Fairness Opinions and Negligent Misrepresentation: Defining Investment Bankers' Duty to Third-Party Shareholders

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FAIRNESS OPINIONS AND NEGLIGENT MISREPRESENTATION: DEFINING INVESTMENT BANKERS' DUTY TO THIRD-PARTY SHAREHOLDERS

INTRODUCTION

The 1980s was a boom decade for corporate mergers and acquisitions. Although the actual number of corporate control transactions changed little from the 1970s, the size of these transactions mushroomed, culminating in the $25-billion leveraged buyout of RJR-Nabisco. Investment bankers were at the center of these enormous deals, which required the involvement of many professional intermediaries.

Although investment bankers may play several roles in these complex deals, use of their fairness opinions is so central to acquisitions of public companies that their non-use "would probably raise eyebrows." A fair-
ness opinion evaluates whether a transaction is fair to the parties involved from a financial point of view. Corporate directors seek investment bankers' fairness opinions for several reasons, including the assurance of a deal's financial soundness, because ascertaining the fair price of a deal "is an economic and financial determination as to which the investment banker's expertise is particularly fitted." On occasion, however, an investment banker may fail to apply its expertise properly and opine negligently on a deal's fairness. Such negligence may hurt all who relied on the fairness opinion, including shareholders who lack contractual privity with the investment banker. Recently, some courts have permitted third-party shareholders to raise friendly tender offers, self-tenders, leveraged buyouts, negotiated share repurchases, ... (footnotes omitted); Steinberg & Lindahl, The Duty Owed to Minority Shareholders by an Investment Banker in Rendering a Fairness Opinion, 13 Sec. Reg. L.J. 80, 80 (1985) (use of fairness opinions to influence minority shareholders in tender offers or mergers is widespread), reprinted in M. Steinberg, Securities Regulation: Liabilities and Remedies § 15.07, at 815-42 (10th rel. 1990); Winter, On "Protecting the Investor," 63 Wash. L. Rev. 881, 895 n.44 (1988) (obtaining fairness opinion for the valuation of a merger is an "increasingly common practice").

8. See Bebchuk & Kahan, supra note 7, at 27; Note, Fairness Opinions, supra note 1, at 120. In particular, however, investment bankers are most concerned that transactions are fair from the perspective of the hand that feeds them—the interested officers and board members. See infra notes 48-50 and accompanying text.

9. See infra notes 26-30 and accompanying text.

10. M. Lipton & E. Steinberger, 1 Takeovers and Freezeouts § 8.06[12], at 8-24-30 (11th rel. 1990); see also J. Freund, supra note 5, at 471-72 ("The basic financial terms of a deal ... are peculiarly the province of the investment banker."); Chazen, supra note 7, at 1442 ("Investment bankers have been held to be qualified professionals with regard to the value of securities.").

In reality, however, most corporate directors seek these opinions to help sway shareholders to approve deals and to satisfy their fiduciary duties. See Bebchuk & Kahan, supra note 7, at 28; see also Chazen, supra note 7, at 1442 (fairness opinion important because it may help to prove directors exercised reasonable business judgment); Smith v. Van Gorkom, 488 A.2d 858, 876-77 (Del. 1985) (directors might have avoided a breach of their fiduciary duties to shareholders by obtaining a fairness opinion). Furthermore, investment bankers "are sometimes no better equipped to form an opinion as to the fairness of a transaction than are the directors, particularly in transactions involving companies with substantial intangible assets, e.g., patents and trademarks, technological information and other proprietary information." Note, Fairness Opinions, supra note 1, at 135 n.89.


13. Shareholders are third parties to the contractual relationship between the invest-
state law claims against investment bankers for negligently preparing fairness opinions, notwithstanding the absence of contractual privity. 14 Although under traditional tort principles the lack of privity bars third-party shareholders from suing investment bankers for negligence, 15 most states have nevertheless rejected the traditional privity defense in negligent misrepresentation suits involving professionals. 16

These states are divided, however, over the appropriate scope of a professional’s duty to third parties. 17 Moreover, courts have not given specific guidance on when investment bankers fail to meet this duty. So far,
courts have addressed investment-banker liability in negligence to third-party shareholders only in pre-trial motions to dismiss for failure to state a claim. Because courts have yet to reach the merits of these cases, the appropriate standard of care that investment bankers owe to third-party shareholders when rendering fairness opinions still awaits judicial definition.

Fairness and justice require that an investment banker's liability reasonably relate to the risks that it assumed in fee negotiations with a board of directors or a special committee. This Note argues that investment bankers owe a duty to third-party shareholders in rendering fairness opinions, but that the scope of that duty should be limited to those shareholders whose reliance was actually foreseen.

Part I briefly explores the role of investment bankers' fairness opinions in corporate control transactions involving public entities and reviews negligent misrepresentation—the most viable third-party cause of action against investment bankers. Part II sets forth the different views on the scope of duty that investment bankers owe to third-party shareholders arising from the negligent preparation of fairness opinions. Part II concludes that negligent bankers owe a duty only to those shareholders whose reliance the bankers actually foresaw. Part III argues for clearer judicial guidelines concerning the standard of care that investment bankers owe to third-party shareholders when rendering fairness opinions. Part III also provides examples of cases in which fairness opinions and proxy statements were sufficiently detailed to warrant a board's reliance upon them in satisfaction of the directors' duties to shareholders. This Note concludes that investment bankers' duty to third-party shareholders requires them to investigate the subject company, reasonably analyze the information retrieved, and thoroughly disclose the bases for their opinions when rendering fairness opinions that third-party shareholders rely upon.


19. A special committee consisting of disinterested directors may be appointed by the board because of a conflict of interest in the subject transaction. The courts consider the use of a special committee as evidence of the board's fair dealing. See infra note 24.
INVESTMENT BANKERS' DUTY

I. BACKGROUND: FAIRNESS OPINIONS AND NEGLIGENT MISREPRESENTATION

A. The Role of Fairness Opinions in Corporate Control Transactions Involving Public Entities: Functions, Preparation and Susceptibility to Abuse

Fairness opinions are "short letters that state an opinion about whether the consideration in a proposed transaction is 'fair'" to the shareholders from a financial point of view. An investment banker usually addresses this letter to a special committee of the board of directors, which then publishes it in a proxy statement to all shareholders in accordance with securities law.

Investment bankers deem a "fair" price to fall "within a range of prices at which informed parties might strike a deal, but not necessarily the highest obtainable price." In corporate control transactions, valuing the stock that is the subject of the transaction is necessary to determine what price is fair; the fairness opinion is a common vehicle to establish the fairness of a price.

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20. See Bebchuk & Kahan, supra note 7, at 27. If the investment banker opines negatively on a deal, then the fairness opinion states that the consideration is "inadequate" to shareholders from a financial point of view.


23. Whether a deal's financial terms are fair to the acquired company's shareholders is "a perennial issue in acquisitions of public companies." Chazen, supra note 7, at 1439.


Another common method to establish fairness is forming a special committee of independent directors. See Booth, supra, at 657; supra note 19; see also Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 570, 473 N.E.2d 19, 26-27, 483 N.Y.S. 667, 675 (1984) (special committee would "tend to negate a finding of self-dealing or overreaching"). But cf. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986) (highlighting defects in securing fairness via special committee of outside directors), revd on other grounds, 481 U.S. 69, 94 (1987).


Investment bankers limit their evaluations of fairness solely to financial matters. The focus of a fairness opinion is not on the merits of the transaction, but rather the consideration that the shareholders are paid for their stock in the target company.

In addition to determining whether the buyers' offer falls within a range of fair prices, fairness opinions serve several functions in corporate control transactions. From the directors' perspective, fairness opinions (1) offer an independent perspective on a deal's fairness, especially important when directors have conflicts of interest that might hinder them in establishing a fair price; (2) provide directors with possible protection from claims of breach of fiduciary duty; and perhaps (3) convince shareholders to approve or disapprove a merger. From the shareholders' perspective, diligently prepared fairness opinions reduce (1) agency costs by limiting the discretion of opportunistic managers and (2) the

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25. See M. Lipton & E. Steinberger, supra note 10, § 8.06[4], at 8-28. Most fairness opinions contain the words "from a financial standpoint," by which an investment banker limits the fairness opinion to the transactions' financial considerations. When investment bankers contract to perform a fairness opinion "from a financial standpoint," it is widely believed that they limit their liability and have no duty to consider any non-economic matters, such as the effect on the community, when valuing a security or corporation. See id. It should be noted that this belief has never been litigated, "nor is it likely to be effective in cases where the investment banker has an advisory role or otherwise assists in the transaction beyond merely providing [a fairness] opinion." Id.

26. See Mancuso, supra note 6, at 258.

27. See M. Lipton & E. Steinberger, supra note 10, § 8.02[1], at 8-9.


Another common method is the appointment of a special committee of directors to represent the outside shareholders. See supra notes 19 & 24.

29. See Gilson, Evaluating Dual Class Common Stock: The Relevance of Substitutes, 73 Va. L. Rev. 807, 835 n.74 (1987); Macey & Miller, supra note 5, at 134; see, e.g., Cottle v. Storer Communication, Inc., 849 F.2d 570, 578 (11th Cir. 1988) (fairness opinion is factor in finding directors did not abuse discretion); Smith v. Van Gorkom, 488 A.2d 858, 876-77 (Del. 1985) (absence of fairness opinion is factor in court's finding that directors were uninformed); In re Radiology Assoc., Inc., No. 9001 (Del. Ch. May 16, 1990) (1990 Del. Ch. LEXIS 58, at *35-36) (same); Danziger v. Kennecott Copper Corp., N.Y.L.J., Dec. 7, 1977, at 7, cols. 1-2 (N.Y. Sup. Ct. Dec. 5, 1977) (fairness opinion is factor in finding directors conducted thorough investigation), aff'd mem., 60 A.D.2d 552, 400 N.Y.S.2d 724 (1st Dep't 1977); see also Fischel, The Business Judgment Rule and the Trans Union Case, 40 Bus. Law. 1437, 1453 (1985) (discussing the significance of Van Gorkom); Note, The Business Judgment Rule, Due Care and Experts: How Much Information is Enough?, 7 J.L. & Com. 225, 239 (1987) ("use of ... outside experts will greatly enhance the probability that a board's action" was adequately informed) [hereinafter Note, Due Care and Experts]. Of course, however, the mere existence of a fairness opinion will not protect directors, especially when it is inadequately prepared. See, e.g., Royal Indus. v. Monogram Indus., [1976-77 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 95,863, at 91,139-40 (C.D. Cal. Nov. 29, 1976) (directors liable despite fairness opinion).

The Model Business Act allows directors to rely in good faith on the evaluations of professionals. See Chazen, supra note 7, at 1442 & n.17.

