NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 16 SPRING 2020 NUMBER 2

DID DELAWARE REALLY KILL CORPORATE LAW? SHAREHOLDER PROTECTION IN A POST-*CORWIN* WORLD

MATTEO GATTI*

Corwin v. KKR, *one of many recent cases aiming to mitigate the "deal tax" in M&A represented by baseless litigation, is considered one of the most important corporate law decisions of the 2000s.* Corwin *shields directors from the enhanced scrutiny of* Revlon *in favor of the business judgment rule whenever a transaction "is approved by a fully informed, uncoerced vote of the disinterested stockholders." Many legal commentators see* Corwin *as the poster child of an ongoing process that has been emphatically labeled with expressions such as "Delaware's retreat," "the fall of Delaware standards," and even "the death of corporate law;" in fact, the mainstream view among scholars is that* Corwin *is a setback in shareholder protection. This Article challenges such view and argues that shareholder protections in* Revlon *M&A deals have not suddenly vanished. First,* Corwin *applies only in the presence of certain preconditions: plaintiffs' efforts have simply been rechanneled around them.* Corwin *has in fact expanded the breadth of litigation challenging lack of "full information." Also, the requirement that shareholder approval be uncoerced is bound to pose a limit on certain director abuses in the sale process and in the adoption of deal protection devices. This Article reports of original empirical data on transactions post* Corwin *suggesting that not much has changed in dealmaking: in other words, the decision has not opened the floodgates to bad process, possibly because deal planners anticipate the possibility that rival bids will arise, possibly because of the preconditions to* Corwin *are taken very seriously (especially if coercion constrains ability to offer outrageous deal protection devices), and possibly because corporate planners adhere to norms and best practices and in the worst cases deal lawyers rein in their clients' impulses.*

* Professor of Law, Rutgers Law School. For helpful comments, I am grateful to Martin Gelter, Frank Gevurtz, Yuliya Guseva, Charlie Korsmo, Steven Davidoff Solomon and to the participants at the National Business Law Scholars Conference held at the University of California – Berkeley on June 21, 2018. Thanks to Yohan Nah for his research efforts. All errors and omissions are mine.

INTRODUCTION

There are few areas of corporate law as litigious as mergers and acquisitions (M&A). For a time in the mid-2010s, virtually all announced transactions with a public corporation as target ended up in court for alleged violation of director fidu-

ciary duties.[1] That was the product of a series of factors, most notably lawyers' incentives.[2] When the judiciary felt that enough was enough, it handed a series of decisions that, among other things, sought to make it less rewarding for a plaintiff attorney to challenge a transaction,[3] made it harder to obtain a preliminary injunction,[4] and gave defendants an early exit in suits claiming monetary damages if they could establish that certain procedural preconditions were satisfied.[5] This Article focuses mainly on the third of these decisions, *Corwin v. KKR Fin. Holdings LLC*,[6] and the core question addressed is whether shareholders are less protected in its aftermath.

Corwin is considered one of the most important corporate law decisions of the 2000s.[7] In short, the case departs from the long-standing regime of enhanced scrutiny imposed by *Revlon*,[8] which requires directors to seek highest price reasonably achievable in a change of control transaction, in favor of the much less demanding business judgment rule, whenever "a

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1. *See, e.g.*, Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 620 (2018) (mentioning that deal litigation peaked in 2013 with 96% of the announced deals being litigated).

2. Jill Fisch, Sean Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015) (describing how whilst almost every deal was litigated, the outcome of litigation led to very little benefit to stockholders, yet lawyers were still awarded generous fees).

3. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016) (establishing that "disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission").

4. C & J Energy Servs., Inc. v. City of Miami Gen. Emps., 107 A.3d 1049 (Del. 2014); *see also* discussion *infra* Section I.B.3.

5. *See infra* note 6 and accompanying text.

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

7. James D. Cox, Tomas J, Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals* 2 (Vanderbilt University Law Sch. Legal Studies Research Paper Series 19-06, 2019), https://ssrn.com/abstract=3333241.

8. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (under *Revlon*, when a corporation is on sale, subject to a break up or a change of control, the role of directors switches "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company"). *See* discussion *infra* Part I.

transaction . . . is approved by a fully informed, uncoerced vote of the disinterested stockholders."[9]

Many legal commentators see *Corwin* as the poster child of an ongoing process that has been emphatically labeled with expressions such as "Delaware's retreat,"[10] "the fall of Delaware standards,"[11] and even "the death of corporate law."[12] Indeed, some authors have said that "heightened judicial scrutiny [in M&A] has . . . become something of a relic of the freewheeling 1980s."[13] The mainstream view among scholars is that *Corwin* is a setback in shareholder protection. As one commentator put it, "*Corwin* . . . represents a new direction in merger litigation, one that reduces directors' legal obligations to, as a practical matter, full disclosure."[14] Others added that the judiciary's "clear message is that enhanced scrutiny is now generally unavailable. The sole constraint is now the shareholder vote."[15] Another author concluded that the decision "drastically limit[s] the ability of plaintiffs to pursue post-closing fiduciary duties claims against boards of directors in M&A transactions."[16] And this comes from academics alone—the reactions from the plaintiff bar have of course been much harsher.[17]

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9. *Corwin*, 125 A.3d at 309.

10. Two different papers actually use this expression in their title: James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323 (2018); Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55 (2019).

11. Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware Takeover Standards*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES (Steven Davidoff Solomon & Randall S. Thomas eds., 2019).

12. Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019) (arguing more broadly that the days of judicial activism by Delaware courts are over).

13. Sean J. Griffith & Dorothy Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151 (2019).

14. Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 318 (2018).

15. Griffith & Lund, *supra* note 13, at 1164.

16. Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 192 (2019).

17. *See, e.g.*, Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 668 (2017) (championing the contributions brought by plaintiffs in post-closing merger litigation and admonishing they will no longer be reachable post-*Corwin*). In a scholarly article, Vice Chancellor Slights amusingly

Conversely, supporters of the *Corwin* decision applaud the shift from courts to markets in determining whether directors performed satisfactorily in the sale of the company. In an age of enhanced investor sophistication given the increasing size of institutional ownership, the argument goes, the judiciary has gladly ceded the role of optimal decision maker to shareholders.[18]

Many commentators are not persuaded by this retreat and believe judicial intervention in M&A is still necessary. First, critics of the *Corwin* decision note that it is unclear and unproven that shareholders approving a merger would have also separately waived a *Revlon* claim. The bundling of shareholder approval is problematic in their view because the merger vote is about the deal at hand, whereas *Revlon* litigation revolves around determining whether directors engaged in actions or omissions that led to the failure to obtain another, better deal.[19] Second, some authors posit that more than sophistication, institutional ownership brings conflicts of various natures and therefore approval by institutions can be easily misinterpreted.[20] Also, the sophistication required to waive a *Revlon* claim is somewhat different than the decision to approve or reject a merger: the former is more of a lawyer's prerogative than a pure investment decision.[21] In these views, the structure, nature, and quality of the substitute (vote vs. judicial review) are not compelling.

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draws a list of the most alarmed headlines that followed the *Corwin* decision, all coming from practitioners representing plaintiffs. These include the following: "Is Stockholder Litigation in Trouble in Delaware? An Update[;]" "Delaware Plaintiffs' Attorneys Fear Exodus of Chancery Deal Suits[;]" "As Deals Bloom, Delaware Judges Are Leaving Shareholders Bar in the Cold[;]" "Delaware Supreme Court Deals Another Blow to Stockholder Plaintiffs in M&A Litigation[;]" "Delaware Plaintiffs' Bar Rattled by Seismic Shift in Merger Law." Joseph R. Slights III, Corwin v. KKR Financial Holdings LLC – *An "After-Action Report"*, 24 FORDHAM J. CORP. & FIN. L. 1, 18 (2019).

18. *See, e.g.*, J. Travis Laster, *Changing Attitudes: The Stark Results of Thirty Years of Evolution in Delaware M&A Litigation*, *in* RESEARCH HANDBOOK ON REPRESENTATIVE SHAREHOLDERS LITIGATION 202, 221 (Sean J. Griffith et al. eds., 2018).

19. *See, e.g.*, Franklin A. Gevurtz, *The Shareholder Approval Conundrum*, 60 B.C. L. REV. 1831, 1892 n.310 (2019).

20. Griffith & Lund, *supra* note 13, at 1158.

21. Cox, Mondino & Thomas, *supra* note 7, at 14.

But the criticism does not stop here. According to some authors, *Corwin* does not even do a good job in curbing litigation because of the full information requirement which has been promptly and heavily embraced by plaintiffs.[22] Further, *Corwin* creates an inherent short-circuit in the logic of remedies in light of *C & J Energy*,[23] another important Delaware Supreme Court decision rendered a year before: while *Corwin* admonishes that *Revlon* (and *Unocal* for that matter) were never conceived to provide plaintiffs with monetary relief but rather to obtain injunctions when director resistance to a takeover was excessive, one of the underlying motifs of *C & J Energy* is for judges to abstain from ordering injunctions while a shareholder vote is still pending, so that shareholders can decide for themselves.[24]

The core question this Article addresses is whether shareholders are left unprotected after *Corwin*. To answer, three separate issues need to be analyzed. First, how effectively was *Revlon* protecting shareholders before *Corwin*? Second, can shareholders still rely on litigation after *Corwin*? Third, has dealmaking acknowledged the death of corporate law and significantly changed as a consequence of the perceived diminishing threat of litigation in the aftermath of *C & J Energy* and *Corwin*?

Part I of this Article addresses the first issue by offering an historical overview from the inception of classical takeover doctrines to *Corwin* and its progeny, chronicling the progressive watering down of *Revlon*. To begin, the reach of the so-called "*Revlon* zone" has always been partial, in that it does not apply to stock-for-stock transactions that do not result in the switch of the underlying ownership structure of the target company from contestable to non-contestable.[25] On the sub-

22. *See* Gevurtz, *supra* note 19, at 1848.

23. C & J Energy Servs., Inc. v. City of Miami Gen. Emps., 107 A.3d 1049 (Del. 2014).

24. *See* Anabtawi, *supra* note 16, at 196; Gevurtz, *supra* note 19, at 1862–63.

25. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1994) (finding that *Revlon* would not apply when the target company gets acquired by a company that does not have a controlling stockholder who would end up controlling the combined company: if the control of the target as merged with the other entity continues to stay fluid in the market, stockholders of the target would not face a loss in their voting rights and therefore *Revlon* would not apply).

stance, we moved from an early understanding of the *Revlon* doctrine as imposing an auctioneering duty on a target board to a conceptualization of it as yet another reasonableness standard of review. Moreover, since the late 2000s, after the *Lyondell* decision,[26] for most companies, more specifically those who have opted out of the duty of care under Section 102(b)(7) of the Delaware General Corporation Law ("DGCL"), only director bad faith matters, which consists of utter dereliction of duty: anything below such an egregious conduct would not violate *Revlon*.[27] Finally, the *C & J Energy* and *Corwin* cases put forward more or less explicitly the proposition that *Revlon* was really conceived for two-bidder deals to guarantee a level playing field and ensure a company does not play favorites among rival bidders.

After Part II analyzes *Corwin*, its progeny, the doctrinal and policy rationales, and the critiques legal commentators levied against it, Part III addresses the second issue, namely whether shareholders can still rely on fiduciary duty litigation. The bulk of the analysis surrounds the preconditions to *Corwin*: full information, lack of coercion, and disinterest.

Of course, a full information requirement represents nothing new in M&A litigation. After *Corwin*, attacking the merger disclosures has been the field the plaintiff industry has relied on the most.[28] Case law attests that judges have definitively been responsive.[29] This is not surprising: cases revolving around informational flaws are easier to adjudicate because they do not need to second-guess director conduct or the substance of the transaction. This Article suggests that the potential reach of the full information precondition should not be underestimated: after all, many *Revlon* cases decided against the defendants contain one or more elements of deception, particularly when directors are not comfortable in candidly detailing certain aspects of the process that can in fact show they were not running an unbiased sale.[30]

It is hard to predict where the lack of coercion requirement is going to take plaintiffs. Coercion is a recurring con-

26. Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).
27. *See infra* Section I.B.2.
28. *See infra* Section III.A.1.
29. *See id.*
30. *See infra* note 192 and accompanying text.

cept in Delaware corporate law; it has been embraced with mixed fortunes by plaintiffs in areas as varied as bond workouts, the treatment of preferred stockholders in self-tender offers, parent-subsidiary tender offers, and takeover defenses.[31] Coercion seldom appears alone; to be actionable it is characterized in various ways: inappropriate, wrongful, structural, substantive, inherent, situational, to name a few. Thus far, judges have found coercion and not applied *Corwin* in somewhat easy cases—some authors categorized the underlying facts as "extreme."[32] While it is unclear whether and how judges will expand coercion reach, coercion can be used to police some of the abuses judges were policing under the general *Revlon* standard. Only time will tell if and how that will happen.

The cleansing effect under *Corwin* requires that shareholder approval come from "disinterested stockholders." Currently, there is no agreement among commentators on whether disinterest is really a precondition to *Corwin*—case law has considered the absence of a controlling shareholder sufficient to satisfy it.[33] This Article views disinterest as a crucial element for the *Corwin* cleansing effect to have a rational justification. If the outcome of the merger vote is swung by the pivotal vote of some potentially interested stockholder (the buyer itself or the directors and officers are the obvious cases, but the list is much longer and includes cross-holders, merger arbitrageurs, and institutions), the merger vote cannot be deemed a proxy for aggregating the genuine preferences of, to use Chief Justice Strine's words, the "real parties in interest."[34]

The preconditions to *Corwin* do not technically exhaust all litigation avenues. Even after *C & J Energy*, plaintiffs can still rely on injunctions. Whether that is a feasible strategy will depend on whether a rival bid arises, in the absence of which judges have shown significant restraint in providing such protection.[35]

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31. For details, see *infra* Section III.A.2.
32. Anabtawi, *supra* note 16, at 195.
33. *See infra* note 222 and accompanying text.
34. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015).
35. *See infra* Sections I.B.3. and III.B.

The third issue analyzed by this Article is whether dealmaking has significantly changed after the seeming endorsement of a *laissez-faire* approach by Delaware judges. The short answer is that for the moment, it has not. In Part IV, I report of a companion paper written together with Professor Martin Gelter, in which we look at all domestic public deals in the 2010–2018 period for a contestable target with an equity value of at least $100 million.[36] According to our study, the normal indicators of bad process have not worsened in the aftermath of *C & J Energy* and *Corwin*. For instance, target termination fees have not increased, deals without a pre-signing market check have not proliferated, nor have deals without both a pre-signing market check and a go shop. Our results are consistent with other recent studies that, with different methodology, have concluded that the two decisions have not had a significant impact on *Revlon* transactions.[37] There are several possible explanations for the lack of discernable changes in dealmaking patterns: *Revlon* was no longer stringent in the 2010s; the preconditions to *Corwin* do retain some bite, especially if we embrace the "saints and sinners" philosophy that permeates adjudication in Delaware fiduciary duty cases; deal lawyers are risk-averse and try to rein in their clients' worst impulses; out-of-Delaware litigation is still a risk. Part V concludes.

I.
Framing *Corwin*: *Revlon* and Its Progeny

Corwin is one of the most recent cases in a series that has progressively limited the reach of the *Revlon* doctrine.[38] This section surveys the "rise and fall" of *Revlon*, while Part II will be devoted to *Corwin* itself.

36. Matteo Gatti & Martin Gelter, Dealmaking and Wealth Effects of *Corwin* (2019) (unpublished manuscript) (on file with author).

37. Matthew D. Cain et al., *Does* Revlon *Matter? An Empirical and Theoretical Study* (Eur. Corp. Governance Inst., Working Paper No. 466/2019, 2020), http://ssrn.com/abstract_id=3418499.

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

A. Revlon*: Historical Context, Trigger, and "Duties"*

Revlon is a takeover decision that cannot be correctly understood unless framed within its historical context. A series of important decisions in the mid-1980s showed how traditional corporate law and fiduciary duties existing at the time were ill equipped to address the M&A boom. The first shock came with *Smith v. Van Gorkom*,[39] which shattered the calm waters of the business judgment rule to impose monetary liability for failure to comply with the duty of care in the sale of the company. The Delaware Supreme Court took issue with the directors' lack of information and involvement in the selling process, which was essentially conducted solo by the Chairman and CEO, Van Gorkom. While the Delaware Supreme Court did not technically apply enhanced scrutiny, *Van Gorkom* is nowadays considered a direct precursor of *Revlon*.[40]

High-stakes deals were not the sole driver of the upcoming changes in the law. Arguably, a far bigger role was played by what can be considered the staple of 1980s American capitalism: the hostile takeover. The unprecedented boom of hostile takeovers of the late 1970s and early 1980s had made the Delaware corporate law of the time incapable of containing the phenomenon of companies resorting to a wide array of new antitakeover defensive tactics, which were engineered and rolled out at each new takeover battle.[41] The old primary purpose test laid out twenty years earlier in *Cheff v. Mathes* proved obsolete.[42] A series of takeover decisions changed the landscape, including, of course, the most crucial of them all, *Unocal*, which introduced the context of enhanced scrutiny.[43]

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39. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1984).

40. *See generally* Laster, *supra* note 18, at 204–05.

41. One of the most exhaustive lists of various takeover defenses that was written at the time of the takeover battles of the 1980s is in ROBERT C. CLARK, CORPORATE LAW 571–77 (1986).

42. Cheff v. Mathes, 199 A.2d 548, 554–57 (Del. 1964) (holding that unless plaintiff could show the sole or primary purpose of the underlying action was entrenchment, a defensive tactic is protected by the business judgment rule).

43. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985). Another landmark decision that followed *Unocal* was Moran v. Household Int'l, Inc., 500 A.2d 1345 (Del. 1985), which represented the most important practical implication of the *Unocal* decision, because it used the *Unocal* test to validate the poison pill. *See Moran*, 500 A.2d at 1351, 1356–57 (holding that adopting a rights plan by the board of directors of a target as a

In such a landmark case, directors responded to a coercive two-tier tender offer with a coercive recapitalization plan that was meant to discriminate against, and to dilute, the bidder. Citing several reasons for empowering directors to respond to hostile takeovers, ranging from concerns relating to two-tier tender offer to the impact on various corporate constituencies other than stockholders,[44] Delaware judges allowed target directors to adopt defensive measures so long as they can meet a two-prong test that requires that: (i) there are "reasonable grounds for believing that a danger to corporate policy and effectiveness exist[s]" and (ii) the response taken by the company is "reasonable in relation to the threat posed" (the latter is often referred to as the Unocal proportionality test).[45] With the crucial decision in *Unocal*, the Delaware Supreme Court established an intermediate standard of review between the entire fairness test (the rigorous standard for duty of loyalty cases) and the business judgment rule, which, according to the *Unocal* court, cannot apply in its pure form in takeover cases "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[46] A new era of enhanced scrutiny of takeover transactions had begun and *Revlon* followed only a year later.

