NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 20 SUMMER 2024 NUMBER 3

FOREWORD

EMILIANO CATAN*, ROBERT JACKSON**, & EDWARD ROCK***

Directors and officers owe fiduciary duties because of their status, but when and why do "controlling stockholders" owe fiduciary duties?[1] What fiduciary duties do they owe? And why? These issues are among the most important in corporate law.[2] In the wake of recent Delaware Supreme Court cases such as *In re Match Group*, they are also among the most timely.[3] The following article is an important analysis of this set of topics by a long-time Vice Chancellor, J. Travis Laster, of the Delaware Court of Chancery. Along with his important recent opinion

* Catherine A. Rein Professor of Law and Co-Director of the Institute for Corporate Governance & Finance, New York University School of Law.

** Nathalie P. Urry Professor of Law and Co-Director, Institute for Corporate Governance & Finance, New York University School of Law.

*** Martin Lipton Professor of Law and Co-Director, Institute for Corporate Governance & Finance, New York University School of Law.

1. *See generally* McMahon v. New Castle Assocs., 532 A.2d 601, 604 (Del. Ch. 1987) (explaining that "[a]mong the most ancient headings" of "Chancery's traditional jurisdiction over corporate directors and officers" is the view that "[t]he duties [directors and officers] owe [arise from] their legal power over corporate property"; although "[o]ne may place trust in a workman of any sort," "it would hardly be contended that such trust would warrant chancery's assuming jurisdiction over a claim that a workman . . . caused injury by want of due care," "although a claim of that very type against [an officer or director] will be entertained in a court of equity").

2. For that reason, these questions have received extensive attention in the scholarly literature. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982); Marcel Kahan, *Sales of Corporate Control*, 91 J. L. ECON. & ORG. 368 (1993); Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957 (1994); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV 785 (2003).

3. *In re* Match Group, Inc. Deriv. Lit., 315 A.3d 446 (Del. 2024).

in *Sears Hometown*,[4] it richly deserves the attention of anyone concerned with controlling stockholders' role in corporate law and corporate governance.

Roughly speaking, there are three general approaches to understanding controller fiduciary duties. One approach is to say that control, by itself, does not impose any fiduciary duties unless and until a controller engages in a conflict of interest transaction or otherwise takes control of the "levers" of the corporation. On this view, when a controller does so, it owes the same fiduciary duties as an officer or director. A second approach is to say that a controller, simply by virtue of becoming a controller, takes on fiduciary duties "equivalent" to those of a director or officer. A third approach is to say that a controller takes on fiduciary duties upon becoming a controller, but those fiduciary duties are substantially narrower and less all-encompassing than a director or officer's fiduciary duties.

The article that follows makes (at least) two important contributions. First, it provides a deeply researched and argued rejection of the "equivalency" thesis. It shows convincingly that courts that have said that controllers, merely by virtue of being controllers, owe the "same" fiduciary duties as directors were either speaking loosely or were simply incorrect.

Second, having rejected the equivalency thesis, the article provides a new foundation for understanding controllers' more limited but still important fiduciary duties. On Vice Chancellor Laster's analysis, the duty of care largely carries over to this context intact: like directors, controllers owe a general duty not to harm the interests of the corporation or stockholders through grossly negligent or intentional action. Thus, when selling a control bloc, a controller can be held liable for selling to a "looter."[5]

The major differences relate to the duty of loyalty. In Vice Chancellor Laster's view, unlike directors, controllers do not owe a general duty to act in the good faith pursuit of the corporation's best interests, although controllers may assume such a

---

4. *In re* Sears Hometown and Outlet Stores, Inc. S'holder Litig., 309 A.3d 474, 508 (Del. Ch. 2024) ("Delaware decisions . . . disconfirm the assertion that controllers owe director-equivalent fiduciary duties of loyalty and care when exercising stockholder rights. A controlling stockholder owes fiduciary duties when exercising stockholder powers, but not the same duties as a director owes.").

5. *See, e.g., id.* at 509 n.24 (citing, *inter alia*, Ford v. VMWare, Inc., 2017 WL 1684089 (Del. Ch. 2017)).

duty when they take the levers of the corporation and thereby displace the directors. But controllers do owe a general duty not to harm the interests of other stockholders.

