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THE SHAREHOLDER APPROVAL CONUNDRUM

FRANKLIN A. GEVURTZ

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Abstract: This Article explores the conundrum resulting from the fact that shareholders almost invariably vote to approve corporate mergers and sales by overwhelming margins, while, at the same time, most larger mergers and sales trigger multiple lawsuits by shareholders claiming that directors breached their fiduciary duty to get the best price for the shareholders. The conventional explanation for this phenomenon is that attorneys are bringing meritless claims. Reflecting this view, the Delaware Supreme Court, in its pivotal *Corwin* decision, declared that an informed and uncoerced shareholder vote in favor of a merger should lead courts to be dismissive of claims that directors breached their fiduciary duty in making the deal. Yet, studies have found that corporate managers, in fact, often sacrifice getting the best deal for the shareholders in favor of deals that maintain the managers' positions and enhance their compensation. This, in turn, suggests that the conventional wisdom is too facile and raises a deeper factual conundrum: Why would shareholders vote for deals that sacrifice their interests? This Article presents an answer to this question. It sets forth a model of decision making contrasting narrow binary decisions with nuanced or flexible decisions and shows how the narrow binary nature of shareholder votes explains the conundrum of shareholders approving deals that sacrifice their interest in getting the best price. Addressing the doctrinal impact of this answer, this Article sets out the unintended consequences, unanswered questions, and doctrinal anomalies plaguing Delaware law regarding shareholder approval following *Corwin* and shows how this Article's central insight regarding shareholder approval paves the way to clear up these doctrinal problems.

INTRODUCTION

Corporate mergers and acquisitions are over a trillion dollar a year business.[1] Ideally, the shareholders' receipt of the highest price in such transactions not only makes the shareholders happy and thereby contributes to their

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* Distinguished Professor of Law, University of the Pacific, McGeorge School of Law. I wish to thank my colleagues, Brian Slocum, John Sprankling, and Leslie Jacobs for their helpful comments.

[1] *See, e.g.*, Dan Primack, *2017 Was a Record Year for Mergers and Acquisitions*, AXIOS (Jan. 3, 2018), https://www.axios.com/2017-was-a-record-year-for-mergers-and-acquisitions-1515111011-

willingness to invest and grow the economy, but also facilitates economic efficiency by moving business assets to the party who places the highest value on them.[2] The boom in corporate mergers and acquisitions has also generated a correspondingly booming legal business through the constant stream of litigation challenging most board decisions to enter such transactions.[3] Plaintiffs cast these actions as a contest between victimized shareholders and faithless directors who failed to act reasonably to get the shareholders the best price.[4] Yet, merging or selling a corporation normally requires approval by the shareholders,[5] who rarely vote down the deal.[6] What explains this apparent incongruity between what plaintiff shareholders assert and how most shareholders vote?

Answering this question has substantial doctrinal and policy significance. Corporate law normally grants large discretion to directors to make corporate decisions without input from the shareholders and, under the business judgment rule, dismisses shareholder complaints about decisions that directors make.[7] Corporate mergers and sales, however, receive different

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18f57e07-c188-4e35-a770-f7a749500531.html [https://perma.cc/J7XR-V39K] (noting that U.S. mergers and acquisitions were valued at $1.4 trillion in 2017 and $1.7 trillion in 2016).

[2] *See* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307, 377 (2000) (theorizing that lockup provisions that foreclose the possibility of sale to a higher bidder breed economic inefficiency by preventing corporate assets from moving to higher-valuing parties).

[3] *See* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 607–08 (2018) (explaining that the vast majority of mergers valued at over $100 million trigger shareholder lawsuits).

[4] *See id.* at 611 ("Most merger lawsuits include claims for breach of fiduciary duty, including allegations that the board failed to adhere to its duty under *Revlon* to maximize shareholder value."). In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court held that if the break-up of a corporation is inevitable, the board of directors inherits the duty to maximize the shareholders' benefit upon sale. *See* 506 A.2d 173, 182 (Del. 1986).

[5] *See infra* notes 57–58 (citing Delaware statutes requiring shareholder approval in order to merge or sell a corporation).

[6] *See* Matteo Gatti, *Reconsidering the Merger Process: Approval Patterns, Timeline, and Shareholders' Role*, 69 HASTINGS L.J. 835, 854 (2018) (showing that shareholders rejected only a little over one percent of arms-length mergers involving a Russell 3000 target company from 2006 to 2015); *see also* John Mark Zeberkiewicz & Blake Rohrbacher, *Paying for the Privilege of Independence: Termination Fees Triggered by "Naked No Votes*,*"* 21 INSIGHTS 10, 11 (2007) (noting that the shareholder rejection of the Lear-Icahn merger in 2007 was only the eighth time between 2003 and 2007 that shareholders voted down a merger out of the over 1,000 submitted for shareholder approval).

[7] *See, e.g.*, DEL. CODE ANN., tit. 8, § 141(a) (West 2011 & Supp. 2018) (providing that a corporation is to be managed by or under the direction of the board of directors); *see also* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (stating that the board of directors' decisions are presumed to be reasonable and "will not be disturbed if they can be attributed to any rational business purpose").

treatment. As just mentioned, corporate law generally requires that shareholders approve such transactions. Moreover, Delaware corporate law—which governs most litigation challenging directors' agreements to merge or sell public companies[8]—often calls for more careful judicial scrutiny of whether directors acted reasonably in entering such agreements.[9] The result is a pair of double checks on directors' decisions to merge or sell a company.

Explaining the apparent incongruity between the claims of plaintiff shareholders and how most shareholders vote is key to resolving whether this pair of double checks creates an undesirable redundancy. The explanation pressed by the corporate bar and many corporate law scholars is simply that a number of attorneys with nothing better to do have developed a business model consisting of bringing meritless claims challenging mergers with the hope of profiting through settlements generating attorney's fees.[10] The result of paying the attorney's fees in such settlements, as well as litigation costs and the costs of unnecessary process aimed at approving appearances in expected litigation, is to impose a transaction tax on corporate mergers[11] that ultimately comes at the expense of the shareholders ostensibly championed in such litigation. Under this view of the world, courts should look to how shareholders vote, rather than what plaintiffs claim.

In *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court took what proponents see as a welcome step toward implementing this worldview.[12] The court stated that an informed and uncoerced vote by the shareholders to approve a merger or sale of a company invokes the deferential

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[8] *See In re* Crown Castle Int'l Corp., 247 S.W.3d 349, 352 (Tex. App. 2008) (stating that Delaware substantive law governs the internal affairs of Delaware corporations); Liz Hoffman, *Dole and Other Companies Sour on Delaware as Corporate Haven*, WALL ST. J. (Aug. 2, 2015), https://www.wsj.com/articles/dole-and-other-companies-sour-on-delaware-as-corporate-haven-1438569507 [https://perma.cc/K3F9-9RZV] (noting that 54% of public companies are incorporated in Delaware).

[9] *See infra* notes 46–51 and accompanying text (discussing various circumstances where mergers or sales trigger higher scrutiny from the courts).

[10] *See, e.g.*, Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 566–67 (2015) [hereinafter *Peppercorn Settlement*] (condemning "disclosure-only" settlements because they often provide monetary rewards to the plaintiffs' attorneys but nothing of value to the plaintiff-shareholders); Gregory A. Markel & Gillian G. Burns, *Assessing a Judicial Solution to Abusive Merger Litigation*, LAW360 (Nov. 19, 2015), https://www.law360.com/articles/728061/assessing-a-judicial-solution-to-abusive-merger-litigation ("[L]awsuits are filed after virtually every public merger is announced, in many cases with little regard to the merits of the claim.").

[11] *See, e.g.*, Lyman Johnson, *The Reconfiguring of* Revlon, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 263, 278 (Claire A. Hill & Steven Davidoff Solomon eds., 2016) (stating that attorney's fees in settlements of cases challenging mergers "essentially represent a kind of transactional 'excise' tax").

[12] 125 A.3d 304, 308–09 (Del. 2015).

business judgment rule in litigation challenging the deal, at least when the deal does not involve a controlling shareholder on the other side.[13]

Yet, there is evidence that this explanation of the incongruity, and accordingly *Corwin*'s solution, is too facile. Studies have found that corporate management, in choosing merger partners and negotiating deals, often approaches the matter by following the adage "one door closes, another door opens."[14] Specifically, management often sacrifices getting the best price for the shareholders in favor of mergers or sales in which the current management retains positions or gains in compensation.[15] These studies, in turn, raise an empirical conundrum: If deals often sacrifice their interest, why do shareholders almost always overwhelmingly vote for the deals?

Perhaps it is because shareholders are misled or forced. If so, we might find suitable reassurance in *Corwin*'s twin prerequisites for according favorable impact to shareholder approval: that the shareholders are fully informed and are not coerced. Yet, this explanation, too, is unsatisfying.

Research has indicated that shareholders do not significantly change their votes when litigation forces the disclosure of additional negative facts about deals; rather, shareholders continue to approve the deals by overwhelming margins.[16] Indeed, such research reinforces a growing perception that litigation producing additional disclosure serves largely to enrich lawyers with little gain for shareholders.[17] This, in turn, suggests that *Corwin*'s impact of increasing litigation's focus on whether the shareholders were fully informed is a bug, not a feature.

As far as whether shareholders are voting for deals sacrificing their interests because they are coerced, this may depend on what one means by coercion. Unfortunately, Delaware courts have yet to come up with a workable

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[13] *Id.*

[14] *See, e.g.*, Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals,"* 20 J.L. ECON. & ORG. 60, 75–80 (2004) (noting the prevalence of mergers that involve directors and officers of the target company who remain as managers of the surviving company).

[15] *See id.* at 94 (finding that management of merging corporations exchange lower premiums for employment in the surviving entity or other benefits); *see also* Jay C. Hartzell et al., *What's in It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 51–56 (2004) (finding that management of selling corporations exchange lower premiums for generous compensation packages).

[16] *See infra* notes 121–122 and accompanying text (discussing the results of a study that analyzed shareholders' decisions to approve mergers when they were presented with negative information compared with situations involving no such disclosure).

[17] *See, e.g.*, *Peppercorn Settlement*, *supra* note 10, at 566–67 (criticizing state merger litigation that focuses on nondisclosure claims for producing settlements that pay off plaintiffs' attorneys despite achieving nothing of value for shareholders).

definition.[18] Even more unfortunately, this may be a function of the impossibility of the task.

In the end, it is unclear how much the court in *Corwin* itself believes in the power of informed and uncoerced shareholder votes to fully protect shareholders. This is because the case contains a doctrinal anomaly, that, in the spirit of this Article, we can label as the *Corwin* conundrum. In the same analysis in which the court stated that a shareholder vote of approval lowers the standard for reviewing the deal to the minimalist guidelines of the business judgment rule, the court also suggested that greater scrutiny of whether directors picked the best deal remains available for actions seeking to enjoin the transaction before the shareholders vote.[19] Yet, why on earth would a court apply extra careful scrutiny of a board's decision for purposes of blocking a shareholder vote that would cause the court to defer to the board's decision without such careful scrutiny, particularly if the court believed in the protective power of shareholder approval?

This Article provides a very different explanation for the conundrum of shareholders voting for deals in which management may have sacrificed their interest. It does so by constructing a model of decision making that contrasts narrow binary decisions (a light switch that is either on or off) from nuanced or flexible decisions in which the decisionmaker has a number of choices (a control panel with numerous dials and switches) and can make related decisions over time. Shareholder votes to approve mergers or sales constitute narrow binary decisions in which the rational shareholder will vote for any deal presenting a significantly better price than the market, even in situations in which a party, able to make nuanced or flexible decisions, would rationally choose a different course in pursuit of an even better deal. In other words, shareholders vote for deals that are better than no deal at all, even in situations in which directors may have sacrificed the shareholders' interest in getting the best deal. This means that shareholder approval does not remove the need for more careful judicial scrutiny when there are grounds for concern about the directors' motives in agreeing to a merger or acquisition.

The roadmap to this conclusion follows a common pattern. Part I of this Article provides, for those less familiar with the area, a brief overview of the different layers of scrutiny applied by Delaware courts when reviewing challenges to board decisions and the impacts of shareholder approval on such

[18] *See infra* notes 136–147 and accompanying text (observing the Delaware courts' inability to define coercion).

[19] *See Corwin*, 125 A.3d at 312 (stating that greater scrutiny is a "tool of injunctive relief" to analyze the reasonableness of important mergers and acquisitions before closing but was not intended to be used for money damages).

scrutiny prior to *Corwin*.[20] Part II looks at *Corwin*.[21] Specifically, after describing the decision, it explores the unintended consequences, unanswered questions, and doctrinal conundrum generated by the decision.[22] Part III sets out this Article's explanation for the empirical conundrum of why shareholders approve deals that sacrifice their interests and discusses the implications of this explanation.[23] Specifically, Part III explains the impact of the narrow binary nature of the shareholders' decision and how this prevents shareholder approval from serving as a complete substitute for more careful judicial scrutiny of board decisions to merge or sell the corporation. Moreover, Part III points out an overlooked potential advantage of judicial scrutiny when viewed in light of this model of decision making. Specifically, courts, unlike shareholders, can make nuanced or flexible decisions (particularly when it comes to injunctive relief). These insights, in turn, light a path for cleaning up the doctrinal problems plaguing Delaware law that governs the impact of shareholder approval.

I. Judicial Scrutiny and Shareholder Approval

In order to understand the impact of the shareholder approval conundrum, a bit of background regarding judicial scrutiny of board decisions and the traditional role of shareholder approval might be helpful.

A. The Judicial Scrutiny Layer Cake

Paralleling constitutional law, the level of scrutiny applied by a court when reviewing a challenged decision by a corporate board commonly has a

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[20] *See* discussion *infra* Part I.

[21] *See* discussion *infra* Part II.

[22] *See, e.g.*, Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016) (addressing *Corwin*'s impact on transactions already subject to the business judgment rule); *In re* MeadWestvaco Stockholders Litig., 168 A.3d 675, 684 (Del. Ch. 2017) (raising but leaving unanswered the question of whether shareholder approval under *Corwin* cleanses the directors' lack of good faith); Paramount Gold & Silver Stockholders Litig., No. 10499-CB, 2017 WL 1372659, at *6 (Del. Ch. Apr. 13, 2017) (raising the question of whether shareholder approval under *Corwin* lowers the standard for reviewing deal protections from *Unocal* to the business judgment rule); Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447, at *10 (Del. Ch. Aug. 25, 2016) (addressing whether *Corwin* changes the impact of shareholder approval on scrutiny of mergers in which directors, but not controlling shareholders, have a conflict of interest); *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 741–47 (Del. Ch. 2016) (addressing whether accepting a tender offer pursuant to § 251(h) of Delaware's corporation statute has the same consequences as a shareholder vote for purposes of *Corwin*); *In re* Zale Corp. Stockholders Litig., No. CV 9388-VCP, 2015 WL 6551418, at *2–4 (Del. Ch. Oct. 29, 2015) (addressing the impact of shareholder approval under *Corwin* on claims against investment bankers for aiding and abetting a breach of duty by the board).

[23] *See* discussion *infra* Part III.

critical impact upon the plaintiff's chances of success.[24] Traditionally, depending upon whether one or more of the directors have a conflict of interest in the matter under review, courts apply one of two basic standards.

In the absence of a conflict of interest, courts normally apply the business judgment rule.[25] Although interpretations of the business judgment rule diverge,[26] the essence of nearly every current interpretation of the rule is to accord directors with greater protection against judicial second-guessing than virtually any other private actor in our society.[27] Hence, almost no court would hold directors liable for their decision simply because the decision was unreasonable.[28] On the contrary, Delaware courts have held that the standard under the business judgment rule for imposing liability on directors for disinterested decisions is gross negligence.[29]

Traditionally, the principal exception to application of the business judgment rule occurs when the board's decision involves a conflict of interest for some or all of the directors or parties controlling the directors.[30] In this event, unless shareholders or directors without a conflict vote to approve the transaction after full disclosure, courts apply the fairness test.[31] Under this test,

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[24] *See* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1279 (Del. 1988) ("[B]ecause the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation.") (quoting AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986)).

[25] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explaining that courts apply the business judgment rule as long as the directors did not appear on both sides of a transaction and made a fully informed decision).

[26] *See* Franklin A. Gevurtz, *The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?*, 67 S. CAL. L. REV. 287, 289–303 (1994) (discussing the various interpretations of the business judgment rule).

[27] *See generally* Andrew S. Gold, *A Decision Theory Approach to the Business Judgment Rule: Reflections on* Disney*, Good Faith, and Judicial Uncertainty*, 66 MD. L. REV. 398, 400–02 (2007) (discussing the scenarios in which courts are willing to review directors' conduct under the business judgment rule, yet noting that "a large swath of director conduct . . . is unreviewable").

[28] *See* Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982) ("Whereas an automobile driver who makes a mistake in judgment as to speed or distance injuring a pedestrian will likely be called upon to respond in damages, a corporate officer who makes a mistake in judgment as to economic conditions, consumer tastes or production line efficiency will rarely, if ever, be found liable for damages suffered by the corporation.").

[29] *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (confirming that the standard of review to determine whether a board of directors' actions violate the business judgment rule is gross negligence).

[30] *See Sinclair*, 280 A.2d at 720–21 (explaining that the intrinsic fairness standard, not the business judgment rule, is used where directors are engaged in self-dealing or are otherwise conflicted).

[31] *See In re* Inv'rs Bancorp, Inc. Stockholder Litig., 177 A.3d 1208, 1211 (Del. 2017) (stating that the entire fairness test is applied in the absence of shareholder ratification of a transaction in which the directors have a conflict of interest).

proponents of the transaction must prove to a skeptical court that the transaction was fair[32]—essentially that the corporation or shareholders received as good a deal as if dealing with a stranger.[33] This bifurcated approach reflects a policy that the degree of judicial scrutiny over board decisions should depend upon the extent that one can trust the directors to act for the right motives (even if not always with the best results).

Over the years, developments in Delaware law have splintered the levels of possible judicial scrutiny beyond this bifurcated approach. Starting at the low end, in response to a 1985 judicial decision holding directors liable to shareholders due to their gross negligence in agreeing to a merger,[34] the Delaware legislature added Section 102(b)(7) to Delaware's corporation statute.[35] This section allows companies to place in their certificate of incorporation a provision waiving liability of directors for monetary damages for breach of certain fiduciary duties.[36] The section, however, does not allow waivers for all misconduct.[37] Notably, the provision does not allow a corporation to waive director liability for disloyal acts or acts not in good faith.[38] As a result, the impact of a Section 102(b)(7) waiver on judicial review of disinterested board decisions in an action seeking damages is to change the standard from gross negligence to lack of good faith.[39] The Delaware Supreme Court characterized the good faith standard applicable when selling a

[32] *See, e.g.*, *Sinclair*, 280 A.2d at 720 (stating that under the fairness standard, the burden is on the conflicted party to prove that "its transactions . . . were objectively fair").

