# Delaware's Retreat from Judicial Scrutiny of Mergers

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*This Article evaluates recent dramatic developments in Delaware law surrounding merger litigation and concludes that they have gone too far in limiting the ability to challenge managerial wrongdoing in the takeover context. The past three years have seen a sea change in merger litigation, brought on by the twin earthquakes of the Delaware Supreme Court's decision in* Corwin v. KKR *and the Delaware Court of Chancery's decision in* In re Trulia. *Both of these decisions were inspired by a perceived crisis in merger litigation. By 2015, the percentage of economically significant deals challenged by at least one lawsuit had been hovering at or above 90% for years. The vast bulk of these suits were resolved via "disclosure only" settlements that provided little or no value to stockholders, but secured broad releases from liability for defendants and significant fees for plaintiffs' attorneys. Decades of academic debate over the merits of stockholder litigation had reached a rare degree of consensus: at least with regard to merger lawsuits, the merits were meaningless and litigation had devolved into absurdity.*

*The explosion of dubious merger litigation demanded a response. On the one hand, most prominently in* In re Trulia*, the Court of Chancery took direct and long-overdue measures to remove the incentives that drove the crisis by increasing scrutiny of low-value settlements and accompanying releases of liability. On the other hand, a series of ill-considered decisions culminating in* Corwin *allowed defendants to avoid judicial scrutiny altogether by adopting various procedural safeguards, despite the lack of evidence that these safeguards will be effective. These decisions will almost certainly reduce merger litigation but are likely to do so relatively indiscriminately, blocking frivolous and meritorious claims alike. This Article concludes that the procedural safe harbors created in* Corwin *and its brethren should be reconsidered as unjustified by the recent merger litigation crisis, and inconsistent with longstanding Delaware law and the realities of merger practice.*

## INTRODUCTION

Despite its youth, the twenty-first century has already seen two sea changes in Delaware merger litigation. The waters rose, and now the waters are falling back. After hovering around 40% for years, the percentage of merger deals challenged by at least one class action lawsuit surged after 2008, remaining over 90% for several years and even approaching 95% in some years.[1] Then, just as abruptly, the wave

1. *See* Matthew D. Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 620 (2018) [hereinafter *Shifting Tides*]; Matthew D. Cain & Steven Davidoff Solomon,

crested and began to recede. By 2016, the percentage of deals facing a lawsuit dropped to 73%, with suits in Delaware cut nearly in half.[2] Early data suggest the rapid drop has continued into 2017, particularly in the Delaware Court of Chancery.[3] The factors leading to the sharp rise in merger litigation are subject to some dispute. The recent drop, however, was manifestly the result of recent judicial actions in Delaware.

These actions came in response to a rare degree of consensus among both academics and practitioners alike: the system was clearly broken. Nearly every economically significant deal resulted in fiduciary duty litigation, and the vast bulk of such cases resolved with little or no benefit to stockholders—but with handsome fees for the lawyers and broad releases for the defendants.[4] Such a system could provide neither meaningful deterrence of wrongdoing nor meaningful compensation for aggrieved stockholders, and ultimately served no plausible social purpose other than as an employment program for lawyers.

The response of the Delaware courts was two-pronged and almost immediately effective at reducing merger litigation. The first prong—which I argue below was a mistake—was a substantive relaxation of the standard of review for merger-related claims, making it more difficult for plaintiffs to prevail.[5] A long series of cases had gradually weakened the entire fairness standard that had been applied to majority stockholder squeeze-outs since the landmark *Weinberger* decision in 1983.[6] This weakening reached its culmination in the 2014 case *Kahn v. M&F Worldwide Corp.* (*MFW*).[7] In *MFW*, the Delaware Supreme Court held that approval by an empowered committee of independent directors and a majority of the minority stockholder vote would entitle a majority stockholder squeeze-out to business judgment rule deference.[8]

The next year, the court carried the reasoning behind *MFW* to its logical conclusion, holding in *Corwin v. KKR Fin. Holdings LLC* (*Corwin*) that "when a merger that is not subject to the entire fairness standard of review has been

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*Takeover Litigation in 2014* (Feb. 20, 2015) (unpublished manuscript, available at https://ssrn.com/abstract=2567902 [https://perma.cc/ZG3A-XPUD]).

2. *See Shifting Tides*, *supra* note 1, at 608, 620.

3. *See, e.g.*, John A. Neuwirth et al., *Impact of 'Trulia' on Merger Litigation in State and Federal Courts*, DEL. BUS. CT. INSIDER (Nov. 29, 2017); Jeffrey Wolters & Nathan Emeritz, *Delaware Litigation 2017: Assessing Trends at Year-End*, LAW360 (Dec. 20, 2017), https://www.law360.com/articles/996247/print?section=delaware [https://perma.cc/R4SH-3B8M].

4. *See, e.g.*, Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 165 (2015) [hereinafter *A Great Game*]; Jill Fisch, Sean Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557 (2015); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L. J. 829 (2014).

5. *See generally* Steven Davidoff Solomon & Randall S. Thomas, *The Rise and Fall of Delaware's Takeover Standards*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (Steven Davidoff Solomon & Randall Stuart Thomas, eds., 2019) [hereinafter *Rise and Fall*].

6. Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983).

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

8. *Id.*

approved by a fully informed, uncoerced majority of the disinterested stockholders," the appropriate standard of review in a post-closing damages action is the business judgment rule, rather than enhanced scrutiny under either *Revlon*[9] or *Unocal*.[10] In early 2016, the Court of Chancery extended *Corwin* to provide business judgment rule deference to a two-stage merger involving a tender offer, where a majority of shares had been voluntarily tendered.[11] As a result, class actions seeking post-closing damages are effectively a dead letter unless the plaintiff can show a deficiency in disclosure that would render the stockholder vote (or decision to tender) uninformed.[12]

The second prong of the Delaware courts' response was to target the engine that powered the merger litigation crisis: low-value settlements accompanied by broad releases. In a series of cases, the Court of Chancery judges began to criticize, and ultimately to reject, low-value settlements—particularly those providing only additional disclosure, with no financial recovery—accompanied by broad releases of liability.[13] This judicial antipathy was ultimately formalized in Chancellor Bouchard's January 2016 decision in *In re Trulia* (*Trulia*), which rejected a settlement providing only additional disclosures and a broad release.[14] The Chancellor went on to make clear that, going forward, such disclosure-only settlements are disfavored, and will only be approved if the additional disclosures are "plainly material" and any accompanying release of liability is "narrowly circumscribed."[15]

These developments have, not surprisingly, been greeted with wide acclaim by the M&A bar and in the deal-making community generally. Academic critics of merger litigation have also, for the most part, welcomed them.[16] For example, two

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9. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985).

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

11. *In re* Volcano Corp. Stockholder Litig., 143 A.3d 727 (Del. Ch. 2016).

12. *See Shifting Tides*, *supra* note 1, at 4 ("The net effect of [*Corwin* and *Volcano*] was to limit substantially the availability of a post-closing suit for damages. Only if the target failed to disclose the alleged improprieties prior to shareholder approval of the transaction would the court allow a claim to proceed.").

13. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 74–75, *In re* Aruba Networks Stockholder Litig., C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015); Transcript of Settlement and Hearings of the Court at 14, *In re* Riverbed Tech., Inc. Stockholders Litig., C.A. No. 10484-VCG, (Del. Ch. Sept. 17, 2015). As early as 2011, then-Chancellor Strine—now Chief Justice of the Delaware Supreme Court—remarked on the anomalous nature of the so-called "disclosure-only" settlement:

> [I]t's an odd thing about this job that you can award a lot of money to someone for a case and award money to an attorney when, in other contexts of the law—no medical malpractice plaintiff's lawyer walks out of cases with money in her pocket and turns on the client and says, "Well, remember, you've got that explanation about why the doctor made his choice in the operating room, and I know you feel a lot better. You don't have any money, but you know why the doctor made the choice he made with the scalpel, and I've got a couple hundred thousand dollars.

Transcript of Settlement Hearing and Application for Attorneys' Fees and Costs and the Court's Ruling at 30, *In re* Danvers Bankcorp, Inc. S'holders Litig., Consol. C.A. No. 6162-CS (Del. Ch. Oct. 19, 2011).

14. *In re* Trulia, 129 A.3d 884 (Del. Ch. 2016).

15. *Id.* at 898.

16. The ultimate holding of *MFW* had been urged years before by several prominent corporate law scholars. *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*,

of the most prominent scholars of merger litigation, Steven Davidoff Solomon and Randall Thomas,[17] have recently depicted the move away from heightened standards of review as a largely justified response to the changing corporate governance environment. They point to three factors in particular: First, the set of strong norms for deal practice that has taken root, following the roadmap provided by three decades of Delaware case law; second, the rise of institutional and activist investors better able to protect themselves through informed voting; and third, the increasing prevalence of independent directors, in part spurred by federal securities law.[18]

In addition to these justifications, some have argued that *Corwin* does not really represent a change in the law at all. Most prominent is the author of the *Corwin* opinion, Chief Justice Strine, himself. The opinion in *Corwin* is relatively brief and portrays itself as a fairly pedestrian application, rather than a re-imagining, of prior precedent. In subsequent public statements, as well, the Chief Justice has argued that *Corwin* is simply a straightforward application of long-standing Delaware doctrine.[19] Under this view, the heightened scrutiny provided by *Unocal* and *Revlon* was never intended to apply to post-closing damages in the first place. As Chief Justice Strine wrote in *Corwin*, "*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind."[20]

Given the amount of commentary *Corwin* has provoked, the claim that it is nothing new is, on its face, difficult to credit.[21] It is, however, true that *Corwin* follows directly from *MFW*. Once you hold that the procedural trappings of an arm's-length deal entitle a majority stockholder squeeze-out to business judgment

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152 U. PA. L. REV. 785, 839–40 (2003); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 60–61 (2005).

17. *See Rise and Fall*, *supra* note 5. Solomon has co-authored a number of influential articles chronicling and critiquing the boom in merger litigation. *See, e.g.*, *A Great Game*, *supra* note 4; Cain & Solomon, *supra* note 1; Fisch, Griffith & Solomon, *supra* note 4. Among his many excellent articles on merger litigation, a 2004 study co-authored by Thomas first drew attention to the increasing prevalence of merger class actions. *See* Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004).

18. *See Rise and Fall*, *supra* note 5, at 2.

19. At the 2017 Tulane Corporate Law Institute conference, for example, Chief Justice Strine stated that "[i]f you read the footnote in *Corwin*, where there's 57 prior cases cited, there's nothing new about this. And it's nothing new either that it applies to tender offers or to the vote, because the prior cases, if you read the old law—the old time religion—if you accepted the benefits of the transaction, you could not stultify yourself and then sue on the transaction." *M&A Practice: In a New Age*, 17 M&A J. 1, 4–5 [hereinafter *M&A Practice: In a New Age*].

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

21. At the 2017 Tulane Corporate Law Institute conference, in reference to Chief Justice Strine's claim that *Corwin* did not represent a change, the moderator of the next panel—dedicated to the aftermath of *Corwin*—delicately noted that "[w]hile that may be true as a matter of law, I think members of the panel would certainly agree that this past year has seen some very, very significant developments in Delaware corporate law." *M&A Practice: In a New Age*, *supra* note 19, at 7.

rule deference, it would be strange indeed to deny such deference to an actual arm's-length deal.[22] But whether *MFW* itself is a faithful continuation of pre-existing law is more debatable. It is certainly true that *Revlon*, *Unocal*, and their direct descendants are not post-closing damages cases, and that Delaware case law is surprisingly mum on the standard of review for such cases. This silence, however, is largely an artifact of such cases having historically been almost universally dismissed or settled before trial.[23] It is a mistake to infer too much from this silence.

In a larger sense, the question of whether or not *MFW* and *Corwin* are consistent with prior law is of little consequence, except as a window into the Delaware Supreme Court's thinking. As then-Chancellor Strine wrote in *MFW*, "tradition should admittedly not persist if it lacks current value."[24] The real question is simply whether business judgment rule deference—making a challenge effectively impossible—is warranted whenever a merger has been approved by independent directors and a stockholder vote.

It is not.[25] To understand why, it is necessary to consider why merger-related decisions merit enhanced scrutiny in the first place. Enhanced scrutiny is necessary because the merger context inevitably creates conflicts of interest between management and directors on the one hand and stockholders on the other. If these conflicts were limited to management's desire to entrench themselves by fending off hostile offers or erecting deal protections around a sale to a favored bidder (the situations confronted in *Unocal* and *Revlon*) then limiting enhanced scrutiny to the pre-closing stage—when defensive measures can be evaluated in real-time—would be sensible. But merger-related conflicts are not so contained.

Two additional conflicts are particularly salient. First is the ever-present risk that management will seek to divert as much of the proceeds of the merger as

22. Vice Chancellor J. Travis Laster made precisely this point in an article a year before *Corwin* was written. *See* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443 (2014).

23. Indeed, it is difficult to see how some of the most prominent settlements of recent decades could have been reached under *Corwin*. *See, e.g.*, *In re* El Paso Corp. S'holder Litig., C.A. 6949-CS (Del. Ch. 2012) (settling merger-related claims for $110 million); *In re* Del Monte Foods Co. S'holder Litig., C.A. 6027-VCL (Del. Ch. 2011) (settling merger-related claims that for $89.4 million). Under *Corwin*, the conflicts at issue in *El Paso* and *Del Monte* could simply have been disclosed and would have been cleansed in the likely event that the stockholders still voted to approve the mergers.

24. *In re* MFW S'holders Litig., 67 A.3d 496, 527 (Del. Ch. 2013).

25. Candor compels me to acknowledge at the outset that this conclusion may appear to be in tension with the arguments I have made elsewhere that the stockholder class action ought to be eliminated altogether. *See, e.g.*, Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with a Market for Legal Claims*, 101 IOWA L. REV. 1323 (2016); Charles R. Korsmo & Minor Myers, *Competition and the Future of M&A Litigation*, 100 IOWA L. REV. BULL. 19 (2014). As discussed more fully below, my views have not substantially changed. In my prior work, I have argued that the merger class action should be eliminated and *replaced* by either a strengthened appraisal remedy or a market for legal claims (via elimination of the contemporaneous ownership requirement). *See id.* In reality, the contemporaneous ownership requirement remains in place, and—as is discussed more fully in my recent paper with Minor Myers—Delaware courts have moved to weaken the appraisal remedy rather than strengthen it. *See* Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 Emory L.J. 220 (2018).

possible to themselves, via employment agreements, change-in-control payments, parachute packages, or other transaction-related side-deals. Second is that, even leaving aside the possibility of side-payments not available to stockholders, management will often have a lower reservation price than diversified public stockholders, by virtue of their concentrated economic and human capital investments in the firm. As non-diversified investors, managers will be rationally risk-averse, and therefore willing to sell the firm at a price below what diversified stockholders would hold out for if given the opportunity to negotiate. As discussed below, neither of these conflicts is well-suited to regulation by pre-closing preliminary injunction.

Nonetheless, such conflicts only warrant enhanced judicial scrutiny if they cannot be policed adequately by other monitors. The conclusion drawn by the *MFW* and *Corwin* courts is that independent directors and minority stockholders can perform such a monitoring function, rendering judicial scrutiny superfluous.

This conclusion, however, is incorrect. It flies in the face of a substantial body of empirical literature on the inefficacy of independent directors as informed and motivated monitors of insider misbehavior. It also overstates the cleansing effect of a stockholder vote. Fundamentally, a merger vote is typically a Hobson's choice—approve the merger as is or reject it altogether—rather than anything resembling a traditional ratification. The stockholders' judgment that a deal is better than no deal should not be mistaken for a judgment that the deal is fair, let alone the "best price available," as *Revlon* tasked boards with seeking.[26] Nor should stockholders be presumed to be informed, even in the absence of colorable disclosure violations. The rise of institutional shareholding has not substantially changed this equation. While institutional investors may be sophisticated, they can rarely be considered informed as to fundamental value. Indeed, an increasing percentage of shares are held by passive index funds that make little or no attempt to assess the value of individual firms. And even active fund managers labor under a huge information deficit in relation to the managers who control what information will be disclosed in the merger proxy.[27]

Nor can we look to industry norms as a bulwark against managerial opportunism. It is certainly possible that the deal-making norms built up since the 1980s will persist even after the legal landscape has shifted to eliminate the possibility of post-closing damages. It seems less likely, however, that managers and directors were moved to obey these norms by their respect for the wisdom of Delaware's judges than that they were motivated by fear of their sanctions. As that fear subsides, it would be naïve to expect these norms to persist unaltered. Indeed, early evidence from the post-*Corwin* era shows that merger premia have fallen to

26. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1985).

27. *See* Chesapeake Corp. v. Shore, 771 A.2d 293, 327 (Del. Ch. 2000) ("[O]ne hopes that directors and officers can always say that they know more about the company than the company's stockholders—after all, they are paid to know more.").

historic lows, and the percentage of deal value paid out to managers as change-of-control payments has spiked.[28]

This Article proceeds in five parts. Part I briefly summarizes the recent surge in merger litigation and the crisis atmosphere it created. Part II traces the judicial response, primarily in *Trulia* and a series of cases culminating in *MFW* and *Corwin*. Part III situates *MFW* and *Corwin* in Delaware merger law, and canvasses the main justifications for their holdings. Part IV critiques these justifications, concluding that these cases represent an unwarranted weakening of judicial scrutiny of merger transactions. Part V concludes, offering some suggestions for how to limit the damage wrought by *Corwin*.

