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The Case Beyond Time

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The Case Beyond Time

By Lyman Johnson* and David Millon**

INTRODUCTION

The Delaware Supreme Court's opinion in Paramount Communications, Inc. v. Time, Inc.1 treats several important questions that arise in connection with hostile corporate takeovers. At the same time, it leaves three critical issues unanswered. In this article, we first briefly describe what the Time decision did, comparing Chancellor William Allen's somewhat discursive Chancery Court opinion with the more peremptory ruling of the Supreme Court. Next, we identify three unarticulated but potentially far-reaching implications of both the Supreme Court's and Chancellor Allen's reasoning that threaten to destabilize seemingly settled doctrine governing the conduct of target company management.

WHAT THE TIME CASE DID

Unlike many of Delaware's corporate takeover decisions, Time did not involve a request to enjoin a lock-up option or to compel redemption of a poison pill. Instead, Paramount and two groups of Time shareholders sought to block Time's purchase of Warner stock at $70 per share pursuant to a cash tender offer. Originally, and long before Paramount's appearance on the scene, Time and Warner had agreed to a stock-for-stock merger of the two companies.2 The selection of Warner as a merger partner had taken a long time and occurred only after the Time board of directors had carefully considered how such a merger would serve the company's long-term expansion strategy while preserving the zealously guarded "Time Culture." In Chancellor Allen's words, "[t]his culture appears in part to be pride in the history of the firm—notably Time

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2. More specifically, Warner was to be merged into a wholly-owned subsidiary of Time with Warner to be the surviving corporation. Thereafter, Warner's common stock would be converted into Time stock at the agreed-upon ratio and the name of Time would be changed to Time-Warner, Inc. Id. at 95,205.
magazine and its role in American life—and in part a managerial philosophy and distinctive structure that is intended to protect journalistic integrity from pressures from the business side of the enterprise."

Both companies had scheduled special shareholder meetings to vote on the proposed merger transaction. Shortly before the meetings, however, and after proxy materials had been mailed to stockholders, Paramount made an all-cash, all-shares tender offer for Time's stock at a price of $175 per share. Time's board of directors met several times to discuss Paramount's offer but regarded it as inadequate and inferior to the proposed merger with Warner. Of special concern to the board was its belief that Paramount's bid threatened Time's control of its destiny and its unique "Time Culture." Therefore, it refused to discuss the offer with Paramount. Nonetheless, while the Time board remained committed to a consolidation with Warner, it feared that Time shareholders would reject the proposed merger in light of the Paramount offer. Thus, Time and Warner abandoned the merger agreement and, instead, agreed that Time would make a cash and securities tender offer for Warner stock. The effect of recasting the transaction was twofold. First, acquisition by tender offer, unlike a merger, does not require shareholder approval. Thus, Time's shareholders were deprived of the opportunity to vote "no" on the proposed merger, a vote which, in effect, would amount to a "yes" vote on the Paramount offer. Second, Time's board conceded that Time's stock would, immediately after the acquisition of Warner, trade at a price somewhere in a range of $106-$188. When Paramount raised its "fully negotiable" offer to $200—an offer the Time board also rejected—Time's advisors predicted that, over the longer term, the stock would appreciate and end up being worth a great deal more than $200. Nevertheless, the decision of Time's board to purchase Warner denied Time's shareholders a choice between a lot of immediate, sure money and a less certain but conceivably much greater return later. Both Time shareholders and Paramount sued to enjoin Time's tender offer.

Circumventing the Efficient Capital Market Hypothesis

Chancellor Allen begins his analysis in Time by framing the ultimate legal issue as the question of who, between shareholders and management, ought to

4. Although Delaware law did not require a vote by Time shareholders, the rules of the New York Stock Exchange required that Time's shareholders approve the issuance of shares to effectuate the merger. Fed. Sec. L. Rep. (CCH) ¶ 94,938 at 95,205.
5. It was agreed that Time would make an all-cash offer for 51% of Warner's outstanding common stock at a price of $70 per share. The remaining 49% of common stock would be purchased later for a combination of cash and securities worth $70 per share. Id. at 95,206. Although the restructured transaction meant that, unlike the original merger proposal, Time would incur several billion dollars of indebtedness, the Supreme Court rebuffed Paramount's argument that such large debt rendered the board's decision unreasonable under Unocal's two-step analysis. See Fed. Sec. L. Rep. (CCH) ¶ 94,938 at 95,211. See also Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
decide whether to proceed with the Warner acquisition and thereby prefer lower current share value for the sake of possibly higher future share value. This choice would not exist, or would be of no consequence, were there no distinction between the current value of Paramount's offer and the claimed longer-term value of Time stock. Thus, Chancellor Allen's first task was to address the legal significance of that distinction. How could the Time board credibly claim that its plan would yield the shareholders value exceeding Paramount's seemingly much higher offer? Answering that question required Chancellor Allen to venture forth into the abstruse world of financial economics and its central tenet of efficient capital markets.

We offer no elaborate explication, critique, or defense of the efficient capital market hypothesis here. The hypothesis actually has three dimensions or forms—weak, semi-strong, and strong. Although Chancellor Allen does not make it clear, he takes up the legal status of the semi-strong form. Briefly, the semi-strong form asserts that market prices of securities react quickly and in an unbiased fashion to publicly available information. Chancellor Allen does not attempt to refute the validity of this proposition about share price behavior. Indeed, he states that it "may be correct." Further, he allows that perhaps "wise social policy and sound business decisions ought to be premised upon the assumptions that underlie that view." But, granting that, Chancellor Allen does not take it as his job to pass on the soundness of this tenet. He sees his task as the more modest one of deciding whether "the common law of directors' duties elevate[s] the theory of a single, efficient capital market to the dignity of a sacred text." Put that way, Chancellor Allen refuses to compel target company directors to subscribe to the theory of efficient capital markets when formulating business and takeover strategy. Directors are thus free to operate on the view that a capital market valuation of the target company is, at any given time, "wrong."

The basis for liberating management from captivity to capital market valuation of corporate securities is simple. As insiders, corporate directors possess more information about the corporation's current and future circumstances than anybody else. Inasmuch as directors have no standing duty to disclose all corporate information to which they have access, absent disclosure or a leak, the public market cannot have digested that information. Thus, the hypothesis of efficient capital markets has not been rejected so much as its predicate rendered inoperative: all information about a corporation is not publicly available. But, Chancellor Allen does not stop there. He goes further and suggests that even with dissemination of all available information, the directors might rationally

6. For a useful collection of materials on the efficient capital market hypothesis, see R. Hamilton, Corporate Finance 252–95 (2d ed. 1989).
8. Id.
9. Id.
10. Id.
11. Id.
conclude that a market's reaction will still "undervalue the stock." The court comes close to repudiating the theory.

