The Omnipresent Specter of Omnicare

Sean J. Griffith
Fordham University School of Law, sgriffith@law.fordham.edu

Follow this and additional works at: http://ir.lawnet.fordham.edu/faculty_scholarship

Part of the Corporation and Enterprise Law Commons, Courts Commons, Jurisprudence Commons, and the State and Local Government Law Commons

Recommended Citation
Available at: http://ir.lawnet.fordham.edu/faculty_scholarship/552

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
The Omnipresent Specter of Omnicare

Sean J. Griffith*

ABSTRACT

In this Article, written for a symposium commemorating the tenth anniversary of the Delaware Supreme Court's opinion in Omnicare, Inc. v. NCS Healthcare, Inc., I argue, notwithstanding reports to the contrary, that Omnicare is still very much with us. Although there is a line of cases that qualifies the narrow holding of the opinion, the strong reading of Omnicare, which requires a fiduciary out in every merger agreement and elevates the "unremitting" duty to remain "fully informed" to an absolute jurisprudential principle, lives on in Delaware law, animating the Court of Chancery's controversial rulings in the recent standstill cases.

Shifting from descriptive to normative, the Article argues that Omnicare's survival is regrettable because it introduces inconsistencies into the fundamental structure of corporate law. Finally, this Article offers a way out of the doctrinal bind by articulating an approach to enhanced scrutiny that would allow courts both to police justifiable concerns regarding strong deal protections while also preserving the ability of boards to act in shareholders' best interests. Although this approach to enhanced scrutiny would require a revision of some aspects of Delaware doctrine, on the whole it does considerably less violence to the basic structure of corporate law than the majority opinion in Omnicare currently does.

I. INTRODUCTION ............................................................................................................. 754
II. TWO READINGS OF OMNICARE .................................................................................. 757
III. OMNICARE IS DEAD .................................................................................................. 760
IV. OMNICARE LIVES ...................................................................................................... 768
   A. The Standstill Cases .................................................................................................. 768
   B. Ancestral Spirits ...................................................................................................... 777
V. PUTTING THE SPIRITS TO REST ................................................................................. 780
   A. The Doctrinal Dilemma .......................................................................................... 780
   B. Enhancing Enhanced Scrutiny ................................................................................ 785
      1. All Deal Protections Should Receive Enhanced Scrutiny ....................................... 785
      2. Enhanced Scrutiny Is Not Confined to Unocal ....................................................... 787

* T.J. Maloney Chair and Professor of Law, Fordham Law School. Thanks to J. Travis Laster and Robert S. Reder for helpful comments. Thanks to Ben Falk for research assistance. The viewpoints and any errors expressed herein are mine alone.
I. INTRODUCTION

The Delaware Supreme Court's opinion in Omnicare, Inc. v. NCS Healthcare, Inc. is widely regarded as the most controversial opinion of that court in a quarter century. It had immediate and wide-ranging implications both for transactional practice, effectively requiring a fiduciary out in every merger agreement, and for the doctrinal underpinnings of Delaware corporate law, drawing into question the traditional change-of-control paradigm and elevating the duty to be "fully informed" to an absolute. It attracted controversy immediately, starting with the strongly worded dissents of the immediate former and current Chief Justices and soon followed by a raft of commentary from practitioners and academics alike.

Yet, it is also commonplace to hear that Omnicare is dead. Not long after the decision, Chief Justice Steele confidently predicted that the opinion would have "the life expectancy of a fruit fly." Other voices from the bench have suggested that the opinion is "of questionable continued vitality" and an "aberrational departure." Practitioners,

3. See infra notes 42-51 and accompanying text (discussing this aspect of the opinion).
4. See infra note 47 and accompanying text (discussing this aspect of the opinion).
6. David Marcus, Man of Steele, D&O ADVISOR, Sept. 2004, at 16 (quoting Chief Justice Steele to say: “While I don't suggest that you rip the Omnicare pages out of your notebook . . . I do suggest that there's the possibility, one could argue, that the decision has the life expectancy of a fruit fly.”). See infra notes 52-54, 70-76 and accompanying text (discussing Orman and Optima).
meanwhile, counsel their clients on how to avoid the implications of the holding.9 Academics, accordingly, have begun to eulogize the decision.10

However, to paraphrase Mark Twain, the reports of Omnicare’s demise have been greatly exaggerated. My descriptive thesis in this Article is that far from having been buried and forgotten, the underlying principles of the Omnicare decision continue to animate Delaware corporate law jurisprudence and continue to channel the actions of transaction planners. I will demonstrate the continued vitality of Omnicare by separating two readings of the decision: a weak reading, focusing narrowly on the facts of the case, and a strong one, based upon the broad language of the opinion.11 Those who claim Omnicare is dead can support their view by pointing to a line of cases that indeed challenges the weak reading of the opinion.12 However, I shall show that neither the factual context nor the doctrinal underpinnings of these cases challenges the strong reading of Omnicare.13 Rather, the core reasoning underlying the strong reading recently arose as the basis for the holding in a number of important Court of Chancery decisions.14 This, I argue, is the omnipresent specter of Omnicare.

What ought we to make of this? In the wake of Omnicare, I argued in the pages of the Journal of Corporation Law that the decision was a mistake.15 Ten years later, it still is. In my earlier analysis of the opinion, I focused on its economic consequences, building a simple game theoretic model to illustrate the intuitive proposition that the ability to trade certainty has value and that taking this ability away may prove detrimental to the merger marketplace.16 Several of my co-panelists have arrived at a contrary view of the economics, pointing out that mergers have not dried up17 and that making targets say “no” or “not-for-sure” to an initial bidder may in some cases lead to higher transaction prices.18 Fair points, but as to the first, much of what influences the merger market is exogenous to Delaware law, making it difficult or impossible to gauge the good


11. See infra Part II (discussing the strong and weak readings of Omnicare).

12. See infra Part III (discussing Orman, OPENLANE, and Optima).

13. See infra Part IV (discussing “the continued vitality of Omnicare”).

14. See Part IV.A (examining the use of Omnicare’s reasoning in several Delaware cases).

15. See generally Griffith, Precommitment, supra note 5 (criticizing the holding in Omnicare).

16. Id. at 605–15.


18. See Quinn, Bulletproof, supra note 5, at 877–81 (disputing the value of precommitment strategies based on the positive effects of competitive bidding on sale prices); Brian J.M. Quinn, Omnicare: Coercion and the New Unocal Standard, 38 J. Corp. L. 837 (2013).
or ill effects of the decision from transaction statistics. As to the second, while standard auction theory recognizes that the seller will always be tempted to renege, it also recognizes that the ability to do so will change bidders’ strategies and destroy the ability of sellers to control the sale process, making the ability to renege undesirable overall.19 In other words, a rule that takes away the commitment power of merger agreements likely has deleterious consequences for shareholder welfare, all of which is to say that the economic implications of the opinion are still bad.

My focus in this Article, however, is the doctrinal consequences of the Omnicare opinion. My normative thesis is that elevating the “unremitting duty” to remain “fully informed” to an absolute principle or a per se rule, as the strong reading of Omnicare does and the cases that follow it also do, wreaks doctrinal havoc on Delaware corporate law. I demonstrate this by reference to the statute and case law,20 and conclude by suggesting a way for Delaware judges to escape these doctrinal consequences through a slightly modified conception of enhanced scrutiny that enables the judiciary, at last, to exorcise the omnipresent specter of Omnicare.21

The remainder of this Article proceeds as follows: Part I discusses Omnicare, separating out the weak and strong readings of the majority opinion. Part II describes the line of cases that has led some to conclude that Omnicare is dead, showing that in fact these cases are limited to a unique factual context (concentrated ownership) and a distinctive doctrinal rationale (majority–minority shareholder rights), which challenges the weak reading but leaves the strong reading undisturbed. Part III presents recent evidence that Omnicare is, in fact, alive and well, demonstrating how the strong reading animates an important line of Court of Chancery decisions and further showing the family resemblance between these decisions and the Court of Chancery’s early deal protection cases that culminated ultimately in Omnicare. Part IV shows how the doctrinal consequences of the strong reading of Omnicare are inconsistent with the underlying structure of Delaware corporate law. It then articulates a way out of the doctrinal bind

19. R. Preston McAfee & John McMillan, Auctions and Bidding, 25 J. ECON. LIT. 699, 733 (June 1987) (offering the following “Machiavellian Advice” to sellers: “The first rule is to make your customers believe that, whatever pricing strategy you have chosen, you will not under any circumstances depart from it”); Paul R. Milgrom, The Economics of Competitive Bidding: A Selective Survey, in SOCIAL GOALS AND SOCIAL ORGANIZATION: ESSAYS IN MEMORY OF ELISHA PAZNER 261 (Hurwitz et al. eds., 1985). The intuition underlying auction theory on this point recently was neatly summarized by Professor Davidoff:

Let’s say you held a silent auction for a painting. Once the bids were unsealed and the highest price revealed, that would normally end the matter. But after the auction closes and a winning bidder is announced, the rest of the bidders can then step in and bid again. The auction continues ad infinitum until the highest price is reached—opening and closing again and again until only one bidder is willing to bid.

This outcome may be good for the seller, but in such circumstances, a potential buyer may not want to bid because it never had assurances of paying less than maximum value. The buyer will not want to take the time to bid knowing that its winning bid can always be trumped. The result is that you have fewer bidders and therefore lower prices because of less competition.


20. See infra Part IV (discussing the continuance of Omnicare).

21. See infra Part V.B (describing and advocating for a modified version of enhanced scrutiny).
through a reinterpretation of enhanced scrutiny that affirms the core principles underlying the standard of review, while rejecting the ossified rubrics under which it has often been applied. The Article then closes with a brief summary and conclusion.

II. TWO READINGS OF OMMICARE

Because this is an Article focusing more on the aftermath of Omnicare than on the decision itself, I will not rehearse the facts of the case here except to emphasize that the NCS–Genesis transaction took place after a two-year canvassing of the market, during which NCS had moved closer to and ultimately over the brink of insolvency.\textsuperscript{22} If not for the Genesis offer, NCS would likely have been forced to sell itself in a pre-packaged bankruptcy to Omnicare, resulting in no recovery to its shareholders.\textsuperscript{23} Omnicare only made an offer outside of the bankruptcy context once negotiations with Genesis were well underway.\textsuperscript{24} Once both Genesis and Omnicare were involved in bidding, NCS sought further concessions from each. Winning them from Genesis, but not Omnicare,\textsuperscript{25} NCS took the best offer then available, which was from Genesis,\textsuperscript{26} fearing that a failure to do so would cause Genesis to make good on its threat to withdraw from the process.\textsuperscript{27} Genesis’s withdrawal would have left NCS with only one negotiating partner, Omnicare, which in the absence of competition, may have reverted to its previous position in favor of a pre-packaged bankruptcy sale.

The transaction agreements between NCS and Genesis were designed to provide Genesis with transactional certainty.\textsuperscript{28} The merger agreement contained a no-shop clause with a standard fiduciary out and benign termination fees.\textsuperscript{29} The principal protective effect came instead from the clause in the merger agreement, requiring the NCS board to submit the agreement to its shareholders for a vote (the so-called “must submit” covenant).\textsuperscript{30} Once combined with the voting agreements of two shareholders together controlling a majority of the company’s voting power (the “majority voting agreements”),\textsuperscript{31} this clause assured approval of the NCS–Genesis merger agreement. As

\begin{itemize}
\item \textsuperscript{22} Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 920–21 (Del. 2003).
\item \textsuperscript{23} Id. at 921–23.
\item \textsuperscript{24} Id. at 924.
\item \textsuperscript{25} Id. at 924–25 (noting that the NCS committee tried and failed to get Omnicare to remove the due diligence conditions to its offer, which, in the view of the committee, rendered the offer excessively contingent, but that the committee succeeded in getting Genesis to increase the consideration to both note holders and shareholders and also to reduce its termination fee).
\item \textsuperscript{26} Id. at 925 (“After receiving similar reports and advice from its legal and financial advisors, the board concluded that ‘balancing the potential loss of the Genesis deal against the uncertainty of Omnicare’s letter, results in the conclusion that the only reasonable alternative for the Board of Directors is to approve the Genesis transaction.””).
\item \textsuperscript{27} Omnicare, 818 A.2d at 925 (“Genesis stipulated that the transaction had to be approved by midnight the next day, July 28, or else Genesis would terminate discussions and withdraw its offer.”).
\item \textsuperscript{28} Id. at 922–23 (describing Genesis’ refusal to be treated as a stalking horse for another bidder).
\item \textsuperscript{29} Id. at 925–26.
\item \textsuperscript{30} Id. at 925 (describing the provision requiring that “NCS submit the merger agreement to NCS stockholders regardless of whether the NCS board continued to recommend the merger”).
\item \textsuperscript{31} Id. at 926 (describing the voting agreements with Jon Outcalt, NCS Chairman, and Kevin Shaw, the CEO).
\end{itemize}
a result, when Omnicare subsequently submitted a superior proposal, the NCS board could withdraw its recommendation to shareholders that they vote in favor of the NCS–Genesis transaction, but it was powerless to stop it. Therefore, Omnicare sued to enjoin the transaction.

On appeal from a set of Court of Chancery rulings denying injunctive relief, the Supreme Court reversed, holding first that a form of enhanced scrutiny applies to deal protection provisions. The Court identified enhanced scrutiny in the deal protection context with the kind of enhanced scrutiny applied under Unocal and its progeny, further specifying that “in applying enhanced judicial scrutiny to defensive devices designed to protect a merger agreement, a court must first determine that those measures are not preclusive or coercive before its focus shifts to the ‘range of reasonableness’ in making a proportionality determination.” With this analytic rubric in place, it remained unclear how to treat this particular package of deal protection provisions. For the purposes of this test, should the majority voting agreements, acts of shareholders in their capacity as such, be treated together with the must-submit clause, an act of the corporation? Or should the deal protection provisions of the merger agreement, which treated alone were unremarkable, and the shareholder voting agreements, be treated separately as acts of independent agents? Ultimately, the majority had little difficulty concluding that the must-submit covenant should be treated together with the voting agreements, since “Genesis made the execution of those voting agreements a non-negotiable condition precedent to its execution of the merger agreement.” Having thus combined the must-submit covenant with the majority voting agreements, the necessary outcome of Unocal scrutiny seems obvious: because the provisions, in combination, made the deal a fait accompli, the Court held, they “coerce the consummation of the

32. The NCS Proxy read: “Notwithstanding [the withdrawal of the board’s recommendation], the NCS independent committee and the NCS board of directors recognize that (1) the existing contractual obligations to Genesis currently prevent NCS from accepting the Omnicare irrevocable merger proposal; and (2) the existence of [certain] voting agreements . . . ensure NCS stockholder approval of the Genesis merger. Omnicare, 818 A.2d at 927 (quoting NCS Proxy).”


