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Response

A Milder Prescription For The Peppercorn Settlement Problem In Merger Litigation

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I. Introduction

In *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*,[1] Professors Steven Davidoff Solomon, Jill E. Fisch, and Sean J. Griffith contribute to our understanding of disclosure-only settlements. They start with a problem: nearly ubiquitous stockholder litigation challenging M&A transactions.[2] They next identify a contributing cause: quick settlements in the vast majority of the resulting cases that generate fee awards for plaintiffs' counsel, global releases for the defendants, and no benefit for stockholders other than supplemental disclosures.[3] In the heart of their paper, they amplify the seriousness of the problem by demonstrating that the information provided in disclosure-only settlements has no statistically significant effect on stockholder voting.[4] Based on this empirical finding, the professors make what they seem to regard as a unitary recommendation: stop awarding attorneys' fees for supplemental disclosures, thereby shifting litigation about the adequacy of merger-related disclosures to the federal courts.[5] To my mind, this

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1. Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEXAS L. REV. 557 (2014).
2. *Id.* at 557–58.
3. *Id.* at 565–67.
4. *See id.* at 579–82.
5. *Id.* at 561–62.

recommendation unnecessarily links two proposals of very different magnitude: first, a grand proposal in which Delaware would abandon the field of merger-related disclosure, leaving the domain to federal law and the federal courts, and second, a narrow proposal in which Delaware courts should stop awarding fees for disclosure-only settlements.

I agree wholeheartedly with the professors' diagnosis of the underlying problem of excessive M&A litigation and their identification of routine disclosure-only settlements as a contributing cause.[6] My primary disagreements lie with their proposals for reform. Perhaps unsurprisingly, given my position as a Delaware judge, I cannot endorse their grand proposal, under which Delaware law would no longer play any role in merger-related disclosures. By contrast, their narrow recommendation has promise, but its implications would eliminate disclosure-only settlements, not just disclosure-only fee awards.

An alternative approach would take account of the professors' empirical findings by requiring a stockholder plaintiff to make a greater showing before obtaining an expedited hearing on a preliminary injunction application. The granting of the motion to expedite is what gives a stockholder plaintiff leverage to extract a preclosing settlement, which the parties then implement using the disclosure-only structure. Under current Delaware law, a breach of the duty of disclosure in connection with a stockholder vote gives rise to a threat of irreparable harm.[7] Consequently, when a plaintiff pleads a colorable disclosure claim, the plaintiff has met the standard for obtaining an expedited hearing.[8] The professors' data indicate that the information stockholder plaintiffs have been obtaining is not material, and hence claims about those types of disclosures should not give rise to a threat of irreparable harm. This would result in the denial of the motion to expedite and release the pressure that leads to a disclosure-only settlement.

II. The Grand Proposal: Federalization

In what I have termed their grand proposal, the professors argue that "plaintiffs should be required to litigate challenges to disclosure quality

6. In opinions, speeches, and articles, Delaware judges have repeatedly identified both issues. For a thorough and illustrative treatment, see Leo E. Strine, Jr. et al., *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 8–23 (2013).

7. *In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 360 (Del. Ch. 2008).

8. *See* Lonergan v. EPE Holdings LLC, 5 A.3d 1008, 1016 (Del. Ch. 2010) (stating that a motion to expedite should only be granted when the plaintiff both articulates a colorable claim and shows a possibility of irreparable harm).

under the federal securities laws."[9] According to the professors, Delaware's disclosure regime is "unnecessary and problematic."[10]

> Specifically, federal law is expressly tailored to achieving an appropriate balance in disclosure requirements and addressing disclosure deficiencies that are substantially likely to influence the voting decision—that is, material misrepresentations or omissions. In contrast, Delaware law creates an incentive for litigants to generate, and judges to reward, throwaway disclosures that are designed simply to end litigation and generate a release.[11]

Recalling the United States Supreme Court's decision in *Santa Fe Industries v. Green*,[12] the professors argue that "claims about the adequacy of merger disclosure should be litigated under federal law and subject to the materiality threshold and other procedural requirements associated with federal litigation," while claims about "the fairness of the merger terms" should be litigated in the state courts.[13] In their view, "[t]his would have the effect of efficiently specializing litigation challenges while reducing plaintiffs' counsel's ability to use disclosure as a negotiating point to justify a fee award."[14]

Because I am a Delaware judge, any criticism of federalization risks sounding defensive and parochial. While mindful of my personal biases, the professors' grand proposal strikes me as "[*d*]éjà [*v*]*u* all over again."[15] Proposing federalization is a recurring academic response to the perceived shortcomings of the extant state-based corporate law system.[16] Federalization is attractive because the idealized replacement has no obligation to function, so its proponent can always imagine that it will better serve the proponent's goals.[17] But in the real world, the call for federalization often rests on debatable premises. Such is the case with the

9. Fisch et al., *supra* note 1, at 562.

10. *Id.*

11. *Id.*

12. 430 U.S. 462 (1977).

13. Fisch et al., *supra* note 1, at 562.

14. *Id.*

15. This quote has been attributed to the dugout philosopher Yogi Berra. ENCYCLOPEDIA OF ETHNICITY AND SPORTS IN THE UNITED STATES 64 (George B. Kirsch et al. eds., 2000).

16. *See, e.g.*, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (advocating a substantial expansion of the role of federal law in shaping corporate law rules); William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 663 (1974) (proposing to "reconsider the federal role").

17. Chancellor William B. Chandler and Anthony A. Rickey made a similar point in response to criticism comparing Delaware case law to the Model Business Corporation Act. *See* William B. Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95 (2009).

professors' grand proposal, which rests on contestable claims about relative federal advantages and presumes a conflict between federal law and Delaware law where none exists. More importantly, in attempting to treat the illness of disclosure-only settlements, the professors would inflict radical surgery on Delaware corporate law by removing the entire subject of transaction-related disclosure. Yet for disclosure-only settlements, the cure would not even be a cure, because those settlements could go on unimpeded in federal court. Federalization is not a solution. It simply relocates the problem, while harming corporate law in the process.

A. *The Contestable Claims of Federal Superiority*

The professors assert that a specialized federal law of takeover-related disclosure would provide a better regime than the current system of symbiotic federalism.[18] But the professors' own work calls that assumption into question. One of the *Peppercorn* authors, Professor Davidoff, has argued elsewhere for renewed federal oversight of takeover regulation, not just takeover-related disclosure, precisely because he believes that federal regulators have failed in their obligation to provide national regulatory oversight.[19] In that article, he points out failings in the federal disclosure regime, including that "federal going-private rules do not apply if stock consideration is offered instead of cash"[20]—a distinction that the Delaware fiduciary duty of disclosure does not make—and the general observation that "SEC disclosure standards are arguably not copious enough or require disclosure that is no longer appropriate or applicable to the present paradigm."[21] The other *Peppercorn* authors, Professor Fisch and Professor Griffith, similarly have questioned the effectiveness of federal regulatory efforts.[22]

How federal takeover-disclosure law would evolve, and whether it would end up being superior, is difficult to predict, because federal law would be influenced by a range of political factors.[23] Delaware's economic interest

18. *See generally* Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005) (arguing that Delaware corporate law and federal regulation coexist rather than compete).

19. Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211 (2007).

20. *Id.* at 251.

21. *Id.* at 253.

22. *See* Jill E. Fisch, *Leave it to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731 (2013) (arguing for the superiority of the Delaware approach over the Dodd-Frank Act with respect to say on pay and proxy access); Sean J. Griffith & Myron T. Steele, *On Corporate Law Federalism: Threatening the Thaumatrope*, 61 BUS. LAW. 1 (2005) (discussing the advantages of Delaware's ability to shift between lax and stringent regulation of corporate governance compared to comparable federal regulatory approaches).

23. *See* Marcel Kahan, *The State of State Competition for Incorporations* 45 (ECGI Working Paper Series in Law, Working Paper No. 263, 2014).

lies in attracting new incorporations while retaining existing charters.[24] This rather straightforward incentive gives Delaware lawmakers a powerful reason to ensure that Delaware law remains balanced—protecting the interests of both managers and providers of capital. Federal lawmakers would not have a similar polestar and could be influenced by a variety of factors, including interest-group lobbying.[25] Unlike the current state system, which allows dissatisfied constituents to reject a particular state-law system by opting for a different one, a federalized takeover-disclosure regime would not permit any alternatives. Whether federalization would lead to a superior disclosure regime therefore presents a contestable proposition.

The professors also rely on the premise that federal courts can better adjudicate takeover-related disclosure questions.[26] At least compared to the Delaware courts, the professors' claim that federal courts are more specialized seems debatable. It is certainly true that the federal courts hear many disclosure cases under the Securities Act of 1933[27] and under Rule 10b-5,[28] neither of which Delaware courts hear, and so have a relative advantage in those areas. But those are not takeover-related claims. They are claims about buying and selling securities. The professors do not provide any information about the number of federal takeover-related disclosure cases, which is the relevant data point for their specific claim of relative expertise. Moreover, federal courts hear disclosure cases within a broader docket that encompasses criminal cases, lawsuits invoking myriad other federal statutes, and state law diversity actions. Docket composition varies across districts, so while it may well be that judges in the Southern District of New York and other commercial centers have developed takeover-disclosure expertise, it is not clear that such a claim can be made about the federal court system as a whole. The numerous federal courts also mean that the federal system speaks with diverse voices. There are 94 federal districts staffed by 677 district court judges.[29] Their decisions are reviewed by 13 circuit courts of appeals staffed by 179 judges.[30] Different judges, or panels of judges, can view materiality differently, and although the United States Supreme Court can resolve splits of authority, it also has discretion to deny a writ of certiorari and let a split persist. Given the breadth of the issues facing the

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24. *See* Mark J. Roe, *Delaware's Shrinking Half-Life*, 62 STAN. L. REV. 125 (2009) (explaining Delaware's need to capture continual in-flow of new incorporations).

