***M & F Worldwide* Global?**

Kenju Watanabe[[1]](#footnote-2)\*

**Abstract**

This paper questions the precept that has long plagued discussions on controller freezeouts and other related party transactions and proposes a new precept, which underpins the optional private solution of 2014 *Kahn v. M & F Worldwide Corp.* (*MFW*). Moreover, this private solution makes *MFW* fit to go global. First, from a social welfare standpoint, precise price determinations of related party transactions are not critical. Rather, unskewed price determinations are critical. This is because consequential related party transactions involve monopolies, monopsonies, or bilateral monopolies. Obviously, controller freezeouts are bilateral monopolies. *MFW* converts entire fairness review to business judgment review when a controller freezeout is preconditioned upfront on dual special committee and a majority of the minority approval. Notwithstanding their bilateral monopoly nature, generally negotiations under *MFW* produce unskewed outcomes similar to competitive markets. This, as well as a zero-sum aspect of price determinations, justify *MFW*’s private solution. *MFW* also covers other controller related party transactions and is likely to produce unskewed results. Last but not least, the new insight will also guide the future course of Delaware’s jurisprudence.

Second, Delaware is in a global regulatory competition with mandatory bid rule (MBR) under the Takeover Directive and its close relatives. MBR has two principal functions: (i) to prevent both structural and substantive coercive control share accumulations and (ii) to frustrate sales of control blocks that may result in greater exploitation of private benefits of control. MBR’s ex ante approach makes its application predictable and less expensive. These features make MBR attractive in non-US jurisdictions with judiciaries not as experienced as that of Delaware. However, MBR pressures third party bidders to pay prices skewed to be higher than fair market prices. Holdouts are a major issue. The restriction on sales of control blocks prevents many efficiency enhancing transactions. Surprisingly, *MFW* can singlehandedly address both the coercion and private benefit issues without frustrating efficiency-enhancing control changes. *MFW* is more rule-like and its judicial enforcement does not involve preliminary injunctions and other anticipatory adjudications that make judicial policing challenging. Specialized local courts can handle *MFW* sufficiently well to replace MBR. *MFW*’s globalization into Europe and beyond, including Asia, is eminently sensible and promising. Globalization is *MFW*’s future.

[I. Introduction 4](#_Toc131077882)

[II. Freezeouts and Other Self-Dealings—How Prices Are Relevant 11](#_Toc131077883)

[A. Cash Freezeouts 11](#_Toc131077884)

[1. Centrality in Control Changes 11](#_Toc131077885)

[2. Self-Dealings in a Bilateral Monopoly 12](#_Toc131077886)

[3. Price Determination and Efficiency 13](#_Toc131077887)

[a) Direct Implication 13](#_Toc131077888)

[b) Indirect Implication 14](#_Toc131077889)

[c) Effects of Intrinsic Value or Market Price as Reference Price 16](#_Toc131077890)

[B. Other Self-Dealings 17](#_Toc131077891)

[1. Direct Implications 17](#_Toc131077892)

[a) Bilateral Monopoly 17](#_Toc131077893)

[b) Monopoly and Monopsony 17](#_Toc131077894)

[2. Other Implications 18](#_Toc131077895)

[III. Mandatory Bid Rule—Functions and Limitations 19](#_Toc131077896)

[A. Mandatory Bid Rule 19](#_Toc131077897)

[1. Acquisition of Control and Tender Offer 20](#_Toc131077898)

[2. Buyout and Sellout 20](#_Toc131077899)

[3. Board Neutrality 21](#_Toc131077900)

[B. High Freezeout Thresholds 21](#_Toc131077901)

[1. Prices 22](#_Toc131077902)

[2. Holdout 24](#_Toc131077903)

[C. Drawbacks of Equal Opportunity Rule (EOR) 27](#_Toc131077904)

[D. Add-on Freezeout Mechanism 29](#_Toc131077905)

[IV.](#_Toc131077906) *[MFW](#_Toc131077906)*[—A Long and Winding Road 30](#_Toc131077906)

[A.](#_Toc131077907) *[Weinberger](#_Toc131077907)*[—Entire Fairness 30](#_Toc131077907)

[1. Fair Price 31](#_Toc131077908)

[2. Fair Dealing 33](#_Toc131077909)

[B.](#_Toc131077910) *[MFW](#_Toc131077910)* [34](#_Toc131077910)

[1. Outline 36](#_Toc131077911)

[2. Reduced Judicial Costs 38](#_Toc131077912)

[C. Other Related Party Transactions 39](#_Toc131077913)

[D. Second Steps of Two-Step Acquisitions 41](#_Toc131077914)

[E. Efficiency 43](#_Toc131077915)

[1. Unskewed Prices 43](#_Toc131077916)

[2. Judicial Economy 45](#_Toc131077917)

[3. Baseball Arbitration 45](#_Toc131077918)

[F. Incomplete Contract Theory and Property Rule 46](#_Toc131077919)

[1. Incomplete Contract Theory 46](#_Toc131077920)

[2. Partial Return to Property Rule 48](#_Toc131077921)

[V.](#_Toc131077922) *[MFW](#_Toc131077922)* [as Substitute for MBR and More 48](#_Toc131077922)

[A.](#_Toc131077923) *[MFW](#_Toc131077923)* [v. MBR 49](#_Toc131077923)

[B.](#_Toc131077924) *[MFW](#_Toc131077924)* [Transplant 50](#_Toc131077924)

[1. Controller Self-Dealings 50](#_Toc131077925)

[a) Less Need for Anticipatory Adjudication 50](#_Toc131077926)

[b) Valuations 51](#_Toc131077927)

[2. MFW 52](#_Toc131077928)

[a) More Rule-Like 52](#_Toc131077929)

[b) Common Global Trends 53](#_Toc131077930)

[C. Legislative Facts, Standards, and Specialized Business Courts 54](#_Toc131077931)

[D. Co-Existence Alternative 55](#_Toc131077932)

[VI. Conclusion 56](#_Toc131077933)

# Introduction

This paper questions the precept that has long plagued discussions on controller freezeouts[[2]](#footnote-3) and other related party transactions and proposes a new precept, which underpins the optional private solution of 2014 *Kahn v. M & F Worldwide Corp.* (*MFW*).[[3]](#footnote-4) Moreover, this private solution makes *MFW* fit to go global. First, this paper reveals, from a social welfare standpoint, precise price determinations of controller related party transactions are not critical. Rather, what is critical is price determinations that do not systematically skew. This is because consequential related party transactions involve monopolies, monopsonies, or bilateral monopolies. Controller freezeouts are bilateral monopolies. *MFW* converts entire fairness review to business judgment review when they are preconditioned upfront on dual special committee and a majority of the minority (MOM) approval. This is justifiable since, notwithstanding the bilateral monopoly nature of controller freezeouts, generally negotiations under *MFW* result in unskewed outcomes similar to competitive markets. This, as well as a zero-sum aspect of price determinations of controller freezeouts, justifies *MFW*’s optional private solution. *MFW* also covers other controller related party transactions and is likely to produce unskewed results. Last but not least, the new insight will also guide the future course of Delaware’s jurisprudence.

Second, Delaware is in a global regulatory competition with mandatory bid rule (MBR) under the Takeover Directive[[4]](#footnote-6) and its close relatives. MBR has two principal functions: (i) to prevent both structural and substantive coercive control share accumulations and (ii) to frustrate sales of control blocks that may result in greater exploitation of private benefits of control. MBR’s ex ante approach makes its application and enforcement predictable and less expensive. These features make MBR attractive particularly in non-US jurisdictions with judiciaries not as experienced as that of Delaware. However, it is revealed, MBR pressures third party bidders to pay prices skewed to be higher than fair market prices. Holdouts are a major issue. The restriction on sales of control blocks prevents many efficiency enhancing transactions. Unlike the United Kingdom, where the Takeover Code[[5]](#footnote-9) prevails and provided a model for the EU Takeover Code,[[6]](#footnote-10) companies with controlling shareholders are globally pervasive,[[7]](#footnote-11) and they tend to experience the inefficiencies of MBR more acutely. On the other hand, in Delaware, *Unocal*[[8]](#footnote-12) and *Revlon*,[[9]](#footnote-13) which regulate director conduct, together with its anti-takeover statute,[[10]](#footnote-14) mask the full powers of *MFW*, which regulates controllers. Unleashing these powers, this paper reveals, *MFW* can singlehandedly address both the coercion and private benefit issues without frustrating efficiency-enhancing control changes. *MFW* is more rule-like, and its judicial enforcement does not involve preliminary injunctions and other anticipatory adjudications that make judicial policing challenging. Specialized local courts outside the United States are becoming more prevalent and should be able to adequately enforce *MFW*’s the ex post policing of control transactions. Moreover, *MFW* simultaneously transforms jurisprudence regarding other controller related party transactions. Therefore, *MFW*’s globalization into Europe and beyond, including Asia, is eminently sensible and promising.[[11]](#footnote-16)

The insignificance of precise price determinations in contrast to the importance of unskewed price determinations, *MFW*’s implicit embrace of this premise, and the case for transplanting *MFW*’s judicial policing of control transactions emerge and become clear while exploring how control changes should be policed. Cash freezeouts are central in many control transactions, and most critical to the policing of control changes is that of cash freezeouts.

*Why Cash Freezeouts*? The answer is non-controversial. Without a freezeout option, attempts to acquire complete control of public companies, whether in third party acquisitions or controller going private transactions, are likely a nonstarter. Various legal techniques may be employed to effect freezeouts. The essential common denominator of these methods is the power to acquire shares of all or a group of target shareholders without their individual consent. Further, stock as an acquisition currency may be less attractive for both acquirors and selling shareholders. The acquirors, especially family owners and financial buyers like private equity firms, may not have shares to offer to the selling shareholders. The acquiring companies may have to register their shares. For various reasons, often stock as an acquisition currency is a nonstarter in both third party acquisitions and controller going private transactions. Other types of considerations are also of limited use.

*A Guiding Principle for Cash Freezeouts—Insignificance of Precise Price Determinations and Importance of Unskewed Determinations.* Cash freezeouts may or may not be efficiency enhancing. The implicitly accepted precept is that efficiency issues can be solved through a process that ensures the price of a transaction to be identical to the fair market value of the shares. However, this blanket assertion is an oversimplification.Most important, and contrary to a widely accepted presumption, no significant direct efficiency losses generally emerge unless prices systematically skew. Controller freezeouts are bilateral monopolies. Thus, there are no alternative buyers to whom minority shareholders can sell their shares at higher prices, and there are no alternative sellers other than the minority shareholders who would offer to sell at lower prices. However, there are adverse externalities if prices of controller freezeouts skew. With respect to third party freezeout acquisitions, neither self-dealings nor bilateral monopolies necessarily result. Thus, the precise price determinations of such acquisitions are less of a concern.

*How Does Delaware Fare?* Delaware has had a liberalized freezeout regime for decades. In Delaware, third party bidders may try to achieve complete acquisitions in one-step or two-steps. Incumbent controllers have the same options, and partial acquisitions are not preempted. Under the Delaware statutory default rule, controller freezeouts essentially are self-dealings where the controllers are empowered to acquire minority shares at prices they dictate. Delaware attempted to ensure fair market prices through ex post judicial policing of directors of target companies in third party acquisitions and of incumbent controllers in controller freezeouts. In the latter case, the applicable judicial standard is entire fairness, and the utmost concern was potential inaccuracies in the determination of fair market value. The Delaware mode of judicial policing relies heavily on an expert judiciary par excellence. However, this created consternation, particularly among judges who might have intuitively wondered if the exercise was largely a zero-sum game and not socially redeemable. In recent years, generally reliable independent committees have become widely used. In addition, the emergence of both a prevalence of institutional investors and a global IT revolution made the MOM condition more reliable. At the end of a tortuous journey of three decades and aided by these changes, finally *MFW* converted entire fairness review to business judgment review and essentially decided not to usurp deal prices when freezeouts are optionally preconditioned on dual independent committee and MOM approval. Outcomes of negotiations under *MFW* generally neither deviate much from those in competitive markets nor skew price determinations. *MFW* has been extended to cover other related party transactions, which fosters potential positive-sum negotiations. *MFW*’s​private solution is consistent with the guiding principle, made Delaware’s jurisprudence streamlined, rational, and efficient, and ushered in a new direction.

*How Does the Takeover Directive Fare?* Through a set of its interdependent key features, the Directive largely successfully addresses, ex ante, structural and substantive coercion and private benefits of control relating to transfers of control blocks. However, as part of its overall scheme, the Directive subjects cash freezeouts to a strict set of conditions. In the EU jurisdictions, controllers are allowed to buy all the remaining minority shares at a “fair price” once they, depending on the choice of Member State, acquire to own, or acquire, a prescribed threshold percentage in tender offers. If the former is chosen, the threshold percentage must be 90% or more but not more than 95%, of all the shares. And, if the latter is chosen, the threshold is 90% of all the shares comprised in the offers. When the controller acquires shares in a mandatory offer or at least 90% of the shares comprised in a voluntary offer, then the offer price is presumed fair. However, under the guise of “shareholder protection,” this regime pressures prices to skew to exceed fair market values in third party acquisitions. This discourages efficiency enhancing third party acquisitions. The high thresholds also invite holdouts. Equal Opportunity Rule (EOR),[[12]](#footnote-17) MBR’s corollary, prevents transfers of control blocks without giving minority shareholders an opportunity to sell under the same conditions in a tender offer. EOR prevents inefficient transfers of control blocks attributable to increased private benefits of control. It achieves its objective, but it is is narrow. It fails to curb many opportunities for controllers to extract private benefits of control. In addition, EOR discourages many efficient transfers of control blocks. Overall, the Directive does not fare particularly well under the guiding principle.

*Should MFW Take the Place of MBR?* The foregoing suggests that the Directive’s dominance needs to be reexamined. If *MFW* addresses issues MBR addresses and non-US jurisdictions can competently handle *MFW*‘s jurisprudence, *MFW*’s transplant to MBR jurisdictions makes sense.

*Can MFW Alone Address Coercive Third Party Acquisitions?* In Delaware, the *Unocal* and *Revlon* lines of cases prevent coercive third party acquisitions. *MFW* is a controller freezeout case. This begs the question of how *MFW* can address coercion in third party two-step acquisitions. However, first, the prospect of the applicability of *MFW* in the second step controller freezeouts indirectly discourages the bidders from engaging in coercive third party two-step acquisitions. In Delaware, the availability of the *Unocal* and *Revlon* lines of cases and an anti-takeover statute have masked this function of *MFW*. Second, *MFW* has also been extended to cover controller related party transactions other than controller freezeouts. Through the policing of these transactions including potential future freezeouts, *MFW* simultaneously addresses bidder techniques to coerce shareholders to tender in partial acquisitions. Thus, in this respect, *MFW*’s coverage is no less broad than that of the Directive.

*MFW Addresses Related Party Transactions Generally and Automatically Covers Private Benefits of Control More Broadly Than MBR. Right?* Yes.However, as indicated, *MFW*, together with the entire fairness standard it is premised upon, addresses the issue of private benefits of control in controller related party transactions head-on and much more broadly than the Directive so much so that it will transform jurisprudence concerning controller related party transactions generally.[[13]](#footnote-18)

*Can Judiciaries Outside the United States Competently Enforce MFW?* Compared to Delaware’s prior jurisprudence*, MFW* relies much less on the expertise of the judiciary. Anticipatory adjudications, such as temporary restraining orders and preliminary injunctions, require an agile and sophisticated judiciary. However, unlike *Unocal* and *Revlon*, *MFW* need not to rely on anticipatory adjudications. Also, the increased prevalence of independent committees, the institutionalization of shareholders, and the IT revolution are not limited to the United States. Thus, the *MFW* mode of judicial policing has become much more feasible in many non-US jurisdictions. Further, specialized judiciaries have become more customary, which can further enhance feasibility. Regarding controller freezeouts non-compliant with *MFW*, under the refined precept, judiciaries need to focus less on the determination of exact prices. Introduction of baseball arbitration could additionally reduce burdens on local judiciaries. Thus, with respect to *MFW*’s transplant, a traditional skeptical attitude toward the ability of non-US judiciaries to administer Delaware’s takeover jurisprudence has become inapposite.

*Net Effects:*​Controller freezeouts are bilateral monopolies. Other consequential related party transactions involve monopolies, monopsonies, or bilateral monopolies. Therefore, from a social welfare standpoint, and unlike popular assumption, precise price determinations are not ​necessarily ​critical.This refined precept underpins *MFW*’s private solution and guides Delaware jurisprudence beyond *MFW*. ​Globally, *MFW*’s ​scope is no less broad than MBR. *MFW* can ​singlehandedly​ ​work as a substitute for the Directive. ​In so doing, *MFW* does not have to rely on Delaware’s heightened scrutiny of directors, which requires anticipatory adjudication.​ *MFW* is more rule-like. Thus, if transplanted, *MFW* will not overload local judiciaries​​. Economically, the Takeover Directive over-deters control changes. ​Holdouts, including by existing large shareholders, are a major issue of the Directive. MFW simultaneously ​transforms other controller related party transactions generally. These factors justify *MFW*’s globalization.

*This Paper Proceeds as Follows.* Part II starts by pointing out the critical importance of cash freezeouts for both third party acquisitions and controller going private transactions. It then discusses self-dealing aspects of controller freezeouts and the efficiency implications of freezeout prices. However, it reveals that since controller freezeouts are bilateral monopolies, exact price determinations of controller freezeouts are not important: Rather what is important is that price determinations do not systematically skew. The same is largely true with respect to other self-dealings that are bilateral monopolies. It is also revealed that precise price determinations of self-dealings that involve monopolies or monopsonies also prove to be much less important. Part III states that MBR, through ex ante rules, prevents coercion and attempts to preempt private benefits of control. It points out, however, that, MBR’s very high thresholds for buyout rights pressure acquisitions prices to systematically skew *above* fair market value. These characteristics are inconsistent with the principle in Part II and generally adverse to efficiency enhancing control changes. Further, Part III points out that, while EOR, an integral feature of MBR, achieves the limited purpose of preventing transfers of control blocks to take advantage of greater private benefits, EOR also prevents many efficiency enhancing transfers of control blocks.

Part IV begins by tracing Delaware’s journey relating to cash freezeouts to *Weinberger*, a 1983 watershed decision*.* However, under *Weinberger*, in general, judges must pinpoint freezeout prices when transaction prices are outside of a range of fairness. *Weinberger*’s attempt to assure fair market value of prices in controller freezeouts is consistent with traditional assumptions about the importance of precise price determinations for freezeout prices. Part IV describes the consternation this requirement created among judges, who might have wondered if the exercise was socially redeeming and anything more than a zero-sum game. It goes on to describe that, finally, and after thirty years of judicial twists and turns, *MFW*,in 2014, converted *Weinberger*’s entire fairness review to business judgement review when controller freezeouts are preconditioned on both independent committee and MOM approval. The move was aided by increased prevalence of independent committees, institutionalization of shareholders, and an IT revolution.

Part IV then shows that *MFW* immediately reduced socially wasteful dispute resolution costs related to controller freezeouts. It is revealed that the new refined precept of the non-importance of precise determinations of prices for controller freezeouts underpins *MFW*. In addition to *MFW*’sextension to cover non-freezeout related party transactions, it is shown that related party transactions within *MFW*’s coverage include second step freezeouts in third party two step acquisitions unless merger agreements are entered into before the second step freezeouts. Such second-steps are controller freezeouts. Providing the background for discussion in Part V, it is highlighted that while, currently, the *Unocal* and *Revlon* lines of cases and an anti-takeover statute in Delaware make the invocation unnecessary, if invoked, *MFW* has the benefits of deterring coercive acquisitions generally. Theoretically, *MFW* limits the fiduciary duty of controllers as incomplete contract theory predicts and also represents a partial return to property rule as a theory behind the use of property rule and liability rule predicts.

Part V first explains how *MFW* can perform virtually all of MBR’s functions, and more, with less downsides. Then, it argues that it is now practical to transplant *MFW* to non-US jurisdictions, particularly to jurisdictions where MBR currently prevails. The factors that make *MFW*’s ex post judicial policing practical outside of the United States include: (i) global changes in the corporate world that facilitated *MFW* in Delaware, i.e., the prevalence of independent directors, the institutionalization of shareholders, and the IT revolution; (ii) *MFW*’s more rule-like procedural requirements that are enforceable without relying on anticipatory adjudications and sophisticated judiciaries; (iii) increasing familiarity of the fairness duty of controllers in civil law jurisdictions; (iv) the regularity of specialized judiciaries; and (v) reduced need for judicial valuations. Part VI concludes. The lynchpin that passes through the entire paper is that consequential controller related party transactions are monopolies, monopsonies, or bilateral monopolies; and therefore, the determination of exact prices in controller related party transactions, in particular controller freezeouts, is less relevant for efficiency purposes. Rather, what is critical is price determinations that do not systematically skew.

# Freezeouts and Other Self-Dealings—How Prices Are Relevant

## Cash Freezeouts

### Centrality in Control Changes

First, this paper reconfirms the obvious. Third party acquisitions and incumbent controller freezeouts may be efficiency increasing.[[14]](#footnote-19) Due to collective action or asymmetric­­­­ information problems or both, however, some of the dispersed shareholders may not tender or otherwise voluntarily sell their shares. For example, if existing shareholders expect, correctly or erroneously, to be able to free ride on the acquiror’s managerial ability, they may opt not to sell.[[15]](#footnote-20) Some may strategically holdout to extract a higher price. Other shareholders simply fail to take actions to sell. Without a freezeout mechanism, these issues frustrate control transactions, even if they are welfare enhancing. Frequently, such transactions are nonstarters if there is no mechanism to allow a third party buyer or an incumbent controller to acquire shares of all or a group of shareholders without their individual consent, whether for cash, stock, or other considerations.[[16]](#footnote-21) Various legal techniques, such as mergers, share exchanges, reverse share-splits, and buyout rights, may be used to effect freezeouts.

Stock as an acquisition currency may be less attractive for both the acquirors and the selling shareholders. The acquirors, especially family owners and financial buyers such as private equity firms, may not have shares to offer to the selling shareholders. The acquirors may have to register their shares. The buyers may not want target shareholders to become their shareholders. The acquirors dominant stockholders may prefer not to be diluted after stock-for-stock acquisitions.[[17]](#footnote-22) If acquirors are foreign companies, target company shareholders may not want to own foreign company shares.[[18]](#footnote-23) For various reasons, stock as an acquisition currency is often a nonstarter. Therefore, cash freezeout as a control change mechanism is critically important.

Notwithstanding the obvious, the road to cash freezeouts was not straightforward, even in Delaware.[[19]](#footnote-24) In Europe, “the debate over the Takeover Directive has focused so little on the link between corporate acquisitions and cash freeze-out rules.”[[20]](#footnote-25) And, as described in Part III.A.2., freezeout rules under the Directive are quite restrictive.

