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Virginia is for Lovers and Directors: Important Differences Between Fiduciary Duties in Virginia and Delaware

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VIRGINIA IS FOR LOVERS¹ *AND DIRECTORS*:
IMPORTANT DIFFERENCES BETWEEN
FIDUCIARY DUTIES
IN VIRGINIA AND DELAWARE

LAURENCE V. PARKER, JR.*

ABSTRACT

Virginia and Delaware have different approaches to a director's fiduciary duties. The Virginia Stock Corporation Act imposes a deferential subjective standard of conduct that allows the more-frequent application of its business judgment rule. Virginia courts have followed the Virginia Stock Corporation Act and have shown even more deference to the decisions of directors than the Virginia Stock Corporation Act may require. In addition, Virginia courts have been reluctant to hold that additional constituencies, beyond the corporation and shareholders as a class, are owed fiduciary duties. Finally, Virginia courts have not imposed "enhanced scrutiny" on the decisions of directors involving hostile takeovers or changes of corporate control analogous to those fashioned by Delaware in Unocol Corp. v. Mesa Petroleum Co. and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc. Virginia does not impose fiduciary duties between shareholders or between the board and minority shareholders, while Delaware has fashioned such duties. The statutory and judicial deference in Virginia, the narrower set of constituencies to attack a director's action or inaction, and the absence of any enhanced scrutiny in the hostile takeover and change of control context gives Virginia a strong argument that it is more director-friendly than Delaware.

¹ The longtime tag line of the Virginia Tourism Corporation. See Official Tourism Website of the Commonwealth of Virginia, <http://www.virginia.org/> (last visited Feb. 3, 2011).

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INTRODUCTION

The deferential interpretation of the Virginia Stock Corporation Act (VSCA) by Virginia's courts gives Virginia an argument that it is more director-friendly than Delaware. VSCA was carefully crafted to ensure the frequent application of the statutory business judgment rule.² In addition, the rule itself is subjective, not objective.³ Virginia's courts have not only followed VSCA, but they have also been reluctant to hold that additional constituencies are owed fiduciary duties or to create enhanced standards of review.⁴

Part I of this Article discusses contrasts between Virginia and Delaware that help demonstrate: (1) in Delaware, the board and majority shareholders owe the minority shareholders fiduciary duties,⁵ while Virginia has not adopted this approach;⁶ (2) in Delaware, the board of an insolvent corporation owes fiduciary duties to the corporation's creditors,⁷ but Virginia has not yet held that directors of an insolvent corporation owe fiduciary duties to creditors;⁸ (3) the standard for evaluating a director's duties in Virginia is subjective,⁹ whereas in Delaware the test is objective;¹⁰ (4) in Delaware, a board taking steps to resist a hostile takeover attempt is held to the "enhanced scrutiny" standard articulated in

² VA. CODE ANN. § 13.1-690 (2006). Virginia's statutory business judgment rule is cross-referenced four times in the VSCA to clarify that it is the proper standard to apply to directors: § 13.1-646 (2010) (regarding the issuance of share options), § 13.1-692 (2006) (regarding the determination that distributions were improper), § 13.1-727.1 (2006) (regarding Virginia's affiliated transactions statute), and § 13.1-728.9 (2006) (regarding Virginia's control share acquisition statute).

³ See *infra* Section IV.

⁴ There are, of course, other factors that support the argument that Virginia may be more director-friendly than Delaware, but this Article focuses primarily on fiduciary duties. For example, one could argue that Delaware's statutory limit on exculpation—no elimination of liability for claims that arise from the duty of loyalty—has resulted in some interesting reasoning in Delaware cases and may be less favorable than Virginia's exculpation provision. Compare VA. CODE ANN. § 13.1-692.1 (2006), with DEL. CODE ANN. tit. 8, § 102(b)(7) (2011). This is, however, beyond the scope of this Article.

⁵ See, e.g., *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156 (Del. 1995); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923).

⁶ See, e.g., *Willard v. Moneta Bldg. Supply*, 515 S.E.2d 277, 288 (Va. 1999); *Remora Invs., L.L.C. v. Orr*, 673 S.E.2d 845, 848 (Va. 2009) (quoting *Am. Gen. Ins. Co. v. Equitable Gen. Corp.*, 493 F. Supp. 721, 741 (E.D. Va. 1980)).

⁷ *Geyer v. Ingersoll Publ'ns. Co.*, 621 A.2d 784, 787 (Del. Ch. 1992).

⁸ See *Trace Mountain Prod., Inc. v. Special Data, Inc.*, 35 Va. Cir. 146, 147-48 (1994) (fiduciary duties may be owed to creditors following dissolution in Virginia).

⁹ VA. CODE ANN. § 13.1-690 (2006) (requiring "good faith business judgment").

¹⁰ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

Unocal Corp. v. Mesa Petroleum Co.,¹¹ whereas in Virginia the board is held to a lesser statutory business judgment standard;¹² and (5) Delaware has adopted enhanced duties for the board where the board has put the corporation on the market, known as “*Revlon Duties*,”¹³ while Virginia has expressly rejected these “*Revlon Duties*.”¹⁴

Part I of this Article discusses the facts in *Willard v. Moneta Building Supply, Inc.*,¹⁵ one of the cases that highlights several key differences between Delaware and Virginia. Part II discusses the constituencies owed fiduciary duties in Delaware and Virginia when the corporation is solvent. Part III discusses the instances where creditors are owed fiduciary duties in Delaware, where creditors may be owed duties in Virginia, and the limits on those duties. Part IV discusses the standard of conduct for directors in Delaware and Virginia. Parts V and VI discuss the enhanced standards of conduct adopted in Delaware that have not been adopted in Virginia.

