Corporate Law—Interested Board of Director’s Termination of Sales Process Subject to Entire Fairness Review—*Gantler v. Stephens*, 965 A.2d 695 (Del. 2009)

Although Delaware statutory law entrusts a corporation’s board of directors with the power to manage the corporation’s business and affairs, fiduciary duties severely circumscribe the authority allocated to the board. Such duties are essential to safeguard the shareholders’ equity stake from opportunistic board behavior, for although shareholders are statutorily empowered to replace self-serving directors, widespread dispersion of ownership may effectively usurp such control of the corporate enterprise. In *Gantler v. Stephens*, the Supreme Court of Delaware considered whether the business judgment rule protected a board’s decision to reject a merger proposal and abandon a sale of the company. Under the unique facts presented, the court held that because a majority of the board had breached its duty of loyalty to shareholders, the court would not apply the business judgment rule, but rather would determine the objective fairness of the board’s actions.

In August 2004, the First Niles board of directors authorized management to conduct a sale of the company for the alleged purpose of reducing expenses imposed incident to reporting requirements under the Securities Exchange Act. At that time, the board consisted of five members: Stephens, Kramer, Eddy, Zuzolo, and Gantler. In addition to serving on the board, Kramer and Zuzolo dealt with First Niles in other capacities; specifically, Kramer’s company

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3. 965 A.2d 695 (Del. 2009).
4. See id. at 706 (framing issue of case-in-chief).
5. See id. at 708 (concluding business judgment rule inapplicable).
7. See Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *5 (Del. Ch. Feb. 14, 2008) (listing members of board), rev’d, 965 A.2d 695 (Del. 2009). As Chairman of the Board, President, and Chief Executive Officer of First Niles, Stephens was the only director also to serve as an officer of the company. *See id.* at *3 (stating Stephens’s duties).
provided heating and air conditioning services to the Bank, while Zuzolo provided legal and title services through his law firm and real estate title company.  By December 2004, three bidders for First Niles emerged: Farmers National Banc Corporation (Farmers), Cortland Bancorp (Cortland), and First Place Financial Corporation (First Place). On January 18, 2005, the board instructed First Niles’s officers, including Stephens, to pursue the Cortland and First Place offers.

Cortland requested due diligence materials and scheduled a due diligence session for February 6, 2005. When Stephens failed to provide the documents, however, Cortland cancelled the meeting and set a February 8, 2005 deadline for submission of the due diligence materials. On February 10, 2005, with First Niles failing to meet its suitor’s deadline, Cortland withdrew its offer. First Place submitted its due diligence request on February 7, 2005, and while Stephens initially resisted, he scheduled a meeting once Cortland withdrew its offer. At a special board meeting on March 9, 2005, the directors effectively terminated the sales process by voting four to one to reject First Place’s revised offer without any discussion regarding its merits.

Six First Niles shareholders brought suit, alleging in relevant part that the First Niles board breached its fiduciary duties by rejecting the First Place merger offer and abandoning the sales process. The defendant directors moved to dismiss on the grounds that the plaintiffs failed to rebut the protection afforded to the board by the business judgment rule. Finding heightened

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9. See Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *6 (Del. Ch. Feb. 14, 2008) (noting potential acquirers of First Niles and Bank), rev’d, 965 A.2d 695 (Del. 2009). Both Cortland and Farmers indicated they would not retain the current board, while First Place did not specify its future plans regarding the board. See id. at *6-7 (noting potential transaction’s effect on board’s composition).


