The Ascendance of the Delaware Supreme Court in American Corporate Law in the 1980s

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INTRODUCTION

The ascendance of the Delaware Supreme Court during the 1980s to become the most important court in American corporate law is one of the most notable changes in corporate law over the last 50 years.[1] Delaware's statute has long been at the center of corporate law—since the New Jersey legislature's abdication of the top rung among states for incorporations in the early 20th century.[2] But changes in Delaware starting in 1983 put more distance between the Delaware high court and any other corporation law decisionmaker. A half-dozen key decisions in a 34-month period in the mid-1980s reset the key corporate law debates of the late 20th century in a way that made Delaware's court the most important corporate law court over the next half-century.[3]

This Article supports that claim with key points developed across five parts. Part I looks at the Delaware Supreme Court through 1982. It was different—in ways that may be lost to many modern readers. How different this early period was becomes more obvious by comparison to three cases discussed in Part II that were decided by the Delaware Supreme Court across 24 months between 1983 and 1985—*Weinberger*,[4] *Van Gorkom*,[5] and *Aronson*.[6] The making of these decisions, overlapping across the Supreme Court's docket during this period, make clear how the law was shifting in a fundamental way as to director duties and the role of litigation. But that was just the warmup. In the next seven months, another triumvirate of cases—*Unocal*,[7] *Moran*,[8] and *Revlon*,[9] took corporate law into the middle of hostile takeovers, unleashing an entirely new vocabulary, new sets of lawyers, and changes in finance. Part III uses these iconic cases to highlight new legal concepts like poison pills that begat new forms of judicial review like intermediate review/enhanced scrutiny, different than just a few years before.

1. This Article was written to be part of the 50th Anniversary celebration of the *Journal of Corporation Law*.

2. New Jersey famously led the deregulatory change in state incorporations codes in the 1890s, but during Woodrow Wilson's governorship pulled back substantially, including a statute passed by the legislature as the governor was leaving for Washington to become president. *See* Joel Seligman, *A Brief History of the Delaware Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 270 (1976) (describing New Jersey's remaking of state corporation statutes in the 1890s, bringing the state enormous wealth, and its sudden turn away from that path just as Governor Woodrow Wilson was leaving for Washington to become President).

3. Left for another day is whether contemporary changes—a series of court decisions, legislative changes and reincorporating in 2024 and thereafter—alone will disrupt the longstanding pattern.

4. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

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

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

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

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

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

Part IV offers an explanation for the remarkable changes in these two trilogies of cases across such a short period. It was partly a change in financial markets that opened new ways of making deals, but it also reflected a shift in the Supreme Court's members who were asked to respond to those changes. Andrew G. T. Moore II, appointed to the court in 1982, occupies a central role in this narrative and in the changes reflected in the jurisprudence that came to the fore during this period. His views evidenced a greater willingness to declare the obligations of directors and officers, and spelled out multiple ways in which Delaware judges would oversee the exercise of power in corporations. Part V broadens the chronological court-based lenses to discuss the contribution of the Chancery Court in the aftermath of these pathbreaking Supreme Court decisions such as in *Blasius* where Chancellor Allen introduced a third type of judicial review/enhanced scrutiny of director actions in takeovers.[10] This part also develops how the justices of the Delaware Supreme Court joining the Court in the late 80s and the 1990s, and the Chancellors and other judges on the Chancery Court after this transformative period continued to build out the initial pattern that had been set in mid-1980s and that remained in place into the 2020s.

I. THE DELAWARE SUPREME COURT BEFORE 1983

Delaware's Supreme Court is quite young among the highest courts in the American states. Delaware had no free-standing Supreme Court until 1951, when it was the last of the (then) 48 states to adopt an independent Supreme Court.[11] Prior to that time, there were six (and later seven) trial judges in the state and appeals of a trial court decision were heard by the other judges who had not initially ruled on the case being appealed (i.e. the "left-over" judges).[12] In the first half of the 20th century, the yearly average number of Delaware appellate cases heard was six.[13] Delaware was also the last of the 50 states to move beyond three seats on its highest court, a change that did not happen until 1978, when it grew to its current size of five justices.[14]

Nor did Delaware courts have the preeminence in making corporate law often attributed to them today. From its inception in 1951 into the 1980s, Supreme Court justices were most often drawn from the Superior Court, a court of general jurisdiction not necessarily well-suited to developing a specific expertise in corporate law, which became the primary domain of the Chancery Court.[15] When Delaware's high court did hand down a corporate law decision, other states were making their own parallel law, often getting as much or more attention. Consider, for example, the Delaware Supreme Court's *Zapata*

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

11. *History of the Supreme Court*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/supreme/history/ [https://perma.cc/H3BK-JQ4A].

12. Paul Dolan, *The Supreme Court: 1900 to 1950*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/supreme/history/history1.aspx [https://perma.cc/YQ7W-EA23]; *see also* Henry R. Horsey & William Duffy, *The Supreme Court: 1951 to 1992*, DEL. CTS. JUD. BRANCH, www.courts.delaware.gov/supreme/history/history3.aspx [https://perma.cc/59QX-83EK].

13. *See* Dolan, *supra* note 12 ("[I]t cannot be said that the judges were overworked.").

14. DEL. CONST. art. IV, § 2; *see* Horsey & Duffy, *supra* note 12 ("By 1978 the Delaware Supreme court was the only court of last resort in the nation with fewer than five members.").

15. *See Historical List of Delaware Supreme Court Justices*, DEL. CTS. JUD. BRANCH, https://courts.delaware.gov/supreme/history/justicespast.aspx [https://perma.cc/X3DH-GLHB] (highlighting that six of the nine justices appointed to the court between 1951 and 1982 had experience on the Superior Court).

decision in 1981 imposing a two-step judicial review to determine when a special litigation committee of the board of directors, could be used to terminate a shareholder's derivative suit (the SLC was a then recently developed strategy of directors and their lawyers).[16] New York's high court had already ruled on a similar case in *Auerbach v. Bennett* that received much of the early attention for its holdings that decisions by such committees gained the business-judgement-rule deference normally accorded other director decisions.[17] The Iowa Supreme Court in *Miller v. Register & Tribune Syndicate, Inc.*,[18] decided after *Zapata*, provided its own alternative to the Delaware and New York standards (one that permitted more judicial review in the committee setting). These other state courts were getting attention that today would be gathered almost entirely by Delaware. *Aronson*, a central case in Part II, was Delaware's catch-up.[19] Similarly, the Massachusetts Supreme Judicial Court adopted a "business purpose" requirement for directors to meet their entire fairness burden in conflict settings (see *Coggins v. New England Patriots Football Club, Inc.*[20]) even after Delaware had abandoned that approach.[21]

Throughout this early period, the Delaware courts faced even larger competition in making corporate law from the federal courts and federal law.[22] Through the 1960s and the first half of the 1970s, the federalization of corporate law through U.S. Supreme Court cases like *J. I. Case Co. v. Borak*[23] and *Mills v. Electric Auto-Lite Co*.[24] and *Supt. of Insurance v. Bankers Life & Casualty Co.*[25] made federal courts a much more important player in corporate governance issues than they are today. Even after the U.S. Supreme Court reversed this movement through a series of opinions in the mid-1970s in *Blue Chip Stamps*,[26] *Ernst & Ernst*,[27] and *Santa Fe*,[28] federal courts continued to cast a large shadow on state corporate law decisions.[29] In the *Santa Fe* decision the Court raised the possibility of federalization of fiduciary duties, albeit by Congress not the Court,[30] and three years

16. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

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

18. Miller v. Reg. & Tribune Syndicate, Inc., 336 N.W.2d 709 (Iowa 1983).

19. See *infra* Part II.

20. Coggins v. New Eng. Patriots Football Club, Inc., 492 N.E.2d 1112 (Mass. 1986).

21. See *infra* Part II.A (discussing *Singer v. Magnavox Corp.* and related cases).

22. Modern readers, if projecting a twenty-first century lens, may well underestimate this federal influence in corporate law, but would be dissuaded by a quick look at the federal presence revealed in the table of contents of the first decade of issues published by the *Journal of Corporation Law*. This sharing of the development of substantive corporate law by Delaware was visible in many corporations coursebooks of the era. One used by this author had more cases from other states than from Delaware (only five Delaware cases were in the book) and more federal than state cases overall.

23. J. I. Case Co. v. Borak, 377 U.S. 426 (1964).

24. Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970).

25. Supt. of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6 (1971).

26. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

27. Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

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

29. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955, 957 (Del. 1985) (highlighting the Delaware Supreme Court's decision that cites to federal decisions such as Johnson v. Trueblood, 629 F.2d 287, 292–93 (3d Cir. 1980) and Panter v. Marshall Field & Co., 646 F.2d 271, 295 (7th Cir. 1981)).

30. In Part IV of its opinion when the Court declined to federalize the substantial portion of the law of corporations without a clear indication of congressional intent it also noted that "[t]here may well be a need for uniform fiduciary standards to govern mergers such as that challenged in this complaint. But those standards

later in in *Chiarella v. United States* sustained a federal prohibition of insider trading by corporate fiduciaries when trading with counterparties to whom they had a fiduciary duty.[31] This was quickly followed by the Securities and Exchange Commission's promulgation of Rule 14e-3 that provided a broad footprint for additional federal regulation of insider trading.[32] Delaware courts, in contrast, paid little attention to one of the most visible areas of debate as to legal limits on the behavior of directors and insiders in American corporations.[33] In this period there was some continuing worry in Delaware of further federalization but it soon became clear that the federalism balance was moving more clearly in the opposite direction. As Gil Sparks, one of the premier litigators of the era put it, "The world started to change…after *Santa Fe* which basically laid all this corporate stuff in Delaware's lap rather than in the federal jurisdiction which was a question up until that time".[34] Parts II and III describe how and why that change evolved in Delaware.