I. HOW IS VIRGINIA DIFFERENT? *WILLARD V. MONETA BUILDING SUPPLY, INC.* COUNTS A FEW OF THE WAYS

A 1999 case, *Willard v. Moneta Building Supply, Inc.*,¹⁶ contains several examples of the clear differences between corporate fiduciary duties in Delaware and Virginia. In *Willard*, the majority shareholders, Amerigo and Rose Mary Cappellari, husband and wife, owned 75.2 percent of the shares of Moneta Building Supply, Inc. (Moneta), a Virginia corporation that owned a building supply business.¹⁷ Their son, David, owned 5.1 percent of the company, and Ronald Willard owned the remaining 19.7 percent.¹⁸ David, who was the President of Moneta, wanted to purchase his parents’ interest in the company but was not able to do so because a Stock Purchase Agreement among the shareholders triggered first refusal rights in favor of all of the shareholders, including Willard, if David’s parents tried to sell him their shares.¹⁹

¹¹ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

¹² *WRL Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1182 (4th Cir. 1995).

¹³ Named for *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). This case applied *Revlon Duties* in Delaware for the first time. *Id.*

¹⁴ *Willard v. Moneta Bldg. Supply*, 515 S.E.2d 277, 284 (Va. 1999).

¹⁵ *Id.*

¹⁶ *Id. But see* *Poth v. Russey*, 281 F. Supp. 2d 814, 826 (E.D. Va. 2003) (stating that “[w]hen a corporation approaches insolvency, the fiduciary duty of the directors shifts from the stockholders to the creditors”).

¹⁷ *Willard*, 515 S.E.2d at 280.

¹⁸ *Id.* at 280 & n.2.

¹⁹ *Id.* at 280.

Because of this restriction, David resigned as President and director of Moneta, but agreed to stay on as a manager until another manager was located.²⁰ David formed Capps Home & Building Supply, Inc. (Capps) and caused it to submit an Asset Purchase Agreement to Amerigo and Rose Mary, who were then the only directors of Moneta, on November 15, 1996. In the agreement, Capps offered to buy Moneta's assets for \$1,300,000.²¹ Subsequently, David revised his offer and proposed to assume Moneta's liabilities in exchange for a purchase price reduction to \$1,150,000.²² The offer would remain open until November 23, 1996.²³ Amerigo and Rose Mary, in their capacities as members of the board of directors, elected to accept the offer subject to shareholder approval and some additional changes in the Asset Purchase Agreement. They called a shareholder meeting for December 20, 1996, to vote on the Asset Purchase Agreement, and did not make any voting recommendation.²⁴ On December 10, 1996, Willard submitted a counter offer to purchase Moneta's assets for \$1,550,000, but indicated the offer would expire on December 13, 1996.²⁵ Moneta's Board did not reject the Willard offer and encouraged Willard to bring it up at the December 20 shareholder meeting.²⁶ Willard increased his offer to \$1,750,000 before the shareholder meeting, but requested an additional thirty days to determine whether an even higher price was warranted.²⁷ At the shareholder meeting, Amerigo and Rose Mary voted to approve the Capps transaction, David abstained, and Willard voted against the proposal.²⁸

After completing the transaction with the Capps, Willard filed a derivative action on Moneta's behalf against Amerigo, Rose Mary, David and Capps, alleging, among other things, that the directors of Moneta breached their fiduciary duties in approving the sale to Capps, and that the sale was a conflict of interest transaction.²⁹ Willard requested that the sale to Capps be voided and sought damages, constructive trust over Capps' income, and an award of expenses, attorneys' fees, and costs.³⁰ The trial

²⁰ *Id.*

²¹ *Id.* at 281.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 282.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 282-83.

³⁰ *Id.*

court dismissed each of Willard's claims, causing Willard to appeal to the Supreme Court of Virginia.³¹

Willard appealed and alleged that Amerigo and Rose Mary breached their duty to maximize the sale price, urging the court to hold that directors of Virginia corporations owe *Revlon* Duties.³² Willard also asserted that the directors of Moneta breached their duty of loyalty because the transaction with Capps involved a conflict of interest, and that the directors of Moneta should not be able to avoid their fiduciary duties as directors by not making a recommendation in their capacities as directors and then voting to approve the transaction as shareholders.³³

The Supreme Court of Virginia affirmed the lower court's ruling, avoided creating fiduciary duties between majority and minority shareholders,³⁴ clarified that Virginia's standard of director conduct is measured by a subjective, not an objective standard,³⁵ and declined to adopt *Revlon* Duties.³⁶ The salient facts of *Willard*—a minority shareholder who offered a higher price disputing the sale to the son of the directors at a lower price—seemed to weigh heavily in favor of Mr. Willard; reasonable people argued that the court could have been true to the deference shown to directors in VSCA but come to a different conclusion in *Willard*.³⁷ Despite this sentiment, the Supreme Court of Virginia in *Willard* showed that, not only does Virginia have a deferential statute in VSCA, but Virginia's courts also provide directors broad deference.

II. DUTIES OWED TO THE CORPORATION, SHAREHOLDERS, AND MINORITY SHAREHOLDERS

In Delaware, a board of directors owes fiduciary duties to the corporation,³⁸ the shareholders,³⁹ and the minority shareholders,⁴⁰ and a

³¹ *Id.* at 283.

³² *Id.*; see *infra* Part VI.

³³ *Willard*, 515 S.E.2d at 286-88.

³⁴ *Id.* at 288.

³⁵ *Id.* at 284.

³⁶ *Id.*

³⁷ In fact, the leading commentator on Virginia corporate law called aspects of the *Willard* case "puzzling." See ALLEN C. GOOLSBY, GOOLSBY ON VIRGINIA CORPORATION LAW 177 (Matthew Bender ed., 2002).

