Measures in Omnicare v. NCS Healthcare, 3 DePaul Bus. & Com. L.J. 105, 120-21 (2004) ("The [Omnicare] majority's decision was incorrect because NCS's board's actions did in fact satisfy Delaware law, the majority misapplied the applicable law, and other jurisdictions lend support against the majority's holding."); Eleonora Gerasimchuk, Stretching the Limits of Deal Protection Devices: From Omnicare to Wachovia, 15 Fordham J. Corp. & Fin. L. 685, 704 (2010) ("As a matter of policy, the Omnicare majority was correctly criticized for announcing a per se rule that seemed to exceed the Delaware courts' traditional equitable authority and tended toward quasi-legislative lawmaking."); Sean J. Griffith, The Costs and Benefits of Precommitment:An Appraisal of Omnicare v. NCS Healthcare, 29 J. Corp. L. 569, 623 (2004) ("In short, the Omnicare rule is bad law, bad economics, and bad policy."); Wayne O. Hanewicz, Director Primacy, Omnicare, and the Function of Corporate Law, 71 Tenn. L. Rev. 511, 556-58 (2004) (describing "problems" with Omnicare and stating it "may well be that [the court] made the wrong substantive decision"); Marcel Kahn & Edward Rock, How to Prevent Hard Cases From Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity, 58 Emory L.J. 713, 730 (2009) ("Omnicare is a problematic and widely criticized opinion."); Thanos Panagopoulos, Thinking Inside the Box: Analyzing Judicial Scrutiny of Deal Protection Devices in Delaware, 3 Berkeley Bus. L.J. 437, 466-68 (2006) (arguing the Delaware Supreme Court "[e]rred in Omnicare" and inappropriately relied on the "unfounded" principle that a board has "a fiduciary duty to protect minority stockholders" from "the will of the majority"); E. Norman Veasey & Christine T. Di Guglielmo, What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective, 153 U. Pa. L. Rev. 1399, 1461 (2005) ("I think most objective observers believe that the majority decision was simply wrong."); Daniel Vinish, The Demise of Clarity in Corporate Takeover Jurisprudence: The Omnicare v. NCS Healthcare Anomaly, 21 St. John's J. Legal Comment. 311, 312 (2006) ("[In Omnicare], the Delaware Supreme Court destroyed the prior lucidity in case law governing corporate directors by holding ... that an amalgam of stockholder and director action may be taken into account" in enhanced scrutiny and that a fiduciary out "would now be imposed on director action.").

3 Then-Justice, now Chief Justice Steele was quoted as saying during a discussion of the case at a continuing legal education event that "[w]hile I don't suggest that you rip the Omnicare pages out of your notebook.... I do suggest that there's the possibility, one could argue, that the decision has the life expectancy of a fruit fly." Gerasimchuk, supra note 2, at 685 (quoting David Marcus, Man of Steele, D&O Advisor, Sept. 2004, at 16).

4 At least two other scholars have put Omnicare in the "not all bad" camp. See generally Megan Wischmeier Shaner, Revisiting and Re-Evaluating Omnicare 10 Years Later (2012) (unpublished manuscript), available at http://works.bepress.com/megan_shaner/11/ (arguing that the decision made positive contributions including (i) establishing that enhanced scrutiny applies to defensive measures in stock-for-stock merger agreements and (ii) reinforcing the need for boards to be active and involved in merger transactions); Brian JM Quinn, Bulletproof: Mandatory Rules for Deal Protection, 32 J. Corp. L. 865 (2007) (arguing that regardless of theoretical and doctrinal weaknesses in its decision, Omnicare reached the right policy result by limiting fully locked-up transactions).

5 Omnicare, 818 A.2d at 920.

6 Id.

7 Id.

8 Id. at 921.

9 Id. at 920.

10 Omnicare, 818 A.2d at 921.

11 Id.

12 Id.

13 Id.

14 Id. at 922.

15 Omnicare, 818 A.2d at 922.

16 Id.

17 Id. at 923.

18 Id.

19 Id.

20 Omnicare, 818 A.2d at 924.

21 Id.

22 "As of July 28, 2002, NCS had 18,461,599 Class A shares and 5,255,210 Class B shares outstanding." In re NCS Healthcare, Inc., S'holders Litig., 825 A.2d 240, 244 (Del. Ch. 2002), rev'd sub nom. Omnicare, Inc. v. NCS Healthcare, Inc., 822 A.2d 397 (Del. 2002). The July 26, 2002 Omnicare offer was for $3.00 per share in cash for all NCS common stock. See id. at 249. NCS had a total of 23,716,809 shares of common stock outstanding (the sum of Classes A and B). The total value of the July 26 Omnicare offer for NCS's equity, therefore, was $71,150,427 (23,716,809 * $3).

23 Omnicare, 818 A.2d at 924.

24 Michael J. Kennedy, The End of Time? Delaware's Search for the Fiduciary GUT, 7 No. 5 M & A Law. 21 (Oct. 2003) (calculating Genesis' offer as equating to $1.60 per NCS share, given that Genesis' common stock closed on the announcement date at $16.00 per share and Genesis offered to exchange 1/10 of a share of Genesis common stock for each share of NCS).

25 23,716,809 * $1.60 = $37,946,894. See supra note 22 (providing the total number of NCS shares outstanding and price per share).

26 Del. Code Ann. tit. 8, § 203 (2013); Omnicare, 818 A.2d at 925.

27 Omnicare, 818 A.2d at 925.

28 Id.

29 Id. at 926.

30 Id.

31 Id.

32 Omnicare, 818 A.2d at 926.

33 Id.

34 Id.

35 Id.

36 See id. at 925 (discussing the implications of the voting agreements).

37 In re NCS Healthcare, Inc., S'holders Litig., 825 A.2d 240 (Del. Ch. 2002). The Court of Chancery issued two other opinions relating to the transaction. See generally Omnicare, Inc. v. NCS Healthcare, Inc., 825 A.2d 264 (Del. Ch. 2002) (denying motion for summary

judgment), rev'd in part sub nom. Omnicare, Inc. v. NCS Healthcare, Inc., 822 A.2d 397 (Del. 2002) (unpublished table decision) (holding that dispute over bidder standing was moot); Omnicare, Inc. v. NCS Healthcare, Inc., 809 A.2d 1163 (Del. Ch. 2002) (holding bidder did not have standing to assert claims for breach of fiduciary duty, but did have standing to challenge the effect of the voting agreement on Class B stock).

