Omnicare: Coercion and the New Unocal Standard

Brian J.M. Quinn

Boston College Law School, brian.quinn@bc.edu

Follow this and additional works at: http://lawdigitalcommons.bc.edu/lsfp

Part of the Commercial Law Commons, and the Corporation and Enterprise Law Commons

Recommended Citation

Omnicare: Coercion and the New Unocal Standard

Brian JM Quinn*

I. INTRODUCTION ................................................................. 835
II. LEARNING TO LOVE OMNICARE ........................................ 837
III. THE GO-SHOP PUZZLE ..................................................... 842
IV. LIVING WITH—OR WORKING AROUND—OMNICARE ............. 845
V. THE NEW DEAL PROTECTION JURISPRUDENCE .................... 849
VI. OMNICARE’S FUTURE AND DEAL PROTECTIONS .................. 862

I. INTRODUCTION

When Omnicare, Inc. v. NCS Healthcare, Inc.1 was decided ten years ago, it was widely derided as one of the worst corporate law opinions since Smith v. Van Gorkom.2 In fact, Chief Justice Myron Steele of the Delaware Supreme Court remarked at a conference not long after that the opinion would likely have the life span of a “fruit fly.”3 I subsequently offered up a modest, and perhaps lonely, defense of the Omnicare decision published in the pages of this Journal.4 In that defense, I argued that when sellers grant buyers deal certainty there should be no expectation that such an act provides sellers any value, notwithstanding nominal payments buyers might make in exchange for that incremental certainty.5 In fact, deal certainty should be expected to lead to low-ball offers.6 I argued that Omnicare, for all its faults, was helpful because it placed fiduciary limits on sellers in situations in which sellers are not able to credibly resist buyer demands for additional transactional certainty.7 These fiduciary limits, by pre-committing sellers to a process that ensures a minimal degree of competition, or at least the threat of it, force buyers to reveal private information about their valuations of the sellers.8 Buyers, for their part, need not be denied deal certainty by Omnicare’s controversial rule. They can still get the transactional certainty they wish, but they have to pay for it.

* Associate Professor of Law, Boston College Law School.
3. “So while I don’t suggest that you rip the Omnicare pages out of your notebook . . . I do suggest that there’s the possibility, one could argue, that the decision has the life expectancy of a fruit fly.” See David Marcus, Man of Steele, D&O ADVISOR, Sept. 2004, at 16 (quoting Justice Steele).
5. Id. at 877–88.
6. Id. at 879.
7. Id. at 867.
8. Id. at 878–80.
Like other modest defenses, my defense of Omnicare was hardly sufficient to protect the opinion's integrity. Now, all these years later, although it is still in my notebook, Omnicare is slightly the worse for wear. Practitioners have learned to live with—or more correctly—work around the decision. Deal protections are perhaps as formidable as they have ever been. While the Supreme Court has not had an opportunity to directly revisit the issue, the Chancery Court has taken the opportunities that have been regularly presented to it to peel back the ruling's effect and distinguish the facts before it from Omnicare's holding. Following the opinion, the courts could have taken Omnicare as a cue to move the needle on a long-standing debate about the proper limits on board action, but they collectively decided against that course of action. In recent years, as practitioners have introduced transactional innovations in response to Omnicare, the courts have regularly blessed them.

Notwithstanding the fruit fly rhetoric, Omnicare may have a much longer life than many of its critics predict. In part, that is because of a second, now less controversial, aspect of the opinion. In Omnicare, the Delaware Supreme Court made it clear that it would apply Unocal\textsuperscript{9} to the analysis of board decisions to adopt deal protection measures in friendly transactions not involving a change of control.\textsuperscript{10} Looking back now, subjecting deal protection measures to intermediate scrutiny was undoubtedly correct, but, at the time, there were many in practice who believed that Paramount v. Time\textsuperscript{11} provided a green light to dealmakers to negotiate almost any deal protections subject to business judgment deference. The clarification of the proper standard of review for deal protections in the context of a friendly merger is an important and enduring contribution of Omnicare.

Of course, in the years since Omnicare, there have been a series of subtle doctrinal changes that now call into serious question the efficacy of Unocal's intermediate standard. The development of the Unocal doctrine in recent years has tended to reduce its plasticity and scope. In part, it appears, having given itself the power to review deal protections in negotiated transactions, the court has since backed away from an aggressive application of that oversight. The result is that Unocal has been largely supplanted by what one might understand as a preliminary inquiry into the competitive posture of a transaction, and then a more constricted view of Unocal's reach. Where transactions do not benefit from alternative bids, courts will be highly deferential to board decisions to grant buyers defensive measures. This approach to deal protections generates a troublesome incentive for dealmakers to innovate and deploy deal protection measures that fall just short of Omnicare's bright line rule, but are still powerful enough to deter second bids.

Just as the courts have declined the opportunity Omnicare afforded them, the courts have also narrowed the reach of Unocal's intermediate standard. When the Delaware Supreme Court first announced the intermediate standard, Unocal's proportionality prong suggested a role for the courts in substantive review of deal protection measures.\textsuperscript{12} However, the courts have, over the years, increasingly narrowed the scope of a court's

\begin{itemize}
\item \textsuperscript{9}Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
\item \textsuperscript{10}Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 934 (Del. 2003).
\item \textsuperscript{11}Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1151–55 (Del. 1989).
\item \textsuperscript{12}See Unocal, 493 A.2d at 955–57 (reasoning that a defensive deal protection device had to "be reasonable in relation to the threat posed").
\end{itemize}
review under the guise of proportionality. By now, preclusivity and "range of reasonableness" analyses are dead letters. Because of the narrowing of Unocal's application, the courts have been largely left to focus only on Unocal's coercion standard. Coercive deal protections that implicate statutory obligations of the board and shareholders are, by now, the only measures likely to run afoul of Unocal.

In Part II of this Article, I review my previous defense of the majority opinion in Omnicare. The essence of that defense is that a prohibition against completely bulletproofing transactions against subsequent bids is beneficial for selling shareholders and helps boards overcome structural biases in negotiation. Such a rule does not dissuade potential bidders who have alternate ways of generating some degree of certainty. Notwithstanding the direction of the court and dealmakers in recent years, I believe this defense of Omnicare's controversial holding remains largely correct. In Part III, I raise the challenge that go-shop provisions present the most common criticism of the Omnicare decision—that dealmakers value transaction certainty. In particular, it is difficult for a proponent of deal certainty to reconcile a stated desire for transaction certainty with the proliferation of a deal structure that purports to generate a post-signing auction. In Part IV, I observe that in the years since Omnicare, dealmakers have proven themselves to be perfectly competent to structure transactions around the opinion's fiduciary requirement. In many ways, these new deal protection measures are just as effective as the protections struck down in Omnicare, but the courts have decided to let them stand. In Part V, I review what I call the new deal protection jurisprudence. The court's own inherent conservatism has resulted in increasingly narrow room to maneuver within Unocal's once flexible standard and Omnicare's mandate. By now, only coercion remains of Unocal's proportionality prong. In Part VI, I provide some thoughts about the future of Omnicare and conclude.

II. LEARNING TO LOVE OMNICARE

In Omnicare, the Delaware Supreme Court made two contributions of real import. First, Omnicare established conclusively that the Unocal intermediate standard was to be applied in all circumstances in which a board adopts a measure to defend a corporate policy. The application of the Unocal standard was not dependent on the presence of so-called Revlon duties. In reaching this conclusion, the court observed:

There are inherent conflicts between a board's interest in protecting a merger transaction it has approved, the stockholders' statutory right to make the final decision to either approve or not approve a merger, and the board's continuing responsibility to effectively exercise its fiduciary duties at all times after the merger agreement is executed. These competing considerations require a threshold determination that board-approved defensive devices protecting a merger transaction are within the limitations of its statutory authority and consistent with the directors' fiduciary duties. Accordingly, in Paramount v. Time, we held that the business judgment rule applied to the Time board's original decision to merge with Warner. We further held, however, that

14. Id. at 930 (internal citations omitted).
defensive devices adopted by the board to protect the original merger transaction must withstand enhanced judicial scrutiny under the *Unocal* standard of review, even when that merger transaction does not result in a change of control.\(^{15}\)

Although this result should have been clear to any reader of the case law, before *Omnicare*, there was a wide-spread feeling amongst practitioners that, following *Time*,\(^{16}\) when negotiated or friendly transactions did not involve a change in control, board decisions about how much and in what manner to protect a transaction from a subsequent bid should receive the benefit of the business judgment presumption when challenged.\(^{17}\) In *Omnicare*, the majority made it clear that the problem of cognitive biases in the board decision-making process is not constrained to boards resisting unwanted hostile offers. Indeed, even boards motivated to sell the corporation may face subtle conflicts when deciding whether, how, and with whom to pursue a corporate transaction. Before providing the decision to grant deal protections with the benefit of the business judgment rule in the context of a friendly transaction, the court must make a preliminary inquiry into the reasonableness of the board’s decision-making process.\(^{18}\) The decision to apply the intermediate standard to transactions not involving a change of control on its face appears to be an appropriate development of *Unocal*’s flexible standard of review that takes into account the drastic change in circumstance between the mid-1980s when the standard was first developed and the turn of the last century when boards were more likely to be willing sellers, perhaps sometimes for the wrong reasons.

*Omnicare*’s second—and more controversial—contribution is the bright line rule that requires sellers’ boards to include effective fiduciary outs in all merger agreements.\(^{19}\) This holding has been widely criticized. Then-Chief Justice Veasey’s dissent distilled the

---

15. *Id.* at 930–31.
17. Then-Vice Chancellor Strine noted that deal protections should rightly be subject to intermediate scrutiny in his “duck” footnote:

Under a “duck” approach to the law, “deal protection” terms self-evidently designed to deter and make more expensive alternative transactions would be considered defensive and reviewed under the *Unocal* standard. The word “protect” bears a close relationship to the word “from.” Provisions of this obviously defensive nature (e.g., no-shops, no-talks, termination fees triggered by the consummation of an alternative transaction, and stock options with the primary purpose of destroying pooling treatment for other bidders) primarily “protect” the deal and the parties thereto *from* the possibility that a rival transaction will displace the deal. Such deal protection provisions accomplish this purpose by making it more difficult and more expensive to consummate a competing transaction and by providing compensation to the odd company out if such an alternative deal nonetheless occurs. Of course, the mere fact that the court calls a “duck” a “duck” does not mean that such defensive provisions will not be upheld so long as they are not draconian.

