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IS REVLOn ONLY COSMETIC?: STRUCTURING A MERGER IN THE MID-1990s

ALEXANDER B. JOHNSON

INTRODUCTION

The fiduciary duties of a board of directors under the Delaware Supreme Court's landmark opinion in Revlon, Inc v. MacAndrews & Forbes Holdings1 have been, for almost a decade, the subject of widespread controversy.2 Now, in the mid-1990s, the Delaware Supreme Court has removed much of the ambiguity in Delaware takeover law3 generated by the Revlon opinion. As a result, what a board may or may not do in structuring a merger transaction has been clarified considerably.4

Normally, under Delaware law, a board of directors manages the business and affairs of every corporation.5 In exercising these powers, Delaware law gives boards broad discretion and generally protects their actions by "the business judgment rule."6 When responding to a takeover bid, however, boards lose some of this discretion, and courts subject directors to an enhanced scrutiny before the protections of the business judgment rule are conferred.7 Moreover, in some circumstances, a court even may force a board to abandon its desired plans for a company and seek a new transaction, focusing solely on obtaining the best value for the shareholders. Such was the case in Revlon.8

In Revlon, during a bidding contest for control of the Revlon Corporation, events transpired that caused the "break-up" of the company to become "inevitable."9 Looking at those events, the Delaware Supreme Court concluded that "the duty of the [Revlon] board had thus changed from the preservation of Revlon as a corporate entity to

1. 506 A.2d 173 (Del. 1986).
2. See infra notes 21, 36, 79.
3. Delaware is the domicile of more than half of the Fortune 500 companies and more than 40% of the companies listed on the New York Stock Exchange. See Lewis D. Solomon et al., Corporations Law and Policy 6 (3d ed. 1994). Therefore, this Note is concerned only with Delaware law.
4. See infra part III.
6. The business judgment rule is a presumption that directors, in fulfilling their duties, acted in good faith, on an informed basis, and in the best interests of the company. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Under the rule, a board's actions will be upheld if they can be attributed to "any rational business purpose." Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). For further discussion on the business judgment rule, see infra notes 39-47 and accompanying text.
7. See infra notes 46-59 and accompanying text.
9. Id. at 182.
the maximization of the company's value at a sale for the stockholders' benefit.\textsuperscript{10} In other words, in the sale of the company, Revlon's board became obliged to act as "auctioneers," charged with getting the best price for the company.\textsuperscript{11} As a result, fiduciary duties that require a board to seek a transaction that obtains the best value for the shareholders, regardless of the board's own plans for the corporation, have been termed a board's "Revlon duties."\textsuperscript{12}

When a board's Revlon duties apply, that board loses much of its discretion because its new objective becomes a narrow one of obtaining "the best value reasonably available to the stockholders."\textsuperscript{13} Originally, when Revlon duties applied, many practitioners thought that these duties required a board to auction the company to the highest bidder.\textsuperscript{14} As a result, a board obviously would wish to avoid any scenario that would require it to put the company on the auction block and sell the company to an entity it disliked. The cases following Revlon, however, have clarified that the fiduciary duties enunciated in that case are not as "radical"\textsuperscript{15} as they originally may have seemed.\textsuperscript{16} There is no affirmative auction duty. Instead, Revlon requires that, in specific situations, a board be informed fully to ensure that the transaction into which it is entering obtains the best value reasonably available to the shareholders.\textsuperscript{17} A board may determine the best value using various methods, such as an auction or an active

\textsuperscript{10} Id.

\textsuperscript{11} Id.

\textsuperscript{12} See, e.g., Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150-51 (Del. 1989) (using the term "Revlon duties" in deciding the inapplicability of Revlon duties to the merger situation in that case); QVC Network, Inc. v. Paramount Communications Inc., 635 A.2d 1245, 1267 (Del. Ch. 1993) (describing what "Revlon duties entail" in that case); In re Wheelabrator Technologies Inc. Shareholders Litig., C.A. No. 11495, 1992 WL 212595, at *7-9 (Del. Ch. Sept. 1, 1992) (discussing "when Revlon duties are triggered"). Nonetheless, the Delaware Supreme Court, as of late, has expressed dislike for colloquialisms such as "Revlon duties." See Arnold v. Society for Sav. Bancorp, 650 A.2d 1270, 1289 n.40 (Del. 1994). Specifically, in Arnold, the plaintiff contended that the board breached its "Revlon duties." Id. at 1289. The court acknowledged the plaintiff's claim by stating: "Presumably, plaintiff is referring colloquially but inappropriately to the enhanced scrutiny courts accord to certain types of transactions described [below]." Id. at 1289 n.40. The court went on to describe the specific circumstances when the board's "obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders" applies. Id. at 1289-90 (quoting Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1993)). In any event, this Note will use the phrase "Revlon duties" to describe the obligation enunciated in Arnold to seek the best value reasonably available to shareholders.

\textsuperscript{13} Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1993).

\textsuperscript{14} See infra note 79.

\textsuperscript{15} See infra note 36.

\textsuperscript{16} See infra notes 79-96 and accompanying text.

\textsuperscript{17} Barkan v. Amsted Indus., 567 A.2d 1279, 1286-87 (Del. 1989).
survey of the market.\textsuperscript{18} When a board has adequate information with which to determine best value, that alone may be enough to satisfy its obligations under \textit{Revlon}.\textsuperscript{19} In any event, when the duties in \textit{Revlon} do not apply, there is no affirmative duty to seek a transaction that obtains the best value reasonably available to shareholders. Rather, Delaware law gives a board broad discretion in exercising its powers.\textsuperscript{20} As a result, boards often strive to avoid the specific situations that trigger \textit{Revlon}.

For some time after the \textit{Revlon} decision, it remained unclear precisely which situations triggered a board's \textit{Revlon} duties and, if triggered, precisely what such duties entailed.\textsuperscript{21} Currently, in the mid-

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\textsuperscript{18} See id.
\textsuperscript{19} Id.
\textsuperscript{20} See infra notes 39-45 and accompanying text.
\textsuperscript{21} Indeed, some commentators argue that \textit{Revlon} duties no longer exist under Delaware law. See Lawrence A. Cunningham & Charles M. Yablon, \textit{Delaware Fiduciary Duty Law After QVC And Technicolor: A Unified Standard (and the End of Revlon Duties?)}, 49 Bus. Law. 1593 (1994). Professors Cunningham and Yablon argue that Delaware law has evolved into a new standard, requiring enhanced scrutiny to ensure that management actions achieve the best value reasonably available to shareholders, that will apply to all management actions in takeover situations and that \textit{Revlon} duties to sell a company to the highest bidder no longer exist. Id. at 1595-96. Part of their statement that \textit{Revlon} duties no longer exist, however, may be only a matter of semantics. They state that "the so-called 'Revlon duty'—an affirmative legal obligation to conduct a fair auction for the company and to sell it to the highest bidder—no longer exists under Delaware law." Id. at 1595 (citation omitted).
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By contrast, while what Professors Cunningham and Yablon term \textit{Revlon} duties may have been those duties imposed by the court in \textit{Revlon}, what since has been termed a board's \textit{Revlon} duties are a set of fiduciary duties that have evolved in Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988), Barkan v. Amsted Indus., 567 A.2d 1279 (Del. 1989), Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989), and Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1993).

Unlike the description of \textit{Revlon} duties by Professors Cunningham and Yablon, the Delaware Supreme Court explicitly has concluded that \textit{Revlon} does not require a board to conduct an auction. See Barkan, 567 A.2d at 1286-87. Rather, what have been termed \textit{Revlon} duties now require a board to obtain the best value reasonably available for the stockholders. See QVC, 637 A.2d at 46. Further, subsequent Delaware case law explicitly supports the existence of \textit{Revlon} duties after \textit{QVC}. See Arnold v. Society for Sav. Bancorp, 650 A.2d 1270, 1289-90 (Del. 1994). In Arnold, the Delaware Supreme Court specifically discussed the applicability of \textit{Revlon} in a takeover situation. Id. While the court expressed dislike for the colloquialism "\textit{Revlon duties}," id. at 1289 n.40, it understood the reference to \textit{Revlon} duties as describing a distinct set of circumstances that implicate a board's duty to "'seek the transaction offering the best value reasonably available to the stockholders.'" Id. at 1290 (quoting \textit{QVC}, 637 A.2d at 43). Indeed, while Professors Cunningham and Yablon argue that this duty applies to all takeover situations, the \textit{Arnold} court found that such a duty applies only in certain distinct circumstances and, actually, did not apply to the takeover situation at hand. Id. at 1289-90.

Thus, the fiduciary duties enunciated in \textit{Revlon} still exist under Delaware law. Rather than argue that \textit{Revlon} duties are extinct, it is seems better to understand \textit{Revlon} duties as requiring a board to obtain the best value reasonably available for shareholders. Further, despite the \textit{Arnold} court's displeasure towards the colloquialism "\textit{Revlon duties}," Delaware courts on various occasions have referred, and continue to refer, to such duties as \textit{Revlon} duties. See supra note 12.
1990s, the Delaware Supreme Court has delineated the circumstances that trigger a board's obligation to seek the best value reasonably available for shareholders. 22 Generally speaking, a board's Revlon duties apply when a transaction has the possibility of resulting in the "break-up" of a company or when the board facilitates a "sale or change of control" of the corporation. 23 The break-up standard plainly derives from Revlon itself. 24 Further, the Delaware Supreme Court, since Revlon, has provided specific examples as to what constitutes a "break-up." 25 The change-in-control standard, however, is a product of the evolution of Revlon's progeny and is more ambiguous. 26 Indeed, one commentator asserted that "'[t]he idea of a change in control is one of the most ill-defined terms in corporate takeover law.'" 27

A simplified version of the facts of a recent case, American General Corp. v. Unitrin, Inc., 28 illustrates some of the nuances in the change-in-control test. In that case, Unitrin's board responded to an unsolicited bid by implementing, among other things, a repurchase plan. 29 The plaintiffs asserted that the plan would increase the combined holdings of Unitrin's board in the company from twenty-three percent of the shares of Unitrin to twenty-eight percent. 30 Because Unitrin's certificate of incorporation provided that a merger must be approved by seventy-five percent of the shareholders, the plaintiffs contended that this "Insider Group" of board members would have veto power over any merger proposal. 31 Plaintiffs therefore argued that this increase of the "Insider Group's" stake in Unitrin constituted a change in control that, under Revlon, required the board to seek a transaction that maximized shareholder value. 32

22. See infra text accompanying note 279.
23. See QVC, 637 A.2d at 42-43, 47; see also Arnold, 650 A.2d at 1289-90 (applying and clarifying the Revlon tests enunciated in QVC).
24. See Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986) (finding that as "the break-up of the company was inevitable... [t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit" (emphasis added)).
25. See infra text accompanying notes 168-70.
26. See infra parts 1.B.2-I.C.
29. Id. at *1. Under the repurchase plan, Unitrin would repurchase 10 million of its shares on the open market.
30. Id. at *3.
31. Id.
32. Id. at *5. One possibility they surely must have hoped for would be a sale of Unitrin to American General, which made an offer for the company that represented a 30% premium above the market price. See id. at *1.
The facts of Unitrin raise some common questions. For example, can a board's repurchase plan trigger Revlon? Should the mere power to block a merger constitute a change in control? Does owning twenty-eight percent of a company constitute control? Does a controlling group qualify, or must a single shareholder possess control of the company? Courts since Revlon have answered some of these questions. In addition, ways in which a board may avoid Revlon duties have been clarified. Recent caselaw suggests that a board can structure a transaction to avoid the type of change-in-control situation likely to trigger Revlon by ensuring that ownership of the post-merger entity remains widely held or by limiting the power of the resulting controlling shareholder. In any event, in light of recent court decisions, doubt as to the state of Revlon duties, and the current resurgence in mergers and acquisitions, the subject of a board's enhanced duties under Revlon demands revisiting.

This Note addresses those situations that trigger a board's Revlon duties and argues that, despite Revlon duties, Delaware law allows boards some flexibility in structuring a merger. Indeed, the distinct circumstances that trigger Revlon are better delineated in the mid-1990s than ever before. This Note examines Revlon duties and provides guidance to corporate planners, giving them room to structure a transaction without concern over inadvertently triggering Revlon.

Part I of this Note shows how Revlon has evolved from its original state as an auction duty to requiring only that a board is informed fully in choosing a transaction that obtains the best value reasonably available for shareholders. Part I also examines those lessons learned from the evolution of the Revlon standard, with particular focus on when Revlon is triggered. Part II discusses the Revlon standard as interpreted in the mid-1990s, with specific emphasis on the Delaware Supreme Court's decisions in Paramount Communications Inc. v. QVC Network Inc. and its progeny. Part III provides guidance as to when Revlon duties will be triggered and how they can be avoided. Specifically, part III illustrates how, after QVC, a board most effectively may avoid the type of change in control likely to trigger Revlon in two scenarios: by implementing structural devices for the protection of minority shareholders or by structuring a transaction so that the post-merger entity is without a controlling shareholder. Because a board could utilize these tactics in a wide variety of merger situations, the threat of Revlon in the mid-1990s may be, in reality, only cosmetic.