II. THE DELAWARE SUPREME COURT'S SHIFT IN 1983: BRINGING "OUR LAW CURRENT"

The shift in Delaware corporate law in the 1980s by the Delaware Supreme Court can best be seen by a closer examination of three key non-hostile takeover cases of the mid-80s identified in the prior section—*Weinberger*, *Van Gorkom*, and *Aronson*. Each of them significantly changed then-current Delaware law. *Weinberger* intensified judicial review of director conflict transactions and fundamentally reformulated how a shareholder's monetary remedy would be calculated.[35] *Van Gorkom* reset the "care" part of director duties, expanding and specifying what directors were expected to do in mergers (and could be held liable for not doing), even when there was no conflict.[36] *Aronson* reconfigured the interaction of two then recently evolving procedural complications of derivative conflict litigation: first, the use of a special litigation committee of the board of directors seeking to cleanse an alleged director conflict in a corporate decision that would support returning judicial examination to the more deferential "business judgment" standard;[37] and second, when a shareholder seeking to bring a derivative suit in the name of the corporation may be excused from the usual requirement to make a demand on the board prior to bringing that suit because directors were disabled from acting on behalf of entity by conflict or otherwise.[38] The decision effectively erased the Court's *Zapata* decision of just three years earlier.[39]

should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe'"). Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 479-80 (1977).

31. Chiarella v. United States, 445 U.S. 222 (1980).

32. 17 C.F.R. § 240.14e-3 (1981).

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

34. *See* Univ. of Penn. Libr. Oral Hist. Project, The Foundations of Corporate Law, Smith v. Van Gorkom Transcript of Interview with Gil Sparks, law.upenn.edu/live/files/6758-sparks-vangorkom-interview-transcript (on file with the *Journal of Corporation Law*) at 2.

35. *See infra* Part II.A.

36. *See infra* Part II.B.

37. Aronson v. Lewis, 473 A.2d 805 (1984).

38. *See infra* Part II.C.

39. Zapata Corp. v. Maldonado, 430 A.2d 770 (1984).

A. Weinberger*: An Unexpected Beginning as a Supreme Court Decision Following Existing Precedent from the '70s Unexpectedly Flips Midstream into Something Much More Ambitious*

In *Weinberger*, UOP's 50.5% shareholder eliminated the firm's minority shareholders via a cash-out merger on terms that a minority shareholder challenged.[40] Signal, the parent, had acquired the 50.5% stake in UOP three years before in a cash tender offer to the UOP shareholders after arms-length bargaining as to the price with the UOP directors and management.[41] The legal issues centered on the entire fairness duty imposed on controllers in this second (merger) transaction when the majority was using a cashout merger to force the minority shareholders out of UOP at a cash price effectively set by the controlling shareholders and the directors it named to the board of the disappearing company by the parent and a breach of fiduciary duty owed to the shareholders of the disappearing corporation.[42]

Over the previous years, the Delaware Supreme Court had decided multiple cash out challenges particularly in cases that had followed a 1967 change in the merger statutes that for the first time permitted cash to be used as consideration in a long-form merger (as an alternative to stock in the controlling company).[43] A leading Delaware practitioner had opined "it can be presumed that the Legislature has approved cash mergers for the very purpose of freezing out the minority. There should be no further inquiry into a "business" or other purpose for the merger."[44] In three cases decided in 1977, the Delaware Supreme Court first held that a cash-out merger for the sole purpose of freezing out minority shareholders states a cause of action for plaintiff,[45] but then three weeks later handed down a pair of cases on the same day, one holding that a parent did not breach its duty as a majority shareholder in a subsidiary "by consummating the merger primarily to advance a business purpose of its own"[46] and the other holding that the majority buying out minority shareholders via a tender offer without fully disclosing critical valuation facts violated its fiduciary duties.[47] All three were decided unanimously by the same three justices (since the Court's expansion of three to five member would not occur until the next year) and all three opinions were written by the same justice, William Duffy, a frequent author of the Court's corporate law opinions up until his retirement in 1982.[48]

Weinberger evidenced a much more ambitious judicial intervention. Gone were the nuanced decisions focused on differences in the specific facts of the case and leaving

40. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 703–04 (Del. 1983).

41. *Id.* at 704.

42. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. 1952).

43. *See* DEL. CODE ANN. tit. 8, § 251(b)(5) (1967).

44. R. Franklin Balotti, *The Elimination of Minority Interest by Mergers Pursuant to Section 251 of the General Corporation Law of Delaware*, 1 DEL. J. CORP. L. 63, 63–79 (1976) (discussing how permitted cash mergers adversely affect minority shareholders).

45. Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977) (emphasis added).

46. Tanzer v. Int'l Gen. Indus. Inc., 379 A.2d 1121, 1122 (Del. 1977).

47. Lynch v. Vickers Energy Corp., 383 A.2d 278, 279 (1977) (frequently referred to as *Lynch I*).

48. There was a fourth opinion later in this period, a follow on to the *Lynch* opinion just discussed, but in a case dealing with damages; that case found the plaintiffs could recover against the company, but not the individual defendants. Lynch v. Vickers Energy Corp., 429 A.2d 497, 498 (Del. 1981) (known as *Lynch II*). This opinion, too, was written by Duffy, joined by his long-time colleagues from the three-member Supreme Court, McNeilly and Chief Justice Herrmann, with dissents by the two new members William Quillen and Henry Horsey appointed when the court grew from three to five in 1978. *Id.*

closely adjacent issues for another day. Instead, there was a willingness to take on director obligations and fiduciary duties, painting with a broad brush. Consider the spread of the declarations found in the *Weinberge*r opinion, the breadth of duties that are identified, and the adjectives that appear:

- When directors are on both sides of a transaction, they are required to demonstrate "utmost good faith", the "most scrupulous inherent fairness", and "fairness [which] is unflinching";[49]

- Directors simultaneously serving on the boards of both a parent and subsidiary involved in the same transaction, as in this case, have no safe harbor for divided loyalties;[50]

- The concept of fairness has two basic aspects: fair dealing and fair price;[51]

- Part of fair dealing is that fiduciaries such as the directors of the subsidiary cannot make use of corporate information (as in the Arledge-Chitiea report that was a flashpoint in the case) to which stockholders are not privy.[52]

The court also addressed the burden of proof in this space and the impact of cleansing by actions of non-conflicted directors or shareholders, issues that had been percolating in then recent decisions and discussions by corporate commentators:

- The initial burden is on the plaintiff to demonstrate some basis for invoking the fairness obligation;[53]

- Approval by an informed vote of majority of minority stockholders would shift to the plaintiff the burden to show unfairness;[54]

- But the burden clearly remains on the insiders to show they completely disclosed all the material facts underlying the argument to shift this burden;[55]

- Approval by disinterested directors could have a cleansing effect as to the conflict: which the Court emphasized: "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;"[56]

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49. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

50. *Id.*

51. *Id.*

52. *Id.* Gil Sparks, the lawyer for the defendant, described the changes as "there are a ton of them, where they really re-made the law in terms of controlled mergers. All of those things weren't raised in oral argument; many of them weren't even discussed by either side in the briefs." Univ. of Penn. Libr. Oral Hist. Project, The Foundations of Corporate Law transcript, https://www.law.upenn.edu/live/files/10525-weinberger-v-uop-transcript-of-interview-of-a [https://perma.cc/U4WS-X4ND] at 34.

53. *Id.* at 703.

54. *See Weinberger*, 457 A.2d at 703.

55. *Id.*

56. *Id.* at 709 n.7 (including illustrations from Delaware cases of the 1970s).

- The "business purpose" requirement which had been raised in cases from the 1970s as relevant, and perhaps determinative, of a company's justification for a cashout, was excised from the Delaware canon.[57]

As to the fair price part of entire fairness, the opinion also made dramatic changes:

- While seemingly open to the use in fiduciary duty claims of the statutory appraisal valuation process, the Court makes clear that the traditional "Delaware block" method of valuation under the statute (a mechanistic formula that calculates the corporation's value by averaging the corporation's (a) market value; (b) assets value; and (c) earning value) is "clearly outmoded"; instead the Court embraces "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court".[58]

- The Court also permitted rescissory damages if susceptible of proof and found appropriate by the Chancellor with no limits on the historic powers of the Chancellor.[59]

- The Court ruled that a statutory exclusion from appraisal of "speculative elements of value that may arise from the 'accomplishment or expectation' of the merger" was "a very narrow" exception.[60]

All in all, it represented a dramatic change for Delaware corporate law in one case. The Court in its discussion of the fair value standard as "clearly outmoded" concluded, "it is time we recognize [the outmodedness] and bring our law current."[61] The sentiment seems to clearly express the Court's motivation not just for fair value in appraisal, but for the multiple changes announced by the opinion as to fiduciary jurisprudence as well.