The facts in *Revlon* were structurally different than those in *Unocal*, in that judges were confronting a two-bidder scenario. That was because the target company Revlon decided to seek help from a white knight to fend off a hostile bid.[47] Be-

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prospective takeover defense meets the *Unocal* proportionality test, but the use of the pill in an actual takeover may be subject to specific scrutiny).

44. *Unocal*, 493 A.2d at 955 (stating that while reviewing the reasonableness of a target's defensive measures against a hostile bidder, the courts may consider such concerns as the "inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)").

45. *Id.* at 955.

46. *Id.* at 954.

47. Pantry Pride, a company controlled by Ron Perelman's private equity firm MacAndrews & Forbes, proposed a transaction to Revlon and went hostile when Revlon rejected it, citing inadequate price and lack of financing. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc, 506 A.2d 173, 176–77 (Del. 1986). Revlon took several defensive steps at the outset. First, it adopted a poison pill giving rights to shareholders other than the bidder to

cause of this defensive strategy, the board of Revlon effectively put the company up for sale—something that the Unocal board never did (rather, it implemented a recapitalization aimed at pursuing its own long-term plan). When Revlon realized it could no longer stay independent, it chose a sale route by selecting a buyer it preferred. To that end, it authorized a series of defensive actions that were scrutinized by the Delaware judges, including a no-shop provision, and two lock-ups (a proper asset lock-up and a termination fee).[48]

The *Revlon* ruling established an enhanced standard of conduct requiring directors to maximize value for the benefit

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acquire notes with one-year maturity and a 12% coupon, that is, poison debt, especially for an LBO specialist like Perelman. *Id.* at 177. Second, it entered a stock buy-back, whereby equity was exchanged for notes having rigid restrictive covenants on the ability to incur debt, divest assets or issue dividends (again, all measures aimed at thwarting Perelman's LBO attempt). *Id.* However, Pantry Pride was not dissuaded and sweetened its offer several times up to $53 per share. Because of the insistence, Revlon had to change tactics and resort to a white knight. *Id.* at 177–78. It found one in Forstmann, Little, which was eager to counter Pantry Pride's offer at $56. *Id.* at 178. However, because the poison debt represented an issue for the white knight as well, Revlon started to work on a waiver of the restrictive covenants in the notes, which triggered a negative reaction in their market price with the noteholders threatening to sue. *Id.* After Pantry Pride raised its offer to $56.25 (mentioning it would top any price offered by Forstmann), Revlon and Forstmann agreed on a deal $57.25 per share conditioned upon several deal protection devices: (i) an asset lock-up, that is, an option to acquire certain business divisions at discounted price if another acquirer purchased 40% or more of Revlon, (ii) a $25 million termination fee, (iii) a restrictive no-shop provision limiting the ability by the Revlon board to negotiate with any other bidder (including of course Pantry Pride), (iv) redemption of Note Purchase Rights, and (v) waiver of the restrictive covenants. *Id.* Additionally, Forstmann agreed to support the par value of the poison debt notes by exchanging them for new notes. *Id.* at 178–79.

48. Lock-ups are deal protection devices that work as consolation prices: they are aimed at enticing a white knight (in case a takeover attempt is already ongoing, as it was in *Revlon*) or a first-bidder (in the case of a friendly transaction). Without a lock-up, a white knight or first bidder would otherwise worry it could become a stalking horse, should their offer not prevail in an auction for control. However, when the size of the lock-up relative to the aggregate deal price reaches certain levels, further bidding is essentially discouraged if not made unfeasible altogether. In fact, the lock-ups Revlon granted to the white knight turned out to be invalid. *See infra* note 51 and accompanying text. For a detailed description of the lock-up debate, see John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

of shareholders in the sale of the company above the protection of interests of other stakeholders, including maintaining the independence of the corporate entity. Specifically, under *Revlon* the role of directors was transformed "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[49]

And in that (new) framework, the Revlon board took two missteps. First, it justified embracing the white knight alternative deal because of its planned support of some faltering notes issued by the target. But once the company was for sale, the court determined that looking after non-shareholder constituencies was inconsistent with Delaware law. (Ironically, it was the same court only a year earlier that in *Unocal* allowed the protection of such constituencies in takeovers.)[50] Second, it abused deal protection devices such as the lock-up and the no-shop. With respect to the lock-up, the Delaware Supreme Court concluded that it destroyed the ongoing auction:

> A lock-up is not per se illegal under Delaware law. . . . Such options can entice other bidders to enter a contest for control of the corporation, creating an auction for the company and maximizing shareholder profit. Current economic conditions in the takeover market are such that a "white knight" like Forstmann might only enter the bidding for the target company if it receives some form of compensation to cover the risks and costs involved. . . . However, while those lock-ups which draw bidders into the battle benefit shareholders, similar measures which end an active auction and foreclose further bidding operate to the shareholders' detriment. . . . The Forstmann option had a . . . destructive effect on the auction process. Forstmann had already been drawn into the contest on a preferred basis, so the result of the lock-up was not to foster bidding, but to destroy it.[51]

The high court drew a similar analysis for the no-shop: not per se illegal, but "impermissible . . . when a board's pri-

49. *Revlon*, 506 A.2d. at 182.
50. *Unocal*, 493 A.2d at 955.
51. *Revlon*, 506 A.2d. at 183.

mary duty becomes that of an auctioneer responsible for selling the company to the highest bidder."[52]

Revlon is a hostile takeover case that invalidated certain defenses in connection with a competitive auction for control, but its implications were far larger: because all negotiated deals do contain deal protection devices similar to those banned under *Revlon*, practitioners assisting companies entering into a friendly transaction had to reflect its ruling to avoid target directors breaching their fiduciary duties.

In practice, *Revlon* immediately raised two crucial issues. First, what triggers it? Second, what are the substantive duties directors are subject to?

Given that answering the first question is not at the core of this Article, it is sufficient to mention that there are three instances triggering *Revlon*: a sale of the company; a break-up of the company; and, in the wake of *Paramount v. QVC*,[53] a change of control of the company, which for the Delaware Supreme Court does not occur when "[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market."[54] *QVC* has a passage that explains the underlying rationale for the enhanced duties: directors must ensure that shareholders get a control premium "[w]hen a majority of a corporation's voting shares are acquired by a single person or entity (or by a cohesive group acting together) . . . [to compensate from the] significant diminution in the voting power of those who thereby become minority stockholders."[55] The enhanced scrutiny of *Revlon* is thus a judicial protection against the risk that directors will not adequately foster the interests of shareholders in the face of the typical end-game situation presented by a sale or change of control.[56]

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52. *Id.* at 184 (noting that the agreement to negotiate only with a white knight "ended rather than intensified the board's involvement in the bidding contest").

53. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994).

54. *Id.* at 47. Therefore, most (but not all) stock-for-stock deals are not *Revlon* transactions.

55. *Id.* at 42–43.

56. *See, e.g.*, RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 720–21 (2d ed. 1995); Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 559 (2002); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1945 (2003);

Coming to the second issue, it is even thornier to establish what are the exact contours and contents of fiduciary duties of directors subject to *Revlon*.[57] In particular, what were the implications of the famous passage that, in a *Revlon* scenario, "directors' role change[s] from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company"? Did it mean directors must always proceed with a full-fledged auction whenever they decide to sell?[58] Did it mean directors must always favor the bid with the highest value, irrespective of other factors? The ensuing section will summarize the arch of *Revlon* substantive duties.

B. *From* Revlon *"Duties" to* Revlon *Standard of Review, No* Revlon *Next?*

It did not take long for Delaware judges to significantly qualify *Revlon* and contain the breadth of the implications of their 1986 decision, especially with respect to what at first

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Stephen M. Bainbridge, Unocal *at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 789 (2006).

57. Gevurtz, *supra* note 19, at 1841 ("The precise impact of applying this doctrine to a board decision is opaque"). For a thorough analysis, see generally J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5 (2013).

58. The dilemma on whether it is good policy to favor auctions over first bidders kept commentators busy in the early 1980s. According to a view, a sale to the highest buyer is desirable because the person willing to spend the most on the target is considered the most efficient user of the asset from an efficiency standpoint. For the argument that auctions are beneficial for the market for corporate control, see Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1052–55 (1982) (arguing that a delay to facilitate competing bids for a target is beneficial and would lead to more efficient transactions in the market for corporate control); Ronald J. Gilson, *Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense*, 35 STAN. L. REV. 51, 61–62 (1982) (arguing that the only defensive measure directors should be allowed to take is seeking higher bids). For a critique, see Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 17 (1982) (arguing that "shareholders are unlikely to gain from rules that promote auctions" and that "[p]rivate and social wealth is greatest when bidders choose their own time periods and disclosures, subject to a prohibition of fraud"); Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 169–84 (1988) (arguing that efficiency does not require that assets move immediately to the highest value user, as any transfer of an asset to a higher value user would be efficient).

glance resembled an auctioneering rule.[59] First, in the 1987 decision *Mills Acquisition Co. v. Macmillian*,[60] whilst the Delaware Supreme Court somewhat acknowledged the duty to run an auction, it refrained from imposing any granular rules. In fact, the judges clarified that "[d]irectors are not required by Delaware law to conduct an auction according to some standard formula, only that they observe the significant requirement of fairness for the purpose of enhancing general shareholder interests."[61]

1. Barkan *and* QVC*: Auction? What Auction?*

More importantly, a couple of years later, with *Barkan v. Amsted Industries, Inc.*,[62] the Delaware Supreme Court famously established that "there is no single blueprint that a board must follow to fulfill its duties."[63] On that occasion, the Supreme Court affirmed a Chancery Court's approval of a class action settlement in connection with an ESOP-sponsored MBO. A plaintiff had appealed the settlement approval challenging that the transaction breached *Revlon* because the board failed to run a proper auction after it determined to put the company on sale.[64] The Supreme Court upheld the settlement on the view that "*Revlon* does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest."[65] In particular:

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59. In 1987, the Delaware Supreme Court had characterized the Revlon obligation as one "to conduct a sale of the corporation," but since it determined that the obligation did not arise under the circumstances, such characterization was arguably dicta. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1338 (Del. 1987).

60. Mills Acquisition Co. v. MacMillan, 559 A.2d 1261 (Del. 1989).

61. *Id.* at 1286. The Court added that Delaware law "does not preclude differing treatment of bidders when necessary to advance [shareholder] interests. Variables may occur which necessitate such treatment. However, the board's primary objective, and essential purpose, must remain the enhancement of the bidding process for the benefit of the stockholders." *Id.* at 1286–87 (ruling that an asset lock-up for the favored buyer KKR did not lead to a better deal, but rather resulted in the premature end of the auction process to the detriment of the unwanted bidder Robert Maxwell).

62. Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989).

63. *Id.* at 1286.

64. *Id.* at 1281–85.

65. *Id.* at 1286.

> *Revlon* is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders. When *multiple bidders* are competing for control, this concern for fairness forbids directors from using defensive mechanisms to thwart an auction or to favor one bidder over another. When the board is considering a *single offer* and has no reliable grounds upon which to judge its adequacy, this concern for fairness demands a canvas of the market to determine if higher bids may be elicited. . . . *When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.*[66]

The above passage contains for the first time an important distinction between transactions with multiple bids and one-bidder deals. The former require a somewhat easier task for the adjudicator, that is, discerning when the target is using defensive mechanism for favoritism toward one of bidders. One-bidder deals are trickier. The adjudicator has to determine in a vacuum whether no rival bids have emerged because the offer represented a solid deal no one could beat or because directors ran a poor sale process or made it impossible to top the first offer with excessive deal protection devices. Dealing with an uncertain territory, the judge gives more discretion to directors: the need for a canvas of the market falls away if directors can show they possess enough information to evaluate the transaction.

The "no single blueprint" approach laid out in *Barkan* was soon picked up, arguably expanded,[67] and followed consistently by subsequent decisions, most notably *Paramount v.*

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66. *Id.* at 1286–87 (emphasis added).

67. In a scholarly piece, Vice Chancellor Travis Laster noted that whilst "the 'no single blueprint' language is cited ubiquitously in support of an argument that a board did not have to contact multiple bidders," in reality the *Barkan* opinion intended to warn about the risks of single-bidder processes: "the Delaware Supreme Court directly reinforced its preference for multiple bidders, explaining that a single-bidder process, while permissible, should be the exception rather than the rule." *Cf.* Laster, *supra* note 18, at 206.

QVC,[68] which sought to restate and clarify the scope of *Revlon* in two sections in the opinion tellingly titled "The Obligations of Directors in a Sale or Change of Control Transaction" and "Enhanced Judicial Scrutiny of a Sale or Change of Control Transaction." Although the first of those two sections begun with emphatically asserting that "[t]he consequences of a sale of control impose special obligations on the directors of a corporation,"[69] the *QVC* decision ultimately framed *Revlon* as a standard of enhanced judicial scrutiny, aimed at ensuring that directors acted reasonably.[70] In fact, according to *QVC*, the objective directors must focus on is qualified by a standard of reasonableness: "secur[ing] the transaction offering the best value reasonably available."[71]

The *QVC* court emphasized that "a board of directors is not limited to considering only the amount of cash involved,"[72] and, drawing on *Macmillan*, clarified that "the board may assess a variety of practical considerations relating to each alternative, including: '[an offer's] fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; . . . the risk of non-consummation; . . . the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests.'"[73] All in all, in the view of the court, the *Revlon* test rests on enhanced judicial scrutiny aimed at determining the reasonableness of the actions of directors:

> A court applying enhanced judicial scrutiny should be deciding whether the directors made *a reasonable* decision, not *a perfect* decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may

68. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43–45 (Del. 1994).

69. *Id.* at 43.

70. *Id.* at 43–45.

71. *Id.* at 44.

72. *Id.* "Where stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives". *Id.*

73. *Id.* (quoting *Macmillan*, 559 A.2d at 1282 n. 29) (alteration in original).

> have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.[74]

While the initial wording of *Revlon* seemed to suggest imposing an auctioneering rule, in less than eight years, the standard had morphed into something much less demanding.[75] In practical terms, lock-ups and termination fees are analyzed under a reasonableness lens (whether under *Revlon* or, after *Omnicare* and *Unocal*)[76] and no-shops are generally valid,[77] so long as they are subject to a fiduciary out (thus effectively narrowing a vested contractual right of a buyer).[78]

Interestingly, some of the very decisions that steered away from any per se depiction of the board duties were either decided against the target directors (*MacMillan* and *QVC*) or contained language characterizing board discretion as an exception rather than the general approach (*Barkan*).[79] But the genie was already out of the bottle.

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74. *Id.* at 45 (footnotes omitted).

75. *See* Lyman Johnson, *The Reconfiguring of* Revlon, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 263, 266 (Elgar Publishing, Steven Davidoff Solomon & Claire Hill, eds., 2015) ("Early on, Delaware courts stepped away from the 'auctioneer' language of *Revlon*, and today the supreme court continues to repudiate the colorful auction metaphor.").

76. In Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 931 (Del. 2003), the Delaware Supreme Court established that deal protection devices, which inherently bear a defensive component, must be analyzed under the *Unocal/Unitrin* standards: therefore, they cannot be either preclusive of other rival bids or coerce shareholders into accepting a deal as a *fait accompli.*

77. *Cf.* Laster, *supra* note 18, at 219 (noting, in the aftermath of *C & J Energy*, that "the once remarkable no-shop clause has become unremarkable"). No-shops are present in virtually all deals. *Cf.* Gatti & Gelter, *supra* note 36, at 2 n. 7 (reporting that more than 99% of deals in the 2010–2018 period contain no-shop provisions).

78. *QVC*, 637 A.2d at 51 ("The No-Shop Provision could not validly define or limit the fiduciary duties of the Paramount directors. To the extent that a contract, or a provision thereof, purports to require a board to act or not act in such a fashion as to limit the exercise of [its] fiduciary duties, it is invalid and unenforceable.").

79. *Cf.* Laster, *supra* note 18, at 204–15 (noting a change of attitude by the Delaware judiciary from the early cases of the 1980s to the cases that culminated with *C & J Energy* and *Corwin*).

2. Malpiede *and* Lyondell*: Duties? What Duties?*

Subsequent decisions went even further and clarified that there are no such things as *Revlon* duties.[80] In *Malpiede v. Townson*,[81] the Delaware Supreme Court admonished that "*Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply[,]"[82] but "[r]ather . . . emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[83] The 2009 Delaware Supreme Court decision *Lyondell Chemical Co. v. Ryan*[84] embraced and built on *Malpiede* to compress even further the level of protection for shareholders of Delaware corporations experiencing a sale or change of control.

In *Lyondell*, the judges reiterated that *Revlon* did not introduce any additional fiduciary duty. Now, following the 1986 amendment to the DGCL passed in the aftermath of *Smith v. Van Gorkom*,[85] under Section 102(b)(7) of the DGCL, the certificate of incorporation of a Delaware corporation can exculpate directors from personal liability arising out of duty of care claims.[86] This means that directors of the overwhelming majority of corporations, including the Lyondell directors in that case, even when in the *Revlon* zone, are only subject to claims arising from violation of the duty of loyalty or of the duty to act in good faith (neither of which is waivable under the statute). Negligence alone, even gross negligence, in conducting the sale of the company will not be sufficient. To fend off a *Revlon* claim, it will be sufficient for defendant directors to show that they are either independent or not motivated by self-interests

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80. For a persuasive account that negates the existence of *Revlon* duties and establishes *Revlon* as a standard of review and not of conduct, see Laster, *supra* note 57, at 25–33.

81. Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).

82. *Id.* at 1083.

83. *Id.*

84. *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009).

85. *See* Smith v. Van Gorkom, 488 A.2d. 858 (Del. 1984).