35. Id. at 931–32 (discussing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995)).

36. Id. at 932 (quoting Unitrin, 651 A.2d at 1367).

37. Id. at 926 (noting that Outcalt and Shaw entered into voting agreements “in their capacity as NCS stockholders”).

38. Id. at 934 (reciting and rejecting the Genesis argument that “stockholder voting agreements cannot be construed as deal protection devices taken by a board of directors because stockholders are entitled to vote in their own interest”).

39. Omnicare, 818 A.2d at 934. The Court had other, perhaps better, arguments for treating the voting agreements as quasi-corporate acts sufficient to combine with the must-submit covenants in evaluating the deal protection provisions. First, NCS was in fact “also required to be a party to the voting agreements by Genesis,” likely in order to give Genesis rights directly against NCS (e.g., for termination fees) in the event of a breach of the voting agreements. Id. at 926. Second, the NCS board had to act to waive the applicability of DEL. CODE ANN. tit. 8, § 203 (2013) to Outcalt and Shaw as a result of their entrance into the voting agreements. Id. at 925. Either or both of these may provide alternative grounds for treating the voting agreements as a corporate act sufficient to justify treating them in combination with the must-submit covenant. Vice Chancellor J. Travis Laster, Del. Court of Chancery, Keynote Address at the Journal of Corporation Law Symposium: Ten Years After Omnicare: The Evolving Market for Deal Protection Devices (Feb. 28, 2013).
Genesis merger and preclude the consideration of any superior transaction." 40 Hence, having been found to be preclusive and coercive, the deal protections were unenforceable.41

The Court did not stop there, however. Rather, the majority went out of its way to announce what amounts to a *per se* rule. In a section headed "Fiduciary Out Required," the Court offered an alternative basis for its holding—that is, that by effectively precommitting to consummate the Genesis transaction, the board abdicated its ongoing fiduciary duties to shareholders.42 Abdication, of course, is something that boards cannot do.43 But abdication is question begging. What responsibility, exactly, is being abdicated here? Boards are generally under no duty to negotiate.44 Even when they are under *Revlon*, boards have discretion to run the sale process as they see fit, which presumably includes the authority to end an auction and accept no further bids.45 So what duty of the board did the NCS-Genesis agreement abdicate? The Court is not especially clear on this point, emphasizing only that the duty is "unremitting" and owed to shareholders "at all times."46 As I describe in further detail below, the relevant duty, which courts articulated both before and after *Omnicare*, is the duty to remain "fully informed."47

If the Court is unclear on what responsibility the NCS board abdicated, it is not at all unclear on what the board ought to have done. They should have included a fiduciary out—specifically, a "termination right" fiduciary out and not merely a "changed recommendation" fiduciary out, which the merger agreement already contained.48

---

41. *Omnicare*, 818 A.2d at 936.
42. Id. at 937 ("The NCS board could not abdicate its fiduciary duties to the minority by leaving it to the stockholders alone to approve or disapprove the merger agreement because two stockholders had already combined to establish a majority of the voting power that made the outcome of the stockholder vote a foregone conclusion.").
43. I discuss this principle at length in Griffith, *Precommitment*, supra note 5, at 592–95.
44. Paramount Commc’ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989) (asserting that there is no general duty to negotiate, so long as the decision not to negotiate is not "uninformed").
45. In re Dollar Thrifty S’holder Litig., 14 A.3d 573, 595–96 (Del. Ch. 2010) (explaining that "directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there").
46. *Omnicare*, 818 A.2d at 938 ("The stockholders of a Delaware corporation are entitled to rely upon the board to discharge its fiduciary duties at all times. The fiduciary duties of a director are unremitting and must be effectively discharged in the specific context of the actions that are required with regard to the corporation or its stockholders as circumstances change.").
47. The duty to remain "fully informed" has been articulated in several important decisions of the Delaware Supreme Court. See Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (1994) ("[D]irectors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them."); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) ("[A] director has a duty . . . to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders."). See infra Part III (discussing the evolution of the duty in the deal protection and standstill cases). See also Kimberly J. Burgess, *Gaining Perspective: Directors’ Duties in the Context of “No-Shop” and No-Talk” Provisions in Merger Agreements*, 2001 COLUM. BUS. L. REV. 431, 462–71 (2001) (emphasizing the importance of the duty to remain “fully informed” in the context of deal protection cases).
48. See infra notes 199–207 (further discussing the distinction between these two types of fiduciary out
According to the court, "[T]he NCS board was required to negotiate a fiduciary out clause to protect the NCS stockholders if the Genesis transaction became an inferior offer." If any doubt remained, the Court repeated this message, saying, "The NCS board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders." It did not matter that the NCS board had canvassed the market for a two-year period or that it had played Omnicare and Genesis off each other, balancing the benefits and costs of further rounds of bidding; nor did it matter that this was not a formal change of control transaction under Revlon requiring enhanced scrutiny of the sale process. Because there was no out permitting the board to terminate the merger agreement in case a better deal came along, the deal protection devices were void and unenforceable. This is the line of reasoning, not surprisingly, that has led Omnicare to be read as articulating a per se rule against transactional certainty. Or, to state the proposition in the affirmative, Omnicare requires fiduciary outs in merger agreements. The doctrinal basis is the "unremitting" duty to remain "fully informed."

In checking the vital signs of Omnicare, as I propose to do in the following Parts, it is important to distinguish between these two aspects of the holding—the preclusivity of majority voting agreements combined with other structural defenses (the "weak" reading of the opinion) and the Court's fiduciary out mandate (the "strong" reading of the opinion). In the following discussion, I will show that although the weak reading of Omnicare may have met its end, the strong reading is alive and well and making a hash of Delaware jurisprudence. The strong survive, unfortunately in this case, but I will ultimately suggest a way that Delaware courts, to continue a tortured metaphor, can put the worst aspects of the opinion finally to rest.

III. OMNICARE IS DEAD

Anyone wishing to herald the demise of Omnicare can support their claim by pointing not only to the Chief Justice's colorful aside, but also to an important line of Chancery cases: Orman v. Cullman, Optima International of Miami v. WCI Steel, and In re OPENLANE. This line of cases has led to a well-known work-around to Omnicare, referred to as the "OPENLANE structure," that is now regularly employed.
These cases allow transacting parties to avoid *Omnicare* when a target company has a sufficient number of large blockholders to effectively lock-up the transaction by getting the blockholders to tender written consents in favor of the transaction. Blockholding is an essential fact in these cases, a fact that courts have emphasized in analyzing these cases along the lines of those focusing on minority-majority shareholder conflicts. As I shall demonstrate below, the OPENLANE structure can best be understood as an expression of Delaware doctrine involving controlling shareholders.

In *Orman*, Swedish Match AB, a publicly held match and tobacco company based in Stockholm, Sweden, sought to merge with General Cigar, a publicly held company in which the founding family, the Cullmans, retained voting control thanks to a class of high-vote stock.\(^{57}\) In the transaction, the Cullmans would sell approximately one-third of their equity interest to Swedish Match, followed by a merger of General Cigar into a subsidiary of Swedish Match, in which the public shareholders of General Cigar would receive cash for their shares.\(^{58}\) The result of the merger would be that Swedish Match owned 64% of General Cigar while the Cullmans owned 36% of the company, but the Cullmans would retain both voting control and day-to-day control over General Cigar.\(^{59}\)

In order to prevent its offer from being shopped to other potential bidders, Swedish Match required the Cullmans to enter into a voting agreement. This agreement required them to vote their high-vote shares in favor of the merger and against any alternative acquisition of the company for a period of eighteen months, should the merger agreement be terminated.\(^{60}\) Because the Cullmans' high-vote shares represented a majority of the voting power of General Cigar, this provision of the voting agreement would have guaranteed approval of the merger except that the merger agreement contained a "majority of the minority" provision.\(^{61}\) The public shareholders later overwhelmingly approved the merger.\(^{62}\)

A minority shareholder nevertheless challenged the transaction as a violation of *Omnicare*, arguing both that the combination of merger agreement and voting agreement effectively coerced the public shareholders' vote and that the voting agreement itself amounted to a breach of fiduciary duty.\(^{63}\) Finding that there was nothing coercive about the transaction, Chancellor Chandler emphasized that "unlike the situation in *Omnicare*, . . . [the public shareholders were not presented with] a 'fait accompli.' The public shareholders were free to reject the proposed deal, even though, permissibly, their

---

58. *Id.* at *2. The public shareholders would receive cash at the same amount paid per share to the Cullmans for their equity interest. *Id.*  
59. *Id.*  
60. *Id.* at *3.  
61. *Orman*, 2004 WL 2348395, at *3. The provision provided that the merger could not proceed without a majority vote of the low-vote shares and required the Cullmans to vote their low-vote shares pro-rata with the rest of the public shareholders. *Id.*  
62. *Id.*  
63. *Id.*
vote may have been influenced by the existence of deal protection measures. The majority of the minority provision in the merger agreement, in other words, operated as an effective out to the voting agreement lock-up. Unlike Omnicare, shareholder approval in Orman was not "mathematically certain," thanks to the majority of the minority provision.

A significant factor in the Chancellor's reasoning with respect to the coercion argument was the unhappy lot typical of minority shareholders in companies with a controlling shareholder. Finding themselves in such a situation, the General Cigar shareholders had no right to expect very much, yet they received something that minority shareholders normally do not possess—veto rights over a merger transaction. Along these lines, the court emphasized:

Plaintiff never addresses the deeper question of how it is fair to say that a minority was coerced by a voting and ownership structure that was fully disclosed to the minority before they bought into a corporation whose capital structure was so organized. In fact, the coercion of which plaintiff complains is more properly understood as the coercion resulting from the fact that the Cullmans owned a controlling interest. Surely it cannot be the case that whenever a controlling stockholder can vote against a sale the out-voted minority can assert a coercion claim.

The public shareholders, in other words, bought into General Cigar with full knowledge of the powers accorded to the Cullmans as a result of their high-vote shares. However, under the terms of this transaction, the public shareholders received greater rights than the law strictly requires.

The normal relationship of majority and minority shareholders was an even more significant factor in the court's rejection of the plaintiffs' claim, under Omnicare, that the Cullmans and their representatives on the board violated their fiduciary duties by entering into the voting agreement in the first place. In its analysis of this claim, the court drew a sharp distinction between agreements entered into as shareholders versus agreements entered into as officers and directors, asserting that the agreement here was merely with the Cullmans "as shareholders" and using this differentiation of roles as a basis to distinguish Omnicare. Having separated the Cullmans as owners from the Cullmans (and their representatives) as board members and managers, the court then conducted a brief review of the fiduciary duties owed by majority shareholders to minority shareholders, pointing out that: (1) majority shareholders are not required to sell the corporation in order to benefit the minority, (2) majority shareholders have discretion over when and to whom to sell their shares without regard to whether the minority shares

64. Id. at *7.
66. Id. at *1.
67. Id. at *7 n.92.
68. Id. at *8.
69. Id. at *5 (emphasis in original).
70. Orman, 2004 WL 2348395, at *5 ("This factual distinction from Paramount and Omnicare is meaningful."). For further discussion on this point, see supra note 39 and accompanying text.
in a control premium,\textsuperscript{72} and (3) majority shareholders have an absolute right to dispose of their shares at any price.\textsuperscript{73} The point here is that the Cullmans, because they were merely acting in their capacity as shareholders in entering into the voting agreement, could do more or less whatever they wanted. And what did they do? They ensured that the minority received the same price they did in the deal.\textsuperscript{74}

In sum, \textit{Orman} rests firmly upon the court’s controlling shareholder jurisprudence. The court treats \textit{Orman} essentially as a majority shareholder case, and without any evidence of abuse or exploitation of the public shareholders, the court concludes that the controlling shareholder, the Cullmans, acted well within their rights.\textsuperscript{75} The case amounts, in other words, to a very limited qualification of the weak reading of \textit{Omnicare}, resting on the distinction between board action and shareholder action. \textit{Optima} presents similar lock-up issues in the context of a closely held corporation in which two shareholders controlled a majority of the voting power. In that case, WCI, a troubled steel company, had canvassed over 20 potential buyers before initiating a bidding process with two prospective buyers: Severstal and Optima. The sale process was complicated by a collective bargaining agreement between WCI and the United Steelworkers Union that gave the union a veto right over any change-of-control transaction. Each bidder sought the union’s exclusive support, and Severstal ultimately won it, subsequently submitting a bid of $101 million. Nevertheless, Optima eventually submitted a bid of $150 million, subject to the union’s approval.

Upon being informed by WCI of Optima’s bid, Severstal increased its bid to $136 million. Optima responded by appealing directly to WCI’s shareholders, offering to buy their shares at a substantial premium. WCI then contacted Severstal and offered to support their bid if Severstal either (a) allowed a 20-day solicitation period after the signing of the merger agreement; or (b) increased its bid. Severstal chose the latter option, raising its offer to $140 million, conditioned on the board’s ability to deliver shareholder approval in the form of written consents from the company’s two majority shareholders, within 24 hours of signing the merger agreement. WCI agreed, signing a merger agreement with Severstal and immediately thereafter delivering signed written consents from the company’s two majority stockholders, thereby locking up the transaction.

Optima and the shareholder plaintiffs sued to enjoin the Severstal transaction, arguing under \textit{Omnicare}, that the WCI board’s commitment in the merger agreement to obtain stockholder approval within 24 hours, coupled with the fact that the two


\textsuperscript{73} \textit{Orman}, 2004 WL 2348395, at *5 (citing Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938 (Del. 2003)).

