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[*251] Introduction

There is a constant stream of litigation that challenges board decisions to enter into corporate merger and acquisition transactions. [2]Plaintiffs characterize these actions as a dispute between "faithless directors" and "victimized shareholders." [3]The Delaware Supreme Court's decision in *Corwin v. KKR Fin. Holdings LLC* has been cited as one of the most significant developments in Delaware corporate law in the last fifteen years. [4]The standard of review is crucial in merger litigation, which is why this case is considered to be a pivotal point in Delaware jurisprudence. [5]Literature on *Corwin* suggests that it reverses about 30 years of Delaware doctrine on judicial review of actions by boards of target companies. [6]In *Corwin v. KKR Fin. Holdings LLC*, the plaintiffs challenged a stock-for-stock merger amongst KKR & Co. L.P. and KKR Financial Holdings LLC.

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[1] Juris Doctor Candidate. Rutgers Law School, Newark 2020.

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[2] Franklin A. Gevurtz, *Cracking the Corwin Conundrum and Other Mysteries Regarding Shareholder Approval of Mergers and Acquisitions*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Oct. 31, 2018), https://corpgov.law.harvard.edu/2018/10/31/cracking-the-corwin-conundrum-and-other-mysteriesregarding-shareholder-approval-of-mergers-and-acquisitions/.

[3] *Id.*

[4] Richard Hall, *The Hot Topic in the United States M&A -- Corwin*, CRAVATH, SWAINE & MOORE LLP, https://www.cravath.com/files/Uploads/Documents/Publications/3850784_1.pdf.

[5] Brandon Mordue, The Revlon Divergence: Evolution of Judicial Review of Merger Litigation, 12 VA. L. & BUS. REV. 532, 534 (2018).

[6] *Id.*

[7]The plaintiffs' primarily argued that the transaction was presumptively subject to the fairness standard of review because the primary business of KKR Financial Holdings was financing KKR's leveraged buyout activities, and rather than having employees manage the company's daily operations, KKR Financial Holdings was managed by an affiliate of KKR, under a contractual agreement that could only be terminated by KKR Financial Holdings through a termination fee. [8]Consequently, plaintiffs' claimed that KKR was a **[*252]** controlling stockholder of Financial Holdings, which was not a corporation but instead an LLC. [9]The Court of Chancery dismissed the plaintiff's complaint. [10]The Delaware Supreme Court held that the business judgment rule is the appropriate standard of review for a post-closing damages action "when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, un-coerced majority of the disinterested stockholders." [11]The court emphasized that this business judgment rule is best suited for facilitating wealth creation through corporate form. [12]

Since being decided in 2015, *Corwin* has had several implications on the legal realm of mergers and acquisitions. *Corwin* has helped shield defendant directors from litigation arising out of corporate sales and mergers. [13]Essentially, the Delaware courts have suggested that "shareholder voting does a much better job than litigation in protecting dispersed shareholders against director abuse in the M&A context because shareholders are better decision makers than a judge if certain conditions are present." [14]The Delaware courts have expanded *Corwin* to provide the business judgment rule standard of review when a majority of the stockholders accept a non-coercive tender offer and have explicitly acknowledged that *Corwin* serves as a limitation on two important Delaware decisions: *Revlon*, which deals with the responsibilities of directors when selling a target company and *Unocal*, which deals with takeover defenses. [15]Despite coercion being an important factor in determining whether *Corwin* cleansing applies, Delaware courts have not provided a bright line rule for what constitutes coercion of **[*253]** stockholders and what it means to be fully informed. [16]Moreover, the Delaware Court of Chancery seems to have reservations about granting motions to dismiss shareholder litigation based on *Corwin* grounds when the target company is in the middle of a restatement process. [17]

In this note, I assess the strength of the *Corwin* doctrine. To answer this, it is necessary to understand how the rationale behind *Corwin* fares when compared to both, relevant Delaware jurisprudence and the nature of mergers and acquisitions ("M&A"). Subsequently, I will address the concerns surrounding *Corwin* and illustrate how they are not problematic. This requires close examination of the un-coerced and full disclosure of the doctrine because

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7 ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306 (Del. 2015)***.

8 ***Id. at 306***.

9 ***Id. at 307***.

10 ***Id. at 306***.

11 ***Id. at 305-06***.

12 ***Id. at 314***.

13 Gevurtz, *supra* note 2.

14 Matteo Gatti, *Reconsidering the Merger Process: Approval Patterns, Timeline, and Shareholders' Role*, 69 HASTING L. J. 835, 850 (2018).

15 Hall, *supra* note 4.

16 *Id.*

17 Meredith E. Kotler, Roger A. Cooper, and Mark E. McDonald, *Second Corwin Denial Due to Restatement Process*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Dec. 16, 2018) https://corpgov.law.harvard.edu/2018/12/16/second-corwin-denial-due-to-restatement-process/.

the decisions finding *Corwin* cleansing to be inapplicable have turned on both prongs. Delaware courts have provided useful guidelines that should be considered when evaluating both prongs. But, the courts, in future decisions, will likely discuss both requirements in further detail because they are context dependent. As they have done so in the past, they will seek to protect the interests of shareholders while still allowing defendant directors to reap the benefits of business judgment rule. I will then consider whether the concerns surrounding *Corwin* and its progeny outweigh the benefits it provides in the M & A realm.

Before I continue, a couple of disclaimers are necessary. First, overall, the purpose of this note is not to declare the doctrine set forth in *Corwin v. KKR Fin. Holdings LLC* as flawless. There are certain shortcomings with the *Corwin* doctrine, but that does not take away from the fact that this doctrine is grounded in Delaware law and therefore, will not be going away anytime soon. Instead, this note seeks to evaluate the functionality of the doctrine in the realm of mergers and acquisitions. Although imperfect, it does address the problem of a constant stream of **[*254]** litigation challenging board decisions to enter corporate M&A transactions without sacrificing accountability of board members. Second, the author's intention is not to create universal applicable frameworks for both the "un-coerced" shareholder requirement or the full disclosure requirement. That would be an improbable task since the applicability of *Corwin* cleansing is fact sensitive. Rather, the author is providing a framework that has been provided by recent decisions interpreting *Corwin's* applicability. Moreover, these recent decisions will illustrate whether *Corwin* serves as a complete bar on M&A litigation or allows for successful claims to be brought.

This note will begin by examining, in Part I, whether the Delaware Supreme Court's decision in *Corwin* is consistent with Delaware law dealing with shareholder ratification and the business judgement rule. In Part II, the author will highlight the concerns of critics who believe that applying the business judgment rule when the majority of disinterested, fully informed, uncoerced shareholders approve the transaction has ultimately created an unreasonable bar for shareholders to succeed in post-closing damages lawsuits. In Part III, the author will explain that these concerns are misguided. For instance, even after the Delaware Supreme Court decided *Corwin*, shareholders have successfully brought post-closing damages lawsuits that have not been subject to Corwin cleansing. Moreover, deference to a majority vote is warranted in today's market, where shareholders are capable of being more informed than before. In Part IV, the author will explain how the benefits of *Corwin* outweigh concerns about its unintended consequences. This note's conclusion will be laid out in Part V.

I. The Consistency of the Corwin Doctrine in Delaware Jurisprudence

As stated earlier, it is well recognized that the Delaware Supreme Court's decision in *Corwin v. KKR Fin. Holdings LLC* has essentially reversed 30 years of Delaware doctrine on judicial **[*255]** review of actions by a target company's board of directors. [18]Essentially, it has been stated that the Delaware Supreme Court abandoned the enhanced scrutiny found under *Unocal* and *Revlon* for the deferential business judgment rule, which applies in a transaction where the majority of voting disinterested shareholders approving the transaction are fully informed and un-coerced. [19]Despite changing the standard of review, it appears that *Corwin* remains consistent with Delaware law. [20]For instance, it applies the basic principle of stockholder ratification that has traditionally existed under the common law. [21]

a. Common law principle of stockholder ratification

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[18] Hall, *supra* note 3.

[19] ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305-306 (Del. 2015)***; *Revlon, Inc. v. Macandrews & Forbes Holdings, Inc. 506 A.2d 173, 181 (Del. 1986)*; *Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954-55 (Del 1985)*; Steven M. Haas, *The Corwin Effect: Stockholder Approval of M&A Transactions*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Feb. 21, 2017), *https://corpgov.law.harvard.edu/2017/02/21/the-corwin-effect-stockholder-approval-of-ma-transactions/*.

[20] *See* Mordue, *supra* note 5, at 575; Haas, *supra* note 19.

[21] Haas, *supra* note 19.

Corwin's deference to shareholder ratification is not a new phenomenon in Delaware corporate law, instead, it is essentially an adoption of the basic principle of shareholder ratification that is rooted in Delaware common law. [22]The Delaware courts have given shareholder ratification the effect of extinguishing breach of fiduciary claims, changing the standard of review, and shifting the burden of proof. [23]Thus, depending on the situation, shareholder ratification may significantly impact a challenge transaction. [24]

1. Using Shareholder Ratification to Dismiss Claims

Exploration of the impact of shareholder ratification dates back to 1952, where it was being discussed as a method for dismissing shareholder claims based on a breach of fiduciary **[*256]** duty. [25]In *Gottlieb v. Heyden Chem. Corp.*, a stockholder filed a lawsuit challenging the decision of director stockholders to issue themselves stock options without first acquiring shareholder ratification. [26]In his opinion, Justice Tunnell explained the impact that shareholder ratification has and the lack thereof. [27]Where the director's decision is ratified by a shareholder vote, the burden of proof is shifted to the challenging shareholder to show that no one of ordinarily sound business judgment would believe that "consideration furnished by the individual directors is a fair exchange for the options conferred." [28]Here, the scope of the court's inquiry is limited to determining whether the terms of the transaction amount to waste, or whether the business judgement rule is applicable. [29]On the other hand, where such ratification is not obtained, the directors have the burden of proving their utmost good faith and the inherent fairness of the transaction. [30]In this instance, the court would be required to exercise its own judgment in deciding if the directors employed the utmost good faith and the most scrupulous good faith. [31]Despite this distinction the court refrained from utilizing shareholder ratification to throw out the plaintiff's case, emphasizing that there was no method in Delaware's jurisprudence for suppressing baseless suits without obstructing just ones. [32]

Despite the Delaware Supreme Court's reluctance in *Gottlieb v. Heyden Chem. Corp.*, Delaware jurisprudence eventually adopted two situations where a fully informed shareholder vote serves to dismiss a shareholder claim. [33]First, shareholder ratification can dismiss a **[*257]** shareholder claim when the board of directors acts in good faith, but exceeds its actual authority. [34]Second, shareholder ratification can dismiss a shareholder claim

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22 *Id.*

23 Craig W. Palm & Mark A. Kearney, *A Primer on The Basics of Directors' Duties in Delaware: The Rules of the Game (Part II)*, 42 VILL. L. REV. 1043, 1086 (1997).

24 *Id.*

25 *Id.* at 1107.

26 *Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952)*.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id. at 59*.

33 Palm & Kearney, *supra* note 23, at 1086.

34 *Id.*

when the board "does not adequately inform itself before approving a transaction, but receives fully informed, disinterested shareholder approval." [35]

2. Ensuring effectiveness of Shareholder Ratification

Specific mechanisms have been set to ensure the effectiveness of shareholder ratification, which is crucial in determining the impact it will have on the conflicted transaction. [36]First and foremost, a distinction between void and voidable acts is necessary. [37]Void acts are defined as acts that constitute waste, gift, or fraud. [38]These kinds of acts are an exception to the shareholder ratification defense and can only be cured by a unanimous shareholder vote. [39]Voidable acts, on the other hand, are acts that the board of directors performed in the interest of the corporation but are beyond its authority. [40]Unlike void acts, voidable acts are curable by shareholder ratification. [41]Differentiating between the voidable and void acts is only the first step of the inquiry. [42]Courts will then analyze whether shareholder approval of the transaction at issue was **[*258]** the result of full disclosure by the board to the shareholders, a lack of coercion, and ratification by a majority of independent shareholders. [43]

Full disclosure of all material information to shareholders is paramount in determining the validity of shareholder approval. [44]The importance of full disclosure was exemplified in *Smith v. Van Gorkom*, where the Supreme Court of Delaware reversed the trial court's decision to apply the business judgment rule in favor of director-defendants because of the lack of full disclosure. [45]Justice Horsey, in his opinion, reiterated that the settled rule in Delaware was that an attack on a transaction typically fails when the majority of fully informed stockholders ratify it. [46]Additionally, Justice Horsey addressed the question of what full disclosure actually entailed. [47]In *Lynch v. Vickers Energy Corp.*, a case that the Delaware Supreme Court decided eight years prior, the court held that directors were required to disclose all facts germane to the conflicted transaction in an atmosphere of complete candor, which was a standard that was interpreted differently by the parties in *Van Gorkom*. [48]Plaintiffs argued that the standard should have been one of "completeness," while defendants argued that it

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35 *Id.* at 1107; *see also* Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (recognizing that a fully informed shareholder vote could cure a board's uninformed decision to merge. Despite this, the court ultimately determined that the lower court committed reversible error by applying the business judgment rule in favor of director defendants. The court reasoned that defendants failed to meet their burden of showing that the shareholder approval "resulted from a fully informed electorate." Moreover, the defendant directors breached their fiduciary duty to stockholders by 1) failing to inform themselves of all the information reasonably and relevant to them; and 2) failing to disclose all material information to stockholders).

