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See Also
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Response

Comments on *Confronting the Peppercorn Settlement*

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Introduction

Let me disclose right up front that Professor Griffith is my wife's current boss and Professor Fisch is my wife's former boss.[1] Normally, this would have inclined me toward "dissing" their article in order to prove my "objectivity." But candor compels me to confess that it is a very fine article indeed.

These days, judges rarely pay attention to law review articles—finding them either hopelessly "theoretical" (in a way that allows the authors, typically professors, to thinly conceal their ideological biases by resorting to abstract jargon) or microscopically narrow (in a way that allows the authors, typically students, to exhibit their fetish with interminable footnotes).[2] So it is a delight to read an article that examines in a clear, concrete, and original way a meaningful legal controversy that judges have to deal with and proposes better ways of dealing with it. In the process, moreover, the article places the legal problem in a broader context, clarifying the appropriate roles of state and federal courts in corporate oversight.

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1. My wife, Ann Rakoff, is the executive director of the Corporate Law Center at Fordham Law School, of which Professor Griffith is the current director and Professor Fisch the former director.

2. *See, e.g.*, Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1133 (1995) (arguing that the "Golden Age" for legal scholarship ended when student-edited law journals became dominated by theoretical and nondoctrinal works).

But the excellent editors of the *Texas Law Review* asked me to provide a commentary of at least 1,500 words, so I guess I have to offer a few quibbles with the article or I would not be doing what I promised to do. Here goes:

I. Quibble # 1

I am not sure the article's statistical analysis can support the weight the authors ascribe to it. The empirical premise of the article is that disclosure-only settlements of lawsuits challenging corporate mergers do not materially affect shareholder voting.[3] This premise, according to the article, is evidenced by a statistical analysis of the voting patterns in 453 large-public-company mergers in the years 2005–2012 that involved various kinds of lawsuit settlements.[4] "Although in theory it would be best to test the effect of [such settlements] by comparing shareholder votes before and after the settlement, such a comparison is not possible because shareholder votes are tallied only once, when the polls are closed at the meeting to approve the merger agreement."[5] So, resort must be had to regression analysis, which notoriously involves making all sorts of assumptions (some, but not all of which are discussed in the main text and the appendix).[6] Regression analysis can, of course, be a powerful tool; but in situations like this where there are a great many variables, many of which have not been the subject of previous study and some of which may yet be unknown, regression analysis may become little more than educated guesswork dressed up in fancy clothes. And here it leads to some results that even the authors cannot explain.

For example, the authors hypothesize that, if settlements are really affecting shareholder voting behavior, disclosure-only settlements, where negative news is added to the mix, should lead to fewer *yes* votes in favor of the merger, whereas "amendment" settlements, where the merger agreement is made more palatable, should lead to more *yes* votes in favor of the merger.[7] Since the data for the disclosure-only settlements, after being regression-analyzed, show no such effect, the authors conclude that they have proved that disclosure-only settlements do not affect shareholder voting.[8] However, the data for amendment-only settlements, when subjected to the same regression analysis, show some weird results. Thus, as the authors candidly concede "We do not have an explanation why an amendment settlement may pick up more shareholder votes as opposed to

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3. 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. 554, 561 (2015).

4. *Id.*

5. *Id.*

6. *See, e.g.*, *id.* app. (discussing the variables used in the regression analysis).

7. *Id.* at 561.

8. *Id.* at 561, 585.

more yes votes."[9] One explanation, however, may be that the regression analysis is flawed or rests on incorrect assumptions, which, if true, could mean that these flaws also infect the disclosure-only data.

Also, by using the least square method of regression analysis, the authors can at best show only correlation or, in this case, lack of correlation, rather than causation, or, in this case, lack of causation.[10] Given how little we know about the psychology of shareholder voting behavior, if the regression analysis had shown a statistically significant correlation between disclosure-only settlements and an increase in no votes, this would at best have been only mildly suggestive that the new, negative disclosures were causing this effect. Conversely, the fact that no such correlation was found does not necessarily mean that the new disclosures were not having an effect on the shareholders' voting analysis, but only that, even with the aid of regression analysis, such an effect may be difficult to discern in this very complicated situation where many competing variables are either unmeasurable or unknown.

Further still, the authors' regression analysis makes no attempt (which, admittedly, might well have been impossible) to distinguish the effect of disclosure-only settlements on individual versus institutional investors or on sophisticated versus unsophisticated investors. Nor, of course, does the regression analysis itself address the issue of whether lawsuits that demand greater disclosure in connection with mergers serve other salutary purposes even if they do not impact voting. To be fair, the authors deal elsewhere with the claim that such lawsuits serve to deter far more egregious instances of nondisclosure that would occur in their absence; but they deal with this objection (convincingly, in my view), not by resort to regression analysis, but by reasoned argument and discussion of specific situations.[11]

For these reasons, it might have been helpful to have supplemented the statistical data with more anecdotal information about how these cases play out in real life. If, for example, the disclosures that result from the disclosure settlements are made too late to alter the psychology of voters who have already become mentally committed to the merger, or if such disclosures are typically met with effective counter publicity denigrating their materiality, the statistical results here presented may say more about the timing and manner in which such disclosures occur than about the potential effects on voting of the disclosures themselves.