30. See Note, Fairness Opinions, supra note 1, at 123.

31. See id. at 125-27. Such costs include those "of monitoring and restricting management behavior as well as the lost profits caused by managers' opportunism." Id. at 125.
shareholders' information costs in evaluating an offer. 32

The preparation of a fairness opinion involves numerous variables and financial considerations that may lead two investment bankers to opine differently on the same transaction. The initial variables in the valuation process may include: (1) the type and structure of the transaction involved; 33 (2) the purpose of the opinion; 34 (3) the investment banker's access to data; 35 (4) the time available to prepare the opinion; 36 and (5) the investment banker's familiarity with the subject company and industry. 37

After reviewing these initial variables, an investment banker must choose one or more valuation techniques. Commonly used techniques include (1) discounted cash flow analysis; (2) evaluation of comparable acquisitions; (3) valuation of comparative companies; (4) breakup analysis; and (5) liquidation analysis. 38 Using one or more of these valuation methods, investment bankers factor into the valuation numerous financial variables:

32. See id. at 126.
33. See Chazen, supra note 7, at 1443-50.
34. See Rosenbloom & Aufses, supra note 1, at 8.
35. See id.
36. Cf. Principles of Corporate Governance: Analysis and Recommendations § 4.01, at 60-61 (Tent. Draft No. 3, 1984) (in determining whether directors acted reasonably, court should consider amount of time board had to acquire information before a decision had to be made).
37. See Rosenbloom & Aufses, supra note 1, at 8. The more familiar an investment banker is with the subject company, the less the need for an in-depth investigation. If the investment banker is unfamiliar with the subject company, the investment banker and its counsel should investigate the company by reviewing relevant documents concerning the company, visiting principal company facilities, and interviewing key personnel. See id. at 8-9; see also M. Lipton & E. Steinberger, supra note 10, § 8.06[6], at 8-31 ("Independent verification of the key issues should be made."). Visiting a company to evaluate its assets independently becomes more important when the asset values are essential in determining the corporation's value. See Bagley & Golze, supra note 24, at 10, col. 4.
38. See Kahn v. Household Acquisition Corp., No. 6293 (Del. Ch. May 6, 1988) (1988 Del. Ch. LEXIS 64, at *32-34); Rosenbloom & Aufses, supra note 1, at 4; see also Note, Fairness Opinions, supra note 1, at 137-39 (listing all but break-up analysis).

[The] discounted cash flow analysis, which calculates the net present value of the cash flows generated from [the] ownership of the business entity plus a residual or terminal value calculation designed to quantify the theoretical perpetuity of the company's cash flows. [An] evaluation of relevant acquisitions ... involves the banker analyzing the prices paid for companies comparable with the business then under consideration ... [The] valuation of comparative companies is based on freely traded minority interest value plus a premium for control or a 'going private' premium. Under such an approach, certain financial ratios of the comparatives are assessed and compared to those of the subject company in order to infer a value for the subject company. [A breakup analysis ... assumes that the units of the business will be sold separately and those units are valued. A ... liquidation analysis] assumes that the assets of the business will be liquidated piecemeal. The price obtained for these assets less the time value of money and the costs of liquidation are used to determine value under this method.

Rosenbloom & Aufses, supra note 1, at 4.
(1) historical financial results and present financial condition, (2) evaluation of management's projections for the next two to five years, including ability to fund projected capital expenditures, (3) market or replacement value of the assets, (4) evaluation of the management's ability, (5) market information—historical and comparative price-earnings ratios, market trends, comparative premiums for sale of control and general economic conditions, (6) evaluation of the timing of sale of the business—can a better price be obtained later, and (7) can a better price be obtained now.39

The investment banker must report its assumptions, methods and conclusions clearly in the fairness opinion.40 Before a board of directors can reasonably rely on the investment banker's opinion, however, an investment banker must defend its valuation in detail at a board meeting.41 Following the board's recommendation to proceed with the transaction, the fairness opinion is commonly, if not nearly always, annexed to the proxy statement,42 which is delivered to all shareholders of record to solicit their approval of the transaction.

The valuation of fairness is, however, prone to abuse and is "[t]he weak link in the protections afforded shareholders in management buyouts."43 Most importantly, fairness opinions are "judgments, not statements of fact or prophecy,"44 based on a whole set of contingencies. They differ substantially from audits, which involve evaluations of specific financial indicators at a given place or time in accordance with the standards of the accounting industry. Furthermore, investment bankers rarely opine that a price is unfair; instead, they refuse to render an opinion or withdraw an opinion already rendered.45 Occasionally, during the

40. See generally infra note 185 (listing recommended procedures for disclosing investigation).
41. See Bebchuk & Kahan, supra note 7, at 27-28; see also Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101, 126-27 (1979) (giving an example of investment banker's presentation to board).
42. An investment banker's representation on a deal's fairness reaches the shareholders via the proxy statement. The investment banker should be aware of whether a board intends to use its fairness opinion in the proxy report because the banker crafts its engagement letter to limit its potential liability to the intended recipients of the opinion. See Wachtell, Hein, Levene, Chappell, Heins, & Barrows, Wachtell, Lipton, Rosen & Katz's Drafting of Indemnification Agreements and Engagement Letters for Investment Bankers in Light of Recent Legal Developments 13 (February 20, 1991) (on file at Fordham Law Review) [hereinafter Drafting Indemnification Agreements]. The investment banker's opinion can be a powerful means of persuading shareholders to approve a board's proposal. See Note, Fairness Opinions, supra note 1, at 123.
43. Oesterle & Norberg, Management Buyouts: Creating or Appropriating Shareholder Wealth?, 41 Vand. L. Rev. 207, 249 (1988). Professor Fischel has concluded that the fairness opinion is unreliable at best, and that its cost is little more than a "judicially imposed tax" on control transactions. Fischel, supra note 29, at 1453. He has also found that the opinion of those who put their money on the line is more valuable than the opinion of disinterested investment bankers. See id. at 1452. But see Lipton, supra note 41, at 131 (fairness opinions are desirable and useful).
44. Fleischer, supra note 22, § 3, at 2, col. 5.
45. See, e.g., Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 696 (2d Cir. 1980)
mergers-and-acquisitions boom of the 1980s, the rendering of a fairness opinion became a mere formality performed after a deal was structured; investment bankers often had to conduct hurried investigations of subject companies to meet the short deadlines that bidders had imposed on target companies for accepting offers.

Another pitfall in the valuation process is an investment banker's tendency to be partial to its client. Not surprisingly, most incentives encourage an investment banker to opine in favor of the interests of the persons who hired it. These persons, often interested board members and officers, seek to garner shareholder support to achieve or prevent a change in corporate control. The investment banker's fee is usually based on a percentage of the deal, with a minimum payment—far less—if the deal folds, unless the banker was hired to block an offer. Refusing to opine on a deal's fairness; FMC Corp. v. Boesky, 727 F. Supp. 1182, 1187 (N.D. Ill. 1989) (investment banker threatened to withdraw its opinion unless corporation's board increased its offer to match increase in the corporation's stock price).


48. See Stein, supra note 5, at 2, cols. 5-6; Note, Platinum Parachutes: Who's Protecting the Shareholder?, 14 Hofstra L. Rev. 653, 669-70 & n.120 (1986); Note, Outside Directors and the Modified Business Judgment Rule in Hostile Takeovers: A New Test for Director Liability, 62 S. Cal. L. Rev. 645, 649 & n.10 (1989); supra note 197 and accompanying text; see, e.g., Sandberg v. Virginia Bankshares, Inc., 891 F.2d 1112, 1122 (4th Cir. 1989) (in addition to initial $25,000 for opinion, investment banker would receive another $75,000 if merger completed), rev'd, Fed. Sec. L. Rep. ¶ 96,036 (June 27, 1991); Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 257 (7th Cir. 1986) (Smith Barney would have lost $75,000 bonus had outside company wrested control of board from existing directors), rev'd on other grounds, 481 U.S. 69, 94 (1987); Wallerstein v. Primerica Corp., 701 F. Supp. 393, 395 (E.D.N.Y. 1988) (Lazard Freres was to receive additional $9 million if shareholders approved merger); In re Appraisal of Shell Oil, No. 8080 (Del. Ch. Dec. 11, 1990) (1990 Del. Ch. LEXIS 199, at *88) (Morgan Stanley received $500,000 flat fee for services rendered and additional $3.5 million for the tender offer's success); Wells v. Shearson Lehman/Am. Express, Inc., 127 A.D.2d 200, 201, 514 N.Y.S.2d 1, 2 (1st Dep't 1987) (Shearson Lehman received $750,000 for its opinion and was promised an additional $3.2 million if the deal went through), rev'd on other grounds, 72 N.Y.2d 11, 24-25, 526 N.E.2d 8, 15-16, 530 N.Y.S.2d 517, 524-25 (1988). But see Fleischer, supra note 22, § 3, at 2, col. 4 (defending the investment banker's objectivity and proficiency in rendering fairness opinions).

Even when the investment banker's fee is not contingent upon the achievement of its
to opine on a deal's fairness may cause the investment banker to lose a client, as well as the business of other potential clients who may perceive the investment banker as one who will not tow the line. Even if shareholders later question the investment banker's opinion, indemnification clauses offer an investment banker further protection from the financial harm that might arise from a shareholder suit.

In addition, the board may limit the investment banker's investigation. For example, the board may forbid the investment banker to consider breakup or liquidation values or to shop the company to confirm the adequacy of the buyout price. The investment banker may also render a fairness opinion based on information supplied solely by the corporation's management, which is especially problematic in deals involving a management-led bid. Due to the numerous definitions of fairness and the investment banker's need to consider a broad range of factors, an investment banker has tremendous discretion when opining on the fairness of a price.

Even with these pitfalls in the valuation process, however, some courts and commentators have noted that shareholders tend to rely on financial experts' opinions. Although it is unrealistic to presume that every client's interest, the desire to maintain a client for future business or to retain other clients under similar circumstances may still sway an investment banker to render an opinion favorable to its patron's position.

49. See, e.g., Dynamics Corp., 794 F.2d at 257 (investment banker was an interested "blocker" of transaction).

50. See, e.g., Anderson v. Boothe, 103 F.R.D. 430, 436-38 (D. Minn. 1984) (board may have influenced special committee's process of selecting investment banker to avoid fairness opinion contrary to its interests).

51. For a discussion of procedural protections, such as indemnification clauses, that the investment banker may seek to include in its engagement contract with the board, see infra notes 174-76 and accompanying text.

52. Shopping constitutes "canvassing dealers for the most favorable price, as in shopping securities dealers for the best bid or offer." Barron's Dictionary of Finance and Investment Terms 379 (1985).

The board may hire a separate investment banker to shop the company for additional offers. For a discussion of investment bankers and shopping, see Mancuso, supra note 6, at 258-60.

53. See Mancuso, supra note 6, at 258; Longstreth, Fairness of Management Buyouts Needs Evaluation, Legal Times, Oct. 10, 1983, at 19, col. 3; Comment, Regulation of Leveraged Buyouts to Protect the Public Shareholder and Enhance the Corporate Image, 35 Cath. U.L. Rev. 489, 533 & n.260 (1986); see also Bagley & Golze, supra note 24, at 10, col. 4 (SEC considering whether it is misleading to allow fairness opinions when all procedures have not been completed).

54. See cases infra note 226.

55. See supra note 22 and accompanying text.

56. See supra notes 33-39 and accompanying text.

57. See Bebchuk & Kahan, supra note 7, at 29-37; see also Fischel, supra note 29, at 1452 ("By assuming sufficiently high future earnings, or a sufficiently low discount rate, it is possible to come up with just about any [real value]."); Macey & Miller, supra note 5, at 134-35 (fairness opinions are "notorious" for the degree to which investment bankers can manipulate the valuation process to favor their clients' position).

58. See Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812, 822 (D. Del. 1974); Joseph v. Shell Oil Co., 482 A.2d 335, 341 (Del. Ch. 1984); see also Note, Fairness
shareholder relies on fairness opinions, the blind reliance that unsophisticated shareholders might have on the opinions of reputable firms compounds the effect of a valuation process that often lacks impartiality because of its dependency upon the discretion of the investment banker and management.

