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I. FIDUCIARY STANDARDS

A. The Business Judgment Rule Is The Touchstone For Fiduciary Analysis Of Board Action

In general terms, the business judgment rule provides that a decision by a board of directors in which the directors possess no direct or indirect personal interest, which is made with reasonable awareness of all reasonably available material information, and after prudent consideration of the alternatives, and which is in good faith furtherance of a rational corporate purpose, will not be interfered with by the courts, either prospectively by injunction, or retrospectively by imposition of liability for damages upon the directors, even if the decision appears to have been unwise or to have caused loss to the corporation or its stockholders.

• McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) (holding that the business judgment rule "combines a judicial acknowledgement of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders").

• Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995) (holding that "a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be attributed to any rational business purpose").

• Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (holding that the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company").

• Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1053 (Del. Ch. 1996) (holding that the business judgment rule "provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty").
B. **Duty of Care. The Board Of Directors Must Exercise Due Care In Connection With A Merger Or Other Business Combination**

- **Smith v. Van Gorkom**, 488 A.2d 858 (Del. 1985) (holding that in the specific context of a proposed merger, directors have a duty to act in an informed and deliberative manner in determining whether to approve a merger agreement before submitting proposal to the stockholders).

- **Aronson v. Lewis**, 473 A.2d 805 (Del. 1984) (holding that directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them; having become so informed, they must then act with requisite care in the discharge of their duties).

C. **Revlon**

A number of cases have imposed a heightened standard on directors approving a change in control. While the parameters of this duty are not entirely clear, when a corporation is in such a position, its directors must maximize the value of the consideration to be received by the stockholders, and courts will scrutinize the methods utilized to do so. See **Malpiede v. Townson**, 780 A.2d 1075, 1084 (Del. 2001) (explaining that even where "the Revlon doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control, it does not eliminate the requirement that plaintiffs plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale").

- **Mills Acquisition Co. v. MacMillan, Inc.**, 559 A.2d 1261 (Del. 1989) (stating that pursuant to Revlon, in the context of sale of corporate control, the responsibility of directors is to get the highest value reasonably attainable for the shareholders).

- **Krim v. ProNet, Inc.**, 744 A.2d 523 (Del. 1999) (stating that Delaware law requires that once a change of control of a company is inevitable the board must assume the role of an auctioneer in order to maximize shareholder value).

1. **Does Revlon apply?**

- **Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.**, 506 A.2d 173 (Del. 1986) (holding that when directors decide to sell the company in a classic cash-out merger, their role
changes from protectors of the corporate entity to "auctioneers" whose duty is to get the best price for stockholders).

- **Arnold v. Soc'y for Sav. Bancorp, Inc.**, 650 A.2d 1270 (Del. 1994) (holding that duty to maximize stockholder value applies "in at least the following three scenarios: (1) 'when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company'; (2) 'where, in response to a bidder's offer, a target abandons its long term strategy and seeks an alternative transaction involving the breakup of the company', or (3) 'when approval of a transaction results in a 'sale or change of control'"").

- **In re Paxson Communication Corp. S'holders Litig.**, C.A. No. 17568, 2001 Del Ch. LEXIS 95 (Del. Ch. July 10, 2001) (holding that duty to maximize shareholder value was not triggered where majority stockholder, that owned 75% of the company's voting power, gave a call right to a third party, because either the majority stockholder or holder of the call right retained control of the company and the minority stockholders would never be in the position to collectively control the company and receive a control premium for their shares).

- **Paramount Communications, Inc. v. QVC Network, Inc.**, 637 A.2d 34 (Del. 1994) (holding that duty to maximize stockholder value was triggered in a stock-for-stock merger that resulted in the shift in control to the acquiror's single controlling stockholder).

- **Paramount Communications, Inc. v. Time, Inc.**, 571 A.2d 1140 (Del. 1990) (holding duty to receive the highest price reasonably available under Revlon was not triggered by a stock-for-stock merger that left control of the surviving entity in "a fluid aggregation of unaffiliated shareholders representing a voting majority," or in other words, in the market).

- **In re Lukens Inc. S'holders Litig.**, 757 A.2d 720 (Del. Ch. 1999) (stating that a stock and cash transaction "in which over 60% of the consideration is cash" triggered duties under Revlon).
• **In re Santa Fe Pac. Corp. S'holders Litig.,** 669 A.2d 59 (Del. 1995) (holding a transaction with a 33% cash component did not necessarily implicate Revlon).

• **Bershad v. Curtiss-Wright Corp.,** 535 A.2d 840 (Del. 1987) (holding Revlon standard is not applicable when a controlling stockholder cashes out minority stockholders).

• **Mendel v. Carroll,** 651 A.2d 297 (Del. Ch. 1994) (holding that presence of controlling stockholder changes duty of directors to maximize the current value of minority shares).

• **McMullin v. Beran,** 765 A.2d 910 (Del. 2000) (reversing Chancery Court's ruling that Revlon duties did not apply to transaction initiated and negotiated by controlling stockholder, and holding that in the specific context presented the directors' Revlon duties required an informed good faith decision by the directors whether to recommend to minority stockholders to accept the merger consideration or seek appraisal rights).

• **In re Best Lock Corp. S'holder Litig.,** C.A. No. 16281, 2001 Del. Ch. LEXIS 134, *92-93 n.139 (Del. Ch. Oct. 29, 2001) (finding that directors did not have duty under Revlon to auction corporation where majority stockholder could block transaction and the director's duty to 'obtain the greatest value reasonably attainable' meant the "greatest value reasonably attainable from the controlling shareholder, in accordance with the entire fairness standard").

• **Orman v. Cullman,** 794 A.2d 5, 42 n.141 (Del. Ch. 2002) (Where controlling stockholder retained control and shares owned by public were sold to third party that had right to purchase controlling stake in three years, Revlon was not implicated because company was not "being broken up nor was control being transferred or sold via the challenged merger.").