The broad expanse of the change can also be seen in the unusual evolution of the *Weinberger* decision itself. After the Chancery Court had held in favor of the company, the case was appealed to the Supreme Court where the three justices that were the only members of the current Court qualified to sit in the appeal under the Court Rule 4(a)[62] voted 2-1 to affirm. There was an eight-paragraph opinion by Justices Quillen and McNeilly finding

57. *See* Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121, 1122 (Del. 1977); Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977).

58. *See Weinberger*, 457 A.2d at 712–13.

59. *Id.* at 714.

60. *Id.* at 713.

61. *Id.* at 712.

62. DEL. SUP. CT. R. P. 4(a).

no reason to justify reversing the conclusions of the Vice Chancellor in favor of the company, i.e., the opposite result to the *Weinberger* opinion described at the beginning of this section that generations of law students and lawyers have learned.[63]

This initial opinion by the Court, was not the last word. There was an additional hearing by which time the two recusals no longer applied. In addition, Justice William Duffy (the dissenter in the 2-1 decision) had retired, and was succeeded by Andrew G. T. Moore II. Moore would write a new opinion for the full five-member court, eventually published a year later. This opinion gathered unanimous support, including the votes of McNeilly and Quillen, despite its dramatic differences from their prior opinion in the case.[64]

B. Smith v. Van Gorkom*: Ratcheting Up Director Duties Arising from the Duty of Care*

During the same month as the release of the 5-0 *Weinberger* decision in 1983, a panel of three justices of the Court heard oral arguments in another fiduciary duty case, *Smith v. Van Gorkom.*[65] The ultimate *en banc* decision in this case in 1985 also suggests a significant move by the Supreme Court as to another important director obligation.

The opinion in this case challenged the failure of the board members of the Trans Union Corporation to satisfy their fiduciary duty of care in deciding to sell the company as advised by the company's long-time CEO who was nearing mandatory retirement. Long-running discussions among the company's senior staff had identified an ongoing weakness—the company's business required large purchase of rail cars to be leased to customers, but the company' business did not generate sufficient income for it to use up all of the tax credits available from such asset purchases.[66] This unresolved dilemma led Van Gorkom, the CEO, to search for a possible buyer who could use those credits and thus would be willing to purchase the company and its assets at a presumably higher price.[67] The CEO identified such a purchaser (Chicago mega-financier Jay Pritzker) and a price that he pitched to Pritzker.[68] After a few days of back and forth discussions produced a meeting of the minds at Van Gorkom's price, Van Gorkom sprang a special meeting on his company's board with no prior notice. After a 2-hour meeting, with little participation by the senior staff, the board approved the merger.[69]

The Chancellor had ruled for the defendants at the trial court.[70] The Supreme Court eventually held three sets of oral arguments, the first before a three-judge panel of

63. Quillen wrote the opinion for the Court that McNeilly joined with a dissent by Duffy who had written five corporate law decisions for the Court over the previous five years. *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977); Tanzer v. Int'l Gen. Indus. Inc., 379 A.2d 1121, 1122 (Del. 1977); Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1033 (Del. 1979); Lynch v. Vickers Energy Corp., 383 A.2d 278, 279 (Del. 1977) (*Lynch I*); Lynch v. Vickers Energy, 429 A.2d 497 (Del. 1981) (*Lynch II*).

64. A review of the transcripts for the oral arguments preceding the two opinions of the two *Weinberger* decisions shows that Duffy dominated the questions at the first oral argument, with some participation by Quillen, and none by McNeilly, and that Moore and Hermann, the Chief Justice, dominated the questions at the second, again with no participation by McNeilly. *See also infra* Part IV.

65. Smith v. Van Gorkom, 488 A.2d 858, 859 (Del. 1985).

66. *Id.* at 864–65.

67. *Id.* at 866.

68. *Id.* at 868.

69. *Id.* at 869.

70. *Van Gorkom*, 488 A.2d at 870–71.

Herrmann, McNeilly & Moore with two additional arguments before the *en banc* court of all five members. The eventual 3-2 decision found that the directors were not adequately informed as to: (1) the CEO's role in forcing the sale of the company and in establishing the per share purchase price, and (2) the intrinsic value of the company. The Court held at a minimum that the defendants were grossly negligent in violation of their duty of care as directors in approving the merger upon two hours consideration without proper notice. Efforts to rely on post-merger market tests or the size of the premium over then current market prices were unpersuasive to the Court.[71] The two dissenters emphasized that the ten directors - five insiders and five outsiders prominent in the Chicago business community with 78 years of experience as CEOs- "knew Trans Union like the back of their hands and that they were more than well-qualified to make on the spot informed business judgments on the fast track."[72]

The outcry in the legal and business community in the aftermath of this decision as to potential liability for directors and the possible impact on director and officer liability insurance premiums and director willingness to serve on boards was large enough that the following year the Delaware legislature passed a statute permitting corporations to include a provision in their articles of incorporation exculpating directors from violations of duty of care (but not loyalty).[73] The great majority of other states quickly added similar provisions to their corporations statutes and most publicly held corporations took advantage of the new statutory rules.[74]

The case's new standard describing decision making by directors in public corporations, had a broad impact notwithstanding the exculpation statute. The opinion's discussions of what directors need to do to meet their fiduciary duty in managing a modern company reshaped director behavior. Law firms incorporated the new approach into their recommended behavior for directors, and the new approach became part of "best practices".[75] The new approaches brought to the fore in *Weinberger* were spreading.

C. Aronson*: Sweeping Out a Three-Year Old Precedent to Remake Procedural Rules Governing Shareholder Litigation*

Another prominent indication of a change in the court's approach in the mid-80s was *Aronson v. Lewis*, which got underway while *Van Gorkom* was still before the court.[76] The impetus for *Aronson* was the 1981 Supreme Court of Delaware decision in *Zapata Corp. v. Maldonado* that had produced a path-breaking judicial response to "special litigation

71. *Id.* at 874.

72. *Id.* at 895 (McNeilly, J., dissenting).

73. DEL. CODE ANN. tit. 8, § 102(b)(7) (1985).

74. As of January 1999, 43 states had adopted statutes permitting firms to immunize directors from personal liability for duty-of-care violations. *See* ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES: CASES & MATERIALS 783 (7th ed. 2001); *see generally* Editor's note, Van Gorkom *and the Company Board: Problem, Solution, or Placebo?*, 96 NW. U. L. REV. 447 (2002).

75. *See* Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 BUS. LAW. 1, 1 (1985).

76. Despite this later start, Aronson was decided and published well before Van Gorkom. *See* Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984).

committees."[77] SLCs arose as a cleansing effort designed by directors and their advisors to permit insiders to take back control of derivative suits brought by an individual shareholder in the name of the corporation and alleging breaches of fiduciary duty. The defendants argued that a decision of the SLC (composed of newly appointed decision-makers chosen to be free of any conflict that would shift the standard of the court's judicial review to entire fairness) should be entitled to the same business judgment deference usually provided to directors.[78] But the *Zapata* court imposed a second step requirement that required the judge to also apply the judge's own independent judgment as to the conflict (unlike New York, for example, that permitted such displacement of entire fairness and return to the business judgment rule with no such conditions).[79] For defendants this was well short of the complete cleansing and return to deference that would have been preferred.

Aronson essentially cabined what to shareholders seemed like a seemingly favorable SLC space for judicial review, not by changing the SLC standard but rather by shining the procedural spotlight on a different decision space and then filling out the law governing this alternative litigation space more favorably to defendants. Under *Aronson*, the focus was on the existing board's capacity (i.e. the board as it was composed at the time the individual shareholder brought a derivative suit) to act without conflict in deciding whether or not to bring suit for the corporation for the alleged breaches.[80] More precisely, the procedural setting for such a claim was the requirement of the Delaware Chancery Court's procedural rule that individuals shareholders bringing derivative suits must first make a "demand" on the board to bring such a suit or to persuade the court that such a demand would be futile.[81]

More importantly, the *Aronson* court noted various claims that were not enough to disqualify directors from deciding whether the suits should be brought. These included:

- An allegation that a director was nominated or elected at the behest of a shareholder controlling the outcome of a corporate election;[82]

- Even proof of majority ownership is insufficient absent allegations of control that would demonstrate the director being beholden to a controlling person;[83]

- A shorthand of dominated and controlled directors is insufficient;[84]

- A mere threat of personal liability for approving a questioned transaction is insufficient.[85]

77. *See generally* Zapata Corp. v Maldonado, 430 A.2d 779 (Del. 1981). The opinion was written by Quillen and joined by Duffy and Horsey who made up the three judge panel. *See id.*

78. *Id.*

79. *See* Auerbach v. Bennett, 393 N.E.2d 994 (N.Y. 1979).

80. The right to bring suit being within the board's plenary power under Section 141(a) of the Delaware General Corporation Law. DEL. CODE ANN. tit. 8, §141(a).

81. DEL. CH. CT. R. 23.1.

82. Aronson v. Lewis, 473 A.2d 805, 816 (1984).

83. *Id.* at 815.

84. *Id.* at 816.

85. *Id.* at 815.