Despite these problems, the Delaware Supreme Court in Smith v. Van Gorkom "accentuated the need for fairness opinions and ... contributed to their ever-widening use" in corporate control transactions. The Van Gorkom court did not require directors to seek fairness opinions to fulfill their fiduciary duties, but it did factor the directors' failure to consult an investment banker on the fairness of the cashout price into its determination that the directors were insufficiently informed to invoke the protection of the business judgment rule. Van Gorkum reflects the

Opinions, supra note 1, at 123 (investment banker's opinion can have "substantial impact" on shareholders' vote).

Interested directors certainly hope that shareholders will rely on the fairness opinion. See Steinberg & Lindahl, supra note 7, at 80.

59. Whether all shareholders actually rely on fairness opinions before voting is debatable. For example, arbitragers seek only a premium on the stock and thus care little about the fairness of the price. Other sophisticated shareholders recognize the pitfalls involved in the valuation process and probably put less faith in the opinions. Less sophisticated shareholders, on the other hand, may never even read the proxy statement—they simply may want a deal that offers a premium well over their basis.

60. 488 A.2d 858 (Del. 1985). Van Gorkum is often referred to as "Trans Union," the name of the corporation that was part of the merger challenged in the case.

61. Stuntebeck & Withrow, Fairness Opinions Should Offer More Detailed Financial Analysis, Nat'l L.J., June 13, 1988, at 22, col. 1; see Van Gorkom, 488 A.2d at 876-77; Chazen, supra note 7, at 1442; Fischel, supra note 29, at 1453; Note, Due Care and Experts, supra note 29, at 237-38.

Van Gorkom did not require that directors seek a fairness opinion; however, it suggested as a general rule that the use of an outside valuation would be given substantial weight in any duty-of-care suit. See Van Gorkom, 488 A.2d at 875-78. Still, many have belittled the Van Gorkom decision. See, e.g., I R. Balotti & J. Finkelstein, The Delaware Law of Corporations and Business Organizations § 4.7, at 101 (1986) ("[t]he decision has sparked harsh criticism, even incredulity"); Fischel, supra note 29, at 1455 (describing Van Gorkom as "surely one of the worst decisions in the history of corporate law"); Borden, First Thoughts on Decision in Delaware on Trans Union, N.Y.L.J., Feb. 25, 1985, at 4, col. 4 (describing Van Gorkom as "baffling" and "a distinct threat to the ability of companies to attract responsible directors").

Despite the substantial criticism of Van Gorkom, "it is highly unlikely that the Delaware Supreme Court, widely recognized as one of the nation's ablest and most experienced in matters of corporate law, would adopt a rule with such self-defeating consequences." Macey & Miller, supra note 5, at 135 (footnote omitted); see also Chittur, The Corporate Director's Standard of Care: Past, Present, and Future, 10 Del. J. Corp. L. 505, 543 (1985) ("[V]an Gorkom is a long-overdue judicial affirmation of the need for better informed directors and, consequently, more responsible corporate behavior.").

62. See Van Gorkom, 488 A.2d at 876.


weight that courts have given to fairness opinions rendered by reputable firms as long as the opinions have appeared reliable. Only recently have the potential pitfalls in the investment banker's valuation procedures made courts more suspicious of the bankers' impartiality and more open to allowing shareholder actions against them.

B. Negligent Misrepresentation: The Most Viable Cause of Action Against the Investment Banker

In 1987, an intermediate New York appellate court in *Wells v. Shearson Lehman/American Express, Inc.* first recognized a third-party shareholders' cause of action against an investment banker for negligently opining on a transaction's fairness. Three other courts have


Causes of action other than negligent misrepresentation may be available against investment bankers, but require shareholders to hurdle major procedural and theoretical impediments. For instance, shareholders could raise derivative or federal securities claims against investment bankers. These actions, however, have "encountered major barriers that substantially inhibit their effectiveness." As an alternative to derivative or federal securities actions, some commentators have suggested that negligent investment bankers owe a fiduciary duty to shareholders.


Recently, the same New York court that decided Wells found an agency relationship between the investment banker and the shareholders, thus avoiding the third-party liability issue. See Schneider, 159 A.D. at 296-97, 552 N.Y.S.2d at 574-75.

71. In derivative suits, a "shareholder sues on behalf of the corporation for harm done to it." R. Clark, Corporate Law § 15.1, at 639 (1986). Before bringing the suit, a shareholder first must make a demand on the corporation's board of directors to remedy the alleged problem. See id. § 15.2, at 640. Most jurisdictions also require that the shareholder own shares of the subject corporation at the time of the alleged wrongdoing as well as at the time of the suit. See id. § 15.4, at 650. In addition, a third of the states authorize courts to require the shareholder to post security for the costs of the defendants. See id. § 15.5, at 652.

72. Several civil actions are available to shareholders via the Securities Act of 1933 and the Securities Exchange Act of 1934. For example, the 1933 Act incorporates private rights of action in the general anti-fraud provisions of sections 11, 12(1)-(2), and possibly 17(a), as authorities are split on whether a private action should be implied under this section. See Clark, supra note 71, § 17.4, at 744-749. Under the 1934 Act, private rights of action include the "catchall anti-fraud provision" of Rule 10b-5. See id. § 8.9, at 309, 312.


74. See, e.g., Steinberg & Lindahl, supra note 7, at 87-89 (banker should be held as a fiduciary to shareholders because its knowledge of facts and skill in reviewing deals are superior to average shareholder, and it expects shareholders to rely upon its opinion); Note, Standard of Care, supra note 69, at 117-19 (shareholders' confidence in investment bankers' superior knowledge should give rise to fiduciary duty); Note, Fairness Opinions, supra note 1, at 136 n.94 ("investment banker arguably might owe a fiduciary duty to the shareholders"). But cf. Oesterle & Norberg, supra note 43, at 252-53 & n.160 (advocating fiduciary duty to corporation when fairness opinion drafted under conflict of interest or without adequate investigation, but rejecting direct fiduciary duty from investment banks
Nevertheless, courts have consistently rejected these suggestions. Shareholders may also argue that they are in privity with an investment banker hired by a special committee and thus allowed to sue the investment banker under its contract with the special committee for negligently advising the special committee on the committee’s auctioning of the corporation. Nevertheless, this would require a dubious finding that a special committee of directors is the shareholders’ agent—a severe twist of textbook corporate law. Thus, negligent misrepresentation is likely the most viable cause of action for shareholders against investment bankers who negligently prepare fairness opinions upon which the shareholders then rely.


Courts have been less inhibited in finding investment bankers liable for aiding and abetting a parent company’s breach of a fiduciary duty to shareholders. See, e.g., Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1284 n.33, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,401, at 92,599 n.33 (Del. May 3, 1989) (“Although Wasserstein was not a MacMillan officer or director, it is bedrock law that the conduct of one who knowingly joins with a fiduciary, including corporate officials, in breaching a fiduciary obligation, is equally culpable.”); Anderson, 103 F.R.D. at 441-42 (refusing to dismiss aiding and abetting claim against investment banker because banker’s fee contingent upon success of management’s wishes); Richardson v. White, Weld & Co., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,864, at 95,545 (S.D.N.Y. May 11, 1979) (false opinion could make investment banker a co-conspirator, or an aider and abettor, of a parent company’s breach of fiduciary duty to shareholders).

76. This argument succeeded in Schneider v. Lazard Freres & Co., 159 A.D.2d 291, 296-97, 552 N.Y.S.2d 571, 574-75 (1st Dep’t 1990). For a further discussion of Schneider, see infra note 162 and accompanying text.

77. The Schneider court found this agency relationship between shareholders and a special committee. See Schneider, 159 A.D.2d at 296-97, 552 N.Y.S.2d at 574-75. Several commentators have criticized Schneider’s agency finding. See, e.g., Coffee, supra note 22, at 6, col. 4 (Schneider’s finding of privity “seems doctrinally incorrect”); Wachtell, Roth & Houston, Investment Banker Liability to Shareholders in the Sale-of-Control Context, N.Y.L.J., Mar. 29, 1990, at 1, col. 1 (Schneider’s view of legal relationships “startling”); cf. Brodsky, Investment Banker Liability to Shareholders, N.Y.L.J., May 3, 1990, at 4, col 5 (Schneider’s theory “should be limited to buyouts” and not confused “with well-established principles of accountant and attorney malpractice liability”). For a discussion of Schneider’s use of traditional agency principles in viewing the director-shareholder relationship, see infra note 162 and accompanying text.

78. See generally Steinberg & Lindahl, supra note 7, at 89 (investment banker should be liable for negligent misrepresentation); Note, Standard of Care, supra note 69, at 112-15 (same); cf. Coffee, supra note 22, at 6, col. 6 (theory of constructive privity would rest on stronger doctrinal grounds and allow state and federal law to interact sensibly).

Only a few courts have allowed this common-law action against investment bankers. See, e.g., Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1125 (D.R.I. 1990) (investment bankers may be liable for negligent misrepresentation); Klein v. King, [1989-
"Negligent misrepresentation is a false representation made by a person who has no reasonable grounds for believing it to be true, though he does not know that it is untrue, or even believes it to be true." The elements of negligent misrepresentation, like all actions in negligence, include duty, breach, actual and proximate cause, and harm. To be liable in a negligence action, the defendant must owe a duty to the plaintiff to exercise reasonable care. Tort law usually requires that this duty be owed to all foreseeable plaintiffs. In negligent misrepresentation involving professionals, however, courts traditionally protected professionals from foreseeable third-party claims by limiting their duty to only those with whom they shared privity. Although most jurisdictions have discarded a privity requirement for imposing liability in negligence, these courts have disagreed on the extent to which a professional's duty should be limited.

After establishing the defendant's duty of care, a plaintiff must prove that the defendant breached this duty of care by misrepresenting a material fact. The Supreme Court has held that under securities laws "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."
Several state courts have applied this definition to state law claims.88

A plaintiff must then demonstrate that the alleged misrepresentation was the actual and proximate cause of the harm by proving that she had reasonably relied on the alleged misrepresentation.89 Under federal securities laws, a rebuttable presumption of reliance arises when a material omission is found because of the "unreasonable evidentiary burden that would be placed on an investor if he was required to prove a 'speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed . . . or if the misrepresentation had not been made.'"90 Tort law generally finds such reliance "where special circumstances make it reasonable or probable that the plaintiff should accept the defendant's opinion and act upon it."91 Some courts have found these special circumstances in the investment banker-shareholder scenario,92 and have determined that the factual assumptions made within a fairness opinion have such persuasive force that investment bankers should be liable for those statements.93 Despite these findings, too few courts have addressed shareholder reliance on fairness opinions under negligent misrepresentation claims to conclude that shareholders will not have to prove actual reliance.94 Ultimately, courts may have to conduct mini-

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91. Prosser and Keeton, supra note 80, § 109, at 760.
92. See Dowling, 735 F. Supp. at 1120; see also CPC Int'l, Inc. v. McKesson Corp., 70 N.Y.2d 268, 286, 514 N.E.2d 116, 125, 519 N.Y.S.2d 804, 813 (1987) (rejecting contention that investment banker's projections were "mere opinions" that could not support claim of fraud).
93. See Dowling, 735 F. Supp. at 1124; Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812, 822 (D. Del. 1974); Joseph v. Shell Oil Co., 482 A.2d 335, 341 (Del. Ch. 1984); see also Steinberg & Lindahl, supra note 7, at 80 (minority shareholders in cashout mergers undeniably rely on investment banker's opinion); Note, Fairness Opinions, supra note 1, at 123 & n.28 (investment banker's opinion can have substantial impact on shareholders' vote).
94. Only the Dowling court has addressed this issue to date. See Dowling, 735 F. Supp. at 1124. In Dowling, Salomon Brothers contended that the shareholders failed to prove actual reliance on its fairness opinion. See id. The court, however, found that the vote of the nonplaintiff-shareholders, which forced the plaintiffs to liquidate their stock
hearings on each shareholder’s or group of shareholders’ contention of reliability or adopt a rebuttable presumption in favor of shareholder reliance.\(^95\)

Finally, a plaintiff must show damages. Courts traditionally hesitated before compensating plaintiffs whose tort claims arose from purely economic losses rather than from physical harm.\(^96\) This convention in negligence-based actions would have completely sheltered investment bankers from liability to shareholders—shareholders rarely suffer anything but financial harm when investment bankers negligently opine on the fairness of transactions. The majority of contemporary courts, however, permit recovery for pecuniary injury arising from negligent misrepresentation.\(^97\) Therefore, because shareholder reliance is expected and neither privity nor non-pecuniary loss is required, investment bankers may be liable to third-party shareholders for negligent misrepresentation when they negligently render fairness opinions that shareholders rely upon.