25. Kahan, *supra* note 23, at 46.

26. *See* Fisch et al., *supra* note 1, at 597–98; *id.* at 604 ("In contrast, the federal courts have developed expertise both in evaluating disclosure quality and in evaluating the quality of litigation challenging that disclosure.").

27. The Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended in 15 U.S.C. §§ 77a–77mm (2012)).

28. 17 C.F.R. § 240.10b-5 (2009).

29. H.R. REP. NO. 113-255, at 3 n.4 (2013), *available at* https://www.congress.gov/113/crpt/hrpt255/CRPT-113hrpt255.pdf, *archived at* http://perma.cc/9L6X-NYZY.

30. CASSIA SPOHN & CRAIG HEMMENS, COURTS: A TEXT/READER 7–8 (2009).

United States Supreme Court and the limited number of cases it hears, expecting the United States Supreme Court to provide nationwide unity on takeover-related disclosure issues hardly seems realistic.

The Delaware courts are different. The Court of Chancery's jurisdiction is focused. It does not hear criminal cases, and a substantial majority of the court's caseload concerns mergers and other transactions. The Court of Chancery only has five chancellors.[31] We may not always agree, but a smaller cadre of judges necessarily produces fewer divergent opinions. To obtain an authoritative determination, parties can appeal by right directly to the Delaware Supreme Court. Given these contrasting attributes, whether federal courts are more specialized and can better adjudicate takeover-related disclosure issues seems debatable.[32]

If a pre-vote adjudication of materiality is needed, then the superiority of the federal courts is not at all clear. As part of the multiforum litigation problem, stockholder plaintiffs now regularly file Section 14(e)[33] claims in federal court. From overseeing deal litigation involving parallel Section 14(e) claims, I understand that plaintiffs have difficulty obtaining expedited, pre-vote determinations of materiality from the federal courts because of the automatic stay of discovery imposed by the Private Securities Litigation Reform Act (PSLRA).[34] The professors cite only one case to support their claim that federal courts will provide expedited injunctive relief before a merger vote, and that decision is from 1988, seven years before the adoption of the PSLRA.[35] In contrast, Delaware courts can—and do—hear expedited challenges to disclosure quality in real time.[36]

If the question is the relative ability of the two court systems to police settlements, the superiority of the federal courts again can be debated. Settlement hearings in federal courts bear the same pathologies as those in state courts, and scholars have not regarded federal courts as immune from the problems the professors cite.[37]

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31. *Judicial Officers of the Court of Chancery*, DELAWARE STATE COURTS, http://courts.delaware.gov/chancery/judges.stm, *archived at* http://perma.cc/EPR8-ZHMH.

32. *See* Kahan, *supra* note 23, at 49 (noting that "federal judges are generally highly regarded" but "lack the specialized expertise of Delaware's judiciary").

33. Securities Exchange Act of 1934 § 14(e), 15 U.S.C. § 78n(c) (2012).

34. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b)(3)(B) (2012).

35. Fisch et al., *supra* note 1, at 596–97 & n.185.

36. *See, e.g.*, *In re* Bioclinica, Inc. S'holder Litig., No. 8272VCG, 2013 WL 673736, at *1 (Del. Ch. Feb. 25, 2013); *In re* 3Com S'holders Litig., No. 5067-CC, 2009 WL 5173804, at *1 (Del. Ch. Dec. 18, 2009); Cnty. of York Emps. Ret. Plan v. Merrill Lynch & Co., C.A. No. 4066-VCN, 2008 WL 4824053, at *8–13 (Del. Ch. Oct. 28, 2008); *In re* Sungard Data Sys., Inc. S'holders Litig., No. Civ.A. 1221-N, 2005 WL 1653975, at *1 (Del. Ch. July 8, 2005).

37. *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1348 (1995) (noting that class-action settlements generally advance "only the interests of plaintiffs' attorneys, not those of the class members" and "courts have little ability or incentive to resist the settlements that the parties in class action litigation reach"). Although

Particularly in light of my status as a Delaware judge, I leave it to others to decide whether or not federal law and the federal courts actually would be superior. My point is simply that reasonable minds can disagree about the premise of superiority on which the professors build their grand recommendation, and the *Peppercorn* article does not establish the superiority of the federal alternative. The Article assumes that specialization inherently will produce a better regime, without considering the potential disadvantages of federalization.

B. No Conflict Between the Disclosure Regimes

Central to the professors' call for separation is their complaint that Delaware's disclosure law clashes with the federal system. According to the professors, "State court merger litigation has had the perverse effect of creating a substantive state law of disclosure that is litigated almost exclusively within the artificial context of settlement approval rather than in truly adversarial proceedings."[38] By contrast, as they see it, "[F]ederal law is expressly tailored to achieving an appropriate balance in disclosure requirements and addressing disclosure deficiencies that are substantially likely to influence the voting decision—that is, material misrepresentations or omissions."[39] They also think federal judges make disclosure law differently:

> [F]ederal judges rule on materiality as a critical element establishing fraud. As a result, the issue is fully briefed and argued by both sides to the dispute. Hence, federal judges routinely receive better information in connection with each materiality determination. When federal judges articulate the basis of their materiality determination in formal judicial opinions, this information produces a higher quality body of precedent that judges can draw upon in future determinations.[40]

This assessment of the source and nature of Delaware's disclosure law is simply wrong.

Professor Coffee's article deals specifically with class action settlements in the mass tort context, the data bolstering his conclusions supports my contention as well. *See id.* at 1348 n.14 (suggesting that federal courts passively approve class action settlements based on a study showing that 34 out of 38 proposed class action settlements in the United States District Court for the Eastern District of Pennsylvania were approved without changes and the median length of the fairness hearings was only 38 minutes).

38. Fisch et al., *supra* note 1, at 562; *see also id.* at 599 ("Delaware courts analyze the materiality of disclosures in connection with the review and approval of settlements, a judicial act that is typically, as we emphasized above, nonadversarial."); *id.* at 600 ("State courts address materiality not in connection with deciding fraud claims, but rather in connection with approving negotiated settlements.").

39. *Id.* at 562.

40. *Id.* at 599 (footnote omitted).

Delaware's "substantive state law of disclosure" is not litigated in or created by settlement approval rulings. The actual Delaware precedents on disclosure issues come from rulings on motions to dismiss,[41] applications for preliminary injunctions,[42] motions for summary judgment,[43] and post-trial rulings.[44] These decisions have all the attributes of the federal decisions that the professors identify as desirable: the parties provide adversarial briefing; the court hears oral argument and, depending on the procedural stage, receives evidence; and the court issues a detailed written opinion.

It is somewhat astounding that the professors have ignored this aspect of Delaware jurisprudence in favor of a caricature in which the only Delaware disclosure decisions are settlement rulings. At the same time, the professors have ignored the fact that federal courts also issue rulings approving settlements, where the federal courts do not receive adversarial briefing, have limited information about the details of the settlement, and issue rulings in the form of transcripts and orders rather than formal opinions.[45] The differentiator is not the types of rulings that the Delaware and federal courts issue, but rather that the Delaware Court of Chancery's settlement rulings are widely circulated and scrutinized. That fact does not change their nature as settlement rulings or increase the relative weight they should be given.

The professors are also wrong in suggesting that federal law, but not Delaware law, focuses on material misrepresentations and omissions that affect stockholder voting. Delaware uses exactly the same standard for materiality as federal law, which the Delaware Supreme Court adopted by quoting language directly from the United States Supreme Court's decision in *TSC Industries, Inc. v. Northway, Inc.*[46] Under Delaware law, as under

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41. *See, e.g.*, *In re* Alloy, Inc. S'holder Litig., C.A. No. 5626–VCP, 2011 WL 4863716, at *14 (Del. Ch. Oct. 13, 2011); Khanna v. McMinn, No. Civ.A. 20545–NC, 2006 WL 1388744, at *29 (Del. Ch. May 9, 2006); Erickson v. Centennial Beauregard Cellular LLC, No. Civ.A. 19974, 2003 WL 1878583, at *6 (Del. Ch. Apr. 11, 2003); *In re* Wheelabrator Techs., Inc. S'holders Litig., No. 11495, 1992 WL 212595, at *787–94 (Del. Ch. Sept. 1, 1992).

42. *See, e.g.*, *In re* Checkfree Corp. S'holders Litig., No. 3193-CC, 2007 WL 3262188, at *1 (Del. Ch. Nov. 1, 2007); Abrons v. Marée, 911 A.2d 805, 811 (Del. Ch. 2006); *In re* Siliconix, Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787, at *1, *9–14 (Del. Ch. June 21, 2001).

43. *See, e.g.*, *In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 19–21 (Del. Ch. 2014); *In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 356–63 (Del. Ch. 2008); Clements v. Rogers, 790 A.2d 1222, 1239–48 (Del. Ch. 2001).

44. *See, e.g.*, Red Oak Fund, L.P. v. Digirad Corp., No. 8559-VCN, 2013 WL 5740103, at *1, *10 (Del. Ch. Oct. 23, 2013); *In re* Emerging Commc'ns, Inc. S'holders Litig., No. Civ.A. 16415, 2004 WL 1305745, at *1, *36–38 (Del. Ch. June 4, 2004); Emerald Partners v. Berlin, No. Civ.A. 9700, 2003 WL 21003437, at *26–28 (Del. Ch. Apr. 28, 2003).

45. *See* Lawrence M. Frankel, *The Flawed Institutional Design of U.S. Merger Review: Stacking the Deck Against Enforcement*, 2008 UTAH L. REV. 159, 173–76 (2008) (describing how the nature of the federal judiciary limits courts' ability to make fully informed rulings when reviewing agency determinations on antitrust mergers); Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 72 (noting that "many motions for approval of a proposed settlement are likely disposed of without opinion").

