Title

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Abstract

In a decades-long series of decisions, the Delaware courts constructed a doctrinal infrastructure that encouraged two procedural protections for minority shareholders in freezeout transactions: approval by a special committee of independent directors ("SC" approval), and approval by a majority-of-the-minority shares ("MOM" approval). Empirical evidence indicated that practitioners largely adopted this dual-pronged approach to freezeouts for most of the following decade. However, in a trilogy of decisions from 2022-2023, the Delaware Chancery Court unintentionally created dis-incentives for MOM conditions. We present the first empirical evidence from this trilogy, and find that MOM conditions have indeed decreased significantly in incidence: from approximately 80% beforehand to approximately 45% afterwards. As a policy matter, we argue that our findings reflect a step in the wrong direction because the combination of SC approval and MOM approval tracks the procedural protections in an arms-length deal process. To the extent that controllers are declining to provide MOM conditions due to "hold up" risk by activist investors, we offer a majority-of-the-*original* minority (MOOM) condition as an alternative to address this concern.

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Declining MOM Conditions in Freezeout Transactions and the MOOM Alternative

1. Introduction

Freezeouts (that is, transactions in which a controlling shareholder buys out the minority shareholders) pose a significant conflict of interest, because the controller stands on both sides of the transaction: as a buyer and as the party who dominates the seller. As a result, Delaware courts (where most public companies are incorporated) subject freezeouts to "entire fairness" review, an enhanced form of judicial review that enables courts to engage in a *de novo* review of the substantive terms of the transaction.[1] In addition, Delaware promotes the use of procedural protections by relaxing entire fairness review if the controlling shareholder conditions the transaction on approval by a special committee of independent directors ("SC" approval) and approval from a majority-of-the-minority shares ("MOM" approval). Under the Delaware Supreme Court's *MFW* decision in 2014, if these two conditions are met, the standard of judicial review shifts from entire fairness to deferential business judgment review, under which a court will not second guess the terms of the transaction except in very exceptional circumstances.[2]

SC approval and a MOM condition play complementary roles. The SC is a bargaining agent for the shareholders, which mitigates opportunism by the controlling shareholder and the collective action problems (and, in some cases, the lack of expertise or access to non-public information) that characterize shareholder action. MOM conditions then provide a binary check against a captured or negligent SC. MOM conditions also can have an upstream effect on the deal process because they give the SC greater bargaining power against the controller. If the SC does not recommend approval of the transaction, the MOM condition should be more likely to fail. In addition, a MOM condition facilitates an implicit market check on the deal, which also can have upstream effects in the form of greater leverage for the SC.

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[1] Weinberger v. UOP, 457 A.2d 701, 711 (Del. 1983).
[2] *In re* MFW Shareholders Litigation, 67 A.3d 496, 500 (Del. Ch. May 29, 2013); Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014);); *In re* CNX Gas Corp. Shareholder Litigation, 4 A.3d 397, 407 (Del. Ch. 2010).

MOM conditions also pose two kinds of execution risk for controlling shareholders. The first risk is straightforward: the minority might vote down the deal. And if the minority votes down the deal, it is not clear how long the controller must wait before re-approaching the company. The second risk is more subtle: activist investors might buy shares of the target company after the deal announcement but before the record date for the MOM condition vote. These shareholders will then threaten to vote against the deal unless the controller pays more.

In a trilogy of recent decisions (*SolarCity*[3] in April 2022, *BGC Partners*[4] in August 2022, and *Straight Path*[5] in October 2023) the Delaware Chancery Court held for the defendant in entire fairness litigation. None of these cases were freezeouts, but they signaled to practitioners that entire fairness review was not outcome-determinative. We hypothesize that this trilogy of cases initiated by *SolarCity* (to which we refer as the "*SolarCity* trilogy") changed the doctrinal calculation: with entire fairness review perceived as less onerous (thereby reducing the benefits of achieving business judgment review through the dual conditions of SC approval and a MOM condition), and with holdup risk (thereby increasing the costs of giving a MOM condition), it is likely that transactional planners were no longer as eager to provide MOM conditions as part of the freezeout process. In other words, the *SolarCity* trilogy likely created the possibility of "leakage" out of the procedural template for freezeouts that was provided by *MFW* in 2014. A recent Reuter article articulates this intuition as follows:

> "Nearly a dozen lawyers and bankers told Reuters there is a growing realization among the controlling investors of companies that the financial benefit of depriving minority shareholders of a deal veto outweighs the legal risks. '(The shareholder vote) opens the door to an activist who can say, 'I know you're negotiating with the special committee, but now you're going to negotiate with me, and I'm going to squeeze a second bite', said Phillip Mills, an M&A partner at law firm Davis Polk…

[3] *In re* Tesla Motors, Inc. Stockholder Litig., No. CV 12711-VCS, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022), judgment entered sub nom. In re Tesla Motors, Inc. (Del. Ch. 2022), aff'd sub nom. In re Tesla Motors, Inc. Stockholder Litig., 298 A.3d 667 (Del. 2023).

[4] *In re* BGC Partners, Inc. Derivative Litig., No. 2018-0722-LWW, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022), judgment entered sub nom. In re BGC Partners, Inc. (Del. Ch. 2022), aff'd sub nom. *In re* BGC Partners, Inc. Derivative Litig., 303 A.3d 337 (Del. 2023)

[5] *In re* Straight Path Commun. Inc. Consol. Stockholder Litig., No. 2017-0486-SG, 2023 WL 6399095 (Del. Ch. Oct. 3, 2023).

> The lawyers who are advising companies against giving minority shareholders a deal vote argue the worst that can happen, based on court precedent in Delaware where most companies are incorporated, is that the controlling shareholders may be ordered in court to pay 5% to 10% over the deal price, possibly years after the transaction has closed. Skipping the vote, on the other hand, prevents hedge funds and other activist shareholders from making deal price demands and allows a transaction to close more quickly, the lawyers say" (Sen and Hals, 2024).

In this article, we examine whether the incidence of MOM conditions has in fact systematically declined in the aftermath of the *SolarCity* trilogy. We find that it has, from approximately 80% in the period between the Delaware Chancery Court's decision in *MFW* and *SolarCity*, to 45% in the period after *SolarCity*. This result is consistent with our prior empirical research on freezeouts finding that practitioners adjust the form of their transaction in response to Delaware case law (Subramanian, 2007; Restrepo, 2013; Subramanian and Restrepo, 2015; Restrepo, 2021). We also examine the "price bump" (i.e., the difference between the final price offered by the controlling shareholder and the initial price) and the returns of the target at the announcement of the transaction. In general, we do not find significant changes in these variables; however, in Section 5 we offer various explanations for these results and discuss why MOM conditions are likely to be welfare-enhancing even though we do not observe significant changes.

From a doctrinal perspective, our results are a case study in unintended consequences: after carefully constructing procedural protections for minority shareholders in a series of cases spanning over two decades, the Delaware courts unintentionally dismantled those protections through its trilogy of non-freezeout cases. From a policy perspective, we argue that our results reflect a step in the wrong direction. SC approval and MOM approval track the protections in an arms-length deal (namely, board approval and approval from a majority of the shares) (Del. Gen. Corp. L. §251(c)), which mitigate the conflicts of interest that characterize freezeouts while at the same time minimizing the cost of judicial intervention.

To the extent that holdup risk is deterring controllers from giving MOM conditions, we propose the MOOM alternative: approval by a majority of the *original* minority. Under this approach, controllers would be allowed to satisfy the MOM condition by subjecting the deal to approval by the majority of the minority shareholders *at the time of the deal announcement*. Shareholders who bought after this date would not be able to vote their shares. Holdup risk is therefore eliminated, while still preserving the backstopping benefits of a MOM condition. Although the determination of beneficial owners on a particular date is complicated and often imperfect, any deal that must set a record date (which is to say, all freezeouts) must go through this exercise; therefore, the MOOM alternative imposes no additional complexity or cost on the proxy voting system. In our opinion, the MOOM alternative to a MOM condition appropriately balances, in at least some instances, the policy interest in obtaining minority shareholder approval with the controller's interest in avoiding holdup risk.

We acknowledge, however, that our MOOM alternative represents a distinct second-best solution to a MOM condition. Despite the pejorative connotations, "holdup risk" (which is only achieved through a MOM condition) can have positive social welfare benefits, and so should continue to be facilitated by Delaware corporate law. Specifically, holdup risk can bolster the minority's ability to block unfair deals, so by eliminating holdup, a MOOM condition also eliminates this collateral benefit. For these reasons, we think that courts should give some weight to the MOOM condition, but unlike the combination of MOM and SC conditions, the combination of MOOM and SC conditions should not lead to business judgment deference.

Freezeouts matter. Although they are a small fraction of overall deal volume, they are an important class of transaction because they involve a crucial moment in the minority shareholder's investment, namely, exit. It is likely that there is a correlation between protections for minority investors and overall capital formation and economic development because minority investors are more likely to invest in controlled companies knowing that they will receive adequate procedural protections on their exit. From this perspective, our findings are troubling. While other jurisdictions around the world are seeking to catch up to Delaware in protecting their minority shareholders, Delaware itself is moving in the opposite direction. The MOOM condition is our proposed approach to bridge the gap between the controller's legitimate interest in deal certainty with our collective policy interest in protecting minority investors.

