PUZZLES AND PARABLES: DEFINING GOOD FAITH IN THE MBO CONTEXT

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INTRODUCTION

Like the reasonable person, good faith is often among the roundup of usual suspects when courts and legislatures articulate the components of legal rules. Due, perhaps, to its pervasiveness, the concept of good faith resists neat and universal definition. Even in particular contexts in which behavior is subject to a good faith criterion—like directors’ evaluation of a proposed management buyout (MBO)—the meaning of good faith is far from self-evident. Many questions come readily to mind: Is good faith a trivial criterion? If not, what function does the criterion serve? Does good faith concern only motive? If so, how is motive established in litigation? Is acting in good faith simply acting without demonstrable bad faith? This article addresses these questions and others by examining Delaware cases which apply good faith standards to transactions in corporate control, principally MBOs and other buyout transactions. As a legal standard, good faith has little discernible content apart from its application by courts in particular types of cases.

This article’s thesis is that judicial review under a standard of good faith enables the court to evaluate the quality of the decision under attack. Restricting the operation of good faith to questions of subjective motive makes the standard unworkable and unsatisfactory in the MBO context. Rather, only a standard of review that permits some substantive assessment fulfills the function of the good faith criterion in this context—which is to ensure that directors’ loyalties are not inappropriately diverted from the interests they are obliged to serve. In fact, when applying the concept of good faith, several Delaware cases effectively define it as encompassing substantive issues that go beyond pure motive.

To be sure, many aspects of the Delaware cases are intriguing. No one operative definition of good faith emerges from them, and regardless of their outcome, the courts often isolate aspects of the parties’ conduct for praise or criticism. Moreover, the meaning of bad faith—and whether it is established by the absence of good faith—is difficult to glean from these opinions. Even in the face of misconduct that prompts the court to enjoin consummation of a transaction, the label of “bad faith” is never

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explicitly applied to the responsible parties’ conduct. This article argues that the distinctively equitable style of Delaware’s Court of Chancery explains many otherwise puzzling aspects of these cases.

I. Basic Patterns of Analysis

Delaware courts openly acknowledge that Delaware law defining the relationships among companies, shareholders and directors is in a state of active evolution.\(^1\) Discerning clear directions amid this evolution is complicated by the variety of apparently separate standards developed by the Delaware Supreme Court. At present, under Delaware case law four different patterns of analysis apply to directors’ decisions concerning MBO proposals. In Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,\(^2\) the supreme court held that once a “break-up of the company was inevitable,” the duty of the company’s board was to maximize its value at a sale for the shareholders’ benefit.\(^3\) The “Revlon mode” becomes applicable when a board decides to enter a transaction that changes control of the corporation. Even if the board is subjectively disinclined to sell, Revlon defines the directors’ duties if an extraordinary transaction including a change in control is involved.\(^4\) For example, if the directors authorize a restructuring that shifts control to management, Revlon applies even though the directors may have decided to restructure precisely to avoid a sale.\(^5\)

Further, if the directors possess a financial or personal interest in a transaction, an interest not applicable to the corporation itself or to all stockholders generally, the directors then have the burden of establishing the “entire fairness” of the transaction.\(^6\) The “entire fairness” standard encompasses separate requirements of fair dealing\(^7\) and fair price; fair price obliges the directors to have an inexorable commitment “to obtaining the highest value reasonably available to the shareholders under all the circumstances.”\(^8\) The “fair price” obligation, however, may differ

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2. 506 A.2d 173 (Del. 1986).
3. Id. at 182.
6. See id. at 1280.
7. Under the “fair dealing” component, the court examines the actual conduct of corporate fiduciaries in connection with the transaction, including its “initiation, structure, and negotiation.” Id. The court also examines whether corporate fiduciaries fulfilled their duty to be candid, by disclosing all material information pertinent to transactions from which they may personally benefit. Id. The duty of candor arguably has different consequences from similar obligations to disclose imposed by the federal securities laws. See Booth, The Emerging Conflict Between Federal Securities Law and State Corporation Law, 12 J. Corp. L. 73, 98–99 (1986) (emphasizing significance of rescissory damages under Delaware caselaw).
8. Mills, 559 A.2d at 1280.
in practical effect from the obligations recognized by Revlon. Litigation subject to the "fair price" criterion turns on the court's determination of the adequacy or fairness of the price paid to shareholders, a determination which requires valuation of the company.\textsuperscript{9} In contrast, in cases testing directors' behavior against the Revlon standard, courts have not determined the company's value but instead have examined the appropriateness of steps the directors took after the company went into play.\textsuperscript{11} To be sure, if directors permit or acquiesce in a flawed auction process, the "entire fairness" standard apparently becomes applicable. In Mills Acquisition Co. v. Macmillan, Inc.,\textsuperscript{12} the supreme court applied the "entire fairness" standard to an asset lockup granted to the financial partner in an MBO because the corporation's directors—most of whom would not be equity participants in the MBO—permitted prospective management participants in the MBO to skew an auction toward their favored bidder.\textsuperscript{13}

If neither Revlon nor the entire fairness standard applies to directors' action in a particular setting, the next relevant question is whether the directors acted defensively in response to a hostile takeover attempt.\textsuperscript{14} If they did not act defensively, the court will review the transaction under the business judgment rule if it was approved by disinterested directors acting in good faith and "pursuant to an appropriate deliberative process."\textsuperscript{16} Under the business judgment rule, the transaction is presumed to be valid and the court will not disturb the directors' decision if it can be attributed to any rational business purpose.\textsuperscript{16} However, if the transaction or decision is a defensive response to a hostile takeover attempt, the supreme court held in Unocal Corp. v. Mesa Petroleum Co.\textsuperscript{17} that directors must establish two matters to qualify for the protections of the business judgment rule: First, the directors must have had reasonable grounds for believing that a threat to corporate policy and effectiveness—satisfied by a showing of good faith and reasonable investigation.\textsuperscript{18} Second, the direc-

\textsuperscript{9} See Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). If a majority of the corporation's non-interested shareholders approve the transaction by an informed vote, the plaintiff challenging the transaction has the burden of showing its unfairness to non-interested shareholders. But a litigant relying on the shareholder vote has the burden of showing complete disclosure of "all material facts relevant to the transaction." Id. at 703.

\textsuperscript{10} See, e.g., id. at 712-15.

\textsuperscript{11} One explanation is the absence of any case in which directors breached their Revlon duties and the plaintiff seeks retrospective monetary damages. That is, cases to date in which plaintiffs have prevailed are also cases in which plaintiffs sought and obtained preliminary injunctions against transactions.

\textsuperscript{12} 559 A.2d 1261 (Del. 1988).