\textsuperscript{74} This may be more ambiguous than it is made to seem in the case. While the Cullmans did bring along the minority so that both received the same price in the transaction, the Cullmans did not, in fact, sell control. \textit{See supra} note 58 and accompanying text (stating that the Cullmans planned to sell approximately one-third of their equity interest). This suggests that the Cullmans may have been able to sell their controlling interest at a higher price in a subsequent transaction after the public shareholders were gone. In this respect, the transaction resembles a minority squeeze out more than it does a control transaction.

\textsuperscript{75} \textit{Orman}, 2004 WL 2348395, at *8.
shareholders who owned majority voting power and were in fact ready to approve the transaction, amounted to an impermissible lockup.\textsuperscript{7} In the words of counsel for Optima: "For 4 million bucks the board traded whatever window of a fiduciary out they would have had, and they . . . totally locked up. The deal was done."\textsuperscript{77}

Responding to the \textit{Omnicare} argument, Vice Chancellor Lamb held:

\begin{quote}
[A] stockholder vote is not like the lockup in \textit{Omnicare} . . . . [T]he stockholder vote here was part of an executed contract that the board recommended after deciding it was better for stockholders to take Severstal's lower-but-more-certain bid than Optima's higher-but-more-risky bid. In this context, the board's discussion reflects an awareness that the company had severe liquidity problems. Moreover, it was completely unclear that Optima would be able to consummate any transaction. Therefore, the stockholder vote, although quickly taken, was simply the next step in the transaction as contemplated by the statute. Nothing in the DGCL requires any particular period of time between a board's authorization of a merger agreement and the necessary stockholder vote. And I don't see how the board's agreement to proceed as it did could result in a finding of a breach of duty.\textsuperscript{78}
\end{quote}

In distinguishing actual voting (via written consent) from binding oneself by means of a voting agreement, the Court of Chancery's holding sketched a clear work-around to the narrow holding of \textit{Omnicare}. Transaction planners, \textit{Optima} suggests, can deliver a fully locked-up agreement whenever (a) the target's charter does not prohibit shareholder action by written consent,\textsuperscript{79} and (b) large shareholders can be aggregated to reach voting control.\textsuperscript{80} In blessing the action-by-written-consent work-around,\textsuperscript{81} the Vice Chancellor also commented candidly: "[I]t's really not my place to note this, but \textit{Omnicare} is of

\begin{footnotes}
\begin{enumerate}
\item In the words of Optima's counsel: "[W]e're not saying that . . . it's per se wrong to approve a merger agreement in this context by written consent; but we are saying that under the facts of this case, it was a breach of fiduciary duty for the board to do so. That's our position." Transcript of Oral Argument at 23, Optima Int'l of Miami, Inc. v. WCI Steel, Inc., No. 3833-VCL (Del. Ch. June 27, 2008), available at http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf.
\item \textit{Id.} at 21--22.
\item \textit{Id.} at 127--28.
\item See \textit{DEL. CODE ANN.} tit. 8, § 228 (2013) (permitting stockholder action by majority written consent, in lieu of a meeting, unless the certificate of incorporation provides otherwise).
\item As a practical matter, the ability to collapse signing and closing as in \textit{Optima} may be limited to the context of closely held corporations because the SEC's proxy rules require public companies to file an information statement, followed by a 20-calendar day waiting period, before corporate action authorized by a majority written consent of stockholders may be taken (at least where consents from the minority stockholders have not been solicited). 17 C.F.R. § 240.14c-2(b). The use of this technique in the public company context, although blessed under Delaware law in \textit{OPENLANE}, may thus violate the proxy rules.
\item Similar to the role played by "overwhelming" minority approval in \textit{Orman}, the \textit{Optima} court was comforted by the fact that the board understood the preferences of "a clear majority" of the company's shareholders to "be sure not to lose the Severstal bid." Transcript of Oral Argument at 133, Optima Int'l of Miami, Inc. v. WCI Steel, Inc., No. 3833-VCL (Del. Ch. June 27, 2008), available at http://lawprofessors.typepad.com/mergers/files/_0702120713_001.pdf (noting that the board had called a meeting inviting all 28 of its stockholders, during which it heard a presentation about the status of the transaction along with the advantages and disadvantages of the competing bids as well as the role of the Union's effective veto right, at which time "a clear majority [of the stockholders] were in favor of the board acting in such a way as to be sure not to lose the Severstal bid").
\end{enumerate}
\end{footnotes}
questionable continued vitality."  

OPENLANE presented the Optima work-around in the context of a publicly held corporation. OPENLANE was a publicly held Delaware corporation, and its board held majority-voting control over the company. Anticipating financial difficulty, the company solicited a number of prospective strategic acquirers, eventually entering into a merger agreement with KAR under which KAR would acquire OPENLANE for approximately $210 million in an all-cash transaction. The day after signing the merger agreement, OPENLANE received written consents from shareholders owning a majority of the corporation's voting power. The consents would have been sufficient under Delaware law to approve the agreement; however, the agreement contained a supermajority consent provision requiring approval of at least 75% of the outstanding shares. The merger agreement also included a "stringent" no-solicitation provision and, interestingly, lacked a fiduciary out clause.  

When shareholder plaintiffs sued to enjoin the transaction, they argued, citing Omnicare, that the combination of defensive devices—specifically the no-solicitation provision and the delivery of majority consents immediately after closing—were preclusive and coercive, amounting to a fully locked-up merger agreement. Rejecting both of these arguments, Vice Chancellor Noble offered a narrow, fact-specific reading of Omnicare and held, citing Optima, that the quick delivery of majority consent after a deal is signed does not present the same issues as entering into a voting agreement. Although acknowledging, in a footnote, that "as a practical matter, approval by a majority..."
of shares within the day after the signing of the Merger Agreement was a virtual certainty," the court emphasized that the DGCL permits shareholders to act by written consent without any time limitations.92

The distinction between shareholder voting and shareholder voting agreements focuses squarely on what I referred to above as the weak reading of Omnicare—that is, the reading that required the must-submit covenant to be viewed together with the majority shareholder voting agreements to hold that NCS deal protections were indeed preclusive.93 Shareholder voting is in no way an act of the board, as opposed to shareholder voting agreements that the board either promises to deliver in the merger agreement or enables by waiving DGCL Section 203.94 While Omnicare may, in certain circumstances, have restricted the freedom to contract, it did limit the shareholders’ statutorily protected power to vote or act through written consent. In creating a clear work-around to the narrow holding of Omnicare, applicable to companies with concentrated ownership whose shareholders retain the power to act by majority written consent,95 OPENLANE thus limits the weak reading of Omnicare to its facts.

Some of Vice Chancellor Noble’s most interesting remarks, however, address what I have described as the strong reading of Omnicare—that is, the per se rule that every merger agreement contain a fiduciary out.96 In a footnote addressing the argument (that the plaintiffs’ counsel had elected not to press),97 the Vice Chancellor wrote:

Omnicare may be read to say that there must be a fiduciary out in every merger agreement . . . . Nevertheless, when a board enters into a merger agreement that fails to contain a fiduciary out it is not at all clear that the Court should automatically enjoin the merger when no superior offer has emerged. In Omnicare itself, the Supreme Court held unenforceable a merger agreement without a fiduciary out, thereby allowing the board to consider what the Supreme Court viewed as a hostile bidder’s superior offer. Thus, hostile bidders are on notice that Delaware courts may not enforce a merger agreement that lacks a fiduciary out if they present a board with a superior offer. If, however, a merger agreement lacks a fiduciary out, and no better offer has emerged why should the Court enjoin the merger? To require that a fiduciary out clause be put in the merger agreement when sophisticated hostile bidders are on notice that the merger agreement may be found unenforceable if they submit a superior offer? Enjoining a merger when no superior offer has emerged is a perilous endeavor because there is always the possibility that the

91. Id. at n.48.
92. OPENLANE, 2011 WL 4599662, at *10. In the public company context, however, the OPENLANE structure may conflict with the federal proxy rules. Supra note 80. 93. See supra notes 30–32 and accompanying text (describing and explaining the must-submit covenant).
94. See supra note 39 and accompanying text (providing an example of a board waiving DGCL § 203).
95. Shareholders have a default right to consent in writing unless the corporation opts-out in its charter. See DEL. CODE ANN. tit. 8, § 228(a) (2013) (“Unless otherwise provided in the certificate of incorporation, any action required by this chapter to be taken at any annual or special meeting . . . . may be taken without a meeting . . . . if a consent or consents in writing . . . . shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted . . . . ”).
96. See supra Part I (discussing the strong reading of Omnicare).
97. OPENLANE, 2011 WL 4599662, at *10 n.53.
existing deal will vanish, denying shareholders the opportunity to accept any transaction.98

This language, technically dicta, suggests that no-out merger agreements may indeed run afoul of Omnicare, but it also suggests that the Court of Chancery will not enjoin transactions unless an intervening bidder gets involved. No-out contracts, in other words, are indeed voidable, but only by frustrated bidders, not by ordinary shareholder plaintiffs. This reasoning has a number of interesting implications for Delaware jurisprudence that are beyond the immediate scope of this Article.99

For our immediate purposes, the important point is that the “OPENLANE structure” represents an important, if narrow, qualification to Omnicare, which can no longer plausibly be read to bar all forms of transactional certainty. Companies with concentrated ownership and the power to act by majority written consent may be able to offer certainty of closing. Moreover, reading Optima and OPENLANE together with Orman shows that the doctrinal foundation of these cases rests upon the reluctance of Delaware courts to ride to the rescue of the minority shareholders in controlled corporations when there has been no misrepresentation as to their status and no fraudulent act depriving them of their basic rights.

This line of cases, however, should not be understood to signal the death of Omnicare. Indeed, since Orman, Optima, and OPENLANE all belong to a narrow factual context and proceed from a doctrinal rationale that is in no way applicable to minority shareholders in a diffusely held corporation, they leave the strong reading of Omnicare fundamentally undisturbed. In the next Part, I hope to show that the strong reading remains both vital and highly relevant in Delaware jurisprudence.

98. Id. Applying this reasoning to the transaction at hand, the Vice Chancellor wrote:

[Here,] [t]here is no alternative or competing offer—importantly, none that is arguably superior—and that suggests that caution should be exercised before enjoining a transaction with no viable alternative and no ready cure. On the other hand, there was little or no publicity about the OPENLANE–KAR transaction before it was announced and almost immediately thereafter irrevocable consents from holders of a sufficient number of OPENLANE shares to approve the Merger were obtained, leaving the impression (or reflecting the reality) of a “done deal.” Under such circumstances, it is not surprising that another suitor has not emerged.

Id.

99. One implication of this may be that professional plaintiffs, who challenge every merger agreement and settle for non-pecuniary compensation (plus attorney’s fees), do not confer a substantial benefit when they moderate a merger agreement’s deal protection provisions because would-be intervening bidders can be deemed to be on notice that such provisions, thanks to the strong reading of Omnicare, are unenforceable anyway. Because would-be intervening bidders are thus on notice, shareholder plaintiffs accomplish nothing by reducing the protective effect of deal protections in their settlement agreements. See generally Sean J. Griffith & Alexandra D. Lahav, The Market for Preclusion in Merger Litigation, 66 Vand. L. Rev. 1053, 1092 (2013) (discussing ways in which non-pecuniary settlements of merger litigation may nevertheless be deemed to provide “substantial benefit” to the shareholder class). Another implication of this reasoning suggests a standing rule in merger litigation that favors intervening bidders over shareholder plaintiffs. See also J. Travis Laster, The Line Item Veto and Unocal: Can a Bidder Qua Bidder Pursue Unocal Claims Against a Target Corporation’s Board of Directors?, 53 Bus. Law. 767, 797 (1998) (marshaling doctrinal support for a bidder-standing rule). But see Omnicare, Inc. v. NCS Healthcare, Inc. 809 A.2d 1163, 1169–73 (Del. Ch. 2002) (holding Omnicare’s status as a bidder did not confer standing to assert breach of fiduciary duty claims).
Evidence of the continued vitality of Omnicare has recently arisen in the context of standstill provisions. Standstills are negotiated provisions in transactions involving public company targets, typically embedded in confidentiality agreements, which restrict prospective bidders from purchasing the target’s stock, initiating a proxy contest, or otherwise seeking to conclude a business combination without the target board’s approval for a defined period of time, often one year. Standstills thus enable the target company to control the sale process and, critically, prevent the prospective buyer from launching a hostile bid after having had access to the target’s confidential information. However, because they preclude prospective buyers from bidding, standstills can also serve as a form of deal protection and can thus be used to insulate a winning bid from subsequent challenge or to favor one bidder over another.

In Part A below, I argue that the animating principle underlying a recent line of Court of Chancery rulings involving standstills is, essentially, the strong reading of Omnicare. In Part B, I demonstrate the parallel between these rulings and a line of pre-Omnicare deal protection decisions themselves invoking the duty to remain “fully informed.”

A. The Standstill Cases

In a line of cases beginning with Topps in 2007, through Celera, Complete Genomics, and Ancestry.com all decided in 2012, the Court of Chancery has begun to wrestle with the deal-protective effects of standstill agreements. Although the opinions do not always acknowledge it, these issues can plainly be seen as Omnicare issues. Moreover, the reasoning in these cases clearly shows that far from dying an early death, Omnicare is alive and well and living in Wilmington.

In Topps, then-Vice Chancellor Strine was asked to enjoin the acquisition of the iconic baseball card maker by a private equity fund headed by Michael Eisner, former


101. See In re Topps Co. S’holders Litig., 926 A.2d 58, 91 (Del. Ch. June 14, 2007) (“Standstills serve legitimate purposes.”). The Topps court stated that legitimate purposes include:

When a corporation is running a sale process, it is responsible, if not mandated, for the board to ensure that confidential information is not misused by bidders and advisors whose interests are not aligned with the corporation, to establish rules of the game that promote an orderly auction, and to give the corporation leverage to extract concessions from the parties who seek to make a bid.

Id.

102. Id. (“[S]tandstills are also subject to abuse. Parties ... often ... insist on a standstill as a deal protection. Furthermore, a standstill can be used by a target improperly to favor one bidder over another, not for reasons consistent with stockholder interest, but because managers prefer one bidder for their own motives.”)


