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Response

Leave Merger Disclosure Litigation Where It Belongs

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We are now fifteen years into the merger litigation boom, and while deal flow waxes and wanes, deal litigation appears to have settled in as a permanent fixture on the mergers and acquisitions (M&A) scene.[1] Jill Fisch, Sean Griffith, and Steven Davidoff Solomon have been leading chroniclers of the rise and continuing rise of this species of contemporary commercial litigation,[2] and their article in the *Texas Law Review* marks an important and timely exercise in stock-taking. Arguing that the M&A litigation explosion has been largely fueled by state-law disclosure-based claims and state-law

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1. As the authors note, only about 40% of mergers attracted litigation in 2005, but this had increased to 92% by 2011. 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, 558–59 & n.4 (2015). In 2013, 97.5% of deals over $100 million were challenged in litigation. *Id.* at 559.

2. *See, e.g.*, Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2015) (analyzing trends in merger litigation from 2005 to 2011); Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 COLUM. L. REV. 650 (2002) [hereinafter Fisch, *Class Counsel*] (proposing an improved method for selecting lead counsel in class actions); Jill E. Fisch, *Leave It to Delaware: Why Congress Should Stay Out of Corporate Governance*, 37 DEL. J. CORP. L. 731, 773–75 (2013) (discussing merger litigation trends); Jill E. Fisch, *Teaching Corporate Governance Through Shareholder Litigation*, 34 GA. L. REV. 745, 749–52 (2000) (discussing potential abuse of shareholder litigation); Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013) (arguing that Delaware courts should focus on expediting strong lawsuits and leave weaker suits to be settled by other state courts).

disclosure-based settlements,[3] the Article asks: just what are we getting for this substantial social investment in merger litigation? Does the current doctrinal regime, in which public disclosures about pending mergers are regulated by both state law and federal law, make any sense?

In response to these fundamental questions, Fisch, Griffith, and Davidoff Solomon say "not so much" and "probably not," respectively.[4] Their analysis is impressive and data-driven. They establish that most deal litigation is resolved by settlement and that in the typical settlement, the only consideration settling stockholders receive is additional disclosure.[5] The stockholders' lawyers then petition for a fee, typically to be ordered by the Delaware Court of Chancery and typically to be paid by the settling defendants, on the ground that the additional disclosure resulting from their suit constituted a "corporate benefit" compensable under Delaware law.[6] In this typical settlement, the authors show, the only cash that changes hands is the payment of the ensuing court-ordered fee award.

So far, so uncontroversial. But Fisch, Griffith, and Davidoff Solomon then undertake a regression analysis of a hand-compiled data set to determine whether the disclosures achieved in such settlements change the way anyone votes. The answer turns out to be no.[7] Litigation-driven supplemental disclosures have no practical effect at all on merger votes, the Article shows, at least not considered on a system-wide basis.[8] And so Fisch, Griffith, and Davidoff Solomon go on to ask the uncomfortable next question: if disclosure-only settlements do not influence how stockholders vote, how can they be considered to work a "benefit" that will justify the payment of fees that frequently run well into six figures?[9] They can't, say our authors. They conclude that these fees, paid in a great fraction of merger cases, are an ill-advised reward for a benefit that does not exist.[10] For want of a benefit, they say, Delaware courts should not award attorneys' fees for supplemental disclosures under the "corporate benefit" doctrine.[11]

Our authors then press an even more uncomfortable question. Noting that the federal securities laws already regulate the content of disclosures that must be made to stockholders in mergers, they ask whether it makes sense for Delaware to impose its own substantive disclosure requirements in an

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3. *See* Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 559.

4. *Id.* at 561–62.

5. *Id.* at 561.

6. *Id.* at 572–73 (citing Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1165 (Del. 1989)).

7. *Id.* at 582–87 & tbl.III.

8. *Id.* app. at 616–18 (showing that disclosure-only settlements appear to increase the "yes" votes cast as a proportion of outstanding shares in cash-only deals in Delaware).

9. *E.g.*, *id.* at 589 ("[I]f the disclosure does not affect the shareholder vote, it is difficult to see how shareholders benefit from it.").

10. *Id.* at 591, 600–01.

11. *See id.* at 600–01.

area subject to concurrent federal rules.[12] The authors argue that federal courts, which have exclusive jurisdiction over disclosure-based claims under the Securities Exchange Act, are better placed than the Delaware Court of Chancery to police the sufficiency of disclosures in merger litigation.[13] The proof of it, the Article suggests, is that Delaware's experiment in policing disclosures has created a lot of litigation and millions in attorneys' fees, and for all that investment has yielded no measurable benefit.[14] And so the authors tell Delaware to stay in its lane. Chancery should police the substantive corporate law of mergers but leave the disclosures to federal law and the federal courts.[15]

Precisely how to achieve that policy prescription is a source of some confusion. Fisch, Griffith, and Davidoff Solomon sometimes speak of "cut[ting] back on the breadth of the substantive duty of disclosure" altogether,[16] but then sometimes, and more narrowly, frame their proposal to be that "Delaware stop recognizing disclosure-only settlements as a substantial benefit for the purposes of a fee award."[17] This indeterminacy strikes me as no accident. To suggest (as the authors sometimes do) that Delaware should walk back its common law of disclosure entirely is at odds with deeply imbedded and core principles of Delaware law, as I will discuss further below. On the other hand, to suggest (as the authors more frequently do) that Delaware should recognize a duty of disclosure but refuse to allow its enforcement in the Court of Chancery, or to recognize its enforcement as a corporate benefit, is doctrinally incoherent and leads to very peculiar results.[18] Putting this considerable difficulty of implementation to the side,

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12. *Id.* at 562.