II. THE SCOPE OF THE INVESTMENT BANKER’S DUTY TO THIRD-PARTY SHAREHOLDERS ARISING FROM NEGLIGENT PREPARATION OF FAIRNESS OPINIONS

In 1981, a third-party shareholder’s claim against an investment banker for negligently preparing a fairness opinion was rejected as “meritless.”\(^98\) Nevertheless, in light of recent holdings that investment bank-
ers owe a duty of reasonable care to third-party shareholders, investment bankers can no longer expect to be insulated entirely from third-party suits. The issues most likely to divide courts are the scope of the investment banker's duty and the standard of care that the investment banker must meet.

A. The Scope of a Professional's Duty to Third Parties

Courts have generally adopted one of three leading views on the scope of a professional's duty to third parties:

1. The Ultramares approach; (2) grounds, 457 A.2d 701, 712 (Del. 1983). The Weinberger court noted that no precedent existed for such a cause of action. See id.


100. See Rosenbloom & Aufses, supra note 1, at 7.

101. Another potential issue is whether the shareholders will have to show actual reliance upon the fairness opinion. Although this Note discusses this issue briefly, see supra notes 59 & 89-95 and accompanying text, a full discussion of this issue is beyond the scope of this Note.

In addition, a few commentators have raised free speech questions in the context of other professionals. See, e.g., Siliciano, supra note 78, at 1966 & n.179 (raising first amendment concerns in context of accountants); Note, What Standard of Care Should Govern the World's Shortest Editorials?: An Analysis of Bond Rating Agency Liability, 75 Cornell L. Rev. 411, 446-58 (1990) (raising first amendment issue in context of bond-rating companies). No court has addressed the freedom of speech issue in the context of an investment banker's fairness opinion.

The first amendment affords special protection to speech of public concern, because such speech "occupies the 'highest rung of the hierarchy [sic] of First Amendment values.' " Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)); see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758-59 (1985) (plurality opinion). For speech on matters of public concern, negligence is constitutionally insufficient to sustain liability. See New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). The Supreme Court distinguishes a public concern from a private concern by examining the speech's "content, form, and context ... as revealed by the whole record." Connick, 461 U.S. at 147-48. See generally Note, supra, at 450-51 (compiling factors from cases that help distinguish matters of public concern from purely private matters). In the context of large, publicly held corporations, a fairness opinion is arguably of public concern: the economic well-being of a major corporation not only affects its numerous shareholders, but also the nation's economy as a whole. Nevertheless, the investment banker's fairness opinion is generally of greater interest to a limited class than the general public. Cf. Dun & Bradstreet, 472 U.S. at 762 (defamatory bankruptcy declaration not a public issue). In addition, the investment banker renders the opinion for a profit—a motive less likely to garner him first amendment protection. See id. Thus the fairness opinion is less a news item of public concern and more a private evaluation to which the public is indifferent. Cf. Note, supra, at 460 (drawing a similar conclusion in regards to accountant's audit).

A full discussion of these first amendment concerns is also beyond the scope of this Note. For a more detailed discussion, see Estlund, Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1 (1990).
the reasonably foreseeable standard; or (3) the Second Restatement's actually foreseen approach. Even though these three views have developed largely in the context of accountant liability, many courts have applied these standards to other professionals who negligently provide information.

California courts have recognized a fourth definition of duty that balances policy concerns including

"the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm."


Several courts have rejected this balancing test as too difficult to apply. See Touche Ross & Co. v. Commercial Union Ins. Co., 514 So. 2d 315, 320-21 (Miss. 1987); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 322 N.C. 200, 214, 367 S.E.2d 609, 617 (1988).

Some courts have also adopted modifications of these three major approaches. See, e.g., Thayer v. Hicks, 243 Mont. 138, 146, 793 P.2d 784, 789 (Mont. 1990) (adopting "modified version" of Credit Alliance); Selden v. Burnett, 754 P.2d 256, 260-61 (Alaska 1988) (adopting modified version of Restatement).


1. The Ultramares Approach

The most restrictive approach is derived from the seminal case on professional liability in negligence, *Ultramares Corp. v. Touche, Niven & Co.* In *Ultramares*, the New York Court of Appeals, speaking through Judge Cardozo, limited the scope of accountant liability for pecuniary harm caused by negligence to those who had a "contractual relation, or... one approaching it" with the accountant. Although Judge Cardozo intimated that actual privity would not be required, courts later interpreted *Ultramares* to demand strict privity for all types of professional liability suits based on negligence. A few jurisdictions have maintained this interpretation of *Ultramares*, which precludes third-party suits.

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105. 255 N.Y. 170, 174 N.E. 441 (1931).
106. Id. at 183, 174 N.E. at 446. With *Ultramares*, the New York Court of Appeals stemmed the deterioration of the privity doctrine that it had initiated in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916). The *MacPherson* court extended an auto manufacturer's duty of care to all those whom its product could foreseeably have injured. See id. at 389, 111 N.E. at 1053.

107. When distinguishing the auditor in *Ultramares* from the public weigher whom the court had held liable to a third party in the earlier decision of *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), Judge Cardozo noted that the weigher's knowledge of the use of the weight certificates created a "bond... so close as to approach... privity." *Ultramares*, 255 N.Y. at 182-83, 174 N.E. at 446. Judge Cardozo later declared that the third party in *Glanzer* to whom the accountant owed a duty of care was "in effect, if not in name, a party to the contract." Id. at 183, 174 N.E. at 446; see supra note 106 and accompanying text.

108. See Bagby & Ruhnka, supra note 15, at 156-57 & n.36; see also Gormley, *The Foreseen, the Foreseeable, and Beyond—Accountants' Liability to Nonclients*, 14 Seton Hall L. Rev. 528, 532 & n.22 (1984) ("Ultramares came to symbolize a requirement of privity of contract which in hindsight appears to be a more rigorous requirement than Judge Cardozo may have intended"); Note, *Attorney Liability to Third Parties for Corporate Opinion Letters*, 64 B.U.L. Rev. 415, 430 & n.103 (1984) (courts viewed *Ultramares* "as holding that accountants owe no duty of care to those persons not in privity of contract with them"); see, e.g., O'Connor v. Ludlam, 92 F.2d 50, 53 (2d Cir.) (interpreting *Ultramares* as allowing third-party liability against accountants only in cases of fraud), cert. denied, 302 U.S. 758 (1937); Thornton v. Little Sisters of the Poor, 380 A.2d 593, 595 (D.C. 1977) (insurer owed no duty to third parties); Birkenmeyer & Co. v. Homestead Minerals, 32 Colo. App. 258, 262, 510 P.2d 449, 451 (1971) (corporation not liable for losses caused by negligence of its stock transfer agent).

One group of courts, led by the New York Court of Appeals, has construed the Ultramares view of professional liability less restrictively, requiring only "constructive privity" as a basis for liability.2 Focusing on Ultramares's "approaching privity" language,3 these courts impose a duty upon accountants and other professionals when (1) the professional actually foresees the likelihood of the third party's reliance on the representation for a particular purpose,4 and (2) there is conduct by the professional linking him to the third party.5 The second requirement—linking conduct—is difficult yet essential to define because it distinguishes the Ultramares approach from the Second Restatement's actually foreseen standard. Courts usually require that the parties have some preexisting relationship or nexus that ensures that the professional actually foresees the third party's reliance. Nevertheless, whether liable to third party); Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Ass'n, 54 Ohio St. 3d 1, 8, 560 N.E.2d 206, 212 (1990) (in absence of privity, architectural designing firm not liable for purely economic damages resulting from inaccurate drafting plans).


Some courts and commentators claim that Credit Alliance and its progeny modified the Ultramares standard. See, e.g., First Nat'l Bank v. Crawford, 386 S.E.2d 310, 311 (W. Va. 1989) (noting an apparent modification despite the New York Court of Appeals' declaration to the contrary); Bagby & Ruhnka, supra note 15, at 163 (acknowledging a modification, but describing it as slight). But see Credit Alliance, 65 N.Y.2d at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443 (claiming that court's new test did not depart from the principles of Ultramares); Siliciano, supra note 78, at 1940 (Credit Alliance merely affirmed the continuing validity of Ultramares).

112. Credit Alliance has been interpreted as requiring "constructive privity." See Cof. fee, supra note 22, at 6, col. 6.

113. See supra notes 106-07 and accompanying text.

114. This is a combination of the first two prongs of the Credit Alliance test: "(1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely." Credit Alliance, 65 N.Y.2d at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443.

115. See Toro, 827 F.2d at 161-62; Colonial Bank v. Ridley & Schweigert, 551 So. 2d 390, 395-96 (Ala. 1989); Idaho Bank, 115 Idaho at 1084, 772 P.2d at 722; Credit Alliance, 65 N.Y.2d at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443; see also Thayer, 243 Mont. at 149, 793 P.2d at 791 (conduct not necessary, but must show that third party's reliance relates to particular transaction of which accountant is aware when preparing audit).

116. See, e.g., Colonial Bank, 551 So. 2d at 395 (accountant had no previous contact with bank that would indicate his awareness of bank's reliance on audits); Ossining Union Free School Dist. v. Anderson LaRocca Anderson, 73 N.Y.2d 417, 425-26, 539
Interpreted as requiring actual or constructive privity, **Ultramares** remains the most restrictive of the three major approaches in defining the scope of professional liability to third parties in negligent misrepresentation.

The **Ultramares** rule aims to prevent excessive liability. This goal stems from two broad policies: (1) applying stricter scrutiny to third-party claims arising from purely economic loss; and (2) allowing private, nonjudicial constraints, such as a profession's self-regulation and a professional's concerns about reputation, to control the risks involved in transactions requiring reliance on a professional's expertise. **Ultramares** protects the professional from unlimited liability by limiting the number of persons that may reasonably rely on the professional's representation to those in privity—or "approaching privity"—with the professional. It also considers broadening professional liability a "matter for legislative rather than judicial reform." **Ultramares**, however, has been criticized for overprotecting the tortfeasor at the expense of the injured.

