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## Delaware's Duty to Auction After Paramount Communications, Inc. v. QVC Network, Inc.

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## **Delaware's Duty to Auction After *Paramount Communications, Inc. v.* *QVC Network, Inc.***

The Roaring Eighties were a new gilded age, where winning was celebrated at all costs . . . . The investment bankers were part croupiers, part alchemists. They conjured up wild schemes, pounded out new and more outlandish computer runs to justify them, then twirled their temptations before executives in a "devil dance."

Why did these people care so much about what came out of their computers and so little about what came out of their factories? Why were they so intent on breaking up instead of building up? And last: What did this all have to do with doing business?<sup>1</sup>

### I. INTRODUCTION

No age in recent American history has been more critically denounced as a period of greed and waste than the "Roaring Eighties."<sup>2</sup> During that single decade, there were more corporate mergers and acquisitions than at any other time in history.<sup>3</sup> As a result, the typical corporate behemoth

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1. BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 514-15 (1990).

2. While this characterization is largely inaccurate inasmuch as many areas experienced true growth and prosperity during the eighties, in the realm of corporate mergers and acquisitions, the reputation is largely deserved. See Dan Shaw, *Greedy for More? The Eighties Sneak Back*, N.Y. TIMES, Oct. 2, 1994, at A43.

3. From 1980 to 1989 there were 31,114 completed merger, acquisition, or leveraged buy-out (LBO) deals with a total value of over \$1,341,068,000,000. *M & A Almanac: 1989 Profile*, MERGERS & ACQUISITIONS, May/June 1990, at 57; see Alex Devience, Jr., *A Hindsight Review of the Business Judgment Rule in a Takeover Environment: The State of the Business Judgment Rule after the Fall*, 5 DEPAUL BUS. L.J. 113, 113 (1993) (noting that the period was extremely active for takeover strategists). Although the eighties undoubtedly win the race for the most merger and acquisition activity, the nineties are catching up, and 1994 should be a record year. *Gaining Momentum For a Peak Year*, MERGERS & ACQUISITIONS, Sept./Oct. 1994, at 54-55 (noting that while 1994 merger and acquisition activity is on a pace that could set a new one year record for the highest number of transactions, the total value of these deals is not likely to break the 1989 record); see *News 10:30 p.m. E.T.: Business Year in Review, Part 6-Merger Mania* (CNN cable news broadcast, Dec. 20, 1994) (transcript #427-6 available on LEXIS) (Lou Dobbs, anchor: "You'd think it was the eighties—merger and acquisition activity heated up in 1994, running about 50% ahead

is now older and wiser, and many are still nursing battle wounds.<sup>4</sup> Whether the pain comes from payments on golden parachute agreements or service payments on lingering "junk" bonds, many did not survive unscathed.<sup>5</sup> Fortunately, some emerged revitalized and refreshed from their going private "cocoon" as leaner, meaner fighting machines.<sup>6</sup> What made some companies come out ahead and some behind? More importantly, have we learned our lessons from the eighties or is more fumbling around necessary before we graduate to a more civil merger environment?

Since *Unocal Corp. v. Mesa Petroleum Co.*,<sup>7</sup> the lines have been drawn between the Delaware Supreme Court and the corporate board room. The court's struggle to protect stockholder interests and require corporate responsibility from a board of directors without unduly interfering in a board's decision-making process has undergone a gradual metamorphosis of sorts.<sup>8</sup> The court's most recent step in this process came in *Para-*

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of last year. In fact, more deals were announced in 1994 than at any time over the past six years.").

4. Viacom is an ideal example of this phenomenon. See *infra* note 274. For a discussion of the problem, see Fred R. Bleakley, *Bad Hangover: Many Firms Find Debt They Piled On in 1980s Is a Cruel Taskmaster*, WALL ST. J., Oct. 9, 1990, at A1 (noting the considerable fiscal tightening and the looming specter of bankruptcy highly leveraged companies may face as they attempt to grapple with their debt loads).

5. "After a highly leveraged takeover, a steep percentage of the revenues produced by the acquired assets is diverted to paying the debt incurred to acquire the assets." Martin Lipton, *Takeover Abuses Mortgage the Future*, WALL ST. J., Apr. 5, 1985; see Bleakley, *supra* note 4, at A1. Many companies, such as Interco, Corp., Allied Stores Corp., and Federated Dept. Stores, Inc., did not survive at all. See Devience, *supra* note 3, at 113 (citing George Anders & Francine Schindel, *Costly Advice: Wall Streeters Helped Interco Defeat Raiders But at a Heavy Price*, WALL ST. J., July 11, 1990, at A1 (analyzing and recounting the history of the bankruptcy of Interco, Inc.)).

6. This is most readily evident when comparing the strength of a company's initial public offering (IPO) and the company's value when it goes public again after an LBO (also called a "Reverse LBO"). Recent examples of strength are Exide Corp. and Ultratech Stepper, Inc. whose stock showed a 161% and 109% increase respectively from their IPO price and market price approximately one year later. *Reverse LBOs*, MERGERS & ACQUISITIONS, Nov./Dec. 1994, at 56. Examples of weakness are CMC Industries and Cobra Industries, whose value dropped 66.7% and 66.1% respectively within approximately eight months after they again went public. *Id.*

7. 493 A.2d 946 (Del. 1985); see *supra* notes 26-46 and accompanying text.

8. Even highly respected commentators and practitioners who have tried to predict or comment on this metamorphosis have frequently summarized the trends in a way the court promptly disproves. See, e.g., James C. Freund & Rodman Ward Jr., *What's "In," "Out" in Takeovers In Wake of Paramount v. Time*, NAT'L L.J., Mar. 26, 1990, at 22 (predicting that long-term plans are "in" and auctions are "out," citing *Time-Warner* as a possible "full-employment act" for corporate planners and describing how "Delaware courts have been chipping away at *Revlon* almost since it first

mount Communications, Inc. v. QVC Network, Inc.<sup>9</sup> (*Paramount v. QVC*). In a case with far-reaching implications,<sup>10</sup> the court greatly enlarged the number of circumstances that give rise to a *Revlon* duty to auction.<sup>11</sup> It also showed the narrowness of the board's discretion once this duty has been activated and the difficulty in determining when that duty attaches.<sup>12</sup>

How will this auction process impact corporate governance, the general public,<sup>13</sup> and the stockholders it is designed to protect? This Com-

came down"). Lower courts fare little better when trying to predict the future. See, e.g., *City Capital Assoc. Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 797 (Del. Ch. 1988) (describing a "front-end" partial tender offer as "already a largely vanished breed" in 1988).

9. 637 A.2d 34 (Del. 1994).

10. This case will prove to have a much greater impact than the court may have intended, despite the court's recitation of the typical disclaimer: "We express no opinion on any scenario except the actual facts before the Court, and our precise holding herein. Unsolicited tender offers in other contexts may be governed by different precedent." *Id.* at 43 n.13; see Thomas A. Gentile, *Refining the Revlon Doctrine's Applicability to Changes of Control: Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), 17 HARV. J.L. & PUB. POL'Y 895, 895, 902, 906 (1994).

11. For a discussion of *Revlon* duties, see *infra* text accompanying notes 67-70. This expansion came primarily through the court's addition of all transactions involving a "change of control" to the list of *Revlon* triggering events, without considering whether a breakup of the company was "inevitable." See *infra* notes 168-205 and accompanying text.

12. The Delaware high court held that Paramount's board of directors acted unreasonably when it adopted certain defensive tactics to facilitate its merger with Viacom and failed to adequately consider QVC's hostile bid. *Paramount v. QVC*, 637 A.2d at 47-50. In the process, the court found that "[t]he Paramount Board, albeit unintentionally, had 'initiate[d] an active bidding process seeking to sell itself' by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquirer (QVC) was equally interested in being a bidder." *Id.* at 47 (emphasis added). As this Comment will discuss, it is difficult to see how the actions of Paramount's Board were different from those of other boards whose actions the court has deemed reasonable. See *Paramount Communications, Inc. v. Time, Inc.*, 571 A.2d 1140, 1154-55 (Del. 1989) ("Time's responsive action to Paramount's tender offer was not aimed at 'cramming down' on its shareholders a management sponsored alternative, but rather had as its goal the carrying forward of a pre-existing transaction in an altered form. Thus, the response was reasonably related to the threat." (footnote omitted)); see *infra* notes 109-43 and accompanying text (analyzing *Time-Warner*).

13. Though obviously not the court's primary focus, it has been repeatedly noted that the interests of the public and other third parties impact the court's balancing of equities and awarding of equitable relief, such as mandating an auction or preventing the triggering of a poison pill. See, e.g., *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341-42 (Del. 1987) (permitting consideration of the impact a transac-

ment suggests that while a focus on short-term stockholder benefit may appear to most adequately serve stockholder interests, it in fact delivers stockholders less than they would otherwise receive, even in change of control situations. The merged companies will also have a much more difficult road ahead. In eighties parlance, they will more closely resemble the wounded survivors than the revitalized victors.<sup>14</sup> The problem is a lack of attention to long-range planning.<sup>15</sup> Though giving lip service to corporate strategy considerations, the court has effectively made final price the ultimate arbiter. The purpose of this Comment is to propose a modified analytical framework that more adequately considers long-range goals.

Section II supplies the backdrop for the *Paramount v. QVC* decision and discusses the progression of cases that have established Delaware's apparent duty to auction.<sup>16</sup> Once set in this historical perspective, Section III analyzes *Paramount v. QVC* and its considerable expansion of the instances in which a duty to auction attaches, a board's obligations once this duty has attached, and the analysis the court would have made

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tion will have on non-shareholder constituencies); *City Capital Assoc. Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 795 (Del. Ch. 1988) ("[I]t is essential for the court to consider the offsetting equities . . . including the interests of the public and other innocent third parties."). Two preeminent practitioners in the field have reasoned that this focus on "economic and social utility" instead of shareholders' rights should be the primary goal and justification for the continued legal recognition of the corporate form. See Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 188-90 (1991) (proposing a plan whereby shareholders would elect their entire board of directors once every five years in a single meeting focusing on long-range planning, to combat the focus on short-term profits that could potentially destroy corporate profitability and our free-market economy that has resulted from current law governing hostile takeovers).

14. The highly leveraged company has been compared to a farmer who does not rotate crops, fertilize, build fences, plant cover, or create windbreaks, and lets the land lie fallow. "In the early years he will maximize his return from the land. But inevitably the farm becomes a dust bowl." Lipton, *supra* note 5. Only in the past five to seven years have commentators begun to recognize the way current policies have strangled many companies who need to engage in long-range planning but have been forced to focus on short-term profits to satisfy stockholders and the courts. See Lipton & Rosenblum, *supra* note 13, at 188-89, 205-10, n.61 (noting the problem of "short-termism" and citing John G. Smale, *What About Shareowner's Responsibility?* WALL ST. J., Oct. 16, 1987, at 24 ("by focusing on the short-term, our publicly held business enterprises will see their competitive position decay"); Alan Greenspan, *Takeovers Rooted in Fear*, WALL ST. J., Sept. 27, 1985, at 28) ("Excessively high discount factors place a disproportionate share of the value of a company's stock on near-term earnings and dividend flows.").

15. This problem and the way it is exacerbated by many different national policies ranging from tax policy to the whims of the stock market is discussed in Lipton, *supra* note 5; see also Lipton & Rosenblum, *supra* note 13, at 210.

16. See *infra* notes 21-143 and accompanying text.

had it followed existing precedent and applied the *Unocal* test.<sup>17</sup> Section IV evaluates the impact this decision will have on corporate governance in the future, concluding that the present duty to auction trivializes a board's assessment of the strategic value of a particular transaction, precludes the possibility of peaceful merger negotiations in the future, and can ultimately destroy corporations to "protect" the shareholders' interests.<sup>18</sup> Section V advocates the application of the business judgment rule to sale of control transactions after certain threshold questions have been answered. These questions establish that the board acted in good faith, was adequately informed, and used the utmost loyalty when deciding to recommend a merger.<sup>19</sup> Finally, Section VI concludes that a modified business judgment rule applied to a narrow category of cases will avoid the negative impact of the duty to auction in its present formulation.<sup>20</sup>

## II. HISTORICAL BACKGROUND

Delaware corporate law has long recognized that the management of a Delaware corporation's business and affairs is entrusted to its directors, the elected and authorized representatives of the stockholders, and that they are best suited for the task.<sup>21</sup> The business judgment rule embodies this principle.<sup>22</sup> The rule creates the presumption that in making a busi-

17. See *infra* notes 145-234 and accompanying text.

18. See *infra* notes 235-77 and accompanying text.

19. See *infra* notes 278-312 and accompanying text.

20. See *infra* note 312 and accompanying text.

21. See DEL. CODE ANN. tit. 8, § 141(a) (1991); *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984) (clarifying the business judgment rule in Delaware). Section 141(a) of the Delaware Code states:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

DEL. CODE ANN. tit. 8, § 141(a) (1993).

22. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) ("A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter's decision can be 'attributed to any rational business purpose.'") (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

ness decision, "the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."<sup>23</sup> Under certain circumstances, however, the Delaware Supreme Court has limited application of the business judgment rule. *Unocal Corp. v. Mesa Petroleum Co.*<sup>24</sup> sets the standard for application of the business judgment rule in takeover conflicts where a target uses defensive tactics.<sup>25</sup>

#### A. *Unocal Corp. v. Mesa Petroleum Co.*

In *Unocal*, a group of affiliated companies, collectively known as "Mesa," which held thirteen percent of Unocal's stock, commenced a two-tier front-end loaded cash tender offer<sup>26</sup> to gain control of Unocal.<sup>27</sup> In the

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23. *Id.*; *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984); see *Paramount v. QVC*, 637 A.2d 34, 41-42 (Del. 1994). For an interesting suggestion for a new approach to the business judgment rule in tender offer situations, see generally Alfred D. Mathewson, *Decisional Integrity and the Business Judgment Rule: A Theory*, 17 PEPP. L. REV. 879 (1990). For a historical discussion of the relevant case law that led to the modern interpretation of the business judgment rule, see Devience, *supra* note 3, at 116-19; see also R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337, 1337-38, 1340-41 (1993) (discussing the three major views of the business judgment rule after pronouncement of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations* and the origins of the presumption). For a discussion of the American Law Institute's Corporate Governance Project, see generally Charles Hansen, *The Duty of Care, The Business Judgment Rule, and the American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355, 1374-76 (1993).

24. 493 A.2d 946 (Del. 1985).

25. One of the more significant results of *Paramount v. QVC* is the effect it will have on defensive tactics in the future, but an extensive discussion of defensive tactics is not within the scope of this Comment. For some early commentary on defensive tactics and their legal and economic justification, see generally Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities—An Update*, 40 BUS. LAW. 1403 (1985); Daniel J. Morrissey, *Defensive Tactics in Tender Offers—Does Anything Go?* 53 TENN. L. REV. 103 (1985). For a more modern discussion, though still pre-*QVC*, see Robert A. Ragazzo, *The Legitimacy of Takeover Defense in the '90s*, 41 DEPAUL L. REV. 689 (1992).

26. A "two-tier front-end loaded offer" generally refers to a cash offer for the first 50% of the target's stock that produces a controlling share, followed by a purchase of the remaining shares at a lower price, usually for subordinated debt or non-voting equity shares of the acquiring company. See 5 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2136-37 (3d ed. 1989 & Supp. 1993); Lipton & Brownstein, *supra* note 25, at 1412 (describing two-tier, front-end loaded bids); Ragazzo, *supra* note 25, at 719-24 (discussing various forms of the two-tier tender offer); Gary P. Kreider, *Corporate Takeovers and the Business Judgment Rule: An Update*, 11 J. CORP. L. 633, 634-35 (1986) (defining a "tender offer"). See generally Theodore N. Mirvis, *Two-Tier Pricing: Some Appraisal and "Entire Fairness" Valuation Issues*, 38 BUS. LAW. 485 (1983) (discussing fairness issues surrounding two-tier transactions); Mark G. Strauch, *Regulating Two-Tier Tender Offers: A Compromise Proposal With Negligible*

"front end," Mesa offered \$54 cash per share for approximately 37% of Unocal's outstanding stock, enough to acquire 50%.<sup>28</sup> The "back end," the portion reserved for those who were not in the first 50% to tender, gave stockholders highly subordinated securities, commonly known as "junk bonds," with a purported value of \$54 per share.<sup>29</sup>

After considerable deliberation, Unocal's board resolved to oppose Mesa's offer as inadequate and instead to self-tender for its own stock as a defensive measure.<sup>30</sup> The board decided that if Mesa got 50% of the shares in its tender offer for \$54 per share, Unocal would offer to exchange debt securities worth \$72 per share for the remaining 49% of the shares, specifically *excluding* Mesa from the list of offerees.<sup>31</sup> Shortly after Unocal commenced its self-tender, Mesa filed suit to restrain Unocal from proceeding with the exchange.<sup>32</sup> The Vice Chancellor granted Mesa's request and issued a temporary restraining order, finding that Unocal improperly excluded Mesa from the exchange offer.<sup>33</sup> The Delaware Supreme Court took the case to consider whether "the Unocal board [had] the power and duty to oppose a takeover threat it reasonably perceived to be harmful to the corporate enterprise, and if so, is its action here entitled to the protection of the business judgment rule?"<sup>34</sup>

The Delaware high court affirmed that the business judgment rule applies in the context of a takeover, but found that when a board exercises its power to forestall a takeover bid, the court must make two threshold inquiries before applying the rule's presumption.<sup>35</sup> First, the

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*Disruption*, 22 WILLAMETTE L. REV. 41, 45-46, 80 (1986) (defining two-tier front-end loaded tender offers and offering a regulatory approach that only minimally controls the tender offer market while still permitting the market to hold management responsible and encouraging management to maintain efficiency by the threat of a hostile takeover).

