Merger Remedies Unbound

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Dhruv Aggarwal
Northwestern University

Albert H. Choi
University of Michigan and ECGI

Geeyoung Min
Michigan State University and ECGI

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Keywords: Mergers and Acquisitions, Commercial Contracts, Contract Remedies, Lost Premium Damages, Contractarian Theory

Dhruv Aggarwal
Assistant Professor of Law
Northwestern University
375 E Chicago Avenue
Chicago, IL 60611, USA
e-mail: dhruv.aggarwal@law.northwestern.edu

Albert H. Choi*
Paul G. Kauper Professor of Law
University of Michigan
3230 Jeffries Hall
Ann Arbor, MI 48109-3091, USA
e-mail: alchoi@umich.edu

Geeyoung Min
Associate Professor of Law
Michigan State University
648 N. Shaw Lane Rm 328
East Lansing, MI 48824-1300, USA
e-mail: geeyoung.min@law.msu.edu

*Corresponding Author

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Dhruv Aggarwal, Albert H. Choi, and Geeyoung Min*

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To address these concerns, the Article proposes legislative and judicial solutions to mitigate the risks of relying exclusively on the transacting parties to craft merger remedies and to curb the excessive application of contractual freedom in merger law. Legislators should consider amending the Delaware corporate code to restore the traditional contract law limits that are suitable for merger transactions. Courts, for their part, could invalidate excessive or socially inefficient merger remedies and only order specific performance when they deem monetary damages to be inadequate. Together, these interventions would preserve the benefits of contractual flexibility while restraining its most distortionary effects.

* Northwestern University School of Law, University of Michigan School of Law and European Corporate Governance Institute ("ECGI"), and Michigan State University School of Law and ECGI, respectively. Acknowledgements to be added. Comments are welcome to dhruv.aggarwal@law.northwestern.edu, alchoi@umich.edu, and geeyoung.min@law.msu.edu.

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Introduction

In April 2022, Elon Musk offered to buy Twitter for $43 billion, promising $54.20 per share to Twitter's shareholders.[1] The price represented a premium of about 38% above the stock's trading price before Musk's interest in Twitter became publicly known.[2] Twitter accepted the offer[3] and the parties executed a merger agreement. One clause in the agreement, known as the "lost premium" provision, allowed Twitter to recover the $12 billion premium that its shareholders were promised, in case Musk breached the agreement and the merger failed to close. Just a few months later, Musk claimed Twitter had breached the merger agreement and announced he was walking away.[4] Twitter responded by suing Musk to compel him to consummate the deal.[5]

Separately, Twitter shareholder Luigi Crispo filed his own lawsuit to force Musk to either complete the merger or let Twitter enforce the lost premium provision and recover the premium that the Twitter shareholders had been promised.[6] In *Crispo v. Musk*, however, the Delaware Chancery Court held that the lost premium provision was unenforceable, reasoning that it violated contract law's anti-penalty doctrine.[7] Under this doctrine, liquidated damages—the contractually stipulated sums intended to compensate the injured party—must not be unreasonably large.[8] The decision came as a surprise to many practitioners,[9] and raised concerns that buyers could opportunistically walk away from deals without paying any damages to the target.[10] Several months later, the Delaware legislature

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[1] *See* Rob Copeland et al., *Elon Musk Makes $43 Billion Bid for Twitter, Says 'Civilization' At Stake*, WALL ST. J. (Apr. 14, 2022), https://www.wsj.com/tech/elon-musk-offers-to-buy-rest-of-twitter-for-54-20-a-share-11649932296.

[2] *Id.* ("The offer of $54.20 a share represented a 54% premium over the day before he began investing in Twitter, and a 38% premium over the day before his investment was publicly announced").

[3] *See* Cara Lombardo et al., *Twitter Accepts Elon Musk's Offer to Buy Company in $44 Billion Deal*, WALL ST. J. (Apr. 25, 2022), https://www.wsj.com/business/deals/twitter-and-elon-musk-strike-deal-for-takeover-11650912837.

[4] *See* Meghan Bobrowsky & Cara Lombardo, *Elon Musk Seeks to Abandon $44 Billion Twitter Deal*, WALL ST. J. (July 9, 2022), https://www.wsj.com/tech/musk-says-he-is-terminating-twitter-deal-11657315905.

[5] *Twitter, Inc. v. Musk*, No. 2022-0613-KSJM (Del. Ch. filed July 12, 2022).

[6] *See* Crispo v. Musk, 304 A. 3d 567 (Del. Ch. 2023).

[7] *See id.* at 583 ("If a contractual provision defines damages to include penalties, then it is unenforceable."). The holding depended, in part, on the fact that Twitter shareholders were not contracting parties and the merger agreement expressly stipulated that they were not third-party beneficiaries. Given that Twitter itself suffers little harm when Musk breaches the agreement and walks away, the lost premium damages to Twitter would constitute supra-compensatory damages. *Id.* at 584-86. For a detailed discussion of this issue, *see infra* Part II

[8] *See* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 556 (1977) ("The current [anti-]penalty rule is….envisioned as a protection against (1) unfair recovery in excess of justifiable reliance, and (2) the performance of a contract through fear of the penalty, where it would be more efficient economically to breach.").

[9] *See* Thomas W. Christopher et al., *Analysis of Lost Premium Damages Provisions Following the Adoption of DGCL Section 261 Amendments*, WHITE & CASE (Mar. 31, 2025), https://www.whitecase.com/insight-alert/analysis-lost-premium-damages-provisions-following-adoption-dgcl-section-261 ("The Crispo decision took many Delaware practitioners by surprise as it has been widely assumed that such damages could be provided for in a merger agreement."). The decision was particularly surprising because the language in the Twitter merger agreement relied on the standard contractual language that was widely used prior to the Chancery Court ruling.