In its analysis, the Supreme Court neither accepts nor rejects the efficient capital market hypothesis as such. Believing it "unwise to place undue emphasis upon long-term versus short-term corporate strategy," the Court instead addresses a more basic and conventional question: to whom has Delaware corporate law assigned the power to make fundamental decisions about corporate affairs? Looking first to the corporate statute, the Court construes the duty of a board of directors to manage the business and affairs of a corporation pursuant to section 141(a) as including a "conferred authority to set a corporate course of action, including time frame, designed to enhance corporate profitability." In other words, the theoretical debate over possible disparities in long-term and short-term share values is "largely irrelevant" to the law because the Delaware legislature, according to the Court, has empowered corporate boards to select the time horizon over which corporate goals will be pursued. Thus, even if there were an admitted difference between long-term and short-term share values, it is of no consequence to bidder and target company shareholders because only incumbent management has the legal stature to choose between the two.

Turning from statutory interpretation to the common law of directors' fiduciary duties, the Court similarly states that, except for the "limited set of circumstances as defined under Revlon," a target board is not "under any per se duty to maximize shareholder value in the short term, even in the context of a takeover." Thus, common law joins statutory law in refusing to pre-ordain a time frame within which directors must pursue corporate goals or within which courts are constrained to evaluate director success. Instead, both sources of law consciously leave that baseline question to the informed discretion of directors.

The portion of the opinion in which the Supreme Court deals with this critical issue is distressingly terse and almost dismissive. Moreover, its troubling implications for the ability of either shareholders or the judiciary to hold corporate management accountable for its performance are either unseen by the Court or simply unacknowledged. For example, although the Court describes a board's responsibility to "charter a course for a corporation which is in its best interests," no benchmark for gauging that interest is provided. It is not even clear, by the Court's reasoning, that directors are required to maximize profit-

12. Id.
13. The Court does say, however, that it "tacitly accept[s] the Chancellor's conclusion that it is not a breach of faith for directors to determine that the present stock market price is not representative of true value . . . ." Fed. Sec. L. Rep. (CCH) ¶ 94,938 at 95,207 n.12.
14. Id. at 95,207.
15. Id. (emphasis added).
16. Id.
19. Id. at 95,207.
ability—any more than shareholder wealth—as the equivalent of "best interest." The Court may presume the pursuit of that financial goal as a basic corporate law norm, but it recites no authority for so constraining director discretion. Furthermore, as a mechanism for disciplining a board that fails to achieve its own professed goals for the corporation, takeovers are defanged. Shareholders can take no meaningful collective actions in the capital markets—such as tendering their stock to the hostile bidder—to express displeasure with management behavior because management can justify a host of formidable defensive measures as essential to the realization of yet a new and ever-shifting investment horizon.

In this scenario it simply wouldn't matter that shareholders are presented with a "short-term" opportunity—that is, a hostile bid—to gain value in excess of what they believe can be achieved longer term. In the name of pursuing the "corporation's best interests," directors can act to preclude shareholders from exercising such a choice. And if no choice can be made, eventually bidders will no longer make such opportunities available.

Indeed, it seems clear that the Supreme Court's brief treatment of the "short-term/long-term" issue is intended to lay the conceptual groundwork for the very end of its opinion, where the Court rejects the plaintiffs' claim that Time's restructuring of the Time-Warner transaction was not "reasonable" under Unocal's second step because it precluded shareholders from receiving a control premium. The Court emphasizes that such a "right" does not exist in the abstract, but only at the discretion of the board as deemed consistent with the attainment of corporate goals.\(^\text{20}\) Such a conclusion would not have been possible without first decisively locating authority over the totality of corporate affairs—including the formulation of corporate goals—with directors rather than shareholders.

In quite different ways, then, both Chancellor Allen's opinion and the Supreme Court's deal a serious setback to efforts to deploy the efficient capital market hypothesis as a "scientific" basis for tying management's hands in takeover contests. Thus, as the intellectual underpinning of the more general project to deregulate capital markets, the efficient capital market hypothesis continues to enjoy only spotty success.\(^\text{21}\)

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20. Id. at 95,211.

21. For a description of how the efficient capital market hypothesis has been used as a justification for advocating deregulation of national capital markets and a response to that argument, see Coffee, Market Failure and the Economic Case for a Mandatory Disclosure System, 70 Va. L. Rev. 717 (1984). The United States Supreme Court appears to have embraced the notion of efficient capital markets and its corollary, the fraud-on-the-market theory, in the context of claims under SEC rule 10b-5, while leaving states free to reject the concept in their state antitakeover legislation. Compare Basic Inc. v. Levinson, 485 U.S. 224 (1988) with CTS Corp. v. Dynamics Corp. of Am. 481 U.S. 69 (1987).
**Containing the Revlon Auction Mandate**

*Revlon v. MacAndrews & Forbes Holdings, Inc.* held that when target company directors conclude that a break-up sale of the company is "inevitable," they are transformed into auctioneers whose sole function is to secure top current dollar for shareholders. Many postRevlon decisions in Delaware have grappled with the question of what events do or do not trigger the Revlon auction mandate. In *Time*, the shareholder plaintiffs argued that Time had entered the Revlon mode because the proposed merger with Warner represented a transfer of control. The basis for that claim was two-fold: first, the exchange ratio in the original transaction would have resulted in Warner shareholders owning approximately 62% of the stock of the combined company; second, the subjective intent of Time's directors as evidenced by statements that the market might perceive the transaction as a sale and the adoption of defensive measures was construed as evidence that they believed the Revlon threshold had been crossed.

While Chancellor Allen draws on the recent *Mills Acquisition Co. v. Macmillan, Inc.* decision to affirm that the Revlon posture could be assumed involuntarily and without the express subjective intention of doing so, he emphasizes that the Revlon threshold and its corresponding duty to maximize current share value is crossed only when a corporate transaction represents a "change in corporate control." He concludes that the initial merger agreement between Time and Warner did not result in a change in control because even though 62% of Time's shares would come to be held by Warner shareholders, the stock would, as before, be widely dispersed among public shareholders in a "large, fluid, changeable, and changing market." Not being a change of control transaction, Time was not in the Revlon mode. Again, as with the efficient capital market hypothesis issue, the predicate for a supposedly operative principle was found not to exist.

