NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 20 SPRING 2024 NUMBER 2

SUBSTANCE AND PROCESS IN CORPORATE LAW

JAMES AN*

The central purpose of corporate law is to facilitate the relationship between the shareholders who provide the corporation's equity capital and the managers who make the bulk of corporate decisions. Although select aspects of corporate law consider the economic merits of those decisions ("substance"), the bulk of corporate law regulates the procedures by which a corporation's managers reached those decisions ("process"). Moreover, recent judicial decisions have tended to push corporate law even further toward process-centered considerations. Courts have defended such tendencies on the basis that the courts charged with reviewing disputed corporate decisions are often better at evaluating process than engaging in financial analysis, an argument with which this Article largely agrees.

That said, the courts have often overlooked the difficulties with analyzing process and the complex relationship between process and substance, which are sometimes inseparable as a practical matter. This has led to doctrines and rules that have failed to deliver on promises of more straightforward judicial review, unintentionally redirected courts back into substantive analyses of business decisions, burdened defendants with unexpected costs, and left plaintiffs without a meaningful remedy despite plain misconduct. As this Article contends, there is significant room for improvement in our understanding of the interactions between substance and process and thus throughout corporate law's various legal standards.

* Teaching Fellow, LL.M. Program in Corporate Governance and Practice, and Lecturer in Law, Stanford Law School. I thank Joel Fleming, Frank Gevurtz, Michael Klausner, Ann Lipton, Roy Shapira, Holger Spamann, and the attendees of the National Business Law Scholars Conference for their excellent comments. I also thank William Weightman for his research assistance. Finally, I thank the editors of the New York University *Journal of Law & Business* for their hard work on this Article.

Introduction 188
I. Mergers 192
A. *Entire Fairness and the Difficulty of the Fair Price Determination* 193
B. *Fairness and the Process-Centered Protections of* MFW 198
C. *Appraisals and Fair Value as a Matter of Process* 201
D. *The Two Sides of* Revlon *Review* 212
E. *The Illusory Promise of* Corwin 214
F. *Poison Pills and Shareholder Empowerment* 218
II. Management of Going Concerns 225
A. Van Gorkom, Disney, *and the Death of the Duty of Care* 225
B. Caremark, Marchand, *and the Mirage of Process* 229
III. Lessons from Looking Back 235
A. *The Real Problem with* Van Gorkom 238
B. *The Challenges of Process-Centered Review* 240
IV. Applying Lessons to Laws 243
A. *Fair Value via Fair Process* 243
1. *What is Fair Value?* 244
2. *What is Fair Process?* 246
3. *Fairer Prices and Plaintiffs' Attorneys* 248
B. *The Purpose of Poison Pills* 251
C. *The Circularity of* Corwin 253
D. Marchand, Caremark, *and the Substance of Process* 258
Conclusion 263

Introduction

Corporate law's constraints on the decisions of a corporation's management may be divided into two broad categories: procedural propriety and substantive propriety. That is to say, corporate law considers two facets of a transaction: (1) whether the corporation's management used processes that are fair to stockholders to reach its decision and (2) whether the economic results of that decision were substantively fair to stockholders. When reviewing a decision in the course of litigation, courts need not always examine both, and indeed, they often do not. This dichotomy not only is facially present in numerous corporate law standards, most obviously in the "entire fairness" test, which explicitly requires "fair dealing" and "fair price,"[1] but also perpetually lurks in the background.

Yet tensions arise due to the difficulty of determining substantive economic value. After all, *tantum bona valent, quantum vendi possunt*[2] (things are worth only what they can sell for). For a court to step in and decide the proper price of a transaction is for the court to substitute its own judgment of value for that of the market, which entails serious challenges given the common assumption that a properly functioning market's determination of price is conclusive as to value.[3] And after all, the notion that courts should not be second-guessing the economic wisdom of business decisions made by duly selected corporate executives is fundamental to the deferential business judgment standard that applies to most management decisions. To resolve this tension between the courts' role as the final overseers of the shareholder-management relationship and the courts' comparative and absolute disadvantage at evaluating the economic substance of business decisions, corporate law has often lent primacy to process-based concerns.

In recent decades, the courts of Delaware, the world's leading corporate law jurisdiction,[4] have pushed corporate law's emphasis on process even further. In so doing, the courts have focused on challenged decisions' qualitative procedural attributes—such as whether there was stockholder ratification—and discouraged trial judges from engaging in extensive quantitative examination of the economic substance of a decision, regardless of whether the deferential business judgment rule or some "heightened" standard of scrutiny applies.

Although previous commentary has identified the Delaware courts' orientation toward process in individual areas,[5] this Article argues that the push toward process is evident in

1. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

2. Edward Coke, The Third Part of the Institutes of the Lawes of England 105 (1644).

3. *See* Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 357 (Del. Ch. 2004).

4. *See* Ido Baum & Dov Solomon, *The Least Uncomfortable Choice: Why Delaware and England Win the Global Corporate Law Race*, 73 S.C. L. Rev. 387, 395 (2021).

5. *See, e.g.*, William W. Bratton, *Fair Value As Process: A Retrospective Reconsideration of Delaware Appraisal*, 47 Del. J. Corp. L. 497, 572 (2023); Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 Del. J. Corp. L. 1, 2 (2020); Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. Irvine L. Rev. 55, 101 (2019); Marcel Kahan, Paramount *or*

nearly every aspect of Delaware corporate law. Furthermore, this Article argues that this push is not, as some commentators have argued,[6] a wholesale retreat from judicial oversight of management. Instead, it is a recalibration of the means by which corporate law should police management. This Article largely agrees with courts' explicit statements and implicit reasoning that, as a matter of judicial policy, it is generally wise for courts to shy away from financial analysis, particularly in public or otherwise liquid markets.

However, the distinction between substance and process often blurs at the edges, leading to serious doctrinal and practical issues when courts instead treat the two as a Manichean duality or otherwise gloss over the complex interactions between the two aspects of corporate decision-making. For example, in merger cases to which the *Revlon* doctrine applies, courts have held that certain deal-protection clauses inappropriately impaired the sales process to the detriment of shareholders.[7] But as theory and data indicate, these clauses are integral to the substantive economic terms of merger agreements,[8] which courts say should be left to the market. Nevertheless, courts have not paused and explained why it is appropriate for them to rule upon what is effectively the economic substance of deal-protection clauses. Similarly, in poison pill cases, the courts have held that defensive devices that directly impair voting rights are impermissible, but those that operate via economic mechanisms are allowed. But from at least one view, the substantive effect of both types of defensive devices is the same: delay the ability of a majority of shareholders to sell their shares to a would-be acquirer.

Issues also arise when courts attempt to center their inquiry on procedural questions that turn out to be less procedural than envisioned. For example, *Corwin* attempted to shift courts' focus away from more complex mixed issues of a deal's substance and process by instead first asking courts to examine whether stockholders properly approved those deals. But as subsequent litigation has shown, analyses of stockholder votes under *Corwin* often devolve back into the substantive economic

Paradox: The Delaware Supreme Court's Takeover Jurisprudence, 19 J. Corp. L. 583, 596, 588, 605–06 (1994).

6. *See, e.g.*, Korsmo, *supra* note 5, at 82–105.

7. *See infra* Part I.D.

8. *Infra* note 127 and accompanying text.

considerations surrounding the deal as courts must evaluate whether the underlying fiduciary breaches were so significant as to render the vote unreliable.[9] Similarly, this Article argues that the *Caremark* doctrine, which requires boards to monitor corporate risks and react to red flags indicating imminent danger, is not the simple process-only question that the courts claim. As shown by recent cases, courts applying *Caremark* do and perhaps must consider the economic substance of those risks. Likewise, to the extent that *Caremark* examines risk monitoring processes and responses to red flags, there is still reason to wonder when these processes and responses are but manifestations of substantive business decisions.

Finally, this Article contends that there are instances where the courts have chosen the wrong procedural guardrail. For instance, although process-centered rules are not inherently strict or forgiving, it certainly would seem that several recent cases have nevertheless signed off on what were arguably flawed deal processes.[10] And while this Article argues that the proper response is to call for more stringent judicial review of the procedural aspects of a transaction, these cases certainly make it difficult to outright dismiss critics' claims that current process-centered rules are inadequately protective of stockholders. That said, as illustrated by the infamous *Van Gorkom* case, courts can also impose too harsh of a procedural standard, and there are concerns that *Caremark* may be headed down a similar path. As such, a judicial migration from focusing on substance to focusing on process may not be as simple or effective as imagined.

As these examples illustrate, the issues that arise out of the complex interplay between substance and process manifest themselves in many different ways. Although there is an intimate connection between how judicial standards examine substance and process and the results of judicial review, that connection cannot be reduced to a simple formula. It cannot be said simply that mishandling the substance-process divide leads to law that is too shareholder-friendly, too management-friendly, too complicated, too simple, or any other singular descriptor. Rather, the myriad issues that arise are the mixed results of complex interactions between legal theory and business practice,

9. *See infra* Part I.E.
10. *See* Parts I.C and IV.A.ii.

the latter of which invariably changes over time. Ultimately, creating an optimized legal framework requires that courts squarely confront a host of issues and interactions, allowing them to synthesize judicial standards that are both more effective and more straightforward.

This Article explores the foregoing in four parts. Parts I and II illustrate corporate law's substance-process divide—and the issues related to that divide—via discussions of specific corporate doctrines organized into change-of-control deals (viz. mergers) and management of going concerns, respectively. Part III synthesizes the lessons offered by the courts' handling of the substance-process divide. Part IV offers specific critiques of select doctrines and proposals for going forward.

I.
Mergers

Conflicts between shareholders and the board of directors often come to a head in the mergers and acquisitions context, with shareholder-board disputes particularly likely for the target (selling) entity. This is an unremarkable fact, given that a sale is one of the two most significant single events a business can experience, with the other being bankruptcy. Though shareholders have more say in the sale of a corporation than in nearly any other corporate decision,[11] shareholders generally have only the power to give an up-or-down vote to the final merger agreement negotiated by the board (or, in the case of tender offers, to either accept or reject the offer) and have no direct ability to negotiate any of the terms of a sale, not the least being the price.

Thus, when it comes to mergers, the great deference that corporate law generally affords to a board's decisions often gives way to more stringent standards of review. Delaware has created a comprehensive scheme to police merger deals for fairness, particularly for the selling corporation's shareholders.

First, if a board decides to sell the corporation, corporate law imposes a heighted standard of review of the process by which the board conducts the sale process to ensure that shareholders receive the best price possible. Shareholders making such so-called *Revlon* claims supplement charges of inadequate

11. *Compare* Del. Code Ann. tit. 8, § 141(a) (2021) *with* Del. Code Ann. tit. 8, § 251(c) (2021).

price with allegations that the board failed to follow a prudent sales process that would sufficiently ensure a fair price. However, a board may immunize itself against such claims by receiving the approval by a majority of disinterested and fully informed shareholders (i.e., *Corwin* cleansing).

Second, after the sale of a company and regardless of any flaws in the sale process, a shareholder may obtain a judicial appraisal for the fair value of their shares.

Third, corporate law also imposes a heightened standard of review upon boards acting to *avoid* a merger, for example, by adopting a poison pill. The *Unocal* framework seeks to ensure that defensive actions undertaken to avoid takeovers do not merely serve to protect the jobs and other interests of the target corporation's executives.

Finally, in mergers where a controlling shareholder or a majority of the board seeks to buy out the other shareholders, corporate law applies its strictest standard of review: entire fairness. The entire fairness standard recognizes the inherent conflicts of interest in such cases and requires defendants to prove the fairness of both the course of dealing and the final economic terms of the deal, i.e., fair dealing and fair price.

This Part examines each of the aforementioned schemes within the process-substance framework, illustrates how the courts have shifted doctrines toward more process-centered analyses, and explains how these shifts have often been accompanied by unforeseen complications. That said, because of the obvious correspondence between the two prongs of entire fairness and the substance-process divide, this Article starts with entire fairness as its first case study.

A. *Entire Fairness and the Difficulty of the Fair Price Determination*

Entire fairness is a paradigmatic example of the divide between substance and process in corporate law—and of several of the issues related to that divide. Where a transaction (including but not limited to mergers) involves self-dealing by a corporation's board or its controlling stockholder (to the extent that one exists), a court will generally apply the entire fairness standard of review to that transaction.[12] Under entire fairness,

12. *Weinberger*, 457 A.2d at 711.

a court examines two qualities of a challenged transaction: fair dealing and fair price. "[Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. [Fair price] relates to the economic and financial considerations of the [transaction], including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of [the transaction]."[13] The correspondence between the two aspects of entire fairness and the substance-process dichotomy is obvious.

Unlike numerous other corporate law standards, entire fairness unambiguously requires the court to evaluate the economic substance of a deal. Indeed, notwithstanding the courts' characterization of entire fairness as an unbifurcated whole,[14] fair price is often the linchpin of an entire fairness inquiry.[15] And in several cases, discussed immediately below, courts have awarded minimal damages despite finding unfair dealing due to the supposed fairness of the price.

As it were, entire fairness cases in which courts found unfair dealing but awarded no damages provide an excellent view of the challenges that courts face in evaluating the substantive economic merits of a transaction.[16] First, a court may

13. *Id.*

14. *Id.*; Kahn v. Tremont Corp., 694 A.2d 422, 432 (Del. 1997) (citing *Weinberger*, 457 A.2d at 711); Kahn v. Lynch Commc'n Sys., 669 A.2d 79, 84 (Del. 1995); *see also* Bomarko, Inc. v. Int'l Telecharge, 794 A.2d 1161, 1182–83 (Del. Ch. 1999) (describing the entire fairness test as "structurally bifurcated" but nevertheless "conceptually singular"). There is no clear explanation of how this "unbifurcated" approach actually differs from various other multi-prong tests in the law. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 798 & n.41 (2003) (describing *Weinberger*'s description of entire fairness as "unhelpful" and its reasoning as "unclear"). It should also not be missed that, as of this writing, Delaware courts have yet to find an instance of fair dealing but unfair price. Notwithstanding the courts' characterization of entire fairness, it is perhaps better described as a framework under which the fair dealing inquiry determines liability and the fair price inquiry determines damages.

15. *Tremont*, 694 A.2d at 432; *see also* Licht, *supra* note 5, at 9–10.

16. *E.g.*, *In re* Straight Path Commc'ns. Inc. Consol. S'holder Litig., C.A. No. 2017-0486-SG, 2023 WL 6399095 (Del. Ch. Oct. 3, 2023); William Penn P'ship v. Saliba, 13 A.3d 749 (Del. 2011); *In re* PLX Tech. Inc. S'holders Litig., C.A. No. 9880-VCL, 2018 WL 5018535, at *50 (Del. Ch. Oct. 16, 2018) [hereinafter *PLX Trial*], *aff'd*, 211 A.3d 137 (Del. 2019); ACP Master, Ltd. v. Sprint Corp., C.A. No. 8508-VCL, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017); Ross Holding & Mgmt. Co. v. Advance Realty Grp. L.L.C., C.A. No. 4113-VCN, 2014 WL 4374261, at *34 (Del. Ch. Sept. 4, 2014); Oliver v. Bos. Univ., C.A.

misinterpret the complex evidence before it—this was the problem in *Trados*[17] and *Nine Systems*.[18] Second, the evidence itself may be deficient—*Nine Systems* suffered from this issue as well.

Trados is probably the most well-known case in which a court found unfair dealing but did not award damages. In *Trados*, the preferred stockholders, who controlled the corporation, sought an exit because the business had failed to satisfy their growth targets.[19] The preferred stockholders' liquidation preferences meant that the first $57.9 million from any merger would be paid to preferred stockholders before common stockholders received anything.[20] Trados' board also gave management an incentive plan such that management's "return profile and incentives closely resembled those of the preferred."[21] Ultimately, management negotiated a sale in which preferred stockholders received $52.2 million, management received $7.8 million, and common stockholders received nothing.

In its post-trial decision, the Court of Chancery found that the process for selling the corporation was not entirely fair to common stockholders.[22] Yet, the court awarded no damages because it determined, after conducting an extensive financial valuation, that the expected value, and consequently the fair value, of Trados' common stock was zero.[23]

The problem with *Trados* is that the Court of Chancery miscalculated the expected value of common stock. Contrary to *Trados*'s approach, the expected value of the common stock is different from the expected value of the firm less preferences. As Adam Katz has pointed out, subtracting a firm's fixed claims against the expected enterprise value to produce equity value will invariably fail to account for the option value inherent in the equity of a limited liability entity.[24] Just as underwater options trade at positive prices, equity also must trade at a pos-

---

No. 16570-NC, 2006 WL 1064169, at *30 (Del. Ch. Apr. 14, 2006); *see also* Gilson & Gordon, *supra* note 14, at 798 n.41 ("Suppose the price is entirely fair, but the process is faulty. To what else are shareholders entitled beyond a fair price?").

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

18. *In re* Nine Sys. Co. S'holders Litig., C.A. No. 3940-VCN, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014).

19. *Trados,* 73 A.3d at 56.

20. *Id.* at 33.

21. *Id.* at 62.

22. *Id.* at 72.

23. *Id.* at 20, 78.

24. *See generally* Adam M. Katz, *Addressing the Harm to Common Stockholders in* Trados *and* Nine Systems, 118 COLUM. L. REV. ONLINE 234 (2018).

itive price.[25] Indeed, *Trados* itself cites a numerical example of how the expected value of equity is greater than the expected enterprise value less fixed claims.[26] For another numerical example, here based on the facts of *Trados*, consider a firm with a payout and financing structure per the below:

Probability	**Firm value**	**Preferences**	**Common stock value**
75%	$50 m	$58 m	$0 m
25%	$76 m	$58 m	$18 m

The expected value of the above firm is $56.5 million, and less $58 million in preferences, the "value" of the common stock so calculated would be zero. But the expected value of the common stock is in fact much higher than $0, and a risk-neutral investor would pay $4.5 million for the firm's common stock. Therefore, $4.5 million should be considered the "fair value" of the firm's common stock. Perhaps such logic convinced the defendants to settle before appeal for a substantial fraction of the plaintiff's original demand.[27]

In *Nine Systems*, the court not only made a similar miscalculation to *Trados* but also relied on questionable evidence to conclude that no economic harm had resulted. *Nine Systems* involved the dilutive recapitalization of a company in the then-nascent field of streaming media.[28] Despite finding unfair dealing,[29] the court concluded that the corporation's equity value was zero when the recapitalization occurred, deemed

25. *Id.* at 247–51.
26. *Trados*, 73 A.3d at 50 n.25.
27. The settlement amounted to about 19 cents per share before fees. *See In re* Trados Inc. S'holder Litig., C.A. No. 1512-VCL, 2016 WL 502898, at *1 (Del. Ch. Feb. 8, 2016). At trial, the plaintiff sought $13,357,573 for himself and the class in compensatory damages, or about 55 cents per share. *See* Opening Post-Trial Brief of Marc Christen and the Class, at 71–72, *In re* Trados Inc. S'holder Litig., C.A. No. 1512-VCL (Del. Ch. Apr. 12, 2013). The 55 cents per share figure excludes the cost of the management incentive from the value of the common shares. The plaintiff also proposed an alternative calculation that included part of the management incentive for a result of 38 cents per share. *Id.* If the management incentive were to be entirely deducted from the plaintiff's damages figure, the class would have been entitled to about 24 cents per share.
28. *Nine Systems*, 2014 WL 4383127, at *10. The recapitalization involved two large investors of Nine Systems investing additional money in exchange for an allegedly excessive amount of convertible preferred stock.
29. *Id.* at *51–52.

the transaction to be economically fair, and awarded no economic damages.[30] The court reached this conclusion after having relied primarily on expert valuations based on comparable company revenue multiples for the trailing twelve months and subtracting the corporation's debt load.[31] As described above, taking enterprise value and subtracting debt will systematically underestimate a firm's equity value, particularly as the debt-to-equity ratio increases. But even setting aside that methodological error, there were numerous problems with much of the valuation evidence,[32] making it difficult to trust *Nine Systems'* final estimate of fair value.

Finally, insofar as "[t]he economic inquiry called for by the fair price aspect is the same as the fair value standard under the appraisal statute,"[33] fair price analyses also suffer from all the issues associated with appraisal methodologies, discussed in Part I.C, *infra*. Even given flawless advocacy and impeccable judicial reasoning, corporate finance valuation methods have numerous shortcomings in determining whether any particular price is fair or not, especially in the context of conflicted transactions where, often, no market-based test is practically available.[34] These problems, reasons, and more have prompted the Delaware courts try to rejigger entire fairness away

30. *Id.* at *42–45.