38 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182-83 (Del. 1986).

39 In re NCS Healthcare, 825 A.2d at 255-56.

40 Id.

41 Id. at 257.

42 Id.

43 Id.

44 In re NCS Healthcare, 825 A.2d at 258-61.

45 Id. at 258.

46 Id.

47 Id.

48 Id. at 259-61.

49 In re NCS Healthcare, 825 A.2d at 261.

50 Id. at 261-63; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

51 In re NCS Healthcare, 825 A.2d at 261-63.

52 Id. at 263.

53 Omnicare, Inc. v. NCS Healthcare, Inc. 818 A.2d 914, 918 (Del. 2003).

54 Id. at 931.

55 Id.

56 Id. at 935.

57 Id.

58 Omnicare, 818 A.2d at 933.

59 Id. at 932.

60 Id.

61 Id. at 934.

62 Id. at 936.

63 Omnicare, 818 A.2d at 935.

64 Id. at 936.

65 Id.

66 Id. at 937.

67 Id. at 938.

68 Omnicare, 818 A.2d at 938.

69 Id. at 939-50.

70 Id.

71 Id. at 940 (Veasey, C.J., dissenting).

72 Id. at 921-24.

73 Omnicare, 818 A.2d at 940.

74 Id.

75 Id.

76 Id. at 941 (Veasey, C.J., dissenting).

77 Id.

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

79 Id.

80 Id. at 945 (Veasey, C.J., dissenting).

81 Id. at 945.

82 Id. at 946 (Steele, J., dissenting).

83 Omnicare, 818 A.2d at 946 (Steele, J., dissenting).

84 Id. at 921-24.

85 Id. at 947 (Steele, J., dissenting)

86 Id. at 948 (Steele, J., dissenting) (emphasis added).

87 Id. at 950 (Steele, J., dissenting).

88 Omnicare, 818 A.2d at 942 (Veasey, C.J., dissenting); see also Griffith, supra note 2, at 615 ("Unfortunately, the majority opinion in Omnicare appears to take the commodity-value of certainty away from target boards."); Kennedy, supra note 24, at 21 ("Since Omnicare ... [targets on the margins] have been robbed of the ability to promise deal certainty. In each case the outcome will be the same, the bidder will lower its price to discount for the uncertainty that its deal will not occur and extract more monetary compensation if that deal does not go through. Neither of these outcomes is wealth-enhancing for target stockholders."); Brian C. Smith, Changing the Deal: How Omnicare v. NCS Healthcare Threatens to Fundamentally Alter the Merger Industry, 73 Miss. L.J. 983, 998 ("Opponents of the decision have already begun to predict that the ruling will increase uncertainty in the bidding process and reduce the value of merger activity among Delaware corporations.").

89 Edward Teach, The Deal, Unlocked, CFO.com (Nov. 1, 2003), http:// www.cfo.com/article.cfm/3010743/c_3046601.

90 See, e.g., id. at 2 (quoting Harvard Law School professor John C. Coates as saying, "[i]f you had taken a poll of [mergers and acquisitions] practitioners--or academics for that matter--90 percent would have said the case would have come out the other way.... In particular, they would have said that [shareholders were] entitled ... to commit themselves to support a particular deal, without regard to whether or not that particular buyer was going to be offering the highest amount of money for the overall company.").

91 Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

92 See Sean J. Griffith, Deal Protection Provisions in the Last Period of Play, 71 Fordham L. Rev. 1899, 1913 (2003) ("In Time Warner, the Delaware Supreme Court stated that deal protections adopted ... prior to the appearance of a hostile bidder ... would be accorded business judgment deference."); Wayne O. Hanewicz, When Silence Is Golden: Why the Business Judgment Rule Should Apply to No-Shops in Stock-for-Stock Mergers, 28 J. Corp. L. 205, 226 (2003) (arguing the business judgment rule should be applied to no-shop provisions and that after Time "only the business judgment rule" has been applied); Michael J. Kennedy, Whole Lotta Fiduciating Goin' On!, 5 No. 8 M & A Law. 1, 2 (2002) ("[I]n light of the Time/Revlon dichotomy, most practitioners viewed defensive contractual provisions through the Time/Revlon binary lens.... If Time applied, defensive provisions could be tight and strong and probably judged under the ... business judgment rule"); Stephen J. Lubben & Alana J. Darnell, Delaware's Duty of Care, 31 Del. J. Corp. L. 589, 620-23 (2006) (suggesting the director entrenchment concerns underpinning Unocal do not exist in stock-for-stock mergers and therefore warrant review under the duty of care, noting that after Time, courts "generally applied the business judgment rule to no-shop provisions in stock-for-stock mergers"); Quinn, supra note 4, at 873 n.28 ("An expansive reading of the holding in [Time] has been taken to mean that boards in friendly settings may negotiate with preferred bidders, protect the resulting deal against a third party bid, and then receive the benefit of the business judgment rule."); Leo E. Strine, Jr., Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements, 56 Bus. Law. 919, 929 (2001) (describing pro-business-judgment-rule view); see also Gerasimchuk, supra note 2, at 700 ("Application of the Unocal standard to deal protection devices in friendly mergers is debatable.").

93 Time, 571 A.2d at 1142; see also id. at 1151-52 (noting that the Delaware Supreme Court was "not require[d] ... to pass on the wisdom of the board's decision to enter into the original Time-Warner agreement," and observing that the Time directors were "entitled to the protection of the business judgment rule").

94 Id. at 1142. See, e.g., Hanewicz, supra note 92, at 531 (arguing the business judgment rule should apply to no-shop provisions in a merger agreement); Gregory V. Varallo & Srinivas M. Raju, A Fresh Look at Deal Protection Devices: Out from the Shadow of the Omnipresent Specter, 26 Del. J. Corp. L. 975, 978 (2001) (same).

95 Id. at 1152. See Hanewicz, supra note 2, at 534-35 (explaining the court's rationale in developing an enhanced scrutiny test to evaluate anti-takeover measures); see also Gilbert v. El Paso Co., 575 A.2d 1131, 1143-44 (Del. 1990) (stating that because the original merger agreement in Time "long pre-dated the Paramount bid, [it] was not a defensive measure in response to Paramount's actions").