46. 426 U.S. 438 (1976).

federal law, "[a] 'fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.'"[47] Under Delaware law, as under federal law, the test is whether there is "'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'"[48] Delaware has not established a separate or different disclosure regime.

Where the professors have erred is in comparing Delaware's work-a-day settlement approval rulings with reported federal decisions and SEC regulations. A fair comparison would match up Delaware settlement approval rulings with federal settlement approval rulings, or Delaware's reported disclosure opinions with the federal courts' reported disclosure opinions. If the professors examined federal settlement approval rulings, they would find exactly the same problems that they identify in Delaware settlement approval rulings. For the SEC, a fair comparison would look not to the disembodied standards expressed in the regulations, but to the staff comment letters applying those regulations to actual deal documents. If the professors looked, they would likely find similarly debatable and fact-specific assessments as to whether more disclosure was needed.

C. No Ability to Separate Out Disclosure from Substantive and Procedural Fairness

The most critical aspect of the professors' grand proposal is the premise that one can achieve an idealized separation between matters of fairness and matters of disclosure. According to the professors: "[M]erger litigation, under state law, should address substantive and procedural fairness. Merger litigation, under federal law, should address disclosure quality."[49] The two concepts, however, cannot be separated. Full disclosure is part of procedural fairness, and the fact that stockholders have approved a transaction after receiving all material information is powerful evidence of substantive fairness. Takeover-related disclosures cannot be neatly excised from other Delaware doctrines.

Before one ever reaches the questions of procedural and substantive fairness, corporate planners must confront the threshold issue of statutory validity. Corporate acts are "twice-tested," once for statutory compliance and again in equity.[50] To be valid, a merger requires an organic stockholder

47. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus.*, 426 U.S. at 449).

48. *Id.* (quoting *TSC Indus.*, 426 U.S. at 449).

49. Fisch et al., *supra* note 1, at 592.

50. Sample v. Morgan, 914 A.2d 647, 672 (Del. Ch. 2007) (citing A.A. Berle, Jr., *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049, 1049 (1931)).

vote.[51] If the merger is an interested transaction that would have been void or voidable at common law, then stockholder approval also establishes a statutory safe harbor to a claim of invalidity.[52] In order to determine whether a merger satisfied these statutory requirements, a Delaware court must be able to consider the takeover-related disclosures.

Moving beyond statutory validity to questions of fiduciary fairness, the fully informed stockholder vote continues to play a central role. A Delaware court uses a standard of review to measure whether directors have complied with the standards of conduct imposed by their fiduciary duties.[53] Delaware has three basic standards of review for evaluating decisions made by fiduciaries: the business judgment rule, enhanced scrutiny, and entire fairness.[54] The presence of a fully informed stockholder vote affects which

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51. DEL. CODE ANN. tit. 8, § 251(c) (2011) (requiring stockholder vote for a long-form merger).

52. DEL. CODE ANN. tit. 8, § 144(a)(2) (2011). At common law, an interested transaction between the corporation and one of its directors or officers was voidable. Blake Rohrbacher et al., *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719, 720–21 (2008). Section 144 was adopted to "rescue" such transactions "from per se voidability" under the common law. *Id.* at 720. Section 144 deals "solely with the problem of per se invalidity; that is, as addressing only the common law principle that interested transactions were entirely invalid and providing a road map for transactional planners to avoid that fate." *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 614–15 (Del. Ch. 2005). The separate determination of "when an interested transaction might give rise to a claim for breach of fiduciary duty—i.e., to a claim in equity—was left to the common law of corporations to answer." *Id.* at 615. Notwithstanding its narrow purpose, and likely because approval by disinterested and independent directors, or by disinterested and independent stockholders, can be relevant to the common law fiduciary duty analysis, section 144 sometimes has "been misconstrued to provide business-judgment protection to transactions complying with its terms." Rohrbacher, *supra*, at 746; *see also id.*, at 741–46 (discussing cases interpreting section 144 beyond its limited scope). This overextension of section 144 is problematic because the standards for director approval and stockholder ratification under section 144 differ from the common law of fiduciary duty. *See id.* at 737–39.

53. For discussions of the distinction between the standard of conduct and the standard of review, see William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1295–99 (2001); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 451–53 (2002); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1416–25 (2005) (distinguishing between the standards of fiduciary conduct and standards of review). *See generally* Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 461–67 (1993) (examining the various standards of review employed by courts in reviewing challenged conduct); Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 553–58 (2012) (rejecting the "aspirational" view of fiduciary duties and arguing that fiduciary duties bind actors even when not enforced).

54. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011).

standard of review applies.[55] For example, if a board of directors lacks an independent and disinterested majority, then the standard of review for a challenged decision, including the decision to enter into a merger, is entire fairness. The compromised board can restore the protections of the business judgment rule by submitting the matter to a fully informed, disinterested stockholder vote. If the corporation has a controlling stockholder that is interested in the transaction, then submitting the matter to a fully informed, disinterested stockholder vote has the effect of shifting the burden of proof on the issue of fairness so that, instead of the defendants having to prove fairness, the plaintiffs have to prove unfairness.[56] If the controlling stockholder transaction is conditioned on *both* the affirmative recommendation of a fully empowered committee of independent and disinterested directors *and* a fully informed, disinterested stockholder vote, then the combined effect is sufficient to restore the protections of the business judgment rule.[57] Although the Delaware Supreme Court has not yet addressed the issue, Court of Chancery precedents indicate that when a transaction otherwise would be subject to enhanced scrutiny, a fully informed, disinterested stockholder vote alone is sufficient to lower the standard of review to the business judgment rule.[58] Likewise, the doctrine of stockholder ratification relies on a fully informed stockholder vote.[59]

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55. *See generally* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443 (2014).

56. Williams v. Geier, 671 A.2d 1368, 1382 (Del. 1996); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994).

57. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

58. *See In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656, 663 n.34 (Del. Ch. 2013) ("[I]t is plain that, when disinterested approval of a sale to an arm's-length buyer is given by a majority of stockholders who have had the chance to consider whether or not to approve a transaction for themselves, there is a long and sensible tradition of giving deference to the stockholders' voluntary decision, invoking the business judgment rule standard of review, and limiting any challenges to the difficult argument that the transaction constituted waste."); *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 793 n.113 (Del. Ch. 2011) (expressing the view that, in the absence of a majority stockholder or de facto controller, "the approval of an uncoerced, disinterested electorate of a merger (including a sale) would have the effect of invoking the business judgment rule standard of review."), *aff'd on other grounds sub nom.* Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012); *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *11 (Del. Ch. Aug. 18, 2006) ("[O]utside the [*Kahn v.*] *Lynch* context, proof that an informed, non-coerced majority of the disinterested stockholders approved an interested transaction has the effect of invoking business judgment rule protection for the transaction and, as a practical matter, insulating the transaction from revocation and its proponents from liability."); *In re* Lukens, Inc. S'holders Litig., 757 A.2d 720, 736–38 (Del. Ch. 1999) (holding that a fully informed stockholder vote on a merger triggered business judgment standard of review resulting in dismissal of a claim that the directors of a corporation breached their duty of care in selling the corporation).

59. Stroud v. Grace, 606 A.2d 75, 82 (Del. 1992) ("Under Delaware law a fully informed shareholder vote in favor of a disputed transaction ratifies board action in the absence of fraud."); *see also* Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 846 (Del. 1987); Smith v. Van Gorkom, 488 A.2d 858, 890 (Del. 1985); Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983);

The selection of the standard of review is not the only issue where disclosure matters. If the applicable standard of review is entire fairness, then the adequacy of the defendants' disclosures is part of the analysis of substantive and procedural fairness. Ironically, to support their argument for federal–state separation, the professors cite the Delaware Supreme Court's decision in *Weinberger*,[60] yet that decision clearly establishes the role of disclosure in determining fairness. In describing the two aspects of the unitary entire fairness test, the Delaware Supreme Court stated that the concept of fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, *and how the approvals of the directors and the stockholders were obtained.*"[61] When analyzing the aspect of fair dealing, the high court reiterated that "[p]art of fair dealing is the obvious duty of candor," as the Delaware Supreme Court then called what is now referred to as the duty of disclosure.[62] As part of its finding that the transaction was not entirely fair, the Delaware Supreme Court held that:

> [T]he minority stockholders were denied the critical information that Signal considered a price of $24 to be a good investment. Since this would have meant over $17,000,000 more to the minority, we cannot conclude that the shareholder vote was an informed one. Under the circumstances, an approval by a majority of the minority was meaningless.[63]

On remand, Chancellor Brown recognized that the principal basis for the Delaware Supreme Court's finding of unfairness was the failure by Signal Corporation, the controlling stockholder of UOP, Inc., and its nominees on the board to disclose information to the UOP stockholders suggesting that the

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Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979); Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58–59 (Del. 1952); Gerlach v. Gillam, 139 A.2d 591, 593 (Del. Ch. 1958).

60. Fisch et al., *supra* note 1, at 591 n.144.

61. *Weinberger*, 457 A.2d at 711 (emphasis added).