31. *Id.* at *42–45.

32. The court's opinion identified many of the problems with the plaintiffs' valuation evidence. *Nine Systems*, 2014 WL 4383127, at *38–45. However, the defendants' valuation approach—which the *Nine Systems* court endorsed—was also deeply flawed as it was based on the revenue multiples of comparable companies. But just four years after the recapitalization, Nine Systems was sold for a figure that the defendants' expert agreed had no reasonable connection to Nine Systems' free cash flow or revenue. Testimony of Defendant's Expert Witness, Jerry Hausman, 2864:19–2867:1, *In re* Nine Sys. S'holders Litig., No. 3940-VCN, 2013 WL 7121317 (Del. Ch. Dec. 13, 2013). Moreover, given that Nine Systems was only founded in fall 1999, Delaware Department of State, Division of Corporations, File No. 3078338, the revenue-multiple method was basically based on the revenue from a technology startup's second year of operation. It is well-understood that startups may take years to begin generating meaningful revenues with significant variance from company to company. Finally, it is undeniable that 2002 was a nadir for technology startup market valuations. *See* Hausman Testimony, *supra*, at 2777:20–2779:1.

33. ACP Master, Ltd. v. Sprint Corp., C.A. No. 8508-VCL, 2017 WL 3421142, at *18 (Del. Ch. July 21, 2017). *See also PLX Trial*, 2018 WL 5018535, at *50.

34. *See* Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 342 n.99 (2022).

from examining the substantive economics of a conflicted transaction.[35]

B. *Fairness and the Process-Centered Protections of* MFW

In 2013, the Court of Chancery issued the landmark *MFW* decision,[36] which promised to reduce the burden of judicial review on transactions involving controlled entities that would otherwise be subject to entire fairness review,[37] not the least being the burden of determining fair price.

MFW sought to achieve its goal by encouraging defendants to use processes that were theoretically more protective of minority shareholders. Absent *MFW*, the burden of proof in entire fairness review lies with the defendant by default. But the defendant may shift the burden of proof onto the plaintiff by obtaining approval of the transaction from either an special independent board committee or an informed, uncoerced vote of disinterested stockholders.[38] However, the burden-shifting rules left a controller unlikely to use both protective processes because the second protective process resulted in no additional benefit.[39] To incentivize controllers to use both protections, *MFW* held that the business judgment standard, which generally results in judicial approval, would apply to conflicted mergers that used both protection devices.[40]

As *MFW* saw it, use of both protections would likely result in a substantively fair outcome. First, "independent directors are presumed to be motivated to do their duty with fidelity, like most other people, and [] directors have a [] self-protective interest in retaining their reputations as faithful, diligent fiduciaries."[41] Second, "a majority-of-the-minority condition gives minority investors a free and voluntary opportunity to decide what is fair for themselves."[42] Third, the combination of the two devices would cause the independent committee to "procure a

35. *See generally* Licht, *supra* note 5, at 34–35.
36. *In re* MFW S'holders Litig., 67 A.3d 496 (Del. Ch. 2013), *aff'd*, 88 A.3d 635 (Del. 2014).
37. Hamermesh et al., *supra* note 34, at 336.
38. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985); *Lynch*, 638 A.2d at 1117.
39. *MFW*, 67 A.3d at 500–01.
40. *Id.* at 536.
41. *Id.* at 528–29.
42. *Id.* at 534.

deal that their minority stockholders think is a favorable one," not the least so that the directors of such a committee do not "suffer the reputational embarrassment of repudiation at the ballot box."[43] *MFW* also noted that "it has long been thought beneficial to investors for courts, which are not experts in business, to defer to the disinterested decisions of directors, who are expert, and stockholders, whose money is at stake."[44] Finally, *MFW* concluded that the two devices "replicate[d] the arm's-length merger steps of the DGCL by requir[ing] two independent approvals."[45]

By offering an incentive for controllers to voluntarily adopt process-centered shareholder protections, *MFW* reduced the burden on courts and improved outcomes for the parties, at least in theory. The complex entire fairness inquiry could be simplified to determining that the minority vote and the independent committee complied with *MFW*. Controllers would no longer need to bear the costs of litigation (and any possible damages award). And minority shareholders would be ensured a fair price, as they received not only the guarantee that their approval was needed for any deal to go through, but also that an independent committee would negotiate the terms of the deal on their behalf.

But even on its own terms, *MFW* was not a magic bullet. Litigation, instead of disappearing entirely, often simply shifted focus from whether the challenged transaction passed muster under entire fairness to whether the controller adequately implemented *MFW*'s protections. For example, *Flood v. Synutra*[46] and *Olenik v. Lodzinski*[47] needed to determine whether *MFW*'s dual protections were implemented early enough to satisfy its requirements. The factual analysis at both the trial and the appellate level was substantial and undoubtedly required much work from both the courts and the parties.

Flood and *Olenik* do not by themselves necessarily give sufficient reason to doubt the overall salutary effects of *MFW*. After all, a doctrine as significant as *MFW* will inevitably require some refining around the edges. That relatively more complex litigation occasionally arises does not necessarily mean that *MFW*

43. *Id.* at 529.
44. *Id.* at 526.
45. *Id.* at 528.
46. Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).
47. Olenik v. Lodzinski, 208 A.3d 704 (Del. 2019).

has not achieved its ends. Still, *Flood* and *Olenik* suggest that process-centered analyses are not inherently immune to the problems—such as the expense and difficulty of litigating and judging close or complex cases[48]—that prompted courts to avoid analyzing economic substance,[49] an issue that will recur in this Article.[50]

A more significant problem is that *MFW* may be built upon a flawed foundation. For one, although *MFW* is premised on the idea that it replicates an arm's-length negotiation process, there are still serious differences between an *MFW*-compliant deal and a genuine arm's-length deal process involving a widely held corporation. An important protection for the selling shareholders of a widely held corporation is the possibility of a bidding war among multiple potential buyers, but no bidding war is possible to protect the minority in a squeeze-out because there is only one potential buyer. Likewise, even under *MFW*, the controller still has the power to remove the independent committee negotiating on behalf of the minority,[51] whereas in widely held corporations, the board serves at the pleasure of shareholders whom they represent.

Furthermore, as some commentators have pointed out,[52] *MFW* allows controllers to pre commit in what is effectively a

48. For example, given that the Delaware Supreme Court ultimately held that the deal protections in *Olenik* did not satisfy *MFW*, necessitating traditional entire fairness analysis, *MFW* may have increased the total costs and burdens of litigation in that case.

49. Furthermore, assuming that *MFW* does not require all future deals to be submitted to a minority vote, *MFW* does not address how a court should evaluate a controller who, having been rebuffed by the minority in an *MFW*-compliant vote, attempts to force through a similar, but not identical, squeeze-out. As an illustration, suppose that after a failed *MFW* minority vote, a controller sells a portion of the at-issue corporation's assets to a disinterested third party and then attempts a traditional, non-*MFW* squeeze-out. At what level of deal dissimilarity should a court return to traditional entire fairness analysis rather than enjoining the squeeze-out as a runaround of *MFW*'s dual protections? And what if the parties disagree on the significance of the third-party sale (e.g., even if the parties agree on the price of the third-party sale, they might well disagree on the value of the assets remaining after the sale, which obviously impacts the relative significance of the third-party sale)?

50. *See, e.g.*, *infra* Parts I.C, I.D, and I.E.

51. *See In re* EZCORP, Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245, at *41–42 (Del. Ch. Jan. 25, 2016).

52. *See* Ryan Bubb et al., *Shareholder Rights and the Bargaining Structure in Control Transactions* 21–23 (Oct. 27, 2022) (unpublished manuscript) (on file at the European Corporate Governance Institute).

game of chicken (also known as the hawk-dove game)[53]: In a game of chicken, two cars speed toward one another, with whomever swerves being the loser. A winning strategy against a rational opponent would therefore be to remove one's own steering wheel, forcing a rational opponent to swerve (and lose). Transferred to the squeeze-out context, the controller is speeding in one direction, claiming that the price cannot possibly be raised, while the minority is speeding in the opposite direction, claiming that the price must be raised or that they will sue or otherwise attempt to blow up the deal. The power to credibly make a take-it-or-leave-it offer would be akin to the power to remove one's own steering wheel, but a controller normally lacks this power because the controller, by definition, can cause the corporation to enter into a deal without minority approval (though subject to entire fairness review). So absent *MFW*, minority shareholders need not accept any deal that is worse than one that a court would consider entirely fair. However, *MFW* essentially allows a controller to remove their own steering wheel by unilaterally committing to the results of any minority vote, forcing a rational minority to accept deals that steer the bulk of benefits to the controller so long as a small crumb is left to the minority. In other words, *MFW* might in fact make minorities *worse* off. *MFW* thus illustrates that choosing effective process-based protections is far from a straightforward exercise.

C. *Appraisals and Fair Value as a Matter of Process*

This Article now turns to appraisal, which is a statutory remedy to give shareholders of a selling corporation a judicially determined[54] price for their shares, rather than the contractually specified merger price. By statute, the price is based on "the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger,"[55] which is generally understood to mean that appraisal values

53. Anatol Rapoport & Albert M. Chammah, *The Game of Chicken*, 10 Am. Behavioral Sci. 10, 10 (1966).

54. There is technically no burden of proof in an appraisal case, though this should not generally matter. Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1242–43 (Del. 2012); *see also* Kahn v. Tremont Corp., 694 A.2d 422, 434 (Del. 1997).

55. Del. Code Ann. tit. 8, § 262(h) (2021).

should exclude merger synergies and control premia.[56] Thus, unique to corporate law, appraisal is solely focused on the economic substance of a deal, or so the statutory text would suggest. However, in recent years, the Delaware Supreme Court has remade appraisal proceedings into inquiries that begin—and often end—with the dealmaking process, effectively turning the question of fair value into a process-based analysis.

Historically, courts used the "Delaware block" method for determining fair value.[57] Under the Delaware block method, a court would take a judicially weighted average of a firm's book value, market value (e.g., trading price), and discounted future earnings to arrive at the firm's fair value.[58] In the 1983 *Weinberger* case, the Delaware Supreme Court held that the Delaware block method would no longer be the exclusive method for valuation, but rather that "any techniques or methods which are generally considered acceptable in the financial community" would be admissible.[59] Still, *Weinberger* did not completely disavow the Delaware block method, and the Court of Chancery continued to use modified versions of the method after *Weinberger*, frequently giving heavy weight to discounted cash flow ("DCF") valuations.[60]

A court conducting an appraisal under either the Delaware block method or post-*Weinberger* DCF methods necessarily engaged in intensive financial factfinding and analysis, particularly given the sensitivity of DCF results to input variables that cannot be readily measured with certainty (such as beta and discount rates) and predictions about the future that are

56. *In re* Appraisal of Jarden Corp., C.A. No. 12456-VCS, 2019 WL 3244085, at *3 (Del. Ch. July 19, 2019); Berger v. Pubco Corp., C.A. No. 3414-CC, 2010 WL 2025483, at *1 (Del. Ch. May 10, 2010). *But see In re* Books-A-Million S'holders Litig., C.A. No. 11343-VCL, 2016 WL 5874974, at *17 (Del. Ch. Oct. 10, 2016).

57. *Weinberger*, 457 A.2d at 712. Although named for Delaware, the Delaware block method is also used across the country. *See, e.g.*, Chokel v. First Nat'l Supermarkets, Inc., 660 N.E.2d 644, 649 (Mass. 1996); Richardson v. Palmer Broad. Co., 353 N.W.2d 374 (Iowa 1984); Utah Res. Int'l, Inc. v. Mark Techs. Corp., 342 P.3d 761, 771 (Utah 2014).

58. *See* Paskill Corp. v. Alcoma Corp., 747 A.2d 549, 555 (Del. 2000).

59. *Weinberger*, 457 A.2d at 712–13.

60. *See, e.g.*, Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 472 & n.21 (Del. Ch. 2011); *In re* Radiology Assocs., Inc., 611 A.2d 485, 498 (Del. Ch. 1991). DCF is a valuation methodology that essentially uses finance theory to estimate the value of all future profits of a business and add the present values of those profits together.

obviously subject to error (such as forward cash flows).[61] Other traditional methods, such as comparable companies methods, suffer from similar shortcomings (e.g., what constitutes a comparable company?). These problems are compounded by the adversarial nature of litigation,[62] but even absent the fog of litigation, calculated valuations are inherently noisy and error-prone.[63]

In light of the problems with traditional methods of estimating fair value, Delaware courts began looking elsewhere. In particular, the Delaware courts have looked in recent years to the deal price itself. This trend began with the 2003 appraisal case, *Union Illinois*,[64] which was decided by then-Vice Chancellor Strine. In *Union Illinois*, a troubled bank with a large but not controlling group of family shareholders sold itself in an open auction to a third-party buyer.[65] The family sought an appraisal of their shares, arguing that DCF valuations indicated a higher fair value. The Court of Chancery rejected the DCF valuations, noting that in numerous other contexts, Delaware courts have stated that market prices were strong indicia of fair prices.[66] The court reasoned that because the deal price resulted from an open auction process, the best evidence of market value—and thus of fair value—was the deal price.[67]

Union Illinois was not appealed, and it was seven years before the Delaware Supreme first waded into the issues around using deal price as fair value in appraisal proceedings in *Golden Telecom*.[68] The *Golden Telecom* trial decision, which was

---

61. *See, e.g.*, Kruse v. Synapse Wireless, Inc., C.A. No. 12392-VCS, 2020 WL 3969386, at *12–19 (Del. Ch. July 14, 2020).

62. Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 20 (Del. 2017) [hereinafter *Dell Appeal*] (practical result of appraisal litigation is that "petitioners contend fair value far exceeds the deal price, and the company argues that fair value is the deal price or lower.").

63. *See DCF Analysis Pros & Cons*, CORP. FIN. INST. (last visited May 9, 2023), https://corporatefinanceinstitute.com/resources/valuation/dcf-pros-and-cons/.

64. Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340 (Del. Ch. 2003). That said, *Union Illinois* was not the first Delaware decision to use deal price as fair value. *Id.* at 357; *In re* Appraisal of Columbia Pipeline Grp., Inc., C.A. No. 12736-VCL, 2019 WL 3778370, at *47 n.45 (Del. Ch. Aug. 12, 2019).

65. *Union Ill.*, 847 A.2d at 342–50.

66. *Id.* at 357.

67. *Id.* at 357–58.

68. Golden Telecom, Inc. v. Glob. GT LP, 11 A.3d 214 (Del. 2010) [hereinafter *Golden Telecom Appeal*].

also authored by then-Vice Chancellor Strine, began with the proposition that an "arms-length merger price resulting from an effective market check is entitled to great weight in an appraisal."[69] However, the Court of Chancery found that the actual merger price in the case did not result from an effective market check, and in fact did not result from any market check.[70] This was because the buyer was largely owned by the seller's two largest shareholders, who preempted the possibility of a market check via their influence.[71] *Golden Telecom* then evaluated the parties' DCF models at length and arrived at a final value that was about 20% higher than the deal price.[72] The Delaware Supreme Court affirmed the Chancery decision in a relatively short opinion. Notably, the affirmance stated that the Delaware courts could not "defer—conclusively or presumptively—to the merger price, even in the face of a pristine, unchallenged transactional process," as doing so "would contravene the unambiguous language of the statute."[73]

Between the affirmance of *Golden Telecom* and the end of 2016, the Court of Chancery used the deal price as fair value in six cases and a combination of metrics in five other cases.[74] Where the Court of Chancery had used something other than or in addition to deal price, it generally pointed to issues with the sale process that undermined confidence in the deal price.[75] The respondents (i.e., the buyers) in two 2016 appraisal cases that did not rely exclusively upon deal price appealed, and the Delaware Supreme Court reversed both in decisions that upended appraisal doctrine.

69. Glob. GT LP v. Golden Telecom Inc., 993 A.2d 497, 507–08 (Del. Ch. 2010) [hereinafter *Golden Telecom Trial*].

70. *Id.* at 508.

71. *Id.*

72. *Id.* at 509–24.

73. *Golden Telecom Appeal*, 11 A.3d at 218.

74. *See* Merion Cap. L.P. v. Lender Processing Servs., Inc., C.A. No. 9320-VCL, 2016 WL 7324170, at *1, 30–31 (Del. Ch. Dec. 16, 2016) (noting that 5 cases after *Golden Telecom* used deal price as fair value and 5 did not; *Merion* itself used deal price).

75. *See, e.g.*, *In re* Orchard Enters., Inc., C.A. No. 5713-CS, 2012 WL 2923305, at *4–5 (Del. Ch. July 18, 2012); Dunmire v. Farmers & Merchs. Bancorp of W. Pa., Inc., C.A. No. 10589-CB, 2016 WL 6651411, at *7 (Del. Ch. Nov. 10, 2016).

The first case, *DFC*,[76] involved determining the fair value of a payday lender that was acquired amidst substantial regulatory uncertainty, with authorities in numerous jurisdictions looking into cracking down on payday lending practices.[77] The Court of Chancery determined the firm's fair value after trial by taking an equally weighted average of the DCF valuation, a comparable-firms analysis, and the deal price.[78] The Court of Chancery's method had obvious similarities to the traditional Delaware block method, and the court defended its method as being the most reliable method where all single-technique methods were "imperfect" in one way or another.[79]

However, this did not satisfy the Delaware Supreme Court, which reversed the trial decision. On appeal, the Delaware Supreme Court claimed that it was not creating a judicial "presumption" that the deal price is the best evidence of fair value after a proper sales process, reasoning that doing so would undermine the statutory text's command that the Court of Chancery "take into account all relevant factors."[80] Nevertheless, the *DFC* appeal decision stated that it is "economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous."[81]

DFC then went through the Court of Chancery's fair value determination with a fine-tooth comb. It first took issue with the Court of Chancery's discounting of the deal price. The Court of

---

76. *In re* Appraisal of DFC Glob. Corp., C.A. No. 10107-CB, 2016 WL 3753123 (Del. Ch. July 8, 2016) [hereinafter *DFC Trial*], *rev'd sub nom.* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017) [hereinafter *DFC Appeal*].

77. *DFC Trial*, 2016 WL 3753123, at *2–4.

78. *Id.* at *21–23.

79. *Id.* at *23.

80. *DFC Appeal*, 172 A.3d at 366.

81. *Id.* It is not entirely clear what the practical difference is between (1) creating a presumption that deal price is the best evidence of fair value after a proper sales process and (2) recognizing an economic reality that the deal price will often be the most reliable evidence of fair value. *Cf.* Rivest v. Hauppauge Digit., Inc., C.A. No. 2019-0848-PWG, 2022 WL 3973101, at *23 (Del. Ch. Sept. 1, 2022) (arguing that accepting a widely held justification as sufficient to support an outcome is not materially different from creating a judicial presumption in favor of that outcome), *aff'd*, No. 442, 2022, 2023 WL 4440279 (Del. July 10, 2023).

Chancery had expressed concern that the unstable regulatory environment had depressed the trading price, which led to a lower deal price. The appellate decision instead reasoned that any depression in pre-deal trading price from regulatory risk was, absent contrary evidence, a proper market pricing of that risk, which presumably should figure into fair value.[82] Similarly, the Delaware Supreme Court did not think that the absence of any other bidders after an apparently fair market check or that lenders would not provide additional debt financing indicated any issues with the deal price.[83] *DFC* also gave a litany of reasons why the Court of Chancery's DCF model used an incorrect perpetuity growth rate.[84]

The Delaware Supreme Court doubled down in *Dell*, which arose out of the management buyout engineered by Dell founder and CEO Michael Dell and his private equity backer Silver Lake. In the decision below, Vice Chancellor Laster had given the sale price no weight in his final fair value determination,[85] pointing to numerous factors that undermined the deal price as a determinant of fair value, including but not limited to:

- the buyers' use of leveraged buyout pricing models that returned lower valuations than going-concern valuation models that relied on the same assumptions;[86]
- "investor myopia"[87]

82. *DFC Appeal*, 172 A.3d at 372–75. Professors Charles Korsmo and Minor Myers have criticized this reasoning on the basis that the deal price in *DFC* was depressed because a financial buyer could not diversify away firm-specific risk and that the Delaware Supreme Court ignored this. Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 Emory L.J. 221, 254–55 (2018), However, *DFC*'s comment regarding the depression in price was probably primarily directed toward the publicly traded price, to which Professors Korsmo and Myers agree "firm-specific risk is not relevant." *Id.* at 254. Furthermore, although public stockholders would not demand a risk premium for idiosyncratic risk (which is what Professors Korsmo and Myers seem to be saying), that does not mean that public stockholders do not reduce their expectations of firm value in accordance with the idiosyncratic risk of a firm.