36 Mary A. Jacobson, *Interested Director Transactions and the (Equivocal) Effects of Shareholder Ratification*, 21 DEL. J. CORP. L. 981, 991-93 (1996).

37 *Id.* at 991-92.

38 *Id.* at 992.

39 Palm & Kearney, *supra* note 23, at 1107-08.

40 *Id.* at 1108.

41 *Id.*

42 *Id.*

43 Jacobson, *supra* note 36, at 991-93.

44 Stroud v. Grace, 606 A.2d 75, 86-87 (Del. 1992) (emphasizing that a fully informed shareholder vote ratifies board action and shifts burden to the challenger of the transaction. In addition, it is a wellestablished principle that disclosure is based on a standard of materiality).

should have been one of **[*259]** "adequacy." [49]Ultimately, the court decided that it was one of materiality. [50]In a subsequent case, *Rosenblatt v. Getty Oil Co.*, the Supreme Court of Delaware elaborated on the materiality standard by stating that an omitted fact is material when there is a substantial likelihood that "a reasonable shareholder would consider it important in deciding how to vote." [51]

As stated earlier, the absence of coercion is another factor that carries significant weight in determining the validity of shareholder ratification. [52]It has been established that shareholder ratification must be both voluntary and meaningful. [53]Furthermore, when analyzing the validity of shareholder ratification, the term "coercion" is extended beyond its core meaning -- the utilization of physical force to overcome the will of another -- to apply in situations where the alleged coercion is the result from an act meant to induce the will of will of another party by creating unpleasant consequences for an outcome sought to be discouraged or by offering inducements to outcome sought to be encouraged. [54]Delaware jurisprudence has illustrated that coercion can occur in several ways. [55]For instance, it can occur in the following two instances: 1) when the board of directors omit or disclose information to pressure shareholders into accepting certain terms or to obscure the real reasons behind an action; and 2) when there is a perception that the parent company may retaliate against an unfavorable vote by its subsidiary. [56]

Other contexts in which coercion claims arise include restructuring or recapitalization transactions, shareholder voting regarding transactions or proposals not involving interested **[*260]** parties, defensive measures in response to unsolicited takeover attempts, and shareholder voting regarding transactions that involve controlling shareholders. [57]Despite all the contexts in which coercion claims have arisen, Delaware courts have not articulated a clear standard. [58]Justice Allen, in his opinion *Katz v. Oak Industries Inc.*, recognized the dilemma of having the term "coercion" covering multiple situations. [59]In an attempt to reconcile this gap, he emphasized that for "coercion" to have meaning for in the legal analysis, a normative judgment should be attached to the concept in each case ("inappropriate coercive" or wrongfully coercive", etc.) [60]He then further

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[45] *Smith v. Van Gorkom, 488 A.2d 858, 891-3 (Del. 1985)* (finding the following five deficiencies in the defendant directors' disclosure to the shareholders: 1) the Board's lack of valuation information; 2) information in the Romans report in the Supplemental Proxy Statement that would invalidate the fairness of the merger price of $ 55; 3) not including the Board's failure to assess the premium offered in terms of other relevant valuation techniques; 4) recital of certain events preceding the September 20 meeting, 5) having information readily accessible to Board or information already at their disposal that should have been included in the Original Proxy statement but not disclosing that information until later in the Board's Supplemental Proxy Statement).

[46] *Id. at 890* (citing *Gerlach v. Gillam, 139 A.2d 591, 593 (1958)*.

[47] *Id.*

[48] *Id.*; Lynch v. Vickers Energy Corp., 383 A.d 278, 281 (Del. 1977) (interpreting "germane" to mean information that a reasonable shareholder would consider "important in deciding whether to sell or retain stock.").

[49] *Van Gorkom, 488 A.2d at 881-91 (Del. 1985)*.

[50] *Id.*

[51] *Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985)* (emphasizing that the materiality standard set forth in *TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, (U.S. 1976)* applies in Delaware cases).

[52] Jacobson, *supra* note 36, at 996-97

[53] *Id.*

[54] *Katz v. Oak Industries, Inc., 508 A.2d 873, 879 (Del. Ch. 1986)*.

explained that legal relevance does not fall on the "conclusory term 'coercion' itself, but instead falls on the norm that leads to the adverb modifying it." [61]

It has also been specified in Delaware jurisprudence that approval from a majority of disinterested shareholders is a necessary condition when ratifying a transaction. [62]Disinterested shareholders are those who are not interested in the transaction in question. [63]When it comes to majority dominated companies, minority shareholders may be adversely affected by the interested transaction, especially if a controlling or dominant shareholder stands to benefit from the transaction. [64]In this situation, directors should concern themselves with whether the **[*261]** minority shareholders received fair treatment. Although not required, a majority of the minority voting provision may cure this situation by adding to the fairness of the transaction. [65]

The three specific mechanisms that have consistently been used by the Delaware courts to ensure the effectiveness of shareholder ratification are the same ones that the Delaware Supreme Court embraced in its decision in *Corwin*. [66]These mechanisms have served as a double-edged sword, on one side, it serves to protect the interests of the shareholders, and on the other side, compliance with these mechanisms allows defendant directors to fall within the protection of the business judgment rule. [67]Adoption of these mechanisms allows shareholder ratification to serve its intended purpose, to provide defendant directors the benefit of the doubt in situations where the majority of shareholders made the collective decision to approve the transaction. [68]In seeking to establish an effective system for shareholder ratification, Delaware courts have indicated that shareholder ratification is valuable. [69]Also evident from Delaware case law, both before and after *Corwin*, is that courts have refrained from providing well-established definitions for these mechanisms. [70]

b. Business Judgment Rule at the Core of Delaware Law

The courts of Delaware apply the following standards of review when determining whether corporate fiduciaries have complied with their duties of care and loyalty: 1) business **[*262]** judgment rule, 2) enhanced scrutiny, and 3)

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55 Jacobson, *supra* note 35, at 997.

56 *Id.*

57 FINDLAW, https://corporate.findlaw.com/corporate-governance/the-doctrine-of-inequitable-coercionunder-delaware-law.html (last visited on Mar. 6, 2020)

58 *Id.*

59 Oak Industries, Inc., 508 A.2d at 880.

60 *Id.*

61 *Id.*; ***FINDLAW, supra note 57*** ("[F]or example, the actionable coercive effect of stock exchange delisting can turn on whether the company intends to seek delisting -- as in *Eisnberg* -- opposed to whether delisting is merely disclosed as a potential consequence of the transaction -- as in *Williams*.")

62 Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 59 (Del. 1952) (emphasizing that shareholders should be both fully informed and independent for there to be formal approval); Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976) (stating that the defendants were not relieved from the burden of proving fairness because only one-third of disinterested shareholders approved the action).

63 Jacobson, *supra* note 36, at 1001.

64 Id. at 995.

65 Id. at 995; *see also* Kahn v. Lynch Communication Sys., 638 A.2d 1110, 1116 (Del. 1994).

entire fairness. [71]Each of these standards are invoked in different situations. [72]Historically, the decisions of the corporation's board of directors have been insulated from judicial review and have been protected by the business judgment rule. The business judgment rule provides a presumption that, "in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in honest belief that the action taken was in the best interest of the company." [73]Director conduct is upheld by courts unless there is no rational business purpose behind such conduct. [74]

Since Merger and Acquisition transactions have the potential for self-interested behavior by the board of directors of target or acquired corporations, which will ultimately serve to the determinant of the shareholders of the corporation, courts have applied Delaware's intermediate standard of review, enhanced scrutiny. [75]When invoked, fiduciaries must show that their motivations were "proper, not selfish, and reasonable in relation to their legitimate objective." [76]Although enhanced scrutiny provides a heightened standard of review, it has typically been limited to the following two scenarios: 1) when a board adopts defensive measures to protect **[*263]** against a hostile takeover; or 2) when a board seeks a transaction to sell the company or cash out shareholders. [77]

On the other hand, the highest form of judicial scrutiny, entire fairness, applies when the board of directors are interested in the transaction different from the shareholders generally or when the controlling shareholder is on both sides of the transaction. [78]Under either situation, defendant directors are required to show that the transaction is entirely fair, regarding both process and price, to the corporation. [79]Despite the initial burden of persuasion resting on defendant directors, the burden may be shifted to the shareholder plaintiff(s) when either of these two cleansing mechanisms occur: 1) the transaction is conditioned on the approval of independent shareholders after full disclosure of the extent of the conflicts; or 2) when the interest of the self-interested fiduciary or the controlling shareholder is neutralized by the creation "sufficiently authorized committee of independent and disinterested directors." [80]Consequently, this burden shifting exemplifies the Delaware court's reliance on cleansing mechanisms to cure conflicted transactions. [81]

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[66] Palm & Kearney, *supra* note 23, at 1086; ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 305-06 (Del. 2015)*** (ruling that the business judgment rule is the appropriate standard of review for a post-closing damages action "when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, un-coerced majority of the disinterested stockholders.").

[67] *Smith v. Van Gorkom, 488 A.2d 858, 891-93 (Del. 1985)*.

[68] Palm & Kearney, *supra* note 23, at 1043.

[69] *Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952)*; *Katz v. Oak Industries, Inc., 508 A.2d 873, 880 (Del. Ch. 1986)*.

[70] *Van Gorkom, 488 A.2d at 891-93*.

[71] Stephen B. Brauerman, *Delaware Insider: When Business Judgment Isn't Enough: The Impact of the Standard of Review on Deal Litigation*, A.B.A., (May 22, 2014) *https://www.americanbar.org/groups/business_law/publications/blt/2014/05/delaware_insider/*; *The Corwin Effect: Stockholder Approval of M&A Transactions*, Hunton & Williams (Feb. 2017), *https://www.huntonak.com/images/content/2/7/v2/27676/the-corwin-effect-stockholder-approval-of-mand-a-transactions.pdf*.

[72] *Id.*

[73] Derek J. Famulari, *The Revlon Doctrine -- The Fiduciary Duties of Directors when Targets of Corporate Takeovers and Mergers*, AmericanBar, *https://www.americanbar.org/content/dam/aba/administrative/young_lawyers/publications/101/fiduciary_duties_of_directors_corporate_takeover.authcheckdam.pdf*.

[74] *See* Brauerman, *supra* note 71.

Corwin's cleansing effect of imposing the business judgement rule to a transaction that was approved by a fully informed, un-coerced majority of disinterested shareholders has been viewed as a substantial limitation on the application of enhanced scrutiny when dealing with takeover defenses and director's responsibilities when selling a target company. [82]Therefore, it is considered to be a deviation from Delaware jurisprudence. [83]But in reality, enhanced scrutiny, **[*264]** unlike the business judgment rule and entire fairness, is not strongly rooted in Delaware jurisprudence. [84]Instead, it was a standard of review that the Delaware Supreme Court set forth in *Unocal Corp. v. Mesa Petroleum Co*. in an attempt to bridge the gap between the business judgment rule, at one end of the spectrum, and the entire fairness standard, at the other end. [85]In *Unocal*, the Delaware Supreme Court was tasked with determining whether the *Unocal* board had the authority and duty to oppose a takeover threat it reasonably believed to be harmful to the corporation by making a conditional, self-tender offer and if so, if its action is entitled to the business judgement rule protection. [86]The court ultimately determined that *Unocal's* attempt to oppose the takeover threat was permissible and also established that the enhanced standard of review for defensive tactics is enhanced scrutiny. [87]In setting out this standard, the court emphasized that Delaware corporate law is not fixed, instead, it must grow and develop in response to, or anticipation of, evolving needs and concepts. [88]The test for this standard consists of defendant directors showing: 1) that the takeover was a danger to corporate policy and effectiveness; and 2) that the defensive tactic was reasonable in relation to the threat posed. [89]When this test is met, the court will then apply the business judgment rule, as it did in *Unocal*. [90]In a subsequent case, *Unitrin, Inc. v. Am. Gen. Corp.*, the Delaware Supreme Court held that when the *Unocal* test is not satisfied, the defendant directors will be subjected to the entire fairness standard of review. [91]

[*265] Despite the Delaware Supreme Court's attempt to use the *Unocal* test to provide an additional protection to shareholders from conflicted board directors, the test has fallen short from doing so. [92]This shortcoming is most likely attributable to the expansive judicial deference granted to board rationale under its burden of proof, essentially giving the business judgment rule and the *Unocal* test the same effect. The first prong of the Unocal

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[75] Brauerman, *supra* note 71; *see also*, Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161 (2019).

