AN ERAS TOUR OF DELAWARE CORPORATE LAW

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INTRODUCTION

Founded over 50 years ago in 1974, the *Journal of Corporation Law* timed its arrival to witness the modern arc of Delaware's corporate jurisprudence. Since Delaware became a state in 1776, there have been nine eras of Delaware corporate law: the Antecedent Era, the Charter-Mongering Era, the Quiet Era, the Responding Era, the Reformation Era, the Moderating Era, the Generative Era, the Implementing Era, and the Current Era. The *Journal* arrived towards the end the Responding Era, and it has helped document developments in Delaware law ever since.

Each era presented the Delaware courts with different challenges. Not surprisingly, those different challenges produced different responses. By examining the changes, an eras tour demonstrates that Delaware has offered a principles-based system in which judges shaped corporate law by ruling on the facts of a particular case within the context of a prevailing legal environment. As Chief Justice Leo E. Strine, Jr. observed over two decades ago, Delaware's corporation law has been "highly dynamic, quick to innovate on the basis of a constituency consensus, but modest and incremental when the 'right' answer is in doubt."[1] Delaware law has been nimble, deploying principles of equity and case-specific rulings to avoid doctrinal lock-in and ossification.

1. Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1257, 1279 (2001).

This Article addresses each era, giving primacy to the five decades of the *Journal*'s existence. Over this period, the Delaware courts have confronted too many issues to cover.[2] This Article focuses on three high-profile areas: controller transactions, third-party mergers and acquisitions (M&A), and derivative actions. For each era, the Article considers the rules the courts established, the results they reached, and the rhetoric they deployed. The Article does not attempt a normative evaluation of each era's innovations. The goal is not to characterize particular innovations as good or bad but only to show how the Delaware courts have responded dynamically to the challenges of different eras.

The Article reaches an unsurprising conclusion: The defining hallmark of Delaware corporate law has been its adherence to the rule of law, embodied by its independent judiciary reaching case-specific decisions as challenges emerge and conditions change. The judge-led dynamism of Delaware corporate law has been the key to its success.

I. THE ANTECEDENT ERA: 1776 TO 1899

An antecedent goes before something else, and that is what the Antecedent Era did. For the first 120 years of Delaware's existence, corporations were no more significant to Delaware than to any other state. If anything, less so, because Delaware's limited industrial base offered few reasons for their formation.

The Antecedent Era ran from 1776, when Delaware first declared itself a state, to 1899, when Delaware enacted the first instantiation of the Delaware General Corporation Law (DGCL). Given this Article's emphasis on the five decades of the *Journal*'s existence, it leaves a detailed review of this era to others.[3]

II. THE CHARTER-MONGERING ERA: 1899 TO 1913

Delaware next entered the Charter-Mongering Era, a period when Delaware actively competed to attract out-of-state incorporations. This fascinating period laid the foundation for modern corporate law.[4]

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2. Commenting on his similar attempt at a five-decade survey, former Justice and Vice Chancellor Jack B. Jacobs sounded a cautionary note, "Five decades is a lot to synthesize and compress into that short a space. But, I will do my best . . . ." Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 141 (2015). That same warning applies to this article.

3. *See, e.g.*, Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 249–51, 254–70 (1976); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 1–6 (1976); *see also* Victoria Barnes, *What Were Shareholder Rights in the Wake of the American Revolution?*, 19 FLA. ST. U. BUS. REV. 131 (2020); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 877–82 (2016); Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033 (2015).

4. Many outstanding articles address this period. One indispensable resource is Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323 (2007). Other important works include Camden Hutchison, *Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement*, 2017 COLUM. BUS. L. REV. 1017, 1026–32; Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 52 BERKELEY BUS. L.J.

The Charter-Mongering Era began in 1899 with the enactment of the first version of the DGCL.[5] At the time, New Jersey dominated the market for corporate charters.[6] Several factors contributed to New Jersey's success. The state offered a flexible and enabling corporation law that allowed corporations to be formed for any purpose and authorized holding companies.[7] The state had an expert Court of Chancery staffed with judges appointed by the governor, confirmed by the senate, and selected by custom on a bipartisan basis.[8] And New Jersey deliberately marketed itself as an attractive state for incorporation.[9]

Because of the success of its corporate model, franchise taxes funded a significant portion of New Jersey's state budget, enabling New Jersey to pay off its outstanding bonds and, in 1902, eliminate its property tax.[10] Many states, including Delaware, wanted a share of that revenue.[11] Delaware's strategy involved copying New Jersey's statute while undercutting New Jersey on price.[12] Delaware also sought to capture the benefits of New Jersey's decisional law by declaring that its courts would follow New Jersey precedents.[13]

Delaware succeeded in attracting new incorporations, but New Jersey remained dominant. Then came Woodrow Wilson's gift. Elected governor of New Jersey at the height of America's progressive era, Wilson maintained that New Jersey's liberalization of corporate law had facilitated the creation of monopolies—contrary to federal antitrust policy—and he convinced the New Jersey legislature to enact new laws limiting big business.[14] Nicknamed "The Seven Sisters Acts," the new provisions outlawed holding company structures and granted the executive significant enforcement authority.[15] Between 1912 and 1914 (the years bracketing the enactment of the new acts), the number of annual New Jersey incorporations fell by a third.[16] In 1914, the total number of New Jersey corporations declined.[17] By 1917, the New Jersey legislature and Wilson's successor had repealed the Seven Sisters

263, 278–82 (2008); and Christopher Grandy, *New Jersey Corporate Chartermongering*, *1875–1929*, 49 J. ECON. HIST. 677, 677–78 (1989).

5. Arsht, *supra* note 3, at 6; Yablon, *supra* note 4, at 359.

6. Yablon, *supra* note 4, at 326–28.

7. *Id.*

8. Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Nonpartisan?*, 2023 WIS. L. REV. 177, 205.

9. *Id.*

10. Grandy, *supra* note 4, at 681–83.

11. Other competitors included Maine, Maryland, New York, South Dakota, Washington D.C., and West Virginia. *See* Eldar & Rauterberg, *supra* note 8, at 207–08; Yablon, *supra* note 4, at 361–67.

12. *See* Yablon, *supra* note 4, at 360.

13. Wilmington City Ry. Co. v. People's Ry. Co., 38 Del. Ch. 1, *23 (1900) (stating that "[o]ur general incorporation law as a whole and the general policy of our legislation favor, rather than rebut, the presumption that the legislature, in adopting the language of the New Jersey statute, had in mind the construction given to it by the New Jersey courts, and intended to incorporate it into the statute . . . ."); *see also* Martin v. Am. Potash & Chem. Corp., 92 A.2d 295, 300 (Del. 1952) ("Our courts have long recognized that our *General Corporation Law* of 1899 was modeled after the then existing New Jersey act . . . and decisions of the courts of that state are persuasive in construing a section of our statute drawn from the New Jersey law.") (citation omitted).

14. William E. Kirk, III, *A Case Study in Legislative Opportunism: How Delaware Used the Federal-State System to Attain Corporate Pre-Eminence*, 10 J. CORP. L. 233, 256 (1984).

15. *Id.*

16. *Id.* at 257.

17. *Id.* at 257 n.192 (quoting N.Y. TIMES, Jan. 17, 1915, § III, at 2, col. 3).

Acts, but the damage had been done, and the state never recaptured its dominance.[18] Big business had come to New Jersey for its apolitical approach. Now, they had seen the role that politics could play.

New Jersey's loss was Delaware's gain. After the passage of the Seven Sisters Acts, Delaware incorporations surged. By 1922, 55% of New York Stock Exchange listed companies incorporated in Delaware, a percentage that has remained stable ever since.[19]

Wilson's gift brought the Charter-Mongering Era to an end, but why did Delaware win? Delaware did not have a large population or a substantial industrial base. It did not yet have a sophisticated judiciary or a well-developed body of corporate law.[20] Delaware's geography gave it a comparative advantage over some competitors but not over other mid-Atlantic states. One theory posits two answers: First, Delaware constitutionalized New Jersey's bipartisan system for picking judges to hear business disputes.[21] Second, Delaware adopted and maintained a balanced, principles-based approach that respected the interests of both managers and investors.[22]

III. THE QUIET ERA: 1913 TO 1963

The Quiet Era came next, marked by steady growth and little fanfare. Much of the work of corporate governance happened on the national level, including the enactment of the federal securities laws.[23] During this period, Chancellors like Charles Curtis (1909–21), Josiah Wolcott (1921–38); William Harrington (1938–50); and Collins J. Seitz (Vice Chancellor 1946–50; Chancellor 1950–66) put the Delaware Court of Chancery on the

18. Seligman, *supra* note 3, at 270. For a different assessment of the role of the Seven Sisters Acts, see Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AM. L. & ECON. REV. 396 (2022) (arguing that New Jersey's market share for incorporates peaked in 1903, that the Seven Sisters Acts had little effect on the competition for charters, and that New Jersey lost its leadership position because other states could easily copy its innovations).

19. DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 18 n.50 (Cambridge Univ. Press, 2018). Delaware's victory resulted from the accretion of new incorporation over time, rather than a spate of existing New Jersey corporations reincorporating in Delaware. *See* Yablon, *supra* note 4, at 325 n.10. Although DuPont and General Motors became Delaware corporates in 2016, they were the exception rather the rule. *Id.* Many large corporations did not change their state of incorporation. *Id.*

20. *See* David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 480 (2012) (stating that "[w]hat is truly remarkable about Delaware is that it became the leading corporate law state with very little common law. Indeed, if one was to take 1920 as a cut-off point, it would be very difficult to say anything at all about the effects of charter competition on corporate law by reference to Delaware law, as there was close to nothing in several key areas of corporate law that one could say was Delaware law—the statute was largely borrowed directly from New Jersey and there were hardly any important Delaware cases."); Maurice A. Hartnett, III, *The Delaware Judiciary in the 20th Century*, 17 DEL. LAW. 10, 11 (Winter 1999/2000) (noting that after the enactment of the Delaware General Corporation Law, "[t]he judges in Delaware had little or no experience in corporate law and there were few precedents to guide them.").

21. Eldar & Rauterberg, *supra* note 8, at 208.

22. *Id.* at 213–23.

23. *See generally* Harwell Wells, *The Birth of Corporate Governance*, 33 SEATTLE U. L. REV. 1247 (2010); Harwell Wells, *The Modernization of Corporation Law, 1920–1940*, 11 U. PA. J. BUS. L. 573 (2009) [hereinafter Wells, *Modernization*].

map.[24] Their decisions did not treat Delaware corporate law as unique or distinctive. They often cited cases from other states and England, and they relied on non-Delaware treatises on corporate law.[25] During this era, Delaware also made few changes to its corporate statute.[26]

For most of the Quiet Era, the Chancellor was the highest-ranking judicial officer in Delaware, and the trial courts operated without a permanent Delaware Supreme Court. Delaware instead followed the "leftover judges" system under which a panel drawn from those trial court judges who did not hear the case constituted the Delaware Supreme Court for purposes of appeal.[27] That collegial system of trial court judges reviewing each other's work may have contributed to a relatively low rate of reversal: Delaware folklore claims that Chancellor Wolcott was only reversed once in 17 years.[28]

The appellate regime changed in 1951 when a constitutional amendment established a permanent Delaware Supreme Court with three justices.[29] The new Delaware Supreme Court wasted no time flexing its muscles, and by the end of 1952, the justices had reversed at least a dozen Chancery decisions.[30] Going forward, the Delaware Supreme Court would provide the final word on Delaware law.

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24. *See* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery—1792–1992*, 18 DEL. J. CORP. L. 819, 840–42, 844 (1993). Chancellor Allen described Seitz as "the greatest citizen of his age." William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 73 (2000). He described Wolcott as "unquestionably the person who more than any other created the national prominence of the Delaware corporation law." *Id.*

25. *E.g.*, N. Assur. Co. v. Rachlin Clothes Shop, 32 Del. 406, 420 (Del. 1924) (citing the Machen and Cook treatises); Henderson v. Plymouth Oil Co., 15 Del. Ch. 40, 67 (1925) (surveying the law of other states and of England; citing English treatises; citing the Cook treatise); *See generally* KERSHAW, *supra* note 19, at 132 (arguing that after becoming a leading jurisdiction, Delaware law became self-referential "to demonstrate that its laws are the product of its own judicial and legislative decisions" and to avoid "situating Delaware law within legal traditions created long before Delaware had any case law."); *id.* at 198–228 (reiterating argument using development of duty of care).

26. Brian R. Cheffins, Steven A. Bank & Harwell Wells, *Shareholder Protection Across Time*, 68 FLA. L. REV. 691, 757 (2016) (explaining that Delaware made few amendments to its corporate statute until the late 1920s, when legislators made major changes to provisions governing corporation finance); *id.* at 758 ("Between 1929 and 1967, Delaware periodically tweaked its corporate law statute but did not disturb the basic structure of the legislation until concerns arose in the mid-1960s that its dominant position might be under threat from other states seeking to compete for incorporations by changing their laws to 'out-Delaware' Delaware.") (citation and internal quotation marks omitted).

27. E. Norman Veasey, *The Drama of Judicial Branch Change in This Century*, 17 DEL. LAW. 4, 5 (Winter 1999/2000).

28. Quillen & Hanrahan, *supra* note 24, at 842 (citing DANIEL O. HASTINGS, DELAWARE POLITICS 1904–1954, at 40 (1961)). That is an exaggeration, but not by much. *See id.* at 842 n.68.

29. Act of May 14, 1951, 47 Del. Laws ch. 109, § 1 (1951).

30. Gottlieb v. Heyden Chem. Corp., 92 A.2d 594 (Del. 1952); Richard Paul, Inc. v. Union Imp. Co., 91 A.2d 49 (Del. 1952); Kerbs v. Cal. E. Airways, 90 A.2d 652 (Del. 1952); Gottlieb v. Heyden Chem. Corp., 90 A.2d 660 (Del. 1952); Hob Tea Room, Inc. v. Miller, 89 A.2d 851 (Del. 1952); John Roane, Inc. v. Tweed, 89 A.2d 548 (Del. 1952); Stabler v. Ramsay, 88 A.2d 546 (Del. 1952); Great Am. Indem. Co. v. State, 88 A.2d 426 (Del. 1952); E.I. du Pont De Nemours & Co. v. Clark, 88 A.2d 436 (Del. 1952); S. Prod. Co. v. Sabath, 87 A.2d 128 (1952); Zeeb v. Atlas Powder Co., 87 A.2d 123 (Del. 1952); Pierce v. Wahl, 86 A.2d 757 (Del. 1952).

IV. THE RESPONDING ERA: 1963 TO 1977

The Quiet Era drew to a close in 1963, when the General Assembly formed the Delaware Corporation Law Revision Committee to review and overhaul the DGCL.[31] That event marked the start of the Responding Era, a period when Delaware responded to renewed competition from other states and credible threats of federal preemption.

Particularly after World War II, a number of states sought to update their corporate codes and challenge Delaware's dominance.[32] In 1950, a group of Illinois practitioners published the first Model Business Corporation Act and began marketing it to states around the country.[33] By 1963, the rate of Delaware incorporations had dropped by 19%.[34] For the first time in a long time, Delaware was experiencing competition.[35]

The principal challenge was statutory, as was Delaware's principal response. The Revision Committee set out to update Delaware's statute.[36] They first consulted with corporate law scholar Ernest Folk, who provided a detailed set of recommendations.[37] After the Revision Committee reviewed those recommendations, sometimes agreeing and sometimes not, they delegated the task of revising the law to a three-member drafting subcommittee whose members were the leading corporate practitioners from three of Delaware's major law firms; S. Samuel Arsht from Morris Nichols Arsht & Tunnell, Henry M. Canby from Richards Layton & Finger, and Richard F. Corroon from Potter Anderson &

31. Act of Dec. 31, 1963, 54 Del. Laws ch. 218, § 1 (1963) ("WHEREAS, many states have enacted new corporation laws in recent years in an effort to compete with Delaware for corporation business."); *see* DEL. CORP. L. REVISION COMM., MINUTES OF THE DELAWARE CORPORATION LAW REVISION COMMITTEE, 1ST MEETING 1 (Jan. 21, 1964) ("The Committee discussed the advisability of making a comprehensive study of the Delaware Corporation Law with the possibility of revising the law so as to make it comparable with recently enacted legislation in other states.").

32. Demetrios G. Kaouris, *Is Delaware Still A Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 970 (1995) ("Following the stock market crash of 1929 and the subsequent Congressional enactment of the federal securities laws, fewer corporations found it advantageous to incorporate in Delaware. After World War II, a number of states revised their corporation statute to compete with Delaware.") (citations omitted); Seligman, *supra* note 3, at 279 (noting that "[a]fter World War II, the corporate laws of over 30 states had been revised to make them more 'competitive' with the Delaware General Corporation Law. In the summer of 1963, Delaware's Secretary of State Elisha Dukes received the disturbing news that both New Jersey and Maryland intended to further amend their laws to 'out-Delaware' Delaware.") (citations omitted). *See generally* Kenneth K. Luce, *Trends in Modern Corporation Legislation*, 50 MICH. L. REV. 1291, 1299 (1952) ("In the past twenty-five years new corporation codes have been enacted in Idaho, Ohio, Indiana, Illinois, California, Louisiana, Michigan, Minnesota, Washington and Pennsylvania.") (citation omitted); Wells, *Modernization*, *supra* note 23, at 589 ("Beginning in the mid-1920s, a series of states, including those that dominated the nation's industrial heartland, either substantially revised or completely replaced their existing corporation laws.").

33. *See* Cheffins, Bank & Wells, *supra* note 26, at 705; Jeffrey M. Gorris, Lawrence A. Hamermesh & Leo E. Strine, Jr., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 L. & CONTEMP. PROBS. 107, 109 (2011).

34. Seligman, *supra* note 3, at 279–80; *see* Kaouris, *supra* note 32, at 970 ("By 1963, Delaware corporate filings had dropped significantly and the state faced serious challenges to its preeminence from New Jersey and Maryland, states that planned to 'out Delaware' Delaware.").

35. *See* Roundtable Discussion, *Commentary from the Delaware Corporation Law Revision Committee*, 33 DEL. J. CORP. L. 619 (2008).

36. *See* Seligman, *supra* note 3, at 280–81; Arsht, *supra* note 3, at 14.

37. *See* Seligman, *supra* note 3, at 281; Arsht, *supra* note 3, at 15.

Corroon.[38] The full Revision Committee adopted the subcommittee's final product without comment, and the Delaware General Assembly approved it unanimously on July 3, 1967.[39]

For Delaware, the revision had the desired effect. Before the revision, Delaware chartered an average of 300 corporations per month.[40] By 1969, that figure tripled to 800 a month.[41] By late 1974, Delaware had reestablished its dominance as the home of approximately half of the nation's largest corporations.[42]

Meanwhile, in the courts, the Delaware Supreme Court reversed a series of Court of Chancery decisions that had ruled against directors.[43] In *Cheff v. Mathes*, the justices reversed a post-trial decision by the Court of Chancery in one of the first takeover cases.[44] An insider-dominated board feared that a large blockholder would launch a proxy contest, so they repurchased the shares at a premium.[45] The Court of Chancery held that the defendants failed to prove that their use of corporate funds was "primarily in the corporate interest"[46] as opposed to an effort to "preserve corporate control in the hands of the incumbents."[47] On appeal, the justices questioned several of the Court of Chancery's factual findings and held that the trial record could only support a finding that the directors "believed, with justification, that there was a reasonable threat to the continued existence of [the corporation]."[48]

The justices also reversed a post-trial decision in *Sinclair Oil Corp. v. Levien.*[49] The trial court found that a controlling stockholder (Sinclair) breached its fiduciary duties by

38. *See* Seligman, *supra* note 3, at 281–82; Arsht, *supra* note 3, at 16. For assistance, the drafting subcommittee tapped a group of young lawyers who each would become a leading figure in his own right: Walter K. Stapleton and David A. Drexler of Morris Nichols, E. Norman Veasey and Charles F. Richards, Jr., of Richards Layton, and Charles S. Crompton, Jr., and Robert K. Payson of Potter Anderson. *See* Roundtable Discussion, *Dogsbodies of the DGCL: Revisiting Roles in the Landmark Achievement*, 2 DEL. LAW. 10 (Spring 2008) (discussion with the Hon. Walter K. Stapleton, Charles S. Crompton, Jr., and Charles F. Richards, Jr.); Allen, *supra* note 24, at 74 (discussing figures who helped shape Delaware's legal landscape).

39. Seligman, *supra* note 3, at 282.

40. *Id.* at 282 (quoting N.Y. TIMES, Jan. 12, 1969, § 1, at 57, col. 1).

41. *Id.*

42. *See id.* at 283.

43. *Cf.* Jacobs, *supra* note 2, at 143 (discussing Delaware case law in the 1960s and 1970s; noting that plaintiffs generally filed cases in federal court and asserted claims under the federal securities laws; "The plaintiffs' bar chose the federal forum because they were more likely to win there. At that time, state courts, including Delaware, were not shareholder-friendly. The mindset of state courts was that if the challenged transaction was not prohibited by the corporate statute or the corporation's certificate or bylaws, and was not fraudulent, it was valid—even if the transaction price was arguably not fair to shareholders."); Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, 8 DEL. L. REV. 1, 3 (2005) (stating that "The plaintiffs' bar had understandable reasons to choose the federal forum. Until the 1970s, the approach of many state courts, including those of Delaware, was that so long as the challenged transaction was not prohibited by the corporate statute or the corporation's certificate or by-laws *and* was not fraudulent, it was valid, even if the outcome seemed not entirely fair to shareholders.").

44. Cheff v. Mathes, 199 A.2d 548 (Del. 1964).

45. *Id.* at 551.

46. *Id.* at 554.

47. Mathes v. Cheff, 41 Del. Ch. 166, 175 (1963).

48. *Cheff*, 199 A.2d at 556.

49. Levien v. Sinclair Oil Corp., 261 A.2d 911 (Del. Ch. 1969).

causing its majority-owned subsidiary (Venezuelan) to pay dividends until the subsidiary became insolvent.[50] The trial court found that the forced dividends inflicted a corporate-level injury on Venezuelan and that Sinclair caused Venezuelan to pay the dividends solely because of its own need for cash.[51] The Delaware Supreme Court reversed, holding that the entire fairness standard only applies in cases of self-dealing, defined as "when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary."[52] The plaintiff had sued derivatively for injury to the subsidiary as a corporation, but the justices looked through the subsidiary to the stockholders, observed that the minority stockholders received their proportionate share of the dividends, and held that the business judgment rule applied.[53]

Not everyone welcomed Delaware's legislative and judicial response to the renewed threat of competition from other jurisdictions. Delaware's staunchest critic was William Cary, who served as Chairman of the Securities and Exchange Commission (SEC) from 1961 to 1964.[54] In 1969, he published *Law for Sale*, an article that criticized the 1967 revision, charged that "Delaware is in the business of selling its corporation law," and asserted that "those who will buy the product are not only consulted about their preferences, but are also allowed to design the product and run the factory."[55] In 1974, Cary authored a follow-up article that memorably described Delaware as having won a "race [to] the bottom,"[56] with the result that "a pygmy among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue."[57] Cary asserted that the deterioration was occurring on "both the legislative and judicial fronts,"[58] and he posited that "the courts and the legislature [of Delaware] may be said to lack the neutrality and detachment" to rule on stockholder complaints.[59] Cary criticized both *Cheff* and *Sinclair* as examples of questionable decisions, as did other scholars.[60]

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50. *Id.* at 919.

51. *Id.* at 920.

52. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

53. *Id.* at 721–22.

54. *See* David Margolick, *William Carey, Former S.E.C. Chairman, Dies at 72*, N.Y. TIMES, Feb. 9, 1983, at B12.

55. William L. Cary, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861, 861–62 (1969).

56. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974).

57. *Id.* at 701.

58. *Id.* at 663.

59. *Id.* at 697–98.

60. *Id.* at 673 (describing *Cheff* as an example of "a clearer penchant in favor of management" than in other jurisdictions); *id.* at 679–81 (arguing that based on *Sinclair*, the Delaware Supreme Court "seems ready to develop a new theory by which it can ignore a basic conflict of interest—quite in contrast with the attitude of the federal courts."); Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 315 n.41 (1974) (citing *Sinclair*, *Singer*, and other Delaware cases and noting that "[t]o regard similarity of formal treatment as inhibiting the inquiry into whether there is substantive inequality of treatment

Consumer activist Ralph Nader was another prominent critic. He claimed that a state of mind called "Delaware syndrome" was failing to restrain corporate abuse.[61] Both Cary and Nader called for federalizing corporation law, either entirely or through the imposition of minimum standards.[62]

The forces arrayed against Delaware were serious, and leaders of the Delaware bar defended their state. Samuel Arsht, one of the principal authors of the 1967 revision, stridently disputed Cary's account and portrayed Delaware law as offering meaningful protections for stockholders.[63] Later, law and economics scholars would argue that due to market forces, Delaware and other states were racing "to the top" in an effort to supply the most efficient corporate law.[64] But during the 1970s, their voices had not yet been heard.

The *Journal*'s founding in 1974 thus took place towards the end of the Responding Era, when Delaware's response to renewed competition from other states led to a more significant threat from the federal government. The future of corporate governance seemed to lie with the federal securities laws, not Delaware corporate law. Consistent with that trend, the *Journal*'s second issue included an article analyzing challenges to squeeze-outs under the federal securities laws.[65] The article opened with a quotation from SEC Commissioner A.A. Sommer, Jr., who stated: "I believe that federal courts will increasingly be

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has even less basis in fiduciary theory than does the denial of a sharing obligation in mergers."); Carlos L. Israels, *Are Corporate Powers Still Held in Trust?*, 64 COLUM. L. REV. 1446, 1455–56 (1964) (describing *Cheff* as paying "lip service" to fiduciary duties and instead reflecting "the antithesis of any 'equitable limitation' on the exercise of corporate powers . . . ."); *see also* Edward F. Greene, *Corporate Freeze-out Mergers: A Proposed Analysis*, 28 STAN. L. REV. 487, 488 n.4, 489 n.7 (1976) (arguing for greater protections in squeeze-out mergers, citing *Sinclair* as an example of problematic conflicts, and citing Delaware as "the foremost example of this trend" towards facilitating freeze-outs); Edward D. Kleinbard, Note, *Going Private*, 84 YALE L.J. 903, 924 n.108 (1975) (criticizing controller freeze-out transactions; examining Delaware law "[b]ecause it is a rare occasion on which the conscience of a Delaware Chancellor plumbs deeper than that of fellow jurists in the remaining states, the objections to going private presented herein should be construed as the minimum of which equity is capable."). *See generally* ERNEST J. FOLK, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS 334–35 (1972) (predicting that the entire fairness standard "will receive only lip service").

61. RALPH NADER, MARK GREEN & JOEL SELIGMAN, TAMING THE GIANT CORPORATION 252 (1976).

62. *See generally id.*; William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. LAW. 1101, 1101 (1974) (describing the need for a revision to modern corporate law which Carey argues has deteriorated largely due to Delaware's leadership).

63. *See* S. Samuel Arsht, *Reply to Professor Cary*, 31 BUS. LAW. 1113, 1113 (1976) ("I submit that Professor Cary's analysis of the Delaware experience is biased, unscholarly and wholly unfair.").

64. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 19–24 (1993) (arguing that Delaware law has not negatively impacted shareholders per the empirical data available); Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 265–73 (1985) (discussing migration to Delaware as a benefit to shareholders according to an author-conduct study); Ralph Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127, 128 (1982) ("Indeed, there are now empirical studies showing that shares in Delaware corporations are, if anything, more profitable than shares in other corporations."); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913, 914 (1982) (noting that there is "not one shred of empirical evidence" that has been offered to support the critical view of Delaware law espoused by Cary).

65. Charles L. Moore, *Going Private: Techniques and Problems of Eliminating the Private Shareholder*, 1 J. CORP. L. 321, 323 (1976). In a short section on state law, the article examined the Model Business Corporation Act, Texas law, New York law, and Delaware law. *See id.* at 336–39, 357.

inclined to find in Rule 10b-5 the basis for concluding that the conduct which is at the heart of 'going private' violates federal securities laws."[66]

But that was not to be. In 1977, the United States Supreme Court's decision in *Santa Fe Industries, Inc. v. Green* shut down the federal securities law avenue.[67] In that case, a stockholder attacked a Delaware short-form merger as a manipulative device under Rule 10b-5.[68] The justices soundly rejected that theory, and they expressly declined "to federalize the substantial portion of the law of corporations . . . particularly where established state policies of corporate regulation would be overridden."[69] That ruling meant that substantive challenges to transactions would take place under state law rather than under federal law, and largely in the Delaware courts.

