THE FORM AND FUNCTION OF FAIRNESS IN MODERN CORPORATE LAW

Charles Korsmo & Minor Myers

INTRODUCTION 681
I. THE FUNCTION OF FAIRNESS IN CORPORATE LAW 685
  A. Conflicted Transactions and the Sorting Function 685
  B. Early Prohibitions on Conflicted Transactions 688
  C. The Entire Fairness Test and the Sorting Function 689
    1. The Unavoidable Nature of the Fairness Inquiry 690
    2. The Broad Scope of the Fairness Inquiry 691
    3. The Forgiving Nature of Entire Fairness Scrutiny 692
    4. Remedial Breadth 695
II. THE ALCHEMY OF FAIRNESS ALTERNATIVES 696
  A. The Synthetic Arm's-Length Bargain as an Alternative to Fairness 697
  *B. The Special Case of Conflicted Controller Merger*s 699
    1. The Short Life of the Business Purpose Test 700
    2. The Return to Fairness as the Sole Criterion 700
    3. Shifting the Burden in the Fairness Inquiry 701
  C. The Advent of the MFW *Safe Harbor* 702
  D. Other Transactions with Controlling Stockholders 706
III. THE MODERN FUNCTION OF FAIRNESS SCRUTINY 708
  A. Procedural Safeguards as the New Sorting Mechanism 708
  B. Entire Fairness as a Choice in the Hands of Conflicted Fiduciaries 710
  C. The New Function of Entire Fairness 711
    1. Providing an Incentive to Submit to the Procedural Mechanisms 711
    2. Supplying Grounds for Arm's-Length Negotiation 715
    3. Performing the Sorting Function Outside the Safe Harbors 718
IV. THE NEW DOCTRINAL FORM OF ENTIRE FAIRNESS 719
  A. A Fairness Test Worth Avoiding 720
  B. The MFW *Paradox* 721
  C. The Inadequacy of Extant Fairness Doctrine 722
    1. The Trend Towards Laxity: SolarCity *and* BGC Partners 722
    2. Market Responses to the Weak Fairness Standard 726
    3. The Musk Pay Ruling 729
  D. Refashioning the Doctrinal Form of Fairness to Suit its New Function 733
    1. A Rebuttable Presumption of Unfairness 734
    2. A Conjunctive Test of Fairness 736
    3. A Less Forgiving Fair Price Analysis 737

4. *A More Aggressive Approach to Remedies* 740
CONCLUSION 741

THE FORM AND FUNCTION OF FAIRNESS IN MODERN CORPORATE LAW

*Charles Korsmo & Minor Myers**

Once upon a time, the entire fairness test performed a straightforward and critical function in corporate law: sorting value-enhancing conflicted transactions from opportunistic ones. The careful, wide-ranging judicial inquiry that characterizes fairness scrutiny serves this function. In recent decades, corporate law has shifted. Across nearly all domains—even the most fraught of all corporate transactions, the conflicted controller merger—procedural mechanisms like approval by disinterested directors or stockholders have overtaken the fairness inquiry as the principal means of discharging the sorting function. Traditional fairness doctrines come into play only where procedural safeguards are absent.

In this Article, we argue that existing fairness doctrine has become an antique, suited to a bygone era in corporate law and ill-equipped to fulfill its modern role. In modern corporate law, the principal function of the entire fairness test is no longer to sort transactions; instead, it is to serve as an adjunct to the procedural mechanisms. To do this, the doctrine must provide sufficient incentive for conflicted fiduciaries to submit to the costly procedural safeguards in the first place. This means the entire fairness test must be sufficiently fearsome that conflicted fiduciaries wish to avoid it. Indeed, the entire doctrinal universe of conflicted transactions relies on the fairness test serving this modern function. We propose a series of concrete doctrinal reforms that would help the fairness test live up to the demands that modern corporate doctrine places upon it: funneling conflicted fiduciaries into the procedural mechanisms that now perform the critical sorting function.

INTRODUCTION

The entire fairness test has long held a special place in the corporate law pantheon[1] as the doctrinal test that accomplishes a critical function: screening the universe of conflicted transactions such that desirable ones may proceed while weeding out (and deterring) the opportunistic ones.[2] Designed with this function in mind, the doctrine recognized that the evaluation in question was hard to get right.[3] Errors in either direction could be costly.[4] A too-lenient approach would allow value-destroying opportunistic transactions to proceed. But a too-strict approach would block value-enhancing transactions. The fairness test accordingly employed a cautious stance, calling for an examination of a vast set of inputs, and—leery of blocking value-enhancing transactions—tolerating transactional terms that fell within an ample "range of fairness."[5]

---

* Korsmo is the Morris G. Shanker Professor of Law at Case Western, and Myers is Professor of Law at the University of Connecticut School of Law. For helpful feedback, we thank participants at the BYU Winter Deals Conference and the Tulane Corporate and Securities Roundtable.

1. *E.g.*, John C. Coffee, Jr., *The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control*, 111 YALE L.J. 1, 28 (2001) (noting that "fiduciary duties generally required any corporate official who engaged in a self-dealing transaction with his firm to prove its 'intrinsic fairness'" as early as the late 19th century); Kahn v. M & F Worldwide Corp., 88 A.3d 635, 642–44 (Del. 2014), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

2. *See infra* Part I.

3. *See infra* Part I.A.

4. *See infra* Part I.A.

5. *See infra* Part I.C.

Over the past half century, and especially in the past decade, corporate law has turned away from using a judicial fairness inquiry to screen conflicted transactions.[6] Instead, procedural mechanisms—most notably approvals by disinterested directors and disinterested stockholders—serve as the principal means to prevent opportunistic conflicted transactions in the first place.[7] This trend has refashioned both statutory and common corporate law and has touched nearly every corner of self-dealing.[8]

Perhaps the most dramatic context involves mergers with controlling stockholders. For decades, a judicial evaluation of the fairness of a controller merger was unavoidable in Delaware; procedural safeguards could, at most, shift the burden of proof.[9] Over time, critics suggested that the persistence of the entire fairness standard of review in this context was *too* demanding—the scrutiny so unforgiving, the remedy for disloyalty so drastic—such that corporate actors might avoid conflicted transactions entirely, thereby deterring socially-beneficial transactions along with opportunistic ones.[10]

In 2014, the Delaware Supreme Court accommodated these concerns in its celebrated *MFW* decision.[11] The opinion created a safe harbor from the conventional fairness inquiry for controller mergers that employ a set of prophylactic measures throughout the pendency of the transaction.[12] Indeed, the *MFW* safe harbor has proven so handy a tool for Delaware courts that its use has expanded beyond the context of mergers to other types of controlling stockholder transactions—among them advisory agreements, executive compensation, and stock reclassifications.[13]

Across all domains, the logic of this trend is the same: These procedural mechanisms introduce a form of adversarial negotiation into an otherwise-conflicted situation, and unconflicted parties help set the terms of the transaction and determine its ultimate advisability. The resulting terms should resemble those of an arm's-length transaction—the goal of a fairness inquiry—and will, in fact, do so more reliably than the post hoc judicial inquiry into fairness. Thus, in the presence of these procedural mechanisms, a judicial inquiry into fairness is unnecessary. The screening function once performed by

6. *See infra* Part II.

7. *See infra* Part II.A.

8. *See infra* Parts II.C.–D.

9. *See infra* Part II.B.

10. *See, e.g.*, Ligos v. Isramco, Inc., No. 2020-0435, 2021 WL 3870679, at *1 (Del. Ch. Aug. 31, 2021) (noting that "the common law of corporations recognizes that conflicted controller transactions may enhance firm value, and that the risk of litigation under the high bar of entire fairness may discourage such value-enhancing deals"); *In re* MFW S'holders Litig., 67 A.3d 496, 504 (Del. Ch. 2013), *aff'd sub nom.*, Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014) (emphasizing "the clear costs to diversified investors that [entire fairness] litigation imposes").

11. *See infra* Part II.C.

12. *Kahn*, 88 A.3d at 642–44.

13. *See infra* Part II.D.

the fairness inquiry has already been performed by the procedural mechanisms. The entire fairness inquiry comes into play only where the procedural safeguards have not been employed.

This shift has far-reaching implications for the fairness doctrine, and this Article is the first to investigate them. We argue that the fairness test must serve a fundamentally different function than it has served in the past.[14] It is no longer primarily a mechanism for sorting conflicted transactions and balancing losses from fiduciary opportunism against the losses arising from foregone beneficial transactions. The procedural devices largely take care of that—and do so more capably than entire fairness review ever could.[15]

The modern function of the fairness test should thus be to induce conflicted fiduciaries to employ these procedural devices in the first place.[16] Such an inducement is necessary, as corporate law never *requires* the procedural mechanisms, and they can be costly to a conflicted fiduciary. To secure approval from an independent committee or disinterested stockholders, a conflicted fiduciary may be forced to sacrifice anticipated gains. Indeed, the entire logic of the modern corporate law approach is that such procedural safeguards *will* prevent conflicted fiduciaries from securing opportunistic gains.[17] Thus, the first job of the fairness inquiry is to be sufficiently threatening that conflicted fiduciaries will employ procedural safeguards—those they'd otherwise wish to avoid but that corporate law expects to generate socially desirable outcomes.

This conclusion is bolstered by a related consideration. When fairness served the screening function, the judicial inquiry needed to carefully balance the risk of allowing opportunistic transactions against the risk of deterring value-enhancing transactions. Such balancing, however, has lost salience in the fairness inquiry's modern role, where a conflicted fiduciary always has recourse to the procedural mechanisms. These offer a clear playbook for consummating a value-enhancing deal with no judicial inquiry into fairness. Under modern doctrine, the risk that entire fairness scrutiny could block a value-enhancing transaction is thus greatly reduced or even eliminated, such that courts should focus almost exclusively on avoiding errors in the other direction: minimizing the likelihood of allowing an opportunistic transaction.[18]

In short, the corporate law developments of recent decades call for a different doctrine of fairness, one designed principally to minimize the risk of opportunistic transactions. This more intimidating fairness inquiry would induce fiduciaries to submit to the procedural mechanisms modern corporate law relies upon to block opportunistic transactions and produce fair and efficient outcomes.

---

14. *See infra* Part III.
15. *See infra* Part III.A.
16. *See infra* Part III.C.1.
17. *See infra* Part III.C.1.
18. *See infra* Part IV.A.

If anything, however, recent trends in Delaware have moved in the other direction.[19] While in corporate lore the fairness inquiry is said to be very demanding,[20] recent developments suggest that fairness is more paper tiger than fearsome beast. In the *SolarCity* case, for example, the court looked past extensive procedural deficiencies and nonetheless found fairness by comparing the transaction price to prevailing market prices,[21] suggesting that any deal at a positive premium stands a good chance of winning the whole game when it comes to fairness. The only cost to the conflicted fiduciary is the relatively trivial cost of the litigation. These developments are not lost on conflicted fiduciaries, who have sometimes expressly declined to bother with *MFW* or other procedural mechanisms.[22] The recent *Tornetta* decision—rescinding Elon Musk's titanic $56 billion compensation package at Tesla—might at first glance appear to represent a fairness renaissance,[23] but on closer examination the case is unlikely to mark the end, let alone a reversal, of the ongoing watering-down of fairness scrutiny.[24]

We propose four doctrinal reforms to the fairness inquiry so that it can better perform its modern function.[25] First, a court should presume that a transaction is unfair when a conflicted fiduciary declines to rely on a procedural safe harbor. At one time, a conflicted fiduciary had no alternative but to face judicial scrutiny, but under modern corporate doctrine an interested fiduciary faces judicial scrutiny *by choice*. When a conflicted fiduciary avoids the fairness-promoting procedural mechanisms that Delaware has provided, the common-sense inference is that the resulting transaction falls short of delivering to minority stockholders what fairness requires: something resembling an arm's-length bargain. The fairness test should recognize that inference. Second, the test should require both fair process *and* fair price, as contrasted with current doctrine, which takes pains to treat fair process and fair price as two prongs in a single unified inquiry, with one prong often making up for shortcomings in the other. Third, the fair price inquiry should be less cautious, abandoning the notion of a broad "range of fairness" in favor of a point estimate for use in

---

19. *See infra* Part IV.C.

20. *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013) (describing entire fairness as "Delaware's most onerous standard").

21. *In re* Tesla Motors, Inc. S'holder Litig., No. CV 12711, 2022 WL 1237185, at *31–48 (Del. Ch. Apr. 27, 2022), *judgment entered sub nom.*, *In re* Tesla Motors, Inc. No. 12711, 2022 WL 1267229 (Del. Ch. 2022), *aff'd sub nom.*, *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667 (Del. 2023) ("In instances where there are process infirmities, the Court is obliged to study fair price even more carefully. I have done that here. After careful consideration, I am persuaded Elon presented credible evidence that Tesla paid a fair price for SolarCity.").

22. *See infra* Part IV.C.2.

23. *See* Tornetta v. Musk, 310 A.3d 430, 539 (Del. Ch. 2024) ("This unique circumstance and this unique CEO do not support a finding of fair price."), *rev'd on other grounds*, *sub nom.*, *In re* Tesla, Inc. Derivative Litig., No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

24. *See infra* Part IV.C.3.

25. *See infra* Part IV.D.

determining liability and damages, and exhibiting far more skepticism towards trading prices as a baseline measure of fair value. Finally, courts should be more aggressive in crafting remedies, with an eye to deterrence. The existing caution in assessing fair price and selecting remedies is a concession to the apparent danger of deterring beneficial transactions, which fades in importance where safe harbors are available.

This article proceeds in four Parts. Part I describes the original role of the entire fairness inquiry. Part II traces how corporate law doctrine has shifted to allow conflicted fiduciaries to avoid fairness scrutiny by employing procedural safeguards. Part III explains the new role for the entire fairness test in modern corporate law. Part IV articulates the doctrinal form this new function requires, notes how recent Delaware trends have moved, if at all, in the wrong direction, and proposes reforms to the entire fairness doctrine.

I. THE FUNCTION OF FAIRNESS IN CORPORATE LAW

The entire fairness test was designed to perform an essential function in corporate law: sorting virtuous self-dealing transactions from value-destroying opportunistic ones.[26] In this Part, we define the sorting function and explain how the evolution of the fairness doctrine over time reflected its functional role.

A. Conflicted Transactions and the Sorting Function

By and large, corporate law leaves control of agency costs within the corporate form to the internal governance structures of the firm and to market forces,[27] and courts generally avoid any substantive review of corporate decisions to determine whether they are in the best interests of the stockholders.[28] This approach reflects both the low risk of opportunism in arm's-length decisions and the comparatively high costs of judicial review.[29] Where, however, a person vested with control—whether as a director, officer, or controlling stockholder—stands on both sides of a transaction, the potential

26. *See infra* Part I.C.

27. DEL. CODE ANN. tit. 8, § 141(a) (2025) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors."); *see generally* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991) (arguing that corporate law supplies default and enforcement rules that replicate costless contracting).

28. EASTERBROOK & FISCHEL, *supra* note 27, at 2 ("The handiwork of managers is final in all but exceptional or trivial instances. Courts apply the 'business judgment rule,' a hands-off approach that judges would not dream of applying to the decisions of administrative agencies.").

29. *See, e.g.*, Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 NW. U. L. REV. 1, 72–75 (1985).

for self-serving behavior is so manifest that positive corporate law has always played a larger regulatory role.[30]

The problems posed by such conflicted transactions, however, are not easily solved. On the one hand, the risk of opportunism is obvious.[31] Such transactions can serve as "straightforward techniques for value diversion" by conflicted parties.[32] Passive investors would wish to prohibit and deter such transactions. On the other hand, a transaction with a conflicted controller might be mutually beneficial and value-enhancing.[33] For one reason or another, a fiduciary might be the party with whom the corporation should transact.[34] Passive investors would wish to receive the benefits of such value-enhancing transactions, and they would be harmed by any legal mechanism that prohibits or otherwise deters them. A method is thus highly desirable for evaluating conflicted transactions, but that task is not easy or costless.[35] The conflicted party has a powerful incentive (and often ability) to disguise an opportunistic transaction as a value-enhancing one, making them difficult to distinguish. And the group of passive investors cannot themselves monitor every transaction without sacrificing the benefits of separated management and control that motivate the corporate form in the first place.[36]

Any corporate law regime must thus supply a mechanism for addressing potential self-dealing—for sorting between opportunistic and value-enhancing conflicted transactions. We refer to this need as the "sorting function" of corporate law and refer to the method employed as the "sorting mechanism." Alternative sorting mechanisms will vary in cost and accuracy.

A sorting mechanism in corporate law will exhibit the characteristics of a conventional hypothesis test.[37] For our purposes, the null hypothesis is that a given conflicted transaction is opportunistic and should be blocked, deterred,

30. *See* Melvin Aron Eisenberg, *Self-Interested Transactions in Corporate Law*, 13 J. CORP. L. 997, 997 (1988) (tracking the changes in how corporate law has treated self-dealing from the late nineteenth century to now).

31. *See* Luca Enriques, Gerard Hertig & Hideki Kanda, *Related-Party Transactions*, *in* THE ANATOMY OF CORPORATE LAW 153, 153 (Reinier Kraakman et al. eds., 2d ed. 2009) (noting the foundational risk in interested transactions "that an influential manager or a controlling shareholder will transact with the company on terms less favorable than could be obtained in an arm's length negotiation").

32. *Id.* For convenience, we refer to such undesirable (i.e. value-destructive) transactions as "opportunistic" transactions.

33. *See* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CAL. L. REV. 393, 400 (2003) (noting that not "all transactions bearing an element of conflicting interests are inefficient transactions"). For convenience, we will refer to such desirable transactions as "value-enhancing."

34. *Id.*

35. *See* EASTERBROOK & FISCHEL, *supra* note 27, at 93 ("[T]he reason for having a fiduciary principle in the first place is the high cost of specifying things by (express) contract. . . .").

36. *E.g.*, Davis, *supra* note 29, at 5–7.

37. We are not the first to frame the fiduciary inquiry as a hypothesis test. *See, e.g.*, Davis, *supra* note 29, at 25–27.

or punished.[38] The alternative hypothesis is that the transaction—though conflicted—is value enhancing and ought not be discouraged by corporate law. Some true state of the world exists, perhaps known only to the conflicted fiduciary, and the sorting mechanism attempts to determine that true state for the purpose of deciding whether to block or permit the transaction. The possible set of outcomes from that sorting is depicted below in Table 1.

Table 1. Possible Outcomes of Sorting Mechanism

		True State of World	
		Value-Enhancing	*Opportunistic*
Legal Outcome	*Permitted*	(1) Value-enhancing decision correctly permitted	(2) Opportunistic transaction erroneously permitted **Type I error**
	Blocked	(3) Value-enhancing decision erroneously blocked **Type II error**	(4) Opportunistic transaction correctly blocked

As can be seen, four outcomes are possible when applying the sorting mechanism to a conflicted transaction, corresponding to the numbered quadrants in Table 1. In the upper left and lower right quadrants (numbered 1 & 4), the screening mechanism gets it right, either correctly permitting a value-enhancing transaction (quadrant 1) or correctly blocking an opportunistic transaction (quadrant 4). In the upper right and lower left quadrants (numbered 2 & 3), the screening mechanism gets it wrong in one of two ways. The screening mechanism can generate a "false positive," or Type I error, by permitting an opportunistic transaction that ought to have been blocked (quadrant 2). Or it could generate a "false negative," or Type II error, by blocking a value-enhancing transaction that ought to have been permitted (quadrant 3).

Both types of error can have serious negative costs.[39] When value-enhancing transactions are disallowed or deterred—a Type II error—both passive investors and the conflicted fiduciary suffer from foregone gains, and allocative efficiency may also be impaired. When opportunistic transactions are permitted—a Type I error—the first-order results may appear to be merely

38. The analysis could just as easily be framed in the opposite fashion, with the null hypothesis being that the conflicted transaction is permissible, but that is less natural in light of the historic corporate law approach of treating conflicted transactions as presumptively impermissible. *See infra* Part I.B.

39. *See* Davis, *supra* note 29, at 27–29.

redistributive, with the conflicted fiduciaries simply benefitting at the expense of passive investors in a zero-sum game. The second-order effects, however, pose more systematic social harms, both by preventing assets from flowing to their highest-value use, and by forcing passive investors to expend resources monitoring or discount their investment for potential opportunism, raising the cost of capital and making the corporation a less efficient vehicle for raising passive investment.[40]

The optimal approach for a system of corporate law is to minimize the sum of the costs associated with these two types of error and the costs of operating the system itself.[41]

B. Early Prohibitions on Conflicted Transactions

Over time, corporate law has altered its approach to conflicted transactions in ways that reflect changing views on the relative costs and benefits of different screening mechanisms. In the nineteenth century, corporate law was seen as embracing a wholesale prohibition against conflicted transactions, treating them as per se void.[42] These prohibitions were couched in overtly moral terms, rather than the concerns with economic efficiency introduced above. One New York court, for example, insisted that the rule against interested transactions arose from "principles of equity . . . founded on immutable truth and justice, and . . . our great moral obligation to refrain from placing ourselves in relations which excite a conflict between self interest and integrity."[43] The fairness or value-enhancing nature of the conflicted transaction was irrelevant to the legal inquiry.[44]

These early rules were easy and inexpensive to administer, and they made avoiding Type I errors the overriding consideration. The downside of a flat prohibition is the obvious risk of Type II errors—blocking value-enhancing transactions. The early rules could thus be said to reflect a strong consensus that Type II errors were likely to be far less common, or far less costly, than the

40. Perhaps unsurprisingly, the social costs of fiduciary opportunism mirror the social costs of theft, as elucidated in a seminal article by Gordon Tullock. *See The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 231 (1967) ("The theft itself is a pure transfer, and has no welfare cost, but the existence of theft as a potential activity results in very substantial diversion of resources to fields where they essentially offset each other, and produce no positive product.").