\textsuperscript{13} Id. at 1281.


\textsuperscript{16} Id.

\textsuperscript{17} 482 A.2d 946 (Del. 1985).

\textsuperscript{18} Id. at 954.
tors must show that the measures adopted in response were "reasonable in relation to the threat posed." According to Unocal, imposing a higher threshold in this setting is justified by the "omnipresent specter" that the directors may be acting primarily in their own interests when their position in the corporation is threatened. If the directors' conduct does not qualify for the business judgment rule, the court will scrutinize the consequences of their conduct and evaluate the fairness to shareholders of any resultant transactions.

The interrelationships among these standards complicate their application to MBOs. In Mills, for example, the supreme court explained that when directors determine that the company is for sale—a situation to which Reuelon applies—the directors' subsequent actions will be assessed against the Unocal standard. If the Unocal threshold is surmounted, the business judgment rule applies to directors' decisions incident to selling the company. Mills limits the applicability of Unocal to cases in which the plaintiff establishes that the directors treated bidders unequally; in the absence of demonstrated disparate treatment, the "ordinary" business judgment standard remains applicable. Moreover, as noted above, Mills applied the "entire fairness" test to a transaction (an asset lockup) resulting from a seriously flawed auction.

Mills also illustrates the difficulty of identifying, in certain cases, precisely which standard the chancery court has applied. Although the supreme court's opinion noted the express references in chancery court opinions to "an ordinary business judgment rule analysis," the supreme court observed that when evaluating directors' discharge of their Reuelon duties "there has been a de facto application of the enhanced business judgment rule under Unocal." This observation is striking. Unless it suggests that Unocal's standard of review is not so "enhanced" after all, it acknowledges the flexibility granted the reviewing court by "ordinary business judgment rule analysis." Moreover, if that mode of analysis can operate like analysis pursuant to Unocal, then Unocal's precise contribution will be difficult to identify and its effect difficult to predict.

19. Id. at 955.
20. Id. at 954.
23. Id. at 1288.
24. Id. at 1281.
25. Id. at 1288.
II. The Contours of Good Faith

Judicial review of control-related transactions under the ordinary business judgment standard is often characterized as nominal, ineffective and unduly deferential. Applying this standard, courts have accepted at face value directors' rationalizations for transactions that preserve their control but disserve shareholders' interests. How, then, can that standard of review operate in fact like the "innovative and important" and "novel and objective" standard embodied in Unocal? The answer lies in the remarkable plasticity of good faith as a legal concept, as illustrated in the discussion below of good faith's application in specific cases. A key component of business judgment analysis—good faith—has always been a concept arguably unequalled for its malleability and formlessness.

Several cases decided by the chancery court during the last two years provocatively illustrate how good faith is defined and applied. In re J.P. Stevens & Co. Shareholders Litigation is characteristic of these cases in many respects. It opens with an elaborate and precise factual narrative. The evident care and extensive detail with which factual accounts are developed in these cases are consistent with legal standards (like good faith) that inevitably require an ad hoc assessment of particular circumstances.

At issue in J.P. Stevens were claims of favoritism to one bidding group during an auction for the company. The auction developed soon after the company announced that its outside directors had been appointed to a special committee to consider an MBO proposal received from Palmetto, Inc., a group formed by senior members of Stevens' present management. The committee was also charged with making a recommendation to the entire board. Two additional bidders emerged, including West Point-Pepperell, Inc., a company engaged in some of the same lines of business as Stevens. The third bidder, Odyssey Partners, which itself lacked capacity to run Stevens, indicated a willingness to retain Stevens' current management and to discuss management's equity participation in the buyout.

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33. See Citron v. Fairchild Camera & Instrument Corp., [1988-1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,915, at 90,091 (Del. Ch. May 19, 1988). In Citron the court said the question of the board's good faith could not finally be determined on the basis that directors lacked a significant adverse financial interest. While that fact created a presumption of good faith or a prima facie showing of it, final determination called "for an ad hoc determination of the board's motives in this particular instance." Id. at 90,102.
West Point claimed that the special committee favored Odyssey in a number of ways. Palmetto's final offer was clearly lower than offers from the other two bidders, and West Point alleged the committee favored Odyssey as the second-best solution for senior management. In light of incidents recounted in its opinion, the court characterized this interpretation as "plausible."³⁵ As a partial competitor of Stevens, West Point's ultimate success in the contest turned on its ability to make arrangements for asset divestiture that resolved obvious antitrust concerns. During the bidding, West Point agreed in principle with a prospective purchaser for selected Stevens' assets. The committee's legal counsel advised that despite the agreement in principle, antitrust problems could prevent or delay a merger between Stevens and West Point. Consequently, the committee concluded that Odyssey's proposal was more likely to close—and to close sooner. This decision prompted express skepticism from the court, which suspected "that the need to reach a final decision may not have been so great"³⁶ as to require the committee to decide to sign a merger agreement only six weeks after the board received Palmetto's initial offer.³⁷ The court was also expressly dubious about aspects of the committee's negotiations with Odyssey. Odyssey obtained the committee's assent to a $17 million (or $1/share) break-up fee even though its submitted proposal was materially lower (by $1.50/share) than West Point's proposal.³⁸

The directors' good faith was at issue in J.P. Stevens because, if they did not act in good faith, the presumptions created by the business judgment rule would be inapplicable to their decisions. Ordinarily the rule precludes judicial review of the merits of the directors' decision. Yet J.P. Stevens noted that Delaware cases permit limited substantive review to determine whether a decision of an apparently well-motivated board was "so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith."³⁹ This standard, of course, is susceptible of more than one interpretation. Does it permit the judgment that a decision is nutty, regardless of the decisionmakers' subjective motives? Or does it restrict the court to concluding that only bad faith could explain such nuttiness?

Despite its express suspicions in J.P. Stevens, the court found that the evidence did not sufficiently support the plaintiff's "plausible story." At trial, it concluded, the court would probably not find that the special committee was motivated by an allegiance to further management's interests at the expense of shareholders' interests.⁴⁰ To support this conclusion, the opinion cited the committee's composition, its apparent

³⁵ Id. at 98,379-80, 98,383.
³⁶ Id. at 98,384.
³⁷ Id.
³⁸ Id. at 98,380.
³⁹ Id. at 98,384.
⁴⁰ Id. at 98,385.
diligence, its successful negotiation with Odyssey over expense reimbursement and its initial resistance to Odyssey’s request for a topping fee. Moreover, the plaintiff proffered no “direct evidence of bad faith.”