19. *Id.* at 939.
essence of the criticisms that would later become common amongst practitioners:

A lock-up permits a target board and a bidder to "exchange certainties." Certainty itself has value. The acquirer may pay a higher price for the target if the acquirer is assured consummation of the transaction. The target company also benefits from the certainty of completing a transaction with a bidder because losing an acquirer creates the perception that a target is damaged goods, thus reducing its value.\(^\text{20}\)

Since Omnicare it has been widely believed that fidelity to the majority opinion would be value reducing. The fear was that in the absence of the exchange of certainties there might be a serious disruption in the deal-making economy as initial bidders became less willing to make the transaction specific investments required to generate initial bids.\(^\text{21}\) To the extent anyone bids without bulletproofing, critics argue that bidders would offer lower prices.\(^\text{22}\)

In the pages of this Journal, I argued to the contrary.\(^\text{23}\) Granting bidders transactional certainty in the context of a bilateral negotiation would more likely result in sellers receiving a lower share of the surplus available in the transaction than they might otherwise expect. Also, I argued that the lack of contractual certainty in the form of bulletproof transactions would not likely present an obstacle to deal-makers who have alternate methods of assuring they can recoup transaction specific costs. Specifically, buyers who wish additional transactional certainty can pay for it through higher bid prices.

Ten years on, the parade of horribles that was supposed to accompany Omnicare never appeared. Deals continued. One might even argue that sellers did very well during the past decade up until the financial crisis of 2008. At the same time, it is clear that deal-makers and the courts have not cottoned to the idea of minimally protected transactions. Rather, parties appear to have grudgingly reconciled themselves to Omnicare; a reconciliation that has involved formal compliance with the rule as well as a high degree of contractual certainty.

In my defense of the Omnicare majority, I observed that bargaining power and leverage in the acquisition market make it reasonable to believe that in bilateral bargaining situations sellers may be unable to credibly resist buyer demands to

\(^{20}\) Id. at 942 (internal citations omitted).

\(^{21}\) I adopt the term "bulletproof" to refer to the array of deal protections measures, including lock-ups, exclusivity devices, termination fees, etc., that render a transaction immune to topping bids.


\(^{23}\) See generally Quinn, supra note 4.
bulletproof transactions because of structural biases.\textsuperscript{24} For example, in consolidating industries, or in transactions involving private equity buyers, potential sellers outnumber potential acquirers.\textsuperscript{25} To the extent there is bargaining power, it lies with buyers who have alternatives to the present transaction. Sellers, particularly where shareholders may be managers with undiversified wealth, have few alternatives to a negotiated deal and therefore less bargaining leverage. In such a situation, an initial bidder can demand, and expect to receive, increased transactional certainty. On the other hand, seller resistance to buyer demand for excessive deal protections in exchange for a transaction is simply not credible because loss of the instant deal would mean a material decline in the seller’s undiversified wealth.

Of course, a seller may seek additional consideration in exchange for buyer demands for contractual deal certainty, creating an exchange of certainties. However, in a bilateral negotiation, sellers have no way of discerning a bidder’s private valuation of the seller and, consequently, no way of adequately assessing the value of incremental deal certainty to the bidder. In a bilateral negotiation, the best a seller can expect is a 50–50 split of the transaction surplus. Similarly, a negotiation over incremental consideration in exchange for deal certainty should be indeterminate in terms of expectation. However, the combined problems of a structural bias in favor of acquirers with respect to bargaining power and an inability of the seller to extract private information from the buyer in a bilateral negotiation suggest that it is more likely sellers will systematically underprice deal protections, thus leading to a lower share of the joint value the transaction creates for sellers. At the extreme, because bulletproofing limits potential competition, buyers who are able to bulletproof have an incentive to submit lower initial bids than they might otherwise were their bids vulnerable to post-contractual competition, and thus shift even more of the transaction surplus in their favor.\textsuperscript{26}

Professor Thomas Schelling observed that “if the buyer [or seller] can accept an irrevocable commitment, in a way that is unambiguously visible to the seller [or buyer],  

\begin{itemize}
  \item \textsuperscript{24} Id. at 884.
  \item \textsuperscript{25} With respect to private equity buyers, this logic is slightly counter-intuitive. However, to the extent private equity bidders view every corporation as a stream of cash flows and every potential transaction as a bit of financial engineering, private equity buyers have an almost infinite number of potential targets. Professor Subramanian interviewed a private equity executive who noted how this dynamic works out in practice: “I sit in meetings sometimes with the younger guys and they get all worked up about a situation. ‘Bid whatever it takes,’ they’ll say. I tell them to calm down, because deals are like buses: if you miss this one, there’s another one coming around the corner.” \textit{Guhan Subramanian, Negotiauuctions: New Dealmaking Strategies for a Competitive Marketplace} 99 (2010).
  \item \textsuperscript{26} Anyone who has ever had the experience of shopping in a market in an emerging market country implicitly understands the dynamic at play here. There are prices and values for goods that are not known to you, the outsider. In the absence of some mechanism to cause the market vendor to reveal their private value for the trinket in question, there is no way the visitor can ever expect better than a 50–50 split of the transaction surplus. Quinn, supra note 4, at 878 (citing Paul Milgrom, \textit{Auctions and Bidding: A Primer}, 3 J. ECON. PERSPS. 3, 9 (Summer 1989)). More often than not, the visitor will have no credible way of determining the true value of the trinket and will get fleeced. That is to say, the tourist will overpay, and the vendor will receive a large portion of the transaction surplus in such situations, unless the tourist can find a way to cause the vendor to reveal private information about the true value of the trinket. In any event, one can change the negotiating dynamics by simply walking away. Before you get too far, the vendor will inevitably reveal some information about their valuation and reduce the price involved.
\end{itemize}
he can squeeze the range of indeterminacy down to the point most favorable to him.”

Irrevocable commitments by the seller to the buyer of the type “I will sell to you and no one else” have the effect of squeezing the range of pricing indeterminacy down to points more favorable to the buyer. Such is the expected effect of bulletproofing a transaction in favor of an initial bidder.

In addition to shifting surplus in favor of an initial bidder, bulletproofing also increases the likelihood of socially inefficient transactions. There is no particular reason to believe *ex ante* that an initial bidder is the highest valuing potential buyer for a seller. To the extent successful initial bidders are able to entrench their first mover position with bulletproofing, this may lock out other higher valuing bidders and lock in lower valuing, socially inefficient outcomes. Given these circumstances, a rule against bulletproofing transactions—thus leaving initial bids open to second bids—would likely be an efficiency-enhancing rule.

In addition, some critics of *Omnicare* suggest that a rule against complete deal certainty leaves sellers vulnerable to “losing an acquirer, creating the perception that a target is damaged goods, thus reducing its value.” It is said that bulletproofing a transaction protects sellers from the threat of being perceived as damaged goods. This fear is over-wrought. In fact, if true, it would lead to the unfortunate circumstance that every seller would have to complete a transaction with the first bidder to happen along lest the market believe it is damaged goods for not completing a negotiation over a proposed transaction. That fear is misplaced. To the extent a perception that the seller is damaged goods is a problem, bulletproofing a transaction is not the solution. Bulletproofing commits the *seller to the buyer*, not the buyer to the seller. Once a transaction is in place, sellers are only likely to abandon it to pursue a superior proposal. Contrary to being damaged goods, a seller who terminates a transaction in such circumstances is generally going to create more, not less, value for its shareholders. Precommitment to a particular buyer using bulletproofing is thus not justified by a fear of being perceived of as damaged goods.

On the other hand, precommitment devices—like *Omnicare*'s bright line rule—help parties in a bilateral negotiation set credible negotiating limits in ways that they might be unable to do themselves. Rather than commit to deal exclusively with a particular buyer, *Omnicare*'s mandate creates credible, process-oriented limits that can be value

27. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 24 (1960). Note that Professor Schelling's comments about precommitment relate to a commitment to process and not to a counterparty. The process commitment states that the seller is willing to end up in the hands of whoever follows a predetermined process. The individual commitment states that the seller is willing to end up in the hands of a particular buyer without regard to other potential outcomes. The former statement leads to an efficient outcome with surplus shifted to the seller. The latter makes no such efficiency guarantee and ensures that transaction surplus will remain with the buyer.

28. Of course, some have argued that if a seller ends up in the hands of a low-value initial bidder, second bidders can still purchase the asset from the initial bidder in a subsequent transaction. See, e.g., Stephen Fraidin & Jon Hanson, Toward Unlocking Lock-ups, 103 YALE L. J. 1739, 1802–04 (1993) (arguing in favor of this flipping hypothesis). This assumes that transaction costs associated with the market for corporate control are low and serial transactions are common. See id. at 1792–93, 1803 (discussing transaction costs, their effect on resales, and arguing that “transaction costs are irrelevant”). This is not likely.


30. See Quinn, supra note 4, at 884 (discussing the benefits of a bright line rule against bulletproofing).
enhancing. Process or rules-based precommitment strategies can be important devices for signaling private valuations, moving parties off their bargaining positions and revealing otherwise private information about their valuations of the seller. In revealing private information, credible commitment devices can help ensure both that transaction surplus shifts in favor of sellers (or at least not too far away from sellers) and that the seller ends up in the hands of a buyer with the highest social value.

