FREEZEOUTS IN DELAWARE AND AROUND THE WORLD

Guhan Subramanian*

I have known Leo Strine since 1987. That spring, I was a high school intern in then-Congressman (now Senator) Tom Carper's Washington, D.C. office. A few weeks after my arrival, a rumbling started to spread through the lower staffer ranks: *Leo would be arriving soon*. I was too busy with my letter-opening and coffee-getting to figure out who Leo was, but from what I could tell he seemed like a very important person. I was therefore surprised when "Leo" (even then he was known only by his first name, like Oprah) turned out to be a second-year law student from the University of Pennsylvania, arriving for his second stint interning for Congressman Carper. Leo was perfectly cordial to me when he arrived (among other things, we quickly discovered that we both grew up in Hockessin, Delaware, population: two thousand), though it was clear that we ran in different circles. I was in the hope-to-get-tickets-to-the-House-gallery crowd, while Leo was part of Congressman Carper's inner circle. Notwithstanding the differences that I noticed at the time, thirty-five years later Senator Carper has taken to describing me and Leo as "easily among the top half of interns" that he has ever had. I document this fact on my resume, not only because of Senator Carper's effusive praise but also because the Senator lumped me together with Leo.[1]

Over those thirty-five years, Leo has been a friend, mentor, critic, and advisor to me, both professionally and personally, and I am delighted to be

---

* Joseph Flom Professor of Law & Business, Harvard Law School; Douglas Weaver Professor of Business Law, Harvard Business School. I served as an expert witness or advisor in some of the freezeouts described in this commentary. Some of the data presented in this commentary comes from those engagements. I thank Chris Corcoran (Harvard JD/MBA 2020) and Savely Zakharenko (Harvard Law School '23) for their excellent help in collecting this data. Comments welcome at *gsubramanian@hbs.edu*.

1. *Cf.*, Associated Press, *Among Jordan's Greatest Games, This Was It*, L.A. TIMES (Mar. 29, 1990), https://www.latimes.com/archives/la-xpm-1990-03-29-sp-582-story.html [https://perma.cc/VQ3R-SNCT] (Stacey King commenting to the press after scoring one point in a Chicago Bulls win in the 1990s, "I'll always remember this as the night that Michael Jordan and I combined to score 70 points.").

able to participate in this *festschrift* to celebrate his contributions to corporate law. My focus will be freezeouts—something that I have studied extensively over two decades,[2] and an area of law to which Vice Chancellor, Chancellor, and Chief Justice Strine has made significant contributions.

As most readers of this symposium will know, a freezeout (also known, with some occasional loss of precision, as a "going private merger," a "squeeze-out," a "parent-subsidiary merger," a "minority buyout," a "take-out," or a "cash-out merger") is a transaction in which a controlling shareholder buys out the minority shareholders for cash or the controller's stock. The traditional route for executing a freezeout uses the process outlined by the Delaware Supreme Court in *Weinberger v. UOP*[3] and *Kahn v. Lynch Communication Systems*[4]: the target board establishes a special committee (SC) of directors who are independent from the controller; the SC hires bankers and lawyers to advise it; and the SC negotiates with the controller over the terms of the deal, most importantly the price to be paid to the minority shareholders and whether the deal will include a non-waivable majority-of-the-minority closing condition (MOM Condition). If the controller and the SC reach agreement, the deal is submitted for the necessary board and shareholder approvals. If approved, the transaction is typically executed as a statutory merger or a two-step tender offer (that is, a first-step tender offer followed by a short-form merger).[5]

---

2. *See, e.g.*, Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2 (2005); Guhan Subramanian, *Post-*Siliconix *Freeze-outs: Theory & Evidence*, 36 J. LEG. STUD. 1 (2007) (hereinafter "*Post-*Siliconix *Freeze-outs*"); Guhan Subramanian & Fernan Restrepo, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach*, 5 HARV. BUS. L. REV. 205 (2015); Guhan Subramanian & Fernan Restrepo, *Freezeouts: Doctrine and Perspectives*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 285 (Claire Hill & Steven Davidoff Solomon, eds., 2016). In fact, my students have made fun of me for my obsession with protecting minority shareholders in freezeouts. *See* Video: Subramanianman! Video (on file with author) (in which Subramanianman beats up a controlling shareholder who was trying to oppress a minority shareholder, after the Special Committee had been "captured" by the controller).

3. *In re* IBP, Inc. S'holders Litig., 457 A.2d 701, 709 n.7 (Del. 1983).

4. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1112 (Del. 1994).

