HOW "BAD LAW, BAD ECONOMICS AND BAD POLICY" POSITIVELY SHAPED CORPORATE BEHAVIOR

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I. INTRODUCTION

The Supreme Court of the State of Delaware is widely considered one of the most prominent authorities on corporate law in the country. Accordingly, the decisions of this court play an important role in shaping the development of corporate law and best business practices in corporate America. The Delaware Supreme Court is also well-known for its unanimity in deciding issues of corporate law. Not surprising, the most controversial of its decisions are often the few non-unanimous ones. In 2003, such a decision was issued in the case of *Omnicare, Inc. v. NCS Healthcare, Inc.*[1] Addressing fiduciary duty and corporate governance issues in the mergers and acquisitions context, the *Omnicare* decision has been described as the "Court's most important decision in a generation"[2] and "among the most controversial corporate cases" decided by the court in the past twenty years.[3] Delaware Supreme Court Chief Justice Myron Steele ranked *Omnicare* among the four "most memorable or most notable" decisions written during his tenure.[4]

The specific issue confronting the court in *Omnicare* was the use of deal protection devices in the proposed merger of NCS Healthcare, Inc. and Genesis Health Ventures, Inc. Prior to *Omnicare*, the Delaware courts had addressed the validity of, and appropriate standard of judicial review for, deal protection devices and other defensive measures in either the hostile takeover context[5] or the change-in-control context.[6] The NCS-Genesis merger, however, presented a different and unusual situation in that the use of deal protection devices occurred in a friendly, non-change-in-control transaction. The Delaware Court of Chancery rejected claims that approval of the merger's deal protection devices violated the NCS board's fiduciary duties, but a sharply divided Delaware Supreme Court reversed. Applying enhanced judicial scrutiny

1. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

2. Wayne O. Hanewicz, *Director Primacy,* Omnicare*, and the Function of Corporate Law*, 71 TENN. L. REV. 511, 512 (2004).

3. Robin Sidel, *Merger Business Faces New Order with Court Ruling on "Lockups,"* WALL ST. J., Apr. 7, 2003 at C4.

4. Francis Pileggi, *Interview with Delaware Supreme Court Chief Justice Myron Steele*, DELAWARE CORPORATE AND COMMERCIAL LITIGATION BLOG (Dec. 28, 2009), http://www.delawarelitigation.com/2009/12/articles/commentary/interview-with-delaware-supreme-court-chief-justice-myron-steele/.

5. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 293 A.2d 946 (Del. 1985).

6. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).

to the challenged merger provisions, the court found that the deal protection devices were both preclusive and coercive. Thus, the provisions were invalid and unenforceable. Further, the court held that this particular combination of deal protection devices rendered the merger an impermissible *fait accompli* and for that reason as well the merger agreement was invalid and unenforceable. In approving a completely locked-up transaction that lacked a fiduciary out, the court held, the board had breached its fiduciary duties by restricting its ability to continually act in the stockholders' best interests. Two of the court's justices strongly disagreed with these holdings, each writing a dissenting opinion that criticized the majority for misinterpreting Delaware case law to support its conclusions and setting bad precedent. The dissenting justices voiced their hope that going forward the decision would be applied in a very limited manner.[7]

Criticism of the *Omnicare* decision has not been limited to the dissenting justices. The majority's opinion has been labeled by scholars, practitioners, and other members of the judiciary as a troubling decision – contrary to both precedent and common sense.[8] In fact, almost all of the scholarship discussing *Omnicare* has described the decision in some manner as one of "bad law, bad economics, and bad policy."[9] Predicting that *Omnicare* would "[f]undamentally [a]lter the [m]erger [i]ndustry,"[10] prompted some to even call for its reversal.[11]

Despite the criticism and opposition to the majority's opinion, this controversial decision has played an important role over the past decade in shaping the development of mergers and acquisitions, in particular

7. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 946 (Del. 2003) (Veasey, C.J., dissenting).

8. *See* E. Norman Veasey & 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, 1458 (2005) ("In 2003, the Supreme Court faced the deal protection question in an unusual and highly controversial case: *Omnicare v. NCS Healthcare*."); Sean J. Griffith, *The Costs and Benefits of Precommitment: An Appraisal of* Omnicare v. NCS Healthcare, 29 J. CORP. L. 569, 623 (2004); Hanewicz, *supra* note 2, at 512 ("*Omnicare* has been called the Delaware Supreme Court's most important decision in a generation, and it is as controversial as it is confusing . . . . ") (internal citations omitted); Sidel, *supra* note 3, at C4; Pileggi, *supra* note 4; Steven Davidoff, *The Long Slow Death of Omnicare*, DEALBOOK, N.Y. TIMES, Aug. 28, 2008, http://dealbook.nytimes.com/2008/08/28/the-long-slow-death-of-omnicare [hereinafter Davidoff, *Long Slow Death*] ("The Delaware Supreme Court's *Omnicare* ruling was arguably the most controversial mergers and acquisitions decision of this decade.").

9. Griffith, *supra* note 8, at 623.

10. Brian C. Smith, Comment, *Changing the Deal: How* Omnicare v. NCS Healthcare *Threatens to Fundamentally Alter the Merger Industry*, 73 MISS. L.J. 983, 983 (2004).

11. *See*, *e.g.*, Thanos Panagopoulos, *Thinking Inside the Box: Analyzing Judicial Scrutiny of Deal Protection Devices in Delaware*, 3 BERKELEY BUS. L.J. 437, 474 (2006).

director decision-making. In many ways *Omnicare* is not unlike other controversial decisions that have come out of the Delaware Supreme Court, most prominently, *Smith v. Van Gorkom*.[12] In each of these famously controversial decisions, the Delaware court used its decision to signal to corporate America about how boards of directors should function. For example, at the time that the court's decision in *Van Gorkom* was issued, the reaction from the corporate law community was one of strong opposition.[13] Indeed, shortly after *Van Gorkom*, the Delaware legislature enacted Section 102(b)(7) of the Delaware General Corporation Law to specifically address the outcome in that case.[14] Today, however, *Van Gorkom* is viewed very differently. As summarized by Professor Therese Maynard: "To show how time heals all wounds, many practicing M&A lawyers today recommend that board members read the facts of the [*Van Gorkom*] decision *carefully* before embarking on any M&A transaction . . . . because it provides a modern case study of how *not* to execute an M&A transaction."[15] Notwithstanding the criticism of the court's decision, *Van Gorkom* contributed to dramatically changing corporate America's business practices and the decision-making process expected of boards of directors. This article concludes that the same can be said about *Omnicare*.

In the years following *Omnicare* many questioned "whether *Omnicare* [is] a normatively 'good' rule, but also whether the current understanding of the rule and rationale in *Omnicare* will continue to be 'good' law."[16] Now, with the benefit of a decade of hindsight, the decision's impact, both practically and normatively, can be seen. With that in mind, the intent of this article is to provide a comprehensive discussion of *Omnicare*'s place in corporate law. While almost all prior

12. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

13. *See, e.g.*, Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985) (criticizing the court's emphasis on board process and referring to the case as "one of the worst decisions in the history"); Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 BUS. LAW. 1, 1 (1985) ("The Delaware Supreme Court in *Van Gorkom* exploded a bomb. [Moreover, the] corporate bar generally views the decision as atrocious.").

14. *See* THERESE H. MAYNARD, MERGERS AND ACQUISITIONS: CASES, MATERIALS, AND PROBLEMS 486 (2d ed. 2009) (describing the legislative history of Section 102(b)(7) and its adoption in response to *Van Gorkom*).

15. *Id*. at 484 (emphasis in original).

16. Daniel C. Davis, Omnicare v. NCS Healthcare*: A Critical Appraisal*, 4 BERKELEY BUS. L.J. 177, 180 (2007).

scholarship surrounding *Omnicare* has been of a critical nature,[17] this article takes a different perspective of the decision, discussing the broader normative contributions *Omnicare* has made to mergers and acquisitions. In many ways *Omnicare* changed the expectations of today's boards of directors, contributing to improving corporate governance and maximizing stockholder value.[18] While this article concludes that *Omnicare* positively contributed to reshaping merger and acquisition conduct, it also asks whether, in the end, these changes are efficient. In particular, do the gains to stockholders resulting from *Omnicare*'s changes to director decision-making outweigh the costs to stockholders that result from its requirement of increased judicial scrutiny and ban on precommitment strategies?

This article begins by briefly discussing the factual background of the *Omnicare* decision and the majority's opinion. Second, this article analyzes the criticism that followed, which generally falls into two broad categories: the doctrinal shortcomings in the majority's reasoning and the negative practical implications of banning precommitment strategies. Third, this article briefly explores whether the concerns about *Omnicare*'s impact on merger and acquisition activity came to fruition in the ten years since the decision was issued, concluding that many did not. This article also reviews post-*Omnicare* case law noting that subsequent decisions of the Delaware Court of Chancery addressing *Omnicare*-based challenges have sought to avoid its application. While *Omnicare* has not been overruled and remains good law, these decisions indicate a willingness of Delaware's lower court to limit its reach. As a result, the number of actual scenarios where the decision may still have a direct impact is small.

Nevertheless, it would be unwise to overlook the positive aspects of

17. *See infra* Part III. *But see* J. Travis Laster, Omnicare*'s Silver Lining*, 38 J. CORP. L. 795, 796 (2013) (asserting that "*Omnicare* does have a silver lining"); Brian JM Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. CORP. L. 865, 866 (2007) (arguing in support of *Omnicare*'s prohibition on "bulletproof" agreements in non-*Revlon* transactions); Mark Lebovitch & Peter B. Morrison, *Calling a Duck a Duck: Determining the Validity of Deal Protection Provisions in Merger of Equals Transactions*, 2001 COLUM. BUS. L. REV. 1, 8-20 (2001) (asserting that *Unocal* scrutiny is the appropriate standard of review for deal protection devices in mergers of equals).

18. This discussion, of course, assumes that one accepts stockholder wealth maximization as the goal of corporate law. *See* Leo Strine, Jr., Essay, *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 155 (2012) ("I simply indicate that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders."); Hanewicz, *supra* note 2, at 511 (assuming that the proper goal of corporate law is maximization of wealth for stockholders and noting the debate on this point).

Omnicare. Because the vast majority of scholarship addressing this controversial decision has been of a critical nature, little attention has been given to *Omnicare*'s normative value. Thus, Part V addresses some of the broader normative implications of *Omnicare* with a particular focus on the role the decision plays in improving corporate governance and increasing stockholder value. In re-evaluating the decision it becomes clear that the *Omnicare* majority sought to improve corporate decision-making in one of, if not the, most important events in the life of a corporation – the merger. To that end, the decision added a renewed and heightened focus on deal protection devices and the role of the board of directors in properly discharging its fiduciary duties in the context of negotiating, evaluating, and ultimately accepting, a merger proposal. In the style characteristic of Delaware fiduciary duty case law, *Omnicare* is a normatively charged decision, providing guidance on the decisional process required of corporate directors. In particular the majority's decision shapes the definition and description of the roles that directors are expected to fill in negotiating and approving mergers, with a focus on deal protection devices. Finally, Part VI of this article discusses whether, despite their positive impact, *Omnicare*'s changes to corporate governance are efficient ones.

II. OMNICARE, INC. V. NCS HEALTHCARE, INC.

The late 1970s and early 1980s marked the beginning of the hostile takeover era in corporate America. Commensurate with the increase in merger and acquisition activity was an increase in the use of deal protection devices.[19] The traditional scheme of fiduciary duty standards that had been applied to friendly merger transactions became unworkable in the context of hostile acquisitions. As hostile takeovers began to dominate the landscape of deal-making, corporate jurisprudence expanded to address the use of defensive tactics and deal protection devices.[20] Beginning with *Unocal Corp. v. Mesa Petroleum Co.*[21] in the mid-1980s, a string of decisions from the Delaware courts began to limit the use of deal protection devices in the merger context by applying heightened judicial scrutiny.[22] In 2003, the Delaware Supreme Court was squarely faced with the issue of the validity of deal protection

19. *See also* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory & Evidence*, 53 STAN. L. REV. 307, 310 (2000).

20. *See infra* note 170 and accompanying text.

21. Indus. Nat. Bank of R.I. v. Bennett 293 A.2d 946 (Del. 1985).

22. *See* Panagopoulos, *supra* note 11, at 441; Veasey & Di Guglielmo, *supra* note 8, at 1454.

devices and the appropriate standard of review for such devices in the friendly merger context.

A. The Background Facts[23]

The *Omnicare* decision arose out of Genesis Health Ventures, Inc.'s ("Genesis") and Omnicare, Inc.'s ("Omnicare") competing efforts to acquire NCS Healthcare, Inc. ("NCS"). In late 1999, NCS was one of the leading independent providers of pharmacy services to long-term care institutions. By 2001, however, changes in the healthcare industry had resulted in NCS finding itself in financial trouble[24] and exploring strategic alternatives. NCS initially approached Omnicare to discuss a possible transaction, but because all of Omnicare's proposals involved acquiring NCS for a purchase price substantially lower than the face amount of NCS's debt obligations they were rejected by the NCS board of directors.[25]

During this time Genesis also became interested, submitting a business combination proposal to NCS.[26] Based on previous experience with Omnicare, Genesis insisted that any potential transaction with NCS be completely locked up to preclude Omnicare from submitting a last-minute bid.[27] Following further negotiations with Genesis and a last-minute acquisition proposal by Omnicare that was rejected by the NCS board, Genesis and NCS reached agreement on a merger of the two corporations.[28] Both the NCS special committee and the full board of directors approved the Genesis merger with the deal protection devices that provided Genesis with deal certainty, believing that they were necessary to secure the best transaction available.[29]

Following the announcement of the NCS-Genesis merger,

23. While the facts surrounding *Omnicare* have been described as "unique" (Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003) (Veasey, C.J., dissenting)), there was little disagreement in either the majority opinion or the dissents regarding the factual findings of the Court of Chancery. *Id*. at 920 (majority opinion).

24. *Id*. at 920. The changes adversely affected NCS's ability to collect accounts receivable from the government and third-party providers, which, in turn, led to a drop in the market value of the corporation's stock and its financial deterioration. *Id.*

25. *Id*. at 921. All of Omnicare's offers at this time involved a pre-packaged bankruptcy sale which would have resulted in zero recovery to NCS's stockholders. *Id*. at 921.

26. *Id*. at 922. Unlike the Omnicare offers, Genesis' proposal was a stock-for-stock deal that would not involve bankruptcy. *Id.*

27. Genesis and Omnicare had a history; they previously had been engaged in a bidding war for a different entity, which Genesis ultimately lost. As a result, Genesis' representatives made clear to NCS that it would not be used as a stalking horse. *Id*. at 921-22.

28. *Id*. at 924-25.

29. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 925 (Del. 2003).

Omnicare submitted a superior proposal to NCS.[30] As a result, the NCS board withdrew its recommendation to the stockholders that they vote in favor of the Genesis merger.[31] Despite this change in recommendation, the NCS board was nevertheless obligated under the terms of the merger's deal protection devices to submit the Genesis merger to the stockholders for adoption. Omnicare and NCS stockholders each filed suit alleging, in pertinent part, that the NCS directors had breached their fiduciary duties in approving the Genesis merger agreement, specifically the deal protection devices.[32]

The focus of the plaintiffs' allegations (and the courts' decisions) was three principal aspects of the NCS-Genesis merger. First, NCS's two largest stockholders, Jon H. Outcalt and Kevin E. Shaw, had entered into voting agreements with Genesis.[33] Under the terms of the voting agreements Outcalt and Shaw agreed to vote their shares of NCS stock, constituting more than sixty-five percent of the voting power, in favor of the Genesis merger.[34] Second, the merger agreement contained a "force-the-vote" provision. This provision required NCS's board to submit the merger agreement to a vote of the stockholders regardless of whether the board continued to recommend adoption of the merger.[35] Third, the merger agreement did not provide NCS with a fiduciary out to allow its board to terminate the transaction in the event of a superior offer without breaching the agreement.[36] The combination of these three elements meant that even though the NCS board changed its recommendation following Omnicare's higher bid, the Genesis merger would still be submitted to the NCS stockholders for adoption, which adoption was certain because over a majority of the voting power was already committed to approving the transaction under the terms of the voting agreements. As a result, NCS was locked into the merger with Genesis.

30. *Id*. at 926.

31. *Id*.

32. *Id*. at 927; Omnicare, Inc. v. NCS Healthcare, Inc., 809 A.2d 1163, 1165 (Del. Ch. 2002); *In re* NCS Healthcare, Inc., S'holders Litig., 825 A.2d 240 (Del. Ch. 2002).

33. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 926 (Del. 2003). Outcalt and Shaw served on the NCS board, however, they both entered into the voting agreements in their capacity as NCS stockholders and not in their capacity as directors or officers. *Id.*

34. In the agreements, Outcalt and Shaw also granted Genesis an irrevocable proxy to vote their shares. *Id*.

35. *Id*. at 925. Force-the-vote provisions are specifically permitted by Section 146 of the Delaware General Corporation Law; *see* 8 Del. C. § 146.

36. *Omnicare*, 818 A.2d at 925.

