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The Changing Odds of the Chancery Lottery

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Delaware is home to the majority of shareholder class action litigations related to mergers and acquisitions (M&A). These cases usually result in settlements that provide shareholders with only disclosure in exchange for a broad release of future claims, which encompasses unknown and federal security claims. The Delaware Court of Chancery must review and approve these settlements under Delaware Rule 23(e), which has been interpreted as creating a fiduciary duty for the court to protect the interests of absent shareholders. Nevertheless, Delaware has a history of routinely approving disclosure-only settlements with laxity. Recently, members of the court have begun discussing the issues with this process and, in some cases, have begun rejecting settlements that were previously likely to be approved. This active discussion, combined with the discretion given to the individual members of the court to make their own business judgment, has resulted in each developing their own method of reviewing disclosure-only settlements and applying their fiduciary duty.

After developing a backdrop of the prototypical M&A case and the rules that define the court's role, this Note reviews recent decisions of each member of the court in order to understand their individual method of reviewing settlements and how they apply their duty to shareholders in this process. This Note then identifies the interest group theory as a potential explanation for the external factors that may influence the court's diverging methodologies. This Note concludes that in order to create a more consistent standard that fully applies the court's fiduciary duty to shareholders, the Court of Chancery should (1) adopt a new materiality standard based on the merits of the case at filing, and (2) limit approval to settlements that have releases that are proportional to the relief provided to shareholders.

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INTRODUCTION

A recent study has revealed that 94.9 percent of merger and acquisition (M&A) transactions over $100 million are challenged in shareholder litigation.[1] The similarity between so many of these cases makes this statistic troubling, particularly because it indicates that M&A litigation has become routine, regardless of actual merit. Historically, a large majority of M&A lawsuits have been class actions filed in Delaware.[2] The cases often result in settlement, with the only relief to shareholders being supplemental disclosures in exchange for a broad release of their future claims.[3] This

1. Matthew D. Cain & Steven Davidoff Solomon, Takeover Litigation in 2014, at 1–2 (Feb. 20, 2015) (unpublished manuscript), http://ssrn.com/abstract=2567902 (indicating that 94.9 percent of deals in 2014 over $100 million were challenged through litigation, each triggering an average of four lawsuits) [perma.cc/MDT6-3H98].

2. Due to the large number of corporations that take advantage of Delaware's incorporation benefits, Delaware is the most popular destination for M&A lawsuits. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 484 (1987).

3. Jill E. Fisch et al., *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 559 (2015).

broad release prevents future litigation against the defendant company related to the same merger.[4] Although judicial approval of class action settlements is statutorily imposed and is meant to safeguard absent shareholders' interests during the settlement process, it does not always achieve this purpose.[5] Delaware has a history of routinely approving M&A settlements while using a low level of scrutiny in review that does not always line up with the court's "gatekeeper" duty.[6] The standard of materiality for reviewing supplemental disclosures gradually became so relaxed that even information that was considered of only minor benefit was being approved, and releases began reaching global breadths.[7] By mid-2015, the Delaware Court of Chancery began to reassess this practice.[8] Members of the court began making their concerns about the previous review process known, and media reports began spinning the court's recognition into a story that showed the end of routine approvals.[9]

The Delaware Court of Chancery is a unique institution with an important role in corporate law.[10] This "specialized trial court," which "sits without a jury," is comprised of judges who are appointed through a

4. 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 13.31, at 13-148 n.683 (3d ed. 2015).

5. *See* 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 13:40 (5th ed. 2015) (describing the difficulties that courts face in reviewing class action settlements, despite having a fiduciary duty to absent class members during settlement to protect those class members' rights).

6. *See* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 381, 389–402 (2011) (referring to the fiduciary-like role of the judge in settlement approval as being a "gatekeeper").

7. *See, e.g.*, Transcript of Settlement Hearing at 51–52, *In re* Carefusion Corp. Stockholders Litig., No. 10214-VCN (Del. Ch. Sept. 17, 2015) [hereinafter Transcript of Settlement Hearing, *Carefusion*] (describing the "helpful and perhaps clarifying" disclosures as a basis for approving the settlements); Transcript of Settlement Hearing at 42, Assad v. World Energy Sols., Inc., No. 10324-CB (Del. Ch. Aug. 20, 2015) [hereinafter Transcript of Settlement Hearing, *Assad*] (approving a settlement with a global release based on it being consistent with how the court handled similar consideration in the past).

8. *See infra* Part III.A–C.

9. *See, e.g.*, *Delaware Court of Chancery Signals Stricter Approach to Approving Settlements in M&A Deals*, PRAC. L. CORP. & SEC. (Jul. 22, 2015), http://us.practicallaw.com/w-000-4790?source=relatedcontent [perma.cc/4UQ4-2CMA]; Daniel Fisher, *Delaware Judge Tells Plaintiff Lawyers: The M&A 'Deal Tax' Game Is Over*, FORBES (Sept. 18, 2015), http://www.forbes.com/sites/danielfisher/2015/09/18/delaware-judge-tells-plaintiff-lawyers-the-ma-deal-tax-game-is-over [perma.cc/HB3Y-CMH5]; William Foley Jr. et al., *The Rise & Rise of M&A Litigation*, LAWFUEL (Sept. 30, 2015), http://www.lawfuel.com/the-rise-rise-of-ma-litigation [perma.cc/GSL6-NQMS]; Kevin LaCroix, *The Beginning of the End of the Merger Objection Lawsuit Curse?*, D&O DIARY (July 16, 2015), http://www.dandodiary.com/2015/07/articles/shareholders-derivative-litigation/the-beginning-of-the-end-of-the-merger-objection-lawsuit-curse [perma.cc/B8M5-YPFT].

10. The Delaware Court of Chancery is the self proclaimed "preeminent forum for the determination of disputes involving the internal affairs of . . . thousands of Delaware corporations . . . through which a vast amount of the world's commercial affairs is conducted[, with a] unique competence in and exposure to issues of business law [that] are unmatched." *Welcome to the Court of Chancery of the State of Delaware*, DEL. ST. CTS., http://courts.delaware.gov/chancery (last visited Mar. 27, 2016) [perma.cc/8GE8-PF4J].

nonpolitical process.[11] The court is known for its "sufficiently uncrowded docket" that permits expeditious resolution of urgent cases.[12] The common law focus of the development of Delaware law gives the Court of Chancery the unique power to play a central role in developing Delaware's corporate law.[13] This style also increases the likelihood that decisions will be made based on "the prevailing judicial attitude" of each individual member of the court, creating uncertainty as to the court's decision at the time of filing and depending largely on who is assigned the case.[14] Each chancellor has their own concerns and their own way of applying these concerns when reviewing cases and making their ultimate decisions.[15] These divergent methodologies have resulted in shifting odds for those seeking settlement approval, based solely on who is assigned to the docket.[16] While some judges use a high level of scrutiny to assess settlements, thereby ensuring the protection of absent shareholders and preventing unfair settlements, others continue to approve settlements that they recognize as being of little value to shareholders.

This Note analyzes the Delaware Court of Chancery's practices for reviewing disclosure-only settlements in light of the court's duties and other factors that may influence their decision making. This Note proposes that the court establish a firmer standard with consistent application by all members of the court in order to minimize frivolous M&A lawsuits. Part I discusses the standard practices of M&A litigation and the court's role in this process. Part II reviews a number of recent Delaware Court of Chancery decisions, identifying the different methods used by each chancellor in approving or rejecting settlements and how this complies with that chancellor's statutory duty as a fiduciary to the class. Part III identifies a theory that explains the external factors that impact chancellor methodologies and how this results in divergent decisions from different members of the court. Based on this analysis, Part IV argues that a new materiality standard should be adopted where settlement consideration is only deemed material when the claims were meritorious at filing. Furthermore, Part IV argues that the court should only approve releases that are proportional to the relief granted.

I. THE ROLE OF THE COURT IN SHAREHOLDER LITIGATION

There is a prototypical process of filing and pursuing M&A litigation in Delaware that is controlled by the Delaware Court of Chancery. The rules that allow for this litigation also require that the court review the

11. Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1760 (2006) (describing the unique features of the Delaware Court of Chancery).

12. *Id.*

13. *Id.* at 1761.

14. *Id.* Hamermesh describes the court as "embrac[ing] a traditional, reactive model of judge-centered lawmaking." *Id.* at 1771 (quoting Marcel Kahan & Edward Rock, *Symbolic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1618 (2005)).

15. *See infra* Part II.A–D.

16. *See infra* Part II.

settlements that it typically produces. This part describes this process and the law that guides it. Part I.A discusses the underpinnings of disclosure-only settlements. Part I.A also describes the legal basis for these settlements and what a typical settlement looks like from agreement to approval. Part I.B explains Delaware Rule 23(e), which establishes judicial review, and how and why it has been interpreted to establish an additional duty to protect shareholder interests.

A. The Classic Game of M&A Shareholder Litigation

When an M&A transaction is announced, there are two remedies for shareholders who are displeased with the transaction: appraisal suits and shareholder class actions.[17] When shareholders sue for appraisal, they are suing to have the value of their shares appraised by the court, with hope that the shares are valued higher than the transaction price, in order to receive a damage award for the difference.[18] Appraisal actions are usually only worthwhile for institutional investors and other shareholders who have large enough blocks of shares that the litigation costs are lower than the potential damages.[19] For all other shareholders, however, there is the option of collective action.[20] While shareholder class actions cannot be brought for financial damages, they can be brought for injunctive relief.[21] Generally, these suits are brought on claims that the company's board of directors has breached its fiduciary duty by pursuing or agreeing to the merger[22] and are filed seeking a temporary or permanent injunction to stop the deal from being completed.[23] The court allows this type of M&A litigation in order to ensure that shareholders get the most out of their final opportunity to receive the "best value reasonably available" for their shares.[24] By

17. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 9.37; *see also* Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 832 (2014) (considering appraisal a "parallel remedy" to shareholder class actions).

18. *See* Korsmo & Myers, *supra* note 17, at 859; Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. ON LEGIS. 79, 91 (1995) (explaining that shareholders receive the fair value of their stock as damages in an appraisal action).

19. *See* Korsmo & Myers, *supra* note 17, at 838 (explaining that an individual shareholder's holding is often too small to make the potential recovery worth enough to justify the costs of pursuing an action individually); Alix Partners, *M&A Litigation: The Upswing in Appraisal Rights Actions*, INSIGHT: FIN. ADVISORY SERVS., May 2014, at 1, http://www.alixpartners.com/en/LinkClick.aspx?fileticket=uGkRP24IJ2A%3d&tabid=635 (describing the types of shareholders who bring appraisal actions as "institutional investors such as hedge funds and other large investors") [perma.cc/G7Q3-HZ9E].

20. *See* Korsmo & Myers, *supra* note 17, at 832–33 (describing the two types of shareholder actions in M&A as fiduciary class actions and appraisal actions).

21. *See* Fisch et al., *supra* note 3, at 565.

22. *See id.* at 563–64.

23. *Id.* at 565.

24. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 50 (Del. 1994).

providing shareholders with the opportunity to stop the transaction, the court's interests cannot be overlooked.[25]

It is common knowledge that courts favor settlement as a matter of public policy.[26] This is no different in M&A litigation. Initially, the court began approving settlements that include minimal consideration for shareholders in M&A class actions in order to allow defendants an alternative to costly litigation.[27] This choice, however, resulted in a proliferation of M&A litigation.[28] This proliferation has resulted in M&A shareholder litigation being commonly considered a side effect of M&A activity,[29] or a "deal tax."[30]

There is a standardized process that many M&A lawsuits follow, from filing to settlement.[31] There is a subset of plaintiffs' attorneys who solicit clients through press releases and other advertising or through "standing arrangements with shareholder clients."[32] Their chosen shareholder must be representative of the class, which normally is made up of all current shareholders at the time of filing.[33] Once the attorney finds a shareholder who is willing to become the representative, she files a complaint that alleges that the directors have breached their fiduciary duty to shareholders by supporting the transaction.[34] Initial complaints commonly contain little detail about the case at hand, as they are commonly filed within only a few days of the companies announcing the transaction, before any proxy

25. *See id.* at 42 (describing the court's role as protecting shareholders from unwarranted inference with their rights).

26. *See In re* Trulia, Inc. Stockholder Litig., No. 10020-CB, 2016 WL 325008, at *4 (Del. Ch. Jan. 22, 2016) ("Delaware has long favored the voluntary settlement of litigation . . . .").

27. *See* Transcript of Settlement Hearing at 63–64, Acevedo v. Aeroflex Holding Corp., No. 7930-VCL (Del. Ch. July 8, 2015) [hereinafter Transcript of Settlement Hearing, *Aeroflex*] (describing the previous rationale for approving settlements as out of sympathy for defendants); Solomon v. Pathe Commc'ns Corp., No. 12563, 1995 WL 250374, at *4 (Del. Ch. Apr. 21, 1995) (explaining that "economical rational defendants" are willing to settle claims "for a peppercorn and a fee" because it is difficult to survive a motion to dismiss), *aff'd*, 672 A.2d 35 (Del. 1996).

28. Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 64.

29. *See* Fisch et al., *supra* note 3, at 559–60.

30. *See, e.g.*, Fisher, *supra* note 9 (describing the tactic of combining "deal tax" and "deal insurance" as occurring when lawyers tax companies with their fees in exchange for selling them deal insurance "in the form of a global release of future claims that might otherwise hinder their deal"); *see also Trulia*, 2016 WL 325008, at *6 (describing the release in a settlement as "deal insurance").

31. *See* Fisch et al., *supra* note 3, at 559 (describing the M&A litigation process that results in disclosure-only settlement).

32. Korsmo & Myers, *supra* note 17, at 857.

33. It is common for complaints to define the class as "shareholder[s] of [the company] during all relevant times hereto." *See, e.g.*, Complaint at 4, Aich v. McCarthy, No. 11133-VCN, 2015 WL 3936348 (Del. Ch. June 17, 2015) [hereinafter Complaint, *Aich*]; Complaint at 3, Scott v. Humana, Inc., No. 11323-VCL (Del. Ch. July 22, 2015); Complaint at 3, *In re* HCC Insurance Holdings Inc. Stockholder Litig., No. 11159-CB, 2015 WL 4576497 (Del. Ch. July 24, 2015).

34. Fisch et al., *supra* note 3, at 563–64; *see also Trulia*, 2016 WL 325008, at *5 (describing the "flurry of class action lawsuits [that are filed] alleging that the [company] directors [have] breached their fiduciary duties by agreeing to sell the corporation for an unfair price").

statement is filed with the Security and Exchange Commission[35] (SEC). The complaints are often amended once the proxy statement is released to include a broader list of claims, but these claims often only focus on disclosure issues.[36] The disclosure claims usually allege that there is misleading or omitted information in the proxy statement that is material to shareholders in making the decision of whether to vote for the transaction.[37]

There is a short time frame between filing and settlement in the prototypical merger class action.[38] To speed up the litigation process, the parties usually expedite discovery.[39] Sometimes this is done through filing a motion asking the court to grant an expedited process, but other times the parties agree to expedite amongst themselves.[40] Although the next step is to have a hearing for a temporary injunction against the merger, settlement commonly occurs before this happens.[41]

The result of this process is commonly a settlement with therapeutic relief for the plaintiff class.[42] Therapeutic relief in this kind of settlement takes two forms: revisions to the terms of the merger agreement and additional disclosures.[43] It is most common today that settlements include only additional disclosure in the proxy statement, establishing the term "'disclosure-only' settlements."[44] As consideration for these settlements,

35. Ann Woolner et al., *Merger Suits Often Mean Cash for Lawyers, Zero for Investors*, BLOOMBERG (Feb. 16, 2012), http://www.bloomberg.com/news/articles/2012-02-16/lawyers-cash-in-while-investor-clients-get-nothing-in-merger-lawsuit-deals (noting that the median interval period for when complaints are filed after announcement is eight days, but in some cases attorneys file complaints the next day) [perma.cc/STN6-N9RU]. A proxy statement is a public disclosure that is required by the SEC in Rule 14a-3(a) under the Securities Exchange Act of 1934 and is published prior to the shareholder vote. 17 C.F.R. § 240.14a-3 (2012). The proxy statement describes the transaction and contains all facts that are likely to influence shareholders when they vote upon the merger proposal. Ferdinand S. Tinio, Annotation, *Sufficiency, Under § 14 of Securities Exchange Act of 1934 (15 U.S.C.A. § 78n) and Implementing Regulations, of Proxy or Information Statement Incident to Merger of Corporation*, 4 A.L.R. Fed. 1021 (2015).

36. *See, e.g.*, Complaint, *Aich*, *supra* note 33.

37. *See, e.g.*, Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1172 (Del. 2000) (alleging a number of claims that relate to omitted information in the proxy statement); Complaint, *Aich*, *supra* note 33, at 2 (making claims of omission in the registration statement); Complaint at 2, Phillips v. Amylin Pharm., Inc., No. 7673-CS, 2012 WL 2936805 (Del. Ch. July 12, 2012) (making claims of omission in the registration statement).

38. *See In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1067 (Del. Ch. 2015) (describing "routine disclosure-only settlements, [that are] entered into quickly after ritualized quasi-litigation").

39. *See* Fisch et al., *supra* note 3, at 565.

40. *See* Transcript of Settlement Hearing, *Assad*, *supra* note 7, at 38 (comparing the process of self-expedition to the process of filing for a motion to expedite).

41. *See* Korsmo & Myers, *supra* note 17, at 832 (indicating that some plaintiffs' attorneys seek quick settlement that provides generous attorney's fees instead of aggressively litigating meritorious actions).

42. *See* K. Tyler O'Connell et al., *Reducing the "Deal Tax": Delaware's Recent Scrutiny of Nonmonetary Settlements*, BUS. L. TODAY (Oct. 2015), http://www.americanbar.org/publications/blt/2015/10/01_oconnell.html (describing the common types of relief offered in M&A class action settlements as therapeutic in nature) [perma.cc/E8SC-A8MX].

43. *See* Fisch et al., *supra* note 3, at 566.

44. *Id.* at 566–67; *see also* Gordon v. Verizon Commc'ns, Inc., No. 653084/13, 2014 WL 7250212, at *2 (N.Y. Sup. Ct. Dec. 19, 2014), *aff'd*, 2015 WL 4610912 (N.Y. Sup. Ct.

the plaintiffs are asked to sign a release of future litigation claims against the defendants,[45] with the purpose of preventing the defendants from having to relitigate the same issues that they are settling again in another case.[46] Despite this purpose, the extent of the release is rarely limited to the information that was disclosed in the settlement, but instead covers a wide breadth of potential claims.[47] The release usually covers all potential shareholder claims related to the M&A transaction, including those that are unknown at the time of settlement and federal securities claims.[48] The release takes an all-encompassing form that has been labeled "intergalactic" by Chief Justice Leo Strine.[49]

When two parties come to a settlement agreement, they file two documents with the court: a memorandum of understanding, which explains the basic terms of the settlement, and a joint stipulation of settlement, which submits the final terms for approval.[50] A settlement hearing also is scheduled.[51] At this hearing, the court reviews the settlement agreement and determines whether it should be approved or rejected.[52] The court uses its own business judgment to assess whether the settlement consideration is fair, adequate, and reasonable.[53] The court looks to the "give" and the "get,"[54] and the parties must attempt to persuade

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July 31, 2015) (describing a disclosure-only settlement as a "settlement relating to a negotiated acquisition involving remedial disclosure").

45. *See Gordon*, 2014 WL 7250212, at *2, *8 (describing settlements that result in global releases in exchange for supplemental disclosures); Fisch et al., *supra* note 3, at 562 (describing releases as the goal of generating supplemental disclosures).

46. Nottingham Partners v. Dana, 564 A.2d 1089, 1106 (Del. 1989) (stating that a release is meant to "achieve a comprehensive settlement" and to "prevent relitigation of settled questions [that are] at the core of a class action" (quoting TBK Partners, Ltd. v. W. Union Corp., 675 F.2d 456, 460 (2d Cir. 1982))).

47. O'Connell et al., *supra* note 42 (describing the release that defendants receive as global, which means it covers "all possible claims, known or unknown, whether or not suspected or matured, arising under any law (state or federal)" which relate to the facts and issues leading up to the merger, the merger itself, or any allegations in the complaint).

48. *See id.*; Transcript of Settlement Hearing, *Assad*, *supra* note 7, at 41 (stating that unknown and securities claims have been routinely included in the release in approved settlements).

49. Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 15 (referring to Chief Justice Strine's use of the term "intergalactic" to describe a global release).

50. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31 (describing the memorandum of understanding as a document providing the basic terms of the settlement and the stipulation of settlement as including the essential terms of the agreement, such as the scope of the release and the amount of settlement consideration).

51. *See* Fisch et al., *supra* note 3, at 568 (describing the settlement hearing as where the court approves the certification of the class, assesses if the settlement is fair and reasonable, and determines the amount of fees for the plaintiffs' counsel).

52. *See id.* at 568–72; *see also infra* Part I.B.

53. *In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1063 n.26 (Del. Ch. 2015) (listing a collection of cases that describe the standard); 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31 (stating that the court only investigates whether the settlement should be approved as fair based on the existing circumstances); Sale, *supra* note 6, at 391 ("[J]udges must determine that the proposal is 'fair, reasonable, and adequate.'" (quoting FED R. CIV. P. 23(e))).

54. *Activision Blizzard*, 124 A.3d at 1043; Transcript of Settlement Hearing at 32, Haverhill Retirement Sys. v. Asali, No. 9474-VCL (Del. Ch. June 8, 2015) [hereinafter

the court that the supplemental disclosures are material.[55] The court has previously considered disclosures material when "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote, [or] if, from the perspective of a reasonable stockholder, there is a substantial likelihood that it 'significantly alter[s] the 'total mix' of information made available.'"[56] The court also can utilize a more general review of materiality. In *Chrysler Corp. v. Dann*,[57] the Delaware Supreme Court held that claims are required to have merit at the time the suit is filed.[58] The court declared that "[a] claim is meritorious within the meaning of the rule if it can withstand a motion to dismiss on the pleadings if, at the same time, the plaintiff possesses knowledge of provable facts which hold out some reasonable likelihood of ultimate success."[59] While this merit requirement still remains active precedent, it is at times only limited to derivative suits[60] and is only sometimes applied in M&A class action settlement rulings.[61]

Although chancellors do not have the power to edit or redraft settlement agreements, they do have the power to reject them.[62] In rejecting settlement agreements, chancellors can explain why they chose to do so and thereby establish a template for what they would have approved or what the court would likely view favorably in the future.[63] The chancellors are also able to require parties to provide the court with more information before making a decision[64] and can scrutinize fees and fee arrangements.[65] All of

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Transcript of Settlement Hearing, *Haverhill*] (finding the most important factor that must be weighed in determining if a settlement would be approved as the "comparison of the get with the give").

