Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review

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Abstract

This Article entertains the idea that Delaware's corporate law is set on a trajectory that would eventually lead to reforming its doctrine of entire fairness as we now know it by retiring the doctrine's substantive fairness review prong and insisting on fully-informed consent as the only way for validating tainted transactions. A growing array of cases, in which the centerpiece is *Kahn v. M&F Worldwide Corp. (MFW)*, creates a legal sphere within which traditional entire fairness analysis has no application. Within this sphere, things rise or fall depending solely on the existence or absence of an uncoerced fully-informed ratification, in line with fundamental principles of fiduciary law in Delaware and in other common law jurisdictions. The critical move, which may take time to materialize, will take place when the courts abolish substantive fairness review entirely. Treating this development as highly desirable in principle, this Article discusses practical and normative issues that call for attention in order to ensure its successful functionality. As this trend is premised on fully-informed consent, its principal challenge will be to ensure the integrity of shareholder voting by securing the supply of full information throughout the process and minimizing the impact of potential conflicts.

Keywords: corporate governance, entire fairness, fiduciary duties

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Farewell to Fairness: Towards Retiring Delaware's

Entire Fairness Review

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This Article entertains the idea that Delaware's corporate law is set on a trajectory that would eventually lead to reforming its doctrine of entire fairness as we now know it by retiring the doctrine's substantive fairness review prong and insisting on fully-informed consent as the only way for validating tainted transactions. A growing array of cases, in which the centerpiece is *Kahn v. M&F Worldwide Corp.* (*MFW*), creates a legal sphere within which traditional entire fairness analysis has no application. Within this sphere, things rise or fall depending solely on the existence or absence of an uncoerced fully-informed ratification, in line with fundamental principles of fiduciary law in Delaware and in other common law jurisdictions. The critical move, which may take time to materialize, will take place when the courts abolish substantive fairness review entirely. Treating this development as highly desirable in principle, this Article discusses practical and normative issues that call for attention in order to ensure its successful functionality. As this trend is premised on fully-informed consent, its principal challenge will be to ensure the integrity of shareholder voting by securing the supply of full information throughout the process and minimizing the impact of potential conflicts.

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Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review

I. INTRODUCTION

In a recent contribution to the Oxford Handbook of Fiduciary Law, Professor Lawrence Hamermesh and Chief Justice Leo Strine, Jr. analyze Delaware's accountability tools for company directors.[1] Central among these tools is the doctrine of entire fairness, which calls on company directors to establish "to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price."[2] Hamermesh and Strine conclude their analysis with a forward-looking statement:

> Like all common law doctrines, the Delaware law defining the fiduciary duties of corporate directors has evolved, often rapidly, in the face of commercial change and experience. *It will continue to do so*. This brief examination of the development of that body of law may guide that future growth, however, by focusing attention on the underlying goals of judicial review of fiduciary conduct. As in the past, that development should be framed by considerations of how to encourage business activity and sensible risk-taking by placing authority for that activity in the hands of those most capable of engaging in it objectively and in the collective interests of the corporation and its stockholders, while reserving a role for active judicial scrutiny in situations in which such objective decision makers are either absent or impaired, through lack of pertinent information or otherwise, from making a truly voluntary decision.[3]

This Article entertains the idea that Delaware's corporate law is set on a trajectory that would eventually lead to reforming its doctrine of entire fairness as we

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[1] Lawrence A. Hamermesh & Leo E. Strine, Jr., *Fiduciary Principles and Delaware Corporation Law: Searching for the Optimal Balance by Understanding that the World is Not*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 871, 872 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[2] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995) (citing Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993), *decision modified on reargument*, 636 A.2d 956 (Del. 1994)).

[3] Hamermesh & Strine, *supra* note 1, at 890 (emphasis added).

now know it by retiring its substantive fairness review prong and insisting on fully-informed consent as the only way for validating tainted transactions. At first blush, this idea may strike one as folly. Entire fairness, after all, is Delaware's gold standard for fiduciary loyalty in the corporation. It is the touchstone for examining corporate fiduciaries' behavior in the face of conflict of interest. Delaware courts describe entire fairness as the "most onerous"[4] and "more exacting"[5] standard of review; they take pride in it as an emblem of their equitable jurisdiction, going as it does beyond following the letter of the law.[6] Substantive fairness review is a key component in this doctrine. Why retire it, then?

In addressing this question, one should recognize that it actually interweaves two elements: a positive aspect and a normative one. This Article highlights the positive aspect. Delaware courts in fact have already begun to reform the entire fairness doctrine as it has been traditionally structured. A growing array of cases, in which the centerpiece is the seminal ruling in *Kahn v. M&F Worldwide Corp.* (widely known as "*MFW*"),[7] creates a legal sphere within which traditional entire fairness

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[4] *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013) (stating "Entire fairness, Delaware's most onerous standard, applies when the board labors under actual conflicts of interest.").

[5] *See, e.g.*, Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (finding "when a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard.").

[6] *See, e.g.*, *In re* Inv'rs Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1222 (Del. 2017) ("[D]irector action is 'twice-tested,' first for legal authorization, and second by equity.") (citing Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007), citing, in turn, Adolf A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931)). The Court went on to emphasize that directors' "inequitable action does not become permissible simply because it is legally possible." *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1223 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971). Thus, "when a stockholder properly alleges that the directors breached their fiduciary duties . . . , the directors should have to demonstrate that their self-interested actions were entirely fair to the company."). *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1223.

[7] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 638 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

analysis has no application.[8] Within this sphere, things rise or fall depending solely on the existence or absence of an uncoerced, fully-informed ratification. Business and legal practice exhibit an unmistakable preference for this approach, such that relevant transactions tend to concentrate within that sphere.[9] The critical move, which may take time to materialize, will take place when the courts deal the traditional doctrine the *coup de grâce* and abolish it entirely, if one may say so.

A separate issue has to do with the normative question—namely, whether substantive fairness review *should* be retired, or even confined as it is today. In this regard I confess a bias upfront: I am firmly in the camp of those who consider the substantive prong of entire fairness review—the "fair price" analysis[10]—as deficient and, in particular, as inferior to the approach that the *MFW* framework reflects, which affirms fully-informed consent as the appropriate response to breaches of fiduciary loyalty.[11] Retiring this doctrine is therefore a desirable development. From this vantage point, review by the court of a tainted fiduciary action in order to verify its substantive fairness, and consequently to validate it, is foreign—indeed, inimical—to fiduciary loyalty and accountability as these legal institutions are understood throughout the common law world, Delaware included. When stripped to its bare elements, substantive fairness review grants corporate insiders a license to expropriate

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[8] *Id.* at 639. Formally, *Kahn v. M&F Worldwide Corp.* and the *MFW* framework it endorsed applied to controlling shareholder transactions. As detailed below, subsequent case law has expanded the scope of this framework to interested director transactions, going beyond the preexisting "safe harbors" provided by section 144 of the Delaware General Corporation Law.

[9] *See infra* note 206.

[10] *See Kahn*, 88 A.3d at 645.

[11] *See id.*

with impunity, albeit at a fair price.[12] As it happens, this part of the doctrine is a vestige of an historical legal accident, the ramifications of which Delaware courts have strived to contain by developing the entire fairness doctrine as we know it today. Granted, reasonable minds can differ on this point. One can subscribe to the view that entire fairness strikes an optimal balance between doctrinal rigidity and a perceived need for business flexibility. Several scholars have in fact cautioned against certain implications of *MFW* with varying degrees of alarm.[13] Nevertheless, as the *MFW*-inspired trend gains momentum, the burden is shifting to proponents of substantive fairness review to justify its continuing existence in Delaware law.

The Article proceeds as follows. Part II critically reviews the present, past, and possible future of entire fairness review.[14] Part III analyzes issues that could affect the future evolution of entire fairness.[15] As the current trend is premised on fully-informed consent, its principal challenge will be to ensure the integrity of shareholder voting by securing the supply of full information throughout the process and minimizing the impact of potential conflicts. This part thus addresses the use of technology to facilitate voting and the rise of institutional cross ownership, which may call for special attention in *MFW*-relevant settings.[16] Next, it deals with some normative justifications for implementing it.[17] Part IV concludes.[18]

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[12] *See id.* at 639 (providing the conditions under which the business judgment standard of review should apply).

[13] *See infra* note 252.

[14] *See infra* Part II.

[15] *See infra* Part III.

[16] *See infra* Part III.

[17] *See infra* Part III.

[18] *See infra* Part IV.

II. THE EVOLUTION OF ENTIRE FAIRNESS

A. Present Perfect? - Entire Fairness Today

The canonical formulation of the entire fairness doctrine was set in the seminal decision in *Weinberger v. UOP*:

> The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.[19]

Weinberger dealt with a squeeze-out merger, but the doctrine it states has general application as Delaware's legal policy on situations or actions that are tainted by corporate fiduciaries' breach of loyalty—in particular, when the latter face a conflict of interest.[20] Entire fairness review thus applies to all instances in which the shadow of a controlling shareholder's interest hangs over corporate action.[21] The

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[19] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (citation omitted).

[20] *Id.* at 710-11. This Article thus largely abstracts from the laws of other U.S. jurisdictions that implement similar legal strategies to address such situations. A noteworthy jurisdiction is New York. *See, e.g.,* Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 568-70 (1984) (casting directors and majority shareholders in the "fiduciary role of 'guardians of the corporate welfare' [in which] they have an obligation to all shareholders to adhere to fiduciary standards of conduct"—consequently implementing the entire fairness standard which has two components: fair process and fair price) (quoting Liebert v. Clapp, 13 N.Y.2d 313, 317 (1963)).

[21] *See In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245, at *11-13 (Del. Ch. Jan. 25, 2016) (providing the Court of Chancery with an opportunity to survey Delaware's jurisprudence on the subject). The Court noted that: "the Delaware courts have expressly rejected the contention that the entire fairness framework only applies to squeeze-out mergers" *id.* at *12; "Delaware courts have applied the entire fairness framework to a variety of transactions in which controlling stockholders have received non-ratable benefits" *id.* at *13; and "Delaware decisions have applied the entire fairness framework to compensation arrangements, consulting agreements, services agreements, and similar transactions between a controller or its affiliate and the controlled entity." *Id*. at *15 (citing, *inter alia*, Levco Alt. Fund Ltd. v. Reader's Digest Ass'n, Inc., 803 A.2d 428, 428 (Del. 2002); Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997); Summa

doctrine similarly (indeed, originally) governs self-interested actions by non-employee directors.[22] Corporate transactions in which directors and officers of a corporation have an interest are also covered by section 144 of the Delaware General Corporation Law (DGCL).[23] However, this section, which provides protection from per se voidability of such transactions if they qualify for safe-harbor protection under the statute, has a more limited role than entire fairness review.[24] Section 144 "merely prevents them from being invalidated due solely to any director's or officer's interest."[25] Compliance with section 144 does not preclude the court from applying the common law standards of review by which fiduciary conduct should be measured.[26]

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v. Trans World Airlines, Inc., 540 A.2d 403, 406 (Del. 1988); Quadrant Structured Prods. Co., Ltd. v. Vertin, 102 A.3d 155, 183-85 (Del. Ch. 2014); Carlson v. Hallinan, 925 A.2d 506, 529 (Del. Ch. 2006); T. Rowe Price Recovery Fund, L.P. v. Rubin, 770 A.2d 536, 551 (Del. Ch. 2000)).

[22] *See* Calma *ex rel.* Citrix Sys., Inc. v. Templeton, 114 A.3d 563, 582 (Del. Ch. 2015) (surveying Delaware jurisprudence); *see also* Valeant Pharms. Int'l v. Jerney, 921 A.2d 732, 746-47 (Del. Ch. 2007); Williams v. Ji, No. CV 12729-VCMR, 2017 WL 2799156, at *1-3 (Del. Ch. June 28, 2017).

[23] DEL. CODE ANN. tit. 8, § 144 (2010) (providing "No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if… (3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders.").

[24] *Id.*

[25] Blake Rohrbacher, John Mark Zeberkiewicz & Thomas A. Uebler, *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719, 719-20 (2008) (providing a comprehensive survey of the history and interpretation of section 144); *See* Zimmerman v. Crothall, 62 A.3d 676, 704-05 (Del. Ch. 2013) (holding that section 144 was not intended to address the common law rules for liability for breach of fiduciary duty), *rev'd on other grounds*, 94 A.3d 733 (Del. 2014); *See also* Fliegler v. Lawrence, 361 A.2d. 218, 221-22 (Del. 1976); *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 614-15 (Del. Ch. 2005); *See generally* Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019) (providing a masterful analysis of Delaware's safe harbors from self-dealing liability).

[26] Cumming *ex rel.* New Senior Inv. Grp., Inc. v. Edens, No. CV 13007-VCS, 2018 WL 992877, at *21-22 (Del. Ch. Feb. 20, 2018).

Delaware courts do not mince words about the policy reasons that underlie its entire fairness doctrine—namely, the fear of corporate fiduciaries' self-interestedness. A number of courts have cited with agreement a dictum from an early case: "Human nature being what it is, the law, in its wisdom, does not presume that directors will be competent judges of the fair treatment of their company where fairness must be at their own personal expense."[27] Another court similarly noted that "[t]here is also an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders."[28] These sobering observations resonate perfectly with Lord Herschell's oft-cited statement in the late 19th Century case of *Bray v. Ford*: "I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was

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[27] *In re Inv'rs Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1211 (Del. 2017) (citing Gottlieb v. Heyden Chem. Corp., 90 A.2d 660, 663 (Del. 1952)); *see also In re* El Paso Pipeline, L.P. Derivative Litig., 132 A.3d 67, 113-14 (Del. Ch. 2015), *judgment entered sub nom. In re* El Paso Pipeline Partners, L.P. (Del. Ch. 2016), and *rev'd sub nom.* El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff, 152 A.3d 1248 (Del. 2016). The *El Paso* Court of Chancery further cited Merritt v. Colonial Foods, Inc., 505 A.2d 757, 765 (Del. Ch. 1986) for a similar proposition, that "the law, sensitive to the weakness of human nature and alert to the ever-present inclination to rationalize as right that which is merely beneficial, will accord scant weight to the subjective judgment of an interested director concerning the fairness of transactions that benefit[] him.")

[28] *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, No. CV 9962-VCL, 2016 WL 301245, at *11-12 (Del. Ch. Jan. 25, 2016) (internal quotation marks omitted) (citing Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005)); *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d at 617 (then-Chancellor Strine used more colorful language to convey the same idea: "Facing the proverbial 800 pound gorilla who wants the rest of the bananas all for himself, chimpanzees like independent directors and disinterested stockholders could not be expected to make sure that the gorilla paid a fair price.").

bound to protect."[29] As it happens, these judicial lay theories that span generations now receive support by empirical evidence from psychological research.[30]

As *Weinberger* indicates, entire fairness (sometimes called "intrinsic fairness") is commonly described as a unitary legal edifice resting on two pillars—a procedural prong of "fair dealing" and a substantive prong of "fair price".[31] These two components are interconnected, leaving a good deal of "play in the joints."[32] Fair dealing revolves primarily around full disclosure and absence of coercion with a view to bringing the interaction between and the fiduciary on the one hand and the company or minority shareholders on the other hand as close as practical to arm's

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[29] Bray v. Ford [1895-99] All Eng. Rep. 1009, 1011 (HL); *see also* York Bldgs. Co. v. Mackenzie [1795] 3 Eng. Rep. 432, 446 (HL) ("He that is entrusted with the interest of others, cannot be allowed to make the business an object of interest to himself; because from the frailty of nature, one who has the power, will be too readily seized with the inclination to use the opportunity for serving his own interest at the expence [sic] of those for whom he is entrusted.").

[30] The literature is vast. *See, e.g.*, Donald C. Langevoort, *Psychological Perspectives on the Fiduciary Business*, 91 B.U. L. REV. 995, 995-96 (2011); Dolly Chugh, Max H. Bazerman & Mahzarin R. Banaji, *Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest*, *in* CONFLICTS OF INTEREST: CHALLENGES AND SOLUTIONS IN BUSINESS, LAW, MEDICINE, AND PUBLIC POLICY 74 (Don A. Moore, Daylian M. Cain, George Loewenstein & Max H. Bazerman eds., 2005); Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RES. 189 (2004).

