Delaware Supreme Court Upholds Multi-Million Dollar Damages Award Against Sell-Side M&A Advisor

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Sell-side advisor conflicts supported finding that it aided and abetted fiduciary breach by Rural Metro's board of directors. Going forward, full and timely disclosure of advisor conflicts—by sell-side advisors to their clients and by target boards to their stockholders—will be crucial.

INTRODUCTION

In what appears to be the latest trend in stockholder merger litigation, plaintiffs' attorneys are targeting deep-pocketed, sell-side financial advisors as a means to obtain monetary damages (and lucrative attorneys' fees) by claiming these advisors aided and abetted alleged fiduciary breaches by the target company boards which retained them. While target company directors are generally exempted from

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monetary liability via an exculpatory provision in their corporation's charter (as authorized by section 102(b)(7) of the Delaware General Corporation Law ("DGCL § 102(b)(7)")), their financial advisors enjoy no similar protection, statutory or otherwise. After the Delaware Chancery Court held RBC Capital Markets, LLC ("RBC")—a sell-side financial advisor—liable for $78.5 million in damages for aiding and abetting its client board's fiduciary breach in 2014 in *In re Rural Metro Corporation Stockholders Litigation*, a spike in aiding and abetting claims against financial advisors followed.[1]

In late 2015, the Delaware Supreme Court affirmed the Chancery Court's award against RBC, ruling that sell-side financial advisors could be liable for aiding and abetting a target board's breach of fiduciary duty, even if (1) the board was insulated from monetary liability by virtue of DGCL § 102(b)(7) and (2) each defendant-director settled with plaintiffs prior to trial.[2] Applying *Revlon*'s enhanced scrutiny standard of review, the Delaware Supreme Court held that the board breached its fiduciary duty of care in connection with the sales process, and that RBC aided and abetted that breach by knowingly exploiting its conflicts of interest and creating an "informational vacuum" that directly impacted the board's actions.[3]

While *Rural Metro* involved unique facts and procedural posture, the Supreme Court's affirmance of the award against RBC will likely lead plaintiffs' counsel to focus even more sharply on potential conflicts (of target boards *and* their financial advisors) as a means of establishing fiduciary breaches and related aiding and abetting claims. Nevertheless, *Rural Metro* is not all bad news for target boards looking to retain potentially conflicted financial advisors, nor for financial advisors themselves. The lengthy Supreme Court opinion provides several key takeaways for target boards and their financial and legal advisors, not the least of which is that complete and ongoing disclosures of conflicts, both actual and potential, offer protection from high-dollar damage awards.

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1. *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54 (Del. 2014), *aff'd sub. nom.* RBC Capital Markets, LLC v. Joanna Jervis, No. 140, 2015, opinion (Del. Nov. 30, 2015).

2. RBC Capital Markets, LLC v. Jervis, No. 140, 2015, slip op. at 3 (Del. Nov. 30, 2015). To avoid confusion from the name of the case on appeal, the Supreme Court's opinion will be referred to hereinafter in the text as "*Rural Metro*."

3. *Id.* at 75–76; *see* Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) (articulating the *Revlon* standard).

I. BACKGROUND

By now, the factual background of *Rural Metro*—to the extent set forth in the detailed record established by the Chancery Court—is well known.[4] This litigation stemmed from the sale of Rural Metro Corporation ("Rural"), "a leading national provider of ambulance and private fire protection services," to an affiliate of Warburg Pincus LLC ("Warburg"), a private equity firm.[5] Plaintiff-stockholders challenged the sale, alleging that Rural's Board of Directors breached its fiduciary duty of care by (1) establishing the process for and approving the sale and (2) failing to disclose certain material information in the company's proxy statement seeking stockholder approval of the transaction. Further, the complaint alleged that RBC, Rural's "primary financial advisor" in the sale,[6] aided and abetted the Board's fiduciary breach. After the directors all settled before trial,[7] the case proceeded to trial solely against RBC.