27. *Unocal*, 493 A.2d at 949.

28. *Id.*

29. *Id.* at 949-50. Since the second tier of a two-tier tender offer consists of market-dependent securities, determining the actual value of the second tier is often a minute-by-minute proposition that constantly varies with the prevailing market price.

30. *Id.* at 950-51.

31. *Id.* at 951.

32. *Id.*

33. *Id.* at 952.

34. *Id.* at 953.

35. *Id.* at 954; *Pogostin v. Rice*, 480 A.2d 619, 627 (Del. 1984) (applying the business judgment rule in a takeover context). The presumption of the business judgment rule, stated in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), is that the directors acted "on an informed basis, in good faith and in the honest belief that the action taken



directors must show "that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed."<sup>36</sup> In making this determination, they "may not have acted solely or primarily out of a desire to perpetuate themselves in office," but must have been "motivated by a good faith concern for the welfare of the corporation and its stockholders," and their action must have been informed and taken with due care.<sup>37</sup> Second, the defensive measure must have been "reasonable in relation to the threat posed."<sup>38</sup> With these two elements established, the business judgment rule applies.<sup>39</sup>

The court held that the Unocal board had reasonable grounds to believe that a danger to corporate policy and effectiveness existed because of the highly subordinated "junk bonds" that would be forced on stockholders who tendered in the second tier.<sup>40</sup> According to the court, protecting these stockholders as well as those who tendered in the front end was an appropriate corporate purpose for the defensive self-tender.<sup>41</sup> The self-tender was reasonable in relation to the threat posed because it was specifically directed to those in the second tier, to protect them from being squeezed out<sup>42</sup> in the back end of the merger and because the threat was from a "corporate raider with a national reputation as a

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was in the best interests of the company." *Id.* at 812; *see also* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986) (describing the deference the business judgment rule gives to the decisions of a corporation's board of directors).

36. *Unocal*, 493 A.2d at 955.

37. *Id.*

38. *Id.*

39. *See id.* at 958-59. *Unocal* has generated considerable commentary and has inspired discussions of its implications and applications to other scenarios, especially by students. *See generally* Mark J. Bernet et al., Comment, *Unocal Corp. v. Mesa Petroleum Co.: The Selective Self-Tender—Fighting Fire With Fire*, 61 NOTRE DAME L. REV. 109 (1986); Eric Grannis, Note, *A Problem of Mixed Motives: Applying Unocal to Defensive ESOPs*, 92 COLUM. L. REV. 851 (1992); James F. Ritter, Comment, *Unocal Corp. v. Mesa Petroleum Co.*, 72 VA. L. REV. 851 (1986); David J. Schubert, Note, *Unocal Corp. v. Mesa Petroleum Co.: A New Era of Fiduciary Duty*, 38 BAYLOR L. REV. 687 (1986).

40. *Unocal*, 493 A.2d at 956.

41. *Id.* at 955-56. The fact that the board was comprised of a majority of outside directors strengthened this conclusion. *Id.* at 955.

42. A squeeze out, also known as a "freezeout," generally refers to a situation where a majority forces a minority to accept cash or debt for its shares. *See generally* 1A MARTIN LIPTON & ERICA H. STEINBERGER, TAKEOVERS & FREEZEOUTS § 9.01 (1994) (defining and discussing freezeouts); Ronald L. Fein & William T. Drescher, *Officers' and Directors' Liability: A Review of The Business Judgment Rule: Leveraged Buy-Out and Squeeze-Outs* 1985, at 279 (PLI Corp. L. Practice Course Handbook Series No. B4-6718, 1985) (discussing the history and application of the "entire fairness" doctrine established in *Weinberger* as it applies to squeeze outs and leveraged buy-outs).

'greenmailer.'<sup>43</sup> Therefore, the court held that the business judgment rule applied to the board's decision and that Mesa failed to show by a preponderance of the evidence that the directors' decision was based primarily on perpetuating themselves in office or on some other improper purpose.<sup>44</sup>

Thus, *Unocal* established that as long as its actions are reasonable and primarily concerned with the welfare of shareholders, a board may institute defensive tactics to avoid a hostile takeover.<sup>45</sup> This ability to use defensive tactics, though apparently broad in *Unocal*, was progressively narrowed in a series of cases beginning with *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,<sup>46</sup> where the duty to auction was born.

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43. *Unocal*, 493 A.2d at 956. "Greenmail: The purchase of a substantial block of target securities by an unfriendly suitor with the primary purpose of coercing the target into repurchasing the block at a premium." LOSS & SELIGMAN, *supra* note 26, at 2140. Greenmail was a growing problem in the mid 1980s, but the Revenue Act of 1987 put a serious damper on the practice. See 26 U.S.C. § 5881(a) (1989 & Supp. 1994). The Act essentially created a 50% excise tax on any gain realized as a result of greenmail. *Id.* Section 5881(b) defines greenmail as:

[A]ny consideration transferred by a corporation (or any person acting in concert with such corporation) to directly or indirectly acquire stock of such corporation from any shareholder if—

(1) such shareholder held such stock (as determined under section 1223) for less than 2 years before entering into the agreement to make the transfer,  
(2) at some time during the 2-year period ending on the date of such acquisition—

- (A) such shareholder,
- (B) any person acting in concert with such shareholder, or
- (C) any person who is related to such shareholder or person described in subparagraph (B),

made or threatened to make a public tender offer for stock of such corporation, and

(3) such acquisition is pursuant to an offer which was not made on the same terms to all shareholders.

*Id.* § 5881(b). 26 U.S.C. § 5881 (b) (1989 & Supp. 1994).

The corporate raider with a reputation for greenmail to which the court referred was T. Boone Pickens, Jr., President and Chairman of the Board of Mesa Petroleum and the holding company that controlled the related entities. *Unocal*, 493 A.2d at 949 n.1. For an amusing account of the antics of T. Boone Pickens and the time he got caught in the unusual position of having to pay greenmail, see CONNIE BRUCK, *THE PREDATORS' BALL* 164-66 (1989) (discussing the Phillips Petroleum deal and Carl Ichan as the greenmailer).

44. *Unocal*, 493 A.2d at 958-59.

45. *Id.* at 955.

46. 506 A.2d 173 (Del. 1986).

## B. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.

In *Revlon*, the court evaluated the legitimacy of defensive measures<sup>47</sup> instituted by the Revlon board to repel Pantry Pride's efforts to acquire Revlon.<sup>48</sup> Discussions about a possible acquisition of Revlon began with a series of meetings between Ronald O. Perelman, chairman of the board and chief executive officer of Pantry Pride, and Michael C. Bergerac, chairman and chief executive officer of Revlon.<sup>49</sup> For several months, Perelman made overtures to Bergerac to purchase Revlon in the \$40 to \$50 per share range, but Bergerac consistently rebuffed the offers, claiming that the price was inadequate.<sup>50</sup> Finally, Perelman received permission from the Pantry Pride board to either negotiate an acquisition of Revlon for \$42 to \$43 per share or to make a hostile tender offer for \$45 per share, and Perelman subsequently informed Bergerac of his intentions.<sup>51</sup> When Bergerac informed Revlon's board of this impending takeover attempt, the board quickly concluded that the prices discussed were too low and began discussing defensive measures.<sup>52</sup>

The Revlon board adopted two defensive measures: a repurchase of up to five million of its outstanding shares and execution of a Rights Plan, or "poison pill" as it is commonly known, that would give shareholders the right to exchange each share of common stock for a \$65 Revlon note at 12% interest.<sup>53</sup> These measures stopped Pantry Pride's advances for only four days, at which time Pantry Pride began making a series of all cash offers to purchase shares of Revlon stock.<sup>54</sup> When the board real-

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47. Revlon instituted a lock-up option, a no-shop provision, and a \$25 million termination fee. Generally, a "lock-up option" refers to any part of a transaction designed to preclude, inhibit, or deter a competing bidder. See LOSS & SELIGMAN, *supra* note 26, at 2146. Specifically, it refers to options to buy assets, unissued or treasury shares, or even certain "crown jewel" divisions of the target that would make the resulting transaction with the raider unattractive. *Id.*; see Jay M. Zitter, Annotation, *Lockup Option Defense to Hostile Corporate Takeover*, 66 A.L.R.4th 180 (1988 & Supp. 1994). For cases in which target companies used a lock-up option, see *Watkins v. Beatrice Cos.*, 560 A.2d 1016, 1018 (Del. 1989) (discussing a different issue in the KKR bid for Beatrice Companies Inc. in which an asset option played an integral role); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1264 (Del. 1989); *In re Vitalink Communications Corp. Shareholders Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 96,585 (Del. Ch. 1991); *In re Holly Farms Corp. Shareholders Litig.*, Fed. Sec. L. Rep. (CCH) ¶ 94,181 (Del. Ch. 1988).

48. *Revlon*, 506 A.2d at 175.

49. *Id.* at 176.

50. *Id.*

51. *Id.*

52. *Id.* at 176-77.

53. *Id.*

54. *Id.* Pantry Pride's first offer was an all-cash tender offer for any and all shares at \$47.50 for common shares and \$26.67 for preferred, made on August 23. *Id.* at 177.

ized that its defensive measures were not keeping Pantry Pride at bay, it began looking for a white knight<sup>55</sup> and found one in the "Forstmann investment group."<sup>56</sup>

The board agreed to a leveraged buyout by Forstmann for \$56 cash per share.<sup>57</sup> As part of the deal, the board waived the provisions of the Rights Plan<sup>58</sup> for the Forstmann transaction or "any other offer superior to Forstmann's."<sup>59</sup> After announcement of the merger and dismantling of the defensive rights in favor of Forstmann, the market for the notes fell through.<sup>60</sup> Pantry Pride responded by raising its bid to \$56.25 and informing Revlon that it would continue raising its all-cash bids to beat any other offer, so long as Revlon's board removed the effect of the Rights Plan for them as well.<sup>61</sup>

Thanks to certain confidential information provided exclusively to Forstmann, the investment group soon returned with yet another offer, for \$57.25, with strings attached: Revlon must agree to a no-shop provision,<sup>62</sup> a lock-up option to purchase several key Revlon divisions,<sup>63</sup> and a twenty-five million dollar cancellation fee if the transaction was not consummated.<sup>64</sup> If these conditions were met and the offer accepted immediately, Forstmann would rescue the falling notes by exchanging them with new ones.<sup>65</sup> The board accepted Forstmann's final offer, and

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55. A "white night" is to an acquirer who is favorable to management and who is willing to bid against a hostile raider. See LOSS & SELIGMAN, *supra* note 26, at 2132; Gregory v. Anderson & Steven Augspurger, *Defensive Tactics to Hostile Tender Offers—An Examination of Their Legitimacy and Effectiveness*, 11 J. CORP. L. 651, 696 (1986) (discussing white night solicitation).

56. *Revlon*, 506 A.2d at 177-78. This "investment group" was comprised of Forstmann Little & Co., and an affiliated partnership. *Id.* at 175.

57. *Id.* at 178.

58. *Id.* Waiving the provisions of the Rights Plan involved waiving the covenants in all outstanding notes, and redeeming the rights issued. *Id.*

59. *Id.* at 178.

60. *Id.*

61. Pantry Pride was able to offer all cash to Revlon's stockholders with the help of Drexel Burnham Lambert and its legendary skill with "junk bonds." *Id.* at 179 n.7.

62. *Id.* at 178.

63. *Id.* The lock-up option was to purchase Revlon's Vision Care and National Health Laboratories divisions for \$525 million. *Id.*

64. *Id.* The fee was also triggered if another bidder acquired more than 19.9% of Revlon's stock. *Id.*

65. *Id.*

Pantry Pride sought injunctive relief from not only the Rights Plan, but the lock-up, no-shop, and termination fee agreements as well.<sup>66</sup>

The Delaware Supreme Court held that although the board's imposition of the Rights Plan and self-tender were appropriate at early stages,<sup>67</sup> they were improper after it "became apparent to all that the break-up of the company was *inevitable*."<sup>68</sup> Once this point was reached, "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit."<sup>69</sup> The directors became "auctioneers charged with getting the best price for the stockholders at a sale of the company."<sup>70</sup>

The court found that when Revlon favored Forstmann and his offer that would support the price of the notes, it ceased protecting the stockholders, and the directors breached their primary duty of loyalty.<sup>71</sup> The court did not, however, state that lock-ups, termination fees, or no-shop provisions were impermissible *per se*, but rather that they become impermissible when they "end an active auction and foreclose further bidding."<sup>72</sup> "[W]hen bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions."<sup>73</sup> Commentary soon followed as directors scrambled to determine the implications of this decision, specifically, when a break-up becomes "inevitable."<sup>74</sup>

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66. *Id.* at 179.

67. The court noted that the poison pill was removed for both parties when the bids exceeded \$57.25. *Id.* at 181. It also revealed its fixation on short-term profits by noting that the Rights Plan caused the price to increase by at least \$16 per share and therefore accomplished the only legitimate purpose possible: increasing the short-term cash shareholders would receive. *See id.*

68. *Id.* at 182 (emphasis added).

69. *Id.*

70. *Id.*

71. *Id.* The court noted that protecting the interests of the note holders was not a permissible goal since their rights were fixed by contract. *See id.* at 182-83 (citing *Wolfensohn v. Madison Fund, Inc.*, 253 A.2d 72, 75 (Del. Ch. 1969); *Harff v. Kerkorian*, 324 A.2d 215 (Del. 1974)). Protecting the interests of note holders, or other "non-stockholder interests," was a breach of the board's duties because the court thought that such protection did not provide "rationally related benefits accruing to stockholders." *Id.* at 182. This reasoning again fails to consider that supporting the notes would inevitably affect the price of the stock and the perceived worth of the company as a whole.

72. *Id.* at 183.

73. *Id.* at 184.

74. *See generally* Judi G. Sorensen, Casenote and Comment, *Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc.: Do Suitors of a Target Corporation Have a "Right to Compete?"* 25 IDAHO L. REV. 441 (1989); David S. White, *Auctioning the*

## C. Clarification of Revlon Duties

1. *City Capital Associates Limited Partnership v. Interco, Inc.*

The next significant clarification of the decision came soon thereafter in *City Capital Associates Limited Partnership v. Interco, Inc.*<sup>75</sup> In *Interco*, Cardinal Acquisition Corporation, a subsidiary of City Capital Associates Limited Partnership (CCA), made a series of all cash bids for Interco<sup>76</sup> that were rejected by the Interco board.<sup>77</sup> Specifically, the board refused to redeem a Rights Plan and presented a reorganization and restructuring plan to its stockholders as an alternative.<sup>78</sup> CCA eventually filed suit, requesting that the Chancellor enjoin management's proceeding with the restructuring plan, require redemption of the Rights Plan, and prevent the selling of what CCA described as one of Interco's crown jewels, Ethan Allen furniture.<sup>79</sup>

The Chancellor analyzed the adoption and retention of the Rights Plan under *Unocal*,<sup>80</sup> by first noting the caution with which it must approach

*Corporate Bastion: Delaware Readjusts the Business Judgment Rule in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 40 Sw. L.J. 1117 (1986). The debate continued for several years. See, e.g., Marcelle R. Joseph, *Corporate Law I: When Is a Company up for Sale? The Case Against Revlon Duties*, 1990 ANN. SURV. AM. L. 273 (1991); Portia Policastro, Note, *When Delaware Corporate Managers Turn Auctioneers: Triggering the Revlon Duty After the Paramount Decision*, 16 DEL. J. CORP. L. 187 (1991); Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: Bridging the Unocal/Revlon Gap*, 35 ARIZ. L. REV. 989 (1993); Ronald J. Rinaldi, Note, *Radically Altered States: Entering the "Revlon Zone,"* 90 COLUM. L. REV. 760 (1990); Erica M. Ryland, Note, *Bracing for the "Failure Boom": Should a Revlon Auction Duty Arise in Chapter 11?*, 90 COLUM. L. REV. 2255 (1990).

75. 551 A.2d 787 (Del. Ch. 1988).

76. *Id.* at 792-93. Interco Incorporated was a diversified holding company with 21 subsidiary corporations that were not interrelated. *Id.* at 791. With its combined 1988 fiscal sales of \$3.34 billion and earnings of \$3.50 per share, Interco became a prime candidate for a "bust-up" takeover. *Id.*; see also LOSS & SELIGMAN, *supra* note 26, at 2132-33. ("Bust-up takeover": A takeover that will result in the sale of substantial assets of the target. Often the term is used pejoratively as in the assertion of a leading practitioner that 'we have entered the era of the two-tier, front-end loaded, bootstrap, bust-up, junk-bond takeover.'" (quoting Martin Lipton, *Takeover Abuses Mortgage the Future*, WALL ST. J., Apr. 5, 1985, at A16)).