86. More precisely, under Section 102(b)(7) of the DGCL, the certificate of incorporation may contain a "provision eliminating . . . the personal liability of a director . . . for monetary damages for breach of fiduciary duty . . . , [except]: (i) [f]or any breach of the director's duty of loyalty . . . ; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . ." DEL. CODE ANN. tit. 8, § 102(b)(7) (2016).

or ill-will, and Delaware courts do not follow any per se rule deeming directors interested by the sole virtue of being in a sale or change of control situation.[87]

Ultimately, *Lyondell* posited that, for corporations with a Section 102(b)(7) waiver, the only *Revlon* issue is whether directors failed to act in good faith. Arguing from *Disney*,[88] *Stone v. Ritter*,[89] and *Caremark*,[90] the *Lyondell* court equated bad faith with "intentional dereliction of duty"[91] and concluded that the target board did not act in that manner because bad faith arises only if "directors utterly fail[ ] to attempt to obtain the best sale price."[92] In the specific case, the directors of the target neither canvassed the market, nor showed they had the impeccable market knowledge of the target and its potential.[93] Still, the Delaware Supreme Court did not find their actions in breach of their duty to act in good faith because they: (i) "met several times to consider the [buyer's] premium offer[,] . . . [(ii)] were generally aware of the value of their company and they knew the chemical company market[,] . . . [(iii)] solicited and followed the advice of their financial and legal advisors[,] . . . [(iv)] attempted to negotiate a higher offer even though all the evidence indicates that [the buyer] had offered a ''blowout'' price[, and] . . . [(v)] approved the merger agreement, because 'it was simply too good not to pass along [to the stockholders] for their consideration'."[94]

All in all, *Malpiede* and *Lyondell* completely eliminated the notion that *Revlon* introduced additional fiduciary duties and

87. *Lyondell*, 970 A.2d at 239–40.

88. Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27, 64–66 (Del. 2006).

89. Stone v. Ritter, 911 A.2d 362 (Del. 2006).

90. *In re* Caremark Int'l Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996).

91. *Lyondell*, 970 A.2d at 240. Bad faith is triggered whenever a "fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a conscious disregard for his duties." *Id.* at 243 (citing *Disney*, 906 A.2d at 67).

92. *Id.* at 244 (criticizing the trial court for "questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price").

93. *Id.* at 243. Following Barkan v. Amsted Indus, 567 A.2d 1279, 1286–87 (Del. 1989), having such knowledge was considered a requisite in case directors wanted to do away with a pre-signing auction.

94. *Lyondell*, 970 A.2d at 244. Note that the merger had obtained support from shareholders representing 99% of the voting stock.

established a significantly higher bar for plaintiffs attacking a transaction with a board that is exculpated from the duty of care,[95] which essentially means virtually all[96] firms incorporated (or reincorporated) in Delaware after July 1, 1986 (when Section 102(b)(7) became effective), and more than 90% of the pre-existing corporations, which have managed to pass the charter amendment.[97]

3. C & J Energy

Of course, a Section 102(b)(7) waiver exculpates directors and officers only with respect to personal liability for monetary lawsuits. Such a waiver does not impede plaintiffs from seeking injunctions for a breach of fiduciary duty—whether care or loyalty, whether in the *Revlon* context or otherwise. However, the bar to obtain that type of remedy, especially when an M&A deal is pending, is quite high, as the *C & J Energy*[98] decision can attest.

In *C & J Energy*, plaintiffs challenged a passive post-signing market check: no auction was run prior to entering the deal, yet there was no go-shop provision, so directors had no power to solicit a better deal, just a duty to engage with superior bidders should they emerge. The Chancery Court had granted a preliminary injunction on the grounds that plaintiffs had demonstrated a plausible breach by the target board of the duty to seek in good faith the highest immediate value for the company.[99] The Supreme Court reversed.[100]

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95. *Cf.* Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 180–93 (2014) (chronicling the decline of *Revlon*'s rigor).

96. *Cf.* HOLGER SPAMANN & GUHAN SUBRAMANIAN, CORPORATIONS (2018) (mentioning that "'102(b)(7) waivers' are now standard in corporate charters"), https://opencasebook.org/casebooks/79342-corporations/resources/2.2.2.2-dgcl-102-b-7#/.

97. Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160–61 (1990) (mentioning that, by 1990, more than 90% of 180 randomly sampled Delaware corporations had amended the charter to adopt the exculpatory provision).

98. *See generally* C & J Energy Servs., Inc. v. City of Miami Gen. Emps., 107 A.3d 1049 (Del. 2014)

99. City of Miami Gen. Emp. & Sanitation Emp. Ret. Trust v. C & J Energy Serv., C.A. No. 9980-CB, 2018 Del. Ch. LEXIS 22 at *13–15 (Del. Ch. Jan. 23, 2018).

100. *C & J Energy*, 107 A.3d at 1054.

In the Court's view, there was no need "to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal."[101] Among the important factors in the *C & J Energy* decision, the Delaware Supreme Court noted that a majority of the target directors were independent,[102] that the target termination fee associated with the fiduciary out to agree to higher bids was only at approximately 2.3% of the deal value,[103] and that stockholders had the ability "to freely accept or reject the board's preferred course of action."[104] This last point is crucial because it introduces something that *Corwin* will reinforce a year later: the elevation of shareholder voting as a better substitute than litigation in protecting shareholders rights, because "the stockholders subject to irreparable harm are . . . capable of addressing that harm themselves by the simple act of casting a 'no' vote."[105]

Importantly, the *C & J Energy* opinion stressed that *Revlon* is more about illegal defenses against a disfavored bidder than about running a proper sale process when no other bidders emerge:

> It is too often forgotten that *Revlon*, and later cases like *QVC*, primarily involved board resistance to a competing bid after the board had agreed to a change of control, which threatened to impede the emergence of another higher-priced deal. No hint of such a defensive, entrenching motive emerges from this record.[106]

101. *Id.* at 1068. For an account chronicling the change of attitude of Delaware courts toward single-bidder process in the 25 years following *Barkan* (which treated it as an exception, yet allowed departures), see Laster, *supra* note 18, at 218 (noting that the quoted "language has nothing of the sense of *Barkan*, where contacting multiple bidders was the general rule and using a single-bidder strategy an exception").

102. *C & J Energy*, 107 A.3d at 1070.

103. *Id.* at 1063–70.

104. *Id.* at 1068.

105. *Id.* at 1072.

106. *Id.* at 1053.

Indeed, injunctions in the context of a one-bidder deal are extremely rare.[107]

4. *Shifting* Revlon *to Business Judgment Rule:* Corwin

Whilst *Revlon* had been significantly compressed for over 30 years, it received a nearly fatal blow with *Corwin*. In that case, which will be thoroughly analyzed in Part II, the Delaware Supreme Court decided to depart altogether from the enhanced scrutiny of *Revlon* (or any other takeover standards for that matter) whenever "a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders,"[108] in which case "the business judgment rule applies."[109]

5. PLX *and the Burden of Proving Damages*

A recent case decided by the Chancery Court in October 2018 constricted the attractiveness of *Revlon* even for the rare circumstances in which it still applies.

In *PLX*,[110] Vice Chancellor Laster found that the sale of PLX Technology to Avago was flawed from a fiduciary standpoint and found director Eric Singer liable together with its activist hedge fund Potomac Capital Partners for aiding and abetting (PLX was a portfolio company of Potomac) for concealing certain material information about potential con-

107. Vice Chancellor Laster made this point clearly in a scholarly article. Laster, *supra* note 57, at 48 (quoting *In re* Netsmart Techs. S'holder Litig., 924 A.2d 171, 208 (Del. Ch. 2007)) ("When a plaintiff asks the Court of Chancery 'to enjoin a transaction and another higher-priced alternative is not immediately available, [the court] has been appropriately modest about playing games with other people's [i.e., the stockholders'] money.'") (alteration in original). *Cf.* Koehler v. NetSpend Holdings, Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *88–89 (Del. Ch. May 21, 2013) (refusing, in the absence of a rival bid, to enjoin a transaction prior to a shareholder vote, even if plaintiffs demonstrated likelihood of success on the merits and irreparable harm); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 515 (Del. Ch. 2010) (arguing that "it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves"). *See infra* note 256 and accompanying text.

108. *Corwin*, 125 A.3d at 309.

109. *Id.*

110. *In re* PLX Technology Inc. S'holders Litig., No. 9880-VCL, 2018 Del. Ch. LEXIS 336 (Del. Ch. Oct. 16, 2018).

flicts.[111] Singer chaired the special committee that was in charge of the sale of PLX and, among the various actions and omissions that resulted in the breach of his duties, he did not share with the other board members of the target certain material information he possessed about the intentions of the buyer, something he was aware of before the start of the sale process.[112] For the very reason that neither directors nor shareholders were aware of such intentions, Vice Chancellor Laster found that the vote was not fully informed and, therefore, *Corwin* did not apply even though shareholders approved the transaction.[113]

However, the plaintiffs win turned out to be pyrrhic at best, because the Chancery Court determined that they failed to successfully carry the burden of proving damages.[114] That was because, in the absence of a better deal to compare the current offer on the table, plaintiffs could only lament that without the violations in the sale process, the company would not have been sold at all. In such a scenario, the Court argued that damages could only be the difference between the merger price and the target "intrinsic" value, which Vice-Chancellor Laster characterized as quasi-appraisal.[115] But because Delaware courts have been reluctant in recent times to depart from the merger price in appraisal cases whenever the price is negotiated in an arm's length transaction (in which case the deal price gets "heavy, if not overriding, probative value"),[116] the plaintiffs could not show damages and the case did not award any monetary relief to them.

This decision, which to be sure received some convincing criticism by legal commentators,[117] stands for the proposition

111. *Id.*

112. Deutsche Bank informed Singer that Avago would be ready to acquire PLX for $300 million (around $6.53 per share) after completing another transaction it had been involved. Deutsche Bank was conflicted because it was Avago's adviser in the other transaction, and Singer did not share this information with the other members of the PLX board. *Id.* at *2–3.

113. *Id.* at *88–89.

114. *Id.* at *109.

115. *Id.* at *111.

116. *Id.* at *118.

117. Holger Spamann, PLX, *Burden of Proof for Damages, and the Internal Logic of Delaware Law*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Nov. 30, 2018), https://corpgov.law.harvard.edu/2018/11/30/plx-burden-of-proof-

that even when the *Corwin* safe-harbor is not met, and *Revlon* is actually breached, plaintiffs might still not recover if they do not come up with a viable showing of the damages they suffered.[118] This is a pretty likely scenario in one-bidder transactions, like *PLX* itself, in which the absence of a higher offer makes it hard to establish the intrinsic value of the target.

II.
THE *CORWIN* DOCTRINE

Part II analyzes the *Corwin* decision and its progeny, by looking in particular at its doctrinal and normative rationales and the criticism it raised. Part III provides a closer look at the preconditions for *Corwin* to apply.

A. Corwin

Plaintiffs sought to challenge a stock-for-stock merger between KKR & Co. L.P. ("KKR") and KKR Financial Holdings LLC ("Financial Holdings"). On October 30, 2013, KKR submitted a proposal to acquire Financial Holdings in an all-stock transaction which was conditioned on the approvals of an independent board committee of the target and a majority of Financial Holdings' stockholders unaffiliated with KKR.[119] While owning less than 1% of Financial Holdings, KKR was in charge of the target's day-to-day operations pursuant to a man-

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for-damages-and-the-internal-logic-of-delaware-law/ (arguing that "putting the burden of proof for damages on the plaintiff virtually guarantees that defendants will not have to pay damages even in the rare instance where a court thought the evidence sufficiently clear to find a violation of a fiduciary duty").

118. As I mention *infra* Part II, in *Corwin* the Delaware Supreme Court explains that *Revlon* is not naturally fit to award damages as the doctrine emerged in the context of a suit seeking a preliminary injunction and not monetary damages. *Corwin*, 125 A.3d at 312. However, this does not mean damages are never awarded under *Revlon*. Professor Gevurtz noted that "[j]ust to keep everyone guessing . . . the Delaware Supreme Court's subsequent decision in RBC Capital Mkts. v. Jervis, 129 A.3d 816, 857 (Del. 2015), affirmed the Chancery Court's application of *Revlon* in a decision seeking damages—albeit, the damages involved an award against the investment bankers for aiding and abetting the directors' breach of duty, instead of an award of damages against the directors themselves." Gevurtz, *supra* note 19, at n.134.

119. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 987 n.14 (Del. Ch. 2014).

agement agreement. Plaintiffs lamented that the target's transaction committee in charge of approving the merger "recognized that an all-stock deal could be disadvantageous to [the target] because its shares were trading near their one-year low while KKR's units were trading near their one-year high."[120] After unsuccessfully seeking to turn the merger into a cash deal, the target's transaction committee negotiated for improvements on the proposal, but according to plaintiffs that did not accomplish much.[121] In the merger, each share of Financial Holdings was exchanged for 0.51 of a share of KKR stock, which, on the day the transaction was announced, implied a 35% premium over the unaffected market price of Financial Holdings for an aggregate value of approximately $2.6 billion.[122] The merger agreement contained mild deal protection devices such as a fairly low break-up fee (1% of deal value), a no-shop subject to customary fiduciary-outs, and matching rights for KKR (the target had to submit any alternative proposal to KKR within one day and KKR had four business days to match or improve it before the target could negotiate with the rival bidder).[123] Under the merger agreement, the requisite majority to approve the merger was a majority of shares held by persons other than KKR and its affiliates.[124] On April 30, 2014, the merger was approved by the target's shareholders, including a majority of the shares held by stockholders other than KKR and its affiliates.[125]

At the motion to dismiss stage, plaintiffs attacked the transaction on the grounds that it was subject to entire fairness because they alleged KKR was, by virtue of the management agreement, the controlling stockholder of Financial Hold-

120. *Id.* at 987.

121. The day after Henry Kravis and George Roberts refused to offer an exchange ratio higher than 0.50 share of KKR for every share of Financial Holdings, they agreed to a 0.51 exchange ratio as their best and final offer—the transaction committee made a final attempt to obtain 0.52, but Kravis and Roberts rejected it. The transaction committee ultimately decided to approve the transaction, which was subsequently approved by the entire board of the target with the board members of KKR abstaining from the tote. *Id.* at 987–88.

122. *Id.* at 988.

123. *Id.*

124. *Id.*

125. *Id.* at 988–89.

ings.[126] The Chancery Court ruled in favor of the defendants[127] and added that "[e]nhanced judicial scrutiny under *Revlon* is not implicated in this action because the stock-for-stock merger involved widely-held, publicly traded companies."[128] However, as the plaintiffs on appeal contested this point,[129] the Delaware Supreme Court decided it did not have to rule on whether *Revlon* was triggered because it gave a ruling that expanded that of the Chancery Court by applying it *also* to *Revlon* transactions:

> [W]e need not delve into whether the Court of Chancery's determination that *Revlon* did not apply to the merger is correct for a single reason: it does not matter. Because the Chancellor was correct in determining that the entire fairness standard did not apply to the merger, the Chancellor's analysis of the effect of the uncoerced, informed stockholder vote is outcome-determinative, even if *Revlon* applied to the merger.[130]

The Delaware Supreme Court thus upheld the Chancery Court decision establishing that "when a transaction not subject to the entire fairness standard is approved by a fully in-

126. *Id.* at 991.

127. KKR did not own a majority of the stock of Financial Holdings. Further, neither the Chancery Court nor the Supreme Court found what is considered necessary to establish control when majority control is not present: "a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock." Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307–08 (Del. 2015).

128. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 989 (Del. Ch. 2014) (citing Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994)) ("[T]here is no 'sale or change in control' when '[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market[.]'").

129. On appeal, the plaintiffs argued that ownership in KKR was not dispersed after the merger because ''KKR is a limited partnership that is controlled by its managing partner, which is in turn controlled by KKR's founders.'' *Corwin*, 125 A.3d at 308 n.12. While the defendants lamented that the *Revlon* claim was a novel one that "should be made in the trial court initially, and not on appeal[,]" Chief Justice Strine decided to not rule on the issue for his ruling would absorb a *Revlon* claim if theoretically applicable (though he noted "the defendants are correct in their argument that the plaintiffs should have fairly raised their *Revlon* argument below and did not."). *Id.*

130. *Id.* at 308.

formed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[131]

Whilst on appeal the plaintiffs complained that broadening the business judgment rule would water down *Unocal* and *Revlon*, but Chief Justice Leo Strine stated that such cases were "primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing . . . not tools designed with post-closing money damages claims in mind."[132] Indeed, among the crucial factors for the decision, Chief Justice Strine mentioned that

> when the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.[133]

B. Corwin *Immediate Progeny*

Corwin was quickly expanded by Delaware judges. Shortly after *Corwin*, *Singh v. Attenborough*[134] and *In Re Volcano*[135] broadened the scope of judicial deference to shareholder voice. The former clarified that when the business judgment rule applies, the only instance in which directors might be liable for damages is under the waste doctrine,[136] while the latter extended the ruling of *Corwin* to two-step mergers under Section 251(h) of the DGCL.[137]

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131. *Id.* at 309.

132. *Id.* at 312 ("[T]he standards they [*Unocal* and *Revlon*] articulate do not match the gross negligence standard for director due care liability under Van Gorkom, and with the prevalence of exculpatory charter provisions, due care liability is rarely even available.") (footnote omitted).

133. *Id.* at 313.

134. Singh v. Attenborough, 137 A.3d. 151 (Del. 2016).

135. *In re* Volcano Corp. S'holder Litig., 143 A.3d 727 (Del. Ch. 2016).

136. *Singh*, 137 A.3d. at 152.

137. In the *Volcano* decision, the Chancery Court held that the acceptance of a first-step tender offer by a majority fully informed, disinterested, uncoerced shareholders has the same cleansing effect of a fully informed, uncoerced vote by disinterested shareholders in connection with a merger. *In re Volcano Corp. S'holder Litig.*, 143 A.3d at 738–41. In 2013, Delaware reformed its merger statute by introducing the so-called medium-form merger

The trend of expanding *Corwin* has continued with several pronouncements by the Court of Chancery. In *Larkin v. Shah*,[138] Vice-Chancellor Slight stated that, absent a controlling stockholder, the effect of disinterested stockholder approval of the merger is review under the business judgment rule (which the Court labeled "irrebuttable"), "even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors."[139] This decision on the applicability of *Corwin* was seemingly endorsed by the *Solera* case,[140] which also clarified several additional interpretative points and expanded *Corwin*'s breadth, including that plaintiffs have the burden of pleading that the vote was not fully-informed[141] and that there is quite a high standard for establishing the materiality of claims to challenge the merger disclosures.

Whilst Delaware courts have initially broadened the reach of *Corwin*, judges in recent years have shown they take the preconditions for the applicability of the safe harbor quite seriously. Notably, the requirement that the vote be fully informed has been fully tested[142] and important interpretational issues remain open, especially what constitutes coercion[143] and when a shareholder is in control.[144] Part III will thoroughly look into the preconditions to *Corwin*.

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under Section 251(h) of the DGCL, which exempts from the voting requirement two-step mergers if, among other things, following a first-step tender offer, the acquirer has a number of shares at least equal to the "percentage of the shares of stock of [the target] corporation . . . that . . . , absent [Section 251(h) of the DGCL], would be required to adopt the agreement of merger by [the DGCL] . . . and by the certificate of incorporation of such . . . corporation." DEL. CODE ANN. tit. 8, § 251(h) (2016).

138. Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447 (Del. Ch. 2016).

139. *Id.* at *1, *8.

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

141. For the observation that it is quite unusual to impose the burden of an affirmative defense to the plaintiff, see Slights, *supra* note 17, at 14.

142. *See infra* Section III.A.1.

143. *See infra* Section III.A.2.

144. Note that, as I argue *infra* Section III.A.3, the absence of a controlling shareholder should not constitute the sole avenue to rebut the "disinterest" precondition of *Corwin*.

C. *Doctrinal Rationale: Ratification*

Quoting from *Williams v. Geier*,[145] *Corwin* emphatically stated that "where a stockholder vote is statutorily required such as for a merger . . . , the stockholders control their own destiny through informed voting, which is the highest and best form of corporate democracy."[146] *Corwin* and its progeny put shareholder decision-making front and center, something that is not new in Delaware case law but in fact goes back to cleansing statutes for conflicted transactions[147] and in some ways to *Unocal* itself.[148] An informed, uncoerced, and unconflicted vote by the shareholders approving a merger shifts the standard of review to the business judgment rule even in transactions that trigger *Revlon*: a vote having such characteristics has

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145. Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996). *Cf.* Gevurtz, *supra* note 19, at 9 ("[I]n Williams v. Geier, the court addressed the standard of scrutiny it would apply to a takeover defense adopted through a shareholder vote to amend the company's certificate of incorporation. In deciding that the business judgment rule, rather than *Unocal*, governed the matter, the court explained that *Unocal* applies to unilateral board actions, but not to actions that receive approval from the shareholders.").

146. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 n.28 (Del. 2015).

147. *See, e.g.*, Del. Code Ann. tit. 8, § 144(a)(2) (2020) (providing for (i) a safe harbor from immediate voidability of an interested transaction and (ii) narrower judicial review on the directors' conduct if, among other things, the transaction is approved by the stockholders). *Cf.* Marciano v. Nakash, 535 A.2d 400, 405 n.3 (Del. 1987) ("[A]pproval by fully-informed . . . disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule and limits judicial review to issues of gift or waste with the burden of proof upon the party attacking the transaction."). Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 133 (2009) ("[I]n the corporate sphere, a vote may act as a way to cleanse behavior by an agent that would otherwise be suspect.").

148. In *Unocal*, the case that started modern takeover law, the Delaware Supreme Court granted target companies the power to defend, because, among other things, bidders could still use a proxy fight to challenge defenses. In the words of Delaware judges, "[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985). Scholars do agree that with this decision shareholder voice through a vote was put at the center stage. *See, e.g.*, Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CAL. L. REV. 1071, 1075 (1990); Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 858 (1993).

the effect of (de facto) ratifying the transaction for liability purposes.

According to Chief Justice Strine, the effect of shareholder approval on judicial standard of review is not a novelty of *Corwin*. In an extended footnote, he points out that "there is . . . precedent under Delaware law for the proposition that the approval of the disinterested stockholders in a fully informed, uncoerced vote that was required to consummate a transaction has the effect of invoking the business judgment rule."[149] Some scholars have taken issue with this assertion. In their view, the cases cited by Strine can be distinguished from *Corwin* because in those instances the vote by shareholders was not a necessary element of a procedure (as it is in a merger), but rather was expressly tailored to have a standard shifting effect.[150]

D. *Policy Rationale: Ending Meritless Litigation*

The core policy rational behind the *Corwin* doctrine is to reduce M&A litigation, which in the mid-2010s had reached absurd levels. For instance, in 2014, a year before *Corwin*, 95% of publicly-announced mergers were litigated.[151] Given that merger litigation normally ends up in disclosure-only settlements that do not benefit shareholders, but rather enrich plaintiff attorneys,[152] the corporate litigation system

149. *Corwin*, 125 A.3d at 309 n.19; *see also* Lawrence A. Hamermesh & Leo E. Strine, Jr., *Fiduciary Principles and Delaware Corporation Law: Searching for the Optimal Balance by Understanding that the World is Not*, *in* OXFORD RESEARCH HANDBOOK OF FIDUCIARY LAW 871, 887 (Evan J. Criddle et al. eds, 2019) ("In its opinion in *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court merely reaffirmed the long-standing principle of Delaware law, that 'the approval of the disinterested shareholders in a fully informed, uncoerced vote that was required to consummate a transaction has the effect of invoking the business judgment rule.'").

150. *See* Anabtawi, *supra* note 16, at 168.

151. Fisch, Griffith & Davidoff Solomon, *supra* note 2, at 579. The surge of M&A litigation in the 2010s was quite dramatic if one considers that only ten years earlier, in 2005, only four out of ten deals above $100 million were litigated. *See also* Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation* 100 IOWA L. REV. 465 (2015).

152. *See* Cain & Davidoff Solomon, *supra* note 151, at 481–82; Laster, *supra* note 18, at 224; Griffith & Lund, *supra* note 13, at 1162–63 (citing as main factors creating strong incentives to sue, plaintiffs' ease to obtain expedited discovery, defendants' strong incentives to quickly settle to avoid discovery,

in Delaware raised significant criticism.[153]

The Delaware judiciary responded with a series of cases to thwart litigation. First, in 2014, with *C & J Energy* the Delaware Supreme Court reversed a preliminary injunction on a deal with a single-bidder process and a passive market check, with an opinion that drastically limited the avenues to obtain a preliminary injunction when no rival bid arises.[154] Second, in 2015, with *Corwin*, the Delaware Supreme Court made the bulk of post-closing litigation involving mergers subject to the more lenient business judgment rule.[155] Finally, in 2016, the Chancery Court established in the *Trulia* case that in the future it would not award attorney's fees to settlements unless the underlying additional disclosures corrected "a plainly material misrepresentation or omission."[156] While the effort to limit litigation abuses could have likely been achieved by tightening the procedure (as *Trulia* did), Delaware judges ended up touching substantive law as well.[157]

In *Corwin*, Chief Justice Strine stated that "judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)."[158] Following the closing of a merger, when the dispute simply revolves around directors' liability only, in Strine's view the heightened standards of review that are typical of the takeover field, such as *Unocal* and *Revlon*, are troubling because monetary liability is not justified once shareholders approve

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and the somewhat lax corporate benefit standard that surrounds the award of fees even in the absence of a monetary payment from defendants).

153. Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 852 (2016); Laster, *supra* note 18, at 223 (mentioning "the generalized failure of stockholder-led M&A litigation").

154. *See supra* Section I.B.3.

155. *Cf.* Cain et al., *supra* note 1, at 606 (noting that the Delaware legislature has also taken steps to reduce abuses such as multi-forum litigation, by authorizing issuers to adopt forum-selection bylaws).

156. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898 (Del. Ch. 2016).

157. *See* Korsmo, *supra* note 10, at 55.

158. *Corwin*, 125 A.3d at 314.

the deal.[159] The Delaware judiciary is essentially suggesting that shareholder voting does a much better job than litigation in protecting dispersed shareholders against director abuses in the M&A context because shareholders, especially in an era of widespread institutional ownership,[160] are better decision makers than a judge if certain conditions are present. A scholarly article by Vice-Chancellor Laster predating the *Corwin* case describes the doctrinal foundation behind this approach in the following terms:

> When a stockholder plaintiff claims that a corporate decision constituted a breach of fiduciary duty, a court applying Delaware law searches for an independent, disinterested, and sufficiently informed decision maker. If one exists, then the court defers to the decision that the qualified decision maker made. Only in the absence of a qualified decision maker will the court assume that role for itself.[161]

When shareholders make effective use of the franchise (that is, the vote is fully-informed, uncoerced, and comes from

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159. *Cf.* the (critical) description by Cox, Mondino & Thomas, *supra* note 7, at 6:

> *Corwin* . . . eliminates the intermediary, the independent board of directors, and in its place rests protection on the palpable force of shareholder self-interest: the majority approval by the owners to a transaction allegedly tainted by fiduciary wrongdoing is the ultimate arbiter of what is in the shareholders' best interest. Therefore, like so many other areas of corporate law, the ultimate rule is the rule of majoritarism whereby the will of a majority of the voting owners carry the day.

160. *Cf.* Goshen & Hannes, *supra* note 12, at 269–71 (endorsing *Corwin* on the grounds that the institutional composition of the stockholder base of modern corporations makes shareholders a sophisticated decision maker with respect to mergers); *see also* Lipton, *supra* note 14, at 318 ("The ostensible rationale behind these shifts in standards of review (occasionally stated explicitly, other times left as subtext) is that today's shareholder base is more sophisticated and powerful than the dispersed shareholder base of a previous era."); Laster, *supra* note 18, at 222–23 (recognizing that "stockholders are empowered and capable of making their own decisions changes the role of the judiciary"); Griffith & Lund, *supra* note 13, at 1167 ("Delaware's willingness to defer to the shareholder vote, especially when the shareholder base contains sophisticated institutional investors, follows corporate law scholarship's emphasis on the importance of sophisticated institutional investors.").

161. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1443 (2014); *see also* Laster, *supra* note 18.

disinterested shareholders), litigation becomes unwarranted. All in all, *Corwin* and its progeny follow a recent trend in Delaware law that seeks to tame litigation abuses in connection with M&A transactions.

E. *Criticism to* Corwin

Corwin raised considerable criticism from a good fraction of legal scholarship. First, the doctrine might be ineffective in its goal to curb litigation because one of the unintended consequences has been to re-route litigation on the preconditions, especially on whether the shareholder vote is fully informed:[162] the abundant litigation on that precondition confirms the point.[163] Similarly, the other preconditions have also been subject to significant litigation efforts.[164] Second, critics have cast doubts on the internal logic of the *Corwin* doctrine, as it creates a short-circuit in shareholder remedies: "courts either apply heightened scrutiny to prevent shareholder votes that would have lowered the level of scrutiny under *Corwin* or else hold off applying heightened scrutiny until shareholders vote, in which case there will never be occasion for applying this heightened scrutiny."[165] Professor Gevurtz calls this limited choice judges locked themselves into the "*Corwin* conundrum."[166] This conundrum significantly reduces the incentives to litigate, as Professor Anabtawi noted:

> In the early stages of litigation, the litigant confronts a higher bar to obtaining injunctive relief after *C & J Energy* because the deal is subject to a stockholder vote. Post-closing, an affirmative stockholder vote confers business judgment rule protection on the

162. Gevurtz, *supra* note 19, at 12 (noting that "insofar as *Corwin* makes it significantly more difficult to challenge the decision to enter the deal in the face of a fully informed shareholder vote of approval, *Corwin* gives greater impetus to challenging the disclosure received by the shareholders").

163. *Id.* ("[N]on-disclosure claims have already provided tempting examples of plaintiff success in the post-*Corwin* world."); *see infra* Section III.A.1.

164. *See infra* Sections III.A.2 and III.A.3.

165. Gevurtz, *supra* note 19, at 20–21.

166. *Id.*

board under *Corwin*, diminishing the litigant's ability to withstand a motion to dismiss.[167]

Third, substantively, a shareholder vote is considered insufficient to truly protect the interests of investors. Indeed, by its nature, the vote on a merger gives shareholders a dry binary choice on the actual deal on the table,[168] whereas *Revlon* litigation revolves around whether directors acted in a way that resulted in the failure to obtain a better deal—whether in the context of the current sale effort or some time in the future if the company is being sold too early in its lifespan. Critics believe that voting for the deal at hand says nothing about whether a better deal was illegally sacrificed or made impossible to start with.[169] In a similar vein, some authors also note that the competence necessary to make a decision on a merger is different than the skill and experiences required to establish whether managers have engaged in misconduct: the authors criticize the assumption that shareholders can make an educated decision on the latter.[170] In other words, shareholders are not truly capable to protect themselves.

Other commentators further highlight that the various conflicts of interests afflicting institutional investors and proxy advisors, as well as the conflicts arising from empty voting and cross-ownership, impact a large amount of shares that vote in favor of mergers, thus making the vote a much less viable candidate to substitute a system of legal liability policing over bad sale processes.[171]

Moreover, some authors find that being so deferential to the stockholders' choice undercuts the core of Delaware jurisprudence on deference to directors' actions in defending

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167. Anabtawi, *supra* note 16, at 31; *see also* Griffith & Lund, *supra* note 13, at 1164 (arguing that because of the Catch-22 created by the combination of *Corwin* & *C & J* Energy, "enhanced scrutiny is now generally unavailable.").

168. *Cf.* Korsmo, *supra* note 10, at 61.

169. Gevurtz, *supra* 19, at 1; Cox, Mondino & Thomas, *supra* note 7, at 67–68; Korsmo, *supra* note 10, at 61.

170. *See* Cox, Mondino & Thomas, *supra* note 7, at 19 ("Simply stated, shareholders are investors not experienced corporate trial judges.").

171. *Id.* at 26–33 (mentioning that funds might not want to create a reputation of being anti-management for when they try to attract a company's business to manage their private pensions); *see also* Griffith & Lund, *supra* note 13, at 1158.

against tender offers, which heavily relied on shareholders incapacity to decide on the merits of the offer.[172]

After reading this thick list of alleged misdeeds of the doctrine, it may sound quite ironic that, according to some author, *Corwin*'s whole discussion on the impact and consequences of shareholder approval was probably not even necessary or relevant to solve the very dispute before the court.[173]

III.
Can Investors Rely on Litigation Anymore?

Voting in mergers has a standard-shifting effect that can chill litigation efforts by the plaintiff's bar. Prominent attorneys have identified *Corwin* as a rupture case that eliminated most of the upside for the plaintiff bar in fiduciary duty cases.[174]

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172. Ronald J. Gilson & Jeffrey N. Gordon, *The Rise of Agency Capitalism and the Role of Shareholder Activists in Making It Work*, 31 J. Applied Corp. Fin. 1, 20–21 (2019). Prior to *Corwin*, Professor Gordon was already questioning the overall logic of Delaware law in giving directors ample powers to say no to a deal in the aim of helping shareholders not make valuation mistakes (this, in short, is the concern the court in *Unitrin* raised to justify the use of defensive measures. Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc.), 651 A.2d 1361, 1385 (Del. 1995) (substantive coercion, that is, the showing that shareholders could accept an inadequate offer because of "ignorance or mistaken belief[,]" is sufficient for directors to show the existence of a threat under *Unocal*)), but then offering shareholders the ballot box route: "[i]f shareholders are prone to mistakes in evaluating a hostile bid, why are they suddenly wiser in deciding how to vote in the related proxy battle presenting the same issue?" Jeffrey N. Gordon, *"Just Say Never?" Poison Pills, Dead-Hand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffet*, 19 Cardozo L. Rev. 511, 530 (1997).

173. Gevurtz, *supra* note 19, at 11 ("[T]he [company] was governed by a provision . . . [which] exculpated the . . . directors from liability. Furthermore, the Delaware Supreme Court had previously held that such provisions trump heightened scrutiny under *Revlon* when it comes to damage claims. Hence, the whole discussion about the impact of shareholder approval was unnecessary to decide the case.").

174. Subramanian & Zhao, *infra* note 256, at 1274 n.244 (quoting David Marcus, Grant's Last Stand, Corp. Control Alert, Aug./Sept. 2018, at 10, 12) ("The world has shifted. There are effectively no more breach of fiduciary duty cases in deal litigation because of *Corwin* and the other doctrines. Appraisal has become the new breach of fiduciary duty."); *see also* Alison Frankel, *Star Shareholders' Lawyer Stuart Grant Is Quitting His Practice: 'I Don't Like Losing,'* Reuters (July 25, 2018), https://www.reuters.com/article/us-otc-

But it is important to remember that *Corwin* does not stand for shifting to business judgment rule as an automatic consequence of the vote. To qualify for the *Corwin* defense, some preconditions must be met. In fact, *Corwin* is triggered (and the business judgment rule applies) "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders."[175] *Corwin* essentially tells plaintiff counsel that the only reasonable path to a favorable judgment post-closing is to claim the vote was uninformed (by challenging the disclosures, or lack thereof, to shareholders), coerced, or not disinterested. In other words, the preconditions to *Corwin* are where the action currently is. Hence, this line of cases does not technically eliminate M&A fiduciary duty litigation altogether, which must refocus on those specific pathologies of the transaction process.

A. *Litigating the Preconditions to* Corwin

1. *Lack of Full Information*

Challenges to insufficient disclosures are obviously not a new feature in corporate and securities litigation. After *Corwin*, attacking the merger disclosures has been the strategy the plaintiff industry has relied on the most. Some legal commentators have argued that it is *Corwin* itself that "gives greater impetus to challenging the disclosure received by the shareholders."[176] Such impetus is clearly at odds with the policy goal of reducing litigation,[177] especially considering the philosophy behind the *Trulia* decision, another important milestone in the retreat of judicial oversight in Delaware, which casted significant skepticism as to whether shareholders do benefit from disclosure-type litigation.[178]

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grant/star-shareholders-lawyer-stuart-grant-is-quitting-his-practice-i-dont-like-losing-idUSKBN1JL26J.

175. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015).

176. Franklin A. Gevurtz, Cracking the Corwin Conundrum and Other Mysteries Regarding Shareholder Approval of Mergers and Acquisitions 10 (2018) (unpublished manuscript), http://ssrn.com/abstract=3252264.

177. *Id.* at 2 ("[T]he result of [the full information] prerequisite is to channel even more litigation into a path criticized for its potential to enrich lawyers with little gain for shareholders.").

178. *See supra* note 156 and accompanying text.

In fact, recent case law attests that judges have been very vigilant on the full information requirement and are not going to give defendants a pass at the pleading stage if there is some showing that directors failed to fully and fairly disclose all material information relating to the transaction to the shareholders. This is not surprising. When present, defects in the disclosures are easier cases for judges to decide because they do not require second-guessing either the conduct of directors or the substance of the terms of the transaction.[179]

One of the recurring themes over the last few years is that Delaware courts have declined to apply *Corwin* for lack of full disclosure on the ultimate incentives to sell.

In *Morrison v. Berry*,[180] the Delaware Supreme Court identified four distinct flaws in the disclosures: (i) failure to disclose to shareholders how early in the sale process a founder and 10% shareholder had agreed to the rollover his stake with the PE buyer (the founder also misled the target board about such timing, thereby blinding the other directors as to the existence of this conflict during its initial phase of the deal);[181] (ii) the misleading suggestion that the same founder would have considered competing offers;[182] (iii) failure to disclose that the founder stated he intended to sell his shares if the target remained public;[183] and (iv) a misleading statement as to the reasons to appoint a special committee to approve the sale (allegedly, the committee was instrumental in case activist pressure would mount, while in fact such a pressure already existed but shareholders were not made aware of it).[184]

In *Appel v. Berkman*,[185] the Delaware Supreme Court faced the opposite scenario of failing to disclose that a reluctant founder, largest stockholder, and chairman, abstained because he believed it was not the right time to sell since recent mis-

179. Judges have been vigilant on the information side well before the *Corwin* line of cases. If disclosure deficiencies threaten to render the stockholder vote uninformed, Delaware courts regularly find that irreparable harm exists and enjoin the vote pending the issuance of supplemental disclosures. *See* Laster, *supra* note 57, at 49 (citing several instances of disclosure violations); *see also infra* note 193.