The practical result was that the special litigation committee cleansing process would be needed much less frequently, and that demand futility challenges would dominate the procedural space, a change that would generally help directors. This change in judicial review happened less than three years after the court's prior decision in *Zapata*, with only one change in makeup of the five justices on the Supreme Court—Moore replacing Duffy. *Zapata* and *Aronson* were decided by three judge panels that did not overlap—the three justices who had decided *Zapata* in 1981 were either not on the *Aronson* panel in 1984 (in the case of Quillen and Horsey) or had retired (in the case of Duffy.)

The direction of the decision in corporate governance terms pointed in the opposite direction than *Van Gorkom* (e.g., more toward giving directors flexibility in *Aronson* as opposed to imposing more judicial oversight in *Van Gorkom*). But that reveals perhaps that the important part of the change that was occurring in the Supreme Court's jurisprudence in the mid-1980s was not necessarily broad or narrow review, rather putting the Delaware Supreme Court at the center of the debate of what the rules should be. This was demonstrated with some clarity to me when Justice Moore visited my class on a day when the assigned reading happened to be *Zapata* and *Aronson.* Always an effective teacher, he made his point succinctly by telling students to open the book to the page where *Zapata* appeared and then told them "Reach up to the top of those pages and tear them out."

III. Now for Something Completely Different

As dramatic as the changes between 1983 and 1985 had been, they were dwarfed by the changes brought by another trilogy of cases that illustrated how much hostile takeovers disrupted corporate law. Over a nine-month period in 1985–86, the Delaware Supreme Court announced and published decisions in *Unocal*,[86] *Moran*,[87] and *Revlon.*[88] Across corporate America, large corporate enterprises and their directors and managers were facing unprecedented challenges to control of their company, often via one of what seemingly had become a vast number of hostile tender offers. Company lawyers and financial advisors responded aggressively, developing a variety of new defensive tactics presenting new theories and new methods. Even so, the result was insufficient deterrence to satisfy incumbent managers.

86. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
87. Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985).
88. Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

Most states passed anti-takeover statutes to little avail;[89] the impact of federal law (i.e., the Williams Act passed in 1968) was small;[90] golden parachutes,[91] greenmail,[92] termination fees,[93] shark repellants,[94] staggered boards[95] each were tried with limited results. Poison pills were a mis-directional façade of director actions dreamed up by the legal and final advisers to target corporations that camouflaged what was little more than an overwhelming financial penalty imposed by the directors on an unwanted bidder seeking to avoid directors' usual positional advantage to block mergers or other unwanted takeovers. Poison pills found a welcome mat from the Delaware courts that remains the core of effective defenses to this day. That story and the adjacent new theories of judicial review that the Delaware Supreme Court invented in response to these innovations, is the most dramatic change in corporate law of the last 50 years.

A. Enhanced Judicial Scrutiny of an Intermediate Sort: Unocal

In *Unocal*, the Delaware Supreme Court added on to its long-standing approach to judicial review. The starting point of courts reviewing director actions when challenged in litigation, the deferential business judgment review, had been around since the 19th century.[96] The development of a more intrusive fiduciary duty review, usually based on conflict, had been a core part of Delaware law for most of the 20th century, including the cases discussed in the prior part. The takeovers wars spurred a new version of enhanced review, in between the two prior standards.

Unocal Corp. was, at the time of the litigation, one of the largest American corporations and an integrated oil producer run out of a Los Angeles high rise.[97] It was seeking to fend off an unwanted takeover (a two-tiered, front-end loaded, bust up, hostile tender offer) by west-Texas wildcatter T. Boone Pickens's Mesa Petroleum Company.[98] The steps were complicated and intended to camouflage what was essentially a run of the mill corporate law fight—how tightly should courts review director actions alleged to be harming the body of shareholders whose assets the directors control. Shorn of much (but not all) of the complexity, the deal developed something like this:

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89. *See, e.g.*, Edgar v. MITE Corp., 457 U.S. 624, 646 (1982) (finding Illinois's statute unconstitutional); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 94 (1987) (upholding a state statute).

90. Williams Act, Pub. L. No. 90-439, 82 Stat. 454, 455 (1968) (codified at 15 U.S.C. § 78(n)) (extending the SEC disclosure regime to tender offers).

91. Golden parachutes provided lucrative financial packages to management upon a hostile takeover.

92. Greenmail referred to payments by a target to an unwanted bidder seeking to entice the bidder to go away. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 956 (Del. 1985).

93. Termination fees would be fees promised to a friendly bidder to be paid if another bidder successfully achieved control of the target, thus raising the cost to the unwanted bidder.

94. The term shark repellant generally refers to a defensive tactic that would cost an unwanted bidder money if successful.

95. Staggered boards permitted incumbent directors to maintain control of the board until a subsequent directors meeting.

96. *See* D. Gordon Smith, *The Modern Business Judgment Rule*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83 (Claire A. Hill & Steven Davidoff Solomon eds., 2016).

97. Unocal was the 24th largest corporation in the country based on the value of its assets. *1985 Assets*, CNN MONEY https://money.cnn.com/magazines/fortune/fortune500_archive/assets/1985/ [https://perma.cc/B2J8-TGV5]; *see also* Thomas C. Hayes, *Pickens's Investment in Unocal*, N.Y. Times, Feb. 25, 1985, at D1.

98. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985).

Mesa Step 1: Mesa bought a little over 13% of Unocal shares in the open market at prices at or below $42 (a small premium over Unocal's prior trading value);[99]

Mesa Step 2: Mesa announced a two-part plan to acquire all of the remaining shares of Unocal.[100] Its first move was to be a public tender offer to all Unocal stockholders to buy up to 37% of Unocal stock for $54 cash[101] (i.e. pay attention to the math and a little bit of corporate law: First, that is a big premium and second, a little more than 13% plus 37% adds up to a little more than 50%);

Mesa Step 3: Mesa's follow-up to the tender offer was to use its majority control to implement a merger in which remaining Unocal shares would be exchanged for "securities" which ostensibly would be the surviving corporation's promise to pay $54 at some point in the future, but a claim that would be subordinated to other obligations of the surviving company such that the securities were described as "junk bonds" whose value could well be only a fraction of their ostensible face value:[102] Mesa, having successfully completed steps 1 & 2, could then replace the directors who would have the power to propose a merger; and, having acquired more than 50% of the shareholder vote, to execute a merger. Add another math point: Shareholders evaluating the Mesa deal for the Unocal shares would likely calculate the weighted average of the cash they will receive: (1) for their shares tendered into Mesa's first step $54 in cash, but only for a fraction of their shares given Mesa's 37% limit, and (2) their estimate of the junk bond values that shareholders will get for the majority of their remaining shares in the merger transaction. They would then evaluate whether the combined value equals or exceeds what they think is the value of Unocal shares).

Unocal Prelude: Unocal argued that the Mesa Steps 2 and 3 added up to a coercive choice since even smart investors who understood junk bonds were a bad deal would feel coerced to take Mesa's step 2 offer.[103] This step would at least give them the attractive cash for a minority of their shares.[104] But, if the shareholder declined to participate at all in the tender offer step, there would be other Unocal shareholders who would jump in.[105] The result is that the "jumpers" would get the high cash price for a greater portion of their holdings and the "smarter" withholders would be stuck with a greater portion of their shares cashed out with the junk bonds.

Unocal Step 1: The Unocal board concluded: (1) the Unocal share value was substantially above the $54 price in the Mesa offer; and (2) that the subordinated securities to be exchanged in Mesa's second step were worth far less than their $54 face value.[106] To protect their shareholders against these possibilities, the Unocal board announced its own exchange: <u>if</u> Mesa was successful in Mesa's Step 2, the 49% remaining Unocal stockholders would immediately become entitled to senior securities (i.e. backed by real assets at the front of the line of claimants to Unocal assets) with a face value of $72; and there was an

99. *Id.* at 949.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Unocal*, 493 A.2d at 953.
104. *Id.* at 951.
105. *Id.*
106. *Id.* at 956.

exclusion that prevented Mesa from participating in this exchange for these attractively priced senior securities.[107]

Mesa Step 4: Mesa, facing acquisition of a company whose assets had been effectively pledged to a priority claim, drops pursuit of Steps 2 and 3.[108]

Mesa Step 5: Mesa pivots to litigation. It sues to enjoin the Unocal board's offer, including the exclusion of Mesa from Unocal's offer of the senior bonds. It argued the offer was a breach of the board's fiduciary duty to shareholders (and particularly to one shareholder—Mesa, who already owned 13%). The Chancery Court granted a preliminary injunction against the selective action of the Unocal board.[109]

This was not a common piece of Delaware litigation. Vice Chancellor Carolyn Berger decided this case on a Monday; the Supreme Court accepted an expedited appeal on Tuesday; the parties' briefs were submitted on Wednesday; arguments were heard Thursday; and the Supreme Court announced its decision at 9 a.m. on Friday.[110] The spotlight again found Drew Moore, sitting on a three-judge panel with McNeilly and a superior judge sitting by designation given the unavailability of other Supreme Court justices.[111] The decision, announced and written by Moore, ruled that the board's defensive actions in such a setting would be tested by a new enhanced judicial scrutiny—i.e. more intense than the deference of the business judgment rule but less intrusive that the entire fairness rule at the center of *Weinberger*.[112]

This opinion embraced the willingness to make new law and the need to do so. In response to Mesa's argument that no case had ever sanctioned a device that precludes a raider from sharing in a benefit to all other shareholders, the court observed, "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."[113] This is the same approach that characterized *Weinberger*, and the approach that motivated the court's approach discussed in the previous section.[114] This case presented an even stronger context for such change—the markets and technological

107. *Id.*

108. *Unocal*, 493 A.2d at 952.