[10] *See* Glenn D. West, *Surprise: Target Company May Not Be Entitled to Expectancy Damages Based Upon the Lost Premium for an Acquirer's Wrongful Failure to Close a Merger*, WEIL, GOTSHAL & MANGES GLOBAL PRIVATE EQUITY WATCH (Nov. 14, 2023), https://privateequity.weil.com/glenn-west-musings/surprise-target-company-may-not-be-entitled-to-expectancy-damages-based-upon-the-lost-premium-for-an-acquirers-wrongful-failure-to-close-a-merger/ ("[M]ost practitioners believed Delaware courts would likely view damages measured by the lost stockholder premium as, at least in part, recoverable by a target company when an acquirer wrongly terminated the merger agreement and the expected conversion of the target's stock into the agreed-upon merger consideration did not occur. But that belief now appears to have been unjustified").

responded to these concerns and amended the Delaware corporate statute,[11] expressly overriding the Chancery Court's *Crispo* ruling and allowing targets to collect the lost premium when such a provision is stipulated in a merger agreement, as was the case in the Twitter deal.[12]

The Delaware legislature's endorsement of lost premium provisions, despite concerns over their compatibility with the anti-penalty doctrine, comports with a parallel, longer-running trend in Delaware jurisprudence: an increasingly contractarian approach to specific performance.[13] Traditionally, courts have exercised substantial discretion over determining whether an injured party is entitled to specific performance as a remedy,[14] regardless of whether an agreement expressly provides for it.[15] Recently, however, Delaware courts have become much more willing to enforce specific performance provisions contained in merger agreements.[16]

The legislative response to *Crispo* and the Delaware courts' growing deference to negotiated specific performance provisions, taken together, signal a broader shift toward contractarianism that allows contracting parties wide-ranging freedom to dictate their preferred remedy with minimal judicial interference.[17] But this increasing deference to party-drafted remedies raises crucial questions about

[11] Del. Code Ann. tit. 8, § 261(a) (2024).

[12] S.B. 313, 152d Gen. Assemb., Reg. Sess. (Del. 2024), https://legis.delaware.gov/BillDetail/141480. ("New § 261(a)(1) is being adopted in light of the Court of Chancery's decision in Crispo v. Musk…. to clarify the authority under Title 8 to include in an agreement of merger or consolidation provisions for penalties or consequences (including a requirement to pay lost premium damages) upon a party's failure to perform or consummate the merger or consolidation, *regardless of any otherwise applicable provisions of contract law*, such as those addressing liquidated damages and unenforceable penalties.") (emphasis added).

[13] *Id.* ("Consistent with the Delaware General Corporation Law's role as an enabling statute, new § 261(a)(1) confirms that constituent corporations have latitude to allocate the risk of non-performance by provisions expressly set forth in agreements of merger or consolidation").

[14] *Restatement (Second) of Contracts* § 357(1) ("[S]pecific performance of a contract duty will be granted in the discretion of the court against a party who has committee or is threatening to commit a breach of the duty."). *See also* Gildor v. Optical Sols., Inc., 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006) ("Specific performance, of course, is a form of relief available at the discretion of this court."). Traditionally, the choice between specific performance and monetary damages has been subject to the discretion of the court. Legal commentators dating back to Oliver Wendell Holmes have noted that common law judges were far more likely to order monetary damages, because of concerns regarding administrability and judicial overreach with the specific performance remedy. *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, - and nothing else"); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978).

[15] *Restatement (Second) of Contracts* § 364(2) ("Specific performance…. will be granted in spite of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons").

[16] *See* Kathleen St. Jude McCormick & Robert Erikson, *Delaware's Approach to Specific Performance in M&A Litigation*, 20 N.Y.U. J.L. & BUS. 7 (2023) (reviewing Delaware M&A cases that have granted specific performance as remedy and arguing that a contractual stipulation to specific performance "can and should give rise to a legal presumption in favor of specific performance"). Delaware courts' willingness to grant specific performance in mergers can be traced to the influential decision of *IBP v. Tyson*, 789 A.2d 14 (Del. Ch. 2001), see McCormick and Erikson, *supra* at 14.

[17] In this Article, following the corporate law scholarship and Delaware case law, the terms "contractarianism" and "contractarian" refer to the view that courts generally defer to the terms of contracts privately negotiated by the parties, particularly in arm's length transactions between sophisticated actors. *See, e.g., REM OA Holdings, LLC v. N. Gold Holdings, LLC*, No. 2022-0589-JTL, 2023 WL 6143042, at *19 (Del. Ch. Sept. 20, 2023) ("Delaware is a 'contractarian' state. Our law recognizes that 'parties have a right to enter into good and bad contracts' and 'enforces both.'"); New Enter. Assocs. 14, L.P. v. Rich, 295 A.3d 520, 565-66 (Del. Ch. 2023) (citing Ascension Ins. Hldgs., LLC v. Underwood, 2015 WL 356002, at *4 (Del. Ch. Jan. 28, 2015)) ("To say that Delaware prides itself on the contractarian nature of its law risks understatement: This jurisdiction respects the right of parties to freely contract and to be able to rely on the enforceability of their agreements; where Delaware's law applies, with very limited exceptions, our courts will enforce the contractual scheme that the parties have arrived at through their own self-ordering, both in recognition of a right to self-order and to

the appropriate boundaries of contractual freedom. To what extent should the parties' stipulated remedy in a merger agreement be enforced as written? How should courts and legislatures balance deference to private ordering with the equitable principles that traditionally govern the enforcement of remedies? More fundamentally, what remedy *should* a disappointed party be entitled to when a merger falls apart?