In essence, cash freezeouts involve a taking of shares for cash. Thus, ultimately, the most important issue is considered the amount of cash compensation at which the transfer takes place.[[21]](#footnote-26) By expounding on this issue in the context of cash freezeouts, a more refined and cogent approach to a liberalized cash freezeout regime emerges. Unlike controller freezeouts, third party one-step cash acquisitions, such as through cash mergers, are neither self-dealings nor bilateral monopolies. Thus, the price determination issue is less of a concern.[[22]](#footnote-27)

### Self-Dealings in a Bilateral Monopoly

Assume, as in most jurisdictions, minority shareholders cannot force a controller to sell its position to third parties.[[23]](#footnote-28) Then, a controller freezeout is a bilateral monopoly. Effectively, the controller is the only purchaser (a monopsonist), and as a group, the minority shareholders are the only sellers (a monopolist).[[24]](#footnote-29) In addition, the demand and supply are identical. However, when a freezeout is the second step of a third party two-step acquisition effected pursuant to an agreement regarding the second-step freezeout, the second step effectively loses both its self-dealing and bilateral-monopoly characteristics. This is because the agreement is entered into when the two parties are unrelated.[[25]](#footnote-30) As in the case of third party one-step acquisitions, precise price determinations are less of a concern.[[26]](#footnote-31)

### Price Determination and Efficiency

Since controller freezeouts are bilateral monopolies, generally, freezeouts are efficiency enhancing when freezeout prices are no less than intrinsic values. However, prices systematically skewed from fair market value will have negative externalities.

#### Direct Implication

Voluntary sales of goods or services to voluntary buyers yield prices generally consistent with fair market values[[27]](#footnote-32) and are generally efficiency enhancing.[[28]](#footnote-33) In addition, in the case of sales of companies with dispersed shareholders, the sole owner standard is accepted in practice[[29]](#footnote-34) and is also strongly advocated as a theory consistent with economic efficiencies.[[30]](#footnote-35) The standard helps construct a governance mechanism for control transactions that involve target companies with dispersed shareholders, which suffer from collective action and asymmetric information problems.

However, since controller freezeouts are bilateral monopolies, there are no market mechanisms to derive freezeout prices. And controller freezeouts are efficiency increasing if effected at prices more than the intrinsic value of the shares.[[31]](#footnote-36) Minority shareholders have no option to force a sale to a third party willing to pay a higher price than the controller.[[32]](#footnote-37) Conversely, if the prices are below such values, they are likely to be efficiency decreasing.[[33]](#footnote-38) While the stakes of the controller and minority shareholders related to the price are quite high, the direct social welfare implications are likely to be positive regardless of the actual price, so long as the price is no less than the shares’ intrinsic value.[[34]](#footnote-39) In addition, a controller freezeout is a bilateral monopoly with identical supply and demand. In these transactions, price disputes and negotiations above intrinsic value are largely zero-sum games. There is less justification to expend social resources, such as judicial resources, to determine the exact price of a controller freezeout. Moreover, so long as freezeout prices are more than the intrinsic value of the shares, the need to stop or reform transactions through preliminary injunctions, or another form of anticipatory adjudication, decreases or entirely disappears;[[35]](#footnote-40) post transaction damage and other monetary relief is more consistent with efficiency.

The same analysis does not necessarily apply to a controller freezeout as the second step of a third party two-step acquisition. In these cases, a transaction with the highest bidder is likely to be the most efficiency enhancing.[[36]](#footnote-41)

#### Indirect Implication

Assume that a governing regime is skewed to allow incumbent controllers to freezeout minority shareholders at below fair market prices. The regime generally drives down prices of existing minority shares below those that would otherwise prevail.[[37]](#footnote-42) A well-recognized concern in third party two-step acquisitions is that the remaining shareholders in the second steps may be frozen-out at prices less than those in the first steps.[[38]](#footnote-43) The often also leads to coercive pressure for shareholders to sell in the first steps and helps bidders drive down the first step prices as well. The prices of one-step third party acquisitions would also be determined under the shadow of two-step coercive acquisitions, which again allows bidders to pay less than fair market prices. Partial acquisitions do not remove this coercive aspect[[39]](#footnote-44) since the remaining minority shareholders may eventually face freezeouts at prices skewed to be less than fair market prices. When freezeout prices are generally lower than fair market prices, overall stock market prices, including those of companies with no controllers, become lower than those that should otherwise prevail. This is because the companies may be subject to coercive complete or partial acquisitions.

The negatively distorted public market will lead to less allocation of capital to the public market than would otherwise prevails. There appears to be no valid economic justification to create the distortion. If so, the resultant smaller allocation of capital to the public market is less than economically optimal. And the larger the gap between the undistorted public market price and the distorted public market price, the larger the inefficiency from the distortion of the capital allocation. It has been said, “[t]he benefits of functioning public stock markets are too various to catalog and are sufficiently well-known as to render a full explication unnecessary.”[[40]](#footnote-45)

For example, assume that an investor has a choice of investing in minority shares in a private company and minority shares offered in an IPO. Assume further, the private company shares have future cash flows less than the IPO shares. However, the private company minority shares are protected by a shareholder agreement against a freezeout price skewed against the minority shareholders, but the minority IPO shares are not so protected. The investor may choose to allocate its capital to the private company shares. This may make an allocation of capital less efficient. Or “[t]he increase in dilution may deter some entrepreneurs from selling a public stake, even when it would be socially desirable for the entrepreneur to do so.”[[41]](#footnote-46) The same analysis also applies to post-IPO share issuances.[[42]](#footnote-47) Public companies may engage in going private transactions when their shares are traded below intrinsic values that reflect cash flows on the shares even if, after the going private transactions, the companies do not expect to produce larger cash flows.[[43]](#footnote-48) Inefficient allocation of capital may also be made to assets other than company shares.

On the other hand, “t]he likelihood that a controller will initiate a freezeout increases monotonically with the controller’s expected profits from the deal.”[[44]](#footnote-49) Thus, a regime skewed to force bidders to pay more than fair market prices in control transactions discourages bidders, including incumbent controllers, from engaging in efficiency increasing control changes.[[45]](#footnote-50) If freezeout prices do not skew, these adverse externalities do not necessarily materialize.

#### Effects of Intrinsic Value or Market Price as Reference Price

If intrinsic value is a reference price, controllers will be encouraged to engage in efficiency enhancing freezeouts.[[46]](#footnote-51) However, the intrinsic value does not allow minority shareholders to share synergies with controllers. Instead, it systematically allows freezeouts at less than fair market value of the shares. This approach to use intrinsic value as a reference price creates adverse externalities.[[47]](#footnote-52) If market price is a reference price, it will have the same adverse externalities because it also does not reflect synergies.

In addition, unlike intrinsic value as a reference price, market price as a reference price may invite efficiency decreasing freezeouts attributable to the “lemons effect.”[[48]](#footnote-53) The risk is well known. Controllers do not expect shareholders to positively react to below-market freezeouts. If controllers know stock market prices are higher than intrinsic values, they may be discouraged from engaging in freezeouts. Generally, a controller is assumed to have superior information about the company than the market. Thus, no attempts for controller freezeouts could signal to the market that such discrepancies exist. Any hint of a discrepancy might lead to a downward spiral of share prices and result in the lemons effect.[[49]](#footnote-54) Of course, there are factors that can disturb a plummet in market price.[[50]](#footnote-55) For example, the lack of a freezeout may be due to the controller’s inability to realize any positive synergies, or it may be due to their inability to raise capital.[[51]](#footnote-56) Thus, a downward spiral is not necessarily assured. However, market price as a reference price increases this risk, which results in more inefficient controller freezeouts. These potential adverse externalities may be greater in jurisdictions with higher percentages of controlled companies.

##  Other Self-Dealings

### Direct Implications

#### Bilateral Monopoly

Pricing or valuation errors related to self-dealings in bilateral monopolies, whether determined through negotiations or ex post determinations, do not necessarily result in serious efficiency losses so long as errors are not systematically skewed. This is no different from controller freezeouts. However, unlike a controller freezeout, demand and supply may differ. Potentially, negotiations under the *MFW* regime may create positive-sum results and extra efficiency gains.

#### Monopoly and Monopsony

When free competition exists with respect to the products or services that are the subjects of controller non-freezeout self-dealings, direct efficiency losses result if third parties lose opportunities to offer more favorable prices to the controlled companies than the controllers. However, if controllers engage in self-dealings, generally there should be comparable arm’s length third party transactions. Independent directors, minority shareholders, and judiciaries, could easily identify and monitor prices of such third party transactions to prevent transactions with controllers whose terms deviate from those of arm’s length transactions. This discourages controllers from engaging in transactions unfavorable to the controlled companies.

In controller self-dealings other than freezeouts, one side may be monopolist or monopsonist. In these situations, market power is not balanced. However, if controlled companies have market power as monopolists or monopsonists, controllers may still dictate actual prices through governance. Therefore, situations where controllers as purchasers overpay, or where controllers as sellers undercharge, do not occur. Thus, only situations where controllers as purchasers from controlled companies underpay and where controllers as sellers to controlled companies overcharge require considerations.

Assume inefficiencies from monopolies or monopsonies as given.[[52]](#footnote-57) When the controlled is a monopolist, generally, no additional efficiency losses should necessarily result from a sale to the controller so long as the price is higher than the cost for the controlled.[[53]](#footnote-58) When the controlled is a monopsonist, generally, no additional efficiency losses will necessarily result so long as the price is less than the value of the item for the controlled.[[54]](#footnote-59) Therefore, unless exceptions apply, from a social welfare standpoint, there is no need to mandate the parties to observe the precise market value of the products or services. Thus, subject to Part II.B.2, precise determinations of prices between controllers and controlled companies are much less critical for efficiency.

In addition, unlike transactions in bilateral monopolies, comparable transaction prices from third party transactions may be available despite the B2B nature of related party transactions. If available, independent directors, minority shareholders, and judiciaries can easily identify arm’s length prices and monitor to prevent non-arm’s length price terms. This discourages controllers from engaging in transactions unfavorable to controlled companies. The comparable transaction prices make valuation errors less likely. Thus, overall efficiency losses from controller self-dealings appear substantially more manageable than many observers implicitly assume.

### Other Implications

As in the case of freezeout prices, if price determinations of other controller related party transactions systematically skew against minority shareholders,[[55]](#footnote-60) it will generally dampen market prices and trigger the indirect efficiency implications described in Part II.A.3.b). If the determinations systematically skew against controllers, it discourages them from engaging in related party transactions even if they are socially desirable.

# Mandatory Bid Rule—Functions and Limitations

 First, how will MBR under the EU Takeover Directive fare under the new precept?under the new precept the two competing models. “The Directive . . . takes as its starting point many aspects of the British model of takeover regulation, both as to substance . . . and as to procedure . . . .”[[56]](#footnote-61) Thus, MBR prevails in the European Union, which included the United Kingdom until its withdrawal in 2020.[[57]](#footnote-62) Its variations also prevail in other jurisdictions.[[58]](#footnote-65) Since the Directive’s freezeout regime is integrally linked to other aspects of the regime, we will start with its overall structure.

## Mandatory Bid Rule

Through a set of its key features, the MBR of the EU Takeover Directive tries to address, ex ante, structural and substantive coercion[[59]](#footnote-66) and private benefits of control relating to transfers of control blocks. The Directive mandates (i) no acquisition of control without a tender offer to all the holders for all of their holdings made to acquire control or made after the establishment of control and (ii) both buyout and sellout rights at a very high threshold.[[60]](#footnote-68) However, these key features also entail less optimal features or consequences.[[61]](#footnote-69)

### Acquisition of Control and Tender Offer

MBR under the Directive[[62]](#footnote-70) generally prohibits an acquisition of control[[63]](#footnote-71) through purchases of shares without subsequently making a tender offer to all the remaining shareholders for all their holdings. Generally, the price of the offer may not be lower than the highest price the bidder has paid during a specified period up to an event that has triggered MBR.[[64]](#footnote-72) Thus, MBR gives all the remaining shareholders an equal opportunity to participate in control premiums. Acquisition of control through a voluntary tender offer exempts the bidder from the mandatory bid requirement. However, such voluntary offers must also include all the shareholders for all their holdings. Thus, equal opportunity is preserved.[[65]](#footnote-73)

### Buyout and Sellout

The Directive requires EU Member States to permit a controller to squeeze out minority shareholders in the form of a buyout at a fair price. Under the buyout regime, the controller, at its option, may force all the minority shareholders to sell all their shares at a fair price if the controller has completed a tender offer to all the shareholders of the target company for all their shares (i) after which the controller satisfies the Ownership Test, or (ii) through which the controller satisfies the Acceptance Test. Each Member State must choose either the Ownership Test or the Acceptance Test. The Ownership Test requires the controller to own a threshold percentage of all the shares. The Member State that opts to use the Ownership Test designates the threshold from a range that is 90% or higher but not higher than 95%. The Acceptance Test requires the controller to acquire at least 90% of the voting shares comprised in a tender offer.[[66]](#footnote-74) The Ownership Test prevails in most of the Member States, a majority of which opt for the 95% threshold.[[67]](#footnote-75)

Minority shareholders also have a sellout right in situations where the buyout right exists.[[68]](#footnote-76) The buyout right is a freezeout option that enhances a bid[[69]](#footnote-77) and, to an extent, alleviates holdout and other collective action problems of dispersed shareholders. The sellout right, along with MBR’s other features, alleviates pressure to tender.[[70]](#footnote-78)

### Board Neutrality

The Takeover Directive has a board neutrality rule. After learning about a decision to bid, target boards are restricted from taking defensive measures other than to seek alternative offers unless they obtain shareholder consent.[[71]](#footnote-79) The rule prevents director agency issues related to hostile acquisitions. In friendly acquisitions, the rule lessens director agency issues and has the effect of inducing alternative third party bidders. However, the board neutrality rule is subject to a Member State optout option,[[72]](#footnote-80) and many Member States exercised the option.[[73]](#footnote-81) Apparently, the exception was created as a political compromise.[[74]](#footnote-82) Further, under another EU Directive, “the US-style poison pill” may be impermissible.[[75]](#footnote-83) Due to its optionality and the likely infeasibility of a strong poison pill, the role of the board neutrality rule appears limited.

## High Freezeout Thresholds

MBR alleviates structural and substantive coercion that may result from collective action and asymmetric information problems of dispersed shareholders. However, under the name of shareholder protection,[[76]](#footnote-84) the high thresholds for freezeouts under MBR ends up pressuring third party bidders to pay *no less than* the fair market value of target shares. With respect to freezeouts by incumbent controllers, if no other measures are available, the thresholds under the Ownership Test may under protect minority shareholders.

According to a commentator, “the choice of the [Takeover Directive’s] squeeze-out threshold involves a trade-off between promoting takeovers and protecting minority shareholders.”[[77]](#footnote-85) However, the overriding concept of economic efficiency can resolve this purported trade-off.[[78]](#footnote-86) In Europe, property rules predominate more strongly than in the United States, and there exists a stronger sense that “cashing-out minorities should be possible only in extreme circumstances.”[[79]](#footnote-87) The property rule “approach assumes that the best protection of minority shareholders consists in allowing them to hold on to their shares.”[[80]](#footnote-88) However, if price determinations are unskewed and otherwise consistent with Part II.A.2, 3, overall, liability rule rather than property rule appears to be more conducive to shareholder welfare than “the best protection.” The Directive is inconsistent with the proposition.

### Prices

If “reservation prices for [the shares of non-bidder shareholders] are normally distributed, the supply curve for [such] shares is upward sloping.”[[81]](#footnote-89) And, the deal price in a voluntary tender offer is presumed fair in a subsequent buyout only when the rate of acceptance in the tender offer reaches 90%.[[82]](#footnote-90) However, the tender offers prices are not presumed unfair when the 90% acceptance rate is not met. Thus, the 90% acceptance percentage is, generally or, at least, more often than not, assumed to overshoot the fair price of the target shares.

Chart 1 compares the rates of acceptance required under the 90% Ownership Test, the 95% Ownership Test, the 90% Acceptance Test, and a MOM condition. Under the two variations of the Ownership Test, the rates of required acceptance depend on the bidder’s pre-bid ownership percentages. Under the above observations, the Acceptance Test pressures bidders to overshoot fair prices. Under the Ownership Test, third party bidders with no significant pre-bid ownership positions are subject to the same pressure.

However, if the bidders originally own significant stakes, then the gap between pre-bid stakes and the applicable Ownership Test percentage may not be sufficient to protect the remaining shareholders. For example, so long as the bidder’s pre-bid ownership is above 80% and 90% respectively, the rates of acceptance necessary to satisfy the 90% Ownership Test or the 95% Ownership Test would be lower than one required under the MOM condition and are far lower than the 90% acceptance rate. In situations where the fair price presumption is inapplicable in a subsequent buyout, “Member States often set up specific rules to determine fair price. Several Member States use some form of appraisal by regulatory agency, independent expert, or court proceeding.”[[83]](#footnote-94)

In sum, the Acceptance Test tends to “over protect” dispersed shareholders. Ultimately, it undermines their interests and reduces efficiency enhancing control changes. The Ownership Test has similar effects in third party acquisitions. Conversely, the Ownership Test may under protect shareholders when the rate of acceptance required to meet its threshold is below 50% or a MOM rate. The Ownership Test leaves room for post freezeout valuations of shares.

### Holdout

Once the Ownership Test or the Acceptance Test, whichever applicable, is met, the buyout right under the EU Takeover Directive assures the bidders 100% ownership of the target. The Directive requires a tender offer to precede granting of the buyout right.[[84]](#footnote-98) In the tender offer, all the tendering shareholders receive the same price, which prevents a strategic investor from negotiating a higher sales price with the bidder separately from other existing shareholders. This may reduce incentive for a strategic buyer to hold out.[[85]](#footnote-99) However, the high thresholds of the Ownership and Acceptance Tests “almost invit[e] [strategic investors] to buy a blocking position to prevent the success of the tender offer and then to demand a premium to complete the transaction.”[[86]](#footnote-100) Strategic investors may not have an immediate exit option if they cause freezeouts to fail. However, they can inflict pain,[[87]](#footnote-101) potentially making the bidders more accommodating. If an interloper fails to accumulate enough shares to block a deal, it has a sell-out right, which is a protection against a downside risk. Moreover, high thresholds for freezeouts may also exacerbate holdout problems due to policies of index funds and ETF not to tender.[[88]](#footnote-102)

Under the Ownership Test, the theoretical size of a maximum blocking position needed by a potential interloper is one share plus 10% or 5% of the outstanding shares, on the assumption that the applicable threshold is 90% or 95%. Under the Acceptance Test, the theoretical maximum percentage the potential interloper needs to acquire is one share plus 10% of the total outstanding shares. However, as the bidder’s pre-bid ownership increases, the pool of minority shareholders becomes smaller. These low percentages of mathematically maximum blocking positions and smaller sizes of minority shareholders may make the potential interloper’s strategic move less complex and easier to maneuver.[[89]](#footnote-103) In addition, the smaller sizes of minority shareholder ownership percentages also mean lower percentages of free riders relative to the minimum blocking positions. This is likely to enhance potential interlopers’ incentives to holdout.[[90]](#footnote-104) Note also that “stricter rules concerning freeze-outs might . . . serve as an indirect, but relatively effective, deterrent to some takeovers to the advantage of existing controlling shareholders”;[[91]](#footnote-105) they may hold out to kill the deal.

The vulnerability of a controller freezeout to holdout is further exacerbated for a different reason. Globally, selling shareholders in M&A deals generally share in synergies from the transactions.[[92]](#footnote-106) However, surpluses controllers expect to achieve from cash freezeouts differ. And such surpluses may be types of those that decrease proportionally as the controllers’ pre-bid ownership percentages increase until they achieve 100%. Surpluses to the controllers from the elimination of minority free ride are an example. However, the sizes of many types of expected surpluses that accrue are largely constant regardless of the controllers’ pre-bid ownership percentages until they come close to 100%. For example, surpluses from the elimination of the cost of maintaining the target as a public company remain largely constant until the company loses such status. Surpluses from synergies that come from operating as a single entity, such as “economies of scale in distribution, production, research and development, or administrative functions,”[[93]](#footnote-107) may also be relatively constant.

When the surpluses from a cash freezeout that accrue to the target remain constant​, the amount that proportionally accrues to each share also remains constant. However, in a consensual sale between the controller and the minority shareholders, as the pre-bid ownership percentage of the controller becomes larger, the minority shareholders’ incentive to holdout appears to become stronger,[[94]](#footnote-108) and the controller’s disincentive to yield to a holdout becomes weaker. As the orange hyperbola in Chart 2 shows, there is an inverse relationship between the size of the minority’s pre-bid ownership and the theoretical maximum of the total surpluses allocable to each minority share.[[95]](#footnote-109) However, as the blue straight line in Chart 2 shows, as the controller’s pre-bid ownership percentage increases, additional cost to the controller divided by the total number of shares it owns pre-bid necessary to increase a per share purchase price by a fixed amount proportionately decreases.[[96]](#footnote-110) This appears to shift the negotiating power from the controller to an interloper holding minority shares. Since the transaction is a bilateral monopoly, the price is not dictated by the market.[[97]](#footnote-111) It is more likely that, in a tender offer, the interloper achieves a price increase in excess of the value of the total surpluses as allocable to each share of the company.[[98]](#footnote-112) Conversely, when the controller’s pre-bid ownership percentage is not high, the same per share price increase translates into a bigger total cost for the controller. If the surpluses are constant, such increase can quickly wipe-out the expected synergies. This is likely a disincentive for the controller to be accommodating.

Guhan Subramanian once postulated: “The price paid to minority shareholders [in controller freezeouts] increases as the required level of minority support increases.”[[99]](#footnote-113) However, his empirical analysis did not support the postulate. He speculated that the “finding might suggest that controllers are less willing to provide per-share concessions to the minority . . . as the total dollar value of those concessions becomes larger.”[[100]](#footnote-114) In other words, controllers are more willing to provide per-share concessions to the minority as the total dollar value of those concessions becomes smaller. The speculation is generally consistent with the deal dynamics described above.[[101]](#footnote-115)

Overall, high freezeout thresholds make it easier to become interlopers. In addition, in the context of controller freezeouts, strategic investors’ incentive to holdout and leverage to negotiate appear to become stronger, which makes the holdout risk higher. At the least, such prospects may deter controllers from engaging in freezeouts that are otherwise efficiency-enhancing.