In late 2010, the Rural Board decided to explore strategic alternatives. This effort was *not* limited to pursuing a sale of the company, but also to consideration of continuing as a "standalone" business or entering into a strategic "business combination transaction."[8] The Board formed a Special Committee consisting of three independent directors to examine these strategic alternatives. The Special Committee in turn retained RBC as financial advisor, but focused that engagement solely on conducting a process to sell the company.[9] RBC recommended that Rural conduct its sales process in parallel with an auction being conducted for the sale of Emergency Medical Service Corporation ("EMS")—the parent company of one of Rural's main competitors. According to the record subsequently established by the Chancery Court, RBC planned to use its position as Rural's sell-side financial advisor as an "angle" to gain financing work

4. This Essay makes reference to the factual circumstances surrounding the sale of Rural/Metro Corporation to an affiliate of private equity firm Warburg Pincus LLC. For a summary of these facts, see *id.* at 3–50.

5. *Id.* at 3.

6. Moelis & Company LLC ("Moelis"), a boutique firm focused on M&A advisory work, was retained at the same time as Rural's "secondary advisor."

7. This settlement called for a payment of $6.6 million. Moelis, which was named as a defendant in the lawsuit, also reached a pre-trial settlement with plaintiffs for an additional $5 million payment.

8. *RBC*, slip op. at 12.

9. Initially, the Rural Board did not authorize Special Committee to initiate a sale. However, the Board later ratified the Special Committee's actions, effectively condoning the Special Committee's sale process.

from companies bidding for EMS, work that would yield fees "more than ten times the advisory fee" it expected to receive from Rural.[10]

From the outset, Rural's sale process was riddled with issues, including reluctance from the private equity world due to the timing of the process. Not only did the Rural process proceed simultaneously with the EMS auction, but RBC first contacted potential private equity bidders who were involved in the bidding for EMS, and only later those who were not participants.[11] Multiple potential bidders, including the eventual winner of the EMS auction, suggested that Rural delay its process so as not to coincide with the EMS sale. Eventually, Warburg, which had withdrawn from the EMS auction, emerged as one of two potential acquirers of Rural.[12] Following a consideration of these two bids, the Special Committee directed RBC to negotiate exclusively with Warburg to obtain the best possible deal price.[13]

Throughout its negotiations with Warburg, RBC aggressively attempted to secure a lucrative role for itself in Warburg's buy-side financing for its purchase of Rural, another fact never disclosed to Rural.[14] RBC's lobbying efforts with Warburg continued right down to the end of the negotiations over the final buyout price, with RBC going so far as to offer to fund a $65 million revolver for a Warburg portfolio company unrelated to the Rural transaction. Despite these efforts, Warburg ultimately did not allow RBC into its financing.

The Rural Board approved the transaction with Warburg on March 27, 2011, having received RBC's valuation analysis only three hours before—the first valuation materials provided to the Board since

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10. *RBC*, slip op. at 17. RBC did not disclose in its engagement letter or otherwise to Rural that it planned to use its position to gain financing work from bidders for EMS. RBC's engagement letter did provide "boilerplate" language specifying that RBC may provide financial services in the normal course to its customers, including acquisition financing to purchasers of companies offering substantially similar services to Rural. *Id.* at 29. However, the lack of *specific* disclosure—i.e., that RBC planned to leverage its position as Rural's financial advisor to gain financing business from potential EMS acquirers—would become a major issue for RBC at trial and on appeal. *Id.* at 70–72.

11. RBC advised that it would be pointless to contact potential strategic bidders, inasmuch as they were either focused on internal issues or engaged in their own M&A transactions.

12. Of the twenty-eight parties that RBC contacted about a potential Rural sale, only six submitted indications of interest. As noted above, several parties expressed dissatisfaction with the timing of the simultaneous auction with EMS. One potential bidder, Bain Capital, went so far as to state that its interest in pursuing a transaction with Rural was contingent upon the results of the EMS auction.

