Right, Wrong AND THE BUSINESS LEADERS Betwixt & Between

A DISCUSSION WITH BERNSTEIN LITOWITZ BERGER & GROSSMANN ON CORPORATE GOVERNANCE • BY KATRINA DEWEY

Bernstein Litowitz Berger & Grossmann has long been a leading voice for investors, in securities litigation and more recently in corporate governance disputes – litigation challenging everything from backdating of stock options to board oversight of legal risk, including sexual abuse claims.

Anchored by partners Mark Lebovitch and Jeroen van Kwawegen, the practice got an enormous boost last year when noted Delaware Chancery practitioner Greg Varallo joined the firm, bringing more than three decades of trench warfare experience from the corporate side. The firm opened a Wilmington, Del., office and achieved a rare feat for shareholder advocates, promptly hiring three former clerks from Delaware's famed Court of Chancery.

Photo by Andrew Kahl

Left to right: Jeroen van Kwawegan, Mark Lebovitch, Greg Varallo

With Lebovitch that makes four. He became fascinated by corporate governance law as a 2L at NYU Law School, where he took Chancellor William Allen's corporate law class. Allen inspired Lebovitch to clerk for Vice Chancellor Stephen P. Lamb, where he found his love of the courtroom. He then worked at Skadden Arps before finding his home at Bernstein Litowitz.

Van Kwawegen started out aiming to be a criminal lawyer after serving in the Dutch Military Police. After going to law school, he joined Latham & Watkins to handle plaintiff-side insurance recovery including the 9/11 disputes, before becoming a shareholder lawyer at Bernstein Litowitz over a decade ago.

Varallo hoped to join a big New York firm after graduating from Temple. But thanks to wise advice, he gave Wilmington a try, joining Richards, Layton & Finger in 1983 as the 33rd lawyer on its letterhead. Starting at the outset of the takeover era, he's had a ringside seat to most of the iconic corporate governance disputes, serving as president of Richards Layton for three years before deciding last year to see if a tiger could change his stripes.

The team's billion-dollar track record speaks for itself: Lebovitch helped recover $2.4B for shareholders in the federal securities claim arising from Bank of America's buyout of Merrill Lynch; a $290M recovery from an insider trading scheme in the Allergan Proxy Violation case; and $90M plus groundbreaking corporate reforms against Fox News. Van Kwawegen netted $92.5M for shareholders in a conflicted merger of the Starz television network with Lionsgate; $75M for shareholders and drug product marketing reforms from Pfizer; and a $289M judgment resulting from an appraisal case over TransCanada's acquisition of Columbia Pipeline. Varallo has played a role in some of the most important corporate governance battles in Delaware history, and most recently defended Fox News against Bernstein Litowitz. That, of course, was before he decided to switch up his practice.

We talked about their shared passion for corporate governance litigation, its evolution through Delaware's Court of Chancery and its importance – especially in today's world. In a time of chaos in which rules are questioned and bent, the importance of a framework to protect investors and motivate good corporate behavior may be more important than ever.

Lawdragon: Let's start with a basic question. Why does corporate governance litigation matter?

Mark Lebovitch: The foundation of our economy rests on investors from all over the world pooling their funds with talented managers. Preserving investors' trust in their fiduciaries while encouraging prudent risk-taking by corporate directors and officers is the essence of corporate governance. That's why on any given day the daily grind of the litigation can be challenging. But in the big picture, I consider myself so lucky. I love my practice, and it's interesting on a day-to-day basis.

And Delaware law's evolution over time is fascinating. A few years back it looked like we were headed toward a world of checklists, which was a shame as we're not tax lawyers and this isn't a real estate closing. What I learned from Bill Allen was that Delaware law and all its standards and complexities are not a checklist, but are really just guideposts to get to the fundamental concept of good faith.

The truth is, when people are doing something for self-interest or for an improper reason, they know more often than not that they shouldn't be doing it, and they do little things to give themselves away. They unconsciously leave a record showing their own guilt. It's fun to parse through a record to figure out who's hiding disloyalty and who genuinely tried to do right by their stockholders.