41. *See generally* Michelle M. Burtis, Jonah B. Gelbach & Bruce H. Kobayashi, *Error Costs, Legal Standards of Proof, and Statistical Significance*, 25 SUP. CT. ECON. REV. 1, 54 (2017) (noting that an object of designing optimal legal rules is to "seek to minimize the sum of error costs and direct costs").

42. Harold Marsh, Jr., *Are Directors Trustees? Conflict of Interest and Corporate Morality*, 22 BUS. LAW. 35, 36–39 (1966).

43. Cumberland Coal & Iron Co. v. Sherman, 30 Barb. 553, 578–79 (N.Y. Sup. Ct. 1859).

44. Marsh, *supra* note 42, at 36 ("In 1880 . . . the general rule was that any contract between a director and his corporation was voidable at the instance of the corporation or its shareholders, without regard to the fairness or unfairness of the transaction."). The early prohibition might not, in practice, have been entirely complete. *See* Norwood P. Beveridge, Jr., *The Corporate Director's Fiduciary Duty of Loyalty: Understanding the Self-Interested Director Transaction*, 41 DEPAUL L. REV. 655, 658–60 (1992).

Type I errors that would result from a less stringent rule. In other words, the prohibition on conflicted transactions reflected an assumption that conflicted transactions were likely to be opportunistic and that the inability to transact with a fiduciary would seldom impose significant costs on a corporation. Where these assumptions hold, the prohibition on interested transactions poses little or no risk of blocking anything value-enhancing. There is also little to gain from instituting a more costly and unpredictable screening mechanism merely to identify a chance value-enhancing conflicted transaction. If one relaxes the assumptions, however, then the prohibition on conflicted transactions becomes untenable. Where conflicted transactions can generate social benefits, a sorting mechanism that fails to take them into account will produce costly errors.[45]

So as attitudes on conflicted transactions changed, corporate law changed too. The late nineteenth century saw a growing sense that "in many cases it is to the advantage of a corporation to have a transaction with an officer, director or other related person."[46] Under such conditions, it was socially detrimental for the sorting mechanism to ignore the possibility of Type II errors, as did the old prohibition.

By the early twentieth century, the old prohibition had largely disappeared.[47] In its place, corporate law regimes around the world began to "permit related-party transactions even when conflicts of interest are especially acute."[48] In light of the obvious risks, however, corporate law continued to "subject such transactions to legal constraints."[49] This requires that the sorting mechanism be a balancing act, trading off the costs of Type I errors from a too-permissive approach against the costs of Type II errors from a too-stringent approach, taking into account the direct costs and unpredictability generated by the sorting mechanism itself.

C. The Entire Fairness Test and the Sorting Function

The sorting mechanism that emerged by the mid-twentieth century was the judicial inquiry known today as the "entire fairness."[50] As the Court of Chancery has explained, "the rule applicable in *all instances of corporate self-dealing*" is that "when officers and directors stand on both sides of a transaction complained

45. *E.g.*, Goshen, *supra* note 33, at 401 ("For this reason, an adequate solution to the problem requires meehanisms [sic] that can distinguish between efficient and inefficient deals.").

46. Marsh, *supra* note 42, at 43–44, 73–74.

47. *Id.* at 39–40.

48. *See* Enriques, Hertig & Kanda, *supra* note 31, at 155.

49. *Id.*

50. *See, e.g.*, Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952). The same test is sometimes referred to as the "intrinsic fairness" standard of review. *See, e.g.*, Trans World Airlines, Inc. v. Summa Corp., 374 A.2d 5, 13 (Del. Ch. 1977).

of they bear the burden of establishing its entire fairness."[51] Corporate law thus embraced a sorting mechanism that took into account the risks of opportunism alongside the possible benefits of value-enhancing transactions.

The contours of the entire fairness test are shaped by its role in performing the sorting function. In other words, the entire fairness test is functional in nature. By this, we mean that corporate law should be, and is, designed to respond to the demands and problems that arise from the operation of enterprise.[52] The fairness test has a job in corporate doctrine, and its content and continued use are justified by reference to this job. This point bears special emphasis because it is easy to sink into fuzzy thinking about concepts like fairness in corporate law.[53] At bottom, the entire fairness test (and the fiduciary concept generally) should serve to "preserve the gains resulting from the separation of management from risk bearing while limiting the ability of managers to give priority to their own interests over those of investors."[54]

The doctrine of entire fairness is highly developed in Delaware law. We highlight below how those doctrinal features serve to sort value-enhancing from opportunistic conflicted transactions. Also, we show how those features generate a *balancing* test, seeking to minimize the costs of both Type I and Type II errors.

1. *The Unavoidable Nature of the Fairness Inquiry*

Traditionally, a conflicted fiduciary had no avenue to avoid entire fairness review of conflicted transactions. The traditional requirement was to "establish to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price."[55] Indeed, scrutinizing conflicted transactions for fairness has

---

51. Greene v. Schenley Indus., Inc., 281 A.2d 30, 32 (Del. Ch. 1971) (emphasis added) (internal quotations omitted), *overruling recognized by In Re* Unocal Expl. Corp. S'holders Litig., 793 A.2d 329, 332 (Del. Ch. 2000), *aff'd sub nom.*, Glassman v. Unocal Expl. Corp., 777 A.2d 242 (Del. 2001).

52. *See* John Armour, Henry Hansmann & Reinier Kraakman, *What is Corporate Law?*, *in* THE ANATOMY OF CORPORATE LAW 1, 4 (Reinier Kraakman et al. eds., 2d ed. 2009) ("Our analysis is 'functional' in the sense that we organize discussion around the ways in which corporate laws respond to [the practical problems presented by the exigencies of commercial activity and organization.]"). In some commentary, the term is used differently. *E.g.*, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr, *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1297–98 (2001) (suggesting that "whether a standard of review is truly functional" can be reduced to a test of whether "the standard [is] a useful tool that aids the court in deciding the fiduciary duty issue" and that "the truly functional standard of review is the test actually used by the judge to reach a decision, not the ritualistic verbal standard that in truth functions only as a conclusory statement of the case's outcome").

53. *See* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 703 n.17 (1981) ("[F]or lawyers fairness is 'a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.'" (quoting George J. Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 2, 4 (1972))).

54. EASTERBROOK & FISCHEL, *supra* note 27, at 92.

55. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1179 (Del. 1995) (internal quotations omitted).

often been cited as one of the principal duties of a court of equity.[56] Where risks of opportunism are most acute, as in controlling stockholder mergers, the fairness inquiry remained unavoidable,[57] at least until recently.[58] Even where conflicted controlling stockholders could shift the burden of proof by employing various procedural safeguards, the substantive fairness inquiry remained the same.[59] No amount of procedure could avoid a shareholder's ability to call upon a court to scrutinize the fairness of a conflicted transaction.[60]

2. The Broad Scope of the Fairness Inquiry

The fairness inquiry is deliberately wide-ranging and requires that the trial court canvas an extensive universe of evidence. The canonical articulation, in the landmark 1983 case of *Weinberger v. UOP, Inc.*,[61] calls for examination of "two basic aspects" of fairness—"fair dealing and fair price."[62] The inquiry into fair dealing "examines the process that generated the result"[63] focusing on "the conduct of the corporate fiduciaries in effectuating the transaction."[64] This is highly context dependent, requiring the court to examine a broad range of considerations, including "questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained."[65] Likewise, the fair price inquiry, which "relates to the economic and financial considerations of the proposed merger," is intentionally far-reaching and encompasses "all relevant factors."[66] Depending on the context, this can entail an examination of "assets, market value, earnings, future prospects, and any other elements that

---

56. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952) (noting that resolving "questions of alleged unfairness or inequity . . . is the duty of the courts in a proper case"); *see also* Kahn v. Tremont Corp., 694 A.2d 422, 433 (Del. 1997) ("It is the responsibility of the Court of Chancery to make the requisite factual determinations under the appropriate standards, which underlie the concept of entire fairness.").

57. Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (noting that "[t]here is no 'safe harbor' for such divided loyalties in Delaware").

58. *See infra* Part II.C.

59. *See, e.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994) ("Once again, this Court holds that the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness.").

60. *See, e.g.*, *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 619 (Del. Ch. 2005) ("Unlike any other transaction one can imagine . . . it was impossible . . . to structure a merger with a controlling stockholder in a way that permitted the defendants to obtain a dismissal of the case on the pleadings.").

61. *Weinberger*, 457 A.2d at 701.

62. *Id.* at 711.

63. Palkon v. Maffei, 311 A.3d 255, 278 (Del. Ch. 2024), *cert. denied*, No. 2023-0449-JTL, 2024 WL 1211688 (Del. Ch. Mar. 21, 2024), and *rev'd sub nom.*, Maffei v. Palkon, 339 A.3d 705 (Del. 2025).

64. Kahn v. Tremont Corp., 694 A.2d 422, 430 (Del. 1997).

65. Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1239 (Del. 2012) (quoting *Weinberger*, 457 A.2d at 711).

66. *Weinberger*, 457 A.2d at 711. The breadth of the inquiry long predated *Weinberger*. *E.g.*, Porges v. Vadsco Sales Corp., 32 A.2d 148, 151 (Del. Ch. 1943) ("[A]ll of its terms must be considered.").

affect the intrinsic or inherent value of a company's stock."[67] From *Weinberger* on, however, the Delaware courts have emphasized that the entire fairness question cannot be neatly reduced into separate inquiries for process and price.[68] Instead, "[a]ll aspects of the issue must be examined as a whole since the question is one of entire fairness."[69]

Where both Type I and Type II errors are possible and costly, careful balancing is required. This makes this sort of judicial inquiry—broad and resource intensive—a necessity.[70] As the Court of Chancery regularly observes in fairness opinions: "[F]airness is not a technical concept. 'No litmus paper can be found or [G]eiger-counter invented that will make determinations of fairness . . . .'"[71] Such a significant investment in judicial and other resources is justified by the fact that errors in either direction—declaring an opportunistic transaction fair or a value-enhancing transaction unfair—could impose significant costs on the parties and society. By contrast, the narrow inquiry associated with the business judgment rule, which sharply limits judicial review in the absence of a conflict,[72] reflects a view that—given the extralegal constraints on director behavior in such situations—Type II errors are unlikely to be costly in comparison to the costs of Type I errors and the costs of conducting a broad inquiry.

3. The Forgiving Nature of Entire Fairness Scrutiny

Rhetoric surrounding the entire fairness standard often accentuates its supposedly fearsome and difficult-to-satisfy nature.[73] Judicial opinions lionize

67. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2022 WL 1237185, at *31 (Del. Ch. Apr. 27, 2022) (quoting *Weinberger*, 457 A.2d at 711).

68. *Weinberger*, 457 A.2d 711 ("However, the test for fairness is not a bifurcated one as between fair dealing and price.").

69. *Id. See also Tremont*, 694 A.2d at 432 ("[T]he concept of entire fairness requires the court to examine all aspects of the transaction in an effort to determine whether the deal was entirely fair.").

70. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1179 (Del. 1995) (describing entire fairness as "a standard by which the Court of Chancery must carefully analyze the factual circumstances[] [and] apply a disciplined balancing test to its findings"); Nixon v. Blackwell, 626 A.2d 1366, 1381 (Del. 1993) (noting that the entire fairness test does not "lend itself to bright line precision or rigid doctrine").

71. *E.g.*, Jacobs v. Akademos, Inc., 326 A.3d 711, 753 (Del. Ch. 2024) (quoting Kahn v. Tremont Corp., No. 12339, 1996 WL 145452, at *8 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997)).

72. *See supra* notes 30–31 and accompanying text.

73. *See, e.g.*, Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 621 (2017) (describing entire fairness as "the most stringent form of judicial scrutiny"); *see also* Enriques, Hertig & Kanda, *supra* note 31, at 173–75 (characterizing entire fairness as "tough standards" applied in a "very strict" manner); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Stockholders*, 152 U. PA. L. REV. 785, 791 (2003) (calling entire fairness review "the most rigorous in corporate law jurisprudence"); Donald J. Wolfe, Jr., *The Special Negotiating Committee and the Business Judgment Rule: A Modest Proposal*, M&A L., Apr. 2002, at 1, 5 (describing entire fairness review as a "withering and frequently unwieldy analysis").

its demands.[74] The Delaware Supreme Court has gone so far as to observe that "the standard of entire fairness [is] so exacting" that its application "frequently is determinative of the outcome" of the case.[75] This rhetoric obscures the fact that the inquiry is not nearly so predictable in its application.

The stringency of the demands made by the entire fairness inquiry is substantially mitigated by two factors. First, where the court finds evidence of fair dealing—in particular, dealing that creates negotiating dynamics approaching those of an arm's-length deal—judicial scrutiny of fair price becomes largely pro forma. A fair process can give the court confidence that the price is also fair.[76] Under recent doctrine, this tendency has been formalized into something approaching bright-line rules.[77] Second, even where the reviewing court does scrutinize fair price, it does so in a more forgiving way than in other contexts. For the most part, Delaware law uses the same method for evaluating fair price as it does for calculating fair value in appraisal proceedings,[78] but with a key difference. In a fairness inquiry, "the court's task is not to pick a single number, [as in an appraisal proceeding,] but to determine whether the transaction price falls within a *range* of fairness."[79] This itself is a relatively recent doctrinal innovation, as neither *Weinberger* nor *Sterling Mayflower* before it mentioned the idea of a "range of fairness." The practice of referring to a range emerged in the 1990s, such that by the early 2000s, the Court of Chancery could assert that the "value of a corporation is not a point on a line,

74. *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013) ("Delaware's most onerous standard"); *Weinberger*, 457 A.2d at 710 ("unflinching in its demand"); Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) ("the highest standard of review in corporate law"); *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2022 WL 1237185, at *30 (Del. Ch. Apr. 27, 2022) ("the highest degree of scrutiny recognized in our law").

75. Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1279 (Del. 1988) (quoting AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986)).

76. *See, e.g.*, *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 29 (Del. Ch. 2014) ("Evidence pertinent to the fair process aspect of the unitary entire fairness test in turn can affect the issue of fair price."); Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1244 (Del. 2012) ("A fair process usually results in a fair price."); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937–38 (Del. 1985) ("[W]e are satisfied that Getty dealt fairly with Skelly throughout the transaction. . . . This is of considerable importance when addressing ultimate questions of fairness, since it may give rise to the proposition that the directors' actions are more appropriately measured by business judgment standards.").

77. *See infra* Part II.C.

78. *Weinberger*, 457 A.2d at 714 (noting that when a court "test[s] the fairness of . . . price" it should do so "in conformity with the principle applicable to an appraisal—that fair value be determined by taking 'into account all relevant factors'" (quoting DEL. CODE. ANN. tit. 8, § 262(h) (2013))).

79. Jacobs v. Akademos, Inc., 326 A.3d 711, 752 (Del. Ch. 2024) (emphasis added); *see also, e.g.*, *In re* Orchard Enters., 88 A.3d at 30 ("[T]he fair price and fair value standards call for equivalent economic inquiries. They differ only in the appraisal statute's insistence on a point calculation when awarding fair value." (footnote omitted)).

but a range of reasonable values."[80] The range concept is now the standard doctrinal formulation.[81]

These forgiving features reflect at least two related considerations, both stemming from the fact that entire fairness review has, for most of its history, performed the sorting function. First, and most obviously, they reflect concern over the possibility of Type II errors—mistakenly blocking a value-enhancing transaction. Rather than requiring a conflicted fiduciary to show that the transaction achieved some ideal fair price, they need only show that it was within a broad range of fairness. If courts never erred or were confident that conflicted transactions are almost always opportunistic, such judicial modesty would be unnecessary. But by evaluating the propriety of interested transactions in light of a *range* of fairness, corporate law takes into account both the uncertainty surrounding the ex post inquiry, and the need to avoid deterring value-enhancing transactions.[82] Likewise, the conflicted fiduciary is not required to "pay the highest price that it is economic for him or her to pay" because doing so "would effectively preclude transactions that may be efficient."[83] The use of entire fairness as the sorting mechanism—and the resulting need to avoid deterring value-enhancing transactions—explains this difference between the entire fairness inquiry and the appraisal inquiry, where, as we have noted elsewhere, the risk of deterring value-enhancing transactions is far less acute.[84]

Similarly, by allowing evidence of fair dealing to relax scrutiny of fair price, the entire fairness inquiry makes clear that the object is not some platonic ideal but simply an approximation of an arm's-length transaction.[85] The court simply "asks whether the transaction was one 'that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably accept.'"[86]

80. Cede & Co. v. Technicolor, Inc., No. 7129, 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003), *aff'd in part, rev'd in part on other grounds*, 884 A.2d 26 (Del. 2005).

81. *See, e.g.*, Tornetta v. Musk, 310 A.3d 430, 539 (Del. Ch. 2024) ("Defendants did not prove that the Grant falls within a range of fairness."), *rev'd on other grounds*, *sub nom. In re* Tesla, Inc. Derivative Litig., No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

82. *See, e.g.*, Kahn v. Tremont Corp., No. 12339, 1996 WL 145452, at *1 (Del. Ch. Mar. 21, 1996) (noting that an obligation "to pay a price that no reasonable counter-party could decline" would "too thoroughly chill a class of transactions that can be jointly productive"), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

83. *Id.*

84. Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 321–22 (2016).

85. *See, e.g.*, Johnston v. Greene, 121 A.2d 919, 925 (Del. 1956) ("[A] fair way to determine the propriety of [a conflicted party's] action 'is to consider whether the proposition submitted would have commended itself to an independent corporation.'" (quoting Int'l Radio Tel. Co. v. Atl. Commc'n Co., 290 F. 698, 702 (2d Cir. 1923))).

86. *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 30 (Del. Ch. 2014) (quoting Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1143 (Del. Ch. 1994); s*ee also Tremont*, 1996 WL 145452, at *1 ("A fair price is a price that is within a range that reasonable men and women with access to relevant information might accept.").

Where fair dealing is present—something approximating an arm's-length bargaining dynamic—the analysis returns to the logic of the business judgment rule. Judges are not "expert[s] in corporate finance" and can at best only hope to "try to detect gross distortions in the experts' opinions"[87] generated by an adversarial process.[88] Under such conditions, judicial review is as likely to confound a value-enhancing transaction as to avert an opportunistic transaction. Thus, in discharging the sorting function, forgiving scrutiny of a transaction's terms is justified where the transaction results from a fair process.[89]

4. *Remedial Breadth*

In a fairness inquiry, a court can draw upon its full complement of equitable remedies; its "powers are complete to fashion any form of equitable and monetary relief as may be appropriate."[90] Most straightforwardly, the court can order that the transaction be treated as void and rescinded.[91] Indeed, rescission is traditionally the preferred remedy, though it may not always be practicable, especially in the context of mergers.[92] The court may instead award rescissory damages, designed to deliver "the monetary equivalent of rescission."[93] In the merger context, this approach results in "money damages equal to the 'fair' or 'intrinsic' value of their stock at the time of the merger, less the price per share that they actually received."[94] Here the concept of the *range* of fairness, which allows for flexibility in determining liability, has no role in the remedial calculation. Instead, "once a breach of duty is established, uncertainties in awarding damages are generally resolved against the wrongdoer."[95] The court also may award damages exceeding the intrinsic value of the stock, "particularly

---

87. Cede & Co. v. Technicolor, Inc., No. 7129, 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003), *aff'd in part, rev'd in part on other grounds*, 884 A.2d 26 (Del. 2005).

88. *Id.*

89. *See* Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 467 (Del. Ch. 2011) ("The range of fairness concept has most salience when the controller has established a process that simulates arm's-length bargaining, supported by appropriate procedural protections.").

90. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

91. *See, e.g.*, Tornetta v. Musk, 310 A.3d 430, 539 (Del. Ch. 2024) ("This court has awarded rescission as a remedy for breach of fiduciary duty, particularly in the context of self-dealing transactions." (footnote omitted)), *rev'd on other grounds*, *sub nom. In re* Tesla, Inc. Derivative Litig., No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

92. *See Weinberger*, 457 A.2d at 714 ("Since it is apparent that this long completed transaction is too involved to undo, and in view of the Chancellor's discretion, the award, if any, should be in the form of monetary damages based upon entire fairness standards, i.e., fair dealing and fair price.").

93. *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 39 (Del. Ch. 2014) (quoting Lynch v. Vickers Energy Corp., 429 A.2d 497, 501 (Del. 1981)).

94. Strassburger v. Earley, 752 A.2d 557, 579 (Del. Ch. 2000).

95. Thorpe v. CERBCO, Inc., No. 11713, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993).

where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved."[96]

This flexible approach promotes the sorting function of the entire fairness test. If the only goal were to deter conflicted transactions, there would be little concern about imposing excessive damages—perhaps personal liability for the conflicted fiduciary. But where Type II errors would be costly—deterring transactions that are value-enhancing—a flexible approach is necessary. To avoid deterring value-enhancing transactions, the preferred remedy in most entire fairness cases is to restore, as best as possible, the status before the transaction.[97] The damage calculation serves this function by seeking to ensure that "a fiduciary [should] not profit personally from his conduct, and that the beneficiary not be harmed by such conduct."[98] The goal is "to eliminate the possibility of profit flowing to defendants from the breach of the fiduciary relationship."[99]

By design, these remedial rules generate incentives to avoid disloyalty, while at the same time not imposing a draconian penalty, the risk of which may deter even value-enhancing transactions.[100] By affording the court wide discretion to craft a remedy that eliminates profit to the conflicted fiduciary, the doctrine serves the sorting function by diminishing the ex ante incentive to engage in an opportunistic transaction, while simultaneously seeking to avoid deterring value-enhancing transactions.