[33] *See* Fliegler v. Lawrence, 361 A.2d 218, 225 (Del. 1976) (holding that a transaction involving interested directors was entirely fair because an independent corporation in the same position also would have performed the same transaction).

[34] *See Van Gorkom*, 488 A.2d at 893 (holding that directors who were grossly negligent in failing to fully inform themselves of all information reasonably available to them before approving a merger were liable to shareholders to the extent that the transaction was not fair).

[35] DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2011 & Supp. 2018); s*ee also In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 751–52 (Del. Ch. 2005) (explaining that the Delaware legislature "acted swiftly" in response to the *Van Gorkom* decision by enacting § 102(b)(7) of the Delaware corporate law).

[36] DEL. CODE ANN. tit. 8, § 102(b)(7).

[37] *See id.* (listing certain fiduciary duties for which a director's liability may not be eliminated or limited by a corporation's certificate of incorporation).

[38] *See id.* (allowing a corporation to eliminate director liability, except: "(i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law . . . or (iv) for any transaction from which the director derived an improper personal benefit").

[39] *See* Sarah Helene Duggin & Stephen M. Goldman, *Restoring Trust in Corporate Directors: The* Disney *Standard and the "New" Good Faith*, 56 AM. U.L. REV. 211, 232–34 (2006) (noting that because § 102(b)(7) effectively "sounded the death knell of the duty of care" claim, plaintiffs shifted towards arguing that directors breached their duty of good faith).

corporation with a Section 102(b)(7) waiver as "whether th[e] directors utterly failed to attempt to obtain the best sale price."[40]

In between the business judgment rule and the fairness test, the Delaware Supreme Court added middle levels of heightened scrutiny for certain situations involving mergers and acquisitions. This began with the court's decision in *Unocal Corp. v. Mesa Petroleum Co.*, when it addressed actions by directors to defend against a hostile tender offer.[41] Recognizing "the omnipresent specter that a board may be acting primarily in its own interests"[42] in seeking to fend off a tender offer that would remove the current directors from power, the Delaware Supreme Court established a two-part test to review directors' decisions to employ takeover defenses. Under the first part of this test the directors must prove that they possessed reasonable grounds for believing a threat to corporate policy and effectiveness existed from the hostile tender offer.[43] The second part of the test requires that the defensive measure used be reasonable in relation to the threat posed.[44] As elaborated by a subsequent decision, this proportionality element, in turn, requires that takeover defenses not be coercive or preclusive, and be within a range of reasonable responses.[45]

Mergers or sales transferring control of the corporation to an individual or privately held entity,[46] as well as arguably any merger or sale substantially cashing out the existing shareholders[47]—which, in either event, turn out to encompass the majority of litigated mergers and sales[48]—trigger the doctrine

[40] Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009). This assumes that a plaintiff attempts to show a lack of good faith from a lack of effort as opposed to that a director acted out of bad motives. *See* Chen v. Howard-Anderson, 87 A.3d 648, 684 (Del. Ch. 2014) (explaining that *Lyondell*'s "utterly disregarded" language does not preclude a plaintiff from seeking to show bad faith by showing that directors acted for improper purposes).

[41] *See* 493 A.2d 946, 954–56 (Del. 1985) (establishing an enhanced scrutiny test for courts to apply to board actions defending against a corporate takeover).

[42] *Id.* at 954.

[43] *Id.* at 955–56.

[44] *Id.*

[45] *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1386–88 (Del. 1995) (recognizing that Delaware courts consistently recognize directors' coercive or preclusive actions to prevent a takeover bid, as well as actions outside of a "range of reasonableness," to be in violation of their fiduciary duties).

[46] *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 46–48 (Del. 1994) (stating that transactions resulting in a change of corporate control trigger the *Revlon* standard).

[47] *See, e.g.*, *In re* Smurfit-Stone Container Corp. S'holder Litig., No. 6164-VCP, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011) (applying the *Revlon* standard to assess the sale of a corporation where consideration was 50% in cash and 50% in stock); *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 732 (Del. Ch. 1999) (suggesting that the *Revlon* standard should apply in transactions where 62% of the consideration is in cash).

[48] *E.g.*, Steven M. Davidoff & Christina M. Sautter, *Lock-up Creep*, 38 J. CORP. L. 681, 702 (2013).

created by the Delaware Supreme Court's decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[49] The precise impact of applying this doctrine to a board decision is opaque.[50] Generally speaking, however, the doctrine calls for heightened judicial scrutiny of whether the board acted reasonably to obtain the best price for the shareholders.[51]

Another variant of the middle level of scrutiny applied by Delaware courts in the mergers and acquisitions context involves so-called deal protections.[52] These are provisions in the merger or acquisition contract, such as termination fees or other actions by the board, that protect the initial buyer or merger partner against a later prospective buyer offering a higher price to the shareholders before the shareholders have a chance to vote on the deal agreed to by the board. In *Omnicare, Inc. v. NCS Healthcare, Inc.*, the Delaware Supreme Court held that *Unocal* provides the appropriate standard for reviewing challenges to deal protections, at least when *Revlon* does not apply.[53]

Finally, although not technically constituting judicial scrutiny of the board's agreement to a merger, appraisal rights create an indirect judicial scrutiny of mergers. Delaware's corporation statute grants shareholders dissenting from a merger, with various exceptions, the right to demand that the corporation cashes them out at a judicially determined fair value (hence the term appraisal rights).[54] The comparison of this judicially determined fair market value to the agreed merger price serves as an indirect judicial review of the merger.

B. The Traditional Impact of Shareholder Approval

The basic model of corporate governance is republican: Shareholders have the power to choose directors[55] and directors have the power to make managerial decisions.[56] Merging or selling the corporation departs from this

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[49] 506 A.2d 173, 182 (Del. 1986).

[50] *See* Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1528–45 (2013) (discussing various possible effects of *Revlon*).

[51] *See Revlon*, 506 A.2d at 182 ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit.").

[52] *See* Thanos Panagopoulos, *Thinking Inside the Box: Analyzing Judicial Scrutiny of Deal Protection Devices in Delaware*, 3 BERKELEY BUS. L.J. 437, 453–55 (2006) (discussing the impact of enhanced scrutiny on deal protection devices used by corporations).

[53] *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928–30 (Del. 2003) (applying the *Unocal* standard to review the board of directors' decision to enter into a deal protection that foreclosed consideration of subsequent offers rather than the *Revlon* standard because the transaction did not result in a change of control).

[54] DEL. CODE ANN., tit. 8, § 262(West 2011 & Supp. 2018).

[55] DEL. CODE ANN., tit. 8, § 216(3) (West 2011).

[56] DEL. CODE ANN., tit. 8, § 141(a) (West 2011 & Supp. 2018).

model. Corporation statutes require a vote of approval by a corporation's shareholders for a sale of substantially all of the company's assets[57] and, with limited exceptions, for a merger of the corporation.[58]

In addition to being a necessary predicate for merging or selling a corporation, shareholder approval of a transaction has long impacted the level of scrutiny applied by courts to claims that directors breached their duty of loyalty when contracting with their corporation. Specifically, corporation statutes[59] and long-standing judicial doctrine[60] establish that a vote of the shareholders approving a transaction can remove the taint created by a conflict of interest among some or all of the board members, thereby returning the review from fairness to the business judgment rule or to a standard referred to as waste.[61] Achieving this impact is predicated upon full disclosure and,[62] despite some unfortunate drafting in Delaware's statute,[63] entails an affirmative vote by shareholders who do not have a conflicting interest in the transaction, rather than a vote pushed across by the shareholders who do.[64]

A decade ago, a question arose about the overlap between these two utilities of shareholder approval under Delaware law. Specifically, in *Gantler v.*

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[57] DEL. CODE ANN., tit. 8, § 271(a) (West 2011).

[58] DEL. CODE ANN., tit. 8, § 251(c) (West 2011 & Supp. 2018).

[59] *See* DEL. CODE ANN., tit. 8, § 144(a)(2) (West 2011) (providing that a transaction is not void where a director's material interest is disclosed or known to the shareholders and the shareholders approve the transaction in good faith).

[60] *See In re Inv'rs Bancorp*, 177 A.3d at 1211 (confirming that the standard of review for a challenged board action is the business judgment rule if the action was ratified by the stockholders); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (Del. 1952) (stating that where a board's decision was ratified by stockholders, the court will consider the waste of corporate assets instead of employing the entire fairness standard). Consideration of waste differs from the business judgment rule in that it asks whether the decision is so irrational that it amounts to giving away corporate assets but does not ask about due care in making the decision. *See Gottlieb*, 91 A.2d at 59.

[61] *See Gottlieb*, 91 A.2d at 58–59 (applying the waste standard rather than the business judgment rule). In part, this focus might reflect the notion that the business judgment rule requires some degree of care, like avoiding gross negligence by being adequately informed when making a decision, and shareholders have no duty of care. It also reflects the notion that even a majority of shareholders may not give away corporate assets without any business purpose over the objections of minority shareholders. *See* Rogers v. Hill, 289 U.S. 582, 591–93 (1933) (applying the waste standard instead of the business judgment rule while clarifying that a majority of shareholders may not give away corporate property such that it would constitute misuse and a waste).

[62] *See* DEL. CODE ANN., tit. 8, § 144(a)(2) (requiring all material facts of the director's interest to be disclosed or known to the shareholders); *In re Inv'rs Bancorp*, 177 A.3d at 1211 (stating that shareholders must be fully informed, not coerced, and disinterested in order to ratify a board action).

[63] As written, Delaware's statute does not explicitly state that approval must come from disinterested shareholders in order for shareholder approval to preclude voidability of a conflict of interest transaction. DEL. CODE ANN., tit. 8, § 144(a)(2).

[64] *See* Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976) (stating that ratification of the board's action by a majority of interested shareholders does not move the standard of review from the fairness test to the business judgment rule).

Stephens, the Delaware Supreme Court indulged in an arcane terminological disputation about ratification versus statutorily mandated approvals.[65] The court concluded that a statutorily required shareholder vote to approve an amendment to the corporation's certificate of incorporation in the case did not ratify the conflicted decision of directors to propose the amendment, thereby blocking the plaintiffs' claim for breach of the directors' duty of loyalty.[66] Because the solicitation seeking the shareholders' proxies in favor of the amendment contained misleading statements, this whole discussion was probably just dicta. Nevertheless, it seemingly created the prospect that statutorily required shareholder votes to approve mergers and the like would have no impact on the level of judicial scrutiny.[67]

A different impact arises with conflict of interest transactions involving controlling shareholders. The Delaware Supreme Court has held that approval of such transactions by a majority of the other shareholders—a so-called majority-of-the-minority approval—shifts the burden of proof on fairness from the controlling shareholder to the complaining minority shareholders.[68] Nevertheless, the court will still subject the transaction to the careful scrutiny of the fairness test instead of applying the business judgment rule.[69] Although this burden shift might be helpful to the controlling shareholder in close cases, it has nowhere near the dramatic impact of shifting the level of scrutiny from fairness to the business judgment rule.[70] More recently, however, the Delaware Supreme Court has held that approval by both a committee of independent directors and a majority of the minority shareholders can return scrutiny of transactions with controlling shareholders, such as a freeze-out merger in which the majority shareholder boots out the minority, to the business judgment rule.[71]

Shareholder approval might also impact judicial scrutiny of transactions in which neither directors nor parties that control directors have a traditional conflict of interest. For example, the Delaware Supreme Court has suggested that approval of a merger by shareholders who are aware of the board's gross

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[65] 965 A.2d 695, 712–14 (Del. 2009).

[66] *See id.*

[67] For an extended discussion of *Gantler*, see J. Travis Laster, *The Effect of Shareholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1477–83 (2014).

[68] Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994).

[69] *Id.*

[70] *See Mills Acquisition*, 559 A.2d at 1279 (explaining the influence the standard of review has on the judicial decision).

[71] *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (holding that the business judgment rule is appropriate where a merger transaction is approved by both a committee of independent directors and a majority of the minority shareholders).

negligence can preclude a claim against the directors for breaching their duty of care.[72]

The Delaware Supreme Court has also dabbled with the impact of shareholder approval of takeover defenses. Specifically, in *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.[73] In deciding that the business judgment rule, rather than *Unocal*, governed the matter, the court explained that *Unocal* applies to unilateral board actions to defend against hostile takeovers, but not to actions that receive approval from the shareholders.[74] On the other hand, in *In re Santa Fe Corp. Shareholder Litigation*, the Delaware Supreme Court made it clear that the shareholders must actually be voting on the takeover defense in order to shift the level of scrutiny from *Unocal*.[75] There, the court rejected the directors' assertion that approval of the board's favored merger by the shareholders effectively approved the board's employment of takeover defenses against a competing bidder.[76]

II. CHANGING THE GAME IN *CORWIN*

The centerpiece of Delaware law regarding the impact of shareholder approval on judicial review of board decisions to merge or sell the company (when the decision does not involve a controlling shareholder on the other side) is the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings LLC*. This makes it necessary to describe this decision and explore the unintended consequences, unanswered questions, and doctrinal anomalies resulting from the decision.

A. Reaching Out to Address Shareholder Approval

Corwin is an odd case to have the impact claimed for it because it is unclear whether the court's discussion of the impact of shareholder approval was all that relevant, let alone necessary, to the resolution of the situation

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[72] *See Van Gorkom*, 488 A.2d at 889–90 (stating that a merger agreement can be upheld, regardless of the board's breach of its duty of care, if it is approved by a majority of informed shareholders).

[73] 671 A.2d 1368, 1377–79 (Del. 1996).

[74] *See id.* at 1377 (explaining that *Unocal* is used only when a board acts without shareholder approval in adopting defensive measures in response to a perceived outside threat).

[75] *See In re* Santa Fe Corp. S'holder Litig., 669 A.2d 59, 68 (Del. 1995) (holding that the shareholders did not ratify the board's defensive measures against a takeover bid because the shareholder vote did not refer to the defensive measure at issue, but rather "merely offered a choice between" the merger and inaction).

[76] *See id.* (stating that a vote to approve a merger is not a vote to ratify takeover defenses that cut off a competing buyer).

before the court. The case involved a merger between a publicly traded limited liability company (KKR Financial Holdings LLC) and a publicly traded limited partnership (KKR & Co. L.P.).[77] The merger agreement called for the LLC's owners to exchange their ownership shares in the LLC for ownership shares in the limited partnership[78] in a ratio that represented a substantial premium (based upon market prices) for the LLC's owners.[79] Although a majority of the LLC's owners voted to approve the merger, some owners of the LLC sued.[80] Their basic argument was that a management contract under which an affiliate of the limited partnership ran the day-to-day affairs of the LLC depressed the value of the LLC to other buyers and rendered the limited partnership a controlling owner of the LLC (even though its actual ownership in the LLC was less than one percent).[81]

The case revolved around what standard the court should use to review the decision by the LLC's managing board to merge.[82] Even though the case involved fiduciary duties owed to the owners of an LLC, the parties treated the case as if governed by Delaware's layer cake of standards for reviewing mergers by corporate directors and shareholders. Although it noted the possible difference in the law governing LLCs, the Delaware Supreme Court decided to respect the litigants' approach.[83] The plaintiffs argued that the fairness test applied based upon the theory that the limited partnership was a controlling owner of the LLC.[84] The Chancery Court refused to hold that a party with only a minuscule ownership or voting power in a company was a

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[77] Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306–08 (Del. 2015).

[78] *Id.* at 306.

[79] *Id.* Although the exchange ratio was one-half share in the limited partnership for each share in the LLC, the market value of the received interest in the limited partnership was 35% more than the market value of the surrendered interest in the LLC. *Id.* Although the Delaware Supreme Court's opinion refers to the owners as stockholders and the exchanged ownership interests as stock, the owners were not stockholders of, nor did they exchange stock in, a corporation. Instead, the owners were members in an LLC, which is what owners in an LLC are called. In reality, the so-called stock being exchanged consisted of membership interests in the LLC for limited partnership interests in the limited partnership.

[80] *See id.* (noting that, despite the plaintiffs' lawsuit, the challenged transaction was approved by a majority of the disinterested stockholders).

[81] *Id.* A termination fee allegedly deterred the LLC from ending this relationship. *See In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 994 (Del. Ch. 2014) (reciting plaintiffs' claim that the target company was unattractive on the market because of the "significant cost that would be incurred to terminate the Management Agreement").

[82] *See Corwin*, 125 A.3d at 306. The LLC agreement parroted corporate management by providing for governance by an elected board of directors. *See id.*at 307 (stating that the members of the LLC knew that the company would be managed by a board of directors).

[83] *See id.* at 306 n.3 (acknowledging that the parties decided to act as if its entities were governed by corporate law rather than the law governing LLCs and partnerships).

[84] *Id.* at 306.

controlling owner based solely upon a contract delegating day-to-day management to an affiliate of that party.[85]

On appeal to the Delaware Supreme Court, the plaintiffs decided to push an alternate theory. They argued that if the fairness test did not apply, the case called for heightened scrutiny under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*.[86] One problem, however, is that it is uncertain whether the merger triggered *Revlon* even if one applies such corporate law doctrines to LLCs. The merger was an equity exchange involving two publicly traded entities—albeit, a general partner, rather than an elected board, controlled the limited partnership.[87] In the end, however, the Delaware Supreme Court decided to ignore the issue of whether *Revlon* applied, as well as whether the plaintiffs sprang their *Revlon* argument too late to consider. Instead, the court held that the business judgment rule governed even if the transaction fell within *Revlon*.[88]

The court gave essentially two reasons for this. The principal reason, which goes to this Article, is the impact of shareholder approval. The court held that an informed and uncoerced shareholder approval triggers the business judgment rule based both upon statements in prior court decisions[89] as well as policy grounds for deferring to the shareholders.[90] The court also rejected the plaintiffs' argument that *Gantler v. Stephens* precluded shareholder votes from impacting the standard of review when the votes occur in the required approval for a merger or sale. Instead, the court explained that *Gantler* was only addressing terminology and not the actual impact of shareholder approval.[91]

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[85] *Id.* at 307–08.

[86] *Id.* at 308; Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[87] *See Corwin*, 125 A.3d at 308 n.12.

[88] *See id.* at 308 (stating that regardless of whether the *Revlon* standard should otherwise be applied, the uncoerced and informed shareholder vote leads the court to apply the business judgment rule).

[89] *See id.* at 309 n.14 (referring to the Chancery Court's adherence to precedent in applying the business judgment rule when a transaction is approved by a fully informed and uncoerced vote of disinterested shareholders); *id.* at 309 n.19 (citing numerous judicial decisions that propose 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"); *id.* at 313 n.28 (citing Delaware precedent suggesting that the courts should avoid interfering with the decisions of disinterested shareholders).

