RECENT CASES

CORPORATE LAW — MERGERS AND ACQUISITIONS — DELAWARE COURT OF CHANCERY IMPOSES *REVLON* DUTIES ON BOARD OF DIRECTORS IN MIXED CASH-STOCK STRATEGIC MERGER. — *In re Smurfit-Stone Container Corp. Shareholder Litigation*, No. 6164-VCP, 2011 WL 2028076 (Del. Ch. May 24, 2011).

In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[1] the Delaware Supreme Court held that, when a Delaware corporation sells itself for cash, its directors are transformed "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders."[2] Practically, *Revlon* means that any sale for cash will be closely scrutinized to ensure that no "considerations other than the maximization of shareholder profit" influenced the board of directors' decision to approve the transaction.[3] Under *Revlon*, a court examines both the price of the deal and the process used to reach that deal.[4] In contrast, the vast majority of other business decisions — including some sales of a company for stock — are subject to the highly deferential business judgment rule,[5] which shields a board's decisions from judicial scrutiny unless "a majority of the board suffers from a disabling interest or lack of independence" or the board is dominated by one or more directors with a "material and disabling interest."[6]

Recently, in *In re Smurfit-Stone Container Corp. Shareholder Litigation*,[7] the Delaware Court of Chancery applied *Revlon* to a merger in which the negotiated consideration was split equally between cash and stock of an acquiror without a controlling shareholder. Vice Chancellor Parsons held that, even though half of the merger consideration was to be paid in widely held acquiror stock, *Revlon* applied because the transaction "constitute[d] an end-game for all or a substantial part of a stockholder's investment in a Delaware corporation."[8] While the court ultimately found that the target board met its duties even

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[1] 506 A.2d 173 (Del. 1986).

[2] *Id.* at 182.

[3] *Id.* at 185.

[4] *See, e.g.*, *In re* Answers Corp. S'holders Litig., No. 6170-VCN, 2011 WL 1366780, at *3 (Del. Ch. Apr. 11, 2011).

[5] *E.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150–51 (Del. 1989) (declining to apply *Revlon* to a stock-for-stock transaction when the acquiror lacked a controlling shareholder); *cf.* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42–43 (Del. 1994) (applying *Revlon* to a stock-for-stock transaction when the acquiror was controlled by a single shareholder).

[6] *In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 363 (Del. Ch. 2008); *see also* Orman v. Cullman, 794 A.2d 5, 19–20 (Del. Ch. 2002) (reviewing the origins and application of the business judgment rule).

[7] No. 6164-VCP, 2011 WL 2028076 (Del. Ch. May 24, 2011).

[8] *Id.* at *14.

under *Revlon*, the decision to extend *Revlon* was premised on the tenuous conclusion that a hybrid cash-stock deal meant there would be "no tomorrow" for target shareholders.[9] By applying *Revlon* to transactions in which half the consideration is paid in widely held stock of the acquiror, *Smurfit-Stone* has the potential to make target boards more reluctant to engage in mixed-consideration strategic mergers, for fear that agreeing to such deals will ultimately force a board to accept a subsequent, facially higher offer from an unfriendly buyer. The decision also places Delaware courts in a position to make judgments about the intrinsic value of mixed-consideration mergers, judgments that boards — not courts — are better equipped to make.

On January 23, 2011, less than seven months after Smurfit-Stone Container Corporation emerged from bankruptcy protection, the company entered into a merger agreement with Rock-Tenn Company.[10] The Smurfit-Stone board unanimously approved the deal, worth a total of $35 per share, after having rejected Rock-Tenn's two prior offers of $30.80 per share and $32 per share, each split equally between cash and Rock-Tenn stock.[11] Under the terms of the final agreement, Rock-Tenn would continue as the surviving corporation, and each Smurfit-Stone shareholder would receive, for each share held at closing, both $17.50 in cash and 0.30605 shares of Rock-Tenn stock — worth $17.50 at the time the deal was announced.[12] Based on the exchange ratio, legacy Smurfit-Stone shareholders would own approximately 45% of Rock-Tenn after the transaction.[13] The Smurfit-Stone board did not conduct a formal "market check" before agreeing to the merger,[14] but it did receive, consider, and reject an all-cash $29 per share offer from a "prominent private equity firm" in September 2010.[15]