II. THE ALCHEMY OF FAIRNESS ALTERNATIVES

The entire fairness standard has been subject to sustained criticism from the start. Commentators have characterized entire fairness review as costly, unpredictable, and—due to the difficulty of disposing of entire fairness claims through a motion to dismiss—a hotbed of nuisance litigation.[101] Partially in response to this line of criticism, corporate law has slowly embraced procedural devices across every realm of self-dealing to perform the sorting function once performed by judicial scrutiny of fairness. This Part traces this doctrinal evolution, culminating in *MFW*.

---

96. *Weinberger*, 457 A.2d at 714.

97. *See generally Strassburger*, 752 A.2d at 579 (explaining the conceptual basis for rescissory damages); Int'l Telecharge, Inc. v. Bomarko, Inc., 766 A.2d 437, 440 (Del. 2000) (highlighting the Chancery Court's broad discretion to award rescissory damages under the entire fairness standard).

98. *Int'l Telecharge*, 766 A.2d at 442 (quoting Thorpe v. CERBO, Inc., 676 A.2d 436, 445 (Del. 1996)).

99. Gesoff v. IIC Indus., Inc., 902 A.2d 1130, 1154 (Del. Ch. 2006).

100. *See Thorpe*, 676 A.2d at 445 ("The strict imposition of penalties under Delaware law are designed to discourage disloyalty."); *see also* Ligos v. Isramco, Inc., No. 2020-0435-SG, 2021 WL 3870679, at *1 (Del. Ch. Aug. 31, 2021) (noting that "the risk of litigation under the high bar of entire fairness may discourage . . . value-enhancing deals" with controlling stockholders).

101. *See, e.g.*, William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 17–28 (2009).

A. The Synthetic Arm's-Length Bargain as an Alternative to Fairness

Through the second half of the twentieth century, corporate doctrine—both statutory and common law—increasingly looked to various procedural mechanisms to address conflicted transactions in lieu of judicial scrutiny under the entire fairness test.

This broad doctrinal trend—specifying precise ways to avoid the entire fairness inquiry by synthesizing some form of arm's-length bargaining—is well-known.[102] This shift was partly reflected in statutory changes, most notably Section 144(a). Adopted in the late 1960s, Section 144(a) expressly authorizes an interested transaction so long as it is fair or, crucially, was approved by disinterested directors or stockholders.[103] The approval by either disinterested directors or stockholders is thus treated as a functional equivalent of the judicial fairness inquiry, an alternative means to achieve the same end.[104] These two approval mechanisms foreclose a judicial inquiry into the validity of an interested transaction, although Section 144(a) did not displace equitable review of fiduciary behavior.[105]

The common law of fiduciary obligation developed in parallel to Section 144's statutory accommodation.[106] Where authority was vested in the hands of disinterested directors, a conflicted transaction could avoid fairness scrutiny and

---

102. *See, e.g.*, ERNEST L. FOLK, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS 80 (1972) (pointing to "the ever-growing scope of the business judgment rule" that has "expanded deep into a domain which many had thought was ruled by the fairness doctrine and other requirements derived from the fiduciary duty concept, including close judicial scrutiny of the transaction as a protection to minority stockholders"); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 10 (2005) (noting that during the 1980s and 1990s "the Delaware courts, in a more gradual movement, established procedural protections for minority shareholders" in the form of synthetic alternatives to fairness).

103. *See* Oberly v. Kirby, 592 A.2d 445, 466 (Del. 1991) (noting that under Section 144 "stockholders may either ratify the transaction or challenge its fairness in a judicial forum, but they lack the power automatically to nullify it").

104. *See* Merritt v. Colonial Foods, Inc., 505 A.2d 757, 764 (Del. Ch. 1986) (noting that conflicted fiduciaries had "the burden of establishing to an independent body, whether a court in litigation, an independent committee of the board under § 144(a)(1), or disinterested ratifying shareholders on full and complete information, that the transaction is fully fair" (footnote omitted)).

105. *See* Benihana of Tokyo, Inc. v. Benihana, Inc., 891 A.2d 150, 185 (Del. Ch. 2005), *aff'd*, 906 A.2d 114 (Del. 2006) ("[E]quitable common law rules requiring the application of the entire fairness standard on grounds other than a director's interest still apply.").

106. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 615 (Del. Ch. 2005) ("[T]he common law of corporations also was centered on the idea of the business judgment rule and its approach to interested transactions looked much like that codified in § 144."). The formal distinction between the "limited safe harbor" provided by Section 144 and the equitable sometimes attracts comment. *See In re* Match Group, Inc. Derivative Litig., 315 A.3d 446, 463 n.115 (Del. 2024) ("Section 144 repealed the common law prohibition on self-dealing by directors. The statute offers a limited safe harbor for directors from incurable voidness for conflict transactions. It is not concerned with equitable review."); *see also In re* Cox, 879 A.2d at 614–15 (describing the parallel yet distinct common law and statutory developments). Our analysis depends only on the existence of the procedural safe harbors, not whether they are grounded in Section 144 or parallel common law developments.

instead receive the conventional deference under the business judgment rule.[107] In effect, the interested transaction is treated as an arm's-length transaction, where the fairness inquiry "simply has no application."[108] Likewise, where disinterested stockholders approve or ratify a conflicted transaction, a court facing a challenge to that transaction would decline to apply the entire fairness standard of review.[109]

The logic of this trend is straightforward. In the absence of any conflict, courts refrain from scrutinizing the substance of a business judgment, whether the decision is "wise or foolish, low risk or high risk" or even if others "look back on it and agree that it was stupid."[110] Judicial fairness scrutiny is justified only "when the persons, be they stockholders or directors, who control the making of a transaction and the fixing of its terms, are on both sides" of it.[111] But what if decision-making power is taken out of the hands of the interested parties and vested instead in unconflicted parties? If the procedural safeguards decouple the conflict from the terms of the transaction,[112] then the negotiating environment resembles that of an arm's-length transaction. We refer to transactions generated in this fashion as *synthetic* arm's-length bargains. Under such conditions, the need for ex post judicial scrutiny of the resulting transactional terms is greatly reduced. The sorting function is better performed by those unconflicted parties than by a court. In effect, a transaction that was conflicted in fact is transmogrified into a disinterested decision in equity.

As policymakers came to have an increasingly hospitable view of self-dealing transactions, the deference afforded to genuine arm's-length transactions came to be regarded as appropriate to synthetic arm's-length transactions. Robert Clark suggests that policymakers "began to realize the [sic] certain self-dealing transactions might be not only normal and virtually unpreventable but also positively better than comparable other-dealing, or

107. *See, e.g.*, Puma v. Marriott, 283 A.2d 693, 696 (Del. Ch. 1971), *abrogation recognized by In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 425 (Del. Ch. 2002).

108. Williams v. Geier, 671 A.2d 1368, 1384 (Del. 1996). In addition to a lack of independence in a transaction, a lack of due care on the part of the board would also be sufficient to invoke the fairness test, though that point is not germane to this discussion. *See id.*

109. *See* Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) ("In all events, informed, uncoerced, disinterested shareholder ratification of a transaction in which corporate directors have a material conflict of interest has the effect of protecting the transaction from judicial review except on the basis of waste."); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952).

110. Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1053 (Del. Ch. 1996).

111. David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 430–31 (Del. Ch. 1968).

112. *See, e.g.*, Cooke v. Oolie, No. 11134, 2000 WL 710199, at *13 (Del. Ch. May 24, 2000) ("[T]he two disinterested directors voted to pursue the [allegedly conflicted] proposal, which removes the alleged taint of disloyalty."); *Puma*, 283 A.2d at 695 (noting that because independent directors approved the transaction "it cannot be said that the [conflicted party] stood 'on both sides of the transaction' within the meaning of" the preconditions articulated in *Sterling* for the entire fairness test).

market, transactions."[113] Courts and legislators thus "adopted more selective rules in order to allow the nonabusive self-dealing transactions to occur."[114]

In addition, courts increasingly came to believe that, as in any other corporate context, disinterested approval is evidence of the transaction's value-enhancing character, presumptively showing that the conflicted transaction advances the interests of the corporation.[115] These developments were strengthened by Delaware's gradual embrace of the then-novel efficient-capital-markets hypothesis and the increasing sense that market transactions could be trusted to be fair and efficient.[116] Indeed, over time, this led to an increasing judicial willingness to define fairness explicitly by reference to the terms of an arm's-length market transaction.[117]

B. The Special Case of Conflicted Controller Mergers

Controlling stockholder transactions long stood apart from the doctrinal trends that allowed procedural devices to sanitize conflicted transactions.[118] These transactions—especially mergers—have long been thought to require extraordinary legal safeguards to police potential opportunism.[119] By

---

113. ROBERT CHARLES CLARK, CORPORATE LAW 164 (1986).

114. *Id.*

115. *See, e.g.*, *Cooke*, 2000 WL 710199, at *13 ("The Court will presume, therefore, that the vote of a disinterested director signals that the interested transaction furthers the best interests of the corporation despite the interest of one or more directors."); Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 901 (Del. Ch. 1999) ("If fully informed, uncoerced, independent stockholders have approved the transaction, they have, it seems to me, made the decision that the transaction is 'a fair exchange.'"); Lewis v. Vogelstein, 699 A.2d 327, 335 (Del. Ch. 1997) (noting that the stockholder vote serves to "affirm that action taken is consistent with shareholder interests").

116. *See* Korsmo & Myers, *supra* note 84; *see also* M.P.M. Enters., Inc. v. Gilbert, 731 A.2d 790, 797 (Del. 1999) (explaining that the merger price resulting from an arm's-length transaction can help show fair value) ("A merger price resulting from arms-length negotiations where there are no claims of collusion is a very strong indication of fair value."); Van de Walle v. Unimation, Inc., No. 7046, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991) ("The most persuasive evidence of the fairness of the $21 per share merger price is that it was the result of arm's-length negotiations between two independent parties, where the seller . . . was motivated to seek the highest available price, and a diligent and extensive canvass of the market had confirmed that no better price was available. The fact that a transaction price was forged in the crucible of objective market reality (as distinguished from the unavoidably subjective thought process of a valuation expert) is viewed as strong evidence that the price is fair.").

117. This trend reached its apotheosis in *DFC Global Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 370–71 (Del. 2017), where fair value as defined as "what would fairly be given to [stockholders] in an arm's-length transaction." *See also id.* at 369 (claiming that "an economist would find that the fair market value of a company is what it would sell for when there is a willing buyer and a willing seller without any compulsion to buy"). Elsewhere, we have criticized this conception of fair value, at least in the appraisal context. *See* Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221, 236 (2018).

118. *Harbor Fin. Partners*, 751 A.2d at 900 ("Delaware fiduciary law ensures that a majority or controlling stockholder cannot use a stockholder vote to insulate a transaction benefiting that stockholder from judicial examination.").

119. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 617 (Del. Ch. 2005) (noting "an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout"). Victor Brudney and Marvin Chirelstein noted that "the distinct possibility that a self-interested

midcentury, the fairness inquiry was firmly in place as the principal sorting mechanism for mergers involving a controlling stockholder.[120]

1. *The Short Life of the Business Purpose Test*

In 1977, Delaware seemed to embrace a more demanding screening mechanism for controlling stockholder mergers, adopting the so-called "business purpose test" in *Singer v. Magnavox*.[121] In *Singer*, the Delaware Supreme Court held that a cash-out merger "without any purpose other than elimination of the minority stockholder . . . was violative of the fiduciary duty owed by the majority to the minority stockholders."[122] This ruling, however, did not fully displace the entire fairness test; it simply overlaid a bright-line rule over the top of entire fairness. Where a transaction's sole purpose was to eliminate minority holders, the transaction was per se impermissible.[123] But the converse was not true. Even if a transaction was not voidable under the *Singer* rule—if, for example, it had an additional purpose in addition to freezing out minority holders—entire fairness scrutiny would still be applied, and the merger could still be blocked on fairness grounds.[124]

2. *The Return to Fairness as the Sole Criterion*

The *Singer* rule attracted criticism because it failed to serve the central sorting function in the context of interested mergers. According to Martin Chirelstein and Victor Brudney, the functional objective in corporate law is to adopt "a rational classification of freezeouts" to be deployed in "the Delaware court's effort to distinguish 'good' from 'bad' freezeouts."[125] But the *Singer* rule's focus on a transaction's business purpose was both overly rigid and somewhat

majority stockholder or control group has ruled unfairly" calls for "special safeguards to ensure that minority stockholders receive equal though not identical treatment." Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1358 (1978) (footnote omitted).

120. *See* Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109–10 (Del. 1952) (describing it as a "settled rule of law" that a controlling stockholder who "stand[s] on both sides of the transaction" must "bear the burden of establishing its entire fairness" and "pass the test of careful scrutiny by the courts"). *See also* Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983) (applying the long-held fairness test to parent-subsidiary mergers) ("[T]he fairness test . . . has long been applicable to parent-subsidiary mergers . . . ."); Charles M. Nathan & K.L. Shapiro, *Legal Standard of Fairness of Merger Terms Under Delaware Law*, 2 DEL. J. CORP. L. 44, 45 (1977) (noting that, when considering a controller merger, "the court will examine *de novo* the terms of the merger to determine whether they are 'intrinsically fair'").

121. Singer v. Magnavox Co., 380 A.2d 969, 979 (Del. 1977), *overruled by, Weinberger*, 457 A.2d 701.

122. *Id.* at 980.

123. *Id.*

124. *Id.* ("[T]he Court will scrutinize the circumstances for compliance with the *Sterling* rule of 'entire fairness' and, if it finds a violation thereof, will grant such relief as equity may require."). Thus, the *Singer* rule could be thought of as the opposite of a safe harbor, what Susan Morse has termed a "sure shipwreck," where acting in specified ways guarantees a finding of non-compliance with the governing standard. Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1388 (2016).

125. Brudney & Chirelstein, *supra* note 119, at 1355–56.

orthogonal to the sorting problem. A freeze-out might have a perfectly legitimate purpose yet be carried out on blatantly unfair terms. By contrast, a freeze-out can have no goal other than to eliminate minority stockholders yet be carried out on manifestly fair terms. Thus, the reign of the *Singer* rule was brief. After six years, the *Weinberger* case, best known for its rearticulation of the fairness inquiry, brought Delaware's experiment with the *Singer* rule to an end.[126]

3. Shifting the Burden in the Fairness Inquiry

Although *Weinberger* was clear that entire fairness was to be the exclusive standard of review for an interested merger, it also explicitly embraced the idea that, in the presence of various procedural safeguards, the burden of proof might shift within the framework of entire fairness.[127]

The *Weinberger* decision also suggested in a "much-noticed footnote" how the use of an independent board committee might affect the fairness analysis.[128] The conflict of interest in the case arose, the Court said, because directors "participat[ed], at least to some extent, in the [target] board's decision-making processes without full disclosure of the conflicts they faced."[129] The Court suggested that the judicial inquiry might vary depending on various prophylactic measures taken in the course of negotiating the deal: the result "could have been entirely different if [the target company] had appointed an independent negotiating committee of its outside directors to deal with [the controlling stockholder] at arm's length."[130] Further, a showing that the transaction was the product of an environment where "each of the contending parties had in fact exerted its bargaining power against the other at arm's length" would be "strong evidence" that the transaction satisfies the fairness test.[131]

Transactional planners enthusiastically took up the suggestion of the footnote, and use of special committees soon became commonplace.[132] The Court of Chancery reached differing initial conclusions about what effect such

---

126. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 704 (Del. 1983) (overruling *Singer*, 380 A.2d 969 by holding that "the business purpose requirement . . . is no longer the law of Delaware").

127. *Id.* at 703 ("[W]here corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority."). This framework had been embraced earlier. *See* Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979) ("We further hold . . . that shareholder ratification shifted the burden of proof of want or inadequacy of consideration for the grant of the options from defendants to plaintiff.").

128. Subramanian, *supra* note 102, at 12.

129. *Weinberger*, 457 A.2d at 709.

130. *Id.* at 709 n.7.

131. *Id.*

132. *E.g.*, Donald J. Wolfe, Jr. & Janine M. Salomone, *Pure Resources, Printcafe and the Pugnacious Special Committee*, 7 M&A L., at 10 (2003) ("Since the landmark Delaware Supreme Court decision in *Weinberger v. UOP*, Inc., the use of special negotiating committees has become commonplace in circumstances where a majority of the board of directors of a Delaware corporation has a disabling conflict of interest or is otherwise controlled by a majority stockholder standing on both sides of the transaction.").

a committee had on the standard of review,[133] and the Delaware Supreme Court resolved the issue in *Kahn v. Lynch*.[134] Where the controlled board created a special board committee to negotiate the controller, and the committee had "real bargaining power so that it could negotiate with the controlling shareholder at arm's length," then the burden of proof shifts to the plaintiffs to demonstrate unfairness.[135]

C. *The Advent of the* MFW *Safe Harbor*

The enduring hesitation to rely on any sorting mechanism beside the fine-grained judicial inquiry of the fairness standard was a recognition of the overwhelming and unavoidable influence of a controlling stockholder.[136] Even disinterested stockholders may have rational reasons for feeling coerced by a controlling stockholder's proposals.[137] In other words, the mechanisms regarded as sufficient for generating synthetic arm's-length bargaining in the presence of conflicted directors were not thought to be adequate for doing so in the presence of a conflicted controlling stockholder. As a result, the sorting function of the entire fairness test endured for some time.[138]

Following *Lynch*, a merger with a controlling stockholder could not avoid being subject to the entire fairness standard.[139] The burden of proof might shift

---

133. *Compare* Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 499 (Del. Ch. 1990) (shifting burden to plaintiffs to demonstrate unfairness), *and* Rabkin v. Olin Corp., No. 7547, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990) (same), *aff'd*, 586 A.2d 1202 (Del. 1990), *with In re* Trans World Airlines, Inc. S'holders Litig., No. 9844, 1988 WL 111271 (Del. Ch. Oct. 21, 1988) (applying the business judgment rule and not entire fairness where a special committee negotiated the controller merger), *abrogated by* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1121 (Del. 1994).

134. *Lynch*, 638 A.2d at 1121.

135. *Id.* at 1117.

136. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 548 (Del. Ch. 2003) ("The rationale for this rule is that the potential power of the controlling stockholder to act in ways that are detrimental to independent directors and unaffiliated stockholders is supposedly so formidable that the law's prohibition of retributive action and unfair self-dealing is insufficient to render either independent director or independent stockholder approval a reliable guarantee of fairness.").

137. *See, e.g.*, *Lynch*, 638 A.2d at 1116 ("Even where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder.") (quoting *Citron*, 584 A.2d at 502); *In re* Wheelabrator Techs., Inc. S'holders Litig., 663 A.2d 1194, 1205 (Del. Ch. 1995) (noting that courts "recognize[] the potential for process manipulation by the controlling stockholder, and the concern that the controlling stockholder's continued presence might influence even a fully informed shareholder vote, justify the need for the exacting judicial scrutiny and procedural protection afforded by the entire fairness form of review.").

138. *See Lynch*, 638 A.2d at 1116–17 ("Consequently, in a merger between the corporation and its controlling stockholder—even one negotiated by disinterested, independent directors—no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation. Given that uncertainty, a court might well conclude that even minority shareholders who have ratified a . . . merger need procedural protections beyond those afforded by full disclosure of all material facts." (quoting *Citron*, 584 A.2d at 502)).

139. *See id.* at 1117 ("Once again, this Court holds that the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness.").

to the plaintiffs, but the substantive inquiry was the same.[140] No amount of procedure could avoid a shareholder's ability to call on a court to scrutinize the fairness of the transaction.[141] This state of affairs was desirable, of course, only so long as entire fairness review could perform the sorting function adequately—that is, that it was reasonably reliable in sorting value-enhancing from opportunistic transactions, without being overly costly. By the turn of the century, however, critics were circling, arguing that fairness review was costly and arbitrary and, ultimately, that approval by disinterested directors and stockholders would be a superior sorting mechanism.[142]

An influential critique came from Guhan Subramanian, who argued that "value-increasing merger-freezeout transactions" were deterred by demands placed on a controller merger: (1) negotiation with a special committee, and then (2) review under the entire fairness standard.[143] First, Subramanian suggested that the special committee, vested with veto power as Delaware doctrine had long suggested, had "excessive power to block the deal."[144] Subramanian suggested that special committee directors might resist a controller's merger proposal out of their own self-interest—most problematically, the risk that any deal would carry liability under the entire fairness standard.[145] And fairness litigation seemed unavoidable.[146]

140. *See* Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 900 (Del. Ch. 1999) ("[I]t appears that a corporation with a controlling or majority stockholder may, under current Delaware law, never escape the exacting entire fairness standard through a stockholder vote, even one expressly conditioned on approval by a 'majority of the minority.'").

141. *See, e.g.*, PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 5.01, reporter's note 4 (A.L.I. 1994) ("[E]ven in the limited number of cases in which there was such disinterested representation [in negotiations against the controller], courts have not indicated that use of fair procedures goes so far as to eliminate the duty to deal fairly with the corporation, but only affects the scope of judicial review.").