For Delaware, the implications could not have been more significant. The *Santa Fe* decision prompted "a complete reallocation of corporate litigation from the federal to the state courts—particularly to the courts of Delaware, where most of the nation's public companies were incorporated."[70]

But the *Santa Fe* decision also contained a warning. Citing Cary's article about the "race to the bottom," the justices cautioned that "[t]here may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of [Section] 10(b) and Rule 10b-5 to 'cover the corporate universe.'"[71] In a footnote, the justices reiterated that federal intervention might be warranted and observed that "some States apparently require a 'valid corporate purpose' for the elimination of the minority interest through a short-form merger, whereas other States do not."[72] Although framed in the plural, Delaware seemed to be one of the states that the justices had in mind.

The *Santa Fe* decision threw down the gauntlet. Both the federal judicial branch (through the Supreme Court) and the federal executive branch (through Cary and the SEC) had threatened preemption. If the legislative branch joined them, a federal corporate law might follow.

V. THE REFORMATION ERA: 1977 TO 1989

Delaware answered the threat of federal preemption with the Reformation Era. During this period, the Delaware Supreme Court remade Delaware corporate law in two principal phases: an Early Reformation lasting from 1977 to 1982, and a High Reformation lasting

66. *Id.* at 321; *see* Jacobs, *supra* note 2, at 143 (noting that the trend of challenging transactions in federal court "became so pronounced that, by 1965, leading members of the American corporate defense bar were predicting that state corporate fiduciary enforcement would become de facto federalized under the rubric of Rule 10b-5") (citing Arthur Fleischer, Jr., *"Federal Corporation Law": An Assessment*, 78 HARV. L. REV. 1146 (1965)).

67. Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

68. *Id.* at 464–65.

69. *Id.* at 479.

70. Jack B. Jacobs, *Introduction: A Brief History of the Delaware Court of Chancery*, 2012 COLUM. BUS. L. REV. 406, 408 (2012).

71. *Santa Fe Indus.*, 430 U.S. at 479–80 (citing Cary, *supra* note 56).

72. *Id.* at 479 n.16.

from 1982 to 1988. The Reformation Era ended after Chancery decisions in 1988 applying one of the new Delaware Supreme Court standards produced a strident reaction from the New York corporate bar. The Delaware courts retreated, and in 1989, the Reformation Era came to a close.

A. The Early Reformation: 1977 to 1982

The Early Reformation saw the justices responding to *Santa Fe*. They substantially changed the law in two areas that this Article examines: controlling stockholder transactions and derivative actions.

1. Reforming Squeeze-outs

Santa Fe telegraphed that Delaware's biggest vulnerability was its squeeze-out regime. The Delaware Supreme Court responded immediately. Just six months later, in *Singer v. Magnavox Co.*, the justices adopted a business purpose test,[73] thereby accepting the United States Supreme Court's unsubtle suggestion about requiring a "'valid corporate purpose' for the elimination of the minority interest through a short-form merger."[74] Noting that prior Delaware decisions had described mergers as "encouraged and favored," the Delaware Supreme Court now cautioned that "it by no means follows that those in control of a corporation may invoke the statutory power conferred by [the merger statute], a power which this Court . . . said was 'somewhat analogous to the right of eminent domain' . . . when their purpose is simply to get rid of a minority."[75]

The justices also described what they called the "going private problem," observing:

> [T]here seems something fundamentally inequitable about such a stark progression of events and perhaps a use of the Delaware statutes should not be permitted which would allow those with controlling interests who originally sought public participation to later kick out public investors for the sole reason that they have outlived their utility to those in control and are made easy pickings by existing market conditions.[76]

The *Singer* decision thus signaled that the Delaware Supreme Court's attitude had changed. The *Singer* decision also emphasized that merely having a valid business purpose for a squeeze-out merger would not be enough.[77] To the contrary, fiduciary review would remain. After examining earlier Delaware precedents, the justices identified

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73. Singer v. Magnavox Co., 380 A.2d 969, 978–80 (Del. 1977), *overruled by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

74. *Santa Fe Indus.*, 430 U.S. at 479 n.16.

75. *Singer*, 380 A.2d at 978.

76. *Id.* at 978 n.9.

77. *Id.* at 980. (noting that "[t]his is not to say, however, that merely because the Court finds that a cash-out merger was not made for the sole purpose of freezing out minority stockholders, all relief must be denied . . . . On the contrary, the fiduciary obligation of the majority to the minority stockholders remains and proof of a purpose, other than such freeze-out, without more, will not necessarily discharge it.").

> two principles of law which we approve: First, it is within the responsibility of an equity court to scrutinize a corporate act when it is alleged that its purpose violates the fiduciary duty owed to minority stockholders; and second, those who control the corporate machinery owe a fiduciary duty to the minority in the exercise thereof over corporate powers and property, and the use of such power to perpetuate control is a violation of that duty.[78]

The justices held that a Delaware court "will scrutinize the circumstances for compliance with the *Sterling* rule of 'entire fairness' and, if it finds a violation thereof, will grant such relief as equity will require."[79]

Nor were the justices finished after *Singer.* That same year, in *Lynch v. Vickers Energy Corp*., the Delaware Supreme Court recognized a fiduciary duty of disclosure under Delaware law—termed the duty of complete candor—and applied it to a controlling stockholder's tender offer for the minority shares.[80] Two years later, in *Roland International Corporation v. Najjar*, the Delaware Supreme Court applied the full fiduciary framework to short-form mergers, holding that there was "nothing magic [sic] about a 90% Ownership of outstanding shares which would eliminate the fiduciary duty owed by the majority to the minority."[81]

Each of these decisions appears principled and well-justified in its own right. Given their timing and substance, however, an observer might also infer that through these decisions, the Delaware justices were telling the federal government that there was nothing to worry about when it came to the protections offered by Delaware law.

2. Reforming Derivative Actions with Special Litigation Committees

A second major issue during the Early Reformation involved the use of a special litigation committee (SLC) to assert control over a derivative action. Echoing *Santa Fe*, the United States Supreme Court held in 1979 that the authority to use an SLC presented a question of state law, not federal law.[82] That same year, New York's highest court upheld the innovation and called for courts to review an SLC's decision under the business judgment rule.[83]

The Delaware Supreme Court did not follow suit. In *Zapata Corp. v. Maldonado*, the justices held that an SLC had the power to assert control over derivative litigation, but

78. *Id.* at 979–80. The court cited Kleinbard, *supra* note 60, an article critical of squeeze-out mergers.

79. *Id.* at 980 (citing Sterling v. Mayflower Hotel Corp, 93 A.2d 107 (Del 1952)).

80. Lynch v. Vickers Energy Corp., 383 A.2d 278, 279–80 (Del. 1977); *see* Jacobs, *supra* note 2, at 152 (explaining that *Lynch* "marked the first time a Delaware court had recognized a disclosure duty under state fiduciary law, paralleling the duty mandated by the federal securities laws governing tender offers and proxy statements under the [Securities Exchange Act of 1934]").

81. Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1036 (Del. 1979), *overruled in part by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), *and overruled in part by* Glassman v. Unocal Expl. Corp., 777 A.2d 242 (Del. 2001). After *Weinberger* and *Glassman*, only the fiduciary duty of disclosure applies to a short-form merger. *See* Berger v. Pubco Corp., 976 A.2d 132, 138–40 (Del. 2009).

82. Burks v. Lasker, 441 U.S. 471, 486 (1979).

83. Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979).

declined to apply the business judgment rule.[84] The justices instead established a two part test. First, the SLC had the burden to show "the independence and good faith of the committee and the bases supporting its conclusions."[85] Second, the court itself had to "determine, applying its own independent business judgment, whether the motion should be granted."[86]

Zapata caused an uproar, with commentators who favored board deference criticizing the decision for undermining the business judgment rule.[87] Like the other Early Reformation decisions, the *Zapata* opinion is principled and well-justified in its own right. But

84. Zapata Corp. v. Maldonado, 430 A.2d 779, 788–89 (Del. 1981).

85. *Id.* at 788.

86. *Id.* at 789. Although not evident at the time, the two-step *Zapata* inquiry "marked the Delaware Supreme Court's first deployment of something akin to the two-step standard of review that later emerged as enhanced scrutiny." *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. 9962, 2016 WL 301245, at *27 (Del. Ch. Jan. 25, 2016); *accord In re* Columbia Pipeline Grp., Inc. Merger Litig., 299 A.3d 393, 459 (Del. Ch. 2023) (explaining that "even the test from [*Zapata*] for judicial review of a decision by a special litigation committee can now be understood as a nascent form of enhanced scrutiny. The situational conflict was the difficult dynamic of directors deciding whether to cause the corporation to sue their fellow directors. The encroachment on stockholder rights involved a stockholder plaintiff's ability to pursue a derivative claim when demand was excused." (footnotes omitted)); Obeid v. Hogan, No. 11900, 2016 WL 3356851, at *13 (Del. Ch. June 10, 2016) ("With the benefit of hindsight, one can discern in *Zapata* the foundational concepts that animate enhanced scrutiny, the intermediate standard of review that the Delaware Supreme Court introduced openly some four years later in [*Unocal*]."); La. Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co., Inc., No. 5682, 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, 851 (2004) (explaining that *Zapata* is "quite similar to Unocal"); Gregory V. Varallo, William M. McErlean & Russell C. Silberglied, *From* Kahn *to* Carlton: *Recent Developments in Special Committee Practice*, 53 BUS. LAW. 397, 423 n.121 (1998) (pointing out that "[t]he [*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.").

87. *See* ROBERT C. CLARK, CORPORATE LAW 647–48 (1986) (describing debate over *Zapata*); Irwin Borowski, *Corporate Accountability: The Role of the Independent Director*, 9 J. CORP. L. 455, 466 (1984) (Explaining that "[i]n 1981, however, the Delaware Supreme Court, in *Zapata Corp. v. Maldonado*, surprised almost everybody by requiring an independent judicial review in which the court applies its own independent business judgment to the allegations in order to determine whether the suit should be allowed to continue. The *Zapata* decision aroused a storm of controversy with numerous articles being written in its aftermath.") (footnotes omitted). Based on a search of *HeinOnline*, approximately 99 law review articles, notes, and comments discussed the decision to varying degrees during the next four years. One article criticized the decision for adopting a new test "which had never before been advocated or followed, by any court" and for having "abandoned any pretext that the 'business judgment rule' has anything much to do with its analysis." Dennis J. Block & H. Adam Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva* Zapata*?*, 37 BUS. LAW. 27, 60 (1981). Those authors described the *Zapata* test as "judicial legislation," "virtually unsupportable," and "a serious misstep." *Id.* at 63. Another scholar asserted that "[t]he most significant, and most unsettling, aspect of *Zapata* is the court's explicit rejection of the business judgment rule as the proper standard for determining whether a derivative suit can be dismissed." Fischel, *supra* note 64, at 937.

given the timing and an outcome that ran against the grain, an observer might infer that the Delaware justices also had in mind the importance of distinguishing Delaware law from other jurisdictions by taking a realistic approach to interpersonal relationships in the boardroom. For purposes of responding to a threat of federal preemption, the Delaware Supreme Court underscored its bona fides by taking an approach that was more protective of stockholders than its sister state.

B. The High Reformation: 1982 to 1990

The High Reformation began in May 1982, when Justice Andrew G.T. Moore joined the Delaware Supreme Court. He immediately became its principal voice and, for the first eight years of his term, led the justices in adopting the innovations that mark that period. Another formative figure, Chancellor William T. Allen, arrived in 1985. A former partner with Morris Nichols, one of Delaware's leading firms, Chancellor Allen brought to the bench a greater allegiance to doctrines from the Quiet and Responding Eras. During the High Reformation, his scholarly opinions often resisted the Delaware Supreme Court's more creative initiatives. Ultimately, Chancellor Allen's embrace of a meaningful form of enhanced scrutiny triggered a backlash that brought the Reformation Era to an end.

1. Reforming Squeeze-Outs—Again

One year after joining the bench, Justice Moore delivered one of the landmark decisions of the Reformation Era. In *Weinberger v. UOP, Inc*., the Delaware Supreme Court reversed a post-trial judgment for the defendants,[88] holding that the freeze-out failed Delaware's revitalized entire fairness test and remanding for a determination of damages.[89] In the course of its ruling, the Delaware Supreme Court abrogated the business purpose requirement, finding that it did not add meaningful protection for stockholders and had proven difficult to apply.[90] Delaware's *Santa Fe*-inspired test lasted just six years. But because *Weinberger* also emphasized the significance of entire fairness review, criticized a controlling stockholder, and imposed liability on the defendants, the abandonment of the business purpose test did not signal a return to the more permissive attitudes towards squeeze-out mergers that had marked Delaware law during earlier eras.

The *Weinberger* decision tempered its stockholder-friendly outcome by holding that, absent fraud or overreaching, appraisal would be a stockholder's exclusive remedy after a merger. The exception promptly dominated the rule. In *Rabkin v. Philip A. Hunt Chemical Corporation*, issued just two years after *Weinberger*, Justice Moore and his colleagues held that minority stockholders would not be limited to an appraisal after a squeeze-out unless the dispute exclusively presented issues of valuation.[91] That meant an action for breach of fiduciary duty generally would be available.[92] With *Santa Fe* still casting a shadow over

88. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).
89. *Id.* at 703–04.
90. *Id.* at 715.
91. Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1107–08 (Del. 1985).
92. *Id.* at 1105–07.

Delaware, *Weinberger* and *Rabkin* promised that Delaware would continue to provide stockholders with a meaningful cause of action and potential remedy, albeit grounded in breach of fiduciary duty rather than on the short-lived independent business purpose test.

2. Reforming Derivative Actions—Again—By Rewriting the Rules of Demand Futility

On squeeze-outs, the pressure for change came from the risk of federal preemption. For derivative actions, the pressure came from the practitioners who reacted strongly to *Zapata* and feared it augured a new receptivity to stockholder claims. Justice Moore responded in 1984 with his decision in *Aronson v. Lewis*, where the plaintiff sought to challenge a one-sided employment agreement between a corporation and its 47% stockholder.[93] Justice Moore stated in the first sentence that "[i]n the wake of [*Zapata*], this Court left a crucial issue unanswered: when is a stockholder's demand . . . excused as futile prior to the filing of a derivative suit?"[94] The *Aronson* decision discussed *Zapata* extensively, stressing that *Zapata* had nothing to do with demand futility.[95]

Aronson introduced several significant innovations. It broke new ground by identifying Section 141(a) of the DGCL as the source of directors' fiduciary duties, rather than the traditional analogy to trustees.[96] It also held that directors who participated in a decision could impartially consider a demand challenging that decision and that the presence of a controlling stockholder did not affect the analysis, overturning Quiet Era precedent on both points.[97] Professor Robert Clark wrote that in adopting those positions, "the court might be argued to have blinded itself to reality."[98] And it reformulated the business judgment rule as a three-part "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[99] That structural move set the stage for later High Reformation decisions involving the duty of care and the concept of good faith.[100]

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93. Aronson v. Lewis, 473 A.2d 805, 808 (Del. 1984).

94. *Id.* at 807.

95. *See id.* at 813–14.

96. *Id.* at 811 (stating that the power granted by Section 141(a) "carries with it certain fundamental fiduciary obligations to the corporation and its shareholders."). The case that *Aronson* cited for that proposition—Loft, Inc. v. Guth, 2 A.2d 225 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939)—relied on the traditional analogy to trustees, not the predecessor to Section 141(a). The *Zapata* decision referenced Section 141(a), but only as a source of director power, not as a source of fiduciary duties. *See* Zapata Corp. v. Maldonado, 430 A.2d 779, 785 (Del. 1981).

97. *Aronson*, 473 A.2d at 816; *See also* Miller v. Loft, Inc., 153 A. 861 (Del. Ch. 1931) (Wolcott, C.); Fleer v. Frank H. Fleer Corp., 125 A. 411 (Del. Ch. 1924) (Wolcott, C.).

98. CLARK, *supra* note 87, at 643.

99. *Aronson*, 473 A.2d at 812.

100. *See* KERSHAW, *supra* note 19, at 93–109 (explaining *Aronson*'s reformulation of the business judgment rule and its implications for subsequent Delaware jurisprudence).

3. Taking a Middle Road on Third-Party M&A

Third-party M&A presented the Delaware Supreme Court with its biggest challenge. Mergers and acquisitions exploded in the 1980s, with many involving hostile takeovers and leveraged buyouts.[101] How to respond was not just a corporate law issue, but a political one. The pressures around squeeze-outs and derivative actions each ran in one direction. Takeovers caught Delaware between two camps. Corporate scholars and the SEC favored them. Management teams, the lawyers who advised them, and politicians from the affected communities opposed them.

The competing issues came to a head in 1985, now remembered as "a watershed year" in Delaware jurisprudence.[102] Four landmark decisions arrived in quick succession: *Van Gorkom*,[103] *Unocal*,[104] *Moran*,[105] and *Revlon*.[106]

The year began with *Van Gorkom*, the takeover decision that came too soon.[107] A stockholder plaintiff challenged the sale of Trans Union Corporation to a third-party buyer

101. Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 873–74 (2002).

102. Corporate practitioner and later Chief Justice E. Norman Veasey popularized the reference to 1985 as a "watershed year." *See, e.g.*, E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 398 (1997) (noting that "[t]he intense takeover era of the 1980s, particularly the Delaware cases decided in the watershed year of 1985, brought these issues into sharp focus and influenced jurisprudence for years to come. When a director resists a takeover for the sole or primary purpose of entrenchment, a duty of loyalty violation may be implicated."); E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. LAW. 2065, 2075 (1990) (referencing "the watershed year of 1985 in Delaware jurisprudence"); E. Norman Veasey, *D. Block, N. Barton and S. Radin*, *The Business Judgment Rule: Fiduciary Duties of Corporate Directors*, 15 DEL. J. CORP. L. 573, 576 (1990) (book review) ("The traditional articulation of the business judgment rule experienced some linguistic strain in Delaware case law until the watershed year of 1985 in Delaware jurisprudence."). *See generally* E. Norman Veasey, *The Roles of the Delaware Courts in Merger and Acquisition Litigation*, 26 DEL. J. CORP. L. 849 (2001) (emphasizing the importance of 1985 in the development of corporate law in Delaware). As Professor Robert T. Miller has suggested, the concept of *annus mirabilis*, or miracle year, better captures the extent of the Delaware Supreme Court's innovations. *See* Robert T. Miller, Smith v. Van Gorkom *and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 72 (2017) (referencing "what must be regarded as the miracle year of 1985"); *cf.* John Dryden, *Annus Mirabilis* (1667). *See generally* https://en.wikipedia.org/wiki/Annus_mirabilis [https://perma.cc/U8AL-KE3N]; *see also* Ryan Cronin, *John Dryden: 'Annus Mirabilis'*, ST. JOHN'S COLL. U. OF CAMBRIDGE (June 11, 2024), https://www.joh.cam.ac.uk/john-dryden-annus-mirabilis-1666 [https://perma.cc/LC5Z-R9GB].

103. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

104. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

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

106. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). As the date of the published *Revlon* decision shows, the four written opinions were issued during a 14-month period between January 1985 and March 1986, making the reference to a single calendar year a form of interpretive license reminiscent of the long 19th century of European historians. Delaware's long year is perhaps more temporally grounded because although the Delaware Supreme Court published the written *Revlon* decision March 13, 1986, the high court issued its injunction ruling orally from the bench on November 1, 1985. *See* J. Travis Laster, *Changing Attitudes: The Stark Results of Thirty Years of Evolution in Delaware M&A Litigation*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDER LITIGATION 202 n.1 (Sean Griffith et al. eds., 2018).

107. *Van Gorkom*, 488 A.2d at 858.

at a premium over the market price.[108] Reversing a post-trial judgment for the defendants, Justice Moore authored a decision that found the directors had been grossly negligent and were liable for breaching the duty of care.[109] The resulting outcry exceeded the reaction to *Zapata*, with one scholar calling *Van Gorkom* "one of the worst decisions in the history of corporate law."[110] With the benefit of hindsight, *Van Gorkom* was a *Revlon* case that arrived before the Delaware Supreme Court invented enhanced scrutiny.[111] The justices tried to squeeze their analysis into an ill-fitting gross negligence box. If they had issued the decision a year later, they would have applied enhanced scrutiny under *Revlon*. The case undoubtedly would have remained noteworthy, but the standard of review and the rationale for the outcome would have been more clear. *Van Gorkom* also contributed to the development of the law by prompting the enactment of Section 102(b)(7),[112] a statutory amendment authorizing corporate charters to include provisions exculpating directors from money damages for breaches of the duty of care.[113] The decision's close analysis of

108. *Id.* at 863.

109. Brian R. Cheffins, *Delaware and the Transformation of Corporate Governance*, 40 DEL. J. CORP. L. 1, 41 (citing *Van Gorkom*, 488 A.2d at 874).

110. Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1455 (1985).

111. *In re* Columbia Pipeline Grp., Inc. Merger Litig., 316 A.3d 359, 387 n.77 (Del. Ch. 2024) ("[A] broad consensus exists 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") (footnotes omitted); Gagliardi v. TriFoods Int'l, 683 A.2d 1049, 1051 n.4 ("I count [*Van Gorkom*] not as a 'negligence' or due care [c]ase involving no loyalty issues, but as an early and, as of its date, not yet fully rationalized, '*Revlon*' or 'change of control' case."); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *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) (explaining that "*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 . . . . [W]ith its emphasis upon immediate value maximization, rather than as a 'due care' case, *Van Gorkom* would not be viewed as remarkable." (citation omitted)); William T. Allen, *The Corporate Director's Fiduciary Duty of Care and the Business Judgment Rule Under U.S. Corporate Law* ("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."), *in* COMPARATIVE CORPORATE GOVERNANCE 307, 325 (Klaus J. Hopt et al. eds., 1998); Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 522 (2002) ("*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, Comment, Trans Union *Reconsidered*, 98 YALE L.J. 127, 128 (1988) ("*Trans Union* [sic] is not, at bottom, a business judgment case. It is a takeover case."); *see also* Miller, *supra* note 102, at 84 (linking *Van Gorkom* to *Revlon* and explaining "*Van Gorkom*'s reasoning was poor and its outcome was disastrous, but *Van Gorkom* was a disaster that had to occur if the current system of Delaware law, especially the system of *Revlon* duties, was to develop.") (footnote omitted).

112. Miller, *supra* note 102, at 209–14.

113. *See* DEL. CODE ANN. tit. 8, § 102(b)(7).

boardroom conduct also prodded lawyers to structure more thorough board approval processes.[114]

The watershed year continued with perhaps Delaware's most iconic decision, Justice Moore's opinion in *Unocal*.[115] A target board responded to a hostile bid by issuing rights that permitted each stockholder, other than the bidder, to exchange its shares for a senior note with a face value equal to what the board believed was the fair value of the company.[116] The Court of Chancery enjoined the plan, holding that the directors had a duty to treat stockholders equally.[117] On appeal, the Delaware Supreme Court reversed. First, the justices held that a board had the power to resist a hostile tender offer.[118] Second, they created enhanced scrutiny, an intermediate standard of review that placed the burden on the directors to show that "they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and chose a response that was "reasonable in relation to the threat posed."[119] Third, the justices held that the board in *Unocal* responded to a valid threat presented by a structurally coercive, two-tier offer and acted reasonably by implementing the discriminatory debt exchange.[120]

The watershed year next served up *Moran*.[121] That decision validated the stockholder rights plan, invented by Marty Lipton of Wachtell, Lipton, Rosen & Katz.[122] By upholding the plan, the justices gave corporations a way to respond to a hostile tender offer without taking equally dramatic action, like engaging in a defensive restructuring or selling to a white knight. The *Moran* decision also cautioned, however, that whenever a board faced a takeover attempt, its use of a rights plan would be reviewed under the enhanced scrutiny standard created in *Unocal*.[123]

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114. *E.g.*, THERESE H. MAYNARD, MERGERS AND ACQUISITIONS: CASES, MATERIALS, AND PROBLEMS 484 (2d ed. 2009) (describing the benefit of *Van Gorkom* as a cautionary tale and stating that "many practicing M&A lawyers today recommend that board members read the facts of the [*Van Gorkom*] decision *carefully* before embarking on any M&A transaction . . . because it provides a modern case study of how not to execute an M&A transaction"); William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 76 (2000) (describing *Van Gorkom* as a terrible decision but "an important political and social success," because it contributed to "the extent to which boards of directors are no longer passive and controlled as they were"; and concluding that "[f]rom an ex-ante perspective, it almost certainly has had a positive effect on corporate governance").

115. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

116. *Id.* at 950–51.

117. *Id.* at 952.

118. *Id.* at 954.

119. *Id.* at 955.

120. *Id.* at 958–59. The SEC effectively preempted *Unocal* on the third point by adopting the all-holders rule, which requires that parties making tender or exchange offerors treat all security holders equally under federal law. *See* 17 C.F.R. § 240.14d-10(a) (2006) ("No bidder shall make a tender offer unless: (1) The tender offer is open to all security holders of the class of securities subject to the tender offer; and (2) The consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer.").

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

122. *Id.* at 1351–53; Cheffins, *supra* note 109, at 52.

123. *Moran*, 500 A.2d at 1357.

Extending briefly into the first months of 1986, the watershed year ended with *Revlon.*[124] In a decision authored by Justice Moore, the justices held that the board of Revlon properly resisted a hostile tender offer until the board decided that the bidder's price exceeded the company's value as a standalone entity.[125] From that point on, the directors had an obligation to seek the transaction offering the best value for the stockholders, without taking into account non-stockholder interests. In the memorable words of the decision, the "directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[126] On the facts presented, the Delaware Supreme Court held that the directors had breached their duties by entering into a lower-valued transaction with their favored white knight in exchange for the buyer's agreement to support the value of the company's notes.[127]

C. The High Reformation After the Watershed Year

For the Delaware Supreme Court, the Reformation Era peaked during the watershed year. After that, the action shifted to the Court of Chancery, which faced the challenge of applying the new precedents. The answers were not clear. Advocating for their clients, lawyers advanced a variety of interpretations.

Revlon initially seemed to have the most bite. The injunction issued in that decision dovetailed with the outcome in *Van Gorkom*, where the justices held directors personally liable for approving a single-bidder transaction.[128] One possible reading of the decisions was "conduct auctions or else." Another was that directors could not play favorites and had to maintain a level playing field. Plaintiffs—and in the High Reformation that often meant hostile bidders—advanced those and other arguments.

Led by Chancellor Allen, the Court of Chancery sought to normalize *Revlon*.[129] Chancellor Allen rejected the argument that *Revlon* created a duty to auction or maintain a level playing field.[130] He also rejected an interpretation that required a judicial assessment of the

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124. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986). On the implications of the date of the published opinion for the concept of the watershed year, see *supra* note 102.

125. *Id.* at 184.

126. *Id.* at 182.

127. *Id.* at 183–85.

128. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985).

129. *See* Equity-Linked Invs., LP v. Adams, 705 A.2d 1040, 1054 (Del. Ch. 1997) (noting that after *Revlon*, some cases "tended to 'normalize' directors' duties in these important transactions; they reflect greater deference to an independent board even in a 'sale' context, and acknowledged the necessity of an independent board to make business judgments even in that setting." Citing *In re* RJR Nabisco, Inc. S'holders Litig., No. 10389, 1989 WL 7036 (Del. Ch. Jan. 31, 1989); then *In re* J.P. Stevens & Co. S'holders Litig., 542 A.2d 770 (Del. Ch. 1988); and then *In re* Amsted Indus. Inc. Litig., No. 8224, 1988 WL 92736 (Del. Ch. Aug. 24, 1988), *aff'd sub nom.* Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989)).

130. *E.g.*, Freedman v. Rest. Assocs. Indus., Inc., No. 9212, 1990 WL 135923, at *5 (Del. Ch. Sept. 19, 1990) ("Although a board of directors may fulfill its obligation to make an informed and reasonable business judgment in a sale context by conducting an auction sale, *e.g.*, *RJR Nabisco*, and that may often be the most prudent way to proceed, an auction is not always necessary."); *In re* Fort Howard Corp. S'holders Litig., No. 9991, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988) ("[A] board need not be passive . . . . It may never appropriately favor one

reasonableness of the sale process, instead framing the inquiry in terms of the business judgment rule.[131] Unlike when directors responded to a hostile deal, Chancellor Allen did not perceive an inherent conflict in a sale scenario.[132]

By contrast, *Unocal* identified such a conflict: "the omnipresent specter that a board may be acting primarily in its own interest."[133] Describing *Unocal* as "the most innovative and promising case in our recent corporation law," Chancellor Allen and his colleagues set out to apply *Unocal* in a meaningful way.[134]

Chancellor Allen also appeared to create another intermediate standard in *Blasius*.[135] Facing a consent solicitation, the incumbent directors expanded the board and filled the resulting vacancies so that the insurgents could not elect a new board majority. In holding the directors' action invalid, Chancellor Allen articulated a standard that called for the directors to make two showings. First, they had to demonstrate that they interfered with the voting process in the good faith pursuit of a legitimate end.[136] Second, they had to show that they deployed a means that had a sufficiently compelling justification.[137]

But it was a series of decisions involving rights plans that proved most significant. Chancellor Allen and his colleagues held consistently that a board could adopt a rights

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buyer over another for a selfish or inappropriate reason, such as occurred in *Revlon*, but it may favor one over another if in good faith and advisedly it believes shareholder interests would be thereby advanced."); *In re* J.P. Stevens & Co. S'holders Litig., 542 A.2d 770, 783–84 (Del. Ch. 1988) (rejecting the level-playing field metaphor and approving a good faith decision to benefit a bidder with the goal of maximizing value).