Our MOOM proposal has greater salience after the Delaware legislature's 2025 amendments to the Delaware corporate code. These amendments, known as Senate Bill 21 ("SB21"), codified the requirement of special committee approval *and* MOM approval for a freezeout to obtain business judgment deference; however, SB21 further specified that the special committee no longer needs to be composed entirely of independent directors, which weakens the effectiveness of the committee as a negotiating agent. With weaker committees, the back-end protection of majority-of-the-minority approval becomes more important. Our proposal strengthens the back-end, and in doing so, it represents a welfare-improving private response to the recent legislative developments in Delaware.

This article is organized as follows. Section 2 provides a summary of the evolution of the Delaware corporate law that created the modern doctrinal infrastructure of freezeouts. Section 3 reviews the recent trilogy of Delaware cases that unintentionally short-circuited that infrastructure. Section 4 reviews the prior empirical evidence on freezeouts. Section 5 examines the effect of the trilogy of cases. Section 6 provides our MOOM condition proposal. Section 7 concludes.

2. The evolution of freezeout doctrine

2.1. *Weinberger* to *MFW*

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 employs the process outlined by the Delaware Supreme Court in *Weinberger* *v. UOP*[6] and *Kahn v. Lynch Communication Systems:*[7] 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).

Historically, freezeouts were invariably scrutinized under stringent "entire fairness" review, regardless of the procedural protections used.[8] In *Kahn v. Lynch*,[9] 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 on entire fairness from the defendant to the plaintiff shareholders; but both procedural protections would achieve no further benefit in terms of standards of review. Subramanian (2007) 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.[10] 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. Examining a broader sample of freezeouts announced between 2000 and 2013, Restrepo (2021) similarly found that 94% of freezeouts during this era required SC approval, but only 37% of deals included a MOM condition.

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

[6] Weinberger v. UOP, 457 A.2d 701, 709 n.7 (Del. 1983).
[7] Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1112 (Del. 1994).
[8] See Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).
[9] Kahn v. Lynch Communication Systems, 638 A.2d at 1117.
[10] See Subramanian (2007) (reporting that 72 out of 76 public-company freezeouts initiated between 2001 and 2005, or 95%, made use of a special committee of independent directors).

meant that SCs could not use their recommendation to the minority shareholders as leverage in the negotiations with the controller.

Academic commentators advocated for a judicial regime that would promote both SC approval and MOM conditions in freezeouts (see Gilson and Gordon, 2003; Subramanian, 2005). In his 2005 *Cox Communications* decision, then Vice-Chancellor Strine proposed in dicta a unified approach. 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 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. Vice Chancellor Strine explained in *Cox* that the two requirements tracked the two steps of an arms-length merger, namely, board approval and approval from a majority of the shares.[11] Eight years later, in *MFW*,[12] then-Chancellor Strine finished the job he had started in *Cox Communications* by formally adopting the unified approach in a merger freezeout. On appeal, the Delaware Supreme Court affirmed and endorsed the approach.[13]

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. 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."[14]

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 (conversely) the significant leverage that the plaintiffs' bar had when parties did not avail themselves of the *MFW* template. In that

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[11] *In re* Cox Commc'n, Inc. S'holders Litig., 879 A.2d 604, 643–46 (Del. Ch. 2005) ("[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."). One of us (Guhan Subramanian) was retained by plaintiffs' attorneys in their fee request to the Delaware Chancery Court.

[12] *In re* MFW Shareholder Litigation, 67 A.3d at 535.

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

[14] *In re* MFW Shareholders Litig., 67 A.3d 496, 500 (Del. Ch. 2013) (Del. 2014).

deal, one of the two directors who served on the special committee of independent directors (Ronald Yagoda) allegedly inquired about the possibility of a consulting contract with the buying company during the freezeout negotiations.[15] 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.[16] 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.[17] If instead the parties had been able to avail themselves of the *MFW* template, the plaintiffs would have had significantly less settlement value.

In the aftermath of *MFW*, some practitioners were skeptical of the benefits of its template. For example, a 2014 Cleary Gottlieb memo to clients 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 (Cleary Gottlieb, 2014; see also Lewkow et al., 2013). However, empirical evidence indicates that these 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), Restrepo (2021) 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). The sharp increase in the incidence of MOM conditions, and no reduction

[15] Complaint at ¶ 51, *In re* Schuff Int'l Inc. S'holders Litig., No. 10323-VCZ (Del. Ch. 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.").

[16] 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. S'holder Litig., 4 A.3d 397, 397 (Del. Ch. 2010).

[17] The stockholders who tendered received an additional payment of $35.95 (568,556 shares), and stockholders who did not tender (289,902 shares) received $67.45 per share. Stipulation and Agreement of Compromise, Settlement, and Release, *In re* Schuff Int'l, Inc. S'holder Litig., No. 10323-VCZ (Exhibit B at 11) (Del. Ch. 2019). One of us (Guhan Subramanian) was retained by HC2 in an arbitration related to this settlement.

in the incidence of SC approval conditions, indicates that practitioners had largely taken up the invitation offered by *MFW*, no doubt because of the benefits of business judgment review compared to entire fairness.

2.2. The importance of the dual protections

The dual protections of SC approval and a MOM condition provide important, and distinct, mechanisms for ensuring that minority shareholders receive fair value in a freezeout. First, the SC approval process is a direct response to the problem of opportunistic timing by the controller. It is well-understood in the academic literature that a controlling shareholder might initiate its freezeout precisely when the undisturbed share price is below intrinsic value.[18] This problem can arise, for example, when the controlling shareholder is aware of value-enhancing, material nonpublic information ("MNPI") unknown to the market (such as pre-release earnings or forecasts). Because of this information, the value of the firm is greater than reflected in the marketplace.[19] In this situation, the controlling shareholder can time an offer before the information becomes public to take advantage of a price dislocation. Some academic commentators have gone so far as to argue that rational shareholders, anticipating this ability for the controller to freezeout the minority opportunistically, should bid down the price of a minority share to zero, even though its intrinsic value should be higher (Bebchuk and Kahan, 2000).

The negotiation between the special committee and the controlling shareholder limits the controller's ability to act opportunistically against the minority, in two ways. First, the special committee will have access to non-public information about the target company. This means that the special committee can extract a price from the controller that includes the value of that non-public information, which the minority are entitled to receive. Without a special committee, a controller could go straight to the minority shareholders

[18] See, e.g., Subramanian (2005). ("[T]he controller controls the timing of a freezeout. This means that a controller can freeze out the minority when it perceives that the market price of the target stock is lower than its intrinsic value. . . ."). See also Clark (1986) ("[A]t what time is [the controller] likely to stage a freezeout? The answer is clear: when he knows that the company is really worth more than its current market price.").
[19] In the finance literature, it is well-understood that the stock market is only "semi-strong efficient" (not "strong form efficient"), because prices only reflect public information.

with an offer that is above the market price of the company, but which does not reflect the value of non-public information.

Second, and related, the special committee can veto the transaction entirely if the controlling shareholder attempts a freezeout at a time when the company is poised to do well. In such a scenario, the intrinsic value of the target company will be higher than its current market price. Unless the controller pays the minority its fair share of that intrinsic value, the special committee can block the deal. In contrast, when the special committee does not have veto power, the controller can initiate the freezeout at a time when the intrinsic value of the company is higher than its current market value.

Empirical evidence indicates vigorous bargaining by the special committee against the controller.[20] The general picture that emerges from this data is meaningful negotiation between the controller and the SC, in which the controller will typically increase its price significantly from the first offer to the final offer.

A MOM condition then provides a binary check against a captured or negligent SC (see, e.g., Gilson and Gordon, 2003). In this binary check, the minority shareholders will not have the benefit of non-public information (as the SC would) but the shareholders would be able to assess the offer based on public information. The converse of this point is equally important: the MOM condition does not present a meaningful check against opportunism if the controller is exploiting non-public information; but to the extent that the controller has timed its offer to exploit publicly-available information, the MOM condition creates an important check against an ineffective SC. The implication is that the absence of a MOM condition is particularly important for the controller when it is attempting to exploit a disconnect between intrinsic value and market price but the information creating that disconnect is publicly available.

[20] See, e.g., Da and Ricks (2024) ("Within the deals in our data, it was far more common for selling shareholders to extract a sweetened price from a controller than from an arms-length acquirer (7.5% versus 2.4%), even though competing bids rarely emerged in the former scenario.").

The freezeout of Santander Consumer USA ("SCUSA") by Banco Santander S.A. ("Banco"), the well-known Spanish retail bank, illustrates exactly this scenario. Banco owned approximately 80% of the SCUSA shares. Banco made its Initial Proposal of $39.00 per share on July 1, 2021. The offer represented a 7.1% premium over the $36.43 stock price on that day.

The next day, on July 2, 2020, Banco amended its Schedule 13D to disclose the offer price publicly. SCUSA's second quarter had just closed the day before the initial proposal was made, June 30. Banco knew of SCUSA's projected second quarter results by early June. Banco also knew of SCUSA's projected 2021 and 2022 results. These second quarter results were extremely good. When they were ultimately reported to the public on July 28, SCUSA beat analyst consensus earnings estimates by a remarkable 94%. SCUSA's projected 2021 and 2022 net income were also well above consensus estimates.