As to one key element in dispute, however, the court appears to have applied a somewhat more substantive test. To induce Odyssey to match West Point’s offer ($64/share), the committee assented to Odyssey receiving a topping fee of 20% of any amount over $64/share ultimately realized by Stevens’ shareholders, with a cap of $.40/share ($8 million). Indeed, Odyssey threatened to withdraw its bid unless the committee assented to its proposals, a threat the court found somewhat hollow. The topping fee, the court found, effectively raised Odyssey’s bid to the $64 level, and thereby created the possibility that, with West Point still in the picture, the price could go even higher, even though the fee favored Odyssey and increased Stevens’ liabilities. Thus, agreeing to the fee “clearly, on balance, was a benefit to shareholders.”

Even though the opinion equates good faith to motivation, it expressly evaluates the committee’s eventual assent to the topping fee against a standard quite different from that of the directors’ motivation. Determining whether the fee benefited Stevens’ shareholders examines the effect of the committee’s action, not the subjective motivation of the committee’s members. Actions that are mistaken or misguided (albeit not demonstrably ill-motivated) are not protected by a test that looks to their effect. And examining the actual effect of the committee’s action exceeds limited substantive review to assess whether the committee’s account of its motivation is “plausible.” The court states that the substantive review which occurred was confined to examining whether the committee’s decision so exceeded “the bounds of reasonable judgment” as to support an inference of bad faith. Given this limited purpose, assessing the actual impact of the committee’s decision is overkill.

_J.P. Stevens_ illustrates the difficulties of formulating and then applying a motive standard to directors’ conduct in MBOs. “[D]irect evidence of bad faith,” however defined, is unlikely. The MBO transaction itself virtually assures that the directors will not retain their offices post-transaction, which severely reduces the prospect of establishing that the directors were motivated to retain control. True, retention of office and personal financial benefit are not the sole instances of improper motives that are imaginable in these settings. In _In re RJR Nabisco, Inc. Share-

41. _Id._
42. _Id._
43. _Id._
44. _Id._ at 98,383 (question of Special Committee’s “good faith or motivation” is a factual matter).
45. _Id._ at 98,386 (“I have considered the substance of the decision to grant the rights here in question, in the context of all the circumstances, to the limited extent necessary to see if they [sic] are so far beyond the bounds of reasonable judgment in the circumstances as to give rise to an inference of bad faith.”). _Id._
46. For discussion of lack of evidence showing bad faith, see text accompanying _supra_ note 41.
holders Litigation" the court observed: "Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge . . . shame or pride."48 That these intriguing motives are imaginable, even in connection with MBOs, does not make it likely that they can be established directly. Direct evidence (a confession? an admission?) of inappropriate motive is readily avoided when people are accustomed or advised to behave with reserve.49 Likewise, people often have more than one motive for any particular action or decision; isolating any motive as primary is difficult to do with confidence, as an earlier generation of Delaware cases illustrates. In a prior era in Delaware's treatment of these issues, cases like Cheff v. Mathes50 applied the business judgment rule only where directors established that pursuit of a proper corporate purpose motivated actions that defeated a challenge to their control.51 This test was inadequate precisely because inappropriate and appropriate motives frequently travel in tandem.

Wholly apart from these practical issues of proof, a standard for good faith that looks solely to directors' motives ignores the function to be served by the standard. As applied to directors' decisions, a standard of

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48. Id. Sometimes commentators assert that the range of improper motives is more limited. See, e.g., Arsi, The Business Judgment Rule Revisited, 8 Hofstra L. Rev. 98, 116 (1979) (under Delaware law, business judgment rule is inapplicable only if transaction is "tantamount to self-dealing" or director "personally receives some tangible benefit not received by the corporation itself or by all stockholders prorata . . . . ") Interestingly, the American Law Institute's long-evolving project on corporate governance likewise appears to define disqualifying motives more narrowly than the court did in RJR Nabisco. See American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 1.15 (Tent. Draft No. 2, 1984) (a director is "interested" in a transaction if the director is a party to the transaction or the director or an associate has a pecuniary interest in the transaction or a "personal or familial" relationship to a party that is so substantial it would be expected to affect the director's judgment in a manner adverse to the corporation). On the other hand, the project's statement of the business judgment rule requires that a director "perform his functions in good faith," see II. at § 4.01 (Tent. Draft No. 3, 1984), which may effectively incorporate the wider scope given disqualifying motive in RJR Nabisco.
49. Facilitating a customary level of reserve is an acknowledged function of lawyers in these settings. Consider the statement of one experienced litigator, challenging directors' decision not to redeem a poison pill after they determined that his client's bid was an inadequate price for the company:

  I think as a matter of law they did not engage in reasonable investigation. I cannot deny that they went through a ceremonial which every corporate lawyer in Wilmington and New York can lead his client through and does with regularity. It consists of a lengthy meeting of the board. It consists of retaining distinguished investment banking firms who render up large notebooks filled with complex graphs and charts . . . .

  At the end of that ceremony that board comes out with a conclusion, like a jury does. In a sort of procedural sense, in a sort of procedural due process sense, if you like, they did what ceremonially, formally, they are required to do.

50. 199 A.2d 548 (Del. Ch. 1964).
51. Id. at 556.
good faith tests directors' fidelity to the interests they may appropriately consider or serve. Subjective motivation and sincere belief are, at best, imprecise surrogates to measure fidelity. Directors, like other people, are capable of deceiving themselves about the point and effect of their actions. Sincere self-deception is not responsive to the obligation to which directors, as fiduciaries, are subject. Fiduciary norms are stringent: they prohibit the fiduciary from creating interests in conflict with interests of the beneficiary protected by the relationship, and they deny a fiduciary the profit derived from a breach of duty even when the breach caused no demonstrable injury to the beneficiary. One explanation for this stringency is the persistent capacity of decisionmakers for sincere self-deception when self-interest is at stake.

The dimensions of good faith in these cases can usefully be contrasted with the courts' use of good faith norms in settings that have received fuller judicial and academic elaboration. Contract law, for example, makes heavy use of standards of good faith; indeed, numerous cases hold that every contract is subject to an implied term of good faith and fair dealing.\(^\text{52}\) Although the meaning of the implied term is open to dispute,\(^\text{53}\) beyond question the implied term differs in its import from the good faith norm in the corporate context. Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.,\(^\text{54}\) involving a dispute in the wake of an LBO, illustrates this difference. Metropolitan Life held $340,542,000 in principal amount of six separate issues of RJR Nabisco senior debt securities, which it purchased before RJR Nabisco's directors announced that they had received an MBO proposal from the company's chief executive officer (CEO). Metropolitan's fellow plaintiff, Jefferson-Pilot Life Insurance Company, held $9.34 million in principal amount of three RJR Nabisco debt issues.\(^\text{55}\) After the MBO proposal was announced, the market value of the debt securities held by the plaintiffs dropped significantly.