[31] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

[32] *See* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1448 (2014); *see also In re* Nine Sys. Corp. S'holders Litig., No. C.A. 3940-VCN, 2014 WL 4383127, at *46-47 (Del. Ch. Sep. 4, 2014), (holding that a conflicted transaction resulting in a fair price nonetheless failed to satisfy the entire fairness standard of review because of a grossly unfair process), *reprinted in* 40 DEL. J. CORP. L. at 845 (2016), *aff'd sub nom.* Fuchs v. Wren Holdings, LLC, 129 A.3d 882 (Del. 2015); Hamilton Partners, L.P. v. Highland Capital Mgmt., L.P., No. CV 6547-VCN, 2016 WL 612233, at *5 (Del. Ch. Feb 2, 2016) (explaining "fair process and fair price are not always neatly distinguishable"); Boyer v. Wilmington Materials, Inc., 754 A.2d 881, 898-99 (Del. Ch. 1999); Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1183 (Del. Ch. 1999) ("[T]he unfairness of the process also infects the fairness of the price."), *as revised* (Nov. 1999), *aff'd*, 766 A.2d 437 (Del. 2000); Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 748 (Del. Ch. 2007). Another facet of this "play in the joints" is the fact the implementation of entire fairness review has not been entirely clear. The following thus need to be read in this light. For critical analyses *see generally* Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903 (2011); Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 DEL. J. CORP. L. 967 (2011).

length bargaining.[33] Fair price reflects the substantive merits of the tainted action, asking how good of a deal was it for the company.[34] A sufficiently fair price for that purpose is not, and cannot be precise.[35] Rather, it lies within a range of acceptable values.[36]

Fair price is the key concept in the present context. It thus deserves emphasizing that despite the unitary appearance of entire fairness review and the presentation of both process and substantive merit as necessary elements, in critical situations, price fairness could dominate and prove dispositive. As a preliminary matter, Julian Velasco points out that the usage of the "range" approach blurs the analysis, which makes it more difficult to establish unfairness of the price, and renders any price above the lower threshold essentially fair, thus transforming entire fairness review into "mere fairness" review.[37] Crucially, sufficiently fair price could overcome severe processual deficiencies. In *Marciano v. Nakash*, the Delaware Supreme Court thus held that a conflicted loan agreement, which was not approved

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[33] *See, e.g.*, ACP Master, Ltd. v. Sprint Corp., No. CV 8508-VCL, 2017 WL 3421142, at *19-20 (Del. Ch. July 21, 2017) ("Consistent with the unitary nature of the entire fairness test, the fair process and fair price aspects interact. The range of fairness has most salience when the controller has established a process that simulates arm's-length bargaining, supported by appropriate procedural protections.") (citing, *inter alia*, M.P.M. Enters., Inc. v. Gilbert, 731 A.2d 790, 797 (Del. 1999), *aff'd*, 184 A.3d 1291 (Del. 2018)); Van de Walle v. Unimation, Inc., No. C.A. 7046, 1991 WL 29303, at *6 (Del. Ch. Mar. 7, 1991), *reprinted in* 17 DEL. J. CORP. L. 390 (1992).

[34] *See Van de Walle*, 1991 WL 29303, at *9-10, *reprinted in* 17 DEL. J. CORP. L. 390 (1992).

[35] *See In re* Dole Food Co., S'holder Litig., No. CV 8703-VCL, 2015 WL 5052214, at *32-33 (Del. Ch. Aug. 27, 2015), *reprinted in* 41 DEL. J. CORP. L. 169 (2016).

[36] *See, e.g., id.* at *33 ("For purposes of determining fairness, as opposed to crafting a remedy, the court's task is not to pick a single number, but to determine whether the transaction price falls within a range of fairness."); *see also* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 466 (Del. Ch. 2011) ("When conducting a fair price inquiry as part of the entire fairness standard of review, the court asks whether the transaction was one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept.") (internal quotation marks omitted) (citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1143 (Del. Ch. 1994)); Ross Holding & Mgmt. Co. v. Advance Realty Grp., LLC, No. C.A. 4113-VCN, 2014 WL 4374261, at *1-2 (Del. Ch. Sep. 4, 2014), *judgment entered sub nom.* Holdings v. Advance Realty Grp., LLC (Del. Ch. 2014).

[37] *See* Julian Velasco, *The Diminishing Duty of Loyalty*, 75 WASH. & LEE L. REV. 1035, 1057 (2018).

according to section 144 of the DGCL but was found to be fully fair in its commercial terms, did not constitute a violation and was therefore not voidable.[38] Two more recent cases demonstrate the potential power of a substantively fair price to effectively cleanse the taint of conflict of interest or other breaches of fiduciary loyalty. In *Trados*, all of the directors were found to be financially interested in the transaction or to have faced a conflict of interest because they owed conflicting fiduciary duties.[39] These directors assessed the value of the common stock at zero, a valuation which the court approved, leading Vice Chancellor Laster to hold:

> [T]he directors breached no duty to the common stock by agreeing to a Merger in which the common stock received nothing. The common stock had no economic value before the Merger, and the common stockholders received in the Merger the substantial equivalent in value of what they had before. Under the circumstances of this case, the fact that the directors did not follow a fair process does not constitute a separate breach of duty.[40]

Vice Chancellor Laster was even more direct in an *obiter dictum* in *Dole Food*:

> Fair price can be the predominant consideration in the unitary entire fairness inquiry…Even a controller that has effected a squeeze-out unilaterally with no process at all conceivably could prove at trial that the transaction was entirely fair…The concept of "process" [may be] non-existent, but even under those circumstances, I believe that a controller who proved that the price was indeed fair would not have breached his duties.[41]

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[38] *See* Marciano v. Nakash, 535 A.2d 400, 403, 407 (Del. 1987).

[39] *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 62 (Del. Ch. 2013).

[40] *Id*. at 78.

[41] *In re Dole Food Co., S'holder Litig.*, No. CV 8703-VCL, 2015 WL 5052214, at *34, n.26 (Del. Ch. Aug. 27, 2015), *reprinted in* 41 Del. J. Corp. L. 169 (2016); *see also* ACP Master, Ltd. v. Sprint Corp., No. CV 8508-VCL, 2017 WL 3421142, at *26 (Del. Ch. July 21, 2017) ("[O]nce the price reached $5.00 per share, it was sufficiently generous that the fair price aspect of the entire fairness inquiry predominates over any lingering coercion."), *aff'd*, 184 A.3d 1291 (Del. 2018) (Both *Dole Food* and *ACP Master*, however, include certain statements to a contrary effect that are discussed below.); *Compare* Carlson v. Hallinan, 925 A.2d 506, 534 (Del. Ch. 2006) (finding that the conflicted or non-independent defendant directors "provided no credible testimony that their compensation was appropriate in light of [the company's] economic and financial circumstances. [They] thus failed to satisfy their burden of showing that the prices of the challenged decisions were entirely fair."); *see also* Dweck v. Nasser, No. C.A. 1353-VCL, 2012 WL 161590, at *1 (Del. Ch. Jan. 18, 2012) ("[Director A]

The entire fairness doctrine is a standard of review with which the court examines the validity of the challenged action.[42] It is one among three such standards, the other two being enhanced scrutiny and the business judgement rule.[43] Standards of review are conceptually distinct from standards of conduct.[44] In the common articulation of this concept, "[t]he standard of conduct describes what directors are expected to do and is defined by the content of the duties of loyalty and care.[45] The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct.[46] Standards of conduct thus address corporate

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failed to carry his burden of proving that it was entirely fair for [the company] to pay him a consulting fee that compensated him equally with [Director B] when he performed no work for [the company]."); *see In re* PLX Tech. Inc. S'holders Litig., No. CV 9880-VCL, 2018 WL 5018535, at *56 (Del. Ch. Oct. 16, 2018) (Vice Chancellor Laster made a non-liability holding in an aiding and abetting claim, where board members breached their fiduciary duties, as the stockholders suffered no damage.), *aff'd*, 211 A.3d 137 (Del. 2019); *id.* at *50 (Note, however, that aiding and abetting liability is in tort rather than in fiduciary law. Hence, "compensatory damages are measured by the plaintiff's 'out-of-pocket' actual loss.") (quoting Strassburger v. Earley, 752 A.2d 557, 579 (Del. Ch. 2000)); *see generally In re* Rural Metro Corp., 88 A.3d 54 (Del. Ch.), *decision clarified on denial of reargument sub nom. In re* Rural Metro Corp. S'holders Litig. (Del. Ch. 2014); Jason W. Rigby, *Financial Advisor Aiding and Abetting of a Breach of a Fiduciary Duty Post Rural Metro: Clarifying "Knowing Participation,"* 41 DEL. J. CORP. L. 545, 548-49 (2017) (discussing *Rural Metro*).

[42] *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 666 (Del. Ch. 2014) ("When determining whether corporate fiduciaries have breached their duties, Delaware corporate law distinguishes between the standard of conduct and the standard of review.").

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 42-43 (Del. Ch. 2013); *see* Pell v. Kill, 135 A.3d 764, 783-84 (Del. Ch. 2016) (focusing on enhanced scrutiny); *see* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1295 (2001) [hereinafter *Function Over Form*] (containing scholarly analyses by prominent members of the Delaware judiciary and academia); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 451 (2002) [hereinafter *Realigning the Standard*]; E. Norman Veasey with Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1416-17 (2005); Gregory Scott Crespi, *Standards of Conduct and Standards of Review in Corporate Law: The Need for Closer Alignment*, 82 NEB. L. REV. 671, 671-72 (2004); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 521 (2012); Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1243-44 (2010); *see* Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 602 (2013); Laster, *supra* note 41, at 1446-50; *see* Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's*

fiduciaries, while standards of review are addressed to and are implemented by courts.[47]

One may conceive of these categories of standards as orthogonal or parallel legal planes that barely intersect with one another if at all. Melvin Eisenberg, who has advanced this analytical distinction and greatly influenced subsequent judicial development, harnesses Meir Dan-Cohen's metaphor of "acoustic separation" to explain and justify it.[48] In this view, or image, corporate fiduciaries and judges are located in separate chambers, to which the law directs related but different instructions.[49] The former are told how to behave; the latter are guided how to adjudicate claims concerning such behavior.[50] When such acoustic separation is in place, it is possible to set strict standards of behavior while allowing their enforcement to exhibit substantial flexibility.[51] According to Eisenberg, "corporate law presents a textbook case of the distinction between conduct rules and decisional rules," and he presents examples to its working from the duty of care and the duty of loyalty.[52] Importantly, standards of review have been characterized as more lenient

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Takeover Standards, in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 29 (Steven Davidoff Solomon & Randall Thomas, eds. 2019).

[47] *Function Over Form*, *supra* note 64, at 1295.

[48] *See* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 461-67 (1993); *see generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 630-34 (1984). *See id.* at 626; *see also* Eisenberg, *supra* note 48, at 462 (invoking JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (W. Harrison ed., 1948) for a distinction between conduct rules and decision rules).

[49] Eisenberg, *supra* note 48, at 462.

[50] *Id.* at 462-63.

[51] *Id.*

[52] *Id.* at 463.

than the underlying standards of conduct.[53] An equally famous metaphor by Ed Rock depicts corporate fiduciaries as "saints and sinners" and the Delaware judges as "preachers" who offer high-spirited sermons and parables on the right behavior but rarely inflict sanctions on transgressors.[54]

A closer inspection of this notional separation between standards of conduct and standards of review reveals severe structural flaws, however. For the purposes of the present Article, let us focus on the two polar standards of entire fairness and business judgment rule and put to one side the supposedly-intermediate standard of enhanced scrutiny.[55] The content of the business judgment rule is well-known. A bulwark of Delaware's jurisprudence, it is the default standard of review for

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[53] *See Chen v. Howard-Anderson*, 87 A.3d 648, 667 (Del. Ch. 2014) ("[T]he standard of review is more forgiving of directors and more onerous for stockholder plaintiffs than the standard of conduct."); *Pell v. Kill*, 135 A.3d 764, 784 n.6 (Del. Ch. 2016) (referring to decisions "articulating the policy rationales for applying standards of review that are more lenient than the underlying standards of conduct").

[54] Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997); *see* Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 849-51 (adopting and extending Rock's analysis); *see also* Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993, 1032-33 (2017) (same); Lyman Johnson, *The Three Fiduciaries of Delaware Corporate Law*, in FIDUCIARY OBLIGATIONS IN BUSINESS (Arthur Laby & Jacob Russell, eds, forthcoming) (on file with author) (challenging the validity and utility of the supposed standard of conduct–standard of review distinction)..

[55] *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 43 (Del. Ch. 2013) (stating that "[e]nhanced scrutiny is Delaware's intermediate standard of review. . . . Enhanced scrutiny applies to specific, recurring, and readily identifiable situations involving potential conflicts of interest where the realities of the decisionmaking context can subtly undermine the decisions of even independent and disinterested directors."); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del. 1985) (originating the doctrine with a seminal decision in the context of hostile takeovers, which was subsequently reconceptualized to encompass additional contexts including, in particular, corporate voting.); *see also* Laster, *supra* note 41, at 1491. On its own terms, enhanced scrutiny deals with supposedly "mild" breaches of fiduciary loyalty, where the conflict of interest is potential rather than actual. Whether this distinction between degrees of intensity of conflict is borne out by principles of fiduciary law is questionable, however. Perhaps the doctrine could be better justified in terms of degrees of materiality, but this conjecture is far from clear. As noted, this subject lies beyond the present scope. Finally, the distinction between actual and potential conflict is not always maintained. *See* Solomon & Thomas, *supra* note 46, at 13-14; *see, e.g., In re* Orchard Enters. S'holder Litig., 88 A.3d 1, 21 (Del. Ch. 2014) ("Where 'omitted information goes to the independence or disinterest of directors who are identified as the company's "independent" or "not interested" directors, the "relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made."'") (citation omitted).

evaluating the decisions of corporate fiduciaries.[56] In one formulation of the rule, "a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be 'attributed to any rational business purpose.'"[57] In another formulation, "[a] plaintiff seeking to rebut the presumption [created by the business judgment rule] 'assumes the burden of providing evidence that corporate fiduciaries, in reaching their challenged decision,' breached their duty of loyalty or care."[58]

When this proposition is distilled to its essence by removing double negatives and evidential elements, however, it boils down to a requirement that in exercising their powers, corporate fiduciaries fulfill their duties of loyalty and care.[59] Or, put even more simply, that they act lawfully.[60] There is nothing lax nor lenient in this approach; one would be surprised if it were. Rather, this rule is strict in insisting that business decisions must not be clouded by bad faith or fiduciary conflict.[61] Granted, the law goes a long way toward business managers by designing the business judgment rule as process-oriented rather than content-oriented,[62] thus making the

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[56] *See* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011).

[57] Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)), *decision modified on reargument*, 636 A.2d 956 (Del. 1994).

[58] RCS Creditor Tr. v. Schorsch, No. CV 2017-0178-SG, 2017 WL 5904716, *9-10 (Del. Ch. Nov. 30, 2017) (quoting *Cede*, 634 A.2d at 361), *reargument denied*, No. CV 2017-0178-SG, 2018 WL 1640169 (Del. Ch. Apr. 5, 2018); *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010) ("Under the business judgment rule, when a party challenges the decisions of a board of directors, the Court begins with the '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.'") (quoting Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995)).

[59] *See eBay Domestic Holdings, Inc.*, 16 A.3d at 41-42.

[60] *Id.*

[61] *See Schorsch*, 2017 WL 5904716, at *13.

[62] *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967-68 (Del. Ch. 1996) (stating that "the business judgment rule is process oriented and informed by a deep respect for all *good faith* board decisions."); Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Due care in the decisionmaking context is process due care only.") (emphasis omitted).

substantive content of business decisions virtually immune to judicial review.[63] Yet in reviewing the decision making process (assuming that duty of care liability is not exculpated), Delaware courts do not shy away from making significant demands on directors that they be reasonably informed, while recognizing that circumstances and cost considerations may affect the scope of information gathering.[64] The evidentiary elements are not particularly lax either. There is nothing special in requiring the plaintiff to shoulder the burden of proof in a duty of care claim.[65] The upshot is that on the business judgment rule pole, the standards of conduct and review converge, leaving no serious acoustic separation to speak of.

It is on the entire fairness pole that the acoustic separation takes place, and there its effect is pernicious. By design, entire fairness review drives a wedge between corporate fiduciaries' loyalty obligations and the enforcement of these

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[63] *See, e.g., In re* MeadWestvaco S'holders Litig., 168 A.3d 675, 684-85 (Del. Ch. 2017).

[64] *See, e.g.,* Citron v. Steego Corp., No. C.A. 10171, 1988 WL 94738, *9-10 (Del. Ch. Sept. 9,1988), *reprinted in* 14 DEL. J. CORP. L. 634, 644 (1989) ("There is no ritual in these matters with which thoughtless compliance will assure later judicial approval or from which thoughtful deviation will risk automatic judicial censure . . . . a determination of director due care is highly particularized and generalizations are of little help in that task."); *see also* Blackmore Partners, L.P. v. Link Energy LLC, No. C.A. 454-N, 2005 WL 2709639, *8 (Del. Ch. Oct. 14, 2005), *reprinted in* 31 DEL. J. CORP. L. 672, 685 n.79 (2006).

