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Corwin v. KKR Financial Holdings LLC—An After-Action Report

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LECTURE

THE EIGHTEENTH ANNUAL ALBERT A. DESTEFANO LECTURE ON CORPORATE, SECURITIES, & FINANCIAL LAW AT THE FORDHAM CORPORATE LAW CENTER[†]

CORWIN V. KKR FINANCIAL HOLDINGS LLC— AN “AFTER-ACTION REPORT”

WELCOME AND INTRODUCTORY REMARKS

*Matthew Diller**

Fordham University School of Law

FEATURED LECTURER

*The Honorable Joseph R. Slight III***

Vice Chancellor of the Delaware Court of Chancery

[†] The lecture was held at Fordham University School of Law on April 9, 2018. It has been edited to remove minor cadences of speech that appear awkward in writing and to provide sources and references to other explanatory materials in respect to certain statements made by the speakers.

* Matthew Diller is the Dean of Fordham University School of Law.

** Joseph R. Slight III is a Vice Chancellor on the Delaware Court of Chancery. The views expressed herein are solely those of the author and not of the Court.

WELCOME AND INTRODUCTORY REMARKS

DEAN DILLER: My name is Matthew Diller. I have the honor of being the Dean of Fordham Law School, and I am here to welcome you to this evening's program.

It is an honor to welcome Vice Chancellor Slight as our special guest tonight and speaker for the 18th Annual DeStefano Lecture on Corporate, Securities & Financial Law.¹

Vice Chancellor Slight will present to us an after-action report following the landmark decision of the Delaware Supreme Court in *Corwin v. KKR Financial Holdings LLC*.²

Before we turn our attention to the Delaware corporate law, allow me to take a few minutes to introduce the annual DeStefano Lecture series.

This year, the DeStefano Lecture is celebrating its eighteenth anniversary. The lecture series was established by Becker Ross in 2001 to honor the distinguished law career of the firm's partner, Albert DeStefano, who dedicated his life to the service of others.

Mr. DeStefano, a 1947 *cum laude* graduate of Fordham Law, served as the Recent Decisions and Comments Editor of the *Fordham Law Review*.³ In 1950 he earned an LLM in taxation down the street from us at New York University where he served as the graduate editor of the *New York University Tax Law Review*.⁴

Mr. DeStefano retired after forty-seven years of practice, having specialized in corporate matters including mergers and acquisitions.⁵ From 1973 to 1983, he shared his expertise with Fordham Law students as an adjunct professor here.⁶

1. *Albert A. DeStefano Lecture on Corporate, Securities and Financial Law*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23050/public_lectures/6100/albert_a_destefano_lecture_on_corporate_securities_and_financial_law [<https://perma.cc/4K6L-52P4>] (last visited Nov. 13, 2018).

2. 125 A.3d 304 (Del. 2015).

3. *Masthead* to 16 FORDHAM L. REV. (1947).

4. *Albert A. DeStefano Lecture on Corporate, Securities and Financial Law*, *supra* note 1.

5. *Id.*

6. *Id.*

Active in numerous *pro bono* organizations, he served as secretary and trustee for the Helen Keller Services for the Blind and as trustee for the Cleary School for the Deaf.⁷

Mr. DeStefano passed away in November 2012, and we remember him with great fondness.

His granddaughter, Katherine DeStefano, is a 2013 Fordham Law graduate and is here with us today. Thank you so much for joining us.

I would like to take a couple of minutes to tell you about Fordham Law's business faculty and our business law programs. One of Fordham Law's core strengths is business law. Our professors are counted among the nation's leading faculty in corporate and securities law.

The breadth of our faculty's expertise and our more than one hundred course offerings in business law cover a wide range of critical business law topics: corporate governance and securities law, of course, but also antitrust and commercial law, compliance and financial institutions, entrepreneurship and intellectual property, and international and comparative law.

In addition, our law clinic offers four business-oriented options where students gain firsthand experience helping clients with issues they have explored in our classrooms, including a new Entrepreneurial Law Clinic.

Our *Fordham Journal of Corporate & Financial Law* is the number-one most cited banking and finance journal by other law journals and second most cited banking and finance journal by judges.⁸

We are proud of our new initiatives in corporate compliance, including two master's programs, a Master of Laws for lawyers⁹ and a

7. *Id.*

8. According to the ranking system maintained by the Law Library at Washington & Lee University School of Law. See *Law Journals: Submissions and Ranking, 2009–2016*, WASH. & LEE U. SCH. L., <http://lawlib.wlu.edu/LJ/index.aspx> [<https://perma.cc/87QV-VDQE>] (last visited Nov. 13, 2018) (to replicate the search results, search "Subject: Banking and Finance;" then "Edit type: Student-edited;" and "Ranking Criteria: Case cites").

9. *Fordham Master of Laws in Corporate Compliance*, FORDHAM U. SCH. L., https://www.fordham.edu/info/22606/corporate_compliance [<https://perma.cc/ECB6-UH4D>] (last visited Nov. 13, 2018).

Master in the Study of Law for non-lawyers, both of which focus on corporate compliance.¹⁰

Complementing all of this is the host of this evening's program, our Corporate Law Center, which plays a key role in bridging the gap between academics and practitioners by bringing together scholars, professionals, policymakers, and students for discussion and study of business law and finance law.¹¹

The Center was established in 2001 by then-Dean John Feerick and has three areas of focus.¹²

First, the Center convenes public lectures, roundtable discussions, expert panels, and academic symposia, including tonight's lecture.¹³

Second, the Center is a platform to showcase the business law scholarship of the Fordham Law faculty in a wide variety of financial subspecialties.¹⁴

Third, the Center serves as a resource for Fordham Law students, connecting them to our distinguished alumni through the business law practitioner series and a variety of mentoring programs.¹⁵

For more information about the Center, I invite you to look on the website.¹⁶

I want to thank the faculty director of the Center, Professor Sean Griffith. Thank you for your leadership, Sean.¹⁷

I also want to thank the Administrative Director, Vera Korzun, who brought us all together this evening. Vera will be leaving us at the end of this semester to begin a teaching post of her own at the University of

10. *Fordham Master in the Study of Law*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23823/corporate_compliance [<https://perma.cc/8X98-V88K>] (last visited Nov. 13, 2018).

11. *Fordham Corporate Law Center*, FORDHAM U. SCH. L., https://www.fordham.edu/info/20691/corporate_law_center/5400/about_us [<https://perma.cc/3LHQ-6V48>] (last visited Nov. 13, 2018).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Sean J Griffith*, FORDHAM U. SCH. L., https://www.fordham.edu/info/23142/sean_j_griffith [<https://perma.cc/LA54-9GPQ>] (last visited Nov. 13, 2018).

Akron.¹⁸ She holds an SJD from our school, and we are tremendously proud of her.¹⁹

Thank you so much, Vera.

Now it is my pleasure to introduce you to today's speaker.

The Honorable Joseph Slight III was sworn in as a Vice Chancellor of the Court of Chancery on March 28, 2016.²⁰ Before his appointment, Vice Chancellor Slight was a partner in the Delaware law firm Morris James, where he practiced corporate and business litigation and chaired the firm's Alternative Dispute Resolution practice group.²¹

Before that, he served a twelve-year term as a judge on the Superior Court of Delaware, where, among other assignments, he was instrumental in forming the court's Complex Commercial Litigation Division.²² Prior to his appointment to the Superior Court, Vice Chancellor Slight worked as a litigator at two other Delaware firms.²³

Vice Chancellor Slight received his JD from Washington & Lee University School of Law in 1988 and holds a bachelor's in political science from James Madison University.²⁴

He is a member of the American Law Institute, the American Bar Association, and the Delaware Bar Association. He is a Fellow of the American Bar Foundation and Past President of the Richard S. Rodney Inn of Court.²⁵

Vice Chancellor, the floor is yours.