13. The other final bidder was the winner of the EMS bid, who made an offer that was competitive with Warburg's, but asked for a delay in the process in order to complete the EMS transaction. The Special Committee declined this request.

14. Based on RBC's internal communications, the Chancery Court found that RBC's priorities had shifted to (1) "closing on the Warburg offer" and (2) "obtaining [Warburg's] buy-side financing business." *RBC*, slip op. at 34–35.

December 2010. The Chancery Court later determined that the fairness opinion provided by RBC to the Board along with its valuation analysis was manipulated to enhance the attractiveness of the Warburg deal. That evening, "without knowledge of RBC's downward modifications to its analysis, back-channel communications with Warburg, and late push to get on the private equity firm's financing tree," the Board and Special Committee met jointly to approve the deal.[15]

After public announcement of the transaction, plaintiffs' counsel filed the usual battery of stockholder lawsuits in the Chancery Court, challenging the transaction and, ultimately, seeking damages from the Rural directors and RBC. Following a full trial on the merits focused on the sole remaining defendant, RBC, Vice Chancellor J. Travis Laster made a series of key findings. With regard to the Rural Board, the Vice Chancellor found that the directors breached their fiduciary duty of care under the enhanced *Revlon* standard, in part because they failed to provide active oversight of RBC, particularly in its final negotiations with Warburg.[16] Next, the Vice Chancellor concluded that RBC aided and abetted this breach and assessed damages of $75.8 million.[17] On appeal to the Delaware Supreme Court, Rural argued in pertinent part that the Chancery Court erred in: (1) finding that the Rural Board breached its fiduciary duty under *Revlon* and (2) holding RBC liable for aiding and abetting that breach.[18]

II. DELAWARE SUPREME COURT ANALYSIS

In affirming Vice Chancellor Laster's damages award against RBC, the Delaware Supreme Court addressed a number of issues that will be of significance to M&A dealmakers and their financial and legal advisors going forward.

15. *Id.* at 45–46.

16. *Id.* at 43. *Revlon* and its progeny require that boards act with the primary goal of maximizing stockholder value when, among other actions, engaging in a sale-of-control transaction. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

17. *RBC*, slip op. at 1. The $75 million award was roughly 83% of the damages suffered by the plaintiff class.

18. *Id.* at 2.

A. Revlon *Issues*

1. The *Revlon* "Trigger"

Neither party argued on appeal that *Revlon* should not apply to the Rural Board's actions in connection with the Warburg transaction. However, RBC, relying on *Lyondell Chemical Co v. Ryan*,[19] argued that the Vice Chancellor Laster erred by applying *Revlon* enhanced scrutiny *too early*, that is, at the time the sales process was undertaken by the Special Committee and RBC. RBC contended that the Special Committee's actions were subject to the more lenient business judgment presumption *until* the sales process produced two bids, allegedly the first time the Committee was "in a position of deciding to sell the Company—when the sale of the Company became inevitable . . . ."[20]

Rejecting RBC's argument, the Delaware Supreme Court explained that enhanced scrutiny under *Revlon* was triggered as soon as Rural's Special Committee, with help from RBC, effectively put the company up for sale by "initiat[ing] the sale process in December 2010."[21] As a policy matter, the Supreme Court noted that finding for RBC on this timing issue would create perverse incentive for future boards, encouraging them to actively avoid oversight until the very end of the sale process to limit their own potential liability.[22] Specifically, delaying enhanced scrutiny until the Special Committee received the two final bids "would afford the Board the benefit of a more lenient standard of review where the sale process went awry, partially due to the Board's lack of oversight."[23] According to the Delaware Supreme Court, "[s]uch a result would potentially incentivize a board to avoid active engagement until the very end of a sales process by delegating the process to a subset of directors, officers, and/or advisors."[24]

At the same time, the Supreme Court cautioned: "we confine our holding to these unusual facts and do not view our affirmance of the trial court's holding as a departure from our prior case law."[25] The result

19. 970 A.2d 235, 242 (Del. 2009) ("*Revlon* duties do not arise simply because a company is 'in play.' The duty to seek the best available price applies only when a company embarks on a transaction . . . that will result in a change of control.").