5. For simplicity of exposition, I have skipped over the doctrinal disconnect that arose during the period 2001 to 2014, between freezeouts executed through a unilateral tender offer and freezeouts executed pursuant to a merger agreement. My empirical evidence at the time indicated that controllers paid less in tender offer freezeouts than merger freezeouts, likely because, at least in part, merger offer freezeouts were subject to entire fairness review while tender offer freezeouts were not. Subramanian, *Post-*Siliconix *Freeze-outs*, *supra* note 2, at 1; *see also* David Marcus, *From Theory to Practice*, CORP. CONTROL ALERT, at 10 (Dec. 2004) ("Most deal lawyers believe buyers pay less if they use the [tender offer] method, an instinct confirmed by the research of Guhan Subramanian. . . ."). Professor Fernán Restrepo subsequently found that these differences in outcomes occurred only after *Siliconix*, also

In the bad-old-days, freezeouts were scrutinized under stringent "entire fairness" review, regardless of the procedural protections used.[6] In *Kahn v. Lynch* (1994), the Delaware Supreme Court held that approval by a special committee of independent directors *or* approval by a majority-of-the-minority shares would shift the burden of entire fairness from the defendant to the plaintiff shareholders; but both procedural protections would achieve no further benefit in terms of standards of review.[7] In my empirical investigation of public-company freezeouts during this time, I reported that establishing a special committee was by far the most common approach for achieving the burden shift, appearing in 95% of U.S. public-company freezeout transactions between 2001 and 2005.[8] But without any obvious incremental benefit from a MOM Condition, such conditions were rarely used—appearing in only 33% of freezeouts during the 2001–2005 timeframe.[9] Examining a broader sample of freezeouts announced between 2000 and 2013, Professor Fernan Restrepo similarly found that 94% of freezeouts during this era required SC approval, but only 37% of deals included a MOM Condition.[10] As Chancellor Strine later explained in *MFW*:

> Assume you have a teenager with math *and* English assignments due Monday morning. If you tell the teenager that she can go to the movies Saturday night if she completes her math *or* English homework Saturday morning, she is unlikely to do both assignments Saturday morning.
>
> She is likely to do only that which is necessary to get to go to the

supporting the idea that controlling shareholders took advantage of the opportunity provided by *Siliconix* and its progeny. Fernán Restrepo, *Do Different Standards of Judicial Review Affect the Gains of Minority Shareholders in Freezeout Transactions? A Re-examination of* Siliconix, 3 HARV. BUS. L. REV. 321, 358 (2013). Vice Chancellor Strine (in *Pure Resources*) and Vice Chancellor Laster (in *CNX Gas*) largely resolved this disconnect. *See In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch.2002) (proffering countervailing protections for minority stockholders from controlling shareholders); *In re* CNX Gas Corp. S'holder Litig., 4 A.3d 397, 397 (Del. Ch. 2010). Today, with the so-called "unified approach" to freezeouts (and therefore no advantage to a tender offer freezeout), 90+% of freezeouts are executed via merger, and the doctrinal disconnect is largely just a historical artifact.

6. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (discussing examining all aspects of these issues under the question of entire fairness).

7. *See* Kahn, 638 A.2d at 1117.

8. *See* Subramanian, *Post-*Siliconix *Freeze-outs, supra* note 2, at 11 fig.1 (reporting that seventy-two out of seventy-six public-company freezeouts initiated between 2001 and 2005, or 95%, made use of a special committee of independent directors).

9. *Id.*

10. Fernán Restrepo, *Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of* MFW, 29 tbl.1 (July 29, 2020) (unpublished manuscript), http://dx.doi.org/10.2139/ssrn.3105169.

> movies—i.e., complete one of the assignments—leaving her parents and siblings to endure her stressful last-minute scramble to finish the other Sunday night.[11]

For reasons that Chancellor Strine so colorfully explained by way of analogy, the puzzle was not why MOM Conditions were so *rare* during this era; the question was why MOM Conditions were given *at all*, given the absence of doctrinal incentives to do so. Putting this question aside, the general absence of MOM Conditions in most freezeouts meant that there was no shareholder vote that would serve as a backstop against a disloyal or incompetent SC. And even with a loyal and competent SC, the absence of a MOM condition in most freezeouts meant that SCs could not use the MOM Condition as a reason to turn down the controller's offer (as in: "We could say yes to that offer, but the shareholders would never go for it.").[12]

Academic commentators, including myself, advocated for a judicial regime that would promote both SC approval and MOM Conditions in freezeouts.[13] In his 2005 *Cox Communications* decision, then Vice-Chancellor Strine proposed in dicta a unified approach to freezeouts.[14] Specifically, if the offer was (1) negotiated and recommended by a special committee of independent directors, and (2) conditioned upon the affirmative tender of a majority of the minority shares, then the business judgment standard of review would presumptively apply, regardless of transactional form (merger or tender offer); but if both requirements were not met, then the transaction would be reviewed for entire fairness.[15] Vice Chancellor Strine explained in *Cox Communications* that the two requirements tracked the two steps of an arms-length merger, namely, board approval and approval from a majority of the shares.[16]

---

11. *In re* MFW S'holders Litig., 67 A.3d 496, 500–01 (Del. Ch. 2013).

12. Another benefit of a MOM Condition, although it rarely materializes in practice, is that it provides (at least theoretically) a market check on the controller's offer. *See* ROBERT CHARLES CLARK, CORPORATE LAW 517–18 (1986) ("One of the most appealing ideas is that before a freezeout can be effected a majority of the minority's shares must be voted in favor of the transaction. The most important consequence of such a rule may not be immediately obvious: It would create the possibility of an auction even when the initiators of the freezeout plan held a majority of the stock.") (citations omitted).