77. *Interco*, 551 A.2d at 792-94. From July 27, 1988 to October 18, 1988, CCA raised its bid at least four times, from \$64 per share to \$74 per share. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 796. Before beginning this analysis, while stating the facts that would provide the basis for the court's reasoning, the court noted a fact that becomes a

the task to avoid interjecting its own business judgment when unnecessary.<sup>81</sup> When analyzing the first element of *Unocal*, the Chancellor identified two categories of threat to corporate policy and effectiveness, both centered on protecting shareholder interest when the transaction in question was for all shares.<sup>82</sup>

The first type of threat, titled a "threat to voluntariness," was defined as occurring when the structure of a tender offer would have a "coercive effect on a rational shareholder"<sup>83</sup> such that it would interfere with the shareholder "exercising choice to remain a stockholder in the firm."<sup>84</sup> In this case, however, the court categorized the threat under its second classification: a substantive threat to shareholders' economic interests.<sup>85</sup> This kind of threat arises when the amount of consideration being offered is inadequate in the eyes of the board.<sup>86</sup> In these cases, removal of the decision to accept or reject the offer by institution or retention of defensive measures is not proper, but this does not necessarily mean that all defensive measures must come down immediately.<sup>87</sup> Measures that function to increase the value that will devolve upon stockholders at the end of the day may, and should, remain effective until they either hinder the process or are no longer needed.<sup>88</sup>

Continued validity of the poison pill was therefore contingent on its effectiveness as a tool for advancing shareholder interests either as a negotiating tool to permit the corporation to fulfill its role as auctioneer,

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crucial point to revisit when dissecting *Paramount v. QVC*. The court noted that "[a] reasonable shareholder could prefer the restructuring to the sale of his stock for \$74 in cash now, but a reasonable shareholder could prefer the reverse." *Id.* The court stated this even after noting that the restructuring was ostensibly worth two dollars per share more than the cash bid, though this amount was "inherently a debatable proposition." *Id.* at 795. For these statements to be consistent, price could not have been the final arbiter. *See id.*

81. *Id.* at 796. "The danger that it poses is, of course, that courts—in exercising some element of substantive judgment—will too readily seek to assert the primacy of their own view on a question upon which reasonable, completely disinterested minds might differ." *Id.*

82. *Id.* at 797. It is interesting to note the similarity between these observations by the Chancellor and the broad definition of an auction in *Paramount*. Compare *id.* at 797 with *Paramount v. QVC*, 637 A.2d 34, 47 (Del. 1994).

83. *Interco*, 551 A.2d at 797.

84. *Id.* As an example of a structurally coercive offer, the court pointed to the all-too-common two-tier front-end loaded tender offer. *Id.*; see *supra* note 26 (defining a front-end loaded two-tier tender offer). The court also identified a "structurally non coercive offer that contained false or misleading material information" as falling within this category. *Interco*, 551 A.2d at 797 n.10.

85. *Id.* at 798.

86. *Id.* at 797

87. *See id.*

88. *Id.* at 797-98.

or some other non-self-interested goal.<sup>89</sup> Although in some rare cases it may be proper for a board to deny shareholders the option of accepting an offer by retaining a poison pill, this was not such a case.<sup>90</sup> There was no great threat posed by the CCA bid over the repurchase agreement because the values were so close, and indeed, the CCA bid may have been worth more after taking into account the contingencies in the market.<sup>91</sup>

## 2. *Mills Acquisition Co. v. Macmillan, Inc.*

The next significant case to address this *Revlon* duty to auction was *Mills Acquisition Co. v. Macmillan, Inc.*<sup>92</sup> In *Mills*, the management of Macmillan, a large publishing, educational, and informational services company, recognized that Macmillan was a likely target of an unsolicited takeover bid.<sup>93</sup> To avoid a hostile takeover, various defensive tactics were instituted,<sup>94</sup> and in the course of a lengthy battle for control between as many as six possible suitors that included a partial break-up of the company, two bidders emerged as serious contenders<sup>95</sup> — a group of companies owned by Robert Maxwell, and Kohlberg Kravis Roberts & Co. (KKR).<sup>96</sup>

As the bidding process proceeded, management gave KKR many highly questionable, and some clearly impermissible, advantages.<sup>97</sup> Through

89. *Id.* at 798.

90. *Id.*

91. *Id.* at 799-800. The court's final discussion focused on whether a sale of the Ethan Allan subsidiary could be enjoined as an improper defensive measure. *Id.* The court concluded that so long as the board acted in good faith to achieve a fair price for the subsidiary, there would be no net loss to the shareholders, and therefore the action was reasonable, even in response to the minimal threat imposed by the CCA bid. *Id.* at 800-01.

92. 559 A.2d 1261 (Del. 1989).

93. *Id.* at 1265.

94. *Id.* at 1265-66. The techniques used in this case included a major corporate restructuring that vested absolute majority control of the restructured company in the hands of top level management. *Id.* at 1265. These individuals also took control of an employee stock option plan (ESOP), *id.*, and subsequently adopted a Rights Plan, commonly known as a "poison pill," to which the ESOP was exempt. *Id.* at 1265-66. Several lucrative severance contracts, known as "golden parachute" agreements, were also instituted for several top executives in the event of a hostile takeover. *Id.*

95. *Id.* at 1272 & n.17, 1274.

96. *Id.* at 1272.

97. *Id.* at 1272-74. A partial list of these indiscretions is noted here for perspective. Macmillan management provided confidential financial information to KKR and



bidding "tips" and disclosure of other internal, nonpublic financial information, KKR finally achieved the highest bid and the board's recommendation, despite Maxwell's repeated emphasis that he was willing to exceed any other bid with an unqualified cash offer.<sup>98</sup> Maxwell sued, seeking to enjoin the lockup agreement, termination fees, and the payment of expenses that Macmillan had granted to KKR.<sup>99</sup>

The Delaware Supreme Court held that there was no justification for the Macmillan board's continuing hostility toward Maxwell after the board had decided to sell the entire company and abandon any further restructuring attempts.<sup>100</sup> The court stated that "[f]urther discriminatory treatment of a bidder, without any rational benefit to the shareholders, was unwarranted."<sup>101</sup> The proper objective was to obtain the highest price reasonably available for the company, "provided it was offered by a reputable and responsible bidder."<sup>102</sup> There was clear impropriety on the part of certain board members who had a personal financial stake in the outcome,<sup>103</sup> fraud was perpetrated upon the board by them,<sup>104</sup> and the board virtually abandoned its oversight functions.<sup>105</sup>

In discussing the scope of the board's responsibilities, the court clearly noted that there was an active bidding process in progress, and the board's role as auctioneer had been invoked under *Revlon*.<sup>106</sup> "At a minimum, *Revlon* requires that there be the most scrupulous adherence to

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repeatedly denied Maxwell the same information. *Id.* at 1272, 1274 n.20. Management set a deadline for bids, and told Maxwell of the deadline the day before, giving him less than 24 hours before to prepare a bid after giving KKR a week; they then negotiated with KKR all night after the deadline to exceed Maxwell's bid. *Id.* at 1273-74. In another round of bidding, Macmillan's Chairman and Chief Executive Officer, Edward P. Evans telephoned a representative of KKR and "tipped" Maxwell's bid, disclosing that the bids were considered "a little close." *Id.* at 1275. Finally, Macmillan led Maxwell to believe that he had made the highest offer when KKR had actually topped his all cash offer with a mixed offer of cash and securities, causing Maxwell to miss the opportunity to make good on his promise to beat any other offer. *Id.*

98. *Id.* at 1274-75.

99. *Id.* at 1278.

100. *Id.* at 1282. The court was careful to note in its analysis that this case did not involve the question of whether *Revlon* duties devolved at all. Instead, the issue was the scope of board's duty once an auction had begun and *Revlon* duties applied. *Id.* at 1285. "What we are required to determine here is the scope of the board's responsibility in an active bidding contest once their role as auctioneer has been invoked under *Revlon*. Particularly, we are concerned with the use of lockup and no-shop clauses." *Id.*

101. *Id.* at 1282.

102. *Id.*

103. *Id.* at 1282-83.

104. *Id.* at 1283-84.

105. *Id.* at 1281-82.

106. *Id.* at 1285.

ordinary principles of fairness in the sense that stockholder interests are enhanced, rather than diminished, in the conduct of an auction for the sale of corporate control.<sup>107</sup> Repeatedly emphasizing that the directors' sole responsibility is to act for the shareholders' benefit, the court found that defensive tactics are only permissible if they substantially or materially enhance general stockholder interests.<sup>108</sup>

### 3. *Paramount Communications, Inc. v. Time, Inc.*

The next case to discuss a possible duty to auction was *Paramount Communications, Inc. v. Time, Inc. (Time-Warner)*.<sup>109</sup> In *Time-Warner*, Paramount Communications, Inc., and shareholders of Time, Inc., sued to enjoin the merger of Time and Warner, Inc.<sup>110</sup> Time and Warner had negotiated a merger whereby Warner's shareholders, mostly independent parties purchasing stock on the market, would exchange their shares for Time stock, and the new board and management would reflect an equitable combination of both companies.<sup>111</sup> Just after Time sent out detailed proxy statements concerning the approval vote on the merger to the stockholders, Paramount announced an all-cash offer to purchase all outstanding Time shares for well over Time's current trading price.<sup>112</sup> Time responded by abandoning the previous merger agreement with Warner and making an immediate all-cash offer for 51% of Warner's outstanding stock, financed by seven to ten billion dollars of debt.<sup>113</sup> Time continued to reject Paramount's advances and increasing bids.

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107. *Id.*

108. *Id.* The court made statements emphasizing the importance of acting for the shareholders' benefit in the context of three different discussions: the board's duties in conducting the auction, *id.*, the permissibility of the lockup option, *id.* at 1285-86, and the use of a no-shop clause. *Id.* at 1286. In this case, Macmillan granted KKR what is known as a "crown jewel" lockup, a right to purchase the company's most valued assets, and the court noted that serious questions as to its propriety were raised when there was little or no improvement in the final bid as a result of the lockup. *Id.* The court found the no-shop clause was even more limited in its appropriate usage, and "[a]bsent a material advantage to the stockholders from the terms or structure of a bid that is contingent on a no-shop clause, a successful bidder imposing such a condition must be prepared to survive the careful scrutiny which that concession demands." *Id.*

109. 571 A.2d 1140 (Del. 1990).

110. *Id.* at 1141-42.

111. *Id.* at 1145-46.

112. *Id.* at 1147.

113. *Id.* at 1148.

Paramount ultimately filed suit to enjoin Time's acquisition of Warner,<sup>114</sup> and Paramount's suit was consolidated with a suit brought by Time's shareholders seeking the same injunction.<sup>115</sup>

The shareholder plaintiffs alleged that when Time agreed to merge with Warner, Time was put up for sale, triggering *Revlon* duties that required Time's board to treat Paramount's bid and Warner's merger on equal footing.<sup>116</sup> Further, the Time plaintiffs alleged that Time's board failed to seek a control premium for its stockholders and thereby breached its duties, failing to maximize short-term value for shareholders as required by *Revlon*.<sup>117</sup> Paramount alleged that the Chancellor improperly applied the first prong of the *Unocal* test because Time's board could not have reasonably believed that Paramount's bid was a "threat to Time's shareholders and a danger to Time's corporate policy and effectiveness."<sup>118</sup> The second prong, Paramount alleged, was also improperly decided because when Time's board denied stockholders the chance to consider or respond to Paramount's offer, it did so to perpetuate itself in office and not as a reasonable response in relation to the Paramount threat.<sup>119</sup>

The court chose not to frame the issue in terms of when a corporation must abandon its long term plans to maximize short-term shareholder value,<sup>120</sup> but in terms of when *Revlon* duties attach. Specifically, "[d]id Time, by entering into the proposed merger with Warner, put itself up for sale?"<sup>121</sup> The court refused to base its decision on a "change of control" as the Chancellor had done. Instead, it concluded that Time did not make "the dissolution or break-up of the corporate entity inevitable," and therefore *Revlon* duties were inapplicable and the board was not under a duty to maximize short-term profits.<sup>122</sup> The court reasoned that "generally speaking and without excluding other possibilities,"<sup>123</sup> two circumstances trigger *Revlon* duties: (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company,"<sup>124</sup> and (2) when "in

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114. *Id.* at 1149.

115. *Id.* at 1141-42.

116. *Id.* at 1149.

117. *Id.*

118. *Id.* This was especially true since, under the stated terms of the merger, Warner shareholders would end up with approximately 62% of the resulting company's stock, so the company would be sold in either case. *Id.*

119. *Id.*

120. *Id.* at 1150.

121. *Id.*

122. *Id.*

123. *Id.* This language becomes a key plank in the court's reasoning in *Paramount v. QVC*.

124. *Id.* (citing *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988)).

response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company."<sup>125</sup> It distinguished these two situations from the situation in which "the board's reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation's continued existence," to which *Revlon* duties do not attach.<sup>126</sup>

The court rejected Paramount's argument that either the board's subjective intent or the adoption of defensive measures resulted in a change of control, stating that *Revlon* does not apply to "corporate transactions simply because they might be construed as putting a corporation either 'in play' or 'up for sale.'"<sup>127</sup> Further, the court also found that recasting the merger as a purchase rather than a stock for stock exchange did not evidence Time's abandonment of its strategic plan or make a sale inevitable.<sup>128</sup> Therefore, Time's board was not under a duty to maximize short-term shareholder value as required by *Revlon*, but was free to pursue a strategic plan driven by long-range goals.

With *Revlon* carefully tucked away, the Time board's decisions were entitled to the protection of the business judgment rule.<sup>129</sup> Because the board adopted defensive measures, a *Unocal* analysis was required before the business judgment rule could attach.<sup>130</sup> The first step in this analysis was to determine if there was a threat to Time's corporate policy and effectiveness.<sup>131</sup> In this regard, Paramount adopted as its argument the bipartite structure of *Interco*<sup>132</sup> for determining when there is a threat. Paramount concluded that because its offer was all cash for all

This language appears verbatim in the text because although its meaning may have been clear to the court at the time, its interpretation in *Paramount v. QVC* showed that these simple words were almost universally misunderstood. See *Paramount v. QVC*, 637 A.2d 34, 47 (Del. 1994).

125. *Time-Warner*, 571 A.2d at 1150. It was the second scenario that the court used to describe the actual events in *Revlon*. *Id.*

126. *Id.*

127. *Id.* at 1151. In this language, the court declined to do exactly what it did in *Paramount v. QVC* when it conditioned the existence of *Revlon* duties on a change in control. See *Paramount v. QVC*, 637 A.2d at 45-46.

128. *Time Warner*, 571 A.2d at 1150.

129. See *supra* notes 22-25 and accompanying text (discussing the presumptions of the business judgment rule). The decision to expand Time's business through a strategic merger with Warner was evaluated under this standard and found to be reasonable. *Time-Warner*, 571 A.2d at 1151-52.

130. *Time Warner*, 571 A.2d at 1150.

131. *Id.* at 1152.

132. See *supra* note 77-82 and accompanying text.

shares and fell "within a range of values a shareholder could reasonably prefer,"<sup>133</sup> no threat arose from the offer.<sup>134</sup>

The court disagreed, and in the process rejected the two part structure<sup>135</sup> for analyzing the first element of the *Unocal* test used by the Chancellor in *Interco*.<sup>136</sup> The court considered the "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact of 'constituencies' other than shareholders . . . the risk of nonconsummation, and the quality of securities being offered in the exchange"<sup>137</sup> and found that three of Time's concerns supported a finding that Paramount's offer was a threat.<sup>138</sup>

The court then considered whether the restructuring of the Time-Warner transaction from a stock for stock merger to an outright purchase was a reasonable response to the threat posed by the Paramount all cash bid.<sup>139</sup> Paramount argued that Time's response was unreasonable because it deprived the shareholders of the control premium they would receive under Paramount's higher offer.<sup>140</sup> Again the court was unpersuaded, finding that because the board's actions were not coercive in nature, were aimed at the "carrying forward of a pre-existing transaction in altered form," and did not preclude Paramount from bidding on the combined Time-Warner entity or making its offer more attractive, the response was reasonable in relation to the threat posed.<sup>141</sup> The court reasoned that "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy."<sup>142</sup>

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133. *Time-Warner*, 571 A.2d at 1152. The fact that Paramount's offer was all-cash for all of Warner's stock is significant because it removes the coerciveness of the typical two-tier tender offer, which was present in *Unocal*. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1984).

134. *Time-Warner*, 571 A.2d at 1152.

135. *Id.* at 1153; see *supra* notes 82-91 and accompanying text; *BNS, Inc. v. Koppers*, 683 F. Supp. 458 (D. Del. 1988).

136. *Time-Warner*, 571 A.2d at 1153. The court specifically disapproved of the "narrow and rigid construction of *Unocal*," used by the Chancellor, and opted for an "open-ended analysis . . . not intended to lead to a simple mathematical approach." *Id.*

137. *Id.* (citing *Unocal v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

138. *Id.* These three concerns were: (1) the risk that "Time shareholders might tender into Paramount's cash offer in ignorance," without a complete understanding of the benefits of the Warner transaction; (2) that the bid would introduce uncertainty that would skew the comparative analysis; and (3) that the timing of the offer was intended to confuse. *Id.* These three facts sufficiently showed that there was a threat to corporate policy. *Id.*

139. *Id.* at 1154.

140. *Id.*

141. *Id.* at 1154-55.

142. *Id.* at 1154. These words would come back to haunt the court in *Paramount*

Many believed after *Time-Warner* that the court had clarified its stance on when *Revlon* duties attach, fixing that time at when a corporation's breakup becomes inevitable.<sup>143</sup> This, however, proved not to be the case.

### III. *PARAMOUNT COMMUNICATIONS, INC. v. QVC NETWORK, INC.*<sup>144</sup>

#### A. *Facts*

In the late 1980s, Paramount began investigating candidates in the entertainment, media, and communications industry for a possible merger or acquisition.<sup>145</sup> In the rapidly evolving field of entertainment and communications, Paramount saw such a merger or acquisition "as desirable, and perhaps necessary, to keep pace with competitors."<sup>146</sup> Cautious, however, about selecting an appropriate merger candidate, the board adopted a "poison pill" Rights Agreement to make Paramount unattractive to any hostile takeover attempts.<sup>147</sup> The Paramount board made its first attempt at strategic expansion through an effort to acquire Time, Inc., but was ultimately unsuccessful.<sup>148</sup>

As early as 1990, Paramount had fixed its sights on Viacom as another possible merger candidate.<sup>149</sup> The most recent round of negotiations between the two companies began at a dinner meeting on April 20, 1993, between Martin S. Davis, Paramount's chairman and chief executive officer, and Sumner M. Redstone, chairman, chief executive officer, and controlling stockholder of Viacom,<sup>150</sup> and by July serious negotiations were underway.<sup>151</sup> The proposed merger would make Davis the chief executive officer of the new company, with Redstone remaining the con-

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v. *QVC* when they were "misinterpreted" by the parties in that case. See *Paramount v. QVC*, 637 A.2d 34, 46-47 (Del. 1994).