The merger agreement signed on August 23rd specified that Banco would make a tender offer for the minority shares of SCUSA, but there would be no majority-of-the-minority voting condition, minimum tender condition, or other mechanism for minority stockholder approval. On September 7, 2021, Banco began its tender offer, with an initial expiration date of October 4. The tender offer deadline was extended fourteen times, ultimately expiring on January 27, 2022. Out of the 20% minority shares, approximately 23.5% were ultimately tendered into the tender offer. The deal closed on January 31, and then minority shareholders brought suit challenging the fairness of the transaction. The case settled for $162 million (representing an 8% bump over the deal price) in October 2024.

This represents a paradigmatic case of opportunistic timing by the controlling shareholder. When Banco made its offer on July 1, the intrinsic value of SCUSA was undoubtedly higher than the market price at the time, because the market price did not yet reflect the extremely favorable second quarter results or projected results for the second half of 2021 and 2022. Banco disclosed its initial offer on July 2. This disclosure meant that the market price of SCUSA would be untethered from intrinsic value; rather, the market price would reflect the offer price, any anticipated bump, and the likelihood of closing.

If, counterfactually, Banco had not disclosed its initial offer in early July, then the SCUSA trading price would have reflected something closer to intrinsic value on July 28, when the second quarter results were disclosed. Given the excellent results, and the fact that analysts adjusted upwards their expectations for the remainder of 2021 and 2022 based on those results,[21] the SCUSA stock price would have likely "popped" in response to these results, which then would have required Banco to increase its offer substantially to provide the same premium over the new market price.

Indeed, many top analysts commented that the controlling shareholders' July 1, 2021 offer "capped" SCUSA's stock price and as a result the stock price no longer reflected standalone, intrinsic value.[22] The important point, for present purposes, is that the strategy of opportunistically timing a freezeout is much less likely to work if there is a MOM condition. If, counterfactually, the SCUSA minority shareholders had a MOM condition, they could have voted down the Banco offer based on their awareness of the (publicly available) second-quarter results and updated analyst forecasts. Instead, the deal closed with very little minority support. The case study illustrates how a MOM condition can provide a check against opportunism by the controller, but only in the instance where the source of the opportunism is publicly-known information.

A second benefit of a MOM condition is that it implicitly subjects the controller's offer to a "market check." Without a MOM condition, a freezeout is finalized after the controlling shareholder negotiates the merger with an SC of independent directors: the target board will recommend the deal to its shareholders, and assuming that the controller has more than 50% of the shares, the transaction will be approved. In contrast, with a MOM Condition,

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[21] Compare Piper Sandler, Discussion Materials Prepared for: Project FUSION – Earnings Per Share Summary (showing analyst consensus estimates for 2021 and 2022 of $6.51/share and $3.86/share, respectively) (July 21, 2021) (PIPER_SANDLER_0021546) with Piper Sandler, Project FUSION Fairness Opinion Presentation to the Special Committee – Summary of Transaction Multiples (showing analyst consensus estimates for 2021 and 2022 of $9.65/share and $4.24/share, respectively) (Aug. 23, 2021) (PIPER_SANDLER_0017718).

[22] See, e.g., Bank of America: "We believe SC is no longer trading on fundamentals"; Morgan Stanley: "While earnings performance looks very strong, the stock price is capped by the outstanding proposal from majority-owner SHUSA to buyout the remaining 20% of shares at $39/share."

there is the possibility of a "deal jumper" who can offer more. For precisely this reason, Clark (1986, p. 517-18) proposed nearly forty years ago that all freezeouts be subject to a MOM condition: "The most important consequence of [a MOM condition] 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."

In fact, a MOM condition is the only way to subject a freezeout to a market check. This is because a controlling shareholder cannot be compelled to sell its shares to a higher-value bidder (or anyone else). Instead, the vast majority of controlling shareholders indicate in their initial approach to the target that they are not interested in selling to a competing bidder.[23] As a result, the special committee typically cannot develop options away from the table, which are often considered to be an important source of bargaining power in negotiations generally.[24]

3. The *SolarCity* trilogy

3.1. Overview of the trilogy

This section summarizes the "*SolarCity* Trilogy": *SolarCity* in April 2022, *BGC Partners* in August 2022, and *Straight Path* in October 2023. Viewed collectively, these cases chart a new course for entire fairness doctrine in the Delaware courts.

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[23] See, e.g., Form 8-K filed by ARV Assisted Living with the Securities and Exchange Commission, Sept. 24, 2002, at 4 (indicating that controlling shareholder Prometheus "stated that it is not interested in selling its shares in ARV"); Letter from William J. Hannigan, Chairman and CEO, Sabre Holdings Corp., to F. William Conner, Chairman of the Special Committee, Travelocity.com (Feb. 20, 2002), in Schedule 14D-9 filed by Travelocity.com with the Securities and Exchange Commission, Mar. 5, 2002, at 23 ("[R]egardless of the outcome of our tender offer, we have no intention of selling any of our equity interests in Travelocity.com . . . . nor are we willing to explore the possibility of another party making an investment in Travelocity.com . . . ").

[24] See Subramanian (2020, p. xi) (noting a "key theme of the book" is that "[c]reating the right kind of competition for the deal, or sometimes even the perception of that competition, can give you far more leverage than the standard negotiation toolkit provides.").

SolarCity

SolarCity[25] involved Tesla's acquisition of SolarCity in 2016. Before the deal, SolarCity traded at historic lows, apparently due to liquidity issues and macroeconomic factors. To respond to the liquidity issues, SolarCity explored strategic alternatives, which led Elon Musk (the largest shareholder of Tesla and also the Chairman and largest shareholder of SolarCity) to propose to the Tesla board an acquisition of SolarCity. After initial resistance by the Tesla board, the companies signed a merger agreement in July 2016 and Tesla's shareholders overwhelmingly voted to approve the acquisition in November 2016. The Tesla board did not form a special committee to negotiate the transaction, but it did condition the deal on a vote of a majority of Tesla's disinterested shareholders.

Shortly after the transaction, several Tesla shareholders sued the company's directors, claiming that Tesla had overpaid to bail out SolarCity and that the transaction ultimately benefited Musk. All director defendants settled except Musk. At trial, the court applied entire fairness review because Musk (likely) controlled both Tesla and SolarCity, and because the Tesla board was not disinterested or independent from Musk. However, the court concluded that both the negotiation process and the price were fair; on appeal, the Delaware Supreme Court affirmed in June 2023.

BGC Partners

In *BGC Partners*,[26] the Delaware Chancery Court held that despite significant flaws in the sale of a company that was under common control with its buyer (like in the Tesla-SolarCity transaction), the transaction was entirely fair. The case stemmed from the acquisition of Berkeley Point Financial, LLC by BGC Partners. Both companies were controlled by Cantor Fitzgerald, which was in turn controlled by Howard Lutnick. Lutnick proposed the transaction in response to Berkeley Point's financial struggles, and a special

[25] *In re* Tesla Motors, Inc. Stockholder Litig., No. CV 12711-VCS, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022), judgment entered sub nom. In re Tesla Motors, Inc. (Del. Ch. 2022), aff'd sub nom. In re Tesla Motors, Inc. Stockholder Litig., 298 A.3d 667 (Del. 2023).

[26] *In re* BGC Partners, Inc. Derivative Litig., No. 2018-0722-LWW, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022), judgment entered sub nom. *In re* BGC Partners, Inc. (Del. Ch. 2022), *aff'd sub nom. In* re BGC Partners, Inc. Derivative Litig., 303 A.3d 337 (Del. 2023)

committee of the independent directors of BGC subsequently approved it. However, BGC's minority shareholders challenged the deal, alleging that Lutnick had caused BGC to overpay for Berkeley Point and that the overpayment was in Lutnick's personal interest because he had a larger ownership interest in Berkeley Point than in BGC. As part of their argument, the plaintiffs argued that Lutnick dictated the timing and terms of the transaction, dominated BGC's special committee, and withheld valuation information from the BGC board.

The Chancery Court applied entire fairness review because Lutnick stood on both sides of the transaction and had a financial incentive to cause BGC to overpay for Berkeley. In addition, the court emphasized that Lutnick overstepped by identifying advisors for the special committee and asking the co-chairs of the committee to serve. However, the court ultimately found that the special committee and its advisors were independent and fully empowered to decide, and that the committee had all the information it needed to negotiate on a fully informed basis. In addition, according to the court, the price the special committee agreed to pay for Berkeley Point was within the range of fairness.

Straight Path

Straight Path[27] stemmed from a settlement of indemnification rights between two companies that were (yet again) under common control. In 2023, IDT Corp., a telecommunications firm, created Straight Path Communications Inc. in a spin-off transaction. IDT's founder and chairman, Howard Jonas, controlled both companies. During the spin-off, IDT transferred to Straight Path intellectual property assets (the "IP Assets") and certain broadcast spectrum licenses, which were considered to have little value. However, several years after the spin-off, the value of the licenses increased significantly because of changes in Federal Communications Commission ("FCC") regulations and the growing need for cellular spectrum. The spin-off agreement also included indemnification rights that required IDT to indemnify Straight Path for certain losses.

[27] *In re* Straight Path Commun. Inc. Consol. Stockholder Litig., No. 2017-0486-SG, 2023 WL 6399095 (Del. Ch. Oct. 3, 2023).