142. *See, e.g.*, Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 BUS. L. 25, 81–90 (2005) (proposed that controller mergers could avoid entire fairness in ways similar to what Delaware ultimately embraced in *MFW*); Gilson & Gordon, *supra* note 73, at 838 (endorsing the view that "a fully empowered special committee . . . affords sufficient process so that entire fairness review in a freeze-out merger can be eliminated."); Allen, Jacobs & Strine, *supra* note 52, at 882 (arguing in favor of a doctrinal shift that would "afford business judgment review treatment to self-interested mergers that are approved by either an effective independent director committee or by a majority of the minority stockholder vote"); Wolfe, *supra* note 73, at 5 ("[T]here is something amiss, something exasperating and pointless, in requiring the Court to scrutinize the substantive fairness of the transaction itself even though it has been satisfied that the deal was the product of an independent, fully informed and optimally effective special committee process that reasonably approximated arm's-length negotiations.").

143. Subramanian, *supra* note 102, at 39.

144. *Id.* at 30–40.

145. *Id.* at 30.

146. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 619 (Del. Ch. 2005) ("Unlike any other transaction one can imagine—even a *Revlon* deal—it was impossible after *Lynch* to structure a merger with a controlling stockholder in a way that permitted the defendants to obtain a dismissal of the case on the pleadings."); *see also* Hamermesh & Wachter, *supra* note 73, at 638 ("[T]ransactions in which the controlling stockholder is acquiring the minority's shares—and where the economic interests of the controller and the minority are thus antithetical—are tested by standards of 'entire fairness,' and motions to dismiss complaints challenging such transactions are understandably close to non-existent.").

Subramanian suggested that the "litigious nature of the merger-freezeout process" might therefore increase the cost of special committee approval, as the members of the committee might insist on a considerable premium price before putting their "chin in the middle of the ring."[147]

A key component of Subramanian's argument, however, was simply that doctrinal inconsistencies had arisen in Delaware law surrounding controller mergers, rendering the doctrine incoherent.[148] In particular, Delaware law subjected tender offer mergers to different—and lesser—judicial review than a traditional long-form merger.[149] This offered an easy end-run around entire fairness scrutiny. Instead of seeking a negotiated merger (and the resulting fairness review), a controlling stockholder could mount a tender offer followed by a short-form merger.[150] The economic outcome is the same, but under then-prevailing law, the transaction would avoid entire fairness scrutiny entirely.[151] Subramanian called it "a blueprint for avoiding entire fairness review in a freezeout transaction."[152] This doctrinal loophole had social consequences, enabling "some inefficient (value-destroying) transactions by allowing the controller to exploit asymmetric information against the minority."[153]

The result was an obviously dysfunctional sorting mechanism—one that distorted the choice of transaction structure without providing any assurance that opportunistic transactions would be deterred while value-enhancing transactions would not.[154] The availability of the tender offer route, free of any fiduciary scrutiny, allowed too many opportunistic transactions. The stringency of the merger route—the special committee followed by judicial scrutiny for fairness—deterred too many value-enhancing transactions.[155]

---

147. Subramanian, *supra* note 102, at 40 (quoting a "senior corporate lawyer").

148. *See id.* at 20–21.

149. *Id.* at 21.

150. *Id.* at 20.

151. *See, e.g.*, *In re* Siliconix Inc. S'holders Litig., No. 18700, 2001 WL 716787, at *6–7 (Del. Ch. June 19, 2001) (holding that, in a tender offer, "unless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate the entire fairness of this proposed tender transaction" and acknowledging that this "may seem strange" because it "is less than the scrutiny that may be given to, for example, a merger transaction").

152. Subramanian, *supra* note 102, at 20.

153. *Id.* at 30.

154. *Id.* ("Tender-offer-freezeout doctrine facilitates some inefficient (value-destroying) transactions by allowing the controller to exploit asymmetric information against the minority. Merger-freezeout doctrine makes the opposite mistake—deterring some efficient (value-creating) transactions—because the [special committee] has excessive power to block the deal. Taken together, this analysis identifies an efficiency loss that motivates my proposal for reform . . . .").

155. *See In re* CNX Gas Corp. S'holders Litig., No. 5377-VCL, 2010 WL 2705147, at *12 (Del. Ch. July 5, 2010) ("Prominent commentators have suggested that *Siliconix* and *Pure Resources* may be too lenient towards controllers and under-protective of minority stockholders, while *Lynch* may be too strict and overprotective.").

Subramanian proposed a unification of the doctrine for tender offers and for mergers.[156] Unification, of course, could proceed in either direction: either by extending entire fairness scrutiny to tender offer mergers, or by removing entire fairness scrutiny from long-form mergers where appropriate procedural safeguards were employed. Subramanian advocated for the latter, suggesting that the right combination of procedural mechanisms should suffice to foreclose review under the entire fairness standard.[157] A transaction subject to *both* of the principal procedural alternatives to fairness—disinterested director approval *and* disinterested stockholder approval—would, Subramanian suggested, "replicate the elements of an arms-length [sic] negotiation" enough to justify shifting the standard of review from entire fairness.[158]

In 2014, the Delaware Supreme Court embraced this proposal in a case called *In re MFW*.[159] The *MFW* case presented the Court with distinctive facts: A controller had preemptively committed to approval by a fully empowered committee of independent directors *and* approval by an informed vote of the majority of minority shares.[160] The Court of Chancery revisited the *Kahn v. Lynch* framework and concluded that the combination of procedural protections at work in the case "replicates the arm's-length merger steps of the DGCL."[161]

In *MFW* situations, multiple legal mechanisms work in concert to minimize opportunism. First, decision-making power is vested, from the outset, in the hands of directors who have no direct economic stake in the outcome of the transaction.[162] Second, unconflicted stockholders have the discretion to adopt or reject the plan by majority vote.[163] Third, complete disclosure is required at each step, creating "obvious advantages" for deterring opportunistic transactions by eliminating information asymmetries.[164] Where, as in *MFW*, all three of these elements are in place, the combined effect, the Court of Chancery reasoned, is such that "a standard of review other than the business judgment rule" would present "more cost than benefit to investors."[165]

Thus, *MFW* created a safe harbor for transactions employing this combination of safeguards. To the Court of Chancery, the safe harbor came "at very little cost" to minority investors.[166] This was so because, on the one hand, litigation over the fairness of transactions imposes "clear costs to diversified investors" while there was a "lack of evidence" that applying the entire fairness

156. *See* Subramanian, *supra* note 102, at 55–60.

157. *Id.* at 60–64.

158. *Id.* at 8.

159. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 643 (Del. 2014).

160. *In re* MFW S'holders Litig., 67 A.3d 496, 499–500 (Del. Ch. 2013).

161. *Id.* at 528.

162. *Id.* at 499.

163. *Id.* at 500.

164. Enriques, Hertig & Kanda, *supra* note 31, at 155–56.

165. *In re MFW*, 67 A.3d at 503.

166. *Id.* at 504.

standard to transactions employing both procedural protections "adds any real value."[167]

The Supreme Court stamped its approval upon the new safe harbor, embracing both the Court of Chancery's holding and its reasoning.[168] Indeed, the Delaware Supreme Court was fulsome in embracing the proposition that the procedure followed by the controller in *MFW* could synthetically replicate "the shareholder-protective characteristics of third-party, arm's-length mergers," going so far as to declare that such a transactional structure "optimally protects the minority stockholders in controller buyouts."[169] Even allowing hyperbole in this conclusion, the Court clearly viewed judicial scrutiny as something that could only detract from a structure already approaching optimality. Further, the mechanisms at work under *MFW* better accomplish the fairness inquiry's ultimate objective: blocking opportunistic deals while permitting value-enhancing transactions on terms that are desirable to minority stockholders.[170] Under these conditions, the resulting transaction should not, and henceforth would not, be subject to judicial scrutiny for fairness.

D. *Other Transactions with Controlling Stockholders*

In *MFW*, the flood tide of doctrinal deference to synthetic negotiations finally reached the controlling stockholder merger. What about transactions *other than a merger*?[171] The Court of Chancery quickly indicated that conflicted controllers could employ the twin procedural protections of *MFW* in non-merger circumstances and thereby obtain review under the business judgment

167. *Id.*

168. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

169. *Id.* at 644; *see also In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 618 (Del. Ch. 2005) (suggesting that the dual protections produce "the transactional structure that most clearly mirrors an arms' length [sic] merger.").

170. *See Kahn*, 88 A.3d at 644–45 (noting that "the underlying purposes of the dual protection merger structure utilized here and the entire fairness standard of review both converge and are fulfilled at the same critical point: price").

171. Traditional doctrine applied the entire fairness standard to transactions where controllers extracted a benefit at the expense and to the exclusion of minority stockholders. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *12 (Del. Ch. Jan. 25, 2016) ("The entire fairness framework clearly governs squeeze-out mergers, but Delaware courts also have applied it more broadly to transactions in which a controller extracts a non-ratable benefit."). That proposition dates back at least to *Sinclair Oil.* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (holding that the entire fairness standard of review applies when "the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary"). The eminent practitioner Steven M. Haas proposed a safe harbor for many types of transactions between a corporation and its controlling stockholder. Steven M. Haas, *Toward a Controlling Shareholder Safe Harbor*, 90 VA. L. REV. 2245, 2249 (2004) (proposing "a controlling shareholder safe harbor that bifurcates transactions into (1) final-period and (2) nonfinal-period categories" and allows disinterested director or stockholder approval to obviate the need for entire fairness review in non-final period transactions).

rule instead of the fairness test.[172] The *MFW* logic was extended to controller transactions where fairness scrutiny was previously unavoidable: review of consulting agreements,[173] compensation arrangements,[174] and acquisitions.[175]

To the extent this line of cases attracted criticism, it was for not going far enough. Several influential commentators argued that outside of the especially fraught merger context, the conflicted controller should be entitled to avoid entire fairness scrutiny by complying with just one procedural protection, rather than the twin protections of *MFW*—that is, through approval by *either* an independent committee *or* a majority of the minority stockholders, rather than only through both.[176] These critics suggested that earlier Delaware doctrine had already allowed for controllers to avoid fairness inquiry with just one procedural device outside of the merger context,[177] and labeled the move to requiring both procedural devices as "*MFW* creep."[178] More broadly, the critics argued that worries about controlling stockholder influence reflected in past doctrine were less acute than in the past, at least for public companies, where the increasing importance of strong institutional investors has created reputational incentives for independent directors to stand up to controllers where necessary.[179]

When these arguments were placed before the Court of Chancery, they were decisively rejected.[180] The critics, however, remained hopeful that the Delaware Supreme Court might intervene.[181] In early 2024, the Delaware Supreme Court faced the issue directly in the *Match* case and embraced the path forged by the Court of Chancery.[182] The Court concluded that entire fairness

172. *See, e.g.*, *In re Ezcorp.*, 2016 WL 301245, at *11.

173. *See id.*

174. *See, e.g.*, Tornetta v. Musk, 250 A.3d 793, 811–12 (Del. Ch. 2019).

175. *See, e.g.*, Berteau v. Glazek, No. 2020-0873-PAF, 2021 WL 2711678, at *15 (Del. Ch. June 30, 2021).

176. *See* Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. L. 321, 331–34 (2022).

177. *Id.* at 340 ("We never understood that entire fairness review would be universally required in these common situations, or that the potential for controller self-dealing makes it impossible for the company's directors to avoid a judicial fairness inquiry. Rather, if one of the traditional cleansing techniques is used, the presumption should be that the transaction or compensation was approved by impartial fiduciaries who could faithfully represent the company's interest in getting a fair deal for itself.").

178. *Id.* at 337.

179. *Id.* at 342 ("[T]here is no reason to base the law on the view that stockholders cannot protect themselves at the ballot box, or that independent directors do not take their duties seriously when considering conflict transactions.").

180. *E.g.*, Berteau v. Glazek, No. 2020-0873-PAF, 2021 WL 2711678, at *13 (Del. Ch. June 30, 2021) (noting that some defendants had "advance[d] a novel, but unpersuasive, argument that the standard of review should be business judgment").

181. *See, e.g.*, Hamermesh, Jacobs & Strine., *supra* note 176, at 341 (noting the "important question the Delaware Supreme Court has yet to answer post-*MFW*: outside of the going private context, what cleansing techniques will change that initial standard from entire fairness to business judgment review?").

182. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 451 (Del. 2024) ("[I]n a suit claiming that a controlling stockholder stood on both sides of a transaction with the controlled corporation and received a non-ratable benefit, entire fairness is the presumptive standard of review.").

would remain the appropriate standard of review for conflicted controller transactions.[183] It is possible for a controller to shield a conflicted transaction from fairness scrutiny, but only by means of the *MFW* framework.[184]

III. THE MODERN FUNCTION OF FAIRNESS SCRUTINY

The entire fairness doctrine has a new functional role in modern corporate law. In this Part, we describe the new function of the fairness inquiry and, in broad terms, how its doctrinal form should change in light of its changed function.

A. Procedural Safeguards as the New Sorting Mechanism

The traditional sorting mechanism in corporate law was the fairness standard, which required judges to apply careful, laborious, and fact-intensive scrutiny to determine whether a conflicted transaction was entirely fair to the stockholders. While evidence of fair dealing might incline the court to look more charitably upon the terms of the transaction, the question of entire fairness was unitary, and no set of procedural safeguards would entitle a conflicted transaction to the kind of sweeping deference given to unconflicted transactions under the business judgment rule.[185] Modern corporate law, however, has moved away from the judicial fairness inquiry as the sorting mechanism. Instead, procedural safeguards, thought to replicate the dynamics of arm's-length bargaining, now serve as the primary sorting mechanisms.[186]

The logic of the modern turn towards procedural safeguards as the primary sorting mechanism can be summarized as follows. The judicial inquiry into fairness is an imperfect sorting mechanism. Lacking in relevant expertise and (perhaps) appropriate incentives, judges were likely to make both Type I and Type II errors—allowing opportunistic transactions or disallowing value-enhancing transactions. Furthermore, the judicial inquiry was costly and time-consuming, potentially deterring many value-enhancing transactions even without regard to the substance of the review.[187] Over time, an increasing body of experience and scholarship persuaded policymakers that adequate

183. *Id.* at 451 ("[I]n a suit claiming that a controlling stockholder stood on both sides of a transaction with the controlled corporation and received a non-ratable benefit, entire fairness is the presumptive standard of review.").

184. *Id.* ("If the controlling stockholder wants to secure the benefits of business judgment review, it must follow all *MFW*'s requirements.").

185. *See supra* Part I.

186. *See supra* Part II.

187. *E.g.*, Ligos v. Isramco, Inc., No. 2020-0435-SG, 2021 WL 3870679, at *1 (Del. Ch. Aug. 31, 2021) (noting that "the common law of corporations recognizes that conflicted controller transactions may enhance firm value, and that the risk of litigation under the high bar of entire fairness may discourage such value-enhancing deals").

procedures vesting decision-making power in disinterested directors and stockholders could more reliably avoid both Type I and Type II errors.

Furthermore, the rule-like nature of the new sorting mechanism economized on judicial resources, and potentially corporate resources as well.[188] In the familiar analytical framework of distinguishing between rules and standards,[189] the entire fairness inquiry is the classic type of standard, with all the attendant costs and benefits standards bring.[190] Indeed, the fairness test in the context of self-dealing transactions is regarded as the "paradigmatic" reliance on standards in the field of corporate law.[191] By contrast, the procedural mechanisms that suffuse modern corporate doctrine represent the classic sort of "rules." For transactional planners, the requirements of, for example, *MFW* are relatively easy to identify and use ex ante, and the costs of determining compliance ex post are relatively low.[192]

It bears noting that, by creating a safe harbor from the fairness test, the *MFW* approach does something highly unusual in corporate law.[193] Conflicted transactions are traditionally seen as "too complex to regulate with no more than a matrix of prohibitions and exemptions, which would threaten to codify loopholes and create pointless rigidities."[194] For these reasons, commentators have noted that historically "safe harbors are not the style in Delaware corporate jurisprudence."[195]

Modern corporate doctrine, however, embraces these mechanisms because they are believed to produce outcomes superior to the old entire fairness review,

---

188. As noted *infra*, the additional procedural safeguards are not costless to either the corporation or, especially, to the conflicted party.

189. *See generally* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (examining how economic factors impact the choice of implementing and the application of rules and standards).

190. *See id.*

191. *See* John Armour, Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 35, 40 (Reinier Kraakman et al. eds., 2d ed. 2009).

192. *See* Flood v. Synutra Int'l, Inc., 195 A.3d 754, 779 (Del. 2018) (Valihura, J., dissenting) ("[*MFW*'s] strict and detailed roadmap is particularly appropriate where the courts must address whether the minority stockholders [sic] claims should be dismissed before discovery, and in ascertaining which standard of review should apply—as opposed to other contexts where we have eschewed rigid 'blueprints.'"); *id.* at 779–80 ("Finally, I am unsympathetic to Defendants' argument that sticking to a bright line rule would potentially punish innocent failures to include the conditions in the controller's first written proposal and thereby disadvantage minority stockholders. The *MFW* Framework was intended to be a clear roadmap in controller buyouts and corporate counsel who routinely practice in the area are familiar with it.").

193. *See* Armour, Hansmann & Kraakman, *supra* note 191, at 39 (noting that "few jurisdictions rely solely on the rules strategy for regulating complex, intra-corporate relations, such as, for example, self-dealing transactions initiated by controlling shareholders").

194. *Id.* at 39–40. For example, the Delaware courts have famously insisted that "there is no single blueprint that a board must follow to fulfill its duties" in the context of evaluating a potential merger. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989).

195. Bill Bratton, *Appraisal Arbitrage*, JOTWELL (Nov. 25, 2015), https://corp.jotwell.com/appraisal-arbitrage/ [https://perma.cc/LMU7-CDDG] (reviewing Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551 (2015)).

and at lower cost. The governing assumption of modern Delaware doctrine is that any transaction that complies, for example, with the *MFW* requirements will generate a transaction that *will be entirely fair* to non-controlling investors.[196] The procedural mechanisms are said to be "fairness-enhancing" and even "fairness-assuring."[197] The Delaware Supreme Court has suggested that the *MFW* combination "best protects minority investors" because disinterested decision-makers, not a judicial inquiry, are "most likely to effectively protect [stockholders'] interests."[198] The explicit premise of the doctrine is that the procedural mechanisms are a cheaper and more effective way to identify the subset of conflicted transactions that are value-enhancing and to separate them from those that are opportunistic.[199] In this way, the architects of *MFW* and other procedural safe harbors gain confidence in the adequacy of the prescribed procedural safeguards when setting forth bright-line rules allowing such fraught transactions to be shielded from traditional judicial scrutiny.

B. Entire Fairness as a Choice in the Hands of Conflicted Fiduciaries

Under present law, a conflicted director or controlling stockholder need never face judicial scrutiny, as long as the requisite procedural safeguards are employed. The need to face entire fairness scrutiny is now a *choice*—an option in the hands of the conflicted fiduciary who decides whether to employ the procedural safeguards envisioned by DGCL Section 144,[200] its common law parallels,[201] and *MFW*.[202]

An alternative sorting mechanism could have made the use of those procedural safeguards mandatory, with liability necessarily following for a conflicted transaction that does not employ them. Under such conditions, the fairness test could be abandoned altogether.[203] That is not the approach modern Delaware law has taken. Instead, Delaware has simply created a safe harbor. The Court of Chancery has recently recognized this dynamic in the context of a controlling stockholder: "Only if the controller makes choices in a way that

196. *See In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 547–48 (Del. Ch. 2003) (positing that procedural safeguards "incline transactions towards fairness").

197. *In re* MFW S'holders Litig., 67 A.3d 496, 504 (Del. Ch. 2013) ("fairness-enhancing"); *id.* at 532 ("fairness-assuring").

198. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 643 (Del. 2014) (quoting *In re* MFW S'holders Litig., 67 A.3d 496, 528 (Del. Ch. 2013)), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

199. *See infra* Part IV.B.

200. DEL. CODE ANN. tit. 8, § 144 (2025).

201. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 615 (Del. Ch. 2005).

202. *Kahn*, 88 A.3d at 645–46.

203. *E.g.*, Wolfe, *supra* note 73, at 4 (suggesting that "the entire fairness standard of review . . . is about to go the way of the proper business purpose test"). Other proposed reforms would likewise render the fairness test nugatory as a screening mechanism. *E.g.*, Marsh, *supra* note 42, at 51–53, 73–76 (endorsing a form of federal administrative approval to handle conflict-of-interest transactions).

invites entire fairness review will that framework come into play."[204] The broader point is important: the choice of whether to take shelter in a particular safe harbor *rests in the hands of the conflicted fiduciary*.

This doctrinal structure reflects a judgment that the procedural safeguards are preferable to judicial review as a sorting mechanism. But it also reflects the view that, in some non-trivial set of circumstances, a conflicted transaction may fail to employ the procedural safeguards but still be value-enhancing.

C. The New Function of Entire Fairness

The fairness inquiry no longer serves as corporate law's primary sorting mechanism. In modern corporate law, we argue that the fairness inquiry performs three distinct functions, the first two of which are closely related. First, the fairness inquiry should provide an incentive for conflicted fiduciaries to employ the procedural safeguards entitling them to safe harbor. Second, the fairness inquiry should promote the effectiveness of the procedural safeguards in performing the sorting function by providing the disinterested decision-makers with sufficient negotiating power when dealing with conflicted fiduciaries. Third, when conflicted fiduciaries fail to employ the necessary procedural safeguards, the fairness inquiry must perform a distinctive kind of sorting function, one that recognizes the substantial likelihood of opportunism exactly because the conflicted fiduciary abjured a safe harbor.