Here, Chancellor Allen continues, as he did in *City Capital Associates v. Interco*, to read Revlon's flash point narrowly and to regard that decision as neither remarkable nor inconsistent with earlier Delaware corporate law. Furthermore, since a board of directors standing outside the Revlon mode is under no obligation to maximize current share value, but may instead operate the corporation for "long run" profit maximization, Chancellor Allen stresses that the board has no freestanding duty to conduct a Revlon auction. Thus, Chancellor Allen pays his respects to the reasoning of Revlon but steadfastly refuses to extend it.

26. *Id.* at 93,280.
The Supreme Court holds that Chancellor Allen's findings of fact on the *Revlon* claim were supported by the record and that his conclusion was correct as a matter of law. Nonetheless, the Supreme Court prefers to reject the shareholders' *Revlon* claim on what it describes as "broader grounds," thereby aiming to dispel the confusion caused by continuing uncertainty about *Revlon*'s scope.

In fact, the Supreme Court's "broader grounds" amount to an even narrower reading of the *Revlon* mandate than that offered by Chancellor Allen. While the Chancellor held that *Revlon* duties had not been triggered because there was no "change in control," the Supreme Court required the inevitable dissolution or break-up—not merely actions that might be interpreted as portending the sale or transfer—of the corporate enterprise. As stated by the Supreme Court: "[w]e premise our rejection of plaintiffs' *Revlon* claim on . . . the absence of any substantial evidence to conclude that Time's board, in negotiating with Warner, made the dissolution or breakup of the corporate entity inevitable, as was the case in *Revlon.*" It further stated: "[w]e decline to extend *Revlon*'s application to corporate transactions simply because they might be construed as putting a corporation either 'in play' or 'up for sale'."

In effect, the Supreme Court holds that, as long as the "corporation's continued existence" is not being abandoned by the board, no *Revlon* duties attach. As with the Court's discussion of the "long-term/short-term" issue, we again see the emphasis on director duties to the corporate enterprise, rather than more narrowly to shareholder interests. Duty to enterprise is paramount; only when the enterprise's configuration is to be substantially diminished do shareholder interests assume primacy.

In this way, *Revlon*'s emphasis on shareholder welfare can be seen as no more than a variation on the basic *Unocal* analysis. Only when the corporation qua corporation is to be broken up is the first prong of *Unocal* (with its emphasis on danger to corporate policy and effectiveness) modified to reflect *Revlon*'s focus on shareholder well-being. *Unocal*'s predicate goal of safeguarding the corporate enterprise having been abandoned by directors in a dissolution or break-up, the new goal in the *Revlon* mode is the maximization of shareholder wealth as achieved by an auction. In short, shareholders are a contingent beneficiary of director duties; they lay claim only if the primary beneficiary (the corporation) legally "predeceases" them.

Describing director duties under *Unocal* and *Revlon* in this way does not completely reconcile the two modes of analysis. It remains to describe the

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29. Id.
30. Id.
31. Id.
32. Id. The Court's language is too broad for the point it wishes to make. What the Court means is that if the "corporation's continued existence" is abandoned by a diminution such as a break-up or dissolution, *Revlon* duties kick in. The corporation's "continued" existence is also altered, as in *Time* itself, by decisions to augment the enterprise by acquisition or consolidation. Such alterations, however, unlike those that diminish the enterprise, are deemed not to trigger *Revlon* duties.
judicial function in all this. Here, Unocal's second step (the reasonableness of the defensive measures in relation to the threat posed) conjoins Revlon to Unocal. Under Unocal, defensive measures must be reasonable in relation to the threat to the corporate enterprise, while Revlon mandates that an auction be conducted in a manner reasonable in relation to the maximization of shareholder value. To put it succinctly, Revlon's facts reveal that Revlon's directors failed the second step of the Unocal analysis.

While the somewhat uneasy relationship of Revlon and Unocal can be harmonized in this way, what warrants emphasis about the Supreme Court's Time opinion is that, absent the limiting circumstances of Revlon, Unocal's focus is wholly on director duty to the continuing enterprise, not on satisfying the desires or enhancing the well-being of shareholders. The net effect of both the Chancery Court and Supreme Court opinions in Time, then, is to integrate Revlon into the larger body of corporate law jurisprudence while, at the same time, blunting its force by treating it as a "special" case.

Limiting Shareholder Choice

Having averted Revlon's auction mandate, Chancellor Allen still faced the challenge of Interco and Grand Metropolitan PLC v. The Pillsbury Co. and their newly-minted emphasis on shareholder choice in resolving key takeover issues. In both Interco and Pillsbury the target company boards were ordered to redeem poison pills so that target company shareholders could choose between the hostile bid and a company-sponsored restructuring alternative. In Time, Chancellor Allen asserts that in both Interco and Pillsbury there was no threat to the "corporation" as an enterprise, only a threat to shareholders. On this, he is wrong. What he might mean is that in those cases target management advanced no "corporate" interests for consideration separate and apart from shareholder financial interests or that "corporate" interests simply have no force in corporate law if they impair shareholder freedom to pick between financial options generated by management after the onset of the hostile contest. Chancellor Allen also stresses that the financial alternatives in each of the Interco and Pillsbury cases were "functionally equivalent" to one another.

In Time, by way of contrast, Chancellor Allen notes that Time's board, while not unmindful of a takeover threat, had planned the original Warner merger well in advance of Paramount's hostile offer. Thus, there were sound reasons for believing the merger would serve the corporation's long-run profit maximizing goals and that it was not primarily motivated to retain control in incumbent management. In other words, because Time's board could advance plausible,

33. The Supreme Court clearly seeks to square Revlon with Unocal in this fashion: "Within the [Revlon] auction process, any action taken by the board must be reasonably related to the threat posed or reasonable in relation to the advantage sought . . . . Thus, a Unocal analysis may be appropriate when a corporation is in a Revlon situation . . . ." Id. at 95,208 n.14.
34. 558 A.2d 1049 (Del. Ch. 1988).
pre-existing (not "reactive") business enterprise reasons for the Warner deal, it could preclude shareholders from choosing the Paramount offer.