109. The case was before the Chancery Court between April 17 and May 13. The Vice Chancellor temporarily restrained Unocal on April 29 from proceeding with its exchange offer unless it included Mesa. *Id.* at 949. Unocal sought an interlocutory appeal before the Supreme Court; the high court deferred but provided four issues for the vice-chancellor's consideration, including questions of duty of care, good faith, possible greenmail by Mesa, or whether the business judgment rule would apply. *Id.* at 953. After a hearing on May 8, the Vice Chancellor granted a preliminary injunction against Unocal's selective repurchase. *Id.*

110. *Id.* at 951–52. *See also* Andrew G.T. Moore II, *The Birth of* Unocal—*A Brief History*, 31 DEL. J. CORP. L. 865, 884 (2006).

111. Moore, as the motions judge for the Court at that time, had also been the conduit for the four issues identified for the chancery court to consider after the Vice Chancellor's first order on April 29. *Unocal*, 493 A.2d at 949, 953.

As to the exclusion point, justices could be excluded, for example, because of their connection (or that of a close relative) to a party to the case or their lawyers. This issue also shaped the justices available to hear the case in *Weinberger*.

112. The court noted that "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests . . . there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred . . . . [D]irectors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed . . . [and the defensive measure] must be reasonable in relation to the threat posed." *Id.* at 954–55.

113. *Id.* at 957.

114. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

advancements making possible hostile tender offers had changed the potential for abuse; directors lacked the usual controlling power over offers and the Court saw its job as responding to this new setting.

The new test had two parts. Directors seeking to persuade a court to defer to their defensive tactics in a takeover (even if none of the touchstones of traditional fiduciary duty breaches existed—e.g. no obvious conflict, or good faith or care violation) must still show there was a threat and that the chosen defensive tactics were proportional to the threat.[115] The specific result was to permit the board's efforts to fend off the unwanted offer from Pickens (who seemed to offer perhaps an easier case for showing a threat than most hostile takeovers). Certainly, the Court found multiple negative adjectives to portray what he did in a bad light: "Two-tier front-end loaded," "bust up," and "coercive" all suggest a threat which was one of the judicial touchstones inserted by the opinion.[116]

B. The Gold Standard of Defensive Tactics: Poison Pills and How They Fit with Unocal

As innovative as *Unocal* was, it was quickly surpassed in innovative impact by the case argued before the Supreme Court the following Tuesday, *Moran v. Household International, Inc.*[117] The defensive action taken by the board of directors at the heart of this case, the poison pill, pushed the envelope of corporate practice more than any defensive tactic had and it showcased the widening impact of New York-based lawyers doing Delaware corporate law—here Wachtell, Lipton, known today across corporate America, still in its initial ascendancy at the time of *Moran.*[118]

The Supreme Court's opinion began by describing the case as involving the most recent defensive mechanism in the arsenal of corporate takeover weaponry."[119] It was more than simply the latest in a long line. It quickly would become the 'go to' defense for almost any takeover defense. The pill has three key parts: (1) the fake; (2) the poison; and (3) the redemption, surrounded by a lot of noise and diversion. The fake is that the target corporation, by all appearances, is granting a right to each of its stockholders to purchase 1/100 of a preferred share with rights that would provide a financial return equal to that of one common share.[120] But the price specified to purchase this fraction of a preferred share was much more than the value of a common share.[121] Result: No one would ever exercise the option provided in this "right".[122] It was nothing more than a placeholder ready to morph into poison if and when a hostile bid showed up.

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115. *Unocal*, 493 A.2d at 954.

116. *Id.* at 949–56.

117. *See generally* Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985). Unlike the *Unocal* case which had been heard in Wilmington, the *Moran* case was heard in the small town of Dover, the state capital. But the argument had been shifted from the Supreme Court's courtroom in Dover to the old Supreme Court courtroom located in the county courthouse on "the Green" with surrounding streets clogged with stretch limousines *See* Moore, supa note 110 at 884.

118. *Moran*, 500 A.2d at 1348.

119. *Id.*

120. *Id.* at 1349

121. *Id.*

122. WACHTELL, LIPTON, ROSEN & KATZ, THE SHARE PURCHASE RIGHTS PLAN (1985).

At that point, the 'fake' (i.e., the right to purchase a fraction of a preferred share) would flip into something quite valuable. Now it would provide a shareholder with the right to purchase two common shares for the price of one,[123] a deal any bargain hunter could quickly understand. Like the exclusion in *Unocal*, the hostile bidder would be excluded from this 'goodie,' thereby effectively diluting the value of any shares the bidder may have already purchased.

Buried in this list of rights and provisions of the poison pill was one more and crucial right—a short clause that permitted the board of directors to redeem the right to exercise the poison pill.[124] At any time before the trigger, the board of directors could effectively kill the poison. What was the effect? Any hostile bidder desiring to avoid the poison of the flip rights (a la Mesa in *Unocal*) had little choice but to give up the deal or come to the board and negotiate on terms that the target could likely control.

The *Moran* opinion approving this innovative defense was not particularly detailed. It defers to *Unocal* (not surprising given that John McNeilly, who wrote the *Moran* opinion, had also served on the panel that had heard and decided *Unocal* just days before Moran's argument, as had Drew Moore, another member of the *Moran* panel who had written the *Unocal* decision). Part IV of *Moran*, the core substance of the opinion, barely covers more than a page. It incorporates *Unocal* to evaluate claims that directors have breached their fiduciary duties by failure to redeem the rights, explicitly tying this issue not just to *Unocal*, but also to *Van Gorkom* and *Aronson* discussed in Part II above.

Over time, other explanations of the poison pills appeared. Four years later, Delaware Chancellor William Allen described the vulnerability of target directors in a hostile tender offer as an anomaly.[125] Directors had long been given blocking power to decide key fundamental changes like mergers, but hostile tender offers had evolved without such protection for the director-blocking position. The poison pills in effect restored the balance.[126] An arresting difference, of course, is that this dramatic change did not happen via statutory amendment (where the director's blocking position as to mergers had long been specified), but in case law. A more interesting alternative is the greater role of private ordering in shaping Delaware law. Lawyers, whose defense clients were looking for protection against hostile takeovers, developed this idea and ran with it and found a receptive audience at the Supreme Court of 1985.[127]

C. Revlon*: A Different Setting Produces a Different Trigger of Intermediate Scrutiny and a more Stringent Standard for Directors to Meet*

The third case of this takeovers' trilogy, *Revlon*, heard and decided just before the *Moran* decision was published, showed that *Unocal* alone was not sufficient to hold the spread of new takeover law. This case, in contrast to the previous two, showed boards could

123. *Moran*, 500 A.2d at 1349.

124. WACHTELL, LIPTON, ROSEN & KATZ, *supra* note 122.

125. TW Servs., Inc. v. SWT Acquisitions Corp., No. 10298, 1989 WL 20290, at *9 (Del. Ch. Mar. 2, 1989).

126. *Id.* at *9–10. This explanation was repeated by Allen's successor as Chancellor, William Chandler, in Air Prods. & Chems., Inc., v. Airgas, Inc., 16 A.3d 48, 94–95 (Del. Ch. 2011).

127. Justice Moore wrote more than a decade after the decision "[w]ith our approval of the pill, Martin Lipton's ingenious conception, hostile takeovers, or the threat of them, were forever changed." *See* Moore, *supra* note 110, at 885.

still lose in Delaware takeover contests.[128] The Court in *Revlon* announced a doctrine that eventually took the name of the case in which it was first identified. *Revlon* required that when the directors' defensive tactic to an unwanted offer was to put the company up for sale, the directors' actions would be subjected to a different, and often more challenging judicial review: the board would be required to show it got the "best price."[129] The test seemed to provide less wiggle room for boards. Like some of the decisions in the previous two parts, the decision showed that Delaware results would go in both directions, but the coin of the realm was still change.