B. The Delaware Supreme Court's Majority Decision

In a rare 3-2 decision, the Delaware Supreme Court, on a consolidated appeal of the two lawsuits,[37] reversed the lower court, holding that the NCS board had breached its fiduciary duties in approving the deal protection devices in the Genesis merger.[38] In its analysis, the majority first held that the NCS directors' approval of the deal protection devices was subject to enhanced scrutiny, as opposed to the deferential business judgment rule.[39] Traditionally, Delaware courts applied *Unocal*'s enhanced scrutiny when a target corporation's board takes defensive measures in response to a pending or potential hostile takeover.[40] The *Omnicare* majority found that "[a] board's decision to protect its decision to enter a merger agreement with defensive devices against uninvited competing transactions that may emerge is analogous to a board's decision to protect against dangers to corporate policy and effectiveness when it adopts defensive measures in a hostile takeover."[41] In the majority's view, the "omnipresent specter" of a conflict of interest that arises between the board of directors and stockholders identified in *Unocal* and its progeny is also present when a board adopts defensive devices to protect a merger agreement, thus enhanced scrutiny is the

37. The Delaware Court of Chancery was presented with two separate suits challenging the NCS-Genesis merger. First, Omnicare filed a complaint (i) seeking to invalidate the NCS-Genesis merger agreement on fiduciary duty grounds, and (ii) seeking a declaratory action that the voting agreements entered into by Outcalt and Shaw caused their shares of stock to be automatically converted from high-vote Class B shares to single-vote Class A shares under the NCS certificate of incorporation. *Omnicare*, 809 A.2d at 1165. The Court of Chancery dismissed the breach of fiduciary duty claims for lacked of standing. *Id*. at 1168-73, and later granted summary judgment against Omnicare with respect to the declaratory judgment claim. *Omnicare,* 825 A.2d at, 270-75.

Second, a class action suit was brought by NCS stockholders challenging the merger on fiduciary duty grounds and requesting that the court enjoin the transaction. *In re* NCS Healthcare, 825 A.2d at 243. The court denied the plaintiffs' application for a preliminary injunction, finding that the NCS directors had acted in accordance with their fiduciary duties in seeking the best transaction that was reasonably available to them. *Id*. at 261. The court also found that the plaintiffs had failed to show that the provisions were improperly preclusive or coercive under Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985). *Id*. at 261-62.

38. *Omnicare*, 818 A.2d 914 (Del. 2003). The court remanded the proceedings to the Chancery Court for entry of a preliminary injunction. Omnicare, Inc. v. NCS Healthcare, Inc., 822 A.2d 397 (Del. 2002) (Order).

39. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003).

40. *See Unocal*, 493 A.2d at 954-55. Courts apply enhanced scrutiny to board decision-making in these situations due to the target directors' inherent conflict between their self-interest in maintaining their positions in the corporation, and thus adopting defensive provisions to protect themselves from the hostile bidder, and acting in the best interests of the corporation and its stockholders.

41. *Omnicare*, 818 A.2d at 932.

proper standard of review.[42]

Based on this holding, the majority applied the two-stage analysis set forth in *Unocal* (as modified in *Unitrin, Inc. v. American General Corporation*)[43] to the combination of deal protection elements in the Genesis merger.[44] First, the majority looked at whether the NCS board had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed."[45] The majority noted that the threat identified by the NCS board – the perceived threat of losing the Genesis transaction with no alternative deal – was a sufficient threat under *Unocal*.[46]

Turning to the second stage of *Unocal* review, the majority addressed whether the deal protection devices were "reasonable in relation to the threat posed."[47] This analysis required the court to determine (i) whether the response to the threat was "coercive" or "preclusive"[48] and (ii) whether the response was within a "range of reasonable responses" (or proportionate) to that threat.[49] Applying this analysis, the majority found the deal protection elements of the Genesis merger to be both coercive and preclusive. The combination of the voting agreements, force-the-vote provision and lack of a fiduciary out was coercive because it predetermined approval of the merger without regard to its merits.[50] And while the minority NCS stockholders were not forced to vote for the Genesis merger, they were required to accept it because the transaction was *a fait accompli*.[51] The deal structure was also found to be preclusive because it "made it 'mathematically impossible' and 'realistically unattainable'" for any alternative superior transaction to succeed.[52] Thus, the majority held, the deal protection

42. *Id*. at 930.

43. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

44. On appeal, the majority rejected Genesis' argument that the voting agreements should not be construed as deal protection devices implemented by the NCS board. *Omnicare*, 818 A.2d at 934. The court pointed out that in the case of the Genesis merger, the voting agreements were "inextricably intertwined" with the rest of the defensive provisions of the merger agreement. *Id*.

45. *Id*. at 935 (quoting *Unocal Corp.*, 493 A.2d at 955).

46. *Id*. at 941.

47. *Id*. (citing *Unocal Corp.*, 493 A.2d at 955).

48. "A response is 'coercive' if it is aimed at forcing upon stockholders a management-sponsored alternative to a hostile offer." Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 935 (Del. 2003). "A response is 'preclusive' if it deprives stockholders of the right to receive all tender offers or precludes a bidder for seeking control by fundamentally restricting proxy contests or otherwise." *Id*.

49. *Id.* at 935.

50. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 935-36 (Del. 2003).

51. *Id*. at 936.

52. *Id*.

devices in the Genesis merger agreement were invalid under *Unocal*.[53]

The majority alternatively held the Genesis merger agreement invalid and unenforceable because it failed to contain a fiduciary out provision. The NCS board was required to negotiate for a fiduciary out in the merger agreement because, in its absence, the combination of the voting agreements and force-the-vote provision resulted in an invalid complete lock-up of the transaction.[54] As the majority explained, "directors of a Delaware corporation have a continuing obligation to discharge their fiduciary responsibilities, as future circumstances develop, after a merger agreement is announced."[55] The NCS board lacked the authority to accede to Genesis' demand that the merger be absolutely locked-up since it would restrict this responsibility to discharge its duties on a continuing basis.[56] Accordingly, the combination of deal protection devices impermissibly locked-up the merger in violation of the NCS directors' fiduciary duties and was invalid.[57]

III. *OMNICARE*'S CRITICISM AND COMMENTARY

Not unlike other influential corporate law decisions, the immediate reaction to the Delaware Supreme Court's opinion in *Omnicare* was one of immediate and widespread criticism. In discussing the role that the *Omnicare* decision has had in shaping mergers and acquisitions, it is necessary to also analyze and evaluate the criticism and commentary surrounding the majority's opinion.

Some of the harshest criticism of *Omnicare* came from the two dissenting justices in the case. Chief Justice Veasey wrote a dissenting opinion that was joined by then Justice, and subsequently Chief Justice, Steele, who also filed a separate dissent. Noting that *Omnicare* was unique in that it was "a rare 3-2 split decision of the Supreme Court,"[58] the dissenting justices expressed their "regret[] that the Court is split in this important case," and wrote that "[o]ne hopes that the Majority rule announced here – though clearly erroneous in our view – will be

53. *Id*. at 935-36. The majority also found (without analysis) that because the deal protection devices were preclusive and coercive they were also not a proportionate response to the perceived threat of losing the Genesis merger. *Id.*

54. *Id.* at 938.

55. *Id*.

56. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938 (Del. 2003).

57. *Id*. at 939.

58. *Id*. at 939, n.90 (Veasey, C.J., dissenting) ("Split decisions by this Court, especially in the field of corporation law, are few and far between.").

interpreted narrowly and will be seen as *sui generis*."[59]

Following in the footsteps of the dissenting justices, many corporate scholars and commentators quickly criticized the majority's opinion based on similar objections and concerns to those expressed by Chief Justice Veasey and Justice Steele. In addition, even some of the members of Delaware's Court of Chancery expressed disagreement with the decision.[60] Critics not only strongly disagree with the majority's holdings but the underlying rationale as well.[61] Overall, these critiques fall into two broad categories: (1) that the majority's decision "rests on an infirm doctrinal foundation"[62] and its holdings are unsupported by Delaware case law, and (2) that as a practical matter, the majority's ban on complete lock-ups will adversely affect both targets and bidders in the mergers and acquisitions context and perhaps the use of precommitment strategies more broadly.

A. "[A]n Infirm Doctrinal Foundation"[63]

The majority's *Omnicare* decision received considerable criticism for its misplaced reliance on Delaware case law to support its holdings. In particular, the dissenting justices took issue with the majority's statement that Delaware jurisprudence compelled the court to invalidate the actions of the NCS board and its controlling stockholders.[64] With respect to each of its holdings, the dissents asserted that the majority was either mistaken in its reliance on Delaware case law (e.g., the majority's reliance on *QVC* to require a fiduciary out), improperly applied that case law (e.g., the majority's application of *Unocal*'s preclusive/coercive and proportionality inquiries), and/or lacked any support in Delaware jurisprudence for its conclusions (e.g., the majority's holding that a complete lock-up is per se invalid). Corporate scholars and commentators level similar criticism against the majority's reasoning

59. *Id*. at 946.

60. *See infra* notes 117-20 and accompanying text (discussing Chancellor Strine's criticisms of *Omnicare*); *see also* Transcript of Oral Argument, Optima Int'l of Miami v. WCI Steel, Inc., C.A. No. 3833-VCL, at *127 (Del. Ch. June 27, 2008) (Vice Chancellor Lamb noting that "*Omnicare* is of questionable continuing vitality"); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1016 n.68 (Del. Ch. 2005) (then-Vice Chancellor Strine calling the decision "aberrational").

61. *See* Hanewicz, *supra* note 2, at 539 ("Unfortunately, although the function of the *Omnicare* ruling is defensible, the reasoning the court used to get there is again, with all due respect, bad.").

62. Griffith, *supra* note 8, at 587.

63. *Id*.

64. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 942-45 (Del. 2003) (Veasey, C.J., dissenting).

while also characterizing the opinion as an improper extension of prior Delaware decisions. For these reasons, as well as others, the majority's holdings and underlying rationale have been described as normatively controversial.[65]

1. The Business Judgment Rule, and Not *Unocal*, Was the Correct Standard of Review

As an initial matter, *Omnicare*'s dissenting justices disagreed with the majority's approach of applying heightened scrutiny in its evaluation of the deal protection devices.[66] The dissenting justices, however, were of the opinion that the more deferential business judgment rule was the correct standard of review. As Chief Justice Veasey explained, there was no threat that the NCS board was acting in its own self-interested manner (this was a friendly, not a hostile, merger), so the deal protection devices were not defensive in nature and heightened scrutiny per *Unocal* was inappropriate.[67] In a separate dissent, Justice Steele emphasized his objection to the majority's application of *Unocal*.[68] In his view, the Court of Chancery's factual findings precluded further judicial scrutiny of the NCS board's actions in negotiating and agreeing to the terms of the Genesis merger.[69] Justice Steele stated that in his opinion, "Delaware law mandates deference under the business judgment rule to a board of directors' decision that is free from self-interest, made with due care and in good faith."[70] In reviewing the actions of the NCS board, Justice Steele found that the decision to approve the merger agreement was an informed decision made by an independent committee and approved by the full board.[71] In the absence of a breach of fiduciary duty, the court should defer to the board's exercise of its managerial

65. *See* Hanewicz, *supra* note 2, at 556. *But see* Laster, *supra* note 17, at 796 (asserting that four aspects of the majority's decision "deserve positive reinforcement").

66. Somewhat ironically, the majority had agreed with the lower court that "the NCS directors' decision to adopt defensive devices to *completely* 'lock up' the Genesis merger mandated 'special scrutiny' under the two-part test set forth in *Unocal*" but reached the opposite conclusion in applying that test. *Omnicare*, 818 A.2d at 934 (emphasis in original).

67. *Id*. at 943 & n.102 (Veasey, C.J., dissenting).

68. *Id*. at 947 (Steele, J., dissenting) ("The majority's conclusion substantially departs from both a common sense appraisal of the contextual landscape of this case and Delaware case law applying the *Unocal* standard."). While Justice Steele concluded that in the absence of self-interest or a lack of due care the court should defer to a board's business judgment and not second guess the decision to agree to the defensive provisions, he stated that even applying *Unocal* review he would reach the same conclusions as the Court of Chancery and uphold the deal protection devices. *Id*.

69. *Id*. at 946-47.

70. *Id*. *But see infra* note 81 and accompanying text.

71. *Omnicare*, 818 A.2d at 947-48 (Steele, J., dissenting).

power in agreeing to the deal protection devices.

Subsequent criticism builds upon the dissenters' objections. Central to this line of criticism is the majority's conclusion underlying its application of *Unocal* that all deal protection devices are defensive in nature.[72] The majority found the "inherent conflicts between a board's interest in protecting a merger transaction it has approved" and "the stockholders' statutory right to make a final decision to either approve or not approve the merger"[73] as analogous to the "omnipresent specter" of conflict of interest that exists when a board adopts defensive measures in response to an attempted hostile acquisition.[74] However, many corporate commentators disagree. They argue the circumstances facing the boards, and the motivations of the individual directors, in *Unocal* and *Omnicare* were quite different.[75] *Unocal* involved a hostile takeover attempt while *Omnicare* involved a friendly negotiated merger. Critics note this important distinction because the inherent conflicts and entrenchment motives of the board in the former are not present to the same extent, if at all, in the latter. Thus, the policy rationale for applying *Unocal*'s enhanced scrutiny to hostile takeovers is lacking in cases like *Omnicare* where the transaction is a negotiated merger.[76]

Despite the criticism, it should be noted that the majority's application of enhanced scrutiny under *Unocal* to a board's approval of deal protection devices is the least controversial aspect of the opinion. In fact, Vice Chancellor Laster has described this holding as "the decision's silver lining."[77] Pre-*Omnicare*, certain corporate scholars

72. *See, e.g.*, Griffith, *supra* note 8, at 588-89 (questioning the majority's equating of "deal protection devices" with "defensive devices" in applying enhanced scrutiny); Smith, *supra* note 10, at 991 ("The classification of all merger lock-up measures as 'defensive in nature' could signal the death knell for the business judgment rule as it relates to mergers in the last period of play."). *But see infra* notes 77-81 and accompanying text.

73. *Omnicare*, 818 A.2d at 930.

74. *Id.* at 932.

75. *See* Hanewicz, *supra* note 2, at 534-35 (stating that the NCS board agreed to the deal protection provisions to avoid losing the Genesis deal, not to avoid a threatened or pending higher, hostile offer, and that the "court simply ignored this distinction between *Unocal* and the facts before it"); *see also* Griffith, *supra* note 8, at 588.

76. *See* Griffith, *supra* note 8, at 588; Hanewicz, *supra* note 2, at 534-35 (asserting that the "omnipresent specter of *Unocal* and its progeny is not the omnipresent specter identified by the *Omnicare* court."); Andrew D. Arons, Comment, *In Defense of Defensive Devices: How Delaware Discouraged Preventive Measures in* Omnicare v. NCS Healthcare, 3 DEPAUL BUS. & COM. L.J. 105, 120-21 (2004).

Critics also attacked the majority's reference to *Time Warner* in support of its application of *Unocal* to deal protection devices. *See* Griffith, *supra* note 8, at 590. Other Delaware case law has also been argued as weighing against the majority's application of *Unocal*. *See id.* at 590-91 (citing to *Williams v. Geier*).

77. Laster, *supra* note 17, at 811.

advocated for the application of some form of enhanced judicial review to these provisions. Most prominently, Professors John C. Coates IV and Guhan Subramanian took a close look at the actual impact that deal protection devices have on the merger process.[78] In their study, Professors Coates and Subramanian concluded that "contrary to the conventional wisdom, lockups may well 'hurt.'"[79] In light of deal protection devices' profound influence, the authors recommended that courts "not rubber-stamp lockups under the business judgment rule or rely on bright-line rules of thumb to approve lockups," rather they should more carefully scrutinize approval of these provisions.[80] Similarly, prior Court of Chancery cases had intimated that applying an enhanced judicial review of these merger provisions was warranted.[81] While critics of *Omnicare* acknowledge that there may be such reasonable arguments for extending *Unocal* to deal protection devices,[82] they nonetheless fault the majority for its failure to provide "a reasoned foundation for the application of enhanced scrutiny to friendly merger agreements."[83] As a result, critics argue, the "application of *Unocal* to

78. Coates & Subramanian, *supra* note 19, at 310.

79. *Id*. at 377-78.

80. *Id*. at 307 & 389-90. In advocating for more judicial scrutiny of deal protection devices, Professors Coates and Subramanian proposed enhanced scrutiny in the form of a *Revlon*-like analysis. *Id.* at 390. Similarly, Mark Lebovitch and Peter Morrison strongly advocated that enhanced scrutiny was the proper standard for judicial review of deal protection devices; however, asserting that *Unocal* was the proper analysis. *See* Lebovitch & Morrison, *supra* note 17, at 8-20; *see also* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 929 (2001).

81. *See, e.g.*, McMillan v. Intercargo Corp., 768 A.2d 492, 506 n.62 (Del. Ch. 2000) (stating that "'deal protection' terms self-evidently designed to deter and make more expensive alternative transactions would be considered defensive and reviewed under the *Unocal* . . . standard"); Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 108 (Del. Ch. 1999); Transcript of Oral Argument, Phelps Dodge Corp. v. Cypress Amax Minerals Co., No. 17398, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999) (implicitly endorsing enhanced scrutiny and criticizing a board's use of a no-talk provision as unreasonable); Roberts v. Gen. Instrument Corp., No. 11639, 1990 WL 118356, at 1554-1555 (Del. Ch. Aug. 13, 1990); Paramount Commc'ns, Inc. v. Time Inc., 572 A.2d 1152 (Del. 1989). *But see In re* IXC Commc'ns, Inc. S'holders Litig., Nos. 17324, 17334, 1999 WL 1009174, at *10 (Del. Ch. Oct. 27, 1999) (applying the business judgment rule to a no-talk provision in a stock-for-stock merger and stating that "neither the termination fee, the stock option agreements nor the no-solicitation provisions [were] defensive mechanisms instituted to respond to a perceived threat.").

82. Hanewicz, *supra* note 2, at 535 n.166 ("This is not to say there are no reasonable arguments for applying *Unocal* to deal protection measures. I happen to believe these arguments are, to a large degree, incorrect. Regardless of where one stands on the issue, the court's failure to consider this question more openly is a serious shortcoming in its doctrinal analysis.") (internal citations omitted).