In spite of that beguiling factual distinction, however, Chancellor Allen appreciates that the trouble paid to shareholder choice in Interco and Pillsbury compels him to address an elemental issue: why should Time shareholders be prevented from choosing (or requiring management to choose on their behalf) between an immediate $200 and an immediate $150, a choice many, perhaps most, shareholders would exercise in favor of Paramount's higher offer of an immediate $200?36 Chancellor Allen speaks to this fundamental issue at two levels. First, he observes that shareholders themselves have no right to make that choice.37 Under longstanding principles of Delaware corporate governance, they simply have no say on whether the corporation is to pursue an acquisition of Warner, even if the acquisition effectively precludes a decision to sell stock to Paramount, a matter Chancellor Allen clearly acknowledges otherwise lies with shareholders. Here, he points out an obvious fact about contemporary corporate law: shareholders are passive bystanders, not active participants, in decisions about corporate activity. As such, at least some "corporate" transactions can be legitimately pursued without shareholder input even if they jeopardize shareholder stock disposition opportunities. Second, in these cases the board itself is not obligated to "follow the wishes of the majority of shares."38 Carrying out its statutory charge to oversee operation of the corporation, management simply is not obligated to maximize short-term shareholder wealth. The board is free to pursue its own business strategy and prefer the longterm over a shorter term financial horizon. Thus, the well-being of shareholders is mediated through management's control of the corporate enterprise and thereby rests entirely in the hands of the board. With managerial skill and good judgment and with luck, shareholders will prosper.39 Without, they will not.

The basic thrust of the Supreme Court's treatment of the shareholder choice issue is much the same as Chancellor Allen's. The key difference is the Supreme Court's effort to ground its reasoning on Unocal while also taking a jibe at the Chancery Court decisions in Interco and Pillsbury.

The Supreme Court states that these two decisions, along with AC Acquisitions Corp. v. Anderson, Clayton & Co.,40 may have misled plaintiffs into believing that an all-cash, all-shares bid falling within a range of values that a reasonable shareholder might accept cannot constitute a "threat" under Unocal's first prong. The Supreme Court declares that this stemmed from a misapprehension that a tender offer can pose only two kinds of threat: first, the

36. Plainly, Chancellor Allen was aware of shareholder preferences. Id. at 93,284 ("That many, presumably most, shareholders would prefer the board to do otherwise than it has done does not . . . afford a basis to interfere with the effectuation of the board's business judgment.").
37. Id. at 93,281.
38. Id. at 93,284.
39. Id. ("The value of a shareholder's investment, over time, rises or falls chiefly because of the skill, judgment and perhaps luck—for it is present in all human affairs—of the management and directors of the enterprise.").
40. 519 A.2d 103 (Del. Ch. 1986).
threat of coercion in a two-tier bid and, second, the threat of inadequate value in an all-cash, all-shares bid. The Court rejects that “narrow and rigid construction”\(^4\) of Unocal, but, in fairness to the Chancery Court and plaintiffs, the Supreme Court itself bears a large measure of responsibility for the confusion.

The Court’s continuing explanation of Unocal as having involved a threat to shareholder interests rather than to the corporate enterprise to which the first prong of Unocal’s formulation makes explicit reference underlies this misunderstanding. Indeed, in the Time opinion itself, the Supreme Court describes Unocal as follows: “Unocal involved a two-tier highly coercive tender offer. In such a case, the threat is obvious: shareholders may be compelled to tender to avoid being treated adversely in the second stage of the transaction.”\(^42\)

What the Court should have said about Unocal all along is what it more successfully says about it in other parts of the Time opinion: Unocal is about threats to the corporate enterprise, not shareholders (otherwise, Revlon’s more pointed focus would apply).\(^43\) Characterizing bids as coercive and inadequate is to describe them in reference to shareholders; they are coercive and inadequate to shareholders, so they are threats to shareholders, not the enterprise.

Later portions of the Time opinion seek to recapture the enterprise dimension of Unocal that suffuses the Court’s earlier discussion of Revlon and the “long-term/short-term” issue. The Court starts in this direction by describing Unocal as a flexible analytical tool, not an “abstract standard”\(^44\) or a “structured and mechanistic procedure of appraisal.”\(^45\) The Court then underscores the array of factors that directors rightly may consider when evaluating the threat posed by a bid. Among these, as in Unocal, is the impact of a bid on constituencies other than shareholders. Surely, if the focus was to be exclusively on coercion or inadequate value, consideration of such interests would be completely inappropriate. Furthermore, to read Unocal as sanctioning a mathematical comparison of the discounted present values of financial alternatives is to substitute a judicial for a directorial business judgment. Doing so would draw judges into the very thick of takeover battles in a way totally at odds with Delaware’s venerable policy of judicial restraint.

Supported by these rationales for rejecting plaintiffs’ narrow reading of Unocal, the Court believes that Time’s board could rightly conclude that the Paramount offer posed “other threats”\(^46\) than inadequate value. Paradoxically, the threats were that Time shareholders, acting out of “ignorance,”\(^47\) “uncertainty,”\(^48\) and confusion, might tender their stock to Paramount and thereby jeopardize, not their own well-being, but the corporate strategy of joining Time
and Warner. In short, the risk was that the Paramount bid provided an instrument by which shareholders themselves might undermine the interests of the enterprise.

As the Court completes its opinion, it focuses in two ways, with even greater precision, on the interests of the corporate enterprise. First, it rejects plaintiffs' claims that the Time board had not made an "informed" decision that Paramount's offer was a threat to Time's corporate policy. The Court refers to Chancellor Allen's finding that Time's board had spurned the offer because the board specifically concluded that the bid did not "serve Time's objectives or meet Time's needs." No mention is made of shareholders. Thus, since Time was under no obligation to negotiate with Paramount, its refusal to do so was not uninformed. Second, in also rejecting the claim that Time's board had not acted reasonably under the second prong of Unocal, the Court goes beyond its earlier assertion that it was the Time enterprise and not Time shareholders that were the proper focal point of attention to stress that the board of directors and not shareholders govern the corporation and make its crucial policy decisions. That duty, conferred by statute, may not be delegated to shareholders. Moreover, in discharging that duty, directors (outside of the Revlon mode) are not obligated to jettison plans for the corporate enterprise to procure a premium for shareholders. Here, the Court comes full circle to its earlier assertion that corporate management's duty to oversee a company's business and affairs extends even to the "selection of a time frame for achievement of corporate goals." A clearer declaration of management's continuing central role in formulating and implementing corporate policy, even in the face of outside challenge via the capital markets, would be hard to find.