143. *Time-Warner*, 571 A.2d at 1150; see also Policastro, *supra* note 74 (discussing the implications of *Time-Warner* on the duty to auction); Gentile, *supra* note 10, at 903 & n.58 (noting that many commentators, through *Time-Warner*, limited the application of *Revlon* duties to circumstances involving a break-up).

144. 637 A.2d 34 (Del. 1994).

145. *Id.* at 38.

146. *Id.*

147. *Id.* at 39.

148. *Id.* at 38; see *supra* notes 109-43 and accompanying text; *Time-Warner*, 571 A.2d 1140 (Del. 1990).

149. *Paramount v. QVC*, 637 A.2d at 38.

150. *Id.*

151. *Id.*

trolling stockholder, but the negotiations broke down when the parties could not agree on the price or terms of a stock option Viacom demanded.<sup>152</sup> Redstone offered a package of cash and stock with a market value of approximately \$61 per share, but Davis wanted at least \$70 per share.<sup>153</sup>

Shortly after negotiations with Viacom broke down, Davis learned of QVC's potential interest in Paramount.<sup>154</sup> Davis told Barry Diller, chairman, chief executive officer, and a substantial stockholder of QVC, that Paramount was not for sale.<sup>155</sup>

Discussions between Paramount and Viacom resumed in August and early September, and resulted in a proposed transaction.<sup>156</sup> The Paramount Board unanimously approved the Original Merger Agreement on September 12, 1993 whereby Paramount would merge with and into Viacom by means of a two-tier offer consisting of a combination of cash and stock that was front-end loaded and highly coercive.<sup>157</sup> Central to the negotiations were several defensive measures insisted upon by Viacom, including a "No-Shop" provision, a Termination Fee, and a Stock Option Agreement.<sup>158</sup>

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152. *Id.* The stock option eventually agreed upon was one of the defensive measures invalidated by the court. *See id.* at 50.

153. *Id.*

154. *Id.*

155. *Id.* It is interesting to note that Diller and Davis were not entirely unacquainted with each other. Diller, now with QVC, had served as chief executive officer of Paramount Pictures Corporation, the motion picture studio subsidiary of Gulf & Western Inc. Mr. Diller left Paramount Pictures in 1984, one year after Mr. Davis became chairman and chief executive officer of Gulf & Western, which was later renamed Paramount Communications, Inc. Diller went on to serve as chairman and chief executive officer of Fox, Inc., for 12 years before joining QVC in January of 1993. *See QVC Network, Inc. v. Paramount Communications, Inc.*, 635 A.2d 1245, 1248 n.4 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994) [hereinafter *Chancery Opinion*]. This was actually a strange kind of homecoming.

156. *Paramount v. QVC*, 637 A.2d at 39.

157. *Id.* The offer was for 51% cash and a "back-end" of various securities. *Id.* In a two-tier front-end loaded tender offer, shareholders are typically coerced into participating in the merger quickly so as to receive cash in the front-end and avoid being left with the often questionable securities in the back-end. *See supra* note 26 (defining a two-tier front-end loaded offer).

158. *Chancery Opinion*, 635 A.2d at 1249-50; *Paramount v. QVC*, 637 A.2d at 49. The termination fee actually began at \$150 million but was negotiated down to \$100 million. *Chancery Opinion*, 635 A.2d at 1250. The stock option permitted Viacom to purchase 19.9% of Paramount's stock at \$69 per share. *Id.* at 1251; *Paramount v. QVC*, 637 A.2d at 39. In itself, this was not so unusual, but the other two features added to the strength of this defensive measure. The Stock Option Agreement also contained a "Note Feature" and a "Put Feature." *Id.* The "Note Feature" freed Viacom from coming up with any cash, permitting it to exercise the option with a senior subordinated note. *Id.* The "Put Feature" permitted Viacom to simply ask for the

On September 20, 1993, Diller sent a letter to Davis proposing a merger by which QVC would acquire Paramount for approximately \$80 per share in a two-tier, front-end loaded, highly coercive combination of cash and securities.<sup>160</sup> After numerous delays, and in light of the potent defensive tactics in the Original Merger Agreement, QVC filed an action to enjoin enforcement of the defensive measures<sup>160</sup> and publicly announced an \$80 cash tender offer on October 21, 1993.<sup>161</sup> In a lengthy opinion, the court of chancery preliminarily enjoined Paramount from taking any action to facilitate the consummation of the Paramount-Viacom Original Merger Agreement, amending its poison pill Rights Agreement, or exercising any portion of the Stock Option Agreement.<sup>162</sup>

### B. Analysis Under Existing Precedent

The Delaware Supreme Court began its analysis with the business judgment rule, acknowledging the importance of trusting the board of directors with managerial decisionmaking.<sup>163</sup> It noted, however, that en-

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difference between the \$69 option price and the current market price if it chose not to exercise the option. *Id.* This provision also appears reasonable on its face, but because there was no cap on how much the "Put Feature" could be worth, when the price of the stock rose to well over \$100 per share the value of the "Put Feature" became unreasonable. *Id.*

159. *Paramount v. QVC*, 637 A.2d at 39.

160. *Id.* at 40. The initial question in this case was whether the Chancery Court should have enjoined the imposition of the defensive measures in the Original Merger Agreement between Paramount and Viacom. *Id.* at 36-37. In Delaware, an injunction is proper if the plaintiff demonstrates a reasonable probability of success on the merits, that some irreparable harm will occur without the injunction, and that the balance of equities or hardships favors the grant of injunctive relief. *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173, 179 (Del. 1986). There is no doubt that QVC would have suffered irreparable harm if defensive measures remained in place because Paramount and Viacom would have completed their merger by the time a court rendered a final decision. Thus, the question becomes whether QVC had a reasonable probability of success on the merits. Success on the merits will often depend on what level of scrutiny the court applies, and what the test that level of scrutiny requires. *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 111 (Del. 1986) ("Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation."). Where the business judgment rule applies, courts will give deference to the decisions of the directors and will presume their good faith. *Revlon*, 506 A.2d at 180.

161. *Paramount v. QVC*, 637 A.2d at 40.

162. *Chancery Opinion*, 635 A.2d at 1245.

163. *Paramount v. QVC*, 637 A.2d at 41-42. As in its general application, the burden



hanced scrutiny is proper under certain circumstances.<sup>164</sup> Two aspects

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to rebut the presumption of the business judgment rule lies squarely on the plaintiff. See *supra* notes 21-23 and accompanying text; Lipton & Brownstein, *supra* note 25, at 1404 & n.16 (citing *Johnson v. Trueblood*, 629 F.2d 287, 292-93 (3d Cir. 1980)).

164. *Paramount v. QVC*, 637 A.2d at 42. The court listed five cases in which enhanced scrutiny has been applied. Of these five cases, three have been previously discussed in this article. For *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1984), see *supra* part II.A; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), see *supra* part II.B; and *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1989), see *supra* part II.C.2. The court also listed *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985), and *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990).

In *Moran*, the Delaware Supreme Court analyzed the validity of the Poison Pill Rights Plan for the first time. The board of Household International, Inc. had adopted a Rights Plan giving stockholders a Right if either an offer was made for at least 30% of Household's outstanding shares or if a single entity or group acquired 20% of the company's shares. *Moran*, 500 A.2d at 1348-49. Once a shareholder received a Right, it could be exercised either to purchase 1/100 of a share of preferred Household stock for \$100 or to purchase \$200 worth of the stock of the tender offeror for \$100. *Id.* at 1349 (this is commonly known as a flip-over poison pill provision).

The court analyzed the validity of the poison pill on two levels, first inquiring whether the board had the power to adopt this type of measure at all under Delaware Corporate Law, *id.* at 1351-55, and if so, whether it breached its fiduciary duties by doing so in this case. *Id.* at 1355-57. As to the first question, the court read the controlling statutes broadly and found that the Household Board was justified in both issuing the rights, and in purchasing the shares of the tender offeror as a form of "Anti-destruction" clause, even though their true purpose was to deter a coercive two-tier tender offer. *Id.* at 1351-52; see DEL. CODE ANN. tit. 8, § 157 (1994) (authorizing a corporation to create and issue securities, rights or options); DEL. CODE ANN. tit. 8, § 151(g) (1994) (permitting the board to issue stock by resolution without stockholder approval); DEL. CODE ANN. tit. 8, § 203 (1994). The requirement that an offeror comply with certain notice requirements, also was not inconsistent with the use of a poison pill in this case. *Moran*, 500 A.2d at 1352 n.9, 1353; see DEL. CODE ANN. tit. 8, § 203 (1994). As if this was not enough justification for its decision, the court also noted that the Household Board was authorized to enact the Rights Plan under the section that gives them the power to manage the corporation's "business and affairs." See DEL. CODE ANN. tit. 8, § 141(a) (1994); *Moran*, 500 A.2d at 1353 n.11. The Board also did not usurp the shareholder's ability to receive hostile bids because there were several ways for a hostile bidder to avoid the provisions of the poison pill. *Id.* at 1353-54 (listing the options of a hostile bidder as (1) "tendering with a condition that the Board redeem the rights, (2) tendering with a high minimum condition of shares and Rights, (3) tendering and soliciting consents to remove the Board and redeem the Rights, (4) to acquiring 50% of the shares and causing Household to self-tender for the rights," or (5) forming a group and acquiring 19.9% of the stock and soliciting proxies "to remove the Board and redeem the Rights"). In its final discussion of this point, the court also pointed out that, although the structure of the poison pill made it difficult for a potential purchaser to wage a proxy contest, the voting power of the individual shares did not diminish. *Id.* at 1355. The court concluded that the Chancellor's decision that the effect on proxies would be minimal was supported by sufficient evidence and the proxy rules were not an inhibition on the stockholders' rights. *Id.*

of this case required application of enhanced scrutiny: it involved a change of control, thereby bringing the board under enhanced *Revlon* duties,<sup>165</sup> and defensive measures requiring analysis under the *Unocal* test.<sup>166</sup> These two tests are common enough, and it is not the court's application of these tests that makes this case noteworthy. Rather, it is the court's choice of which test to apply under these circumstances that is significant. Therefore, any critical analysis of this opinion must embrace the goals that motivated the court to choose its test, and then evaluate how well that test furthered those ends. The crux of this case, and the place to begin, is the reasoning used to conclude that Paramount's *Revlon* duties had arisen. The court stated that its primary reason for applying *Revlon* duties was that a "change of control" had taken place.<sup>167</sup>

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On the second issue, more relevant in hindsight, the court discussed whether the board of directors was entitled to the presumption of the business judgment rule when adopting a poison pill. *Id.* at 1355-56. After noting that there was no contention that the directors acted in bad faith or to entrench themselves in office, the court applied the two prong test set forth in *Unocal* to determine whether the business judgment rule attached. *Id.* at 1356. As to the first prong, the court found that Household's adoption of the Rights Plan was in response to "what it perceived to be the threat in the market place of coercive two-tier tender offers." *Id.* The court then dismissed Moran's contention that the Household Board was not entitled to the presumption of the business judgment rule because it did not make an informed decision by noting that a plaintiff must show gross negligence when attacking the business judgment of the directors, *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), and that this could not be shown when the directors received information on the essentials of the plan, and a summary of relevant takeover law, and they engaged in "extended discussion" with knowledgeable counsel. *Moran*, 500 F.2d at 1356. As to the second prong of *Unocal*, the court quickly concluded that given the board's research, and the fact that an insider was the aggressor, it was reasonable for the board to adopt a poison pill as a defense. *Id.* at 1357. Therefore, the adoption of the poison pill was in all respects appropriate, and a new precedent was set.

165. *Paramount v. QVC*, 637 A.2d at 42; *see supra* note 69-70 and accompanying text (discussing *Revlon* duties).

166. *Paramount v. QVC*, 637 A.2d at 42; *see supra* notes 35-39 and accompanying text (discussing the *Unocal* test). The court distinguished these two types of scrutiny from the more exacting standard applied where actual self-interest is present and affects a majority of the directors approving a transaction. *Paramount v. QVC*, 637 A.2d at 42 n.9. In such a case, a court will determine whether the transaction is "entirely fair to the stockholders." *Id.*; *see infra* notes 284-88 and accompanying text (applying the *Weinberger* entire fairness test).

167. *Paramount v. QVC*, 637 A.2d at 51.

## 1. Change of Control—Implication of *Revlon* Duties

Existing precedent dictated two scenarios that give rise to a board's duty as auctioneer: "[W]hen a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" or "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company."<sup>168</sup> In this case, however, neither of these scenarios existed. Paramount had not initiated a bidding process but rejected QVC's bids at every turn.<sup>169</sup> Paramount's board also had not abandoned its long-term strategy, but rather first considered a combination with Viacom because of its "strategic fit."<sup>170</sup> Therefore, if the *Revlon* duty to maximize shareholder profit were to arise, it must devolve from another source.<sup>171</sup> This source was dicta from *Mills Acquisition Co. v. Macmillan, Inc.*<sup>172</sup> and *Barkan v. Amsted Industries, Inc.*<sup>173</sup>

Ironically, the court previously spoke only once of these two cases in close proximity to each other, and without reference to this usage.<sup>174</sup> The language in *Barkan*<sup>175</sup> is more prone to the reading the court gave it in *Paramount v. QVC*, but neither case had been previously understood to stand for the proposition that any change of control required the board to maximize shareholder value.<sup>176</sup> When the language the

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168. *Time-Warner*, 571 A.2d 1140, 1150 (1990).

169. See *Paramount v. QVC*, 637 A.2d at 37-41.

170. See *id.* at 38-39; *Chancery Opinion*, 635 A.2d 1245, 1248, 1269-70 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994).

171. In the sense that a the duty to maximize short-term profit had to come from somewhere, it comes from the cases noted in the text. However, the court clearly stated that the true reason for the rule in this case was its desire to protect minority shareholder interests. See *Paramount v. QVC*, 637 A.2d at 42.

172. 559 A.2d 1261 (Del. 1989); see *supra* notes 92-108 and accompanying text.

173. 567 A.2d 1279 (Del. 1989).

174. The one case where the Delaware Supreme Court cited both *Mills* and *Barkan* for the same proposition was in *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 & n.36 (Del. 1993) (generally referring to the business judgment rule in the context of a merger or sale).

175. The phrase the court extracted reads as follows: "We believe that the general principles announced in *Revlon*, in *Unocal Corp. v. Mesa Petroleum Co.*, Del.Supr., 493 A.2d 946 (1985), and in *Moran v. Household International, Inc.*, Del.Supr., 500 A.2d 1346 (1985) govern this case and every case in which a fundamental change of corporate control occurs or is contemplated." *Paramount v. QVC*, 637 A.2d at 46 (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

176. On the contrary, the Court of Chancery opinions following *Mills* and *Barkan* note that there is "no single blueprint that a board must follow to fulfill its duties" even in change of control situations. *Roberts v. General Inst. Corp.*, Fed. Sec. L. Rep. ¶ 95,465, 16 DEL. J. CORP. L. 1540 (Del. Ch. 1990); *Freedman v. Restaurant Assoc. Indus., Inc.*, Fed. Sec. L. Rep. ¶ 95,617, 16 DEL. J. CORP. L. 1462 (Del. Ch. 1990)

court extracted from *Barkan* is put back into its original context, the court's deconstructionism becomes potently evident.

In *Barkan*, the court stated that the principles of *Revlon* govern in every case in which a "fundamental change of corporate control occurs or is contemplated," but explicitly noted that the *general principles* of *Revlon*, *Unocal*, and *Moran v. Household Int'l Inc.* control: "[T]he basic teaching of these precedents is simply that the directors must act in accordance with their fundamental duties of care and loyalty."<sup>177</sup> The court went on to emphasize that

a court evaluating the propriety of a change of control or a takeover defense must be mindful of "the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." Nevertheless, *there is no single blueprint that a board must follow to fulfill its duties . . . .* Rather, a board's actions must be evaluated in light of relevant circumstances to determine if they were undertaken with due diligence and in good faith. If no breach of duty is found, the board's actions are entitled to the protections of the business judgment rule.<sup>178</sup>

The court in *Barkan* was not concerned with creating a duty to auction or establishing a new trigger after which a board must maximize short-term share value; it was trying to do exactly the opposite. There is no need to paraphrase the court's intentions when the actual language of *Barkan* is forthright:

Revlon does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest. Revlon is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders.<sup>179</sup>

It is clear from this statement that *Barkan* cannot realistically be construed as creating a duty to auction to maximize short-term value whenever there is a change of control, as the court concludes in *Paramount v. QVC*.<sup>180</sup> The language in *Mills* is similarly clear in stating that although the court applied a duty to maximize short-term value, the court's

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(specifically noting that the board was not under a duty to auction the company even when the transaction involves the sale of the enterprise); *see also In re Vitalink Communications Corp. Shareholders Litig.*, Fed. Sec. L. Rep. ¶ 96, 585, 17 DEL. J. CORP. L. 1311, 1324-25 (Del. Ch. 1991) (noting the enhanced scrutiny required in change of control situations but using a "reasonableness in the circumstances" test to determine what is in the stockholders' best interests).

177. *Barkan*, 567 A.2d at 1286.

178. *Id.* at 1286 (emphasis added) (citations omitted).

179. *Id.* (emphasis added).