83. *DFC Appeal*, 172 A.3d at 374–76.

84. *Id.* at 376–86.

85. *In re* Appraisal of Dell Inc., C.A. No. 9322-VCL, 2016 WL 3186538, at *29 (Del. Ch. May 31, 2016) [hereinafter *Dell Trial*].

86. *Id.* at *29–31.

87. *Id.* at *32–34.

- that deal markets, which involve the purchase and sale of entire firms all at once, are less liquid and less efficient than the stock market for individual shares.[88]
- that deal prices are made by "[t]ime-bound mortals," who, even if acting loyally and in good faith, may not have arrived at a fair value in reaching a deal price;[89]
- that the at-issue transaction was a management buy-out where Michael Dell was (at least viewed as) a key component of the deal value;[90]
- the lack of pre-signing competition;[91]
- the buyers' match right, albeit a limited one, during the go-shop period;[92]
- the difficulty of properly valuing a company as large as Dell by a would-be buyer.[93]

Ultimately, Vice Chancellor Laster concluded that "it is impossible to quantify the exact degree of the sale process mispricing."[94] Instead, to reach fair value, he waded through the parties' experts' DCF assumptions and averaged two DCF valuations based on projections that the company had submitted to the deal creditors and projections that Boston Consulting Group had provided to the board committee negotiating the deal.[95]

The Delaware Supreme Court, however, slammed the Court of Chancery's reasoning, in particular the Court of Chancery's determination that Dell shares were mispriced on stock exchanges despite Dell's prominence and its stock's liquidity.[96]

88. *Id.* at *24.

89. *Id.* at *25–27; *see also* 31 (noting that the negotiating committee "did not seek to determine a pre-merger going concern value for the Common Stock to determine the fairness of the merger consideration to the Company's unaffiliated stockholders").

90. *Id.* at *28, 43–44. For further discussion of the economics of Michael Dell's involvement, see Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 Harv. L. Rev. 590, 626–27 (2016).

91. *Dell Trial*, 2016 WL 3186538 at *37.

92. *Id.* at *41; *see also* Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 Harv. L. Rev. 1215, 1233–38 (2020).

93. *Dell Trial*, 2016 WL 3186538 at *42.

94. *Id.* at *51.

95. *Id.* at *45–51.

96. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund, 177 A.3d 1, 25–27 (Del. 2017) [hereinafter *Dell Appeal*].

Among other things, the fact that there was no strategic buyer for Dell did not indicate that there was anything amiss with the deal price:

> Fair value entails at minimum a price some buyer is willing to pay—not a price at which no class of buyers in the market would pay. If a company is one that no strategic buyer is interested in buying, it does not suggest a higher value, but a lower one.[97]

Likewise, *Dell* disputed the Court of Chancery's arguments that there were other fundamental issues with management buyouts that undermined the probative value of the deal price.[98]

Lastly, *Dell* discounted the DCF analysis undertaken by the Court of Chancery. *Dell* argued that if no buyer would come forth at the price produced by the DCF analysis, "that is not a sign that the asset is stronger than believed—it is a sign that it is weaker."[99] *Dell* also noted that DCF analyses depend on numerous inputs, and small differences in those inputs (particularly discount and growth rates) can produce large differences in outputs.[100] Accordingly, *Dell* reversed the decision below, whereupon the parties settled for the deal price plus statutory interest.[101]

Aruba[102] was a coda to the *Dell/DFC* saga. In *Aruba*, which concerned the acquisition of network hardware supplier Aruba by Hewlett-Packard, the Delaware Supreme Court confronted the problem of synergies that might be generated from a strategic merger as opposed to a purchase made by a financial buyer. Although it was long recognized that appraisal valuations should exclude synergies to account for § 262's command to exclude "any element of value arising from the accomplishment or expectation of the merger or consolidation,"[103] the matter

97. *Id.* at 29.
98. *Id.* at 31–34.
99. *Id.* at 37.
100. *Id.* at 37–38.
101. *In re* Appraisal of Dell Inc., No. 9322-VCL, 2018 WL 2939448, at *1 (Del. Ch. June 11, 2018).
102. Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019) [hereinafter *Aruba Appeal*].
103. Merion Cap. LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 6164771, at *16 (Del. Ch. Oct. 21, 2015).

was not squarely at issue in *Dell* and *DFC*,[104] which suggested that courts should be wary when conducting or assessing financial analyses, a necessary part of determining synergy value. The *Aruba* trial decision identified a tension in the *Dell/DFC* framework: use of the deal price as a starting point for fair value may also require the court to subtract synergies, which in turn may require the use of analyses that *Dell* and *DFC* had denounced as prone to error. Instead, the Court of Chancery used the pre-announcement trading price as the basis for fair value.

The Delaware Supreme Court reversed, primarily criticizing the Court of Chancery's decision for its supposedly excessive concern over "reduced agency costs" that might arise from the merger.[105] The appellate *Aruba* decision also criticized the decision below for ignoring Aruba's stock price increase after the announcement of earnings, though the Court of Chancery had reasoned that it did so because the day before the earnings announcement, news of the merger had been leaked to the public.[106] Finally, *Aruba* instructed the Court of Chancery to award the deal price minus synergies on remand, glossing over any inaccuracies that might arise from calculating those synergies.[107]

DFC, *Dell*, and *Aruba* set the tenor for the cases that came after, which illustrate the primacy of deal process in contemporary appraisal litigation. The first significant case after *Aruba* was *PLX*, which applied quasi-appraisal methods in an entire fairness proceeding. The *PLX* plaintiffs had alleged that (1) an activist shareholder, Potomac, improperly pushed the PLX board to sell the company and (2) the board withheld material information[108] in the proxy statement recommending the sale.

104. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 367 (Del. 2017) ("synergy gains . . . are not contested" here); *see Dell Appeal*, 177 A.3d at 29 (noting lack of strategic/synergistic buyers).

105. *Aruba Appeal*, 210 A.3d at 133; Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., C.A. No. 11448-VCL, 2018 WL 922139, at *54 (Feb. 15, 2018) [hereinafter *Aruba Trial*].

106. *Aruba Appeal*, 210 A.3d at 140; *see Aruba Trial*, 2018 WL 922139, at *33–34. *Cf. In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 732 (Del. 2023) ("Our discussion in *Aruba* should have cautioned against reliance on a stock price that did not account for material, nonpublic information"). Of course, the issue in *Aruba* was that the Court of Chancery did not wish to rely on a stock price that had included material public information that was irrelevant to the question of going-concern value.

107. *Aruba Appeal*, 210 A.3d at 130, 142.

108. Namely, that the buyer was willing to pay more than the deal price.

However, despite finding Potomac liable, the Court of Chancery held that "the sale process was sufficiently reliable," that the deal price was the best estimate of fair value, and that the plaintiffs were not entitled to damages.[109]

Similarly, in *Stillwater*,[110] Court of Chancery adopted the deal price, noting that while "[t]he sale process was not perfect," it compared favorably to other deal processes in previous cases that had endorsed the deal price as the measure of fair value.[111] *Stillwater* rejected the parties' DCF analyses, finding that the parties' disagreements on DCF inputs resulted from "legitimate debates," but that "the large swings in value they create undercut the reliability of the DCF model as a valuation indicator."[112]

Amid these cases that adopted deal price as the proper measure of fair value, there was one notable case, *Jarden*,[113] in which the Court of Chancery rejected the deal price. Instead, the Court of Chancery used the pre-announcement trading price on the basis that the deal price was reached after a deficient deal process and would have required the court to subtract synergies, even though reliable evidence regarding synergies was sparse.[114] The *Jarden* affirmance noted that, unlike in *Aruba*, there was likely no material non-public information that would have supported a higher trading price but for the public's ignorance.[115] Furthermore, the court pointed out that the appraisal petitioners had attacked the deal price as unreliable at trial and it was accordingly within the Court of Chancery's discretion to not treat the deal price as a floor. While *Jarden* was the only case that used trading price as the proper measure of fair value, some commentators have argued that every case from *DFC* to *Stillwater* has signaled the primacy of trading price in the Delaware courts.[116] But if anything, these cases suggest the importance of

109. *PLX Trial*, 2018 WL 5018535, at *54.

110. *In re* Stillwater Mining Co., C.A. No. 2017-0385-JTL, 2019 WL 3943851, at *59 (Del. Ch. Aug. 21, 2019).

111. *Id.* at *44.

112. *Id.* at *61.

113. *In re* Appraisal of Jarden Corp., C.A. No. 12456-VCS, 2019 WL 3244085 (Del. Ch. July 19, 2019) [hereinafter *Jarden Trial*], *aff'd sub nom.* Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020) [hereinafter *Jarden Appeal*].

114. *Jarden Trial*, 2019 WL 3244085, at *3.

115. *Jarden Appeal*, 236 A.3d at 321–22.

116. Charles Korsmo & Minor Myers, *What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 J. Corp. L. 389, 421 (2022) (arguing that *Stillwater* "cemented" the views expressed in *Jarden*).

deal price, with *Jarden* sitting as an outlier that employed trading price. Still, even such an interpretation would fail to adequately capture the gestalt of these appraisal cases.

Rather, the best way to reconcile these cases with one another is that, intending to give appraisals greater certainty in outcome and reduce the impact of uncertain expert witness testimony,[117] the Delaware Supreme Court elevated deal process as the primary question in appraisal cases.[118] In theory, such a mode of analysis allows courts to establish and enforce clear process-centered standards to protect shareholders. In turn, such clarity allows future buyers and sellers to structure deals in a way that conforms to those standards. Finally, conforming deals, having been subject to a protective process, are accordingly less likely to be subject to the expense of appraisal litigation, as would-be plaintiffs recognize that their recourse lies only at the ballot box.

Do the Delaware Supreme Court's theories of appraisal jurisprudence truly ensure that shareholders receive fair value? That question prompts yet more fundamental questions: what does "fair value" even mean, and how does it relate to the deal price and deal process? In light of the real world of transactional costs, imperfect information, and limited resources, what does it mean for a deal process to "pristine"? And at what level of deviation from the ideal deal process can the deal price no longer be trusted, requiring the court to make its own estimate of fair value? Certainly, given that the Court of Chancery took great exception with the deal processes in *DFC* and *Dell* while the Delaware Supreme Court blessed both, reasonable minds may well differ on the answers to these questions.

117. Bratton, *supra* note 5, at 569.

118. Accordingly, the notion that there is some logical inconsistency or doctrinal conflict between the *Dell/DFC* framework and *Airgas*, which credited a board's evaluation of the corporation's market price as undervaluing the company, is misplaced. Korsmo & Myers, *supra* note 116, at 428–29 ("The appraisal cases suggest that *Airgas* is now bad law."). *Dell/DFC* and *Airgas* are, at bottom, not really about what the value of a corporation is. Rather, the cases stand for the proposition that a court should generally not be determining the value of a corporation at all, and to the extent that a court must determine the value of a corporation because of a case brought before the court, it should, when possible, defer to the judgment of loyal directors acting dutifully.

D. *The Two Sides of* Revlon *Review*

The *Revlon* doctrine, which polices the conduct of a board when sale of the corporation is inevitable, is often misconceived as a mandate for a board seeking to sell a corporation to obtain the highest price possible. This misconception is understandable given *Revlon*'s stated holding that once the board determines that sale of the corporation is inevitable, the "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[119] And it logically follows from the idea that *Revlon* charges directors with getting the highest price possible that *Revlon* charges a court with conducting an inquiry into a deal's economic substance.

But such thinking would be incorrect, as *Revlon* is a standard of review of *process*, not *price*.[120] The focus of *Revlon* review is not on whether the board in fact obtained a price commensurate to the firm's underlying value, but rather whether the board has "undertak[en] a logically sound *process* to get the best deal that is realistically attainable."[121] When a court applies *Revlon*, it is not actually determining whether the directors got the "best price" (except perhaps to the extent that the price is probative of whether the board in fact had "reasonable grounds to believe they acted in good faith.")[122]

Moreover, *Revlon* does not prescribe specific sale process protections, and it does not proscribe any conduct *per se* in the deal process. *Revlon* does not impose a duty to conduct an auction, a duty to preserve a right to take a better offer, or a special duty to maximize sale price beyond what the duty of loyalty already imposes.[123] Instead, the *Revlon* inquiry is a holistic "judicial examination of the reasonableness of the board's decision-making process."[124]

Nevertheless, the supposed process bent of *Revlon* sometimes seems to go beyond just the board's decision-making

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

120. J. Travis Laster, Revlon *is a Standard of Review: Why It's True and What It Means*, 19 Fordham J. Corp. & Fin. L. 5 (2013).

121. *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007) (emphasis added).

122. Laster, *supra* note 120, at 31.

123. *Id.* at 19–33.

124. *Netsmart*, 924 A.2d at 192 (emphasis added).

process. Often, *Revlon* review touches on the economics of the actual decision itself. This is exemplified by how *Revlon* treats deal protection measures, such as termination fees and no-shop provisions. Although some decisions have stated that such protection measures are permissible so long as they are negotiated in good faith, many *Revlon* analyses have stated that such measures must also be substantively reasonable, and several decisions have found deal protection measures impermissible because they effectively preclude competing bids and prevent shareholders from receiving the highest possible price.[125]

Insofar as some these decisions might be distinguished based on, among other things, the precise amount of the termination fee negotiated, it is hard to say what makes courts particularly well-qualified to decide, as a matter of business economics,

125. *Compare Stillwater*, 2019 WL 3943851, at *61 (collecting cases where the Court of Chancery approved of certain deal protection measures under *Revlon*); *In re* Zale S'holders Litig., C.A. No. 9388-VCP, 2015 WL 5853693, at *16 (Del. Ch. Oct. 1, 2015) (approving of no-shop provision and 2.75% termination fee); Dent v. Ramtron Int'l Corp., C.A. No. 7950-VCP, 2014 WL 2931180, at *8–9 (Del. Ch. June 30, 2014) (approving of no-shop provision and 4.5% termination fee); *In re* BioClinica, Inc. S'holder Litig., C.A. No. 8272-VCG, 2013 WL 5631233, *2-3, *12 (Del. Ch. Oct. 16, 2013) (approving of no-shop and 5.3% termination fee); *In re* BJ's Wholesale Club, Inc. S'holders Litig., C.A. No. 6623, 2013 WL 396202, at *13 (Del. Ch. Jan. 31, 2013) (approving of no-shop provision and 3.1% termination fee); *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397 (Del. Ch. 2010) (approving of no-shop provision and 3% termination fee); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 996–97, 1014–22 (Del. Ch. 2005) (approving of no-shop provision and 3.75% termination fee); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34 (Del. Ch. 1993) (approving of 3% termination fee and no-shop provision) *with* FrontFour Cap. Grp. LLC v. Taube, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at *27–28 & n.303 (Del. Ch. Mar. 11, 2019) (disapproving of no-shop provision and 2.79% termination fee in controller transaction); *In re* Comverge, Inc. S'holders Litig., C.A. No. 7368-VCP, 2014 WL 6686570, at *14–15 (Del. Ch. Nov. 25, 2014) (disapproving of no-shop provision and termination fee between 5.5% and 13.1%); Phelps Dodge Corp. v. Cyprus Amax Mins. Co., C.A. No. 17383, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) (stating in dicta that a 6.3% termination fee is excessive). *See In re* Topps Co. S'holders Litig., 926 A.2d 58, 86 (Del. Ch. 2007) (calling a 4.3% termination fee "a bit high in percentage terms"); *In re* Answers Corp. S'holders Litig., C.A. No. 6170-VCN, 2011 WL 1366780, at *4 & n.52 (Del. Ch. Apr. 11, 2011) (calling a 4.4% termination fee "near the upper end of a 'conventionally accepted' range"). *See also* La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1181 & n.10 (Del. Ch. 2007) ("Though a '3% rule' for termination fees might be convenient for transaction planners, it is simply too blunt an instrument, too subject to abuse, for this Court to bless as a blanket rule").

why a 3% or 4% termination fee would not deter rival bidders, but a 6% or higher termination fee would. This notably contrasts with *Unocal* review, under which courts are loathe to determine that poison pills may effect a certain amount of dilution but not more.[126]

Furthermore, although terms such as the length of go-shop periods or the presence of no-shop clauses would seem to relate to process concerns, they also inescapably relate to the economic substance of deals: buyers benefit economically from greater deal certainty, and some of these benefits are shared with sellers. Restrictions on deal protection devices that effectively demand that buyers bear a greater risk that a merger agreement is signed but the merger does not ultimately close, will, in expectation, reduce the price that buyers are willing to bid for a target and may also reduce the overall volume of mergers as an empirical matter.[127] In other words, even when evaluating questions of deal process, courts reach into economic substance of those deals and risk giving the wrong answer, given that the net economic effect of some of these process questions can only be empirically determined after the fact.

Now, this is not to say that courts should not be evaluating go-shops, no-shops, and termination fees under *Revlon*. Indeed, totally avoiding a decision is philosophically impossible—ignoring these provisions and permitting them all is still a decision. Rather, the point is that *Revlon* does not simply consider process alone. Process inevitably affects price, and additionally, these evaluations of process require drawing the kind of fine lines that have historically troubled courts about judicial evaluations of economic substance.

E. *The Illusory Promise of* Corwin

Corwin arguably represents the apex of the Delaware courts' approach toward process and the distillation of its belief that the vagaries of having courts evaluate substance can be excised by adding additional layers of process. *Corwin*, which followed on the heels of *MFW*, held that "when a transaction not subject

126. *Infra* Part I.F.
127. Micah S. Officer, *Termination Fees in Mergers and Acquisitions*, 69 J. Fin. Econ. 431 (2003); Fernán Restrepo & Guhan Subramanian, *The Effect of Prohibiting Deal Protection in Mergers and Acquisitions: Evidence from the United Kingdom*, 60 J.L. & Econ. 75 (2017).

to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[128] Practically speaking, *Corwin* held that a stockholder approval "cleansed" a transaction and relieved the corporation's management of fiduciary liability. On its face, *Corwin* swept away enormous amounts of judicial scrutiny of dealmaking. So long as there was proper stockholder approval, *Revlon* was gone, *Unocal* was gone, and in principle, even recoveries for breaches of duty of loyalty—so long as they were disclosed—were gone.[129]

In theory, *Corwin* provides a powerful tool for defendants in merger litigation to seek early dismissal of claims and for reducing courts' analytical burdens. So long as there was a valid stockholder approval, a court could avoid trekking into thorny issues of substance discussed above, such as whether a termination fee was preclusive or how much damages plaintiffs suffered.[130] But as things turned out, plaintiffs have instead often pleaded around (or at least tried to plead around) *Corwin* cleansing by alleging that the shareholder vote was not fully informed or uncoerced.

Most plaintiffs trying to avoid *Corwin* cleansing have focused on whether the vote was "fully informed," as even "[o]ne sufficiently alleged disclosure deficiency will defeat a motion to dismiss under *Corwin*."[131] The standard for adequate disclosure is cribbed from federal securities law on materiality and asks "if there is substantial likelihood that a reasonable shareholder would consider [an omission] important in deciding how to vote."[132] As securities lawyers know well, the materiality standard under securities law is far from self-explanatory and

128. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015), *aff'g In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 1001 (Del. Ch. 2014).

129. *In re* USG Corp. S'holder Litig., C.A. No. 2018-0602-SG, 2020 WL 5126671, at *2 (Del. Ch. Aug. 31, 2020); Goldstein v. Denner, C.A. No. 2020-1061-JTL, 2022 WL 1671006, at *19 (Del. Ch. May 26, 2022).

130. Matteo Gatti, *Did Delaware Really Kill Corporate Law? Shareholder Protection in a Post-*Corwin *World*, 16 N.Y.U. J.L. & Bus. 345, 383 (2020).

131. *In re* Mindbody, Inc. S'holder Litig., C.A. No. 2019-0442-KSJM, 2020 WL 5870084, at *26 (Del. Ch. Oct. 2, 2020); *see also* van der Fluit v. Yates, C.A. No. 12553-VCMR, 2017 WL 5953514, at *8 n.115 (Del. Ch. Nov. 30, 2017); *see also* Franklin A. Gevurtz, *The Shareholder Approval Conundrum*, 60 B.C. L. Rev. 1831, 1848 (2019).

