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## Swing and a Miss: The Missouri Court of Appeals Attempts to Interpret Delaware Corporation Law. *HCI Investors, LLC v. Fox*

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## NOTE

# Swing and a Miss: The Missouri Court of Appeals Attempts to Interpret Delaware Corporation Law

*HCI Investors, LLC v. Fox*, 412 S.W.3d 424 (Mo. Ct. App. 2013).

DAVID FERGUSON\*

### I. INTRODUCTION

The intricate details of obscure legal doctrines may sometimes veil the applicable law governing a dispute. In turn, this obscuration may sometimes lead to a court's misapplication of the relevant legal principles. The Missouri Court of Appeals for the Western District's decision in *HCI Investors, LLC v. Fox* seems to fit squarely within this camp. In attempting to resolve a dispute relating to the fiduciary duties of self-interested directors, the court declined to explicitly determine the applicable legal principle at play and then saw fit to fundamentally rework the ambiguous standard that it chose.<sup>1</sup> Unfortunately, the court's misapplication was not performed in a vacuum, and the precedential consequences of its decision could be substantial.<sup>2</sup>

Traditionally, under Delaware corporation law, a corporate director could not successfully abdicate her fiduciary duty to make informed business decisions to other parties, including her attorney.<sup>3</sup> Although Delaware courts utilize two standards in analyzing corporate decisions made by directors and majority shareholders, neither of these standards condone this form of abdication.<sup>4</sup> Under the director-friendly business judgment rule, the Delaware Supreme Court has expressly forbidden this sort of behavior.<sup>5</sup> Further, under the more minority shareholder-friendly entire fairness standard, Delaware

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1. See *infra* Part IV.

2. See *infra* Part V.

3. See *infra* notes 94-95 and accompanying text.

4. See *infra* Part III.B-C.

5. See *Smith v. Van Gorkom*, 488 A.2d 858, 873 (Del. 1985).

courts have likewise prohibited corporate directors from abdicating their responsibility to make informed business decisions.<sup>6</sup>

However, in *HCI Investors*, the Missouri Court of Appeals for the Western District implicitly condoned the abdication of determination of financial terms by a self-interested corporate director to his attorney.<sup>7</sup> In analyzing a case that required the imputation of Kansas corporation law, which itself required an analysis of Delaware corporation law, the court found that a corporate director had *not violated* the entire fairness standard by leaving the terms of a complex debt-shifting scheme up to his attorney.<sup>8</sup> With this decision, the court signaled a substantial departure from the existing body of Delaware corporation law and the law of those states, like Missouri, that regard Delaware's corporation law as persuasive in the context of the duties of corporate fiduciaries under both the business judgment rule and entire fairness standard.<sup>9</sup>

This Note examines the court's analysis in implicitly adopting this new interpretation of the duties of corporate fiduciaries under the entire fairness standard and argues that by essentially ignoring the dichotomy between the standards and misapplying the relevant case law, *HCI Investors* was improperly decided. Part II examines the background of the underlying transaction at issue in the case, the parties' arguments, the lower court's disposition, the appellants' arguments on appeal, and the appellate court's disposition. Part III gives some legal background for the issues at play, including the adoption of Delaware's corporation law by the Kansas courts generally and the application of the business judgment rule and the entire fairness standard more specifically. Part IV details the court's decision, specifically its innovative approach to corporate fiduciary duties and its failure to expressly choose an applicable standard of fiduciary duty. This Note concludes by determining that, when faced with arcane legal principles that may have obscured the dispute at issue, the court in *HCI Investors* ducked its responsibility to clearly delineate the tenets of its decision, and, in doing so, the court effected a fundamental alteration in the construction of the relevant fiduciary duties that may have immediate and lasting consequences.

## II. FACTS AND HOLDING

In January 2011, the appellants, the Fox Family,<sup>10</sup> were minority shareholders of Hillcrest Bancshares ("Bancshares"), a one-bank holding company

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6. See *infra* Part III.C.

7. *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 430-33 (Mo. Ct. App. 2013).

8. *Id.* at 439.

9. See *infra* Part V.

10. See Brief of the Appellant at \*2 n.3, *HCI Investors*, 412 S.W.3d 424 (Nos. WD75880, WD75831) 2013 WL 2391264, at \* 2 (included in the "Fox Family" were Shayle and Deanna Fox, their three children, trusts for their eight grandchildren, and a family-owned limited liability company).

(“Holding Company”) incorporated in Kansas.<sup>11</sup> The shares of the Hillcrest Bank (“Bank”) were almost entirely held by Bancshares.<sup>12</sup> Further, approximately 99.5% of the common stock of Bancshares was held by seven families: respondent Fingersh and his family owned 31.66%, respondent Blitt and his family owned 25.45%, the Copaken Family owned 10.32%, the White Family owned 10.51%, the Morgan/Dreiseszen Family owned 6.84%, and the Fox Family owned 14.71%.<sup>13</sup> Together, respondents Fingersh, Blitt, and their families held a majority of the outstanding stock with over 57%.<sup>14</sup>

For decades, the Copaken, White, and Blitt families, in association with their long-time legal representative Fingersh, had engaged in a variety of real estate ventures and investment opportunities in conjunction with their Kansas City commercial real estate firm.<sup>15</sup> However, the Fox Family did not have the same historical investment relationship with the other families involved in the Bancshares corporation.<sup>16</sup> In fact, the Fox Family’s business relationship with the other families was limited to its investments in Bancshares and two shopping malls.<sup>17</sup> Likewise, as minority shareholders of Bancshares, no member of the Fox Family served on its board of directors.<sup>18</sup> Moreover, in their limited role in the corporation, the Fox Family had “never received any cash or other benefit from the ownership interest in Bancshares” and had never been called upon to make additional cash contributions to any of the three investments in which they participated.<sup>19</sup>

For the majority of its existence the Bank had been a solid investment. In fact, by all accounts, the Bank had been “thriving and profitable” for some time.<sup>20</sup> However, in the midst of the substantial downturn that affected the commercial real estate market in 2008, the Bank began to encounter difficulties similar to those faced across the county by other “financial institutions with outstanding real estate loans.”<sup>21</sup> As the Bank’s borrowers were increasingly unable to make payments on loans secured by real estate, the Bank’s proportion of these nonperforming assets began to approach financially untenable levels.<sup>22</sup> Historically, the Bank had maintained nonperforming assets

11. *Id.* at \*2.

12. *Id.*

13. *Id.*

14. *Id.* at \*3.

15. *See id.* at \*4 n.8.

16. *Id.* at \*4-5.

17. *See id.* at \*5 n.9.

18. *Id.* at \*2.

19. *Id.* at \*5 n.9.