• **McGowan v. Ferro,** 859 A.2d 1012 (Del. Ch. 2004) (expressing doubt that Revlon applied to post-bid negotiations when there was "no evidence of any alternative value maximizing transaction" but finding that, even if Revlon standard of enhanced scrutiny applied, directors satisfied their fiduciary duties).
2. **How is value maximized?**

- Generally, there is "no single blueprint" to maximizing value. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Thus one recent case noted that directors may exercise their business judgment whether value should be maximized through an auction or other shopping process. *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) ("[w]hether it is wiser for a disinterested board to take a public approach to selling a company versus a more discreet approach relying upon targeted marketing by an investment bank is the sort of business strategy question Delaware courts ordinarily do not answer.").

- A post-signing market check may be an acceptable method for maximizing value. See *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (board met its fiduciary duties by aggressively negotiating with a single bidder and insuring that transaction was subject to a post-signing market check unobstructed by onerous deal protection measures that would impede a topping bid); *In re Fort Howard Corp. S'holders Litig.*, C.A. No. 9991, 1988 Del. Ch. LEXIS 110 (Del. Ch. Aug. 8, 1988) (although special committee of independent directors did not conduct an auction prior to signing agreement, it fulfilled its fiduciary duties by negotiating provisions intending to permit an effective check of the market prior to closing of the transaction); *In re MONY Group Inc. S'holder Litig.*, C.A. No. 20554 (Del. Ch. Feb. 17, 2004) (holding that board's decision to limit merger negotiations to one bidder and to rely on a five month, post-signing market check complied with Revlon and was reasonable in light of the company's circumstances).

- It may be that a single bid has certain attributes that make it a pre-emptive bid. See *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989) (holding that when "directors possess a body of reliable information with which to evaluate the fairness of a transaction, they may approve [a] transaction without conducting an active survey of the market").
3. **Revlon not a guarantee that stockholders receive "highest" price.**


- **Malpiede v. Townson**, C.A. No. 15943 (Del. Ch. Sept. 29, 1997) (transcript) ("rules of the game are not that the highest offer always wins no matter what the circumstances. This Court will intervene, but only if there is some showing measured by some appropriate evidentiary standard that the lower price was the product of a breach of fiduciary duty. It will not intervene if the price is merely the product of a complex business judgment which itself was the product of highly unusual circumstances.").

D. **Unocal**

In **Unocal Corp. v. Mesa Petroleum Co.**, 493 A.2d 946 (Del. 1985), the court held that when a board unilaterally – i.e., without stockholder approval – adopts defensive measures, it must establish that the board had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and that its response to that threat was reasonable. This rule is generally applied to mergers that are designed to fend off hostile bids to acquire the corporation.

1. **Some cases have indicated that deal protections have the effect of fending off competing offers and are therefore "defensive." Thus, even where the heightened standard of Revlon does not apply, courts may apply the heightened Unocal standard to deal protections.**

- **In re Santa Fe Pac. Corp. S'holders Litig.**, 669 A.2d 59 (Del. 1995) (applying enhanced judicial scrutiny under Unocal to board's entering into a joint tender offer with acquiror, adopting a poison pill rights plan exempting one bidder, amending the pill to allow one bidder to increase its ownership, and authorizing a stock repurchase program).

(transcript of oral ruling) (indicating that Unocal would apply to board's decision to enter into a merger agreement containing a 6.3% termination fee, stating that such fee "certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point").

- **Ace Ltd. v. Capital Re Corp.,** 747 A.2d 95, 108 (Del. Ch. 1999) ("When corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out by the board, some of the policy concerns that animate the Unocal standard of review might be implicated. In this case, for example, if [the no-talk provision of the merger agreement] is read as precluding board consideration of alternative offers – no matter how much more favorable – in this non-change of control context, the [target] board's approval of the Merger Agreement is as formidable a barrier to another offer as a non-redeemable poison pill.").

- **Omnicare, Inc. v. NCS Healthcare, Inc.,** 818 A.2d 914 (Del. 2003) (applying Unocal standard of enhanced scrutiny to board's adoption of deal protections when such "defensive measures" were challenged in context of competing higher bid; declining to determine whether Revlon applied).

2. Other cases have suggested that, outside of Revlon, the business judgment rule is the appropriate standard to apply.

- **In re IXC Communication, Inc. S'holders Litig.,** C.A. Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210, *20 (Del. Ch. Oct. 27, 1999) (refusing to accept contention that a board consisting of three of the largest individual shareholders would actively shirk their fiduciary duties and in the process ignore their own economic self interest by not shopping the company, court held that ",absent convincing evidence that the board skewed the process in order to prevent a shareholder from voting knowingly and intelligently on the merger agreement, no court should apply an artificial barrier to market consideration of that business judgment").

- **McMillan v. Intercargo Corp.,** 768 A.2d 492 (Del. Ch. 2000) ("In contrast to the usual Revlon/Unocal case involving defendants who have resisted a sale, this complaint attempts to state
a claim against a board with a disinterested majority that engaged an investment banker to search for strategic buyers, that consummated a merger agreement with a third-party purchaser, and that put up no insuperable barriers to a better deal.

- **In re MONY Group Inc. S'holder Litig., C.A. No. 20554 (Del. Ch. April 9, 2004)** (holding that Unocal did not apply when none of the directors were to retain positions with the surviving company; explaining that Unocal (and potentially Blasius) review are implicated when a board acts to impede the stockholder franchise and the board's control of the corporation is at risk).

**II. DUTIES TO CREDITORS**


- **Production Resources Group, L.L.C. v. NCT Group, Inc., C.A. No. 114-N (Del. Ch. Nov. 17, 2004)** (holding that directors in the zone of insolvency have the protection of the business judgment rule and that Section 102(b)(7) limits the liability of directors when creditors' claims are derivative).

**A. Entire Fairness**

Finally, there will be situations where the board of a target corporation does not consist of a majority of disinterested directors, thereby possibly invoking the entire fairness level of scrutiny.
1. **When the entire fairness test applies, a transaction must be fair as to both price and process.**
   - *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (holding "fair dealing" embraces questions of process, particularly how the transaction was timed, initiated, structured, negotiated, and disclosed, and how the approvals of the directors and the stockholders was obtained, and that "fair price" relates to the economic and financial terms of the transaction).