[65] Note that Delaware's duty of care liability is predicated on gross negligence. *See* McMullin v. Beran, 765 A.2d 910, 921 (Del. 2000) ("Director liability for breaching the duty of care 'is predicated upon concepts of gross negligence.'") (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000)); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009). However, there is a fine—if not somewhat murky—line here between the duty of care and duty of loyalty, because courts have repeatedly said that gross negligence involves a subjective mental element, while on other occasions they invoked an objective standard. *Compare, e.g., In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749-50 (Del. Ch. 2005) (referring to "reckless indifference to or a deliberate disregard of the whole body of stockholders"), *aff'd*, 906 A.2d 27 (Del. 2006), *with* Guttman v. Huang, 823 A.2d 492, 507 n.39 (Del Ch. 2003) (referring to "facts that suggest a *wide* disparity between the process the directors used … and that which would have been rational."); *see* DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 198 (2018) (discussing origins and development of Delaware's gross negligence standard).

obligations, that necessarily leads to subpar compliance—again, by design.[66] This is true even before taking into account the unavoidable frictions that legal enforcement entails in practice due to costs, information availability (or lack thereof), suboptimal incentives, and so forth. For a legal institution that prides itself on "demand[ing] of an officer or director the utmost good faith in his relation to the corporation"[67] and "the punctilio of an honor the most sensitive"[68] this is a rather awkward situation, familiar as it may be to lawyers in the corporate workaday world.

The crux of the matter lies in the fair price limb, which allows corporate fiduciaries to escape liability for breach of loyalty, including core breaches such as self-dealing, by showing that the substantive terms of the transaction were entirely fair.[69] A fair price can thus cleanse the taint of conflict, bad faith, or non-disclosure.[70] Although such conduct does not *ipso facto* substantiate any pecuniary liability, it does constitute a breach of loyalty and should trigger the fiduciary's liability to account.[71] The fair price rule essentially creates a sphere in which the fiduciary can derive private benefits from her office and redeem them—post hoc, if and when the company brings suit—at a decent price.[72] Needless to say, this rule contradicts, and

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[66] *See* Guth v. Loft, Inc., 5 A.2d 503, 510-11 (Del. 1939).

[67] *Id*. at 510.

[68] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[69] *See* Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 591-92 (Del. Ch. 1986)

[70] *Id.* at 594-95.

[71] *Id.* at 596.

[72] *See id.* at 598 ("While the law requires that corporate fiduciaries observe high standards of fidelity and, when self-dealing is involved, places upon them the burden of demonstrating the intrinsic fairness of transactions they authorize, *the law does not require more than fairness*. Specifically, it does not, absent a showing of culpability, require that directors or controlling shareholders sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders.") (emphasis added).

undermines, the basic tenets of fiduciary law and, for that matter, the standard of conduct it aspires to enforce.[73]

A corollary of these observations has to do with the rhetoric used in the standards of review jurisprudence. As already noted, courts tend to present the business judgment rule as "director-friendly" and entire fairness review as "onerous" and "exacting."[74] In actuality, the legal situation is quite the opposite. When the court implements the business judgment rule it defers to directors' business discretion but only after it verifies that they exercised that discretion in good faith, without conflict, and with full candor.[75] It thus treats them most strictly, holding them fully to the standards of fiduciary loyalty.[76] In contrast, by scrutinizing the substance of less-than-wholesome decisions the court effectively endeavors to validate a breach of loyalty, thus being more lenient and accommodating to corporate fiduciaries rather than onerous and exacting with them.[77] This language of strictness consequently serves as a literary device for concealing the structural weakness in the entire fairness doctrine—namely, the gap between genuine fiduciary loyalty and what suffices to discharge this obligation. The following passage illustrates this point:

> Corporate officers and directors, like all fiduciaries, have the burden of showing that they dealt properly with corporate funds and other assets

[73] *See Jedwab*, 509 A.2d at 598.

[74] *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 36 (Del. Ch. 2013); *see* also Chen v. Howard-Anderson, 87 A.3d 648, 684 (Del. Ch. 2014) (referring to "the business judgment rule, Delaware's most director-friendly test"); Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) ("the conduct of the parties will be viewed under the more exacting standard of entire fairness as opposed to the more deferential business judgment standard."); Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1240 (Del., 2012); Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) ("Delaware's default standard of review is the business judgment rule, a principle of non-review… Entire fairness is Delaware's most onerous standard of review.").

[75] *See* Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993).

[76] *See id.*

[77] *See id.* at 1378.

> entrusted to their care. Where, as here, fiduciaries exercise exclusive power to control the disposition of corporate funds and their exercise is challenged by a beneficiary, the fiduciaries have a duty to account for their disposition of those funds, *i.e.*, to establish the purpose, amount, and propriety of the disbursements. And where, as here, the fiduciaries cause those funds to be used for self-interested purposes, *i.e.*, to be paid to themselves or to others for the fiduciaries' benefit, they have 'the burden of establishing the transactions' entire fairness, sufficient to pass the test of careful scrutiny by the court[s].'[78]

Fiduciary lawyers will immediately notice the tension between the opening and the closing sentences in the above quote. The fiduciary's fundamental obligation to account indeed calls on her to explain and bear responsibility for the beneficiary's interests that are subject to her authority. However, no fiduciary other than corporate fiduciaries may discharge this responsibility merely by showing its substantive fairness. All other fiduciaries face the time-honored doctrine of "no further inquiry" that subjects the breaching fiduciary to full accounting, including by making the tainted action voidable at the behest of the beneficiary regardless of its substantive terms.[79] For non-corporate fiduciaries the law is truly onerous and exacting, leaving no room for post hoc maneuvers of "no harm" claims to get away from liability.

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[78] Technicorp Int'l II, Inc. v. Johnston, No. C.A. 15084, 2000 WL 713750, *16 (Del. Ch. May 31, 2000) (alteration in original) (quoting Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985)).

[79] *See* RESTATEMENT (THIRD) OF TRUSTS § 78 cmt. b (AM. LAW INST. 2007) ("In transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee. . . . The principle applies as well to conflict-of-interest situations that do not involve self-dealing."); s*ee also id.* § 78 cmt. d Note, however, that although they are unincorporated, business trusts resemble limited liability corporations (LLCs) in terms of the duties of their trustees. Such trustees thus owe fiduciary duties of loyalty and care like corporate directors, while the latter duties may be eliminated in the trust instruments. *See also* William K. Sjostrom, Jr., *Tapping the Reservoir: Mutual Fund Litigation Under Section 36(a) of the Investment Company Act of 1940*, 54 KAN. L. REV. 251, 274 (2005) ("[S]tate courts have generally analogized the duties of trustees of business trusts to those of directors of corporations.") (citing Saminsky v. Abbot, 185 A.2d 765, 768 (Del. Ch. 1961)); *see also* DEL. CODE ANN. tit. 12, § 3806(c) (2018) (providing *inter alia* that "the trustee's or beneficial owner's or other person's duties may be expanded or restricted or eliminated by provisions in the governing instrument") (I am grateful to Deborah DeMott for this point.).

Delaware's judges are fully aware of this gap and openly acknowledge it. In *Oberly v. Kirby*, where the directors of a charitable corporation were involved in self-dealing, the Delaware Supreme Court held:

> Under trust law, self-dealing on the part of a trustee is virtually prohibited. An interested transaction is not void but is voidable, and a court will uphold such a transaction against a beneficiary challenge only if the trustee can show that the transaction was fair and that the beneficiaries consented to the transaction after receiving full disclosure of its terms. However, a court of equity has the power to approve a transaction on behalf of the trust's beneficiaries if they are not *sui juris* and if it finds the transaction to be in their best interest. By contrast, the restrictions upon interested transactions by a stock corporation are less stringent…. If a transaction is found to be unfair to the corporation, the stockholders may then demand rescission of the transaction or, if that is impractical, the payment of rescissory damages. If, however, the directors meet their burden of proving entire fairness, the transaction is protected from stockholder challenge.[80]

The Delaware Supreme Court returned to this point in *Stegemeier v. Magness*, where estate administrators effected a sale of estate assets to a company they owned at a fair price and using a sale mechanism that was operated by a disinterested third party.[81] The Court did not hesitate to condemn the transaction and emphasized:

> In *Oberly v. Kirby*, this Court made it clear that in conducting a review of allegations of self-dealing, the standards of trust law and corporation law are different. In that decision, this Court refused to apply the stricter standards of trust law to the decision of the directors of a nonstock, charitable corporation to engage in a transaction where the directors had a personal interest. . . . The premise that the fiduciary duty of loyalty is more relaxed in corporate law was recognized in Delaware as early as 1911.[82]

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[80] Oberly v. Kirby, 592 A.2d 445, 466 (Del. 1991) (citations omitted); *id.* at 467 (stating "[s]imilarly, the creator of a charitable enterprise recognizes that different legal rules govern the operation of charitable trusts and charitable corporations and selects a form with those rules in mind. The founder of a charitable trust binds its funds by the express limitations and conditions of the trust document and imposes upon its trustees the strict and unyielding principles of trust law. By contrast, the founder of a charitable corporation . . . invokes the far more flexible and adaptable principles of corporate law.") (citation omitted).

[81] Stegemeier v. Magness, 728 A.2d 557, 559-60 (Del. 1999).

[82] *Id.* at 562, 562 n.22 (citing Eberhardt v. Christiana Window Glass Co., 81 A. 774, 778 (Del. Ch. 1911) ("There is in fact, an apparent divergence in the strictness of the rule [of self-dealing] respecting

Oberly and *Stegemeier* thus clarify that the relative laxity of the duty loyalty owed by corporate fiduciaries stems from the corporate element, not the fiduciary element of the rule. As the *Oberly* Court noted, "form is not an unimportant consideration."[83] After eliminating double negatives, mere form stands out as the only justification for the separation between the standard of conduct and standard of review that the entire fairness doctrine epitomizes. Nothing of substance, especially not business substance, explains the result in that case, which therefore appears somewhat arbitrary even if legally accurate. In light of the fact that the roots of this doctrine in Delaware go back at least a century ago, one may wonder what were the reasons for its development and whether any such reasons remain valid today.

B. Past Simple? - The Puzzling Origins of Entire Fairness

Legal scholars have pointed out the difficulty in Delaware's law on entire fairness already in the mid-twentieth century.[84] In a seminal paper, Harold Marsh advanced a fierce critique of this legal situation, which he has also identified in several other states.[85] Marsh argued that between late nineteenth century and mid-twentieth century, a gradual deterioration process took place, causing the law on director self-dealing to weaken and thus exposing companies and shareholders to

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the dealings of the directors of the corporation with the corporation respecting its property."); *see also* Schock v. Nash, 732 A.2d 217, 225 (Del. 1999); Cargill, Inc. v. JWH Special Circumstance LLC, 959 A.2d 1096, 1113 (Del. Ch. 2008) ("Delaware courts have found the fiduciary duty of loyalty to be stricter in trust law than corporate law.").

[83] *Oberly*, 592 A.2d at 466-67.

[84] *See, e.g.*, Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35 (1966).

[85] *See id.* at 35 (echoing in the title of Marsh's article the famous exchange between Adolf Berle and E. Merrick Dodd on the objectives of the corporation); *see also* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932). Marsh, *supra* note 84, at 35, thus pointed to the fundamental implications of the legal flaws that he has identified: "I propose to examine a more basic question, namely, whether directors are trustees for anyone."

abuse by the former.[86] In his view, the major cause for the weakening of the law was the emergence of fairness as an independent alternative channel for validating transactions tainted by conflict of interest.[87] Marsh considered persuasive the reasons that guided courts in the 1880s to adhere to the traditional strict approach of fiduciary law—namely, people's inclination to self-interestedness ("human nature") combined with partial information,[88] as well as social dynamics among board members that depress their ability to criticize their fellow directors.[89] These are the same factors that Delaware courts underscore today.[90] In assessing the resulting legal regime

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[86] *See* Marsh, *supra* note 84, at 36.

[87] *See id.*, at 36, 39-40, 43. A somewhat extensive quote is in place here: "In 1880 it could have been stated with confidence that in the United States the general rule was that any contract between a director and his corporation was voidable at the instance of the corporation or its shareholders, without regard to the fairness or unfairness of the transaction. . . . Thirty years later this principle was dead. . . . It could have been stated with reasonable confidence in 1910 that the general rule was that a contract between a director and his corporation was valid if it was approved by a disinterested majority of his fellow directors and was not found to be unfair or fraudulent by the court if challenged. . . . By 1960 it could be said with some assurance that the general rule was that no transaction of a corporation with any or all of its directors was automatically voidable at the suit of a shareholder, whether there was a disinterested majority of the board or not; but that the courts would review such a contract and subject it to rigid and careful scrutiny, and would invalidate the contract if it was found to be unfair to the corporation."

[88] *See id.* at 35-37 (quoting from contemporary decisions: "[i]n this *conflict of interest* the law wisely interposes . . . . [against] the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. . . . Constituted as humanity is, in the majority of cases duty would be overborne in the struggle. . . . The law cannot accurately measure the influence of a trustee with his associates, nor will it enter into the inquiry.").

[89] *Compare* Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003), *and* Delaware Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017 (Del. 2015), *with* Marsh, *supra* note 84, at 37 ("Perhaps the strongest reason for this inflexibility of the law was . . . that, when a contract is made with even one of the directors, 'the remaining directors are placed in the embarrassing and invidious position of having to pass upon, scrutinize and check the transactions and accounts of one of their own body.'").

[90] S*ee* sources cited *supra* note 31 (focusing on self-interestedness); *see, e.g., Oracle Corp. Derivative Litig.*, 824 A.2d at 936-38 (concentrating on social connections); *Delaware Cty. Emps. Ret. Fund*, 124 A.3d at 1022 (centering on social circles); *In re* Oracle Corp. Derivative Litig., No. CV 2017-0337-SG, 2018 WL 1381331, at *19 (Del. Ch. Mar. 19, 2018) (focusing on social dynamics).

Marsh, too, did not mince words.[91] To him, decisions that strayed from the traditional strict approach were shamefaced.[92]

Marsh's article has had a profound impact in legal circles and is considered a classic. Numerous scholars have adopted his analysis as well as his normative critique of the legal doctrine as it has evolved.[93] James Cox used equally harsh terms to describe it,[94] while Velasco argues that the trend Marsh identified has continued and even accelerated.[95] Notably, then-Chancellor Chandler in *Solomon v. Armstrong* referred to Marsh's article with agreement,[96] and so did an article whose lead author

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[91] *See* Marsh, *supra* note 84, at 41.

[92] *See id.*

[93] *See* ROBERT C. CLARK, CORPORATE LAW 160-66 (1986); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 613 (1997); John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 334 (2004); John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 28 (2001); James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors with Independent Counsel*, 48 VILL. L. REV. 1077, 1078-80 (2003); Melvin Aron Eisenberg, *Self-Interested Transactions in Corporate Law*, 13 J. CORP. L. 997, 997 (1988); Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 668 (2002). For additional works concurring generally with Marsh's view *see* J. Robert Brown, Jr., *Disloyalty Without Limits: "Independent" Directors and the Elimination of the Duty of Loyalty*, 95 KY. L.J. 53, 54 (2006-2007); Lawrence A. Cunningham, *Choosing Gatekeepers: The Financial Statement Insurance Alternative to Auditor Liability*, 52 UCLA L. REV. 413, 414 (2004); Kenneth B. Davis, Jr., *Approval by Disinterested Directors*, 20 J. CORP. L. 215, 216 (1995); Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457, 459 (2009); Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1147 (1996); Edwin W. Hecker, Jr., *Fiduciary Duties in Business Entities*, 54 U. KAN. L. REV. 975, 987 (2006); Darian M. Ibrahim, *Individual or Collective Liability for Corporate Directors?*, 93 IOWA L. REV. 929, 955-56 (2008); Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 41 (2003).

[94] *See* Cox, *supra* note 93, at 1078 (averring "Four decades ago Harold Marsh authored his classic treatment of conflict of interest transactions. The significant contribution of his article is that it disrobed the courts' and legislatures' rapid shift in their approaches to the treatment of conflict of interest transactions.") (footnote omitted).

[95] *See* Velasco, *supra* note 37, at 1049 (arguing that "today, fairness review plays only a minor role in policing conflicts of interest.").

[96] *See* Solomon v. Armstrong, 747 A.2d 1098, 1115 n.48 (Del. Ch. 1999) ("Commentators . . . ultimately conclude that Marsh's characterization is most likely still viable.") (citing William L. Cary & Melvin Aron Eisenberg, *Corporations: Cases and Materials* 650-51 (7th ed. 1995)), *aff'd,* 746 A.2d 277 (Del. 2000).

was Leo Strine, Jr.[97] Needless to say, one can find different nuances in the views of various scholars who have addressed the subject over the years, but in the main a consensus seems to exist that the substantive fairness review rule that applies to corporate fiduciaries derogates from the conventional regime of fiduciary loyalty.

Marsh could not explain the reasons for the legal transformation that he identified, and in some places he conjectured that legal developments had simply got out of control.[98] Writing some twenty years after Marsh, Robert Clark, in his treatise on corporate law, provides an extensive discussion of Marsh's article in an effort to rationalize this legal development, which appeared to him as motivated by technical reasons only while ignoring the rationales of the traditional doctrine.[99] Clark further examines alternative conjectures as to possible reasons for this development.[100] One conjecture is that the courts and legislators have been captured by corporate managers, which is compatible with the fact that substantive fairness review benefits corporate insiders.[101] Alternatively, Clark avers that the new rule served the interests of lawyers; or that courts may have experienced enlightenment about the value of self-dealing transaction to companies; or that the new rule was especially appropriate for small private firms whereas the older, strict doctrine better fitted public firms.[102]

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[97] *See* Leo E. Strine, Jr. et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 667 (2010).