20. Brief of Plaintiffs-Respondents at \*3, *HCI Investors, LLC*, 412 S.W.3d 424 (No. WD75831), 2013 WL 3559174, at \*3.

21. *Id.*

22. *HCI Investors*, 412 S.W.3d at 426; *see also* Brief of the Appellant, *supra* note 10, at \*3 n.6. “Non-performing assets are loans that are either in default or not current on interest and principal payments. At the Bank the nonperforming assets were largely real estate loans.” *Id.*

somewhere in the range of 1%.<sup>23</sup> However, with the increasing defaults the Bank was now encountering ratios of 5% to 7%.<sup>24</sup> Conscious of the potential for undesirable regulatory consequences of an impending FDIC examination in May 2008, the Bank's directors began moving toward a plan to divest the Bank of a portion of the unwanted nonperforming assets.<sup>25</sup>

Because Fingersh and Blitt realized that the Bank's level of nonperforming assets were a serious issue that would need to be remedied before the Bank's pending examination, they began exploring potential options for reducing the Bank's rate of nonperforming assets below 5%.<sup>26</sup> Although Fingersh was not an official officer of the Bank, he had functioned as its "*de facto* CEO, sat on its board and loan committee and had," in his words, "'shepherded' the Bank for many years."<sup>27</sup> Continuing in the role of *de facto* CEO, Fingersh proposed a transaction (the "Transaction") in which he and Blitt would organize limited liability companies ("LLCs") that would purchase the nonperforming assets from the Bank and later sell them off in the market.<sup>28</sup>

In a memorandum sent to all Bancshares shareholders on April 14, 2008, Fingersh explained that all Holding Company shareholders would be given the opportunity to participate in the Transaction by agreeing to become members of the LLCs.<sup>29</sup> However, membership came with substantial risks.<sup>30</sup> Fingersh proposed that the LLCs' members would be bound by the operating agreements to make capital calls to fund the LLCs' obligation and, further, that they would be required to personally guarantee the debt incurred by the LLCs to acquire the nonperforming assets.<sup>31</sup> Though Fingersh was confident that most of the families would voluntarily participate,<sup>32</sup> he intended to incentivize participation in the Transaction by providing a penalty for those who opted out.<sup>33</sup> According to Fingersh's plan, the Transaction involved issuing

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23. *HCI Investors*, 412 S.W.3d at 426.

24. *Id.*

25. *Id.* at 426-27; *see also* Brief of the Appellant, *supra* note 10, at \*3 n.6 ("NPAs [nonperforming assets] in excess of 5% of total assets may trigger regulatory action.").

26. Brief of the Appellant, *supra* note 10, at \*3.

27. *Id.*

28. *Id.* at \*4.

29. *HCI Investors*, 412 S.W.3d at 426-27.

30. *Id.* at 427.

31. *Id.*

32. *See* Brief of the Appellant, *supra* note 10, at \*4 ("Fingersh expected that the Copaken, White and Morgan/Dreiseszen families would participate in the LLCs because they had participated in many prior real estate ventures, and in Fingersh's words, had always 'ponied up.'").

33. *Id.* at \*6. There seems to have been a significant amount of disagreement among the parties and the courts regarding the penal nature of Fingersh's proposal. *See id.* ("Fingersh intended the dilution of the non-participants that would result from the exercise of the warrants to be a *penalty*." (emphasis added)). *But cf.* *HCI Inves-*

warrants to Bancshares' shareholders who agreed to participate "allowing them 'on a pro rata basis and without additional consideration, to acquire stock in the Holding Company equal to 25% of the stock owned by the non-participating shareholder.'"<sup>34</sup> The 25% figure was originally set by Fingersh at 20% on the advice of Richard Degen, chief financial officer of the Bank, and attorney Stan Johnston, who was a partner in the Lewis, Rice & Fingersh law firm once headed by Fingersh.<sup>35</sup> However, Fingersh decided to raise the rate by 5% following his conversation with Degen and Johnston.<sup>36</sup>

The Fox Family was initially hesitant to participate in the Transaction.<sup>37</sup> However, after hearing Fingersh's representations regarding the likely losses to be incurred by the LLCs,<sup>38</sup> the terms of the loans to be taken out by the LLCs in purchasing the nonperforming assets,<sup>39</sup> and the individuals who would be placed in charge of collection efforts of the nonperforming assets by the LLCs, the Fox Family signed on to the Transaction.<sup>40</sup> In fact, all of Bancshares's shareholders except the Morgan and Dreiseszun Families agreed to participate in the Transaction following the presentation of the operating agreements for signature in June 2008.<sup>41</sup>

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tors, 412 S.W.3d at 427 ("The warrant issuance was thus intended to *incentivize participation* so that nonparticipating shareholders would not unfairly benefit from the willingness of other shareholders to accept the risk of participation in the Transaction." (emphasis added)); Brief of Plaintiffs-Respondents, *supra* note 20, at \*6 ("Mr. Fingersh further proposed in his Memorandum that Holding Company warrants be issued to all participants as *an incentive*." (emphasis added)).

34. *HCI Investors*, 412 S.W.3d at 427.

35. Brief of the Appellant, *supra* note 10, at \*8.

36. *See id.*

37. *Id.* at \*9-10; *see also id.* at \*11 ("Based on Fingersh's representations, [the Fox Family] calculated the likely loss . . . if it participated in the Transaction to be approximately \$2.4 million. Contrasted with the certain loss of over \$5.5 million of the book value of their Bancshares stock if it did not participate in the LLCs, [the Fox Family] concluded that participation at a cost of approximately \$2.4 million was required if Fingersh's estimate of the loss was even nearly correct.").

38. *See id.* at \*9-10.

39. *See id.* at \*10 ("Although the Fox Family knew from Fingersh's Memorandum that the NPAs [nonperforming assets] likely could not be sold off or liquidated in time for the Bank examination in May 2008, Fox took the fact that the LLCs obtained two year loans to mean that Fingersh expected to liquidate the NPAs within two years.").

40. *Id.* at \*12; *see id.* (detailing Mr. Fox's concerns regarding Fingersh's son Paul's involvement in the collection process and highlighting Fingersh's assertions that he would be personally responsible for the loan work outs). *But see* Brief of Plaintiffs-Respondents, *supra* note 20, at \*10 (suggesting that Mr. Fox was aware from the time of the formation of the LLC that there would be no workouts of the loans given that the loans were non-performing).

41. *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 427 (Mo. Ct. App. 2013); *see also id.* (discussing the unanimous decision on the part of the participating shareholders to cancel the warrants to avoid an undesirable impact on the Bank's earnings – the accountants originally miscalculated the charge on the Bank's earnings that would be

Following execution of the operating agreements by the participating families, the LLCs successfully secured loans totaling approximately \$28 million from two banks.<sup>42</sup> After combining these loans with the capital contributions made by the LLCs' members, the LLCs had over \$40 million available to purchase nonperforming assets from the Bank.<sup>43</sup> However, as predicted, after purchasing these nonperforming assets the LLCs began making capital calls to fund the various costs of owning and marketing the nonperforming assets that they had acquired.<sup>44</sup> Although the Fox Family initially honored all capital calls,<sup>45</sup> in September 2009 they "summarily announced they would no longer pay capital calls and that they were no longer willing to participate in the LLCs."<sup>46</sup> Subsequently, in July 2010, the LLCs filed suit against the Fox Family for breach of contract.<sup>47</sup> In the suit, the LLCs sought recovery of the unpaid capital calls required by the operating agreement and a declaratory judgment that the Fox Family remained obligated under its terms.<sup>48</sup>