13. Ron Gilson & Jeff Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003); Subramanian, *Fixing Freezeouts*, *supra* note 2, at 2.

14. *In re* Cox Commc'n, Inc. S'holders Litig., 879 A.2d 604, 643–46 (Del. Ch. 2005). I was retained by plaintiffs' attorneys in their fee request to the Delaware Chancery Court.

15. *Id.*

16. *Id.* ("[The unified approach] would permit the invocation of the business judgment rule for a going private merger that involved procedural protections that mirrored what is contemplated in an arms-length merger under § 251—independent, disinterested director *and* stockholder approval.").

Eight years later, in *MFW*, now-Chancellor Strine finished the job he had started in *Cox Communications* by formally adopting the unified approach in a merger freezeout.[17] On appeal, the Delaware Supreme Court affirmed and endorsed the unified approach for merger freezeouts.[18] Delaware law now provides that: (1) if the transaction is approved by a special committee of independent directors *and* a majority-of-the-minority shares, then the standard of review shifts from entire fairness to business judgment; (2) if the transaction is approved by a special committee of independent directors *or* a majority-of-the-minority shares, then the standard of review remains entire fairness, with the burden on plaintiffs; and (3) if the transaction is approved by *neither* a special committee of independent directors *nor* a majority-of-the-minority shares, then the standard of review remains entire fairness, with the burden on defendants to demonstrate fair process and fair price.[19]

Providing a pathway to business judgment review is a big deal. Entire fairness is the most stringent standard of review in Delaware corporate law—it requires a de novo inquiry into the fairness of the transaction, which includes both fair price and fair process.[20] Under business judgment review, in contrast, "the claims against the defendants must be dismissed unless no rational person could have believed that the merger was favorable to [the] minority stockholders."[21] In most cases, the determination of standards of review determines the outcome: defendant wins under business judgment, while plaintiff will have significant settlement value under entire fairness.

HC2's buyout of the remaining 30% of Schuff International illustrates the power of the "get out of jail free" card that *MFW* provides, and

17. *In re* MFW, 67 A.3d at 535. One feature of Strine's opinions was his constant dialogue (through writing and through direct conversations) with academia. *MFW* was no exception. *See, e.g.*, *Id.* at 529–30 ("The premise that independent directors with the right incentives can play an effective role on behalf of minority investors is one shared by respected scholars sincerely concerned with protecting minority investors from unfair treatment by controlling stockholders. Their scholarship and empirical evidence indicate that special committees have played a valuable role in generating outcomes for minority investors in going private transactions that compare favorably with the premiums received in third-party merger transactions.").

18. Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

19. *Id.* at 644.

20. *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 276–95 (2012) (describing the unified approach to merger freezeouts).

21. *In re* MFW, 67 A. 3d at 519 (citing *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006)) ("[W]here business judgment presumptions are applicable, the board's decision will be upheld unless it cannot be attributed to any rational business purpose.") (citations and internal quotation marks omitted); Brehm v. Eisner, 746 A.2d 244, 265 (Del. 2000) ("We do not even decide if [directors' decisions] are *reasonable* in this context.").

(conversely) the significant leverage that the plaintiffs' bar has when parties do not avail themselves of the *MFW* template. In that deal, one of the two directors who served on the Special Committee (Ronald Yagoda) allegedly inquired about the possibility of a consulting contract with the buying company during the freezeout negotiations.[22] HC2 eventually offered $31.50 per share to the minority shareholders, subject to a MOM Condition. A majority of minority shares were tendered at this price, and the deal closed.[23] Plaintiffs' attorneys brought a claim for entire fairness review in the Delaware Chancery Court, claiming among other things that the Special Committee was not independent from HC2, the controller, due to Mr. Yagoda's request for a consulting contract. In November 2019, HC2 settled with plaintiffs' counsel for additional consideration of $35.95 per share payable to the minority shareholder class—more than doubling the original deal price that the allegedly conflicted Mr. Yagoda had negotiated.[24] If instead the parties had been able to avail themselves of the *MFW* template, the plaintiffs would have had significantly less settlement value.

Notwithstanding the substantial benefits of the *MFW* template, some practitioners were skeptical of Chancellor Strine's offering. For example, a Cleary Gottlieb memo to clients, entitled "*MFW*'s Bumpy Road to Business Judgment Review," flagged that "high execution risks are often created by an unwaivable majority-of-the-minority" and that "[t]he controlling stockholder will sharply limit its flexibility for an unspecified period" if negotiations broke down.[25] However, empirical evidence indicates that these

22. Complaint at ¶ 51, *In re* Schuff Int'l Inc. S'holders Litig., No. 10323, 2020 BL 525341 (Del. Ch. Aug. 14, 2020) ("Yagoda had numerous conversations with HC2's CEO, Falcone, and HC2's Senior Managing Director – Investments, Voigt, about providing consulting services to the Company, and Yagoda repeatedly explicitly stated during the course of negotiations that he wanted to be compensated for his services.").