[98] *See* Marsh, *supra* note 84, at 41.

[99] *See* CLARK, *supra* note 93, at 161.

[100] *See id.* at 162.

[101] *See id.*

[102] *See id.* at 163-66.

As he fails to find convincing support for any of these reasons, Clark concludes that that this legal transformation in U.S. corporate law is an historical puzzle.[103]

Identifying the factors that engendered the legal transformation remained an open issue, therefore. During the 1990s, Norwood Beveridge showed that Marsh's account of the process was inaccurate—namely, that while the opening and closing positions that Marsh identified conformed with his analysis, the unfolding of the events did not follow the stages that he postulated and, in particular, that during the nineteenth century courts have already validated conflicted transactions by declaring their terms to be fair.[104] Beveridge's analysis has not significantly impacted the literature and jurisprudence, however.

A particularly insightful article by David Kershaw casts new light on the subject and consequently, on the legal transformation that Delaware law is undergoing today.[105] Unlike Marsh, who surveyed the jurisprudence of several states and analyzed it from within by comparing corporate law to trust law, Kershaw implements a different methodological strategy.[106] He focuses on the corporate laws of New York and New Jersey, which were the leading business law jurisdictions during the nineteenth and early twentieth centuries, and investigates legal developments over time in comparison to the position in English company law.[107] Kershaw first shows

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[103] *See* CLARK, *supra* note 93, at 166.

[104] *See* Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655, 659-60 (1992); *see also* Norwood P. Beveridge, *Interested Director Contracts at Common Law: Validation Under the Doctrine of Constructive Fraud*, 33 LOY. L.A. L. REV. 97, 97-99 (1999) (contradicting Marsh's widely accepted views and analysis).

[105] *See* David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. 395, 395 (2012).

[106] *See id.*

[107] *See id.* at 457-59. Kershaw's analysis is exceptionally intricate at times but is equally rewarding with the insights it gleans from the meticulous doctrinal analysis that it undertakes. At certain points

(as Marsh did) that in both states, courts in the mid-nineteenth century stood precisely where English court did at that time—namely, they explicitly relied on the seminal 1854 decision in *Aberdeen Railway v. Blaikie Brothers*[108] that implemented a strict "no further inquiry" approach.[109] While English has remained faithful to this approach to this day,[110] Kershaw finds that within a short period, both U.S. jurisdictions had developed a doctrine that recognized the substantive fairness of a transaction as validating self-dealing. Importantly, the cause of that development was not that courts had caved in to pressures from managements or other interest groups.[111] Rather, the doctrine stemmed from differences between English and

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one may not see eye to eye with particular suppositions or inferences, but overall this article is a masterful demonstration of the promise borne by "taking the law seriously."

[108] *See* Aberdeen Ry. Co. v. Blaikie Bros., (1854) 1 Macq 461, 471 (HL) ("A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into.").

[109] *See* Kershaw, *supra* note 105, at 446-47 n. 166, 457-59. Kershaw further finds that in addition to *Aberdeen Ry.*, early American cases have relied on older yet guiding English cases such as Keech v. Sandford, (1726) 25 E.R. 223 and Whelpdale v. Cookson (1747) 27 E.R. 856.

[110] *See* Tuch, *supra* note 25, at 4, 7-8 (noting that while this principled approach has not changed, corporate practice since the nineteenth century already has crafted "safe harbors" for self-dealing transactions.); *see* also Timothy W. Guinnane et al, *Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries*, 91 BUS. HIST. REV. 227, 227 (2017); Martin Gelter & Geneviève Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 BERKELEY BUS. L.J. 92, 119, 123-24 (2018) (providing comparative analyses); *see also* John H. Farrar & Susan Watson, *Self-Dealing, Fair Dealing and Related Party Transactions—History, Policy and Reform*, 11 J. CORP. L. STUD. 495, 500-06 (2011); *see also* Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541, 544-45 (2005); *see also* Deborah A. DeMott, *The Figure in the Landscape: A Comparative Sketch of Directors' Self-Interested Transactions*, 62 LAW & CONTEMP. PROBS. 243, 247-50 (1999); *see* KERSHAW, *supra* note 65, at 369 (providing an in-depth comparative analysis of corporate opportunity doctrine.).

[111] *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 668-69 (1974) (arguing that in order to attract incorporations, Delaware's case has catered to managerial interests); *see also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 498-505 (1987) (pointing to the Delaware bar as a powerful interest group whose incentives are not necessarily aligned with those of corporate managers or shareholders).

American conceptions of the corporation as a legal entity when such conceptions were forming in light of mid-nineteenth century liberal incorporation legislations.[112]

The key question today is how did American courts justify the abandonment of the "no further inquiry" rule, which they knew and appreciated, in favor of a doctrine that effectively benefits corporate insiders. In one word, the answer to this question is "inadvertently." The details vary from one state to another but are of lesser importance here. For example, in New Jersey, in order to assess disgorgement of profits from a self-dealing transaction that had been completed, courts considered market price; over time, that context was forgotten and a view that considered market-price-based substantive fairness as annulling the breach has taken root.[113] Entire fairness review thus was conceived from a series of doctrinal missteps.[114] Against this backdrop, Delaware emerged as a leading business jurisdiction only in the early twentieth century, when the doctrine on substantive fairness has already been firmly established.[115] Delaware's courts imported this rule from New York and New Jersey without much analysis.[116] Section 144 of the DGCL was enacted in 1967 and partly codified this doctrine with regard to directors.[117]

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[112] *See* Kershaw, *supra* note 105, at 401-05, 469 (arguing that while English courts emphasized contractual facets of incorporation, their American counterparts focused on companies as creations of the law (i.e., the state)—a view that hindered the development of a doctrine on corporate consent to directors' conflicted actions.)

[113] *See id.* at 444-56; *see also id.* at 458-71 (for an analysis of legal developments in New York.)

[114] *See id.* at 480-83.

[115] *See* Kershaw, *supra* note 105, at 480-83.

[116] *See id.*; *see also* Eberhardt v. Christiana Window Glass Co., 81 A. 774, 778, 788 (Del. Ch. 1911) ("There is, in fact, an apparent divergence in the strictness of the rule applied respecting the dealings of the directors of the corporation with the corporation respecting its property."); *see also* Stegemeier v. Magness, 728 A.2d 557, 565 (Del. 1999) (citing *Eberhardt*).

[117] *See* Kershaw, *supra* note 105, at 482-83.

C. Future Progressive - The Course of Entire Fairness

The legal situation described in the preceding sections puts Delaware in an awkward position. While being the undisputed "corporate capital of the world,"[118] there is a structural flaw in the main pillar of its corporate law edifice that is well-known despite being cloaked with protective rhetoric. As noted, allowing corporate fiduciaries to escape all liability by showing that their breach of loyalty was nonetheless substantively fair is inconsistent with fundamental principles of fiduciary law. This section argues that Delaware's corporate law is undergoing a transformative process that has been underway for several years now, the final destination of which may be the complete retiring of substantive fairness review, which in turn will have left only the fair dealing prong of the doctrine intact such that it is compatible with the principles of fully-informed consent and no further inquiry.

Delaware's current entire fairness doctrine is very different from the version that was adopted in the early twentieth century. As Hamermesh and Strine note, it is continuing to evolve.[119] A retrospective of Delaware's jurisprudence since the early 2000s reveals a double-headed campaign aimed, respectively, at the two prongs of the entire fairness doctrine—namely, fair dealing and fair price.[120] Courts' main effort

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[118] *See generally* Randy J. Holland, *Delaware's Business Courts: Litigation Leadership*, 34 J. CORP. L. 771, 772 (2009); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 354 (1992); *see also* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 472-73 (2015); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1131-32 (2008); Larry E. Ribstein & Erin Ann O'Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661, 662-63 (2008).

[119] *See* Hamermesh & Strine, *supra* note 1, at 879-81; *see also* Solomon & Thomas, *supra* note 46, at 7 (pointing out that "[i]n the turn of the millennium, there also occurred a sustained effort to turn back the *Weinberger* entire fairness standard which addressed issues associated with minority/majority shareholder relationships.").

[120] *See* Hammeresh & Strine, *supra* note 1, at 879-80.

focuses on the former prong. In it, they have worked to strengthen corporate decision-making mechanisms with regard to conflicted or tainted transactions by promoting decisions made by fully-informed, disinterested and uncoerced organs, such that they could be viewed as a beneficiary's valid consent.[121] In the second effort, which also appears secondary in terms of the judicial energy invested in it (at this point), court concentrate on discrediting the idea that substantive fairness assessments could be a reliable basis for validating tainted transactions.[122] The following sections analyze these movements in this order.

1. A More Perfect Process

The procedural self-dealing prong was strengthened in a gradual process that took some nine years. A convenient starting point is *Cox Communications*, where then-Vice Chancellor Stine sent up a trial balloon by suggesting, in an *obiter dictum*, that a controlling shareholder's self-dealing transaction might be reviewed according the business judgment rule standard if it were approved by disinterested director as well as disinterested shareholders (namely, the minority).[123] The next stage was in the

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[121] *See id.*

[122] *See id.*

[123] *See In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 606 (Del. Ch. 2005) (observing that "Delaware law would improve the protections it offers to minority stockholders and the integrity of the representative litigation process by reforming and extending *Lynch* in modest but important ways. The reform would be to invoke the business judgment rule standard of review when a going private merger with a controlling stockholder was effected using a process that mirrored *both* elements of an arms-length merger: 1) approval by disinterested directors; and 2) approval by disinterested stockholders. The two elements are complementary and not substitutes."); *Function Over Form*, *supra* note 64, at 1306-09 (writing extra-judicially with co-authors, then-Chancellor Strine entertained this idea even earlier.); *see In re* John Q. Hammons Hotels Inc. S'holder Litig., No. C.A. 758-CC, 2009 WL 3165613, at *14, *18 (Del. Ch. Oct. 2, 2009). Later on, after this decision was handed down, the Court of Chancery treated the above proposition from *Cox* as a rule rather than as a *dictum*.; *see In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010) ("I apply the unified standard for reviewing controlling stockholder freeze-outs described in [*Cox*]. Under that standard, the business judgment rule applies when a freeze-out is conditioned on *both* the affirmative recommendation of a special committee *and* the approval of a majority of the unaffiliated stockholders.") At that stage, it was still unclear if entire fairness review applies similarly to all transactions in which a controlling shareholder

case of *Hammons Hotels*, which involved a sale of control to a third party.[124] It therefore was not a regular self-dealing transaction, but a conflict of interest between the controlling shareholder and the minority potentially affected the division of the consideration. Then-Chancellor Chandler averred that "business judgment would be the applicable standard of review if the transaction were (1) recommended by a disinterested and independent special committee, *and* (2) approved by stockholders in a non-waivable vote of the majority of all the minority stockholders."[125] These mechanisms would provide "robust procedural protections" that are key for a reliable informed consent.[126]

The Court of Chancery repeated this proposition several times, preparing the ground for its actual implementation.[127] This move materialized in two stages in the seminal *MFW* case—first, in the Chancery and then in the Supreme Court.[128] *MFW* was a textbook case of a controlling shareholder standing on both sides of a transaction—a squeeze-out merger. The Supreme Court affirmed the formula set by

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has an interest. This point was settled (affirmatively) in *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245, at *11-15 (Del. Ch. Jan. 25, 2016).

[124] *See generally In re John Q. Hammons Hotels, Inc. S'holder Litig.*, 2009 WL 3165613.

[125] *Id*. at *12.

[126] *Id*. (stating "it is paramount—indeed, necessary in order to invoke business judgment review—that there be robust procedural protections in place to ensure that the minority stockholders have sufficient bargaining power and the ability to make an informed choice of whether to accept the third-party's offer for their shares.").

[127] *See* Se. Pennsylvania Transp. Auth. v. Volgenau, No. C.A. 6354-VCN, 2012 WL 4038509, at *3 n.17 (Del. Ch. Aug. 31, 2012), *aff'd,* 91 A.3d 562 (Del. 2014); Frank v. Elgamal, No. C.A. 6120-VCN, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012); *see also* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 460 (Del. Ch. 2011).

[128] *See In re* MFW S'holders Litig., 67 A.3d 496, 502, 504 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 638-45 (Del. 2014) (applying the new business judgement standard of review to a controlling stockholder buyout). Delaware courts continued to cite *Cox Commc'ns* and *Hammons Hotels* even after *MFW* was decided.; *see also Frank v. Elgamal*, 2012 WL 1096090, at *7-8.

then-Chancellor Strine for a mechanism that can be considered as ensuring a valid consent by the vulnerable party in these complex corporate fiduciary relations:

> [I]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[129]

As is now well-known, *MFW* was a watershed event. In its wake, Delaware courts moved quickly to generalize and bolster the mechanism it adopted. In *Martha Stewart Living Omnimedia* the Court of Chancery implemented the *MFW* framework in circumstances where the controlling shareholder did not stand on both sides of the deal but rather derived private benefits from a "side deal"[130]; it also emphasized the importance of ensuring that the entire deliberation and approval process is completely free from any tainted influence.[131] More recently, in *Flood v. Synutra International, Inc.*, the Delaware Supreme Court further refined the contours of the *MFW* framework by clarifying that its procedural protections must be in place from the very beginning

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[129] *M&F Worldwide Corp.*, 88 A.3d at 645.

[130] *See In re* Martha Stewart Living Omnimedia, Inc. S'holder Litig., No. CV 11202-VCS, 2017 WL 3568089, at *1-2, *15-25 (Del. Ch. Aug. 18, 2017), *reprinted in* 42 DEL. J. CORP. L. 221 (2017).

[131] *Id.* at *17 ("Regardless of which side of the transaction a conflicted controller stands, it is critical that the process is designed from the outset to incentivize the special committee and the controller to take positions at every turn of the negotiations, including during the negotiation of side deals, which will later score the approval of the majority of other stockholders."); *see also In re* Books-A-Million, Inc. S'holders Litig., No. CV 11343-VCL, 2016 WL 5874974, at *8-10, *17, *19 (Del. Ch. Oct. 10, 2016) (applying *MFW* in a squeeze-out merger), *aff'd*, 164 A.3d 56 (Del. 2017); Swomley v. Schlecht, No. CV 9355-VCL, 2015 WL 1186126, at *2 (Del. Ch. Mar. 12, 2015), *aff'd*, 128 A.3d 992 (Del. 2015).

of economic negotiations.[132] In a different direction, the scope of *MFW* was expanded to encompass stock reclassification.[133]

Another major development took place in *Corwin*, where the alleged fiduciary duty breaches related to the directors rather than the controller. The Supreme Court held that a fully-informed, uncoerced approval by disinterested shareholders provides the directors with the protection of business judgment rule review.[134] Although not yet in a formal ruling, the Chancery continues to explore further expansions of the *MFW* framework. In *Tornetta v. Musk*, Vice Chancellor Slights went beyond the structural changes context envisaged in *MFW* to suggest that a regular self-dealing transaction (there, Elon Musk's tainted $56bn compensation package award) could have been duly approved through an *MFW* dual protection mechanism and thus avoid an entire fairness review.[135] One may also note, anecdotally, that the *MFW*

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[132] *See* Flood v. Synutra Int'l, Inc., 195 A.3d 754, 756 (Del. 2018) (explaining "what is critical for the application of the business judgment rule is that the controller accept that no transaction goes forward without special committee and disinterested stockholder approval early in the process and before there has been any economic horse trading."); *see also* Olenik v. Lodzinski, 208 A.3d 704, 707 (Del. 2019) (applying *Flood*; disallowing *MFW* protection in light of a number of fairly extensive contacts between the parties in advance of formal negotiations).

[133] *See* IRA Tr. FBO Bobbie Ahmed v. Crane, No. CV 12742-CB, 2017 WL 7053964, at *11-12 (Del. Ch. Dec. 11, 2017).

[134] *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 308-09 (Del. 2015); *see also In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 737-39 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (holding that the business judgment rule applied when a majority of the target company's stockholders provided their informed, uncoerced, and disinterested approval.); *but cf.* Morrison v. Berry, 191 A.3d 268, 275 (Del. 2018) (denying such protection due to directors' failure to make full disclosure); Appel v. Berkman, 180 A.3d 1055, 1057 (Del. 2018) (same). Note that *Corwin* did not involve entire fairness review claims but rather claims for enhanced scrutiny review of alleged breaches of fiduciary duties by the directors. Moreover, *Corwin* does not match *MFW* in terms of novelty. As the *Corwin* Court emphasized, *id.* at 309, a long line of Delaware precedent stands for invoking the business judgment rule when the above conditions are met (citing, *inter alia*, In re Southern Peru Copper Corp. Shareholders Derivative Litig., 52 A.3d 761 (Del. Ch. 2011); Harbor Fin. Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999); In re General Motors Class H Stockholders Litig., 734 A.2d 611 (Del. Ch. 1999); In re Wheelabrator Technologies, Inc. Shareholders Litig., 663 A.2d 1194 (Del. Ch. 1995); Marciano v. Nakash, 535 A.2d 400 (Del. 1987)). I am grateful to a colleague for highlighting the latter point.