In their original answer and counterclaim, the Fox Family asserted that the Operating Agreements were unenforceable because the Fox Family had been "coerced into the Transaction by the threat of dilution and induced to participate by misrepresentations and lack of disclosure."<sup>49</sup> Additionally, the Fox Family sought rescission of the Operating Agreements and the return of their multi-million dollar investment in the LLCs.<sup>50</sup> Further, in March 2012, the Fox Family was granted leave to file an amended answer to add an affirmative defense and a counterclaim "asserting an additional theory of breach of fiduciary duty by Fingersh and Blitt in their capacities as directors and controlling shareholders of the Holding Company."<sup>51</sup>

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necessary for the warrants' issuance; however, under the proper calculation the negative impact on the Bank's earnings would have been substantial).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* *But see* Brief of the Appellant, *supra* note 10, at \*15 (suggesting that, although the Fox Family had honored all capital calls to this point, conflict had already begun to surface following the Fox Family's belief that, contrary to the agreement made by the Fox Family with Jack Fingersh, Fingersh's son Paul had become involved in the liquidation of the purchased NPAs).

46. *HCI Investors*, 412 S.W.3d at 427; Brief of the Appellant, *supra* note 10, at \*15 (stating that the decision to no longer honor the capital calls resulted from the involvement, in direct contravention of the original agreement made between Jack Fingersh and the Fox Family, of Paul Fingersh in the collection process).

47. *HCI Investors*, 412 S.W.3d at 427.

48. *Id.*

49. Brief of the Appellant, *supra* note 10, at \*16.

50. *Id.* The Fox Family also added Fingersh to the litigation as an individual counterclaim-defendant due to his alleged misconduct in his role as promoter of the LLCs. *Id.*

51. *HCI Investors*, 412 S.W.3d at 428; *see also* Brief of the Appellant, *supra* note 10, at \*18. The Fox Family argued that there were significant facts that were not disclosed to them until pretrial discovery on October 30, 2011, and that this discovery

In October of 2012, the trial court entered judgment in favor of the LLCs and against the Fox Family.<sup>52</sup> The court found that the Fox Family owed \$1.6 million in unpaid capital calls required under the Operating Agreements, plus interest and attorneys' fees.<sup>53</sup> Further, the court found that although the amended counterclaim against Fingersh and Blitt for breach of fiduciary duty in their capacities as directors and controlling shareholders of Bancshares was barred by the statute of limitations, the related affirmative defense was not.<sup>54</sup> However, the court found that the newly added affirmative defense alleging breach of fiduciary duty against Fingersh and Blitt was meritless based on the evidence presented.<sup>55</sup> Importantly, the trial court was ambiguous with respect to the applicable standard to be applied regarding the appellants' breach of fiduciary duty counter-claim and affirmative defense.<sup>56</sup> In the face of the appellants' argument that the entire fairness standard should be applied and the respondents' argument that the business judgment rule was the applicable standard,<sup>57</sup> the trial court made an "equivocal" judgment that "the [entire fairness] standard" might apply, and that the standard was satisfied here.<sup>58</sup>

On appeal, the Fox Family relied on four allegedly erroneous factual findings by the trial court to support their primary assertion that Fingersh and Blitt were self-dealing directors and shareholders who had failed to sustain their burden of proving that the Transaction met the entire fairness standard.<sup>59</sup> The first finding was that "[t]he warrant proposal was made following consultation with Mr. Degan and the Holding Company's outside counsel" and that "Mr. Fingersh testified that the 'professionals' 'came up with the percentage, and [he] looked at it after they were finished.'"<sup>60</sup> Here, the Fox Family argued that Fingersh and Blitt had offered no evidence of what process was used in making the percentage determination.<sup>61</sup> Further, the Fox Family maintained that there was no evidence that either Johnston or Degen was qualified to analyze the fairness of the selected rate.<sup>62</sup>

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revealed "Fingersh and Blitt's failure to obtain qualified advice as to the fairness of the Transaction and failure to exercise any care in making representations aimed at ensuring that the Fox Family did not receive a 'free ride.'" Brief of the Appellant, *supra* note 10, at \*18.

52. Brief of Plaintiffs-Respondents, *supra* note 20, at \*23.

53. *HCI Investors*, 412 S.W.3d at 428.

54. *Id.*

55. *Id.* Additionally the court found "that the Fox Family remained a member of the LLCs bound by the operating agreements." *Id.*

56. *Id.* at 431.

57. *See infra* Part III.B-C.

58. *HCI Investors*, 412 S.W.3d at 431.

59. *Id.* at 428-29.

60. *Id.* at 433.

61. *See* Brief of the Appellant, *supra* note 10, at \*29.

62. *Id.*



The second contested finding was that “the 25% factor . . . represented a choice for the participants between compensation for their further contribution or a risked dilution of their shares should they opt not to contribute,” and that that figure seemed reasonably fair given that it represented roughly the same amount of dilution that would have occurred had a \$40 million investment been made by an outside investor, as it represented roughly 25% of the Bank’s book value at that time.<sup>63</sup> As a threshold matter, the Fox Family argued that this finding was based on an inaccurate premise.<sup>64</sup> Specifically, they argued that although a \$40 million injection by a third party would have decreased an existing shareholder’s “piece of the pie,” that same investment would also have created a larger pie by increasing the Bank’s book value.<sup>65</sup> More importantly, the Fox Family asserted that if the Transaction were to be deemed entirely fair, the “percentage of warrant issuance must bear a direct relationship to the risk shareholders [were] being asked to undertake.”<sup>66</sup> They maintained that Fingersh and Blitt had failed this test, as both were unable to explain precisely how the rate tied to the risk of participation.<sup>67</sup>

The third contested finding was that “[o]btaining a formal fairness opinion from an investment bank would have been very expensive and may have been impracticable under the time pressure of the imminent FDIC exam, and the directors believed it to be unnecessary because all shareholders were to be treated equally under the proposal.”<sup>68</sup> The Fox Family found both clauses of this assertion to be objectionable.<sup>69</sup>

As to the trial court’s holding regarding the temporal and financial limitations on obtaining a formal fairness opinion, the Fox Family argued that the trial court had misinterpreted the facts before it.<sup>70</sup> Regarding the temporal finding, the Fox Family argued that “the genesis of the Transaction was in February 2008,” and thus several months before the formal proposal was submitted to the shareholders.<sup>71</sup> The Fox Family argued that this three-month window allowed Fingersh and Blitt plenty of time to secure the opinion of an independent third party.<sup>72</sup> Further, as to the assertion that this review would have presented a substantial financial hardship, the Fox Family simply pointed to a statement made by the Bank’s chief financial officer, Richard Degen, “that he did not consider \$250,000 to be a material expense.”<sup>73</sup>

On a more fundamental level, the Fox Family argued that, in determining that Fingersh’s subjective fairness intentions were dispositive in drafting

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63. *HCI Investors*, 412 S.W.3d at 433.

64. See Brief of the Appellant, *supra* note 10, at \*34-35.

65. *HCI Investors*, 412 S.W.3d at 434.