132. Morrison v. Berry, 191 A.3d 268, 282 (Del. 2018).

has engendered significant confusion and apparent inconsistency in its application.[133]

Even aside from the vagueness of the materiality standard, the question of whether shareholders received adequate disclosure is often tied up in the economic significance of the omitted information.[134] In cases where the alleged omission related to management misconduct, this analysis devolves into whether the misconduct was serious enough so as to lead to liability under substantive standards of conduct.[135] Thus, despite *Corwin*, a court often must analyze the purportedly cleansed claim, with plausible claims ineligible for cleansing due to inadequate disclosure, and implausible claims making cleansing unnecessary.

Although less frequently litigated, *Corwin*'s non-coercion requirement also often results in legal analyses that are no simpler than what would have been necessary absent *Corwin*. As the Delaware courts have acknowledged, "[t]he term [coercion] itself 'is not very meaningful,'"[136] and courts have added additional gloss to the term to make it analytically tractable. As Vice Chancellor Laster described the noncoercion requirement, "the court must have confidence that the vote reflects an endorsement of the merits of the transaction, not just a

---

133. Kurt S. Schulzke & Gerlinde Berger-Walliser, *Toward a Unified Theory of Materiality in Securities Law*, 56 COLUM. J. TRANSNAT'L L. 6, 9 (2017) (describing the Supreme Court's definition of materiality as "so vague that it invites arbitrary decision-making"); James J. Park, *Assessing the Materiality of Financial Misstatements*, 34 J. CORP. L. 513, 515 (2009) (describing the current approach to the materiality standard to be "qualitative" and "nebulous"); Dale A. Oesterle, *The Overused and Under-defined Notion of "Material" in Securities Law*, 14 U. PA. J. BUS. L. 167, 168 (2011) (describing the application of the materiality standards by federal courts in the absence of a clear definition as "maddeningly imprecise and often fickle"); *see also* Escott v. BarChris Constr. Corp., 283 F. Supp. 2d 643, 682 (S.D.N.Y. 1968) ("Since no one knows what moves or does not move the mythical 'average prudent investor,' it comes down to a question of judgment, to be exercised by the trier of the fact as best he can in light of all circumstances.").

134. *See, e.g.*, Finnerty v. Stiefel Lab'ys, Inc., 756 F.3d 1310, 1321 (11th Cir. 2014); *In re* Insys Therapeutics, Inc. Sec. Litig., No. 17-cv-1954, 2018 WL 2943746, at *5 (S.D.N.Y. June 12, 2018).

135. *In re* Mindbody, C.A. No. 2019-0442-KSJM, 2020 WL 5870084, at *26 (Del. Ch. Oct. 2, 2020) ("Generally, where facts alleged make the paradigmatic *Revlon* claim reasonably conceivable, it will be difficult to show on a motion to dismiss that the stockholder vote was fully informed.").

136. Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152, at *20 (Del. Ch. May 31, 2017) (quoting Katz v. Oak Indus. Inc., 508 A.2d 873, 880 (Del. Ch. 1986)).

preference for a marginally better alternative over an already bad situation."[137]

For *Corwin* purposes, there are at least two types of coercion: structural and situational. Structural coercion is illustrated by *Sciabacucchi v. Liberty Broadband*.[138] In *Sciabacucchi*, the Court of Chancery held that structural coercion was plausible where the plaintiff had alleged that the deal proposed to shareholders essentially required them to approve or reject both 1) multiple mergers that were undisputedly beneficial to the corporation's shareholders, and 2) a purportedly unfair financing transaction involving the corporation's largest shareholder that were express conditions of the merger transaction.[139] The plaintiffs alleged that, by conditioning the lucrative merger transactions on the financing transaction, shareholders were coerced into approving something that they otherwise would have rejected.[140] Situational coercion, on the other hand, is illustrated by *Saba Software*. In *Saba*, the court held that stockholders were subject to situational coercion where the board pushed for a sale of the company at a depressed price after having grossly mismanaged the company's response to a fraud perpetuated by two of its former executives.[141] As *Saba* stated, "inequitable coercion flowed from the situation in which the Board placed its stockholders as a consequence of its allegedly wrongful action and inaction."[142] In other words, either type of coercion returns a court to an examination of the board's conduct, the same examination that *Corwin* cleansing was supposed to allow courts to avoid.

Moreover, in several cases where *Corwin* was found to apply and the complaint dismissed, the courts' opinions explicitly indicated that other reasons would have prompted dismissal anyway.[143] Thus, if the impact of *Corwin* has been less than what

137. *In re* Dell Techs. Inc. Class V S'holders Litig., C.A. No. 2018-0816-JTL, 2020 WL 3096748, at *27 (Del. Ch. June 11, 2020).
138. *Sciabacucchi*, 2017 WL 2352152 (Del. Ch. May 31, 2017).
139. *Id.* at *1.
140. *Id.* at *2–4.
141. *In re* Saba Software, Inc. S'holder Litig., C.A. No. 10697-VCS, 2017 WL 1201108, at *16 (Del. Ch. Mar. 31, 2017).
142. *Id.* at *16.
143. *See, e.g.*, Ryan v. Buckeye Partners, L.P., C.A. No. 2021-0432-JRS, 2022 WL 389827, at *9 (Del. Ch. Feb. 9, 2022); *In re* Cyan, Inc. S'holders Litig., C.A. No. 11027-CB, 2017 WL 1956955, at *7–11 (Del. Ch. May 11, 2017).

was expected, it may be because *Corwin* made but empty promises of empowering shareholders and simplifying litigation.

F. *Poison Pills and Shareholder Empowerment*

Unlike most of the other doctrines discussed in this Part that aim to regulate the power of controllers and managers to engineer unfair mergers, the rules around poison pills aim to contain a legal device that allows managers to avoid mergers. Invented in the 1980s to ward off so-called hostile takeovers, the original poison pills were essentially instruments that diluted the holdings of would-be hostile bidders to make takeovers economically impossible without the consent of target boards.[144] Since then, poison pills have evolved to also protect boards from activist shareholders who pursue only minority stakes in a corporation.[145] The problem for corporate law is that poison pills also limit the powers and rights of shareholders to make decisions and undertake transactions that those shareholders would otherwise be entitled to make and take.[146] What could justify such an intrusion? Delaware courts have struggled with the answer, and recent case law suggests that such intrusions may often be inappropriate.

Nominally, Delaware's *Unocal* standard required courts to consider whether the board had articulated a legitimate threat justifying its action and whether the board's actions were proportionate to that threat. Specifically, a board defending the adoption of a poison pill must show "(1) that it had reasonable grounds for believing a danger to corporate policy and effectiveness existed (i.e., the board must articulate a legally cognizable threat) and (2) that any board action taken in response to that threat is reasonable in relation to the threat posed."[147] While less deferential than the business judgment standard used in many other states,[148] *Unocal* is by no means as tough as entire

144. Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. Rev. 915, 921 (2019).

145. *Id.* at 918–20, 923–25.

146. *See, e.g.*, Julian Velasco, *The Enduring Illegitimacy of the Poison Pill*, 27 J. Corp. L. 381, 403–11 (2002).

147. Air Prod. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 92 (Del. Ch. 2011) (quoting Unitrin v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995) (citing Unocal v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985))).

148. Michal Barzuza, *The State of State Antitakeover Law*, 95 Va. L. Rev. 1973, 1998–2002, 2042–46 (2009).

fairness, and Delaware courts have often approved poison pills, especially in *Unocal*'s earlier years.[149]

Unocal's first prong is primarily an investigation of decision-making process.[150] Under that prong, a board must demonstrate that it had "reasonable grounds for believing a danger to corporate policy and effectiveness existed," which it does by showing that it conducted a reasonable investigation. Although *Unocal*'s first prong technically requires that the threat be "legally cognizable," giving the inquiry a sheen of judicial inquiry into substance, *Unocal* in fact generally allows boards to implement a poison pill on the mere basis that a takeover offer supposedly underprices the corporation and shareholders may confusedly and erroneously accept such an offer, a notion known as "substantive coercion."[151] Before Delaware courts deprecated the theory, the availability of substantive coercion as a legitimate threat effectively eliminated consequential inquiry into the legitimacy of the threat.[152]

The meaning of *Unocal*'s second prong, known as the proportionality test, is more contested. Under the proportionality test, courts consider the nature of the threat and the nature of management's response to that threat.[153] In the years after *Unocal*, Professors Ronald Gilson and Reiner Kraakman influentially argued that courts must evaluate the economic value of the hostile offer and the value of management's proposed alternative in cases where a board claims substantive coercion.[154] As Gilson and Kraakman acknowledge, a "real challenge" of the proportionality test arises when courts must determine values of the competing alternatives.[155] For instance, if a court finds structural coercion in the threat, and a board proposes a preclusive restructuring

149. *See, e.g.,* Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1154 (Del. 1989); *Airgas*, 16 A.3d at 49. *See generally* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 268 (1989).

150. *Airgas*, 16 A.3d at 92 ("The first hurdle under *Unocal* is essentially a process-based review").

151. *Unitrin*, 651 A.2d at 1384; *Paramount*, 571 A.2d at 1154.

152. A notable exception is Chesapeake Corp. v. Shore, 771 A.2d 293, 329 (Del Ch. 2000), in which the court excoriated the board for the lackadaisical manner by which the board considered the pill in question.

153. *See* Versata Enters., Inc. v. Selectica, Inc., 5 A.3d 586, 606 (Del. 2010); *Chesapeake*, 771 A.2d at 329.

154. Gilson & Kraakman, *supra* note 149, at 266–71.

155. *Id.* at 270.

to thwart the threat, Gilson and Kraakman argue that a court should require a "demonstration of a benefit to shareholder interests."[156] In other words, Gilson and Kraakman would seemingly have courts examine the economic merits of the competing alternatives. However, as discussed previously, the Delaware courts are often leery of conducting substantive economic analysis, and the courts have often resorted to other process-centered analytics to avoid making such quantitative comparisons.

The *Airgas* case is illustrative of Delaware courts' avoidance of examining quantitative proportionality. In *Airgas*, Air Products made a "structurally non-coercive, all-cash, fully financed tender offer" to Airgas's stockholders.[157] In response, the Airgas board instituted a poison pill with flip-over and back-end rights.[158] There was no question that the sole legally cognizable basis of Airgas's poison pill was that the Airgas board felt that Air Products' offer should have been higher. But why should the board usurp stockholders' right to accept or reject the tender offer for themselves? *Airgas* replied simply that a board could not delegate its duty to decide what is best for the corporation (and presumably, for stockholders) to stockholders themselves.[159] The court then found that the pill fell within the range of reasonableness because it "d[id] not *forever* preclude Air Products, or any bidder, from acquiring Airgas."[160] Indeed, this is the Delaware courts' usual approach when faced with poison pills that operate via what might be termed financial or economic mechanisms—e.g., diluting a would-be acquirer or paying out large cash dividends in the event of a sale.[161]

By contrast, the Delaware courts have rejected defensive measures under *Unocal* when the measure directly impaired the decision-making powers of shareholders or of boards, labeling such measures "draconian" or "preclusive." For example, in *Quickturn*, the Delaware Supreme Court considered a "dead-hand" pill, which prevented any newly elected boards from redeeming the pill for six months.[162] *Quickturn* affirmed

156. *Id.*
157. *Airgas*, 16 A.3d at 54.
158. Airgas, Inc., Current Report (Form 8-K) (May 10, 2007).
159. *Airgas*, 16 A.3d at 124.
160. *Id.* at 124 (emphasis in original).
161. *See, e.g.*, Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995).
162. Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1288 (Del.), *aff'g* Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 49–52 (Del. Ch. 1998).

the Court of Chancery's invalidation of the pill, reasoning that dead-hand pills violate Delaware law by limiting the power of a board to manage the corporation.[163] As *Quickturn* held, D.G.C.L. § 141(a) requires that corporate decisions be made by the current board, and a board cannot delegate the powers of a future board to itself.[164]

Likewise, in *Liquid Audio*,[165] the Delaware Supreme Court determined that a board expansion violated *Unocal* because the expansion was specifically meant to frustrate a stockholder vote that would have likely replaced two incumbent directors with directors nominated by a would-be acquirer, who had previously made an offer that the board rejected as inadequate.[166] The Delaware Supreme Court ruled that such actions violated the rule articulated in *Blasius v. Atlas* that where a board "act[s] for the primary purpose of interfering with or impeding the effective exercise of a shareholder vote," it "bears the heavy burden of demonstrating a compelling justification for such action."[167] In such cases, "the board must first demonstrate a compelling justification for such action as a condition precedent to any judicial consideration of reasonableness and proportiona[lit]y."[168] Without much further factual analysis, *Liquid Audio* held that the board had not demonstrated a compelling justification for its actions and reversed the trial court's decision.[169]

As shown by these cases, the operative inquiry under *Unocal* seems to concern the nature of the poison pill—its purpose and mechanism of operation—as much as the process by which the board adopted the pill. At first blush, that may seem to be a question of business substance. Still, the rubric by which a pill is examined focuses on whether that pill infringes on the procedural rights of shareholders and boards to control the fate of the corporation; courts leave in place those measures that make it more economically difficult for a would-be acquirer to

163. *Id.* at 1290–92.
164. *Id.*
165. MM Cos. v. Liquid Audio, Inc., 813 A.2d 1118 (Del. 2003).
166. *Id.* at 1125–27, 1135.
167. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659–61 (Del. Ch. 1988) (quoted in *Liquid Audio*, 813 A.2d at 1129).
168. *Liquid Audio*, 813 A.2d at 1132.
169. *See id.* at 1125–26, 1131–32. *Cf.* Coster v. UIP Cos., 300 A.3d 656, 663 (Del. 2023) (affirming the trial court's approval of a stock sale that diluted a 50% stockholder, ended a deadlock, and mooted a custodial action).

take over a corporation but do not directly infringe upon shareholder or board rights.

That said, are pills that operate via economic mechanisms all that different from pills that more directly impact decision-making processes? Returning to *Airgas*, which involved a solely "economic" pill that did not directly limit shareholder or board powers, the court gave three reasons why the board's defensive measures were within the range of reasonableness.[170] First, it found that the board was "not 'cramming down' a management-sponsored alternative" but instead "simply maintaining the status quo."[171] Second, the board's actions "do not *forever* preclude" a change-of-control.[172] Third, it found that appraisal, an alternative protection suggested by stockholders, may not adequately recognize Airgas's value, in part due to appraisal's exclusion of synergies from fair value.[173] But do not all three reasons apply also the measures in *Quickturn* and *Liquid Audio*? After all, the *Quickturn* dead-hand pill was not "forever" either, but lasted only six months, and the impact of the board expansion in *Liquid Audio* could have been neutralized by subsequent shareholder votes.[174] It is far from clear that the two groups of defensive measures can be genuinely distinguished under process-centered principles, and it may be the case that the two types of defensive measures are more similar—and should be treated more similarly—than might initially appear.

Recently, the use of poison pills has gone beyond attempting to limit takeovers to limiting even minority shareholder activism. The precise terms of pills, particularly the terms of triggers, are far more important in activism contexts than in takeovers because activists economically benefit in proportion only to their shareholdings, whereas takeover buyers often obtain only a small toehold position anyway before launching a tender offer for the remaining shares.[175] Thus, in a lucid

170. *Airgas*, 16 A.3d at 124–25. *Airgas* also noted in its section on the range of reasonableness that the board was responding to a legitimately articulated threat. *Id.* at 122–23. This seems to fall under the first prong of *Unocal*, however.

171. *Id.* at 124.

172. *Id.* at 124–25 (emphasis in original).

173. *Id.* at 125–26.

174. *Quickturn*, 721 A.2d at 1287–88, 1291-92; *Liquid Audio*, 813 A.2d at 1125.

175. Kahan & Rock, *supra* note 144, at 922–924.

exposition of anti-activist pills, Professors Marcel Kahan and Ed Rock have argued that "[t]he analysis of whether a pill is reasonable requires greater scrutiny in the context of an anti-activist pill than in the context of an anti-takeover pill."[176] Professors Kahan and Rock conclude that pills should be allowed only to the extent that they "serve to maintain a balanced election process, without significantly impeding an activist."[177] In their view, provisions that include derivative exposure in calculating ownership and "wolf-pack" provisions that trigger a pill when investors act in parallel without any actual agreement should be invalidated because they do not plausibly protect, much less enhance, the benefits of shareholder democracy.[178]

The 2021 *Williams*[179] case relied heavily on Professors Kahan and Rock's analysis to invalidate an anti-activist pill with a 5% ownership trigger. The pill's trigger also included an expansive beneficial ownership definition that encompassed economic exposure via derivatives, a wolf-pack provision, and a more limited definition of "passive" investor than what the federal securities laws provides.[180]

In its *Unocal* analysis, the Court of Chancery first rejected stockholder activism and then short-termism (which appeared to be essentially another way of describing "substantive coercion") as legitimate corporate threats against which a board may adopt a poison pill at all.[181]

Williams then considered the legitimacy of the board's third justification: filling in a supposed "gap" in the rules implementing Section 13(d) of the Securities Exchange Act. This "gap" allows parties to surreptitiously acquire significant portions of a corporation's stock in the days before disclosure is required of a stockholder who newly becomes a holder of 5% or more of a company's stock. (The current rule requires disclosure within 10 days; the Securities and Exchange Commission has formally proposed shortening the period to five days, but no

176. *Id.* at 946.
177. *Id.* at 970.
178. *Id.* at 951–53, 962–66.
179. Williams Cos. S'holder Litig., C.A. No. 2020-0707-KSJM, 2021 WL 754593, at *38–40 (Del. Ch. Feb. 26, 2021) [hereinafter *Williams Trial*], *aff'd sub nom.* Williams Cos. v. Wolosky, 264 A.3d 641 (Table), 2021 WL 5112495 (Del. 2021).
180. *Williams Trial*, 2021 WL 754593, at *10–13 (comparing the pill's definitions to those under 17 C.F.R. § 240.13d-1).
181. *Id.* at *9.

final rule has been promulgated as of the date of this writing.) The court noted that "if gap filling were a legitimate corporate objective that justified the adoption of a poison pill, then all Delaware corporations subject to the federal disclosure regime would have a ready-made basis for adopting a pill,"[182] which bears obvious similarities to criticisms of substantive coercion claiming that it would be universally available. The court then assumed without deciding that filling gaps in federal disclosure requirements was a permissible purpose.[183]

Nevertheless, the court invalidated the pill as disproportionate because it went beyond the gap-fillers previously suggested by commentators. The pill's passive investor provision excluded investors who engaged in "routine activities such as attending investor conferences and advocating for the same corporate action" and, combined with the pill's acting-in-concert provision, was "likely to chill a wide range of anodyne stockholder communications."[184] Notably, conduct that might trigger the wolf-pack provision included "exchanging information, attending meetings, conducting discussions, or making or soliciting invitations to act in concert or in parallel,"[185] which nearly exactly mirrored the provisions that Professors Kahan and Rock had criticized.[186]

We can thus see *Williams* as an *a fortiori* application of *Quickturn* and *Liquid Audio*: Given that the defensive measures in *Quickturn* and *Liquid Audio* were impermissible because they threatened to dilute the practical impact of shareholder votes, a measure that threatens the pre-vote campaigns and activities that give votes credibility as genuine reflections of shareholder preferences and sentiment must be even more impermissible.[187] But as noted above, the *Quickturn* and *Liquid Audio* measures were, in some ways, no more restrictive upon shareholder choices than traditional poison pills.[188] Likewise, if, under *Williams*, pills may not dilute the power of shareholder

---

182. *Id.* at *34.
183. *Id.*
184. *Id.* at *37.
185. *Id.* at *11.
186. *Id.* at *38 (citing Kahan & Rock, *supra* note 144, at 962–66).
187. Compare this to the requirements in *Corwin* and *MFW* that cleansing votes be "fully informed." Corwin v. KKR Fin. Holdings, LLC, 125 A.3d 304 (Del. 2015); *In re* MFW S'holders Litig., 67 A.3d 496 (Del. Ch. 2013), *aff'd*, 88 A.3d 635 (Del. 2014).
188. *See supra* notes 170–73.

votes as a means to express shareholder sentiment, then why may pills block tender offers as a means to express shareholder sentiment?

II.
Management of Going Concerns

The complications raised by the interactions between substance and process also extend to the ordinary day-to-day management of corporations. In the day-to-day context, the business judgment rule looms large and generally shields unconflicted management decisions from investor attack via judicial processes. However, the Delaware courts have considered two contexts in which even unconflicted, non-merger management decisions might be subject to fiduciary liability. One of these contexts, *Van Gorkom*, is widely viewed as wrongly decided, but the other, *Caremark*, has recently been invigorated by several decisions that have expanded its scope.