1. Providing an Incentive to Submit to the Procedural Mechanisms

The first, and most important, function of the modern fairness test is to motivate the use of the requisite procedural mechanisms: to supply transactional planners with the incentive to recommend their use to conflicted fiduciaries and for the conflicted fiduciaries to submit to them.

The procedural safeguards, by design, impose costs on conflicted fiduciaries—costs that, all else being equal, they would prefer to avoid. For a controlling stockholder, negotiating with independent directors or submitting a matter to a shareholder vote will take longer and consume more resources than unilaterally dictating terms to a controlled board and helpless minority stockholders. Furthermore, the entire premise of the modern doctrine is that the procedural safeguards will result in terms more favorable to the corporation and the disinterested stockholders and thus necessarily *less* favorable to the conflicted fiduciary. In sum, a conflicted fiduciary will anticipate that it will be

204. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *23 (Del. Ch. Jan. 25, 2016) ("Importantly, it is the controller, not the court, who creates the scenario calling for substantive fairness review. . . . [T]he controllers can obtain business judgment review by following *M & F Worldwide*, having a committee approve the compensation arrangement, and then submitting it to the disinterested stockholders for approval at the next annual meeting.").

costly to secure the assent of an independent board committee, disinterested stockholders, or both. A conflicted fiduciary will not embrace such costly measures unless there is some incentive—some offsetting benefit—for doing so.

Avoiding entire fairness scrutiny can serve to provide an incentive—perhaps the most powerful incentive provided by corporate law—for a conflicted fiduciary to submit to the procedural safeguards. This has long been viewed as the principal incentive for boards to seek disinterested director approval for many common forms of self-interested transactions.[205] Early proponents of what would become the *MFW* approach also recognized this role for fairness review.[206] The Court of Chancery in *MFW* itself observed that the safe harbor created "an across-the-board incentive . . . to provide minority stockholders with the best procedural protections in all going private transactions."[207] The test was supposed to provide "transactional planners with a basis to structure transactions from the beginning in a manner that, if properly implemented, qualifies for the business judgment rule."[208] In addition, by giving "controllers who grant both protections to the minority the benefit of business judgment rule review" the courts could "create an incentive for the use of both protections."[209] The Delaware Supreme Court similarly embraced the idea that the chance to avoid entire fairness review created a "strong incentive" to adopt the *MFW* conditions.[210] Indeed, the shift in the standard of review is important because it creates "a strong incentive for controlling stockholders to accord minority investors the transactional structure" reflected in the *MFW* requirements.[211] Early scholarly commentary on *MFW* praised the decision on

205. *See* Enriques, Hertig & Kanda, *supra* note 31, at 164 (noting that Delaware law "incentivizes interested managers to seek board approval by usually according transactions that are authorized (or ratified) by the board *business judgment* [rule] protection").

206. *See, e.g.*, Subramanian, *supra* note 102, at 60 ("The proposed reforms give a controller substantial incentives to form [a special committee], because this is the only way to avoid entire fairness review by the courts."). Judicial commentary likewise embraced the idea. *See., e.g.*, *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 606–07 (Del. Ch. 2005) ("Through [the dual-synthetic mechanism], there would be an incentive for transactional planners to use the transactional structure that virtually all informed commentators believe is most advantageous to minority stockholders.").

207. *In re* MFW S'holders Litig., 67 A.3d 496, 504 (Del. Ch. 2013).

208. *Id.*

209. *Id.* at 528.

210. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 643 (Del. 2014) ("[G]iving controlling stockholders the opportunity to have a going private transaction reviewed under the business judgment rule, a *strong incentive* is created to give minority stockholders much broader access to the transactional structure that is most likely to effectively protect their interests." (emphasis added)) (quoting *In re MFW*, 67 A.3d at 528), *overruled by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018). *See also Flood*, 195 A.3d at 763 ("This requirement—having *MFW*'s dual requirements in place at the start of economic negotiations . . . incentivizes controllers to precommit to *MFW*'s conditions early to take advantage of business judgment review.").

211. *Kahn*, 88 A.3d at 644 (quoting *In re MFW*, 67 A.3d at 528).

precisely these grounds,[212] reasoning that the decision embraced the "forceful logic that [pleading-stage] dismissal will encourage controllers to use a process that protects minority stockholders."[213]

Even before *MFW*, Delaware doctrine was said to have "strongly encouraged" the use of a special committee merely by providing that doing so would alter the burden of proof within the entire fairness standard.[214] Indeed, corporate practice changed after *Weinberger*, with independent committees becoming commonplace.[215] On the advice of transactional lawyers, conflicted fiduciaries did things they would not otherwise have done, solely to secure favorable legal treatment down the road.[216] Commentators see these burden-shifting doctrines as "powerful incentives."[217] Similarly, the 2015 case of *Corwin v. KKR* offers shifting standards of review as an incentive for informed stockholder merger votes: shifting to the deferential business judgment rule from the enhanced scrutiny that customarily applies to fiduciary behavior surrounding end-period mergers.[218] Under *Corwin*, this shift is available only "when the transaction is approved by a majority of disinterested, fully informed and uncoerced stockholders."[219] Meeting this standard requires comprehensive disclosures to stockholders, often more than SEC rules require and more than fiduciaries would otherwise wish to make public.[220] The only reason to submit to making such comprehensive disclosures is to secure the shift in the standard

---

212. *See* Hamermesh & Wachter, *supra* note 73, at 638 ("The Delaware courts have come to recognize, however, that the prospect of avoiding litigation could supply a useful incentive to employ deal techniques that provide protection to minority stockholders that is substantially equivalent to arm's length bargaining.").

213. *Id.* at 639–40.

214. Edward Rock et al., *Fundamental Changes*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 183, 204 (Reinier Kraakman et al. eds., 2d ed. 2009).

215. *See* WILLIAM T. ALLEN, REINIER KRAAKMAN, AND VIKRAMADITYA S. KHANNA, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 552 (6th ed. 2021) ("[B]oards would appoint a committee of independent board members who would, with the help of independent bankers and lawyer advisors, negotiate the deal, presumably saying no to any deal that did not offer both a fair price and the best price available from the controller. The hope of deal planners was that when such transactions were attacked in court as unfair to public shareholders, the courts would accord, [sic] some kind of deference to the judgment of the independent committees.").

216. *See generally id.* (providing examples and analysis of controllers' decision making).

217. *E.g.*, Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939, 977 (2019) ("[I]nterested directors nevertheless have powerful incentives to invoke exceptions before the transaction occurs by informing their disinterested directors and, in the United States, also seeking their approval.").

218. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

219. Tornetta v. Musk, 250 A.3d 793, 810 (Del. Ch. 2019); *see also Corwin*, 125 A.3d at 312–13 ("Finally, when a transaction is not subject to the entire fairness standard, the long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves.").

220. *See* Morrison v. Berry, 191 A.3d 268 (Del. 2018).

of review.[221] Even the doctrine surrounding stockholder appraisal has been expressly shaped to provide incentives to market participants in this way.[222]

Indeed, the *MFW* paradigm arose from a diagnosis that the incentives facing controlling stockholders under then-existing doctrine were insufficient, or even perverse. For one thing, under *Kahn v. Lynch*, a controlling stockholder already negotiating with a special committee had no incentive to further agree to a majority-of-the-minority vote, because doing so would have no additional effect on the standard of review.[223] No matter what concoction of procedural mechanisms were employed, the test was always entire fairness, so controllers had no incentive to agree to anything beyond what was necessary to shift the burden of persuasion.[224] At the same time, controlling stockholders faced an incentive to mount a tender offer—potentially avoiding any meaningful negotiations whatsoever—instead of pursuing a negotiated merger because, under then-prevailing doctrine, doing so would evade the entire fairness inquiry, which was not possible in a long-form merger.[225]

221. *Id.* at 272 ("This case calls into question the integrity of a stockholder vote purported to qualify for *Corwin* 'cleansing.' It offers a cautionary reminder to directors and the attorneys who help them craft their disclosures: 'partial and elliptical disclosures' cannot facilitate the protection of the business judgment rule under the *Corwin* doctrine." (footnote omitted)).

222. *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 37 (Del. 2017) ("If the reward for adopting many mechanisms designed to minimize conflict and ensure stockholders obtain the highest possible value is to risk the court adding a premium to the deal price based on a DCF analysis, then the incentives to adopt best practices will be greatly reduced.").

223. *See* Allen, Jacobs & Strine, *supra* note 52, at 1306 (noting that Delaware doctrine "unintentionally created a disincentive to seek an approving 'majority of the minority' shareholder vote, because the acquired company's board can obtain the same protection by using the 'special committee' device as a 'cleansing' mechanism"). *See also In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 618 (Del. Ch. 2005) ("[T]he absence of any additional standard of review-affecting benefit for a Minority Approval Condition, has made the use of that independent, and functionally distinct, mechanism less prevalent."); *id.* ("[C]ontrollers were unlikely to accept a Minority Approval Condition as an initial requirement, and would, at most, agree to such a Condition at the insistence of a special committee and/or as a way to settle with the plaintiffs.").

224. *See* Subramanian, *supra* note 102, at 15 ("And what exactly does the controller get from behaving nicely? . . . [E]ven a pristine [special committee] process only shifts the burden of proof to the plaintiff on entire fairness review."); *id.* at 16–17 ("[O]ne puzzling (if unintended) consequence of [Delaware doctrine] is that either [special committee] approval or a [majority-of-the-minority] condition shifts the burden on entire fairness review, but the combination of the two procedural protections provides no further benefit to the controlling shareholder in terms of standards of judicial review. . . . With the burden thus shifted through a well-functioning [special committee], controllers have no further incentive to provide a [majority-of-the-minority] condition."); *see also* Allen, Jacobs & Strine, *supra* note 52, at 1309 ("Because the standard of review presently gives no greater effect to conditioning a transaction on an informed majority of the minority vote than it does to approval by an effective committee of independent directors, there is little incentive for controlling stockholders to use the stockholder vote mechanism as a protective device.").

225. *See* Subramanian, *supra* note 102, at 20 (noting that, in the wake of Delaware cases applying the business judgment rule to controller tender offers, "practitioners now had a blueprint for avoiding entire fairness review in a freezeout transaction"); Gilson & Gordon, *supra* note 73, at 817 ("The supreme court stated, in no uncertain terms, that even the creation of a special committee with the power to block the transaction would not eliminate entire fairness review. Rather, the court held that establishing such a committee merely shifted the burden of proof. In response, transaction planners began to look at a tender offer as the first step in a two-step freeze-out process.").

At bottom, entire fairness review plays a keystone role in the internal structure of corporate law simply by representing something a conflicted fiduciary would prefer to avoid. Delaware doctrine assumes a basic pattern of incentives operating upon conflicted fiduciaries and assumes further that conflicted fiduciaries will incur costs to avoid entire fairness review by submitting to the procedural safeguards favored by the law. This function is now paramount. Modern doctrine provides a conflicted fiduciary with a choice: submit to a particular set of procedural safeguards or face judicial scrutiny. The larger the fairness inquiry looms in the mind of the controller, the stronger the incentive to seek out the protection of *MFW* and the other procedural safe harbors.[226] By steering transactions towards safe harbors, the entire fairness test serves the overall goal of promoting value-enhancing transactions.

2. *Supplying Grounds for Arm's-Length Negotiation*

Fairness has a second function in modern corporate law: supplying genuine bargaining leverage to those who are expected to negotiate at arm's length with conflicted fiduciaries.

In general, bargaining power with respect to a counterparty arises from having a satisfactory next-best option to a negotiated deal with that counterparty.[227] An independent committee, for example, cannot convert any procedural power it has into economic value unless it can credibly point to some *alternative* source of economic value, other than an agreement with the conflicted fiduciary.

For example, consider negotiations over a new compensation package for an incumbent corporate CEO. A compensation committee of independent directors might negotiate such a deal on the corporation's behalf, and in doing so would receive deferential treatment from a reviewing court.[228] Meanwhile, the compensation committee's bargaining power arises directly from the possibility that the board might instead elect to hire an alternative candidate. The attractiveness of an alternative candidate, and the terms on which that candidate might be hired, are what gives any serious meaning to the committee's formal power to "say no" to the CEO in compensation negotiations. That

---

226. *See* Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 2010 (2019) ("[I]f transaction planners respond to uncertainty by voluntarily adopting strong cleansing measures for interested transactions, so much the better . . . .").

227. *See* MICHAEL KLAUSNER & GUHAN SUBRAMANIAN, DEALS: THE ECONOMIC STRUCTURE OF BUSINESS TRANSACTIONS 9 (2024) ("The most common definition of bargaining power, espoused in *Getting To Yes* and other important books in the negotiations field, is that a party's BATNA is the source of its bargaining power: the better your BATNA, the greater your bargaining power." (citing ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1991))).

228. *See* Valeant Pharms. Int'l v. Jerney, 921 A.2d 732, 745–46 (Del. Ch. 2007) ("To avoid this high level of judicial scrutiny [associated with the entire fairness standard], an independent compensation committee can be employed to award salaries and bonuses to officers.").

committee, in other words, has some alternative transaction in the open market that it can use to support its bargaining positions with the conflicted fiduciary and to which it can take recourse if bargaining breaks down.[229] This outside option is a necessary condition for any supposition that the bargaining between compensation committees and CEOs resembles what would occur in arm's-length negotiations.[230] And it is only that supposition that justifies shielding the resulting interested transaction from the judicial fairness inquiry.[231]

These propositions—that the power to seek alternative transactions is the source of genuine bargaining power and that the right yardstick for evaluating the terms of any transaction is knowledge of the possible alternatives—are not novel or controversial in corporate law. The entire foundation of corporate jurisprudence surrounding mergers and acquisitions is premised on the idea that the power to pursue alternative transactions is a source of value. For this reason, directors considering a sale of the company have an obligation "to seek the best premium-conferring transaction that is available in the circumstances"—indeed, "[f]airness requires no less."[232] Any critical evaluation of a transaction requires some understanding of the available alternatives.[233] This is a core part of what is expected of directors. Directors must be able to evaluate the terms of a proposed transaction, and without reliable grounds to do so, a "concern for fairness demands a canvas of the market to determine if higher bids may be elicited."[234]

---

229. *E.g.*, Omri Ben-Shahar, *A Bargaining Power Theory of Default Rules*, 109 COLUM. L. REV. 396, 407 (2009) ("[I]f bargaining power is determined by outside options, and if there is a thick market of alternative partners for each party, the terms of that bargain will necessarily be influenced by the terms in that market.").

230. *See* Minor Myers, *The Perils of Shareholder Voting on Executive Compensation*, 36 DEL. J. CORP. L. 417, 424 (2011) ("In the view of some observers, the independence of compensation committees allows them to negotiate at something close to arm's-length with executives, and the market for managerial talent largely sets the terms of negotiation." (footnote omitted)).

231. *See* LUCIAN BEBCHUK & JESSIE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION 22 (2004) ("[T]he validity of the arguments for deference to market outcomes depends on whether those outcomes are largely generated by arm's-length negotiations . . . .").

232. QVC Network, Inc. v. Paramount Commc'ns Inc., 635 A.2d 1245, 1266 (Del. Ch. 1994), *aff'd*, 637 A.2d 828 (Del. 1993), and *aff'd*, 637 A.2d 34 (Del. 1994). *See also* Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1288 (Del. 1989) (articulating obligation to secure "the best possible deal for shareholders"); *In re* Fort Howard Corp. S'holders Litig., No. 9991, 1988 WL 83147, at *1 (Del. Ch. Aug. 8, 1988) (stating that directors are obligated "to search, in good faith and advisedly, for the best available alternative" when considering a sale of the *company*); Roberts v. Gen. Instrument Corp., No. 11639, 1990 WL 118356, at *8 (Del. Ch. Aug. 13, 1990) (noting that directors must have "a basis reasonably to conclude that if the transactions contemplated by the merger agreement close, they will represent the best available alternative for the corporation and its shareholders").

233. *See* Smith v. Van Gorkom, 488 A.2d 858, 878 (Del. 1985) (upholding a judgment which held directors liable when "the Board lacked valuation information adequate to reach an informed business judgment as to the fairness of $55 per share for sale of the Company"), *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

234. *Barkan*, 567 A.2d at 1287 (articulating expectations for a board that "is considering a single offer and has no reliable grounds upon which to judge its adequacy").

The critical importance of alternatives is why the judicial inquiry encompasses, among other things,

> [T]he nature of any provisions in the merger agreement tending to impede other offers, the extent of the board's information about market alternatives, the content of announcements accompanying the execution of the merger agreement, the extent of the company's contractual freedom to supply necessary information to competing bidders, and the time made available for better offers to emerge.[235]

Furthermore, in considering the substantive terms of a conflicted transaction, "the most economically meaningful way of judging fairness is to compare the price paid with the price that was likely to be available in alternative transactions."[236]

With a garden-variety CEO compensation and certain other types of conflicted transactions, genuine third-party alternatives generally exist to the interested transaction.[237] The set of outside options is non-zero, and thus the judicial fairness inquiry will rarely represent the sole outside alternative to the interested transaction.

For some transactions with conflicted fiduciaries, however, matters are different. In many controlling stockholder transactions, the judicial fairness inquiry is likely to be the only other game in town, thus giving the fairness inquiry a critical function to discharge. The paradigm case is the controller merger, where the controller makes clear that it will not entertain any alternative transactions—that is, that it is willing to be only a buyer and not a seller.[238] In such a situation, an independent committee's power to say "no" to the controller has a limited and specific meaning. The committee has no power to effectuate an alternative transaction. The exclusive outside alternative to the conflicted transaction is the judicial fairness inquiry, and thus that judicial inquiry serves as the only source of substantive bargaining power for the disinterested decision-maker. In such circumstances, bargaining is done entirely in the shadow of the fairness inquiry. The power to "just say no" provides bargaining leverage to a special committee only to the extent that terms that the controller could force through by going around the committee might be rejected by the resulting fairness inquiry.

The inter-related nature of the independent committee's bargaining power and the fairness standard means that it is likely impossible to disentangle the

---

235. *Roberts*, 1990 WL 118356, at *8.

236. Oberly v. Kirby, 592 A.2d 445, 471 (Del. 1991) (evaluating "the fairness of price, the second element of entire fairness under *Weinberger*").

237. *See In re Fort Howard*, 1988 WL 83147, at *1.

238. *See, e.g.*, *In re* MFW S'holders Litig., 67 A.3d 496, 508 (Del. Ch. 2013) ("In its announcement, MacAndrews & Forbes plainly stated that it was not interested in selling its 43% stake. . . . [I]ts block . . . was large enough, as a practical matter, to preclude any other buyer from succeeding unless it decided to become a seller.") (footnote omitted).

respective effects of independent committee negotiations and stockholder litigation on deal prices. One court examined this issue extensively and concluded that "the threat of bare knuckles litigation over fairness is not as important as the special committee's role as [a] negotiating force."[239] This conclusion is suspect, however, as it fails to recognize that the direct source of an independent committee's negotiating power is the threat of the only alternative: entire fairness review in a stockholder suit. Therefore, it is a mistake to consider independent committee negotiations as a stand-alone source of value for stockholders, independent of entire fairness review.

Thus, the fairness inquiry must serve the function of providing a credible outside option in negotiations—to endow disinterested decision-makers with a substantive benchmark that supports their bargaining positions and allows them to evaluate the terms of any potential transaction.[240] This critical role for the fairness inquiry has not been explicitly recognized in Delaware law and is only glancingly acknowledged in the scholarly literature.[241]

3. Performing the Sorting Function Outside the Safe Harbors

Where conflicted fiduciaries forego the procedural safe harbors, entire fairness scrutiny reenters the picture. The only ground for this structure is that circumstances must exist where (1) the procedural safeguards have not been followed but (2) the resulting conflicted transaction is nonetheless value-enhancing. Otherwise, the law could mandate the procedural safeguards instead of leaving them optional.

What sort of circumstances would such a fairness test be seeking to identify? The possibilities are no doubt endless, but two broad classes of situations suggest themselves. First, a conflicted party might inadvertently neglect to employ the requisite safeguards, or employ them imperfectly, yet the

---

239. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 631 (Del. Ch. 2005).

240. This proposition is known in the game theory literature as the outside option, and the basic insight is intuitive and obviously has applications that transcend corporate law. *See, e.g.*, Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961, 991 (2011) ("Although the literature on this is thin, the argument to date is that the presence of a strong outside option, such as a strong arbitrator, results in the weaker party in the negotiations being better able to resist pressure toward an inequitable bargaining outcome. This is again highly intuitive and corresponds to the sensible result that the ability to seek a strong outside ally for the weaker bargaining party diminishes the power of the stronger party to cram down its desires." (footnote omitted)).