Jeroen van Kwawegen: There are a couple things I really like about corporate governance litigation. One is it deals with right and wrong because we don't bring lawsuits on a disagreement about a business decision or a business judgment. It really is about disloyalty and bad faith.

The second element I like is that it's about human agency. I'm trying to understand human motivations. When you think about a typical breach of contract dispute or a typical corporate dispute, very often it's about what the corporation did and why the corporation did certain things. Whereas in my cases – which very often deal with controlling shareholders because of the development in the law – there very often is also a strong human component to it: The controller's motivations can be very personal. There's this interesting dynamic of complex corporate transactions that are motivated by human motivations. I like that sort of interaction between human nature and corporate decisions very much. It's fascinating.

A third reason I really like it is, typically I have a very nice interaction with the judges. They don't always agree with me and that's okay, and sometimes they do and that's great. But the judges I deal with in Delaware and also outside of Delaware are typically really engaged, and I have a dialogue with them

about where the law is, sometimes where I think the law should be going.

LD: Greg, you're a newcomer to the plaintiff side of corporate governance and are considered one of its more notable practitioners from your 36 years of Chancery defense litigation. Can you talk a bit about your evolving perspective on corporate governance over the years?

Greg Varallo: I was lucky enough to find the Delaware legal community in 1983 at what I consider sort of a fulcrum on the continuum of development. There was a new takeover every week and we had an injunction every week, so in four or five years I got the equivalent of a career's worth of experience in this area. If I had been in New York it would have taken me 30 years to get the experience I had in just a couple of years in Delaware.

When I started it was all about takeovers because the law concerning takeovers wasn't well established. My first big case as a new associate was *Moran v. Household International*, which ruled on the legitimacy of the use of a poison pill. Before then pills didn't even exist and up until *Moran* and *Unocal* – which was decided a couple of months later establishing the rules of the road as to what a board could and couldn't do in connection with a takeover – there wasn't an agreed-to framework for adjudicating a board's behavior when facing a threat to its control. People were trying to put it in the business judgment rule rationale. Other people were trying to put it in a securities law framework and the courts didn't seem to agree on how to review a board's conduct in the takeover context.

When we got to *Unocal* and then *Revlon*, which is sort of the next step in the development, boards then at least had a roadmap.

But when I started we didn't even have agreed-upon standards. Nobody knew what the standards were. We were making it up in every case and if you read the law from the late 1970s to 1984 or so it's clear that judges were literally trying to figure it out. I was a young kid. I was in the library researching cases but I worked on the cases that framed how you do takeovers and in the process learned a lot about how boards are supposed to work and how they're not supposed to work.

LD: And it's fair to say Richards Layton was a dominant player in most Delaware governance battles in those days.

GV: The firm was probably in nine out of 10 of the most important matters and we were a relatively small shop at the time. When I started I was the 33rd lawyer on the letterhead and when I left we were about 170. In 1984 I was a first-year associate and my participation in the debate, fairly put, was listening to the giants of the bar discuss it. I was lucky enough to be in the room when these debates were being had.

For example, I was on the call in which Lou Finger debated with other leading Delaware corporate lawyers the pros and cons of whether GM could do the first tracking stock and even helped prepare the legal opinion in that regard. And shortly after working on *Moran*, the first pill case, I worked on *Unocal* and a few years later on *Time Warner*. And moving forward in time, in a rather strange twist of fate, after working on the case that approved the adoption of the first poison pill, I had the good fortune to work on the first use of the pill in *Selectica*, many years later.

LD: That's a great perspective on how corporate governance litigation has been shaped over the years. And maybe it's a good segue to the case that brought you all together – the 2016 battle over sexual abuse at Fox that sprung from Gretchen Carlson's lawsuit against Fox television chief Roger Ailes which revealed oh so many very, very bad foxes. Bernstein Litowitz, led by Max Berger, Mark, and your partners David Wales and Rebecca Boon, represented the City of Monroe, Mich., Employees Retirement System to protect its investment in Fox, and Richards Layton defended.