2. **To minimize conflict issues, inside deals should be negotiated last.**
   - *Parnes v. Bally Entm't Corp.*, C.A. No. 15192, 2001 Del. Ch. LEXIS 34 (Del. Ch. Feb. 20, 2001) (concluding that business judgment rule applied and directors acted in good faith where interested director's severance agreement, consulting agreement, and purchase of certain warrants were negotiated after the parties reached an understanding regarding price, price protections and basic structure of the merger agreement, and interested director recused himself from any board discussions regarding his inside agreements), aff'd, 788 A.2d 131 (Del. 2001).

3. **There are many types of conflicts:**
   a) **"Interest" v. "Independence":**
      - *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002), discussed the difference between director disinterest and director independence. A director is interested when he or she stands on both sides of a transaction, or will benefit or experience some detriment that does not flow to the corporation or the stockholders generally. Absent self-dealing, the benefit must be material to the individual director. In contrast, a director is not independent where the director's decision is based on "extraneous considerations or influences" and not on the "corporate merits of the subject." The stockholder must plead particularized facts that show that the director is under the control of or beholden to another such that he or she is unable to exercise discretion in decision-making.

   b) **Employment or Consulting Relationships:**
(holding that plaintiffs raised reasonable doubt as to directors' independence where interested director as Chairman of the Board and CEO was in a position to exercise considerable influence over directors serving as President and COO; director serving as Executive Vice President; a director whose small law firm received substantial fees over a period of years; and directors receiving substantial consulting fees).


- Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002) (questioning the independence of one director who had a consulting contract with the surviving corporation and questioning the disinterestedness of another director whose company would earn a $3.3 million fee if the deal closed).

- In re The Ltd., Inc. S'holders Litig., C.A. No. 17148, 2002 Del. Ch. LEXIS 28 (Del. Ch. March 27, 2002) (finding, in context of demand futility analysis, that the plaintiffs cast reasonable doubt on the independence of certain directors in a transaction that benefited the founder, Chairman, CEO and 25% stockholder of the company, where one director received a large salary for his management positions in the company's wholly-owned subsidiary, one director received consulting fees, and another director had procured, from the controlling stockholder, a $25 million grant to the university where he formerly served as president).

- Biondi v. Scrushy, C.A. No. 19896, 2003 Del. Ch. LEXIS 7 (Del. Ch. Jan. 16, 2003) (questioning the independence of two members of a special committee formed to investigate charges against the CEO because committee members served with the CEO as directors of two sports organizations and because the CEO and one committee member had "long-standing personal ties" that included making large contributions to certain sports programs).
In re NCS Healthcare, Inc., S'holders Litig., C.A. No. 19786, 2002 Del. Ch. LEXIS 133 (Del. Ch. Nov. 22, 2002) (rejecting argument that two directors were conflicted based on their agreements with the acquiror because, with the exception of one consulting agreement, the payments by acquiror were based on prior obligations; noting that, despite consulting agreements, the level of the directors' stock ownership aligned the directors' interests with the stockholders' interests in receiving the highest value for their shares), rev'd on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

Krasner v. Moffett, 826 A.2d 279 (Del. 2003) (holding that, despite use of independent committee to negotiate merger with third party, entire fairness standard would apply if majority of the board was not disinterested and independent; determination of whether two directors who received income from companies related to the other merger party were disinterested and independent would control the determination of the appropriate standard of review).

c) Family Relationships:


Harbor Fin. Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999) (holding that director who was brother-in-law of CEO and involved in various businesses with CEO could not impartially consider a demand adverse to CEO's interests).


d) Affiliation with Acquiror:

Kahn v. Tremont Corp., 694 A.2d 422 (Del. 1997) (holding members of special committee had significant prior business relationship with majority stockholder such that the committee lacked independence triggering entire fairness).
**Heineman v. Datapoint Corp.,** 611 A.2d 950 (Del. 1992) (holding that allegations of "extensive interlocking business relationships" did not sufficiently demonstrate the necessary "nexus" between the conflict of interest and resulting personal benefit necessary to establish directors' lack of independence).

**Citron v. Fairchild Camera & Instr. Corp.,** 569 A.2d 53 (Del. 1989) (holding mere fact that a controlling stockholder elects a director does not render that director non-independent).

e) **Allocation Issues.**

Where there is more than one class/series of stock, directors may have conflict with stockholders because of their affiliation with one or more classes or series of stock.

- **In re FLS Holdings, Inc. S'holders Litig.,** C.A. No. 12623, 1993 Del. Ch. LEXIS 57 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or directors who were affiliates of the company's controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock).

- **Jedwab v. MGM Grand Hotels, Inc.,** 509 A.2d 584 (Del. Ch. 1986) (applying entire fairness test to allocation of merger consideration where one element of consideration was apportioned wholly to the shares of the controlling stockholder).

- **Lewis v. Great W. United Corp.,** C.A. No. 5397, 1978 Del. Ch. LEXIS 723 (Del. Ch. Mar. 28, 1978) (applying entire fairness test where a corporation that was controlled by a 65% common stockholder structured a merger treating preferred less favorably than common).

- **Orman v. Cullman,** 794 A.2d 5, 25 (Del. Ch. 2002) (explaining that four related directors, who were treated together as a controlling stockholder group, were interested because they "received benefits from the transaction that were not shared" with the other stockholders, including the initial ability to enter into a private sale with the acquiror and the
right to put their remaining interest to the company three years after the merger). But see Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corp., 805 A.2d 221 (Del. Ch. 2002) (applying business judgment rule even though there was a duty to creditors and the board owned common stock, not debt).

4. **Mergers with majority or controlling stockholders are generally subject to entire fairness test.**

   - **Kahn v. Lynch Communication Sys., Inc.,** 638 A.2d 1110 (Del. 1994) ("It is a now well-established principle of Delaware corporate law that in an interested merger, the controlling or dominating shareholder proponent of the transaction bears the burden of proving its entire fairness.").

   - **Orman v. Cullman,** 794 A.2d 5 (Del. Ch. 2002) (discussing at length the difference between transactions involving the entire fairness standard of review and those that call for application of business judgment rule in the context of a merger with an unaffiliated third party where, because of the presence of a controlling stockholder group, the corporation used a special committee and submitted the merger to a vote of the minority stockholders).