18. *Vera Korzun*, U. AKRON SCH. L., <https://www.uakron.edu/law/faculty/directory/profile.dot?u=vkorzun> [<https://perma.cc/8FGV-4HWW>] (last visited Nov. 13, 2018).

19. Samantha Mathewson, *Vera Korzun Completes S.J.D. Requirements to Become Fourth Graduate of Program*, FORDHAM L. NEWS (Sept. 16, 2016), <https://news.law.fordham.edu/blog/2016/09/16/vera-korzun-completes-s-j-d-requirements-to-become-fourth-graduate-of-program/> [<https://perma.cc/TJ3P-YR9T>].

20. *Court of Chancery Judicial Officers – Vice Chancellor Joseph R. Slight III*, <https://courts.delaware.gov/chancery/judges.aspx> [<https://perma.cc/B9VW-E6S9>] (last visited Nov. 13, 2018).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

LECTURE

VICE CHANCELLOR SLIGHTS: Thank you.

Good evening. Thank you, Dean, for that kind introduction. Thanks to all of the folks here, especially the students at Fordham Law School, for hosting me. We had a great roundtable before I came to be with you all this evening, I really enjoyed it.

I also want to thank Professor Griffith for the kind invitation to have me here. Professor Korzun, you have been terrific today too, very kind and welcoming. It has been a great day, and I am looking forward to being with you all tonight.

I am especially honored to be giving a lecture named for Albert A. DeStefano, who was a practitioner of corporate law; a dear friend of this law school, as I gather; and a lawyer who by all accounts applied his law training to extend a helping hand to those who needed it. I enjoyed getting to read a little bit about him in advance of tonight's lecture because I thought that would be a good thing to do. I was inspired by the good work that he did. And so, it is truly an honor to give a lecture named after him.

Before I dive into my remarks, I have to confess that I proceed with a little bit of trepidation.

My younger son is completing his junior year in college. He has been very busy. He is trying to gear up to submit law school applications later this year, so I have not really had a chance to speak to him much. But we did speak last night.

After he told me a little bit about what he has been up to, he asked what I was up to. I said that I was going to be here tonight giving a lecture.

He asked, "What are you going to talk about?"

I said, "Just some corporate law stuff."

He pressed for details, and I figured, "He is going to go to law school. He is a smart kid. Why not?" So, I dove in and gave him a summary. I told him, "I am going to talk about this case called *Corwin*.²⁶ Some say it was just another case in a long line of stockholder ratification cases in Delaware.²⁷ Others say it is the most significant decision to come out in the last two decades and it is going to spell the end of stockholder

26. 125 A.3d 304 (Del. 2015).

27. See, e.g., Robert S. Reeder & Celine L. Feys, *Delaware Rejects Claim That Directors Acted in Bad Faith by Selling Company Facing Activist Threat*, 71 VAND. L. REV. EN BANC 34, 39 (2018) (downplaying the relevance of *Corwin* on future decisions).

litigation as we know it in Delaware, and in particular in the Court of Chancery.”²⁸

I talked to him a little bit about some of the challenges that the decision has presented to us as judges on the Court of Chancery. I spent about three minutes or so talking about that, and afterward I said, “So what do you think?” Silence. I said, “Are you still there?”

He said, “Oh, my God, Dad. That sounds awful. Is it too late to tell them you are going to talk about something else?”

I said, “Yes, it is a little too late for that.”

What I now appreciate is that I have entered this phase with my adult son which is called the brutal honesty phase of our relationship. For some of you students, you may be there now with your parents—in this state of brutal honesty. I just want to say be gentle with your parents because you can really rattle them.

What I am going to try to do is provide a not-too-awful after-action report, if you will, on the Delaware Supreme Court’s 2015 decision in *Corwin v. KKR Financial Holdings*.²⁹ To that end, I am hoping to cover five points.

I have some PowerPoint slides that I hope will serve as markers along the way and sort of help guide us through the discussion.

The five points are these:

First, I want to break down the holding. I think that is going to be a helpful springboard into the broader discussion that I hope we can have tonight about *Corwin*.³⁰

Second, I want to dwell a bit on *Corwin*’s origins because I think that background is helpful, if not necessary, to understand fully the significance of the decision.³¹

Third, I want to discuss *Corwin*’s impact with regard to stockholder litigation, and in particular how the decision has been received among practitioners and commentators.³²

Fourth, I want to get into some of the practical and doctrinal challenges that have arisen as *Corwin* settles.³³

28. See, e.g., Matt Chiappardi, *Delaware Plaintiffs’ Bar Rattled by Seismic Shift in Merger Law*, LAW360 (Feb. 10, 2017), <https://www.law360.com/articles/891000/del-plaintiffs-bar-rattled-by-seismic-shift-in-merger-law> [<https://perma.cc/3PB4-79UW>].

29. 125 A.3d 304.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

Finally, I would like to close with some thoughts about where this *Corwin* doctrine might be going and whether there really is cause for concern.³⁴

Before I get into further remarks, I need to also step back and take a page from my friends at the Securities and Exchange Commission (SEC) who always remind us when they talk in public that their views are not the views of the Commission or anyone who works at the Commission; they are their own views. These views are absolutely my own views. Do not blame anyone else for what I am saying tonight.

I also hope it goes without saying that judges are rarely able to be as provocative as they might like to be in public comments, especially as some of these issues are either before me or soon will be before me. So, in some instances, I am going to raise questions, but likely not answer them, at least not here. Hopefully you all can appreciate that. The questions themselves, I think, are provocative in their own way.

Corwin involved a post-closing challenge to a stock-for-stock merger where the plaintiffs raised fiduciary duty claims against the target's board and an alleged conflicted controlling stockholder.³⁵ The target's board submitted the transaction for stockholder approval, as required by statute, and the stockholders approved the transaction by a significant margin.³⁶

The plaintiffs argued that the standard of review that the court should apply was entire fairness, given the presence of a conflicted controller, and the defendants argued that the standard of review was the business judgment rule.³⁷

Interestingly, there was no argument, at the trial court level at least, that *Revlon*³⁸ enhanced scrutiny might apply, although that argument was

34. *Id.*

35. *Id.* at 306.

36. *Id.* at 308.

37. *Id.* at 306, 308.

38. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). The *Revlon* decision addressed the fiduciary obligations of a Delaware corporation's board of directors in connection with a sale of the company. *Id.* at 182. Per *Revlon*, once it becomes "apparent [to a corporation's board of directors] that a break-up of the company [is] inevitable . . . [t]he duty of the board . . . change[s] from the preservation of [the company] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." *Id.* Following *Revlon*, the Delaware Supreme Court made clear that directorial "approval of a transaction resulting in a sale of [corporate] control" will be subject to "enhanced [judicial] scrutiny to ensure that it is reasonable."

raised in the Delaware Supreme Court, even though this was a stock-for-stock transaction.³⁹

For those who might be interested in that discussion, see footnote twelve of the Delaware Supreme Court's opinion and page 989 of the Chancery opinion.⁴⁰ There is actually, I think at least, a fascinating discussion of that issue there.⁴¹

The Court of Chancery granted a motion to dismiss upon concluding that there was no controlling stockholder, and the stockholder vote triggered business judgment review.⁴²

The Supreme Court affirmed and held—and this is a bit of a mouthful, but we will break it down—that approval of a corporate merger not subject to entire fairness review by the vote of a fully informed uncoerced majority of the corporation's disinterested stockholders invokes pleading-stage business judgment review in a post-closing stockholder damages action challenging the transaction.⁴³

In essence, the court determined that the informed uncoerced stockholder vote will cleanse any breaches of fiduciary duty that might have been alleged.