66. *Id.*

67. *Id.* at 434-35.

68. *Id.*

69. *Id.* 435-36.

70. *Id.* at 435.

71. *Id.*

72. *Id.*

73. *Id.*; see Brief of the Appellant, *supra* note 10, at \*13.

clause two of Paragraph 39 of its opinion, the trial court misinterpreted the applicable Delaware corporation law.<sup>74</sup> First, the Fox Family cited the United States Court of Appeals for the First Circuit's opinion in *Baldwin v. Baker* for the proposition that “[u]nder Delaware law, directors [are] not freed from any duty to value the compensation fairly merely because the offer was made to all shareholders.”<sup>75</sup> Additionally, the Fox Family argued that the trial court had ignored “Fingersh’s admission that he simply consulted with Johnston as to whether the Transaction ‘looked okay’ and not specifically as to whether it was ‘fair’ to the minority shareholders”<sup>76</sup> and that the court had given undue weight to Fingersh’s testimony that he had intended to make the deal fair to everybody.<sup>77</sup>

The final contested finding was the assertion that “Mr. Fingersh and Mr. Blitt also reasonably relied upon the advice provided by Mr. Johnston that the warrant issuance was ‘fair’ in its treatment of all shareholders.”<sup>78</sup> Here, the Fox Family argued that Degen and Johnston were not disinterested third parties because of their relationship with Fingersh and Blitt.<sup>79</sup> Further, relying on their own expert on Kansas fiduciary law, the Fox Family argued that “[a] review of the Transaction by a disinterested third party before it was proposed to the Fox Family was essential.”<sup>80</sup> Finally, the Fox Family maintained that Fingersh and Blitt’s failure to seek a qualified independent assessment was demonstrative of their general disregard for the entire fairness of the Transaction to the minority shareholders.<sup>81</sup>

On appeal, the Western District Court of Appeals, applying Kansas corporation law, elided determining whether the transaction should be subject to the protection of the business judgment rule, a question made moot by the court’s affirmance of the trial court’s conclusion that the transaction met the heightened requirements of the entire fairness standard.<sup>82</sup> Further, the court concluded that the weight of the evidence supported the trial court’s rejection of the breach of fiduciary duty affirmative defense and related counterclaim,

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74. Brief of the Appellant, *supra* note 10, at \*30-31 n.26.

75. 585 F.3d 18, 24 (1st Cir. 2009).

76. Brief of the Appellant, *supra* note 10, at \*30 (“Fingersh and Blitt offered no testimony from Johnston and presented no evidence of what Johnston considered or even that he advised them on whether the Transaction was fair to the minority stockholders such as the Fox Family.”).

77. *Id.* at \*31 n.26.

78. *Id.*

79. *Id.* at 437.

80. Brief of the Appellant, *supra* note 10, at \*31.

81. *Id.* at \*32 (“Fingersh’s only concern of fairness was that the Transaction not be unfair to the *majority* stockholders, which he thought would happen if the Bank [were] stabilized by the Transaction and the Fox Family had not contributed.”).

82. Royce de Rohan Barondes, *HCI Investors, LLC v. Fox*, 2013 WL 5525841 (Mo. App. W.D. 2013) – *Abdicating Determination of Financial Terms . . . to Counsel??*, MISSOURI-K (Oct. 10, 2013), <http://missouri-k.com/?p=253>.

specifically holding that the record supported the trial court's findings of fact as to each of the contested claims.<sup>83</sup>

### III. LEGAL BACKGROUND

In the state of Kansas, as in many states<sup>84</sup> (including Missouri),<sup>85</sup> Delaware corporation law has been imported to solve close legal issues.<sup>86</sup> One of the most litigated components of corporation law is the breach of fiduciary duty claim, and determinations of whether to apply the business judgment rule or the entire fairness standard can often be dispositive.<sup>87</sup> Furthermore, understanding the precise contours of the standards and understanding what is and is not permissible fiduciary behavior under either standard is essential to accurately deciding close cases.<sup>88</sup> The following sections attempt to untangle this web as well as give a brief primer detailing the adoption of Delaware corporation law by the Kansas courts.<sup>89</sup>

#### A. Delaware Corporation Law & the Kansas Courts

As in many states, Kansas courts often look to Delaware corporation law in cases involving corporate entities.<sup>90</sup> The Kansas Supreme Court has addressed the matter directly, holding that “Kansas courts have a long history . . . of looking to the decisions of the Delaware courts involving corporation law, as the Kansas Corporation Code was modeled after the Delaware code.”<sup>91</sup> Additionally, in *Achey v. Linn County Bank*, the court reiterated its holding that “decisions of the Delaware courts involving corporation law are

83. *HCI Investors*, 412 S.W.3d at 429; *see also id.* (finding that the court's determination as to point one of defendants' appeal negated “any need to address points two and three”).

84. *See, e.g., In re Prudential Ins. Co.*, 659 A.2d 961, 969 (N.J. 1995) (“Delaware is recognized as a pacesetter in the area of corporate law. Indeed, it has been observed that ‘*Delaware corporate law has long been followed – sometimes almost reflexively – by other American Jurisdictions.*’” (quoting John C. Coffee & Adolf A. Berle, *Derivative Litigation Under Part VII of the ALI Principles of Governance: A Review of the Positions and Premises*, C853 ALI-ABA 89, 114 (1993)) (emphasis added)).

85. *Significant Missouri Law Distinctions*, COURTS.MO.GOV. 10, <http://www.courts.mo.gov/file.jsp?id=40802> (last visited Mar. 14, 2015) (“Initially, Missouri law followed Illinois law, but more recently, it has tended to pattern itself after provisions of Delaware law.”).

86. *See, e.g., Arnaud v. Stockgrowers State Bank of Ashland*, 992 P.2d 216, 218 (Kan. 1999).

87. *See infra* note 88 and accompanying text.

88. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983).

89. *See infra* Part III.A-C.

90. *Arnaud*, 992 P.2d at 218.

91. *Id.*

persuasive.”<sup>92</sup> Therefore, any time a court is faced with a close issue involving Kansas corporation law, precedent dictates that it look to the Delaware courts for guidance.

