Università degli Studi di Siena
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Lezioni in materia di *Corporate governance*
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Programma e indicazione dei materiali di studio ***(da leggere prima della lezione)***

Martedì 9 marzo 2004

- I sistemi di amministrazione e controllo della s.p.a.
- Struttura dell'organo amministrativo e sistema delle deleghe
- Diligenza, informazione e *business judgement rule*
- Responsabilità per la gestione: presupposti ed azione

- V. CALANDRA BUONAURA, *I modelli di amministrazione e controllo nella riforma del diritto societario*, in *Giurisprudenza commerciale*, 2003, I, p. 535

- G. ROSSI, *Le c.d. regole di "corporate governance" sono in grado di incidere sul comportamento degli amministratori?*, in *Rivista delle società*, 2001, p. 6

- F.E. EASTERBROOK- D.R. FISCHEL, *The Economic Structure of Corporate Law*, tr. it *L'economia della società per azioni*, Milano, 1996, capitolo IV (responsabilità degli amministratori)

- Supreme Court of Delaware, *Smith v. Van Gorkom*, 488 A.2d 858 (1985)

- Corte di Cassazione, 6 marzo 1999, n. 1925, in *Giurisprudenza commerciale*, 2000, II, 167

Giovedì 25 marzo 2004

- I controlli sulla gestione: controlli interni ed esterni
- Tutela delle minoranze e poteri di controllo dei soci
- Abuso di maggioranza e principio di buona fede
- Governo societario e gruppi: la responsabilità da abuso di direzione e coordinamento

- C. ANGELICI, *Soci e minoranze nelle società non quotate*, in A.A.V.V., *La riforma delle società per azioni non quotate*, Milano, 2000, p. 16

- F. DENOZZA, *Analisi economica e diritto delle società per azioni*, in A.A.V.V., *Analisi economica del diritto privato*, Milano, 1998, p. 317

- Corte di Cassazione, 26 ottobre 1995, n. 11151, in *Giurisprudenza commerciale*, 1996, II, 329

- F. DENOZZA, *Rules vs. standards nella disciplina dei gruppi: l'inefficienza delle compensazioni "virtuali"*, in *Giur. comm.*, 2000, I, p. 327

- L. ENRIQUES, *Gruppi piramidali, operazioni intragruppo e tutela degli azionisti esterni: appunti per un'analisi economica*, in *Giur. comm.*, 1997, I, 698

- Corte di Cassazione, 5 dicembre 1998, n. 12325, in *Giur. it.*, 1999, I, 2318, con nota di P. MONTALENTI

Smith v Van Gorkom

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

Before HERRMANN, C.J., and McNEILY, HORSEY, MOORE and CHRISTIE, JJ., constituting the Court en banc.

HORSEY, Justice (for the majority):

This appeal from the Court of Chancery involves a class action brought by shareholders of the defendant Trans Union Corporation ("Trans Union" or "the Company"), originally seeking rescission of a cash-out merger of Trans Union into the defendant New T Company ("New T,'), a wholly-owned subsidiary of the defendant, Marmon Group, Inc. ("Marmon"). Alternate relief in the form of damages is sought against the defendant members of the Board of Directors of Trans Union, New T, and Jay A. Pritzker and Robert A. Pritaker, owners of Marmon.

Following trial, the former Chancellor granted judgment for the defendant directors by unreported letter opinion dated July 6, 1982. Judgment was based on two findings: (1) that the Board of Directors had acted in an informed manner so as to be entitled to protection of the business judgment rule in approving the cash-out merger; and (2) that the shareholder vote approving the merger should not be set aside because the stockholders had been "fairly informed" by the Board of Directors before voting thereon. The plaintiffs appeal.

Speaking for the majority of the Court, we conclude that both rulings of the Court of Chancery are clearly erroneous. Therefore, we reverse and direct that judgment be entered in favor of the plaintiffs and against the defendant directors for the fair value of the plaintiffs' stockholdings in Trans Union, in accordance with *Weinberger V. UOP, Inc.,* Del.Supr., 457 A.2d 701 (1983).

We hold: (1) that the Board's decision, reached September 20, 1980, to approve the proposed cash-out merger was not the product of an informed business judgment; (2) that the Board's subsequent efforts to amend the Merger Agreement and take other curative action were ineffectual, both legally and factually; and (3) that the Board did not deal with complete candor with the stockholders by failing to disclose all material facts, which they knew or should have known, before securing the stockholders' approval of the merger.

I.

The nature of this case requires a detailed factual statement. The following facts are essentially uncontradicted:

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Trans Union was a publicly-traded, diversified holding company, the principal earnings of which were generated by its railcar leasing business. During the period here involved, the Company had a cash flow of hundreds of millions of dollars annually. However, the Company had difficulty in generating sufficient taxable income to offset increasingly large investment tax credits (ITCs). Accelerated depreciation deductions had decreased available taxable income against which to offset accumulating ITCs. The Company took these deductions, despite their effect on usable ITCs, because the rental price in the railcar leasing market had already impounded the purported tax savings.

In the late 1970's, together with other capital-intensive firms, Trans Union lobbied in Congress to have ITCs refundable in cash to firms which could not fully utilize the credit. During the summer of 1980, defendant Jerome W. Van Gorkom, Trans Union's Chairman and Chief Executive Officer, testified and lobbied in Congress for refundability of ITCs and against further accelerated depreciation. By the end of August, Van Gorkom was convinced that Congress would neither accept the refundability concept nor curtail further accelerated depreciation.

Beginning in the late 1960s, and continuing through the 1970s, Trans Union pursued a program of acquiring small companies in order to increase available taxable income. In July 1980, Trans Union Management prepared the annual revision of the Company's Five Year Forecast. This report was presented to the Board of Directors at its July, 1980 meeting… The report projected an annual income growth of about 20%. The report also concluded that Trans Union would have about $195 million in spare cash between 1980 and 1985, "with the surplus growing rapidly from 1982 onward." The report referred to the ITC situation as a "nagging problem" and, given that problem, the leasing company "would still appear to be constrained to a tax breakeven." The report then listed four alternative uses of the projected 1982-1985 equity surplus: (1) stock repurchase; (2) dividend increases; (3) a major acquisition program; and (4) combinations of the above. The sale of Trans Union was not among the alternatives. The report emphasized that, despite the overall surplus, the operation of the Company would consume all available equity for the next several years, and concluded: "As a result, we have sufficient time to fully develop our course of action."

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On August 27, 1980, Van Gorkom met .with Senior Management of Trans Union. Van Gorkom reported on his lobbying efforts in Washington and his desire to find a solution to the tax credit problem more permanent than a continued program of acquisitions. Various alternatives were suggested and discussed preliminarily, including the sale of Trans Union to a company with a large amount of taxable income.