[76] *Id.*

[77] *See id; see also* Anabtawi, *supra* note 75, at 161.

[78] *See* Brauerman, *supra* note 71 at 2.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Hall, *supra* note 4, at 3.

[83] *Id.*

[84] Jenifer J. Johnson & Mary Siegel, Corporate Mergers: Redefining the Role of Target Directors, 136 U. PA. L. REV. 315, 333 (1987).

[85] *Id.* at 54-57; *see also*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954, 958 (Del. 1985).

[86] Siegel, *supra* note 84, at 49.

[87] Siegel, *supra* note 84, at 54-57; *see also* Unocal, 493 A.2d at 954, 958 (Del. 1958).

[88] Unocal, 493 A.2d at 958.

test, requiring proof that the takeover was a danger to corporate policy and effectiveness, mandates that the defendant director show they conducted a "good faith and reasonable investigation" of the perceived threat and the corporation's possible defenses. [93]No significant burden is placed on defendant directors under this first prong because it essentially mandates them to satisfy what is presumed under the business judgment rule: "that decision was made on an 'informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" [94]Furthermore, the deferential treatment that Delaware courts have typically granted to board rationales for "informed decisions" have made it rather easy for defendant directors to satisfy *Unocal's* first prong. [95]

Like the first *Unocal* prong, Delaware courts approach the second prong in a deferential fashion. [96]This prong requires a showing that the defensive measure was reasonable to the threat **[*266]** posed. [97]The court in *Unocal* elaborated further that the focus of the reasonableness analysis is on the nature of the takeover bid and its effect on the corporate enterprise. [98]In subsequent decisions, Delaware courts have applied the *Unocal* test cautiously. [99]The court in *City Capital Associates Ltd. Partnership v. Interco, Inc.*, for instance, cited its concern that if the *Unocal* test were to be applied inappropriately it could ultimately cause the unraveling of the business judgment rule. [100]Unraveling would occur in situations where the courts would use the *Unocal* test to assert their own views, while reasonable and completely disinterred directors would differ. [101]Moreover, Delaware courts will ultimately refrain from substituting the judgment of directors for their own judgment because courts are ill-equipped and unwilling to actually review substantive decisions. [102]Thus, courts usually grant directors wide latitude in assessing the second *Unocal* prong. [103]Keeping these concerns in mind, Delaware courts have typically concluded that a response is appropriate where there is an underlying business purpose, a conflict between the hostile offer, the target company's corporate policy, and prophylactic decisions made prior to the actualization of a threat. [104]

[*267] Shortly after deciding *Unocal Corp. v. Mesa Petroleum Co.*, the Delaware Supreme Court extended the reach of enhanced judicial scrutiny to include cases in which defendant directors approve a transaction that ends in

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89 *Id. at 953-57*; Siegel, *supra* note 84, at 49.

90 *Unocal, 493 A.2d at 958*.

91 Siegel, *supra* note 84, at 49; *See also Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1377 (Del. 1995)*.

92 Frank Cara & Peter Lane, Note, *The Business Judgment Rule and Unocal: Twin Barriers to Shareholder Welfare*, 5 J. of C.R. and ECON. DEV., 207 (1989).

93 *Unocal, 493 A.2d at 955*.

94 Cara & Lane, *supra* note 92, at 207.

95 *Id.* at 209; *see also Moran v. Household Int'l Inc., 500 A.2d 1346 (Del. 1985)* (stating that the board's decision was not grossly negligent because it had an extended discussion of proposed defensive measures with legal consults, and that this weighs in favor of finding that the board's decision to be an informed one); *Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1342 (Del. 1987)* (emphasizing that the recognition that the corporation making the hostile tender offer has a history of attempting to acquire and break-up other corporations supports the defendant board's finding that the tender offer was inimical to the shareholders and the corporation); *City Capital Associates Ltd. Partnership v. Interco, Inc. 551 A.2d 787, 795-798* (Court of Chancery of Delaware, New Castle 1988) (indicating that a determination of the value of the company gives credence that board's decision was an informed one).

96 Cara & Lane, *supra* note 92, at 211.

97 *Unocal, 493 A.2d at 955*.

98 *Id.*

the sale of the corporation or in the change of corporate control. [105]In these kinds of transactions, the aim of the board is no longer to maintain the corporate enterprise but to sell it to the highest bidder. [106]In *Revlon, Inc. v. Macandrews & Forbes Holding, Inc.*, there was a battle for corporate control of Revlon, Inc. (Revlon) between Pantry Pride, Inc. (Pantry Pride) and Forstmann Little & Co. (Forstmann). [107]In response to Pantry Pride's hostile takeover, *Revlon's* board implemented multiple defensive measures, including a poison pill, repurchase of ten million shares of the company's common stock in exchange for preferred stock and promissory notes, and entering into an agreement to be acquired by Forstmann. [108]Consequently, Pantry Pride, who initially sought injunctive relief from the Notice Purchase Right Plan, later amended its complaint to challenge the cancellation fee, and the exercise of the Rights and the Notes covenants. [109]It also sought a temporary restraining order to prevent *Revlon* from placing assets in escrow or transferring them to Forstmann. [110]In making its determination, the Delaware Supreme Court found that the successive offers for *Revlon* and the board's subsequent search for an acquirer (Forstmann) made it clear that the breakup of the company was inevitable. [111]This changed the board's role from defenders of the **[*268]** corporate enterprise to auctioneers responsible for "getting the best price for the stockholders at a sale of the company. [112]Shifting the focus of directors in a corporate break-up towards maximizing shareholder profit is the principal teaching of *Revlon*. [113]Applying this principle to the facts in the case, the court ultimately determined that defendant directors allowed considerations other than maximizing shareholder profit to affect their judgment, and accordingly, held that an injunction was proper. [114]

Although *Revlon* extends enhanced scrutiny to include the sale or change of control context, decisions from Delaware courts have indicated that it is necessary to preserve the board's ability to make business judgments. [115]In this lines of cases, the courts have evaluated board conduct in terms of the board's to be informed and to act in good faith. [116]Essentially, the courts have adopted a business-judgment like view where boards continue to have substantial discretion with respect to conducting the sale, on the condition that the board shows its compliance with its basic duties of good faith, independence, and due attentiveness. [117]Hence, business

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99 *City Capital Associates Ltd., 551 A.2d at 796*.

100 *Id.*

101 *Id.*

102 Jenifer J. Johnson & Mary Siegel, *Corporate Mergers: Redefining the Role of Target Directors*, *136 U. PA. L. REV. 315, 333 (1987)*.

103 *Id.* at 333

104 Cara & Lane, *supra* note 92, at 210-11; *Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345 (Del. 1987)* (imposing a comprehensive defensive scheme consisting of a standstill agreement, dividend payments, and a street sweep is reasonable when impeding the treat of an inadequate coercive offer and the threat on the continued interest of the shareholders in the independent control and prosperity of the company); *Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1142 (Del. Ch. 1989)* (revising a merger agreement is a reasonable defensive measure for protecting against a threat on a long term corporate policy); *City Capital Associates Ltd. Partnership v. Interco, Inc. 551 A.2d 787, 801 (Del. Ch. 1988)* (employing defensive tactics against the belief of an unfair bid is reasonable). *See generally* Siegel, *supra* note 84 (stating that anticipatory defensive measures have not only been determined to be reasonable but have also been determined by the Delaware Supreme Court to deserve greater protection than defensive measures instituted under pressures from a takeover bid).

105 *Paramount Communications, 637 A.2d at 44* (emphasizing that in the sale of control context, defendant directors must secure the transaction that offers the best value reasonably available to the shareholders and must exercise their fiduciary duties to meet that objective); *Revlon, Inc. v. Macandrews & Forbes Holding, Inc., 506 A.2d 173, 182-84 (Del. 1986)* (stating that when the board is auctioning the company it must maximize the company's value at a sale for the shareholder's benefit).

106 *Revlon, Inc. v. Macandrews & Forbes Holding, Inc., 506 A.2d at 182 (Del. 1986)*.

judgment seems to be prevailing even when courts apply the intermediate scrutiny that was set forth by the Delaware Supreme Court in *Unocal* and later extended by *Revlon*. [118]

Furthermore, as mentioned earlier, even the highest standard of judicial review, enhanced scrutiny, which has traditionally applied to transactions involving controlling stockholders and transactions that do not involve controlling stockholders, has gradually shifted course throughout **[*269]** the years. [119]In the controlling stockholder context, the Delaware Supreme Court held, in *Kahn v. Lynch Communication Sys.*, that entire fairness remained as the exclusive standard for reviewing the propriety of an interested cash-out merger transaction by a dominating or controlling shareholder. [120]But the court's holding did not end there, it also stated that ratification of a transaction by either an informed majority of minority stockholders or an independent committee "shifts the burden of proof on the issue of fairness from a controlling or dominating stockholder to the challenging shareholder-plaintiff." [121]Although the standard of review continues to be entire fairness, the court's ruling re-emphasizes the fact that shareholder ratification does alleviate defendant directors. [122]

Review of the application of the three standards of judicial review has illustrated two recurring themes: 1) courts are typically willing to defer to the business judgment of corporate boards, especially when they fulfill their basic duties; and 2) courts favor cleansing mechanisms, like shareholder ratification. [123]For instance, even when enhanced scrutiny or entire fairness are applied, defendant board members have been entitled to certain protections, either from judicial reluctance to "unravel the business judgement rule" by replacing director judgment with its own or from the safeguards that shareholder ratification possess, which in turn, shifts the burden onto shareholders. [124]Therefore, it should not be surprising that the Delaware Supreme Court **[*270]** incorporated these two themes in its decision in *Corwin v. KKR Fin. Holdings LLC*. [125]Although it is a significant decision nonetheless, it does not appear as contrary to Delaware jurisprudence as some literature may suggest. [126]Moreover, each of the three standards of review are invoked in different circumstances. [127]Consistent with this, the Delaware Supreme Court's holding in *Corwin*, that the business judgment rule applies

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107 *Id. at 175, 178*.

108 *Id. at 177-79*. (mentioning that the agreement with Forstmann includes the following protective provisions: a termination fee, a no-shop clause, and a lock-up option).

109 *Id.*

110 *Id.*

111 *Id. at 182*.

112 *Id.*

113 *Id. at 182-83*.

114 *Id. at 184-85*.

115 *Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1054 (Ch. 1997)* (mentioning that cases applying *Revlon* duties have shown greater deference to an independent board in the sale context, and have "acknowledged the necessity of an independent board to make business judgments even in that setting.").

116 *Id.*

117 *Id.*

118 *Id.*

119 *Weinberger v. Uop, 457 A.2d 701, 710-11 (Del. 1983)* (stating that there is a burden to establish entire fairness); Clare O'Brien & Aselle Kurmanova, Shearman & Sterling Discussing the Cleansing Effect of Stockholder Ratification, The CLS BLUE

in a post-closing damages action when a merger not subject to the entire fairness doctrine has been approved by a fully informed, un-coerced majority of the disinterested shareholders, is yet another circumstance that has been deemed to warrant protection from the business judgment rule. [128]As the court stated in its opinion, *Corwin* cleansing only occurs in the post-closing damages context and when fully informed, un-coerced majority of disinterested shareholders ratify the transaction. [129]This differs from the contexts of *Unocal* and *Revlon*, where injunctive relief was to address merger and acquisition decisions in real time, prior to closing. [130]In addition, it is acknowledged that Delaware corporate law is not fixed, but instead, grows and develops in response to, or in anticipation of, evolving needs and concepts. [131] *Corwin* cleansing illustrates the use of the two recurring themes in Delaware jurisprudence to address the evolving need to decrease the number of wasteful and abusive postclosing shareholder litigation challenging mergers and acquisitions. [132]

[*271] II. Although Strongly Supported by Delaware Law, there are Concerns about Shareholder Ratification

Despite being strongly supported by Delaware jurisprudence, the premise that shareholder ratification can cleanse a transaction, raises some concerns. Shareholder ratification is believed to be a line of defense against managerial misconduct regarding merger and acquisition transactions, and it could reasonably be believed that shareholders would turn down bad deals. [133]But contrary to this belief, findings show that shareholders rarely vote down deals. [134]Therefore, there are concerns that *Corwin* cleansing creates a hopeless avenue for disapproving shareholders, who are ultimately trapped in "suboptimal transactions." [135]In addition, class action lawyers have complained that *Corwin* cleansing sweeps too broadly and risks eliminating "breach-of-fiduciary-duty

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SKY BLOG (Mar. 7 2017), http://clsbluesky.law.columbia.edu/2017/03/07/shearman-sterling-discusses-the-cleansing-effect-ofstockholder-ratification/.

120 *Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1117 (Del. 1994)*.

121 *Id. at 1117* (citing *Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937-38 (Del. 1985)*).

122 *See* O'Brien & Kurmanova, *supra* note 119.

123 *See Equity-Linked Inv'rs, L.P. v. Adams, 705 A.2d 1040, 1054 (Del. Ch. 1997)*; *see also* Brauerman, *supra* note 71.