This Article wrestles with these important questions. While the statutory amendment overriding the *Crispo* decision appears to resolve the controversy over the lost premium provision,[18] which, we believe, is desirable, it has simultaneously introduced a broader tension with foundational principles of contract law.[19] Lost premium and termination fee provisions function as liquidated damages clauses and are thus subject to contract law's anti-penalty doctrine.[20] Under this doctrine, the stipulated liquidated damages cannot be punitively high. The new amendment to the Delaware corporate code, however, allows a form of unchecked contractarianism, immunizing liquidated damages provisions from the anti-penalty doctrine. For instance, the plain language of the amended statute potentially allows targets to require a punitive termination fee if the buyer does not close the deal.[21]

At the same time, under the amended statute, this escape from the anti-penalty doctrine would apply only when one party has breached the merger agreement,[22] but not when the party is obligated to pay the fee without breaching the agreement.[23] As a result of the statutory amendment, Delaware law governing liquidated damages in mergers has arguably become "bifurcated," with the application

promote certainty of obligations and benefits."); *New Enter. Assocs.*, 295 A.3d at 566 ("Delaware's embrace of *contractarianism* extends to the corporate form, where it manifests as the concept of private ordering.") (emphasis added).

[18] *See* WHITE & CASE, *supra* note 9 ("Silence is Not Golden: To recover lost premium damages in the event of breach or fraud, the DGCL [§ 261(a)] requires that the merger agreement specify that the non-breaching party may pursue lost premium damages").

[19] *See infra* Sections I.A & I.B.

[20] The application of the mandatory anti-penalty doctrine is not without its own practical limitations. *See* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 616-17 (2003) ("[C]ourts sometimes find compensatory liquidated damages clauses to be penalties in complex cases because the courts have failed to understand just how the clause protected the promisee's expectation"); John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000).

[21] While both lost premium provisions and reverse termination fees operate as forms of liquidated damages, they are used differently in merger agreements. Lost premium provisions generally appear under the "Effect of Termination" clause, whereas reverse termination fees are set forth in separate provisions, often alongside target termination fees, specifying exact pre-set amounts payable upon certain buyer failures. For example, in the Twitter-Musk agreement, the lost-premium provision was embedded in the form of "damages-definition" under Section 8.2. Effect of Termination ("in the case of liabilities or damages payable by [Musk, the Buyer]….the benefits of the transactions contemplated by this Agreement lost by the [Twitter, the Target Company]'s stockholders) (taking into consideration all relevant matters, including lost stockholder premium, other combination opportunities and the time value of money)….shall be deemed in such event to be damages of such party"). But the agreement did not include a reverse termination fee. In the wake of *Crispo* and subsequent amendments to the DGCL, lost premium provisions and reverse termination fees increasingly appear to serve as functional substitutes for one another. *See* WHITE & CASE, *supra* note 9 ("Of the 25 merger agreements that followed the strategic model, 19 (76%) provided for lost premium damages and only six (24%) did not. All six merger agreements that did not provide for lost premium damages provided for a reverse termination fee….Of the 13 merger agreements that followed the private equity model, only three (23%) included lost premium damages provisions).

[22] Del. Code Ann. tit. 8, § 261(a) (2024) ("[A] party to the agreement that fails to perform its obligations under such agreement…fails to comply with…fails to consummate…or fails to cause the consummation of…shall be subject…to such penalties or consequences as are set forth in the agreement of merger").

[23] For instance, the buyer may be obligated to pay a stipulated reverse termination fee even if the buyer has abided by all the contractual obligations, so long as the buyer was unable to secure the necessary regulatory approval or arrange the requisite financing. *See infra* Sections I.A. & III.A.

of the anti-penalty doctrine depending on whether a court finds that a party has breached the agreement. This bifurcation of merger remedies is a significant development that has arguably made Delaware law less predictable for transactional planners.[24] Such increased uncertainty can lead to more litigation between merging parties about whether a "breach" actually occurred and whether the termination fee is under the purview of the amended statute.

This Article also applies insights from economic theory to analyze how the new contractarianism can impede efficient dealmaking. First, parties that have incomplete information about the transaction can agree to suboptimal and inefficient remedy terms.[25] For instance, a buyer that is not fully informed of the risks associated with the deal can commit to paying an excessively large reverse termination fee in case it cannot consummate the deal. This large fee may preclude the buyer from later walking away from the transaction, even if breaching would otherwise have been efficient ex post.[26] Second, if there are substantial agency problems between managers and their shareholders, the managers can use their newfound contractual freedom to commit their companies to mergers that are not in the best interests of their shareholders. For example, if a manager stands to personally obtain financial benefits from a merger, they can agree to pay excessively high termination fees in order to "lock in" to a merger that is beneficial to them but not to their shareholders.

Third, the Article also discusses how unchecked contractarianism can engender negative consequences on non-contracting third parties. For one, after the legislative amendment, merger agreements can potentially require a large termination fee to be paid by the target if it were to withdraw from the deal and instead sell itself to another buyer. An excessively large target termination fee could deter third-party buyers from competing against the initial acquirer, even if they value the target more highly and the efficient outcome would be for the target to sell itself to the third-party buyer.[27] Enforcing the specific performance provision in favor of the initial acquirer can also have a similar effect. Another third-party harm from unchecked contractarianism is that an unreasonably large reverse termination fee can potentially frustrate the government's competition policy. For instance, a buyer may be obligated to pay a reverse termination fee if the buyer fails to secure regulatory approval from antitrust authorities.[28] The larger this reverse termination fee, the stronger the buyer's incentives to secure antitrust approval to close the transaction.[29] With a large reverse termination fee, the buyer

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[24] *See infra* Section III.A.

[25] *See, e.g.,* Schwartz & Scott, *supra* note 20, at 556. ("The existence of asymmetric information sometimes will cause parties to make constrained efficient contracts; these contracts are not 'first-best' but are efficient given the information structure facing the parties").

[26] *See* Goetz & Scott, *supra* note 8; Maria Bigoni, Stefania Bortolotti, Francesco Parisi & Ariel Porat, *Unbundling Efficient Breach: An Experiment*, 14 J. EMPIRICAL LEGAL STUD. 517 (2017). *Cf.* Barry E. Adler, *Efficient Breach Theory Through the Looking Glass*, 83 N.Y.U. L. REV. 1679 (2008).