CEO of Disney.106 Having failed to win Topps in the initial round of bidding, in connection with which it had entered into a standstill agreement, industry rival Upper Deck launched a bid at a significant premium to the merger price prior to the expiration of the merger agreement’s go-shop period.107 Rejecting this offer as inadequate, the Topps board moved forward to close the transaction with the Eisner group, leaving the standstill in place to prevent Upper Deck from appealing directly to shareholders.108 Upper Deck then sued Topps for breach of fiduciary duty.109

In enjoining the merger agreement until Topps waived the standstill to allow Upper Deck to make its tender offer, Vice Chancellor Strine highlighted the importance of fiduciary outs in standstills.110 Finding a likelihood of improper motive beneath the reluctance of the Topps board to transact with Upper Deck,111 the court criticized Topps for using the standstill provision for an improper purpose.112 Underscoring the importance of Revlon in this analysis, the Vice Chancellor wrote:

Because the Topps board is recommending that the stockholders cash out, its decision to foreclose its stockholders from receiving an offer from Upper Deck seems likely, after trial, to be found a breach of fiduciary duty . . . . What Upper Deck is asking for is release from the prior restraint on it, a prior restraint that prevents Topps’s stockholders from choosing another higher-priced deal. Given that the Topps board has decided to sell the company, and is not using the Standstill Agreement for any apparent legitimate purpose, its refusal to release Upper Deck justifies an injunction. Otherwise, the Topps stockholders may be foreclosed from ever considering Upper Deck’s offer . . . .113

In a Revlon context, in other words, where the court will scrutinize the efforts undertaken by the target board to maximize short-term shareholder wealth, the board may not use standstills for the improper purpose of proceeding with a favored bidder in the face of a significant overbid. Significantly, however, Topps acknowledges a role for standstills even under Revlon, explicitly suggesting that the board may use such standstills to conduct an auction process in good faith.114 The issue, it seems, is the purpose to which

---

106. Topps, 926 A.2d at 63.
107. Id. at 62.
108. Id. at 62–63.
109. Id. at 63.
110. Id. at 91 (“In this case, the Topps board reserved the right to waive the Standstill if its fiduciary duties required. That was an important thing to do, given that there was no shopping process before signing with Eisner.”).
111. Topps, 926 A.2d at 90 (emphasizing the founding family’s reluctance to allow Topps to fall into the hands of an “upstart rival”).
112. Id. at 91 (doubting that “the Topps board is using the Standstill to extract reasonable concessions from Upper Deck in order to unlock higher value. The Topps board’s negotiating posture and factual misrepresentations are more redolent of pretext, than of a sincere desire to comply with their Revlon duties”).
113. Id. at 92.
114. Id. at 91. In a footnote, the Vice Chancellor offers a clarifying hypothetical:

Contemplate, for example, a final round auction involving three credible, but now tired bidders, who emerged from a broad market canvass. One can easily imagine how a board striving in good faith to extract the last dollar they could for their stockholders might promise the three remaining bidders that the top bidder at 8:00 p.m. on the next Friday will get very strong deal protections...
the provisions are put.

The controversy surrounding standstills became acute in 2012 with three Court of Chancery cases addressing so-called "Don't Ask, Don't Waive" (DADW) standstills. Standstills routinely prevent bound parties from making a public request to be released from their standstill obligations, a feature that is plainly necessary if the provisions are to accomplish the goal of preventing bound parties from subsequently launching a hostile bid. The purpose of DADW standstills is to prevent bound parties from making any request, public or private, to be released from the standstill. Parties bound by standstills, in other words, may no longer communicate with the target. This gives DADW standstills a potentially strong deal-protective effect, especially when combined with a merger agreement that contains a no-shop provision because the DADW standstill will prevent the most likely bidders of the target from making inbound communications, while the no-shop will effectively prevent the target from making outbound communications to prospective bidders. It is this aspect of DADW standstills that troubled the Court of Chancery in three 2012 cases: Celera, Complete Genomics, and Ancestry.com.

Celera involved the March 2011 merger agreement between Quest Diagnostics Inc. and Celera Corp., providing for the acquisition of Celera by Quest for approximately $680 million. The acquisition agreement resulted from a bidding process in which Celera's financial advisors had contacted nine potential bidders, five of which performed at least some amount of due diligence. In exchange for access to diligence information, all five of these companies entered into confidentiality agreements. The confidentiality agreements contained standstill provisions that included a DADW including a promise from the target not to waive the Standstill as to the losers.

Id. at 91 n.28.


116. See Don’t Ask, Don’t Waive Standstill Provisions: A Tool to Maximize Value or Willful Blindness?, JONES DAY (January 2013), http://www.jonesday.com/dont_ask_dont_waive ("A 'don't ask, don't waive' provision in a standstill prohibits a potential acquirer from making any public or private request that a target waive the standstill restrictions.").

117. While the duration of a standstill provision varies, they typically run for six months to two years. 1-5 TRAVIS SOUZA, M & A PRACTICE GUIDE, § 5.03(3)(b)(iii)(2012).

118. This assumes that the target cannot decide to waive standstills, which would be the case if the merger agreement so provided. See, e.g., Agreement and Plan of Merger, dated as of September 15, 2012, by and among BGI-Shenzhen, Beta Acquisition Corporation and Complete Genomics, Inc., § 5.3(a)(vi) (including language not to “waive, terminate, modify, fail to enforce or release any Person . . . from any provision of . . . any 'standstill,' confidentiality or similar agreement”) [hereinafter Complete Genomics Merger Agreement].


123. Id. at *3.

124. Id.
When Quest emerged from this process as the winning bidder, the companies structured the acquisition as a front-end tender offer, followed by a second-step squeeze-out merger. The merger agreement contained several deal-protection measures, including a no-shop provision (with a window shop fiduciary out) and a termination fee. When the shareholders challenged the merger in litigation, the plaintiffs argued that the combination of the no-shop provision with the DADW standstill provision effectively precluded Celera’s board from communicating with those bidders most likely to submit a superior proposal.

The parties ultimately settled the merger litigation for non-monetary consideration, including: (1) reduction of the termination fee, (2) waiver of the DADW provision and modification of the no-shop to invite competing bids, (3) a seven-day extension of the tender offer, and (4) additional disclosures about the transaction process and financial analysis. In approving the settlement (and plaintiffs’ attorneys’ fees), Vice Chancellor Parsons noted:

Taken together . . . the Don’t-Ask-Don’t-Waive Standstills and No Solicitation Provision are . . . problematic. [The Delaware Supreme] Court has stressed the importance of the board being adequately informed in negotiating a sale of control: “The need for adequate information is central to the enlightened evaluation of a transaction that a board must make.” Here, the Don’t-Ask-Don’t-Waive Standstills block at least a handful of once-interested parties from informing the Board of their willingness to bid (including indirectly by asking a third party, such as an investment bank, to do so on their behalf), and the No Solicitation Provision blocks the Board from inquiring further into those parties’ interest . . . . Moreover, the increased risk that the Board would outright lack adequate information arguably emasculates whatever protections the No Solicitation Provision’s fiduciary out otherwise could have provided. Once resigned to a measure of willful blindness, the Board would lack the information to determine whether continued compliance with the Merger Agreement would violate its fiduciary duty to consider superior offers. Contracting into such a state conceivably could constitute a breach of fiduciary duty.

Because the Vice Chancellor was merely approving a settlement, the court did not hold such provisions unenforceable, either in Celera itself or in general. But as is typically the case in the development of Delaware law, the court was using dicta to articulate a potential doctrinal basis to analyze an emerging issue, in this case the deal-protective

125. Id.
126. Id. at *1.
128. Id. at 13-14.
129. Id. at *7.
130. Id. at 21 (citations and internal quotations omitted).
131. Id. at 22 (“To be clear, I do not find, either in the circumstances of this case or generally, that provisions expressly barring a restricted party from seeking a waiver of a standstill necessarily are unenforceable.”).
effects of standstill provisions. In supporting its reasoning, the court cited *QVC* and *ACE:* *QVC* for the propositions that boards must be fully informed and that contracts are voidable when they force boards to abrogate their fiduciary duties; *ACE* for the proposition that a no-shop provision cannot prevent a board from complying with its fiduciary duties. The suggestion from *Celera,* in other words, is that DADW standstills combined with no-shops may prevent boards from complying with their fiduciary duties by preventing them from being “fully informed.”

Later in the year, the court finally acted to enjoin a DADW standstill on the basis of similar reasoning, emphasizing the need of boards to remain fully informed. In *Complete Genomics,* Vice Chancellor Laster enjoined a merger between Complete Genomics, Inc. (“Genomics”) and BGI–Shenzhen, and he also enjoined Genomics from enforcing a confidentiality agreement with a third-party bidder that contained a DADW standstill provision.

In this case, Genomics publicly announced that it was pursuing strategic alternatives in June 2012, and contacted 42 parties that might be interested in an equity investment, a strategic partnership, or an acquisition. Of these 42 parties, nine signed confidentiality agreements, four of which contained standstill agreements that prohibited the potential bidder from making any public request to be released from the standstill agreement, and at least one of these contained a further DADW provision. Genomics pursued discussions with all interested parties, but eventually all except BGI withdrew, leaving Genomics with one remaining bidder. The resulting merger agreement with BGI was strongly protected. Significantly, the merger agreement did not permit Genomics to

---


> The need for adequate information is central to the enlightened evaluation of a transaction that a board must make. This requirement is consistent with the general principle that “directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them.”

*QVC,* 637 A.2d at 44 (internal quotations omitted).

135. *Celera,* 2012 WL 1020471, at *21 n.145 (citing *ACE,* 747 A.2d at 106) (finding no solicitation provision “pernicious” where it arguably required “an abdication by the board of its duty to determine what its own fiduciary obligations require”).

136. In comparison, a Canadian appeals court, addressing a similar issue, recently upheld a standstill agreement in the face of a superior offer, declining to adopt the rule set out by “some American authorities, that the target vendor can place no limits on the directors’ right to consider superior offers and that any provision to the contrary is invalid and unenforceable.” *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust,* [2007]O.A.C. 205, ¶ 54.


138. *Id.* at 8.

139. *Id.*

140. *Complete Genomics Merger Agreement,* supra note 118, § 5.3 (no solicitation and change of recommendation covenants), § 7.1(e) (break fee for superior proposal or changed recommendation), and § 7.2
terminate the transaction to accept a superior proposal.\textsuperscript{141} Genomics could only terminate the agreement unilaterally if BGI failed to complete the tender offer by the outside date (originally December 14, 2012), a date the parties were required to extend automatically by up to 90 days if any condition to the offer (including the minimum number of shareholders tendering into the offer) was not met.\textsuperscript{142} As a result, although Genomics could change its recommendation should a superior offer appear,\textsuperscript{143} the appearance of a topping bid was actively discouraged by the mechanics of the merger agreement which would have required an intervening bidder to wait until March 14, 2013 (a date six months after the signing was actively discouraged by the mechanics of the merger agreement which would have required of the merger agreement) before its offer could be acted upon.\textsuperscript{144} The merger agreement, in other words, granted exclusivity for a six-month period. In addition, the agreement contained a provision barring the board from waiving any standstill agreements.\textsuperscript{145}

Addressing the DADW provision in a transcript opinion, Vice Chancellor Laster analogized the DADW standstill to a "bidder-specific no-talk clause."\textsuperscript{146} Just as no-talks enhance the customary features of a no-shop by prohibiting discussions altogether,\textsuperscript{147} DADW provisions enhance the customary features of standstills by similarly barring discussions on a bidder-specific basis.\textsuperscript{148} Citing a line of deal protection cases including Phelps Dodge,\textsuperscript{149} \textit{ACE},\textsuperscript{150} and Cirrus Holdings\textsuperscript{151} for the proposition that deal protections are most problematic when they bar negotiations, inhibit information exchange, and thereby prevent a board of directors from its ongoing obligation to be

\begin{itemize}
\item \textsuperscript{141} \textit{Id.} §7.1 (specifying termination rights).
\item \textsuperscript{142} \textit{Id.} §§ 1.1(c) & (e). \textit{See also} Annex I (setting forth the minimum condition).
\item \textsuperscript{143} Complete Genomics Merger Agreement, supra note 118, §5.3(e) (specifying the fiduciary out for the no adverse change in recommendation covenant).
\item \textsuperscript{144} This is so because the appearance of the topping bid could be expected to cause the minimum condition to fail (since rational shareholders will not tender into an inferior offer), which would then trigger automatic extensions of the drop-dead date until the March 14, 2013, prior to which date Genomics could not terminate the transaction. \textit{Id.} §§ 1.1, 7.1, Annex I. The merger agreement was entered into as of September 15, 2012.
\item \textsuperscript{147} \textit{Id.} (“Unlike a traditional no-shop clause, which permits a target board to communicate with acquirers under limited circumstances, a no-talk clause ‘...not only prevents a party from soliciting superior offers or providing information to third parties, but also from talking to or holding discussions with third parties.’”).
\item \textsuperscript{148} \textit{Id.} at 18 (holding that a DADW standstill “has the same disabling effect as the no-talk clause, although on a bidder-specific basis”).
\item \textsuperscript{149} Phelps Dodge Corp. v. Cyprus Amax Minerals Co., Nos. 17398, 17383, 17427, 1999 WL 1054255 (Del. Ch. 1999 Sept. 27, 1999).
\item \textsuperscript{150} \textit{ACE} Ltd. v. Capital Re Corp., 747 A.2d 95, 96 (Del. Ch. 1999).
\item \textsuperscript{151} Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191, 1207 (Del. Ch. 2001).
\end{itemize}
"fully informed," especially in making its recommendation to the shareholders regarding approval of the merger agreement. Vice Chancellor Laster located the problem with DADW provisions principally in their ability to interfere with the requirement under Delaware law that "a board of directors give a meaningful, current recommendation to stockholders regarding the advisability of a merger including, if necessary, recommending against the merger as a result of subsequent events." Summarizing the basis for his injunction of the standstill, the Vice Chancellor wrote:

So in my view, by analogy to Phelps Dodge, a Don't Ask, Don't Waive Standstill is impermissible because it has the same disabling effect as the no-talk clause, although on a bidder-specific basis. By agreeing to this provision, the Genomics board impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders.

Interestingly, Vice Chancellor Laster did not base his holding on the exclusive merger agreement’s interference with the target board’s duty under Revlon to remain fully informed, especially in making its recommendation to the shareholders regarding approval of the merger agreement. Vice Chancellor Laster focused on the target’s ability to decide whether to negotiate with third parties and whether the provision impermissibly prevented the board “from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party.”

