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CAUSATION AND INJURY IN CORPORATE CONTROL TRANSACTIONS: *CEDE & CO. v. TECHNICOLOR, INC.*

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Abstract: In *Cede & Co. v. Technicolor, Inc.*, the Delaware Supreme Court held that shareholders are not required to prove injury from corporate directors' failure to exercise due care in approving a merger transaction. Tort principles, the court stated, have no role in a business judgment rule analysis. Therefore, once shareholders prove a violation of the directors' duty of care, the burden is shifted to the directors to prove the entire fairness of the transaction despite the absence of a breach of the duty of loyalty. This Note argues that the entire fairness review of a disinterested board transaction is unworkable. Rather, courts should use tort principles to analyze a breach of the duty of care, and those principles require plaintiffs to prove causation and resulting injury. Because proving causation to an absolute certainty in the corporate control setting can be forbidding, this Note proposes a "substantial lost chance" causation standard as a more viable alternative.

In 1985, the Delaware Supreme Court shocked the corporate world. The court found in *Smith v. Van Gorkom*[1] that the corporate directors of Trans Union Corporation were not entitled to the protection of the business judgment rule and had breached their duty of care in evaluating and approving a merger offer.[2] Before this decision, courts had rarely found individual directors liable for breaching their duty of care absent accompanying disloyal acts.[3] In *Van Gorkom,* however, the court found liability based solely on the directors' failure to inform themselves properly before approving a takeover.[4] The court awarded damages consisting of the difference between the fair value of the stock and the offered price.[5] The decision provoked strong criticism and extensive

1. 488 A.2d 858 (Del. 1985).

2. *Id.* at 888.

3. Before *Van Gorkom* was decided, one commentator had stated that "[t]he search for cases in which directors . . . have been held liable in derivative suits for negligence uncomplicated by self-dealing is a search for a very small number of needles in a very large haystack." Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers,* 77 Yale L.J. 1078, 1099 (1968). *But see* Norwood P. Beveridge, Jr., *The Corporate Director's Duty of Care: Riddles Wisely Expounded,* 24 Suffolk U. L. Rev. 923, 945–46 (1990) (disputing Prof. Bishop's statement and noting that there are actually many cases upholding duty of care violations).

4. *Van Gorkom,* 488 A.2d at 888. The directors were grossly negligent because they approved the merger after only two hours' deliberation, without prior notice, and without the existence of an emergency. *Id.* at 874.

5. *Id.* at 893. Before damages were assessed, the directors agreed to settle for $23.5 million. Luckily for the directors, the acquiring Pritzker group agreed to pay the difference between the $10 million liability insurance coverage and the settlement amount. Craig W. Hammond, Note, *Limiting*

commentary because Delaware courts rarely second-guessed decisions made by experienced directors.[6] Lost in the furor, however, was any consideration by the court of the burden of proof plaintiffs carried in proving damages.[7] Most commentators assumed that damages for duty of care violations were based on the tort principle that the plaintiff had the burden of proving all foreseeable injuries resulting from the negligent act.[8]

In 1993, the Delaware Supreme Court's decision in *Cede & Co. v. Technicolor, Inc.*[9] surprised the corporate world again.[10] A Technicolor shareholder sued the company's directors in a personal liability action, claiming that the directors breached their fiduciary duties in the approval of a merger transaction. The court ruled that once the shareholder plaintiff proved that the directors had breached their duty of care and were not entitled to the protection of the business judgment rule, the plaintiff was not required to prove actual causation and injury in order to recover monetary damages.[11] Upon proof of a breach of due care, the

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Directors' Duty of Care Liability: An Analysis of Delaware's Charter Amendment Approach, 20 U. Mich. J.L. Ref. 543, 544 n.6 (1987).

6. *See, e.g.*, Krishnan Chittur, *The Corporate Director's Standard of Care: Past, Present, and Future*, 10 Del. J. Corp. L. 505 (1985); Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 Bus. Law. 1437 (1985); Bayless Manning, *Reflections and Practical Tips on Life in the Boardroom After Van Gorkom*, 41 Bus. Law. 1 (1985); E. Norman Veasey, *Further Reflections on Court Review of Judgments of Directors: Is the Judicial Process Under Control?*, 40 Bus. Law. 1373 (1985); E. Norman Veasey & Julie M.S. Seitz, *The Business Judgment Rule in the Revised Model Act, the Trans Union Case, and the ALI Project—A Strange Porridge*, 63 Tex. L. Rev. 1483 (1985). *Van Gorkom* spurred the enactment of state statutes that allow shareholders to adopt charter provisions eliminating or limiting a director's liability for monetary damages for a breach of the duty of care. *See, e.g.*, Del. Code Ann. tit. 8, § 102(b)(7) (1991). The crisis in director and officer (D & O) liability insurance, in part caused by an increase in litigation, also prompted these statutes. Skyrocketing premiums had resulted in inadequate D & O coverage, leading many individuals to decline to serve as corporate directors. Stephen A. Radin, *The Director's Duty of Care Three Years After Smith v. Van Gorkom*, 39 Hastings L.J. 707, 744–45 (1988).

7. Combined Opening Brief of Respondent/Defendants Appellees and Cross-Appellants at 118, Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993) (Nos. 336 & 337).

8. *Principles of Corporate Governance: Analysis and Recommendations* (Proposed Final Draft 1992) [hereinafter *Principles*], §§ 4.01(d) & 7.18(c); Dennis J. Block et al., *The Business Judgment Rule* 29 (3d ed. 1989 & Supp. 1991); Ernest L. Folk III et al., *Folk on the Delaware General Corporation Law* § 141:28 (3d ed. 1993); Norman D. Lattin, *Lattin on Corporations* 276 (2d ed. 1971); Hammond, *supra* note 5, at 544 n.6.

9. 634 A.2d 345 (Del. 1993). Plaintiffs were Cinerama, Inc., the shareholder, and Cede & Co., the owner of record.

10. *See* Dennis J. Block & Jonathan M. Hoff, *Director Fiduciary Duties and Entire Fairness Standard*, N.Y. L.J., January 20, 1994, at 5; Karen Donovan, *Corporate Directors Take Beating From Del. Supreme Court*, Nat'l L.J., Dec. 27, 1993/Jan. 3, 1994, at 17; William Klein II, *Delaware Directors: Take Care or Beware*, N.Y. L.J., Dec. 23, 1993, at 5.

11. *Cede*, 634 A.2d at 371.

burden shifted to the defendant directors to prove that the transaction was entirely fair.[12] Tort principles, it proclaimed, had no role in a business judgment rule analysis.[13] The court's ruling has provoked strong criticism.[14]

This Note asserts that the *Cede* court wrongly decided the proof of damages issue. After analyzing the director's duty of care in corporate control transactions, this Note concludes that proof of causation and injury should be required elements of the plaintiff's case.[15] Shifting the burden to the directors to prove the entire fairness of the transaction is inappropriate when the directors are disinterested. Furthermore, despite the court's contention that prior case law controlled, no Delaware cases have addressed the burden of proof that plaintiffs must bear in proving causation. Courts should use tort principles to analyze the director's duty of care; those principles require proof of causation and injury as necessary elements of the plaintiff's case-in-chief. Recognizing the difficult burden that a stringent "but for" causation requirement would impose upon plaintiffs, however, this Note considers alternative approaches to proof of causation. Building on the lessons learned in the medical and legal malpractice context, this Note proposes that when directors breach their duty of care in making corporate control decisions, shareholders should be required to prove a "substantial lost chance" to satisfy the causation requirement.

I. FIDUCIARY DUTIES OF CORPORATE DIRECTORS AND THE BUSINESS JUDGMENT RULE

Corporate directors owe fiduciary duties of both care and loyalty to the corporations they serve. The business judgment rule protects

12. *Id.*

13. *Id.*

14. One commentator described the result as creating director liability for "negligence in the air" and an "open invitation to litigate these cases." Donovan, *supra* note 10, at 23 (quoting Prof. Michael P. Dooley).

15. Corporate control transactions include buying or selling plants, acquiring or being acquired, increasing or decreasing leverage, going public or private, and selling stock and buying it back. Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 109 (1991). The *Cede* court did not restrict its holding to the corporate control setting. Corporate control transactions, however, are litigated frequently. They also present some of the most important, complicated, and, from a director's perspective, expensive areas of corporate litigation. Therefore, this Note concentrates on the effect that this ruling will have on corporate control transactions. Furthermore, this Note focuses primarily on Delaware corporate law. The influence of Delaware corporate law is nationwide. More than 40% of New York Stock Exchange companies and more than 50% of Fortune 500 companies are incorporated in Delaware. Klein, *supra* note 10, at 5.

directors from liability for decisions made in accordance with their fiduciary duties. If the business judgment rule is satisfied, corporate directors will not be held liable for any loss arising from a business decision. Historically, however, courts have treated the implications of breaches of the duty of care as distinct from breaches of the duty of loyalty. In corporate control transactions in which both the duties of loyalty and care are implicated, separating judicial analyses of the two duties is difficult.