ML: The law typically evolves slowly, but sometimes external events force it to take a sharp turn. I think that's the story of the Fox News case. When Gretchen Carlson filed a lawsuit against Roger Ailes and chose not to name Fox News itself in order to avoid the confidential arbitration process that had concealed so many similar stories of sexual harassment by powerful executives, she changed corporate America forever. From the stories of despicable and abusive conduct by Roger Ailes, we saw the birth of the #MeToo movement and the downfall of prominent figures like Harvey Weinstein, Bill O'Reilly, Matt Lauer and others who used their powerful positions as cover for predatory behavior.

When we got involved, we didn't know if the law would follow, but we firmly believed it should. And what made the settlement possible was having adversaries in Greg and then-Fox General Counsel Gerson Zweifach who were strong enough to decide that sometimes fighting a case to the death is not in the client's interest.

GV: Mark and I sat down and I said, "Look, we want to work with you. We want to get to a solution which is a fair and a good solution for the company." It was important to Fox that Bernstein Litowitz work with us to achieve a result before it filed its suit. We wanted the news not to be that 21st Century Fox was sued but that 21st Century Fox just entered a landmark settlement addressing the issues that had been identified in the suit.

ML: I distinctly remember an early conversation in the Fox News case where Greg and I spoke about the position that the company will be in if we file the complaint. I recognized that once we filed suit, it would be tough for the board to justify its own conduct without seeming callous to the victims. But if they engaged with us, it was possible for the board to come out looking good.

Greg and I had a real conversation. When I say real, I mean it's not just, "My client's going to beat you and here's why." We were each doing our best for our clients, but we were able to level with each other in a way that is far too rare among lawyers used to pummeling their adversaries into a pulp. There was a level of trust. And as we went from the precipice of what would have been a mutually bruising litigation to the path that led to the settlement, that trust was repeatedly tested, but it held. We kept a large group of plaintiffs' firms at bay and not in court, while Greg kept a challenging client open to making change and improving its culture instead of trying to justify its prior conduct.

LD: And after about a year of negotiations, you reached a settlement that set a new standard for corporate governance reform. Tell us about how you executed that.

GV: When we were ready to announce the settlement, Mark, his partner Max and I called the Court to give the Court a heads up that the case and settlement would be coming. The Court facilitated the settlement being filed on the same day that the case was. Which sounds easy, but believe it or not, it took a fairly significant amount of logistical work to make that go smoothly.

So instead of the press cycle being, "Fox were sued again," it was, "Fox reaches novel, interesting and positive settlement." Bernstein Litowitz and their client achieved their goal of creating an example of how you could do this correctly and well. And I came away thinking anybody that could hold the whole plaintiffs' bar together for a year, as they had, and that was trustworthy enough and had enough integrity to not only keep their word but also manage all of their colleagues, was a true powerhouse.

JVK: That case also made clear to us the need for a bigger footprint in Delaware. The Fox settlement was just one of the corporate governance battles we were handling. We were killing ourselves. We were working so hard, and we've got a great team, but we were a New York firm handling a lot of our cases in Delaware.

Mark and I always viewed Delaware law somewhat as a pendulum swinging back and forth. There was a period of time where the decisions were very tough on shareholders. And while we didn't always win in Delaware, we felt well received. We thought the pendulum was about to swing back, and decided the time was right to capitalize on something we treat as precious, which is good will with the judiciary. It's critical that win or lose, the Delaware judges see us as quality players.

LD: And thanks to the Fox case, you knew just the right lawyer to anchor it. Varallo embodied the Delaware way, and was trusted on the corporate side of the bar as well as the Chancery bench.