³⁸ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

³⁹ *Id.*

⁴⁰ See, e.g., *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1176, 1180 (Del. 1995) (recognizing the rights of minority shareholders on issues of fairness and fair price analysis).

majority or controlling shareholder owes fiduciary duties to the minority shareholders,⁴¹ especially in transactions that result in a change of control of the corporation.⁴² The fiduciary duties of directors and controlling shareholders include the duties of care and loyalty.⁴³

However, the directors and controlling shareholders are subject to different standards of review. In most instances, when assessing the duties owed to a corporation or its shareholders, the board of directors of a Delaware corporation is entitled to the protection of the business judgment rule.⁴⁴

The [business judgment] rule operates as both a procedural guide for litigants and a substantive rule of law. As a rule of evidence, it creates a presumption that in making a business decision, the directors of a corporation acted on an informed basis [i.e., with due care], in good faith and in the honest belief that the action taken was in the best interest of the company. The presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment.⁴⁵

The protection of the business judgment rule, however, is not absolute:

To rebut the [business judgment] rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the *triads* of their fiduciary duty—good faith, loyalty or due care. If a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make, and our courts will not second-guess these business judgments. If the rule is rebutted, the burden shifts to the defendant directors, the proponents of the challenged transaction, to prove to the trier of fact the “entire fairness” of the transaction to the shareholder plaintiff.⁴⁶

⁴¹ *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923).

⁴² *See, e.g., Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113-17 (Del. 1994); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, No. 758-CC, 2009 Del. Ch. LEXIS 174, at *36-43 (Del. Ch. Oct. 2, 2009).

⁴³ “Good faith” is not a separate fiduciary duty but a component of the duty of loyalty. *Stone v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

⁴⁴ Anti-takeover measures, which are subject to the standard in *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), and sale of the enterprise, which is subject to the duties outlined in *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986), are two notable exceptions to the application of the business judgment rule.

⁴⁵ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (internal citations omitted).

⁴⁶ *Id.* (internal citations omitted). While following *Gantler v. Stephens*, 965 A.2d 695

When a majority or controlling shareholder exercises its majority power to receive benefits to the detriment of the minority shareholder, Delaware courts have held that the majority shareholder owes the minority shareholder a fiduciary duty.⁴⁷ In this situation, a majority shareholder is not entitled to the protection of the business judgment rule. Instead, entire fairness is the standard of review.⁴⁸ “[T]he ultimate burden of proof is on the majority shareholder to show by a preponderance of the evidence that the transaction is fair.”⁴⁹ To demonstrate unfairness of the transaction, the plaintiff must first “allege specific acts of fraud, misrepresentation or other items of misconduct.”⁵⁰ In addition, the controlling shareholder may shift the burden to the plaintiff to prove that the transaction was unfair.⁵¹ This may be done if there has been “an approval of the transaction by an independent committee of directors or an informed majority of minority shareholders.”⁵²

In contrast, in Virginia, the fiduciary duties of directors run to the corporation and the shareholders as a class, with no duties owed by directors or majority shareholders to minority shareholders.⁵³ Because shareholders cannot bring direct claims against an officer or director in Virginia,⁵⁴ a director’s duty to the shareholders as a class may not add

(Del. 2009), it is clear that officers of Delaware corporations owe the same fiduciary duties as directors; however, the extent of the protection the business judgment rule is unclear. Some commentators have suggested that the business judgment rule should not apply to officers. *See* Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW 439 (2005). Virginia has not addressed whether officers owe the same fiduciary duties as directors or whether officers may be protected by the business judgment rule. Virginia does provide for favorable indemnification of officers. *Compare* VA. CODE ANN. §§ 13.1-698 (2006), and 13.1-704(B), with DEL. CODE ANN. tit. 8, § 145 (2011)) and, unlike Delaware, allows for exculpation of officers. *Compare* VA. CODE ANN. § 13.1-692.1, and DEL. CODE ANN. tit. 8, § 102(b)(7)). This may allow Virginia to lay claim to being more favorable to officers than Delaware. This, however, is a topic for another day.

⁴⁷ *See, e.g.*, *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720-22 (Del. 1971).

⁴⁸ *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110, 1116-17 (Del. 1994).

⁴⁹ *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983).

⁵⁰ *Id.*

⁵¹ *Kahn*, 638 A.2d at 1117.

⁵² *Id.* However, Delaware courts have held that in transactions where the controlling shareholder did not stand on both sides of the transaction but merely was selling alongside the minority that *both* negotiation by a committee of disinterested directors and a non-waivable approval by a majority of all outstanding minority shares is required to shift the burden to the plaintiff. *In re John Q. Hammons Hotels Inc. S’holder Litig.*, No. 758-CC, 2009 Del. Ch. LEXIS 174, at *10 (Del. Ch. Oct. 2, 2009).

⁵³ *See, e.g.*, *Remora Invs., L.L.C. v. Orr*, 673 S.E.2d 845, 848 (Va. 2009) (quoting *American General Ins. Co. v. Equitable General Corp.*, 493 F. Supp. 721, 741 (E.D. Va. 1980)).

⁵⁴ *Simmons v. Miller*, 544 S.E.2d 666, 675 (Va. 2001).

much to the duty a director owes to the corporation beyond the duty to fully and fairly disclose material information to the shareholders.⁵⁵ In most instances, if a director discharges his duty to the corporation, he probably has discharged his duties to the shareholders as a class. Further, while not an issue on appeal, the facts in *Willard* offered an opportunity for the Supreme Court of Virginia to hold that majority shareholders owe fiduciary duties to minority shareholders, but it did not do so. After *Willard*, in *Remora Investments, L.L.C. v. Orr*,⁵⁶ the Supreme Court of Virginia made clear that there are, in fact, no fiduciary duties between shareholders in Virginia.⁵⁷ As a result, a director of a solvent corporation in Virginia has fewer constituencies to whom he owes fiduciary duties—the corporation and the shareholders as a class—than his counterparts in Delaware. This interpretation of the law makes it easier for a director to understand his duties and leaves fewer avenues to challenge director action or inaction.