180. Morrison v. Berry, 191 A.3d 268 (Del. 2017).

181. *Id.* at 277–80.

182. *Id.* at 280–81.

183. *Id.* at 281.

184. *Id.* at 281–82.

185. Appel v. Berkman, 180 A.3d 1055 (Del. 2018).

management lowered the price the shareholders would receive.[186]

In the *Xura* case,[187] according to the Chancery Court, the proxy statement failed to disclose that the CEO pushed for an allegedly undervalued deal because he was otherwise going to lose his job and a $25 million payout in the event the company was not sold, thus leaving stockholders in blind sight with respect to his influence and possible self-interest over the transaction.

In *PLX*, the chair of special committee that was in charge of the sale of the target (and who was also the head of the activist hedge fund that controlled PLX) did not share with the board material information concerning the intentions of the buyer, which he knew of before the sale process started.[188]

In the *KCG Holdings* case, the Chancery Court refused to apply *Corwin* based on multiple disclosure failures that included not mentioning that the CEO had once considered $20.21 per share "too low" a price before supporting a $20 per share deal price after he had negotiations on retention and compensation pool (which were also not disclosed).[189]

Other cases denied the *Corwin* cleansing effect to target companies that were in the midst of a restatement process. *In re Saba Software, Inc. S'holder Litig.*[190] held that information about the status of a restatement process that was stalling was material to stockholders. Another case, *In re Tangoe, Inc. S'holders Litig.*,[191] held that for a target in a regulatory storm,

186. *Id.* at 1059.

187. *In re* Xura, Inc. S'holder Litig., No. 12698-VCS, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018).

188. Singer knew from Deutsche Bank that the buyer would be ready to acquire PLX. Deutsche Bank was conflicted because it was the buyer's adviser in another transaction, and this information was not shared with the other members of the PLX board. *In re* PLX Technology Inc. S'holders Litig., No. 9880-VCL, 2018 Del. Ch. LEXIS 336 (Del. Ch. Oct. 16, 2018).

189. Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc., No. 2017-0421-KSJM, 2019 WL 2564093, at *2 (Del. Ch. June 21, 2019) (additional material disclosure violation included not providing full disclosure on the potential upside of a crown jewel divestiture and failure to disclose the optimistic, earlier projections that were presented during the merger negotiations).

190. *In re* Saba Software, Inc. S'holder Litig., No. 10697-VCS, 2017 WL 1201108 (Del. Ch. Apr. 11, 2017).

191. *In re* Tangoe, Inc. S'holders Litig., C.A. No. 2017-0650-JRS, 2018 WL 6074435 (Del. Ch. Nov. 20, 2018).

boards have to exercise the highest care to thoroughly explain to stockholders "how the company sailed into the storm, how the company has been affected by the storm, what alternative courses the company can take to sail out of the storm, and the bases for the board's recommendation that a sale of the company is the best course."[192] All in all, one can expect the full information requirement to keep deal planners in check by renewing the warning that Delaware courts have little tolerance for lack of candor or similar dishonesty. In fact, several pre-*Corwin Revlon* cases decided against the defendants rotated around one or more elements of deception or lack of material information.[193] Given how engaged Delaware courts have

192. *Id.* at *38 (the decision disclaims that it is not a priori impossible for a target in a restatement phase to avail itself of the *Corwin* defense).

193. *See, e.g.*, Upper Deck Co. v. Topps Co., 926 A.2d 58, 74–82 (Del. Ch. 2007) (finding that the proxy statement omitted several material facts (and enjoining the shareholder vote until such omissions were remedied), which included: the terms of a competing offer the target received but did not disclose to its shareholders; buyer's talks with management on their retention post-closing; and substantive changes in the financial advisor's analysis that were made after the bid was received in order to make it more attractive for shareholders); *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 112–15 (Del. Ch. 2007) (issuing a limited preliminary injunction requiring supplemental disclosures to a proxy statement that was found materially misleading by failing to disclose how the merger addressed the CEO's personal financial concerns with respect to his desire to cash out his equity stake in corporation and securing a short-term schedule for the payout of his otherwise unsecured retirement benefits); *In re* Netsmart Techs. S'holder Litig., 924 A.2d 171, 209–10 (Del. Ch. 2007) ("Stockholders face a threat of irreparable injury to exist when it appears stockholders may make an important voting decision on inadequate disclosures."); *see also id.* (issuing a preliminary injunction against effecting a shareholder merger vote, until the board provided better disclosures on the board's actions with regard to the possibility of finding a strategic buyer and on the financial advisor's final cash flow). Similarly, for non-*Revlon* stock-for-stock deals, see Allen v. News Corp., No. 979-N, 2005 WL 415095, at *1 (Del. Ch. Feb. 3, 2005) (finding a sufficiently colorable claim that the disclosures contained in News' proxy materials were materially deficient or misleading and the ensuing risk that Fox shareholders might not have "all pertinent information available at the time they decide whether to tender their shares into the exchange offer"); *In re* MONY Group Inc. S'holder Litig., 852 A.2d 9, 18 (Del. Ch. 2004) ("This disclosure violation threatens irreparable harm because stockholders may vote 'yes' on a transaction they otherwise would have voted 'no' on if they had access to full or nonmisleading disclosures regarding the CICs."). Of course the tradition of Delaware courts to censor the substance of a transaction by formally taking issue with violations of the underlying disclosures (or lack thereof)

been on full information after *Corwin*, we should expect their lack of tolerance for dishonesty to persist.

2. *No Coercion*

For the business judgment rule to apply, *Corwin* also requires that the vote be uncoerced. The precise boundaries of coercion are not very clear and, for reasons explained below, this is not necessarily bad thing. As Vice Chancellor Slights seems to suggest, "our courts have not fully hashed out the concepts of situational and structural coercion. In these doctrinal spaces, I do think there is room for creative pleading."[194] However, commentators showed dissatisfaction with the vague precondition—and for opposite reasons. Some lamented that in early cases coercion was found only in rare instances, which were described as "extreme fact patterns."[195] Others fear that such a standard calls for a lot of discretion on the judge's end, which is what *Corwin* sought to depart from.[196]

In fact, coercion is a somewhat hazy concept, as Chancellor Allen aptly described in *Katz v. Oak Industries*,[197] the famous bond workout case of the 1980s. In his view, coercion is "[a] commonly used word—seemingly specific and concrete when used in everyday speech—[which] may mask troubling ambiguities that upon close examination are seen to derive

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goes a long way back, well before *Revlon*: consider cases chastising director actions for lack of candor to their shareholders, e.g., *Weinberger*, 457 A.2d at 707 (finding that directors did not meet the fair dealing standard for, among other things, failure to disclose a report prepared for the parent/buyer by two conflicted directors of the target indicating the buyer's reservation price at $24 while the deal recommended to shareholders was at $21, which report was based on internal target data and the two directors were also senior managers of the parent); Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1984) ("We hold that the directors of Trans Union breached their fiduciary duty to their stockholders (1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable stockholder would consider important in deciding whether to approve the Pritzker offer.").

194. Slights, *supra* note 17, at 30.

195. Anabtawi, *supra* note 16, at 30 (first citing Sciabacucchi v. Liberty Broadband Corp., No. 11418-VCG, 2017 WL 2352152, at *2 (Del. Ch. May 31, 2017); then citing *In re* Saba, 2017 WL 1201108, at *1).

196. Gevurtz, *supra* note 19, at 17 (mentioning "the danger of turning coercion into a license for the court to consider whatever it wants").

197. Katz v. Oak Industries, Inc. 508 A.2d 873 (Del. Ch. 1986).

not simply from casual use but from more fundamental epistemological problems."[198] In that case, he concluded that

> for [coercion] to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept ("inappropriately coercive" or "wrongfully coercive" etc.). But, it is then readily seen that what is legally relevant is not the conclusory term "coercion" itself but rather the norm that leads to the adverb modifying it.[199]

To be sure, coercion has been a recurring character in Delaware corporate law for quite a while. Cases in which coercion was invoked by a plaintiff to challenge a transaction include the already mentioned *Katz* case (relating to the treatment of tendering bondholders in exit-consent debt workouts),[200] *Eisenberg v. Chicago Milwaukee* (dealing with the treatment of preferred stockholders in a self-tender offer),[201] and a series of cases concerning the treatment of tendering stockholders in parent-subsidiary tender offers.[202] Of course,

198. *Id.* at 875.

199. *Id.* at 880.

200. In *Katz*, the Chancery Court did not find actionable coercion in a self-tender offer by a company to buy back its bonds whereby tendering shareholders were asked to consent to strip down certain significant protective covenants. The alleged coercion consisted in the fact that if a bondholder who disliked the offer decided to not tender but a sufficient number of the other bondholders did, the bondholder would have been left with bonds that no longer contained protective covenants and that would be worth less than before the deal. Therefore, due to a coordination problem, bondholders were allegedly forced to accept the offer in order to avoid a bigger loss. Chancellor Allen determined that coercion was not actionable because the plaintiff could not demonstrate that the original contracting parties would not have permitted the exit consent's terms had they foreseen them at the time of contracting. *Id.* at 879–81.

201. Eisenberg v. Chi. Milwaukee Corp., 537 A.2d 1051, 1061 (Del. Ch. 1987) (finding that the following conduct constituted "inequitable coercion": the timing of an offer to coincide with the lowest preferred stock price levels in five years and the directors' decision not to pay dividends on or redeem preferred shares, created the perception on preferred stockholders' that unless they tendered, they would not have realized any return on or value for their investment in the foreseeable future, especially after they were told that the corporation intended to request delisting of its shares from NYSE).

202. *Cf.* Solomon v. Pathe Commc'ns Corp. 672 A.2d 35, 39–40 (Del. 1996) (establishing that under *Eisenberg v. Chicago Milwaukee* coercion would invalidate a parent/subsidiary tender offer but finding that the plaintiffs did

coercion is also a crucial topic in the context of hostile takeovers, whereby directors satisfy the *Unocal* standard and may adopt antitakeover defenses against an offer that is coercive (whether structurally or substantively),[203] so long as their response is not, among other things, coercive.[204] Unsurprisingly,

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not adequately plead coercion in the specific case); *In re* Siliconix Inc., S'holders Litigation, No. 18700, 2001 WL 716787 at *15–16 (Del. Ch. June 19, 2001) (following *Solomon v. Pathe*, positing that "[a] tender offer is coercive if the tendering shareholders are 'wrongfully induced by some act of the defendant [materially influencing the shareholder] to sell their shares for reasons unrelated to the economic merits of the sale'") (citing *Ivanhoe*, 533 A.2d at 605) (not finding actionable coercion, given the actual circumstances, in any of the following: (i) timing of offer, (ii) pricing depressive effect of an earlier offer, (iii) offeror's refusal to commit to short-form merger, and (iv) delisting threat); *In re* Pure Resources, Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (expanding the *Solomon v. Pathe* standard by "consider[ing] an acquisition tender offer by a controlling stockholder non-coercive only when: 1) it is subject to a non-waivable majority of the minority tender condition; 2) the controlling stockholder promises to consummate a prompt § 253 merger at the same price if it obtains more than 90% of the shares; and 3) the controlling stockholder has made no retributive threats").

203. *See* Ronald J. Gilson & Reiner Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 (1989) (mentioning structural and substantive coercion as two types of threats, which under *Unocal* a board can respond to via defensive tactics). While structural coercion is typical of the tender offer acquisition technique, see, e.g., Lucian Arye Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693 (1985) (describing "pressure to tender" in hostile deals, whereby shareholders might tender their shares to a low-ball offer even if they believe it is not in their best interests to do so because tendering represents a second-best strategy, given the risk of being stuck with lower-value minority shares if the acquisition succeeds), the concept of "substantive coercion" was introduced by Professors Gilson and Kraakman to describe a situation where (i) management actually believes the offer price is inadequate, and (ii) shareholders do not trust management's ability either to assess the circumstances objectively or to deliver on the expected long-term value. Gilson & Kraakman, *supra*, at 260. Note incidentally that to the authors' dismay, the concept was loosely adopted later by Delaware judges starting with Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d, 1140 1153 n.17 (Del. 1989).

204. This is the result of the *Unitrin* Delaware Supreme Court case of 1995, which established that in order to satisfy the second prong under *Unocal*, that is, the proportionality test, the board's actions must not be "draconian, by being either preclusive or coercive," and, if the "response [is] not draconian, the Court must then determine whether it [is] within a range of reasonable responses to the threat . . . posed." Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

Delaware courts have not adopted a unitary definition of coercion, but rather selectively applied precedential language that fits the deal at hand.

Back to the *Corwin* line of cases. In *Saba Software*,[205] one of the two instances in which the Chancery Court refused to apply the *Corwin* defense because of (among other factors) coercion, the court turned to the definition of coercion offered in *Williams v. Geier*:[206] "[t]he court will find wrongful coercion where stockholders are induced to vote in favor of the proposed transaction for some reason other than the merits of that transaction."[207] In *Saba Software*, the target, a company traded over the counter following a delisting by NASDAQ, was at the time of its acquisition delinquent in its prior commitments with the SEC to restate its financials (it had previously boosted its earnings by $70 million and the Commission had imposed a fine and ordered it to restate them).[208] With its stock price in free fall, the target agreed to a merger, which shareholders approved shortly after the target missed its final deadline from the SEC to restate its earnings.[209] As a result, the SEC deregistered the stock, thus making it not publicly tradable.[210] In the court's view, the target's shareholders were coerced because if they had voted down the deal they would have been stuck with shares that they could not trade.[211]

Vice Chancellor Glasscock analyzed coercion quite in depth in *Sciabacucchi v. Liberty Broadband Corp.*:

> [R]atification will not cleanse a transaction where the vote is *structurally* coercive, as where the directors have created a situation where a vote may be said to be in avoidance of a detriment created by the structure of the transaction the fiduciaries have created, rather than a free choice to accept or reject the proposition voted on. . . . If the vote was structured in such a way that the vote may reasonably be seen as driven by matters extraneous to the merits of the

205. *In re* Saba Software, Inc. Stockholder Litig., C.A. No. 10697–VCS, 2017 WL 1201108 (Del. Ch. Mar. 31, 2017).
206. Williams v. Geier, 671 A.2d 1368, 1382–83 (Del. 1996).
207. *In re* Saba Software, 2017 WL 1201108, at *14.
208. *Id.* at *3.
209. *Id.* at *6.
210. *Id.*
211. *Id.* at *15.

> transaction, the Court cannot determine that the stockholders demonstrated thereby a determination that the challenged transaction was in the corporate interest. Such a vote is structurally coercive, and no cleansing by ratification obtains.[212]

In *Sciabacucchi*, the court found that approval of an issuance of shares to a significant stockholder and of the related voting proxy agreement occurred not as a result of free choice by the disinterested stockholders, but rather because they were forced to approve these transactions, which were effectively bundled with the two beneficial acquisitions of TWC and Bright House.[213]

It is hard to predict whether future cases will keep finding coercion only in extreme fact patterns or whether judges will use coercion as a license to consider whatever they want[214]—probably something in between. If past experience on coercion is of any lesson, courts tend to expand it when they use it to justify directors' actions (e.g., as demonstrated by substantive coercion in the hostile takeover context),[215] and to restrict it when they use it to second-guess a transaction (e.g., *Katz*).[216] Here, however, finding coercion would not automatically result in monetary liability (let alone striking down a transaction), but simply make a defense unavailable to directors. Judges could expand the scope of coercion without too harsh a repercussion on deal activity, since the end result would be to go back to *Revlon*, which was the law for almost thirty years. Certainly, coercion is the sole precondition that, at least theoretically, can cover the substantive terms of the deal and what I would call pure misconduct of directors in the sale process (that is, actions amounting to a fiduciary duty violation without involving any violation on the disclosure front). Therefore, in the event that there are blatant abuses that do not involve an informational flaw, coercion will be the precondition to rein in bad actors.[217]

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212. C.A. No. 11418–VCG, 2017 WL 2352152, at *2 (Del. Ch. May 31, 2017) (emphasis in original).

213. *Id.* at *22.

214. These represent the two opposite critiques to the coercion precondition in the early literature. *See supra* notes 194–95.

215. *See supra* notes 202–03.

216. *See supra* note 200.

217. For an expansion of this argument, see *infra* Section IV.A.

3. *Disinterest*

Corwin requires a fully informed and uncoerced vote of the disinterested stockholders. There are two distinct questions with respect to what "disinterested stockholders" means. First, is disinterest an actual precondition to *Corwin*? Second, if it is, can plaintiffs realistically rely on denouncing the failure to meet such a precondition to avoid *Corwin*'s standard-shifting effect?

To be sure, legal commentators and case law have not offered sufficient clarity as to how many preconditions the *Corwin* doctrine does exactly entail. All agree that full information and absence of coercion are required for *Corwin* to apply. But there is no consensus on how to interpret the requirement that the vote comes from "disinterested" stockholders. *Corwin* itself suggests,[218] and some commentators argue, that a vote from disinterested stockholders should be considered as a separate precondition aimed at ensuring that the vote reflects the sincere, genuine opinion of a majority untainted by conflicts by one or more shareholders.[219] Other authors either do not mention it[220] or consider it satisfied whenever the target does not have a controlling shareholder.[221] Courts seem to embrace the latter view that *Corwin* does not apply in the presence of a controlling stockholder, and to imply that such a presence exhausts the list of circumstances in which a the vote would not come from "disinterested stockholders."[222] I do not believe

218. *See infra* note 254 and accompanying text.

219. Among the authors treating disinterest as a separate precondition, see Matteo Gatti, *Reconsidering the Merger Process: Approval Patterns, Timeline, and Shareholders' Role*, 69 HASTINGS L.J. 835, 904 (2018); Griffith & Lund, *supra* note 13, at 1168 ("[T]he sine qua non of judicial deference to the vote is disinterest. . . . Interested votes count neither in a majority of the minority vote under *M&F Worldwide* nor in a cleansing vote under *Corwin*."); Lipton, *supra* note 14, at 322.

220. Authors citing only full information and absence of coercion as preconditions include Anabtawi, supra note 16, at 194–95; Gevurtz, supra note 19, at 11; Gilson & Gordon, supra note 172, at 21; Cain et al., supra note 37, at 47.