The *Revlon* transaction developed over the summer of 1985, after the *Unocal* decision was published but before the decision in *Moran* that validated poison pills, an uncertainty that may explain why Revlon pursued a defense that did not rely on poison pills. Vice Chancellor Walsh, who would take Herrmann's seat on the Delaware Supreme Court at the end of September,[130] continued to hear the case at Chancery. The case was different because the target in this case, the directors of Revlon, a well-known cosmetics business, sought to protect against a hostile takeover by Pantry Pride, controlled by legendary dealmaker Ronald Perelman.[131] Their choice was to pursue a preferred buyer, Forstmann Little, which triggered a judicial response focused on the affirmative defense.[132] Here the trial court enjoined the actions of the Revlon board in pursuing a "white knight" over Perelman's hostile bid.[133] The Supreme Court, through a three-judge panel made up of Moore, McNeilly, and a superior judge sitting by designation, immediately affirmed the lower court's action to enjoin.[134] The decision, written by Moore, opined that the new context "significantly altered the board's responsibilities" under *Unocal*.[135] The decision "to sell the company" made the question of defensive measures moot, changing the board's duty to getting the "best price" reasonably available.[136] This action, via an initial oral decision by a three-judge panel that again included both Moore and McNeilly, came prior to the announcement of the *Moran* decision validating the approval of the poison pill (by a panel that also included Moore and McNeilly). The written opinion in *Revlon* followed in the spring of 1986.[137]

IV. EXPLAINING THE CHANGE

Parts II and III show a distinctive change in Delaware corporate law in the mid-1980s, something much different than what came before. These changes are reflected across a few key cases. They occurred within an unusually tight period—34 months or so—with more

128. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).
129. *Id.*
130. William T. Quillen & Michael Hanrahan, *A Short History of the Court of Chancery 1792-1992*, *in* COURT OF CHANCERY IN THE STATE OF DELAWARE (1993) ("[I]n 1985 . . . Vice Chancellor Walsh was appointed to the Supreme Court . . . . Though elevated to the Supreme Court, Justice Walsh continued to sit by designation in the Court of Chancery in order to wrap up a number of important cases.").
131. *Revlon*, 506 A.2d at 176.
132. *Id.* at 179.
133. *Id.* at 183.
134. *Id.* at 176.
135. *Id.* at 182.
136. *Revlon*, 506 A.2d at 182.
137. *Id.*

than one of the cases before the court at the same time. The relevant cases were decided by a small number of justices. The key cases arose in two of the core subject matter areas of corporate law—directors' fiduciary duties and hostile takeovers. But the court's holdings in the two subject matter areas tended to move in opposite directions—the fiduciary duty cases, trending toward increasing director duties, and the takeover cases, more likely to provide directors greater freedom to make decisions about the future of the entity. The differences provide an opportunity to test some of the other factors that may have been influencing the court's outcomes.

A. The Likely Impact of Different Justices Deciding the Cases

Why did Delaware law change? An obvious possibility is differences in the justices who decided the cases. While the full five-member court is eligible to decide these cases, four of the six cases that are the focus of this Article were decided by three-judge panels.[138] With 20 total judge slots available for the five sitting justices (the two remaining slots were filled by judges from other Delaware courts sitting by designation), an average would suggest that each justice would serve on four of the cases. The pattern of the number of cases on which an individual justice sat, the number of times a justice joined the majority decision, the number of opinions that an individual justice wrote, and the degree of participation in oral arguments all point to an outsized role for one of the justices: Andrew Moore.

1. Sitting on the Case

Andrew Moore participated in all six of the transformative cases in the core period of change that is the focus of this Article. John McNeilly participated in five of the six, Henry Horsey and Andrew Christie in three of the six. Daniel Herrmann participated in two and William Quillen in one.[139]

2. In the Majority for the Decision

There is a similar pattern for justices who were in the majority. Moore was within the majority in all six of the key cases. McNeilly dropped to four and Quillen to zero after taking into account their dissents in *Van Gorkom*, one of the two *en banc* cases. Horsey and Christie remain at three of the six and Herrmann in two of the six.

3. Writing Opinions for the Court

The writing of the opinions was also not equally shared. Again, Moore is distinctively apart from the rest, having authored four of the six opinions for the Court (and likely also

138. *Revlon* was before McNeilly, Moore, and Balick. *Id.* at 173. *Moran* was before Christie, McNeilly, and Moore. Moran v. Household Int'l Inc., 500 A.2d 1346 (Del. 1985). *Unocal* was before McNeilly, Moore, and Taylor, sitting by designation. Unocal Corp. v Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). *Aronson* was before McNeily, Moore, and Christie. Aronson v. Lewis, 473 A.2d 805 (Del. 1984).

139. Four of the six cases were decided by three-judge panels. *Weinberger* and *Van Gorkom* included all five judges, including Quillen's only sitting and one of Herrmann's two. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). Quillen left the Court to run for Governor in 1983 and was succeeded by Christie after the first of the six cases. *Historical List of Delaware Supreme Court Justices*, *supra* note 15.

essentially wrote one of the remaining two). The disproportion is more noticeable given that he was never the senior justice on the panel, (the person who would normally pick which justices in the majority would write the opinion).[140] McNeilly and Horsey each wrote one opinion and Herrmann and Christie/Quillen none.

4. Participation in Oral Arguments

The disparity is even greater when looking at participation in oral argument (admittedly a harder indicium to measure). McNeilly, who was the only justice to come close to Moore in participation in the cases, and the number of times being in the majority, hardly ever asked questions at oral argument. Moore was dominant in oral argument in each of them. Only Chief Justice Herrmann, who sat in only two of the cases, has a comparable participation to Moore in oral arguments in any of the cases.[141]

5. Other Indicia

Two of the six cases had unusual procedural histories that further support the influence of Moore. In *Weinberger*, a three-judge panel before Moore joined the court had decided the case 2-1. After Moore took the seat of the retiring Duffy, who dissented in that first opinion, the full court decided in the opposite way to the decision of the withdrawn opinion. Moore's opinion for the *en banc* court attracted the votes of McNeilly and Quillen, opposite from the way that they had originally voted in the three-judge decision. In *Van Gorkom*, oral arguments before a three-judge panel were followed by two additional sets of oral arguments before the *en banc* court. Moore wrote the court's eventual opinion in a 3-2 split. In two of the six opinions that were decided by a three-judge panel, Moore and McNeilly sat with a third non-Supreme Court judge sitting by designation. Moore's status as one of two Supreme Court justices on the panel may have provided him greater influence.

B. Results in the Different Contexts of the Pivotal Cases: Fiduciary Duty and Takeovers

The dramatic changes in corporate law described in the earlier parts took place across two key areas of corporate governance. The first set of cases, *Weinberger*, *Van Gorkom*, and *Aronson*, dealt with the core director fiduciary duties in public corporations, principally as to the application of an entire fairness standard of judicial review as opposed to business judgment deference.[142] The second set of cases dealt with how much room directors had

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140. Extending the window through the end of Moore's term in 1994 to 16 major corporate law cases in the 1982–1994 period (author-defined), Moore sat on 15 of the 16 cases and wrote the opinion for the Court in 8 of the 16 cases. Even so, the committee charged with making recommendations to the governor on court vacancies chose not to forward his name for reappointment at the end of his twelve-year term in 1994, see Diana B. Henriques, Top Business Court Under Fire; Critics Say Politics is Hurting Delaware Judiciary, New York Times May 23, 1995; Gov. Thomas R. Carper, Delaware Supreme Court Nomination Involved No Conspiracy, Letter to the Editor of the New York Times, May 29, 1995, section 1 page 20.

141. This opinion derives from the review of oral arguments in each of the cases (sometimes in multiple hearings)—the differences among the justices participating on the panels being large enough to suggest a reliable difference, albeit without the normal statistical measurements of significant differences.

142. *See Weinberger*, 457 A.2d at 710; *Van Gorkom*, 488 A.2d at 890; *Aronson*, 473 A.2d at 812.

to deal with hostile takeover efforts, a relatively new area of case law for the Delaware courts.[143]

1. *The Changing Space of Entire Fairness and Business Judgment Deference*

The Delaware Supreme Court has been dealing with the appropriate standard of judicial review and with areas where directors or managers had a conflict in their exercise of corporate power since the court became a freestanding institution in the early 1950s.[144] By the early 1980s, the court was confronting new settings for this core doctrine. There were new efforts by directors to avoid entire fairness by employing new methods of cleansing conflict. There were new complications in dealing with derivative suits and the extent to which shareholders bringing derivative suits must make demand upon directors.

Weinberger, *Van Gorkom*, and *Aronson* dealt with these questions. The Supreme Court's general direction in addressing these questions focused on increasing director duties. *Weinberger* was full of directives on what directors must do and the judicial role in responding to the need for entire fairness in conflict situations.[145] *Van Gorkom* similarly pushed director duties beyond where they had previously been, imposing with specificity duties of care that extended beyond prior judicial directives.[146] *Aronson* ultimately redounded to the directors' benefit in its procedural shift of shareholder challenges to director actions to the earlier demand point of litigation as opposed to the challenge to cleansing of conflict by a special litigation committee that would come much later. Yet, like the earlier two opinions, *Aronson* confirmed that the Court was the sun around which corporate law-making revolved with the Court quickly changing precedent that did not fit the new vision of the mid-80s.

2. *Providing New Rules for Hostile Takeovers*

In the second trilogy of cases, across 1985 and early 1986, the Supreme Court was dealing with previously undefined space as to the reach of director power in hostile takeovers. Taking over American corporations by getting dispersed public shareholders to tender their shares and enabling a new control group to take over the company had been occasionally successful but not generally enough to generate lots of case law. As these alternative strategies became more common, conflicts between directors and shareholders in this new setting became more common. The holdings in *Unocal* and *Moran* were generally in the direction of providing directors with greater powers to resist unwanted takeovers. In contrast, *Revlon* limited the space for directors' defenses in the particular setting of that case.

The bigger picture though was to insert a broad new addition to the tools of judicial review in responding to claims of fiduciary duty violations. The longstanding frame had been that judges in any fiduciary duty case will begin by deference to the business judgment of directors, except in cases of conflict or other claims of breach of duty, in which case the court would shift to a more exacting entire fairness standard. To deal with these new hostile

143. *See Unocal*, 493 A.2d at 949; Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 175 (Del. 1986).

144. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109–10 (Del. 1952) (describing the court's job to scrutinize a merger because minority shareholders alleged a breach of fiduciary duty).

145. *See, e.g.*, *Weinberger*, 457 A.2d at 710–11.