### B. *The Business Judgment Rule*

The business judgment rule has developed over time to “[insulate] officers and directors from liability.”<sup>93</sup> In its classic *Smith v. Van Gorkom* decision, the Delaware Supreme Court held that “[u]nder Delaware law, the business judgment rule is the offspring of the foundational principle . . . that the business and affairs of a Delaware corporation are managed by or under its board of directors.”<sup>94</sup> The *Van Gorkom* court held unequivocally that “[t]he business judgment rule exists to protect and promote the full and free exercise of the managerial power granted to directors.”<sup>95</sup>

Following in the line of the *Van Gorkom* progeny, Kansas courts have defined the business judgment rule as follows:

The presumption that in making business decisions *not involving direct self-interest or self-dealing*, corporate directors act on an *informed basis*, in good faith, and in the honest belief that their actions are in the corporation’s best interest. The rule shields directors and officers from liability from unprofitable or harmful corporate transactions if the transactions were made in good faith, with due care, and within the directors’ or officers’ authority.<sup>96</sup>

However, following Delaware’s lead, Kansas courts have recognized that:

Because the business judgment rule is a rebuttable presumption, it places the initial burden on the party challenging a corporate decision to demonstrate the decisionmaker’s self-dealing or other disabling factor. If a challenger sustains that initial burden, then the presumption

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92. 931 P.2d 16, 21 (Kan. 1997); *see also* Norton v. Nat’l Research Found., 141 F.R.D. 510, 513 (D. Kan. 1992) (“The Kansas Corporation Code is modeled after the Delaware Code, and Kansas courts often look to Delaware case law for guidance.”); Vogel v. Mo. Valley Steel, Inc., 625 P.2d 1123, 1126 (Kan. 1981) (“The Kansas Corporation Code was patterned after the Delaware Corporation Code . . . and therefore, Delaware decisions interpreting its code are considered persuasive in our interpretation of the Kansas code.”).

93. *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 431 (Mo. Ct. App. 2013).

94. 488 A.2d 858, 872 (Del. 1985), *overruled on other grounds by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

95. *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

96. *HCI Investors*, 412 S.W.3d at 431 (quoting *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 147 (Kan. 2003); *Unrau v. Kidron Bethel Retirement Servs., Inc.*, 27 P.3d 1, 14 (Kan. 2001); BLACK’S LAW DICTIONARY 192 (7th ed. 1999)) (internal quotation marks omitted).

of the rule is rebutted, and the burden of proof shifts to the defendants to show that the transaction was, in fact, fair to the company.<sup>97</sup>

Therefore, the business judgment rule's shield of rebuttable presumption is just that and "there is no protection for directors who have made 'an unintelligent or unadvised judgment.'"<sup>98</sup> Indeed, "[r]epresentation of the financial interests of others imposes on a director an affirmative duty to protect those interests and to proceed with a critical eye in assessing information . . . ."<sup>99</sup> The business judgment rule thus imposes a duty on a director to "exercise an *informed business judgment*."<sup>100</sup> Implication of the business judgment rule may therefore have significant ramifications in assessing the factual circumstances of a given case due to the protections it provides and the duties it imposes.<sup>101</sup>

### C. The Entire Fairness Standard

As a threshold issue, Delaware courts have repeatedly recognized that "[i]t is often of critical importance whether a particular decision is one to which the business judgment rule applies or the entire fairness rule applies."<sup>102</sup> In the event that the party challenging a corporate decision successfully overcomes the business judgment rule by demonstrating the decisionmaker's self-dealing or other disabling factor, the burden then shifts to the decisionmaker to prove the "entire fairness" of the decision.<sup>103</sup>

In its definitive explication in *Weinberger v. UOP, Inc.* of the more onerous entire fairness standard, the Delaware Supreme Court described the standard as follows:

When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both

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97. *HCI Investors*, 412 S.W.3d at 432 (quoting *Becker v. Knoll*, 239 P.3d 830, 834-35 (Kan. 2010)); see also Royce de Rohan Barondes, *supra* note 82 (quoting *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) ("[T]he business judgment rule . . . has no role where directors have . . . abdicated their functions.")).

98. *Van Gorkom*, 488 A.2d at 872.

99. *Id.*

100. *Id.* (emphasis added).

101. See *id.* (finding that defendant directors' failure to scrutinize a \$55 per-share price in a leveraged buy-out constituted a violation of the duty to reach an informed business judgment under the business judgment rule).

102. *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (quoting *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993)).

103. *Becker v. Knoll*, 239 P.3d 830, 835 (Kan. 2010) (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).

sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.<sup>104</sup>

Further, the court explained that “the concept of fairness has two basic aspects: fair dealing and fair price.”<sup>105</sup> As to the fair dealing aspect of entire fairness, the court instructed that this conception “embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained.”<sup>106</sup> As to fair price, the court explained that this aspect “relates to economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic value of a company’s stock.”<sup>107</sup> However, the court cautioned that it is important to remember that the entire fairness test is not a bifurcated one, between fair dealing and price, but rather a holistic examination of the fairness of a transaction.<sup>108</sup> Additionally, the court has maintained, “Not even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board’s beliefs.”<sup>109</sup>

As with the business judgment rule, Kansas courts have borrowed heavily from their Delaware counterparts in defining the contours of the entire fairness standard.<sup>110</sup> In *Becker v. Knoll*, the Kansas Supreme Court cited Delaware precedent to describe the application of the entire fairness standard in Kansas.<sup>111</sup> There the court announced that “[o]nce the business judgment rule is rebutted, ‘the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was *entirely fair* to the corporation and its shareholders.’”<sup>112</sup> Thus, the court observed that once a plaintiff is able to successfully rebut the business judgment presumption, “the burden shifts to the defendant to . . . prove the ‘*entire fairness*’ of the transaction to the . . . plaintiff.”<sup>113</sup>

Additionally, Kansas courts have set a relatively high evidentiary threshold for defendants to clear in order to satisfy the entire fairness stand-

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104. 457 A.2d 701, 710 (Del. 1983).

105. *Id.* at 711.

106. *Id.*

107. *Id.*

108. *Id.*

109. Royce de Rohan Barondes, *supra* note 82 (quoting *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006)).

110. *See* *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 149 (Kan. 2003); *see also* *Becker v. Knoll*, 239 P.3d 830, 835 (Kan. 2010).

111. 239 P.3d at 835.

112. *Id.* (citing *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27, 52 (Del. 2006)).

113. *Id.* (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).

ard.<sup>114</sup> To meet the burden, a defendant must “prove by clear and satisfactory evidence that they acted in fairness and good faith.”<sup>115</sup> In *Barbara Oil Co. v. Kansas Gas Supply Corp.*, the Kansas Supreme Court elaborated on this burden, holding that “evidence should be ‘clear’ in the senses that it is certain, plain to the understanding, and unambiguous, and ‘satisfactory’ in the sense that it is so believable that people of ordinary intelligence, discretion and caution may have confidence in it.”<sup>116</sup> Thus, the court observed that “[c]lear and satisfactory is not a quantum of proof, but rather a quality of proof.”<sup>117</sup>

Clearly, the entire fairness standard presents a substantially higher obstacle to surmount for self-interested directors seeking to defend their decisions and the information relied on in making them.<sup>118</sup>

#### IV. THE INSTANT DECISION

In *HCI Investors, LLC v. Fox*, the Missouri Court of Appeals for the Western District, applying Kansas corporation law, adopted the trial court’s findings regarding the applicable review standard and determined that, under the circumstances, the entire fairness standard had been satisfied.<sup>119</sup> Stressing that appellant “Fox [was] a CPA, and ha[d] been a business and commercial transactions attorney for over fifty years,” the court found that the evidence supported the trial court’s rejection of the breach of fiduciary duty affirmative defense and related counterclaim.<sup>120</sup> The fact that Fingersh abdicated the determination of important financial terms of the Transaction to his counsel notwithstanding, the court held that Fingersh and Blitt’s actions were entirely fair.<sup>121</sup>

The court recognized that issuance of the warrants would effectively dilute the position of non-participating shareholders.<sup>122</sup> However, the court held in its opinion that the Transaction was designed to incentivize participation by prohibiting nonparticipating shareholders from unfairly benefitting from the risks taken by those shareholders who chose to participate in the Transaction.<sup>123</sup> Additionally, the court acknowledged that a pervasive sense of urgency had surrounded the decision to initiate the Transaction, and that all

114. See *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 432 (Mo. Ct. App. 2013).

115. *Id.* (citing *Becker*, 239 P.3d at 835).