180. *Paramount v. QVC*, 637 A.2d 34, 43-44 (Del. 1994).

primary concern was to scrupulously advance shareholder "fairness."<sup>181</sup> *Mills* also involved what the target board acknowledged was a clear auction for the company wherein both bidders planned to divide the company if they prevailed.<sup>182</sup> There was little question that *Revlon* duties applied. So why did the court extrapolate from the dissimilar facts of *Mills* a duty to auction for Paramount? The court's intention and underlying principal has remained the same, and it is as noble now as it was then: to ensure that shareholder interests are protected.

The extensive preliminary discussion of the court's commitment to protect the voting rights of shareholders shows that protecting shareholder rights was the reason the court expanded the language in *Barkan* and *Mills* to create a more broadly applicable duty to auction.<sup>183</sup> The court asserted that minority shareholders suffer a "significant diminution" in voting power when a single person or group acquires a controlling share.<sup>184</sup> For such a sacrifice, shareholders should receive a "control premium," testifying to the value of a controlling block of shares.<sup>185</sup>

The court was concerned with protecting the interests of the stockholders once control passed to Redstone and his Viacom empire.<sup>186</sup> Before the Paramount-Viacom merger, a "fluid aggregation of unaffiliated

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181. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1264 (Del. 1989).

182. *Id.* at 1266.

183. *See Paramount v. QVC*, 637 A.2d at 42-43.

184. *Id.* at 42. This focus on the diminution of voting rights of majority stockholders when they become a minority implies that their vote is being stolen or otherwise rendered ineffectual. This is hardly the case since their vote will be by tender and stockholders are frequently paid handsomely for their support. If a majority does not tender, they have rejected the offer, just as if they had so told the board at the last shareholder's meeting. The most ironic part of this case is that, notwithstanding its being couched in language of protecting shareholders, the court is actually trying to protect a willing majority from itself and the consequences of its own actions.

185. *Id.* at 43. It is interesting to note that the court would have applied an even more exacting scrutiny if there had been any actual fraud, director self-interest, or a majority "freezeout" of the minority. *See, e.g., Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (testing to see if a transaction involving a cash-out merger was made as a result of director self-dealing). The court, however, would have had no problem if this had been a "going private" acquisition whereby the raider left shareholders with *no position at all* in the target. *See LIPTON & STEINBERGER, supra* note 42, § 9.01. It is ironic that the court requires the board to achieve a bigger control premium when the shareholders have the opportunity to *keep* a minority position, as compared to a simple purchase transaction where the minority, who may not have agreed or who voted against the merger but lost, will receive *no position at all*. In those cases, a simple majority vote is sufficient to satisfy the court that the transaction was equitable to all. *Id.*; Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 *YALE L.J.* 1354, 1357-59 (1978).

186. *Paramount v. QVC*, 637 A.2d at 43.

stockholders" owned a majority of Paramount's voting stock.<sup>187</sup> The court noted that Delaware's General Corporation Law requires approval by a majority vote of the stockholders for many of the most fundamental corporate changes,<sup>188</sup> and this protection becomes ineffectual when one stockholder holds a majority.<sup>189</sup> Further, the Paramount stockholders will have no leverage in the future to demand a control premium or to establish devices to protect their interests after the Paramount-Viacom merger, when they are no longer a majority.<sup>190</sup> The court held that under these circumstances, the Paramount directors had an obligation to act "reasonably to seek the transaction offering the *best value* reasonably available to the stockholders"<sup>191</sup> and to uphold the fiduciary duties that generally attach in a sale of control context.<sup>192</sup>

To avoid implicating *Revlon* duties, Paramount argued that this case should be resolved like *Time-Warner*, where defensive measures against an attacker were permitted to stand and *Revlon* duties did not attach.<sup>193</sup>

187. *Id.*

188. *Id.* Corporate changes that require approval by a majority of stockholders under the Delaware General Corporation Law include: elections of directors, amendments to the certificate of incorporation, mergers, consolidations, sales of all or substantially all of the assets of the corporation, and dissolution. See DEL. CODE ANN. tit. 8, §§ 211, 242, 251-258, 263, 271, 275 (1993).

189. The court listed, in *Paramount v. QVC*, the powers a controlling stockholder will have:

- (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests.

*Paramount v. QVC*, 637 A.2d at 43. The court failed to note, however, that these powers do not come free from responsibility. A majority stockholder is held to some of the highest burdens of care under scenarios such as those listed by the court. See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1:02 (1993 & Supp. 1994) (noting that absent intervening laws, a majority can deprive a minority of an effective voice in corporate governance or can act in its own interests to the detriment of the minority under pure principles of majority rule).

190. *Paramount v. QVC*, 637 A.2d at 42-43.

191. *Id.* at 43 (emphasis added).

192. *Id.* "[T]he directors must act in accordance with their fundamental duties of care and loyalty." *Id.* (quoting *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989)).

193. *Id.* at 46. Ironically, Paramount was the attacker in *Time-Warner*, and the defensive tactics were used against its hostile bid. See *Time-Warner*, 571 A.2d 1140, 1146-48 (Del. 1990). Now, when Paramount attempts the same actions undertaken by its target only a few years ago, it is proscribed by the court because it chose an

The court remained unpersuaded and distinguished *Time-Warner*, holding that unlike *Time-Warner*, this case involved a change of control.<sup>194</sup>

Although the court's statement of the facts reveals its animosity towards Redstone and Viacom, the court did not find that the directors were self interested or engaged in the type of self-perpetuating transactions<sup>195</sup> against which an auction is intended to protect.<sup>196</sup> There existed none of the silver lining provisions a self-interested board would typically provide for itself, such as golden parachute agreements,<sup>197</sup> the creation of "rabbi trusts,"<sup>198</sup> extended pension plans or long-term employment contracts. The greatest fault the court could ascribe to the

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inappropriate merger candidate, one that had a single majority shareholder. It is likely that the result in this case would have been vastly different if Viacom had been owned by a "fluid aggregation of unaffiliated stockholders." See *Paramount v. QVC*, 637 A.2d at 43.

194. *Id.* at 46-48.

195. *Id.* The only indication of self interested activity is that of Davis in the initial meetings with Redstone when Davis may have conditioned the possibility of a merger on his remaining chief executive officer of the combined entity. See *infra* note 215. Although not clear at this early stage, whatever weak indication of impropriety this may have been, it was in no way enough to taint the entire board of directors with self-serving intentions sufficient to remove the protections of the business judgment rule from its decisions.

196. On the surface, it appears that an auction is *not* intended to protect against director impropriety, but to maximize shareholder value. This, however, fails to acknowledge that except when the directors are acting in their own self-interests to the exclusion of other shareholders, their interests as stockholders coincide with the other stockholders' interests, provided the directors own stock (and they usually do). A director will naturally seek to bolster share value because as a shareholder, the director will benefit. The auction is merely a prophylactic rule that attempts to confine directors to serving no interests other than attaining the highest price per share. Therefore, the primary intended purpose must be to prevent self-interested, self-promoting director misconduct.

197. A "golden parachute agreement" is a special employment agreement between the company and top executives giving the executive extremely lucrative severance pay in the event of a change in control. LOSS & SELIGMAN, *supra* note 26, at 2138. Depending on precisely how lucrative, these agreements are often referred to as either "silver" or "tin" parachutes. *Id.* In 1984, Congress amended the Internal Revenue Code to create a 20% nondeductible excise tax on persons who receive "excess parachute payments." 26 U.S.C. § 4999 (1988 & Supp. 1994). Section 280G provides a comprehensive definition of parachute payments and when they become "excess." 26 U.S.C. § 280G(b) (1988 & Supp. 1994). The Delaware Supreme Court has considered the validity of golden parachute agreements on several occasions. See *Gilbert v. El Paso Co.*, 575 A.2d 1131 (Del. 1990); *Mills Acquisition Co. v. Macmillan, Inc.*, 559, A.2d 1261, 1266 (Del. 1989); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348 (Del. 1988); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985).

198. In merger and acquisition vernacular, a "rabbi trust" is a trust established to fund payment of golden parachute agreements, or other employee benefits, that will come due in the future. LOSS & SELIGMAN, *supra* note 26, at 2138.

Paramount board was that they remained "prisoners of their own misconceptions and missed opportunities to eliminate the restrictions they had imposed on themselves."<sup>199</sup>

Having expanded the duty to auction to all change of control situations, the court still needed to apply this standard to these facts to hold that Paramount's defensive measures in the Original Merger Agreement were impermissible. Because there was a change of control, the court could have done this by finding that Paramount *should have* initiated an auction. Instead, the court held that because QVC wanted to bid when Paramount sold control, Paramount had initiated a type of *de facto* auction. This *de facto* auction was not even foreshadowed by earlier cases.<sup>200</sup>

While it was easier for the court to find an auction was taking place when evaluating the propriety of maintaining the defensive measures in the Original Merger Agreement, the court concluded that enactment of the defensive measures was improper as a breach of the board's duty to act as auctioneer.<sup>201</sup> To arrive at this conclusion, the court must have found that, at the time the measures were adopted, there was already an auction taking place. This is a difficult conclusion, unless it is premised on the rule that all changes of control must result in auctions, especially when, at the time of the Original Merger Agreement, QVC had not yet

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199. *Paramount v. QVC*, 697 A.2d at 50.

200. *Id.* In *Time-Warner*, the court approved of the concept that when a transaction does not involve a "change of control," *Revlon* duties do not attach; but the court had not previously held that in all cases involving a "change of control," *Revlon* duties always do attach. See *Time-Warner*, 571 A.2d 1140, 1150-51 (Del. 1990). The distinction is significant because in the past, *Revlon* duties have always arisen where there is an admitted auction taking place. See, e.g., *Mills*, 559 A.2d at 1266. Never before has the court held that a "de facto" auction could arise merely because a company enters a transaction involving its own sale and there exists another potential acquirer equally interested in being a bidder, *who has not yet submitted a bid*.

201. *Paramount v. QVC*, 637 A.2d at 49, 50. This conclusion is drawn from the phrasing the court used in analyzing the defensive measures. The court did not apply a *Unocal* analysis to these defensive measures alone, or it would have evaluated whether the QVC bid was a threat to corporate policy and effectiveness. Furthermore, the court would have examined the reasonableness of adopting these defensive measures in response to that threat. See *infra* notes 206-35 and accompanying text (applying the *Unocal* test to the facts of *Paramount v. QVC*). Instead, it evaluated whether the Paramount board gave sufficient attention to other "potential bidders." *Paramount v. QVC*, 637 A.2d at 39. This is the heart of an auctioneer's duty, but not part of the board's consideration when adopting defensive measures in a *Unocal* scenario.



made a bid.<sup>202</sup> “The Paramount Board, albeit unintentionally, had ‘initiate[d] an active bidding process seeking to sell itself’ by agreeing to sell control of the corporation to Viacom in circumstances where another potential acquiror (QVC) was equally interested in being a bidder.”<sup>203</sup> At that point, however, there was little indication that QVC was anything more than one of the many suitors that had come calling in the past several years while Paramount had been considering possible mergers or acquisitions in the communications industry.<sup>204</sup> Finding a *de facto* auction is not only a stretch of the facts, but an unruly standard with indiscernible boundaries.<sup>205</sup> Moreover, it prevented the court from analyzing the defensive measures under the *Unocal* standard, a threshold created for that very purpose.

## 2. *Unocal* Analysis

When a corporation adopts defensive measures in response to a threat to corporate control, courts generally apply a simple *Unocal* analysis.<sup>206</sup> In *Paramount v. QVC*, the court acknowledged the applicability of *Unocal*,<sup>207</sup> but did not take the analytical steps required by the test. Rather, the court focused on the change of control that occurred to justi-

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202. *Id.* The Original Merger Agreement was approved by the Paramount Board on September 12, 1993. *Id.* It was not until September 20, after a number of public statements and Redstone’s infamous description of the merger as a “‘marriage’ that would ‘never be torn asunder.’” that Diller sent Davis a letter proposing a merger between Paramount and QVC. *Id.*

203. *Id.* at 47.

204. See *Chancery Opinion*, 635 A.2d 1245, 1258 (Del. Ch. 1993), *aff’d*, 637 A.2d 34 Del. 1994). After the Time-Warner fiasco, it is not surprising that Paramount executives were reluctant to actively pursue any offer they received. See *supra* notes 109-43 and accompanying text. Another irony in this case exists in that had Viacom not presented itself, QVC would likely have been rejected outright and no case would ever have been required. The protections of the business judgment rule after a *Unocal* analysis would have permitted the board to adopt a “just say no defense” and reject all offers. See *Time-Warner*, 571 A.2d at 1152 (“We have repeatedly stated that the refusal to entertain an offer may comport with a valid exercise of a board’s business judgment.”); LOSS & SELIGMAN, *supra* note 26, at 2139 (defining the “just say no defense” as when a target board simply rejects the bidder’s offer as inadequate and does not redeem or invalidate poison pill rights). See generally Robert A. Prentice & John H. Langmore, *Hostile Tender Offers and the “Nancy Reagan Defense” : May Target Boards ‘Just Say No’? Should They be Allowed To?*, 15 DEL. J. CORP. L. 377 (1990).

205. See *infra* text accompanying note 272 (discussing the legal uncertainty of any test triggered by a “change of control”).

206. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985).

207. See *Paramount v. QVC*, 637 A.2d at 36.

fy application of the higher standard and increased duties mandated by *Revlon*.<sup>208</sup>

Without the application of *Revlon* duties, the result would have been vastly different. The court's conclusions in *Time-Warner*, where in *Revlon* duties did not devolve and the analysis concerned only potential violations of *Unocal*,<sup>209</sup> demonstrate the difference such an analysis would have made. In *Time-Warner*, the board was "convinced that Warner would provide the best 'fit' for Time to achieve its strategic objectives."<sup>210</sup> Further, under *Unocal* duties alone, "[t]he refusal to entertain an offer may comport with a valid exercise of a board's business judgment."<sup>211</sup> The court found that "Time's board was under no obligation to negotiate with Paramount"<sup>212</sup> and the directors were not obligated to abandon their corporate plan for long-term shareholder profit.<sup>213</sup>

In this case, the closest the court came to applying the *Unocal* test was reciting the parallel test used in an auction scenario.<sup>214</sup> Applying *Unocal*, the board's actions would have been protected by the business judgment rule after the court addressed the threshold questions of whether the directors had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and whether the defensive measures were reasonable in relation to the threat.<sup>215</sup>

208. *Id.* at 43-46.

209. *Time-Warner*, 571 A.2d 1140, 1151 (Del. 1990).

210. *Id.* at 1152.

211. *Id.* This does not necessarily mean that a "just say no" defense is clearly permissible. By many accounts, the law remains in a state of flux. *See, e.g.*, Prentice & Langmore, *supra* note 204, at 411.

212. *Time-Warner*, 571 A.2d at 1154.

213. *Id.*

214. *Paramount v. QVC*, 637 A.2d 34, 45 (Del. 1994). The test the court recited from *Macmillan* is very similar to a *Unocal* framing of the issue, but set in an auction context. *See id.* at 44. Its application is irrelevant here, however, because the court never saw fit to apply the test and the court's analysis does not reach such questions directly. *Id.*

215. *See Unocal*, 493 A.2d at 955. *Unocal* also requires courts to insure that the directors were not acting "solely or primarily out of a desire to perpetuate themselves in office . . .," but were acting with due care from an informed position, "motivated by a good faith concern for the welfare of the corporation and its stockholders." *Id.* There was no indication in the fact scenario presented by the court that Davis or any of the other board members were acting to perpetuate themselves in office. Testimony submitted to the Court of Chancery, however, indicated that the 1990 negotiations between Paramount and Viacom may have broken down because Mr. Davis insisted that he become CEO and Mr. Redstone retain a voting control upon the merger of the two entities. *See Chancery Opinion*, 635 A.2d 1245, 1248 (Del. Ch.

Since 1983, Paramount has actively pursued a strategic restructuring plan devoted to transforming it into a major entertainment and publishing company, making it well aware of the threat an inadequate merger partner would pose to achieving these goals.<sup>216</sup> It is undisputed that the board was well informed of the strategic plan and saw its implementation as in the best interests of the company and the stockholders.<sup>217</sup> In pursuit of these goals, Paramount unsuccessfully attempted to acquire Time in 1989<sup>218</sup> and thereafter considered merging with or acquiring several other video media companies, with no success.<sup>219</sup> It was not until the Viacom transaction that the board was again satisfied that it had found a company that would fit its long-range strategic goals. An evaluation of the two bidders in this case reveals a strong reason supporting Paramount's view of the QVC bid as a threat to corporate effectiveness, especially considering that it threatened a nearly completed merger with Viacom.

QVC is a general merchandise retailer that sells products nationwide through a televised shopping network that has become one of the leading networks of its kind in the United States.<sup>220</sup> Though it has grown substantially in recent years, QVC is a smaller company than either Viacom or Paramount and controls only a limited number of other enterprises.<sup>221</sup> Viacom is a diversified entertainment and communications company that controls, among other entities, two core networks: MTV Networks and Showtime Networks Inc.<sup>222</sup> These two primary networks control a number of basic cable television networks, including MTV, VH-1, Nickelodeon/Nick at Nite, and premium networks including Showtime,

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1993), *aff'd*, 637 A.2d 34 (Del. 1994). There was no question, however, that the current round of negotiations presumed these two conditions, and were never a point of contention. *Paramount v. QVC*, 637 A.2d at 38.

216. *See Chancery Opinion*, 635 A.2d at 1248.

217. *See id.* The court noted that:

The record establishes that Paramount's board was well informed of Paramount's strategic goals and of the steps taken by management to achieve those objectives. For example, at a board retreat in early May 1993, the board was presented with, and considered, four books detailing Paramount's long-range strategic aims and the alternative methods of achieving them. Management had been exploring alternatives with Viacom, Turner Broadcasting System, Inc. and TCI, as well as other entities that they believed would fit the strategic plan.