## I. THE MERGER LITIGATION CRISIS

In order to understand the Delaware courts' recent takeover jurisprudence, it is first necessary to get some sense of the context. Accordingly, this Section does two things. First, it provides a brief account of the ubiquity of takeover litigation in recent years and the character of that litigation.[29] Second, it documents the increasing evidence that this litigation provided little benefit to stockholders and the growing sense that merger litigation was in urgent need of reform.

### *A. The Merger Litigation Boom*

Class action lawsuits challenging director actions in acquisitions are not a new phenomenon.[30] At least since the 1980s, and the landmark cases of *Unocal* (applying enhanced scrutiny to takeover defenses)[31] and *Revlon* (specifying a board's duty to obtain the highest price reasonably available and subjecting their efforts to enhanced scrutiny),[32] merger challenges have been one of the rare contexts where stockholder plaintiffs could hope to avoid application of the highly deferential business judgment rule.

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28. *See* Matthew Schoenfeld, *The High Cost of Fewer Appraisal Claims in 2017: Premia Down, Agency Costs Up*, at 4–5 (2017). One should be cautious in interpreting these results. In particular, it is possible that both low premia and high change-in-control payments are artifacts of unusually high market valuations in 2017. On both metrics, however, 2017 mergers look substantially worse than mergers during the last market peak in 2007. *See id.* at 4.

29. For a more complete discussion of the historical data on takeover litigation, see *A Great Game*, *supra* note 4; *Shifting Tides*, *supra* note 1; and Matthew D. Cain & Steven Davidoff Solomon, *Takeover Litigation in 2015* (Jan. 14, 2016) (unpublished manuscript) (on file with the Berkeley Center for Law, Business and the Economy), http://ssrn.com/abstract=2715890 [https://perma.cc/5YNQ-UGNU]. Much of the data presented in this section is drawn from these sources.

30. *See A Great Game*, *supra* note 4, at 111 ("Takeover litigation has existed for some time in Delaware.").

31. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) ("Because of the omnipresent specter that a board may be acting primarily in its own interests [by enacting takeover defenses], rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination at the threshold before the protections of the business judgment rule may be conferred."); *Rise and Fall*, *supra* note 5, at 3 (*Unocal* "held that such defensive actions would be subject to a heightened standard of review.").

32. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1985).

Earlier data is scarce, but an influential study found that by the turn of the century, "the vast bulk" of state court stockholder litigation consisted of "class actions against public companies challenging director action in an acquisition."[33] At the time, the authors of the study were cautiously optimistic about this development. On the one hand, they found some of the classic markers of litigation agency costs, suggesting the litigation may have been serving the interests of the plaintiffs' lawyers more than the interests of the stockholders.[34] On the other hand, they found that—unlike with securities fraud class actions—a substantial number of merger cases led to meaningful monetary settlements, and that these settlements appeared to correlate with the potential merit of the claims.[35]

Optimism faded, however, in the face of subsequent developments. In early 2012, Matthew Cain and Steven Davidoff Solomon released a working paper documenting a recent, and massive, increase in the incidence of merger litigation.[36] As late as 2007, fewer than 40% of transactions (96 of 248) were challenged by a fiduciary duty class action.[37] This volume of litigation may already have been excessive—that so many mergers might involve culpable breaches of fiduciary duty strains credulity. Nonetheless, the fact that most mergers went unchallenged suggests at least some degree of restraint and discrimination on the part of plaintiff's lawyers. This restraint did not last. By 2009, Cain and Solomon found 85% of transactions (62 out of 73) faced at least one suit.[38] By 2011, the proportion had reached 92% (117 out of 127), with an average of five lawsuits being brought against each transaction.[39] The inescapable conclusion was that merger challenges were now being brought virtually indiscriminately.[40]

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33. Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 137 (2004).

34. *See id.* at 138 ("For example, in most cases multiple lawsuits with virtually identical complaints are quickly filed, usually within a few days of the announcement of the proposed acquisition. Over 75 percent of the time, the cases are filed by a small, well-defined group of plaintiff's law firms in the name of a professional cadre of plaintiff shareholders.").

35. *See id.* ("[W]e find that there were large monetary settlements paid to shareholders in many of these cases . . . ."); *id.* at 138–39 ("Furthermore, beneficial settlements…are concentrated in cases where a majority shareholder is squeezing out minority public shareholders on disadvantageous terms . . . [and] are more likely to occur in cases where the initial offer price was substantially lower . . . .").

36. The working paper would ultimately become *A Great Game*, *supra* note 4.

37. *Id.* at 112.

38. *Id.*

39. *Id.* at 112–13.

40. Even prominent plaintiffs' attorneys, while counseling against drastic reforms, admitted that "it is troubling that a majority of public corporation mergers results in a lawsuit." 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, 491 (2016).

### *B. The Building Consensus for Change*

The disposition of these (suddenly ubiquitous) merger claims gave a clue to the incentives that drove them. Approximately 28% of such claims were dismissed in one form or another.[41] The remaining 72% were all settled, without a single case from Cain and Solomon's sample proceeding to final judgment.[42] Of the settled cases, nearly 80% were so-called "disclosure only" settlements, where the only relief for the stockholders is an agreement by the parties to the merger to provide additional or corrected disclosures.[43] Despite the lack of financial relief, such settlements resulted in an average of $750,000 being awarded to the plaintiff's attorneys. In only a handful of cases, from a sample covering seven years and hundreds of cases, did the plaintiff's attorney even claim that the suit had resulted in additional cash for stockholders.[44]

The incentives for the plaintiff's lawyers were obvious enough, but the system had something in it for defendants, as well. As Professors Griffith and Lahav pointed out, this indiscriminate pattern of litigation benefited defendants by allowing them to secure global releases of all potential fiduciary claims at relatively low cost—less than the cost of actually litigating even a frivolous claim.[45] As a result, frivolous claims abounded and potentially meritorious claims were sold off to the lowest bidder via a cheap settlement.[46] This was a "great game," indeed—a dynamic that Chief Justice Strine recently referred to as "stinky-as-cheese."[47]

Cain and Solomon's working paper quickly became a minor sensation,[48] prompting articles in the mainstream press calling attention to the problem of merger litigation.[49] It was also referenced in a parade of publications by prominent M&A law firms[50] and was the centerpiece of a paper issued by the U.S. Chamber

41. *A Great Game*, *supra* note 4, at 115.

42. *Id.*

43. *Id.*

44. *Id.*

45. Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053, 1057–58 (2013).

46. As James Cox and Randall Thomas have observed, faced with the risks and costs of litigation, risk-averse plaintiffs' attorneys may be tempted to settle meritorious cases for too little. *See* Cox and Thomas, *Does the Plaintiff Matter?*, 106 COLUM. L. REV. 1587, 1593 ("[A] settlement offer that provided recovery of the attorney's tangible and opportunity costs could loom larger than the prospect of aggressively pursuing the action to a more lucrative prospective judgment or settlement."). This incentive to settle quickly is exacerbated by the possibility that a duplicate claim brought in another jurisdiction may result in a settlement and release, with the fee award going to another firm.

47. *M&A Practice: In a New Age*, *supra* note 19.

48. Or whatever the legal academia equivalent of a "sensation" is—it was not exactly Beatlemania.

49. *See, e.g.*, Allison Frankel, *Must Read: Deal Prof's Study of Competition for M&A Litigation*, REUTERS (Jan. 17, 2012), http://blogs.reuters.com/alison-frankel/2012/01/17/must-read-deal-profs-study-of-competition-for-ma-litigation [https://perma.cc/3YSW-AXKA].

50. *See, e.g.*, Adam O. Emmerich & Trevor S. Norwitz, *An Antidote to Multiforum Shareholder Litigation*, *in* THE INTERNATIONAL COMPARATIVE LEGAL GUIDE TO: MERGERS & ACQUISITIONS 2014 (8th ed.).

of Commerce Institute for Legal Reform advocating for restrictions on merger litigation, which it called a "merger tax" imposed by plaintiff's lawyers.[51] Understandably, these critics focused on the most obvious problem revealed by Cain and Solomon's data—the manifest proliferation of nuisance litigation. The Chamber of Commerce paper, which is characteristic of the criticism, argued that recent merger litigation represented "extortion through litigation," threatening to "obstruct[] economically beneficial transactions," and demanded Congressional action.[52] With a few notable exceptions,[53] the second problem suggested by the data—that meritorious claims were buried in the avalanche of nuisance claims and settled cheaply rather than being litigated diligently—was rarely a focus.[54]

By the time a subsequent study found that the additional disclosures resulting from merger litigation provided, on average, no meaningful benefit to stockholders,[55] Delaware courts had already begun openly questioning the value of much of the merger litigation being filed, and commentators were arguing that merger litigation was fundamentally broken.[56] The ensuing judicial pushback is described in the next Section.

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51. *See The Trial Lawyers' New Merger Tax: Corporate Mergers and the Mega Million-Dollar Litigation Toll on Our Economy*, U.S. CHAMBER INST. FOR LEGAL REFORM (Oct. 24, 2012), http://www.instituteforlegalreform.com/resource/the-trial-lawyers-new-merger-tax-corporate-mergers-and-the-mega-million-dollar-litigation-toll-on-our-economy [https://perma.cc/KKZ5-DZU5].

52. *Id.* at 1.

53. *See* Griffith & Lahav, *supra* note 45; *see also* Joel E. Friedlander, *How Rural/Metro Exposes the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 878 (2015) (warning that meritorious cases may be settled too cheaply).

54. Post-*Trulia* developments suggest that this second dynamic (high-value claims being settled and released too cheaply) may be at least as important as the first (low-value claims being settled for nuisance value) in driving merger litigation. Around the same time as *Trulia*, the Delaware legislature formally allowed corporations to enact forum-selection bylaws by simple board action. Such bylaws could, for example, require any stockholder suit to be brought in Delaware. Post-*Trulia*, however, defendants have not, for the most part, used forum-selection bylaws to block the migration of merger litigation to non-Delaware jurisdictions. This suggests that defendants value the ability to secure the kind of low-cost release of claims no longer tolerated in Delaware. *See, e.g.*, William B. Chandler III & Anthony A. Rickey, The Trouble with Trulia: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to the Overlitigation of Corporate Claims (Apr. 4, 2017) (working paper); Sean J. Griffith, Private Ordering Post-Trulia: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't 2 (Fordham Law Legal Studies, Research Paper No. 2855950) (noting that "defense counsel must be seen as complicit in the out-of-Delaware dynamic because they have failed to exercise Exclusive Forum bylaws to bring the litigation back to Delaware.").

55. *See* Fisch et al., *supra* note 4. (finding that, on average, additional disclosures from such settlements had no discernible effect of subsequent stockholder voting and concluding that these settlements were of no value).

56. *See, e.g.*, Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 852 (2016) (referring to deal litigation as a "problem [that] has reached crisis proportions"); Marc Wolinsky & Ben Schireson, *Deal Litigation Run Amok: Diagnosis and Prescriptions*, 47 REV. SEC. & COMM. REG. 1, 1 (Jan 8, 2014) (arguing that "the system is broken, that shareholder suits are being filed regardless of the merits, and that shareholder plaintiffs are imposing a dead weight on society").

## II. THE JUDICIAL RESPONSE TO THE MERGER LITIGATION BOOM

The Delaware judiciary's response to the merger litigation boom has consisted of two prongs, which have each developed over a period of years, largely independent of one another. First, in a series of cases culminating in *Trulia*, the Court of Chancery has gradually imposed greater scrutiny on merger litigation settlements, ultimately refusing to approve settlements that do not provide clear benefits to stockholders. Second, in a series of cases culminating in *Corwin*, the Delaware Supreme Court has weakened substantive scrutiny of directors' merger-related decisions, providing a deferential business judgment rule standard of review where certain procedural safeguards are in place. These judicial developments are summarized in this Section.

### *A. The Road to Trulia*

Because merger class actions are representative suits, the court must approve settlements.[57] As a result, it has always been possible for a presiding judge to reject the kind of low-value or collusive settlements that fueled the merger boom. And, in fact, Delaware judges have for years complained about and criticized the merger litigation settlements that have come before them.[58] The judges' comments at settlement hearings suggest they were well aware of the pathologies developing in merger litigation well before they had been fully documented in academic scholarship.

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57. *See, e.g.*, *In re* Activision Blizzard, Inc. S'holder Litig., WL 2438067, at *12 (Del. Ch. May 21, 2015) (concluding that the potential divergence between the personal interests of the attorneys conducting the litigation and the interests of the class or corporation they represent means that "the Court of Chancery must . . . play the role of fiduciary in its review of these settlements." (quoting *In re* Resorts Int'l S'holders Litig. Appeals, 570 A.2d 259, 266 (Del. 1990))); *In re* Nat'l City Corp. S'holders Litig., C.A. No. 4123-CC, 2009 WL 2425389, at *5 (Del. Ch. July 31, 2009) ("The Delaware Supreme Court has unequivocally held that, where plaintiffs and defendants agree upon fees in settlement of a class action lawsuit, a trial court 'must make an independent determination of reasonableness' of the agreed to fees." (quoting Goodrich v. E.F. Button Grp., Inc., 681 A.2d 1039, 1045–46 (Del. 1996))).

58. *See, e.g.*, Transcript of Settlement Hearing at 33, Roffe v. Eagle Rock Energy GP, L.P., C.A. 5258-VCL (Del. Ch. Oct. 28, 2010) (likening settlements providing a release of claims in exchange for additional disclosures to "using [the] Court to facilitate the sale of indulgences, . . . excusing the defendants from any of their actual or potential sins."); Transcript of Courtroom Status Conference at 19, Scully v. Nighthawk Radiology, C.A. No. 5890-VCL (Del. Ch. Dec. 17, 2010) (explaining that "plaintiffs' lawyers have been subjected to criticism for the practice of suing on the announcement of every deal, then agreeing to global disclosure statements. I've criticized you all for it. My colleagues have criticized you all for it."); Transcript of Settlement Hearing at 14, *In re* Monogram Biosciences, Inc. S'holders Litig., C.A. No. 4703-CC (Del. Ch. Jan. 26, 2010) (noting the "continuing pattern of people just challenging deals, basically raising sort of increasingly marginal disclosure claims . . . [a]nd then . . . settl[ing] at the original price"); Transcript of Settlement Hearing at 25, Smith v. Curagen Corp., C.A. No. 4670-VCS (Del. Ch. Nov. 9, 2009) (noting the pattern of low-value merger litigation and concluding that "[t]he incentive system that that creates is not, in my view, wholesome").

Nonetheless, until very recently the Court of Chancery was hesitant to reject settlements that all parties appearing before the court favored,[59] even when the perverse incentives fostered by such settlements were fairly clear.[60] As of 2013, a researcher was able to find "only a few instances where the Court refused to approve a disclosure-only settlement."[61] Instead of rejecting settlements outright, the typical pattern was for the judge to grumble about the low-value relief and broad release, but nonetheless approve the settlement after awarding the plaintiffs' attorneys somewhat lower fees than requested.[62]

Only in 2015 did the Court of Chancery begin to take decisive action to change the settlement dynamic in merger litigation. In September of that year, Vice Chancellor Glasscock was faced with approving or rejecting a disclosure-only settlement resolving litigation challenging the acquisition of Riverbed Technology.[63] The Vice Chancellor initially followed the traditional pattern. He characterized the benefit to the class as "a peppercorn, a positive result of small therapeutic value," and noted that "the breadth of the release is troubling."[64] Nonetheless, he ultimately approved the settlement—after knocking the plaintiffs' attorneys' award down to $300,000 from a requested $500,000. In this regard, the case resembled so many that went before it. Glasscock then, however, fired a shot across the bow of merger litigants. First, he emphasized that he was only approving the settlement because the parties had clearly proceeded in "reasonable reliance . . . on formerly settled practice in this Court."[65] The Vice Chancellor, however, then put litigants on notice that they should not do so going forward. He noted "that this [reliance] factor . . . will be diminished or eliminated going forward in light of this

59. As Henry Friendly remarked, "[o]nce a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend [their] joint handiwork." Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting).

60. *See* Transcript of Motion for Class Certification, Settlement and Attorneys' Fees and the Court's Ruling at 37, Becker v. Am. Commercial Lines Inc., C.A. No. 5919-VCL (Del. Ch. Sept. 9, 2011) ("Historically, we have tried to err on the side of allowing defendants to dispose of weak cases by entering into [disclosure only] settlements like this. I think, certainly, the Chancellor [Strine] and I have commented on the potentially bad incentives that that creates systemically in terms of encouraging people to file suit on these types of actions and in terms of allowing defendants to obtain broad releases in these types of actions.").

61. *See* Phillip R. Sumpter, *Adjusting Attorneys' Fee Awards: The Delaware Court of Chancery's Answer to Incentivizing Disclosure-Only Settlements*, 15 U. PA. J. BUS. L. 669, 675 n.22 (2013). Sumpter cites only two such cases. *See In re* SS & C Techs., Inc. S'holders Litig., 911 A.2d 816 (Del. Ch. 2006); *In re* FLS Holdings, Inc. S'holders Litig., 1993 WL 104562 (Del. Ch. Apr. 21, 1993). In both cases, the settlements were rejected, in part, for failure to demonstrate diligent investigation of potentially meritorious claims.

62. *See* Sumpter, *supra* note 61, at 704–28 (describing the dynamics behind fee awards in merger litigation).

63. *See In re* Riverbed Tech., Inc., S'holders Litig., C.A. No. 10484-VCG (Del. Ch. Sept. 17, 2015).

64. *Id.* at *5–6.

65. *Id.* at *6.

Memorandum Opinion and other decisions of this Court."[66] In doing so, he indicated that what was "formerly settled practice" was not likely to remain so in the future.