III. CREDITORS

In Delaware, when a corporation becomes insolvent, fiduciary duties arise in favor of its creditors;⁵⁸ however, as there is no direct right of action in favor of the creditors, the claim must be enforced derivatively.⁵⁹ Delaware courts do not recognize fiduciary duties to creditors when the corporation is still solvent but in the “zone of insolvency.”⁶⁰ Delaware courts believe that the better policy is to encourage the board of a corporation that is not yet insolvent to “continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation and for the benefit of its shareholder owners.”⁶¹ Delaware reasoned that finding a fiduciary duty to creditors when a corporation is in the “zone of insolvency” may involve:

[U]sing the law of fiduciary duty to fill gaps that do not exist. Creditors are often protected by strong covenants, liens on assets, and other negotiated contractual protections. The implied covenant of good faith

⁵⁵ See, e.g., *Adelman v. Conotti Corp.*, 213 S.E.2d 774, 779 (Va. 1975).

⁵⁶ *Remora Invs., L.L.C. v. Orr*, 673 S.E.2d 845 (Va. 2009).

⁵⁷ *Id.* at 848.

⁵⁸ *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 787 (Del. Ch. 1992).

⁵⁹ *N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 101-02 (Del. 2007).

⁶⁰ *Id.* at 101.

⁶¹ *Id.*

and fair dealing also protects creditors. So does the law of fraudulent conveyance. With these protections, when creditors are unable to prove that a corporation or its directors breached any of the specific legal duties owed to them, one would think that the conceptual room for concluding that the creditors were somehow, nevertheless, injured by inequitable conduct would be extremely small, *if extant*. Having complied with all legal obligations owed to the firm's creditors, the board would, in that scenario, ordinarily be free to take economic risk for the benefit of the firm's equity holders, so long as the directors comply with their fiduciary duties to the firm by selecting and pursuing with fidelity and prudence a plausible strategy to maximize the firm's value.⁶²

Delaware courts have held that the insolvency of a corporation, however, "makes the creditors the principal constituency injured by any fiduciary breaches that diminish the firm's value."⁶³ For this reason, Delaware allows the creditors of an insolvent corporation to derivatively pursue claims that a director has breached his or her fiduciary duty.⁶⁴

Virginia has not addressed the fiduciary duty to creditors issue directly. In *Luria v. Board of Directors of Westbriar Condominium Unit Owners Association*,⁶⁵ the Supreme Court of Virginia came close, but the *Luria* case was about fraudulent transfers and improper distributions, not any fiduciary duty to creditors per se.⁶⁶ In *Luria*, John Luria was the developer of the Westbriar Condominium, a 224 unit condominium in Fairfax, Virginia (Westbriar).⁶⁷ Mr. Luria owned an interest in several entities—Jade Westbriar, Inc., Jade WFW, LLC, and Westbriar, LLC—which were used to build the project and served as declarants under Westbriar's condominium declaration.⁶⁸ By virtue of their position as declarants under Virginia's Condominium Act, Mr. Luria's entities controlled Westbriar's condominium owners' association (the

⁶² *Id.* at 100 (quoting *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 790 (Del. Ch. 2004)).

⁶³ *Id.* at 102 (quoting *Prod. Res. Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772, 794 n.67); *see also* *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, No. 12150, 1991 Del. Ch. LEXIS 215, at *108 n.55 (Del. Ch. Dec. 30, 1991) (explaining, in a simple hypothetical, how a director of an insolvent corporation would pursue a riskier decision that may result in some residue for shareholders if he believed his duty was to the shareholders, but would pursue a safer alternative that was likely to cover some or all of the corporation's debt if he believed his duty was to the creditors).

⁶⁴ *See Gheewalla*, 930 A.2d at 102.

⁶⁵ *Luria v. Bd. of Dirs. of Westbriar Condo. Unit Owners Ass'n*, 672 S.E.2d 837 (Va. 2009).

⁶⁶ *See id.*

⁶⁷ *Id.* at 838.

⁶⁸ *Id.*

Association) during construction and initial sale of the units.⁶⁹ The Exterior Installation and Finishing System (EIFS) was applied to the exterior of Westbriar in lieu of siding or stucco.⁷⁰ In June of 1999, Mr. Luria learned that the design architect, Christian J. Lessard, believed that caulking and flashing were needed for the EIFS in several areas, and in October of 2000, Mr. Lessard recommended that a waterproofing engineer be hired to verify the application of caulking and flashing.⁷¹

Mr. Luria caused each of his entities to make distributions and transfers to him between 1996 and the end of 2002.⁷² Control of the Association passed to the unit owners in June of 2002.⁷³ When the Association hired engineering consultants to identify any warranty claims, the consultants discovered that there were substantial issues with the EIFS, and the consultants recommended that all of the EIFS be removed and replaced.⁷⁴ The Association brought claims against Mr. Luria, including a claim that as a manager of Westbriar, LLC, the last entity that served as declarant before control of the Association shifted to the unit owners, he breached his fiduciary duty to the Association in its capacity as a creditor of Westbriar, LLC.⁷⁵ The claim asserted breach because Mr. Luria made distributions to himself from Westbriar, LLC when the Association was owed monies to remove and replace the EIFS.⁷⁶ The trial court found that, under the standard in *Marshall v. Fredericksburg Lumber Co.*,⁷⁷ Mr. Luria breached his fiduciary duty to the Association as a creditor of Westbriar, LLC, and Mr. Luria appealed.⁷⁸

The Supreme Court of Virginia highlighted its holding in *Marshall* that “where there are existing creditors of a corporation the stockholders will not be permitted, as against those creditors, to withdraw the assets of the corporation without consideration, whether it be done through a purchase of stock by the corporation or otherwise.”⁷⁹ The *Marshall* case, which was decided well before the current version of VSCA was adopted, has been cited as an example of Virginia’s adoption of the “trust fund

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 839.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ 173 S.E. 553 (Va. 1934).