Corwin and the trial court opinion that it affirmed are packed with interesting tidbits, including the *Revlon*⁴⁴ and *Unocal*⁴⁵ discussions that I just mentioned, and the court's treatment of a rather unique controlling-stockholder argument where the court was asked to determine that a minority stockholder with a one-percent stake in the target was actually a controlling stockholder.⁴⁶ That also is worth the read in and of itself, and I would encourage you to take a look at the discussion there because it is, I think, significant in our controlling-stockholder jurisprudence.

Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994). This type of enhanced judicial scrutiny is sometimes referred to as "*Revlon* enhanced scrutiny."

39. *Corwin*, 125 A.3d at 308.

40. *Id.* at 308 n.12; *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 989 (Del. Ch. 2014).

41. *KKR*, 101 A.3d at 989.

42. *Id.* at 990–91.

43. *Corwin*, 125 A.3d at 305–06.

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

45. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (holding that corporate board's adoption of defensive measures in response to a perceived threat to corporate control is subject to enhanced judicial scrutiny).

46. *See KKR*, 101 A.3d at 991–95.

But for today's purposes, what I want to focus on is the standard of review and why we care about that.

We see in *Corwin* that the court says it is appropriate to ratchet down a more searching standard of review to the deferential business judgment review by virtue of the stockholder vote.⁴⁷

But again, why do we care? We care because, in fiduciary litigation, the business judgment rule is the golden egg. As Professor Bernard Sharfman wrote in his recent article aptly titled "The Importance of the Business Judgment Rule," it is fair to say that the business judgment rule is the "most prominent and important standard" in all of corporate law because when it applies, the court is obliged to presume that director fiduciaries were fully informed and were acting in good faith in their decision-making.⁴⁸

As a practical matter, and as our Supreme Court made clear in *Singh v. Attenborough*, "[w]hen the business-judgment-rule standard of review is invoked because of a [stockholder] vote, dismissal is typically the result. That is because the vestigial waste exception has long had little real-world relevance because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful."⁴⁹ That is a quote from *Singh*.⁵⁰

So, the post-vote application of the business judgment rule at the pleading stage almost always means that breach-of-fiduciary-duty claims will be dismissed before they even get out of the gate. That is why we care.

Back to the holding, I want to break it down just a little bit more because there is a good bit in there.

First, the court limits the reach of its holding in the case to mergers.⁵¹ That makes perfect sense since that was the form of transaction at issue there. Does it apply to other types of transactions, to other transactional structures? Not clear from this decision.

Next, the court makes a point of stating that the holding does not apply to transactions that are subject to entire fairness review.⁵² *Corwin* involved, as I mentioned, an alleged conflicted controlling-stockholder

47. *Corwin*, 125 A.3d at 312.

48. Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J. L. & Bus. 27, 28–29 (2017).

49. 137 A.3d 151, 151–52 (Del. 2016).

50. *Id.*

51. *Corwin*, 125 A.3d at 306.

52. *Id.*

transaction.⁵³ If the court had agreed that the merger involved a conflicted controller, we know that entire fairness would have been the operative standard of review,⁵⁴ and we know from the opinion that the court would not have found that the stockholder vote cleansed the alleged breaches.⁵⁵ So, *Corwin* does not apply to conflicted controller transactions.⁵⁶

But what about cases where entire fairness might apply as a result of alleged board-level conflicts? Does *Corwin* apply in those cases?⁵⁷ Again, not clear.

The court emphasizes that the stockholder vote must be fully informed.⁵⁸ That is clear enough. But at the pleading stage, how does that play out? *Corwin* appears to embrace a stockholder ratification defense of sorts.⁵⁹ Does the plaintiff have to plead around the defense? It appears that the answer to that question is yes, given that the court affirmed an order dismissing a complaint for failure to state a claim.⁶⁰ But the question is not directly presented in the *Corwin* decision, so it is not directly answered.⁶¹

The vote must be “uncoerced.”⁶² Well, what does that mean exactly? The court earlier says that the holding will not apply to transactions where entire fairness is the standard of review,⁶³ and yet, those are typically the types of transactions where the court is on highest alert for coercion. So, what other scenarios does the court have in mind here?

53. *Id.*

54. *See Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (“[T]his Court holds that the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness.”).

55. *See Corwin*, 125 A.3d at 312 (Only “[a] fully informed, *uncoerced* stockholder vote[]” will invoke pleading-stage business judgment deference.) (emphasis added); *see also Kahn*, 638 A.2d at 1117 (“[E]ven when an interested cash-out merger transaction receives the informed approval of a majority of minority stockholders . . . an entire fairness analysis is the only proper standard of judicial review.”).

56. *See generally Corwin*, 125 A.3d at 312.

57. *See generally id.*

58. *Id.*

59. *See generally id.*

60. *Id.* at 313.

61. *See generally id.*

62. *Id.* at 312.

63. *Id.* at 306 (limiting the holding to “merger[s that are] not subject to the entire fairness standard of review.”).

Then, finally, the court emphasized that the relevant vote tally must be comprised only of disinterested stockholders.⁶⁴ Again, seems easy enough, but, as we will discover later, maybe not.

So, we see in *Corwin* a holding that appears straightforward.⁶⁵ Whether it is really groundbreaking can be debated, and we will get to that. But we also can see that the holding leaves several questions unanswered. Why? Because the questions were not presented in the case, and the court did what even Delaware courts try to do, at least usually, and that is it answered the questions that were presented by the facts in that case and left other questions not presented to be decided in other cases where those facts would justify that decision-making. Fair enough.

In fairly short order, in fact, other cases did come along that allowed our courts to answer some of these lingering questions. I do not want to dwell on those answers too long. They are what they are, and you can read those decisions. I would rather spend the time talking about questions that have not been answered yet.

But let us briefly talk about the answers that we have so far.

Does *Corwin*⁶⁶ apply only to mergers as contemplated by Sections 251(b) and (c) of the Delaware General Corporation Law (DGCL)?⁶⁷ The answer to that is no. We see in *In re Volcano*⁶⁸ that the *Corwin*⁶⁹ doctrine will apply to transactions where stockholders manifest their approval of the transaction by tendering their shares.⁷⁰ In that case, it was a merger under Section 251(h) of the DGCL where a stockholder vote on the front end was not required.⁷¹

Does *Corwin*⁷² apply to transactions where entire fairness may apply based only on board-level conflicts? The answer is yes.⁷³ The reference

64. *Id.* at 313.

65. *See generally id.*

66. *Id.*

67. *See generally* DEL. CODE ANN. tit. 8, § 251(b), (c) (2017).

68. *In re Volcano Corp. Stockholder Litig.*, 143 A.3d 727 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017).

69. *See generally* 125 A.3d 304.

70. *Volcano*, 143 A.3d at 738 (“I conclude that stockholder approval of a merger under Section 251(h) by accepting a tender offer has the same cleansing effect as a vote in favor of that merger.”).

71. *Id.*

72. *See generally* 125 A.3d 304.

73. *Larkin v. Shah*, C.A. No. 10918-VCS, 2016 WL 4485447, at *10 (Del. Ch. Aug. 25, 2016) (“[T]he only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval are those involving a controlling stockholder.”).

to “entire fairness” in *Corwin* is to cases where the standard applies ab initio, meaning transactions involving conflicted controlling stockholders.⁷⁴

This appears now, I think, to be fairly well settled in Chancery, but not expressly decided by our Supreme Court yet, although I think that holding is implicit in *Corwin*.⁷⁵ That is what I found in *Larkin*,⁷⁶ and I think other members of the court have shared that view.⁷⁷ But I do want to come back to this issue later because I think it may be a bit more nuanced than it appears. But, for now, we have an answer to that question.

Aiding and abetting: does *Corwin* apply to those cases?⁷⁸ I think the answer here again is yes. I think our Supreme Court affirmed as much in the *Singh v. Attenborough* case.⁷⁹

Next is the question of whether a plaintiff bringing a post-close damages complaint has to plead around the *Corwin* defense.⁸⁰ In other words, does the plaintiff have to plead that the stockholder vote was uninformed or coerced, even though structurally the defendant ultimately would have to prove those facts as an element of the defense in the event the case went beyond a Rule 12(b)(6) motion?