116. See *id.* at 432 (citing *Barbara Oil Co. v. Kan. Gas Supply Corp.*, 827 P.2d 24, 32 (1992)); see also *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 146 (Kan. 2003) (“The entire fairness standard is exacting and requires judicial scrutiny regarding both fair dealing and fair price.”).

117. *Barbara Oil Co.*, 827 P.2d at 32.

118. See *Royce de Rohan Barondes*, *supra* note 82 (“Entire fairness is Delaware’s most onerous standard.”).

119. *HCI Investors*, 412 S.W.3d at 424, 426, 431, 439.

120. *Id.* at 426, 429.

121. *Id.* at 436.

122. *Id.* at 434.

123. *Id.* at 427.

of the shareholders, including the Fox Family, had agreed that “doing nothing was not an option.”<sup>124</sup> Therefore, the court seemed unpersuaded by the appellants’ argument that they had been coerced into accepting the terms of the agreement and had been given insufficient information regarding the nature and logistics of the Transaction.<sup>125</sup>

The court began its opinion by “sorting through” the Fox Family’s brief to identify the foundation of their claim that Fingersh and Blitt had breached their fiduciary duties as directors and controlling shareholders in the Holding Company.<sup>126</sup> In its opinion, the court highlighted that “[f]or purposes of the breach of fiduciary duty allegations, the Fox Family’s singular quarrel with the structure of the Transaction was the *percentage* of warrants authorized.”<sup>127</sup> The court then recognized the Fox Family’s argument that no connection had been established between the 25% figure and the risk the shareholders were being asked to engage in by participating in the Transaction<sup>128</sup> and that this figure, formulated at the behest of self-dealing directors, essentially created a Hobson’s choice in which either their position would be diluted to the tune of \$5.5 million or, if they were to sign on to the Transaction, they would be exposed to financial liability of no more than \$2.4 million.<sup>129</sup>

After identifying the contours of the Fox Family’s argument, the court then turned to the trial court’s ambiguous findings regarding the relevant standard for determining the appropriateness of Fingersh and Blitt’s conduct.<sup>130</sup> Here, after analyzing the trial court’s reasoning regarding the potential implication of the business judgment rule and entire fairness standard, the court openly admitted that the lower court’s judgment was “equivocal in its conclusion about the applicability of the entire fairness standard.”<sup>131</sup> However, the court apparently found it unnecessary to draw its own conclusions.<sup>132</sup> Instead it chose to rely on the trial court’s suggestions that the entire fairness standard “might apply” and that “the standard was satisfied” to find that it

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124. *Id.*

125. *See* Brief of the Appellant, *supra* note 10, at \*16-17 (“Not until October 30, 2011, when plaintiff produced 63,000 of the 66,000 pages of document production, did the Fox Family learn that Fingersh and Blitt failed adequately to inquire, investigate, determine and disclose all material facts when they sought to coerce the Fox Family’s participation.”).

126. *HCI Investors*, 412 S.W.3d at 429-30.

127. *Id.* at 430.

128. *Id.*

129. *Id.*

130. *Id.* at 431 (“The trial court held the Fox Family’s allegations created a colorable inquiry that the entire fairness doctrine controlled assessment of the propriety of Fingersh and Blitt’s conduct. The trial court then concluded that the Transaction was appropriate under a rule of fairness standard.”).

131. *Id.*

132. *Id.*



was unnecessary to determine whether Fingersh and Blitt's conduct should have been governed by the business judgment rule.<sup>133</sup>

After its review of the trial court's determination regarding the applicable standard of fiduciary duty, the court then reviewed the trial court's application of that standard to the facts of the case.<sup>134</sup> Specifically, the court assessed the Fox Family's claims as to each of the contested findings of fact.<sup>135</sup> However, the court found that each was sufficiently supported by the evidence at trial.<sup>136</sup>

The court began by analyzing the Fox Family's criticisms of the trial court's findings in Paragraph 29 of the original opinion regarding the fairness of the warrant proposal and the fiduciary obligations of the directors in determining the warrant percentage.<sup>137</sup> Here, the court focused almost entirely on the Fox Family's critique of the discrepancy between the rate recommended by Degan and Johnston and the one adopted by Fingersh.<sup>138</sup> In doing so, the court essentially set to one side the Fox Family's argument that Fingersh and Blitt had apparently turned over their fiduciary obligations to carefully analyze the financial terms of the Transaction to third parties with no demonstrable competence in the field.<sup>139</sup> Instead, the court focused on a more nuanced critique predicated on the ambiguity surrounding why the original figure of 20% suggested by Degan and Johnston was arbitrarily raised to 25% by Fingersh.<sup>140</sup> The court found Fingersh's admission that "he did not know 'how [the percentage] got from 20 to 25'" to be irrelevant in determining that "the trial court's finding that the rate of dilution had been recommended to Fingersh was supported by substantial evidence."<sup>141</sup> Thus, the court held that it was essentially immaterial that no one quite knew who had recommended what to whom or how the rate had been established.<sup>142</sup>

The court next turned to the Fox Family's critiques of the trial court's findings in Paragraph 30 of the original opinion regarding (1) the expansion of the financial pie in the third party investor hypothetical and (2) the necessity of the existence of a direct relationship between the warrant percentage and the amount of risk the shareholders were being asked to undertake.<sup>143</sup> Essentially setting the Fox Family's "pie" argument to the procedural wayside,<sup>144</sup> the court instead chose to address the irrelevance, under the entire fairness

133. *Id.*

134. *Id.* at 431-32.

135. *Id.* at 433.

136. *Id.* at 439.

137. *Id.* at 433; *see supra* note 60 and accompanying text.

138. *HCI Investors*, 412 S.W.3d at 433.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*; *see supra* note 63 and accompanying text.