33. See supra note 21.
35. 637 A.2d 34 (Del. 1993).
I. THE EVOLUTION OF Revlon DUTIES AND LESSONS LEARNED THEREFROM

Despite the importance of Revlon duties, courts normally do not impose those duties upon a board.36 Because a board manages the business and affairs of a corporation,37 courts generally defer to a board's actions and review those actions only under the business judgment rule.38 When Revlon duties apply, however, boards have less freedom as specific duties are imposed on them. The cases interpreting Revlon illustrate how those duties have evolved, when they apply, and their importance in merger situations.

A. The Business Judgment Rule, Unocal, and Revlon

The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."39 The rule entitles a board to great deference and precludes a court from unreasonably imposing itself in the business and affairs of a corporation.40 For a party challenging a board's actions to overcome the powerful presumptions of the business judgment rule, that party must prove that the board's actions were either uninformed, in bad faith, or not in the best interests of the company.41 Only if such a showing is made will the court scrutinize the "entire fairness" of the transaction.42 If a challenging party cannot


41. Id. at 361 ("To rebut the rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty—good faith, loyalty or due care.").

42. Id. If a challenging party can rebut any of the presumptions of the business judgment rule, the directors then have the burden of proving the "entire fairness" of the transaction to the shareholder plaintiff. Id. Under the "entire fairness" standard, the directors must show that "the transaction was the product of both fair dealing and fair price." Id.
prove any of these elements, the court will uphold a board’s decision if it can be ‘‘attributed to any rational business purpose.’’ 43

The presumptions of the business judgment rule apply in the context of a takeover.44 The rule operates to protect directors’ decisions and prevent courts from second-guessing a board’s business judgments.45 Nonetheless, in some situations a court will impose specific obligations upon a board, such as those mandated by Revlon.46 Further, in evaluating a board’s response to a hostile takeover bid, courts apply an enhanced scrutiny before allowing directors the deference entitled to them under the business judgment rule. One such situation occurred in Unocal Corp. v. Mesa Petroleum Co.47

1. Unocal Corp. v. Mesa Petroleum Co.

In Unocal, Mesa Petroleum Co., a reputed “greenmailer,”48 made an unsolicited, coercive, two-tiered tender offer49 for Unocal. After lengthy discussions and opinions from its financial advisors, the Unocal board rejected the offer as “inadequate.”50 The board then, as a defensive measure, decided to make a self-tender that excluded the bidder, Mesa, from tendering its shares.51

43. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)) (“A hallmark of the business judgment rule is that a court will not substitute its judgment for that of the board if the latter’s decision can be ‘attributed to any rational business purpose.’ ”); see also Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (“If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments.”).


45. See Technicolor, 634 A.2d at 360.

46. See id. at 361 (“[I]n the review of a transaction involving a sale of a company, the directors have the burden of establishing that the price offered was the highest value reasonably available under the circumstances.”).

47. 493 A.2d 946, 954-55 (Del. 1985).

48. The term “greenmail” refers to the practice of a target company’s “buying out a takeover bidder’s stock at a premium that is not available to other shareholders in order to prevent the takeover.” Id. at 956 n.13.

49. Id. at 949. Mesa, the owner of 13% of Unocal’s stock, offered $54 cash for approximately 37% of Unocal’s outstanding stock, the “front-end.” Id. The “back-end” of the two-tiered offer was comprised of “junk bonds,” which Mesa determined were worth far less than $54 per share. Id. at 956. The Unocal court found that such offers are coercive and thus a threat, in that they are “designed to stampede shareholders into tendering at the first tier, even if the price is inadequate, out of fear of what they will receive at the back end of the transaction.” Id.

50. Id. at 949.

51. Specifically, the resolution provided that if Mesa’s stake in Unocal increased to 51%, Unocal would buy the remaining 49% of outstanding shares for an exchange of debt securities having an aggregate par value of $72 per share. Id. at 951. Moreover, the resolution excluded Mesa from tendering its shares, because if Mesa were permitted to do so, it would defeat the resolution’s purpose of adequately compensat-
In upholding the Unocal board’s actions, the court fashioned a two-pronged enhanced scrutiny test for boards responding to takeover threats. The court declared that, before a board will be protected by the business judgment rule when responding to a takeover threat, the directors must show that (1) the board had reasonable grounds to believe that the offer constituted a legally cognizable “danger to corporate policy and effectiveness” and (2) the board’s response was “reasonable in relation to the threat posed.” This enhanced scrutiny is necessary because of the inherent conflicts of interest that boards face in takeover situations.

Applying the two-pronged test, the court found the board’s perception of a grossly inadequate two-tiered coercive tender offer by a reputed greenmailer to be a reasonably perceived threat to the corporation. The court further found that the board’s response was reasonable, in that its objective was either to defeat the inadequate Mesa offer, or, should the offer succeed, to provide the “back end” shareholders with a higher valued security than they would have received from Mesa. Because the board made the required showing, the business judgment rule applied. Thus, the challenging party had to overcome the presumptions underlying the rule, which it ultimately failed to do.

52. See id. at 954-55.
53. Id. at 955. A board satisfies this burden by showing “good faith and reasonable investigation.” Further, a board may enhance such a showing if a majority of independent directors approves its transactions. Id.
54. Id. at 955. Such considerations may include, for example, “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.” Id.
55. See id. at 954. The Unocal court stated:

When a board addresses a pending takeover bid it has an obligation to determine whether the offer is in the best interests of the corporation and its shareholders. In that respect a board’s duty is no different from any other responsibility it shoulders, and its decisions should be no less entitled to the respect they otherwise would be accorded in the realm of business judgment. There are, however, certain caveats to a proper exercise of this function. [In takeover situations,] [b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, [e.g., protecting their jobs] rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred.

Id. (citation omitted).
56. See id. at 956. Specifically, the court emphasized the nature of the offer and the fact that Unocal’s board was well informed. See id.
57. See id.
58. See id.
59. See id. at 958-59.
2. Revlon, Inc. v. MacAndrews & Forbes Holdings

Applying the principles of Unocal, the Delaware Supreme Court in Revlon, Inc. v. MacAndrews & Forbes Holdings\(^6\) ruled that once the break-up of a company becomes inevitable, the duty of the board becomes obtaining “the best price for the stockholders at a sale of the company.”\(^6\) In Revlon, Revlon’s board faced an unsolicited tender offer from Pantry Pride, Inc. Revlon’s board responded to this perceived threat by implementing a note purchase rights plan\(^6\) and by commencing a self-tender for up to ten million shares.\(^6\) The self-tender allowed each shareholder to tender his shares of common stock for a combination of notes and preferred stock.\(^6\) The court found these actions to be valid defensive measures under Unocal’s two-pronged test.\(^6\)

Higher bids from Pantry Pride soon followed. In response, Revlon’s board agreed to a leveraged buyout proposal, with management participation, in which Fortsman Little & Co. would acquire all of Revlon’s outstanding shares for fifty-six dollars per share in cash.\(^6\) A bidding contest ensued, during which Pantry Pride bid $56.25 per share and stated that it would top any offer for Revlon.\(^6\) Fortsman then made an offer of $57.25 per share for a merger without management participation.\(^6\) Fortsman conditioned the offer upon the receipt of a “lock-up” option,\(^6\) a “no shop” provision,\(^6\) and a twenty-five

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\(^6\) 506 A.2d 173 (Del. 1986).

\(^6\) Id. at 182.

\(^6\) Under this plan, if anyone acquired 20% of Revlon, each Revlon shareholder would receive the right to exchange each share of common stock it owned for a $65 principal Revlon note at 12% interest, with a one year maturity. Id. at 177. The rights were not available to the acquiror, and the Revlon board could redeem such rights. Id.

\(^6\) Id.

\(^6\) The self-tender offer exchanged, for each share of common stock tendered, one senior subordinated note of $47.50 principle at 11.75% interest, due 1995, and one-tenth of a share of $9.00 cumulative convertible exchangeable preferred stock valued at $100 per share. Id.

\(^6\) Id. at 181. In applying Unocal, the court noted that the Revlon directors concluded that Pantry Pride’s offer was grossly inadequate. Id. The court found that in reaching this conclusion, the board acted in good faith, on an informed basis, and with reasonable grounds for believing that there existed a harmful threat to the corporate enterprise. Id. The court then concluded that the adoption of these defensive measures were reasonable in relation to the threat posed and fully accorded with the powers, duties, and responsibilities of directors. Id.

\(^6\) Id. at 178.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id.

\(^6\) Id. A lockup is “a target board’s promise to compensate a bidder a specified amount if the target breaches or does not consummate its merger agreement with the bidder.” Stephen Fraidin & Jon D. Hanson, Toward Unlocking Lockups, 103 Yale L.J. 1739, 1742 (1994). In Revlon, the “lock-up” option would give Fortsman the right to purchase Revlon’s Vision Care and National Health Laboratories divisions for $525 million, some $100-$175 million below their estimated value, if another acquiror obtained 40% of Revlon’s shares. Revlon, 506 A.2d at 178.
million dollar "break up" fee. In return, Fortsman agreed to support the par value of the issued notes, which had faltered in the market, by issuing new notes. Revlon’s board approved Fortsman’s proposal, and Pantry Pride brought suit.

Looking at these events, the Delaware Supreme Court found that the bidding reached such heights that "the break-up of the company was inevitable." The court found that the board’s authorization for a merger or buyout was a recognition that the company was for "sale." As a result, the court reasoned that "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company’s value at a sale for the stockholders’ benefit." In other words, the "directors’ role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." By entering into the agreement with Fortsman, largely out of concern for supporting the value of the notes, the board breached its duty to the shareholders to maximize share value, as the agreement with Fortsman effectively foreclosed further bidding.

70. The "no shop" provision was a promise by Revlon to deal exclusively with Fortsman in the face of a takeover. Id. at 175.

71. There would be a $25 million cancellation fee payable to Fortsman by Revlon if the agreement terminated or if another acquiror obtained more than 19.9% of Revlon’s stock. Id. at 178.

72. Id. at 178-79.

73. Id. at 179. By this point, Pantry Pride already had sought injunctive relief from the note purchase rights plan. Id. In light of these developments with Fortsman, Pantry Pride amended its complaint, challenging the lock-up, the cancellation fee, and the exercise of the rights and the notes covenants. Id. Pantry Pride also sought a temporary restraining order preventing Revlon from putting any assets in escrow or transferring them to Fortsman. Id.

The Court of Chancery granted the relief Pantry Pride sought. See MacAndrews & Forbes Holdings v. Revlon, Inc., 501 A.2d. 1239, 1239 (Del. Ch. 1985). The court concluded that Revlon’s directors had breached their duty of loyalty by making such concessions to Fortsman out of concern for the noteholders, rather than maximizing the sale price of the company for the stockholders’ benefit. Id. at 1249-50.

74. See Revlon, 506 A.2d at 182 ("[W]hen Pantry Pride increased its offer to $50 per share, and then to $53, it became apparent to all that the break-up of the company was inevitable."). The court did not specify why the "break-up" was inevitable, but presumably it was because the bidding had reached such heights that the only way to service the debt taken on to purchase Revlon would be to break up and sell parts of the company. Indeed, part of Fortsman’s plan was to sell Revlon’s Noreliff Thayer and Reheis divisions to American Home Products for $335 million. Id. at 178. Before the merger, Revlon planned to sell its cosmetics and fragrance division to Adler & Shaykin for $905 million. Id. These transactions were to facilitate the purchase of Revlon by Fortsman or any other acquiror. Id.

75. Id. at 182.

76. Id.

77. Id.

78. Id. The court placed particular emphasis on the Board’s concern for the sagging value of the notes and the Board’s belief that the Fortsman proposal would shore up the value of the notes. See id. The court stated that "the Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring
For some time after the Revlon decision, it widely was thought that the case created specific duties that required a board to auction the company off to the highest bidder. The language of the Revlon opinion, in which the court emphasized the board’s duty to act as “auctioneers,” “get[ ] the best price for the stockholders” and “sell[ ] the company to the highest bidder,” appears to support such an interpretation. Nevertheless, when analyzing the opinion in its entirety, it becomes clear that the “auction” language in Revlon does not confer an affirmative duty to auction off the company. In Revlon, an intense auction was already in progress. By entering into the agreement with Fortsman, out of a misplaced concern for the noteholders, Revlon’s board ended the auction with “no rationally related benefit thereby accru[ing] to the stockholders.” Accordingly, the court found that Revlon’s board breached its obligation to the shareholders because ending the auction operated to the shareholder’s detriment. Therefore, the Delaware Supreme Court subsequently has found Revlon to stand for the notion that “when several suitors are actively bidding for control of a corporation, the directors may not use defensive tactics that destroy the auction process” by impermissibly favoring one bidder over another.