## Drawbacks of Equal Opportunity Rule (EOR)

EOR prevents control blocks from being sold without involving a tender offer to all the minority shareholders for all their shares at prices no less than the per share prices at which the control blocks are sold. Under EOR, “minority shareholders are entitled to participate in the transaction on the same terms as the control seller,”[[102]](#footnote-116) as opposed to the market rule (MR), under which “minority shareholders enjoy no rights in connection with a sale-of-control transaction.”[[103]](#footnote-117)

EOR prevents transfers of control blocks that take advantage of increased private benefits of control. In and of itself, MR is less equipped to deal with private benefits.[[104]](#footnote-118) However, EOR also prevents many efficiency-enhancing transactions. The economic literature attempts to provide frameworks for analyzing and comparing social welfare consequences of the two rules.[[105]](#footnote-119) Unfortunately, due in particular to the lack of “data on ‘lost acquisitions’”[[106]](#footnote-120) EOR kills, the literature paints an inconclusive picture.[[107]](#footnote-121)

However, “the MR is overall superior to the EOR if the differences among controllers in the amounts of private benefits of control are sufficiently small.”[[108]](#footnote-122) If the policing of related party transactions is effective, it appears that private benefits proportionately decrease, which generally appears to result in smaller differences in private benefits among controllers. If the size of controller private benefits can be managed, the problems of MR become smaller. If the buyers’ private benefits are close to zero, there is no need for EOR.[[109]](#footnote-123) The Shareholder Directive, as amended in 2017,[[110]](#footnote-124) attempts to manage private benefits.[[111]](#footnote-125) Overall, the reduction of private benefits is efficiency increasing. Moreover, EOR does not address controllers’ ability to exploit private benefits, except in situations involving sales of control blocks.[[112]](#footnote-126) Also note that from an efficiency standpoint, the inaccuracies of price determinations are not as fatal as generally assumed.[[113]](#footnote-127)

EOR significantly increases risk and other costs for both the controllers and potential buyers. For example, under the EOR regime, the controller is likely to assume a principal role in negotiating conditions for the required tender offer. However, the controller would end up performing such a role without being compensated by the minority shareholders. The minority shareholders have a free ride on the controller’s efforts. When controllers own only slightly more than the threshold for control, which in most EU jurisdictions is 30%,[[114]](#footnote-128) the size of the free ride is substantial.

## Add-on Freezeout Mechanism

The Takeover Directive provides the buyout right as a specific method for a freezeout. However, on its face, the Takeover Directive does not prohibit EU Member States from legislating other regimes to freezeout minority shareholders, in cash or otherwise, and whether by incumbent controllers or otherwise.[[115]](#footnote-129) Member States may individually create cash freezeout mechanisms other than the buyout right, such as a cash merger.[[116]](#footnote-130)

# *MFW*—A Long and Winding Road[[117]](#footnote-131)

## *Weinberger*—Entire Fairness

Cash freezeouts in the United States had a surprisingly long germination period, characterized by gradual and often tortuous developments in state corporate law statutes and cases.[[118]](#footnote-132) Historically, property rule was widely prevalent.[[119]](#footnote-133) However, unlike Europe,[[120]](#footnote-134) states in the United States became less hostile to cash freezeouts, resulting, for example, in statutory changes in the 1930s when liability rule gained more prominence.[[121]](#footnote-135)

In 1977, *Singer v. Magnavox Co.*[[122]](#footnote-136) and *Tanzer v. International General Industries, Inc.*[[123]](#footnote-137) required controller cash freezeouts to satisfy both business purpose and entire fairness requirements. Under the default statutory arrangement of the Delaware General Corporation Law by the time of *Singer* and *Tanzer*,[[124]](#footnote-138) controller cash freezeouts could be effected through a cash merger, which required no more than board and shareholder approval.[[125]](#footnote-139) In a controller freezeout, neither the directors nominated by the controller nor the controller was statutorily prohibited from voting. These pivotal decisions came “to grips with two vexing questions . . . : (1) When should take out mergers be allowed? [and] (2) How should the fair value of a taken-out shareholder’s interest be determined, since arm’s length bargaining is not possible?”[[126]](#footnote-140)

Several years later, however, *Weinberger*[[127]](#footnote-141) kept the entire fairness review but abandoned the business purpose requirement.[[128]](#footnote-142) The business purpose requirement, if maintained, might lead to anticipatory relief,[[129]](#footnote-143) and *Weinberger* removed the residual element of property rule.[[130]](#footnote-144) Entire fairness consists of fair dealing and fair price prongs.[[131]](#footnote-146) These two are not entirely separate.[[132]](#footnote-147) However, “in a non-fraudulent transaction . . . price may be the preponderant consideration outweighing other features of the merger.”[[133]](#footnote-148) The court also abolished the so-called Delaware block method and, for both fair price and statutory appraisal purposes, embraced “a more liberal approach [that] . . . include[s] proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court.”[[134]](#footnote-149)

Under *Weinberger*, if the freezeout price is in a range of fairness, the judiciary needs “not to pick a single number.”[[135]](#footnote-150) Otherwise, the court needs to pick a specific price.[[136]](#footnote-151) As shown below, the judicial exercise of determining specific prices under *Weinberger*’s entire fairness caused consternation among some of the parties involved, particularly, judges. They might have wondered if the exercise was largely no more than a zero-su­­­­­­­­m game and, thus, not socially redeemable.

### Fair Price

At best, valuation is an inexact science. For example, while a discounted cash flow analysis (DCF) is “the most authoritative method used among valuation experts, commentators . . . observed that the methodology is highly sensitive to the inputs, in particular the weighted average cost of capital . . . and terminal value assumptions.”[[137]](#footnote-152) Valuation under DCF is “malleable.”[[138]](#footnote-153) Thus, valuation experts tend to submit widely divergent conclusions,[[139]](#footnote-154) and expert opinions are not necessarily reliable.[[140]](#footnote-155) This puts “the court in a quite difficult position.”[[141]](#footnote-156) Valuation lies outside the core expertise of judges.[[142]](#footnote-157) They “try and look to the integrity of the procedures . . . [b]ecause they don’t want to have to find out if a price is fair.”[[143]](#footnote-158) In discussing *Cede & Co. v. Technicolor, Inc*.,[[144]](#footnote-159) for example, late Chancellor William Allen made the following candid observation:

[W]hat the Court of Chancery does often enough is to be forced into figuring out what fair prices are. And when the judges do that, they end up with a profound understanding of the unreliability of that process. You just change any of the inputs if you use a discounted cash flow model, change any of the inputs – but the inputs all of which are guesses – and you can move that final price around quite a bit. The whole thing is intensely unsatisfying intellectually.[[145]](#footnote-160)

Similarly, Chancellor William Chandler stated: “Experience in the adversarial, battle of the experts’ appraisal process under Delaware law teaches one lesson very clearly: valuation decisions are impossible to make with anything approaching complete confidence.”[[146]](#footnote-161) Judges were frustrated.

The valuation of minority shares involves an estimate of synergies from the freezeout and its allocation between the controller and minority shareholders. However, “[t]here exists no agreement among lawyers (nor among economists) giving a general answer on how to divide gains from transactions between a parent and a subsidiary company . . . .”[[147]](#footnote-162) Further, the estimate of synergies, particularly the estimate of revenue synergies, is not a straightforward task.[[148]](#footnote-163) The achievement of synergies highly depends on the buyer’s performance.[[149]](#footnote-164) In short, synergies make valuations more challenging.[[150]](#footnote-165)

Judges may prefer to hire neutral expert appraisers.[[151]](#footnote-166) However, “[s]uch an appointment has no effect whatever in limiting the Court of Chancery’s broad discretion in fixing fair value of corporate stock in an appraisal action.”[[152]](#footnote-167) This put judges in an unpleasant predicament.

### Fair Dealing

Elements of fair dealing, such as independent committee approval and MOM,[[153]](#footnote-168) help establish a fair price.[[154]](#footnote-169) However, often, it may not be essential to keep the prong as an independent requirement. If controllers underpay minority shareholders, the underpayments directly enrich the controllers.[[155]](#footnote-170) In addition, they typically have resources to pay the underpaid amounts in post-closing adjudications. Further, freezeouts are bilateral monopolies.[[156]](#footnote-171) In most instances, the minority shareholders do not have a practical option to sell their shares to alternative more welfare-maximizing buyers. This negates potential positive social welfare effects of anticipatory relief, such as a preliminary injunction. While *Weinberger*’s entire fairness has the fair dealing prong that allows the judiciary to issue anticipatory relief, in controller freezeout cases, the need for such relief is generally less.[[157]](#footnote-172)

The fair dealing prong still permits the court to award anticipatory and other equitable remedies in limited circumstances.[[158]](#footnote-173) Thus, for example, “[a] majority stockholder must ‘disclose with entire candor all material facts concerning the merger, so that the minority stockholders [will] be able to make an informed decision as to whether to accept the merger price or to seek judicial remedies such as appraisal, an injunction, or a post-merger damage action.’”[[159]](#footnote-174) And if the transaction has been completed, the judiciary may award monetary relief in excess of the fair value of the shares.[[160]](#footnote-175) This non-compensatory monetary relief discourages controllers from engaging in unfair freezeout procedures. However, it remains true that anticipatory relief in controller freezeout cases is not the norm.

## *MFW*

Before *MFW* in 2014, “there had been rumblings in the Delaware Corporate Bar, and also the Delaware Judiciary . . . .” [[161]](#footnote-176) For some time after *Weinberger*, the court was uncertain about what procedural device or mix of procedural devices could obviate entire fairness review for controller freezeouts. Before *MFW*, special committee approval and MOM each shifted the burden of proof to plaintiffs. Still, entire fairness remained the standard of review.[[162]](#footnote-177) Further, unlike one-step freezeouts, controller two-step freezeouts the second steps of which are short-form mergers might not have been subject to the same entire fairness review absent a disclosure or coercion issue.[[163]](#footnote-179) It was unclear if and under what conditions the approvals of both would convert entire fairness review to business judgment review. Notwithstanding the difficulty with valuing shares, the Delaware judiciary performed the valuation task relatively well. The “good performance” of the judiciary[[164]](#footnote-180) resulted in insufficient incentives for controllers to test the dual cleansing approach first suggested by academics[[165]](#footnote-181) and then sanctioned by *MFW*.

Before *MFW*, in evaluating the use of the dual cleansing approach, controllers that considered freezeouts needed to weigh (i) the combined risks of post-transaction price bumps and related litigation costs[[166]](#footnote-182) against (ii) the combined risks of a rejected freezeout and the judiciary that would still apply the entire fairness standard.[[167]](#footnote-183) Presumably, the latter combination of risks outweighed that of the former.[[168]](#footnote-184) MacAndrews & Forbes Holdings, Inc. had a unique situation: It owned several publicly traded controlled companies, and the controller recognized an opportunity to benefit from a court decision blessing the dual cleansing approach that might go beyond the immediate freezeout.[[169]](#footnote-185) The controller ventured to test the new mechanism.[[170]](#footnote-186)

The Delaware judiciary responded favorably. Over the decades, independent directors became prevalent.[[171]](#footnote-187) Similarly, institutionalization of the shareholder base progressed,[[172]](#footnote-188) and an IT revolution transpired.[[173]](#footnote-189) Together, these factors have reduced collective action and asymmetric information problems. These favorable changes in legislative facts[[174]](#footnote-190) encouraged the Delaware judiciary to respect deal prices in controller freezeouts when the deal process adopted the dual approval of both a special committee and the MOM from the outset. *MFW* led the way for two subsequent Delaware Supreme Court decisions, *Leal v. Meeks*[[175]](#footnote-191) and *Corwin v. KKR Financial Holdings LLC*.[[176]](#footnote-192) As in *MFW*, these cases show strong deference to independent director and informed shareholder decisions.

### Outline

*MFW*[[177]](#footnote-193) stated as follows:

[I]n controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[[178]](#footnote-194)

While “mimicking *MFW*’s form” is not enough,[[179]](#footnote-195) *MFW* offers “situational ‘road maps’ that guide directors, officers and others involved in the sales process through these scenarios in a manner that will allow them to earn the maximum deference for their decision making that [Delaware] law allows under the circumstances.”[[180]](#footnote-196) When the conditions are met, the business judgment standard will apply, and a shareholder claim that alleges violation of the entire fairness standard will be dismissed except when “no rational person could have believed that the merger was favorable to . . . minority stockholders.”[[181]](#footnote-197) Note that the MOM condition is not satisfied unless a majority[[182]](#footnote-198) of all the minority shareholders[[183]](#footnote-199) vote in favor of the transaction.

One salient procedural benefit of *MFW* in Delaware is the increased ability to seek a summary judgment. To overcome a motion for summary judgment to dismiss a complaint, the plaintiff must allege “a reasonably conceivable set of facts showing that any or all of those enumerated conditions did not exist.”[[184]](#footnote-200) Thus, *MFW* often reduces an otherwise possible settlement value.[[185]](#footnote-201)

### Reduced Judicial Costs

 Some questioned whether *MFW* would be widely utilized.[[186]](#footnote-202) However, after *MFW* “the use of MOM conditions increased by more than 40 percentage points, from an incidence rate of 37% before *MFW* to an incidence rate above 80% after the opinion.”[[187]](#footnote-203) Presumably, the increaseis attributable to *MFW*.[[188]](#footnote-204) In addition, generally, *MFW* has been used as is.

The precedent leaves open a few potential issues.[[189]](#footnote-205) However, the risk of entirely losing the benefits of business judgment rule disincentivizes typical timely and well advised typical controllers[[190]](#footnote-206) from aggressively testing *MFW*’s boundaries.[[191]](#footnote-207) If so, this is the reverse of what transpired before *MFW*.[[192]](#footnote-208) For example, *MFW* involved a one-step freezeout, but *MFW*’s reasoning presumably favors the position that both one-step and two-step freezeouts[[193]](#footnote-209) by incumbent controllers should be subject to the entire fairness review unless the dual cleansing mechanism exception applies.[[194]](#footnote-210) However, the Supreme Court has not been forced to explicitly comment on its applicability to two-step controller freezeouts.

If there are cases that test the boundaries, tweaks within the framework of *MFW* are possible.[[195]](#footnote-211) The judiciary is not necessarily abandoning its traditional role as a court of equity.[[196]](#footnote-212) For example, as to the *MFW* Requirement (i), the Delaware Supreme Court subsequently stated that “so long as the controller conditions its offer on the key protections at the germination stage of the [s]pecial [c]ommittee process . . ., the purpose of the pre-condition requirement of *MFW* is satisfied.”[[197]](#footnote-213) There is no concrete indication that the controller group was knowingly testing the boundary of the *MFW* Requirement (i).[[198]](#footnote-214)

## Other Related Party Transactions

*MFW* applies to controller related party transactions other than freezeouts.[[199]](#footnote-215) According to the Chancery Court, entire fairness review has been applied to “(1) security issuances, purchases, and repurchases; (2) asset leases and acquisitions; (3) compensation arrangements, consulting agreements, and service agreements; (4) settlements of derivative actions; and (5) recapitalizations.”[[200]](#footnote-216) Similarly, according to the Chancery Court, these non-freezeout controller related party transactions, otherwise subject to the entire fairness standard, could bypass it if they employed *MFW*’s dual cleansing mechanism.[[201]](#footnote-217) For example, the court stated, while typically the judiciary is deferential to a board’s determination of executive compensation, Tesla, Inc.’s 2018 executive compensation arrangement with Elon Musk, which provided him with “the potential to earn stock options with a value upwards of $55.8 billion,”[[202]](#footnote-218) was subject to entire fairness review unless *MFW*’s dual cleansing requirement was satisfied.[[203]](#footnote-219) Recently, the court applied *MFW* to a charter amendment to prolong the duration of a class of high-vote shares that made the controller of the company a controller.[[204]](#footnote-220)

The Delaware Supreme Court has not spoken yet whether *MFW*’s dual cleansing mechanism is necessary to convert entire fairness to business judgment in relation to non-freezeout controller related party transactions.[[205]](#footnote-221) And a former Chief Justice and a Justice of the Delaware Supreme Court argue that the dual cleansing mechanism need not be required outside of controller freezeouts and, at least, is limited to those for which no statutory requirement exists to obtain shareholder consent.[[206]](#footnote-222) Instead, they argue that one of the following should be sufficient to convert entire fairness to business judgment: (i) approval by a board comprised of a majority of independent directors, (ii) approval by a special committee of independent directors, or (iii) approval by a majority of the disinterested stockholders.[[207]](#footnote-223) However, dynamics different from those that emerge in controller freezeouts may be at play when independent director approvals are required in relation to non-freezeout related party transactions. For example, in non-freezeout related party transactions, independent directors may have incentives to curry favor with controllers since, unlike freezeouts, they are not preordained to lose their jobs. Similarly, these related party transactions are not necessarily bilateral monopolies.[[208]](#footnote-224) Unlike controller freezeouts, the demand and the supply in transactions may not be identical, even if such transactions are bilateral monopolies. These transactions are not suitable for simple binary decisions through MOM without first negotiated by independent committees. Either way, the commentators do not argue for business judgment review without any of the arm’s length measures.

## Second Steps of Two-Step Acquisitions

At least in form, the second step of a third party two-step acquisition involves a controller freezeout. And in 1977, *Singer v. Magnavox Company*[[209]](#footnote-226) applied entire fairness to the second step freezeout merger of a third party two-step acquisition. The second step merger was not effected pursuant to an agreement concluded before the second step. *Cede & Co. v. Technicolor, Inc.[[210]](#footnote-227)* involved a cash out merger by a bidder who acquired approximately 82% of a target company without obtaining a board approval that would satisfy Delaware’s antitakeover statute.[[211]](#footnote-228) The court proceeded on the basis entire fairness standard would apply to the freezeout.[[212]](#footnote-229) However, if a third party two-step acquisition is effected pursuant to an agreement that is signed *before*, and fully covers, the second steps, the freezeout merger is not a self-dealing but one between unrelated parties.[[213]](#footnote-230) Thus, entire fairness should not be applicable to the second steps. For example, the Court of Chancery in *In re Volcano Corporation Shareholder Litigation*[[214]](#footnote-231) held that target directors in a third party two-step acquisition pursued as a medium-form merger under Section 251(h) of the Delaware General Corporation Law[[215]](#footnote-232) will be entitled to business judgment review.[[216]](#footnote-233) However, the issue was the applicability of *Unocal* and *Revlon*, which the court rejected. Section 251(h) requires a merger agreement covering both the first and second steps to be in place before the first step. Therefore, whether the controller status of the bidder after the first step should invoke entire fairness standard was not even discussed as an issue in the case.[[217]](#footnote-234)

In Delaware, since most third party two-step acquisitions have been effected pursuant to merger agreements concluded before the second steps, entire fairness standard for the second step of a third party two-step acquisition has been largely dormant. However, it will reactivate if a second step in a third party two-step acquisition that is a self-dealing emerges.

There are two primary factors that contribute to merger agreements before second steps of third party two-step acquisitions. Two-step acquisitions stand on where *Corwin*[[218]](#footnote-235) and *MFW* intersect. The former involves duties of directors, and the latter, duties of controllers. At early stages of its takeover jurisprudence in the mid-1980s, Delaware developed lines of jurisprudence regulating the conduct of target directors to protect shareholders in third party acquisitions that may have coercive effects. These lines of jurisprudence relied on director fiduciary duties. For example, under *Unocal Corp. v. Mesa Petroleum Co.*,[[219]](#footnote-236) the board has the power and duty to oppose a bid it perceives as harmful to the corporate enterprise or its shareholders. Further, under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[[220]](#footnote-237) and its progenies, the board of a target company in a change of control transaction needs to “secure the best value reasonably available to the stockholders.”[[221]](#footnote-238) Thus, when the boards discharge their duties, coercive two-tier tender offers rarely succeed. If they fail, the deals typically face injunctive and other anticipatory relief. *Corwin* stated that “*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing.”[[222]](#footnote-239) At least, the *Unocal* and *Revlon* lines of jurisprudence encouraged the use of merger agreements no later than the completion of the first steps of two-step acquisitions.

No less important, the anti-takeover statute in Delaware[[223]](#footnote-240) dissuades most unsolicited bidders to accumulate 15% or more shares without first persuading target boards.[[224]](#footnote-241) Against this background, it has become rare for a third party bidder attempting a two-step acquisition to become a controller without first entering into a merger agreement that covers the second step.

## Efficiency

### Unskewed Prices

In controller freezeouts, a proverbial 800-pound gorilla[[225]](#footnote-242) looms large in the process. Controllers can elect directors. They can vote at the shareholders meeting to approve the freezeouts. They can choose the timing and have informational advantages. Minority shareholders are dispersed and suffer from collective action and asymmetric information problems. The *MFW* Requirements are an attempt to restore the balance of power between controllers and minority shareholders by “*replicat[ing] an arm’s-length merger*—the employment of an active, unconflicted negotiating agent free to turn down the transaction and a requirement that any transaction negotiated by that agent be approved by the disinterested stockholders.”[[226]](#footnote-243) Third party one-step acquisitions through cash mergers are judged under business judgment rule if the *Corwin* standard is met.[[227]](#footnote-244) This arm’s length approach is consistent with the sole owner standard.[[228]](#footnote-245)

Controller freezeouts are bilateral monopolies. Unlike third party acquisitions, bilateral negotiations are not subject to competitive markets. One may wonder if the arm’s length approach would yield fair market values. However, as stated, what is critically important is unskewed prices. In addition, when the bargaining power of the two sidess in bilateral monopolies are similar, the terms of the negotiated prices tend to be close to those in a competitive market.[[229]](#footnote-246) And, in general, with respect to controller freezeouts, the *MFW* Requirements appear to balance the bargaining power of the two sides.[[230]](#footnote-248) Thus, under the new precept , the bilateral monopoly character resulting in the absence of a competitive market should not be perceived as *MFW’*s problem.

Notwithstanding the increase in the use of MOM conditions after *MFW*, “deal premiums, CARs, bumps from the first to the final offer, and deal completion rates did not change significantly.”[[231]](#footnote-249) This may suggest that the bargaining power of the two sides under *MFW* did not necessarily systematically skew against either the controllers or the minority shareholders.[[232]](#footnote-250) The results are not surprising either. For example, since no competing buyers or sellers can emerge, it is easy to see that each side tends to engage in negotiations with both (i) financial valuations of the companies in hand, and (ii) likely judicial valuations[[233]](#footnote-251) if the transactions were subject to judicial entire fairness review, in mind.[[234]](#footnote-252) Supposedly, neither side chooses to opt in to the *MFW* regime if it knows to be worse off.

Technically, as MBR, MOM may trigger a holdout.[[235]](#footnote-253) However, as Chart 1 shows, the MOM’s actual holdout risk is much less than that of MBR. In addition, the use of *MFW* is not forced upon controllers.[[236]](#footnote-254) The controllers can assess the holdout risk[[237]](#footnote-255) before they opt to use *MFW*. For example, in low minority ownership situations, attempts to holdout may increase. However, controllers may be able to tolerate MOM when they have the ability to more easily accommodate interlopers in negotiations and neutralize the possible increased interventions by interlopers.[[238]](#footnote-257) Therefore, actual holdouts appear not to be significant.[[239]](#footnote-258) Special committees are not entirely free from duty of loyalty concerns, which may result in incentives to veto deals. For example, they may be more vulnerable to lawsuits when they let a deal proceed than when they reject the freezeout.[[240]](#footnote-259) In the context of freezeouts, however, independent directors may feel less threatened since either way they are likely to lose their jobs. This is different than other related party transactions.[[241]](#footnote-260)

### Judicial Economy

*MFW* has achieved one of its objectives: judicial economy.[[242]](#footnote-262) At least, judicial economy helps limit the number of hours judges need to spend on corporate control transactions.[[243]](#footnote-263) As Part II.A.3.a) made clear, in a price dispute between the controller and minority shareholders that involves a freezeout by an incumbent controller, the stakes of the controller and minority shareholders are direct and high. However, there is less justification to expend judicial resources to resolve a zero-sum aspect of such a dispute. *MFW* also encourages private parties to expend fewer resources on zero-sum aspects of price disputes. In such often rough-and-tumble negotiations, the parties do not have to finely theorize their arguments.