A. *Fiduciary Duties of Corporate Directors*

Corporate directors manage the affairs of a corporation.[16] In performing their obligations, directors owe unyielding fiduciary duties to the corporation and its shareholders.[17] The principal fiduciary duties are the duty of care and the duty of loyalty.[18]

The duty of care imposes a standard for director behavior that is generally familiar throughout the law of negligence: that a person who undertakes conduct presenting the risk of injury to others must perform that role carefully.[19] In corporation law, the duty of care requires directors to exercise the care that an ordinarily prudent person would exercise under similar circumstances.[20] There are two distinct aspects to a director's duty of care: due care in decision making,[21] which is subject

16. "The business affairs of every corporation . . . shall be managed by or under the direction of a board of directors." Del. Code Ann. tit. 8, § 141(a) (1991). *See also* Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). The delegation of corporate authority to directors by shareholders enables skilled managers to run companies and investors lacking managerial skills to reap the benefits of the directors' expertise. Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 700 (1982).

17. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939). The divergence of corporate ownership and control creates monitoring costs of the directors' actions. Kenneth B. Davis, Jr., *Judicial Review of Fiduciary Decisionmaking—Some Theoretical Perspectives*, 80 Nw. U. L. Rev. 1, 4–5 (1985). The imposition of legally created fiduciary duties is a response to those monitoring costs. Easterbrook & Fischel, *supra* note 16, at 702.

18. Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985). *See also* Block et al., *supra* note 8, at 1. Embodied in these fiduciary duties is the duty of candor discussed *infra* at note 54.

19. Melvin A. Eisenberg, *The Duty of Care of Corporate Directors and Officers*, 51 U. Pitt. L. Rev. 945, 945 (1990).

20. Unlike the majority of other states, Delaware has no statutory formulation of the duty of care. Delaware case law, however, describes a duty in words almost identical to those in a majority of state statutes: "[D]irectors . . . in managing . . . corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances." Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125, 130 (Del. 1963). *See also* Revised Model Business Corp. Act § 8.30(a) (1984).

21. Veasey & Seitz, *supra* note 6, at 1493.

to business judgment rule protection,[22] and due care required of directors in carrying out their general responsibilities in delegation and oversight.[23] Courts normally characterize a corporate control decision of the type in *Cede* as one involving due care in decision making, not general oversight responsibilities.[24] In addition, unlike other areas in the law of negligence, Delaware imposes liability only for grossly negligent lapses of due care in decision making.[25]

Under the duty of loyalty, a director must scrupulously work to protect the interests of the corporation and its shareholders and refrain from conduct that would result in improper personal benefits.[26] Hence, directors must avoid any conflicts between their official position and their own self-interest.[27] The duty of loyalty is implicated if directors use their positions to effect or further a transaction between the corporation and that director. If the transaction is not fair to the corporation, a breach of the duty of loyalty is committed.[28] Such violations may include fraud, bad faith, and self-dealing.[29] Actions that have the primary purpose of

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22. *See infra* notes 35–72 and accompanying text.

23. Veasey & Seitz, *supra* note 6, at 1493. *See also* Bayless Manning, *The Business Judgment and the Director's Duty of Attention: Time for Reality*, 39 Bus. Law. 1477, 1494 (1984) (explaining that directors make discrete decisions and have general oversight functions). To satisfy the oversight component of the duty of care, directors must ensure that the officers of the corporation are properly managing its business and affairs. *Graham*, 188 A.2d at 130. Some of those oversight functions include ensuring compliance with the law, monitoring management, maintaining a financial reporting system and information system, and informing management of major corporate developments. Manning, *supra*, at 1499; Veasey & Seitz, *supra* note 6, at 1503. In carrying out their oversight functions, however, directors may delegate to subordinates if the decision to delegate is made with due care. Lutz v. Boas, 171 A.2d 381, 395–96 (Del. Ch. 1961). Del. Code Ann. tit. 8, § 141(e) (1991) also allows good faith reliance on information provided by officers or employees of the corporation.

24. Cases charging lapses in the duty of care for general oversight responsibilities normally arise in the midst of a corporate failure or a series of poor business judgments over a prolonged period of time. This Note does not address directors' due care in oversight. For a discussion of the director's general oversight functions, see Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981).

25. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985). The Delaware standard of care in the oversight context, however, is ordinary negligence. Rabkin v. Philip A. Hunt Chem. Corp., 547 A.2d 963, 972 (Del. Ch. 1986). *See also Francis*, 432 A.2d at 823 (imposing standard of ordinary care on directors for oversight responsibilities).

26. Folk et al., *supra* note 8, § 141:12.

27. *See, e.g., Aronson*, 473 A.2d at 812.

28. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1988). Conflict of interest transactions are not automatically voidable if a fully-informed majority of disinterested directors properly applies its business judgment in good faith to authorize the transaction or if approval of fully informed and disinterested shareholders has been secured. Del. Code Ann. tit. 8, §144(a) (1991). *See also* Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 59 (Del. 1952).

29. *Van Gorkom*, 488 A.2d at 873.

entrenching the directors in office, such as unreasonably resisting a takeover, are also violations of the duty of loyalty.[30]

Courts historically have scrutinized alleged violations of the duty of loyalty more thoroughly than violations of the duty of care.[31] Breaches of the duty of loyalty warrant higher scrutiny because they implicate the fundamental reason for fiduciary principles: the divergence of the directors' interests from those of the shareholders.[32] Unlike breaches of the duty of care, which are often punished by the market in the form of competition from efficiently run firms, duty of loyalty cases often involve "take the money and run" appropriations in which subsequent market penalties are inadequate deterrents in preventing future lapses in the duty.[33] Therefore, judicially enforced liability rules are needed to supplement market penalties for duty of loyalty breaches.[34]

B. *The Business Judgment Rule*

1. *The Elements of the Rule*

The business judgment rule, as fashioned by Delaware courts,[35] applies the directorial fiduciary duties to a discrete decision.[36] Delaware

30. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 953–55 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986). Other situations that implicate breaches of the duty of loyalty include dealings by a corporate parent with its subsidiaries, directors taking advantage of corporate opportunities, competition by directors with the corporation, and excessive compensation paid to directors. David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report,* 40 Bus. Law. 1383, 1386–87 (1985).

31. One famous case states the following about the duty of loyalty:

> A public policy . . . derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director . . . the most scrupulous observance of his duty . . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.

Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939). *See also* AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986); Easterbrook & Fischel, *supra* note 15, at 103.

32. Easterbrook & Fischel, *supra* note 15, at 91. *See also Guth,* 5 A.2d at 510 (finding duty of loyalty violation so uncompromising that liability does not rest upon proof of injury to corporation).

33. Easterbrook & Fischel, *supra* note 15, at 103. In fact, because of the market's failure to deter breaches of the duty of loyalty, Professor David M. Phillips would reformulate the duty of care to address what he sees as the primary risk to corporations: the risk of unfair self-dealing. David M. Phillips, *Principles of Corporate Governance: A Critique of Part IV,* 52 Geo. Wash. L. Rev. 653, 692–98 (1984).

34. Easterbrook & Fischel, *supra* note 15, at 103.

35. There is a lack of consensus on the business judgment rule. The drafters of the Revised Model Business Corporation Act abandoned their attempt to formulate the rule because of its ongoing judicial development. Revised Model Business Corp. Act § 8.30 official comment at 220–21 (1984). The ALI's formulation met with considerable controversy over the 15-year development of the

courts describe the rule as both a procedural and a substantive rule of law.[37] The procedural element of the rule contains the presumption that in reaching decisions, directors "acted on an informed basis [i.e., with due care], in good faith, and in the honest belief that the action taken was in the best interests of the company."[38] A shareholder wishing to challenge a discrete decision by directors must rebut the presumption by producing evidence of director self-interest, or that the directors either lacked good faith or failed to exercise due care.[39] If the plaintiff overcomes any element of the presumption, the directors are not afforded the protection of the business judgment rule.[40]

In all, the business judgment rule contains five elements:[41] a discrete business decision,[42] disinterestedness,[43] due care,[44] good faith,[45] and no abuse of discretion.[46] When each element of the rule is satisfied, the substantive component of the business judgment rule prohibits a court from substituting its judgment for that of the directors.[47] The business judgment rule also provides that there is no liability for an injury or loss

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Principles of Corporate Governance Project. See William J. Carney, *Section 4.01 of the American Law Institute's Corporate Governance Project: Restatement or Misstatement?*, 66 Wash. U. L.Q. 239, 239–52 (1988).