On this account, conflict of interest transactions are problematic because the controller potentially benefits at the expense of the non-controlling stockholders. The approach raises an interesting question relating to controller transactions: does preferential treatment for the controller per se violate the controller's duty of loyalty, or only when it comes at the expense of the non-controlling stockholders?[6] The "no-harm" principle might seem to require that the preferential treatment comes at the expense of non-controlling stockholders. But one could also argue that conflict of interest transactions present such *risk* of harm to non-controlling stockholders that, as a prophylactic measure, differential treatment alone should suffice.

More controversially, on Vice Chancellor Laster's analysis, the "no-harm" principle extends beyond the transactional context to the exercise of stockholder-level rights like voting.[7] This move raises a variety of fascinating issues including the fiduciary analysis of votes on transactions, bylaws and directors. Here, the discriminating factor is whether a vote preserves the status quo or changes it. To a first approximation, preserving the status quo does not trigger a fiduciary duty analysis, but changing it will be constrained by the "no-harm" principle.[8]

This approach, of course, places a great deal of importance on being able to distinguish between votes that preserve the status quo and those that change it, a distinction that immediately raises the question of the relevant baseline. To take one example that Vice Chancellor Laster discusses at length, when Conrad Black, the controller of Hollinger International, used his control to enact a bylaw requiring unanimous director approval, was that status quo preserving or status quo changing? On the one hand, it was designed to preserve his control (status

---

6. Lawrence A. Hamermesh, Jack B. Jacobs, Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 349-50 (2022).

7. *See In re* Sears Hometown and Outlet Stores, Inc. Stockholder Litigation, 309 A.3d at 510 (citing Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987) ("Stockholders in a Delaware corporation have a right to control and vote their shares in their own interest. They are limited *only by any fiduciary duty owed to other stockholders*." (emphasis added)).

8. J. Travis Laster, *The Distinctive Fiduciary Duties that Stockholder Controllers Owe,* 20 N.Y.U. J. L. & BUS. 463, 502 (Sep. 2024).

quo preserving?), while on the other, it was designed to frustrate his agreement to cooperate with a sale process overseen by the controlled company's board (status quo changing?).[9]

Finally, having provided an account of controller fiduciary duties that is narrower than director fiduciary duties, Vice Chancellor Laster argues that this narrower account implies that courts need not be so anxious about the consequences of denoting a stockholder as a "controller." This implication depends, at least in part, on whether the courts' reluctance is driven by the "equivalency" thesis or other considerations. To be sure, if driven by the equivalency thesis, Vice Chancellor Laster's rebuttal of that thesis should make courts more willing to adopt a more flexible understanding of control. If, on the other hand, as explored below, the reluctance is driven by other considerations – e.g., a concern about vexatious litigation – then refuting the equivalency thesis will have a more limited impact.

Will the corporate law ecosystem find Vice Chancellor Laster's analysis persuasive? One can expect pushback from several directions. First, given that, under his analysis, nearly any decision or transaction in which a controller is involved will trigger a fiduciary duty analysis that will likely be analyzed under either "enhanced scrutiny" or "entire fairness," some will argue that this is a substantial *expansion* of controllers' fiduciary duties compared to the more "categorical" analysis of the narrow view of controllers duties. In particular, Vice Chancellor Laster's analysis rejects the conventional interpretation of *Bershad v. Curtis-Wright* as affording controllers the unfettered ability to vote their shares "selfishly," a proposition that traditionally relies on the opening sentence of the key section in the opinion, namely: "Stockholders in Delaware corporations have a right to control and vote their shares in their own interest."[10]

On the Vice Chancellor's reading, this broad permission must be understood as being limited by the next sentences: "They are limited only by any fiduciary duty owed to other stockholders. It is not objectionable that their motives may

---

9. Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1030 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).

10. *Bershad*, 535 A.2d at 845. Although academics often invoke *Bershad* for the broader principle, in recent work one of us has examined the limitation on *Bershad*'s language closely, exploring what that Article calls "the right to vote selfishly." Marcel Kahan & Edward Rock, *Systemic Stewardship with Tradeoffs,* 48 J. Corp. L. 497 & n.92 (2023).

be for personal profit, or determined by whim or caprice, so long as they violate no duty owed other shareholders." This oft-neglected limitation immediately raises the question of the fiduciary duties that controllers owe to other stockholders in voting their shares. For Laster, those duties include a duty of "no-harm" to other stockholders. This reading of *Bershad* implies that controllers do not have an unlimited right to vote their shares "selfishly" but, rather, that a controller's decision to vote its shares will be subject to a fiduciary analysis, even if that analysis is limited (because a controller's fiduciary duties are limited).