221. Ann Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1986 (2019).

222. *Cf. In re* Merge Healthcare Inc. Stockholders Litig., Consol. C.A. No. 11388-VCG, 2017 WL 395981, at *6 (Del. Ch. Jan. 30, 2017) (*Corwin* does not apply in controlling stockholder transactions); *In re* Solera Hldgs., Inc. Stockholder Litig., C.A. No. 11524-CB, 2017 WL 57839, at *6 n.28 (Del. Ch.

this position is sound—neither from a coherence nor a normative standpoint.

Consider that judicial doctrines dealing with controlling stockholders in the M&A context are already in place. If the controlling stockholder is also on the buy-side of the transaction, entire fairness will apply.[223] If a controlling stockholder

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Jan. 5, 2017) ("[T]he only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval are those involving a controlling stockholder."); Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447, at *8 (Del. Ch. Aug. 25, 2016) (a lawsuit challenging a transaction with a conflicted controller or that was approved by an uninformed or coerced stockholder vote will survive a *Corwin* defense); *see also In re* Merge Healthcare, Inc., Consol. C.A. No. 11388-VCG, 2017 WL 395981, at *6–7 (Del. Ch. Jan. 30, 2017); Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152, at *14 (Del. Ch. May 31, 2017) (John Malone was not deemed a controller and the disinterest precondition was considered satisfied); van der Fluit v. Yates, C.A. No. 12553-VCMR, 2017 WL 5953514, at *5 (Del. Ch. Nov. 30, 2017); *In re* Rouse Properties, Inc., Fiduciary Litig., Consolidated C.A. No. 12194-VCS, 2018 WL 1226015 at *12 (Del. Ch. Mar. 9, 2018); *In re* Tesla Motors, Inc. Stockholder Litig., Consolidated C.A. No. 12711-VCS, 2018 WL 1560293 at *13 (Del. Ch. Mar. 28, 2018) (not applying *Corwin* after finding reasonably conceivable that Elon Musk, notwithstanding his holding was only above 22.1%, was in control of Tesla as a result of "(1) Musk's ability to influence the stockholder vote to effect significant change at Tesla, including the removal of Board members; (2) Musk's influence over the Board as Tesla's visionary, CEO and Chairman of the Board; (3) Musk's strong connections with members of the Tesla Board and the fact that a majority of the Tesla Board was 'interested,' as that term is defined in our law, in the Acquisition; and (4) Tesla's and Musk's acknowledgement of Musk's control in its public filings"). See Lipton, *supra* note 221, at 1987–90 (analyzing under what circumstances control can be established at below fifty percent).

223. In the lead-in to the ruling, Chief Justice Strine clarified that the standard applies to "a transaction not subject to the entire fairness standard." Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015). Under Delaware law mergers between a company and its controlling shareholder trigger an enhanced level of scrutiny of the underlying transaction, which goes under the name of entire fairness and requires the defendant directors and controlling shareholder to show both "fair dealing" and "fair price." Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983). Under Delaware case law, the burden of proving that the transaction meets such criteria, which the entire fairness standard initially puts on the defendants because of the conflicted nature of the transaction, can be shifted back to the plaintiff if certain procedural safeguards are followed: namely, the transaction is either negotiated by an independent committee with broad negotiating powers (inclusive of the power to appoint separate counsel and a financial advisor, as well as to say no to the transaction) or is approved by a majority of the minority of shareholders of the subsidiary. *Compare* Kahn v. Lynch Commc'ns

sells her majority stake, sale of control doctrines will kick in and require her to share the premium in the presence of certain pathologies.[224] Therefore, if the disinterest precondition were simply just requiring the absence of a controlling stockholder, as the leading interpretation posits, this exception to the *Corwin* defense would be conceived only[225] to cover a *controller's exit transaction via a merger* (long- or medium-form[226]). The risk surrounding this transaction type is represented by side deals the controller might extract in a deal structure (merger or tender offer) that on its face should ensure equal treatment between the controller and the minority shareholders. The question is then whether *Revlon* would be the right doctrine to police this risk in the first place, considering that a transaction whereby a controlling shareholder already exists does not perfectly fit with the loss of control rationale for the *Revlon* zone given by *QVC*.[227] Note also the incongruence: a

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Sys., 638 A.2d 1110, 1117 (Del. 1994) (clarifying that an effective independent committee would only shift the burden of proof, which in the specific case did not happen because the independent committee faced a retributive threat by the parent—to launch a tender offer at a lower price if the committee kept rejecting it terms—thus impairing its judgment and negotiating abilities), *with* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) ("[A]pproval of a merger . . . by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs."). *See also* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645 (Del. 2014) (business judgment standard of review to apply if the controlling stockholder subjects the merger to the necessary approval of: (i) a special committee of independent directors with separate financial and legal advisors, fully empowered to reject the transaction and negotiating a fair price with due care and (ii) a majority of the unaffiliated stockholders, fully informed and not coerced).

224. Sales of control are generally allowed without sharing the control premium with minority shareholders, unless some macro-categories of exceptions apply, such as sale to looters, sales of office, and diversion of corporate opportunities. *See generally* Einer R. Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465 (1992); John C. Coffee, Jr., *Transfers of Control and the Quest for Efficiency: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 DEL. J. CORP. L. 359 (1996).

225. This is because, as mentioned in the text, other controlling shareholder settings are covered by entire fairness or sale of control doctrines.

226. *See In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 981 n.14 (Del. Ch. 2014).

227. *QVC* famously established that *Revlon* does not apply when "[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market," Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 47

controller is free to sell her controlling stake to another shareholder in the absence of the pathologies under sales of control doctrines. However, if she decided to share the premium with the other shareholders and enter into a merger, the target directors would not be in a position to benefit from the *Corwin* defense. More importantly, a justification for the disinterest exception as a device targeting side deals by controllers would fall short in explaining why it should be limited to controlling stockholders only, considering that, for example, directors and officers might be offered side deals too. That is one of the main reasons these transactions are subject to shareholder approval and enhanced scrutiny in the first place.[228]

From a normative angle, the prevalent position in case law, that to satisfy the disinterest requirement the target must not have a controlling shareholder, essentially cuts out all situations in which the merger outcome is swayed by the pivotal

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(Del. 1994), which implied that the core of *Revlon*'s concerns lies in the loss of contestability of a public company. But if a company is already not contestable once it is under the control of a shareholder, its minority shareholders have already "lost" the relevance of their voting rights (or bought shares at a cheaper price) because a change of control could not occur unless the controlling shareholder so decides. It would be quite odd for the judiciary to introduce a separate precondition for *Corwin* that covers a borderline hypothetical that is not even representative of the concerns behind *Revlon*.

228. *See* STEPHEN M. BAINBRIDGE, MERGERS AND ACQUISITIONS 58–59 (2012) ("Although the tension between shareholders and managers is perhaps most obvious in hostile takeovers, . . . similar conflicts of interest arise in negotiated acquisitions. To purchase the board's cooperation the bidder may offer side payments to management, such as an equity stake in the surviving entity, employment or non-competition contracts, substantial severance payments, continuation of existing fringe benefits or other compensation arrangements. Although it is undoubtedly rare for side payments to be so large as to materially affect the price the bidder would otherwise be able to pay target shareholders, side payments may affect management's decision making by causing them to agree to an acquisition price lower than that which could be obtained from hard bargaining or open bidding."); *see generally* John C. Coates IV, *Mergers, Acquisitions, and Restructuring: Types, Regulation, and Patterns of Practice*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 570, 579 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018) (mentioning, among other things, that "[f]iduciaries may favor one bidder over another, not in return for an explicit quid pro quo (e.g., in the form of a payment) but to curry goodwill in the hope of obtaining post-deal employment, or perhaps out of malice towards a bidder or gratitude for some past favor").

vote of some "interested" shareholder who does not qualify as a controller.

Those situations are important. Consider, for instance, cases in which the outcome of the merger is determined by the votes of the buyer (who sits on the opposite side of the transaction),[229] or by the votes of the target insiders (directors and officers, who have a vested interest in the transaction going through),[230] or by the votes of "minority controllers" (significant and influential stockholders who hold less than necessary for a court to ascertain actual control),[231] or by the votes of significant cross-holders (those who own stock in both the buyer and the target and might want the transaction to go through for the advantage qua shareholders of the buyer),[232] or by the votes of conflicted institutions (who might vote for a deal irrespective of whether it is a good decision for the actual shareholder/fund),[233] or by the votes of merger arbitrageurs

229. *Cf.* Matteo Gatti, *It's My Stock and I'll Vote If I Want to: Conflicted Voting by Shareholders in (Hostile) M&A Deals*, 47 U. MEM. L. REV. 183, 212, 217 (2016) (all else being equal, buyers are naturally inclined to pay the minimum necessary to secure the deal, and in case they already own some stock in the target would not be aligned with other shareholders in the context of a shareholder vote).

230. *Id.* at 212–14 (describing the conflicts of target directors in final situations typical of M&A).

231. *See, e.g.*, Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152, at *15 (Del. Ch. May 31, 2017) (not finding John Malone a controller and considering the disinterest precondition satisfied).

232. On cross-ownership, see generally Griffith & Lund, *supra* note 13, at 1172–76. Note that in the different context of parent-subsidiary tender offers, in the *CNX* case, a pivotal shareholder (T. Rowe Price) had stock ownership in both the bidder/parent and the target/subsidiary. Vice-Chancellor Laster, stressing the importance of economic incentives when casting votes, questioned the effectiveness of the majority-of-the-minority clause:

> T. Rowe Price's has materially different incentives than a holder of CNX Gas common stock, thereby calling into question the effectiveness of the majority-of-the-minority condition. . . . This case is not about "holdings in competitor corporations" or "directional sector bets." It is about a direct economic conflict that at best renders T. Rowe Price indifferent to the allocation of value between [the parent] CONSOL and [the subsidiary] CNX Gas and at worst gives T. Rowe Price reason to favor CONSOL.

In re CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400, 416-17 (Del. Ch. 2010).

233. Griffith & Lund, *supra* note 13, at 1172–87 (shedding light on the various conflicts affecting the mutual fund industry, not only from cross-own-

(whose investment strategy is paid off only if the deal closes).[234]

The narrow reading of disinterest currently given by courts makes little sense from a policy perspective because the very rationale for a disinterest precondition—that the vote expresses the sincere[235] preferences of the shareholders—calls for a coverage that goes beyond the mere presence of a controlling stockholder. Indeed, bypassing the enhanced scrutiny of *Revlon*, which is meant to police, in change of control settings, director abuses fueled by their conflict in a final period scenario, should occur only in the presence of preconditions aimed at curbing such conflicts. If the outcome of the merger vote can be swayed by the pivotal vote of one or more interested shareholders, the shareholder vote triggering the *Corwin* defense would be nothing more than an imperfect dress seeking to mask the defect it was supposed to cure.[236]

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ership but also from "corporate client" relationships—supporting mergers to appease their fund management corporate clients—and compliance with a fund manager uniform policy).

234. *See* Gatti, *supra* note 219, at 878 (mentioning that, following the announcement of a deal, arbitrageurs buy large amounts of shares in the target at below the deal price, bet on the closing of the transaction in order to profit by selling the shares to the buyer, and are therefore inevitably biased to approve the transaction irrespective of its merits and the interests of the remaining unbiased shareholders). For an empirical study confirming the incidence of arbitrageurs of mergers outcomes, see Cox, Mondino & Thomas, *supra* note 7, at 575 (showing that merger arbitrage has a statistically significant positive effect on deal completion).

235. On the importance of voting sincerely for the majority principle to work, see Zohar Goshen, *Voting (Insincerely) in Corporate Law*, 2 THEORETICAL INQUIRIES IN L. 815 (2001).

236. It is critical to consider that merger completion and voting percentage rates are influenced by the insider ownership that supports the transaction. *Cf.* Jennifer E. Bethel & Stuart L. Gillan, *The Impact of the Institutional and Regulatory Environment on Shareholder Voting*, 31 FIN. MGMT. 29, 36 (2002) ("Managers . . . appear to have been likely to include proposals when they had sufficient holdings to influence voting results . . . ."). Barring extraordinary circumstances, directors and managers always vote to support the merger and they often do so because they have signed voting agreements with the acquiring firm to that effect. In another work of mine, I report that almost half of the 392 mergers between 2010 and 2015 with a contestable domestic target, which required a majority of the outstanding stock for approval, contemplated parallel voting agreements. *See* Gatti, *supra* note 219, at 879 n.132 (reporting that voting agreements are present in 43.4% of the deals in the sample). When present, such agreements aggregate significant blocks: the median holding is 13.67% and the mean is 14.74% and the stan-

Therefore, it would constitute sound policy to require defendants who want to avail themselves of the *Corwin* defense to show that the merger vote is truly disinterested,[237] by putting in place something akin to a revised majority of the minority condition evidencing that a true majority of the disinterested stockholders approved the merger. For example, such a condition should treat as presumptively interested one or more of the shareholders mentioned above:[238] directors and officers, the buyer, parties to a stockholder agreement to support the merger, cross-shareholders, conflicted funds, and merger arbitrageurs.[239] Consider that the *Corwin* case itself revolved around a transaction that was subject to a majority of the minority vote. When the Chancery Court and the Supreme Court interpreted it, they were confronting a merger resolution with that particular device built-in.[240] In the absence of such a condition, a plaintiff's showing that the merger passed because of the pivotal vote of an interested shareholder should suffice to set aside a *Corwin* defense, unless the defendants can demonstrate that the allegedly interested shareholder was not in fact

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dard deviation is 10.37%. *Id.* Importantly, with respect to the deals that get narrowly approved, it is quite common for insiders' votes to determine the ultimate outcome of the transaction. In my sample covering the 2010–2015 period, six of the 13 narrow-margin deals that were approved by a vote of less than 60% of the outstanding shares, ultimately passed because of votes cast by insiders, as shown in the table below. *Id.*

237. One may object that the *Corwin* opinion requires a vote from disinterested stockholders, rather than a disinterested vote. One cannot really draw a line once and for all as to who is interested and who is not by deeming controlling shareholders as *always* interested and the rest of the stockholder base *never* interested. In fact, on the one hand, a controlling shareholder who is not sitting on the other side of the transaction (as a buyer or as a partner or facilitator to a buyer) but rather is aligned with all other shareholders in obtaining the highest price should not be considered interested; on the other hand, disinterest does not magically appear when there is no controlling shareholder if certain relevant minority blockholders who have conflicting interests sway the vote in favor of approving the transaction. And finally, if the disinterest requirement really meant to cover only situations in which there is no controlling shareholder, it would have been easier to state it explicitly, instead of leaving a margin of ambiguity with a concept that would naturally cover broader scenarios.

238. *See supra* note 229–34 and accompanying text.

239. *See* Griffith & Lund, *supra* note 13, at 1158.

240. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 988 (Del. Ch. 2014).

interested in the specific merger vote.[241] To determine whether or not those votes were cast in the best interests of the corporation, one needs to establish whether rejecting the deal was a better course of action than approving it, by looking at the expected value of the target as an independent entity at the time of the vote.[242] Interestingly, one can argue that, if the purpose for having the shareholder approval requirement in the first place is to curb the intensified agency problems directors and managers might have in a final period,[243] then letting those same agents vote and be in a position to influence the fate of the deal contradicts such a purpose. Even more troub-

241. This solution follows closely the approach I laid out in another article of mine analyzing conflicted voting in hostile deals. *Cf.* Gatti, *supra* note 229, at 277 (proposing a "rebuttable presumption that both contenders (i.e., bidder and target incumbents) are conflicted[, in which] each group would vote, but their shares would not be counted for determining the outcome of the proxy fight/deal. However, each group can prove that in fact its votes are not conflicted because they are directed to achieve an outcome that maximizes shareholder value").

242. As I stated elsewhere, the complex aspect in policing shareholders' conflicts of interest in the M&A context is that their negative influence is circumstantial: the mere possibility of a conflict is not sufficient to taint the vote. "The pathology . . . is pursuing a personal interest and casting a pivotal vote against the interests of the other shareholders: to make such determination, there is no way other than looking at facts and circumstances arising from the actual [deal] on the table." Gatti, *supra* note 229, at 188. In other words, if the deal is value maximizing, directors and managers supporting it will not be in conflict, but if it is not value maximizing, their votes in favor will in fact be conflicted.

Note, incidentally, that historically Delaware judges do not seem particularly keen to second-guess shareholder votes. In the context of the Zale merger litigation, the Chancery Court discussed, yet dismissed, whether a shareholder, who stood to earn an additional $3.2 million in prepayment fees on a loan they had previously made to the target Zale, was conflicted in casting its 23.3% stake in favor of the merger (such stake was worth approximately $225 million at the price of the merger consideration). The alleged conflict was based on the fact that the merger triggered the $3.2 million payment, which the Court ultimately did not consider material because it only amounted to less than 1.5% of the payment the shareholder was expecting from its consideration under the merger. *In re* Zale Corp. Stockholders Litig., CA No. 9388–VCP, 2015 WL 5853693, at *9 (Del. Ch. Oct. 1, 2015), *amended on reargument*, No. CV 9388-VCP, 2015 WL 655148 (Del. Ch. Oct. 29, 2015) (noting that under Delaware law "there are cases in which a plaintiff's allegations of a large stockholder's need for liquidity have been sufficient to defeat a motion to dismiss").

243. This Article and mainstream legal and financial literatures consider this to be the best explanation. *See, e.g.*, Gatti, *supra* note 219, at 847–48.

ling is allowing such insiders' votes to be determinative in a resolution with standard-shifting effects for directors and officers, which short-circuits the entire system of protections for investors.

For the reasons above, if *Corwin* is to be awarded any credibility from a policy standpoint, the judiciary must start taking disinterest seriously.

B. *Enforcing Fiduciary Duties Through Preliminary Injunctions?*

The *Corwin* doctrine applies to lawsuits seeking monetary damages post-closing. Prior to closing, the *Revlon* standard still stands. When introducing the *Corwin* defense to monetary suits, Chief Justice Strine made the point that *Revlon* (as well as *Unocal*) was in fact "primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing."[244] But can stockholders realistically resort to injunctions to curb violations of fiduciary duties?

It is unlikely (but not impossible) that *Revlon* will resuscitate in this form. Injunctions had been quite rare before *Corwin*, and for a reason: judges are hesitant to intrude and kill deals when there is no alternative.[245] Therefore, absent the contention of a bidding war, a preliminary injunction blocking a deal on *Revlon* grounds will be a rarity.[246]

The *C & J Energy* decision,[247] whereby the Delaware Supreme Court reversed a Chancery Court injunction for violation by the board of its *Revlon* duties, reinforced this assessment. There, the alleged fiduciary duty violation consisted of entering into a deal with neither a pre-signing market check (no auction was run prior to entering the deal) nor a "go-shop" provision (directors had no power to seek a better deal, just to passively sit and react if one ever arose). While the Chancery Court found that this was a violation of the board's duty to seek in good faith the highest immediate value for the

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

245. *See supra* note 107 and accompanying text.