Since Revlon, Delaware courts have expanded the application of the principles articulated in Revlon to situations other than an auction. Now, in the specific situations when Revlon duties apply, a board must ensure that the transaction into which it is entering obtains the best value reasonably available for shareholders. In deter-

79. See, e.g., Paul E. Burns, Timing is Paramount: The Impact of Paramount v. Time on the Law of Hostile Takeovers, 19 Fla. St. U. L. Rev. 761, 770 (1991) (describing Revlon as imposing a duty to auction when invoked); Mirvis, supra note 36, at 5-6 (“Revlon is the ‘radically altered state’ in which directors come under a categorical imperative to maximize immediate, short-term stockholder value.”); Barry Reder, The Obligation of a Director of a Delaware Corporation to Act as an Auctioneer, 44 Bus. Law 275 (1989) (describing throughout a director’s obligation to act as an auctioneer under Revlon); Rinaldi, supra note 36, at 762 (“Once in the ‘Revlon zone,’ a director’s obligation to the corporation’s shareholders is narrow and specific: achieve immediate maximization of share value.”).
80. Revlon, 506 A.2d at 182-84.
81. See id. at 178-85.
82. Id. at 183.
83. Id. 182-83.
85. See infra text accompanying note 279.
86. See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1993).
mining "best value," a board must be informed fully. Further, while a board may become informed by using various methods, such as an auction or canvass of the market, neither method is required. A board also may consider various factors other than the dollar amount of a bid. Indeed, there is "no single blueprint" for fulfilling Revlon duties. Thus, in the mid-1990s, Revlon duties do not require an auction, but rather require that a board is informed fully when entering into a transaction in which it is required to obtain the best value reasonably available for shareholders.

B. Triggering Revlon—The Early Cases and Their Teachings

In Revlon, presumably because an auction was in progress, the court characterized the situation as a "sale" of the company that was "inevitable." The court, however, did not articulate what would constitute a "sale" in other contexts, thus leaving ambiguous the precise events that trigger Revlon. The evolution of Revlon's progeny illustrates some circumstances in which Revlon duties apply. Indeed, the Delaware Supreme Court, interpreting these cases, recently enunciated a distinct set of criteria for when this obligation to obtain the best value reasonably available for shareholders occurs. The duty does not apply to all takeovers. Rather, it applies during the "break-up" of a company or when the board facilitates a "sale" or "change in control" of a corporation. Boards of directors thus may attempt to

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87. See Barkan v. Amsted Indus., 567 A.2d 1279, 1287 (Del. 1989). For factors to consider in determining the value of a company, see infra note 245.

88. See id. at 1286-87. If an auction that will result in a change in control is involved, however, in encouraging the best value for shareholders, directors must "act in a neutral manner" and may not play favorites with contending bidders. Id. at 1286.

89. See id. at 1286. Revlon, however, is still misinterpreted as requiring an auction. See Phillip J. Azzollini, The Wake of Paramount v. QVC: Can a Majority Shareholder Avoid Triggering the Auction Duty During a Merger And Retain A Significant Equity Interest? Suggestion: A Pooling of Interests, 63 Fordham L. Rev. 573, 581 (1994) ("The Revlon duty requires that a board, upon recognition that the corporation is for sale, must maximize the company's value at an auction for the stockholders' benefit."). Indeed, perhaps it is this continued association of an auction with the phrase Revlon duties that is an element of the Delaware Supreme Court's dislike of that phrase in Arnold v. Society for Sav. Bancorp, 650 A.2d 1270, 1289 n.40 (Del. 1994).

90. See infra note 245.


92. See id.


94. See Rinaldi, supra note 36, at 763 (noting that perhaps because the court "first applied the duty to [Revlon,] a case involving an unambiguous transaction . . . the Revlon court overlooked the need to explain what would qualify as a 'sale' in less clear-cut circumstances").


96. Id. at 1290.
avoid the obligations set forth in Revlon and its progeny by structuring transactions or responding to hostile bids in ways in which the Delaware courts have deemed not to result in a "sale," "change in control," or "break up." Furthermore, the opinions in post-Revlon cases illustrate some of the concerns behind Revlon duties. The lessons learned from the following cases, therefore, are valuable for boards considering transactions that may implicate Revlon.

1. Ivanhoe Partners v. Newmont Mining Corp.

In Ivanhoe Partners v. Newmont Mining Corp., the Delaware Supreme Court held that a board's actions, facilitating the emergence of a 49.7% shareholder, did not constitute a Revlon-triggering change in control because of an agreement limiting that shareholder's board representation to 40% for a ten-year period. In that case, Ivanhoe Partners and Ivanhoe Acquisition Corp. mounted an unsolicited bid for Newmont Mining Corp. Newmont's board responded to the threat by implementing a restructuring plan. The plan included a special dividend that facilitated Newmont's largest shareholder, Consolidated Gold Fields PLC, to increase its stake in Newmont from 26% to 49.7%. Newmont and Gold Fields also entered into a ten-year "standstill agreement," which limited Gold Fields to a maximum of 49.9% of Newmont's stock and 40% representation on Newmont's board. It further provided that Gold Fields could not transfer its interest to a third party unless that third party agreed to be bound by the standstill agreement.

The Delaware Supreme Court, focusing on the board's desire to keep the company independent through the standstill agreement, held that the board's response was reasonable in relation to the threat posed and that the transaction did not constitute an inevitable sale of the company within the meaning of Revlon. No change of control

97. 535 A.2d 1334 (Del. 1987).
98. Id. at 1345.
99. Id. at 1336-37.
100. Id.
101. Id. at 1337.
102. Id. at 1340.
103. Id.
104. Id. at 1345. The court stated:

First, Newmont was never for sale.... The Newmont board held fast to its decision to keep the company independent. Ultimately, this goal was achieved by the standstill agreement and related defensive measures.

Second, there was neither a bidding contest, nor a sale. The only bidder for Newmont was Ivanhoe. Gold Fields was not a bidder, but wished only to protect its already substantial interest in the company. It did so through the street sweep. Thus, the Newmont board did not "sell" the company to Gold Fields. The latter's purchases were from private sellers. While Gold Fields now owns 49.7% of the stock, its representation on the board is only 40% because of the restrictions of the standstill agreement. These facts do not strip the Newmont board of the presumptions of independence and good
occurred because the remaining shareholders still controlled the corporation, as the standstill agreement retained in them the power to elect sixty percent of the company's board.\textsuperscript{105} The Delaware Supreme Court since has recognized \textit{Newmont} as an example of how such a corporate restructuring can take place in the face of coercive offers without invoking \textit{Revlon}.\textsuperscript{106} More specifically, the Delaware Supreme Court has cited \textit{Newmont} as an example of a means to protect minority interests in a potential change-of-control situation.\textsuperscript{107} Protecting the minority's interests is important because when control of a corporation is acquired, the remaining minority stockholders lose any control of the corporation they may have had and are entitled to compensation for their loss.\textsuperscript{108} This compensation generally comes in the form of a control premium.\textsuperscript{109} Thus, absent structural devices protecting minority stockholders in a change of control, the directors have the obligation to obtain the best value reasonably available for the stockholders' shares.\textsuperscript{110} In \textit{Newmont}, because the protective devices caused the powers of majority ownership to remain dormant, control, in effect, was not sold. Accordingly, \textit{Newmont} illustrates that protective devices may be employed to curtail the voting power of a transactionally-resultant controlling shareholder and thus prevent the type of change in control likely to trigger \textit{Revlon}.\textsuperscript{111}

\section*{2. Mills Acquisition Co. v. Macmillan, Inc.}

The Delaware Supreme Court's opinion in \textit{Mills Acquisition Co. v. Macmillan, Inc.}\textsuperscript{112} helps to clarify what constitutes a change of control for \textit{Revlon} purposes and also contributes to understanding a board's fiduciary duties under \textit{Revlon}. While the court's opinion in \textit{Macmillan} specifically decides whether to enjoin a lock-up agreement with a

\begin{itemize}
  \item faith under the business judgment rule. Even though Newmont's declaration of the dividend facilitated the street sweep, it did not constitute a "sale" of the company by Newmont.
  \item \textit{Id.} (citations omitted).
  \item \textsuperscript{105} \textit{See id.}
  \item \textsuperscript{106} \textit{See Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1285 n.35 (Del. 1988) ("In [\textit{Newmont}] we recognized that a change in corporate structure under the special facts and circumstances of that case did not invoke \textit{Revlon}.")}.
  \item \textsuperscript{107} \textit{See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 n.12 (Del. 1993) ("Examples of such protective provisions [for minority shareholders] are supermajority voting provisions, majority of the minority requirements, etc. . . . [W]e note that this Court has upheld, under different circumstances, the reasonableness of a standstill agreement which limited a 49.9 percent stockholder to 40 percent board representation." (citations omitted)).}
  \item \textsuperscript{108} \textit{Id.} at 43.
  \item \textsuperscript{109} \textit{See id.}
  \item \textsuperscript{110} \textit{See id.}
  \item \textsuperscript{111} \textit{See Preserving a Friendly Merger: Top M&A Lawyers Debate how the Paramount Battle will Affect Future Mergers, American Law. Corp. Couns. Mag., Summer 1994, at 86, 87. For further discussion on employing structural devices, see infra part III.B.}
  \item \textsuperscript{112} 559 A.2d 1261 (Del. 1988).
\end{itemize}
leverage buyout firm, it is that court’s characterizations of Revlon duties regarding other specific facts described earlier in the Macmillan opinion\textsuperscript{113} that are most helpful.

In Macmillan, Macmillan’s board, recognizing that the company was a likely takeover candidate, adopted various defensive measures that included a restructuring plan with anti-takeover features.\textsuperscript{114} The plan involved a complex restructuring of the company, dividing the company into two parts: the information business and the publishing business.\textsuperscript{115} Soon after the board’s approval of this restructuring, a hostile bid emerged from the Robert M. Bass Group, Inc.\textsuperscript{116} In response, Macmillan’s board amended various aspects of the restructuring plan and its anti-takeover mechanisms.\textsuperscript{117} Under the amended restructuring plan, management would own thirty-nine percent of the more valuable part, the information business, while a management-controlled employee stock option plan would own twenty-six percent of the publishing business.\textsuperscript{118} The court stated that the net effect of the plan would increase management’s then combined holdings of 4.5% in Macmillan to 39% in the information business alone.\textsuperscript{119} A special committee of the board adopted the plan and rejected the Bass offer.\textsuperscript{120} After further deliberations that failed to result in an agreement, Bass brought suit.\textsuperscript{121}

In looking at these facts, the Delaware Supreme Court noted that “[t]his case does not require a judicial determination of when Macmil-

\textsuperscript{113} Id. at 1264. The facts of the case described in this Note have come to be known as Macmillan I. See id. at 1272. Macmillan II involved the enjoining of a lock-up agreement between Macmillan and Kholberg Kravis Roberts & Co., a firm specializing in leveraged buyouts. See id. at 1264. Although the Delaware Supreme Court’s decision here relates to Macmillan II, it is the court’s characterizations of the transaction in Macmillan I that are most helpful for the purposes of this Note. This Note therefore will refer to the case only as Macmillan and will not be concerned with those facts which have been termed Macmillan II.

\textsuperscript{114} Id. at 1266.

\textsuperscript{115} Id. The reason for the two-company concept was to increase management’s control over the entities, thus making a takeover more difficult. Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id. at 1267-71.

\textsuperscript{118} Id. at 1270. In exchange for their Macmillan shares, the public stockholders would receive a dividend of $2.35, a $4.50 debenture, a “stub share” of the publishing business ($5.10) and a one-half share of the information business ($2.20). Id. The management group and the ESOP would exchange their restricted stock and options for restricted shares of the information business, representing a 39.2% stake in that company. Id. The ESOP would own 26% of the publishing business. Id.

\textsuperscript{119} Id.

\textsuperscript{120} Id. at 1271.