### Baseball Arbitration

In Delaware, shareholders who choose not to vote for a merger, as well as minority shareholders in short-form and medium-form mergers,[[244]](#footnote-264) are allowed to request that the Chancery Court value their shares.[[245]](#footnote-265) In a statutory appraisal case, Chancellor William Allen adopted a “final offer arbitration” or the “baseball arbitration.” However, the Delaware Supreme Court rejected the approach stating that it is “at odds with Section 262’s command that the [Chancery] Court ‘shall appraise’ fair value.”[[246]](#footnote-266)

In general, appraisal claimants may also be class members of fiduciary actions.[[247]](#footnote-267) However, under the appraisal statute,[[248]](#footnote-268) “the [C]ourt [of Chancery] must value the company ‘as an operating entity . . . *but without regard to post-merger events or other possible business combinations*.’”[[249]](#footnote-269) Thus, the appraisal statute works to deter efficiency destroying mergers, including controller freezeouts.[[250]](#footnote-270) If so, at least arguably, precise price determinations in statutory appraisal cases are socially redeeming and there can be an economic justification for the Supreme Court rejection of the baseball arbitration.

Section 262, however, does not apply to controller fiduciary duty cases. In addition, precise price determinations in valuation cases based on controller fiduciary duties are not economically important. Therefore, baseball arbitration appears a viable approach to further reduce judicial costs without a change to Delaware’s corporate statute.

## Incomplete Contract Theory and Property Rule

### Incomplete Contract Theory

In Delaware, controllers in freezeouts owe fiduciary duty to minority shareholders. Fiduciary duty is an open-ended concept[[251]](#footnote-271) and a prominent example of an incomplete contract.[[252]](#footnote-272) In general, the premise is that transaction costs will be minimized because the court will be able to craft the outcome that the parties to the incomplete contract would have agreed to if the negotiation had been costless.[[253]](#footnote-273) However, as the history of lawsuits leading up to *MFW* suggests, the justification for the entire fairness fiduciary duty approach to controller freezeouts is more marginal than presumed.[[254]](#footnote-274)

Typically, a fiduciary under duty of loyalty is required to act in the exclusive or best interest of the principal. Thus, “[t]he duty of loyalty presumptively prohibits self-dealing . . . .”[[255]](#footnote-275) However, in the context of self-dealings not subject to an outright prohibition, this formulation does not work. If the fiduciary acts under such premise, it would be required to suffer losses.[[256]](#footnote-276) Thus, “controlling shareholders are not subject to conventional standards of duty of loyalty. They are not prohibited from acting in self-interest, nor are they forbidden from making profits from their ‘fiduciary’ position.”[[257]](#footnote-277) Rather, the controllers would be subject to the entire fairness test with *Weinberger*’s fair dealing and fair price prongs.[[258]](#footnote-278) And, as Part IV.A.1. indicates, the fair price determinations substantially “increased *uncertainty* and increased *decision costs*.”[[259]](#footnote-279)

And “[t]he fiduciary principle is an alternative to direct monitoring. It replaces prior supervision with deterrence . . . .”[[260]](#footnote-280) When a large sum of money is involved, as in most control transactions, the adjudication cost may have been tolerable since the relative costs of ex post policing are smaller than otherwise.[[261]](#footnote-281) However, the absolute size of the judicial cost remains high, which can tip the balance toward direct supervision if it costs less and becomes feasible. In *MFW*, the controller volunteered to submit and chose to revert to direct supervision. It represents a partial return to the traditional trust law fiduciary principle of “subjecting [in self-dealings] the principal’s consent to such actions to procedural and substantive safeguards . . . .”[[262]](#footnote-282)

Given that the weak theoretical justification for the applicability of incomplete contract theory on the fair value prong of the entire fairness test and that the examination of procedural or governance aspects of transactions is the judiciary’s forte,[[263]](#footnote-283) *MFW* is an option for controllers engaging in self-dealings to extricate themselves from costly and unpredictable post-closing risks.[[264]](#footnote-284) In other words, *MFW* permits the controller to adopt a private ordering or “private solution,”[[265]](#footnote-285) with the consent of both an independent committee and minority shareholders, a form of direct supervision.[[266]](#footnote-286)

### Partial Return to Property Rule

Cash freezeout represents liability rule.[[267]](#footnote-287) At the option of controllers, *MFW* lets the minority shareholders and their agents, viz. special committees, have a say before relinquishing their shares. Therefore, *MFW* represents a partial return to property rule.[[268]](#footnote-288) Reduced cost and increased feasibility and effectiveness of the negotiations under *MFW* justify the partial return.[[269]](#footnote-290)

# *MFW* as Substitute for MBR[[270]](#footnote-291) and More

 This Part makes a modest[[271]](#footnote-293) proposal to transplant *MFW* to replace MBR.[[272]](#footnote-294) For the transplant to be made, first, *MFW* must be able to effectively address the issues MBR addresses, and second, judiciaries outside of the United States need to be sufficiently equipped to enforce *MFW*. Traditionally, MBR has advantages over Delaware’s ex post judicial enforcement: low cost of enforcement,[[273]](#footnote-295) certainty,[[274]](#footnote-296) and less need for a sophisticated judiciary.[[275]](#footnote-297) Note that MBR in the United Kingdom was a response to a perceived prior failure of the ex post judicial policing of control transactions.[[276]](#footnote-298) However, *MFW*’s coverage is no less broad than MBR. But the level of sophistication required of judiciaries for *MFW* is less. In addition, specialized judiciaries are globally becoming more common. Nor is *MFW* saddled with MBR’s tendency to curb efficiency enhancing control changes. No less important, *MFW* transforms jurisprudence concerning related party transactions generally.

## *MFW* v. MBR

MBR addresses, through ex ante rules, structural and substantive coercion.[[277]](#footnote-299) The second steps of two-step acquisitions are subject to *MFW* unless, before the second steps, the parties conclude merger or other types of freezeout agreements covering the second steps. *MFW* is also applicable to other controller related party transactions and generally curbs private benefits of control. First, the prospect of the applicability of *MFW* in the second steps discourages the bidders from engaging in coercive third party two-step acquisitions. Second, in combination with its application to future controller freezeouts, *MFW* as extended to cover other controller related party transactions simultaneously addresses bidder techniques to coerce shareholders to tender in partial acquisitions. *MFW* does not cover share accumulatios unless the bidders acquire control blocks. However, the same is generally true for MBR. Therefore, *MFW* substantially addresses MBR’s principal concerns of structural and substantive coercion that exploit shareholder collective action and asymmetric information problems. *MFW* does not address a frustration action of the target board. However, overall, the board neutrality rule of MBR is of lesser practical importance.[[278]](#footnote-300)

EOR effectively prevents transfers of control blocks that may exacerbate private benefits of control.[[279]](#footnote-301) However, for controllers, private benefits of control consist largely of those generated through related party transactions.[[280]](#footnote-302) Thus, the *MFW* regime, which is applicable to related party transactions generally,[[281]](#footnote-303) significantly reduces the need for EOR.[[282]](#footnote-304) Further, to curb controllers from siphoning off cash flows that should belong to the controlled companies or minority shareholders, it casts a much wider net than EOR.[[283]](#footnote-305)

Relatively speaking, MBR’s ex ante approach makes its application and enforcement predictable and less expensive. On the other hand, the rough justice approach of MBR, a consequence of its ex ante approach, has negative efficiency implications. As stated, under the guise of “shareholder protection,” MBR pressures acquisition prices to skew to exceed fair market prices in third party acquisitions. If the pressure works, it discourages efficiency enhancing control changes. Holdouts, including by existing large shareholders, are another issue. EOR restricts transfers of control blocks including those that are efficiency increasing. At least, since MBR pressures transaction prices to skews above fair market value, a market for control changes under MBR appears less optimal than that under *MFW*.

## *MFW* Transplant

### Controller Self-Dealings

#### Less Need for Anticipatory Adjudication

Delaware judicial precedents related to control transactions, particularly those rendered in the 80s, are imbued with terms that suggest urgency, such as “temporary restraining order” and “preliminary injunction.”[[284]](#footnote-306) These are anticipatory adjudications.[[285]](#footnote-307) For example, *Unocal* and *Revlon* are primarily a “tool of injunctive relief.”[[286]](#footnote-308) However, *MFW* focuses on controller self-dealings, which are more likely to be resolved after the fact without efficiency losses. Thus, they require less anticipatory adjudications.[[287]](#footnote-309) Recently, Vice Chancellor Travis Laster stated that “[a] finding that a transaction is not entirely fair . . . could lead to transaction-based relief, such as an injunction, rescission, or an equitable modification of the transaction’s terms.”[[288]](#footnote-310) Price determinations under the fair price prong are essentially such “equitable modifications of the transaction’s terms,” but injunctive or other anticipatory relief is not common in the context of *MFW*.

Anticipatory adjudications are drastic and dramatic and require a sophisticated specialized judiciary capable of moving quickly and flexibly[[289]](#footnote-311) to render decisions on the fly.[[290]](#footnote-312) Anticipatory adjudications are likely a significant reason why the Delaware mode of ex post policing control changes have been met with skepticism in other countries. However, because of its reduced reliance on anticipatory adjudications to police controller self-dealings, *MFW*, as transplanted, should not overload judiciaries, including those in civil law jurisdictions.[[291]](#footnote-313)

#### Valuations

Although still sparse, there are examples of jurisdictions, including those in the EU[[292]](#footnote-314) as well as Asia,[[293]](#footnote-315) that permit appraisals for shareholders who involuntarily relinquish their shares.[[294]](#footnote-316) While they may rely on outside experts, judiciaries in some jurisdictions have been involved in such appraisals.[[295]](#footnote-317) In addition, when controllers breach outright prohibitions or procedural requirements, but it is not appropriate to undo the related party transactions, the local judiciary is forced to engage in valuation.[[296]](#footnote-318) Further, unlike many other duty of loyalty issues, a lack of robust discovery unique to the United States[[297]](#footnote-319) is not fatal since most issues are quantitative. Similarly, lack of an opt-out class action system[[298]](#footnote-320) may not be fatal. In addition to legal developments, institutionalization of shareholders, including activists, as well as the advent of litigation funding and other techniques, may lower the barrier.[[299]](#footnote-321)

Further, the optional self-help measure available to controllers under *MFW* should reduce occasions where judiciaries are forced to value shares under *Weinberger*’s fair price prong. As in Delaware, the controllers may prefer to avoid entire fairness review, or at least significant price bumps in entire fairness review. For example, *MFW* will strongly encourage agreements in relation to second step merger or other types of freezeouts before the second steps. This will reduce the occasions for entire fairness review by local courts.[[300]](#footnote-322) Precise price determinations are not critically important. Thus, use of baseball arbitration is also a viable alternative to further reduce the burden on local judiciaries.[[301]](#footnote-323)

### *MFW*

#### More Rule-Like

Noted US commentators once characterized “the fiduciary duties of loyalty and care” in the context of corporate law as “notoriously vague and open-ended.”[[302]](#footnote-324) However, *MFW* provides judiciaries with a better “off-the-rack”[[303]](#footnote-325) cleansing device. Of course, the elements of the cleansing device are subject to interpretation.[[304]](#footnote-326) Form-only compliance with the *MFW* Requirements is not enough, and there will be borderline cases.[[305]](#footnote-327) However, the *MFW* Requirements are less substantive, more procedural and rule-like, and much less open-ended than many fiduciary doctrines.[[306]](#footnote-328) *MFW* suggests a retreat by the Delaware judiciary from its substantive role in corporate law adjudications.[[307]](#footnote-329) *MFW* is not litigated in a frenzied atmosphere. In short, it requires less judicial sophistication.[[308]](#footnote-330)

#### Common Global Trends

As in the case of Delaware,[[309]](#footnote-331) the proliferation of independent directors,[[310]](#footnote-332) greater institutionalization of the shareholder base,[[311]](#footnote-333) and an IT revolution have been trends in advanced economies. With respect to material related party transactions, in recognition of these trends, the EU Shareholder Directive perhaps adopted measures that have elements similar to *MFW*’s dual cleansing mechanism.[[312]](#footnote-334)

## Legislative Facts, Standards, and Specialized Business Courts

As stated, the judicial enforcement related to *MFW* is much less complex. Nevertheless, due to the highly specialized nature of the transactions governed under *MFW* as compared to regular civil law matters, a specialized business court would likely significantly enhance the feasibility of the transplant.[[313]](#footnote-335)

In a speech entitled “*The Inescapably Empirical Foundation of the Common Law of Corporations*,”[[314]](#footnote-336) then Vice Chancellor of the Chancery Court of Delaware and subsequent Chief Justice of the Delaware Supreme Court, Leo E. Strine, Jr. stated: **“**As the [common] law [of corporations] developed, the outcome of corporate law cases more and more turned on common law rules founded on empirical assumptions about human behavior and the fairness-enhancing features of certain board and transactional structures.”[[315]](#footnote-337) He similarly stated that “these so-called ‘legislative facts’ are incredibly important in the resolution of corporate fiduciary duty cases.”[[316]](#footnote-338) For example., in reaching the lower court decision in *MFW*, he first analyzed, in detail, compliance with the special committee and MOM cleansing mechanism in the context of the proposed freezeout.[[317]](#footnote-339) He then discussed how the Delaware common law of corporations should evaluate and respond to such compliance.[[318]](#footnote-340) These analyses involve many intuitive judgments. Unspecialized judges are less equipped to make such judgements.

Judges in the transplant jurisdictions need to assess the extent to which the “empirical assumptions” behind *MFW* are valid in the respective jurisdictions. There may be assumptions not necessarily explicitly stated. Depending on the extent to which the assumptions deviate from local realities, local judges must tweak the application of *MFW*. Thus, judges who deal with control changes need to be keenly preceptive of and form their own educated guesses or “empirical intuitions”[[319]](#footnote-341) related to the dynamics and human aspects of such transactions. Judges who are involved in decisions related to corporate control transactions need to be experienced and “street smart” in this highly specialized area. The same, although perhaps to a lesser extent, should also apply to other related party transactions. A specialized business court provides a solution.

While not necessarily identified as such, the “fiduciary relationship and fiduciary duties have long invigorated the law of civil law jurisdictions.”[[320]](#footnote-342) Historically, civil law judges have less experience with open-ended standards.[[321]](#footnote-343) However, “contrary to conventional wisdom, standards do already cover significant areas of European M&A law, as well as of national company laws.”[[322]](#footnote-344) Asian jurisdictions appear not to be that different.[[323]](#footnote-345) Thus, the fact that *MFW* is premised on fiduciary duty should not seriously impede its transplant to civil law countries. In civil law jurisdictions, stare decisis is weak. However, it is also relatively weak in Delaware.[[324]](#footnote-346) Therefore, judges in civil law jurisdictions should not be seriously handicapped in enforcing *MFW*.[[325]](#footnote-347) If judges are specialized, they should be able to handle *MFW* cases even better.

Recently, the number of business courts has globally increased,[[326]](#footnote-348) which should make the transplant easier. The larger the economy, the greater the frequency of lawsuits involving control transactions, including controller freezeouts.[[327]](#footnote-349) As Ronald Gilson and Alan Schwartz have suggested, “an EU level commercial court” may be effective.[[328]](#footnote-350)

## Co-Existence Alternative

As Part III.D. states, the Takeover Directive does not prohibit a freezeout regime outside the mandated buyout right. Thus, EU Member States may individually legislate alternative regimes to freezeout minority shareholders as add-ons. This approach may be attractive as an interim step until judiciaries gain experience. Further, since *MFW* represents a partial return to property rule in Delaware,[[329]](#footnote-351) the co-existence alternative may be more palatable in European jurisdictions.

# Conclusion

Delaware has long allowed ​cash ​freezeouts liberally. ​However, its jurisprudence on controller freezeouts was somewhat tortuous. ​Controller freezeouts are bilateral monopolies. Other consequential related party transactions involve monopolies, monopsonies, or bilateral monopolies. Therefore, despite popular assumption, precise price determinations of ​freezeouts and other ​related party transactions are not ​necessarily ​critical from a social welfare standpoint.What is critical is that the determinations do not skew. The new insight underpins *MFW*’s private solution in 2014, and *MFW* made Delaware’s jurisprudence streamlined, rational, and efficient.​ *MFW* ended the tortuous journey of the Delaware’s jurisprudence on freezeouts. In so doing, *MFW* simultaneously streamlined jurisprudence regarding other related party transactions. The new insight will guide the future course of Delaware’s jurisprudence beyond *MFW*.

Globally, the Takeover Directive pressures prices of third party acquisitions to skew higher than fair market prices and frustrates ​efficiency-enhancing control transactions. ​Holdouts are a major issue of the Directive. ​*MFW*’s ​private solution​ ​creates advantages​, and avoids disadvantages, in Delaware’s regulatory competition with the Takeover Directive. ​With its masked ability to regulate ​the second steps of third-party two-step acquisitions as well as other related party transactions, *MFW* can ​singlehandedly​ ​work as a substitute for the Takeover Directive. ​In so doing, *MFW* does not have to rely on Delaware’s heightened scrutiny of directors, such as *Unocal* and *Revlon*​, that require anticipatory adjudication.​ *MFW* is more rule-like. Thus, if transplanted, *MFW* will not overload judiciaries outside the United States, especially if there are business courts. ​These advantages over ​the Directive make *MFW*’s globalization into Europe and beyond, including Asia, eminently sensible and promising. In fact, since *MFW* will cover other related party transactions generally, its influence goes far beyond MBR. Globalization is *MFW*’s future.