Vice Chancellor Laster also stated, “[D]irectors cannot willfully blind themselves to opportunities that are presented to them, thus limiting the reach of "no talk" provisions.”

Carrying the point further, the Vice Chancellor wrote:

So regardless of whether a no-talk provision, as in Phelps Dodge, or a Don’t Ask, Don’t Waive provision here, would create problems for the decision to negotiate, and certainly Phelps Dodge holds that it would, those provisions interfere with the target’s ability to determine whether to change its merger recommendation because they absolutely preclude the flow of incoming information to the board.


Relying principally on Phelps Dodge, Vice Chancellor Laster noted that “Chancellor Chandler in Phelps Dodge focused on the target’s ability to decide whether to negotiate with third parties and whether the provision impermissibly prevented the board ‘from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party.’” Id. (quoting Phelps Dodge Corp., 1999 WL 1054255, at *1). The Vice Chancellor also stated, “[D]irectors cannot willfully blind themselves to opportunities that are presented to them, thus limiting the reach of “no talk” provisions.” Id. (quoting Cirrus Holdings, 794 A.2d at 1207) (internal quotation marks). Vice Chancellor Laster also noted that then-Vice Chancellor Strine cited Phelps Dodge with approval in his ACE opinion. Vice Chancellor Laster’s support for the duty to remain fully informed came from Van Gorkom and Frontier v. Holly. See Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (“[A] director has a duty . . . to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. Certainly in the merger context, a director may not abdicate that duty by leaving [it] to the shareholders alone.”); Frontier v. Holly, No. Civ.A. 20502, 2005 WL 1039027, at *28 (Del. Ch. Apr. 29, 2005) (“Revisiting the commitment to recommend the Merger was not merely something that the Merger Agreement allowed the Holly Board to do; it was the duty of the Holly Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties.”), quoted in Telephonic Oral Argument and the Court’s Ruling at 16, In Re Complete Genomics, Inc. S’holder Litig., No. 7888–VCL (Del. Ch. Nov. 27, 2012), available at http://www.wlrk.com/docs/In_re_Complete_Genomics_Shoulder_Litigation_CA_No_7888-VCL_(Del_Ch_Nov272012)(00232324).PDF.


So regardless of whether a no-talk provision, as in Phelps Dodge, or a Don’t Ask, Don’t Waive provision here, would create problems for the decision to negotiate, and certainly Phelps Dodge holds that it would, those provisions interfere with the target’s ability to determine whether to change its merger recommendation because they absolutely preclude the flow of incoming information to the board.

Id. at 17–18.

154. Id. at 18.
open to superior offers but rather on the way in which the DADW standstill inhibited the flow of information to the board concerning the potential interest of other bidders. In *Complete Genomics*, the crucial flaw was not the locked-up merger agreement. Instead, it was the interference of the DADW standstill on the ability of the board to inform itself prior to making a recommendation to stockholders in a transaction requiring a stockholder vote. In this way, the *Complete Genomics* ruling appears to restore the pre-*Omnicare* understanding of *Van Gorkom*, according to which exclusive merger agreements are indeed enforceable, while nevertheless insisting on a robust fully-informed/anti-disablement principle that I have here described as the strong reading of *Omnicare*. *Complete Genomics* immediately raised concern among practitioners. In client memoranda, firms objected to the ruling's apparent *per se* invalidation of DADW standstills. The concern was quickly taken up once more, less than a month later, by the Court of Chancery in *Ancestry*. *Ancestry* involved a private bidding contest for Ancestry.com with three prospective buyers. Investors challenged the transaction, objecting, among other things, to the DADW standstill provision. In a ruling enjoining the transaction until further disclosures could be made, principally regarding the negotiation process and the role of the standstill, Chancellor Strine emphasized that he was not crafting a *per se* rule for DADW standstills, nor did he think it was the role of the Court of Chancery to do so. The Chancellor went so far as to acknowledge and accept the value of standstills, even DADW standstills, as a credible commitment mechanism, or in his words, as a "gavel" in the auction process:

So here we get a provision, and . . . I'm not prepared to rule out that they can't

155. According to this reading, *Complete Genomics* does not in fact imply that DADW standstills are *per se* invalid but rather that they are invalid when they interfere with a fully informed shareholder vote. In transactions not requiring a shareholder vote, such as a sale of less than substantially all of a company's assets, *Complete Genomics* suggests that DADW standstills are unobjectionable.

156. See infra note 206 and accompanying text (discussing the aftermath of *Van Gorkom*'s holding).

157. According to this reading, the board's duty to remain fully informed is an instrumental part of its obligation to make a candid recommendation. *Complete Genomics* thus implies that the board's duty to remain informed concerning topping bids does not derive from the duty to take such a bid (hence the court's acceptance of the exclusive merger agreement) but rather from the duty under §251(b) to make a candid recommendation to shareholders (hence the court's injunction of the DADW standstill). This reading of the case is consistent with the argument I make infra at notes 208–11 and accompanying text.

158. See, e.g., Memorandum from Wachtell, Lipton, Rose & Katz, Don't Ask Don't Waive Standstills 1 (Dec. 18, 2012), available at http://www.wlrk.com/webdocs/wlrknew/AttorneyPUBS/WLRK.22235.12.pdf (claiming that the *Complete Genomics* ruling could have a significant negative effect on the merger market).


160. See generally id. (Chancellor Strine addressing the standstill provision).

161. Id. at 20–22.

162. Id. at 24 ("[I]f you want to say *per se* invalidity, that sounds like something for the Legislature to decide.").

163. Id. (accepting that transacting parties "can use this tool to gain credibility so that those final-round bidders know the winner is the winner, at least as to them").
be used for value-maximizing purposes. But the value-maximizing purpose has to be to allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you're creating an auction, there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process.  

The question therefore becomes: how did the target board use the DADW standstill? Did the board in good faith use the provision as a credible commitment mechanism—a means of offering transactional certainty—in order to induce bidders to put their last best offer on the table? Or, alternatively, did the board act in bad faith, using the commitment mechanism to protect a bidder that they favored for selfish or otherwise improper motivations? 

Having been unconvinced by the allegations of improper motive in the sale process the Chancellor also doubted that Ancestry effectively used the provision as a credible commitment mechanism. Instead, Chancellor Strine found the board likely did not know or understand what it was dealing with—the board was not informed about the “potency” of the standstill provision, nor did the bankers or executives negotiating the deal seem to understand it—suggesting a likely violation of the duty of care, both in entering into the provision and in failing to use it as Revlon required. To remedy this problem, the Chancellor ordered further disclosures: the board would have to better describe the deal process and, in particular, the role of the DADW standstill so that shareholders could hold an informed vote, enjoining consummation of the transaction until these disclosures were made.

Ancestry and Complete Genomics are both based on a principle of disclosure. Insofar as DADW standstills prevent information concerning the potential presence of other bidders from reaching stockholders, Complete Genomics would void the DADW aspect of the standstill to allow that information to flow. Ancestry offers an alternative approach by requiring disclosure of the number of bidders who signed standstills and at what stage in the transaction process. The disclosure offered by Ancestry, while less valuable than the revelation of a competitor’s actual bidding intent, at least enables stockholders to understand that other bidders might offer a higher price if the present deal is voted down. In the absence of this information, stockholders are likely to draw the logical inference that no other bidder has emerged because the deal process resulted in the best price available. Furthermore, disclosures channel conduct. Hence, if transacting

165. Id. at 14.
166. Id. at 25 (“It was not used as an auction gavel.”).
167. Id. at 24–25.
168. Id. at 25–26.
170. Id. at 29–31.
parties are forced to be explicit about the deployment and use of DADW provisions, boards will be encouraged to use them only where appropriate, and as importantly, subsequent dealmakers will have a blueprint for when and how such provisions may be validly used.

Although Ancestry goes in a different direction from either Celera or Complete Genomics, emphasizing the context-specific use of DADW standstills rather than an absolute duty to remain fully informed, the Ancestry finesse in no way solves the problem. All three are holdings of the Court of Chancery and none overrules any other. Moreover, the underlying principle animating Celera and Complete Genomics that Ancestry contests is the same principle underlying two important pre-Omnicare deal protection cases, Phelps Dodge¹⁷¹ and ACE,¹⁷² that is again contested by a third, IXC.¹⁷³ The parallels between these three cases and the DADW standstill cases are useful in understanding the lingering strong reading of Omnicare. This is the task of the next Part. Once we have understood the past, we pursue the question, in the following Part, of where the jurisprudence still has to go in fully settling the question in the future.

B. Ancestral Spirits

The first of the ancestral spirits is Phelps Dodge.¹⁷⁴ That case involved Phelps Dodge's unsolicited offer for Cyprus Amax Minerals Co. after Cyprus had agreed to merge with Asarco, Inc. in an agreement containing a strong no-talk provision, barring the target from negotiating with other bidders.¹⁷⁵ Thus stymied in its acquisition attempt, Phelps Dodge sued to enjoin the agreement as a breach of fiduciary duty.¹⁷⁶ Finding no likelihood of irreparable harm since the shareholders could still vote to reject the Cyprus–Asarco merger, Chancellor Chandler nevertheless suggested that Phelps Dodge had demonstrated a reasonable probability of success on the merits of its claim that the no-talk provision violated the board's fiduciary duty.¹⁷⁷ In particular, the Chancellor stated, "the decision not to negotiate, in my opinion, must be an informed one. A target can refuse to negotiate . . . but it should be informed when making such refusal."¹⁷⁸ Further, "[n]o-talk provisions . . . are troubling precisely because they prevent a board from meeting its duty to make an informed judgment with respect to even considering whether to negotiate with a third party."¹⁷⁹ And later:

[Cyprus and Asarco] should not have completely foreclosed the opportunity to

¹⁷². ACE Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).
¹⁷⁵. Id. at *1–2. See also Cyprus Amax Minerals Co., Definitive Information Statement, filed as of Nov. 2, 1999, at 31 (describing no solicitation provision barring target from "participat[ing] in any discussions or negotiations" with an intervening bidder).
¹⁷⁷. Id. at *1.
¹⁷⁸. Id.
¹⁷⁹. Id. at *1.
[negotiate], as this is the legal equivalent of willful blindness, a blindness that
may constitute a breach of a board’s duty of care; that is, the duty to take care
to be informed of all material information reasonably available.180

This, of course, is the very language Vice Chancellor Laster quoted in Complete
Genomics.181 Indeed, the duty to be fully informed is the thread that runs through
the deal protection cases, Omnicare, and the DADW standstill cases.

The second precursor to Omnicare’s “must have fiduciary outs” holding, ACE Ltd.
v. Capital Re Corp.,182 also influenced the reasoning of the recent standstill cases, having
been relied upon in both Celera and Complete Genomics.183 ACE involved the bidding
contest between ACE Limited and XL Capital Limited for Capital Re Corporation.184 As
Capital Re began to founder financially, it agreed to a stock-for-stock merger with ACE
in an agreement containing a no-talk provision with a fiduciary out allowing Capital Re
to negotiate with other bidders if the board received written advice from counsel that such
negotiations were “required in order to prevent [it] . . . from breaching its fiduciary
duties.”185 ACE had also obtained voting agreements from 33.5% of Capital Re’s shares,
which, together with its own 12.3% stake, virtually assured shareholder approval of the
merger agreement.186 Nevertheless, in response to XL’s competing bid, Capital Re
reopened negotiations with ACE, threatening to terminate the agreement unless ACE
raised its offer, a request with which ACE complied.187 But when XL topped ACE again,
rather than raise a second time, ACE sued for injunctive relief to prevent Capital Re from
terminating the agreement on the grounds that absent a written opinion from counsel
regarding the fiduciary out, Capital Re was bound by its contract with ACE.188

In refusing to issue injunctive relief for several narrow, highly fact-specific reasons,
then-Vice Chancellor Strine also remarked broadly on the validity of strong deal
protections, distinguishing a commitment not to go back to prior bidders or seek to
stimulate an auction from a commitment “to enter into a merger agreement that precludes
the board from considering any other

180. Id. at *2.
181. In Complete Genomics, however, Vice Chancellor Laster based the obligation to remain fully informed
on the board’s duty of disclosure to shareholders, not on any implication of Revlon duties. See supra notes 150–
57 (detailing Vice Chancellor Laster’s findings).
182. ACE Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999).
2012); Telephonic Oral Argument and the Court’s Ruling at 15, In Re Complete Genomics, Inc. S’holder Litig.,
In_re_Complete_Genomics_Sholder_Litigation_CA_No_7888-VCL(Del_Ch_Nov272012)(00232324).PDF.
185. Id. at 98.
186. Id. at 97–98.
187. Id. at 100
188. Id. at 100–01.
189. ACE, 747 A.2d at 106.
190. Id. at 107–08.
is most important." In this way, *ACE* is another manifestation both of the duty to remain fully informed and of the view that contractual protections inhibiting the board's ability to receive competing transaction proposals may disable the board from fulfilling that duty.

Just as *Ancestry* suggests a different course from *Celera* and *Complete Genomics*, *IXC*, the third important pre-*Omnicare* deal protection case, goes the other way from both *Phelps Dodge* and *ACE*. In that case, a merger agreement between *IXC* and Cincinnati Bell contained strong no-talk and no-solicitation provisions and, like the Capital Re-*ACE* agreement, was secured by voting agreements locking up approximately 50% of the target's stock. The agreement was the product of a sale process in which *IXC* had retained a financial advisor to solicit bidders, entered into negotiations, and provided due diligence information to several companies in the industry, ultimately choosing Cincinnati Bell at the end of the process. When *IXC* shareholders sued to enjoin the merger agreement, they argued, as the plaintiffs in *Phelps Dodge* and *ACE* had, that the deal protection provisions amounted to a breach of the board's fiduciary duties.