[135] *See* Tornetta v. Musk, 2019 Del. Ch. LEXIS 999, *28-*29 (Del. Ch. 2019). *See* also *In re* Pilgrim's Pride Corp. Derivative Litig., No. CV 2018-0058-JTL, 2019 WL 1224556, at *8-9 (Del. Ch. Mar. 15,

framework was adopted by the New York Court of Appeals—a symbolic development in light of the migration of entire fairness review from New York to Delaware roughly a century earlier.[136]

The *MFW* framework has become a general mechanism for validating tainted transactions based on principles that seek to ensure corporate or shareholder group consent through fully-informed and disinterested decision makers who, when working together, can reasonably proxy for arm's length bargaining.[137] If such conditions are met, traditional fiduciary law approves of self-dealing and other conflicted or tainted fiduciary actions in non-corporate relations; corporate law could thus follow suit.[138] In the division of labor between the bodies involved, the disinterested director committee has the advantage of greater professional skills and greater capacity for effective bargaining due to its smaller size but it lacks in fully representing the interests of the company or its shareholders, exposed as it is to social and other pressures from the controller and other board members.[139] Non-controlling shareholders, in contrast, may lack in knowledge, skills, and functional capacity relative to disinterested director committees but their position is closer to representing the best interests of the corporation or of the shareholder body as a whole. These two

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2019) (raising, in dicta, the possibility that in a self-dealing transaction in a controlled corporation, approval by disinterested directors elected exclusively by minority shareholders, a majority-of-the-minority approval might not be necessary) (citing Lucian Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017)).

[136] *See In re* Kenneth Cole Prods., Inc., 52 N.E.3d 214, 219-20 (N.Y. 2016); *see also In re* Baltic Trading S'holders Litig., 76 N.Y.S.3d 117, 119-21 (N.Y. App. Div. 2018) (applying *MFW* in a shipping company merger dispute).

[137] *See* Itai Fiegenbaum, *The Geography of MFW-Land*, 41 DEL. J. CORP. L. 763, 766-68, 802 (2017) (arguing in a critical interpretation that the intuitive application of the *MFW* framework to all controlling stockholder transactions is misguided and that the borders of "*MFW*-Land" are narrower than they appear.)

[138] *Id*.

[139] *See* Marsh, *supra* note 84, at 37.

components are complementary, such that when they operate together the combined mechanism engenders an acceptable equivalent of an individual's fully-informed consent.[140]

When the *MFW* framework is duly implemented, the substantive terms of the tainted action are virtually immune to judicial review, as they are deemed to be the product of business judgment. Recent developments in business judgment rule jurisprudence are consistent with this approach. Notwithstanding the fact that the business judgment rule is highly deferential with respect to the content of business decision, it has never been an ironclad shield against substantive review of such content. Under the classic exception of waste, or (substantive) irrationality, courts have always retained the power to review even non-conflicted, seemingly informed business decisions for their content.[141] While the traditional justification for the waste exception tended to invoke morals and conscionability,[142] more recent case law conceptualizes waste as breach of loyalty, where the apparent wastefulness of the decision functions as *prima facie* evidence for bad faith.[143] In another formulation,

[140] *See* Fiegenbaum, *supra* note 137, at 768.

[141] *See, e.g.*, Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962).

[142] *See id.*; *see also* Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

[143] *See, e.g.*, Se. Pennsylvania Transp. Auth. v. AbbVie Inc., No. CV 10374-VCG, 2015 WL 1753033, at *14 n.144 (Del. Ch. Apr. 15, 2015) ("This Court has found that, doctrinally, waste is a subset of good faith under the umbrella of the duty of loyalty"), *reprinted in* 40 DEL. J. CORP. L. 400 (2015), *judgment entered sub nom.* Rizzolo v. Abbvie Inc. (Del. Ch. 2015), and *aff'd*, 132 A.3d 1 (Del. 2016); *Se. Pennsylvania Transp. Auth.*, 2015 WL 1753033, at *14 n.144 ("The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith.") (quoting *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749 (Del. Ch. 2005)); *see also* D. Gordon Smith, *The Modern Business Judgment Rule, in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 83, 83 (Claire A. Hill & Steven Davidoff eds., 2016).

waste was presented as the counter-factual of fully-informed consent by shareholders.[144]

This development is compatible with the transformation that the entire fairness doctrine is undergoing in that courts in both contexts exhibit greater reluctance than (even) before to pass judgment on business rationales. *MFW* and its progeny thus have carved out a legal sphere within which only the procedural fair dealing prong is examined and in which there is no room for fair price analysis. Put more concisely, the entire fairness doctrine does not apply within that sphere. Especially after *EZCORP* and *Corwin*, which generalized *MFW*'s scope of application,[145] it may not be an overstatement to consider the traditional entire fairness doctrine as the *residual* approach to corporate actions that raise issues of fiduciary loyalty. Resolving which approach is primary and which is residual now becomes an empirical question rather than a doctrinal one. As we shall see below, current legal praxis indeed treats entire fairness review overwhelmingly as residual. Within a short period after *MFW* was handed down, designers of transactions of the type covered by *MFW* have been opting into its framework in droves.[146]

Both the Court of Chancery and the Delaware Supreme Court in *MFW* and *M&F Worldwide*, respectively, more than hinted that the new framework is not only

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[144] *See*, e.g., Singh v. Attenborough, 137 A.3d 151, 151-52 (Del. 2016) ("When the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful.") (footnotes omitted); *see also* Morrison v. Berry, 191 A.3d 268, 274 n.16 (Del. 2018) (denying such protection due to directors' failure to make full disclosure).

[145] *See generally* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 304 (Del. 2015); *In re* EZCORP Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245, at *11-15 (Del. Ch. Jan. 25, 2016).

[146] *See* Fernán Restrepo, *Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of MFW*, 13 (Stanford Law Sch. Working Paper, 2018), https://ssrn.com/abstract=3105169.

workable for validating tainted corporate actions but is also the more desirable one. Then-Chancellor Strine in *MFW* said that "the rule of equitable common law that best protects minority investors is one that encourages controlling stockholders to accord the minority this potent combination of procedural protections."[147] Justice Holland in the Delaware Supreme Court endorsed this observation and, moreover, presented it as an animating factor in adopting the new framework.[148] The notion that a dual mechanism that utilizes both disinterested directors and shareholders—a majority of the minority where a controller is involved—provides the best protection for shareholders and the company is shared by the Organization for Economic Development and Cooperation (OECD)[149] and by scholars alike.[150]

Whether the *MFW* framework does in fact provide the best protection to vulnerable companies and shareholders from corporate fiduciary opportunism may be

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[147] *In re* MFW S'holders Litig., 67 A.3d 496, 526 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

[148] *See Kahn*, 88 A.3d at 643 ("The Court of Chancery rested its holding upon the premise that the common law equitable rule that best protects minority investors is one that encourages controlling stockholders to accord the minority both procedural protections.").

[149] *See* OECD, RELATED PARTY TRANSACTIONS AND MINORITY SHAREHOLDER RIGHTS 24-34 (2012) (surveying legal mechanisms in various countries for policing related party transactions).

[150] *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 839-40 (2003); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 60-61 (2005); *See In re MFW S'holders Litig.*, 67 A.3d at 503 (citing both Gilson & Gordon and Subramanian for this point). Scholars are not single-minded about this question. *See* James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 349 (2018) ("[C]ontrollers, safe from the prying eyes of plaintiffs' lawyers, are likely to be less careful about protecting the interests of minority shareholders in squeeze-outs. If they carefully follow the process requirements laid out in the *M&F* litigation, why should they agree to pay high premiums as well?"). In addition, Gilson's position on this issue has subsequently evolved. *See* Ronald J. Gilson & Alan Schwartz, *Constraints on Private Benefits of Control: Ex Ante Control Mechanisms versus Ex Post Transaction Review*, 169 J. INSTITUTIONAL & THEORETICAL ECON. 160, 168 (2013) [hereinafter *Constraints on Private Benefits of Control*] (originating from a report the authors filed on behalf of certain Israeli pyramid groups that analyzed a proposed structural reform intended to curb corporate pyramids and controlling shareholders' power.); *see generally* Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119 (2015); Report of Professors Ronald J. Gilson and Alan Schwartz Concerning Recommendations of the Committee on Enhancing Competitiveness (2011), http://mof.gov.il/Committees/CompetitivenessCommittee/SeconedRound_ProfGilson.pdf.

debatable. Crucially for the present discussion, however, the Delaware judiciary presents this framework as living up to the highest standard in this regard. Adopting this framework in Delaware law is thus consistent with Delaware's status as the leading business jurisdiction. *Noblesse oblige*, if you will. And there's the rub: *MFW* could have been decided similarly by declaring the dual mechanism as equivalent in its shareholder-protection quality to entire fairness review. Granting this award of excellence to the new framework was clearly an *obiter dictum*; it was not necessary for the decision. By describing the *MFW* framework as the best, the courts by necessity ranked substantive entire fairness review as inferior to it in terms of shareholder protection. It is submitted that that *dictum* can and may be used in future decisions to justify further derogation in the status of substantive fairness review, which could range from full abolition of this limb of the doctrine to at least imposing additional requirements for its use. After all, if entire fairness review is at the same time both "most onerous" but only "second best", why keep it? Unlikely as such a move may appear at this point, one should note that *MFW* probably appeared unlikely before *Cox Communications* was decided.

2. A Fairer Price

In tandem with developing an alternative for entire fairness review in *MFW*, Delaware courts have also been active in eroding the credibility of its substantive review prong—the part of the doctrine that strays from standard fiduciary law and which has attracted scholarly critique. In pointing to judicial statements that question the credibility of reviewing economic valuations in court, this section offers admittedly speculative conjectures about their relation to the major movement that *MFW* stands for.

When exercising its substantive fairness review power, the court essentially seeks to satisfy itself that the economic terms of the challenged action were adequate.[151] More bluntly, that the price paid was not just reasonably good but really good. Courts often undertake the task of economic valuation as a matter of necessity (e.g., when shareholders assert appraisal rights). Delaware courts are famous for being exceptionally good at this task.[152] While examining price fairness in an entire fairness inquiry and assessing appraisal awards in appraisal proceedings are very different exercises,[153] the two do share the feature that the court has to pass judgment on complex economic valuations. For that purpose, the parties and the court inevitably rely on expert opinions ("fairness opinions", when prepared before the transaction), such that the proceedings often turn into "expert battles."[154]

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[151] *See* Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C. L. REV. 1021, 1021-22 (2009).

[152] *See generally id.*

[153] These two processes stem from different legal sources: the former being a common law doctrine; the latter—a statutory right. They aim to achieve different goals: the former is intended to ascertain whether fiduciary loyalty was breached; the latter—to give squeezed-out shareholders their lost value. And they are structured differently: in assessing price fairness the court considers a range of possible fair prices; in assessing an appraisal award the court is called to reach a point estimate. *See* Merion Capital L.P. v. Lender Processing Servs., Inc., No. CV 9320-VCL, 2016 WL 7324170, *15-16 (Del. Ch. Dec. 16, 2016) (surveying cases and summarizing differences); *see also* Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1556-57 (2015); *see also* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 127 (2005).

[154] *See, e.g.*, *In re* Appraisal of Dole Food Co., 114 A.3d 541, 556-57 (Del. Ch. 2014) ("[T]he Delaware Supreme Court's description of an appraisal proceeding as a 'battle of experts' . . . is only one of many cases to have made this observation. These decisions have not employed this phrase approvingly to suggest limitations on the scope of admissible evidence. Rather, they have used the term as a shorthand reference to what the Delaware Supreme Court identified as 'a recurring theme in . . . appraisal cases—the clash of contrary, and often antagonistic, expert opinions on value.' . . . Chief Justice Strine, writing as a Vice Chancellor, described the phenomenon as follows: '. . . These starkly contrasting presentations have, given the duties required of this court, imposed upon trial judges the responsibility to forge a responsible valuation from what is often ridiculously biased 'expert' input.") (footnotes omitted) (first quoting Rapid-Am. Corp. v. Harris, 603 A.2d 796, 802 (Del. 1992); then quoting *In re* Shell Oil Co., 607 A.2d 1213, 122 (Del. 1992); and then quoting Finkelstein v. Liberty Digital, Inc., No. C.A. 19598, 2005 WL 1074364 (Del. Ch. Apr. 25, 2005)).

In the context of entire fairness inquiry Delaware courts have taken economic valuation opinions with a big grain of salt and openly questioned their reliability. In *Ryan v. Lyondell*, Chancellor Noble thus expressed nearly unreserved sarcasm about the ability of directors of a company that faces a sale offer "to secure an expensive fairness opinion that (Quelle surprise!) concludes that the offer is 'fair' to the shareholders."[155] Vice Chancellor Parsons similarly quipped that "[m]uch has been said on litigation-driven valuations, none of it favorable."[156]

This humorous spirit cannot, however, conceal the fact that there is a deep problem in exercising substantive fairness review. This problem is qualitatively different from and graver that common evidentiary difficulties that every judge faces on a daily basis. Because of their fiduciary position, corporate insiders enjoy absolute informational superiority vis-à-vis the company, its shareholders, and the court. Expert advice and acquired skills that help a judge implement the proverbial "smell test"[157] can mitigate her informational inferiority but cannot overcome it. Elsewhere I

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[155] Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 Del. Ch. LEXIS 125, at *8 n.12 (Del. Ch. July 29, 2008); *see* Lucian Arye Bebchuk & Marcel Kahan, *Fairness Opinions: How Fair Are They and What Can be Done About It?*, 1989 DUKE L.J. 27, 29 (1989) (stating an early and still pertinent critique.).

[156] LongPath Capital, LLC v. Ramtron Int'l Corp., No. CV 8094-VCP, 2015 WL 4540443, at *9 (Del. Ch. June 30, 2015); *see also In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 449 (Del.Ch. 2002) (asserting that "courts must be candid in acknowledging that the disclosure of the banker's 'fairness opinion' alone and without more, provides stockholders with nothing other than a conclusion, qualified by a gauze of protective language designed to insulate the banker from liability"). Delaware courts have developed a special jurisprudence on the use of expert valuations, emphasizing in particular the need for full disclosure about investment bankers' conflicts of interest. *See generally* Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 BUS. LAW. 881 (2008); Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary II: An Update on Delaware's Disclosure Regime Regarding Fairness Opinions*, 66 BUS. LAW. 943 (2011).

[157] *See* Eisenberg, *supra* note 48, at 455 ("[I]t is widely understood that … approval of a self-interested transaction by disinterested directors will not prevent a court from applying to self-interested transactions a 'smell' test that is more rigorous than the business judgment rule."); *see also* Charles M. Yablon, *On the Allocation of Burdens of Proof in Corporate Law: An Essay on Fairness and Fuzzy Sets*, 13 CARDOZO L. REV. 497, 502 n.16 (1991) ("The proverbial 'smell test' used in Delaware

have explained why information asymmetries in fiduciary relations are insurmountable, especially for courts.[158] Luca Enriques argues specifically that "substantial fairness is intuitively hard to evaluate, as the convenience of a transaction to a corporation is known only, if at all, to corporate insiders."[159] Ron Gilson and Alan Schwartz seem to differ on this issue.[160]

This scholarly debate is independent of the present point, however. The claim made here is that Delaware's chancellors and judges are fully aware of their limited ability to counter the informational superiority of corporate insiders. Their willingness to ridicule the evidentiary basis on which they are expected to rely must not be taken lightly. As such dicta accumulate, one might not be surprised if at some point, the court may hold that the balance had changed and no longer favors using such valuations for deciding on fairness—namely, on breach.[161]

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proceeds upon the theory that if the terms of the underlying transaction stink badly enough, the courts will find a way to abrogate any procedural protections supplied by the business judgment rule.").

[158] *See* Amir N. Licht, *Motivation, Information, Negotiation: Why Fiduciary Accountability Cannot be Negotiable*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 159, 163-69 (D. Gordon Smith & Andrew S. Gold eds., 2018); *see also* Lucian Arye Bebchuk & Marcel Kahan, *Adverse Selection and Gains to Controllers in Corporate Freezeouts*, *in* CONCENTRATED CORPORATE OWNERSHIP 247, 248-50 (Randall K. Morck ed., 2000) (discussing the fundamental problem of informational asymmetry in freezeouts); *see generally* Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability and Fiduciary Loyalty*, 37 OXFORD J. LEGAL STUD. 770 (2017) (providing a historical analysis).

[159] Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)*, 16 EUR. BUS. ORG. L. REV. 1, 35 (2015).

[160] *See Corporate Control and Credible Commitment*, *supra* note 150, at 167 ("An effective court commonly can recover the facts relevant to answering this question. Contract terms and prices are verifiable, market prices for similar transactions may exist, and expert testimony is often useful. Hence, courts can effectively police self-dealing: that is, they can apply the equivalence test."); *compare* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 610-611 (2016) (referring to "Delaware's ecosystem of specialized courts and vibrant private enforcement, we find this approach desirable."); *with* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 947 (2005) (arguing the concern "that without the sole interest rule the beneficiary would be not able to prove trustee misbehavior--is archaic.") (internal quotations omitted) (footnote omitted).