In theory, both *Van Gorkom* and *Caremark* are process-centered schemes, which, also in theory, should be a point of strength for courts. But as just mentioned, *Van Gorkom* has been widely derided.[189] And although *Caremark* has been received more positively, it often shifts its focus away from process, as this Article will illustrate. Rather, *Caremark* regularly requires courts to second-guess directors' business judgment. These lines of decisions also show how a focus on process does not guarantee good decisions, and moreover, may even lull the unsuspecting into falling for a mirage.

A. Van Gorkom, Disney, *and the Death of the Duty of Care*

It is a carefully guarded principle of Delaware corporate law that the board of directors manages the affairs of the corporation,[190] and the business judgment rule is perhaps the most significant realization of that principle. Under the business judgment rule, courts "presume[] that in making a business decision the directors of a corporation acted on an informed

189. *See, e.g.*, Leo Herzel & Leo Katz, Smith v. Van Gorkom: *The Business of Judging Business Judgment*, 41 Bus. Law. 1187 (1986); Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After* Van Gorkom, 41 Bus. Law. 1 (1985).

190. Del. Code Ann. tit. 8, § 141(a) (2023).

basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[191] Unless that presumption is rebutted, "a court will not interfere with the judgment of a board of directors."[192]

The business judgment rule is highly deferential and protects the great bulk of corporate actions from judicial review. A board may adopt a terrible business plan; it may hire an incompetent CEO; it may award the same CEO tens of millions in severance. Absent self-dealing, none of these decisions will be subject to successful stockholder attack. That is, until *Smith v. Van Gorkom*[193] threatened to eviscerate the protection offered by the business judgement rule. (Although *Van Gorkom* was a merger case, the perceived impact also extended to review of ordinary business decisions, hence its discussion in this Part.)

In *Van Gorkom,* Trans Union (the same company as the credit reporting agency, but then also engaged in railcar leasing) held millions of nonrefundable tax credits, an issue that the board had discussed repeatedly.[194] To realize the value of those tax credits, Trans Union's CEO, Jerome Van Gorkom, decided to sell the company to an entity controlled by businessman Jay Pritzker, then-patriarch of the wealthy Pritzker family.[195] After negotiating for a few days, Van Gorkom reached a deal in principle with Pritzker at $55 per share.[196] Van Gorkom then called a Saturday meeting of the Trans Union board, and after a two-hour meeting, the board resolved to approve the deal.[197] The merger agreement was executed without any director having read the final copy, and later amendments were also executed without the directors having read them.[198]

The Delaware Supreme Court held that the board breached its duty of care by approving the merger without having sufficiently analyzed the deal and by not disclosing the board's ignorance to stockholders in the proxy statement soliciting stockholder approval of the deal. Two of the five justices dissented. In his dissent, Justice McNeilly noted that by the

191. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).
192. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (citations omitted).
193. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
194. *Id.* at 864–65, 895 (McNeilly, J., dissenting).
195. *Id.* at 866.
196. *Id.* at 866–67.
197. *Id.* at 867–69.
198. *Id.* at 869–70, 882–83.

time of the merger, the Trans Union board had repeatedly discussed Trans Union's tax problems and had recently reviewed forecasts and analyses of Trans Union's business.[199] Justice McNeilly's dissent also criticized the majority's emphasis on the speed with which the deal was approved, noting that the "the corporate world . . . operates on what is so aptly referred to as 'the fast track'" and that Trans Union's outsider directors were each CEOs of large corporations or prominent business professors.[200]

Even under *Van Gorkom*, the focus of the duty of care analysis remains on the process by which the directors arrived at their decision and not the result. Contrary to suggestions in other bodies of law, under Delaware law,

> compliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests. To employ a different rule—one that permitted an "objective" evaluation of the decision—would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all good faith board decisions.[201]

---

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

200. *Id.* at 894–95 (McNeilly, J., dissenting); *see* Jonathan R. Macey & Geoffrey P. Miller, Trans Union *Reconsidered*, 98 Yale L.J. 127, 129 (1988) ("While the majority opinion claimed to have articulated a 'gross negligence' standard as governing the case, the facts did not support a finding of negligence, much less gross negligence.").

201. *Caremark*, 698 A.2d at 967-68 (footnotes omitted) (contrasting the Delaware position with that espoused by the American Law Institute, which stated that for a decision to qualify for judicial deference under the business judgment rule, a director must have "rationally believe[d] that the business

Nevertheless, *Van Gorkom* sent the business world into a tizzy.[202] The following year, the Delaware General Assembly responded with Section 102(b)(7),[203] which allowed corporations to indemnify directors for breaches of the duty of care, overruling *Van Gorkom* in all but name. Following enactment of § 102(b)(7), the threat of liability for breach of the duty of care largely disappeared. It would prove nearly impossible to assert actionable damages claims against directors: demand futility required that plaintiffs plead that the directors face a meaningful risk of personal financial liability, which § 102(b)(7) eliminated for duty of care claims.

Later retrospectives on *Van Gorkom* have rehabilitated it somewhat into an early heightened-scrutiny case for mergers, i.e., a *Revlon* before *Revlon*.[204] I am sympathetic to these views, but there is good reason to believe that even under the legal standard articulated by the majority, *Van Gorkom* was simply an incorrect application of law to fact, as expressed by Justice McNeilly's dissent and others.[205] Even if *Van Gorkom* represented a court's skepticism of a board's deliberative process and not of the substance of the final decision, that skepticism still seems unjustified. And thus, one of the worst business court decisions of the last 40 years, requiring almost immediate rectification by the legislature, was in a field—process—where courts were supposed to excel.

Disney[206] was the coup de grâce for the duty of care. In *Disney*, the Delaware Supreme Court held that, among other things, Disney's board did not breach its fiduciary duties by approving a contract to hire Michael Ovitz as president that eventually cost Disney $140 million for just over one year of (poor) service. Although *Disney* technically did not overrule *Van Gorkom*,

judgment is in the best interests of the corporation." AM. L. INST., PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 4.01(c) (1994)).

202. *See* Hamermesh et al., *supra* note 34, at 351 & n.136.

203. DEL. CODE ANN. tit. 8, § 102(b)(7) (2023).

204. Laster, *supra* note 120, at 24 n.94; Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996); *see* Cinerama, Inc. v. Technicolor, Inc., C.A. No. 8358, 1991 WL 111134, at *16 (Del. Ch. June 24, 1991) ("the due care theory and the *Revlon* theory do not present two separate legal theories justifying shareholder recovery").

205. *Supra* note 200.

206. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006) [hereinafter *Disney Appeal*].

the effect was the same. Both the Delaware Supreme Court and the Court of Chancery took many pains to distinguish the facts from those of *Van Gorkom*,[207] but it is hard to see light between the angle taken by the *Disney* opinions and Justice McNeilly's dissent in *Van Gorkom*: the board "f[e]ll short of best practices,"[208] "underperformed,"[209] and did not "reflect . . . ideal corporate governance,"[210] but nevertheless knew enough and tried hard enough to satisfy their duty of care.

B. Caremark, Marchand, *and the Mirage of Process*

Section 102(b)(7) and *Disney* seemingly restored the status quo ante to duty of care rules: absent self-dealing or a similar conflict of interest, directors could do as they pleased. In the years afterward, cases such as *Revlon* raised the bar for director conduct in the merger context, but there was little judicial oversight of directors' management of day-to-day business. Still, there was one case that lurked in the shadows: *Caremark*,[211] a 1996 Court of Chancery case that had stated that a board was obligated to (1) set up a reasonable system of monitoring,[212] and (2) act in the face of known issues, or "red flags."[213]

Nominally, *Caremark* is an inquiry into process, not results. It examines whether a board had systems and procedures for making good decisions and not whether those decisions were

207. *Id.* at 55–60; *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 760–72 (Del. Ch. 2005) [hereinafter *Disney Trial*].

208. *Disney Appeal*, 906 A.2d at 56.

209. *Disney Trial*, 907 A.2d at 772.

210. *Id.*

211. Before *Caremark*, the leading Delaware case on directors' duty of oversight was *Graham v. Allis–Chalmers Mfg. Co.*, 188 A.2d 125 (Del. 1963), in which the Delaware Supreme Court absolved a large corporation's directors from failing to address antitrust violations on account of the firm's large size and the directors' ignorance of indications that the firm was in fact engaged in illegal activity. *Caremark* did not and could not technically overrule *Graham* because *Caremark* was a Court of Chancery decision, and moreover, was a settlement approval in which its most remembered statements were technically dicta. Still, it is *Caremark* and not *Graham* that forms the basis for today's law on the duty to monitor. *See* Jennifer Arlen, *The Story of* Allis-Chalmers, Caremark*, and* Stone: *Directors' Evolving Duty to Monitor*, in CORPORATE LAW STORIES 323, 331, 339 (J. Mark Ramseyer ed., 2009).

212. *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996); *In re* GoPro, Inc., C.A. No. 2018-0784-JRS, 2020 WL 2036602, at *10 (Del. Ch. Apr. 28, 2020).

213. *Id.* at 971.

actually any good. The monitoring system required under *Caremark*'s first monitoring prong "is a question of business judgment," and *Caremark* itself acknowledged that "no rationally designed information and reporting system" will eliminate the possibility of regulatory and risk-management violations.[214] Likewise, directors are entitled to rely upon management reports to assure themselves that there are no issues requiring their attention.[215] By its own terms, *Caremark* is not a particularly strict standard. As *Caremark* remarked, "[t]he theory here advanced is possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment."[216] In the decade after *Caremark* was decided, it does not appear that the Court of Chancery denied a single motion to dismiss a *Caremark* claim for failure to state a claim.[217]

Notwithstanding the weakness of *Caremark* by its own terms, *Stone v. Ritter*,[218] decided just five months after *Disney* and by the same court, further called into question whether *Caremark* had any real force. In *Stone*, a bank facilitated a Ponzi scheme and failed to make proper disclosures required by federal laws

214. *Id.* at 970.

215. *Id.* at 971; *see also* Wood v. Baum, 953 A.2d 136, 143 (Del. 2008).

216. *Caremark*, 698 A.2d at 967.

217. In rare cases, non-Delaware courts did allow *Caremark* claims to proceed past the dismissal stage during this period. *See, e.g.*, *In re* Abbott Lab'ys Derivative S'holders Litig., 325 F.3d 795 (7th Cir. 2003) (applying Delaware law and reversing dismissal). After the financial crisis, the Delaware courts also allowed a few *Caremark* claims to proceed past dismissal. These cases were (1) *In re* Am. Int'l Grp., Inc., Consol. Derivative Litig., 965 A.2d 763, 774, 777 (Del. Ch. 2009), in which the Court of Chancery found that the complaint raised a plausible inference that the individual defendants knew that AIG's internal controls were faulty and did nothing about it; (2) *In re* Puda Coal, Inc. S'holders Litig., C.A. No. 6476-CS, 2013 WL 769400 (Del. Ch. Feb. 6, 2013) (bench ruling), in which independent directors failed to discover for two years that the corporation's chairman fraudulently transferred the corporation's primary asset, and upon the fraud coming to their attention, quit instead of taking any remedial action; (3) *In re* China Agritech, Inc. S'holder Derivative Litig., C.A. No. 7163-VCL, 2013 WL 2181514, *19, *20, *24 (Del. Ch. May 21, 2013), in which the court found that the complaint raised a plausible inference that, *inter alia*, the members of the audit committee knowingly disregarded their duties by never meeting or doing any actual work, even as they were also aware of ongoing oversight problems; and (4) Rich *ex rel.* Fuqi Int'l, Inc. v. Chong, 66 A.3d 963 (Del. Ch. 2013), in which the court found that the complaint raised a plausible inference that, *inter alia*, the board had no "meaningful" controls in place and ignored red flags.

218. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362 (Del. 2006).

designed to police such crimes.[219] Federal regulators found that the bank's compliance program "lacked adequate board and management oversight," and that "reporting to management for the purposes of monitoring and oversight of compliance activities was materially deficient."[220] Despite all this, the Court of Chancery held that the complaint had failed to state a claim, and the Delaware Supreme Court affirmed. In its affirmance, the Delaware Supreme Court found that the board had implemented a sufficient oversight system by adopting written compliance policies and procedures, establishing numerous departments to handle compliance matters, receiving annual compliance reports, and having an audit committee that "oversaw [the company's] compliance program on a quarterly basis."[221] However, seemingly in part to avoid § 102(b)(7) exculpation, *Stone* also held that *Caremark* claims—which relate to a board's oversight duties—relate to the duty of loyalty rather than the duty of care.[222] If time had stopped there, Delaware's critics would have a fair basis to argue the duty to monitor is all hat, no cattle.[223]

Marchand v. Barnhill,[224] decided in 2019, heralded the arrival of a more vigorous *Caremark* standard. The headline holding of *Marchand* was a refinement of *Caremark*'s first monitoring prong to require that "a board make a good faith effort to put in place a reasonable system of monitoring and reporting about the corporation's central compliance risks."[225] But more significant than that rule statement was how *Marchand* applied it to the

219. *Id.* at 365–66.

220. *Id.* at 366.

221. *Id.* at 371–73.

222. *See id.* at 369–70 (distinguishing *Caremark* claims from the duty of care claims found to be exculpated in *Disney*). Arguably, *Stone*'s verbal gymnastics are unnecessary, as § 102(b)(7) does not allow exculpation of "acts or omissions not in good faith," an exclusion separate from the exclusion for breaches of the duty of loyalty. Del. Code Ann. tit. 8, § 102(b)(7)(i)-(ii) (2021).

223. *See, e.g.*, Cheryl L. Wade, *Corporate Governance Failures and the Managerial Duty of Care*, 76 St. John's L. Rev. 767, 769 (2002). *See also* Robert T. Miller, *Wrongful Omissions by Corporate Directors:* Stone v. Ritter *and Adapting the Process Model of the Delaware Business Judgment Rule*, 10 U. Pa. J. Bus. & Emp. L. 911, 941 (2008) (arguing that *Caremark* and *Stone* lack a meaningful inquiry into what information a monitoring system must provide and proposing that boards pass a resolution to determine what information is necessary on penalty of an *ad hoc* judicial determination of necessary information).

224. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

225. *Id.* at 824.

factual allegations at hand: the inferences drawn in *Marchand* go far beyond what Delaware courts had previously been willing to infer from complaints asserting *Caremark* claims. Although the Delaware Supreme Court framed its decision in terms of a total failure to monitor food safety,[226] the complaint does not actually seem to suggest that the company completely lacked a system of oversight. In *Marchand*, which concerned the Blue Bell ice cream company, management undisputedly provided regular reports from food safety regulators and third-party food safety auditors to the board chairman individually as well as to the entire board,[227] which arguably should suffice under the business judgment standard that *Caremark* would apply to oversight systems.[228] Even so, *Marchand* concluded that it was plausible that "no board-level system of monitoring or reporting on food safety existed."[229] Similarly, *Marchand* inferred that the directors' response that "management regularly reported to them on 'operational issues'" indicated only reporting of "general operations" in a manner insufficient to satisfy *Caremark*.[230]

In *Marchand*'s wake, plaintiffs have filed several successful *Caremark* complaints, resulting in decisions that have rapidly expanded *Caremark*'s scope and have placed into question former assumptions about limitations on *Caremark* liability. To illustrate, although some post-*Marchand* analyses suggested that risks must be "mission-critical" to warrant *Caremark* scrutiny,[231] a subsequent Chancery case explained that *Caremark* applies not only to "mission critical risks," but in fact to all "central compliance risks," an inherently broader standard.[232] Moreover, as that decision held, a risk need not be a central compliance risk or a mission-critical risk to warrant action in the face of

226. The Court of Chancery also rejected a "red-flag" *Caremark* claim. Although management received several "red flags," none of these flags appeared to have been passed on to the board. The Supreme Court's decision noted some of these red flags, but it did not appear to have reversed on that holding.

227. *Marchand*, 212 A.3d at 817.

228. *Caremark*, 698 A.2d at 970.

229. *Marchand*, 212 A.3d at 824.

230. *Id.* at 823–24.

231. *See, e.g.*, H. Justin Pace & Lawrence J. Trautman, *Mission Critical:* Caremark, Blue Bell, *and Director Responsibility for Cybersecurity Governance,* 2022 Wis. L. Rev. 887, 891 (2022) (stating that the most plausible interpretation of *Caremark* is that it "will be limited to 'mission critical' operations").

232. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 678 (Del. Ch. 2023).

a red flag.[233] Rather, the significance of a risk merely makes it "easier to draw an inference that a failure to respond meaningfully resulted from bad faith."[234]

Likewise, recent Chancery guidance places in serious doubt previous attempts to limit *Caremark* to monitoring failures "in connection with the corporation's violation of positive law."[235] These recent cases suggest that even nonlegal risks may be subject to *Caremark* duties so long as they carry sufficient economic significance.[236] Given, however that nearly all modern economic business risks overlap with legal and compliance risks,[237] it is not clear what it would mean to limit *Caremark* to violations of positive law.

The line between economic and legal risk is particularly blurred for public companies, which must disclose potential risks and financially account for those risks in regulatory filings. The regulatory requirements that apply to public companies mean that economic problems can often be rolled over into violations of securities and accounting law. Consider that in *Hughes v. Hu*, the underlying misconduct was improper self-dealing by corporate executives, but the instant claim against the board was that the board failed to implement adequate accounting controls to prevent self-dealing, resulting in inaccurate regulatory filings that prompted accounting restatements and securities fraud lawsuits.[238] In other words, even if *Caremark* monitoring duties only covered those risks that arise from unlawful conduct, the wide ambit of securities and accounting

233. *Id.* at 680.
234. *Id.*
235. Constr. Indus. Laborers Pension Fund v. Bingle, C.A. No. 2021-0940-SG, 2022 WL 4102492, at *1 (Del. Ch. Sept. 6, 2022), *aff'd*, No. 411, 2022, 2023 WL 3513271 (Del. May 17, 2023) (rejecting such a characterization). *Cf.*, Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 Vand. L. Rev. 2013, 2031–32 (2019); Lisa M. Fairfax, *Managing Expectations: Does the Directors' Duty to Monitor Promise More than It Can Deliver?*, 10 U. St. Thomas L.J. 416, 427–28 (2012).
236. *Bingle*, 2022 WL 4102492, at *1.
237. For example, *McDonald's* cited both employee walkouts and regulatory investigations as reasons why sexual harassment constituted a risk subject to *Caremark* monitoring. *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 353 (Del. Ch. 2023). *See also* Roy Shapira, *Max Oversight Duties: How* Boeing *Signifies a Shift in Corporate Law*, 48 J. Corp. L. 119, 130 (2022).
238. Hughes v. Hu, C.A. No. 2019-0112-JTL, 2020 WL 1987029, at *13–16 (Del. Ch. Apr. 27, 2020).

laws may act to sweep many seemingly non-legal business risks within *Caremark* anyway.[239]

Other post-*Marchand* cases such as *Pettry v. Smith*[240] also undermine the view that the core of *Caremark* concerns legal compliance. *Pettry* concerned illegal shipments of cigarettes delivered by FedEx. In 2006, FedEx agreed to cease future shipments and pay $1,000 for each violation thereafter in a settlement that expressly bound its directors.[241] However, FedEx continued to make illegal shipments of cigarettes, and for six years, the board seemed to take no steps to improve compliance.[242] Nevertheless, *Pettry* concluded that it was implausible that the board knew that FedEx was violating the law, given that "illegal cigarette shipments at issue here, and the resulting fines, constitute an infinitesimal fraction of the overall business FedEx does."[243] As *Pettry* suggests, even legal risks need not trigger *Caremark* monitoring duties if the reviewing court determines that those legal risks are but minor business risks.

Furthermore, it is hard to see how determining what constitutes "central compliance" and "mission-critical" risks is not something that otherwise should be entrusted to the sound business judgment of the board.[244] At high enough levels of generality, almost any significant corporate trauma can be linked to a corporation's core functions, and an artfully pleaded complaint could seemingly charge that any impactful activity worthy of derivative litigation was by definition a critical activity. For example, in *Boeing*, the absence of a specific board committee to oversee safety (a mission-critical matter, according to the

239. Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. Irvine L. Rev. 1331 (2022) *Cf. Bingle*, 2022 WL 4102492, at *1 (cybersecurity risks, even if untethered to violations of positive law, nevertheless may constitute mission-critical risks falling within *Caremark*).