13. *Id.* at 602–04; *see also, e.g.*, Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 477–78 (1977) ("[T]he [U.S. Supreme] Court repeatedly has described the fundamental purpose of the [Securities Exchange] Act as implementing a philosophy of full disclosure; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." (internal quotation marks omitted)).

14. *See* Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 591–92.

15. *Id.* at 592 ("Delaware [should] cooperate by limiting the role of state law in regulating merger disclosure. . . . [T]he federal securities laws are better suited to regulating merger disclosure.").

16. *Id.* at 613; *see also id.* at 600 (suggesting that Delaware should "eliminat[e] the state law claim for disclosure"). *But see id.* at 601 ("Nor do we seek to address the scope of the duty of disclosure under state law.").

17. *Id.* at 601; *see also id.* at 612–13 (suggesting that the General Assembly or courts could limit the corporate benefit doctrine).

18. By preserving the state law duty of disclosure intact, it seems as if the authors would maintain a cause of action for breach of that duty, but deny any remedy. The Delaware Supreme Court has made clear that where there is a cause of action under Delaware law, the courts will use their legal and equitable powers to provide a remedy. *E.g.*, Malone v. Brincat, 722 A.2d 5, 11–14 (Del. 1998) (discussing remedies for breaches of the duty of disclosure). Where Delaware does not wish to grant stockholders remedies for alleged wrongs, it removes the cause of action altogether. *E.g.*, *id.* at 12–13 (declining to adopt a cause of action for fraud on the market); *see also infra* note 39 (discussing the possibility that foreign courts might enforce Delaware's duty of disclosure, but

however, the Article's basic contention is that—through whatever means—Delaware should leave merger disclosure to the federal courts.[19]

I disagree. Even assuming away the practical obstacles to implementation, the bifurcation of judicial merger review that Fisch, Griffith, and Davidoff Solomon propose is not a good idea.[20] The proposal would institutionalize rather than ameliorate the problem of multi-jurisdictional merger litigation. The proposal fails to appreciate that informed stockholder voting is integral to the substantive scheme of Delaware (and other state) corporate law. And the proposal would compromise the substantial advantages the Court of Chancery offers the litigants and corporations who act against the backdrop of Delaware law.

I

Let's assume that Fisch, Griffith, and Davidoff Solomon have their way. Starting tomorrow, challenges to what they call the "substantive and procedural fairness" of proposed mergers will be litigated in Delaware, but challenges to the sufficiency of the disclosure of proposed mergers will be litigated in federal court.[21] Their rule expressly approves dual-jurisdiction merger litigation and the result will be more forum jockeying, not less.

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that Delaware would not). In addition, the authors discount the possibility that the disclosures that are obtained in a settlement may, in an individual case, benefit the stockholders. For example, in *Globis Capital Partners*, the Court of Chancery awarded $1.2 million for "very substantial and informative" disclosures of two complete bankers' books. Transcript of Settlement Hearing at 45–46, Globis Capital Partners, LP v. SafeNet, Inc., No. 2772-VCS (Del. Ch. Dec. 20, 2007), *discussed in In re* Del Monte Foods Co. S'holders Litig., No. 6027–VCL, 2011 WL 2535256, at *11 (Del. Ch. June 27, 2011). Individual, highly meritorious cases like this are submerged into the aggregate mass of the authors' regression analysis, which combine Delaware cases from all other states, and so the authors do not consider such examples. Delaware courts generally avoid per se rules, preferring to decide each case on its own merits. But if the courts or the General Assembly did adopt a blanket rule that disclosure-only settlements cannot confer a corporate benefit, plaintiffs in meritorious cases such as *Globis Capital Partners* would likely see no choice but to refuse to settle and to litigate for what might otherwise have been achieved through resolution. This would be at odds with Delaware's policy of encouraging settlements. *See, e.g.*, Rome v. Archer, 197 A.2d 49, 53 (Del. 1964). The authors do not seem concerned that diligent plaintiffs in such a case could end up with nothing if they achieve a disclosure benefit but no subsequent amendment to the deal terms. *See* Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 610–11.

19. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 562.

20. This is far from the first academic attempt to federalize corporate law. The most famous is William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974). More recently, Jill Fisch has suggested that derivative suits be federalized, and Brian Quinn has floated the abolition of the "Delaware carve-out," which permits stockholders to bring class actions based on misleading disclosures in state court. Brian J.M. Quinn, *Shareholder Lawsuits, Status Quo Bias, and Adoption of the Exclusive Forum Provision*, 45 U.C. DAVIS L. REV. 137, 160–62 (2011); *see also* Fisch, *Class Counsel*, supra note 2, at 723–24 (suggesting that shareholder derivative suits are analogous to federal securities fraud litigation and thus may be treated similarly).

21. *E.g.*, Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 602–04.

This is largely because disclosure claims will not go away just because, in the authors' words, they are "relegate[d]" to the federal courts.[22] In most deal suits, disclosure claims are the only basis for a plaintiff to allege potential irreparable harm.[23] Disclosure claims thus offer shareholder plaintiffs a route to seek expedited discovery and a preliminary injunction to block the deal, both of which can in turn create leverage to force a settlement. Moreover, once the vote is held and the deal closes, the universe of potential remedies shrinks dramatically.[24] Damages for disclosure violations are the exception, not the rule.[25] And damages for breaches of the duty of care are generally unavailable by virtue of the exculpation clauses that appear in nearly every public company charter.[26] For these reasons, expedited pre-closing disclosure claims offer substantial tactical benefits to stockholder plaintiffs and their lawyers.