[90] *See id.* at 313 (stating that judges should refrain from imposing their own judgment in place of the owners or managers of corporations).

[91] *See id.* at 309–11 (reasoning that the *Gantler* court likely did not intend to unsettle longstanding precedent that gives the informed shareholder vote effect in determining the standard of review, regardless of whether the transaction required shareholder approval, and instead intended to narrow the meaning of the word "ratification"); Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

A second reason for its decision dribbled out in response to the plaintiffs' argument that invoking the business judgment rule based upon shareholder approval would impair the operation of *Unocal Corp. v. Mesa Petroleum Co.* and *Revlon* and leave shareholders unprotected from unfair actions by directors. In part, the court responded with the reassurance that the shareholders must be informed and not coerced in order to trigger the business judgment rule.[92] In part, the court once again pointed to the shareholders' economic stake in the transaction as vouching for their ability to protect themselves through a vote, as well as the problems generated by litigating over mergers.[93] Before making these arguments, however, the court observed that *Unocal* and *Revlon* were primarily designed for actions seeking injunctions rather than actions for damages.[94]

Interestingly, the court failed to pursue this observation as far as it could go. The defendants pointed out that the LLC was governed by a provision in the operating agreement that exculpated the LLC's directors from liability.[95] Furthermore, the Delaware Supreme Court had previously held that such provisions trump heightened scrutiny under *Revlon* when it comes to damage claims.[96] Hence, the whole discussion about the impact of shareholder approval was unnecessary to decide the case.

B. Problems Following Corwin

Every important judicial decision leaves some chaos in its wake. *Corwin* is no exception. The potential problems created or exposed by *Corwin* flow both from the prerequisites it sets forth in order for a shareholder vote to lessen judicial scrutiny and from the various ways in which this lessening of scrutiny might interact with the layer cake of standards applied by Delaware courts in reviewing decisions to merge or sell a corporation.

1. Problems from *Corwin*'s Prerequisites

The predicable impact of *Corwin* is to shift the focus in litigation challenging an independent board's decision to merge or sell the corporation from the process and substance of the board's decision to the twin prerequisites for triggering favorable treatment based upon a shareholder vote: (1) whether the

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[92] *See Corwin*, 125 A.3d at 312 (affirming that the business judgment rule would not apply where troubling facts are not disclosed to the shareholders or where shareholders are coerced into approving a transaction).

[93] *Id.* at 312–14.

[94] *Id.* at 312. The plaintiffs in *Corwin* did not seek to enjoin the merger before closing, but rather sought post-closing money damages. *In re KKR Fin. Holdings*, 101 A.3d at 989.

[95] *See Corwin*, 125 A.3d at 308.

[96] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239–40 (Del. 2009) (stating that in situations in which the corporation's certificate of incorporation contains an exculpatory provision, the court will not apply heightened scrutiny to allegations that the directors breached their duty of care).

shareholders were fully informed; and (2) whether the shareholders were uncoerced. The first prerequisite has produced an unintended side effect, whereas the second has exposed the failure of Delaware courts to resolve a critical question.

a. Uncovering Corwin*'s Impact on Disclosure Litigation*

Claims that directors failed to adequately inform the shareholders when seeking approval for mergers and sales long predate *Corwin* and invoke well-established state and federal law.[97] Nevertheless, 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.[98] Indeed, non-disclosure claims have already provided tempting examples of plaintiff success in the post-*Corwin* world.

A pair of recent Delaware Supreme Court decisions—*Appel v. Berkman* and *Morrison v. Berry*—shows this to be the case. Coincidentally, both involved sales to the same private equity buyer.[99] The parties structured the transactions as board-supported tender offers followed by mergers to remove the non-tendering shareholders at the same price as the tender offers.[100] Under Section 251(h) of Delaware's corporation statute,[101] this turned ac-

[97] *See, e.g.*, Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1276 (Del. 1994) (discussing shareholder-plaintiffs' claims that the directors violated their fiduciary duty by failing to fully disclose material information); Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: A Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1093–98 (1996) (discussing claims under Delaware law against directors for non-disclosure to shareholders). Rules promulgated pursuant to the Securities Exchange Act of 1934 prohibit the inclusion of false or misleading statements in proxy statements. *See* 17 C.F.R. § 240.14a-9 (2010) (prohibiting false or misleading proxy solicitations); *see also* Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1095–98 (1991) (addressing elements of a private cause of action to claim a violation of Rule 14a-9 through misleading solicitation of shareholder proxies in favor of a merger).

[98] *Corwin* might also tempt plaintiffs to delay pushing non-disclosure claims until after the shareholders vote, rather than to seek corrective disclosure before the vote. In this manner, plaintiffs might try to use such claims to avoid the business judgment rule when seeking damages. *See* Brandon Mordue, *The* Revlon *Divergence: The Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 531, 563–66 (2018) (discussing the incentive created by the *Corwin* decision to bring non-disclosure claims after closing).

[99] In both cases, Apollo Global Management LLC was the private equity firm seeking to acquire the different corporations. Morrison v. Berry, 191 A.3d 268, 274–73 (Del. 2018); Appel v. Berkman, 180 A.3d 1055, 1057 (Del. 2018).

[100] *Morrison*, 191 A.33d at 272–73; *Appel*, 180 A.3d at 1057.

[101] DEL. CODE ANN. tit. 8, § 251(h) (West 2011 & Supp. 2018) (permitting a target corporation to forgo a shareholder vote in favor of a merger that gives the holdout shareholders of the target the same consideration paid to the shareholders accepting a tender offer). For this to occur, the target's board must support the tender offer and a majority of the target's shareholders must accept the offer.

ceptance of the tender offers by a majority of the target corporations' shareholders into de facto shareholder votes to approve the mergers.[102] In both cases, the plaintiffs complained about failures to disclose material facts in the Schedule 14D-9 statements filed by the targets' boards recommending the shareholders accept the offers.[103] Completing the parallel between the cases, the non-disclosed facts in both cases involved the positions of the target companies' founders regarding the deal.[104]

Here, however, the parallel stops. In *Appel*, the board's 14D-9 statement mentioned that the company's founder and former CEO, who still served as chairman of the board, had abstained on the board's vote to recommend the deal and had not decided whether to tender his own stock.[105] What the statement neglected to point out, however, is that this individual twice stated to the board that he was abstaining because he believed mismanagement had lowered the purchase price and it was not the right time to sell the company.[106] In *Morrison*, by contrast, the target company's founder, who also owned ten percent of the company's shares, favored the deal and had agreed to roll over his stock, thereby placing him on the buyer's side and in a conflict of interest.[107] Although the 14D-9 statement disclosed the rollover, it failed to disclose how early in the process the founder had agreed to the rollover with the buyer or that the founder had misled the board about this timing, thereby blinding the board to the conflict during its early deliberations.[108] Moreover, the 14D-9 statement was misleading in suggesting that the founder was more open to competing offers than he, in fact, was.[109] There were also failures to disclose, or misleading statements regarding, the founder's desire

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[102] *See In re* Volcano Corp. Stockholder Litig., 143 A.3d 727, 741–47 (Del. Ch. 2016) (treating the acceptance by a majority of the target's shareholders of a tender offer that fit within § 251(h) as the equivalent of a shareholder approval for purposes of *Corwin*).

[103] The Securities and Exchange Commission ("SEC") permits communications by the board of the target corporation to its shareholders in response to a tender offer as long as it is provided in the form specified by the SEC in Schedule 14D-9. 17 C.F.R. § 240.14d-9 (2008).

[104] *See Morrison*, 191 A.3d at 274 (discussing the plaintiff's allegations that the founder did not fully disclose his pre-established connections with the buyer); *Appel*, 180 A.3d at 1057 (stating that the shareholder proxy statement did not include the fact that the founder did not support the sale of the corporation).

[105] *Appel*, 180 A.3d at 1058–59.

[106] *Id.*

[107] *See Morrison*, 191 A.3d at 274 (noting that the founder continued to be a substantial shareholder in the corporation, thereby incentivizing him to make payments to the other shareholders at a lower price).

[108] *See id.* at 277–80 (stating that the founders, in their e-mail to the board of directors on November 28, did not disclose the fact that they had entered into an agreement with the buyer as early as October).

[109] *See id.* at 280–81 (noting that by omitting language in its statement to the shareholders, the founders exaggerated their willingness to consider offers from competing buyers).

for an immediate sale and the reasons for the board appointing a special committee to approve the sale.[110] Reversing contrary decisions by the Chancery Court, the Delaware Supreme Court in both cases found the non-disclosures to be material. Accordingly, the shareholders' acceptance of the tender offers did not lower the standard to the business judgment rule under *Corwin* and did not warrant dismissal of the complaints.[111]

So far, this seems to show that *Corwin* is operating as intended: giving weight to the decisions of fully informed shareholders but refusing to allow shareholder approval to serve as a "get out of jail free card" for directors who are less than candid with their shareholders. The problem is that this runs into another development in Delaware mergers and acquisition litigation: the growing skepticism about whether litigation over disclosure to shareholders benefits the shareholders.

This skepticism has found expression in both court opinions and scholarly commentary.[112] In *In re Trulia, Inc. Stockholder Litigation*, the Delaware Chancery Court refused to approve a settlement agreement releasing all of the plaintiffs' shareholder class action claims in exchange for the corporation's additional disclosures to its shareholders prior to them voting to approve the proposed merger.[113]

The court worried that settlements that only call upon the corporation to make additional disclosure to the shareholders ("disclosure-only settlements"), such as the one before the court, can do little for the shareholders, but can allow the plaintiffs' attorneys to collect fees based upon this so-called success.[114] This can encourage unscrupulous plaintiffs' attorneys to bring actions challenging every merger, knowing that it is often more economical for the corporation to agree to additional disclosure than to litigate the merits.[115]

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[110] *See id.* at 284–88 (discussing the various omissions and misleading statements by the company's founder to both the rest of the board and shareholders and holding that they were material).

[111] *Id.*; *Appel*, 180 A.3d at 1064–65.

[112] *See infra* notes 113–122 and accompanying text.

[113] 129 A.3d 884, 907 (Del. Ch. 2016). The settlement agreement was made pursuant to an earlier memorandum of understanding between the parties. *Id.* at 889–90.

[114] *See id.* at 891–92. Delaware, like other jurisdictions, holds that the plaintiff's attorney in a class action, who obtains a substantial benefit (even if not monetary damages) for a class, is entitled to an award of reasonable attorney's fees. *See* Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164–65 (Del. 1988) (discussing court-ordered payment of attorney's fees in light of counsel conferring a corporate benefit). *See generally* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 19–25 (2015) (discussing the judiciary's role in determining whether the plaintiffs' attorneys conferred a corporate benefit to the shareholders).

[115] *See Trulia*, 129 A.3d at 892 (observing that corporations would rather settle to lessen legal expenses and potential distractions rather than litigate with shareholders over disclosure requirements).

Moreover, such settlements can entice plaintiffs' attorneys to throw away meritorious challenges to poor mergers in order to get quick payoffs through disclosure-only settlements.[116]

Yet, despite its seemingly desirable corrective, *Trulia* might be in tension with *Corwin*. After all, if the essence of *Corwin* is that fully informed shareholders should decide if a merger or sale is a good deal, then there is nothing wrong with litigation focusing on whether the shareholders were fully informed. Moreover, if the focus of the challenge is on the failure to disclose, then there is nothing wrong with a settlement solely involving additional disclosure. Of course, read narrowly, *Trulia* is not inconsistent with this view, because the court was concerned with disclosure-only settlements that failed to force disclosure of material or even helpful information to the shareholders.[117]

Some scholars, however, have gone further in broadly condemning disclosure-only settlements.[118] Others, led by Jill Fisch, Sean Griffith, and Steven Davidoff Solomon, even more broadly condemn state law merger litigation that focuses on disclosure to the shareholders.[119]

Fisch, Griffith, and Solomon present a study comparing the margins (typically overwhelming) by which shareholders voted to approve mergers in the sample of cases the authors collected against the presence or absence of various factors.[120] Recommendations from the principal shareholder advisory service and the premium that the merger price represents over the existing

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[116] *See, e.g.*, Joel Edan Friedlander, *How* Rural/Metro *Exposes the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 904 (2015) (discussing a case in which a disclosure-only settlement generating $475,000 in legal fees was nearly finalized before new counsel obtained partial settlements paying shareholders $11.6 million).

[117] *See Trulia*, 129 A.3d at 904–07 (rejecting the settlement agreement because the disclosures given to the shareholders as consideration were neither material nor helpful).

[118] *See, e.g.*, Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 BERKELEY BUS. L.J. 55, 59, 89 (2014) (alleging that disclosure-only settlements harm shareholders by requiring them to release all future claims, reducing the monetary benefit that they would have received from the transaction, and shifting control of the settlement to their attorneys); Mark Lebovitch & Jeroen Van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 DEL. J. CORP. L. 491, 537–39 (2016) (arguing that disclosure-only settlements should be brought only after plaintiffs show that the disclosures would provide material benefits and the release of claims should be limited to additional disclosures, rather than a broader release of all claims).

[119] *See Peppercorn Settlement*, *supra* note 10, at 615 (arguing for the elimination of disclosure-only settlements).

[120] *See generally id.* at 577–82 (providing the method and results of a study of merger settlements and shareholder voting).

market price appear to impact the margin by which shareholders vote to approve the merger.[121] To a lesser extent, settlements of shareholder litigation, which produce either improved price or other amendments to the terms of the merger agreement, also appear to impact the vote. The study, however, found no difference in the margin of victory in situations involving corrective disclosure of negative information—which should have discouraged some shareholders from voting in favor—when compared to mergers for which there was no corrective disclosure.[122]

This result raises the question as to why corrective disclosures do not seem to have any noticeable impact on shareholder votes to approve mergers. One answer, consistent with the holdings in *Trulia*, is that in many cases the corrective disclosures involve unimportant facts.[123] Yet in other cases, such as *Appel* and *Morrison*, the shareholders ignore facts that logic would deem highly relevant.[124] If so, this might raise the question of whether informed shareholders are the ideal decisionmakers that *Corwin* assumes them to be.

We shall return to explore these questions later in this Article. For now, it is sufficient to note that, based upon the result of their study, Fisch, Griffith, and Solomon conclude that state court litigation challenging disclosure to the shareholders does little good for the shareholders.[125] Accordingly, they recommend elimination of disclosure-only settlements as a means to more

[121] Institutional Investment Services, Inc. (ISS) is a principal shareholder advisory service that provides advice to its institutional investor clients, including on how to vote on mergers. *About Us*, ISS, https://www.issgovernance.com/about/about-iss/ [https://perma.cc/RRT2-QV9B].

[122] *Peppercorn Settlement*, *supra* note 10, at 583–87. One problem with this comparison, however, is the assumption that mergers with corrective disclosure should have a lesser margin of victory than mergers without such disclosure. If the corporations that did not make corrective disclosure had originally disclosed all the negative facts about the deal without the prompting of litigation (because they had more honest directors rather than less negative facts), the study's hypothesis as to the expected impact of corrective disclosure would not be true. Moreover, it is possible that the reassurance, which additional disclosures provide to shareholders that they have seen the worst of it as far as hidden information, might offset the impact of additional negative disclosure on shareholder voting decisions. In any event, the overwhelming amount of votes of approval even after corrective disclosure makes it clear that the corrective disclosures in the sample could not have lost that many votes.

[123] *See Trulia*, 129 A.3d at 907 (holding that directors' disclosures were immaterial to shareholders' decision on whether to approve a transaction).

[124] *See Morrison*, 191 A.3d at 284–88 (holding that omitted disclosures were material to shareholders); *Appel*, 180 A.3d at 1064–65 (holding that by omitting the chairman's concerns from shareholder disclosure, the board withheld material information, and therefore, the shareholders were not fully informed).

[125] *See Peppercorn Settlement*, *supra* note 10, at 591 (concluding that because disclosure-only settlements do not affect shareholder voting on mergers, they "do not provide shareholders with useful information").

broadly curtail state court litigation over disclosure.[126] If one accepts this conclusion, then *Corwin*'s impact of channeling even more litigation into arguing about disclosure seems highly problematic.

b. Forcing the Determination of Coercion

Despite not impacting as many cases as non-disclosure claims, arguments that the shareholders were coerced can also provide an avenue for plaintiff success in the post-*Corwin* world. The Delaware Chancery Court's decision in *In re Saba Software, Inc. Stockholder Litigation* shows this to be the case.[127]

Saba Software was a Delaware corporation whose stock traded over the counter after being delisted by NASDAQ in 2013.[128] Things went further downhill when, the next year, the SEC accused the company of having inflated reported earnings for 2007 through 2011 by seventy million dollars.[129] The company agreed to pay a fine and to restate its financial results for those years.[130] It did the former but, despite repeated promises, did not do the latter. With the company repeatedly missing public commitments to issue restated earnings reports and its stock price falling from $14 to $8.75, Saba Software's board embarked upon an effort to sell the company.[131] This produced a merger agreement under which the shareholders received $9 per share.[132] The merger received a favorable vote from the shareholders. Critically, the vote occurred shortly after the company missed its final deadline from the SEC for restating its earnings and the SEC deregistered the company's stock, rendering it not publicly tradable.[133]

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[126] *Id.* at 615.

[127] *See* No. 10697-VCS, 2017 WL 1201108, at *16–17 (Del. Ch. Feb. 17, 2017) (applying enhanced scrutiny when reviewing a merger under the *Revlon* standard because the directors coerced the shareholders into approving the transaction). A second case in which claims of coercion allowed a plaintiff to get past *Corwin*—only to fail in his effort to establish that the underlying transaction implicated the directors' duty of loyalty—is *Sciabacucchi v. Liberty Broadband Corp.*, No. 11418-VCG, 2017 WL 2352152, at *23–24 (Del. Ch. May 31, 2017). The claimed coercion arose when the directors made the favorable corporate combinations submitted to the shareholders for approval dependent on financing to be accomplished by issuing stock to an allegedly controlling shareholder. In this instance, however, the claim was not that the shareholders were coerced into voting for the combinations. Rather, the contention was that the shareholders were coerced into voting for the financing in order to get the favorable combinations. *Id.*

[128] *Saba Software*, 2017 WL 1201108, at *2.

[129] *Id.* at *3.

[130] *Id.*

[131] *Id.*

[132] *Id.* at *6.

[133] *Id.* at *2–6.