Of course, if bidders are unable to secure contractual certainty, it does not mean that buyers must accept a world where sellers' transaction commitments are reed-thin, and buyers forever face the prospect of losing transaction-specific investments to free-riding second bidders. Rather, to the extent certainty is required to back up transaction-specific investments, it must come from a different source. First, properly priced termination fees should be sufficient to recoup a buyer's transaction-specific investments. If buyers seek transactional certainty for reasons not related to their specific investments, then buyers should reasonably be expected to pay for that additional certainty. Competition—even if only implicit—for the sellers will result in higher prices for sellers because buyers understand that only by revealing private information about their valuation through preemptive bids can they ensure second bidders stay out. Where the initial bidder has the highest private value for the seller and that value is reflected in a preemptive bid, alternate, lower-valuing bidders will not have an incentive to top the initial bid. Put differently, in the absence of a bulletproof transaction, a rational bidder will exchange transaction surplus for certainty by bidding the price up even in the absence of present competition for the seller.

Bulletproofing may sometimes be defended as innocuous when the buyer is the "only game in town." However, there is reason to believe that bulletproofing a transaction is never as innocuous as one might think. For example, if the probability of a subsequent bid were zero (i.e. the buyer were truly the "only game in town"), then rational buyers would never be willing to offer any increase in price in exchange for bulletproofing. Rather, it is precisely because buyers understand that bulletproofing excludes potential competition and allows buyers to take the seller for less than their private valuations, thus retaining more surplus, that buyers are willing to offer some nominal value in exchange for bulletproofing. Because bulletproofing does not increase a seller's expected share of transaction surplus by more than a nominal amount, it is difficult to argue that bulletproofing generates more value for selling shareholders than the implicit competition one gets from Omnicare's fiduciary requirement.

III. The Go-Shop Puzzle

With all the criticisms of the Omnicare decision and arguments in favor of deal certainty, there remains a significant puzzle: the go-shop provision. Go-shop provisions are by now ubiquitous in private equity transactions. To cite one example, when Dell recently announced that it would be going private in a sale to Michael Dell and Silver Lake Partners, the fact that the negotiated deal included a go-shop provision figured prominently in the deal's description to shareholders. When the terms of the transaction

31. Id. at 943.
were announced, the board’s special committee, following months of negotiations with the buyers, had reached agreement on a price of $13.65 per share. Following the end of the 45-day go-shop period required under the terms of the merger agreement, the special committee was able to identify two additional proposals at potentially higher valuations.

The current ubiquity of the go-shop provision is a puzzle given the widespread articulation of the importance of an “exchange of certainties” to the process of deal-making. In fact, rapid assimilation of go-shop provisions by market players turns many of the objections to Omnicare on their head. In particular, a reasonable observer must be struck by the fact that private equity buyers, who are famously opposed to playing stalking horse in post-signing auctions, now readily agree to go-shop provisions and happily place themselves in harm’s way of falling victim to a winner’s curse.

The development of go-shop provisions raises a question. Why is it that buyers who are otherwise interested in deal certainty—indeed some of the very buyers who criticized Omnicare when it was first handed down for threatening the deal economy—now regularly agree to provisions to permit sellers to actively shop the initial transaction and attempt to generate an active auction? Legal rules cannot explain the ubiquity of these provisions in private equity transactions. The “no single blueprint” language of Barkan resonates in this context. No case or statute requires a board to rely on such provisions to fulfill its fiduciary obligations to shareholders. Unlike Omnicare where the court opted for a bright line rule indicating the far limits of board action, the courts have specifically noted that there are no positive requirements or bright line rules that a board must comply with in order to meet its fiduciary obligations in a sale of control. However, in the absence of such requirements, certain categories of buyers who are otherwise averse to auctions have nevertheless opted to adopt transaction structures, which, on their face, suggest increased buy-side uncertainty.

If it were true that transactional certainty were valuable to buyers, then one would expect buyers to resist seller demands to include go-shop provisions in merger agreements, especially because there is no legal requirement that a seller rely on the device. Perhaps it may have been true at one point that buyers resisted seller demands to engage in a go-shop process, but, by now, go-shop provisions have become commonplace, and such resistance has faded into obscurity. Thus, we are left with the question why buyers who otherwise crave certainty are willing to leave a carefully negotiated transaction to the winds of fate.

Buyers should agree to go-shop provisions only if one of two things are true. First,
the price that buyers offer through the bilateral negotiating process before granting the go-shop provision is sufficiently robust that buyers are confident that the price they offer sellers will be materially larger than any reasonably likely subsequent bid. In effect, knowing that a transaction will include a go-shop, wherein the seller will treat the initial bidder as a stalking horse to generate an active post-signing auction, may incent initial bidders to offer a preemptive bid to deter subsequent bids. In that view, the prospect of competition, even if no competition subsequently emerges, should be sufficient incentive for a bidder to shift transaction surplus to the seller. This should be true because every incremental dollar in transaction surplus a seller receives in a preemptive bid reduces the likelihood of a subsequent topping bid as the initial bidder takes out potential second bidders with lower private valuations of the seller.\(^39\) The effect of precommitting to a post-signing auction process is to cause the initial bidder to generate a preemptive bid to effectively shut out post-signing competition. In this optimistic view of the go-shop provision, the fact that a transaction is \textit{not} bulletproof should result in higher prices for sellers without preventing the buyer with the highest social value from acquiring the seller.

A more pessimistic interpretation of the widespread adoption of go-shop provisions is that go-shop provisions are not truly effective at generating post-signing competition and that buyers understand as much. Because buyers understand that the variety of embedded defenses—such as termination fees, matching rights, board recommendations, and many others—as well as the common value nature of any bidding contest, give the initial bidder the upper hand in any such contest, buyers are less resistant to go-shop provisions. In this interpretation, although the go-shop makes it possible that a second bidder might appear, it is not reasonably likely that one actually will. Defenses already embedded in the merger agreement, as well as the common value nature of prospective second-bidders, provide the acquirer with sufficient assurance that the transaction will close without regard to the go-shop. To the extent the competitive effects of go-shop provisions are no more than illusory, buyers should be willing to give sellers the go-shop provision without threatening perceived transactional certainty. With an ineffective competitive process in place, there is also little incentive for a buyer to reveal its private information to the seller.

In his empirical study of go-shop transactions, Professor Subramanian tested shareholder returns in transactions with go-shop provisions.\(^40\) Professor Subramanian posited:

If go-shop clauses are an effective tool for identifying the highest-value buyer and extracting full value from it, then returns to target shareholders should be higher (or at least not lower) in go-shop deals than in the traditional no-shop route. If instead go-shop deals deter potentially higher-value bidders, then target shareholder returns should be lower in the go-shop sample than in the no-shop sample.\(^41\)

Professor Subramanian found that in transactions with "pure go-shops," or go-shop

\(^{39}\) Quinn, \textit{supra} note 4, at 879.


\(^{41}\) \textit{Id.} at 751.
provisions in transactions where there was no pre-signing market check, shareholder returns were significantly larger than in similar transactions without go-shop provisions.\textsuperscript{42} Contrast that with transactions with "add-on go-shops," or transactions with a pre-signing market check as well as a post-signing go-shop, for which shareholders returns are indistinguishable from similar transactions without go-shops.\textsuperscript{43} Although Professor Subramanian does not provide cumulative shareholder return data for management buyouts ("MBOs") with go-shops, he does observe that in none of the MBOs with go-shops was there a subsequent topping bid, whereas 17\% of transactions with pure go-shops and only 5\% of transactions with add-on go-shops had competing bids.\textsuperscript{44}

Professor Subramanian's results suggest that the proper interpretation of go-shop provisions is that where parties use them in lieu of a market check, bidders—faced with uncertainty—attempt to buy certainty through the use of preemptive bidding. Buyers who still value certainty will only agree to go-shop provisions if they are reasonably confident that, notwithstanding the contractual uncertainty brought on by the go-shop provision, the seller will have the economic certainty of closing the transaction.

This conclusion is consistent with the approach to understanding Omnicare that I offered some years ago in the pages of this Journal.\textsuperscript{45} Rather than inhibit transactions, when parties are required to structure their transactions in a manner that leaves them open to viable second bids, initial bidders have an economic incentive to shift transaction surplus in favor of the sellers through preemptive bidding, thus raising prices for sellers and ensuring that sellers will end up in the hands of owners generating the highest possible social welfare.

IV. LIVING WITH—OR WORKING AROUND—OMNICARE

In the years since Omnicare, few if any of the parade of horribles that accompanied criticisms of the ruling have come to pass. In fact, practitioners appear to have learned to live with and work around Omnicare's charge not to contract for complete transaction certainty. Transactional innovations deployed since Omnicare pay lip service to the ruling by technically complying with a narrow interpretation while still ensuring the maximum amount of certainty for buyers possible.

While reliance on voting commitments to secure a majority of votes as in Omnicare may be troublesome, the use of "fall away" voting commitments is a post-Omnicare transactional innovation that has become relatively common.\textsuperscript{46} Where the shareholder base is reasonably concentrated amongst directors or a control group, as is often the case in private companies, fall away commitments are a go-to strategy for locking up the vote required to protect a transaction. Fall away commitments permit acquirers to secure voting agreements sufficient to approve the merger agreement while still technically complying with Omnicare. Some portion, but not all, of the votes committed under the

\textsuperscript{42} Id. at 730–31.
\textsuperscript{43} Id.
\textsuperscript{44} Id. at 731, 747.
\textsuperscript{45} See generally Quinn, supra note 4.
\textsuperscript{46} For example, the sellers in Synthes agreed to fall away commitments of the type described here. In re Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1030 (Del. Ch. 2012).
voting agreements are subject to a contingency that permits the obligation to vote in favor of the acquirer’s transaction to “fall away” in the event a superior offer is presented to the board following signing, but before the shareholder vote is held.

The size of the vote subject to these contingencies is usually sufficient to bring the total vote irrevocably committed to the preferred transaction down to something less than 50%. With the majority commitments in place, the voting agreements provide the buyers with adequate assurance that a controlling block will vote in favor of the initial transaction without presenting shareholders a fait accompli. In the event a subsequent bid appears, the percentage permitted to fall away is just small enough to make it mathematically possible for a superior bid to succeed.