**TIME'S UNARTICULATED IMPLICATIONS**

As with any judicial decision, one can read it narrowly or broadly. To read a decision narrowly one emphasizes its facts and suggests how altered facts might dictate a different outcome. To read a decision broadly, one stresses an enunciated principle that transcends the specific fact situation and potentially controls the outcome in varied settings.

The *Time* decision is no different. Chancellor Allen himself points out that the behavior in question—Time's proposed acquisition of Warner—is "perfectly conventional" business behavior and may be distinguished from a more overt control mechanism like a decision not to redeem a poison pill. While Chancellor Allen is a careful judge who seeks to limit his analysis to the case before him, we think neither he nor the judges on the Supreme Court can so easily contain the larger thrust of the decision. We explore three ways in which

49. The emphasis on the requirement that corporate directors' decisions be "informed" derives from Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985).
51. *Id.* at 95,211.
52. Fed. Sec. L. Rep. (CCH) ¶ 94,514 at 93,284 n.22.
the reasoning that underlies *Time* destabilizes—and therefore leaves unsettled—important elements of pre-*Time* corporate law.

**Extending Time to the Poison Pill Redemption Context**

As noted above, one way to limit the reach of *Time* is to differentiate overt control maintenance mechanisms from more “conventional” business conduct. Doing so enables one to explain why shareholders in *Interco* and *Pillsbury* were allowed to choose between financial alternatives while those in *Time* were not. In retrospect, one can say that the boards of Interco and Pillsbury made a strategic mistake in trying to fight the fire of a hostile bid with the fire of a restructuring alternative because, in so doing, they unavoidably invoked the norm of shareholder welfare. This norm has two dimensions in the takeover context. The first dimension is the orthodox, largely implicit notion that the ultimate purpose of corporate endeavor is maximization of shareholder wealth. In arguing that the company-sponsored restructurings were financially superior to the hostile bids, the Interco and Pillsbury boards tacitly acknowledged that immediate shareholder wealth enhancement was the relevant benchmark by which their behavior should be evaluated. Having done so, it should not have been a great surprise that the Chancery Court applied the second dimension of shareholder primacy—ultimate say in decisions about the disposition of stock—with considerable zeal in assessing target board behavior. The result in each case was an order that the poison pills be redeemed so that shareholders could elect between the two options.53

Management’s behavior in *Interco* and *Pillsbury* thus can be viewed as quite different from “just saying no” to a hostile bid and steadfastly refusing to redeem a pill for reasons unrelated to shareholder welfare. Such reasons might include concern about the proposed takeover’s harmful impact on non-shareholder constituencies, a factor explicitly reiterated by the Supreme Court in *Time* as forming a part of the *Unocal* reasonableness test, or the larger enterprise considerations exemplified by Chancellor Allen’s and the Supreme Court’s repeated references to “Time Culture.” After the *Time* decision, however, one might sensibly ask why target boards, in the same position as the Interco and Pillsbury boards, could not simply decline to develop a restructuring alternative and refuse to redeem their pills by asserting one of two things. First, subscribing to the benchmark of shareholder wealth, management might contend that its assessment of the long-term value of the target company exceeds the short-term break-up value and that its determination is controlling. The Supreme Court’s *Time* opinion is adamant that management, not shareholders, plays the pivotal decisionmaking role in corporate affairs and thus supports this

53. Our analysis leads to a different assessment of *Interco* and *Pillsbury* than the criticism leveled at those decisions by the Supreme Court in *Time*. We lay the “blame,” if you will, for the outcome of those cases at the hands of target management, not the Chancery Court.

54. For a discussion of *Time* that focuses on the value placed on preservation of “Time Culture” as indicative of the relevance of public interest considerations as a justification for antitakeover measures, see Millon, *Theories of the Corporation*, 1990 Duke L.J. (forthcoming).
position. Alternatively, by tempering strict shareholder primacy, management might assert that shareholders simply have no right to immediate premiums even if management agrees that the longer term share value may be less than the bidder’s offering price. Here, the claim by management is not simply that it, rather than the shareholders, has the decisive takeover voice as a matter of process. It goes further and contends that, as a substantive matter, shareholder well-being might yield to nonshareholder concerns or to enterprise considerations such as preservation of “Time Culture.”

The latter claim is less orthodox than the former, but it seems no less plausible a reading of Time, especially since the Supreme Court treated the objective of immediate shareholder wealth as seemingly limited to the special case of Revlon. Both arguments lead to a preference for management’s over shareholders’ voice. If, as the Time decision makes clear, shareholders have no “say” on whether a target company should make an acquisition—the upshot of which is to preclude an opportunity to tender their stock—why must they have “say” on management’s refusal to redeem a pill where the result is similarly to preclude an opportunity to tender? Whether such refusal is premised on managerial concern for “long run” shareholder welfare or on solicitude for enterprise and nonshareholder considerations, the outcome is the same: shareholders have no legitimate complaint if management drives a bidder away by refusing to redeem the pill.

There is little doubt that yet another case challenging a target board’s refusal to redeem a poison pill will arise in Delaware. If the target company board refuses to develop a financial alternative to the hostile bid, then the Delaware courts must state why that board’s behavior is improper. Given the reasoning of Time and its assertion that a target company board is free to favor articulable longterm financial goals and preservation of the corporate enterprise over shorter term shareholder wealth, the judiciary will be hard pressed to distinguish “conventional” business behavior from more overt defensive behavior directed toward the same objectives.

**Marginalizing Revlon**

A second question that needs rethinking in the wake of Time is the meaning and continued viability of Revlon. As indicated above, the Supreme Court’s Time opinion followed Chancellor Allen’s lead in Interco and Time and read

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55. Essentially this claim was made by the board of directors of Universal Foods when Amanda Acquisition Corp. launched a hostile bid. While referring to this constituencies dimension as the “corporate issue,” the district court credited this concern in its Unocal review of the board’s refusal to redeem a poison pill. Amanda Acquisition Corp. v. Universal Foods Corp., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,435 (E.D. Wis. Mar. 18, 1989), aff’d on other grounds, 877 F.2d 496 (7th Cir. 1989), cert. denied, 110 S. Ct. 367 (1989). Wisconsin, however, unlike Delaware, has a statute explicitly authorizing director consideration of nonshareholder interests. See infra note 62.

56. This may be the point of the Supreme Court’s apparent criticism of AC Acquisitions, Interco, and Pillsbury. See Fed. Sec. L. Rep. (CCH) ¶ 94,938 at 95,209–10.
Revlon narrowly and as not representing any radical departure from earlier Delaware law. Sometime in the near future it will be necessary to revisit Revlon in order to rethink its underlying rationale. To put it bluntly, why, even if a break-up of the target company is "inevitable," should target company directors be transformed into auctioneers whose sole function is to garner top dollar for shareholders?