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N.E.2d 91, 95-96, 541 N.Y.S.2d 335, 339 (1989) (consulting engineer's "direct contact" with third-party school district alerted it to school's reliance). Such "conduct" has included a third-party school's authorization to retain defendant sub-contractors, who billed the school directly, see id. at 425-26, 539 N.E.2d at 94-95, 541 N.Y.S.2d at 339; and investment bankers rendering fairness opinions that they knew the directors would include in the proxy statement to the shareholders, see Wells v. Shearson Lehman/Am. Express, Inc., 127 A.D.2d 200, 202-03, 514 N.Y.S.2d 1, 2 (1st Dep't 1987), rev'd on other grounds, 72 N.Y.2d 11, 202-25, 530 N.Y.S.2d 517, 524-25 (1988). In finding that no such conduct existed, the **Credit Alliance** court emphasized that the accountant had neither dealt directly with the plaintiffs, agreed with its client to prepare an audit for the plaintiffs' use, nor provided plaintiffs with a copy of the audit. See **Credit Alliance Corp. v. Arthur Andersen & Co.**, 65 N.Y.2d 536, 553-54, 483 N.E.2d 110, 119, 493 N.Y.S.2d 435, 444-45 (1985); see also **Colonial Bank**, 551 So. 2d at 396 (conduct insufficient to alert accountant of third-party bank's reliance, even though accountant gave multiple copies to client and contacted bank as part of standard audit procedures).

For a discussion of the Restatement approach, see infra notes 130-35, 164-78 and accompanying text.

117. See **Ultramares**, 255 N.Y. at 179-80, 189, 174 N.E. at 444, 448.


2. The Reasonably Foreseeable Approach

A second view, the reasonably foreseeable approach, is the least restrictive and most recent of the three major standards. First imposed by the Supreme Court of New Jersey, this approach extends a professional's duty to third parties whose reliance on the professional's representation was foreseeable, notwithstanding the professional's lack of actual knowledge of the third parties' reliance. This view rejects the protection that Ultramares gave professionals in negligent misrepresentation and suggests that, as long as there is foreseeable harm, all tortfeasors should be responsible for their acts regardless of privity.

The policies underlying the reasonably foreseeable rule focus less on the defendant and more on the interests of the plaintiff and society in recovery by (1) compensating the injured; (2) deterring negligent conduct by forcing the professional to bear the burden of resulting financial losses; and (3) holding professionals to the same scope of duty as other potential tortfeasors. Those advocating the reasonably foreseeable approach suggest that professionals can insure themselves to protect against the overwhelming liability that a class of foreseeable plaintiffs might create.

In the context of investment banking, the expansion of liability to

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123. See Rosenblum, 93 N.J. at 333, 352-53, 461 A.2d at 142, 153; Wiener, supra note 120, at 260; see also Spherex, Inc. v. Alexander Grant & Co., 122 N.H. 898, 903-04, 451 A.2d 1308, 1311-12 (1982) (modern accounting profession no longer in need of judicial protection provided by Ultramares to a then "fledgling profession"). But see Siliciano, supra note 78, at 1950 (arguing that Judge Cardozo's reasoning in Ultramares cannot be dismissed simply as "outdated protectionism").

124. See Rosenblum, 93 N.J. at 341, 461 A.2d at 146-47; Citizens State, 113 Wis. 2d at 386, 335 N.W.2d at 366.

125. See Rosenblum, 93 N.J. at 352-53, 461 A.2d at 153; Wiener, supra note 120, at 260; supra notes 82-83 and accompanying text.

126. See, e.g., H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 349 & n.11, 461 A.2d 138, 151 & n.11 (1983) (reasonably foreseeable approach does not threaten accountant industry because accountants can protect themselves from indeterminate liability by buying insurance).

In the investment banking context, reliance on insurance is unnecessary as investment bankers often have indemnification clauses in their engagement letters. See infra notes 175-76 and accompanying text.
all foreseeable parties might enhance the independence of the investment banker's fairness opinion by making an investment banker more concerned about rendering an accurate fairness opinion than securing shareholder support for its clients.27 The reasonably foreseeable approach, however, has been criticized for analogizing professional liability to product liability28 and for failing to distinguish between the negligent professional and the deceitful professional.29

3. The Second Restatement's Actually Foreseen Approach

The Second Restatement's actually foreseen approach, the majority view,130 extends a professional's duty to "a person or one of a limited group of persons" whose reliance on the representation the professional could actually foresee.131 Unlike the reasonably foreseeable approach, the Restatement approach limits a professional's scope of duty for negligent misrepresentations to those whose reliance was foreseen—not merely foreseeable—and retains a broader duty for reckless and intentionally fraudulent misrepresentations.132

The Restatement's actually foreseen approach achieves a compromise between the policies of Ultramares and the reasonably foreseeable approach. This approach balances "the need to hold accountants to a standard that accounts for their contemporary role in the financial world with the need to protect them from liability that unreasonably exceeds the bounds of their real undertaking."133 It compensates the injured

127. See Note, Fairness Opinions, supra note 1, at 135; Note, Standard of Care, supra note 69, at 112; Stuntebeck & Withrow, supra note 61, at 23, cols. 2-3. For a discussion of why an investment banker's fairness opinion might be unreliable, see supra notes 43-57 and accompanying text.

128. See Gormley, supra note 108, at 552-54; see also Note, Foreseeably Unreasonable, supra note 121, at 904-09 (noting that not all courts allow for economic recovery under products liability and that misrepresentations of manufacturers differ greatly from those of auditors).

129. See infra note 132 and accompanying text.


132. See Restatement (Second) of Torts § 552 comment a (1965); Gormley, supra note 108, at 570.

133. Raritan River Steel, 322 N.C. at 215, 367 S.E.2d at 617.
while limiting the number of parties that may rely upon a professional's representations and to which it could potentially be held liable. Nevertheless, although the Restatement approach has the "potential for an optimal balance," it too has flaws. For example, by requiring the professional to know of the third parties at the time of the representation, but not at the time the client engages the professional, the Restatement approach may subject the professional to liability disproportionate to the risk that it assumes at fee negotiations. On the other hand, the Ultramares approach limits the possibility of disproportionate harm by requiring either privity or preexisting conduct between the parties.

B. The Investment Banker Cases

Few courts have addressed third-party negligent misrepresentation claims against investment bankers who negligently performed fairness opinions. Three of these courts agreed that an investment banker owed a duty to third-party shareholders when it negligently rendered a fairness opinion upon which shareholders relied, but differed on the scope of that duty.

135. See id. at 190. The authors note that this might be avoided by creating "an exception from liability for uses or users not reasonably identified at the time of the engagement contract." Id. at 190-91
136. For a discussion of these two interpretations of the Ultramares approach, see supra notes 108-16 and accompanying text. For a discussion of the various interpretations of what conduct Ultramares requires, see supra notes 115-16 and accompanying text.
In Dowling v. Narragansett Capital Corp., a federal district court in Rhode Island relied on the Restatement to find that investment bankers owed a duty to shareholders they actually anticipated would rely on their fairness opinion. The court reasoned that the Ultramares policy concern with exposing professionals to indeterminable liability was not at issue in the investment banker-shareholder context, because the plaintiffs in this case belonged to a limited class whose reliance was actually foreseen.

In Wells v. Shearson Lehman/American Express, Inc., a New York court applied the Ultramares approach and inferred that the shareholder-investment banker relationship, which arose from a special committee's retention of two investment bankers to advise the shareholders, approached one of privity. Not surprisingly, the court offered no policy to justify its extension of the Ultramares approach to investment bankers: the New York Court of Appeals had previously applied its Ultramares approach to engineers, stating that Ultramares might apply to professionals other than accountants. Rep. (CCH) ¶ 95,002, at 95,602, 95,615; Wells, 127 A.D.2d at 202-03, 514 N.Y.S.2d at 2.

The fourth case, Brug, 755 F. Supp. at 1258-59, did not state that an investment banker would never owe a duty in negligent misrepresentation to third-party shareholders. Recognizing that Delaware courts have followed the Restatement standard to determine the extent of liability for negligent misrepresentation by professionals, the federal court in Delaware applied the Restatement standard to the shareholder-plaintiffs' claim of negligent misrepresentation. It dismissed the shareholder-plaintiffs' cause of action, however, because it held that they were not part of the "limited group" for whose benefit the information in the public statements was intended:

the only documents which plaintiffs identify as containing the alleged misrepresentations are ones that were released to the public at large. If any member of the public who might choose to invest in [the issuer's] common stock were to qualify as part of a protected class, then the "limited group" requirement [of the Restatement approach] would be meaningless.

Id. at 1259.

140. See Dowling, 735 F. Supp. at 1125. The investment banker's assessment of the proposed purchase price "was patently intended to guide shareholders in deciding whether to approve the sale." Id.
141. See id. The court concluded that the investment banker's duty to exercise reasonable care was extended to its client's shareholders because the banker's "assessment was patently intended to guide shareholders in deciding whether to approve the sale." Id.
143. See id. at 202-03, 514 N.Y.S.2d at 2. The Wells court reasoned that the duty the investment bankers owed to their client, a special committee formed to determine the deal's fairness for the shareholders, could be extended to the company's shareholders. See id. at 202-03, 514 N.Y.S.2d at 2. The court also noted that the investment bankers must have been aware that their opinion would be used to help shareholders decide on the fairness of the merger offer. See id. at 202-03, 514 N.Y.S.2d at 2 (citing Credit Alliance Corp. v. Arthur Andersen & Co., 65 N.Y.2d 536, 551, 483 N.E.2d 110, 118, 493 N.Y.S.2d 435, 443 (1985)).
144. See id. at 202-03, 514 N.Y.S.2d at 2.
146. See id. at 424, 539 N.E.2d at 94-95, 541 N.Y.S.2d at 338-39.
Finally, in *Klein v. King*, a federal district court in California considered both the reasonably foreseeable standard and a policy-balancing test in the evaluation of a shareholder claim of negligent misrepresentation by an investment banker. The shareholders asserted that the investment banker played a substantial role in the business of the corporation and in the publication of the proxy statement. In holding that the investment banker owed a duty to the shareholders under their negligent misrepresentation claim, however, the court did not explicitly adopt either formula.

*Dowling, Wells* and *Klein* offer little guidance on the appropriate scope of the investment banker's duty to third-party shareholders. These courts merely announce which approach they have chosen without discussing the underlying concerns.

C. The Appropriate Scope of Duty for Investment Bankers: The Restatement's Actually Foreseen Approach

Despite the paucity of cases involving shareholders' negligent misrepresentation claims against investment bankers, numerous cases exist that involve negligent misrepresentation actions against other professionals, including accountants, lawyers and engineers. Based on these decisions and the role of the investment banker in corporate control transactions, the appropriate scope of the investment banker's duty in negligence actions brought by third-party shareholders is the Restatement's actually foreseen approach.

The *Ultramares* view imposes unnecessary restrictions on the liability of the investment banker by responding to policy concerns that are less relevant in the investment banker-fairness opinion context than in the accountant-audit context. For instance, third-party shareholder claims theoretically pose less of a threat of indeterminable liability to investment...
bankers than do similar claims against accountants. The shareholders compose the class of potential plaintiffs, as they are the group for whose benefit the information was intended.\textsuperscript{153} This class is limited and foreseen:\textsuperscript{154} even the largest corporation has a finite number of shareholders that the investment banker can identify in advance;\textsuperscript{155} further, the investment banker's engagement letter, which its lawyers help craft, mentions whether the investment banker's opinion will appear in communications to shareholders.\textsuperscript{156} Although an accountant might know who initially receives its audit, it is more prone to indeterminable liability because an audit has more uses than an investment banker's fairness opinion.\textsuperscript{157} Although knowledge of the number of shares is insufficient in and of itself to determine the extent of an investment banker's potential liability,\textsuperscript{158} it is one piece of the potential liability puzzle that investment bankers have and accountants lack.