144. *HCI Investors*, 412 S.W.3d at 433 (citing *Newton v. Hornblower, Inc.*, 582 P.2d 1136 (1978)).

standard, of a demonstrable correlative relationship between the percentage of warrant issuance and the risk shareholders are asked to undertake.<sup>145</sup> In reaching its conclusion, the court found it critical that the Fox Family had both “conceded that incentivizing participation” by all shareholders in the Transaction was “an appropriate objective”<sup>146</sup> and failed to suggest “what they believe[d] would have been a reasonably fair rate of warrant issuance.”<sup>147</sup> In the court’s view, this concession had effectively negated any right the Fox Family may have possessed to protest if Fingersh and Blitt were unable to explain precisely how the rate tied to the risk of participation.<sup>148</sup> Thus, the court found the Fox Family’s “myopic strategy of challenging whether the 25% rate was proven to be entirely fair” to be fatally undermined by their approval of the general scheme and failure to suggest post hoc what an appropriately commensurate rate might have been.<sup>149</sup>

The court then turned its attention to the Fox Family’s criticisms of the trial court’s findings in paragraph 39 of the original opinion regarding the practicality of obtaining a fairness opinion from an investment bank and the necessity of an objective determination on the part of the directors that all shareholders would be treated equally as a result of the Transaction.<sup>150</sup> Here, the court tackled the Fox Family’s temporal, financial, and *Baldwin v. Baker* arguments head on.<sup>151</sup> However, it declined to address the trial court’s reliance on Fingersh’s subjective intentions, or the lack of an inquiry on the part of Fingersh and Blitt as to the fairness of the Transaction to minority shareholders.<sup>152</sup>

The court made short work of the Fox Family’s temporal and financial arguments regarding the potential plausibility of a pre-Transaction fairness assessment.<sup>153</sup> As to the Fox Family’s temporal argument regarding the date of the original “genesis of the Transaction,” the court simply found that no evidentiary support had been provided for this assertion and that the Fox Family had failed to “guide [it] to any place in the record on appeal where this evidence was before the trial court.”<sup>154</sup> Next, turning to the Fox Family’s argument that \$250,000 was a relatively paltry sum to the Bank’s C.F.O., the court found the fact that “Degan was not testifying about the cost of a formal fairness evaluation, but was testifying about the initial estimated impact of the warrant transaction on the Bank’s earnings” to be dispositive.<sup>155</sup>

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145. *Id.*

146. *Id.*

147. *Id.* at 435.

148. *Id.* at 434.

149. *Id.* at 435.

150. *Id.*; see *supra* note 71 and accompanying text.

151. *HCI Investors*, 412 S.W.3d at 435.

152. *Id.* at 435-46; see also Brief of the Appellant, *supra* note 10, at \*30-31 & n.26.

153. *HCI Investors*, 412 S.W.3d at 435.

154. *Id.*

155. *Id.*

Following its fairness assessment discussion, the court paused briefly to analyze the Fox Family's *Baldwin v. Baker* argument.<sup>156</sup> The court acknowledged the *Baldwin* holding "that the mere offering of the same terms to all shareholders is not in and of itself dispositive of entire fairness."<sup>157</sup> However, it found the Fox Family's *Baldwin* argument unpersuasive in this context, holding that the trial court had merely found Fingersh and Blitt's homogeneous offer to all the shareholders to be an element in the inquiry and not itself conclusive.<sup>158</sup>

Finally, the court focused its attention on the Fox Family's arguments regarding the trial court's findings in paragraph 41 of the original opinion that Fingersh and Blitt had reasonably relied upon the advice provided by Mr. Johnston that the warrant issuance was fair in its treatment of all shareholders.<sup>159</sup> Here, the court leveled fundamental legal criticisms against the Fox Family's critiques.<sup>160</sup> Although the Fox Family had maintained that review by a disinterested third party was "essential,"<sup>161</sup> the court pointed out that the "[a]ppellants cite[d] no authority for the proposition that directors cannot establish entire fairness if they have relied on advice from professionals who are not disinterested."<sup>162</sup> Further, the court roundly criticized the Fox Family's argument, given that they had "conceded at oral argument that there is no authority to suggest that entire fairness can only be established by proof that self-dealing directors secured truly independent advice and guidance on critical transaction terms."<sup>163</sup> Although the court acknowledged that both review by disinterested third parties and truly independent guidance could be strongly probative of the entire fairness of a transaction, it held that the apparent lack of these elements was not *prima facie* evidence of its absence.<sup>164</sup>

## V. COMMENT

This case was improperly decided under the applicable Delaware law.<sup>165</sup> As a threshold matter, the court's reluctance to critically analyze the standard implemented by the trial court in making its determination, and the court's

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156. *Id.* at 435-36.

157. *Id.* at 435 (citing *Baldwin v. Bader*, 585 F.3d 18 (1st Cir. 2009)).

158. *Id.* at 436.

159. *Id.*; see *supra* note 82 and accompanying text.

160. *HCI Investors*, 412 S.W.3d at 437.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. See *id.* at 429 (quoting *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. 2012) (en banc)) (although "[o]nce an issue is contested, a trial court is free to disbelieve any, all, or none of the evidence, and the appellate court's role is not to re-evaluate testimony through its own perspective," an initial evaluation of the relevant standards and their proper application would have served to reinforce the accuracy of the court's opinion here).

subsequent adoption of that standard for purposes of its own review, belie an understanding of the two relevant standards.<sup>166</sup> Substantively, the court's review of the trial court's application of the entire fairness standard to the facts of the case demonstrates, at the very least, a misapplication of the relevant legal concepts. The directors' abandonment of their fiduciary duties to third parties of questionable competency would not have satisfied the business judgment rule under the controlling precedent, much less the entire fairness standard.<sup>167</sup>

Further, simply allowing the directors to claim confusion does not satisfy the onerous standards of the entire fairness rule.<sup>168</sup> Just because a fiduciary finds it difficult to formulate a basis for demonstrating the fairness of the transaction does not allow it to avoid its duty to demonstrate entire fairness.<sup>169</sup> Finally, under the totality of the circumstances analysis announced by the Delaware Supreme Court in *Weinberger*, the onus was at all times upon Fingersh and Blitt to demonstrate the entire fairness of the transaction by clear and satisfactory evidence.<sup>170</sup> The court's failure to adhere to these tenets in analyzing the arguments made by the Fox Family on appeal is disconcerting. It is made all the more troubling given that the court's attempt to lower the fiduciary bar under the entire fairness standard has the potential to resonate throughout a significant number of American jurisdictions, including Missouri.<sup>171</sup>

Although the court failed to make a critical assessment of the potentially applicable standards, it accurately held that the entire fairness standard was almost certainly appropriate given the circumstances.<sup>172</sup> However, finding that Fingersh and Blitt's decisions were governed by the entire fairness standard did not eliminate their responsibility to demonstrate that they had proceeded with a critical eye in assessing information related to the Transaction<sup>173</sup> or that their judgment had been an informed one.<sup>174</sup> The court's nuanced assessment of the ambiguity surrounding the adjustment in the warrant percentage fundamentally missed the mark.<sup>175</sup> In agreeing to represent the financial interests of the Fox Family, Fingersh and Blitt accepted an affirma-

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166. See *HCI Investors*, 412 S.W.3d at 431-39.

167. *Id.*

168. See Royce de Rohan Barondes, *supra* note 82.

169. *Id.*

170. See *HCI Investors*, 412 S.W.3d at 432.

171. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (internal citations omitted).

172. See *Becker v. Knoll*, 239 P.3d 830, 835 (Kan. 2010); *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 149 (Kan. 2003).

173. See *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (quoting *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993)).

174. See *Becker*, 239 P.3d at 835 (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993)).

175. See *HCI Investors*, 412 S.W.3d at 433.

tive duty to protect those interests.<sup>176</sup> Fingersh's statements at trial that he "did not know" how the warrant percentages had been set failed to meet the exacting standard of fiduciary duty demanded by *Van Gorkom* and its progeny.<sup>177</sup> The court's failure to accurately acknowledge this fundamental lapse is telling.