131. *See, e.g.*, *In re* R.J.R. Nabisco Inc. S'holders Litig., No. 10389, 1989 WL 7036, at *14, *21 (Del. Ch. Jan. 31, 1989) (Allen, C.) (explaining use of business judgment rule framework); *Fort Howard Corp.*,1988 WL 83147, *14 (Allen, C.) ("The need to exercise judgment is *inescapably* put on the board at points in an auction process and the validity of the exercise of that judgment is appropriately subjected to a business judgment form of judicial review."); *J.P. Stevens*, 542 A.2d at 780 ("Given the inability to conclude provisionally at this stage that the Stevens board, functioning through its Special Committee, was inappropriately motivated in conducting the auction, the question becomes, in my mind, whether its actions in granting to Odyssey the contract rights in question are protected by the business judgment rule."); *see generally* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1287–88 (Del. 1989) (commenting that "[i]t is not altogether clear that, since our decision in *Revlon*, the Court of Chancery has explicitly applied the enhanced *Unocal* standards in reviewing such board action," noting that "[o] n the surface, it may appear that the trial court has been applying an ordinary business judgment rule analysis," but concluding that "[o]n closer scrutiny, it seems that there has been a *de facto* application of the *enhanced* business judgment rule under *Unocal*.").

132. *J.P. Stevens*, 542 A.2d at 780 ("I note preliminarily that, as currently viewed, this case involves neither a self-dealing transaction . . . , nor corporate measures designed to defeat a threatened change in 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 to grant the topping fee or the expense reimbursement provision, except in one respect."); *id.* at 782 (finding that assuming grant of topping fee required greater scrutiny, the directors were properly motivated and informed when approving it).

133. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

134. City Cap. Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 796 (Del. Ch. 1988) (subsequent history omitted). In 1986, for example, Chancellor Allen enjoined a corporation's self-tender offer, finding that although the directors responded to a valid threat to the corporation and its stockholders, the directors chose a means disproportionate to the threat they faced. *See* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 113–16 (Del. Ch. 1986).

135. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988).

136. *Id.* at 658.

137. *Id.* at 662–63.

plans to defeat a structurally coercive offer, to obtain time to negotiate with a bidder, or to create a window in which to develop alternatives.[138] Yet they repeatedly questioned whether an all-cash, all-shares offer constituted a sufficient threat to maintain a rights plan in place indefinitely.[139] A noncoercive offer could represent a threat

> in the special sense that an active negotiator with power, in effect, to refuse the proposal may be able to extract a higher or otherwise more valuable proposal, or may be able to arrange an alternative transaction or a modified business plan that will present a more valuable option to shareholders.[140]

After that, "absent unusual facts, there may come a time when a board's fiduciary duty will require it to redeem the rights and to permit the shareholders to choose."[141]

Towards the end of 1988, that possibility came to fruition. In *Interco*, a board attempted to use a rights plan to block an all-cash, all-shares offer so that the board could complete a leveraged restructuring.[142] Chancellor Allen explained that once the board had an opportunity to negotiate with the bidder or develop alternatives, "then, in most instances, the legitimate role of the poison pill in the context of a noncoercive offer will have been fully satisfied."[143] At that point, the plan's only function was to preclude the stockholders

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138. *Interco*, 551 A.2d at 797–98 (explaining that a pill could be used to defend against "structurally coercive offers" or to enable "an active negotiator . . . to extract a higher or otherwise more valuable proposal, or . . . to arrange an alternative transaction . . . ."); *see, e.g.*, MAI Basic Four, Inc. v. Prime Comput., Inc., No. 10428, 1988 WL 140221, at *5 (Del. Ch. Dec. 20, 1988) (denying preliminary injunction requiring redemption of pill given "[o]f particular significance . . . the fact that without the [pill and other] anti-takeover devices being in place, plaintiff will not increase its offer"); Doskocil Co. Inc. v. Griggy, No. 10095, slip op. at *5–6 (Del. Ch. Oct. 7, 1988) ("Where the board has determined that the offered price is inadequate and has decided to conduct an auction for the company, it may be appropriate to keep the rights in place in order to allow time for higher bids to be made."); Tate & Lyle PLC v. Staley Cont'l, Inc., No. 9813, 1988 WL 46064, at *10 (Del. Ch. May 9, 1988) (denying preliminary injunction redeeming rights plan where "the rights plan is obviously serving a useful purpose in allowing the Board to seek a more realistic offer"); Facet Enters., Inc. v. Prospect Grp., No. 9746, 1988 WL 36140, at *6 (Del. Ch. Apr. 15, 1988) ("[G]iven the pendency of the proposed auction, should the directors be allowed to keep the Rights in place until the auction process has reasonably run its course? On the present record, I conclude that they should."). *See generally* Andrew J. Turezyn, *1988 Developments in Delaware Corporate Law*, 14 DEL. J. CORP. L. 931 (1989).

139. Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 289 (Del. Ch. 1989) (stating that "It is difficult to understand how, as a general matter, an inadequate all cash, all shares tender offer, with a back end commitment at the same price in cash, can be considered a continuing threat under *Unocal* . . . . [W]here there has been sufficient time for any alternative to be developed and presented and for the target corporation to inform its stockholders of the benefits of retaining their equity position, the 'threat' to the stockholders of an inadequate, non-coercive offer seems, in most circumstances, to be without substance."); Metro. Pub., Ltd. Co. v. Pillsbury Co., 558 A.2d 1049, 1056 (Del. Ch. 1988) (holding that in all-cash, all-shares offer, "[w]hatever danger there is relates solely to the shareholders and that concerns price only."); *see also MAI Basic Four*, 1988 WL 140221, at *4 ("[T]he tender offer is for all cash and there is nothing about it which would indicate that it is coercive to the stockholders. It appears to be bona fide and represents a premium over current market value.").

140. *Interco*, 551 A.2d at 798.

141. *Id.*

142. *Id.* at 789–90.

143. *Id.* at 798.

from making a different decision about their property than the directors preferred.[144] That result, Chancellor Allen believed, would be "so inconsistent with widely shared notions of appropriate corporate governance as to threaten to diminish the legitimacy and authority of our corporation law."[145] Chancellor Allen therefore issued a mandatory injunction requiring the target board to redeem its rights plan.[146]

Doctrinally, the *Interco* decision fulfilled the promise of the Delaware Supreme Court's decisions during the watershed year. But few in the corporate bar saw it that way. One unhappy attorney was Lipton, the inventor of the rights plan and the preeminent defense-side lawyer of his day.[147]

On November 3, 1988, Lipton circulated a "To Our Clients" memo titled "The Interco Case." After criticizing the decision, Lipton wrote, "If it is not reversed by the Delaware Supreme Court, it will be a dagger aimed at the hearts of all Delaware corporations and a further fueling of the takeover frenzy."[148] He followed with a statement that, depending on one's perspective, could be viewed as a promise or a threat:

> The Interco case and the failure of Delaware to enact an effective takeover statute, raise a very serious question as to Delaware incorporation. New Jersey, Ohio and Pennsylvania, among others, are far more desirable states for incorporation than Delaware in this takeover era. Perhaps it is time to migrate out of Delaware.[149]

The memo was "conspicuously leaked" to the *Wall Street Journal*.[150] As former Chief Justice Strine described it, "Marty roared back."[151]

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144. *Id.* ("The only function then left for the pill at this end-stage is to preclude the shareholders from exercising a judgment about their own interests that differs from the judgment of the directors, who will have some interest in the question.").

145. *Interco*, 551 A.2d at 800.

146. *Id.* at 803.

147. *See generally* Leo E. Strine, Jr., *The Story of* Blasius Industries v. Atlas Corp*.: Keeping the Electoral Path To Takeovers Clear*, (chronicling Lipton's reaction and Delaware courts' response), in J.M. RAMSEYER, CORPORATE LAW STORIES 243, 275–76 (Foundation Press, 2009).

148. Letter from Marty Lipton, Partner, Wachtell, Lipton, Rosen & Katz, on the *Interco* case (Nov. 3, 1988), https://theliptonarchive.org/wp-content/uploads/340-The-Interco-Case-dated-November-3-1988.pdf [https://perma.cc/M2A2-JG25].

149. *Id.* (formatting in original).

150. Nell Minow, *Shareholders, Stakeholders, and Boards of Directors*, 21 STETSON L. REV. 197, 204 n.27 (1991) (quoting Joseph Nocera, *Delaware Puts Out*, ESQUIRE, Jan. 1990, at 48); *see* Laurie P. Cohen, *Lipton Tells Clients that Delaware May Not be a Place to Incorporate*, WALL ST. J., Nov. 11, 1988, at B7 (noting Lipton's memo that suggested that "[p]erhaps it is time to migrate out of Delaware"), *quoted in* Richard E. Kihlstrom & Michael L. Wachter, *Corporate Policy and the Coherence of Delaware Takeover Law*, 152 U. PA. L. REV. 523, 532 n.27 (2003).

151. Strine, *supra* note 147, at 275. As former Chief Justice Strine recounts, Lipton continued his attacks on the Interco decision and Delaware in the months that followed. *See id.* at 275–76. One article quoted Lipton stating that "Delaware has misled Corporate America" and that "[y]ou've got a bunch of judges down in Wilmington who are threatening our future, who are depressing the standard of living for the U.S. public. I'm sure Judge [sic] Allen doesn't recognize this." William Meyers, *Showdown in Delaware: The Battle to Shape Takeover Law*, INSTITUTIONAL INV., Feb. 1989, at 64, 77.

On the heels of *Interco*, another decision added fuel to the fire. Retired Justice William Duffy, sitting by designation, followed *Interco*'s reasoning in *Grand Metropolitan PLC v. Pillsbury Co.* and ordered a target board to redeem its rights plan.[152] Lipton was apoplectic. In another "To Our Clients" memo, he called for corporations to abandon Delaware:

> The Pillsbury decision yesterday fulfills the threat to Delaware corporations presaged by the Interco decision. In Pillsbury a single Delaware judge substituted his judgment for the business judgment of the Pillsbury Board of Directors and sentenced Pillsbury to death as an independent company . . . .
>
> The Pillsbury decision shows that Delaware either does not understand, or does not care about, the long-range macroeconomic problems of the takeover frenzy . . . . Unless Delaware acts quickly to correct the Pillsbury decision, the only avenues open to the half of major American companies incorporated in Delaware will be federal legislation of the type now being considered by the Treasury Department or leaving Delaware for a more hospitable state of incorporation.[153]

As a prominent and influential member of the New York bar, Lipton's critiques had clout.

The Lipton memos arrived at a time when the political environment had shifted. For much of the decade, federal policy makers had supported a competitive takeover market, counterbalancing calls for greater deference to directors.[154] But by the end of 1988, when Lipton issued his memos, the federal counterpressure was lessening.[155] Consistent with a reduced federal counterweight, the Delaware bar pushed forward during 1988 with a proposed anti-takeover statute, and the General Assembly adopted it over objections from the SEC.[156]

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152. Grand Metro. PLC v. Pillsbury Co., 558 A.2d 1049 (Del. Ch. 1988). In between *Interco* and *Pillsbury*, then-Vice Chancellor Jacobs enjoined the use of a rights plan to protect a management-sponsored leveraged buyout, while at the same time declining to enjoin the buyout itself. *See* Mills Acquisition Co. v. Macmillan Inc., No. 10168, 1988 WL 108332, at *18, *19 (Del. Ch. Oct. 18, 1988) (explaining that "[i]n this case, MCC argues that no longer is any corporate purpose served by maintaining the rights in place, because the auction is over and the two highest bids are now on the table. Moreover, both bids are fair: Macmillan's advisors have opined that KKR's $90.05 per share bid is fair; *a fortiori*, MCC's $90.25 bid must be fair as well. Thus, keeping the rights in place will only cause the shareholders irreparable harm, since they will be deprived of the opportunity to consider, as an alternative to the KKR offer, MCC's higher bid. I concur."), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1989) (enjoining management-sponsored leveraged buyout). Perhaps because then-Vice Chancellor Jacobs allowed the management-sponsored transaction to proceed, his decision did not attract the same attention as *Interco* and *Pillsbury*, even though it was doctrinally comparable.

153. Letter from Marty Lipton, Partner, Wachtell, Lipton, Rosen & Katz, *You Can't Just Say No in Delaware No More* (Dec. 17, 1988), https://theliptonarchive.org/wp-content/uploads/346-You-Cant-Just-Say-No-in-Delaware-No-More-dated-December-17-1988.pdf [https://perma.cc/DT3R-WMW8] (formatting in original).

154. *See* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 630 (2003); *accord id.* at 627 ("Before the insider trading scandals hit in the late 1980s, the Washington atmosphere was generally pro-takeover. Many key Washington players were pro-takeover; others were moderate.").

155. *Id.* at 630–31.

156. DEL. CODE ANN. tit. 8, § 203 (2017). In late 1987, when the Delaware bar first proposed an anti-takeover statute, federal policy makers responded. SEC Chairman David Ruder sent a letter to future Chief Justice E.

D. The Reformation Era Ends

The year after Lipton's threat saw the Delaware courts retreat. In lieu of decisions like *Interco* and *Pillsbury*, the Delaware courts "began producing decisions that were more to Marty Lipton's liking."[157]

Chancellor Allen made the initial concession. In *TW Services*, a bidder sought a mandatory injunction to force a target to redeem its rights plan so that the bidder could close its all-cash, all-shares premium offer, with 88% of the shares already tendered.[158] The board did not argue that the company was more valuable independently.[159] The directors simply argued that the company was not for sale.[160] From the bidder's perspective, *Interco* and *Pillsbury* governed.[161] Once the target board had a sufficient period to negotiate or develop an alternative, the valid use of the rights plan had ended.[162]

To distinguish *Interco* and *Pillsbury*, Chancellor Allen made three moves. First, he conceptualized those cases as involving directors who created alternatives to the offer, rather than electing "to continue managing the enterprise in a long term mode and not to actively consider an extraordinary transaction of any type."[163] That was true, but the distinction was weak. Continuing to manage the company is always one available alternative. The logic of *Interco* suggested that once the directors decided on that alternative and disclosed their decision, the stockholders had the right to decide whether to tender.[164] At that point, as Chancellor Allen had written in *Interco*, the plan only functioned to preclude the stockholders from making a different decision about their stockholdings than the directors

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Norman Veasey, then a Delaware practitioner and leading proponent of Section 203, in which Ruder asserted, "I believe that Federal law should control [takeovers] by preempting state statutes . . . ." David S. Ruder, Address at the 26th Annual Corporate Counsel Institute (Oct. 7, 1987), *quoted* in Letter from David S. Ruder, Chairman, SEC, to E. Norman Veasey (Dec. 8, 1987), *reprinted in* CRAIG B. SMITH & CLARK W. FURLOW, GUIDE TO THE TAKEOVER LAW OF DELAWARE 155 (1988). Then-SEC Commissioner Joseph A. Grundfest also threatened Delaware with preemption. *See* Letter from Joseph A. Grundfest, Comm'r, SEC, to David B. Brown, Sec'y, Council of the Corp. L. Section of the Del. St. Bar Ass'n (Dec. 10, 1987) ("[A] decision by Delaware to adopt an anti-takeover statute will be subject to far greater scrutiny . . . and is more likely to provoke a federal response . . . ."), *reprinted in* SMITH & FURLOW, *supra* at 156. And then-SEC Commissioner Charles Cox questioned whether a state anti-takeover statute would be constitutional. *See* Letter from Charles C. Cox, Comm'r, SEC, to David B. Brown, Sec'y, Council of the Corp. L. Section of the Del. St. Bar Ass'n (Dec. 10, 1987), *reprinted in* SMITH & FURLOW, *supra* at 156. The White House Council of Economic Advisors also opposed state anti-takeover legislation. Roe, *supra* note 154, at 627–28. Yet during 1988, the leadership of the Delaware bar felt sufficiently confident to move forward.

157. Minow, *supra* note 150, at 204 n.27 (quoting Joseph Nocera, *Delaware Puts Out*, ESQUIRE, Jan. 1990, at 48); *see generally* Jens Dammann, *Homogeneity Effects in Corporate Law,* 46 ARIZ. ST. L.J. 1103, 1117 & n.58 (2014) (describing Lipton's criticism and Delaware's response and observing that "[t]his episode struck many observers as a demonstration of Delaware's willingness to bow before the dictates of the charter market.") (collecting citations).

158. TW Servs., Inc. v. SWT Acquisition Corp., No. 10427 & 10298, 1989 WL 20290, at *1 (Del. Ch. Mar. 2, 1989).

159. *Id.*

160. *Id.*

161. *Id.* at *6.

162. *Id.* at *4.

163. *TW Servs.*, 1989 WL 20290, at *9.

164. *Id.*

preferred, a result that would be "so inconsistent with widely shared notions of appropriate corporate governance as to threaten to diminish the legitimacy and authority of our corporation law."[165]

Second, Chancellor Allen emphasized that the bidder's offer involved "a proposal to negotiate a merger."[166] Chancellor Allen noted that Delaware's merger statute required that the board approve and recommend a merger, so the business judgment rule applied.[167] Doctrinally, that should not have made a difference for fiduciary review.[168] A decision not to proceed with merger discussions and a decision not to redeem a rights plan could have been regarded as fiduciary equivalents, warranting the application of *Unocal* to the rejection of a merger proposal.[169]

Third and most significantly, Chancellor Allen inverted the relationship between *Unocal* and *Revlon*.[170] Since the watershed year, Chancellor Allen and his colleagues had sought to normalize *Revlon* while applying *Unocal* meaningfully.[171] In *TW Services*, their significance flipped.[172] *Revlon* became a "radically altered state."[173] Rather than asking, as in *Interco* and *Pillsbury*, when maintaining a rights plan became a disproportionate and unreasonable defense under *Unocal*, Chancellor Allen changed the question.[174] In *TW Services*, he asked when a board's fiduciary duties obligated the directors to maximize short-term value under *Revlon*.[175] The issue then became a legal question of what triggered *Revlon*, rather than a factual determination about when stockholders should be able to choose. With that reframing, *Revlon* became the more significant standard of review, albeit one with a legal trigger that a board and its advisors could structure their actions to avoid.[176]

Four months later, in *Time-Warner*, Chancellor Allen skillfully navigated around *Revlon*, *Unocal*, and *Blasius*.[177] He distinguished *Revlon* by following the *TW Services* model, stating that "under Delaware law, directors are under no obligation to act so as to

165. City Cap. Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 800 (Del. Ch. 1988).

166. *TW Servs.*, 1989 WL 20290 at *11.

167. *Id.*

168. Two decades later, then-Vice Chancellor Strine would explain the absence of any meaningful distinction between approving a merger and responding to a tender offer for purposes of determining the standard of review applicable to a controlling stockholder tender offer. *See In re* Pure Res., Inc. S'holder Litig., 808 A.2d 421, 439 (Del. Ch. 2002); *see also In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 414 (Del. Ch. 2010) (applying a unified standard that applied the same principles of fiduciary review to a controller single-step merger and a controller tender offer followed by a second-step merger).

169. Chancellor Allen used similar reasoning in 1990 to avoid applying *Blasius* to a board decision to postpone an annual meeting that they had not formally called once a hostile bid emerged. *See* Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1123 (Del. Ch. 1990) (acknowledging that "[t]his view may be criticized as placing undue emphasis on the formal act of fixing the date of the annual meeting").

170. *TW Servs.*, 1989 WL 20290, at *7–9.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at *1.

175. *TW Servs., Inc.*, 1989 WL 20290, at *1.

176. *Id.* at *7–9.

177. Paramount Commc'ns Inc. v. Time Inc. (*Time-Warner*), No. 10866, 10670 & 10935, 1989 WL 79880 (Del. Ch. July 14, 1989) (subsequent history omitted).

maximize the immediate value of the corporation or its shares, except in the special case in which the corporation is in a 'Revlon mode.'"[178] As in *TW Services*, that meant the key issue became the legal question of when *Revlon* applied.[179] In language that would become famous, Chancellor Allen reasoned that a stock-for-stock merger did not trigger *Revlon* when control "remained in a large, fluid, changeable and changing market."[180]

Chancellor Allen next distinguished his own decision in *Blasius* based on the source of law establishing the voting requirement.[181] In *Time-Warner*, Delaware law did not give stockholders a right to vote on the original Time-Warner merger.[182] Only the New York Stock Exchange did.[183] Chancellor Allen reasoned that because Delaware law did not call for a stockholder vote, *Blasius* did not apply.[184]

Finally, Chancellor Allen distinguished *Unocal*. He described *Interco* and *Pillsbury* as cases involving responses that resembled the highly leveraged alternatives that management claimed was a threat.[185] In *Time-Warner*, by contrast, Chancellor Allen viewed the merger as grounded in the legitimate pursuit of a long-term strategic plan:

> [W]here the board has not elected explicitly or implicitly to assume the special burdens recognized by *Revlon*, but continues to manage the corporation for long-term profit pursuant to a preexisting business plan that itself is not primarily a control device or scheme, the corporation has a legally cognizable interest in achieving that plan.[186]

Chancellor Allen issued his decision on July 14, 1989.[187] The Delaware Supreme Court affirmed by summary order on July 24, 1989.[188] The high court's *Time* opinion arrived seven months later.[189] In its *Unocal* analysis, the *Time* opinion went out of its way to hold that an underpriced all-cash, all-shares tender offer could indeed constitute a threat,[190] contrary to the line of Court of Chancery cases that had rejected that approach.[191] And the

178. *Id.* at *19 (formatting in original).

179. *See id.*

180. *Id.* at *23.

181. *Compare* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 652–53 (Del. Ch. 1988) (stockholder action by written consent to expand size of board and fill new seats with directors in conformity with Delaware law) *with Time-Warner*, 1989 WL 79880, at *9 (stockholder vote to authorize issuance of shares exceeding 20% of the outstanding to comply with New York Stock Exchange listing rule).

182. *See Time-Warner*, 1989 WL 79880, at *26.

183. *Id.* at *9. In a direct merger, as opposed to a triangular merger, Delaware law requires approval from the acquirer's stockholders if a corporation will issue more than 20% of its outstanding stock, but a triangular merger sidesteps that voting requirement. *See* DEL. CODE ANN. tit. 8, § 251(f).

184. *Time-Warner*, 1989 WL 79880, at *26. He also reiterated his reasoning in *TW Services* where he concluded that because a merger requires a board determination, the stockholders had no inherent right to vote on a merger. *See id.* at *19.

185. *See id.* at *28.

186. *Time-Warner*, 1989 WL 79880, at *29.

187. *Id.* at *1.

188. Literary Partners, LP v. Time Inc., 565 A.2d 280 (Del. 1989).

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

190. *Id.* at 1152–53.

191. *See* sources cited, *supra* notes 138–42.

justices adopted Lipton's characterization of *Interco* and *Pillsbury* as cases where the Court of Chancery "substitut[ed] its judgment as to what is a 'better' deal for that of a corporation's board of directors."[192] That, however, was not what Chancellor Allen and Justice Duffy did in *Interco* and *Pillsbury*. Those decisions instead held that once the board had developed, disclosed, and had a sufficient chance to explain its plan, then *the stockholders* were entitled to choose whether to sell their shares to the offeror.[193] But the *Time* decision memorialized Lipton's characterization, and the justices expressly "reject[ed] such approach."[194] Signaling support for a just-say-no defense, the Delaware Supreme Court wrote that "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."[195]

Lipton was thrilled. In a "To Our Clients" memo titled "Delaware Says Yes To Just Say No," he described the *Time* decision as "a ringing endorsement of the Just Say No response to a hostile tender offer," and he specifically noted the that "the Delaware Supreme Court has rejected Pillsbury and Interco."[196]

The decisions in *TW Services, Time-Warner*, and *Time* marked the end of the Reformation Era. The Delaware courts had retreated from each of their major innovations in third-party M&A. None had been rejected, but each had been considerably weakened.

E. Themes from the Reformation Era

With the Reformation Era marking the first of the eras that the *Journal* fully witnessed, the time has come to examine to what extent that era introduced new rules, rhetoric, and results. The Reformation Era saw Delaware thrust into the national spotlight, and Delaware law changed dramatically in response to external forces. The overall theme was increased fiduciary accountability.

The most obvious change involved new rules. During the Early Reformation, the Delaware Supreme Court adopted a business purpose requirement for squeeze-out mergers, reinvigorated the entire fairness test, created the duty of complete candor, and established the *Zapata* two-step standard of review for special litigation committees.[197] During the High Reformation, the *Weinberger* decision rejected the business purpose requirement adopted just six years before while strengthening the entire fairness test.[198] The *Aronson* decision wiped the demand-futility slate clean and started anew.[199] And for third-party

192. *Time*, 571 A.2d at 1153.

193. *See supra* notes 135– 48 and accompanying text.

194. *Time*, 571 A.2d at 1153.

195. *Id.* at 1154.

196. Letter from Martin Lipton, Partner, Wachtell, Lipton, Rosen & Katz, (Feb. 27, 1990), https://thelipton-archive.org/wp-content/uploads/366-Delaware-Says-Yes-to-Just-Say-No-dated-February-27-1990.pdf [https://perma.cc/SN9K-4GB7].

197. *See supra* Part V.A.

198. *See supra* Part V.B.1.

199. *See supra* Part V.B.2.

M&A, the Delaware Supreme Court created two new intermediate standards of review (*Unocal* and *Revlon*), and the Court of Chancery created another (*Blasius*).[200]

Those new rules led to different results, including plaintiff-side victories. Stockholder plaintiffs prevailed in entire fairness cases like *Singer*,[201] *Lynch*,[202] *Weinberger*,[203] *Rabkin*,[204] and *Cavalier Oil*.[205] Hostile bidders and stockholder plaintiffs also prevailed in enhanced scrutiny cases like *Revlon*,[206] *Macmillan*,[207] *AC Acquisitions*,[208] *Interco*,[209] and *Pillsbury*,[210] as well as the proto-enhanced scrutiny decision of *Van Gorkom*.[211] Before the Reformation Era, plaintiffs' victories were few and far between, with commentators viewing the Delaware courts as defense-friendly to the point where plaintiffs primarily sought relief in federal court under Rule 10b-5.[212]

The most dramatic change was rhetorical. Responding to the federal threat required emphasizing the vibrancy of fiduciary review. And because the federal threat focused primarily on controller squeeze-outs, that meant regarding stockholder controllers with skepticism, expressing concern about the conflicts they faced, and stressing the fiduciary duties they owed. The new rhetoric also meant praising directors who did the right thing while criticizing those who erred. When Ed Rock wrote in *Saints and Sinners* about the expressive quality of Delaware law, he was discussing Delaware Supreme Court decisions from the Reformation Era.[213] As he correctly perceived, those opinions operated as parables intended to show directors and practitioners what they should and should not do.

VI. THE MODERATING ERA: 1990 TO 1998

After the Reformation Era came the Moderating Era. During this period, the Delaware courts sought to integrate and clarify the rulings from the Reformation Era.

Personnel changes at the Delaware Supreme Court had a major effect on the path of the law. The first came in 1992 with the arrival of E. Norman Veasey as Chief Justice. Before joining the bench, Chief Justice Veasey practiced as a corporate attorney with one

200. *See supra* Part V.C.

201. Singer v. Magnavox Co., 380 A.2d 969, 979 (Del. 1977).

202. Lynch v. Vickers Energy Corp., 429 A.2d 497, 507 (Del. 1981), *overruled in part by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

203. *Weinberger*, 457 A.2d at 712.

204. Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1106–07 (Del. 1985).

205. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1139 (Del. 1989).

206. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 175 (Del. 1986).

207. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1264–65 (Del. 1989).

208. AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 116 (Del. Ch. 1986).

209. City Cap. Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 803 (Del. Ch. 1988) (subsequent history omitted).

210. Grand Metro. Pub., Co. v. Pillsbury Co., 558 A.2d 1049, 1061 (Del. Ch. 1988) (subsequent history omitted).

211. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (subsequent history omitted).

212. *See supra* Part IV.

213. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1063–64 (1997).

of Delaware's old-line firms.[214] He had both litigated cases and served as a board-room advisor.[215] He was also a prolific author who defended Delaware law against competing regimes like the Model Business Corporation Act and the American Law Institute's *Principles of Corporate Governance.*[216] And he had questioned the rapid and significant developments during the Reformation Era.[217] He strongly supported board-centrism, but saw less of a need for equitable review to backstop director decision-making. He viewed the DGCL—rather than fiduciary duties—as the cornerstone of Delaware law. As Chief Justice, he displaced Justice Moore as the principal Delaware voice on corporate law.