55. *See* Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 70–71 (discussing the importance of matching "the types of claims and relief and the scope of the release").

56. *In re* Family Dollar Stores, Inc. Stockholder Litig., No. 9985-CB, 2014 WL 7246436, at *19 (Del. Ch. Dec. 19, 2014) (citations omitted).

57. 223 A.2d 384 (Del. 1966).

58. *Id.* at 388. Although *Chrysler* actually applied the meritorious-when-filed test to the fee award calculation process, the court extended this test to settlement review in its subsequent ruling in *Hoffman v. Dann*, 205 A.2d 343, 352 (Del. 1964) (considering a settlement based on a nonmeritorious claim "nothing more than a buying-off of the plaintiffs for the dismissal of worthless claims").

59. *Chrysler*, 223 A.2d at 387.

60. *See, e.g.*, *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 635 (Del. Ch. 2005).

61. *See, e.g.*, Transcript of Settlement Hearing at 59, *In re* Aruba Networks, Inc. Stockholder Litig., No. 10765-VCL (Del. Ch. Oct. 9, 2015) [hereinafter Transcript of Settlement Hearing, *Aruba Networks*] (applying the meritorious-when-filed standard).

62. Sale, *supra* note 6, at 402.

63. *See id.* at 402–03, 410 (explaining that judges can use rejection as a tool to establish templates for "better settlement terms and processes"); *see, e.g.*, Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 73–75 (rejecting the settlement but providing the parties with three options of how to proceed, two of which involved returning to the court with a revised agreement that was within the scope of what he would approve).

64. Sale, *supra* note 6, at 403–04; *see, e.g.*, Transcript of Settlement Hearing at 42–43, *In re* Trulia, Inc. Stockholders Litig., No. 10020-CB (Del. Ch. Sept. 16, 2015) [hereinafter Transcript of Settlement Hearing, *Trulia*] (requesting additional briefing by the parties before making a decision because the Vice Chancellor did not feel comfortable "approving the settlement on the spot").

these means of control allow judges to improve the process and outcomes of future proposals both in the specific case and in future cases in order to better serve the interests of shareholders.[66]

If the settlement is rejected, the parties can go back and revise their agreement or can voluntarily dismiss the claim with prejudice.[67] If it is approved, the court will certify the class of shareholders and will enter the settlement as an order of the court, which makes the release of claims valid in all U.S. jurisdictions.[68] Additionally, the court will award the plaintiffs' attorneys legal fees, which are paid for by the defendants, in addition to their own legal fees, which are based on the benefit that the plaintiffs were granted in the settlement.[69] At the hearing for approval, objectors are permitted to voice their concerns about the settlement.[70] This is not common, however, due to the passive nature of shareholders.[71]

Disclosure-only settlements were initially allowed on the theory that they provide some kind of value to the shareholders, who take the disclosures into consideration before making their decision to vote for or against a merger.[72] One study has recently shown, however, that the resulting disclosures have no impact on the shareholder vote.[73] This study highlights a problem that is exacerbated by the proliferation of M&A litigation and has resulted in skepticism by both scholars and the courts about these class action settlements. This also has resulted in certain members of the court reassessing the scrutiny that they use to review and, even in some cases reject, settlements.[74]

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65. Sale, *supra* note 6, at 410; *see, e.g.*, *In re* Riverbed Tech. Inc. Stockholders Litig., No. 10484-VCG, 2015 WL 5458041, at *6–7 (Del. Ch. Sept. 17, 2015) (reducing the plaintiffs' fee award from what was requested based on the inadequacy of the consideration that was exchanged for the broad release).

66. *See* Sale, *supra* note 6, at 402–04 (describing the powers that judges have to impact the future of the case and other future cases through their rejection power).

67. *See, e.g.*, Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 76 (offering the parties the option of a dismissal where they receive mootness fees); Transcript of Settlement Hearing, *Haverhill*, *supra* note 54, at 41 (offering the parties the option of a dismissal where they receive mootness fees).

68. Fisch et al., *supra* note 3, at 568 n.58 (explaining that the Full Faith and Credit Clause extends this release to all other jurisdictions); O'Connell et al., *supra* note 42 (quoting Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) (describing releases as having "'full faith and credit' in other jurisdictions")).

69. Fisch et al., *supra* note 3, at 560. The value of attorneys' fees has skyrocketed in recent years. Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 64–65 (describing how fees have climbed in recent years and how this has resulted in claims that should be litigated being happily settled for "a peppercorn and a fee").

70. 4 RUBENSTEIN, *supra* note 5, § 13:40 (describing objectors as parties who provide the court with "an adversarial presentation of the issues under review").

71. William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1449 (2006).

72. Fisch et al., *supra* note 3, at 585 (describing the value that the court recognizes in supplemental disclosures and other nonpecuniary relief).

73. *Id.*

74. *See, e.g.*, Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61; Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27; Transcript of Settlement Hearing, *Haverhill*, *supra* note 54.

B. Rule 23(e): The Judge's Fiduciary Role

The federal and Delaware courts have both established procedures that allow for this class action litigation dance in Rule 23.[75] In both the Federal Rules of Civil Procedure and the Delaware Court of Chancery rules, there is a Rule 23, which contains similar content.[76] Rule 23(e) requires judicial approval for any class action settlement.[77] Both courts and legal scholars have interpreted judicial approval as creating a more active "fiduciary-like role" for the court.[78] This "gatekeeper" role[79] charges the judges with the responsibility to safeguard the interests of absent class members.[80] In order to pass this approval stage, the settling parties have a burden to "demonstrate that the proposed settlement is a fair compromise."[81]

This judicial role is distinct for class actions and is peculiar when compared to the "neutral arbiter" role that a judge usually plays between two adversaries.[82] This unique role is deemed necessary by the unusual circumstances that surround a class action settlement. While in a regular hearing two adversaries present facts to the court, in a class action settlement hearing the facts are instead presented by two parties who have settled their differences and are working toward a common goal of

75. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31. *See generally* 4 RUBENSTEIN, *supra* note 5, § 13:40 (describing the procedures of class action settlements and the outcomes of the settlements).

76. *See* FED. R. CIV. P. 23; DEL. CH. CT. R. 23.

77. *See* FED. R. CIV. P. 23(e); DEL. CH. CT. R. 23(e).

78. *See, e.g.*, Mirfasihi v. Fleet Mortg. Corp., 450 F.3d 745, 748 (7th Cir. 2006) ("[T]he district court judge functions as 'a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.'" (quoting Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002))); Transcript of Settlement Hearing, *Haverhill*, *supra* note 54, at 31 ("The court is supposed to act in a fiduciary capacity."); *see also* Sale, *supra* note 6, at 390 (stating that both the federal and Delaware Rule 23(e) assign the judges an active role in settlements); Gregory W. Werkheiser, *Delaware's New Mandate in Class Action Settlements: Expanding the Scope and Intensity of Settlement Review*, 20 DEL. J. CORP. L. 496, 496 (1995) ("Chancery court Rule 23[ ] provides for a more active judicial role in the resolution of class actions.").

79. *See* Sale, *supra* note 6, at 389–91 (describing how the role of a judge relates to that of a gatekeeper).

80. *See In re* Amsted Indus., Inc. Litig., 521 A.2d 1104, 1107 (Del. Ch. 1986) ("[T]he court's function in the setting of a hearing on the fairness of a settlement is to protect the interests of absent class members."); 15A C.J.S. *Compromise & Settlement* § 28 (2015) (stating that judicial approval is meant "to protect all unnamed class members from unjust or unfair settlements"); 4 RUBENSTEIN, *supra* note 5, § 13:40 ("The settlement process aims to ensure that the interests of these absent class members are safeguarded."); Rubenstein, *supra* note 71, at 1468 (describing the court's role in understanding how the terms of the settlement affect the shareholders); Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements* 38 (N.Y. Univ. Law & Econs. Research, Working Paper No. 07-34, 2007), http://ssrn.com/abstract=1017266 (considering the court to be the best safeguard of the class's interests against class counsel agency) [perma.cc/W4NH-KASC].

81. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31 (quoting *In re* FLS Holdings, Inc. S'holders Litig., No. Civ. A. 12623, 1993 WL 104562, at *1 (Del. Ch. Apr. 2, 1993)).

82. 4 RUBENSTEIN, *supra* note 5, § 13:40.

approval.[83] This creates an informational asymmetry[84] and the risk of agency problems.[85]

The informational asymmetry is unique compared to what is typical of a court proceeding. Normally, the two parties facing each other in an adversarial hearing are inclined to each serve as a check for the information provided by the other in order to win the case.[86] In a settlement hearing, however, the two parties' interests are aligned, and therefore there is no incentive to clarify or question each other's information.[87] Unless an objector to the settlement chooses to appear, it is difficult for judges to obtain the same type of objective criteria that is provided in an adversarial hearing to assess the value of the settlement.[88] Judges are therefore charged with determining the value of the facts that the parties present when evaluating the merits of the settlement.[89] Often they must still rely in part on "the good faith of the representative party and . . . their competence" despite this informational asymmetry.[90]

The agency costs associated with representative litigation worsen the informational asymmetry in settlement hearings. In representative litigation, there is a general lack of monitoring of attorneys by class members, including the representative shareholder, because these shareholders typically have only a small stake in the company and therefore do not feel inclined to put their resources into the case.[91] The lack of

83. *See id.* (noting that judicial approval is a nonadversarial process because "prior competing parties . . . have resolved their differences and are now in harmony in seeking the court's approval").

84. *See* Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 41–42 (stating that the judge "operat[es] in an informational vacuum" during the settlement hearing); Rubenstein, *supra* note 71, at 1445 (describing the "remarkable informational deficit" that judges face in the fairness hearing).

85. *See In re* Riverbed Tech. Inc. Stockholders Litig., No. 10484-VCG, 2015 WL 5458041, at *1, *3 (Del. Ch. Sept. 17, 2015) (describing the types of agency problems that are present in representative litigation); Sale, *supra* note 6, at 380, 384, 390 (describing the causes of agency problems and judges' roles in adjusting for and counteracting them). *See generally* 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31 (discussing the agency problems in class action settlements).

86. *See* Werkheiser, *supra* note 78, at 521 (describing the typical adversarial relationship between parties).

87. *See id.* (describing a settlement as a relationship "where former opponents are working together to secure approval of a settlement"); *In re* Trulia, Inc. Stockholder Litig., No. 10020-CB, 2016 WL 325008, at *6 (Del. Ch. Jan. 22, 2016) (describing the litigation for M&A settlements as having a "non-adversarial character" that rarely contains opposing viewpoints).

88. Rubenstein, *supra* note 71, at 1444.

89. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31; *see Trulia*, 2016 WL 325008, at *7 (explaining that the lack of adversarial process requires the court to act as "a forensic examiner of proxy materials [in order to] play devil's advocate in probing the value [given to] stockholders" in the settlement); *see also In re* Amsted Indus., Inc. Litig., 521 A.2d 1104, 1107–08 (Del. Ch. 1986) (describing how the court evaluates a settlement).