Only three weeks later, Vice Chancellor Laster went a step further, actually rejecting a proposed settlement of litigation arising out of the acquisition of Aruba Networks by Hewlett-Packard, and then dismissing the case entirely on grounds of inadequate representation of counsel.[67] Again, the Vice Chancellor criticized the pairing of minimally useful disclosure for stockholders and broad global releases of liability for defendants.[68]

By this point, it was clear that something had to give, and the final step came in January of 2016, in the form of Chancellor Bouchard's decision in *Trulia*. In it, the Chancellor fingered the courts' practice of approving disclosure-only settlements as one of the driving "dynamics that ha[s] fueled disclosure settlements of deal litigation"[69] and announced an intent to put an end to these dynamics by applying greater scrutiny to such settlements going forward. Bouchard cautioned attorneys to "expect that disclosure settlements are likely to be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission."[70] He emphasized that by "plainly material," he meant "that it should not be a close call."[71] Bouchard also emphasized that settlements would not be approved unless "the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than the disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently."[72]

### *B. The Road to Corwin*

The Delaware courts have spent much of the past few decades slowly retreating from the intensified scrutiny of merger-related decisions promised by seminal 1980s cases like *Weinberger*, *Unocal*, *Van Gorkom*, and *Revlon*.[73]

66. *Id.* (citing *In re* Susser Holdings Corp. S'holder Litig., C.A. No. 9613-VCG (Del. Ch. Sept. 15, 2015); Acevedo v. Aeroflex Holding Corp., C.A. No. 9730-VCL (Del. Ch. July 8, 2015); *In re* Intermune, Inc., S'holders Litig., C.A. No. 10086-VCN (Del. Ch. July 8, 2015)).

67. *In re* Aruba Networks, Inc. S'holder Litig., C.A. No. 10765-VCL (Del. Ch. Oct. 9, 2015).

68. Vice Chancellor Laster suggested that the type of "reliance interest in past practice" that may have applied in *Riverbed* did not apply, given his own prior record of aggressively questioning disclosure-only settlements accompanied by broad releases. *Id.*

69. *In re* Trulia, 129 A.3d 884, 894 (Del. Ch. 2016).

70. *Id.* at 898.

71. *Id.*

72. *Id.*

73. *See Rise and Fall*, *supra* note 5, at 5 ("[T]he courts gradually backed away from the interventionist approach and new standards of the 1980s. The result over a 25-year period spanning from the 1990s until today are clear, a wholesale change in the application and use of these standards.").

*Unocal* was the first to be scaled back by the judiciary.[74] As originally conceived, *Unocal* doctrine promised substantial scrutiny of management's use of defensive tactics in the face of a hostile bid, requiring the board to demonstrate 1) that the hostile bid presented a threat to the corporation and 2) that the defensive measures were reasonable and proportionate to that threat.[75] As applied, however, these two prongs have become increasingly easy for boards to satisfy. First, in *Paramount Communications Co. v. Time, Inc.*,[76] the Delaware Supreme Court recognized "substantive coercion" as a justification for defensive action, ensuring that boards could easily satisfy the first requirement of *Unocal* by simply declaring the hostile offer inadequate.[77] The second prong of *Unocal* was also later weakened, most prominently in *Unitrin, Inc. v. American General Corp.*, which adopted a deferential approach to assessing proportionality.[78] By 2001, Professors Gordon Smith and Robert Thompson could survey the relevant case law and judged that *Unocal* was "a dead letter."[79] This judgment was vindicated in 2011, when Chancellor Chandler (reluctantly) refused to order redemption of a poison pill even in the face of a hostile offer that stockholders manifestly and reasonably regarded as fair.[80]

The *Revlon* doctrine, too, has become notably weaker over time, most prominently in *Lyondell Chemical Co. v. Ryan*.[81] In *Revlon* itself, the Delaware Supreme Court applied *Unocal*'s "enhanced scrutiny" to the target board's efforts to get "the best price for the stockholders at a sale of the company,"[82] with a focus

74. *Van Gorkom*, of course, was met by rapid legislative action in the form of Sec. 102(b)(7), allowing corporations to adopt charter provisions exculpating directors from monetary liability for breaches of the duty of care. Virtually all public corporations have adopted such provisions. *See* Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkom*, 34 GA. L. REV. 477, 490, 497–503 (2000) (finding that ninety-eight out of a sample of 100 Fortune 500 companies had adopted such provisions, including all fifty-nine Delaware-incorporated companies in the sample).

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

76. Paramount Commc'ns Co. v. Time, Inc., 571 A.2d 1140 (Del. 1989).

77. *See* Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: "Sacred Space" in Corporate Takeovers*, 80 TEX. L. REV. 261, 291 ("[T]he Delaware Supreme Court sanctioned the use of defensive mechanisms in the face of an offer at a price perceived to be inadequate. By approving substantive coercion as a rationale for defensive action, the court ensured that directors would always carry their burden of proof on the first prong of the *Unocal* framework.").

78. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995). In *Unitrin*, the court held that defensive measures would be found to be proportionate unless they were 1) coercive or preclusive, or 2) outside the range of reasonableness. *Id.* at 1386–88. In practice, defensive measures have been found proportionate under *Unitrin* unless they render even a proxy contest essentially impossible. *See* Thompson & Smith, *supra* note 77, at 286 (referring to *Unocal* as "a dead letter" in the wake of *Unitrin*).

79. *See* Thompson & Smith, *supra* note 77, at 286.

80. *See* Air Prod. and Chems. Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011). In defense of the target board's actions, it should be noted that their strategy proved successful, with the company ultimately being acquired in 2016 for more than twice the amount of the hostile offer. *See* Leslie Picker, *Why Airgas Was Finally Sold, for $10 Billion Instead of $5 Billion*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/business/dealbook/why-airgas-was-finally-sold-for-10-billion-instead-of-5-billion.html [https://perma.cc/D77B-HDAP].

81. Lyondell Chemical Co. v. Ryan, 970 A.2d 235 (Del. 2009).

82. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

on the "reasonableness and purpose" of the board's actions.[83] While Lyondell retained *Revlon*'s language of "enhanced scrutiny" and "reasonableness," the court examined the challenged conduct through a lens of good faith, emphasizing that it would not second guess the reasoned judgment of the board even in the pre-closing period.[84]

It is the weakening of *Weinberger*, however, that led most directly to *MFW*, and then *Corwin*. The *Weinberger* court applied an entire fairness standard to a controlling stockholder squeeze-out, requiring the defendant directors to demonstrate that the transaction was entirely fair to minority stockholders.[85] Entire fairness review makes it difficult to dispose of a claim early in the process, and dealmakers have long searched for procedural safe harbors to gain more deferential review, even before the twenty-first century boom in merger litigation. This effort bore early fruit in 1985 in *Rosenblatt v. Getty Oil*, where the court held that "approval of a merger, as here, by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs."[86] This principle was extended again in 1994 in *Kahn v. Lynch*,[87] where the court additionally allowed the burden to be shifted to the plaintiffs if an empowered committee of independent directors approved the transaction.[88]

Though the *Lynch* court was not confronted with a scenario where both safeguards were in place, it nowhere acknowledged the possibility of anything other than entire fairness as a standard of review. Indeed, the *Lynch* court referred to the "policy rationale which requires judicial review of interested cash-out mergers exclusively for entire fairness."[89] Ultimately, while *Rosenblatt* and *Lynch*'s shifting the burden of proof to the plaintiffs was certainly a benefit to defendants, it did little to alter the fundamental litigation dynamics. Even with the burden of proof on the plaintiffs, the application of entire fairness made claims difficult to dispose of early, allowing plaintiffs to impose substantial discovery costs and giving even frivolous suits substantial settlement value.[90]

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83. *Id.* at 180.

84. *See Rise and Fall*, *supra* note 5, at 6 ("Once again, the court had removed itself from a more searching scrutiny, instead preferring in this instance to subsume *Revlon* within the general fiduciary duty of loyalty and its standard of good faith."); Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167, 209 (2014) ("Both the actual words and the clear 'music' of the *Lyondell* opinion imposed a demanding liability standard for challenging director conduct in the *Revlon* setting.").

85. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.").

86. Rosenblatt v. Getty Oil, 493 A.2d 929, 929 (1985).

87. Kahn v. Lynch, 638 A.2d 1110 (Del. 1994).

88. *Id.*

89. *Id.* at 1117.

90. *See In re* MFW S'holders Litig. , 67 A.3d 496, 534 ("[A]bsent the ability of defendants to bring an effective motion to dismiss, every case has settlement value, not for merits reasons, but because the cost of paying an attorneys' fee to settle litigation and obtain a release . . . exceeds the cost in terms

Over the past two decades, the Delaware courts have gradually expanded the availability of such safe harbors. Initially this took place in the context of tender offers, partly on the grounds the board had less of a gatekeeping function in tender offers.[91] Eventually, however, the Court of Chancery questioned the wisdom of applying two different standards in the functionally similar tender offer and statutory merger contexts.[92]

In a series of opinions, the Court of Chancery sought to harmonize the law of squeeze-outs by building on the framework created by *Lynch*. Instead of simply shifting the burden of proof for adopting one of two procedural safeguards—and providing no additional incentive to adopt both safeguards—the Court of Chancery began arguing for full business judgment rule deference to squeeze-outs where a controlling stockholder agreed to have their offer conditioned on approval by both an independent committee and a majority of the minority stockholder vote. This standard was put forward initially in pure dicta in *Cox Communications*.[93] It was subsequently employed in several cases but not found to apply under the facts of those cases.[94]

This line of case law finally culminated in *MFW*. In *MFW*, the controlling stockholder of *MFW* took the company private via a squeeze-out merger.[95] The controller, however, had stipulated at the beginning of negotiations that it would "not move forward with the transaction unless it [was] approved by . . . a special committee" of independent directors.[96] The controller also specified at the outset that the squeeze-out would be "subject to a non-waivable condition requiring the approval of a majority of the" minority shares.[97]

In *MFW*, then-Chancellor Strine first noted that *Lynch* had not confronted a situation involving both an independent committee and a majority of the minority condition.[98] Chancellor Strine then engaged in a wide-ranging analysis of the

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of dollars and time consumed of going through the discovery process under a standard of review in which a substantive review of financial fairness is supposedly inescapable.").

91. *See, e.g.*, *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001).

92. *See, e.g.*, *In re* Cysive, Inc. S'holders Litig. 836 A.2d 531, 547 (Del. Ch. 2003) (referring to the disparity in treatment as "passing strange"); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 435 (Del. Ch. 2002) (noting the potential incoherence of treating economically similar transactions differently).

93. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005).

94. *See, e.g.*, *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010); *In re* John Q. Hammons Hotels Inc. S'holder Litig., No. 758-CC, 2009 WL 3165613, at *2 (Del. Ch. Oct. 2, 2009).

95. *MFW*, 67 A.3d at 499.

96. *Id.* at 506.

97. *Id.*

98. *Id.* at 522 ("[T]he Supreme Court was only asked to determine what the standard of review was when a merger was approved by a special committee, not by a special committee *and* a non-waivable majority-of-the-minority vote."). Strine admitted that "there is broad language in [*Lynch* and other precedents] that can be read to control the question," but concluded that the "question remains an open one." *Id.* at 524.

relevant policy considerations at play in deciding the proper standard of review.[99] I evaluate these considerations more fully in the next two Sections. In short, however, Strine concluded that a structure featuring both protections "replicates the arm's-length merger . . . by 'requir[ing] two independent approvals, which it is fair to say serve independent integrity-enforcing functions.'"[100] As a result, the business judgment rule would be invoked if the controller conditioned the transaction on approval of both an empowered, independent special committee and a majority of the minority, where there is no inference that the committee failed to meet its duty of care or that the stockholders were uninformed or coerced.[101] Amid some suspense, the Delaware Supreme Court affirmed *MFW*, treating the issue as one of first impression and largely adopting the Chancellor's reasoning.[102]

With *MFW* settled, the treatment of mergers not involving a controlling stockholder was largely a *fait accompli*.[103] If the business judgment rule applied when a controlling stockholder squeeze-out mimicked the trappings of a third-party deal, then surely it would also apply to an actual third-party deal.[104] The predictable result came the next year in *Corwin*, which, in comparison to *MFW*, is a fairly brief and cursory opinion. *Corwin* involved the acquisition of KKR Financial Holdings by KKR in a stock-for-stock merger.[105] The transaction was approved by a stockholder vote.[106] While the plaintiffs alleged that KKR functioned as a controller despite its small stock holdings, the Court of Chancery found that the target board was independent, and the Supreme Court found no reason to disagree.[107]

In the lower court, the primary dispute (other than the question of whether KKR should be treated as a controlling stockholder) was over whether *Revlon* was triggered by the stock-for-stock merger and enhanced scrutiny thereby applied.[108] The Supreme Court, however, found that *Revlon* was irrelevant because the informed stockholder vote in favor of the merger invoked the business judgment rule as the appropriate standard of review, insulating against anything but a claim

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99. *Id.* at 524–36.

100. *Id.* at 528 (quoting *Cox*, 879 A.2d at 618).

101. *Id.* at 535. Chancellor Strine noted that dissenting stockholders could still challenge the price via an appraisal action. *Id.*

102. *See generally* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

103. Indeed, Vice Chancellor Laster suggested in a 2014 article, shortly after *MFW*, that "[a]s a matter of first principles, in a situation where enhanced scrutiny applies, stockholder approval by a disinterested, uncoerced, and fully informed stockholder majority should restore the business judgment rule." Laster, *supra* note 22, at 1444.

104. It is worth noting that the result in *MFW* begs the question of the proper standard of review in post-closing damages actions for third-party deals. If the proper standard for a third-party deal were *Revlon*-style enhanced scrutiny, the *MFW* court should have imposed that standard rather than the business judgment rule in exchange for adopting the procedural trappings of a third-party deal.

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

106. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 988–89 (Del. Ch. 2014).

107. *Corwin*, 125 A.3d at 307–08.

108. *Id.* at 308; *see also* Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016) (clarifying that plaintiffs can only challenge such a transaction on the basis that it constitutes waste).

for waste.[109] Thus, the court concluded that approval by an "uncoerced, informed stockholder vote is outcome-determinative, even if *Revlon* applied to the merger."[110] Because the transaction was not coercive, and because the plaintiffs did not allege that the stockholder vote was uninformed, the business judgment rule applied, and the case was at an end.

Following *Corwin*, it is now clear that a transaction "not subject to the entire fairness standard" will be reviewed under the business judgment rule standard for the purposes of a post-closing damages action "when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves."[111] *Corwin* has since been extended to apply to two-stage mergers under 251(h).[112] As a result, the prospects of succeeding in a post-closing damages action are now exceedingly dim. The only plausible path to liability—or even discovery—is via allegations of disclosure violations. [113] For reasons discussed below, however, this is rarely a promising approach.

## III. THE RATIONALES FOR *MFW* AND *CORWIN*

In the previous Section, I introduced the holdings of *Trulia*, *MFW*, and *Corwin*. *Trulia* has largely been welcomed as providing long-overdue adult supervision to the disclosure-only settlements that drove the merger boom.[114] It manifestly blocks low-value merger litigation without foreclosing the possibility of high-value suits. While many have noted that *Trulia*, standing alone, is not a

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

110. *Id.* at 308.

111. *Id.* at 312–13.

112. *In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 741 (Del. Ch. 2016) ("Stockholder acceptance of a tender offer pursuant to a Section 251(h) merger has the same cleansing effect as a stockholder vote in favor of a transaction.").

113. The ability to bring a waste claim is largely illusory, given that a claim that informed, uncoerced stockholders approved a wasteful transaction will generally be implausible on its face. *See Singh*, 137 A.3d at 153 (noting that "the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful") (internal citations omitted).

114. *See, e.g.*, Chandler III & Rickey, *supra* note 54, at 1 (noting that *Trulia* was "widely seen as a promising corrective to the problem of excessive corporate litigation"). Commentators had long called for greater judicial policing of collusive settlements, while noting that litigation dynamics made such policing unlikely. *See, e.g.*, Cox & Thomas, *supra* note 46, at 1594 ("[T]he presiding judge, overwhelmed by a crowded docket and poorly armed against the possible self-interest of the attorneys who promoted the suit's settlement, was not capable of effectively protecting the interests of the class."); Korsmo & Myers, *supra* note 4, at 842 ("In practice . . . a busy judge is understandably reluctant to reject a settlement that all parties before the court are pressing the court to accept."). Cox and Thomas did note, however, that judges already possessed the necessary tools to police stockholder litigation, even if they did not always have the incentives to use them. *Id.* The Delaware State Bar Association evidently agreed. When tasked with making a recommendation on whether to allow corporations to adopt bylaws forcing plaintiffs to bear the corporation's litigation costs for an unsuccessful suit, they recommended not allowing such bylaws, at least partly because the problem of excessive stockholder litigation could be adequately controlled by "increase[d] judicial confidence to use the tools available to supervise stockholder litigation more effectively." DELAWARE CORPORATE LAW COUNCIL, EXPLANATION OF COUNCIL LEGISLATIVE PROPOSAL 9 (2015).

panacea,[115] I am unaware of any serious criticism of the decision itself, or the standard it announced for approving settlements.

*MFW* and *Corwin*, while still largely welcomed, are not as self-evidently positive developments.[116] Certainly the decisions have occasioned some gnashing of teeth among the Delaware plaintiff's bar. Indeed, in the next Section, I will conclude that a little teeth-gnashing is appropriate—*MFW* and *Corwin* are likely to do more harm than good.[117] Preparatory to this criticism, it is necessary to consider in more detail the justifications proffered for the holdings, both in the opinions themselves and by supporters of their outcome.