The other personnel change came two years later, in 1994, when Governor Tom Carper made the controversial decision not to reappoint Justice Moore. Delaware lore ascribes the decision to senior practitioners' dissatisfaction with Justice Moore's strong, even domineering personality.[218] But even before Justice Moore's departure, Chief Justice Veasey's presence diluted his influence.

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214. *Member Spotlight: E. Norman Veasey*, 2013 BUS. L. TODAY 1, 1 ("He began his career at the Delaware law firm of Richards, Layton & Finger, where he served as managing partner and chief executive officer.").

215. *See id.*

216. *See* Michael P. Dooley & E. Norman Veasey, *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. L. 503, 531–42 (1989); E. Norman Veasey & Julie M.S. Seitz, *The Business Judgment Rule in the Revised Model Act, the* Trans Union *Case, and the ALI Project—A Strange Porridge*, 63 TEX. L. REV. 1483, 1505 (1985).

217. *See generally* E. Norman Veasey, *Duty of Loyalty: The Criticality of the Counselor's Role*, 45 BUS. L. 2065, 2065–83 (1990); E. Norman Veasey, Jesse A. Finkelstein & Robert J. Shaughnessy, *The Delaware Takeover Law: Some Issues, Strategies and Comparisons*, 43 BUS. L. 865, 865–86 (1988); E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. L. 399, 399–422 (1987); E. Norman Veasey, *The New Incarnation of the Business Judgment Rule in Takeover Defenses*, 11 DEL. J. CORP. L. 503, 503–12 (1986); E. Norman Veasey, *Further Reflections on Court Review of Judgments of Directors: Is the Judicial Process Under Control?*, 40 BUS. LAW. 1373, 1373–82 (1985); E. Norman Veasey, *New Insights Into Judicial Deference to Directors' Business Decisions: Should We Trust the Courts?*, 39 BUS. L. 1461, 1461–76 (1984).

218. *See* David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 158–59 (1997) (noting that "[a] much-reported recent incident involving the selection process reinforces the point that Delaware's justices have reason to be sympathetic to the interests of local lawyers. Delaware's justices are typically reappointed as a matter of course. However, when Justice Andrew Moore's twelve-year term came to an end in early 1994, the nomination committee declined to submit his name to the governor as an acceptable choice. It was widely believed that the refusal to renominate Moore had little to do with the quality of his decisionmaking—which was, and is, seen as highly competent—and everything to do with his frequent belittling of the lawyers who appeared before him."); *id.* at 133–34 n.19 ("The bar's influence was particularly striking when Justice Andrew Moore's 12-year term expired in 1994. Rather than a list of multiple qualified candidates, the nominating commission excluded Moore and submitted exactly one name to the governor—Vice Chancellor Carolyn Berger."); *id.* at 159 n.91 (citing Richard B. Schmitt, *Delaware Governor Picks Trial Judge for Supreme Court*, WALL ST. J., May 26, 1994, at B7) (noting allegations that the law firm of Skadden, Arps, Slate, Meagher & Flom influenced the outcome and stating that "the main case against [Justice Moore] appeared to be that he was sometimes verbally abusive to lawyers and insensitive to their needs in scheduling hearings"); *cf.* Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 HASTINGS L.J. 287, 297–98 n.41 (1996) ("In 1994, in a politically charged appointments process, Chancellor Berger replaced Judge Moore on the Delaware Supreme Court.").

During the Moderating Era, judicial decisions began explicitly identifying certainty and predictability as goals for Delaware law.[219] After the significant judicial innovation during the Reformation Era, that change in tone was understandable. In one of the more poetic examples, the Delaware Supreme Court wrote in 1998 that "[t]his Court has endeavored to provide the directors with clear signal beacons and brightly lined-channel markers as they navigate with due care, good faith, and loyalty on behalf of a Delaware corporation and its shareholders."[220] Chief Justice Veasey also emphasized those goals in his speeches and writings.[221]

After leaving the bench, Chief Justice Veasey trenchantly described his time leading the Delaware Supreme Court as "a rational period of some clarification" that nevertheless left "some residual ambiguity in Delaware jurisprudence."[222] That description captures the essence of the Moderating Era.

A. Moderating Entire Fairness

Decisions from the Moderating Era addressed a series of issues involving entire fairness. One was whether entire fairness only applied to squeeze-outs or whether that standard applied generally to interested transactions with a controlling stockholder. The Delaware Supreme Court took the latter view.[223]

A second issue involved whether the use of stockholder-protective devices such as approval by a special committee of independent directors or conditioning the transaction on a majority-of-the-minority vote could reduce the standard of review from entire fairness to the business judgment rule. In its High Reformation decision in *Weinberger*, the Delaware Supreme Court had written that the outcome "could have been entirely different" if the board had established a committee of independent directors to negotiate the squeeze-out and suggested that "a showing that the action taken was as though each of the

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219. E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1410.

220. Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998); *see* Broz v. Cellular Info. Sys., 673 A.2d 148, 159 (Del. 1996) ("In reaching our conclusion on this point, we note that certainty and predictability are values to be promoted in our corporation law."); Williams v. Geier, 671 A.2d 1368, 1385 n.36 (Del. 1996) ("Directors and investors must be able to rely on the stability and absence of judicial interference with the State's statutory prescriptions.").

221. E. Norman Veasey, *An Economic Rationale for Judicial Decisionmaking in Corporate Law*, 53 BUS. L. 681, 688–89 (1998) ("Case law should be reasonably stable, predictable, and dynamic. It is obvious, therefore, that there is a tension between dynamism and stability in the development of the case law . . . . In the 1980s, the takeover era put quite a strain on courts . . . ."); *cf. id.* at 694–95 (highlighting that "complete predictability could theoretically have a cost to the stockholders if that very predictability were manipulated by management to the stockholders' disadvantage. And no doubt some managers would prefer to be in another jurisdiction that provides more opportunities to avoid takeovers than Delaware's more predictable case law would allow. Nevertheless, stability is a stated goal of Delaware Supreme Court jurisprudence.").

222. Veasey & Di Guglielmo, *supra* note 219, at 1404.

223. *See* Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (applying entire fairness to controlled corporation's purchase of a block of stock from another controlled corporation); Nixon v. Blackwell, 626 A.2d 1366, 1375–76 (Del. 1993) (applying entire fairness to a compensation program that offered liquidity to management representatives of the controlling stockholder through a stock repurchase plan and corporate funded life insurance).

contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness."[224] Two years later, in the *Getty Oil* decision, the justices considered a situation in which the parent and subsidiary empowered their management teams to negotiate against each other and conditioned the merger on a majority-of-the-minority vote.[225] The Delaware Supreme Court held that the combination could only shift the burden of proof to the plaintiffs to prove unfairness.[226]

Against that backdrop, Chancellor Allen issued his High Reformation decision in *Trans World Airlines*, where he held that the use of a special committee or a majority-of-the-minority vote standing alone would result in the business judgment rule applying rather than the entire fairness test.[227] Two years later, at the start of the Moderating Era, then-Vice Chancellor Jacobs issued his decision in *Citron*, where he concluded that under the Delaware Supreme Court's reasoning in *Getty Oil*, conditioning a squeeze-out transaction on either the approval of a special committee or a majority-of-the-minority vote would not restore the business judgment rule but only shift the burden of proof to the plaintiff to establish unfairness.[228]

Midway through the Moderating Era, the issue reached the Delaware Supreme Court. In *Kahn v. Lynch*, the justices held that entire fairness remained "the exclusive standard of judicial review" and that a protective device like a special committee or majority-of-the-minority vote could only shift the burden of proof.[229] Although that ruling imposed a high burden on the defendants, Chief Justice Veasey and his colleagues elsewhere stressed the importance of stability when applying the entire fairness test, noting that the standard of review should not be applied in a way "which could do violence to the stability of our corporation law."[230]

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224. Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983) (noting that the "result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm's length. Since fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.") (citations omitted).

225. Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985).

226. *Id.* at 937 ("However, approval of a merger, as here, by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs."). Commenting on the negotiations between the managerial teams, the Delaware Supreme Court found that "the adversarial nature of the negotiations completely supports a conclusion that they were conducted at arm's length." *Id.*

227. *In re* Trans World Airlines, Inc. S'holder Litig., No. 9844, 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988) (explaining that "[b]oth the device of the special negotiating committee of disinterested directors and the device of a merger provision requiring approval by a majority of disinterested shareholders, when properly employed, have the judicial effect of making the substantive law aspect of the business judgment rule applicable and, procedurally, of shifting back to plaintiffs the burden of demonstrating that such a transaction infringes upon rights of minority shareholders."), *abrogated by* Kahn v. Lynch Commc'n Sys., 638 A.2d 1110 (Del. 1994).

228. Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 501–02 (Del. Ch. 1990). When referencing the different result in *Trans World*, the *Citron* decision noted that the parties there had not cited *Getty Oil. See id.* at 501 n.15.

229. *Kahn*, 638 A.2d at 1117.

230. Nixon v. Blackwell, 626 A.2d 1366, 1381 (Del. 1993).

B. Moderating Enhanced Scrutiny

During the Moderating Era, the Delaware Supreme Court started the process of integrating the different types of enhanced scrutiny into a single test. One part of that effort involved reframing *Blasius* as a species of *Unocal* review. Another part involved retooling the *Unocal* and *Revlon* standards to call for the same range-of-reasonableness inquiry.

The initial Moderating Era decision addressing *Blasius* slightly pre-dated Chief Justice Veasey's arrival on the court. In *Stroud v. Grace*,[231] Justice Moore wrote that *Blasius* and *Unocal* were "not mutually exclusive" and that when directors responded to a threat to corporate control involving voting, "a court must recognize the special import of protecting the shareholders' franchise within *Unocal*'s requirement that any defensive measure be proportionate and 'reasonable in relation to the threat posed.'"[232] By contemplating the application of *Blasius* within *Unocal*, the *Stroud* decision began the process of eliminating *Blasius* as a separate standard.

The Moderating Era's incorporation of *Blasius* into *Unocal* continued in *Unitrin*, where the Delaware Supreme Court split the second prong of *Unocal* into two parts.[233] Initially, a court applying the second prong of *Unocal* would have to evaluate whether the defensive measure was "draconian," meaning assessing whether it was either "preclusive or coercive."[234] If so, then the defensive measure was disproportionate and invalid. If not, then the court would address the original *Unocal* question of whether the defensive measure was reasonable. The *Unitrin* decision applied the concepts of preclusion and coercion within the modified *Unocal* test to evaluate a defensive measure that the trial court had

231. Stroud v. Grace, 606 A.2d 75 (Del. 1992).

232. *Id.* at 92 n.3. The justices also described the circumstances where *Blasius* might apply independently as "situations where boards of directors deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote." *Id.* at 91. That language interpreted *Blasius* as requiring subjective bad faith, even though Chancellor Allen had explained that interference with the franchise could result from an unintentional breach of the duty of loyalty. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 663 (Del. Ch. 1988) (concluding that "even finding the action taken was taken in good faith, it constituted an unintended violation of the duty of loyalty that the board owed to the shareholders. I note parenthetically that the concept of an unintended breach of the duty of loyalty is unusual but not novel."). The different approaches created uncertainty about when and why *Blasius* would apply, undermining the use of the doctrine and making it seem more like "an after-the-fact label placed on a result" (i.e., disloyal conduct), rather than "a genuine standard of review that is useful for the determination of cases." Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 788 (Del. Ch. 2007) (Strine, V.C.); *see* Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000) (Strine, V.C.) (asserting that under an intent-based test, "invocation of the *Blasius* standard of review usually signals that the court will invalidate the board action under examination"). That uncertainty in turn provided an additional rationale for incorporating the *Blasius* test into *Unocal* and eliminating it as a separate standard of review. *See generally infra* Part VII.B.2.

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

234. *Id.* at 1367 (explaining that "[t]he Court of Chancery should have directed its enhanced scrutiny: first, upon whether the Repurchase Program the Unitrin Board implemented was draconian, by being either preclusive or coercive and; second, if it was not draconian, upon whether it was within a range of reasonable responses to the threat American General's Offer posed. Consequently, the interlocutory preliminary injunctive judgment of the Court of Chancery is reversed."); *id.* at 1383 (applying the preclusive or coercive standard to assess whether an insurgent could prevail in a proxy contest); *id.* at 1387 ("In the modern takeover lexicon, it is now clear that since *Unocal*, this Court has consistently recognized that defensive measures which are either preclusive or coercive are included within the common law definition of draconian [and are invalid].").

found rendered a proxy contest to elect insurgent directors a mathematical impossibility. The justices thus seemed to be taking an even bigger step towards folding *Blasius* into *Unocal*, first by introducing *Blasius*-style language into the *Unocal* test and then by using the modified test to review issues touching on voting rights.[235]

The reframing of *Revlon* began in *QVC*.[236] Authored by Chief Justice Veasey, the decision clarified *Revlon*'s trigger and application.[237] Some read the Delaware Supreme Court's decision in *Time* as limiting *Revlon* to corporate breakups and de-emphasizing the role of a change of control in triggering enhanced scrutiny.[238] The *QVC* decision eliminated any doubt about the triggering role of a change of control, explaining that enhanced scrutiny applied in that context because of "(a) the threatened diminution of the current stockholders' voting power; (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again; and (c) the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights."[239] The *QVC* decision also explained that once enhanced scrutiny applied, the court had to make two determinations: "(a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[240]

The *QVC* decision then emphasized the degree of deference that was warranted even when enhanced scrutiny applied:

> The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not a **perfect** decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.[241]

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235. *See* Chesapeake Corp. v. Shore, 771 A.2d 293, 320–21 (Del. Ch. 2000) (Strine, V.C.) ("The Supreme Court's *Unitrin* opinion seems to go even further than *Stroud* in integrating *Blasius's* concern over manipulation of the electoral process into the Unocal standard of review."); Bradley R. Aronstam, *The Interplay of Blasius and Unocal-A Compelling Problem Justifying the Call for Substantial Change*, 81 OR. L. REV. 429, 470–71 (2002) (discussing extent to which *Unitrin* properly incorporated and applied the principles of *Blasius*); Gregory W. Werkheiser, *Defending the Corporate Bastion: Proportionality and the Treatment of Draconian Defenses from* Unocal *to* Unitrin, 21 DEL. J. CORP. L. 103, 124 (1996) ("[F]ollowing *Unitrin*, the lines between *Blasius's* 'compelling justification' standard and the traditional *Unocal* test of proportionality have been blurred.").

236. *See generally* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994).

237. *Id.* at 36.

238. *Id.* at 46.

239. *Id.* at 45.

240. *Id.*

241. *Paramount Commc'ns Inc.*, 637 A.2d at 34 (emphasis in original).

Several phrases in this passage stress the importance of judicial deference to independent directors. Yet despite that deferential language, the Delaware Supreme Court affirmed and broadened an injunction issued by the Court of Chancery.[242] The Delaware Supreme Court also brushed aside the acquirer's claim to "vested contract rights" under the merger agreement that it could enforce notwithstanding the sell-side fiduciary breach.[243]

Two later decisions—*Arnold*[244] and *Santa Fe Pacific*[245]—also addressed the *Revlon* trigger. *Arnold* explained that *Revlon* would apply

> in at least the following three scenarios: (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company," (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company," or (3) when approval of a transaction results in a "sale or change of control."[246]

The *Santa Fe Pacific* decision used the same language, but dropped the reference to "at least the following" that implied the possibility of other scenarios.[247] Three major Moderating Era decisions thus sought to eliminate uncertainty from the Reformation Era by addressing when enhanced scrutiny under *Revlon* would apply.

With *QVC* having introduced the concept of range-of-reasonableness review, the Delaware Supreme Court's *Unitrin* decision incorporated that concept into *Unocal*.[248] As discussed, the *Unitrin* decision split the second prong of *Unocal* into two parts, with the first asking whether a defensive measure was preclusive or coercive, in which case it would be disproportionate and invalid. But if a defensive measure passed that initial inquiry, then the *Unitrin* decision modified the *Unocal* reasonableness test to require instead that the directors show their actions fell within a range of reasonableness.[249] Citing *QVC*, the *Unitrin* court explained that "[t]he *ratio decidendi* for the 'range of reasonableness' standard is a need of the board of directors for latitude in discharging its fiduciary duties to the corporation and its shareholders when defending against perceived threats" and "[t]he concomitant requirement is for judicial restraint."[250] The justices thus took another step

242. *Id.* at 49–51 (broadening injunction to include termination fee that Court of Chancery had not enjoined).

243. *Id.* at 50–51 (explaining that "[i]n effect, Viacom's argument is that the Paramount directors could enter into an agreement in violation of their fiduciary duties and then render Paramount, and ultimately its stockholders, liable for failing to carry out an agreement in violation of those duties. Viacom's protestations about vested rights are without merit. This Court has found that those defensive measures were improperly designed to deter potential bidders, and that such measures do not meet the reasonableness test to which they must be subjected. They are consequently invalid and unenforceable under the facts of this case.").

244. Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270 (Del. 1994).

245. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59 (Del. 1995).

246. *Arnold*, 650 A.2d at 1290 (emphasis added) (citations omitted).

247. *Sante Fe Pac.*, 669 A.2d at 71.

248. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

249. *Id.* at 1387–88.

250. *Id.* at 1388.

towards unifying the *Revlon* and *Unocal* standards, which some had viewed as separate,[251] by using similar language to frame the analysis and simultaneously making both standards more deferential to directors.[252]

C. Moderating Derivative Actions

During the Moderating Era, the Delaware Supreme Court did not make major changes to the law governing derivative actions. The Moderating Era's main contribution was *Rales v. Blasband*, which established a broader standard for demand futility that would apply where *Aronson* did not fit.[253] Introducing that standard, however, raised new issues, including when each standard would apply. Wrestling with that question eventually would become a frequent threshold issue when defendants moved to dismiss a derivative action on the basis of demand futility, leading to Court of Chancery decisions calling for the

251. *See* Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: The Impact of* QVC *and Its Progeny*, 32 HOUS. L. REV. 945 (1995) (arguing for the existence of a gap between *Unocal* and *Revlon* and suggesting that *QVC* narrowed it); Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After* QVC *and* Technicolor*: A Unified Standard (and the End of* Revlon *Duties?)*, 49 BUS. L. 1593 (1994) (perceiving *QVC* as a step towards unifying takeover law); Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: Bridging the* Unocal/Revlon *Gap*, 35 ARIZ. L. REV. 989 (1993) (arguing for the existence of a gap between *Unocal* and *Revlon* and recommending its elimination).

252. *See* James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 384 (2018) (discussing "the Delaware Supreme Court's movement of *Unocal* in the direction of the traditional deferential business judgment rule . . . ."); Robert B. Thompson & D. Gordon Smith, *Toward A New Theory of the Shareholder Role: 'Sacred Space' in Corporate Takeovers*, 80 TEX. L. REV. 261, 261–62 (2001) ("The actual results of cases decided under the *Unocal* standard reflect a much more passive judicial role that seems to distrust shareholder decision-making and to prefer that of directors."); Paul L. Regan, *Delaware Court of Chancery Invalidates Limited Duration No-Hand Poison Pill*, 21 BANK & CORP. GOVERNANCE L. REP. 900, 904 (1999) (arguing that *Unocal* review gives target directors "a fairly forgiving, if not entirely free, pass"). *See generally* WILLIAM T. ALLEN, REINER KRAAKMAN & VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 541 (5th ed. 2016) ("*Unitrin* makes clear how limited an 'enhancement' to the business judgment rule *Unocal* can be.").

253. Rales v. Blasband, 634 A.2d 927, 929 (Del. 1993).

Delaware Supreme Court to fold the narrower *Aronson* test into the broader *Rales* inquiry.[254] Nearly three decades later, during the Current Era, the justices took that step.[255]

D. Moderating the Scope of Equity Through Statutory Compliance

A final point of emphasis during the Moderating Era was to elevate the significance of statutory compliance. Law and equity have always stood in tension, with equity tempering the occasional unfairness of the law. During the Quiet Era and the Responding Era, some practitioners argued that as long as a transaction complied with the terms of the statute, then a court could not intervene. The Delaware Supreme Court held otherwise in *Schnell*, famously stating that "inequitable action [by corporate fiduciaries] does not become permissible simply because it is legally possible."[256] Although that holding authorized a second level of equitable review, the Delaware courts rarely deployed equitable principles to alter a statutory result.[257] It was during the Reformation Era, and particularly the High Reformation, that equitable principles came to the fore.[258]

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254. *See* Hughes v. Hu, No. 2019-0112, 2020 WL 1987029, at *12 (Del. Ch. Apr. 27, 2020) ("Conceptually, . . . the *Rales* test supersedes and encompasses the *Aronson* test, making the *Aronson* test a special application of *Rales*."); *In re* Wal-Mart Stores, Inc. Del. Derivative Litig., No. 7455, 2016 WL 2908344, at *11 (Del. Ch. May 13, 2016) ("[T]he *Rales* test encompasses all relevant aspects of the *Aronson* test."); Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, No. 9503, 2015 WL 4192107, at *17 n.131 (Del. Ch. July 13, 2015) (same); David B. Shaev Profit Sharing Account v. Armstrong, No. 1449, 2006 WL 391931, at *4 (Del. Ch. Feb. 13, 2006) ("[T]he *Rales* test, in reality, folds the two-pronged *Aronson* test into one broader examination."), *aff'd*, 911 A.2d 802 (Del. 2006) (ORDER); Guttman v. Huang, 823 A.2d 492, 501 (Del. Ch. 2003) ("Upon closer examination, however, that singular [*Rales*] inquiry makes germane all of the concerns relevant to both the first and second prongs of *Aronson.*"); *see also* Buckley Fam. Tr. v. McCleary, No. 2018-0903, 2020 WL 1522549, at *9 (Del. Ch. Mar. 31, 2020) ("This court has commented on many occasions that the *Aronson* and *Rales* tests look different but they essentially cover the same ground."); Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chicago v. Smith, No. 11000, 2017 WL 1382597, at *5 (Del. Ch. Apr. 18, 2017) ("The analyses in both *Rales* and *Aronson* drive at the same point; they seek to assess whether the individual directors of the board are capable of exercising their business judgment on behalf of the corporation.").

255. *See infra* Part IX.C.

256. Schnell v. Chris-Craft Indus. Inc., 285 A.2d 437, 439 (Del. 1971).

257. Jacobs, *supra* note 43, at 5 ("[U]ntil the early 1980s American corporate law, as practiced by the bar and as decided by the courts, fell most often on the 'law' side [of the law and equity divide]."). Jacobs explains that:

> To some extent that was due to the influence of the corporate bar, whose bread and butter included drafting opinion letters that attested to the validity of transactions that involved enormous assets and potential liabilities. For that constituency, predictability and the need to advise corporate clients with relative confidence was and always will be a predominate value. But, the "law" model orientation also reflected the sociological fact that the 1960s were the tail end of a decades-long era during which courts were far less skeptical about the motivations, and were far more confident of the decisions, of corporate managers and boards than they are today.

Id. at 6.

258. *Id.* at 8 ("Beginning in the mid-1980s, equitable principles took on an entirely new dimension. The original equitable principle, you may recall, was that courts could intervene to remedy unfair fiduciary exercises of power, even if the fiduciary conduct conformed to bright-line legal rules.").

Under Chief Justice Veasey's leadership, the Delaware Supreme Court reemphasized statutory compliance. The principal illustration is *Williams v. Geier*,[259] where a stockholder plaintiff challenged an amendment to a controlled corporation's charter that authorized tenured voting.[260] The Court of Chancery applied enhanced scrutiny and held that the amendment fell within the range of reasonableness.[261] The Delaware Supreme Court affirmed but rejected the application of enhanced scrutiny. Instead, the justices emphasized the company's compliance with the statute and applied the business judgment rule,[262] stressing that "the relief requested by [the stockholder-plaintiff], if granted, would introduce an undesirable degree of uncertainty into the corporation law. Directors and investors must be able to rely on the stability and absence of judicial interference with the State's statutory prescriptions."[263] The justices added that "absent a showing of inequitable conduct on the part of the board, compliance with the applicable corporate governance regime (be it statute or bylaw) will generally shield corporate action from judicial interference."[264] The justices thus preserved the possibility that inequitable conduct could play a role in the outcome, while elevating the significance of statutory compliance.

E. Themes from the Moderating Era

The Reformation Era and the Moderating Era took contrasting approaches to the development of Delaware law. Unlike the Reformation Era, the Moderating Era did not witness the Delaware Supreme Court creating any significant new fiduciary rules. The Delaware Supreme Court tweaked Reformation Era innovations with the apparent goals of harmonizing their approaches, limiting the triggers for their application, increasing the level of deference to directors, and using statutory compliance as an indicator of fiduciary propriety. The principal fiduciary innovation came in the form of Chancellor Allen's *Caremark* decision in 1996.[265]

In terms of results, the Moderating Era favored defendants to a greater degree than the Reformation Era. Stockholder plaintiffs notched few victories. Hostile bidders secured the most notable wins, including in *QVC* (1994), where Wachtell Lipton and Young Conaway Stargatt & Taylor represented a topping bidder,[266] and *Mentor Graphics* (1998), where Latham & Watkins LLP and Richards Layton represented a bidder who launched a tender offer and proxy contest.[267] Cases rarely went the distance through trial.[268]

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

260. *Id.* at 1370.

261. *Id.* at 1376.

262. *Id.* at 1371, 1373–78.

263. *Id.* at 1385 n.36 (citations omitted).

264. *Williams*, 671 A.2d at 1385 n.36.

265. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 963–66 (Del. Ch. 1996)

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

267. *See* Mentor Graphics Corp. v. Quickturn Design Sys., 728 A.2d 25 (Del. Ch. 1998), *aff'd sub nom.* Quickturn Design Sys. v. Shapiro, 721 A.2d 1281 (Del. 1998).

268. The anecdotal assessments in this paragraph reflect the author's impressions, informed by having practiced during much of the era and having engaged in extensive Westlaw searching to find disconfirming examples.

Rhetorically, the Moderating Era made explicit claims about the stability and predictability of Delaware law. After the major changes during the Reformation Era, emphasizing stability and predictability helped calm the waters. And at least compared to the Reformation Era, the Moderating Era delivered on those claims. The Moderating Era's changes were relatively small. Moreover, the decisions likely seemed more predictable because plaintiffs secured far fewer wins. When a plaintiff prevails, a court necessarily tells the defendants that they have conceivably (at the pleading stage) or actually (at the trial stage) done something wrong, so those decisions tend to resonate disproportionately and can generate concern. The absence of significant plaintiff-side wins made the era less unsettling for directors and their counsel. And while the Moderating Era continued to emphasize board-centrism, it was a more deferential version that stressed the presumed disinterestedness and independence of directors.

VII. THE GENERATIVE ERA: 1998 TO 2013

The next era began in 1998, when Leo E. Strine, Jr. joined the Court of Chancery as a Vice Chancellor. With his brilliant mind, rapier wit, and outspoken nature, Vice Chancellor Strine quickly became Delaware's leading voice. After 13 years as a Vice Chancellor, his already considerable stature grew when he became Chancellor in 2011, and he cemented his influence when he became Chief Justice in 2014. In addition to writing many path-breaking decisions, Strine authored articles throughout his career at a pace that few full-time academics can match. It is safe to say that no one has had a bigger influence on Delaware corporate law.

Then-Vice Chancellor Strine's arrival was part of a changing of the guard at the Court of Chancery. Then-Vice Chancellor William B. Chandler, III, took over as Chancellor in 1997, succeeding Chancellor Allen who retired at the end of his term.[269] Then-Vice Chancellor Chandler had joined the Court of Chancery from the Delaware Superior Court in 1989, as the Reformation Era ended. Vice Chancellor Stephen P. Lamb filled the vacancy created by then-Vice Chancellor Chandler's elevation.[270] Vice Chancellor Lamb had been involved in many of the cases from the Reformation Era, primarily as a defense attorney, but also as part of the team that represented the bidder in *Revlon*. Then-Vice Chancellor Myron T. Steele had joined the court in 1994, also coming from the Delaware Superior Court. He moved to the Delaware Supreme Court in 2000 and became Chief Justice in 2004. Vice Chancellor John W. Noble replaced him on the Court of Chancery. Only then-Vice Chancellor Jacobs had been a trial judge during the Reformation Era. He joined the court with Chancellor Allen in 1985, then moved to the Delaware Supreme Court in 2003. Vice Chancellor Donald F. Parsons, Jr., filled his seat.