124 *See City Capital Assocs. Ltd. P'ship v. Interco, Inc., 551 A.2d 787, 796 (Del. Ch. 1988)*; *Kahn v. Lynch Communc'n Sys., 638 A.2d 1110, 1117 (Del. 1994)*.

125 *See* Hall, *supra* note 4.

126 *Id.*

127 *See* Brauerman, *supra* note 71.

128 *See* ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015)***.

129 *Id.*

litigation." [136]Consequently, critics argue that Delaware has increased the power of directors to act without judicial oversight when they obtain shareholder ratification. [137]

[*272] III. Concerns Surrounding Corwin Are Not Troublesome

Although concerns regarding the impact of *Corwin* cleansing are reasonable and expected, they are disproportionate. Not only is applying the business judgment rule when there is shareholder ratification a functional manner to limit weak or frivolous actions for post-closing damages, but also its application is subject to several procedural safeguards. Courts will only use *Corwin* cleansing when the shareholders ratifying the transaction are disinterested, fully informed, and un-coerced. On top of that, *Corwin* cleansing is restricted to actions for postclosing damages and situations where entire fairness does not apply, which consists of transactions that lack a controlling shareholder. The fruitfulness of these procedural restrictions has been illustrated by the fact that, post *Corwin*, shareholders have been successful in postclosing damages actions and courts have refrained from applying the business judgment rule. To state that the Delaware Supreme Court's decision in *Corwin* has essentially eliminated accountability on directors for breaches of fiduciary duties is to imply that directors are inherently bad actors, which is far from true.

a. Coercion

The requirement of an un-coerced shareholder vote is one of the several safeguards in place to ensure that defendant directors are completely insulated from liability and that shareholders are not left defenseless. To receive the benefit of the business judgment rule under *Corwin*, defendant directors must be careful in the manner they structure the vote. [138]As a result, directors place importance on making sure the vote is not coercive. This requires a clear understanding of what constitutes coercion. "Coercion" is understood to be a context driven **[*273]** term, thus, its definition by itself is not very meaningful. [139]Since *Corwin v. KKR Financial Holdings* was decided, Delaware courts have examined what actions constitute coercion in particular scenarios. [140]Identifying what constitutes coercive action by corporate fiduciaries will be the focus of this section.

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130 *Id.*

131 *Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985)*.

132 *See* Haas, *supra* note 18 (noting widespread litigation imposes costs on the parties of the merger and acquisition, shareholders, and the courts); *see also* William Savitt, *Post-Closing Merger Litigation -- The Road Ahead*, Harv. L. Sch. F. on Corp. and Fin. Reg. (Jan. 16, 2019) *https://corpgov.law.harvard.edu/2019/01/16/post-closing-merger-litigation-the-road-ahead/#more-114648*; Olga Koumrian, *Shareholder Litigation Involving Acquisitions of Public Companies: Review of 2014 M&A Litigation*, CORNERSTONE RESEARCH, *https://www.cornerstone.com/Shareholder-Litigation-Involving-Acquisitions-2014-Review* (last visited Apr. 26 2020) (stating that in 2014, the year prior to the Delaware Supreme Court's decision in*Corwin*, 93 percent of M&A deals valued over $ 100 million were litigated. Additionally, 88 percent of Delaware --incorporated companies were challenged).

133 *See* American Bar, Delaware Insider: A Fully Informed and Disinterested Shareholder Vote Cleanses Transactions Tainted by Board Conflicts, ABA, (Mar. 23, 2017), *https://www.americanbar.org/groups/business_law/publications/blt/2017/03/delaware_insider* (emphasizing that "[f]or sound policy reasons, Delaware Corporate law has long been reluctant to secondguess the judgment of a disinterested stockholder majority that determines that a transaction with a party*other than a controlling stockholder* is in their best interests.") (quoting ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306 (Del. 2015)))***; *See also* Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, *43 DEL. J. CORP. L. 161 (2019)* (noting that the rationale behind shareholder ratification is that shareholders are "at least as well-positioned as judges to evaluate the merits of the sale.").

134 *See* Gatti, *supra* note 13, at 853 (finding that out of the 907 mergers that were submitted to a shareholder vote between 2006 to 2015 by 98.68 percent were approved. Of the 1.32 percent (12 mergers) that were not approved, seven were abandoned prior to an actual vote. Hence, only 0.55 percent (5 mergers) were actually voted down by shareholders).

135 Ann M. Lipton, *Shareholder Divorce Court*, *44 IOWA J. CORP. L. 297, 326 (2018)*

Corwin cleansing does not apply to a transaction where the shareholder vote is structurally coerced. [141]In *Sciabacucchi v. Liberty Broadband Corp.*, Charter Communications, Inc. ("Charter") made two major acquisitions, of Time Warner Cable ("TWC") and Bright House Networks, LLC ("Bright House"). [142]The shareholders approved the transactions but Charter conditioned the acquisitions on shareholder approval of a related series of transactions, which included the issuance of equity to Liberty Broadband, Charter's largest shareholder. [143]Voting shareholders were advised that the transactions would not finalize if the favorable issuance to Liberty Broadband was not approved. [144]Plaintiff-shareholders brought direct and directive actions, on behalf of Charter, challenging the transactions. [145]Despite determining that there was no inherent coercion because shareholder defendants were not controlling fiduciaries, the court held that the plaintiff sufficiently claimed that *Corwin* cleansing was inapplicable because the transactions were structurally coerced. [146]This finding was based on the manner that the deal was **[*274]** structured that allowed the value of the lucrative acquisitions to be used to coerce a vote for the equity issuance to the company's largest shareholder and for the agreement that granted the shareholder greater voting power. [147]The shareholders essentially had to choose between accepting the equity issuance and the voting power agreement or to lose out on two beneficial transactions. [148]The court defined structurally-coerced vote as a vote that is structured in a manner that allows extraneous considerations to the transaction influence shareholder voters, which in turn prevents the court from determining whether the shareholders deemed the challenged transaction to be in the corporate interest. [149]Emphasis is placed on giving shareholders the "free choice between maintaining their current status and taking advantage of the new status offered by" the transaction. [150]The facts plead gave rise to a reasonable inference that the acquisitions were used as leverage to secure shareholder approval on unrelated transactions that were not in the corporate interest, therefore, precluding *Corwin* cleansing. [151]Yet, the court withheld its decision on defendants' motion to dismiss pending supplemental briefing.

Affirmative action is not a predicate of wrongful coercion, inequitable coercion can be found when a fiduciary fails to act when he or she knows that there is a duty to act and consequently coerces shareholder action. [152] *In*

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136 William Savitt, *Delaware's Prudent Approach to the Cleansing Effect of Stockholder Approval*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jan. 16, 2018) https://corpgov.law.harvard.edu/2018/01/16/delawares-prudent-approach-to-the-cleansing-effect-ofstockholder-approval/.

137 *See* Lipton, *supra* note 135, at 319-20.

138 *See* Albert H. Manwaring, IV, *Structural Coercion Negated Cleansing Effect Under 'Corwin'*, MORRIS JAMES LLP (Jun. 14, 2017) https://www.morrisjames.com/blogs-Delaware-Business-Litigation-Report,structural-coercion-negated-cleansing-effect-under-corwin.

139 Robert S. Reder & Victoria L. Romvary , *Delaware Corporate Law Bulletin: Delaware Court Determines Corwin Not Available to "Cleanse" Alleged Director Misconduct Due to "Structurally Coercive" Stockholder Vote*, 71 VAND. L. REV. EN BANC 131 (2018) (quoting Sciabacucchi v. Liberty Broadband Corp., No: 11418-VCG, 2017 Del. Ch. Lexis 93, *230-31 (May 31, 2017)).

140 Steven M. Haas & Patrick C. Quine, *Delaware Court Upholds Coercion and Disclosure Challenges to Merger -- Saba Software*, Hunton & Williams, (last visited Apr. 26, 2020) https://www.huntonak.com/images/content/3/1/v2/31603/delaware-court-upholds-coercion-disclosurechallenges-merger.pdf.

141 *See* Manwaring, *supra* note 138.

142 Sciabacucchi v. Liberty Broadband Corp., No. 11418-VCG, 2017 Del. Ch. LEXIS 93, at *2 (Ch. May 31, 2017).

143 *Id.* at *2-3.

144 *Id.* at *7.

145 *Id.* at *12-14, 44.

re Saba Software, Inc. dealt with an action that arose from the acquisition of Saba Software, Inc. ("Saba"), through an all cash merger of $ 9 per share, by entities affiliated with Vector Capital Management, L.P. [153]The Securities and **[*275]** Exchange Commission ("SEC") claimed that Saba engaged in a fraudulent scheme to overstate its pre-tax earnings by $ 70 million from 2008 through 2012. [154]Shortly after, Saba promised its shareholders, regulators, and the market that it would "get its financial house in order." [155]Saba failed to keep its promise to shareholders that it would restate its financial statements by the specified date, which led to the SEC de-registering Saba's common stock. [156]Thereafter, Saba announced that one of the alternatives it was considering to pursue was the sale of the company. [157]When shareholder approval of the merger was sought, the shareholders had to decide between accepting $ 9 per share, which was well below its average trading price of the past two years, or holding onto their de-registered, illiquid stock. [158]The majority of the shareholders approved the merger. [159]The court ultimately determined that the application of the business judgment rule under Corwin was inapplicable because there was a reasonable inference that the shareholder vote was not fully informed and was coercive. [160]In regards to the coercion claim, the court stated "that inequitable coercion derived from the situation that the Board placed" the shareholders of Saba as a result of the Board's alleged wrongdoing and inaction. [161]By failing to complete the restatement of the company's financials and soon thereafter pushing for the sale of the company in the midst of regulatory chaos, the Board left shareholders with "the choice of either keeping their recently -- deregistered, illiquid stock" or accepting the $ 9 per **[*276]** share Merger price. [162]The merger's forced timing, coupled with the Board's decision not to disclose to shareholders the reason why the Restatement was not completed and the available financing alternatives that Saba would have if it remained a standalone company; provided shareholders with no other choice than to vote for the merger. [163]Consequently, the impermissible coercive nature of this transaction precluded the application of the business judgement rule under *Corwin*. [164]Instead, Vice Chancellor Slights subjected the merger to the enhanced scrutiny test under *Revlon*. [165]

The cases following *Corwin v. KKR Fin. Holdings LLC.* have provided guidance as to what constitutes coercion in the context of mergers and acquisitions. As of now there appears to be three categorical distinctions: affirmative

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146 *Id. at *62, 75*.

147 *Id. at *75*.

148 *Id. at *68-69*.

149 *Id. at *64-65*.

150 *Id. at *66*.

151 *Id. at *75*.

152 *In re Saba Software, Inc., No. 10697-VCS, 2017 Del. Ch. LEXIS 52, at *43 (Ch. Mar. 31, 2017)*.

153 *Id.* at *2.

154 *Id.*

155 *Id.*

156 *Id.* at *2-3.

157 *Id.* at *3.

158 *Id.*

159 *Id.* at *4.

coercion, situational coercion, and structural coercion. [166]Affirmative coercion, which encompasses the traditional meaning of coercion, involves threats of retribution. [167]Controller transactions, for instance, are deemed inherently coercive because there is an underlying concern that fear of controller retribution "in the face of a thwarted transaction may overbear a determination of best corporate interest by the unaffiliated majority." [168]Then there is situational coercion, defined as a situation that was created by the board of directors and that leaves the shareholders with no practical alternative but to vote for the proposed transaction. [169]This type of coercion was one of the two reasons why the Chancery **[*277]** Court of Delaware in *In re Saba Software, Inc.* determined that the transaction fell outside the purview of *Corwin* cleansing. [170]The Chancery Court of Delaware's decision was pivotal for Delaware law since it was the first time, post *Corwin*, that the court found that a transaction was not subject to *Corwin* protection. [171]It also provided insight on how the Delaware courts interpret the "coerciveness" of a transaction when it comes to shareholder ratification. [172]Emphasis was placed on the fact that coercion may exist when the board of directors allow "situationally coercive factors" to force the shareholders to vote a specific manner. [173]As described above, situational coercion occurred here because shareholders were left to choose between proceeding with the merger consisting of $ 9 per share price or retaining their recently deregistered, illiquid stock, without the information that would allow the shareholders to "assess whether the choice of rejecting the Merger and staying the course makes any sense." [174]Lastly, there is structural coercion, which occurs when the shareholder vote to approve a transaction is attached to a shareholder vote on an unrelated action. [175]Examining a transaction for structural coercion requires consideration of whether the shareholders are allowed to exercise their franchise free of undue pressure caused by their fiduciaries that would otherwise distract them from the merits of the transaction. [176]In *Sciabacucchi v. Liberty Broadband Corp*, shareholder approval of the Voting Proxy Agreement and the Issuances were determined not to represent free choice because **[*278]** they were "forced to approve these transactions if they wanted to receive the benefit," of the Bright House and TWC transactions, which were deemed to be value enhancing by all parties. [177]

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160 *Id.* at *3-4, 24-5 (explaining that when the plaintiff challenged the approval of a transaction that identifies a deficiency in the operative disclosure document the burden shifts onto the defendants to show that the alleged deficiency as a matter of law in order to be granted the cleansing effect of the vote).