In a departure from the holdings in *Phelps Dodge* and *ACE*, however, the court in *IXC* applied the business judgment rule to approve the deal protections embedded in the merger agreement. In a direct challenge to the strong reading of those opinions, then-Vice Chancellor Steele wrote: "the assertion that the board 'willfully blinded' itself by approving the . . . 'no-talk' provision in the Merger Agreement is unpersuasive . . . . Provisions such as these are common in merger agreements and do not imply some automatic breach of fiduciary duty." The Vice Chancellor emphasized that the distinguishing feature was the care with which the *IXC* board had shopped the company prior to entering into the merger agreement with Cincinnati Bell. The reasoning of *IXC* thus suggests that a careful and thorough sale process may justify transacting parties in using deal protections to lock up their transactions from subsequent bidders, a principle that the Vice Chancellor had the opportunity to affirm in *SWIB v. Bartlett* prior to his elevation, four months later, to the Supreme Court.

At the Supreme Court, then-Justice Steele was, of course, on the losing side of this

---

191. *Id.* at 106.
192. *Id.* at 107 ("A ban on considering a [superior] proposal . . . comes close to self-disablement by the board. Our case law takes a rather dim view of restrictions that tend to produce such a result.").
194. *Id.* at *4-5.
195. *Id.* at *8-9.
196. *Id.* at *4.
197. *Id.* at *6.
198. *IXC*, 1999 WL 1009174, at *6 (approving of a sale process in which "[n]o superior offers were received and therefore none were turned away").
The strong reading of Omnicare, clearly articulated in the “Effective Fiduciary Out Required” section of the majority opinion, set to rest the deal protection controversy. A board cannot abdicate its “unremitting” fiduciary duty to remain “fully informed,” a duty it owes to shareholders at all times, especially in the pendency between the signing and closing of a merger agreement, a period in which the board must develop and issue its ultimate recommendation to shareholders concerning the merger. The logic here is plainly that of a per se rule—that is, if any contractual provision inhibits the board from becoming fully informed, that provision is void as a violation of the board’s unremitting duties, notwithstanding the intent of the board in agreeing to that provision. This is the logic underlying the deal protection cases (Phelps Dodge and ACE) as well as, more recently, the DADW standstill cases (Celera and Complete Genomics). It is the omnipresent specter of Omnicare.

V. PUTTING THE SPIRITS TO REST

By now I hope I have shown that the “unremitting” duty to remain “fully informed,” what I have called the strong reading of Omnicare, continues to haunt Delaware jurisprudence. This Part focuses on the regrettable doctrinal consequences the opinion creates and how the Delaware courts might finally put them to rest. The first Section below articulates the doctrinal inconsistencies Omnicare created in the larger structure of Delaware corporate law. The second offers Delaware judges an escape from the doctrinal bind through an application of enhanced scrutiny that would allow them to police the worst aspects of deal protections while allowing transaction planners to structure transactions as their negotiating context requires, finally giving Omnicare its well-deserved eternal rest.

A. The Doctrinal Dilemma

Constitutional law scholars are accustomed to discussing allocation of powers issues. However, as Bill Savitt pointed out in his remarks, corporate law is fundamentally about the same kinds of issues. Corporate law allocates powers to decisionmakers. The questions it then generates focus on the authority of the decisionmakers and the process they employed.

In the context of merger transactions, there are two decisionmakers: the board and shareholders. The authority of each is explicitly created by Section 251 of the Delaware General Corporation Law: the board adopts the merger agreement and declares its advisability and the shareholders vote on whether to approve it. Generally, at least in

200. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 950 (Del. 2003) ("For the majority to articulate and adopt an inflexible rule where a board has discharged both its fiduciary duty of loyalty and care in good faith seems a most unfortunate turn.").

201. Id. at 925, 938.

202. William D. Savitt, Esq., Panel I: Participants at the Journal of Corporation Law Symposium: Ten Years After Omnicare: The Evolving Market for Deal Protection Devices (Mar. 1, 2013). Accord Hanewicz, supra note 5, at 511 (arguing that “corporate law does and should allocate decision-making authority to various institutions, such as the board, the shareholders, and the judiciary, and that this decision-making authority ought to be allocated so as to most efficiently advance the ultimate goal of corporate law”).

203. Del. Code Ann. tit. 8, § 251(b) (2010) ("The board of directors of each corporation which desires to
transactions for public target companies, these two decisionmakers cannot act at the same time.\textsuperscript{204} Hence, a time lag typically exists between when the board acts to adopt the agreement and declare its advisability ("T1") and when the shareholders vote on whether to approve it ("T2").

The time lag between T1 and T2 complicates matters because it opens the door to intervening events, and intervening events may require further board action. Intervening events may be intrinsic to the firm, such as the discovery of an extremely valuable asset—the proverbial gold under the headquarters—or they may be extrinsic to the firm, such as the appearance of an intervening bidder willing to buy the target at a substantial premium to the merger price.\textsuperscript{205} In either case, the intervening event, combined with the ongoing fiduciary duties that the target board owes its shareholders, clearly creates the need for the target board of directors to act again. In other words, it is inaccurate, at least in situations where intervening events do in fact arise, to say that the board acts at T1 and the shareholders act at T2. Rather, boards act twice. First, at T1, the board acts to adopt the merger agreement and declare its advisability at that time. Then, at T2, the board must act again. But what must they do? On the face of the statute, at least, it is unclear.

A board's fiduciary duties with respect to intervening events could be interpreted in two ways. Fiduciary duty could require a target board, confronted with intervening events, to get out of its initial deal, thereby freeing the target, in the context of an intervening bid, to reopen bidding and take the highest subsequent offer (the "termination duty"). Alternatively, fiduciary duty could require only that a target board revisit its recommendation and, if necessary in light of intervening events, advise its shareholders not to vote in favor of the merger (the "changed recommendation duty"). While the choice between these two interpretations of fiduciary duty may not always have been clear, the matter did, at least for a time, appear to be settled by the Delaware Supreme Court. \textit{Van Gorkom} clearly rejected the termination duty, a holding that has been affirmed by courts and emphasized by commentators.\textsuperscript{206} Although QVC created

\begin{itemize}
\item[	extsuperscript{204}] This is due to the need to obtain shareholder, third-party, and government/regulatory approvals. For example, federal securities law rules require lengthy disclosure documents to be prepared for most transactions except fully-financed cash offers for private company targets. \textit{See generally} 17 C.F.R. \textsection{}230.145 (applying the protections of the Securities Act of 1933 to mergers to require non-exempt transactions in which the consideration is stock to be accompanied by a "prospectus"); Exchange Act Rule 14a-3(a) (requiring distributions of proxies, required in all transactions for public companies requiring a shareholder vote, to be accompanied by a "proxy statement"). Other regulatory regimes, most notably antitrust, may also apply to delay the consummation of merger transactions. \textit{See}, \textit{e.g.}, Hart–Scott–Rodino Antitrust Improvements Act of 1976, 15 U.S.C. \textsection{}18a(b)(1) (2013).
\item[	extsuperscript{205}] \textit{See generally} R. Franklin Balotti & A. Gilchrist Sparks, III, \textit{Deal-Protection Measures and the Merger Recommendation}, 96 NW. U. L. REV. 467, 468 (2002) [hereinafter Balotti & Sparks, \textit{The Merger Recommendation}] (noting the "classic law school example" of gold under the corporate headquarters).
\item[	extsuperscript{206}] Smith v. Van Gorkom, 488 A.2d 858, 887–88 (Del. 1985) (noting that the board's only options were either "to proceed with the merger and the stockholder meeting" or "to rescind its agreement with Pritzker, withdraw its approval of the merger, and notify its stockholders that the proposed shareholder meeting was cancelled," and noting further that "the second course of action would have clearly involved a substantial risk—
uncertainty on this point, subsequent amendments to Section 251 of the DGCL explicitly allowing merger agreements to be submitted to a shareholder vote without a positive board recommendation seemed to endorse the changed recommendation duty. Fiduciary duty, in other words, could be understood to require boards confronting intervening events to remain free to change their recommendation but not necessarily free to terminate their merger agreement.

Omnicare disrupted this settled understanding and destroyed the delicate balance created by the statute. Omnicare, driven by the logic of the "unremitting duty" to remain "fully informed," unambiguously requires fiduciary outs. However, the fiduciary outs contemplated by the majority opinion clearly are not limited to the fiduciary out for the board to change its recommendation as a result of intervening events—that is, the changed recommendation duty that clearly follows from the discussion above and is unanimously supported in the commentary on this subject. Rather, the fiduciary out

that the Board would be faced with suit . . . for breach of contract”). Accord WaveDivision Holdings, LLC v. Millennium Digital Media Sys., LLC, No. 2993–VCS, 2010 WL 3706624, at *17 (Del. Ch. Sept. 17, 2010) (“Delaware entities are free to enter into binding contracts without a fiduciary out so long as there was no breach of fiduciary duty involved when entering into the contract in the first place.”); Corwin v. DeTrey, No. 6808, 1989 WL 146231, at *273 (Del. Ch. Dec. 4, 1989) (“[T]he directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed. The buyers, likewise, are not required to give up their rights under a binding contract simply because . . . changed circumstances make their bargain more favorable.”). See also William T. Allen, Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept, 55 BUS. LAW. 653, 654 (2000) (“Corporate directors have no fiduciary right (as opposed to power) to breach a contract.”).

207. Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 51 (Del. 1994) (“To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable.”).

208. Section 251 has evolved. At the time of Van Gorkom, the statute required that boards “adopt a resolution approving an agreement of merger or consolidation” and it was clear that only agreements boards recommended could be submitted to stockholders. Van Gorkom, 488 A.2d at 873 n.14 (emphasis added). In 1998, Section 251 was amended explicitly to permit a board of directors to change its recommendation on the merger while nevertheless submitting the merger agreement to a shareholder vote. See Paul L. Regan, Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups, 21 CARDozo L. REV. 1, 30–31 (1999) (summarizing the 1998 amendments). Pursuant to subsequent rounds of amendments, the statutory authorization of a board to submit a merger agreement with a negative recommendation has moved to Section 146. DEL. CODE ANN. tit. 8, § 146 (2013) (“A corporation may agree to submit a matter to a vote of its stockholders whether or not the board of directors determines at any time subsequent to approving such matter that such matter is no longer advisable and recommends that the stockholders reject or vote against the matter.”).

209. A board would clearly violate its fiduciary duty by continuing to recommend a merger agreement that it no longer believed was advisable. Malone v. Brincat, 722 A.2d 5, 11 (Del. 1998) (addressing fiduciary duties of candor and disclosure to board interactions with shareholders). See also Allen, supra note 206, at 658 (“A board may not suggest or imply that it is recommending the merger to the shareholders if in fact its members have concluded privately that the deal is not now in the best interest of the shareholders.”); Balotti & Sparks, The Merger Recommendation, supra note 205, at 476 (“Delaware law requires that a board of directors give a meaningful, current recommendation to stockholders regarding the advisability of a merger including, if necessary, recommending against the merger as a result of subsequent events.”).

210. See supra notes 42–51 and accompanying text (discussing Omnicare’s requirement of fiduciary outs).

211. See, e.g., Allen, supra note 206, at 658 (“[A]ny provision that commits the board to recommend the deal at a future time must be accompanied by a fiduciary out clause.”); Balotti & Sparks, The Merger Recommendation, supra note 205, at 477 (“As with the mandatory board recommendation, a provision limiting the target board’s ability to change its recommendation to situations in which the target has received a superior
mandated by *Omnicare* clearly involves the termination duty. This is clear from the factual context of the case itself—NCS had negotiated for a changed recommendation out but not a termination out.\(^{212}\) Hence, if the majority's fiduciary out requirement had only involved the changed recommendation requirement, there would have been no basis to enjoin the NCS–Genesis merger agreement. Requiring a termination out not only silently overrules the well-established holding of *Van Gorkom* on this point,\(^{213}\) it also fundamentally interferes with the powers of boards in a way that is not sanctioned by Section 251 and that is clearly inconsistent with Section 141(a).\(^{214}\)

To see this, take a step back and consider the fundamental conceptual problem that deal protections pose to the corporate law allocation of power issues outlined above. Deal protections are problematic because they amount to commitments, made at T1, that constrain the board's choice-set at T2. For example, as in *Omnicare*, the board may lock up its agreement to such an extent that it is precluded from doing anything at T2 other than recommending against the deal it has made to the shareholders entitled to vote thereon.\(^{215}\) Alternatively, the board may agree to such stringent deal protections at T1 that other bidders choose not to come forward and the board never learns, by the time it gets to T2, what other transactions might have been available. If something the board agrees to at T1 limits its information at T2, its ability to carry out its duty at T2 may be seen as inhibited. This is the problem to which *Omnicare* and the "unremitting duty" to be "fully informed" responds. As we have seen, the lesson from these cases is that the board cannot act in a manner at T1 that disables it from performing its fiduciary duties at T2.

The trouble, of course, with adopting a *per se* rule that the board cannot act at T1 to inhibit information available at T2 is that such a rule privileges T2 over T1.\(^{216}\) Barring the board from so acting necessarily constrains the board's choice-set at T1. The rule, in other words, inhibits the board's authority and interferes with the exercise of its duties at proposal likely is invalid under Delaware law."); John F. Johnson, *A Rubeophobic Delaware Counsel Marks Up Fiduciary-Out Forms: Part I*, 13 INSIGHTs 2, 5 (1999) ("The target board must have an ability to make a truthful and candid recommendation consistent with its fiduciary duties.").

\(^{212}\) See supra note 32 and accompanying text (describing the fiduciary out the NCS board included in the merger agreement).

\(^{213}\) See supra note 206 and accompanying text (articulating the *Van Gorkom* holding). Vice Chancellor Laster suggests that *Omnicare* ought not to be read in this way because it is not sound juridical practice to overrule settled precedent without commentary. Vice Chancellor J. Travis Laster, Del. Court of Chancery, Keynote Address at the Journal of Corporation Law Symposium: Ten Years After *Omnicare*: The Evolving Market for Deal Protection Devices (Feb. 28, 2013). But *Omnicare* is not often touted as an example of sound juridical practice, even among those who agree with the outcome.

\(^{214}\) DEL. CODE ANN. tit. 8, § 141(a) (allocating to boards the fundamental power to manage corporations).

\(^{215}\) Nevertheless, it would proceed, notwithstanding their vote. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003).