⁷⁸ *Luria v. Bd. of Dirs. of Westbriar Condo. Unit Owners Ass’n*, 672 S.E.2d 837, 839 (Va. 2009).

⁷⁹ *Id.* (quoting *Marshall*, 173 S.E. at 557).

doctrine.”⁸⁰ However, it appears that the actual issue before the court in *Marshall* was whether the use of corporate assets to redeem stock for the benefit of the controlling shareholder’s family members was a fraudulent transfer.⁸¹ The test enunciated in *Marshall* seems to be similar to the current statutory test for an improper distribution—that is, a distribution is prohibited if the corporation is insolvent on a balance sheet test or “would not be able to pay its debts as they become due in the usual course of business”⁸²—and the VSCA’s dissolution provisions that require directors to make reasonable provisions for payment of claims before approving a distribution to shareholders.⁸³ In each case, under current law, a director is not personally liable for the distribution under section 13.1-692 of VSCA unless he approved the improper distribution without complying with the standard of conduct in Virginia’s business judgment rule under 13.1-690.⁸⁴ In addition, the court’s reasoning in *Luria* suggests that under an unlawful distribution analysis, like a fraudulent transfer analysis under section 55-80 of the Virginia Code,⁸⁵ the court must first determine whether the transferor had actual notice of the claimant’s claim at the time of the challenged distribution.⁸⁶

Thus, in *Luria*, the court did not decide whether a manager of an LLC or a director of a corporation could owe a fiduciary duty to the entity’s creditors; rather, the court held that it was unnecessary to make that determination.⁸⁷ The court ultimately held, because Mr. Luria did not have actual notice of the issues with the EIFS at the time of the distributions

⁸⁰ *Bank of Am. v. Musselman*, 222 F. Supp. 2d 792, 798 (E.D. Va. 2002).

⁸¹ *Marshall*, 173 S.E. at 556 (stating the appellant alleged that “the [trial] court erred in holding that the stock sale was a fraud, and in entering a decree requiring the repayment of the purchase price of the stock”).

⁸² VA. CODE ANN. § 13.1-653(C)(1) (2006).

⁸³ § 13.1-746.

⁸⁴ § 13.1-692(A). Directors may seek contribution from other directors and recoupment from shareholders under § 13.1-692(B). *See also* Commonwealth Transp. Comm’r v. Matyiko, 481 S.E.2d 469 (Va. 1997).

⁸⁵ *See generally* VA. CODE ANN. § 55-80.

⁸⁶ *Luria v. Bd. of Dirs. of Westbriar Condo. Unit Owners Ass’n*, 672 S.E.2d 837, 840 (Va. 2009). Another case, not involving improper distributions, suggested that Virginia courts may be reluctant to allow creditors to recover from officers or directors absent self-dealing. In *Bank of America v. Musselman*, 222 F. Supp. 2d 792, 794, 797-98 (E.D. Va. 2002), the court held that such recoveries are only permitted in three extraordinary circumstances, each of which require self-dealing from the officer or director: (1) where the corporate veil piercing doctrine applies; (2) where officers or directors prefer themselves over other creditors, in repaying loans by the officers or directors; or (3) when “trust fund doctrine” applies and the directors or officers divert the corporation’s assets for their benefit—that is, the corporation is insolvent and the directors or officers distribute corporate assets for their benefit that could have been used to repay creditors.

⁸⁷ *Luria*, 672 S.E.2d at 841.

and transfers, the Association was not a creditor, and Mr. Luria could not have owed it fiduciary duties, even if such duties existed in Virginia.⁸⁸

While the court in *Luria* did not state that directors owe fiduciary duties to creditors, it did not rule such duties out entirely. Further, the operative provision of VSCA, section 13.1-692, states:

A director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation *and its creditors* for the amount of the distribution that exceeds what could have been distributed without violating this chapter or the articles of incorporation if the party asserting liability establishes that when taking the action the director did not comply with § 13.1-690.⁸⁹

The italicized language suggests that the General Assembly specifically expected creditors to be able to recover improper distributions directly from directors but only if the directors do not satisfy the standard of conduct in section 13.1-690 of VSCA. While Virginia courts have not stated that this right to recover arises from a fiduciary duty, directors have been held responsible for creditors' claims where the directors approved a distribution in violation of VSCA.⁹⁰

Delaware has held that directors owe fiduciary duties to creditors when the corporation is insolvent, and then the claims may only be enforced derivatively.⁹¹ Virginia has a statutory scheme that allows creditors to recover directly from directors in the narrow instance where the creditor is harmed by a distribution approved by the director in violation of the standard of conduct in Virginia's statutory business judgment rule.⁹² The VSCA does not list a creditor among those authorized to pursue a derivative action against a director,⁹³ therefore, a creditor may not be able to enforce the broader fiduciary duties of care and loyalty owed to the corporation and its shareholders as a class. However, in Delaware, the courts have suggested that they would allow creditors to enforce the broader fiduciary duties of care and loyalty directors owe to the

⁸⁸ *Id.*

⁸⁹ VA. CODE ANN. § 13.1-692 (emphasis added).