[161] Courts will continue to rely on financial expert opinions in other contexts, including for fashioning remedies in cases of breach of loyalty. *See* also Kershaw, *supra* note 105, at 400 (showing that there is a conceptual difference between using fairness assessments for finding on breach and for fashioning a remedy for it.).

In *Dole Food*, the court made one more step towards destabilizing the substantive fairness basis for validating a breach of loyalty.[162] The chairman, CEO, and controlling shareholder and his confidant misled the disinterested director committee that was formed as part of implementing an *MFW*-like process in a freeze-out merger.[163] This was a blatant breach of the duty of loyalty, and uninteresting as such.[164] The pivotal move in Vice Chancellor Laster's opinion lies in his ruling that entire fairness is not omnipotent, at least not against fraud:

> But what the Committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud.... Murdock and Carter's conduct throughout the Committee process, as well as their credibility problems at trial, demonstrated that their actions were not innocent or inadvertent, but rather intentional and in bad faith. Under these circumstances, assuming for the sake of argument that the $13.50 price still fell within a range of fairness, the stockholders are not limited to a fair price. They are entitled to a fairer price designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty.[165]

At first glance, the first sentence stands in contrast to the basic idea of entire fairness, which holds that an entirely fair price *does* work to cleanse a tainted fiduciary action.[166] As it happens, it was Vice Chancellor Laster who implemented this approach in *Trados*, holding that zero was the fair price of the stocks in dispute

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[162] *See In re* Dole Food Co., S'holder Litig., No. CV 8703-VCL, 2015 WL 5052214, at *38-39, *128 (Del. Ch. Aug. 27, 2015), *reprinted in* 41 DEL. J. CORP. L. 169 (2016).

[163] *Id.* at *1.

[164] *Id.* at *6-7.

[165] *Id.* at *5-6; *see also* ACP Master, Ltd. v. Sprint Corp., No. CV 8508-VCL, 2017 WL 3421142 at *19 (Del. Ch. July 21, 2017) ("But the range of fairness is not a safe-harbor that permits controllers to extract barely fair transactions. Factors such as coercion, the misuse of confidential information, secret conflicts, or fraud could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved."), *aff'd*, 184 A.3d 1291 (Del. 2018).

[166] *See ACP Master, Ltd.*, 2017 WL 3421142 at *19.

there.[167] Now a director or a controller rarely become involved in a conflicted transaction without having a clue about such conflict. In other words, breach of loyalty by way of self-dealing or non-disclosure is done in most cases (though not necessarily) with some awareness of the situation—that is, in bad faith. This is precisely where the entire fairness doctrine exerts its pernicious effect in validating the breach due to its substantive fairness.[168] At the same time, the fraud exception invoked in *Dole Food* is not novel.[169] In fact, it was mentioned already in *Weinberger*.[170] Based on this principle, the *Dole Food* court could forcefully hold that "[a]ccording to the common law nostrum, *fraus omnia corrumpit*—fraud vitiates everything."[171] Add to this that "fraud" is an equitable term of art that is broader and more flexible than its common law counterpart (which the *Dole Food* court carefully distinguishes)[172], and one gets a clear sense of unclarity.

Out of this vagueness the court may develop the law further by conditioning the applicability of the substantive fairness rule on fiduciary good faith and full disclosure. This, in turn, will enable valid consent by the company or public

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[167] *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 78 (Del. Ch. 2013).

[168] *See* CLARK, *supra* note 93, at 169 (stating "the effect of the third [fairness] alternative is that the interested party can always defend a basic self-dealing transaction against a charge of automatic voidability by arguing that it was fair, whether or not there was adequate disclosure").

[169] *See In re Dole Food Co., S'holder Litig.*, 2015 WL 5052214, at *26 (citing Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104 (Del. 1985)).

[170] *See* Weinberger v. UOP, 457 A.2d 701, 711-14 (Del. 1983) ("[I]n a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger."); *id.* at 714 (mentioning, in tandem, fraud and self-dealing as seemingly equal facets of breach of loyalty: "The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.") (citing Cole v. Nat'l Cash Credit Ass'n, 156 A. 183, 187 (Del. Ch. 1931) (referring to equitable constructive fraud)). The upshot is that the uncertainty discussed in the text traces back to *Weinberger*.

[171] *See In re Dole Food Co., S'holder Litig.*, 2015 WL 5052214, at *26.

[172] *Id*. at *44-46.

shareholders to be achieved and thus converge with the classic, time-honored approach to fiduciary loyalty.[173] Such a move may or may not require an amendment to Section 144 of the DGCL, which saves conflicted corporate actions from voidness or voidability if the transaction is fair; entire fairness in this context serves as a backstop, if the two alternatives of disinterested (and fully-informed) consent have not been met.[174] To begin, Section 144 applies only to directors' conflict, such that the courts can start with actions that are tainted by controlling shareholders' interest.[175] In addition, Delaware courts have demonstrated that the language of Section 144 does not necessarily pose an insurmountable hurdle to legal development of the very type discussed here. In *Marciano v. Nakash*,[176] the Delaware Supreme Court thus read a condition of distinterestedness with regard to shareholder approval into the text of the statute.[177] Similarly-spirited interpretation could be used to reshape the contours of entire fairness review.[178] As Hamermesh and Strine note, "judicial inquiry into compliance with fiduciary duty is not foreclosed by formal statutory authorization."[179]

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[173] *See* generally Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209, 1232 (1995) (discussing the relationship between fiduciary duty and consent).

[174] *See* DEL. CODE ANN. tit. 8, § 144 (2010).

[175] *See id*. at § 144(a).

[176] Marciano v. Nakash, 535 A.2d 400, 405 (Del. 1987) (holding that "approval by fully-informed disinterested directors under section 144(a)(1), or disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule and limits judicial review").

[177] *Id.*

[178] Recently, the Delaware Superior Court implemented an intrinsic fairness review of a tainted contract in a way that could be viewed as suggesting that it is cumulative with rather than alternative to disinterested director approval under Section 144(a)(1). *See e.g.*, Toedtman v. TurnPoint Med. Devices, Inc., No. CV N17C-08-210 RRC, 2019 WL 328559, *10 (Del. Super. Ct. Jan. 23, 2019) ("Although the transaction falls within the § 144(a)(1) safe harbor, the Court will address the intrinsic fairness of the transaction as well.").

[179] Hamermesh & Strine, *supra* note 1, at 875 (referring to Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971)).

A different path for reforming substantive fairness review may have already been taken in several decisions that point to the availability of a "fairer price" in cases of breach of fiduciary loyalty. *Dole Food* again may be pivotal in this regard. Recall Vice Chancellor's Laster's suggestion, having found that the controller had engaged in fraud, that notwithstanding the entire fairness of the price, the stockholders "are entitled to a fairer price designed to eliminate the ability of the defendants to profit from their breaches of the duty of loyalty."[180] Earlier, in *Reis v. Hazelett Strip-Casting Corp.*, the Court of Chancery opined that a "fairer price" may be available "[d]epending on the facts and the nature of the loyalty breach."[181] The *ACP Master* court mentioned both a fairer price and rescissory damages as possible remedies in such circumstances.[182] The Delaware Supreme Court has also emphasized that damages for breach of loyalty may be more capacious than damages for breach of contract,[183] and in *Americas Mining*—that "[i]t is also undisputed that the Court of Chancery has greater discretion when making an award of damages in an action for breach of duty of loyalty than it would when assessing fair value in an appraisal action."[184]

Several cases went significantly further than awarding or contemplating rescissory damages. In *Bomarko, Inc. v. International Telecharge, Inc.* the court expressed willingness to assess damages with the advantage of hindsight to ensure

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[180] *See In re* Dole Food Co., S'holder Litig., No. CV 8703-VCL, 2015 WL 5052214, at *2 (Del. Ch. Aug. 27, 2015), *reprinted in* 41 DEL. J. CORP. L. 169 (2016).

[181] *See* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 467 (Del. Ch. 2011).

[182] *See* ACP Master, Ltd. v. Sprint Corp., No. CV 8508-VCL, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017) (citing *Reis* and *Dole Food, inter alia*), *aff'd*, 184 A.3d 1291 (Del. 2018).

[183] *See* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 175-76 (Del. 2002); *see also* Gatz Properties, LLC v. Auriga Capital Corp., 59 A.3d 1206, 1220-21 (Del. 2012).

[184] Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1252 (Del. 2012).

that the breaching fiduciary does not profit from the breach.[185] This is a radically different principle than compensatory damages for fashioning a private law remedy, drawing as it does on the court's equitable powers. In *Technicorp Int'l II, Inc. v. Johnston*, after mentioning a corporate fiduciary's burden to demonstrate entire fairness, the court equated the duty to account of corporate officers and directors to that of agents and other fiduciaries.[186] Finally, in *eBay, Inc.*, then-Chancellor Chandler held:

> [A] cognizable claim is nevertheless stated on the common law ground that an agent is under a duty to account for profits obtained personally in connection with transactions related to his or her company. The complaint gives rise to a reasonable inference that the insider directors accepted a commission or gratuity that rightfully belonged to eBay but that was improperly diverted to them. Even if this conduct does not run afoul of the corporate opportunity doctrine, it may still constitute a breach of the fiduciary duty of loyalty.[187]

The upshot of these holdings could be far-reaching in terms of bringing the law of corporate fiduciaries back closer to the law that governs other fiduciaries. Bearing in mind that entire fairness of the substantive terms of the tainted action may not be a safe harbor anymore, as *ACP Master* indicates, the door could be opened to the truly exacting and onerous (yet orthodox) remedies of accounting in fiduciary law—namely, forcing the breaching fiduciary to fully disclose every benefit she may have derived in connection with the breach and assessing disgorgement awards that exceed the standard approach of contractual or tort damages but are fully compatible with

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[185] *See* Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1184-85 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000).

[186] *See* Technicorp Int'l II, Inc. v. Johnston, No. C.A. 15084, 2000 WL 713750, *5 (Del. Ch. May 31, 2000).

[187] *In re* eBay, Inc. S'holder Litig., No. C.A. 19988-NC, 2004 WL 253521, at *5 (Del. Ch. Jan. 23, 2004) (citing Gibralt Capital Corp. v. Smith, No. 17422, 2001 WL 647837, at *9 (Del. Ch. May 9, 2001); Thorpe v. CERBCO, Inc., 676 A.2d 436, 444 (Del. 1996)), *reprinted in* 29 DEL. J. CORP. L. 924 (2004).

fiduciary accountability.[188] As then-Master Glasscock reminded not too long ago, "[a]n accounting is an equitable remedy by which a fiduciary is required to account to those to whom he owes his fidelity for the results of the exercise of his duty…. This Court will order an accounting between parties as required by equity."[189]

III. CRITICAL ANALYSIS

The main thrust of this Article is positive: to point out the trajectory that Delaware's jurisprudence has set on towards greatly limiting and, eventually, retiring the substantive fairness review limb of the entire fairness doctrine. This Part offers a critical discussion of this legal development, without attempting to exhaust the issues that it raises. Sections A and B deal with practical aspects, the most pressing among them is the feasibility of such a development.[190] Section C touches upon normative considerations that militate for or against implementing it.[191]

A. Feasibility

A fundamental question about abolishing substantive fairness review is whether such abolition is at all feasible. Next, even if it is feasible, it must be determined whether implementing this reform is worthwhile. The feasibility question comes in two versions: First, "can we build it?"—namely, can we do without substantive fairness review such that we can do away with it? Second, "if we build it,

[188] *See generally* Joshua Getzler, *"As If." Accountability and Counterfactual Trust*, 91 B.U. L. REV. 973, 973 (2011) (arguing that "the law sustains trust in fiduciaries not primarily by ordering redress of losses caused by a falling below fiduciary standards, but rather by requiring that the fiduciary be induced to act *as if* those standards were met.").

[189] DiGiacobbe v. Sestak, No. C.A. 14525, 2003 WL 1016985, *4 (Del. Ch., Mar. 3, 2003) (citing, *inter alia*, Pomeroy's Equity Jurisprudence § 1421, at 1078 (1941)).

[190] *See infra* Sections III.A, III.B.

[191] *See infra* Section III.C.

will they come?"— i.e., is there demand for this legal change? Briefly, the answers to both queries appear to be "yes".

The first question is fairly simple. One possible concern about abolishing entire fairness review on feasibility grounds is based on the notion that unlike simple self-dealing, in the corporate world—especially with regard to large-scale transactions such as mergers and other structural changes—it is impractical to implement the traditional legal response to breach of fiduciary loyalty, which is voidability of the tainted action. Once a merger is consummated, runs the argument, it is impossible to unwind it even if in principle, the wronged beneficiary is entitled to avoid the tainted transaction.[192] Substantive fairness review that relies on notoriously unreliable valuations could be simply unavoidable then, as Ed Rock notes.[193] Delaware courts at least since *Weinberger* thus have held that entire-fairness-based damages are appropriate.[194]

This concern, albeit not unfounded, is nonetheless overstated. To begin, Delaware courts have acknowledged that voidness or voidability could be impractical and fashioned responses for this situation.[195] In *Basho Technologies Holdco B v. Georgetown Basho Investors*, Vice Chancellor Laster said:

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[192] Roughly, a notion of this sort may also underlie Section 144. *See supra* note 25 and accompanying text.

[193] *See* Edward B. Rock, *MOM Approval in a World of Active Shareholders* 21 (European Corp. Governance Inst., Working Paper No. 389, 2018), https://ssrn.com/abstract=3122681 ("[W]hat happens in those cases in which the [MFW] procedure is *not* followed? This procedural 'failure' can be for a variety of reasons . . . What happens then? In the vast majority of transactions that cannot literally be undone (and even in some of them), some sort of valuation exercise will be necessary").

[194] Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) ("Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price.").

[195] *See* DEL. CODE ANN. tit. 8, § 144 (2010)

> When defendant fiduciaries have failed to satisfy the entire fairness test and have breached their duty of loyalty, 'the stockholders may … demand rescission of the transaction or, if that is impractical, the payment of rescissory damages.' Rescissory damages are 'the monetary equivalent of rescission' and may be awarded when 'the equitable remedy of rescission is impractical.' Delaware courts have awarded rescissory damages for adjudicated breaches of the duty of loyalty…. [196]

Thus, getting the law in line with basic legal principles (by removing substantive fairness review from the legal menu) in and as of itself does not entail blocking transactions with a sound business rationale.[197]

Recall, moreover, that substantive fairness review as a means for validating breaches of loyalty in companies is the product of a nineteenth century legal accident.[198] That this doctrine applies to corporate fiduciaries stems from idiosyncratic reasoning that does not have much coherence today. It was not crafted to facilitate complex mega-deals in widely-held corporations that encounter an occasional fiduciary failure by entrusting the court with the authority to iron out such wrinkles through verifying their substantive fairness. It is the latter branch of the doctrine that Delaware courts have been trimming in recent years and may cut down completely in the future.

The drawbacks of economic valuations notwithstanding, courts can and will continue to use them for other purposes, including for fashioning appraisal awards and, in particular, in assessing damages as part of the remedies for breach of loyalty.

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[196] Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC No. CV 11802-VCL, 2018 WL 3326693, at *49 (Del. Ch. July 6, 2018), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, No. 14, 2019, 2019 WL 5399453 (Del. Oct. 22, 2019) (footnotes omitted) (quoting, *inter alia*, Oberly v. Kirby, 592 A.2d 445, 466 (Del. 1991)); *see also* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1144 (Del. Ch. 1994), *aff'd,* 663 A.2d 1156 (Del. 1995).

[197] *See Basho Techs. Holdco B, LLC*, 2018 WL 3326693, at *36.

[198] *See* Kershaw, *supra* note 105, at 401-05, 469.

Insisting on retaining substantive fairness review for validating breach of loyalty entails committing the same analytical misstep that nineteenth-century courts in New Jersey made according to Kershaw's analysis—confusing the remedy with the breach.[199] The legally appropriate response to breach of fiduciary loyalty is accounting, in Delaware as in other common law jurisdictions.[200] "No harm done" is an appropriate defense claim in tort, not in fiduciary law.[201] Demonstration by the breaching fiduciary that "no harm was done" is a *non sequitur* in that it should not exculpate her from her continuing liability to account. Such a move deprives the betrayed beneficiary, be it the company or public shareholders, from getting a "fairer price"[202] and from demanding disgorgement of ill-gotten benefits, contrary to basic principles of fiduciary law.[203]

Another possible objection to removing substantive fairness review from the menu of available responses to tainted transactions points to the latter doctrine's flexibility and efficacy, leveraging as it does the unique expertise of Delaware's chancellors and judges. Put differently, insisting on a fully-informed-consent mechanism could be portrayed as overly rigid and wooden. In considering this critique one must note Judge Cardozo stern admonition in *Meinhard v. Salmon*: "Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty … It will not consciously be lowered by any

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[199] *See* Kershaw, *supra* note 105, at 401-05, 469.

[200] *Id*. at 442.

[201] *See supra* note 57 and accompanying text.