36. Block et al., *supra* note 8, at 2.

37. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989).

38. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

39. *Id.* Some commentators have pointed out that the "presumption" aspect of the business judgment rule is confusing. As in any civil action, the plaintiff already has the burden of proof on every element of the case. Therefore, it is misleading to say that a party with the burden of proof must also overcome a "presumption." R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 Bus. Law. 1337, 1345 (1993). However, the effect of the presumption may be to require particularized pleading and increased amounts of evidence. *Id.* at 1347–52.

40. *See Aronson*, 519 A.2d at 812.

41. Block et al., *supra* note 8, at 12.

42. "[T]he business judgment rule operates only in the context of director action . . . . [I]t has no role where directors have either abdicated their functions, or . . . failed to act." *Aronson*, 473 A.2d at 813. Nonetheless, a conscious decision not to act may be protected by the rule. *Id.*

43. *See infra* notes 51–57 and accompanying text.

44. *See infra* notes 58–72 and accompanying text.

45. Director action must be motivated by an honest desire to benefit the corporation's shareholders. *Aronson*, 473 A.2d at 812. One of the most common allegations of bad faith concerns an attempt by directors to entrench themselves in office during a corporate control transaction. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

46. *Aronson*, 473 A.2d at 812. Courts may review a directorial decision to see if it falls within the bounds of reason. The most common example of this review is to determine if there has been a waste of corporate assets, which is a cause of action in its own right. Gimbel v. Signal Cos., Inc., 316 A.2d 599, 615 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).

47. *Unocal*, 493 A.2d at 954; *Aronson*, 473 A.2d at 812.

to the corporation arising from the decision.[48] Therefore, a determination that each of the elements has been satisfied mandates that the court find in favor of the directors.[49]

2. *The Fundamental Elements of the Business Judgment Rule: Due Care and Disinterestedness*

Liability for directors usually hinges on whether the disinterestedness and due care components of the business judgment rule, which correspond to the traditional fiduciary duties of loyalty and care, have been met.[50] Prior to *Cede,* a violation of either component traditionally had distinct results. The business judgment rule presumes that directors possess a disinterested independence and do not stand on both sides of a transaction in a way that prevents an unbiased exercise of judgment.[51] If the plaintiff is able to plead and prove facts sufficient to show that a majority of the board was interested, the business judgment rule does not apply, and the burden shifts to the directors to prove that the transaction was entirely fair.[52] Under this "entire fairness" standard of review, the directors must make a very exacting showing encompassing both fair dealing and fair price.[53] "Fair dealing" involves the timing of the transaction and how it was initiated, structured, negotiated, and disclosed to the shareholders.[54] "Fair price" includes all the relevant factors comprising a company's intrinsic worth such as assets, market value,

48. S. Samuel Arsht, *The Business Judgment Rule Revisited,* 8 Hofstra L. Rev. 93, 111–12 (1979); R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 4.6, at 76 (1989). Joseph Hinsey distinguishes between the business judgment rule which shields directors who act in good faith from personal liability, and the business judgment doctrine, which allows a court to enjoin a directors' decision but not to determine personal director liability. Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine, and the Reality,* 52 Geo. Wash. L. Rev. 609, 611–13 (1984).

49. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989). The ALI labels the rule a "safe harbor" for corporate directors and officers. *Principles, supra* note 8, § 4.01 cmt. d.

50. *See supra* notes 19–30 and accompanying text.

51. *Aronson,* 473 A.2d at 812. *See also* Auerbach v. Bennett, 393 N.E.2d 994, 1001 (N.Y. 1979).

52. *See, e.g.,* Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983); AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. 1986); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. 1952).

53. *Weinberger,* 457 A.2d at 711. Depending on the posture of the proceedings, the court can also enjoin the transaction. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1279 (Del. 1989).

54. *Weinberger,* 457 A.2d at 711. One aspect of fair dealing is the duty of candor owed by corporate directors to disclose all material information relevant to corporate decisions which may bestow a personal benefit on the directors. *Mills,* 559 A.2d at 1280.

earnings, and future prospects.[55] Normally, courts apply this entire fairness review to self-dealing transactions involving a merger or sale of assets between related corporations.[56] In an auction for corporate control, entire fairness mandates that directors commit themselves, inexorably, to obtaining the highest value reasonably attainable to the shareholders.[57]

In addition to disinterestedness, directors are presumed to have satisfied the due care component of the business judgment rule. To overcome this presumption, plaintiffs must show that the directors were grossly negligent in informing themselves of all material information reasonably available to them.[58] The more significant the decision is, the higher the directors' responsibility is to have an informed basis for their decision.[59] The most significant decisions are corporate control decisions, which involve changes to the basic structure, or continuing existence, of the corporation.[60] These decisions place a special burden on directors to reach a decision in a deliberative manner. A plaintiff seeking to establish a breach of the duty of care, assuming no other breach of fiduciary duties, must plead and prove facts sufficient to overcome the presumption that directors were not grossly negligent in reaching a decision.[61]

The due care element of the business judgment rule has been the focus of considerable attention in the corporate control context. Since *Van Gorkom*,[62] Delaware and other jurisdictions have carefully examined the process a board uses to inform itself of all material aspects of a corporate

55. *Weinberger*, 457 A.2d at 711. The *Weinberger* court, however, recognized that the test for fairness is not a bifurcated one. Rather, the entire fairness of the transaction as a whole must be scrutinized by the court. *Id.* The real objective is to determine whether a truly independent board would have produced a similar transaction. *Id.* at 709 n.7.

56. *See, e.g.*, Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985). *But see* Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 275 (Del. Ch. 1989) (applying entire fairness review to board's adoption of an Employee Stock Ownership Plan (ESOP)).

57. *Mills*, 559 A.2d at 1280.

58. Smith v. Van Gorkom, 488 A.2d 858, 872–73 (Del. 1985). *See also* Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274–75 (2d Cir. 1986).

59. Folk et al., *supra* note 8, § 141:11. In a takeover situation, the court describes the board's duty as "enhanced" because the board may be acting to entrench itself rather than in the best interests of the corporation. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

60. Easterbrook & Fischel, *supra* note 15, at 109.

61. *Van Gorkom*, 488 A.2d at 872–73.

62. *See generally* Radin, *supra* note 6 (discussing due care decisions in aftermath of *Van Gorkom*).

control decision before making its decision.[63] Some of the factors courts consider in weighing whether a board is informed include the following: whether the board had a majority of outside directors,[64] whether the corporation created a special committee of outside directors,[65] the extent to which the board consulted with outside and inside financial advisors and legal counsel,[66] and whether outside directors questioned advisors and management.[67] In addition, courts have referred to pre-meeting distribution of material documentation; [68] discussion of the transaction at an extensive meeting,[69] rather than a perfunctory meeting;[70] and directors' use of the time they have.[71] No single factor, however, is dispositive. As long as the court is satisfied that the decision-making process is informed, even a bad substantive outcome will not be questioned absent bad faith or a conflict of interest.[72]

3. *The Relationship Between the Business Judgment Rule and the Duty of Care*

The business judgment rule shields directors from liability when all of the elements of the rule have been satisfied. Accordingly, a plaintiff seeking to establish a breach of the duty of care first must overcome the presumption afforded by the business judgment rule.[73] If the plaintiff is able to prove that the directors were grossly negligent in making a discrete decision, the burden shifts to the directors to prove that they acted with the requisite degree of care. The presumption of the rule, however, should not be confused with the plaintiff's entire case-in-chief.[74] As in any ordinary negligence action, even if the presumption is rebutted, traditionally, before *Cede,* plaintiffs prevailed only when they

63. Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 66 (Del. 1989); Block et al., *supra* note 8, at 60–66.

64. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348 n.2 (Del. 1985).

65. Grobow v. Perot, 539 A.2d 180, 191 (Del. 1988); Rabkin v. Philip A. Hunt Chem. Corp., 547 A.2d 963, 970 (Del. 1985).

66. *Grobow,* 539 A.2d at 191; Rosenblatt v. Getty Oil Co., 493 A.2d 929, 939 (Del. 1985).

67. *Rosenblatt,* 493 A.2d at 939.

68. *Id.*

69. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 950–51 (Del. 1985).