[27] This Article focuses primarily on the magnitude of termination fees, rather than on their existence. For earlier work on these provisions, see Afra Afsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 VAND. L. REV. 1161 (2010); John C. Coates, Darius Palia & Ge Wu, *Reverse Termination Fees in M&A* (European Corp. Governance Inst., Law Working Paper No. 655/2022, 2022), https://ssrn.com/abstract=4138891; Micah S. Officer, *Termination Fees in Mergers and Acquisitions*, 69 J. FIN. ECON. 431 (2003).

[28] For the taxonomy of reverse termination fee triggers, see Brian JM Quinn, *Optionality in Merger Agreements*, 35 DEL. J. CORP. L. 789, 813-14 (2010).

[29] *See* Darren S. Tucker & Kevin L. Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, 22 ANTITRUST 70, 74 (2008) (finding that in transactions where buyers actually paid reverse termination fees to sellers, the size of reverse termination fees "averaged only 1.8 percent of the transaction value, significantly below the 4.2 percent rate for other transactions in our survey. This result provides further evidence that the higher fees may have their intended effect of encouraging the buyer to obtain regulatory clearance."); Samuel N. Weinstein, *Anticompetitive Merger Review*, 56 GA. L. REV. 1057, 1099 (2022) ("[Tucker & Yingling] found in this result additional evidence that higher ARTF [reverse

may be "over-committed" to consummate the merger even when the merger is anticompetitive.[30] We could, for instance, see buyers more vigorously and even successfully challenging the antitrust authorities, by taking regulators to court and appealing any adverse judgment. More anticompetitive mergers can ultimately harm consumers, employees, and suppliers.

This Article is organized as follows. In Part I, we present a brief review of the underlying contract law doctrines, with a focus on the anti-penalty doctrine and the traditional discretion courts exercise in choosing between remedies, including specific performance. This Part also briefly discusses the development of Delaware case law regarding termination fees and specific performance provisions in mergers. Part II canvasses the recent changes that have moved Delaware toward becoming more contractarian in its approach to merger remedies, describing the recent legislative amendment that grants unprecedented contractual freedom to merging parties. In Part III, the Article argues that the legislative amendment creates a bifurcated regime for liquidated damages in merger agreements. When a termination fee is triggered by a party's breach of the merger agreement, the amended statute arguably places little limits on the size of this fee. On the other hand, if the termination fee is triggered in the absence of a breach, the traditional anti-penalty doctrine applies, and there would be substantial limits on the fee size. The Part argues that the bifurcated approach introduces more deal uncertainty, as well as litigation regarding whether a party "breached" the merger agreement in the first place and whether a fee is subject to the amended statute or the traditional anti-penalty doctrine. The Part also discusses transactional lawyers' incentive to broaden or narrow the definition of a breach.

Part IV deploys core concepts from economic theory to explain the problems associated with the unbridled contractarianism. We argue that unchecked contractarianism can lead to large termination fees that could impede the efficient transfer of assets and accentuate the issues related to asymmetric information, agency costs, and negative externalities on third parties. An important aspect of this harm to third parties is the prospect of contracting parties litigating against antitrust regulators and closing more anticompetitive transactions, thus increasing corporate concentration and hurting consumers, employees, and other stakeholders. Part V argues that both the legislature and the Chancery Court should consider that unmitigated contractarianism can undermine fundamental objectives of Delaware corporate law, and suggests responsive reforms.

I. The Contract Law of Liquidated Damages and Specific Performance

The choice of remedy has long been a challenging issue in contract law. This is partly because contract law offers the injured party different types of remedies against the breaching party. While the principal objective of contract law remedy is "compensation" and to allow the injured party to recover the "benefit of the bargain,"[31] the injured party can sometimes recover restitution or reliance damages,

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termination fees triggered by failure to obtain regulatory approval] may incentivize acquirers to expend greater effort to ensure that a deal receives antitrust clearance").

[30] On the signaling effects of large reverse termination fees to antitrust authorities, see Albert H. Choi & Abraham L. Wickelgren, *Reverse Break-Up Fees and Antitrust Approval* (unpublished manuscript, 2024) (large reverse termination fee "is more costly to the [buyer] the more likely the merger is to be challenged, and the more likely a court is to find the merger anti-competitive, a large reverse breakup fee can be a credible signal that the acquirer believes the deal is pro-competitive"). *Cf.* Weinstein, *supra* note 29, at 1099 ("[A] large [reverse termination fees] may send the opposite signal: that the seller insisted on a large breakup fee because it is sufficiently concerned that the transaction will be blocked").

[31] *See Restatement (Second) of Contracts* § 347, cmt. a ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed").

and it can even receive specific performance.[32] Unique to contract law, contracting parties can also stipulate which remedy they prefer ex-ante, at the time they enter into the contract. The contract can "liquidate" the damages, i.e., specify an amount of money that would constitute the remedy for a breach, or state that the injured party is entitled to specific performance. The parties' contractual ability to stipulate remedies raises an interesting question. How much freedom should the contracting parties have in choosing their own remedy? This question implicates at least two issues: the anti-penalty doctrine that applies to liquidated damages and the discretion given to the court in choosing specific performance as a remedy.[33]

A. Liquidated Damages and the Anti-Penalty Doctrine

The most important avenue through which contracting parties can dictate their remedy is by contractually stipulating the amount of money that a breaching party has to pay the non-breaching injured party. "Liquidating" the damages thus involves contracting parties stipulating the sum of money that will constitute compensation for breach at the time they enter into the contract. This reduces the effort and resources courts must later expend to decide the appropriate remedy in case of breach. While contract law takes a permissive approach in allowing the contracting parties to liquidate damages, there are limitations. Most notably, under the "anti-penalty" doctrine, the liquidated amount cannot be unreasonably large. The Restatement (Second) of Contracts § 356(1), for instance, states:

> Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.[34]

Comment a to the Restatement section further clarifies:

> The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation. The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation….However, the parties to a contract are not free to provide a penalty for its breach. The *central objective behind the system of contract remedies is compensatory, not punitive*. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.[35]

As the Restatement indicates, a liquidated damages provision plays an important role in promoting contractual certainty and conserving judicial resources. By allowing parties to decide the sum of money that constitutes sufficient compensation for a breach, it enables them to enter into contracts without fear that courts will later impose excessively high or low remedies after a dispute.[36]

32 *See* ROBERT E. SCOTT & JODY P. KRAUS, CONTRACT LAW AND THEORY 94–114 (5th ed. 2013).
33 Remedy provisions in contract can raise other contract law issues, as well. For instance, if liquidated damages are considered to be "too high" or "too small," the court can strike it down using the doctrine of unconscionability or even the doctrine of duress or undue influence. For commercial contracts, however, such doctrines are rarely invoked.
34 *Restatement (Second) of Contracts* § 356(a)(1).
35 *Restatement (Second) of Contracts* § 356(a)(1) cmt. a (emphasis added).
36 *See* Eric L. Talley, *Contract Renegotiation, Mechanism Design, and the Liquidated Damages Rule*, 46 STAN. L. REV. 1195 (1994).

At the same time, parties stipulating excessively high damages can bind themselves to inefficient transactions that ideally *ought* to be breached.[37] Moreover, allowing punitive damages would deviate from the philosophy underlying contract remedies—that remedial terms should be designed to *compensate* injured parties, rather than providing them a windfall by penalizing the breaching party. The anti-penalty doctrine has thus evolved to provide courts with a means to void unreasonably large liquidated damages that contradict the central objective of contract law, which is to compensate the injured party, rather than punish the breaching party.[38]

The anti-penalty doctrine has important applications in contemporary corporate transactions with billions of dollars at stake. Liquidated damages in mergers and acquisitions transactions come in two types. First, transacting parties often stipulate a "termination fee" that one party must pay the other when a specified circumstance occurs. It is common for the target corporation to pay a "target termination fee" if the target were to walk away from the agreement and decide to sell itself to a different buyer. Similarly, buyers often promise to pay a "reverse termination fee" if they are unable to consummate the transaction due to their inability to obtain a necessary regulatory approval (such as clearance from antitrust authorities) or to secure necessary financing.[39] The second type of liquidated damage provisions applies when breach is "intentional," "willful," or "knowing," that is, when breach is more "egregious,"[40] and typically results in damages substantially larger than those envisaged by termination fees. The "lost premium" provision explained earlier is an example of this latter type. These two types of damages differ not just because the second type requires a higher breach threshold to be triggered, but also because termination fees (the first type) may be triggered even if no party has breached the agreement.

Given that termination fees are triggered by a *termination* of the merger agreement under stipulated circumstances rather than a *breach*, it is not immediately obvious that they qualify as liquidated damages provisions. Delaware courts, however, have decided to treat termination fees as liquidated damages since the seminal case of *Brazen v. Bell Atlantic.*[41] The case involved a merger agreement between NYNEX and Bell Atlantic, where the merger agreement stipulated a reciprocal termination fee of up to $550 million if either party was unable to consummate the transaction. A priori, because the termination fee could be triggered even when the parties had abided by the agreement's obligations (such as if Bell Atlantic's shareholders withheld approval for the merger), it was unclear whether the provision should be treated as liquidated damages. In fact, the Chancery

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[37] *See* Goetz & Scott, *supra* note 8.

[38] See 3 E. Allan Farnsworth, *Farnsworth on Contracts* § 12.18 (3d ed. 2004) (stating that if a stipulated damages provision "is condemned as a penalty, it is unenforceable."). The Uniform Commercial Code takes a similar approach. See Uniform Commercial Code §§ 2-718 & 2-719 ("damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach…A term fixing unreasonably large liquidated damages is void as a penalty").

[39] On occasion, reverse termination fee can also be based on "material breach" by the buyer. The Twitter transaction is an example. *See* Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022 at § 8.3(b). The section states that, in case Parent (X Holdings I, Inc.) has materially breached the covenants or representations and warranties and the agreement is terminated in response by Twitter, "Parent *shall*…pay…the Parent Termination Fee [of $1 billion]" (emphasis added). Section 8.3(c) of the agreement goes on to state that, unless the breach was "knowing and intentional," the collection of the termination fee "shall constitute the *sole and exclusive monetary remedy of the Company*" (emphasis added). When read together with Section 8.2 of the agreement, in case the buyer materially breaches the agreement and the agreement is terminated, Twitters' sole remedy is to collect the Parent Termination Fee of $1 billion. In case the breach is "knowing and intentional," Twitter can also pursue the lost premium.

[40] This is often known as the "bad conduct" exception, that preserves liability for "bad conduct" when an agreement is terminated. *See* Crispo v. Musk, 304 A. 3d 567, 578–79 (Del. Ch. 2023).

[41] Brazen v. Bell Atl. Corp., 695 A.2d 43 (Del. 1997).

Court held that the termination fee was *not* an example of liquidated damages.[42] The Delaware Supreme Court, however, reversed and held that the termination fee was a form of liquidated damages. The court based its decision partly on the fact that the merger agreement itself stated that the termination fees "constitute liquidated damages and not a penalty."[43] According to the Court, "the express language in section 9.2(e) of the agreement unambiguously states that the termination fee provisions 'constitutes liquidated damages and not a penalty'….we find no compelling justification for treating the termination fee in this agreement as anything but a liquidated damages provision, in light of the express intent of the parties to have it so treated."