20. *RBC*, slip op. at 52.

21. *Id.* at 58. Even though the Special Committee initially did not possess authority to initiate a sale of the company, in March 2011the Board later ratified any and all actions of the Special Committee, effectively condoning the Committee's sale process. *Id.* at 3.

22. *Id.* at 59 & n.121.

23. *Id.* at 59.

24. *Id.*

25. *Id.* at 58–59.

may have been different had the Special Committee followed the Board's original mandate that it explore a variety of strategic circumstances open to Rural. However, by focusing solely on a sale process to the exclusion of other alternatives, the Special Committee was found to have triggered *Revlon* review.

2. Breach of the Duty of Care

The Supreme Court next determined that the Rural Board's actions "fail[ed] *Revlon* scrutiny," thereby resulting in a breach of its fiduciary duty of care.[26] While "initiating a sale process to run in tandem with the EMS auction . . . 'would be one of the many debatable choices that . . . fall within the range of reasonableness' " under normal circumstances, that calculus changes "where undisclosed conflicts of interest exist."[27] When a court is confronted with conflicts of this nature, "such decisions must be viewed more skeptically."[28]

Specifically, the Supreme Court found that the Rural Board did not "address or mitigate RBC's conflicts," largely because the Board was not aware of them.[29] While the Board was "not required to perform a searching and ongoing due diligence on its retained advisors," the directors nevertheless were required to take an "active and reasonably informed" oversight role in the sale process, "including identifying and responding to actual or potential conflicts of interest."[30] In failing to oversee RBC—and in turn failing to uncover the full range of RBC's conflicts—the Rural Board (1) went forward with RBC's suggested auction process, which impeded its ability to conduct a full and robust market check that would have provided more complete information as to the company's value; (2) was unable to determine how RBC's conflicts may have impacted the sale process; and (3) passed along incomplete information in the proxy statement to stockholders.[31] This in turn led to an *uninformed* stockholder vote approving the transaction, rendering that vote ineffective as a cleansing agent for the directors' fiduciary breach.[32]

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26. *Id.* at 59.
27. *Id.* at 60–61.
28. *Id.* at 61.
29. *Id.*
30. *Id.* at 62.
31. *Id.* at 62–63.
32. *Id.* at 63, 164; *see* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306 (Del. 2015) ("[T]he voluntary judgment of the disinterested stockholders to approve the merger invoked the business judgment rule standard of review."); *In re* Zale Corp. Stockholders Litig., No. CV 9388-VCP, 2015 WL 5853693 (Del. Ch. 2015) (granting defendant financial advisor's motion to dismiss

In this connection, the Supreme Court also rejected RBC's contention that the Vice Chancellor "erred by finding a due care violation without finding gross negligence."[33] The Supreme Court explained that while gross negligence is the appropriate standard, "for policy reasons," when the question is whether directors should face monetary liability for a fiduciary breach, that is not the appropriate standard for determining, in the first instance, whether directors have committed a breach.[34] When *Revlon*'s enhanced scrutiny standard of review has been triggered, the operative question is simply one of whether "their conduct was unreasonable."[35] Here, the directors "breached their fiduciary duty by engaging in conduct that fell outside the range of reasonableness False"[36]

B. Aiding and Abetting

Having established that the Rural Board breached its duty of care, the Supreme Court turned to the question whether such breach was a "sufficient predicate" to justify Vice Chancellor Laster's "finding of aiding and abetting liability against RBC."[37] In this connection, the Supreme Court reiterated the four essential elements for establishing aiding and abetting liability: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in that breach by the defendants, and (iv) damages proximately caused by the breach."[38] The first two elements were satisfied by the Supreme Court finding that the Rural Board breached its duty of care.[39]

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an aiding and abetting claim because disinterested stockholder approval shifted the standard of review of the board's conduct to business judgment).