   - **Emerald Partners v. Berlin,** 787 A.2d 85 (Del. 2001) (explaining that entire fairness standard applied, *ab initio*, to merger in which the controlling stockholder stood on both sides of the transaction and holding that exculpatory provision in charter could not shield directors from liability until court had undertaken entire fairness analysis).

   - **In re Cysive, Inc. S'holders Litig.,** 836 A.2d 531 (Del. Ch. 2003) (holding that 35% stockholder and founder of company was controlling stockholder and applying entire fairness test despite presence of majority of disinterested, independent directors and effective special committee process; concluding after trial that management buy-out was entirely fair).

   - There is, however, an exception for short form mergers.
5. **Tender offer followed by short form merger may limit fiduciary duty issues.**

- **In re Siliconix Inc., S'holders Litig.,** C.A. No. 18700, 2001 Del. Ch. LEXIS 83 (Del. Ch. June 19, 2001) (Absent coercion or disclosure violation directors had no duty to demonstrate the entire fairness of tender offer by 80% stockholders. The court distinguished *McMullin v. Beran* on the basis that it involved a merger pursuant to § 251 which imposes statutory duties with "attendant fiduciary duties." In addition, the minority shareholders in *Siliconix* had the power to thwart the tender offer because it could only go forward if a majority of the minority shares tendered.).

- **Glassman v. Unocal Exploration Corp.,** 777 A.2d 242 (Del. 2001) (holding that absent fraud or illegality appraisal is the exclusive remedy available to stockholders in a § 253 short form merger and entire fairness doctrine does not apply and there is no need to use a special committee where there is no opportunity to "deal").

- **In re Aquila, Inc. S'holders Litig.,** 805 A.2d 184 (Del. Ch. 2002) (stating that controlling stockholder's tender offer followed by short form merger was not subject to entire fairness review; stockholders could freely choose whether to accept or reject the offer where transaction was structured to allow a majority of the minority to make the decision).

- **Next Level Communications, Inc. v. Motorola,** 834 A.2d 828 (Del. Ch. 2003) (finding that 74% stockholder's tender offer, conditioned on a majority of the minority shares tendering, that committed majority stockholder to complete short form merger at same price was not coercive even though offer made when stock price depressed and using inside information where majority stockholder made full and fair disclosure).

- **Gillian v. Motorola, Inc.,** C.A. No. 411-N, 2004 WL 2260553 (Del. Ch. Oct. 8, 2004) (holding that even where extensive information had been made publicly available to Next Level stockholders in connection with the tender offer and cash out merger, a notice of appraisal sent to stockholders following the merger was inadequate where it failed to include summary financial information, i.e., two years of stock price information.
and five years of summary financial data, and directions as to how to obtain more detailed information).

- **In re Pure Resources, Inc. S'holders Litig.,** 808 A.2d 421 (Del. Ch. 2002) (holding that a controlling stockholder's tender offer followed by a short form merger was not subject to entire fairness where the offer did not structurally coerce the shareholders by either suggesting that those who did not tender would be forced to take a lower price or misleading the shareholders into tendering by concealing or misstating material facts; where decision is left to shareholders, and confidentiality is not required for negotiations, shareholders are entitled to the analyses performed by the investment bankers).

- **In re Life Techs., Inc., S'holders Litig.,** C.A. No. 16513 (Del. Ch. Nov. 24, 1998) (transcript ruling) (declining to enjoin a tender offer by a majority stockholder and holding that noncoercive tender offer by parent was not subject to entire fairness review).

6. **Effective use of committees of independent directors may shift burden of proof back to plaintiff.**

- **Kahn v. Lynch Communication Sys., Inc.,** 638 A.2d 1110 (Del. 1994) (approval of cash-out merger transaction initiated by controlling stockholder by independent committee or informed majority of minority stockholders shifts burden on issue of fairness from controlling stockholder to plaintiff).

- **In re W. Nat'l Corp. S'holders Litig.,** C.A. No. 15927, 2000 Del. Ch. LEXIS 82 (Del. Ch. May 22, 2000) (holding that use of independent committee triggered more deferential business judgment standard of review in absence of controlling stockholder or group).

- **Clements v. Rogers,** 790 A.2d 1222 (Del. Ch. 2001) (holding that special committee did not act properly where its chairman did not understand that he had no duty to act in the best interest of the 84% parent proposing the merger and reject the proposed transaction and committee was uninformed as to their financial advisors' willingness to conform their valuation opinion to the parent's offer).

- **In Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, Inc.,** 803 A.2d 428 (Del. 2002), the Class A stockholders of
Reader's Digest sought to enjoin a recapitalization of Reader's Digest that included a plan to purchase all of the Class B voting stock at premium ratio for newly issued common stock and recapitalize all Class A nonvoting stock into shares of voting common. Reader's Digest formed a special committee to evaluate the recapitalization because certain Funds controlled half of the Class B voting stock and two Reader's Digest directors served as directors of the Funds. The special committee focused on the effects of the recapitalization on the corporation as a whole and on the stockholders (other than the Funds) but did not consider the transaction from the perspective of the Class A stockholders and did not procure a fairness opinion specifically regarding the effects on the Class A holders. Because the special committee did not properly consider the interests of the Class A stockholders in the recapitalization, the Supreme Court reversed the Court of Chancery's denial of the preliminary injunction motion.

- **In re Pure Resources, Inc. S'holders Litigation**, 808 A.2d 421 (Del. Ch. 2002) (stating that greater effect should be given to protective devices such as special committee negotiation and approval and majority of the minority provisions in the cash-out merger context).

7. **A stockholder vote approving an interested transaction may obviate the need for judicial review of the substantive fairness of such transactions.**

- **In re Staples, Inc. S'holders Litig.,** 792 A.2d 934, 952 (Del. Ch. June 5, 2001) (refusing to take the power to vote for and approve of conflicted transaction away from sophisticated institutional investors "well positioned to vote in an informed manner," court stated that in such circumstances "this court has been rightly reluctant to interpose its own view of the business merits, thereby precluding an opportunity for the genuine stakeholders to make their own decision").
III. MERGER AGREEMENT PROVISIONS

A. No Talk/No Solicitation

Agreeing not to solicit bids once a deal is signed up is standard, although it is also standard to permit targets to negotiate with unsolicited topping bidders.