246. *See* Johnson & Ricca, *supra* note 95, at 212 (noting that in the 2008–2013 period, the Chancery Court had granted an injunction on *Revlon* grounds only once: *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011)).

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

company,[248] the Supreme Court reversed, citing, among many factors, that the target stockholders had not yet voted on the merger and an injunction would have been premature.[249]

But after *Corwin*, this means that plaintiffs in one-bidder deals are left with little choice: litigate for an injunction, but a judge may tell them to wait for the shareholder vote; or wait for the vote, but the injunction is gone, and most likely so are monetary damages.[250] The ensuing Part IV analyzes whether this paradoxical outcome will translate into a vacuum of shareholder protections.

IV.
DEALMAKING IN A POST-*CORWIN* WORLD: DOES *REVLON* STILL EXIST?

Is shareholder approval a good substitute for process? Before *Corwin*, investors could rely on two separate levels of protections: on their vote and on the possibility to sue directors for breach of their fiduciary duties if the sale process was flawed. Nowadays, the vote might be the sole protection for the overwhelming majority of deals, that is, one-bidder deals,[251] in which no rival bid emerges (and where the expectation is that shareholders will very likely approve).[252] Given the close to nil instances of rejection votes in connection with mergers,[253] the *Corwin* doctrine de facto seems to kill suits seeking monetary damages post-closing. In light of this, the question is whether *Revlon* still exists. To what extent does the landmark 1986 decision still apply to corporate decision-makers? The angle of my inquiry revolves around the lasting impact of *Revlon* in the context of transaction planning, as Section IV.A illustrates.

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248. *Id.* at 1053.

249. *Id.* at 1072–73.

250. *See* Anabtawi, *supra* note 16, at 192–93; Gevurtz, *supra* note 19, at 1861.

251. In the 2010–2018 period, 7.7% of deals with a Delaware target experienced a rival or bust-up offer. The percentage is 5.3% for deals with a target not from Delaware and 6.9% overall. Gatti & Gelter, *supra* note 36, at 2 n.7.

252. *See* Gatti, *supra* note 219, at 853 (reporting that shareholders rejected only 1.32% of mergers presented for approval in the 2006–2015 period).

253. *See id.*

A. *Can* Corwin *Open the Floodgates to Bad Process?*

A reasonable fear after *Corwin* is that target directors might feel that they are in a position to run whatever (bad) process they wish, so long as they believe the merger will obtain stockholder approval.[254]

Theoretically, one could in fact capture *Corwin* with the following maxim: in a target with no controlling shareholder, directors are free to structure the deal whichever way they please, without any constraint on the process, so long as they are confident that they will obtain shareholder approval, that the transaction is not coercive, and that shareholders are fully informed. This would be a tentatively precise and certainly expansive reading of the innovation brought by *Corwin*—something that on its face would sharply depart from the law that preceded it. Following this logic, one might conclude there are no limits on how directors could frame a deal. For instance, a board could embrace a relaxed attitude toward target termination fees and keep expanding the "lock-up creep" that has been observed in the early 2010s;[255] imagine such fees reaching the 10% level on average. Similarly, boards could feel that they can go back to experimenting with asset lock-ups more boldly.[256] Boards could decide to do away with market checks, without resorting to go-shops.[257] They could make matching rights even more ubiquitous and first-bidder

254. Lipton, *supra* note 14, at 319–20 ("Delaware has reinvigorated the power of directors to act without judicial oversight, at least so long as they seek a sanitizing shareholder vote. Since shareholders necessarily can only express a blunt preference for or against a proposed transaction, the relaxation of legal obligations leaves directors with more flexibility to satisfy a range of preferences, within the boundaries of what shareholders will tolerate.") (footnotes omitted).

255. Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. L. 681, 681 (2013).

256. According to Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 STAN. L. REV. 1013, 1036–40 (2017), this phenomenon was to some extent already taking place prior to *Corwin*.

257. Traditionally, under best practices, if a board did not perform a market check prior to selling the company, it was customary to introduce a go-shop period to try to obtain better offers after the deal was announced. *See* Guhan Subramanian & Annie Zhao, Go-Shops Revisited 5, 6 (Jan. 30, 2019) (unpublished manuscript), https://ssrn.com/abstract=3328202. However, this has hardly ever been something deal planners have felt compelled to follow as a matter of law (and *C & J Energy* confirmed they were right: *see supra* Section I.B.3), as the data reported *infra* Section IV.B also shows.

friendly.[258] They could use selective poison pills that apply only to the unwanted rival bidder. They could even dare to reintroduce unqualified no-talk provisions and eliminate fiduciary outs altogether.[259] In the worst cases, boards will be tempted to low-ball shareholders so long as they are upfront in disclosing whatever conflicts they have.[260]

Should we expect any of these deviations from pre-*Corwin* best practices to become more common? To answer this question, one needs to establish what type of constraints *Revlon* posed to deal planners. However, based on the overview in Part I, it is clear that *Revlon* has never been anything close to a precise standard. In fact, the doctrine has never required directors to fulfill anything specific; certainly not after *Barkan* and its "no single blueprint" refrain.[261] *Revlon* does not require directors to auction off the company, it does not require selecting the highest bid irrespective of other factors, and it does not require eliminating or significantly curbing certain deal protection devices like termination fees, asset lock-ups or matching rights.[262] *Revlon*'s lack of precision is hardly surprising: it certainly is consistent with all other major lines of cases in Delaware corporate law.[263] With this in mind, it would be

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258. Matching rights give an inherent advantage to the first bidder. *See generally* Brian J.M. Quinn, *Re-Evaluating the Emerging Standard of Review for Matching Rights in Control Transactions*, 36 DEL. J. CORP. L. 1011 (2011) (warning of the potential deterrent effect of matching rights and suggesting courts engage in fact-intensive review to discern when matching rights are unreasonable).

259. No-talks in the absence of fiduciary outs were made illegal at the outset by the *Revlon* decision itself. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).

260. Think of, for instance, transactions in which directors and managers are going to be retained and/or plan to reinvest in the buyer, MBOs, or transaction quarterbacked by a significant (yet non-controlling) shareholder. See *supra* note 189 and accompanying text for the *KCG Holdings* case, in which the targets were subject to the influence of *Jefferies*.

261. *See supra* Section I.B.1.

262. *See generally* Laster, *supra* note 57, at 19–32.

263. For a sobering analysis of what *Revlon* can and cannot deliver, see *supra* Part I; Johnson & Ricca, *supra* note 95. One can argue that it has taken commentators quite a long time to metabolize that the expectation that directors had an active duty to sell at the highest price (which is how *Revlon* could have been read initially: for a similar view, see Laster, *supra* note 57, at 10–11) was not going to become a per se rule to be satisfied in each and every case.

quite a stretch to argue that *Corwin* has brought a *more precise, yet narrower* set of commands that sharply depart from the *vague, yet potentially demanding*, commands permeating *Revlon* prior to *Corwin*.[264] In hindsight, *Corwin* can be seen as a predictable evolution of the vagueness of *Revlon*.[265]

In any event, the main question still remains: can boards act as they please? My working hypothesis is that it is doubtful they can, for the reason laid out below and tested in Section IV.B.

First, the preconditions—whether two or three does not matter—still give judges wide latitude to intervene whenever a poorly run process emerges from the underlying facts. To borrow from Professor Ed Rock, in the presence of "sinners,"[266] the Delaware judiciary is still capable of intervening. Indeed, a judge can easily pick on an informational flaw (in Chief Justice Strine's words, undisclosed "troubling facts regarding director behavior [that are] material"[267]), or label a material defect in the process as a coercive element, and decide to not apply *Corwin*.[268] This is, at least for information, what judges had

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264. *Cf.* Johnson & Ricca, *supra* note 95, at 217 (questioning in 2014 "whether, lacking meaningful correlative remedial relief, *Revlon* remains a legally enforceable directive at all rather than a customarily adhered to but ultimately nonenforceable norm or mere aspirational standard").

265. I believe that from a normative standpoint one might argue that it is irrelevant whether shareholder protections shrunk because of *Corwin* or because of one (or more) cases that preceded it: the end result would still be that M&A law is currently inadequate in taming director abuses in a sale or change of control scenario. That is correct, but would miss an important point: it is still quite important to determine what cases were the actual causes in the erosion of shareholder protections, because such determination would obviously implicate different policy corrections. For instance, it is more plausible that, rather than *Corwin*, it was *Lyondell* (*see supra* Section I.B.2) that made *Revlon* much less significant because it implied that to satisfy the standard, directors have to simply avoid acting in bad faith, which arises only if "directors utterly fail[ ] to attempt to obtain the best sale price." Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009). If this intuition is correct, then the bases and rationales not of *Corwin* but of the *Lyondell* decision should be questioned (among many: whether it is sensible to not consider *Revlon* a separate fiduciary duty and the soundness of the rationale behind Section 102(b)(7) of the DGCL in the M&A context). Of course, all these issues are beyond the scope of this Article.

266. *See infra* note 275 and accompanying text.

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

268. *But see* Cain et al., *supra* note 37, at 50 ("Whether the alternatives presented in a shareholder vote are coercive, whether the disclosures are

been doing pre-*Corwin* and have continued to do post-*Corwin*.[269]

Second, notwithstanding the disillusioned stance on preliminary injunctions described in Section III.B, such remedies could still play a role, for the very reason that no deal planner can anticipate with absolute certainty if the underlying transaction will be a one-bidder deal or become a two-bidder deal. If the latter turns out to be the case, all bets are off. Indeed, *C & J Energy* was notably deferential to director conduct because no rival bid arose.[270] So, from an ex ante standpoint, the question is how far deal planners are comfortable going to try to eliminate a competitive situation without fearing judicial intervention.

An example might help clarifying. Assume there are two types of deal planners: aggressive and non-aggressive. Let us start with the latter. A non-aggressive deal planner will anticipate that there is a chance that pre-*Corwin* law will apply as a result of a rival bid emerging and will base her decisions on how to structure process accordingly (empirical studies show that rival bids occur in the 5–10% range depending on the year of observation and the jurisdiction).[271] On the other

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adequate, or whether a large minority shareholder ought to count as controlling are, in a sense, procedural questions. They do not directly address the substance of whether the transaction was designed to maximize shareholder wealth."). However, the same authors concede that "it may not matter whether the central question of management bias is addressed directly, as in *Revlon*, or indirectly, as in *Corwin*, so long as the question is raised. And indeed, there is at least some evidence that pleadings under *Corwin* addressing issues of procedure are frequently argued in ways that raise core substantive concerns." *Id.*

269. Think of cases such as *Topps*, *Lear* or *Netsmart*. *See supra* note 193 and accompanying text. Post-*Corwin*, consider the increasing number of cases (all mentioned *supra* Section III.A.1) that did not apply the defense for lack of full information.

270. C & J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Trust, 107 A.3d 1049, 1072–73 (Del. 2014); *see also supra* note 107.

271. Coates and Subramanian report that of the all mergers and acquisitions of U.S. public targets, announced between January 1, 1988 and August 31, 1999, and greater than $50 million in value, 6% of deals experienced a rival bid. Coates & Subramanian, *supra* note 48, at 315. In a different period, 2010–2018 for U.S. public targets having an equity value greater than $100 million, Martin Gelter and I report that rival bids were 7.8% (counting rival bids and bust up offers). *See* Gatti & Gelter, *supra* note 36, at 2 n.7.

hand, the aggressive deal planner will try to tip the odds in her favor by making it harder for rival bids to emerge.

Either way, pre-*Corwin* law will likely still be relevant. The non-aggressive deal planner who fears but does not know whether a rival bid might happen will not force her hand and will voluntarily subject herself to pre-*Corwin* law when the deal is planned and negotiated. If there is no rival bid in the end, the deal will likely pass and *Corwin* will apply post-closing, so no director liability will ensue. But during the entire preparation and the post-signing phase until it is perceived there is still a chance for a rival bid to arise, the non-aggressive deal planner abides by pre-*Corwin* law.

Conversely, an aggressive deal planner wants to avoid a rival bid and to that end does not follow pre-*Corwin* law. This is the corporate actor that *Corwin* critics are ultimately concerned about—someone who will use the more relaxed advantage, to the detriment of shareholders, to fully protect subpar deals. However, I find it hard to imagine that blatant attempts to reduce the likelihood of rival bids will remain unnoticed. Consider that although no judge has ever granted a pre-closing injunction following *Corwin*, it is completely possible that, even in the aftermath of *C & J Energy*, some judge will.[272] Note that the *Corwin* opinion itself suggests that *Unocal* and *Revlon* were designed to grant injunctive relief.[273] So if in the specific case it is apparent the actions of the aggressive deal planner are put in place to avoid a competitive situation, I see no reasons stemming from *C & J Energy* or *Corwin* that would con-

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272. In a monetary damages case following both *C & J Energy* and *Corwin*, the Delaware Supreme Court ruled against the defendants positing, among other things, that under *Revlon*, at a minimum, a potential rival bidder must have a "fair opportunity to present a higher-value alternative[,]" coupled with a fiduciary out for the board to take it. RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 854 (Del. 2015):

> *Revlon* permits a board to pursue the transaction it reasonably views as most valuable to the stockholders, provided "the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so." We stated in *C & J Energy* that "[s]uch a market check does not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal." (footnotes omitted)

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

strain a Delaware court from intervening in the presence of such egregious facts. It is quite possible that judges will still look at all the facts of the deal with a *Revlon* mindset, and if they find something that shows some form of malfeasance on the directors' part, they will work from the *Corwin* preconditions backwards to give shareholders relief (or at least a victory on the motion to dismiss).[274]

It is worth keeping in mind Professor Rock's insight that the core of Delaware fiduciary law can be correctly understood if conceptualized in process terms, not in mere legal rulings. Delaware courts fulfill their duties by determining the law applicable to the specific dispute after a "fact-intensive, normatively saturated description[ ] of manager, director and lawyer conduct, and of process—descriptions that are not reducible to rules . . . ."[275] Under this view, the true prescriptive power of fiduciary duties does not necessarily emanate from their deterrent effect, but mostly from the persuasiveness of judicial opinions rendered in Delaware to corporate decision makers. Rock describes these opinions as "'corporate law sermons' . . . richly detailed and judgmental factual recitations, combined with explicitly judgmental conclusions, [which] sometimes impose legal sanctions but surprisingly often do not."[276] Because law and corporate conduct are shaped by these "richly detailed narratives of good and bad behavior, of positive and negative examples,"[277] it is not a stretch to predict that, unlike in other areas, corporate actors (managers, directors, and lawyers) engage less in legal arbitrage when it comes to fiduciary duties at large. This is because, on the one hand, they care about their reputation in the community and know that they can be easily criticized by a judge for bad behavior (even when they are ultimately not sanctioned). On the other hand, it is quite possible that a judge will intervene if he or she finds that corporate actors have engaged in bad behavior—especially if the judge feels that a bad corporate actor is trying to take advantage of a

274. *Cf.* Cain et al., *supra* note 37, at 48 (noting that "Delaware courts will still find a way to intervene in transactions where there is evidence of biased processes").

275. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. Rev. 1009, 1015 (1997) (analyzing the inner mechanics of how Delaware cases are adjudicated).

276. *Id.* at 1016.

277. *Id.* at 1017.

doctrine originally designed simply to limit frivolous litigation. Thus, the concerns raised by aggressive deal planners should not be overplayed.[278]

In sum, the behavior of corporate actors is still likely to be informed by judicial intervention, which per the analysis above is quite likely to occur in the following circumstances:[279] (i) two-bidder deals in which the playing field turns out to be unleveled; (ii) extreme one-bidder[280] deal cases in which the violation of *Revlon* (whether by directors or by aiding and abetting advisors)[281] is apparent prima facie and an injunction is in order; or (iii) less extreme (or less apparent) one-bidder deal cases that do not lead to an injunction, yet are permeated by "bad facts," which are sufficient to convince a judge that the preconditions to *Corwin* are not satisfied.

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278. For a similar take, see Cain et al., *supra* note 37, at 6 ("The lesson of *Revlon* may thus be that a standard alone is insufficient—it is the implementation and oversight which counts. As for the criticism of *C&J* and *Corwin*, such criticism may be overstated to the extent that *Revlon*'s core precept—access for judicial intervention into substantively biased transactions—is preserved.").

279. Consider that a negative outcome is not even necessary from a deterrence standpoint, because "[l]itigation can impose costs on defendants—making them internalize the social costs of their misconduct—even without compensating plaintiffs." Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. Rev. 873, 882 (2019); *see also* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 Colum. L. Rev. 1908, 1919 (1998) (noting that even if "litigation is unlikely to cost [directors and managers] their jobs, liability can damage their reputations and future careers"); Rock, *supra* note 275, at 1104 (arguing that Delaware courts' "public shaming" is an effective deterrent on outside directors' behavior).

280. Unlike the single-bidder process versus active market check dichotomy, which relates to the chosen process structure in the preliminary phase of the deal, the taxonomy I use here is outcome-driven: one-bidder deals are transactions in which shareholders do not have the opportunity to consider a competing bid. Clearly, one-bidder deals that are the by-product of a single-bidder process are more problematic than those resulting from a preliminary active market check.

281. Note that Delaware courts have lately ruled on *Revlon* grounds more against aiders and abettors than against directors. *See, e.g.*, Gevurtz, *supra* note 19, at 26 (first citing *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 815 (Del. Ch. 2011); then citing RBC Capital Markets, LLC v. Jervis, 129 A.3d 816 (Del. 2015)).

B. *Has the M&A Market Moved Towards Bad Process?*

If the working hypothesis suggests that *Corwin* will not have the negative impact that some commentators fear, early data on dealmaking in the aftermath of the decision confirm such conclusion. In fact, if the novelty of *Corwin* was so earth-shattering and negative, we would observe a much more relaxed approach by M&A players in the way deals are planned, structured, run, and protected. However, this has yet to occur.

In a companion paper with Martin Gelter, from a dataset provided by Deal Point Data, we analyze all domestic public deals in the 2010–2018 period for a contestable domestic target with an equity value of at least $100 million.[282] After removing deals for non-contestable targets[283] and spin-outs, out database comprises 1,232 transactions. We look into what are considered indicators of bad process, including the size of target termination fees,[284] the absence of pre-signing market checks,[285] the absence of a go-shop when a pre-signing market check is also absent,[286] the length of go-

282. Gatti & Gelter, *supra* note 36, at 1.

283. Transactions for non-contestable targets can be considered as "done deals," because no rival bid can realistically arise. Therefore the underlying contractual documentation on deal protections lacks the probative value we can infer from deals with contestable targets, whereby the parties do seek to discourage superior proposals by using such protections.