70. Sealy Mattress Co. of N.J. v. Sealy, Inc., 532 A.2d 1324, 1331 (Del. Ch. 1987). *See also* Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 275 (2d Cir. 1986).

71. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 67 (Del. 1989).

72. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

73. Block et al., *supra* note 8, at 29.

74. Balotti & Hanks, *supra* note 39, at 1353. *See also supra* note 39.

could also prove causation and damages,[75] or the necessity for injunctive relief.[76]

C. Corporate Control Transactions and the Business Judgment Rule

Applying the protection of the business judgment rule to corporate control transactions is controversial.[77] Often, directors attempt to resist hostile takeovers,[78] erect barriers to hostile takeovers,[79] or preempt bidding wars by agreeing to mergers with preferred suitors.[80] Their resistance to mergers raises the "omnipresent specter" that the directors are trying to entrench themselves in office at the expense of the shareholders' interests.[81] Thus, these actions implicate the directors' duty of loyalty. Because of this inherent conflict, some courts do not apply the protection of the business judgment rule to defensive tactics.[82]

The Delaware courts apply the protection of the business judgment rule to such defensive actions but subject them to a heightened review.[83] The court announced in *Unocal Corp. v. Mesa Petroleum Co.*[84] a two-pronged test to determine if a defensive measure is in the best interests of the corporation and its shareholders.[85] First, the directors must have reasonable grounds for believing that a threat to corporate policy exists.[86] Second, directors must adopt a measure that is reasonable in relation to the threat posed.[87]

An even more stringent test applies if the directors of a target corporation decide to resist a takeover by selling the corporation to another, more friendly party. An inevitable sale triggers *Revlon* duties, which mandate that the board of directors maximize shareholder

75. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985). *See also Principles, supra* note 8, §§ 4.01(d), 7.18(c); Folk et al., *supra* note 8, § 141:28; Lattin, *supra* note 8, at 276–77.

76. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986).

77. Block et al., *supra* note 8, at 117.

78. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

79. *See, e.g.*, Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257 (Del. 1989).

80. *Revlon*, 506 A.2d 173.

81. *Shamrock*, 559 A.2d at 269; *Revlon*, 506 A.2d at 180; *Unocal*, 493 A.2d at 954.

82. Minstar Acquiring Corp. v. AMF, Inc., 621 F. Supp. 1252 (S.D.N.Y. 1985).

83. *Unocal*, 493 A.2d at 954.

84. *Id.* at 955.

85. *Id.*

86. *Id.* In *Unocal*, the threat was an inadequate and coercive tender offer. *Id.* at 956.

87. *Id.* For other states that have adopted the *Unocal* approach see Block et al., *supra* note 8, at 136 n.106.

wealth.[88] A board's primary duty in these instances becomes that of an auctioneer whose role is to obtain the highest possible price.[89]

Because an auction is one way of obtaining information concerning the highest value of a company, [90] the directors' due care duty to inform themselves of the intrinsic worth of the firm is also implicated. Defensive strategies, such as a pre- or post-agreement market-check[91] or a "lock-up,"[92] are suspect because an alternative buyer is less likely to bid once such agreements are in place.[93] Therefore, in corporate control situations, defensive strategies that work to entrench the directors in office also impede the flow of information regarding the price of the company. Without adequate information, directors cannot satisfy the due care element of the business judgment rule.

Seeking a preliminary injunction is the most common means of challenging a transaction involving control of a corporation.[94] Courts will grant preliminary injunctions only upon a showing that the plaintiffs will otherwise suffer irreparable harm without one.[95] By enjoining an ill-informed decision to sell or merge a corporation, courts remove the possibility of injury occurring due to a lack of information from the marketplace; the injury is failure to obtain the higher price shareholders might receive if an auction were held. Less common are suits against directors for personal liability stemming from corporate control transactions. Here, also, most commentators would have agreed that

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88. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

89. *Id.* at 184. *See also* Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986) (finding directors violated duties by favoring one bidder to put an end to auction). *But see* Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1150–51 (Del. 1989) (holding that *Revlon* duties not triggered when resistance to tender offer preserves long-term corporate strategy); Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 844–45 (Del. 1987) (finding that *Revlon* duties not applicable in parent-subsidiary context).

90. Cinerama, Inc. v. Technicolor, Inc., No. 8358, 1991 LEXIS 105, at *54 (Del. Ch. June 21, 1991).

91. A market-check provision allows a target corporation to probe the market for better offers during a specific period of time in order to test the fairness of the offer. Block et al., *supra* note 8, at 226.

92. A lock-up option gives a preferred suitor an option to purchase one or more of a target company's key assets. Block et al., *supra* note 8, at 211.

93. *Cinerama,* 1991 LEXIS 105, at *54.

94. *See, e.g.,* Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1993); Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

95. *Revlon,* 506 A.2d at 185. *See also Fed. R. Civ. P.* 65.

plaintiffs must prove harm in order to win money damages. *Cede,* however, changed that basic supposition.

II. *CEDE & CO. V. TECHNICOLOR, INC.*

In *Cede,* the Delaware Supreme Court jettisoned tort principles from an analysis of a breach of the duty of care by corporate directors.[96] The court overturned a judgment for the defendant directors of Technicolor, Inc., in a personal liability action for breach of fiduciary duty. The Technicolor directors had approved a two-step, cash-out merger[97] with MacAndrews & Forbes Group, Inc. (MAF) at an October, 1982, meeting.[98] In January, 1983, a majority of Technicolor shareholders voted to approve this merger. Cinerama, Inc., a dissenting Technicolor shareholder, sued for an appraisal of the value of its shares.[99] Cinerama subsequently filed a second suit seeking money damages for the directors' breach of their fiduciary duties. Although no breach of loyalty was found, the Chancellor (Delaware trial court judge) ruled that the directors had breached their duty of care by failing to meet their *Revlon* obligations to sell to the highest bidder.[100] However, relying on *Barnes v. Andrews,*[101] the Chancellor ruled for the defendants because the

96. Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).

97. A two-step, cash-out merger is a transaction in which an investor acquires control of a majority of a company's stock by a tender offer and then uses that control to arrange for the corporation to merge with another corporation controlled by the investor. Block et al., *supra* note 8, at 93–94.

98. *Cede,* 634 A.2d at 356–57. The Technicolor directors approved the merger for $23 per share. At the time, Technicolor stock was trading at $8.37 per share. *Id.* at 352.

99. Cede & Co. v. Technicolor, Inc., 542 A.2d 1182 (Del. 1988). In an appraisal proceeding under Del. Gen. Corp. Law § 262, shareholders dissenting from a merger on the basis of inadequacy of the offering price may seek a judicial determination of the fair value of their shares. Block et al., *supra* note 8, at 97 n.99. Following extended discovery and before deciding the personal liability action, the court found the fair value of Cinerama's Technicolor stock was $21.60 per share. *Cede,* 634 A.2d at 350.

100. Cinerama, Inc. v. Technicolor, Inc., 1991 LEXIS 105, at *55–*56 (Del. Ch. June 21, 1991). See *supra* note 88 and accompanying text for description of *Revlon* duties.

101. 298 F. 614 (S.D.N.Y. 1924). *Barnes* concerned the liability of a director for the failure of a corporation due to general mismanagement. Judge Learned Hand, in ruling for the director, stated:

> This cause of action rests upon a tort, as much though it be a tort of omission as though it had rested upon a positive act. The plaintiff must accept the burden of showing that the performance of the defendant's duties would have avoided loss, and what loss it would have avoided.
>
> . . . But when a business fails from general mismanagement . . . how is it possible to say that a single director could have made the company successful[?] . . . [T]he plaintiff must show that, had Andrews done his full duty, he could have made the company prosper, or at least could have broken its fall . . . . Neither of these has he made any effort to do.

plaintiff had failed to show that the directors' negligence was the proximate cause of some injury.[102] Absent proof of self-interest, the Chancellor stated that a shareholder-plaintiff must prove with sufficient evidence the precise amount of injury flowing from the directors' negligence.[103]

In overturning the Chancellor's decision, Judge Horsey, writing for the Delaware Supreme Court, rejected the proximate cause requirement. Decisional law of the court, he wrote, had always given equal weight to the duties of care and loyalty.[104] The court found its prior precedent "patently clear" that proof by the plaintiff that defendant directors had breached the duty of care, even in the absence of self-dealing, shifted the burden to defendants to prove the entire fairness of the transaction.[105] No requirement of a proof of injury was necessary,[106] and any reliance on tort principles was inappropriate in a business judgment rule standard of review.[107] To rule otherwise, the court stated, would convert the burden-shifting purpose of the business judgment rule into a dispositive finding on the merits.[108] Burden-shifting, the court said, does not create per se liability but merely dictates the proper standard of review.[109] Accordingly, reliance on the "seventy-year-old" *Barnes* decision was inappropriate.[110] The court reversed and remanded the case with instructions to apply the entire fairness standard of review.[111] Significantly, the court stated that the measure of recoverable losses was not limited to the difference between the appraisal value and the intrinsic value of the shares. Rather, the Chancellor may "fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages."[112]

Id. at 616–17.