In *TW Services Inc. v. S.W.T. Acquisition Corp.*, decided just four months before his decision in *Time*, Chancellor Allen appeared to anticipate this challenge to Revlon. In *TW Services* he sought to preserve a role for Revlon by contending that because there is no long run for shareholders once the target company is in the Revlon mode, it does not matter to them "that a buyer who will pay more cash plans to subject the corporation to a risky level of debt, or that a buyer who offers less cash will be a more generous employer for whom labor peace is more likely." Here Chancellor Allen took up the question of how the corporate "enterprise" and various nonshareholder interests such as employees fit into the matrix of considerations that target company directors can draw on in formulating takeover strategy. But Chancellor Allen's somewhat cavalier assertions on this question only express the conflict between shareholders and other interests; they do not resolve that conflict. Of course shareholders don't care about nonshareholders or the long run once a corporation is in the Revlon mode—they expect to be gone in the near future. Yet, Chancellor Allen himself recognized in *Interco* and *TW Services* that corporate law is filled with normative preferences, and in *Time* both he and the Supreme Court appreciate that shareholder desires for current wealth are subordinated to other considerations when the corporation is outside the Revlon mode. Why does freedom to prefer other interests become illicit once in the Revlon mode? By endorsing Revlon, even in its modest post-*Time* form, Chancellor Allen in effect says that, in one set of cases (Revlon, Interco, and Pillsbury) he prefers the norm of shareholder primacy—whether in its substantive wealth maximization dimension or its procedural choice dimension—over competing values like labor security and minimal indebtedness, while in others (such as *Time*) he does not. Nowhere, however, has either he or the Supreme Court stated why, or identified a more elemental and authoritative principle that differentiates those two categories. Underlying normative preference remains, unarticulated and unjustified.

To suggest a wholesale revisiting of Revlon thus is to suggest that shareholder primacy is no less subject to subordination within the Revlon mode than it is without. For corporate law, of course, that borders on heresy. Shareholders have been presumed to be what the game is all about, even if only over the usefully vague long run. Yet *Time*'s collaring of shareholder primacy invites us to explore whether such a conceptualization of corporate activity remains useful and viable today, whether based on traditional property law or newly-emerging

58. Id. at 92,179.
59. Id. at 92,180 n.14; *Interco*, 551 A.2d at 799–800.
contractual grounds, or whether an altogether new and richer framework is needed to account for the myriad demands placed on modern public corporations. Less ambitiously, allegiance to the conventional norm of shareholder primacy can be preserved by reading Time's emphasis on managerial prerogative to imply that, when placed in the Revlon mode, the target company board can seek a resolution that harmonizes shareholder wealth desires with sensitivity to nonshareholder claims on corporate endeavor. No one disputes that management can take account of those considerations outside the takeover context in a way that "costs" shareholders. Doing so once in the Revlon posture is not necessarily inappropriate, even if it likewise "costs" shareholders. Indeed, in bringing Revlon under the analytical framework of Unocal, the Supreme Court in Time seems implicitly to sanction director consideration of the nonshareholder interests it listed in Unocal. The result would be that shareholders may depart the corporation via a Revlon auction but only with a price per share equivalent to that obtainable, in management's judgment, over the "long run" to which they usually are remitted when the enterprise is to remain intact.

One might respond that such an approach would drain Revlon of its significance, but there are several reasons to believe that Revlon's days may be numbered anyway. First, outside of Delaware, statutes broadly authorizing directors to consider the impact of their actions on nonshareholder interests are proliferating. Those statutes essentially overrule Revlon in the states where they apply. For example, in breaking up a Pennsylvania corporation in response to a takeover bid—a situation where in Time the Supreme Court indicated Revlon would clearly apply to a Delaware corporation—a board may


61. For a recent example of how in a multi-bidder, but not overtly hostile, context directors can and do consider nonshareholder interests in selling a company, see Garcia, Core States To Buy First Pennsylvania, Wall St. J., Sept. 19, 1989, at A45, col. 1. The board of directors of First Pennsylvania Corp. rejected a $20.85 per share bid from Meridian Bank Corp. in favor of an $18.75 bid from Core States Financial Corp. because the board of First Pennsylvania was convinced that Core States would consolidate the operations of the two companies without massive employee lay-offs. Even in the nonRevlon takeover context, nonshareholder constituencies are cited by target boards as a basis for resisting bids, especially highly leveraged bids. See, e.g., Amanda Acquisition Corp. v. Universal Foods Corp., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,435 (E.D. Wis. Mar. 18, 1989), aff'd on other grounds, 877 F.2d 496 (7th Cir. 1989), cert. denied, 110 S. Ct. 367 (1989).

structure the sale in a way that takes into account more than short-term shareholder wealth.\textsuperscript{63}

Second, in \textit{Revlon} the Supreme Court stated that "concern for non-stockholder interests is \textit{inappropriate} when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."\textsuperscript{64} Yet, three years later, the Supreme Court qualified the auctioneer's duties by introducing a proviso. The Court stated that the "proper objective of Macmillan's fiduciaries was to obtain the highest price reasonably available for the company, \textit{provided} it was offered by a reputable and responsible bidder."\textsuperscript{65} In a footnote, the Court lists a wide variety of factors a target board may consider in evaluating a bid and the bidder's responsibility.\textsuperscript{66} Among the factors cited are "the impact of both the bid and the potential acquisition on \textit{other} constituencies, provided that it bears some reasonable relationship to general shareholder interests."\textsuperscript{67} What "reasonable relationship" and "general shareholder interests" are remains to be filled in. The point here is that Time's implicit challenge to \textit{Revlon} was already inaugurated in \textit{Macmillan}, with its renewed suggestion that target company boards acting as auctioneers may recognize the interests of nonshareholders even in Delaware.

Third, should \textit{Time} be interpreted to empower management to refuse redemption of poison pills or rescission of other defensive measures, as we suggested above, it is likely that target boards will have little trouble steering clear of the \textit{Revlon} mode in the first place. Like so many hoary legal doctrines, it will remain on the books, unused. In the burgeoning wake of \textit{Time} and \textit{TW Services}, then, it is far from clear that \textit{Revlon}'s insistence on exclusive devotion to immediate shareholder wealth is, if ever it was, still viable.