judicial scrutiny inappropriate under *Unocal v. Mesa Petroleum Co.*, the Court of Chancery of Delaware applied the business judgment rule to the defendant directors’ decision to reject the First Place offer and terminate the sales process. Further, because the plaintiffs did not allege sufficient facts demonstrating a breach of the duty of loyalty (or the duty of care), they had not overcome the presumption that the directors held an honest belief that they acted in the best interests of the corporation and its shareholders. Specifically, with regards to the duty of loyalty, the court cited three reasons in support of its conclusion: first, the fair price prong of the entire fairness test would be difficult to apply where no transaction had occurred; second, it would be doctrinally inconsistent to apply a more stringent standard of review (entire fairness) to board action “arguably less intrusive on shareholder interests” than defensive action taken in a hostile takeover attempt (subject to *Unocal*’s less exacting proportionality test); and third, because in the absence of extraordinary entrenchment allegations, a board’s decision not to undertake a merger is protected by the business judgment rule. The Supreme Court of Delaware rejected the Court of Chancery’s three-pronged rationale and reversed, holding that the plaintiffs rebutted the business judgment rule, thereby establishing entire fairness as the governing judicial standard of review, because disloyalty tainted the directors’ rejection of the First Place bid and abandonment of the sales process. In *Aronson v. Lewis,* the Supreme Court of Delaware anointed the business judgment rule as the governing standard in ascertaining the propriety of board action. When the business judgment rule applies, it creates “a presumption

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18. 493 A.2d 946 (Del. 1985).
19. See Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *25-28 (Del. Ch. Feb. 14, 2008) (determining appropriate standard of review under Delaware law), rev’d, 965 A.2d 695 (Del. 2009). The Court of Chancery of Delaware reasoned that *Unocal* did not apply because the board’s action was not a defensive measure in response to an external threat; rather, the board initiated the sales process on its own accord. See id.
22. See 965 A.2d at 707-08 (addressing facts revealing conflict of interest as to majority of board). The court referenced distinct evidence of loyalty: Stephens sabotaged the due diligence process, and the animus underlying Kramer and Zuzolo’s votes represented a desire to avoid jeopardizing the significant business relationships the two directors developed with First Niles. See id.
24. See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (holding stockholder demand excused as futile only where facts indicate business judgment rule inapplicable). The business judgment rule represents judicial recognition of Delaware’s broad statutory grant of authority to a corporation’s board of directors. See Del. CODE ANN. tit. 8, § 141(a) (2001) (empowering directors to manage corporate affairs or delegate such management to others); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (setting forth business judgment rule’s rationale); Joseph Himsey, IV, *Business Judgment and the American Law Institute’s Corporate
that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."25 Thus, unless the party challenging a board’s decision demonstrates that it violated the duty of loyalty or the duty of care, the court will not substitute its business judgment for that of the directors if the board’s decision can be attributed to any “rational business purpose.”26

When applying the duty of loyalty, courts generally seek to establish whether directors, because of a conflict of interest, deprived the corporation of an economic benefit or otherwise dealt with the corporation in an unfair manner.27 In determining whether directors violated the duty of care, a court must determine whether the board acted in a grossly negligent manner (i.e., whether

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25. See Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (discussing effects of applying business judgment rule). Through its recognition that directors—not judges—are best suited to manage the business and affairs of the corporation, the business judgment rule serves to increase shareholder welfare by shielding directors from personal liability in the lion’s share of cases. See Frank H. Easterbrook & Daniel R. Fischel, The Proper Role of a Target’s Management in Responding to a Tender Offer, 94 Harv. L. Rev. 1161, 1196 (1981) (contending business judgment rule maximizes corporate value).


the board made an informed decision).\textsuperscript{28}

In potential change of control transactions, an incumbent board faces a substantial obstacle before a reviewing court will apply the business judgment rule, which effectively shields directors from personal liability.\textsuperscript{29} Because of the “omnipresent specter” that self-interest may dominate the board’s decision to oppose an unsolicited offer for corporate control, the business judgment rule only applies if the board possesses a reasonable belief that the offer poses a threat to corporate policy and effectiveness, and the board’s response is objectively reasonable in relation to the threat posed.\textsuperscript{30} Delaware courts have only applied \textit{Unocal}, however, when directors have taken defensive action in response to a presently existing external takeover threat or in an environment with an increased danger of hostile takeover.\textsuperscript{31}