These benefits will not evaporate if the Fisch, Griffith, and Davidoff Solomon rule is implemented. They will simply migrate. The rule our authors propose should be expected to lead to routine disclosure-based merger litigation in the federal district courts. Those courts may or may not be as accommodating to merger-disclosure claims as the Court of Chancery or other state courts, and stockholder plaintiffs will have to overcome the discovery stay imposed by the Private Securities Litigation Reform Act

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22. *Id.* at 602.

23. As Vice Chancellor Laster has put it, "the principal claims that are litigated by stockholder plaintiffs in most of these cases are disclosure claims." Plaintiffs' Motion for a Preliminary Injunction and the Court's Ruling at 21–22, *In re* Compellent Techs., Inc. S'holder Litig., No. 6084-VCL, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011). Or, as lead counsel for plaintiffs candidly conceded in the *Gen-Probe* settlement hearing, after counsel had found that there was no realistic possibility of establishing that the defendants had breached their duty of loyalty: "[A]s is not uncommonly the case, plaintiffs' counsel turned to [] the disclosure issues . . . ." Transcript of Settlement Hearing and Rulings of the Court at 21, *In re* Gen-Probe Inc. S'holders Litig., No. 7495-VCL (Del. Ch. Apr. 10, 2013). The authors themselves acknowledge that "litigants cannot necessarily evaluate deal quality until the case gets into discovery." Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 607.

24. *See, e.g.*, *In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 362 (Del. Ch. 2008) (holding that a damages remedy would not lie for disclosure violations after the closing of a merger "where there is no evidence of a breach of the duty of loyalty or good faith by the directors who authorized the disclosures").

25. *See, e.g.*, *id.* at 361 ("[T]he right to cast an informed vote is peculiar and specific and it cannot be adequately quantified or monetized." (internal quotation marks omitted)).

26. Provisions exculpating directors for breaches of the duty of care are authorized by §102(b)(7) of the Delaware General Corporation Law. Because of this provision, "personal liability of directors solely for due care violations has largely become moot." 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, 1428 (2005). Damages against corporate officers for breach of the duty of care, and those who aid and abet breaches of the duty of care, are still available. Gantler v. Stephens, 965 A.2d 695, 709 n.37 (Del. 2009) (officers); *In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 85–87 (Del. Ch. 2014) (aiders and abettors).

(PSLRA),[27] but these considerations have never been insurmountable and have not dissuaded plaintiffs from such litigation in the past.[28]

Moreover, these federal suits need not be disclosure only and usually won't be. Rather, plaintiffs who choose to challenge merger disclosures in federal court should be expected to assert claims of state-law "substantive and procedural fairness" under the doctrine of supplemental jurisdiction.[29] A federal district court confronted with such a pleading—a federal disclosure claim with exclusive federal jurisdiction and a state-law substantive claim with supplemental jurisdiction—will generally have an obligation to exercise jurisdiction over the entire controversy.[30] Defendants will be left with few arguments from efficiency to obtain a stay to avoid that result, because only the federal forum will be equipped to adjudicate the entire case, Chancery having been ousted of jurisdiction over the disclosure claims by hypothesis.[31]

The Article does not anticipate this difficulty but appears to place near-complete reliance on the availability of forum-selection bylaws to solve all problems of multi-forum litigation.[32] So let's make the further simplifying

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27. *See* 15 U.S.C. § 78u-4(b)(1)–(2)(A), (4) (2012) (raising pleading standards for securities class actions); *id.* § 78u-4(b)(3)(B) (providing that "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss").

28. *See, e.g.*, Nichting v. DPL Inc., No. 3:11–cv–141, 2011 WL 2892945 (S.D. Ohio July 15, 2011) (granting plaintiff stockholders' motion for expedited discovery to correct disclosures prior to a merger vote); Ryan v. Walton, No. 10–145, 2010 WL 3785660 (D.D.C. Mar. 9, 2010) (lifting PSLRA discovery stay and finding undue prejudice to plaintiffs where the shareholder vote could cause irreparable harm).

29. 28 U.S.C. § 1367 (2012).

30. *See id.* § 1367(c) (providing that the district court "may" decline to exercise its supplemental jurisdiction where the state law claim is novel, predominates over the federal claim, or "in exceptional circumstances, there are other compelling reasons for declining jurisdiction").

31. *See, e.g.*, Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817–18 (1976) (holding that the "comprehensive disposition of litigation" is a relevant principle for determining whether a federal court should exercise its jurisdiction (quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183 (1952))); United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966) (noting that supplemental jurisdiction is justified by "considerations of judicial economy, convenience and fairness to litigants").

32. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 605 ("[A] corporation can effectively opt in to the Delaware approach [i.e., not awarding fees for disclosure-only settlements] to merger litigation by adopting a forum-selection bylaw . . . ."); *see also id.* at 612 ("[T]he likely proliferation of forum-selection bylaws will enhance Delaware's ability to [implement the authors' proposal]."). The facial validity of forum-selection bylaws was upheld in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 963 (Del. Ch. 2013), and the Delaware Supreme Court has likewise indicated its approval of such bylaws. *See* United Techs. Corp. v. Treppel, 109 A.3d 553, 562 (Del. 2014). Non-Delaware courts have enforced forum-selection clauses designating Delaware as the forum state. *See, e.g.*, Groen v. Safeway, Inc., No. RG14716641, 2014 WL 3405752, at *2 (Cal. Super. Ct. May 14, 2014); Hemg, Inc. v. Aspen Univ., No. 650457/13, 2013 WL 5958388, at *2–3 (N.Y. Sup. Ct. Nov. 4, 2013). The Delaware Court of Chancery has also enforced a bylaw designating a foreign state as the forum, City of Providence v. First Citizens Bancshares, Inc., 99 A.3d 229, 242 (Del. Ch. 2014), although proposed legislation awaiting consideration by the General Assembly would restrict Delaware corporations from exclusively designating a non-Delaware forum for the resolution of internal affairs disputes. AN ACT TO AMEND TITLE 8 OF THE