While the two cases obviously address somewhat different situations, they involve overlapping justifications. These justifications fall into eight major categories, which also unavoidably overlap somewhat. First, that *Corwin* does not represent a change at all but is simply an application of longstanding principle. Second, relatedly, that the enhanced scrutiny of *Revlon* and *Unocal* was never intended to apply to post-closing claims. Third, that deferring to informed directors and stockholders is in keeping with the core reasoning underlying the business judgment rule. Fourth, that boards and stockholders have less need for judicial scrutiny due to the increasing prevalence of independent directors and institutional investors. Fifth, that *MFW* creates an incentive for controlling stockholders to employ beneficial procedural protections. Sixth, that the cleansing power of a stockholder vote is an application of general principles of ratification. Seventh, that dissenters can still avail themselves of the appraisal remedy. Eighth, that merger litigation does not provide any substantial benefits in the first place.

I introduce each of these justifications briefly in this Section and critique each of them in the next.

115. The main concern is that *Trulia* can be evaded by filing the merger challenge outside of Delaware, in jurisdictions still willing to approve disclosure-only settlements. *See, e.g.*, Chandler III & Rickey, *supra* note 54, at 2 ("Although Delaware courts have acted to rein in disclosure settlements, few courts in other jurisdictions have followed suit."); Griffith, *supra* note 54, at 2 (documenting the migration of merger litigation to non-Delaware jurisdictions and concluding that hopes that *Trulia* had solved the merger litigation problem once and for all "now appear to have been wishful thinking").

116. *See, e.g.*, Daniel Wilson, *Desirable Resistance:* Kahn v. M&F Worldwide *and the Fight for the Business Judgment Rule in Going-Private Mergers*, 17 U. PA. J. BUS. L. 643, 644 (2015) (characterizing Chancellor Strine's decision in *MFW* as "controversial").

117. *See infra* Part IV.

### *A. That "Old-Time Religion"*

The first and most straightforward defense of *Corwin* is that it is simply a continuation of long-standing Delaware practice, and not a change in the law at all.[118] Chief Justice Strine, the author of the *Corwin* opinion, has been particularly adamant on this point. At a 2017 conference, he implored those alarmed by *Corwin* to "read the old law—the old time religion" and noted that "[i]f you read the footnote in *Corwin*, where there's 57 prior cases cited, there's nothing new about this."[119] While fifty-seven is a bit of hyperbole, it is certainly the case that both the Supreme Court and Chancery opinions cite a large number of cases, including such well-known warhorses as *Wheelabrator*[120] and *Stroud v. Grace*.[121]

Indeed, the footnote to which Strine was referring cites no fewer than sixteen cases—stretching back as far as 1928—for varying versions of the broad proposition that stockholder approval of an action or transaction can result in business judgment rule deference.[122] For good measure, the footnote also throws in a cite to an article by former Chancellor William Allen (now counsel at Wachtell, Lipton, Rosen & Katz) for the more specific contention that "a fully informed majority vote of the disinterested stockholders that approves a transaction (other than a merger with a controlling stockholder) has the effect of insulating the directors from all claims except waste."[123]

### *B. Enhanced Scrutiny Intended Only for Pre-Closing Claims*

An extension of the argument that Corwin does not represent a change in the law is that Unocal and Revlon never called for enhanced scrutiny in a post-closing damages action, following stockholder approval of a merger. Then-Chancellor Strine strongly implied this in his *MFW* opinion, arguing that, under *Unocal* and *Revlon*, "when arm's-length cash mergers were approved by fully informed, uncoerced votes of the disinterested stockholders, the business judgment rule standard of review was applied to any class-action claim for monetary relief based on the inadequacy of the merger price."[124]

This conclusion was restated more explicitly in the Supreme Court's *Corwin* opinion, which concluded that "*Unocal* and *Revlon* are primarily designed to give

118. The same, of course, cannot be said of *MFW*, which both the Court of Chancery and the Supreme Court treated as a matter of first impression, and where both acknowledged the potential tension with prior case law. *See In re* MFW S'holders Litig., 67 A.3d 496, 524 (Del. Ch. 2013) ("Admittedly, there is broad language in [earlier cases] that can be read to control the question asked in this case."); Kahn v. M&F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014) (noting that "[t]his appeal presents a question of first impression").

119. *M&A Practice: In a New Age*, *supra* note 19, at 4–5 (2017).

120. *In re* Wheelabrator Tech., Inc. S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995).

121. Stroud v. Grace, 606 A.2d 75 (Del. 1992).

122. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 310 n.19 (Del. 2015).

123. *Id.* (quoting William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1317–18 (2001)).

124. *MFW*, 67 A.3d at 527.

stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind."[125] Indeed, virtually all of the landmark merger cases under *Revlon* and *Unocal* involve a rival bidder as the plaintiff, not stockholders. Furthermore, these cases do not involve challenges to the merger price but rather to defensive measures intended to ward off a hostile bid or steer the target company into the arms of a favored acquirer.[126]

Under this view, enhanced scrutiny is intended to provide the Court of Chancery with a tool to police self-serving actions by the target board that may tend to entrench them or otherwise hamper a robust auction dynamic. The implication of this argument is that even with post-closing damages foreclosed by business judgment rule deference, pre-closing challenges by rival bidders (or, presumably, stockholders) can adequately police managerial misconduct surrounding mergers.

### *C. The Business Judgment Rule*

Another justification—perhaps the paramount one—for *Corwin* and *MFW* is that deference under such circumstances is in keeping with the underlying rationale for the business judgment rule. As Vice Chancellor Laster summarized Delaware's approach to the business judgment rule, "a court applying Delaware law searches for an independent, disinterested, and sufficiently informed decision maker. If one exists, then the court defers to the decision that the qualified decision maker made. Only in the absence of a qualified decision maker will the court assume that role for itself."[127]

The *Corwin* court concluded that independent directors and stockholders constitute such qualified decision makers for the purposes of approving a merger. As a result, it argued that its reasons for deference were "tied to the core rationale of the business judgment rule, which is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)."[128]

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

126. *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 919 (Del. 2003) (challenge by thwarted bidder seeking to invalidate deal protections granted to rival bidder); Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 36 (Del. 1994) (challenge by hostile bidder seeking to invalidate deal protections granted to rival bidder); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1142 (Del. 1990) (challenge by hostile bidder seeking to enjoin efforts to steer target into alternative transaction); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 178 (Del. 1985) (challenge by rival bidder seeking to nullify deal protections granted to favored acquirer); Unocal Corp v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (challenge by hostile bidder seeking to enjoin defensive self-tender).

127. Laster, *supra* note 22, at 1443.

128. *Corwin*, 125 A.3d at 313–14; *see also MFW*, 67 A.3d at 502 ("This conclusion is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors,

### *D. Independent Directors and Institutional Stockholders*

The argument that directors and stockholders could be treated as qualified decision-makers to whom deference should be accorded under the business judgment rule is arguably bolstered by changes in board composition and patterns of stockholding over the past several decades. As Professors Solomon and Thomas recently noted, "the rise of independent directors and institutional investors had provided Delaware courts with alternative monitoring mechanisms" and, as a result "the view changed that judges were necessary to police this market as the courts recognized other private mechanisms."[129]

The prevalence of independent directors is, indeed, far greater than it was at the time the initial Delaware merger cases were decided.[130] In 1970, a clear majority of large-company directors were insiders, with only approximately 20% plausibly characterized as independent.[131] By the 1980s, while inside directors were still not uncommon, they were typically outnumbered by independent directors.[132] By the turn of the century, it was rare for a public company board to contain a majority of insiders, in part due to changes in NYSE and NASDAQ listing requirements.[133] The trend ultimately became law as the Sarbanes-Oxley Act[134] and Dodd-Frank Act[135] mandated independent majorities on public company boards of directors, as well as audit committees consisting wholly of independent directors. A clear majority of S&P 500 firms now have only a single non-independent director, typically the company's CEO.[136]

In theory, the increasing dominance of independent directors could serve to mitigate what *Unocal* called the "omnipresent specter" that the board would yield to

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especially when those decisions have been approved by the disinterested stockholders on full information and without coercion.").

129. Solomon & Thomas, *supra* note 5, at 7–8.

130. *See* Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855, 864 (2014) ("The number of insiders sitting on corporate boards declined steadily from the mid-1970s and fell precipitously towards the end of the century.").

131. *See* Barry D. Baysinger & Henry N. Butler, *Corporate Governance and the Board of Directors: Performance Effects of Changes in Board Composition*, 1 J.L. ECON. & ORG. 101, 113 (1985).

132. *See* Benjamin E. Hermalin & Michael S. Weisbach, *The Determinants of Board Composition*, 19 RAND J. ECON. 589 (1988); Velkonja, *supra* note 130, at 863 ("Most public companies have maintained a majority independent board since at least the late 1980s.").

133. *See* Ran Duchin, John G. Matsusaka & Oguzhan Ozbas, *When Are Outside Directors Effective?*, 96 J. FIN. ECON. 195, 196 (2010). Writing in 2002, Professors Bhagat and Black could write that "[t]oday, almost all [boards] have a majority (usually a large majority) of outside directors, most have a majority (often a large majority) of independent directors, and an increasing number have only one or two inside directors." Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231, 232 (2002).

134. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 and 18 U.S.C.).

135. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.).

136. *See* Velikonja, *supra* note 130, at 864 (noting that in 1986, only 3% of S&P 500 firms had only one inside director, and that the figure had risen to 23% in 1997 and 60% in 2013).

conflicts of interest in the merger context.[137] This is both because independent directors will typically have less of an interest in entrenchment and change-of-control payments and because they will often be constrained by countervailing reputational interests.[138]

The rise of independent directors has been mirrored by a rise in institutional investors. In 1950, the vast majority of public company shares were held by individuals, with only about 6% of U.S. equities held by institutional investors—including mutual funds, pension funds, and other investment funds and financial institutions.[139] By 1980, institutional ownership had crossed 25%[140] and has now risen past 80% of the equity value of the S&P 500.[141] A number of these institutional investors are so-called "activist funds" that seek to take an active role in shaping corporate policy.

As far back as 1994, the Delaware Supreme Court suggested that the increasing prevalence of institutional investors created a potential check on managerial opportunism.[142] In his *MFW* opinion, then-Chancellor Strine emphasized that "[m]arket developments in the score of years since have made it far easier, not harder, for stockholders to protect themselves,"[143] pointing to increased institutional ownership[144] and better availability of information.[145] After noting the willingness of stockholders to buck management initiatives,[146] the court concluded

137. *See* Unocal Corp v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); Solomon & Thomas, *supra* note 5, at 11 (noting that "boards were now comprised of a majority of independent directors who presumably were more willing to serve as a check against conflicted management responses").

138. *See In re* MFW S'holders Litig., 67 A.3d 496, 528–29 (Del. Ch. 2013) ("The Supreme Court has held that independent directors are presumed to be motivated to do their duty with fidelity, like most other people, and has also observed that directors have a more self-protective interest in retaining their reputations as faithful, diligent fiduciaries."). The *MFW* court went on to emphasize that this reputational interest is especially strong "in a market where many independent directors serve on several boards, and where institutional investors and their voting advisors, such as ISS and Glass Lewis, have computer-aided memory banks available to remind them of the past record of directors . . . ." *Id.* at 529.

139. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 874 (2013); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1568 (2007).

140. Gordon, *supra* note 139, at 1568.

141. *See* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1268 (2016) ("[I]nstitutional investors like BlackRock, Vanguard, Fidelity, and State Street now own around 80% of all stock in S&P 500 corporations.").

142. Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1382 (Del. 1995) ("Institutions are more likely than other shareholders to vote at all [and] more likely to vote against manager proposals.").

143. *In re* MFW S'holders Litig., 67 A.3d 496, 530 (Del. Ch. 2013).

144. *Id.* (noting that "institutional investor holdings have only grown since 1994, making it easier for a blocking position of minority investors to be assembled").

145. *Id.* ("With the development of the internet, there is more public information than ever about various commentators', analysts', institutional investors', journalists' and others' views about the wisdom of transactions.").

146. *Id.* at 531 ("Stockholders have mounted more proxy fights, and, as important, wielded the threat of a proxy fight or a 'withhold vote' campaign to secure changes in both corporate policies and

that "[g]iven the evident and growing power of modern stockholders, there seems to be little basis to doubt the fairness-assuring effectiveness of an upfront majority-of-the-minority vote condition."[147] While the *Corwin* court did not mention these considerations, the same logic would necessarily apply to a stockholder vote in an uncontrolled company.[148]

### *E. Positive Incentive Effects*

Central to the holding in *MFW* was the desire to give controllers "a strong incentive for the wide employment of a transactional structure highly beneficial to minority investors."[149] Under *Lynch*, a controlling stockholder could shift the burden of proof on fairness by employing either an independent committee or a majority-of-the-minority condition, but would receive no additional benefit from employing both protections. As a result, the controlling stockholder had no incentive to employ what most agreed was the optimal transactional structure for freezeouts.[150] By granting controlling stockholders the protections of the business judgment rule in the presence of both safeguards, *MFW* provides a powerful incentive to mimic the protections of an arm's-length deal.[151]

### *F. Stockholder Vote as Ratification*

Another intuitive defense of both *MFW* and *Corwin* is that both decisions are, in broad strokes, consistent with general principles of stockholder ratification. Both by statute and under the common law, an informed vote of the stockholders can ratify—and thereby insulate from judicial review—even overtly self-dealing transactions.[152] On its face, or so the logic of *Corwin* suggests, a decision to accept

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the composition of corporate boards. Stockholders have voted against mergers they did not find favorable, or forced increases in price.") (internal citations omitted).

147. *Id.* at 532.

148. *See* Solomon & Thomas, *supra* note 17, at 11 ("Hedge funds, empowered and backed by institutional shareholders, could police misconduct and oppose, support or even instigate, takeovers.").

149. *In re* MFW S'holders Litig., 67 A.3d 496, 536 (Del. Ch. 2013).

150. *See id.* at 501 ("For controlling stockholders who knew that they would get a burden shift if they did one of the procedural protections, but who did not know if they would get any additional benefit for taking the certain business risk of assenting to an additional and potent procedural protection for the minority stockholders, the incentive to use both procedural devices and thus replicate the key elements of the arm's-length merger process was therefore minimal to downright discouraging."); *see also* Subramanian, *supra* note 16, at 16–17 ("With the burden thus shifted through a well-functioning [special committee], controllers have no further incentive to provide a [majority-of-the-minority] condition.").

151. *MFW*, 67 A.3d at 535 ("Importantly, this incentive structure can be made even more effective as an efficient and powerful way of ensuring fair treatment of the minority in going private transactions."); *id.* at 502-03 ("[T]he adoption of this rule will be of benefit to minority stockholders because it will provide a strong incentive for controlling stockholders to accord minority investors the transactional structure that respected scholars believe will provide them the best protection . . . .") (citing Gilson & Gordon, *supra* note 16, at 839–40; Subramanian, *supra* note 16, at 60–61).

152. *See generally* DEL. CODE ANN. tit. 8, § 144 (2019); *In re* Wheelabrator Inc., S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995).

or reject a merger is no different, and a vote of approval should have a similar ratifying effect.[153]

Indeed, as discussed more fully below, a large proportion of cases cited by the *Corwin* court in support of its core holding are concerned more with stockholder approval in general—of asset sales, charter amendments, executive compensation packages, etc.—than with the specific question of stockholder approval of a merger. The court noted that some of the cases involved full, formal ratification under Delaware law, while others involved "ratification" in the more colloquial sense of an approval that warrants a reduction in judicial scrutiny.[154] The authority the *Corwin* court sought to rely on, however, was "the critical reasoning of these opinions . . . giving standard of review-invoking effect to a fully informed vote of the disinterested stockholders."[155]

### *G. Availability of Appraisal*

Allowing stockholders to seek post-closing monetary damages in a merger class action may also seem redundant, given the availability of the appraisal remedy.[156] The appraisal remedy already allows a dissenting stockholder to refuse the merger consideration and instead file a special judicial proceeding where the sole remedy available is the "fair value" of the dissenter's shares.[157] Given that fair value is generally the remedy sought in a post-closing fiduciary duty class action, it would arguably be more efficient to simply relegate all dissatisfied stockholders to appraisal. Appraisal is already typically the exclusive remedy available for short-form mergers, and Professor Myers and I have argued elsewhere that the merger class action might profitably be eliminated in favor of a strengthened appraisal-like remedy.[158]

In his opinion in *MFW*, and in several related opinions, then-Chancellor Strine repeatedly references the continuing availability of appraisal as a judicial backstop even where a fiduciary duty class action cannot go forward.[159] While the Supreme

153. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015) ("When the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.").

154. *Id.* at 310 n.19 ("In citing to these authorities, we note than many of them used the term 'ratification' in a looser sense than the clarified and narrow description that was given to that term in the scholarly *Gantler* opinion.").

155. *Id.*

156. *See* DEL. CODE ANN. tit. 8, § 262 (2019).

157. For a description of the appraisal remedy and its modern usage, see Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551 (2015).

158. *See* Korsmo & Myers, *supra* note 25; *see also* Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829 (2014) (arguing that litigation agency costs play a less pernicious role in appraisal litigation than in merger class actions).