\textsuperscript{28} Compare Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (finding gross negligence where board approved merger quickly, without prior notice, and without consulting expert), with \textit{In re} Walt Disney Co. Derivative Litig., 906 A.2d 27, 55-61 (Del. 2006) (refusing to subject directors to liability where board largely relied upon own expertise). The duty of care inquiry is procedural, not substantive: it does not generally scrutinize the merits of a board’s decision, but rather examines the process by which the board rendered its decision. See Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (focusing on manner in which board sold company); see also \textit{In re} Walt Disney Co. Derivative Litig., 906 A.2d 27, 55-60 (Del. 2006) (scrutinizing decision-making process).


Generally, Delaware courts have applied the business judgment rule when a board rejected an offer to merge. Application of the business judgment rule to the board’s unilateral decision to decline a merger is principally based on the board’s statutory ability to propose a merger. Furthermore, such an approach recognizes that the decision not to merge is typically motivated by corporate concerns, as mergers may decrease shareholder wealth by increasing the target’s debt and compromising the corporation’s long term share value.

In *Gantler v. Stephens*, the Supreme Court of Delaware first addressed the propriety of applying heightened judicial scrutiny under *Unocal* to the First Niles board’s rejection of the First Place merger proposal and termination of the sales process. The court held *Unocal* inapposite because the board, in taking such action, did not respond defensively to an external threat. In other words, the record did not disclose a hostile bidder’s attempt to gain control by

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34. See TW Servs., Inc. v. SWT Acquisition Corp., CIV. A. Nos. 10427, 10298, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (articulating board’s legitimate concerns in declining merger). In this situation, shareholders benefit from management expertise in negotiating change of control transactions. See Gilson, supra note 29, at 850 (acknowledging management’s skill in negotiated transactions).

35. See 965 A.2d at 705 (reviewing plaintiffs’ *Unocal* claim). On appeal, the plaintiffs argued that *Unocal* mandated a finding that the business judgment rule did not protect the board’s decision because the directors acted in response to a threat (i.e., First Place’s merger proposal), which could have resulted in loss of employment and its attendant benefits, when they rejected the bid and foreclosed the possibility of other shareholder wealth-enhancing bids by ending the sales process. See id. (explaining plaintiffs’ basis for invoking *Unocal*).

36. See id. (stating "defensive" action invokes *Unocal*).
making an unsolicited tender offer to shareholders; rather, the board actively sought out bidders, who in turn submitted their offers to the company.\textsuperscript{37} Thus, as the board faced no external threat, the court refused to construe the board’s rejection of the merger offer and abandonment of the company’s sale as a “defensive measure” under Unocal\textsuperscript{38}.

Although a court’s failure to invoke the Unocal standard of review in the context of a change of control transaction almost always results in judicial validation of the board’s action under the business judgment rule, the Supreme Court of Delaware applied entire fairness review after a searching inquiry into the conflicts facing those board members who opposed continuing the sales process.\textsuperscript{39} In response to the plaintiffs’ argument that the court should scrutinize the underlying transactions for entire fairness solely because the board may have acted to preserve their positions, the court warned that such an approach would sweep too broadly by calling into question every merger rejection and effectively precluding the board from acting in the best interests of shareholders.\textsuperscript{40} Therefore, the court deemed such an entrenchment motive alone insufficient to trigger review under the entire fairness standard; rather, the plaintiffs would have to show additional facts demonstrating that a majority of the board acted disloyally.\textsuperscript{41} In concluding that Stephens violated his duty of loyalty to the shareholders, the court looked to the manner in which Stephens conducted the sales process: he not only failed to respond to Cortland’s initial due diligence request, causing Cortland to withdraw its bid, but also he initially resisted First Place’s attempts at conducting due diligence.\textsuperscript{42} Kramer and Zuzolo were also conflicted because they risked losing the Bank as a major client of their personal businesses if they voted in favor of a change of control transaction: Kramer, a man of “comparatively modest means,” provided

\textsuperscript{37} See id. at 700-01 (detailing sales process). Unocal is not necessarily inapplicable every time a board decides to sell a company. See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding board must act reasonably to maximize company’s value once sale becomes inevitable); see also Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1287-88 (Del. 1989) (applying Revlon standard).