assumptions that the Delaware Supreme Court affirms the validity of forum-selection bylaws (which is a reasonable assumption)[33] and that every Delaware corporation adopts one (which isn't).[34] When a plaintiff sues to challenge a merger in federal court alleging disclosure and substantive violations, the defendants may interpose the bylaw, but only with respect to the "substantive" claims—once again, the disclosure claims having been expressly confided to the federal courts by the Article's policy hypothesis.[35] Whether the federal court will enforce the bylaw is always open to question, but the regime advocated by the Article makes it more likely that the federal court will conclude that interests of comity and judicial economy favor keeping the case for itself, to avoid piecemeal adjudication.[36] And even if the federal court enforces the bylaw, it can avoid only the "substantive" part of the dispute, because there will exist no other court that can resolve the disclosure issue.

Not only will some disclosure-based litigation move to the federal courts, but it may move to other state courts as well. Fisch, Griffith, and Davidoff Solomon recognize this risk, and rely primarily on the existence of forum-selection bylaws to cure it.[37] They appear to acknowledge that, even under their proposal, companies without a bylaw would remain vulnerable to non-Delaware state-court suits alleging Delaware state-law disclosure violations.[38] The Article takes the simple view that if companies do not want to face such a result, they need only implement such a bylaw.[39] But there are

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DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW (Del. State Bar Ass'n Corp. Law Council, Mar. 6, 2015) (proposing a new section 115 for the Delaware General Corporation Law).

33. The Delaware Supreme Court has cited approvingly the Court of Chancery's decision upholding forum-selection bylaws. *Treppel*, 109 A.3d at 562; ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 560 n.38 (Del. 2014).

34. The authors themselves envision that not every corporation will adopt a forum-selection bylaw. *See* Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 606.

35. *Id.* at 602–03.

36. *E.g.*, *Colo. River*, 424 U.S. at 818–19; *Gibbs*, 383 U.S. at 726.

37. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 604 (noting that the Delaware courts "face a real risk that . . . they will drive merger litigation outside of Delaware"); *id.* at 606 ("[T]o the extent that courts accept [forum-selection] clauses, they enable our proposed rule to operate as a form of private ordering.").

38. *Id.*

39. While the hypothesis of the Article is that Delaware's courts should no longer adjudicate disclosure disputes, *e.g.*, *id.* at 562, the Article also appears to anticipate Delaware-law disclosure litigation outside of Delaware with respect to companies lacking a forum-selection bylaw. *Id.* at 606. This seems to imply an unusual regime in which Delaware would continue to have a fiduciary duty of disclosure, but that plaintiffs would effectively be barred from enforcing it in the courts of Delaware. Perhaps such an outcome could be fashioned through a rule of prudential standing but even if it could be achieved, it is difficult to imagine why Delaware would maintain a fiduciary duty of disclosure but allow only foreign courts to enforce it. *See, e.g.*, *In re* The Topps Co. S'holders Litig., 924 A.2d 951, 961 (Del. Ch. 2007) (observing that matters of Delaware law should be decided in Delaware courts, "so that the courts whose law is at stake will decide whether [the

a number of reasons that a Delaware company may choose not to implement a forum-selection bylaw and the enforcement of such bylaws in foreign courts is determined on a case-by-case basis.[40]

And while all this suing is going on outside of Delaware, the Article contemplates that merger litigation will continue apace in Chancery. Maybe the result will be, as Fisch, Griffith, and Davidoff Solomon suppose, that the "good" and "real" cases will stay in Chancery.[41] Or maybe not. For reasons I discuss next, even the most responsible litigants will often feel the need to test the adequacy of merger disclosure, which would take them out of Delaware. But one result seems certain: deal suits in multiple forums, with no possible means to corral them in the one court where they belong.

II

Underlying the Article is the premise that disclosure claims are doctrinally unimportant, brought not to be litigated but to be settled on the cheap, and that Delaware disclosure law has thus been forged outside of the adversarial crucible. That is why, our authors argue, Delaware need not incentivize or even adjudicate such claims.[42]

The premise is unsound. Disclosure is not a second-rate duty existing separate from the requirements of substantive and procedural fairness. Under Delaware law, whether a substantive claim exists often turns on whether

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defendants] complied with their duties"). It is possible that this curious result could be avoided through the authors' suggestion that the Delaware legislature or courts adopt a substantive rule of law providing that attorney's fees shall not be awarded in disclosure-only settlements. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 607, 612–13. If, as the authors assert, such a rule would be respected by foreign courts, the authors might evade the problem of nonuniversal adoption of bylaws. But it is unclear that the courts or legislature would want to bind themselves to such a per se rule, and it would be incongruous for Delaware to maintain a duty of disclosure but provide no remedy for it. *See supra* note 18 and accompanying text.

40. For example, a company may face resistance from influential proxy advisory firms. Glass Lewis "believes that charter or bylaw provisions limiting a shareholder's choice of legal venue are not in the best interests of shareholders." GLASS LEWIS & CO., 2015 PROXY SEASON GUIDELINES (2013), *available at* http://www.glasslewis.com/assets/uploads/2013/12/2015_GUIDELINES_United_States.pdf, *archived at* http://perma.cc/2USZ-98VR. Institutional Shareholder Services states it considers exclusive forum bylaws on a "case-by-case" basis, taking into account whether the company has already suffered harm from multiforum litigation. INST. SHAREHOLDER SERVS., United States Proxy Voting Guideline Updates (2014), *available at* http://www.issgovernance.com/file/policy/2015USPolicyUpdates.pdf, *archived at* http://perma.cc/T484-X99T. For the case-by-case enforcement of such bylaws, see *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 949 (Del. Ch. 2013), which held that the board's use of a forum-selection bylaw may be challenged at the time of enforcement on the ground that it is inconsistent with the board's fiduciary duties.

41. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 607, 615.

42. *Id.* at 562.

stockholders have approved corporate action on the basis of complete disclosures.[43] Disclosure *is* substance.

Indeed, the need for merger disclosure is grounded in Delaware statute. Section 251 of the Delaware General Corporation Law requires a stockholder vote as a condition to completing a merger.[44] Delaware's courts have predictably held that a vote procured on the basis of inaccurate or insufficient disclosure cannot satisfy the statutory mandate.[45] The only alternative would be to pretend that the statute is satisfied by a vote taken in ignorance. Because such a rule would reduce the vote requirement of § 251 to a mere formality, it lacks any equitable or interpretive appeal and has not even been advocated, let alone adopted.[46] The Article does not recognize the state-law significance of the stockholder franchise, and so it does nothing to explain why Delaware law and Delaware courts should be unconcerned with policing the adequacy of the information upon which the franchise is exercised. I doubt any persuasive explanation exists.

To the contrary, Delaware doctrine makes clear that disclosure claims are irretrievably bound up in the substantive matters that Fisch, Davidoff Solomon, and Griffith propose to assign to Chancery. In recognition of the substantive significance of the franchise, Delaware law holds that a third-party merger approved on the basis of a fully-informed stockholder vote is substantially immune from attack on grounds of fiduciary breach.[47] And in

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43. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 893 (Del. 1985) (holding that the defendant directors had violated their duty of disclosure and therefore the stockholder vote approving the merger did not defeat the plaintiffs' claim against the directors for breach of the duty of care); Lawrence A. Hamermesh, *Calling Off the* Lynch *Mob: The Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1091–96 (1996) (presenting a hypothetical where directors could be liable for damages in connection with a merger, despite acting with the utmost good faith, solely as a result of a failure to disclose financial projections for one minor division of the company).

44. DEL. CODE ANN. tit. 8, § 251(c) (2011).

45. *E.g.*, *Van Gorkom*, 488 A.2d at 893.

46. The Delaware courts have been relentless in holding that a vote must be fully informed for it to have legal effect. In 2009, for example, the Delaware Supreme Court reversed the Court of Chancery's determination that the stockholder vote on a reclassification proposal under § 242 of the Delaware General Corporation Law was not flawed by misleading disclosures. Gantler v. Stephens, 965 A.2d 695, 714 (Del. 2009), *rev'g* Gantler v. Stephens, No. 2392-VCP, 2008 WL 401124 (Del. Ch. Feb. 14, 2008).

47. *See, e.g.*, *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 1001 (Del. Ch. 2014) (applying the rule that "the legal effect of a fully-informed stockholder vote of a transaction with a non-controlling stockholder is that the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste"); *In re* Wheelabrator Techs., Inc. S'holders Litig., 663 A.2d 1194 (Del. Ch. 1995) (holding that the disinterested stockholder approval of a transaction extinguishes a claim for breach of the duty of care and leads a claim for breach of the duty of loyalty to be reviewed under the business judgment rule). This is part of the reason why, in Delaware, disclosure is so important. As Chief Justice, then-Vice Chancellor, Strine put it in the *Lear* case:

the recent *MFW* case, the Court of Chancery ruled—and the Supreme Court agreed—that a fully-informed minority stockholder vote, together with the approval of a disinterested special committee, would be sufficient to shift the standard of review from entire fairness to the business judgment rule.[48] These doctrines reflect the fundamental idea that effective and informed stockholder decision-making (just like effective and informed director decision-making) is integral to Delaware substantive law.[49] And, just as it supplies the standard for effective director action, Delaware law rather than federal law properly supplies the standard for effective shareholder decision-making. As Chancellor Allen, Justice Jacobs, and Chief Justice Strine have written, disclosure in this context is a matter of substantive law: "If . . . the vote is uncoerced and is fully informed, there is no reason why the shareholder vote should not be given that effect, particularly given the supreme court's rightful emphasis on the importance of the shareholder franchise and its exercise."[50]

Assigning disclosure claims to federal court would not only interfere with Delaware's ability to shape its substantive law, but it would also create perplexing procedural puzzles. Imagine a controlling stockholder freeze-out merger structured to satisfy the *MFW* blueprint, with an effective pre-commitment to special committee approval and minority stockholder approval.[51] When issue is joined in the inevitable lawsuit, how is Chancery to resolve whether the stockholder vote was fully informed? Must it wait until the federal court has ruled on the disclosure issue? If there is no parallel suit in federal court, should the state court dismiss the suit because the plaintiffs have not disturbed the presumption that the vote is fully informed? When the disclosure issue crops up, does Chancery somehow "certify" it to a district court?[52] Absent a federal ruling, can the state court conduct its own

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> Delaware corporation law gives great weight to informed decisions made by an uncoerced electorate. When disinterested stockholders make a mature decision about their economic self-interest, judicial second-guessing is almost completely circumscribed by the doctrine of ratification. *For that reason*, our law has also found the irreparable injury prong of the preliminary injunction standard satisfied when it is shown that the stockholders are being asked to vote without knowledge of material facts, because it deprives stockholders of the chance to make a fully-informed decision whether to vote for a merger, dissent, or make the oft-related decision (relevant here) whether to seek appraisal.

In re Lear Corp. S'holder Litig., 926 A.2d 94, 114–15 (Del. Ch. 2007) (emphasis added) (footnotes omitted).

48. *In re* MFW S'holders Litig., 67 A.3d 496 (Del. Ch. 2013), *aff'd*, Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

49. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 618–19 (Del. Ch. 2005) (discussing the complementary roles of the board and stockholders in corporate governance).