GV: When I came on Mark had already hired Andrew Blumberg a few months earlier. Andrew had been Chancellor Bouchard's clerk and then worked at Weil Gotshal. Since I've joined we've hired Tom James, who was Vice Chancellor Laster's clerk and also worked at Weil; and Daniel Meyer, who had also been Chancellor Bouchard's clerk and worked at Davis Polk. These associates joined a team of really excellent lawyers who had been working with Mark and Jeroen for years.

We've got a bench now that I would put against anybody. This team is really, really good. And I remember from Richards Layton, if we could hire one clerk a year we thought we were doing great. If we got two it was fantastic – and we never got three in a year. I mean, it just didn't happen. Adding to an already strong team, this group has become a juggernaut.

LD: Greg, it would have been so easy for you to just stay at Richards Layton, it's an amazing firm. But you seem so reinvigorated and it's fun to try different things.

GV: I couldn't have said it better myself. I was also at a point in my career where I was blessed not to have to work if I didn't want to and so I found myself ready for a new and meaningful challenge. One of the things I do in my spare time is hunt and I've hunted some big game. When I came in I said, "Look, we're

hunting big game. We're only going after big cases or big concepts, things that haven't been done before."

In our Wilmington conference room we have a huge photo of an enormous grizzly called Mountain Outlaw. It reminds me every day of what we are doing and where we are headed.

LD: Mark, you pitched the idea of a corporate governance litigation focus to Bernstein Litowitz in 2004 when you interviewed with the firm as you were leaving Skadden. Can you talk about that and why you chose Bernstein Litowitz?

ML: I realized there was an opportunity in the Delaware legal system for aggressive plaintiff shareholder litigation because there were really only a few lawyers who were doing it the right way for shareholders. I interviewed with Max [Berger] and made my pitch. "Look, I can litigate securities cases and that's what you're hiring me for, but down the road there's an opportunity." And Max is just the absolute embodiment of a visionary leader. He encourages entrepreneurial lawyering and has been tremendously supportive of our efforts since day one.

By the end of 2006, Bernstein Litowitz began to file corporate governance litigation. We started in late '06 bringing really interesting cases in Delaware, hostile takeover cases where we were representing shareholders. But we quickly focused on voting rights cases, dealing with core corporate governance questions. I think the judges welcomed it. Our strategic ethos at the time was what I'll call unapologetically representing shareholders.

LD: What makes a case a Bernstein Litowitz type of case – what cases do you like to pursue and which aren't for you?

ML: As part of the firm's decision on which cases to pursue, the core question is: what would a person of honesty and basic integrity do in the same situation? And if the answer is something other than what the prospective defendants did, they probably aren't doing the right thing. If bad conduct not only harms that company's shareholders but will be replicated at other companies if left unchallenged, then we are very likely to want to bring that challenge in the first place.

LD: When you achieve corporate governance reform or a settlement, does it feel like justice? I think to non-corporate types, the "victory" of reform can feel nebulous. Although as in *Fox*, it brings about discussion and it's seen by other companies as a warning, saying "No, they were wrong. You can't do this."

ML: I think that structuring and negotiating intelligent and meaningful governance relief is really satisfying because it requires multiple skills. When I started law school, the dean asked us whether as a kid we envisioned ourselves being more of an architect or an archeologist. If you said archeologist, you're a litigator; if you said architect you were a transactional lawyer.

What I like about governance cases is you're a little bit of both. If there's a deal pending, you are going through the history of it and piecing together what happened. But at the same time, you're influencing things in real life, in real time. A smart governance settlement examines what went wrong in the past to craft a structure that tries to prevent a similar problem from happening in the future.

LD: Can we talk about some of your favorite cases? And what about the resolution was meaningful to you?

ML: In addition to *Fox*, I'd say the Pfizer derivative suit. Until that point, you really didn't have monetary recoveries in derivative suits related to the board overseeing legal compliance. The defense lawyers couldn't believe we were serious in demanding that their clients had to pay to avoid a trial. Another was the El Paso buyout case. We really brought to light not only conflicts from insiders, but also, I would say, the callous way the Wall Street banks were approaching their own conflicts. Holding Goldman Sachs accountable in that case actually made them change the way they deal with personal conflicts of their bankers. It was a big wake up call to the Wall Street banks.