The Generative Era covers then-Vice Chancellor and later Chancellor Strine's time on the Court of Chancery. During this era, he and his colleagues introduced concepts at the Chancery level that responded to Reformation Era innovations. But unlike the Moderating

269. Paul A. Fioravanti, Jr. & Michael Hanrahan, *The Delaware Court of Chancery: 1992–2017*, *in* COURT OF CHANCERY OF THE STATE OF DELAWARE: 1792–2017, at 66 (2017).

270. *Id.*

Era's efforts at doctrinal stabilization, the Generative Era proposals contemplated doctrinal change.

Many of those proposals appeared in a 2001 article authored by then-Vice Chancellor Strine, then-Vice Chancellor Jacobs, and former Chancellor Allen.[271] Colloquially known as the "Three Chancellors Article," it set out a to-do list of reforms.[272] Most of the proposals became law,[273] but that principally happened during the Implementing Era, after then-Chancellor Strine became Chief Justice. In addition, the members of the Court of Chancery during the Generative Era responded in real-time when they disagreed with Delaware Supreme Court decisions. Those responses effectively operated as additional proposals for change.

The first six years of the Generative Era (1998 to 2004) overlapped with the second half of Chief Justice Veasey's term. During this period, the Delaware Supreme Court largely maintained the status quo. Despite that conservative approach, there were still decisions that surprised the members of the Court of Chancery and drew strong reactions.

The dynamics on the Delaware Supreme Court changed only moderately in 2004 when Chief Justice Steele succeeded Chief Justice Veasey. During the ensuing nine years of the Generative Era (2004 to 2013), the Delaware Supreme Court continued its conservative approach, but with a greater emphasis on alternative entity law and the strict enforcement of contracts.

The Generative Era proposals from the Court of Chancery reflected the continuing dynamism of Delaware law. At times, however, the differences between the Chancery-level proposals and Delaware Supreme Court precedent raised questions about how the law would apply to particular cases. During the Generative Era, the Court of Chancery sought to achieve meaningful change in each of the three major areas that this article has examined, but those areas only partially reflect the degree of dynamism that marked the era. The members of the Court of Chancery also pushed for change on issues beyond the scope of this article. For example:

- Early in the Generative Era, both Chancellor Chandler and then-Vice Chancellor Strine called for discarding *Brophy*,[274] a Quiet Era decision that treated insider trading as a breach of fiduciary duty, reasoning that the federal

271. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 58 BUS. LAW. 1287 (2001) [hereinafter Three Chancellors Article].

272. That the article reflected a to-do list should not be controversial. Two of the authors, joined by Professor Lawrence Hamermesh, their "primary sounding board" on their earlier piece, looked back at the Three Chancellors Article, acknowledged that it proposed changes, and reviewed the extent to which the Delaware courts had adopted those recommendations. *See* Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 322–25 (2022) (showing evolution of Delaware corporate law since 2001); *see also* Lawrence A. Hamermesh & Jack B. Jacobs, *Lyman Johnson's Invaluable Contribution to Delaware Corporate Jurisprudence*, 74 WASH. & LEE L. REV. 909, 923 (2017) (referencing the "comprehensive doctrinal critique set forth in an article co-authored by former Chancellor William T. Allen and then-Vice Chancellors Jack B. Jacobs and Leo Strine and published one year later in *The Business Lawyer*").

273. *See* Hamermesh, Jacobs & Strine, *supra* note 272, at 322–25.

274. Brophy v. Cities Serv. Co., 70 A.2d 5 (Del. Ch. 1949).

securities laws had eliminated the need for a state-level remedy.[275] A later Generative Era decision argued for retaining *Brophy*, but limiting its application to situations where the corporation suffered discernable monetary harm.[276] In 2011, towards the end of the Generative Era, the Delaware Supreme Court rejected the effort to cut back on, much less to eliminate *Brophy*, reaffirming that Delaware law treated insider trading as a breach of the duty of loyalty that would support a full disgorgement remedy.[277]

- In 2004, then-Vice Chancellor Strine argued for re-interpreting Chancellor Allen's decision in *Credit Lyonnais*[278] to discard the concept of a zone of insolvency and reject any shift in fiduciary duties from stockholders to creditors.[279] The Delaware Supreme Court adopted those proposals in 2007.[280]
- Also in 2004, then-Vice Chancellor Strine argued for changing appraisal law to make the deal price, minus synergies, first among equals as a valuation methodology.[281] Three years later, Vice Chancellor Lamb gave partial weight to that method in an appraisal.[282] After that, the deal-price metric lay dormant for six years until 2013, when the court used it to value a unique company with only one asset.[283] The method achieved prominence in a string of four Chancery decisions issued in 2015, during the Implementing Era, after then-Chancellor Strine became Chief Justice.[284] Two years later, also during the Implementing Era, Chief Justice Strine led the Delaware Supreme Cout in elevating the deal-price-less-synergies method to the level of doctrine.[285]

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275. *See In re* Oracle Corp., 867 A.2d 904, 927 (Del. Ch. 2004), *aff'd sub nom.* Oracle Corp. Derivative Litig. v. Oracel Corp., 872 A.2d 960 (Del. 2005); Goldman v. Isaacs, No. 18732, 2001 WL 1671439, at *1 (Del. Ch. Dec. 17, 2001).

276. Pfeiffer v. Toll, 989 A.2d 683, 698–708 (Del. Ch. 2010) (Laster, V.C.) (subsequent history omitted).

277. Kahn v. Kolberg Kravis Roberts & Co., LP, 23 A.3d 831 (Del. 2011).

278. *See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No 12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."); *id.* at *34 n.55 (illustrating how "[t]he possibility of insolvency can do curious things to incentives, exposing creditors to risks of opportunistic behavior and creating complexities for directors").

279. Prod. Res. Grp., LLC v. NCT Grp., Inc., 863 A.2d 772, 787–93 (Del. Ch. 2004).

280. N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 98 (Del. 2007).

281. Union Ill. 1995 Inv. LP v. Union Fin. Grp., 847 A.2d 340, 357 (Del. Ch. 2004).

282. Highfields Cap., Ltd. v. AXA Fin., Inc., 939 A.2d 34, 61 (Del. Ch. 2007).

283. Huff Fund Inv. P'ship v. CKx, Inc., No. 6844, 2013 WL 5878807, at *1 (Del. Ch. Nov. 1, 2013).

284. *See* Merion Cap. LP v. BMC Software, Inc., No. 8900, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015) (using a deal price as fair value); LongPath Cap., LLC v. Ramtron Int'l Corp., No. 8094, 2015 WL 4540443 (Del. Ch. June 30, 2015) (same); Merlin Partners v. AutoInfo, Inc., No. 8509, 2015 WL 2069417, at *5 (Del. Ch. Apr. 30, 2015) (same); *In re* Appraisal of Ancestry.com, Inc., No. 8173, 2015 WL 399726, at *24 (Del. Ch. Jan. 30, 2015) (same).

285. DFC Glob. Corp. v. Muirfield Value Partners, 172 A.3d 346, 367 (Del. 2017) ("[T]he deal price is the most reliable evidence of fair value in a certain case, and that's especially so in cases . . . where things like synergy gains or minority stockholder discounts are not contested."); *accord* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 141–42 (Del. 2019); Dell, Inc. v. Magnetar Glob. Event Driven Master

- Perhaps most significantly, beginning in 2005 then-Vice Chancellor Strine introduced a reinvigorated approach to contract interpretation grounded on powerful rhetoric about Delaware's public policy commitment to contractarianism.[286] That innovation has had so powerful a legacy as to deserve article-length treatment of its own.

A. Innovating with Entire Fairness

In the first area addressed in this Article, a series of Chancery-level proposals during the Generative Era called for updating Delaware's approach to entire fairness. One proposal involved the use of protective devices to alter the standard of review, a second addressed the operation of exculpation, and a third addressed the role of a breach of the duty of care.

1. Restoring the Business Judgment Rule

The first proposal contemplated a different approach to the standard of review for squeeze-out mergers. The Three Chancellors Article argued for the framework set out in Chancellor Allen's *Trans World Airlines* decision, under which the business judgment rule would apply if the squeeze-out merger was conditioned on *either* approval by a special negotiating committee of disinterested directors *or* approval by a majority-of-the-minority of the disinterested stockholders.[287] In 2005, however, then-Vice Chancellor Strine proposed a different concept: restoring the business judgment rule if the squeeze-out merger was conditioned on *both* protective devices.[288] Then-Chancellor Strine implemented that

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Fund Ltd., 177 A.3d 1, 30–31 (Del. 2017). *See generally In* re Appraisal of Columbia Pipeline Grp., No. 12736, 2019 WL 3778370, at *17 (Del. Ch. Aug. 12, 2019) (describing evolution in appraisal law). For competing academic assessments, compare Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221 (2018), with William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61 (2018). For an examination of the decisions' impact, see Wei Jiang, Tao Li & Randall Thomas, *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. REV. 2133 (2020).

286. *E.g.*, ABRY Partners V, LP, v. F&W Acquisition LLC, 891 A.2d 1032, 1059–60 (Del. Ch. 2006). (reasoning that "[a]s the Buyer notes, there is a strong tradition in American law that holds that contracts may not insulate a party from damages or rescission resulting from the party's fraudulent conduct . . . . On the other hand, there is also a strong American tradition of freedom of contract, and that tradition is especially strong in our State, which prides itself on having commercial laws that are efficient. The Seller stresses this strain in our law to buttress its argument that contracts between sophisticated parties with equal bargaining strength should be honored without intrusion by the policy concerns of unelected judges."); Libeau v. Fox, 880 A.2d 1049, 1056 (Del. Ch. 2005) ("When parties have ordered their affairs voluntarily through a binding contract, Delaware law is strongly inclined to respect their agreement, and will only interfere upon a strong showing that dishonoring the contract is required to vindicate a public policy interest even stronger than freedom of contract."), *aff'd in part, rev'd in part*, 892 A.2d 1068 (Del. 2006); Bateman v. 317 Rehoboth Ave., LLC, 878 A.2d 1176, 1185 (Del. Ch. 2005) (stating that "Delaware public policy strongly favor[s] the right of parties to contract" and calling for courts "not to interpret statutes in derogation of that right broadly").

287. Allen, Jacobs & Strine, Three Chancellors Article *supra* note 271, at 1317.

288. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 643–44 (Del. Ch. 2005).

proposal in 2013 when he issued his landmark decision in *MFW*.[289] The Delaware Supreme Court did not weigh in on the proposals during the Generative Era. The Delaware Supreme Court adopted *MFW* at the start of the Implementing Era.[290]

2. Expanding Exculpation and Resisting Emerald Partners

A second proposal contemplated a different approach to Section 102(b)(7). In March 1999, the Delaware Supreme Court reversed a grant of summary judgment in favor of the defendants in *Emerald Partners*.[291] At the trial court level, then-Vice Chancellor Jacobs required the plaintiffs to come forward with evidence that particular directors had acted disloyally or in bad faith. When the plaintiffs failed, he ruled in the defendants' favor. On appeal, the justices held that a Section 102(b)(7) provision was "in the nature of an affirmative defense," such that the defendants would "normally bear the burden of establishing each of its elements."[292] The high court reversed the Court of Chancery for requiring the plaintiff to come forward with evidence of bad faith.[293]

That ruling did not only affect summary judgment motions. A court usually cannot adjudicate an affirmative defense on a motion to dismiss. Before *Emerald Partners*, the Court of Chancery had applied Section 102(b)(7) at the pleading stage by looking for specific allegations indicating disloyalty or bad faith on the part of individual directors.[294] Then-Vice Chancellor Strine asserted that *Emerald Partners* had not altered the Court of Chancery's ability to dismiss claims at the pleading stage under Section 102(b)(7).[295] Relying on public policy arguments, he reasoned that the purpose of Section 102(b)(7) was not just to protect against damages, but "to guarantee that the defendant directors do not suffer discovery or a trial simply because the plaintiffs have stated a non-cognizable damages claim for a breach of the duty of care."[296] He contended that "[t]o give the exculpatory charter provision any less substantial effect would be to strip away a large measure of the protection the General Assembly has accorded directors through its enactment of [Section

289. *In re* MFW S'holders Litig., 67 A.3d 496, 536 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

290. *See infra* Part VIII.A.

291. Emerald Partners v. Berlin, 726 A.2d 1215 (Del. 1999).

292. *Id.* at 1223–24.

293. *Id.* at 1218.

294. *E.g.*, Apple Comput., Inc. v. Exponential Tech., Inc., No. 16315, 1999 WL 39547, at *8 (Del. Ch. Jan. 21, 1999); *see also* Goodwin v. Live Ent., Inc., No. 15765, 1999 WL 64265, at *6 (Del. Ch. Jan. 25, 1999) (Strine, V.C.) (according to the exculpatory provision, "Goodwin may survive summary judgment only by pointing to record evidence creating a genuine factual dispute whether the defendant directors breached their fiduciary duties of good faith or loyalty. Goodwin's disclosure, *Revlon*, and unfair dealing claims will therefore survive or fail summary judgment depending on the presence or absence of record evidence of bad faith or disloyalty."), *aff'd*, 741 A.2d 16 (Del. 1999).

295. *In re* Gen. Motors Class H S'holders Litig., 734 A.2d 611, 619 n.7 (Del. Ch. 1999) (Strine, V.C.) (explaining that "I do not read *Emerald Partners* as precluding a Rule 12(b)(6) dismissal of claims that the directors breached their fiduciary duty of care on the basis of an exculpatory charter provision so long as dismissal on that *basis* does not *thereby* preclude plaintiffs from pressing well-pleaded allegations that the directors breached their fiduciary duties of loyalty and good faith.").

296. McMillan v. Intercargo Corp., 768 A.2d 492, 501–02 (Del. Ch. 2000).

102(b)(7)]."[297] From this standpoint, exculpation serves the same purpose as sovereign immunity and operates similarly.[298] The Three Chancellors Article took the same position.[299] Other members of the Court of Chancery generally followed then-Vice Chancellor Strine's lead.[300]

The Delaware Supreme Court, however, stood by its treatment of exculpation as an affirmative defense. In *McMullin v. Beran*, the justices reiterated that exculpation "is in the nature of an affirmative defense."[301] Then in a second decision in *Emerald Partners*, the justices again reversed the Court of Chancery—and again then-Vice Chancellor Jacobs—for not applying Section 102(b)(7) as an affirmative defense.[302] The justices in that decision described Section 102(b)(7) as intending "to exculpate directors from any personal

297. *Id.*

298. Delaware has a separate statute providing for sovereign immunity, but that statute uses different language than Section 102(b)(7). The sovereign immunity statute states that "[e]xcept as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages." DEL. CODE tit. 10, § 4011(a). Section 102(b)(7) authorizes a provision "eliminating or limiting the personal liability of a director or officer to the corporation or its stockholders for monetary damages . . . ." DEL. CODE tit. 8, § 102(b)(7). The sovereign immunity statute thus contemplates immunity "from suit" and from "all tort claims seeking recovery of damages." Section 102(b)(7) only speaks in terms of eliminating or limiting "liability . . . for monetary damages." It does not speak in terms of protection against "suit" or "claims." The Generative Era decisions did not engage with the distinction.

299. Allen, Jacobs & Strine, Three Chancellors Article, *supra* note 271, at 1305 (illustrating that "[a]s an analytical matter, to establish the section 102(b)(7) defense, all that the defendant directors should be required to do is demonstrate the existence of the exculpatory charter provision. By doing that, the directors establish that they cannot be held liable for damages on account of any breaches of the duty of care. The logical procedural consequence would be that the plaintiff who seeks a monetary recovery against the directors will have the burden to plead facts that support the inference (and the eventual burden to prove at trial) that the directors engaged in non-exculpated conduct that resulted in damage.").

300. *In re* Frederick's of Hollywood, Inc. S'holder Litig., No. 15944, 2000 WL 130630, at *6 (Del. Ch. Jan. 31, 2000) (Jacobs, V.C.) (explaining that "[t]he plaintiffs claim that the Delaware Supreme Court's decision in *Emerald Partners v. Berlin* precludes any consideration of this § 102(b)(7) defense on a motion to dismiss, because *Emerald Partners* holds that a § 102(b)(7) charter provision is 'in the nature of an affirmative defense' . . . . The plaintiffs misread *Emerald Partners.* This Court has interpreted the above-quoted language as not precluding a Rule 12(b)(6) dismissal of claims that the directors breached their fiduciary duty of care on the basis of an exculpatory charter provision, so long as a dismissal on that ground does not prevent a plaintiff from pursuing well-pleaded claims that the directors breached their fiduciary duty of loyalty.") (subsequent history and internal quotation marks omitted); O'Reilly v. Transworld Healthcare, Inc., 745 A.2d 902, 914 (Del. Ch. 1999) (Steele, V.C.) ("With the benefit of the Supreme Court's guidance, I now conclude that claims against directors can be dismissed pursuant to certificate of incorporation provisions tracking Section 102(b)(7) only where the complaint fails to plead sufficiently that the directors' conduct falls into at least one of the exceptions under which the directors are not afforded the provisions' protection."); Green v. Phillips-Van Heusen Corp., No. 14436, 1999 WL 33318814, at *1 (Del. Ch. May 5, 1999) (Jacobs, V.C.) ("The motion is predicated upon overly expansive reading of *Emerald Partners*. That case does not hold (as plaintiff contends) that a Section 102(b)(7) provision can never be the basis for a motion to dismiss fat the pleading stage regardless of the violation alleged. In *Emerald Partners* the Supreme Court explicitly noted that its holding will not prevent the dismissal of breach of fiduciary duty claims where 'the factual basis for [the] claim solely implicates a violation of the duty of care . . . .'").

301. McMullin v. Beran, 765 A.2d 910, 926 (Del. 2000).

302. Emerald Partners v. Berlin (*Emerald Partner II*), 787 A.2d 85, 95 (Del. 2001).

liability for the payment of monetary damages for breaches of their duty of care," but did not reference protection from discovery or lawsuits in general.[303]

The second decision in *Emerald Partners* also emphasized the relevance of the standard of review. The justices explained that when the business judgment rule applied, a plaintiff had to rebut one of the presumptions of the business judgment rule.[304] If, however, the pled facts only rebutted the presumptions of care, then entire fairness would apply, but "a trial pursuant to the entire fairness standard of review would serve no useful purpose" because "the entry of a monetary judgment following a finding of unfairness would be uncollectible."[305] Under those specific circumstances, a pleading-stage dismissal would be appropriate. But if entire fairness applied because of an interested transaction with a controller, then a Section 102(b)(7) provision could not come into play until after trial, "because, by definition, the inherently interested nature of those transactions are inextricably intertwined with issues of loyalty."[306]

After the second *Emerald Partners* decision, the Court of Chancery continued to parse claims at the pleading stage to determine whether they sounded in loyalty or care, albeit more cautiously.[307] There also was open resistance. Chancellor Chandler interpreted the *Emerald Partners* cases narrowly as applying only to controller freezeouts.[308] Then-Vice Chancellor Strine co-authored an article describing the *Emerald Partners* cases as "unfortunate" and asserting that "[a] section 102(b)(7) defense is more properly viewed—and

303. *Id.* at 90. Furthermore, the justices stated that "[a]lthough a Section 102(b)(7) provision does not operate to defeat the validity of a plaintiff's claim on the merits, it can operate to defeat the plaintiff's ability to recover monetary damages." *Id.* at 92.

304. *Id.* at 91.

305. *Id.* at 92.

306. *Id.* at 93. The Delaware Supreme Court adhered to that approach in *Malpiede v. Townson*, 780 A.2d 1075, 1090–96 (2001). There the justices affirmed the trial court's reliance on a Section 102(b)(7) provision to dismiss a care claim at the pleading stage where the complaint did not challenge an interested transaction with a controlling stockholder and did not otherwise plead a breach of the duty of loyalty. *Id.* at 1094. The decisions in *Malpiede* and *Emerald Partners II* governed the operation of Section 102(b)(7) until the Implementing Era.

307. *See, e.g.*, Alidina v. Internet.com Corp., No. 17235, 2002 WL 31584292, at *8 (Del. Ch. Nov. 6, 2002) (Chandler, C.) ("At this stage, I cannot dismiss plaintiffs' duty of care claim based upon an exculpatory provision. . . ."); *In re* Ply Gem Indus., Inc. S'holders Litig., No. 15779, 2001 WL 755133, at *10 (Del. Ch. June 26, 2001) (Noble, V.C.) ("Accordingly, because Lilley is entitled to the shield of Section 102(b)(7) and because the Complaint fails to state a claim as to any breach of his duty of loyalty, he is entitled to dismissal of the action against him."); *In re* BHC Commc'ns, Inc. S'holder Litig., 789 A.2d 1, 10 (Del. Ch. 2001) (Lamb, V.C.) ("Without more, these allegations allege only a breach of the duty of care and fall within the protection of the Section 102(b)(7) charter provisions."); *but cf. In re* The Ltd., Inc., No. 17148, 2002 WL 537692, at *10 n.65 (Del. Ch. Mar. 27, 2002) (Noble, V.C.) (noting that "as to those defendants about whom there is no question as to their disinterestedness and independence, I am reluctant to evaluate the § 102(b)(7) defense at this stage. First, this defense has not been asserted by the defendants on a director-by-director basis. Second, whether an independent director can obtain dismissal of the claims against him at this stage of the proceedings is an open question.").

308. *See* Orman v. Cullman, 794 A.2d 5, 20 n.36 (Del. Ch. 2002) (Chandler, C.) ("[O]ur Supreme Court [has limited] such automatic requirement to the narrow class of cases in which there is a controlling shareholder on both sides of a challenged merger.").

should be treated—as a statutory immunity rather than as an affirmative defense."[309] That same year, in a third article, then-Vice Chancellor Strine argued that changing the outcome in *Emerald Partners* would represent "an incremental improvement[]" in Delaware law.[310]

The Delaware Supreme Court did not meaningfully address the operation of Section 102(b)(7) for the rest of the Generative Era. Then-Vice Chancellor Strine reiterated his argument for interpreting Section 102(b)(7) as a statutory immunity in 2008,[311] then again in 2010.[312] After Strine became Chancellor, Vice Chancellor Parsons took up the idea in 2013.[313] But the *Emerald Partners* decisions remained official doctrine until the Implementing Era, when then-Chief Justice Strine led the Delaware Supreme Court in adopting his approach.[314]

3. Care Allegations to Rebut the Business Judgment Rule

The Three Chancellors Article advanced a third proposal about the role of a breach of the duty of care. In *Cede & Co. v. Technicolor, Inc.*,[315] a decision from the early Moderating Era, the Delaware Supreme Court held that a breach of the duty of care could rebut the business judgment rule and trigger entire fairness in the same way as a breach of the duty of loyalty or allegations of bad faith.[316] The Three Chancellors Article argued that only a breach of the duty of loyalty should trigger entire fairness review.[317] The Delaware Supreme Court has not revisited that issue, so the continuing vitality of this aspect of *Technicolor* remains unsettled. The *Technicolor* decision remains authoritative, but the Three Chancellors Article offers a strong critique.

B. Innovating with Enhanced Scrutiny

During the Generative Era, the Delaware courts continued the process of recasting enhanced scrutiny as a single, intermediate standard of review. The Court of Chancery took the lead, with the Delaware Supreme Court following suit on the integration of *Blasius*, an

309. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *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, 463 (2002).

310. Strine, *supra* note 1, at 1278 n.103 (stating that there "are incremental improvements that would speed up the pace at which meritless cases are resolved and thus result in a reduction of litigation costs" and citing "[t]he Court of Chancery's reaction to the Delaware Supreme Court's opinion in *Emerald Partners v. Berlin*").

311. *See In re* Lear Corp. S'holder Litig., 967 A.2d 640, 648 (Del. Ch. 2008) ("[B]ecause the Lear charter contains an exculpatory provision authorized by § 102(b)(7), the plaintiffs cannot sustain their complaint even by pleading facts supporting an inference of gross negligence; they must plead a non-exculpated claim.").

312. *See* Shandler v. DLJ Merch. Banking, Inc., No. 4797, 2010 WL 2929654, at *12 (Del. Ch. July 26, 2010) ("That claim is barred by the exculpatory charter provision and therefore the complaint is dismissed against Fort.").

313. *See* DiRienzo v. Lichtenstein, No. 7094, 2013 WL 5503034, at *16 (Del. Ch. Sept. 30, 2013) (Parsons, V.C.) (rejecting the plaintiff's argument that dismissal was premature on account of the company's 102(b)(7) provision).

314. *See infra* Part VIII.A.

315. *See generally* Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

316. *Id.* at 361.

317. Allen, Jacobs & Strine, Three Chancellors Article, *supra* note 271, at 303–05.

issue the justices had pioneered during the Moderating Era. Otherwise, the Delaware Supreme Court did not take up the Court of Chancery's proposals. If anything, the Delaware Supreme Court moved in a different direction, producing strong reactions from the members of the Court of Chancery.

1. Unocal *and Substantive Coercion*

One of then-Vice Chancellor Strine's earliest proposals for changing *Unocal* involved the concept of substantive coercion. Put simply, he argued for eliminating it. In the *Interco* decision, Chancellor Allen cited a manuscript by two scholars who set out a framework for using *Unocal* to produce "a more realistic, flexible and, ultimately, more responsible corporation law."[318] In that article, the professors identified three threats from a hostile offer: (i) opportunity loss, the risk that a hostile offer might deprive stockholders of a superior alternative championed by management, (ii) structural coercion, the risk that the structure of an offer or the company's response might distort stockholder choice, and (iii) substantive coercion, "the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value."[319] The authors harbored skepticism about management teams deploying substantive coercion to justify defensive action and argued that before being permitted to rely on substantive coercion, management should be forced to provide

> a coherent statement of management's expectations about the future value of the company. From the perspective of shareholders, substantive coercion is possible only if management plausibly expects to better the terms of a hostile offer—whether by bargaining with the offeror, by securing a competitive bid, or by managing the company better than the market expects.[320]

The professors recommended that the management team should have to provide "sufficient detail to permit the court independently to evaluate the plausibility of management's claim."[321] The published version of the article praised *Interco* as an example of how a court could deploy the *Unocal* test responsibly.[322]

But in *Time*, the decision that brought the Reformation Era to an end, the Delaware Supreme Court approached substantive coercion differently. The justices cited the professors' identification of three possible threats, but expressly criticized *Interco*'s reasoning, thereby rejecting how the professors thought their framework would operate.[323] By endorsing substantive coercion without the limits the professors envisioned, the *Time* decision

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318. City Cap. Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 796 (Del. Ch. 1988) (citing Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. L. 247 (1989)).

319. Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. L. 247, 267 (1989).

320. *Id.* at 268.

321. *Id.*

322. *Id.* at 266 n.63.

323. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1153 n.17 (Del. 1989).

suggested that Delaware law would permit management teams to invoke substantive coercion more freely.

The result that *Time* foreshadowed came to pass in *Unitrin*.[324] In that Moderating Era decision, the Delaware Supreme Court held that a target board "reasonably perceived [a] risk of substantive coercion, i.e., that *Unitrin*'*s* shareholders might accept American General's inadequate Offer because of 'ignorance or mistaken belief' regarding the Board's assessment of the long-term value of Unitrin's stock."[325] The Delaware Supreme Court did not require the type of detailed plan that the professors recommended.

The *Unitrin* formulation threatened to make establishing a threat perfunctory. In 2000, then-Vice Chancellor Strine issued a decision in which he argued vigorously against the *Unitrin* approach and urged the Delaware courts to abandon the concept of substantive coercion.[326] The Three Chancellors Article repeated his arguments.[327] Then-Vice Chancellor Strine reiterated his position in a 2007 decision,[328] and he continued to criticize the doctrine in his extrajudicial writings.[329]

During the Generative Era, the Delaware Supreme Court did not address the proposal to eliminate substantive coercion. Not only that, but toward the end of the Generative Era, Chancellor Chandler credited a board's reliance on substantive coercion in *Airgas*, while noting his own discomfort with the doctrine.[330] The continuing viability of substantive coercion remains open, caught between then-Vice Chancellor Strine's incisive criticisms and the Delaware Supreme Court's decisions in *Time* and *Unitrin*.

2. Unocal *and* Blasius

During the Generative Era, both the Delaware Supreme Court and the Court of Chancery continued the process of incorporating *Blasius* into the enhanced scrutiny framework of *Unocal*. The Delaware Supreme Court had started that work in *Stroud v. Grace* and

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324. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1385 (Del. 1995).

325. *Id.*

326. *See generally* Chesapeake Corp. v. Shore, 771 A.2d 293, 324–29 (Del. Ch. 2000).

327. *See* Allen, Jacobs & Strine, Three Chancellors Article, *supra* note 271, at 1315–16 n.111 ("Our willingness to fold *Blasius* into *Unocal* does not take us so far to recommend the notion of importing the 'substantive coercion' concept of justification into voting law."); *see also* Hamermesh, Jacobs & Strine, *supra* note 272, at 362 ("[The Three Chancellors Article] argued that the parentalistic doctrine of substantive coercion should not be expanded into the electoral context by allowing directors to argue that the stockholders might hurt themselves if, on a fully informed basis, they disbelieved the incumbent boards' view that it would be harmful to unseat them.") (footnote omitted).

328. Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 806 (Del. Ch. 2007) (referring to "the bizarre doctrine of 'substantive coercion'").

329. *See, e.g.*, Leo E. Strine, Jr., *The Story of* Blasius Industries v. Atlas Corp.*: Keeping the Electoral Path to Takeovers Clear*, *in* CORPORATE LAW STORIES at 243, 286–87 (J. Mark Ramseyer ed., 2009); Leo E. Strine, Jr., *The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic 'Just Say No' Question*, 55 STAN. L. REV. 863, 875–81 (2002); Leo E. Strine, Jr. et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1092–93 n.75 (2002).

330. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 57, 96–101 (Del. Ch. 2011).

continued it in *Unitrin*, both decisions from the Moderating Era.[331] Eight years after *Stroud*, in 2000, then-Vice Chancellor Strine proposed formally folding *Blasius* into *Unocal*.[332] The Three Chancellors Article reiterated that proposal.[333]

In 2003, the Delaware Supreme Court took yet another step toward that goal. In *Liquid Audio*,[334] the justices discussed *Blasius* as part of *Unocal* in the only Delaware Supreme Court decision to address *Blasius* during the Generative Era. In 2007, then-Vice Chancellor Strine returned to the topic and treated the unification as settled law.[335] Subsequent Court of Chancery decisions also treated *Blasius* as part of a unified intermediate standard of review.[336] The Delaware Supreme Court ultimately would approve a full unification during the Current Era.[337]

3. Applying Revlon

In contrast to other enhanced scrutiny innovations, where the Court of Chancery took the lead, it was the Delaware Supreme Court that arguably innovated with *Revlon*. The justices issued two decisions that surprised the members of the Court of Chancery.

The first controversial decision was *McMullin v. Beran*.[338] There, a controlling stockholder conducted a sale process for its subsidiary without significant involvement from the subsidiary board.[339] Reversing the Court of Chancery, the Delaware Supreme Court held that enhanced scrutiny applied to the transaction.[340] Members of the Court of Chancery criticized the decision and argued for a safe harbor from fiduciary review when a controlling stockholder received the same consideration as the minority.[341] In 2005, Vice

331. *See supra* Part VI.B.

332. Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000) ("Stated differently, it may be optimal simply for Delaware courts to infuse our *Unocal* analyses with the spirit animating *Blasius* . . . .").

333. Allen, Jacobs & Strine, Three Chancellors Article, *supra* note 271, at 1311–16.

334. *See generally* MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118 (Del. 2003).

335. Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 788 (Del. Ch. 2007).

336. *See, e.g.*, Kallick v. Sandridge Energy, Inc., 68 A.3d 242, 258–59 (Del. Ch. 2013) (Strine, C.); Johnston v. Pedersen, 28 A.3d 1079, 1089–91 (Del. Ch. 2011) (Laster, V.C.); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011) (Laster, V.C.); Portnoy v. Cryo-Cell Int'l, Inc., 940 A.2d 43, 69–70 (Del. Ch. 2008) (Strine, V.C.).

337. *See infra* Part IX.B.

338. McMullin v. Beran, 765 A.2d 910 (Del. 2000).

339. *Id.* at 915–16.

340. *See id.* at 926.

341. *See In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1041 n.91 (Del. Ch. 2012) (Strine, C.) (reiterating prior criticisms of *McMullen*); Trenwick Am. Litig. Tr. v. Ernst & Young, LLP, 906 A.2d 168, 202–03 n.95 (Del. Ch. 2006) (Strine, V.C.) (highlighting that "[*McMullin*] is controversial for several reasons, one of which is that it imposed *Van Gorkom*-like duties on the board of a non-wholly owned subsidiary board with regard to a merger in which the parent and the minority stockholders received identical consideration. Transactions where the minority receive the same consideration as the majority, particularly a majority entitled to sell its own position for a premium, had long been thought to fall within the ambit of non-conflict transactions subject to business judgment rule protection"), *aff'd sub nom.* Trenwick Am. Litig. Tr. v. Billett, 931 A.2d 438 (Del. 2007); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1013 n.57 (Del. Ch. 2005) (Strine, V.C.) (pointing out that "[i]n the odd decision in *McMullin v. Beran*, 765 A.2d 910 (Del. 2000), the Supreme Court said that a board selling a company

Chancellor Lamb distinguished *McMullin* on its facts and applied the business judgment rule to a merger in which the controlling stockholder received the same pro rata consideration.[342] In 2010, then-Vice Chancellor Strine declined to follow *McMullin*.[343] The tension between *McMullin* and the subsequent Court of Chancery rulings persists to this day.

The Delaware Supreme Court issued an even more controversial decision in *Omnicare*.[344] In a 3-2 decision, the majority reversed the Court of Chancery and issued an injunction enjoining a buyer from enforcing voting agreements that bound holders of 40% of the outstanding voting power to vote irrevocably in favor of a merger.[345] Writing in separate dissents, Chief Justice Veasey and then-Justice Steele disagreed vehemently with the majority decision, and they continued their criticisms in extrajudicial writings.[346] Then-Vice Chancellor Strine and other Chancery judges joined in,[347] and many practitioners and academics also reacted negatively.[348] Within a short time, it became difficult to say anything positive about the decision, much less cite it as authoritative. Doctrinally, the opinion

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should consider whether the sale looks advisable in light of what the shareholders would likely receive in an appraisal. Among the oddments in that decision was an assumption that the board in that case was not presented with such information, even though they heard two valuation presentations: If those presentations contained DCF valuations, or a similar model, they focused the board directly on appraisal value.").

342. *In re* CompuCom Sys., Inc. S'holders Litig., No. 499, 2005 WL 2481325, at *6–8 (Del. Ch. Sept. 29, 2005).

343. *In re Synthes*, 50 A.3d at 1024 ("[P]ro rata treatment remains a form of safe harbor under our law."); *id.* at 1033–34 (applying business judgment rule).

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

345. *Id.* at 939–50.

346. *E.g.*, Veasey & Di Guglielmo, *supra* note 219, at 1461 ("I think most objective observers believe that the majority decision was simply wrong."); Edward B. Micheletti & T. Victor Clark, *Recent Developments in Corporate Law*, 8 DEL. L. REV. 17, 18 n.4 (2005) (noting then-Justice Steele's speech criticizing *Omnicare*); *accord* David Marcus, *Cardinals, Fruit Flies and the Mouse*, THE DEAL.COM (Apr. 2004) (reporting on then-Justice Steele's comment at a continuing legal education event that "[w]hile I don't suggest you rip the [*Omnicare*] pages out of your notebook, I suggest that there is a possibility, one could argue, that the decision has the life expectancy of a fruit fly.").

347. *See* Milbank, Tweed, Hadley & McCloy, LLP., OmniCare *of "Questionable Continued Vitality"?: Delaware Chancery Court Rejects Application of Controversial Case in Context of Same-Day Stockholder Vote Approve Merger*, 1, 1 n. 1 (Sept. 15, 2008) (discussing the case, explaining there is no opinion due to the sensitive nature of the proceeding and Vice Chancellor Lamb's criticism of *Omnicare*); Optima Int'l of Miami v. WCI Steel, Inc., No. 3833 at 127 (Del. Ch. June 27, 2008) (TRANSCRIPT) (Lamb, V.C.) ("[I]t's really not my place to note this, but *Omnicare* is of questionable continued vitality."); Sample v. Morgan, 914 A.2d 647, 672 n.79 (Del. Ch. 2007) (Strine, V.C.) (describing *Omnicare* as "controversial" and citing the "two well-reasoned dissents"); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1016 n.68 (Del. Ch. 2005) (Strine, V.C.) (describing *Omnicare* as "aberrational"); Orman v. Cullman, No. 18039, 2004 WL 2348395, at *5–8 (Del. Ch. Oct. 20, 2004) (Chandler, C.) (repeatedly distinguishing *Omnicare*); Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 897–903 (2005) (describing the Court of Chancery decision in *Omnicare* as "a classic example of the Delaware corporate law model" and criticizing the Delaware Supreme Court's majority opinion).

348. *See In re* Columbia Pipeline Grp., Inc. Merger Litig., 316 A.3d 359, 391 n.100 (Del. Ch. 2024) (Laster, V.C.) (describing the reaction to *Omnicare* and contrasting it with the reaction to *QVC*, which made similar doctrinal moves).

made progress toward recognizing a single intermediate standard of review,[349] but the cacophony of criticism drowned out that positive step. It remains unclear to what extent *Omnicare* is good law.

4. Revlon *and the Organic Statutory Vote*

Perhaps the most significant of then-Vice Chancellor Strine's enhanced scrutiny proposals responded to a dramatic rise in the number of challenges to third-party deals. During the Reformation Era, the primary litigants in M&A cases were disadvantaged bidders, with stockholder plaintiffs occupying a supporting role.[350] The bidders retained highly qualified lawyers, paid on an hourly basis, who had every reason to match the lawyers representing the defendants in terms of thoroughness and effort. The bidder's presence also changed the remedial dynamic because the bidder's competing transaction provided a concrete alternative and put real economic value behind its arguments.[351]

The enhanced scrutiny framework from the High Reformation recognized the possibility that disloyalty could lurk in ambiguous circumstances. For example, when a board of directors adopted a rights plan in response to an all-cash, all-shares tender offer at a substantial premium to the unaffected market price, were they acting loyally to defend against an undervalued offer, or were they protecting management and preserving their positions? The enhanced scrutiny regime therefore incorporated pro-plaintiff features like the reasonableness standard and a shift in the burden of proof to enable the parties to proceed past the pleading stage and take discovery.[352] Specialized plaintiff's firms soon realized that they did not need a competing bidder to assert an enhanced scrutiny claim. They could allege that the defensive measures in a merger agreement had deterred other bidders from emerging. At that point, the same litigation features that made enhanced scrutiny meaningful also made it difficult to dispose of weak cases at the pleading stage. The Delaware Supreme Court effectively accepted that pleading regime when, in a Moderating Era decision, the justices declined to dismiss a post-closing challenge to defensive measures in a third-party merger agreement where the complaint alleged little more than that the directors responded defensively to a takeover threat. Flagging the implications of its holding, the justices observed that "[t]his case may very well illustrate the difficulty of expeditiously dispensing with claims seeking enhanced judicial scrutiny at the pleading stage where the complaint is not completely conclusory."[353]

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349. *See generally* J. Travis Laster, Omnicare*'s Silver Lining*, 38 J. CORP. L. 795, 804–11 (2013) (commending unification of *Revlon* and *Unocal* review while criticizing other aspects of the decision).

350. *E.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings., Inc., 506 A.2d 173 (Del. 1986); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); TW Servs., Inc. v. SWT Acquisition Corp., No. 10298, 1989 WL 20290 (Del. Ch. Mar. 2, 1989); *In re* Holly Farms Corp. S'holders Litig., No. 10350, 1988 WL 143010 (Del. Ch. Dec. 30, 1988); Robert M. Bass Grp., Inc. v. Evans, 552 A.2d 1227 (Del. Ch. 1988); *In re* J.P. Stevens & Co., S'holders Litig., 542 A.2d 770 (Del. Ch. 1988); MAI Basic Four, Inc. v. Prime Computer, Inc., No. 10428, 1988 WL 140221 (Del. Ch. Dec. 20, 1988).

351. *See* Laster, *Changing Attitudes*, *supra* note 106, at 224.

352. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71–72 (Del. 1995).

353. *Id.* at 72.

Slowly at first, and then at an accelerating rate, the volume of stockholder-led M&A litigation increased. It soon became a torrent: By 2012, stockholders challenged 93% of deals over $100 million and 96% of deals over $500 million.[354]

Just as tellingly, the avalanche of M&A lawsuits produced minimal value for stockholders.[355] In the vast majority of cases, the same plaintiffs whose complaints initially objected vociferously to the economics of the challenged transactions settled their cases for no increase in consideration, accepting instead the defendants' agreement to make supplemental disclosures to stockholders in advance of the merger vote. In return, the merging entities and their directors, officers, affiliates, and advisors received a court-approved global release of known and unknown claims.[356] Everyone directly involved received some form of benefit.[357] Defense counsel could predict with uncanny accuracy how the litigation would play out, then put to rest a lawsuit against their clients for what in the context of the transaction was a relatively minimal expense.[358] Plaintiffs' attorneys received a six-to-seven figure award of attorneys' fees.[359] Even the court benefitted through the fast disposition of a case—possibly several if multiple complaints were consolidated into a single action then settled.[360] The attractiveness of disclosure-only settlements for all concerned soon channeled virtually all M&A litigation toward that non-substantive outcome. [361] While some plaintiffs' firms engaged in meaningful litigation activity and achieved monetary recoveries for investors, those results were comparatively rare.[362]

The ubiquity of stockholder litigation coupled with their routine resolution through disclosure-only settlements suggested a structural flaw in the legal system. It could not have been true that 90% of all takeovers involved fiduciary problems sufficient to warrant litigation.[363] And if they did, then that level of widespread misconduct called for a systemic

354. Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 558–59 (2015).

355. *Id.* at 559.

356. *Id.* at 568 n.58.

357. *See id.* at 559–60.

358. *See id.*

359. Fisch, Griffith & Solomon, *supra* note 354, at 568–69.

360. *See id.* at 568.

361. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 891–93 (Del. Ch. 2016) (Bouchard, C.) (describing problem of disclosure-only settlement problem); Fisch, Griffith & Solomon, *supra* note 354, at 559–60 n.9 (same).

362. *See* Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623 (2017). For different perspectives on the M&A litigation epidemic, see Anderson v. Magellan Health, Inc., 298 A.3d 734 (Del. Ch. 2023) (McCormick, C.) (judicial perspective); Edward B. Micheletti & Jenness E. Parker, *Multi-Jurisdictional Litigation: Who Caused This Problem, and Can It Be Fixed?*, 37 DEL. J. CORP. L. 1 (2012) (perspective of primarily defense-side practitioners); Joel Edan Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016) (perspective of practitioner who represented both plaintiffs and defendants); Mark Lebovitch & Jeroen van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491 (2016) (perspective of primarily plaintiff-side practitioners); Fisch, Griffith & Solomon, *supra* note 354 (academic perspective).

363. *See* Fisch, Griffith & Solomon, *supra* note 354, at 559.

remedy like federal legislation or agency intervention, not case-by-case adjudication in the Delaware courts.[364]

Seeking a substantive solution to the litigation epidemic, then-Vice Chancellor Strine proposed giving standard-of-review-altering significance to the organic stockholder vote that the DGCL required for a merger. In a series of decisions, he asserted—but stopped short of holding—that when a plaintiff challenged a transaction under *Revlon*, stockholder approval would extinguish all claims as long as the vote was fully informed.[365] Although presented as a form of ratification, the stockholder approval concept hearkened back to the Moderating Era theme of statutory compliance foreclosing an equitable remedy.[366]

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364. *See id.* at 591–600.

365. *See, e.g.*, *In re* Morton's Rest. Grp. S'holders Litig., 74 A.3d 656, 663 n.34 (Del. Ch. 2013) (Strine, C.) (noting that "when disinterested approval of a sale to an arm's-length buyer is given by a majority of stockholders who have had the chance to consider whether or not to approve the transaction for themselves, there is a long and sensible tradition of giving deference to the stockholders' voluntary decision, invoking the business judgment rule standard of review"); *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 793 n.113 (Del. Ch. 2011) (Strine, V.C.) ("[I]t has long been my understanding of Delaware law, that the approval of an uncoerced, disinterested electorate of a merger (including a sale) would have the effect of invoking the business judgment rule standard of review."); Sample v. Morgan, 914 A.2d 647, 663 (Del. Ch. 2007) (Strine, V.C.) ("When uncoerced, fully informed, and disinterested stockholders approve a specific corporate action, the doctrine of ratification, in most situations, precludes claims for breach of duty attacking that action." (footnote omitted)); *In re* PNB Holding Co. S'holder Litig., No. 28, 2006 WL 2403999, at * 14 (Del. Ch. Aug. 18, 2006). (Strine, V.C.) ("[O]utside the [controlling stockholder] context, proof that an informed, non-coerced majority of the disinterested stockholders approved an interested transaction has the effect of invoking business judgment rule protection for the transaction and, as a practical matter, insulating the transaction from revocation and its proponents from liability.").

366. *See supra* Part VI.D. A Delaware Supreme Court decision during the Generative Period also elevated statutory compliance over equity. *See* Glassman v. Unocal Expl. Corp., 777 A.2d 242, 243–44 (Del. 2001). There, the justices revisited the same issue addressed 24 years before in *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1033–34 (Del. 1979): Could a stockholder plaintiff challenge a short-form squeeze-out merger as a breach of fiduciary duty? The defendants' argument was exactly the same: A claim for breach of fiduciary duty is inconsistent with the abbreviated process for a short-form merger. But the two cases reached opposite results. Issued in 1979 during the Early Reformation, *Roland* held that a statutory structure could not eliminate fiduciary review. *Roland*, 407 A.2d at 1033. Issued in 2001 during the Generative Era, the *Glassman* decision held that a claim for fiduciary duty could not co-exist with the statutory structure. *Glassman*, 77 A.2d at 248. In reaching the latter conclusion in *Glassman*, both the Court of Chancery and the Delaware Supreme Court arguably gave an anachronistic interpretation to the term "fraud" that earlier precedents used when stating that appraisal provided the exclusive remedy absent "illegality or fraud." *Id.* at 245 (quoting Stauffer v. Standard Brands, Inc., 187 A.2d 78, 80 (Del. 1962)). Until the Reformation Era, a reference to "fraud" in a case involving a fiduciary typically meant "constructive fraud," a synonym for breach of fiduciary duty or other equitable wrong. *E.g.*, William A. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 AKRON L. REV. 181, 191–92 (2005) (discussing authorities holding that a breach of fiduciary is constructive fraud); Amanda K. Esquibel, *The Economic Loss Rule and Fiduciary Duty Claims: Nothing Stricter Than the Morals of the Marketplace?*, 42 VILL. L. REV. 789, 845 (1997); 10 AMERICAN LAW OF TORTS, § 32:11 (Alfred W Gans, Charles F Krause & Stuart M. Speiser eds., 2020) (explaining that "[a] cause of action for constructive fraud, as opposed to actual fraud, does not include the elements of actual dishonesty or intent to deceive. Rather, 'constructive fraud' is defined as a breach of a legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others."). The *Glassman* decisions seem to have understood "fraud" to mean actual fraud. *See* Marc I. Steinberg, *Short-Form Mergers in Delaware*, 27 DEL. J. CORP. L. 489, 491 n.11 (2002). Only during the Reformation Era did "breach of fiduciary duty" emerge as the more common descriptor.

C. Innovating with Derivative Actions

Finally, Generative Era decisions introduced a series of innovations for derivative actions. In some cases, the Court of Chancery led the way; in others, the Delaware Supreme Court broke ground.

The first set of innovations involved oversight claims. Intuitively, the concept of imposing liability for allowing a corporation to suffer harm sounds like it would require a showing of negligence, likely gross negligence, but in any event would be an inquiry grounded in the duty of care. Corporate fiduciaries might have caused the harm by making decisions that led to a tragic outcome, but disinterested and independent directors who were not also sociopaths would not intentionally cause a corporate trauma to happen. It would follow that the duty of oversight generally derives from the duty of care, rather than from the duty of loyalty. In *Graham v. Allis Chalmers Manufacturing Co.*, the Delaware Supreme Court's initial foray into this area, the justices seemed to envision that oversight liability might result from a breach of either the duty of loyalty or the duty of care.[367] When Chancellor Allen authored that landmark opinion in *Caremark*, he seemed to contemplate both paths, and he most often framed the duty of oversight using the language of care.[368] In one passage, however, he posited that liability only would exist if the oversight failure was sufficiently egregious such that a court could infer that the directors had acted in bad faith.[369] The corporation in *Caremark* had a Section 102(b)(7) provision, so that conclusion made sense given that the directors could not be held liable for an oversight breach stemming from the duty of care.[370]

In 2003, then-Vice Chancellor Strine took up the question and held that liability for a breach of the duty of oversight always derives from the duty of loyalty, with no room for care.[371] Four years later, during the Generative Era, the Delaware Supreme Court adopted that formulation and held that a breach of the duty of loyalty, such as action in bad faith, is a "necessary condition to liability."[372] That reframing made it more difficult to plead and later prove a *Caremark* violation, but it made a successful *Caremark* claim more threatening, because exculpation, indemnification, and potentially insurance would be unavailable to protect the directors adjudicated liable.[373]

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367. Graham v. Allis Chalmers Mfg. Co., 188 A.2d 125, 130–31 (Del. 1963).

368. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 960, 964, 967, 671 (Del. 1996).

369. *Id.* at 971.

370. *See id.* at 970 n.27 (observing that a plaintiff would have to prove causation and that "questions of waiver of liability under certificate provisions authorized by [DEL. CODE ANN. tit. 8, § 102(b)(7)] may also be faced").

371. Guttman v. Huang, 823 A.2d 492, 506 (Del. Ch. 2003).

372. Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006).

373. *See* H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark, Blue Bell, *and Director Responsibility for Cybersecurity Governance*, 2022 WIS. L. REV. 887, 889–90 ("Failure to monitor under *Caremark*, however, is a breach of the duty of loyalty. A breach of the duty of loyalty is not protected by the business judgment rule. It cannot be exculpated. And it cannot be covered by indemnification."); Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 89 (2022) (explaining that when directors face *Caremark* liability., "no exculpation or indemnification would be available because the conduct involved bad faith and disloyal action not subject to statutory immunization"); Martin Petrin, *Assessing Delaware's Oversight Jurisprudence: A Policy and Theory Perspective*, 5 VA. L. & BUS. REV. 433, 449 (2011) (citing concern that "D&O

Then-Vice Chancellor Strine later made another significant contribution to the development of oversight liability by holding that directors of a Delaware corporation cannot pursue profit at the expense of legal compliance, thereby intentionally choosing to violate the law.[374] Stating definitively that "Delaware law does not charter law breakers,"[375] he explained that:

> Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue "lawful business" by "lawful acts." As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.[376]

Through that ruling, he definitively rejected the law-and-economics concept of law as price.[377]

A second innovation involved the test for distinguishing between derivative and direct actions. Chancellor Chandler took the lead in 2004 by proposing a new approach that rejected the existing "special injury" test in favor of a new inquiry.[378] Later that year, the justices adopted a new test that resembled what Chancellor Chandler had proposed.[379]

A third innovation concerned demand futility. Then-Vice Chancellor Strine held that when a corporation had an exculpatory provision in its charter, a director could not face a conflict of interest for purposes of demand futility under the second prong of *Aronson* unless the complaint pled facts supporting an inference that that specific director breached his duty of loyalty.[380] Other members of the Court of Chancery, however, concluded that

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insurance might not cover a director if found liable under *Stone*, since certain policies exclude from their coverage instances of directors' disloyal or bad faith conduct"); Scott J. Davis, *Would Changes in the Rules for Director Selection and Liability Help Public Companies Gain Some of Private Equity's Advantages?*, 76 U. CHI. L. REV. 83, 101 (2009) ("[M]any 'directors and officers' (D&O) insurance policies contain exceptions that arguably might prevent coverage if a court found that the directors had acted in bad faith."). In 2022, the Delaware General Assembly authorized corporations to establish captive insurance companies that could provide coverage directors for a *Caremark* judgment. *See* DEL. CODE ANN. tit. 8, § 145(g); 83 Del. Laws ch. 279 (2022).

374. *In re* Massey Energy Co., No. 5430, 2011 WL 2176479 (Del. Ch. May 31, 2011).

375. *Id.* at *20.

376. *Id.* (citations omitted). Although the *Massey* decision stands as then-Vice Chancellor Strine's definitive framing of this concept, he had foreshadowed that holding through statements in earlier cases. *See* Desimone v. Barrows, 924 A.2d 908, 934–35 (Del. Ch. 2007) ("[I]t is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully. The knowing use of illegal means to pursue profit for the corporation is director misconduct." (cleaned up)); Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 131 (Del. Ch. 2004) ("[A] fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity.").

377. *See* McRitchie v. Zuckerberg, 315 A.3d 518, 572–73 (Del. Ch. 2024) (explaining Delaware law's rejection of law-as-price and its implications); Lebanon Cnty. Emps.' Ret. Fund v. Collis, 287 A.3d 1160, 1206–07 (Del. Ch. 2022) (same); *see generally* Asaf Raz, *The Legal Primacy Norm*, 74 FLA. L. REV. 933 (2022).

378. Agostino v. Hicks, 845 A.2d 1110, 1117–22 (Del. Ch. 2004) (Chandler, C.).

379. Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1035–39 (Del. 2004).

380. *E.g.*, *In re* Lear S'holders Litig., 967 A.2d 640, 657 (Del. Ch. 2008) (Strine, V.C.). Chancellor Chandler had first introduced this approach, but did not follow it consistently. *Compare In re* Walt Disney Co. Derivative

an exculpatory provision had no effect on the analysis.[381] The Delaware Supreme Court did not address the issue definitively until 2021, during the Current Era, when the justices adopted the approach that then-Vice Chancellor Strine proposed.[382]

Yet another Chancery innovation addressed when a director would be viewed as independent. Seeking a test that was more realistic than *Aronson*'s seemingly narrow focus on financial ties, then-Vice Chancellor Strine argued in *Oracle* that:

> Delaware law should not be based on a reductionist view of human nature that simplifies human motivations on the lines of the least sophisticated notions of the law and economics movement. *Homo sapiens* is not merely *homo economicus*. We may be thankful that an array of other motivations exist that influence human behavior; not all are any better than greed or avarice, think of envy, to name just one. But also think of motives like love, friendship, and collegiality, think of those among us who direct their behavior as best they can on a guiding creed or set of moral values.[383]

Then-Vice Chancellor Strine proposed that a court ask "whether a director is, *for any substantial reason*, incapable of making a decision with only the best interests of the corporation in mind."[384]

The Delaware Supreme Court did not adopt that test during the Generative Era. Instead, the justices reinforced a predominantly economic approach. In *Beam v. Stewart*, writing for the court in one of his last decisions, Chief Justice Veasey stated that "[a]llegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence."[385] The decision even included a section titled "A Word About the *Oracle* Case," where the justices implied that the *Oracle* decision's reasoning should be limited to settings involving a

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Litig., 825 A.2d 275, 285–89 (Del. Ch. 2003) (Chandler, C.) (asserting that a Section 102(b)(7) provision prevented care claims from rendering demand futile) *with* McPadden v. Sidhu, 964 A.2d 1262, 1270–73 (Del. Ch. 2008) (Chandler, C.) (holding that exculpated breach-of-care claims can excuse demand under the second prong of the *Aronson* test).

381. *E.g.*, Khanna v. McMinn, No. 20545, 2006 WL 1388744, at *25 n.201 (Del. Ch. May 9, 2006) (Noble, V.C.) (explaining the "tension" between a strict reading of *Aronson*'s second prong, which would render demand futile if the business judgment rule did not apply, and the effect of an exculpatory provision in limiting whether a director faced a substantial threat of liability; following then-current law, under which a court could not rely on an exculpatory provision at the pleading stage unless it was clear that the claim resulted exclusively from a breach of the duty of care); *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 808, 824 (Del. Ch. 2005) (Lamb, V.C.) (stating that plaintiffs could establish demand excusal under the second prong of *Aronson* by pleading "particularized facts sufficient to raise (1) a reason to doubt that the action was taken honestly and in good faith or (2) a reason to doubt that the board was adequately informed in making the decision") (internal quotation marks omitted); Emerald Partners v. Berlin, No. 9700, 1993 WL 545409, at *7–8 (Del. Ch. Dec. 23, 1993) (Hartnett, V.C.) (rejecting argument that Section 102(b)(7) should overlay the *Aronson* test).

382. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1057 (Del. 2021). After the Delaware Supreme Court's decision, former Chief Justice Strine (who had by that time retired from the bench) joined two co-authors in arguing against the *Zuckerberg* approach. *See* Hamermesh, Jacobs & Strine, *supra* note 272, at 351–61.

383. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003).

384. *Id.* at 920.

385. Beam v. Stewart, 845 A.2d 1040, 1050 (Del. 2004).

special litigation committee.[386] The competing approaches, in decisions issued just months apart, raised questions about the relevant inquiry.[387] During the Implementing Era, then-Chief Justice Strine would lead the Delaware Supreme Court in shifting to the *Oracle* view.[388]

Finally, the Generative Era saw the Delaware Supreme Court asserting greater control over derivative actions. In *Brehm v. Eisner*, the Delaware Supreme Court held that review of a demand futility decision would be *de novo* rather than deferential, partially overruling seven significant Delaware Supreme Court precedents.[389] That change in approach sought to create greater consistency across cases by facilitating early appellate review and eliminating any role for deference to the trial court's decision.