Following the increase in the value of the licenses, the FCC alleged that IDT had employed deceptive practices to obtain a renewal of the licenses years earlier, before the licenses were transferred to Straight Path. Straight Path settled with the FCC for a $15 million fine and a forfeiture of several licenses. In addition, Straight Path was required to either forfeit the remaining licenses, pay an $85 million penalty, or sell the remaining spectrum assets and pay a percentage of the sale proceeds to the FCC as a penalty. The board opted for selling the company (which, after selling the IP Assets, was effectively equivalent to a sale of the spectrum licenses), and to this end, the board formed a special committee of independent directors.

Straight Path's special committee believed that the company could seek indemnification from IDT for the penalties under the settlement with the FCC (the "Indemnification Claim"). The board therefore explored ways to preserve the Indemnification Claim as a separate shareholder asset (including, for example, by creating a trust to hold the claim on the shareholders' behalf). When Jonas learned of this plan, however, he used his position as controller to force the special committee to release the Indemnification Claim in exchange for a cash payment and a contingent right to profits from the sale of the IP Assets. As part of his negotiation strategy, Jonas threatened to remove the members of the special committee if they did not agree to his proposal, and he made clear that he would reject any sale that did not immediately eliminate the Indemnification Claim. Within a few weeks, the committee accepted Jonas's demands, and Verizon ultimately purchased Straight Path.

The minority shareholders of Straight Path sued IDT and Jonas for eliminating their right to recover the penalties paid by Straight Path to the FCC. The court applied entire fairness review because Jonas was the controlling shareholder of Straight Path and at the same time he had a significant interest in IDT. Using this standard, the court found that the process was unfair because Jonas resorted to a "campaign of abuse and coercion" to cause Straight Path's special committee to accept his demands. But despite the tainted process, the court found that the price was within the range of fairness. According to the court, the Indemnification Claim was "economically worthless" because Straight Path did not comply with the procedural requirements to create a viable indemnification obligation for IDT.[28] Jonas's liability was therefore limited to nominal damages.

3.2. Implications for Transactional Practice

Although none of the *SolarCity* trilogy were freezeouts, they all involved cases that invoked entire fairness review, and in all of them the defendant survived such review. This changed the perceived risks of undergoing entire fairness review, in that entire fairness no longer meant an automatic finding of liability. As one practitioner explained in the aftermath of *BGC Partners*: "Although, historically, application of the entire fairness standard generally was outcome-determinative in favor of plaintiffs, over the past few years, in several cases, the court has found that the standard was satisfied" (Fried, Frank, Harris, Shriver & Jacobson LLP, 2023).

Meanwhile, as the benefits of the business judgment safe harbor were receding, activists continue to lurk in freezeouts. Controllers might reasonably fear that an activist will buy a stake in the minority float and then threaten to veto (or "hold up") the deal unless the minority shareholders received more money. The possibility of a blocking coalition might thus push a controller to not give a MOM condition despite the doctrinal benefits under *MFW*.

We address the question of whether holdup is desirable as a policy matter in Section 6 below. From the perspective of the controlling shareholder, however, holdup is clearly undesirable. And the *SolarCity* trilogy changed the doctrinal calculation: with entire fairness review no longer perceived as onerous (thereby reducing the benefits of a MOM condition), and with perceived holdup risk increasing (thereby increasing the costs of giving a MOM condition), transactional planners are no longer as eager to provide MOM conditions as part of the freezeout process.

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[28] Specifically, Straight Path failed to fulfill the spin-off agreement's notice and consent requirements for indemnification claims. Although the indemnification claim was an indemnifiable loss under the contract, the indemnification terms included a requirement of prompt written notice and granted consent rights to IDT over a settlement. Even though IDT was aware of the potential claim, Straight Path did not follow the formal procedure for demanding indemnification.

Practitioners have debated the wisdom of this doctrinal shift. Varallo, van Kwawegen, Blumberg & Janison (2024), for example, argue that the *SolarCity* trilogy represents "excessive deference in scenarios where exacting scrutiny was necessary" because all three deal processes (in the Court's own assessment) had significant flaws. We do not engage with this doctrinal debate in this article. Our interest is in examining the natural prediction that emerges from the *SolarCity* trilogy (i.e., whether the trilogy resulted in less use of MOM conditions) and in the implications of this change for the MOM condition.

4. Prior research

Empirical studies on freezeouts have generally focused on the impact of judicial review on the wealth of the target shareholders. In his sample of freezeouts between 2001 and 2005, for example, Subramanian (2007) found that minority shareholders received lower cumulative abnormal returns (CARs) in tender offer freezeouts (which the Delaware Chancery Court's decision in *Siliconix*[29] temporarily excluded from entire fairness review during the sample period) than in merger freezeouts (which were continuously subject to entire fairness review), thus concluding that there is a positive relationship between enhanced judicial review and the gains of the target shareholders.[30] In line with this intuition, Restrepo (2013) compared tender offer and merger freezeouts before and after *Siliconix*, and found that CARs in tender offers in fact declined in relation to CARs in mergers after the decision.[31] Restrepo and Subramanian (2015) found that CARs in tender

[29] *In re* Siliconix Inc. Shareholders Litigation, Civ. A. No. 18700, *7 2001 WL 716787 (Del. Ch. June 19, 2001).

[30] The Chancery Court's decision in *Siliconix* was based on the premise that the decision to tender or not to tender is a sufficient protection for minority shareholders – which renders entire fairness review unnecessary. However, the Chancery Court subsequently questioned this premise in its *Cox Communications* decision and reversed the *Siliconix* policy in *CNX Gas* and *MFW*. See *In re* Cox Communications, Inc. Shareholders Litigation, 879 A.2d 604, 618–19 (Del. Ch. 2005); *In re* CNX Gas Corp. Shareholder Litigation, 4 A.3d 397, 407 (Del. Ch. 2010); *In re* MFW Shareholders Litigation, 67 A.3d 496, 500, 528 (Del. Ch. May 29, 2013).

[31] Bates, Lemmon, and Linck (2006, 681-708) also studied CARs in freezeouts in a period that partially overlapped with Subramanian's (2007) and Restrepo's (2013) samples, and the authors concluded that *Siliconix* was not associated with lower CARs. However, there are various methodological aspects that might explain that difference. First, Bates, Lemmon, and Linck include Delaware and non-Delaware targets in their sample even though *Siliconix* was not necessarily adopted outside of Delaware. Second, the authors classified tender offers that were executed pursuant to a merger agreement as pure tender offers – even though the Delaware Chancery Court has held that the presence of a merger agreement triggers entire fairness review. See Hartley v. Peapod, Inc., Civ.A. 19025-NC, 2002 WL 31957458, at *1 (Del. Ch. Feb. 27, 2002). And third, the post-*Siliconix* sample in Bates, Lemmon, and Linck (2006) (i.e., 2001-2003) is shorter than the post-*Siliconix* sample examined in Subramanian (2007) and Restrepo (2013) (i.e., 2001-2005). There are other papers that also examine the gains of the target shareholders in freezeouts, but those papers are examine

offers subsequently increased in relation to CARs in mergers after the Delaware Chancery Court's decision in *Cox Communications*,[32] which stated in dicta that freezeouts should generally be subject to entire fairness review except when the transaction is conditioned on SC and MOM approval.

Although these studies do not focus on the use of procedural protections, they provide data on the frequency with which the protections are used. All of the studies show that SC approval has been commonplace, occurring in at least 80% of freezeouts. This is likely explained by the fact that *Lynch*[33] shifted the burden of proof on entire fairness to the plaintiff if a freezeout includes an SC (or an MOM condition), but the decision did not provide any further benefit to controllers that implemented both conditions (Subramanian, 2007; Restrepo, 2013). With respect to MOM conditions, Restrepo & Subramanian (2015) find that while approximately 33% of the merger freezeouts announced before *Cox* included the condition, the incidence increased to 50% after *Cox* – consistent with the view that the decision was interpreted as a signal that courts would subsequently provide greater deference to controllers conditioning their deals on MOM approval in addition to SC approval.

More recently, Restrepo (2021) examines the impact of *MFW* on the incidence of procedural protections. He finds that MOM conditions significantly increased after the decision, from approximately 50% to 85%. Consistent with previous studies, SC conditions were adopted in over 80% of the transactions before and after *MFW*. In addition, Restrepo suggests that the combination of SC and MOM conditions may provide a level of protection that is approximately similar to entire fairness review because the gains of the target shareholders remained approximately the same throughout the entire sample period despite the increase in MOM conditions post-*MFW*.

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samples that predate *Siliconix* and do not compare tender offers and mergers. See Dodd and Ruback (1977); DeAngelo, DeAngelo, and Rice (1984); Holderness and Sheehan (1988).

[32] *In re* Cox Communications, Inc. Shareholders Litigation, 879 A.2d 604, 618–19 (Del. Ch. 2005).

[33] Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1117 (Del.1994).

Examining freezeouts announced between 2013 and 2022, Subramanian (2022) similarly found that 95% of deals required SC approval and 81% of deals included a MOM condition. Most of the deals that did not include a MOM condition were freezeouts with a small minority float, where an activist could buy a blocking stake relatively easily, and therefore the hold-up problem might be perceived to be large.