83. Griffith, *supra* note 8, at 588; *see* Hanewicz, *supra* note 2, at 535 n.166. *But see* Laster, *supra* note 17, at 807-11 ("The Delaware Supreme Court also provided a coherent policy-based analysis for applying enhanced scrutiny under these circumstances.").

the deal protection devices in *Omnicare*, and to deal protection devices generally, is deeply unsatisfactory."[84]

2. The Majority Incorrectly Applied *Unocal*

Even if *Unocal* was the proper standard by which to judge the actions of the NCS board, the dissenting justices – and much subsequent legal scholarship – assert that the majority improperly applied that standard. This argument follows two separate, but related, lines. First, the majority misapplied the concepts of "coercive" and "preclusive" by characterizing them as a threshold inquiry that preempts any proportionate balancing of deal protection devices.[85] Second, the combination of deal protection devices in the Genesis merger was neither preclusive nor coercive, was a proportionate response to the threat posed, and thus, as was found by the Court of Chancery, satisfied scrutiny under *Unocal*.[86]

Regarding the first point, Chief Justice Veasey argued in dissent that the majority's reading of *Unitrin* as dictating that the concepts of "preclusive" and "coercive" act as a threshold analysis under *Unocal*'s enhanced scrutiny before engaging in the proportionality inquiry was incorrect.[87] The proper inquiry, rather, should be consideration of *both* the preclusiveness/coerciveness of the provisions *and* their proportionality to the threat posed. Refining enhanced scrutiny under *Unocal*/*Unitrin*, as the majority had done in its opinion, to prescribe the coercive and preclusive analysis as preempting the proportionality inquiry would result in the courts discounting the specific facts that led to a board's decision.[88] Indeed, that was just what the majority had

84. Griffith, *supra* note 8, at 591.

85. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 942-43 (Del. 2003); Arons, *supra* note 76, at 121-26 (asserting that the court misapplied the enhanced scrutiny standard); Smith, *supra* note 10, at 994.

86. *Omnicare*, 818 A.2d at 943; *see* Veasey & Di Guglielmo, *supra* note 8, at 1459 (asserting that even applying *Unocal* the board had acted reasonably and properly exercised its business judgment as the Chancery Court found).

87. *See Omnicare*, 818 A.2d at 942-45 (Veasey, C.J., dissenting); *see also* Smith, *supra* note 10, at 994 ("This bifurcated test applied by the majority in analyzing the proportionality prong of *Unocal* is a deviation from the traditionally fact-specific body of Delaware corporate law."); Daniel Vinish, Comment, *The Demise of Clarity in Corporate Takeover Jurisprudence: The* Omnicare v. NCS Healthcare *Anomaly*, 21 ST. JOHN'S J. LEGAL COMMENT. 311, 335-44 (2006).

88. *See Omnicare*, 818 A.2d at 943-45 (Veasey, C.J., dissenting); Smith, *supra* note 10, at 994; *see also* Arons, *supra* note 76, at 125-26 (asserting that "[t]he majority gave no justification for this drastic alteration of the proportionality test"); Davis, *supra* note 16, at 194 (criticizing the majority for "further refin[ing] the *Unitrin* analysis by specifying that the question of preclusiveness or coerciveness is a threshold inquiry which must be satisfied prior to considering the

done. The majority erred, Chief Justice Veasey maintained, when it failed to take into account the fact that the deal protection devices were necessary to secure the only available deal – the Genesis deal – which was a reasonable and a proportionate response in relation to the threat of not having any possible transaction at all.[89] As stated in his dissent, "In our view, the proportionality inquiry must account for the reality that the contractual measures protecting this merger agreement were necessary to obtain the Genesis deal."[90] Thus, the Chief Justice concluded he would have affirmed the judgment of the Court of Chancery that the NCS directors satisfied *Unocal* as the deal protection devices were a reasonable, proportionate response to the perceived threat of losing the Genesis transaction.[91]

On the second point, the majority and dissenting justices (along with most critics) reach opposite conclusions as to whether the combination of deal protection measures was preclusive and/or coercive. As set forth in *Unitrin*, to be preclusive, an action must "deprive stockholders of the right to receive all tender offers or preclude a bidder from seeking control by fundamentally restricting proxy contests or otherwise."[92] But how could the deal protection devices in the NCS-Genesis merger have been preclusive, critics ask, when they did not deprive NCS stockholders from receiving any subsequent bids, as evidenced by the later offer from Omnicare?[93] As for coerciveness, which occurs when a response is "aimed at forcing upon shareholders a management-sponsored alternative to a hostile offer,"[94] critics point out that the majority ignored an important fact – that stockholders holding a majority of the voting power, Outcalt and Shaw, freely supported the Genesis merger agreement including the deal protection devices. Any

'reasonableness' of the board's action"). In a recent article, Vice Chancellor Laster has disagreed with the dissenters' proffered application of *Unocal*, explaining that "Combining the inquiries into a single, overarching reasonableness test would have implied that under some circumstances, a board could coerce a stockholder vote or preclude stockholders from having any alternative other than the board's chosen transaction." Laster, *supra* note 17, at 811. Vice Chancellor Laster tempers his support of the majority, however, stating that while he agrees with the doctrinal framework in the majority opinion, he "does not [agree] with the application of the principles to the facts." *Id*. at 818.

89. *Omnicare*, 818 A.2d at 945 (Veasey, C.J., dissenting).

90. *Id.*

91. *Id*. ("The Majority has not demonstrated that the director action was a disproportionate response to the threat posed. Indeed, it is clear to us that the board action . . . was reasonable in relation to the threat, by any practical yardstick.").

92. *Id.* at 935 (majority opinion) (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387-88 (Del. 1995)).

93. *See* Davis, *supra* note 16, at 197.

94. *Omnicare*, 818 A.2d at 935 (citing *Unitrin*, 651 A.2d at 1387-88).

coercion was therefore merely a result of being minority public stockholders in a controlled company, and not as a result of the deal protection devices.[95] The majority was incorrect in focusing its coercion analysis on the fact that the public stockholders could not outvote the majority stockholders. Instead, critics argue, coercion arises only when, as a result of inequitable, unilateral board action, stockholders are forced to accept a proposed transaction for reasons other than its merits.[96] Because Outcalt and Shaw – two stockholders with a combined 65 percent of the voting power who could therefore approve the Genesis merger without the need for the approval of the minority stockholders – made an informed choice as stockholders to commit their shares of stock in favor of the merger, the dissents argued that any coercion that a minority stockholder may have felt was meaningless since there was no meaningful minority stockholder voting decision at issue.[97]

In sum, critics assert that under the majority's broad application of the preclusiveness and coerciveness inquiries, any set of deal protection devices that completely locked up a merger agreement would be improper. This holding, in combination with the majority's analysis of coercion/preclusion as a threshold inquiry (and thus a failure to even consider the proportionality of the provisions to the threat posed), results in locked-up merger agreements being per se invalid under *Unocal* regardless of how reasonable they may be under the circumstances.[98] "[T]his new rule," Chief Justice Veasey noted in dissent, "is a judicially-created 'third rail' that now becomes one of the given 'rules of the game,' to be taken into account by the negotiators and drafters of merger

95. *See* Hanewicz, *supra* note 2, at 541 ("It was not the deal protection measures that coerced the public shareholders into accepting the Genesis merger or precluded them from accepting another offer, but their status as minority shareholders."); Davis, *supra* note 16, at 198.

96. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 944 (Del. 2003) (Veasey, C.J., dissenting) ("The proper inquiry in this case is whether the NCS board had taken actions that 'have the effect of causing the stockholders to vote in favor of the proposed transaction for some reason other than the merits of that transaction.'"); Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It's Equitable to Take That Action: The Important Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW 877, 900-01 (2005) (asserting that the majority's rationale for its coercion finding ignored "an arguably necessary premise . . . namely, that the question of preclusion and coercion are designed to frame an inquiry into whether the stockholders have, by inequitable board action, been prevented from accepting a valuable takeover offer or been coerced into accepting a board-approved transaction").

97. *Omnicare*, 818 A.3d at 944-45 (Veasey, C.J., dissenting). As later pointed out by Chancellor Strine, "[In *Omnicare*], of course, stockholders who controlled a majority of the votes and who were receiving the same per share consideration as the minority, had approved the transaction, meaning that free and unconflicted stockholder choice was vindicated." Strine, *supra* note 96, at 900-01.

98. *See* Smith, *supra* note 10, at 994.

agreements. In our view, this new rule is an unwise extension of existing precedent."[99]

3. The Majority Opinion Represents Improper Judicial Second-Guessing

The dissent also criticized the majority for failing to "respect the reasoned judgment of the board of directors and give effect to the wishes of the controlling stockholders."[100] In its evaluation of the deal protection devices, the majority stated that "[t]he latitude a board will have in either maintaining or using the defensive devices it has adopted to protect the merger it approved will vary according to the degree of detriment to the stockholders' interest that is presented by the value or terms of the *subsequent* competing transaction."[101] Critics condemn this approach as contrary to established Delaware law in that it evaluates the reasonableness and validity of a board's decision to agree to deal protection devices in light of later events.[102] Indeed, Delaware law is clear that it is not the role of the courts, with the benefit of hindsight, to second-guess a board's business decision in the absence of self-interest

99. *Omnicare*, 818 A.2d at 943 (Veasey, C.J., dissenting); *see also* Hanewicz, *supra* note 2, at 538 ("Notice that the court did not apply *Unocal* in such a way as to police certain types of board behavior or action . . . that might be corrected by some future board, . . . [i]nstead, the court made an absolute decision that there should be no complete lock-ups.").

100. *Omnicare*, 818 A.2d at 940 (Veasey, C.J., dissenting); *see also* Hanewicz, *supra* note 2, at 537 (asserting that the *Omnicare* court "unambiguously chose itself as the decision-maker" and thus "divested the board of decision-making authority with respect to complete lock-ups").

101. *Omnicare*, 818 A.2d at 933 (majority opinion) (emphasis added).

102. *See id.* at 940 & 947-48 (Veasey, C.J., dissenting); *see also* Orman v. Cullman, No. 18039, 2004 WL 2348395, at *8 n.98 (Del. Ch. Oct. 20, 2004) ("As formulated, the test [in *Omnicare*] would appear to result in judicial invalidation of negotiated contractual provisions based on the advantages of hindsight."); Transcript of Oral Argument, at *99-101, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012); Strine, *supra* note 96, at 901 n.99 ("Moreover, in a conceptual move that borders on the metaphysical, the Court indicated that the reasonableness of the NCS board's actions would be determined, not by what they knew when they acted, but by later events."); Clifford E. Neimeth & Cathy L. Reese, *Locked and Loaded: Delaware Supreme Court Takes Aim at Deal Certainty*, 7 No. 2 THE M&A LAWYER 16 (June 2003) ("We believe that if *Omnicare* is followed in its most broad sense, the decision may entirely subjugate the 'real time' validity and reasonableness of that process to the occurrence of unforeseen (post-decisional) economic events."); Panagopoulos, *supra* note 11, at 441. It should be noted, however, that not everyone reads this language in the majority's opinion as the court judging the Genesis board's decision in light of later events. Rather, Vice Chancellor Laster has expressed the view that "Taking *Omnicare* as a whole, and giving the opinion a charitable reading, the majority did not attempt to change the point in time at which directors' decisions are measured for compliance with their fiduciary duties. *Omnicare* does not require directors to be soothsayers, nor does it create a 'fiduciary put.'" Laster, *supra* note 17, at 796, 818-19 (stating that "the timing of the majority's fiduciary analysis has been overly criticized").

or lack of due care.[103] Thus, Delaware courts should exercise limited intervention and evaluate a board's decision based on the information reasonably available at the time the decision was made and not based on later events.[104] The majority's approach in reviewing the NCS board's decision in light of the later Omnicare bid was based on judicial second-guessing and hindsight, directly contrary to Delaware jurisprudence.

In specifically addressing some of what they saw as further failings of the majority's analysis, the dissenting justices pointed out that the majority had also reviewed the NCS board's actions as isolated actions in a vacuum, without taking into account the circumstances confronting NCS at the time. Most prominently, the merger and voting agreements were the result of "a lengthy search and intense negotiation process in the context of insolvency and creditor pressure where no other viable bid had emerged"[105] and of a "board's disinterested, informed, good faith exercise of its business judgment."[106] The dissent criticized the majority for judging the NCS board's actions in light of the fact that it was later known that the NCS stockholders could receive substantially more for their shares through Omnicare's topping bid.[107] At the time the NCS board was faced with the lock-up request from Genesis, the Chief Justice pointed out, the only value-enhancing transaction available was with that company, and had the NCS board not acceded to Genesis' request it

103. *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994); Auriga Capital Corp. v. Gatz Props., 40 A.3d 839, 854 (Del. Ch. 2012); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 830 (Del. Ch. 2011) ("Time-bound mortals cannot foresee the future. The test therefore cannot be whether, with hindsight, the directors actually achieved the best price."); *In re* Citigroup Inc. S'holder Deriv. Litig., 964 A.2d 106, 122 (Del. Ch. 2009) (stating that the business judgment rule prevents judicial second guessing of a board's decision); Albert v. Alex. Brown Mgmt. Svcs., Inc., No. C.A. 04C-05-250 PLA, 2004 WL 2050527, at *4 (Del. Sept. 15, 2004) (explaining that Delaware has a "strong policy to let the managers of corporate entities run them with minimal judicial second-guessing").

104. *See* Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985); *Omnicare*, 818 A.2d at 947 (Steele, J., dissenting) ("Importantly, *Smith v. Van Gorkom*, correctly casts the focus on any court review of board action challenged for alleged breach of the fiduciary duty of care 'only upon the basis of the information then reasonably available to the directors and relevant to their decision. . . .'"); *id*. at 940 (Veasey, C.J., dissenting) ("Rather, the NCS board's good faith decision must be subject to a real-time review of the board action before the NCS-Genesis merger agreement was entered into."); *see also In re* El Paso Corp. S'holder Litig., 41 A.3d 432 at 99 (stating that the court should review board actions "in realtime"); Citron v. Fairchild Camera & Instrument Corp., C.A. No. 6085, 14 Del. J. Corp. L. 273, 301 n.17 (Del. Ch. May 19, 1988) (Allen, C.) ("[T]he duty can only be to try in good faith . . . to get the best available transaction for the shareholders. Directors are not insurers.").

105. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 940 (Del. 2003) (Veasey, C.J., dissenting).

106. *Id*.

107. *Id*. ("Our jurisprudence cannot, however, be seen as turning on such ex post felicitous results.").

would have lost the deal.[108] Moreover, Justice Steele, in his separate dissenting opinion, pointed out that the decision to agree to the lock-up in the Genesis merger was an informed one made by an independent committee of the board and approved by the full board. In his view, to second guess a board's decision as the majority had done ran afoul of the fundamental principal of Delaware law that courts will not substitute their judgment for that of a careful, selfless board.[109]

4. A Per Se Rule Invalidating Complete Lock-Ups Is Unsupported by Delaware Case Law

The most controversial aspect of the majority's decision comes out of its third holding – that the NCS board owed an "unremitting" fiduciary duty to the minority stockholders and thus it was "required to contract for an effective fiduciary out clause" in the merger agreement with Genesis.[110] Failure to do so, the majority held, was a breach of the directors' fiduciary duties and invalidated the Genesis merger agreement. Critics of this new bright-line rule argue that it is overbroad, inflexible, unsupported by Delaware law and an improper intrusion into the board's decision-making authority.

The per se rule in *Omnicare* has first been attacked for its lack of support in Delaware case law.[111] Critics fault the majority for its misplaced reliance on the court's prior decision in *Paramount Communications Inc. v. QVC Network Inc.*[112] to support its finding that the NCS board's "unremitting" fiduciary duties prevented it from agreeing to a merger agreement without a fiduciary out clause.[113] The

108. *Id*. at 940-41.

109. *Id*. at 948 (Steele, J., dissenting) ("If attorneys counseling well motivated, careful, and well-advised boards cannot be assured that their clients' decision – sound at the time but later less economically beneficial only because of post-decision, unforeseeable events – will be respected by the courts, Delaware law, and the courts that expound it, may well be questioned."). Of course, this statement assumes that the NCS board was careful and selfless in negotiating and agreeing to the Genesis merger. Justice Steele pointed out that the majority had identified no breach of the duty of loyalty or care by the NCS directors, but nonetheless sanctioned them for failing to insist upon a fiduciary out in the merger agreement. *Id*. Contrary to the majority's approach, the Justice stated that he "would not shame the NCS board, which acted in accordance with every fine instinct that we wish to encourage, by invalidating their action approving the Genesis merger because they failed to insist upon a fiduciary out." *Id*.

110. *See id.* at 938-39 (majority opinion).

111. *See id*. at 945 (Veasey, C.J., dissenting) ("We know of no authority in our jurisprudence supporting this new rule, and we believe it is unwise and unwarranted.").

112. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 37 (Del. 1994).

113. *See Omnicare*, 818 A.2d at 945 (internal citations omitted); Griffith, *supra* note 8, at 592; Panagopoulos, *supra* note 11, at 467-68. Critics also pointed out that the court's decision in *McMullin v. Beran*, does not support the proposition for which it is cited by the majority. *See*

QVC decision, the Chief Justice explained, "does not create a *special duty* to protect the minority stockholders from the consequences of a controlling stockholder's ultimate decision unless the controlling stockholder stands on both sides of the transaction, which is certainly not the case here."[114] In fact, the situation in *QVC* is inapposite to that in *Omnicare*. In *QVC*, the court was concerned about protecting Paramount's public stockholders in the proposed change-of-control transaction where they would go from (in the aggregate) owning a majority of Paramount's voting stock to, post-merger, being minority stockholders in a controlled corporation.[115] *Omnicare*, on the other hand, was not a change-of-control situation. This critical distinction, critics argue, demonstrates why the *QVC* court was correct in finding that the board had a fiduciary duty to serve the minority stockholders in their last chance to sell control of the corporation and why the *Omnicare* court was not.[116]

Now Chief Justice Strine offers a slightly different angle on this criticism saying the per se rule of *Omnicare* blurs the well-established "law-equity divide" that exists in Delaware.[117] This law-equity divide, Chief Justice Strine explains, means that Delaware courts will consider director and corporate action through the dual rubric of law and equity – first, is the action lawful; second, is the action equitable under the circumstances (e.g., *Schnell v. Chris-Craft Industries*).[118] In light of this, he proposes a "corollary to the rule of *Schnell*. To wit, if the General Assembly has declared certain acts lawful, presumably there must be circumstances in which those acts would be equitable (otherwise why permit the acts at all). Fidelity to the corollary requires the judiciary to eschew the formulation of per se rules in equity."[119] Because the

Panagopoulos, *supra* note 11, at 466-67.