The answer is yes, the plaintiff does have a pleading burden to plead around the *Corwin* defense.⁸¹ Chancellor Bouchard held in *Solera* that:

it makes little sense in my view that defendants must bear this pleading burden for it would create an unworkable standard, putting a litigant in the proverbially impossible position of proving a negative . . . It is instead far more sensible that a plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document, at which point the burden would fall

74. 125 A.3d at 308.

75. See generally 125 A.3d 304.

76. See generally *Larkin*, 2016 WL 4485447.

77. See, e.g., *In re Merge Healthcare Inc. Stockholder Litig.*, Consol. C.A. No.11388-VCG, 2017 WL 395981, at *6 (Del. Ch. Jan. 30, 2017) (following *Larkin*).

78. See generally 125 A.3d 304.

79. 137 A.3d 151, 153 (Del. 2016) (“Having correctly decided . . . that the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs’ claims against all parties [including the board’s financial advisor].”).

80. See generally 125 A.3d 304.

81. See generally *id.*

to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote.⁸²

So, we now know that *Corwin* does impose a heightened pleading burden on the plaintiff in the sense that the plaintiff must affirmatively plead around what is generally regarded otherwise as an affirmative defense.⁸³ I will not say that is unique because I do not know that is so. But it is remarkable that, in an affirmative pleading, the plaintiff has that burden to plead around an affirmative defense.

What about coercion? Some guidance has emerged on what is meant by “coercion” in the *Corwin* context.⁸⁴ The notion of inherent coercion is confined to transactions involving conflicted controlling stockholders—not a terribly novel proposition. In the *Pure Resources* case, I think then-Vice Chancellor Strine made that point, that those transactions are uniquely and inherently coercive.⁸⁵ I think Vice Chancellor Glasscock has also reiterated that point.⁸⁶ Vice Chancellor Glasscock also discussed structural coercion in the *Sciabacucchi* case.⁸⁷

I have to digress for a moment. I actually had Mr. Sciabacucchi as a lead plaintiff in a case that I had, and his name was pronounced six different ways during the course of the oral argument. It was sort of like *Daubert*⁸⁸—is it “Dow-burt,” “Dough-bair”? Nobody quite could get that pronunciation down. I think Mr. Sciabacucchi, who is, I am sure, a lovely man, has his name routinely butchered in our courts. I think that is wrong, and we should learn how to pronounce it. But in the meantime, we will

82. *In re Solera Holdings, Inc. Stockholder Litig.*, C.A. No. 11524–CB, 2017 WL 57839, at *8 (Del. Ch. Jan. 5, 2017).

83. *See generally* 125 A.3d 304.

84. *Id.*

85. *In re Pure Res., Inc., S’holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002) (explaining the “‘inherent coercion’ that exists when a controlling stockholder announces its desire to buy the minority’s shares,” and likening a controlling stockholder so situated to a “800–pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors . . . [and] minority stockholders, [who] would fear retribution from the gorilla if they defeated the merger and he did not get his way”).

86. *See Sciabacucchi v. Liberty Broadband Corp.*, C.A. No. 11418–VCG, 2017 WL 2352152, at *2 (Del. Ch. May 31, 2017).

87. *Id.* at *20 (“In the *Corwin* context, a structurally-coerced vote is simply a vote structured so that considerations extraneous to the transaction likely influenced the stockholder-voters, so that [the court] cannot determine that the vote represents a stockholder decision that the challenged transaction is in the corporate interest.”).

88. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

call that case the *Liberty* case because I think that is what it is more commonly referred to as.

In the *Liberty* case, Vice Chancellor Glasscock explained that this strain of coercion—structural coercion—occurs when the board structures the vote in a manner that requires stockholders to base their decisions on reasons extraneous to the economic merits of the transaction at issue.⁸⁹

In the *Massey* case, Chancellor Bouchard explained that when a board tries to pack too much into a vote, that dynamic can also create a structurally coercive vote.⁹⁰ I want to come back to this idea of vote packing in a moment.

Situational coercion can arise where the board, by its conduct, creates a situation where stockholders are being asked to tender shares in ignorance or a mistaken belief as to the value of their shares.

In the *Saba* case, the target company's stockholders were given a choice between keeping their recently deregistered illiquid stock, which was a circumstance created by the board's own failures, or accepting substantially deflated merger consideration.⁹¹ I found that these circumstances created situational coercion since the board had "[f]oisted a Hobson's choice upon the stockholders" by insisting on selling the company "in the midst of [its] regulatory chaos."⁹² That was a quote from that decision.

What we have seen in these cases is that, as the facts are presented, the court is given opportunities to answer some of the unanswered questions that were left after *Corwin* was decided.⁹³ But, as we will discuss in a moment, there are still more to be answered. I want to get to those shortly.

Before I discuss reactions that we have seen to *Corwin*—and I think that is an important discussion to have—I do want to very briefly cover

89. *Sciabacucchi*, 2017 WL 2352152, at *15, *20.

90. *In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 508 (Del. Ch. 2017) ("[I]n order to invoke the cleansing effect of a stockholder vote under *Corwin*, there logically must be a . . . proximate relationship . . . between the transaction or issue for which stockholder approval is sought and the nature of the claims to be 'cleansed' as a result of a fully-informed vote.").

91. *In re Saba Software, Inc. Stockholder Litig.*, C.A. No. 10697-VCS, 2017 WL 1201108, at *15 (Del. Ch. Mar. 31, 2017), *as revised* (Apr. 11, 2017).

92. *Id.*

93. *See generally* 125 A.3d 304.

where *Corwin* came from.⁹⁴ I think that discussion of history is useful to understand the differences in view and the differences in the way in which folks have reacted to the decision.

Corwin is, as I have mentioned, an outgrowth of the doctrine of stockholder ratification which, as we know from *Gantler v. Stephens*,⁹⁵ assigns certain legal consequences to fully informed, uncoerced approval of a corporate transaction by a majority of the corporation's disinterested stockholders, provided that the DGCL does not require stockholder approval for the transaction to become effective.⁹⁶ That was the state of ratification law, at least post-*Gantler*.⁹⁷

A long line of pre-*Corwin* case law addresses how the doctrine operates and its conceptual underpinnings.⁹⁸ In fact, the now-famous footnote nineteen in *Corwin*⁹⁹ traces stockholder ratification as far back as 1928 with the Chancery's opinion in the *MacFarlane v. North American Cement Corporation*¹⁰⁰ case. So, we have a long history here for sure.

What I want to emphasize about the history is that the notion that stockholders can ratify less-than-perfect decisions made by corporate fiduciaries is well-embedded in our law, not new. The idea that stockholder ratification can and should ratchet down the level of judicial scrutiny paid to fiduciary decision-making—also not new.

In this regard, I suppose it is important that the Delaware Supreme Court in *Corwin* reiterated that when stockholders determine with their votes that a transaction is a “fair exchange,” it is appropriate that our courts not substitute their own business judgment for that exercise in good faith by the stockholders.¹⁰¹ Important to reiterate that concept, no doubt.

94. See generally *id.*

95. 965 A.2d 695 (Del. 2009).

96. See generally *Corwin*, 125 A.3d 304.

97. See, e.g., *Espinoza v. Zuckerberg*, 124 A.3d 47, 62 (Del. Ch. 2015) (applying the holding in *Gantler* that the shareholder ratification doctrine is limited to circumstances in which a fully informed shareholder vote approves director action that does not require shareholder approval to become legally effective).

98. See Matteo Gatti, *Reconsidering the Merger Process: Approval Patterns, Timelines, and Shareholders' Role*, 69 HASTINGS L. J. 835, 849 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) in support of the argument that shareholder decision-making has been at the forefront of Delaware case law for many years).