\textbf{Revisiting Unocal}

Once target management's behavior is challenged in court the critical threshold question is the level of judicial scrutiny to which the conduct will be subjected. From the vantage point of target management, the best outcome is the fairly lax review accorded by the traditional business judgment rule. Here the inquiry essentially is: "did the Board reach \textit{[its]} decision in good faith pursuit of legitimate corporate interests, and did it do so advisedly?"\textsuperscript{68}

Until 1985, conventional business judgment rule review prevailed in examining management's defensive behavior just as it did in examining management's behavior outside the takeover context. Concerned about the risk that target management's defensive behavior was tainted by self-interest, the Delaware


\textsuperscript{64} \textit{Revlon}, 506 A.2d at 182 (emphasis added).

\textsuperscript{65} Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 (Del. 1989) (emphasis added).

\textsuperscript{66} \textit{Id.} at 1282 n.29.

\textsuperscript{67} \textit{Id.} (emphasis added).

\textsuperscript{68} \textit{TW Services}, Fed. Sec. L. Rep. (CCH) ¶ 94,334 at 92,182.
Supreme Court in *Unocal* advanced a modified and somewhat stricter level of judicial review. *Unocal* promulgated the now familiar two-step inquiry in which, first, target directors must prove the existence of reasonable grounds for believing that a takeover endangers "corporate policy and effectiveness."69 This burden is satisfied by showing "good faith and reasonable investigation . . . ."70 Second, a defensive measure must be "reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise."71 Only after both aspects of the analysis are answered favorably does the adoption of a defensive measure receive the deference of the business judgment rule.

Having played a central role in Delaware corporate law for five years now, another significant post-*Time* question concerns the continued vitality of the *Unocal* standard. This may appear odd in light of the Supreme Court's effort to firmly ground its analysis on *Unocal*, even to the point of drawing *Revlon* under the *Unocal* mantle. Nonetheless, by emphasizing in *Time* the centrality of management in the handling of corporate affairs, the Delaware judiciary may be forced to conflate the distinction between friendly and hostile acquisitions. With the loss of that distinction goes the accepted rationale for differing standards of judicial review.

Recall a basic point. Outside the narrow *Revlon* mode, a target company board is under no obligation to conduct an auction or even to negotiate with a potential buyer. This is true whether the buyer seeks a friendly or hostile acquisition, as *Lewis v. Honeywell* and other cases make quite clear.72 In concluding that Honeywell shareholders did not state a claim upon which relief could be granted because Honeywell's chairman had spurned an overture by Sperry Rand, the Chancery Court stated that directors may "in a proper case involving a valid exercise of their business judgment discretion, reject a takeover proposal without further negotiation."73 That traditional business judgment review rather than the *Unocal* standard is appropriate in examining a company's refusal to negotiate was reiterated by Chancellor Allen in *TW Services*, where the more conventional standard was applied in assessing a board's refusal to negotiate with a hostile bidder who insisted on a board's assent to a merger agreement.74 In light of this uncontroversial principle, shouldn't the refusal of *Time*'s board of directors to negotiate with Paramount similarly have been

69. 493 A.2d at 955.
70. *Id.* (quoting Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964)).
74. *TW Services*, Fed. Sec. L. Rep. (CCH) ¶ 94,334 at 92,182. Chancellor Allen stated that "Insofar as . . . [a bidder makes] a proposal to negotiate a merger, I understand the law to permit the board to decline it . . . ." *Id.*
reviewed under traditional business judgment standards rather than the modified *Unocal* analysis?

Had Time's board of directors merely refused to negotiate with Paramount and were that refusal itself the behavior challenged in court, then the answer clearly is "yes." The Time board did more than refuse to negotiate, however. It also proposed to purchase Warner. But does that wrinkle really matter if corporate acquisitions of stock are committed to the discretion and judgment of a board of directors, with governing statutes denying shareholders any role? Chancellor Allen insists, and the Supreme Court wholeheartedly agrees, that *Unocal* applies in *Time* because the purchase of Warner was "defensive in character." Thus, he believes that the "risks that *Unocal* was shaped to protect against are equally present . . ." Simply asserting that doesn't make it so, however. Nothing but the chronology of Paramount's bid and the change in the Warner acquisition from a merger to a stock purchase made it "reactive." As to the managerial self-interest that forms the central concern of *Unocal*, that motivation is as likely to exist in friendly acquisitions and in stubborn refusals to negotiate with hostile bidders as in defensive measures taken in "reaction" to hostile bids. Yet the possibility of self-interest in the former contexts does not compel a higher standard of review.

Perhaps a truer test of *Unocal*'s viability will arise in a case that involves managerial behavior less "conventional" than the purchase of a business—behavior such as adoption and subsequent refusal to redeem a poison pill plan. Such a case will differ from *Time* because in *Time* the board stayed within its "corporate" domain, proposing an action that traditionally falls to management. In intervening in the tender offer process by deploying a poison pill, however, a target board less clearly advances a "corporate" objective than seems to meddle in a "shareholder" matter. Indeed, Chancellor Allen discussed the anomalous treatment of mergers and tender offers under modern corporate law in the *TW Services* opinion. He recognized that, although both friendly mergers and hostile takeovers are alternative routes to the same destination (control over corporate assets), under current corporate statutes directors play a critical role in mergers but no explicit role in tender offers, which are assumed to be pure stock disposition matters. Poison pill plans, much like contemporary antitakeover statutes, are essentially attempts to fill this statutory "gap" and afford management some "say" in the resolution of takeover contests. Sanction for this move can be found in *Unocal* itself where the Supreme Court rejected the argument that management must remain passive in responding to hostile bids.