146. *Van Gorkom*, 488 A.2d at 873–74, 893.

takeover settings, the Delaware Supreme Court was now introducing an intermediate standard between the first two. In the scheme of traditional Delaware fiduciary duty analysis, and in the parallel law in other states, this was a big deal. There certainly was still room for significant differences in the outcome of cases decided within this new space, but the shifting of the Court's approach to a more complicated and demanding judicial involvement in director decision-making was the key message of these cases.

C. Pairing the Change in the Court's Decisionmakers with the Law They Pronounced.

Why did these two important changes occur when they did? Or put a different way, would the Court's jurisprudence have evolved in the ways described here if there had not been a change in the Court's justices at this particular time? The move from a two-part business judgment deference/entire fairness juridical review frame to a three-part frame with many takeover cases now falling into an intermediate third space focused on enhanced scrutiny, was not preordained by anything in then-existing Delaware law.

In a parallel way, the list of directives in dealing with director conflict in *Weinberger* overwhelms previous judicial discussions in that space. The Court had been dealing with new contexts for cleansing in director conflict settings in the 70s and early 80s that were continuing to grow. Director duty of care had long been a staple of fiduciary duty discussions, but the frame set out in *Van Gorkom* extends previous expectations of director duties into a much broader space. The direction provided by the Court in *Aronson* in no way can be seen as a continuation of the direction of *Zapata* but rather reordering the space so that demand (and futility) and cleansing would become key strategic alternatives for litigants in derivative litigation.

Those kinds of changes appearing in the corporate law of the time pushed the consideration of causation for these developments more in the direction of change that had an impact on the court's personnel. The confluence of Andrew Moore's arrival and the advent of the court's more aggressive treatment of corporate law is more than coincidence. He was more of an outsider than the usual Delaware Supreme Court justice. A New Orleans native, Moore had gone to Tulane Law School and come to Delaware first for military service as an Air Force JAG officer. He quickly made a name for himself, clerking for Supreme Court Chief Justice (and later governor) Charles I. Terry. After joining one of the larger Wilmington law firms, Moore ran for attorney general (unsuccessfully after getting the Democratic party nomination) in 1970. He was named to multiple state boards, including the Judicial Nomination Commission by Governor Pete DuPont after DuPont formed that commission in the late 1970s, serving until Moore's resignation from the Commission after Justice Duffy retired from the Supreme Court in early 1982. Gov. Dupont, a Republican, appointed Moore to the Supreme Court in 1982.

Moore's decisions favored directors sometimes, and other times did not. The consistent pattern was crafting a new paradigm that pushed directors to do more than they had been doing and to increase the space for the judiciary calling more of the shots in corporate governance. The difference in approach from the prior court was apparent quickly. By the month following his appointment his questions during argument of the *Weinberger* case focused repeatedly on the conflicts raised by the *Arledge-Chitiea* report, which had not been raised in the case in the initial decision handed down by the Court.

Alan Stone, one of Moore's clerks and later a long-time corporate practitioner in Delaware, described Moore as having "a sense of balance,"—formulating protection of the business judgment rule that has stood the test of time and contributing to a new approach to frame a judicial approach to increasing high-profile takeovers that had not been seen before in such numbers.[147] Arthur Dent, another Moore clerk and long-time friend, noted that Moore had no patience for those who, charged with a fiduciary responsibility to maximize shareholder value, failed to exercise diligence or sought primarily to satisfy their own interests. "I saw no inconstancy between the decisions in *Revlon* (requiring a bord to obtain maximum value in sale of control) and *Trans Union* (the imposition of liability in the face of gross board negligence)."[148]

V. Building Out the New Paradigm

Another way of examining the significance of change in a particular period is to compare it to adjacent eras. Part I discusses the Delaware Supreme Court prior to 1983. This section focuses on the periods that followed the cases discussed in Parts II and III and expands the lens somewhat to include later decisions of the Supreme Court and the Court of Chancery without going into the post-1986 period in the same detail as in the prior parts.[149] Here, there were decisions by Delaware's Chancellor Bill Allen as in *Blasius* that sometimes went further than the Supreme Court had been willing to go. Over time, the influence of successive Chancellors—Allen, Bill Chandler, and Leo Strine—provided more continuity and depth in Delaware law, and new justices on the Supreme Court like Norm Veasey, Randy Holland, Jack Jacobs, and Carolyn Berger shaped the evolution of corporate law. But the trend lines themselves were well-established by the middle 1980s and continued unabated into the 2020s.

A. Weinberger

Weinberger opined on many fiduciary duty issues and valuation issues, such that there were soon follow-on cases back before the Supreme Court. When the Supreme Court in *Weinberger* got to the "fair price" portion of entire fairness under common law, it diverted to updating the statutory determination under "fair value" under the appraisal statute.[150] The structure created some confusion as to the relationship between the statutory and common law remedies. When Vice Chancellor Berger relied on the part of *Weinberger* noting that absent fraud or deception appraisal was the exclusive remedy, the Supreme Court overturned the result as "a narrow interpretation of *Weinberger* that would render meaningless our extensive discussion of fair dealing found in that opinion."[151]

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147. Interview with the author March 18, 2025 (on file with author).

148. Email exchange with the author March 19, 2025 (on file with author).

149. Vice Chancellor J. Travis Laster's keynote for this volume of the *Journal of Corporation Law*'s provides a masterful presentation of this extended period.

150. *Weinberger*, 457 A.2d at 715 (stating that statutory appraisal shall govern the financial remedy available to minority shareholders in a cashout merger).

151. Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104 (Del. 1985), *overruling* 480 A.2d 655, 660 (Del. Ch. 1985); *see also* Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985) (another early example, where the Supreme Court affirmed a Chancery interpretation of *Weinberger*).

In subsequent years, the Delaware courts worked to reduce differences as to available remedies under appraisal statues, and fiduciary duty claims at common law.[152] Later Supreme Court decisions clarified somewhat *Weinberger's* language that led to confusion about whether synergies were excluded from fair value.[153] The 2017 Supreme Court backed use of deal value (which often would split synergies as bargained between the parties) where there weren't conflicts of interest that would cast doubt on that negotiation.[154]

Other issues of entire fairness framed in *Weinberger* continued to evolve in subsequent decades. For example, the methods and boundaries of cleansing of alleged conflicts of directors and other fiduciaries were a recurring issue. The Supreme Court's 2014 decision in *Kahn v. M&F Worldwide Corp. (MFW)*[155] inserted requirements for independence in both director actions and shareholder actions in contexts of fundamental changes such as mergers. The issues required going beyond the holdings of *Weinberger* itself, but the spirit of the reforms had more in common with the changes invoked in *Weinberger* rather, than, for example, the weaker approach to entire fairness that *Weinberger* displaced.[156]

B. Van Gorkom

Part II addressed the statutory overruling of *Van Gorkom* and the continuing large impact of Van Gorkom's substance in terms of shaping director and lawyer perceptions of appropriate director actions in managing a corporation (even if breaches of duty of care are usually now exculpated in American corporations). Under section 102(b)(7) and other exculpation statutes, plaintiff lawyers shifted their pleadings to characterize claims that might have previously been brought as care claims as coming instead under the good faith prong of loyalty that could not be exculpated. This led to subsequent Supreme Court cases cutting back on such claims.[157]

The Court of Chancery's subsequent articulation of *Caremark* claims identified the seemingly small space for good faith allegations.[158] More recently, cases on possible company, director, or senior manager liability for failure to monitor serious failure in manage-

152. *See, e.g.*, *In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004) (opinion by Justice Jacobs sitting by designation as Vice Chancellor and awarding same financial result under the statutory and common law claims).

153. *See generally Weinberger*, 457 A.2d at 701.

154. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017).

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

156. *See supra* Part II. For example, the rule in the case required not just the double cleansing mechanisms but that the process be put into effect before any steps of the transactions had been taken. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, n.14 (Del. 2014). MFW reflects the strong impact of Leo Strine, one of the post-*Weinberger* generation of judges, on the legacy created by the cases of the mid-1980s. Strine wrote the Chancery opinion. *In re* MFW Shareholders' Litigation, 67 A.3d 496 (Del. 2013). It was affirmed by the Supreme Court, just as Strine was poised to arrive as Chief Justice. *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) (*en banc*). *MFW* illustrates a different kind of continuity in Delaware law, that of the moving party who brought the issue to the Court. The company in question was controlled by Ronald Perelman, who structured the deal to set up this issue. Perelman had also been the moving party in other well-known takeover cases, including *Revlon*, discussed in Part III.