241. Subramanian noted that the content of the entire fairness review would inform the practical negotiating power of a special committee. Subramanian, *supra* note 102, at 44 (noting that "courts have the authority to award a share of the synergies in an entire fairness proceeding," and reasoning that special committees "bargaining in the shadow of entire fairness will be able to extract a share of the synergies as well"). More broadly, Subramanian recognized that entire fairness review would continue to play a role even under an *MFW*-like framework. *See id.* at 8 ("If either or both of these protections are absent, this Article proposes that courts should step in to scrutinize the transaction under the entire fairness standard."); *id.* at 70 ("If these procedural protections are not met, courts should step in to apply stringent entire fairness review."). Subramanian did not explore the critical role that fairness review plays in the entire structure of corporate law safe harbors.

failures had no material effect on the ensuing transaction and would be too costly to rectify after the fact. Second, a conflicted party might deliberately choose to forego the requisite safeguards but do so for a good reason; the procedural safeguards would have, under the circumstances, created an undue risk of deterring a value-enhancing transaction. The law creates a safe harbor, however, because it strongly believes that, in most cases, the procedural safeguards are a superior sorting mechanism. The safe harbor should therefore only be abjured where the reasons for doing so are extremely compelling or the costs of doing so are obviously small.

Thus, while the overall function of entire fairness review in such cases retains its historical character—sorting value-enhancing transactions from opportunistic ones—the new context gives the inquiry a substantially different flavor. Even traditionally, entire fairness review has always applied to only the most fraught circumstances, suffused with conflicts of interest. Under the modern law, the application of entire fairness has narrowed even further, to a still more treacherous tranche of transactions: those suffused with conflicts of interest *and* where the conflicted party has, deliberately or otherwise, failed to employ the well-known procedural safeguards to cleanse the conflict.

The risk of opportunism in this narrow universe of transactions is at its peak. As such, the concern about Type II errors (allowing opportunistic transactions) is significantly heightened, while worries about Type I errors (blocking value-enhancing transactions) are greatly reduced, particularly given the fact that the conflicted fiduciary always has the choice to simply employ the procedural safeguards instead.

IV. THE NEW DOCTRINAL FORM OF ENTIRE FAIRNESS

The conclusions to be drawn from the above analysis are clear. Under the traditional doctrine, where the primary role of the entire fairness standard was to perform the sorting function, a meticulous and modest approach was appropriate, carefully balancing the risks of Type I and Type II errors. Under the modern doctrine, however, the primary role of the entire fairness standard is to encourage use of the superior procedural safe harbors. Only secondarily does entire fairness perform the sorting function, and only in the highly suspect circumstances where a conflicted fiduciary has not availed themselves of the superior procedural safe harbors.

The doctrinal form of entire fairness review should follow its function. In this Part, we develop this insight into three complementary points. First, we present the general doctrinal form that fairness should take to fulfill its modern function, a far bolder and more stringent approach to entire fairness review. Second, we examine a trend in recent Delaware jurisprudence that suggests a languid application of the fairness standard, where the only significant threat to a controller is the relatively trivial expense associated with the legal proceeding

itself. Such a fairness doctrine might be insufficient incentive for conflicted fiduciaries to submit to the procedural safeguards, and we present suggestive evidence that conflicted fiduciaries are more inclined to abjure the *MFW* safe harbor and instead face a judicial scrutiny that they apparently do not fear. Third, we offer some doctrinal proposals to bring the fairness inquiry into better alignment with its new role in modern doctrine.

A. A Fairness Test Worth Avoiding

At the most fundamental level, entire fairness review must be sufficiently fearsome to fulfill the functions above. Doctrinal inducements like *MFW* only work to create a "strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection"[242] if avoiding entire fairness review is a sufficient reward. As such, the prospect of judicial scrutiny must be unappetizing enough for conflicted fiduciaries that they choose, at significant cost to themselves, to give up their power to proceed unilaterally and instead submit to the fairness-promoting procedural safeguards.

Similarly, the application of entire fairness review must produce outcomes that are sufficiently serious that they provide an adequate alternative to a negotiated transaction, because this is the only way an independent negotiating committee can have sufficient bargaining power to make the procedural safeguards effective in the first place. If the alternative of entire fairness review asks nothing of a conflicted controlling stockholder, a special committee can demand no more. A feeble entire fairness inquiry would thus corrode the negotiating power of committees and directly undermine attempts to secure better terms.[243]

Moreover, a more stringent entire fairness review would impose less cost under modern doctrine than it would under traditional doctrine. It can be sufficiently fearsome to fulfill its new functions without undue efficiency loss because it is dealing with a much smaller universe of transactions—those where a conflicted party has, often deliberately, failed to take refuge in the safe harbor.

In this universe, opportunistic transactions are likely to be over-represented. As a result, Type I errors are less likely to occur, and less likely to be costly when they do. Indeed, modern doctrine has rendered concerns over Type I errors largely irrelevant where no serious obstacle exists to employing

242. *In re MFW*, 67 A.3d at 502–03.

243. Indeed, the lack of negotiating power for an independent committee where a controller could instead simply employ a tender offer structure was precisely the dynamic scholars described and criticized in proposing the *MFW* framework in the first place. *See* Subramanian, *supra* note 102, at 42 ("In a regime in which the tender offer option is well understood, therefore, prices in merger freezeouts will be driven down to the predicted prices in tender offer freezeouts."). A weak entire fairness standard would generate a similar dynamic.

the requisite procedural safeguards. A conflicted fiduciary always has recourse to the procedural mechanisms, which offer a clear playbook for effectuating a conflicted deal without meaningful judicial scrutiny. So, when called into service by a conflicted fiduciary, the judicial fairness inquiry will typically need only be concerned with errors in one direction: minimizing the likelihood of allowing an opportunistic transaction. Thus, entire fairness review should prioritize deterring opportunistic transactions.

B. *The* MFW *Paradox*

Modern corporate doctrine assumes that synthetic mechanisms generate negotiating dynamics that resemble arm's-length negotiation. The procedural safe harbors in Delaware law—and *MFW*, most explicitly—are designed to synthetically replicate the negotiation dynamics of an arm's-length deal.[244] Delaware encourages the use of these ex ante procedural safeguards precisely because they are viewed as more reliable than post hoc judicial review in sorting value-enhancing transactions from opportunistic ones. Indeed, the embrace of the *MFW* conditions, said to mimic the negotiation process of arm's-length mergers and thereby generate desirable outcomes, is so extreme that the judicial scrutiny applied to *MFW* mergers is in fact *lower* than that applied to conventional arm's-length mergers in the first place.[245]

The assumption of modern doctrine is that the *MFW* safeguards are, in fact, reliable in sorting transactions, more so than judicial scrutiny. This assumption is enormously important and not self-evidently correct. The more one relaxes that assumption, the more sorting remains for the entire fairness test, and the less able the test is to take on the unforgiving attributes we suggest below.

In the controlling stockholder context, there is reason to doubt the effectiveness of even the full panoply of *MFW* procedural protections. Defenders of the status quo thus face what we term the "*MFW* Paradox." If *MFW* is effective, the fairness inquiry performs little residual sorting and should be, as we develop below, far less forgiving in order to channel transactions into the safe harbors. If, however, *MFW* is ineffective, performing the sorting

244. *See, e.g.*, *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 463 (Del. 2024) (noting that *MFW* employs "procedural tools to replicate arm's length bargaining"); Subramanian, *supra* note 102, at 8 (noting the "objective . . . to replicate the elements of an arms-length negotiation" and characterizing this as a "return to first principles of corporate law"); *id.* at 70 ("At the highest level, I propose that minority shareholders should receive, to the extent possible, the same procedural protections that are built into the arms-length merger process.").

245. *See* Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 82 (2019) (arguing that *MFW* may have "stolen a march by awarding the business judgment rule rather than enhanced scrutiny" to a controller freezeout "if it mimicked the conditions of an arm's-length deal"—particularly given that an actual arm's-length deal would receive enhanced scrutiny).

function poorly, then it serves primarily to shield an indiscriminate set of transactions from judicial scrutiny.

In short, if *MFW* works poorly, it should be scrapped, and the fairness inquiry should retain its traditional character to accurately perform the sorting function.[246] But if *MFW* works well, the fairness inquiry should change to serve its new function. Under no circumstances, however, should both *MFW* and the entire fairness standard remain as they are. For purposes of the analysis here, we embrace the working assumption of modern doctrine that bargains generated by synthetic arm's-length bargaining resemble those of bona fide arm's-length bargaining. Thus, we focus on reforming the entire fairness test to promote the "fairness-assuring" properties of *MFW* and other procedural mechanisms.[247]

C. *The Inadequacy of Extant Fairness Doctrine*

Although entire fairness is reputedly a difficult-to-satisfy standard of review in corporate law,[248] developments over the past decade suggest that the old tiger is, if not quite made of paper, increasingly domesticated. And it seems that conflicted fiduciaries have responded by declining to submit to procedural mechanisms. The recent high-profile decision involving Elon Musk's compensation at Tesla applied the entire fairness test and concluded that the defendants failed to demonstrate the fairness of the $58 billion option grant,[249] but this does not constitute a fairness renaissance.

1. *The Trend Towards Laxity:* SolarCity *and* BGC Partners

Over the past decade, Delaware courts have applied entire fairness scrutiny in ways that have sapped much of its fearsome quality.[250] Some recent high-profile cases suggest that the application of entire fairness in Delaware has not adapted to its modern function. They reveal that the persistence of the historic

246. In arguments we develop in a separate article, the *MFW* conditions may systematically fall short of generating terms that resemble the product of arm's-length bargaining. To ensure *MFW* can adequately perform the sorting function, we propose an additional precondition for taking shelter in the *MFW* safe harbor: that controllers be required to give independent committees unfettered discretion to consider alternative transactions with third parties.

247. *In re MFW*, 67 A.3d at 532–33.

248. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2022 WL 1237185, at *30 (Del. Ch. Apr. 27, 2022) ("the highest degree of scrutiny recognized in our law").

249. *See* Tornetta v. Musk, 310 A.3d 430, 526–44 (Del. Ch. 2024) *rev'd on other grounds*, *sub nom. In re* Tesla, Inc. Derivative Litig., No. 10, 2025 WL 3689114 (Del. Dec. 19, 2025).

250. In addition to the two cases examined in detail, the Court of Chancery has also found entire fairness in a number of other post-*MFW* cases with significant process flaws. *See, e.g.*, *In re* Energy Transfer Equity, L.P. Unitholder Litig., No. 12197-VCG, 2018 WL 2254706 (Del. Ch. May 17, 2018), *aff'd sub nom.*, Levine v. Energy Transfer L.P., 223 A.3d 97 (Del. 2019); Dieckman v. Regency GP LP, No. 11130-CB, 2021 WL 537325 (Del. Ch. Feb. 15, 2021), *aff'd*, 264 A.3d 641 (Del. 2021).

function of fairness—distinguishing value-enhancing transactions from opportunistic ones—remains the primary concern, especially in the core domain of *MFW*, the controller merger. This may be animated by an outdated worry over deterring value-enhancing transactions.

Two merger cases illustrate this trend. The first involves Tesla's 2016 acquisition of SolarCity. Both Tesla and SolarCity were arguably controlled by Elon Musk, the eccentric billionaire. Musk was the largest stockholder, board chair, and CEO at Tesla, and simultaneously the largest stockholder and board chair at SolarCity.[251] SolarCity itself had been founded by two of Musk's cousins, one of whom served as CEO and the other as chief technology officer.[252] At the time of the merger, SolarCity was struggling,[253] with its stock price having fallen by more than 60% over the year preceding the transaction, and the company was perhaps facing bankruptcy.[254]

Tesla offered to acquire SolarCity in a stock transaction valuing the company at $2.6 billion, representing approximately a 30% premium to the prevailing market price for SolarCity stock.[255] Upon the deal's announcement, Tesla shares plummeted in value by more than 10%.[256] This drop represented a loss of approximately $3 billion in market capitalization—actually slightly exceeding the $2.6 billion being paid for SolarCity.[257] This unequivocal market reaction suggested that investors not only believed that SolarCity was effectively worthless, or even harmful to Tesla, but it also revealed that Tesla faced internal governance issues that reduced their projections for the company.

Analyst opinion was sharply critical of the transaction's terms,[258] lamenting that any benefits from the deal could have been secured on far better terms "through arm's length" bargaining.[259] Elon Musk defended the merger in

---

251. Scott A. Barshay, *Elon Musk and the Control of Tesla*, HAR. L. SCH. F. ON CORP. GOVERNANCE (Apr. 23, 2018), https://corpgov.law.harvard.edu/2018/04/23/elon-musk-and-the-control-of-tesla/ [https://perma.cc/TZY2-JGAT].

252. *See* SolarCity Corp., Definitive Proxy Statement (Form DEFM14A), 7, 23, 50 (Oct. 12, 2016).

253. *See* Ezequiel Minaya, *SolarCity Expenses Contribute to Wider Loss*, WALL ST. J. (May 9, 2016, at 18:19 ET), https://www.wsj.com/articles/solarcity-expenses-contribute-to-wider-loss-1462832344 [https://perma.cc/T7FN-PM5C].

254. *See* Mike Ramsey & Rebecca Smith, *Tesla Shares Hit Hard After Offer to Buy SolarCity*, WALL ST. J. (June 22, 2016, at 23:26 ET), https://www.wsj.com/articles/tesla-shares-hit-hard-after-offer-to-buy-solarcity-1466610884 [https://perma.cc/4DVB-LPKJ].

255. *See* Mike Ramsey, Lynn Cook & Mike Spector, *Tesla Offers to Acquire SolarCity*, WALL ST. J. (June 22, 2016, at 00:08 ET), https://www.wsj.com/articles/tesla-offers-to-acquire-solarcity-1466545551 [https://perma.cc/Z2MN-3ZLH].

256. *Id.*

257. *See* Ramsey & Smith, *supra* note 254.

258. *See* Paul Vigna, *Wall Street's Enthusiasm for Tesla Cools*, WALL ST. J. (June 23, 2016, at 19:20 ET), https://www.wsj.com/articles/wall-streets-enthusiasm-for-tesla-cools-1466724035 [https://perma.cc/Q5LQ-HFXK] ("Analysts who had long praised the electric-car maker turned sour this week, after billionaire entrepreneur Elon Musk moved Tuesday to combine two of his companies by having Tesla buy SolarCity Corp. for up to $2.8 billion in stock.").

259. *See id.* (quoting Morgan Stanley analyst Adam Jonas). *See also* Ramsey & Smith, *supra* note 254 (describing analyst sentiment that investors would "view the takeover as a bailout of SolarCity" and quoting

disembodied, global terms: "It's really all part of solving the sustainable energy problem," and "[t]hat's why we are all doing this, to accelerate the advent of a sustainable energy world."[260] Outside investors saw something more straightforward: "It's a bailout," said one analyst.[261] Nonetheless, stockholders approved the transaction, and the merger closed on November 21, 2016.[262] Stockholders of Tesla filed a derivative lawsuit challenging the transaction, arguing that Tesla directors breached their fiduciary duties by pursuing the transaction.[263]

The outcome of the SolarCity case was remarkable not simply for its surprising outcome—that the lopsided deal with SolarCity satisfied the entire fairness test[264]—but also for two more subtle reasons. First, the Court of Chancery did not seem to think the case was a close call. There was a serious question as to whether, under Delaware precedent, Elon Musk should be considered a controlling stockholder, and thus, whether the entire fairness test was the appropriate standard of review in the first place.[265] The Court of Chancery acknowledged that the question of the proper standard of review presented "provocative questions that could be debated at even the most fashionable corporate law conferences" but nonetheless saw "no reason to answer them."[266] The reason it was unnecessary to answer them was that, even under the supposedly "onerous" entire fairness standard,[267] Musk would inevitably prevail. In other words, it was so obvious to the trial court that the transaction satisfied the entire fairness test, there was "no point to be served by pondering" the threshold question of whether it ought even to apply.[268]

The second striking feature of the SolarCity case is the grounds on which the Court arrived at the conclusion that the transaction was obviously fair. The Court catalogued an extensive set of procedural shortcomings arising from Musk's "apparent inability to acknowledge his clear conflict of interest and separate himself from Tesla's consideration of the Acquisition."[269] This led to

ARK Investment Management LLC analyst Sam Korus who says they "are not happy with the offer" and Esplanade Capital LLC fund manager Shawn Kravetz who says "[t]he market obviously hates this").

260. Mike Ramsey & Cassandra Sweet, *Tesla and SolarCity Agree to $2.6 Billion Deal,* WALL ST. J. (Aug. 1, 2016, at 17:25 ET), https://www.wsj.com/articles/tesla-and-solarcity-agree-to-2-6-billion-merger-deal-1470050724 [https://perma.cc/T9JZ-NVNN].

261. *Id.* (quoting Roth Capital Partners investment banker Jesse Pichel).

262. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2022 WL 1237185, at *24 (Del. Ch. Apr. 27, 2022), *aff'd*, 298 A.3d 667 (Del. 2023).

263. *Id.* at *26.

264. *Id.* at *31–48.

265. *Id.* at *27 ("The parties' dispute begins, unsurprisingly, with the 'gating question' of what standard of review is implicated by Plaintiffs' showcase claims of breach of fiduciary duty.").

266. *Id.* at *29.

267. *Id.* at *29 ("If Elon is deemed a controlling stockholder of Tesla, therefore, his conduct will be subject to the 'onerous' entire fairness review since there is no question he was conflicted with respect to the Acquisition.").

268. *Id.*

269. *Id.* at *34.

a series of process flaws that were so lengthy that the Court resorted to presenting them in bullet points.[270] Traditionally, such a troubling process would have led the court to regard the price with a great deal of suspicion.[271] The trial court nonetheless found that the transaction price—and thus the transaction itself—was entirely fair, placing heavy emphasis on the fact that, pre-transaction, SolarCity stock traded in an "efficient market"[272] and that the transaction price reflected at most a small premium to the pre-announcement trading price.[273]

On appeal, the Delaware Supreme Court upheld the trial court's finding of entire fairness.[274] Of note, the Court found that the trial court had erred in relying in the pre-announcement stock price as evidence of fair value, both because the stock price could not reflect "nonpublic information [the trial court] identified as not being available" prior to the announcement and because "the court did not explain, at least in a general sense, the weight it gave to the [pre-announcement] stock price."[275] The Supreme Court nonetheless found that the other evidence pointed to by the trial court was sufficient to show that the transaction was entirely fair—indeed, that the conclusion was still so obvious as to render it unnecessary to consider whether the entire fairness standard was the proper standard of review.[276] It reached this conclusion despite the fact that the other evidence of fairness pointed to by the trial court—such as analyst price targets,[277] an investment bank's fairness opinion,[278] speculative testimony of future cash flows[279] and hoped-for synergies,[280] and a stockholder vote the court did not explicitly find to be informed and uncoerced[281]—was extremely weak.

270. *Id.* at *34–36.

271. Estelle Georges-Nason & Alex J. Kaplan, *Entire Fairness Does Not Require Perfection*, SIDLEY (Aug. 3, 2023), https://ma-litigation.sidley.com/2023/08/entire-fairness-does-not-require-perfection [https://perma.cc/2866-L8L9].

272. *In re Tesla Motors*, 2022 WL 1237185, at *42 ("Experts for both parties testified that SolarCity traded in an 'efficient market.'").

273. *Id.* at *43–44 (The court noted that "the Acquisition price offered by Tesla's Board reflected, at most, a modest premium when measured at the time of contracting" and that, due to a subsequent drop in the value of the stock component of the merger consideration, "Tesla paid no premium for SolarCity as of closing."). In the court's defense, the plaintiffs made life difficult by advancing the risky argument that SolarCity was worth nothing at all.

274. *In re* Tesla Motors, Inc. Stockholder Litig., 298 A.3d 667, 734 (Del. 2023).

275. *Id.* at 730.

276. *Id.* at 733 (concluding that "even without the June 21 price, there is ample support in the record to support the fairness of the price").

277. *In re Tesla Motors*, 2022 WL 1237185, at *44.

278. *Id.* at *46.

279. *Id.* at *45.

280. *Id.* at *46–47.

281. *Id.* at *44–45.

Another illustrative case involved the fairness of BGC Partners' acquisition of Berkeley Point Financial from an affiliate of Cantor Fitzgerald.[282] The deal involved a serious conflict of interest, in that Howard Lutnick was the controlling stockholder of both BGC and Cantor Fitzgerald.[283] As in *Tesla*, the trial court, purportedly applying the entire fairness standard,[284] found serious conflicts and process flaws:

> Lutnick initiated the deal. He had a financial incentive to cause BGC to overpay for Berkeley Point. He overstepped in identifying advisors for the special committee and asking its co-chairs to serve. [A special committee member] had one-off discussions with Lutnick that should never have happened. When it came time for the final negotiations, the special committee's written counterproposal did not reflect its preferred structure. And there remains some mystery around how the ultimate deal was reached.[285]

As in *Tesla*, however, the trial court found that, despite the process flaws, the transaction was nonetheless entirely fair.[286]

Again, the Court credited evidence of fair price that was strikingly weak. After rejecting most of the evidence proffered by the expert witnesses in the case, the only piece of evidence the court credited that pointed to a price range above the transaction price was a "comparable companies" analysis by the defendants' expert witness.[287] This comparable companies analysis was particularly shaky in that it employed only a single comparable company, applying that company's price-to-earnings and price-to-book multiples to Berkeley Point.[288] On the basis of this evidence—and an analysis by the plaintiff's expert pointing to a value below the transaction price—the trial court found the deal entirely fair.[289]

2. *Market Responses to the Weak Fairness Standard*

These doctrinal developments loom large in discussions of how best to structure the negotiations around a merger.[290] And the trend towards an

282. *In re* BGC Partners, Inc. Derivative Litig., No. 2018-0722-LWW, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022).

283. *Id.* at *1.

284. *Id.* at *13.

285. *Id.* at *1.

286. *Id.* at *2.

287. *Id.* at *32–34.