102. *Cinerama,* 1991 LEXIS 105, at *58.

103. *Id.* at *59.

104. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993).

105. *Id.* See *supra* notes 52–55 and accompanying text for explanation of entire fairness review.

106. *Id.* at 371.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 368.

111. *Id.* at 371.

112. *Id.* (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983)). Rescissory damages give the plaintiffs the option of having the value of the stock calculated either as of the time the damage award is made or at the time of the transaction. In theory, plaintiffs can take back the stock and resell it to the defendant at current values or take the value of the stock at the time of the transaction. Rescissory damages give the plaintiffs the benefit of future increases in value, which

III. CAUSATION AND THE DUTY OF CARE

By eliminating proof of causation and injury from a plaintiff's action for the breach of the duty of care on a discrete business decision, the Delaware Supreme Court ignored the historic tort content of that duty. Mechanically shifting the burden of proof to the directors, once such a breach of due care is shown, does not comport with the purposes of the entire fairness review. Courts should require proof of causation and injury because not all lapses in due care result in harm. Furthermore, focusing on causation disciplines courts to limit damage awards to those injuries that reasonably flow from the lapse in care.

A. *Entire Fairness Review Inapplicable*

1. *Entire Fairness Review Erroneously Applied to Disinterested Transaction*

The *Cede* court erroneously applied the entire fairness review to a decision by a disinterested, but uninformed, board of directors. In accord with its precedents, the court correctly stated that a prerequisite to applying the business judgment rule was a preliminary finding that the board was both informed and disinterested.[113] In that sense, courts do give "equal weight" to both duties. However, the effects of a breach of each duty in prior Delaware case law were distinct in keeping with the distinct nature of each duty.[114] Traditionally, proof by the plaintiff of a breach of the duty of loyalty automatically invalidated business judgment rule protection, resulting in a shift to defendant directors to prove the entire fairness of a decision.[115] The review's exacting standards mirrored

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may be attributable to circumstances arising after the transaction. *See* Lynch v. Vickers Energy Corp., 429 A.2d 497 (Del. 1981). Technicolor was resold in 1988 for $750 million. Donovan, *supra* note 10, at 23. Under a rescissory damages calculation, plaintiffs are seeking the value of the shareholders' portion of Technicolor's worth at the time of the sale—a calculation that would give them a $32.8 million award. *Id.*

113. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

114. *See supra* notes 31–34 and accompanying text.

115. Thus if a board is interested in a transaction, "the appropriate form of judicial review is to place upon the board the burden to establish the entire fairness of the transaction. Each of the second two elements of the rule [good faith and due care] reflects one of the two theoretically possible bases for director liability in a disinterested transaction." *In re* RJR Nabisco, Inc. Shareholders Litigation, [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194, at 91,709–10 (Del. Ch. Jan. 31, 1989) (citations omitted); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) (finding that presumption initially attaches in absence of self-dealing); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1988) (stating that when faced with divided loyalties, directors have burden of establishing entire fairness of

the serious nature of a breach in the duty of loyalty, a breach that implicates a director's highest fiduciary duty.[116]

On the other hand, prior to *Cede,* a due care violation alone did not trigger an entire fairness review. Ultimately, to prevail on a breach of the duty of care claim, Delaware case law appeared to require plaintiffs to prove causation and injury as in any typical negligence action.[117] The difficulty, however, in pinpointing discussions of the causation and injury requirements in duty of care actions is that few courts have addressed corporate control transactions in which the board is disinterested but has breached its due care duty.[118] When a board is interested, the court automatically applies the entire fairness review and never has to reach the injury requirement.

Despite the paucity of such discussions, nevertheless, there are Delaware decisions addressing causation and injury for due care violations. These discussions have occurred under two circumstances: actions for money damages and preliminary injunctions. The only prior case to address a pure breach of due care in which money damages were at stake was *Van Gorkom.* In that case, unlike in *Cede,* the court did not remand for an entire fairness review nor impose rescissory damages. Instead, it remanded for an assessment of damages consisting of the difference between the fair value of the share and the price actually offered.[119] The court, thus, implicitly identified the injury that flowed from the breach as the higher price shareholders might have received if the directors had adequately informed themselves. Despite the *Cede*

transaction); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (requiring judicial examination before protections of business judgment rule conferred when board may be acting in its own interest); *Aronson,* 473 A.2d at 814–15 (finding business judgment rule inapplicable to interested board transaction); Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (holding that one standing on both sides of transaction has burden of establishing its entire fairness).

116. The *Cede* court's dismissal of the business judgment rule as "merely" a burden shifting device belies the powerful effect of the entire fairness review. Because the entire fairness review is so rigorous, determination of the correct standard of judicial review is often determinative of the outcome of the litigation. AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986).

117. *See infra* notes 119–22 and accompanying text. The *Cede* court may have been influenced by the fact that at least one Technicolor director, if not a second director, may have breached their duties of loyalty. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 358 (Del. 1993). Nevertheless, the Chancellor ruled that the Technicolor board as a whole had not breached its duty of loyalty, and the court upheld that finding. *Id.* In addition, the court's sweeping language made clear that a breach of the duty of care alone mandated the entire fairness review. *Id.* at 368.

118. Block & Hoff, *supra* note 10, at 5.

119. Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985).

court's assertion to the contrary, therefore, its most compelling precedent required causation and injury for a breach of the duty of care.

To grant a request for preliminary injunctive relief, courts similarly require plaintiffs to prove a likelihood of injury flowing from the breach of the directors' duties.[120] For instance, in *Revlon* the court granted injunctive relief because the directors had cut off an active auction for the target company, reducing competition that might have resulted in a higher price for shareholders.[121] In *Unocal,* however, the court refused to enjoin a board's efforts to defeat a hostile takeover because it found that the board's efforts were reasonably designed to protect the company from a coercive tender-offer.[122] In both cases, the court analyzed the particular injury likely to flow from the alleged breach in the duty of care if injunctive relief was not granted. Thus, a comparable causation and injury requirement should also be required for plaintiffs in a full trial proceeding in which money damages are being sought.

2. *Entire Fairness Review's Objectives Unsuited to Duty of Care Breach*

Mechanical application of the entire fairness review when only a breach of due care has been proven undermines the objectives of such a review. The basic purpose of an entire fairness review is to determine whether a truly independent board would have produced the same transaction.[123] The court becomes the objective arbiter for fairness,[124] which includes both fair dealing and fair price.[125] In a situation not involving self-dealing, however, it is unclear how a "fair dealing" analysis would differ from a *Van Gorkom* "informed decision-making" review.[126] The *Cede* court did not explain how defendants can prove the presence of fair dealing when they have already been found to have been grossly negligent in approving the decision.

120. To obtain a preliminary injunction, a plaintiff must show both a reasonable probability of success on the merits and irreparable harm if the injunction is not granted. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179 (Del. 1986).

121. *Id.* at 184–85.

122. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985). *See also* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1282 (Del. 1988) (granting injunction when auction not designed to bring shareholders highest price reasonably available).

123. Weinberger v. UOP, Inc., 457 A.2d 701, 710 n. 7 (Del. 1983).

124. Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993).

125. *See supra* notes 52–55 and accompanying text.

126. Block & Hoff, *supra* note 10, at 5.

Furthermore, the *Cede* court did not distinguish between decisions implicating corporate control and other director decisions; it merely asserted that a breach of either fiduciary duty would result in an entire fairness review. However, the entire fairness standard is typically applied only to self-dealing transactions in the corporate control setting. The *Cede* court gave no guidance on how directors would prove a "fair price" in situations not involving the sale of the corporation. When the transaction does not involve a self-dealing transaction or corporate control decision, the fair-price standard of review has no obvious application.[127]

B. The Relationship of the Business Judgment Rule to Tort Law

The *Cede* court incorrectly asserted that tort principles have no place in a business judgment rule analysis. Though the connection between the business judgment rule and current tort doctrine is controversial,[128] tort principles naturally lend themselves to an analysis of a breach of the director's duty of care. Indeed, the very rationale for the business judgment rule is to provide directors with those protections that other professionals enjoy in reasonably carrying out their duties. Some commentators argue that, unlike tort's reasonable person standard, objective standards do not exist for evaluating director decisions. In a corporate control transaction, however, courts have developed standards by which to judge director conduct.