\textsuperscript{121} Id. at 1271-72. On July 14, 1988, the Court of Chancery preliminarily enjoined the restructuring and held that the Bass offers were clearly superior to the restructuring plan. Robert M. Bass Group, Inc. v. Evans, 552 A.2d 1227, 1243-47 (Del. Ch. 1988). The Chancery Court implied that any threat posed was being used merely as a pretext for management to avail themselves of any takeover threat and to increase their own and their employees’ stake in the company. See Macmillan, 559 A.2d at 1271 n.16. The Chancery Court’s holding essentially ended Macmillan I. Id. at 1272.
Ian was 'for sale' but rather that the transaction could be characterized as a "sale" for *Revlon* purposes "[b]y any standards." More importantly, the court made clear that *Revlon* would apply in such a situation, whether the "'sale' takes the form of an active auction, a management buyout, or a 'restructuring.'

Three important lessons are learned from *Macmillan*. First, the court's characterization of the transfer of thirty-nine percent as a "sale of control" acknowledges that the transfer of effective control will suffice to trigger *Revlon* and that the transfer of a majority of stock is not required.

Second, the *Macmillan* court's broad description of what a "sale" includes for *Revlon* purposes (i.e., an active auction, a management buyout, or a restructuring) indicates that any transaction that results in a transfer of corporate control will be governed by *Revlon*, regardless of how the transaction is structured. Thus, boards must be wary of any transfer, regardless of the form, that changes the effective control of a corporation. Moreover, in a widely held public corporation, it seems that a transfer of near thirty-nine percent of a company's shares, as in the *Macmillan* transaction, may suffice for control.

Third, the court clarified some aspects of the fiduciary duties enunciated in *Revlon*. Specifically, the court noted that a board can

122. *Id.* at 1285. The court continued: "By any standards this company was for sale both in *Macmillan I* and *II.*" *Id.*

123. *Id.*

124. *See id.* One might argue that this finding is a departure from *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987). *See* Portia Policastro, Note, *When Delaware Corporate Managers Turn Auctioneers: Triggering the Revlon Duty After the Paramount Decision*, 16 Del. J. Corp. L. 187, 189 (1991) (arguing that, under *Newmont*, a change of control for *Revlon* purposes occurs only when a majority voting block of a company's stock is sold). In *Newmont*, the board facilitated a shareholder's acquisition of 49.9% of the company's stock, and the court found no change in control. *Newmont*, 535 A.2d at 1345. Thus, one might think *Newmont* requires majority ownership for control. Nonetheless, in that case the 49.9% shareholder entered into an agreement with the *Newmont*'s board, whereby that shareholder was limited to 40% board representation. *Id.* There was no change in control because the other shareholders retained control over 60% of the board and thus control of the corporation. *Id.* Accordingly, it is inaccurate to argue that effective control does not constitute control under *Newmont* because, in *Newmont*, the 49.9% shareholder did not have effective control as the other shareholders retained control of the corporation.

125. In widely held public corporations, where ownership is fragmented over myriad shareholders, a shareholder with a large block of stock that is less than 50% often has *de facto* control, because that person is usually in the best position to mobilize sufficient votes to elect a majority of the board. *See* Solomon et al., *supra* note 3, at 1138; *see also* Rinaldi, *supra* note 36, at 775-81 (noting that in widely held public corporations, ownership of around 35% gives control depending on the circumstances, and arguing that *Revlon* should only be triggered where there has been a change in the control structure of a corporation).
sider factors other than price; thus, the highest dollar amount does not necessarily control. Those considerations include, among other things, the reputation of the bidder, the financing involved, the bidder's plans for the corporation, and the effects on the stockholders. The court also explained the level of judicial scrutiny a court applies when imposing Revlon duties upon directors. Namely, the court "will continue to exact an enhanced judicial scrutiny at the threshold, as in Unocal, before the normal presumptions of the business judgment rule will apply."

3. Barkan v. Amsted Industries

In Barkan v. Amsted Industries, the Delaware Supreme Court explained that Revlon applies whenever there is a change in control of a corporation and also emphasized that, in fulfilling its obligations under Revlon, a board must be informed fully to ensure that the stockholders receive the best value for their shares. In Barkan, Amsted's board, following the accumulation of a large block of shares by a reputed "greenmailer," implemented a "poison pill" and created a special committee of independent directors to consider a possible management-sponsored leveraged buyout and an employee stock plan. The court notes that once within Revlon, "discriminatory treatment of a bidder, without any rational benefit to the shareholders, [is] unwarranted" and that a board's proper objective within Revlon is "to obtain the highest price reasonably available for the company, provided it was offered by a reputable and responsible bidder." Macmillan, 559 A.2d at 1282. Thus, the court provided some helpful examples of what a board might look to in evaluating a bid:

Id. at 1282 n.29.

126. Macmillan attempts to clarify the duties of directors once Revlon has been triggered. The court notes that once within Revlon, "discriminatory treatment of a bidder, without any rational benefit to the shareholders, [is] unwarranted" and that a board's proper objective within Revlon is "to obtain the highest price reasonably available for the company, provided it was offered by a reputable and responsible bidder." Macmillan, 559 A.2d at 1282. Thus, the court provided some helpful examples of what a board might look to in evaluating a bid:

In assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, the adequacy and terms of the offer; its fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests; the risk of nonconsumation; the basic stockholder interests at stake; the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.

127. Id. at 1288.

128. Id. at 1279 (Del. 1989).

129. 567 A.2d 1279 (Del. 1989).

130. Id. at 1286-87.

131. For a definition of "greenmail," see supra note 48.

132. Poison pills are shareholder rights plans that typically grant to stockholders a contingent right to purchase stock or other securities on the occurrence of a specific triggering event. See Solomon et al., supra note 3, at 1205-06. Until the triggering event occurs, the board retains the right to redeem the rights for a nominal payment. Id. Thus, the board's power to redeem the rights provides incentive to bidders to negotiate with a target board before making a tender offer. Id. In Barkan, the rights plan would be triggered if anyone acquired 20% of Amsted's shares or announced an offer enabling them to acquire 30% and would allow holders of such rights to purchase newly issued Amsted stock. See Barkan, 567 A.2d at 1282.
ownership plan. The special committee sought the opinion of an investment bank, which opined that the value of the board-sponsored transaction was "high in the range of fairness." The special committee then recommended the transaction to the full board of directors, which approved the transaction.

A group of stockholders who claimed that the board breached its fiduciary duties by entering into the transaction settled their claim with the Chancery Court's approval. Barkan, a shareholder, challenged the settlement. Barkan claimed that because control would change, the directors violated their Revlon duties by not canvassing the market to seek an alternative that would bring the highest value before approving the management buyout.

The court rejected Barkan's claim, holding that the board had fulfilled any duties it may have had under Revlon. It noted that the board had adequate information to evaluate the fairness of the transaction. Additionally, the court held that the board was not required to conduct an active survey of the market and found that it had valid reasons for believing that no rival bidder would be able to surpass the price offered by the management-sponsored buyout group. Therefore, the court concluded that a board need not conduct an auction in fulfilling its Revlon duties, but only must ensure that it is obtaining the best value for the shareholders.

In Barkan, because the board had

133. Barkan, 567 A.2d at 1281-82.
134. Id. at 1283.
135. Id.
136. Id. at 1282.
137. Id.
138. Id. at 1285.
139. Id. at 1286-87.
140. Id. at 1286.
141. Id. In discussing a board's duties under Revlon, the court stated: [I]n Revlon we held that when several suitors are actively bidding for control of a corporation, the directors may not use defensive tactics that destroy the auction process. When it becomes clear that the auction will result in a change of corporate control, the board must act in a neutral manner to encourage the highest possible price for shareholders. However, Revlon does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest. Revlon is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders. When multiple bidders are competing for control, this concern for fairness forbids directors from using defensive mechanisms to thwart an auction or to favor one bidder over another. When the board is considering a single offer and has no reliable grounds upon which to judge its adequacy, this concern for fairness demands a canvas of the market to determine if higher bids may be elicited. When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.
142. Id. at 1286-87 (citations omitted).
adequate information on which to base such a determination, it was not required to seek alternative transactions.143

Barkan further clarified when Revlon applies. The court stated that "the general principles announced in Revlon . . . govern this case and every case in which a fundamental change of corporate control occurs or is contemplated."

Thus, while Revlon concerned the inevitable break-up of a company,145 Barkan explicitly dictates that Revlon duties also are triggered by a change in control.146 Although Barkan is helpful in stating the significance of a "change in control," the case does not assist in defining a "change in control."

C. Approaching the 1990s: Time-Warner and its "Break-Up" Tests

In Paramount Communications, Inc. v. Time Inc., commonly referred to as "Time-Warner,"147 the Delaware Supreme Court found that Revlon did not apply to a transaction that resulted in Warner shareholders owning sixty-two percent of the merged entity.148 Unlike Barkan, which indicated that a "change in control" triggers Revlon,149 the court in Time-Warner apparently concluded that only certain scenarios involving the "break-up" of a company trigger Revlon.150 As a result, Time-Warner cast some confusion on the appropriate test for when Revlon applies.151

1. Time-Warner

In 1987, Time, hoping to move into the area of video programming, established a special committee to evaluate possible expansion strategies for the 1990s.152 The primary concern of Time's outside directors was the preservation of "Time culture," with emphasis on Time's tradition of journalistic integrity.153 With these considerations in mind, Time's board considered various potential merger candidates and con-

143. Id. at 1287.
144. Id. at 1286 (emphasis added).
146. Barkan, 567 A.2d at 1286.
147. 571 A.2d 1140 (Del. 1989). This case has come to be called Time-Warner, referring to the transaction between Time and Warner in that case. See Cunningham and Yablon, supra note 21, at 1595 n.14.
150. See infra note 174.
153. Id. at 1143 n.4.
cluded that Warner Communications was the superior candidate for a consolidation.154

After a series of negotiations, the two companies agreed upon a stock-for-stock deal with an exchange rate favoring Warner of .465.155 The merged entity, Time-Warner, would have a twenty-four member board, with twelve members representing each corporation.156 The company would begin with co-CEOs, one from Time and one from Warner.157 Eventually, after the Warner CEO's retirement, the Time CEO would remain the sole CEO of Time-Warner.158

About three months later, two weeks before the requisite shareholder vote on the merger, Paramount Communications, Inc. announced an all-cash offer to purchase Time for $175 per share.159 After considering Paramount's offer and then rejecting it, Time's board, with Warner's approval, recast the consolidation into an outright acquisition of Warner by Time.160 Paramount then raised its bid to $200 per share.161 Once again, Time's board rejected Paramount's bid, maintaining that "the Warner transaction offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its 'culture.' "162

Subsequently, Paramount, and some of Time's shareholders, brought suit and forwarded, among other things, a Revlon claim.163 The plaintiffs contended that the Time-Warner agreement, which would result in Warner shareholders owning sixty-two percent of the combined company, effectively put Time up for sale and triggered the board's Revlon duties to sell the company to the highest bidder.164 The Chancery Court rejected the Revlon claim, finding that the Time-Warner agreement did not constitute a "change in control" because "control of the corporation existed in a fluid aggregation of unaffiliated shareholders" and, therefore, did not trigger Revlon.165 Further,

154. Id. at 1145.
155. Id. at 1146. On the basis of a .465 exchange rate, Warner stockholders would own approximately 62% of the common stock of the merged entity Time-Warner. Id.
156. Id.
157. Id.
158. Id.
159. Id. at 1147.
160. Id. at 1148.
161. Id. at 1149.
162. Id.
163. Id. at 1149. Plaintiffs also forwarded a Unocal claim, which the court rejected on the basis that the board's actions satisfied Unocal's two-pronged test. Id. at 1153-55.
164. Id. at 1149.
165. Id. at 1150. Chancellor Allen stated:

If the appropriate inquiry is whether a change in control is contemplated, the answer must be sought in the specific circumstances surrounding the transaction. Surely under some circumstances a stock for stock merger could reflect a transfer of corporate control. That would, for example, plainly be the case here if Warner were a private company. But where, as
the transaction did not preclude Time's shareholders from receiving a control premium for their shares, because they retained the possibility of receiving such a premium for their shares if the merged entity was later sold.166

While the Delaware Supreme Court explicitly upheld the Chancery Court's legal and factual conclusions,167 it nevertheless premised its rejection of the Revlon claim on different grounds. The court declared that, without excluding other possibilities, two circumstances may implicate Revlon:168 (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company";169 and (2) where "in response to a bidder's offer, a target [board] abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company."170 As no such break-up was apparent in Time-Warner, the court found that Revlon did not apply.171 Furthermore, while cases such as Barkan v. Amsted Industries172 broadened the scope of Revlon duties by including situations such as changes in control, the Time-Warner court apparently narrowed the scope with its "break-up" tests.173 Indeed, to some, Time-Warner's break-up tests represented the only means of triggering Revlon.174

here, the shares of both constituent corporations are widely held, corporate control can be expected to remain unaffected by a stock for stock merger... [as] [c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.