Donald Romans, Chief Financial Officer of Trans Union, stated that his department had done a "very brief bit of work on the possibility of a leveraged buy-out." This work had been prompted by a media article which Romans had seen regarding a leveraged buy-out by management. The work consisted of a "preliminary study" of the cash which could be generated by the Company if it participated in a leveraged buy-out. As Romans stated, this analysis "was very first and rough cut at seeing whether a cash flow would support what might be considered a high price for this type of transaction."

On September 5, at another Senior Management meeting which Van Gorkom attended, Romans again brought up the idea of a leveraged buy-out as a "possible strategic alternative" to the Company's acquisition program. Romans and Bruce S. Chelberg, President and Chief Operating Officer of Trans Union, had been working on the matter in preparation for the meeting. According to Romans: They did not "come up" with a price for the Company. They merely "ran the numbers" at $50 a share and at $60 a share with the "rough form" of their cash figures at the time. Their "figures indicated that $50 would be very easy to do but $60 would be very difficult to do under those figures." This work did not purport to establish a fair price for either the Company or 100% of the stock. It was intended to determine the cash flow needed to service the debt that would "probably" be incurred in a leveraged buy-out, based on "rough calculations" without "any benefit of experts to identify what the limits were to that, and so forth." These computations were not considered extensive and no conclusion was reached.

At this meeting, Van Gorkom stated that he would be willing to take $55 per share for his own 75,000 shares. He vetoed the suggestion of a leveraged buy-out by Management, however, as involving a potential conflict of interest for Management. Van Gorkom, a certified public accountant and lawyer, had been an officer of Trans Union for 24 years, its Chief Executive Officer for more than 17 years, and Chairman of its Board for 2 years. It is noteworthy in this connection that he was then approaching 65 years of age and mandatory retirement.

For several days following the September 5 meeting, Van Gorkom pondered the idea of a sale. He had participated in many acquisitions as a manager and director of Trans Union and as a director of other companies. He was familiar with acquisition procedures, valuation methods, and negotiations; and he privately considered the pros and cons of whether Trans Union should seek a privately or publicly-held purchaser.

Van Gorkom decided to meet with Jay A. Pritzker, a well-known corporate takeover specialist and a social acquaintance. However, rather than approaching Pritzker simply to determine his interest in acquiring Trans Union, Van Gorkom assembled a proposed per share price for sale of the Company and a financing structure by which to accomplish the sale. Van Gorkom did so without consulting either his Board or any members of Senior Management except one: Carl Peterson, Trans Union's Controller. Telling Peterson that he wanted no other person on his staff to know what he was doing, but without telling him why, Van Gorkom directed Peterson to calculate the feasibility of a leveraged buy-out at an assumed price per share of $55. Apart from the Company's historic stock market price, and Van Gorkom's long association with Trans Union, the record is devoid of any competent evidence that $55 represented the per share intrinsic value of the Company.

Having thus chosen the $55 figure, based solely on the availability of a leveraged buy-out, Van Gorkom multiplied the price per share by the number of shares outstanding to reach a total value of the Company of $690 million. Van Gorkom told Peterson to use this $690 million figure and to assume a $200 million equity contribution by the buyer. Based on these assumptions, Van Gorkom directed Peterson to determine whether the debt portion of the purchase price could be paid off in five years or less if financed by Trans Union's cash flow as projected in the Five Year Forecast, and by the sale of certain weaker divisions identified in a study done for Trans Union by the Boston Consulting Group ("BCG study"). Peterson reported that, of the purchase price, approximately $50-80 million would remain outstanding after five years. Van Gorkom was disappointed, but decided to meet with Pritzker nevertheless.

Van Gorkom arranged a meeting with Pritzker at the latter's home on Saturday, September 13, 1980. Van Gorkom prefaced his presentation by stating to Pritzker: "Now as far as you are concerned, I can, I think, show how you can pay a substantial premium over the present stock price and pay off most of the loan in the first five years. * * * If you could pay $55 for this Company, here is a way in which I think it can be financed."

Van Gorkom then reviewed with Pritzker his calculations based upon his proposed price of $55 per share. Although Pritzker mentioned $50 as a more attractive figure, no other price was mentioned. However, Van Gorkom stated that to be sure that $55 was the best price obtainable, Trans Union should be free to accept any better offer. Pritzker demurred, stating that his organization would serve as a "stalking horse" for an "auction contest" only if Trans Union would permit Pritzker to buy 1,750,000 shares of Trans Union stock at market price which Pritzker could then sell to any higher bidder. After further discussion on this point, Pritzker told Van Gorkom that he would give him a more definite reaction soon.

On Monday, September 15, Pritzker advised Van Gorkom that he was interested in the $55 cash-out merger proposal and requested more information on Trans Union. Van Gorkom agreed to meet privately with Pritzker, accompanied by Peterson, Chelberg, and Michael Carpenter, Trans Union's consultant from the Boston Consulting Group. The meetings took place on September 16 and 17. Van Gorkom was "astounded that events were moving with such amazing rapidity."

On Thursday, September 18, Van Gorkom met again with Pritzker. At that time, Van Gorkom knew that Pritzker intended to make a cash-out merger offer at Van Gorkom's proposed $55 per share. Pritzker instructed his attorney, a merger and acquisition specialist, to begin drafting merger documents. There was no further discussion of the $55 price. However, the number of shares of Trans Union's treasury stock to be offered to Pritzker was negotiated down to one million shares; the price was set at $38-75 cents above the per share price at the close of the market on September 19. At this point, Pritzker insisted that the Trans Union Board act on his merger proposal within the next three days, stating to Van Gorkom: "We have to have a decision by no later than Sunday [evening, September 21] before the opening of the English stock exchange on Monday morning." Pritzker's lawyer was then instructed to draft the merger documents, to be reviewed by Van Gorkom's lawyer, "sometimes with discussion and sometimes not, in the haste to get it finished."

On Friday, September 19, Van Gorkom, Chelberg, and Pritzker consulted with Trans Union's lead bank regarding the financing of Pritzker's purchase of Trans Union. The bank indicated that it could form a syndicate of banks that would finance the transaction. On the same day, Van Gorkom retained James Brennan, Esquire, to advise Trans Union on the legal aspects of the merger. Van Gorkom did not consult with William Browder, a Vice President and director of Trans Union and former head of its legal department, or with William Moore, then the head of Trans Union's legal staff.