161 *Id.* at *45.

162 *Id.* at *41-44.

163 *Id.*

164 *Id.* at *45.

165 *Id.*

166 Gail Weinstein,?? ??. *When Del. Courts May Reject Corwin Cleansing: Some Clarity*, LAW360 (Jul. 13, 2017),*https://advance.lexis.com/api/permalink/a20bb9a5-3d28-4330-84ee-4e0c1687862c/?context=1000516*

167 *See* Haas & Quine, *supra* note 140.

168 *Sciabacucchi v. Liberty Broadband Corp.*, No. 11418-*VCG, 2017 Del. Ch. LEXIS 93, *47-48 (Del. Ch. May 31, 2017)*.

169 Weinstein, ET AL., *supra* note 166.

170 *In re Saba Software, Inc., 2017 Del. Ch. LEXIS 52, at *43*.

171 Stephen Glover, ?? ??. *Gibson Dunn Provides an Update on "Fully Informed, Uncoerced" Shareholder Votes in Delaware Under Corwin*, THE CLS BLUE SKY BLOG, (Apr. 20, 2017), *http://clsbluesky.law.columbia.edu/2017/04/20/gibson-dunn-provides-an-update-on-fully-informeduncoerced-shareholder-votes-in-delaware-under-corwin/*.

Now that the three categorical distinctions of coercion have been identified and discussed, it is important to note that a finding of coercion will depend on the unusual circumstances of the specific case in question. [178]There is no universal checklist - instead, Delaware courts have provided a general framework that needs to be measured against the facts surrounding the challenged transaction. In some circumstances the specific actions that the Board takes may be considered coercive, while in other situations it may not. Luckily, decisions like *Sciabacucchi* and *Saba* have provided guidelines on how corporations can avoid issues of coercion. [179]Based on these two decisions, corporations should review transactions and voting structures to provide shareholders with freedom of choice to vote based on the merits of the transaction. [180]It is also wise to examine non-essential matters that are being bundled or cross-conditioned. [181]Despite the available guidance, clearer lines still need to be drawn. For one, clarifying the intersection between disclosure and coercion would be helpful in future in cases when considering whether there was successful shareholder ratification under the *Corwin* doctrine. [182]This is an issue because precedent has suggested that a finding of coercion can be intertwined with the information, or in this context the lack thereof, that shareholders receive **[*279]** regarding the corporation's prospects and value. [183]This analysis of coercion has illustrated that there is a workable framework currently in place, one that allows shareholders to hold their fiduciaries accountable while not opening the floodgates to meritless claims. But, despite this current system, there are further clarifications that need to be made to fully understand the confines of coercion.

b. Full Disclosure

Another limitation on the *Corwin* doctrine has been the requirement of full disclosure. Full disclosure essentially serves as a tradeoff between directors and shareholders, directors move one step closer towards obtaining business judgement rule deference effectively insulating the transaction from challenges brought against it and the shareholders receive information that will allow them to make an informed decision. [184]The adequacy of disclosures has been a more frequently contested issue than the inquiry of whether the vote was coerced or not. *Corwin* seems to have shifted the focus of litigators and practitioners towards the adequacy of disclosure. [185]Therefore, it is crucial to analyze the scope of full disclosure within Delaware law.

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172 *Id.*

173 *Id.*

174 *In re Saba Software, Inc., No. 10697-VCS, 2017 Del. Ch. LEXIS 52, at *43 (Ch. Mar. 31, 2017)*.

175 Gail Weinstein, Philip Richter, Steven Epstein, & Warren S. de Wied, *When Del. Courts May Reject Corwin Cleansing: Some Clarity*, LAW360 (Jul. 13, 2017), *https://advance.lexis.com/api/permalink/a20bb9a5-3d28-4330-84ee-4e0c1687862c/?context=1000516*.

176 Sciabacucchi v. Liberty Broadband Corp., No. 11418-*VCG, 2017 Del. Ch. LEXIS 93, at *66 (Ch. May 31, 2017)*.

177 Scott A. Barshay, ET. AL., *Delaware Court of Chancery Finds Vote Coercive and Insufficient to Cleanse Board Action*, PAUL WEISS: Mergers & Acquisitions (June 8, 2017), *https://www.paulweiss.com/practices/transactional/mergers-acquisitions/publications/delaware-court-ofchancery-finds-vote-coercive-and-insufficient-to-cleanse-board-action?id=24411*.

178 Glover, *supra* note 171.

179 Barshay, *supra* note 177.

180 *Id.*

181 *Id.*

182 Haas and Quine, *supra* note 140.

183 *Id.; Sciabacucchi, 2017 Del. Ch. LEXIS 93, at *8*. (stating that when considering whether there was structural coercion or not, there was ample weight given to the omissions in the proxy statement).

Partial and elliptical disclosures do not enable the protection of the business judgment rule under the *Corwin* doctrine. [186]In *Morrison v. Berry*, the integrity of the stockholder vote approving Apollo Global Management LLC's (Apollo) tender offer for The Fresh Market ("Fresh Market") was questioned. [187]Plaintiff shareholder, Elizabeth Morrison, filed a breach of fiduciary duty claim stating that Ray and Brett Berry (Fresh Market founder and his son, **[*280]** respectively) collaborated with Apollo to purchase Fresh Market at a price below fair value by deceiving the Board and convincing the directors to put the Fresh Market up for sale. [188]According to the plaintiff, they did so through a process that allowed Apollo and the Berry's to have an improper bidding advantage and emerge as the sole bidder. [189]The court held that the voting shareholders were not fully informed because Fresh Market failed to "disclose troubling facts regarding director behavior." [190]Disclosure of these facts would have revealed the depth of Berry's commitment to Apollo, the degree of Apollo's and Ray Berry's pressure on the Board, and the extent to which their influences may have had on the structure of the sale process. [191]Furthermore, the following four problems were identified as rendering the Schedule 14D-9 materially misleading: 1) the November 28 email from Ray Berry's counsel acknowledging that Berry in fact had an agreement with Apollo since October which was not disclosed; 2) Ray Berry's statements conveying a clear preference for rollover transaction involving Apollo were not disclosed; 3) the threat in the November 28 email that Ray Berry would sell his shares if the Board did not undertake a sale process was not disclosed; and 4) the Board's failure to state that the directors were motivated by existing activist pressure. [192]Consequently, the court concluded that the invocation of the business judgement under *Corwin* was not warranted. [193]

[*281] Omitting the reasons why a company is unable to complete the restatement in its proxy materials and information surrounding the sale process are both material. [194]As mentioned earlier, the Court of Chancery of Delaware in, *In re Saba Software, Inc.*, handled an action that arose from the acquisition of Saba Software, Inc. ("Saba"), through an all cash merger of $ 9 per share, by entities affiliated with Vector Capital Management, L.P. [195]The court ultimately determined that the application of the business judgment rule under Corwin was inapplicable because there was a reasonable inference that the shareholder vote was neither un-coerced nor fully informed.

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184 P. Clarkson Collins Jr., *Court Relies on Fully Informed Uncoerced Stockholder Vote in 'Revlon' Challenge*, MORRIS JAMES: Delaware Business Court Insider (Nov. 9, 2016), https://www.morrisjames.com/newsroom-articles-744.html.

185 Haas, *supra* note 4.

186 Morrision v. Berry, 191 A.3d 268, 272 (Del. 2018).

187 Id. at 272.

188 Id. at 273-74.

189 *Id.*

190 Id. at 275, 283 (quoting, Tsc Indus. v. Northway, 426 U.S. 438 (1976)) (stating that "An omitted fact is material if there is substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

191 Id. at 275.

192 Id. at 277; Arnold v. Soc'y for Sav. Bancorp, 650 A.2d 1270, 1280 (Del. 1994) (emphasizing that partial and elliptical disclosures are misleading. "[O]nce defendants traveled down the road of partial disclosure of the history leading up to the Merger and used the vague language described, they had an obligation to provide stockholders with an accurate, full, and fair characterization of those historic events.").

193 *See* Morrison, 191 A.3d at 275-85. (stating that when material facts are either not disclosed or are presented in an ambiguous, misleading, or incomplete manner, the directors fail to fulfill their disclosure obligations).

[196]In regards to the claim that the shareholder vote was not fully informed, the court found that omission of the Saba management's financial projections and the information regarding Morgan Stanley's valuation analysis and conflicts were not material. [197]The court's finding did not end there though, as the court proceeded by determining that the shareholder vote was not fully informed because the omissions of the information regarding the failure to complete the restatement and the information regarding the sale process were both material. [198]Typically "asking why" does not state a meritorious disclosure claim but the court differentiated the request for information regarding the failure to complete the restatement because it was a factual development that spurred the sale process, instead of a purposeful decision by the board. [199]With regard to the information on the sale process, the court stated that omission of the post-deregistration options available to Saba were material because the deregistration of the **[*282]** company's shares caused a fundamental change to the value and nature in the shareholder's equity stake in Saba over which the shareholders had no control. [200]Consequently, not including information on the failure to complete the restatement and information on the sale process in the Proxy undermined the cleansing effect of *Corwin*. [201]

Failure to provide adequate company financial information and to disclose the status of restatement efforts is sufficient to preclude Corwin cleansing. [202] *In re Tangoe, Inc. Stockholders Litig.*, involved attempts of the Board to sell Tangoe, Inc. (Tangoe) after a financial restatement and subsequent delisting by NASDAQ. [203]The Board ultimately agreed on the take-private acquisition by Marlin Equity Partners and TAMS Inc. and Asentinel, LLC (collectively "Marlin"). [204]The Board recommended the transaction during a regulatory storm caused by actions of the Board. [205]These actions included: false filings with the S.E.C., failed efforts to restate Tangoe's financials and correct the false failings, failure to file the restatement, and the "enticement of noteworthy equity awards to Director Defendants" which would be prompted only by a change of control. [206]Instead of completing the restatement the Board decided to sell Tangoe. [207]The complaint plead that the Defendant Directors breached their duties by: "1) **[*283]** agreeing to sell Tangoe for an inadequate price, through an unreasonable process, while being inadequately informed, failing to maximize shareholder value; and 2) failing to disclose to the Plaintiff and the Class all material information for deciding whether Tangoe shareholders should

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194 Jason M. Halper, *Lessons Beyond Corwin: Columbia Pipeline and Saba Software*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (May 10, 2017), https://corpgov.law.harvard.edu/2017/05/10/lessonsbeyond-corwin-columbia-pipeline-and-saba-software; *see* In re Saba Software, 2017 Del. Ch. LEXIS 52, at *2 (Ch. Mar. 31, 2017).

195 *See* In re Saba Software, 2017 Del. Ch. LEXIS 52, at *2 (Ch. Mar. 31, 2017).

196 *Id.* at *24-25.

197 *Id.* at *27 (arguing that the failure to disclose management projections does not constitute a material omission because the plaintiff failed to plead facts that the projections even existed).

198 *Id.* at *38-39.

199 *Id.* at *35.

200 *Id.* at *37-38 (explaining that this an exception to the typical case because the deregistration of Saba's shares by the SEC occurred "just prior to the time shareholders vote on the Merger was to occur.").

201 *See id.* at *39.

202 *See Delaware Court of Chancery Declines to Dismiss Fiduciary Duty Breach Claims in Connection With Take-Private Acquisition of Recently Delisted Company*, SHEARMAN & STERLING (Nov. 27, 2018)https://www.lit-ma.shearman.com/Delaware-Court-Of-Chancery-Declines-To-Dismiss-Fiduciary-Duty-Breach-Claims.