\(^{216}\) Here I am not claiming, as Vice Chancellor Laster and others have claimed, that the *Omnicare* majority erred by engaging in hindsight bias in its evaluation of the board's decision at T1. Vice Chancellor J. Travis Laster, Del. Court of Chancery, Keynote Address at the Journal of Corporation Law Symposium: Ten Years After *Omnicare*: The Evolving Market for Deal Protection Devices (Feb. 28, 2013). My claim here is rather that in articulating a principle about "unremitting duties" to remain "fully informed," the court crafted a *per se* rule that necessarily results in the privileging of T2 over T1 in a way that is neither justified by statute nor by the court's prior jurisprudence.
T1 in favor of the “unremitting” duties at T2. However, why should the board’s duties at T2 trump its duties at T1? What is the basis for allowing the board’s authority at either time to trump the other?

Nothing in the statute supports creating a trump right at either T1 or T2. The statute, rather, presents the board with a pair of difficult choices. A board must ask itself whether it must agree to strong deal protections at T1 in order to get shareholders the best deal then available, understanding that doing so may restrict the choices (and information) subsequently available to it. Then, at T2, the board must ask itself again, with the benefit of hindsight, whether the deal it got remains advisable. The statute gives the board full responsibility at both times. Nowhere does it indicate that one responsibility trumps the other. Rather, it leaves the two responsibilities in tension, leaving boards with difficult and serious choices.

Seen in this way, the fundamental problem with the “unremitting” duty to remain “fully informed” is that it privileges T2 over T1 in a manner inconsistent with Section 251. While a board’s duty to act in an informed manner is well supported in both Delaware case law and common sense, there is no doctrinal basis to interpret that duty to trump other powers and responsibilities of the board. Such an interpretation unnecessarily and unjustifiably interferes with the fundamental authority that Section 141 (a) guarantees to boards. Moreover, making an absolute out of the duty to be “fully informed” is question begging and this is bound to require Delaware courts to answer questions they would rather avoid, potentially turning them into “super-directors” substituting their own judgment for the judgment of the board.

What then should the court have done? More importantly, what might future courts do to correct this problem? As I argue below, courts do have a way out of this doctrinal bind, but it requires courts to rearticulate (or perhaps merely to re-articulate) the meaning of enhanced scrutiny. Lest this doctrinal project seem overly ambitious, I note that Vice

217. See supra note 47 (noting that the Delaware Supreme Court fully endorsed the duty to “remain fully informed”).

218. In Hohfeldian terms, the statute creates oppositions (between privilege and duty, power and disability) that the courts must mediate. See Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 30 (1913) (discussing the challenge that the Supreme Court faced in distinguishing “rights” from “privileges”). Elevating the “fully informed” principle to an absolute effectively trumps other powers and responsibilities of the board and fundamentally conflicts with the board’s authority to manage the corporation. See DEL. CODE ANN. tit. 8, § 141(a) (2010) (detailing that boards of directors have the authority to manage the business and affairs of corporations).

219. The duty to remain “fully informed” is one that does not have a meaningful limiting principle. When is a board fully or even sufficiently informed? How much information is enough? And who decides?

220. See, e.g., Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000) (cautioning courts against becoming “super-directors, measuring matters of degree in business decisionmaking”); In re RJR Nabisco, Inc. S’holders Litig., No. 10389, 1989 WL 7036, at *22 n.13 (Del. Ch. Jan. 31, 1989) (“To recognize in courts a residual power to review the substance of business decisions for ‘fairness’ or ‘reasonableness’ or ‘rationality’ where those decisions are made by truly disinterested directors in good faith and with appropriate care is to make of courts super-directors.”). Ordinarily, the extent of a board’s information-gathering would receive the protection of the business judgment rule such that, as long as a board acted rationally and in good faith, a court could not second-guess the board’s conduct. In re Caremark Int’l Inc. Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). The business judgment rule may not be the correct standard here—I argue below for a form of enhanced scrutiny—but neither is a principle that allows the court to upset board action any time an intervening bidder appears. I make this argument at greater length at Sean J. Griffith, Deal Protection Provisions in the Last Period of Play, 71 FORDHAM L. REV. 1899, 1926-31 (2003) [hereinafter Griffith, Deal Protections].
Chancellor Laster recently called for something similar and that the Court of Chancery has already done much of the work to prepare for this doctrinal correction. The next Part discusses this and describes what remains to be done.

**B. Enhancing Enhanced Scrutiny**

The lever to escape the doctrinal bind that the strong reading of *Omnicare* has created is enhanced scrutiny. Enhanced scrutiny, correctly applied, would enable courts to police the worst excesses of deal protections while also allowing boards the necessary leeway to structure transactions, as circumstances require. As I conceive of it here, enhanced scrutiny would allow courts to strike deal protections where boards might have agreed to them in order to protect a sweetheart deal or side-payments favored by members of the board or management. At the same time, this vision of enhanced scrutiny would also allow an unconflicted board to fully protect a transaction, agreeing to strong deal protections with no fiduciary-cut, as long as the board acted reasonably to prevent the loss of a deal the board reasonably believed would benefit shareholders.

However, this application of enhanced scrutiny requires two doctrinal revisions or, at least, reaffirmations. First, enhanced scrutiny of the type I am describing here must be understood to apply to deal protections in every transaction, regardless of whether the deal formally involves a change-of-control. Second, this vision of enhanced scrutiny is not satisfied by the rote application of *Unocal* and *Unitrin* that courts, including the *Omnicare* majority, have typically fallen back upon in this context. Rather, the application of enhanced scrutiny I articulate here involves a rediscovery of the core principles underlying enhanced scrutiny—motive and means. Going back to the foundational principles of enhanced scrutiny, I argue, would enable Delaware courts appropriately to evaluate the use of deal protection provisions.

*1. All Deal Protections Should Receive Enhanced Scrutiny*

It is perhaps time to acknowledge that *Omnicare* gets at least one thing right: it scrutinizes deal protections without regard to the traditional change-of-control paradigm, which if rigidly applied, would suggest that deal protections in cash (or other *Revlon*) deals get enhanced scrutiny while deal protections in stock deals (that do not involve a *QVC* change-of-control) get business judgment deference.222 Such mechanistic reasoning no longer makes sense, if it ever did, and the *Omnicare* majority's willingness to break with the rigid change-of-control paradigm stands as a judicial concession that this rubric is not sufficiently subtle to account for the problems of deal protection provisions.223

The basic real-world problem with deal protection provisions is that boards may use them to insulate favored transactions from the broader market for corporate control,
effectively allowing boards to divert shareholder wealth (in the form of a deterred or blocked over-bid) to self-serving ends (such as a continuing role with the ongoing enterprise or consulting arrangements or other forms of side-payments for members of the board and management). The ability of boards so to act does not depend on whether the transaction involves a formal change of control or not. Every merger or acquisition transaction presents an opportunity to divert a portion of shareholder wealth to management or the board.

The good news is that the Court of Chancery now clearly recognizes this problem. Accordingly, that court has begun to apply enhanced scrutiny to deal protections generally, and its judges have clearly stated that courts should scrutinize deal protections regardless of whether the transaction is one for cash, stock, or mixed consideration. As a result, the application of enhanced scrutiny called for here does not require any significant departure from the current practice of Delaware courts. Nor does it require the broader application of enhanced scrutiny to all merger transactions, as Vice Chancellor Laster has recently advocated, igniting a lively debate which, because it exceeds the targeted application of enhanced scrutiny called for here, I will treat as outside of the scope of this Article. Indeed, the recognition that enhanced scrutiny

---

224. Here I distinguish between the real-world problems presented by deal protections as opposed to the fundamental doctrinal problem discussed above. *Supra* Part V.A. I have discussed the real-world implications of deal protections at length elsewhere. See Griffith, *Deal Protections, supra* note 220, at 1947 (“If the management team is able to protect the self-serving transaction with deal protection provisions, it will be further insulated from the disciplinary effect of the market for corporate control, leaving the outgoing management team free to serve their own self-interest with relative impunity.”); Griffith, *Precommitment, supra* note 5, at 584 (explaining how self-interested directors may seek side-payments in friendly deals).


226. See, e.g., *In re El Paso Corp. S’holders Litig., 41 A.3d 432, 445* (Del. Ch. 2012) (“Because of the importance of the merger transaction and their profound effect on management’s future, deal protection measures that protect management’s favored deal tend to give a stock-for-stock merger agreement the flavor of an interested transaction.”); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 459 (Del. Ch. 2011) (“Enhanced scrutiny likewise extends to defensive measures that have the potential to insulate last period decision-making from market forces or undermine the ability of stockholders to reject the transaction.”) (citations omitted); *In re Toys “R” Us, Inc. S’holder Litig., 877 A.2d 975, 1015* (Del. Ch. 2005) (“It is no innovation for me to state that this court looks closely at the deal protection measures in merger agreements. In doing so, we undertake a nuanced, fact-intensive inquiry . . . .”)

227. See J. Travis Laster, *Revlon is a Standard of Review: Why It’s True and What It Means*, 18 FORDHAM J. CORP. & FIN. L. (forthcoming 2013) (manuscript at 38) (“If defensive measures can be problematic in *Revlon* deals because they insulate management’s chosen transaction, then they are equally problematic in stock-for-stock deals.”). *Accord* Leo E. Strine, *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements, 56 BUS. LAW. 919, 939* (2001) (“[D]eal protection measures that protect management’s favored deal tend to give a stock-for-stock merger agreement the flavor of an interested transaction.”).

228. Laster, *supra* note 227, (manuscript at 38-39) (“But if those conflicts are sufficiently present to support applying reasonableness review to the defensive measure, the same conflicts should be sufficiently present to support applying reasonableness review of the transaction as a whole and dispensing with the Paramount doctrine.”). Several of the Vice Chancellor’s recent rulings urge the same point. See Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 458 (Del. Ch. 2011) (“Final stage transactions for stockholders provide another situation where enhanced scrutiny applies.”); Steinhardt v.Occam Networks, Inc., C.A. No. 5878–VCL (Del.
should apply to all deal protections, regardless of where the underlying deal falls on the change-of-control paradigm, requires merely that this strand of Omnicare be reaffirmed.

2. Enhanced Scrutiny is Not Confined to Unocal

The bad news is that even as Omnicare creates a glimmer of hope, hinting at a more subtle relationship between judicial scrutiny and transactional practice, it dashes that hope by reverting to a rote application of the Unocal standard to deal protections.229 While there is a sense in which Unocal scrutiny is apt—deal protections, after all, are defensive devices230—the majority’s Unocal analysis is unsatisfactory on its own terms.231 Worse, however, is the majority’s failure to acknowledge the limitations of Unocal scrutiny in the deal protection context. Specifically, we know from cases applying Unocal that boards are justified in executing long-term business strategies and are not required to abandon their plans and dismantle their defenses when suddenly presented with an unsolicited bid.232 Both the Delaware Supreme Court and the Court of Chancery have recently unambiguously affirmed this core principle.233 Hence, outside of the context when the board has decided to sell the company and therefore has no valid long-term interest to consider,234 Unocal does not prevent boards from carrying out their strategic plans.235 The problem is that a merger, as long as it does not implicate a change

---

Ch. Jan. 6, 2012), available at http://www.deallawyers.com/Blog/2011/01/vc-laster-issues-ruling-that-could-significantly-alter-when-revlon-rules-apply.html (applying enhanced scrutiny in a 50% cash, 50% stock merger). In support of the application of enhanced scrutiny in Occam Networks, the Vice Chancellor wrote:

This is a situation where the target stockholders are in the end stage in terms of their interest in Occam. This is the only chance they have to have their fiduciaries bargain for a premium for their shares as the holders of equity interests in that entity. It's easy to see here in two ways. First, it's easy to see in terms of the amount of cash. If you want more cash for your shares, this is the only time you have to get it. But it's also easy to see in terms of the amount of interest you're going to have in the post-transaction entity. We often talk about, oh, well, but the stockholders can get a future control premium. That's all well and good for the future entity, but what you're bargaining over now is how much of that future premium you're going to get.

Id. On the other side of this debate is Professor Bainbridge. See generally Stephen M. Bainbridge, The Geography of Revlon-Land, 81 FORDHAM. L. REV. 3277 (2013) (articulating a basis for restricting the scope of enhanced scrutiny under Revlon).

230. Id. at 931–32.
231. The deal protections in Omnicare may have been preclusive in the sense that the must-submit covenant and the majority shareholder voting agreement would indeed have prevented minority shareholders from considering an alternative merger agreement, but there was nothing coercive in the deal protections. The majority, however, insisted that the deal protections were both preclusive and coercive. Id. at 918.
232. Paramount Commc’ns, Inc. v. Time, Inc., 571 A.2d 1140, 1154 (Del. 1989) (“Directors 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.”).
234. This of course, is Revlon.
235. Not surprisingly, the leading study has found that Unocal scrutiny has been used to enjoin defensive devices almost exclusively in the Revlon context. Robert B. Thompson & D. Gordon Smith, Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers, 80 TEX. L. REV. 261, 284 (2002).
of control, clearly amounts to a board carrying out its strategic plans. This would suggest that protecting such deals with defensive devices would nearly always be a valid act of the board, deserving of business judgment rule scrutiny at most.\(^{236}\) This clearly is not what courts are aiming at in the deal protection context, yet it is the undisputed (and indeed recently affirmed) meaning of *Unocal* itself.\(^{237}\) In other words, whatever these courts are doing in scrutinizing deal protections (and whatever they say they are doing), they are not really applying *Unocal*.\(^{238}\)

On this account, the fundamental error of the *Omnicare* majority was not that it applied enhanced scrutiny to deal protections but that it attempted to use a form of enhanced scrutiny that was (and is) inapt. The majority was led into this error by a tendency of courts and commentators alike to understand enhanced scrutiny by means of a doctrinal paradigm in which the standard has two distinct forms: either *Unocal* or *Revlon*.\(^{239}\) This is a misinterpretation of enhanced scrutiny, the fundamental elements of which precede both of these cases, dating back at least to 1964 in *Cheff v. Mathes*.\(^{240}\) In addition, the essential elements of enhanced scrutiny are not, as in *Unocal*, threat and proportionality, but rather motive and means.\(^{241}\)

---

\(^{236}\) See *Omnicare*, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 947 (Del. 2003) (Steele, J., concurring in dissent) (expressing the view that “Delaware law mandates deference under the business judgment rule to a board of directors’ decision that is free from self interest, made with due care and in good faith” and applying this view to the conduct in *Omnicare* itself).