Paramount Communications, Inc. v. Time, Inc., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514, at 93,279-80 (Del. Ch.), aff'd, 571 A.2d 1140 (Del. 1989). This notion of keeping control widely held by public shareholders is especially important in that it increases the options of corporate planners. In other words, any transaction may take place, without triggering Revlon, provided that control of the corporation after the transaction remains vested in a widely dispersed public and providing that there is no break-up involved. See infra part III.C.

167. Time-Warner, 571 A.2d at 1150 ("The Chancellor's findings of fact are supported by the record and his conclusion is correct as a matter of law.").
168. Id.
169. Id.
170. Id.
171. Id. at 1150-51.
172. 567 A.2d 1279 (Del. 1989).
174. See, e.g., Stephen M. Bainbridge, Exclusive Merger Agreements and Lockups in Negotiated Corporate Acquisitions, 75 Minn. L. Rev. 239, 312 (1990) ("[O]nly those negotiated acquisitions that contemplate breaking-up the target will trigger Revlon."); Jeffrey N. Gordon, Corporations, Markets, and Courts, 91 Colum. L. Rev. 1931, 1944 n.45 (1991) ("Revlon applies only if the board actively initiates a bidding process for the firm or, as in Revlon itself, goes about breaking up the firm in response to a hostile bid."); Policastro, supra note 124, at 237 (concluding that Time-Warner holds that, aside from the isolated case where a board initiates a bidding process to sell the corporation, "the Revlon duty will trigger only when a board of directors either initi-
Time-Warner is important for corporate planners structuring a merger. At the very least, it represents a merger transaction, the structure of which was approved by the Delaware Supreme Court, that did not trigger Revlon. Specifically, Time-Warner effectively approves mergers between widely held companies and notes that absent one of the two “break-up” scenarios, Revlon is not triggered. After Time-Warner, a change in control will not occur if control remains vested in a widely dispersed public.75 Furthermore, the Time-Warner decision remains helpful as it has not only been upheld, but the Delaware Supreme Court explicitly has incorporated its “break-up” scenarios into the Revlon analysis.176

2. In re Wheelabrator Technologies Inc. Shareholders Litigation

While Time-Warner still may have didactic value to corporate planners, courts nonetheless entered the 1990s unsure of the correct Revlon test.177 Barkan suggested a “change in control test,” while Time-Warner suggested its “break-up” tests.178 Before the court in QVC first reconciled the two cases,179 early 1990s’ caselaw exhibited admitted uncertainty. Indeed, in In re Wheelabrator Technologies Inc. Shareholders Litigation,180 the court explicitly asserted that the courts’ conclusions in Time-Warner and Barkan are not easily reconcilable.181

In Wheelabrator, the Wheelabrator Technologies Inc. board approved a merger with Waste Management, Inc. that would result in Waste becoming a fifty-five percent stockholder of Wheelabrator.182 The structure of the acquisition was a stock-for-stock merger of a

ates a transaction or responds to an offer in such a way as to cause a break up or dissolution of its corporation”). Indeed, Paramount Communications, Inc., in litigation with QVC Network, Inc., recently relied on the purported absence of a “break-up” to argue that Revlon was not triggered. See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 46 (Del. 1993) (“The Paramount defendants and Viacom assert that . . . enhanced judicial scrutiny . . . [is] not implicated in this case in the absence of a ‘break-up’ of the corporation.”). Paramount made the fatal mistake, however, of ignoring the phrase “without excluding other possibilities” that the Time-Warner court used before listing its “break-up” tests. Id. at 47. Consequently, as the Delaware Supreme Court in QVC clarified, the situations that trigger Revlon are not as narrow after Time-Warner as they may have seemed, because other non-break-up situations also trigger Revlon. Id. at 47.

Waste subsidiary into Wheelabrator, resulting in the Wheelabrator shareholders realizing a ten percent premium over the market value of their shares given up in the merger.\textsuperscript{183} Although a majority of Wheelabrator's shareholders approved the merger, several other Wheelabrator shareholders brought suit, alleging, among other things, that the board breached their Revlon duties to maximize shareholder value in the merger transaction.\textsuperscript{184}

The defendants argued that Time-Warner controlled and, therefore, Revlon duties did not apply.\textsuperscript{185} The plaintiffs argued that Barkan controlled and that the board's Revlon duties applied and were violated.\textsuperscript{186} In assessing these arguments, the court stated that, under Barkan, a board becomes subject to Revlon duties whenever "'a fundamental change of corporate control occurs or is contemplated.'"\textsuperscript{187} The court went on to state that the premise of Time-Warner appears more narrow because in that case, the Delaware Supreme Court stated that Revlon duties arise when "'the dissolution or break-up of the corporate entity [is] inevitable.'"\textsuperscript{188} The court concluded that a fundamental change of corporate control need not involve the dissolution or break-up of a company.\textsuperscript{189} Thus, the court concluded, because Barkan appears not to fit within Time-Warner's categories, it would be difficult to conclude that Barkan's formulation was intended as one of Time-Warner's "'other possibilities.'"\textsuperscript{190}

Unfortunately, after setting up this doctrinal conflict, the court declined to resolve this issue, noting that the facts of the case did not require this determination.\textsuperscript{191} In Paramount Communications Inc. v. QVC Network Inc.,\textsuperscript{192} however, the Delaware Supreme Court revisited the question of when a court will impose Revlon duties upon a board.

\section{The Impact of QVC on Triggering Revlon Duties}

In the early 1990s, as the Chancery Court's opinion in Wheelabrator illustrates, some ambiguity remained as to whether a "break-up" or a "change in control" triggered the duties enunciated in Revlon. Paramount Communications Inc. v. QVC Network Inc.\textsuperscript{193} clarified that

\begin{itemize}
  \item 183. \textit{Id.}
  \item 184. \textit{Id.} at *1-2.
  \item 185. \textit{Id.} at *7.
  \item 186. \textit{Id.}
  \item 187. \textit{Id.} (quoting Barkan v. Amsted Indus., 567 A.2d 1279, 1286 (Del. 1989)).
  \item 188. \textit{Id.} (quoting Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989)).
  \item 189. \textit{Id.} at *8.
  \item 190. \textit{Id.} (quoting Time-Warner, 571 A.2d at 1150).
  \item 191. \textit{Id.}
  \item 192. 637 A.2d 34 (Del. 1993).
  \item 193. \textit{Id.}
\end{itemize}
both tests are relevant for Revlon purposes.\textsuperscript{194} QVC also contributed to an understanding of the change-in-control standard. For example, in Time-Warner, the court acknowledged that a change in control should not trigger Revlon if control of the corporation remains widely held.\textsuperscript{195} This assertion, however, was not explicit in the Delaware Supreme Court's opinion in Time-Warner, but derived from that court's broad approval of the Chancery Court's opinion in that case.\textsuperscript{196} The Delaware Supreme Court in QVC clarifies the issue, specifically noting that a change in control would not have occurred in QVC if control of the post-merger entity remained widely held by an unaffiliated group of public shareholders.\textsuperscript{197} Moreover, since QVC, the Delaware Supreme Court in Arnold v. Society for Savings Bancorp\textsuperscript{198} applied and clarified QVC's Revlon analysis. What amount of ownership is necessary for control, however, remains ambiguous. Nonetheless, if a shareholder is in a position to acquire control, QVC supports the type of protective devices used in Ivanhoe Partners v. Newmont Mining Corp.\textsuperscript{199} to avoid a change in control for Revlon purposes.\textsuperscript{200}

A. Paramount Communications Inc. v. QVC Network Inc.

In early July 1993, Paramount Inc. and Viacom, Inc. began serious negotiations for a possible combination.\textsuperscript{201} Paramount was a widely held public corporation.\textsuperscript{202} Viacom, however, was controlled by its Chairman and Chief Executive Officer, Sumner Redstone, who owned approximately 85.2\% of Viacom's Class A voting stock.\textsuperscript{203} On September 12, 1993, the Paramount board approved a merger agreement whereby Paramount would merge with and into Viacom.\textsuperscript{204} Paramount also agreed to amend its "poison pill" to exempt the proposed merger with Viacom.\textsuperscript{205} The merger agreement contained several defensive measures designed to discourage competing bids, including a

\begin{itemize}
\item \textsuperscript{194} Id. at 48. In making this conclusion, the court refrains from using the term "Revlon duties." Rather, the court states that the obligation to obtain the best value reasonably available for shareholders arises when there is either a break-up or change in control.
\item \textsuperscript{195} See supra notes 165-67 and accompanying text.
\item \textsuperscript{196} See supra note 167.
\item \textsuperscript{197} See QVC, 637 A.2d at 46.
\item \textsuperscript{198} 650 A.2d 1270 (Del. 1994).
\item \textsuperscript{199} 535 A.2d 1334, 1345 (Del. 1987).
\item \textsuperscript{200} QVC, 637 A.2d at 42 n.12.
\item \textsuperscript{201} Id. at 38.
\item \textsuperscript{202} Id. at 37.
\item \textsuperscript{203} Id. at 38. Sumner Redstone owned this 85.2\% indirectly. Further, Redstone also owned 69.2\% of Viacom's nonvoting Class B stock through an entity owned 91.7\% by him. Id.
\item \textsuperscript{204} Id. at 39. The terms provided that "each share of Paramount common stock would be converted into 0.10 shares of Viacom Class A voting stock, 0.90 shares of Viacom class B nonvoting stock, and $9.10 in cash." Id.
\item \textsuperscript{205} Id.
\end{itemize}
"no-shop" provision, a termination fee, and a stock option agreement.

The parties announced the merger on September 12, 1993. On September 20, 1993, QVC Network Inc. proposed to Paramount a transaction whereby QVC would acquire Paramount. Shortly thereafter, QVC announced an eighty dollar per share cash tender offer for fifty-one percent of Paramount's shares, to be followed by a second-step merger for Paramount's remaining shares. QVC conditioned its offer upon the invalidation of the stock option agreement.

In response to QVC's bid, Viacom and Paramount amended their original merger agreement, and Viacom announced an eighty dollar per share cash tender offer for fifty-one percent of Paramount's shares, with the remainder in securities. Soon after, Viacom unilaterally raised its offer to eighty-five dollars per share, with a comparable increase in the securities. Viacom's proposed transaction would have resulted in Sumner Redstone owning a majority of the shares of the merged entity. On November 12, 1993, QVC responded by increasing its bid to ninety dollars per share and by increasing the securities by a similar amount. On November 15, 1993, the Paramount

206. Id. Under the no-shop provision, "the Paramount Board agreed that Paramount would not solicit, encourage, discuss, negotiate, or endorse any competing transaction unless: (a) a third party makes an unsolicited written, bona fide proposal, which is not subject to any material contingencies relating to financing; and (b) the Paramount Board determines that discussions or negotiations with the third party are necessary for the Paramount Board to comply with its fiduciary duties." Id.

207. Id. Under the termination fee provision, "Viacom would receive a $100 million termination fee if: (a) Paramount terminated the Original Merger Agreement because of a competing transaction; (b) Paramount's stockholders did not approve the merger; or (c) the Paramount Board recommended a competing transaction." Id.

208. Id. The court described the stock option agreement as "the most significant deterrent device." Id. It "granted to Viacom an option to purchase approximately 19.9 percent (23,699,000) shares of Paramount's outstanding common stock at $69.14 per share if any of the triggering events for the Termination Fee occurred." Id. In addition, a "Note Feature" allowed Viacom to pay for the shares with a senior subordinated note, and thereby avoid the need to raise the $1.6 billion purchase price. Id. Further, a "Put Feature" entitled Viacom to elect to require Paramount to pay Viacom a cash sum equal to the difference between the purchase price and the market price of Paramount's stock. Id. As this amount was not "capped," it thus could, and eventually did, reach unreasonable levels. Id.

209. Id. at 39.

210. Id.

211. Id. at 40. Under the second-step merger, each remaining share of Paramount common stock would be converted into 1.42857 shares of QVC common stock. Id.

212. Id. By this point, the stock option agreement was worth over $200 million, and by November 15, 1993, it was worth nearly $500 million. Id. at 40 n.5.

213. The merger consideration was such that each Paramount share would be converted into 0.20408 shares of Viacom Class A voting stock, 1.08317 shares of Viacom Class B nonvoting stock, and 0.20408 shares of a new series of Viacom convertible preferred stock. Id. at 40.

214. Id. at 41.

215. Id. at 43.

216. Id. at 41.
The board determined that the QVC offer was not in the best interests of the stockholders, purportedly concluding that QVC's bid was excessively conditional.