\textsuperscript{38} See 965 A.2d at 705 (interpreting Unocal as applying to situations involving hostile bidders). Justice Jacobs, writing for the court, stated “[t]he premise of Unocal is ‘that the transaction at issue was defensive.’” Id. (quoting Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 271 (Del. Ch. 1989)) (concluding external threats to corporate policy and effectiveness appropriately analyzed under Unocal’s two-prong test). The court also cited Kahn for the proposition that rejection of a merger proposal, standing alone, does not invoke Unocal. See 965 A.2d at 705 n.23 (declaring rejection of merger offer not cognizable threat for Unocal purposes).

\textsuperscript{39} See 965 A.2d at 706-08 (reviewing rejection of merger and termination of sales process under intrinsic fairness).

\textsuperscript{40} See id. at 707 (explaining board’s entrenchment motive insufficient to subject directors to entire fairness review).

\textsuperscript{41} See id. at 706-07 (declining intrinsic fairness review without other evidence demonstrating directors violated duty of loyalty). The Court of Chancery followed a similar approach in TW Services. See TW Servs., Inc. v. SWT Acquisition Corp., CIV. A. Nos. 10427, 10298, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (holding board did not breach duty of loyalty in declining merger).

\textsuperscript{42} See 965 A.2d at 707 (detailing Stephens’s disloyal conduct).
heating and air conditioning to the Bank while Zuzolo regularly rendered legal and title services. Thus, by scrutinizing the directors’ motives more carefully than in most other change of control cases, the Supreme Court of Delaware held that because a majority of the First Niles board voted down the merger and terminated the Bank’s sale, the directors needed to demonstrate that their decisions were objectively fair to the Bank’s shareholders.

Although the Supreme Court of Delaware properly declined to apply Unocal to the board’s rejection of the merger proposal and termination of the sales process, it contravened a cardinal principle underlying the business judgment rule by improperly reviewing the First Niles board’s action for entire fairness. Unless board action unnecessarily encroaches upon a limited set of rights retained by shareholders, courts analyze it under an extremely lenient framework. The Gantler result, however, creates inconsistency and incoherence by subjecting board action comparatively less intrusive on shareholder interests than the action taken in Unocal and similar cases to a more exacting level of judicial scrutiny than that mandated by Unocal. The board’s rejection of the First Place bid and termination of the sales process in no way precluded First Place, or any other bidder, from making an acquisition proposal directly to shareholders.