Since *Brazen*, numerous courts have similarly treated the termination fee as liquidated damages.[44] Interestingly, while one may theoretically have imagined that merging parties could have dodged the anti-penalty doctrine by not classifying termination fees as liquidated damages in merger agreements, they have not done so in practice. Instead, the standard language in merger contracts is to classify termination fees as liquidated damages, *and* state that they are not penalties. For example, in the Twitter transaction, the merger agreement stated that "the Termination Fee is not a penalty, but is liquidated damages, in a reasonable amount that will compensate the [buyer]."[45] Since *Brazen*, parties have not just accepted the application of the anti-penalty doctrine to termination fees: they have gone out of their way to privately bargain for the doctrine's application to termination fees in their merger agreements, by classifying these fees as liquidated damages and clarifying that, in accordance with the anti-penalty doctrine, these amounts are not meant to be penalties (and thus not punitively high).[46]

B. Specific Performance and Judicial Discretion

Merger remedies do not just consist of liquidated damages; they also encompass equitable relief. Contracting parties often stipulate in the agreement that the injured party will be entitled to specific performance. Specific performance compels the breaching party to fulfil its contractual commitments and close the transaction.[47] Under traditional contract law, granting specific performance is under the court's equitable discretion, and specific performance will not be ordered if monetary damages would be "adequate to protect the expectation interest of the injured party."[48]

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[42] *Id.* at 47 (stating that "the event that triggers payment of the [termination] fees is not a breach but a termination").

[43] *Id.* at 46.

[44] *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003) (applying the *Brazen* analysis to termination fee in both majority and dissenting opinions); and Alltrista Plastics, LLC v. Rockline Indus., Inc., 2017 WL 237625 (Del. Super. Ct. 2017) (holding a termination fee in a supply agreement to be liquidated damages even when not phrased similarly to *Brazen*).

[45] *See Twitter, Inc.*, Definitive Proxy Statement (Schedule 14A) § 8.3(d) (Form DEFA14A) (filed Dec. 19, 2022), https://www.sec.gov/Archives/edgar/data/1418091/000119312522120474/d310843ddefa14a.htm.

[46] In fact, after *Brazen*, the incidence of termination fees increased from 33% to 65%. *See* John C. Coates IV & Guhan Subramanian, *A Buy-Side Model of M&A Lockups: Theory and Evidence*, 53 STAN. L. REV. 307 (2000). There are corporate law-based constraints on the size of termination fees. *See* Quinn, *supra* note 28, at 808 n.84 (2010) ("[t]here are fiduciary constraints against the excessively large termination fees. Such limitations are acceptable when a court must balance damages caused by a termination on the one hand and fiduciary obligations to seller's shareholders on the other."). We will discuss this issue more in Section III.C.

[47] *See* Yair Listokin, *The Empirical Case for Specific Performance: Evidence from the IBP-Tyson Litigation*, 2 J. EMPIRICAL LEGAL STUD. 469 (2005).

[48] *See Restatement (Second) of Contracts* §§ 357, 359, & 360. An interesting twist on this issue is that it is common to see specific performance provisions in merger agreements that expressly prohibit the breaching party from raising the "adequacy" issue. There is little precedent to determine whether this prohibition overrides the Restatement's presumption that the choice of contractual remedy is within the court's discretion, and the doctrinal norm that specific performance is only suitable when monetary (expectation) damages are inadequate.

Delaware courts have historically been reluctant to order the specific performance remedy in merger litigation.[49] This reluctance is in keeping with common law judges' general historical aversion to ordering specific performance, because courts are uncertain about how to administer such equitable relief, and the possibility that judicial overreach will deprive parties of their contractual freedom.[50]

A specific performance provision in an agreement does not raise anti-penalty issues, because the court is ordering the actual execution of the merger rather than the payment of monetary damages. However, it does raise the question of whether the court should apply the usual test to decide whether specific performance is the appropriate remedy. The Restatement (Second) of Contracts § 357, comment c, provides a cryptic passage to describe how courts operationalize the "discretionary nature" of specific performance as a contractual remedy:

> The granting of equitable relief has traditionally been regarded as within judicial discretion….It is…subject to general principles of equity that are not peculiar to contract disputes, such as those that bar relief to one who has been guilty of laches or who has come into court with unclean hands. Furthermore, it is subject to principles of common sense so that, for example, a court will not order a performance that is impossible. In granting relief, as well as in denying it, a court may take into consideration the public interest.[51]

A key predicate for ordering specific performance is that the court, applying its discretion, must hold that monetary damages are inadequate. How do courts decide on the adequacy of damages? Comment a to § 359 of the Restatement provides some insight into how courts make such decisions. It lists "uncertainty of terms, insecurity as to the agreed exchange and difficulty of enforcement"[52] as factors that influence the decision between monetary damages and specific performance, with an increase in any of these factors increasing the court's likelihood of ordering specific performance. The comment admits that this choice of remedies is a subjective decision and that "adequacy is to some extent relative," but concludes that the "modern approach is to compare remedies to determine which is more effective in serving the ends of justice."[53]

However, the most important aspect of comment a to § 359 is not its recitation of the factors that courts may consider in determining the adequacy of damages. Instead, it is the comment's description of the evolution of judicial attitudes toward specific performance that should merit most attention. It describes "a tendency to liberalize the granting of equitable relief by enlarging the classes of cases in which damages are not regarded as an adequate remedy," and states that "[t]his tendency has been encouraged by the adoption of the Uniform Commercial Code, which 'seeks to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale.'" Finally, the comment to § 359 states that "[d]oubts…should be resolved in favor of the granting of specific performance or injunction." The Restatement describes an evolution of the case law from the common law tradition, where there was a strong presumption that monetary damages were the appropriate remedy, toward a greater willingness to order specific performance. In fact, by asking courts to resolve doubts in favor of granting specific performance, § 359 suggests that judges ought to invert the common law rule and favor equitable relief.