1. More aggressive agreements may prevent targets from even talking to such unsolicited bidders. Is this "willful blindness?"

- Phelps Dodge Corp. v. Cyprus Amax Minerals Co., C.A. No. 17398, 1999 Del. Ch. LEXIS 202 (Del. Ch. Sept. 27, 1999) (transcript of oral ruling) (considering prospective competitor's challenge to "no-talk" provision under which target could not talk to prospective acquirors, court stated that clause appeared to impose upon the target board "willful blindness" in violation of the board's fiduciary duty to be informed of all material information reasonably available).

- Ace Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999) (suggesting that agreement to a "no-talk" provision – i.e., a provision without an effective carve-out permitting it to talk with unsolicited bidders – in a merger for which the stockholder vote was locked up would violate a board's duty of care).

- In re IXC Communications, Inc. S'holders Litig., C.A. Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999) (dismissing stockholder claim that their directors breached their fiduciary duties by agreeing to a "no-talk" clause, where the provision was agreed to late in the negotiation process after a thorough examination of possible alternatives).

- Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191, 1207 (Del. Ch. 2001) (holding that under directors' heightened duty to obtain best price reasonably available, "directors cannot be precluded by the terms of an overly restrictive 'no-shop' provision from all consideration of possible better transactions" and that directors are "required to consider all available alternatives in an informed manner until such time as [the transaction is] submitted to the stockholders for approval").
2. **Is there a distinction between "discussions" and "negotiations"?**

B. **Right To Terminate for Superior Proposal**

1. **The Delaware General Corporation Law authorizes "exclusive" merger agreements.**
   - Section 251(c) of the DGCL has, since 1998, specifically permitted merger agreements to provide that a company can, in a merger agreement, promise to present a merger to its stockholders even if the board of directors changes its recommendation. 8 Del. C. § 251(c) (“The terms of the agreement may require that the agreement be submitted to the stockholders whether or not the board of directors determines at any time subsequent to declaring its advisability that the agreement is no longer advisable and recommends that the stockholders reject it.”).

   - It is increasingly common, especially in stock deals, to see agreements that have no termination right for higher offers, although directors are expressly permitted to change their recommendation when such an offer is made.

   - **Omnicare, Inc. v. NCS Healthcare, Inc.,** 818 A.2d 914 (Del. 2003) (holding that, by approving voting agreements that assured stockholder approval of merger coupled with a force the vote provision, the directors irrevocably locked up the merger and took measures that were unreasonable and preclusive).

2. **In order to preserve a termination right, it should be clear that the right is a right to terminate for a defined superior proposal and that there is no independent requirement that "fiduciary duties" require termination.**

   - **Smith v. Van Gorkom,** 488 A.2d 858, 888 (Del. 1985) (explaining that merger agreement, which provided that the directors "may have a competing fiduciary obligation to the shareholders under certain circumstances," did not permit the board to terminate the merger agreement to accept a better offer, stating that the board's only options were to (i) proceed with merger and stockholders' meeting, with the board's recommendation of approval or (ii) rescind the merger agreement,
withdraw its approval of the merger and notify its stockholders that the proposed stockholders' meeting was cancelled).

- See Corwin v. deTrey, C.A. No. 6808, 1989 Del. Ch. LEXIS 166, *10 (Del. Ch. Dec. 1, 1989) ("In such a third-party trans-action, the directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed.").

C. **May A Board Limit Its Right To Change Its Recommendation?**

1. **Directors may present a merger agreement to stockholders that they no longer recommend.**

   - Prior to 1998, the board recommendation was a technical requirement. See Smith v. Van Gorkom, 488 A.2d 858, 887-888 (Del. 1985) (stating that board could neither (i) recommend that the stockholders vote against the merger nor (ii) take a noncommittal position on the merger).

   - Since 1998, there has not been a technical requirement that a board continue to recommend in order to present a merger agreement to stockholders. From 1998 to 2003, Section 251(c) permitted a merger agreement to require that the agreement be submitted to the stockholders (i.e., a force the vote provision) whether or not the board of directors determined subsequent to declaring its advisability that the agreement was no longer advisable and recommended that the stockholders reject it. In 2003, Section 251(c) was amended to remove the language permitting a force the vote provision in a merger agreement and Section 146 was added to the DGCL. Section 146 provides that a corporation may agree to submit any matter (including merger agreements) to its stockholders for approval whether or not the board of directors determines after approving any such matter that it is no longer advisable and recommends that stockholders vote against the matter.

   - See In re Berkshire Realty Co., Inc. S'holder Litig., C.A. No. 17242, 2002 Del. Ch. LEXIS 146, *13 (Del. Ch. Dec. 18, 2002) (Although charter provision required board of directors to submit liquidation plan to stockholders, the board had no duty to recommend stockholder approval of the plan. In fact, "if the board, in the exercise of its business judgment, deter-
mined that liquidation was not in the best interests of the corporation and its stockholders, it could not have recommended a liquidation without violating its fiduciary duty to the stockholders.

2. **There is strong case law language regarding the board's fiduciary duty of disclosure.**

   - See **Malone v. Brincat**, 722 A.2d 5 (Del. 1998) (board of directors owes a fiduciary duty of disclosure in connection with disclosures to its stockholders even when the board is not seeking shareholder action, and that directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder thereby violate their fiduciary duty to the corporation and its stockholders).

   - **DS Technologies, L.P. v. Marshall**, 832 A.2d 1254, 1261 (Del. Ch. 2003) (emphasizing the duty of disclosure in the context of a stockholder vote on various charter amendments and stating that "Delaware law requires full and fair explanation of the rationale for a proposal that directors are recommending stockholders to approve").