23. This deal was a tender offer, not a merger freezeout, but Vice Chancellor Laster endorsed the same "unified approach" for tender offers in *CNX Gas*. *In re* CNX Gas Corp. Shareholder Litig., 4 A.3d 397, 397 (Del. Ch. 2010).

24. The stockholders who tendered (568,556 shares) received an additional payment of $35.95 per share, and stockholders who did not tender (289,902 shares) received $67.45 per share. Exhibit B to Stipulation and Agreement of Compromise, Settlement, and Release at 11, *In re* Schuff, 2020 BL 525341. I was retained by HC2 in an arbitration related to this settlement.

25. Memorandum from Cleary Gottlieb, *Going Private Transactions -* MFW*'s Bumpy Road to Business Judgment Review* 3 (Mar. 18, 2014), https://www.clearygottlieb.com/~/media/organize-archive/cgsh/files/publication-pdfs/going-private-transactions-mfws-bumpy-road-to-business-judgment-review.pdf [https://perma.cc/A6CE-XJ2C]. *See also* Victor I. Lewkow, *Be Wary of the Path to the Business Judgment Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 11, 2013), https://corpgov.law.harvard.edu/2013/07/11/be-wary-of-the-path-to-the-business-judgment-rule/ [https://perma.cc/UMQ8-6DEP] (noting non-waivable conditions as important safeguards).

concerns were overstated, or at least outweighed by the benefits of a pathway to business judgment review. Examining the seven year period after *MFW* (2013–2020), Professor Restrepo found that 95% of merger freezeouts required SC approval (compared to 94% before *MFW*) and 81% of deals included a MOM Condition (compared to 37% before).[26] The sharp increase in the incidence of MOM Conditions, and no reduction in the incidence of SC approval conditions, indicates that practitioners have largely taken up the invitation offered by *MFW*, no doubt because of the vast benefits of business judgment review compared to entire fairness. To return to Chancellor Strine's metaphor, it turns out that if completion of Math *and* English homework is a necessary precondition to going to the movies, the teenager will do both Math and English.

The proliferation of MOM Conditions in the aftermath of *MFW* improves the leverage for SCs to extract fair value in the freezeout. The freezeout of the minority shareholders of AmTrust Financial Services Corp. illustrates how this leverage can play out in practice. In November 2017, the controlling family of AmTrust (which owned 55% of the outstanding shares), along with its private equity partner, offered $12.25 per share to buy out the minority shareholders of the company. The AmTrust board formed a Special Committee of independent directors, and in February 2018 the parties agreed to $13.50 per share, subject to a MOM Condition. Activist investor Carl Icahn held 9% of the outstanding shares, and threatened to vote against the deal. Although Icahn's 9% only represented 20% of the minority shares, his threat increased the risk that the MOM Condition would not be fulfilled. The controlling family negotiated directly with Icahn and eventually agreed to $14.75 per share, which amounted to a 9% improvement over the $13.50 price previously negotiated with the Special Committee. Two-thirds of the minority shares approved the revised deal, and the freezeout closed in November 2018. The 9% bump for the minority shareholders was only achieved because of the presence of a MOM Condition in the deal. The case study illustrates the power of a MOM Condition in action.

In contrast to the pre-*MFW* era, when the puzzle was why controllers would ever provide a MOM Condition, the puzzle in the post-*MFW* era is the identification of the conditions in which a controller would *not* provide a MOM Condition. The answer might be related to the rise of shareholder activism in the period since *MFW* was decided. More specifically, the *MFW* pathway might be less desirable because of the risk that a MOM Condition

26. Restrepo, *supra* note 10, at 29 tbl.1.

would not be achieved. This risk increases for larger controllers, because a blocking position becomes correspondingly smaller. With a 60% controller, for example, 21% of shares would need to vote against or abstain in order to block the deal. For an 80% controller, however, only 11% of shares are needed to block.[27] The possibility of a blocking coalition might push a controller to not give a MOM Condition despite the doctrinal benefits under *MFW*.

The risk of a blocking coalition further increases with the possibility of arbitrageurs, who might buy shares precisely to hold up the deal in order to force the controller to pay more. The holdup risk from arbitrageurs is inversely proportional to the dollar value needed for a blocking stake.[28] For example, holdup risk is larger when the dollar value of a blocking stake is $50 million, relative to a situation where the dollar value of a blocking stake is $1 billion. The reason is that many activist funds can readily make a $50 million investment but only a few can make a $1 billion investment. Even among the very few funds that would be capable of making a $1 billion investment, funds generally have diversification requirements that would prevent them from taking a $1 billion position in any single activist situation.