I'm also proud of *Amylin*, which is a voting rights case. We were working with now-Chancellor Andre Bouchard and his partner Joel Friedlander. We identified what are called proxy puts, which are basically debt-acceleration provisions triggered by stockholders changing the board. Proxy puts had proliferated through debt agreements in all sorts of public companies. We looked at it and said, "This is the craziest thing we've ever seen." You literally are telling shareholders that if they choose to vote to change the board, they're creating a risk of default. We challenged the puts in Amylin's debt agreements but feel like we created rules applicable to all companies.

LD: Can we talk a bit more about the development of the law as it reflects human motivation and influence? You have all spent a fair amount of your careers advocating for acknowledgement of what we

all know: human beings are conflicted with feelings and motivations, and where to draw lines about that.

JVK: There have been a number of decisions that I think have been influenced by former Chief Justice Leo Strine, cases like *Sanchez* and *Pincus* where he and his colleagues on the Delaware Supreme Court made very clear that directors are people, and that "homo economicus" does not exist; that people are driven by not only economic and financial incentives, but also by personal incentives.

I find that to be, A, true. I'm just looking at myself, right? But, B, that also then frames how you look at director conduct – that becomes a very human lens. And I've had several arguments since those cases where I was explaining to the judge why I believed that there was going to be a problem with the supposed independence of certain directors because of human factors. I find that discussion really interesting, trying to essentially figure out if this person is really independent given the facts and motivations.

I love that aspect of the practice because it is really that intersection of right and wrong, personal motivations, financial motivations, complex corporate transactions. And essentially if cases get resolved, you can have a meaningful impact about how companies operate in the future. You can change practices, and I think that's one of the reasons why you hear so much about Fox because that was one recent, high profile example.

We did the same thing with Pfizer 10 years ago about how they were overseeing drug marketing practices. You can have a direct impact on how companies operate in a changing social regulatory environment. That's empowering, right? It's empowering for the clients that we represent, the shareholders, very often institutional shareholders, but in many ways it's also empowering for me because I'm part of that effort to make companies better and hold their boards and executives accountable if they are really off the rails.

LD: It's interesting because the nature of directors has historically been very "insider." Bringing elements of corporate governance that have been hidden from shareholders out into the light of day is something Bernstein Litowitz and others can facilitate by pushing in places where it's still a bit old school and protective of things that maybe should be more transparent.

JVK: I completely agree, and I don't think it's just because of litigation, but there's definitely been a move towards the professionalization of boards, but also of the directors themselves, right? Activists should be credited for that too, putting the spotlight on directors who have been at companies for a very long time, including companies that have been underperforming for a very long time.

LD: Greg, what's the intellectual attraction of the clients you're representing at Bernstein Litowitz and do you see it as a continuation of your corporate governance practice in a way?

GV: I think that being a plaintiffs' lawyer gives you the ability to be at the leading edge of lots of common law governance development, and I've now had the opportunity to argue a number of cases on the plaintiffs' side.

The issue is typically framed by the plaintiffs' lawyers. On the defense side, you're sued and then you choose your defense based upon the way the plaintiffs have constructed the litigation. I did plaintiffs' work occasionally as a defense lawyer, usually for activists, but I rarely got the opportunity to frame the legal issue in the way that I knew exactly what the Court had to decide and exactly how the defendants had to respond to a particular issue.

LD: It's also interesting to look at the crossover of corporate governance litigation to the global sphere. Jeroen, that's an area of particular interest for you as head of the firm's European practice.

JVK: One of the founders of the firm, Max Berger, at one point said to me, "Is this something that you would like to do? Because culturally it probably is a good fit. You're a Dutch person. You can be a cultural bridge for us between the United States and Europe." I thought that was a wonderful opportunity for me and for the firm. I said, "Max, that sounds like a great plan." So I started building a network of European clients. But first we thought long and hard about our core values, market positioning and strategy. This principally happened during a very long conversation with Max walking around Amsterdam for hours.