159. *See In re* MFW S'holders Litig., 67 A.3d 496, 503 (Del. Ch. 2013) (arguing that merger litigation "promises more cost than benefit" and that this "is especially the case because stockholders

Court's *Corwin* opinion makes no reference to appraisal—it may be that Chief Justice Strine has cooled somewhat on appraisal in the intervening years—the need for post-closing damages actions for arm's-length mergers is also attenuated if a robust appraisal remedy is available. Indeed, some respected academic commentators suggest that increased appraisal activity in recent years may be driven, in part, by a migration of claims that once would have been filed as class actions.[160]

### *H. No Value from Merger Litigation*

Perhaps the most ubiquitous justification for not allowing post-closing damages actions to proceed is that such litigation provides no value in the first place—or, at the very least, not enough value to justify the associated costs. The evidence on this score was presented above, and the picture of merger litigation as a sewer of nuisance litigation is evident in the case law.[161] In *MFW*, for example, the chancery court acknowledged that "[t]he loss from invoking the business judgment rule standard of review is whatever residual value it provides to minority investors to have the potential for judicial review of fairness."[162] Before summarizing the unwholesome dynamics of merger litigation, however, the court notes that "[t]he difficulty for the plaintiffs is that what evidence exists suggests that the systemic benefits of the possibility of such review in cases like this are slim to non-existent."[163]

While the *Corwin* court denied that its decision represented a change in course, it is difficult to understand the developments of the past decade without an appreciation of the increasingly apparent failure of merger litigation. In describing what they characterize as an overall scaling back of judicial scrutiny in the merger context, Professors Davidoff and Thomas emphasize the mounting evidence that

who vote no, and do not wish to accept the merger consideration in a going private transaction despite the other stockholders' decision to support the merger, will typically have the right to seek appraisal"); *id.* at 535 ("[A]ny minority stockholder who voted no on a going private merger where appraisal is available, which is frequently the case, may also exercise her appraisal rights. Although appraisal is not a cost-free remedy, institutional ownership concentration has made it an increasingly effective one, and there are obvious examples of where it has been used effectively."); *see also In re* Lear Corp. S'holders Litig., 926 A.2d 94 (Del. Ch. 2007) (noting that stockholders who think the merger consideration is insufficient "may vote no and seek appraisal"); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1023 (Del. Ch. 2005) (same).

160. *See* Fisch et al., *supra* note 4, at 17 (suggesting that "substantive cutbacks" in fiduciary duty law "may help explain a related development, the rapid increase in Delaware appraisal litigation").

161. Sometimes the analogy to a sewer borders on explicit. In his remarks at Tulane in 2017, Chief Justice Strine referred to the dynamics of merger litigation as "just skanky" and then, warming to his theme, clarified that he did not mean "Bourbon Street when you're having fun. It's Bourbon Street the next morning when the last thing you need to do is to smell something bad that just puts you over the line that holds it together." Gay Jervey et al, *Strine Moments*, 17 M&A J. 1, 3 (June 2017).

162. *MFW*, 67 A.3d at 534.

163. *Id.*; *see also In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005) (arguing that private litigation driven by plaintiffs' lawyers did not function effectively).

merger litigation was not functioning properly.[164] They also point to the almost complete absence of injunctions or (especially) monetary payments to stockholders as evidence that merger litigation had come to serve little purpose except as a vehicle for legal fees and releases of liability.[165] For any who would argue that something is being lost by blocking the possibility of post-closing damages, the ready response is to ask, "How can you miss something you never had?"

## IV. *MFW* AND *CORWIN* REPRESENT AN UNWARRANTED WEAKENING OF JUDICIAL SCRUTINY OF MERGERS

In the last Section, I introduced the main justifications for the results of *MFW* and *Corwin*. No doubt others are possible, but the arguments listed convey the main themes, and I have attempted to give them full and fair expression. Thus far, I have withheld critical evaluation of the arguments, which is provided in this section. In short, I find that most, if not all, of the arguments are substantially weaker than they first appear.

### *A. Prior Precedent is Unclear at Best*

*MFW* admittedly addressed a question of first impression, and thus unavoidably created new law. The claim that *Corwin* was nothing new, however, is a little harder to credit. Certainly after *MFW* held that a controller freeze-out would receive business judgment rule deference if it mimicked the conditions of an arm's-length deal, it only stood to reason that an actual arm's-length deal should also receive the same deference. But it is far from clear that this has always been the universal understanding. Instead, *MFW* may have stolen a march by awarding the business judgment rule rather than enhanced scrutiny.

In part, the uncertainty in the case law is due to the scarcity of merger cases proceeding all the way to a full written opinion. But case law prior to *Corwin* was, at best, mixed. Indeed, just months prior to the *Corwin* decision, Vice Chancellor Parsons was confronted with the same question as in *Corwin* and held that "where, as here, the merger consideration paid to the target company's stockholders is cash, *Revlon* enhanced scrutiny applies, even after the merger has been approved by a fully informed, disinterested majority of stockholders."[166] Even if *Corwin* was not the

164. *See* Solomon & Thomas, *supra* note 17, at 11 ("[B]y 2010 the costs of such regulation [by litigation] were proving to be excessive due to widespread and admittedly frivolous litigation") (internal citations omitted).

165. *Id.* at 12 (pointing to "the small number of cases which result in a significant monetary payment to shareholders or an injunction enjoining the deal from completion").

166. *In re* Zale Corp. S'holders Litig., No. 9388–VCP, 2015 WL 5853693, at *10 (Del. Ch. Oct. 1, 2015); *see also id.* ("Until the Supreme Court signals otherwise, I interpret [prior precedent] as holding that an enhanced standard of review cannot be pared down to the business judgment rule as a result of a statutorily required stockholder vote, even one rendered by a fully informed, disinterested majority of stockholders."). After *Corwin*, Vice Chancellor Parsons granted re-argument on the issue and dismissed all claims. *See In re* Zale Corp. S'holders Litig., No. 9388–VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015).

bolt from the blue it is sometimes portrayed as, the fact that a Vice Chancellor directly contradicted its holding mere months earlier suggests it was hardly an uncontroversial application of uniform precedent.

The *Corwin* opinion at least partially masks this uncertainty in two ways. First, it repeatedly cites as authority cases on stockholder approval of director actions that have little or nothing to do with mergers, assuming a *fortiori* that the same considerations apply equally in the merger context. As noted above, footnote 19 of the *Corwin* opinion cites sixteen cases as "additional precedent under Delaware law the proposition that the approval of the disinterested stockholders in a fully informed, uncoerced vote that was required to consummate a transaction has the effect of invoking the business judgment rule." Of these sixteen, ten do not involve mergers at all, but are instead cases involving approval of spin-offs of subsidiaries, asset sales, charter amendments, or incentive compensation plans.[167] In most of these ten cases, enhanced scrutiny under *Revlon* or *Unocal* is never even a possibility that is discussed, and in none of them is *Revlon* or *Unocal* held to apply.

Two of the remaining six cases are from the 1920s and 1930s and involved challenges by preferred stockholders, with respect to whom fiduciary duties apply somewhat differently.[168] One involved a challenge to an asset sale where it is far from clear *Revlon* would apply under modern law.[169] The other, *MacFarlane*, challenged a stock-for-stock consolidation—where, again, *Revlon* would likely not apply—and involved a dispute over the division of the merger proceeds between the common and preferred stockholders, rather than the overall adequacy of the consideration.[170] In *MacFarlane*, the issue of ratification was rather theoretical, given that fewer than half the preferred shares had been voted in favor of the consolidation in any case, and most of these were voted by stockholders who also had substantial crossholdings of common stock.[171] None of these twelve cases

167. *See* Stroud v. Grace, 606 A.2d 75 (Del. 1992) (involving charter amendments that the court found not to implicate *Unocal*); Marciano v. Nakash, 535 A.2d 400 (Del. 1987) (involving Sec. 144 ratification of self-interested loans); Michelson v. Duncan, 407 A.2d 211 (Del. 1979) (involving stockholder approval of a stock option plan); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57 (Del. 1952) (involving approval of a stock option plan); Sample v. Morgan, 914 A.2d 647 (Del. Ch. 2007) (involving a charter amendment and incentive compensation plan); Solomon v. Armstrong, 747 A.2d 1098 (Del. Ch. 1999) (involving the spinoff and recapitalization of a subsidiary of General Motors); *In re* General Motors Class H S'holders Litig., 734 A.2d 611 (Del. Ch. 1999) (same); Apple Comput., Inc. v. Exponential Tech., Inc., No. 16315, 1999 WL 39547 (Del. Ch. Jan. 21 1999) (involving a challenge to an asset sale conducted without a statutorily required stockholder vote which was found to have been remedied by subsequent submission to the stockholders for ratification); Weiss v. Rockwell Int'l Corp., No. 8811, 1989 WL 80345 (Del. Ch. July 19, 1989) (involving a charter amendment); Schiff v. RKO Pictures Corp., 104 A.2d 267 (Del. Ch. 1954) (involving a sale of assets to the CEO).

168. *See generally* Charles R. Korsmo, *Venture Capital and Preferred Stock*, 78 BROOK. L. REV. 1163 (2013).

169. Cole v. Nat'l Cash Credit Ass'n, 156 A. 183 (Del. Ch. 1931).

170. MacFarlane v. N. Am. Cement Corp., 157 A. 396 (Del. Ch. 1928).

171. *See id.* at 399 (noting that the vote in favor of merger was "of little evidentiary value").

speaks clearly to the effect a stockholder vote should have in the special circumstances of a change of control transaction.

Three of the remaining four cases cited were opinions written by Strine while on the Court of Chancery. In all three, any analogy to the facts of *Corwin* would have been dicta. For two of the three, any analogy would also be strained, as they involved squeeze-outs, where Strine found that entire fairness applied, rather than enhanced scrutiny.[172] One of these two involved a challenge to the acquirer's board for paying too much, rather than the target's for accepting too little.[173] The third case, *Morton's*, is unquestionably analogous, involving a stockholder vote approving an arm's-length merger to which *Revlon* applied.[174] On the question at issue in *Corwin*, however, any statement in *Morton's* is emphatically dicta, given that the defendants never raised the argument that the stockholder vote altered the standard of review.[175] The fact that counsel for defendants—experienced litigators from top firms like Young Conaway; Potter Anderson; Morgan, Lewis & Bockius; Connolly Gallagher and Jones Day[176]—did not even make this apparently case-winning argument in a 2013 case perhaps undermines Morton's as support for the notion that Corwin is nothing new.

Only one of the sixteen cases—*In re Lukens*[177]—involved a stockholder vote in a merger where enhanced scrutiny under *Revlon* would apply, and was not dicta. As such, it does support the holding of *Corwin*.[178] The *Lukens* opinion was notably cautious, however, admitting that "the matter is hardly free from doubt."[179] Furthermore, Vice Chancellor Lamb limited his holding in *Lukens* to cases "where there was an active bidding process, no measures precluded any participant from bidding, and the merger agreement presented to stockholders represented the highest offer made by anyone."[180] On its face, and as applied, *Corwin* blocks judicial scrutiny under a far broader set of circumstances.

Elsewhere in the opinion, two additional cases are cited in support of the central holding.[181] The first is another opinion from then-Vice Chancellor Strine

172. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 763 (Del. Ch. 2011) ("This is the post-trial decision in an entire fairness case."); *In re* PNB Holding Co., No. Civ. A 28-N, 2006 WL 2403999 at *1 (Del. Ch. Aug. 18, 2006) (finding "that the Merger is presumptively subject to entire fairness review").

173. *In re* S. Peru Copper, 52 A.3d 761.

174. *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656 (Del. Ch. 2013).

175. *Id.* at 663 n.34 (suggesting that stockholder approval would invoke the business judgment rule, but acknowledging that "[t]he defendants here, however, have not made this particular argument").

176. *Id.* at 657.

177. *In re* Lukens, 757 A.2d 720 (Del. Ch. 1999).

178. While *Lukens* was a Chancery Court opinion, it was affirmed without opinion "on the basis of and for the reasons assigned by the Court of Chancery in its well-reasoned opinion." Walker v. Lukens, Inc., 757 A.2d at 1278 (Del. 2000).

179. *In re Lukens*, 757 A.2d at 736.

180. *Id.* at 737.

181. The same two cases—along with several of the sixteen just discussed—are cited for support in the Court of Chancery's *MFW* opinion. *See In re* MFW S'holders Litig., 67 A.3d 496, 527 (Del. Ch. 2013).

dealing with the very different question of approval of a merger by the acquiring firm's stockholders.[182] As such, it is of limited support for the holding in *Corwin*. The second, however, is the celebrated *Wheelabrator* case, which famously outlines the different effects stockholder approval can have under Delaware law.[183] *Wheelabrator* involves a situation roughly analogous to that at issue in *Corwin*, and is undoubtedly the best-known case prior to *Corwin* to address the issue. Together, *Wheelabrator* and *Lukens* are the clearest precedents for the holding in *Corwin*.

The *Corwin* court did address, directly and convincingly, the recent, superficially conflicting precedent of *Gantler v. Stephens*.[184] In *Gantler*, Justice Jacobs attempted to clean up decades of loose usage of the term "ratification," which could be traced back to language from the *Van Gorkom* opinion. As he had in his *Wheelabrator* opinion, Justice Jacobs sought to distinguish between 1) "'classic' or paradigmatic" ratification, which "describes the situation where shareholders approve board action that, legally speaking, could be accomplished without any shareholder approval," and 2) "the effect of an informed shareholder vote that was statutorily required for the transaction to have legal existence."[185] Justice Jacobs clarified that only the first situation actually constituted ratification.[186] This, of course, would exclude a stockholder vote approving a merger, which is statutorily required in order for the transaction to have legal existence.

The plaintiffs in *Corwin* argued that *Gantler's* holding meant that a stockholder vote on a merger can have no ratifying effect. The court sensibly rejected this argument, concluding that *Gantler* was focused on clarifying the "precise term 'ratification'" and was not intended to imply that a statutorily required stockholder vote could have no effect on the appropriate standard of review.[187] This is the most plausible reading of *Gantler*, given that the plaintiffs' reading would mean the court had, without expressing any such intention, overruled the substantive holding of *Wheelabrator*—an opinion also written by Jacobs and quoted approvingly throughout the *Gantler* opinion.[188] Any such holding would also have been dicta, given that the court found that the stockholder vote at issue was not fully informed because the relevant disclosures were defective.[189]

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

183. *See In re* Wheelabrator Techs., Inc. S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995).

184. Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

185. *Id.* at 713 (quoting *In re Wheelabrator*, 663 A.2d 1194, 1202 n.4).

186. *Id.* ("To restore coherence and clarity to this area of our law, we hold that the scope of the shareholder ratification doctrine must be limited to its so-called 'classic' form; that is, to circumstances where a fully informed shareholder vote approves director action that does not legally require shareholder approval in order to become legally effective.").

187. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 311 (Del. 2015).

188. *Id.* at 310.

189. *Id.* (endorsing the trial court's holding that "any statement about the effect a statutorily required vote had on the appropriate standard of review would have been dictum because in *Gantler* the Court held that the disclosures regarding the vote in question . . . were materially misleading"). For a more thorough argument in favor of the *Corwin* court's reading of *Gantler*, see Laster, *supra* note 22, at 1477–83.

Unlike *Gantler*, however, a number of conflicting precedents exist that are either glossed over or ignored entirely by the *Corwin* court. The most prominent of these is the Delaware Supreme Court's 1995 decision in *Santa Fe*, which arguably should have controlled.[190] The case involved a battle to acquire Santa Fe Industries, where Santa Fe's board allegedly took a number of defensive actions to protect a deal with a friendly acquirer and ward off a competing hostile bidder.[191] While the hostile bidder initially sought a preliminary injunction, after several unfavorable rulings it withdrew its bid, leaving the stockholders as the remaining plaintiffs, and they persisted in their claims post-closing, after a stockholder vote approving the merger with the favored bidder.[192]

The defendants argued that the informed stockholder vote extinguished any claims under *Revlon* and *Unocal*.[193] Though the court agreed that the vote had been an informed one, the court rejected the ratification argument, holding that "[p]ermitting the vote of a majority of stockholders on a merger to remove from judicial scrutiny unilateral Board action in a contest for corporate control would frustrate the purposes underlying *Revlon* and *Unocal*."[194] The court explained its reasoning as follows:

> In voting to approve the [merger], the Santa Fe stockholders were not asked to ratify the Board's unilateral decision to erect defensive measures against the [competing] offer. The stockholders were merely offered a choice between the [Board's favored] Merger and doing nothing. The Santa Fe stockholders did not vote in favor of the precise measures under challenge in the complaint . . . . Since the stockholders of Santa Fe merely voted in favor of the merger and not the defensive measures, we decline to find ratification in this instance.[195]

The court went on to find that enhanced scrutiny was the proper standard for reviewing the Santa Fe board's actions, requiring the defendants "to justify their decisionmaking within a range of reasonableness."[196]

The holding of *Santa Fe* was on similar facts as *Corwin*—an arm's-length merger approved by an informed vote of the stockholders. It answered the same question—the effect of the stockholder vote on the standard of review. It was decided by the Delaware Supreme Court rather than a trial court. Furthermore, the holding was not dicta. This combination of attributes makes it unique among the cases mentioned in *Corwin*. The court did not, however, analyze *Santa Fe*. Instead, it noted that "the parties have engaged in an interesting debate" about it, but declared that it was "unnecessary to engage in that debate, when the overwhelming

190. *In re* Santa Fe Pacific Corp. S'holders Litig., 669 A.2d 59 (Del. 1995).
191. *Id.* at 63–65.
192. *Id.* at 65.
193. *Id.* at 67.
194. *Id.* at 68.
195. *Id.*
196. *Id.* at 72.

weight of our state's case law supports the Chancellor's decision below."[197] The court also noted that "a learned article [by Vice Chancellor Laster] has a thoughtful consideration of [*Santa Fe*]."[198] In light of this statement, it is worth quoting that article's conclusion that "the case [*Santa Fe*] stands as an apparent impediment to the view that a fully informed stockholder vote on a merger otherwise subject to enhanced scrutiny causes the transaction to be reviewed under the business judgment rule."[199]

In addition, the *Corwin* court did not cite any of a number of Chancery Court opinions applying enhanced scrutiny to post-closing damages claims, even in the presence of a stockholder vote that was conceded or found to be informed.[200] Nor did the court take notice of the large settlements reached in recent cases like *El Paso* or *Del Monte*, involving post-closing merger class actions following informed stockholder votes.[201] Following *Corwin*, it appears unlikely these cases could survive a motion to dismiss, let alone result in settlements far beyond the costs of litigation.