On Friday, September 19, Van Gorkom called a special meeting of the Trans Union Board for noon the following day. He also called a meeting of the Company's Senior Management to convene at 11:00 a.m., prior to the meeting of the Board. No one, except Chelberg and Peterson, was told the purpose of the meetings. Van Gorkom did not invite Trans Union's investment banker, Salomon Brothers or its Chicago-based partner, to attend.

Of those present at the Senior Management meeting on September 20, only Chelberg and Peterson had prior knowledge of Pritzker's offer. Van Gorkom disclosed the offer and described its terms, but he furnished no copies of the proposed Merger Agreement. Romans announced that his department had done a second study which showed that, for a leveraged buy-out, the price range for Trans Union stock was between $55 and $65 per share. Van Gorkom neither saw the study nor asked Romans to make it available for the Board meeting.

Senior Management's reaction to the Pritzker proposal was completely negative. No member of Management, except Chelberg and Peterson, supported the proposal. Romans objected to the price as being too low; he was critical of the timing and suggested that consideration should be given to the adverse tax consequences of an all-cash deal for low-basis shareholders; and he took the position that the agreement to sell Pritzker one million newly-issued shares at market price would inhibit other offers, as would the prohibitions against soliciting bids and furnishing inside information to other bidders. Romans argued that the Pritzker proposal was a "lock up" and amounted to "an agreed merger as opposed to an offer." Nevertheless, Van Gorkom proceeded to the Board meeting as scheduled without further delay.

Ten directors served on the Trans Union Board, five inside (defendants Bonser, O'Boyle, Browder, Chelberg, and Van Gorkom) and five outside (defendants Wallis, Johnson, Lanterman, Morgan and Reneker). All directors were present at the meeting, except O'Boyle who was ill. Of the outside directors, four were corporate chief executive officers and one was the former Dean of the University of Chicago Business School. None was an investment banker or trained financial analyst. All members of the Board were well informed about the Company and its operations as a going concern. They were familiar with the current financial condition of the Company, as well as operating and earnings projections reported in the recent Five Year Forecast. The Board generally received regular and detailed reports and was kept abreast of the accumulated investment tax credit and accelerated depreciation problem.

Van Gorkom began the Special Meeting of the Board with a twenty-minute oral presentation. Copies of the proposed Merger Agreement were delivered too late for study before or during the meeting. He reviewed the Company's ITC and depreciation problems and the efforts theretofore made to solve them. He discussed his initial meeting with Pritzker and his motivation in arranging that meeting. Van Gorkom did not disclose to the Board, however, the methodology by which he alone had arrived at the $55 figure, or the fact that he first proposed the $55 price in his negotiations with Pritzker.

Van Gorkom outlined the terms of the Pritzker offer as follows: Pritzker would pay $55 in cash for all outstanding shares of Trans Union stock upon completion of which Trans Union would be merged into New T Company, a subsidiary wholly-owned by Pritzker and formed to implement the merger; for a period of 90 days, Trans Union could receive, but could not actively solicit, competing offers; the offer had to be acted on by the next evening, Sunday, September 21; Trans Union could only furnish to competing bidders published information, and not proprietary information; the offer was subject to Pritzker obtaining the necessary financing by October 10,1980; if the financing contingency were met or waived by Pritzker, Trans Union was required to sell to Pritzker one million newly-issued shares of Trans Union at $38 per share.

Van Gorkom took the position that putting Trans Union "up for auction" through a 90-day market test would validate a decision by the Board that $55 was a fair price. He told the Board that the "free market will have an opportunity to judge whether $55 is a fair price." Van Gorkom framed the decision before the Board not as whether $55 per share was the highest price that could be obtained, but as whether the $55 price was a fair price that the stockholders should be given the opportunity to accept or reject.

Attorney Brennan advised the members of the Board that they might be sued if they failed to accept the offer and that a fairness opinion was not required as a matter of law.

Romans attended the meeting as chief financial officer of the Company. He told the Board that he had not been involved in the negotiations with Pritzker and knew nothing about the merger proposal the morning of the meeting; that his studies did not indicate either a fair price for the stock or a valuation of the Company; that he did not see his role as directly addressing the fairness issue; and that he and his people "were trying to search for ways to justify a price in connection with such a [1everaged buy-out] transaction, rather than to say what the shares are worth." Romans testified:

I told the Board that the study ran the numbers at 50 and 60, and then the subsequent study at 55 and 65, and that was not the same thing as saying that I have a valuation of the company at X dollars. But it was a way-a first step towards reaching that conclusion.

Romans told the Board that, in his opinion, $55 was "in the range of a fair price," but "at the beginning of the range."

Chelberg, Trans Union's President, supported Van Gorkom's presentation and representations. He testified that he "participated to make sure that the Board members collectively were clear on the details of the agreement or offer from Pritzker;" that he "participated in the discussion with Mr. Brennan, inquiring of him about the necessity for valuation opinions in spite of the way in which this particular offer was couched;" and that he was otherwise actively involved in supporting the positions being taken by Van Gorkom before the Board about "the necessity to act immediately on this offer," and about "the adequacy of the $55 and the question of how that would be tested."

The Board meeting of September 20 lasted about two hours. Based solely upon Van Gorkom's oral presentation, Chelberg's supporting representations, Romans' oral statement, Brennan's legal advice, and their knowledge of the market history of the Company's stock, the directors approved the proposed Merger Agreement. However, the Board later claimed to have attached two conditions to its acceptance: (1) that Trans Union reserved the right to accept any better offer that was made during the market test period; and (2) that Trans Union could share its proprietary information with any other potential bidders. While the Board now claims to have reserved the right to accept any better offer received after the announcement of the Pritzker agreement (even though the minutes of the meeting do not reflect this), it is undisputed that the Board did not reserve the right to actively solicit alternate offers.

The Merger Agreement was executed by Van Gorkom during the evening of September 20 at a formal social event that he hosted for the opening of the Chicago Lyric Opera. Neither he nor any other director read the agreement prior to its signing and delivery to Pritzker.

On Monday, September 22, the Company issued a press release announcing that Trans Union had entered into a "definitive" Merger Agreement with an affiliate of the Marmon Group, Inc., a Pritzker holding company. Within 10 days of the public announcement, dissent among Senior Management over the merger had become widespread. Faced with threatened resignations of key officers, Van Gorkom met with Pritzker who agreed to several modifications of the Agreement. Pritzker was willing to do so provided that Van Gorkom could persuade the dissidents to remain on the Company payroll for at least six months after consummation of the merger.

Van Gorkom reconvened the Board on October 8 and secured the directors' approval of the proposed amendments-sight unseen. The Board also authorized the employment of Salomon Brothers, its investment banker, to solicit other offers for Trans Union during the proposed "market test" period.

