

## Why the *Corwin* Doctrine Matters to Financial Advisors

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In 2015, the Delaware Supreme Court affirmed the Court of Chancery's decision in *Corwin v. KKR Financial Holdings*, holding that the business judgment rule "is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders."<sup>2</sup> The effect of *Corwin* has been to increase, in a fairly dramatic fashion, Delaware courts' application of the business judgment rule at the pleadings stage to transactions formerly subject to enhanced judicial scrutiny. Of course, under Delaware law, "[w]hen the business judgment rule standard of review is invoked because of a vote, dismissal is typically the result."<sup>3</sup> Thus, the end result of *Corwin* is a significant up-tick in successful dismissal motions of stockholder lawsuits challenging M&A transactions.<sup>4</sup>

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<sup>2</sup> 125 A.3d 304, 305-6 (Del. 2015).

<sup>3</sup> *Singh v. Attenborough*, 137 A.3d 151, 151-152 (Del. 2016), *aff'g In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015)

<sup>4</sup> See, e.g., *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015), *aff'g In re KKR Fin. Hldgs. LLC S'holder Litig.*, 101 A.3d 980 (Del. Ch. 2014); *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016), *aff'g In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015); *In re Chelsea Therapeutic Int'l Ltd. S'holders Litig.*, 2016 WL 3044721 (Del. Ch. May 20, 2015); *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727 (Del. Ch. 2016), *aff'd* 156 A.3d 697 (Table), 2017 WL 563187 (Del. Feb. 9, 2017); *City of Miami Gen. Empls' & Sanitation Empls' Ret. Tr. v. Comstock*, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016), *aff'd* 2017 Del. LEXIS 129, 158 A.3d 885 (Del. Mar. 3, 2017); *Huff Energy Fund, L.P. v. Gershen*, C.A. No. 11116-VCS, 2016 WL 5462958 (Del. Ch. Sept. 29, 2016); *In re OM Grp., Inc. S'holder Litig.*, 2016 WL 5929951 (Del. Ch. Oct. 12, 2016); *Chester Cty. Ret. Sys. v. Collings*, 2017 WL 7117924 (Del. Ch. Dec. 6,

*Corwin* matters to financial advisors who, under Delaware law, may be sued for aiding and abetting in fiduciary breaches in connection with their work advising officers and directors of Delaware companies. Because a dismissal pursuant to *Corwin* eliminates predicate claims of fiduciary breach, it also eliminates claims for aiding and abetting in that breach. This is true although, in other circumstances in which *Corwin* does not apply, claims for aiding and abetting can be pursued against financial advisors even when predicate claims of fiduciary breach have been dismissed or settled.<sup>5</sup>

The Delaware Supreme Court clarified *Corwin*'s effect on aiding and abetting claims in *Singh v. Attenborough*,<sup>6</sup> the first significant decision addressing the scope of *Corwin*. There, Vice Chancellor Parsons held, and the Delaware Supreme Court affirmed, that a dismissal pursuant to *Corwin* eliminates any predicate claim for fiduciary breach necessary to sustain an aiding and abetting claim against financial advisors.

*Attenborough* concerned the acquisition of Zale Corporation by Signet Jewelers Limited in a \$690 million merger.<sup>7</sup> The minority stockholders alleged that Zale's board of directors had breached their fiduciary duties of loyalty and care, and that Zale's financial advisor aided and abetted these breaches. The Zale board formed a Negotiation Committee after Signet Jewelers proposed an offer to purchase Zale's entire outstanding common stock in cash with a requirement that Golden Gate, a private equity firm and Zale's largest stockholder,

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2016), *aff'd* 165 A.3d 286, 2017 del. LEXIS 238 (Del. June 15, 2017); *Morrison v. Berry*, 2017 WL 43417252 (Del. Ch. Sept. 28, 2017); *Solera Hldgs., Inc. S'holder Litig.*, C.A. No. 11524-CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017); *In re Merge Healthcare Inc. S'holder Litig.*, 2017 WL 395981 (Del. Ch. Jan. 30, 2017); *In re Columbia Pipeline Grp., Inc. S'holder Litig.*, 2017 Del. Ch. LEXIS 123 (Del. Ch. Mar. 7, 2017); *In re Paramount Gold & Silver Corp. S'holders Litig.*, 2017 Del. Ch. LEXIS 56 (Del. Ch. Apr. 13, 2017); *In re Cyan, Inc. S'holder Litig.*, 2017 WL 1956955 (Del. Ch. May 11, 2017); *Appel v. Berkman*, 2017 WL 299900 (Del. Ch. July 13, 2017) (Order).

<sup>5</sup> See, e.g., *In re Rural/Metro Corp. S'holders Litigation*, 102 A.3d 205 (Del. Ch. 2014) (holding RBC Capital liable for \$75.8 million in damages for aiding and abetting in fiduciary breach, although the predicate claims of fiduciary breach had all been dismissed or settled).

<sup>6</sup> 137 A.3d 151 (Del. 2016), *aff'g In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) (decision applying *Corwin* on reargument). See also *In re Zale Corp. S'holders Litig.*, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015) (decision, issued prior to *Corwin*, denying dismissal).

<sup>7</sup> 2015 WL 5853693, at \*5.

enter into a voting agreement. The Negotiation Committee engaged Merrill Lynch, Pierce, Fenner & Smith Incorporated as its financial advisor; however, the Court held that Merrill Lynch did not accurately represent its relationship with Signet to the committee, as it had previously pitched the idea of acquiring Zale to Signet and had received over two million in fees from Signet in the two prior years. Although this fact was not disclosed to the board until after the merger was publicly announced, it was disclosed to stockholders in the proxy.<sup>8</sup> Initially, the Court of Chancery denied the defendants' motion to dismiss in light of Merrill Lynch's failure to timely disclose its conflicts to the Negotiation Committee and the board.<sup>9</sup> After *Corwin* was issued, however, the defendants moved to reargue the motion. On reargument, the Court dismissed the complaint under *Corwin* because the vote of disinterested stockholders approving the transaction was fully informed.<sup>10</sup>

The Supreme Court, sitting *en banc*, affirmed the Court of Chancery's dismissal of claims against Zale's board of directors as well as its financial advisor. The Supreme Court described the holding in *Gantler v. Stephens*<sup>11</sup> as clarifying that the defense of ratification invokes the business judgment rule standard of review. The Court noted that when the business judgment rule is invoked by a fully informed and disinterested stockholder vote, dismissal usually follows because the only remaining claim is waste, which is historically difficult to sustain.<sup>12</sup> In a brief "Order" affirming the lower court's decision, the Supreme Court observed: "[h]aving correctly decided . . . that the stockholder vote was fully informed and voluntary, the Court of Chancery properly dismissed the plaintiffs' claims *against all parties*," including Merrill Lynch.<sup>13</sup>

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<sup>8</sup> 137 A.3d at 152.

<sup>9</sup> 2015 WL 5853693.

<sup>10</sup> 2015 WL 6551418.

<sup>11</sup> 965 A.2d 695 (Del. 2009).

<sup>12</sup> 137 A.3d at 152 ("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.").

<sup>13</sup> 137 A.3d at 152 (emphasis added).