   - Many agreements purport to limit the circumstances under which directors can change their recommendation to certain defined, "superior proposals." But there may be other developments that would require a board to change its recommendation. There may be an unforeseen positive development with respect to the target or an unexpected decline in an acquiror's stock price. A requirement that the board continue to "recommend" a transaction in the face of such a development may place directors in an untenable position.

   - **Marmon v. Arbinet-Thexchange, Inc.**, C.A. No. 20092, 2004 Del. Ch. LEXIS 44, *16 (Del. Ch. April 28, 2004) (stating, in Section 220 context, that the "directors of a Delaware corporation have a duty to disclose material facts to all of the corporation's shareholders. The directors are not free arbitrarily to pick and choose the shareholders to whom they will or will not make disclosure. Nor can the corporation be heard to defend such a practice on the basis that it has bound itself contractually not to make such disclosures. [The Company's] directors were not free to contract away disclosure obligations that they had a fiduciary duty to observe. Nor could they rely upon a cer-
tificate provision prohibiting disclosure to avoid a share-
holder's inspection right conferred by statute."}) (footnotes
omitted).

- **Calvacade Oil Corp. v. Texas American Energy Corp., C.A.**
  No. 7605, 1984 Del. Ch. LEXIS 603 (Del. Ch. May 22, 1984)
  (holding that charter amendments would not become effective
  until corporation made additional disclosures because, inter
  alia, board of directors had unanimously recommended in
  favor of the amendments but, after proxy statements were
  mailed, two directors changed their position and one director
  resigned in opposition to the amendments).

- **Alessi v. Beracha,** 849 A.2d 939 (Del. Ch. 2004) (refusing to
  dismiss former shareholder's complaint alleging disclosure
  violations arising from company sponsored stock repurchase
  program where company had not disclosed ongoing merger
  discussions that culminated in offer to purchase the company
  for a premium; rejecting argument that merger discussions
  were not material before price and structure were definitively
  agreed upon and instead analyzing the probability that merger
  would occur and the magnitude of the potential transaction to
  assess materiality).

D. **Break-Up Fees**

1. **What standard applies?**

   - **In re IXC Communications, Inc. S'holders Litig., C.A.**
     Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27,
     1999) (holding that where a termination fee is not a defensive
     mechanism instituted to respond to a perceived threat from a
     potential acquiror, or the result of disloyalty or lack of care, the
     courts will review break-up fees under deferential business
     judgment standard).

   - **Mills Acquisition Co. v. MacMillan, Inc.,** 559 A.2d 1261 (Del.
     1989) (where break-up fee is adopted as a defensive measure
     in the context of a sale of control favoring one bidder over oth-
     ers, heightened judicial scrutiny will be applied).

   - **Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,** 506
     A.2d 173 (Del. 1986) (break-up fee as part of no-shop provi-
sion improperly ended "rather than intensified" the bidding contest).

2. *Magic number?*

- **Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.**, 729 A.2d 280, 291-92 n.15 (Del. Ch. 1998) (citing authority referring to break-up fees as "liquidated damages provisions," acknowledging that fees in the range of one to five percent of the proposed acquisition price are reasonable and upholding 4.98% break-up fee (including expense reimbursement) based on the number of shares outstanding as of date of merger agreement).

- **McMillan v. Intercargo Corp.**, 768 A.2d 492 (Del. Ch. 2000) (holding 3.5% break-up fee "was at the high end" of fees approved by Delaware courts, but within a reasonable range).

- **In re Pennaco Energy, Inc. S'holders Litig.**, 787 A.2d 691 (Del. Ch. 2001) (holding break-up fee of 3% was "modest and reasonable").

- **In re IXC Communications, Inc. S'holders Litig.,** C.A. Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210, *28 (Del. Ch. Oct. 27, 1999) (stating "[i]t is very difficult to say that any termination fee is so excessive on its face that it is unenforceable. Termination fees are most properly evaluated in the context of the merger agreements under which they arise.").

- **Phelps Dodge Corp. v. Cyprus Amax Minerals Co.**, C.A. No. 17398, 1999 Del. Ch. LEXIS 202, *5 (Del. Ch. Sep. 27, 1999) (transcript of oral ruling) (stating that 6.3% termination fee "certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point").

- **Paramount Communications, Inc. v. QVC Network, Inc.**, 637 A.2d 34 (Del. 1994) (1.2% termination fee coupled with uncapped stock option entitling bidder to 19.9% of target's stock upon triggering of termination fee was an "improper" and "counter-productive" measure in violation of the board's fiduciary duties).
3. **What is included in the percentage? Expenses? Profit on stock option? Is the percentage based on the equity value of the transaction or the enterprise value?**


- **In re NCS Healthcare, Inc., S'holders Litig.**, C.A. No. 19786, 2002 Del. Ch. LEXIS 133 (Del. Ch. Nov. 22, 2002) (holding that termination fee that was 2% of total transaction value was not "coercive or preclusive"; instructing that because board owed duties to stockholders and creditors, debt should be included in calculation of transaction value), rev'd on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

- **In re MONY Group Inc. S'holder Litig.**, C.A. No. 20554 (Del. Ch. Feb. 17, 2004) (holding that termination fee that represented 3.3% of the equity value and 2.4% of the transaction value was "well within the range of reasonableness").

4. **Vote coercion. Analysis of fee may be different if triggered solely by stockholder vote against deal. Does triggering fee based on board recommendation change raise similar issue? What if company has no cash?**

- **Brazen v. Bell Atl. Corp.**, 695 A.2d 43, 50 (Del. 1997) (stating that "the mere fact that the stockholders knew that voting to disapprove the merger may result in activation of the termination fee does not constitute stockholder coercion"; rather, the "'determination of whether a particular stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case'").

- **McMillan v. Intercargo Corp.**, 768 A.2d 492 (Del. Ch. 2000) (stating that structure in which termination fee was payable only if stockholders rejected the merger and there was another acquisition proposal within one year was significant in Court's
E. Voting Agreements

The Delaware courts have recently indicated their concern with voting agreements that make approval of the transaction a "virtual certainty."