99. 125 A.3d 304, 310 n. 19.

100. 157 A. 396 (Del. Ch. 1928).

101. *Corwin*, 125 A.3d at 313–14.

It also could be deemed important that the court reiterated, in a rare moment of judicial self-awareness—and I say that referring to all judges, who as a breed are generally not self-aware—but in this instance self-awareness carried the day because the court recognized that, as a general matter, judges are poorly positioned to evaluate the wisdom of business decisions and that there is little utility to having them second guess the determination of impartial decision-makers with an actual economic stake in the outcome—namely, the corporation’s stockholders.¹⁰²

These are important statements of doctrine, but they are not new, as evidenced by the decision’s ample footnotes.

As a functional matter, *Corwin* is significant in the development of our ratification law only because it made clear that the doctrine of stockholder ratification does extend to corporate transactions where stockholder approval is required for the deal to be effective.¹⁰³ That was not clear under *Gantler*;¹⁰⁴ it was made clear in *Corwin*.¹⁰⁵

But here again, even on this point, the decision is not terribly remarkable because, I think, frankly, it was quite predictable, as the Chancellor, I think, made clear in his trial court opinion.¹⁰⁶

Indeed, because these are not new pronouncements, it is not at all surprising that some commentators push back on the notion that *Corwin* was really groundbreaking at all.¹⁰⁷

So, what is the big deal? There was more. There was more. I have already alluded to this, but it is important to reiterate. This is why we, I think, talk about *Corwin*.¹⁰⁸ *Corwin* calls for pleading-stage business judgment deference, and it requires dismissal of post-closing stockholder litigation challenges to stockholder-ratified transactions.¹⁰⁹

Again, as the Delaware Supreme Court has emphasized, “[w]hen the business judgment rule standard of review is invoked because of a

102. *Id.*

103. *See generally id.*

104. *See generally* *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

105. *See generally* 125 A.3d 304.

106. *See generally* *In re KKR Fin. Holdings LLC S’holder Litig.*, 101 A.3d 980 (Del. Ch. 2014).

107. *See, e.g.*, Edward B. Micheletti, et al., *M&A Litigation Developments: Where Do We Go From Here?*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (May 29, 2018), <https://www.skadden.com/insights/publications/2018/05/insights-the-delaware-edition/ma-litigation-developments> [<https://perma.cc/7XVG-TLSE>].

108. *See generally* 125 A.3d 304.

109. *See generally id.*

[stockholder] vote, dismissal is typically the result.”¹¹⁰ That direction, I think, is loud and clear, and it is not equivocal. Again, the case is not going to get off the starting line.

So what is this “*Corwin* effect” and how has it been received? Here are just a few of the representative articles that came out post-*Corwin*.

“Is Stockholder Litigation in Trouble in Delaware? An Update.”¹¹¹ That was published just a few weeks ago.

“Delaware Plaintiffs’ Attorneys Fear Exodus of Chancery Deal Suits.”¹¹²

“As Deals Bloom, Delaware Judges Are Leaving Shareholders Bar in the Cold.”¹¹³ “In the cold”!—that is pretty dramatic.

“Delaware Supreme Court Deals Another Blow to Stockholder Plaintiffs in M&A Litigation.”¹¹⁴

“Delaware Plaintiffs’ Bar Rattled by Seismic Shift in Merger Law.”¹¹⁵ That I very much doubt. The stockholder plaintiffs’ bar does not easily rattle, in my experience. I mean that entirely as a compliment.

So, not a terribly warm reception out there. Now, I will confess that there are some articles that take the other point of view, but these are the ones that grab our attention.

As was mentioned in the introduction, I joined the Court of Chancery in March 2016.¹¹⁶ *Corwin* was decided in October 2015.¹¹⁷ When I submitted my application to join the court, right around October 2015, I

110. Singh v. Attenborough, 137 A.3d 151, 151-52 (Del. 2016).

111. Edward M. McNally, *Is Stockholder Litigation in Trouble in Delaware? An Update*, DEL. BUS. CT. INSIDER (Mar. 21, 2018), <https://www.law.com/delbizcourt/2018/03/21/is-stockholder-litigation-in-trouble-in-delaware-an-update/> [<https://perma.cc/G8RQ-5GTL>].

112. Matt Chiappardi, *Delaware Plaintiffs’ Attorneys Fear Exodus of Chancery Deal Suits*, LAW360 (May 19, 2017), <https://www.law360.com/articles/926199/del-plaintiffs-attys-fear-exodus-of-chancery-deal-suits> [<https://perma.cc/EG44-Q5X3>].

113. Alison Frankel, *As Deals Boom, Delaware Judges Are Leaving Shareholders’ Bar in the Cold*, REUTERS (Oct. 24, 2016), <http://reut.rs/2fa2Ylu> [<https://perma.cc/NNT3-PGLL>].

114. Bradley R. Aronstam & S. Michael Sirkin, Singh v. Attenborough: *Delaware Supreme Court Deals Another Blow to Stockholder Plaintiffs in M&A Litigation*, 20 M&A LAW. 5 (2016).

115. Matt Chiappardi, *supra* note 28.

116. *Court of Chancery Judicial Officers – Vice Chancellor Joseph R. Slight III*, *supra* note 20.

117. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

thought that our law and stockholder litigation was pretty well settled for the most part.

Had I known that I would join the court and would immediately thereafter bear witness to the brutal slaying of stockholder litigation in Delaware as we know it and, worse, that I would be asked to pick up a club and start beating the cases over the head (of course, I jest), I might have thought twice about my timing, because it does seem to be a time when the court is very much under the microscope. But as I will mention later in my remarks, I think it is one of the coolest times to be a judge on the court.

But to be sure, in all seriousness, the *Corwin* stakes are very high.¹¹⁸ For starters, as we discussed, the *Corwin* case does, in my view—and I think it would be hard to debate—impose a heightened pleading burden on stockholder plaintiffs in post-closing fiduciary duty litigation.¹¹⁹

But that burden is made all the more onerous by recent Delaware decisions that limit the stockholder plaintiffs' ability to obtain expedited pre-closing discovery. Take, for instance, the Delaware Supreme Court's 2014 decision in *C&J Energy Services, Inc.*¹²⁰ There, the court made clear that the Court of Chancery should not preliminarily enjoin the completion of a pending merger based on alleged flaws in the deal process "where no rival bidder has emerged to complain that it was not given a fair opportunity to bid, and where there is no reason to believe that stockholders are not adequately informed or will be coerced into accepting the transaction if they do not find it favorable."¹²¹

Leaders in our stockholder plaintiffs' bar have observed that, in practice, *C&J* eliminates "a basis for seeking expedit[ed pre-closing] discovery."¹²² That is a quote from Joel Friedlander's very thoughtful article discussing this dynamic, titled "Vindicating the Duty of Loyalty."¹²³

Also significant in the post-*Corwin* litigation landscape is the Court of Chancery's 2016 decision in *In re Trulia Inc. Stockholder Litigation*.¹²⁴

118. See generally *id.*

119. See generally *id.*

120. *C&J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr.*, 107 A.3d 1049 (Del. 2014).

121. *Id.* at 1072–73.

122. Joel Edan Friedlander, *Vindicating the Duty of Loyalty*, 72 BUS. LAW. 623, 643 (2017).

123. *Id.*

124. 129 A.3d 884 (Del. Ch. 2016).

Chancellor Bouchard, who authored that decision, discussed it at length, I gather, in his DeStefano Lecture two years ago.¹²⁵

There is not time to dissect that decision here tonight. Suffice it to say, it marked the end, for practical purposes, of disclosure-only settlements with broad releases, at least in the Delaware Court of Chancery.¹²⁶

Again, as a practical matter, the end of disclosure-only settlements meant the end of expedited discovery that was routinely taken in aid of those settlements. So, without discovery in either of those contexts, it is surely more difficult to plead a *Corwin*-worthy complaint.