The board designs these fall away commitments to comply with the formal requirements of Omnicare while still providing the acquirer with a maximum of protection from a potential subsequent bid. Typically, managers or other shareholders who may be emotionally vested in the initial bid are otherwise predisposed to pursue the initial bid notwithstanding second bids own contingent shares. Consequently, there is every reason to believe that although a successful topping bid may be theoretically possible, it is not realistically attainable. In that sense, these fall away provisions formally comply with Omnicare’s rule while not giving much by way of real protection for the initial bidder.

Another post-Omnicare innovation is the quick delivery of written consents. Where controlling or majority shareholders are easily accessible to the seller’s board, sellers can eschew a shareholder meeting and substitute an action by written consent pursuant to Section 228 of the Delaware General Corporate Law (DGCL). Unlike statutory voting requirements, there is no required notice prior to undertaking a shareholder consent. Therefore, it is possible to sign a merger agreement and then, nearly simultaneously, to receive shareholder approval via written consent for the merger agreement. The board intends immediate or near immediate delivery of shareholder consent to head off any potential second bid before it has a chance to appear. Indeed, the shareholders deliver their consents even before the transaction is announced to the public. As a consequence, the quick consent strategy formally complies with the requirements of Omnicare without giving up much in the way of transactional certainty.

The quick consent strategy is coercive of selling shareholders and intended to be so. Buyers will typically negotiate the right to terminate without paying a fee in the event the board does not deliver consents sufficient to approve the merger agreement with the acquirer within a designated window, typically 24 hours. In such a situation,
shareholders will be under extreme pressure to consent quickly to the merger agreement or risk losing the transaction altogether. The board will present minority shareholders who are likely not at the negotiating table with a *fait accompli* after the acquirer secures written consents sufficient to approve the merger agreement.

Notwithstanding the Chancery Court’s opinion in *OPENLANE*, the quick consent strategy should be preclusive. Although it is possible that a subsequent bid might appear during the interim period between delivery of consents and closing, unless the seller’s board has negotiated a right to terminate the merger following shareholder approval and before closing, the transaction may be practically immune to a topping bid. The quick consent strategy is preclusive of second bids by design. Transaction planners rely on the fact that post-consent boards have no further statutory obligations, and therefore, the law might not require them to consider a topping bid that appears during the lengthy interim period between signing and closing. Of course, securing a vote in favor of the transaction does not terminate any of the board’s fiduciary obligations to the corporation or its shareholders between signing and closing. Those duties are unremitting.

Elsewhere, I have tried to document the development of matching rights in recent years. Matching rights span a range from explicit requirements to engage in good faith negotiations with the initial bidder upon the receipt of a superior proposal to broad information rights for the initial bidder. Matching rights that require good faith negotiation are quite specific about their purpose—to ensure that in any bidding contest the initial bidder has the last opportunity to offer up a bid. To the extent any transaction or bidders demonstrate common value attributes, having the last look can be an extremely powerful deterrent to second bids. Indeed, mere information rights or built-in delays can also be protective. In general, a broad conception of matching rights uses these delays to explicitly or otherwise create opportunities for the initial bidder to match a superior offer before the seller’s board can terminate.

Although there are economic arguments to suggest that in some circumstances rights of first refusal can powerfully deter second bids, courts have nevertheless regularly dismissed matching rights as “modest deal protection measures.” Of course, the suffering the perception of being damaged goods, the coercive aspect of the quick-consent strategy is a little more than ironic. The acquirer can use the termination right that accompanies the quick-consent strategy as a threat to turn the seller into damaged goods if the seller’s shareholders waive within the first hours of signing an agreement.


53. Section 251(d) permits boards to include provisions in merger agreements reserving unto boards the right to terminate the merger agreement at any point prior to the filing of the Certificate of Merger with the Secretary of State. Del. Code Ann. tit. 8, § 251(d) (2010). There is, of course, a strong argument that even without such a provision, boards under certain circumstances may be required to terminate an existing agreement in order to pursue a subsequent bid. However, in the absence of a provision like § 251(d), a board that agrees to do so may find itself in breach of the agreement leaving the corporation open to damages in contact.


55. *In re 3Com S’holder Litig.*, Civil Action No. 5067–CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009) (characterizing matching rights as “standard [] terms” in merger agreements); *In re Toys “R” Us*, Inc., 877 A.2d 975, 1017 (Del. Ch. 2005) (noting that matching rights are “common contractual feature[s]”); *In re Pennaco Energy, Inc. S’holder Litig.*, 787 A.2d 691, 707 (Del. Ch. 2001) (rejecting plaintiff challenges that the combination of termination fees and matching rights were anything more than “modest deal protection
ubiquity of these measures belies the court’s dismissiveness of matching rights as effective deal protections. If one supposes that matching rights were no more than boilerplate, or mere surplusage, then one might expect to see variability with respect to their use. However, there is very little variability. In fact, there is near uniformity in the use of information rights and other forms of matching rights. Their usage suggests that buyers value their presence in merger agreements. To the extent such protections become common or standard terms, it is unlikely that sellers will ever be able to negotiate incremental increases in value in exchange for the added protection they afford buyers.

In recent years, parties have also become increasingly creative in their use of standstill agreements as deal protections. The standstill agreement strategy falls under the broad category of “exclusivity measures” and its designers intended it to prevent selling boards from considering or negotiating a superior offer with a potential rival acquirer. The parties typically negotiate standstill agreements to include a contractual prohibition against attempting to pursue the target in anything other than a friendly transaction. The purpose of this restriction is to ensure that the seller’s board remains in control of the negotiated transaction by cutting off the ability of the bidder to go around the board straight to the shareholders via a tender offer.

The economic argument in favor of the standstill agreement was recently described by Chancellor Strine in *Ancestry.* The Chancellor observed that a properly motivated and informed board might believe that it is important—even necessary—to have auction rules that require bidders to put up their best and final bid, rather than engage in a series of “negotiauctions.” In doing so, the standstill agreement permits a board to establish credible rules of the game and promote an orderly auction. Bidders who low-ball targets may find themselves contractually prohibited from launching a subsequent hostile bid and losing an opportunity to acquire the seller. Sellers who use standstills in this way are engaging in precommitment strategies intended to maximize the value from a pre-signing auction. Notice, of course, that this structure is process-oriented and not outcome-oriented.

Standstills can become powerful defensive measures in post-signing when boards deploy them to prevent an unsuccessful initial bidder from asking for a waiver and preventing sellers from waiving any standstill provisions with respect to any potential bidders. To the extent these “don’t ask–don’t waive” provisions require boards to keep their eyes and ears closed to any second bids, such provisions may be preclusive.

---

56. Quinn, supra note 4, at 869 (describing the general category of exclusivity measures as deal protections).


58. Id. A negotiauction is a hybrid strategy of bilateral negotiations and competitive, auction-like arrangements. SUBRAMANIAN, supra note 25, at 126–27. Professor Subramanian argues that hybrid strategies like negotiauctions lead to higher prices for sellers. Id.

59. In re *Topps S’holder Litig.*, 926 A.2d 58, 91 (Del. Ch. 2007). A properly deployed standstill agreement is an apt example of precommitment in action. The buyer and the seller irrevocably commit to a process that has the effect of drawing information out of the buyer about its private valuation of the seller, thus increasing the value of the transaction to the seller.
V. THE NEW DEAL PROTECTION JURISPRUDENCE

In general, the Chancery Court has not been enthusiastic about *Omnicare*'s more controversial holding. In fact, with few exceptions the court has regularly sought to pare back and limit the application of the ruling. The Chancery Court's restrained approach to *Omnicare* is more of a type with Delaware's largely secular move away from substantive review of the decision-making process of boards. For example, at one point the legal community engaged in a vibrant debate about the proper limits of board action in the context of the hostile tender offer. This debate focused on the question of the proper contours of the *Unocal* standard. This vibrant debate is now largely over. The court has denuded *Unocal*'s threat prong but left the proportionality prong, leaving only shareholder coercion as a workable standard.

In the years immediately following *Unocal*, no one did more than Chancellor William Allen to grapple with the meaning of the decision and apply its principles to the messy facts that present themselves in the courtroom. In *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, Chancellor Allen first applied *Unocal* to a board's defensive tactics in response to an unsolicited offer. The board of Anderson, Clayton developed an economically coercive alternative offer for shareholders in response to an unwanted offer from Bear, Stearns & Co., Inc., Gruss Petroleum Corp. and Gruss Partners (collectively "BS/G"). While agreeing with the board that BS/G's offer represented a mild threat, Chancellor Allen ruled that the board's preferred response, an economically coercive alternative that would cause all rational shareholders to eschew the BS/G offer was coercive and therefore not reasonable in response to the threat posed. Rather than provide shareholders with a choice in the face of an unsolicited offer, the board's alternative was designed to effectively take away shareholder autonomy with respect to the decision whether or not to accept the bidder's offer. For Chancellor Allen, eliminating shareholder autonomy went too far.

60. Academics and practitioners have lined up on both sides of this debate. Those arguing for allocating more authority to shareholders over the management of the corporation include Ronald J. Gilson, Lucian Bebchuk, and Daniel Fischel, among many others. Those arguing for a more limited role for shareholders in the management of the corporation include Martin Lipton and Stephen Bainbridge.


63. *Id.* at 112–15.

64. *Id.* at 105.

65. The court acknowledged that:

[1]he BS/G offer poses a "threat" of any kind (other than a threat to the incumbency of the Board) only in a special sense and on the assumption that a majority of the Company's shareholders might prefer an alternative to the BS/G offer. On this assumption, it is reasonable to create an option that would permit shareholders to keep an equity interest in the firm, but, in my opinion, it is not reasonable in relation to such a "threat" to structure such an option so as to preclude as a practical matter shareholders from accepting the BS/G offer.

*Id.* at 113.