114. *Omnicare*, 818 A.2d at 946 (Veasey, C.J., dissenting) (emphasis in original). Nor does *QVC*, in the Chief Justice's opinion, further extend the concept of "continuing fiduciary duties" to permit a court to second-guess a board's weighing the risk and return with respect to the only possible transaction at that time versus a potential future offer that has not yet materialized. *Id*. at 945.

115. *See QVC*, 637 A.2d at 42-3 & 47.

116. *See* Griffith, *supra* note 8, at 592-93 ("*QVC* cannot be separated from the change-of-control context on which its holding rests . . . . The absence of a change-of-control in *Omnicare* is a critical distinction between *Omnicare* and *QVC*."); Panagopoulos, *supra* note 11, at 467-68.

117. Strine, *supra* note 96, at 903; *see also* Davis, *supra* note 16, at 188.

118. Strine, *supra* note 96, at 880; *see also* Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007) (stating that under Delaware law decisions by fiduciaries are "'twice-tested' – once by the law and again by equity"). In *Schnell v. Chris-Craft Industries*, the Delaware Supreme Court held that "inequitable action does not become permissible simply because it is legally possible." Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

119. Strine, *supra* note 96, at 883.

Omnicare holding invalidates any merger agreement with an absolute lock-up, even if permitted under the Delaware General Corporation Law, it amounts to a per se rule of equity and "renders indistinct the line between law and equity by announcing that legally authorized action is, in any conceivable circumstance, somehow invalid."[120]

Turning specifically to the majority's analysis of the Genesis deal protection devices, Chief Justice Strine notes its failure to consider the issues before it through Delaware's law-equity rubric.[121] Each of the deal protection devices was lawful under the Delaware General Corporation Law. Thus, under the law-equity rubric, to invalidate the provisions the majority would need to ask whether the provisions were equitable under the circumstances, which it did not do. The majority failed to tie its ruling to any specific instance of the NCS board acting unreasonably in the circumstances or otherwise breaching its fiduciary duties.[122] In Chief Justice Strine's view, invalidating the Genesis deal protection devices without this analysis and setting forth a per se rule invalidating all future complete lock-ups not only exceeded Delaware's law-equity divide, but also trended into the realm of legislative lawmaking by the majority.[123]

Finally, critics point out that an inherent problem in any per se rule is its rigidity and *Omnicare*'s per se ban on absolute lock-ups is no exception. A rule that mandates a fiduciary out provision for a

120. *Id*. at 902. To further illustrate his point, Chief Justice Strine provides the following example:

> [I]magine a seller that has conducted a full market search for buyers for a year. In the last round, the seller is down to three bidders, who have completed due diligence and engaged in a few weeks of preliminary competition. To extract the very last nickel from the bidders' pockets, the seller, which has a majority stockholder who has agreed to share the control premium ratably with the minority, indicates that final bids will be due in a week and that the high bidder will get an 'absolutely locked up' deal including a force-the-vote provision, a voting agreement from the majority stockholder, and no fiduciary out. Under the strict reasoning of *Omnicare*, that action would be invalid, yet it is difficult to see why such an agreement would be inequitable.

Id. at 902. However, as one commentator has noted in response to Chief Justice Strine's critique of *Omnicare*'s per se rule: "[I]f one believes that absolute lock-ups involving a majority shareholder are always inequitable, then this rule remains a violation of the form of equitable jurisprudence but is far less troubling because we would expect equitable review to reach substantially the same result as the per se rule in most every case." Davis, *supra* note 16, at 191.

121. Strine, *supra* note 96, at 902-03.

122. *Id*.; *see also* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 948 (Del. 2003) (Steele, J., dissenting) (stating that the majority held that the NCS board's actions were invalid without finding any breach of loyalty or care).

123. Strine, *supra* note 96, at 903 ("For the judiciary to decide that in all possible circumstances, particular legally authorized acts are forbidden, is for the judiciary to place itself clearly on the law side of the law-equity divide."); *see also* Davis, *supra* note 16, at 188.

transaction to be enforceable provides no room for a board to completely lock-up a deal where it might, in fact, be in the best interests of the stockholders to do so. Nor does such a rule allow for the kind of factual case-by-case analysis in determining the validity of a particular combination of deal protection devices for which the Delaware courts are known.[124] Critics assert that such a result essentially "usurp[s] the proper role of the board of directors" and "limit[s] a board's ability to discharge its fiduciary duty to act in stockholders' best interests"[125] in light of the specific circumstances before it.

Moreover, due to the majority's ambiguous reasoning and lack of support in Delaware case law, critics express concern that *Omnicare*'s per se ban has potentially overbroad implications on precommitment strategies. Noting that precommitment strategies such as deal protection devices are not limited to mergers and acquisitions, scholars express concern that these other measures could also be invalidated in light of the *Omnicare* decision.[126] "[T]he broad language used by the court, stating that no contractual provision can validly define or limit a board's fiduciary duties, clearly elevates corporate law considerations above contract principles and deal certainty."[127] The majority's arguably broad holding thus leaves open the question: What contracts post-*Omnicare* will require fiduciary out clauses to be enforceable and which will not?

124. *See Omnicare*, 818 A.2d at 950 (Steele, J., dissenting) (questioning, "Instead of thoughtful, retrospective, restrained flexibility focused on the circumstances existing at the time of the decision, have we now moved to a bright line regulatory alternative?").

125. Panagopoulos, *supra* note 11, at 441, 469-70; *see* Stephen M. Bainbridge, *Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 J. CORP. L. 1, 32 (2003) ("Given the considerable virtues of authority-based decision-making, however, such mechanisms should proceed on a case-by-case basis rather than by adopting prophylactic restrictions on the board's authority."); Smith, *supra* note 10, at 996 (stating that *Omnicare*'s per se rule "invited unwarranted judicial review into the risk/return analyses of boards of directors, which have traditionally been granted judicial deference under the business judgment rule") (citing *Omnicare*, 818 A.2d at 945).

126. *See* Hanewicz, *supra* note 2, at 561-62; *see also* Bainbridge, *supra* note 125, at 32 (expressing concern prior to *Omnicare* that precommitment provisions might be invalidated in light of Delaware court's prior rulings invalidating dead-hand and no-hand poison pills); Jay H. Knight, *Merger Agreements Post-*Omnicare, Inc. v. NCS Healthcare, Inc.*: How the Delaware Supreme Court Pulled the Plug on "Mathematical Lock-Ups,"* 31 N. KY. L. REV. 29, 49-50 (2004). Just a few examples of precommitment strategies that could be implicated by *Omnicare*'s per se rule include bond covenants, fair price shark repellents, and nonredeemable poison pills. While the majority in *Omnicare* attempted to distinguish other precommitment provisions from those at issue, discerning a clear demarcation between what is permissible and what is not may prove difficult. *See* Hanewicz, *supra* note 2, at 561-62.

127. Smith, *supra* note 10, at 997.

B. Practical Impact on Mergers and Acquisitions

Omnicare's criticism is not limited to its perceived doctrinal shortcomings. Critics are equally vocal regarding the negative impact *Omnicare*'s ban on complete lock-ups would have, as practical matter, on the M&A market. Following the decision, scholars and practitioners alike feared that it would discourage potential bidders or, at a minimum, cause bidders to offer lower prices, ultimately leading to decreased value for targets and their stockholders.[128] Further, *Omnicare*'s elimination of the ability to precommit to a transaction would limit the negotiating position of target boards of directors.[129] For instance, proponents of complete lock-ups contend that target corporations will lose credibility in negotiations in that a target can never truly commit to a transaction.[130] The result being lower offers to targets and/or the potential loss of transactions entirely,[131] again to the detriment of the target's stockholders.[132]

Concerns regarding the practical impact of *Omnicare* were again first expressed by the dissenting justices. Chief Justice Veasey and Justice Steele worried that the majority's opinion and its per se ban on complete lock-ups would have a deterrent effect and that the universe of future bidders "who could reasonably be expected to benefit

128. *See* Arons, *supra* note 76, at 130 ("The [*Omnicare*] decision may cause potential bidders to offer lower prices, especially early in the negotiations for fear that higher offers cannot (or will not) be protected with any guarantee, and simply be used as a stalking horse to seek higher bidders to subsequently enter negotiations."); Griffith, *supra* note 8, at 614; Tamara Loomis, *Beware, Delaware, the State's Recent Supreme Court Decisions Make Waves*, 229 NEW YORK L.J. 5, 5 (2003) ("There are real life cases in which bidders turn away because they didn't get lockup protection . . . .") (quoting Robert Profusek, a partner at Jones Day, New York); Christopher J. Moceri, Comment, *M&A Lockups: Broadly Applying the* Omnicare *Decision to Require Fiduciary Outs in All Merger Agreements*, 2004 MICH. ST. L. REV. 1157, 1166-67 (2004) ("On the other hand, lockups may affect whether a company will even enter into a bidding contest.") (citing Marcel Kahan & Michael Klausner, *Lockups and the Market for Corporate Control*, 48 STAN. L. REV. 1539, 1544 (1996)); Quinn, *supra* note 17, at 876 n.52 & 54; *see also* Stephen M. Bainbridge, *Exclusive Merger Agreements and Lock-Ups in Negotiated Corporate Acquisitions*, 75 MINN. L. REV. 239, 283 (1990) [hereinafter Bainbridge, *Exclusive Merger Agreements*] (stating that "rational bidders presumably discount their bids to account for the risk that the target board will renege"); Jennifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, 136 U. PA. L. REV. 315, 365 n.170 (1987) (stating that "[a]n acquiring company predicates it offering price upon (i) the value of the target, and (ii) risks involved in attempting the acquisition").

129. *See* Griffith, *supra* note 8, at 571.

130. *See infra* notes 141-43 and accompanying text.

131. *See* Quinn, *supra* note 17, at 876 n.52 & 54.

132. *See* Griffith, *supra* note 8, at 571, 606-13 ("Boards can no longer follow a 'precommitment strategy,' committing to sell to a particular bidder at some point in the negotiation process in order to force the hand of the other bidders at the table.").

stockholders could shrink or disappear."[133] The Chief Justice pointed out that "[a] lock-up permits a target board and a bidder to 'exchange certainties'" and that "certainty has value."[134] In situations such as the one facing the NCS board, deal certainty in the form of a lock-up may be necessary to retain the only value-enhancing transaction available at the time.[135] Summing up his pragmatic concerns, the Chief Justice wrote: "Situations will arise where business realities demand a lock-up so that wealth-enhancing transactions may go forward. Accordingly, any bright-line rule prohibiting lock-ups could, in circumstances such as these, chill otherwise permissible conduct."[136]

Of course Chief Justice Veasey's recognition of the value of certainty was not a new idea; support for precommitment strategies, broadly, in corporate law existed well before *Omnicare*.[137] In eliminating a board's ability to precommit to a transaction, critics assert, the majority took away something very valuable.[138] This value may take many forms. For instance, precommitment strategies have been shown to have economic value to target corporations in the context of merger negotiations.[139] An acquirer generally will be willing to pay a higher

133. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 946 (Del. 2003) (Veasey, C.J., dissenting); *see also id*. at 948 (Steele, J., dissenting) ("The majority's proscriptive rule limits the scope of a board's cost benefit analysis by taking the bargaining chip of foregoing a fiduciary out 'off the table' in all circumstances.").

134. *Id*. at 942. The court had previously acknowledged the value of certainty in *Rand v. Western Air Lines*, where the court affirmed the Chancery Court's decision to uphold a board's decision to grant its only bidder a stock option agreement to acquire thirty percent of the target corporation's stock.; Rand v. W. Air Lines, Inc., C.A. No. 8632, 1994 WL 89006 (Del. Ch. Feb. 25, 1994) *aff'd*, 659 A.2d 228 (Del. 1995).

135. *Id*. at 941-42, 946 (noting that the NCS board acceded to Genesis' request to lock-up the merger so as to secure the only value-enhancing transaction available – an essential fact).

136. *Id*. at 942.

137. *See, e.g.*, Bainbridge, *supra* note 125, at 25-26 (asking "why should a board of directors have an ongoing fiduciary duty to constantly reevaluate its decision?" and arguing that there is no satisfying answer to this question yet from Delaware courts). Commentators have also been favorable specifically to lock-ups in mergers. *See, e.g.*, Ian Ayres, *Analyzing Stock Lock-Ups: Do Target Treasury Sales Foreclose or Facilitate Takeover Auctions?*, 90 COLUM. L. REV. 682, 704 (1990); Bainbridge, *Exclusive Merger Agreements*, *supra* note 128, at 289, 327-32; Stephen Fraidin & Jon D. Hanson, *Toward Unlocking Lockups*, 103 YALE L.J. 1739, 1834 (1994); David A. Skeel, Jr., *A Reliance Damages Approach to Corporate Lockups*, 90 NW. U.L. REV. 564, 595-600 (1995).

138. Davis, *supra* note 16, at 199 ("Is the *Omnicare* court correct to interpret precommitment devices as a clear evil? While the court insists that it is preserving the ability of the board 'to discharge its fiduciary duties at all times,' it would seem obvious that it is taking away something valuable as well.").

139. *See* Griffith, *supra* note 8, at 605; Hanewicz, *supra* note 2, at 559 (discussing the higher prices buyers may be willing to pay for the extra protection associated with completely locked-up offers); Michael J. Kennedy, *The End of Time? Delaware's Search for the Fiduciary Gut*, M&A LAW., Oct. 2003, at *6 ("[A]s any economist will tell you, an [fiduciary out] option has a price, and

price for the added protection and certainty offered by a completely locked-up deal.[140] Secondly, and somewhat relatedly, certainty can have negotiating value.[141] Precommitment strategies can entice potential buyers to evaluate target corporations and bring them to the table.[142] Knowing that it could secure a transaction alleviates a buyer's concern that it will be a stalking horse for later bids. Further, the ability to trade deal certainty allows a target corporation to credibly convey its intentions in negotiations with potential buyers.[143] In being able to completely commit to a proposed transaction, a target board signals to a buyer that it supports that deal. The failure of the *Omnicare* majority to recognize, let alone weigh, the costs and benefits associated with precommitment strategies and the elimination thereof led proponents of such tools to assert that the decision is in fact detrimental to target corporations and their stockholders.[144] As summarized by two commentators, "In that we live in a prevailing corporate and market environment replete with buyer hesitation and hypercaution, it would be most unfortunate if overreaction to the *Omnicare* decision increases buyer recalcitrance and precludes a motivated buyer from putting its very best deal and price on the table in exchange for closing certainty out of fear that a fully locked-up deal subsequently may be judicially second-guessed upon the unforeseen emergence of a potentially superior proposal – even if the target's process leading to the signing and announcement otherwise was ostensibly pristine."[145]

because such a target will not actually pay money to a buyer for the option the economic price for the option will be paid for by the target shareholders in the form of a lower initial deal price."); *see also* Bainbridge, *supra* note 125, at 26. *But see* Griffith, *supra* note 8, at 616-17 (acknowledging that precommitment strategies can result in costs to stockholders as well); Moceri, *supra* note 128, at 1166-67 (discussing arguments that lock-ups "do not alter the outcomes of bidding contests" and "do not affect the value that a bidder gives" to a target corporation; rather lock-ups "reduce[] the price paid for the target company while increasing profit to the losing company, since the losing company receives the value of the lockup despite losing the chance to acquire") (citing Kahan & Klausner, *supra* note 128, at 1544). As the NCS-Genesis merger showed, precommitment strategies can also have value to a potential buyer "who may be worried that a subsequent bidder (like Omnicare) will emerge to break up the deal and 'steal' the target." Hanewicz, *supra* note 2, at 559.

140. *See supra* notes 128 & 134.

141. *See* Griffith, *supra* note 8, at 606-613 (evaluating the strategic value of precommitment through a number of game theory simulations and concluding that precommitment is a valuable tool in merger negotiations).

142. *See id*. at 613; Hanewicz, *supra* note 2, at 559-60.

143. *See* Griffith, *supra* note 8, at 615.

144. *See* Davis, *supra* note 16, at 200; Griffith, *supra* note 8, at 597 ("[I]t is plain that the majority's analysis did not adequately address the considerations arising from the elimination of precommitment."); Hanewicz, *supra* note 2, at 558-60.

145. Neimeth & Reese, *supra* note 102, at 6.

IV. *OMNICARE*'S IMPACT ON MERGERS AND ACQUISITIONS

Given the perceived flaws and incorrect outcome in the *Omnicare* case, critics predicted an immediate impact on the mergers and acquisitions market, with negative effects on the number, structure, and value of corporate transactions. Critics were worried that *Omnicare* had effectively turned Delaware into an option contract state, leaving open the possibility that a trumping bid could come at any time.[146] As a result, the potential universe of bidders would shrink or disappear, lead to lower prices being offered to target corporations, or both.[147] However, in the decade following the decision, these concerns do not, to a large extent, appear to have materialized.[148] Immediately following *Omnicare*'s issuance, and in the years since, there has not appeared to have been a marked decline in merger transactions.[149] Similarly, there was not a substantial chilling effect on the use of any individual deal protection provision, in particular the ones at issue in the decision itself (e.g., force-the-vote provision, voting agreements).[150] In fact, Professors Davidoff and Sautter have found that post-*Omnicare*, the number and type of deal protection devices have significantly increased.[151]

The fears of *Omnicare*'s negative impact have not come true for many reasons. First, many factors drive M&A activity, with the ability to precommit to a particular transaction being only one of those. Potential acquirers may also be motivated to pursue and engage in mergers and acquisitions because of synergistic gains, regulatory changes, changes in the market, globalization, a desire to increase

146. *See* Griffith, *supra* note 8, at 595; David Marcus, *Holland's Clarity Is Others' Confusion*, CORP. CENT. ALERT, May 2003, at 12-13 (quoting a Wachtell, Lipton, Rosen & Katz client memorandum).