[202] *See In re* Dole Food Co., S'holder Litig., No. CV 8703-VCL, 2015 WL 5052214, at *2 (Del. Ch. Aug. 27, 2015), *reprinted in* 41 Del. J. Corp. L. 169 (2016).

[203] *Id.* at *38.

judgment of this court."[204] That is to say, fiduciary law is strict by design and on principle. Giving up on its strictness inevitably means giving up on its animating spirit and the social benefits that it aims to achieve. The law can approve of that approach - e.g., in limited liability corporations[205] - but then those serving those corporations are no their fiduciaries at all; merely commercial contractors.

Relatedly, one may wonder whether it is feasible to "*MFW* the world" by implementing a full-fledged *MFW* procedure for every tainted transaction, and even point to *Tornetta* as suggesting such a trend. Given the logistics and costs involved in implementing an *MFW*-based dual protection procedure, this objection is not without merit. However, "*MFW*" and "fully-informed consent" are not synonyms. Courts can thus mandate the latter as a guiding principle without mandating the former as a means to fulfill it. An *MFW*esque procedure instantiates corporate fully-informed consent in certain settings. In other circumstances that involve potential breaches of fiduciary loyalty, leaner procedures for following the fair dealing prong could suffice for achieving sufficiently untainted fully-informed consent. The key point, around which this Article revolves, is to make substantive fairness review less (or un-) available as a bypass around such procedures.

Next, consider the second feasibility issue—whether a mechanism of fully-informed, uncoerced consent in lieu of substantive fairness review is in fact employed by transaction designers. A recent working paper by Fernán Restrepo addresses this

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[204] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[205] *See* Delaware Limited Liability Company Act, 6 Del. C. § 18-1101(c) ("…the member's or manager's or other person's duties may be expanded or restricted or eliminated by provisions in the limited liability company agreement .")

question.[206] His study comes on the heels of a line of research that has sought to quantify the effects of changes in Delaware law on standards of review of buyouts by controlling shareholders—in particular, freezeouts versus tender offers, in the wake of *Siliconix Inc*.[207] Focusing on changes brought about by *MFW*, this study compares 141 freezeouts effected before that decision with 11 freezeouts that were completed after it.[208] The empirical findings are illuminating. Bearing in mind that special committees of disinterested directors (SCs) have been in common use before *MFW*, the major change was observed in the frequency of using a majority-of-the-minority (MOM) approval in tandem with SCs in merger freezeouts—from 37% to 90%.[209] A vast majority of deal planners thus prefer the strict, novel yet classic mechanism of fully-informed consent over the protection of substantive entire fairness review, vindicating as it does the prediction of then-Chancellor Strine in *MFW* that if the Chancery built it they will come.[210]

Importantly, in terms of financial consequences of this shift, firms and public shareholders have not been harmed and may even benefit from implementing the

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[206] *See* Restrepo, *supra* note 146, at 1.

[207] *In re* Siliconix Inc. S'holders Litig., No. C.A. 18700, 2001 WL 716787, at *6 (Del. Ch. June 19, 2001), *reprinted in* 27 DEL. J. CORP. L. 1011 (2002); *see* Guhan Subramanian, *Post-Siliconix Freeze-Outs: Theory and Evidence*, 36 J. LEGAL STUD. 1, 2 (2007) (showing empirical studies); Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach*, 5 HARV. BUS. L. REV. 205, 206 (2015); Matthew D. Cain & Steven M. Davidoff, *Form Over Substance? The Value of Corporate Process and Management Buy-Outs*, 36 DEL. J. CORP. L. 849, 873-76 (2011); Audra Boone, Brian Broughman & Antonio J. Macias, *Shareholder Decision Rights in Acquisitions: Evidence from Tender Offers* 1 (Indiana Legal Studies Research Working Paper No. 331, 2017), https://ssrn.com/abstract=2629424.

[208] *See* Restrepo, *supra* note 146, at 12-13.

[209] *Id*. at 17-18.

[210] *In re* MFW S'holders Litig., 67 A.3d 496, 528 (Del. Ch. 2013) ("By giving controlling stockholders the opportunity to have a going private transaction reviewed under the business judgment rule, a strong incentive is created to give minority stockholders much broader access to the transactional structure that is most likely to effectively protect their interests. In fact, *this incentive may make this structure the common one*, which would be highly beneficial to minority stockholders.") (emphasis added), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).

MFW framework.[211] Restrepo reports that its implementation "was not followed by significant changes in deal premiums, target returns, changes from the controller's first offer to the final offer, and deal completion rates."[212] The signs of the estimators of most of these parameters in fact appear positive, which would be consistent with a definite improvement thanks to the legal change.[213] These signs tend to be statistically insignificant, however, possibly due to the smaller sample of post-*MFW* transactions.[214]

One should read Restrepo's findings with all the necessary caution due to the empirical limitations and the early stage of that study.[215] In particular, these findings thus do not show a relative efficiency of *MFW*-structured transactions over traditional ones.[216] What these findings do show is that *MFW*-structured transactions are practically feasible.[217] One may also infer that concerns about harms that might visit companies and shareholders in the absence of entire fairness review of conflicted transactions may be overstated.[218] While Rock points to several cases in which transactions faced hurdles and even faltered because of certain maneuvers that took advantage of MOM approval,[219] it does not appear at this stage that such difficulties

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[211] *See, e.g.*, *id.*

[212] Restrepo, *supra* note 146, at 1.

[213] *Id.* at 27.

[214] *Id.*

[215] *Id.* at 22-23.

[216] *See* Restrepo, *supra* note 146, at 22-23.

[217] *Id.* at 27.

[218] *See* Rock, *supra* note 193, at 7-8; *see* Gilson & Gordon, *supra* note 240, at 839-40 (offering general discussions); *see also* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CAL. L. REV. 393, 396-97 (2003).

[219] *See* Rock, *supra* note 193, at 9.

are systemic.[220] The opposite may be the case, in fact.[221] These preliminary findings further support the expansion of *MFW*'s framework and logic to other conflicted transactions and so forth at least from a practical feasibility perspective, and the concomitant gradual diminution of the purview of entire fairness review.[222]

B. Informed Shareholder Participation

Giving up on court oversight of tainted corporate actions through substantive entire fairness review in favor of effective consent mechanisms entails greater reliance on shareholder participation.[223] At first blush, such a strategy goes against the received wisdom on public companies, which holds that public shareholders are rationally apathetic *inter alia* with regard to monitoring corporate insiders/fiduciaries. Giving the final say on supposedly value-maximizing transactions to a majority of the minority (or all public) shareholders could thus open the door to all sorts of shenanigans, ranging from strategic holdup behavior by marginal shareholders to theoretically-informed but practically-ignorant decision makers. These concerns should not be taken lightly. Developments in shareholding structures in U.S. public companies nonetheless support the legal change that *MFW* and *Corwin* reflect.

During the decades, institutional investors have become the predominant shareholders in U.S. public firms.[224] These investors come in many stripes, from long-term, portfolio-investor pension funds to short-to-medium-term, strategic-

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[220] *Id*. at 22

[221] *Id*.

[222] *See*, Restrepo, *supra* note 146, at 20.

[223] *Id*. at 18-21.

[224] *See* Marcel Kahan & Edward Rock, *Index Funds and Corporate Governance: Let Shareholders be Shareholders* 2 (European Corp. Governance Inst., Working Paper No. 467, 2019), https://ssrn.com/abstract=3295098.

investor, activist hedge funds.[225] Together, they have changed the landscape of shareholding structures such that today, blockholders with substantial blocks rather than miniscule holdings are the common shareholders.[226] Several factors cause these investors, including the traditionally passive one, to behave differently than the textbook rationally apathetic shareholder.[227] Several scholars have noted that institutional investorss exhibit a substantial level of involvement and independence in shareholder voting, being supported by information intermediaries, pressured by political and social-activist groups, and incentivized by the sheer size of their holdings together with lower information gathering costs.[228] This optimistic view of institutional investors' informedness and the positive ramifications for conflicted transaction ratification is not unanimous, however.[229]

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[225] *Id*.

[226] *See* Alex Edmans & Clifford G. Holderness, *Blockholders: A Survey of Theory and Evidence*, *in* THE HANDBOOK OF THE ECONOMICS OF CORPORATE GOVERNANCE 541, 547 (Benjamin E. Hermalin & Michael S. Weisbach eds., 2017).

[227] *See* Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective*, 2019 U. ILL. L. REV. 223, 225-26 (stating an insightful analysis, on which this paragraph draws); *see* also Edward B. Rock, *Institutional Investors in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORP. L. & GOVERNANCE 363, 364-67 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (examining the role of institutional investors); Randall S. Thomas & Patrick C. Tricker, *Shareholder Voting in Proxy Contests for Corporate Control, Uncontested Director Elections and Management Proposals: A Review of the Empirical Literature*, 70 OKLA. L. REV. 9, 120-21 (2017); Paul H. Edelman, Randall S. Thomas & Robert B. Thompson, *Shareholder Voting in an Age of Intermediary Capitalism*, 87 S. CAL. L. REV. 1359, 1362-63 (2014) (proposing that institutional investors have varying views).

[228] *See, e.g.*, Kahan & Rock, *supra* note 370, at 2-4 (the scale of the largest institutional investors provides incentives for involvement in core areas of corporate governance); Dragana Cvijanovic, Moqi Groen-Xu & Konstantinos E. Zachariadis, *Free-Riders and Underdogs: Participation in Corporate Voting* 3, (Working Paper, 2017) (institutional participation averaged 73% for Russell 3000 firms between 2003 and 2013), https://ssrn.com/abstract=2939744; Joseph A. McCahery, Zacharias Sautner & Laura T. Starks, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN. 2905, 2913 (2016) (over half of the large institutional investors surveyed voted against management at a portfolio company in the previous five years); Stephen Choi, Jill Fisch & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 45 (2013) (leading institutional investors exhibit voting independence in director elections).

[229] *See* Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. (forthcoming) (advancing a generally skeptic assessment of index funds, the largest institutionals, in this regard). *See* also James D. Cox, Tomas Mondino, &

Be it as it may, it goes without saying that genuine full disclosure is key to the working a fully-informed-consent-based legal mechanism.[230] This simple insight is also the most important one to bear in mind in any consideration of implementing such a mechanism. The rise of the *MFW* framework and increased attention to shareholder ratification after *Corwin* should thus make courts even more sensitive to this element than before. Among other things, failure to make full disclosure throughout the ratification process should be met with a strict, even harsh, remedial response. Roy Shapira thus argues that post-*Corwin* Delaware decisions have indeed greatly expanded the scope of pre-filing disclosure through the use of section 220-based books-and-records requests.[231] This is a welcome development from the present paper's perspective.

Shareholder approval must also be disinterested. Two types of threats lurk to the integrity of shareholder vote: an intra-firm one and an extra-firm one. The following discusses them in turn.

From an intra-firm vantage point, it is not entirely clear that the administrative apparatus of voting management in public firms in fact ensures such integrity at this stage. To see the problem, consider an *MFW*-like situation, in which the controlling shareholder fears that she might fail to mobilize a majority of the minority to approve her conflicted transaction. One way to get enough disinterested shareholders' support

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Randall S. Thomas, Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals, Vanderbilt Law Research Paper No. 19-06 ; Duke Law School Public Law & Legal Theory Series No. 2019-12 (2019), https://ssrn.com/abstract=3333241 (offering a strong critique of *Corwin* in light of public shareholders' information and incentives).

[230] *See generally* Cox, Mondino, & Thomas, *supra* note 229, at 43-46 (discussing some of the disclosure considerations that have not yet been addressed).

[231] *See* Roy Shapira, Pre-Filing Investigations, working paper (2019), on file with Author (analyzing Lavin v. West Corp. 2017 Del. Ch. LEXIS 866 (Del. Ch. 2017); KT4 Partners LLC v. Palantir Technologies, Inc., 203 A.3d 738 (Del., 2019)).

could be to improve the financial terms of the deal. Another, less legitimate way could be to have interested shareholders vote for the transaction without disclosing their interestedness or that they act in concert with the controller. While clearly in violation of federal securities regulation rules on disclosure of beneficial ownership,[232] without effective means for verifying the identity and beneficial ownership of shareholders who voted on a particular agenda item, the incentive to engage in such behavior could be substantial.[233]

To my knowledge, based on informal discussions with practitioners, the entities that manage voting in U.S. public firms to date do not have the wherewithal for such tracking of individual votes and voters. Technically, the problem stems from common use of street name accounts and the fact that specific street name accountholder information is not always available. Voting agents do not disclose voting information regarding specific street name accounts; they only provide aggregate totals as to how many shares have voted For, Against, and Abstain on each matter through each bank and broker client. To ensure the integrity of shareholder approval, Delaware courts in the future should consider adding another requirement to the standard *MFW/Corwin* framework, namely, that the company and its fiduciaries can in fact verify the disinterestedness of supporting votes.

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[232] *See* Securities Exchange Act of 1934, ch. 404, tit. I, § 13(d) Stat. 894 (codified as amended 15 U.S.C. § 78m (2012)).

[233] The problem is related to but conceptually distinct from the problem of "empty voting," where investors use derivatives to avoid the economic consequences of their position while exercising voting rights. *See generally*, Roberta S. Karmel, *Voting Power Without Responsibility or Risk: How Should Proxy Reform Address the Decoupling of Economic and Voting Rights?*, 55 VILL. L. REV. 93, 94 (2010); Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1280 (2008); Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1267 (2008); Henry T. C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811, 816 (2006).

These weaknesses of the voting mechanism are well-known. Writing already in 2008 in the wake of *Transkaryotic Therapies, Inc.*,[234] Marcel Kahan and Edward Rock noted that the existing system of shareholder voting is "crude, imprecise, and fragile."[235] That shareholder voting is required mostly in director elections and fundamental changes (primarily mergers and charter amendments) is consistent with the board-centered model of corporate governance, they argued, while emphasizing that "given the problems with the existing system, one should not rush to expand the opportunities for shareholder voting in corporate governance."[236] Following two separate voting debacles involving Dell, Inc.,[237] Vice Chancellor Laster, speaking extra-judicially, said that current system makes it difficult for stockholders to vote their shares accurately and referred to the situation as "absurd".[238] "The inability to confirm that beneficial holders' stock was timely and accurately voted and tabulated creates doubt about the integrity of the stockholder vote," Laster argued, and called for implementing blockchain technology to resolve some of the system's complexities.[239] The Delaware legislature indeed has met this challenge by amending

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[234] *See In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 379 (Del. Ch. 2008).

[235] Kahan & Rock, *supra* note 233 at 1279 (citing a Delaware lawyer for the view "that, in a contest that is closer than 55 to 45%, there is no verifiable answer to the question 'who won?'").

[236] *Id.* at 1280.

[237] *See In re* Appraisal of Dell Inc., 143 A.3d 20, 58 (Del. Ch. 2016); *In re* Appraisal of Dell Inc., No. CV 9322-VCL, 2015 WL 4313206, *24 (Del. Ch. July 13, 2015).

[238] J. Travis Laster, Vice Chancellor, The Block Chain Plunger: Using Technology to Clean Up Proxy Plumbing and Take Back the Vote, Keynote Speech at the Council of Institutional Inv'rs 7 (Sept. 29, 2016), *available at* https://www.cii.org/files/09_29_16_laster_remarks.pdf.

[239] *Id.* at 14.

the DGCL such that companies can now rely on providers using blockchain-based systems for implementing voting.[240]

The *MFW* framework has changed the balance postulated by Kahan and Rock in the direction of greater involvement of shareholders through the voting system. It thus made Delaware corporations more vulnerable to insiders' opportunistic behavior through exploitation of the system's weaknesses. Blockchain technology could mitigate the problem to some extent, but it will have to be implemented in a way that addresses these issues such that true ownership will be more transparent.[241] This will not be enough, however. Blockchain cannot reveal clandestine beneficial ownership, as noted above.[242] While no system can be conspiracy-proof, bolder measures may be needed to minimize the temptation to conceal true shareholding interests.

A case in point is Section 793 of the U.K. Companies Act, 2006, which allows a public company to issue a notice requiring a person it knows, or has reasonable cause to believe, has an interest in its shares to disclose information about any other person with an interest in the shares.[243] Section 794 authorizes the court to freeze the

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[240] *See* DEL. CODE ANN. tit. 8, §§ 219, 224 (2017); *id.* at § 232 (2019); *see also* J. Travis Laster & Marcel T. Rosner, *Distributed Stock Ledgers and Delaware Law*, 73 BUS. LAW. 319, 327-30 (2018); *see generally* Wonnie Song, Note, *Bullish on Blockchain: Examining Delaware's Approach to Distributed Ledger Technology in Corporate Governance Law and Beyond*, 8 HARV. BUS. L. REV. 9, 19 (2018); Anne Lafarre & Christoph Van der Elst, *Blockchain Technology for Corporate Governance and Shareholder Activism* 19-21 (European Corp. Governance Inst., Working Paper No. 390, 2018), https://ssrn.com/abstract=3135209; Mark Fenwick & Erik P.M. Vermeulen, *Technology and Corporate Governance: Blockchain, Crypto, and Artificial Intelligence* 14 (European Corp. Governance Inst., Working Paper No. 424, 2018), https://ssrn.com/abstract=3263222.