QVC and certain stockholders of Paramount brought suit, seeking an injunction against the Viacom tender offer and the invalidation of Paramount's anti-takeover mechanisms. QVC argued that when Paramount's board committed itself to a transaction that would involve a change of voting control from Paramount's public stockholders to Sumner Redstone, it became subject to the duties articulated in *Revlon* and its progeny. QVC contended that those duties required Paramount's board to obtain the highest value immediately available for its shareholders. Further, QVC argued that Paramount's board failed to make an adequately informed decision in concluding that Viacom's bid represented the highest available value for the company. Finally, QVC argued that the Paramount board's actions were defensive measures that could not survive the enhanced scrutiny mandated by *Unocal*.

Paramount responded by stating that its board had acted diligently and was informed fully throughout. It further argued that the merger with Viacom represented the fulfillment of a long-standing business strategy, which had a greater long-term value than a combination with QVC. Specifically, Paramount argued that Time-Warner, not *Revlon*, controlled because Paramount did not put itself up for sale, initiate an active bidding process, or abandon a long-term business strategy by seeking or effecting a reorganization or other transaction involving the break-up of the company. Paramount further argued that a change of control, on its own, was not sufficient to trigger *Revlon* because Paramount's shareholders would experience

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217. *Id.*
218. *Id.*
220. *Id.* at 1261.
221. *Id.*
222. *Id.*
223. *Id.* at 1262.
224. *Id.* at 1263.
225. *Id.* at 1263-64.
226. *Id.* at 1263 n.37. By contrast, QVC argued that Paramount's and Viacom's public characterizations of the transaction, stating that Viacom would acquire Paramount, showed that Paramount put itself up for sale. *Id.* Further, at least one commentator argues that these public characterizations of the transaction are significant: "In terms of public relations, boards stand a greater chance of receiving judicial deference should they ever find themselves in court if they avoid characterizing a strategic merger as a 'sale' of the company. . . . A deal's 'packaging' from day one as well as its legal substance are both important in determining how a given business combination will be viewed by a court." Anthony J. Dennis, *Is it all in the packaging?: Mergers & acquisitions in the wake of Paramount/QVC*, Bus. L. Today, July/August 1994, at 7, 10.
no liquidation of their interests and would have a significant continu-
ing interest in the merged entity.227

1. The Chancery Court Opinion

On November 24, 1993, the Court of Chancery issued its decision granting a preliminary injunction in favor of QVC.228 The court held that “this change of control transaction” triggered duties under Rev-
lon.229 Moreover, it noted that a change in control entitles the owners of control to a control premium for their shares and, generally, “to the highest premium their controlling interest will command in the marketplace.”230 Furthermore, the court held that the board’s duty was to seek for the shareholders “the best premium-conferring transaction that is available in the circumstances.”231

The Chancery Court then explained what a board’s Revlon duties entail. Specifically, it emphasized that a board must be informed ade-
quately in evaluating the best available alternative for the corporation and its shareholders.232 The court noted that directors need not con-
duct an auction or a canvass of the market in every case to determine the best value.233 Instead, directors may approve a transaction pro-
vided they are able to demonstrate, while subject to enhanced scru-
tiny, that they based their decision on a body of reliable evidence.234 After analyzing the board’s actions, however, the Court of Chancery concluded that the board had not demonstrated that it was informed sufficiently to have a reasoned basis for its conclusions.235

228. Id at 1245, 1273.
229. Id at 1265.
230. Id at 1266.
231. Id. The Chancery Court also noted that under Delaware law, “in transactions involving a change of corporate control . . . the directors must satisfy the Court of the reasonableness of their actions before those actions will merit the protection of the business judgment rule.” Id. In addition, the court noted that the fiduciary and fairness concerns that underlie Revlon and its progeny exist in QVC as well and, whereas in Time-Warner there was no change in control, in QVC there was. Id.
232. Id at 1268.
233. Id.
234. Id (citing Barkan v. Amsted Indus., 567 A.2d 1279, 1287 (Del. 1989)). In such an enhanced scrutiny context as is applicable here, “directors are not cloaked with the normally applicable presumption that they acted with appropriate due care. The en-
hanced scrutiny required by Revlon imposes upon the directors the burden of showing the reasonableness of their conduct.” Id. at 1268 n.44.
235. Id at 1268. The court also concluded that “the board cannot be permitted to render its . . . antitakeover mechanisms inapplicable to the present Viacom transac-
tion, so as to permit that transaction to close and thereby preclude the shareholders having the opportunity to consider the QVC offer.” Id. at 1270. The court did, how-
ever, find the termination fee provision to be reasonable. Id. at 1273.
2. The Delaware Supreme Court Opinion and Its Impact

The Delaware Supreme Court affirmed the Chancery Court decision. The court held that the "pending sale of control implicated in the Paramount-Viacom transaction required the Paramount Board to act on an informed basis to secure the best value reasonably available to the stockholders." The court noted that, before the transaction, ownership of a majority of Paramount's voting stock was vested in a "fluid aggregation of unaffiliated stockholders." If the transaction were consummated, the unaffiliated public shareholders would lose their voting power because a majority of Paramount's voting shares would pass to a single stockholder, Sumner Redstone. As a result, Redstone would have control and thus the power to break up the corporation. The court then noted, presumably in response to Paramount's contention that the transaction with Viacom best comported with its long term vision that "[i]rrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision." The court explained:

In the case before us, the public stockholders (in the aggregate) currently own a majority of Paramount's voting stock. Control of the corporation is not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders. In the event that the Paramount-Viacom transaction is consummated, the public stockholders will receive cash and a minority equity voting position in the surviving corporation. Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests.

Accordingly, the court found that the Paramount shareholders were "entitled to receive, and should [have] receive[d], a control premium

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237. Id. at 37.
238. Id. at 43.
239. Id.
240. Id. The court's reasoning suggests that the change in control standard is easily derivable from the "break-up" language in Time-Warner and the language in Revlon, which states that a board's duty to maximize shareholder value is triggered when "the break-up of the company [is] inevitable." Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989). This reasoning makes sense because, as in QVC, when one acquires a majority of the corporation's shares that person generally will have the power to break-up the corporation. See QVC, 637 A.2d at 43.
241. QVC, 637 A.2d at 43.
242. Id. (emphasis added).
and/or protective devices of significant value.”

Because of the absence of protective devices, the Paramount directors had an obligation to take advantage of the current opportunity to realize for the stockholders “the best value reasonably available.” The court specifically emphasized “the importance of the board being adequately informed in negotiating a sale of control” and noted that, in determining the best value, a board may consider other factors besides the amount of cash involved.

The court then went on to distinguish Time-Warner. The court rejected Paramount’s argument that only a break-up triggers Revlon. It noted that Paramount ignored Time-Warner’s explicit language stating that “other possibilities,” aside from a break-up, exist to trigger Revlon. Unlike Time-Warner, QVC involved a change in control. In Time-Warner, control was vested in a fluid aggregation of unaffiliated stockholders. The proposed Paramount-Viacom merger would have transferred control out of the public’s hands and vested control of the merged entity with Viacom’s chairman, Sumner Redstone. The court therefore concluded that when a “single person or entity, or . . . cohesive group acting together” acquires a major-

243. Id.
244. Id.
245. Id. at 44. Like the Chancery Court, the Delaware Supreme Court explained that “there is ‘no single blueprint’ that directors must follow” in determining the transaction with the best value. Id. (citation omitted). The court noted that methods for determining value include “conducting an auction, canvassing the market, etc.” Id. The court provided the following guidance:

In determining which alternative provides the best value for the stockholders, a board of directors is not limited to considering only the amount of cash involved, and is not required to ignore totally its view of the future value of a strategic alliance. Instead, the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered. Where a stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives.

Id. (citations omitted). The court then proceeded to state that the board may assess a variety of practical considerations, including those listed in Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261,1282 n.29 (Del. 1988). See id. For the considerations listed in Macmillan, see supra note 126.

246. QVC, 637 A.2d at 46-48. Paramount contended that Time-Warner and not Revlon governed, and that under Time-Warner, only the break-up of a company will trigger Revlon. See id. at 46.

247. Id. at 48 (“Neither Time-Warner nor any other decision of this Court holds that a ‘break-up’ of the company is essential to give rise to this obligation where there is a sale of control.”)

248. Id. at 46.
249. Id. at 46.
250. Id. at 43. Although the court distinguished Time-Warner by the fact that there was no change in control in that case, the court found that, even under Time-Warner, Revlon would apply. Id. at 46. The court stated:

[T]he instant case is clearly within the first general scenario set forth in Time-Warner. The Paramount Board, albeit unintentionally, had “initiate[d] an active bidding process seeking to sell itself” by agreeing to sell control of
ity of a corporation’s voting shares, a sale of control results. In this situation, the board must act reasonably to seek the transaction offering the best value reasonably available to the stockholders. This obligation will be subject to enhanced judicial scrutiny.

In addition, the court resolved the tension that courts and commentators perceived over the appropriate Revlon trigger, namely, the applicability of a change-in-control test versus a break-up test. The QVC court concluded that both tests were applicable. The court stated: “[W]hen a corporation undertakes a transaction which will cause: (a) a change in control; or (b) a break-up of the corporate entity, the directors’ obligation is to seek the best value reasonably available to the stockholders.” Moreover, while the court refrained from frequent use of the term “Revlon duties,” the court explicitly concluded that these two distinct circumstances implicate a board’s duty to obtain the best value reasonably available for the shareholders. While this obligation is not the auction duty that many thought Revlon imposed, this obligation is what has come to be embodied by the colloquialism Revlon duties.

QVC thus clarifies the applicability of Revlon. The court further noted that in a potential change-in-control situation, there is no change in control for Revlon purposes if a board implements structural devices that restrict the power of a potential controlling shareholder or if control of the merged entity remains widely held. Because QVC clarifies when Revlon applies and describes what a

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251. Id. at 47 (quoting Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989)).
252. Id. at 42.
253. Id. at 43.
256. See supra note 79.
257. See supra note 12.
258. See QVC, 637 A.2d at 42-43, 42 n.12.
259. See id. at 46-47.
board may do to avoid a change in control, the threat of implicating the specific duties imposed in Revlon is lessened.261

B. Arnold v. Society for Savings Bancorp

In Arnold v. Society for Savings Bancorp,262 the first case involving Revlon duties decided after QVC, both the Court of Chancery and the Delaware Supreme Court explicitly applied the Delaware Supreme Court's reasoning in QVC in deciding the applicability of Revlon.263 In particular, the Delaware Supreme Court held that if control remains widely held, there is no change in control for Revlon purposes.264 Moreover, that court also delineated specific circumstances for when Revlon applies.265

In Arnold, Bank of Boston sought to enter into a merger agreement with Society for Savings Bancorp.266 Bank of Boston offered to acquire all of Bancorp by way of a stock swap, whereby Bancorp shareholders would receive eight-tenths of a share of Bank of Boston common stock for each share of Bancorp common stock.267 Both Bancorp's board and shareholders approved the transaction.268 Soon after, Arnold, a minority shareholder of Bancorp,269 brought suit alleging, among other things, that when the Bancorp board decided to sell the company, Revlon required it to obtain the highest price for its shareholders.270

As QVC suggested, the Chancery Court applied both a break-up test and a change-in-control test in determining whether Revlon applied.271 After the court summarily concluded that neither of the Time-Warner break-up scenarios was implicated, it went on to ex-

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261. QVC also affirms prior Delaware caselaw allowing a target board to resist an unsolicited offer. See QVC, 637 A.2d at 43 n.13 ("[W]here a potential sale of control by a corporation is not the consequence of a board's action, this Court has recognized the prerogative of a board of directors to resist a third party's unsolicited acquisition proposal or offer."). Yet, if in response to a bidder's threat, a target board seeks an alternative transaction that may result in a break-up of the company, then, as in Revlon itself, a board will be subject to Revlon duties. See Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989).


263. Id. at *9-10.


265. Id.


267. Id. at *2. At the time the board voted on the offer, the exchange rate translated into an offer of $17.30 per share for Bancorp's stockholders. Id.

268. Id. at *2.

269. Arnold owned 300 shares of common stock of Bancorp. Id at 1. Over 10 million shares of Bancorp were issued and outstanding at the time. Id. at *2.

270. Id. at *9. Arnold also alleged that Bancorp's board breached its fiduciary duty of full disclosure during the period surrounding the merger. Id. at *1.