The next day, October 9, Trans Union issued a press release announcing: (1) that Pritzker had obtained "the financing commitments necessary to consummate" the merger with Trans Union; (2) that Pritzker had acquired one million shares of Trans Union common stock at $38 per share; (3)

that Trans Union was now permitted to actively seek other offers and had retained Salomon Brothers for that purpose; and (4) that if a more favorable offer were not received before February 1, 1981, Trans Union's shareholders would thereafter meet to vote on the Pritzker proposal.

It was not until the following day, October 10, that the actual amendments to the Merger Agreement were prepared by Pritzker and delivered to Van Gorkom for execution. As will be seen, the amendments were considerably at variance with Van Gorkom's representations of the amendments to the Board on October 8; and the amendments placed serious constraints on Trans Union's ability to negotiate a better deal and withdraw from the Pritzker agreement. Nevertheless, Van Gorkom proceeded to execute what became the October 10 amendments to the Merger Agreement without conferring further with the Board members and apparently without comprehending the actual implications of the amendments.

Salomon Brothers' efforts over a three-month period from October 21 to January 21 produced only one serious suitor for Trans Union-General Electric Credit Corporation ("GE Credit"), a subsidiary of the General Electric Company. However, GE Credit was unwilling to make an offer for Trans Union unless Trans Union first rescinded its Merger Agreement with Pritzker. When Pritzker refused, GE Credit terminated further discussions with Trans Union in early January.

In the meantime, in early December, the investment firm of Kohlberg, Kravis, Roberts & Co. ("KKR"), the only other concern to make a firm offer for Trans Union, withdrew its offer under circumstances hereinafter detailed.

On December 19, this litigation was commenced and, within four weeks, the plaintiffs had deposed eight of the ten directors of Trans Union, including Van Gorkom, Chelberg and Romans, its Chief Financial Officer. On January 21, Management's Proxy Statement for the February 10 shareholder meeting was mailed to Trans Union's stockholders. On January 26, Trans Union's Board met and, after a lengthy meeting, voted to proceed with the Pritzker merger. The Board also approved for mailing, "on or about January 27," a Supplement to its Proxy Statement. The Supplement purportedly set forth all information relevant to the Pritzker Merger Agreement, which had not been divulged in the first Proxy Statement.

II.

We turn to the issue of the application of the business judgment rule to the September 20 meeting of the Board.

The Court of Chancery concluded from the evidence that the Board of Directors' approval of the Pritzker merger proposal fell within the protection of the business judgment rule. The Court found that the Board had given sufficient time and attention to the transaction, since the directors had considered the Pritzker proposal on three different occasions, on September 20, and on October 8,1980 and finally on January 26, 1981. On that basis, the Court reasoned that the Board had acquired, over the four-month period, sufficient information to reach an informed business judgment on the cash-out merger proposal. The Court ruled:

…that given the market value of Trans Union's stock, the business acumen of the members of the board of Trans Union, the substantial premium over market offered by the Pritzkers and the ultimate effect on the merger price provided by the prospect of other bids for the stock in question, that the board of directors of Trans Union did not act recklessly or improvidently in determining on a course of action which they believed to be in the best interest of the stockholders of Trans Union.

The Court of Chancery made but one finding; i.e., that the Board's conduct over the entire period from September 20 through January 26, 1981 was not reckless or improvident, but informed. This ultimate conclusion was premised upon three subordinate findings, one explicit and two implied. The Court's explicit finding was that Trans Union's Board was "free to turn down the Pritzker proposal" not only on September 20 but also on October 8, 1980 and on January 26, 1981. The Court's implied, subordinate findings were: (1) that no legally binding agreement was reached by the parties until January 26; and (2) that if a higher offer were to be forthcoming, the market test would have produced it, and Trans Union would have been contractually free to accept such higher offer. However, the Court offered no factual basis or legal support for any of these findings; and the record compels contrary conclusions.

This Court's standard of review of the findings of fact reached by the Trial Court following full evidentiary hearing is as stated in *Levitt v. Bouvier,* Del.Supr., 287 A.2d 671, 673 (1972):

[In an appeal of this nature] this court has the authority to review the entire record and to make its own findings of fact in a proper case. In exercising our power of review, we have the duty to review the sufficiency of the evidence and to test the propriety of the findings below. We do not, however, ignore the findings made by the trial judge. If they are sufficiently supported by the record and are the product of an orderly and logical deductive process, in the exercise of judicial restraint we accept them, even though independently we might have reached opposite conclusions. It is only when the findings below are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings of fact.

Applying that standard and governing principles of law to the record and the decision of the Trial Court, we conclude that the Court's ultimate finding that the Board's conduct was not "reckless or imprudent" is contrary to the record and not the product of a logical and deductive reasoning process.

The plaintiffs contend that the Court of Chancery erred as a matter of law by exonerating the defendant directors under the business judgment rule without first determining whether the rule's threshold condition of "due care and prudence" was satisfied. The plaintiffs assert that the Trial Court found the defendant directors to have reached an informed business judgment on the basis of "extraneous considerations and events that occurred after September 20, 1980." The defendants deny that the Trial Court committed legal error in relying upon post-September 20, 1980 events and the directors' later acquired knowledge. The defendants further submit that their decision to accept $55 per share was informed because: (1) they were "highly qualified;" (2) they were "well-informed;" and (3) they deliberated over the "proposal" not once but three times. On essentially this evidence and under our standard of review, the defendants assert that affirmance is required. We must disagree.

Under Delaware law, the business judgment rule is the offspring of the fundamental principle, codified in 8 *DelC.* S 141(a), that the business and affairs of a Delaware corporation are managed by or under its board of directors. [cites omitted] In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders. [cites omitted] The business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to Delaware directors. [cites omitted] The rule itself "is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." [cites omitted] Thus, the party attacking a board decision as uninformed must rebut the presumption that its business judgment was an informed one.

The determination of whether a business judgment is an informed one turns on whether the directors have informed themselves "prior to making a business decision, of all material information reasonably available to them." [cites omitted]

Under the business judgement rule there is no protection for directors who have made "an unintelligent or unadvised judgment." [cites omitted] A director's duty to inform himself in preparation for a decision derives from the fiduciary capacity in which he serves the corporation and its stockholders. [cites omitted] Since a director is vested with the responsibility for the management of the affairs of the corporation, he must execute that duty with the recognition that he acts on behalf of others. Such obligation does not tolerate faithlessness or self-dealing. But fulfillment of the fiduciary function requires more than the mere absence of bad faith or fraud. Representation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information of the type and under the circumstances present here. [cites omitted]

Thus, a director's duty to exercise an informed business judgment is in the nature of a duty of care, as distinguished from a duty of loyalty. Here, there were not allegations of fraud, bad faith, or self-dealing, or proof thereof. Hence, it is presumed that the directors reached their business judgment in good faith, [cites omitted] and considerations of motive are irrelevant to the issue before us.