We drilled down on who are we, and how do we want people in Europe to perceive us. Because from the outside all these firms are sort of similar and everybody has a friendly face. How do people actually realize that people at Bernstein Litowitz are different? The answer was simple: We prove over and over again to our clients that we are in it for the long-haul, that we are repeat players who care more about our clients' long-term strategic interests than about achieving a "quick" win with any individual case or outcome. As shown by our track record – measured by third parties like ISS-SCAS and others – this approach leads to unparalleled success over time.

That long-term view was very important to me. That became the driving factor when I was working with European clients, educating them on shareholder litigation and explaining essentially our approach and how that is different from other firms. That ties into corporate governance because the European clients that I work with are all sophisticated institutional investors with a long-term perspective. They tend to be, by American standards, huge. Some of my smallest clients in Europe, they may have $10B under management. That is a pretty big client in the United States. I also have clients in Europe that have more than $400B under management. They are massive institutions with massive assets that they are investing, and sophisticated legal departments and in-house portfolio managers. What I've seen over time is that in Europe with these institutional clients, they increasingly started using Environmental, Social and Governance Principles when assessing investments and their approach to shareholder litigation to further their funds' and stakeholders' long-term objectives.

LD: That seems particularly timely with the legal and financial worldwide fallout from Covid.

JVK: What's been borne out specifically for our clients with respect to Covid is the belief that they are investing for the long term. They want this to be sustainable. They are looking out for their beneficiaries and they need to be able to get paid and have their pensions 50 or 100 years from now. So they have a very long-term view.

I recently became an American citizen, but having this cultural fit of a European background helps me talk the same "language" because I consider the governance aspect of our practice in the same way. Look, the environmental and social aspects of the investment policies, I'm much less conversant there because I'm not an environmental lawyer, I'm not a social justice lawyer. But the governance aspect, we talk the same language, we understand what the ultimate goals are: Hold disloyal agents accountable and align interests with shareholder objectives.

LD: What do you think the impact near-ish term and longer of Covid and the financial peril we're in is going to be on corporate governance litigation?

JVK: I am a very optimistic person, but I'm not very optimistic with respect to this pandemic. So that also colors my views because the way I see this now going is a longer period of economic stress, a longer period of social distress. I'm very concerned about a lot of companies going out of business and the ripple effect it's going to have.

When you are running a company that is under duress, the tensions between your personal interests as a CEO controller or a director, and the interests of your shareholders are exacerbated. So I think that there will be more instances of disloyal conduct because the incentives are going to be more exacerbated, not because people are bad people but because they are human.

LD: So could there be more governance litigation on the horizon?

JVK: I expect there to be more governance litigation because people will have stronger incentives not to act in the best interest of their shareholders. Interestingly enough, currently there's a new movement afoot here in the United States to essentially say that we should move from a shareholder model to a stakeholder model. The idea is that the board and the insiders should be focused on a broader range of stakeholders and ESG interests, as opposed to maximizing value for shareholders.

I don't think it's caused by the Covid-19 pandemic, but there's a strong push to start saying, "You know what, the directors and the officers, they shouldn't just be accountable to shareholders. They should have more freedom to also take into account the environmental, social and governance issues when they're making decisions." This is embraced by the same law firms and advisors that don't like accountability for directors and officers to shareholders to begin with. I don't think that this is a good development, especially because it moves away from accountability right at a time when accountability for corporate insiders is more important than ever, in part because of the Covid-19 pandemic.

LD: In addition to the firm's expertise and the remarkable conversations you all have, you seem to really enjoy working together.

JVK: I'm thrilled with our team and my partners. It is such a great, fun practice to do this with my colleagues. We complement each other in so many different ways.

LD: Mark, what cases are you working on now?