Soon after the merger announcement, John M. Marks, a Smurfit-Stone shareholder, filed a class action suit in the Delaware Court of Chancery against Rock-Tenn, Smurfit-Stone, and all ten members of Smurfit-Stone's board of directors.[16] Alleging breach of fiduciary duty, Marks claimed that the board "failed to take steps to maximize the value of Smurfit-Stone to its public shareholders,"[17] and sought to en-

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[9] *Id.* at *13 (stating that *Revlon* applies when "there is no tomorrow for the corporation's present stockholders, meaning that they will forever be shut out from future profits generated by the resulting entity").

[10] *Id.* at *1–2.

[11] *Id.* at *6–8.

[12] *Id.* at *9. By the time the court ruled in this case, the value of the stock portion of the consideration had risen to approximately $22.27. *See id.* at *11 n.80.

[13] *Id.* at *9.

[14] *Id.* at *18.

[15] *Id.* at *3; *see id.* at *3–5.

[16] *Id.* at *1, *9.

[17] Verified Amended Class Action Complaint at 32, *Smurfit-Stone*, 2011 WL 2028076 (No. 6164-VCP), 2011 WL 884320.

join the transaction.[18] Additional suits by other shareholder plaintiffs followed shortly thereafter, alleging substantially the same claims.[19] Vice Chancellor Parsons consolidated the pending Delaware actions related to the transaction and granted class certification, naming Marks as the lead plaintiff.[20]

Important to the resolution of the case was the question of whether *Revlon*'s heightened scrutiny or the less onerous business judgment rule applied. Plaintiffs argued that the Smurfit-Stone acquisition constituted a "change of control" for the company such that *Revlon* applied and obligated the board to pursue a "maximization of the company's value at a sale for the stockholders' benefit."[21] Plaintiffs further asserted that, because a "sizeable portion of the consideration" was to be paid in cash, the transaction represented "shareholders' last chance to maximize the value they will receive for their shares."[22] Defendants, meanwhile, countered that *Revlon* should not apply because Smurfit-Stone shareholders "will continue to be substantial equity investors in the business of the merged entity"[23] and because "control of the combined entity will remain diffused and fluid, with no person or entity having a disproportionate ownership interest."[24]

Vice Chancellor Parsons held that *Revlon* applied to the transaction, but he concluded that the Smurfit-Stone board faithfully discharged its fiduciary duties during negotiations with Rock-Tenn.[25] As the court noted,[26] *Revlon* applies in three scenarios:

> (1) "[W]hen a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company"; (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving

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[18] *Smurfit-Stone*, 2011 WL 2028076, at *1. Rock-Tenn was alleged to have aided and abetted Smurfit-Stone's breach of fiduciary duty. *See id.* at *10.

[19] *Id.* at *9. Other plaintiffs later filed suit in Delaware, *id.* at *1 n.1, as well as in Illinois, *id.* at *9 & n.73, where Smurfit-Stone is headquartered.

[20] On defendants' motion, Vice Chancellor Parsons conferred with Judge Novak in Illinois, and the two agreed the case would be heard in Delaware to avoid duplicative proceedings. *Id.* at *9.

[21] Plaintiffs' Opening Brief in Support of Their Motion for a Preliminary Injunction at 21, *Smurfit-Stone*, 2011 WL 2028076 (No. 6164-VCP), 2011 WL 1806890 [hereinafter Plaintiffs' Opening Brief] (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)) (internal quotation mark omitted).

[22] *Id.* at 23.

[23] Rock-Tenn Company's and Sam Acquisition, LLC's Answering Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction at 16, *Smurfit-Stone*, 2011 WL 2028076 (No. 6164-VCP), 2011 WL 1980476 [hereinafter Defendants' Answering Brief].

[24] *Id.* at 14.

[25] *Smurfit-Stone*, 2011 WL 2028076, at *16–24.