[241] *See* David Yermack, *Corporate Governance and Blockchains*, 21 REV. FIN. 1, 8-9 (2017) ("Perhaps most importantly, blockchains could provide unprecedented transparency to allow investors to identify the ownership positions of debt and equity investors (including the firms' managers) and reduce the opportunity for rent-seeking or corrupt behavior by regulators, exchanges, and listed companies.").

[242] *Id*.

[243] Eclairs Grp. Ltd. and Glengary Overseas Ltd. v. JKX Oil & Gas plc [2015] UKSC 71, [9] (appeal taken from EWCA).

voting rights of shares in order to verify the identity of their beneficial owners.[244] In Israel, no such mechanism exists under the Companies Law, 1999; in tandem, the Law requires a majority of disinterested shareholders' approval for controller-related transactions in public companies.[245] The very situation discussed here arose in an Israeli company with shares trading on the New York Stock Exchange, which led Judge Grosskopf to note, with palpable frustration, that "[a] determined controlling shareholder will find ways to conceal his identity even if there is a duty to disclose the shareholder's formal identity. In order to combat this phenomenon, as with any scam phenomenon, other, more sophisticated and aggressive mechanisms are needed."[246] Time will tell if, or how, Delaware will address this challenge.

The steep increase in institutional holdings, especially during the past decade, gives rise to a related problem due to common ownership of major institutional investors.[247] The issue came to the forefront in the wake of empirical findings and subsequent legal analysis that pointed out potential antitrust ramifications of such common ownership.[248] Einer Elhauge thus argued that under section 7 of the Clayton Act, which prohibits acquisitions of assets that lessen competition, institutional investors would have to avoid exercising their voting rights in order to enjoy the

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[244] *Id.* at [10]-[11] (holding that the company's bylaws authorized the board of directors to issue such a restriction order).

[245] Companies Law, 5759-1999, §§ 270, 275 (1999) (Isr.).

[246] Opening Motion at para. 39, CA (CT) 366222-11-13 BlueMountain Capital Mgmt. LLC v. Taro Pharm. Indus. Ltd. (Feb. 23, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

[247] *See* Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 91-93 (2017) (portraying institutional ownership of the 20 largest U.S. corporations, excluding controlled corporations).

[248] *See* José Azar, Martin C. Schmalz & Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. FIN. 1513, 1546 (2018); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1273-78 (2016); José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition*, (Working Paper, 2016), https://ssrn.com/abstract=2710252.

exemption granted to passive investors.[249] The lively antitrust debate that ensued is beside the present scope.[250] However, independently of that issue, this situation could entail significant corporate governance implications.[251]

One can readily observe that, at least in principle, such common ownership could cast a shadow over the status of institutional investors as disinterested for purposes of *MFW/Corwin* shareholder votes. According to Rock and Kahan, for example, the holdings of the three largest index funds (BlackRock, Vanguard, and State Street) make them the de facto "deciders" of corporate law controversies, as they could cast the decisive votes in many contested director elections and merger votes.[252] Lucian Bebchuk and Scott Hirst argue in a similar vein that "institutional investors now . . . have a dominant impact on vote outcomes at those companies" and that within a decade, these "three investment managers would largely dominate shareholder voting in practically all significant U.S. companies that do not have a controlling shareholder."[253] A concurrent holding in a competing or otherwise business-related firm *might* affect their vote in such cases.[254] Rock and Kahan

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[249] Elhauge, *supra* note 411, at 1302-04.

[250] *See id.*; Fiona Scott Morton & Herbert Hovenkamp, *Horizontal Shareholding and Antitrust Policy*, 127 YALE L.J. 2026, 2030-32 (2018); Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anticompetitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669, 673-74 (2017); Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 222-24 (2018); *see generally* Martin C. Schmalz, *Common-Ownership Concentration and Corporate Conduct*, 10 ANN. REV. FIN. ECON. 413 (2018) (offering a survey).

[251] *See* Schmalz, *supra* note 414, at 435-38.

[252] Kahan & Rock, *supra* note 233, at 4, 43.

[253] Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B. U. L. REV. 721, 724, 726 (2019) ; *see* also Caleb Griffin, *We Three Kings: Disintermediating Voting at the Index Fund Giants*, MARYLAND L. REV. (forthcoming 2020) (arguing that the three large index funds have assumed a new and pivotal role as the arbiters of corporate law controversies); *see* generally Bebchuk & Hirst, *supra* note 229.

[254] *See* C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 6-7 (European Corp. Governance Inst., Working Paper No. 423, 2018), https://ssrn.com/abstract=3210373 (arguing that some anti-competitive mechanisms are, in fact, not tested through conventional

nonetheless argue that these institutional investors should be allowed to vote—basically, because there are no "pure" shareholders.[255] They further point out that Delaware takes a post hoc approach to validating shareholders' disinterestedness.[256] In contrast, Sean Griffith and Dorothy Lund argue that such disinterestedness should be considered before counting the votes, as part of their general critique of Delaware's "retreat from heightened judicial scrutiny."[257] Griffith goes even further, to argue that mutual funds should abstain from voting altogether in votes over decisions that involve managerial conflicts.[258]

By granting a breach-of-loyalty cleansing effect to qualified shareholders' vote, Delaware does not *ipso facto* turn shareholders into fiduciaries.[259] Shareholders are shareholders, and as Rock and Kahan rightly note, they are never "pure," nor do they have to be.[260] This simple insight undermines the logic of the proposals by Griffith and Lund and by Griffith separately. Emasculating institutional investors cannot help in holding corporate insiders in check. A more moderate approach should be sought, that would nonetheless be consistent with the informed consent principle. In tandem, to the extent that certain powerful shareholders become "deciders", they could consequently assume a status of controlling shareholders, even if only on an *ad hoc* basis. That is, they could be considered as *ad hoc* fiduciaries. As is the case with

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methodology, some mechanisms are likely either infeasible or ineffective, and several mechanisms are not in the interest of institutional investors).

[255] Kahan & Rock, *supra* note 233, at 35.

[256] *Id.* at 52.

[257] Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151, 1158-59 (2019).

[258] Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEXAS L. REV. (forthcoming 2020), text to notes 176-277.

[259] *Id*.

[260] Kahan & Rock, *supra* note 233, at 35, 52.

every fiduciary, full disclosure is key for ensuring proper performance. At the very least, they must provide full disclosure of relevant material interests, especially due to other holdings in their portfolios.[261] Such holdings may or may not disable them from voting—depending on whether the holdings create a material conflict, not just a fanciful one.[262] But disclosure must be made, and preferably in advance, to avoid claims less-than-candid behavior by "decider" institutions. For that to take place, a reliable system for recoding beneficial ownership should be in place, in line with the above analysis.

C. Normative Considerations

To conclude this Part, which deals with critical aspects of the legal evolution that Delaware's entire fairness doctrine is undergoing, this section points to some normative considerations that may, or could be guiding this process. The legal literature post-*MFW* has been debating the partial shift from substantive judicial review towards shareholder approval, with several scholars lamenting or at least concerned by it.[263] As *MFW* is the pivotal event so far in the trend discussed here, it is noteworthy that its ruling is motivated primarily, if not solely, by an economic

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[261] Eclairs Grp. Ltd. and Glengary Overseas Ltd. v. JKX Oil & Gas plc [2015] UKSC 71, [9] (appeal taken from EWCA).

[262] *See* Bolkiah v. KPMG [1998] UKHL 52 (Lord Millett, dictum) ("It goes without saying that the risk [of breach by a fiduciary] must be a real one, and not merely fanciful or theoretical. But it need not be substantial."); *see also* Novoship (UK) Ltd. v. Mikhaylyuk [2012] EWHC 3586 (Comm), 2012 WL 6151801, (Christopher Clarke, J.) ("The test is whether the payment (or other benefit) puts the fiduciary in a real (as opposed to a fanciful) position of potential conflict between interest and duty.").

[263] *See, e.g.*, Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 210 (2019) ("Reduced standards of review will weaken direct judicial monitoring of target boards. Moreover, with fewer M&A fiduciary duty cases to decide, the Delaware judiciary . . . will enjoy less indirect influence over the sale process."); Cox & Thomas, *supra* note 240, at 349; *See also* Matthew Schoenfeld, *From Corwin to Dell: The Cost of Delaware Turning a Blind Eye* 1-2 (2018), https://ssrn.com/abstract=3122511 (providing examples for cases of lower deal premia and higher agency costs, arguably due to dull shareholder defenses).

analysis of the incentives faced by corporate fiduciaries as they deliberate which form of approval to choose.[264] Then-Chancellor Strine memorably explained:

> Uncertainty about the answer to a question that had not been put to our Supreme Court thus left controllers with an incentive system all of us who were adolescents (or are now parents or grandparents of adolescents) can understand. Assume you have a teenager with math *and* English assignments due Monday morning. If you tell the teenager that she can go to the movies Saturday night if she completes her math *or* English homework Saturday morning, she is unlikely to do both assignments Saturday morning. She is likely to do only that which is necessary to get to go to the movies—*i.e.*, complete one of the assignments—leaving her parents and siblings to endure her stressful last-minute scramble to finish the other Sunday night.[265]

This back-of-the-envelope model, convincing as it is, does not capture the role of the court in the more realistic corporate fiduciary setting. The key factor here is courts' susceptibility to information asymmetry. Scholars differ, however, with regard to this issue, as they hold different views about courts' ability to overcome the informational superiority that corporate fiduciaries enjoy and the costs that the efforts to do that entail. While some scholars believe that courts—Delaware's in particular—are fully capable of doing that, others (with the present Author emphatically among them) hold that like other fiduciaries, corporate fiduciaries oftentimes are "out of the reach of investigation,"[266] as Lord Eldon put it long ago.[267] Resolving this debate is

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[264] *See In re* MFW S'holders Litig., 67 A.3d 496, 502-03 (Del. Ch. 2013) ("[T]he adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection") (citing Gilson & Gordon, *supra* note 240, at 839-40 and Subramanian, *supra* note 240, at 60-61) *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); *see also id.* at 527-28 (referring to controlling stockholders' incentives).

[265] *Id.* at 500-01.

[266] *Ex parte* James (1803) 32 E.R. 385.

[267] *See* sources cited *supra* notes 258-262. As we saw above, Delaware's chancellors and judges candidly doubt the value of professional valuations presented to them. They do and will engage in this exercise to the extent that the law requires, but an informed, uncoerced decision by shareholders relieves them from deciding for others who are *sui juris*.

beside the present focus.[268] What is important is to note that the move toward narrowing, and perhaps eventually retiring, substantive fairness review is consistent with the latter view. As such, it is highly desirable.

An alternative framework for a normative assessment of the legal trend discussed here turns to social-political values. Hamermesh and Strine thus complement *MFW*'s reliance on an economic analysis of incentives with an appeal to republican values of freedom:

> Two core principles animate Delaware's regulation of the fiduciaries who govern corporations … a variety of accountability tools that draw on our traditions of republican democracy and equity ensure that the stockholder electorate is protected from unfair exploitation…. [T]hese principles hew to our nation's republican origins and commitment to freedom in another way: when possible, regulation of fiduciary behavior that might involve a conflict of interest should involve not after-the-fact governmental review, but before-the-fact oversight by the fiduciaries of the corporation who are impartial and, most importantly, by the disinterested stockholders themselves.[269]

Hamermesh and Strine's view thus chimes with Evan Criddle's recent contributions that turn to republican political theory to explain central features of fiduciary law.[270] These approaches share the notion that fiduciary governance is premised on protecting the beneficiary in fiduciary relations - either shareholders or

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[268] The issues involved are endless. Among other things, one could concede that fully-informed consent is appropriate for validating straightforward self-dealing transactions but still be concerned about situations, in which corporate fiduciaries tie a self-interested side-deal with a major beneficial transaction. In such cases, runs the argument, only substantive review by the court can ensure the fairness of the side-deal. Consider, for example, the facts in *In re* Martha Stewart Living Omnimedia, Inc. S'holders Litig., No. CV 11202-VCS, 2017 WL 3568089, at *12 (Del. Ch. Aug. 18, 2017), *reprinted in* 42 DEL. J. CORP. L. 221 (2017). Note, however, that the entire fairness doctrine was not created to ensure substantive fairness; rather, it was originally a result of doctrinal confusion. *See generally* Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (providing a general analysis of such situations). I am grateful to Mark Lebovitch for this point.

[269] Hamermesh & Strine, *supra* note 1, at 871; *id.* at 874 ("It is not coincidental that corporate law borrows tools that our nation used to create a republican democracy.") (footnote omitted).

[270] *See, e.g.*, Evan J. Criddle, *supra* note 54, at 1033-34; Evan J. Criddle, *Fiduciary Law's Mixed Messages*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 15, 22-23 (D. Gordon Smith & Andrew S. Gold eds., 2018)

the public - through republican non-domination, namely, by imposing an obligation to exercise discretionary power non-arbitrarily.[271]

Whether a republican theory conception of non-domination underlies fiduciary law in general and Delaware's corporate law in particular may be debatable, however; even doubted. Fiduciary loyalty traces its origins to a distant past and an equally distant political environment in feudal England during the late Middle Ages, especially during the "long thirteenth century" (from the late 1200s until the late 1340s' Black Death period).[272] The first agents to become "proto-fiduciaries" by dint of an obligation to account that the common law imposed on them assumed their position in a feudal ceremony—a feature that was later abandoned but is hard to reconcile with modern conceptions of freedom.[273]

The key feature that traditional fiduciary law and republican theory do share is the supremacy of the beneficiary's consent. Thus, a fiduciary *may* engage in a loyalty-breaching activity, provided that her beneficiary granted his fully-informed consent to it. In this sense the traditional doctrine indeed protects the beneficiary from arbitrary exercise of power. And this is precisely where substantive fairness review strays both from traditional doctrine of "no further inquiry" about the fairness of the breach and from the republican conception of personal freedom. When a court reviews a conflicted action for its substantive fairness, it deprives the beneficiary from the freedom to decide for himself. In a way, the court gets co-opted by the ostensibly-

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[271] *See generally* PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 293 (Cambridge Univ. Press 2012).

[272] *See* Joshua S. Getzler, *Fiduciary Principles in English Common Law, in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 471 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019); Licht, *supra* note 158, at 168-69.

[273] *See* Getzler, *supra* note 453, at 475.

breaching fiduciary in dominating the beneficiary. The republican theory analytical framework thus helps in exposing the deep flaw in substantive fairness review and in motivating its correction by insisting on valid-consent-based ratification mechanisms.

IV. CONCLUSION

In a recent article on the influence of American Legal Realism on corporate law judging, Ed Rock contrasts Delaware with the United Kingdom, where judicial style reflects traditional doctrinalism.[274] According to Rock, "it seems likely that the disputes would ultimately be resolved in more or less the same way in each system. This is unsurprising in a field such as corporate law, where market and institutional pressures demand practical solutions to practical problems."[275] Referring specifically to *MFW* and to then-Chancellor Strine's method, Rock argues that "with the Realists, he spent far more time considering the 'best' rule on policy grounds than in deep analysis of the principles immanent in the cases and how they might be extended to cover the unprovided-for situation."[276] The *MFW* framework was not made mandatory, Rock avers, "[b]ecause to make [it] mandatory, most would agree, would require a change in the statute, while shifting burdens of proof and standards of review, all of which were invented by the courts, is well within the proper scope of judicial 'lawmaking.'"[277]

The substantive fairness review prong of Delaware's entire fairness doctrine is perhaps the single most prominent example for a core issue on which Delaware's

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[274] *See* Edward B. Rock, *Corporate Law Doctrine and the Legacy of American Legal Realism*, 163 U. PA. L. REV. 2019, 2029, 2053 (2015).

[275] *Id*. at 2048.

[276] *Id.* at 2035.

[277] *Id.* at 2035-36.

corporate law and U.K. fiduciary (including company) law diverge. While seemingly sensible when examined in isolation, substantive fairness review is inconsistent with fundamental tenets of fiduciary law that reject validation of breach of loyalty in light of its substantive appropriateness and insist on the beneficiary's fully-informed consent to the breach. Likely the vestige of a nineteenth century legal accident, this contradiction and its deplorable consequences for companies and shareholders have been pointed out by Marsh, with whom numerous scholars have agreed. Delaware courts have worked for decades to contain the problem by elaborating the entire fairness doctrine. Recent empirical evidence indicates that they have done a good job at that.

This paper argues that for several years now, Delaware courts are set on a track towards retiring entire fairness review. This reform process reached a peak in *MFW* but it began earlier and is now being expanded (e.g., in *Corwin*) and elaborated (e.g., in *Flood*); in extra-judicial writing (for now), this reform is given principled justifications beyond economic efficiency. The next step would be abolishing substantive fairness review by making the *MFW/Corwin* framework mandatory. I believe that a legislative intervention might not be necessary for accomplishing this step. In light of the enthusiastic reception of this framework by market participants, this stage could arrive soon. It should.

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