62. *Id.* at 710. The Delaware Supreme Court coined the phrase "duty of candor" in Lynch v. Vickers Energy Corp. (Vickers I), 383 A.2d 278, 279, 281 (Del. 1977). Delaware decisions used it consistently until *Stroud v. Grace*, when the Delaware Supreme Court criticized the term as potentially misleading. *Stroud*, 606 A.2d at 84. The *Stroud* court clarified that the duty of candor "represents nothing more than the well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action." *Id.* After *Stroud*, the prevailing Delaware terminology shifted from the "duty of candor" to the "duty of disclosure." Some of my colleagues appear to be revisiting the earlier term. *See, e.g.*, Dent v. Ramtron Int'l Corp., No. 7950–VCP, 2014 WL 2931180, at *10 (Del. Ch. June 30, 2014) (using "duty of candor" terminology); Raul v. Astoria Fin. Corp., No. 9169–VCG, 2014 WL 2795312, at *8 (Del. Ch. June 20, 2014) (same); Ehlen v. Conceptus, Inc., No. 8560–VCG, 2013 WL 2285577, at *2 (Del. Ch. May 24, 2013) (same).

63. *Weinberger*, 457 A.2d at 712.

price of the deal was too low.[64] The lack of disclosure was critical to the Delaware Supreme Court's holding that the challenged merger failed to satisfy "any reasonable test of fairness."[65]

If the standard of review is enhanced scrutiny, then the adequacy of the defendants' disclosures plays an even greater role in precisely the context that the professors are most concerned about: applications to enjoin pending mergers. When a plaintiff asks the Court of Chancery "to enjoin a transaction and another higher-priced alternative is not immediately available, [the court] has been appropriately modest about playing games with other people's money."[66] Numerous decisions have declined to issue an injunction against a pending merger in deference to the stockholders' collective decision.[67] This is because:

> Delaware corporate law strives to give effect to business decisions approved by properly motivated directors and by informed, disinterested stockholders. By this means,

64. Weinberger v. UOP, Inc., No. 5642, 1985 WL 11546, at *2 (Del. Ch. Jan. 30, 1985) ("It seems obvious to me that the finding by the Supreme Court that Signal had not dealt fairly with the UOP minority equates to a finding that Signal was guilty of misrepresentation in presenting the facts relating to the proposed merger to the UOP minority."), *aff'd* 497 A.2d 792 (1985); *id.* ("interpret[ing] the Supreme Court's finding of unfair dealing on Signal's part . . . to be a finding of misrepresentation").

65. *Weinberger*, 457 A.2d at 712; *see also* Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1283 (Del. 1988) (holding that because "the duty of candor is one of the elementary principles of fair dealing, Delaware law imposes this unremitting obligation not only on officers and directors, but also upon those who are privy to material information obtained in the course of representing corporate interests").

66. *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 208 (Del. Ch. 2007).

67. *See, e.g.*, *In re* Delphi Fin. Grp. S'holder Litig., No. 7144–VCG, 2012 WL 729232, at *21 (Del. Ch. Mar. 6, 2012) ("Nonetheless, given that the meritorious allegations discussed above are remediable by damages, I find it in the best interests of the stockholders that they be given the opportunity to decide for themselves whether the Merger negotiated by Rosenkranz and the Director Defendants offers an acceptable price for their shares."); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434–35 (Del. Ch. 2012) ("Although the pursuit of a monetary damages award may not be likely to promise full relief, the record does not instill in me the confidence to deny, by grant of an injunction, El Paso's stockholders from accepting a transaction that they may find desirable in current market conditions, despite the disturbing behavior that led to its final terms."); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 515 (Del. Ch. 2010) ("At the other end of the spectrum, where a selling Board's alleged *Revlon* violations occur in the absence of another viable bid, this Court often finds injunctive relief to be inappropriate because it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves."); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 618 (Del. Ch. 2010) (ruling that the balance of harms tilted against injunction because stockholders could decide for themselves to vote a deal down and take the chance of receiving an actionable higher bid); *Netsmart*, 924 A.2d at 208 ("[W]hen [the] court is asked to enjoin a transaction and another higher-priced alternative is not immediately available, it has been appropriately modest about playing games with other people's [(i.e., the stockholders')] money."); *In re* Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 715 (Del. Ch. 2001) ("After all, even when a sufficient merits showing is made by a plaintiff, this court is justifiably reluctant to enjoin a premium-generating transaction when no other option is available, except insofar as is necessary for the disclosure of additional information to permit stockholders to make an informed decision whether to tender.").

> our law seeks to balance the interest in promoting fair treatment of stockholders and the utility of avoiding judicial inquiries into the wisdom of business decisions. Thus, doctrines like ratification and acquiescence operate to keep the judiciary from second-guessing transactions when disinterested stockholders have had a fair opportunity to protect themselves by voting no.[68]

Delaware decisions regularly take this course even if the plaintiffs had established a reasonable probability that they could succeed in showing an underlying fiduciary breach other than disclosure.[69] Conversely, where there is a disclosure deficiency, the Delaware Court of Chancery will find irreparable harm and enjoin the transaction.[70] "By issuing an injunction

68. *Netsmart*, 924 A.2d at 207.

69. *See Pennaco Energy*, 787 A.2d at 715; *accord El Paso*, 41 A.3d at 434 (finding reasonable likelihood of success on the merits but denying a request for preliminary injunction where "the stockholders of El Paso, as the seller, have a choice whether to turn down the Merger themselves"); *Cogent*, 7 A.3d at 515 ("[W]here a selling Board's alleged *Revlon* violations occur in the absence of another viable bid, this Court often finds injunctive relief to be inappropriate because it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves."); *Dollar Thrifty*, 14 A.3d at 618 (ruling that balance of harms tilted against injunction because stockholders could decide for themselves to vote the deal down and take the chance of receiving an actionable higher bid); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1023 (Del. Ch. 2005) ("[T]he bottom line is that the public stockholders will have an opportunity . . . to reject the merger if they do not think the price is high enough in light of the Company's stand-alone value and other options."); H.F. Ahmanson & Co. v. Great W. Fin. Corp., Nos. CIV. A. 15650, CIV. A. 15549, CIV. A. 15555, CIV. A. 15556, CIV. A. 15557 & CIV. A. 15577, 1997 WL 305824, at *12 (Del. Ch. June 3, 1997) (declining to enjoin vote on friendly merger to allow stockholders first to elect hostile bidder's nominees: "If Great Western's shareholders wish to elect Ahmanson's nominees to the board, they need only vote down the Washington Mutual merger proposal at the merger meeting, and then vote for Ahmanson's nominees at the rescheduled annual meeting.").

70. *See, e.g.*, Berger v. Pubco Corp., No. 3414-CC, 2008 WL 2224107, at *4 (Del. Ch. May 30, 2008) ("A disclosure violation results in an irreparable injury, which implicates the jurisdiction of this Court.") (footnote omitted), *rev'd on other grounds*, 976 A.2d 132 (Del. 2009); *Netsmart*, 924 A.2d at 207 ("[T]his court has typically found a threat of irreparable injury to exist when it appears stockholders may make an important voting decision on inadequate disclosures."); Allen v. News Corp., Nos. Civ.A. 979-N, Civ.A. 980-N, Civ.A. 981-N, Civ.A. 982-N, Civ.A. 984-N, Civ.A. 985-N, Civ.A. 986-N, Civ.A. 991-N, Civ.A. 994-N, Civ.A. 995-N, Civ.A. 996-N, Civ.A. 1003-N, Civ.A. 1018-N, Civ.A. 1026-N, Civ.A. 1033-N, Civ.A. 1034-N & Civ.A. 1036-N, 2005 WL 415095, at *1 (Del. Ch. Feb. 3, 2005) ("At this early stage, plaintiffs have demonstrated a 'sufficiently colorable claim' that the disclosures contained in News' proxy materials are materially deficient or misleading and that there is a 'possibility of a threatened irreparable injury,' namely the loss of the ability by the Fox shareholders to have all pertinent information available at the time they decide whether to tender their shares into the exchange offer, if expedition is not granted." (quoting U.S. Surgical Corp. v. Circon Corp., No. Civ.A. 15223, 1997 WL 33175025, at *2 (Del. Ch. Sept. 17, 1997))); *In re* The Mony Grp., Inc. S'holder Litig., 852 A.2d 9, 18 (Del. Ch. 2004) ("This disclosure violation threatens irreparable harm because stockholders may vote 'yes' on a transaction they otherwise would have voted 'no' on if they had access to full or nonmisleading disclosures regarding the CICs."); ODS Techs., L.P. v. Marshall, 832 A.2d 1254, 1262 (Del. Ch. 2003) ("The

requiring additional disclosure, the court gives stockholders the choice to think for themselves on full information, thereby vindicating their rights as stockholders to make important voting and remedial decisions based on their own economic self-interest."[71] In contrast to a post-closing entire fairness analysis, where disclosure is part of the overall fairness analysis, in the deal-injunction setting, disclosure dominates the courts' assessment of substantive and procedural fairness.

In my view, these examples show that questions of disclosure are not secondary under Delaware law but rather inextricably linked to fundamental corporate law concepts. The professors do not grapple with any of these issues. They simply envision that litigation over merger-related disclosure can be excised with surgical precision and transplanted to the federal courts. The professors do not explain, if that were to occur, how the Court of Chancery would evaluate transactional validity, determine the applicable standard of review, or consider issues of ratification. If the sufficiency of the defendants' disclosures and the adequacy of the stockholder vote were to be determined exclusively under federal law in the federal court, how would the Court of Chancery proceed? Because directors are presumed to comply with their fiduciary duties,[72] would the Court of Chancery presume that the vote was fully informed absent a federal decision to the contrary? Or because the burden of proof is generally on the party seeking to invoke the protection of a stockholder vote,[73] would the Court of Chancery court presume the contrary? Either presumption would have a dramatic effect on the applicable standard of review, skewing the judicial lens either in favor of or against the defendants. Or perhaps the Court of Chancery would stay its case pending a federal decision on the efficacy of the vote, in which case the time to judicial resolution would lengthen dramatically.