[26] *Id.* at *12 (citing *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995); Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994)).

the break-up of the company"; or (3) when approval of a transaction results in a "sale or change of control."[27]

As the first two scenarios were not implicated, the threshold question before the court in *Smurfit-Stone* was whether a half-cash, half-stock transaction constitutes a "change of control" for *Revlon* purposes.[28] Under settled Delaware law, "if ownership shifts from one large unaffiliated group of public stockholders to another" in a pure stock-for-stock transaction, "that alone does not amount to a change of control."[29] As Vice Chancellor Parsons explained, however, a change of control does occur "where stockholders will receive cash for their shares" because "they will forever be shut out from future profits generated by the resulting entity as well as the possibility of obtaining a control premium in a subsequent transaction."[30] The *Smurfit-Stone* court discussed two cases as points of reference for the application of *Revlon* in mixed-consideration mergers: *In re Santa Fe Pacific Corp. Shareholder Litigation*[31] and *In re Lukens Inc. Shareholder Litigation*.[32] In *Santa Fe*, the Delaware Supreme Court held that *Revlon* did not apply to a transaction in which 33% of the consideration was offered in cash.[33] In *Lukens*, the Court of Chancery assumed, without deciding, that *Revlon* applied to a transaction in which up to 62% of the aggregate consideration was to be offered in cash.[34] However, the structure of the merger consideration in *Lukens* was substantially different from that in *Smurfit-Stone*. Vice Chancellor Parsons noted that each target shareholder in *Lukens* had the option of receiving the merger consideration entirely in cash, subject to the condition that the aggregate cash consideration to be paid out was not to exceed 62% of the total merger consideration.[35] Therefore, unlike in *Smurfit-Stone*, where each target shareholder received an equal mix of cash and stock, some — perhaps most — target shareholders in *Lukens* were completely cashed out.[36]

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[27] *Arnold*, 650 A.2d at 1290 (citations omitted) (quoting Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994)).

[28] *Smurfit-Stone*, 2011 WL 2028076, at *12 (internal quotation marks omitted).

[29] *Id.* (citing *Santa Fe*, 669 A.2d at 71).

[30] *Id.* at *13 (citing Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 101–02 (Del. Ch. 2011); TW Servs., Inc. v. SWT Acquisition Corp., Nos. 10427, 10298, 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989)).

[31] 669 A.2d 59.

[32] 757 A.2d 720 (Del. Ch. 1999), *aff'd sub nom.* Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000).

[33] *Santa Fe*, 669 A.2d at 64, 71.

[34] *Lukens*, 757 A.2d at 732 n.25.

[35] *Smurfit-Stone*, 2011 WL 2028076, at *13 (citing *Lukens*, 757 A.2d at 725). The balance of the aggregate merger consideration was to be paid in acquiror stock. *Lukens*, 757 A.2d at 725.

[36] The court in *Lukens* assumed *Revlon* would apply because "for a *substantial majority* of then-current shareholders, 'there is no long run.'" *Lukens*, 757 A.2d at 732 n.25 (quoting TW Servs., Inc. v. SWT Acquisition Corp., Nos. 10427, 10298, 1989 WL 20290, at *7 (emphasis added)

While Delaware law was clear at the extremes and in the case of 33% cash consideration, the *Smurfit-Stone* court recognized that there was no clear rule for determining whether *Revlon* applies when cash makes up more than 33% of the total consideration.[37]

Rather than point to a bright-line threshold for triggering *Revlon* duties, Vice Chancellor Parsons instead looked to the rationale behind *Revlon* itself. *Revlon* applies, the court stated, to protect shareholders' "right to obtain a control premium."[38] If shareholders are cashed out, they face an "end-game" with no "tomorrow"[39] and must realize the maximum value for their investment today, because there is no later opportunity to receive a control premium.[40] And Vice Chancellor Parsons concluded that the 50% cash consideration in the Smurfit-Stone transaction constituted enough of an "end-game" for the heightened protections of *Revlon* to apply.[41] The fact that legacy Smurfit-Stone shareholders would retain a 45% interest in the combined entity was not enough to avoid *Revlon* because "half of [the shareholders'] investment will be liquidated."[42] Despite facing heightened scrutiny, however, the Smurfit-Stone board's decision to approve the Rock-Tenn transaction was on the "path of reasonableness" leading toward "obtain[ing] the best value reasonably available to Smurfit-Stone stockholders."[43] Therefore, the board met its fiduciary duties under *Revlon*, and the court declined to enjoin the transaction.[44]