D. Themes of the Generative Era

Like earlier eras, the Generative Era brought its own range of rules, rhetoric, and results. In terms of new rules, the Generative Era stands out as a particularly fertile period, but because the creativity principally happened at the Chancery level, the implications were unclear. Sometimes, the Delaware Supreme Court adopted the trial court's proposals; sometimes, the high court rejected them. In most cases, the justices did not have an opportunity to weigh in, leaving open the question of whether prior precedent or the proposed innovation would control. Members of the Court of Chancery also regularly took issue with Delaware Supreme Court decisions they disagreed with, again creating uncertainty about how the law would apply.

Against the backdrop of the Generative Era's creativity, the era's rhetoric continued the Moderating Era's emphasis on stability and predictability. Chief Justice Veasey, in particular, stressed those concepts in his speeches, both while on the bench[390] and after his

386. *Id.* at 1054–55.

387. *See* Mohsen Manesh, *Indeterminacy and Self-Enforcement: A Defense of Delaware's Approach to Director Independence in Derivative Litigation*, 6 J. BUS. & SEC. L. 177, 188–89 (2006) (arguing that *Oracle* and *Beam* "come out on opposite sides of the independence inquiry" and "do little to resolve the indeterminacy of Delaware law regarding the effects of non-economic, non-familial professional, social, and institutional relationships on director independence"). Professor Manesh argues that the indeterminacy of Delaware law regarding independence is an advantage because it encourages boards to monitor director independence themselves. *Id.* at 197–99.

388. *See infra* Part VIII.C.

389. Brehm v. Eisner, 746 A.2d 244, 253, 253 n.13 (Del. 2000) (overruling in part on this issue Scattered Corp. v. Chi. Stock Exch., 701 A.2d 70, 72–73 (Del. 1997); then Grimes v. Donald, 673 A.2d 1207, 1217 n.15 (Del. 1996); then Heineman v. Datapoint Corp., 611 A.2d 950, 952 (Del. 1992); then Levine v. Smith, 591 A.2d 194, 207 (Del. 1991); then Grobow v. Perot, 539 A.2d 180, 186 (Del. 1988); then Pogostin v. Rice, 480 A.2d 619, 624–25 (Del. 1984); and then Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984)).

390. E. Norman Veasey, *Law and Fact in Judicial Review of Corporate Transactions*, 10 U. MIAMI BUS. L. REV. 1, 13 (2002) (citing the goals of "promptness, clarity, predictability, stability, and a coherent economic rationale"); E. Norman Veasey, *The Ethical and Professional Responsibilities of the Lawyer for the Corporation in Responding to Fraudulent Conduct by Corporate Officers or Agents*, 70 TENN. L. REV. 1, 7 (2002) ("The state-based system of corporate governance depends on the traditional expertise, decisiveness, stability, speed, and integrity of the Delaware and other state courts."); Veasey, *Roles of the Delaware Courts*, *supra* note 102, at 856 (stating that "stability and predictability is our goal"); E. Norman Veasey & Michael P. Dooley, *The Role of*

retirement.[391] Ironically, one of the decisions in which Chief Justice Veasey and the Delaware Supreme Court sought to achieve those goals did the opposite. In *Grimes v. Alteon*, the justices adhered to two of Justice Moore's decisions from the Reformation Era demanding strict statutory compliance when issuing stock.[392] Those earlier decisions sought to provide certainty by adopting a brightline rule under which defective issuances could not be cured, but the effect was to create uncertainty not only about the validity of the defectively issued shares themselves but also corporate acts in which the defective shares participated in the stockholder vote.[393] The legislature provided a statutory fix during the Implementing Era.[394]

In terms of results, the Generative Era produced a mix of outcomes that, on balance, favored defendants. Plaintiffs achieved prominent post-trial victories in *eBay* (2010)[395] and

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Corporate Litigation in the Twenty-First Century, 25 DEL. J. CORP. L. 131, 135–36 (2000) ("The Supreme Court in a few cases has said that predictability and stability are important to Delaware jurisprudence. We don't believe that it's helpful to have wild swings in the way cases are decided. We don't think that it's a good idea to have stray dictum that's misleading, although that does creep in no matter how you try to avoid it. But our goal is predictability/stability.").

391. E. Norman Veasey et al., *Corporations: The Short-Termism Debate*, 85 MISS. L.J. 697, 698 (2016) (stating that "one of the things that's good about Delaware law is its stability"); Veasey & Di Guglielmo, *supra* note 219, at 1410 (citing the court's role "in preserving stability and predictability in corporate jurisprudence"); E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 174 (2004) (expressing concern that with increasing federalization, "the degree of reasonable stability we have come to expect from Delaware judge-made law and legislation could be lost"); E. Norman Veasey, *Counseling Directors in the New Corporate Culture*, 59 BUS. LAW. 1447, 1450 (2004) (observing that "[n]ow—and for the past few decades—part of the national attention in the corporate area has focused on the ten Delaware judges of the Supreme Court and Court of Chancery. In my view, what we are seeing as our jurisprudence develops are the 'evolving expectations of directors.' This evolution has, as its principal dynamic, the quintessential application of the common law by these ten Delaware judges, while maintaining the expertise, balance, and stability that has long characterized Delaware jurisprudence.").

392. *See* Grimes v. Alteon, Inc., 804 A.2d 256, 260 (Del. 2002) ("The law properly requires certainty in such matters [as the issuance of stock]."); *id.* at 262 ("Thus, director approval of stock issuance or agreements affecting the respective rights of the corporation and a putative purchaser of stock reduces later disputes about their propriety and enhances corporate stability and certainty."). The two Reformation Era decisions were *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991), and *Waggoner v. Laster*, 581 A.2d 1127, 1137–38 (Del. 1990).

393. *See* Olson v. EV3, Inc., No. 5583, 2011 WL 704409, at *14 (Del. Ch. Feb. 21, 2011) ("Deep faults could have developed in the ev3 corporate structure if the Top–Up Option Shares were found invalidly issued and the Merger invalidly consummated."); C. Stephen Bigler & Seth Barrett Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 BUS. LAW. 1109 (2008) (explaining difficulties and uncertainty created by bright-line rule requiring strict statutory compliance on pain of voidness).

394. *See* DEL. CODE ANN. tit. 8, §§ 204, 205 (2014) (authorizing ratification of defective acts and referencing the ability to cure defective stock issuances); *see also* Holifield v. XRI Inv. Holdings LLC, 304 A.3d 896, 930 (Del. 2023) (acknowledging statutory abrogation of *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991), and *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990) by DEL. CODE ANN. tit. 8, §§ 204, 205); *see generally* C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 BUS. LAW. 393 (2014) (explaining uncertainty created by *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130, 1137 (Del. 1991), and *Waggoner v. Laster*, 581 A.2d 1127, 1137 (Del. 1990), and explaining implications of DEL. CODE ANN. tit. 8, §§ 204, 205).

395. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010) (Chandler, C.).

Southern Peru (2011),[396] plus less well-known post-trial wins in *HMG/Courtland* (1999),[397] *Bomarko* (1999),[398] *Emerging Communications* (2004),[399] and *Hazelett Strip-Casting* (2011).[400] Defendants achieved prominent post-trial victories in *Emerald Partners* (2003),[401] *Disney* (2006),[402] *Boston University* (2006),[403] *Nemec v. Shrader* (2010),[404] *EMAK* (2010),[405] *Airgas* (2011),[406] and *Trados* (2013).[407] But the defining issue of the Generative Era was the epidemic of stockholder litigation challenging third-party deals and the steady stream of non-substantive results in the form of disclosure-only settlements. That chronic problem both undermined the credibility of stockholder-plaintiff litigation and demanded a solution.

VIII. THE IMPLEMENTING ERA: 2014 TO 2019

The next era began on January 29, 2014, when then-Chancellor Strine became the Chief Justice of the Delaware Supreme Court. Between 2014 and 2019, Chief Justice Strine led the Delaware Supreme Court in adopting many of the innovations that the members of the Court of Chancery had explored during the Generative Era. Like the Reformation Era before it, the Implementing Era reinvented much of Delaware law.[408]

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396. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761 (Del. Ch. 2011) (Strine, V.C.), *aff'd sub nom.* Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

397. HMG/Courtland Props., Inc. v. Gray, 749 A.2d 94 (Del. Ch. 1999) (Strine, V,C.).

398. Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161 (Del. Ch. 1999) (Lamb, V.C.), *aff'd*, 766 A.2d 437, 441 (Del. 2000).

399. *In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004) (Jacobs, V.C.). In a throwback to the hostile bidder cases from the Reformation Era, when major law firms represented plaintiffs, Skadden secured the plaintiffs' win in *Emerging Communications*. *Id.* at *43.

400. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442 (Del. Ch. 2011) (Laster, V.C.).

401. Emerald Partners v. Berlin, No. 9700, 2003 WL 21003437 (Del. Ch. Apr. 28, 2003) (Jacobs, V.C.), *aff'd*, 840 A.2d 641 (Del. 2003) (ORDER).

402. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), (Chandler, C.) *aff'd*, 906 A.2d 27 (Del. 2006)

403. Oliver v. Bos. Univ., No. 16570, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006) (Noble, V.C.) (awarding $1.00 in nominal damages).

404. Nemec v. Shrader, 991 A.2d 1120 (Del. 2010).

405. Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

406. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011) (Chandler, C.).

407. *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013) (Laster, V.C.).

408. That observation should not be controversial. Many commentators have offered similar assessments. *See, e.g.*, Itai Fiegenbaum, *Taking* Corwin *Seriously*, 26 LEWIS & CLARK L. REV. 791, 809–12 (2022) (discussing significance of *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 305 (Del. 2015)); Matteo Gatti, *Did Delaware Really Kill Corporate Law? Shareholder Protection in A Post-*Corwin *World*, 16 N.Y.U. J.L. & BUS. 345, 366–75 (2020) (discussing effects of Delaware Supreme Court jurisprudence including *Corwin* and *C & J Energy*); Joel Edan Friedlander, *Confronting the Problem of Fraud on the Board*, 75 BUS. LAW. 1441, 1441–42 (2020) (asserting that "[c]orporate law litigation has entered a new phase" in which "[d]ecades-old canonical cases—*Weinberger v. UOP, Inc.*, *Unocal Corp. v. Mesa Petroleum Co.*, *Revlon v. MacAndrews & Forbes Holdings, Inc.*, *Blasius Indus., Inc. v. Atlas Corp.*, and *Unitrin v. American Gen. Corp*.—and the associated procedural weapons of enhanced judicial scrutiny and expedited discovery no longer carry much salience," yielding instead to "the new leading cases of *In re Synthes, Inc. Shareholder Litigation*, *Kahn v. M&F Worldwide Corp. ('MWF'), C & J*

A. Implementing a New Approach to Entire Fairness

The first major Implementing Era decision arrived in March 2014, two months after Chief Justice Strine took office.[409] In the appeal from his decision granting summary judgment for the defendants in *MFW*, the Delaware Supreme Court affirmed his Generative Era decision and agreed that conditioning a transaction on the use of both a committee and a majority-of-the-minority vote would result in the application of the business judgment rule.[410] But the Delaware Supreme Court's decision departed from then-Chancellor Strine's decision in at least one significant respect: It required a showing that the special committee had acted with due care.[411] That change potentially limited the pleading-stage application of *MFW* and could have required deferring the innovation's use to the summary judgment stage, as in the *MFW* decision itself. Then-Chancellor Strine's intent in *MFW*, however, had been to facilitate pleading stage dismissals, and later during the Implementing Era, Chief Justice Strine led the Delaware Supreme Court in conforming Delaware doctrine to his Chancery Court opinion.[412]

One year later, the Delaware Supreme Court revisited the *Emerald Partners* line of cases and whether the application of the entire fairness standard of review limited a court's ability to address exculpation at the pleading stage. Writing for the Delaware Supreme Court in *Cornerstone*, Chief Justice Strine adopted his Generative Era proposal that Section

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Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust, *Corwin v. KKR Financial Holdings LLC*, *In re Trulia, Inc. Stockholder Litigation*, and *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd.*" (citations omitted)); Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 210 (2019) (describing changes in the application of enhanced scrutiny and asserting that "[i]n *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court went further by altering the very framework of M&A fiduciary duty law"); Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 62–65 (2019) (discussing Delaware's response to the "surge" of merger litigation); James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 333–40 (2018) (discussing effects of *C & J Energy* and *Corwin*); *id.* at 341–49 (discussing effects of *MFW*); Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards* (describing Delaware Supreme Court case law and concluding that "[t]he collective result of these cases was a significant reduction in judicial oversight of takeovers"), *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 29, 35 (Steven D. Solomon & Randall S. Thomas eds., 2019); Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 605–06 (2018) (explaining that during the period from 2014 to 2015, "the Delaware courts significantly restricted the substantive ability of plaintiffs to win takeover-related claims by adopting more deferential standards of judicial review in these cases.").

409. *See Historical List of Delaware Supreme Court Justices*, DEL. CTS., https://courts.delaware.gov/supreme/history/justicespast.aspx [https://perma.cc/A9E3-N5JJ].

410. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

411. *See id.* at 645 (requiring as an element of the test that "the Special Committee meets its duty of care in negotiating a fair price"); *id.* at 645 n.14 (positing that allegations in the complaint "about the sufficiency of the price call into question the adequacy of the Special Committee's negotiations, thereby necessitating discovery on all of the new prerequisites to the application of the business judgment rule"); *id.* at 654 (noting that court ruled for defendants on summary judgment "[b]ased on a highly extensive record" that enabled the court to conclude that the elements for applying the business judgment rule were "undisputedly established *prior to trial*").

412. *See* Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756 (Del. 2018); Swomley v. Schlecht, 128 A.3d 992 (Del. 2015) (ORDER) (summarily affirming *Swomley v. Schlecht*, No. 9355, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014) (TRANSCRIPT) (applying *MFW* to dismiss challenge to squeeze-out merger at the pleading stage)).

102(b)(7) should operate as a form of immunity and held that regardless of which standard of review applied to a transaction, "plaintiffs must plead a non-exculpated claim for breach of fiduciary duty against an independent director . . . or that director will be entitled to be dismissed from the suit."[413]

B. Implementing a New Approach to Enhanced Scrutiny

During the Implementing Era, the Delaware Supreme Court also reworked the operation of enhanced scrutiny. Writing for the Delaware Supreme Court in *Corwin*, Chief Justice Strine led the justices in adopting his Generative Era proposal regarding the effect of an organic stockholder vote.[414] The *Corwin* decision held that even when enhanced scrutiny applied, an "uncoerced, informed stockholder vote" invoked the business judgment rule.[415] Evidencing the doctrinal elevation of a Generative Era innovation, 17 of the supporting citations were to Generative Era decisions by the Court of Chancery.[416]

Next, in *C & J Energy*, Chief Justice Strine led the justices in reversing the Court of Chancery's issuance of a preliminary injunction against a no-shop provision.[417] The *C & J Energy* decision held that a court could not interfere with a bidder's contractual rights unless the original agreement was the subject of a breach of duty *and* the bidder aided and abetted the breach.[418] That holding turned away from *QVC*, a Moderating Era decision that had prioritized the target directors' fiduciary duties over the bidder's contract rights.[419] The citations again depicted the doctrinal elevation of Generative Era precedent. Out of the approximately 60 legal citations, only 17 referenced Delaware Supreme Court precedents.[420] Approximately 43—more than two thirds—cited Court of Chancery cases, including 20 decisions Chief Justice Strine authored while serving as a member of the Court of Chancery during the Generative Era.[421]

C. Implementing a New Approach to Derivative Actions

Finally, the Delaware Supreme Court's decisions during the Implementing Era addressed derivative actions. Here too, Chief Justice Strine led the court in elevating Chancery innovations from the Generative Era to Delaware Supreme Court doctrine.

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413. *In re* Cornerstone Therapeutics, Inc., S'holder Litig., 115 A.3d 1173, 1179 (Del. 2015).

414. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307–08 (Del. 2015).

415. *Id.* at 308.

416. *See id.* at 304–14 nn.1–28; Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 UC IRVINE L. REV. 55, 82–88 (2019) (discussing citations to precedent in *Corwin*); *see generally* Laster, *Changing Attitudes*, *supra* note 106, at 222–26 (discussing reasons for the adoption of Chancery Court innovations in the Generative Era).

417. C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1052 (Del. 2014).

418. *Id.* at 1073.

419. *See supra* Part VI.B.

420. *See* Laster, *Changing Attitudes*, *supra* note 106, at 215 n.70 (discussing citations to precedent in *C & J Energy*).

421. *See id.* (same).

First, Chief Justice Strine authored a series of decisions that took a more realistic and nuanced approach to director independence comparable to what he proposed in *Oracle.*[422] Those decisions moved beyond *Beam*, Chief Justice Veasey's final decision, to give greater consideration to interpersonal connections like longstanding friendships and prior relationships that could create a sense of gratitude or other entanglements and compromise a director's independence.

Second, Chief Justice Strine led the Delaware Supreme Court in taking a more meaningful approach to oversight cases, most notably through his decision in *Marchand*.[423] Although debate exists, scholars have largely regarded Chief Justice Strine's decision in *Marchand* as reflecting a change in Delaware doctrine that imposes greater oversight obligations on directors.[424]

D. Themes from the Implementing Era

Like each earlier era, the Implementing Era distinguished itself with different rules, rhetoric, and results. The extent of the change, however, exceeded anything since the Reformation Era.[425]

The Implementing Era saw the Delaware Supreme Court adopt many of the innovations that the Court of Chancery developed during the Generative Era. Those new rules reflected and responded to a different set of external forces and circumstances. During the Reformation Era, the Delaware Supreme Court faced the threat of federal preemption and

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422. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 808 (Del. 2019) (discussing how "very close personal [or professional] relationship[s] that, like family ties," could "heavily influence a human's ability to exercise impartial judgment"); Sandys v. Pincus, 152 A.3d 124, 130 (Del. 2016) (suggesting that a "very close personal relationship" could "heavily influence a human's ability to exercise impartial judgment"); Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1022 (Del. 2015) (stating that "deeper human friendships could . . . exist that would have the effect of compromising a director's independence").

423. *Marchand*, 212 A.3d at 809 (discussing the directors' duty to exercise board-level oversight regarding a core compliance risk); *see* City of Birmingham Ret. & Relief Sys. v. Good, 177 A.3d 47, 65 (Del. 2017) (Strine, C.J., dissenting) (arguing that stockholder plaintiff had pled facts sufficient to support inference that directors acted in bad faith by consciously flouting environmental regulations).

424. *See, e.g.*, Asaf Eckstein & Roy Shapira, *Compliance Gatekeepers*, 41 YALE J. REG. 469, 486–87 (2024) (stating that "[p]rior to the 2019 *Marchand* decision, corporate law had remained remarkably silent on corporate compliance . . . . *Marchand* changed all this, by suggesting that the fact that there were no indications that Blue Bell directors had known about any food safety issue could, in itself, be an indication that directors breached their oversight duties . . . . *Marchand* ushered in 'a new *Caremark* era,' typified by increased willingness to heighten the scrutiny of director oversight duties, and increased willingness to grant shareholders access to internal company documents in order to investigate potential failure-of-oversight claims."); H. Justin Pace & Lawrence J. Trautman, *Financial Institution D&O Liability After* Caremark *and* McDonald's, 76 RUTGERS U. L. REV. 101, 126–31 (2024) (describing *Marchand*'s impact); H. Justin Pace & Lawrence J. Trautman, *Climate Change and* Caremark *Doctrine, Imperfect Together*, 25 U. PA. J. BUS. L. 777, 785 (2023) ("*Stone* gave *Caremark* claims doctrinal definition, but it [did not] give them teeth. That would change with the Supreme Court of Delaware's 2019 decision in *Marchand*."); Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U. L. REV. 1857, 1859 (2021) ("Yes, there is a trend of revamped director oversight duties. And this trend is here to stay.").

425. *See supra* note 408 (collecting scholarly articles making similar observations regarding extent of change).

the politically sensitive challenges posed by hostile deals and management-led buyouts. A significant portion of the stockholder base was unsophisticated, including proverbial "widows and orphans." The Delaware Supreme Court also harbored concern about a board's ability to carry out its duties in situations fraught with actual or potential conflicts. That external backdrop set the stage for more intrusive standards of review to ensure that fiduciaries were doing their jobs. They also suggested a diminished role for stockholder votes, both because of the DGCL's statutory allocation of power to the board and because a significant number of stockholders could not be trusted to take care of themselves. The doctrine of substantive coercion offers the clearest manifestation of that concern.[426]

By the time Chief Justice Strine took office, the dynamics were different. Delaware did not face a meaningful threat of federal intervention, and boardrooms had evolved, with supermajority independent boards less likely to fall prey to situational conflicts.[427] Instead, because of reputational concerns and equity compensation (including option acceleration), directors were more likely to support a sale of the company than engage in entrenchment. The stockholder profile had changed to an even greater degree, with more capital held through institutions who could make meaningful voting decisions. Meanwhile, the epidemic of stockholder litigation that prevailed during the Generative Era called into question the value of fiduciary litigation in the first place.[428] Rhetorically, decisions during the

426. *See supra* note 319 and accompanying text.

427. *See In re* Cornerstone Therapeutics Inc. S'holder Litig., 115 A.3d 1173, 1182–83 (Del. 2015) (noting that even in the face of a controller's demands, "independent directors are presumed to be motivated to do their duty with fidelity").

428. *See supra* Part VII.B.4.

Implementing Era stressed those changes,[429] and that rhetoric set the stage for the doctrinal retreat embodied in some of the new rules.[430]

The different rhetoric and different rules led to different results. During the Implementing Era, the Delaware Supreme Court upheld only two post-trial plaintiffs' victories in representative actions,[431] only one of which involved a public company.[432] Those isolated wins contrasted with a series of high-profile reversals of post-trial plaintiffs' victories.[433] During the same period, defendants prevailed after trial on two occasions under the

429. *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312–13 (Del. 2015) (explaining that "when a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves. There are sound reasons for this policy. When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them."); *id.* at 313–14 (arguing that "judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders). In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form."); Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (subsequent history omitted) (explaining that the *MFW* standard "is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion. Not only that, the adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection, a structure where stockholders get the benefits of independent, empowered negotiating agents to **bargain for the best price and say no** if the agents believe the deal is not advisable for any proper reason, plus the critical ability to determine for themselves whether to accept any deal that their negotiating agents recommend to them." (quoting *In re* MFW S'holders Litig., 67 A.3d 496, 528 (Del. Ch. 2013) (Strine, C.) (emphasis in original)), *aff'd sub nom.* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 638 (Del. 2014)); *accord* Morrison v. Berry, 191 A.3d 268, 274 (Del. 2018).

430. On the concept of doctrinal retreat, see *supra* note 400.

431. *See* CDX Holdings, Inc. v. Fox, 141 A.3d 1037, 1040–42 (Del. 2016) (affirming award of $16 million to class of option holders); RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816, 879 (Del. 2015) (affirming award of $70 million to class of stockholders). One justice would have reversed the liability finding in *CDX*. *See CDX*, 141 A.3d at 1042 (Valihura, J., dissenting).

432. *See* RBC Cap. Mkts, 129 A.3d at 879.

433. *See, e.g.*, Dell, Inc. v. Magnetar Glob. Event Driven Master Fund, Ltd., 177 A.3d 1, 5–6 (Del. 2017) (reversing post-trial judgment awarding fair value of $17.62 per share to appraisal class comprising 5,505,730 shares, resulting in incremental value over deal price of $13.75 per share of $21.3 million (exclusive of interest)); *see also* DFC Glob. Corp. v. Muirfield Value Partners, 172 A.3d 346 (Del. 2017) (reversing post-trial judgment awarding fair value of $10.21 per share to appraisal class comprising 4,604,683 shares, resulting in incremental value over deal price of $9.50 per share of $3.2 million (exclusive of interest)); El Paso Pipeline GP Co., v. Brinckerhoff, 152 A.3d 1248, 1250–51 (Del. 2016) (vacating post-trial judgment of $171 million to be implemented through investor-level remedy). The *Dell* and *DFC* decisions were appraisal proceedings, which functions like an opt-in class action. *E.g.*, Alabama By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 260 (Del. 1995) ("This court has long recognized that an appraisal action is a proceeding in the nature of a class suit."). From one perspective, the outcome in *Aruba* could be viewed as a plaintiff's victory, because the Delaware Supreme Court increased the appraisal award from the unaffected market price to a value based on the deal-price minus synergies,

entire fairness standard,[434] and there were four cases where the defendants lost on liability, but the plaintiff could not prove any damages or was only entitled to $1.00 in nominal damages.[435] The trend in results thus favored the defendants.

Taken as a whole, the rules, rhetoric, and results of the Implementing Era suggested that a new constituency had established itself as the principal consumer of Delaware M&A law. During prior eras, Delaware law seemed designed predominantly for publicly traded firms, their directors, and their counsel. But during the Generative Era, private equity firms came to dominate the transactional space. The business model required regular participation in M&A, both on the buy-side to acquire portfolio companies and on the sell-side when seeking exits.

The private equity business model did not mesh well with the strictures of Reformation Era caselaw, even after the tweaking during the Moderating Era.[436] Private equity bidders are common value bidders, meaning they do not usually bring a unique source of value, such as synergies, to a deal.[437] When buying companies, private equity firms seek to enhance their ability to secure a deal by aligning the interests of target management with their own.[438] While understandable as a business matter, that strategy creates the potential for sell-side conflicts of interest. Like other bidders, private equity firms also seek to avoid competing for deals and prefer to be the only bidder, but private equity firms frequently seek to use their contacts with management to secure incumbent bidder status and to limit the possibility of overbids after deal announcement or during go-shops.[439] Enhanced

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but the fair value was still less than what the appraisal claimants would have obtained by accepting the deal consideration, so it was hardly a win for the appraisal class. *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 141 (Del. 2019) (finding that "Aruba's $ 19.10 deal price minus synergies value is corroborated by abundant record evidence").

434. ACP Master, Ltd. v. Sprint Corp., No. 8508, 2017 WL 3421142 (Del. Ch. July 21, 2017) (Laster, V.C.), *aff'd*, 184 A.3d 1291 (Del. 2018); Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155 (Del. Ch. 2014) (Laster V.C.).

435. *In re* PLX Tech. Inc. S'holders Litig., No. 9880, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018) (Laster, V.C.), *aff'd*, 211 A.3d 137 (Del. 2019); Ravenswood Inv. Co., LP v. Est. of Winmill, No. 3730, 2018 WL 1410860 (Del. Ch. Mar. 21, 2018) (Slights, V.C.), *aff'd*, 210 A.3d 705 (Del. 2019); Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC, No. 4113, 2014 WL 4374261 (Del. Ch. Sept. 4, 2014) (Noble, V.C.); *In re* Nine Sys. Corp. S'holders Litig., No. 3940, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014) (Noble, V.C.).

436. *See supra* Part V.E.

437. *See, e.g.*, Brian JM Quinn, *Re-Evaluating the Emerging Standard of Review for Matching Rights in Control Transactions*, 36 DEL. J. CORP. L. 1011, 1027–28 (2011) (explaining common value auctions and the general status of private equity firms as common value bidders); *see also* Brian JM Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. CORP. L. 865, 870–71 (2007) (same).

438. Lloyd L. Drury, III, *Publicly-Held Private Equity Firms and the Rejection of Law as a Governance Device*, 16 U. PA. J. BUS. L. 57, 59 (2013).