203 *See* Francis Pileggi, *Corwin Case Does Not Apply When Stockholder Vote Not Fully Informed*, DEL. CORP. & COMMERCIAL LITIG. BLOG (Dec. 6, 2018), https://www.delawarelitigation.com/2018/12/articles/chancery-court-updates/corwin-case-does-not-applywhen-stockholder-vote-not-fully-informed/.

agree to sell the company." [208]Defendant directors sought dismissal on the following two grounds: 1) *Corwin* cleansing applied; and 2) the Plaintiff's claim is subject to the Section 102(b)(7) exculpatory provision adopted in Tangoe's certificate of incorporation. [209]In regards to the *Corwin* defense, the court ultimately held that application of the business judgement rule was inappropriate because shareholder approval of the transaction was uninformed due to the Board's failure to provide audited financial statements and failure to explain the Restatement to shareholders. [210]However, the court cautioned that its ruling here does not imply that *Corwin* cleansing is unavailable to defendant directors during a "regulatory storm." [211]Instead, the premise of this decision is that for defendant directors to be granted deferential treatment they must show that they "carefully and thoroughly explained all material aspects of the storm to [shareholders]." [212]In other words, directors must explain with commensurate care extraordinary transactions that are being proposed to shareholders during extraordinary times. [213]

[*284] Omitting the reasons why a company's founder and chairman abstained from supporting the merger renders the proxy statement incomplete and materially misleading. [214]In *Appel v. Berkman*, the board of directors of Diamond Resorts International recommended to the company's shareholders that they should sell their shares to Apollo Global Management, a private equity buyer, for cash in a two-step merger transaction. [215]Absent from the proxy statement was the reason why the company's founder, largest shareholder, and still Chairman, Stephen J. Cloobeck, refrained from approving the merger. [216]His disapproval of the merger was due to his disappointment with the merger price and with the management of the company "for not having run the business in a manner that would command a higher price, and that in his view, it was not the right time to sell [Diamond Resorts]." [217]In the most recent annual election prior to the tender offer, the board of directors described Mr. Cloobeck as a professional with decades of experience, who had in-depth knowledge about the business, and who had a unique understanding of the opportunities and challenges the company faced. [218]The Supreme Court of Delaware held that omitting that a company's founder and chairman abstained from voting on the sale of the company is material and therefore precludes the application of the business judgment rule

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204 *See In re* Tangoe, Inc. Stockholders Litig., No. 2017-0650-JRS, 2018 Del. Ch. LEXIS 534, *2 (Ch. Nov. 20, 2018).

205 *Id.*

206 *Id.*

207 *See id.* at *4.

208 *Id.*

209 *See id.* at *23.

210 *See id.* at *23, *27-29 (stating that although the Schedule 14D-9 does not require audited financials and Delaware law does not have a per se rule deeming audited financials to be material, the court concluded that under the circumstances of this case the audited financials were material. The engagement of Alvarez & Marsal LLC to prepare a quality of earnings report to address some of the uncertainty surrounding the Restatement but not disclosing the report the public shareholders, the failure to file multiple 2016 quarterly reports, and the failure to hold an annual shareholders meeting for about three years, when compounded, give rise to a reasonable inference that shareholder approval was uniformed due to the lack of adequate financial information).

211 See *id.* at *37-38.

212 *Id.*

213 *See id.; see also* Kotler, et al., *supra* note 17 (explaining that during extraordinary times Boards should carefully and thoroughly explain the following: "1) how the company sailed into the storm, 2) how the company has been affected by the storm, 3) what alternative courses the company can take to sail out of the storm, and 4) the bases for the board's recommendation that a sale of the company is the best course.").

standard at the pleading stage. [219]The court considered that it was uncommon for a chairman to abstain from voting on the sale of the business he or she founded and that such an omission is most likely not inadvertent "when the reasons why the chairman abstained **[*285]** contradicts the board's recommendations" to the company's shareholders. [220]Defendants distinguished between facts and opinions, stating that the chairman's belief that it was the wrong time to sell was an opinion and therefore, did not mandate disclosure. [221]The court clarified that this distinction was of little relevance because "proxy statements are oftentimes filled with statements of fact about opinions." [222]Moreover, the fiduciary relationship is engrained with the notion that shareholders are entitled to weight to the opinions of their fiduciaries' regarding important business matters. More importantly, the court clarified that its holding in this case did not establish a per se rule requiring disclosure of a director's dissent or abstention. [223]Instead, the court adopted the contextual approach that is embedded in Delaware law, which mandates an examination of whether a fact is material. [224]It was also reiterated that under Delaware law, disclosures must "provide a balanced, truthful account of matters they disclose." [225]

Directors of Delaware corporations have a long history of being subject to a duty of disclosure, also known as the duty of candor. [226]The Delaware Supreme Court's decision in *Corwin v. KKR Fin. Holdings LLC* has made full disclosures a focal point when it comes to a challenged transaction. [227]As a result, Delaware decisions post *Corwin* have elaborated on the **[*286]** question of whether fiduciaries have met their duty of full disclosure as to grant them the protection of the business judgment rule under *Corwin*. The underlying premise of the full disclosure requirement is that shareholders are briefed on all the material information relating to the transaction. [228]As for omitted facts, information where there is substantial likelihood that a reasonable shareholder will consider it when deciding to approve the challenged transaction is material. [229]Moreover, Justice Valihura made clear in *Morrison* that partial and elliptical disclosures do not warrant the protection of the business judgment rule under the *Corwin* doctrine. [230]Directors must disclose material facts, even when they are troubling facts concerning director behavior. [231]The preference of a target company's founder for a potential acquirer is material because it can cause the shareholders to question the "openness of the sale process."

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214 *See* ***Appel v. Berkman, 180 A.3d 1055, 1057-58 (Del. 2018)***.

215 *See id.*

216 *See id.* (stating that all the 14D-9 stated was that "[a]ll of the directors voted in favor of [the transaction] with the exception of the Company's chairman, who abstained.")

217 *Id.*

218 ***Id. at 1059***.

219 *See* ***id. at 1060, 1064*** (clarifying that information is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available").

220 *See* ***id. at 1064***.

221 ***Id. at 1060-61***.

222 *See* ***id. at 1060-61*** (emphasizing these statements typically "recount why fiduciaries and their advisors take certain actions" and why they believe a transaction is in the best interest of the company.").

223 *See* ***id. at 1062***.

224 *See* i *d.* at 1062-63 (requiring an examination of whether a fact would, "materially affect the mix information, or whether the disclosure is required to make sure that other disclosures do not present a materially misleading picture."Therefore, disclosures cannot be materially misleading or providing the reader with a distorted impression).

[232]Additionally, omissions of information surrounding the sale process and the reasons why a company failed to complete the restatement from the proxy statement have been held to be material. [233]Besides providing further examples of what constitutes material facts, the court in *In re Saba Software, Inc*. also provided procedural and substantive lessons. [234]As a procedural matter, a plaintiff's failure to seek pre-closing injunctive relief regarding their disclosure claims **[*287]** will not deprive them of the right to push disclosure claims post-closing. [235]As a substantive matter, disclosures and contextual importance go hand in hand. [236]In his opinion, Vice Chancellor Slights stated that Delaware courts have had the practice of asking 'why' not to state a meritorious disclosure claim. [237]But when examining the facts presented in *Saba*, Vice Chancellor Slights held that factual developments that significantly affect the value of the corporation require explanation. [238]Furthermore, disclosing the reasons why a company failed to complete the restatement was distinguished from the typical asking 'why" claim because it is not a purposeful decision by the Board. [239]Evidently, the context of the specific facts of the challenged transaction matter.

If a Board of Directors decides to sell the company during a "regulatory storm," *Corwin* cleansing will most likely be inapplicable if the Board fails to disclose audited financials and to explain the Restatement to shareholders. [240]Disclosure of audited financials are not mandated by Delaware law or Schedule 14D-9 but there is a reasonable inference that shareholder approval is not informed without it when, an "information vacuum" caused by the "sporadic and heavily qualified" nature of the financial information given to shareholders by the Board of Directors is combined with the company's failure to hold annual shareholder meeting during the past three years and fails to file quarterly and annual reports. [241]Additionally, a company's delisting from NASDAQ and threats of deregistration from the S.E.C. requires explanation of the Restatement **[*288]** process to shareholders. [242]Materiality has also been extended to include omitting why a company's founder and chairman abstained from voting on the sale of the company. [243]Again, the Delaware Supreme Court, in *Appel v. Berkman*, reiterated that it favored the adoption of a "contextual approach" rather than establishing a bright line rule. [244]Therefore, bright line tests distinguishing between facts and opinions and "between the board's collective decision and any individual's viewpoint" are erroneous under Delaware law. [245]Instead, the proper approach is to look at the

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225 ***Id. at 1064***.

226 *See* Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 532, 562 (2018).

227 *See* Nicholas D. Mozal, *The Limits of the "Corwin Effect,"* HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jul. 29, 2018), https://corpgov.law.harvard.edu/2018/07/29/the-limits-of-the-corwin-effect/; *see also* ***Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015)*** (emphasizing that the effect of an uncoerced, informed shareholder vote is outcome-determinative).

228 Mordue, *supra* note 226, at 562.

229 See *id.*

230 Morrison v. Berry, 191 A.3d 268, 272 (Del. 2018); *see also* Nicholas D. Mozal, *The Limits of the "Corwin Effect,"* HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jul. 29, 2018), https://corpgov.law.harvard.edu/2018/07/29/the-limits-of-the-corwin-effect/ (emphasizing that disclosures should not be structured in a way that can be misleading).

231 Id. at 275 (finding the facts in this case were material for the following reasons: 1) they would illustrate the depth of the Berrys' [target founder and son) commitment to Apollo [acquiring company]; 2) the extent of Apollo's and Ray Berry's pressure on the Board; and 3) the degree that "this influence may have impacted the structure of sale process").

232 *See* Morzal, *supra* note 227.

233 Jason M. Halper, *Lessons Beyond Corwin: Columbia Pipeline and Saba Software*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (May 10, 2017); In re Saba Software, Inc., No. 10697-VCS, 2017 Del. Ch. LEXIS 52, at *2, *37-38 (Ch. Mar. 31, 2017)

information in a holistic manner. [246]In other words, the disclosing party is required to consider the "total mix of information" that it has made available to shareholders and any fact or opinion may significantly that mix of information. [247]

Cases analyzing the fully informed prong of the *Corwin* doctrine have demonstrated the willingness of Delaware courts to closely scrutinize a company's contemporaneous documents to discover whether they support the facts disclosed to the corporation's shareholders. [248]This places directors on notice of the importance of full and accurate disclosures, especially in a climate where shareholders possess a growing reliance on Section 220 of Delaware General Corporation Law ("DGCL), which will be discussed in the following section. [249]As a practical manner, directors should carefully consider disclosing information relating to analysis and **[*289]** motivations of key board members and shareholders [250]According to the teachings of *Morrison v. Berry*, directors should also be careful not to draft disclosures in the most positive light for the company because it may change the underlying facts in a manner that would leave shareholders with a distorted impression of what occurred. [251]Moreover, directors, in the wake of a "regulatory storm," should make sure to equip shareholders with the information that will enable them to determine whether to retain their shares in hopes that the "company will return to the good graces of the S.E.C." or to accept merger price reflecting the company's depressed value due to the company's regulatory non-compliance. [252]Disclosure under these facts will include the post-deregistration options available to the company prior to the execution of the merger agreement when the deregistration causes a fundamental change to the environment in which the Board of Directors conduct the sale process and the nature and value of the shareholders equity. [253]Furthermore, instead of distinguishing between fact and opinion directors should compressively focus on what information is material. [254]In the case of a company chairman abstaining from voting on the challenged transaction, the disclosing party, when determining whether to disclose, should consider if the individual: 1) is a founder of the company or has significant management experience at the company; 2) is a significant shareholder of the company; and 3) has distrust about the final price and either the Board's entire timing or process or the management of the company itself. [255]Again, these are useful guidelines from Delaware court decisions following *Corwin*, but at the end

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234 S. Michael Sirkin and Nick Mozal, *Saba Software Inc. -- Eluding Corwin Dismissal*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Apr. 5, 2017), https://corpgov.law.harvard.edu/2017/04/05/sabasoftware-inc-eluding-corwin-dismissal/.

235 *Id.*

236 *Id.*

237 *In re Saba Software, Inc., No. 10697-VCS, 2017 Del. Ch. LEXIS 52, at *2, *35 (Ch. Mar. 31, 2017)*.

238 *See generally* Sirkin and Mozal, supra note 234.

239 *In re Saba Software, Inc., 2017 Del. Ch. LEXIS 52, at *2, *35*.

240 *In re Tangoe, Inc. Stockholders Litig.*, No. 2017-0650-*JRS, 2018 Del. Ch. LEXIS 534, at *28-32, (Ch. Nov. 20, 2018)*.

241 *See* Kotler, et al., *supra* note 17.

242 *Id.*

243 ***Appel v. Berkman, 180 A.3d 1055, 1060 (Del. 2018)***.

244 ***Id. at 1062-63***.