*Id.* (citations omitted).

218. *See Time-Warner*, 571 A.2d 1140 (Del. 1990).

219. *Chancery Opinion*, 635 A.2d at 1248.

220. *Id.* at 1247. The company broadcasts television programs that display and discuss an item for sale. *Id.* The price is displayed on the screen with a running tally of how many customers have called in to place an order. *Id.*

221. *Id.* at 1248.

222. *Id.* at 1247.

The Movie Channel, and FLIX.<sup>223</sup> Additionally, Viacom controls a portion of three joint venture cable services: Comedy Central, Lifetime and the All News Channel.<sup>224</sup>

The companies are not on equal footing when considering access to the public, success in the entertainment industry, or product name recognition. The Paramount board undoubtedly feared the new entity would miss out on the strategic advantages of a merger with Viacom should QVC's offer succeed.<sup>225</sup> The board's investigation of the available alternatives, which had been ongoing for as much as a decade, was far more extensive than necessary to satisfy the first prong of the *Unocal* duties.<sup>226</sup> Therefore, the court would have found that the board had reasonable grounds to believe the QVC bid was a threat to corporate policy and effectiveness. Whether the steps taken by the Paramount board were reasonable in relation to the threat posed is a more difficult issue.

As noted by the court, the combination of a No-Shop Provision, a 100 million dollar Termination Fee, and a stock option to purchase almost 20% of Paramount's outstanding stock was a very potent, and arguably "draconian" package of defensive measures.<sup>227</sup> Analyzed individually, however, their effect is more reasonable. As to the Termination Fee, the costs of a transaction approaching ten billion dollars will, in most cases, approach the one hundred million dollar range, and courts have held that a termination fee of approximately 1% is within the range of reasonable-

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223. *Id.*

224. *Id.*

225. *See id.* at 1248. These strategic advantages have been called "synergistic goals" by some commentators. *See Policastro, supra* note 74, at 202-03 (noting that in the period post-*Revlon*, pre-*Time-Warner*, there was some doubt as to whether "friendly negotiations between companies having synergistic goals could be defeated simply by a third-party's higher offer," and concluding that the court could not have intended to take such a drastic step consistent with *Unocal* and its precedents) (citing RONALD J. GILSON, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 387 (1986) ("[T]wo plus two equals four; synergy exists when the answer is five or more.")).

226. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985). It was precisely this type of analysis of strategic "fit" that the court found sufficient to satisfy the information requirements of *Unocal* in *Time-Warner*. *See Time-Warner*, 571 A.2d 1140, 1153-54 (Del. 1990). Time had explored available merger alternatives with various entertainment companies and concluded that Warner, not Paramount, provided the best strategic fit. *Id.*

227. *Paramount v. QVC*, 637 A.2d 34, 39, 50-51 (Del. 1994). The court was most concerned with the Put Feature and the Note Feature of the Stock Option Agreement, which effectively assured Viacom a substantial and limitless payout that it could purchase with senior subordinated debt should the deal fall through. *Id.* at 39.

ness.<sup>228</sup> The No-Shop Provision can also be construed as reasonable as long as a board does not use it to avoid its fiduciary duties. By itself, a No-Shop Provision is not an unreasonable concession for a strong merger candidate to ask of a target when the parties believe an auction is not taking place.<sup>229</sup>

Notwithstanding, the fact that the stock option agreements, “put” and “note” features and no cap on its maximum value had the power alone to end any auction in process, the court would likely find few situations when this would be reasonable absent a clear intention on the part of the raider to bust-up the target.<sup>230</sup> Combined with the other elements of this defensive package, the inclusion of the Stock Option Agreement could easily be described as an overkill.<sup>231</sup> Addressing these items individually, the court should have found that though the stock option agreement was excessive and unreasonable in relation to the threat posed, the Termination Fee and No-Shop Agreements were reasonable and enforceable.

However, the court defined Paramount’s duties more broadly. Because of the perceived change of control, the court expected Paramount not only to evaluate Viacom’s offer in the abstract under a *Unocal* standard, but to compare it to the QVC transaction as required when an auction is already in progress.<sup>232</sup> The court described these duties as: (a) to be

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228. In fact, this precise termination fee was deemed reasonable by the Chancery Court in this case. *Chancery Opinion*, 635 A.2d at 1270-71. The court reasoned that because the fee was negotiated, as is evidenced by the 30% reduction from the originally proposed amount, both parties agreed that the amount of this termination fee would actually be the costs of consummating the transaction, the Termination Fee was a permissible liquidated amount of damages and enforceable. *Id.* The Delaware Supreme Court’s dismissal of this reasoning demonstrates its preoccupation with finding the defensive measures unreasonable. *See Paramount v. QVC*, 637 A.2d at 50.

229. No-Shop provisions have been construed as reasonable in a number of cases, usually when insisted upon by a bidder who is entering into a merger agreement with the target. *See, e.g., Time-Warner*, 571 A.2d at 1151 n.15. However, they are often viewed skeptically by the court. *See supra* note 108.

230. *See supra* note 158 (describing the stock option agreement in *Paramount v. QVC*).

231. One commentator has noted the importance that target management resist “the urge to indulge in tunnel vision, narrowly focused zealotry and overkill.” Fred B. White, III, *Directors’ Duties in Corporate Takeovers, Mergers, and Acquisitions*, in *BANK MERGERS AND ACQUISITIONS*, at 7 (PLI Corp. L. & Practice Course Handbook Series No. 857, 1994). Both parties in a transaction should resist the tendency to load the transaction with “lock up” arrangements, especially before a market test has occurred, because arrangements that are preclusive of competition “are looked at with a jaundiced judicial eye.” *Id.* at part III.

232. Instead of applying the well known *Unocal* test, the court recited a two-part test derived from *Unocal* as stated in *Macmillan* that applies when “competing bidders are not treated equally.” *Paramount v. QVC*, 637 A.2d at 45. The *Macmillan* test requires that “[i]n the face of disparate treatment, the trial court must first examine

"diligent and vigilant" in critically examining both the Paramount-Viacom transaction and the QVC tender offers; (b) to act in good faith; (c) to obtain and act on all material information reasonably available to determine which of these offers, "or an alternative course of action, would provide the best value<sup>233</sup> reasonably available to the stockholders; and (d) to negotiate actively and in good faith with both Viacom and QVC to that end."<sup>234</sup>

The court had no doubt that Paramount's board failed to fulfill these duties under this standard.<sup>235</sup> This was not surprising once the court found that the *Revlon* duty to act as an impartial auctioneer applied. Unaware that such *Revlon* duties had arisen, the Paramount board had no reason to respond to QVC's hostile bid as an impartial auctioneer. Even if it had, however, one final idiosyncrasy of this case would have prevented the Paramount board from attaining what the court thought was the highest value for the stockholders. Specifically, the court's narrow interpretation of what was in the "best interest" of stockholders, namely short-term profits, would have resulted in the same disposition despite Paramount's evaluation of QVC's bid under auction-like conditions since the board's interpretation of "best interest" included long-range planning.

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whether the directors properly perceived that shareholder interests were enhanced." *Id.* Second, "the board's action must be reasonable in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests." *Id.* The court then stated the key features of an enhanced scrutiny test:

(a) [A] judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing . . . . [A] court applying enhanced judicial scrutiny should be deciding whether the directors made a reasonable decision, not a perfect decision . . . . [C]ourts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.

*Id.* Though stating *Macmillan* as the test, the court applied these elements of enhanced scrutiny to whether Paramount had fulfilled its *Revlon* duties. *Id.* at 45-48.

233. *See infra* notes 260-64 and accompanying text (discussing the impact of the court's "best interest" test on long-range corporate planning).

234. *Paramount v. QVC*, 637 A.2d at 48.

235. *Id.* at 49 ("We conclude that the Paramount directors' process was not reasonable, and the result achieved for the stockholders was not reasonable under the circumstances.").

From any angle, *Paramount v. QVC* brought a novel interpretation to the cases the court claimed controlled its actions.

#### IV. THE IMPACT AND APPLICATION OF A DUTY TO AUCTION

Beyond the question of whether the court properly decided *Paramount v. QVC* under existing precedent is the question whether the court should continue down this new path it has embarked upon. The answer depends on whether an auction is in fact an efficient and effective way to protect the interests of the parties involved.<sup>236</sup> Resolution of this inextricably policy laden question requires consideration of the ways in which a corporate auction impacts both society and individual stockholders.<sup>237</sup> For the individual stockholder, the result of an auction is clear: stockholders immediately receive the highest possible amount of cash per share. On a societal level, a well-policed auction has the virtue of reducing director self dealing at shareholder expense. However, these benefits come with some significant costs to both society as a whole and the resulting corporation. These costs are more subtle, and their analysis more complex, than a simple cash equivalent test.<sup>238</sup> They impact four

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236. One would expect the "interests of the parties involved" in a merger or acquisition to include stockholders and the society at large as the two primary interests, but as the investment world has evolved an interesting conflict has developed. Institutional investors now hold close to one half of the total equity of United States companies, and it has been asserted that they do not carry the same motivations as the individual stockholder to further the long-range profitability of a corporation. See Lipton & Rosenblum, *supra* note 13, at 205-06. This would indicate stockholder interests should be considered in two separate categories, one including institutional investors whose primary concern is maximizing short-term share value, and one including the individual investor who is more likely to want to further the long-range success of the enterprise. See *id.* at 206-07; MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 528-29 (1990) (noting the strong incentive institutional investors give their managers to maximize short-term quarterly and annual profit).

237. Especially in Delaware, it is still unclear exactly to what extent a corporate board is under an obligation to consider interests other than the stockholders and when those interests are of sufficient importance to control its actions. See Kreider, *supra* note 26, at 636 (discussing external interests that a board may consider when evaluating a tender offer, including "the presumed effects of a successful offer upon employees, communities, suppliers, creditors, customers, the state and national economies, and community and societal considerations"). As of 1991, at least 29 state legislatures had enacted "Constituency Statutes" permitting boards to consider interests other than those of shareholders. Lipton & Rosenblum, *supra* note 13, at 214-15 & n.83 (citing as examples ILL. ANN. STAT. ch. 32, para. 8.85 (Smith-Hurd Supp. 1990); N.J. STAT. ANN. § 14A:6-1 (West Supp. 1990); N.Y. BUS. CORP. LAW § 717 (McKinney 1989); 15 PA. CONS. STAT. ANN. § 1721(c) (1990)).

238. A simple cash equivalent test appears to be what the court would have preferred, as indicated by its suggestion that the board attempt to quantify the value of stock or other non-cash consideration to achieve an "objective comparison of the alternatives." *Paramount v. QVC*, 637 A.2d at 44.

primary areas: long-range corporate planning,<sup>239</sup> the frequency and likelihood of consensual mergers in the future,<sup>240</sup> the ability of auctioned companies to survive the auction process,<sup>241</sup> and the impact of auctions on remaining minority shareholders in the resulting corporation.<sup>242</sup>

#### A. *Impact of a Duty to Auction on Long-Range Planning*

The impact that a duty to auction will have on long-range planning must be analyzed on two levels: the use of auctions generally and the use of an auction like the one the court expected in *Paramount v. QVC*. The separate analysis is necessary because, unfortunately, the impact is different.

##### 1. The Impact of the Use of Auctions on Planning

In the early-eighties there was a considerable scholarly debate on whether auctioning companies benefited or harmed investors and society as a whole. Though no consensus was ever officially reached because the Delaware Supreme Court apparently decided the issue in *Revlon*, this was the first time scholars carefully analyzed whether an auction of a corporation was beneficial to society and stockholders.<sup>243</sup> Two primary

239. See *infra* notes 243-67 and accompanying text.

240. See *infra* notes 268-72 and accompanying text.

241. See *infra* notes 273-74 and accompanying text.

242. See *infra* notes 275-77 and accompanying text.

243. Two primary groups of opposing views developed. One side consisted of then Professor, now Judge Frank H. Easterbrook and Professor Daniel R. Fischel, who began the debate with two preliminary articles. See generally Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Frank H. Easterbrook & Daniel R. Fischel, *Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 BUS. LAW. 1733 (1981). The opposing group included Lucian A. Bebchuk and Ronald J. Gilson and their series of rebuttal articles. Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23 (1982); see also Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028 (1982); Ronald J. Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51 (1982); Ronald J. Gilson, *A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 STAN. L. REV. 819 (1981). Though this Comment does not adopt wholesale the views of either position, the author believes the reflections of Easterbrook and Fischel more accurately reflect the realities of an auction scenario. See Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982) [hereinafter *Sunk Costs*].



criticisms of auctions were recognized. First, requiring the use of an auction increased the price tag of acquisitions in general and thereby discouraged potential acquirers from bidding.<sup>244</sup> Without the threat of a hostile takeover to force management to use a corporation's resources for their highest and best uses, management could become lax with stockholders in no position to analyze their performance in a meaningful way.<sup>245</sup> Second, auctions place the first bidder at a disadvantage because that bidder must go to the expense of preparing an initial bid and researching the target, receiving no benefit from these additional costs if a second bidder can step in and steal the target away with a marginally higher bid.<sup>246</sup>

In light of these criticisms, it is not in a company's best interest to spend time and effort carefully selecting a merger candidate that will maximize the use of resources in both companies. When management concludes that it must acquire another company to avoid becoming a target,<sup>247</sup> it need only find a good acquisition candidate by watching what others in the industry are doing, regardless of whether this is the

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244. See *Sunk Costs*, *supra* note 243, at 2.

245. *Id.* The argument that the threat of a hostile takeover encourages inefficient managers to improve their performance, entitled the "managerial discipline model" by its critics, has been forcefully challenged. See John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1242-43 (1984); Lipton & Rosenblum, *supra* note 13, at 201-05 ("[T]he threat of a hostile takeover is far more likely to create an attitude of defensiveness on the part of managers than to create an openness to the kind of change and new ideas that might serve to improve business performance.").

246. *Sunk Costs*, *supra* note 243, at 2. As noted in *Sunk Costs*, the primary cost to initial bidders is that they are not compensated for their research in discovering a potential acquisition candidate because the auction leaves no protection for the information they have expended funds and effort to acquire. *Id.* at 4-5. In other areas of the law, such as contract law or real estate law, a person who desires to purchase an item or a plot of land needs not disclose his reasons for doing so, and can thereby benefit from the effort expended to acquire the information through increased profit in the transaction. *Id.* at 5. The securities industry, however, requires extensive disclosure. *Id.* This prevents bidders from benefiting from the funds expended on research and information development unless the first bidder can obtain a bargain purchase price, which is impossible when the law imposes an auction at the whim of an intervening bidder. *Id.* (noting that even the "Saturday Night Special," which permitted a raider to benefit from information development, is no longer permissible under the Williams Act). This lack of benefit from the research process will discourage future companies from spending the money and effort to develop the information when they can ride the coattails of another bidder. *Id.* at 5-6. The result will be a decrease in the scrutiny with which potential acquirers scrutinize the performance of management, resulting in more inefficient management. *Id.* at 6.

247. For an extensive discussion of the factors that make a company vulnerable to a takeover, see 2 BYRON E. FOX & ELEANOR M. FOX, *FOX & FOX CORPORATE ACQUISITIONS AND MERGERS* § 27.07[1][b] (1994).

most efficient combination possible. Conversely, if management concludes that it has become a target that will likely be acquired in the near future, there is little incentive to make long-range plans when it will have no control over either its future or the selection of a merger candidate.<sup>248</sup> Therefore, a rule requiring auctions is likely to decrease, rather than increase, the quantity and quality of long-range planning by corporate boards and management.

## 2. The Impact of an Auction as Defined by *Paramount v. QVC*

The key to success in business is long-range planning. Through careful planning, a company preempts impending disasters and profits from predicted trends. Planning for a hostile tender offer or a strategic merger combination is no less important than any other kind of planning, and in many cases, is more important.<sup>249</sup> The court apparently recognized this in *Mills Acquisition Co. v. Macmillan, Inc.*,<sup>250</sup> when it affirmed a position it had long held, that a board may consider "the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests."<sup>251</sup> The court in *Paramount v. QVC* quoted this passage from *Macmillan* favorably<sup>252</sup> and indicated that these were the factors a board should use when determining which alternative is most likely to offer the "best value" to the stockholders.<sup>253</sup> Notwithstanding, when the court conducted its own evaluation of the offers, it gave little, if any, merit to the Paramount board's determination that a merger with Viacom was more consistent with its long-range strategic vision for the company.<sup>254</sup>

248. The selection of a merger candidate can be a form of corporate planning in itself. See *infra* note 253 and accompanying text.

249. The court's very acknowledgment that a corporation may plan against its own destruction under certain circumstances recognizes that the "corporate enterprise has an independent interest" in its own success. See Lipton & Rosenblum, *supra* note 13, at 203.

250. 559 A.2d 1261 (Del. 1989); see *supra* notes 92-108 and accompanying text.

251. *Mills*, 559 A.2d at 1282 n.29.

252. *Paramount v. QVC*, 637 A.2d 34, 44 (Del. 1994).