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[49] *See* Listokin, *supra* note 47.
[50] *See* sources cited *supra* note 16.
[51] *Restatement (Second) of Contracts* § 357 cmt. c.
[52] *Id.* at § 359 cmt. a.
[53] *Id.*

There are limits to the contracting parties' ability to choose specific performance to the *exclusion* of monetary damages. The last sentence in comment a to § 359 states, in relevant part, "[b]ecause the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages."[54] This indicates that the conventional approach, where the *court*—rather than the parties themselves—grants specific performance if (and only if) it concludes that damages are inadequate, persists. A "private ordering" solution where the parties themselves eliminate the possibility of monetary damages and choose specific performance as the exclusive remedy will not always be honored.[55] Thus, while there has been a slow doctrinal move toward increasing the salience of specific performance as a viable contractual remedy, it is a court-centric change. Contracting parties themselves cannot designate equitable relief to be the exclusive remedy if their agreement is breached.

How does this doctrinal evolution in contract law inform the extent to which corporate parties are entitled to specific performance as a remedy in mergers? Delaware corporate law has gradually overcome an aversion to equitable merger remedies and become more likely to order specific performance. Going back to the nineteenth century, Delaware courts historically emphasized that specific performance is only granted in unusual circumstances. For example, the Court of Chancery denied specific performance in an 1868 case, holding that "there is no 'entitlement' to specific performance….Specific performance is available when it is equitable, and in this case specific enforcement…would be inequitable."[56] In contemporary times, the court has asserted that "the party seeking specific performance must make a clear and convincing showing that the remedy is warranted."[57] Delaware case law emphasizes that judges in the state take the default status of monetary damages seriously: "[t]he [clear and convincing] standard….reflects the expectation that a court will be reluctant to grant the atypical remedy of specific performance unless a sufficiently persuasive showing has been made."[58] Therefore, by repeatedly holding that specific performance is an "atypical" remedy to which parties are not entitled, Delaware law has historically followed the common law in positioning damages as the default merger remedy.

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[54] *Restatement (Second) of Contracts* § 359 cmt. a. Since the merger of the court of law and the court of equity from the mid-nineteenth century, this jurisdictional issue may be no longer as relevant, and we are not arguing that we should treat the specific performance provision as a matter of jurisdiction. Our analysis is rooted more on concerns over efficiency. For previous scholarship on specific performance versus monetary damages and why, in many circumstances, the court should grant specific performance as remedy for breach of contract, see Yonathan A. Arbel, *Contract Remedies in Action: Specific Performance*, 118 W. VA. L. REV. 369 (2015); Hanoch Dagan & Michael A. Heller, *Specific Performance: On Freedom and Commitment in Contract Law*, 98 NOTRE DAME L. REV. 1323 (2023); Felipe Jiménez, *Specific Performance*, *in* RESEARCH HANDBOOK ON THE PHILOSOPHY OF CONTRACT LAW (Mindy Chen-Wishart & Prince Saprai eds., 2025); Kronman, *supra* note 16; Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984).

[55] Contracting parties are also prohibited from the converse action of eliminating the possibility of specific performance through private ordering. The Restatement explains that "[s]pecific performance or an injunction may be granted to enforce a duty even though there is a provision for liquidated damages for breach of that duty." *Restatement (Second) of Contracts* § 361. Comment b to the same section states: "If a contract contains a provision for the payment of such a price as a[n]…alternative performance, specific performance or an injunction may properly be granted on condition that the alternative performance is not forthcoming." *See id.* at cmt. b.

[56] Godwin v. Collins, 1868 WL 1255, at *1 (Del. Ch. 1868).

[57] *See* 26 Cap. Acquisition Corp. v. Tiger Resort Asia Ltd., 309 A.3d 434, 464 (Del. Ch. 2023).

[58] *Id.* at 464 n.14.

In recent years, however, Delaware courts have become more willing to embrace the availability of specific performance.[59] In the seminal case of *IBP v. Tyson*,[60] IBP (the target) sought specific performance against Tyson (the buyer), asking the Chancery Court to force Tyson to close the transaction. Judge Leo Strine, who was Vice Chancellor at the time, determined that specific performance was the appropriate remedy. The court's decision relied on a few important observations. First, the court noted that, for Tyson, acquiring IBP was "a unique opportunity that cannot be adequately monetized."[61] Furthermore, according to the court, "the determination of cash damages award will be very difficult."[62] Finally, Tyson admitted that the merger would still make strategic sense. Considering all these factors, the court granted specific performance as a remedy for IBP.[63] From a doctrinal perspective, *IBP* represents a fact pattern that fit into the scenario § 359 of the Restatement envisages as being ideal for the specific performance remedy: the uncertainty about damages calculations meant that liquidated damages may not have been "adequate" to compensate the injured target for the buyer's breach, and the equitable remedy was enforceable given the buyer's concession that it could still consummate the merger.[64]

In cases decided after *IBP*, Delaware courts have become more willing to honor the specific performance provisions in merger agreements.[65] For example, in a 2016 case called *Williams Companies*, the Chancery Court emphasized that "Delaware is strongly contractarian, and the presence of a provision in favor of specific performance in case of breach…must be respected."[66] There is a subtle and important distinction between this line of reasoning and the earlier *IBP* case. The *IBP* court ordered specific performance for reasons that clearly fit § 359's guidelines for when equitable relief was warranted: there was "uncertainty of terms, insecurity as to the agreed exchange, and difficulty of enforcement."[67] On the other hand, in *Williams Companies*, the Chancery Court grounded its decision to order specific performance in contracting party autonomy: the court would choose this remedy simply because the parties had themselves indicated their preference for specific performance in the merger contract.