66. *Id.*

67. *AC Acquisitions Corp.*, 519 A.2d at 115. Furthermore, the court stated:
In *AC Acquisitions*, Chancellor Allen engaged in more than just a cursory review of board process. In what would become a trademark of the Chancery Court’s approach to the application of *Unocal*, the court engaged in a substantive analysis of the threat proposed by the unsolicited offer and made a determination about whether the board’s response was reasonable in relation to the threat.\(^6\) In these early years of implementation by the Chancery Court, the intermediate standard exhibited a degree of plasticity that would permit trial courts to engage in substantive review of director decisions and provide for a real threat of sanction in the event of board over-reach.\(^6\)

In *Capital City Associates v. Interco Inc.*, Chancellor Allen determined whether the adoption of a board sponsored alternative transaction was reasonable in response to an unwanted bidder’s offer.\(^7\) Chancellor Allen adopted a version of Professors Gilson and Kraakman’s formulation of substantive coercion and approach to the intermediate standard when he expounded on the nature of cognizable threats to the corporation under *Unocal*.\(^7\) Allen identified two threats to the corporation. The first set of threats is the threat to voluntariness of shareholder choice.\(^7\) Offers that are structurally coercive, like front-end loaded tender offers, coerce stockholders to tender against their will and are thus cognizable threats.\(^7\) The second set of cognizable threats stems from inadequate, but otherwise non-coercive offers.\(^7\) The threat in such cases is not necessarily that a shareholder will make an irrational decision to tender into a low-ball offer, but that in the absence of any negotiating leverage, a target board might be unable to engage in active negotiating to refuse an initial offer and extract a higher offer or have sufficient time to generate a more valuable alternative for shareholders to choose.\(^7\) In any event, where the threat is the inadequacy of price, there are natural limits to the use of defensive measures intended to deprive shareholders of the right to choose the offer for themselves.\(^7\)

As Chancellor Allen developed and applied the new intermediate standard, the substantive nature of the threat determined the limits of a reasonable response. In the face

---

Plaintiffs contend to the contrary that the Company Transaction was deliberately structured so that no rational shareholder can risk tendering into the BS/G offer. Plaintiffs say this for two related reasons: (1) Stockholders tendering into the BS/G offer have no assurance that BS/G will take down their stock at $56 a share since that offer is subject to conditions including a minimum number of shares tendered and abandonment of the Company Transaction; and (2) Tendering shareholders would thereby preclude themselves from participating in the “fat” front-end of the Company Transaction and risk having the value of all their shares fall very dramatically. In such circumstances, plaintiffs say, to characterize the Board’s action as an attempt to preserve the ability of shareholders to choose is a charade. They claim the Company Transaction is coercive in fact and in the circumstances presented, improperly so in law.

*Id.* at 113.

\(^6\) *Id.*


\(^7\) *Capital City Assocs. v. Interco Inc.*, 551 A.2d 787, 789 (Del. Ch. 1988).

\(^7\) *Id.* at 796.

\(^7\) *Id.* at 797.

\(^7\) *Id.*

\(^7\) *Id.*

\(^7\) *Id.* at 798.

\(^7\) *Id.*
of a structurally coercive offer that robs shareholders of their autonomy, courts should grant boards significant leeway in determining appropriate defenses. On the other hand, in the face of milder threats like substantive coercion, the court should be more measured in permitting board discretion to resist offers. For example, although the court would likely permit a shareholder rights plan in order to assist a target board to negotiate a higher price for a seller where the threat identified by the board was an inadequate offer, Chancellor Allen made it clear that relying on a rights plan to permanently foreclose autonomous shareholders from an opportunity to choose an unsolicited offer would go too far given the nature of the threat.

Seeking that careful balance between shareholder choice on the one hand, and the obligation of the boards to act in the best interests of shareholders and the corporation on the other, is a hallmark of Chancellor Allen’s approach to Unocal. On the one hand, courts are appropriately hesitant to become too involved in reviewing the substance of business decisions. On the other hand, where boards act to defend the corporation against threats, the court is in a unique position to moderate the cognitive biases that are the essential motivators of Unocal. Chancellor Allen recognized that for the intermediate standard to function as it was intended, judges would be required to investigate and pass judgment on the substance of board decisions with respect to defensive measures. Most of the Chancery Court opinions in the years after Unocal followed some form of Chancellor Allen’s approach to balancing these interests.

The Delaware Supreme Court, however, did not follow Chancellor Allen’s approach. When in Paramount Communications, Inc. v. Time, Inc. the court was asked to rule on the appropriateness of Time’s response to Paramount’s unsolicited offer, it took the opportunity, in dicta, to reject the Chancellor’s approach to the intermediate standard:

Plaintiffs’ position represents a fundamental misconception of our standard of review under Unocal principally because it would involve the court in substituting its judgment as to what is a “better” deal for that of a corporation’s board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper Unocal analysis.

Rather than limiting the scope of cognizable threats as in Interco, the Delaware Supreme Court adopted an approach to the intermediate standard that was highly deferential to a board’s decisions to identify a broader set of threats to the corporation, including inadequacy of price, shareholder mistake, uncertainty with respect to the offer, and

---

77. Id.
78. Id.
79. Among others, see Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 278, 289 (Del. Ch. 1989) (observing that “where there has been sufficient time for an alternative to developed and proposed to shareholders the threat . . . to shareholders . . . seems almost without substance”); Grand Metro. Public Ltd. Co. v. Pillsbury Co., 558 A.2d 1049, 1060 (Del. Ch. 1988) (agreeing with and following Chancellor Allen’s analysis in Interco with respect to shareholder choice); Robert M. Bass Grp., Inc. v. Evans, 552 A.2d 1227, 1241–42 (Del. Ch. 1988) (identifying the development of a management-sponsored alternative as a reasonable response to the threat of an inadequate price).
81. Id. at 1151.
timing of the offer. At the time, the Court defended deference to board decisions as necessary to ensure the "flexibility" of the Unocal standard. The Court made it clear in adopting a deferential position with respect to board actions that the Unocal standard was "not intended as an abstract standard; neither [was] it a structured and mechanistic procedure of appraisal." Although it may not have realized it at the time, in allocating what it called a high degree of flexibility to boards with respect to their identification of cognizable threats to the corporation, the court was ensuring a high degree of mechanistic application. In the years since, identification of "threats" to the corporation devolved into little more than asserting an inadequate or low-ball offer with support from investment banker opinions. With Paramount, the court began a steady move away from the substantive intermediate standard in favor a more conservative, less flexible, approach to application of the standard.

Later, when the Delaware Supreme Court revisited the intermediate standard in Unitrin, Inc. v. American General Corp., the court demonstrated its new adherence to a more procedurally-oriented understanding of Unocal. The Unitrin court reviewed a decision by then-Vice Chancellor Chandler who found that when the Unitrin board adopted a poison pill, advance notice bylaw provisions, and a share repurchase plan, the board had violated its duties under Unocal. Although the board had properly identified a mild threat in the form of a low-ball bid and potential antitrust challenges to completing a potential transaction with American General, Vice Chancellor Chandler struck down the share repurchase program as an unreasonable response in relation to the threat. Given that the board had already put a pill and advance notice bylaw provisions in place, the share repurchase plan was not necessary to accomplish the goal of protecting Unitrin from the mild threat of an inadequate offer. In determining whether the defensive measures were reasonable in relation to the threat, Vice Chancellor Chandler looked at the substance of the threat as well as the substance of the response. The Vice Chancellor reasoned that the repurchase program was not necessary to accomplish the goal of protecting Unitrin from the mild threat of an inadequate bid. Therefore, the plan was not reasonable in relation to the

82. Id. at 1153.
83. Id.
84. Id.
86. See id. at 1375-89 (applying the Unocal test to the facts of the case).
88. Id.
89. Id. at *5-10.
90. Unitrin, 651 A.2d at 1377. Regarding the Chancery Court’s decision in the case, the Delaware Supreme Court wrote:

The Court of Chancery framed the ultimate question before it as follows:

This case comes down to one final question: Is placing the decision to sell the company in the hands of stockholders who are also directors a disproportionate response to a low price offer to buy all the shares of the company for cash?

The Court then answered that question:

I conclude that because the only threat to the corporation is the inadequacy of an opening bid made directly to the board, and the board has already taken actions that will protect the
threat. Vice Chancellor Chandler's approach to *Unocal* reflected Allen's: a conservative approach that board defensive responses should be limited to the minimum required to achieve the desired ends.

In *Unitrin*, the court adopted the view that "substantive coercion" is a legally cognizable threat. However, in rejecting then-Vice Chancellor Chandler's opinion below, the court denuded substantive coercion of much of the meaning Professors Gilson and Kraakman gave it. That is, the court identified the potential threat that shareholders might tender their shares in ignorance or based upon a mistaken belief (substantive coercion), but did not require that a board respond to those threats by addressing them directly through an information campaign, as Professors Gilson and Kraakman and the Chancery Court recommended. Going forward, the doctrine of substantive coercion would permit boards to identify inadequate bids as threats to corporate policy without the substantive limits on board action that Professors Gilson and Kraakman proposed.

Indeed, the Delaware Supreme Court refused to impose any sort of reasonable restriction on board action when it ruled that the Chancery Court had incorrectly found one of the Unitrin board's defenses disproportionate to the threat faced by the corporation. The Chancery Court had ruled that a share repurchase program instituted as

stockholders from mistakenly falling for a low ball negotiating strategy, a repurchase program that intentionally provides members of the board with a veto of any merger proposal is not reasonably related to the threat posed by American General's negotiable all shares, all cash offer.

In explaining its conclusion, the Court reasoned that:

I have no doubt that a hostile acquiror can make an offer high enough to entice at least some of the directors that own stock to break ranks and sell their shares. Yet, these directors undoubtedly place a value, probably a substantial one, on their management of Unitrin, and will, at least subconsciously, reject an offer that does not compensate them for that value. . . . The prestige and perquisites that accompany managing Unitrin as a member of its Board of directors, even for the non-officer directors that do not draw a salary, may cause these stockholder directors to reject an excellent offer unless it includes this value in its "price parameter."

Id.

91. *Id.* at 1384 ("[T]his Court held that the Time board of directors had reasonably determined that inadequate value was not the only threat that Paramount's all cash for all shares offer presented, but was also reasonably concerned that the Time stockholders might tender to Paramount in ignorance or based upon a mistaken belief, i.e., yield to substantive coercion.").

92. Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 523 (Winter 2002) ("[T]he word 'substantive coercion' has been used to describe how a court might (by squinting) conclude that shareholders who wished to accept a tender offer were coerced into doing so, merely because the target's board considered the offer price to be too low.").

93. *Unitrin*, 651 A.2d at 1384 ("Courts, commentators and litigators have attempted to catalogue the threats posed by hostile tender offers. Commentators have categorized three types of threats: (i) opportunity loss . . . [where] a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management [or, we would add, offered by another bidder]; (ii) structural coercion, . . . the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions; and (iii) substantive coercion, . . . the risk that shareholders will mistakenly accept an underpriced offer because they disbelieve management's representations of intrinsic value." (quoting Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 (1989) (alterations in original) (internal citations omitted)).
a belt-and-suspenders defense was disproportionate in relation to the threat because it was "unnecessary" to achieve the aim of defending the corporation and shareholders against the threat of an inadequate bid given the presence of a shareholder rights plan and an advance notice provision that had already been implemented.  

Abandoning any traditional principle of conservatism, the court overturned an approach to proportionality that tied the nature of appropriate responses to the threats they were meant to address. Going forward, the courts would no longer engage in an intensive investigation of facts to determine whether defensive measures were disproportionate in relation to the threat. Instead, the court would work with heuristics to determine proportionality. Disproportionate defenses are those, according to the Unitrin court, that are coercive, preclusive, or otherwise outside a range of reasonableness. Coercive defenses are those that are "aimed at 'cramming down' on its shareholders a management-sponsored alternative." Defensive measures are preclusive of shareholder action when they make shareholder action "mathematically impossible or realistically unattainable." Measures that are neither coercive nor preclusive of shareholder action but lie outside a range of reasonableness may also be disproportionate responses to threats. The new proportionality announced in Unitrin is thus a very different conception of proportionality, and one that favors procedural review over substantive review.

Notwithstanding the Delaware Supreme Court's adoption of its substantive coercion doctrine and its preference for a high degree of deference to board decisions to adopt defenses against unsolicited tender offers, the Chancery Court continued to struggle with application of the intermediate standard in exactly those situations. For example, in In re Gaylord Container Corp. Shareholder Litigation, Vice Chancellor Strine questioned whether it was even possible for a non-coercive tender offer, even an inadequate one, to...

94. Id. at 1385.
95. In the process, the court ignored its own admonition to tie defensive responses to the identified threats:

Pursuant to the Unocal proportionality test, the nature of the threat associated with a particular hostile offer sets the parameters for the range of permissible defensive tactics. Accordingly, the purpose of enhanced judicial scrutiny is to determine whether the Board acted reasonably in "relation . . . to the threat which a particular bid allegedly poses to stockholder interests."

Id. at 1384 (quoting Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989) (alteration in original)).
96. Professors D. Gordon Smith and Robert B. Thompson later asserted that Unocal proportionality review was a "dead-letter." Thompson & Smith, supra note 69, at 286.
97. Unitrin, 651 A.2d at 1387-88.
98. Id. at 1387.
99. Id. at 1389.
100. Id. at 1388. The court later explained:

Even if a defense is not preclusive, the court must strike down the defense if the directors fail to persuade the court that that defense was within the "range of reasonableness." That is, Unitrin left room for a determination that a non-preclusive, non-coercive defensive measure was nonetheless unreasonable in light of the threat faced by the corporation. As we shall soon see, this "range" comes into play in this case, according to Yucaipa.

Yucaipa American Alliance Fund II, LP v. Riggio, 1 A.3d 310, 337 (Del. Ch. 2010).
be a threat to the corporation. In doing so, Vice Chancellor Strine reiterated doubts that Vice Chancellor Allen raised earlier in TW Services, where Allen identified a tender offer as a question of shareholder property rights and not one that necessarily implicates board rights. Vice Chancellor Strine also questioned whether boards, when they block unsolicited tender offers, have the right to reach out to impinge on shareholder autonomy in the form of property rights.

The importance of shareholder autonomy to the question of the limits of board authority has been a regular theme in the Chancery Court since it first began struggling with implementing the intermediate standard. Shareholder autonomy will ultimately become the reed upon which the shell of Unocal will rest. Central to the shareholder autonomy framework is the respect that the law provides to uncoerced shareholder decisions to purchase and sell shares. The law generally presumes shareholders are perfectly capable of making decisions to buy and sell their shares. In fact, during periods of severe market stress, the law has little to say about shareholder decisions to sell at prices below the intrinsic value of the firm. Indeed, boards do not generally attempt to prevent shareholders from selling their shares when markets underprice or otherwise misprice the shares. In the words of Chancellor Strine, the law does not generally “ascribe rube-like qualities to stockholders” when it comes to their investment decisions.

The tender offer and decisions by shareholders whether to accept a non-coercive tender offer is an obvious anomaly in the takeover jurisprudence. Here, the courts are willing to permit boards to step in between a shareholder and an offer, limited

101. In re Gaylord Container Corp. S’holders Litig., 747 A.2d 71, 78 (Del. Ch. 1999). Again, the court explained:

Nor is it clear to me why a board’s action to interpose itself between stockholders who are ordinarily free to sell their shares, and purchasers who are ordinarily free to buy those shares—if improper—works an injury on the corporation as an entity. In circumstances where directors act to protect against inadequate acquisition offers, they are acting to protect stockholders from selling at an inadequate price. If they act improperly and prevent stockholders from receiving a favorable offer, it is difficult to conceive how the corporation qua corporation is harmed. It is not at all difficult—in fact, it is quite obvious—how the stockholders qua stockholders are injured.


103. Justice Strine wrote:

In a capitalist nation like ours, I would think it inarguable that an owner of stock has the right to sell her property, free and clear of unreasonable restrictions imposed by the directors of the corporation she partly owns. Why should our law not recognize such an unquestionable right as individual?

In re Gaylord Container Corp., 747 A.2d at 78–79.

104. See, e.g., In re Topps Co. S’holders Litig., 926 A.2d 58, 92 (Del. Ch. 2007); (struggling to apply the intermediate standard in deciding whether to grant a preliminary injunction on a proposed merger; Mercier v. Inter–Tel (Delaware), Inc. 929 A.2d 786, 807–09 (Del. Ch. 2007) (addressing problems with the intermediate standard); Chesapeake v. Shore, 771 A.2d 293, 328 (Del. Ch. 2000) (expressing concern with using the substantive coercion doctrine).

105. Chesapeake, 771 A.2d at 328 (“Our law should also hesitate to ascribe rube-like qualities to stockholders. If stockholders are presumed competent to buy stock in the first place, why are they not presumed competent to decide when to sell in a tender offer after an adequate time for deliberation has been afforded them?”).
only by *Unocal*’s proportionality prong.

*Unocal*’s proportionality prong is dominated by its heuristics. Although there are three disjunctive components to the prong (coercion, preclusivity, and a “range of reasonableness” analysis), there is little doubt that the coercion and preclusivity heuristics have been the dominant tools that courts rely on. Courts have been reluctant to deploy “range of reasonableness” analyses, perhaps because it requires judges to conduct a substantive review of the efficacy of deal protections of the type Chandler undertook in *Unitrin* and Allen in *Interco* before him. Consequently, coercion and preclusivity are left bearing the burden of proportionality review.

That changed in 2010 when the Delaware Supreme Court decided *Versata Enterprises, Inc. v. Selectica Inc.* In *Versata*, the court attempted to provide additional clarity about *Unocal*’s proportionality prong by restating its understanding of the preclusivity heuristic. It succeeded, however, only in stripping preclusivity of much of its meaning. Justice Holland, who wrote the court’s opinion in *Unitrin* clarified the Court’s understanding of preclusivity, which was earlier defined by the “mathematically possible or realistically unattainable standards” in the following way:

> A successful proxy contest that is mathematically impossible is, *ipso facto*, realistically unattainable. Because the “mathematically impossible” formulation in *Unitrin* is subsumed within the category of preclusivity described as “realistically unattainable,” there is, analytically speaking, only one test of preclusivity: “realistically unattainable.”

The court appeared to adopt the more liberal view of preclusivity as between the two when it adopted the realistically unattainable standard; in fact, the court, as it had done previously with the substantive coercion doctrine, used an exercise to clarify its position to rob the announced standard of any meaning.

The question that the court was asked to resolve in *Versata* was whether an effective staggered board, combined with a poison pill, is a “preclusive” defensive measure and therefore unreasonable in response to the threat posed. The plaintiffs offered uncontroverted evidence that, during that period, no bidder had ever successfully overcome the effective staggered board/poison pill defense to acquire control of a target. Given that evidence, it would be unrealistic for a potential acquirer to believe *ex ante* that they would be able overcome this combination of defensive measures. That is to say, the evidence before the court suggested strongly that the goal of overcoming an effective staggered board/poison pill combination was not realistically attainable.

However, the Delaware Supreme Court differed with this conclusion. It reasoned that “[t]he fact that a combination of defensive measures makes it more difficult for an acquirer to obtain control of a board does not make such measures realistically

106. Elsewhere, I have urged the courts to revitalize the “range of reasonableness” analysis in their review of deal protection measures. See Quinn, supra note 54, 1048–49 (urging courts to find the use of matching rights outside the range of reasonableness).
108. *Id.* at 601.
109. *Id.*
110. *Id.* at 603.
111. *Id.* at 601–02.
unattainable, i.e., preclusive.”\textsuperscript{112} In other words, the mere fact that no buyer has ever successfully overcome the combined effective staggered board/poison pill defense does not mean it is impossible. Theoretically, it is possible that a determined second bidder will pull off the two consecutive proxy contests required to overcome the defense. This new understanding of the term “realistically unattainable” seems odd from a plain English point of view. If, over the past three decades, no bidder had ever successfully overcome the effective staggered board/poison pill defense, then a bidder’s declaration that it is determined to be the first to overcome the defense is not realistic. To be realistically attainable, there should be some reasonably accessible evidence that someone in the recent past has been able to achieve the goal proscribed.