Second, Laster argues that his rejection of the "equivalency" thesis (and the resulting limitation of the controller's fiduciary duties in comparison to directors' and officers' duties) should make courts more comfortable with a flexible, multifactor approach to determining control. But the expansion of fiduciary analysis beyond conflict of interest transactions to include nearly any involvement of a controller in corporate decision-making will lead others to conclude that a narrow definition is even more essential.

Third, observers are likely to view Laster's broader fiduciary framework through a procedural lens and argue that it will make it hard or even impossible to dismiss claims involving a controller short of trial. This, they will argue, will increase the settlement value of any claim involving a controller, a result in tension with the Delaware courts' decade long effort to promote pre-trial dismissal of claims.[11]

Finally, still others will argue that Laster's analysis is trapped in the view that a controlling stockholder threatens non-controlling stockholder interests through taking "private benefits of control" without appreciating the significant benefits that come with controlling stockholders. Such stockholders, of course, can have powerful incentives to maximize the firm's value in a fashion that benefits all investors by limiting managerial agency costs.[12] Furthermore, control can allow a controller to pursue a distinctive "idiosyncratic vision" and achieve transformative success as illustrated by examples

11. *See, e.g.*, Corwin v. KKR Fin. Holdings, LLC, 125 A.3d 304 (Del. 2015); Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

12. *See, e.g.*, Sanford J. Grossman & Oliver Hart, *One Share/One Vote and the Market for Corporate Control*, 20 J. FIN. ECON. 175 (1988); Gilson & Gordon, *supra* note 2, at 792.

ranging from Henry Ford's control of Ford Motor Company to some of today's most successful tech companies.[13] Imposing a fiduciary analysis on a controller's involvement in setting firm direction—indeed, holding controllers who do so to the same duties as directors owe—will, on this analysis, potentially undermine these benefits, especially as controllers, unlike directors, cannot be exculpated under DGCL § 102(b)(7).

Vice Chancellor Laster's article is a *tour de force*. It sets forth a comprehensive and conceptually sophisticated approach to controllers that is deeply rooted in both doctrine and policy. It will become an essential touchstone for any subsequent analysis. All three of us expect it to become required reading for corporate lawyers—and for our students, too.

For that reason, we are especially grateful to the Vice Chancellor for his contribution to the *Journal of Law and Business*'s partnership with the Institute for Corporate Governance to publish the Institute's annual Distinguished Jurist Lecture. Vice Chancellor Laster's article is the third in this series, which first featured the insightful commentary of Delaware's Chief Justice, C.J. Seitz, Jr., on the importance of independence in the boardroom of the modern corporation,[14] followed by Chancellor Kathaleen McCormick's thoughtful and timely remarks on Delaware's embrace of specific performance as the preferred remedy in broken-merger cases.[15]

As we have noted before, this series reflects NYU's long and deep connection to the Delaware judiciary, a connection borne of the conviction that practitioners, students, and scholars alike benefit immensely from the chance to engage with, and challenge, corporate law's leading thinkers.[16] As readers will see in the pages that follow, Vice Chancellor Laster's article is a canonical illustration of why that is so.

---

13. Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560 (2016).

14. Collins J. Seitz, Jr., *A Declaration of Independence: Committees, Conflicts, and the Courts*, 19 N.Y.U. J.L. & Bus. 467 (2023).

15. Kathaleen St. Jude McCormick & Robert Erikson, *Delaware's Approach to Specific Performance in M&A Litigation*, 20 N.Y.U. J.L. & Bus. 7 (2023).

16. Robert J. Jackson, Jr., Edward R. Rock & Elizabeth R. Crimmins, *Foreword*, 19 N.Y.U. J.L. & Bus. 463, 465 & nn.6 & 9 (2023) (describing previous NYU lectures delivered by former Delaware Chief Justice Leo Strine, *see* Leo E. Strine, Jr., *Fiduciary Blind Spot: The Failure of Institutional Investors to Prevent the Illegitimate Use of Working Americans' Savings for Corporate Political Spending*, 97 WASH. U. L. REV. 1007 (2020), and Chancellor Andre Bouchard).