\(^{237}\) See *Versata Enters., Inc.*, 5 A.3d at 608 (affirming this principle); *Air Products & Chemicals, Inc.*, 16 A.3d at 129 (affirming this principle).

\(^{238}\) Indeed, the most charitable way to understand the majority opinion in *Omnicare* is to understand it as motivated by an unarticulated conflict rationale to which *Unocal* was subsequently applied as a sort of ill-fitting doctrinal cloak. Vice Chancellor J. Travis Laster, Del. Court of Chancery, Keynote Address at the Journal of Corporation Law Symposium: Ten Years After *Omnicare*: The Evolving Market for Deal Protection Devices (Feb. 28, 2013).

\(^{239}\) See generally *Air Products and Chemicals, Inc.*, 16 A.3d at 90 (stating that “the Delaware Supreme Court in *Unocal* created an intermediate standard of review applying enhanced scrutiny to board action before directors would be entitled to the protections of the business judgment rule”). See also Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 Del. J. Corp. L. 769, 802 (2006) (noting that “differences between *Unocal* and *Revlon* loomed large”).

\(^{240}\) Enhanced scrutiny, as it is used today, originates most clearly in *Cheff v. Mathes*, 199 A.2d 548 (Del. Sup. 1964). Although *Cheff* does not use the phrase “enhanced scrutiny,” it clearly applies the concept to scrutinize the motive of directors in resisting takeover and the means used to do so (i.e., the payment of greenmail). *Id.* at 554–58. Other pre-1985 cases apply a similar framework of motive and means, including the now-overruled “business purpose” test from *Singer v. Magnavox*, 380 A.2d 969, 980 (Del. Sup. 1977) (requiring that the board establish a motive, other than elimination of the minority, for squeeze-out mergers), overruled by *Weinberger* v. UOP, 457 A.2d 701, 704 (Del. Sup. 1983).

\(^{241}\) *Accord Mercier v. Inter–Tel* (Del.), Inc., 929 A.2d 786 (Del. Ch. 2007) (explaining the core of *Unocal’s* test). In *Mercier*, then-Vice Chancellor Strine decried the proliferation of specific standards in the M&A context and formulated enhanced scrutiny more broadly as follows:

>[T]he burden should be on the . . . board as an initial matter to identify a legitimate corporate objective served by its decision. . . . As part of meeting that burden, the directors should bear the burden of persuasion to show that their motivations were proper and not selfish. That showing, however, is not sufficient to ultimately prevail. To ultimately succeed, the directors must show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way. If for some reason, the fit between means and end is not reasonable, the directors would also come up short.
Enhanced scrutiny first examines the directors’ motive. Directors may not act from an impermissible motive—that is, self-interest, whether in the form of greed, entrenchment, or any of the myriad more subtle variations of personal interest. Enhanced scrutiny next examines the means the directors employ by asking whether the chosen means falls within a range of reasonable alternatives. The first element of analysis is subjective; the second is objective. The reasonableness standard here falls between the weaker standard of rationality (really, deference) called for by the business judgment rule and the stricter standard of fairness. The reasonableness standard for the board’s choice of means is also more deferential and less onerous that the least restrictive means test, which some jurisdictions apply to actions taken by the majority in closely held corporations. The board’s justifications must support the chosen means, which must be reasonable in light of other possible courses of action. If the board chooses a more potent means, the justification must be stronger.

Understood in this way, Unocal merely applies the essential elements of motive and means to the context of takeover defense. In that particular context, motive typically involves a bid’s threat to the board’s long-range plans, and means relates the board’s response to its effect on shareholders—that is, whether it coerces them or precludes other alternatives. Likewise, Revlon merely applies the motive and means test to sale-of-the-

---

Id. at 810–11 (emphasis added). A unitary conception on enhanced scrutiny was further elaborated by then-Vice Chancellor Strine in Dollar Thrifty:

In a situation where heightened scrutiny applies, the predicate question of what the board’s true motivation was comes into play. The court must take a nuanced and realistic look at the possibility that personal interests short of pure self-dealing have influenced the board to block a bid or to steer a deal to one bidder rather than another. Through this examination, the court seeks to assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and to thereby smoke out mere pretextual justifications for improperly motivated decisions. In this sense, the reasonableness standard requires the court to consider for itself whether the board is truly well motivated (i.e., is it acting for the proper ends?) before ultimately determining whether its means were themselves a reasonable way of advancing those ends.

In re Dollar Thrifty S’holder Litig., 14 A.3d 573, 598–600 (Del. Ch. 2010).

242. See In re El Paso Corp. S’holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012) (noting that “a range of human motivations . . . can inspire fiduciaries and their advisors to be less than faithful to their contextual duty to pursue the best value for the company’s stockholders”); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 30 (Del. Ch. 2010) (“Human judgment can be clouded by subtle influences like the prestige and perquisites of board membership, personal relationships with management, or animosity towards a bidder.”); City Capital Assocs. v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988) (acknowledging the human power “to rationalize as right that which is merely personally beneficial”); In re RJR Nabisco, Inc. S’holders Litig., No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989) (“Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or . . . shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.”).


244. The reasoning here has direct implications for deal protection analysis, to be explored explicitly in the section that follows. Essentially, if a board agrees to very strong deal protections, for example, binding all likely bidders by means of non-waivable DADW standstills, to protect a marginal transaction amid strong indications of interest from other potential bidders, the means might not fit the motive. See infra Part B.3 (discussing deal protections).
company transactions. In that particular context, boards are compelled to justify their actions as being reasonably designed to further shareholder interests in the sale. The two standards, as applications of enhanced scrutiny to particular factual contexts, have a great deal in common. Enhanced scrutiny thus conceived becomes a continuum, and Revlon and Unocal are merely points along the spectrum.

The interpretation of enhanced scrutiny offered here does not involve a major break from current doctrine, but rather a recovery of foundational principles. Enhanced scrutiny, under this basic conception, involves an evaluation of the motive and means of the board. The famous 1985 cases applying enhanced scrutiny perform that evaluation in particular contexts—takeover defense in Unocal and sale-of-the-company transactions in Revlon. The evaluation of deal protections fits squarely into neither of these specific factual contexts. Nevertheless, the broader paradigm of enhanced scrutiny, understood as analysis of motive and means, does fit the deal protection context. How enhanced scrutiny might work in this particular context is the subject of the next Part.

3. Enhanced Scrutiny Applied to Deal Protections

Applying enhanced scrutiny’s fundamental motive/means analysis to deal protections involves first inquiring into the motivations of the board in agreeing to deal protections. Because boards agree to deal protection at the time of entering into the merger agreements, a court should look to the negotiating context at TI in evaluating a board’s potential motivation. In performing this analysis, courts should first evaluate whether the board was in fact informed about, and fully understood the implications of, the deal protection provisions to which they agreed. Were they advised about the possible effects of the deal protections in deterring other bids? Did they understand the possible alternatives and seek consideration for the package of protections ultimately chosen? Under this line of analysis, terms that boards make no effort to comprehend would not pass muster. Nor would terms that are simply claimed to be “customary” unless the board could demonstrate that it had evaluated the specific effect of such items on the particular sale context in which it found itself.

245. See, e.g., Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1287–88 (Del. 1989) (describing a court’s analysis under Revlon as a manifestation of Unocal scrutiny in a particular context in which, once disparate treatment in the sale process is shown, the “the trial court must first examine whether the directors properly perceived that shareholder interests were enhanced [by the preferential treatment accorded to one bidder, and] . . . the board's action must be reasonable in relation to the advantage sought to be achieved . . . .”).

246. Accord Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457–60 (describing the range of situations to which enhanced scrutiny may apply). Remember, both Unocal and Revlon arose at a particular point in economic history and at a unique moment in deal technology. The evolution of mergers and acquisitions did not stop in 1985.

247. See supra Part V.A (discussing board’s commitments at TI).

248. The Court’s Ruling on Plaintiffs’ Motion for Preliminary Injunction at 24–25, In re Ancestry.com, Inc. S’holder Litig., No. 7988-CS (Del. Ch. Dec. 17, 2012), available at http://www慰k.com/docs/121712%20Ancestry%20ruling.pdf (striking down a protective standstill provision because: “[T]his board was not informed about the potency of this clause. The CEO was not aware of it. It’s not even clear the banker was aware of it.”).

At the same time that courts are evaluating whether a board understood the deal protection provisions to which it ultimately agreed, courts should also investigate potential problems with the board’s motives in protecting a particular transaction. Is there anything to suggest a self-interested motive underlying the board’s decision to protect a deal? Might entrenchment concerns have motivated the decision to protect a particular transaction against others, such as a deal with a financial bidder that will leave management in place rather than a strategic buyer that will likely replace management? Does the transaction otherwise create a last-period scenario from the perspective of board or management? Are there side payments, in the form of consulting or other arrangements that might cause particular members of the board or management to prefer and therefore protect one transaction over another? Are there legacy concerns or issues of personal antipathy underlying the preference of one transaction over another? Alternatively, were the deal protections consciously employed by the board as a gavel, to signal a clear end to the sale process, thereby forcing prospective buyers to put their best and final offer on the table? A board’s motivation in agreeing to deal protections may be sufficiently problematic for the court to void the deal protections on that basis alone. Alternatively, motive problems may cause courts to evaluate the means—that is, the restrictive effect of the deal protections themselves—more critically.

Turning to the means analysis, the court would ask whether the package of the deal protections, taken as a whole, reasonably accomplishes the valid objectives of the board. Again, evaluating the negotiating position of the board at T1, did it deploy a package of deal protections reasonably necessary to control the process? Can the board show that it received consideration in the form of buyer concessions elsewhere in the merger agreement in exchange for the deal protection package to which it ultimately agreed?

Embracing these generic terms, the defendants have listed the types of provisions found in the Original Merger Agreement and labeled them ‘customary’ . . . But to identify defensive measures by type without referring to their details ignores the spectrum of forms in which deal protections can appear.”).


251. See In re Topps Co. S’holder Litig., 926 A.2d 58, 90 (Del. Ch. 2007) (emphasizing the reluctance of the founding family of the iconic baseball card company to allow it to fall into the hands of an upstart rival). See also supra Part IV.A (discussing different aspects of In re Topps).

252. In the words of Chancellor Strine:

I’m not prepared to rule out that [DADW standstills] can’t be used for value-maximizing purposes. But the value-maximizing purpose has to be to allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you’re creating an auction, there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process.


253. See In re Dollar Thrifty S’holder Litig., 14 A.3d 573, 599 (“As one would expect, when the record reveals no basis to question the board’s good faith desire to attain the proper end, the court will be more likely to defer to the board’s judgment about the means to get there.”).
What was the relationship of the strength of the deal protection provisions to the board's information about the company at the time of sale? Because strong deal protections effectively trade away the ability of the board to bargain with or, in some cases, even learn about the value that other potential bidders might place on the company, was the board's knowledge about the value of the company at T1 sufficient to inhibit its ability to deal with other bidders between T1 and T2? Because the best way to learn about the value of the company is by exposing it to potential buyers on the market for corporate control, it would be reasonable, as some cases have suggested, to weigh the strength of the deal protections against the degree to which the board has shopped the company. Moreover, exposing the company to the market for corporate control has the salutary effect of limiting the ability of the board to divert shareholder wealth by exposing the favored transaction to outside bidders who, because they have not agreed to divert a portion of the deal price to the board or management, might well be able to pay more. None of this is to suggest that a particular sale process is required in order for a package of deal protections to be deemed reasonable, but consideration of the sale process may be highly relevant to the court in evaluating the reasonableness of the deal protection package ultimately chosen in light of the information then available to the board in choosing it.

Returning to the context of the statute, if the board unreasonably encumbered itself at T1, then it would follow that the board had also unjustifiably disabled itself from carrying out its fiduciary duties at T2. But if a board acted reasonably and in good faith pursuant to a valid motive at T1, then the inhibition of other bids between T1 and T2 must be viewed as necessarily in furtherance of the reasonable and valid act at T1. The "unremitting duty" to be "fully informed," under the analysis I am advocating here, would be relegated to the dustbin of unhelpful rhetoric, allowing Delaware courts to proceed as they always have—on a case-by-case basis, applying principles of good faith and reasonableness. Ultimately, it ought to be possible, under this analysis, for the boards of Delaware corporations, under the right circumstances of clear heart and reasonable process and planning, to fully protect their deals—that is, to agree to an unbreakable merger agreement. This implication is inescapable from the foregoing analysis. Nevertheless, it is clearly anathema to Omnicare. In order for transaction planners to feel comfortable in moving in this direction, the Delaware courts must speak to put this lingering aspect of Omnicare finally to rest.

254. See, e.g., In re Pennaco Energy, Inc., 787 A.2d 691, 706–08 (Del. Ch. 2001) (balancing the information of the board at the time it entered into the merger agreement against the strength of the deal protections contained therein).

255. In re Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1017–21 (Del. Ch. 2005) (evaluating the strength of deal protection provisions against the extent to which the company had been shopped to potential bidders).

256. See Griffith, Deal Protections, supra note 220, at 1966 (discussing the benefits of exposing a deal to outside bidders).

257. Understood here as a merger agreement with strong deal protections and no termination right. As discussed above, the board would still have to retain the right to change its recommendation but could be forced, nevertheless, to submit the agreement to a shareholder vote.
VI. CONCLUSION

The fact that Omnicare is still with us can be seen in the "unremitting duty" to remain "fully informed." This lingering aspect of the opinion does violence to Delaware doctrine on mergers and acquisitions by creating an unnecessary per se rule that unjustifiably privileges the board's responsibility to declare the advisability of a transaction over its power to enter into the agreement. The practical effect of this is that every transaction now contains a fiduciary out and thus that no deal is ever done until it closes, a consequence with a deleterious effect on shareholder welfare.

The way out of this is for Delaware courts to finally and explicitly reject Omnicare's conception of an "unremitting duty" to remain "fully informed." Having definitively rejected this inflexible per se rule, the courts should then replace it with the more flexible standard of enhanced scrutiny. However, because the deal protection context is not the same as the context of takeover defense, as in Unocal, or the context of the sale of the company, as in Revlon, in applying enhanced scrutiny to deal protections, the courts should return to the foundational jurisprudential principle underlying enhanced scrutiny—that is, motive and means.