Metropolitan Life argued, inter alia, that the MBO transaction breached an implied covenant not to take action that would destroy the securities' investment-grade rating.\(^\text{56}\) This covenant arose from RJR Nabisco's continuing duty of good faith and fair dealing as an issuer of debt securities. The court, unpersuaded, granted the defendants' motion for summary judgment on this claim, observing that the function of the implied covenant was to assure parties of the fruits of their contract's

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52. See Restatement (Second) of Contracts § 205 (1981). Section 205 reads: "Duty of Good Faith and Fair Dealing. Every contract imposes on each party a duty of good faith and fair dealing in its performance and its enforcement." Id.

53. See, e.g., Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 359, 403 (1980) (obligation to perform in good faith restricts discretion to recapture opportunities foregone upon entering into contract); Summers, "Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 54 Va. L. Rev. 195, 262 (1968) (good faith can best be understood as concept that excludes many different forms of bad faith).


55. Id. at 1508.

56. Id. at 1522.
express terms. Additionally, the court detailed factual circumstances that illustrated the purchasers’ awareness of the impact LBOs have on previously-issued senior debt. The court held that the implied covenant could not impose “a new, substantive term of enormous scope,” especially when express terms in the indenture instruments permitted the issuer to merge and to incur additional indebtedness. Thus, in this contractual context, good faith has suppletory and protective functions whose scope is defined by the express terms of the parties’ contract. In contrast, as applied to the decisions of corporate directors, good faith focuses on directors’ position as fiduciaries obliged to serve the interests of others.

Other recent cases apply good faith standards that vary in their precise formulation but nonetheless encompass judicial assessment of the substantive merits of the decision. In Citron v. Fairchild Camera & Instrument Corp., for example, the court observed that inquiry into decisionmakers’ subjective states of mind necessarily requires that inferences be drawn from “overt conduct” such as the quality of the decision being made. Likewise, in In re Fort Howard Corp. Shareholders Litigation, the court examined whether the directors’ stated rationale for their actions “makes sense” and whether the actions were “reasonably calculated to (and did) effectively probe the market” for control transactions superior to that proposed by a management-sponsored group. Finally, in In re Holly Farms Corp. Shareholders Litigation, the court effectively defined “rationality” to mean whether the directors’ action would likely maximize the corporation’s value for its shareholders.

In contrast, the boundaries and function of substantive review were both stated and applied more narrowly in RJR Nabisco. The court considered whether a committee decision to prefer a bid with a lower face amount over one with a higher face amount was “so far beyond the bounds of reasonable judgment as to raise an inference of bad faith . . .” one of the standards applied in J.P. Stevens. The competing bids in RJR Nabisco each consisted of packages of cash and securities, principally preferred stock with complex terms. The investment bank assisting

57. Id. at 1519.
58. Id. at 1518-19.
59. Id. at 1619.
61. Id. at 90,102.
63. Id.
65. Id. at 91,644 (“Even if the Board thought it was acting in good faith, the sale process itself was so substantially flawed that the Board’s actions, considering all the facts and circumstances, were not likely to have maximized the value of the corporation for its shareholders and, therefore, its actions cannot be viewed as being rational.”). Id.
the committee advised that the two packages were financially equivalent, despite having different nominal amounts and different configurations of securities involved.

Taken as a whole, these cases suggest that good faith embodies a spectrum of formulations or discrete tests. As applied by the court, scrutiny of the parties' actions under the good faith standard may, as in RJR Nabisco, be limited to considerations of motive bounded at the outside by an expansive concept of rationality. More searching examination is also possible. J.P. Stevens, Fort Howard and Holly Farms, in reviewing good faith, examine the impact or effect of the directors' actions. Left unexplored are the court's reasons for evaluating particular facts under a test falling at any given point on the spectrum.

Directors are not the only actors in these scenarios whose conduct raises issues of good faith. Aggressive or problematic behavior by bidders is a fertile source of intriguing questions about good faith. In several recent cases applying the good faith standard, the court's review concerned, at least in part, how directors responded to bidders' tactics. In some instances, the directors themselves seem to have concluded that bidders were not acting credibly. However formulated, the standard applied by the court subjects these decisions to some level of substantive review. In Mills, the supreme court noted the Revlon duties are not triggered by every proposal affecting corporate structure, and that "[c]ircumstances may dictate that an offer be rebuffed . . . ." What the circumstances do dictate appears open to judicial review, however. In In re TW Services, Inc. Shareholders Litigation, TW's directors determined that an all-cash, all-shares tender offer was not a "'real'" offer because it constituted either an attempt to put the company in play or a prelude to attempted greenmail. The court held that the directors had no obligation to redeem the poison pill that blocked the tender offer and no obligation to take any other extraordinary steps to maximize share value.

It would be a mistake to treat this case as a license to directors to "just say no" to an unwanted bid by determining that it is other than real. The tender offer was conditioned on the approval of TW's directors. Consequently, the court characterized it as a proposal to negotiate a

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67. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1285 n.35 (Del. 1988). Circumstances mentioned by the court are: "the nature and timing of the offer; its legality, feasibility and effect on the corporation and the stockholders; the alternatives available and their effect on the various constituencies, particularly the stockholders; the company's long term strategic plans; and any special factors bearing on stockholder and public interests." Id. One ground often given for rejection but not explicitly mentioned by the court is inadequacy of the offer's price, unless price inadequacy is encompassed by "effect on . . . the stockholders." Id.


69. Id. at 92,174, 92,180.

70. Id. at 92,192.

71. But see T. Mirvis, TW Services: Just Another Brick in the Wall? The Return of "Just Say No" (1989) (unpublished manuscript on file with author) (TW holds promise for development in law permitting directors to "just say no" to tender offer).
merger with TW made simultaneously with a conditional tender offer. The court held in *TW Services* that the board’s decision not to pursue the merger proposal did not trigger the *Unocal* standard of review, but instead fell within the business judgment standard.72 The court reached this question of the appropriate standard of review only after assessing the basis for the determination by TW’s board that the offer was not “real.”73