271. Id. at *9-11.
amine whether a change in control had occurred.\textsuperscript{272} Like the \textit{QVC} court, the Chancery Court in \textit{Arnold} focused on the control structure of the corporation both before and after the merger.\textsuperscript{273} The \textit{Arnold} court found that both companies involved were publicly owned, neither company had a controlling block of shares held by an individual, entity, or group, and nothing in the merger's structure suggested any threat to the continuity of the Bancorp shareholders in the merged entity.\textsuperscript{274} Thus, the Chancery Court concluded that, unlike \textit{QVC}, control would remain in a "large, fluid market of disaggregated shareholders," both before and after the merger.\textsuperscript{275} The court therefore found that no change in control occurred and that \textit{Revlon} duties did not apply.\textsuperscript{276}

The Delaware Supreme Court applied a similar analysis in finding that \textit{Revlon} did not apply.\textsuperscript{277} The court first explained that presumably the term "\textit{Revlon duties}" applied to a board's obligation to obtain the best value reasonably available to shareholders.\textsuperscript{278} The court then explained when such duties apply:

The directors of a corporation "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders" in at least the following three scenarios: (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company"; (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company"; or (3) when approval of a transaction results in a "sale or change of control." In the latter situation, there is no "sale or change in control" when "'[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.'\textsuperscript{279}

The court in \textit{Arnold}, therefore, clearly sets forth the specific circumstances in which the duty to obtain the best value for shareholders applies. While \textit{QVC} enunciated that a break-up or change in control

\textsuperscript{272} \textit{Id.} at *10.
\textsuperscript{273} \textit{Id.} at *11.
\textsuperscript{274} \textit{Id.}
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.} The court also noted that "neither company had a large controlling block of shares held by one individual or entity" and that "there is nothing in the Merger's structure that suggests that the continuity of Bancorp's shareholders in the merged entity is threatened." \textit{Id.}
\textsuperscript{278} \textit{See id.} at 1289 n.40. The court notes that the plaintiff refers to the phrase "\textit{Revlon duties}" and assumes that the phrase refers to the obligation to obtain the best value reasonably available for shareholders. \textit{Id.} at 1289 & n.40. Nonetheless, the court did not use the phrase directly because it found that colloquialisms such as "\textit{Revlon duties}" are inappropriate in matters before Delaware courts. \textit{Id.} at 1289 n.40.
\textsuperscript{279} \textit{Id.} at 1289-90 (quoting Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42-43, 47 (Del. 1993); Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989)).
triggers this obligation, *Arnold* explains that a "break-up" refers to the two particular scenarios described in *Time-Warner*. Further, *Arnold* affirms the principle articulated in *QVC* and *Time-Warner*—if control remains widely held, a change in control for *Revlon* purposes will not occur.\(^\text{280}\)

*Arnold* thus depicts specifically how a widely held company can acquire another widely held company without imposing *Revlon* duties upon the target board. In *Arnold*, because control remained widely held, even though the control structure changed, Bancorp was under no duty to maximize shareholder value. This holding illustrates that, despite *Revlon*, boards have some flexibility in structuring a merger. Because *Arnold* delineates specifically the *Revlon*-triggering circumstances, a board should be able to determine how it may structure a transaction without implicating *Revlon*.

### III. *Revlon* Duties in the Mid-1990s

The evolution of *Revlon* into the 1990s, as illustrated by the caselaw, reveals developments as to *Revlon*’s triggers and content. At first, *Revlon* duties were characterized as an auction duty, requiring a board to obtain the highest price for shareholders and to sell the company to the highest bidder.\(^\text{281}\) Subsequent courts, however, clarified that an auction is not required and that a board should consider factors besides the dollar amount of a bid in determining the best value for shareholders. Now, mid-decade, when a board’s *Revlon* duties apply, the board’s obligation is to seek “the best value reasonably available to the stockholders”\(^\text{282}\) rather than merely obtain the highest dollar amount. Therefore, *Revlon* duties are not as radical as they originally appeared, and boards have some flexibility in structuring

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\(^{280}\) See Thomas A. Gentile, *Refining the Revlon Doctrine’s Applicability to Changes of Control*: Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1993), 17 Harv. J.L. & Pub. Pol’y 895, 906 (1994) (“When there is an effective transfer of control to a fluid aggregate of unaffiliated public stockholders, [the Chancery Court in] *Arnold* held, there is no legal change of control and *Revlon* duties do not apply.”). This finding in *Arnold* completely affirms prior Delaware caselaw. In *Time-Warner*, the transaction was structured so that Warner stockholders would own 62% of Warner after the merger; further, no change in control was found in that, as in *Arnold*, control was vested in a fluid aggregation of unaffiliated shareholders. See supra notes 165–67 and accompanying text. Moreover, this rationale was cited approvingly in *QVC*, which based its finding of a change in control on the fact that control of the corporation passed out of the public’s hands and into the hands of Sumner Redstone. See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 46-47 (Del. 1993). Thus, even though, in *Arnold*, Bank of Boston ended up owning 100% of the merged entity’s stock, because Bank of Boston was a widely held public corporation, control of Bancorp remained widely held by unaffiliated public stockholders, and thus no change of control for *Revlon* purposes was found. See *Arnold* v. Society for Sav. Bancorp, Civ. A. No. 12883, 1993 WL 526781, at *11 (Del. Ch. Dec. 17, 1993), rev’d on other grounds, 650 A.2d 1270 (Del. 1994).

\(^{281}\) See supra note 79 and accompanying text.

\(^{282}\) *QVC*, 637 A.2d at 46 (emphasis added).
mergers. The Chancery Court in *QVC* made such an observation, stating that "Delaware corporations should be and are free to enter into strategic combinations" and that "[i]f *Revlon* in anyway restricts that freedom, it is only to the extent necessary to assure that the fundamental interests of the corporation's [shareholders] are protected."  

After *Revlon*'s original implementation in the context of a "break-up" of a company, courts soon applied *Revlon* to the "change in control" of a corporation. Subsequently, after much dispute as to which of the two standards was proper, the court in *QVC* instructed that both scenarios may impose *Revlon* duties upon directors.  

An examination of the "break-up" and change-in-control standards demonstrates precisely which situations are likely to trigger *Revlon*. Under *QVC* and *Arnold*, a board can avoid *Revlon* duties by either implementing structural devices restricting the power of a potential controlling shareholder or by avoiding transactions resulting in a controlling person, entity, or cohesive group.  

**A. Triggering Revlon**

To determine what will trigger *Revlon* at mid-decade, one must extract principles from the caselaw. In *QVC*, the Delaware Supreme Court concluded that when a board undertakes a transaction that will cause either a change in control or the break-up of the corporate entity, the directors' obligation is to seek the best value reasonably available to the stockholders. The court in *Arnold* clarified that a "break-up" refers to the two "break-up" scenarios articulated in *Time-Warner*. Those situations are: (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization" and (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company." These situations stem from the language in *Revlon* that the "break-up" of the company had become "inevitable." They also reflect the concern in *Revlon* that, in a bidding contest or a break-up, directors must act in a neutral manner to obtain the best value for shareholders. When a target board faces an unsolicited offer, if it seeks out an alternative transaction, as

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285. *Id.* at 46.
287. *Id.*
289. See *id.* at 184.
in Revlon, then it must obtain the best value reasonably available to the shareholders.\footnote{290}{See id. A target board, however, may reject all offers and keep itself independent, without worrying about Revlon. See supra note 261.}

While the Time-Warner scenarios describe which situations may constitute a "break-up" for Revlon purposes, the Delaware courts provide little guidance as to what constitutes a change of control. Although the Delaware Supreme Court has explained that there will be no change in control for Revlon purposes if a company remains widely held without a controlling shareholder, it remains unclear precisely what constitutes control. Nonetheless, certain developments in Delaware caselaw clarify, to an extent, what constitutes a change of control in some situations.

To control a corporation, one need not own a majority of its shares.\footnote{291}{See supra note 125.} In large public corporations, owning a large block generally constitutes control.\footnote{292}{See supra note 125.} Whether effective control will suffice for Revlon purposes has been uncertain for some time.\footnote{293}{See Dennis J. Block & Jonathan M. Hoff, Fiduciary Duties of Directors in Negotiating Mergers, N.Y.L.J., April 14, 1994, at 6.} Yet, in Mills Acquisition Co. v. Macmillan, Inc.,\footnote{294}{559 A.2d 1261 (Del. 1988).} the Delaware Supreme Court characterized the transfer of thirty-nine percent of a target company's outstanding stock into management's hands as a sale of control.\footnote{295}{Id. at 1270, 1285.} In light of Macmillan, it appears that one does not need majority ownership, but only effective control for Revlon purposes.\footnote{296}{One might argue that QVC requires majority ownership for control. QVC states that a change in control occurs when a single person, entity, or group acquires a majority of a company's voting shares. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1993). Nonetheless, the court in QVC had no need to mention whether effective control would suffice because it found that the change in control in that case was "crystal clear." See id. at 51.} There is, however, no precise amount that constitutes control, and, because each transaction is different, a bright line test may be unworkable. Nonetheless, incorporating a presumption of control at some level of ownership is helpful in understanding what constitutes control.

Although it has not been cited for Revlon purposes, the Delaware General Corporation Law provides that an owner of twenty percent or more of a corporation's voting stock is presumed to have "control" of such corporation.\footnote{297}{See Del. Code Ann. tit. 8, § 203 (1991). While the definition of "control" in section 203(c) contains the caveat, "[a]s used in this section only," section 203 is entitled "Business combinations with interested stockholders," which by its title alone seems to suggest the relevance of its definition of "control" to takeover situations, especially whereas "control" is not defined elsewhere in the statute. Section 203(c)(4) reads in pertinent part: "Control," including the term "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the}
Corporate Governance also discusses control. The ALI definition is similar to that of the Delaware statute, although the ALI requires holdings of twenty-five percent for there to be a presumption of control. Nevertheless, these numbers are merely presumptions that do not seem to have found their way into the Revlon analysis. Indeed, in American General Corp. v. Unitrin, Inc. where the board facilitated an alleged control group’s acquisition of twenty-eight percent of Unitrin, the Chancery Court found that the transaction did not result in a change in control.

In Unitrin, the board implemented a repurchase plan that, plaintiffs contended, resulted in the board’s ownership of Unitrin increasing from twenty-three percent to twenty-eight percent of the outstanding shares. The plan thereby gave the board members, acting together, the power to block a merger. Accordingly, the plaintiffs argued that this increase of the “Insider Group’s” stake in Unitrin constituted a change in control that implicated Revlon. In evaluating the transaction, the Chancery Court concluded that, although the transaction intended to give the directors the power to block a merger, it did not constitute a change in control. The Chancery Court based this decision on the fact that the public shareholders retained some control and still had the possibility of receiving a control premium for their shares. It noted that a controlling stockholder often has far
more power than the single ability to block a merger. For example, the controlling stockholder in QVC had the power, among other things, to elect a majority of the board, amend the certificate of incorporation, and enter into a merger. In Unitrin, the Chancery Court concluded, the directors, with their twenty-eight percent, had none of these powers, only the power to block a merger. Accordingly, the power to block a merger alone does not constitute control.

The Chancery Court in Unitrin, however, neglected to address that the board’s repurchase plan, increasing the groups ownership to twenty eight percent, might, on its own, constitute a transfer of effective control. The case law indicates that effective control will suffice for Revlon purposes. The Chancery Court in Unitrin only concluded that the director group had none of the powers of the controlling stockholder in QVC. Those powers, however, were the powers of majority ownership. Thus, the court left little guidance as to whether the board’s twenty-eight percent could constitute effective control.

While what constitutes effective control is uncertain, boards should be wary of entering into transactions transferring an amount close to thirty-nine percent because, in Mills Acquisition Co. v. Macmillan, Inc., the Delaware Supreme Court found that amount to constitute control. Although the definition in DGCL section 203 has not been applied to a Revlon case, a change in control probably should not occur if the transaction does not result in a shareholder or group holding more than twenty percent of the merged entity.

Additionally, any transfer that is deemed a change of control will suffice for Revlon purposes. The court in Macmillan made clear that Revlon would apply in such a situation, whether a sale takes the

308. Id. The court stated:
In QVC, the controlling stockholder would have been able to: “(a) elect directors; (b) cause a break-up of the corporation; (c) merger it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interest.”

309. Id.
310. Id.
311. See id.
312. See supra notes 124-25 and accompanying text.
314. 559 A.2d 1261 (Del. 1988).
315. See id. at 1285.
316. Because of the imprecision involved in what constitutes control, it is possible, however, that a court might even find a stockholder with less than 20% ownership as having effective control.
form of an active auction, a management buyout, or a restructuring. Nonetheless, even if such a transfer occurs, a board can implement various measures to obviate the possibility of a court imposing Revlon duties.

B. Avoiding Revlon Duties Through Structural Devices

In QVC, the court noted that a board can structure a transaction so that the presence of a controlling shareholder need not trigger Revlon. Accordingly, a board may consider various structural devices, such as supermajority voting provisions or limiting board representation. In Ivanhoe Partners v. Newmont Mining Corp., where the board facilitated a shareholder increasing its stake in Newmont from 26% to 49.7%, the court found that Revlon was not triggered because of a ten-year standstill agreement that limited that shareholder to a maximum of 49.9% of the stock and 40% representation on Newmont's board. While 49.9% is clearly effective control, the court found no change in control because the standstill agreement vested control in the minority shareholders. Despite the shareholder's ownership of 49.7%, the standstill agreement gave the remaining shareholders the power to elect 60% of the board members and thereby retain control of the corporation.