Perhaps most revealing, however, was the Delaware Supreme Court's approach in the well-known *Lyondell* case.[202] In the opinion being appealed, Vice Chancellor Noble had applied enhanced scrutiny under *Revlon* in denying a motion to dismiss claims that the defendants had not taken appropriate steps to secure the best price reasonably available.[203] Enhanced scrutiny was applied—and found to preclude dismissal—despite the overwhelming stockholder vote in favor of the merger, and despite the defendant's argument that the vote constituted a ratification.[204]

In his opinion, Noble found that the ratification defense had been raised too late in the proceedings for the plaintiffs to respond adequately, but nonetheless engaged in a lengthy digression on the issue.[205] After acknowledging fellow Vice Chancellor Strine's dicta in *Solomon* that "an informed and uncoerced shareholder vote on the [merger] provides an independent reason to maintain business judgment

197. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, n.20 (Del. 2015).

198. *Id.*

199. Laster, *supra* note 22, at 1477.

200. *See, e.g.*, *In re* Zale Corp. S'holders Litig., No. 9388–VCP, 2015 WL 5853693, at *10 (Del. Ch. Oct. 1, 2015) ("Until the Supreme Court signals otherwise, I interpret *Gantler* as holding that an enhanced standard of review cannot be pared down to the business judgment rule as a result of a statutorily required stockholder vote, even one rendered by a fully informed, disinterested majority of stockholders."); *In re* Novell, Inc. S'holders Litig., No. 6032–VCN, 2014 WL 6686785 (Del. Ch. Nov. 25, 2014) (applying enhanced scrutiny to arm's-length merger despite overwhelming, informed stockholder approval); Rand v. W. Air Lines, Inc., No. 8632, 1994 WL 89006 (Del. Ch. Feb. 25, 1994) ("Such a claim requires the Court to apply enhanced scrutiny.").

201. *See, e.g.*, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012) ($110 million settlement); *In re* Del Monte Foods Co. S'holders Litig., No. 6027–VCL (Del. Ch. June 7, 2011) ($89.4 million settlement).

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

203. Ryan v. Lyondell Chem. Co., No. 3176–VCN, 2008 WL 2923437, at *12 (Del. Ch. July 29, 2008).

204. *Id.*

205. *Id.* at n.129.

protection for the board's acts,"[206] Noble concluded that the reasoning of Santa Fe was more persuasive. Just as the Supreme Court had found that Santa Fe's stockholders "could not have approved the board's unilateral decision to erect defensive barriers" by voting for the merger, Lyondell's stockholders "could not have been asked to ratify the Board's alleged unilateral decision to abdicate its fundamental fiduciary obligations in that regard simply by voting in favor of the Merger."[207]

Vice Chancellor Noble's opinion was reversed on appeal. Interestingly, however, the Delaware Supreme Court did not address the standard of review issue at all, which would have furnished easy grounds for reversal. Instead, the court conducted a delicate analysis of when exactly *Revlon* duties attach and what they require from a target board. It may be that the Delaware Supreme Court agreed that the defendants had waived the argument, but the court's failure even to mention the issue—and resolve an evident confusion—suggests that the issue was not entirely cut and dried.

Given the foregoing, it is difficult to conclude that *Corwin* was simply an application of a deep strain of uncontroversial precedent. The picture of precedent presented in the opinion is only partial. At best, *Corwin* presents a case of selective and dubious citation. At worst, it represents the bootstrapping of prior Chancery Court dicta into binding precedent. Of course, it is tempting to say that it does not matter whether *Corwin* is really "new" or not. Whether it is good or bad depends little on its novelty.[208] Nonetheless, the burden of persuasion often rests, and sensibly so, on the party seeking a change in the status quo.

### *B. Pre-Closing Claims Are Insufficient to Police Merger-Related Misconduct*

The argument that *Revlon* and *Unocal* were never intended to provide enhanced scrutiny to post-closing money damages actions involves several claims. The first is historical, and was evaluated in the last sub-Section, with inconclusive results. The second is that pre-closing preliminary injunction suits are sufficient for policing the "omnipresent specter" of conflicts of interest in merger transactions. And arguably third, that injunctive suits by competing bidders are likely to be effective in policing misconduct.[209] Regardless of what enhanced scrutiny under *Revlon* and *Unocal* was "designed" to do, if having it at the preliminary injunction stage is sufficient, there would be little need for it post-closing. Conversely, if pre-closing enhanced scrutiny

206. *Id.* (quoting Solomon v. Armstrong, 747 A.2d 1098, 1117 (Del. Ch. 1999)).

207. *Id.*

208. As then-Chancellor Strine noted in his *MFW* opinion, "tradition should admittedly not persist if it lacks current value." *In re* MFW S'holders Litig., 67 A.3d 496, 527 (Del. Ch. 2013) (citing Keeler v. Hartford Mut. Ins. Co., 672 A.2d 1012, 1017 n.6 (Del. 1996)) (a rule should not be followed if its best defense is that it was "laid down in the time of Henry IV") (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

209. As noted above, many, if not most, of the landmark merger cases have involved a rival bidder as plaintiff. *See* cases cited, *supra* note 126.

is unlikely to be effective in policing serious conflicts, it may be appropriate to retain it in post-closing damages actions.

In addressing these contentions, it is helpful to recall the kinds of conflicts that can plague merger-related decisions. As then-Chancellor Strine noted in his opinion in *El Paso*:

> [A]s *Revlon* itself made clear, the potential sale of a corporation has enormous implications for corporate managers and advisors, and a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisors to be less than faithful to their contextual duty to pursue the best value for the company's stockholders.[210]

Put simply, merger decisions are different from other types of decisions—even important decisions—boards make while running a firm as a going concern. The potential conflicts fall under three broad headings in the context of an arm's-length merger.[211]

First is the concern that managers[212] will seek to entrench themselves. The conflict is fairly obvious. Managers want to keep their jobs and the accompanying perquisites. In the event of a takeover, however, the new owners would boot them out of office. As a result, they may be willing to spurn an offer that would be beneficial to the stockholders. This was a dominant concern in the 1980s merger cases, including *Unocal* and *Revlon*, at a time of heated debate over the rise of leveraged buyouts, hostile takeovers, and the market for corporate control.[213] The conflict can result in defensive measures, such as poison pills, designed to ward off a takeover altogether,[214] or favoritism and deal protections intended to steer the firm into the arms of a favored bidder who will not replace management.[215] In the former, the harm to stockholders comes from losing out on an attractive deal. In

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210. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012).

211. Additional conflicts of a fairly obvious nature come into play in non-arm's-length mergers (i.e., management buyouts or controlling stockholder squeeze-outs). It is worth noting, however, that even an ostensibly arm's length merger can end up infected by the kinds of dynamics normally associated with conflicted mergers. In *El Paso*, for example, El Paso's lead financial adviser, Goldman Sachs, owned a 19% stake in the acquirer, Kinder Morgan, giving it a large incentive to get the lowest price possible. *In re El Paso*, 41 A.3d at 434. Meanwhile, the bankers brought in to cleanse this conflict, Morgan Stanley, only got paid in event the merger with Kinder Morgan was consummated, receiving nothing if another option were pursued. *Id.* at 442.

212. Rather than repeatedly employing the cumbersome locution "officers and directors," I will refer to both together as "managers" in this section. While it is obviously the directors who are the ultimate decision-makers in the merger context, as a practical matter the officers will also generally play a large, perhaps dominant role.

213. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1180–81 (1981) (describing the market for corporate control and the risk of entrenchment and arguing that most defensive measures should be proscribed).

214. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (involving Unocal management's efforts to ward off a hostile tender offer from Mesa Petroleum).

215. *See, e.g.*, Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1985) (involving Revlon management's efforts to steer itself to a favored acquirer while warding off a hostile bidder).

the latter, the harm comes from management leaving stockholder money on the table in exchange for job security.

Second is the broader concern that management will seek to divert value from the stockholders to themselves.[216] This siphoning off of value can be done in innumerable ways, ranging from employment agreements,[217] to change-in-control payments,[218] to sweetheart side-deals,[219] to straight-out cash bribes.[220] The concern that management will try to steal from stockholders is, however, hardly unique to the merger context. Management always has an incentive to siphon value away from the firm and the stockholders and into their own pockets.

What changes in the merger context is not the motive—or not exclusively the motive—but the opportunity. As many commentators have pointed out, while most managerial decisions take place in the context of on ongoing series of repeat transactions, the decision to approve a merger is, in game theoretic terms, a "final period" transaction.[221] The business may continue after a merger, but as far as the relationship between managers and stockholders goes, a merger is the end of the road. For most decisions, managerial discretion is heavily constrained by a large number of legal and extra-legal constraints, including annual director elections, regular reports under securities law, product markets, capital markets, and labor markets, among others.[222] Managers who behave foolishly or dishonestly in one period face the possibility of being found out, punished, or shamed in the next. Such constraints do not operate in the context of a final period transaction like a merger. In this respect, mergers are unlike partial asset sales, incentive compensation

216. In a sense, entrenchment is simply a subset of this broader concern—management trading off value for the stockholders for the value of their own jobs. The entrenchment concern is sufficiently important, however, to merit emphasis in its own right.

217. *See* Crescent/Mach I Partners, L.P. v. Turner, 846 A.2d 963 (Del. Ch. 2000) (declining to dismiss a duty of loyalty claim involving a CEO who negotiated a lucrative employment agreement in connection with a merger transaction).

218. *See* Chen v. Howard-Anderson, 87 A.3d 648, 687 (Del. Ch. 2014) (declining to grant summary judgment on a claim that officers of a target company favored a bidder who "was willing to confirm that it would honor management's change in control agreements and monetize all equity awards").

219. *See In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012) (noting that the target company's CEO was simultaneously planning to personally buy back part of the company from the acquirer, giving him an incentive to reach a lower price).

220. *See, e.g.*, Parnes v. Bally Entm't Corp., 722 A.2d 1243, 1246 (Del. 1999) (manager "allegedly demanded that any potential acquirer pay [him] for his approval of the merger").

221. *See, e.g.*, Stephen M. Bainbridge, *The Geography of* Revlon *Land*, 81 FORDHAM L. REV. 3277, 3291 (2013) ("[S]tructural decisions—such as corporate takeovers—present a final period problem entailing an especially severe conflict of interest."); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1945 (2003) ("Another corporate law last period problem occurs when a company is sold . . . .").

222. *See* Bainbridge, *supra* note 221, at 3292 ("[S]hareholder voting is just one of an array of extrajudicial constraints that, in totality, incentivize directors to exercise reasonable care in decision making. In particular, directors and managers are subject to important constraints imposed by the product and job markets."); Griffith, *supra* note 221, at 1937–41 (discussing various legal and extra-legal constraints on managerial decision making).

plans, purchase of another company, or even charter amendments—the subjects of most of the cases cited by the *Corwin* case as supposedly analogous instances of stockholder ratification.

Another aspect of the final period problem is that the division of value becomes a zero-sum game. In the ordinary course, barring completely perverse compensation schemes, management prospers in some rough correlation to the extent stockholders prosper. Management thus has an incentive to increase the size of the pie today, in order to increase their take tomorrow. In a merger however, once the amount of the merger consideration is fixed, the size of the pie is fixed and there is no tomorrow. All that matters is the amount managers can take for themselves now.

In short, in a merger, because it is a final period decision, many of the former constraints on managerial opportunism fall away. As Professor Griffith puts it:

> Because it simultaneously releases managers and directors from their ordinary mid-stream constraints and increases the temptation to enrich oneself at the expense of a dying corporation and its anonymous shareholders, the last period signals a structural dilemma in corporate law, a point at which managers and directors have greater incentives to favor selfish objectives rather than the best interests of their shareholders. In the context of a negotiated acquisition, the target corporation's board and management may demand side payments from the acquirer, thus effectively diverting a portion of the merger consideration from the shareholders to the management team.[223]

The only constraints on value-hoarding that remain are 1) the short-term need to get stockholder approval; 2) the prospect of judicial sanction; and 3) reputational interests.[224] Even reputational concerns may be attenuated, however, if the managers are near retirement or receiving a large enough cash-out to become indifferent to censure.[225]

The third type of conflict is that managers, with their concentrated investments of human and financial capital in the firm, will be more sensitive to firm-specific risk than will diversified public stockholders. As a result, managers will be risk-averse, and will rationally apply a higher discount rate to the future cash flows of the firm than would an equally informed public stockholder. As a result, they may be willing to sell their shares for less than a public stockholder would.[226]

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223. Griffith, *supra* note 221, at 1947.

224. To be charitable, perhaps we could add to this list the managers' internal moral compasses.

225. *See, e.g.*, Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1662 (2001) (noting that "if one can get seriously rich, one can move to Aspen and ski for the rest of one's days").

226. Modern finance theory divides the risks faced by a firm into two broad categories: market risk and firm-specific risk. (An investor can effectively eliminate their exposure to firm-specific risk by holding a diversified portfolio. An undiversified stockholder, however, will bear both kinds of risks. Because the undiversified stockholder receives the same expected cash flows but bears greater risk,

This conflict is less frequently recognized but increasingly pervasive. Since the tax reform of the early 1990s, an increasing percentage of managerial compensation is in the form of stock options and stock grants, and many managers (including directors) have a substantial portion of their personal wealth invested in the firms they manage. The resulting conflict is especially acute when managers face restraints on their ability to sell, such as long vesting periods, which would be obviated in the event of a merger that triggers immediate vesting. Faced with a choice between a certain payout of a life-changing amount of money now on the one hand, or an uncertain payout in the future on the other, managers may opt for the former even where the latter has a higher expected value.

Delaware case law has previously acknowledged precisely this sort of problem. For example, then-Vice Chancellor Strine held in *In re Lear* that a CEO's exposure to non-diversifiable risk at a time when he was worried about retirement generated a potential conflict. The then-Vice Chancellor observed that it was "silly" to ignore the possibility that CEO stock ownership in a risky firm could "create incentives that actually give managers reasons to pursue ends not shared by the corporation's public stockholders."[227] Likewise, the CEO "had powerful interests to agree to a price and terms suboptimal for public investors so long as the resulting deal" secured the CEO's personal financial objectives of cashing out his equity stake.[228]

With these conflicts in view, we can now ask whether any or all of them are amenable to policing by pre-closing actions seeking preliminary injunctions. For the first type of conflict—entrenchment—the answer is likely a qualified "yes." The entrenchment motive only comes into play where there is a realistic prospect of a hostile bidder, and that potential bidder ought to be relatively well-situated to challenge improper defensive actions by the target board. Moreover, a court may be more willing to grant a preliminary injunction when the likely result is an improved offer or rival bid than when an injunction seems likely to kill the deal altogether. In a sense, this conclusion is unsurprising, given that the *Revlon* and *Unocal* doctrines were formulated in cases where entrenchment was the primary issue. Nonetheless, the "yes" is qualified because current doctrine gives boards so much leeway to use defensive measures that only an extremely motivated hostile bidder—or one facing a particularly egregious set of facts—would undertake the expense of litigation rather than simply moving on to other potential deals.[229]

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their stock is less valuable to them. *See generally* RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 170 (10th ed. 2011).

227. *In re* Lear Corp. S'holders Litig., 926 A.2d 94, 117 (Del. Ch. 2007).

228. *Id.* Of course, the public stockholders could always vote the deal down. But, as is discussed more fully *infra* Part IV.F., in practice the managers can use their considerable information advantages and control over projected results to persuade the stockholders to accept a deal they would not accept if they were fully informed.

229. As Barry Diller famously concluded following his unsuccessful battle to take over Paramount Communications: "They won. We lost. Next." James Bates, *Paramount Deal: As Show Closes, a Look at the Script*, L.A. TIMES (Feb. 16, 1994).

For the second type of conflict however—diversion of value to management—it is unlikely that pre-closing preliminary injunction actions could be effective. Certainly, potential acquirers are unlikely to make effective police, as bidders will typically be concerned only with the aggregate cost of the merger, and not with how that cost is divided between management and the stockholders. Stockholders could challenge the action, but unless another obvious buyer waits in the wings, they may be reluctant to do so if the available remedy is a preliminary injunction that might kill the deal altogether. Indeed, even when substantial evidence exists of managerial misconduct, a court may be hesitant to grant a potentially deal-killing preliminary injunction, rather than let stockholders decide whether "no deal" is less appetizing that a deal where management skims some off the top.[230]

An injunction is simply not a remedy well-suited to the harm caused by management siphoning value from a merger. More appropriate would be to allow the stockholders to seek post-closing damages for the value diverted by management, under an enhanced standard of review appropriate to the fraught circumstances. Even this may not provide full compensation for what was lost, as it is probable that management would be willing to trade off more than one dollar of loss for the stockholders for every dollar of gain to themselves. But the possibility of money damages would have the great virtue of deterring such conduct in the first place. *Corwin*, however, forecloses this possibility. Under *Corwin*, as long as the relevant conflicts and side-deals are disclosed, a stockholder vote approving the merger would effectively extinguish all claims.