Furthermore, it may be unjust to grant an investment banker the protection that \textit{Ultramares} offered accountants. An accountant's fee is negligible in relation to what a corporation pays an investment banker for its opinion.\textsuperscript{159} \textit{Ultramares}’s reliance on private ordering to encourage the

\begin{footnotesize}

Of course, if the investment banker disseminated information to the public at large, a shareholder could not claim to be part of a limited class for whose benefit the information in the public statements was intended. See Brug v. Enstar Group, Inc., 755 F. Supp. 1247, 1259 (D. Del. 1991); supra note 138.

\textsuperscript{155} For the huge corporations whose shareholders might number well into the thousands, calling a shareholder class “limited” might seem specious. Nevertheless, even with the largest corporation, an investment banker can technically determine the number of shares that are publicly held and thus the amount of risk assumed. It can then bring its estimate to the fee negotiations. Cf. Bagby \& Ruhnka, supra note 15, at 192-93 (discussing how accounting firms may better control liability when dealing with a known number of recipients). Accountants, however, cannot define their potential liability as easily because an audit has many users, including “government agencies, investors, creditors, unions and other interested parties.” Practicing Law Institute, Accountants' Liability 78 (1981); see also H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 345, 461 A.2d 138, 149 (1983) (discussing numerous uses of audit).

\textsuperscript{156} Investment bankers normally attempt to limit expressly the persons to whom they owe duties. \textit{See Drafting Indemnification Agreements}, supra note 42, at 13.

\textsuperscript{157} For example, audits help to inform management of potential business problems, to satisfy SEC requirements, to garner funds from banks and other lending institutions, and to acquire credit from suppliers of goods and services. \textit{See Rosenblum}, 93 N.J. at 345, 461 A.2d at 149.

\textsuperscript{158} Determining the number of shares that an investment banker may be liable for serves little purpose unless an investment banker can also project the price that a judge will later decide falls within a range of fair prices.

\textsuperscript{159} For a discussion of an investment banker’s fees, see supra note 48 and accompanying text. Arguably, an investment banker may deserve greater protection than an accountant because its fairness opinion involves numerous presumptions and projections often made under tremendous time pressures. \textit{See supra} notes 33-39 and accompanying text for a discussion of the variables involved in the valuation process. Conversely, an
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professional to apply its expertise more carefully is less tenable in the context of investment banking than of accounting, because investment bankers lack the industry standards for performing fairness opinions that accountants have for making audits. Moreover, the resilience of professions such as accounting for almost three decades under the Restatement standard also disproves Ultramares’s fear of unlimited liability.

One indication that the Ultramares approach may be too restrictive in the investment banking context is a New York court’s artful evasion of Ultramares’s near-privity requirement to find a duty between an investment banker and shareholders. The Restatement approach, by contrast, allows courts to avoid altering basic corporate law when the “approaching privity” standard of the Ultramares approach is not met.

The Restatement approach also satisfies the most fundamental concerns of those advocating the reasonably foreseeable approach: it compensates injured shareholders who form a limited and foreseen class and deters investment bankers from acting negligently. Adopting the reasonably foreseeable approach instead of the Restatement approach accountant’s audit entails more certain, mathematical calculations. Most investment bankers, however, are so familiar with the routine of valuation that they can perform fairness opinions perfunctorily. See supra note 46 and accompanying text.

Courts have also allowed recovery for negligent misrepresentation despite the Ultramares concern for limiting recovery for pecuniary loss. See supra note 97 and accompanying text.


See Schneider v. Lazard Freres & Co., 159 A.D.2d 291, 296-97, 552 N.Y.S.2d 571, 574-75 (1st Dep’t 1990). In holding an investment banker liable to the shareholders, this New York appellate court redefined the relationship between a special committee of directors and shareholders as one of agency. See id. at 296, 552 N.Y.S.2d at 574-75. The court reasoned that the shareholders were in privity with the investment banker because the investment banker was hired by a special committee whose primary function was to obtain the highest price possible for the shareholders’ stock. See id. at 296, 552 N.Y.S.2d at 574-75. Schneider’s reasoning has startled observers. See supra note 77. Its finding of privity fundamentally confuses the legal relationship between directors and shareholders. See Wachtell, Roth & Houston, supra note 77, at 4, col. 2. “It is well-settled law that directors are not agents of the shareholders, or even the corporation.” Id.; see H. Henn & J. Alexander, Laws of Corporations § 207, at 562-63 (3d ed. 1983); see also Continental Sec. Co. v. Belmont, 206 N.Y. 7, 16-18, 99 N.E. 138, 141-42 (1912) (discussing relationship between directors and shareholders); Coffee, supra note 22, at 6, col. 4 (“[D]irectors are not agents in the classic master/servant sense, but rather their relationship is sui generis and involves a level of discretionary authority that most agents do not possess[es].”).

For a discussion of this standard, see supra notes 105-20 and accompanying text.

As some commentators have pointed out: “Are the shareholders, as ‘principals’, to be deemed personally liable for any ‘torts’ committed by their ‘agents’ in the conduct of an auction?” Wachtell, Roth & Houston, supra note 77, at 4, col. 2; see also Coffee, supra note 22, at 6, col. 4 (questioning Schneider’s interpretation of shareholder-director relationship).

For a discussion of limited and foreseen in the shareholder context, see supra notes 154-55 and accompanying text.
places undue burdens on bankers when balanced against the risk they assume. Although investment bankers earn high fees, the reasonably foreseeable approach would expose them to liability that is potentially disproportionate to their wrongdoing if liability is extended to a class of third-party shareholders neither limited nor foreseen by the investment bankers. Admittedly, indemnification agreements, which are commonly found in engagement letters, might limit an investment bank's exposure to liability. Nevertheless, corporations may be less willing in the future to indemnify investment bankers if more courts hold that investment bankers owe a duty to third-party shareholders when rendering fairness opinions on which the shareholders rely.

The Restatement approach also avoids some common criticisms of the reasonably foreseeable approach. Unlike the Restatement approach, the reasonably foreseeable approach's extension of liability creates incentives for unknown third parties to make fraudulent or exaggerated claims against investment bankers. In addition, the reasonably foreseeable approach unfairly allocates to the investment banker unbargained-for risks, as the investment banker may be liable to any foreseeable plaintiff that reasonably relies on its fairness opinion, regardless of whether the banker intended to render the opinion for that plaintiff's purpose. The Restatement approach affords investment bankers, especially those who are unable to obtain an indemnification agreement from its client, more of an opportunity to avoid unfair risk allocations by providing them with one variable—the number of shares outstanding—that may help them to negotiate a fee that reflects the added exposure to financial risk when management circulates their opinion to the shareholders.

166. For examples of investment banker fee structures, see supra note 48.
167. Cf. Siliciano, supra note 78, at 1944-48 (merely foreseeable test poses these dangers to accountants); Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 Stan. L. Rev. 1513, 1537 n.74 (1985) (“The most persuasive basis for maintaining the limited duty [for accountants] is a proportionality argument”).

For an example of how the Restatement approach limits the investment banker’s liability to the public at large, see Brug v. Enstar Group, Inc., 755 F. Supp. 1247, 1259 (D. Del. 1991), discussed in supra note 138.
168. Indemnification agreements may appear in engagement letters or constitute a separate agreement. See Drafting Indemnification Agreements, supra note 42, at 23. For further discussion of indemnification agreements, see infra notes 175-76 and accompanying text.
169. Cf. Siliciano, supra note 78, at 1947 (merely foreseeable test poses this “moral hazard[]” to accountants).
170. For a discussion of the justifications and criticisms of the reasonably foreseeable approach’s extension of the professional’s duty to foreseeable plaintiffs, see supra notes 125-29 and accompanying text.
171. This opportunity may be severely limited, however, by the inherent unpredictability of a court holding that retrospectively determines what would have been a fair price, especially given that a court may be deciding this issue years after the actual transaction.
172. Cf. Bagby & Ruhnka, supra note 15, at 192 (discussing the ability of accountants to negotiate for a fee with knowledge of all intended uses of the audit). The Restatement approach offers the investment banker a better opportunity to measure its potential liability at the time of fee negotiations, because the number of outstanding shares is known.
For further protection from liability disproportionate to their undertaking, investment bankers may attempt to limit those that may reasonably rely on the fairness opinions via express clauses within their engagement letter and, subsequently, their opinions. The express disclaimers may help prove that investment bankers justifiably did not foresee the shareholders' reliance. The investment banker may also negotiate to limit its liability through the use of indemnification provisions and procedural clauses, such as jury waiver or forum selection clauses. All of these devices are common to most investment-banker engagement letters and should be disclosed in the fairness opinion to counter shareholders' claims of reliance most effectively.

Finally, the Restatement approach does not shield investment bankers absolutely; it exposes investment bankers to enough liability to create incentives for them to act as quasi-investigative agents in management

Few companies perform public offerings—a common method of increasing a corporation's capital—in the midst of a corporate control transaction. If such an offering were to occur, courts could “create, or investment bankers could contract for, an exception for uses... not reasonably identified at the time of the engagement contract.” Bagby & Ruhnka, supra note 15, at 190-91. In this way, an increase in the corporation's capital after fee negotiations would not cause the investment banker undue hardship.

173. For discussions and examples of such disclaimers, see Rosenbloom & Aufses, supra note 1, at 10-13; Drafting Indemnification Agreements, supra note 42, at 15-20.

174. Cf. Hoffman v. Greenberg, 159 Ariz. 377, 380, 767 P.2d 725, 728 (Ct. App. 1988) (disclaimer strengthened accountant's contention that it did not actually foresee a third party's reliance, as disclaimer suggested that audit would be used to help client in decision-making process). A disclaimer within an engagement letter, however, would not automatically protect the investment banker from tort liability to third-party shareholders who relied on a negligently prepared fairness opinion. Tort obligations normally cannot be disclaimed because they are based on policy considerations independent of the parties' manifest intent. See Prosser and Keeton, supra note 80, § 92, at 656. It follows that competing policy considerations, such as those balanced in the Restatement approach, see supra notes 133 & 154-170 and accompanying text, may warrant exceptions to this general bar on disclaiming tort liability. Cf. H. Rosenblum, Inc. v. Adler, 93 N.J. 324, 331, 461 A.2d 1138, 152 (1983) (in some circumstances, auditor could expressly limit number of persons who could rely on audit); Prosser and Keeton, supra note 80, § 92, at 656 (extent to which tort obligations may be impaired by contract depends largely “on the relationship between the parties, the nature of the bargaining transaction, and the type of loss for which liability is disclaimed”).

The most effective disclaimer would appear in the fairness opinion and would limit the investment banker's undertaking, not the opinion's dependability, because general disclaimers of reliability are insufficient. See First Nat'l Bank v. Crawford, 386 S.E.2d 310, 314-15 (W. Va. 1989); Ryan v. Kanne, 170 N.W.2d 395, 404 (Iowa 1969). If the investment banker sets forth its methods of valuation in its engagement letter and, subsequently, in its fairness opinion, it might limit the basis upon which injured parties could sue it for misfeasance. See infra notes 190-93 and accompanying text; cf. Ryan, 170 N.W.2d at 404 (concerning accountants).