245 *Appel v. Berkman: Delaware Supreme Court Rejects Application of "Corwin" Due to Omission of Chairman's Reasons for Abstaining from Board Vote on Merger*, PRACTICAL LAW & SECURITIES (Feb. 22, 2018), https://content.next.westlaw.com/w-013-2986?isplcus=true&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.

of the day the fully informed prong under the **[*290]** *Corwin* doctrine is case specific dependent on the facts of the case and the specific disclosures at issue. [256]The Delaware cases mentioned earlier in this section also illustrate that *Corwin* in fact is not an impenetrable shield for defendant directors.

c. Inspection Rights are Protected

Under Section 220 of the Delaware General Corporation Law ("DGCL"), shareholders of Delaware corporation can inspect the books and records of the corporation. [257]To be entitled to inspection, shareholders must first submit a "written demand under oath," in which they state the purpose for the inspection. [258]In the case that the corporation refuses the shareholder's demand, the shareholder may seek to compel inspection through an order from the Chancery Court of Delaware. [259]Success in doing so depends on the shareholder proving the following: 1) that the shareholder is actually a shareholder of the corporation; 2) that the shareholder has met the form and manner requirements under Section 220; and 3) that the inspection is for a "proper purpose." [260]After the shareholder has proven these requirements, he or she will be entitled to the "indispensable investigative tool" of Section 220. [261]This statutory provision is relevant to the discussion of Corwin cleansing because the Delaware Supreme Court's decision in *Corwin v. KKK Fin. Holdings LLC* left open the question of whether and to what extent affirmed in its decision apply to a Section 220 demand to inspect books and records. [262]There were concerns **[*291]** that *Corwin* would preclude shareholders from making a Section 220 demand, thus, leaving shareholders pursuing litigation against corporate management at a disadvantage. [263]But as discussed below, that was not the case. [264]

Although a fully informed and un-coerced shareholder vote of a merger may eliminate the plenary review of the merger itself, the vote does not affect statutory books-and-records inspection rights. [265]In *Lavin v. West Corp,*West Corporation ("West") entered into an Agreement and Plan of Merger with affiliates of Apollo Global Management ("Apollo"), in which Apollo agreed to purchase West's outstanding stock for $ 23.50 a share in cash. [266]Shortly after, the Company solicited votes in favor of the Merger in the Schedule 14A Proxy Statement that it

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246 *Id.*

247 *Id.*

248 Jacqueline A. Rogers & Timothy R. Dudderar, *Supreme Court of Delaware Emphasizes "Careful Application of Corwin" in Morrison v. Berry*, BUSINESS LAW TODAY (Sept. 26, 2018), https://businesslawtoday.org/2018/09/supreme-court-delaware-emphasizes-careful-application-corwinmorrison-v-berry/.

249 *Id.*

250 *Id.*

251 *See* Morzal, *supra* note 227.

252 Jason M. Halper, *Lessons Beyond Corwin: Columbia Pipeline and Saba Software*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (May 10, 2017), https://corpgov.law.harvard.edu/2017/05/10/lessonsbeyond-corwin-columbia-pipeline-and-saba-software/.

253 *Id.*

254 PRACTICAL LAW & SECURITIES, *supra* note 245, at 47.

255 *Id.*

256 Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 532, 562 (2018)

distributed to its shareholders. [267]Despite the majority of shareholders voting to approve the Merger and its consummation thereafter, plaintiff, Mark Lavin, served a demand on West to inspect its book and records under Section 220 of the DGCL. [268]He stated the purpose of the demand was to determine whether mismanagement or wrongdoing had occurred in regards to the Merger and to investigate the "independence and disinterestedness" of the Company's directors. [269]Lavin's demand was rejected by West because it claimed that the demand failed to state a proper purpose due to its overly broad nature. [270]West additionally claimed that the fully informed and un-coerced shareholder vote cleansed any breaches of fiduciary duty and **[*292]** consequently, the Merger may only be challenged on grounds of waste. [271]The Chancery Court of Delaware held that *Corwin* would not impede an otherwise properly supported demand for inspection under Section 220. [272]In other words, *Corwin* does not provide a framework for determining whether a plaintiff has met his or her burden of justifying inspection. [273]The court's decision was based, in part, on the longstanding practice of having Delaware courts encourage shareholders to utilize the "tools at hand," such as Section 220, to gather information prior to filing complaints that will be subjected to higher pleading standards. [274]Plaintiff shareholders would face significant obstacles when attempting to meet their pleading burden in anticipation of a *Corwin* defense if public filings of the company they are suing would be all they would have to rely on in preparing their complaint. [275]Access to books and records prior to filing grants plaintiff shareholders the opportunity to prepare their complaint with well plead facts. [276]Moreover, since plaintiff shareholder bears the burden to be precise in the pleading stage of his or her shareholder vote challenge, it equitable to allow him or her to have the tools that will allow for a better prepared compliant, which ultimately will help the court in making an informed decision as to whether there was a breach of a fiduciary duty. [277]The court elaborated that the documents obtained from the demand may shed some light on whether the shareholder vote was fully informed as the plaintiff attempts to meet his or her pleading burden "in anticipation of a *Corwin* defense." [278]Therefore, demands under Section 220 continue to be a useful tool in the arsenal of shareholders.

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257 Robert S. Reder & Dylan M. Keegan, Article, *Chancery Court Declines to Apply Corwin to Foreclose a Books and Records Inspection Under DGCL § 220*, 71 VAND. L. REV. 101, 102 (Jun. 17, 2018).

258 *Id.* at *2.

259 *Id.* at *2.

260 *Id.*

261 Megan D. McIntyre, *The Stockholder's Statutory Right to Inspect Corporate Books and Records*, GRANT & EISENHOFER P.A., https://www.gelaw.com/wpcontent/uploads/2015/02/Books_and_Records.pdf (last modified 2010).

262 Sarah T. Runnells Martin and Michelle Davis, *The Inapplicability of Corwin and Section 220*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jul. 9, 2018), https://corpgov.law.harvard.edu/2018/07/09/theinapplicability-of-corwin-and-section-220/.

263 *Id., see* McIntyre, *supra* note 261.

264 William Savitt, *Delaware's Prudent Approach to the Cleansing Effect of Stockholder Approval*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jan. 16, 2018), https://corpgov.law.harvard.edu/2018/01/16/delawares-prudent-approach-to-the-cleansing-effect-ofstockholder-approval/.

265 *Id.*

266 Lavin v. West Corp., No. 2017-0547-JRS, 2017 Del. Ch. LEXIS 866, at *1-2 (Ch. Dec. 29, 2017).

267 *Id.* at *2.

[*293] In ruling that *Corwin* cleansing does not preclude shareholders from requesting a demand for inspection under DGCL Section 220, the court has remained consistent with its past jurisprudence. [279]Historically, the judiciary of Delaware has made efforts to uphold this statutory right, an expansion of the common law right of shareholders to protect themselves by keeping a check on how their corporate fiduciaries conduct business. [280]More importantly, it is sound public policy to allow shareholders to be informed and able to request certain company documents that will enable them to bring well-pleaded complaints. [281]As Vice Chancellor Slights mentioned in his decision in *Lavin v. West Corp.*, granting a demand for inspection enables shareholders to file well plead complaints and in turn, courts are better able to determine whether there was a breach of fiduciary duty because such claims possess more factual support. [282]Shareholders are also able to benefit from inspection under a Section 220 demand regardless of the magnitude of their holdings. [283]The different benefits given to shareholders under a Section 220 demand appear to have made it desirable to them since each year more shareholders have elected to use this investigative tool prior to filing post-merger damages or shareholder derivative suits. [284]Notably, although the cases determining the application of the Corwin doctrine have turned on the unique facts presented, the increasing success of using corporate documents obtained through Section 220 demands to "defeat the application of the doctrine **[*294]** based on alleged inadequate disclosures" has been one of the likely reasons as to why there has been a rising trend of courts declining to apply the Corwin doctrine. [285]In 2018, it got to the point where the *Corwin* doctrine was applied only once by the Delaware Court of Chancery to dismiss an action. [286]Not only does this signify that the *Corwin* doctrine is not an ironclad rule shielding fiduciaries from liability and leaving shareholders defenseless in the process, but it also seems to be aligned with the intention of the *Lavin v. West Corp*. decision to promote shareholders bringing well-pleaded complaints that will not be easily subjected to dismissal. [287]

d. The Need for a Proximate Relationship

Application of the Corwin doctrine is contingent on there being a logically proximate relationship between the transaction or "issue for which [share]holder approval is sought" and the nature of the claims to be cleansed by the

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268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.* at *3.

272 *Id.*

273 *Id.* at *15.

274 *Id.* at *18.

275 *Id.* at *19.

276 *Id.*

277 *Id.* at *22.

278 *Id.* at *30.

279 SHEARMAN & STERLING LLP, " *You're Not Fully Clean": § 220 Inspection Demands Under Corwin* (Jan. 08, 2018), https://www.shearman.com/-/media/Files/Perspectives/2018/01/Youre-Not-Fully-Clean--220-Inspection-Demands-Under-Corwin-MA-010818.pdf?la=en&hash=AACE80B046DE16AB2A35AE181ED7B7CF9329FF32.

280 *See* McIntyre, *supra* note 261.

281 *Id.*

shareholder vote. [288] *In re Massey Energy Co. Derivative & Class Action Litig*. was a case where the plaintiffs challenged the transaction based on their claim that the defendants breached their fiduciary duties. [289]More specifically, plaintiffs claimed that the defendant directors breached their duty of oversight for several years, which ultimately led to widespread and systematic violations of mining regulations, ending in one of the biggest mining incidents in the U.S., with numerous casualties and several criminal convictions of Massey leadership. [290]Although the Delaware Court of Chancery granted **[*295]** defendants' motion to dismiss the plaintiffs' action based on standing the issues, the court's ruling in *In re Massey Energy Co. Derivative & Class Action Litig*. is significant for its discussion on the *Corwin* doctrine. [291]The court stated that despite shareholder approval of a merger, the alleged "breaches by directors and their fiduciary duties with respect to historic director actions that were "unrelated" and "extraneous" to the merger could not be "cleansed" under *Corwin*." [292]In other words, defendant directors cannot cleanse breaches of fiduciary duty regarding actions that the directors took that were unrelated to the action that was approved by shareholders. [293]In reaching this conclusion, Chancellor Andre Bouchard reiterated that the underlying policy of *Corwin* was not intended to serve as a massive eraser used to exonerate fiduciaries of Delaware corporations for any of their actions or inactions prior to their decision to go forward with a transaction. [294]Therefore, the decision in this case adds yet another procedural safeguard; on top the disinterested,un-coerced, and fully informed shareholder requirements, for *Corwin* cleansing to apply.

IV. The Benefits of Corwin Outweigh its Implications

Going forward, parties to deal litigation should expect that Delaware courts will continue to give substantial deference to decisions made by un-coerced, fully informed, disinterested shareholders to approve merger and acquisitions. [295] *Corwin* and the Delaware decisions that followed thereafter embrace the view that "the market's judgment is usually sound and that the costs of intensive litigation regarding transactions approved by informed and self-interested **[*296]** [share]holders generally outweigh the benefits." [296]By creating a strong

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282 *See* Lavin v. West Corp., No. 2017-0547-JRS, 2017 Del. Ch. LEXIS 866, at *22 (Ch. Dec. 29, 2017).

283 Robert S. Reder & Dylan M. Keegan, *Chancery Court Declines to Apply Corwin to Foreclose a Books and Records Inspection Under DGCL § 220*, 71 VAND. L. REV. 101, 102 (Jun. 17, 2018).

284 Roger A. Cooper, Vanessa C. Richardson, & Kimberly Black, *The Rise of Books and Records Demands Under Section 220 of the DGCL*, Cleary M&A and Corporate Governance Watch (Mar. 25, 2019), https://www.clearymawatch.com/2019/03/the-rise-of-books-and-records-demands-under-section-220-of-the-dgcl.

285 Edward B. Micheletti & Mary T. Reale, *Examining Corwin: Latest Trends and Results*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (May 9, 2019), https://www.skadden.com/insights/publications/2019/05/insights-the-delaware-edition/examining-corwinlatest-trends-and-results.

286 *Id.*

287 *See* Haas, *supra* note 184; Lavin, 2017 Del. Ch. LEXIS 866, at *22; Micheletti & Reale, *supra* note 285.

288 In re Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484, 508 (Ch. 2017).

289 Id. at 496-97.

290 Gail Weinstein, Philip Richter, Steven Epstein, & Warren S. de Wied, *When Del. Courts May Reject Corwin Cleansing: Some Clarity*, LAW360 (Jul. 13, 2017), https://advance.lexis.com/api/permalink/a20bb9a5-3d28-4330-84ee-4e0c1687862c/?context=1000516.

291 *Id.*

292 *Id.*

likelihood that most shareholder litigation challenging transactions that have been approved by shareholders will be outright dismissed, *Corwin* has the effect of reducing the costs of post-closing litigation and likely resulting in a decrease in the frequency with which shareholders pursue post-closing claims for damages. [297]Addressing the high shareholder litigation rate, which was at 96% of publicly announced mergers prior to *Corwin*, was one of the intended purposes of the *Corwin* doctrine. [298]Concerns over the high shareholder litigation rate was justified, especially since it usually is settled without material benefit to shareholders but instead gives a significant fee payment to the lead plaintiffs' attorney filing the case. [299] *Corwin*, along with other Delaware court decisions at the time, were attempts to limit litigation and for the most part have been successful in doing so. [300]An empirical analysis examining the dataset of merger litigation for deals over $ 100 million completed from 2003 through 2017 discovered that the overall litigation levels initially declined but rose back up. [301]For instance, in 2013 about 96% of all completed deals were challenged in at least one lawsuit but then that number declined to 73% in 2016. [302]This decrease in litigation was not long lived, it rose to 85% in 2017. [303]

If courts give substantial deference to decisions made by un-coerced, fully informed, disinterested shareholders to approve merger and acquisitions, why is shareholder litigation back **[*297]** on the rise? Some have suggested that this rise is credited to plaintiffs' attorneys adapting the new legal regime in Delaware. [304]Filing merger litigation in federal court is one strategy that plaintiffs' attorneys have adopted. [305]Even though forum selection bylaws prevent merger litigation from being brought in state courts outside of Delaware, they do not preclude plaintiffs from bringing federal suits claiming disclosure violations under Rule 14a-9, which is the federal prohibition against proxy fraud. [306]Moreover, collusion amongst plaintiffs' counsel and defendant corporation may occur where the board of directors waive application of the forum selection bylaw, thereby, allowing the corporation to be sued in a non-Delaware forum. [307]In 2016 alone, out of all of the deals completed only 34% were challenged in Delaware, while 61% were challenged in other states and 39% challenged in federal court. [308]This trend accelerated in 2017, where 87% of completed deals were challenged in federal court and only 9% challenged in Delaware. [309]

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293 *Id.*

294 *In re Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484, 508 (Ch. 2017)*.