439. *See, e.g.*, Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679, 692 (2015) (noting that "[a]t the early stages of the sales process, buyers, particularly private equity buyers, often send in expressions of interest that are as bullish as the pitches themselves. Early on, private equity firms can all write the entire equity check, make stockholders happy, and, of course, have more confidence in and love management more than anyone else in human history."); Steven J. Gartner, *Evolving Private Equity Markets*, 2015 WL 1802927, at *8 (2015) (explaining that "[n]early every private equity firm is seeking to link up with operators, managers, and executives

scrutiny decisions from the 1980s and early 1990s were skeptical about single-bidder processes and on the look-out for conflicts.[440] The Implementing Era decisions mitigated those concerns. As long as the conflicts were disclosed, *Corwin* provided a significant defense to post-closing litigation,[441] and *C & J Energy* validated a single-bidder strategy as reasonable.[442]

The private equity business model also created issues on the sell side, because the desire to achieve liquidity events, make distributions, and wrap up funds could push private equity firms to sell a portfolio company earlier than disinterested fiduciaries might choose.[443] And because private equity firms want to wrap up their funds, they have a particularly strong incentive to minimize tail risks from fiduciary litigation or appraisal proceedings.[444] The Implementing Era decisions addressed those concerns as well. Delaware decisions declined to treat the fund life cycle as creating a liquidity conflict, while increasing the level of deference to controller-led sale processes where there was no evident

with whom they can establish relationships and hopefully effect transactions outside of an auction process, whether they are making an investment in a company or starting up a new company. But creating proprietary deal flow is a great challenge for private equity investors; it is much easier to articulate as a strategy than it is to implement. The private equity firm needs to persuade a manager that there is some benefit to linking up with a private equity firm. They need to show they can bring domain expertise and other assets to the boardroom besides a checkbook—something that will entice a management team and a board to talk to a private equity firm outside of a full-blown auction process. Private equity firms spend an enormous amount of time and money cultivating these relationships. In the long run, if the firm can sidestep an auction, the investment is well worth it."); Christina M. Sautter, *Shopping During Extended Store Hours: From No Shops to Go-Shops the Development, Effectiveness, and Implications of Go-Shop Provisions in Change of Control Transactions*, 73 BROOK. L. REV. 525, 555–56 (2008) (discussing private equity buyers' efforts to avoid auctions and structure favorable go-shops); J. Russel Denton, Note, *Stacked Deck: Go-Shops & Auction Theory*, 60 STAN. L. REV. 1529, 1542 (2008) ("The prototypical transaction for a go-shop provision is a private equity buyout of a public company where management is working with a private equity buyer."); *id.* at 1549 (concluding that "go-shops have structures that discourage bidding wars between financial buyers. Management involvement with the initial private equity bidder only increases the advantages that are given to the initial bidder, since it gives the initial bidder better information about the value of the target. Despite appearing to encourage additional bidders and a post-signing auction, go-shop provisions are structured in a way that discourages financial buyers from bidding for the company.").

440. *See* Laster, *Changing Attitudes*, *supra* note 106, at 204–07. Even the "no single blueprint" line from *Barkan* is followed by a paragraph saying that multi-bidder sale processes should be the norm. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286–87 (Del. 1989).

441. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

442. C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049 (Del. 2014).

443. Felix Barber & Michael Goold, *The Strategic Secret of Private Equity*, HARV. BUS. REV. (Sept. 2007), https://hbr.org/2007/09/the-strategic-secret-of-private-equity [https://perma.cc/VR5F-5LZ2].

444. *See* Korsmo & Myers, *supra* note 285, at 243 (describing negative practitioner reaction to appraisal decisions perceived to create increased tail risk for private equity firms).

misalignment of interests.[445] The Delaware Supreme Court also reoriented appraisal law in a manner that substantially mitigated appraisal risk.[446]

IX. THE CURRENT ERA

Chief Justice Strine retired from the bench in 2019, marking the end of a remarkable and highly consequential judicial career that lasted over two decades. With his departure, the Implementing Era came to an end, and the Current Era began.[447] Chronicling this era definitively will be the work of future scholars, but some themes have already come into focus. Most notably, the justices during the Current Era have shown greater deference to precedent. Just as the Moderating Era sought to create a period of calm after the doctrinal revolutions during the Reformation Era, so too are the justices during the Current Era seemingly striving for quieter days after the changes made during the Implementing Era. More recently, a different trend has emerged that suggests the Current Era could evolve into the Legislative Era.

A. Staying the Course on Entire Fairness

During the Current Era, the Delaware Supreme Court has stayed the course on the application of entire fairness. In *Match*, the justices reaffirmed that Delaware's entire fairness regime applies to all transactions between a corporation and a controller, not just squeeze-out mergers.[448] Under that regime, the use of one protective device shifts the burden of proof to the plaintiffs; the use of two devices restores the business judgment rule.[449] In reaching that conclusion, the decision rejected a revisionist historical account advanced by those who contended that Delaware's entire fairness regime had only ever applied to freeze-out mergers.[450] The Delaware Supreme Court instead applied settled precedent from the Moderating Era.[451]

445. *See In re* Morton's Rest. Grp. S'holders Litig., 74 A.3d 656, 666 (Del. Ch. 2013) ("The fact that a corporation has a controlling stockholder . . . who suggests a change of control transaction does not automatically subject that transaction to heightened scrutiny."); *In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1041 (Del. Ch. 2012) ("[M]inority stockholders are not entitled to get a deal on better terms that what is being offered to the controller, and the fact that the controller would not accede to that deal does not create a disabling conflict of interest.").

446. *See* sources citied *supra* note 285 (describing the Delaware Supreme Court's adoption of the deal-price-less-synergies metric in the Implementing Era decisions of *DFC*, *Dell*, and *Aruba*). As a mathematical matter, a deal-price-less-synergies method will typically generate an appraised value below the deal price, reducing the incentive to seek appraisal and mitigating tail risk.

447. *Delaware Chief Justice Leo E. Strine, Jr. to Retire from Delaware Supreme Court*, DEL.GOV (July 8, 2019), https://news.delaware.gov/2019/07/08/delaware-chief-justice-leo-e-strine-jr-to-retire-from-delaware-supreme-court/ [https://perma.cc/PA6T-WXRY].

448. *In re* Match Grp. Derivative Litig., 315 A.3d 446, 463–70 (Del. 2024).

449. *Id.* at 459.

450. *Id.* at 463–65.

451. *See supra* Part VI.A.

B. Staying the Course on Enhanced Scrutiny

During the Current Era, the Delaware Supreme Court has also stayed the course regarding the application of enhanced scrutiny. Delaware law recognizes enhanced scrutiny as one of three doctrinally co-equal standards of review occupying a middle tier between the business judgment rule, Delaware's broadly deferential standard of review that applies by default, and the entire fairness test, Delaware's most onerous standard of review that applies to cases involving actual conflicts of interest.[452]

In *Mindbody*,[453] the justices adhered to precedent while clarifying the operation of enhanced scrutiny. Cases during the Reformation Era and the Moderating Era applied enhanced scrutiny as a separate standard of review, including in post-closing damages settings.[454] But the *Corwin* decision from the Implementing Era asserted that:

> *Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*.[455]

That passage suggested that enhanced scrutiny could not apply after a deal closed.

Although both *Unocal*[456] and *Revlon*[457] were decisions that ruled on preliminary injunctions applications, they did not limit enhanced scrutiny to that context, and enhanced scrutiny was never a special standard of review designed solely for that setting. During the High Reformation, the Delaware Supreme Court had applied enhanced scrutiny in a post-

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452. *See* Metro Storage Int'l LLC v. Harron, 275 A.3d 810, 841 (Del. Ch. 2022) ("Entity law generally uses three standards of review: a default standard of review that is highly deferential and known as the business judgment rule; an intermediate standard of review known as enhanced scrutiny; and an onerous standard of review known as the entire fairness test."); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011) (same); J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1446–50 (2014) (same).

453. *See In re* Mindbody, Inc., 332 A.3d 349, 406–07 (Del. 2024) (upholding a damage award for a *Revlon* breach).

454. *See, e.g.*, *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995) (holding plaintiffs stated a claim under *Unocal* in post-closing damages action); *id.* at 70–71 (holding plaintiffs had not stated claim under *Revlon* in post-closing damages action because of stock-for-stock structure of transaction, not because claim was not available in post-closing setting); Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1290 (Del. 1994) (same); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 369–70 (Del. 1993) (holding *Revlon* could apply to damages claim involving third-party acquisition); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) (stating when reviewing settlement in post-closing damages case that "[w]e believe that the general principles announced in *Revlon*, in [*Unocal*], and in [*Moran*] govern this case and every case in which a fundamental change of corporate control occurs or is contemplated"); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 67–69 (Del. 1989) (analyzing post-closing *Revlon* claim and affirming trial court's decision); *see also* Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (subsequent history omitted) (awarding damages in post-closing action following change-of-control transaction in proto-enhanced scrutiny case).

455. Corwin v. KKR Holdings Inc., 125 A.3d 304, 312 (Del. 2015).

456. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

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

closing setting,[458] and the justices had suggested in another decision that the standard would have applied post-closing had the case not settled.[459] Moreover, as a matter of civil procedure, a court does not apply a unique standard in the preliminary injunction setting. A court takes the standard that applies at trial, then asks at the preliminary injunction phase whether there is a reasonable likelihood that a party can meet it, in addition to having to show irreparable harm and a balance of the equities that favors an injunction.[460] Those points made *Corwin*'s assertion dubious, as did the Delaware Supreme Court's application of enhanced scrutiny in a post-closing damages case involving aiding and abetting liability.[461] In *Mindbody*, the Delaware Supreme Court both applied enhanced scrutiny as a separate standard of review in a post-closing damages case *and* affirmed a finding of liability against a CEO whom the trial court found had committed a breach of the duty of loyalty.[462] That holding preserved the coherence of Delaware's hierarchy of standards of review.

The Delaware Supreme Court also continued the multi-era project of establishing enhanced scrutiny as a single and unified standard of review. In *Coster*,[463] the Delaware Supreme Court formally folded *Blasius* into the enhanced scrutiny standard of review, explaining that in a setting involving the election of directors or a stockholder vote in a context for corporate control, the directors must satisfy the first prong of *Unocal* by proving that they identified a threat "to an important corporate interest or to the achievement of a significant benefit," without attempting to justify their actions on the theory "that the board knows what is in the best interests of stockholders."[464] To satisfy the second prong of *Unocal* in that setting, the directors must show that the response they chose was reasonable in relation to the threat posted, was not preclusive or coercive, and was tailored "to only what is necessary to counter the threat."[465] That unification completed a project that began during the Moderating Era.[466]

C. Staying the Course on Derivative Actions

Finally, during the Current Era, the Delaware Supreme Court has stayed the course on derivative actions. Most significantly, in *Zuckerberg*,[467] the Delaware Supreme Court adopted a single test for demand futility that combined Delaware's two traditional tests,

458. *Citron*, 569 A.2d at 67–69 (Del. 1989) (analyzing post-closing *Revlon* claim and affirming trial court's decision).

459. *Barkan*, 567 A.2d at 1286–88 (Del. 1989) (explaining that *Revlon* would have applied because the case involved a change of control but that the trial court nevertheless correctly viewed the plaintiffs' claims as weak).

460. *See Revlon*, 506 A.2d at 179.

461. RBC Cap. Markets, LLC v. Jervis, 129 A.3d 816, 851–53 (Del. 2015).

462. *In re* Mindbody, Inc., 332 A.3d 349, 382–85 (Del. 2024).

463. Coster v. UIP Cos., Inc., 300 A.3d 656, 672 (Del. 2023).

464. *Id.*

465. *Id.* at 672–73.

466. *See supra* Part VI.B.

467. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1058 (Del. 2021) ("This Court adopts the Court of Chancery's three-part test as the universal test for assessing whether demand should be excused as futile.").

the *Aronson*[468] test from the High Reformation and the *Rales*[469] test from the Moderating Era. Although the creation of a new unified test might sound innovative, it merely combined and reorganized the prior tests, and the Delaware Supreme Court confirmed that prior demand-related precedent remained authoritative.[470] And in *Brookfield*, the justices took a step foreshadowed during the Implementing Era[471] and held that claims involving stock dilution are generally derivative.[472]

D. Themes from the Current Era

In its rules, rhetoric, and results, the Delaware Supreme Court's jurisprudence in the Current Era most closely resembles the jurisprudence of the Moderating Era. Both eras followed periods of significant change. During both eras, the Delaware Supreme Court seemed to have sought to slow down and to devote significant effort to tweaking existing doctrines rather than heading off in new directions.

To date, the Current Era has not witnessed the Delaware courts introducing new rules. Instead, the Delaware courts have continued to develop the existing rules and typically followed the outcomes foreshadowed by Implementing Era decisions.

To date, the Current Era's cases have not involved major new rhetorical components. The justices have neither emphasized the importance of fiduciary duties and their enforcement (Reformation Era), nor have they catalogued the reasons why the need for fiduciary enforcement has declined (Implementing Era). Rather than making broad statements about policy, the Current Era's decisions have more closely examined the law and stressed the importance of *stare decisis*.[473] The rhetorical volume about contractarianism has grown louder, but the continuing effects of that Generative Era innovation deserve separate treatment.[474]

In terms of high profile results, the pattern has not changed significantly from the Implementing Era. The justices have continued to reverse post-trial money judgments in representative actions,[475] while showing greater deference to decisions involving non-

468. Aronson v. Lewis, 473 A.2d 805 (Del. 1984) (subsequent history omitted).

469. Rales v. Blasband, 634 A.2d 927 (Del. 1993).

470. *Zuckerberg*, 262 A.3d at 1059 ("[B]ecause the three-part test is consistent with and enhances *Aronson*, *Rales*, and their progeny, the Court need not overrule *Aronson* to adopt this refined test, and cases properly construing *Aronson*, *Rales*, and their progeny remain good law.").

471. El Paso Pipeline GP Co., v. Brinckerhoff, 152 A.3d 1248, 1251 (Del. 2016) (holding that "the derivative plaintiff's claims were and remain derivative in nature.").

472. Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1277 (Del. 2021).

473. *E.g.*, Holifield v. XRI Inv. Holdings LLC, 304 A.3d 896, 927–28 (Del. 2023); *Brookfield*, 261 A.3d at 1278–80.

474. *See supra* note 286 and accompanying text.

475. *See In re* Mindbody Inc., 332 A.3d 349 (Del. 2023) (reversing in part and affirming in part a post-trial judgment of $35 million); Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP, 288 A.3d 1083 (Del. 2022) (reversing post-trial judgment of $690 million for plaintiff class of limited partner investors).

monetary relief[476] or where a large stockholder has sued in an individual action.[477] There have been no reversals of judgments for defendants in representative actions.[478]

E. A Legislative Era?

Although the Delaware courts have not broken significant new ground during the Current Era, a four-year trend involving increasingly significant legislative interventions suggests that the Current Era may be remembered as the Legislative Era. It is too soon to know for certain, but the development bears watching.

The four-year trend began in 2022, when the General Assembly amended Section 102(b)(7) to make exculpation available to officers. In 2020 and 2021, a series of Court of Chancery decisions dismissed breach of fiduciary duty claims against directors based on exculpatory provisions, but allowed the cases to continue past the pleading stage against the corporations' CEOs, noting that those individuals took action as officers and therefore were not entitled to exculpation.[479] In 2021, retired Chief Justice Strine co-authored an article with retired Justice Jacobs and Professor Lawrence A. Hamermesh that criticized the treatment of officers in the decisions as "unhealthy and unfair," "not justifiable," and "highly problematic," and called for amending Section 102(b)(7) to encompass officers.[480] That same year, the Council of the Corporate Law Section of the Delaware State Bar Association (Corporate Council) proposed legislation to amend Section 102(b)(7) to provide exculpation for direct claims for breach of fiduciary duty against officers, but not for claims brought by or in the same of the corporation. The General Assembly enacted the statute in 2022.[481]

The trend continued in 2023. Some companies with high levels of retail stock ownership, often known as "meme stocks," found it difficult to secure the vote necessary to authorize more shares for raising capital or, alternatively, to effectuate a reverse split to

476. *See* CCSB Fin. Corp. v. Totta, 302 A.3d 387, 401 (Del. 2022) (affirming judgment of Court of Chancery holding that defendants' interpretation of charter provision was contrary to law); Williams Cos. v. Wolosky, 264 A.3d 641 (Del. 2021) (ORDER) (affirming the judgment of the Delaware Court of Chancery declaring rights plan unenforceable).

477. *See* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019) (ORDER) (affirming the judgment of the Delaware Court of Chancery); HOMF II Inv. Corp. v. Altenberg, 263 A.3d 1013 (Del. 2021) (ORDER) (affirming the judgment of the Delaware Court of Chancery).

478. *See In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667 (Del. 2023); Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co., 240 A.3d 3 (Del. 2020). Technically, there has been one reversal of a post-trial judgment for the defendants in a representative action, but the judgment was affirmed after the trial court reached the same conclusion on remand. *Compare* Coster v. UIP Cos., 255 A.3d 952 (Del. 2021) *with* Coster v. UIP Cos., 300 A.3d 656 (Del. 2023).

479. *E.g.*, Teamsters Loc. 237 Additional Sec. Benefit Fund v. Caruso, No. 2020-0620, 2021 WL 3883932, at *26 (Del. Ch. Aug. 31, 2021) (Fioravanti, V.C.); *In re* Columbia Pipeline Grp., Inc., No. 2018-0484, 2021 WL 772562, at *57 (Del. Ch. Mar. 1, 2021) (Laster, V.C.); City of Warren Gen. Emps.' Ret. Sys. v. Roche, No. 2019-0740, 2020 WL 7023896, at *15–16 (Del. Ch. Nov. 30, 2020) (Fioravanti, V.C.); *In re* Baker Hughes Inc. Merger Litig., No. 2019-0638, 2020 WL 6281427, at *15–16 (Del. Ch. Oct. 27, 2020) (Bouchard, C.).

480. *See* Hamermesh, Jacobs & Strine, *supra* note 272, at 364–71.

481. 83 Del. Laws ch. 377, § 1 (2022). *See generally* Marguerite M. Mitchell, *Closing Delaware's Liability Donut Hole: Section 102(b)(7) Protection Is Extended to Corporate Officers*, 58 WAKE FOREST L. REV. 1017 (2023) (explaining background of, rationale for, and benefits of amendment).

increase their trading price to avoid delisting.[482] Both actions required charter amendments and hence had to be approved by a majority of the voting power carried by their outstanding shares.[483] Practitioners designed shares of preferred stock that carried the necessary level of total voting power and would vote as a block in accordance with the outcome reached by a majority of the shares of common stock voting at the meeting, thereby satisfying the statutory voting power requirement.[484] Stockholder plaintiffs, however, sued the directors at some of the companies that deployed those innovations for breaching their fiduciary duties by improperly interfering with the stockholder franchise. While the litigation was pending, the Corporate Council proposed legislation to lower the necessary vote to a majority of the votes cast. The General Assembly adopted the statute that year.[485]

The trend escalated in 2024. In February, the Court of Chancery issued two decisions that corporate lawyers viewed as calling into question prevailing market practices.[486] A third decision the previous fall had called into question the viability of provisions included in merger agreements to enable the sell-side corporation to claim expectancy damages in the event of a broken deal that would include the stockholders' lost premium.[487] By the end of March 2024, the Corporate Council had proposed legislation overturning those decisions. After a contentious floor debate,[488] the General Assembly promptly enacted the statute.[489]

The trend escalated again in January 2025. Concern about corporations reincorporating to other states led Delaware Governor Matt Meyer, newly sworn into office, to set up a working group to produce recommendations for legislation in "weeks not months."[490] The concepts initially under discussion included (i) restricting the Chancellor's discretion in assigning cases, (ii) enhancing the ability of parties to obtain interlocutory review of

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482. *See* Usha R. Rodrigues, *The Hidden Logic of Shareholder Democracy*, HARV. L. SCH. F. ON CORP. GOVERNANCE 29–31, 47–49 (Apr. 19, 2024), https://corpgov.law.harvard.edu/2024/04/19/the-hidden-logic-of-shareholder-democracy/ [https://perma.cc/F4HF-XVXU].

483. DEL. CODE ANN. tit. 8 § 242(b). If the amendment sought to increase the number of authorized shares of a particular class of stock, and the charter did not specifically provide otherwise, the amendment also required the affirmative vote of a majority of the voting power carried by the affected class, voting separately as a class. *Id.*

484. *See In re* AMC Ent. Holdings, Inc. S'holder Litig., 299 A.3d 501, 512 (Del. Ch. 2023) (describing operation of preferred stock in the course of evaluating a settlement of an action challenging its use); *see also* Rodrigues, *supra* note 482, at 37–38, 54–56.

485. 84 Del. Laws ch. 98, § 7 (2023). The amendment also flipped the default rule for a class vote on increasing the number of authorized shares, providing that a class vote only would exist if the charter expressly provided for it. *See* Salama v. Simon, 328 A.3d 356, 363–64 (Del. Ch. 2024).

486. *See* Sjunde AP-Fonden v. Activision Blizzard, Inc., No. 2022-1001, 2024 WL 863290 (Del. Ch. Feb. 29, 2024); W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

487. Crispo v. Musk, 304 A.3d 567 (Del. Ch. 2023).

488. *See generally* Joel Edan Friedlander, *Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster: What Does It Signify?*, 51 J. Corp. L. (forthcoming 2025); Mohsen Manesh, *A New Cardinal Precept in Corporate Law*, 86 La. L. Rev. (forthcoming 2025).

489. 84 Del. Laws ch. 309 (2024).

490. Mike Leonard, *Delaware Legal Tweaks Threaten Business Court's Famed Speed (1)*, BLOOMBERG LAW (Feb. 7, 2025), https://news.bloomberglaw.com/business-and-practice/delaware-legal-tweaks-threaten-business-courts-famed-speed [https://perma.cc/GAP2-SGSC].

Chancery decisions, (iii) imposing caps on attorney fee awards, and (iv) changing the substantive law.[491] Two weeks later, State Senator Bryan Townsend introduced a bill that would overturn the *Match* decision, create a set of statutory safe harbors, establish statutory definitions for the terms "controlling stockholder," "disinterested director," and "disinterested stockholder," and limit the ability of stockholders to use Section 220 of the DGCL to obtain books and records.[492] The bill did not originate with the Corporate Council; former Chief Justice Strine, former Chancellor Chandler, and Professor Hamermesh took leading roles in crafting it.[493] Senator Townsend also introduced a resolution asking the Corporate Council to prepare a report making recommendations for legislative action regarding fee awards in stockholder litigation. In the face of unprecedented opposition, the General Assembly enacted the statute[494] and adopted the resolution.[495]

The political branches plainly have the power to respond to legal developments and make changes in the DGCL. At least on the surface, however, the four data points suggests a trend towards a new and more interventionalist legislative approach that contemplates increasingly fast and significant statutory responses to pending litigation and court decisions.[496] For present purposes, that is something to watch. The Current Era may be evolving into the Legislative Era, marking a new phase in the ongoing and dynamic development of Delaware law.

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491. *See id.*

492. *See* Jacob Owens & Karl Baker, *Landmark Delaware Corporate Law Changes Aim to Stem Exits*, SPOTLIGHT DEL. (Feb. 19, 2025), https://spotlightdelaware.org/2025/02/19/delaware-corporate-law-change-sb-21/ [https://perma.cc/R9V7-XD2C].

493. *Id.*

494. 85 Del. Laws ch. 6 (2025).

495. S. Con. Res. 17, 153d Gen. Assem. (Del. 2025).

496. *See* Greg Varallo, Andrew Blumberg, & Ben Potts, *Optimizing Delaware's Corporate Law Amendment Process: Ideas for the Next 20 Years*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5283642. To be clear, none of the amendments have affected pending cases, and the drafters of the bills have been careful to make that clear. *See* Seavitt v. N-Able, Inc., 321 A.3d 516, 556–59 (Del. Ch. 2024) (discussing the "donut hole" that the 2024 amendments expressly created to avoid addressing pending cases). That approach has doubtless helped make the bills more palatable to legislators, who could maintain legitimately that they were not interfering in the outcome of any pending case. But the legislation has addressed issues raised by recent or still-pending lawsuits, and parties and amici have cited the responsive legislation when arguing on appeals to the Delaware Supreme Court. *E.g.*, Moelis & Co. v. West Palm Beach Firefighters' Pension Fund, No. 340, 2024 (Del. May 7, 2025) (TRANSCRIPT) available at https://courts.delaware.gov/supreme/oralarguments/ [https://perma.cc/3VJG-8CMU]; Amicus Curiae Brief of Charles M. Elson in Support of Appellee, *In re* Tesla Derivative Litig., No. 10, 2025 (Del. May 19, 2025) Dkt. No. 87 at 13 n.48, 15; Amicus Curiae Brief of Corporate Law Academics in Support of Appellee, *In re* Tesla Derivative Litig., No. 10, 2025 (Del. May 19, 2025) Dkt. No. 86, at 4–6; Individual Director-Appellants' Reply Brief, *In re* Tesla Derivative Litig., No. 10, 2025 (Del. May 16, 2025) Dkt. No. 83, at 3, 6, 10–11, 13 n. 3; Brief of Washington Legal Foundation as Amicus Curiae Supporting Appellants and Reversal, *In re* Tesla Derivative Litig., No. 10, 2025 (Del. Apr. 14, 2025) Dkt. No. 68, at 15; Objector-Appellants' Opening Brief, *In re* Tesla Derivative Litig., No. 10, 2025 (Del. Mar. 11, 2025) Dkt. No. 38, at 18.

X. LESSONS LEARNED

The whirlwind tour of historical eras shows how Delaware has changed over time in the three principal areas that this Article has examined. But to recognize the dynamism of Delaware law is nothing new. Scholars often describe Delaware law as indeterminate, with some criticizing that feature[497] and others commending it.[498] By using this term, scholars mean that Delaware case outcomes turn on how a judge applies broad principles to the facts of a given case.

That description, however, merely captures the flexibility that any good legal system must incorporate: "No law applied by human judges to the myriad actions brought by skilled and well-financed business organizations could ever hope to be wholly certain."[499] Precisely because conditions change over time, legal frameworks must adapt.[500] In

497. *See, e.g.*, William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1; Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465 (2009); Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205 (2001); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998); Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

498. *See, e.g.*, Andrew S. Gold & Henry E. Smith, *The Equity in Corporate Law*, 100 NOTRE DAME L. REV. 789 (2025); Asaf Raz, *The Original Meaning of Equity*, 102 WASH. U. L. REV. 541 (2024); Hamermesh, Jacobs, & Strine, *supra* note 272; William W. Bratton & Simone M. Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675 (2020); Matteo Gatti, *Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt to the Market for Corporate Control?*, 25 COLUM. J. EUR. L. 1 (2019); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000); Rock, *supra* note 213.

499. William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's 'The Mystery of Delaware Law's Continuing Success'*, 2009 U. ILL. L. REV. 95, 98 (acknowledging that Delaware law has always been "far from . . . entirely determinate"); *see, e.g.*, Jacobs, *supra* note 2, at 141 (expressing hope that his charting of the changes in Delaware law across time "will dispel any myth you may have been taught in law school that judge-made corporate law is revealed truth that emanates from some all-knowing cosmic force" and demonstrate instead that "the evolution in corporate law is better described as a series of practical resolutions of institutional conflicts that, over time, were influenced and developed by converging economic forces and events"); Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witenagemot*, 2 VA. L. & BUS. REV. 189, 193 (2007) ("Granted, . . . [Delaware's] standards are not exact. The predictability of judicial response to each permutation of a certain deal measure or structure is not absolute."); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 683 (2005) ("By its very nature, equitable review is situationally-specific and proceeds in the common law fashion . . . . [T]hat can lead to what some scholars like to call indeterminacy."); Strine, *supra* note 1, at 1265 (conceding that "in many ways Delaware corporation law is less than optimally clear"); E. Norman Veasey, *Juxtaposing Best Practices and Delaware Corporate Jurisprudence*, INSIGHTS, Dec. 2004, at 7 (acknowledging that Delaware's corporate law "may be somewhat indeterminate").

500. *E.g.*, Ronald J. Gilson & Curtis J. Milhaupt, *Shifting Influences on Corporate Governance: Capital Market Completeness and Policy Channeling*, 12 HARV. BUS. L. REV. 1, 3 (2022) (discussing "cycles in corporate governance" and arguing that "the shape of the governance system is at any time the result of the interaction of two central influences, which we will refer to as *capital market completeness* and *policy channeling*"); Wells, *Modernization*, *supra* note 23 (using historical period to demonstrate implications of "diverse and competing influences" on corporate law; concluding that "the development of corporation law [was] not solely . . . the result of state competition, but as a contingent, conflicted, and fragmented historical process").

England during the late middle ages it was the stultified and fixed system of writs that gave birth to equity and the first Court of Chancery. The writ system was stable and predictable to the point of calcification. It failed because it did not allow for sufficient flexibility to adjust to new circumstances.[501]

At the other end of the spectrum, some argue that Delaware law should track market practice. But market practice changes rapidly—think of SPACs—so a practice-based approach is inherently volatile. Surveys of market practice also reveal a range of views, raising questions about what is truly "market." There are also questions about how a court makes or revisits findings about what is "market." To chase market practice risks arbitrarily enshrining the current fashion as law.

From a larger doctrinal standpoint, a court achieves legitimacy by applying principles transparently, even-handedly, and in accordance with the rule of law. Change is the only constant, and the world of Delaware corporate law is no different. The eras tour shows that Delaware's rules, rhetoric, and results have changed over time. It also shows that Delaware judges apply a set of principles to the facts of a given case with a commitment to the rule of law. A court system must strive for stability and predictability, but not as the law's only or overriding goals. Transparency, integrity, responsiveness, and independence are equally important, with justice and fairness standing above all. If Delaware corporate law can serve those goals, then the *Journal of Corporation Law* will be able to publish articles about the preeminence of Delaware law for another 50 years.

501. XRI Inv. Holdings LLC v. Holifield, 283 A.3d 581, 630–35 (Del. Ch. 2022) (describing writ system and the equitable response), *aff'd in part, rev'd in part on other grounds*, 304 A.3d 896, 927 (Del. 2023).