It is worth noting at this point that although *Corwin* holds out the prospect of stockholders being able to show disclosure defects that rendered the stockholder approval uninformed, this is likely to be rare in practice. Most disclosure or securities fraud claims arise when faulty disclosures are revealed to have been faulty by subsequent events or disclosures, or by information uncovered in enforcement actions or related litigation discovery. In the case of a merger where the target company is going private, disappearing, or being subsumed within a larger entity, it

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230. Again, *El Paso* is an excellent illustration of this dynamic. Despite finding "that the plaintiffs have a reasonable likelihood of success in proving that the Merger was tainted by disloyalty," then-Chancellor Strine concluded that "[b]ecause, however, there is no other bid on the table and the stockholders of El Paso, as the seller, have a choice whether to turn down the Merger themselves, the balance of harms counsels against a preliminary injunction." *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012); *see also id.* at 452 ("I reluctantly deny the plaintiffs' motion for a preliminary injunction, concluding that the El Paso stockholders should not be deprived of the chance to decide for themselves about the Merger, despite the disturbing nature of some of the behavior leading to its terms."); Brian Broughman, *CEO Side Payments in Mergers and Acquisitions*, 2017 BYU L. REV. 67, 105 (2017) ("Judges do not have a line-item veto, and are therefore reluctant to strike down a multi-billion-dollar transaction because of side payments. Judges are reluctant to use their injunctive power for the same reason that shareholders and directors have trouble blocking such deals—a deal with an unsavory side payment is better than no deal at all.").

is unlikely there will be any subsequent events or disclosures to reveal the falsity of the original disclosures, and *Corwin* itself will serve to block litigation discovery after the preliminary injunction stage. Thus, while *Corwin* allows management to disclose their misdeeds candidly and receive absolution via an informed stockholder vote, more furtive managers will likely be able to hide their indiscretions with little fear of subsequent revelation. The resulting dynamic is likely to be: if it comes out in discovery in a preliminary injunction action, disclose it and it will be sterilized by the stockholder vote; if it doesn't come out pre-close, it never will.

The third conflict—risk-aversion on the part of management—is also unlikely to be amenable to regulation by pre-closing preliminary injunction. Certainly, would-be acquirers will rarely have an incentive to argue that managers are undervaluing the target company. And it is a bold judge who will grant an injunction on this basis.[231] Again, the prospect of post-closing damages—which *Corwin* makes vanishingly slim—is better calculated to provide compensation and, more importantly, deterrence.

In sum, the argument that enhanced scrutiny under *Revlon* and *Unocal* is (and ought to be) designed only for pre-closing preliminary injunction actions is partly correct, but incomplete. Pre-closing scrutiny is likely to be appropriate and reasonably effective in dealing with managerial self-interest arising out of the entrenchment motive, but inappropriate and ineffective in policing other predictable and acute conflicts of interest in the merger context.

### *C. Deference to the Stockholder Vote is not Supported by the Underlying Reasons for the Business Judgment Rule*

The argument that deference to a stockholder vote approving a merger is in keeping with the business judgment rule is, when one looks beneath the surface, an odd one. The key issue in both *MFW* and *Corwin* is what deference to accord to a stockholder vote. Both cases deal with a situation where management has already made a decision, and that decision is subject to a heightened standard of review (entire fairness in *MFW* and enhanced scrutiny in *Corwin*). The question, then, is whether to provide additional deference to a stockholder vote on the same decision. The business judgment rule is generally concerned with deference to the business decisions of managers, not stockholders, who are not typically vested with the power to make business decisions in the first place.[232] As such, the rationales of the business judgment rule do not easily map on to the question of deference to a stockholder vote.

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231. *See In re* Lear Corp. S'holders Litig., 926 A.2d 94, 123 (Del. Ch. 2007) (granting a preliminary injunction until supplemental disclosure was provided on the CEO's financial motivations to sell).

232. *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

A classic statement of the reasoning behind the business judgment rule was given by Judge Winter in *Joy v. North*.[233] Judge Winter identified three primary rationales. First, by investing in a firm, stockholders take on the risk of bad managerial decision-making voluntarily.[234] Stockholders can refrain from investing in the first place, sell their shares, or elect different managers. This point is subsidiary to the more general point made in the last subsection, that most managerial decisions take place in a setting of repeat transactions, and are thus constrained by a host of factors. As Professor Bainbridge has elaborated in defense of the business judgment rule, operational decisions are subject to "an array of extrajudicial constraints that, in totality, give directors [an incentive] to exercise reasonable care in decision making."[235]

Second, judges are not well-situated to evaluate complex business decisions.[236] As the Michigan Supreme Court pithily noted in the foundational case *Dodge v. Ford Motor Co.*, "The judges are not business experts."[237] As such, judicial modesty counsels a certain degree of deference to management, who are likely to be both better informed and more expert than the judges.

Third, every business decision involves a degree of risk. Because risk and return generally go hand-in-hand, stockholders want directors to take risks.[238] Moreover, stockholders can reduce their exposure to these risks by holding a diversified portfolio.[239] If stockholders get most of the gain when risks turn out well, but managers face a threat of personal liability when those risks turn out badly, management's incentives will be to make decisions that minimize the chance of liability rather than maximize expected stockholder wealth.[240]

The Corwin court emphasized the second of Judge Winter's rationales for the business judgment rule, suggesting that its decision was "tied to the core rationale of the business judgment rule, which is that judges are poorly positioned to evaluate the wisdom of business decisions."[241] As an initial matter, this "core rationale" is

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233. Joy v. North, 692 F.2d 880 (2d Cir. 1982).

234. *Id.* at 885 ("Since shareholders can and do select among investments partly on the basis of management, the business judgment rule merely recognizes a certain voluntariness in undertaking the risk of bad business decisions.").

235. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 130 (2004).

236. *Joy*, 692 F.2d at 886 ("[C]ourts recognize that after-the-fact litigation is a most imperfect device to evaluate corporate decisions. The circumstances surrounding a corporate decision are not easily reconstructed in a courtroom years later, since business imperatives often call for quick decisions, inevitably based on less than perfect information.").

237. Dodge v. Ford Motor Co., 204 Mich. 459, 508 (1919).

238. *Joy*, 692 F.2d at 886 ("[B]ecause potential profit often corresponds to the potential risk, it is very much in the interest of shareholders that the law not create incentives for overly cautious corporate decisions.").

239. *Id.* ("Shareholders can reduce the volatility of risk by diversifying their holdings.") (internal footnote omitted).

240. *Id.* ("A rule which penalizes the choice of seemingly riskier alternatives thus may not be in the interest of shareholders generally.").

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

not one that many academic commentators have found convincing, given that the same rationale would seem to apply with far greater force in any number of other contexts where courts are tasked with evaluating the actions of experts.[242] But whatever its weaknesses as a rationale for deferring the managers—who can at least safely be presumed to have expert knowledge of the firm—it is significantly weaker as a rationale for deferring to stockholders.

The *Corwin* court attempts to finesse this by providing a very different justification—that the stockholders can be deferred to because of their "actual economic stake in the outcome."[243] This is a very different argument, however, than the "core rationale" for the business judgment rule to which the court originally alluded. It suggests that even if stockholders are not better situated to evaluate the merger than the court, in terms of information and expertise, they are better motivated. The specialist judges of the Delaware Court of Chancery, however, themselves face powerful reputational incentives to make careful decisions.[244]

The first and third *Joy v. North* rationales apply even less clearly in the context of a stockholder vote approving a merger. The first has no obvious application at all. And it is difficult to fit a stockholder vote into the third, as stockholders face no risk of personal liability from which they require shielding to encourage optimal risk-taking. As a practical matter, though, *MFW* and *Corwin* implicate deference to managers as much or more than deference to stockholders. As such, it is worth considering the application of these two justifications for business judgment rule deference to managers in the context of a merger.

For the first, as noted above, a merger is a final period decision, rather than being part of a series of repeat transactions. For this reason, Professor Bainbridge, among others, has drawn a sharp "distinction between operational issues, such as whether to install lighting in a baseball park, and structural choices, especially those creating a final period situation, such as takeovers."[245] Bainbridge—certainly no fan of stockholder litigation—concludes that "[t]he former appropriately receives much less probing review than does the latter."[246]

The third rationale—not deterring risk-taking—may apply in the merger context, though it applies somewhat differently. A decision to agree to a merger is

242. *See, e.g.*, Bainbridge, *supra* note 235, at 117 (calling this "an incomplete explanation for the business judgment rule at best"); Kenneth B. Davis, Jr., *Once More, the Business Judgment Rule*, 2000 WIS. L. REV. 573, 581 (2000) (noting that "judges should find it far easier to overcome the barrier of expertise and stand in the shoes of outside directors than in those of almost any of the other professionals whose actions courts are routinely called upon to review"); Kent Greenfield & John E. Nilsson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799, 825–26 ("This rationale . . . seems more than a little disingenuous.").

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

244. *See, e.g.*, Bainbridge, *supra* note 235, at 121 (discussing the powerful reputational incentives faced by Delaware's chancellors).

245. *Id.* at 129; *see also* E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 394 (1997) (making a similar distinction).

246. Bainbridge, *supra* note 235, at 129.

not a decision to take a risk with stockholders' money with the hope of achieving a return for them in the future. It is a decision to stop taking risks, in exchange for a more certain payout in the here and now. It may not be the case that managers need judicial protection to induce them to take what is a fundamentally risk-averse decision. That said, if, all else being equal, agreeing to a merger were to place a director at greater risk of personal liability than not agreeing to a merger, directors may have an incentive to avoid even beneficial mergers. Thus, it is important that agreeing to a merger that is beneficial to stockholders does not place a director at a greater risk of personal liability than refusing to agree to the same merger.

In sum, the core rationales of the business judgment rule provide little, if any, reason for deference to a stockholder vote. These rationales are also attenuated even for deference to managerial decisions in the context of a merger.

### *D. Independent Directors and Institutional Stockholders*

Independent directors and institutional stockholders are not necessarily the reliable gatekeepers they may appear to be at first blush. Independent directors do not necessarily make effective monitors of managerial opportunism, and even sophisticated stockholders operate at a severe informational disadvantage *vis-à-vis* management.

The Delaware courts' trust in the cleansing power of independent directors is belied by a substantial empirical literature on their effectiveness, or lack thereof.[247] While the available evidence shows that majority-independent boards tend to perform better than the insider-dominated boards of yesteryear,[248] the evidence changes direction when it comes to supermajority-independent boards where the CEO is the only inside director.[249] Of particular concern in this context, the evidence casts doubt on the ability of supermajority boards—which are present at

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247. *See, e.g.*, Velikonja, *supra* note 130, at 863 ("Surprisingly, a growing body of economic research has failed to find any statistical correlation between supermajority independent boards and corporate profitability or the likelihood of misconduct, leading academics and policy makers to question their value.").

248. *See, e.g.*, *id.* at 867 ("Academic commentators generally agree that majority independent boards are a good thing, certainly better than their insider-dominated peers."); Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283, 1292–94 (1998).

249. *See, e.g.*, Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921, 950 (1999); Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 178 (2010); Jill Fisch, *Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 279–80 (1997); Donald Langevoort, *The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797, 798 (2001); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 26–27 (2002); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1530 (2005); Velikonja, *supra* note 130, at 868 ("In contrast, virtually all academic commentators view supermajority independent boards as too much of a good thing.").

a large majority of S&P 500 firms—to be effective at policing self-interested behavior by senior management.[250]

These findings should not be surprising. Independent directors may be more willing to discipline executives, but lacking the detailed knowledge of the firm that comes from day-to-day involvement in management, they often lack the necessary information.[251] The spirit is willing but the knowledge is weak. To a very large extent, independent directors are forced to rely upon the information provided to them by the very managers they are meant to discipline.[252] In evaluating the desirability of a merger, independent directors will often be forced to rely on management projections, the accuracy of which they may have difficulty evaluating. In some cases, they may be little more informed than the stockholders and equally dependent on information provided to them by management.

And despite the rise in institutional investors, there remains a serious informational asymmetry between corporate managers and stockholders. Even a sophisticated activist investor will find it difficult or impossible to acquire the information—including properly non-public information—that corporate managers acquire in the process of their day-to-day work.[253] Even sophisticated institutional investors are forced to rely, in large part, on the information disclosed to them by management. In many cases, it would be difficult for management to fully convey to investors the information required to accurately value the firm, even if they in good faith wanted to.[254] The problem is that much more acute where, as in a merger, management has powerful incentive to dissemble and little fear of future repercussions.[255]

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250. *See, e.g.*, Bhagat & Black, *supra* note 249, at 931, 931 nn.35–38 (summarizing empirical studies showing that supermajority independent boards were correlated with higher executive compensation and lower performance); Broughman, *supra* note 230, at 92–93 ("[A]s long as the CEO remains the primary deal negotiator, even an independent board cannot wholly prevent rent extraction."); R. Richard Geddes & Hrishikesh D. Vinod, *CEO Age and Outside Directors: A Hazard Analysis*, 12 REV. INDUS. ORG. 767, 769 (1997) (finding that majority-independent boards were more likely than majority-insider boards to fire a CEO, but supermajority-independent boards were less likely to do so).

251. *See, e.g.*, Bhagat & Black, *supra* note 249, at 950; Velikonja, *supra* note 130, at 868 ("[W]holly independent boards might be marginally more willing than only majority independent boards to fire a failing chief executive or stop fraud, [but] they are less able to do so because their independence renders them unaware of the problem.").

252. *See, e.g.*, Bhagat & Black, *supra* note 249, at 953; Jeffrey Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV., 1465, 1541 (2007); Nicola Faith Sharpe, *Process Over Structure: An Organizational Behavior Approach to Improving Corporate Boards*, 85 S. CAL. L. REV. 261, 266 (2012) (stating that independent directors "face multiple informational disadvantages that may make it difficult for them to evaluate management's decisions."); Velikonja, *supra* note 130, at 868 ("Many believe the share of independent directors on the board and the amount of relevant information that the board possesses are inversely correlated.").

253. If this were not the case, insider trading would rarely be profitable.

254. *See generally* Henry T. C. Hu, *Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm*, 90 TEX. L. REV. 1601 (2012).

255. *See* discussion *supra* Section IV.B.

Though the share of stock held by institutional investors continues to grow, there is also reason to think that information asymmetries will worsen in the near future. A large and growing share of institutional investment is in the form of "passive" index funds. Such investors, who currently hold approximately 30% of U.S. equities, seek to assemble a diversified portfolio tracking a broad index such as the S&P 500.[256] They seek to offer a market return and compete by offering the lowest possible fees to individual investors. As a result, they expend little or no effort seeking to value the firms they invest in. While these index funds are certainly "sophisticated" investors in the sense that they understand the central lesson of modern portfolio theory—that picking stocks is usually a fool's errand—they are not "sophisticated" in the sense of knowing anything about the firms they invest in.[257] The whole philosophy of index investing is that it is unnecessary to know anything about the firms you invest in. This philosophy, however, makes index investors—who are projected by Moody's to make up more than half of the assets in the investment management business within the next four to seven years[258]—singularly unlikely to make effective judges of fair value in a merger. When added to the approximately 20% share of U.S. equities owned by individuals, we may already be at or near the point where a majority of the stockholder vote is effectively totally uninformed.

### *E. Incentive Effects of MFW*

Probably the best justification for the holding of *MFW* is that it provides controlling stockholders with an incentive—previously lacking—to employ a deal structure likely to result in fair treatment of the minority stockholders. It is primarily for this reason that several respected scholars had urged the result in *MFW*,[259] and I acknowledge its force in the controlling stockholder context. It should be noted, however, that this rationale has little or no force when applied to *Corwin*, as *Corwin* does not require management to do anything they were not already required to do—provide full disclosure and hold a stockholder vote.

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256. Investopedia describes an index fund as "a type of mutual fund with a portfolio constructed to match or track components of a market index, such as the Standard & Poor's 500 Index (S&P 500)." *Index Fund*, INVESTOPEDIA, https://www.investopedia.com/terms/i/indexfund.asp [https://perma.cc/457C-RZUF] (last visited Apr. 9, 2019).

257. *See id.* ("Since the fund managers of an index fund are simply replicating the performance of a benchmark index, they do not need the services of research analysts and others that assist in the stock-selection process."); Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 864 (1991) (noting that the index investor "does not research the particular characteristics of a company").

258. *See* Trevor Hunnicutt, *Index Funds to Surpass Active Fund Assets in U.S. by 2024: Moody's*, REUTERS (Feb. 2, 2017) (quoting a Moody's report estimating "that passive investments will overtake active market share between 2021 and 2024"), https://www.reuters.com/article/us-funds-passive/index-funds-to-surpass-active-fund-assets-in-u-s-by-2024-moodys-idUSKBN15H1PN [https://perma.cc/P5F7-VB9X].

259. *See* Gilson & Gordon, *supra* note 16, at 839–40; Subramanian, *supra* note 16, at 60–61.

A few additional points are worth making. As the *MFW* opinion recognized, the benefits of the improved deal structure must be balanced against the loss of judicial scrutiny.[260] The court concluded that the benefits of judicial scrutiny were "slim at best, and there is a good case to made that it is negative overall."[261] Other balances, however, were possible. Instead of dropping all the way from entire fairness to business judgment rule deference in exchange for employing an independent committee and majority-of-the-minority condition, the court could have simply reduced the standard of review to enhanced scrutiny. In this way, controllers would still have an incentive to adopt the desired precautions, but some prospect of judicial scrutiny would be preserved.