The impact of the cleansing device on related claims against financial advisors was nicely illustrated in *Zale*. Before *KKR*, the Chancery Court refused to dismiss a claim alleging that Zale's sell-side financial advisors aided and abetted the target board's alleged fiduciary breach. After *KKR*, however, the Chancery Court revisited the motion to dismiss and, applying the more deferential business judgment standard to the target board's conduct, dismissed the aiding and abetting claim. *In re Zale Corp.*, 2015 WL 5853693, at *3. For a deeper dive into the mechanics of the *Zale* case, see Robert S. Reder & Stephanie Stroup Estey, *Sell-Side Financial Advisors in the M&A Crosshairs*, 68 VAND. L. REV. EN BANC 279 (2015).

33. *RBC*, slip op. at 65.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 65–66.

38. *Id.* at 73; *see also* Malpiede v. Townson, 780 A.2d 1075 (Del. 2001) (establishing these four elements).

39. *RBC*, slip op. at 72.

1. The Scienter Requirement

The crux of the Supreme Court's analysis of the third element—"knowing participation"—focused on whether RBC acted with "scienter."[40] RBC argued that assessing damages against financial advisors in cases where target boards benefit from DGCL § 102(b)(7) exculpation results in an inequitable shift of liability, effectively making financial advisors "sureties for grossly negligent directors" although these directors "have no risk of [monetary] liability . . . themselves."[41] Rejecting this argument, the Supreme Court explained that plaintiffs are required to establish that the financial advisor acted with scienter in order to establish knowing participation.[42] This in turn requires a showing that the financial advisor acted " 'knowingly, intentionally, or with reckless indifference . . . [;]' that is, with an 'illicit state of mind.' "[43] In the Supreme Court's view, the scienter requirement militates against an unfair extension of the scope of aiding and abetting liability, as the scienter requirement "makes an aiding and abetting claim among the most difficult to prove."[44] As such, even advisors acting with gross negligence will not be liable for aiding and abetting.[45]

The Supreme Court applied this analysis to support its holding that RBC could knowingly aid and abet even an exculpated breach of fiduciary duty by the Rural directors.[46] In this regard, the Supreme Court affirmed Vice Chancellor Laster's finding that there was sufficient evidence—including RBC's own internal communications highlighting its conflicted interests—to establish RBC's "knowing participation" in the Rural Board's fiduciary breach.[47] Importantly,

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40. *Id.* at 73–74.

41. *Id.* at 96–97. The Supreme Court further noted that the Delaware Legislature did not intend to extend DGCL § 102(b)(7)'s exculpatory provision to third parties, as such a rule would "create a perverse incentive system wherein trusted advisors to directors could, for their own selfish motives, intentionally mislead a board only to hid behind their victim's liability shield . . . . RBC cannot essentially commit a fraud upon the very directors who hired and relied upon it, and subsequently seek to exploit the Board's exculpatory provision." *Id.*

42. *Id.* at 73–74.

43. *Id.* at 74 (quoting Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc., 854 A.2d 121, 143 (Del. Ch. 2004) (quoting DRR, L.L.C. v. Sears, Roebuck & Co., 949 F. Supp. 1132, 1137 (D. Del. 1996))).

44. *Id.* at 81.