5. Empirical analysis

To examine changes in the incidence of MOM conditions after the *SolarCity* trilogy, we analyze all the freezeouts of Delaware corporations since the Delaware Chancery Court's *MFW* decision in April 2013. The main independent variable of interest is *Post*, an indicator variable that takes the value of 1 for deals announced after *SolarCity* and 0 otherwise. This is our baseline analysis because there is no ideal set of deals that should be unaffected by the *SolarCity* trilogy and that, therefore, could work as a control group. Perhaps freezeouts of non-Delaware targets (which are not governed by Delaware law) and freezeouts of non-incorporated business entities (which are not subject to corporate law) are the most plausible comparisons. Those transactions are also an imperfect benchmark because there are very few of them (particularly after *SolarCity*) and because Delaware doctrine often has spillover effects on other states and non-corporate entities. However, it is reasonable to think that if the *SolarCity* trilogy had any effect, that effect should be strongest among the transactions that are most directly affected by the decisions – that is, freezeouts of Delaware corporations. Therefore, with these caveats in mind, we also compare our sample of Delaware corporate freezeouts with non-Delaware and non-corporate freezeouts.

We focus on merger freezeouts because mergers are the main way in which freezeouts are executed and because *MFW* and *SolarCity* involved mergers. We classify a merger as a freezeout if the buyer had at least 30% of the shares in the target before the announcement of the transaction because even though a 50% holding establishes clear control, the

Delaware courts have held that a shareholding in the vicinity of 30% can be enough to trigger control.[34]

Our regressions include a parsimonious set of controls because of the small size of the sample. Those controls include the size of the deal (the value of the transaction), the profitability of the target (ROA) in the year immediately preceding the announcement of the transaction, the consideration structure (cash versus other forms of payment), and the presence of an SC condition. We control for the size of the deal because larger deals are more difficult for a single shareholder (or group of shareholders) to block, which might lead to a positive correlation with the presence of MOM conditions. We control for ROA for two reasons: because the controller might be more concerned about the deal being blocked if the target is more profitable (which would lead to a negative relationship between MOM conditions and ROA); and, alternatively, because higher profitability might give the SC greater bargaining power to demand a MOM condition (which would lead to a positive correlation between MOM conditions and ROA). We control for the consideration structure (cash versus other forms of payment) because a controller might be less concerned about the minority shareholders rejecting the deal (and thus a MOM condition) if the controller pays with cash. The control for the SC condition is to account for the fact that SC and MOM conditions might be positively correlated because an SC is likely to demand a MOM condition.

The list of transactions and their characteristics are from LSEG; the companies' financials are from LSEG and, when not available, from Compustat; and information about SC and MOM conditions are from SEC filings by the target company and the controller, especially 8-K, 14D-9, 13-E, 13-D, and 14A filings. In the few instances in which information is missing for a dependent variable, we impute the data using the median sample values (or,

[34] See, for example, *In re* Cysive Inc. Shareholders Litigation, 836 A.2d 531 (Del. Ch. 2003) (finding a 35% shareholder to be a controller). In some cases, the Delaware Chancery Court has gone even further, concluding that a shareholding below 30% can trigger control. See Calesa Associates, L.P. v. American Capital, Ltd., 2016 WL 770251, at *10 (Del.Ch., 2016) (finding that a 25% shareholder can be a controlling shareholder); *In re* Zhongpin Inc. Stockholders Litigation, 2014 WL 6735457, at *9 (Del.Ch., 2014) (finding that a 17.3% shareholder can be a controlling shareholder, although that stake is "much smaller than a typical controller's"). However, control in those cases is more controversial.

alternatively, mean or minimum values). However, the results do not significantly change if we do not impute missing values.

Table 1 provides summary statistics. It shows that MOM conditions declined significantly after the *SolarCity* trilogy, from 78% before the decision to 45% after, and this decline is statistically significant at the 5% level. The current incidence of the conditions is thus approximately the same as that observed during the period after *Cox* but before *MFW* (Restrepo, 2021).

Table 2 shows the regression results on the relationship between the *SolarCity* trilogy and the incidence of MOM conditions. The main variable of interest in all the regressions is *Post*, which is an indicator variable that takes the value of one for transactions announced after *SolarCity* and zero otherwise. Model 1 shows the results without any controls; Model 2 includes controls only for the size of the deal and the profitability of the target; and Model 3 includes all the controls. As shown, the *Post* variable is negative and statistically significant at the 5% level in the first model, and it becomes significant at the 1% after we control for the covariates.

Although, as discussed earlier, we do not have an ideal control group, we compare the evolution of MOM conditions in freezeouts of Delaware corporations with MOM conditions in non-Delaware and non-corporate freezeouts. Table 3 shows the results. The variable of interest in these regressions is *DelawareCorp*×*Post*, an interaction between the *Post* variable and a *DelawareCorp* variable that takes the value of 1 for freezeouts of Delaware corporations and 0 for other freezeouts. As in Table 2, Model 1 does not include any control (other than *DelawareCorp*×*Post* and the stand-alone *Delaware* and *Post* variables); Model 2 includes controls for the financial characteristics of the transaction; and Model 3 adds the indicator for the presence of an SC. As shown, the interaction *DelawareCorp*×*Post* is negative and significant at the 5% level in all the models, indicating that the incidence of MOM conditions declined among Delaware corporations relative to other freezeouts.

As mentioned before, the risk of holdup may increase for larger controllers because a blocking position becomes correspondingly smaller. With a 60% controller, for example, 21% of shares would need to vote against to block the deal; in contrast, for an 80% controller, only 11% of shares are needed to block. In line with this intuition, Subramanian (2022) finds that, before *SolarCity*, the absence of a MOM condition was largely explained by a small minority float. In contrast, in our sample of post-*SolarCity* deals, we do not find an inverse relationship between the presence of an MOM condition and the size of the minority float. In the pre-*SolarCity* tranche of our sample, consistent with Subramanian (2022), larger deals were more likely to have a MOM condition: \$82 million average deal size for no-MOM deals and \$735 million average deal size for MOM deals. In the post-*SolarCity* tranche, the correlation reverses and larger deals were *less* likely to have a MOM condition: \$1,089 million average deal size for no-MOM deals and \$249 million average deal size for MOM deals. One possible interpretation of this result is that controllers are in fact engaging in a different cost/benefit calculation after the *SolarCity* trilogy.

Unlike the earlier freezeouts era, when the absence of a MOM condition could largely be explained by a small minority float (and therefore higher hold out risk) (Subramanian, 2022), the absence of a MOM condition in our post-*SolarCity* sample cannot be explained by a small minority float. Pre-*SolarCity*, larger deals were more likely to have a MOM condition: \$82 million average deal size for no-MOM deals and \$735 million average deal size for MOM deals. This evidence is consistent with the intuition that large deals have low hold-up risk, so a MOM condition should be a relatively straightforward give by the controller.

In untabulated results, we also examined changes after the *SolarCity* trilogy in a proxy for the value extracted by the target company in the negotiation process: the "price bump" – that is, the difference between the final offer and the first offer. We found that although the bump declined, the change was not statistically significant. Similarly, like in Table 3, we compared the bump in corporate freezeouts of Delaware targets, on the one hand, and non-Delaware and non-corporate freezeouts, on the other hand, and we found that the interaction $DelawareCorp \times Post$ was not statistically significant. Moreover, although the cumulative abnormal returns (CARs) of the target at the announcement of the transaction might be a less direct proxy for the value extracted by the company during the negotiation process, we also examined those returns, and once again, we found that the CARs did not experience statistically significant changes.[35]

The absence of significant changes might be explained by the small size of the sample. In a separate paper, in fact, we examine a larger sample of freezeouts and find that MOM conditions were correlated with higher returns for the target shareholders in the cross-section (Restrepo and Subramanian, 2024).[36] Alternatively (and this interpretation does not exclude the previous one), it is possible that the gains of the target did not fall after the *SolarCity* trilogy because enhanced judicial review provides a level of protection that is approximately similar to the combination of MOM and SC approval. According to this interpretation, even though MOM conditions declined after *SolarCity*, that decline also meant that more deals became subject to entire fairness review; therefore, if the combination of MOM and SC conditions works as a substitute for judicial review, then it would be natural to expect no significant post-*SolarCity* change in the gains of the target shareholders. This interpretation is consistent with prior empirical evidence, which indicates that even though *MFW* resulted in an increase in MOM conditions, that increase did not lead to higher returns for the target shareholders (Restrepo, 2021).

Even in the absence of statistically significant changes, however, MOM conditions are still an important form of protection for the minority shareholders at least in some transactions. As discussed in Section 2.2, the conditions provide a check on the actions of the SC, create

[35] We define the CARs as the difference between the daily returns for the stock of the target relative to the returns of the Center for Research in Securities Pricing (CRSP) index over a window of five days around the announcement of the transaction. We use the value-weighted CRSP index to adjust the raw returns, but the results do not materially change if we use the equal-weighted index. In the estimations in which the CARs were the dependent variable and the sample was limited to freezeouts of corporate targets from Delaware, the *Post* variable was positive but not significant. In the regressions that compare Delaware corporate freezeouts with non-Delaware and non-corporate freezeouts, the variable $DelawareCorp \times Post$ was positive and it became significant. However, since the CARs among Delaware freezeouts did not decline in a significant manner, this result is entirely driven by an increase in the CARs of the comparison group.

[36] Other studies outside of the freezeout context also find that there is a positive relationship between shareholder voting and the gains of the target shareholders. See Becht, Polo, and Rossi (2016). However, other papers suggest the opposite. See Boone, Broughman, and Macias (2018); Cox, Mondino, and Thomas (2019).

the possibility of a market check on the transaction, and might even give the minority shareholders the opportunity to negotiate directly with the controlling shareholder. Case studies illustrate these points.