Don't get me wrong: I think that, even with these limitations, the authors' regression analysis is at least suggestive. Further, the authors

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9. *Id.* at 586.

10. *See* Kelly H. Zou et al., *Correlation and Simple Linear Regression*, 227 RADIOLOGY 617, 618–19 (2003) (reviewing the concepts of correlation and linear regression, including the limitations and precautions that should be considered in the use of these methods of analysis).

11. Fisch et al., *supra* note 3, at 607–09.

provide other evidence, some of it statistical and some nonstatistical, to support their ultimate conclusion that disclosure-only settlements are, in effect, a kind of extortionate racket.[12] I am just not sure that their regression analysis is quite so conclusive a proof of the ineffectual nature of disclosure-only settlements as the authors believe it is.

II. Quibble # 2

I wish the authors had spent a little more time discussing the reasons for the striking increase over the past few years in lawsuits challenging mergers. For example, although the authors statistically analyze their pool of 2005–2012 merger lawsuits as if it were a static whole, they elsewhere discuss that the frequency of lawsuits challenging mergers increased from 39% in 2005 to 92% in 2011,[13] an incredible rise. Was the increase the result of, for example, a greater receptivity by courts in Delaware and elsewhere to such lawsuits? Or, for example, did it reflect a growing awareness by plaintiffs' attorneys that such lawsuits were fertile ground for extortionate settlements? It would have been helpful, at least to this judge, to have the authors' informed views on such a pertinent question, even if supported only by anecdotes and inferences, rather than the regression analysis.

III. Quibble # 3

While I generally favor the authors' suggestion that disclosure issues in merger situations be left to federal securities law and issues of fairness be left to state law, the authors perhaps underestimate the arguments that can be made in favor of retaining a parallel state law presence in the area of disclosure. Both Congress and the Supreme Court have made private enforcement in the federal securities area increasingly difficult,[14] and the SEC has yet to fully regain the robust enforcement character that once was its hallmark.[15] The states may still have a role to play, therefore, in making full disclosure a reality.

But having said that, and even taking account of the quibbles offered above, it is hard to escape the conclusion that the state lawsuits challenging mergers on the ground that the shareholders were not fully informed seem in reality to be little more than efforts by clever plaintiffs' lawyers to take

12. *See id.* at 591, 598–600 (highlighting that disclosure-only claims are generally not well developed in the complaint and are not subject to careful scrutiny at the pleading stage, likely leading to a settlement that generates attorneys' fees but little benefit for shareholders).

13. *Id.* at 558 n.4.

14. *See, e.g.*, J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1164–67, 1170–72 (2012) (describing more stringent pleading standards proscribed by the Supreme Court and more restrictive access to the class action device instituted by Congress).

15. Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 294–96 (2009).

advantage of relaxed state standards to feed their own pockets. In this regard, the authors also make mention, quite rightly, of the difficulty that state judges face in determining legal fees in disclosure-only settlements.[16] At both the state and federal level, the adversary system disappears when it comes to determining plaintiffs' counsels' legal fees in a class settlement,[17] for the joint interest of both plaintiffs' counsel and defendants' counsel is in having the court approve all aspects of the settlement, including the legal fees, without the courts mucking it up.[18] But at least in the great majority of federal securities class actions, there is a monetary return to the class that provides the court with some modest guidance as to the value of the legal efforts.[19] In state disclosure-only settlements, however, no such monetary guidance is provided,[20] and even the most conscientious court has little basis aside from hours spent for determining a legal fee different from what the parties recommend.

Conclusion

In their excellent discussion of this issue, as throughout most of their article, Professors Davidoff, Fisch, and Griffith neither get carried away with abstractions nor bogged down in minutiae, but rather provide a clear-eyed, practical evaluation of what disclosure-only merger lawsuit settlements are all about. Although, as a federal judge, I am not directly concerned with such settlements, the insights provided by the authors have implications for many other kinds of cases and settlements that I do have to deal with, and I know that I and other judges, state and federal, will find our paths enlightened by the illumination this fine article provides.

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16. Fisch et al., *supra* note 3, at 572–75.

17. *Id.* at 567 & n.48.

18. *Id.* at 569–70.

19. *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 498–500 (1991) (discussing federal securities class actions in detail and speculating about the role the merits of the case play in the recovery amount and distribution).

20. *See* Fisch et al., *supra* note 3, at 575.