43. See id. at 708 (examining remaining directors’ conflicts).
45. See supra note 32 and accompanying text (explaining Unocal only applies in hostile takeover situations); see also supra note 25 (examining rationale behind business judgment rule). Although the Gantler court did not substitute its judgment for that of the board in the literal sense—for example, by criticizing the substantive merits of the board’s rejection of the merger proposal and termination of the sales process—the Gantler result nonetheless is inconsistent with Delaware’s policy of according directors great discretion in conducting the business and affairs of the corporation. See Del. Code Ann. tit. 8, § 141(a) (2001) (bestowing power to manage company upon corporate board); see also Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *31 (Del. Ch. Feb. 14, 2008) (asserting “less exacting standard comports with Delaware’s broad allocation of power to directors”), rev’d, 965 A.2d 695 (Del. 2009); Cunningham, supra note 44 (admonishing Gantler court’s close scrutiny of director behavior).
46. See supra note 28 and accompanying text (analyzing limited circumstances where courts will closely scrutinize board action). Many legitimate business reasons may motivate a board to reject a merger proposal, such as a concern that the price offered is insufficient, that the merger will preclude the company from pursuing welfare-maximizing alternatives to a change of control transaction, and that increased post-merger debt will threaten the company’s long term viability. See TW Servs., Inc. v. SWT Acquisition Corp., Civ. A. Nos. 10427, 10298, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (describing board’s legitimate reasons for rejecting offer to merge).
48. See Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *31 (Del. Ch. Feb. 14, 2008) (indicating First Place’s ability to make tender offer), rev’d, 965 A.2d 695 (Del. 2009); see also Easterbrook & Fischel, supra note 25, at 1200 (noting availability of tender offer when board rejects merger proposal). Furthermore, the record did not disclose any procedural impediments (such as a shareholder rights
The Supreme Court of Delaware’s duty of loyalty analysis also sweeps far too broadly, at least for a change of control transaction: while Unocal and Revlon subject board action clearly shown to have been motivated by self-interest to the intrinsic fairness test, Gantler handicaps a board merely upon a showing that the decision may have been motivated by self-interest.49 In this regard, it is unclear whether the self-interest relied upon by the Gantler court is distinguishable from that which the TW Services court found insufficient to

plan, staggered board, supermajority voting, or similar provisions in the company’s charter or bylaws) standing in the way of a successful tender offer. See 965 A.2d at 699-700 (outlining company’s internal structure). In contrast, a Unocal situation involves the board interposing itself between shareholders and a hostile bidder in a manner that may frustrate a change of control. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 951 (Del. 1985) (providing terms of Unocal board’s self-tender). Of course, the rejoinder is that the intrusiveness of corporate action is not the appropriate standard under Delaware law, for although an action may be intrusive, it still may be designed to protect shareholder interests. See id. at 956-57 (treatment board’s response as reasonable in light of bidder’s coercive tender offer). For example, Unocal fact patterns invariably involve a board’s response to an external threat to corporate policy and effectiveness (such as inadequacy of price or threats to a long term strategic plan) that promises to harm shareholder welfare. See Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1389-90 (Del. 1995) (stipulating inadequate price of tender offer sufficiently harms shareholders to constitute threat under Unocal). Thus, Unocal and its progeny require courts to employ the intrinsic fairness standard only to board action that is intrusive and shown to be motivated by self-interest alone (because it altogether precludes a hostile bid or coerces target shareholders to reject a takeover proposal). See id. at 1367 (defining draconian defensive measures as preclusive or coercive). In the final analysis, then, whether intrusiveness is the appropriate standard or not, the Gantler result is far more restrictive than that contemplated by Unocal, for in Gantler the mere fact that an interested board decided to reject a merger proposal (regardless of whether the board took such action in contemplation of shareholder value-maximization) was sufficient to trigger entire fairness review. See 965 A.2d at 707-08 (applying entire fairness to board’s rejection of merger and abandoning sale of company); see also infra note 49 and accompanying text (asserting Gantler court improperly invoked intrinsic fairness test).