45. *Id.* at 98. The Supreme Court pointed out that this standard of proof is actually "a more stringent standard for imposing liability than a director faces when the director is not protected by a Section 102(b)(7) provision." *Id.*

46. *Id.*

47. *Id.* at 75. The Supreme Court did not have kind words for RBC, stating:

> The manifest intentionality of RBC's conduct—as evidenced by the bankers' own internal communications—is demonstrative of the advisor's knowledge of the reality that the Board was proceeding on the basis of fragmentary and misleading information.

however, the Supreme Court qualified the Vice Chancellor's holding to apply narrowly, that is, only to situations where the financial advisor "knows that the board is breaching its duty of care and participates in the breach by misleading the board or creating [an] informational vacuum."[48]

2. Financial Advisors are not Gatekeepers

The Supreme Court found that RBC's actions proximately caused damage to Rural stockholders, thereby satisfying the fourth requirement of aiding and abetting liability. Once again, the Supreme Court emphasized that this "holding is a narrow one that should not be read expansively to suggest that any failure on the part of a financial advisor to *prevent* directors from beaching their duty of care gives rise to a claim for aiding and abetting a breach of the duty of care."[49] The Supreme Court thereby explicitly rejected Vice Chancellor Laster's categorization of financial advisors as "gatekeepers" in M&A transactions, focusing instead on the contractual (as opposed to fiduciary) nature of the relationship between the sell-side advisor and the target board.[50]

CONCLUSION

The Delaware Supreme Court's holding in the *Rural Metro* appeal has important implications for corporate directors and their financial and legal advisors.

First, in light of the *Rural Metro* Court's explanation that *Revlon*'s enhanced scrutiny standard may be triggered earlier in a sales process than RBC argued, target boards must proceed as though their actions will be scrutinized with enhanced scrutiny from the earliest point of a potential sales process. The facts of *Rural Metro* are certainly unique: although the Rural Board authorized its Special Committee to

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> Propelled by its own improper motives, RBC misled the Rural directors into breaching their duty of care, thereby aiding and abetting the Board's breach of its fiduciary obligations.

Id. at 76.

48. *Id.* at 74.

49. *Id.* at 80.

50. *Id.* at 80 n. 191. The Supreme Court recognized that the parameters of the financial advisor's responsibilities are negotiated between sophisticated parties and are laid out in an engagement letter. By the very nature of these engagements, financial advisors are "under an obligation not to act in a manner that is contrary to the interests of the board of directors, thereby undermining the very advice that it knows the directors will be relying upon in their decision making process." *Id.*

"explore strategic alternatives," the Special Committee pursued only one of those alternatives—a sale of the company—without proper Board authorization.[51] To be sure, the Board later ratified the acts of the Special Committee. However, it is easy to envision a Delaware court reaching a similar conclusion absent this ratification, given the Supreme Court's discussion of the perverse incentives that delaying *Revlon* scrutiny would have. As such, a board even considering a sale should consciously work to shrink the size of the "litigation target zone"[52] by acting as though *Revlon* enhanced scrutiny will be applied at the earliest possible stage.

Second, the *Rural Metro* case illustrates that a target board's duty of care requires that it "be active and reasonably informed when overseeing [a] sale process, including identifying and responding to actual or potential conflicts of interest."[53] This does not simply mean requiring a financial advisor to provide detailed representations concerning potential conflicts during negotiations for its retention and in the formal engagement letter. Rather, as the *Rural Metro* Court suggests, the engagement letter should expressly require the financial advisor to provide *ongoing* disclosure of "material information that might impact the board's process" throughout the advisor's engagement.[54] Obviously, an advisor's conflicts will oftentimes not be discoverable by the target board absent disclosure by the advisor. Moreover, "a board is not required to perform searching and ongoing due diligence on its retained advisors to ensure that the advisors are not acting in contravention of the company's interests."[55] But the *Rural Metro* Court's holding strongly suggests that one way boards can "shrink the target" is by implementing processes to uncover conflicts and by requiring ongoing disclosure by advisors.[56]

Third, financial advisors should recognize that conflict disclosure is in their best interests as well. While target company boards want to shrink the target for potential litigation that could interfere with an attractive change in control transaction, directors may be less concerned about potential monetary liability given the

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51. *Id.* at 57–58.