1. \* Kenju Watanabe is a member of the New York State Bar and formerly a M&A partner at Skadden, Arps, Slate, Meagher & Flom LLP and Paul Hastings LLP. This article was prepared as a visiting scholar at Columbia Law School (2020–21). The author is indebted to Curtis Milhaupt, Matin Gelter, Mateo Gatti, Nobu Ishizuka, and Yusuke Nakano. Errors in this paper are solely the author’s. © Kenju Watanabe (2023). [↑](#footnote-ref-2)
2. In this paper, unless the context otherwise indicates, the term “freezeout” means a unilateral acquisition of shares of a target company whether by a third party or a controller in which the acquiror becomes 100% owner of the target. The term “controller freezeout” refers to such an acquisition by a controller. [↑](#footnote-ref-3)
3. 88 A.3d 635 (Del. 2014). [↑](#footnote-ref-4)
4. Directive 2004/25, of the European Parliament and of the Council of 21 April 2004 on Takeover Bids, 2004 O.J. (L 142) 12 (EC) [hereinafter EU Takeover Directive, Takeover Directive, or Directive]. [↑](#footnote-ref-6)
5. The Panel on Takeovers and Mergers, The Takeover Code (13th ed. 2021), https://www.thetakeoverpanel.org.uk/wp-content/uploads/2021/08/567845\_005\_The-Take-Over\_Bookmarked\_02.08.21.pdf?v=28Jun2021 [hereinafter The UK Takeover Code]. After December 31, 2020, the Directive generally ceased to apply where securities are traded in the United Kingdom. *See* European Commission, Notice to Stakeholders, Withdrawal of the United Kingdom and EU rule of Company Law, (Brussels, 8 March 2021 REV3 – replaces the notice (REV2) dated 3 July 2020), https://ec.europa.eu/info/sites/default/files/notice-to-stakeholders-brexit-company-law\_en.pdf. [↑](#footnote-ref-9)
6. *See infra* quotation accompanying note 55. [↑](#footnote-ref-10)
7. For extensive analyses of ownership structures around the globe, *see* Gur Aminadav et al., *Corporate Control Around the World,* 75 J. Fin. 1191 (2020): Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. Fin. 471 (1999). With respect to Europe, *see* Matteo Gatti, *Upsetting Deals and Reform Loop: Can Companies and M&A Law in Europe Adapt to The Market for Corporate Control?*, 25 Colum. J. Eur. L 1, 24–27 (2019) [hereinafter Gatti, *Upsetting Deals and Reform Loop*] (“C[oncentrated] O[wnership] tends to be the norm in Europe . . . .”). The UK has seen “an influx of overseas-based business with dominant shareholders.” Brian R. Cheffins, *The Undermining of UK Corporate Governance(?)*, Oxford J. Leg. Stud. 503, 505 (2013). *See also* Alessio M. Pacces, *The Procedural and Substantive Review of Related Party Transactions*, *in* Law and Finance of Related Party Transactions 181, 207–09 (Luca Enriques & Tobias H. Tröger eds., 2019) [hereinafter Pacces, *Procedural and Substantive Review of Related Party Transactions*]. In the United States, companies newly listed in recent years often have dual classes of stock. However, this paper focuses on single class share companies. [↑](#footnote-ref-11)
8. *See infra* note 218. [↑](#footnote-ref-12)
9. *See infra* note 219. [↑](#footnote-ref-13)
10. *See infra* note 222. [↑](#footnote-ref-14)
11. *See* Guhan Subramanian, *Freezeouts in Delaware and Around The World*, 24 U. Penn. J. Bus. L. 803, 816–17 (2022) [hereinafter Subramanian, *Freezeouts in Delaware*] (suggesting that controllers in China, Japan, Hong Kong, Cayman Islands, and Bermuda, “among other places, engage in . . . abusive freezeouts.”). At the beginning of this millennium, Japan instituted a statutory “appraisal” system that can be used by squeezed-out shareholders. In 2014, Alan Koh touted it as a success and suggested that policy makers and academics in many jurisdictions around the world, including the United States, China, and Korea, are “learn[ing] from Japan’s example.” Alan K. Koh, *Appraising Japan’s Appraisal Remedy*, 62 Am. J. Comp. L. 417, 459 (2014). Depending on its initial goal and the circumstances under which it was adopted, the appraisal system could have been characterized as a success. In part to correct its perceived deficiencies, however, The Ministry of Economy, Trade and Industry of Japan issued non-binding guidelines in 2019. *See* Ministry of Economy, Trade and Industry of Japan, Kōseina M&A no arikata ni kansuru shishin – kigyōkachi no kojō to kabunushirieki no kakuho ni mukete [Fair M&A Guidelines – Enhancing Corporate Value and Securing Shareholders’ Interests –] (June 28, 2019), https://www.meti.go.jp/shingikai/economy/fair\_ma/pdf/20190628\_shishin.pdf. Its English translation is available at https://www.meti.go.jp/policy/economy/keiei\_innovation/keizaihousei/pdf/fairmaguidelines\_english.pdf. Japan’s appraisal system appears to be playing a long and winding catchup with *MFW*. [↑](#footnote-ref-16)
12. *See infra* Part III.C. [↑](#footnote-ref-17)
13. Related party transactions present thorny issues. *See* The Law and Finance of Related Party Transactions 105, 126] (Luca Enriques & Tobias H. Tröger eds., 2019). [↑](#footnote-ref-18)
14. For the types of synergies from M&A deals, *see*, *e.g.*, Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 Yale J. Regul. 119, 125–29 (1992) (categorizing synergies into operating synergies and financial synergies). For the rationale for controller freezeouts, s*ee*, *e.g.*, Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 560 Yale L.J. 560, 611–13 (2016) [hereinafter Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*]; John C. Coates IV, *“Fair Value” as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. Pa. L. Rev. 1251, 1327–29 (1999) (giving several rationales for freezeouts); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 706 (1982) [hereinafter Easterbrook & Fischel, *Corporate Control Transactions*] (stating that synergies from freezeouts by incumbent controllers may include “economies of scale, centralized management and corporate planning, or economies of information”). For possible collective action and asymmetric problems of minority shareholders that might incentivize controllers to freezeout, *see* Kenju Watanabe, *Control Transaction Governance: Collective Action and Asymmetric Information Problems and Ex post Policing,* 36 Nw. J. Int'l L. & Bus.45, 55–56 (2016). [↑](#footnote-ref-19)
15. *See*, *e.g.*, Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. Econ. 957, 966–67 (1994) [hereinafter Bebchuk, *Sales of Corporate Control*]. [↑](#footnote-ref-20)
16. For example, private equity buyers’ debt financing may become unavailable or costlier. A business may be sold for cash in the form of an asset sale. However, generally a control transaction in the form of an asset sale is likely to face more legal, regulatory, tax, and practical hurdles. [↑](#footnote-ref-21)
17. *See* Mara Faccio & Ronald W. Masulis, *The Choice of Payment Method in European Mergers and Acquisitions*, 60 J. Fin. 1345, 1346 (2005). [↑](#footnote-ref-22)
18. For the regulation of stock-for-stock mergers in the European Union, *see*, *e.g.*, Marco Ventoruzzo, *Freeze-Outs: Transcontinental Analysis and Reform Proposals*, 50 Va. J. Int’l L. 841, 879–83 (2010). [↑](#footnote-ref-23)
19. *See infra* Part IV.A. [↑](#footnote-ref-24)
20. Ventoruzzo, *supra* note 17, at 914. Stock mergers are more liberally permitted. *See id.* at 877–88. As in the case of cash freezeouts, if one party of such a merger controls the other, provided a majority rule prevails, it would be a related party transaction. Unlike cash freezeouts, however, the parties can only focus on relative values of the parties and appropriate allocation percentages of synergies from the merger and need not convert them into cash equivalents. [↑](#footnote-ref-25)
21. In non-cash freezeouts, a similar issue exists. However, in cash freezeouts, the issue takes a sharper form. For example, in a stock-for-stock merger, the value of the shares received by the shareholders of a target company increases as synergies from the merger materialize. [↑](#footnote-ref-26)
22. This does not mean pricing and other issues do not exist in these transactions. At least, the Directive is silent on these issues. [↑](#footnote-ref-27)
23. *See* Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 964 (“Under all of the prevailing and proposed rules for sale-of-control transactions, a transfer cannot be forced on [an existing controller] . . . .”). *See also*, Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, *supra* note 13, at 601–03 (giving a theoretical justification for property rule concerning controllers’ ownership positions). With respect to Delaware, *see*, *e.g.*, Thorpe v. Cerbco, Inc., 676 A.2d 436 (Del. 1996); Smart Loc. Unions and Counsels Pension Fund v. Bridgebio Pharma, Inc., C.A. No. 2021-1030-PAF (Ct. Ch. Dec. 29, 2022) (stating that *MFW* applies even when higher premium offers by a third party exist); *In re* Pure Res., Inc., S’holders Litig, 808 A.2d at 441–42 (2002). In the case of *MFW*, the controller expressed in its offer letter that it “would intend to remain as a long-term stockholder.” *In re* MFW S'holders Litig., 67 A.3d 496. 506 (Del. Ch. 2013), *affirmed sub nom.*, Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014). And “the vast majority of controlling shareholders indicate in their initial approach to the target that they are not interested in selling to a competing bidder.” Guhan Subramanian, *Fixing Freezeouts*, 115 Yale L.J. 2, 54 (2005) [hereinafter Subramanian, *Fixing Freezeouts*]. However, they may opt to sell their positions together with minority shareholders. For an example, *see* *id.* at 42 (describing a controller freezeout in which the controller at one point “took an unusual position of offering to either match or sell to any bona fide third-party bidder that the [controlled company] might come up with.”) (footnote omitted). *See also* *In re* Books-A-Million, Consol. C.A. No. 11343-VCL, 2016 WL 5874974, at \*5–6 (Del. Ch. Oct. 10, 2016) (same), *aff’d*, 164 A.3d 56 (Del. 2017) (notwithstanding a higher offer from a third party to buy the entire company, the controller refuses to sell its position and the special committee decided to consent to the freezeout.). [↑](#footnote-ref-28)
24. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Penn. L. Rev. 785, 804 (2003) [hereinafter Gilson & Gordon, *Controlling Controlling Shareholders*] (characterizing a controller freezeout as a transaction in a bilateral monopoly); John C. Coffee, Jr., *Transfers of Control and the Quest for Efficiency: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 Del. J. Corp. L. 359, 389 (1996) (stating that a negotiation by an independent committee with a controller to obtain the best price “creates an apparent standoff the monopolistic buyer confronts the monopsonistic seller, and the outcome of these negotiations becomes *uncertain even in theory*.”) (emphasis added). [↑](#footnote-ref-29)
25. This does not necessarily mean that these third party transactions are devoid of fiduciary duty and other issues. [↑](#footnote-ref-30)
26. *See* text accompanying *supra* 21. [↑](#footnote-ref-31)
27. In other words, such prices do not systematically skew to deviate from fair market values. [↑](#footnote-ref-32)
28. *See* DFC Glob. Corp. v. Muirfield Value Partners., L.P., 172 A.3d 346, 369 (Del. 2017) (“[A]n economist would find that the fair market value of a company is what it would sell for when there is a willing buyer and willing seller without any compulsion to buy.”). [↑](#footnote-ref-33)
29. *See*, *e.g.*, Charles R. Korsmo & Minor Myers, *The Single-Owner Standard and the Public-Private Choice*, 47 J. Corp. L. 675, 678 n.7 (2022) (stating that the single or sole-owner standard “encapsulates the courts’ practice of valuing the firm as if it had a single owner.”). [↑](#footnote-ref-34)
30. *See*, *e.g.*, Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harv. L. Rev. 1693, 1701 (1985) [hereinafter Bebchuk, *Toward Undistorted Choice*] (“[W]e should enable a target’s dispersed shareholders to act as a sole owner would be likely to act.”); Lucian A. Bebchuk et al., *The Agency Problems of Institutional Investors*, 31 J. Econ. Perspectives 89, 95–96 (2017) (stating that “[T]he decisions [by a sole owner of a company] would be ones that maximize the value of the owners’ wealth.”). Recently, Charles Korsmo and Minor Myers attempted to give a flesh defense of the standard. *See supra* note 28. [↑](#footnote-ref-35)
31. On the assumption that the controller has not manipulated such value to go downward. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 32, 34. [↑](#footnote-ref-36)
32. *See supra* text accompanying note 22. [↑](#footnote-ref-37)
33. For efficiency losses from freezeout prices less than intrinsic values, *see* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 35. For possible efficiency losses from an attempt to lower stock market prices by reducing intrinsic values when a valuation method refers to historical stock market prices, *see* *id* at 34. *See also* Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 984 (suggesting that if a court appraisal in the context of a freezeout is below “the shares’ no-transaction per share value,” it invites an inefficient freezeout). [↑](#footnote-ref-38)
34. *See* Gilson & Gordon, *Controlling Controlling Shareholders*, *supra* note 23, at 804 n.73 (“There is no obvious reason to believe that giving all the gain to one side or another [relating to synergies] in a bilateral monopoly is necessary in order to achieve an efficient level of transactions. From the perspective of either participant, any value above the reservation price is a rent.”). [↑](#footnote-ref-39)
35. For the term “anticipatory adjudication,” *see infra* Part. V.B.1.a). [↑](#footnote-ref-40)
36. In Delaware, *Unocal* and *Revlon*, which are implicated at earlier stages of third party acquisitions and regulate director conduct, have direct efficiency implications. *See infra* text accompanying notes 218 and 219. [↑](#footnote-ref-41)
37. This may not happen if transaction costs are zero. However, in a real world, we cannot make the assumption. *See* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 Calif. L. Rev. 393, 405 (2003) [hereinafter Goshen, *Controlling Corporate Self-Dealing*] (“[M]arkets are not perfect, and the efficiency level of a capital market is a function of the economic and legal conditions in a given jurisdiction.”). [↑](#footnote-ref-42)
38. Tiered offers, or in the words of Guhan Subramanian, “dual consideration offers.” Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 Yale L.J. 621, 632 (2003). [↑](#footnote-ref-43)
39. The coercive effect disappears if the minority shareholders are paid for the call options to buy their shares at less than fair market value that they in effect write to the controllers. For an attempt to calculate the value of the controller’s option to freezeout, *see* Goshen & Wiener, *infra* note 48. In the context of third party partial acquisitions, target boards may extract such option values in the form of additional acquisition premiums. *See* Adam C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 Berkeley Bus. L.J. 83, 99 (2004). It has been suggested that to assure such negotiations, defense measures such as poison pills would be necessary. *See* *id*. at 99 (suggesting a board “armed with the bargaining leverage of the poison pill”). However, the judicial policing of the use of a poison pill is complex and requires anticipatory adjudication. Thus, it does not seem likely to achieve Pritchard’s goal of a “streamlined regime [that] is . . . positive for shareholders.” *Id*. at 84. In addition, the third party bidders would not be assured that judiciaries would recognize the payments of the additional premiums in subsequent lawsuits. For a possible dampening impact of the mandatory nature of fiduciary duties, *see* Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 Int’l Rev. of Law & Econ. 119, 121 (2015) [hereinafter Gilson & Schwartz, *Credible Commitment*] (“The contractual solution has not been tried seriously because it is difficult to contract over or around fiduciary duties.”). [↑](#footnote-ref-44)
40. *See* Korsmo & Myers, *supra* note 28, at 708–10. [↑](#footnote-ref-45)
41. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 38. *See also* Korsmo & Myers, *supra* note 28, at 705–12 (arguing that the market standard, which competes with the sole-owner standard, discourages private firms from going public). *See also supra* Part.II.A.3.c). [↑](#footnote-ref-46)
42. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 38. [↑](#footnote-ref-47)
43. Going private transactions may anticipate future exits through IPOs. If so, public market prices dampened by freezeout prices skewed against minority shares do not necessarily benefit those who take companies private. [↑](#footnote-ref-48)
44. Subramanian, *Fixing Freezeouts*, *supra* note 22, at 43 (footnote omitted). [↑](#footnote-ref-49)
45. There is “[a] widespread readiness to resist unfair transactions or to punish unfair actors even at some cost.” Daniel Kahneman et al., *Fairness and Assumptions of Economics*, 59 J. Econ. S285, S290 (1986). It is true that “the behavioral implications of fairness are greatest when the material consequences of an economic interaction are not too large.” Matthew Rabin, *Incorporating Fairness into Game Theory and Economic*, 83 Am. Econ. Rev. 1281, 1282 (Dec. 1993). But “the economic implications of fairness” are not “minor.” *Id.* at 82–83. If controller freezeout prices are perceived to be generally unfair and such perception arises when freezeout prices are below fair market value, then the adverse social welfare effect discussed in Part II.A.3.b) appears to worsen. Of course, institutional shareholders may react much differently from individual shareholders. For example, they may use program trading. However, the presence of institutional shareholders does not seem to neutralize the human element. [↑](#footnote-ref-50)
46. ­­*See supra* Part II.A.2. [↑](#footnote-ref-51)
47. *See supra* Part II.A.3.b). [↑](#footnote-ref-52)
48. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 36 (suggesting that prices reached in arm’s length negotiations under the shadow of entire fairness review do not trigger the lemons effect). [↑](#footnote-ref-53)
49. *See* Lucian Arye Bebchuk & Marcel Kahan, *Adverse Selection and Gains to Controllers in* Corporate Freezeouts, in Concentrated Corporate Ownership 247 (Randall K. Morck ed., 2000); Zohar Goshen & Zvi Wiener, *The Value of Freezeout Option* (Colum. L. & Econ. Working Paper No. 260, Nov. 29, 2004), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=217511. [↑](#footnote-ref-54)
50. Subramanian, *Fixing Freezeouts*, *supra* note 22, at 36–37. [↑](#footnote-ref-55)
51. For this and other examples, *see* *id.* at 37. [↑](#footnote-ref-56)
52. However, no illegal monopoly or monopsony is assumed to exist. [↑](#footnote-ref-57)
53. As an exception, if the sale to the controller prevents the controlled from satisfying demands from a third party buyer who will pay more than the controller, an efficiency loss might result. [↑](#footnote-ref-58)
54. As an exception, if the purchase from the controller prevents the controlled from buying from a third party at a price more favorable to the controlled, an efficiency loss might also arise. [↑](#footnote-ref-59)
55. The underpayment and overcharge are judged relative to the prices that prevail without the controller’s governance over the controlled but with the market power of the controller. [↑](#footnote-ref-60)
56. John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? − The Peculiar Divergences of U.S. and U.K. Takeover Regulation*, 95 GEO. L.J. 1727, 1787–88 (2007). *See also* Edmund-Philipp Schuster, *The Mandatory Bid Rule: Efficient, After All?*, 76 Mod. L. Rev. 529, 532 (2013) (“[M]ost Member States had already implemented the MBR in their domestic legal systems.”). [↑](#footnote-ref-61)
57. *See supra* note 4. [↑](#footnote-ref-62)
58. Umakanth Varottil and Wai Yee Wan state that in Asia, China, Japan, Korea, and India, in addition to Hong Kong and Singapore, have adopted MBR or its variants. *See* Umakanth Varottil & Wai Wee Wan, *The Divergent Designs of Mandatory Takeovers in Asia*, 55 Vand. J. Transnat’l L. 89, 92 (2022). However, the rules of the four Asian jurisdictions vary dramatically from each other and perform functions markedly different from those of MBR in the UK or in Europe. For a comparison of the intensity of the rules in the Asian countries relative to that of the United Kingdom, *see id*. 138 tbl. 1. As for Japan, *see* Watanabe, *supra* note 13, at 113 (for example, “the JPN MBR does not address the coordination/coerciveness issues that the U.K. MBR addresses.”). [↑](#footnote-ref-65)