In the injunction context, which is central to the professors' article, the Court of Chancery presumably no longer would be able to defer to the stockholder vote, because the court would not be able to evaluate its efficacy. Rather, the Court of Chancery would have to grapple directly with the merits of the transaction. Historically, Delaware courts have only rarely issued injunctions blocking transactions—or aspects of transactions—for issues

threat of an uninformed stockholder vote constitutes irreparable harm."); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 452 (Del. Ch. 2002) ("[I]rreparable injury is threatened when a stockholder might make a tender or voting decision on the basis of materially misleading or inadequate information.").

71. *Netsmart*, 924 A.2d at 207.

72. Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1048 (Del. 2004).

73. Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983) ("[T]he burden clearly remains on those relying on the vote to show that they completely disclosed all material facts relevant to the transaction.").

other than disclosure.[74] But under the professors' schema, the Court of Chancery would have to because the court would not know whether the stockholder vote was fully informed or not unless a federal court made that determination.

Perhaps the professors have answers to all of these problems, but the *Peppercorn* article does not provide them, and simply citing *Santa Fe* won't do the trick. Personally, I do not think the idealized separation between matters of fairness and matters of disclosure can survive an encounter with the operative legal doctrines.

D. The Failure of the Grand Proposal

Ultimately, as a solution to the merger-litigation problem, the proposal to shift litigation to the federal courts will only change the forum where disclosure-only settlements occur. As part of the multiforum litigation problem, stockholder plaintiffs now regularly file Section 14(e) claims in federal court.[75] Those cases could just as easily provide vehicles for disclosure-only settlements. As noted, the same problems that affect representative litigation settlements in the Delaware courts infect the federal court system as well.

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74. And they have done so only where the plaintiff also had established a reasonable probability of success on a claim against the acquirer for aiding and abetting the target fiduciaries' breach of fiduciary duty. *Compare In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 836–37, 840–42 (Del. Ch. 2011) (granting preliminary injunction against exercise of contract rights where there was a reasonable probability that third party acquirer had aided and abetted the fiduciary breach), *with El Paso*, 41 A.3d at 448–49, 451 (declining to issue preliminary injunction against exercise of contract rights where third party acquirer had bargained at arm's length and there was not a reasonable probability of success on a claim of aiding and abetting), *and Toys "R" Us*, 877 A.2d at 1022–23 (declining to issue preliminary injunction where bidder negotiated for reasonable contract provisions). The decisions in which the Delaware Supreme Court has issued or affirmed the issuance of injunctions targeted to specific deal protection terms all involved viable claims of aiding and abetting against the holder of the third party contract rights. *See, e.g.*, Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 51 (Del. 1994) (affirming targeted injunction against stock option lockup and expanding it to include no-shop and termination fee where counterparty, "a sophisticated party with experienced legal and financial advisors, knew of (and in fact demanded) the unreasonable features"); Mills Acquisition Co. v. MacMillian, Inc., 559 A.2d 1261, 1282, 1286, 1288 (Del. 1989) (reversing denial of injunction by Court of Chancery and granting a targeted injunction against asset lock-up and breakup fee and expense reimbursement provisions where bidder knowingly participated in breach by receiving and using information gained from improper management tip during sale process); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183–85 (Del. 1986) (affirming targeted injunction against asset lock-up and termination fee where counterparty consistently received favored treatment to the exclusion of other bidders and used that advantage to demand unreasonable defensive measures).

75. *See, e.g.*, Hohenstein v. Behringer Harvard Reit I, Inc., No. 3:12–CV–3772–G, 2014 WL 1265949, at *7 (N.D. Tex. Mar. 27, 2014) (dismissing plaintiffs' 14(e) claims); Biotechnology Value Fund, L.P. v. Celera Corp., No. C 13–03248, 2014 WL 988913, at *8–9 (N.D. Cal. Mar. 10, 2014) (denying motion to amend complaint because section 14(e) violations were insufficiently pled).

The professors pin their optimism about federal court settlements on the PSLRA[76] and the vigilance of the federal courts providing a greater threat of pleadings stage dismissal,[77] but that assessment overlooks the value of disclosure-only settlements to the defendants. Although defendants complain loudly about multiforum litigation, they like disclosure-only settlements. The key provision for the defendants is the global release, which extinguishes all claims, known or unknown, against the defendants and their associates and affiliates.[78] By design, the release extinguishes all claims relating to the sale of the company, including claims that the stockholder plaintiffs never identified or explored.[79] If the acquired company faced pending or potential derivative claims, then the combination of the global release of individual claims plus the transfer of control over derivative claims to the acquirer, particularly in a setting where the sell-side fiduciaries will receive advancements and indemnification from the acquirer, provides virtually blanket protection against breach of fiduciary duty claims.[80] If the

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76. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737.

77. Fisch et al., *supra* note 1, at 597–98, 608.

78. *See In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010) ("The limiting function of the defendants' ability to seek dismissal . . . operates imperfectly when defendants can routinely purchase global releases by paying transactionally immaterial plaintiffs' fees, and when defendants rationally prefer to do so."); Brinckerhoff v. Tex. E. Products Pipeline Co., 986 A.2d 370, 385–86 (Del. Ch. 2010) (explaining defendants' incentives to settle deal litigation); Elliot J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1810 n.47 (2004) (noting that defendants "may find it attractive to settle . . . not only to avoid litigation-related expenses but also because such settlements invariably include broad releases . . . [and] thus provide defendants with a form of 'litigation insurance'"); *id.* at 1828 ("[V]ery few of the 51 cases that plaintiffs' attorneys dismissed voluntarily involved significant litigation efforts by plaintiffs following the filing of a complaint or, in most instances, multiple complaints."); *id.* at 1838–40 (describing absence of meaningful litigation activity in lawsuits challenging third-party deals).

79. For example, the global releases granted by stockholder plaintiffs have been invoked by buy-side private equity firms in federal antitrust litigation. *See, e.g.*, Dahl v. Bain Capital Partners, LLC, 963 F. Supp. 2d 38, 50 (D. Mass. 2013) (acknowledging that releases given to private equity firms' released them from claims related to underlying LBO transactions but denying their motion to dismiss the overarching conspiracy claims).

80. As an example, consider the state law litigation involving Countrywide Financial Corporation. Delaware litigation challenging Bank of America's acquisition of Countrywide was resolved through a disclosure-only settlement. *In re* Countrywide Corp. S'holders Litig., No. 3464-VCN, 2009 WL 2595739 (Del. Ch. Aug. 24, 2009), *aff'd sub nom.* Ark. Teacher Ret. Sys. v. Caiafa, 996 A.2d 321 (Del. 2010). The plaintiffs received an agreed-upon $750,000 in attorneys' fees. *Countrywide*, 2009 WL 2595739, at *1. Rather than providing negative information about the Bank of America deal, each of the supplemental disclosures made it look more favorable. *Id.* at *3. The closing of the merger deprived stockholder plaintiffs of standing to maintain various derivative claims pending in federal court that alleged premerger breaches of fiduciary duty and which their proponents valued at approximately $2 billion. *Id.* at *5. As part of the settlement hearing, these claims were determined to be "functionally worthless." *Id.* at *10. Based on the finding that the derivative claims were "functionally worthless," the Delaware Supreme Court affirmed the approval of the settlement but commented that "[a]n otherwise pristine merger cannot absolve fiduciaries from accountability for fraudulent conduct that necessitated the merger." *Ark. Teacher*, 996 A.2d at 323. The Delaware Supreme Court implied that the Countrywide stockholders could satisfy "the fraud exception to maintain a post-merger claim." *Id.* The plaintiffs attempted to continue to litigate

acquirer has issued stock to fund the deal, the global release also provides protection against claims under section 20 of the 1933 Act. The release is like an insurance policy that is cost-effective and worth buying. I suspect defendants would prefer to pay $500,000 to $1 million to plaintiffs' counsel as part of a settlement with a global release, rather than pay a similar amount to their own lawyers to brief and argue a motion to dismiss.

In my view, therefore, shifting takeover-related disclosure issues to the federal courts will simply shift the locus of disclosure-only settlements. If the grand proposal did not otherwise harm the fabric of Delaware law, I would have no objection to the shift. Settlement approval is not a particularly enjoyable task and does not, in my view, generate substantial benefits for Delaware. I am more than happy to have federal courts, or the courts of other states, handle the largely administrative task of processing settlements. The grand proposal would make my life easier, but because I believe it would harm Delaware law, I cannot endorse it.

III. The Narrow Proposal: No Fees for Disclosure-Only Settlements

In their narrow and more practical proposal, the professors recommend that "Delaware courts stop awarding fees for disclosure-only settlements."[81] Their explanation is simple: "If disclosure settlements do not affect shareholder voting, it is difficult to argue that they benefit shareholders."[82] This recommendation has considerable promise, but it is not without weaknesses.

A. *No Fees? Or No Disclosure-Only Settlements?*

Initially, the professors face a problem of definition. It is not entirely clear (at least to me) whether the professors are advocating a world in which courts can approve disclosure-only settlements and grant defendants a

their claims in federal court under the fraud exception, but the federal district court held that the closing of the merger deprived the plaintiffs of standing. Ark. Teacher Ret. Sys. v. Mozilo, 705 F.3d 973, 974 (9th Cir. 2013). The United States Court of Appeals for the Ninth Circuit certified to the Delaware Supreme Court the question of whether the plaintiffs had standing to continue litigating, and the Delaware Supreme Court held that the fraud-exception claim described a direct claim that had been released for no tangible consideration as part of the disclosure-only settlement. Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp., 75 A.3d 888, 896–97 (Del. 2013). The Countrywide defendants settled federal securities law claims based on conduct that overlapped with the derivative plaintiffs' allegations for a payment of $624 million. *See* Edvard Pettersson, *Bank of America, KPMG Win Countrywide Settlement Approval*, BLOOMBERG (Feb. 25, 2011), http://www.bloomberg.com/news/2011-02-25/bofa-kpmg-win-approval-for-601-5-million settlement-in-countrywide-case.html, *archived at* http://perma.cc/ LT5N-AX26. Although one can never know whether the plaintiffs could have proven any breaches of fiduciary duty or recovered any damages, the combination of a disclosure-only settlement and the extinguishing of sell-side stockholder standing eliminated any potential for a Delaware law remedy.