The standard of care applicable to a director's duty of care has also been recently restated by this Court. In *Aronson, supra*, we stated:

While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence. (footnote omitted)

473 A.2d at 812.

We again confirm that view. We think the concept of gross negligence is also the proper standard for determining whether a business judgment reached by a board of directors was an informed one.

In the specific context of a proposed merger of domestic corporations, a director has a duty under 8 Del.C. S 251(b), [footnote omitted] along with his fellow directors, to act in an informed and deliberate manner in determining whether to approve an agreement of merger before submitting the proposal to the stockholders. Certainly in the merger context, a director may not abdicate that duty by leaving to the shareholders alone the decision to approved or disapprove the agreement. [cites omitted] Only an agreement of merger satisfying the requirements of 8 Del.C. S 251(b) may be submitted to the shareholders under S 251(c). [cites omitted]

It is against those standards that the conduct of the directors of Trans Union must be tested, as a matter of law and as a matter of fact, regarding the exercise of an informed business judgment in voting to approve the Pritzker merger proposal.

III.

The defendants argue that the determination of whether their decision to accept $55 per share for Trans Union represented an informed business judgment requires consideration, not only of that which they knew and learned on September 20, but also of that which they subsequently learned and did over the following four-month period before the shareholders met to vote on the proposal in February, 1981. The defendants thereby seek to reduce the significance of their action on September 20 and to widen the time frame for determining whether their decision to accept the Pritzker proposal was an informed one. Thus, the defendants contend that what the directors did and learned subsequent to September 20 and through January 26, 1981, was properly taken into account by the Trial Court in determining whether the Board's judgment as an informed one. We disagree with this *post hoc* approach.

The issue of whether the directors reached an informed decision to "sell" the Company on September 20, 1980 must be determined only upon the basis of the information then reasonably available to the directors and relevant to their decision to accept the Pritzker merger proposal. This is not to say that the directors were precluded from altering their original plan of action, had they done so in an informed manner. What we do say is that the question of whether the directors reached an informed business judgment in agreeing to sell the Company, pursuant to the terms of the September 20 Agreement presents, in reality, two questions: (A) whether the directors reached an informed business judgment on September 20, 1980; and (B) if they did not, whether the directors' actions taken subsequent to September 20 were adequate to cure any infirmity in their action taken on September 20. We first consider the directors' September 20 action terms of their reaching an informed business judgment.

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On the record before us, we must conclude that the Board of Directors did not reach an informed business judgment on September 20, 1980 in voting to "sell" the Company for $55 per share pursuant to the Pritzker cash-out merger proposal. Our reasons, in summary, are as follows:

The directors (1) did not adequately inform themselves as to Van Gorkom's role in forcing the "sale" of the Company and in establishing the per share purchase price; (2) were uninformed as to the intrinsic value of the Company; and (3) given these circumstances, at a minimum, were grossly negligent in approving the "sale" of the Company upon two hours' consideration, without prior notice, and without the exigency of a crisis or emergency.

As has been noted, the Board based its September 20 decision to approve the cash-out merger primarily on Van Gorkom's representations. None of the directors, other than Van Gorkom and Chelberg, had any prior knowledge that the purpose of the meeting was to propose a cash-out merger of Trans Union. No members of Senior Management were present, other than Chelberg, Roman.'s and Peterson; and the latter two had only learned of the proposed sale an hour earlier. Both general counsel Moore and former general counsel Browder attended the meeting, but were equally uninformed as to the purpose of the meeting and the documents to be acted upon.

Without any documents before them concerning the proposed transaction, the members of the Board were required to rely entirely upon Van Gorkum’s 20-minute oral presentation of the proposal. No written summary of the terms of the merger was presented; the directors were given no documentation to support the adequacy of $55 price per share for the sale of the Company; and the Board had before it nothing more than Van Gorkom’s statement of his understanding of the substance of any agreement which he admittedly had never read, not which any member of the Board had ever seen.

Under 8 Del.C. s 141(e), "directors are fully protected in relying in good faith on reports made by officers." [cites omitted] The term "report" has been liberally construed to include reports of informal personal investigations by corporate officers. [cites omitted] However,, there is no evidence that any "report", as defined under S 141(e), concerning the Pritzker proposal, was presented to the Board on September 20. Van Gorkom’s oral presentation of this understanding of the terms of the proposed Merger Agreement, which he had not seen, and Romans’ brief oral statement of his preliminary study regarding the feasibility of a leveraged buy-out of Trans Union do not quality as S 141(3) "reports" for these reasons: the former lacked substance because Van Gorkom was basically uninformed as to the essential provisions of the very document about which he was talking. Romans’ statement was irrelevant to the issues before the Board since it did nor purport to be a valuation study. At a minimum for a report to enjoy the status conferred by S 141(3), it must be pertinent to the subject matter upon which a board is called to act, and otherwise be entitled to good faith, not blind, reliance. Considering all of the surrounding circumstances--hastily calling the meeting without prior notice of its subject matter, the proposed sale of the Company without any prior consideration of the issue or necessity therefore, the urgent time constraints imposed by Pritzker, and the total absence of any documentation whatsoever--the directors were duty bound to make reasonable inquiry of Van Gorkom and Romans, and if they had done so, the inadequacy of that upon which they now claim to have relied would have been apparent.

The defendants rely on the following factors to sustain the Trial Court’s finding that the Board’s decision was an informed one: (1) the magnitude of the premium or spread between the $55 Pritzker offering price and Trans Union’s current market price of $38 per share; (2) the amendment of the Agreement as submitted on September 20 to permit the Board to accept any better offer during the "market test" period; (3) the collective experience and expertise of the Board’s "inside" and "outside" directors; [footnote omitted] and (4) their reliance on Brennan’s legal advice that the directors might be sued if they rejected the Pritzker proposal. We discuss each of these grounds *seriatim*:

(1)

A substantial premium may provide one reason to recommend a merger, but in the absence of other sound valuation information, the fact of a premium alone does not provide an adequate basis upon which to assess the fairness of an offering price. Here, the judgment reached as to the adequacy of the premium was based on a comparison between the historically depressed Trans Union market price and the amount of the Pritzker offer. Using market price as a basis for concluding that the premium adequately reflected the true value of the Company was a clearly faulty, indeed fallacious, premise, as the defendants’ own evidence demonstrates.