To provide more systematic evidence on when MOM Conditions are (and are not) provided in the post-*MFW* era, I used the MergerMetrics database to construct a sample of all negotiated freezeouts of Delaware public-company corporate targets announced between May 29, 2013, the

27. Most MOM Conditions have been structured as a majority of the outstanding shares rather than majority of the voting shares, particularly after the Delaware Chancery Court's 2006 holding in *In re PNB Holdings*, No. 028, 2006 WL 2403999 (Del. Ch. Feb. 21, 2006), which strongly encouraged structuring a MOM Condition as a majority of the outstanding minority. Virtually all MOM Conditions are non-waivable in order to properly emulate the shareholder vote condition in an arms-length acquisition. *See, e.g.*, *In re* John Q. Hammons Hotels Inc. S'holder Litig., No. 758, 2009 WL 3165613, at *31 (Del. Ch. Oct. 2, 2009) ("The majority of the minority vote, however, provides the stockholders an important opportunity to approve or disapprove of the work of the special committee and to stop a transaction they believe is not in their best interests. Thus, to provide sufficient protection to the minority stockholders, the majority of the minority vote must be nonwaivable, even by the special committee.") (citations omitted); *In re* JCC Holding Co., 843 A.2d 713, 724–25 n.33 (Del. Ch. 2003) (discussing the consequences of minority stockholders' votes). "Majority of the outstanding minority" also tracks the procedural template for arms-length merger, which requires a majority of the shares to approve a merger. *See* DEL. GEN. CORP. L. § 251(c) (2020) (proscribing voting rules regarding a majority and minority stockholders).

28. *Cf.* Marcel Kahan & Ed Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 920 (2019) ("[T]oday's activists generally expect to profit from an increase in the value of their stakes in the target that they hope to result from significant operational changes, increased dividends, asset sales, or the sale of the company. For activists, pill features that affect the size of their stake are thus of the utmost importance.").

decision date of *MFW*, and April 2022.[29] I excluded transactions in which the buyer did not seek to gain 100% control of the target, deals where the negotiations broke down at a preliminary stage, and deals in which the buyer already held 90% or more of the target's shares. I also excluded transactions smaller than $5 million in value, because choice of transactional form will not have any meaningful consequences in these economically trivial transactions. The resulting sample includes forty-three freezeouts (the "Freezeout Sample").

As a threshold point (and one that would only be of interest to freezeout historians, a small group to be sure), I find that thirty-two out of the forty-three deals in the Freezeout Sample (74%) were executed as mergers, while the remaining eleven deals (26%) were executed as tender offers. The 74% incidence of merger freezeouts is close to the 67% incidence that I reported in my prior research, for a sample of freezeouts in the four years after *Siliconix*.[30] This shift illustrates how experienced transactional planners responded to changes in Delaware corporate law: when the tender offer route became more attractive after *Siliconix*, practitioners gravitated in that direction;[31] and when the merger route became more attractive, potentially after *Cox Communications* but certainly after *MFW*, practitioners gravitated in that direction.

Turning to the procedural protections, I find that forty-one out of forty-three (95%) deals in the Freezeout Sample obtained SC approval and thirty-five out of forty-three deals (81%) provided a MOM Condition. These findings are nearly identical with Restrepo (2020), who reports 93% incidence for SC approval conditions and 81% incidence for MOM Conditions in his sample of post-*MFW* merger freezeouts.[32] Notwithstanding some handwringing immediately after *MFW*, it seems that practitioners have overwhelmingly accepted the pathway to business judgment review that Chancellor Strine offered.

To assess the holdup risk in each of the deals in the Freezeout Sample, I first examined the percentage of shares held by the minority. As noted

29. The earlier date corresponds to the day the *In re MFW* decision was published. I used a 30% threshold to identify controlling shareholders. *See* HOLGER SPAMANN & GUHAN SUBRAMANIAN, CORPORATIONS: CASEBOOK 159 (2017) ("The Delaware courts have held that a control block can be as small as 30–35% of the outstanding shares, particularly if the other shares are widely-held, because less than 51% could still constitute effective control of the corporation.").

30. *Post-*Siliconix *Freeze-outs*, *supra* note 2, at 11 fig.1.

31. *See, e.g.*, David Marcus, *Cleaning up your Corporate Structure*, CORP. CONTROL ALERT, at 20 (July 2003) ("The current thinking on minority buyouts [i.e., freezeouts], many lawyers say, boils down to two words: tender offer.").

32. Restrepo, *supra* note 10, at 29 tbl.1.

above, holdup risk might be greater when there is a smaller minority float, because it means that a smaller percentage of shares can block the deal. Interestingly, I find no correlation between the incidence of MOM Conditions and the percentage of shares that are held by the minority. To take the ends of the spectrum, MOM Conditions appeared in ten out of thirteen deals (77%) when the minority float was 11–30%, and eighteen out of twenty-three deals (78%) when the minority float was greater than 40%. One would expect to see fewer MOM Conditions when the minority float is small (because holdup risk is arguably greater) but I find no such correlation.