59. For the term “substantive coercion,” *see* Ronald J. Gilson & Reinier Kraakman, *Delaware’s Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review*, 44 Bus. Law. 247, 248 (1989) (stating that “‘substantive coercion[]’ is the claim that shareholders will voluntarily tender to an underpriced offer”). *See also* Paul Davies, Sarah Worthington & Cristopher Hare Gower’s Principles of Modern Company Law ¶ 28–036 (11th ed. 2021) (stating that the UK Takeover Code “does contain a wide range of rules designed to preserve the integrity of the target shareholders’ decision making.”). [↑](#footnote-ref-66)
60. The author does not necessarily include features that are made optional. [↑](#footnote-ref-68)
61. For a highly critical view of the Directive, *see* Jesper Lau Hansen, *The Mandatory Bid Rule: Unnecessary, Unjustifiable and Inefficient* 17–18 (Nordic & European Company Law Working Paper, Paper No. 18–01, Univ. of Copenhagen Faculty of Law Research Paper, Paper No. 2018–54, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3112100. [↑](#footnote-ref-69)
62. EU Takeover Directive, *supra* note 3, art. 5. [↑](#footnote-ref-70)
63. Around 30% in most EU Member States. *See* Schuster, *supra* note 55, at 532. For purposes of the “control,” the ownership of “parties acting in concert” is counted. [↑](#footnote-ref-71)
64. Under the Takeover Directive, the period is fixed by a Member State within six to 12 months. *Id*. [↑](#footnote-ref-72)
65. *Id*. art. 5(2). [↑](#footnote-ref-73)
66. EU Takeover Directive, *supra* note 3, arts. 15(2), (4). [↑](#footnote-ref-74)
67. *See*, *e.g.*, CEPS, Directorate-General for the Internal Market and Services (European Commission), The Takeover Bids Directive Assessment Report 221 tbl., 222 (2012) [hereinafter The Takeover Bids Directive Assessment Report], https://op.europa.eu/en/publication-detail/-/publication/67501b75-7583-4b0d-a551-33051d8e27c1.When it was a Member State, the United Kingdom opted to use the Acceptance Test. *See* Companies Act, 2006, c. 3, § 979 (U.K.). [↑](#footnote-ref-75)
68. EU Takeover Directive, *supra* note 3, art. 16(2). [↑](#footnote-ref-76)
69. *See* *id*. [↑](#footnote-ref-77)
70. *Id.* at 220. For a more expanded analysis, *see id* at 287–99. [↑](#footnote-ref-78)
71. EU Takeover Directive, *supra* note 3, art. 9(2). [↑](#footnote-ref-79)
72. *Id.* art. 12(1). The breakthrough rule was subject to the same fate. *See id.* [↑](#footnote-ref-80)
73. *See* The Takeover Bids Directive Assessment Report, *supra* note 65, at 190; Luca Enriques et al., *The Case for an Unbiased Takeover Law (with an Application to the European Union* 36–37 (ECGI Working Paper Series in Law, Working Paper No. 212/2013, May 2013), http://ssrn.com/abstract=2258926. [↑](#footnote-ref-81)
74. *See* The Takeover Bids Directive Assessment Report, *supra* note 65, at 52 (indicating that the opt-out rule was part of the “Portuguese compromise”); Enriques et al., *supra* note 72, at 37 (suggesting that the optionality of the board neutrality rule was a political compromise). [↑](#footnote-ref-82)
75. *See* Luca Enriques, *EU Takeover Law: The Case for a Neutral Approach*, 2011 Eur. Bus. L. Rev. 623, 628 (2011) (giving the Second Company Law Directive as a possible reason); Gatti, *Upsetting Deals and Reform Loop, supra* note 6, at 57–58 (describing issues that may make poison pills infeasible). [↑](#footnote-ref-83)
76. *See* *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union*, at 64 (Jan. 10, 2002) (“The minimum of 90% seems appropriate in view of the necessity to restrict any interference with the right of property to a reasonable degree.”). [↑](#footnote-ref-84)
77. Mike Burkart & Fausto Panunzi, *Mandatory Bids, Squeeze-out, Sell-out and the Dynamics of the Tender Offer Process* *in* Reforming Company and Takeover Law in Europe 737, ­­­­756 (Guido Ferrarini et al. eds., 2004). *See also* Andrew Johnson, *Takeover Regulation: Historical and Theoretical Perspectives on the City Code*, 66 Cambridge L.J. 422, 441–42 (2007) (indicating that when introduced, the UK Takeover Code aimed to reduce takeover defenses and promote control changes.). [↑](#footnote-ref-85)
78. In fact, one of the commentators appears to have acknowledged in a subsequent article. [↑](#footnote-ref-86)
79. Ventoruzzo, *supra* note 17, at 912. Ventoruzzo, however, also speculates that “in Europe, controlling shareholders and directors might be less eager to buy out minority shareholders because the likelihood of litigation . . . is low while the possibility of exploiting the private benefits of control are more significant than in the United States.” *Id.* at 910. [↑](#footnote-ref-87)
80. *Id.* at 912. *See also* Christian A. Krebs, *Freeze-Out Transactions in Germany and the U.S.: A Comparative Analysis*, 13 German L.J. 901, 973 (2012) (indicating that Germany’s 95% threshold for freezeouts reflects “the European tradition of seeing share ownership as essentially equivalent to real property.”). [↑](#footnote-ref-88)
81. Guhan Subramanian, *Post-Siliconix Freezeout: Theory and Evidence*, 36 J. Legal Stud. 1, 7–8 (2007) [hereinafter Subramanian, *Post-Siliconix Freezeout*]. *See also* Ventoruzzo, *supra* note 17, at 913 (“It is intuitive that the higher this second threshold is set, the more the price and conditions of the front­-end bid must attract minority shareholders.”). Of course, institutionalization of shareholders may make the investor preferences more uniform and may make the upward sloping less steep. *See* Burkart & Panunzi, *supra* note 76, at 756 (stating that a threshold for cash freezeouts “becomes relevant only in a framework in which the supply of tendered shares is upward-sloping because target shareholders have for instance different liquidity needs or tax rates.”) (footnote omitted). For the role of arbitrageurs in shaping takeover prices, *see* Armando Gome*s, Takeovers, Freezeouts, and Risk Arbitrage* (March 2001), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=277109. [↑](#footnote-ref-89)
82. EU Takeover Directive, *supra* note 3, art. 15(5). A deal price in a mandatory tender offer is accorded with the presumption. *Id*. art. 15(5). As to how this presumption works in the United Kingdom, *see* Jennifer Payne, Minority Shareholder Protection in Takeovers: A UK Perspective, 8 Eur. Co. & Fin. L. Rev. 145, 152–58 (2011). Delaware’s anti-takeover statute requires 85% ownership for a hostile bidder to be exempt from the three-year ban on a freezeout. Del. Code Ann. tit. 8, § 253(a)(2) (2019). The threshold makes it expensive to engage in hostile takeovers. *See*, *e.g.*, Guhan Subramanian et al., *Is Delaware’s Antitakeover Statute Unconstitutional? Evidence from 1988–2008*, 65 Bus. Law. 685, 715–22 (2010). It may be reasonable to expect the thresholds under the Takeover Directive to have similar effects. Professor Martin Gelter pointed out this analogy to the author. [↑](#footnote-ref-90)
83. Ventoruzzo, *supra* note 17, at 892. According to Ventoruzzo, it is not clear if this presumption is rebuttable. *See id.* at 892–93; Krebs, *supra* note 79, at 970–71. [↑](#footnote-ref-94)
84. *See infra* Part III.A.2. [↑](#footnote-ref-98)
85. *See* Ventoruzzo, *supra* note 17, at 893 (“Setting the freeze-out price at the same level as that preceding a mandatory or voluntary tender offer . . . serves two conflicting goals. The first is to protect minorities from the pressure to tender in a front-loaded two-step acquisition. *The second goal, however, is to avoid strategic behavior by minority shareholders*.”) (emphasis added). If 90% or more of the subject shares are tendered, then the fair price presumption is accorded to the tender offer price. This may further disincentivize strategic buyers. [↑](#footnote-ref-99)
86. Edward B. Rock, *Majority of the Minority Approval in a World of Active Shareholders, in* The Law and Finance of Related Party Transactions 105, 126] (Luca Enriques & Tobias H. Tröger eds., 2019) [hereinafter Rock, *Majority of the Minority Approval*]. This can be contrasted with Rock’s observation: among the transactions in which MOM provisions were used, there were no observable instances where “an active shareholder acquired a significant block and then sought to use the threat of blocking MOM approval to negotiate a higher price.” *Id.* at 117. [↑](#footnote-ref-100)
87. *Id*. at 128. [↑](#footnote-ref-101)
88. *See* Ludwig Dobmeier et al., *Index Fund and ETF Ownership and German Market for Corporate Control* 39, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3443622 (“There is a negative relationship between index fund and ETF ownership and takeover success in Germany.”). [↑](#footnote-ref-102)
89. *See* Goshen, *Controlling Corporate Self-Dealing*, *supra* note 36, at 402 (“[W]hen the minority is composed of a small group, the threat of strategic voting increases.”). [↑](#footnote-ref-103)
90. Smaller percentages of free riders limit the absolute sizes of the controllers’ concessions. *See infra* text accompanying nn.98–100. [↑](#footnote-ref-104)
91. Ventoruzzo, *supra* note 17­­, at 911. For example, a proposed buyout of Swedish Orphan Biovitrum AB was blocked by its 8% shareholder, AstraZeneca Plc., which refused to tender its shares. *See* Alex Keown, *AstraZeneca Objections Torpedo $8 Billion SOBI Acquisition, BioSpace* Dec. 3, 2021), https://www.pharmalive.com/astrazeneca-objections-torpedo-8-billion-sobi-acquisition/. [↑](#footnote-ref-105)
92. *See* Bos. Consulting Grp., How Successful M&A Deals Split the Synergies — Divide and Conquer (March 27, 2013), https://www.bcg.com/publications/2013/mergers-acquisitions-postmerger-integration-divide-conquer-deals-split-synergies. On average, sellers reap “31 percent of the average capitalized value of expected synergies.” *Id*. at 3. The buyers’ larger average share may reflect the fact that the sellers do not take the risk of realizing the synergies post acquisition. *See id*. *See also* DFC Glob. Corp. v. Muirfield Value Partners., L.P., 172 A.3d 346, 371 (Del. 2017) (“[I]t is widely assumed that the sales price in many M&A deals includes a portion of the buyer’s expected synergy gains, which is part of the premium the winning buyer must pay to prevail and obtain control.”). However, in controller freezeouts, synergies are often realized without efforts by the controllers. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 43 n.175. For a rough sketch of the allocation of synergies in parent-subsidiary mergers in the United States, Germany, and the United Kingdom, *see* Schuster, *supra* note at 55, at 558–60. [↑](#footnote-ref-106)
93. Gomes, *supra* note 80, at 32. [↑](#footnote-ref-107)
94. *See* Subramanian, *Freezeouts in Delaware*, *see supra* note 10, at 809–10 (stating in the context of MOM that a holdout “risk increases for larger controllers, because a blocking position becomes correspondingly smaller.”). [↑](#footnote-ref-108)
95. $f\left(x\right)=\frac{100}{100-x}, where 0 \leq x \leq 99.$ Chart 2 assumes the total surpluses of €100 and the total outstanding shares of 100. It is also assumed that the surpluses are not subject to corporate tax. [↑](#footnote-ref-109)
96. In contrast, the bidder’s deal execution cost is unlikely to show a linear decrease. [↑](#footnote-ref-110)
97. *See supra* Part II.A.2. [↑](#footnote-ref-111)
98. All the remaining minority shareholders can free ride on the interloper’s efforts to increase the tender offer price. [↑](#footnote-ref-112)
99. Subramanian, *Post-Siliconix Freezeout*, *supra* note 80, at 8. For an analysis of efficiency implications of Delaware’s business judgement approach related to two-step controller freezeouts prior to *MFW, see id.* at 34–38. [↑](#footnote-ref-113)
100. Subramanian, *Post-Siliconix Freezeout*, *supra* note 80, at 18. [↑](#footnote-ref-114)
101. With respect to post-*MFW* freezeouts in Delaware, Guhan Subramanian reports (i) “no correlation between the incidence of MOM Conditions and the percentage of shares that are held by the minority” and (ii) “a strong inverse correlation between the size of the blocking stake and the incidence of MOM Conditions.” Subramanian, *Freezeouts in Delaware*, *see supra* note 10, at 812. However, a correlation between “the percentage of shares that are held by the minority” and “the size of the blocking stake” appears plausible. If so, one would wonder why, notwithstanding the statistical fact in (ii), the statistical fact in (i) holds true. One may suspect that, as discussed in this and the immediately preceding paragraphs, as minority ownership percentages become smaller, it becomes easier for controllers to financially accommodate interlopers if they emerge to take advantage of MOM conditions and to neutralize them. [↑](#footnote-ref-115)
102. Bebchuk, *Sales of Corporate Control*, *see* *supra* note 14, at 960. The UK Takeover Code and the EU Takeover Directive take this approach. *See supra* Part I. There is a variation of EOR in which the buyer is permitted to make a partial offer provided that tendered shares are prorated if such shares exceed the maximum number of shares the buyer is set to buy in the offer. *Id.* at 968. Japan takes a further variation of this proration approach. *See* Watanabe, *supra* note 13, at 112–13. [↑](#footnote-ref-116)
103. Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 959. The United States adopts the MR. *Id.* Schuster describes three strands of cases that may be characterized as exceptions to the MR. *See* Schuster, *supra* note 55, at 536–38. However, he admits that they “(at best) play[] a minor role in US sale-of-control transactions.” *Id.* at 538. Most importantly, his analysis does not consider measures to curb post-control change extractions of private benefits. [↑](#footnote-ref-117)
104. Because it does not involve a conflicted controlling stockholder transaction in general, a sale of control alone does not trigger *MFW*. *See* *In re* Martha Stewart Living Omnimedia, Inc. S’holder Litig., Consol. C.A. No. 11202-VCS, 2017 WL 3568089, \*11 n.45 (Del. Ch. Aug. 18, 2016). [↑](#footnote-ref-118)
105. *See* Bebchuk, *Sales of Corporate Control*, *supra* note 14; Marcel Kahan, *Sales of Corporate Control*, 9 J. L. Econ. & Org. 368 (1993); Einer R. Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. Chi. L. Rev. 1465 (1992); Burkart & Panunzi, *supra* note 76, at 758–62 (analyzing efficiency implications of MR and EOR in the context of the then draft Takeover Directive). [↑](#footnote-ref-119)
106. Gatti, *Upsetting Deals and Reform Loop,* *supra* note 6, at 50. [↑](#footnote-ref-120)
107. *See*, *e.g.*, Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 961 (“[C]ompletely resolving the question of which rule is superior still requires empirical evidence concerning the distribution of controller’s characteristics.”); Burkart & Panunzi, *supra* note 76, at 761 (“[T]he likely benefits and costs of the mandatory bid rule are sensitive to the environment.”). [↑](#footnote-ref-121)
108. *See* Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 960. *See also* Burkart & Panunzi, *supra* note 76, at 25 (text accompanying note 45). [↑](#footnote-ref-122)
109. *See* Bebchuk, *Sales of Corporate Control*, *supra* note 14, at 968. *See also* Goshen & Hamdani, *Majority Control and Minority Protection* *in* The Oxford Handbook of Corporate Law and Governance Ch. 17, § 3.3 (Jeffrey N. Gordon & Wolf-George Ringe eds., 2018) (“A key premise underlying the objection to controllers’ right to sell for a premium is that a control premium serves as a proxy for private benefits and thus for minority protection.”). [↑](#footnote-ref-123)
110. Directive 2017/828, of The European Parliament and of the Council 17 May 2017 Amending Directive 2007/36/EC, of the European Parliament of the Council of 11 July 2007 as regards the Encouragement of Long-term Shareholder Engagement [hereinafter EU Shareholder Directive II], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32017L0828. Globally, the magnitude of private benefits of control differs greatly from jurisdiction to jurisdiction. *See* Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. Fin. 537 (2004). For a UK example, *see*, *e.g.*, Pacces, *Procedural and Substantive Review of Related Party Transactions*, *supra* note 6, at 207–09. This is in response to “an influx of overseas-based business with dominant shareholders.” Brian R. Cheffins, *The Undermining of UK Corporate Governance (?)*, 33 Oxford J. Leg. Stud. 503, 505–09 (2013). [↑](#footnote-ref-124)
111. *See* EU Shareholder Directive II, *supra* note 109, art. 9c. If transplanted, of course, *MFW* will broadly police private benefits of control. *See* Part IV.C. and Part V.A. [↑](#footnote-ref-125)
112. Therefore, the functional convergence of EOR with *MFW* is incomplete. *Cf.* Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. Comp. L. 329, 336–37 (2001) (discussing a possible functional convergence between EOR and “strictly enforced rules against self-dealing”). [↑](#footnote-ref-126)
113. *See supra* Part II. [↑](#footnote-ref-127)
114. *See supra* note 62. A very significant percentage of controlled companies in EU jurisdictions appears to be in this category. [↑](#footnote-ref-128)
115. For various alternative squeeze-out procedures, *see* The Takeover Bids Directive Assessment Report, *supra* note 65, at 225–261. *See also* Ventoruzzo, *supra* note 17, at 902 (stating that while “the Takeover Directive is not the *exclusive* freeze-out provisions in all European jurisdictions,” other rules “are significantly less liberal than in the United States.”). EU Takeover Directive, *supra* note 3, Recital 24 provides, in part, that “Member States may continue to apply national rules to squeeze-out and sellout procedures in other circumstances [than those provided in the Takeover Directive].”). Before the departure of the United Kingdom from the European Union, a scheme of arrangement in the United Kingdom was an example. The scheme requires consent by a majority in number of shareholders that represent at least 75% in value of the total shares. *See* The Takeover Bids Directive Assessment Report, *supra* note 65, at 220. However, prior court approval is required. *See* Davies, Worthington & Hare, *supra* note 58, at ¶ 29–011. For the current state of national legislation concerning merger freezeouts in France, Germany, and Italy, *see* Edward Rock et al., *Fundamental Changes*, *in* The Anatomy of Corporate Law: A Comparative and Functional Approach ch. 7, § 7.4.2.2 (Reinier H. Kraakman et al. eds., 3d ed. 2017). [↑](#footnote-ref-129)
116. Krebs, *supra* note 79, at 975 n.176 (“[M]ember states could have created or maintained a separate squeeze-out procedure with differing thresholds without infringing on the Directive.”). The Merger Directive (Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1)). *See* Tom Vos, *‘Baby, it’s cold outside ...’ – A Comparative and Economic Analysis of Freeze-outs of Minority Shareholders*, 15 Eur. Fin. L. Rev. 148, 168 (2018) (“In general, member states of the European Union have not allowed cash mergers, despite the fact that this is explicitly allowed by the article 30 of the Merger Directive.”) (footnotes omitted). The Merger Directive was subsequently incorporated into article 89 of Directive (EU) 2017/1132 of The European Parliament and of The Council of 14 June 2017 relating to Certain Aspects of Company Law, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32017L1132. [↑](#footnote-ref-130)
117. *See* Lawrence A. Hamermesh et al., *Optimizing the World’s Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 334 (2022) [hereinafter Hamermesh et al, *Optimizing the World’s Leading Corporate Law*] (“[T]he path [to *MFW*] was long (about twenty years) and not entirely straight . . . .”). [↑](#footnote-ref-131)
118. *See* Elliot J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. Rev. 624 (1981). [↑](#footnote-ref-132)
119. *Id.* at 627–29. [↑](#footnote-ref-133)
120. *See supra* text accompanying notes 78–79. [↑](#footnote-ref-134)
121. *See* Weiss, *supra* note 117, at 648–57. [↑](#footnote-ref-135)
122. 380 A.2d 969 (Del. 1977). As to the business purpose, the court stated, “[U]se of corporate power solely to eliminate the minority is a violation of [the controller’s fiduciary] duty.” *Id*. at 980. [↑](#footnote-ref-136)
123. 379 A.2d 1121 (Del. 1977). [↑](#footnote-ref-137)
124. *See* Weiss, *supra* note 117, at 648. [↑](#footnote-ref-138)
125. Del. Code Ann.1