Likewise, directors may conclude that a bidder is not serious if key aspects of the bid are undefined or unresolved. In *In re Formica Corp. Shareholders Litigation*, directors were ultimately “vindicated” in their determination that a major shareholder’s proposal to acquire Formica at $20/share was not serious.74 The shareholder proposed no specific form for the transaction, lacked internal capability to finance the acquisition in the judgment of the board’s financial advisor, and apparently failed to arrange financing from any source. Although Formica’s CEO twice urged the shareholder to contact Formica’s investment bank “to open communications,” the shareholder never did and shortly thereafter sold his Formica stock to another company for $15 7/8/share.75 Similarly, in *Citron*, one offer that Fairchild’s directors received at the final stage of an auction would have entailed a second-step merger between Fairchild and the offeror, Gould, Inc., in which about half of Fairchild’s shares would be exchanged for a new issue of Gould preferred stock.76 Gould’s offer did not specify the terms (such as dividend rate, convertibility, etc.) of the preferred, and Fairchild’s board rejected it in favor of an all-cash offer at a lower nominal price made by Schlumberger, Inc. As the court observed, “there was some basis to suspect that Gould may have intentionally left itself some maneuvering room on the issue of the precise terms of its second step consideration.”77

Bidder threats pose similar issues of evaluation for the directors who receive them and for the court. In *Citron*, after negotiations following its

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73. *See id.* *TW Services* points out that the bidder, by conditioning its offer on the board’s approval, chose to proceed in a fashion that directly entailed the board’s direct statutory authority concerning merger proposals. Although the court was not persuaded that the bidder waived the condition, *id.*, the opinion’s discussion presupposes that the condition was waivable. The opinion also presupposes that, once the bidder waives the condition, its remaining proposal—a tender offer—no longer calls upon the board to act. No Delaware case yet grapples with the board’s discretion to block an all-cash bid for all shares (through a poison pill) if the board proposes no alternate transaction and no competing bidder emerges. *See id.* at 92,180. *Mills* ventures no express resolution of this question. *See supra* note 67. *But see* *Coffee*, *supra* note 27 at 987 (writing prior to *Mills*, commentator argues that a non-coercive bid cannot be blocked except possibly on grounds of illegality).


75. *Id.* at 92,386.

76. *Id.*


78. *Id.* at 90,103.
earlier bid at $62/share, Schlumberger made an all-cash bid at $66 for all shares with one condition—the offer must be accepted by noon the day it was communicated. The court found that Fairchild’s directors believed to be “real” the risk that delay would jeopardize the Schlumberger bid. To the court, the board’s belief “was no sham or pretext for preferring a favored bidder.” Fairchild’s investment banker and a Fairchild director both testified (in the director’s words) that they believed “Schlumberger meant what it said and it was a take it or leave it, $66 that day or Schlumberger was gone.” This belief was attributed to the “continental no-nonsense, no bargaining, take it or leave it” style of Schlumberger’s CEO. Similarly, in RJR Nabisco, RJR’s special committee and the court treated as credible a bidder’s threat to withdraw unless the committee accepted the bid within thirty minutes. “Of course,” observed the court, “this may have been an empty threat.” But the other bid—from a management-allied group—was substantively less appealing. Further, the investment banker advising the committee testified that in his professional judgment, the values of both bids were way at the upper end of the range and the directors were in danger of overtrading the transaction and losing the outside bidder.

The court occasionally is less persuaded than the directors that a bidder’s threat is credible. In J.P. Stevens, as noted above, the court expressly questioned the directors’ acquiescence in Odyssey’s demand that its offer be accepted immediately. Undermining the credibility of Odyssey’s threat, the court suggested, was the likelihood that Odyssey would be willing to pay the same amount a few days later. A question underlying these cases is whether credibility requires some demonstrable basis. That is, are threats, conditions, or demands credible simply because they have been asserted? The Delaware Supreme Court’s controversial opinion in Smith v. Van Gorkom effectively raises this question, along with many others. In Van Gorkom, the CEO of Trans Union Corporation received an offer to buy all shares in the company at $55 through a cash-out merger. The prospective acquiror said Trans Union’s board needed to act on the proposal within three days. The proposed merger was communicated on a Thursday, and the prospective acquiror’s CEO said “we have

79. Id. at 90,099.
80. Id. at 90,103-04.
81. Id. at 90,099.
82. Id.
84. In particular, the bid from the management-allied group included convertible preferred stock with a dividend reset provision that made it less valuable than the convertible debentures proposed by the competing group. Additionally, the debentures carried a higher interest rate, while the preferred’s convertibility feature could be defeated at any time because the preferred was to be callable. Id. at 91,708, 91,712.
85. Id. at 91,712.
87. 488 A.2d 858 (Del. 1985).
to have a decision by no later than Sunday . . . before the opening of the English stock exchange on Monday morning." 88 The opinion notes with disapproval that Trans Union's directors failed to seek a deadline extension to enable them to make a more informed decision about the price. 89 Indeed, nothing in the opinion suggests why the securities market in Great Britain would be self-evidently important for the companies involved (both domestic) or for financing the merger. At a minimum, Van Gorkom establishes that the fact that an acquisition proposal is aggressively presented is not in itself a defense to directors' gross negligence in evaluating whether its price is adequate.

III. RHETORICAL INHIBITION

One puzzling dimension of the MBO cases is an apparent reluctance by courts explicitly to attach the "bad faith" label to conduct. In both Revlon and Mills, the court was persuaded that the process leading to a transaction was so flawed that the transaction (in both cases an asset lockup option) should be enjoined. In Revlon, the directors "allowed considerations other than the maximization of shareholder profit to affect their judgment," 90 leading them to end an auction prematurely by granting a lockup option to a bidding group initially allied with Revlon's senior management. The impermissible considerations included the directors' stated desire to obtain a bidder committed to bail out Revlon noteholders, who threatened to sue the directors when the market value of their notes dropped. Even restricting the operative definition of good faith to subjective motivations, this account of motive readily suggests bad faith.

In Mills the directors of Macmillan permitted an interested party (Macmillan's CEO) to control and, according to the court, impermissibly skew 91 an auction between a third-party bidder and a management-sponsored bidding group. Among other acts, the CEO appointed the board's special committee, selected the committee's counsel, and arranged for the committee to be advised by an investment banking firm that had earlier worked with senior management on a restructuring proposal that would have conferred a large equity stake on management participants. Finally, at the end of a purported blind auction, the CEO tipped the amount of the third party's bid to the management-allied group and failed to disclose this action to the board. The court characterized the board as "torpid, if not supine" and found that it "materially contributed to the unprincipled conduct of those upon whom it looked with blind eye." 92 The factual story told by Mills fits so well within the annals of bad faith that, again, the court's failure to use that terminology is striking.