I also calculated the dollar value needed to be able to block the deal under a MOM Condition. I calculated this blocking position as 50.1% of the dollar value of the minority float.[33] Here I find a strong inverse correlation between the size of the blocking stake and the incidence of MOM Conditions. The results are reported in Figure 1:

Figure 1: Incidence of MOM Conditions by Size of Blocking Stake

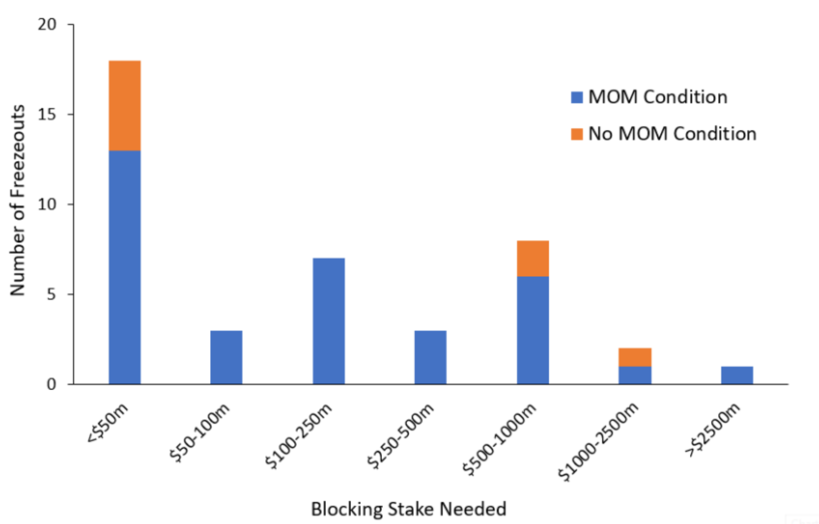

Figure 1 shows that a MOM Condition is less likely to appear when the dollar value of a blocking stake is small. Specifically, MOM Conditions appear in only thirteen out of eighteen deals when the blocking stake is less than $50 million (72%), compared to twenty-two out of twenty-five (88%)

33. One deal in the Freezeout Sample (Steel Partner's buyout of the minority shares in Handy & Harman Ltd.) did not include a deal value and is therefore not included in this analysis. This freezeout included both SC approval and a MOM Condition.

when the blocking stake is greater than $50 million. Or put the other way, among the eight deals that do not include a MOM Condition, five are freezeouts where a blocking stake would cost an activist or arbitrageur less than $50 million. These are deals where holdup risk might be significant, and the benefits of a MOM Condition might reasonably be outweighed by this holdup risk.

There are three freezeouts with a blocking stake greater than $500 million that do not provide a MOM Condition.[34] In two out of three of these deals, the Special Committee tried to negotiate for a MOM Condition,[35] but was unable to obtain one. In the third freezeout (Santander's acquisition of the 19% remaining shares of its U.S. consumer finance subsidiary), the offer was extended a remarkable fourteen times, and in the end only achieved 24% of minority shares tendered,[36] suggesting that both parties understood that a

---

34. These deals were: Kyocera's March 2020 acquisition of the remaining 28% minority stake in AVX Corp for $1.0 billion in cash (blocking position = $501 million), and Liberty Interactive's December 2017 acquisition of the remaining 62% stake in HSN Inc for $1.4 billion in stock (blocking position = $700 million). Kyocera is a Japanese company, and so it might have "imported" Japanese norms to a Delaware freezeout. For reasons described below, MOM Conditions are exceedingly rare in Japanese freezeouts. *See* JAPAN MINISTRY ECON. TRADE INDUS., FAIR M&A GUIDELINES: ENHANCING CORPORATE VALUE AND SECURING SHAREHOLDERS' INTERESTS 42–44 (2019), https://www.meti.go.jp/policy/economy/keiei_innovation/keizaihousei/pdf/fairmaguidelines_english.pdf [https://perma.cc/EMV5-YG5K] (allowing disuse of MOM Conditions when the controller has a large stake). This deal is currently being challenged in Delaware Chancery Court for breach of fiduciary duty. *See* Jeff Montgomery, *Chancery Picks Class Leads For $1B Kyocera-AVX Merger Suit*, LAW360 (Feb. 9, 2021), https://www.law360.com/articles/1353747/chancery-picks-class-leads-for-1b-kyocera-avx-merger-suit [https://perma.cc/LHH5-8QRW] (discussing litigation surrounding the Kyocera-AVX merger).

35. In Kyocera/AVX, the Special Committee attempted to include a MOM Condition but the controlling shareholder refused. *See* AVX CORP., SCHEDULE 14D-9 at 23–24, (Mar. 2, 2020) (noting as a "potentially negative factor" that "Parent's initial proposal did not include a Majority of the Minority Condition, and despite the Special Committee's attempts to include one, such condition is not a condition to the consummation of the Offer or the Merger") (Mar. 2, 2020). In Liberty Interactive/HSN, Liberty offered a price bump in exchange for no MOM Condition. HSN INC. SCHEDULE 14A at 44 (Nov. 29, 2017) ("Mr. Maffei informed the representative of Goldman Sachs that Liberty Interactive may be willing to increase the exchange ratio to 1.650 shares of Liberty QVCA common stock per share of HSNi common stock . . . but Liberty Interactive was not willing to condition the transaction on the approval of the non-Liberty Interactive shareholders.").