, §§ 251(a), (b). Neither board nor shareholder approval is required for short-form mergers. *Id*. at § 253(a) (2019). Shareholder approval is no longer required for medium-form mergers. *Id.* at § 251(h). [↑](#footnote-ref-139)
126. Weiss, *supra* note 117, at 658. [↑](#footnote-ref-140)
127. Weinberger v. UOP, Inc., 457 A.2d 701, 704 (Del. 1983). [↑](#footnote-ref-141)
128. The entire fairness standard of review applies “(1) when a plaintiff pleads facts that ‘call[] into question the disinterestedness and independence of a sufficient number of directors,’ (2) when the transaction was effectuated ‘by a controlling or dominating shareholder,’ and (3) when a plaintiff pleads a fraud-on-the-board theory and the attendant ‘illicit manipulation of a board’s deliberative processes by self-interested corporate fiduciaries.’” (citation omitted). *In re* Pattern Energy Grp. S’holder Litig., C.A. No. 2020-0357-MTZ (Del. Ch. May. 6, 2021). In a 1982 article, the business purpose requirement was characterized as “vacuous.” Easterbrook & Fischel, *Corporate Control Transaction, supra* note 13, at 725. [↑](#footnote-ref-142)
129. *See* Singer v. Magnavox Co., 380 A.2d at 982 (McNeilly, J., concurring) (“Upon finding a breach of the fiduciary duty owed, the Court must then grant such relief as the circumstances require, by *injunction*, appraisal, damages, or other available equitable relief, if any . . . .”) (emphasis added). [↑](#footnote-ref-143)
130. *See* Robert K. Payson & Gregory A, Inskip, *Weinberger v. UOP, Inc.: Its Practical Significance in the Planning and Defense of Cash-out Mergers*, 8 Del. J. Corp. L. 83, 93 (1983) (“After *Weinberger*, minority shareholders no longer have an absolute right to continued participation in the corporate enterprise as such.”). *See also* Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, *supra* note 13, at 613 n.161 (attributing *Weinberger*’s rejection of the business purpose to asymmetric information). [↑](#footnote-ref-144)
131. *Weinberger*, 457 A.2d at 710 (“When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”) (citation omitted). [↑](#footnote-ref-146)
132. *See* *In re* BGC Partners, Inc. Derivative Litig., Consol. C.A. No. 2018-0722-LWW, 2022 WL 3581641, \*29 (Del. Ch. Aug. 19, 2022) (“[T]he entire fairness test is unitary.”). [↑](#footnote-ref-147)
133. *Weinberger*, 457 A.2d at 711. *See also In re* Orchard Enters., Inc., 88 A.3d 1, 39 (Del. Ch. 2014) (“To determine the fair value of the shares, the Court of Chancery held that ‘a proceeding analogous to an appraisal hearing such as is provided for in merger cases is appropriate here in a situation in which active fraud has not been alleged or proved.’”). [↑](#footnote-ref-148)
134. *Weinberger*, 457 A.2d at 712–13. Appraisals are subject to the appraisal statute, viz., Del. Code Ann. tit. 8, § 257(h) (2017). [↑](#footnote-ref-149)
135. *In re* Dole Food Co., Inc. S’holder Litig., Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL, 2015 WL 5052214, at \*33. [↑](#footnote-ref-150)
136. *See id*. *See also* Eric L Talley, *Finance in the Courtroom, Appraising Its Growing Pains*, Del. Law., Summer 2017, at 16, 17 (stating in the context of statutory appraisals that unlike investment bankers whose job is to “generat[e] ‘a football field’ *range* of discounted cash flow (DCF) valuations,” a judge “must conjure up a *single number* at the end of the process.”) (emphasis added). [↑](#footnote-ref-151)
137. Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 Harv. L. Rev. 1215, 1276 (2020). [↑](#footnote-ref-152)
138. *Id*. [↑](#footnote-ref-153)
139. *Id. See also* Jonathan Macey & Joshua Mitts, *Asking the Right Question: The Statutory Right of Appraisal and Efficient Market*, 74 Bus. Law. 1015, 1044 (2019) (“DCF models must be treated with caution and skepticism because such models are easily abused.”) (citation omitted). [↑](#footnote-ref-154)
140. *See* Hon. Sam Glasscock III, *Ruminations on Appraisal*, Del. Law., Summer 2017, at 8, 10) (The proposition “that a bench judge, armed with self-serving expert testimony from the parties, is a more reliable diviner of inherent value than the market and the directors” is “more or less unlikely.”); Golden Telecom, Inc. v. Global GT LP, 11 A.3d 214, 218 (Del. 2010) (“[I]t is difficult for the Chancellor and Vice Chancellors to assess wildly divergent expert opinions regarding value.”). [↑](#footnote-ref-155)
141. Gilson & Gordon, *Controlling Controlling Shareholders*, *supra* note 23, at 834. [↑](#footnote-ref-156)
142. Guhan Subramanian, *Fixing Freezeouts*, *supra* note 22, at 23 (2005) (“[C]ourts are not well positioned to engage in the difficult task of valuation.”). [↑](#footnote-ref-157)
143. *Id*. at 39. [↑](#footnote-ref-158)
144. 634 A.2d 345 (Del. 1993). [↑](#footnote-ref-159)
145. A remark by William Allen, former Chancellor of the Court of Chancery of the State of Delaware, p. 39 of Transcript of Interview of William Allen titled *From UOP to MFW: Evolution of The Evolution of Delaware Freezeout Law* conductedas part of Oral Histories, the University of Pennsylvania Law (discussing *Caremark*, *Interco*, *Paramount* and *Blasius*), https://www.law.upenn.edu/live/files/8634-wt-allen-corrected-transcriptdocx. [↑](#footnote-ref-160)
146. Cede & Co. v. Technicolor, Inc., Civil Action No. 7129 (Del. Ch. Dec 31, 2003; Revised: July 9, 2004), *affirmed in part and remanded in part*, 884 A.2d 26 (Del. 2005). [↑](#footnote-ref-161)
147. Edmund-Philip Schuster, *Efficiency in Private Control Sales – The Case for Mandatory Bids* 35 (2010) (LSE, Society and Economy Working Papers 08/2010), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=1610259.). For various allocation methodologies, *see id.* at 36. [↑](#footnote-ref-162)
148. *See, e.g.*, Bain & Co., *Bringing Science to the Art of Revenue Synergies* (Feb. 10, 2022) (“[R]evenue synergies are difficult to size and to realize.”), https://www.bain.com/insights/revenue-synergies-m-and-a-report-2022/. [↑](#footnote-ref-163)
149. *See, e.g.*, McKinsey & Co., *Seven rules to crack the code on revenue synergies in M&A* (Oct. 15, 2018), https://www.mckinsey.com/capabilities/growth-marketing-and-sales/our-insights/seven-rules-to-crack-the-code-on-revenue-synergies-in-ma. [↑](#footnote-ref-164)
150. As stated, controllers are not forced to sell their positions against their will. *See supra* Part II.A.2. However, this does not necessarily mean that synergies from a sale to a hypothetical third party buyer should be completely disregarded. If such synergies from a hypothetical sale need to be taken into account, the valuations would become even more challenging. [↑](#footnote-ref-165)
151. *In re* Appraisal of Shell Oil Co., 607 A.2d 1213, 1222 (Del. 1992) (“[T]he Court of Chancery has the inherent authority to appoint neutral expert witnesses.”). [↑](#footnote-ref-166)
152. *Id. at* 1222 n.3. [↑](#footnote-ref-167)
153. According to *Weinberger* “[t]he [fair dealing prong] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained.” *Weinberger*, 457 A.2d at 711. [↑](#footnote-ref-168)
154. Thus, for example, *Weinberger* held that informed MOM shifts the burden from the controller to the minority. *Weinberger*, 457 A.2d at 703. It also signaled a possible cleansing effect of the use of “an independent negotiating committee.” *Id*. at 710 n.7. [↑](#footnote-ref-169)
155. In contrast, conflicts of interest of the directors of the issuing company related to such related party transactions tend to arise as externalities of the controllers’ self-dealings. [↑](#footnote-ref-170)
156. *See* text accompanying note 22. [↑](#footnote-ref-171)
157. *See supra* Part II.A.3.a). A preliminary injunction will not be issued unless the plaintiff would suffer irreparable injuries if the injunction does not issue. *See supra* Watanabe, at 93. [↑](#footnote-ref-172)
158. *See* Weinberger, 457 A.2d at 711 (indicating that where fraud is involved, anticipatory relief or recessionary damages may be due.). [↑](#footnote-ref-173)
159. Berger v. Intelident Solutions, Inc., 911 A.3d 1164, 1173 (Del. Ch. 2006) (citation omitted). *See also* SEC Schedule 13e-3, Item 7, 17 C.F.R. § 240.13e-100 (2022) (referencing Item 1013 of Regulation M-A, 17 C.F.R. § 229.1013). In general, however, it is not required to disclose a reservation price. *See* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 939 (Del. 1985) (*Weinberger* does not stand for the proposition that “a majority shareholder must under all circumstances disclose its top bid to the minority.”); *In re* BGC Partners, Inc. Derivative Litig., Consol. C.A. No. 2018-0722-LWW, 2022 WL 3581641, \*26 (Del. Ch. Aug. 19, 2022) (“A controller is not required to disclose ‘information that relates only to its consideration of the price at which it will buy or sell and how it would finance a purchase or invest the proceeds of a sale.’”) (quoting *In re* Dole Food Co., Inc. S’holder Litig., Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL, 2015 WL 5052214, at \*29 (Del. Ch. Aug. 27, 2015). In *Weinberger*, the court heavily criticized the controller’s failure to share a feasibility study that its officers, double-hatting as directors of the subsidiary, prepared, which showed a significantly higher reservation price than the price offered to the controlled company. *See* Weinberger, 457 A.2d at 711–12. Thus, *Weinberger* involved a unique situation. In particular, the court hinted that a compensatory remedy may not be sufficient. *Id.* at 714 (indicating the possibility of rescissory damages). [↑](#footnote-ref-174)
160. *Id.*; *In re* Dole Food Co., Inc. S’holder Litig., Consol. C.A. No. 8703-VCL, Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL, 2015 WL 5052214, at \*2 (stating that there are situations where minority shareholders “are entitled to fairer price designed to eliminate the ability of [controllers] to profit from their breaches of the duty of loyalty.”). [↑](#footnote-ref-175)
161. A remark by Thomas Allingham, who represented MacAndrews & Forbes Holdings, Inc. in *MFW*, at p. 2 of the transcript of the interview titled *Kahn v. M&F Worldwide Corp.: Interview of Thomas Allingham* conductedas part of Oral Histories, the University of Pennsylvania Law [hereinafter Thomas Allingham Transcript], https://www.law.upenn.edu/live/files/9942-mampf-worldwide-allingham-transcriptdocx. *Cf*. Ventoruzzo, *supra* note 17, at 873 (“[T]he general legal framework drawn by Delaware’s judiciary is sensible (if perhaps imperfect and subject to possible fine-tuning.)”). [↑](#footnote-ref-176)
162. Kahn v. Lynch Commc’n Sys., 683 A.2d 1110, 1117 (Del. 1994), *aff’d on remand*, 669 A.3d. 779 (Del. 1995). At one point, William Allen, Jack Jacobs, and Leo Strine argued that one of the two should suffice to convert the entire fairness to business judgment review. *See* William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1308–09 (2001) (“The better policy . . . is to afford business judgment review treatment to self-interested mergers that are approved by either an effective independent director committee or by a majority of the minority stockholder vote.”) (2001). The authors, William T. Allen, Jack B. Jacobs, and Leo E. Strine, Jr., were, respectively, then former Chancellor of the Court of Chancery of the State of Delaware (1985–1997), Vice Chancellor, and Vice Chancellor. Jack B. Jacobs subsequently became Justice of the Delaware Supreme Court, and Leo E. Strine, Jr. subsequently became Chancellor of the Delaware Chancery Court and then Chief Justice of the Delaware Supreme Court. [↑](#footnote-ref-177)
163. *In re* Siliconix Inc. S’holders Litig., No. CIV. A. 18700, 2001 WL 716787, at \*6 (Del. Ch. June 19, 2001). *See also* Solomon v. Pathe, 672 A.3d 35, 39–40 (Del. 1995). [↑](#footnote-ref-179)
164. *See* Fernán Restrepo, *Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of MFW*, 6\_J. L., Fin., and Acct. 353, 355-56 (2021) [hereinafter Restrepo, *Evidence from the Effect of MFW*] (endorsing the view that Delaware’s judicial scrutiny before *MFW* appears to be “an effective substitute for procedural protections”) (citation omitted). [↑](#footnote-ref-180)
165. *See* Gilson & Gordon, *Controlling Controlling Shareholders*, *supra* note 23, at 839–40; Subramanian, *Fixing Freezeouts*, *supra* note 22, at 60–61. [↑](#footnote-ref-181)
166. This creates a settlement value “­because there is no feasible way for defendants to get [the lawsuits] dismissed on the pleadings.” *See* *In re* MFW S’holders Litig., 67 A.3d at 504. [↑](#footnote-ref-182)
167. It is not that there were no controller freezeouts subject to both special committee and MOM approval. *See* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 368 tbl.1, Panel A. At least, however, it is explicitly stated if the dual conditions in these deals satisfy *MFW*, especially the upfront non-waivable MOM condition. [↑](#footnote-ref-183)
168. See *In re* MFW S’holders Litig., 67 A.3d at 500–01. *See also* Thomas Allingham Transcript, *supra* note 160 (“[I]t was very hard for a controller to try to bring a case that would tee up the issue of whether you could get business judgment review for a controller transaction if you were willing to structure the transaction with certain procedural protections.”); Hamermesh et al, *Optimizing the World’s Leading Corporate Law*, *supra* note 116, at 335 (“Not until 2011 . . . did a controller take the chance of employing both cleansing protections in combination in an effort to invoke business judgment rule protection.”). [↑](#footnote-ref-184)
169. *See* Allingham, *supra* note 167, at 3 (“[B]ecause the structure of MacAndrews & Forbes, as a holding company, involved lots of controlled corporations, that this was an issue that was of real interest to MacAndrews & Forbes and Ronald Perelman and his in-house legal team.”). [↑](#footnote-ref-185)
170. Kahn v. M & F Worldwide, 88 A.3d at 640 (quoting a passage from the controller’s letter stating the condition). The original letter of MacAndrews & Forbes Holdings Inc., dated June 13, 2011 to M&F Worldwide Corp. is available at https://www.sec.gov/Archives/edgar/data/918939/000134100411001286/ex-32.htm. [↑](#footnote-ref-186)
171. The use of a special committee for controller freezeouts was already a standard feature. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 3 (stating that the traditional route for executing a freezeout involved the use of a special committee). [↑](#footnote-ref-187)
172. *See* *In re* MFW S’holders Litig., 67 A.3d at 530–31. When the takeover jurisprudence in Delaware made transformational changes in the 1980s, an assumption was that there were a sizable number of “unsophisticated investors” who needed judicial protections. *See*, *e.g.*, Bebchuk, *Toward Undistorted Choice*, *supra* note 29, at 1696 (“[S]ome shareholders, largely unsophisticated investors, end up with considerably less than their pro rate share of the acquisition price.”). In 2007, John Armour and David Skeel predicted that notwithstanding the institutionalization of shareholders, including the emergence of hedge funds, “the court-centered U.S. approach [as opposed to the UK Takeover Code] seems likely to endure.” *See* Armour & Skeel, *supra* note 55, 1792–93. The prediction still holds true. However, the Delaware judiciary took the institutionalization into account in its judicial rule making and let shareholders have a greater autonomy in control transactions. *Cf.* Burkart & Panunzi, *supra* note 76, at 742 (stating that ownership concentration is “not a feasible or realistic option”). [↑](#footnote-ref-188)
173. *See* *In re* MFW S’holders Litig., 67 A.3d at 530 (“With the development of the internet, there is more public information than ever about . . . views about the wisdom of transactions. Likewise, the internet facilitates campaigns to defeat management recommendations.”). For the benefit of the IT revolution for retail investors, *see* Bhattacharya & Saar, Limited Order Market under Asymmetric Information (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3688473. [↑](#footnote-ref-189)
174. For the importance of legislative facts in the context of the common law of corporations in Delaware, *see infra* Part V.C. [↑](#footnote-ref-190)
175. 115 A.3d 1173, 1179–80 (Del. 2015) (holding that a plaintiff seeking damages from independent directors protected by an exculpation close must plead a non-exculpated claim against them, even if they are involved in a transaction judged under entire fairness). [↑](#footnote-ref-191)
176. 125 A.3d 304 (Del. 2015). [↑](#footnote-ref-192)
177. The Delaware Supreme Court affirmed the lower court decision in *In re MFW Shareholders Litigation*, 67 A.3d 496 (2013). “[T]he plaintiffs dropped their preliminary injunction motion in favor of seeking a post-closing damages remedy for breach of fiduciary duty.” *Id.* at 499. [↑](#footnote-ref-193)
178. 88 A.3d at 645. Hereinafter, the six *MFW* requirements will be referred to collectively as “the *MFW* Requirements” and individually as a “*MFW* Requirement.” [↑](#footnote-ref-194)
179. *In re* Dole Food Co., Inc. S’holder Litig., Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL, 2015 WL 5052214, at \*1 (Del. Ch. Aug. 27, 2015) (“Despite mimicking *MFW*’s form, [the controller] did not adhere to its substance.”). *See also* Ligos v. Isramco, Inc. et al., C.A. No. 2020-0435-SG (Del. Ch. Aug. 31, 2021) (MOM not satisfied since material information was not disclosed to the minority shareholders who need to be fully informed). [↑](#footnote-ref-195)
180. *In re* Martha Stewart Living Omnimedia, Inc., Consol. C.A. No. 11202-VCS, 2017 WL 3568089, at \*1 (Del. Ch. Aug. 18, 2017). [↑](#footnote-ref-196)
181. MFW, 88 A.3d at 654. [↑](#footnote-ref-197)
182. *See* Bebchuk, *Toward Undistorted Choice*, *supra* note 29, at 1774 (“[T]he decisive fraction, the fraction whose view should prevail, is a majority of the shareholders.”); Lucian Arye Bebchuk, *Sole Owner Standard for Takeover Policy,* 17 J. Legal Stud. 197, 198 n.2 (1988) (“If the target’s shareholders differ in their judgment, then, according to the proposed standard, the judgment of the majority should be followed.”); Ventoruzzo, *supra* note 17, at 914–16 (proposing that Delaware increases MOM threshold to 2/3 and EU lower it down to 2/3); Milton Harris & Artur Raviv, *Voting Rights and Majority Rules*, 20 J. of Fin. Econ. 203 (1988). In most US jurisdictions, “a required vote today is a majority of the outstanding shares.” 1 Lou R. Kling, Eileen T. Nugent & Brandon Van Dyke, Negotiated Acquisitions of Companies, Subsidiaries, and Divisions, § 2.03[2] (2020]). Or in the United States, the minimum condition in third party two-step tender offers is typically a majority of the target’s shares on a fully diluted basis. *See*, *e.g.*, Latham & Watkins LLP, Acquiring a US Public Company – An Overview for the Non-US Acquiror 9 (2020), https://www.lw.com/admin/upload/SiteAttachments/2020%2002%2012%20Acquiring%20a%20US%20Public%20Company\_2020.pdf. [↑](#footnote-ref-198)
183. *See In re* PNB Holding Co. S’holders Litig., Consol. C.A. No. 28-N, 2006 WL 2403999, \*15 (Del. Ch. Aug. 18, 2006) (rationalizing the position based on the requirement for a statutory merger of a majority vote of all outstanding shares entitled to vote). [↑](#footnote-ref-199)
184. MFW, 88 A.3d at 645.In *MFW*, the plaintiff raised the issue of special committee independence. However, the Chancery Court was able to conclude the independence of the committee “as a matter of law.” *In re* MFW S’holders Litig., 67 A.3d at 514. It analyzed the independence of each of the members of the independent committee. *Id.* At 509–14. [↑](#footnote-ref-200)
185. *See supra* note 165. [↑](#footnote-ref-201)
186. Restrepo offers four possible reasons for the skepticism. *See* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 385–86. [↑](#footnote-ref-202)
187. *Id*. At 385. The freezeouts included both cash and non-cash deals. *Id.* At tbl.1, Panel A. However, the paper reports a “correlation between all-cash deals and MOM conditions.” *Id.* At 371. Guhan Subramanian made a nearly identical finding for a longer period from the date of *MFW*’s Chancery Court decision, May 29, 2013, to April 2022. *See* Subramanian, *Freezeouts in Delaware,* *supra* note 10, at 811. *See also* Itai Fiegenbaum, *The Geography of MFW-Land*, 4 Del. J. Corp. L. 763, 800 (2017) (“Arguably, a majority of the minority condition works to dissipate the rational apathy associated with the stockholder vote.”). For views expressing such apathy, *see* Rock, *Majority of the Minority Approval*, *supra* note 85, at 135 (“This review of the U.S. experience with majority of the minority approval of conflicted transactions should give its supporters some pause. While it rarely seems to do much harm, it likewise does not seem to do much good.”); Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. Rev. 595, 612 (1997) 612 (see text accompanying note 42). [↑](#footnote-ref-203)
188. *See* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 362 (“It seems unlikely that a significant increase in MOM conditions in merger freezeouts after 2013 could be explained by events other than *MFW*.”). No bright line exits to set the timing to meet the ab initio requirement. In a subsequent decision, the court held that under the facts of the case, substantive economic negotiation started before the dual conditions were proposed. Olenik v. Lodzinski, 208 A.3d 704, 706 (2019). [↑](#footnote-ref-204)
189. *See*, *e.g.*, Rock, *Majority of the Minority Approval*, *supra* note 85, at 131–32 (pointing out several open issues relating to *MFW*). [↑](#footnote-ref-205)
190. *Cf.*, *e.g.*, *In re* Dole Food Co., Inc. S’holder Litig.; *In re* Appraisal of Dole Food Co., Inc., Consol. C.A. No. 8703-VCL, Consol. C.A. No. 9079-VCL,, 2015 WL 5052214, at \*1 (Del. Ch. Aug. 27, 2015) (see sentence quoted in note 178); Kosinski v. GGP Inc., 214 A.3d 944 (Del. Ch. 2019) (involving a case where director independence satisfying the second *MFW* Requirement was questioned); Ark. Teacher Ret. Sys. v. Alon U.S. Energy, Inc., C.A. No. 2017-0453-KSJM (Del. Ch. Jun. 28, 2019) (refusing to apply *MFW* since negotiations started before the adoption of the dual cleansing mechanism). [↑](#footnote-ref-206)
191. Controllers can still be successful in satisfying the fair dealing prong of the entire fairness standard without attempting to comply with *MFW*. *See In re* BGC Partners, Inc. Derivative Litig., Consol. C.A. No. 2018-0722-LWW, 2022 WL 3581641, \*18 (Del. Ch. Aug. 19, 2022) (“[T]he transaction was entirely fair to [the controlled company] and its minority stockholders.”). [↑](#footnote-ref-207)
192. *See supra* text accompanying note 168. [↑](#footnote-ref-208)
193. Here, “two-step freezeout” refers to a tender offer by a controller followed by a short-form merger. [↑](#footnote-ref-209)
194. *See* Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure & Outcomes: Evidence on the Unified Approach*, 5 Harv. Bus. L. Rev. 205, 207 (2015). *See also* discussions and academic commentaries in Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 359–62. [↑](#footnote-ref-210)
195. *See* Hamermesh et. al., *supra* note 116 (suggesting several refinements and changes to the *MFW* jurisprudence). [↑](#footnote-ref-211)
196. *See* Rock, *Majority of the Minority Approval*, *supra* note 85, at132–33. *MFW* was also followed in New York and several other states. *See*, *e.g.*, *In re* Kenneth Cole Productions, Inc., S’holders Litig., 27 N.Y.3d 268 (2016) (slip opinion). [↑](#footnote-ref-212)
197. Synutra Int’l Inc. v. Flood, 195 A.3d 754, 763 (Del. 2018). [↑](#footnote-ref-213)
198. *See* Synutra Int’l Inc. v. Flood, 195 A.3d 757–58. [↑](#footnote-ref-214)
199. For exchange rules in the United States that require review of certain related party transactions by an independent body of the board of directors, *see* Section 3.14 of the New York Stock Exchange Listed Company Manual; Section 5630 of Nasdaq Marketplace Rule. [↑](#footnote-ref-215)
200. IRA Tr. ex rel. Ahmed v. Crane, Consol. C.A. No. 12742-CB, 2017 WL 7053964, at \*7 (Del. Ch. Dec. 11, 2017) (a stock reclassification). *See also*, *e.g.*, *In re* Dell Techs. Class V S’holders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748, \*1 (Del. Ch. March 13, 2020) (purported to comply with *MFW* in relation to redemption of a class of stock). [↑](#footnote-ref-216)
201. *In re* Ezcorp Inc., C.A. No. 9962-VCL, 2016 WL 301245, at \*11, \*23 (Del. Ch. Jan. 25, 2016) (stating that “the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit,” but that “the controllers [who engage in such transactions] can obtain business judgment review by following *M & F Worldwide* . . . .”). [↑](#footnote-ref-217)
202. *See* Tornetta v. Musk, 250 A.3d 793, 797 (Del. Ch. 2019) (involving a derivative suit). [↑](#footnote-ref-218)
203. *Id.* at 800 (“[E]ntire fairness is the standard by which [an incentive-based compensation plan for Musk] must be reviewed.”). This appears to be a bilateral monopoly. [↑](#footnote-ref-219)
204. *See* City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, In., C.A. No. 2021-0560-PAF (Del. Ch. July 29, 2022) (granting a motion to dismiss). However, defendants did not dispute the application of entire fairness to the disputed corporate action. At least, the application of entire fairness goes against an admonition by Zohar Goshen and Assaf Hamdani. *See* Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limited of Judicial Review*, 120 Colum. L. Rev. 941, 977–80 (2020) (arguing in the context of dual class shares that in the absence of a method to value reallocation of control rights, *MFW*’s optional private solution would not work). [↑](#footnote-ref-220)
205. Hamermesh et al, *Optimizing the World’s Leading Corporate Law*, *supra* note 116, 341 (stating that outside of controller freezeouts, the Supreme Court has not addressed if *MFW*’s dual cleansing mechanism is required to convert entire fairness to business judgment review). [↑](#footnote-ref-221)
206. *Id*. at 343. [↑](#footnote-ref-222)
207. *Id*. at 333. [↑](#footnote-ref-223)
208. *See supra* Part. II.B.1.b). [↑](#footnote-ref-224)
209. 380 A.3d 969, 980 (Del. 1977). *Weinberger* later abolished *Singer*’s primary purpose requirement*. See supra* text accompanying notes 126–127. [↑](#footnote-ref-226)
210. 542 A.2d 1183 (Del. 1988). [↑](#footnote-ref-227)
211. *See supra* text accompany notes 222–223. [↑](#footnote-ref-228)
212. 542 A.2d 118, [↑](#footnote-ref-229)
213. *See* Subramanian & Zhao, *supra* note 136, at 1268 n.224 (“Entire fairness would not apply, provided that [a third party bidder] paid the same . . . deal price in the freezeout, because the freezeout price had been negotiated at arm’s length, before [the third party bidder] became a controlling shareholder.”). If the bidders accumulate 90% ownership, they can effect short-form mergers, which do not trigger the entire fairness review. *See infra* note 216. However, this approach tends to be expensive. Related, cash freezeouts in the second steps of two-step acquisitions would not be exempt from Rule 13e-3 (going private rule) under the Securities Exchange Act of 1934, as amended unless the second steps are to occur pursuant to binding plans of merger, and the considerations in the second steps are no less than the tender offer prices. 17 C.F.R. § 240.13e-3(g)(1) (2008). [↑](#footnote-ref-230)
214. 143 A.3d 727, 741 (Del. Ch. 2016), *aff’d*,156 A.3d 697 (Del. 2017). [↑](#footnote-ref-231)
215. Del. Code Ann. tit. 8, § 251(h) (2020). [↑](#footnote-ref-232)
216. *See In re* Volcano Corp. S’holder Litig., 143 A.3d at 747. [↑](#footnote-ref-233)
217. Of course, transactions with incumbent controllers would be treated differently. With respect to a short-form merger, however, “absent fraud or illegality, the only recourse [in a short-form merger] for a minority stockholder who is dissatisfied with the merger consideration is appraisal.” Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001). [↑](#footnote-ref-234)
218. *Corwin*, 125 A.3d 304. It held that the business judgment standard applies to determine liabilities of directors in third party one-step acquisitions approved by a fully informed, uncoerced majority of the disinterested stockholders. [↑](#footnote-ref-235)
219. 493 A.2d 946 (Del. 1985). [↑](#footnote-ref-236)
220. 506 A.2d 173 (Del. 1986). [↑](#footnote-ref-237)
221. Paramount Commun’s Inc. v. QVC Networks Inc., 637 A.2d 34, 37 (Del. 1994). [↑](#footnote-ref-238)
222. *Corwin*, 25 A.3d. at 312. [↑](#footnote-ref-239)
223. Del. Code Ann. tit. 8, § 203 (2017). *See also supra* note 80. [↑](#footnote-ref-240)
224. *See* Subramanian, et al., *supra* note 81, at 714 (“[E]very bidder in our sample conditioned its offer on the inapplicability of Section 203.”); Guhan Subramanian, et al., *Is Delaware’s Antitakeover Statute Unconstitutional? Further Analysis and a Reply to Symposium Participants*, 65 Bus. Law. 799, 800 (2010) (stating that no critics questioned the authors’ finding . . . that “[n]o bidder in the past nineteen years has been able to achieve 85% in a hostile tender offer against a Delaware target.”). [↑](#footnote-ref-241)