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127. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985); Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 275 (Del. Ch. 1989). The court in *Shamrock Holdings* noted the oddness of a fairness review in the context of a non-corporate control situation:

> This court is unaware of any case where an entire fairness analysis was applied to an ESOP. Typically, this rigorous standard of review is applied in self-dealing transactions involving a merger or sale of assets. In the merger context, our Supreme Court has recognized that "fairness . . . can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them."

Id. at 275 (citations omitted). Thus, the court compares the outcome of a transaction conducted by a disinterested board to the actual price received and evaluates the price for fairness.

128. For a view supporting tort analysis in the business judgment setting, see Eisenberg, *supra* note 19. For a view questioning tort's applicability in the business judgment setting, see Manning, *supra* note 23, at 1493–94.

1. The Rationale for the Business Judgment Rule

The business judgment rule is analogous to the "honest errors of judgment" principle found in negligence cases.[129] This principle states that professionals will not be found liable for a bad outcome if the course pursued in reaching their decision is recognized as correct by the profession generally.[130] Likewise, the business judgment rule states that if all the elements of the rule are met in making a business decision, the court will not question the merits of the decision.[131] The business judgment rule, therefore, prevents the inference that a bad decision was necessarily the product of negligent directors.

Various rationales have been offered to justify the business judgment rule. Frequently cited are the courts' lack of expertise in business decision making and the inappropriateness of judicial second-guessing.[132] Neither of these is entirely persuasive, however, because courts regularly review decisions made in the fields of law, medicine, and other specialties.[133] Moreover, this contention ignores the initial review courts must make to determine if the elements of the rule have been satisfied.

Perhaps a more persuasive reason is that business decisions, like those in other professions, are inherently complex and risky,[134] and directors should not be held liable for all business decisions that have bad outcomes.[135] Directors of large corporations must deal with highly diversified business operations in which the quality of deliberation on

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129. Eisenberg, *supra* note 19, at 960.

130. *Id.* at 961.

131. However, the business judgment rule's protection is higher because the level of culpability required for a finding of liability is gross negligence versus ordinary negligence in the normal malpractice situation. *Id.* at 963.

132. Block et al., *supra* note 8, at 6.

133. Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. Cal. L. Rev. 287, 307 (1994).

134. Manning, *supra* note 23, at 1482–83.

135. The origin of the rule can be traced back at least 150 years to Percy v. Millaudon, 8 Mart (n.s.) 68 (La. 1829) (quoted in Block et al., *supra* note 8, at 4):

> [T]he adoption of a course from which loss ensues cannot make the [director] responsible, if the error was one into which a prudent man might have fallen. The contrary doctrine seems to . . . require the exercise of perfect wisdom in fallible beings. No man would undertake to render a service to another on such severe conditions . . . . The test of responsibility, therefore, should be . . . [an] error . . . of so gross a kind that a man of common sense, and ordinary attention, would not have fallen into it.

issues can be constrained by the necessity of a quick response.[136] After-the-fact litigation cannot recreate the conditions under which directors make decisions, and the fear is that courts may assign liability on the basis of poor outcomes, not poor decision making. Especially when a range of decisions is reasonable, fact finders can easily confuse decisions that turn out badly with bad decisions.[137] Thus, without the protection offered by the business judgment rule, talented men and women may not serve as directors.[138]

The duty of care in corporation law has been considered by some commentators as a special case of the standard of care required throughout the law of negligence.[139] The care required of a doctor, lawyer, or any other professional in a malpractice case necessarily demands reference to the applicable community.[140] Similarly, the reference point for the business judgment rule is the "reasonable person in the director's circumstances."[141] Like malpractice defendants,

136. Manning, *supra* note 23, at 1481–82. *But see* Conference Panel Discussion, *The Business Judgment Rule,* 45 Ohio St. L.J. 629, 631 (1984) (Prof. Tamar Frankel disputing the necessity of fast decision making in large corporations).

137. Eisenberg, *supra* note 19, at 963.

138. Arsht, *supra* note 48, at 97. Some commentators have argued that what discourages courts from reviewing business decisions is the nature of what directors do: overseeing management, establishing corporate policy, and weighing business decisions. Courts just do not have a good grasp of the duties of the average director. Manning, *supra* note 23, at 1494. *But see* Gevurtz, *supra* note 133, at 308 (asserting that professional business education contradicts notion that there are no standards to guide business decision making). This argument may be valid in the context of evaluating the general oversight functions that directors perform. In the context of a discrete corporate control transaction, however, courts have developed criteria for evaluating director decision making. *See supra* notes 64–72 and accompanying text.

139. The concept of gross negligence in tort law actually grew out of the law of mandataries and gratuitous bailees, to whom corporate directors, usually uncompensated at that time, were compared in many of the Nineteenth Century cases. Beveridge, *supra* note 3, at 926. *See also* Hammond, *supra* note 5, at 544 n.3 (explaining that duty of care liability originally based on common law requirement that directors make reasonable inquiries regarding business).

140. Arsht, *supra* note 48, at 97. There are rare circumstances in which a court will decide that the applicable community does not have high enough standards, but the normal reference is to the "reasonable person" standard in that profession. *See, e.g.,* Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974), superseded by statute as stated in Meeks v. Marx, 15 Wash. App. 571, 550 P.2d 1158 (1976) (finding physician negligent despite adherence to prevailing standard of care because reasonable prudence required higher degree of care).

141. Graham v. Allis-Chalmers Manufacturing Co., 188 A.2d 125, 130 (Del. 1963). *See also* Briggs v. Spaulding, 141 U.S. 132, 152 (1891) (applying reasonable person standard); Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 264 (2d Cir. 1984) (holding duty of care requires directors, in performance of duties, exercise care that ordinarily prudent person would exercise under similar circumstances). Numerous states have also adopted the traditional formulation of the Model Business Corporation Act § 8.30(a)(2). The comment to this section states that "reference to the

directors should be held liable only for conduct that is unreasonable.[142] Making an honest error in judgment while exercising due care in the decision-making process is not negligence.[143] Accordingly, the predominant purpose of the business judgment rule is to bestow the same protections that other professionals enjoy if sued for malpractice.[144]

2. *The Reasonable Director in the Corporate Control Transaction*

Nevertheless, some commentators reject the tort framework because courts have not developed a clear conception of what a reasonable director does.[145] Negligence actions presuppose the concept of the "reasonable person" making a discrete decision or acting in a discrete event.[146] However, a director's oversight function consists of a flow of innumerable decisions, actions, judgments, and omissions.[147] Courts, therefore, cannot adequately determine what is a negligent departure from the typical behavior of a director.[148]

Courts, however, can identify negligent departure from reasonable director behavior in the corporate control context. In contrast to the flow of work directors must manage, decisions involving the sale of control of the corporation are discrete and identifiable. Thus, courts treat corporate control transactions differently from the general oversight functions that directors perform.[149] They view takeovers or mergers as discrete events,

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'ordinarily prudent person' embodies long traditions of the common law." Model Business Corp. Act § 8.30 official cmt. at 222 (1984).

142. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 170 (5th ed. 1984) [hereinafter *Prosser & Keeton*]. Unlike the typical tort case, however, director liability is predicated on departures from the standard of care that are grossly negligent. This Note does not explore whether the applicable standard of care should be lowered. *See* Gevurtz, *supra* note 133 (arguing that ordinary negligence should be liability standard for directors).

143. Beveridge, *supra* note 3, at 939. A gross error in judgment that no reasonably prudent person would make constitutes an abuse of discretion, not negligence. This is consistent with the tort principle that the required degree of professional skill is based on the minimum common skill of members of the profession in good standing. Otherwise, half of any profession would be judged incompetent. *Prosser & Keeton, supra* note 142, at 187.

144. Arsht, *supra* note 48, at 97.

145. Manning, *supra* note 23, at 1493–94.

146. *Id.* at 1494.

147. Conference Panel Discussion, *supra* note 136, at 649 (comments of Prof. Manning). *See also* Manning, *supra* note 23, at 1494 (stating that life of boardroom is continuing flow of supervisory process punctuated only by occasional discrete transactional decisions).

148. Manning, *supra* note 23, at 1494. Furthermore, when the charge is inattention or abdication of responsibility, the business judgment rule does not even apply because there has been no discrete decision. Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984).