81. Fisch et al., *supra* note 1, at 561.

82. *Id.*

release, but will not award fees to plaintiffs' counsel, or whether they are arguing for a world in which courts no longer will approve disclosure-only settlements at all. The professors likely have not pursued this distinction because it is safe to assume that plaintiffs' lawyers will not agree to settlements where they cannot receive fees. But the distinction matters for Delaware law, because there are situations where plaintiffs' lawyers seek to be paid for achieving supplemental disclosures without having entered into a settlement.

The clearest statements in the professors' article appear to target awards of attorneys' fees, not the underlying settlements.[83] But if disclosure-only settlements do not yield any benefits for stockholders, then it is not so easy to cabin the implications to the fee award. A holding that supplemental disclosures do not provide any meaningful benefit would affect the viability of the settlement itself. As the professors observe, the court has at least three tasks at a settlement hearing: decide whether to certify the class, determine whether the settlement is fair and reasonable, and decide on the amount of the fee award for plaintiffs' counsel.[84] They correctly note that:

> While these steps are independent in theory, as a practical matter, they often collapse. If the court determines that the benefits provided by a settlement are illusory, the plaintiff class will not have received any consideration for the releases that accompany a settlement, and the settlement will not be seen as fair. In such a case, the court might properly refuse to approve the settlement. This decision might, however, raise questions about the adequacy with which the class has been represented, suggesting that the court should deny class certification. Similarly, if the court approves the settlement, it has implicitly concluded that the plaintiff class has received something of value, making it difficult to decline to award a fee to class counsel.[85]

Working backwards, if a court were to rule that supplemental disclosures do not provide a meaningful benefit, that holding would imply that they also do not provide any consideration to the class, making it impossible to approve the settlement itself. The logic of the professors' position does not stop with the award of attorneys' fees. It would prevent the court from approving disclosure-only settlements.

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83. *See id.* ("[O]ur article proposes that the Delaware courts stop awarding fees for disclosure-only settlements."); *id.* at 591 ("[T]he current practice of treating disclosure-only settlements as a shareholder benefit sufficient to entitle plaintiffs' attorneys to a fee award incentivizes attorneys to file claims in order to win those settlements. On the basis of our empirical findings, we argue that this incentive is misplaced.").

84. *Id.* at 568.

85. *See id.* (footnotes omitted).

The extension of the analysis from fees to settlements is not necessarily fatal to the professors' proposal. In the real world, it likely will not make much difference, because plaintiffs' lawyers working on contingency are highly unlikely to agree to settlement terms that will not support a fee. Expecting plaintiffs' lawyers to do so would run contrary to the prevailing model of stockholder representative litigation, in which lawyers represent stockholder plaintiffs on a contingent basis.

There are, however, situations when stockholder plaintiffs seek a fee for obtaining supplemental disclosures without having first reached a settlement. A stockholder plaintiff could litigate disclosure claims to an injunction hearing and obtain a decision blocking the transaction from proceeding until the defendants issue supplemental disclosures.[86] Awarding fees in this setting is not something that likely troubles the professors. By issuing the injunction, a court has determined that the proxy contained materially inaccurate information or omitted material information. The disclosure claims were therefore found to be meritorious under the same standard applied by federal law. When the court later takes up the issue of fees, the fee petition is frequently contested, and the court is positioned as well as it can be to award a commensurate fee.

Defendants can also disclose information unilaterally, thereby mooting the plaintiffs' claims.[87] Awarding fees in a mootness scenario is not something that likely troubles the professors either. There is no settlement and no release, which eliminates the risk that the defendants are using a disclosure-only settlement to extinguish meaningful claims. In my experience, voluntary disclosure by the defendants often signals that the claims were strong and the information material. Although the defendants inevitably take the position that the information was of questionable materiality at best and not worth fighting over, those are the settings when parties typically agree to disclosure-only settlements. Plaintiffs' lawyers are less likely to accept a disclosure-only settlement when they think their disclosure claims would support an injunction, because obtaining an injunction can lead to a sufficiently higher fee award to offset the incremental investment of time and effort in the case. There is also no agreed-upon fee.

86. *See, e.g.*, Globis Partners, L.P. v. Plumtree Software, Inc., No. 1577-VCP, 2007 WL 4292024, at *10 (Del. Ch. Nov. 30, 2007) (expressing a "preference for having [disclosure claims] brought as [motions] for a preliminary injunction before the shareholder vote, as opposed to many months after."); Gilmartin v. Adobe Res. Corp., No. 12467, 1992 WL 71510, at *13 (Del. Ch. Apr. 6, 1992); Eisenberg v. Chi. Milwaukee Corp., 537 A.2d 1051, 1063 (Del. Ch. 1987); Sealy Mattress Co. of N.J. v. Sealy, Inc., 532 A.2d 1324, 1341 (Del. Ch. 1987); Joseph v. Shell Oil Co., 482 A.2d 335, 345 (Del. Ch. 1984).

87. *See, e.g.*, *In re* Novell, Inc. S'holder Litig., No. 6032–VCN, 2011 WL 4091502, at *3–4 (Del. Ch. Aug. 30, 2011); Frank v. Elgamal, No. 6120–VCN, 2011 WL 3300344, at *2 (Del. Ch. July 28, 2011); *In re* Smurfit–Stone Container Corp. S'holder Litig., No. 6164–VCP, 2011 WL 2028076, at *25 (Del. Ch. May 20, 2011).

Although by making voluntary disclosures, the defendants largely concede the plaintiff's entitlement to a fee award of some amount, fee petitions involving mootness dismissals are more frequently contested or only settled after briefing on the merits of the amount of the award. In the briefing, the parties squarely address the materiality of the disclosures and engage in the type of adversarial debate that is lacking in the settlement context. A court awarding fees in a mootness scenario can therefore make informed assessments about whether the disclosures were material as part of the exercise of awarding fees commensurate with their importance. When ruling on fee petitions in mootness cases, Delaware decisions have held that particular disclosures did not satisfy the materiality requirement.[88]

It seems to me, therefore, that the professors' narrow proposal is not really about fee awards for supplemental disclosures, but rather about fee awards in disclosure-only settlements. It also seems to me that the professors' narrow proposal is best understood as an argument that courts applying Delaware law should not approve disclosure-only settlements because the data show that those settlements do not result in statistically measurable changes in stockholder voting. The remainder of this comment takes the liberty of addressing the professor's narrow proposal in this form.

B. Is the Statistical Evidence Sufficient?

The next question to my mind is whether the professors' data provides sufficient support for Delaware courts to stop approving disclosure-only settlements. Here, the professors encounter an all-too-human limitation: the inability to foresee the future. The professors' data is retrospective in nature. It shows that, historically, disclosure-only settlements have not provided meaningful information. It does not follow that disclosure settlements *could not* provide meaningful information. The professors' proposal to eliminate disclosure-only settlements therefore suffers from the problem of over-inclusiveness that plagues all bright-line rules. It is easy to imagine reasons why, and scenarios where, a disclosure-only settlement would provide adequate consideration for stockholders. In my view, to make a persuasive case for their proposal, the professors must also argue why courts applying Delaware law cannot determine effectively which disclosure-only settlements provide adequate consideration and which do not.

The argument in favor of disclosure-only settlements starts from the premise that Delaware courts can and do grant significant relief for breaches of the duty of disclosure. A Delaware court can issue an injunction blocking a merger from proceeding because of a failure to disclose material information.[89] A Delaware court can rescind a merger or grant rescissory

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88. *See, e.g.*, *In re* Sauer-Danfoss Inc. S'holders Litig., 65 A.3d 1116, 1128 (Del. Ch. 2011).

89. *See, e.g*, *In re* Staples, Inc. S'holders Litig., 792 A.2d 934, 960 (Del. Ch. 2001); Sonet v. Plum Creek Timber Co., No. 16931, 1999 WL 160174, at *11 (Del. Ch. Mar. 18, 1999).

damages because of a failure to disclose material information.[90] A Delaware court also can grant other forms of relief, including damages calculated using other measures, because of a failure to disclose material information.[91] If a pending lawsuit poses these types of threats, and if the defendants believe that an adverse judicial decision is likely, then they should be able to address the disclosure claim without awaiting a formal ruling against them. It is hard to object to the defendants accomplishing by choice what a court otherwise would order them to do. If the stockholder vote has not happened, the defendants can provide the information that the plaintiffs say is required. If the transaction has closed, the defendants can seek to cure the problem through stockholder ratification.

As discussed in the prior section, the defendants can take these actions unilaterally and moot the plaintiffs' claims. More likely, the defendants will negotiate with the plaintiffs to provide certain forms of relief as part of a settlement. When a claim rests on a failure to provide disclosures, the logical remedy is to provide the necessary disclosures, particularly if the transaction has not already closed.[92] The question for the validity of the settlement thus is not the form of the consideration (disclosure) but rather the sufficiency of the consideration, i.e. the materiality of the information and its relationship to the threat that the litigation otherwise posed.