50. 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, 1308 (2001).

51. *See M&F Worldwide*, 88 A.3d at 645.

52. *Cf.* DEL. CONST. art. IV, § 11(8) (providing that the Delaware Supreme Court may hear certified questions from other courts).

disclosure analysis? If it determines that a disclosure violation has occurred, can it order corrective disclosures?

And—more fundamentally from a policy standpoint—why isn't the Court of Chancery simply the right place to resolve such disclosure claims, in an *MFW* case or any other? Fisch, Griffith, and Davidoff Solomon seek to undermine Delaware's disclosure jurisprudence with the claim that it is largely crafted "in connection with the review and approval of settlements, a judicial act that is typically . . . nonadversarial."[53] Accordingly, the authors assert, "the courts in Delaware are rarely faced with arguments on both sides of questions" going to the materiality of potential disclosures.[54]

This claim misses the mark. Delaware's recent disclosure law has not been created in "unopposed settlements" but in a series of motions for preliminary injunction and motions to dismiss sharply contested by able counsel. As detailed in the margin, it is a body of jurisprudence built up in the old-fashioned common law tradition: brick by doctrinal brick, in cases generating general rules of conduct derived from the resolution of specific disputes.[55] Delaware disclosure law as it has developed may or may not be optimal, but it cannot be said that it has emerged in any significant part from nonadversarial settlement proceedings.[56] The authors do not cite a single rule

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53. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 599.

54. *Id.*

55. *See, e.g.*, *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 448–50 (Del. Ch. 2002) (holding that analyses by an investment banker should be disclosed in connection with a proxy). In the first half of 2007 alone, four motions for a preliminary injunction in the Court of Chancery significantly advanced Delaware's common law of disclosure. *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 112–15 (Del. Ch. 2007) (holding that a proxy statement was materially misleading because it failed to disclose that the CEO had a strong financial interest in liquidating his stock holdings); *In re* Topps Co. S'holders Litig., 926 A.2d 58, 73–77 (Del. Ch. 2007) (holding that a proxy statement was materially misleading because it failed to disclose assurances given by the bidder to management and did not mention an unfavorable fairness presentation from a bank); *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 201–05 (Del. Ch. 2007) (holding that disclosures to stockholders were incomplete because the board failed to disclose the final cash-flow projections used by the financial advisor); La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1190–91 (Del. Ch. 2007) (holding that the board breached its duty of disclosure by not disclosing the financial advisors' incentive to issue favorable fairness opinions). The Delaware Supreme Court has also been active in shaping the duty of disclosure. *See, e.g.*, Gantler v. Stephens, 965 A.2d 695, 711 (Del. 2009) (holding that a board's statement that it had "carefully deliberated" about a merger proposal was materially misleading); McMullin v. Beran, 765 A.2d 910, 925–26 (Del. 2000) (holding that the plaintiffs had stated a claim for a breach of the board's duty of disclosure after the board failed to disclose information about, *inter alia*, the banker's valuation methodologies); Malone v. Brincat, 722 A.2d 5, 11–14 (Del. 1998) (holding that Delaware directors could be liable for breaching their fiduciary duty by issuing misleading disclosures both when seeking and not seeking stockholder action); Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1279–82 (Del. 1994) (holding that directors breached their fiduciary duty by failing to disclose a prior bid for the company).

56. The authors claim that "most of the court's rulings on materiality come in the form of transcript opinions." Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 599. It may be that the Court of Chancery produces more bench opinions than written opinions, as befits judicial economy.

of Delaware disclosure law announced "in connection with approving negotiated settlements."[57] I doubt there is one.

Equally wide of the mark is the Article's suggestion that merger-disclosure claims are better litigated post-vote and post-closing.[58] The opposite is true. The role of disclosure is to allow informed stockholder decision-making, in accordance with Delaware law. The proper remedy for insufficient disclosure is sufficient disclosure; only that remedy can restore to the stockholders their statutory entitlement to an informed vote and thus ensure for the stockholders the authority assigned to them by the corporate constitutional scheme. Fisch, Griffith, and Davidoff Solomon insist that federal courts can fashion "meaningful" post-closing damages.[59] Maybe,[60] but I can conceive no basis to conclude that money after-the-fact is a superior remedy to an informed vote before-the-fact. Sufficient disclosure (not money) is what the law requires and what gives effect to stockholders' statutory right to cast an informed vote; damages are at best an inadequate substitute. That, at any rate, is the logic behind a long line of case law

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But it is certainly true that the most influential opinions and most cited opinions in the Court of Chancery are written opinions—such as the important disclosure opinions cited in the previous footnote. Nor should it be readily accepted that transcript decisions do not provide important and well-reasoned guidance for M&A practitioners. For example, in a recent *M&F Worldwide* challenge decided in a transcript ruling, *Swomley v. Schlecht*, Vice Chancellor Laster set out the facts of the case and the legal analysis clearly and concisely to show that the *MFW* standard could apply in the context of a motion to dismiss. Transcript of Oral Argument on Defendants' Motion to Dismiss and the Court's Ruling at 64–78, Swomley v. Schlecht, No. 9355-VCL, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014).

57. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 600. For example, in the settlement in the *Amylin Pharmaceuticals* case, which was approved in a bench opinion, the court simply offered some fact-specific remarks about the usefulness of the additional disclosures, which were extremely meager and consistent with the previously disclosed information. Transcript of Hearing on Peter Doucet's Motion to Intervene and for an Award of Attorneys' Fees and Expenses, Settlement Hearing, and Rulings of the Court at 30, 37–38, *In re* Amylin Pharms., Inc. S'holders Litig., No. 7673-CS (Del. Ch. Feb. 5, 2013). Similarly, in the *Gen-Probe* case, the Vice Chancellor approved the settlement, which was based on the disclosure of cash-flow projections and DCF analysis, in a bench ruling that produced no new law. Transcript of Settlement Hearing and Rulings of the Court at 36–48, *In re* Gen-Probe, Inc. S'holders Litig., No. 7495-VCL (Del. Ch. Apr. 10, 2013). In *In re Sauer-Danfoss, Inc. Shareholders Litigation*, 65 A.3d 1116 (Del. Ch. 2011), the court analyzed a disclosure-only settlement in a written opinion, but did not create any new rules of law; instead, the court took the opportunity to benchmark settlements to produce a range of attorneys' fees that might be used in future settlement fee awards. *Id.* apps. A–C.

58. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 599.

59. *Id.* at 596–97.

60. But maybe not. If the Delaware judges, who are experts in M&A transactions, hesitate to impose post-merger damages remedies for breach of the duty of disclosure because such remedies involve "speculat[ion]," there does not seem to be any reason to think that federal judges will be more successful in this difficult task. *In re* Staples, Inc. S'holders Litig., 792 A.2d 934, 960 (Del. Ch. 2001). The sole support that the authors provide for their claim that federal judges will be able to shape damages awards is one case from over forty years ago and a *settlement* in the Bank of America–Merrill Lynch merger. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 597 & n.186.

holding that a shareholder vote held without adequate disclosure amounts to irreparable harm.[61]

Finally, a rapid dissent from the Article's contention that the federal courts offer a comparative advantage in "evaluating disclosure quality" in the merger context.[62] As described in the next Part, evidence and logic are to the contrary. The federal bench is strong and sophisticated. But the Chancery bench is selected for its expertise in merger law and each of its five judges sees far more merger claims, disclosure and substantive, than any judge anywhere else. Chancery enjoys an unassailable lead in its merger caseload. This translates to an unrivalled ability to make and remake transactional law—including the law of transactional disclosure—in response to an evolving merger marketplace.[63]

III

Beyond these objections lies a broader policy concern. As demonstrated in a thread of recent scholarship, the modern Court of Chancery is an expert tribunal, national in scope, that oversees the U.S. market for corporate control and governance.[64] The Chancery system confers significant benefits—"docket dividends," in the words of one of its judges—on every participant in these markets.[65] The benefits are in the nature of positive network effects, and they become stronger, not weaker, as the court sees more cases. The Article's proposal would reduce these positive network effects and produce no countervailing benefit.

The argument here is uncomplicated. The Delaware Court of Chancery is a nimble court of equity, staffed by judges expert in corporate law, that presides over a concentrated docket of M&A and corporate-governance litigation.[66] As a result of these attributes, Chancery is "uniquely able to regulate vast quantities of deal activity, protect the interests of absent stakeholders, test previously-announced rules of law, and announce forward-

61. *See In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 360–61 & n.48 (Del. Ch. 2008) (citing numerous cases for the concept of irreparable harm).

62. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 604.

63. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 594–97.

64. *See, e.g.*, Donald F. Parsons, Jr. & Jason S. Tyler, *Docket Dividends: Growth in Shareholder Litigation Leads to Refinements in Chancery Procedures*, 70 WASH. & LEE L. REV. 473 (2013) (arguing that the Court of Chancery is able to timely address emerging questions of corporate law); Savitt, *supra* note 63 (describing how the Court of Chancery is beneficial to the regulation of mergers and acquisitions); David Friedman, Note, *The Regulator in Robes: Examining the SEC and the Delaware Court of Chancery's Parallel Disclosure Regimes*, 113 COLUM. L. REV. 1543, 1548 (2013) (suggesting that the SEC "confirm and codify Delaware's rules" in the disclosure context).

65. Parsons & Tyler, *supra* note 64.

66. Savitt, *supra* note 63, at 572–78, 584–86.

looking rules consistent with market efficiency and traditional rules of equity."[67] The success of the Chancery system depends on its exposure to, and adjudication of, a large and representative docket of governance and deal cases. A court that handled such cases only episodically would be more likely to fall victim to the "availability heuristic," the cognitive bias that causes decision makers to be overly influenced by proximate examples.[68] The Chancery system cures for this bias by pairing expert adjudication with a representative docket that allows the five Chancery judges to see the whole doctrinal field, adjudicating cases on all aspects of corporate governance to reasoned judgment within the short time periods that modern transactional practice requires.[69]

What this means is in Chancery, far more than in other courts, the benefits of litigation redound not just to the litigants in the case before the court but to the litigants in the next case as well. And these benefits accrue not just to litigants, but to all market participants: directors, stockholders, advisors, lawyers, dealmakers, and stakeholders of every kind. Moreover, the social benefits are amplified with each incremental case, because each case increases Chancery's "docket dividends"—the Court's ability to frame effective and efficient forward-looking rules of law while justly disposing of the dispute presented.[70]

Fisch, Griffith, and Davidoff Solomon propose to hive off a substantial fraction of Chancery's docket and distribute it randomly over almost 1,000 district judges sitting in 94 judicial districts all over the country.[71] Each of these judges is no doubt entirely capable of properly resolving any M&A or corporate-governance case. But none will have the corporate-governance judging experience that comes with Chancery's concentrated bench and docket.[72] The Article would compromise that experiential expertise and in the bargain impair the effectiveness of the Chancery system and decrease clarity for directors, stockholders, and transaction planners.

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67. *Id.* at 571.

68. *Id.* at 594–95.

69. *Id.*; *see also* Parsons & Tyler, *supra* note 64, at 483–84 ("[T]he volume of cases that [the Delaware Court of Chancery] hears contributes importantly to . . . valuable predictability, even in a dynamic economic and capital marketplace.").