The record is clear that before September 20, Van Gorkom and other members of Trans Union’s board knew that the market had consistently undervalued the worth of Trans Union’s stock, despite steady increases in the Company’s operating income in the seven years preceding the merger. The Board related this occurrence in large part to Trans Union’s inability to use its ITCs as previously noted. Van Gorkom testified that he did not believe the market price accurately reflected Trans Union’s true worth; and several of the directors testified that, as a general rule, most chief executives think that the market undervalues their companies’ stock. Yet, on September 20, Trans Union’s Board apparently believed that the market stock price accurately reflected the value of the Company for the purpose of determining the adequacy of the premium for its sale.

In the Proxy Statement, however, the directors reversed their position. There, they stated that, although the earnings prospects for Trans Union were "excellent," they found no basis for believing that this would be reflected in future stock prices. With regard to past trading, the Board stated that the prices at which the Company's common stock had traded in recent years did not reflect the "inherent" value of the Company. But having referred to the "inherent" value of Trans Union, the directors ascribed no number to it. Moreover, nowhere did they disclose that they had no basis on which to fix "inherent" worth beyond an impressionistic reaction to the premium over market and an unsubstantiated belief that the value of the assets was "significantly greater" than book value. By their own admission they could not rely on the stock price as an accurate measure of value. Yet, also by their own admission, the Board members assumed that Trans Union's market price was adequate to serve as a basis upon which to assess the adequacy of the premium for purposes of the September 20 meeting.

The parties do not dispute that a publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price represents only the value of a single share. Nevertheless, on September 20, the Board assessed the adequacy of the premium over market, offered by Pritzker, solely by comparing it with Trans Union's current and historical stock price. (See supra note 5 at 866.)

Indeed, as of September 20, the Board had no other information on which to base a determination of the intrinsic value of Trans Union as a going concern. As of September 20, the Board had made no evaluation of the Company designed to value the entire enterprise, nor had the Board ever previously considered selling the Company or consenting to a buy-out merger. Thus, the adequacy of a premium is indeterminate unless it is assessed in terms of other competent and sound valuation information that reflects the value of the particular business.

Despite the foregoing facts and circumstances, there was no call by the Board, either on September 20 or thereafter, for any valuation study or documentation of the $55 price per share as a measure of the fair value of the Company in a cash-out context. It is undisputed that the major asset of Trans Union was its cash flow. Yet, at no time did the Board call for a valuation study taking into account that highly significant element of the Company's assets.

We do not imply that an outside valuation study is essential to support an informed business judgment; nor do we state that fairness opinions by independent investment bankers are required as a matter of law. Often insiders familiar with the business of a going concern are in a better position than are outsiders to gather relevant information; and under appropriate circumstances, such directors may be fully protected in relying in good faith upon the valuation reports of their management. *See* 8 *Del.C.* § 141(e). [cites omitted]

Here, the record establishes that the Board did not request its Chief Financial Officer, Romans, to make any valuation study or review of the proposal to determine the adequacy of $55 per share for sale of the Company. On the record before us: The Board rested on Romans' elicited response that the $55 figure was within a "fair price range" within the context of a leveraged buy-out. No director sought any further information from Romans. No director asked him why he put $55 at the bottom of his range. No director asked Romans for any details as to his study, the reason why it had been undertaken or its depth. No director asked to see the study; and no director asked Romans whether Trans Union's finance department could do a fairness study within the remaining 36- hour period available under the Pritzker offer.

Had the Board, or any member, made an inquiry of Romans, he presumably would have responded as he testified: that his calculations were rough and preliminary; and, that the study was not designed to determine the fair value of the Company, but rather to assess the feasibility of a leveraged buy-out financed by the Company's projected cash flow, making certain assumptions as to the purchaser's borrowing needs. Romans would have presumably also informed the Board of his view, and the widespread view of Senior Management, that the timing of the offer was wrong and the offer inadequate.

The record also establishes that the Board accepted without scrutiny Van Gorkom's representation as to the fairness of the $55 price per share for sale of the Company-a subject that the Board had never previously considered. The Board thereby failed to discover that Van Gorkom had suggested the $55 price to Pritzker and, most crucially, that Van Gorkom had arrived at the $55 figure based on calculations designed solely to determine the feasibility of a leveraged buy-out.19 No questions were raised either as to the tax implications of a cash-out merger or how the price for the one million share option granted Pritzker was calculated.

We do not say that the Board of Directors was not entitled to give some credence to Van Gorkom's representation that $55 was an adequate or fair price. Under §141(e), the directors were entitled to rely upon their chairman's opinion of value and adequacy, provided that such opinion was reached on a sound basis. Here, the issue is whether the directors informed themselves as to all information that was reasonably available to them. Had they done so, they would have learned of the source and derivation of the $55 price and could not reasonably have relied thereupon in good faith.

None of the directors, Management or outside, were investment bankers or financial analysts. Yet the Board did not consider recessing the meeting until a later hour that day (or requesting an extension of Pritzker's Sunday evening deadline) to give it time to elicit more information as to the sufficiency of the offer, either from inside Management (in particular Romans) or from Trans Union's own investment banker, Salomon Brothers, whose Chicago specialist in merger and acquisitions was known to the Board and familiar with Trans Union's affairs.

Thus, the record compels the conclusion that on September 20 the Board lacked valuation information adequate to reach an informed business judgment as to the fairness of $55 per share for sale of the Company.

(2)

This brings us to the post-September 20 "market test" upon which the defendants ultimately rely to confirm the reasonableness of their September 20 decision to accept the Pritzker proposal. In this connection, the directors present a two-part argument: (a) that by making a "market test" of Pritzker's $55 per share offer a condition of their September 20 decision to accept his offer, they cannot be found to have acted impulsively or in an uninformed manner on September 20; and (b) that the adequacy of the $17 premium for sale of the Company was conclusively established over the following 90 to 120 days by the most reliable evidence available--the marketplace. Thus, the defendants impliedly contend that the "market test" eliminated the need for the Board to perform any other form of fairness test either on September 20, or thereafter.

Again, the facts of record do not support the defendants' argument. There is no evidence: (a) that the Merger Agreement was effectively amended to give the Board freedom to put Trans Union up for auction sale to the highest bidder; or (b) that a public auction was in fact permitted to occur. The minutes of the Board meeting make no reference to any of this. Indeed, the record compels the conclusion that the directors had no rational basis for expecting that a market test was attainable, given the terms of the Agreement as executed during the evening of September 20. We rely upon the following facts which are essentially uncontradicted:

The Merger Agreement, specifically identified as that originally presented to the Board on September 20, has never been produced by the defendants, notwithstanding the plaintiffs' several demands for production before as well as during trial. No acceptable explanation of this failure to produce documents has been given to either the Trial Court or this Court. Significantly, neither the defendants nor their counsel have made the affirmative representation that this critical document has been produced. Thus, the Court is deprived of the best evidence on which to judge the merits of the defendants' position as to the care and attention which they gave to the terms of the Agreement on September 20.