295 Tariq Mundiya, Martin L. Seidel, Mary Eaton, Sameer Advani, & Jessica T. Sutton, *Delaware M&A Review: Lessons from 2017 and Outlook for 2018*, WILLKIE FARR & GALLAGHER LLP, (Jan. 2018) https://www.willkie.com/~/media/Files/Publications/2018/01/Delaware_MA_Review_January_2018.pdf.

296 William Savitt, *Post-Closing Merger Litigation -- The Road Ahead*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Jan. 16, 2019), *https://corpgov.law.harvard.edu/2019/01/16/post-closing-mergerlitigation-the-road-ahead/#more-114648*.

297 *See* Haas, *supra* note 184.

298 Matthew D. Cain Jill Fisch, Steven Davidoff Solomon, & Randall S. Thomas, Essay, *The Shifting Tides of Merger Litigation*, *71 VAND. L. REV. 603, 604-5 (March 2018)*.

299 *Id.* at 605.

300 *Id.*

301 *Id.* at 607-08.

302 *Id.*

303 *Id.*

304 *Id.*

305 *Id.* at 607.

Another strategy that plaintiffs' attorneys have adopted is to pursue appraisal litigation. [310]The difficulty of successfully bringing fiduciary duty claims has made appraisal suits an attractive option. [311]This is an unfavorable development since appraisals create uncertainty for buyers "by giving [share]holders the potential to seek payment in excess of the merger price." [312]It is worth noting, however, that the rise in appraisal litigation did not start right after *Corwin* was decided, but instead has been on the rise since the beginning of 2011, as measured by **[*298]** multiple metrics. [313]This ongoing resurgence of appraisal litigation can be attributed, in part, to investors who seek to exploit the "once-seldom-used appraisal remedy by buying target company stock after the announcement of the merger solely to pursue the appraisal," otherwise known as appraisal arbitrageurs. [314]Delaware legislature resisted the rise of appraisal litigation by making two significant changes to the appraisal statute in 2016. [315]The legislature restricted appraisal filings to cases involving a minimum collective state of $ 1 million, or 1% of the outstanding stock of the company. [316]The amended statute also permitted issuers to lower their exposure to the statutory interest rate by tendering all or some of the merger consideration to plaintiffs before the case was resolved. [317]Both amendments to the appraisal statute have been criticized as insufficient because it appears to have minimal, if any, impact in stopping the flow of litigation. [318]Delaware courts have not stood idly by though. Recent appraisal decisions have signaled that Delaware Courts will be skeptical of lawsuits that claim that the "fair value" of a company's stock, as determined in a judicial proceeding brought by a dissenter from the merger, will be higher than the transaction price. [319]Delaware has clarified that in the context of strategic transactions the appraised value may well be less than the deal price. [320]More importantly, these recent decisions have indicated that "an investor who does not want to be a long-term [share]holder in the target, but instead buys shares only to pursue a lawsuit, cannot confidently **[*299]** be expected to be rewarded in an appraisal." [321]This appears to parallel one of the premises of *Corwin*, which is to weed out frivolous litigation. But, despite the recent appraisal actions in recent years, it still needs to be seen whether *Corwin* will contribute more to appraisal actions. [322]

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306 *Id.*

307 *Id.*

308 *Id.* at 608.

309 *Id.*

310 *Id.* at 612.

311 *See* Haas, *supra* note 184.

312 *Id.*

313 Charles Korsmo & Minor Myers, Article, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 287 (2017).

314 Stanley Onyeador, T *he Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339, 340 (Jan. 2017).

315 Matthew D. Cain Jill Fisch, Steven Davidoff Solomon, & Randall S. Thomas, Essay, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 613 (March 2018).

316 *See* Haas, *supra* note 184.

317 Cain, et al., *supra* note 315.

318 *Id.* at 613.

319 Theodore N. Mirvis, *The New New Regime in Delaware Appraisal Law*, HARV. L. SCH. F. ON. CORP. AND FIN. REG. (Mar. 1, 2018).

It is true that shareholder litigation has slightly risen, but nevertheless it is still down when compared to the 96% rate that existed prior to *Corwin*. Moreover, one of the primary goals of the Corwin doctrine is to limit post-closing money damages claims through the application of business judgement rule after effective shareholder ratification has occurred. [323]The other tactics that plaintiffs' attorneys have adopted do not hinder that goal. For instance, appraisals are used to obtain the "fair value" of the shares that have been taken. [324]In other words, the remedy available to shareholders who successfully bring appraisal claims is that the corporation will be required to buy their stock at a price equal to its fair value immediately prior to the extraordinary corporate action being taken. [325]

Additionally, it is not uncommon for Delaware courts to address current trends mergers and acquisitions through their rulings. The decisions rendered in both, *Unocal Corp. v. Mesa Petroleum Co*. and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, as well other decisions at that time, were the Delaware judiciary's attempt to address the sharp increase in corporate takeover activity in the early 1980s. [326]The underlying purpose of these decisions was to ensure that corporate fiduciaries complied with their fiduciary duties when faced with hostile **[*300]** takeovers. [327]Yet, there were some unintended consequences. By 2012, shareholders were challenging 96% of merger and acquisition transactions that valued more $ 500 million and 93% of transactions with a value higher than $ 100 million. [328]The common argument that plaintiffs brought in these challenges were that the board of directors failed to maximize the sale price -- "in other words, the board breached its so-called Revlon duty." [329]Then the Delaware Supreme Court, in an unsurprising fashion, issued its ruling in *Corwin v. KKR Financials Holdings, LLC*, which would be used to address the recent trend in mergers and acquisition, a high litigation rate. [330]As mentioned above, the decision was successful but plaintiffs' attorneys adapted, which is expected since shareholders have several tools at their disposal to challenge merger and acquisition transactions. Shareholders have Section 220 demands, injunctive relief, supplemental disclosures, monetary relief, appraisals, access to Delaware courts, and access to federal courts. Naturally, if one tool becomes less accessible, plaintiff attorneys will look to use other tools at their disposal. There is a strong likelihood that the Delaware judiciary will grapple with reported surge in litigation involving these other tools.

Besides the fact that the different mechanisms that attorneys have adopted to pursue litigation on behalf of their clients is not necessarily concerning, *Corwin* provides several benefits. For one, challenges to mergers and

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320 *Id.*

321 *Id.*

322 *See* Haas, *supra* note 184.

323 *Id.*

324 Keith L. Johnson, *Shareholder Appraisal Process in Delaware*, Reinhart Law, (July 11, 2014),*https://www.reinhartlaw.com/knowledge/shareholder-appraisal-process-in-delaware/*

325 Note, *Appraisal Rights*, PRACTICAL LAW PRACTICE NOTE 8-517-0205,*https://us.practicallaw.thomsonreuters.com/8-517-0205*.

326 Paul L. Regan, A Tribute to Honorable Raymond L. Sullivan, *The Importance of Being Earnest: Paramount Rewrites the Rules Enhancing Scrutiny in Corporate Takeovers*, *46 HASTINGS L.J. 125, 145 (Nov. 1994)*.

327 Will Kenton, *Revlon Rule*, INVESTOPEDIA, (Mar. 5, 2018), *https://www.investopedia.com/terms/r/revlon_rule.asp*.

328 Lyman P.Q. Johnson and Robert Ricca, *The Dwindling of Revlon*, *71 WASH. & LEE L. REV. 167, 168 (2014)*.

329 *Id.*

330 Cain, et al., *supra* note 315.

acquisitions have dropped from 96% to 85%. [331]Moreover, challenges are being voluntarily dismissed. [332]This decrease in merger and acquisition litigation **[*301]** is beneficial because litigation imposes costs on M&A parties, shareholders, and the courts. [333]Another benefit of *Corwin* is that it encourages companies to be more transparent through their disclosures because it will allow them to obtain business judgment protection. Disclosures have become a vital component of the *Corwin* doctrine, not only has most cases refusing to apply the *Corwin* doctrine been the result of the inadequate disclosures but, Section 220 demands also serve as a check on corporate fiduciaries. [334] *Corwin* also seems to consider the fact that today almost all United States public companies are held by sophisticated institutional investors, who can evaluate complex transactions that affect the value of their investment. [335]Consequently, the need for judicial review is less compelling today. [336]The expertise of the Delaware judiciary can be put to better use on other matters. Therefore, taking everything into consideration, the *Corwin* doctrine is more beneficial than harmful.

V. Conclusion

Examination of *Corwin v. KKR Financial Holdings, LLC* and its progeny has revealed that the Delaware Supreme Court's decision is well rooted in Delaware jurisprudence. The court's decision applies the basic principle of stockholder ratification that has traditionally existed under the common law. There has been a common practice of giving shareholder ratification the effect of extinguishing breach of fiduciary claims, changing the standard of review, and shifting the burden of proof. The rationale behind this is that Delaware courts should not have to second guess transactions that shareholders approved through an effective vote. Moreover, the procedural safeguards that allow for an effective share vote, full disclosure and un-coercion, have been utilized prior to *Corwin*. Throughout history Delaware courts have exemplified a **[*302]** willingness to defer to the business judgment of corporate boards, especially when they fulfill their basic duties. This kind of deferential treatment was embraced during the race to bottom and is one of the primary reasons why Delaware became a favorable destination for corporations. Accordingly, the *Corwin* doctrine is not departure from Delaware corporate law, on the contrary, *Corwin* encapsulates the very essence of it.

Furthermore, the fear that *Corwin* creates a hopeless avenue for disapproving shareholders is misguided. Although Corwin serves as a tool to limit the litigation over M&A transactions, shareholders are successfully able to bring challenges against the transactions they disapprove of. On several occasions, defendant directors have not had the benefit of *Corwin* cleansing due to findings of inadequate disclosure and coercion. As a result, Delaware courts have had the opportunity to clarify the scope of both prongs. One thing that all parties must remember though is that findings of inadequate disclosure are context dependent and, therefore, the facts of the case will be primary focus when analyzing the applicability of *Corwin* to the challenged transaction. Nevertheless, the cases interpreting both prongs provide helpful guidance. The framework laid out by the cases illustrate what courts will be looking for when analyzing transactions and the type of actions that may fall under either prong.

Concerns that *Corwin* was not successful in lowering litigation rates and that it led to pursuit of other litigation strategies is not problematic. Litigation rates went down drastically but then rose light but the bottom line is that the current rates are still lower than what it was prior to *Corwin*. Additionally, trial strategy is all about adapting to the

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331 *Id.*

332 Kevin LaCroix, *Percentage of M&A Deals Attracting Litigation Continued to Decline in 2017*, THE D&O DIARY (Jul. 19, 2018), https://www.dandodiary.com/2018/07/articles/mergerlitigation/percentage-ma-deals-attracting-litigation-continued-decline-2017/.

333 *See* Haas, *supra* note 184.

334 *Id.; See also* Reder, et al., *supra* note 282, at 102.

335 *See* Haas, supra note 184.

336 *Id.*

current law in place so the fact that plaintiffs' attorneys are utilizing other tools at their disposal should come to no surprise at all. In a way, this should be celebrated because it emphasizes that shareholders are not helpless post-*Corwin*, a concern that shareholders and commentators have shared. *Corwin* can partially be **[*303]** attributed to the rise in appraisal litigation and filings in federal court but there are other factors at play too. Nonetheless, Delaware courts can be expected to address this "new" rise in litigation in future rulings and in similar fashion as it did in *Corwin* to limit lawsuits for post-closing damages. More importantly, these concerns do not carry enough weight to take away from the benefits of *Corwin* cleansing. The Delaware Supreme Court's ruling weeds out frivolous clams, promotes transparency, and accounts for the increase of institutional investors.

The Delaware courts are not done with *Corwin* or its implications. Going forward, Delaware courts will still have to grapple with the reach of *Corwin* and the need for clearer definitions of what constitutes full disclosure and an un-coerced shareholder vote. The courts will also be expected to issue rulings that will deter filing in federal court and seeking appraisal claims. *Corwin* remains a work in progress but it was a step in the right direction.

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