52. This quote is a reference to a recent piece by Delaware Supreme Court Chief Justice Leo Strine discussing how target boards can "reduce the litigation target zone" in the M&A process. *See* Leo E. Strine, *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70 A.B.A. BUS. LAW. 679 (2015).

53. *RBC*, slip op. at 62.

54. *Id.* at 62–63.

55. *Id.*

56. *Id.*

prevalence of DGCL § 102(b)(7) provisions in corporate charters. As *Rural Metro* makes clear, financial advisors enjoy no similar statutory or other protection, yet, as a practical matter, it is very difficult for them to avoid conflicts. To be effective, investment bankers must talk to a wide range of players—both potential buyers and sellers—in any given industry. Post-*Rural Metro*, the key to maintaining this same level of effectiveness is to disclose any and all potentially material conflicts from the outset, and as they may arise during the course, of a sell-side engagement. Complete and timely disclosure will help insulate financial advisors from aiding and abetting claims by avoiding the kind of "informational vacuum" that led the *Rural Metro* Court to find that RBC had acted with the requisite scienter to support plaintiffs' aiding and abetting claim.[57]

Fourth, complete disclosure is also key to ensuring stockholders are able to make fully informed decisions whether to approve a transaction. A fully informed stockholder vote (which *Rural Metro* suggests is only possible if financial advisors have fully disclosed all material conflicts) further insulates financial advisors from post-closing liability, shifting the standard of review of the board's conduct from *Revlon*'s enhanced scrutiny to the more lenient business judgment rule. In operation, fully informed stockholder ratification requires plaintiffs to first prove the board's actions do not merit the business judgment presumption (a very difficult burden to sustain) before succeeding on a related aiding and abetting claim against advisors. The beneficial impact of this cleansing device—and the fact that advisors' incomplete disclosure can nullify the benefits of stockholder ratification—further illustrates why financial advisors should favor disclosure throughout the sale process.[58]

Lastly, *Rural Metro* clarifies that financial advisors have a contractual relationship with company boards, rejecting Vice Chancellor Laster's theory that bankers are "gatekeepers" who may have some fiduciary responsibilities to the companies they advise.[59] On the other hand, the *Rural Metro* Court cautions that the contractual nature of the relationship does not provide bankers with an unbridled license to act in a manner contrary to their clients' interests. While directors have an obligation to remain actively informed in the sale process and to identify potential conflicts of interest, "the conflicted banker has an informational advantage when it comes to knowledge of

57. *Id.* at 75.

58. *See* discussion *supra* note 32.

59. *RBC*, slip op. at 80–81 n.191.

its real or potential conflicts."[60] Ongoing disclosures, coupled with fully informed stockholder ratification, may provide an avenue for advisors to limit liability ex post, if target stockholders approve the transaction. However, sell-side advisors also should consider enhancing their engagement letters with representations and warranties and ongoing covenants to address potential liabilities and conflicts ex ante. *Rural Metro* makes clear that boilerplate language permitting a sell-side advisor to conduct its business in the normal course of business during the period of engagement are insufficient where an advisor operating under the guise of those provisions creates a material conflict with the target board it is advising.[61]

Rural Metro provides, at a minimum, a harsh wake-up call for target boards and their financial advisors, who must be aware that fee-driven plaintiffs' attorneys no doubt heard the call as well. In response, savvy target boards and their financial advisors—guided by their legal advisors—must tweak their practices in connection with M&A sales processes, starting with the recommendations outlined above. The bottom line for directors and financial advisors operating in a post-*Rural Metro* world is clear: full disclosure—by sell-side M&A advisors to their clients and by target company boards to their stockholders—is crucial.

60. *Id.* at 80 n.191.

61. As the Delaware Supreme Court noted, RBC's engagement letter "expressly permitted RBC to explore staple financing. But, this permissive language was general in nature and disclosed none of the conflicts that ultimately emerged." *Id.*