Van Gorkom states that the Agreement as submitted incorporated the ingredients for a market test by authorizing Trans Union to receive competing offers over the next 90-day period. However, he concedes that the Agreement barred Trans Union from actively soliciting such offers and from furnishing to interested parties any information about the Company other than that already in the public domain. Whether the original Agreement of September 20 went so far as to authorize Trans Union to receive competitive proposals is arguable. The defendants' unexplained failure to produce and identify the original Merger Agreement permits the logical inference that the instrument would not support their assertions in this regard. [cites omitted] It is a well established principle that the production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse. [cites omitted] Van Gorkom, conceding that he never read the Agreement, stated that he was relying upon his understanding that, under corporate law, directors always have an inherent right, as well as a fiduciary duty, to accept a better offer notwithstanding an existing contractual commitment by the Board. (See the discussion infra, part III B(3) at p. 55.)

The defendant directors assert that they "insisted" upon including two amendments to the Agreement, thereby permitting a market test: (1) to give Trans Union the right to accept a better offer; and (2) to reserve to Trans Union the right to distribute proprietary information on the Company to alternative bidders. Yet, the defendants concede that they did not seek to amend the Agreement to permit Trans Union to solicit competing offers.

Several of Trans Union's outside directors resolutely maintained that the Agreement as submitted was approved on the understanding that, "if we got a better deal, we had a right to take it." Director Johnson so testified; but he then added, "And if they didn't put that in the agreement, then the management did not carry out the conclusion of the Board. And I just don't know whether they did or not." The only clause in the Agreement as finally executed to which the defendants can point as "keeping the door open" is the following underlined statement found in subparagraph (a) of section 2.03 of the Merger Agreement as executed:

The Board of Directors shall recommend to the stockholders of Trans Union that approve and adopt the Merger Agreement ('the stockholders' approval') and use its best efforts to obtain the requisite votes therefor. *GL acknowledges that Trans Union directors may .a competing fiduciary obligation to the shareholders under certain circumstances.*

Clearly, this language on its face cannot be construed as incorporating either of the two "conditions" described above: either the right to accept a better offer or the right to distribute proprietary information to third parties. The logical witness for the defendants to call to confirm their construction of this clause of the Agreement would have been Trans Union's outside attorney, James Brennan. The defendants' failure, without explanation, to call this witness again permits the logical inference that his testimony would not have been helpful to them. The further fact that the directors adjourned, rather than recessed, the meeting without incorporating in the Agreement these important "conditions" further weakens the defendants' position. As has been noted, nothing in the Board's Minutes supports these claims. No reference to either of the so-called "conditions" or of Trans Union's reserved right to test the market appears in any notes of the Board meeting or in the Board Resolution accepting the Pritzker offer or in the Minutes of the meeting itself. That evening, in the midst of a formal party which he hosted for the opening of the Chicago Lyric Opera, Van Gorkom executed the Merger Agreement without he or any other member of the Board having read the instruments.

The defendants attempt to downplay the significance of the prohibition against Trans Union's actively soliciting competing offers by arguing that the directors "understood that the entire financial community would know that Trans Union was for sale upon the announcement of the Pritzker offer, and anyone desiring to make a better offer was free to do so." Yet, the press release issued on September 22,,with the authorization of the Board, stated that Trans Union had entered into "definitive agreements" with the Pritzkers; and the press release did not even disclose Trans Union's limited right to receive and accept higher offers. Accompanying this press release was a further public announcement that Pritzker had been granted an option to purchase at any time one million shares of Trans Union's capital stock at 75 cents above the then-current price per share.

Thus, notwithstanding what several of the outside directors later claimed to have "thought" occurred at the meeting, the record compels the conclusion that Trans Union's Board had no rational basis to conclude on September 20 or in the days immediately following, that the Board's acceptance of Pritzker's offer was conditioned on (1) a "market test" of the offer; and (2) the Board's right to withdraw from the Pritzker Agreement and accept any higher offer received before the shareholder meeting.

(3)

The directors' unfounded reliance on both the premium and the market test as the basis for accepting the Pritzker proposal undermines the defendants' remaining contention that the Board's collective experience and sophistication was a sufficient basis for finding that it reached its September 20 decision with informed, reasonable deliberations. Compare Gimbel v. Signal Companies, Inc., Del. Ch., 316 A.2d 599 (1974), affd per curiam, Del. Supr., 316 A.2d 619 (1974). There, the Court of Chancery preliminary enjoined a board's sale of stock of its wholly-owned subsidiary for an alleged grossly inadequate price. It did so based on a finding that the business judgment rule had been pierced for failure of management to give its board "the opportunity to make a reasonable and reasoned decision." 316 A.2d at 615. The Court there reached this result notwithstanding the board's sophistication and experience; the company's need of immediate cash; and the board's need to act promptly due to the impact of an energy crisis on the value of the underlying assets being sold-all of its subsidiary's oil and gas interests. The Court found those factors denoting competence to be outweighed by evidence of gross negligence; that management in effect sprang the deal on the board by negotiating the asset sale without informing the board; that the buyer intended to "force a quick decision" by the board; that the board meeting was called on only one-and-a-half days' notice; that its outside directors were not notified of the meeting's purpose; that during a meeting spanning "a couple of hours" a sale of assets worth $480 million was approved; and that the Board failed to obtain a current appraisal of its oil and gas interests. The analogy of Signal to the case at bar is significant.

(4)

Part of the defense is based on a claim that the directors relied on legal advice rendered at the September 20 meeting by James Brennan, Esquire, who was present at Van Gorkom's request. Unfortunately, Brennan did not appear and testify at trial even though his firm participated in the defense of this action. There is no contemporaneous evidence of the advice given by Brennan on September 20, only the later deposition and trial testimony of certain directors as to their recollections or understanding of what was said at the meeting. Since counsel did not testify, and the advice attributed to Brennan is hearsay received by the Trial Court over the plaintiffs' objections, we consider it only in the context of the directors' present claims. In fairness to counsel, we make no findings that the advice attributed to him was in fact given. We focus solely on the efficacy of the defendants' claims, made months and years later, in an effort to extricate themselves from liability.