Responding to a lawsuit alleging the directors breached their fiduciary duty in agreeing to the merger, the Delaware Chancery Court refused to invoke *Corwin* despite the favorable vote of Saba Software's shareholders. In part, this was because of the company's failure to disclose certain facts to the shareholders, such as why those in charge of the company could not manage to issue a statement of what the company actually earned from 2007 through 2011.[134] Of relevance to the present discussion, the court also concluded that the shareholders were coerced by the predicament in which, if they voted down the merger, they would be left with stock they could not publicly sell.[135]

As with the non-disclosure claims in *Appel* and *Morrison*, at first glance the court's reaction to the coercion claim in *Saba Software* shows *Corwin* working as intended: giving weight to the decision of shareholders, but not when the directors forced the decision with arm-twisting. The problem in this instance lies in the difficulty of deciding what is coercion.

Saba Software illustrates the problem. At first glance, the case for coercion seems easy. Saba Software's shareholders were in a situation in which if they did not vote for the merger, they would be stuck with stock barred from public trading. On the other hand, this is ultimately no different than any other merger by a flailing company attempting to salvage something for its shareholders. True, illegal actions by former executives and the current management's inability to correct the problem caused the trouble for Saba Software. Yet, does this mean there is coercion any time management proposes a merger to salvage the wreck created by its mismanagement and illegal

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[134] *Id.* at *11–12.

[135] *Id.* at *14–16. The Chancery Court's recent decision in *In re Tangoe, Inc. Shareholders Litigation* is somewhat similar. No. 2017-0650-JRS, at *1–2 (Del. Ch. Nov. 20, 2018). Like Saba Software, Tangoe, Inc. was forced to restate false financial statements that resulted in its stock being delisted and threatened with deregistration. *Id.* Tangoe's board also agreed to sell the company while working on restating earnings. *Id.* at *2. Continuing the parallel, the Chancery Court in *Tangoe* refused to dismiss a suit against Tangoe's directors based upon the effect under *Corwin* of the shareholders' approving the sale. *Id.* at *9. Once again, the court found inadequate disclosure to the shareholders. In *Tangoe*, however, the court decided it was unnecessary to address coercion. Nonetheless, the court stated that the analysis regarding coercion would likely repeat *Saba Software*. *Id.* at *11–12. The combined impact of *Saba Software* and *Tangoe* is to raise the question as to whether corporations can ever be sold while in the middle of restating their earnings to a major degree. *Tangoe* suggests that the failure to disclose accurate financials is a material non-disclosure, whereas both cases suggest that the threat of delisting or deregistration is coercion. Although *Tangoe* closes with a paragraph reassuring that a sale is possible with sufficiently careful disclosure, the court does not explain how the directors can disclose accurate financials before the accountants figure out how to restate the financials. Moreover, without the restatement, the threat of delisting and deregistration hangs over the shareholder vote. Of course, one might say that this simply leaves the directors to face heightened scrutiny under *Revlon*. This ignores, however, the prospect that an uninformed or coerced shareholder vote might not meet the statutory requirement for shareholder approval.

activities? If so, does this mean that shareholders are supposed to go down with the ship?

To state the obvious, one must define coercion before deciding whether there is coercion. *Saba Software* recites the definition established by the Delaware Supreme Court in *Williams v. Geier*.[136] There, the court defined coercion as an action by the board or some other party that causes shareholders to vote in favor of a proposed transaction for some reason other than the merits of the transaction.[137] Despite sounding sensible, this definition is often impossible to apply.

Saba Software shows the difficulty. The court implicitly treats the "regulatory chaos" in which the company found itself as extrinsic to the merits of selling at $9 per share.[138] This assumes, however, that one can separate the company's legal problems from the merits of cheaply selling a company in trouble with the law. In order to achieve this separation, the court accepted the plaintiffs' theory that the directors should have put the company's legal affairs in order prior to selling the company or, at least, prior to putting the matter to the shareholders.[139] Yet, there is no suggestion that the directors were stalling the earnings restatements in order to force the shareholders to approve the sale. Rather, it seems that the company's financial records were so thoroughly messed up that forensic accounting had yet to figure out the actual earnings.[140]

Turning to *Williams* for guidance is no more helpful because the court there never applied the test it announced. *Williams* involved a shareholder-approved amendment to the company's certificate of incorporation that gave more votes per share to stock not sold within a three-year period.[141] A dissenting shareholder challenged this amendment, arguing that the minority shareholders were coerced into voting for it. The claimed coercion arose from the fact that the NYSE would delist the company's stock if the amendment passed only by a majority vote, but might not delist the stock if the amendment passed by a two-thirds vote.[142] Under these circumstances, minority

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[136] 671 A.2d 1368 (Del. 1996).

[137] *Id.* at 1382–83.

[138] *See Saba Software*, 2017 WL 1201108, at *15–16.

[139] *See id.* (stating that the board was "hellbent" on selling before issuing restatements).

[140] The cynic might suspect that the real motive was that the earnings were even worse than outsiders assumed. In that case, however, restating the earnings would further undercut the merger price, which hardly helps the shareholders.

[141] *See Williams*, 671 A.2d at 1373 (reciting the explanation in the proxy statement that the amendment was intended to provide, among other things, "existing and long-term shareholders with a greater voice in the company").

[142] *Id.* at 1382.

shareholders who disfavored the amendment might vote for it anyway because the majority's support assured that it was going to pass and the minority shareholders' approval might prevent delisting.

Although the threat of delisting in *Williams* seems somewhat tangential to the merits of altering voting power, the *Williams* court did not hold that there was coercion.[143] Curiously, instead of discussing whether the listing problem was part of the merits of the amendment, the court in *Williams* focused most of its attention on pointing out that the board had little choice but to disclose the delisting danger and the prospect that a two-thirds vote would prevent delisting under a proposed change in the NYSE rule.[144] Furthermore, the court noted that the board did not use threatening language when pointing out these facts.[145] The court also stated that it would be unacceptable to preclude an amendment altogether because of the need to disclose the impact of the NYSE rule and proposed rule change.[146]

Implicitly recognizing that the *Williams* court did not apply the other-than-the-merits test, the court in *Saba Software* explained that coercion hinges upon what the court holds to be inequitable.[147] This allows one to reconcile *Williams* and *Saba Software* by noting that the arguably coercive impact of the NYSE rule and proposed rule change was not something the directors in *Williams* deliberately created or could do anything about. This differs from *Saba Software*, where the company's legal problems resulted from management misdeeds and the board could have deferred selling the company until it sorted out the mess. The problem is that the relevance of the coercion in *Saba Software* dictated the level of scrutiny the court applied to the board's refusal to delay selling the company until the company complied with the law. Under *Corwin*, if there is no coercion (or non-disclosure), the court should apply the business judgment rule to this timing decision. Hence, second-guessing the board's timing in order to disregard the shareholder vote that would preclude the court from second-guessing the timing decision

[143] *Id.* at 1384.

[144] *See id.* at 1382–84 (describing the disclosures as facts that were required to be disclosed and facts that a reasonable shareholder would want to know).

[145] *Id.* at 1383.

[146] *Id.* at 1383–84. The plaintiff in *Williams* brought this rejoinder upon herself by arguing that the shareholder vote was null and void due to the coercion. She should have argued that the shareholder vote was insufficient to change the standard to the business judgment rule when just the minority was coerced.

[147] *Saba Software*, 2017 WL 1201108, at *15. This makes coercion somewhat like Justice Potter Stewart's "I know it when I see it" take on the meaning of "pornography." *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Potter, J., concurring) (remarking on how one defines hard-core pornography).

seems to be an application of bootstrap logic. This illustrates the danger of turning coercion into a license for the court to consider whatever it wants.[148]

2. *Corwin*'s Messy Impact on the Judicial Scrutiny Layer Cake

Corwin also invites a host of questions regarding how it relates to the various standards Delaware has established for reviewing board decisions to merge or sell corporations. Some of these questions result from omissions or sloppy language in *Corwin*, whereas some of the questions are more fundamental.

a. Corwin*, the Business Judgment Rule, and Good Faith Standards: How Low Can You Go?*

Corwin states that shareholder approval returns review from heightened scrutiny to the business judgment rule.[149] Accordingly, one might assume that *Corwin* is simply irrelevant to a case in which the applicable standard is already at the business judgment rule. This should even be more true for a case in which plaintiffs must prove a lack of good faith, rather than just gross negligence, in order to overcome a Section 102(b)(7) waiver. Nevertheless, subsequent Delaware court decisions have suggested that, as a result of *Corwin*, shareholder approval further lowers the standard, even in cases in which the standard is low to start with.

In *In re MeadWestvaco Stockholders Litigation*, the Delaware Chancery Court left open the impact of *Corwin* on cases governed by a Section 102(b)(7) waiver.[150] Specifically, the court stated that the plaintiff's failure to present facts that showed a lack of good faith made it unnecessary to address the defendants' argument that shareholder approval cleanses a claim that directors did not act in good faith.[151]

In *Singh v. Attenborough*, however, the Delaware Supreme Court did not exhibit a similar reticence toward unnecessary discourse when affirming a Chancery Court decision that held the plaintiff had not established gross negligence in order to get past the business judgment rule. Instead, the Delaware Supreme Court observed that applying a gross negligence standard in the face

[148] One might respond that applying the business judgment rule to the timing decision in order to respect the shareholder vote that triggers the business judgment rule is also bootstrap reasoning. This is why it would be helpful to have a definition of coercion that is independent of what the court thinks of the merits of the board's decision that creates pressure on the shareholders to vote for the deal.

[149] *Corwin*, 125 A.3d at 313–14.

[150] 168 A.3d 675, 684 (Del. Ch. 2017).

[151] *Id.*

of shareholder approval in a situation already falling within the business judgment rule would mean that shareholder approval had no impact on the standard of review.[152] Disturbed by this prospect, the Delaware Supreme Court stated that courts should not apply the gross negligence standard in such situations, but instead should normally dismiss the case.[153]

Singh's dictum returns to an issue that dates at least to *Smith v. Van Gorkom*. In *Van Gorkom*, the Delaware Supreme Court held directors to be grossly negligent in approving a merger based upon a twenty-minute oral presentation.[154] The directors argued, among other things, that the shareholder vote to approve the merger exonerated them.[155] The court responded that, because the directors' breach of duty constituted a voidable act, an informed vote by the shareholders to approve the merger would have freed the directors from liability.[156] Nevertheless, the directors' failure to disclose to the shareholders the board's careless process meant that there was not an informed vote by the shareholders.[157]

Over the years, this discussion in *Van Gorkom* has remained largely theoretical for the simple reason that directors are unlikely to inform their shareholders how careless they were in agreeing to a merger. In addition, the Delaware Supreme Court in the *Gantler* decision expressly overruled this language in *Van Gorkom*, explaining that ratification of voidable acts only refers to acts for which directors lack authority.[158] It remains to be seen whether *Singh*'s resurrection of *Van Gorkom*'s outcome, even if not its language, will lead future directors to argue that they provided sufficient disclosure to the shareholders of careless process in order for shareholder approval to preclude any claim for carelessness. Of course, this might be awkward if the directors also deny their process was careless. If directors start arguing that they disclosed careless process to the shareholders sufficiently for the shareholder vote to insulate them from claims based upon sloppiness, then the consequence of *Singh* might become a subset of *Corwin*'s channeling more litigation into disputes about disclosure. Specifically, instead of disputes over whether the directors' carelessness was sufficiently egregious to create liability, the focus will turn to whether directors were sufficiently candid in confessing all of their failures of process to their shareholders.

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[152] Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016).

[153] *See id.* at 151–52 (stating that when "the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result").

[154] Smith v. Van Gorkom, 488 A.2d 858, 881 (Del. 1985).

[155] *See id.* at 873–74, 889 (directors arguing that they were informed in making their decision to approve the merger, but "ultimately rely[ing] on the stockholder vote . . . for exoneration").

[156] *Id.* at 889.

[157] *Id.* at 889–91.

[158] *Gantler*, 965 A.2d at 713 n.54.

Instead of talking about grossly negligent process of investigation and deliberation in deciding upon a merger,[159] the court in *Singh* elaborated on the rationale for its approach by attacking the waste standard.[160] As explained earlier, waste is the standard courts commonly apply when reviewing transactions approved by the shareholders.[161] Waste, however, is not concerned with grossly negligent process, but rather with the merits of the board's decision.[162] Specifically, to constitute waste, an action must be so egregiously stupid that no reasonable person would think that the corporation or its shareholders received the equivalent to what the corporation or its shareholders gave up.[163]

In questioning the possibility of waste when shareholders approve a transaction, *Singh* relies on the logic that a shareholder vote of approval rebuts the notion that no reasonable person would have thought the corporation or shareholders received the equivalent to what they gave up in the deal. Of course, one might say the same about a vote by a disinterested board. Perhaps in either event the bottom line is that waste claims have no more basis in reality than the Loch Ness Monster.[164] Before dismissing the whole notion of waste as a myth, however, one should be aware of cases in relatively recent years in which Delaware courts have upheld claims that transactions amounted to waste.[165]

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[159] *See In re* Zale Corp. Stockholders Litig., No. 9388-VCP, 2015 WL 6551418, *5 (Del. Ch. Oct. 29, 2015) (holding that the directors did not act with gross negligence in their process of deciding to enter into the merger agreement).

[160] *See Singh*, 137 A.3d at 152 (supporting the argument that courts should dismiss claims of gross negligence in the face of shareholder approval because the waste standard triggered by shareholder approval has "little real-world relevance").

[161] *See supra* note 61 (discussing corporate waste standard).

[162] *See* Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 893 (Del. Ch. 1999) (stating that a waste claim depends on whether the "economics of the transaction were so flawed" that no ordinary business person would approve of it, rather than whether the board's process in approving the transaction was flawed).

[163] *E.g.*, Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 59 (Del. 1952) (stating that corporate waste occurs when "no person of ordinarily sound business judgment would be expected to entertain the view that the consideration furnished by the individual directors is a fair exchange for the options conferred").

[164] *See* Steiner v. Meyerson, No. 13139, 1995 WL 441999, at *5 (Del. Ch. July 18, 1995) (comparing the likelihood of a plaintiff's complaint meeting the legal standard of waste to the existence of Nessie, the Loch Ness Monster).

[165] *E.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 138 (Del. Ch. 2009) (holding that providing a departing CEO who was allegedly responsible for the company's massive financial loss with a $68 million reward as well as an office, administrative assistant, and car with a driver could constitute waste). For a more complete discussion of the emergence and survival of the corporate waste doctrine, see Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239 (2017).

In any event, *Singh*'s statement that complaints already subject to the business judgment rule should be dismissed if the shareholders approved the challenged transaction, without mentioning the issue of good faith, creates an anomaly. Section 102(b)(7) does not allow shareholders to exculpate director actions that are not in good faith.[166] One might think that what shareholders cannot do ex ante, they should not be able to do ex post.

One might try to deal with this anomaly by saying that *Singh* eliminates the prospects for waste claims but preserves the possibility for lack of good faith claims. This argument also reconciles *Singh* and *MeadWestvaco*. The problem, however, is that the Delaware Chancery Court in *MeadWestvaco* suggested waste and good faith might end up at the same place. Specifically, the court explained that to constitute waste, an action must be so egregiously stupid that the directors could not have subjectively believed that the transaction was in the best interest of the corporation or its shareholders and so acted in bad faith.[167]

b. Corwin *and* Revlon*: Two Foundations Make Up a Conundrum*

The Delaware Supreme Court in *Corwin* used its ruling regarding the impact of shareholder approval as a reason to reject applying heightened scrutiny under *Revlon*.[168] In the middle of invoking the impact of shareholder approval, however, the court observed that *Revlon* is really a doctrine designed to govern actions seeking injunctions rather than, as in the case at hand, actions for damages.[169] Unfortunately, *Corwin* once again proves that from the standpoint of judicial clarity, two rationales offered for the same conclusion is often one too many. The problem in this instance is that the combination of these two rationales for rejecting *Revlon* scrutiny creates a conundrum.

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[166] *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (West 2011 & Supp. 2018) (disallowing a limiting liability provision for directors' "acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law").

[167] *See In re* MeadWestvaco Stockholders Litig., 168 A.3d at 686 (equating the test of whether directors acted in bad faith with that of whether they committed waste, thereby collapsing the test for corporate waste with that of bad faith) (citing White v. Panic, 783 A.2d 543, 554 n.36 (Del. 2001)).

[168] *See Corwin*, 125 A.3d at 308 (stating that approval of the transaction by a fully informed and uncoerced shareholder vote made the *Revlon* standard inapplicable).

[169] *See id.* at 312 (stating that *Unocal* and *Revlon* are "primarily designed to give stockholders and the Chancery Court the tool of injunctive relief"). Just to keep everyone guessing, however, the Delaware Supreme Court's subsequent decision in *RBC Capital Mkts., LLC v. Jervis* affirmed the Chancery Court's application of *Revlon* in a decision seeking damages—albeit, the damages involved an award against investment bankers for aiding and abetting the directors' breach of duty instead of an award of damages against the directors. 129 A.3d 816, 857 (Del. 2015).

In stating that *Revlon* is designed for actions seeking injunctions rather than damages, *Corwin* appears to suggest that courts should continue to apply *Revlon*'s heightened scrutiny in situations otherwise triggering the doctrine when the remedy sought is an injunction against proceeding with the deal as is. Besides, because mergers generally close shortly upon a favorable shareholder vote, there typically would not yet be a shareholder vote to trigger *Corwin* at the time the court decides upon issuing an injunction to block the merger from closing.[170]

There are policy and doctrinal bases for the distinction *Corwin* draws between actions for injunctions and actions for damages. *Corwin* mentions the ability to provide real time relief with injunctions.[171] The underlying notion is that courts can correct board actions through injunctions without chilling necessary risk-taking in business by making directors liable for damages based upon hindsight. The distinction between actions for injunctions and actions for damages is also consistent with the Delaware Supreme Court's decision in *Lyondell Chemical Co. v. Ryan* where the court held that plaintiffs must prove a lack of good faith in order to recover damages in the face of a Section 102(b)(7) waiver even in a situation triggering *Revlon*.[172]

The problem is that if the court grants an injunction before the shareholders vote, then the shareholders will never see the deal. More precisely, even if they see a deal, it will not be the deal with precisely the same terms or context as existed prior to the court granting the injunction. If the underlying policy behind *Corwin* is that shareholders, not judges, should decide if a deal is good for the shareholders, then it seems strange to employ heightened scrutiny under *Revlon* in order to prevent the shareholders from having the opportunity to vote on the deal without judicially-ordered adjustments. Put in doctrinal terms, it seems anomalous to apply heightened scrutiny to a deal under *Revlon* in order to prevent a shareholder vote that would cause the court to apply the business judgment rule to the same deal without whatever modifications or additional actions the court might order. On the other hand, delaying injunctions until the shareholders have a chance to vote under the terms and circumstances originally proposed, even if practical, would seem to eliminate *Revlon* scrutiny altogether. This is because if the shareholders vote down the deal, then there is no deal to challenge; whereas if the shareholders approve the deal, *Revlon* scrutiny does not apply.