⁹⁰ Commonwealth Transp. Comm'r v. Matyiko, 481 S.E.2d 469, 472-73 (Va. 1997).

⁹¹ N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 102 (Del. 2007).

⁹² VA. CODE ANN. § 13.1-690(A).

⁹³ See § 13.1-672.1(A) (referring to derivative and similar proceedings as being brought by shareholders without reference to creditors).

corporation via a derivative action.⁹⁴ In short, in Delaware, creditors of an insolvent corporation may enforce the full range of fiduciary duties against directors via a derivative action, but, in Virginia, under current precedent, creditors may only pursue a direct action to recover an improper distribution—a much narrower range of creditor remedies against directors.

IV. SUBJECTIVE VERSUS OBJECTIVE STANDARD OF CONDUCT

In Delaware, the standard of care is objective: “directors of a corporation in managing the corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances.”⁹⁵ If the board does not satisfy this standard of conduct, Delaware does not apply the deferential business judgment standard of review.⁹⁶ Delaware has indicated that a failure to meet the standard of care requires more than simple negligence.⁹⁷

In Virginia, the General Assembly adopted a subjective standard that requires a director to “discharge his duties as a director, including his duties as a member of a committee, in accordance with *his* good faith business judgment of the best interests of the corporation.”⁹⁸ This was a deliberate effort to avoid the idealized reasonable man standard,⁹⁹ and Virginia courts have followed the subjective approach.¹⁰⁰ However, in *Willard*, the court indicated that it will look favorably upon boards that engage in an informed and deliberative decision-making process,¹⁰¹ perhaps not that different from what you would expect an objective reasonable man to pursue. The *Willard* court held that “[i]f a director acts in accordance with that standard, Code § 13.1-690(C) provides a ‘safe harbor’ that shields a director from liability for any action taken as a director, and for failure to take action.”¹⁰² However, the business judgment rule in section 13.1-690 of the VSCA does not displace common law

⁹⁴ *Gheewalla*, 930 A.2d at 102.

⁹⁵ *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963).

⁹⁶ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993).

⁹⁷ *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. Super. Ct. 1984).

⁹⁸ VA. CODE ANN. § 13.1-690(A) (emphasis added).

⁹⁹ Joint Bar Committee Commentary (Revised 1999) to VA. CODE ANN. § 13.1-690 (2007).

¹⁰⁰ *Willard v. Moneta Bldg. Supply, Inc.*, 515 S.E.2d 277, 284 (Va. 1999).

¹⁰¹ *Id.* at 289.

¹⁰² *Id.* at 284 (quoting *Commonwealth Transp. Comm’r v. Matyiko*, 481 S.E.2d 468, 470 (Va. 1997)).

fiduciary duties; it merely provides a safe harbor if a director satisfies the standard of conduct.¹⁰³

Thus, the objective Delaware standard and the subjective Virginia standard differ in material ways and could result in different outcomes under similar fact patterns. Each approach has its shortcomings. The Delaware approach can be problematic because it may invite the application of hindsight bias,¹⁰⁴ it is difficult for a trier of fact to apply consistently, and, if applied literally (for example, for simple negligence), it may hold directors to an unrealistic standard.¹⁰⁵ The Delaware Supreme Court itself indicated that it may not be perfectly clear what the standard of conduct is, but simple negligence is not enough to violate the standard.¹⁰⁶ While Virginia's approach has the virtue of simplicity, a director who subjectively believes a decision that no reasonable person would approve is appropriate, could, at least in theory, benefit from the protection of Virginia's statutory safe harbor under section 13.1-690(C) of VSCA. In addition, if a Virginia court emphasizes the decision process, it could undercut the subjective standard and turn it into a *de facto* reasonable man standard. Regardless, most directors would probably prefer to be judged by a Virginia court applying Virginia's subjective standard as opposed to a reasonable man standard applied by any court.

¹⁰³ *Id.* at 285; *see also* the discussion of the common law duty of loyalty in the context of business opportunities in *Simmons v. Miller*, 544 S.E.2d 666, 676 (Va. 2001). The court noted:

The acts cited by Simmons as constituting Miller's breach of duty to Las Palmas include 'secretly organizing Las Palmas International/Professor Sila.' *Clearly, the organization of [Las Palmas] International, a competitor, was not a corporate act of Las Palmas* Although implicating a common law duty of loyalty, this act does not fall within the scope of Code § 13.1-690. Miller was not entitled to protection under the statutory business judgment rule.

Id. (emphasis added). Since *Simmons*, Supreme Court of Virginia has adopted the business opportunities provision, which provides a safe harbor for directors seeking to take advantage of a corporate opportunity. VA CODE ANN. § 13.1-691.1 (2006). For another case that addressed directors' common law duty of loyalty and actions that were not corporate acts of the entity in question, see *Feddeman & Co., C.P.A., P.C. v. Langan Assoc., P.C.*, 530 S.E.2d 668 (Va. 2000).

¹⁰⁴ Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 144 (1980).

¹⁰⁵ Joint Bar Committee Commentary (Revised 1999) to VA. CODE ANN. § 13.1-690 (2007).

¹⁰⁶ *Aronson v. Lewis*, 473 A.2d 805, 812 n.6 (Del. 1963).