One example is the freezeout of the minority shareholders of Federal-Mogul. In February 2016, Carl Icahn offered to buy the remaining 18% of the company that he did not own for $7.00 per share in cash, subject to SC approval and a MOM condition. In June 2016, Icahn bumped his offer to $8.00 per share. And in September 2016, he reached agreement with the special committee at $9.25 per share, subject to a 50% minimum tender condition. In January 2017, Icahn bumped to $10.00 per share because that condition was unlikely to be fulfilled. He closed the deal later that month after achieving 58% minority stockholder approval. The MOM condition thus seems to have produced an 8% bump over the price negotiated by the special committee.

One year later, Icahn was on the other side of a MOM condition. 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. 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 MOM condition thus produced a 9% bump over the price negotiated by the special committee.

Another transaction, the freezeout of Asta Funding by Asta's CEO (Gary Stern) and his private equity partner, illustrates the "market check" created by a MOM condition. Stern held approximately 35% of Asta Funding. In October 2019, he proposed to acquire the remaining shares of Asta for $10.75 per share, subject to special committee approval and a MOM condition. In his initial proposal, Stern stated that he was "not interested" in selling his shares to a third party. In April 2020, the parties agreed to a deal at $11.47 per share, subject to a MOM condition. RBC Capital, a 9% holder in Asta, objected to the $11.47 per share price; and in May 2020, RBC made a competing offer at $13.00 per share notwithstanding Stern's claim of disinterest in a competing offer. RBC's offer would have had no pathway to success without the MOM condition (and therefore would have been unlikely to have been made), because in the absence of a MOM condition, Stern could have unilaterally voted his lower-value deal through. Instead, Stern was forced to increase his offer to $13.10 per share, amounting to a 22% increase over his initial offer and a 14% increase over his previously agreed-upon price. In September 2020, the $13.10 offer was approved by a majority of the minority shares, and the deal closed shortly thereafter.

6. Policy Implications

The empirical findings presented in Section 5 are consistent with a long line of research indicating that practitioners respond to changes in Delaware doctrine. For example, when Delaware doctrine provided more deference to freezeouts executed as tender offers compared to freezeouts executed as mergers, practitioners shifted to the tender offer route (Subramanian, 2007; Restrepo, 2013). When *MFW* exempted from entire fairness review freezeouts that adopted SC and MOM conditions, MOM conditions increased significantly (Restrepo, 2021). And we report that when Delaware doctrine reduced the "cost" side of the *MFW* cost/benefit calculation – namely, by making clear that it was feasible for a defendant to demonstrate entire fairness even with a flawed process – practitioners increasingly chose to not opt for the *MFW* pathway to business judgment deference.[37]

[37] A senior New York City practitioner offered an alternative explanation for our empirical findings: "I think things take time to percolate. I think controllers came around slowly to the realization that if they do a fair deal, they are better off being sued (and probably having the costs either paid for by the insurers or being immaterial compared to the value of the deal) than they are having a MOM with its risk either of being held hostage (like in AmTrust) or that the retail shareholders won't vote in sufficient numbers. I would bet that not only did it take a while for controllers to come around, but that the big-firm corporate lawyers who were advising them didn't come around to that realization either for quite a while, if they did at all. Personally, I don't think *SolarCity* was the cause, itself, but maybe it did help some people come to the realization."). (Email from Senior New York City Practitioner, June 26, 2024, on file with authors). We believe that this "learning" explanation would not explain the sharp decline in MOM conditions post-*SolarCity*. There has similarly been no meaningful change in retail share ownership of public companies over the past five years. Finally, the possibility that any bump achieved through entire fairness litigation would be "paid by the

This empirical finding is perhaps unsurprising, but it is doctrinally interesting because the result seems to have been a by-product of non-freezeout case law. None of *SolarCity*, *BGC Partners*, or *Straight Path* involved a freezeout transaction, and so the implications for transactional practice were not intended (or perhaps even anticipated) by the Delaware courts. By way of comparison, all of the prior decisions that created the doctrinal infrastructure for freezeouts – e.g., *Siliconix*, *Cox*, *MFW* – involved freezeouts. Putting these points together, while the *MFW* framework was deliberate, the clawback through the *SolarCity* trilogy was not.

We find this dismantling of freezeout doctrine to be troubling from a policy perspective. The conceptual underpinning of the SC-MOM approval requirements was to replicate the procedural protections in arms-length deals, namely, board approval and shareholder approval. *MFW* successfully channeled practitioners into this route, thereby providing minority shareholders with appropriate protections in freezeouts. In our view, the *SolarCity* trilogy was an unintended step backwards, as a policy matter.

In the remainder of this section, we examine, from a policy perspective, the claim that holdup risk provides controllers with a valid reason to withhold MOM conditions. Even though the term “holdup” has negative connotations, we conclude that holdup has socially desirable effects. Specifically, the possibility of holdup facilitates the blocking of unfair deals.

Regardless of whether holdup is good or bad, we then address the practical reality that controllers are less willing to give MOM conditions after the *SolarCity* trilogy. We then provide the “MOOM” condition alternative (majority of the *original* minority shares) that largely eliminates holdup risk while still providing minority shareholders a meaningful vote on the freezeout. With the MOOM alternative, we argue that Delaware courts should

insurers” has decreased (not increased) in recent years, with case law clarifying that the “bump up exclusion” in D&O policies excludes coverage in such claims.

be less sympathetic to controllers and special committees that claim holdup risk as the reason for not providing minority shareholders with any vote on the deal at all.

A. Holdup Risk

Holdup risk can take two forms. The first arises when existing shareholders threaten to vote against the deal in order to extract a higher price from the controller.[38] We believe that there is no serious policy argument against this form of holdup risk. Existing shareholders clearly have the right to vote against the deal. Against this baseline right, articulation of the terms on which those shareholders would support the deal seems unobjectionable. In addition, the controlling shareholder goes in "eyes wide open" regarding the existing shareholder base, and so (from an equitable perspective) would seem to be taking the risk of disapproval from existing shareholders when it agrees to a MOM condition.

The second case of holdup comes from activist shareholders who buy shares after the deal is announced but before the record date for the shareholder vote to satisfy the MOM condition. Elliott, for example, bought $800 million of the minority float in Santander Consumer after the freezeout by Banco Santander was announced (but before the record date), which amounted to approximately 33% of the minority shares outstanding. As mentioned in Section 2.2, the deal did not have a MOM condition, so Elliott was unable to block the deal. Instead, Elliott brought a fiduciary duty class action against Banco Santander and Santander Consumer. The case settled for $162 million (representing an 8% bump over the deal price) in October 2024 (Konnath, 2024).

When the deal does have a MOM condition, Elliott and other activists can buy shares and threaten to veto the deal unless the controller pays more. This threat of holdup becomes more credible as the deal price is less fair. To see the point, if the deal price already represents fair value to the minority, the controller can reject the activist's demands and (effectively) dare the activist to vote against the deal. If the deal is in fact voted down even though (by assumption) the deal price represents fair value, the activist will inevitably

[38] Throughout this section, we refer to "existing shareholders" as shareholders who hold shares of the controlled company at the time of the announcement of the deal.

suffer a loss as the trading price declines to the pre-deal unaffected value. Putting the point the other way, the threat of holdup is effective only when the deal price does not reflect fair value. In this scenario, the activist can credibly threaten to vote against the deal; and if the deal nevertheless goes through, the activist will have a strong appraisal claim and/or an entire fairness claim against the controller (so-called "appraisal arbitrage").

The point is that while the word "holdup" has negative connotations, we believe that a careful analysis reveals important benefits. As mentioned, the threat of holdup is most effective when the deal price is unfair; and conversely, the threat of holdup is least effective when the deal price is fair. In this sense, the holdup threat operationalizes the aspiration of a MOM condition, namely, to block unfair deals and to facilitate fair deals.[39]

B. Appraisal Arbitrage

Activists who buy shares after the deal announcement but before the record date amplify the effectiveness of the appraisal remedy and the (related) class action claim. In doing so, activists create two beneficial spillover effects for all shareholders. First, small shareholders can sell their shares to activists between the announcement and the shareholder meeting date, at a higher price than they would otherwise.[40] Second, foreseeing the possibility that appraisal arbitrage would aggregate dissatisfaction with the deal, an acquiring company will offer more to all shareholders in the first instance, and the selling company will insist on a robust deal process, all in order to minimize appraisal risk.[41]

For these reasons, commentators in legal academia generally agree that appraisal arbitrage is socially desirable.[42] Opponents of appraisal arbitrage argue that acquirers pay less

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[39] See also Glasscock (2017) ("[A]ppraisal arbitrage is no better or worse than the underlying cause of action: whether that action promotes efficiency or not, the effect – good or ill – is simply magnified by the availability of arbitrage.").

[40] See Boone, Broughman, and Macias (2019) (finding an absence of an arbitrage spread in deals targeted by appraisal litigation "implies that some of the gains from merger arbitrage . . . are shared with passive investors").

[41] See Callahan, Palia, and Talley (2018) (finding that "the credible threat of appraisal can act as an effective 'reserve price' in a target company auction" and that "deal premia are discernibly higher in appraisal eligible transactions").