49. Compare Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985) (indicating entire fairness only applies to unreasonable defensive actions, despite “omnipresent specter” of disloyalty), and Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1287-88 (Del. 1989) (upholding board action favoring management-sponsored group in sale of company under Revlon proportionality analysis), with 965 A.2d at 708 (applying intrinsic fairness without considering whether rejection of merger proposal definitively harmed shareholders). However, other decisions in the area of mergers and acquisitions are similar to Gantler in applying intrinsic fairness simply upon a showing of self-interest. See Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) (applying Weinberger’s fairness doctrine in take-out merger); Weinberger v. UOP, Inc., 457 A.2d 701, 710-11 (Del. 1983) (holding directors in parent-subsidiary cash-out merger must prove objective fairness in absence of protective mechanisms). It is questionable whether such an approach is consistent with a policy of deferring to management’s expertise in the merger context. See Easterbrook & Fischel, supra note 25, at 1200 (suggesting market forces, not courts, should regulate board’s decision to reject merger proposal); Gilson, supra note 29, at 850 (recognizing management’s expertise and concomitant “unfettered discretion . . . with respect to mergers”). Weinberger and similar cases are distinguishable from Gantler in that the self-interest animating the results in parent-subsidiary mergers (that the subsidiary board will assuredly vote in favor of a transaction involving a parent because of the myriad benefits interested directors receive from the transaction and because of the noninterested directors fear of parent retaliation) is far more concerning than the self-interest presented in Gantler. Compare Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990) (discussing inherent dangers of parent-subsidiary mergers), with 965 A.2d at 707-08 (examining Stephens’s conduct in sales process and Kramer and Zuzolo’s business relationships with the Bank). In the nontransactional context, courts have held self-dealing, standing by itself, insufficient in triggering entire fairness review. See Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (concluding fairness test applies only where parent receives something to exclusion of subsidiary).
invoke entire fairness review.\textsuperscript{50} Thus, the type of self-interest the \textit{Gantler} court found salient should not have been sufficient to strip away the protections of the business judgment rule, especially where, as here, the bidder easily could have appealed to shareholders via a tender offer.\textsuperscript{51}

\textit{Gantler} is also problematic because it creates uncertainty as to what renders an individual board member interested for purposes of triggering entire fairness review: in determining that Stephens violated the duty of loyalty by what it viewed as an attempt to sabotage a potential bid, the Supreme Court of Delaware deviated from precedent by looking to a director’s conduct rather than traditional indicia of self-interest.\textsuperscript{52} Furthermore, although the \textit{Gantler} court properly held that the mere possibility of directors losing control in a merger alone does not bring a transaction within the realm of entire fairness, the court continued to reason that two outside directors acted disloyally on account of their outside business relationships with the Bank; such a distinction, however, stands on tenuous grounds.\textsuperscript{53} Although the court required

\textsuperscript{50} Compare 965 A.2d at 707 (proffering “motive to retain corporate control” insufficient in showing directors acted disloyally), with TW Servs., Inc. v. SWT Acquisition Corp., CIV. A. Nos. 10427, 10298, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (concluding board did not breach duty of loyalty).

\textsuperscript{51} See supra note 49 and accompanying text (arguing \textit{Gantler} result inconsistent with director’s broad authority to manage company, especially in merger context). There is no question that, had the \textit{Gantler} conflicts been present in \textit{Unocal}, they would have been insufficient to trigger inherent fairness review. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (holding business judgment rule applies when board reasonably responds to threat). In other words, personal business dealings and board conduct beyond the defensive conduct in question are simply irrelevant under a \textit{Unocal} analysis; rather, a board only violates its \textit{Unocal} duties by acting unreasonably (i.e., in a preclusive or coercive manner). See Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995) (maintaining board violates \textit{Unocal} when defensive measure constitutes unreasonable response to threat). Furthermore, it is debatable whether a majority of the \textit{Gantler} board was interested in the decision to reject the First Place offer and abandon the sale of the Bank. See infra note 52 and accompanying text (criticizing \textit{Gantler} court’s duty of loyalty analysis).