147. *See Omnicare*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 946 (Del. 2003) (Veasey, C.J. , dissenting); Davidoff, *Long Slow Death, supra* note 8 ("Some even asserted that bidders may no longer attempt to bid as frequently since they could no longer get the certainty they required in agreeing to acquisitions."); Neimeth & Reese, *supra* note 102, at 16.

148. *See* Megan W. Shaner, *Revisiting* Omnicare*: What Does Its Status 10 Years Later Tell Us?,* 38 J. CORP. L. 865 (2013) (discussing M&A transactions and use of deal protection devices following *Omnicare*); *see also* Davidoff, *Long Slow Death*, *supra* note 8 (stating that "[t]his parade of horrible did not come to pass"). This concern also begs the question: "Why should Delaware care if there is a decline in merger activity?"; Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1935-36 (2003) [hereinafter Griffith, *Last Period of Play*].

149. Shaner, *supra* note 148, at 878-79 (noting that merger activity in the years following *Omnicare* increased); *see* Laster, *supra* note 17, at 833 (stating that following *Omnicare* "M&A continued, even bubbled").

150. *Id*.

151. *See* Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. L. 681, 683-88 (2013).

market presence (or relatedly, decrease competition) and diversification.[152] These other factors and the associated potential gains therefrom appear to override any possible negative effect *Omnicare* would have had on the M&A landscape.

Second, corporate practitioners quickly adapted to the new rules set forth in *Omnicare* in structuring transactions. The *Omnicare* majority made clear that it was not invalidating the use of deal protection devices generally,[153] thus alternative combinations of deal protection devices emerged that provide the maximum amount of deal certainty possible while avoiding invalidation.[154] Relatedly, the Delaware Court of Chancery upheld some of these alternative transaction structures and, in connection therewith, limited the application of *Omnicare*. Since its issuance, three notable decisions of the Court of Chancery addressed *Omnicare*-based challenges to mergers. In each of these decisions, the court distinguished the valid combination of deal protection measures before it from the invalid *fait accompli* in *Omnicare*. In *Orman v. Cullman*, for instance, the court's holding and rationale indicate that so long as it is theoretically possible for an alternative transaction to be considered and approved by a target corporation's stockholders, *Omnicare* would be inapplicable.[155] Similarly, in *Optima International of Miami v. WCI Steel, Inc.*,[156] and more recently *In re OPENLANE, Inc., Shareholders Litigation*,[157] the court upheld the sign-and-consent structure of a merger agreement that required stockholder approval of the merger to occur immediately following board approval of the deal.[158]

152. *Id*. (discussing the different factors that play a role in merger activity).

153. *See Omnicare*, 818 A.2d at 938-39; Veasey & Di Guglielmo, *supra* note 8, at 1460 ("*Omnicare* does not preclude the use of deal protection devices in the future . . . . ").

154. *See* Alexander B. Johnson & Roberto Zapata, *Optima Is Optimal: Sidestepping* Omnicare *in Private Company M&A Transaction*s, DEAL POINTS: THE NEWSLETTER OF THE COMMITTEE ON MERGERS AND ACQUISITIONS, Summer 2009, at 2 (discussing alternative deal structures to avoid *Omnicare*'s application); Neimeth & Reese, *supra* note 102; Laster, *supra* note 17, at 833 ("[*Omnicare*] did not limit the ability of deal planners to agree to a range of other common protective measures, such as termination fees, no-shop provisions, match rights, or even voting agreements covering a lesser percentage of shares. These features give an initial bidder a significant leg up and provide ample reasons for a potential acquirer to want incumbent merger-party status.").

155. Orman v. Cullman, C.A. No. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004).

156. Transcript of Oral Argument, C.A. No. 3833-VCL (Del. Ch. June 27, 2008). In *Optima*, Vice Chancellor Lamb (who also issued the ruling in *Omnicare* that was subsequently overturned), commented that "*Omnicare* is of questionable continued vitality." *Id*. at 127.

157. *In re* OPENLANE, C.A. No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).

158. Because corporations with controlling stockholders can, based on *Optima* and *OPENLANE*, take advantage of the sign-and-consent structure as a way to lock-up a transaction by securing immediate stockholder approval, *Omnicare* as a practical matter has very few instances of applicability. *See* Davidoff, *Long Slow Death*, *supra* note 8 Shaner, *supra* note 148 at 875 (discussing the rare instances where *Omnicare* has, as a practical matter, applicability in Delaware);

In distinguishing and limiting *Omnicare*'s applicability to the disputes before it, the court used language and reasoning similar to the view encouraged by the dissenting justices in *Omnicare* – that a board of directors should be granted judicial deference in evaluating decisions regarding deal protection measures.[159] Additionally, the court relied heavily in *Orman*, *Optima*, and *OPENLANE* on the distinction between the mathematically impossible *Omnicare* structure and the other three theoretically possible transaction structures as the basis for validity, in particular where the court acknowledged that the intent (and practical effect) of the structures at issue was to lock-up the deal. This suggests that the Court of Chancery in these decisions was seeking to narrow the scope of a decision with which it disagreed.[160] In light of the fact that *Omnicare* was almost immediately undercut by these Court of Chancery decisions, it may very well be the case that *Omnicare* did not cause a change in the M&A market because it was never really given a chance to affect it in the first place.

V. THE CONTRIBUTIONS OF *OMNICARE* TO CORPORATE LAW

In the decade since it was issued, reception to the *Omnicare* decision has been overwhelmingly critical. As discussed in Part III, judges, practitioners, and academics point to the majority opinion's

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Daniel E. Wolf, *Noble Prose: Sound Bites on Public M&A*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Oct. 26, 2011 9:33 A.M.), http://blogs.law.harvard.edu/corpgov/2011/10/26/noble-prose-sound-bites-on-public-ma/. ("For targets where written consent by shareholders is permitted, *Omnicare* may be dead in practice, even if not in law.").

159. *See, e.g.*, Transcript of Oral Argument, Optima Int'l of Miami v. WCI Steel, Inc., C.A. No. 3833-VCL (Del. Ch. June 27, 2008) at 138 ("I don't substitute my judgment for that of the board or my business judgment for the board's judgment. My job is to look at what the directors did and determine whether the actions they took are within the range of reasonableness."); *see also* Eleonora Gerasimchuk, *Stretching the Limits of Deal Protections Devices: From* Omnicare *to* Wachovia, 15 FORDHAM J. CORP. & FIN. L. 685, 717-18 (2010).

160. *See* Davidoff, *Long Slow Death, supra* note 8 ("All in all, the actions of the Chancery Court here provide a nice picture of how Delaware works: how the court responds to decisions perceived by its constituencies (lawyers, corporations, even stockholders) to be wrong."); Janine M. Salomone & David B. DiDonato, *In re* OPENLANE *Bolsters Omnicare and Sheds New Light on Revlon*, BUSINESS LAW TODAY (Dec. 30, 2011), http://www.americanbar.org/publications/blt/2011/12/delaware_insider.html (stating that "certain commentators characterized the *OPENLANE* decision as another step toward burying *Omnicare*"); Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 758 n.118 (2008) (stating that *Omnicare* "is perceived to be weak precedent among practitioners, academics, and even other judges"); Veasey & Di Guglielmo, *supra* note 8, at 1461 ("Nevertheless, *Orman* indicates a possible trend toward limiting the majority holding in *Omnicare* to its facts."); Wolf, *supra* note 158. This has led many corporate scholars and commentators to ask what, if anything, is really left of *Omnicare* today.

questionable doctrinal footing, its potential negative effects on the mergers and acquisitions market, and its poor corporate policy implications. Further, given the limited manner in which the Delaware courts subsequently applied *Omnicare*, it begs the question of the decision's relevance and actual impact, if any, on corporate law. At the same time, however, Delaware's highest court strives for unanimity in its decisions, so the fact that three of the five justices supported the opinion suggests it would be a mistake to dismiss the case entirely. Indeed, even though the dissenting justices "strongly believe[d] that the majority opinion was wrong-headed," one has subsequently acknowledged that the decision represents an intellectual disagreement regarding the proper use of deal protection devices and complete lock-ups.[161]

In revisiting *Omnicare* it is not the purpose of this article to defend the majority opinion's rationale and holdings. Many of the criticisms raised regarding the majority's incorrect interpretation and improper extension of Delaware corporate law are well-founded. Further, both the majority's application of *Unocal* review and establishment of a per se rule against complete lock-ups appear to be a more formalistic approach to protecting stockholder interests. That is, the majority's holdings in effect require target boards to follow a specific process to result in enforceable merger agreements. Or, stated another way, the decision deters a certain process – agreeing to a completely locked-up transaction. The intent of this article is to take a different approach from the majority's formalistic one in discussing how *Omnicare* protects stockholders interests and improves corporate governance. The decision does so by setting forth broad normative principles that play an important role in shaping current merger and acquisition law and decision-making. When evaluating the court's decision from this perspective, one can conclude that the importance of *Omnicare* to corporate law does not come from the vitality of its specific holdings or whether the decision can be easily avoided by creative contract drafting. *Omnicare*'s contributions to shaping our current merger and acquisition law and practices come from the message underlying the majority opinion – that, like in all decisions, but particularly in significant situations like mergers, directors must take an active role and be mindful

161. *See* E. Norman Veasey, *Musings from the Center of the Corporate Universe*, 7 DEL. L. REV. 163, 172 (2004); *see also* Randy J. Holland & David A. Skeel, Jr., *Deciding Cases Without Controversy*, 5 DEL. L. REV. 115, 128 (2002) (explaining that where members of the Delaware Supreme Court have dissented, those opinions have been said to "illustrate that principled differences of opinion about the law [are] . . . never compromised for the sake of unanimity").

of their fiduciary obligations. It is this aspect of *Omnicare* that is significant.

In what can be said as characteristic of the Delaware style, the *Omnicare* decision provides a norm-based account of how directors should and should not behave in negotiating and approving mergers, particularly deal protection devices.[162] In a jurisdiction where the courts appear to say "no" to boards of directors infrequently, instead granting great deference under the business judgment rule to their decisions, *Omnicare* goes against that tendency, signaling to directors and their counsel that more careful consideration of their fiduciary obligations is required, as they will be held accountable for their decisions. Several aspects of the majority's opinion contribute to this message: (i) a renewed attention to deal protection devices, (ii) director accountability for decisions regarding deal protection devices, (iii) preserving optionality in mergers and acquisitions, (iv) advancing the corporate policy of protecting stockholder interests, and (v) providing a precise rule for corporate actors to follow.

Thus, *Omnicare* impacted director decision-making in a positive manner – reminding directors of their fiduciary obligations and encouraging thoughtful consideration in the negotiation and approval of mergers, which then leads to better governance and greater stockholder value. It is in this respect that *Omnicare*'s contribution to corporate law can be viewed in much the same way as one of the Delaware Supreme Court's other famously controversial decisions, *Smith v. Van Gorkom*.[163] Also a split decision, the court in *Van Gorkom* held that the target board had acted in a grossly negligent manner and that its approval of the proposed merger was not the product of an informed business judgment.[164] In each of these cases, subsequent events arguably eroded the decision's holdings – in the case of *Van Gorkom*, the adoption of director exculpation statutes, and in the case of *Omnicare*, limited interpretation and application by the Court of Chancery. But the normative value of each of these decisions does not hinge on the vitality of their specific legal holdings. What is important, rather, is the court's

162. *See* Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1012-13 (1997) (describing Delaware fiduciary duty case law as normative stories on how directors should behave); *see also* David Fox, *Delaware Decisions: Data Points, Not Doctrine* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (May 31, 2012 9:53 A.M.), http://blogs.law.harvard.edu/corpgov/2012/05/31/delaware-decisions-data-points-not-doctrine/ (stating that Delaware M&A opinions "offer market participants useful insights into best practices").

163. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

164. *Id*. at 893.

message to directors that they need to take ownership of their fiduciary obligations and have an active role in corporate decision-making. The court in both *Omnicare* and *Van Gorkom* is expressing corporate community norms with respect to director decision-making. At the same time the court is also protecting and reinforcing those norms by holding directors accountable for their decisions, which aids in creating that very same community.[165] Through these decisions, the court is essentially communicating those standards of proper conduct not only to the parties involved in the case, but also to corporate America generally.[166] Stated another way, through its decision the court is teaching lawyers how to facilitate good corporate governance, not regulate corporate governance. As a result, these landmark cases continue to influence corporate decision-making today.

A. Renewed Attention to Deal Protection Devices

Beginning in the late 1970s and early 1980s Delaware courts were faced with an active market for control of corporations.[167] As merger and acquisition activity increased so, too, did the use of deal protection devices.[168] In connection with their review of the many hostile takeovers during this time, the courts expressed discomfort and skepticism with respect to the use of strong deal protection devices. This is because deal protection devices have important implications for corporate governance and directors' fiduciary duties.[169] As a result, beginning in the mid-1980s, a string of decisions issued by the Delaware courts limited the use of deal protection devices in the merger context.[170]

165. *See* Rock, *supra* note 162, at 1016 n.15.

166. *Id*. at 1019; *see id*. at 1152 (discussing that Delaware opinions in the MBO context "made clear to the planners of all future deals that the court expects a higher standard of behavior"); *see also* William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 76 (1999) ("*Van Gorkom* exploded on the world of corporate directors. People most definitely took notice of its stern message. From an ex-ante perspective, it almost certainly has had a positive effect on corporate governance.").

167. As described by former Chief Justice of the Delaware Supreme Court, "During the 1980s, the Delaware Supreme Court developed a jurisprudence to deal with the extant hostile takeover environment, which seemed to confound the traditional business judgment approach." Veasey & Di Guglielmo, *supra* note 8, at 1454; *see also* Strine, *supra* note 96, at 884 ("The advent of the hostile takeover era put in play. . .the question of the balance of power between law (i.e., the DGCL and corporate instruments) and equity (i.e., the fiduciary duties of directors) in addressing this new market phenomenon.").

168. *See also* Coates & Subramanian, *supra* note 19, at 310.

169. *See infra* notes 173-75, 178-81 and accompanying text (discussing the impact deal protection devices have on corporate governance and discharging fiduciary duties).

170. *See* Panagopoulos, *supra* note 11, at 441; Veasey & Di Guglielmo, *supra* note 8, at 1454 ("*Unocal*, represented the sea change in the takeover jurisprudence of the mid-1980s, although *Van*

The majority's decision in *Omnicare* was consistent with this prior jurisprudence in its judicial scrutiny of a board's decision to agree to deal protection devices,[171] but extended that case law in three important ways.

First, in holding that *Unocal* was the proper standard of review for the deal protection devices, the *Omnicare* majority extended enhanced judicial scrutiny of those provisions to non-change-in-control, friendly mergers as well. Most of the deal protection cases arose out of the hostile takeover era and thus involved hostile transactions (triggering *Unocal* scrutiny) and/or change-in-control transactions (triggering *Revlon* scrutiny). This left deal protection devices in friendly, non-change-in-control mergers arguably analyzed under a totally different framework, subject to the deferential business judgment rule review.[172] Regardless of the context, however, a merger is one of, if not the, most important events in a corporation's life span, thus "implicat[ing] accountability concerns, raising proverbial judicial eyebrows due to conflict of interest concerns between the personal interest of directors and the overall corporate policy protection afforded to shareholders."[173] Whether a transaction is hostile or friendly or results in a change-in-control or not in a change-in-control, the purpose of deal protection devices is the same – to defend the current transaction by deterring subsequent bids (actual or possible) and render the transaction immune

Gorkom, *Moran*, and *Revlon*, all decided in that watershed year, 1985, were also landmark cases that live with us daily, well into the twenty-first century."); *see also* Bainbridge, *supra* note 125, at 24 ("In a number of cases, the Delaware courts have expressed doubts as to whether merger exclusivity provisions are consistent with the board of directors' fiduciary duties.") (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 48-49 (Del. 1994); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986)). "The key departure here is that the business judgment rule (which presumes proper process and rationality) has been supplanted in these takeover situations by an objective test of reasonableness – not found in the business judgment rule." Veasey & Di Guglielmo, *supra* note 8, at 1454.

171. *See, e.g.*, Ryan v. Lyondell Chem. Co., C.A. No. 3176–VCN, 2008 WL 2923427, at *16 n.96 (Del. Ch. July 29, 2008), *rev'd by* Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009) ("Thus, *Omnicare* did not mark an analytical sea change; instead, it is consistent with numerous cases in which this court has carefully scrutinized a board's decision to grant deal protections before according it the deference normally given to directors' business decisions.").

172. *See* Lebovitch & Morrison, *supra* note 17, at 4 (discussing the uncertainty surrounding what standard of review should apply to adoption of deal protection devices in merger of equals transactions – *Unocal* or the business judgment rule – and the divided views of the Court of Chancery).