[42] See, e.g., Myers and Korsmo (2015) ("[A]ppraisal arbitrage focuses private enforcement resources on the transactions that are most likely to deserve scrutiny, and the benefits of this kind of appraisal accrue to minority shareholders even when they do not themselves seek appraisal"); Subramanian (2017) ("[A]ppraisal

overall because they must keep more "in their pocket" to pay appraisal petitioners.[43] This is only true if the sell-side deal process is not sufficiently meaningful to warrant deference to the deal price. If an acquirer is willing to tolerate a meaningful sell-side deal process, then appraisal risk is minimized if not eliminated. And if an acquirer is not willing to tolerate a meaningful sell-side process, then the deal is likely inefficient to begin with.

The logic of permitting appraisal arbitrage is best seen by the example of class action litigation against freezeouts, a close cousin to appraisal litigation. Indeed, some freezeouts (such as Continental Resources) are challenged in both ways: certain shareholders will aggregate shares and seek appraisal, while plaintiffs' attorneys will bring a parallel class action suit on behalf of all minority shareholders. While the elements are different in the two claims (notably, a class action requires a fiduciary duty breach while an appraisal claim does not), the criticisms of the deal process from petitioners (in the appraisal litigation) and the plaintiffs (in the class action litigation) are virtually the same in the two parallel actions.

The critical point for present purposes is that the shareholder class in the class action challenge will invariably be the shareholders who held shares at the time of the closing of the deal, because these were the shareholders who were allegedly injured by the transaction. Many of these shareholders will have bought shares after the announcement of the deal, yet there is not (to our knowledge) any suggestion by academic or practitioner commentators that they should not be members of the shareholder class. In our view, there is no conceptual reason why shareholders who bought shares after the announcement of the deal for purposes of seeking appraisal should be treated differently from shareholders who participate in the class action who bought shares after the announcement of the deal.

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arbitrage, in general, bolsters shareholder protections in a socially desirable way"); Callahan, Palia, and Talley (2018) (finding that the development of appraisal arbitrage has "enhanced target-company welfare"); Boone, Broughman, and Macias (2019) (concluding that "appraisal provides enhanced protection when shareholders are more at risk, while not necessarily resulting in significant costs to target shareholders"). See also Hamermesh and Wachter (2018) ("In sum, we see no basis in existing statutes or precedent to conclude that appraisal arbitrage offends some well-established moral or legal precept.").

[43] See, e.g., Kesten (2017) ("Rational acquirers that anticipate appraisal proceedings . . . will self-insure against appraisal outlays by offering less for their acquisitions, thereby transferring value from target shareholders as a class to the minority who dissent."); Norwitz (2015) ("[B]uyers will just respond to the new wave of appraisal arbitrage with lower purchase prices, as they feel the need to hold something back for the likely appraisal 'grab'").

In fact, in some freezeouts, investors buy shares after the deal announcement not to seek appraisal, but precisely to participate in the anticipated class action litigation. For example, in the freezeout of Endeavor Holdings in April 2025 (one of the largest deals in our sample that did not include a MOM condition), the deadline to submit an appraisal demand was February 4, 2025. Famed activist Carl Icahn announced that he had bought 8.4% of the shares in March 2025 – after the deadline for appraisal had passed. In fact, from trading volumes it appears that he bought most of the shares on Friday, March 21st, just one trading day before the deal actually closed (Levine and Greifeld, 2025) And the Endeavor stock price on that day closed at $29.25 per share – a full $1.75 per share above the deal price. Icahn could not exercise his appraisal rights, and there was no arbitrage spread that he could exploit (in fact, the arbitrage spread was negative) but he could certainly participate in the class action litigation, which (although not yet filed at the time the deal closed) was widely viewed as being evitable. In our view, if there is no objection to Icahn's participation in the class action litigation (and we know of none), then it would seem that there should equally be no objection other shareholders who bought shares after the announcement of the deal – by some reports $1 billion worth of shares – for the sole purpose of seeking appraisal on those shares after the closing.

C. The MOOM Alternative

While holdup risk that arises from MOM conditions might be beneficial as a policy matter, and appraisal arbitrage (which is the investment strategy that permits holdup) provide additional positive spillover effects for other shareholders, it is clear that controllers prefer the deal certainty that comes from no MOM condition. That is, what might be socially optimal (MOM condition) may not be privately optimal for the controller. The desire for deal certainty seems especially legitimate when the risk of holdup is particularly acute, like in a controlled company with a small minority percentage float (e.g., 15%) and/or a small dollar value minority float.

To address this disconnect, we propose the MOOM alternative: approval by a majority of the *original* minority shares. Under this approach, controlling shareholders could satisfy the MOM condition by subjecting the deal to approval by the majority of the minority shareholders *at the time of the deal announcement*. Activists who buy shares after the deal announcement date would not be able to vote those shares. Of course, this nullifies the second type of holdup threat we identified in Section 6.A, thereby discouraging activists from attempting holdup in the first place.

We think that Delaware courts should give some weight to the presence of our MOOM alternative because the condition represents a reasonable compromise between the socially desirable effects of a MOM condition and greater execution certainty for the controller. We leave open the specific contours of this doctrinal implication. However, we believe that a freezeout conditioned on SC approval and a MOOM condition should not receive business judgment deference. As discussed in Sections 6.A and 6.B, a MOOM condition is a distinct second-best alternative to a MOM condition because the holdup risk that arises from a MOM condition has positive social welfare effects, so MOM conditions should continue to be encouraged by Delaware corporate law.

It is worth mentioning some operational aspects of our MOOM proposal. Delaware corporate law requires a "record date" for a shareholders' meeting; and all shares held on the record date are eligible to vote at the meeting. The simplest way to implement a MOOM condition would be setting the record date for the shareholder meeting as the announcement date of the transaction. Delaware corporate law requires that the record date must be within 60 days of the shareholder vote,[44] so if a 60-day timeline is feasible then the record date approach would be the cleanest mechanism for implementing a MOOM condition. However, the practical reality of putting out a proxy statement and soliciting proxies typically requires more than 60 days. Empirically, we find that only a few companies in our freezeouts sample took less than 60 days from announcement to shareholders' meeting. Although none of these companies had a 60-day clock ticking, we

[44] Del. Gen. Corp. L. § 213 (a) ("In order that the corporation may determine the stockholders entitled to notice of any meeting of stockholders or any adjournment thereof, the board of directors *may* fix a record date, which record date shall not precede the date upon which the resolution fixing the record date is adopted by the board of directors, and which record date shall not be more than 60 nor less than 10 days before the date of such meeting.") (emphasis added).

nevertheless believe that most companies would have difficulty getting from an announced deal to a shareholder vote within 60 days.

However, the MOOM condition could be implemented by specifying in the announcement of the deal that only shares held at that date would be counted for purposes of the MOOM condition. This is consistent with other aspects of freezeout practice, in which (for example) shares that are held by affiliates of the controller or other rollover shareholders are not counted for purposes of a MOM condition;[45] and in which shares that are held by conflicted shareholders are similarly not counted.[46] The only required shareholder vote, as a matter of statutory law, is approval from a majority of the shares, so as long as the controller votes its shares in favor of the deal this requirement will be satisfied. The MOM condition (and variations such as a MOOM condition) are constraints imposed on the deal solely by the parties themselves, and as such can be tailored to the relevant business objectives. Although the determination of beneficial owners on a particular date is complicated and often imperfect (see, e.g., Laster, 2016), any deal that must set a record date (which is to say, all freezeouts) must go through this exercise – therefore the MOOM alternative imposes no additional complexity or cost on the proxy voting system.

Schedule 13D under the 1934 Act imposes a continuing reporting obligation on the filer, which means that a controlling shareholder subject to Schedule 13D would have to publicly report its offer to the controlled company within two days of making the offer. Schedule 13D generally applies to investors who own more than 5% of a company, which is a hurdle

[45] See, e.g., Cellular Biomedicine Group Proxy Statement at 37-51 (initial proposal on Nov. 11, 2019 came from a consortium that held 23% of the shares, but final rollover shares constituted 53% of shares, which were all put aside for purposes of fulfilling the MOM condition).

[46] See, e.g., *In re* CNX Gas Corp. S'holders Litig., 2010 WL 2291842, at *16 (Del. Ch. 2010). In this case, Vice Chancellor Travis Laster of the Delaware Chancery Court held that shares held by T. Rowe Price, a well-known asset management firm, should be ignored for purposes of determining whether the MOM Condition was fulfilled, because T. Rowe Price owned 6.5% of CONSOL, the controlling shareholder, and 6.35% of CNX Gas, the freezeout target. Vice Chancellor Laster wrote: "T. Rowe Price's roughly equivalent equity interests leave it fully hedged and indifferent to the allocation of value between CONSOL and CNX Gas. To the extent the Tender Offer shortchanges CNX Gas holders, T. Rowe Price gains proportionately through its CONSOL ownership. To the extent CONSOL overpays, T. Rowe Price gains proportionately through its CNX Gas ownership. T. . . . T. Rowe Price's has materially different incentives than a holder of CNX Gas common stock, thereby calling into question the effectiveness of the majority-of-the-minority condition.").

that all controllers would meet. However, controlling shareholders are not subject to Schedule 13D if they owned more than 5% of the controlled company at the time of the company's IPO. These controllers would have the right but not the obligation to report their initial offer publicly.