175. See Coffee, supra note 22, at 6, cols. 5-6; Brodsky, supra note 77, at 4, cols. 5-6; Wachtell, Roth & Houston, supra note 77, at 4, col. 2. For a discussion and sample of an investment banker's indemnification agreement, see Rosenbloom & Aufses, supra note 1, at 12-13.

176. Courts, however, have historically hesitated before enforcing a party's attempt to limit its liability to third parties. For a discussion of disclaimers, see supra note 174.
buyouts that may involve fraud.\footnote{177} Thus, investment bankers protect both themselves and shareholders by deterring opportunistic directors and managers from acting inconsistently with the shareholders' interests.\footnote{178} Furthermore, courts could prevent an investment banker from merely disclaiming any knowledge of the shareholders' reliance. If the facts suggest that the investment banker should have known of the shareholders' reliance, then courts should hold that the investment banker did foresee this reliance.\footnote{179}

In summary, the Restatement approach compensates injured shareholders, deters investment bankers from rendering inaccurate fairness opinions, and protects investment bankers from liability potentially disproportionate to the risk they assumed. It reconciles two conflicting concerns: overprotecting the investment banker at the expense of the shareholder, and underprotecting the investment banker who must render an opinion based on numerous variables and projections.

III. Clarifying the Standard of Care

A. The Need for a Clear Standard of Care

Having delineated a duty between investment bankers and shareholders who have relied on the bankers' fairness opinions, courts must clarify the standard of care that the duty mandates. Although third-party shareholders may bring causes of action against negligent investment bankers, shareholders may still lose on the merits. "As a practical matter, it may be difficult for [them] to prove that [the] investment bankers were acting negligently."\footnote{180} Generally, a person "who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."\footnote{181} Applying this standard to investment bankers rendering fairness opinions poses problems. The lack of industry guidelines governing the conduct of investment bankers,\footnote{182} the numerous variables and financial considerations from which an investment banker may choose when preparing a fairness opinion,\footnote{183} and the tremendous time pressures often associated with corporate control transactions make the rendering of a fairness opinion highly discretionary. With this discretion, investment bankers can determine that a widely differing array of bids fall within a range of fair prices,

\footnote{177} For a discussion of how expanded liability will compel investment bankers to conduct more objective analyses, see supra note 127 and accompanying text.\footnote{178} See Oesterle & Norberg, supra note 43, at 250.\footnote{179} See, e.g., Wells v. Shearson Lehman/Am. Express, Inc., 127 A.D.2d 200, 202-03, 514 N.Y.S.2d 1, 2 (1st Dep't 1987) (investment bankers must have been aware of the shareholders' reliance), rev'd on other grounds, 72 N.Y.2d 11, 24-25, 526 N.E.2d 8, 15-16, 530 N.Y.S.2d 517, 524-25 (1988).\footnote{180} Brodsky, supra note 77, at 3, col. 1.\footnote{181} Restatement (Second) of Torts § 299A (1965).\footnote{182} See Steinberg & Lindahl, supra note 7, at 85.\footnote{183} See supra notes 33-39 and accompanying text.
“all of which would be reasonable and none of which could be shown to be ‘wrong’ (or unfair) under objective criteria.”

In light of this situation, courts must clarify what a reasonable investment banker would do when rendering a fairness opinion. Delineation of the standard of care would benefit (1) shareholders, because they could identify viable claims and thus avoid fruitless legal costs; (2) investment bankers, because they would know better how to avoid liability; and (3) courts, because clarification would conserve judicial resources by allowing more widespread use of dismissal and summary judgment mechanisms.

B. Past Attempts at Clarification

Despite the lack of industry guidelines, few courts have attempted to specify when an investment banker is acting negligently in rendering a fairness opinion. Because the courts that have addressed investment


185. Curiously, few commentators have tried to fill this judicial void, as most commentators have generally called for increased disclosure. See, e.g., Coffee, Shareholders Versus Managers: The Strain in the Corporate Web, 85 Mich. L. Rev. 1, 107 (1986) (reformers have sought to increase protection of shareholders via several means, including increased disclosure); Oesterle & Norberg, supra note 43, at 251-52 (calling for fairness opinions that include price evaluation, detailed explanation of data and assumptions underlying estimate, and methodology used); Stuntebeck & Withrow, supra note 61, at 23, cols. 3-4 (bankers must “include a more thorough analysis of the relative weight given to the factors considered in rendering the [fairness] opinion”).

Those commentators that have proposed more specific measures have been helpful. In particular, Martin Lipton and Erica Steinberger assert that certain general procedures should be followed:

(1) The opinion should describe the matters considered, those statements relied upon without investigation, those statements or matters that have been independently verified, and the inherent limitations, if any, of any procedures or standards that have been used.

(2) The opinion should describe the fee being paid, all relations with the client, and any conflicts of interest. If the investment banker participated in the negotiation of the transaction this should be noted in the opinion.

(3) The opinion should be updated to the latest possible date (although, when an opinion is included in a proxy statement, it should be dated approximately the date of such statement; it is not necessary to update it to the actual transaction date, absent a material change in circumstances), and if that date is prior to the date of the transaction the opinion should set forth that it is as of a specific date and does not reflect matters thereafter.

(4) Counsel for the investment banker should assist in the due diligence review and advise as to the kind of backup material which should be prepared.

(5) Independent verification of the key issues should be made.

(6) Where a key issue is legal, the opinion should state that the investment banker has consulted and relied on counsel with respect to such issue.

(7) Where the opinion is to be used in a conflict transaction, the investment
banker liability for negligence misrepresentation to third-party shareholders have yet to reach the merits of these cases, the appropriate standard of care required of investment bankers awaits judicial definition. In addition, in cases not involving negligent misrepresentation, courts that have addressed the standard of care that the banker’s duty imposes have been unhelpful. They fail to specify what facts and assumptions the investment banker must consider before rendering an opinion, and what analytical methods it must use when making an opinion. Furthermore, it is unclear what information the investment banker must disclose to avoid negligent misrepresentation liability. For instance, in 1983, the Supreme Court of Delaware declared that, when determining fair value, directors may rely on investment banker opinions that consider all relevant facts except those that are purely speculative. This court, however, never specified what factors were relevant. Similarly, in a 1988 federal securities case involving the possible negligence of investment bankers, the Third Circuit adopted a general, objective test of liability: whether the investment banker’s assumptions were “objectively unreasonable in the circumstances.” Like the Delaware court, however, the Third Circuit

M. Lipton & E. Steinberger, supra note 10, § 8.06[6], at 8-30 to -31 (footnotes omitted). Professors Bebchuk and Kahan discourage courts from specifying in advance what assumptions bankers should make and what valuation techniques they should use. Rather, courts should weigh an opinion depending on whether it states a range of fair prices and on the extent to which its conclusion is sensitive to its assumptions. Thereby, fairness opinions will convey more information and investment banks will have less discretion. Bebchuk & Kahan, supra note 7, at 47 (footnotes omitted).

Professor Oesterle and Mr. Norberg have suggested that whenever advisors render opinions with an indemnification agreement, specific and conspicuous disclosure should be made to shareholders. See Oesterle & Norberg, supra note 43, at 254. They also suggest that any indemnification provision should be approved by a shareholders’ vote or by a special negotiating committee. See id.

Another commentator has suggested that bankers should be liable if they fail to use more than one of the accepted methodologies for determining fairness. See Note, Fairness Opinions, supra note 1, at 139.

186. See supra note 18 and accompanying text.
188. See id.
provided no specific guidance on what would be objectively reasonable under the circumstances.

Because no court has set specific guidelines for rendering fairness opinions, courts might consider borrowing an approach employed by courts reviewing uncertified audits. In these cases, some courts have recognized that an accountant may affect the parameters of its potential liability by limiting its undertaking in the engagement contract. The accountant, then, would be liable only for any negligently performed task outlined in the contract. It would not be liable for failing to perform an additional procedure not referred to in the contract. Like an accountant performing an uncertified audit, an investment banker lacks official industry guidelines for rendering a fairness opinion. It follows that an investment banker might be able to limit the parameters of its potential liability by describing its intended methods of valuation within its engagement letter and, subsequently, within its fairness opinion. Unfortunately, this approach also has its flaws and is an inadequate alternative to clearer judicial guidelines for the rendering of fairness opinions.

C. The Duties of an Investment Banker When Rendering a Fairness Opinion

As an interim substitute to industry and judicial guidelines that specify what investment bankers must investigate, consider and disclose when rendering fairness opinions, courts and practitioners may seek guidance from cases concerning directors' fiduciary and statutory duties of disclosure. Because investment bankers lack the directors' fiduciary duty to shareholders, they should not be held to every requirement that courts have placed upon directors. Nevertheless, these cases best set forth judicial expectations of dealing fairly with shareholders. The cases researched include instances where courts held fairness opinions to be sufficiently detailed to warrant directors' reliance. From these cases, a three-pronged standard of care can be construed for investment bankers who render fairness opinions upon which third-party shareholders rely: (1) a duty to investigate; (2) a duty to perform a reasonable analysis; and (3) a duty to disclose the bases for the opinion.

191. See Ryan, 170 N.W.2d at 404.
192. See Steinberg & Lindahl, supra note 7, at 85.
193. Theoretically, if the investment banker performs these procedures with reasonable care, it should avoid liability even if other methods not referred to in the contract might have rendered a more accurate valuation. This approach, however, assumes that (1) an investment banker will know at the outset of its investigation exactly what methods it will employ, and that (2) it will carefully choose which methods are most appropriate given the information available. The numerous considerations that are associated with the valuation process may often render these assumptions misleading. Nevertheless, most investment bankers are familiar with the routine of valuation and, arguably, as professionals, should be able to determine what procedures are necessary based on the information provided.
1. Duty To Investigate

Generally, an investment banker must merely disclose whether it investigated the subject corporation independently or whether it relied solely on information supplied by management. Nevertheless, some courts have criticized investment bankers who rendered fairness opinions based on data supplied solely by management. Most courts require only that investment bankers disclose their lack of an independent investigation. As a matter of policy, however, courts should demand an independent investigation of any information that an investment banker may obtain from sources other than management, especially when management has an interest in the deal's outcome and the banker is not subject to severe time or management constraints.

2. Duty To Perform A Reasonable Analysis

Courts have criticized fairness opinions that were made under fee arrangements that were contingent upon the deal's outcome or that were too conclusory, improvised or cursory. Although courts have

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194. See infra note 226 and accompanying text.

Of course, merely reciting that the investment bankers made no independent analysis of the transaction would not protect them from liability if they knew the directors' information was false or if they recklessly rendered the opinion. See Richardson v. White, Weld & Co., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,864, at 95,545 (S.D.N.Y. May 11, 1979).

197. These courts argue that an investment banker on a contingent fee may no longer be an independent evaluator because it is inclined to skew a fairness opinion in favor of satisfying the directors' interests. See Sandberg v. Virginia Bankshares, Inc., 891 F.2d 1112, 1122 (4th Cir. 1989), rev'd on other grounds, 111 S. Ct. 2749 (1991); In re Appraisal of Shell Oil Co., No. 8080 (Del. Ch. Dec. 11, 1990) (1990 Del. Ch. LEXIS 199, at *88); cf. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 257 (7th Cir. 1986) (describing investment banker as an interested "blocker" of transaction), rev'd on other grounds, 481 U.S. 69, 94 (1987); Terrydale Liquidating Trust v. Barness, 642 F. Supp. 917, 923 (S.D.N.Y. 1986) (citing Dynamics Corp. for appropriately criticizing hiring investment bankers on contingent fee basis); Anderson v. Boothe, 103 F.R.D. 430, 441-42 (D. Minn. 1984) (refusing to dismiss aiding and abetting claim against investment banker because of contingency fee).