While the court's decision to avoid laying out a bright-line *Revlon* trigger was a reasonable one, the structure of the Smurfit-Stone transaction did not compel the court to conclude that there would be "no tomorrow" for target shareholders. A transaction in which 50% of the merger consideration — 56% if calculated at the time the case was actually before the Court of Chancery[45] — is to be paid in stock of the

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(Del. Ch. Mar. 2, 1989)). This language suggests that the fact that some shareholders would be *completely* cashed out was critical to the reasoning in *Lukens*.

37 *See* Laurence V. Parker, Jr., *Virginia Is for Lovers* and Directors*: Important Differences Between Fiduciary Duties in Virginia and Delaware*, 2 WM. & MARY BUS. L. REV. 51, 67–68 (2011) (reviewing Delaware case law and concluding that "it is not clear exactly what percentage of stock consideration is required to avoid *Revlon* Duties," *id.* at 67).

38 *Smurfit-Stone*, 2011 WL 2028076, at *15.

39 *Id.* at *14 (internal quotation marks omitted).

40 *See id.* at *15.

41 *Id.* at *14 ("[W]hile the stock portion of the Merger Consideration is larger than the portion in *Lukens*, I am persuaded that Vice Chancellor Lamb's reasoning [in *Lukens*] applies here, as well. Defendants attempt to distinguish *Lukens* on its facts . . . . I disagree.").

42 *Id.* at *15.

43 *Id.* at *16.

44 *Id.* at *26.

45 *Id.* at *11 n.80. Despite the defendants' emphasis on the cash-stock split at the time the case was argued, Vice Chancellor Parsons considered the claims "in light of the 50% cash and 50% stock Merger Consideration that was in effect as of the date the parties entered into the Mer-

acquiror does not per se constitute an "end-game" in which there is "no tomorrow" for target shareholders. The court could have declined to apply *Revlon* to the Smurfit-Stone transaction and still remained faithful to Delaware precedent by focusing on the magnitude of the Smurfit-Stone shareholders' collective and individual equity interests in the combined enterprise. However, by applying *Revlon* to a merger with consideration split equally between cash and stock, *Smurfit-Stone* is likely to deter at least some future strategic transactions that would have benefitted shareholders. Furthermore, the decision took the Delaware courts beyond their institutional capacity by forcing them to evaluate the merits of strategic acquisitions.

The Smurfit-Stone transaction left target shareholders with a "tomorrow" for their investment both collectively and individually. First, from a collective perspective, the shareholders had a "tomorrow" because, as a group, they were to maintain a 45% equity stake in the merged entity,[46] giving them the right to 45% of any control premium from a subsequent transaction. In *Steinhardt v. Howard-Anderson*,[47] a case not cited by the *Smurfit-Stone* court,[48] the Court of Chancery applied *Revlon* to a merger "where the consideration was approximately 50 percent cash" and 50% stock.[49] Vice Chancellor Laster stated it was "not worth having the dance on the head of a pin"[50] to determine the exact minimum cash consideration required to trigger *Revlon*.[51] Rather, in deciding whether to apply *Revlon*, the *Steinhardt* court focused on the fact that the target shareholders would "end up holding approximately 15 percent of the post-transaction entity"[52] and therefore would no longer be fully compensated for their control block in a future sale.[53] Vice Chancellor Laster opined that a change of control occurs not only when target shareholders are receiving cash, but also when target shareholders are facing their last opportunity to receive a

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ger Agreement" in order to avoid "[l]eaving this determination up to the vagaries of the stock market." *Id.* at *15 n.106.

[46] Defendants' Answering Brief, *supra* note 23, at 15; *cf.* Ruling of the Court: Plaintiffs' Motion for a Preliminary Injunction at 5–7, Steinhardt v. Howard-Anderson, No. 5878-VCL (Del. Ch. Jan. 24, 2011) [hereinafter *Steinhardt* Ruling], *available at* http://www.alston.com/files/docs/occam_ruling.pdf (applying *Revlon* to a situation where target shareholders were left with a 15% equity stake in the combined post-merger entity).