From the perspective of stockholder plaintiffs and their attorneys, these developments are unfortunate and troubling. The concern, as it relates to *Corwin*, is that the inability to meet the heightened *Corwin* pleading standard means that “potentially meritorious damages claims for breach of the duty of loyalty or aiding and abetting will either be dismissed or they will not be filed [in the first place]”¹²⁷—at least not in Delaware. That is another quote from the Friedlander article, where I think that concern is very clearly articulated.¹²⁸

Friedlander goes on to identify several of the seminal recoveries achieved by plaintiffs in post-closing stockholder litigation and, I think legitimately, questions whether those results could have been achieved in a post-*Corwin* environment.¹²⁹

Beyond the litigator’s perspective of the *Corwin* effect, I think there are some concerns that you will hear from deal lawyers, at least under Chatham House Rules, and perhaps more freely articulated by judges.

First and foremost, after *Corwin*, there are fewer opportunities for Delaware courts to evaluate and opine on the propriety, or lack thereof, of corporate fiduciaries’ deal-related conduct. This is notable insofar as a number of landmark Delaware corporate law cases have a particular didactic quality to them, in that they address the conduct of corporate directors, officers, or advisors in connection with a particular transaction or structure of a transaction and then convey some message to the effect

125. See Andre G. Bouchard, *Disclosure Settlements—Before and After Trulia*, 22 FORDHAM J. CORP. & FIN. L. 4 (2017).

126. See generally *In re Trulia*, 129 A.3d 884.

127. Joel Edan Friedlander, *Vindicating the Duty of Loyalty*, 72 BUS. LAW. at 645.

128. *Id.*

129. *Id.* at 646–48.

of “do this” or “do not do this,”¹³⁰ sometimes explicitly, other times implicitly.

Former Chancellor Chandler, who is a personal hero of mine, referred to Delaware corporate law decisions as parables that counselors could take with them into the boardroom as support for the often tough advice they were having to give their clients. After *Corwin*, however, there are fewer opportunities for our courts to offer such parables to corporate counselors.

Insofar as questionable board conduct may now be cleansed by a *Corwin*-compliant stockholder vote, judicial discussion of the propriety of *Corwin*-cleansed board conduct in a given case is essentially hortatory in nature. Query, then, whether judicial commentary on the propriety of *Corwin*-cleansed board conduct is appropriate at all. While the Court of Chancery is a court of equity, there is a difference between adjudicating a dispute based on equitable principles and idle moralizing for the sake of hearing oneself speak.

The other concern is one that I think we as judges have to confess we do not fully appreciate. Not a single member of the Court of Chancery, and I think only one member of our Supreme Court, was actually in practice when the effects of *Corwin* were felt in the boardrooms.¹³¹ But I gather the effects are palpable.

It is, perhaps, harder to sell “do the right thing” advice when the prospect of injunctive relief or post-close damages is more remote. It is harder to bargain away deal protections from the sell side when the data tells us that jumping bidders are not regularly surfacing, and it has been a while since our courts have had an opportunity to weigh in on the propriety of deal protections or even, for that matter, deal processes more generally. Has *Corwin* given bidders more negotiating leverage?¹³²

130. See, e.g., *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) (holding that a board’s conduct in decision-making in the absence of an abuse of discretion is deemed as proper exercise of business judgment if the board of directors is disinterested, has acted in good faith, and with due care. The court also emphasized that it would substitute its own judgment for that of a board if it is shown by a preponderance of evidence that the directors’ decisions were primarily based on perpetuating themselves in office, or some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or being uninformed).

131. See generally *Court of Chancery—Judicial Officers*, <https://courts.delaware.gov/chancery/judges.aspx> [<https://perma.cc/B9VW-E6S9>] (last visited Nov. 13, 2018).

132. See generally *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

Then, of course, there is the impact on litigation activity. Here is what we know. Following *Corwin*, *C&J*, and *Trulia*—and we should probably throw the Delaware Supreme Court’s decision in *M&F Worldwide Corporation* (“*MFW*”)¹³³ into the mix—there has been a decline in merger litigation in the Court of Chancery. I draw this data from a terrific article published last year by Professors Fisch, Solomon, and Thomas, and Matthew Cain from the SEC, titled “The Shifting Tides of Merger Litigation.”¹³⁴

The data in Table 1 is widely publicized by now. It speaks for itself, and I am not going to dwell too long on it here. Filings are down, and the temporal relationship of this phenomena to *Trulia*, *Corwin*, *MFW*, and *C&J* is likely not a coincidence.

Table 1: Merger Litigation Filings by Deal Completion Year

Year	Percentage of all deals challenged in at least one shareholder lawsuit	Percentage of all deals challenged in a Delaware-filed shareholder lawsuit
2013	96%	52%
2014	91%	55%
2015	89%	60%
2016	73%	34%
2017 (first ten months)	85%	9%

While the filing numbers are down, I will say that the cases are still coming. I always have at least a handful under submission for decision, and I will confess that they are generally the most challenging and the most interesting cases that I have on my docket. I would be lying if I did not admit that I would not mind a little more of the deal litigation in the mix of cases I get to decide.

With that said, I think it is important to note that the court is certainly as busy as it has ever been, and the numbers bear that out. It is just now a different kind of busy.

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

134. Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603 (2018).

Before I leave the filing trends, I think it is worth raising the question of whether, given the internal affairs doctrine, the change in filing patterns reflected in the data means that stockholder plaintiffs are actually avoiding *Corwin* when they file outside of Delaware, at least in other state courts.¹³⁵

On the other hand, there is, of course, always looming the question of how our federal courts will address matters of state corporate law, including *Corwin*. But that is a subject very much for another day, and absolutely for another speaker. So, I leave it at that.

Let me turn now away from the reception of *Corwin* to some of the challenges.

There are six challenges I want to talk to you about. One is what I am going to call the post-closing disclosure dilemma. The next is the disinterested stockholder question. The third is what I will refer to as the larger proxies problem. The fourth is the difficulty of working through disclosures at the pleading stage. Fifth, I will talk to you a little bit about controlling stockholder issues. Lastly, where are we now on *Revlon* and *Unocal* in this post-*Corwin* world?

I will confess that I am going to raise lots of questions. I will offer very few answers. I am not sure how meaningful that will be to you, but I think some of these questions are some you maybe have not thought that much about.

The first is the post-closing disclosure dilemma. Here is the scenario:

A corporation's board of directors authorizes a corporate transaction and recommends that the corporation's stockholders vote to approve the transaction. Assume there is no controlling stockholder. The board's disclosures to stockholders concerning the transaction omit or misstate one or more material facts. A stockholder, say Investor X, discovers the disclosure violations prior to the stockholder vote on the transaction, but does not undertake to remedy them before the stockholder vote because he fears that the board will try to correct the disclosures and moot his claim.

The stockholder vote to approve the transaction occurs and approval is overwhelming. Investor X then brings a post-closing breach of fiduciary duty action against the directors, seeking to recover damages, and pleads either that the directors breached their fiduciary duties by failing to fully and fairly disclose to stockholders all material transaction-related information before the vote on the transaction, or that the directors

135. See *id.* at 631.

breached their fiduciary duties by authorizing the transaction following a bad deal process, but then raises the disclosure allegations as a means to demonstrate, at the pleading stage, that *Corwin* does not apply because the vote approving the transaction was not fully informed.

In either circumstance, the plaintiff is likely to face the post-closing disclosure dilemma. Specifically, if Investor X asserts the disclosure violations as an affirmative claim, the defendants will likely argue that the claim should be barred by laches because it was not asserted pre-vote.