If so, then the adequacy of a disclosure-only settlement cannot be addressed across the board, as the professors wish, but rather must be evaluated on a case-by-case basis, as the Delaware courts are currently doing. The professors' analysis shows that, historically, disclosure settlements have not provided meaningful information,[93] but it does not follow that disclosure settlements *could not* provide meaningful information. Instead of counseling

90. Lynch v. Vickers Energy Corp., 429 A.2d 497, 501 (Del. 1981), *overruled in part on other grounds*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). Delaware decisions have distinguished between the showing required to obtain injunctive relief and the showing required to obtain monetary damages in connection with an alleged breach of the duty of disclosure in connection with a request for stockholder action. *See, e.g.*, *In re* Wayport, Inc. Litig., 76 A.3d 296, 314–15 (Del. Ch. 2013) ("A failure to disclose material information in [the context of a request for stockholder action] may warrant an injunction . . . but will not provide a basis for damages from defendant directors absent proof of (i) a culpable state of mind or nonexculpated gross negligence, (ii) reliance by the stockholders . . . , and (iii) damages proximately caused by that failure."); *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 766, 773–75 (Del. 2006).

91. *See, e.g.*, *Weinberger*, 457 A.2d at 714 (coining the term "quasi-appraisal" and awarding a quasi-appraisal remedy); Turner v. Bernstein, 768 A.2d 24, 39 (Del. Ch. 2000) (recognizing that quasi-appraisal or rescissory damages could be appropriate). *See generally In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 38–50 (Del. Ch. 2014) (discussing availability of damages awards for disclosure violations).

92. *See, e.g.*, Gilmartin v. Adobe Res. Corp., No. 12467, 1992 WL 71510, at *13 (Del. Ch. Apr. 6, 1992) (observing that "[t]he right to cast an informed vote is specific, and its proper vindication in this case requires a specific remedy such as an injunction, rather than a substitutionary remedy such as damages.").

93. Fisch et al., *supra* note 1, at 585.

against fee awards for disclosure-only settlements, their empirical analysis calls for insisting upon more significant types of information as the price of settlement—at least as long as disclosure remains a viable cause of action under Delaware law.[94] We therefore would continue to have disclosure-only settlements, but we need more vigorous judicial enforcement of the informational content.

To my mind, the professors' narrow recommendation is not persuasive if supported only by their empirical analysis. To make a case for not awarding fees based on disclosure, the professors must also argue convincingly that judges cannot effectively police the informational content of disclosures in the settlement context. There is an extensive literature on the pathologies in the representative-action settlement process, which the professors touch on in passing.[95]

There are good reasons to believe that the dynamics of representative-action settlements undermine the ability of judges to do a good job evaluating the fairness of settlement consideration, including the sufficiency of supplemental disclosures. The professors cite some of these problems, and there is an extensive literature exploring these issues both for stockholder class actions and for representative litigation generally.[96] Perhaps a convincing case could be made, but the recommendation would rest on a combination of empirical evidence showing that historically disclosure-only settlements have not provided meaningful information *and* an argument that the dynamics of the representative-action settlements prevent courts from doing a better job going forward. The historical finding alone is insufficient.

C. The Practical Problem of Implementation

A final practical problem lies in the implementation of the professors' proposal. Only the Delaware Supreme Court can do it, and assuming for the sake of argument that they were willing to consider it, they are not likely to have the opportunity. As the professors note, under current Delaware Supreme Court precedent, "A heightened level of corporate disclosure, if attributable to the filing of a meritorious suit, may justify an award of counsel fees."[97] Until the Delaware Supreme Court says otherwise, that is the law of Delaware.[98] A trial court cannot adopt the professors'

94. *Id.* at 585–86.

95. *See id.* at 562–63 nn.19–20.

96. *Id.*

97. Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1165 (Del. 1989) (citing Allied Artists Pictures Corp. v. Baron, 413 A.2d 876, 878 (Del. 1980) and Chrysler Corp. v. Dann, 223 A.2d 384, 386 (Del. 1966)).

98. In theory the General Assembly could step in, but it is unlikely to do so given its conservative approach. *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1782 (2006) (noting that the General Assembly "prefer[s] that the courts be the first responders to controversies in applying Delaware corporate law, at least in those matters that defy clarification through simple legislation or codification.").

recommendation without inviting a substantial risk of reversal and sharp criticism from the senior tribunal.

If a trial judge were inclined to favor the professors' narrow recommendation and prepared to accept the appeal risk, it is likely that the trial court would have to act sua sponte. None of the parties to the settlement will be advancing the professors' position. The plaintiff seeking a fee award certainly won't be, and the defendants are highly unlikely to endorse it. When defendants settle, they typically agree not to oppose a fee request up to a particular amount. This aspect of the settlement is often referred to as a "clear-sailing provision," reflecting how frequently plaintiffs' counsel encounter opposition to their fee requests once the defendants have signed off.[99] Having made that agreement, the defendants cannot argue against the availability of a fee as a matter of law. Moreover, to the extent a defendant might refuse to agree to a clear-sailing provision and oppose a fee, the defendants cannot go to the extreme of arguing that the supplemental disclosures provide no compensable benefit, because at that point there will not be sufficient consideration to support the settlement itself. The only litigants likely to advance the professors' proposal are the professors themselves, who like Professor White in the *Cox* litigation,[100] might appear as objectors to advocate their normative view.

IV. An Alternative: Shift Towards Post-Closing Litigation

In my view, a potentially more promising solution to the M&A litigation crisis would be to use the professors' findings as a basis for shifting away from expedited, preclosing litigation and towards nonexpedited, post-closing litigation. As I see it, the major driver of nonsubstantive settlements is the pressure created by expedited discovery and the threat of a preliminary injunction during the preclosing phase. If that pressure is removed and the deal is allowed to close, then the litigation can be dealt with in the ordinary course. Because the vast majority of the ubiquitous challenges to deals are exceedingly weak, in most cases the complaints will be dismissed.

The granting of a motion for an expedited preliminary injunction hearing is the litigation event that creates the hydraulic pressure that drives settlement. Once the motion to expedite is granted, the plaintiff can obtain

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99. *See generally* William D. Henderson, *Clear Sailing Agreements: A Special Form of Collusion in Class Action Settlements*, 77 TUL. L. REV. 813 (2003) (defining clear-sailing provisions and proposing a ban on settlements relying on clear-sailing provisions); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985).

100. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 626 (Del. Ch. 2005) (noting that Professor White submitted an affidavit on the objectors' behalf).

broad discovery from the defendants.[101] The defendants must bear the significant expense of collecting, reviewing, and producing documents on an expedited basis; preparing and producing witnesses for deposition; and briefing and arguing a preliminary injunction proceeding. The target board typically has one set of lawyers, the acquirer another, and any differently situated subset of defendants, such as management, often has its own counsel. If the litigation spans multiple jurisdictions, then the number of lawyers multiplies as well. The cost to defend a four to six week injunction proceeding can easily cost $1–2 million and potentially more, particularly if expert witnesses are involved.

In addition to cost, the expedited proceeding creates risk. The plaintiffs can use the discovery process to uncover claims unknown at the time of filing. With the aid of discovery, the plaintiff may have a realistic shot at obtaining an injunction against the transaction. Even a limited injunction requiring the issuance of supplemental disclosures marginally increases the risk to the transaction, which the parties to the deal would prefer to avoid. Discovery may also enable the plaintiff to plead claims that would survive a post-closing motion to dismiss. A complaint based solely on the proxy statement and other public filings might be subject to dismissal, but if the plaintiff has been able to access emails and other internal documents and can extract snippets of testimony from depositions taken during the injunction phase, then the plaintiff may be able to continue to litigate claims after closing and impose additional costs and uncertainty on the surviving corporation.

A nonsubstantive settlement, of which disclosure-only settlements are merely one example, is a rational response to the leverage that plaintiffs gain from the granting of a motion to expedite and the ability to conduct pre-closing discovery. The professors are correct that plaintiffs' lawyers file lawsuits challenging virtually every M&A transaction because they can readily obtain and get paid for nonsubstantive settlements,[102] but they have the leverage to extract these settlements because of the pressures that flow from the granting of a motion to expedite.

A more direct answer to the M&A litigation explosion therefore lies in re-examining the showing needed to commence expedited preclosing M&A litigation. In Delaware, the standard for obtaining an expedited hearing on a motion for preliminary injunction challenging a transaction has historically been exceedingly low. The party seeking accelerated discovery or an expedited schedule needs only to show "good cause why that is

101. *See* Giammargo v. Snapple Beverage Corp., No. 13845, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994) (noting that granting an expedited motion leads to extra, and potentially substantial, costs).

102. Fisch et al., *supra* note 1, at 558–59.

necessary."[103] When evaluating the request, the court conducts "a truncated determination of the merits of the underlying claims alleged and an examination of the necessity for prompt adjudication sufficient to impose the increased burdens that an expedited proceeding entails."[104] When the plaintiff seeks an expedited hearing on an application for a preliminary injunction, the court applies a more particularized version of the good cause test that calls for a hearing to be scheduled only if "the plaintiff has articulated a sufficiently colorable claim and shown a sufficient possibility of a threatened irreparable injury, as would justify imposing on the defendants and the public the extra (and sometimes substantial) costs of an expedited preliminary injunction proceeding."[105] In the oft-quoted words of Chancellor Allen, the Court of Chancery "traditionally has acted with a certain solicitude for plaintiffs in this procedural setting and thus has followed the practice of erring on the side of more [expedited injunction] hearings rather than fewer."[106] Moreover, because the Court of Chancery has long regarded colorable claims of false or misleading disclosures to present an inherent threat of irreparable harm, the motion to expedite is typically granted.[107]

In my view, the time has come to rethink the tradition of solicitude. That tradition recognizes the difficulty that courts have in evaluating the strength of claims on an initial incomplete record, and it relied on the bar to triage claims and bring only serious challenges.[108] Unfortunately, the plaintiff's bar has abandoned any pretense of triage and has taken advantage of the tradition to file complaints challenging virtually every M&A transaction. Because those claims are then settled, the court lacks meaningful opportunities to weed out the meritless claims. To address the litigation epidemic, a more rigorous screening mechanism is needed at the motion to expedite stage. Perhaps, rather than merely requiring a colorable claim, a motion to expedite challenging an M&A transaction should have to meet a standard more closely akin to a Rule 12(b)(6) motion to dismiss.[109]

It is also time, in my view, to rethink the premise that disclosure claims present an inherent threat of irreparable harm. The empirical analysis that the professors have conducted suggests that the types of disclosures that

103. Greenfield v. Caporella, No. 8710, 1986 WL 13977, at *2 (Del. Ch. 1986) (considering request for expedited appointment of a receiver).