One might argue that there is no conundrum and that the two rationales in *Corwin* are complementary. Post-closing damage actions may have a greater downside than pre-vote injunction actions due to the prospect of

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170 *E.g.*, FRANKLIN A. GEVURTZ & CHRISTINA M. SAUTTER, MERGERS AND ACQUISITIONS § 1.3.1 (2018).

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

172 *Lyondell Chem. Co.*, 970 A.2d at 239–40.

chilling necessary risk-taking by the board. There may also be less need for post-closing damage actions because the shareholder vote provides assurance to the court that the deal is not bad. The problem with this argument is that even if injunction actions have less of a downside than damage actions, it still makes no sense to have heightened scrutiny, so long as one assumes that shareholder votes provide adequate protection against bad deals. Hence, the *Corwin* conundrum seemingly exposes a telling bit of judicial doubt. At the same time the court is expressing confidence in an informed and uncoerced shareholder vote as assurance against bad deals, the court's discussion of injunctions suggests that the court does not really believe that an informed and uncoerced shareholder vote fully protects the shareholders.

Two other Delaware Supreme Court decisions make this even more perplexing. The Delaware Supreme Court's opinion in *C&J Energy Services, Inc. v. City of Miami General Employees' & Sanitation Employees' Retirement Trust* contains language undercutting the distinction *Corwin* seemingly creates between actions for damages after shareholders vote and seeking injunctions before the vote.[173] This opinion reversed the Chancery Court's grant of an injunction that blocked a merger and ordered the directors to shop for more bids.[174] The Delaware Supreme Court's highly contextual analysis goes off in so many directions that it is possible to find support in the resulting ink blot of reasoning for whatever proposition one wants regarding the application of *Revlon*—thereby continuing the total obscurity in which the court's opinions have shrouded the impact of *Revlon*. The simplest interpretation of *C&J Energy Services, Inc.* is to see it as a second reprimand of the Chancery Court for erroneously holding that *Revlon* establishes protocols for directors selling their company. Specifically, it rejects the notion that directors unable to prove their impeccable knowledge of the market must conduct a market test to establish that they are getting the best price for selling their company.[175] An alternate interpretation is to limit *Revlon* to situations in which directors agree to deal protections or engage in other actions that block superior bids from emerging prior to the shareholder vote.[176] As relevant to the

[173] *See* 107 A.3d 1049, 1072–73 (Del. 2014) (suggesting that preliminary injunctions should be approached with caution, especially in situations where shareholders are able to avoid "irreparable harm" by rejecting a transaction proposed by the board of directors).

[174] *Id.* at 1053–54.

[175] *See* GEVURTZ & SAUTTER, *supra* note 170, at 287–89 (discussing the Delaware Supreme Court's multiple dismissals of the Chancery Court's attempts to require the board to undertake a market test to demonstrate that they got the best price in a sale).

[176] *Id.*

present discussion, however, the court also offers reassurance that shareholders could always vote down a bad deal as a further reason why an injunction was unnecessary.[177]

Moving in the opposite direction, the Delaware Supreme Court's post-*Corwin* decision in *Singh* makes one wonder which end is the tail and which is the dog regarding the two rationales *Corwin* offered for not applying *Revlon*. *Singh*'s author, Justice Strine, who also wrote the *Corwin* opinion, remembered a Chancery Court opinion he wrote years earlier when he stated that plaintiffs, in the absence of a Section 102(b)(7) waiver and without regard to shareholder approval, need to establish gross negligence in order to recover damages, even in a situation in which the challenged transaction would otherwise be subject to scrutiny under *Revlon*.[178] This makes *Corwin*'s invocation of shareholder approval superfluous as the basis for applying the business judgment rule, rather than *Revlon*, to actions seeking damages.[179] Hence, but for *Singh*'s statement regarding the impact of shareholder approval on transactions already subject to the business judgment rule, *Corwin*'s discussion of the impact of shareholder approval might turn out to be nothing more than a big red herring.

c. Corwin *and* Omnicare: *Can Voting Yes Cure a Lack of Choice?*

As discussed earlier, the board's agreement to deal protections is subject to heightened scrutiny under *Omnicare* and *Unocal* even in situations not triggering heightened scrutiny under *Revlon*.[180] This raises the question of whether an informed and uncoerced vote of the shareholders approving a merger or sale subject to deal protections lowers the standard for judicial review of the deal protections to the business judgment rule in situations in which *Omnicare* would otherwise have demanded review under the heightened standard of *Unocal*.

So far, there is limited authority on this question. In *In re Paramount Gold and Silver Stockholders Litigation*, the Delaware Chancery Court stated that it was unnecessary to resolve the impact of *Corwin* on the standard for

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[177] *See C&J Energy Servs., Inc.*, 107 A.3d at 1070, 1072–73 (emphasizing shareholders' ability to avoid harm by voting down a transaction).

[178] *See Singh*, 137 A.3d at 151 (citing McMillan v. Intercargo Corp., 768 A.2d 492, 505 n.56 (Del. Ch. 2000)).

[179] Actually, as discussed earlier, the presence of an exculpatory provision in the LLC's operating agreement made the invocation of shareholder approval irrelevant in *Corwin* itself, as indeed it would be in any case seeking damages from the directors of a corporation having a Section 102(b)(7) waiver in its certificate of incorporation. *See supra* note 95 and accompanying text.

[180] *See supra* note 53 and accompanying text.

reviewing deal protections because the deal protections in the case met the *Omnicare/Unocal* reasonableness standard.[181]

At first glance, it seems difficult to disentangle *Corwin*'s impact on *Omnicare* and *Unocal*'s scrutiny of deal protections from *Corwin*'s impact on scrutiny under *Revlon.* This is because *Revlon* itself invalidated a deal protection: the asset lock-up given to the favored white-knight bidder.[182] In *Paramount Communications, Inc. v. QVC Network Inc.*, another significant decision that found a breach of duty under *Revlon*, the Delaware Supreme Court also invalidated deal protections in the merger agreement with a buyer favored by the board.[183]

There is, however, a subtle, but potentially critical, difference in focus between *Revlon* and *Omnicare*. *Revlon* is concerned with the merits of the deal: did the directors get the best deal for the shareholders?[184] In *Revlon,* the court held that the directors breached their duty in this regard because they favored one bid over another, not because the favored bid offered a higher price to the shareholders, but rather because it protected certain corporate creditors. The court held this was an impermissible consideration when choosing between two buyers who were offering to pay cash.[185] Similarly, in *QVC*, the court held that the directors breached their duty by agreeing to sell the company to a bidder that offered the shareholders a package of cash and securities whose market value was considerably less than the market value of the package offered by a competing bidder.[186] If the focus of the court's inquiry is on the merits of the deal and whether the price is right, then a vote by informed and uncoerced shareholders that they like the deal seemingly makes the court's intervention unnecessary.

By contrast, *Omnicare*'s focus is whether the deal protections impermissibly interfere with the shareholder's ability to vote down a board-favored deal. Indeed, *Omnicare* applied *Unocal* scrutiny to deal protections based in large part upon the so-called conflicts of interest created by the tension between the directors' desire to get their way in deciding about a merger versus the statutory power granted to shareholders to vote contrary to the board's

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[181] *In re* Paramount Gold & Silver Corp. Stockholders Litig., No. 10499-CB, 2017 WL 1372659, at *6 n.15 (Del. Ch. Apr. 13, 2017).

[182] *Revlon*, 506 A.2d at 185.

[183] 637 A.2d 34, 49–51 (Del. 1994). The deal protections included a stock lock-up, termination fees, and a no-shop provision. *Id.*

[184] *See Revlon*, 506 A.2d at 182 (stating that once the break-up of a company becomes unavoidable, the directors' duty is to get the best price for the shareholders).

[185] *Id.* at 182–83.

[186] *QVC Network Inc.*, 637 A.2d at 50.

wishes.[187] Applying *Unocal* scrutiny, the court in *Omnicare* condemned the deal protections in the case because the protections rendered the merger effectively a done deal before the shareholders had a chance to formally vote on it.[188] If the problem with deal protections is that they interfere with the practical ability of the shareholders to vote against the merger, then it makes no sense to say that the formal but preordained vote of shareholders in favor of the merger renders the court's intervention unnecessary.

Actually, the question of whether *Corwin* changes scrutiny of deal protections under *Omnicare* often may be moot because of the overlap between the scrutiny called for by *Omnicare* and the prerequisites for triggering the business judgment rule under *Corwin*. *Corwin* only lessens scrutiny to the business judgment rule if the shareholders are not coerced. Meanwhile, *Omnicare* holds that deal protections must pass muster under the *Unocal* test, as elaborated by subsequent Delaware case law. This means that deal protections cannot be coercive or preclusive.[189] Hence, if the issue is whether the deal protections are coercive, *Corwin* and *Omnicare* arrive at the same place.

This, however, forces us back to the problem of deciding what coercion is. Unfortunately, cases addressing whether deal protections are coercive have been no better on this score than the cases discussed earlier. *Omnicare* simply throws this label on the deal protections facing the court for reasons that are unexplained and defy rational explanation. The Omnicare board's promise to bring the merger to a shareholder vote did not pressure the shareholders to vote in favor of the merger. The agreements by Omnicare's controlling shareholders promising to vote in favor of the merger meant the merger would be approved, but there is no indication that the controlling shareholders were pressured to enter the agreements for reasons beyond the merits of the deal. The fact that the voting agreements left the minority outvoted if it voted against the merger is no more coercive towards the minority than is any election.[190]

Beyond *Omnicare*, the leading Delaware Supreme Court decision addressing coercion from deal protections is *Brazen v. Bell Atlantic Corp*.[191] Interestingly, the court dealt with the termination fees challenged in that case

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[187] *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930 (Del. 2003) (applying enhanced scrutiny where a board of directors adopted defensive tactics to protect a merger agreement because of the necessary "balance of power between boards and stockholders").

[188] *Id.* at 936.

[189] *See supra* notes 42–45, 53 and accompanying text (explaining that takeover defenses must not be coercive or preclusive).

[190] *See* Franklin A. Gevurtz, *Saying Yes: Reviewing Board Decisions to Sell or Merge the Corporation*, 44 FLA. ST. U. L. REV. 438, 468–69 (2017) (discussing the flaws in *Omnicare*'s finding that the deal protections in that case were coercive).

[191] Brazen v. Bell Atl. Corp., 695 A.2d 43 (Del. 1997).

under the rubric of liquidated damages, rather than fiduciary duty.[192] The court held that a $550 million termination fee payable to the jilted party if the merger did not occur was a reasonable estimate of damages rather than an impermissible penalty.[193] As relevant to the present discussion, the court rejected the plaintiff's argument that the termination fee impermissibly coerced the shareholders into voting for the merger.[194] The court conceded that the fee might have influenced shareholders to vote for the deal in order to avoid potential damage to the company.[195] Nevertheless, the court held that the fee did not fall within the definition of coercion from *Williams*.[196] Specifically, the court explained that because the termination fee was an integral part of the merger contract, the shareholders' consideration of the fee's impact was not a consideration of something other than the merits of the transaction and therefore not coercion.[197]

If the *Brazen* decision means that every provision in a merger contract is part of the merits of the deal simply because it is in the contract and no provision in the merger contract can constitute coercion, then a provision in a merger contract allowing one company to destroy all of the other company's property if the other company's shareholders vote down the merger would not be coercion. Presumably what the court meant in *Brazen* was that insofar as the fee was an attempt to compensate the other side for a reasonable estimate of its damages, rather than to pressure the shareholders, it was part of the deal's merits and therefore not coercion. This, however, can lead back to the approach in which the definition of coercion depends upon what the court happens to think of the substantive merits of the challenged contract provision. *Omnicare* illustrates the hazard of such an untethered approach to identifying coercion.[198]

Putting aside the overall test for coercion, one might analyze whether deal protections are potentially coercive by looking at their effects upon the shareholders' thinking. If we use *Brazen*'s termination fees as an illustration, deal protections might influence the shareholders' calculus of how to vote in

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[192] *Id.* at 46. Because the case predated *Omnicare* and did not involve a *Revlon* situation, the plaintiff used this characterization as a tool to get out of the business judgment rule. Although the question of whether termination fees are reasonable in the context of contract law is not the same as whether they meet the multistage reasonableness inquiry under *Unocal*, the court stated that the tests were in some respects analogous. The court pointed particularly to the part of *Unocal* requiring the board's response to be within a range of reasonableness. *Id.* at 49.

[193] *Id.* at 50.

[194] *Id.*

[195] *See id.* at 50.

[196] *Id.*

[197] *Id.* at 49–50.

[198] *See supra* note 190 and accompanying text.

two ways. The first comes from the fees' negative impact on the corporation if the shareholders vote down the merger. Specifically, voting down the merger in *Brazen* would cause the company to lose over half a billion dollars,[199] which, in turn, can lower the value of the shareholders' stock. Depending upon the overall size of the company relative to the size of the fees, this could cause the shareholders to vote for a merger they dislike simply to avoid the alternative of having a much less valuable company and stock.[200]

Alternately, deal protections such as the termination fees in *Brazen* indirectly impact the shareholders' calculus by deterring other prospective buyers who will think twice about bidding more for a less valuable company.[201] Again, the impact depends upon the size of the fees relative to the size of the company. The effect of deterring prospective other buyers, however, raises a fundamental question: does depriving the shareholders of choice equal coercion?

At first glance, an affirmative answer seems obvious. After all, depriving the shareholders of possible better offers effectively pressures them to vote for the board-favored deal as the only game in town. On the other hand, if the purpose for the statutory requirement that shareholders approve a merger or sale is simply to give the shareholders an opportunity to assess the merits of the deal approved by the directors relative to the status quo of no deal at all, then the absence of other bids is not relevant to the merits of the transaction the shareholders are asked to approve. Whereas this might seem to be a blinkered way of viewing the decision, it is consistent with the historical purpose for the statutory requirement that shareholders approve mergers

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[199] *Brazen*, 695 A.2d at 45.

[200] Agreements, such as in *Revlon*, to sell assets cheaply to the favored bidder (asset lock-ups), or, as in *QVC*, to sell stock cheaply to the favored bidder (stock lock-ups) have the same impact. Contingencies to the fees or lock-ups, however, can remove this impact, for example, by providing that the fee or lock-up is only triggered if the company is immediately sold to a higher bidder. *E.g.*, *McMillan*, 768 A.2d at 505–06. In this event, the shareholders have no reason to vote for a deal in order to avoid a penalty that does not happen if the company remains independent or becomes someone else's problem if the company is sold immediately.

[201] Some deal protections, such as standstills and no-shops, influence the prospect for other bids, but otherwise do not negatively impact the corporation. *See generally* Christina M. Sautter, *Promises Made to Be Broken? Standstill Agreements in Change of Control Transactions*, 37 DEL. J. CORP. L. 929, 931–32, 949 (2013) (explaining that standstill and no-shop provisions limit the possibility for additional bids but do not call for termination fees if the transaction falls apart).

and sales[202] as well as the board's gatekeeping role when it comes to corporate mergers.[203]

At this point, *Corwin*'s prerequisites and *Omnicare* scrutiny start to diverge. This is because Delaware courts applying *Omnicare* to deal protections do not need to ask whether the impact of deterring other bidders is coercion of the shareholders. *Omnicare*, by applying *Unocal* to deal protections, condemns either coercion or preclusion in deal protections. Even if unreasonably deterring other bids is not coercion, it is preclusion.[204]

This possible divergence between *Corwin*'s prerequisites and *Omnicare*/*Unocal* scrutiny of deal protections brings us to the nub of the question in evaluating *Corwin*'s application to deal protections: if shareholders vote in favor of a merger or sale, should it matter that deal protections might have deprived shareholders from seeing a different deal? The answer to this question dictates whether *Corwin* should change the standard for reviewing deal protections.

d. Corwin *and Investment Banker Conflicts: Draining the Swamp?*

As explained earlier, heightened scrutiny of board decisions typically results from conflicts of interest by directors or persons controlling directors.[205] Conflicts of interest by persons other than directors or persons controlling directors, however, can also affect decisions to merge or sell the corporation. Most notably, such conflicts arise when an investment banker provides advice and assistance to the target's board in seeking the best deal; meanwhile the investment banker is attempting to sell services, often assistance in raising money to finance the purchase, to a prospective buyer. Under such circumstances, the investment banker may steer the deal toward a buyer who will use its services instead of a higher paying buyer and may not push for the highest sales price (which makes it more difficult to raise financing). Particularly egregious cases of this sort—including hiding their buyer side activities from the target's board—led to an injunction delaying the sale to

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[202] *See* Lynne L. Dallas, *The Control and Conflict of Interest Voting Systems*, 71 N.C.L. REV. 1, 6–11 (1992) (tracing the history and purposes for shareholder approval requirements, which existed long before the relatively recent phenomenon of prospective buyers who take advantage of the logistical delay entailed in a shareholder vote in order to make competing offers to the shareholders).

[203] *See* Mark Lebovitch & Peter B. Morrison, *Calling a Duck a Duck: Determining the Validity of Deal Protection Provisions in Merger of Equals Transactions*, 2001 COLUM. BUS. L. REV. 1, 17–20 (discussing the board of directors' role as gatekeeper of major corporate transactions).

[204] *See, e.g.*, J. Travis Laster & Steven M. Haas, *Judicial Scrutiny of Deal Protection Measures*, 11 M&A LAW. 18, 20–21 (2007) (contrasting the impact of deal protections coercing shareholders versus precluding other bidders).

[205] *See supra* notes 30–33 and accompanying text (discussing the various scenarios when courts will use heightened scrutiny rather than the business judgment rule).

allow further bids in *In re Del Monte Foods Co. Shareholders Litigation*,[206] and a significant dollar award against the investment banker in *RBC Capital Markets, LLC v. Jervis*.[207]

Although the conduct of the investment bankers in these cases justified condemnation, the Delaware courts had to engage in some contortions to get there. Unfortunately, a direct approach of condemning the investment bankers for breaching a fiduciary duty to the shareholders encounters problems with regards to whether investment bankers are fiduciaries and, if so, whether their fiduciary relationship runs all the way to the shareholders.[208] Instead, the courts in these cases took the indirect approach of holding that the investment bankers aided and abetted a breach of fiduciary duty by the targets' directors.[209]

The trick to this approach is to find that directors, who were misled by the investment bankers and thus are more like victims than wrongdoers, breached their duty. Indeed, the more egregiously the investment banker acted in hiding a conflict from the board, the more difficult it is to say that directors should have discovered the conflict. Application of the business judgment rule seemingly would make this a bridge too far. Applying *Revlon*'s heightened scrutiny has allowed Delaware courts with a wink and a nod to determine that there is a sufficient breach of the directors' duty in order to impose liability upon the investment bankers.[210] At the same time, the handy presence of a Section 102(b)(7) waiver allows the court to avoid imposing liability upon individual directors.