253. *Id.*

254. *Id.* at 48. This lack of attention to long-range planning when *Revlon* duties attach is one of the few areas for which the court does not give a board credit, and is in fact one in which the court requires the board to make long-range plans, as evidenced by the court's comments in *Time-Warner*, 571 A.2d 1140, 1150 (Del. 1990). In *Time-Warner*, the court chose not to analyze the issue based on long versus short

In this case, the court's reluctance to credit the board's business judgment was apparently based upon the conclusion that after a Paramount-Viacom transaction, Viacom, and therefore Sumner Redstone, would have the voting power to alter the company's long-term vision.<sup>256</sup> By adopting this approach, the court limited the factors a board may consider to those it would have the power to enforce at the end of the day. Taken to its logical conclusion, a board cannot reasonably consider its vision for the corporation as a factor when selecting among suitors whenever a change of control is contemplated, since its vision will be irrelevant once the transaction is complete. The problem with this reasoning is that a board's lack of ability to implement its vision is not a reason to ignore a suitor's conformity with that vision, but rather a reason to put special focus on strategic compatibility. Even when, as in *Paramount v. QVC*, the target board will lose the ability to shape the company's long-range plan after a transaction,<sup>256</sup> there is no single more defining moment in a company's future than the selection of a merger candidate. An acquirer with a similar vision and a track record in accordance with that vision will have less motivation to abandon the target's corporate strategy, even if the acquirer may have that power after a change of control.<sup>257</sup> Stated in the context of the Paramount-Viacom deal, the court was quick to point out that as a controlling stockholder, Redstone could alter the corporate strategy,<sup>258</sup> but failed to recognize that since the companies were such a good strategic fit, there was no conceivable reason for him to do so. Thus, a target's board protects stockholder interests when it insists on a suitor that will likely continue to implement the predetermined corporate strategy it has concluded is in the best interests of the company.<sup>259</sup>

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term interests, because "directors, generally, are obligated to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon." *Id.* It was apparently a foregone conclusion that the target board must consider long range interests, unless the company was "for sale." *See id.* The problem with this position, however, is that if the sale will not be followed by a bust-up, *someone* should be looking out for the long-range interests of the company during the auction process. If not the board, who?

255. *Paramount v. QVC*, 637 A.2d at 43; *see also* Gentile, *supra* note 10, at 905 (supporting the court's conclusion based on this reasoning).

256. *Paramount v. QVC*, 637 A.2d at 43.

257. In fact, the court has explicitly stated that "[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy." *Time-Warner*, 571 A.2d at 1154. If there is a possibility of maintaining corporate strategy by selecting an appropriate purchaser, it can hardly be said that there is clearly no basis to sustain the corporate strategy. *See id.*

258. *Paramount v. QVC*, 637 A.2d at 43.

259. From this perspective, it was reasonable for the board to capitulate to Viacom's demands and institute defensive measures as part of negotiations. *See supra*

This, however, was not the conclusion of the court in *Paramount v. QVC*, and a company's long-range plan can be given no such consideration in an auction setting.<sup>260</sup> If the target board must determine fair value in the same way the court did in *Paramount v. QVC*, it must apply the "best interest" test in the same manner as did the court.<sup>261</sup> While acknowledging in passing that the decisions of a board are complex and should be extended deference, the court was content to reduce its analysis to one solitary factor: monetary value.<sup>262</sup> Determining what is in the best interest of a company is highly subjective and difficult to analyze, and precisely the kind of decision the business judgment rule exists to protect.<sup>263</sup> After quoting the language in *Mills* to show the factors the board could consider, the court continued with its "best value" analysis without applying the business judgment rule and did not recount or address the following statement, also appearing in *Mills*:

Circumstances may dictate that an offer be rebuffed, given the nature and timing of the offer; its legality, feasibility and effect on the corporation and the stockholders; the alternatives available and their effect on the various constituencies, particularly the stockholders; the company's long term strategic plans; and any special factors bearing on stockholder and public interests.<sup>264</sup>

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notes 206-35 and accompanying text. Recognizing the value of the alliance and seeking to avoid the fiasco that resulted when Paramount's negotiations with Time fell through, it is not surprising that Viacom insisted on defensive measures of this magnitude. *Id.* The extensive negotiation necessary to agree on the specifics of the defensive measures also indicate their reasonableness. See *Paramount v. QVC*, 637 A.2d at 38-39; *Chancery Opinion*, 635 A.2d 1245, 1248-52 (Del. Ch. 1993), *aff'd*, 637 A.2d 34 (Del. 1994).

260. *Paramount v. QVC*, 637 A.2d at 50.

261. See *id.* at 44-45 (discussing the "best interest" test).

262. This focus reveals itself in the court's language throughout the case: "With the QVC hostile bid offering greater value to the Paramount stockholders . . ." *Id.* at 40.

[T]he value of the revised QVC offer on its face exceeded that of the Viacom offer by over \$1 billion at then current values. This significant disparity of value cannot be justified on the basis of the directors' vision of future strategy, primarily because the change of control would supplant the authority of the current Paramount Board to continue to hold and implement their strategic vision in any meaningful way.

*Id.* at 50. "QVC's unsolicited bid presented the opportunity for significantly greater value for the stockholders . . ." *Id.* at 51. Each of these examples evidences the way the court considered "value" based on monetary amount alone, and considered "value" and strategic planning as separate concepts.

263. See *id.* at 45.

264. *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1285 n.35 (Del. 1989) (emphasis added).

The court's misunderstanding of the intangible advantages and disadvantages of a merger with one company over another is exemplified by its suggestion that a board attempt to "quantify" noncash consideration after telling the board to consider its view of the future value of a strategic alliance when analyzing the entire situation.<sup>265</sup> In short, the court's auction was not any ordinary auction, but one in which the target board was limited to considering exclusively the estimated monetary value of the offer.<sup>266</sup> This kind of auction carries with it all the expense and societal cost of auctions generally, and in addition, fails to account for the long-range planning of a corporation.<sup>267</sup>

### B. *The Future of the Consensual Merger*

Though the primary fare through much of the nineties, the consensual merger has been significantly weakened by *Paramount v. QVC*. Deal makers have been acutely aware of the rest of the market for some time,<sup>268</sup> but never have they been so helpless in the face of a competing bid. After *QVC*, a Delaware corporation can no longer calculate for itself a company that would best fit its corporate strategy and then negotiate its own acquisition. The sale will become an auction dependent solely on price if any other bidder seeks to enter the fray.<sup>269</sup> Whichever company

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265. *Paramount v. QVC*, 637 A.2d at 44.

266. This monetary value test is also extremely difficult to apply in practice because it oversimplifies a process that is profoundly more complex. First, it is often difficult to determine which bid is in fact the higher bid, especially in cases such as this where both parties are utilizing front-end loaded, two-tier highly coercive offers. The value of the offer is directly contingent on the value of the securities offered by the raider in the second tier. These prices often fluctuate dramatically as the bidding process escalates, causing even the experts to disagree as to which offer is worth more in reality. See, e.g., *City Capital Assoc. Ltd. Partnership v. Interco Inc.*, 551 A.2d 787, 792 (Del. Ch. 1988); Leo Herzel & Richard W. Shepro, *Negotiated Acquisitions: The Impact of Competition in the United States*, 44 BUS. LAW. 301, 305-06 (1989); see generally Mirvis, *supra* note 26.

267. One of the most radical conclusions that can be drawn from the realities of a price-only auction is that all defensive measures, including poison pills, will become worthless. Whoever has the highest bid wins, no matter what defensive measures are in place, because the winner can always go to court and have them struck down as unreasonable if they protect a lower bid. No defensive actions against the highest bidder could ever be reasonable.

268. See James C. Freund, *A Turbulent Decade For Friendly Deals*, NAT'L L.J., Nov. 11, 1985, at 13 (noting that "merging parties and their counsel spend as much time worrying about what's going on 'out there' as 'in here'").

269. See *supra* notes 249-67 and accompanying text. A possible way to avoid this dilemma is to create a transaction like the one the court approved in *Time-Warner*: a merger of equals. See *infra* notes 289-92 and accompanying text (discussing the *Time-Warner* "merger of equals" type of sale); Phillip J. Azzollini, Note, *The Wake of Paramount v. QVC: Can a Majority Shareholder Avoid Triggering the Auction Duty*

in a merger is perceived as taking an inferior position to the other, even if this perception is inaccurate, will be subject to intervening hostile takeover bids which it must consider on equal par with the carefully negotiated and evaluated original merger agreement. The parties must now grapple with the court's hindsight, that will determine which company put itself up for sale and implicated *Revlon* duties.<sup>270</sup>

The bidding process is not cheap. A bidder often will "expend hundreds of hours of time and millions of dollars" obtaining regulatory approvals, negotiating merger agreements, printing tender offers or proxy statements, and obtaining financing commitments.<sup>271</sup> An open auction offers no protection for this investment, and merger candidates are much less likely to enter into voluntary negotiations when they will likely have to give in to a raider with a higher bid.

A persistent set of questions will constantly plague merger candidates. What is a change of control? Is there a particular percentage of ownership that triggers *Revlon* duties? Can this amount be less than 50% if it constitutes a controlling share? Does the existence of supermajority provisions change the number necessary for a change of control?<sup>272</sup> If shareholders indicate a willingness to vote with a raider even though no formal action has taken place, is there a constructive change of control?

Where this level of uncertainty abounds, the wise are unlikely to tread.

*During a Merger and Retain a Significant Equity Interest? Suggestion: A Pooling of Interests*, 63 *FORDHAM L. REV.* 573, 596-98 (1994) (suggesting criteria for a "pooling" arrangement whereby the companies would merge on an equal basis). Though this type of transaction may be possible on the surface, there is no indication how *Time-Warner* will survive *Paramount v. QVC*, because *Time-Warner* was decided before the "change-of-control" language in *Revlon* became important to the court and when a breakup of the company had to have been "inevitable" before *Revlon* duties attached. See *Time-Warner*, 571 A.2d 1140, 1150-51 (Del. 1990).

270. This rule also increases the likelihood of wasteful deception in the early stages of a negotiated transaction. See *Sunk Costs*, *supra* note 239, at 13 (noting one of the strange effects of a rule requiring an auction: "An auctioneering rule simply reduces the bidder's options and places prospective bidders in an awkward position if target's managers use friendly overtures as signals to begin digging moats and trenches.").

271. Kenneth J. Nachbar et al., *The Duty to Achieve the Highest Price in the Sale of the Company: Auctions and Alternatives*, 8 *DEL. LAW.* 30, 30 (1991).

272. For a discussion of supermajority provisions and their legitimacy, see generally Jay M. Zitter, Annotation, *Validity, Construction, and Effect of Provision in Charter or Bylaw Requiring Supermajority Vote*, 80 *A.L.R.4th* 667 (1990).

### C. *The Fate of Auctioned Companies*

A third consideration when evaluating the societal implications of imposing a duty to auction is the impact of an auction on the resulting company. Bids that were once considered outrageous have now become commonplace, and a rule requiring an auction encourages this trend. Although stockholders benefit from an increased cash payout, studies in the late eighties indicated that most companies failed to receive a similar benefit, and most acquirers failed to improve the performance of purchased companies.<sup>273</sup>

Not only is it possible that acquirers will not improve the profitability of companies, but Viacom and many other companies like it who actually win auctions will face a tough battle bearing the weight of the extreme debt loads necessary to win any leveraged auction. Selling off assets or subsidiaries, or both, is often the only way a company can meet the exorbitant interest payments on debt incurred in the process of a merger.<sup>274</sup>

### D. *Impact of Auctions on Remaining Minority Shareholders*

Ironically, the requirement that the board conduct an auction to achieve the highest price for shareholders has the potential of entirely missing the mark for which the court was shooting. It is clear from the extensive discussion of the minority's voting power after a takeover that the court was concerned with protecting the *remaining* shareholders,

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273. Herzel & Shepro, *supra* note 266, at 301 (citing then unpublished studies by independent authors and the SEC Office of Economic Analysis to support the "winner's curse" created by the legal rules that force acquirers to pay top dollar).

274. Viacom is an ideal example of this phenomenon. Not long after the Paramount-Viacom merger, there was considerable speculation that Viacom would have to sell assets to make ends meet, especially as its proposed merger with Blockbuster, which would have infused much needed cash, began to fall through. See James Bates & Kathryn Harris, *Viacom May be Forced to Sell Off Assets; Mergers: It Will Need to Trim Debt from Paramount Deal if Blockbuster Alliance Folds*, L.A. TIMES, Apr. 12, 1994, at D4; Dan Dorfman, *Viacom Stock: A Dog or a Deal?* USA TODAY, Apr. 15, 1994, at 4B (describing Sumner Redstone and Paramount-Viacom as "a wounded gladiator and his band of supporters winning the battle, but losing the war"); John Lippman, *Malone Expects Viacom's Debt to Derail Blockbuster Merger Plan*, L.A. TIMES, Apr. 8, 1994, at D4 (commenting on the prediction of TV magnate John C. Malone); *S & P Looks at Paramount-Viacom Debt*, STAR TRIB., Feb. 17, 1994, at D3 (Standard & Poors considers a downgrade of Paramount and Viacom debt in light of the large amount of debt financing to fund the merger); *Viacom Now is Full Owner of Paramount After Vote*, WALL ST. J., July 8, 1994, at B9. This heavy debt load and an intense need to increase stock value has pushed Viacom management into major restructuring and drastic cost reduction methods. Anonymous interview, Universal City, Cal. (Mar. 15, 1995).

those who tendered in the second tier of the two-tier coercive offer as well as those who were cashed-out in the first tier.<sup>275</sup> By nature, however, these stockholders benefit the *least* from the face value per share of the offer. As the offerors bid up the front-tier cash price, the first to tender are the ones who benefit from more cash. The remaining stockholders, who will likely be left with subordinated debt or highly diluted equity securities will be left to rely on the company or a future stream of income for repayment of their debt, or at minimum, to support the value of their consideration.<sup>276</sup> A ten, twenty, or even thirty dollar per share increase in the face value of an offer does not necessarily translate into any increase in the back end although the raider will undoubtedly assert that it does. The face value of the securities offered will increase, but the actual value delivered to these remaining stockholders will be inversely proportional to the amount of debt incurred through the bidding process, because the market will likely view a highly leveraged company as a poor investment option, and a drop in stock value may occur shortly after the transaction is complete. It is, therefore, counter-productive to encourage the highest possible bidding price when there is no limit on the amount of leverage or the type of securities that can be offered in the second tier. Greater leverage will place more strain on the company whom the remaining stockholders rely upon for payment. The very stockholders the court tried to protect will be the ones harmed the most. If a "control premium," such as the court sought in *Paramount v. QVC*, is to be awarded to anyone, it should be awarded to the remaining stockholders, those in the second tier.

Still, the most disturbing part of *Paramount v. QVC* is the lack of competence the court ascribes to the Paramount shareholders. Whether Viacom purchased the shares of the Paramount stockholders for cash, leaving them no voting power and no remaining stake in the new corporation, or only purchased a portion of their shares, the stockholders have the same say in approving a transaction in which they will lose voting power as they do when they will be entirely cashed-out. In both scenarios, the board can only recommend a transaction. The stockholders must tender their shares. These shareholders become no less capable of weighing the worth of a particular transaction simply because the effect of that transaction is to remove all their rights. Moreover, a significant

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275. See *Paramount v. QVC*, 637 A.2d 34, 42-43 (Del. 1994).

276. While these minority shareholders may have the remedy of an accounting available to them, knowledge of the company's poor financial condition will not guarantee payment.



minority of obstinate stockholders in the resulting company could create considerable problems for the new management.<sup>277</sup>

## V. A NEW APPROACH

Having concluded that the auction process has the potential to be not only inefficient, but harmful to both stockholders and the community at large, what approach should the court take when confronted with a merger or acquisition issue that carries with it the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders?"<sup>278</sup> The range of transactions posing this issue fall into four general categories and the proper response varies with the category. The first category includes those cases actually following the *Revlon* fact pattern, namely, when it is inevitable that the sale of a company will result in a break-up of the company.<sup>279</sup> The second category includes those cases where the majority of the target board exhibits actual self-dealing in approving a transaction, whether or not a fundamental corporate change occurs.<sup>280</sup> The third category includes transactions involving a change in corporate structure or governance whereby two groups of unaffiliated stockholders combine to form the new entity on equal grounds.<sup>281</sup> Finally, the fourth

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277. See ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 161.11 & n.1 (1995) (noting the reluctance of corporate management to enter into a situation where it anticipates interference from minority stockholders who have the power to bring individual or derivative suits to voice their opinions).

278. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986) (quoting *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985)).

279. See *Revlon*, 506 A.2d at 182; *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1285 & n.35 (Del. 1989). The description of this category intentionally includes only those sales that will result in a break-up of the company, instead of other "sales" or transactions not resulting in a break-up. When a sale will not result in a break-up, the implications of the transaction from a long-term corporate strategy perspective are vastly different, as are the legal principles that should be applied to account for the various concerns. This apparent blur between a "sale" and a "break-up" that pervades the *Revlon* opinion has been previously noted. See Herzl & Shepro, *supra* note 266, at 313 (quoting the "highly ambiguous key paragraph" in *Revlon* in which the court describes the board's duty to auction); Policastro, *supra* note 74, at 204 (discussing the *Revlon* court's interchangeable use of the terms "sale" and "break-up").

280. *E.g.*, *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993).

When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain . . . . The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.

281. This is the quintessential "merger of equals." See *Time-Warner*, 571 A.2d 1140,

category exemplifies cases where an aggregate of stockholders sharing a common affiliation lose the power to effect changes to the corporation without the assent of a new group of affiliated stockholders.<sup>282</sup> Treatment of each of these categories will be addressed seriatim.

The first category of transactions requires little discussion, as *Revlon* properly decided the issue.<sup>283</sup> When the sale of a corporation becomes inevitable, and all legitimate bidders intend to break-up the company upon consummation of a deal, there are no long-range planning interests and only minimal societal interests remain. The board of directors has essentially one primary concern and nothing against which to balance that interest. Whatever benefits may have ensued to society through preservation of the corporate form were removed by the acquirers when they decided to bust-up the entity. The single overbearing concern is to maximize shareholder value, and thus the role of the auctioneer is appropriate. This is where the standards developed by the court to govern auctions should receive their application.