Nevertheless, courts generally seem unconcerned about contingent fee arrangements; judicial opinions often fail to mention that a contingent fee was given. See, e.g., Cottle v. Storer Communication, Inc., 849 F.2d 570, 578 (11th Cir. 1988) (no mention of contingent fee along with other transactional fees); Bebchuk & Kahan, supra note 7, at 49 & n.112 (same). Moreover, disclosure of an investment banker's contingent fee may sufficiently notify investors of an investment banker's economic interest in a transaction. See Radol v. Thomas, 534 F. Supp. 1302, 1314-15 (S.D. Ohio 1982).

198. See, e.g., Howing Co. v. Nationwide Corp., 826 F.2d 1470, 1478-79 (6th Cir. 1987) (proxy statement's laundry list of fairness factors considered by investment bankers in rendering their fairness opinion insufficient disclosure of transaction's fairness), cert. denied, 486 U.S. 1059 (1988); Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 275-76 (2d Cir. 1986) (directors cannot rely on fairness opinion that merely states
recognized that corporations must often act on deals quickly, no court has allowed directors to use time constraints as an excuse to forego their fiduciary duties to their shareholders of diligently investigating the fairness of a deal. Again, however, given the numerous variables involved in the valuation process, most courts have recognized that the mere disclosure of the time constraints sufficiently puts the shareholders on notice of possible problems.

3. Duty To Disclose The Bases For The Opinion

Disclosure of the bases for an investment banker's fairness opinion is necessary to avoid fairness opinions that are too conclusory and may protect investment bankers from allegations that they misrepresented their conclusions. The general rule of disclosure is that all material (or "germane") facts must be disclosed. To determine what information a court might find material to rendering a fairness opinion, investment option prices were within range of fair value, particularly when quick appraisal unnecessary). But see Citron v. E.I. Du Pont de Nemours & Co., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) § 95,420, at 97,134 (Del. Ch. June 29, 1990) (allowing directors to rely on an investment banker's financial advice despite lack of "formal opinion placing specific dollar value or range of values" on corporation's stock); Kaplan v. Goldsamt, 380 A.2d 556, 567-68 (Del. Ch. 1977) (allowing directors to confirm their decision to make transaction with two fairness opinions that lacked formality and detail; proxy statement had merely said that both banking firms had approved offer price).


In the absence of time constraints, however, hasty decisions suggest that a board may have breached its fiduciary duty to shareholders. See, e.g., Hanson Trust, 781 F.2d at 275 (paucity of information and swiftness of decision suggested breach of fiduciary duty).

201. See, e.g., EAC Indus., No. 8003, slip op. (Del. Ch. June 28, 1985) (LEXIS, States library, Del file, at 9) (imprvised fairness opinion one factor suggesting that attempted ratification of deal was "mere window dressing"); cf. Edelman v. Fruehauf Corp., 798 F.2d 882, 886 (6th Cir. 1986) (business judgment rule does not protect independent directors' rubber stamping of management's buyout proposal); Hanson Trust, 781 F.2d at 274-75 (directors must make informed decisions).

202. See notes infra 217-18 & 225 and accompanying text.

203. See cases listed in supra note 198.

ment bankers may analogize to cases that have held directors liable for failing to disclose material facts. Examples of material facts that might result in liability if undisclosed include:

a. Information Contradicting The Price's Fairness: additional information that suggested a price given may have inadequately reflected present market value, such as the value of the company's holdings; the magnitude of a corporation's reserves; a corporation's recent quarterly earnings; the riskiness of the debentures offered; the extraordinary increases in a company's inventory and its short-term debt; an insider's report that higher cash price was a good investment; the management's estimate of value; the majority shareholder's authorization prior to a tender offer of open-market purchases of a target company's shares at a price twenty-five percent higher per share; and the lowest price that the stock had traded in five years, when the directors established the premium at this price.

b. Information Concerning Other Influential Transactions: the likelihood of another transaction that would have a financial impact on the subject deal, such as when the directors had information on the status of an impending merger that was likely to affect the company, and when the board claimed that it reviewed the prospective financial conditions of the
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subject company;215

c. Details Of An Investment Banker's Investigation: a reasonably detailed analysis of the investment banker's valuation methods and the weight it attached to each method;216

d. The Cursory Performance Of A Fairness Opinion: it is necessary to disclose that a fairness opinion was done over a long weekend,217 but unnecessary to disclose that investment bankers only had a few days to prepare for their briefing to the board on fairness when they had a month to prepare the written opinion;218

e. Conflicts Of Interest:219 such conflicts have included directors who recommended a merger to shareholders after they already had been selected to the prospective company's board,220 and an investment banker who opined on a deal's fairness while purchasing the subject company's debentures;221

f. Prior Business Relationships Between Investment Bankers And Corporations: these scenarios include an investment banker who rendered a fairness opinion for the target company and was also a long-time director of the purchasing corporation;222 an investment banker who had been the advisor of a corporation for two years before rendering a fairness opinion on a merger involving that corporation;223 and an investment banker who had a prior and continuing advisory relationship with the maker of the tender offer;224

g. The Contingent Nature Of Investment Bankers' Fees: especially when a large portion of the investment banker's fee was contingent upon shareholder approval of the client's interests225—i.e., garnering share-

holder support to achieve or prevent a change in corporate control.

h. The Lack Of Independent Investigations By Investment Bankers: especially when information was supplied solely by an interested board of directors;\textsuperscript{226} and

i. Managements' Limitations On The Scope Of The Investment Bankers' Investigations: directors have limited the scope of information available to an investment banker concerning the value of the company's assets\textsuperscript{227} and the type of buyer that an investment banker may seek when shopping the company.\textsuperscript{228}

On the other hand, the following information need not be disclosed:

(a) simple mathematical calculations or deductions;\textsuperscript{229}

(b) matters of public knowledge,\textsuperscript{230} such as information available in periodicals;\textsuperscript{231}

(c) unquantifiable benefits of transactions,\textsuperscript{232} although courts are split on a general rule for disclosing "soft information";\textsuperscript{233}

\textsuperscript{226} Courts have held that directors mislead shareholders when they failed to disclose that their investment bankers relied on information supplied solely by the directors. See Kohn v. American Metal Climax, Inc., 458 F.2d 255, 268 (3d Cir. 1972), cert. denied, 409 U.S. 874 (1972); Denison Mines Ltd. v. Fibreboard Corp., 388 F. Supp. 812, 821-22 (D. Del. 1974); see also Weinberger v. UOP, Inc., 426 A.2d 1333, 1352 (Del. Ch. 1981) (noting that failure to disclose such information would have resulted in liability), rev'd on other grounds, 457 A.2d 701, 712 (Del. 1983).

\textsuperscript{227} See Dowling v. Narragansett Capital Corp., 735 F. Supp. 1105, 1119 (D.R.I. 1990); see also Joseph v. Shell Oil Co., 482 A.2d 335, 341-42 (Del. Ch. 1984) (holding that directors' failure to disclose tender offeror's withholding from investment banker information about oil reserves was both breach of fiduciary duty and failure to make full disclosure).


\textsuperscript{233} Soft information is "valuation data based upon 'forwardlooking' information or estimates." Weinberger v. Rio Grande Indus., 519 A.2d 116, 126-27 (Del. Ch. 1986).
(d) events occurring after the issuance of a fairness opinion or proxy statement, unless material changes have occurred;\textsuperscript{234}
(e) every approach made by would-be acquirers;\textsuperscript{235}
(f) concerns about takeover attempts;\textsuperscript{236}
(g) faithless motives, unless they “translat[e] into actionable deeds or omissions both objective and external”\textsuperscript{237} and


Some courts reject soft information as unreliable per se. See, e.g., Panter v. Marshall Field & Co., 646 F.2d 271, 292 (7th Cir.) (no duty to disclose financial projections), cert. denied, 454 U.S. 1092 (1981); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1294 (2d Cir. 1973) (no duty to disclose asset appraisals). Other courts, however, require disclosure of calculations that can be made with reasonable certainty. See, e.g., Starkman v. Marathon Oil Co., 772 F.2d 231, 241 (6th Cir. 1985) (no duty to disclose financial forecasts unless they are “substantially certain”), cert. denied, 475 U.S. 1015 (1986); Vaughn v. Teledyne, Inc. 628 F.2d 1214, 1221 (9th Cir. 1980) (no duty to disclose unless estimates made with “reasonable certainty”). Yet other courts adopt a case-by-case approach, refusing to reject soft information per se. See, e.g., Flynn v. Bass Bros. Enter., 44 F.2d 978, 984 (3d Cir. 1984) (asset appraisals not immaterial per se, but rather should be disclosed when potential aid of such information outweighs potential harm of undue reliance); Dowling, 735 F. Supp. at 1118-19 (adopting Flynn’s balancing test); Rio Grande Indus., 519 A.2d at 129-30 (finding that pro forma statements on prospective financial conditions fail Flynn’s balancing test).

In the merger context, the Supreme Court has held that the materiality of information “depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities.” Basic, Inc. v. Levinson, 485 U.S. 224, 250 (1988). Courts should determine materiality in this context on a case-by-case basis. See id.

Soft information must be disclosed if it is curative: management has made partial or erroneous disclosures whose accuracy depends upon further disclosure of soft information. See, e.g., Dowling, 735 F. Supp. at 1119 (directors disclosed information on the value of company holdings, but failed to divulge further information showing higher value for holdings).


235. See Panter, 646 F.2d at 296.


Regardless of which assumptions and valuation methods the investment banker ultimately chooses when opining on fairness, the above cases suggest that an investment banker may avoid liability by thoroughly disclosing the suppositions and techniques on which its opinion is based, especially its material assumptions. At times, full disclosure may be difficult, if not impossible, as the valuation may involve material non-public information, such as an investment banker’s trade secrets or information that would endanger a corporation if publicly disclosed. The above lists do suggest, however, that the more thorough the investment banker’s investigation and disclosure, the less likely a court finding of negligent misrepresentation liability. It may seem unjust that an investment banker might avoid liability for a shabby investigation of a company or a poor analysis of the relevant factors simply by disclosing these conditions within the fairness opinion. Given the complexity of the valuation process and the time constraints of corporate control transactions, however, this leeway may be a necessary evil in the context of these extraordinary deals. Courts, however, should hold bankers liable for the financial harm that arises from the reasonable reliance on a negligently prepared fairness opinion by an intended recipient of the opinion when neither the complexities of the valuation process nor the time constraints so often associated with corporate control transactions are at issue.

CONCLUSION

Investment bankers owe third-party shareholders a duty of reasonable care in preparing fairness opinions. Courts, however, should limit the scope of this duty to correlate to the risks investment bankers foresee and assume during fee negotiations. This approach would appropriately balance the need to account for investment bankers’ current role in the financial world with the need to shield them from liability that unreasonably surpasses the bounds of their actual undertaking. Finally, in the absence of clear judicial or industry guidelines, investment bankers can draw the best guidance on the standard of care that they owe third-party shareholders from cases that have measured whether fairness opinions and proxy statements were sufficiently detailed to warrant a board’s reliance upon them.

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239. For a discussion of the variables inherent in the valuation process and the techniques available to the investment banker, see supra notes 33-39 and accompanying text.