96 Time, 571 A.2d at 1152.

97 See, e.g., Griffith, supra note 92, at 1914 (arguing that under Time, analysis turns on whether "deal protections were adopted in connection with a transaction that is the culmination of the board's long term strategic thinking--in which case the agreement and the business judgment that it embodies will not be disturbed--or whether the transaction ... amounted to a short term defensive tactic, more responsive to a hostile bidder's offer than any long term strategy, in which case Unocal scrutiny will apply.").

98 See Gregory V. Varallo & Srinivas M. Raju, A Process Based Model for Analyzing Deal Protection Measures, 55 Bus. Law. 1609, 1629-30 (2000) ("With respect to the deal protection measures in the original merger agreement, however ... the court held that Unocal was the proper standard of review despite the fact that these protections were agreed to prior to the emergence of Paramount.... There is logic to this approach because deal protection measures are in some ways analogous to defensive measures in that they both impose a hurdle to potential unwanted suitors."); Strine, supra note 92, at 933 ("As important for the current discussion is the fact that the Supreme Court also decided the question of what standard of review applied to the deal protection measures contained in both the original and the final Time-Warner merger agreement.... The Supreme Court's decision in this regard is consistent with other decisions ... that have applied the Unocal standard of review [to deal protections].").

99 Time, 571 A.2d at 1151 n.15.

100 Id.

101 ACE Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).

102 Id. at 98.

103 In re IXC Commc'ns, Inc. S'holders Litig., Nos. 17324, 17334, 1999 WL 1009174, at *4 (Del. Ch. Oct. 27, 1999).

104 Id. at *10.

105 See, e.g., Mark Lebovich & Peter B. Morrison, Calling a Duck a Duck: Determining the Validity of Deal Protection Provisions in Merger of Equals Transactions, 2001 Colum. Bus. L. Rev. 1, 18 (2001) (arguing enhanced scrutiny should be applied to deal protections because it "ensures that directors adopt Deal Protections that will not impermissibly usurp decision-making power from the stockholders by severely limiting the directors' ability to serve as gatekeepers"); Mark A. Morton et al., What is the Appropriate Standard of Review for Deal Protection Measures?, 8 Corp. Governance Advisor 13, 13-14 (July 2000) (reviewing the seemingly conflicting positions represented by ACE and IXC and noting the boundaries of both perspectives); Varallo & Raju, supra note 98, at 1635 (arguing that a "process based model" should be used to analyze deal protections because such a model is "consistent with Delaware cases" and permits "significant flexibility").

106 See Strine, supra note 92 (describing the pro-business-judgment-view).

107 See McMillan v. Intercargo Corp., 768 A.2d 492, 506 n.62 (Del. Ch. 2000) ("Under a 'duck' approach to the law, 'deal protection' terms self-evidently designed to deter and make more expensive alternative transactions would be considered defensive and reviewed under the [Unocal] standard.").

108 Omnicare, Inc. v. NCS Healthcare, Inc. 818 A.2d 914, 930 (Del. 2003).

109 Id. at 930-31.

110 Id. at 930.

111 Id. at 930-31.

112 Id. at 932 (emphasis added).

113 Omnicare, 818 A.2d at 930-31.

114 See id. at 943 n.102 (Veasey, C.J., dissenting) ("The basis for the Unocal doctrine is the 'omnipresent specter' of the board's self-interest to entrench itself in office. NCS was not plagued with a specter of self-interest. Unlike the Unocal situation, a hostile offer did not arise here until after the market search and the locked-up deal with Genesis."); see also id. at 949 (Steele, J., dissenting) ("I believe that the absence of a suggestion of self-interest or lack of care compels a court to defer to what is a business judgment that a court is not qualified to second guess. However, I recognize that another judge might prefer to view the reasonableness of the board's action through the Unocal prism before deferring.").

115 See, e.g., Kahn & Rock, supra note 2, at 730 ("The voting agreements [in Omnicare] were executed by the company's shareholders, not by the board of directors. The agreements thus did not raise the concern underlying Unocal that the board was acting in its own interest in adopting a defensive device or the concern that the board was usurping shareholders' effective right to vote on a merger."); Griffith, supra note 2, at 583 ("[S] elfishly entrenched management is the omnipresent specter haunting the world of hostile takeovers, and the standard of enhanced scrutiny in Unocal was designed to protect shareholder welfare by controlling this threat. Friendly acquisitions, in contrast, do not have such ghosts.") (footnote omitted); Hanewicz, supra note 2, at 534-35 ("The omnipresent specter of Unocal and its progeny is not the omnipresent specter identified by the Omnicare court.... In Omnicare, [the conflict of interest in Unocal] was simply not present. The NCS board actively sought to sell the company ... The court simply ignored this distinction between Unocal and the facts before it [in Omnicare].").

116 See, e.g., In re J.P. Stevens & Co., Inc. S'holders Litig., 542 A.2d 770, 780 (Del. Ch. 1988) ("[A]s currently viewed, this case involves neither a self-dealing transaction, nor corporate measures designed to defeat a threatened change of control. Thus, I do not regard myself as authorized by Unocal or any other precedent of this court or the Supreme Court to pass upon the reasonableness of the judgment") (internal citations omitted). See generally Paul R. Regan, The Unimportance of Being Earnest: Paramount Rewrites the Rules for Enhanced Scrutiny in Corporate Takeovers, 46 Hastings L.J. 125, 158-65 (1994) (discussing the Court of Chancery's early post-Revlon decisions).

117 Revlon, Inc. v. MacAndrews Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986).

118 See MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1131 (Del. 2003) (discussing the rationale for applying the Unocal standard).

119 Stroud v. Grace, 606 A.2d 75, 92 n.3 (Del. 1992).

120 See generally Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981) (establishing two-part test for reviewing recommendations of special litigation committees in which a court first evaluates the good faith of the committee and then examines the reasonableness of the committee's recommendation); Louisiana Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., Inc., C.A. No. 5682-VCL, 2011 WL 773316, at *7 (Del. Ch. Mar. 4, 2011) ("An SLC's decision to dismiss a post-demand-excusal derivative claim is reviewed under Zapata's two-step standard, which effectively amounts to reasonableness review and a context-specific application of enhanced scrutiny."); Julian Velasco, Structural Bias and the Need for Substantive Review, 82 Wash. U. L.Q. 821, 849 (2004) (explaining that Zapata "is quite similar to Unocal"); Gregory V. Varallo et al., From Kahn to Carlton: Recent Developments in Special Committee Practice, 53 Bus. Law. 397, 423 n.121 (1998) ("The [Zapata] standard is also reminiscent of the enhanced scrutiny courts use to examine the actions of directors engaged in a sale of a corporation or other like transactions.... Perhaps the similarity ... is best explained by the fact that in all of these situations courts would like to defer to the business judgment of a board, but because the scenarios in which these cases arise create a potential conflict of interest for board members, the court is only willing to do so if a board first demonstrates it is capable of making an independent business judgment and the judgment seems at least to make some rational sense.").