[47] No. 5878-VCL.

[48] *Steinhardt* is conspicuously absent from the court's opinion, even though plaintiffs and defendants each discussed the case in their respective briefs. *See* Plaintiffs' Opening Brief, *supra* note 21, at 22–23; Defendants' Answering Brief, *supra* note 23, at 15.

[49] *Steinhardt* Ruling, *supra* note 46, at 3.

[50] *Id.* at 6.

[51] *Id.* at 6–7.

[52] *Id.* at 4.

[53] *Id.* at 6 ("[N]ow is the time[] when the target fiduciaries are bargaining for how much of that future control premium their folks will get. This is it. This is the end. This is the only opportunity where you can depend upon your fiduciaries to maximize your share of that value.").

control premium.[54] Under this reasoning, even if the *Steinhardt* transaction were a pure stock-for-stock deal leaving the target shareholders with a 15% equity interest, Vice Chancellor Laster would still have applied *Revlon* because the target shareholders would no longer be able to sell *control* of their company in a future transaction. In *Smurfit-Stone*, by contrast, target shareholders were to receive a 45% equity interest in the post-transaction entity,[55] about three times the size of the stake that the target shareholders received in *Steinhardt*. Because of their larger equity interest, Smurfit-Stone shareholders would have been eligible to receive almost half of any control premium eventually offered to Rock-Tenn in a later transaction. Put in Vice Chancellor Parsons's terms, the Smurfit-Stone shareholders still had a "tomorrow" for their investment: Rock-Tenn's acquisition of Smurfit-Stone was *not* the final opportunity for Smurfit-Stone shareholders to receive a meaningful control premium. Perhaps 45% of a future premium was not enough of a "tomorrow" for the *Smurfit-Stone* court, but Vice Chancellor Parsons did not even address the issue in a meaningful way, despite briefing by both parties.[56]

Furthermore, on an individual basis, each Smurfit-Stone shareholder had a continuing interest in the combined entity because no shareholder was to be completely cashed out by the transaction.[57] In contrast, in *Lukens* — a case on which the *Smurfit-Stone* opinion heavily relies[58] — each target shareholder had the option of receiving all of his or her merger consideration in cash, subject to the condition that the aggregate cash consideration to be paid would not exceed 62% of the total merger consideration.[59] Thus, some — perhaps most — shareholders in *Lukens* liquidated their entire investment in the target corporation. Vice Chancellor Parsons was not persuaded by this distinction,[60] but it is an important one for the purpose of determining whether *Revlon* should apply to protect shareholders. Every Smurfit-Stone shareholder had the opportunity to participate meaningfully in the continuing corporate enterprise and to receive a control premium going forward if and when Rock-Tenn sold itself. The 45% stake offered legacy Smurfit-Stone shareholders, in the aggregate, the ability to influence corporate decisions at the combined entity going forward.

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[54] *See id.* at 5 ("We often talk about, oh, well, but the stockholders can get a future control premium. That's all well and good for the future entity, but what you're bargaining over now is how much of that future premium you're going to get.").

[55] *Smurfit-Stone*, 2011 WL 2028076, at *9.

[56] *See* Plaintiffs' Opening Brief, *supra* note 21, at 22–23; Defendants' Answering Brief, *supra* note 23, at 15.

[57] *Smurfit-Stone*, 2011 WL 2028076, at *14.

[58] *See id.*

[59] *In re* Lukens, Inc. S'holders Litig., 757 A.2d 720, 725 (Del. Ch. 1999).

[60] *Smurfit-Stone*, 2011 WL 2028076, at *14.

The reasoning from *Lukens*, in which some — perhaps 62% — of the target shareholders were to be *completely* cashed out, should not have controlled the court's decision in *Smurfit-Stone*, where there was a "tomorrow" for each and every target shareholder.