240. Pettry *ex rel.* FedEx Corp. v. Smith, C.A. No. 2019-0795-JRS, 2021 WL 2644475, at *12 (Del. Ch. June 28, 2021), *aff'd*, 273 A.3d 750 (Del. 2022).

241. Assurance of Compliance ¶ 23, 31, *In re* Federal Express Corp., and FedEx Ground Package Sys., Inc., N.Y. Att'y Gen. Health Care Bureau (Feb. 3, 2006), https://web.archive.org/web/20150911225103/https://ag.ny.gov/sites/default/files/press-releases/archived/FedEx%20-%20Executed%20AOC.pdf.

242. Notwithstanding being legally bound to a settlement that required it to cease illegal shipments, the board even may have been unaware of FedEx's illegal conduct until so notified by counsel in 2012. *Pettry*, 2021 WL 2644475, at *12.

243. *Id.* at *7, *12 n.125.

244. *See, e.g.*, *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *26 (Del. Ch. Sept. 7, 2021).

court) purportedly indicated a plausible *Caremark* violation.[245] Now, it may be that there was no board committee on safety, but neither was there a board committee that specifically oversaw macro risk management (i.e., managing risk from events such as terrorist attacks or global pandemics that might negatively affect airplane sales), or even sales and marketing.[246] Risks in each of these areas, if realized, might have impacts as large or greater on Boeing than the 737 MAX disasters, and yet the absence of committees overseeing these matters did not seem to suggest to the court that it was reaching deeply into questions of business judgment and discretion.

Post-*Marchand Caremark* is thus often defined by judicial estimation of business substance. *Marchand* requires courts to second guess the judgement of boards as to what constitutes a "central compliance risk" or a "mission-critical risk," which is determined in part with reference to the economic significance of the risk. Likewise, despite the characterization of the necessary monitoring processes as a matter of business judgment not subject to a court's second guessing in the original *Caremark* decision, *Marchand* suggests that courts may legitimately find some monitoring mechanisms to be plainly deficient. In the wake of *Marchand*'s characterization of a board's monitoring duties, we might fairly ask what truly divides substance and process in corporate law?

III.
Lessons from Looking Back

The Delaware courts have good reason to be wary of engaging in judicial second-guessing of business decisions. Among other things, it is tremendously difficult for even the most invested and talented businesspeople, much less courts of law, to make consistently accurate business forecasts. It is largely undisputed that the valuation methodologies used to evaluate economic substance often suffer from great uncertainty and imprecision. For example, DCF outputs can swing wildly depending on the discount and growth rates chosen, and comparable firms analyses depend heavily on which firms are deemed comparable. Likewise, when faced with competing

245. *Id.* at *5. Notably, the comparator companies cited to have had safety board committees were each airlines and not manufacturers. *Id.* at *5 n.18.
246. *Id.* at *5 (identifying the board's standing committees).

sets of assumptions, it is often challenging for a court to decide which set of assumptions is the more justified one. Consider a restaurant chain that aims to establish Welsh food as the next big thing in the United States. Suppose that, during an appraisal proceeding, management argues that the best growth rate that can be expected from a business that celebrates cawl and Welsh rarebit is a few basis points over inflation, while a plaintiff-shareholder argues that properly promoted stew and cheesy toast are likely to rival hamburgers and hot dogs in popularity. Who is right, and how is a court supposed to decide? Many smart, educated, and well-meaning businesspeople have lost their shirts by incorrectly answering these sorts of questions.

Thus, corporate law usually anchors itself around evaluating the processes by which corporate fiduciaries reached a decision rather than the economics of those decisions. Any reforms to corporate law in the foreseeable future will likely concern modifying the rules around board decision-making processes rather than having courts reevaluate the economic substance of challenged transactions.

Along these lines, commentators proposing that courts dive headfirst into the economic substance of challenged transactions, despite claiming to offer concrete "suggestions for policy reform,"[247] rarely explain how judges should actually adjudicate these matters. How can courts effectively distinguish *ex ante* between the economic merits of Time's poison pill, which by one estimate cost stockholders $6.26 billion,[248] and those of Airgas's poison pill, which resulted in a subsequent acquisition price just a few years later that was more than double the contested offer?[249] Such matters are still "left as an exercise for the reader."[250]

By contrast, process-based analyses require seemingly less prescience. There is little doubt as to whether courts can accurately decide whether a director was conflicted, whether such a director was involved with deliberations, or whether a director

247. Reza Dibadj, *Delayering Corporate Law*, 34 Hofstra L. Rev. 469, 504 (2005).

248. Park McGinty, *The Twilight of Fiduciary Duties: On the Need for Shareholder Self-Help in an Age of Formalistic Proceduralism*, 46 Emory L.J. 163, 298–99 (1997).

249. *See* Leslie Picker, *Why Airgas Was Finally Sold, for $10 Billion Instead of $5 Billion*, N.Y. Times (Sept. 5, 2016).

250. Dibadj, *supra* note 247, at 504.

was kept out of the loop and then railroaded into approving a particular transaction.

As such, when the Delaware courts state that corporate law should not be interpreted to require courts to compare the relative economic merits of alternative business decisions,[251] there is no reason to believe that the Delaware judiciary is being disingenuous. The Delaware Court of Chancery, which is properly held in high regard for its business-law acumen, is nevertheless not an investment bank or business strategy hub. As of this writing, there are six vice chancellors and one chancellor, aided by fourteen judicial clerks who are often recent law school graduates. That is not sufficient to review the substance of business decisions made after thousands of hours of collective analysis.

Judicial review of the economic substance of transactions would likely also impose additional costs on businesses and shareholders. For instance, the possibility of litigation injects additional risk into any business decision, and management would likely respond accordingly by choosing decisions that reduce the amount of litigation risk and minimizing the combination of litigation and business risk.[252] Even worse, management may make *ex ante* risky and/or unprofitable decisions simply because such decisions reduce litigation risk, as exemplified by the business maxim "nobody ever got fired for buying IBM." Business leaders may well know ahead of time that a particular business decision is suboptimal but still make that decision because they believe that pleading the suboptimality of the decision and proving it at trial will be difficult. Relatedly, business leaders may systematically choose suboptimal decisions where the suboptimality is less than the costs of litigation for would-be plaintiffs. Although similar problems may arise with increased process requirements (e.g., a board may decide to have a formal meeting and keep minutes to lower litigation risk when absent such risk, the board would have conducted the same business over informal emails or text messages), the magnitude of the downsides are arguably lower, and with any

---

251. *See, e.g.*, Paramount Commc'ns., Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1989).

252. For a discussion of that issue, see Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 110–17 (2004).

luck, perhaps the increased process may lead to substantively better business decisions.[253]

And critics should not overlook the promise of process-based protections. In a series of decisions since 2019, Delaware courts have significantly broadened shareholder rights[254] under Section 220 of the D.G.C.L., which gives shareholders who suspect misconduct the right to obtain corporate books and records to further investigate that wrongdoing. As Professor Roy Shapira has convincingly argued, judicial oversight in recent years has been invigorated by the resurgence of Section 220,[255] notwithstanding criticism that the underlying standards of review have been diminished. Thus, by guarding shareholders' procedural rights to examine the documents underlying a transaction, Delaware courts have improved the protection afforded by corporate law's substantive fiduciary standards.

Of course, this Article does not suggest that it is easy or simple for courts to evaluate process. Certainly, a central point of this Article is that courts have underestimated the difficulties of adopting good process-based rules. Both the choice of the proper rule and the application of any particular rule to the facts at hand present challenges for courts, challenges that compound themselves when the law unduly favors process and discounts process's weaknesses.

A. *The Real Problem with* Van Gorkom

Indeed, just as courts can err when determining the fair price of a transaction, courts can also err when determining

253. *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1973–92 (2021); *see* KT4 Partners v. Palantir Techs., 203 A.3d 738, 758 (Del. 2019).

254. *See* AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund, 243 A.3d 417 (Del. 2020) (holding that stockholder need not identify the particular course of action for a proper Section 220 inspection demand); Tiger v. Boast Apparel, Inc., 214 A.3d 933 (Del. 2019) (holding that Section 220 inspections are not subject to a presumption of confidentiality and any confidentiality order requires weighing the stockholder's legitimate interests in communication against the corporation's interests in confidentiality); *KT4*, 203 A.3d at 748–65; Rivest v. Hauppauge Digit., Inc., C.A. No. 2019-0848-PWG, 2022 WL 3973101, at *1 (Del. Ch. Sept. 1, 2022), *aff'd*, 300 A.3d 1270 (Del. 2023).

255. Shapira, *supra* note 253; Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 WASH. U.L. REV. 1857, 1872–80 (2021).

whether fair dealing occurred or when defining what ought to constitute legally permissible deal process.

Notwithstanding the passage of § 102(b)(7), *Van Gorkom* can still illuminate the fundamental tensions in judicial review of deal process. In an article written shortly after *Van Gorkom* was decided, Professor Dan Fischel argued that because *Van Gorkom* involved no allegations of conflicted interests, the Delaware Supreme Court should have applied the business judgment rule and affirmed the dismissal of the suit.[256] In Professor Fischel's view, the factual disagreements between the *Van Gorkom* majority and the dissenters regarding the board's adequacy of understanding were of no moment.[257]

But the facts do matter, and as a matter of principle and positive law, it was proper for the *Van Gorkom* court to craft rules for deal-making processes, investigate the process at hand, and apply those rules to the facts of the case. Conceptual lines such as that between the duty of care and the duty of loyalty, as Professor Fischel would draw, can provide indicia of the deference due to fiduciaries' decisions but cannot alone suffice for that task, not the least because the duty of care and the duty of loyalty represent somewhat arbitrary divisions on a continuous spectrum of agency costs.[258] Accordingly, the problem with *Van Gorkom* is not that Delaware courts should not consider how boards reached a decision, that the deal-making process in particular is a matter where the courts should defer to boards' judgment,[259] or that the case should have been dealt with as essentially a breach of the board's *Revlon* duties.[260] Courts—especially specialized courts such as the Delaware Court of Chancery—can and must somehow decide whether the defendant fiduciaries did their job, and if courts are loathe to look at

256. Daniel R. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 Bus. Law. 1437, 1445–50 (1985).
257. *Id.* at 1438–39.
258. Although the duty of care is sometimes conceptualized without an inherent conflict of interest unlike the duty of loyalty, the duty of care too involves a conflict of interest—namely, the fiduciary's interest in doing less work for the beneficiary in opposition to the beneficiary's interest in having the fiduciary do more work.
259. Fischel, *supra* note 256, at 1447.
260. *See generally* Robert T. Miller, Smith v. Van Gorkom *and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 Wm. & Mary Bus. L. Rev. 65 (2017).

the economic substance of the decision, then they must look at the process by which the decision was made.

Rather, the problem with the *Van Gorkom* majority opinion is well characterized by Justice McNeilly's dissent: the Trans Union board's process for approving the sale was in fact adequate. As Justice McNeilly (and Professor Fischel) correctly pointed out, the board had received multiple briefings regarding Trans Union's finances, the directors were well-versed in business, and the speed with which they approved the deal was reasonable in the age of computers and telecommunications.[261]

B. *The Challenges of Process-Centered Review*

As shown by *Van Gorkom*, evaluating process-based protections is not necessarily simple or straightforward, and courts may well make mistakes in deeming a process to be permissible or impermissible. There are numerous such sources of potential judicial error or oversight.

As an initial matter, it may be easier to err significantly when adjudicating questions of process than when conducting economic valuations because a binary scale applies to the former while a continuous scale applies to the latter. That is to say, when a court has concerns about a party's numerical evidence of economic value, the court may discount dubious calculations in proportion to its concerns and find a middle ground. But when a court faces troubling conduct combined with mitigating factors, courts cannot deem the conduct somewhat unacceptable and place the conduct within a gray area of liability. Courts must decide where to draw the line between sufficient process and insufficient process. For instance, a court cannot enjoin a 10% breakup fee, allow a 3% breakup fee, and "partially enjoin" a 6% breakup fee. Rather, process decisions are often an all-or-nothing deal.

Relatedly, it may be difficult to ascertain the optimal level of protective benefits. For example, determining when a breakup fee is permissible or impermissible requires courts to evaluate matters that are inextricable from the economic terms of a transaction, which courts have acknowledged to be a difficult matter to judge. Market conditions and practices can also

261. Fischel, *supra* note 256, at 1445–48; *supra* notes 199–200 and accompanying text.

change rapidly, making precedent less reliable as a touchstone of wisdom: go-shops were non-existent before 2004; now they are relatively common, particularly in private equity deals.[262]

Likewise, questions of economic theory that bear on the proper rule may be difficult to assess. For instance, a few Court of Chancery cases over the years suggested that in controller-conflicted transactions other than squeeze-outs, a single cleansing device (i.e., an independent negotiating committee or a majority-of-the-minority approval) could change the standard of review from the stringent entire fairness standard to the much more forgiving business judgment standard.[263] Most other cases, however, held that a single cleansing device could shift the burden of proof, but that the entire fairness standard would still apply.[264] Underlying the differing outcomes in these cases was a disagreement on whether controller-conflicted transactions were invariably tainted due to the controller's influence.[265] In the recent *Match* decision, the Delaware Supreme Court found that the inherent coercive power wielded by a controller does taint all controller-conflicted transactions, regardless of the precise nature of that transaction.[266] *Match* thus held that a single cleansing device could not change the standard of review, but only shift the burden of proof.[267] However, *Match*'s understanding of inherent coercion and its legal holding were far from preordained, given not only the case law conflict but also that multiple former members of the Delaware judiciary—including former Chief Justice Strine—publicly doubted the salience of inherent coercion as well as the proper legal significance of a single cleansing device.[268] *Match* thus could have been decided quite differently had it been judged on another day by another set of jurists.

262. Subramanian & Zhao, *supra* note 92, at 1216, 1223.

263. *See e.g., In re* Tyson Foods, Inc., 919 A.2d 563 (Del. Ch. 2007); Friedman v. Dolan, 2015 WL 4040806 (Del. Ch. June 30, 2015).

264. *See, e.g., In re* EZCORP Inc. Consulting Agreement Deriv. Litig., 2016 WL 301245, at *30 (Del. Ch. Jan. 25, 2016).

265. *See* Hamermesh et al., *supra* note 34, at 332–44.

266. *In re* Match Grp., Inc. Deriv. Litig., No. 368, 2022, 2024 WL 1449815, at *14 (Del. Apr. 4, 2024). I co-authored an amicus brief in support of the ultimate holding of the court. Amicus Curiae Br. of Academics in Support of Appellants, *In re* Match Grp., Inc. Derivative Litig., No. 368, 2022 (Del. Sept. 7, 2023).

267. *Match*, 2024 WL 1449815, at *16.

268. Hamermesh et al., *supra* note 34, at 336.

Moreover, insofar as the spirit of the law—including that of corporate law—concerns normative questions of distributive fairness, even a supposedly "efficient" economic outcome may fail to serve other normative ends of the law. For instance, distributional concerns arise in controller conflicts that take the form of an ultimatum game, or a "take-it-or-leave-it" offer.[269] In such situations, one participant proposes how to divide up a benefit (say, $10), and the other participant can either accept or reject the proposal. If the latter participant rejects the proposal, neither participant receives anything. However, because the first participant has sole control over the terms of the proposal, he can propose lopsided deals ("I get $9 and you get $1") that a rational second participant would nevertheless accept.[270] While any outcome where the second participant accepts the proposed deal is economically efficient, a lopsided deal is generally considered unfair. The analogy to minority approval in controller transactions readily presents itself: A rational minority may vote to accept an unfair deal that reserves the bulk of benefits to the controller simply because the controller's offer is better than nothing. Consequently, the minority vote may have little to no value as an indicator of fairness. As a matter of political economy, Americans have trillions of dollars invested in the great corporations of America, including over $3 trillion in just publicly traded controlled companies,[271] but the vast majority of Americans are not sitting on the other side as controllers, board members, or executives. Accordingly, when corporate law decides whether majority-of-the-minority votes may be indicia of entire fairness, it is inherently also deciding normative questions of political economy.

Finally, even having determined the nominal rule to apply, courts may err in applying that rule to fact, whether because they incorrectly determined those facts or because they incorrectly evaluated the legal significance of the facts. This latter issue is the underlying problem with *Van Gorkom*—even if *Van Gorkom* were but an early, *sub silentio* attempt to apply *Revlon*,

269. *See generally* John C. Harsanyi, *On the Rationality Postulates Underlying the Theory of Cooperative Games*, 5 J. CONFLICT RESOL. 179 (1961).
270. *Id.* at 180.
271. Author's calculations. *See* Steven Rosenthal & Lydia Austin, *The Dwindling Taxable Share of U.S. Corporate Stock*, Tax Notes 923, 928 (2016), available at https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000790-The-Dwindling-Taxable-Share-of-U.S.-Corporate-Stock.pdf.

Van Gorkom still reached the wrong ultimate conclusion because it incorrectly assessed the practical sufficiency of the deal process. Conversely, in cases such as *Dell*, even accepting the nominal rule that deal price should be heavily weighted when there is a robust deal process, a conflicted management buyout in which the CEO of the company stood to profit from a lower deal price does not seem like a robust deal process.[272]

While each of these problems are significant, they are not insurmountable. However, what is necessary is awareness and concerted effort to confront these problems. Process is not simply substance's smarter, better-looking, and more successful sibling. Instead, process is both entangled with substance and laden with its own issues. A court therefore must constantly guard against doctrinal and case-specific missteps, regardless of whether it is examining substance or process.

IV.
Applying Lessons to Laws

This Article finally turns to four particular areas in which the inherent natures of substance and process have created ongoing issues and in which a reevaluation of doctrine may produce better results going forward.

A. *Fair Value via Fair Process*

DFC and *Dell* attempted to circumvent the issues with previous methods of determining the fair value of a corporation by directing trial courts to examine the deal process first: If the deal process is fair, then the deal price suffices as fair value. After all, if the purpose of an appraisal is to award shareholders "what would fairly be given to them in an arm's-length transaction,"[273] and there was an arm's length transaction, then how could the deal price be anything but the authoritative standard for an appraisal award? However, despite *DFC*'s framing of its answer as a common-sense, practical solution, there are still several issues and questions that arise. Relatedly, to the extent that *DFC* and *Dell* have reduced the volume of appraisal suits, it is not clear that they have done so by actually awarding fair

272. *See supra* notes 86-93 and accompanying text.
273. DFC Global Corp. v. Muirfield Value Partners, 172 A.3d 346, 370–71 (Del. 2017).

compensation after fair deal processes rather than by gutting appraisal as a meaningful remedy.

1. *What is Fair Value?*

As the Roman philosopher Seneca once wrote, no wind will help those who do not know the port to which they sail.[274] So it is with appraisal. There are multiple conceptions of fair value, and attempts to rationalize appraisal doctrine cannot succeed without analyzing these conceptions, and ultimately, selecting the most appropriate conception. A significant difficulty with contemporary appraisal law under *Dell* and *DFC* is that they in fact contain different and contradictory visions of fair value. One conception of fair value, third-party sale value, is described in the quote from *DFC* above: what shareholders would receive in an arm's-length transaction.[275] Its primary competitor, going-concern value, instead represents "the net present value of the firm's future free cash flows."[276] *DFC* also endorses this approach, which it terms "stand-alone value."[277]

These two conceptions of fair value entail not only different objectives but also different methodologies.[278] The debate over which approach is superior is longstanding with fair arguments on both sides.[279] Notably, however, the leading arguments for both sides begin with supposed substantive economic principles and legal entitlements. Proponents of third-party sale value argue that using third-party sale value increases minority economic returns and promotes efficiency, while proponents of going-concern value argue that their choice promotes value-creating mergers and allocates surplus to those who create it: the buyers of an enterprise.[280]

I would suggest that this debate also be examined from a process viewpoint, which recommends third-party sale value for

274. Lucius Annaeus Seneca, Moral Letters to Lucilius LXXI ("ignoranti quem portum petat nullus suus ventus est.").
275. *See* Bratton, *supra* note 5, at 509–12.
276. Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. Pa. L. Rev. 1, 4 (2007).
277. *DFC*, 172 A.3d at 368 (citing Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989)). There are yet other possible conceptualizations of value, such as liquidation value, that modern courts generally do not use for appraisal purposes.
278. *See* Bratton, *supra* note 5, at 516–22.
279. *Id.* at 513–16.
280. *Id.*

a few reasons. First, going-concern value requires extensive use of DCF and like methods,[281] while third-party sale value does not necessarily need to do so, at least where there was a fair sale process. And to the extent that the statutory exclusion of "value arising from the accomplishment or expectation of the merger" may require courts to deduct synergies or control premia estimated via DCF and like methods, that exclusion should be removed for the same reason.[282]

Second, among the rights that appraisal aims to protect is shareholders' right to have fiduciaries undertake a fair deal process. In other words, "what has been taken from the shareholder" in a merger is not merely "his proportionate interest in a going concern,"[283] but also the shareholder's ability to receive the price obtained after a fair deal process.[284] Some have argued that shareholders have no rational expectation of receiving a control premium[285] (and thus do not deserve to receive one in appraisal). But if shareholders had no rational expectations of receiving control premia, then trading prices should not

281. *See* Hamermesh & Wachter, *supra* note 275, at 47. To the extent that courts might instead solely use pre-announcement trading prices as fair value or estimate fair value as the merger price less synergies and control premia, that simply eliminates the viability of appraisal as a remedy, as such methods contain no possibility that the judicial determination of fair value exceeds deal price.