121 In re El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012).

122 In re Dollar Thrifty S'holder Litig., 14 A.3d. 573, 597 (Del. Ch. 2010).

123 In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1002 (Del. Ch. 2005); see In re Topps Co. S'holders Litig., 926 A.2d 58, 64 (Del. Ch. 2007) ("When directors bias the process against one bidder and toward another not in a reasoned effort to maximize advantage for the stockholders, but to tilt the process toward the bidder more likely to continue current management, they commit a breach of fiduciary duty.").

124 In re El Paso, 41 A.3d at 439 n.24 (quoting Revlon, Inc. v. MacAndrews Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986)).

125 Stephen M. Bainbridge, Unocal at 20: Director Primacy in Corporate Takeovers, 31 Del. J. Corp. L. 769, 788-89 (2006) [hereinafter Bainbridge, Director Primacy]; accord Stephen M. Bainbridge, The Story of Smith v. Van Gorkom, in Corporate Law Stories 197, 223 (J. Mark Ramseyer ed., 2009) [hereinafter Bainbridge, Story of Van Gorkom] ("Corporate acquisitions are a classic example of what game theories refer to as 'final period problems."'); see Bernard Black & Reinier Kraakman, Delaware's Takeover Law: The Uncertain Search for Hidden Value, 96 Nw. U. L. Rev. 521, 536 (2002) (describing negotiated acquisition as a scenario in which "the target's managers and board will likely lose their positions. They face a strong conflict of interest, yet they are in a final period where reputation and fear of future discipline lose their force as constraints on self-interested behavior."); Ronald J. Gilson & Reinier Kraakman, What Triggers Revlon?, 25 Wake Forest L. Rev. 37, 54 (1990) ("A friendly merger in which the ownership of a constituent company remains diffuse but de facto control shifts from one management team to another, is no less a control shift than a transaction that gives rise to a control block.... [T]he absence of [a controller] ... does not reduce the danger that [stockholder] interests will suffer under the merger terms negotiated by their own management."); Griffith, supra note 2, at 616 ("Acquisitions create a last period scenario for target managers and directors because the reorganization of the corporate structure following the transaction is likely either to end their tenure or, at the very least, significantly change their role in the company."); Griffith, supra note 92, at 1945 ("Although the drama and hyperbole of a bust up acquisition is typically not present in the context of a 'friendly' merger--after all, the business continues to operate and many employees keep their jobs--last period features are still present at the level of the board of directors and senior management, many of whom are likely to be in the last period of their employment.").

126 Ronald J. Gilson & Bernard S. Black, The Law and Finance of Corporate Acquisitions 720 (2d ed. 1995).

127 Griffith, supra note 2, at 616.

128 See Bainbridge, Director Primacy, supra note 125, at 785 ("Corporate directors operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants. A variety of market forces provide important constraints. The capital and product markets, the internal and external employment markets, and the market for corporate control all constrain shirking by firm agents.").

129 Id. at 789.

130 In re RJR Nabisco, Inc. S'holders Litig., CIV. A. No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989); see also In re El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012) ("[A] range of human motivations ... can inspire fiduciaries and their advisors to be less than faithful to their contextual duty to pursue the best value for the company's stockholders.").

131 Griffith, supra note 92, at 1948.

132 See id. at 1949-53.

133 City Capital Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988).

134 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 30 (Del. Ch. 2010).

135 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 935 (Del. 2003).

136 Del. Code Ann. tit. 8, § 251 (2013).

137 See Strine, supra note 92, at 926 (explaining that "[w]hen directors ... with a pill and other formidable defenses already in place decide to enter into a merger contract with strong deal protection measures, they are deepening their own role as the stockholders' market intermediary" and placing "stockholders in a position that is radically different from that they occupy under the default rules of Delaware law. Because that change in position was caused by the stockholders' own fiduciaries, those fiduciaries should expect that the propriety of their actions will be subject to careful judicial review. After all, it is they who have changed the natural order of things.").

138 Del. Code Ann. tit. 8, § 251 (2013).

139 Id. § 251(b).

140 Id. § 251(c).

141 Strine, supra note 92, at 933.

142 Williams v. Geier, 671 A.2d 1368, 1387 (Del. 1996).

143 Strine, supra note 92, at 942.

144 Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

145 Id. at 1387-88.

146 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930 (Del. 2003).

147 Williams, 671 A.2d at 1368.

148 Omnicare, 818 A.2d at 935 (quoting Williams, 671 A.2d at 1382-83).

149 Id.

150 Id. at 936.

151 Id. at 925 ("Among other things, the NCS/Genesis merger agreement provided the following: ... NCS stockholders could exercise appraisal rights under 8 Del. C. § 262").

152 Williams, 671 A.2d at 1377 ("A Unocal analysis should be used only when a board unilaterally (i.e., without stockholder approval) adopts defensive measures in reaction to a perceived threat.").

153 Omnicare, Inc., 818 A.2d at 925.

154 Id. at 936.

155 Id. at 943 (Veasey, C.J., dissenting).

156 Id. at 938.

157 In addition to these options, each of which could be implemented within the merger structure, the independent directors could have blocked the stockholder lockup simply by declining to allow the transaction to proceed by merger. Under the terms of Outcalt and Shaw's high vote stock, their shares would convert to low vote stock if they sold to a third party. See id. at 918-19 ("Outcalt owns 202,063 shares of NCS Class A common stock and 3,476,086 shares of Class B common stock.... Shaw own[s] 28,905 shares of NCS Class A common stock and 1,141,134 shares of Class B common stock."). A merger was the only transactional form in which they could deliver the necessary votes. Omnicare, 818 A.2d at 925; see also Ronald J. Gilson & Jeffrey N. Gordon, Controlling Controlling Shareholders, 152 U. Pa. L. Rev. 785, 815 n.115 (2003) (noting that Outcalt and Shaw only could deliver the majority vote in a merger). Because the independent directors' consent was necessary to facilitate a transaction using the merger route, they could have prevented the lockup from working by saying "no" to the merger. The particularities of Outcalt and Shaw's control position did not let them dictate the form of the transaction. My thanks to Brian Quinn for this point.