One possible explanation is that Delaware courts have effectively de-

88. Id. at 867.
89. Id. at 877.
90. Revlon, 506 A.2d at 185.
91. Mills, 559 A.2d at 1281.
92. Id. at 1280.
fined bad faith to mean something other than an absence of good faith. Such a definition might require the party challenging a decision to establish that those making it acted with malice—that is, with a demonstrable intention to inflict injury. This explanation is undercut by the frequent observation that bad faith may be established by inferences drawn from overt conduct, which does not seem to limit the bases for inference to speech or other explicit expressions of motive. Another explanation is that a form of rhetorical inhibition is at work in these opinions. Explicitly finding that someone has acted in bad faith has a punitive and stigmatizing quality. Especially as applied to non-management directors, who rarely derive a direct financial benefit from acquiescing in an MBO proposal, the “bad faith” label may seem excessive.

Rhetorical inhibition helps explain what is otherwise a curious aspect of Mills; namely, the court’s application of the entire fairness standard. The court held in Mills that the entire fairness standard applied because the directors’ interests were divided: “[D]irectors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally.” Eleven of Macmillan's thirteen directors were non-management, independent directors who would not have been equity participants in the management-sponsored transactions. What is the nature of their disqualifying “financial, business or other personal interest”?

Sloth? Extremely passive or slothful directors are typically characterized as failing to fulfill their duty of care (as in Van Gorkom), not as diverging inappropriately from loyalty to shareholder interests. Nonetheless, the supreme court in Mills analyzed the directors’ defaults exclusively as breaches of their obligation to be loyal to shareholders. Perhaps a resort to “entire fairness” as talismanic language follows, though, from the court’s reluctance to apply the bad faith label to conduct evidently deserving strong condemnation. Indeed, the rhetorical import of concluding that someone failed to meet a standard of entire fairness seems weaker than concluding that the person acted in bad faith.

One uncertainty in the wake of Mills is how the “entire fairness” standard relates to criteria applicable to motions for preliminary injunction. As noted above, under the entire fairness standard directors have the burden of establishing fair dealing and fair price. Most prior cases applying these criteria involved proposed or completed transactions (like freeze-out mergers) between majority shareholders and entities they controlled. In contrast, Mills granted a preliminary injunction against an

94. Mills, 559 A.2d at 1282.
96. See, e.g., Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); Weinberger, 457
asset lockup agreement. In Delaware, a plaintiff seeking a preliminary injunction must demonstrate both reasonable probability of success at trial on the merits and irreparable harm if the injunction is not granted. The court will also evaluate whether the likely injury to the defendant if the injunction is granted exceeds the likely injury to the plaintiff if the injunction is denied. Does Mills mean plaintiffs must demonstrate that defendants will be unable to establish the “fair price” component of entire fairness? And how does the irreparable injury requirement fit? Defendants in the prior “entire fairness” cases who failed to establish the fairness of the price paid were ordered to pay damages equal to the difference between the price paid and the company’s value as ascertained by the court. These cases also recognize the appropriateness of monetary relief calculated on a rescissory basis if fraud, misrepresentation, self-dealing or other forms of misbehavior tainted a transaction that cannot practically be undone. A prospective injury is, of course, not irreparable if money damages can adequately compensate for it. These uncertainties suggest that the court in Mills may have used the “entire fairness” terminology more rhetorically than operationally.

Not surprisingly, this body of case law also avoids resort to the “bad faith” label when the conduct at issue is less outrageous but nonetheless seriously flawed in its design or execution. In In re Trans World Airlines, Inc. Shareholders Litigation, the TWA board established a special committee comprised of its two outside directors to consider a merger proposal from TWA’s dominant shareholder, Carl C. Icahn, to acquire all shares in TWA. Neither the committee nor its advisory investment bank, Dillon Reed, developed a view as to a single range of fair value for the minority shares in TWA. Although the committee relied heavily on Dillon Reed, it was not instructed to attempt to get the highest possible price from Mr. Icahn. Instead, the responsible member of Dillon Reed testified, “our role was to provide the independent committee with our opinion with respect to the fairness of the consideration being offered . . . .” The court found that the directors “did not seem to understand that their duty was to strive to negotiate the highest or best available transaction for the shareholders whom they undertook to

A.2d at 712-15; In re Trans World Airlines, Inc. Shareholders Litig., No. 9844, (Del. Ch. Oct. 21, 1988) (Westlaw, 1988 WL 111271); cf. Van Gorkom, 488 A.2d at 893 (directors breached fiduciary duty to shareholders by approving cash-out merger without adequate inquiry as to company’s value and by failing to disclose material information to shareholders; chancery court ordered on remand to determine fair value of shares represented by plaintiffs’ class).

97. See Mills, 559 A.2d at 1278-79.
98. See Weinberger, 457 A.2d at 713-14; Van Gorkom, 488 A.2d at 893.
99. See id. at 714.
100. See In re Trans World Airlines, Inc. Shareholders Litig., No. 9844, Westlaw text at 19-22, 29-30 (denying preliminary injunction against freeze-out merger because plaintiffs will have adequate remedy in award of money damages; court notes availability of rescissory damages if defendants’ misleading disclosure establishes lack of fair dealing).
102. Id. at 7.
103. Id. at 11.
represent.”

So flawed was the committee's performance that the court said the defendants would have the burden at trial of proving the entire fairness of the transaction. Further, the court concluded that the plaintiff's claims of incomplete or inadequate disclosure raised serious questions; among other things, the proxy statement sent to shareholders omitted any mention of an enormous ($1.5-$2 billion) financing for new airplanes that would—or at least could—have a dramatic impact on TWA.

That conduct never receives the “bad faith” label may, at most, be a rhetorical curiosity. The problematics of bad faith have not inhibited the robust assessment of good faith's meaning in this context. These cases contain elaborately developed and highly textured factual accounts of multi-layer scenarios leading to complex transactions. Applying a norm of good faith in such settings, to evaluate directors' fidelity to their fiduciary obligation of loyalty, may not require explicit elaboration or identification of bad faith.

IV. SIGNALS, NUDGES, WINKS AND HELPFUL HINTS

Regardless of their outcome, Delaware cases applying the good faith standard contain numerous expressions of judicial approval or disapproval for varied aspects of parties' conduct. The “bad faith” label may be avoided, but statements of judicial puzzlement, perplexity and concern often appear. Indeed, they appear frequently in cases (like J.P. Stevens) in which the plaintiff fails to persuade the court that it ought to enjoin consummation of the transaction. One explanation for this willingness by Delaware courts to express their reaction lies in the audience for these opinions. That audience is much broader than the immediate litigants and their counsel. If these opinions are, as they appear to be, read closely by corporate lawyers, they can influence advice given to clients in the future.