90. *Amsted Indus.*, 521 A.2d at 1107–08; 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31.

91. *See* Rubenstein, *supra* note 71, at 1442 (explaining that class representatives generally are not supposed to appear or monitor their counsel); Sale, *supra* note 6, at 384 (describing the shareholders stake as too small to justify regularly monitoring their counsel).

monitoring further increases the chances of the plaintiff and defense counsel working together.[92] If the plaintiffs' attorney begins working for his or herself instead of the class, the agreed upon settlement is likely to include less benefit for the class than a settlement would otherwise in exchange for financial benefits that flow directly to that attorney.[93] The combination of these agency costs and the informational asymmetry, which can plague class action settlements, makes the judicial approval rule significant and necessary to ensure the protection of the shareholders.

II. THE CHANCERY LOTTERY: VARYING OPINIONS WITHIN THE JUDICIARY

There has recently been a surge of discussion about the future of disclosure-only settlements in Delaware.[94] This was sparked by a number of recent decisions in both Delaware and other jurisdictions, where the court has shown a higher level of scrutiny on disclosure value and release breadth than in previous cases.[95] Some experts have considered this indicative of a wave of change.[96] Despite these signs of change and the candid critiques of the process by many members of the Court of Chancery, many settlements that do not provide cognizable benefit to shareholders are nevertheless approved.[97] This part reviews a series of recent settlement decisions made in Delaware. Part II.A through II.E reviews the decisions of each chancellor in the Court of Chancery to identify the method of review that has been used by that chancellor.[98] Part II.F analyzes the different amounts of scrutiny used by the chancellors and how this aligns with their duty to shareholders.

92. Werkheiser, *supra* note 78, at 496–97 (describing the inherent dangers of representative litigation, including collusion between the parties in settlement).

93. 1 BALOTTI & FINKELSTEIN, *supra* note 4, § 13.31.

94. *See supra* note 9 and accompanying text.

95. For examples of Delaware actions where a high level of scrutiny is used, see generally Transcript of Settlement Hearing, *In re* TW Telecom, Inc. Stockholders Litig., No. 9845-CB (Del. Ch. Sept. 17, 2015) [hereinafter Transcript of Settlement Hearing, *TW Telecom*]; *In re* Riverbed Tech. Inc. Stockholders Litig., No. 10484-VCG, 2015 WL 5458041 (Del. Ch. Sept. 17, 2015); Transcript of Settlement Hearing, *Trulia*, *supra* note 64; Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27; Transcript of Settlement Hearing, *In re* InterMune, Inc. Stockholders Litig., No. 10086-VCN (Del. Ch. July 8, 2015) [hereinafter Transcript of Settlement Hearing, *InterMune*].

96. *See supra* note 9 and accompanying text.

97. *See generally* Transcript of Settlement Hearing, *TW Telecom*, *supra* note 95; *Riverbed Tech.*, 2015 WL 5458041; Transcript of Settlement Hearing, *In re* Susser Holdings Corp. Stockholders Litig., No. 9613-VCG (Del. Ch. Sept. 15, 2015) [hereinafter Transcript of Settlement Hearing, *Susser Holdings*]; Transcript of Settlement Hearing, *Assad*, *supra* note 7.

98. There are five members of the Court of Chancery, which is made up of one chancellor and four vice chancellors. *See Judicial Officers of the Court of Chancery*, DEL. ST. CTS., http://courts.delaware.gov/chancery/judges.stm (last visited Mar. 27, 2016) [perma.cc/4AJM-6NZD].

A. Vice Chancellor Travis Laster's Intergalactic Disapproval

In three recent decisions, Vice Chancellor Laster rejected settlements that he believed included overly broad releases. In *Acevedo v. Aeroflex Holding Corp.*,[99] the Vice Chancellor rejected a settlement based on his determination that the disclosures provided no material value to shareholders in exchange for an "intergalactic" release.[100] He explained that previously the court was willing to accept disclosure-only settlements "largely out of sympathy for the defendants" in order to prevent costly litigation.[101] While at the time he considered this a "necessary evil," he found that it resulted in plaintiffs' attorneys filing to get easy money in exchange for granting defendants broad releases.[102] He offered the attorneys two possibilities for where to go next: they could dismiss the case for a mootness fee or return with a new settlement that involves a release that is tailored to fiduciary duty claims.[103]

Similarly, in *Haverhill Retirement System v. Asali*,[104] Vice Chancellor Laster felt uncomfortable allowing a settlement with a similarly broad release where the settlement benefits were "virtually nonexistent" and the companies had worrisome corporate governance procedures.[105] He also made this decision by comparing the scope of the release to the value of the consideration.[106] The Vice Chancellor considered the release to be a poor deal for the shareholders, due to the company's governance practices creating "simply too many unknown unknowns," with "the unknown unknowns [being] too substantial to approve the settlement" in light of such a broad release.[107] While he considered dismissing the case due to inadequate representation, Vice Chancellor Laster decided to reject the settlement.[108] He offered the parties the same two options that he offered in *Aeroflex*, this time saying that he would approve a release that is tailored to the specific allegations, theories, and issues presented in the complaint.[109]

Most recently, Vice Chancellor Laster monumentally rejected a settlement in *In re Aruba Networks, Inc. Stockholder Litigation*[110] by following through on the threat that he made in *Haverhill*.[111] Vice Chancellor Laster not only rejected the disclosure-only settlement, but also dismissed the case altogether based on inadequacy of representation.[112] He explained that the case looked like a "harvesting-of-a-fee opportunity," due

99. No. 9730-VCL, 2015 WL 4127547 (Del. Ch. July 8, 2015).
100. Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 15, 73.
101. *Id.* at 63–64.
102. *Id.* at 64.
103. *Id.* at 74.
104. No. 9474-VCL, 2015 WL 3582361 (Del. Ch. June 8, 2015).
105. Transcript of Settlement Hearing, *Haverhill*, *supra* note 54, at 39, 43.
106. *Id.* at 36–39.
107. *Id.* at 39.
108. *Id.* at 42–43.
109. *Id.* at 42.
110. No. 10765-VCL, 2015 WL 5924767 (Del. Ch. Oct. 9, 2015).
111. *See supra* note 108 and accompanying text.
112. Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 73–74.

to the lack of basis at filing and, because even though the plaintiffs then found something that was litigable, they instead chose to settle for disclosure and a fee.[113] The Vice Chancellor was troubled by the amount of mistakes in the plaintiffs' brief, despite the brief being the factual record that the court relies on to make a judgment.[114] In reviewing the settlement consideration, he focused heavily on the scope of the release, which he considered overly broad.[115] Vice Chancellor Laster also focused on the fact that the disclosures offered were just not enough and were "not helpful at all."[116] He said that the court had reached a point where it was necessary to acknowledge that allowing disclosure-only settlements in exchange for an expansive release "created a real systemic problem"[117] and described a better alternative: using a release that only covers the scope of the disclosures.[118]

Vice Chancellor Laster offered a variety of explanations for the high scrutiny he used in these three cases. He explained that the court has a fiduciary role to "look out for the interests of the class" by ensuring that the settlement is "within a range of reasonableness," which he defines as a settlement that "a client, in possession of the information and not under any compulsion, could reasonably accept."[119] He considered factors such as a recent study that shows a lack of significant benefit to stockholders for settlement disclosures[120] and the impact that broad releases can have by barring future cases, such as unknown antitrust and securities claims related to that merger.[121] Vice Chancellor Laster also acknowledged that other state courts, particularly in New York, recently had used a similarly high level of scrutiny to review disclosure-only settlements.[122]

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113. *Id.* at 73.

114. *See id.* at 40–47 (describing the importance of being accurate in court documents due to the judge relying on them for facts).

115. *See id.* at 26–40, 65–66.

116. *Id.* at 74–75 ("[W]hen I get objections from class members, they look at the disclosure that you guys got for them and say, 'What is this about? We don't need this. This is not helpful at all.' You probably don't think what I've told you is helpful at all. That's fine. But you've had the benefit of disclosure.").

117. *Id.* at 65.

118. *Id.* at 66.

119. Transcript of Settlement Hearing, *Haverhill*, *supra* note 54, at 32.

120. *See* Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 64–65 (referring to Fisch et. al., *supra* note 3, at 586–87, which determines that disclosure-only settlements do not provide any identifiable benefit).

121. *See id.* at 66.

122. *Id.* at 68. It is likely that Laster was referring to two recent high profile New York cases: *City Trading Fund v. Nye*, No. 651668/2014, 2015 WL 93894 (N.Y. Sup. Ct. Jan. 7, 2015), and *Gordon v. Verizon Communications*, No. 653084/13, 2014 WL 7250212 (N.Y. Sup. Ct. Dec. 19, 2014), *aff'd*, 2015 WL 3610912 (N.Y. Sup. Ct. July 31, 2015). In *City Trading Fund*, Justice Kornreich rejected a settlement with a broad release and weak disclosures using a strict standard to determine materiality. *See* 2015 WL 93894, at *6, *12, *19. Justice Kornreich referred to her role as a "gatekeeper" who protects from litigation that "unjustifiably extract[s] money from shareholders, who get no benefit from the litigation but nonetheless end up paying two sets of attorneys." *Id.* at *20. In *Gordon*, Justice Schweitzer rejected a settlement where disclosures were trivial and redundant. *See* 2014 WL 7250212, at *13–15. Justice Schweitzer utilized similar explanations to Vice Chancellor

B. Chancellor Andre Bouchard's Changing Tune

Chancellor Bouchard has a significant role in resolving the debate on how the Court of Chancery should handle disclosure-only settlements. As Chancellor, he has the sole discretion to assign cases to each member of the court and has the respect of the Vice Chancellors, which might influence their decisions.[123] Throughout 2015, Chancellor Bouchard has shown the most change in how he personally reviews disclosure-only settlements.

In two hearings on the same day in August 2015, Chancellor Bouchard approved settlements for both *Assad v. World Energy Solutions, Inc.*[124] and *In re TW Telecom, Inc. Stockholder Litigation*.[125] In *Assad*, he approved a settlement despite expressing his growing concern over the scope of releases in settlements that cover unknown claims.[126] Chancellor Bouchard provided an example of how releasing such broad claims could go wrong by presenting a hypothetical in which cash flow information added in the supplemental disclosure ended up being fraudulent.[127] He thus showed that even a reasonable claim relating to this fraud would be released.[128] He also concluded that the disclosures were based on public information or previously disclosed facts, except for one that had "meaningful information."[129] At the end of his review, Chancellor Bouchard stated that there would be more scrutiny on settlement consideration in settlements going forward.[130]

In *TW Telecom*, Chancellor Bouchard approved another settlement, despite expressing his concern over approving a settlement where the deal consideration was weak for shareholders.[131] He referred to two of the plaintiffs' top disclosures as neither "remotely important" nor material.[132] He also considered the release to be overly broad because it included unknown claims, federal claims, and claims based on "any allegations in [the] complaint."[133] Chancellor Bouchard said that the quality of what was obtained for the release was not great and that this was the closest he had been to rejecting a settlement during his time as Chancellor.[134] Despite this, Chancellor Bouchard reluctantly considered the small amount of value worthy of approval and stated that the settlement was "under the circumstances . . . fair and reasonable."[135] He again warned that these

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Laster. *See id.* at *2 (referring to Fisch et. al., *supra* note 3, at 586–87); *see also supra* note 120 and accompanying text.

123. Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 72 (stating that the Chancellor gets sole discretion as to which cases are assigned to which judge).

124. No. 10324-CB, 2015 WL 4977604 (Del. Ch. Aug. 20, 2015).

125. No. 9845-CB (Del. Ch. Sept. 17, 2015).

126. *See* Transcript of Settlement Hearing, *Assad*, *supra* note 7, at 31.

127. *Id.* at 33–34.

128. *Id.*

129. *Id.* at 17–22, 42.

130. *Id.* at 40.

131. *See* Transcript of Settlement Hearing, *TW Telecom*, *supra* note 95, at 51.

132. *Id.* at 17, 36.

133. *Id.* at 31.

134. *See id.* at 47 (stating that only one disclosure provided any real value).

135. *Id.* at 51.

settlements will face more scrutiny from the court in the future and that the attorneys should be ready to explain why the disclosures matter in the real world.[136]

Chancellor Bouchard's concern regarding the overly broad releases being offered in disclosure-only settlements came to a breaking point in his review of *In re Trulia, Inc. Stockholders Litigation*,[137] where he withheld judgment on what he considered to be "the underbelly of settlements" because he did not feel comfortable coming to a decision during the hearing.[138] The Chancellor was concerned about the unknown claims included in the release.[139] He also focused on the fact that the supplementary disclosures provided information that was, for the most part, already public information.[140] To explain his concern, the Chancellor cited *Matsushita Electric Industrial Co. v. Epstein*,[141] a Supreme Court case where litigation over a valid securities claim that may have had a large payout to the class was barred due to a global release that was bargained for in a Delaware class action settlement.[142] Based on these concerns, Chancellor Bouchard requested additional briefing from the attorneys on two issues.[143] The issues were: (1) which standard of materiality the court has to apply in assessing the value of the supplemental disclosures, and (2) whether it makes sense for the court to endorse releases that include unknown claims.[144]

Chancellor Bouchard later released a landmark opinion in *Trulia*, where he not only rejected the settlement but instructed the court to be "increasingly vigilant in scrutinizing the 'give' and the 'get' of . . . settlements to ensure that they are genuinely fair and reasonable to the absent class members."[145] He warned practitioners that they should expect disclosure settlements to be disfavored by the court in the future unless supplemental disclosures address "plainly material misrepresentation or omission [and the] release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process" and only in circumstances where those "claims have been investigated sufficiently."[146] He said that the decision of whether

136. *Id.* at 44.
137. No. 10020-CB, 2016 WL 325008 (Del. Ch. Jan. 22, 2016).
138. Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 40–43.
139. *Id.* at 30.
140. *Id.* at 20–21.
141. 516 U.S. 367 (1996).
142. *See id.* at 385–86, 390–91 (holding that the plaintiffs could not litigate valid claims based on unequal treatment in the tender offer for certain insiders due to the preclusive effect of the global release from a Delaware class action settlement that the court approved).
143. Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 40, 43.
144. *Id.* at 43–44; *see also id.* at 31–38 (discussing Chancellor Bouchard's concern over which standard of materiality he should be applying because he did not have confidence in the answer).
145. *In re* Trulia, Inc. Stockholder Litig., No. 10020-CB, 2016 WL 325008, at *1 (Del. Ch. Jan. 22, 2016).
146. *Id.* at *10.

something is material or immaterial should not be a close call under the new "plainly material" standard.[147]

C. Vice Chancellor Sam Glasscock Warns That Change Is Coming, Soon

In two recent cases, Vice Chancellor Glasscock reacted similarly to Chancellor Bouchard's earlier decisions in 2015. He also warned attorneys that settlements will soon be reviewed differently, but provided more clarity on his reasoning for delaying this new scrutiny when he approved both settlements.

In *In re Riverbed Technology, Inc. Stockholders Litigation*,[148] the Vice Chancellor approved a settlement with "meager benefit" achieved for the class and a broad release.[149] While he appeared persuaded by the objector, who argued that the settlement should be rejected because there may be valuable unknown claims extinguished by the release, he approved the settlement based on the attorneys' "reasonable expectation" that the court would approve a "very broad, but hardly unprecedented, release."[150] He granted approval despite calling the benefit achieved "a mustard seed"[151] and the breadth of the release troubling[152] and stating that "the interests of the Class might merit rejection of a settlement encompassing a release that goes far beyond the claims asserted and the results achieved."[153] Vice Chancellor Glasscock determined that the "reasonable reliance of the parties on formerly settled practices" warranted his approval.[154] He warned that the reasonableness of these expectations, however, would be diminished or eliminated going forward.[155]

Vice Chancellor Glasscock similarly approved a settlement in *In re Susser Holdings Corp. Stockholder Litigation*[156] based on the parties' expectations.[157] This settlement included a release that was notably narrower than the one in *Riverbed*, as it was represented as applying only to shareholders of Susser and therefore only applied to litigation that could arise from issues prior to the closing.[158] In this case, however, the

147. *Id.*
148. No. 10484-VCG, 2015 WL 5458041 (Del. Ch. Sept. 17, 2015).
149. *Id.* at *6.
150. *Id.*
151. *See id.* ("If I may describe what has been achieved for the Class as a peppercorn, what has been released looks more like a mustard seed."). The term "peppercorn" comes from the words used by a famous jurist to refer to a settlement where the benefit is "often worth no more . . . than a 'peppercorn.'" Fisch et al., *supra* note 3, at 559.
152. *Riverbed*, 2015 WL 5458041, at *6 ("It is hubristic to believe that upon this record I can properly evaluate, and dismiss as insubstantial, all potential Federal and State claims.").
153. *Id.*
154. *Id.*
155. *Id.*
156. No. 9613-VCG, 2015 WL 5444524 (Del. Ch. Sept. 15, 2015).
157. Transcript of Settlement Hearing, *Susser Holdings*, *supra* note 97, at 57 (stating that settlement expectations were "growing less and less reasonable" going forward based on the court's concern over broad releases).
158. *Id.* at 27, 57.

defendants disputed the fee requested by the plaintiffs' attorneys, stating that while the settlement should be approved, the disclosures were not material and therefore were not worth a high fee.[159] Vice Chancellor Glasscock was concerned that the defendants considered the disclosures to be immaterial.[160] He recognized that the defendants were asking to get something of value, while contesting the value of what the class was getting in return.[161] Vice Chancellor Glasscock stated that the parties' expectations were becoming "less and less reasonable" moving forward despite approving the settlement once again on these expectations.[162]

During the hearing for *In re Silicon Image, Inc. Stockholders Litigation*,[163] the Vice Chancellor approved a settlement that he said he would be unlikely to approve if it was filed after July 2015.[164] This decision set up a starting point for what Vice Chancellor Glasscock perceives as when the attorney's reasonable expectations will no longer be reasonable. It is presumable that he is using July 2015 as the starting point for a heightened review because this is when *Aeroflex* was decided.[165] Vice Chancellor Glasscock determined that there are now two categories of settlements: ones where "settlement was entered with notice of the [c]ourt's concerns post-July" and settlements that were entered prior—and that these two categories will be reviewed differently.[166]

D. Vice Chancellor John Noble's Unclear Stance

In the recent hearing for *In re InterMune, Inc. Stockholder Litigation*,[167] held on the same day as *Aeroflex*, Vice Chancellor Noble made headlines when he withheld approval of a settlement.[168] He showed concern over the broad scope of the release that was granted when compared to the small value of the disclosures that were obtained[169] and discussed his general concern over the fairness of allowing global releases.[170] During this

159. *See id.* at 30–37 (explaining the defendant's argument as saying that the disclosures were immaterial, however, the disclosure still had some kind of value that therefore made the settlement worth approving).

160. *Id.*

161. *Id.* at 33.

162. *Id.* at 57.

163. No. 10601-VCG, 2015 WL 8482918 (Del. Ch. Dec. 9, 2015).

164. Transcript of Settlement Hearing at 55, *In re* Silicon Image, Inc. Stockholders Litig., No. 10601-VCG (Del. Ch. Dec. 9, 2015) [hereinafter Transcript of Settlement Hearing, *Silicon Image*].

165. *See supra* notes 99–103 and accompanying text.

166. Transcript of Settlement Hearing, *Silicon Image*, *supra* note 164, at 54.

167. No. 10086-VCN, 2015 WL 9481182 (Del. Ch. Dec. 29, 2015).

168. Transcript of Settlement Hearing, *InterMune*, *supra* note 95, at 17; *see, e.g.*, LaCroix, *supra* note 9; David Marcus, *Delaware Appraisal and Judicial Activism*, DEAL PIPELINE (Aug. 4, 2015), http://www.thedeal.com/content/ regulatory/delaware–appraisal–and–judicial–activism.php [perma.cc/55TL-ZSA3].

169. *See* Transcript of Settlement Hearing, *InterMune*, *supra* note 95, at 17 (questioning why the facts in the case justify a broad release instead of being limited to disclosure claims).

170. *See id.* at 28–32 ("[I]f it's a disclosure case, why shouldn't the release go to what the case was destined to be, which is disclosure?").

hearing, the Vice Chancellor decided to reserve his judgment, which was perceived by the media as signaling the Vice Chancellor's intention to use a high level of scrutiny in reviewing disclosure-only settlements with broad releases moving forward.[171]

Despite many interpreting Vice Chancellor Noble's actions this way, his decision to approve the settlement in *In re Carefusion Stockholders Litigation*[172] applied a level of scrutiny that was closer to the relaxed standard accepted in the past.[173] He approved the settlement despite only finding the supplemental disclosures "helpful and perhaps clarifying" and explained that sometimes a global release makes sense, even if in some cases the shareholders are not offered meaningful recovery.[174] Throughout the hearing, the Vice Chancellor only once expressed concern over the breadth of the release.[175] Vice Chancellor Noble responded to his own concerns in *InterMune* by saying that "[t]here will always be the risk . . . that some viable claim of the shareholder class will be unwisely released [because a]bsolute certainty simply is not a realistic goal."[176] He also discounted the court's overall concern that some attorneys try to "settle quickly and cheaply to collect a fee" by saying that it "may simply be somewhat too cynical."[177]

This much lower level of scrutiny of the settlement consideration was in line with the final decision in *InterMune* that was announced after *Carefusion*. Vice Chancellor Noble approved the settlement as fair, reasonable, and "in the best interests of the class" despite saying that the disclosures only "marginally satisf[ied] the materiality standard."[178] Prior to making his decision, the Vice Chancellor discussed the possibility of limiting the scope of a release to the supplemental disclosures and explained that releases that go beyond this breadth require a careful assessment to ensure that there is no relief available.[179] He also discussed the troubling nature of including unknown claims based on the fact that they require class members to "give up something . . . without a full appreciation of what they may be surrendering."[180] Despite mentioning

171. *See, e.g.*, Fisher, *supra* note 9 (including *InterMune* among recent cases that indicate "game over" for settlements that extract fee awards in exchange for a broad release); Marcus, *supra* note 168 (raising the question of whether *InterMune* is going to create major change in Delaware's global release policy); O'Connell et al., *supra* note 42 (including Vice Chancellor Noble's *InterMune* with Vice Chancellor Laster's recent decisions in a description of Delaware's increased scrutiny on settlements and releases).