158 Omnicare, 218 A.2d at 938.

159 Del. Code Ann. tit. 8, § 203 (2013).

160 Id. § 203(c)(9).

161 Id. § 203(a)(1).

162 Id. § 203(c)(9)(iii).

163 Id.

164 See Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 933 (Del. 2003) (stating that Genesis gave Outcalt and Shaw voting agreements, which "committed them irrevocably to vote their majority power in favor of the merger").

165 Id. at 925.

166 See id. (citing the board's vote to authorize Outcalt and Shaw's voting agreements).

167 Del. Code Ann. tit. 8, § 203(a) (2013); see also In re Digex Inc. S'holders Litig., 789 A.2d 1176, 1214 (Del. Ch. 2000) ("The plaintiffs have established a likelihood of success on the merits of their claim that the defendants breached their fiduciary duties in waiving the protections afforded by § 203.").

168 In re Digex, Inc., 789 A.2d at 1214.

169 Hollinger Int'l v. Black, 844 A.2d 1022, 1089 (Del. Ch. 2004), aff'd, 872 A.2d 559 (Del. 2005) [hereinafter Hollinger I].

170 Hollinger Int'l v. Hollinger Int'l, Inc., 858 A.2d 342, 387 (Del. Ch. 2004), appeal denied, 871 A.2d 1128, No. 331, 2004, 2004 WL 1732185 (Del. 2004) (unpublished table decision) [hereinafter Hollinger II].

171 Paramount Commc'ns Inc. v. Time Inc., Nos. 10866, 10670, and 10935, 1989 WL 79880, * 749 (Del. Ch. July 14, 1989) (Allen, C.), aff'd, 571 A.2d 1140 (Del. 1990); see In re Lear Corp. S'holder Litig., 967 A.2d 640, 655 (Del. Ch. 2008) ("Directors are not thermometers, existing to register the ever-changing sentiments of stockholders.... During their term of office, directors may take good faith actions that they believe will benefit stockholders, even if they realize that the stockholders do not agree with them."); TW Servs., Inc. v. SWT Acquisition Corp., CIV. A. Nos. 10427, 10298, 1989 WL 20290, at *1186 n.14 (Del. Ch. Mar. 2, 1989) (Allen, C.) ("[A] corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject however to a fiduciary obligation.").

172 See, e.g., Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (citing Section 141(a) of the DGCL as the source of a "broad mandate" that "includes a conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability"); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1341 (Del. 1987) (citing Section 141(a) of the DGCL as conferring on the board of directors "the ultimate responsibility for managing the business and affairs of a corporation"); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953. (Del. 1985) (citing Section 141(a) of the DGCL as giving the board "a large reservoir of authority upon which to draw").

173 See, e.g., McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors."); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291-92 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. Section 141(a) ... confers upon any newly elected board of directors full power to manage and direct the business and affairs of a Delaware corporation.") (internal citations omitted); Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); see also CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 (Del. 2008) (holding that stockholders' statutorily mandated authority to amend bylaws is "not coextensive with the board's concurrent power and is limited by the board's management prerogatives under Section 141(a)").

174 See Hanewicz, supra note 2, at 542-43 (explaining that unlike public shareholders who are likely to have a diversified portfolio, Outcalt and Shaw had all of their eggs in one basket and therefore were likely to be risk averse).

175 In re NCS Healthcare, Inc., S'holders Litig., 825 A.2d 240, 254 n.20 (Del. Ch. 2002).

176 Id.

177 Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 56 (Del. 1994); see id. at 56 n.3 ("This Court's standard and scope of review as to facts on appeal from a preliminary injunction is whether, after independently reviewing the entire record, we can conclude that the findings of the Court of Chancery are sufficiently supported by the record and are the product of an orderly and logical deductive process."); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1340-41 (Del. 1987) ("Since the decision below denying Ivanhoe's motion for a preliminary injunction was based entirely on a paper record, the standard and scope of review on appeal requires this Court to review the entire record and draw its own conclusions with respect to the facts if the findings below are clearly wrong and justice requires us to do so.").

178 For example, the majority stated:
We have also assumed arguendo that the NCS board exercised due care when it: abandoned the Independent Committee's recommendation to pursue a stalking horse strategy, without even trying to implement it; executed an exclusivity agreement with Genesis; acceded to Genesis" twenty-four hour ultimatum for making a final merger decision; and executed a merger agreement that was summarized but never completely read by the NCS board of directors. But see Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 929 (Del. 2003). By pointedly including a "but see" cite to the famous Van Gorkom decision, where directors were held liable for breaching their duty of care after only receiving a summary of a merger agreement (among other process failures), the majority implicitly questioned the validity of the assumption.

179 Moran v. Household Int'l., Inc., 500 A.2d 1346, 1356-57 (Del. 1985).

180 See Omnicare, 818 A.2d at 940 (Veasey, C.J., dissenting) (arguing against turning to "ex post felicitous results").

181 See Clifford E. Neimeth & Cathy L. Reese, Locked and Loaded: Delaware Supreme Court Takes Aim at Deal Certainty, 7 No. 2 M & A Law. 16 (June 2003) ("We believe that if Omnicare is followed in its most broad sense, the decision may entirely subjugate the 'real time' validity and reasonableness of that process to the occurrence of unforeseen (post-decisional) economic events."); Panagopoulos, supra note 2, at 473 ("[B]y taking an ex post approach to enhanced scrutiny ... the Delaware Supreme Court has enforced a substantive conclusion that deal protection devices in the change of control context, and absolute lock-ups in any context, are not in the best interests of stockholders."); Troy A. Paredes, The Firm and the Nature of Control: Toward a Theory of Takeover Law, 29 J. Corp. L. 103, 161 (2003) ("[T]he majority's reasoning [in Omnicare] has a distinct ex post flavor to it. At bottom, the majority was troubled that the NCS board had pre-committed to the Genesis merger, in effect precluding the NCS shareholders from accepting a subsequent superior offer from Omnicare.").