Corwin, however, might upset this kabuki dance. The previously discussed *Singh* case, due to its timing, presented the issue in a sharply cut setting. *Singh* arose out of a merger of Zale's. In a decision handed down shortly before *Corwin*, the Delaware Chancery Court applied heightened scrutiny under *Revlon* when holding that Zale's directors breached their duty in being

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[206] 25 A.3d 815, 844–45 (Del. Ch. 2011).

[207] *See RBC Capital Mkts., LLC*, 129 A.3d at 823, 866–68 (affirming the Chancery Court award of over $75 million to a class of shareholders).

[208] *See, e.g.*, Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079, 1117–19 (2016) (discussing the numerous difficulties that arise when considering whether a fiduciary relationship exists between bankers and the shareholders of its corporate clients).

[209] *See RBC Capital Mkts., LLC*, 129 A.3d at 863 (holding that the corporation's financial advisor aided and abetted the board's breach of its fiduciary duties to its shareholders by providing misleading information to the directors); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 836–37 (holding that there is reasonable likelihood that a private equity firm aided and abetted breaches of fiduciary duties by the target's board by knowingly participating in self-interested activities by the corporation's financial advisor).

[210] *See RBC Capital Mkts., LLC*, 129 A.3d at 857 (holding that the board violated its fiduciary duties by unreasonably relying on defective advice from its financial advisors, leading them to fail in taking "reasonable steps to attain the best value reasonably available to the stockholders").

unaware of their investment banker's conflicts of interest.[211] On rehearing after *Corwin*, the Chancery Court decided that, pursuant to *Corwin*, the shareholders' approval of Zale's merger triggered the business judgment rule.[212] The Chancery Court then concluded that the board had not been grossly negligent in missing the conflicts, meaning that there was no breach of the directors' duties and, therefore, the investment banker could not be liable for aiding and abetting.[213] The Delaware Supreme Court affirmed.[214]

Unfortunately, the Delaware Supreme Court's short opinion is cryptic, consisting of two paragraphs in which the court criticized the Chancery Court's approach while affirming the Chancery Court's decision. As discussed earlier, the first paragraph criticized the Chancery Court's decision to apply the gross negligence standard to a transaction approved by the shareholders when, because the action sought damages, the standard was gross negligence even without shareholder approval.[215] In a second paragraph, the Delaware Supreme Court criticized aspects of the Chancery Court's treatment of the claim against the investment banker.[216]

In a curious sandwich of reasoning, the Delaware Supreme Court first criticized the Chancery Court's holding that the investment banker had engaged in intentional misconduct. Then, the court criticized the Chancery Court for suggesting that investment bankers cannot be liable for aiding and abetting the board's breach of duty if the directors are protected from liability for damages by a Section 102(b)(7) waiver. Lastly, the court affirmed the dismissal of the claims against all parties based upon a fully informed shareholder approval of the merger.[217] The problem is that the middle and final layers of this sandwich might be philosophically inconsistent.

In criticizing the Chancery Court's suggestion that investment bankers cannot be liable when the directors cannot be liable due to a Section 102(b)(7) waiver, the Delaware Supreme Court pointed to the high degree of culpability required to impose liability upon the investment bankers for aiding and abetting.[218] Specifically, the court noted the investment bankers must have scienter.[219] Under these circumstances, the court explained, "To grant immunity to an advisor because its own clients were duped by it would be unprincipled

[211] *Zale Corp.*, 2015 WL 5853693, at *19–20.
[212] *Id.* at *3.
[213] *Id.* at *2.
[214] *Singh*, 137 A.3d at 151–52.
[215] *See supra* notes 152–153 and accompanying text.
[216] *Singh*, 137 A.3d at 152–53.
[217] *Id.*
[218] *Id.*
[219] *Id.* at 152.

and would allow corporate advisors a level of unaccountability afforded to no other professionals in our society."[220]

Given this policy, why does the court then close by stating that shareholder approval of the merger precluded a claim against all parties, including the investment bankers? Presumably, the investment banker's conflicts must be disclosed to the shareholders before they vote. Although this prevents investment bankers from escaping the consequences of their actions by duping both the directors and the shareholders, it promotes litigation over the adequacy of disclosure. More fundamentally, if the investment bankers disclose their misdeeds, the court's statement seemingly puts the shareholders in a position in which they must either forgive the investment banker's treachery or else lose a deal that is better than no deal at all. It is as if a stockbroker who embezzled some of the client's funds could demand the client either forgive the embezzlement or forgo the gains from any successful trades placed on the client's behalf by the broker. This seems to "allow corporate advisors a level of unaccountability afforded to no other professionals in our society."[221] In any event, it is unclear how seriously the court took this last part of its reasoning because the court was skeptical that the investment bankers had acted with sufficient scienter to be liable regardless of the shareholder vote.[222] Indeed, reading over the entire paragraph makes it unclear whether the court even thought about the impact of *Corwin* on aiding and abetting liability for investment bankers.

e. Corwin *and Director Conflicts: Reconciling Differences*

As explained earlier, shareholder approval of transactions in which directors, but not controlling shareholders, have a conflict of interest returns scrutiny from the fairness test to the business judgment rule or to the related standard of waste.[223] *Corwin* contains language, however, that seems to undermine this rule. Specifically, the opinion states that the business judgment rule is the appropriate standard when shareholders approve "a merger that is not subject to the entire fairness standard of review."[224] In its conclusion, the

[220] *Id.* at 153.

[221] *Id.*

[222] *See id.* at 152–53 (questioning whether the board's financial advisor acted with scienter in knowingly misleading the directors).

[223] *See supra* notes 59–64 and accompanying text (discussing Delaware statutory and case law that reduce the level of scrutiny of actions by conflicted board members if they are nevertheless approved by shareholders).

[224] *Corwin*, 125 A.3d at 305–06.

opinion repeats that the policy is to defer to the shareholders "when a transaction is not subject to the entire fairness standard."[225] Read literally, this suggests that shareholder approval no longer moves the level of scrutiny from fairness to the business judgment rule for mergers in which directors, but not controlling shareholders, have a conflict of interest.

This language, however, came when the plaintiffs argued for heightened scrutiny under *Revlon* after their push for the fairness test failed because they were unable to establish that the other party to the merger was a controlling owner of their company.[226] Moreover, had the plaintiffs shown that the other party was a controlling owner, then approval by a vote of disinterested shareholders (a so-called majority-of-the-minority vote) would not, on its own, return matters to the business judgment rule rather than the fairness test.[227] Hence, the court's language was correct for the situation that it faced in which, had the plaintiffs proven the buyer was a controlling owner, the standard would have been fairness regardless of the shareholder vote. The court never thought about the situation in which fairness is triggered due to conflicts on the board, rather than dealing with a controlling owner.

After feeding the uncertainty,[228] Delaware Chancery Court decisions have subsequently clarified that shareholder votes in the face of conflicted directors continue to return review to the business judgment rule.[229]

Whereas subsequent Chancery Court decisions corrected this error in *Corwin*, *Singh* has introduced a different uncertainty. Specifically, it is unclear whether *Singh*'s statement that courts should not apply the business judgment rule/gross negligence standard in the face of shareholder approval, but rather should ordinarily dismiss the lawsuit, governs transactions in which directors have a conflict of interest. At first glance, the answer is negative: *Singh* was addressing a situation in which the business judgment rule/gross negligence standard would apply without regard to shareholder approval and the court was concerned that without further reducing the standard

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[225] *Id.* at 312–13.

[226] *Id.* at 308.

[227] *See supra* notes 68–70 and accompanying text (discussing the longstanding doctrine of majority-of-the-minority vote).

[228] *See* City of Miami Gen. Emp. v. Comstock, No. CV 9980-CB, 2016 WL 4464156, at *17 (Del. Ch. Aug. 24, 2016) (indicating that if the plaintiff had successfully pled that a majority of the directors were interested in the merger and thereby triggered the fairness test that, under *Corwin*'s caveat, shareholder approval would not have moved the standard from fairness to the business judgment rule).

[229] *E.g.*, *In re* Columbia Pipeline Grp., Inc. Stockholder Litig., No. 12152-VCL, 2017 WL 898382, at *2 (Del. Ch. Mar. 7, 2017); *In re* Merge Healthcare Inc. Stockholders Litig., No. 11388-VCG, 2017 WL 395981, at *6 (Del. Ch. Jan. 30, 2017); Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447, at *10 (Del. Ch. Aug. 25, 2016).

of review, shareholder approval would have no impact on such cases.[230] This is not relevant to director conflicts. On the other hand, *Singh*'s discussion of the pointless nature of the waste standard seems as applicable to shareholder approval of conflicted director transactions as it is to transactions subject to the business judgment rule regardless of a shareholder vote.

f. Corwin *and Shareholder Conflicts: Keeping a Distance*

As just discussed, *Corwin* excluded from its reach transactions in which the fairness test applies because a controlling shareholder stands on the other side from the minority shareholders, such as a merger in which the controlling shareholder forces out the minority shareholders and keeps the entire ownership for itself (a "freeze-out merger"). Naturally, shareholder approval of such a transaction based upon the votes of the controlling shareholder hardly protects the minority or serves as a substitute for judicial scrutiny of the deal's fairness to the minority.[231] This raises the question, however, as to what influence courts should accord to a vote by a majority of the minority shareholders in favor of the transaction.

As explained earlier, under Delaware law such a vote shifts the burden of proof on fairness from the majority or controlling shareholder to the complaining minority shareholders.[232] Nevertheless, Delaware courts have traditionally still subjected freeze-out mergers to the careful scrutiny of the fairness test instead of applying the business judgment rule.[233] The year before *Corwin*, however, the Delaware Supreme Court modified this approach. In *Kahn v. M&F Worldwide Corp.*, the Delaware Supreme Court held that a

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[230] If, however, disinterested directors approved a transaction in which some of their fellow directors have a conflict, then the approval by disinterested directors returns scrutiny to the business judgment rule. *See, e.g.*, Benihana of Tokyo, Inc. v. Benihana, Inc., 906 A.2d 114, 120 (Del. 2006) (stating that courts review a transaction involving a conflicted director under the business judgment standard as long as the transaction is approved by a majority of disinterested directors). Under such scenarios, *Singh* presumably applies.

[231] *See supra* note 64 and accompanying text (discussing how approval of a conflicted transaction by a majority of interested shareholders does not move the standard of review from the fairness test to the business judgment presumption). The same is true in situations in which non-controlling shareholders have conflicting interests in the transaction. For this reason, the votes of conflicted minority shareholders should not count for purposes of *Corwin*. *See* Mordue, *supra* note 98, at 567 (explaining that a majority of fully informed, uncoerced, and disinterested stockholders must approve a transaction in order to apply the business judgment presumption under *Corwin*).

[232] *See supra* notes 68–70 and accompanying text.

[233] *See* Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1116–17 (Del. 1994) (stating that, due to the "nature of the underlying 'interested' transaction," entire fairness remains the appropriate standard of review when an informed majority of the minority shareholders approve a transaction); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937–38 (Del. 1985) (stating that although approval of a merger by an informed majority of the minority shareholders shifts the burden away from the interested parties to the plaintiffs, the entire fairness standard is still the appropriate standard of review).

freeze-out merger conditioned on "approval of both an independent, adequately-empowered Special Committee [of directors] that fulfills its duty of care, and the uncoerced, informed vote of a majority of the minority stockholders" moves scrutiny from the fairness test to the business judgment rule.[234] Subsequent cases have extended this approach to other mergers and sales in which the majority or controlling shareholder has conflicting interests from the minority shareholders.[235]

At first glance, *M&F Worldwide* and *Corwin* seem to be arriving at the same destination through shareholder approval: application of the business judgment rule. Nevertheless, they contain a critical difference in the prerequisites for getting there. *Corwin* simply focuses on the shareholders; were they fully informed and uncoerced?[236] By contrast, *M&F Worldwide* also looks to the directors; were the directors who made the decision (the special committee of the board) independent and acting with due care?[237] This, in turn, raises the question of why the difference exists. Specifically, why does a conflict by a controlling or majority shareholder require the court to examine the independence and due care of those directors tasked with approving the deal, whereas, in the absence of a controlling shareholder conflict, approval by the shareholders is enough to move the level of scrutiny?

The answer is not that a controlling shareholder, by definition, controls a majority of the board,[238] thereby necessitating a review of whether the specific directors tasked with approving the deal are independent. Such a rationale is inconsistent with the traditional rule when dealing with conflicts of interest among directors (as opposed to controlling shareholders). As discussed above,[239] approval by disinterested shareholders will move review of a transaction involving conflicted directors to the business judgment rule or

[234] 88 A.3d 635, 642 (Del. 2014) (emphasis omitted).

[235] *See, e.g.*, Olenik v. Lodzinski, No. 2017-0414-JRS, 2018 WL 3493092, at *24 (Del. Ch. July 20, 2018) (applying the business judgment rule to review a non-freeze-out merger where the controlling shareholder fully disclosed to the other shareholders its conflict and a Special Committee of directors negotiated with due care); *Larkin*, 2016 WL 4485447, at *9 (citing, in a non-freeze-out context, to *M&F Worldwide*'s dual protections that move judicial review from the fairness test to the business judgment rule).

[236] *See Corwin*, 125 A.3d at 312 (limiting inquiry to whether the shareholders were fully informed and uncoerced when deciding whether to apply the business judgment rule to a transaction not involving a controlling shareholder).

[237] *See M&F Worldwide*, 88 A.3d at 645 (considering whether a special committee of directors met its fiduciary duty of care when approving a transaction to determine whether to apply the business judgment presumption).

[238] *See, e.g.*, *Kahn*, 638 A.2d at 1114–15 (determining that a shareholder was controlling because it controlled a majority of the board); *In re* Rouse Props., Inc., Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015, at *11–12 (Del. Ch. Mar. 9, 2018) (stating that the question of whether a shareholder is controlling depends upon whether the shareholder controlled the board).

[239] *See supra* notes 59–64 and accompanying text.

to waste even if no disinterested directors approve the transaction (for example, if all of the directors have an interest on the other side of the deal).[240] Moreover, *M&F Worldwide*'s requirement that the independent directors act with due care in order to trigger the business judgment rule is inconsistent with *Singh*'s refusal to look at due care in the face of shareholder approval.

Over the years, the explanation Delaware courts have given for not invoking the business judgment rule upon approval of a transaction with a controlling shareholder by a majority of the minority shareholders focused on the fear of retaliation.[241] Specifically, minority shareholders might vote in favor of a deal they dislike because they fear retaliation of various sorts (such as cutting off dividends) if they vote against the controlling shareholder's proposed merger or other transaction.[242]

One concern with this rationale is whether it explains the different treatment of transactions in which directors, rather than controlling shareholders, have a conflict of interest. Shareholders asked to approve a transaction that involves a conflicted director might legitimately fear retaliation by the directors if the shareholders vote against approving the transaction. After all, directors are in control of the corporation,[243] including deciding whether to declare dividends. Perhaps the distinction is that shareholders have the ultimate power of counterretaliation against directors who are not also the majority shareholders—the ability to vote them out of office. At the same time, shareholders lack a similar power of counterretaliation against a majority shareholder. Yet, this distinction runs into the reality that shareholders in a public corporation are highly unlikely to unseat directors.[244]

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[240] *See, e.g.*, *In re* Inv'rs Bancorp, Inc. Stockholder Litig., 177 A.3d 1208, 1211 (Del. 2017) (noting the fact that all, as opposed to only some, directors received stock options did not matter in the court's analysis of whether shareholder ratification would return review to the business judgment rule).

[241] *See, e.g.*, *Kahn*, 638 A.2d at 1116–17 (suggesting that courts use the entire fairness standard instead of the business judgment rule when assessing approvals by a minority of shareholders due to risk of retaliation by the controlling shareholders); *In re* W. Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192, *26 (Del. Ch. May 22, 2000) (explaining that the rationale for applying the entire fairness review instead of the business judgment rule is due to the potential for controlling shareholders to retaliate against minority shareholders who refused to approve a transaction favored by the controlling shareholders).

[242] *E.g.*, *Kahn*, 638 A.2d at 1116–17 (providing examples of why minority shareholders may vote for a transaction of which they disapprove due to the potential negative consequences brought about by the controlling shareholder); *In re W. Nat'l*, at *26 (explaining that controlling shareholders are able to retaliate against minority shareholders by implementing "some onerous and oppressive policy upon the public shareholders through board action").

[243] *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2011 & Supp. 2018) (placing control of business and everyday affairs of a corporation in the hands of the board of directors).

[244] *See* Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 682–93 (2007) (discussing the difficulty shareholders face in replacing board members).

Beyond this, it is unclear how *M&F Worldwide*'s requirement for approval by independent directors is supposed to counter the retaliation problem. Indeed, unless directors are indifferent to remaining or would rather not remain directors, they are inherently susceptible to retaliation by a majority shareholder who can kick them off the board.

g. Corwin *and Appraisal Rights: Does This Add Up?*

Appraisal rights originated in the nineteenth century when corporation statutes abandoned the requirement that shareholders unanimously approve mergers.[245] State legislatures worried on both constitutional law and fairness grounds about allowing mergers to alter the nature of minority shareholders' investments over their objections.[246] To ameliorate these concerns, the idea arose to give the shareholders, who dissented from the merger, the right to demand the corporation buy back their stock at a price determined by the court to be the fair value of the stock (hence the term appraisal rights).[247] Delaware's corporation statute continues to provide for such rights.[248]

Despite not technically involving a claim for breach of fiduciary duty, appraisal rights clash with *Corwin*'s deference to shareholder approval. Specifically, *Corwin* embodies the view that if most of the shareholders support the merger, courts should not second-guess the deal at the behest of dissenting shareholders. By contrast, appraisal rights exist to respect the views of the dissenting minority.

Admittedly, the court does not directly address the merits of the merger in an appraisal proceeding. In fact, Delaware law precludes the court from considering the impact of the merger on the value of the dissenter's stock.[249] Moreover, the court in an appraisal proceeding will not grant a damage award for all shareholders, including those who voted for the deal, much less enjoin the merger—albeit merger contracts often include a closing condition that limits the percentage of shareholders that exercise appraisal rights.[250] Never-

[245] *See* Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. LEGIS. 79, 86–91 (1995) (providing history of the evolution of appraisal rights in the United States).

[246] *Id.*

[247] *See id.* at 89–91 (explaining that whereas shareholders were previously required to engage in litigation in order to receive the fair value of their shares, their ability to receive such compensation has since evolved into the appraisal rights that shareholders enjoy today).

[248] DEL. CODE ANN. tit. 8, § 262 (West 2011 & Supp. 2018).

[249] *See id.* § 262(h) ("[T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation.").