104. Brown v. Rite Aid Corp., No. Civ.A. 094-N, 2004 WL 723153, at *1 (Del. Ch. Mar. 29, 2004) (considering request for expedited schedule in advancement action).

105. *Giammargo*, 1994 WL 672698, at *2.

106. *Id.*

107. *See, e.g.*, *In re* Inergy L.P., No. 5816–VCP, 2010 WL 4273197, at *17 & n.159 (Del. Ch. Oct. 29, 2010); *In re* 3Com S'holders Litig., No. 5067-CC, 2009 WL 5173804, at*1 (Del. Ch. Dec. 18, 2009); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 452 (Del. Ch. 2002).

108. *See* Weiss & White, *supra* note 78, 1798–99 (arguing that Delaware courts effectively privatized enforcement of fiduciary duties in public corporations in part by relying on plaintiffs' attorneys' understanding of difficult issues of corporate governance and fiduciary duties).

109. FED. R. CIV. P. 12(b)(6).

plaintiffs' lawyers are obtaining in M&A litigation is not changing votes, which means it is not remedying anything at all.[110] The professors use the results of their analysis to argue against approving disclosure-only settlements.[111] A better use might be to argue against granting motions to expedite.

In lieu of rushed, preclosing injunction applications that typically lead to disclosure-only settlements, disclosure claims could be addressed post-closing as damages actions. In that setting, the plaintiff not only must plead a materially false disclosure or a material omission, but also plead an actionable breach of duty that can support the recovery of causally related damages.[112] If the corporation has an exculpatory charter provision, this requires pleading an actionable breach of the duty of loyalty, including the subsidiary requirement of good faith.[113]

Because the plaintiff must plead an actionable breach of fiduciary duty, the defendants have a meaningful opportunity to defeat a post-closing claim for breach of the duty of disclosure at the pleadings stage. Moreover, if the defendants evaluate the complaint during the injunction stage and think the complaint might survive a motion to dismiss, then they can provide the information unilaterally before the stockholder vote, thereby mooting the disclosure claim. Although the act of mooting the claim would likely give the stockholder plaintiff an entitlement to an attorneys' fee award, it would eliminate the risk of a prolonged, post-closing damages action.

From a doctrinal standpoint, the availability of quasi-appraisal damages if the plaintiffs can prove an actionable breach of the duty of disclosure provides stockholders with an adequate, post-closing remedy, thereby avoiding the ritual of sue, settle, and supplement. Importantly, the quasi-appraisal remedy does not entitle a stockholder plaintiff to litigate a class-wide, non-opt-out appraisal proceeding. "'Quasi-appraisal' is simply a short-hand description of a measure of damages" that "refers to the quantum of

110. Fisch et al., *supra* note 1, at 583–86.

111. *Id.* at 561.

112. When seeking injunctive relief for a breach of the duty of disclosure in connection with a request for stockholder action, a plaintiff need only show a material misstatement or omission. The plaintiff need not address the "elements of reliance, causation and actual quantifiable monetary damages." *In re* J.P. Morgan Chase & Co. S'holder Litig., 906 A.2d 766, 775 (Del. 2006) (quoting Malone v. Brincat, 722 A.2d 5, 12 (Del. 1998)). When seeking post-closing damages for breach of the duty of disclosure, however, the plaintiffs must prove quantifiable damages that are "logically and reasonably related to the harm or injury for which compensation is being awarded." *Id.* at 773. In other words, although the request for stockholders to take action based on the disclosures may satisfy the requirement of reliance, the plaintiff still must prove causation and damages. *See In re* Wayport, Inc. Litig., 76 A.3d 296, 314–15 (Del. Ch. 2013) ("A failure to disclose material information in [the context of a request for stockholder action] may warrant an injunction . . . but will not provide a basis for damages from defendant directors absent proof of (i) a culpable state of mind or non-exculpated gross negligence, (ii) reliance by the stockholders . . ., and (iii) damages proximately caused by that failure.").

113. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2011).

money" equal "to what a stockholder would have received in an appraisal, namely the fair value of the stockholder's proportionate share of the equity of the corporation as a going concern."[114] This measure is a form of compensatory damages, which are generally measured by the harm inflicted on the plaintiff at the time of the wrong. When a merger has resulted from a breach of duty, such as the duty of disclosure, the quasi-appraisal remedy compensates the injured stockholders for the loss of their shares by awarding them "out-of-pocket (*i.e.*, compensatory) money damages equal to the 'fair' or 'intrinsic' value of their stock at the time of the merger, less the price per share that they actually received."[115]

The proposition that the availability of a post-closing, quasi-appraisal remedy for disclosure claims eliminates the risk of irreparable harm is by no means a new one. The remedy was applied in this fashion in the early 1990s by Chancellor Allen in *Steiner v. Sizzler Restaurants*[116] and by then-Vice Chancellor Chandler in *Ocean Drilling*.[117] It is available not only in controlling stockholder squeeze-outs and short-form mergers, but also in long-form mergers.[118]

The availability of quasi-appraisal enables a court at the motion to expedite stage to do more than apply a simple formula of "if disclosure, then expedite." Rather, a court can and should make a preliminary determination regarding the significance of the claimed disclosure violation.

> Where a court with some confidence determines early-on that a disclosure is, or quite likely is, deficient, the response that most surely will fulfill the law's policy mission will be augmented, corrective disclosure. Where complete, corrected disclosure can be made before corporate action is taken the cost and inherent risk of error that unavoidably accompanies a legal remedy—counter-factual determinations (*i.e.*, what would have happened if disclosure had been

114. *In re* Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 42 (Del. Ch. 2014).

115. Strassburger v. Earley, 752 A.2d 557, 579 (Del. Ch. 2000).

116. Steiner v. Sizzler Rests. Int'l, Inc., No. 11994, 1991 WL 40872, at *2 (Del. Ch. Mar. 19, 1991) (stating that, in light of the availability of a quasi-appraisal remedy, the court could not "perceive in what practical way plaintiff will be irreparably injured should the exchange offer close").

117. *In re* Ocean Drilling & Exploration Co. S'holders Litig., No. 11898, 1991 WL 70028, at *7 (Del. Ch. Apr. 30, 1991) (denying a preliminary injunction motion because "the 'irreparability' of any harm caused by the defendants' conduct is limited to a large extent by the availability of the quasi-appraisal remedy."); *see also* Taylor v. LSI Logic Corp., No. 13915-NC, 1995 WL 405737, at *3 (Del. Ch. June 19, 1995) (denying a motion to expedite an application to preliminarily enjoin the acquisition of a Canadian company because the relevant Canadian statute provided a quasi-appraisal like remedy and, as a result, "the injury complained of by plaintiff may not be irreparable.").

118. Turner v. Bernstein, 768 A.2d 24, 39 (Del. Ch. 2000); Arnold v. Soc'y for Sav. Bancorp, Inc., No. 12883, 1995 WL 376919, at *6 (Del. Ch. June 15, 1995), *aff'd*, 678 A.2d 533 (Del. 1996).

> made) and damage or "quasi-appraisal" calculation—is avoided.[119]

But where the strength of the disclosure claim is dubious, a court is not required to bestow the leverage of an expedited proceeding on a stockholder plaintiff. A court rather can deny the motion to expedite and allow the defendants to evaluate the strength of the disclosure claim and, if they choose, moot it. If the defendants choose not to moot the claim, then the court can adjudicate the issue post-closing, with compensatory or rescissory damages as a potential remedy if the plaintiff succeeds in pleading and eventually proving an actionable breach of fiduciary duty.

V. Conclusion

Although the professors correctly identify the problem of disclosure-only settlements, their proposals for reform rest on debatable premises and misapprehensions of Delaware law. Their grand proposal—that Delaware courts cede the field of merger-related disclosures to the federal courts—assumes that federal courts are more competent to grapple with such matters yet provides no basis to believe that federal courts have any better ability to police settlements than the Delaware courts. The professors further mischaracterize the body of Delaware law regarding disclosures as emanating exclusively from settlement approval rulings when, in fact, litigants regularly argue and Delaware courts dispose of disclosure issues through active litigation. To suggest, as the professors propose, that disclosure issues can be neatly cleaved from other aspects of Delaware law is to ignore their inextricable connection. Rather than remedy the problem of disclosure-only settlements, the grand proposal merely shifts it to the federal courts and in so doing leaves a void in Delaware substantive law.

Similarly, the professors' narrow proposal—that Delaware courts stop awarding fees for disclosure-only settlements—identifies a troublesome aspect of stockholder litigation but provides an overly broad solution. The professors' data suggest that disclosure-only settlements historically have not provided consequential information, but that does not mean that a disclosure-only settlement could not provide meaningful consideration.

By focusing on disclosure-only settlements, the professors are addressing a symptom. Curbing the explosion of challenges to M&A transactions requires something akin to preventative medicine. A better solution would be to re-examine the standard for granting a motion to expedite. The professors' empirical findings suggest that the disclosures historically obtained by plaintiffs' counsel fail to change votes and therefore do not warrant expedited treatment. Requiring a stronger showing at the front end,

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119. *Steiner*, 1991 WL 40872, at *3.

before granting expedition, does more to address the source of the disclosure-only settlement problem.