182 Omnicare, 818 A.2d at 933.

183 See Brian JM Quinn, Optionality in Merger Agreements, 35 Del. J. Corp. L. 789, 792 (2010) ("A seller's fiduciary put permits the seller to terminate a transaction, pay a fee, and then pursue a transaction with an alternate buyer."); Ronald Gilson & Alan Schwartz, Understanding MACs: Moral Hazard in Acquisitions 4 (Feb. 2004) (unpublished manuscript), available at http://papers.ssrn.com/

sol3/papers.cfm?abstract_id=515105 ("[C]hanges in corporate law ... have accentuated the resemblance of the seller's interest in an executed but not yet closed transaction to a put option.").

184 See In re Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 830 (Del. Ch. 2011) ("Time-bound mortals cannot foresee the future. The test therefore cannot be whether, with hindsight, the directors actually achieved the best price."); In re Dollar Thrifty S'holder Litig., 14 A.3d 573, 617 (Del. Ch. 2010) (expressing skepticism about an approach that would require directors to predict the future); In re Fort Howard Corp. S'holder Litig., CIV. A. No. 9991, 14 Del. J. Corp. L. 699, 722 (Del. Ch. Aug. 8, 1988) (Allen, C.) ("Revlon explicitly recognized that a disinterested board ... may enter into lock-up agreements if the effect was to promote, not impede, shareholder interests. (That can only mean if the intended effect is such, for the validity of the agreement itself cannot be made to turn upon how accurately the board did foresee the future)."); Citron v. Fairchild Camera & Instrument Corp., CIV. A. No. 6085, 14 Del. J. Corp. L. 273, 301 n.17 (Del. Ch. May 19, 1988) (Allen, C.) ("[T]he duty can only be to try in good faith ... to get the best available transaction for the shareholders. Directors are not insurers.").

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

186 See William T. Allen, Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept, 55 Bus. Law. 653, 654 (2000) ("One of the holdings of the Delaware Supreme Court in Smith v. Van Gorkom was that corporate directors have no fiduciary right (as opposed to power) to breach a contract."); R. Franklin Balotti & A. Gilchrist Sparks, III, Deal-Protection Measures and the Merger Recommendation, 96 Nw. U. L. Rev. 467, 468-69 (2002) ("In Smith v. Van Gorkom, the Delaware Supreme Court established that Delaware law does not give directors, just because they are fiduciaries, the right to accept better offers, distribute information to potential new bidders, or change their recommendation with respect to a merger agreement even if circumstances have changed."); John F. Johnston, Recent Amendments to the Merger Sections of the DGCL Will Eliminate Some--But Not All--Fiduciary Out Negotiation and Drafting Issues, 1 Mergers & Acquisitions L. Rep. 20, 777, 778 (July 20, 1998) (BNA) ("[T]here is ... no public policy that permits fiduciaries to terminate an otherwise binding agreement because a better deal has come along, or circumstances have changed."); John F. Johnston & Frederick H. Alexander, Fiduciary Outs and Exclusive Merger Agreements--Delaware Law and Practice, 11 Insights: The Corp. & Sec. L. Advisor No. 2, 15, 15 (Feb. 1997) ("[T]he Delaware Supreme Court held that directors of Delaware corporations may not rely on their status as fiduciaries as a basis for (1) terminating a merger agreement due to changed circumstances, including a better offer; or (2) negotiating with other bidders in order to develop a competing offer."); A. Gilchrist Sparks, III, Merger Agreements Under Delaware Law--When Can Directors Change Their Minds?, 51 U. Miami L. Rev. 815, 817 (1997) ("[Van Gorkom] makes it clear that under Delaware law there is no implied fiduciary out or trump card permitting a board to terminate a merger agreement before it is sent to a stockholder vote.").

187 WaveDivision Holdings., LLC v. Millennium Digital Media Sys., C.A. No. 2993-VCS, 2010 WL 3706624, at *17 (Del. Ch. Sept. 17, 2010); accord Hokanson v. Petty, C.A. No. 3438-VCS, 2008 WL 5169633, at *2 (Del. Ch. Nov. 3, 2008) (enforcing an option granted to acquire company by merger; rejecting fiduciary challenge to merger on grounds that the "directors were constrained by the Buyout Opinion Altiva had granted Exatech when Altiva was in financial peril in 2003"); Corwin v. DeTrey, CIV. A. No. 6808, 1989 WL 146231, at *273 (Del. Ch. Dec. 4, 1989) ("[T]he directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed."). One decision suggests in dictum that Omnicare might have overruled Van Gorkom on this point, but does not endorse or expound on that view. See In re OPENLANE, Inc. S'holders Litig., C.A. No. 6849-VCN, 2011 WL 4599662, at *10 n.53 (Del. Ch. Sept. 30, 2011) ("Omnicare may be read to say that there must be a fiduciary out in every merger agreement."). As discussed in the text, I do not believe that Omnicare silently overruled Van Gorkom.

188 Van Gorkom, 488 A.2d at 878.

189 Id. at 879 (quoting merger agreement).

190 Id.

191 Id.

192 Id. at 878.

193 Van Gorkom, 488 A.2d at 883.

194 Id. at 884.

195 Id.

196 Id. at 887-88 (alteration in original).

197 Id. at 888.

198 Van Gorkom, 488 A.2d at 888.

199 Id. (internal quotation omitted).

200 Id.

201 Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 56 (Del. 1994) [hereinafter QVC].

202 See Johnston & Alexander, supra note 186, at 18 ("[W]hat the [QVC] court found to be a breach of fiduciary duty was the perceived inadequacy of the process followed by the board in conjunction with its entering into a merger agreement with a number of provisions intended to protect the merger from other offers."); see also John F. Johnston, A Rubeophobic Delaware Counsel Marks Up Fiduciary-Out Forms: Part I, 13 Insights: The Corp. & Sec. L. Advisor, No. 10, 2, 2 (Nov. 1999) [hereinafter Johnston, Rubeophobic Part I] ("[T]he target board's compliance with its fiduciary duties [for purposes of the right to accept a superior proposal] will be measured at the time it enters into the agreement."); John F. Johnston, A Rubeophobic Delaware Counsel Marks Up Fiduciary-Out Forms: Part II, 14 Insights: The Corp. & Sec. L. Advisor, No. 2, 16, 21 n.10 (Feb. 2000) [hereinafter Johnston, Rubeophobic Part II] ("If the board is not properly informed or is otherwise in breach of its fiduciary duties at the time it agrees to tie its hands, the provision will be invalid and unenforceable. Hence, the stockholders will be protected. See QVC."); Johnston, supra note 186, at 779 ("[I]n freedom-of-contract jurisdictions like Delaware, the target board will be held to its bargain (and the bidder will have the benefit of its bargain) only if the initial agreement to limit the target board's discretion can withstand scrutiny under applicable fiduciary duty principles").