This prospective influence is a type of “systematic institutional effect” that follows “searching judicial review,” a phenomenon identified by Professors Gilson and Kraakman. Their article argues that if the Unocal standard results in searching judicial review of participants' rationales for defensive strategies, benevolent effects on participants in control transactions will follow. The impact of review under the good faith standard may be weaker, but statements of judicial disapproval under that standard should nonetheless function, at least to an attentive audience, as guideposts to perils to avoid in the future. The audience's responsiveness, in turn, is aided by the existence of cases like Mills and Trans World—that is, by the prospect of an adverse outcome in litigation. Although it would be difficult to empirically demonstrate the impact on behavior of courts' statements of puzzlement or disapproval, it is

104. Id.
105. Id. at 21.
noteworthy that the chancery court itself characterized as “perceptive” Gilson and Kraakman’s argument that Unocal could have a “beneficial impact upon corporate culture.” Likewise, the opinions read like exemplary stories, with compelling factual narratives in which the author explicitly commends or disapproves aspects of the parties’ conduct.

The limits of the good faith standard regarding MBOs were probably tested most severely (without being exceeded) in In re Fort Howard Corp. Shareholders Litigation. As the court observed, “aspects [of the parties’ conduct] supply a suspicious mind with fuel to feed its flame.” Fort Howard’s senior management sought the advice of Morgan Stanley, an investment banking firm, on responses to the company’s depressed stock price. After reviewing the alternatives, Morgan Stanley expressed its interest in sponsoring an LBO with senior management’s participation. In response, Fort Howard’s CEO told Morgan Stanley that senior management’s interest was conditioned on receiving from Fort Howard’s board its prior approval for management’s efforts to structure an MBO and its assent to receive such a proposal. The CEO himself selected the chairman of the board’s special committee to consider the proposal; together they discussed and selected the committee’s other two members. In effect, the court said, the CEO also chose the committee’s special counsel. These methods of selection were “not the best practice.” In addition, the court found it “odd” that the committee asked its financial advisor, First Boston, to talk directly with Morgan Stanley “‘to insure that everybody was dealing with the same factual information’” after the committee’s chairman concluded that the two firms might be far apart in their opinions on fair value. Given the committee’s likely dependence on First Boston for an independent valuation, the court was expressly perplexed that the committee would jeopardize First Boston’s independence.

In Fort Howard, the committee conducted no auction prior to signing a merger agreement with Morgan Stanley. The agreement was structured so that the proposed transaction (to be effectuated through a cash tender offer for any and all shares) would be publicly known for thirty business days prior to implementation. During that period, the committee could provide non-public information to potential acquirors, and could negotiate with them if they initiated the contact with the committee or First Boston. The agreement, however, prohibited actively soliciting competing bids. Although this market check on the deal’s price led to eight inquiries, no competing proposals emerged. Thus, while the absence of competing proposals tends to validate the deal’s valuation of Fort Howard, the pro-

108. Id. No. 9991 (Del. Ch. Aug. 8, 1988).
109. Id., Westlaw text at 29.
110. Id. at 29-30.
111. Id. at 30.
112. Id. at 11.
hilitation on active solicitation might undercut the credibility of the market check.

Throughout the transaction, the committee’s efforts were inhibited by restrictions on the management proposal: an all-cash bid for all shares would be made, but only if the board endorsed the offer. Given this constraint, the court concluded that the committee’s approach “makes sense (and thus, cannot alone justify an inference of bad faith).” The court commended the committee for other aspects of the market check: that it would operate for a sufficient period of time, that “a rapid and full hearted response” met the eight inquiries and that the process was not inhibited by lockup options or fees that would discourage other bidders. Although the committee’s approach unquestionably favored the management group (which enjoyed a head start in negotiating in the absence of other bidders and time limitations) the committee’s market check, the court said, effectively probed for alternative transactions.

Fort Howard can be read as much as a cautionary story as it can be read as a vindication of Fort Howard’s special committee. The opinion expressly disapproves of particular techniques for selecting the committee and its counsel. It strongly questions direct contact between the committee’s financial advisor and that of the bidding group for the purpose—or at least the apparent purpose—of harmonizing their efforts at valuation. By implication it sets guidelines for the credibility of market checks. Indeed, nine months later, the chancery court in In re Formica Corp. Shareholders Litigation used Fort Howard as a benchmark against which to assess the adequacy of another post-agreement market check for an MBO. Interestingly, the agreement in Formica permitted “active exploration” of the market for an alternative transaction; Formica’s investment bank contacted 125 prospects and, as of the date of the opinion, was actively engaged in discussions with four.

Formica nonetheless contributes its own cautionary observation. The court expressly stated its concern that while Formica’s CEO actively considered and then attempted to assemble an MBO, the board permitted him to explore strategic alternatives for Formica, including diversifying its product line through acquisitions, selling Formica and recapitalizing the company. The CEO’s interest in the success of his own deal (the MBO) could jeopardize the likelihood that any alternative would develop. The court, however, said two factors allayed its concern. First, Formica’s outside directors were informed of important developments and supervised the CEO. Second, and more persuasively, Shearson, Lehman, Hutton, Inc., which owned 13.1% of Formica’s common stock, was retained to advise the committee of outside directors. In the court’s view, Shearson

113. Id. at 31 (parenthetical in original).
114. Id.
116. Id. at 92,393.
117. Id. at 92,392 & n.14.
had “economic structural incentive to give independent, accurate valuation advice to the Committee . . . .”\textsuperscript{118} As Shearson owned 1,702,500 shares of Formica, and the tender offer to implement the first stage of the MBO was for $18/share, Shearson’s incentive was large in magnitude and paralleled Shearson’s interest to that of other non-management shareholders. Further, Shearson’s own financial interests overcame its prior business ties with Formica’s management. But in the absence of a financial advisor with a large incentive to realize the highest sale price, the court might, as in \textit{Mills}, focus instead on aspects of the parties’ conduct that are problematic.\textsuperscript{119}

Anecdotal evidence confirms the attentiveness of readers to the chancery court’s statements of disapproval. As it happens, the same lawyer advised the special board committees in both \textit{Fort Howard}, described above, and \textit{RJR Nabisco}. \textit{RJR Nabisco} is especially noteworthy because after an active auction the management-sponsored bidding group lost. This outcome is unusual.\textsuperscript{120} Upon learning that the lawyer used by the committee in \textit{Fort Howard} had been retained by the RJR Nabisco committee, another lawyer (who represented RJR Nabisco’s CEO) is reported to have said: “‘It was clear [he] was going to be living down \textit{Fort Howard} . . . [we] figured he was going to be holier than Caeser’s wife.’”\textsuperscript{121}

\section*{Conclusion}

Corporate lawyers often read cases like those discussed in this article and expect that, in time, courts will develop a set of specific, predictable rules that can be used to evaluate clients’ proposed transactions and strategies.\textsuperscript{122} Equity doesn’t work like that. Many aspects of these cases are best explained in light of the institutional character of the courts deciding them. The institutional fact that the court of chancery is a court of equity defines the expectations one can reasonably hold for its development of the law.