- **Omnicare, Inc. v. NCS Healthcare, Inc.**, 818 A.2d 914 (Del. 2003) (reversing the Court of Chancery and holding that NCS board had impermissibly "locked up" a merger with a third party bidder where directors agreed to a "force the vote" provision and approved agreements between the bidder and two stockholders (who owned shares having a majority of the voting power) that obligated the stockholders to vote for the merger. The directors' approval of the voting agreements and force the vote provision in the merger caused the board to abdicate its fiduciary duties during the period between the signing and the vote, because the board was unable to react to the subsequent offer).

- **Orman v. Cullman**, C.A. No. 18039, 2004 Del. Ch. LEXIS 150 (Del. Ch. Oct. 20, 2004) (upholding transaction in which majority stockholders with high vote stock agreed to vote shares pro rata in accordance with public stockholders where majority stockholders also agreed not to vote in favor of another transaction for 18 months following termination and stating that such a transaction was not coercive because there was no penalty to public stockholders for voting against the transaction).

- **Ace Ltd. v. Capital Re Corp.**, 747 A.2d 95 (Del. Ch. 1999) (noting that acquiror's ownership of 12.3% of target's stock and voting agreements with respect to another 33.5%, gave acquiror, as a "virtual certainty," the votes to consummate the merger even if a materially more valuable transaction became available).

- **In re IXC Communications, Inc. S'holders Litig.**, C.A. Nos. 17324 & 17334, 1999 Del. Ch. LEXIS 210, *24 (Del. Ch. Oct. 27, 1999) (stating, in reference to a transaction where an independent majority of the target's stockholders owning nearly 60% of the target's shares could freely vote for or against the merger, "'[a]lmost locked up' does not mean 'locked up,' and 'scant power' may mean less power, but it decidedly does not mean 'no power,'" and finding that the voting agreement did not have the purpose or
effect of disenfranchising the remaining majority of stockholders).

- **American Bus. Info., Inc. v. Faber, C.A. No. 16265 (Del. Ch. Mar. 27, 1998) (oral ruling)** (refusing to enjoin grant of lock-up to high bidder because of "credible risk" that high bidder "may abandon the picture, leaving only [lower bidder] in the picture").

### F. Company Options

Options granted by a target corporation to purchase shares of the target's stock serve several purposes including (i) providing the acquiror an upside in the event a merger is consummated with another party, and (ii) generally deterring third-party bidders. Historically, options granted by a target corporation also made pooling of interests accounting treatment difficult or unavailable for a third party; however, since pooling of interests accounting treatment for corporate acquisitions was eliminated in 2001, use of such options has become less common.

1. **Size of option? Should the option be capped?**


   - **Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994)** (invalidating a 19.9% stock option, the terms of which permitted the acquiror to exercise the option by payment of a note of questionable marketability instead of cash and had a put feature permitting the acquiror to put the stock to the target for the difference between a strike price and the market price of the target's stock, without a cap to limit its maximum dollar value, finding the option to be unreasonable and draconian).

G. Can Board Covenant To Leave Rights Plan In Place To Fend Off Other Acquirors?

- **Quickturn Design Sys. v. Shapiro**, 721 A.2d 1281 (Del. 1998) (invalidating delayed redemption provision of rights plan that prohibited a newly elected board from redeeming the rights for six months because such provision prevented a newly elected board from completely discharging its fundamental managerial duties to the corporation and its stockholders).

- **In re Pure Resources, Inc. v. S'holders Litig.**, 808 A.2d 421 (Del. Ch. 2002) (finding that subsidiary board had no duty to adopt poison pill to fend off non-coercive tender offer and suggesting that board might have obligation to remove rights plan in face of non-coercive third party tender offer).

IV. STRUCTURAL ISSUES

A. Section 203; Delaware's Business Combination Statute

Section 203 imposes severe restrictions on transactions between corporations and stockholders who own more than 15% of its voting stock, unless the stockholder obtains board approval before crossing the 15% threshold.

1. **Target Shares.** Make sure that acquiror does not get a 15% stake in company prior to board approval. Note that definition of ownership is very broad.

- **Chesapeake Corp. v. Shore**, 771 A.2d 293, 351 (Del. Ch. 2000) (given the broad language of Section 203, it is "plausible that an agreement could create such substantial economic incentives for the seller with respect to purchased shares that the agreement could also, as a practical matter, constitute an 'agreement, arrangement or understanding for the purpose of . . . voting' other shares still held by the seller").

- **Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.**, 729 A.2d 280 (Del. Ch. 1998) (holding that acquiror did not become "owner," within meaning of Section 203, of shares of target corporation stock pursuant to agreement where stockholder of target corporation agreed to tender 20% block to acquiror and abstain from taking any actions which would encourage another bidder to make a competing proposal, because evi-
dence showed that board approved the merger with the acquiror prior to the stockholder's execution of the agreement).

- **Siegman v. Columbia Pictures Entm't, Inc., 576 A.2d 625, 634 (Del. Ch. 1989)** (noting that intent of Section 203, as set forth in the legislative history thereof, is to force acquirors to approach the board before buying a significant interest in a corporation: "[T]he essential element to avoid a stockholder vote is the approval by the board of the about-to-be-acquired corporation before the board becomes beholden to the acquiror.").

- **Siegman v. Columbia Pictures Entm't, Inc., C.A. No. 11152, 1993 Del. Ch. LEXIS 1 (Del. Ch. Jan. 12, 1993)** (stating that agreement by stockholder of target corporation giving acquiror option to purchase 49% of target's stock which stated that it was contingent upon approval by the boards of target and stockholder, would prevent an "agreement, arrangement or understanding" under the definition of owner in Section 203 from coming into being until the contingencies were removed but holding that despite stated contingency, there was a disputed question of fact as to whether the agreement was contingent upon such board approval).

2. **Target Interest in Public Companies.** If target owns a stake in a Delaware corporation, then, following an acquisition, any "business combination" involving that Delaware company and the combined entity may be subject to the restrictions of Section 203. **Business combination is broadly defined.**

- **In re Digex, Inc. S'holders Litig., 789 A.2d 1176 (Del. Ch. 2000)** (finding at preliminary injunction stage that defendants were not reasonably likely to meet their burden as to the entire fairness of the decision of the interested directors of a subsidiary corporation to waive proscriptions of Section 203 that would otherwise apply to acquiring corporation as result of merger with parent-target corporation, due to independent directors' lack of "meaningful participation" in negotiations leading to the Section 203 waiver).