203 See, e.g., Balotti & Sparks, supra note 186, at 471-72 ("Although the Delaware Supreme Court's fiduciary language in QVC could be read to contradict the freedom-of-contract approach taken in Van Gorkom, commentators have reasoned that because the QVC court specifically limited its holding to 'the actual facts before the court,' the holding is distinguishable from Van Gorkom."); Johnston, Rubeophobic Part II, supra note 202, at 22 (interpreting QVC as consistent with Van Gorkom); John F. Johnston and James D. Honaker, Toys "R" Us: An About-Face from the Deal Protection Jurisprudence that led to Omnicare, 19 Insights: The Corp. & Sec. L. Advisor, No. 12, 13, 17-18 (Dec. 2005) (describing conflicting language in QVC, but stating that "[d]espite the per se rules that these passages appear to announce ..., the opinion can be read as holding only that the failure to adequately shop the company prior to granting the protections at issue required their invalidation"); Johnston & Alexander, supra note 186, at 17-18 (interpreting QVC as consistent with Van Gorkom).

204 QVC, 637 A.2d at 49 (emphasis added).

205 Id. at 50 (emphasis added).

206 Id. at 49 n.20.

207 Id. at 50. See also id. at 50 n.21 (finding that the Paramount board breached its duties by not scheduling and holding an additional board meeting "shortly before the closing date [of the Viacom tender offer] in order to make a final decision, based on all of the information and circumstances then existing, whether to exempt Viacom from the Rights Agreement"); Id. at 51 ("The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process to the point where the arsenal of defensive measures established at the outset was perpetuated (not modified or eliminated) when the situation was dramatically altered." (emphasis added)).

208 Id. at 48.

209 Indeed, there is now a broad consensus that Van Gorkom was not actually a duty of care case, but rather the Delaware Supreme Court's initial, albeit unacknowledged enhanced scrutiny case. In re Dollar Thrifty S'holder Litig., 14 A.3d. 573, 602 (Del. Ch. 2010) ("Van Gorkom, after all, was really a Revlon case"); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) (Allen, C.) ("I count [Van Gorkom] not as a 'negligence' or due care case involving no loyalty issues but as an early, as of its date not yet fully rationalized 'Revlon' or 'change of control' case."); William T. Allen, et al., Realigning The Standard of Review of Director Due Care With Delaware Public Policy: A Critique of Van Gorkom And Its Progeny As a Standard of Review Problem, 96 Nw.

U. L. Rev. 449, 459 n.39 (2002) ("Van Gorkom and Cede II must also be viewed as part of the Delaware courts' effort to grapple with the huge increase in mergers and acquisition activity in 1980s and the new problems that posed for judicial review of director conduct. Indeed, if decided consistent with the 'enhanced scrutiny' analysis mandated by Revlon, with its emphasis upon immediate value maximization, rather than as a 'due care' case, Van Gorkom would not be viewed as remarkable."); William T. Allen, The Corporate Director's Fiduciary Duty of Care and the Business Judgment Rule Under U.S. Corporate Law, in Comparative Corporate Governance: State of the Art and Emerging Research 307, 325 (Klaus J. Hopt et al. eds., 1998) ("In retrospect, [[Van Gorkom] can be best rationalized not as a standard duty of care case, but as the first case in which the Delaware Supreme Court began to work out its new takeover jurisprudence."); Black & Kraakman, supra note 125, at 522 ("Van Gorkom should be seen not as a business judgment rule case but as a takeover case that was the harbinger of the then newly emerging Delaware jurisprudence on friendly and hostile takeovers, which included the almost contemporaneous Unocal and Revlon decisions.") Jonathan R. Macey & Geoffrey P. Miller, Trans Union Reconsidered, 98 Yale L.J. 127, 128 (1988) ("Trans Union is not, at bottom, a business judgment case. It is a takeover case."); see also Stephen M. Bainbridge, Why a Board? Group Decisionmaking In Corporate Governance, 55 Vand. L. Rev. 1, 51-52 (2002) (interpreting "the oft-maligned decision in Smith v. Van Gorkom" as addressing a breakdown in the group decision making process in which the board "blindly relied on Van Gorkom," thereby enabling Van Gorkom not to disclose and the board not to discover "key facts suggesting that the deal was not as attractive as it seemed on first look").

210 Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 n.2 (Del. 1989); accord Cede & Co. v. Cinerama, 634 A.2d 345, 367 (Del. 1993) (applying enhanced scrutiny under Revlon, decided in 1986, to a merger that closed in 1982).

211 Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 51 (Del. 1994).

212 See supra note 184 and accompanying text.

213 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 934 (Del. 2003).

214 Id. at 936.

215 Id.

216 Id. at 938. Consistent with the view that the breach occurred at the time of approval, the majority opinion "assumed arguendo that the NCS board exercised due care" when it entered into the original merger agreement with Genesis, but did not make a similar assumption regarding the duty of loyalty. Id. at 929. It would make sense for the majority to have perceived the board's time-of-contracting breach of duty as falling under the heading of loyalty. The majority found that the board impermissibly approved a merger agreement that was both coercive and preclusive. A board owes fiduciary duties to the corporation and its stockholders, and the acts of coercion and preclusion violate the norm of loyalty by interfering with voting rights allocated by statute to the stockholders.