173. Amy Y. Yeung & Charles B. Vincent, *Delaware's "No-Go" Treatment of No-Talk Provisions: Deal-Protection Devices after* Omnicare, 33 DEL. J. CORP. L. 311, 322 (2008). Concern regarding these conflicts may be especially great where, as was the case in *Omnicare*, there are large stockholders who support one transaction over another and want to ensure its successful completion.

to a topping bid.[174] Accordingly, the conflict of interest and director accountability concerns regarding deal protection devices are the same. Regardless of the particular analytical framework in which a merger occurs, deal protection devices thus lead to the same conflict between the contract obligations a target board owes to a bidder and its duties to the stockholders in approving the best transaction.[175] The *Omnicare* decision erased the artificial line[176] between applying enhanced judicial scrutiny to deal protection devices in hostile/friendly transactions and change-in-control/non-change-in-control transactions. In closing the loop that was negotiated, non-change-in-control mergers the opinion emphasizes to the corporate world the importance of director decision-making in mergers and acquisitions.[177]

Second, the decision brought a renewed focus to the role of the fiduciary out clause in mergers.[178] Important is the fiduciary out provision highlighted in *Omnicare*, which has been characterized as advancing both a board’s duty of care and duty of loyalty. An “out” allows a target board to continue to receive information regarding potential alternative proposals, thereby providing the board with the

174. *See also* Coates & Subramanian, *supra* note 19, at 389 (asserting that “[l]ockups should be recognized for what they are – deal protection” and that “[c]ourts should not rubber-stamp lockups under the business judgment rule or rely on bright-line rules of thumb to approve lockups”); Lebovitch & Morrison, *supra* note 17, at 14 (contending that all deal protection devices are inherently defensive). Indeed, the fact that many initially (or potentially) hostile transaction may morph into friendly, negotiated transactions further supports the contention that using the merger context as the dividing line between enhanced scrutiny and business judgment rule review of deal protection devices unsound. *See* Johnson & Siegel, *supra* note 128, at 372 n.208 (noting that “there is no bright line separating defensive mergers, such as the merger evaluated in *Revlon*, from uncoerced combinations, given that even the threat of a hostile takeover may compel target management to consider a negotiated transaction”); Griffith, *supra* note 8, at 585 n.81.

175. The *Omnicare* majority recognized this “inherent conflict” in reaching its conclusions. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930 (Del. 2003); *see also* Laster, *supra* note 17, at 804-07.

176. Lebovitch & Morrison, *supra* note 17, at 40-41 (asserting that the dividing line regarding the judicial standard of review of board actions in approving a merger is illusory).

177. However, one can argue that *Omnicare* merely results in a different artificial line with respect to what type of enhanced scrutiny applies in change-in-control versus non-change-in-control friendly mergers – with *Revlon* scrutiny applying in the former and *Unocal* scrutiny (per *Omnicare*) in the latter.

178. The fiduciary out has been defined as a contract provision that “typically provides that if some triggering event occurs (often the receipt of a defined ‘Superior Offer’ and sometimes the receipt from the corporation’s outside lawyers of an opinion to the effect that the board must as a matter of fiduciary duty do an act that the contract forbids or must not do an act the contract requires), then the doing of that act (or the refraining from doing a required act) will not constitute a breach.” William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 BUS. LAW. 653, 654 (2000).

information and ability to maximize value for the stockholders.[179] A fiduciary out provision also promotes the duty of loyalty by preventing director self-interest. The fiduciary out allows a topping bid to come in to a target, surpassing any pro-management deal with a preferred bidder on lesser terms.[180] This provision thus acts as a market check on a target board fulfilling its fiduciary obligations to the stockholders to find the best transaction. Moreover, the fiduciary out provision allows a target board the flexibility to respond to changes in circumstances beyond a superior offer. Because directors have no fiduciary right under Delaware law to breach a contract,[181] the fiduciary out provision allows target board flexibility in the event circumstances surrounding a target change, making a transaction no longer appear to be a reasonable one.

Finally, *Omnicare* focused on not just deal protection devices individually, but also the combination of devices and their cumulative impact.[182] Much of the case law pre-*Omnicare* has been described as focusing on "specific deal protection provisions and whether they violated a board's fiduciary duty. For example, courts analyzed how much a termination fee could be in relation to the deal or whether a stock lock-up granted in the merger agreement coupled with other protection devices was 'draconian.'"[183] While individually, each deal protection device may be reasonable, *Omnicare* drew attention to the overall effect that the devices, in combination, have on a board's ability to continue to discharge its fiduciary duties for the benefit of the stockholders.

179. Michael A. Stanchfield, *Fiduciary Duties in Negotiated Acquisitions: Questioning the Legal Requirements for "Outs,"* 27 WM. MITCHELL L. REV. 2261, 2268-69 (2001). In the absence of a fiduciary out, the likelihood that a higher-valuing bidder will make an alternative proposal is slim. As Professors Coates and Subramanian found, deal protection devices can "erect significant barriers against outside overbidding" and "foreclos[e] potentially higher value offers." Coates & Subramanian, *supra* note 19, at 335-353, 387.

180. Stanchfield, *supra* note 179, at 2268-69.

181. *See* Allen, *supra* note 178, at 654-58 (citing Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985)). It should be noted that a contract entered into in violation of a board's fiduciary duty has been found by the Delaware courts to be void. Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 51 (Del.1994) ("To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of fiduciary duties, it is invalid and unenforceable."). In contrast, where a board of directors enters into a contract without breaching its fiduciary duties, it cannot escape performance under the contract simply by claiming that its fiduciary duties require it to do so. *See* Transcript of Oral Argument, Global Asset Capital, LLC v. Rubicon US Reit, Inc., C.A. No. 5071-VCL, at 6-7 (Del. Ch. Nov. 16, 2009).

182. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 934 (Del. 2003). Subsequent decisions of the Court of Chancery, while not citing to *Omnicare*, can be seen to apply this collective evaluation of deal protection devices. *See, e.g.*, *In re* Orchid Cellmark Inc. S'holder Litig., No. 6373-VCN, 2011 WL 1938253, at *8 (Del. Ch. May 12, 2012) ("Moreover, it is not merely a matter of measuring one deal protection device; one must address the sum of all devices.").

183. Knight, *supra* note 126, at 49.

Following the Court of Chancery's decisions in *Orman*, *Optima*, and *OPENLANE*, which validated alternative transaction structures to avoid *Omnicare*, some commentators asserted that the decision is easy to draft around and thus "dead in practice, if not in law."[184] But perhaps this misses the point of the decision. The majority was careful not to preclude the use of deal protection devices in total. In fact, the majority pointed out that it would still be acceptable for a transaction to include "reasonable structural and economic defenses, incentives and fair compensation [to a potential acquirer] if the transaction is not completed" as long as the combination of those provisions are not impermissibly coercive or preclusive or do not amount to a *fait accompli* that "limit[s] or circumscribe[s] the directors' fiduciary duties."[185] What *Omnicare* can be said to demand is more careful consideration of one's fiduciary duties by directors and their counsel in negotiating and approving mergers, which includes giving attention to how all of the provisions work together.[186] Because both parties will want their merger agreement to be enforceable, the majority's decision discourages the careless overuse of deal protection devices. Instead, it requires target boards and acquirers to consider which deal protection devices may be more important to them and which items to forgo. "For example, the acquirer may consider granting the board of the target the right to terminate the acquisition agreement if it receives a financially superior proposal but retaining the voting agreements."[187] The decision also requires parties to not only consider the costs and benefits of each provision individually, but also the combined effect of the devices. In

184. *See supra* notes 158 & 160 and accompanying text.

185. *Omnicare*, 818 A.2d at 938 *see also* Stephen I. Glover & Michael J. Scanlon, *The Landscape for Negotiated Mergers After* Omnicare Inc. v. NCS Healthcare, Inc. *– What Combination of Protective Measures Will Withstand Scrutiny?*, SEC. REG. & LAW REPORT (May 26, 2003), at 893; Veasey & Di Guglielmo, *supra* note 8, at 1460. Professor Quinn has advocated that limited deal protection devices, such as termination fees, can adequately protect and reimburse acquirers' investments (e.g., direct costs and opportunity costs) in bidding on a target, thus there is no need for "bulletproof" transactions. Quinn, *supra* note 17, at 867.

186. *Omnicare*'s indirect effect in this regard can be seen in subsequent Delaware decisions which evaluate deal protection devices individually and as a whole. *See, e.g.*, *In re* Compellent Techs., Inc. S'holder Litig., C.A. No. 6084–VCL, 2011 WL 6382523, at *23 (Del. Ch. Dec. 9, 2011); La. Municipal Police Employee's Ret. Sys. v. Crawford, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007); *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 197 n.80 (Del. Ch. 2007); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1014-16 (Del. Ch. 2005).

187. *The* Omnicare *Decision: A Completely Lock-Up Merger Is Invalid Under Delaware Law*, SIDLEY AUSTIN BROWN & WOOD LLP CORPORATE ALERT (Apr. 28, 2003). Also, post-*Omnicare*, the boards of directors of the target and acquiring corporations "will need to carefully weigh the likelihood of an interloper appearing after an acquisition agreement is signed and the related risk of litigation and possible invalidation of the agreement against the desire for certainty of closing." *Id.*

invalidating the Genesis merger, *Omnicare* put parties on notice that the Delaware courts will invalidate entire contractual provisions where they are excessive. The result being that both a target's and an acquirer's board will undertake a more thoughtful approach to negotiating deal protection so as to achieve an aggressive, but not extreme, combination of provisions that will be enforced.[188] In contrast, were Delaware courts to narrowly interpret target board's fiduciary duties in the context of deal protection devices so as to avoid invalidating the entire provision, it would encourage parties to draft aggressive provisions locking-up a potential transaction knowing that there is little risk to the merger being invalidated. Requiring boards of directors to take a thoughtful, measured approach to negotiating and approving deal protection devices has become more and more important as the use of these provisions has become increasingly prevalent.[189]

B. Director Accountability

Mergers and acquisitions are very important corporate events. As explained by (former) Chancellor Chandler of the Court of Chancery, "[a]ll M&A events are fundamentally extraordinary moments in the life of a corporation. They're not common, they're not typical, and they're usually transformative events."[190] Indeed, the negotiated merger is likely the most economically significant transaction in the life of a corporation.[191] Thus it should be no surprise that in connection with their duty of care, directors are required to be fully informed in entering into such a transaction.[192] Included in the decision to enter into a merger are a number of considerations, including negotiating and approving deal protection devices, that a board must undertake. In exercising due care a board must not only inform itself about the transaction as a whole, but

188. *See also* Yeung & Vincent, *supra* note 173, at 334-35.

189. *See* Coates & Subramanian, *supra* note 19, at 310 ("In friendly U.S. mergers greater than $50 million in value, lockups appeared in 80% of the deals in 1998, compared with 40% of deals a decade ago."); Davidoff & Sautter, *supra* note 151, at 682, 684-92 (discussing the lock-up creep in mergers and stating that "[l]ock-ups are also ubiquitous in merger agreements").

190. *See* Deloitte & Touche LLP, *Corporate Development 2012 – Leveraging the Power of Relationships in M&A*, 31 (2012) [hereinafter Deloitte, *Developments*].

191. *See* Brian C. Brantley, *Deal Protection or Deal Preclusion? A Business Judgment Rule Approach to M&A Lockups*, 81 TEX. L. REV. 345, 346 (2002).

192. *See* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985); Phelps Dodge Corp. v. Cypress Amax Minerals Co., No. Civ. A. 17398, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999) ("Under [Delaware] law, a board of directors must be informed of all material information reasonably available . . . [and] even the decision not to negotiate . . . must be an informed one."); *see also* Stanchfield, *supra* note 179, at 2272, 2277.

also the decision to approve the deal protection devices.

In the context of no-shop/no-talk provisions, the Court of Chancery suggested that provisions designed to restrict a target board from communicating with third parties are unlawful because they prevent the board from informing itself about whether to negotiate with a third party.[193] Similarly, locking-up a transaction so that it is *a fait accompli*, contractually forecloses a board's ability to receive information in contravention of its duty of care. Completely locked-up transactions deter, and likely prevent, subsequent bidders from coming forward,[194] thus restricting relevant information regarding the market for a target corporation. *Omnicare*'s requirement that a target board maintains a fiduciary out, and with it the ability to continue to receive relevant information regarding alternative bidders and transactions, ensures directors carry out their fiduciary obligations in a sale of the business. This continuing flow of information is particularly important where a target board may not have undertaken (or been able to undertake) an adequate analysis of the market and potential acquirers.

To that end, it should be noted that the majority's opinion did not focus on the controlling stockholder context in which the dispute arose, but rather on the role of the board of directors.[195] During the years surrounding *Omnicare* there was a movement in corporate America toward greater accountability for boards of directors' decisions.[196] The majority's decision fell in line with this accountability movement. Prior decisions such as *Revlon* and *Unocal* led to significant changes in thinking with respect to the types of deal protection devices a target board could agree to as well as the flexibility of a target board in agreeing and responding to proposals containing strong deal protection

193. *See Phelps Dodge Corp*., C.A. 17398, CIV. A. 17383, No. Civ. A. 17427, 1999 WL 1054255; Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 95 (Del. Ch. 1999); *see also* Yeung & Vincent, *supra* note 173, at 331-32 (discussing *Phelps* decision). *But see In re* IXC Commc'ns, Inc. S'holders Litig., Nos. 17324, 17334, 1999 WL 1009174, at *10 (Del. Ch. Oct. 27, 1999) (applying business judgment rule to no-talk).

194. *See* Coates & Subramanian, *supra* note 19, at 387.

195. Hanewicz, *supra* note 2, at 564 ("Indeed, a fair reading of the case is that controlling shareholders qua controlling shareholders escape with no additional duties. Instead, the court focused on the board.").

196. *See* Knight, *supra* note 126, at 48 ("In light of these changes, it seems only natural that *Omnicare* was decided the way it was."). Former Chief Justice Veasey has been quoted as stating that "a new set of expectations for directors [is] changing how the court looks at these issues" and now-Chancellor Strine has noted that "there's increasing pressure on the court to look at the subject of independent directors." Loomis, *supra* note 128, at 3; *see also* Stanchfield, *supra* note 179, at 2272 (stating that *Unocal*, *Van Gorkom*, and *Revlon* "signaled an increased willingness by the [Delaware] courts to give less deference to boards of directors' actions in extraordinary corporate transactions").

devices. *Omnicare* continued this trend and added another layer to it – enhanced scrutiny of decisions involving deal protection devices in the negotiated, non-change-in-control merger context.[197] In refusing to grant deference to the NCS board's decisions until after applying a more substantive review under *Unocal*, the majority signaled a willingness to hold boards of directors more accountable for their decisions in connection with negotiating and approving a merger.[198]

Moreover, the *Omnicare* decision can be viewed as an effort by the majority to properly shape director decision-making. Delaware's takeover jurisprudence leading up to and including *Omnicare* affected the thought process on how a board should run a potential acquisition from start to finish, with an emphasis on the negotiation of a transaction.[199] This body of case law developed as a normative/narrative style of corporate law, with the courts telling directors, officers, and lawyers what kind of behavior is acceptable or a breach of fiduciary duty.[200] The *Omnicare* decision contributed to and shaped the definition

197. *See* Lebovitch & Morrison, *supra* note 17, at 5-6 (asserting that the application of *Unocal* to deal protection devices "merely requires that directors, as agents, not appear to place their allegiance to a potential merger partner ahead of their loyalty to their principals, the stockholders").

198. This message underlying the majority's opinion can be continually seen in other merger and acquisition opinions of the Delaware courts throughout the ten years following *Omnicare*. *See, e.g., In re* Del Monte Goods Co. S'holders Litig., 25 A.3d 813, 835 (Del. Ch. 2011) (stating that "the buck stops with the Board").

199. *See* Coates & Subramanian, *supra* note 19, at 312, 320-37 (presenting evidence that Delaware case law strongly shapes decisions regarding deal protection devices); *cf.* Rock, *supra* note 162, at 1100 (concluding that Delaware opinions in the management buyout context seem to shape director conduct).

Indeed, *Omnicare* came on the heels of four Delaware Supreme Court decisions, all of which reversed the Court of Chancery in favor of the plaintiff-stockholders. *See* Loomis, *supra* note 128 (citing Telxon Corp. v. Meyerson, 802 A.2d 257 (Del. 2002), Saito v. McKesson HBOC Inc., 806 A.2d 113 (Del. 2002), Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, 803 A.2d 428 (Del. 2002); MM Cos. v. Liquid Audio Inc., 813 A.2d 1118 (Del. 2003)). These decisions illustrated that after "recent corporate management controversies, the public and courts seem to be willing to accept more judicial instruction/intrusion upon the decision making of corporate directors and officers." Arons, *supra* note 76, at 130.

200. This description of takeover jurisprudence is consistent with Professor Edward Rock's proposed theory on how Delaware corporate law works – operating as a "norm-based" account of managerial behavior supported by the Delaware courts' decisions, which also serve as a "source of gossip, criticism and sanction for this set of actors who are beyond the reach of the firm's normal system of social control." Rock, *supra* note 162, at 1012-13, 1105 (describing the "Delaware judicial style as one well suited to the articulation and expression of standards of managerial conduct"). Professor Rock describes Delaware fiduciary duty law as having a "normative narrative style." *Id*. at 1063. Using the management buyout (MBO) jurisprudence as a case study in which to watch Delaware corporate law in action (*see id*. at 1019), Professor Rock found that the standards governing MBOs evolved through decisions where the court provided guidance on the appropriate standards of behavior by describing the good and bad performances by directors. *Id*. at 1063. This same development and articulation of the proper standards of director conduct can be seen in

and description of the role that directors are expected to fill in negotiating and approving mergers, by providing guidance on the decisional process necessary in approving deal protection devices.