36. *Santander Holdings USA, Inc. Announces Federal Reserve Approval of its Acquisition of the Shares It Does Not Own of Santander Consumer USA Holdings Inc. and the Expiration of its Tender Offer to Acquire Such Shares*, BUS. WIRE (Jan. 28, 2022), https://www.businesswire.com/news/home/20220128005240/en/Santander-Holdings-USA-Inc.-Announces-Federal-Reserve-Approval-of-its-Acquisition-of-the-Shares-It-Does-Not-Own-of-Santander-Consumer-USA-Holdings-Inc.-and-the-Expiration-of-its-Tender-Offer-to-Acquire-Such-Shares [https://perma.cc/88EW-LC5D].

MOM condition would be unlikely to be met.

The bottom-line conclusion is that MOM Conditions *are not* less likely to appear when the percentage blocking stake is small; but MOM Conditions *are* less likely to appear when the dollar value of the blocking stake is small. This evidence suggests that transactional planners are more concerned about an activist coming into the stock (for whom the dollar value needed to block the deal would be most relevant) rather than existing minority shareholders forming a blocking coalition against the freezeout.

Putting it all together, and in keeping with the *festschrift* genre of this volume, the experience with freezeouts after *MFW* is best understood with the following visualization. Leo Strine lands his F-16 fighter plane perfectly on the aircraft carrier deck. He bounds down the steps, aviator sunglasses on, toward the eager crowd of corporate law academics and practitioners. A large "Mission Accomplished" sign billows behind him, along with the Delaware state flag (probably because, in keeping with the overall fantasy, the aircraft carrier is owned by the state of Delaware). He then gives a short speech to the cheering crowd, highlighting the key points of his reform of freezeouts: (1) Shifted choice of transactional form away from the hardball tender offer to the more genteel merger mechanism; (2) Provided practitioners a viable pathway to success, away from entire fairness review and to business judgment review, thereby reducing the historically litigious nature of freezeouts; (3) Promoted the use of MOM Conditions, thereby replicating the procedural protections in arms-length deals; and (4) Provided sufficient flexibility such that practitioners can forego MOM Conditions in situations where holdup risk might be significant. The crowd nods appreciatively with each one of these points. After some obligatory fist bumps, Strine waves goodbye, straps back into his F-16, and rockets off into the sunset.

But *MFW* was by no means Strine's last word on freezeouts. Once elevated to the Delaware Supreme Court, Chief Justice Strine began refining around the edges of the doctrinal regime that he had created, mostly related to the ab initio requirement articulated in *MFW*.[37] In *Flood v. Synutra International, Inc.*, the controlling shareholder proposed a price ($5.91 per

37. *See In re* MFW, 67 A.3d at 528 ("When these two protections are established up-front, a potent tool to extract good value for the minority is established. From inception, the controlling stockholder knows that it cannot bypass the special committee's ability to say no. And the controlling stockholder knows it cannot dangle a majority-of-the-minority vote before the special committee late in the process as a deal-closer rather than having to make a price move. *From inception*, the controller has had to accept that any deal agreed to by the special committee will also have to be supported by a majority of the minority stockholders.") (emphasis added).

share) but did not commit to the *MFW* conditions until fourteen days later, after the Special Committee had been constituted.[38] The parties ultimately agreed on $6.05 per share, subject to a MOM Condition, which was then fulfilled. Chief Justice Strine, writing for a four-Justice majority, affirmed a Chancery Court ruling that that the business judgment rule applied, because "substantive economic negotiations" had not yet begun between the controller and the Special Committee when the controller committed to the *MFW* conditions.[39] In *Olenik v. Lodzinski*, however, Chief Justice Strine joined the unanimous opinion of the Court that "substantive economic discussions" had taken place before the controller had committed to a MOM condition, and therefore the *MFW* conditions were not fulfilled.[40] Cleary Gottlieb summarized these developments as follows: "Although the application of *MFW*'s timing requirement will depend on the facts of each case, [*Olenik*] together with *Synutra*, further clarifies where the line is between 'preliminary discussions'—which are permissible before *MFW*'s dual protections are put in place—and 'substantive economic discussions,' which are not."[41]

One could—and I will—quibble with the Chief Justice's tinkering with *MFW*. In my opinion, the Court's holding in *Synutra* seems to ignore basic negotiation theory that "substantive economic negotiations" begin when one party has put an offer on the table.[42] And the dividing line between "preliminary discussions" and "substantive economic discussions" seems to be a murky one at best. I prefer Justice Valihura's articulation of the ab initio requirement in her dissent in *Synutra*:

> I believe this Court did conclude in [*MFW*], and should reaffirm now, that in controller squeeze-out transactions . . . the *ab initio*

38. Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

39. *Id.* at 763 ("[*MFW*] require[s] the controller to self-disable before the start of substantive economic negotiations . . . . Thus, so long as the controller conditions its offer on the key protections at the germination stage of the Special Committee process, when it is selecting its advisors, establishing its method of proceeding, beginning its due diligence, and has not commenced substantive economic negotiations with the controller, the purpose of the pre-condition requirement of *MFW* is satisfied.").

40. Olenik v. Lodzinski, 208 A.3d 704, 707 (Del. 2019) (holding that "substantive economic discussions" had taken place before the controller had committed to a MOM Condition, and therefore the *MFW* Conditions were not fulfilled).