284. Because a termination fee "discourages second bidders from bidding [by] siphon[ing] value out of the target company for the first bidder's benefit in the event of an overbid," the higher the fee, the less likely an overbid. Restrepo & Subramanian, *supra* note 256, at 1018.

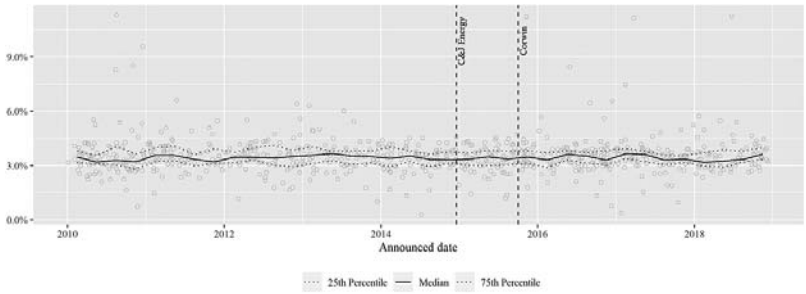
285. Pre-signing market checks are not legally necessary (*see supra* Section I.B.1 discussing *Barkan*, which liberalized the practice), but represent the optimal way to conduct a sale to gauge the most interest. *See generally* Guhan Subramanian, *Go-Shops vs. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729, 736 (2008) ("[A] pre-signing market check places all bidders on a level playing field with respect to the economics of the transaction; in contrast, a post-signing market check gives the announced bidder a slight leg up because of the breakup fee. Even though the breakup fee is a modest fraction of deal value, the combination of the fee and the first bidder's match right may deter a prospective bidder.").

286. This means that the sole market check that the board engages in occurs only after signing and does not even require any active solicitation, but simply to stay passive and entertain offers only if and when they arise (and so long as they represent superior proposals). This technique is clearly more problematic than a true post-signing market check. Indeed, while not illegal (this was made clear once and for all by *C & J Energy*, *see supra* Section I.B.3), a post-signing *passive* market check is the selling technique that wor-

shops,[287] and the incidence and length of matching rights.[288] We find that none of these indicators have worsened following *Corwin* (or *C & J Energy* for that matter).[289] Some of our main findings ensue.

Fig. 1 graphically shows that target termination fees for deals with a Delaware corporation as a target have essentially stayed at the same level before and after the two decisions.[290] Table 1 contains the descriptive statistics for median, 25th and 75th percentiles in the 2010–18 period. Table A.1 in the Appendix displays the regression[291] numbers from a difference-in-differences analysis that shows no statistically significant change.

FIG. 1 Termination fee as percentage of equity value



ries commentators the most, since it might resolve in a deal in which the target ultimately spoke with one purveyor only, the buyer they agreed to sign with. *Cf.* Guhan Subramanian, *Deal Process Design in Management Buyouts*, 130 HARV. L. REV. 590, 592 ("The 'market-check' process is generally viewed as an important protection to ensure that exiting shareholders receive fair value. In particular, a post-signing 'go-shop' is disproportionately the tool of choice for special committees seeking to satisfy their duties to noncontinuing shareholders.").

287. The shorter the period of the go-shop, the less likely it will be for alternative buyers to show up.

288. On the concerns raised by matching rights, see *supra* note 277.

289. Gatti & Gelter, *supra* note 36, at 3, 23.

290. This is consistent with studies analyzing termination fees prior to *Corwin*. *See* Restrepo & Subramanian, *supra* note 256, at 1016 (noting that termination fees capped before the 2010s).

291. The regression additionally drops pending deals, and several observations are lost because of missing values.

TABLE 1. Termination fee as a fraction of equity value (Delaware targets)

	25th percentile	median	75th percentile
2010	3%	3.3%	3.7%
2011	3.2%	3.5%	4%
2012	3.1%	3.5%	3.9%
2013	3.1%	3.5%	3.8%
2014	3%	3.4%	3.8%
2015	3%	3.4%	3.8%
2016	3.1%	3.5%	3.8%
2017	3.1%	3.5%	3.7%
2018	3%	3.4%	3.8%

Contrary to the common wisdom expectation that *C & J Energy* and *Corwin* have lowered the quality of sales processes, the chart in Fig. 2 shows that deals with neither a pre-signing market check nor a go-shop have actually decreased following each of *C & J Energy* and *Corwin*, while deals with both features (so-called "add-on" go-shop)[292] have increased and so have deals with pre-signing market check. Table 2 contains the relevant descriptive statistics and Table A.2 in the Appendix displays another set of difference-in-difference regressions that again fails to show any evidence for an impact of the two cases on dealmaking practices.

292. Subramanian, *supra* note 285, at 730.

FIG. 2 Go shop auction (proportions)

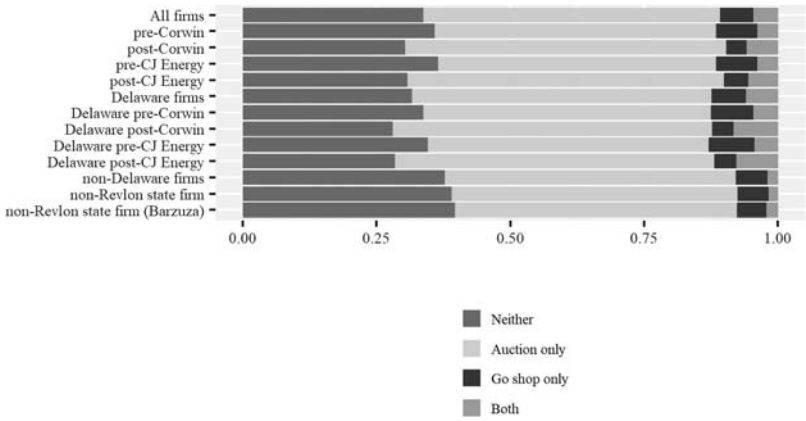


TABLE 2

	Neither	Go shop only	Auction only	Both
All firms	33.8%	6.2%	55.4%	4.6%
pre-Corwin	35.9%	7.7%	52.5%	3.9%
post-Corwin	30.4%	3.9%	59.8%	5.8%
pre-CJ Energy	36.5%	7.7%	51.9%	3.9%
post-CJ Energy	30.8%	4.7%	59.1%	5.4%
Delaware firms	31.7%	6.4%	55.9%	6.0%
Delaware pre-Corwin	33.9%	7.9%	53.6%	4.6%
Delaware post-Corwin	28.1%	3.9%	59.7%	8.4%
Delaware pre-CJ Energy	34.6%	8.4%	52.6%	4.4%
Delaware post-CJ Energy	28.5%	4.1%	59.6%	7.8%
non-Delaware firms	37.8%	6.0%	54.3%	1.9%
non-Revlon state firm	39.1%	5.9%	53.3%	1.8%
non-Revlon state firm (Barzuza)	39.7%	5.7%	52.6%	2.1%

The study also shows that other metrics indicative of bad process, such as length of go-shop and incidence and length of

matching rights, have not worsened in any statistically significant way.[293]

Our findings are, overall, consistent with recent empirical literature that has demonstrated how the *Revlon* doctrine "matters" for Delaware corporations in terms of protracted negotiations, more rounds of bidding, more bidders, and higher deal premiums. More importantly, such findings persist even after controlling for the *C & J Energy* and *Corwin* decisions.[294]

There are several plausible explanations for the lack of impact of *Corwin* on deal process. One is that *Revlon* was already no longer stringent in terms of substance in the 2010s, and the deal activity in the early years of the decade already reflected bad process.[295] While on the one hand this explanation seems to be supported by data on target termination fees and the ubiquity of matching rights well prior to *Corwin* and *C & J Energy*, on the other hand, it is not consistent with the more recent empirical literature showing that in terms of process robustness *Revlon* has mattered throughout the years.[296]

Another explanation is that directors of Delaware corporations keep responding strongly to deterrence, which in the new legal landscape is fueled by deal planners' risk aversion to the possibility of rival bids (which would de facto trigger more extensive judicial review), combined with the ongoing bite of the preconditions to *Corwin* (full information, no coercion, and disinterest). In this environment, market participants are deterred from blatantly engaging in bad process due to the risk that a judge may determine that their actions are not shielded by the *Corwin* defense because the deal does not satisfy all its preconditions.[297] A related and complementary explanation has to do with deal attorneys, who closely guide transaction planners in a sale process. Indeed, while their colleagues on the plaintiff front have depicted the new legal landscape in gloomy terms,[298] there have not been indications from the transactional bar that board is now freer in shaping a

293. Gatti & Gelter, *supra* note 36, at 13–14.
294. Cain et al., *supra* note 37, at 5.
295. *See, e.g.*, Johnson & Ricca, *supra* note 95.
296. *See supra* note 294 and accompanying text.
297. This is essentially the working hypothesis laid out *supra* Section IV.A.
298. *See supra* note 17 and accompanying text.

process.[299] While it is true that no one wants to be on record in telling a board to take a relaxed approach in a sale process, it is even truer that no one wants to be the attorney who advises a board that loses a *Revlon* claim after *Corwin*. In this respect it is important to have in mind that deal lawyers have strong incentives to rein in their clients' worst impulses because of peer pressure and risk aversion typical of their profession.[300] Consider further that in *Revlon* deals, in most circumstances, lawyers for the target expect to "lose" their client after the transaction closes and the corporation is absorbed by the acquirer. In such an end-game scenario, the legacy of the deal is more important than pleasing the client by letting it accept borderline provisions in the acquisition agreement.

Finally, we should not underestimate that litigation outside of Delaware still poses a risk, which has arguably risen *because* of *Corwin*. It is conceivable that non-Delaware judges (those who do not have any incentive to reject excessive litigation) will not give *Corwin* too much deference in the aim to keep attracting plaintiffs. This risk may well make deal planners conscious of ending up in a lengthy lawsuit with unpredictable outcome if they push the envelope too far. Future research should investigate each of the foregoing possible explanations.

Conclusion

As deal litigation reached unsustainable levels in the mid-2010s, the judiciary intervened on a few fronts to contain

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299. A review of more than thirty randomly sampled alert memos from top-tier law firms (on file with author) following *Corwin* does not show any indicia of law firms advising their clients to take a more relaxed approach in fulfilling their fiduciary duties in a sale process.

300. *See* Rock, *supra* note 275, at 1103:

> Consider what I have claimed is a characteristic style of Delaware law: The denial of a preliminary injunction motion coupled with strong criticism. In the next deal, the "thick-skinned" businessman wants to skate close to the edge. Will he be constrained by the possibility that he will go down in history as a villain of Delaware corporate law? Probably not. But his lawyer is likely to advise him that such behavior will make it more likely that the deal will be enjoined, or that he will be left unprotected against maneuvers by his opponents. In other words, even the corporate actor who is immune to the social sanctions of Delaware corporate law will be constrained to some degree by Delaware "law."

abuses. An important change took place when the Delaware Supreme Court with *Corwin* gave defendants an early way out of litigation if "a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders."[301] Whilst the majority of commentators boldly criticized the departure from the more demanding *Revlon* standard, this Article posits that the changes will be less traumatic than critics have feared. Thus far, they have in fact proven to be less momentous than expected, if one looks at data on deal making in the years following *Corwin*.[302]

All in all, *Corwin* can be viewed as the Delaware judiciary finally setting a different standard for one-bidder deals in which no alternative is ever presented to shareholders. Consider the *C & J Energy* passage that "*Revlon*, and later cases like *QVC*, primarily involved board resistance to a competing bid after the board had agreed to a change of control . . . ."[303] The dichotomy of one-bidder/multiple-bidder deals dates back to *Barkan*.[304] *Corwin* essentially embraced the rationale with a ruling that simply does away with enhanced scrutiny for one-bidder deals if some preconditions are met.

The judicial unease to second-guess one-bidder deals is understandable. Judges are asked to make an *ex post* determination on a transaction—that shareholders have already approved—as to whether a better deal could have arisen in the absence of certain actions by the board or management. Con-

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301. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015).

302. *See supra* Section IV.B.

303. C & J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Trust, 107 A.3d 1049, 1053 (Del. 2014). According to Laster, *supra* note 18, at 219, "[t]he implication appears to be that, absent a competing bidder, a reviewing court does not need to be as worried about subtle conflicts of interest."

304. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286–87 (Del. 1989):

> When *multiple bidders* are competing for control, [the] concern for fairness forbids directors from using defensive mechanisms to thwart au auction or to favor one bidder over another. When the board is considering a *single offer* and has no reliable grounds upon which to judge its adequacy, this concern for fairness demands a canvas of the market to determine if higher bids may be elicited. . . . *When, however, the directors possess a body of reliable evidence with which to evaluate the fairness of a transaction, they may approve that transaction without conducting an active survey of the market.* (emphasis added).

versely, in a multiple-bidder deal, when a rival bidder is present, judges have a much easier task: spotting the target's favoritism for one bidder that thwarts the efforts of the rival and does not allow it to prevail.

However, justifying a de facto dual approach based on the one-bidder versus multiple-bidder distinction can hide several issues, because one-bidder deals are not always the product of exogenous market factors (for example, the original deal is truly advantageous, there are no other suitable buyers, strategic or otherwise, there is no interest in the target, and so forth). Indeed, inferring from the lack of rival bids that a one-bidder deal is the product of market forces is simply unrealistic, for one-bidder deals may well be the result of endogenous factors such as bad process and/or deal protections that make a multiple-bidder deal impossible. It is much more realistic to consider one-bidder deals as a product of both exogenous and endogenous factors, and judges should be concerned about one-bidder deals in which endogenous factors outweigh the exogenous ones.[305]

With all this said, I still do not believe that the new law made by *Corwin* is much worse than the old one in detecting predominantly manufactured one-bidder deals. The new law policies only two macro scenarios: board dishonesty, by imposing a full disclosure requirement; and insincere decisions by shareholders, via the coercion and disinterest requirements. However, there are powerful deterrents at work (such as rival bids, deal attorneys, and the looming threat of being censored by the Delaware judiciary) that constrain transaction planners just as strongly as they did prior to *Corwin*. Such deterrents might well be already seeded in the preconditions to *Corwin* themselves.

First, board dishonesty resulting in lack of full disclosure represents the bulk of what pre-*Corwin* law already sanctioned. In fact, several *Revlon* cases decided in the plaintiff's favor were, in whole or in part, around disclosure. Unsurprisingly,

305. Whether or not in the life of a deal there is ever going to be a two-bidder situation is something that no one can surely predict ex ante; still, original deal planners can influence the outcome to varying degrees by building harsh deal protection devices and adopting a process that discourages potential deal jumpers and reduces significantly the chances that an announced transaction will ever face a rival bid.

Delaware courts kept busy ruling for plaintiffs in these types of cases. So, not much can be expected to change on this front.

Second, to qualify for the *Corwin* defense, the merger approval must come from disinterested stockholders. Here, only time will tell if judges will take the requirement seriously. If they do, as this Article argues they should, target corporations will have a choice: subject the deal to a serious disinterest vote condition, or face the risk of being judged under *Revlon*. In a way, under a more demanding disinterest requirement, *Corwin* would act as a sort of penalty default, in that steps ought to be taken to escape *Revlon*.

Third, as to the no coercion requirement, it is implausible that the "saints and sinners" logic that permeates Delaware law will refrain from sanctioning a bad process that somehow does not involve a disclosure violation, which would have failed a *Revlon* review, under the new coercion standard. Because the new law is on its face more deferential to boards, in the presence of a bad process, judges will likely take steps to prove that they interpret the coercion (as well as any other) precondition stringently.

Appendix

Table A.1

OLS regression

Dependent variable:

Termination fee (as percentage of equity value)

	(1)	(2)	(3)	(4)
Delaware	0.001	0.002	0.001	0.002
	(0.001)	(0.001)	(0.001)	(0.001)
post_*Corwin*	0.001*	0.001		
	(0.001)	(0.001)		
time		0.00000		0.00000
		(0.00000)		(0.00000)
Delaware:post_*Corwin*	-0.001	0.001		
	(0.001)	(0.002)		
Delaware:time		0.00000		-0.00000
		(0.00000)		(0.00000)
post_CJ_Energy			0.001	-0.001
			(0.001)	(0.001)
Delaware:post_CJ_Energy			-0.001	0.002
			(0.001)	(0.002)
Constant	0.034***	0.034***	0.035***	0.034***
	(0.001)	(0.001)	(0.001)	(0.001)
Observations	1,211	1,211	1,211	1,211
R^2	0.003	0.006	0.001	0.002
Adjusted R^2	0.001	0.002	-0.002	-0.002
Residual Std. Error	0.009	0.009	0.009	0.009
	(df = 1207)	(df = 1205)	(df = 1207)	(df = 1205)
F Statistic	1.283 (df = 3; 1207)	1.520 (df = 5; 1205)	0.295 (df = 3; 1207)	0.431 (df = 5; 1205)

*p<0.1; **p<0.05; ***p<0.01 (White's heteroscedasticity-robust standard errors)

TABLE A.2

Linear probability model

Dependent variable:

Bad process (i.e. neither go-shop nor auction)

	(1)	(2)	(3)	(4)
Delaware	-0.061	-0.025	-0.059	-0.025
	(0.038)	(0.072)	(0.041)	(0.071)
post_Corwin	-0.053	-0.059		
	(0.048)	(0.087)		
time		0.00000		0.00001
		(0.00005)		(0.0001)
Delaware:post_Corwin	-0.006	0.049		
	(0.059)	(0.106)		
Delaware:time		-0.00003		-0.00004
		(0.0001)		(0.0001)
post_CJ_Energy			-0.054	-0.071
			(0.048)	(0.095)
Delaware:post_CJ_Energy			-0.007	0.054
			(0.058)	(0.116)
Constant	0.400***	0.395***	0.405***	0.394***
	(0.031)	(0.061)	(0.034)	(0.060)
Observations	1,222	1,222	1,222	1,222
R^2	0.007	0.008	0.008	0.008
Adjusted R^2	0.005	0.004	0.005	0.004
Residual Std. Error	0.472 (df = 1218)	0.472 (df = 1216)	0.472 (df = 1218)	0.472 (df = 1216)
F Statistic	2.927** (df = 3; 1218)	1.948* (df = 5; 1216)	3.088** (df = 3; 1218)	1.978* (df = 5; 1216)

*p<0.1; **p<0.05; ***p<0.01 (White's heteroscedasticity-robust standard errors)