The court's analysis of the trial court's factual findings, in Paragraph 30 of the original opinion, that the \$40 million dollar figure was appropriate and that the 25% factor was reasonable given the circumstances, suffer from misapplications of Delaware corporation law that are similar to those seen throughout the opinion.<sup>178</sup> Here, the court improperly shifted the burden from Fingersh and Blitt to the Fox Family to explain with precision how the warrant rate should have tied to the risk of participation.<sup>179</sup> This was an inaccurate application of the governing legal principles.<sup>180</sup> It is distinctly not "the complaining party's duty to explain what it believes to be the proper incentive when the transaction is subject to the entire fairness standard."<sup>181</sup> The fact that the Fox Family failed to assert post hoc an agreeable degree of commensurate risk should have been irrelevant.<sup>182</sup> Instead, the court should have employed Delaware corporation law to place the burden squarely on the shoulders of Blitt and Fingersh to demonstrate the fairness of the transaction.<sup>183</sup> However, the court essentially gave the directors a pass based on their confusion regarding the factual circumstances surrounding the determination of the warrant percentage.<sup>184</sup> The court's analysis in this respect is once again indicative of a fundamental misunderstanding of the governing case law.

In its analysis of the lower court's finding that obtaining a third-party fairness opinion from an investment bank would have been impractical and that an objective fairness determination was unnecessary in the face of Fingersh's subjective fairness assurances, the appellate court seemed to have once again missed the heart of the argument.<sup>185</sup> Here, the truly critical issue was not whether or not Fingersh and Blitt had had accurate time and financial resources to seek an independent fairness review.<sup>186</sup> Nor was the issue *Baldwin v. Bakers*'s relatively straightforward holding that "the mere offering of

176. See *Kahn*, 638 A.2d at 1113-14 (internal citations omitted).

177. See *HCI Investors*, 412 S.W.3d at 433.

178. See *id.* at 433-35.

179. *Id.* at 435.

180. See *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness.").

181. See *Royce de Rohan Barondes*, *supra* note 82.

182. *Id.*

183. *Id.*

184. *Id.*

185. See *supra* notes 152-157.

186. See *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 435-37 (Mo. Ct. App. 2013).

the same terms to all shareholders is not in and of itself dispositive of entire fairness.”<sup>187</sup> These were ancillary considerations in the entire fairness analysis. The fundamental issue raised by the Fox Family, and essentially ignored by the court, was the collective failure on the part of Blitt and Fingersh to investigate the entire fairness of the Transaction to the minority shareholders and the trial court’s reliance on Fingersh’s subjective intentions in determining that entire fairness had, in fact, been established.<sup>188</sup> Once again, the court declined to point to a specific instance in the record where Fingersh and Blitt had sufficiently demonstrated that the Transaction was fair to both sides.<sup>189</sup> The court simply relied on the trial court’s findings, including Fingersh’s subjective belief that a fairness review was unnecessary because “all shareholders were to be treated equally under the proposal.”<sup>190</sup> The fact that the trial court relied on Fingersh’s trial testimony that he “intended to make the deal fair to everybody” in making its determination, and that the court affirmed this holding, is particularly troubling in this regard.<sup>191</sup>

The court’s conclusion that the trial court was correct in finding that Fingersh and Blitt reasonably relied upon Johnston’s advice that the warrant issue was fair in its treatment of all shareholders serves as a useful microcosm for the court’s general misapplication of the entire fairness standard.<sup>192</sup> Although the court leveled its strongest arguments against the Fox Family’s appeal in this portion of its opinion, these arguments also exposed the underlying fallacy of the court’s analytical framework.<sup>193</sup> Finding the elements of review by disinterested third parties and truly independent guidance in formulating a transaction to be strongly probative of entire fairness, the court nonetheless held that these factors were not necessary to a finding of entire fairness.<sup>194</sup> This was indicative of the general tenor of the opinion. Throughout, the court seemed to go to great lengths to find daylight in support of Blitt and Fingersh’s tenuous legal positions. However, Blitt and Fingersh’s confusion as to the formulation of the final warrant terms, abdication of fiduciary duty, and failure to attempt to specifically demonstrate the fairness of the Transaction to the minority shareholders would not seem to represent the sort of clear and satisfactory evidence of their utmost good faith and scrupulousness required by Delaware’s most onerous standard.<sup>195</sup>

It seems doubtful that a Kansas court fully informed of the applicable Delaware precedent will give any amount of deference to the Appellate Court’s decision here. However, the court’s effort to gloss over the applica-

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187. *Id.* at 435 (citing *Baldwin v. Baker*, 585 F.3d 18 (1st Cir. 2009)).

188. *Id.* at 433.

189. *Id.*

190. *Id.* at 435.

191. See Brief of the Appellant, *supra* note 10, at \*30 n.26.

192. See *supra* notes 160-165 and accompanying text.

193. See *supra* notes 160-165 and accompanying text.

194. See *supra* notes 160-165 and accompanying text.

195. See *Weinberger v. UOP, Inc.*, 47 A.2d 701, 710 (Del. 1983).

ble standards by lowering the threshold fiduciary duty requirements under the entire fairness standard will undoubtedly provide valuable ammunition to clever counsel representing corporate fiduciaries who have abdicated their fiduciary responsibilities to third parties not only in Kansas but in all jurisdictions that look to Delaware corporation law.<sup>196</sup> By applying the standard in the way in which it did, the Appellate Court has worked to undermine one of the fundamental protections established by a ubiquitous corporate fiduciary duty.<sup>197</sup>

## VI. CONCLUSION

The Missouri Court of Appeal's decision in *HCI Investors* departs from existing Delaware precedent and represents an idiosyncratic step backwards in the annals of corporate fiduciary jurisprudence. By merely accepting the trial court's ambiguous determinations regarding applicable standards of fiduciary duty instead of making its own independent determinations, the court signaled early on that a potential for misapplication of the relevant case law was present.<sup>198</sup> This potential was borne out in the court's decision, in which it both permitted corporate directors to simply abdicate their fiduciary duties to third parties and declined to require any specific evidence as to the processes used in formulating the terms of a transaction.<sup>199</sup> Ignoring the details of the transaction and the failure of the corporate fiduciaries to carry their burden under the entire fairness standard, the court instead shifted the burden to the complaining minority shareholder.<sup>200</sup> While the tenor of the opinion bears out a misunderstanding of the relevant case law, this will likely present little deterrence to deft counsel seeking to exempt self-dealing clients from Delaware's most onerous standard of fiduciary duty.<sup>201</sup>

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196. *Id.* at 710-15.

197. *See supra* Part V.

198. *HCI Investors, LLC v. Fox*, 412 S.W.3d 424, 435-37 (Mo. Ct. App. 2013).

199. *Id.* at 436-37.

200. *See Royce de Rohan Barondes, supra* note 82.

201. *See HCI Investors*, 412 S.W.3d at 435-37.