41. Roger A. Cooper et al., *Delaware Supreme Court Provides Further Guidance on Timing Requirement Under* MFW, CLEARY M&A AND CORP. GOVERNANCE WATCH (Apr. 10, 2019), https://www.clearymawatch.com/2019/04/delaware-supreme-court-provides-further-guidance-on-timing-requirement-under-mfw/ [https://perma.cc/EXX4-RQ6U].

42. *See, e.g.*, GUHAN SUBRAMANIAN, DEALMAKING: THE NEW STRATEGY OF NEGOTIAUCTIONS 16–19 (2d ed. 2020) (documenting "anchoring" effect of first offers in negotiations).

> requirement is satisfied when the Dual Protections are contained in the controller's initial formal written proposal.[43]

But these would just be quibbles. The more interesting—and more important—question is whether the reforms that Strine undertook for U.S. freezeouts doctrine should be imported to other jurisdictions around the world. Most other countries do not have anywhere near the procedural protections for freezeouts that Delaware provides. In particular, MOM Conditions are not very common in freezeouts outside the U.S. This is not terribly surprising, because MOM Conditions were not common even in Delaware freezeouts until *MFW* in 2014. But in other parts of the world, there are more egregious process flaws as well, e.g.:

- A controlling shareholder promises employment to two members of the SC during the negotiations between the controller and the SC. Not surprisingly, the SC extracts a trivial bump from the controller's initial offer; and there is no MOM Condition in the deal so the controller votes it through unilaterally.
- A 44% shareholder (with the remaining shares widely held) claims that it is not a controller, and therefore no procedural protections are necessary because the deal is not a freezeout.
- A CEO unilaterally engineers a dual-class recapitalization that increases his control from 11% to 56%, before executing a freezeout at below book value of assets.
- A 67% controller rejects a MOM Condition in favor of a post-signing go-shop process, but refuses to provide any commitment that it would sell into a higher bid. Not surprisingly, no bidders emerge during the post-signing go-shop process.
- A controlling shareholder refuses to provide a MOM Condition due to perceived holdup risk, even though a blocking stake would have cost more than $2 billion (thereby making a hypothetical blocking position one of the largest activist positions of all time).
- Numerous situations where the controller drives down intrinsic value before initiating the freezeout.

These examples highlight why Delaware corporate law is a crown jewel of American capitalism. While Delawareans debate freezeout nuances such as the line between "preliminary discussions" and "substantive economic discussions," controllers in other parts of the world trample minority shareholders like T.J. Watt steamrolling over offensive linemen.[44] Many of these freezeouts occur in Chinese-controlled companies. According to

43. Flood, 2018 WL 4869248 at *768 (Del. Oct. 9, 2018).
44. I had to get in at least one Strine-esque analogy before ending.

Professor Jesse Fried, ninety Chinese controllers have engaged in freezeouts over the past ten years, often at "confiscatory" prices.[45] But the problem is not limited to China; from my own observation, controllers in Japan, Hong Kong, Cayman Islands, and Bermuda, among other places, engage in equally abusive freezeouts.

Of course, there is the reasonable response of caveat emptor: what should a minority shareholder expect when investing in a company controlled by a Chinese national, other than to be trampled in the inevitable freezeout just before the company hits it big? But at least over time, legal protections for minority shareholders are essential for overall capital formation and wealth creation. The well-known "law & finance" literature finds a connection between legal protections for minority shareholders and the development of capital markets around the world.[46] The intuition for this finding is that protecting minority shareholders facilitates minority investments, which ultimately benefits controlling shareholders and the capital markets overall. Put simply, investors will not give their money to a controlled company if the controller could take them out on a whim, without procedural protections. Leo Strine understood this point and implemented it in Delaware. As with so many things that Leo did for corporate law, it would be wise for the rest of the world to follow his lead.

---

45. *See* Jesse Fried, *Delisting Chinese Companies Plays Right into Their Hands*, FIN. TIMES (June 1, 2020), https://www.ft.com/content/7bb80406-a0c6-11ea-ba68-3d5500196c30 [https://perma.cc/3J3K-FR48] ("Over the past decade, controlling shareholders of more than 90 China-based, US-traded firms have arranged confiscatory 'take-private' transactions. The goal: delist US shares at a low buyout price and then relist in China at a much higher valuation. The poster child is Qihoo 360, an internet security firm that was taken private in 2016. Founders squeezed out US shareholders at a valuation of $9.3bn. In February 2018, Qihoo relisted on the Shanghai Stock Exchange at a valuation of more than $60bn. Qihoo's chairman made $12bn—more than the whole company claimed to be worth 18 months before.").

46. *See, e.g.*, Rafael La Porta, Florencia Lopez-de-Silanes, Andrei Shleifer & Robert Vishny ("LLSV"), *Law and Finance*, 106 J. POL. ECON. 113 (1998); LLSV, *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999); LLSV, *Investor Protection and Corporate Governance*, 58 J. FIN. ECON. 3 (2000) (listing law and finance literature that touch on capital markets and minority shareholder protections).