Thus, a provision immediately limiting a controlling stockholder's board representation may help to avoid Revlon because it protects minority interests. Such a covenant truly must limit that shareholder's power. For example, in a transaction resulting in a controlling stockholder, a covenant requiring that shareholder to lessen ownership to twenty percent within two years would not avoid Revlon because it does not protect minority shareholders.

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318. Id.
319. See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 n.12 (Del. 1993) (citing with approval Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987), where the court found that a transaction protecting minority stockholder interests by limiting a 49.9% stockholder to 40% board representation did not trigger Revlon).
320. See id.
322. See id. at 1345.
323. See id.
324. See id.
325. See Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 42 n.12 (Del. 1993).
326. See Preserving A Friendly Merger: Top M&A lawyers debate how the Paramount battle will affect future mergers, American Law. Corp. Couns. Mag., Summer 1994, at 86-87 (describing a colloquy between A. Gilchrist Sparks, III and Martin Lipton discussing this situation, in which Sparks concludes that even if the minority stockholders remained unprotected for one day, as opposed to two years, that control would pass and trigger Revlon).
before ownership is reduced, that shareholder could exploit the minority.\textsuperscript{327}

The concern, as explained in \textit{QVC}, is that "[i]n the absence of devices protecting the minority stockholders, stockholder votes are likely to become mere formalities where there is a majority stockholder."\textsuperscript{328} Generally, in the absence of such a controlling stockholder, one's stock in a company represents both one's ownership and control of the corporation. Therefore, when a board facilitates the emergence of a controlling shareholder, minority shareholders are entitled to a "control premium and/or protective devices of significant value" for their loss of decision-making power in the corporation.\textsuperscript{329} \textit{Revlon} duties represent the control premium aspect of this compensation for a loss of control—seeking the best value reasonably available for shareholders is obtaining the control premium they deserve. Protective devices, which preserve the control aspect of share ownership, abrogate the need for such a control premium and for \textit{Revlon} duties, because control remains with the minority shareholders.

In light of these concerns, a board seeking to avoid \textit{Revlon} duties should attempt to structure a transaction to curtail the power of a potential controlling stockholder. There are no specific structural devices that a board must employ, providing that they actually protect minority shareholders once a controlling shareholder emerges. If a board can ensure that minority stockholders retain some control of the corporation, then it is less likely that a court will find a change in control. As a result, absent a break-up, \textit{Revlon} duties should not be triggered.

\textsuperscript{327} See id.
\textsuperscript{328} \textit{QVC}, 637 A.2d at 42 (footnote omitted).
\textsuperscript{329} See id. at 43. Although \textit{QVC} speaks in terms of protecting minority shareholder interests when there is a majority shareholder, this may be a difficult task as mere majority status generally carries with it true control, as opposed to the \textit{de facto} control of a significant shareholder. In other words, based on the rationale in \textit{QVC}, it seems that protective devices will not avoid a change in control when the resulting shareholder owns more than 50\% of the merged entity. This is evidenced by the provisions of the standstill agreement in \textit{Newmont}, which limited the shareholder to acquiring 49.9\% of Newmont's stock. See \textit{Ivanhoe Partners v. Newmont Mining Corp.}, 535 A.2d 1334, 1345 (Del. 1987). A recent article also made this observation:

Where post-merger ownership by a single stockholder or stockholder group is less than 50\%, the imposition of minority stockholder status and removal of a potential control premium from public shares that motivated adoption of the change of control test may be so attenuated that enhanced judicial scrutiny may be found unnecessary. In this regard, the Court [in \textit{QVC}] suggested that supermajority voting provisions or standstill agreements may sufficiently limit the control value of a significant block of post-merger stock so that the change of control test does not come into play.

C. Avoiding Revlon by Keeping Ownership of a Merged Entity Widely Held

While protective devices are helpful to curtail what is otherwise deemed a change in control, a corporation may avoid a potential change-in-control situation altogether by ensuring that ownership of the post-merger entity remains widely held.\textsuperscript{330} \textit{QVC} specifically supports this rationale because it requires a transfer of control out of the public stockholders' hands to constitute a change in control for \textit{Revlon}.\textsuperscript{331} Further, such a notion would be consistent with the policy behind conferring a control premium to shareholders who are giving up control.\textsuperscript{332} In a situation like QVC, where a single shareholder would own a majority of the shares of the merged entity, the voting power of the resulting minority shareholders is diminished significantly.\textsuperscript{333} Indeed, when a single shareholder owns a majority of a corporation's shares, regardless of how many additional shares a minority shareholder acquires, the minority shareholder will have no power in certain matters of corporate governance.\textsuperscript{334}

By contrast, in a situation like \textit{Time-Warner}, where Warner shareholders owned sixty-two percent of the merged entity, the merged entity's shares remained widely held by the public.\textsuperscript{335} Although the merger may dilute their ownership stake, any shareholders who purchased additional shares would increase their control in the corporation proportionately. The Chancery Court in \textit{Time-Warner} explained the concern:

\textquote{The existence of a block of stock in the hands of a single shareholder or a group with loyalty to each other does have real consequences to the financial value of “minority” stock. The law offers some protection to such shares through the imposition of a fiduciary duty upon controlling shareholders . . . . The shareholders of [the target company] would have “suffered” dilution, of course, but they would suffer the same type of dilution upon the the [sic] public distribution of new stock.}\textsuperscript{336}

Therefore, as long as control of the corporation remains widely held, there is no need for a control premium, as control remains in the

\textsuperscript{331} See \textit{QVC}, 637 A.2d at 42.
\textsuperscript{332} In \textit{QVC}, the court emphasized that when shareholders give up control in a corporation, they are entitled to a control premium and/or protective devices of significant value. \textit{Id.} at 43.
\textsuperscript{333} \textit{Id.}
\textsuperscript{334} \textit{Id.} at 42 (“In the absence of devices protecting the minority stockholders, stockholder votes are likely to become mere formalities where there is a majority stockholder.” (footnote omitted)).
\textsuperscript{335} Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1149-51 (Del. 1989).
STRUCTURING A MERGER

hands of the public. In light of the concerns expressed in \textit{QVC} and \textit{Time-Warner}, it is no surprise that the Delaware Supreme Court, in \textit{Arnold v. Society for Savings Bancorp},\textsuperscript{337} explicitly endorsed this result.\textsuperscript{338} In that case, the court approved the outright acquisition of all of the shares of a company by way of a stock-for-stock merger.\textsuperscript{339} It held that \textit{Revlon} duties do not apply to a target board in such a situation providing that control " ‘remain[s] in a large, fluid, changeable and changing market.' "\textsuperscript{340}

This language in \textit{QVC}, \textit{Time-Warner}, and \textit{Arnold} is immensely helpful to corporate planners. Directors structuring mergers are more likely to succeed in avoiding \textit{Revlon} duties if control of the merged entity remains widely held.\textsuperscript{341} If control changes from the public to a "single person or entity, or . . . cohesive group acting together,"\textsuperscript{342} then, as in \textit{QVC}, a court may impose \textit{Revlon} duties upon a board.\textsuperscript{343} Accordingly, while widely held corporations are less restricted in entering into transactions, companies dominated by a single shareholder may be able to merge only through the application of \textit{Revlon} duties or by implementing structural devices to avoid \textit{Revlon}. A board therefore must be conscious of who will have control of the post-merger corporation, as the make-up of the parties themselves will affect the outcome of transaction.

For example, suppose a group of investors formed a corporation with the intention of acquiring other companies. Further, suppose that the corporation then wished to purchase a controlling interest in a widely held public company, and the directors of that company agreed to such a transaction. Because a court would likely see the acquiring company as a "cohesive group acting together,"\textsuperscript{344} the directors of the target company would be obliged under \textit{Revlon} to ensure that the transaction offered the best value reasonably available to shareholders. \textit{Revlon} duties would apply here because the public shareholders would lose their decision making power once this group acquired control.

\textsuperscript{337} 650 A.2d 1270 (Del. 1994).
\textsuperscript{338} \textit{Id}. at 1289-90.
\textsuperscript{339} \textit{Id}.
\textsuperscript{340} \textit{Id}. at 1290 (quoting Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34, 47 (Del. 1993)).
\textsuperscript{341} See Dennis J. Block & Jonathan M. Hoff, \textit{Delaware Court Revisits ‘Unocal’ and ‘Revlon’}, N.Y.L.J., Feb. 16, 1995, at 5, 7 ("\textit{Arnold} reaffirms that \textit{Revlon} duties do not attach when control of the merged company remains in a fluid market and the possibility of shareholders receiving a control premium in the future is not foreclosed.").
\textsuperscript{342} \textit{QVC}, 637 A.2d at 42.
\textsuperscript{343} This conclusion, that that \textit{Revlon} is not triggered providing control remains widely held by the public, may indeed be a powerful one. Its plain terms license stock-for-stock acquisitions by widely held companies, providing that the acquiring company, and thus the resulting merged entity, is not dominated by a controlling shareholder.
\textsuperscript{344} See \textit{QVC}, 637 A.2d at 42.
On the other hand, suppose one widely held public corporation wished to acquire another, giving the target company's shareholders stock in the acquiring company in consideration for their shares. Further, suppose the transaction would not result in a controlling shareholder or group. These facts fit squarely under both *Time-Warner* and *Arnold*. Indeed, in *Arnold*, the acquiring corporation acquired all of the outstanding shares of the target by way of a stock-for-stock merger.\(^{345}\) Here, *Revlon* would not be triggered because control remains widely held. A less clear case would present itself if the transaction resulted in a shareholder who owned thirty-five percent of the corporation. Obviously, these facts present the question of whether thirty-five percent constitutes control. Specific facts of such a case would determine the answer. For example, a court probably would consider whether or not there were any structural provisions in place for the protection of minority shareholders. This example would be even less predictable if thirty-five percent represented the combined holdings of certain people alleged to be a “group.” What constitutes a group, like what constitutes control, may be difficult to ascertain.\(^{346}\)

Because of the ambiguity inherent in what constitutes control, a board may best situate itself by ensuring that control of a post-merger entity remains widely held. Only borderline cases, such as the example given above, present predictability problems. Otherwise, in a transaction that has no possible controlling shareholder, the threat of *Revlon*, absent a break-up, should not exist. Stock-for-stock mergers among widely held equals, therefore, should not be problematic.\(^{347}\)

Thus, a board may avoid changes in control and *Time-Warner's* “break-up” scenarios through careful board action. Target boards must be careful when entertaining offers from acquiring companies that are closely held. Even if a target might favor a combination with such an acquiror, entertaining its bids may subject the target to *Revlon* duties. Likewise, acquiring companies should be aware that if they have a controlling stockholder, their merger plans may be more limited. Therefore, if a board wishes to avoid the type of change-in-control situation likely to trigger *Revlon*, it obviously should avoid transactions that might result in a controlling stockholder or group. By preserving the widely held aspect of a post-merger entity, directors will afford themselves much more freedom in structuring a transaction as, absent a break-up, *Revlon* is less likely to apply.

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347. *See* Martin Lipton & Theodore N. Mirvis, *10 Questions and Answers Raised by Delaware 'Paramount' Decision*, N.Y.L.J., Feb. 10, 1994, at 1, 5 (noting that after QVC, a company can enter into a merger of equals, in which neither company gets a premium).
CONCLUSION

Revlon duties, requiring a board to obtain the best value reasonably available to shareholders, still exist in Delaware corporate law. There is no single method, however, for fulfilling those duties. Boards need not conduct an auction, but must be informed fully to ensure that a transaction obtains the best value reasonably available to the shareholders. Further, Revlon duties apply specifically when one of the break-up scenarios listed in Time-Warner is involved or when the board facilitates a sale or change in control of the corporation.

As the court in QVC explained, Revlon duties arise largely to protect minority shareholders when control is transferred from them. Thus, a board may implement certain measures protecting minority shareholders, such as supermajority voting or limiting board representation, so that a change in control for Revlon purposes may be avoided. Perhaps a board's greatest freedom is the notion, approved of in Time-Warner, QVC, and Arnold, that, absent a break-up, if control remains widely held, Revlon will not be triggered. By its application in Arnold, this conclusion licenses stock-for-stock acquisitions by widely held companies. Even non-widely held companies, however, have some freedom, as any board may implement structural devices. Consequently, while Revlon duties could reduce a board's options in structuring a transaction, Revlon duties are not inevitable in merger situations and, through careful planning, may be avoided.