77. *Unocal*, 493 A.2d at 955 n.10. In *TW Services*, Chancellor Allen found support for applying *Unocal* analysis to a target board's pill redemption decision in the case of *Moran v. Household Int'l*, 500 A.2d 1346 (1985). He noted that the Supreme Court in *Moran* cited the *Unocal* case after stating that a board's action on the pill redemption question would be reviewed in accordance with the basic fundamental duties owed by directors to the corporation and its stockholders. He went on to say that he has "understood that citation to mean that a decision not to redeem a pill in the face of a hostile tender offer is a defensive step that has to be 'reasonable in relation to the threat posed' by
Chancellor Allen’s distinction in *TW Services* between mergers and tender offers appears to drive both his and the Supreme Court’s conclusion in the later *Time* decision. That is, since Paramount did in fact launch a hostile takeover bid, not simply an overture directed to management to negotiate a merger or acquisition, that alone appears to be sufficient to trigger *Unocal*. We demur, at least, to that rationale. After all, outside the special *Revlon* mode, a target company board can, in advancing the best interests of the corporation, respond to an acquisition effort by declining to do anything and still receive business judgment review of its conduct, regardless of the self-interest presumed by *Unocal*. Similarly, in advancing the best interests of the corporation, why should a board of directors facing a hostile bid not be free to take less passive, more affirmative action, such as implementing and refusing to redeem a poison pill, and still have its behavior scrutinized under traditional business judgment review standards?²⁸

At bottom, there must be some nagging judicial doubt about the latter course of behavior. But on what basis? Certainly not the managerial self-interest thought to inhere in seeking to preserve the corporate enterprise and continue corporate policy. That abounds in other contexts as well. Perhaps it is the drastic interference with shareholder ability to alienate stock, an ability that smacks of property rights. That “right,” however, exists in unimpaired form only if the law says it does. It occupies no special status aloof from other claims, but, as with all manner of property, is hemmed in with whatever restrictions are thought necessary for the public good. Moreover, that unfettered shareholder claim is the very claim the Supreme Court rejected in *Time* when, in approving *Time’s* actions under *Unocal* analysis, it said that the board has no obligation either to afford shareholders an opportunity to tender for premiums or to operate the corporation so as to maximize short-term wealth. The end result in *Time* is that the law declares that shareholders have no right, either as a matter of corporate law or property law, to vote “yes” on the Paramount offer by tendering their stock. A board of directors can effectively short-circuit the power to sell.

such offer.” *TW Services*, Fed. Sec. L. Rep. (CCH) ¶ 94,334 at 92,182. That reference to *Unocal* in the *Moran* decision, coming as a cryptic dictum only a short time after the *Unocal* standard was first articulated, is a very thin reed upon which to base such a significant conclusion. See Amanda Acquisition Corp. v. Universal Foods Corp., [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,435 (E.D. Wis. Mar. 18, 1989) (analyzing target board refusal to redeem poison pill under *Unocal* standard), aff’d on other grounds, 877 F.2d 496 (7th Cir. 1989), cert. denied, 110 S. Ct. 367 (1989). Compare Ohio Rev. Code § 1701.59(C) (1988) (adopting clear and convincing standard for reviewing claims that directors violated duties).

²⁸. See *In re DeSoto, Inc. Shareholder Litigation*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 94,964 (Del. Ch. Feb. 5, 1990) (denying bidder request for order compelling redemption of poison pill where target management made no effort to procure higher offer but warning target board to maximize share value or face order for redemption). In light of the Supreme Court’s reasoning in *Time*, albeit not a poison pill case, the insistence of cases like *DeSoto* on using pills only as “gavels” to run auctions and maximize share values rather than to preserve enterprises intact needs rethinking.
The fact that the outcome in *Time* was reached via the *Unocal* route or that the target board arranged an acquisition rather than refusing to redeem a poison pill is of no consequence. In fact, the real irony of Chancellor Allen's *Unocal* analysis in *Time* is that it looks very much like vintage business judgment review until the very end when he summarily concludes that the Warner acquisition was "reasonable" under *Unocal's* second prong because it didn't "legally preclude the successful prosecution of a hostile tender offer." Thus, while allowing target company management to place enormous (and potentially insurmountable) barriers in the path of Paramount and hostile bidders in general, the Delaware judiciary apparently wants to preserve the possibility that companies can be acquired against the wishes of management. The judges achieve this larger policy objective by purporting to acknowledge the continued vitality of *Unocal* and its concerns about management self-interest. The very logic and rhetoric of *Time* belie that acknowledgement, however, and lead us to question what role *Unocal* can continue to play in the future.

If *Unocal* is to survive, its retention will not be a matter of logic—any more than *Revlon*'s will be. Instead, clinging to *Unocal* and *Revlon* will represent a confession that, after five years of experience with *Unocal* review of management behavior in corporate takeovers, the Delaware judiciary still remains uncertain about what to make of these transactions or how it should evaluate management's reactions to them. Indeed, how can one read Delaware's takeover decisions of the past few years and see anything but a gallant but still incomplete struggle to come to grips with the larger takeover phenomenon. Thus, while in result *Time* represents a swing back towards empowering management to protect the corporate enterprise, an unwillingness to jettison the role of takeovers as important accountability instruments in corporate governance is likely to remain. As their advocates have insisted, hostile takeovers are the ultimate capital market check on the deficiencies of the traditional corporate governance scheme. The central question in Delaware's corporate law today is the extent to which the judiciary will sanction management's strategy of transforming hostile takeovers from national securities market phenomena into "corporate" matters to be evaluated under the generous protection Delaware accords to management via the business judgment rule.

**CONCLUSION**

Unable yet to opt decisively for a solution that subjects shareholder welfare or the fate of the corporate enterprise entirely to management's ambivalent and loose fiduciary obligation (although in *Time* it comes quite close), and also refusing to extend the shareholder centered thrust of *Revlon* and *Interco*, in this still unfolding saga the Delaware judiciary purports to choose a middle course, clinging to *Unocal* and *Revlon*, however questionable the courts' rationale may

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79. Fed. Sec. L. Rep. (CCH) ¶ 94,514 at 93,284. The Supreme Court affirmed Chancellor Allen's ruling on this point as "clearly supported by the record." Fed. Sec. L. Rep. (CCH) ¶ 94,938 at 95,211.
be. The logic of *Time* seems to imply the coming demise of *Unocal* and calls into question the normative basis of *Revlon*. At the same time, *Time* implicitly insists on the continued vitality of those decisions if for no other reason than that *Unocal*'s somewhat heightened standard of review and *Revlon*'s auction mandate assure continuing judicial participation in monitoring an enormously important social phenomenon. Despite that insistence, we suspect that the Delaware judiciary will soon be called upon to decide the fate of *Unocal* review, and also to articulate more clearly the meaning of *Revlon*. As it confronts those challenges, it must ground *Unocal* on something more substantial than ever-present managerial self-interest. The judiciary must reconcile two deeply-imbedded principles that have come to symbolize the two poles in the larger takeover debate: shareholder control over stock disposition matters and management control over corporate affairs. Inevitably, one must yield. It must also explain the justification for *Revlon*'s asserted preference for shareholders, an assertion that grows increasingly puzzling in the wake of *Time*. Here a different choice must be made: shareholder welfare versus broader enterprise considerations as the central principle of corporate law. Again, the tension demands resolution.