V. *UNOCAL* AND THE “ENHANCED SCRUTINY” STANDARD

In *Unocal Corp. v. Mesa Petroleum Co.*,¹⁰⁷ the Delaware Supreme Court adopted an “enhanced scrutiny” standard that a board must satisfy before the business judgment rule can be applied if a board takes defensive measures to resist a hostile takeover, reasoning that in such cases “a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.”¹⁰⁸ Under the *Unocal* “enhanced scrutiny” standard, the board must show that it “had reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person’s stock ownership.”¹⁰⁹ The defensive measure must be motivated by “a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or misconduct” and must not arise “solely or primarily out of a desire to perpetuate [the directors] in office.”¹¹⁰ Finally, the defensive measure “must be reasonable in relation to the threat posed.”¹¹¹

In contrast, in *W.L.R. Foods, Inc. v. Tyson Foods, Inc.*,¹¹² the United States Court of Appeals for the Fourth Circuit, applying Virginia law, declined to adopt any test based on a common law duty of loyalty and held that Virginia’s statutory standard, under section 13.1-690 of VSCA, is the proper standard to apply when reviewing director’s actions in the face of a hostile takeover attempt.

[T]he Code expressly provides that actions of directors with respect to issuing rights or options for the purchase of shares of a corporation are subject to review under the standard articulated in § 690. Similarly, the Code provides that conduct concerning affiliated transactions ... as well as transactions involved in control share acquisitions ... are subject to § 690.¹¹³

¹⁰⁷ 493 A.2d 946 (Del. 1985).

¹⁰⁸ *Id.* at 954.

¹⁰⁹ *Id.* at 955.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² 65 F.3d 1172 (4th Cir. 1995).

¹¹³ *Id.* at 1182 (internal citations omitted); see VA. CODE ANN. § 13.1-646(B) (2010) (regarding a director’s duties in connection with the adoption of a rights plan); § 13.1-727.1 (2006) (regarding a director’s duties in connection with defensive measures taken under Virginia’s Affiliated Transactions statute); § 13.1-728.9 (2006) (regarding a director’s duties in connection with defensive measures take under Virginia’s Control Share Acquisitions statute).

In addition, the court held that in evaluating conflicts of interest involving a corporate transaction, section 13.1.691, not the common law, governs.¹¹⁴

In *Willard ex rel. Moneta Building Supply, Inc. v. Moneta Building Supply*,¹¹⁵ the case that the Virginia Supreme Court ultimately upheld in *Willard*, the Circuit Court of Bedford County, Virginia, cited at length and found persuasive the trial court's analysis in *W.L.R. Foods*, including the trial court's determination that *Unocal* and *C-T of Virginia, Inc. v. Barrett*¹¹⁶ were not applicable in Virginia.¹¹⁷ Although the Virginia Supreme Court did not need to address the *Unocal* enhanced scrutiny issue directly in the *Willard* appeal, in rejecting *Revlon* Duties it did adopt the Circuit Court of Bedford County's reasoning and indicated it will stick closely to the language of section 13.1-690 of VSCA. Therefore, it is unlikely that the Supreme Court of Virginia would adopt *Unocal* "enhanced scrutiny" if called on to address the question directly.¹¹⁸

So, again, Virginia and Delaware differ in a meaningful way. Where Delaware presumes that directors may be acting in their own interest in adopting anti-takeover measures and imposes an enhanced standard of conduct, Virginia provides directors the deference of its statutory business judgment rule.

VI. *REVLON* DUTIES

The Delaware Supreme Court, in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*¹¹⁹ and its progeny, imposed additional duties on a board of directors of a Delaware corporation if the corporation pursues a change of control transaction "on its own initiative or in response to an unsolicited offer."¹²⁰ A transaction where the target's stockholders receive cash or mostly cash, as opposed to stock in a surviving entity, is a change of control transaction and triggers the board's *Revlon* Duties.¹²¹ However, it is not clear exactly what percentage of stock consideration is required to avoid *Revlon* Duties.¹²² *Revlon* Duties are intended for the "maximization

¹¹⁴ *W.L.R. Foods*, 857 F. Supp. at 1183.

¹¹⁵ *Willard ex rel. Moneta Bldg. Supply Inc. v. Moneta Bldg. Supply Inc.*, 50 Va. Cir. 558 (Bedford County 1998), *aff'd*, 515 S.E.2d 277 (Va. 1999).

¹¹⁶ 124 B.R. 689 (W.D. Va. 1990).

¹¹⁷ *Willard ex rel. Moneta Bldg. Supply*, 50 Va. Cir. at 565-67 (citing *W.L.R. Foods, Inc. v. Tyson Foods*, 155 F.R.D. 142, 145 (W.D. Va. 1994)).

¹¹⁸ *Willard v. Moneta Bldg. Supply*, 515 S.E.2d 277, 290 (Va. 1999).

¹¹⁹ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

¹²⁰ *Lydonell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009).

¹²¹ *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720, 732 n.25 (Del. Ch. 1999).

¹²² *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995).

of the company's value at sale for the stockholders' benefit."¹²³ Once the corporation pursues a change of control transaction, "[t]he directors' role [changes] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."¹²⁴

During the period after an acquisition agreement is signed, but before the transaction closes, *Revlon* Duties continue.¹²⁵ Cases like *Omnicare, Inc. v. NCS Healthcare, Inc.*¹²⁶ emphasize finding the best price even after a definitive agreement is executed and have made the contractual "fiduciary out"—an ability to terminate the agreement if a superior proposal later materializes—a staple in acquisition agreements.¹²⁷

In contrast, the Supreme Court of Virginia specifically declined to adopt *Revlon* Duties for directors of Virginia corporations in *Willard*.¹²⁸ Instead, the Supreme Court of Virginia held that a board must evaluate the "quantity and quality of the offers" and a board is "not required to accept an offer merely because it maximize[s] the purchase price."¹²⁹ The court reasoned that a strict application of *Revlon* Duties would mean that only one offer was in the best interests of the corporation and "would erode the deference afforded a director's discharge of duties" under section 13.1-690 of the VSCA.¹³⁰ In fact, in *Willard*, the Supreme Court of Virginia held that the directors did not breach their fiduciary duties where the corporation ultimately accepted the lower of two offers.¹³¹ The board accepted the lower offer where the higher offer was received late, would require a delay in closing, and imposed a risk that the party making the lower offer would open his own competing business in the interim, thereby harming the value of the corporation's business.¹³²

When a Virginia court evaluates whether a board of directors has discharged its fiduciary duties in accepting a lower price, the key factor is whether the board followed a deliberative process that allowed the board in good faith to reach the conclusion that, based on qualitative factors other than price, the offer that included a lower price was the better

¹²³ *Revlon*, 506 A.2d at 182.