[250] *See* Matthew W. Abbott et al., *Paul Weiss Discusses Appraisal Risk in Private Equity Transactions*, THE CLS BLUE SKY BLOG (June 12, 2017), http://clsbluesky.law.columbia.edu/2017/06/

theless, in demanding an appraisal, the dissenting shareholder bets that a judicial determination of the fair value of the stock will be greater than what the shareholder will receive in the merger. Hence, an appraisal ultimately involves the court indirectly second-guessing the merits of the deal approved by the majority of the shareholders. This is contrary to *Corwin*'s underlying faith in and deference to the wisdom of the disinterested majority of shareholders.

One way to reconcile appraisal rights with *Corwin* would be to treat the merger price approved by a disinterested shareholder majority as the fair value of the dissenters' stock. Although there has been some movement in this direction, this is not the rule.[251]

In recent decisions, the Delaware Supreme Court addressed using the price resulting from arm's length mergers approved by the shareholders to dictate the fair value of stock in appraisal proceedings.[252] The court's holdings represent something of a compromise. Whereas the court reversed decisions by the Delaware Chancery Court that either gave no or relatively little weight to the agreed merger price as evidence of fair value, it refused to adopt a presumption that a negotiated price arising from a competitive sale process is the fair market value.[253] Instead, the court held that the appraisal provision in the corporations statute gives the Chancery Court discretion to look at all relevant factors in determining the fair value.[254] Moreover, these decisions looked at the processes used by the target companies' boards before accepting the price as significant evidence of fair value.[255] Such an examination is precisely what *Corwin* and *Singh* state that shareholder approval precludes.

12/paul-weiss-discusses-appraisal-risk-in-private-equity-transactions/ [https://perma.cc/7KVD-2YKJ] (discussing common closing conditions that are inserted into merger agreements by private equity firms).

[251] *See infra* notes 252–255 and accompanying text.

[252] *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 5–6 (Del. 2017) (considering the degree to which courts should consider the merger price when determining the fair value in perfecting an appraisal); DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 348 (Del. 2017) (considering the respondent's argument that the court should presume that the price of an arm's length merger is the fair value of the stock price in an appraisal).

[253] *See Dell*, 177 A.3d at 16, 37–38, 44 (holding that the Chancery Court's refusal to give the merger price any weight in determining the fair value was erroneous, yet rejecting the presumption that the merger price is the fair value); *DFC Global*, 172 A.3d at 359, 366 (refusing to presume that the merger price alone can be used as the sole evidence of the share's fair value).

[254] *Dell*, 177 A.3d at 21–22; *DFC Global*, 172 A.3d at 366–67.

[255] *See Dell*, 177 A.3d at 28–31 ("Here, it is clear that Dell's sale process bore many of the same objective indicia of reliability that we found persuasive enough to diminish the resonance of any private equity carve out or similar such theory in *DFC*."); *DFC Global*, 172 A.3d at 372–74 (considering the market test provided by various parties that showed interest in buying the target company as evidence in determining the fair value).

III. BACK TO FIRST PRINCIPLES: WHAT IS SHAREHOLDER APPROVAL TELLING US?

Corwin reflects the premise that a favorable vote by a majority of shareholders, who are fully informed and not coerced (including by fear of a controlling shareholder), is the best indication of the merits of a merger. The problem with this premise is that it ignores the nature of the choice before the shareholders and thus misses the disconnection between the justifications for heightened scrutiny and what shareholder approval signifies as far as the merits of the deal.

A. The Nature of the Shareholders' Choice

To understand what shareholder approval is telling us, it is necessary to contrast two different types of decisions. Simplifying what is really a spectrum, we can separate decisions into two polar types. At one pole are narrow binary decisions and at the other pole are nuanced or flexible decisions. Narrow binary decisions are like light switches—they are either on or off. Nuanced or flexible decisions, on the other hand, provide multiple options that often interrelate.

An individual's decision to enter a contract is a nuanced or flexible decision. At any point before making the ultimate decision to enter the contract, the individual has multiple interrelated options: negotiate more over various terms, gather more information, shop around, or contract with someone else. Subject to the limit that it takes two to tango, an individual in choosing between these options knows that he or she retains a great deal of control over what happens next.

The board's statutory authority allows it the same sort of nuanced or flexible decision making with respect to merging or selling the corporation. Even if the board works through senior executives, the board has the authority to command those executives to do what the board decides,[256] and, in issuing those commands, the board knows that it has the authority to dictate what the senior executives will do next.

By contrast, the shareholder veto is a narrow binary decision. The shareholders cannot command the board to merge or sell the company.[257] They

[256] *See* DEL. CODE ANN. tit. 8, § 141(a) (West 2011 & Supp. 2018) (granting the board the authority to manage and direct the business and affairs of the corporation).

[257] *See* Charleston Boot & Shoe Co. v. Dunsmore, 60 N.H. 85, 86–87 (N.H. 1880) (stating that the shareholders could not command the board of directors to wrap up the business); FRANKLIN A. GEVURTZ, CORPORATION LAW 196 (2d ed. 2010) ("[S]hareholders cannot initiate, for instance, a merger or sale of all assets; they cannot negotiate the terms of such a merger or asset sale; they

cannot command the board to gather more information, to make a deal with someone else, or to negotiate over specific terms of the deal. The shareholders can simply say yes or no. If they reject the deal, they have no control over what the board does next, meaning they have no control over whether they will see another deal.[258]

This means that the shareholders' choice ultimately comes down to asking whether the deal before them is better than no deal at all. This explains why shareholders typically vote overwhelmingly for any deal that provides an immediate and significantly positive return. Understanding the narrow binary nature of the shareholders' choice, in turn, allows us to crack many of the doctrinal mysteries raised by *Corwin* and to fashion a sensible approach to the impact of shareholder approval on judicial scrutiny of mergers and sales.

B. Implications for Judicial Scrutiny

1. Binary Choice and *Corwin*'s Prerequisites

The binary nature of the shareholders' choice explains some of the difficulties raised by *Corwin*'s two prerequisites: that shareholders be fully informed and that shareholders not be coerced. To begin with, it helps explain the results of the Fisch, Griffith, and Solomon study showing that additional disclosures almost never change the shareholder vote. As discussed earlier, one interpretation of this result is to suggest that the disclosure failures in these cases did not involve material facts.[259] The other interpretation, however, is that, at least in some instances, shareholders do not change their votes on mergers despite facts that, as in *Morrison v. Berry* and *Appel v. Berkman*, logic would dictate the shareholders should consider.[260]

Perhaps this shows, contrary to *Corwin*'s underlying premise, that shareholders are poor decisionmakers who are unwilling to put in the time to consider important facts about the deal. Yet, the Fisch, Griffith, and Solomon study suggests that many shareholders react to the recommendations of the

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cannot order the board to make such a deal, or set in advance the parameters of the deal the board should make . . . .").

[258] This analysis is based upon the statutory division of power between directors and shareholders. Majority or controlling shareholders have the practical, if not legal, ability to command the board and, thus, might make nuanced or flexible decisions regarding mergers. It is also possible in certain circumstances that so-called activist shareholders might exercise sufficient influence over the board to achieve some ability to make nuanced or flexible decisions regarding mergers.

[259] *See supra* notes 122 and accompanying text.

[260] *See supra* notes 99–110 and accompanying text (discussing facts and holdings of *Morrison v. Berry*, 191 A.3d 268, 274–73 (Del. 2018), and *Appel v. Berkman*, 180 A.3d 1055, 1057 (Del. 2018)).

principal shareholder advisory service. One would think that such an organization would put in the time to consider negative corrective disclosures.[261]

Instead, perhaps the mystery is partially solved by returning to the shareholders' narrow binary choice. Although Delaware court opinions do not tend to explain things this way,[262] one suspects that facts subject to corrective disclosure raise questions about whether the deal before the shareholders was the best deal possible, rather than whether the deal is better than no deal at all. Again, however, we must remember the narrow nature of the shareholders' choice. Facts suggesting that, for instance, because of conflicts or sloppiness, the directors did not get the best deal do not mean that the deal at hand still is not better than the status quo. Moreover, these facts can make the shareholders doubt that the same conflicted or sloppy directors will manage to get a better deal if forced to go back and try again or whether they will even try again.

Morrison and *Appel* provide good illustrations. If the board knew about the founder's conflicted position in *Morrison* earlier, then it might have negotiated a better deal.[263] This does not mean, however, that the deal the board negotiated was not a more attractive option than no sale or that the prudent thing to do for shareholders confronted with a narrow binary choice would be to reject the proposed deal and hope that the board and buyer come back with a better one. After all, the shareholders have no control over subsequent negotiations, if any, after they say no. Along similar lines, the founder's diagnosis in *Appel*, if believed, provides important information to one in a position to make a nuanced or flexible decision (such as the board) because it suggests an alternative course to an immediate sale.[264] Specifically, a decisionmaker in a position to make nuanced or flexible decisions (like the board) can wait to sell the company while it first addresses the mismanagement problem. This is not a realistic option for the public shareholders asked to tender their stock. If the public shareholders decline the deal at hand, they have little ability to address the mismanagement and no assurance that a future board will be as open to selling the company.[265]

The narrow binary nature of the shareholders' choice also helps explain the inherent limits to defining coercion. In the mergers and acquisitions con-

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[261] *See supra* note 121 and accompanying text.

[262] *See, e.g.*, R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 17.2 (3d ed., 2018 supp.) (discussing the duty of disclosure to shareholders under Delaware cases).

[263] *See supra* notes 107–111 and accompanying text (discussing the omissions in *Morrison*).

[264] *See supra* notes 105–106 and accompanying text (discussing the omissions in *Appel*).

[265] *See supra* notes 257 and accompanying text.

text, claims of coercion typically fall into one of two baskets. The first, commonly labeled structural coercion,[266] consists of exploiting the problem public shareholders face in coordinating a collective response. *Unocal Corp. v. Mesa Petroleum Co.* provides the classic illustration.[267] There, the hostile two-tier tender offer pressured shareholders to accept, even though they might not find the price sufficient, in order to avoid being part of the minority holdouts that would get a worse deal.[268] Shareholder votes, however, normally do not raise this structural coercion problem because voting against a deal when most other shareholders vote in favor of it generally does not prejudice the dissenters.[269]

The other basket involves coercion claims resulting from the shareholders' binary choice when called upon to approve a merger or sale. Shareholders simply have the option of voting yes or no on the deal as presented to them. They do not have the option to negotiate over various terms, such as the existence and size of termination fees (as in *Brazen*).[270] They do not have control over the timing and context of the deal (for example, to stall the merger while carefully monitoring the effort to restate the earnings reports as the board could have done in *Saba Software*).[271] Hence, the shareholders' calculus of whether to vote yes or no on a merger or sale inevitably involves a package of terms and context for the deal that has been dictated to them.

This is not to say that the combination of terms and circumstances presented to the shareholders on a take-it-or-leave-it basis in a merger contract automatically renders the process coercive. Rather, it indicates that attempting to define coercion by trying to distinguish the merits of the deal from extraneous terms is akin to Sisyphus pushing the boulder up the mountain.

The upshot of this analysis is that the narrow binary nature of the shareholders' choice renders *Corwin*'s all-or-nothing focus on disclosure and coercion too crude an approach for determining the impact of shareholder approval on the level of judicial scrutiny.

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[266] *See* Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 267 (1989) (defining structural coercion as "the risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions").

[267] 493 A.2d 946, 949 (Del. 1985).

[268] *Id.* at 956.

[269] *Williams v. Geier* provides a rare exception. 671 A.2d 1368, 1382 (Del. 1996). There, although the failure of enough minority shareholders to vote for the proposed amendment to the voting rights of their stock did not prevent the majority from passing the amendment, it could have prevented the action from receiving the two-thirds vote necessary under a proposed change to the NYSE listing standards for the corporation's stock to remain listed. *Id.*

[270] *See supra* notes 191–197 and accompanying text.

[271] *See supra* notes 127–140 and accompanying text.

2. Binary Choice and Functional Equivalence

Judicial scrutiny of board decisions traditionally begins, even without regard to shareholder approval, where *Corwin* itself ends: application of the highly deferential business judgment rule. Generally, greater scrutiny arises in situations in which we do not trust directors to act for the corporation and its shareholders because of some conflicting interest.[272] Shareholder approval serves as a substitute for greater scrutiny because we trust shareholders to act for the right reasons (their own interest). The primary question presented by the interactions of shareholder approval with Delaware's layer cake of standards is whether shareholder approval, given the narrow binary choice facing the shareholders, adequately substitutes for whatever heightened scrutiny the court would otherwise apply in light of the reasons for that heightened scrutiny.

a. Achieving the Goals for Scrutiny Under Revlon, Omnicare, *and* Unocal

We can start to answer the question of whether shareholder approval provides an adequate substitute for heightened scrutiny with the issue before the court in *Corwin*: whether to apply the intermediate level of heightened scrutiny under *Revlon*. Unfortunately, it is difficult to compare the efficacy of shareholder approval as a tool to achieve the purpose for heightened scrutiny under *Revlon* because the purpose for heightened scrutiny under *Revlon* is not clear.[273] What we can say is that *Revlon* spoke of the board's obligation to get the best price for the shareholders and that the case arose in the context in which the board was choosing between two prospective buyers.[274] Both of these facts bear on the efficacy of shareholder approval as a substitute for heightened judicial scrutiny under *Revlon*.

As stated before, the narrow binary nature of the shareholders' choice in voting on a merger or sale means that shareholder approval is not a complete substitute for judicial scrutiny when it comes to seeing if the directors got the best deal or acted reasonably towards this goal. As repeatedly emphasized in this discussion, the issue before the shareholders is whether the deal in front of them is better than no deal, not whether it is the best deal. True, shareholders might reject a deal they find otherwise acceptable if they view it not to be the best deal because they hope that by doing so they will be presented with a better deal. Barring, however, the presence of a hostile competing bidder, shareholders have limited control over whether they will actually see a better

[272] *See supra* notes 25–33 (distinguishing between the business judgment rule and heightened scrutiny).

[273] *See* Gevurtz, *supra* note 50, at 1545–56 (discussing the incoherent and overly complex doctrine that has resulted from the opinion in *Revlon*).

[274] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

deal if they reject the one in front of them. Hence, the prudent course typically is to take the bird in the hand even in a situation in which a person in a position to make nuanced or flexible decisions (the board) would pursue a different path. This explains the studies showing that shareholders normally vote overwhelmingly in favor of mergers.

At first glance, this suggests that *Corwin* got it wrong in holding that shareholder approval substitutes for heightened judicial scrutiny under *Revlon* when assessing whether the directors got the best deal in selling the company. Further reflection, however, might suggest instead an explanation for the *Corwin* conundrum. As discussed above, the court's apparent holding that heightened scrutiny under *Revlon* applies in actions for injunctions before shareholders vote, but not in actions for damages after shareholders vote, only makes sense if the court has doubts about the efficacy of shareholder approval as protection for the shareholders.[275] The impact of the narrow binary choice on the shareholder approval's ability to ensure shareholders get the best deal explains such doubt. At the same time, the danger that damage awards might chill necessary risk-taking could justify confining heightened scrutiny to injunctive relief despite the limits of shareholder approval as a tool to protect shareholder interests.

There is, however, a problem with this explanation: the business judgment rule, which courts normally apply both to damage actions and to actions for injunctive relief,[276] exists based upon the notion that courts should not ask whether disinterested directors got the best deal or otherwise made the best decision, but rather should confine review to whether the directors made a grossly negligent or irrational decision. Why then should a merger or sale involving transfer of control to a privately held party (or arguably any merger sale cashing out the shareholders) justify a greater level of scrutiny? This question, however, gets well beyond the topic of shareholder approval and is the subject for another article.[277]

The fact that *Revlon* involved a situation in which the board was saying yes to one bidder (the white knight) while saying no to another bidder (the party making a hostile tender offer) also bears upon the efficacy of shareholder approval to protect the shareholders.[278] At first glance, this situation

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[275] *See supra* 171–172 and accompanying text. *See generally* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

[276] *E.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780–81 (Ill. App. Ct. 1968) (applying the business judgment rule in response to a complaint seeking an injunction ordering the board to install lights in a corporation's baseball stadium).

[277] *See* Gevurtz, *supra* note 190, at 456–64 (discussing the impact of *Revlon* on the standard of review used by courts when assessing corporate mergers).

[278] *See Revlon*, 506 A.2d at 184 (addressing the favoritism displayed by the board towards the white knight over the hostile bidder).

appears to ease the normally narrow binary choice involved with shareholder approval. The shareholders can vote against the deal presented to them by the board, not just to retain the status quo, but alternatively to accept the hostile tender offer. The problem, as illustrated by *Revlon*, arises from the board's agreement to deal protections or taking other actions that block the hostile bid.[279] This returns the shareholders to the binary choice of only voting yes or no on the deal in front of them without the option to choose the bid blocked by the board.

Moreover, deal protections might not only block a competing bid of which the shareholders are aware, but also can deter competing bids from even surfacing in the first place.[280] Hence, in voting on the bird in the hand represented by the deal before them, shareholders commonly never even know whether there was another potentially higher offer. True, fully informed shareholders would be aware of the deal protections and thereby the prospect of deterring better bids. The narrow binary nature of the shareholders' choice, however, means that shareholders can only vote on the deal agreed to by the board, not on negotiating over specific deal protections. This puts the shareholders in a position where they can either swallow the prospect that deal protections might have cut off a better deal or else put at risk the deal they have in the hope that their directors will return with a better combination of the deal and deal protections. Again, the prudent course for the shareholders is to take the bird in the hand.

At this point, the impact of shareholder approval on scrutiny under *Revlon* should converge with its impact on scrutiny under *Omnicare* and *Unocal* and returns us to the question posed earlier: in weighing the impact of shareholder approval, should it matter that directors cut off the choice of other deals that the shareholders might have preferred? To answer this question, we must ask why *Omnicare* imposed heightened scrutiny (*Unocal*) on deal protections.

The court in *Omnicare* put forward essentially two reasons for applying *Unocal*. One reason lies in the tension between the directors' desire to have their way on a merger versus the statutory power granted the shareholders to vote contrary to the board's wishes.[281] As explained in the earlier discussion, it makes little sense to subject deal protections to heightened scrutiny on the ground that they interfere with the shareholder's practical ability to veto the board's favored deal and, at the same time, hold that shareholder approval reduces the need for heightened scrutiny. The only question is whether this

[279] *See id.* (discussing the various exclusivity advantages given to the white-knight bidder by the board).

[280] *See, e.g.*, Lebovitch & Morrison, *supra* note 203, at 27 (stating that deal protections are most often approved "'on a clear day,' when a third-party unsolicited bidder has yet to come forward").