282. Notably, *Weinberger* applauded the synergy exclusion because when financial estimation methods are used as the primary valuation method, inclusion of synergy value may require the use of "*pro forma* data and projections of a speculative variety." Weinberger v. UOP, Inc., 457 A.2d 701, 713 (Del. 1983). That policy concern, of course, is essentially flipped when courts begin with deal price, which, by their nature, incorporate a portion of synergy value. *See also* Steven J. Cleveland, *Appraisal Rights and "Fair Value,"* 43 CARDOZO L. REV. 921, 960–66 (2022) (suggesting yet other reasons for removing the synergy exclusion).

283. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989).

284. *See DFC*, 172 A.3d at 370-71 (purpose of appraisal is to "make sure that [shareholders] receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's-length transaction"); Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 125–26 (Del. Ch. 2011) (criticizing appraisal as insufficiently protective of shareholders due in part to the synergies exclusion); *see also* Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1183 (Del. Ch. 1999). The contrary view is expressed in a series of articles by Professors Lawrence Hamermesh and Michael Wachter. *See, e.g.*, Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies*, 73 BUS. LAW. 961 (2018).

285. William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Courts' Struggle with Control Premiums*, 152 U. PA. L. REV. 845, 870 (2003).

increase after announcements of merger agreements, whereby a control premium is included in the announced merger price. However, trading prices do increase after merger announcements because shareholders now expect to receive those control premia. Before such an announcement, share prices also incorporate expectations of control premia, though those amounts are discounted by the likelihood that a change-of-control transaction will take place. Additionally, if we are to anchor notions of fair value in market considerations, then it seems strange to exclude the market for corporate control from the list of relevant markets that affect fair value.[286] So far as a fair deal process is considered an important protection for shareholders, it is hard to see why the concept of fair value would, much less should, discount it by ignoring what shareholders would obtain after a fair deal process.

2. *What is Fair Process?*

Still, even if we define fair prices in terms of fair processes, that raises the questions of what constitutes a fair deal process, and perhaps more importantly, how much a real transaction process can deviate from the Platonic ideal of a fair process and still produce a deal price that is determinative of fair value.

Answers to those questions should be informed by the substantive purpose of appraisal: minority protection.[287] Unlike other events that may involve shareholder disagreements (such as contested board elections), a merger extinguishes the possibility of future debates over the future of the business, particularly

---

286. Professors Hamermesh and Wachter have argued that going-concern value is appropriate because "value belongs to the party that creates it." Hamermesh & Wachter, *supra* note 275, at 32–33. However, the notion of who creates value is subjective and often indeterminate. Consider a widget manufacturer who produces a widget at a cost of $1 and a widget consumer who can use the widget in his factory to produce knickknacks that then sell for $10. What is the value of the widget, and who has created it? It seems unlikely that Professors Hamermesh and Wachter would insist that the consumer is legally entitled to pay only $1 for each widget because any additional value from the widget is in fact created by the consumer.

287. *Dell Appeal*, 177 A.3d at 19; Cede & Co. v. Technicolor, 542 A.2d 1182, 1186 (Del. 1988); *see* Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 679 (1998) (arguing basically that all defensible purposes of appraisal "can be seen as animated by a goal of minority shareholder protection, primarily against the risk that majority shareholders and insiders could act to appropriate corporate value to the detriment of minority shareholders").

when cash is the merger consideration. After the merger is approved by shareholders, the courts provide the sole option for redress. And even with the availability of fiduciary duty claims, appraisal provides a valuable protective function: as studies have shown, stronger appraisal rights lead to higher deal prices.[288]

Protecting minorities does not necessarily mean tilting the fair-value scale in their favor,[289] but it does mean that courts should not reflexively avoid shouldering the burden of determining whether and to what degree minority stockholders were injured. By contrast, if a court is bent on using deal price and avoiding substantive review of a deal's economic merits, then it must also generally lower the bar it applies to the deal's process. That is to say, the problem is not that courts defer to deal prices upon satisfaction of certain minimum conditions, but rather that those conditions, are sometimes, in the words of two commentators, "minimal."[290] Indeed, in *Dell* and *DFC*, the Court of Chancery found that the deals' process problems rendered the deal price unreliable, and the Delaware Supreme Court's reversals rehabilitated those process problems into irrelevancy in order to hold that the deal price sufficed.[291] But laxity is not inherent to process-centered standards. Courts can and should demand high-quality deal processes before deferring to deal prices as measures of fair value.

Academics have also suggested other process-centered mechanisms that aim to strengthen *Dell/DFC* without undermining the concerns that prompted those decisions. Professor Guhan Subramanian has proposed a framework whereby a deal price is presumptively entitled to deference if and only if it was reached after a reasonably thorough market check that was not

288. Audra Boone et al., *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J.L. & Econ. 281, 314 (2019); *see* Matthew Schoenfeld, *The High Cost of Fewer Appraisal Claims in 2017: Premia Down, Agency Costs Up*, 8 Harv. Bus. L. Rev. Online 7, 8–9 (2017).

289. Professors Alex Peña and Brian Quinn have suggested that Delaware courts have given weight to deal price partially "to reduce the option value of appraisal." *See* Alex Peña & Brian JM Quinn, *Appraisal Confusion: The Intended and Unintended Consequences of Delaware's Nascent Pristine Deal Process Standard*, 103 Marq. L. Rev. 457, 480, 504 (2019). However, the option value of appraisal is limited by the fact that fair value determinations can fall below the deal price (i.e., appraisal is not an option). Furthermore, even if some option value remains, that should not be considered *per se* problematic, or else all litigation would be suspect as creating option value for plaintiffs.

290. Korsmo & Myers, *supra* note 116, at 427.

291. *Supra* Part I.C.

impeded by unduly inhibitive match rights or other deal protection devices.[292] With the greater certainty of outcome that accompanies a clear framework providing presumptive deference (as opposed to the reading-between-the-lines kind of deference that *Dell/DFC* holdings provide), buyers and sellers would have accordingly greater incentive to use deal mechanisms that are protective of stockholders.

That said, when reforming *Dell/DFC*, courts should take care to remember the special problems that arise during management buyouts (*Dell*) and controller squeeze-outs (*Weinberger*). In both cases, shareholders are at a particular disadvantage because those with power have a particular interest in channeling corporate value to themselves. In the case of controller squeeze-outs, no meaningful market market check is possible, and the effect of board and minority approval is significantly diminished.[293] In such cases, courts should consider heightening the process requirements for deal price deference, such as granting any deference to deal price only if two-thirds or three-quarters of disinterested stockholders approve the deal.

All said, if process review is to have genuine meaning, it must be that some deal processes fail that review. And if a court determines that the deal process did not represent a fair arm's length transaction, how is a court supposed to determine what a shareholder should fairly receive? The next subpart turns to that issue.

3. *Fairer Prices and Plaintiffs' Attorneys*

Professors Gilson and Gordon once asked how damages should be calculated if there was unfair dealing, but the deal price fell within the range of fairness.[294] Although the question posed originally related to entire fairness, it can also be transplanted to appraisal as well, given the use of quasi-appraisal in entire fairness proceedings.

In *Dole Food*, the Court of Chancery answered the professors' question by holding that a transaction that fails the entire

---

292. Subramanian, *supra* note 90, at 647–49, 654–57.

293. *See generally* Amicus Br. of Academics, *supra* note 266; *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 36 (Del. Ch. 2014); *see In re* Dell Techs. Inc. Class V S'holders Litig., C.A. No. 2018-0816, 2020 WL 3096748, at *80 (Del. Ch. June 11, 2020).

294. Gilson & Gordon, *supra* note 14, at 798 n. 41.

fairness test for lack of fair dealing may entitle the plaintiff to a "fairer" price and other damages that "eliminate the ability of the defendants to profit from their breaches of the duty of loyalty.[295] *Dole Food* held that even though the deal price fell within a range of fairness, the plaintiffs were still entitled to $150 million in recompense for the defendants' misconduct because that was the amount that shareholders may well have received absent that misconduct.[296]

Here, I advocate for the answer presented by cases such as *Dole Food*: Shareholders in such a situation should receive all that the evidence shows would have been the most likely result of an entirely fair course of dealing. Delaware courts have expressed sympathy for this approach in both old and new cases. For instance, then-Vice-Chancellor Strine provided a hypothetical of just such a case in one of his early opinions:

> Posit a scenario where a 43% stockholder who is the company's chairman and chief executive officer consummates a tender offer followed by a back-end, squeeze-out merger. Suppose the stockholder offered $25 a share, which is by any measure "fair," and obtains tenders from enough minority stockholders to enable him to cash out the remaining minority stockholders in a short-form merger at the same price. Undisclosed by the 43% stockholder, however, is the fact that a well-funded third party was willing to make a tender offer for $28 a share but had been rebuffed by the 43% stockholder, who did not even disclose the offer to the rest of his hand-picked board. . . . While $25 is a fair price, they had arguably been wrongfully denied the opportunity for $28.[297]

That scenario is remarkably akin to what happened in *PLX*: the proxy did not disclose that the buyer was willing to pay more than the offer being presented to shareholders. And

295. *In re* Dole Food Co., S'holder Litig., C.A. No. 8703-VCL, 2015 WL 5052214, at *2 (Del. Ch. Aug. 27, 2015); HMG/Courtland Props. v. Gray, 749 A.2d 94, 116 (Del. Ch. 1999) (awarding damages despite the possibility that deal price fell within range of reasonableness); *see also Bomarko*, 794 A.2d at 1183 (awarding damages after finding that plaintiffs' pre-squeeze-out shares had little value but also that the low value of the shares were inseparable from breaches of fiduciary duty related to the squeeze-out).

296. *Dole Food*, 2015 WL 5052214, at *44-46.

297. Andra v. Blount, 772 A.2d 183, 193 (Del. Ch. 2000).

in fact, language in *PLX* suggested that the court would have been sympathetic to a damages theory that that the board could have sold the corporation at a higher price but for the at-issue misconduct.[298]

Furthermore, this is akin to the standard for damages that the Court of Chancery recently invoked in the recent case of *In re Mindbody*, a *Revlon* case.[299] In *Mindbody*, Chancellor McCormick awarded damages based on the "fairer" price principles first introduced in entire fairness cases.[300] (Indeed, *Mindbody* specifically cited to *PLX*'s statements that the measure of damages should be based on the transaction that was foregone because of the misconduct.)[301] Notably, there was evidence in *Mindbody* that the defendants' employees—including the deal team—had actually made bets on the final deal price, with the line being $1 per share above the actual deal price.[302] The bets provided "compelling evidence as to what [the buyer] would have paid," and the court accordingly awarded $1 per share as damages.[303] Likewise, in denying a motion to dismiss, *Columbia Pipeline* also cited *PLX* to support its conclusion that a foregone transaction or otherwise lost opportunity forms a viable basis for a theory of damages.[304]

However, cases such as *Mindbody* and *Dole Food* that have awarded compensation for unfair dealing despite a finding of fair price on a lost-opportunity theory have been, at least until recently, the exception, not the rule.[305] One reason for this seems to be that plaintiffs' counsel do not raise lost-opportunity arguments,[306] a fact that may result from well-documented attorney biases and miscalculations,[307] rather than any bad faith or improper self-interest. Still, regardless of the reason, when

298. *See PLX Trial*, 2018 WL 5018535, at *51.
299. *In re* Mindbody, Inc., S'holder Litig., C.A. No. 2019-0442-KSJM, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023).
300. *Id.* at *44–46.
301. *Id.* at *45.
302. *Id.* at *25, 46.
303. *Id.* at *46.
304. *In re* Columbia Pipeline Grp., C.A. No. 2018-0484-JTL, 2021 WL 772562, at *56 (Del. Ch. Mar. 1, 2021).
305. *See supra* note 16 and accompanying text.
306. *See, e.g.*, Plaintiffs' and Petitioners' Opening Post-Trial Brief, *In re* Mindbody, S'holder Litig., No. 2019-0442-KSJM (Del. Ch. June 2, 2022).
307. *See generally* Elizabeth F. Loftus & Willem A. Wagenaar, *Lawyers' Predictions of Success*, 28 JURIMETRICS 437 (1988). Because lawyers often misestimate the chances of winning, plaintiffs' attorneys may (wrongly, but in good

plaintiffs' attorneys do not raise such damages theories even in the alternative, courts should seriously evaluate whether such counsel can fairly and adequately represent the interests of the class and rein in class counsel that is inadequately representing the class's interests.[308] All said, plaintiffs' attorneys are agents too, and effective corporate law—and the courts enforcing that law—must also manage the agency costs that such agents impose.[309]

B. *The Purpose of Poison Pills*

Williams and its predecessors, *Quickturn* and *Liquid Audio*, represent meaningful steps forward in poison pill jurisprudence and theory. They provided a long-needed rationalization of why poison pills should be allowed at all, considering that they inherently thwart the rights of shareholders, who are in theory the ultimate beneficiaries of the fiduciary duties that govern directors' conduct. According to these cases, the legitimacy of poison pills arises from how they help "channel[] critical corporate decisions through a fair election process."[310] This is the case regardless of whether the poison pill at issue is directed toward a hostile bidder or a mere activist. Thus, as Professors Kahan and Rock argue, courts' approach toward poison pills should aim to "maintain a balanced election process,"[311] i.e., that the courts should allow pills that "prevent gross imbalance in the electoral stakes [that is, the voting power] of the contestants."[312]

However, notwithstanding the charm of appeals to shareholder democracy, elections are only one of multiple means by which shareholders can and do exercise their fundamental rights as contributors of equity capital. If "[c]orporate democracy is not an attack"[313] because shareholders should have certain procedural rights (such as voting) to choose the future

---

faith) estimate that high-return quasi-appraisal arguments are better than low-return lost-opportunity arguments.

308. *See* Del. Ch. Ct. R. 23(a)(4); Emerald Partners v. Berlin, 564 A.2d 670, 676 (Del. Ch. 1989); *accord* Fed. R. Civ. P. 23(g)(4).

309. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 887 (Del. Ch. 2016).

310. Kahan & Rock, *supra* note 144, at 939–42; *see also* Ronald J. Gilson & Alan Schwartz, *Sales and Elections as Methods for Transferring Corporate Control*, 2 Theoretical Inquiries L. 783, 784 (2001).

311. Kahan & Rock, *supra* note 144, at 970.

312. *Id.* at 942.

313. *In re* Aerojet Rocketdyne Holdings, C.A. No. 2022-0127-LWW, 2022 WL 2180240, at *15 (Del. Ch. June 16, 2022).

of the corporation, then what justifies limiting shareholders' rights to willingly transfer their property or to otherwise vote with their feet? The so-called "Wall Street rule" of voting with management or selling explicitly recognizes this right,[314] and in numerous forms of business organizations (such as mutual funds), selling is effectively the sole method by which equityholders can pursue a different use of their capital. Insofar as poison pills limit the power of a willing buyer to purchase shares, they also limit the power of existing shareholders to sell their shares at a good price.

Allowing boards to hamstring shareholder rights with poison pills is also at odds with corporate law's traditional understanding of the power of markets. Even aside from well-founded doubts that elections are superior to markets as shareholder protection mechanisms,[315] the market already gives all shareholders (including directors and officers) the power to create their own balanced elections. Via the market, if any of a corporation's shareholders truly believes that an election should proceed with the two sides owning particular percentages of stock, such a shareholder may use their personal resources to buy an appropriate number of shares.[316]

Furthermore, what makes a "balanced" election, wherein the two slates are directly backed by roughly equal numbers of shares, truly fair or even desirable? After all, nobody suggests that controlling shareholders should relinquish all corporate decisions to a majority of the minority, even though by definition elections in controlled companies are unbalanced. And insofar as Professors Kahan and Rock themselves analogize to political elections,[317] it would hardly seem sensible in that context to limit the number of Democrats eligible to vote in Massachusetts, or the number of Republicans eligible to vote in Arkansas, so that the number of partisan voters is perpetually balanced and election results dependent on the choices of

314. Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 Va. L. Rev. 675, 716 (2007).

315. Gilson & Schwartz, *supra* note 309, at 791–72; *see also* Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 Yale L.J. 411, 454 (2022) (explaining how minority activists may pose greater risks for shareholders than wholesale takeovers).

316. Likewise, a shareholder may bid up the price of the corporation's shares on the market until an activist feels economically persuaded to sell, or at least not purchase any more.

317. Kahan & Rock, *supra* note 144, at 940.

nominal independents. In any event, why should corporate law not let the competing sides put their money where their mouth is, so to speak, especially given the well-known problems with allocating decisions to unaffiliated shareholders who are often rationally indifferent?

As the above questions show, protecting decision-making processes is far from a neutral inquiry, and attempts to protect one process, such as the supposedly neutral shareholder vote, can encumber other processes, such as market transactions. The reverse is also true: if courts imposed more stringent restrictions upon poison pills, the result may well be that shareholder elections will hold less salience in the takeover or activism context as would-be acquirers and activists gain control or influence via the markets rather than the ballot box.

That all said, though I personally believe that the balance of evidence and logic tilts against poison pills and would suggest that the courts scrutinize them and other defensive mechanisms closely, the question is clearly within the realm of fair and reasonable disagreement. Even with eyes wide open about the challenges of regulating processes for shareholder decision-making, the potential for error remains.

C. *The Circularity of* Corwin

Critics have attacked *Corwin* as giving excessive leeway to corporate boards,[318] but it is uncertain that *Corwin* has in fact resulted in excessive leeway.[319] As the post-*Corwin* cases discussed in this Article show, courts can and do find that *Corwin* cleansing cannot be invoked and have not simply neutered the fully informed and uncoerced requirements.

Instead, the problem with *Corwin* seems to be that it has often complicated litigation rather than simplified it. Moreover, *Corwin* has created several new thorny legal issues relating to judicial review of cleansing votes.

First, *Corwin*'s requirement that cleansing votes be "fully informed" are at odds with other principles of corporate law. As mentioned, *Corwin* imports the materiality standard from federal securities law and asks whether omitted or erroneous information would have been important to a reasonable

318. Korsmo, *supra* note 5, at 89–94.
319. Gatti, *supra* note 130, at 401–12.

investor. The materiality standard thus requires courts not only to second-guess the directors' judgment regarding what to disclose, but also to speculate on what a "reasonable shareholder" would think of absent disclosures.[320]

In addition, as courts and commentators have noted, the subjective nature of the materiality standard lends itself to inconsistent and inaccurate judicial evaluation,[321] concern over which is a primary reason that Delaware courts have avoided evaluating economic substance. Additionally, determining materiality still necessitates (or at least should necessitate) significant business analysis. For example, even if the materiality standard "does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote,"[322] whether reasonable investors would change their votes is surely *probative* of materiality. Along these lines, should *PLX* still have found that the board's failure to disclose the buyer's desire to buy PLX was material if it could be known that stockholders would have still voted for the $6.50 deal as presented? Likewise, if it could have been known that full disclosure would have only resulted in a 25-cent increase in deal price, would the disclosure failure have still been material? What about 10 cents? 1 cent? Alternatively, consider a case involving Apple that alleges that it misstated its value by $25 billion. Is such a misstatement material? What if that $25 billion was reframed as being merely 1% of Apple's equity value? What if it was unclear what the ultimate financial impact of the misstatement is? And what if a misstatement or omission is significant to only a subset of investors?[323] How small can that subset be before the misstatement or omission is legally

320. That said, some of the reasons behind the business judgment rule's deference to directors, namely that directors are statutorily charged with management of the corporation, do not apply to a court's hindsight evaluation of what "reasonable shareholders" would think.