172. No. 10214-VCN, 2015 WL 5471250 (Del. Ch. Sept. 17, 2015).

173. Transcript of Settlement Hearing, *Carefusion*, *supra* note 7, at 18–19.

174. *Id.* at 49–51.

175. *See id.* at 18–19 (questioning the plaintiffs' lack of concern over potential unknown claims by saying that the defendants must be worried about some potential claim to include all unknown claims and that this worry might be worth figuring out).

176. *Id.* at 47.

177. *Id.*

178. Transcript of Telephonic Bench Ruling on Settlement Hearing at 6, 11, 13, *In re* InterMune, Inc. Stockholder Litig., No. 10086-VCN (Del. Ch. Dec. 29, 2015) [hereinafter Transcript of Telephonic Bench Ruling on Settlement Hearing, *InterMune*].

179. *Id.* at 5.

180. *Id.* at 7.

these concerns, Vice Chancellor Noble chose to revise his previous perceptions on the case and accept the counsel's original explanations due to "predictability and consistency" having value and declined to reject the settlement based on his release concerns.[181]

E. The New Vice Chancellor: Tamika Montgomery-Reeves

The Delaware Court of Chancery has fairly low turnover, but when Vice Chancellor Donald Parsons announced his retirement in October 2015, a new Vice Chancellor was nominated.[182] The Delaware Senate confirmed the appointment of Tamika Montgomery-Reeves as the next Vice Chancellor.[183] She is a former clerk of the former Chancellor William B. Chandler III and has eight years of experience working in corporate law.[184] She is one of the youngest vice chancellors to be appointed to the court and is the first African-American, and the second woman, to serve.[185] She has experience with M&A litigation and disclosure-only settlements, even recently being on the defense for *Riverbed*.[186] Due to her recent instatement as a vice chancellor, Vice Chancellor Montgomery-Reeves has not reviewed any M&A settlements to date. Only time will tell how she will apply her fiduciary role and which level of scrutiny she will use in reviewing class action settlements.

F. The Court of Chancery's Unclear Standard and Its Fiduciary Reality

The recent Delaware cases show that there is a trend within the court to at least consider a higher level of scrutiny in reviewing and comparing the "give" and "get" of settlements.[187] The heightened analysis does not always come across in the final decision, which more often than not is approval of the settlement even when the give is considered weak.[188] This disparity raises questions about how effective the review process is in the Delaware Court of Chancery, as well as how the court as a whole is fulfilling its fiduciary duty when it approves settlements that only offer minor benefit to the shareholders while providing defendants with a broad

181. *Id.* at 9, 15.

182. Tom McParland, *Montgomery-Reeves Confirmed by Senate to Del. Court of Chancery*, AM. LAW. (Oct. 28, 2015), http://www.americanlawyer.com/id=1202740991656/MontgomeryReeves–Confirmed–by–Senate–to–Del–court–of–Chancery?mcode=0&curindex=0&curpage=ALL [perma.cc/66WN-WW9V].

183. *Id.*

184. *Id.* (mentioning her eight years working at Weil, Gotshal & Manges and Wilson Sonsini Goodrich & Rosati in corporate law).

185. *Id.*

186. Chelsea Naso, *Del. Opinion Spells an End to Disclosure-Only Settlements*, LAW360 (Sept. 18, 2015, 7:18 PM), http://www.law360.com/articles/704591/del–opinion–spells–an–end–to–disclosure–only–settlements [perma.cc/49B2-N3PJ].

187. *In re* Activision Blizzard, Inc. Stockholder Litig., 124 A.3d 1025, 1043 (Del. Ch. 2015) (describing one of the court's roles as "assessing the reasonableness of the 'give' and the 'get,' as well as the allocation of the 'get' among various claimants").

188. *See supra* notes 126–29, 131–32, 149, 174, 178 and accompanying text.

release.[189] The recent cases reviewed earlier in this part are analyzed below based on their application of the court's fiduciary duty.

A number of chancellors have chosen to approve settlements in which they indicate clear concern over the balance of benefit and cost for the shareholders.[190] This is difficult to reconcile with the chancellors' fiduciary-like role. Vice Chancellor Glasscock's approval of cases like *Riverbed* and *Susser* was based on the expectations of the attorneys who file and defend against these lawsuits. The choice to protect the attorneys' expectations conflicts with the purpose behind this required stage of approval, which is to protect shareholders from situations where plaintiffs and defendants may potentially work together to serve their interests over the classes' interest.[191] By approving a settlement with "meager" benefit, or where the defendants admit that the disclosures are not material, the absent shareholders' interests do not appear protected.[192]

Chancellor Bouchard, however, despite similarly approving settlements in which he showed clear concern, progressed toward establishing a new standard in *Trulia*. When he warned in *TW Telecom* that attorneys would soon have to face more scrutiny from the court, Chancellor Bouchard indicated that he would not continue to approve settlements so easily in the future.[193] He then affirmed this change in scrutiny when he withheld approval and subsequently rejected the settlement in *Trulia*.[194] He made it clear that his goal is to establish a firmer materiality standard for the court to apply consistently and to limit the scope of releases that are approved in cases where the consideration is only disclosure.[195] Chancellor Bouchard's actions indicate that he is aware that the previous standard that he has applied to review settlements is not clearly aligned with his fiduciary duty to shareholders and that he is committed to establishing a new standard that better reflects this role.[196]

Vice Chancellor Noble's application of his fiduciary duty is the hardest to read. When the *InterMune* hearing occurred, many believed that Vice Chancellor Noble was joining Vice Chancellor Laster in generally

189. *See* Sale, *supra* note 6, at 389–91.

190. *See supra* Part II.B–D.

191. *See supra* notes 91–93 and accompanying text.

192. *See In re* Riverbed Tech. Inc. Stockholders Litig., No. 10484-VCG, 2015 WL 5458041, at *6 (Del. Ch. Sept. 17, 2015) (approving the settlement despite "the rather meager benefit achieved . . . for the [c]lass"); *see also supra* Part II.C. *See generally* Transcript of Settlement Hearing, *Susser Holdings*, *supra* note 97 (approving a settlement even though the defendants argued that it was immaterial in order to reduce plaintiffs' fee award).

193. Transcript of Settlement Hearing, *TW Telecom*, *supra* note 95, at 44 (stating that disclosure settlements need to be scrutinized more in future cases); *see also supra* note 136 and accompanying text.

194. Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 42–44; *In re* Trulia, Inc. Stockholder Litig., No. 10020-CB, 2016 WL 325008, at *1 (Del. Ch. Jan. 22, 2016); *see also supra* notes 144–47 and accompanying text.

195. *See Trulia*, 2016 WL 325008, at *10; *see also supra* notes 145–47 and accompanying text.

196. *See supra* Part II.B.

disapproving of disclosure as fair consideration for a broad release.[197] After *Carefusion*, however, this became unclear. In *Carefusion*, Vice Chancellor Noble applied very little scrutiny to review the settlement terms and discounted many of the court's concerns as unrealistic and "too cynical."[198] The decision in *InterMune* further confused Vice Chancellor Noble's unclear standard, because the decision indicated that he still believed in his criticisms of the broad release, but was unwilling to reject the settlement based on that concern.[199] Vice Chancellor Noble's manner of settlement review makes it difficult to determine his method of applying his duty as a fiduciary to shareholders. Due to Vice Chancellor Noble announcing his retirement just two months after the *Carefusion* hearing, his scrutiny is unlikely to be fully explained before he leaves the bench.[200]

Finally, Vice Chancellor Laster's recent decisions suggest that he interprets his role as a class fiduciary to require rejecting settlements that provide little or no benefit for the shareholder class. By rejecting the three settlements discussed above and utilizing a high level of scrutiny on the value of the disclosure that was offered in exchange for a broad release, it is clear that Vice Chancellor Laster will not acquiesce to the court's past practices or attorney expectations at the expense of protecting the absent shareholders.[201] By rejecting settlements that do not align with his fiduciary role, Vice Chancellor Laster has triggered a number of voluntary dismissals,[202] thus improving the process and outcomes of future proposals to better serve the interests of shareholders.[203]

While other members of the court have focused on attorneys' expectations, it appears that Vice Chancellor Laster is changing the expectations of those same attorneys. It is likely that these attorneys understand that their cases will not meet Vice Chancellor Laster's scrutiny if they have the typical elements of a disclosure-only settlement and therefore will only proceed with settlements that provide more substantial consideration for shareholders. A recent analysis of filings in the Delaware courts alludes to the impact of Vice Chancellor Laster's rejection power by

197. *See supra* notes 168–70 and accompanying text.

198. Transcript of Settlement Hearing, *Carefusion*, *supra* note 7, at 47; *see supra* notes 173–74 and accompanying text.

199. Transcript of Telephonic Bench Ruling on Settlement Hearing, *InterMune*, *supra* note 178, at 9; *see also supra* notes 178–81 and accompanying text.

200. Press Release, Del. Court of Chancery, Vice Chancellor John Noble to Retire in February (Nov. 19, 2015), http://courts.delaware.gov/forms/download.aspx?id=84048 (announcing that the Vice Chancellor will retire in February) [perma.cc/9T5F-WTD3].

201. Transcript of Settlement Hearing, *Aeroflex*, *supra* note 27, at 63–64.

202. *See* Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 72 ("I would say I also have, by far, the highest incidence of assign and dismiss. So seven or eight cases will get filed on a deal. The Chancellor . . . assigns it to me. Boom. I see seven notices of dismissal."); *see also, e.g.*, Casey v. Hospira, Inc., No. 10630-VCL, 2015 WL 5032516 (Del. Ch. Aug. 25, 2015) (dismissed); Hyer v. Rally Software Dev. Corp., No. 11109-VCL, 2015 WL 6697313 (Del. Ch. Nov. 2, 2015) (dismissed); *In re* Emulex Corp. Stockholders Litig., 10743-VCL, 2015 WL 3582347 (Del. Ch. June 5, 2015) (dismissed).

203. *See supra* notes 62–63 and accompanying text.

showing a lower ratio of class action cases compared to the number of deals that were announced during October and November 2015.[204]

III. INTEREST GROUP THEORY AND THE INFLUENCE OF THE DELAWARE BAR

This part describes and applies a potential explanation for the disparate application of the court's fiduciary duty amongst the chancellors. Part III.A discusses the interest group theory and the structural mechanisms in Delaware that establish and define this theory. Part III.B provides an example of how the theory's lead interest group uses its influence over the decisions of the Delaware Court of Chancery and how that influence affects the delicate balance of the court. Part III.C applies this theory to the current members of the court and their recent decisions.