157. Stone v. Ritter, 911 A.2d 362 (Del. 2006).

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

ment, for example, listeria outbreaks, plane crashes, employee harassment, illustrate present-day extensions of director and management fiduciary duties that draw on *Van Gorkom's* reasoning of four decades ago.[159]

C. Aronson

The evolution of the law arising from *Aronson* in subsequent decades shows the sustaining core application of the rules first developed there as well as the updating that naturally occurs without changing the existing paradigm. That is not to say that *Aronson* law has not produced challenging problems of application over the four decades since. The standard first explicated there reflected possible liability for violations of duty of care, a standard that Section 102(b)(7), enacted not long thereafter, essentially removed from the workspace for future litigation. *Aronson* itself reflected facts in which the directors in place at the time of the alleged conflicted decision had remained in place through the time the question of the necessity for demand would have arrived. Subsequent cases reflected different facts to which *Aronson* was not easily applied, i.e., new directors have been appointed. A subsequent Delaware case, *Rales v. Blasband*, nine years after *Aronson*, adapted the original test to more easily apply to different facts.[160]

In a 2021 Delaware Supreme Court decision, the Court revisited and reformulated the then-37 year old decision that, in the Court's words, blended *Rales* and *Aronson*, "refocus[ing] the inquiry on the decision regarding the litigation demand, rather than the decision being challenged."[161] But the Court noted that the newly rephrased test was "consistent with and enhances, *Aronson*, *Rales* and their progeny [so that the Court] need not overrule *Aronson* . . . and cases properly construing *Aronson*, *Rales*, and their progeny remain good law."[162] The key result for the purposes of this analysis is that the law since *Arons*on in this space after four decades, remains grounded in the redirection set out in *Aronson.* Change was needed to address a situation that was not covered in the original *Aronson* decision and by section 102(b)(7).[163]

159. *See, e.g.*, Marchand v. Barnhill, 212 A.2d 805 (Del. 2019); *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343 (Del. Ch. 2023); *see generally* Robert C. Bird & Julie Manning Magid, *Operational Risk and the New Caremark Liability for Boards of Directors*, 103 B.U. L. REV. 1539 (2023).

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

161. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1041 (Del. 2021).

162. *Id.*

163. The point of *Aronson* was to focus on the directors deciding about whether to pursue litigation against the corporation. The focus thus is on the directors in office at the time that a demand is made by a shareholder to bring a derivative suit and to ask if directors can speak for the corporation. *Aronson* did not address alternative facts such as when the demand being made did not occur until sometime later when the identity of the directors seeking to act for the entity may have changed. Rales v. Blasband, 634 A.2d 920, 934 (Del. 1993). A case subsequent to *Aronson* addressed that situation which the *Zuckerberg* opinion felt more directly described the general rule. *Aronson* also included a provision that in addition to naming conflict or beholdeness to someone who was conflicted, added a third dimension that addressed a director's possible liability for breach of duty of care as to the decision to bring suit. The *Zuckerberg* court recognized that Section 102(b)(7) eliminated many if not most possible claims under the second prong in contemporary cases. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1060 (Del. 2021).

D. Enhanced Scrutiny/Intermediate Review: Unocal*,* Moran *and* Revlon

The enhanced scrutiny judicial review was completely new in 1985 when it was introduced in *Unocal*. How has usage and influence of this initiative fared over the four decades since its initial appearance and have there been comparable innovations in corporate law in more recent eras? Enhanced scrutiny, triggered in response to a defense to a takeover where there would be the "omnipresent specter" that the board members were acting in their own interest, generally received a good reception upon its introduction in *Unocal* in 1985.[164] Chancellor William Allen, who had taken office about the time of *Unocal*, called it the "most innovative and promising case in our recent corporate law."[165] Less than a year after *Unocal*, the Delaware Supreme Court introduced a second iteration of enhanced scrutiny in *Revlon*, as discussed in Part II. This version had a different trigger—when the board had put the company up for sale—and a different standard of review that had to be met—an obligation to get the best price for shareholders.[166]

Two years later, Chancellor Allen introduced a third version of enhanced scrutiny in *Blasius Indus., Inc. v. Atlas Corporation* with still a different trigger and a different standard of review that had to be met.[167] This version of enhanced scrutiny was triggered by board action to interfere with shareholder voting which would require the board to show a compelling justification.[168] Chancellor Allen was clear in his concern: the central purpose of voting to Delaware's approach to corporate governance. He observed that "the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests" and provided the justification for "the exercise of [power] by directors over vast aggregations of property that they do not own."[169] From the beginning, *Blasius* was intended to block a subset of board actions that *Unocal* would permit.

In the years since, the Delaware courts returned regularly to the enhanced view under *Blasius*, although with varying approaches. Much of the heavy lifting was done by the Chancery Court. The Supreme Court first entered the debate in *Stroud v. Grace*, (another decision written by Drew Moore) where it generally approved *Blasius* but found it inapplicable in a closely held corporation setting at issue in that case.[170] In two other cases over the next two decades, the Supreme Court again mentioned *Blasius* favorably, but then quickly shifted the discussion to applying *Blasius* within *Unocal*, which left little for *Blasius* to do.[171] The more detailed discussion about *Blasius* happened in chancery. In a

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

165. City Cap. Assoc. Ltd. P'ship v. Interco, Inc. 551 A.2d 787, 796 (Del. Ch. 1988).

166. Revlon, Inc. v. MacAndrews & Forbess Holdings, Inc., 506 A.2d 173 (1986).

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

168. *Id.* at 659.

169. *Id.*

170. Stroud v. Grace, 606 A.2d 75, 96, n.3 (Del. 1992). In *Williams v. Geier* decided four years later, the Supreme Court declared that the burden of demonstrating a compelling justification was very high with the result the *Blasius* was "rarely applied." Williams v. Geier, 671 A.2d 1368, 1376 (Del. 1996). In the only other Supreme Court rulings in the *Blasius* space until recent times, the Supreme Court began its opinion with a mention of *Blasius*, but then disposed of that impulse with a conclusory statement, without analysis that *Blasius* did not apply in the absence of a primary purpose to interfere with the vote and then slid into a pure *Unocal* analysis that occupied the remainder of the opinion with no violations found. Unitrin v. Am, Gen. Corp., 651 A.2d 1361, 1366–70 (Del. 1995). In the following decade the Supreme Court affirmed *Blasius*, followed by a repeat of its earlier statement that *Blasius* was rarely applied. MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1130 (Del. 2013).

171. Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000).

2000 case decided by Leo Strine,[172] and in a contemporaneous law review article written by Strine and two Chancery colleagues, Bill Allen and Jack Jacobs, the chancellors confronted more directly the challenges in the *Blasius* space.[173] Then, a 2007 decision by Strine noted the great strength of *Blasius* but also its overbroad language "that rendered the standard of review articulated in the case too crude a tool for regular employment."[174] The Supreme Court stayed away from this tricky debate for two decades. Finally in 2021, it stuck its toe into the *Blasius* space again, embracing the previous Chancery suggestion that *Unocal* could be folded into *Blasius*, that would result is a more "sensitive" or more "muscular" holding that reflected the importance of protecting the shareholder vote, without explaining how that might happen.[175]

During the post-1985 era, a similar pattern was visible as to intermediate scrutiny in the *Revlon* space. Subsequent cases made it easier to satisfy the initial Revlon version of enhanced scrutiny—not necessarily the best price or a perfect decision, but a reasonable decision and not necessarily requiring an explicit market check.[176] During the same period new contexts for the application of *Unocal* also appeared. For example, there was a challenge to "substantive coercion" that had been embraced by the Supreme Court in *Unitrin* but was challenged in later cases.

Overall, the bold innovation of *Unocal*, *Moran* and *Revlon* of 1985–86, continued to guide enhanced review in the succeeding 40 years. There were some movements in either direction but no developments in an order of magnitude that would match the initial rulings of the Supreme Court in the mid-1980s.[177]

CONCLUSION

Corporate law decisions of the Delaware Supreme Court between 1983 and 1986 revealed a fundamental shift in the Supreme Court's approach to corporate law as compared to the time before. When examining what was different about at this point of inflection, the most likely explanation is the change in the makeup of the Delaware Supreme Court. Specifically, it occurred at the point in time when Andrew G. T. Moore II arrived at the Court

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172. *Id.*

173. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. L. 1287, 1313 (2001) (acknowledging that post-*Blasius* case law had "exposed analytical difficulties in determining the proper scope of the 'compelling justification' test" and led to unintended competition between the Unocal and Blasius standards of review).

174. Mercier v. Inter-Del, Inc., 929 A. 2d 786, 805–06 (Del Ch. 2007).

175. Coster v. UIP Cos., 300 A.3d 656, 670–72 (Del. 2023).

176. The loss by Paramount in this case was ironic; Paramount had challenged a somewhat hostile bid several years before when it had the role of the second bidder seeking to combine with Time, Inc. The Paramount offer was for much more than Time's value as reflected in a pending offer by Time to combine with Warner, a well-known media company. The Delaware court declined to find a breach of fiduciary duty as to the Time directors for taking the lower bid. In this case, Paramount wanted to make the same argument that permitted it to fend off a higher bid from a subsequent bidder seeking to bust up the Paramount merger with QVC. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1994); Lyondell Chem. Co. v. Ryan, 970 A.2d 285 (Del. 2009).

177. Chancellor Kathaleen McCormick's 2021 Chancery opinion, *In re Williams Companies Shareholders Litigation*, was perhaps the most innovative decision of the recent period in developing how *Unocal* could be applied to activist shareholders. *See In re* Williams Cos. S'holder Litig., No. 2020-0707, 2021 WL 754593 (Del. Ch. 2021), *aff'd without opinion*, Williams Cos. S'holder Litig. v. Wolosky, 264 A.3d 641 (Del. 2021).

and his participation influenced a changed role for the Delaware courts in fiduciary duty challenges and in newly emerging takeover claims. The result enabled the Delaware court to ensure its preeminence in corporation law in a way that they had not been achieved before, a status that the Court retained for four decades.[178]

178. Changes to Delaware statutes in 2024 and 2025 and their impact on Delaware, unfolding as this is written, are left for another day.