321. *Supra* note 133. *See also* Thomas M. Madden, *Significance and the Materiality Tautology*, 10 J. Bus. & Tech. L. 217, 233 (2015); Wendy Gerwick Couture, *Opinions Actionable as Securities Fraud*, 73 La. L. Rev. 381, 384–85 (2013); SEC v. Bausch & Lomb, 565 F.2d 8, 10 (2d Cir. 1977). Suggestions that the "total mix" test be replaced with a market price test represent an improvement in some ways, but they suffer from other problems that are beyond the scope of this Article. *See generally* Daniel R. Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1 (1982).

322. Madden, *supra* note 321, at 223.

323. *See* J & R Mktg., SEP v. Gen. Motors Corp., No. 2:06-cv-10201, 2007 WL 655291, at *12 (E.D. Mich. Feb. 27, 2007).

immaterial? *Corwin* defers to federal securities law standards,[324] but why are those standards right for state corporate law?

Corwin's non-coercion requirement presents its own conceptual thorns, beginning with the definition of coercion. As commentators have noted, in view of the complex terms of modern M&A deals, "attempting to define coercion by trying to distinguish the merits of the deal from extraneous terms is akin to Sisyphus pushing the boulder up the mountain."[325] But if coercion exists when a board staples together a deal's "merits" and "extraneous" matters for a singular vote, then perhaps all would-be cleansing votes are inherently coercive, as a fiduciary liability release seems hardly integral to a deal's merits.[326]

Returning to *PLX*, suppose that the buyer would have returned with a $7 offer if stockholders had rejected the $6.50 offer, but also that it would have taken months to mail out new proxies and conclude a new vote, with any closing likewise delayed. In such a case, even completely informed stockholders may well have voted to approve the $6.50 deal anyway, thinking that "a bird in the hand is worth two in the bush."[327] (Certainly, Eric Singer thought so.) Under this hypothetical scenario, stockholders would have been deprived of $0.50 per share due to Potomac's breach of fiduciary duty.[328] Note that it assumes the antecedent to argue—as *Corwin* essentially does—that stockholders implicitly approved of the fiduciary breach by approving the deal, and therefore the law should offer no recourse. After all, a rational stockholder would prefer to have both the $6.50 in merger consideration and the $0.50 in compensatory damages for the breach. As cases such as *Saba*, *Sciabacucchi*, and *PLX* show, the threat in *Corwin* situations is that stockholders might agree to an underwhelming deal because they fully understand

324. Although there is no bright-line test, a 5% threshold is often used for materiality when a financial misstatement is at issue. Tabak v. Canadian Solar Inc., 549 F. App'x 24, 27 (2d Cir. 2013). But why, *under Delaware fiduciary principles*, should stockholders be considered fully informed and deprived of a recovery if Apple misled them with respect to over $100 billion in equity value?

325. Gevurtz, *supra* note 131, at 1881.

326. *Cf. id.* at 1888.

327. *See id.* at 1878–83.

328. It is perhaps worth noting that Plaintiffs' estimate of PLX's cost of equity would have attached a cost of 46 cents per share to a six-month delay. Plaintiffs' Opening Post-Trial Brief, at 53, *In re* PLX Tech. S'holders Litig., C.A. No. 9880-VCL (Del. Ch. May 14, 2018).

that directors' breaches of fiduciary duty have made the deal the best option available.[329]

Therefore, *Corwin*'s coercion analysis must eventually return to an examination of the board's conduct, the same conduct that *Corwin* cleansing was supposed to allow courts to avoid analyzing. For example, the *Saba* court had to determine whether coercion resulted from a sale that the board pushed for only after the company's stock was delisted because of the board's nonfeasance.[330] As such, the proposition that an "uncoerced" stockholder vote should cleanse fiduciary breaches may in fact have little practical value because the fiduciary breaches that *Corwin* is supposed to cleanse themselves often result in coerced votes that do not provide for any cleansing.[331]

Corwin's progeny thus illustrates the limits of process-centered analyses. First, if a court is going to enforce any meaningful duties upon corporate boards who undertake a transaction, it must at some point delve into a critical analysis of that transaction. A court may find that it more sensible to take a harder look at the processes by which a board approved a deal and sidestep the substance, but it cannot infinitely use more layers of process (e.g., shareholder approval) to avoid review of underlying processes (e.g., board negotiations) and expect an intelligible legal framework. Second, even if a court can avoid significant evaluation of a deal's substantive merits by focusing on process (at least at the liability stage), it is impossible to completely avoid economic and financial analysis, not the least because the economic significance of the alleged process fault is often an important part of whether a purported failure to disclose the fault renders stockholders uninformed and whether the fault was so egregious as to render any vote intrinsically coercive.

Hence, this Article's proposals for *Corwin* are not so much that *Corwin* should be "strengthened" or "weakened" because *Corwin* does not innately embody a tough or lax standard of

329. *See also In re* USG Corp. S'holder Litig., C.A. No. 2018-0602-SG, 2020 WL 5126671, at *2 n.5 (Del. Ch. Aug. 31, 2020).

330. *In re* Saba Software, Inc. S'holder Litig., C.A. No. 10697-VCS, 2017 WL 1201108, at *16 (Del. Ch. Mar. 31, 2017).

331. *See* Gevurtz, *supra* note 131, at 1880. Similar problems might also arise in the *MFW* context, *i.e.*, that any controller-led transaction failing entire fairness cannot but result in an inherently coercive majority-of-the-minority vote, and thus *MFW* cleansing is ultimately but an inquiry into of whether the deal is entirely fair.

judicial review. Rather, courts applying *Corwin* must create a logically coherent, non-circular method for conceptualizing whether a vote is fully informed and uncoerced, and only then can a court make optimizations to calibrate the strength of judicial scrutiny.

As for coercion, courts should resolve whether and why a shareholder vote should be considered uncoerced despite occurring after a material breach of fiduciary duty. I might suggest that duty of loyalty breaches and instances of bad faith are inherently coercive. It is one thing to tell someone to try again (as stockholders do when they vote down a proposal) when that person has put in an honest effort. It is another to do so when you know that they were never trying to begin with.[332]

Likewise, notwithstanding the Delaware courts' adoption of securities law standards for materiality, courts reviewing state corporate law claims have yet to truly grapple with the meaning of materiality and whether it should differ from that used in securities law. The specific question under *Corwin* is whether investors knew enough that their vote should be credited to mean that they have consented to any director misconduct tied to the transaction.[333] Note that the common law applies a different standard of materiality for purposes of evaluating the effectiveness of a principal's ratification than do the securities laws. Under the common law, a representation is material even if a reasonable person would not "attach importance to it[]" so long as "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."[334]

It is also worth noting that when pronouncing the standard for materiality in federal securities law, the U.S. Supreme Court was concerned that "if the standard of materiality is unnecessarily low . . . the corporation and its management [risk] be[ing] subjected to liability for insignificant omissions or

332. *But see supra* note 258 and accompanying text.

333. *See* Restatement (Third) of Agency § 4.06 (2006).

334. Restatement (Second) of Torts § 538 (1977) (cited by Restatement (Third) of Agency § 4.06 cmt. c). *See* Allan Horwich, *An Inquiry into the Perception of Materiality as an Element of Scienter Under SEC Rule 10b-5,* 67 Bus. Law. 1, 19 n.96 (2011) (noting that § 538 uses a broader meaning of "material" than the securities laws). *Contra Am. L. Inst., supra* note 201, at § 1.25.

misstatements."[335] Such risk is minimized under *Corwin* because *Corwin* is merely a ratification device, and failure to comply with *Corwin* does not directly entail liability. Even if a court erroneously found that *Corwin* cleansing did not apply because of the omission of supposedly "insignificant" matters, a plaintiff would still need to plead—and prove—an underlying fiduciary breach before obtaining any relief. Accordingly, courts should consider relaxing the materiality standard under *Corwin* by, for example, allowing plaintiffs to allege and prove the materiality of a misstatement or omission on the basis that the directors subjectively believed or had reason to believe that investors would find the information important to (1) their assessment of the transaction itself or (2) their assessment of the conduct of the directors while arranging and approving the transaction.

D. Marchand, Caremark, *and the Substance of Process*

One preliminary problem with post-*Marchand Caremark* case law is that Delaware courts have not clearly stated the applicable legal standard, especially with respect to *Caremark*'s monitoring prong. *Marchand* and *Caremark* couch the monitoring inquiry in terms of "central compliance risks," "mission-critical risks," "reasonable systems of monitoring." But, as discussed above, the case law gives reason to think that these words, though roughly related to the topic at hand, are nevertheless not quite accurate.[336]

Instead, taking *Marchand* and its progeny collectively, it seems that what the courts are really asking when considering *Caremark* is the following:

(1) Was there a significant corporate trauma?
(2) Was the trauma foreseeable (with red-flag claims inherently satisfying foreseeability)?
(3) Did the board do enough to prevent it?

There are two problems, however, with such an approach.

First, if this is a correct articulation of the test that courts are applying, then courts should clearly say so.

Second and more importantly, such an approach is fundamentally at odds with the general rule that courts should not

335. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448 (1976).
336. *Supra* Part II.B.

second-guess boards on issues of business judgment.[337] *Marchand* effectively requires courts to independently decide which corporate traumas are "significant" (for both monitoring and red-flags claims), which traumas are "foreseeable," (for monitoring claims only), and whether the board did "enough" in response (for both monitoring and red-flags claims). *Marchand* brings the current state of *Caremark* to a less-than-analytically-rigorous rule that "if a serious disaster happens to your company, you better have tried to stop it."

If anything, the economic significance of the trauma may be easiest to determine. Many of the caveats that ordinarily apply to judicial evaluation of economic substance do not apply here. Parties generally do not contest the amount of the loss, or the methodology by which the loss was calculated, as precision is often unnecessary in the *Caremark* context.[338] But even then, the question arises of where to draw the line between significant and insignificant, particularly in the context of multibillion dollar companies where millions of dollars might be a rounding error.[339]

The problems with judicial second-guessing escalate from there and are especially acute when determining foreseeability, which is necessary for *Caremark*'s monitoring prong to function. If boards are to owe enforceable monitoring duties, then somebody will have to decide what should be monitored. But as Vice Chancellor Laster has noted, "[t]ime and attention are precious commodities, and with limited supplies of each, officers and directors must make judgments about what risks to monitor."[340] Thus, a court enforcing monitoring duties cannot totally abstain from deciding which business risks the board should have been monitoring; it must eventually engage in what is essentially a reasonableness review of substantive business judgment.[341] Furthermore, it is hard to see how a nontrivial

337. *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 746 (Del. Ch. 2005).

338. At least until a *Caremark* claim goes to trial, which has yet to occur.

339. *Cf. Disney*, 907 A.2d at 767–68 & n.533 (determining that a $100 million+ executive contract was relatively immaterial).

340. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 679 (Del. Ch. 2023).

341. *Contra* City of Detroit Police & Fire Ret. Sys. v. Hamrock, C.A. No. 2021-0370-KSJM, 2022 WL 2387653, at *14 n.111 (Del. Ch. June 30, 2022) ("Generally speaking, even after *Marchand*, Delaware courts are not applying reasonableness review in *Caremark* cases."). Although penned before *Marchand*

judicial evaluation of whether a risk should have been monitored materially differs from essentially a hindsight evaluation of the magnitude of the corporate disaster—if nothing bad happened, how can it be claimed that the board should have been monitoring the issue? Conversely, despite boards' limited time and attention, how is a court to determine which possible catastrophes, including acts of God and force majeure, need *not* be monitored? After all, even global systematic risks such as climate change (and now worldwide pandemics) are on the radar for many corporations.

Even after having established what should be monitored, courts would still need to determine whether the monitoring system was adequate to prevent the monitored risk from actualizing into corporate catastrophe. In other words, what facts are necessary to rebut the court's ordinary deference toward directors in matters of business judgment? In answering that question, courts could look to the subjective good faith of directors, or they could hold directors to a more objective standard of whether the monitoring systems are adequate in fact. Obviously, determining subjective good faith requires a challenging inquiry into mental states that are not directly observable. *Marchand*, like many other legal approaches to evidence of mental state,[342] instead looks to observable conduct to determine unobservable mental states. Specifically, *Marchand* held that a lack of *systematic* monitoring constitutes bad faith sufficient to give rise to liability.[343] Moreover, *Marchand* indicates that presence of *ad hoc* monitoring is insufficient to overcome the absence of systematic monitoring in the determination of whether a good-faith effort existed.[344] Under *Marchand*, the

---

was decided, Professor Robert Miller's article on *Caremark* presciently critiqued such an approach on a similar basis. Miller, *supra* note 223 at 947–49. However, I am skeptical of Professor Miller's suggestion that boards pass resolutions to set standards for director knowledge because (1) Professor Miller basically assumes that he has proposed a more efficient rule, *id.* at 947 ("The argument presented here assumes that shareholders will be better off in the long run by choosing the first prong of this dilemma"), and (2) the cases discussed in this subsection each concerned serious and significant matters that one reasonably might expect directors to include in such a standard-setting resolution, but the question of how *much* information and oversight is necessary still remains (and remained in these cases).

342. *See* Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601, 691–96 (2005).

343. *See* Marchand v. Barnhill, 212 A.3d 805, 822 (Del. 2019).

344. *Supra* note 227 and accompanying text.

"good faith effort" required by *Caremark*'s monitoring prong means something more than subjective good faith and instead something approaching "effort with a rational basis," if not "objectively rational effort."[345] *Marchand* thus contrasts with traditional notions of bad faith, which require "intentional dereliction of duty" or "conscious disregard for one's responsibilities"[346] and cannot be proven by even gross negligence.[347]

Even before *Marchand* was decided, critics have long anticipated the dangers posed by *Marchand*-like rules that require courts to assess the objective adequacy of monitoring processes. As Chancellor Chandler wrote a decade before *Marchand*,

> To the extent the Court allows shareholder plaintiffs to succeed on a theory that a director is liable for a failure to monitor business risk, the Court risks undermining the well settled policy of Delaware law by inviting Courts to perform a hindsight evaluation of the reasonableness or prudence of directors' business decisions.[348]

Such critics have renewed their concerns in *Marchand*'s wake.[349] *Caremark*'s monitoring prong cannot be made meaningful without judicial second-guessing of substantive business decisions.

By contrast, the adequacy of fiduciaries' efforts under the red-flags prong need not be as fraught. Although the red-flags prong requires fiduciaries to make good-faith efforts to address known issues,[350] "good-faith effort" need not be a high

345. *See* Caremark, 698 A.2d at 967 (distinguishing a "good faith effort" from a "rational" process).

346. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 63–67 (Del. 2006) (noting that the intentional dereliction and conscious disregard definitions are appropriate, if not exclusive, definitions of bad faith and that gross negligence alone "clearly" does not suffice).

347. *Cf. Marchand*, 212 A.3d at 822.

348. *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 126 (Del. Ch. 2009).

349. *See* Stephen Bainbridge, *After Boeing, Caremark is No Longer "The Most Difficult Theory in Corporation Law upon Which a Plaintiff Might Hope to Win a Judgment,"* ProfessorBainbridge.com (Sept. 8, 2021, 4:43 PM), https://www.professorbainbridge.com/professorbainbridgecom/2021/09/after-boeing-caremark-is-no-longer-the-most-difficult-theory-in-corporation-law-upon-which-a-plainti.html.

350. Lebanon Cnty. Emps' Ret. Fund v. AmerisourceBergen Corp., C.A. No. 2019-0527-JTL, 2020 WL 132752, at *20 (Del. Ch. Jan. 13, 2020), *aff'd*,

or exacting standard for the red-flags prong to be meaningful, given the amount of corporate misconduct that is intentionally swept under the rug until it can be concealed no longer.[351]

That said, a red-flags-only *Caremark* may leave many instances of corporate wrongdoing judicially unchallenged, especially in large, widely held corporations. The first red flags are often seen only by officers, who are involved in the day-to-day operations of the business, and not directors, who might meet on a monthly or even quarterly basis. By the time a board hears of issues, the problem may well already have metastasized beyond repair due to the mismanagement of the officers who stand at the front lines of a company's operations. However, a board may be nevertheless reluctant to pursue lawsuits against lackadaisical officers, lest the board mark itself as a difficult and capricious boss and unable to attract the best talent going forward.[352] Such reluctance arises not necessarily out of a board's disloyalty, but out of (presumably) good-faith considerations for shareholder interest. Nevertheless, the result is diminished accountability and potentially diminished shareholder value. By contrast, derivative suits pursued by shareholders and their attorneys significantly lessen these reputational impacts because officers cannot avoid derivative suits simply by working at a corporation with a pliant board (or even by avoiding public corporations—note that *Marchand* involved a privately held company). The problem is that, absent concurrent board misconduct, officers can rarely be held liable for breaches of

243 A.3d 417 (Del. 2020); *In re* McDonald's Corp. S'holder Derivative Litig., 289 A.3d 343, 378 (Del. Ch. 2023).

351. *See id.* at 378–80. A brief list suffices to illustrate additional examples of such misconduct: Theranos, Enron, WorldCom, Volkswagen, FTX.

352. Zucker v. Andreessen, C.A. No. 6014-VCP, 2012 WL 2366448, at *9 (Del. Ch. June 21, 2012) ("Denying [a CEO terminated for sexual harassment] any severance . . . could have undermined [the board's] efforts to attract outside executive talent"); *see* Shabbouei v. Potdevin, C.A. No. 2018-0847-JRS, 2020 WL 1609177, at *11 (Del. Ch. Apr. 2, 2020) (holding that in a CEO misconduct case, the board had no duty to pursue an antagonistic separation with the CEO); *In re* Boeing Co. Derivative Litig., C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *36 (Del. Ch. Sept. 7, 2021) (finding that it was reasonable to infer that allowing the CEO "to go quietly and with full pockets . . . was in furtherance of the legitimate business objective of avoiding further reputational and financial harm"). *Cf. McDonald's*, 291 A.3d at 692 (dismissing shareholder derivative suit against former CEO in light of the $105 million settlement in which McDonald's released its claims against the CEO).

fiduciary duty via a derivative suit because it is exceedingly unlikely that a plaintiff will be able to plead demand futility.[353]

I would therefore suggest that courts find a third way for *Caremark* as follows: first, courts should strip out the monitoring prong of *Caremark*, as it unavoidably invites judicial encroachment into business judgment. Instead, courts should limit *Caremark* to its red-flags prong, where courts can police behavior without touching near-intractable questions of what must be monitored and how much monitoring there should have been. Second, understanding that boards are often constrained when considering suits against officers, the courts should consider relaxing the pleading rules around demand futility when shareholders seek to press derivative *Caremark* claims against officers. That is to say, courts should consider that at times, demand may be futile because even fully loyal directors engaged in reasonable decision-making processes may face structural conflicts that make them unwilling to bring certain claims, while shareholders can derivatively bring such claims without facing such conflicts.

Conclusion

The distinction between process and substance is well-known to legal scholars, and this distinction is pervasive in how corporate law regulates the behavior of corporate fiduciaries.

Often, the primary question that courts ask is whether a corporation's managers used sensible processes to reach their decisions. Only after finding some issue with those processes do courts even consider examining the economic substance of the resulting decisions, and even then, reasons abound why such examinations will be invariably imperfect. These same reasons recommend against reforms that would transform courts into judicial arbiters of business skill.

The problem, however, is that only too often do questions of substance and process intersect and interact. Adopting process-centered standards does not guarantee that courts will be able to avoid difficult questions of business substance. Likewise, estimations of economic entitlements often depend on choices of procedural entitlements. Such interplay of substance and process has frequently increased the practical difficulty of

353. *See* Order Granting Dismissal Under Rule 23.1, *In re* McDonald's Corp. S'holder Derivative Litig., C.A. No. 2021-0324-JTL (Del. Ch. Mar. 1, 2023).

applying novel doctrines. Decisions such as *Corwin* that were expected to streamline litigation by shifting courts' focus toward process considerations have often met with limited success. At the same time, other decisions such as *Van Gorkom* that were intended to only reaffirm existing procedural requirements have been received as serious invasions of management's business judgment.

Of course, the courts have not been without their successes: recent Section 220 cases have made corporate misconduct harder to hide, while poison pill doctrine has evolved to be more protective of shareholder rights. As this Article has shown, courts may be able to more rapidly and more effectively reach the policy ends they seek for corporate law by crafting doctrines that are the result of active evaluation of the interactions between substance and process.