**B. Class Votes**

Delaware law does not provide for class voting in mergers. Compare 8 Del. C. § 251 (no class vote in mergers) with 8 Del. C. § 242.
(charter amendments require class vote of a class of stock if the rights, preferences and powers thereof are amended so as to adversely affect them). However, preferred stock provisions often do provide for class votes in connection with adverse changes to the stock. The case law provides some guidance as to whether these provisions are triggered by mergers. Generally, a close reading of the provision is required to determine whether such a vote is required.

- **Warner Communications Inc. v. Chris-Craft Indus., Inc.,** 583 A.2d 962 (Del. Ch.) (provision of Warner charter requiring a class vote of preferred stock to amend, alter or repeal any provision of charter which adversely affects the preferred stock did not require class vote in triangular merger where Warner preferred stock was converted into Time preferred stock and Warner charter was amended to delete the terms of the preferred stock because the conversion of the preferred stock in the merger created the adverse effect, not the amendment), *aff'd*, 567 A.2d 419 (Del. 1989).

- **Sullivan Money Mgmt., Inc. v. FLS Holdings, Inc.,** C.A. No. 12731, 1992 Del. Ch. LEXIS 236 (Del. Ch. Nov. 20, 1992) (provision of charter requiring class vote of the preferred stock to change, by amendment to the charter "or otherwise" the terms and provisions of the preferred stock so as to affect adversely the rights and preferences thereof, did not trigger class vote in merger where the preferred stock was converted into cash, because "or otherwise" cannot be interpreted to mean merger where other provisions of charter specifically required class vote of another series of preferred stock to amend the terms of such preferred stock so as to affect adversely the rights thereof "either directly or indirectly or through merger or consolidation with any other corporation").

- **Elliott Assocs., L.P. v. Avatex Corp.,** 715 A.2d 843 (Del. 1998) (charter provision requiring class vote of preferred stock for the amendment, alteration or repeal, "whether by merger, consolidation or otherwise," of any provision of the Avatex charter that would adversely affect the rights of the preferred stock applied to merger where Avatex did not survive and preferred stock was converted into common stock of surviving corporation, because the adverse effect was caused by the repeal of the charter and the
stock conversion, and because the Avatex charter contained the phrase "whether by merger, consolidation or otherwise").

- **Starkman v. United Parcel Serv. of Am., Inc., C.A. No. 17747 (Del. Ch. Oct. 18, 1999)** (transcript of oral ruling) (applying Avatex and stating that charter provision requiring supermajority vote to amend or delete right of first refusal in charter was not triggered in holding company merger where corporation survived and charter was not amended as there was no amendment or deletion to charter and reasoning, in dicta, that the supermajority voting requirement would not apply even if the charter of the surviving corporation in the merger amended or deleted the right of first refusal because the critical language, referring to "merger, consolidation or otherwise," present in Avatex but absent in Warner, was not found in the charter provision at issue).

- **In Benchmark Capital Partners IV, L.P. v. Vague, C.A. No. 19719, 2002 WL 1732423 (Del. Ch. July 15, 2002)**, the company's charter required a series vote for corporate action that would "materially adversely change the rights, preferences and privileges" of the junior stock. The charter required a series vote to issue or authorize securities senior to or on parity with junior preferred stock, but the vote could be waived where the contemplated corporate action would "diminish or alter the liquidation preference or other financial or economic rights" of the junior preferred. The Court held that the first series vote provision did not expressly extend to mergers and therefore, the preferred stockholders were not entitled to a series vote. With respect to the waiver of the second series vote, the Court rejected a broad reading of the limitation on the waiver and found that the issuance of senior stock did not "diminish or alter . . . financial or economic rights of the existing preferred" under the principle that preferences must be express and will not be presumed.

- **Watchmark Corp v. ARGO Global Capital, LLC, C.A. No. 711-N, 2004 Del. Ch. LEXIS 168 (Del. Ch. Nov. 4, 2004)** (confirming that provision in certificate of incorporation requiring 80% vote of each series of preferred stock to amend certificate of incorporation to create a new series of preferred stock did not apply to a merger to eliminate the high vote provision).
C. **Business Combination; Fair Price Provisions**

This type of provision is often long and complex but, in general, requires a supermajority vote to approve a merger with an interested stockholder, i.e., a stockholder that owns more than a fixed percentage of the company's stock. These provisions often require close and creative reading.

D. **Rights Plans**

Before a merger agreement can be signed, it is often necessary to amend the company's rights plan in order to exempt the acquiror from the terms thereof, particularly where the acquiror is entering into voting agreements with stockholders or a stock option agreement with the company, which would otherwise make it an "acquiring person," and trigger the pill.

1. It is important to give the rights agent some notice so that the amendment can be signed over the weekend, if necessary.
2. Because Section 251 does not permit the conversion of securities other than stock in a merger, the rights plan must be amended so that it will not be triggered in the merger, unless the company plans to actually redeem the rights.
3. Avoid issuing rights as merger consideration – doing so may trigger appraisal rights. 8 Del. C. § 262 (appraisal rights triggered if stockholders are required to accept anything other than stock or depository receipts in a merger).

E. **Control Premiums**

Courts have approved receipt of a premium by controlling stockholders.

- **Mendel v. Carroll**, 651 A.2d 297, 305 (Del. Ch. 1994) ("The law has acknowledged, albeit in a guarded and complex way, the legitimacy of the acceptance by controlling shareholders of a control premium.").

- **In re BHC Communications, Inc. S'holder Litig.**, 789 A.2d 1 (Del. Ch. 2001) (holding directors of controlling stockholder corporation properly agreed to accept control premium of wholly owned subsidiary and indirectly owned subsidiary without implicating fiduciary duties to minority stockholders of subsidiaries and mere fact that controlling stockholder corporation received
premium not shared by minority stockholders of subsidiaries did not support inference of breach of fiduciary duties).