If the disclosure violations are asserted, not as an affirmative claim but as a basis to avoid *Corwin*, then the defendants will argue that the plaintiff should be estopped from pressing an inadequate disclosure argument, again because he deliberately chose not to bring a disclosure claim when it counted, before the stockholders were asked to vote on the transaction.

Defendants might also question Investor X's fitness to serve as a class representative because he kept important information from the other members of the putative class when they needed it most.

But we know that Investor X kept his disclosure claims in his pocket for a reason. He knew if he put them on the table before the vote, the board would issue corrective disclosures and potentially moot the claim. He needs the disclosures to plead around the *Corwin* defense that he knows is coming. Hence the dilemma.

On one hand, allowing post-closing disclosure challenges by stockholder plaintiffs such as Investor X arguably encourages and possibly rewards litigation gamesmanship by stockholder plaintiffs and their attorneys.

On the other hand, this strategy may well be justifiable on a net value basis. Is the class better served by a successful post-close damages recovery that exposes bad behavior than by a pre-close disclosure fix that invokes *Corwin* cleansing?

I am not going to try to answer that question because it has been before me before, and is likely going to come before me again. It is before my colleagues now. It is an issue that is being raised regularly and I suspect at some point will be decided, probably not too far off. My purpose now is to just raise the question.

While we are on disclosure claims—we talked about this at the roundtable earlier—what do those really look like post-closing? What does an affirmative disclosure claim that gets through a *Corwin* defense become once you are in litigation?

Sure, it might have been material to disclose why the chairman of a selling board abstained from voting to approve a sale of the corporation,¹³⁶ but if you are actually pressing that as an affirmative claim, how do you do that? What does it look like at trial? Quasi-appraisal?¹³⁷ And what do you recover for that if that is all that there is left?

I do not know the answer to those questions. They are ones I have not had to confront yet but suspect that I will.

Another question that, for now, will remain unanswered is what votes to count in the disinterested stockholder tally. In the *Tesla* case that I just decided, I noted in a footnote that the plaintiffs had pled in their complaint that a large block of the Tesla stockholders that voted for the merger actually held stock, perhaps substantial stock, in the target company that Tesla acquired.¹³⁸

The question was raised: should the votes of those stockholders count when the court is determining whether a majority of the disinterested stockholders voted to approve the transactions when the stockholders may have had a stake in, and therefore may have been interested in, that transaction?

The plaintiffs in the *Tesla* case said, “No, those votes should not count.”¹³⁹ I ultimately did not have to reach that issue, at least at the motion-to-dismiss stage. I am told that the issue has been raised in other cases now, so it is an issue that is percolating.

We also have what I refer to as a larger proxies problem. Maybe it is just a problem for me because I have had to read a lot of proxies since I have taken this job in connection with public M&A transactions. I just

136. See *Appel v. Berkman*, 180 A.3d 1055, 1057–58 (Del. 2018) (so holding).

137. See *In re Orchard Enters., Inc. Stockholder Litig.*, 88 A.3d 1, 42 (Del. Ch. 2014) (“[Q]uasi-appraisal damages are available . . . when a [corporate] fiduciary breaches its duty of disclosure in connection with a transaction that requires a stockholder vote. The premise for the award is that without the disclosure of false or misleading information, or the failure to disclose material information, stockholders could have voted down the transaction and retained their proportionate share of the equity in the corporation as a going concern. Quasi-appraisal damages serve as a monetary substitute for the proportionate share of the equity that the stockholders otherwise would have retained.”); *id.* at 53 (“In my view, in an appropriate case Delaware law continues to recognize the possibility of a post-closing award of damages as a remedy for a breach of the fiduciary duty of disclosure.”).

138. *In re Tesla Motors, Inc. Stockholder Litig.*, C.A. No. 121711-VCS, 2018 WL 1560293, at *9 n.183 (Del. Ch. Mar. 28, 2018).

139. *Id.*

have to tell you that they are really dense. There is a lot in them, they are heavily lawyered, and, at times, they are a challenge to get through.

Given that a *Corwin*-compliant stockholder approval of a transaction results in pleading-stage business judgment deference, there is a concern certainly that has been expressed that *Corwin* may incentivize directors to overwhelm stockholders with proxy disclosures concerning the transaction, and the process that led to the transaction, before the stockholders vote on it.¹⁴⁰ In that case, stockholder “yes” votes may not in fact reflect that stockholders have “decided that the transaction is a fair exchange,” borrowing from the language in *Harbor Finance*.¹⁴¹ Absent that decision, there is no basis for *Corwin* cleansing. Again, this notion of packing information into a proxy and then asking for a vote is a concern, and it is one I want to address again later.

Further on the disclosure point, I suspect we may well see—if we have not already—arguments that certain matters that were never thought to be material may be material now in the post-*Corwin* world. For instance, what about disclosures about *Corwin* itself? Does the board have to disclose to stockholders what their yes vote means with regard to post-close challenges to the transaction? Is there more or different disclosure required about appraisal rights in the wake of recent developments?

An informed vote is a *prima facie* element of a *Corwin* defense, therefore I think we can expect to see more and more creative disclosure arguments as the doctrine evolves—“devolves,” I almost said. Freudian.

What I will say too about disclosure claims is that they are challenging to decide at the pleading stage, and they are challenging to decide in a post-close environment where the deal is done, and probably challenging to argue in that environment as well.

I think, at least anecdotally, we seem to be seeing more complaints where plaintiffs are alleging that a minority block holder is a controlling stockholder, perhaps as a means to avoid the *Corwin* analysis *ab initio*.¹⁴²

This causes our *Corwin* jurisprudence, at least from my observation, to take on a certain predictable cadence. We cannot get to the *Corwin*

140. See Robert S. Reder & Victoria L. Romvary, *Delaware Court Determines Corwin Not Available to “Cleanse” Alleged Director Misconduct*, 71 VAND. L. REV. EN BANC 131, 141-42 (2018) (discussing *In re Massey* to raise concerns regarding proxy disclosures and whether disclosures of certain transactions before a stockholder vote are “integral transactions” requiring disclosure or are extraneous information simply inserted to “strong-arm a favorable vote.”).

141. *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 901 (Del. Ch. 1999).

142. See generally *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

defense until we decide whether there is a conflicted controller. If not, we go to *Corwin*. If *Corwin* does not apply, then we turn to 102(b)(7) and *Cornerstone*.¹⁴³ You walk through this cadence in each case.

I am not saying that is a bad thing. I am not saying it is a good thing. I am just saying it is happening. We are seeing that flow occur in nearly every motion to dismiss that we are deciding.

Last but not least, where do *Revlon* and *Unocal* stand post-*Corwin*? That is a lecture that is itself probably worthy of an hour's discussion.

Corwin tells us that these are “not tools designed with post-closing money damages in mind.”¹⁴⁴ That was, I think, a thoughtful observation, but tell that to the folks involved in the *Rural/Metro* case.¹⁴⁵ I think that would be news to them.

But, in any event, what I will say at this point is that the Supreme Court's recent order just last month in the *Kahn v. Stern* case can be read to indicate that the court still does see a role for *Revlon* to play in a post-close damages action.¹⁴⁶

Right now, I think we just have to see how this plays out. A few cases have gone beyond *Corwin*, have broken through that defense, and we have to see—we had some discussion of this in the roundtable earlier—what are the burdens, what are the standards that are going to apply, and what are those cases going to look like as they approach trial? I think that is a stay-tuned question.

143. See DEL. CODE ANN. tit. 8, § 102 (2015). See also *In re Cornerstone Therapeutics Inc., Stockholder Litig.*, 115 A.3d 1173, 1175 (Del. 2015) (holding that “[a stockholder] plaintiff seeking only monetary damages must plead non-exculpated claims against a director who is protected by an exculpatory charter provision to survive a motion to dismiss, regardless of the underlying standard of review for the board's conduct . . .”).

144. 125 A.3d at 312.