288. *Id.*

289. *Id.* at *30–31.

290. *See, e.g.*, Berteau v. Glazek, No. 2020-0873-PAF, 2021 WL 2711678, at *4 (Del. Ch. June 30, 2021) ("On January 28, 2020, the Special Committee met with its counsel. The Form S-4 discloses that, the prior day, the Special Committee 'engaged the law firm of Blank Rome LLP . . . to advise the TPB special committee on aspects of Delaware law applicable to the potential transaction with SDI.' The minutes of the January 28 meeting state that the Special Committee and its counsel discussed the Second Term Sheet, along with 'the application of *Kahn vs. M & F Worldwide Corp.* ("MFW") and Delaware decisions refining the

increasingly docile application of the entire fairness standard has attracted the attention of deal advisors. One prominent corporate law firm, for example, highlighted the emergence of a friendlier fairness test as an important development, noting that inquiry is not the "death sentence" it was once reputed to be.[291] Other practitioners have drawn similar lessons from recent case law.[292] As one firm noted, the *BGC Partners* holding "fits neatly within a continuing line of cases, both before and after *MFW*, where the Court of Chancery found for defendants after trial when applying entire fairness."[293]

These corporate law advisors have drawn the obvious conclusion: conflicted fiduciaries may decide they need no safe harbor from tranquil seas. Going forward, therefore, they may be less likely to find it worth giving up their flexibility in exchange for the shelter of the business judgment rule. Indeed, practitioner commentary reveals that the weakening of entire fairness has been sufficiently dramatic such that controlling stockholders may "be willing to forgo procedures that would otherwise result in the application of the business judgment rule under *MFW*."[294] In the words of one team of prominent advisors, "[w]hile the business judgment rule undoubtedly remains appealing to many controlling stockholders, there may be reasons why some may choose not to go down the *MFW* path and instead embrace entire fairness review."[295]

Some courts and commentators have speculated that, even if entire fairness is no longer so fearsome, the desire to avoid the expense of litigation will still serve as sufficient incentive to employ fairness-producing procedural safeguards.[296] The Court of Chancery in *Tesla*, made this point somewhat defensively:

> Before addressing the merits, I cannot help but observe that [the defendants] likely could have avoided this expensive and time-consuming litigation had they just adopted more objectively evident procedural protections. Delaware law incentivizes parties "to employ deal techniques that provide protection to [ ] stockholders that [are] substantially equivalent to arm's length bargaining."

---

principle [sic] holding of MFW,' and then discussed 'Delaware law process, timing and next steps regarding the [Second Term Sheet] and follow up on same.'").

291. *See* POTTER ANDERSON & CORROON LLP, DELAWARE CORPORATE LAW 2022 YEAR IN REVIEW 9 (2023).

292. *See, e.g.*, Michael Holmes et al., *The Delaware Chancery Court Finds That an Unfair Process Resulted in a Fair Price*, VINSON & ELKINS (Oct. 9, 2023), https://www.velaw.com/insights/the-delaware-chancery-court-finds-that-an-unfair-process-resulted-in-a-fair-price/ [https://perma.cc/TF7S-GUUE] (concluding that "recent decisions demonstrate that all is not lost for defendants in entire fairness cases presenting significant process flaws").

293. Meredith Kotler et al., *In re BGC Partners: Maybe Entire Fairness Review Isn't So Bad After All*, HAR. L. SCH. F. ON CORP. GOVERNANCE (Oct. 4, 2022), https://corpgov.law.harvard.edu/2022/10/04/in-re-bgc-partners-maybe-entire-fairness-review-isnt-so-bad-after-all/ [https://perma.cc/P436-R2MW] (The authors are lawyers at Freshfields).

294. POTTER ANDERSON & CORROON LLP, *supra* note 291.

295. Kotler et al., *supra* note 293.

296. *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2022 WL 1237185, at *33 (Del. Ch. Apr. 27, 2022), *aff'd*, 298 A.3d 667 (Del. 2023); Tuch, *supra* note 217.

> That [the defendants] failed to follow this clear guidance and yet prevailed here should not minimize those incentives or dilute the implications of the onerous entire fairness standard of review. Their choices constricted the presumptive path to business judgment deference and subjected Elon's conduct to post-trial judicial second-guessing. In other words, if Chancery opinions are "parables," let this be a parable of unnecessary peril, despite the outcome.[297]

Practitioners, as well, have begun to characterize the costs of the proceedings—rather than the risk associated with the outcome—as the main penalty conflicted fiduciaries will pay by eschewing the safe harbors.[298] This comports with some commentary that regards the principal benefit of procedural safe harbors as providing an opportunity to dispose of cases on the pleadings.[299]

In reality, however, the costs of litigation—while no doubt large in everyday terms—fade into triviality in the context of a multi-billion-dollar transaction. Doctrinal inducements are so powerful that there may be little marginal incentive for conflicted fiduciaries to submit to costly procedure.[300] Furthermore, without a strong prospect of victory, it would seem unlikely that competent plaintiff firms will continue to invest the time and resources necessary to litigate entire fairness claims vigorously. If the current trend continues, the most likely scenario is that entire fairness claims will, for the most part, devolve into a desultory game of cost-of-litigation settlements. As such, it is unsurprising in light of recent case outcomes that "numerous transactions that have not embraced *MFW* have settled for amounts that controlling stockholders and their insurers have found reasonable."[301]

Given the diminished risks of entire fairness review, it is predictable that controlling stockholders will often be "unwilling to face the execution risks that can arise from a non-waivable majority-of-the-minority condition or to limit their flexibility at the outset of negotiations for an undefined period of time."[302]

---

297. *In re Tesla Motors, Inc.*, 2022 WL 1237185, at *33.

298. *E.g.*, POTTER ANDERSON & CORROON LLP, *supra* note 291, at 9 (characterizing the risk of entire fairness review in terms of "the substantial costs in going to trial, as proving entire fairness is fact-intensive and will likely result in significant discovery and expert costs"); Holmes et al., *supra* note 292 (concluding that "companies and their directors and officers planning potentially conflicted transactions should not be dismissive of the importance of a good process based on these decisions" in part because "these recent defense victories came post-trial, with all of the attendant expenses and uncertainties").

299. *See, e.g.*, *In re* Books-A-Million, Inc. S'holders Litig., No. 11343-VCL, 2016 WL 5874974, at *8 n.2 (Del. Ch. Oct. 10, 2016) (confirming that "one purpose of [MFW] was to remedy a doctrinal situation in which there was no feasible way for defendants to get [cases] dismissed on the pleadings" (quotation marks omitted)), *aff'd*, 164 A.3d 56 (Del. 2017); Hamermesh & Wachter, *supra* note 73, at 639 (noting the incentive of "litigation avoidance").

300. *See* Joseph R. Slights III, Corwin v. KKR Financial Holdings LLC—*An "After-Action Report"*, 24 FORDHAM J. CORP. & FIN. L. 1, 21 (2018) (noting that the "palpable" effects of *Corwin* "in the boardrooms" were that "[i]t is, perhaps, harder to sell 'do the right thing' advice when the prospect of injunctive relief or post-close damages is more remote" and likewise "harder to bargain away deal protections from the sell side").

301. Kotler et al., *supra* note 293.

302. *Id.*

As prominent practitioners have noted—pointing to the Tesla–SolarCity transaction, as well as the Sprint–Clearwire merger[303]—"[e]ven after *MFW* was decided, with the business judgment rule formally on the table, companies have still occasionally chosen to forgo that option and take their chances at trial with entire fairness review."[304] As evidence mounts that the old entire fairness tiger has lost its fangs, there is every reason to expect that more and more conflicted fiduciaries will reach this conclusion: Fairness seems to demand so little that the benefits of the various safe harbors are simply not worth the cost of foregoing the full gains from an opportunistic transaction.

3. The Musk Pay Ruling

In a much-noted 2024 ruling, the Court of Chancery applied the entire fairness test to Elon Musk's titanic compensation package at Tesla, rescinding a $57 billion stock option award after concluding that the defendants had failed to prove its fairness.[305] Although it may be too soon to tell, there are strong reasons to doubt that this marks the beginning of a fairness renaissance. The decision was just a garden-variety fairness case, carefully applying well-settled doctrine to singularly bizarre facts. If anything, the saga surrounding the case illustrates the very declining trend in question, as the ferocious reaction to the decision shows that market participants were surprised when Delaware did not further water down the entire fairness test.

The saga was extraordinary from the start. In 2018, Tesla's board approved an equity grant for Musk, Tesla's CEO and largest stockholder.[306] The plan entitled Musk to tranches of options, twelve in all, as Tesla achieved escalating operational and financial milestones.[307] In total, Musk could earn options to 20 million shares of Tesla, or around 12% of the company.[308] If Musk led Tesla to meet the milestones, earning all tranches of the grants, the value of the package to Musk would be $56 billion.[309] At the time, the company estimated that the award was worth $2.6 billion.[310] Musk's pay was not just the highest of any CEO in 2018; it was the largest compensation package ever.[311] Musk's compensation

303. ACP Master, Ltd. v. Sprint Corp., No. 8508-VCL, 2017 WL 3421142, at *1 (Del. Ch. July 21, 2017).

304. Kotler et al., *supra* note 293.

305. *See* Tornetta v. Musk, 310 A.3d 430, 445–48 (Del. Ch. 2024), *rev'd on other grounds*, *sub nom. In re* Tesla, Inc. Derivative Litig., No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

306. *Id.* at 486.

307. *See* Tesla, Inc., Definitive Proxy Statement (Schedule 14A Form), at 8–15 (Feb. 8, 2018).

308. *Id.* at 7–9.

309. *Id.* at 18. The proxy makes clear that, in light of plan's conditional nature, the plan had no straightforward valuation. *Id.*

310. *Id.* at 34.

311. *See* Peter Eavis, *It's Never Been Easier to Be a C.E.O., and the Pay Keeps Rising*, N.Y. TIMES (May 24, 2019) https://www.nytimes.com/2019/05/24/business/highest-paid-ceos-2018.html [https://perma.cc/Y84Q-P9A7].

was 17 times larger than the second-place CEO that year, and 123 times the size of the median CEO compensation that year.[312] In its tabulation of CEO pay, the *New York Times* had to alter its graphical scale for compensation so it could present Musk's package alongside others.[313]

The resulting legal dispute over Musk's pay was extraordinary in two respects. First, and most straightforwardly, it was extraordinary in the high-profile nature of the case. Elon Musk has developed a massive public following as an avatar of various things—technology exceptionalism, left-wing environmental industrial policy, right-wing nativism, and maximalist procreative tendencies. And of course, the sheer magnitude of the compensation involved was unlike anything before or since. Simply by virtue of the size and structure of the compensation, it pushed into new frontiers and was bound to receive attention, and the celebrity of Musk only heightened the resonance.

The second extraordinary aspect was that Tesla had carelessly flaunted—and perhaps deliberately defied—the well-developed mechanisms for handling conflicted transactions. In light of the towering magnitude of the award, Tesla might have made commensurate efforts to secure the protection of the various procedural safe harbors. Instead, the board was comically supine to Musk: the Tesla directors were beholden to him and never attempted to engage in even pantomimed negotiations with him. In other words, Tesla declined to embrace the utterly conventional structure for negotiating CEO pay: a committee of disinterested directors. Perhaps in recognition of its own compromised judgment, the board conditioned approval of the award on approval by disinterested stockholders. At first glance, this seems like an embrace of one mechanism of synthetic fairness. But Tesla could not bring itself to present the complete picture of the package to its stockholders, and this timidity doomed the vote as a matter of corporate governance.

In 2024, the Court of Chancery issued a careful and exhaustive ruling, concluding that the defendants failed to demonstrate the fairness of the award.[314] The supposedly independent directors in charge of negotiating in fact had pervasive, overlapping personal and financial ties with Musk.[315] There were no meaningful negotiations over the size or terms of the award: directors testified that they and Musk "were not on different sides of things" and that they engaged in a "cooperative, collaborative process" with Musk.[316] As the

312. *See id.*

313. *See* Karl Russell & Josh Williams, *The Highest-Paid C.E.O.s of 2018: A Year So Lucrative, We Had to Redraw our Chart*, N.Y. TIMES (May 24, 2019), https://www.nytimes.com/interactive/2019/business/highest-paid-ceos-2018.html [https://perma.cc/N9CS-V65F] ("The pay package Tesla promised to Elon Musk was so large, we had to add an extra dimension to the chart below to display it accurately.").

314. *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024), *rev'd on other grounds*, *sub nom. In re* Tesla, Inc. Derivative Litig., No. 10, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

315. *Id.* at 508–10.

316. *Id.* at 519–20 (quoting witness testimony) (emphasis removed).

Court noted, "[t]he testimony from the key witnesses is perhaps as close to an admission of a controlled mindset as a stockholder-plaintiff will ever get."[317] The disclosures to stockholders omitted Musk's role in the negotiations,[318] and also the deep ties that the supposedly independent directors had with Musk.[319] On the question of substance—whether Musk's labor was worth what Tesla agreed to pay for it—the court exhaustively considered the multitude of arguments offered by the defendants but ultimately concluded that they failed to carry their burden of showing that the award was within even a commodious range of fairness.[320]

At first glance, this decision might look like the beginning of a fairness renaissance, in tension with the broader trend of recent years. Time will tell, of course, but on closer inspection the saga over this decision suggests, if anything, the persistence of that retiring trend.

The opinion attracted a ferocious reaction in some quarters. Musk himself was, perhaps quite understandably, displeased.[321] Some critics saw in the opinion objectionable things that simply were not there: a political effort to undermine the rule of law,[322] animosity directed at Musk,[323] or ideological support for creeping collectivism.[324] In such a high-profile case, perhaps this sort of attention is unavoidable, and a 200-page opinion provides plenty of fodder. What made the backlash especially bizarre, however, is that market

---

317. *Id.* at 520.

318. *Id.* at 524 ("The Proxy does not disclose the level of control that Musk exercised over the process—e.g., his control over the timing, the fact that he made the initial offer, the fact that his initial offer set the terms until he changed them six months later, the lack of negotiations, and the failure to benchmark, among other things.").

319. *Id.* at 521–23.

320. *Id.* at 533–44.

321. *See* Alexis Keenan, *Elon Musk Wants to Take Away Delaware's Incorporation Crown. It Won't Be Easy*, YAHOO FIN. (Feb. 17, 2024), https://finance.yahoo.com/news/elon-musk-wants-to-take-away-delawares-incorporation-crown-it-wont-be-easy-090033669.html [https://perma.cc/8CGU-2599] ("'Never incorporate your company in the state of Delaware,' Musk said on his social media platform X, formerly known as Twitter, adding that 'I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters.'").

322. *See* Jeb Bush & Joe Lonsdale, *Elon Musk and Donald Trump Cases Imperil the Rule of Law*, WALL ST. J. (Feb. 21, 2024, at 14:14 ET), https://www.wsj.com/opinion/trump-and-musk-cases-imperil-the-rule-of-law-new-york-delaware-courts-business-266a5559 [https://perma.cc/7ALU-FWS3].

323. *See* Andrew E. Graw, Megan Monson & Jessica I. Stewart, *Corporate Governance Takeaways Following Recission of Elon Musk's $55.8 Billion Equity Compensation Package*, LOWENSTEIN SANDLER (Mar. 7, 2024), https://www.lowenstein.com/news-insights/publications/client-alerts/corporate-governance-takeaways-following-rescission-of-elon-musk-s-558-billion-equity-compensation-package-eben [https://perma.cc/E3NT-JUL5].

324. *See* Jonathan Macey & M. Todd Henderson, *Is A Trial Lawyer Worth 100 Elon Musks?*, WALL ST. J. (May 13, 2024, at 16:56 ET), https://www.wsj.com/opinion/is-a-trial-lawyer-worth-100-elon-musks-ebaec6c3 [https://perma.cc/PWR3-RDL3] (suggesting that "[t]he court spends much of its 201-page opinion attacking the value of 'superstar' CEOs and the importance of individuals to corporate achievement" and that "collectivist notion that no single person can make a huge difference suffuses the opinion").

participants seemed surprised and even outraged by it.[325] This surprise seemed to focus on two aspects of the case.

Practitioners seemed surprised that the court even analyzed the substantive fairness in light of the procedural mechanisms Tesla rolled out.[326] Tesla's synthetic fairness mechanisms all had a sham quality, so much so it appears the company (and Musk) consciously chose to confront the judicial fairness review. Strangely, Tesla and Musk responded to the opinion with yet more procedure in an attempt to resuscitate the award with an additional stockholder vote.[327] Tesla formed a new committee of one director to determine whether Musk's 2018 grant "should be ratified" by Tesla stockholder vote.[328] Tesla stockholders voted in favor of what the company called "ratification,"[329] but the Court of Chancery later concluded that the vote had no legal consequence.[330] The opinion surprised market participants because they evidently believed that sham procedural mechanisms ought to be enough to foreclose substantive judicial fairness review.

Corporate lawyers also expressed surprise over the substantive analysis itself and sometimes confusion at the opinion's reasoning and seemed to regard it as a troubling omen of things to come.[331] In fact, the opinion was a garden-variety fairness case: a careful application of long-standing doctrine to an outlandish set of facts. The reasoning was exhaustive and the conclusion inescapable. This was widely recognized,[332] sometimes even by the opinion's

325. *See, e.g.*, Bret T. Chrisope et al., *Implications of Tornetta v. Musk II for Executive Compensation and for Stockholder Ratification*, FRIED FRANK (Jan. 10, 2025), https://www.friedfrank.com/news-and-insights/implications-of-tornetta-v-musk-ii-for-executive-compensation-and-for-stockholder-ratification-12199 [https://perma.cc/FK94-ZMMP] ("The *Tornetta* decisions have been controversial . . . .").

326. *See, e.g.*, Ellen Bardash, *A 'Legal Doomsday'?: Delaware Faces Criticism at Tulane Conference*, LAW.COM (Mar. 8, 2024, at 15:59), https://www.law.com/delbizcourt/2024/03/08/a-legal-doomsday-delaware-faces-criticism-at-tulane-conference/?slreturn=20260110165626 [https://perma.cc/BQ9N-5794]; Rose Krebs, *Del.'s Corp. Law Dominance A Hot Topic At Tulane Conference*, LAW360 (Mar. 7, 2024, at 20:18 ET), https://www.law360.com/pulse/articles/1811403/del-s-corp-law-dominance-a-hot-topic-at-tulane-conference [https://perma.cc/68S2-ZE9T].

327. Tesla, Inc., Proxy Statement (Form 14A) (Apr. 29, 2024).

328. *Id.* at 19.

329. Tornetta v. Musk, 326 A.3d 1203, 1219 (Del. Ch. 2024), *overruled by*, In re Tesla, Inc. Derivative Litig., No. 2018-0408, 2025 WL 3689114 (Del. Dec. 19, 2025).

330. *Id.* at 1219–35.

331. Bardash, *supra* note 326.

332. *See, e.g.*, Holger Spamann, *Delaware Shows That Elon Musk Isn't Above the Law*, WALL ST. J. (Feb. 28, 2024, at 12:42 ET), https://www.wsj.com/opinion/delaware-elon-musk-case-compensation-law-b71d448c [https://perma.cc/9MME-P2G7] (noting that the opinion does not "imperil[] the rule of law" but instead "does the opposite" by "appl[ying] equal justice even to the most powerful, most vocal CEO alive" and that the opinion exhibits the "nuance and respect for private ordering that Delaware's corporate judiciary is justly famous for, and that has made Delaware's the corporate law of choice in the U.S.").

critics.[333] Some commentary lamented the subjective nature of conclusions drawn in fairness cases,[334] but this is a long-recognized aspect of the inquiry.[335]

Although hard to square with the reality of the opinions, the sense that something was ineffably wrong about the opinion persists among high-end legal advisors.[336] In that sense, it reflects the persistence of the old model of fairness as a first-order sorting mechanism, but even that may be more than what the legal advisors expect.

On its own, the Court of Chancery's opinion—its evenhanded application of longstanding doctrine—suggests that the fairness test has not been as wholly watered down as other recent cases might suggest. The decision looks bold only by contrast with cases like *SolarCity*,[337] but it marks no new ground doctrinally. At bottom, the hostile rhetoric surrounding the case—and perhaps its future on appeal—undermines any sense that the case represents an end, if not a reversal to the ongoing dilution of the fairness test.

D. Refashioning the Doctrinal Form of Fairness to Suit its New Function

Because the main function of entire fairness review is to serve as sufficient incentive for conflicted fiduciaries to employ the superior procedural safeguards, modern doctrine demands a more fearsome fairness standard. Furthermore, because the universe of entire fairness cases has narrowed to only those fraught situations where a conflicted fiduciary has failed to take shelter in an obvious safe harbor, accuracy, too, demands that courts cast a more suspicious eye in evaluating the conduct of conflicted fiduciaries.

If terror were the only requirement, of course, the entire fairness standard could simply become the corporate version of a medieval ordeal such as plunging a hand into a cauldron of boiling water and concluding liability from signs of harm on the flesh—painful and ultimately arbitrary.[338] Indeed, the more unforgiving and erratic the fairness standard is in expectation, the more likely that transaction planners will ex ante seek out the safe harbors provided by Delaware law—a highly desirable outcome if one assumes that the procedural protections deliver the promised benefits. However, in addition to being

---

333. *See, e.g.*, Macey & Henderson, *supra* note 324 ("In rejecting Elon Musk's $55.8 billion pay package, the Delaware Chancery Court applied straightforward corporate law.").