The questionable decision to extend *Revlon* to include a larger subset of hybrid cash-stock transactions will have two negative consequences. First, although empirical research provides some limited evidence that *Revlon* may not deter *bidders* from pursuing merger transactions,[61] *target* corporations may be reluctant to agree to a strategic deal with some cash consideration if they fear that the deal will trigger *Revlon*.[62] Once a target is in *Revlon* mode, it "has no principled basis for rejecting an unsolicited, higher priced third-party offer,"[63] even if that offer is from an unfriendly buyer. Although *Revlon* has been read in a way that gives directors significant latitude[64] and *Smurfit-Stone* itself suggests that the presence of *Revlon* duties is "not necessarily outcome determinative,"[65] a target corporation seeking a strategic deal with one particular buyer will still be wary of triggering *Revlon* out of fear that an interloper will appear. Should a target in *Revlon* mode receive an unsolicited offer from a third party, there is a distinct risk that the target will be forced to abandon its strategic merger plans — which presumably presented a compelling long-term value proposition for shareholders — and sell to an unfriendly buyer at a nominally higher price.[66] If a strategic buyer insists on paying a sub-

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[61] *See* Guhan Subramanian, *The Drivers of Market Efficiency in* Revlon *Transactions*, 28 J. CORP. L. 691, 714 (2003) (presenting "some evidence . . . that deal activity for *Revlon* transactions has not been reduced, and that, by implication, incentives to [bid for target companies] have been preserved in the seventeen years since *Revlon* was handed down").

[62] *See* Clark W. Furlow, *Reflections on the* Revlon *Doctrine*, 11 U. PA. J. BUS. L. 519, 525 (2009).

[63] *Id.*

[64] *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) ("No court can tell directors exactly how to accomplish [the] goal [of maximizing shareholder value], because they will be facing a unique combination of circumstances, many of which will be outside their control." *Id.* at 242.); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("[T]here is no single blueprint that a board must follow to fulfill its [*Revlon*] duties. A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment.").

[65] *Smurfit-Stone*, 2011 WL 2028076, at *12. *But see* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 320 (2000) ("[T]he general consensus has been that deals subject to *Revlon* are more likely to be second guessed by the courts . . . ."); T. Richard Giovannelli, Note, *Revisiting* Revlon*: The Rumors of Its Demise Have Been Greatly Exaggerated*, 37 WM. & MARY L. REV. 1513, 1545 (1996) ("The *Revlon* trigger is the subject of such intense debate because a decision to apply the *Revlon* standard often is outcome determinative . . . .").

[66] *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 611–15 (Del. Ch. 2010) (reviewing a board's actions under *Revlon*'s reasonableness test, but reiterating that the board must "undertak[e] a sound process to get the *best deal available*," *id.* at 595 (citing *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007) (emphasis added) (internal quota-

stantial fraction of the merger consideration in cash, the target board may refuse to consider a value-creating strategic deal from the start. *Smurfit-Stone* exacerbates this problem by expanding the subset of mixed-consideration mergers to which *Revlon* applies.

The potential deterrent effect posed by *Smurfit-Stone* is especially problematic because mixed-consideration mergers have been on the rise in recent years.[67] In a 2010 study, the American Bar Association found that fully 25% of all M&A transactions completed in 2009 included mixed cash-stock consideration.[68] After *Smurfit-Stone*, targets seeking certainty in avoiding *Revlon* must take refuge in the bright-line holding of *Santa Fe*, which eschewed imposing *Revlon* when 33% of the merger consideration was to be paid in cash.[69] If acquirors insist on more than 33% cash and targets wish to avoid a merger with anyone other than a single favored acquiror, fewer corporate transactions — particularly strategic ones that produce greater value for the very shareholders *Revlon* was intended to protect — may take place.

Second, forcing Delaware courts to determine whether a fifty-fifty cash-stock merger is worth more to target shareholders than a competing proposal takes the courts beyond their institutional capacity by requiring them to evaluate the financial merits of strategic acquisitions — a task better left to target boards. In its original form, *Revlon* applied to the sale of a company for cash.[70] In determining whether a board breached its *Revlon* duties in deciding between multiple cash offers, a court's inquiry is simple: did the board agree to the deal that offered the highest price?[71] However, in strategic stock-for-stock mergers, the business judgment rule applies[72] because the board is best

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tion mark omitted))); Furlow, *supra* note 62, at 525 ("[A] board that is subject to Revlon duties has no principled basis for rejecting an unsolicited, higher priced third-party offer.").