225. *See*, *e.g., In re* Pure Res., Inc., S'holders Litig, 808 A.2d 421, 436 (Del. Ch. 2002)*.* [↑](#footnote-ref-242)
226. *In re* MFW S’holders Litig., 67 A.3d 500 (emphasis added). However, unlike a typical arm’s length merger, the transaction is a bilateral monopoly. *See supra* note 22. [↑](#footnote-ref-243)
227. *See infra* note 217. [↑](#footnote-ref-244)
228. *See supra* text accompanying notes 28, 29. [↑](#footnote-ref-245)
229. *See*, *e.g.*, John Cirace, Law, Economics, and Game Theory 211 (2018) (“If legal institutions and government intervention favor neither party and the parties have similar economic strength, the results from bilateral monopoly negotiations, in terms of price and quantity of output, will tend to be the same as in competitive markets.”). [↑](#footnote-ref-246)
230. Albert Choi and George Triantis listed five factors that affect bargaining power: “(1) demand and supply conditions, (2) market concentration, (3) private information, (4) patience and risk aversion, and (5) negotiating skills and strategy.” Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 Va. L. Rev. 1665, 1675 (2012). In the context of a bilateral monopoly, (1) and (2) are neutral factors. Of course, *MFW* Requirements (iv)and (v) require the special committee and the minority shareholders to be informed and address (3).*See, for example, In re* Dole Food Co., Inc. S’holder Litig., C.A. No. 8703-VCL, 2015 WL 5052214, at \*2 (Del. Ch. Aug. 27, 2015) (refusing to apply *MFW* by stating that the controller usurped the ability of the independent committee “to negotiate on a fully informed basis and potentially say no” to the transaction and “likewise deprived the stockholders of their ability to consider the Merger on a fully informed basis and potentially vote it down.”). Under *MFW* Requirements (ii) and (iii), the special committee needs to be independent, has veto power, and can hire its own advisors. Under *MFW* Requirement (vi), there can be no controller coercion on the minority shareholders.These requirements generally address (5). With respect to (4), controllers can choose the timing of freezeouts, which allows them to be patient or less risk adverse. For an explanation of “(4) patience and risk aversion,” *see* Choi & Triantes*, supra.* note 229, at 1676. However, the independent committee may choose not to go forward with the *MFW* freezeout if its negotiating position is weak. Thus, so long as judicial determinations of freezeout prices do not skew when *MFW* does not apply, neither side should be statistically favored. *See supra* text accompanying note 232. [↑](#footnote-ref-248)
231. Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 385. [↑](#footnote-ref-249)
232. *Id.* at 21 (“One is that the combination of SC and MOM approval may be a functionally equivalent protection to entire fairness review.”). [↑](#footnote-ref-250)
233. *See* Dell, Inc. v. Magnetar Global Event Driven Master Fund LTD, 177 A.3d 1, 36 (Del. 2017) (“A DCF analysis can provide the court with a helpful data point about the price a sale process would have produced had there been a robust sale process involving willing buyers with thorough information and the time to make a bid.”). [↑](#footnote-ref-251)
234. *See* Richard Squire, *Why the Corporation Locks in Financial Capital but the Partnership Does Not*, 74 Vand. L. Rev. 1787, 1820 (2022) (describing a similar anchoring effect of valuation prices in negotiations between departing partners and remaining partners). [↑](#footnote-ref-252)
235. *See generally* Goshen, *Controlling Corporate Self-Dealing*, *supra* note 36, at 402 (“[T]he minority, or some of its members, can attempt to hold out for a larger piece of the transaction’s expected profit.”), at 417 (“[T]he voting process is susceptible to strategic voting.”). For other possible reasons, including an asymmetric information problem, that would increase the deal completion risk, *see* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 356. [↑](#footnote-ref-253)
236. As to the importance of private ordering in Delaware, *see*, *e.g.*, Salzburg et al. v. Blue Apron Holdings, Inc., No. 346,2019 (Del. Mach 18, 2020) (text accompany notes 59–61). *See also* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 Del. J. Corp. L. 845, 856–60 (2008). [↑](#footnote-ref-254)
237. *See* Thomas Allingham Transcript, *supra* note 167, at 7 (Allingham remarked, “So, we looked at the shareholder profile and it was a good case for this—for a, you know, a test case because there wasn’t a very large blocking position among the minority.”). [↑](#footnote-ref-255)
238. *See supra* note 100. [↑](#footnote-ref-257)
239. *See* Rock, *Majority of the Minority Approval*, *supra* note 85, at 117 (“﻿[B]ased on a review of public sources . . . , in none of these cases is there evidence that an active shareholder acquired a significant block and then sought to use the threat of blocking MOM approval to negotiate a higher price.”). *See also* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 356 (“[H]oldup problems (and, more generally, frustration rates) are not meaningfully associated with qualified majority voting.”). However, Guhan Subramanian reports Carl Icahn’s purchase of minority shares of AmTrust Financial Services Corp., which forced a bump up of the freezeout price by 9%. Subramanian, *Freezeouts in Delaware*, *supra* note 10, at 809. The controller’s purported compliance with *MFW* was subsequently rejected. *In re* AmTrust Fin. Servs. Stockholder Litig., Consol. C.A. No. 2018-0396-AGB (Del. Ch. Feb. 26, 2020). [↑](#footnote-ref-258)
240. Subramanian, *Fixing Freezeouts*, *supra* note 22, at 39–40. [↑](#footnote-ref-259)
241. For the same reason, in the context of controller related party transactions other than freezeouts, potentially independent directors may be less independent. However, arguably, MOM might have a stronger influence since minority shareholders remain as shareholders. [↑](#footnote-ref-260)
242. *See* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 385. This result is what then Vice Chancellor Leo Strine hoped for in rendering *MFW*’s lower court decision. *See In re* MFW S’holders Litig., 67 A.3d at 535 (stating that *MFW*’s approach would allow minority shareholders to protect themselves in “the most cost-effective way”). He also emphasized the judicial economy in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304, at 313 (Del. 2015) (“[T]he utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.”). [↑](#footnote-ref-262)
243. Recently, the number of vice chancellors of the Court of Chancery in Delaware was increased to six. For the current members of the Delaware Chancery Court, *see* https://courts.delaware.gov/chancery/judges.aspx. [↑](#footnote-ref-263)
244. Del. Code Ann. tit. 8, §§ 262(b)(3), (d)(2) (2022). [↑](#footnote-ref-264)
245. *Id*. (h). For the appraisal right regime in Delaware, *see* Wei Jiang et al., *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. Rev. 2133, 2140–42, 2144–47 (2020). For various reasons, they are considered weaker than fiduciary duty claims. *See* Restrepo, *Evidence from the Effect of MFW*, *supra* note 163, at 361 n.4; Subramanian, *Fixing Freezeouts*, *supra* note 22, at 30, 53, 59–61. [↑](#footnote-ref-265)
246. Gonsalves v. Straight Arrow Publishers, 701 A.2d 357, 361 (Del. 1997). [↑](#footnote-ref-266)
247. For a recent case where damages were awarded for breach of fiduciary duty because of a price determination that far exceeded a prior appraisal for that same transaction, *see* *In re* Columbia Pipeline Grp. Merger Litig., Cons. C.A. No. 2018-0484-JTL, 2021 WL 772562, \*44 (Del. Ch. Mar. 1, 2021) (stating that an appraisal action merely determined the company’s stand-alone value operating as a going concern). [↑](#footnote-ref-267)
248. Del. Code Ann., tit. 8, § 262(h) (2022) (“[T]he fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation.”). [↑](#footnote-ref-268)
249. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 133 (Del. 2019) (citation omitted) (emphasis added). For a while, the judiciary was not entirely consistent in its application of the synergy carveout. *See*, *e.g.*, Subramanian, *Fixing Freezeouts*, *supra* note 22, at 43–44. In short-form mergers, absent fraud or illegality, no fiduciary duty claim can be made against the controllers. *See infra* note 216. [↑](#footnote-ref-269)
250. *See* Part II.A.3.c). [↑](#footnote-ref-270)
251. *See generally* Katharina Pistor & Chenggang Xu, *Fiduciary Duty in Transitional Civil Law Jurisdictions – Lessons from the Incomplete Law Theory*, *in* Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals ch. 3 (Curtis Milhaupt ed., 2002). [↑](#footnote-ref-271)
252. *See* Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. Rev. 1039, 1044 (2011). *See also* Pistor & Xu, *supra* note 250, at 86 (“[T]he principle of fiduciary is a highly incomplete legal principle.”). [↑](#footnote-ref-272)
253. *See* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & Econ. 425, 427 (1993) (“[A] ‘fiduciary’ relation is a contractual one characterized by unusually high costs of specification and monitoring.”); Sitkoff, *supra* note 251, at 1044 (with respect to an incomplete contract). [↑](#footnote-ref-273)
254. This might be a reason for the long germination period for a cash freezeout to become permissible in the United States. *See supra* Part IV.A. Similarly, this may be a reason why cash freezeouts are still quite restricted in EU jurisdictions. *See supra* Part III.A.2. [↑](#footnote-ref-274)
255. *See* Sitkoff, *supra* note 251, at 1043. [↑](#footnote-ref-275)
256. *See* Brudney, *supra* note 186, at 613–14 (“The test of fairness permits the fiduciary to obtain some or all of the gain from self-dealing for itself, the restrictions on self-aggrandizement arc not simply looser than required by traditional fiduciary notions, but they tend to become invisible.”). *See also id.* at 618–19. A disgorgement remedy under duty of loyalty may require all surpluses from the self-dealing to go to the principal. *See* Sitkoff, *supra* note 251, at 1049. [↑](#footnote-ref-276)
257. Paul B. Miller, *Equity, Majoritarian Governance, and The Oppression Remedy*, *in* Fiduciary Obligations in Business 166, at 179 (Arthur B. Laby & Jacob Hale Russell, eds., 2021). *See also infra* text accompanying notes 254–258. Entire fairness belongs to the concept of duty of loyalty. *See, e.g.*, *Leal v. Meeks* 115 A.3d 1173, 1179–81 (Del. 2015) (suggesting that a violation of entire fairness standard is not exculpated since it is a violation of duty of loyalty). [↑](#footnote-ref-277)
258. *See* *supra* Part IV.A. [↑](#footnote-ref-278)
259. Sitkoff, *supra* note 251, at 1044 (describing these as attributes of standards as opposed to rules). [↑](#footnote-ref-279)
260. Easterbrook & Fischel, *Corporate Control Transactions*, *supra* note 13, at 702. [↑](#footnote-ref-280)
261. *See* Watanabe *supra* note 13, at 87 (discussing M&A related adjudication costs relative to deal values). [↑](#footnote-ref-281)
262. Sitkoff, *supra* note 251, at 1043. “[T]he fiduciary obligation in trust law is generally stricter than the fiduciary obligation in corporate law.” *Id.* at 1045. [↑](#footnote-ref-282)
263. The procedural requirements relate to conduct before the consummation of the relevant transaction. *See* Alessio M. Pacces, Rethinking Corporate Governance 183 (2012). However, judicial reviews are in most instances ex post. For example, in the United States, including Delaware, courts do not entertain lawsuits unless disputes are ripe. *See*, *e.g.*, Watanabe, *supra* note 13, at 63, 92 n.252. [↑](#footnote-ref-283)
264. *See* Subramanian & Zhao, *supra* note 136, at 1276 (“In view of the malleable nature of DCF, some have argued that the deal price should be given greater presumptive weight—that is, in choosing between a price that results from an imperfect deal process and a price that results from an imperfect valuation method, courts should rely more on the former.”). *Cf.* Rock, *Majority of the Minority Approval*, *supra* note 85, at 133–34 (arguing that judicial review of substance, such as fair value, is unavoidable in the context of questioning *MFW*). [↑](#footnote-ref-284)
265. *See* Subramanian, *Fixing Freezeouts*, *supra* note 22, at 47–48. [↑](#footnote-ref-285)
266. The foregoing discussion is generally consistent with the approach Zohar Goshen and Sharon Hannes suggested. *See* Zohar Goshen & Sharon Hannes, *Death of Corporate Law*, 914 N.Y.U. L. Rev. 262, 292–302 (2019) [hereinafter Goshen & Hannes, *Death of Corporate Law*] (presenting “a theory to explain when a principal and an agent might prefer to use a court for dispute resolution, and when they might, alternatively, prefer to use discretionary control rights.”). [↑](#footnote-ref-286)
267. With respect to a choice between property rule and liability rule, *see generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Richard Craswell, *Property Rules and Liability Rules*, 60 Univ. Chi. L. Rev. 1 (1993); Daphna Lewinsohn-Zamira, *The Choice Between Property Rules and Liability Rules Revisited: Critical Observations from Behavioral Studies*, 80 Tex. L. Rev. 219, 2919 (2001) (“Calabresi and Melamed offered a simple, elegant criterion for choosing between property rules and liability rules—namely, transaction costs.”). [↑](#footnote-ref-287)
268. Depending on their exceptions and actual operations, property rule and liability rule may become much closer in practice. *See generally* Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88. Ford. L. Rev. 939 (2019). [↑](#footnote-ref-288)
269. *See supra* text accompanying notes 171–173. [↑](#footnote-ref-290)
270. To replace MBR, this paper presumes, among others, the existence of a regime like the Williams Act in the United States that regulates tender offers. Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d), n(d)–(f); 17 C.F.R. §§ 240.14d-1 to 14d-103. [↑](#footnote-ref-291)
271. Israel aimed to approximate its corporate law jurisprudence to that of Delaware. Israel is said to have had two aims: “[F]irst, to draw domestic entrepreneurs away from choosing Delaware over Israel as the locus of incorporation, and second, to increase the willingness of foreign investors—especially U.S. and global investors—to choose or accept Israeli corporate law as the governing law in cross-border M&A transactions involving Israeli target corporations.” Ido Baum & Dov Solomon, *Delaware’s Copycat: Can Delaware Corporate Law Be Emulated?*, 23 Theor. Inq. Law 1 (2022). [↑](#footnote-ref-293)
272. Therefore, for example, this paper does not suggest the transplant of *Unoca*l and *Revlon* lines of cases. The proposal, however, is more audacious than Marco Ventoruzzo’s proposal made before *MFW*. Ventoruzzo, *supra* note 17, at 915–16. [↑](#footnote-ref-294)
273. *See* Watanabe, *supra* note 13, at 87 (describing litigation costs in the United States, which may not be prohibitive but are substantial). [↑](#footnote-ref-295)
274. *See* articles cited by *id.* at 92 nn.244–246 suggesting that Delaware’s ex post judiciary policing creates uncertainty. *See also supra* note 258. [↑](#footnote-ref-296)
275. *See* Watanabe, *supra* note 13, at 100–03. *See also* Armour & Skeel, *supra* note 55, at 1732 (“[T]he United Kingdom’s system has *prima facie* advantages in terms of procedure-it seems at once quicker, cheaper, and more certain than a system that relies upon litigation.”); Varottil & Wan, *supra* note 57, at 134 (“The sophistication and speed of the judiciary, the manageability of costs, and the availability of appropriate incentives to shareholders and plaintiff law firms would determine the success (or failure) of the fiduciary duty approach [of treating controllers as fiduciaries].”). [↑](#footnote-ref-297)
276. *See* Johnson, *supra* note 76, at 436–41. [↑](#footnote-ref-298)
277. *See supra* Part III.A. [↑](#footnote-ref-299)
278. *See supra* Part III.A.3. [↑](#footnote-ref-300)
279. *See supra* Part III.C. [↑](#footnote-ref-301)
280. Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, *supra* note 13, at 582 (“In the typical case of a widely held public company, mismanagement dominates takings and the problem is labeled ‘management agency costs,’ while in the typical controlling shareholder case, takings dominate mismanagement and the problem is labeled ‘control agency costs.’”) (citation omitted). [↑](#footnote-ref-302)
281. *See supra* Part IV.C. [↑](#footnote-ref-303)
282. Of course, there are methods other than the extension of *MFW*. For alternatives, *see*, *e.g.*, Luca Enriques & Tobias H. Tröger, *The Law and (Some) Finance of Related Party Transactions*, *in* The Oxford Handbook of Corporate Law and Governance 1, 6 tbl.1.3 (Jeffrey N. Gordon & Wolf-George Ringe eds., 2018). [↑](#footnote-ref-304)
283. *See* Rock, *Majority of the Minority Approval*, *supra* note 85, at 110 (speculating that in Delaware, cases involving sales of control blocks are few “because Delaware apparently does a good job at controlling self-dealing by controlling shareholders.”). *See also* Schuster, *supra* note 55, at 534 n.31 (“[T]he German ‘*Konzernrecht*’, the body of law dealing with intra-group transactions and governance, for a long time had been regarded as a potential alternative to the MBR.”). [↑](#footnote-ref-305)
284. Del. Ch. Ct. R. 65. [↑](#footnote-ref-306)
285. Declaratory judgment and permanent injunction are other examples. *See* Watanabe, *supra* note 13, at 76 n.135. [↑](#footnote-ref-307)
286. *See supra* quoted text accompanying note 221. [↑](#footnote-ref-308)
287. For an economic rationale, *see supra* text accompanying note 34 and Part IV.A.2. *S*e*e also* Watanabe, *supra* note 13, at 78–81. [↑](#footnote-ref-309)
288. Firefighters’ Pension Sys. of Kan. City v. Presidio, Inc., 251 A.3d 212, 251 (Del. Ch. 2021). [↑](#footnote-ref-310)
289. *See* Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 Del. J. Corp. L. 499, 500 n.4 (2002) (stating that preliminary injunction cases relating to takeovers are judged under extreme pressure and require judges to “procure *real-world knowledge”* of such transactions before they take upon such cases) (emphasis added). [↑](#footnote-ref-311)
290. *See* Ronald J. Gilson, *The Fine Art of Judging: William T. Allen*, 22 Del. J. Corp. L. 914, 916 (1997). *See generally,* Watanabe, *supra* note 13, at 80–81. [↑](#footnote-ref-312)
291. “Designing remedies for the breach of trusts has been a challenge for lawyers not practicing in common law jurisdictions.” Masayuki Tamaruya, *Japanese Law and Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229, 2250 (2018). Unlike Delaware, civil law prevails in most EU jurisdictions, and globally, there are many more civil law jurisdictions than common law jurisdictions. *See* Central Intelligence Agency, The World Factbook-Legal Systems, https://www.cia.gov/the-world-factbook/field/legal-system/ (last visited Oct. 31, 2022) (stating that civil law is “[t]he most widespread type of legal system in the world”). [↑](#footnote-ref-313)
292. *See* *supra* text accompanying note 82. However, a lack of harmonization has contributed to the sparing use of appraisals. *See* Alexandros L. Seretakis, *Appraisal Rights in the US and the EU*, in Cross-Border Mergers — EU Perspectives and National Experiences, Studies in European Economic Law and Regulation, vol. 17, 65, 77 (2019). [↑](#footnote-ref-314)
293. Akin Gump Strauss Hauer & Feld LLP., Capitalizing on Merger Arbitrage Investment Opportunities in Asia Pacific Markets 5 (2020), https://www.akingump.com/a/web/jmJoFmptC5MHV2fqG9oXJC/capitalizing-on-merger-arbitrage-investment-5.pdf. [↑](#footnote-ref-315)
294. This type of substantive review differs from one that broadly reviews whether related party transactions should have been entered into and is less susceptible to hindsight bias. *See also* Rock, *Majority of the Minority Approval*, *supra* note 85, at 133–35. However, there are scholars in non-US jurisdictions who object to substantive judicial review of related party transactions. *See* *id*. at 133 n86 (making references to the papers in the same book by Alessio M. Pacces and Amir N. Licht cited respectively in *supra* note 6 and *infra* note 325). [↑](#footnote-ref-316)
295. *See supra* quoted text accompanying note 82. *See also,* Krebs, *supra* note 79, at 967 (with respect to a general squeeze-out in Germany), at 971–72 (with respect to a takeover squeeze-out in Germany); Raluca Papadima et al., *Shareholder Exit Signs on American and European Highways: Under Construction*, 18 U. Penn. J. Bus. L. 1059, 1127 (2016) (describing court involvements in selecting appraisal experts in France and Romania). [↑](#footnote-ref-317)
296. *See* Rock, *Majority of the Minority Approval supra* note 85, at 133 (“[C]ourts cannot *avoid* some version of the substantive ‘entire fairness’ standard.”). [↑](#footnote-ref-318)
297. *See supra* note 3. [↑](#footnote-ref-319)
298. *See* Watanabe *supra* note 13, at 83 n.172 (“In European jurisdictions, ‘opt-in’ class actions seem to predominate.”). [↑](#footnote-ref-320)
299. *See, e.g.,* AIG White Paper, Rise of the European Class Action?, https://www.aig.co.uk/content/dam/aig/emea/united-kingdom/documents/Insights/aig-claims-class-action-white-paper-final.pdf. [↑](#footnote-ref-321)
300. In Delaware, a similar reduction happened for different reasons. *See supra* Part IV.D. [↑](#footnote-ref-322)
301. *See supra* note text accompanying note 245. [↑](#footnote-ref-323)
302. Henry Hansmann & Reinier H. Kraakman, *End of History for Corporate Law*, 89 Geo. L.J. 539, 459 (2000). [↑](#footnote-ref-324)
303. Easterbrook & Fischel, *Corporate Control Transactions*, *supra* note 13, at 702 (describing fiduciary rules as “off-the-rack rules”). [↑](#footnote-ref-325)
304. *See* Rock, *Majority of the Minority Approval*, *supra* note 85, at 132 (pointing out various interpretive issues). [↑](#footnote-ref-326)
305. For examples of cases where the judiciary rejected purported compliance with *MFW* Requirements, *see supra* note 189. [↑](#footnote-ref-327)
306. This less “facts and circumstances” jurisprudence lessens the role of strong discovery. As stated, strong discovery is a uniquely American institution. *See* Érica Gorga & Michael Halberstam, *Litigation Discovery and Corporate Governance: The Missing Story About the “Genius of American Corporate Law,”* 63 Emory L.J. 1384, at 1389–90 (2014). [↑](#footnote-ref-328)
307. *See* Goshen & Hannes, *Death of Corporate Law,* *supra* note 265, at 265 (“[C]orporate law jurisprudence originating from the Delaware courts is no longer active as a substantive regulatory influence.”). [↑](#footnote-ref-329)
308. This might deal a blow to corporate law scholars. *See* Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 245 n.37 (1962) (“[C]orporation law as a field of intellectual effort is dead in the United States. When American law ceased to take the ‘corporation’ seriously the entire body of law that had been built upon that intellectual construct slowly perforated and rotted away. We have nothing left but our great empty corporation statutes-towering skyscrapers of rusted girders, internally welded together and containing nothing but wind.”); Goshen & Hannes, *Death of Corporate Law,* *supra* note 265, at 265 (“The transformation of American equity markets from retail to institutional ownership has relocated control over corporations from courts to markets and has led to the death of corporate law.”) (footnote omitted). [↑](#footnote-ref-330)
309. *See supra* text accompanying notes 170–172. [↑](#footnote-ref-331)
310. Bebchuk & Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. Penn. L. Rev. 1271, 1282 (2017) (stating that “countries [other than the United States] are also increasingly viewing independent directors as essential to protecting public investors at controller companies.”); OECD Corporate Governance Fact Book 2021 14 (“Despite differences in board structures, nearly all jurisdictions (92%) require or recommend a minimum number or ratio of independent directors. The recommendation for boards to be composed of at least 50% of independent directors is the most prevalent voluntary standard, while two to three board members (or at least 30% of the board) are more commonly subjected to legal requirements for independence.”), https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf. Of course, the level of independence of independent directors may significantly differ depending on the jurisdictions. Lucian Bebchuk and Assaf Hamdani proposed measures to enhance independence of independent directors. *See* Bebchuk & Hamdani, *supra* note 309, at 1293–1304. Alessio Pacces proposed a permanent group of directors elected by minority shareholders. However, their role is limited to the review of related party transactions. *See* Pacces, *The Procedural and Substantive Review of Related Party Transactions*, *supra* note 6, 209–12. [↑](#footnote-ref-332)
311. “[I]nstitutional investors is the largest category of investors globally holding 41% of public equity. This overall dominance is largely due to their significant presence in advanced markets, notably the United States.” OECD, Owners of the World’s Listed Companies 10 (2019), https://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf. For the percentages of institutional ownership in individual countries, *see id.* 12 fig. 2. [↑](#footnote-ref-333)
312. *See* Shareholder Directive II, *supra* note 109, art. 9c. Unlike the Directive, Belgium and Italy explicitly require “the involvement of independent directors in the decision-making process for related party transactions.” Giovanni Strampelli, *How to Enhance Directors’ Independence at Controlled Companies*, 44 J. Corp. L. 103, 112 (2018). [↑](#footnote-ref-334)
313. There is no shortage of articles stressing this point. *See*, *e.g.*, Goshen & Hamdani, *Corporate Control and Idiosyncratic Vision*, *supra* note 13, at 611 n.154 (“[S]pecialized courts would not only enhance minority protection, but also reduce the risk of excessive interference with controlling shareholders’ rights.”); Goshen, *Controlling Corporate Self-Dealing*, *supra* note 36, at 434 n.144 (“[T]hese particular chambers [the chambers for commercial affairs in Germany] specialize in cases involving corporate law and should develop a high level of proficiency over time.”); Maribel Sáez Lacave & María Gutiérrez Urtiaga, *Corporate Groups: Corporate Law, Private Contracting and Equal Ownership* 19–21 (Eur. Corp. Gov. Inst. Law Working Paper No. 581/20212021) (stating difficulties for inexperienced judges to make substantive judgments on related party transactions), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3826510. [↑](#footnote-ref-335)
314. Reprinted in Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 Del. J. Corp. L. 499 (2002). [↑](#footnote-ref-336)
315. *Id.* at 502. [↑](#footnote-ref-337)
316. *Id*. at 503 (footnote omitted). [↑](#footnote-ref-338)
317. *See In re* MFW S’holders Litig., 67 A.3d at 505–20. [↑](#footnote-ref-339)
318. *Id*. at 524–36. [↑](#footnote-ref-340)
319. *See* Strine, *supra* note 313, at 505. [↑](#footnote-ref-341)
320. Martin Gelter & Geneviève Hellerlinger, *Fiduciary Principles in European Civil Law Systems*, *in* The Oxford Handbook of Fiduciary Law 583, 584 (Evan J. Criddle et al. eds., 2019). [↑](#footnote-ref-342)
321. Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law*, 51 Am. J. Comp. L. 887, 895 (2003). [↑](#footnote-ref-343)
322. Gatti, *Upsetting Deals and Reform Loop, supra* note 6, at 69. [↑](#footnote-ref-344)
323. *See* Masayuki Tamaruya & Mutsuhiko Yukioka, *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*, 5 UC Irvine J. Int’l Transnat’l & Comp. L. 111 (2020). [↑](#footnote-ref-345)
324. See Watanabe, *supra* note 13, at 101–02 (“As a court of equity, the court is less constrained by precedents and the range of available remedies, and it resolves disputes based on the particular facts of the disputes brought before it.”). [↑](#footnote-ref-346)
325. *See*, *e.g.*, Stefano Civitarese, *A European Convergence Towards A Stare Decisis Model*,14 Revista Digital de Derecho Administrativo 173 (2015). [↑](#footnote-ref-347)
326. *See* Amir N. Licht, *Be Careful What You Wish For: How Progress Engendered Regression in Related Party Transaction in Israel*, in The Law and Finance of Related Party Transactions 452, 453 (Luca Enriques & Tobias H. Tröger eds., 2019) (stating that specialized courts “have mushroomed both within the United States and in countries around the world.”); World Bank, Doing Business Report 2019 1 (The common features shared by “top 10 economies in the ease of doing business ranking” include specialized business courts.”). [↑](#footnote-ref-348)
327. *See* Gilson & Schwartz, *Credible Commitment*, *supra* note 38, at 126 (“Specialized courts like the Delaware Chancery Court and the Commercial Division of the Queen’s Bench in the UK, as well as the courts of large commercial jurisdictions such as New York probably would perform well.”). [↑](#footnote-ref-349)
328. *Id*. For the evaluation of Israel’s adoption of Delaware’s ex post judicial policing approach, *see* Baum & Solomon, *supra* note 270. [↑](#footnote-ref-350)
329. *See supra* Part IV.F.2. [↑](#footnote-ref-351)