334. *See* Bardash, *supra* note 326 (noting a practitioner observation that "the judges in the five recent entire-fairness cases that were tried to verdict wouldn't agree entirely on the answers").

335. *See In re* Nine Sys. Corp. S'holders Litig., No. 3940-VCN, 2014 WL 4383127, at *47 (Del. Ch. Sep. 4, 2014) (*quoting* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1140 (Del. Ch. 1994)) (noting that entire fairness is "a standard which in one set of circumstances or another reasonable minds might apply differently").

336. *See* Krebs, *supra* note 326.

337. *In re* Tesla Motors, Inc. S'holder Litig, 298 A.3d 667 (Del. 2023).

338. *See* Peter T. Leeson, *Ordeals*, 55 J.L. & ECON. 691, 693–94 (2012).

anathema to Delaware law,[339] such arbitrariness would offer little advantage here over a per se rule making the appropriate procedural safeguards mandatory instead of safe harbors. Under current doctrine, entire fairness still serves as a second-order sorting mechanism, and it should strive to serve that role accurately.

In the modern setting, however, the bulk of the risk in performing the function is in one direction: allowing opportunistic transactions. There is far less risk than under traditional doctrine of blocking value-enhancing transactions, as the conflicted fiduciary always has recourse to the procedural safe harbors.

With these considerations in mind, we develop four proposed reforms. First, and most generally, a far greater skepticism of fiduciary conduct, verging on a rebuttable presumption that a transaction failing to employ the requisite procedural safeguards is unfair. Second, a formally conjunctive test for entire fairness, requiring the conflicted fiduciary to establish both fair dealing and fair price. Third, a more robust scrutiny of fair price, less willing to employ a forgiving "range of fairness," and less credulous in relying on evidence from market trading prices. Fourth, a more flexible approach to damages, recognizing the role of entire fairness review in *deterring* disloyal behavior before the fact, not simply remedying it after the fact.

1. *A Rebuttable Presumption of Unfairness*

At the broadest level, the fairness test should recognize that the fiduciary has elected to face the judicial inquiry. The extant fairness doctrine was designed for a conflicted fiduciary who faces judicial scrutiny because no other path was available. Under modern corporate doctrine, an interested fiduciary faces judicial scrutiny *by choice*. Delaware has crafted fairness-promoting mechanisms to address nearly every sort of conflicted transaction and shield those transactions from judicial scrutiny. By avoiding these mechanisms, a conflicted fiduciary conveys information about the transaction: that the desired terms could not be secured through a process resembling an arm's-length bargain. The fairness test ought to draw this inference expressly, moving beyond the old burden-shifting framework and adopting a presumption that the transaction is unfair.

As discussed above, the sine qua non of a conflicted transaction that is fair is that the terms approximate those that would have been obtained absent a

339. An additional challenge here is that corporate law has professed a distaste for an inquiry of this character. The outcome of the fairness inquiry, the Delaware Supreme Court has noted, "should not be the product solely of subjective, reflexive impressions based primarily on suspicion or what has sometimes been called the 'smell test.'" Nixon v. Blackwell, 626 A.2d 1366, 1378 (Del. 1993). In a similar vein, the Court expressed wariness over "equity jurisprudence which takes on a random or ad hoc quality." *Id.* at 1379 n.17.

conflict in an arm's-length deal.[340] And the procedural mechanisms generate terms resembling arm's-length transactions. Thus, great suspicion should attach to any argument from a conflicted fiduciary that a transaction *not* employing the procedural safeguards has nonetheless delivered terms resembling an arm's-length deal. Whatever arguments the conflicted fiduciary may present at trial must be viewed, broadly, as the presentation of weak evidence when strong evidence should otherwise have been available.[341] Similarly, where a conflicted fiduciary could have employed synthetic arm's-length bargaining but did not, it can lead only to the conclusion that the terms of an arm's-length bargain would have been materially less favorable to the conflicted fiduciary.

If the presumption of unfairness were effectively irrebuttable, it would be simpler just to mandate the procedural safeguards rather than use them to define a safe harbor. The question thus remains: what kind of evidence should be sufficient to rebut a presumption of unfairness? The unsatisfying but unavoidable answer is, well, it depends. Three general principles can be identified, however.

First, the strength of the presumption should depend on the underlying risk of opportunism in the context. For example, in the controller freezeout context, the risk of opportunism is very plausibly at its apex. Such transactions are final period decisions, and even a faithful board is almost entirely helpless in the face of an intransigent controller. The presumption of unfairness should thus be especially strong in this context. In non-final period decisions like executive compensation, on the other hand, the potential for opportunism is at least somewhat constrained.

Second, the strength of the presumption might depend on the nature of the conflicted fiduciary's failure to qualify for a safe harbor. At one extreme, it is evident that a controlling stockholder who starts down the road of *MFW* only to subsequently abandon it and impose a transaction unilaterally should face a very strong presumption that the resulting transaction is unfair. At the other extreme would be a conflicted fiduciary who attempts to employ the requisite procedural safeguards but inadvertently does so imperfectly. Safe harbor may be inappropriate in such circumstances, but so too may be a strong inference of unfairness. Somewhere in between these extremes would be a deliberate choice to forego the procedural safeguards—which may be nearly as suspect as beginning and then withdrawing them—or more serious defects in their employment, akin to the Musk compensation case.

340. *See supra* notes 244–47.

341. Smith v. Van Gorkom, 488 A.2d 858, 878 (Del. 1985) (citing Interstate Cir. v. United States, 306 U.S. 208, 226 (1939) (noting that "[i]t is a well established principle that the production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse."); *see also* Kahn v. Lynch Comm. Sys., Inc., 638 A.2d 1110, 1118 n.7 (Del. 1994) (making a similar point).

Third, it should be kept in mind exactly what the conflicted fiduciary needs to justify. The relevant question is not simply whether the transaction is fair (though that is certainly part of the question). The question is why—if indeed the transaction is fair—did the conflicted fiduciary not employ the procedural safeguards that would have provided the best evidence of fairness? As discussed above, the underlying logic of the modern doctrine is that synthetic arm's-length bargaining is presumed to be the best guarantor of fairness, but that some circumstances may exist where insisting upon synthetic arm's-length bargaining would stymie a value-enhancing transaction. The burden is on the conflicted fiduciary to show how the particular transaction at issue falls into the latter camp, whether due to unusual costs associated with the procedural safeguards or to other idiosyncratic circumstances.

2. *A Conjunctive Test of Fairness*

In *Weinberger*, the Delaware Supreme Court identified "two basic aspects" of fairness: "fair dealing and fair price."[342] From *Weinberger* on, however, the Delaware courts have frequently emphasized that the entire fairness inquiry is "unitary" in nature, and cannot be neatly reduced into separate inquiries into process and price.[343] In recent years, however, the unitary nature of the test has tended to make it disjunctive in nature, such that *either* fair dealing *or* fair price is enough to save a conflicted transaction. It has long been the case that a finding of fair process effectively ends the judicial inquiry.[344] Likewise, courts routinely find that a transaction passes muster under entire fairness review despite grave misgivings about the process, if the price is nonetheless found to be fair.[345]

At times, the Delaware Supreme Court has suggested that, despite the unitary nature of the fairness test, defendants must show *both* fair dealing and fair price. For example, in *Cede v. Technicolor*, the Supreme Court held that "directors must establish to the court's satisfaction that the transaction was the product of *both* fair dealing and fair price."[346] Even in the *SolarCity* case, the Delaware Supreme Court noted that "[b]oth aspects of the entire fairness test — fair dealing and fair price — must be satisfied."[347] The Court also rejected

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

343. *Id.* ("However, the test for fairness is not a bifurcated one as between fair dealing and price.").

344. *See* Wolfe, *supra* note 73, at 1 (A "judicial inquiry as to the fairness of the price is a mere redundancy. Fair dealing is where the judicial action is and the evaluation of the propriety of process, as opposed to result, is where the judicial function always has been at its most effective in corporate controversies. That is why there does not appear to have been a decision in which a Delaware court has found fair dealing without finding fair price as well, and why there probably never will be.").

345. *See supra* Part IV.C.

346. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) (emphasis added and omitted), *modified on reargument*, 636 A.2d 956 (Del. 1994).

347. *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 715 (Del. 2023).

the contention that the trial court had "applied a bifurcated entire fairness test" with "its separate fair price analysis alone satisf[ying] entire fairness."[348] At the same time it acknowledged that "fair price played a large role in the trial court's analysis" and concluded that "[t]he paramount consideration, however, is whether the price was a fair one."[349] As a practical matter, this approach leaves little room for a trial court to find a fair price and nonetheless find the transaction unfair. Moreover, such a finding would also be largely symbolic under the current approach to damages.[350]

The new role of entire fairness makes an explicitly conjunctive test appropriate: a conflicted transaction should be adjudged unfair unless the defendant can show *both* fair dealing *and* fair price. Entire fairness is now only a question where the conflicted fiduciary has failed to follow a deal process employing the fairness-promoting templates provided in the law. Having abjured "the transactional structure that respected scholars believe will provide [stockholders] the best protection,"[351] conflicted fiduciaries should be required to show that the alternative process they followed was equivalently fair. Given the context, however, any such conclusion is inherently uncertain. As such, conflicted fiduciaries should further be required to show that the price was entirely fair, without any presumption that the unorthodox process (even if it appears fair) may have led to a fair price.

3. A Less Forgiving Fair Price Analysis

Because of the especially suspect contexts where entire fairness review now arises, and the much-reduced danger of blocking value-enhancing transactions, scrutiny of fair price should change to reflect this differing posture. Two aspects of the fair price analysis, in particular, should be altered.

First, the courts should abandon the practice of adjudging the price fair where the conflicted fiduciary can establish that it fell within a broad "range of fairness." Neither *Weinberger*[352] nor *Sterling Mayflower*[353] before it mentioned the idea of a range of fairness, instead suggesting that courts should view fair value the same as they would in an appraisal proceeding, where the trial court must assign a precise figure to the "fair value" of the shares.[354] As noted above, the practice of evaluating fair price as embracing an expansive "range of fairness" emerged in the 1990s, as a concession to the fear of deterring beneficial

348. *Id.* at 717 (quoting appellants' brief).

349. *Id.* at 718 (internal quotation marks omitted) (emphasis removed).

350. *See infra* Part IV.D.4.

351. *In re* MFW S'holders Litig., 67 A.3d 496, 502–03 (Del. Ch. 2013).

352. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

353. Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952).

354. *See* DEL. CODE ANN. tit. 8, § 262 (2023).

transactions.[355] This concern fades in importance where safe harbors are available. As a result, courts should revert to the less deferential practice of finding a point estimate of fair price.

Undoubtedly, courts will find doing so uncomfortable. The "range of fairness" approach is reassuring because it makes explicit the inevitable uncertainty, or even artificiality, of declaring a single, precise figure as *the* fair value of something as complicated as a firm. But the fairness inquiry can draw from other areas of law that embrace the wrongdoer rule, resolving uncertainties against the faithless fiduciary who generated those uncertainties.[356] A conflicted fiduciary could have avoided any uncertainties by simply following a deal process that would have provided a safe harbor. As such, a presumption is warranted that the actual deal process resulted in a less-favorable outcome for stockholders than the prescribed process would have, even if the result falls within a "range of fairness." Viewed in this light, requiring a point determination is only a slight—and appropriate—extension of existing doctrine, which recognizes that "[f]actors such as coercion, the misuse of confidential information, secret conflicts, or fraud could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved."[357]

Second, courts should be far more skeptical of attempts by conflicted fiduciaries to establish fair price by pointing to market trading prices. Elsewhere, we have written a fuller explanation of the need for caution in relying on market prices as a reliable indicator of fair value.[358] Two major points bear repeating here.

First, courts have been too quick to elide the distinction between the well-established concept of *informational* efficiency—that stock prices rapidly adjust to new information[359]—and the more contested notion of *fundamental value* efficiency—that stock prices are always, in some sense, "right." [360] At times, the Delaware courts have seemed alert to this distinction. For example, in 2010, then-Vice Chancellor Strine rejected the notion that judges should follow

355. *See supra* Part I.D.3.

356. *See* Thorpe v. CERBCO, Inc., No. 11713, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 1993).

357. ACP Master, Ltd. v. Sprint Corp., No. 8508-VCL, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017).

358. *See* Charles Korsmo & Minor Myers, *Assessing Market Efficiency in Corporate and Securities Litigation*, 101 IND. L.J. (manuscript at 143) (forthcoming 2026).

359. *See* Bradford Cornell & John Haut, *How Efficient Is Sufficient: Applying the Concept of Market Efficiency in Litigation*, 74 BUS. LAW. 417, 420 ("As defined by Sharpe, a market is informationally efficient if prices respond immediately so that investors cannot make abnormal returns by trading in response to public announcements."); Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 393–95 (1980) (defining a market as "informationally efficient" when "prices are such that all arbitrage profits are eliminated").

360. *See* Cornell & Haut, *supra* note 359, at 420 ("By contrast, a market that is fundamentally efficient is one that gets prices 'right.' By 'right,' we mean the market price equals the present value of expected future cash flows discounted at the appropriate cost of capital—what is often called the fundamental value.").

"blindly some crude rendition of the semi-strong form of the efficient capital markets hypothesis, one in which any board should treat the current market price as a reliable guidepost to decisionmaking."[361] He instead remarked that "[his] understanding of ECMH is that it makes much less drastic claims."[362] Strine has been even more explicit in his non-judicial writings, noting that "the claim of the efficient market hypothesis is not that a corporation's stock price at any time is a reliable estimate of fundamental value, but rather that it is not possible to design a trading strategy that will outguess the guesses of the market as a whole."[363] In practice, however, once persuaded that a stock trades in an informationally efficient market, the Delaware Supreme Court has consistently found reversible error when the trial court has failed to credit market prices.[364]

In reality, however, while it is undoubtedly true that "[i]dentifiable and persistent instances of fundamental inefficiency would be easily exploitable" and quickly arbitraged away,[365] many prominent economists and market participants have modest expectations for fundamental value efficiency, even where they do not reject it altogether.[366] That securities prices are always fundamentally accurate is no longer seriously contended, even by strong proponents of the efficient capital markets hypothesis. As Belinfanti and Stout note, "[b]y the close of the twentieth century, . . . the idea that stock market prices always capture fundamental value had been largely abandoned by sophisticated commentators in the face of an enormous and growing empirical and theoretical literature demonstrating this often was not true."[367]

Second, the need for caution in relying on market prices is enhanced by the context. The need to assess fair value arises only where a transaction is tainted by a potential conflict of interest, and where the conflicted parties have chosen not to employ basic procedural safeguards that would entitle them to the safe

361. *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 611 (Del. Ch. 2010).

362. *Id.* (internal citation omitted).

363. Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1930 (2017).

364. *See* Korsmo & Myers, *supra* note 117, at 260 ("In every concrete circumstance, however, the Supreme Court held that the trial court judges had abused their discretion by crediting evidence that the market price was incorrect . . . .").

365. *See* Cornell & Haut, *supra* note 359, at 422.

366. *See, e.g.*, Fischer Black, *Noise*, 41 J. FIN. 528, 533 (1986) (stating that "[w]e might define an efficient market as one in which price is within a factor of 2 of value, i.e., the price is more than half of value and less than twice value"); *id.* ("I think almost all markets are efficient almost all of the time. 'Almost all' means at least 90%."); *see also* Eugene F. Fama & Kenneth R. French, *Disagreement, Tastes, and Asset Prices*, 21 (Tuck Bus. Sch. Working Paper No. 2004-03, 2005), https://ssrn.com/abstract=502605 (noting that where investors have divergent expectations as to the future "distortions of expected returns can be large" and "[o]ffsetting actions by informed investors [will] not typically suffice to cause the price effects of bad beliefs to disappear with the passage of time").

367. Tamara Belinfanti & Lynn Stout, *Contested Visions: The Value of Systems Theory for Corporate Law*, 166 U. PA. L. REV. 579, 593 n.70 (2018). The trial court in *Dell* cited extensively to the growing academic literature skeptical to claims of fundamental value efficiency. *See In re* Appraisal of Dell Inc., No. 9322-VCL, 2016 WL 3186538, at *24 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part sub nom.*, Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017).

harbors provided by statute or case law. Furthermore, conflicted fiduciaries will often possess an informational advantage over even highly efficient markets. As a result, they should be expected to engage in conflicted transactions—and to forego the procedural safeguards in order to do so—precisely when temporary market mispricings work most to their advantage. The Delaware Supreme Court has declared that the market price is "generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client."[368] If courts were called upon at a random time to declare the fair value of a random S&P 500 company, this statement would undoubtedly be correct.

This claim is far less compelling, however, in the narrow subset of cases where modern doctrine actually requires a court to evaluate fair value. In that subset of cases, a too-easy reliance on trading prices simply hands conflicted parties a get-out-of-jail-free card any time a transaction bears some relation to market prices. This would allow fiduciaries free rein to time a conflicted transaction to take advantage of market mispricings and undermine the incentives for employing procedural best practices.[369]

4. *A More Aggressive Approach to Remedies*

As noted above, entire fairness sounds in equity, giving courts enormous latitude in fashioning equitable remedies.[370] Historically, however, the need to balance the risks of deterring value-enhancing transactions against the benefits of deterring opportunistic transactions tempered the willingness of courts to make use of their full remedial arsenal.[371] In particular, rescission—a remedy often appropriate in transactional contexts where damages are difficult to determine—has often proved unappetizing to courts in the merger context.[372] Even when awarding monetary damages, courts have often been cautious, sometimes awarding nominal damages or no damages at all even where a breach of fiduciary duties has been found.[373]

Under modern doctrine, however, the need to avoid deterring value-enhancing transactions is greatly reduced, and the primary function of entire

368. *Dell*, 177 A.3d at 24.

369. More subtly, but perhaps more fundamentally, where the market value of property depends heavily on the legal protections extended—as is the case for minority shares in a controlled company—judicial deference to market prices becomes circular. As Subramanian has noted, full judicial deference to market prices for minority shares would cause the shares to be worthless in equilibrium—making it impossible to raise capital from minority stockholders in the first place. *See* Subramanian, *supra* note 102, at 146–47.

370. *See supra* Part I.D.4.

371. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

372. *See id.*

373. *See, e.g.*, *In re* Straight Path Commc'ns Inc. Consol. S'holder Litig., No. 2017-0486-SG, 2023 WL 6399095, at *1 (Del. Ch. Oct. 3, 2023) (finding that the controlling stockholder "drove an unfair transaction in breach of fiduciary duty, but that no damages flowed therefrom").

fairness review is to provide an incentive to resort to the procedural safe harbors. As a result, courts should no longer hesitate to draw upon their full powers "to fashion any form of equitable and monetary relief as may be appropriate."[374] In particular, courts should be far more willing to grant rescission of mergers where controlling stockholders have chosen to face such peril by forgoing the *MFW* protections, or rescissory damages where rescission is completely impractical.

Indeed, the new incentive-providing function of entire fairness justifies a more demanding approach to crafting remedies. After all, a purely remedial approach means that the worst realistic outcome a controller faces from entire fairness litigation is the need to "top up" the merger consideration to an amount approximating what would have been paid had the controller employed the *MFW* protections in the first place. Such a prospect, however, can provide no incentive to the controller to actually employ the *MFW* safeguards. After all, entire fairness litigation offers only the *possibility* of a result that would be virtually guaranteed by simply employing the safeguards. The result is a "heads I win, tails I don't lose" game for the controller. Given these incentives, the controller would almost always be better off forcing through a favorable transaction and then taking their chances with litigation.

To give controllers a genuine incentive to favor the *MFW* procedures, there must be some prospect that entire fairness review will deliver the controller a result that is actually *worse* than the result that a fair process would have delivered. Depending on the circumstances, treble damages, punitive damages, or rescissory damages may be suitable and appropriate.

CONCLUSION

The role of entire fairness review in corporate law has changed dramatically. At one time, it was unavoidable for conflicted fiduciaries, serving as the primary corporate law mechanism for distinguishing opportunistic transactions from value-enhancing transactions. Even through the early twenty-first century, entire fairness review remained unavoidable for controlling stockholders, particularly in the important context of freezeout mergers. Following *MFW*, however, procedural safe harbors became available across the entire spectrum of conflicted transactions.

The transformation of entire fairness review's role is thus complete. The procedural safe harbors now primarily perform the function of sorting conflicted transactions. The primary role of entire fairness review in this new doctrinal universe is to provide sufficient incentive for conflicted fiduciaries to employ the presumptively superior procedural safeguards that will grant them safe harbor. Only secondarily does entire fairness perform its old sorting

---

374. *Weinberger*, 457 A.2d at 714.

function, and then only with respect to the dubious set of transactions where conflicted fiduciaries have failed—or refused—to satisfy the requirements for safe harbor.

The form of entire fairness review should change to better fulfill its new function. In its traditional role, entire fairness needed to carefully balance the costs of mistakenly deterring value-enhancing transactions against the benefits of deterring opportunistic transactions. In its new role, the balance of costs and benefits is drastically altered, with the risks of deterring value-enhancing transactions far less and the chance of opportunistic transactions much greater. To better serve its new role, entire fairness review can be, and should be, more fearsome and less forgiving than in the past. Yet, if anything, entire fairness review has become more toothless in recent years. Unless and until courts recognize the implications of entire fairness review's new function—and embrace reforms such as those detailed here—conflicted fiduciaries will have insufficient incentives to employ the efficiency-enhancing procedural safeguards developed across decades of Delaware case law.