A. The Interest Group Theory

One theory that may account for the divergent approaches to disclosure-only settlements of various members of the Court of Chancery is "interest group theory," first described by Jonathan R. Macey and Geoffrey P. Miller and subsequently elaborated on by others.[205] In their article, Macey and Miller form a theory that explains the influence of interest groups over the Delaware legislature and judiciary.[206] The main interest group that they refer to is the Delaware Bar Association, which has "strong incentives to lobby for laws that transfer wealth from the public to themselves."[207]

To better understand this theory, it is essential to understand the underpinnings of Delaware's legal system. The Delaware General Corporate Law (DGCL) is the compilation of all of Delaware's corporate law statutes.[208] These laws can only be changed or amended with a two-thirds vote of both the Delaware Senate and House of Representatives.[209] The Delaware General Assembly does not internally assess the need for DGCL amendments or write the actual amendments.[210] Instead, the Corporation Law Section of the Delaware Bar Association has this responsibility.[211] This council is made up of twenty-one members who are elected annually and consists of nominees selected by the seven biggest

204. Post-*Aruba* Class Action Filings in the Court of Chancery (Nov. 13, 2015) (on file with *The Chancery Daily*), http://us7.campaign-archive1.com/?u=1db63475183f3a61b32348447&id=6a2c623a03&e=f68a851e4f (supporting statistics available at https://www.dropbox.com/s/6yrrgib231ho6mf/STOCKHOLDER%20CLASS%20ACTIONS%202015.pdf?dl=0) [perma.cc/K7BX-FCR9]. This represents the period that directly followed Chancellor Laster's *Aruba* decision.

205. *See generally* Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Macey & Miller, *supra* note 2.

206. *See* Macey & Miller, *supra* note 2 at 498–507.

207. *Id.* at 499.

208. Hamermesh, *supra* note 11, at 1752.

209. *Id.* at 1753.

210. *Id.* at 1754.

211. *Id.* at 1755.

commercial law firms in Wilmington, Delaware, and other smaller firms from the area.[212] This council also includes a small minority of plaintiffs' attorneys,[213] Lawrence A. Hamermesh, who is a professor at Widener Law School,[214] and one Skadden Arps attorney.[215] These members meet in private and do not make any of their discussions or writings publicly available until the council submits the amendments to the Delaware Bar Association's Executive Committee.[216] The amendments are then submitted to the General Assembly for their respective approval, which is usually granted anonymously.[217] This process does not provide for any input from or meetings with the Delaware Court of Chancery judges, but there is a longstanding policy to consciously avoid proposing legislation that would impact litigation pending in the court, either directly or indirectly.[218] The legislative process follows "a common law approach, waiting to see how specific cases develop . . . before determining . . . [if any] legislative solution would be useful."[219] This style of lawmaking provides the court with a great deal of discretion and a focus on the complex facts of individual cases instead of black letter law.[220] These principles are dependent upon the theory that "courts will police overly opportunistic behavior on the part of those in control."[221]

While the Macey and Miller article argues that Delaware judges are partially insulated from the interest group pressures that the legislature faces, they did find that the judiciary is partially responsive to these pressures.[222] This is contrary to the opinion of Professor William Cary, who found that the judiciary is "extremely responsive to the interests of the Delaware Bar."[223] Despite being in overall agreement with Macey and Miller's theory, Douglas M. Branson appears to side closer to Cary on this debate, suggesting that not only does the Delaware bar have a strong influence on the Delaware Court of Chancery, but that this influence is motivated by the plaintiff bar's interest in eliminating hurdles for bringing suit and ensuring that settlements will be approved in exchange for handsome attorneys fees.[224] Branson backs up his theory with a study that finds numerous time periods in which the court's decisions visibly focused

212. *Id.*
213. *Id.* at 1756 & n.25.
214. Widener Law School is located in Wilmington, Delaware, and it is the only law school in Delaware.
215. Hamermesh, *supra* note 11, at 1755–56, 1755 n.25.
216. *Id.* at 1756.
217. *Id.*
218. *Id.* at 1757–58.
219. *Id.* at 1773.
220. *See id.* at 1777 (finding that judicial deference is based on broader principles "than a desire to avoid legislative intrusion," but instead on the "idea that legal issues that depend for their resolution on complex facts cannot and should not be reduced to black letter codification").
221. *Id.* at 1784 (describing the purpose of the "legislative preference for flexibility and private ordering").
222. Macey & Miller, *supra* note 2, at 500.
223. *Id.* at 499.
224. Branson, *supra* note 205, at 91–92.

on shareholder interests, despite strong indeterminacy in Delaware's law.[225] He found that these periods of shareholder interest-focused decision making indicate the plaintiff bar's influence on the court.[226] Despite their contrasting opinion, Macey and Miller do recognize that the Delaware courts further the goals of this interest group through their statutory interpretation and through their ties to the organization from personal and professional contacts.[227] As many members of the Delaware courts are previously from firms that represent corporations that are registered in Delaware, they are likely to be unconsciously in alignment and therefore are likely to approve rules that serve the corporate bar's interests.[228] Additionally, many of the judges are also likely to return to practice at the same group of firms when their time in the court ends.[229] This generates a personal and professional interest in sustaining relationships with the lawyers at top law firms who bring cases in the Delaware courts and may cause a similar alignment between their decisions and those firms' interests.

B. Fee-Shifting Bylaws: An Example of the Relationship Between the Delaware Courts and Bar Association

The risk of teetering this fragile relationship can best be explained through example. In 2014, the Delaware Supreme Court issued an opinion in which it allowed Delaware corporations to adopt fee-shifting bylaws.[230] This established the ability of Delaware corporations to amend their bylaws to establish a "loser pays" system for shareholder litigation.[231] In representative litigation, plaintiffs' attorneys take on class actions through contingency fees, which place all of the monetary risk on the attorneys and their firms.[232] This allows for suits that plaintiffs would not bring to court otherwise due to the small individual interest of each member of the class.[233] Under this bylaw, the attorneys and firms would also become liable to pay the defendant corporation's full defense costs if the plaintiffs

225. *Id.* at 111.
226. *Id.*
227. Macey & Miller, *supra* note 2, at 502.
228. *Id.*
229. *See* Transcript of Settlement Hearing, *InterMune*, *supra* note 95, at 24–25 ("[If] Your Honor decides to leave the bench, he is going to make plenty of money at the end of the day when one of these big Delaware defense firms picks him up if that's what you so choose to do at the later part of your career."). As the attorney in *InterMune* alluded to, it is not uncommon for members of the Court of Chancery to resume the practice of law at a large law firm after they leave the bench. Two examples of this are former Chancellor Chandler and former Vice Chancellor Lamb. *See Stephen P. Lamb*, PAUL WEISS, http://www.paulweiss.com/professionals/partners-and-counsel/stephen-p-lamb.aspx (last visited Mar. 27, 2016) [perma.cc/9RVJ-URG3]; *William B. Chandler III*, WILSON SONSINI GOODRICH & ROSATI, https://www.wsgr.com/wsgr/DBIndex.aspx?SectionName=attorneys/BIOS/12348.htm (last visited Mar. 27, 2016) [perma.cc/4SSS-23UY].
230. Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 2–3 (2015) (discussing the holding of *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014)).
231. *Id.* at 3.
232. *Id.* at 3 & nn.11–12.
233. *Id.*

lose the case.[234] The purpose of allowing this bylaw was to deter shareholder claims that are frivolous by making plaintiffs' attorneys more selective in which cases they bring to the court.[235] Within two weeks of this decision, the Delaware Bar Association's Executive Committee had crafted an amendment to the DGCL to reverse this holding.[236]

This amendment is a clear example of the delicate relationship that the court has with the Delaware bar. Due to the Delaware bar's ability to craft legislation, they have a large amount of power to redefine the decisions of the Delaware courts.[237] The court appears aware of this power, and therefore is likely to take this risk into consideration in every decision that it makes. While on occasion the court chooses to make a decision that is likely at odds with the Delaware bar's interests, such as the choice to adopt a fee-shifting doctrine, the court generally is sensitive to the risk of the Delaware bar reacting and using its influence over the legislature to reverse its decisions.[238]

C. Applying the Interest Group Theory to Delaware's Reality

The interest group theory helps to explain the inconsistencies between the settlement review processes that many of the members of the court use and the method by which they apply their fiduciary duty. The Delaware bar is a core interest group that is likely to have influence over many of the choices made by the Delaware judiciary.[239] This group's influence can be seen in the shifting sands of disclosure-only settlements.[240] Certain members of the Court of Chancery have attitudes that reflect a great deal of respect for this interest, while others do not.

Vice Chancellor Glasscock expressly has considered the interests of the Delaware Bar Association in his recent decisions. His decision to withhold applying a heightened review process to settlements in cases where the complaint was filed before July 2015 was based upon the "reasonable expectations" of the attorneys who filed the cases.[241] In contrast, Vice

234. *Id.*

235. *See id.* at 27.

236. *Id.* at 3–4; *see also* S. 236, 147th Gen. Assemb., Reg. Sess. (Del. 2014) ("Notwithstanding any other provision of this chapter, neither the certificate of incorporation nor the bylaws of any corporation may impose monetary liability . . . on any stockholder of the corporation."). This amendment was adopted by the legislature and began a ban on fee shifting bylaws as of August 1, 2015. Laura D. Richman & Andrew Noreuil, *DGCL Amendments Authorize Exclusive Forum Provisions and Prohibit Fee-Shifting Provisions*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 6, 2015), http://corpgov.law.harvard.edu/2015/07/06/dgcl-amendments-authorize-exclusive-forum-provisions-and-prohibit-fee-shifting-provisions [perma.cc/XZP8-SYRG].

237. *See supra* notes 206–19 and accompanying text.

238. *See supra* notes 220–22 and accompanying text.

239. *See supra* notes 220–22 and accompanying text.

240. *See supra* Part II.

241. *See supra* Part II.C; *see also* Transcript of Settlement Hearing, *Silicon Image*, *supra* note 164, at 38 (describing the current period as an interim period while the court's process is being reevaluated, making attorneys' expectations still reasonable based on the previous process).

Chancellor Laster does not appear to take the interests of the Delaware Bar Association into consideration when reviewing settlements. Instead, Vice Chancellor Laster has indicated that he does not mind that the attorneys on either side of settlements do not favor him.[242] He appears unalarmed by this interest group influence, which allows him to act as a leader in M&A litigation reform, a role that has also provided him with the unfavorable reputation of being a judicial activist.[243] One recent article referred to Vice Chancellor Laster's actions as a leader in the increasingly aggressive rejection of disclosure-only settlements as an example of judicial activism.[244] While this is one interpretation of what Vice Chancellor Laster is doing, another may be that he is exercising his statutorily imposed fiduciary duty to protect shareholder interests and is resisting the pressures of the Delaware Bar Association.

As the other members of the court have not expressly reflected on this influence, the extent to which the Delaware Bar Association influences their decision-making process is difficult to assess. The collective slow shift by the court from making candid critiques of the process to applying those critiques to their decisions, however, reflects that the majority of the court is taking these interests into consideration.[245] The slow pace of change allows for a more subtle warning to be made to the Delaware Bar Association before the changes materialize, thereby protecting the delicate balance that exists between this interest group and the judiciary.[246]

IV. A NEW STANDARD FOR JUDICIAL REVIEW OF SETTLEMENTS IN M&A LITIGATION

As is recognized by a majority of the Court of Chancery, there is a clear need for the chancellors to take a closer look at disclosure-only settlements before deciding whether to approve or reject them.[247] This part proposes a new standard for settlement review that will establish more consistency and a focus on the court's fiduciary duty to protect absent shareholders' interests. Part IV.A explains the underlying policy implications of the current system and why it requires a new standard. Part IV.B proposes a new standard of materiality modeled after *Chrysler*. Part IV.C proposes a stricter standard for release breadth that allows tailored releases in proportion to the case being settled.