149. *See supra* text accompanying notes 64–71.

manageable in a conceptual framework, consisting of beginning, middle, and end.[150]

Because of this view, the Delaware courts since *Van Gorkom* have established objective benchmarks to analyze whether directors have met reasonable care standards in corporate control situations. A merger decision, like the one in *Cede,* more readily lends itself to the type of discrete, tort-like analysis that courts are used to making. Thus, courts can develop standards by which to determine if the correct level of care was utilized in the decision-making process used for a particular merger transaction. These standards consist of a laundry list of acts that directors must perform to make a decision an informed one.[151] By comparing the actions that the Technicolor directors took in approving the merger against those standards, the *Cede* court was able to determine, essentially as a matter of law, that the Technicolor directors had not used due care.[152] While this trend of judicial scrutiny has been criticized,[153] the courts are not likely to retreat from this course.[154]

C. *Proof of Causation and Injury in Corporate Control Transactions*

There are strong theoretical reasons why tort law persists in demanding proof of causation.[155] Tort law requires a reasonable connection between the act of the defendant and the damage suffered.[156] This requirement recognizes that some boundary must be established for

150. It is possible to view takeovers as non-discrete events. "All firms are 'in play' from the day they are created, and the possibility of a later takeover only spurs greater innovation now." David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers,* 73 Va. L. Rev. 701, 711 (1987). However, this view may just be a particularized form of the general problem in torts of what acts actually constitute sufficient legal causation to require imposition of liability. *Prosser & Keeton, supra* note 142, at 264 (stating that, philosophically, consequences of an act go forward to eternity and back to beginning of time).

151. See *supra* notes 64–71 and accompanying text regarding other requirements courts have indicated are important in reaching an informed decision. While the courts have cautioned that the presence or absence of these factors is not dispositive, other commentators and practitioners emphasize the necessity of creating a paper trail to fend off shareholder suits. Fischel, *supra* note 6, at 1453.

152. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 369–70 (Del. 1993).

153. *See* Manning, *supra* note 23.

154. Eisenberg, *supra* note 19, at 969.

155. Even in strict liability, one who carries on an ultrahazardous activity is liable for harm "resulting" from the dangerous activity, but is "limited to the kind of harm, the possibility of which makes the activity abnormally dangerous." Restatement (Second) of Torts § 519 (1965). Causal principles are necessary, therefore, to determine the scope of liability for the harm. H.L.A. Hart & Tony Honoré, *Causation in the Law* 288 (2d ed. 1985).

156. *Prosser & Keeton, supra* note 142, at 264.

the consequences of any act based upon some idea of social policy.[157] Causal questions, therefore, normally determine not only the existence of liability but also its extent.[158] Attention to causation principles teaches us that every lapse in judgment is not automatically coupled with an injury, and not every injury is the result of negligent action. Tort law does not bother itself with rectifying a non-injurious lapse in the applicable standard of care.[159] It is designed to provide compensation to those injured for foreseeable damages resulting from negligence.[160]

The *Cede* court, however, asserted that requiring proof of injury would place an insurmountable burden on the plaintiffs.[161] The court is correct in stating that causation is a nettlesome problem, but it has always been a difficult puzzle in the law.[162] Typically, plaintiffs must prove both cause-in-fact and proximate cause.[163] Cause-in-fact or "but

157. *Id.*

158. Hart & Honoré, *supra* note 155, at 85. Causal issues are also bound up in assigning moral blame. We blame those who cause harm to others and require that they compensate those whom they have harmed. *Id.* at 63.

159. Morally culpable conduct without resulting injury, such as unlawful possession of a firearm, is typically punished under the criminal laws. Hart & Honoré, *supra* note 155, at xlvi. This is not to say that elimination of the causation requirement is unheard of in corporation law. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (eliminating causation requirement for implied cause of action for violation of proxy rules). In *Mills,* however, the Court eliminated the basic common law requirement of causation in light of a specific statute. To do otherwise, the Court believed, would frustrate congressional policy. *Id.* at 382.

160. George C. Christie & James E. Meeks, *Cases and Materials on the Law of Torts* 100 (2d ed. 1990). Furthermore, breaches of the duty of care in the corporate sphere typically involve only economic damages and are spread over a large group of people. It is difficult to understand why plaintiffs in the corporate arena would not have to prove causation and injury while the victim of medical malpractice who has suffered a catastrophic injury normally would. Eisenberg, *supra* note 19, at 964. Also, investors can better compensate for risk by diversifying their investment portfolios than the victims of other professional malpractice. Davis, *supra* note 17, at 12–13. All of these reasons may help explain why the level of culpability necessary to find liability in the director malpractice area, gross negligence, is higher than in other fields. *But see* Gevurtz, supra note 133 (arguing directors should be liable for ordinary negligence).

161. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 371 (Del. 1993). The court's characterization may also have been influenced by the particular predicament of Cinerama. Because the Chancellor had already determined that the fair value of Cinerama's shares was $21.60 per share, proving injury would be practically insurmountable for Cinerama. However, the court's answer—to dispense with causation altogether—is an extreme solution to a particular plaintiff's dilemma.

162. *Prosser & Keeton, supra* note 142, at 263. We posit a causal relationship between two events to determine the degree of interdependence between them and to assign blame. If the probability is high that the absence of a particular event would lead to the occurrence of another event, we say one event "caused" another even though a confluence of events would be necessary to reach a particular outcome. The stringency or expansiveness of a court's view on causation issues is often a policy question. Hart & Honoré, *supra* note 155, at 5–6.

163. *Prosser & Keeton, supra* note 142, at 264–65.

for" causation is particularly problematic in professional malpractice actions.[164] For instance, lawyers and doctors must often make complex and risky judgments when a range of decisions is reasonable.[165] Distinguishing harms caused by professional negligence from other factors beyond the professional's control is, therefore, difficult.[166] Likewise, directors confront a large array of choices and combinations of variables.[167] An unfavorable outcome in the business setting may be the result of bad timing, misperceived opportunity, or unexpected occurrences in the market; it also may be the result of malfeasance, inattention, or stupidity. Divining which outcomes are the result of which decisions or combination of decisions is a complex task.[168] Because of this dilemma, it is tempting to waive proof of causation once directors are proved negligent. Waiving proof of causation turns directors, in effect, into insurers for any injury to the corporation that occurs during the period of their negligent act.[169]

An additional problem in the corporate world is that injuries are not often immediately manifested. While a discrete positive misdeed, such as embezzlement, is normally followed by quantifiable and obvious harm to the corporation,[170] injuries in the corporate arena are usually financial and indirect, and their effects are not evident until some time has passed.[171] The same is true in corporate control transactions. For instance, directors may negligently fail to gather market reports, financial projections, and similar information regarding the intrinsic worth of the company prior to approving the sale of the corporation. However, no one can reconstruct the sale and say with certainty that directors armed with such information would have received a higher price for shareholders.[172] The presence of an injury is just not readily apparent

164. Polly A. Lord, Comment, *Loss of Chance in Legal Malpractice*, 61 Wash. L. Rev. 1479 (1986).

165. Eisenberg, *supra* note 19, at 962.

166. Lord, *supra* note 164, at 1479.

167. Manning, *supra* note 23, at 1485.

168. In particular, omissions pose difficult causation problems because a director's failure to act cannot necessarily be said to have "caused" an injury. Richard B. Dyson, *The Director's Liability for Negligence*, 40 Ind. L.J. 341, 360 (1965). *See also* Francis v. United Jersey Bank, 432 A.2d 814, 826 (N.J. 1981) (finding that cases of nonfeasance present more difficult causation question than those of affirmative acts); Barnes v. Andrews, 298 F. 614, 617–18 (S.D.N.Y. 1924) (finding that there was no clear evidence that any intervention by director would have prevented harm).

169. Dyson, *supra* note 168, at 365.

170. *Id.* at 359.

171. *Id.*

172. *Id.* at 360.

when a decision has resulted in thwarting a hostile takeover or obtaining a substantial per-share premium in a merger. Therefore, demonstrating the actual harm with certainty is problematic.