In Delaware, law and equity have never been merged; the court of chancery is exclusively a court of equity and the supreme court, in reviewing its decisions, expressly acknowledges chancery’s special character.\textsuperscript{123} The supreme court itself innovates with an unapologetic readiness

\begin{footnotesize}
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\item \textsuperscript{118} \textit{Id.} at 92,393.
\item \textsuperscript{119} Some factual elements of \textit{Formica} are reminiscent of \textit{Mills}. In \textit{Mills}, the court emphasized that Macmillan’s board had placed “the entire process” in the hands of its interested CEO, who acted “through his own financial advisors, with little or no board oversight . . . .” 559 A.2d at 1280. In \textit{Formica}, at a minimum, absent Shearson’s own economic incentives the court might scrutinize more closely the degree and extent of the board’s oversight of the CEO’s exploration of strategic alternatives.
\item \textsuperscript{120} See DeMott, \textit{Introduction - The Biggest Deal Ever}, 1989 Duke L.J. 1, 11.
\item \textsuperscript{121} See B. Burrough & J. Helgar, \textit{Barbarians at the Gate} 182 (1990).
\item \textsuperscript{122} See Yablon, \textit{Poison Pills and Litigation Uncertainty}, 1989 Duke L.J. 54, 73 (discussing caselaw directed to redemption of poison pills).
\item \textsuperscript{123} See, e.g., Aronson v. Lewis, 473 A.2d 805, 815 n.8 (Del. 1984) (acknowledging chancery’s discretionary review of excuse of demand on directors in shareholder derivative actions).
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reminiscent of equity's dynamic and elastic qualities. 124 Moreover, equity emphasizes the use of judicial discretion to do justice in particular cases rather than the development of hard-and-fast particularized rules. 125 That is, equity courts often develop norms that are formulated very generally but which, given wide judicial discretion, could be applied however justice demands in given circumstances. The good faith norm fits this pattern—fits it so well that the supreme court in Mills acknowledged that chancery applied the norm as if it were the Unocal test. Relatedly, the application of equity's norms often matters more than their precise formulation.

The relationship between the supreme court and the chancery court has intriguing dimensions of its own. As this article illustrates, the supreme court has proliferated differential and complexly interrelated standards. Chancery, meanwhile, adjudicates disputes in such a fact-specific style that one legal standard may readily be transmuted into another. Unless the supreme court effects a drastic change in the law, 126 its impact on chancery's decision may be muted considerably by chancery's unique style of adjudication. Given the complexity of the transactions at issue in these disputes, fact-dominated decisionmaking may well be preferable to readily manipulated formal rules.

To be sure, neither equity courts nor the bodies of law that originate in them are static. 127 Their characteristic qualities are nonetheless instructive. Many early chancellors were ecclesiastics. 128 Beyond that historical fact, equity's general mandate to do justice may help explain why courts of equity sometimes openly acknowledge the normative nature of their decisions 129 or appear to speak directly from moral intuition. 130 The

124. See generally Pound, The Decadence of Equity, 5 Colum. L. Rev. 20, 24 (1905).
125. Id. at 21-22.
126. The supreme court's earlier efforts—subsequently abandoned—to regulate going private transactions by subjecting them to specific uniform standards met with the objection that the supreme court was insufficiently sensitive to equity's unique judicial capacities. See Roland Int'l Corp. v. Najjar, 407 A.2d 102, 1038 (Del. 1979) (Quillen, J. dissenting) (uniqueness of equity is "its ability to react on a case-by-case basis without the rigidity of pigeon holes").
128. Most of the early chancellors in England were ecclesiastics. See 6 McClintock, McClintock on Equity (2d ed. 1948). Equity's early jurisdiction greatly expanded during the reign of Henry VIII in the hands of Cardinal Wolsey. See J. Story, 1 Commentaries on Equity Jurisprudence as Administered in England and America 54-55 (14th ed. 1918). Cardinal Wolsey's successor, Sir Thomas More, in contrast, took a "sober and limited" view of the jurisdiction, which helped to dignify the institution and enhance its public acceptability. See at 56. More, unlike his predecessors, was a layman trained in the common law. See R. Meagher, W. Gummow & J. LeHane, Equity Doctrines and Remedies 6 (2d ed. 1984).
129. See In re TW Services, Inc. Shareholders Litig., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) at 92,180 n.14 (defining the relationships among shareholders, directors and corporations "seems inescapably to involve normative questions, which are probably inherent in the word 'loyalty.'").
130. See DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L.J. 579, 891-92 (discussing presence of language of moral obligation in judicial opinions
chancery court opinions discussed in this article have many of these qualities. The court explores, elaborately and with careful detail, the particulars of each case before it. The criteria applied, like good faith, are so loosely formulated that ample room is left for the court's discretion. The court often expresses judgmental reactions to the parties' conduct—commending it or characterizing it as “odd,” “puzzling” or “troubling”—reactions which are, in a formal sense, gratuitous. On the other hand, these are opinions that resolve no dispute beyond that immediately before the court.

Opinions like these demand a distinctive style of reading, one as alert to nuance as to ultimate disposition. The highly particularized approach taken in the opinions—replete with judicial reactions to the parties' behavior—defies extrapolation into definitive rules. To read these opinions as if they were the work of common law courts leads inevitably to disappointment, if not confusion, for the reader. Consider the image of common law adjudication developed by Professor Dworkin. He writes that common law judges can usefully be analogized to a group of novelists writing one novel seriatim, each chain member in turn interpreting her predecessors' work and adding her own chapter "so as to make the novel being constructed the best it can be . . .”\textsuperscript{131}

Novels, however, have both plots and conclusions, structural features with no apparent analogs in the caselaw discussed in this article. Assuming that literary analogies help at all, itself a debatable point,\textsuperscript{132} these cases most closely resemble parables rather than novels. Each in turn is a factual narrative, a story, used by the court to illustrate general normative principles. The principles mean little apart from the story. And parables are written as if their authors intended them to caution and instruct their readers. So it is with the Delaware cases that seek to define "good faith."

\textsuperscript{131} R. Dworkin, Law's Empire 229 (1986).
\textsuperscript{132} See generally R. Posner, Law and Literature: A Misunderstood Relation (1988) (analysis of claims that literary devices and literary treatments of legal and moral issues are useful to lawyers and judges).