Several defendants testified that Brennan advised them that Delaware law did not require a fairness opinion or an outside valuation of the Company before the Board could act on the Pritzker proposal. If given, the advice was correct. However, that did not end the matter. Unless the directors had before them adequate information regarding the intrinsic value of the Company, upon which a proper exercise of business judgment could be made, mere advice of this type is meaningless; and, given this record of the defendants' failures, it constitutes no defense here.

We conclude that Trans Union's Board was grossly negligent in that it failed to act with informed reasonable deliberation in agreeing to the Pritzker merger proposal on September 20; and we further conclude that the Trial Court erred as a matter of law in failing to address that question before determining whether the directors' later conduct was sufficient to cure its initial error.

A second claim is that counsel advised the Board it would be subject to lawsuits if it rejected the $55 per share offer. It is, of course, a fact of corporate life that today when faced with difficult or sensitive issues, directors often are subject to suit, irrespective of the decisions they make. However, counsel's mere acknowledgement of this circumstance cannot be rationally translated into a justification for a board permitting itself to be stampeded into a patently unadvised act. While suit might result from the rejection of a merger or tender offer, Delaware law makes clear that a board acting within the ambit of the business judgment rule faces no ultimate liability. Thus, we cannot conclude that the mere threat of litigation, acknowledged by counsel, constitutes either legal advice or any valid basis upon which to pursue an uninformed course.

Since we conclude that Brennan's purported advice is of no consequence to the defense of this case, it is unnecessary for us to invoke the adverse inferences which may be attributable to one failing to appear at trial and testify.

[remainder of opinion, and dissents, omitted]

ENDNOTES

The plaintiff, Alden Smith, originally sought to enjoin the merger; but, following extensive discovery, the Trial Court denied the plaintiff's motion for preliminary injunction by unreported letter opinion dated February 3, 1981. On February 10, 1981, the proposed merger was approved by Trans Union's stockholders at a special meeting and the merger became effective on that date. Thereafter, John W. Gosselin was permitted to intervene as an additional plaintiff; and Smith and Gosselin were certified as representing a class consisting of all persons, other than defendants, who held shares of Trans Union common stock on all relevant dates. At the time of the merger, Smith owned 54,000 shares of Trans Union stock, Gosselin owned 23,600 shares, and members of Gosselin's family owned 20,000 shares.

Following trial, and before decision by the Trial Court, the parties stipulated to the dismissal, with prejudice, of the Messrs. Pritzker as parties defendant. However, all references to defendants hereinafter are to the defendant directors of Trans Union, unless otherwise noted.

It has been stipulated that plaintiffs sue on behalf of a class consisting of 10,537 shareholders (out of a total of 12,844) and that the class owned 12,734,404 out of 13,357,758 shares of Trans Union outstanding.

More detailed statements of facts, consistent with this factual outline, appear in related portions of this Opinion.

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The common stock of Trans Union was traded on the New York Stock Exchange. Over the five year period from 1975 through 1979, Trans Union's stock had traded within a range of a high of $39 _ and a low of $24 _. Its high and low range for 1980 through September 19 (the last trading day before announcement of the merger) was $38 _-$29 _.

Van Gorkom asked Romans to express his opinion as to the $55 price. Romans stated that he "thought the price was too low in relation to what he could derive for the company in a cash sale, particularly one which enabled us to realize the values of certain subsidiaries and independent entities."

The record is not clear as to the terms of the Merger Agreement. The Agreement. as originally presented to the Board on September 20, was never produced by defendants despite demands by the plaintiffs. Nor is it clear that the directors were given an opportunity to study the Merger Agreement before voting on it. All that can be said is that Brennan had the Agreement before him during the meeting.

In Van Gorkom's words: The "real decision" is whether to "let the stockholders decide it" which is "all you are being asked to decide today."

The Trial Court stated the premium relationship of the $55 price to the market history of the Company's stock as follows: *** the merger price offered to the stockholders of Trans Union represented a premium of 62% over the average of the high and low prices at which Trans Union stock had traded in 1980, a premium of 48% over the last closing price, and a premium of 39% over the highest price at which the stock of Trans Union had traded any time during the prior six years.

We refer to the underlined portion of the Court's ultimate conclusion (previously stated): "that given the market value of Trans Union's stock, the business acumen of the members of the board of Trans Union, the substantial premium over market offered by the Pritzkers and the ultimate effect on the merger price provided by the prospect of other bids for the stock in question, that the board of directors of Trans Union did not act recklessly or improvidently..."

8.DelC. S 141 provides, in pertinent part: (a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

Compare Mitchell v. Highland-Western Glass, supra, where the Court posed the question as whether the board acted "so far without information that they can be said to have passed an unintelligent and unadvised judgment. 167 A. at 833. Compare also Gimbel v. Signal Companies, Inc., 316 A.2d 599, aff'd per curiam Del. Supr., 316 A.2d 619 (1974), where the Chancellor, after expressly reiterating the Highland-Western Glass standard, framed the questions, "Or to put the question in its legal context, did the Signal directors act without the bounds of reason and recklessly in approving the price offer of Burman?" Id.

Section 141(e) provides in pertinent part:

A member of the board of directors…shall, in the performance of his duties, be fully protected in relying in good faith upon the books of accounts or reports made to the corporation by any of its officers, or by an independent certified public accountant, or by an appraiser selected with reasonable care by the board of directors…or in relying in good faith upon other records of the corporation.

In support of the defendant's argument that their judgment as to the adequacy of the $55 per share was an informed one, the directors rely on the BCG study and the Five Year Forecast. However, no one even referred to either of these studies at the September 20 meeting; and it is conceded that these materials do not represent valuation studies. Hence, these documents do not constitute evidence as to whether the directors reached an informed judgement on September 20 that $55 per share was a fair value for sale of the Company.

Romans' department study was not made available to the Board until circulation of Trans Union's Supplementary Proxy Statement and the Board's meeting of January 26, 1981, on the eve of the shareholder meeting-; and, as has ',been noted, the study has never been produced for inclusion in the record in this case.

Trans Union's five "inside" directors had backgrounds in law and accounting, 116 years of collective employment by the Company and 68 years of combined experience on its Board. Trans Union's five "outside" directors included four chief executives of major corporations and an economist who was a former dean of a major school of business and chancellor of a university. The "outside" directors had 78 years of combined experience as chief executive officers of major corporations and 50 years of cumulative experience as directors of Trans Union. Thus, defendants argue that the Board was eminently qualified to reach an informed judgment on the proposed "sale" of Trans Union notwithstanding their lack of any advance notice of the proposal, the shortness of their deliberation, and their determination not to consult with their investment banker or to obtain a fairness opinion.