¹²⁴ *Id.*

¹²⁵ *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 938 (Del. 2003).

¹²⁶ *Id.*

¹²⁷ *Id.* at 936 (holding that the omission of a "fiduciary out" clause prevented the board from discharging its fiduciary duties).

¹²⁸ *Willard v. Moneta Bldg. Supply*, 515 S.E.2d 277, 284 (Va. 1999).

¹²⁹ *Id.* at 285.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

offer.¹³³ In evaluating an offer, a director is entitled to rely on reports and opinions prepared by: (1) officers or employees of the corporation; (2) committees of the board; or (3) committees of advisors, including investment bankers, lawyers, accountants, or other persons, on matters that the director believes, in good faith, are within the person's professional or expert competence.¹³⁴

Virginia courts have not addressed whether the board of a Virginia corporation that is an acquisition target must have the right to terminate an acquisition agreement if, after executing a definitive acquisition agreement, an apparently superior offer emerges. For example, *if* the board of a Virginia corporation that is an acquisition target (1) holds a reasonable auction process, (2) uses a reputable investment banking firm to market the corporation to a meaningful number of financial and strategic bidders, and (3) makes a decision on selecting a bidder that is informed by a fairness opinion from its financial advisor or investment bank, *then* it is possible that a Virginia court following *Willard* would hold that the board did not need a "fiduciary out" to pursue a subsequent bid; the acquisition agreement would be enforceable even if it did not include a "fiduciary out" and a subsequent bidder offered a higher price because the board followed a reasonable process and had no duty to pursue the absolute highest price.¹³⁵

However, even after *Willard*, if a target's board has discussed a sale with one suitor, but there are other suitors that may have an interest and a similar ability to consummate who are not contacted, the board of a Virginia corporation would be wise to bargain for a "fiduciary out" because the process it used to select a suitor may not be sufficient. Until there is additional case law in Virginia, the safest course of action is for Virginia corporations that are acquisition targets to bargain for "fiduciary outs" in acquisition agreements. The good news is that these provisions have become so commonplace that it is routine for a target's board to request them and out of the ordinary for a suitor to resist them.¹³⁶ We may one day discover that Virginia boards do not need the broad "fiduciary out" that is common in acquisition agreements because of Delaware case

¹³³ *Id.*

¹³⁴ VA. CODE ANN. § 13.1-690(B) (2006).

¹³⁵ *Willard*, 515 S.E.2d at 285, 289.

¹³⁶ See American Bar Association, Mergers & Acquisitions Committee, *2009 Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study*, Slide 61 (Sept. 17, 2010), <http://www.abanet.org/dch/committee.cfm?com=CL560003> (noting 94 percent of all cash deals included in the 2009 survey, 96 percent in the 2007 survey, and 83 percent in the 2005-2006 survey included a "fiduciary out" termination right).

law. In the meantime, the boards of Virginia corporations can and should benefit from the practice of including this language in acquisition agreements.

Revlon Duties and the duties of directors of a Virginia corporation may not be as different as they seem when comparing *Willard* and *Revlon*. There is room in the *Willard* holding to move toward a Delaware-like standard. While it clearly will never focus on price alone, the *Willard* court's focus on process could lead to *Revlon*-like results in the future. In addition, although Delaware's *Revlon* Duties clearly impose a price maximization duty on directors, Delaware does not require a board to blindly pursue the highest price without considering other factors.¹³⁷ The Delaware Supreme Court acknowledged that:

[i]n assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, the adequacy and terms of the offer; its fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests; the risk of nonconsumation; the basic stockholder interests at stake; the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.¹³⁸

Delaware has also made it clear that there is no single way to satisfy *Revlon* Duties and that *Revlon* Duties do not require each board to follow a strictly defined set of best practices.¹³⁹ Nevertheless, when *Revlon* and its progeny are compared to *Willard*, it is clear that the emphasis on price is greater in Delaware, and that Delaware courts are less deferential to a board's decision to accept a lower offer than courts in Virginia.

CONCLUSION

In conclusion, Virginia and Delaware have different approaches to a director's fiduciary duties. The VSCA imposes a deferential subjective standard of conduct that allows the more frequent application of its business judgment rule. Virginia courts have followed the VSCA and have shown even more deference to the decisions of directors than the VSCA may require. In addition, Virginia courts have been reluctant to hold that

¹³⁷ *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1286-87 (Del. 1988).

¹³⁸ *Id.* at 1282 n.29 (internal citations omitted). In fact, the court in *Willard* cited the *Mills* factors. *Willard*, 515 S.E.2d at 285 n.9.

¹³⁹ *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242-43 (Del. 2009).

additional constituencies, beyond the corporation and shareholders as a class, are owed fiduciary duties. Finally, Virginia courts have not imposed “enhanced scrutiny” on the decisions of directors involving hostile takeovers or changes of corporate control analogous to those fashioned by Delaware in *Unocal* and *Revlon*. Virginia does not impose fiduciary duties between shareholders or between the board and minority shareholders, while Delaware has fashioned such duties. The statutory and judicial deference in Virginia, the narrower set of constituencies to attack a director’s action or inaction, and the absence of any enhanced scrutiny in the hostile takeover and change of control context gives Virginia a strong argument that it is more director-friendly than Delaware.