In particular, two of *Omnicare*'s holdings can be regarded as efforts by the majority to improve decision-making by boards of directors. The first holding is the majority's application of enhanced scrutiny under *Unocal* to a board's decision to approve deal protection devices.[201] In applying enhanced scrutiny, the majority signaled to the corporate world the importance in negotiating each aspect of a merger regardless of the context. The direct effect of the application of more meaningful judicial scrutiny to board action is more careful director decision-making.[202] To satisfy substantive judicial review of their decisions to approve deal protection devices as dictated by *Omnicare*, boards and their advisors must engage in informed and thoughtful deliberations and consideration of these provisions. Encouraging this type of fulsome discussion in the boardroom builds consensus among directors, as well as leads to thicker, more robust decisions by the board.[203] The result is an actively engaged board that negotiates for and approves the best possible transaction and structure for its stockholders.[204]

Second, after concluding that approval of the provisions did not satisfy *Unocal* scrutiny, the majority held that the deal protection devices were invalid and unenforceable.[205] As previously discussed, in invalidating the merger provisions entirely, as opposed to enforcing part

Delaware's takeover jurisprudence, and in particular in the majority's *Omnicare* decision.

201. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 934-35 (Del. 2003).

202. *See* Coates & Subramanian, *supra* note 19, at 336-37 (concluding that Delaware case law has "a significant impact on the incidence and design of lockups" and that "[a]t a general level, lockup incidence is affected strongly by whether a given deal is subject to the type of 'enhanced scrutiny' announced in *Revlon*, with lockups being more likely and breakup fees being larger outside the borders of *Revlon*-land").

203. In this respect, the normative implications of *Omnicare* are similar to *Smith v. Van Gorkom*, with the majority opinion in each case emphasizing the necessity of an informed, careful process in director decision-making. *See* Smith v. Van Gorkom, 488 A.2d 858, 872-73 (Del. 1985); *see also* Rock, *supra* note 162, at 1015 (noting that Delaware conceptualizes fiduciary duty law in process terms). Thus, *Omnicare* can be read as respecting the board's institutional competence if the board's decisional process in approving deal protection devices meets certain standards.

204. Recently it was reported that more than 40 percent of corporate executives surveyed regarding the role of boards of directors in merger and acquisition activity believe that directors have become more involved in these transactions over the last two years. *See* Deloitte, *Developments*, *supra* note 190, at 27. And fifty-four percent of corporate executives at corporations with at least $1 billion in annual revenue believe that this board involvement adds value "through constructive evaluation of and challenges to transaction objectives." *Id*. at 29-30 (internal quotations omitted). At smaller corporations, only 31 percent of corporate executives held this same view. *Id*.

205. *See Omnicare*, 818 A.2d at 936.

or all of the provisions by applying a narrow interpretation, the majority's decision encourages thoughtful consideration and negotiation of these provisions.[206] With a heightened focus to make sure combinations of deal provisions are enforceable, target boards and acquirers are deterred from agreeing to overbroad prohibitive deal protection devices. Rather, to avoid invalidation of contractual merger restrictions under *Omnicare*, boards of directors and their advisors must now put forth the time and effort to engage in vigorous negotiations of deal protection devices, approving only those that are more narrowly tailored to achieve the parties' objectives.

C. Precommitment Is Not Necessarily a Good Thing

Is the value of precommitment overstated? Many scholars and practitioners assert that the ability to completely lock-up a transaction is necessary to have an efficient buyer-seller market.[207] But do the costs and preclusive effect of a locked-up deal outweigh the gains asserted?[208] This is an issue on which neither commentators nor the justices in *Omnicare* themselves, could agree. As former Chief Justice Veasey has subsequently commented, *Omnicare* represents an intellectual disagreement over whether a transaction can ever be absolutely locked-up.[209]

From the stockholder perspective, the costs of complete lock-ups seem to be outweighed by the benefits. In fact, many of the benefits proponents of precommitment strategies proffer inure to other constituencies such as the board of directors and potential acquirers, which does not necessarily benefit the stockholders. For instance, deal protection devices increase a target board's control over the sale process.[210] In theory, this control enables a target board to maximize stockholder value.

206. *See supra* Part V.A.

207. *See* Griffith, *supra* note 8, at 595-614; *supra* note 137; *see also* Meredith M. Brown & William D. Regner, *What's Happening to the Business Judgment Rule?*, CORP. & SEC. LAW ADVISOR, Aug. 2003, at 5; J. Travis Laster, *The* Omnicare *Opinion: A New Rule From Delaware?*, CORP. & SEC. LAW ADVISOR, May 2003, at 16-17.

208. *See* Quinn, *supra* note 17, at 865-67 (asserting that from an economic perspective that completely locked-up transactions in the non-*Revlon* context are not as beneficial as asserted by proponents of precommitment and arguing that boards' abilities to approve deal protections devices should be limited); Laster, *supra* note 17, at 828-29; *see also* Moceri, *supra* note 128, at 1159-60 (questioning whether the benefits of lock-ups outweigh the detriments and asserting that other defensive provisions such as termination fees, sufficiently protect bidders).

209. Veasey, *supra* note 161, at 172.

210. *See* Griffith, *supra* note 8, at 615.

> However, deal protection provisions also increase target directors' ability to commit to a transaction that puts their own interest ahead of those of their shareholders. Large scale acquisition transactions, in particular, may create strong incentives for target directors to act in pursuit of their own selfish interest because such transactions throw target directors and managers into a last period problem.[211]

Indeed, scholars have found that in the merger context target management and directors are willing to accept lower prices in exchange for personal benefits in the transactions (e.g., additional compensation, continuing employment, or board seats) or the guarantee that the transaction will close and the merger consideration will be paid (as opposed to a riskier, but higher, offer).[212]

The problem with a completely locked-up transaction is that it eliminates the ability of the market to act as a check on this incentive for director and manager selfishness. Deal protection devices not only insulate an acquirer's bid, but also target directors and managers from competition in the market for corporate control.[213] Once a transaction has become locked-up, the possibility of alternative, superior bidders emerging is essentially, if not actually, eliminated. This, too, eliminates the disciplinary effect of the acquisition market. In the case of target directors and managers, their self-serving approval of a transaction that maximizes their interests is shielded from later bids that may not provide the same benefits. In requiring a fiduciary out, *Omnicare* preserves a market check, which eliminates, at least to some extent, the potential for directors and managers to act self-interestedly in maximizing their own welfare to the detriment of the stockholders.

Omnicare's optionality not only improves stockholder value in this governance sense, but also in an economic sense. In requiring a fiduciary out, the opinion ensures that target stockholders receive the initial transaction and the potential that a later, superior offer, may emerge. In fact, the most important time for a target corporation with respect to receiving higher-value proposals can occur after an initial merger agreement is signed and announced. During the time that passes between the signing of the merger agreement and stockholder approval

211. *Id*.

212. *See* Jay C. Hartzell, et al., *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 51-56 (2004) (finding target management exchange lower premiums for generous compensations packages); Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from Mergers of Equals*, 20 J.L. ECON. & ORG. 60, 94 (2004) (finding target management exchanges lower premiums for employment in the surviving entity).

213. *See* Griffith, *supra* note 8, at 616; Kahan & Klausner, *supra* note 128, at 1560 & 1563.

of the deal, several months may go by (at least in the case of public corporations), during which interlopers may make a competitive bid.[214] The reason that this time can be so important is that announcement of a pending transaction can signal to the market that a corporation may be more favorable than originally thought.[215] Following *Omnicare*, target corporations are not limited to only those bids that are made during the negotiation or auction period, but have a longer window in which to receive the highest possible value. In preventing transactions from being *a fait accompli*, *Omnicare* preserves this period of time as one in which the superior proposal concept has actual meaning and must be enforced. Thus, the fiduciary out leaves a transaction open for additional bidders to compete for a target. This competition, as well as merely the possibility of competition for a target, can lead to additional value for a target and its stockholders.[216]

In addition, proponents of precommitment assert that preserving the ability to completely lock-up a transaction creates an incentive for potential acquirers to search for targets and make a bid in the first place.[217] This is because, proponents argue, there are substantial costs associated with evaluating a target and making a bid. The ability to completely lock-up a bid mitigates the possibility that these costs will be

214. *See* Brantley, *supra* note 191, at 346; Jim Mallea, *Timing to Close – Tender Offers vs. Mergers*, FACTSET MERGERS (Feb. 24, 2010), https://www.mergermetrics.com/marequest?an=dt.getPage&st=1&pg=/pub/rs_20100224.html&Timing_to_close_Tender_Offers_vs_Mergers&rnd=476844 (stating that the average number of days it took to complete a merger for 2009 was 111.85); *see also* Coates & Subramanian, *supra* note 19, at 310 (noting that "compliance with disclosure and other rules regulating the process of obtaining target shareholder acceptance or approval entails delay, ranging from a minimum of thirty days up to six months in some situations").

215. *See* Moceri, *supra* note 128, at 1171-72 (arguing that allowing lock-ups eliminates the important time between the merger agreement and the stockholder vote which then also eliminates the chance that a higher bid could be made; all at the stockholders' expense).

216. *See* Celia R. Taylor, *"A Delicate Interplay": Resolving the Contract and Corporate Law Tension in Mergers*, 74 TUL. L. REV. 561, 594 (1999) ("Under basic rules of supply and demand, the fewer the bidders, the lower the final price paid."); Quinn, *supra* note 17, at 879-80. Precommitment strategies do not necessarily, as proponents asserted, lead to bidders paying a higher price for the extra protection afforded by a complete lock-up. Rather, as Brian JM Quinn, explains:

> [t]he reason buyers often insist on bulletproofing a transaction may be because they understand that by limiting competition they can accomplish the transaction for less than their private valuation, thereby retaining more surplus. Bulletproofing may sometimes be defended as innocuous when the buyer is the "only game in town." However, if the probability of a subsequent bid were zero, or close to it, then rational buyers would not be willing to offer any increase in price in exchange for bulletproofing.

Id. at 880 (also pointing out that "negotiations that are open to topping bids are better for sellers than bulletproof transactions").

217. *See* Hanewicz, *supra* note 2, at 559-60; Moceri, *supra* note 128, at 1166-67.

lost if an interloper emerges to break up the deal.[218] However, there are strong counterarguments that compensatory deal protection devices such as termination fees can adequately address the costs bidders incur in making a bid, thus generating initial bids without the need for a complete lock-up.[219] As Professor Brian JM Quinn explains in arguing in favor of a mandatory rule against complete lock-ups, compensatory devices such as termination fees not only cover the costs of a bidder's transaction-specific investments, thus attracting initial bids for a target corporation, they can also spur competition for the target, creating the potential for the highest-valuing bid to emerge.[220]

More importantly, in contrast to complete lock-ups that encourage bidders in the initial stages of a sale process, *Omnicare* can be viewed as encouraging additional bidders to participate in the sale process at all stages, including after an initial merger agreement is executed. The majority's opinion put bidders on notice that the Delaware courts may not enforce a merger agreement if it lacks a fiduciary out when a superior offer emerges.[221] Moreover, requiring a fiduciary out means that subsequent bidders will not have to challenge the locked-up merger agreement in court to have a chance at the deal – instead, the merger agreement will provide how the subsequent bid may be considered and accepted by the target board and stockholders.[222] Encouraging (and allowing for) competing offers, which may lead to a superior one, at all stages of the sale process increases the potential for higher stockholder value.[223]

218. *See* Griffith, *supra* note 8, at 613; Hanewicz, *supra* note 2, at 559-60; Moceri, *supra* note 128, at 1166-67.

219. *See* Quinn, *supra* note 17, at 881 (arguing that limited compensatory devices, alone, are sufficient to accomplish the objectives that have previously been used to justify complete lock-ups).

220. *Id*. at 881.

221. *See In re* OPENLANE, C.A. No. 6849–VCN, 2011 WL 4599662, at *10 n.53 (Del. Ch. Sept. 30, 2011).

222. *See* Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 CARDOZO L. REV. 1, 5 (1999) (noting that a subsequent bidder is either unable to make a bid or must make its bid conditional upon judicial invalidation of the lock-up provisions).

223. *See* Moceri, *supra* note 128, at 1181-82 (describing the bidding war between Viacom and QVC for Paramount as an example of how bidding wars may increase the value stockholders of a target company receives). Of course, there is the possibility that such competition could end in a target losing both possible deals. It should be noted, however, that *Omnicare* does not eliminate deal protection devices generally (*see supra* note 153 and accompanying text), and thus a target may still protect its "bird in hand" with deal protection devices from such an event so long as this protection is not absolute. Further, Delaware courts have been clear that boards of directors may validly reject superior, but more risky, bids for the corporation. *See* Transcript of Oral Argument, Optima Int'l of Miami v. WCI Steel, Inc., C.A. No. 3833-VCL, at 127 (Del. Ch. June 27, 2008) (upholding the board's decision to recommend the lower-but-more-certain bid over the higher-but-

D. Protection of Minority Stockholders

Throughout its decision, the *Omnicare* majority was concerned about the rights of minority stockholders. In describing the fiduciary duties a board owes to its stockholders, the majority stated that they were "unremitting" and must be discharged "at all times."[224] This meant that (1) the "NCS board was required to contract for an effective fiduciary out clause to exercise its continuing fiduciary responsibilities to the minority stockholders," and (2), Genesis' contractual expectations in protecting its merger "must yield to the supervening responsibilities of the directors to discharge their fiduciary duties on a continuing basis" to minority stockholders.[225] In finding the deal protection devices to be invalid and unenforceable, the court appears to be motivated by an interest to protect the minority stockholders. It achieved this by making clear that a board of directors' fiduciary obligations include an obligation to protect stockholder interests throughout the entire merger process.

In reaching its holdings, the majority also recognized that stockholders play an important, and indeed, statutorily-prescribed role in mergers and acquisitions.[226] This is because these types of transactions

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more-risky bid). Thus, discretion is still left with the target board to determine what the best deal is for the corporation and stockholders, which may be the original bidder.

In addition to the economic value associated with enticing and potentially securing a later, superior bid, *Omnicare's* requirement for optionality in a merger agreement may also provide target boards with bargaining power. As between target corporations and acquirers, bidding corporations generally have greater bargaining power. *See* Quinn, *supra* note 17, at 882-84. The majority's decision gives target boards a legal basis to refuse overly aggressive, locked-up proposals. While some critics argue that the inability to be able to agree to a lock-up results in a loss of negotiating value to target boards, the flip side can also be argued – because *Omnicare* forbids it, target boards are now able to preserve the ability to accept a higher, subsequent bid without having to give something up in exchange for this optionality (e.g., a lower price, higher termination fee, less favorable terms). *See* Stanchfield, *supra* note 179, at 2285-86 (asserting that that the lack of a fiduciary out provision may "shift bargaining power form target corporations to acquirers"); *see also* Moceri, *supra* note 128, at 1177-80. In particular where a target corporation is in financial distress, providing the board with this additional bargaining leverage is important. *See* Laster, *supra* note 17, at 796, 832 (explaining that "The *Omnicare* pre-commitment rule operates similarly by taking away the board's ability to agree to an absolute lockup in a context where the board is unlikely to be able to resist.").

224. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938-39 (Del. 2003).

225. *Id.* at 939; *see also* Neimeth & Reese, *supra* note 102, at 4. ("Of course, the *Omnicare* decision [was] but the latest in a string of Delaware Supreme Court decisions that . . . reversed the Chancery Court decisions in the name of stockholder activism and minority stockholder protection."); Arons, *supra* note 76, at 130; Panagopoulos, *supra* note 11, at 469.

226. *Omnicare*, 818 A.2d at 930; *see also* 8 Del. C. § 251 (requiring stockholder adoption of a merger agreement); 8 Del. C. § 271 (requiring stockholder approval of a sale of all or substantially all of a corporation's assets).

implicate stockholder ownership rights. The majority explained, "the Delaware corporation law expressly provides for a balance of power between boards and stockholders which makes a merger transaction a shared enterprise and ownership decision."[227] This balance of power is provided for statutorily, giving the board the authority to negotiate and execute a merger agreement while vesting the ultimate approval of a transaction with the stockholders.[228]

To ensure a proper balance between these two groups, the majority's decision limited deal protection devices and shifted power from the board to the stockholders. First, the majority held that *Unocal*'s enhanced scrutiny was the proper standard of review for a board's approval of deal protection devices. In contrast to the deference afforded to a board's decision under the business judgment rule, enhanced judicial scrutiny entails the court taking a closer look at the deal protection measures and their effect as well as the board's motivations in approving them. This type of considered review allows the court to make certain that there is a proper balance between the interests of the stockholders and board in approving deal protection devices.[229] In addition, enhanced scrutiny is particularly important in situations like *Omnicare* that involve a controlling stockholder or group with the requisite voting power to unilaterally approve a transaction, leaving minority stockholders without the ability to approve or reject the deal. Where minority stockholders' voting rights are, as a practical matter, a nullity, it can be important for the court to engage in a more substantive review of the merger provisions to ensure that the board is properly discharging its fiduciary obligations and acting in the best interests of all of the stockholders and not just the controllers.[230]

227. *Omnicare*, 818 A.3d at 930; *see* Coates & Subramanian, *supra* note 19, at 387 ("On the other hand, the very reason that the law requires a period of vulnerability between signing and shareholder approval – i.e., that shareholders and not directors bear the risks and costs of ownership, and retain important veto rights over significant transactions – should indicate the limit of lockups.").

228. *See* 8 Del. C. § 251. As explained by Professors Coates and Subramanian, "The primary policy justification for this set of legal rules is that shareholders should have some power over fundamental corporate transactions, presumably to minimize agency costs." Coates & Subramanian, *supra* note 19, at 310 n.4.

229. Relatedly, Delaware practitioners Mark Lebovitch and Peter Morrison have asserted that the majority's opinion in *Omnicare* is a move back to a more robust *Unocal* standard of review, effectively shifting the power back to the stockholders by engaging in a substantive review of boards' decisions. Lebovitch & Morrison, *supra* note 17, at 46-47.