In our freezeouts sample, we find that approximately half of all freezeouts are announced publicly at the time of the initial offer from the controller (either by the controller or by the controlled company or in a joint press release between the two), while the other half are announced only at the time of the definitive agreement between the controller and the special committee. In both of these scenarios, the record date for fulfilling the MOOM condition would be set on the date of the first public announcement of the freezeout.

D. Implications of Delaware SB21

Our MOOM proposal has greater salience after the Delaware legislature's April 2025 amendments to the Delaware corporate code. Outside of the context of freezeouts, these amendments, known as Senate Bill 21 ("SB21"), eliminated the requirement of MOM approval for transactions between the corporation and its controlling shareholder (Del. Gen. Corp. L. § 144 (b)). A non-freezeout transaction with a controlling shareholder is now subject to business judgment review if the transaction is conditioned upon approval by a special committee of independent directors *or* approval from a majority of the minority shares voted.[47] This legislative amendment effectively reverses the Delaware Supreme Court's 2024 decision in *In re Match Group, Inc.*[48]

More importantly for the purposes of this paper, SB21 codifies the requirement of special committee approval *and* MOM approval for a freezeout to obtain business judgment review (Del. Gen. Corp. L. § 144 (c)). In doing so, SB21 rightly acknowledges that freezeouts are different from other transactions with a controller because of their end-game, high-stakes nature. But SB21 nevertheless weakens the special committee requirement in freezeouts in

[47] In a recent working paper, Bebchuk and Kastiel Professor Lucian Bebchuk and Kobi Kastiel (2025) propose that special committee approval in this context should only be given judicial deference if approved by (what they call) "enhanced-independence" directors, i.e., directors whose appointment received MOM approval.
[48] *In* re Match Grp., Inc. Deriv. Litig. (Match Group II), 315 A.3d 446, 2024 WL 1449815 (Del. 2024).

three important ways. First, SB21 requires that only a majority of the special committee are independent from the controller, not the entire committee. Second, the freezeout does not need to be conditioned upon special committee approval from the outset (i.e., the *ab initio* requirement from *MFW*[49] and *Synutra*[50]), but rather only at the time it is submitted to the shareholders. And third, the special committee no longer needs to be empowered to select and retain its own financial and legal advisors.

Each of these changes, on its own, reduces the effectiveness of special committees as a bargaining agent for minority shareholders. Taken together, they severely compromise the special committee's ability to negotiate on behalf of the minority. The requirement that only a majority of directors are independent introduces the possibility of a "spy" who can report back to the controller on the special committee's deliberations.[51] The elimination of the *ab initio* requirement means that, instead of "self-disabling" himself from the beginning of the negotiations, the controlling shareholder could agree to an SC or MOM condition as a mid-stream concession.[52] And the elimination of the requirement that the special committee must hire its own bankers and lawyers cuts against longstanding Delaware doctrine indicating that such expert advisors are critical for a well-functioning special committee process.

[49] *In re* MFW, 67 A.3d at 528 (Del. Ch. 2013) ("When these two protections are established up-front [SC approval and a MOM condition], 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).

[50] Flood v. Synutra International, Inc*.,* 195 A.3d 754, 763 (Del. 2018) ("[*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.").

[51] See Stine (2025) ("The mere possibility that an interested director could serve as a conduit for information to the controller would chill the effectiveness of special committees. Independent directors would logically be less candid in internal deliberations for fear that their negotiating positions could be exposed. This dynamic creates a lopsided process in which the controller has a significant advantage, potentially gaining information about the committee's weaknesses, pressure points, or even their ultimate bottom line.").

[52] See Flood v. Synutra Intl., Inc., 195 A.3d 754, 762–63 (Del. 2018) ("The key concern of *MFW* was ensuring that controllers could not use the conditions [i.e., SC and MOM approval] as bargaining chips during economic negotiations") (citations omitted).

In effect, SB21 compromises the one meaningful procedural impediment that remained against a lowball freezeout. In the new doctrinal and statutory regime, controllers will negotiate with weakened special committees, forego a MOM condition for reasons described in this paper,[53] and then take their chances with an entire fairness review that is perceived to be less onerous. Not only *could* they do this; the real question is why they would not. With weaker special committees, the back-end protection of majority-of-the-minority approval becomes more important. Our MOOM proposal strengthens this back-end, and in doing so it represents a welfare-improving private response to the recent legislative developments in Delaware.

7. Conclusion

In this paper, we present empirical evidence on the effect a set of cases beginning with *SolarCity*, which that signaled that entire fairness review was not outcome-determinative (in the sense that it did not necessarily mean a negative outcome for the defendant). When Delaware doctrine reduced the benefits of MOM conditions, we find, not surprisingly, that the incidence of such conditions dropped significantly.

As a policy matter, our empirical finding represents a step in the wrong direction. Delaware courts should encourage the procedural protections of SC approval and a MOM condition, because these protections track the procedural protections in an arms-length deal process. While jurisdictions around the world are attempting to replicate Delaware's protections for minority shareholders, Delaware itself has unintentionally moved away from those same protections. To the extent that controllers and special committees are declining to provide MOM conditions due to hold up risk by activist investors, we offer a majority-of-the-*original* minority (MOOM) condition as an alternative that would address this concern.

[53] It is possible that the shift in SB21 from a majority of the minority shares outstanding to a majority of the minority shares voted will reduce the perceived execution risks of minority voting so as to make MOM conditions more commonplace in freezeouts. In fact, under the new regime, non-votes will no longer count as effective no votes on the deal. However, the fact that a vote must be cast in order to signify a no vote also might encourage dissenters to vote in numbers that they have not previously.

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Table 1
Summary statistics

The sample includes all freezeouts of target companies incorporated in Delaware. The sample period is May 2013 (after the Chancery Court's decision in *MFW*) through the end of 2024. The variables are defined in the appendix. The tests of statistical significance are based on *t*-tests. The variables are defined in Table 4, and the continuous variables are winsorized at the 5% level. * significant at 0.10, ** significant at 0.5, and *** significant at 0.01.

Variable	Pre-*SolarCity*			Post-*SolarCity*			
	Mean	St. Dv.	N	Mean	St. Dv.	N	Difference
MOM	0.78	0.42	32	0.45	0.51	20	-0.33**
Log(Value)	5.34	2.11	34	5.26	2.51	21	-0.08
ROA	-12.76	42.19	34	-9.47	18.84	21	3.29
Cash-only	0.56	0.50	34	0.81	0.40	21	0.25*
SC	0.88	0.34	32	1.00	0.00	20	0.13

Table 2
Changes in MOM conditions after the *SolarCity* trilogy

The table presents the baseline regression results. The dependent variable in all models is *MOM*, an indicator variable for the presence of an MOM condition. Model 1 does not include any control other than the *Post-SolarCity* variable. Model 2 is a parsimonious model that includes only controls for the size of the deal and profitability. Model 3 adds a control for the presence of a special committee of independent directors (SC). * significant at 0.10, ** significant at 0.5, and *** significant at 0.01.

Variable	(1)	(2)	(3)
Post	-0.331**	-0.347***	-0.415***
	(-2.44)	(-2.69)	(-3.32)
Log(Value)		-0.018	-0.033
		(-0.56)	(-1.19)
ROA		0.005***	0.006***
		(3.53)	(4.15)
SC			0.684**
			(2.51)
Cash-only			-0.057
			(-0.48)
R-squared	0.115	0.215	0.357
N	52	52	52

Table 3
Changes in MOM conditions after the *SolarCity* trilogy relative to non-Delaware and non-corporate freezeouts

The table examines changes in MOM conditions among freezeouts of Delaware corporations relative to changes in MOM conditions in non-Delaware and non-corporate freezeouts. * significant at 0.10, ** significant at 0.5, and *** significant at 0.01.

Variable	(1)	(2)	(3)
DelawareCorp×Post	-0.468**	-0.488**	-0.514**
	(-2.20)	(-2.27)	(-2.35)
Post	0.137	0.154	0.129
	(0.84)	(0.92)	(0.74)
Delaware	0.464***	0.469***	0.457***
	(4.87)	(4.95)	(4.82)
Log(Value)		0.001	0.002
		(0.06)	(0.07)
ROA		0.001	0.001
		(0.43)	(0.58)
SC			0.121
			(0.72)
Cash-only			0.111
			(1.20)
R-squared	0.146	0.149	0.163
N	126	126	126

Table 4
Variable definitions

Variable	Description
Cash-only	Binary variable that equals 1 for deals in which the consideration structure consisted only of cash and 0 otherwise.
DelawareCorp	Indicator variable that takes the value of 1 for freezeouts of corporations incorporated in Delaware, and 0 for non-Delaware and non-corporate freezeouts.
Log(deal value)	Natural log of the deal value. The deal value is defined as the number of shares multiplied by the price per share before the announcement of the deal.
MOM	Indicator variable that takes the value of one if the freezeout was conditioned on approval by the majority-of-the-minority shareholders of the target.
Post	Indicator variable that takes the value of 1 for deals announced after *SolarCity* and 0 otherwise. All deals in the sample are announced after *MFW*.
ROA	Ratio of net income to the total assets of the target for the most recent fiscal year prior to the announcement of the transaction.
SC	Indicator variable that takes the value of one if the freezeout was conditioned on approval by a special committee of independent directors of the target.