[281] *See supra* notes 187–188 and accompanying text.

concern with protecting the shareholder veto power simply exists for deal protections (like termination fees) that negatively impact the corporation if shareholders vote down the deal and thereby pressure the shareholders to vote for a deal they dislike, or whether the concern also exists for deal protections that simply chase away competing bidders.

The other reason given by the court in *Omnicare* for heightened scrutiny is that the purpose and effect of deal protection devices is to fight off competing offers, which means deal protections are much like poison pills or other takeover defenses subject to review under *Unocal*.[282] *Unocal*, in turn, imposed heightened scrutiny on takeover defenses in order to address the omnipresent specter that, in combating hostile tender offers, directors might be motivated by the desire to preserve their positions rather than by the best interest of the shareholders.[283] Although this specter disappears if the buyer in a merger or sale favored by the board will not retain the current directors or management, it hovers over any situation in which the favored buyer will retain the current directors or management but a subsequent higher bidder might not. Indeed, empirical evidence supports the fear that directors and managers steer deals toward buyers that retain the current directors and managers over prospective buyers who would have paid more.[284]

The upshot of this discussion is that a critical justification for heightened scrutiny of deal protections under *Omnicare* and *Unocal*, as well as for heightened scrutiny of the board's choice of the buyer under *Revlon*, is to address the concern that directors may be favoring a buyer who will retain them as a director over another prospective buyer who will not. If this is the goal, the narrow binary nature of the shareholders' choice means that shareholder approval is not an adequate substitute for heightened judicial scrutiny. Unless there is a hostile bid awaiting them upon rejecting the deal presented by the board, shareholders can only vote on the deal in front of them. Hence, so long as directors present shareholders with deals that are better than no deal, shareholder approval will not prevent directors from sacrificing the best deal for the shareholders in favor of a deal that preserves their own positions.

b. Reconciling the Law Regarding Traditional Conflicts of Interest

One potential objection to the analysis so far is that it is inconsistent with the impact of shareholder approval of transactions involving conflicts of interest for directors or parties controlling directors. It is possible, however,

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[282] Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 932 (Del. 2003). Poison pill plans, also known as shareholder rights plans, can be adopted by a corporation in order to prevent a hostile takeover. *See* Christine Hurt, *The Hostile Poison Pill*, 50 U.C. DAVIS L. REV. 137, 141–42 (2016) (discussing case law that addresses the boards' adoptions of a poison pill plan).

[283] *See supra* note 41 and accompanying text.

[284] Wulf, *supra* note 14, at 75–80, 92.

to reconcile the above analysis with the treatment of most transactions in which directors have a conflict of interest. Furthermore, this analysis helps explain the current Delaware approach to transactions in which controlling shareholders have a conflict of interest.

As stated earlier, approval by disinterested shareholders traditionally returns judicial scrutiny of transactions in which directors (but not controlling shareholders) have a conflict of interest to the business judgment rule or the waste standard.[285] One might argue, however, that the narrow binary nature of shareholder approval limits the efficacy of shareholder approval in the context of traditional director conflicts as much as it does in the merger or sale context. If so, either the traditional rule regarding the impact of shareholder approval of transactions in which directors have a conflict of interest is wrong or we should disregard the narrow binary nature of the shareholders' choice when dealing with challenges to mergers or sales.

There is a difference, however, between the two contexts. Run-of-the-mill conflict of interest transactions, such as executive compensation involving members of the board, do not involve transactions in which the essential question is whether the corporation should have contracted with a different party. Moreover, run-of-the-mill conflict of interest transactions do not involve board actions, such as deal protections, whose essential purpose is to cut the shareholders off from seeing competing alternatives. In other words, the complaint in an executive compensation case is that the directors or senior executives overpaid themselves, not that they should have hired someone else.[286] Hence, the fact that shareholders did not get to see other candidates does not undermine their assessment of the executive compensation they vote to approve. By contrast, the fact that deal protections or other board actions may have prevented the shareholders from considering other merger offers undermines the impact of the shareholders' vote on showing they got the best deal.[287]

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[285] *See supra* notes 61–64 and accompanying text.

[286] *See, e.g., In re* Inv'rs Bancorp, Inc. Stockholder Litig., 177 A.3d 1208, 1216 (Del. 2017) (plaintiff-stockholders alleging that the directors breached their fiduciary duties by "awarding themselves excessive compensation").

[287] One caveat to this distinction between the two situations arises with a management buyout ("MBO") in which board members participate on the buyer's side. Here, it would not be uncommon for the decision to involve a choice between competing buyers. *See, e.g.,* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1272–73 (Del. 1989). Accordingly, the narrow binary nature of shareholder approval limits its effectiveness in the MBO context. Following this logic, shareholder approval should lower the level of scrutiny of an MBO from the fairness test, but only to the intermediate level of scrutiny provided by *Revlon* or *Omnicare* instead of the business judgment rule.

Turning to conflicts by controlling shareholders, *Kahn v. M&F Worldwide Corp.* becomes more understandable once one considers the shareholders' narrow binary choice. Specifically, *M&F Worldwide* differs from *Corwin* in requiring not just approval by the minority shareholders, but also approval by independent directors acting with due care, before the court is willing to apply the business judgment rule to a freeze-out merger. Why the added requirement for independent directors? The court explained that this provided the shareholders with the protection of having an agent bargain on their behalf.[288] Yet, if minority shareholders can protect themselves against poor terms in freeze-out mergers by vetoing a deal subject to a majority-of-the-minority condition, why do we need an independent committee negotiating in order to ensure minority shareholders get a fair deal?

The answer returns to the narrow binary nature of the shareholders' choice in voting on the merger: shareholders can only vote up or down on the deal in front of them, they cannot vote on the deal not in front of them. Hence, a majority of the minority shareholders will approve any deal above their reservation price, but they lack the power to negotiate for a deal closer to the majority shareholder's reservation price that they could have received if the board were negotiating the price paid by a stranger.[289] If the definition of a fair deal is the price that would result from arm's length dealing, the minimum reservation price of a majority of the minority shareholders is not it.[290]

[288] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

[289] Viewing shareholders as investors with heterogeneous expectations regarding the corporation's prospects and thus differing reservation prices, the price will be one meeting or exceeding the reservation price of a majority of the minority shareholders, but less than the reservation price of a minority of the minority shareholders. *See* Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1287–88 (1990) (discussing how the varying valuation of a corporation's shares from shareholder to shareholder impacts the price necessary for a successful tender offer).

[290] The observant reader will have noticed an apparent inconsistency between this rationale for requiring independent director approval of dealings with controlling shareholders and the earlier discussion of transactions in which directors, but not controlling shareholders, have a conflict of interest. Shareholder approval of run-of-the-mill conflicts, such as executive compensation, for all members of the board still leaves no one to negotiate with the conflicted directors in order to get a better deal. Under these circumstances, shareholders having only a narrow binary choice might approve a transaction (such as a level of compensation for senior executives including directors) as long as it is acceptable, even though independent directors might have been able to negotiate a better deal for the corporation. There are, however, a couple of ways in which to reconcile this inconsistency. First, a decision, such as executive compensation, that does not provide anything to the shareholders directly (unlike a merger or sale) gives the shareholders no reason to vote in its favor simply because it is personally better for the shareholders than the status quo. Also, practicality concerns—the necessity of compensation for all board members—argue for overlooking the flaws of shareholder approval to a greater extent than courts should in less necessary transactions, such as freeze-out mergers.

c. Remaining Goals for Judicial Scrutiny

This brings us to the remaining interactions of shareholder approval with Delaware's layer cake of standards for reviewing decisions to merge or sell the corporation. It will aid analysis to restructure our discussion of these interactions into three categories: (1) complaints about sloppy process by the board; (2) complaints about investment bankers; and (3) circumstances in which the law embodies a counter-majoritarian goal (the waste doctrine and appraisal rights).

As discussed earlier, *Singh v. Attenborough* potentially breathes new life into the prospect raised by *Smith v. Van Gorkom*, that approval of a merger by shareholders informed about the board's sloppy process might insulate directors from claims for breaching a duty of care or even perhaps for not acting in good faith.[291] Again, this may read too much into shareholder approval. To see why, in this instance, we must address the two possible reasons one might give for shareholder approval to insulate careless directors from liability.

One reason is embodied in *Van Gorkom*'s reference to void versus voidable acts.[292] This would be relevant if the shareholders explicitly voted not to pursue an action against the directors. On the other hand, if the argument is that a vote to approve the merger is a vote to forgive the directors' laxity, then the broader reading of *Gantler v. Stephens* as seeking to confine the impact of a statutorily required shareholder vote to just the question the shareholders were voting on was correct.[293] Forgiveness is not what the shareholders are voting on when voting to approve a merger. Alternatively, one might invoke the concept of ratification in agency law under which a principal cannot both knowingly accept the benefits of an agent's unauthorized action and, at the same time, complain that the agent lacked authority.[294] Yet, whereas this may have sway when the issue is lack of authority, it is not clear why a party who is the victim of another's carelessness (rather than lack of authority) must forgive the carelessness or forgo the benefits of any acts by the careless party. For example, a doctor who negligently fails to diagnose a disease before it harms the patient should not be able to argue that the victimized patient's agreement to later treatment waives any claims for the injuries already suffered.

The alternative reason is that shareholder approval shows that the shareholders like the deal and therefore the board's sloppiness caused no damage.

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[291] *See supra* notes 152–153 and accompanying text.

[292] *See supra* notes 154–157 and accompanying text.

[293] *See supra* notes 89–96 and accompanying text. *See generally* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

[294] *See* RESTATEMENT (SECOND) OF AGENCY § 98 (AM. LAW INST. 1958) (describing a principal's non-repudiated receipt of benefits as affirmance).

The fact that the shareholders think the deal in front of them is better than no deal at all, however, does not necessarily mean that a better process at the outset could not have gotten a few extra dollars per share, even though the shareholders figure that by the time the merger came to them the opportunity to negotiate a better deal was gone. Alternatively, the shareholders might not want to take a chance on whether their sloppy board can do a better job next time.

A similar analysis applies to cases in which conflicted investment bankers attempt to force absolution by disclosing the bankers' conflicts to the shareholders when the shareholders vote on the deal. As discussed earlier, it would provide investment bankers a cloak of unaccountability not enjoyed by other agents if bankers can foist upon the shareholders the choice of forgoing a deal or waiving claims for intentionally disloyal conduct.[295] Again, the fact that the shareholders conclude that the deal in front of them, despite the investment banker's conflict, is better than nothing, or better than taking their chances after the most opportune moment may have passed, does not show that the investment banker's conflict did not harm the shareholders.

Finally, we come to judicial scrutiny based upon a counter-majoritarian philosophy—in other words, based upon protecting the minority from foolish decisions by the majority. In these instances, approval by a majority vote of the shareholders, by definition, cannot fulfill the function of the judicial scrutiny—albeit for a different reason than the narrow binary nature of the shareholder's choice. The two relevant examples of counter-majoritarian-based scrutiny are the waste standard and appraisal rights.

The waste standard is a derivation from the *ultra vires* doctrine.[296] For much of its history, the *ultra vires* doctrine existed primarily to protect minority shareholders against actions that are beyond the purposes of the corporation in which they agreed to invest.[297] Hence, *ultra vires* actions historically could only proceed with the unanimous consent of the shareholders.[298] Waste stems from the notion that giving away corporate assets for no business purpose is beyond the purpose of a corporation established to conduct business and that exchanging corporate assets for something that no reasonable

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[295] *See supra* notes 219–220 and accompanying text.

[296] In corporate law, the *ultra vires* doctrine states that a corporation may not act beyond its purposes or powers. DOUGLAS K. MOLL & ROBERT A. REGAZZO, CLOSELY HELD CORPORATIONS § 2.08 (2017 ed.).

[297] *See* GEVURTZ, *supra* note 257, § 3.1.4(c) (describing the purpose of the *ultra vires* doctrine in corporate law). Whereas an earlier era viewed the doctrine as designed to protect society from corporations acting beyond the purposes for which the government had seen fit to bestow their charters, this view waned with the advent of general incorporation laws.

[298] *Id.* This strict view has waned insofar as statutes commonly allow courts to balance the interests of the other party to ultra vires contracts.

person would find of equivalent value is the same as giving away the difference.[299] Hence, waste embodies the notion that minority shareholders are entitled to some minimal judicial scrutiny, at least in extreme cases, of the wisdom of what the majority of the shareholders vote to do.

As a judicial construct, it is certainly open to the Delaware Supreme Court to eliminate the waste doctrine under Delaware corporate law. The same is not true of appraisal rights that exist by virtue of statute. As discussed earlier, the idea behind appraisal rights is to protect the minority from being forced to go along with the board and the majority of shareholders.[300] This is why appraisal rights are also referred to as dissenters' rights. As long as the legislature thinks it is necessary to protect dissenters from deals favored by the board and a majority of the shareholders, the Delaware Supreme Court has correctly refused to sabotage the legislative scheme by treating mergers approved by disinterested and careful directors and shareholders as conclusively establishing the value of the dissenters' stock.

3. Comparing Litigation: The Problem of Second-Best Solutions

In examining the ability of shareholder approval to achieve the goals of judicial scrutiny, we have considered only half the picture. One must also consider the limitations of judicial scrutiny itself when it comes to achieving its goals and at what costs.

Judges like to repeat that they are not business experts, and so their assessment of the merits of a merger or sale could be worse than that of the shareholders.[301] It is worth noting, however, that the frequent merger litigation in Delaware courts both creates and demonstrates substantial sophistication by Delaware judges in dealing with mergers and acquisitions.[302] As mentioned at the beginning of this Article, it also is no secret that a small industry

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[299] *See supra* note 61.

[300] *See supra* note 247 and accompanying text.

[301] *See, e.g.*, *Corwin*, 125 A.3d at 313 ("[J]udges are poorly positioned to evaluate the wisdom of business decisions . . . ."); Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 901 (Del. Ch. 1999) ("[I]n this day and age in which investors also have access to an abundance of information about corporate transactions from sources other than boards of directors, it seems presumptuous and paternalistic to assume that the court knows better in a particular instance than a fully informed corporate electorate with real money riding on the corporation's performance.").

[302] *See, e.g.*, *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 773–74 (Del. Ch. 2011), *aff'd*, 51 A.3d 1213 (Del. 2012) (presenting a highly sophisticated discussion of what independent directors might do in response to a perceived market overvaluation of the company's stock); Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts*, BUS. L. TODAY, Mar.–Apr. 2008, at 23 ("[J]udges' [on the Delaware Chancery Court] 'experience, both prior to and after becoming judges, gives them an unmatched expertise in the field of corporate law.'").

has developed in litigation challenging the majority of board decisions to merge, thereby imposing what many have referred to as a transaction tax on mergers and acquisitions.[303] Enough has been said on these limits and downsides of merger litigation to avoid the need to belabor the points here. Balancing these limits and downsides of merger litigation against the evidence that directors and senior executives sacrifice shareholder premiums in favor of deals that retain their positions—which is something that shareholder approval often cannot prevent—is an empirical and judgmental question. Some have pointed to a decline in premiums received by shareholders since *Corwin* as suggesting that the court struck the wrong balance.[304]

Returning to the theme about different types of decisions, it is useful to note that courts, unlike shareholders, are not limited to narrow binary decisions (in the case of courts, of liability or not), but rather have the ability to make nuanced or flexible decisions. This is particularly the case in granting injunctive relief, when the court can order more shopping, or modify or eliminate deal protections or other terms.[305] Indeed, the Fisch, Griffith, and Solomon study found evidence that settlements amending merger agreements receive a positive reaction in shareholder votes.[306] This insight, in turn, reinforces the conclusion that *Corwin* is more about remedies than it is about shareholder approval.

This is not to say that *Corwin* might not have gone too far in blocking damage actions. There could be cases in which opportunities for a better deal have been irretrievably lost and no amount of injunctive relief will put Humpty Dumpty back together. In such instances, a little deterrence through a damage award might be entirely appropriate. This is especially so because Section 102(b)(7) waivers, as well as the scienter requirement for imposing aiding and abetting liability upon investment bankers, rule out damages except in extreme cases anyway.[307]

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[303] *See supra* notes 10–11 and accompanying text.

[304] *See, e.g.*, Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 200–01 (2019) (pointing to a 22% decline in premiums paid to selling shareholders).

[305] *See, e.g.*, *Revlon*, 506 A.2d at 184 (enjoining enforcement of lockup, no-shop and termination fee); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 815, 839–43 (Del. Ch. 2011) (enjoining shareholder vote in order to allow more time for competing bids to surface).

[306] *See supra* note 122 and accompanying text.

[307] *See* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 874–75 (Del. 2015) (noting that the enactment of § 102(b)(7) eliminates the possibility of recovering monetary damages for any breach of care and that financial advisors may only be liable for aiding and abetting directors if they act with scienter, not merely with gross negligence).

CONCLUSION

One can certainly question—and indeed I have elsewhere[308]—whether Delaware courts have gone too far in applying heightened scrutiny under *Revlon* to situations in which the decision to sell presented no particular conflict of interest for the directors. To the extent that *Corwin* provides a backdoor curb on applying *Revlon* to entirely disinterested decisions, this may be a good thing. In situations, however, in which the omnipresent specter of director self-interest haunts the transaction—as it does when directors favor a buyer who will retain them—more careful judicial scrutiny of whether the directors picked the best deal, as well as the tactics they use to protect their favored deal, is appropriate.[309] Here, the ability of courts to provide a nuanced and flexible remedy can accord the shareholders protection that the narrow binary choice provided by shareholder approval cannot achieve.[310]

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[308] Gevurtz, *supra* note 50, at 1564–70 (arguing that *Unocal* provides sufficient scrutiny of situations in which directors may be favoring a buyer with whom they will retain their positions, without *Revlon*'s overreach both in terms of applying in situations in which no such conflict exists and in terms of potentially calling for a higher level of scrutiny than *Unocal*).

[309] Gevurtz, *supra* note 190, at 512 (stating that courts should evaluate the reasonableness of board decisions to merge or sell the corporation when directors maintain their positions after the merger or sale). This is not to say that these situations call for more intense scrutiny than *Unocal* would apply to takeover defenses, as under some interpretations of *Revlon*. Again, however, this is a different question than the impact of shareholder approval.

[310] Professor Iman Anabtawi recently made a proposal to address the shareholder's narrow binary choice in approving mergers (which she partially recognizes and labels a bundling problem). In order to invoke *Corwin*, Professor Anabtawi would require separate votes on the process the directors follow in selling the company and the ultimate deal. *See* Anabtawi, *supra* note 304, at 208 (suggesting that shareholders should make separate determinations on the terms of the deal and the board's conduct related to the deal). Although a potential improvement, this still leaves us at two narrow binary decisions that still leave shareholders voting for processes and deals because they are better than no deal at all.