ML: I'm working on HC2, formerly Primus Telecommunications, whose shareholders are conducting a proxy consent solicitation to replace the board led by Phil Falcone, who previously admitted to misconduct in running his prior hedge fund – paying $18M to settle claims by the Securities and Exchange Commission that he used fund assets to pay personal income taxes, among other things. In response, the board in

its own public filings essentially warned shareholders that, "If you vote for the other guys, we may have to pay out $27M to our preferred stockholders because of a change of control provision."

We saw that and said, "That's insane. There's no reason why the incumbent directors should be able to say, 'Voting us out is going to make the company owe money to some third party.'"

Corporate lawyers have started using "change of control" language that included not just buying the company, but also a change in the board. We thought maybe the language was a mistake, but not long after filing suit we learned that the language was no mistake. HC2 was represented by Skadden and Cadwalader. These are big 800-pound gorillas who know every nuance of M&A law and they're manipulating this proxy-put provision that shouldn't be on the table.

LD: What about you Jeroen?

JVK: I'm in the midst of two battles, BGC and Regency. They both come to mind because I think they are part of the pendulum swinging back to neutral as opposed to anti-shareholder.

In BGC, I successfully fought a motion to dismiss in front of Chancellor Bouchard, which I believe would have been dismissed five years ago when the court would not have looked beyond the economic incentives of the board members.

The Regency case is a challenge to a self-interested merger of a master limited partnership. MLP agreements exclude fiduciary duties and can be ripe for abuse. For the longest time, the boards and the controllers of these MLPs essentially thought they had free reign to abuse their limited partner unit holders and that there would never be any consequences.

We brought the suit in 2015, claiming Regency's general partner engaged in a self-interested transaction for the benefit of its controller, which they lied to investors about and had conflicted directors approve. Initially, the Chancellor dismissed the case. We appealed and the Delaware Supreme Court overturned, finding that the absence of fiduciary duties did not mean the general partner of an MLP could act arbitrarily and contrary to the reasonable expectations of LP unit holders as expressed in the MLP contract and the implied terms of good faith and fair dealing. The idea that a general partner can lie to other unit holders about the process it used to orchestrate a self-interested merger and claim it's not a breach of the MLP contract is crazy talk, because of the implied covenant of good faith and fair dealing. After that decision came out, there were a lot of client alerts from prominent defense firms saying, "Newsflash: We can't lie to our unit holders anymore!" I was actually shocked to see that and it confirmed my worst fears about the level of misconduct that had gone unchecked in the MLP space.

The Delaware Supreme Court has moved the needle back to what I would call the middle, more to a world where the directors are presumed to work in good faith and act in good faith, but if there are serious red flags that they did not, the Court is going to take a serious look at that.

LD: OK Greg, who's in your sights?

GV: I'm working on a case involving Tile Shop, which decided to go dark and de-register from NASDAQ and the SEC. Companies decide to go dark for a variety of reasons. But the day after Tile Shop announced its decision to do so, two of its directors went into the marketplace and bought up millions of shares. At that point, its stock price had cratered roughly 60 percent. They bought 12 percent of the company between them in the course of a few days until our team, led by my colleague C.J. Orrico, was able to go in and get a temporary restraining order against their continuing to purchase.

And more recently, we challenged a number of hyper-aggressive poison pills that have been adopted over the last few months, all of which will go to trial in early 2021. It will be really fun to be challenging pills after defending them and using them in prior cases.

LD: And finally, what do you see on the horizon for corporate governance litigation in the years ahead?

GV: You know, when Covid hit, a leading defense lawyer posted on the Harvard Governance blog and suggested that investors should stop bringing cases during the pandemic. We disagreed strongly with this – in times of crisis, access to justice is more important, not less, and investors have every right to preserve their access to lawful remedies. As we predicted, those who would bend the rules didn't sit still during the pandemic. As Mark noted we saw a company try to slip by its use of a proxy put and others adopting poison pills that are so restrictive as to be virtually preclusive. In the coming months we will be dealing with some of these governance issues, as well as cases involving controllers who we think took advantage of their investors, among other things.