217 The dissenters vigorously criticized the Omnicare majority for second-guessing the NCS board's decision to discount the competing Omnicare bid as overly conditional. See Omnicare, 818 A.2d at 945 (Veasey, C.J., dissenting); id. at 948 (Steele, J., dissenting). The majority's doubts about the reasonableness of the NCS board's judgments hearken back to sections of QVC, where the Delaware Supreme Court (i) disagreed with the Paramount board's assessment of the conditionality of the QVC proposal and (ii) found that the Paramount board failed to negotiate sufficiently with Viacom to obtain changes in the defensive measures in the already-executed Paramount-Viacom agreement. See Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 40 (Del. 1994) (noting that after QVC made its post-signing unsolicited proposal, "the opportunity for a 'new deal' with Viacom was at hand"); id. at 41 ("The purported basis for [continuing with Viacom] was that QVC's bid was excessively conditional."); id. at 50 (finding that after QVC emerged, "the Paramount board made no effort to eliminate or modify these counterproductive [[deal-protection] devices, and instead continued to cling to its vision of a strategic alliance with Viacom"); id. (finding that when the Paramount board met to consider QVC's increased bid, the directors "remained prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves"); id. (holding that on November 15, "the Paramount directors remained paralyzed by their uninformed belief that the QVC offer was 'illusory"' and that "[t]his final opportunity to negotiate on the stockholders' behalf and to fulfill their obligation to seek the best value reasonably available was therefore squandered"); QVC, 637 A.2d at 51 ("The directors' initial hope and expectation for a strategic alliance with Viacom was allowed to dominate their decisionmaking process").

218 Omnicare, 818 A.2d at 933.

219 Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989).

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

221 Omnicare, 818 A.2d at 933.

222 Macmillan, 500 A.2d at 1288.

223 Omnicare, 818 A.2d at 938 n.84.

224 Moran, 500 A.2d at 1385.

225 See, e.g., In re Topps Co. S'holders Litig., 926 A.2d 58, 92 (Del. Ch. 2007) (requiring that target board waive standstill agreement).

226 Omnicare, 818 A.2d at 938.

227 See, e.g., Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998) ("[T]he fiduciary duty of a Delaware director is unremitting."); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1292 (Del. 1998) ("In discharging the statutory mandate of Section 141(a), the directors have a fiduciary duty to the corporation and its shareholders. This unremitting obligation extends equally to board conduct in a contest for corporate control."); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("The fiduciary nature of a corporate office is immutable.").

228 Smith v. Van Gorkom, 488 A.2d 858, 888 (Del. 1985) ("[U]nder the terms of the October 10 amendment, the Board's only ground for release from its agreement with Pritzker was its entry into a more favorable definitive agreement to sell the Company to a third party.... [S]hort of negotiating a better agreement with a third party, the Board's only basis for release from the Pritzker Agreement without liability would have been to establish fundamental wrongdoing by Pritzker. Clearly, the Board was not 'free' to withdraw from its agreement with Pritzker on January 26 by simply relying on its self-induced failure to have reached an informed business judgment at the time of its original agreement.").

229 Omnicare, 818 A.2d at 943 (Veasey, C.J., dissenting).

230 Id.

231 Id. at 937.

232 See, e.g., Griffith, supra note 2, at 622 ("The Omnicare majority has thus deprived target boards both of a negotiating strategy (precommitment) and an exchangeable commodity (certainty).").

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

234 Id. at 950 (Steele, J., dissenting).

235 Griffith, supra note 2, at 596 ("A board that cannot pursue a precommitment strategy can no longer control the merger process."); Neimeth & Reese, supra note 181 ("[I]t would be most unfortunate if overreaction to the Omnicare decision increases buyer recalcitrance and precludes a motivated buyer from putting its very best deal and price on the table in exchange for closing certainty").

236 Del. Code Ann. tit. 8, § 251 (2013).

237 Quinn, supra note 4, at 878.

238 Id.

239 Id.

240 Id. at 879.

241 Id. at 879-80.

242 Quinn, supra note 4, at 880.

243 Id.

244 See Guhan Subramanian, Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications, 63 Bus. Law. 729, 753 (2008) (arguing that pure go-shop transactions result in higher sales prices than single-bidder negotiations).

245 Id. at 756.

246 Id. at 755-56.

247 See Matthew D. Cain & Steven M. Davidoff, Form over Substance? The Value of Corporate Process and Management Buy-Outs, 36 Del. J. Corp. L. 849, 894-95 (2011) (finding that merger contracts that allow for post-signing competition are associated with statistically significant increases in deal value).

248 David A. Lax & James K. Sebenius, 3D Negotiation: Powerful Tools to Change the Game in Your Most Important Deals 91 (2006).

249 Quinn, supra note 4, at 880. (discussing tactics that sellers may deploy to raise deal prices).

250 See, e.g., Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 843 (Del. 1987) (noting that if the "proposed merger was not consummated, [the acquirer] had no present intention of proposing a merger or other amalgamation of [the target] on terms or conditions substantially different from those ... proposed."); In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 607-08 (Del. Ch. 2005) (stating that the controller "previewed its intention [at a board meeting] to offer to pay $32 per share as an initial bid in a merger transaction ... [The controller] made clear that it expected that [the board] would form a special committee ... to respond to and negotiate its [p] roposal.").

251 Berkshire Hathaway Annual Report 24 (2008).

252 Strine, supra note 92, at 939.

253 Bainbridge, Story of Van Gorkom, supra note 125, at 224.

254 Griffith, supra note 2, at 597; see also Stephen Bainbridge, Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills, 29 J. Corp. L. 1, 7 (2003) ("To the extent precommitment strategies lend credibility to threats and promises, agency costs thus are reduced.").

255 Griffith, supra note 2, at 596-97.

256 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003) (Veasey, C.J., dissenting).

257 Id. at 923.

258 Id.

259 See, e.g., Gerasimchuk, supra note 2, at 725 (describing Wells Fargo's acquisition of Wachovia, in which Wachovia issued Wells Fargo new shares carrying 39.9% of Wachovia's total voting power); Kahan & Rock, supra note 2, 71920 (describing acquisition of Bear Stearns by J.P. Morgan in which Bear Stearns granted JP Morgan the right to acquire 95 million newly issued shares, representing 39.5% of the then-outstanding stock, which combined with open market purchases gave JP Morgan 49.73% of the outstanding shares at the time of the merger vote). The U.S. Treasury brokered both deals as part of the response to the 2008 financial crisis. Perhaps because of Omnicare, both deals stopped short of conveying shares carrying a mathematical majority of the target's outstanding voting power. In other situations involving the financial crisis, the U.S. Treasury acquired an equity stake giving it hard (mathematical) control. See Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1299-1301 (2011).

38 JCORPL 795

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