230. Of course, in any case where a controlling stockholder or group is on both sides of a transaction, or receiving any special benefits not otherwise shared by all stockholders, entire fairness will apply. *See, e.g.*, Frank v. Elgamal, C.A. No. 6120–VCN, 2012 WL 1096090 (Del. Ch. Mar. 30, 2012); *In re* S. Peru Copper Corp. S'holder Derivative Litig., 30 A.3d 60 *opinion revised*

Second, the majority's focus on the duties directors owe to minority stockholders can be characterized as protecting voting rights, in particular, in situations like mergers where stockholders are statutorily given approval rights. The combination of deal protection devices in the Genesis merger agreement rendered approval of the transaction a mathematical certainty, which in turn rendered any stockholder vote a moot point.[231] In holding that a board could not completely lock-up a transaction, the majority prevented a board from contractually diminishing the stockholders' role in the process of selling the corporation. This, in effect, shifted power back to the stockholders in ensuring that final approval of a merger rested with the stockholder vote, and not board approval of contractual provisions.[232]

Besides the reasons expressly articulated by the majority in *Omnicare*, protection of minority stockholders is often necessary due to differing risk preferences that exist between public minority stockholders and controlling stockholders in selling a corporation. A controlling stockholder, often with heavy influence on the board, may prefer, and thus want to protect, one proposed transaction over another. Public stockholders are likely to have more diversified holdings than a controlling stockholder. As a result, the minority public stockholders generally will prefer a riskier, but also higher value, transaction.[233] In contrast, less diversified controlling stockholders will generally prefer the safer, but lower value, transaction.[234] This means that a controlling

and superseded, 52 A.3d 761 (Del. Ch. 2011) *judgment entered sub nom. In re* S. Peru Copper Corp., CIV. A. 961-CS, 2011 WL 6382006 (Del. Ch. Dec. 20, 2011) *vacated sub nom. In re* S. Peru Copper Corp. S'holder Derivative Litig., 961-CS, 2011 WL 6476919 (Del. Ch. Dec. 22, 2011) This was not the case in *Omnicare*, which involved a negotiated, non-change-in-control transaction and the controlling stockholders were not on both sides of the transaction.

231. Knight, *supra* note 126, at 48.

232. *See also* Moceri, *supra* note 128, at 1175-76 ("Although the shareholders have the ultimate vote on whether a merger or acquisition is consummated, lockup provisions act as a way to lead the shareholders in a certain direction, or at the very least add another variable to consider that does not relate to the merits of the transaction. Since such deal protection devices are entered into and negotiated by the directors, they have a strong influence on the outcome of a proposed merger.").

233. *See* Ronald A. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 816 n.115 (2003) (noting that public stockholders are generally diversified and, as a result, risk neutral); *see also* Henry T.C. Hu, *New Financial Products, the Modern Process of Financial Innovation, and the Puzzle of Shareholder Welfare*, 69 TEX. L. REV. 1273, 1307 (1991) (stating that "investors can substantially eliminate their exposure to unsystematic risk through the simple expedient of buying a large enough number of stocks").

234. *See* Richard A. Booth, *Stockholders, Stakeholders, and Bagholders (or How Investor Diversification Affects Fiduciary Duty)*, 53 BUS. LAW. 429, 442 (1998) ("In short, an undiversified stockholder is risk-averse."); Gilson & Gordon, *supra* note 233, at 816 n.115 (noting that controlling stockholders are generally undiversified and thus risk-averse). Wayne O. Hanewicz has

stockholder is more likely to support and want to protect the safer transaction – a result that does not necessarily align with the interests of public stockholders. These differing risk preferences clearly impact decisions surrounding deal protection devices, including controlling stockholders agreeing to measures such as voting agreements. This result may explain why the *Omnicare* majority emphasized directors' fiduciary obligations and having a more fulsome process in negotiating, considering, and approving deal protection devices – to remind boards that they should act in the best interests of all stockholders and not favor one group over another. Further addressing this issue, the majority's opinion also focused on the timing of controlling stockholders' vote on the merger, seeking to have all stockholders voting on the merger at the same time, thus aligning their risk preferences.[235]

E. The Benefits of a Per Se Rule

A per se rule has both inherent drawbacks[236] and benefits. The most obvious benefit of this type of rule is clarity for those who must follow it. In establishing a per se ban on completely locked-up transactions that lack a fiduciary out, *Omnicare* did just that. This was in contrast to prior deal protection jurisprudence, which had been criticized as inconsistent and lacking legal clarity.[237] Professors Coates and Subramanian have explained the problem with pre-*Omnicare* jurisprudence as follows: "[l]ockup doctrine . . . has more of the character of a standard than a rule (or set of rules), with the costs that standards entail: greater litigation costs; greater error of application, and

also noted that risk-averse preferences of controlling stockholders may also be due to the face that they are substantially more exposed than minority public stockholders to entity-specific or "unsystematic risk." Hanewicz, *supra* note 2, at 544-46. Thus, in the case of *Omnicare*, "[t]he unsystematic risk that Outcalt and Shaw faced by refusing to grant a complete lock-up was the possibility that Genesis would walk away and leave Omnicare to acquire NCS for a lower price." *Id.* at 543-44.

235. *See* Davis, *supra* note 16, at 200-01 (discussing the differences in the risk preferences between controlling stockholders and public minority stockholders and that *Omnicare*'s focus on the timing of the controlling stockholder vote on the merger at the same time as the public stockholders aligns these preferences); Hanewicz, *supra* note 2, at 546.

236. *See* Part III.A.4.

237. *See* Griffith, *Last Period of Play*, *supra* note 148, at 1904 (asserting that Delaware decisions regarding deal protection devices are "inconsistent not only with prior Delaware jurisprudence but also with each other" and that "[t]he Chancery Court's deal protection decisions introduce a lack of legal clarity into an area of high economic stakes"); Gregory V. Varallo & Srinivas M. Raju, *A Fresh Look at Deal Protection Devices: Out from the Shadow of the Omnipresent Specter*, 26 DEL. J. CORP. L. 975, 982 (2001) (noting the inconsistencies in deal protection case law).

resulting uncertainty; and at the margin more desirable and less desirable conduct, with associated decreases in efficiency."[238] Thus, the benefit of the majority setting forth a per se rule on complete lock-ups, as opposed to a standard, is that the rule is more precise and easy to follow, while a standard would have required factual analysis and, as a result, be less clear and more complex. Following *Omnicare*, corporations and their counsel have clear guidance on negotiating and approving merger agreements that will be enforced by the courts.[239] Such a clear rule also limits the judicial burden in enforcing it.[240] And, in fact, this has been the case, as illustrated by only a handful of *Omnicare*-based challenges being filed in the past ten years.[241]

Of course, the rigidity in application of per se rules can pose problems, especially in a field as dynamic and varied as corporate acquisitions. Recognizing this, the *Omnicare* court tried to narrowly tailor its holding to apply only to complete lock-ups (i.e., those combinations of deal protection devices that result in *a fait accompli*). Despite invalidating the offending provisions in the NCS-Genesis merger agreement, the court stressed that deal protection devices generally would not be invalidated under its analysis.[242] As summarized by one commentator, post-*Omnicare*, "a mere impediment to competing transactions is [not] enough; something more – much more – should be required."[243] In addition, the majority limited its holdings to the merger context, distinguishing other types of transactions where precommitment strategies may still be used.[244] The *Omnicare* decision was not an attempt to set forth a sweeping rule requiring fiduciary out provisions and thereby invalidating all precommitment strategies. Rather, the majority intended to provide a narrowly tailored, targeted rule in the

238. Coates & Subramanian, *supra* note 19, at 384.

239. *See* E. Norman Veasey, *The Roles of the Delaware Courts in Merger and Acquisition Litigation*, 26 DEL. J. CORP. L. 849, 855 (2001) (stating that one of the goals of the Delaware courts is to "[a]chieve stability and predictability for the benefit of corporate planners and trial courts").

240. *See* Hanewicz, *supra* note 2, at 554 (stating that "the clarity of the rule should limit the judicial burden of enforcing it . . . , but if the court had upheld or invalidated the measures based on more flexible reasonableness grounds, many new cases almost certainly would result"). It has also been suggested that the per se rule in *Omnicare* may be a reflection of the court's perception of some of the weaknesses of the judiciary as a decision-maker. *Id*.

241. *See supra* Part V (discussing the three *Omnicare*-based challenges brought in Delaware since the decision in 2003).

242. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938-39 (Del. 2003).

243. Hanewicz, *supra* note 2, at 554-55.

244. *See Omnicare*, 818 A.2d at 939 n.88 (explaining that other "contracts do not require a fiduciary out clause because they involve business judgments that are within the exclusive province of the board of directors' power to manage the affairs of the corporation"); Hanewicz, *supra* note 2, at 561-62.

merger context to address its concerns with board's restricting themselves (and stockholders) in extraordinary transactions.

VI. IS *OMNICARE* EFFICIENT?

A decision's holding and rationale may establish normatively "good" rules; however, it does not necessarily mean that such a rule is efficient. For purposes of assessing the "efficiency" of *Omnicare*'s normative contributions, this article asks specifically: Do the gains to stockholders by having directors take the steps suggested by the court in its opinion exceed the costs? In its majority opinion, the Delaware Supreme Court was conveying to corporate America its view on how directors should function in negotiating and approving mergers and acquisitions, with a particular emphasis on deal protection devices. To that end *Omnicare* provides a road map as to the preferred steps boards of directors should follow. For example, the majority's holdings suggest boards of directors engage in thoughtful consideration of deal protection devices (both individually and collectively), fulsome negotiations of merger terms, and consideration of all stockholder interests (in particular minority stockholders). In sum, the *Omnicare* majority's opinion is a clear process-oriented decision, emphasizing the appropriate decisional course to be followed in negotiating and approving mergers and acquisitions.

So what gains do the court's suggested decision-making practices provide to stockholders? One such gain would seem to be lower litigation costs for corporations. To the extent that a board undertakes a proper process per *Omnicare*, the Delaware courts will respect the board's institutional competence and uphold its decisions. In addition, stockholders receive gains from the more informed and comprehensive decision-making by a board of directors that *Omnicare* encourages. This type of decision-making leads to thicker, more robust board decisions. And an actively engaged board will also be more likely to negotiate for and approve the best possible transaction and structure for its stockholders. Further, the preservation of optionality arising from *Omnicare*'s fiduciary out requirement can lead to both economic and corporate governance benefits to stockholders.[245] Lastly, the clarity provided by *Omnicare*'s per se rule against complete lock-ups allows for greater certainty and predictability for corporations and their counsel with respect to the enforceability of merger agreements.

245. *See supra* notes 213-23 and accompanying text.

Conversely, the costs that stockholders may incur due to *Omnicare*'s suggested directorial decision-making process can include the additional time and money arising from a more detailed board process and creating a good paper trail with respect to merger negotiations and board approval (e.g., expert fees, attorneys' fees and additional board meetings). These increased decision-making costs of the board of directors – by requiring boards to collect information and engage in dialogue or negotiations that might not always be relevant to a reasoned determination – can significantly delay the board's decision, which can be particularly costly where a decision is required within a relatively short time frame. Thus, the costs to stockholders created by *Omnicare*'s informed, fulsome decisions may, at least in certain instances, mitigate or outweigh the gains from lower litigation costs. Other potential costs to stockholders come from *Omnicare*'s per se ban on completely locked-up deals. In establishing such a rule the court took away the board's flexibility to structure a transaction that, while being completely locked-up, may also secure the only and best transaction available deal for stockholders. More importantly, this holding of the court results in the loss of precommitment strategies, their negotiating value, and the economic value in complete deal certainty, all of which proponents of precommitment assert is very high.[246]

What appears to be the likely sticking point in evaluating *Omnicare*'s efficiency – weighing the gains to stockholders against the costs – is the value of precommitment. Where one believes in, and highly values, the ability to completely commit to a transaction, *Omnicare* results in large costs to stockholders. On the other hand, if one does not place such a high value on precommitment strategies then the gains to stockholders resulting from *Omnicare*'s holdings and rationale, would seem to outweigh the costs. If one assumes the goal of improving corporate governance in M&A is maximization of stockholder value, empirically determining the value of precommitment, and thus *Omnicare*'s efficiency, would appear to be possible. The results of prior scholarship that have looked at precommitment strategies in mergers from this perspective, however, have come to opposite conclusions.[247] Such results indicate that the value of precommitment is,

246. *See supra* Part III.B.

247. *Compare* Griffith, *supra* note 8, at 606-13 (applying game theory simulations to precommitment strategies and concluding that precommitment is a valuable tool in merger negotiations), *and* Kennedy, *supra* note 139, at 6 (asserting that an economist will tell you that a fiduciary out option has a price because target stockholders will receive a lower initial deal price), *with* Quinn, *supra* note 17, at 865-67, 880 (asserting that from an economic perspective, completely

in fact, empirically difficult to pinpoint.

Accordingly, this article looks at the question of *Omnicare*'s efficiency from a more theoretical perspective. As discussed in Part V.C., there exists a clear intellectual disagreement in corporate law regarding the value and necessity of the ability to precommit in mergers and acquisitions.[248] While it is clear that *Omnicare* impacted and shaped today's corporate law environment and M&A practices in what this article contends is a positive manner, whether these changes are, in the end, efficient comes down to what side of the precommitment argument one falls. From the stockholder perspective, the preservation of optionality has important corporate governance and economic benefits.[249] Further, while the elimination of a target board's ability to completely lock-up a potential transaction results in some loss (although the extent of such loss is arguable) to target stockholders, this can be easily mitigated through the use of other deal protection devices. In particular, it has been suggested that alternative mechanisms such as compensatory deal protection devices can achieve many of the benefits of a completely locked-up transaction.[250] Thus, the gains that inure to stockholders as a result of *Omnicare*'s preservation of optionality in mergers may very well outweigh any losses resulting from the elimination of precommitment, making the decision's normative impact on corporate law an efficient one.

VII. CONCLUSION

At the time of its issuance, and still today, *Omnicare* is viewed as one of the most controversial mergers and acquisitions decisions. Indeed, the majority's opinion was immediately met with widespread

locked-up transactions in the non-*Revlon* context are not as beneficial as asserted by proponents of precommitment), Coates & Subramanian, *supra* note 19, at 335-53, 387 (finding that deal protection devices "foreclos[e] potentially higher value offers"), and Moceri, *supra* note 128, at 1166-67 (stating that lock-ups "do not affect the value that a bidder gives" to a target corporation; rather they reduce "the price paid for the target company"). The difficulty in empirically evaluating whether corporate law principles result in value to stockholders has also been noted in other contexts. *Compare* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783, 813-17 (2009) (finding statistically significant negative correlations between managerial entrenchment and stockholder wealth during the 1990s), *with* Jay B. Kesten, *Managerial Entrenchment and Shareholder Wealth Revisited: Theory Evidence from a Recessionary Financial Market*, 2010 BYU L. REV. 1609, 1647 (2010-11) (finding that previous statistical correlations between managerial entrenchment and stockholders wealth disappeared entirely during the financial crisis from 2007-2008).

248. *See supra* Part V.C.

249. *See id*. (discussing the governance, economic and negotiating benefits of optionality).

250. *See* Quinn, *supra* note 17, at 881; Moceri, *supra* note 128, at 1159-60.

criticism, which included two of the justices on the court. The majority's rationale and holdings have been heavily attacked for their questionable doctrinal footing and bad corporate policy implications. Further, there was significant concern that *Omnicare*'s ban on precommitment strategies would stunt merger growth by discouraging potential bidders or, at a minimum, causing bidders to offer lower prices and decreasing acquisition value for targets and their stockholders.

In revisiting *Omnicare* ten years later, however, it does not appear to have led to the detrimental consequences that many predicted. Merger and acquisition activity did not significantly decrease in the years that followed the decision, nor did the use of the deal protection devices at issue in *Omnicare*. This may be due, in large part, to the Court of Chancery's consistently narrow interpretation of the decision. Subsequent Delaware decisions reflect greater judicial deference to a board's approval of deal protection devices, distinguishing and upholding strong combinations of deal protection devices such as the sign-and-consent structure even while acknowledging that the intent and practical effect of the devices was to lock-up the transaction. Following these decisions, *Omnicare* has become, as a practical matter, of little to no import in the private merger context and rarely applicable in public mergers.

Despite what many critics assert, however, *Omnicare* should not be dismissed as a case of bad facts making bad law or, based on its consistently narrow application, a historical footnote in the development of corporate law. Indeed, such marginalization overlooks the impact of the majority's opinion in shaping director decision-making in today's corporate environment. *Omnicare* has, in fact, had positive normative implications in advancing proper corporate governance standards as well as the policy of protecting stockholder interests. The impact of the decision is not dependent on the vitality of the specific holdings or whether the decision can be easily avoided by creative contract drafting. Rather, it is the message underlying *Omnicare* that is important – conveying to directors, officers and lawyers the proper standards of managerial conduct in approving mergers and acquisitions.

In this respect, it seems more appropriate to characterize *Omnicare* in a similar manner as scholars have for *Smith v. Van Gorkom*, as a normatively charged decision serving as part of an ongoing narrative of the Delaware courts trying to improve corporate governance by influencing director decision-making. Several aspects of the majority's opinion can be accurately viewed as shaping the definition and description of the norms of proper director conduct and conveying the expectation of a higher standard of behavior, including a renewed attention to deal protection devices and the role of the fiduciary out, as well as director accountability for decisions regarding deal protection devices. Also, in requiring a fiduciary out in all merger agreements the court preserved optionality in mergers and acquisitions and protected stockholder interests. Finally, the court provided a precise rule regarding complete lock-ups for corporate actors to follow. Thus, perhaps former Chancellor Allen's description of *Van Gorkom*'s legacy can also be said to be applicable to *Omnicare*:

> I have to say that I think [*Van Gorkom*] was an important political and social success. One of the greatest improvements in corporate law and governance over the last twenty years is the extent to which boards of directors are no longer passive and controlled as they were. . . . People most definitely took notice of its stern message. From an ex-ante perspective, it almost certainly has had a positive effect on corporate governance. In this light, *Van Gorkom*, which, from a professional view, I think, is one of the worst cases in corporation law history, can be seen as one of the greatest opinions of modern corporation law.[251]

251. Allen, *supra* note 166, at 76.