Cases within the second category, where the majority of a target board exemplifies actual self-dealing, are also easily resolved.<sup>284</sup> *Weinberger v. UOP, Inc.*<sup>285</sup> defined the controlling principles for cases in which the directors in Delaware corporations are on both sides of a transaction.<sup>286</sup> Entire fairness is required, and the court will exert the most exacting scrutiny to see that this standard is met.<sup>287</sup> Not only are these decisions

1446 (Del. 1990); LOU R. KLING & EILEEN N. SIMON, NEGOTIATED ACQUISITIONS OF COMPANIES, SUBSIDIARIES AND DIVISIONS § 22.01[1] (1994) (defining a merger of equals as when "two companies of approximately the same size combine in a stock-for-stock exchange with the ratio based upon their relative size or upon the ratio of their unaffected trading prices"); see *infra* note 289 and accompanying text.

282. While this category includes what the *Paramount v. QVC* court considered a change of control, the actual phrase was not used because it is fraught with uncertainty and because the basis upon which the court defined the phrase in *Paramount v. QVC* is inconsistent with its previous usage. See *infra* note 295 and accompanying text. The distinction between affiliated stockholders and majority stockholders is also significant and is explained *infra* note 297 and accompanying text.

283. See *Revlon*, 506 A.2d at 181-82.

284. Actual self-dealing occurs inside and outside the merger and acquisition context, most commonly outside when directors issue themselves stock or usurp a corporate opportunity. See *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939) (discussing usurpation of corporate opportunity).

285. 457 A.2d 701 (Del. 1983).

286. *Id.* at 710.

287. *Id.* at 711. The court defined entire fairness:

The concept of fairness has two basic aspects: fair dealing and fair price.

unprotected by the business judgment rule, but they must also be entirely fair to survive review.<sup>288</sup>

The third category has been called a "merger of equals" because that is essentially what it entails, and the best example is *Time-Warner*.<sup>289</sup> In *Time-Warner*, two companies of essentially the same strength and of complementary interests planned to merge but were stopped by a hostile bid, forcing the merger to become an acquisition.<sup>290</sup> The court held that a tender offer that would result in the stockholders of each corporation essentially controlling equal portions of the combined company did not involve a change of control, as supported the chancellor's reasoning on this point, and thus found that *Revlon* duties did not attach because a break up of the company was not inevitable.<sup>291</sup> As a result, the presumption of the business judgment rule applied just as it does in non-merger situations, protecting the discretion of the board and its decisionmaking process.<sup>292</sup>

The final category is altogether different from the first three. It is the category within which the Paramount-Viacom transaction falls. If, as suggested previously, an auction is not the proper way to address these cases, what rule should be applied? Any replacement of the auction

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The former 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. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.

*Id.*

288. This is one of the few areas of merger and acquisition law in which the court has applied principles borrowed from the conflicts of interest field. See Mary Siegel, *Tender Offer Defensive Tactics: A Proposal for Reform*, 36 HASTINGS L.J. 377, 394-95 (1985).

289. *Time-Warner*, 571 A.2d 1140, 1146 (Del. 1990); see *supra* notes 109-43 and accompanying text. KLING & SIMON, *supra* note 281, § 22.01 (discussing the "merger of equals concept").

290. *Time-Warner*, 571 A.2d at 1146.

291. *Id.*

292. See *Paramount v. QVC*, 637 A.2d 34, 44 (Del. 1994); see also Martin Lipton & Theodore N. Mirvis, *Ten Questions And Answers Raised By Delaware 'Paramount' Decision*, N.Y.L.J., Feb. 10, 1994, at 5 (downplaying the significance of the opinion generally and noting that a merger of equals is still possible). This is what some in the industry have considered a safe-harbor from the unruliness of the *Paramount v. QVC* standard. Unfortunately, this reliance may be misplaced because the Delaware Supreme Court did not base its decision in *Paramount v. QVC* on the oft-quoted language it used to describe the holding of *Time-Warner* regarding "a fluid aggregation of unaffiliated stockholders," *Paramount v. QVC*, 637 A.2d at 43, but on the change of control principles it obfuscated in *Paramount v. QVC* and particularly, whether a change of control was inevitable. See *id.* at 44-45.

called for by the court must accommodate the goals that drove the court to its conclusion. These goals are centered on the concept of a control premium.<sup>293</sup>

The court made clear that its primary goal was to provide the shareholders with adequate compensation for their lost control, and a reasonable control premium was necessary to adequately compensate, but not overcompensate, the shareholders.<sup>294</sup> The court's usage of a control premium, however, is inconsistent with the uses of a control premium in other contexts.<sup>295</sup>

In the traditional sense, a control premium is awarded when a single person or affiliated group of persons or entities controls a block of stock that a raider or other bidder needs to acquire control of a corporation. The control block held by the person is either a controlling block in itself (over 50% under most charters or articles of incorporation), or a block that is not a controlling block by itself, but without which the raider cannot acquire a controlling interest.<sup>296</sup>

This is not the case when individual stockholders who are part of a "fluid aggregation of unaffiliated stockholders"<sup>297</sup> are the "holders" of a controlling interest. Each individual stockholder suffers no real harm by a single party purchasing a controlling interest as the individual stockholder never had a controlling interest. Although a controlling interest may result from the sale of many non-controlling shares, none of the unaffiliated shareholders had the power to control the corporation that they could sell or exercise, in short, nothing that would warrant a control premium. The stockholder was not part of a group that voted together, and the tender offer transaction may have been the only time this particular majority ever voted together. The same damage to the stockholder's voting power could have occurred if 50.1% of the outstanding shareholders of independently held stock decided to enter into a voting agree-

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293. See generally O'NEAL & THOMPSON, *supra* note 189, § 4:02 (discussing transactional settings for control premiums).

294. See *Paramount v. QVC*, 637 A.2d at 43, 51.

295. For a discussion of the various contexts in which payment of a control premium arises, see O'NEAL & THOMPSON, *supra* note 189, § 4.03.

296. For example, if 40% of the stock of a company were held by the public at large, 30% by the founder and chairman, and 20% by the vice-president, or some other insider, either the chairman's block or the vice-president's block could give the raider a controlling interest after the public stockholders tendered into a tender offer. Either party could demand a control premium if the other party were unwilling to sell.

297. *Paramount v. QVC*, 637 A.2d 34, 43 (Del. 1994).

ment or create a voting pool. It is still possible for the stockholder to vote for either the majority or the minority view in any decision. This was no more or less possible when the stock was held by a "fluid aggregation of independent shareholders."<sup>298</sup> A control premium to an independent shareholder, therefore, need not represent a loss of control, because the shareholder never had control to lose. Control is still based on the willingness to vote with the majority on a particular issue, and that ability has not diminished in the slightest by the purchase of a controlling block by another party.<sup>299</sup>

Thus, the shareholder has lost protection from the possibility of abuse by the majority through a cash-out merger or otherwise.<sup>300</sup> This is the one case where a legitimate distinction arises between the new majority stockholder's interests and the remaining minority shareholders' interests. The majority stockholder will by nature differ from those of the minority, since the majority will want to pay as little as possible, and the minority will want to receive as much as possible for outstanding shares the majority seeks to purchase. This is why the court imposes such a high duty of care on the majority in cash-out mergers.<sup>301</sup> The courts must make certain that the minority receives the proper value for its shares when the majority has the ability to overpower it.

The shareholders are not, however, entitled to receive the highest possible compensation for their shares in all circumstances, especially if they will possess the power to vote in the future. Furthermore, it is not necessary for the board to maximize short-term over long-term share value because the remaining shareholders could feasibly continue to be shareholders and reap long-term benefits.<sup>302</sup> If, at some time in the fu-

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298. *Id.*

299. As previously discussed, when an identifiable entity or affiliation holds a controlling interest in a target without which a suitor cannot obtain control, the suitor may be willing to pay a "control premium" for that share. *See O'NEAL & THOMPSON, supra* note 189, § 4.02. The ability of the suitor to pay this premium, however, disappears if the suitor has to pay the premium to *all* the shareholders. *Id.* § 4.03(B). Moreover, there would be no reason to pay any "premium," if the suitor could obtain control simply by offering to purchase all the corporation's stock at a price to which the stockholders at large would agree. Any "premium" would be included in the offer price and would in fact be no premium at all, but only a determination of market price for the shares.

300. There was no such threat before the shareholders tendered precisely because there was no identifiable majority stockholder.

301. *See supra* notes 284-88 and accompanying text (describing the "entire fairness" standard established in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983)).

302. In the actual Paramount-Viacom transaction, there was no intent to go completely private and no ability to do so even if the desire had been present. The shareholders in the back end of the deal, or others who have purchased since then, though now a minority, will continue to benefit from dividends and an increase in their stock value if the company can improve its performance and profitability.

ture, the majority seeks to cash-out the minority, the *Weinberger* rules would require entire fairness and the minority would be protected.<sup>303</sup>

So what about cases where the new majority *does* intend to cash-out the minority? The court might just as well require a premium as part of the auction instead. The problem with this formulation of the original deal is that there is no cap on the potential price of the merger. In a cash-out merger, the court will require that the majority give the minority a reasonable control premium.<sup>304</sup> This reasonableness requirement can act as both a minimum and a maximum amount. No such limitation exists in an auction, which will be governed not by what is reasonable under the circumstances, but by which suitor wants the target more.<sup>305</sup> Even more relevant, in the leveraged purchase situation neither is playing with real money. The higher the bidding, the more likely the raider is buying on credit, leverage based on the target's projected profits, and not its own treasure chest. In effect, an auction between two raiders using leveraged bids is a battle to see who can spend more of the target's money.

Therefore, lenders and investors alone determine the limits of the war. These entities attempt to predict which bidder will have a more profitable future, especially since no lender would provide cash to a newly merged company unless it believed the forthcoming profits would be sufficient to service the amount of leverage necessary to acquire it. When institutional lenders supply cash, this may be a far more scrutinizing test than a court would ever apply. However, as one of the few remaining legacies of the eighties, this leverage may not be provided by institutional lenders, but instead by the general public through highly leveraged bonds or other similar debt instruments.

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303. See *supra* note 284-88 and accompanying text.

304. See O'NEAL & THOMPSON, *supra* note 189, § 5.04.

305. This is often more an ego contest between the controlling individuals than a representation of the "fair market value" of the company. One popular modern merger and acquisition novel provides a particularly good demonstration of how interpersonal conflicts can shape merger negotiations. See generally PETER F. HARTZ, *MERGER* (1985) (recounting the 1982 Bendix/Martin Marietta takeover and the conflict between Bill Agee, Chairman and CEO of Bendix Corp., and Thomas Pownall, President and CEO of Martin Marietta). There may also exist a sort of one-upmanship on the part of raiders in general who want to have the newest and biggest deal to hit the headlines. See Lipton & Rosenblum, *supra* note 13, at 200 (noting that "the arrogance and ego of corporate raiders, seeking to do a bigger or better deal than the one just announced in the financial press, may also have helped fuel the takeover wave").

Therefore, by requiring an open auction, the court is endorsing the use of junk bonds, and highly speculative junk bonds at that, since most auctions will involve leveraged bidders who will each drive the other to greater and greater leverage in order to "win." The emerging company will not only find itself in a much more precarious position, but will be much less likely to benefit the economy as a whole.<sup>306</sup> Viacom itself provides evidence of this phenomenon.<sup>307</sup>

When a board is faced with competing bids and must choose which to recommend to the shareholders, or whether to recommend any action at all, it should first evaluate the situation from as many different vantage points as possible. It should then recommend to the stockholders the transaction that will provide them with the highest short-term price for their shares, and will place the corporation in the best position to expand and grow toward previously established long-term goals. This evaluation will involve an intricate balance between similar bids, exactly the kind of analysis that the court would ordinarily leave to the discretion of the board of directors when the business judgment rule applies. The court's presumption, that the directors operated in an honest belief that their actions were in the best interest of the company and their decisions were informed and made in good faith, would settle the issue and end the court's inquiry. Such a highly deferential view, however, is inappropriate in these cases because of the intrinsic conflict of interest. Though equally inappropriate to apply a blind duty to auction, there exists an intermediate position that will more adequately serve the interests concerned.

The court should continue to approach the decisions of a target board in response to a merger or acquisition offer with the deference of the business judgment rule, but only after a threshold inquiry, much like that used in *Unocal*.<sup>308</sup> This threshold inquiry must satisfy the court's concerns that it is the interests of stockholders, and not the board's self-interest, that motivate the board's actions. This inquiry must support the foundational concepts of the business judgment rule: that the board acted with care, loyalty, independence, and adequate information.<sup>309</sup>

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306. One leading practitioner in the field predicted that the hostile tender offers of the eighties would put our banking system and credit markets in jeopardy. Lipton, *supra* note 5. Though the Savings and Loan crisis was brought on by many other causes, his insights have turned out to be surprisingly accurate. *See id.*

307. *See supra* notes 273-74 and accompanying text (discussing the fate of auctioned companies).

308. *See generally* *Unocal Corp v. Mesa Petroleum Co.*, 493 A.2d 946 (1985).

309. Two authors have suggested that *Paramount v. QVC* represents the first signs that the court is departing from rigid rules construing a *Revlon* duty or other specific duties. Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After QVC and Technicolor: A Unified Standard (and the End of Revlon Duties?)*,

In cases such as this, when the board's actions are initially suspect due to the intrinsic conflict of interest between its self preservation instincts and what may or may not be in the best interests of stockholders, a two part inquiry would satisfy the initial requisites of the business judgment rule. First, did the board have a reasonable basis for believing that the stockholders would benefit from a transaction with this suitor more than a transaction with any other likely suitor? Second, was the board's process of acquiring information and reaching its conclusion sufficient to provide a reasonable basis for its conclusion?<sup>310</sup>

An affirmative response to these two questions will confirm that the target board was acting with care and loyalty and from an informed position necessary to justify an application of the presumption provided by the business judgment rule.<sup>311</sup> The first question will require a specific enumeration of the factors that influenced the board's decision, but will not permit the court to interfere with the deliberative process. The inquiry is simply whether there was a reasonable basis for the board to conclude as it did. If, as the court indicated, the duty to auction was merely a more specific enumeration of what a board must do to support its duty of loyalty to the corporation and the stockholders, the standard suggested here will merely validate the truth of the court's statement that there

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49 BUS. LAW. 1593 (1994). They assert that these cases reflect a new unified standard in Delaware corporate law that will eventually do away with specific *Revlon* or *Unocal* frameworks for analysis: "[N]ot only are breaches of the duties of care and loyalty treated similarly, but sales of control, defensive tactics, and other extraordinary management decisions having a significant practical impact on stockholder interests are all potentially united under a single intermediate standard of enhanced scrutiny." *Id.* at 1596. Though these authors do not endorse such a position, Cunningham and Yablon correctly note that in *Paramount v. QVC*, the court was primarily concerned that the board uphold its general fiduciary duties of care and loyalty toward the stockholders. *Id.* at 1595-96. The threshold questions offered in this Comment also share this as their primary focus and the solution proposed seeks to accomplish these ends.

310. This formulation of a threshold test for the business judgment rule is because it is derived from the court's language in *Paramount v. QVC* in which the court described what goes into an enhanced scrutiny test. *See Paramount v. QVC*, 637 A.2d 34, 45 (Del. 1994).

311. A key part of this confirmation focuses on the process through which the board comes to making its decision, thereby addressing the concerns of the court in *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); *see Kreider, supra* note 26, at 637-38 (analyzing the duties imposed by *Van Gorkom*). *See generally* Thomas C. Wagner, Note, *The Business Judgment Rule Imposes Procedural Requirements on Corporate Directors—Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), 14 FLA. ST. U.L. REV. 109 (1986).



is “no single blueprint” directors must follow when searching for the best value for stockholders.<sup>312</sup>

## VI. CONCLUSION

The court's conclusions in *Paramount v. QVC* result from the perspective from which it approached the case, not clearly stated until well into its reasoning. Once the court concluded that an auction took place, it was clear that Paramount's board treated the bidders unequally and, therefore, failed to uphold its *Revlon* duties. This does not mean, however, that the court properly applied existing precedent or chose a course of action that would most fully benefit either stockholders or society at large.

The business judgment rule and the principle it supports, that directors are generally in a better position to make decisions for a corporation than a court, need not be abdicated in change of control transactions unless evidence exists that the board actually took steps that were in the directors' own interests rather than the best interests of the corporation or stockholders. A test that ensures that the board is upholding its duties, rather than an unqualified statement that the highest short-term value is always in the shareholders' “best interest” would much more adequately address the problem. The auction requirement as it presently exists discourages long-range planning, diminishes the possibility of consensual mergers, forces companies into a much more leveraged position than is otherwise necessary, and harms rather than benefits the minority shareholders of the resulting corporation.

On its face, the quote at the beginning of this Article describes the high profile deal makers of the eighties, but also describes a very different and very distinguished group of modern jurists. Those who took part in the merger and acquisition frenzy of the eighties adopted policies that in the short-term appeared justified, but in the long-run caused damage to society and individual stockholders. In short, business leaders forgot that the policies of *controlling* business should be aimed at *doing* business.

At least the corporate power players seem to have taken heed of the lesson, as evidenced by the number of strategic mergers in the nineties compared to the number of bust-ups of the eighties. The direction of recent decisions by the Delaware Supreme Court, however, have not reflected this enlightenment. Imposing a duty to maximize short-term shareholder value through an auction appears to satisfy the short-term problem. When the court orders greater compensation for an aggregate

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312. *Paramount v. QVC*, 637 A.2d at 44 (citing *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286-87 (Del. 1989)).

of unaffiliated shareholders, the result is satisfying and leaves the impression that justice prevailed. It does not, however, take the practical functioning of business into account. Unfortunately, the current judicial policies that *control* business do not take into account those who are actually *doing* business and who must continue *doing* business for the economy to survive.

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