Here, there is absolutely no evidence that the object is attainable. That the court nevertheless concluded that overcoming the defense was realistically attainable suggests a new definition for the term. In Versata, the court effectively defined realistically attainable as “theoretically possible.” To the extent the court rules that theoretical, nonrealistic deal protection measures, which leave an opportunity for a topping bid, are not preclusive, a broad brush of very strong deal protections then become possible. OPENLANE’s quick-consent strategy was not preclusive because it was theoretically possible, though not realistic, because during the 24-hour period between signing and delivery of the consents, a second bidder might have appeared and attempted to top the incumbent bid.\textsuperscript{113} Similarly, there is a strong argument that large termination fees are not preclusive\textsuperscript{114} notwithstanding the fact that a large fee is payable before a determined second bidder with a materially higher valuation can supplant an incumbent bidder. Although large termination fees might realistically deter higher valuing second bidders from coming forward, because large termination fees do not preclude shareholders from accepting a higher bid, they may not be preclusive under the Delaware Supreme Court’s post-Versata interpretation of the term. Applying the Delaware Supreme Court’s understanding of the preclusivity standard suggests a shrinking space for the courts to decide.\textsuperscript{115}

With this shrinking space, one is left to wonder what is left of the Unocal standard. The Delaware Supreme Court’s empty substantive coercion doctrine has left the threat analysis wanting. With respect to Unocal’s proportionality prong, preclusivity has been defined nearly out of existence for the purposes of shareholders seeking to limit a board’s ability to adopt defensive measures that will have the effect of deterring subsequent bidders. The “range of reasonableness” analysis remains mostly an afterthought to justify deal protections rather than to exclude them. This leaves precious little space for judicial maneuvering. Only shareholder coercion remains a viable area for judicial action.

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{112} Versata, 5 A.3d at 604.
\item\textsuperscript{113} In re OPENLANE, Inc. S’holders Litig., C.A. No. 6849-VCN, 2011 WL 4599662, at *3 (Del. Ch. Sept. 30, 2011).
\item\textsuperscript{114} I am not arguing that certain termination fees are not coercive. For example, a termination fee paid on a ‘naked no’ vote might well be coercive if it is large enough.
\item\textsuperscript{115} I am not the first to observe this shrinking space. Professors Thompson and Smith observed that “the Unocal standard reflect[s] a much more passive judicial role that seems to distrust shareholder decision-making and to prefer that of directors.” Thompson & Smith, supra note 69, at 262. Professors Thompson and Smith also note in their study of litigation from 1995 to 2001 that the courts relied on the “range of reasonableness” analysis only twice and observe that a judge’s reliance on the coercion and preclusivity heuristics are understandable. Id. at 294.
\end{enumerate}
\end{footnotesize}
In addition to developments in the *Unocal* doctrine, the court's naturally conservative tendencies have given rise to what might be understood as a new preliminary inquiry. Preliminary inquiries, like *Unocal*, are extremely important because they are usually outcome-determinative. In the context of transaction-related litigation, where there is no obvious prospect of a topping bid for the seller at the time the board approves the merger agreement, courts are reluctant to second-guess board decisions to enter into an agreement and protect it. I will not dwell on this point more than to suggest that the competitive posture of a transaction affects the degree of scrutiny and the aggressiveness of the court in reviewing board decisions to adopt deal protections. If the transaction in question is one in which there are no obvious second bidders, then the courts will be highly deferential to selling boards' decisions to protect the transaction from a second bid, provided shareholders have the opportunity to vote "no" in an uncoerced shareholder vote. Notwithstanding a highly imperfect process, courts remain reasonably confident that shareholders are able to determine their own best interests. Provided boards make full disclosure of the imperfections of the process and shareholders are not coerced, courts are willing to defer to their conservative nature and permit shareholders to decide whether to accept a premium offer. As a consequence, where shareholders are presented with a single offer that management prefers, the only constraint on board action under *Unocal* is coercion.

116. For its part, the *Omnicare* majority also noted that its review of deal protection measures will vary depending on the competitive posture of the transaction before it when it stated that when deal protection measures are taken "against an existing bidder... the latitude a board will have in either maintaining or using the defensive devices it has adopted to protect the merger it approved will vary according to the degree of benefit or detriment to the stockholders' interests that is presented by the value or terms of the subsequent competing transaction." *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 933 (Del. 2003).

117. See, e.g., *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432, 450–51 (Del. Ch. 2012) ("I share the plaintiffs' frustration that the traditional tools of equity may not provide the kind of fine instrument that enables optimal protection of stockholders in this context. The kind of troubling behavior exemplified here can result in substantial wealth shifts from stockholders to insiders that are hard for the litigation system to police if stockholders continue to display a reluctance to ever turn down a premium-generating deal when that is presented. The negotiation process and deal dance present ample opportunities for insiders to forge deals that, while 'good' for stockholders, are not 'as good' as they could have been, and then to put the stockholders to a Hobson's choice. Think about some of the early management buyouts of the cappuccino market of 2006 and 2007 in that regard, where the early actions of poorly policed, conflicted CEOs in baking up deals with their favorite private equity sponsors before any market check (or often even board knowledge) likely dampened the competition among private equity firms that could have generated the highest price if proper conduct occurred and the right process had been used. The resulting deals might have been good for investors, but the suspicion that they were not on the 'best' terms available lingers for rational reasons."); see also Transcript of Telephonic Oral Argument and the Court's Ruling at 25, *In re Complete Genomics S'holder Litig.*, No. 7888–VCL (Del. Ch. Nov. 27, 2012) available at http://www.wlrk.com/docs/In_re_Complete_Genomics_S'holder_Litigation_CA_No_7888-VCL_(Del_Ch_Nov272012)(PDF) (stating that, because there was no evidence to suggest the board was even considering a second bid or that a potential bidder had requested and was denied a waiver of the standstill provisions, the challenged deal protection had not run afoul of the board's fiduciary obligations).

118. Chancellor Strine described his thinking with respect to permitting shareholders to accept uncoerced shareholders in the face of imperfect process in the following way:

And people are going to, in an uncoerced way, get to decide for themselves to decide [sic] whether to take the $8.20 or not. Because there's no coercion, you know, this Court should be hesitant—and because this could possibly be a valuable price. It appears like it is a fairly high market multiple. Whether the company has, frankly, told its story accurately enough so that it's getting full
On the other hand, where there is competition present for a seller, courts will be less deferential and are more likely to strike down or at least be critical of board attempts to protect the incumbent transaction from second bidders. There, however, the board is likely to fall short because of its obligations under Revlon to be even handed and not unreasonably favor one bidder over any other.\textsuperscript{119}

The motivation for the court’s reticence to intercede in the absence of the prospect of a competitive bid is understandable, but it may also be self-defeating. Courts are extremely reluctant to get into the business of passing on the substance of transactions. As the court in OPENLANE observed, “it is not at all clear that the Court should automatically enjoin the merger when no superior offer has emerged.”\textsuperscript{120} An order to blue-line a merger agreement that is not subject to a competing offer may strike judges as too much of an intrusion into the business judgments of boards. The great irony of this approach, however, is that the court’s own reluctance tends to reward the most preclusive deal protection measures—those that are most effective at deterring second bids—and create an incentive for buyers to increase the levels of effective contractual deal protections as much as possible without fear of judicial interference. The court then finds itself in an awkward position of its own making where deals are highly protected—but still compliant with a narrow reading of Omnicare—and challenges appear before the court where there is no second bidder. Courts then shrug and rely on disclosure while they pass on a more substantive review of the deal protection measures.

The fact that courts are deferential to non-competitive transactions is not to say that courts have completely given up efforts to place limits on boards with respect to deal protections. Rather, the new deal protection jurisprudence appears to have limited the number and type of deal protections that might run afoul of Unocal. In such situations, courts might find that only coercive deal protections violate Unocal’s proportionality prong. In recent cases where the courts have ruled that deal protection measures exceed a board’s authority, the court has protected the statutory rights of shareholders and the statutory obligations of boards in the context of a shareholder vote. Courts have deemed coercive—and therefore beyond a board’s authority to grant—deal protection measures that impinge on the free exercise of statutory rights.

\textsuperscript{119} Revlon Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 184 (Del. 1986).

\textsuperscript{120} In re OPENLANE, Inc. S’holders Litig., C.A. No. 6849-VCN, 2011 WL 4599662, at *10 n.53 (Del. Ch. Sept. 30, 2011). See, e.g., Transcript of Telephonic Oral Argument and the Court’s Ruling, \textit{supra} note 117, at 23 (concluding that because there was no evidence to suggest the Board was even considering a second bid or that a potential bidder had requested and was denied a waiver of the standstill provisions, the don’t ask-don’t waive provision had not run afoul of the board’s fiduciary obligations).
In addition to coercive deal protection measures that might cause shareholders to accept an offer that they might not otherwise accept, there are two types of deal protections that run afoul of statutory authority and have caused the courts to pause in recent years. First, deal protection measures that purport to limit the ability of the board to communicate with its own stockholders likely go too far.\textsuperscript{121} Of course, covenants with respect to board recommendations as part of the merger agreement are nothing new. However, given the limited room to maneuver within \textit{Unocal}, courts are giving more attention to these covenants. Purported restrictions on the ability of boards to change or reconsider their recommendation with respect to the advisability of the merger agreement now get negative attention.\textsuperscript{122}

For example, in \textit{Compellent}, the merger agreement purported to restrict the ability of the seller's board to change its positive recommendation by delaying the timing of such a change.\textsuperscript{123} Vice Chancellor Laster asked rhetorically:

\begin{quote}
if stockholders are entitled to a current, candid, and accurate board recommendation, can a merger agreement contractually prevent the board from updating its recommendation for "at least four business days" and potentially longer given procedural hurdles and a requirement that "any change in the form or amount of the consideration payable in connection with a Superior Offer, and any other material change to any of the terms of a Superior Offer, will be deemed to be a new Superior Offer (or other Acquisition Proposal), requiring a new Recommendation Change Notice and a new advance notice period?\textsuperscript{124}
\end{quote}