Perhaps the best response to this argument is that enhanced scrutiny would be both too much, and too little. On the one hand, it would make it difficult to get claims dismissed before discovery, thus preserving the settlement value of even nuisance suits. On the other, enhanced scrutiny would not provide much value to stockholders that they could not achieve by seeking appraisal.[262] As a result, the holding of *MFW*, while setting the table for the unfortunate *Corwin*, is probably a net positive as a policy matter.

### *F. Stockholder Approval of a Merger Does Not Resemble Traditional Ratification*

The analogy of stockholder approval of a merger to ratification appears throughout both the *MFW* and *Corwin* opinions. Indeed, as noted above, the majority of the cases relied upon by the *Corwin* court—to demonstrate the deep precedential roots of its holding—involved stockholder approval of something other than a merger.[263] Some of them, such as approval of options grants, involved what *Gantler* termed "classic" ratification. Others were statutorily required votes, such as approval of charter amendments, which were not technically "ratification" but nonetheless had a ratifying effect. The analogy to a merger vote is, in many ways, natural. If the majority of stockholders find the merger acceptable, why should they now be permitted to turn around and complain?

This analogy, however, is fatally flawed. Classic ratification requires a separate vote for each specific action being ratified.[264] A stockholder vote on a merger is a bundled Hobson's choice—take it, warts and all, or leave it. In theory, a negative stockholder vote could send the parties back to the negotiating table to hammer out

260. *In re* MFW S'holders Litig., 67 A.3d 496, 534 (Del. Ch. 2013) ("The loss from invoking the business judgment rule standard of review is whatever residual value it provides to minority investors to have the potential for a judicial review of fairness . . . .").

261. *Id.*

262. To the extent, however, that a price approved by an independent committee and a majority of the minority stockholders is treated in an appraisal proceeding as strongly persuasive evidence of fair value, the compensatory and deterrence value of an appraisal proceeding would be vitiated. *See infra* Part IV.G.

263. *See supra* 167–89 and accompanying text.

264. *See* DEL. CODE ANN. tit. 8, § 144(a)(2) (2019) (requiring that "the contract or transaction is specifically approved").

a better deal, but often there is a real prospect that stockholder rejection will scuttle the merger altogether. As a result, the practical question facing stockholders is often not "Is this deal the best price reasonably available?" or even "Is this deal fair?" but rather "Is this deal better than no deal?" Sometimes an unfair deal is better than no deal at all.[265] Yet *Corwin* collapses the innumerable decisions and actions attendant to a merger into a single yes or no vote for purposes of ratification.[266]

A stylized example may be helpful in illustrating the resulting problem. Ignoring for a moment that stockholders are typically operating with serious informational disadvantages,[267] assume stockholders have perfect information about the value of the firm and about managerial actions. Assume further that they know that the firm is worth $80 per share on a standalone basis. They also know that, due to substantial synergies and cost savings, the firm would be worth $120 per share to a competitor in a merger. With competent bargaining by faithful management, they could expect to split those gains with the buyers, achieving a "fair" price of $100. But management is unfaithful, and skims $5 per share off the top in the form of sweetheart side-deals, presenting the stockholders with a deal for $90 per share—trading off $2 in stockholder value for every dollar they capture—and no assurance that any deal will be reached if the stockholders reject the $90. Even in the presence of full information, the stockholders are likely to approve the deal. The reality is worse, of course, given that stockholders will not have full information, and management will be doing their best to convince them that $90 is really a fantastic deal, and the best they could possibly hope for.

This problem is at the heart of the Delaware Supreme Court's decision in *Santa Fe*, which the *Corwin* court declined to confront. As the *Santa Fe* court emphasized, a vote in favor of the merger was not a vote in favor of the defensive measures being challenged.[268] The stockholders were not, and could not, be offered that

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265. As Vice Chancellor Laster put it in the context of a controlling stockholder squeeze-out, "[e]ven accepting that the minority stockholders can reject a controller's proposal, collective action problems prevent diffuse minority stockholders from bargaining affirmatively for better terms." Laster, *supra* note 22, at 1462. Even outside the controller context, stockholders would face significant hurdles in seeking to arrange an alternative deal, or in replacing a board with directors who will.

266. *See* Brian Broughman, *CEO Side Payments in Mergers and Acquisitions*, 2017 BYU L. REV. 67, 87 (2017) ("By bundling the side payment into a single yes-or-no merger vote, management makes it impossible for target shareholders to oppose the side payment without also voting against the merger. Provided the bundled deal is better than the status quo (i.e. no merger), shareholders will rationally vote in favor of the entire transaction."); *id.* at 67.

267. *See* Sharpe, *supra* note 252, at 266.

268. *In re* Santa Fe, 669 A.2d 59, 68 (Del. 1995); *see also* Gantler v. Stephens, 965 A.2d 695, 713 (Del. 2009) (citing approvingly to *Santa Fe* and noting that "the only director action or conduct that can be ratified is that which the shareholders are specifically asked to approve"); Sample v. Morgan, 914 A.2d 647, 663–64 (Del. Ch. 2007). In *Sample v. Morgan*, then Vice-Chancellor Strine declined to find that stockholder approval of a stock option plan ratified the actual issuances of options pursuant to that plan. 914 A.2d at 633–64. Strine emphasized that "the Delaware doctrine of ratification does not embrace a 'blank check' theory. When uncoerced, fully informed, and disinterested stockholders approve a specific corporate action, the doctrine of ratification, in most situations, precludes claims for breach of fiduciary duty attacking that action. But the mere approval by stockholders of a request by

choice. They were "merely offered a choice between the [Board's favored] Merger and doing nothing."[269] Under *Corwin*, however, the stockholder vote provides omnibus absolution, and any defensive measures and side-payments are ratified along with everything else.

As a result, the incentives of management will be to present stockholders with a deal that is just enough better than the alternatives to secure their approval, while skimming as much as possible of the surplus value created by the merger for themselves. In a sense, it will be true, as the *Corwin* court claims, that the stockholders "have had the free and informed chance to decide on the economic merits of a transaction for themselves."[270] But this is, at best, lukewarm comfort. The stockholders' evaluation of the economic merits is usually limited to finding that the deal, warts and all, is better than nothing. The possibility remains of significant deadweight losses to unfaithful management.

### *G. Appraisal is Not a Full Substitute*

Elsewhere, together with Professor Myers, I have written extensively on stockholder appraisal, cautiously praising it, and even proposing an alternative to the class action mechanism patterned after some of the features of appraisal.[271] My heart beats a little faster to see the Delaware courts reference appraisal as a viable alternative to a class action. In theory, appraisal, or something like appraisal, could be a comprehensive alternative to merger class actions.[272] But in the here and now, appraisal is limited as a judicial backstop for at least three major reasons.

First, appraisal is not always available. In particular, appraisal is not available in mergers where the consideration is publicly traded stock.[273] This is so even when the transaction constitutes a change of control that would trigger *Revlon* scrutiny. Professor Myers and I have argued that conditioning the availability of appraisal on the form of consideration is a mistake.[274] But thus far the Delaware legislature has not heeded our wisdom, and appraisal can play no role in a stock-for-stock merger.

Second, recent judicial trends in appraisal have mirrored developments in merger class action law. In particular, in cases involving apparent arm's-length mergers, the Delaware courts have been increasingly likely to defer to the negotiated

directors for the authority to take action within broad parameters does not insulate all future action by the directors within those parameters from attack." *Id.*

269. *In re Santa Fe*, 669 A.2d at 68.

270. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015); *see also In re* MFW S'holders Litig., 67 A.3d 496, 534 (Del. Ch. 2013) ("[A] majority-of-the-minority condition gives minority investors a free and voluntary opportunity to decide what is fair for themselves.").

271. *See* Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing the Class Action with a Market for Legal Claims*, 101 IOWA L. REV. 1323 (2016).

272. *See id.* at 1370.

273. *See* DEL. CODE ANN. tit. 8, § 262(b)(1) (2019).

274. *See* Myers & Korsmo, *Reforming Modern Appraisal Litigation*, 41 BROOK. L. REV. 279, 288 (2017).

merger price as the best evidence of fair value.[275] Most recently, in *DFC Global*[276] and *Dell*,[277] the Delaware Supreme Court emphasized the high hurdle for departing from the negotiated price. In short, many of the same considerations that have caused the court to grant business judgment rule deference in the class action context have also caused it to grant deference to the negotiated price in the appraisal context.[278]

Third, appraisal petitioners must forgo the merger consideration in order to pursue appraisal.[279] While recent amendments to Section 262 allow the acquirer to pre-pay undisputed amounts in order to avoid the running of interest, this is a unilateral option the acquirer need not exercise.[280] Accordingly, petitioners face substantial opportunity costs from having their capital tied up, potentially for years, while bearing the costs and risks of litigation. As a result, appraisal is a relatively blunt tool, which will only be worth using where the merger consideration is substantially below fair value in percentage terms.

Assume, for example, managers skimmed $100 million off the top of a $10 billion merger, and stockholders holding 10% of the stock think they can prove it, showing that fair value was really $10.1 billion. While $100 million is large in absolute terms and would likely make a class action worthwhile, appraisal petitioners are unlikely to tie up $1 billion and bear the costs and risks of litigation in pursuit of $10 million (their share of the amount diverted). The structure of appraisal—in particular the need to forgo the merger consideration—makes it ill-suited to control deadweight losses that, while large in absolute terms, are small in percentage terms.

### *H. The Benefits of Merger Litigation*

The evidence that merger litigation has not heretofore functioned well is canvassed above and need not be repeated. A few caveats, however, are in order. There is, at this point, a mountain of evidence that the merits have not historically mattered in merger litigation.[281] That the merits do not matter, however, should not

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275. *See, e.g.*, Merion Capital L.P. v. Lender Processing Services, Inc., C.A. No. 9320-VCL, 2016 WL 7324170, at *30–33 (Del. Ch. Dec. 16, 2016); Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 6164771 (Del. Ch. Oct. 21, 2015); Merlin Partners LP v. AutoInfo, Inc., C.A. No. 8509-VCN, 2015 WL 2069417, at *56 (Del. Ch. Apr. 30, 2015); *In re* Appraisal of Ancestry.com, Inc., No. 8173-VCG, 2015 WL 399726, at *10 (Del. Ch. Jan. 30, 2015); *cf.* Dunmire v. Farmers & Merchants Bancorp of W. Pa., Inc., C.A. No. 10589-CB, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016).

276. DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 366 (Del. 2017).

277. Dell, Inc., v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 23–31 (Del. 2017).

278. At least one member of the Court of Chancery has concluded that the logic of the recent Supreme Court pronouncements on appraisal may—where significant synergies exist—compel the trial court to award the unaffected, pre-announcement market price in an appraisal proceeding. *See* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL, 2018 WL 922139, at *66, *124–28 (Del. Ch. Feb. 15, 2018).

279. DEL. CODE ANN. tit. 8, § 262(2)(e).

280. *Id.* at § 262(2)(h).

281. *See* Wolinsky & Schireson, *supra* note 56.

be taken to imply that there are no merits. The "merits don't matter" problem is two-sided. Meritless claims are brought and settled quickly. And meritorious claims are brought and also settled (usually too quickly).

It is worth considering the likely scale of the problem. It is impossible to quantify the costs of merger litigation with any precision, but we can make some (extremely) crude estimates. Cain et al. find approximately one hundred mergers being challenged each year since 2010, with some cases being dismissed, and a few score—eighty-nine in the busiest year—settlements each year.[282] While some claims result in more meaningful settlements (and more meaningful legal fees), the bulk of the settlements—and the most obviously troubling ones—are disclosure-only.[283] For these settlements, the mean legal fees awarded hovers around $500,000.[284] With these figures in mind, if we assume a worst-case scenario of one hundred disclosure-only settlements a year, that would come to $50 million in plaintiff's attorney fees. Even if we multiply this figure by a factor of ten to account for other deadweight costs of litigation, this comes to $500 million per year, spread across the multi-trillion-dollar deal market. As taxes go, the "deal litigation tax" is far from the most onerous.[285]

Of course, if deal litigation produces no benefits, any costs at all are a waste. And cases providing real compensation for stockholders are few and far between.[286] Nonetheless, compensation is only one value implicated in litigation, and likely not the primary one in merger litigation, where the value of deterrence will tend to loom larger. Even a small likelihood of personal monetary liability—or even just the prospect that embarrassing facts will be revealed in discovery—can serve a powerful deterrent function, providing far greater societal benefit than any after-the-fact compensation for stockholders.

In this respect, a recent study provides intriguing findings that the average value of change-in-control packages for senior executives in deals "substantial enough to warrant an ISS recommendation" was 2.1% of deal value in the first half of 2017, as compared to an average of 1.36% from 2012–2016.[287] While the

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282. *See* Cain et al., *supra* note 1, at 26.

283. *Id.* at 24.

284. Jill Fisch, Sean Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 568 (2015).

285. To perform the classic comparison designed to make large dollar amounts seem small, $500 million in merger litigation costs would represent less than 1% of the $66.75 billion Americans spent on their pets in 2016. *See Pet Industry Market Size & Ownership Statistics*, AMERICAN PET PRODUCTS, http://www.americanpetproducts.org/press_industrytrends.asp [https://perma.cc/AH5V-UVL7] (last visited Apr. 12, 2019).

286. *But see* Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, BUS. LAW. (manuscript at 3–6) (forthcoming 2018) (collecting cases involving substantial monetary recoveries for stockholders).

287. Matthew Schoenfeld, *The High Cost of Fewer Appraisal Claims in 2017: Premia Down, Agency Costs Up* 4–5 (Aug. 29, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3028381 [https://perma.cc/7GS5-VT9Q].

evidence is far too limited to ascribe this increase to any particular cause,[288] it does serve as a useful reminder that even small changes in management behavior can create effects that dwarf the costs of merger litigation.

In any event, the evidence that merger litigation produces, on net, little benefit all pre-dates *Trulia*. It is frustrating, from a social science standpoint, that *Trulia* and *Corwin* came so close together in time, making it impossible to untangle their effects. We will never know what effect *Trulia*—whose approach promised to limit meritless litigation while encouraging meritorious litigation—would have had independent of *Corwin*—which, as I argue above, made even meritorious claims difficult or impossible to pursue.

## V. CONCLUSION

The crisis in merger litigation demanded a judicial response. Unfortunately, it got two. In *Trulia*, it got the response that was required, a new scrutiny of the low-value settlements and releases that provided the fuel for the spread of merger litigation. *Trulia* promised to block low-value litigation, while enabling high-value litigation to be litigated more effectively. In *Corwin*, however, the merger crisis received a response that may do more harm than good. The doctrine espoused in *Corwin*—whether it is new or not—will certainly reduce meritless merger litigation. But it is also effectively forecloses the possibility of judicial scrutiny for predictable forms of managerial opportunism that are unlikely to be adequately policed by independent directors, stockholders, or competing bidders.

In closing, I will offer some tentative prescriptions. Ideally, the effects of *Trulia* would have been allowed to play out without any other significant changes to the substantive law. It is worth remembering that data from prior to the merger litigation boom suggested that merger class actions were functioning relatively well.[289] Given the ability of plaintiff's lawyers to bring merger suits in non-Delaware jurisdictions,[290] it would have taken some time for the post-*Trulia* picture to become clear, with other jurisdictions adopting (or not adopting) the *Trulia* standard, and firms employing (or not employing) forum-selection bylaws or other measures to keep litigation in Delaware.[291] At that point, additional measures, such as fee-

288. In particular, it could be an artifact of rising equity prices in 2017 increasing the value of stock options that vest in the event of a change-of-control.

289. *See* Thompson & Thomas, *supra* note 17, at 137–38.

290. *See, e.g.*, Minor Myers, *Fixing Multi-Forum Shareholder Litigation*, 2014 U. ILL. L. REV. 467 (2014).

291. *See, e.g.*, William B. Chandler III & Anthony A. Rickey, *The Trouble with* Trulia*: Re-evaluating the Case for Fee-Shifting Bylaws as a Solution to Overlitigation of Corporate Claims* 2 (Apr. 4, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946477 [https://perma.cc/K3N9-5CTD]; Sean J. Griffith, *Private Ordering Post-*Trulia: *Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't* 1, 12 (Jan. 5, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2855950 [https://perma.cc/S5MQ-HCY2].

shifting bylaws, could have been considered as necessary.[292] Unfortunately, *Corwin* cut short this process and muddied the empirical picture.

Steps are possible, however, short of reversing course on *Corwin* altogether, which seems an unlikely prospect. One possibility would be to distinguish more carefully than has thus far been done among the various types of conflicts that can plague takeover situations. Three such conflicts were catalogued above: 1) entrenchment; 2) diversion of merger value; and 3) risk-aversion due to concentrated holdings. Of these, only entrenchment is likely to be adequately policed by the pre-closing preliminary injunction actions *Corwin* holds out as the only option. The other two are unlikely to be seriously constrained by independent directors, a stockholder vote, or a preliminary injunction action. Both are far better suited for scrutiny via a post-closing money damages action. Both also involve self-serving conduct of the type that could potentially satisfy Lyondell's good faith analysis. For diversion-of-value conflicts, one option for allowing such claims to proceed would be to find it coercive for management to ask stockholders to approve, in a single vote, both the merger and the diversion of value, and thus not cleansing under *Corwin*. It is less clear this would be plausible in the risk-aversion context. But to the extent that *Corwin* left the door open to claims targeting these particular conflicts, the Court of Chancery should walk through

292. *See id.*