70. Thus, even though the Article is correct that disclosure-only settlements do not typically affect the votes of individual deals, they can nevertheless be said to contribute to the effectiveness of the Chancery system by facilitating the Chancery judges' ability to review the entire field of mergers and merger litigation. *See* Savitt, *supra* note 63, at 581–82, 595–96.

71. *See* Fisch, Griffith & Davidoff, *supra* note 1, at 604; UNITED STATES COURTS, JUDICIAL FACTS AND FIGURES 2013, at tbl.1.1 (2013), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2013/Table101.pdf, *archived at* http://perma.cc/2R45-GSDF (listing the number of judicial officers in 2013).

72. *See, e.g.*, Leo E. Strine, Jr., Lawrence A. Hamermesh & Matthew C. Jennejohn, *Putting Stockholders First, Not the First-Filed Complaint*, 69 BUS. LAW. 1, 61–62 (2013) (discussing the disadvantages of a judge in one jurisdiction having to apply another jurisdiction's law).

All of which is not to say that everything is perfect. For example, Fisch, Griffith, and Davidoff Solomon persuasively demonstrate that the volume of litigation in Chancery has reached excessive levels. In the vast majority of cases, the directors of Delaware corporations fulfill their fiduciary duties admirably, leaving no grounds for a lawsuit, but they nearly always get one anyway. This problem, like other system-wide problems in Chancery, shows signs of self-correcting, as the court and the practitioners before it are increasingly developing the tools needed to restrict merger litigation. Delaware judges are reducing the fees that they award in disclosure-only settlements, as the authors acknowledge.[73] Companies are adopting forum-selection bylaws that require stockholders to file suit in Delaware.[74] Fee-shifting bylaws, which would require losing plaintiffs to pay fees for an unsuccessful lawsuit, are a topic of hot debate.[75] These developments indicate that judges, lawyers, and legislators are cognizant of, and capable of curing, any abuses in the system through incremental measures that enhance rather than compromise the considerable virtues of the present system.

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73. Fisch, Griffith & Davidoff Solomon, *supra* note 1, at 567–68; *see, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 47, *In re* Gen-Probe Inc. S'holders Litig., No. 7495-VCL (Del. Ch. Apr. 10, 2013) (awarding a fee of $100,000 "because . . . the case was very weak"); Transcript of Hearing on Plaintiffs' Application for Award of Attorneys' Fees and Expenses and Rulings of the Court at 52–60, *In re* Complete Genomics, Inc. S'holder Litig., No. 7888-VCL (Del. Ch. Oct. 2, 2013) (departing downward from the fee award suggested by *In re Sauer-Danfoss Inc. Shareholders Litigation*, 65 A.3d 1116 (Del. Ch. 2011), and awarding $315,000 where plaintiffs' counsel had achieved an injunction).

74. *See, e.g.*, Claudia H. Allen, *Trends in Exclusive Forum Bylaws*, CONFERENCE BD. (Jan. 2014), http://www.conference-board.org/retrievefile.cfm?filename=TCB_DN-V6N2-141.pdf&type=subsite, *archived at* http://perma.cc/2D74-SF87.

75. *See, e.g.*, Theodore N. Mirvis et al., *With a Note of Caution, Delaware Rules Fee-Shifting Bylaws Facially Permissible*, WACHTELL, LIPTON, ROSEN & KATZ (May 21, 2014), http://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.23341.14.pdf, *archived at* http://perma.cc/Y3RC-2K3Y (discussing the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014)). Proposed legislation that is awaiting consideration by the General Assembly would categorically prohibit fee-shifting bylaws in stock corporations. AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW (Del. State Bar Ass'n Corp. Law Council, Mar. 6, 2015) (proposing an amendment to DEL. CODE ANN. tit. 8, § 102 (2011)). If adopted, this mandatory rule would have the effect of restricting the Court of Chancery's "prerogative to manage . . . the destiny of Delaware-law fiduciary duty litigation." Savitt, *supra* note 63, at 601. Just as the Fisch, Griffith, and Davidoff Solomon proposal reflects an overreaction to disclosure-only settlements, the proposed legislation appears to overreact to the open legal question of the potential use of fee-shifting bylaws in stock corporations, to the detriment of the Delaware General Corporation Law's broad enabling character and Chancery's unique ability to craft flexible legal rules that ensure proper corporate governance. *See* Theodore N. Mirvis & William Savitt, *Shifting the Focus: Let the Courts Decide*, 53 BANK & CORP. GOVERNANCE L. REP. 8, 11 (2015) (arguing that "legislation is a bad idea whatever one thinks of the merits or demerits of any kind of fee-shifting").

In a 1999 decision, the Supreme Court of the United States held that the federal district courts lacked the equitable power to preserve a debtor's assets pending judgment, leaving aggrieved commercial plaintiffs with no effective remedy.[76] Lamenting this result, the dissent suggested that what modern commercial justice requires is "a pie-powder court"—a reference to the specialized, now-disappeared English market courts of the Middle Ages—capable of resolving business disputes "on the instant and on the spot."[77] Delaware's Court of Chancery is the elegant modern realization of that court. Alone among contemporary courts, Chancery is capable of resolving complex corporate control and governance disputes, "on the instant and on the spot," with equity's remedial flexibility and the expertise that comes only with constant adjudication. The Article's proposals are calculated to dilute Chancery's jurisprudential advantage. From this practitioner's perspective, that would be an appreciable loss with no corresponding benefit.

76. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308 (1999).

77. *Id.* at 334 (Ginsburg, J., concurring in part and dissenting in part) (quoting Parks v. City of Boston, 32 Mass. (15 Pick.) 198, 208 (1834)).