The court, however, noted that in agreeing to tie their own hands by delaying the time at which the board would change its recommendation to shareholders, the board may be compromising its statutory obligation to provide the shareholders with a current recommendation, therefore implicating the integrity of the statutorily required shareholder vote.\textsuperscript{125} Later, in his transcript ruling in \textit{Genomics}, Vice Chancellor Laster was more explicit about the obligations of a board with respect to its recommendation in the context of a statutory merger:

\begin{quote}
A board has an ongoing fiduciary obligation to review and update its recommendation. That's clear from the original \textit{Van Gorkom} decision. It was the explicit holding of Vice Chancellor Noble in the \textit{Frontier Oil Corp. v. Holly Corp.} decision—I'm going to quote from that—"Revisiting the commitment to recommend the Merger was not merely something that the Merger Agreement allowed the Board to do; it was the duty of the Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties." Maintaining a current and candid merger
\end{quote}

\begin{footnotes}
\item[121.] Transcript of Telephonic Oral Argument and the Court's Ruling, \textit{supra} note 117, at 18; Transcript of Settlement Hearing at 46, \textit{In re} Rehabcare Grp, Inc. S'holders Litig., C.A. No. 6197–VCL (Del. Ch. Sept. 28, 2011).
\item[123.] \textit{Id.}
\item[124.] \textit{Id.}
\item[125.] \textit{Id.}
\end{footnotes}
recommendation is part of the director's duty of disclosure.\textsuperscript{126}

While no court has yet sought to nullify purported constraints on boards' ability to change their recommendations, there is no reason to suspect that once the courts focus on the requirement that boards owe shareholders their timely and unfettered view on the prospect of a merger that recommendation delays built into matching rights and other deal protection devices should survive for long. Where a recommendation delay prevents directors from updating their recommendation to shareholders with respect to the transaction at issue, a court could well find that such a deal protection is coercive and thus exceeds a board's ability to contract.

A second area where the courts have begun to focus their attention is the use of restrictive standstill agreements as deal protection measures. Over the past year or so, parties have been litigating so called "don't ask--don't waive" provisions in standstill agreements.\textsuperscript{127} Such provisions attempt to contractually prevent potential second bidders from asking the seller's board to waive standstills, and, in that way, provide increased transactional certainty for initial bidders. To the extent courts have been asked to rule on don't ask-don't waive provisions in recent months, they have mostly reacted negatively to such provisions. For example, in \textit{Celera}, Vice Chancellor Parsons observed that:

Plaintiffs have at least a colorable argument that these constraints collectively operate to ensure an informational vacuum. Moreover, the increased risk that the Board would outright lack adequate information arguably emasculates whatever protections the No Solicitation Provision's fiduciary out otherwise could have provided. Once resigned to a measure of willful blindness, the Board would lack the information to determine whether continued compliance with the Merger Agreement would violate its fiduciary duty to consider superior offers. Contracting into such a state conceivably could constitute a breach of fiduciary duty.\textsuperscript{128}

The challenge of the don't ask-don't waive provisions is that when they work as conceived, no second bid will appear. Second bidders will not ask for a waiver of a standstill, and a board will not have a second bid to consider. Vice Chancellor Parsons explained the fiduciary challenge thusly:

Plaintiffs argue that this deal protection measure was especially onerous in Celera's case because the most likely competing bidders were the companies already bound by the Don't-Ask-Don't-Waive Standstills. That is, Celera could not reach out to the companies it already knew were interested, and those companies could not reach out to Celera to take the necessary first step—requesting a waiver of the standstill restrictions—to make a competing offer. . . Here, the Don't-Ask-Don't-Waive Standstills block at least a handful of once-

\begin{footnotesize}
\footnotesize
\begin{itemize}
    \item \textsuperscript{126} Transcript of Telephonic Oral Argument and the Court's Ruling, \textit{supra} note 117, at 16.
    \item \textsuperscript{127} Transcript of Settlement Hearing at 46, \textit{In re} RehabCare Grp., Inc. S'holder Litig., C.A. No. 6197-VCL (Del. Ch. Sept. 8, 2011) (expressing doubt that don't-ask-don't-waive standstills are "ever going to hold up if it's actually litigated, particularly after Topps"). \textit{See generally} Transcript of Telephonic Oral Argument and the Court's Ruling, \textit{supra} note 117 (litigating the don't-ask-don't-waive provision); \textit{In re} Celera Corp. S'holder Litig., Civil Action No. 6304-VCP, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (litigating the don't ask-don't waive provisions).
    \item \textsuperscript{128} \textit{Celera}, 2012 WL 1020471, at *21.
\end{itemize}
\end{footnotesize}
interested parties from informing the Board of their willingness to bid (including indirectly by asking a third party, such as an investment bank, to do so on their behalf), and the No Solicitation Provision blocks the Board from inquiring further into those parties’ interest.129

Combine this with the typical deference courts provide sellers’ boards in the absence of competition, and the don’t ask-don’t waive provisions are potentially very powerful transaction defenses if not carefully deployed.130 To the extent boards use don’t ask-don’t waive provisions to enforce a form of “willful blindness,” such provisions can also be abused.131 Unfaithful or inattentive boards can use don’t ask-don’t waive provisions to prevent bidders from making subsequent, perhaps superior, offers. This potential for abuse requires courts to pause before passing on the appropriateness of such provisions. Otherwise, shareholders may find themselves deprived of knowledge of potential second bids and thus coerced to accept a suboptimal offer.

VI. OMNICARE’S FUTURE AND DEAL PROTECTIONS

Notwithstanding the arguments that Omnicare would not survive, ten years later, Omnicare has secured its place. Its contributions are mixed. The court’s decision to apply the intermediate standard of review to all deal protection measures was an important and enduring contribution. Even the more controversial holding of the opinion—requiring an effective fiduciary out—has survived the past decade, though somewhat worse for wear. The policy that places outside limits on the ability of sellers’ boards to lock-up a transaction is good policy, and one should not run away from that.

The wear on Omnicare’s legacy has come not necessarily from a direct attack on Omnicare itself, but from the court’s narrower application of the Unocal standard over the past decade. Courts remain hesitant to rely on a range of reasonableness analysis, perhaps for fear a reasonableness standard will require them to pass on the substance of transactions and rely on their own business judgment. Courts have rarely relished putting themselves in this position. Rather, the courts have relied on heuristics, like coercion and preclusivity, to minimize wandering into unfamiliar territory. At the same time, courts have narrowed the definition of one of these heuristics—preclusivity—to the point where the term has lost most of its meaning. The only effective limit on the reasonableness of defensive measures is through coercion. Only deal protection measures that are coercive to shareholders are likely to run afoul of Unocal’s narrow, modern application.

Consider again the quick consent strategy deployed in OPENLANE. A selling board seeking to close its eyes to potential future offers could deliver consents sufficient to approve the transaction within 24 hours, safe in the knowledge that a subsequent bidder is not precluded from bidding during that short, interim period. Of course, a topping bid is not likely, nor even realistic, during such a short window. In the private company context,

---

129. Id.

130. In re Topps S’holders’ Litig., 924 A.2d 951, 953 (Del. Ch. 2007) (noting that the board refused to waive a standstill provision in order to favor one bidder over another).

131. “[D]irectors cannot willfully blind themselves to opportunities that are presented to them.” Cirrus Holding Co. Ltd. v. Cirrus Indus., 794 A.2d 1191, 1207 (Del. Ch. 2001); See Phelps Dodge Corp. v. Cyprus Amax Minerals Co., CIV.A. Nos. 17398, 17383, 17427, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) (holding that foreclosing the opportunity to negotiate is the legal equivalent of willful blindness).
there is perhaps no public window, as a deal would not be announced to the market until well after the consents had been secured. Nevertheless, this strategy passes under Unocal’s narrower preclusivity standard. However, a board that agrees to a quick consent strategy may run afoul of Unocal if it is doing so to disable itself from the prospect of exercising its own fiduciary obligations during the post-signing/pre-closing period.132

Indeed, any fair reading of Omnicare’s charge to include an effective fiduciary out should conclude that the quick consent strategy, although compliant with the requirements of the statute, runs afoul of directors’ fiduciary obligations. Leaving the strategy’s coercive aspects aside, quick consent clearly precludes second bids even though it complies technically with the requirements of Section 228 of the DGCL. It would hardly be novel for a Delaware court to remind litigants that “inequitable action does not become permissible simply because it is legally possible.”133 Deal protections, such as the quick consent strategy, should be, in the words of Chancellor Strine, “twice-tested” — once by the law and again by equity.”134

To date, however, the courts have mostly been extremely reluctant, as was the court in OPENLANE when it observed that enjoining a merger when no subsequent offer has appeared “is a perilous endeavor because there is always the possibility that the existing deal will vanish, denying stockholders the opportunity to accept any transaction.”135 Of course it is precisely this fear that makes otherwise preclusive deal protections lose their power. If courts refuse to enjoin or proscribe deal protections that have the effect of keeping second bids at bay, then buyers will have an incentive to increase the use of highly protective deal protections that only just comply with the technical requirements of Omnicare, but in fact do not provide shareholders with a realistic opportunity to accept a second bid.136 It is worth remembering that Omnicare’s charge is that every merger include not just a fiduciary out, but an effective fiduciary out. To the extent fiduciary outs devolve into no more than formalistic genuflections, they may run afoul of a plain reading of Omnicare. Only by revisiting preclusivity and considering the “realistically attainable” standard can courts create the room for maneuver required to provide any credible resistance to incentives that result in incremental increases in deal protections over time.

132. In Omnicare, the majority noted that Genesis bargained for measures to “completely protect[] its transaction” precisely because of an anticipated eleventh-hour bid from Omnicare. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 938 (Del. 2002). Given the board’s knowledge of the likelihood of this eventuality, by failing to guarantee itself a fiduciary out, the board “disabled itself from exercising its own fiduciary obligations at a time the board’s own judgment is most important, i.e. receipt of a subsequent superior offer.” Id.

133. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971). See also Kurz v. Holbrook, 989 A.2d 140, 180–81 (Del. Ch. 2010) (observing that even though voting arrangements are permissible under § 218, the statute does not limit the court’s ability to redress inequitable practices associated with voting arrangements).

134. Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007).