Despite these problems of proof, however, there are persuasive policy reasons for requiring proof of causation and injury in director negligence actions. Proper attention to causation issues focuses the judiciary on the proper size of damages flowing from the breach. Limiting damages is critical because a particular decision should not expose directors to monetary damages disproportionate to the breach. Such exposure would discourage directors from making risky decisions.[173] Risky decisions can enhance shareholders' overall returns, and ultimately shareholders would suffer from overly cautious director behavior.[174]

Moreover, under the *Cede* standard, plaintiffs may now allege egregious outcomes flowing from individual negligent acts but do not have to connect those acts to any identifiable harm. This is exacerbated by the availability of rescissory damages, whereby plaintiffs may claim outrageous damage amounts only remotely connected to the alleged negligent act. Thus, plaintiffs will be encouraged to file suits, and anxious directors eager to settle in the face of possible rescissory damage awards.[175]

The *Cede* court is correct, however, in stating that proof of causation under the *Barnes* standard can be daunting if the plaintiff must prove to a virtual certainty what loss would have been avoided but for the directors' negligence.[176] *Barnes* involved an action for the failure of a corporation due to a director's lack of oversight, not a discrete decision. The causation issue in *Barnes,* therefore, involved numerous business decisions over a substantial period of time. Under those conditions, a

173. Eisenberg, *supra* note 19, at 964.

174. *Id.*

175. Commentators have stated that "the [Delaware] Supreme Court arguably has created an environment that has enhanced the settlement value of breach of fiduciary duty claims for plaintiffs—permitting plaintiffs to pursue litigation (and seek large monetary settlements) beyond the pleading stage of a litigation although the plaintiffs have in fact not suffered any injury." Block & Hoff, *supra* note 10, at 5. Indeed, the *Cede* decision quickly found its way into other merger cases. Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1993) (enjoining merger because directors did not adequately inform themselves); *In re* Tri-Star Pictures, Inc. Litigation, 634 A.2d 319 (Del. 1993) (relying on *Cede* and ruling that no proof of injury required once breach of fiduciary duty is shown).

176. The possible reason the lower court relied on *Barnes* to analyze the *Cede* issues is that it is one of the few cases to discuss causation in director liability actions. One of the problems in analyzing courts' views on causation in director liability actions is that the issue seems to be mentioned only when a court feels it disposes of a case. Dyson, *supra* note 168, at 362.

director can always point to other factors that could plausibly account for the demise of the company. Plaintiffs would indeed face an undue burden proving causation with certainty in such a case.[177] However, corporate control decisions are different.[178] They are discrete decisions that have clear consequences and are conducted in a particular manner. Proving the injury resulting from a negligent business decision is analogous to proving injury from the lawyer who misses the filing deadline. Identifying the injury that was caused by such a negligent action presents problems of proof, but the solution is not to throw up our hands and dispense with proof of causation and injury altogether.

IV. A PROPOSAL FOR PROVING CAUSATION AND INJURY IN CORPORATE CONTROL TRANSACTIONS

Instead of requiring either proof of causation and injury to an absolute certainty or no causation at all, a better approach is the "substantial lost chance" doctrine.[179] Courts have adopted variations of this standard in medical misdiagnosis cases,[180] and commentators have proposed this standard for legal malpractice cases.[181] The "substantial lost chance" approach grew out of courts' frustration with a strict "but for" causation standard. Medical and legal malpractice cases traditionally demanded that a plaintiff prove to a virtual certainty that, but for the defendant's

177. This Note does not address causation in the oversight situation. For a discussion of causation issues in the oversight context, see Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981).

178. *See supra* notes 149–54 and accompanying text.

179. The ALI adopted a "substantial factor" test for determining whether the defendant's act or omission was the cause-in-fact of the loss. While an improvement over the *Cede* court's approach, the "substantial factor" test was developed primarily for cases in which application of the "but-for" rule would allow multiple defendants to escape liability because the conduct of each was not sufficient to produce a particular result. *Prosser & Keeton, supra* note 142, at 268. In the corporate situation, directors act as a group. Potentially, each director may claim that his or her conduct was less causally significant than others'. This is the problem of concurrent causation. *Principles, supra* note 8, § 7.18 cmt. d. Unless a director protested a decision or voted against the decision, however, a director should not escape liability. Once plaintiffs establish causation for a negligently made decision, the burden should be on each defendant to prove his or her respective level of culpability. Alternatively, the directors should be jointly or severally liable. *Id.* The "substantial lost chance" approach addresses a different question from the "substantial factor" approach; it determines whether the board decision in its entirety "caused" any injury at all.

180. *See, e.g.*, Herskovits v. Group Health Coop., 99 Wash. 2d 609, 664 P.2d 474 (1983) (finding causation for reduction in chance of survival as a result of medical misdiagnosis).

181. Erik M. Jensen, Comment, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 Cornell L. Rev. 666 (1978); Lord, *supra* note 164.

negligence, the plaintiff would not have suffered an injury.[182] Medical misdiagnosis cases required plaintiffs to show that they would not have deteriorated but for the physician's mistake.[183] Legal malpractice cases demanded the plaintiff prove that, but for the attorney's negligence, the plaintiff would have prevailed in the underlying action.[184] Because few plaintiffs prevailed under this standard,[185] dissatisfaction with the strictness of this approach has led to proposals to mitigate its undue harshness.[186]

Courts and commentators have taken novel measures to resolve proof of causation in medical and legal malpractice cases. Analogous to the approach that the *Cede* court took, those novel approaches have included burden-shifting.[187] For instance, in *Winter v. Brown,*[188] defendant attorneys missed a statutory deadline rendering plaintiff's claims moot against a hospital. The defendants claimed that the plaintiffs could still pursue their case against the doctor, and therefore, damages could not be ascertained to a certainty. The court, however, shifted the burden of proof to the defendants to prove damages not attributable to their negligence because the defendants' own negligence made proof on the causation issue onerous.[189]

In circumstances analogous to *Winter,* the court in *Cede* shifted the burden to the defendants. The *Cede* court recognized that the burden-shifting was in part due to the difficult causation issues presented to the plaintiff.[190] The problem with burden-shifting in *Cede,* as well as the medical and legal fields, is that it fails to deal with the core of the problem—the lack of a viable causation standard. In addition, unreflective burden-shifting can have unintended effects. For instance, it led the *Cede* court to impose the awkward entire fairness review, an imposition that may result in significant personal liability including rescissory damages.

The substantial lost chance approach is the solution that many courts and commentators have utilized to deal with the causation problem in the

182. Jensen, *supra* note 181, at 670.

183. *Id.* at 679.

184. *Id.* at 670.

185. *Id.*

186. Lord, *supra* note 164, at 1480–81.

187. Jensen, *supra* note 181, at 673. *See, e.g.,* Baker v. Beal, 225 N.W.2d 106 (Iowa 1975).

188. 365 A.2d 381 (D.C. 1976).

189. *Id.* at 385.

190. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 371 (Del. 1993).

medical and legal fields. Under this standard, when the defendant's negligent action has effectively terminated a person's chance to recover in a medical or legal situation, the fact finder may infer causation.[191] The requirement that the chance be substantial eliminates those cases in which the chance of recovery, medically or legally, was remote.[192]

Similarly, plaintiffs challenging a corporate control transaction should be required to prove that the directors' failure to inform themselves prior to a decision was a substantial factor in a lost opportunity. The lost opportunity would be the higher price shareholders could have received but for the directors' negligence. "Substantial" opportunity in this context means that prima facie evidence exists that other probable buyers were willing to offer a higher price or that the price received fell outside a reasonable range of prices.[193] In this way, the injury and the lapse in the duty of care would be temporally and theoretically tied together.

The "substantial lost chance" approach provides a sensible causation standard and limits damages to those closely connected to the negligent decisions. Rescissory damages would be available only if the injury were conceptually linked to and temporally close to the sale of the company. On the other hand, plaintiffs would not be forced to show damages to a mathematical certainty. In this way, plaintiffs could still recover for egregious abuses of directorial power, but directors would not be exposed to unlimited liability. As a result, director risk-taking would not be dampened to the detriment of corporate profitability.

V. CONCLUSION

The *Cede* court announced that plaintiffs did not have to prove causation and injury in a corporate control transaction when suing corporate directors for money damages. Tort principles, it asserted, had no place in a business judgment rule analysis. However, this assertion ignores the fundamental nature of a breach of the duty of care as the duty imposed throughout the law of negligence.[194] Inattention to tort principles improperly leads to the imposition of the incongruous entire fairness review upon defendant directors.

191. Jensen, *supra* note 181, at 679–80.

192. *Id.* at 680.

193. A range of prices is consistent with arm's length bargaining. Davis, *supra* note 17, at 92 n.325.

194. Eisenberg, *supra* note 19, at 945.

Plaintiffs should not prevail on director negligence causes of action without demonstrating some resulting injury. There are just too many decisions that directors make in the course of performing their duties that could rise to the level of "harmless error." To make directors monetarily liable for these decisions would hinder reasonable corporate risk-taking. Neither, though, should the burden be insurmountable for the plaintiffs. The solution is to place the burden on the plaintiff to show a substantial lost opportunity flowing from the negligence. This standard adequately balances the interests of directors and shareholders—a balance sorely lacking in the *Cede* approach.