145. *In re Rural Metro Corp. Stockholder Litig.*, 88 A.3d 54 (Del Ch. 2014) (holding that selling board's financial advisor was liable to the corporation's stockholders in damages for aiding and abetting the board's breach of fiduciary duty in connection with a sale of the company); *In re Rural Metro Corp. Stockholder Litig.*, 102 A.3d 205 (Del. Ch. 2014) (assessing damages against the board's financial advisor in an amount equal to 124% of the deal price).

146. *Kahn v. Stern*, 183 A.3d 715 (Del. 2018) (Table) (“To the extent . . . that the Court of Chancery's decision suggests that it is an invariable requirement that a plaintiff plead facts suggesting that a majority of the board committed a non-exculpated breach of its fiduciary duties in cases where *Revlon* duties are applicable, but the transaction has closed and the plaintiff seeks post-closing damages, we disagree with that statement.”).

As for *Unocal*, the Chancellor in the *Paramount Gold & Silver Corp. Stockholder Litigation*¹⁴⁷ case did not have to reach the question of whether *Unocal* would continue to apply to a review of defensive actions notwithstanding fully informed and uncoerced approval of the transaction by stockholders. In other words, in my view at least, the question of whether *Corwin* would cleanse a defensive action that otherwise might be found to be unreasonable under *Unocal* review remains unanswered.

So, there are many interesting issues and challenges to confront going forward as we grapple with *Corwin* and its application. I am quite certain there are more than I have just identified.

What, then, is the *Corwin* after-action report—I am not quite sure why I came up with that title, but I am going with it—at least according to Slight's? Not that it matters, but I do personally think that *Corwin* was correct as a matter of law and as a matter of doctrine.¹⁴⁸

Vice Chancellor Laster explained the doctrinal rationale most clearly, in my view, in his 2014 pre-*Corwin* article entitled “The Effect of Stockholder Approval on Enhanced Scrutiny,”¹⁴⁹ which is a mandatory read for all of my law clerks and, I think, for law students to get some handle on the shifting standards of review. This is an excellent article for that too.

What Vice Chancellor Laster tells us is that stockholders are “qualified decision makers.”¹⁵⁰ And that is what we are looking for in our analysis of the sort of in-the-rearview-mirror transactions: who decided these questions?

When the decision-makers on the front line, the board of directors, are disqualified by conflict or otherwise, it is appropriate to defer next to a decision-maker with skin in the game before the court steps in and assumes that role. I think Vice Chancellor Laster explains the rationale for that very clearly.¹⁵¹ Stockholders are those qualified decision-makers.

But given the pleading-stage deference that is at stake, the key, as in most things, is to apply the *Corwin* doctrine carefully and thoughtfully.¹⁵²

147. *In re Paramount Gold & Silver Corp. Stockholder Litig.*, C.A. No. 10499–CB, 2017 WL 1372659 (Del. Ch. Apr. 13, 2017).

148. *See generally* 125 A.3d 304.

149. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443 (2014).

150. *Id.* at 1459, 1466.

151. *See id.*

152. *See generally* 125 A.3d 304.

Chancellor Bouchard aptly observed that *Corwin* is not the great eraser.¹⁵³ We have to be careful that we apply the doctrine as intended and that egregious loyalty breaches do not get swept away with the stockholder vote.

We also have to appreciate the pleading challenges created by *Corwin*,¹⁵⁴ and we have to be faithful to the reasonably conceivable standard embedded in our Rule 12(b)(6).¹⁵⁵

I have always wondered what the opposite of “reasonably conceivable” is. Is it delusional? These are the things that keep me up at night. “Reasonably conceivable” is just—it is a Delaware thing. That is all I can say. But we do have to wrestle with the standard, try to understand it, and apply it in a thoughtful way.

Can Section 220 inspections aid plaintiffs in meeting the pleading burden?¹⁵⁶ I think yes, at least to some extent. However, as a court, we have to be mindful of timing issues, and we have to be willing to expedite 220 matters to meet the deal timeline. Of course, plaintiffs have to file on time. I know that is easier said than done.

Then when they do file, the plaintiffs are still going to have to state a proper purpose for inspection, which can be a challenge in the midst of an unfolding transaction.¹⁵⁷ They are going to have to be precise in what they are asking for.¹⁵⁸ The fact of the matter is 220 inspection is more limited than full-blown discovery.¹⁵⁹ That standard will remain. That standard has to remain, just as the “proper purpose” standard must remain.

153. *In re Massey Energy Co. Deriv. & Class Action Litig.*, 160 A.3d 484, 507 (Del. Ch. 2017) (“The policy underlying *Corwin*, to my mind, was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions preceding their decision to undertake a transaction for which stockholder approval is obtained.”).

154. *See generally* 125 A.3d 304.

155. *See* FED. R. CIV. P. 12(b)(6).

156. *See generally* DEL. CODE ANN. tit. 8, § 220 (2010).

157. *Seinfeld v. Verizon Commc’ns, Inc.*, 909 A.2d 117, 121 (Del. 2006) (“In a [S]ection 220 action, a stockholder has the burden of proof to demonstrate a proper purpose [for inspection] by a preponderance of the evidence.”).

158. *See Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (“[Stockholder] plaintiffs may [obtain] relevant books and records of the corporation under Section 220 of the [DGCL], if they can ultimately bear the burden of showing a proper purpose and make specific and discrete identification, with rifled precision, of the documents sought.”) (footnotes omitted).

159. *See* *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 570 (Del. 1997) (“The scope of the production which the [trial court] ordered in this case is more

But I do see a role for 220 to play to assist plaintiffs in pleading a better complaint, one that perhaps is more *Corwin*-compliant.

Lastly, I think we have to pay attention to the “*Corwin* effect.”¹⁶⁰ Some have suggested that we rethink the stockholder yes vote, the so-called two-box solution: ask stockholders to check one box for approval of the deal process, one box for deal price, or perhaps several boxes for deal process.

Others, including myself and some other members of the court, have taken a slightly different view on the vote. One vote is fine. It is certainly far more practical. But do not pack too much into that vote.

How much is too much will be a case-specific inquiry for sure, but the court should always be mindful of that concern and should not shy away from calling foul when a board piles on in its disclosures. There gets to be a point where there are so many aspects of a deal process that are off the rails where you cannot say that a yes vote approved all of it. Is it coercion? Is it not fully informed? Again, those are questions that have yet to be answered. But there is only so far that the assumption that a yes vote means yes to everything can take us.

Our courts have not fully hashed out the concepts of situational and structural coercion. In these doctrinal spaces, I do think there is room for creative pleading. I think going forward, we are going to see cases that add some flavor or contour to the situational and structural coercion analysis.

Vice Chancellor Glasscock has spoken about this publicly and eloquently, so I do not want to steal his thunder, but he does see that as an area where the *Corwin* law is going to develop perhaps most rapidly.

Bottom line, *Corwin* is very much a work in progress. That is one of the many reasons that, in my view at least, it is a pretty cool time to be a judge on the Court of Chancery. As I approach my thirtieth year as a Delaware lawyer, which is just mind-blowing to me, I can tell you this is the best job I have ever had.

With that, I thank you for listening. I think we have some time for questions, I hope, and I definitely encourage them—and more than

akin to a comprehensive discovery order under Court of Chancery Rule 34 than a Section 220 order. The two procedures are not the same and should not be confused. A Section 220 proceeding should result in an order circumscribed with rifled precision.”); *Khanna v. Covad Comm’ns Grp., Inc.*, No. 20481-NC, 2004 WL 187274, at *9 (Del. Ch. Jan. 23, 2004) (“A Section 220 action is not a substitute for discovery under the rules of civil procedure.”).

160. See generally 125 A.3d 304 (Del. 2015).

questions, comments. There are people in the room substantially smarter than me, and I would love to hear your thoughts about this interesting area of our law.

I do, by the way, think everything is going to be okay.