67 *Compare 2010 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study*, AM. BAR ASS'N, 4 (Dec. 29, 2010), http://apps.americanbar.org/buslaw/committees/CL560000/materials/matrends/2010public_study.pdf [hereinafter *2010 Deal Points Study*] (25% of M&A transactions in 2009 included mixed cash-stock consideration), *with 2009 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study*, AM. BAR ASS'N, 4 (Sept. 10, 2009), http://www.abanet.org/buslaw/committees/CL560000/materials/matrends/2009public_study.pdf (19% of transactions in 2008), *and 2008 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study*, AM. BAR ASS'N, 4 (Nov. 13, 2008), http://www.abanet.org/buslaw/committees/CL560000/materials/matrends/2008public_study.pdf (16% of transactions in 2007).

68 *2010 Deal Points Study*, *supra* note 67, at 4.

69 *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 64–65, 71 (Del. 1995).

70 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 177 (Del. 1986).

71 *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) ("There is only one *Revlon* duty — to '[get] the best price for the stockholders at a sale of the company.'" (alteration in original) (quoting *Revlon*, 506 A.2d at 182)). However, a board may consider deal certainty in evaluating multiple deals at different prices. *See Dollar Thrifty*, 14 A.3d at 605–08.

72 The business judgment rule applies in stock-for-stock mergers when the acquiror does not have a controlling shareholder. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150–51 (Del. 1989).

able to decide among competing offers in "pursu[it of] its long-term vision for the company."[73] A court cannot easily declare that one strategic merger proposal is better than another when the merger consideration is made up solely of acquiror stock, the value of which will ultimately depend on the financial health of the acquiror and the profits generated by the operations of the combined entity.[74]

Thus, in a mixed-consideration strategic merger, the overall value of the merger consideration is also not easily ascertainable. If a target corporation faces two competing merger proposals — a fifty-fifty cash-stock proposal valued at $10 per share and an all-cash proposal valued at $11 per share — the facially higher $11 proposal may *not* be superior if the acquiror's stock is undervalued by the market or if the target's aggregate synergies with the $10 acquiror are worth more than 20% of the acquiror's market capitalization.[75] If a court is reviewing a board's decision to accept the $10 proposal under *Revlon*, it will be forced to evaluate the strategic merits of the mixed-consideration merger to determine how much the acquiror's stock will be worth post-merger. However, the target board of directors has a unique perspective on the target corporation and its prospective synergies with a particular acquiror. Thus, boards — not courts — are better equipped to determine the intrinsic value of a mixed-consideration merger proposal, because boards possess an informational advantage over courts in determining the prospective value of acquiror stock.[76] Courts need not worry that directors will have private incentives to favor one buyer over the other, because the business judgment rule applies only when a board is disinterested in the decision under consideration.[77] Delaware corporate law would have been better served if the Court of Chancery had refrained from applying *Revlon* to the Smurfit-Stone transaction and instead deferred to the business judgment of the disinterested directors, who could best determine whether the Rock-Tenn transaction was in the interest of Smurfit-Stone shareholders.

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[73] Furlow, *supra* note 62, at 533.

[74] *See* WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 566–68 (3d ed. 2009).

[75] A $10 proposal made up of 50% cash and 50% stock would include $5 worth of acquiror stock. In order for this $10 proposal to be superior to an $11 all-cash proposal, the synergies in the $10 proposal would have to be worth at least $1, or 20% of the value of the included stock.

[76] *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 74, at 567 ("A focus on informational advantage implies that the more the value of merger consideration depends on synergies between the target and the acquiring company (about which the directors have superior information), the more courts will defer to the judgment of [the target corporation's] directors."); *see also Time*, 571 A.2d at 1153–54; Furlow, *supra* note 62, at 532–33.

[77] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (stating that, for the business judgment rule to apply, "directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it"), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).