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242. *See* Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 74 (stating that Vice Chancellor Laster is not offended by the fact that attorneys always dismiss cases when he is assigned because their "junky" cases are a waste of judicial resources).

243. Marcus, *supra* note 168 (referring to Vice Chancellor Laster as an example of judicial activism).

244. *Id.* (defining judicial activism as "a court's willingness to overturn laws or venture into areas of social policy").

245. *See, e.g.*, Transcript of Telephonic Bench Ruling on Settlement Hearing, *InterMune*, *supra* note 178, at 9 (showing Vice Chancellor Noble revising his previous concerns over the release provided in the settlement based on the value of "predictability and consistency . . . in a venue such as [the Delaware courts]").

246. *See supra* Part III.B.

247. *See supra* Part III.A–C.

A. Policy Rationales for a New Standard of Review

Delaware's choice to adopt a version of Rule 23 that requires judicial approval, combined with the court's choice to interpret this rule as requiring the court to act as a fiduciary, indicates that this role is significant.[248] The interest group theory offers a compelling explanation for the court's new scrutiny not materializing in many of its decisions, but it does not free the court of its fiduciary role as established by Rule 23(e). When the chancellors choose to give in to interest group influences or approve settlements in which shareholders give away significantly more than they receive, the court's application of its fiduciary duty becomes unclear and potentially denies absent shareholders the safeguard that Rule 23 establishes.

It is no longer feasible to continue down this incongruent path. As explained by the court in *Assad*, considering the statistic that plaintiffs' lawyers file claims in 94.9 percent of shareholder litigations,[249] it seems impossible that there are meaningful disclosure violations in every case being filed in the Delaware courts.[250] To say that this is the case is equivalent to saying that "every financial advisor in America is committing malpractice—or the lawyers [are]—when they [distribute the proxy statement]."[251] The court risks leaving its fiduciary duty behind if it continues to approve settlements at such a frequent rate with the same lax review process.[252] It is time to back up the chancellors' promises of change with actions by all members of the court.

Allowing class representatives to sign away absent shareholders' rights—in some cases with releases that are so broad that they cover unknown federal securities and antitrust claims—in exchange for disclosures that are commonly based on publically available information or other information that is only of minimal value, does not protect shareholders. Instead, it protects the attorneys on both sides who are getting large paychecks from the approval of the settlement. It is unlikely that this is the intention of the court, and therefore it is necessary for the court to adopt a new standard that prevents this benefit shift and ensures that the court's fiduciary duty is clearly and consistently applied.

This can be done by establishing firm standards that are consistently applied by all members of the court that speak to the questions asked by Chancellor Bouchard in the *Trulia* hearing.[253] The court must apply a firm standard of materiality to assess the value of supplemental disclosures and a firm definition of what is acceptable and not acceptable for release

248. Hamermesh, *supra* note 11, at 1777.

249. *See supra* note 1 and accompanying text.

250. *See* Transcript of Settlement Hearing, *Assad*, *supra* note 7, at 38 ("Every deal basically is the subject of litigation. Litigants are . . . conveniently reaching disclosure settlements on a repeated pattern . . . . It just can't be that there are meaningful disclosure violations in every single M&A case that's being filed in this court.").

251. Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 21.

252. *See* Transcript of Settlement Hearing, *TW Telecom*, *supra* note 95, at 44 (describing the past laxity of the court and how settlements need to be scrutinized more in the future).

253. Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 43–44.

breadth.[254] In utilizing these two standards, the court should focus on assessing what is required to fulfill its fiduciary duty to the absent shareholders.

B. A New Materiality Standard Based on a Holistic Review of the Case's Merit at Filing

While Chancellor Bouchard has put the wheels into motion for a firmer materiality standard, the new "plainly material" standard still allows great flexibility for the other members of the court to interpret and apply the standard as they see fit.[255] This creates a risk that the new standard will gradually become softer over time. The materiality standard that Vice Chancellor Laster applied in *Aruba* is a viable alternative or additional standard that is aligned with past precedent of the court.[256] He determined that a case must be meritorious when filed in order to be successful at settlement.[257] Vice Chancellor Laster said that this standard requires complaints to assert claims beyond unfair price, including something that suggests "a lack of reasonableness."[258] This fits within *Chrysler*'s rule, where a claim must be able to withstand a motion to dismiss on the pleadings, and the plaintiff must make the claim based on provable facts that hold a reasonable likelihood of success.[259] Despite this rule being active precedent, it is not commonly applied when reviewing the materiality of settlement consideration.[260] By applying this standard, the court will save valuable resources, instead of going through individual disclosures for materiality in settlements that have no cognizable value to shareholders. Jill E. Fisch et al.'s study suggests that settlement disclosures do not impact the shareholder's vote to approve or reject a settlement, and therefore it is ineffective to review each individual disclosure in terms of how it would alter the total mix of information that a shareholder considers in their decision to vote.[261] A more holistic review of the background of the claims will ensure that complaints are filed in good faith and representative attorneys are seeking to benefit the class, without getting bogged down in details that have proven to provide no cognizable value.

C. Limiting the Scope of the Release to the Scope of the Relief

The second issue described by Chancellor Bouchard provides the true key to ensuring that the court's fiduciary duty to the class is fulfilled. The "intergalactic" releases that are included in a majority of settlement proposals are the main source of tension between the court's role and the

254. *Id.*
255. *See supra* notes 145–47 and accompanying text.
256. Transcript of Settlement Hearing, *Aruba Networks*, *supra* note 61, at 59.
257. *Id.*
258. *Id.*
259. Chrysler Corp. v. Dann, 223 A.2d 384, 387 (Del. 1966); *see supra* notes 57–61 and accompanying text.
260. *See supra* notes 60–61 and accompanying text.
261. *See supra* notes 72–73 and accompanying text.

result of recent Delaware settlement approvals.[262] This issue can be solved if all of the members of the court stringently apply the limited release standard defined by Chancellor Bouchard in *Trulia*. If the court only approves settlements that tailor the release to the claims that are asserted in the complaint and to the terms of the relief, the risk that absent shareholders are missing out on potentially viable and fruitful claims based on the release will be minimized.[263] In cases where only disclosure is provided to the shareholder class and there is no indication that the plaintiffs' attorneys were actively looking to find other meritorious claims, the court should require that any bargained-for release be tailored only to the disclosures that were provided as consideration.[264] Despite Vice Chancellor Noble's theory that in many cases the potential claims being signed away may not truly exist, the reality of the circumstance is that only minimal discovery is completed before arriving at a disclosure-only settlement, and therefore representative shareholders are signing away absent shareholder rights with almost no confirmation that there are not viable claims.[265] In both *Assad* and *Trulia*, Chancellor Bouchard provided examples of how this risk could become a reality.[266] His depiction of *Matsushita* provided the most pointed example of why Vice Chancellor Noble's theory is shortsighted. A Delaware settlement eliminated a valid federal claim based on a poorly conceived complaint, despite active litigation taking place in federal court in California at the same time.[267] This settlement extinguished all federal and unknown claims and thereby resulted in the dismissal of a federal case.[268] This is exactly the risk that Vice Chancellor Noble disregarded in *Carefusion* and shows that if absolute certainty is not possible, a higher degree of certainty should at least be required.[269] It is not justifiable to sign

262. *See supra* notes 100–02, 108–15, 126–28, 133, 139, 149–53, 169–70, 175 and accompanying text.

263. *See supra* note 118 and accompanying text. While it is possible that allowing a release for claims in the complaint would create an issue where complaints are instead filed with a wider array of unmeritorious claims in hope that they will be bargaining tools for the release, the new materiality standard would minimize this concern. Under the *Chrysler* rule, these claims would not be sustainable, and therefore a settlement would not be approved. *See supra* notes 57–61 and accompanying text.

264. *See supra* note 146 and accompanying text.

265. *See supra* note 176 and accompanying text.

266. *See* Transcript of Settlement Hearing, *Assad*, *supra* note 7, at 33–34 (providing a hypothetical fraud case that could exist after the settlement is approved because it would be blocked by the release); *supra* note 128 and accompanying text; *see also* Transcript of Settlement Hearing, *Trulia*, *supra* note 64, at 41–42 (citing *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996), as an example of a case where a settlement was approved with a broad release that later barred a valid discriminatory tender offer claim that was unknown to the court when the settlement was approved); *see also In re* Trulia, Inc. Stockholder Litig., No. 10020-CB, 2016 WL 325008, at *8 (Del. Ch. Jan. 22, 2016) (discussing a case where the Court of Chancery almost approved a settlement calling it "a very close call" that would have released claims that ended up earning stockholders over $100 million after new counsel took over the case (citing Transcript of Settlement Hearing at 134, *In re* Rural/Metro Corp., Stockholders Litig., No. 6350-VCL (Del. Ch. Jan. 17, 2012))).

267. Matsushita Elec. Indus. Co., 516 U.S. at 370–71.

268. *Id.* at 370–72.

269. *See supra* note 176 and accompanying text.

away the shareholders' rights to future unknown claims without the shareholders receiving a similarly significant consideration, a type of security that a disclosure-only settlement cannot provide.

If the complaint asserts a specific, stronger claim that is disproven by facts presented in the record, then the court may consider approving a release that also covers those claims, because this also can help prevent additional frivolous litigation. In order to fulfill the court's duty to shareholders, however, no members of the court should continue approving "intergalactic" releases that go beyond the scope of the case itself, into the realm of unknown and federal securities claims, without there being extenuating circumstances. In a disclosure-only settlement, the supplemental disclosures are highly unlikely to be of enough value to justify such broad consideration and are not worth the risk that shareholders cannot sue in a situation that may result in actual financial relief.

By following the above recommendations for establishing a new standard for settlement review, the Court of Chancery should be able to continue protecting defendants from unnecessary litigation, but through deterrence mechanisms that will be built into the review process instead of approval of uneven settlements. Additionally, this will prevent the court from risking the safeguards for which Rule 23(e) was created from being sacrificed by protecting shareholders that may otherwise have their rights bargained away without fair compensation.

CONCLUSION

While there are clearly structural and external factors that have created the inconsistencies that currently exist within the Delaware Court of Chancery regarding the way that the settlement approval process is undertaken, this does not diminish the importance of the court's fiduciary role in this review process. The apprehension of the rest of the court to change their standard of review as quickly as Vice Chancellor Laster did is understandable in light of the interest group theory. Despite this, the court has given warnings to attorneys in *Assad*, *TW Telecom*, *Riverbed*, and *Susser*. This is more than a sufficient amount of warning to provide the Delaware bar before applying a new, stricter standard of review. These parties have had more than enough time to understand and prepare for what is to come. With this task complete and the significance of the court's role as the "gatekeeper" explained, the time for apprehension clearly has passed.

In light of recent studies that have shown the proliferation of M&A litigation and the minimal value that the resulting settlements provide to shareholders, the low level of scrutiny that has dominated the court can no longer be justified. By consistently utilizing the new materiality standard and a new standard for release breadth that is proposed in Part IV, the court will enable a more consistent application of its fiduciary duty that utilizes the significance that it deserves. In order to comply with Rule 23(e) and the fiduciary role that it creates, the Delaware Court of Chancery must now move past this period of laxity and join Vice Chancellor Laster in defining a new future for M&A litigation and class action settlements.