\textsuperscript{52} See supra note 27 and accompanying text (outlining traditional conflict of interest fact patterns); see also Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *537 (Del. Ch. Feb. 14, 2008) (deeming plaintiffs entrenchment allegations “unexceptional”), rev’d, 965 A.2d 695 (Del. 2009); Cunningham, supra note 44 (criticizing \textit{Gantler} decision for creating uncertainty as to what constitutes conflict of interest). Due to the inherent ambiguity of human behavior, difficulties arise anytime a court uses conduct to ascertain whether a director breached his or her duty of loyalty: inferences from such conduct cut in multiple directions, and it may be exceedingly difficult to determine whether conduct reveals self-serving motives. Compare 965 A.2d at 707 (declaring Stephens breached fiduciary duties in failing to respond to due diligence request), with Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *37-42 (Del. Ch. Feb. 14, 2008) (finding Stephens not to have breached fiduciary duties), rev’d, 965 A.2d 695 (Del. 2009). Where the stakes are high—an inference that a director acted disloyally could shift the analytical standard from business judgment to entire fairness (which is precisely what occurred in \textit{Gantler})—the prudent course is to abandon conduct as a barometer in duty of loyalty cases. See 965 A.2d at 707-08 (holding intrinsic fairness applies because three out of five board members were conflicted). Finally, even if Stephens’s withholding due diligence materials from Cortland tends to prove disloyalty, such evidence cannot be used to show Stephens’s self-interest in rejecting the First Place offer because there is no doubt that Stephens furnished the requested materials. See id. at 700-01 (detailing course of dealing between Stephens and First Place). Not only did Stephens provide First Place with the due diligence materials, but he also informed the directors of First Place’s revised offer, and, when the board deferred consideration of whether to accept the First Place offer, Stephens scheduled a special meeting to discuss the proposal. Id. (reciting Stephens’s conduct in merger discussion).

\textsuperscript{53} See 965 A.2d at 707 (determining entrenchment motive alone insufficient in bringing transaction
the plaintiffs to plead, “in addition to a motive to retain corporate control, other facts sufficient to state a cognizable claim that the Director Defendants acted disloyally,” it is doubtful that the plaintiffs actually did so; they presented no empirical evidence, nor does logic compel the conclusion, that outside business dealings are any more likely to cause a director to act selfishly in rejecting a merger than entrenchment motives and other benefits accruing to directors in a merger situation. Finally, by applying entire fairness review, Gantler creates an array of practical difficulties by requiring fact-finders to determine fair price without the guidance of an underlying transaction.

In Gantler v. Stephens, the Supreme Court of Delaware considered whether the self-interest of a majority of the First Niles board tainted its rejection of the First Place offer and subsequent termination of the sales process. In holding that Stephens’s failure to timely provide due diligence materials together with Kramer and Zuzolo’s outside business dealings were sufficient to establish that a majority of the five-member board acted disloyally, the Supreme Court of Delaware erred for several reasons. First, the court needlessly created doctrinal inconsistency in corporate takeover law by subjecting board conduct that is less intrusive of shareholder interests to a more stringent standard of review than defensive action in the takeover context. Second, the court’s willingness to apply the entire fairness test upon even the slightest showing of self-interest is plainly inconsistent, not only with the board’s statutory authority to conduct the business and affairs of the corporation (including its broad authority in the area of mergers and acquisitions), but also with the associated judicial recognition that courts are in no position to question the business judgment of corporate decision-makers. Finally, the decision creates enormous practical difficulties in administering the fair price prong of the entire fairness test, for it is either

under entire fairness’s purview). A rule that would trigger fairness review from mere entrenchment allegations would all but extinguish directors’ broad statutory powers in merger transactions. See id. (claiming rejecting merger “could always enable a plaintiff to assert that . . . directors had an entrenchment motive”).


55. See Gantler v. Stephens, Civil Action No. 2392-VCP, 2008 Del. Ch. LEXIS 20, at *29 (Del. Ch. Feb. 14, 2008) (questioning ability of court to determine value of transaction that did not occur), rev’d, 965 A.2d 695 (Del. 2009). Under Weinberger, intrinsic fairness requires an inquiry into course of dealing and price. See Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (outlining two-prong test). However, it is doubtful that such a rubric could be sensibly applied where an interested board rejects a merger proposal. See Easterbrook & Fischel, supra note 25, at 1200 (maintaining “[o]nly at great cost, if at all, could a court determine” propriety of merger rejection).
impossible or far too costly for a court to measure the value of a transaction that never took place.

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