In subsequent cases, the Chancery Court has continued to order specific performance and justified this decision by citing the contracting parties' inclusion of specific performance clauses in the merger agreements: *Channel Medsystems, Inc. v. Boston Sci. Corp.*,[68] *Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc.*,[69] and *Level 4 Yoga, LLC v. CorePower Yoga, LLC.*[70] In *Snow Phipps*, for instance, private equity buyer Kohlberg & Company attempted to walk away from acquiring DecoPac (a cake

[59] *See* McCormick & Erikson, *supra* note 16.
[60] *In re* IBP, Inc. S'holders Litig, 789 A.2d 14 (Del. Ch. 2001).
[61] *Id.* at 82.
[62] *Id.* at 83.
[63] Similarly, then-Vice Chancelor Strine granted specific performance of the preemptive rights set forth in a shareholder agreement after an equitable review of whether such relief was appropriate. Gildor v. Optical Sols., Inc., No. 1416-N, 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006) ("Specific performance, of course, is a form of relief available at the discretion of this court").
[64] *See Restatement (Second) of Contracts* § 359 cmt. a.
[65] Partly in response to the case of *IBP v. Tyson*, specific performance provision has become quite common in merger agreements. *See* McCormick & Erikson, *supra* note 16, at 17 (observing that, after the IBP case, "[p]ractitioners viewed *IBP* as a sign that…'the Delaware judiciary [takes] a more expansive perspective on the specific performance remedy,' at least in M&A cases," and "specific performance clauses in M&A transactions became relatively commonplace").
[66] *See* Williams Companies, Inc. v. Energy Transfer Equity, L.P., 2016 WL 3576682, at *2 (Del. Ch. 2016).
[67] *See Restatement (Second) of Contracts* § 359 cmt. a.
[68] 2019 WL 6896462 (Del. Ch. Dec. 18, 2019).
[69] 2021 WL 1714202 (Del. Ch. Apr. 30, 2021).
[70] 2022 WL 601862 (Del. Ch. Mar. 1, 2022).

decorating supplier) in the middle of the COVID-19 pandemic. The court ruled that the buyer had breached its "reasonable best efforts" obligation in securing debt financing and ordered the transaction to close. In support of its decision to order equitable relief, it noted, "this court does not hesitate to order specific performance in cases of this nature, particularly where sophisticated parties represented by sophisticated counsel stipulate that specific performance would be an appropriate remedy in the event of breach."[71] This is largely consistent with Delaware courts' contractarian turn, allowing transacting parties to contractually stipulate the appropriate remedy and honoring such stipulations.

Importantly, the *Snow Phipps* court did not evaluate whether damages would be adequate because the merger agreement evidenced the parties' preference for the specific performance remedy. Similarly, in other cases, such as *United Rentals, Inc. v. RAM Holdings, Inc.*,[72] Delaware courts have turned down requests for specific performance, stating that the plain language of the merger agreement was inconsistent with the parties seeking equitable relief as the appropriate remedy.[73] This is arguably an even greater thumb on the scale for specific performance as a remedy than the Restatement's suggestion that "[d]oubts" about the comparative appropriateness of merger remedies "should be resolved in favor of the granting of specific performance or injunction."[74] Indeed, courts in these recent decisions seem to have largely abandoned § 359's framework for weighing the choice between competing remedies, despite the fact that the decision to grant or reject specific performance has "traditionally been regarded as within judicial discretion."[75] Instead, the Chancery Court now seems to treat the contracting parties' preference for specific performance, as indicated by clauses in the merger agreement, as being presumptively enforceable.

Contractarianism and party autonomy seem to have taken precedence over judicial oversight of the choice of remedies. Delaware's contractarianism with respect to merger remedies has arguably exceeded the common law baseline as expressed in the Restatement, which generally disfavors the parties choosing unreasonably large liquidated damages or specific performance through private ordering.[76] Delaware judges cite specific performance clauses in merger agreements to order the equitable remedy, without necessarily delving into their merits as suggested in the Restatement. Specific performance is now firmly within the realm of possible outcomes for merger litigation in Delaware courts.

II. *Crispo v. Musk* and The Subsequent Legislative Amendment

The changes to the traditional contract law approach to remedies we described in the previous Part, particularly the anti-penalty doctrine and judicial discretion over specific performance, have had far-reaching consequences when applied to corporate mergers. Some of these effects stem from the fact that, in mergers involving public targets, while the target shareholders are the ones who receive the promised consideration, their legal rights to contest the merger terms are often restricted. This issue came to the fore in a recent Chancery Court case involving Elon Musk's acquisition of Twitter,

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[71] *Snow Phipps*, 2021 WL at *51.
[72] 937 A.2d 810, 845 (Del. Ch. 2007).
[73] *See* John Patrick Hunt, *Guest Post 2: John Patrick Hunt on Specific Performance in Delaware*, CONTRACTS PROF BLOG (July 14, 2022), https://lawprofessors.typepad.com/contractsprof_blog/2022/07/guest-post-2-john-patrick-hunt-on-specific-performance-in-delaware.html.
[74] *Restatement (Second) of Contracts* § 359 cmt. a.
[75] *Id.* at § 357 cmt. c.
[76] *See supra* note 34 and accompanying text.

Crispo v. Musk, and Delaware's subsequent legislative response to the court's decision. In this Part, we present a more detailed description and analysis of the underlying problem as well as recent judicial and legislative developments. We begin by explaining how transactional lawyers addressed the separation of economic benefits from legal rights for target shareholders in the years preceding the Twitter litigation, followed by an in-depth examination of *Crispo v. Musk* and the subsequent legislative amendment that overrode the Chancery Court's decision.

A. The Origins of Lost Premium Provision: *Con Ed* Provisions

Public company merger agreements have an intriguing tripartite structure. In most mergers with a public target (i.e., a target with dispersed shareholders and shares traded on a stock exchange), the transacting parties use a structure under which a buyer's merger subsidiary—which, in almost all cases, has no physical assets or operations, and is created solely for the purposes of the merger—merges with the target corporation. Once the merger becomes effective, the surviving corporation (either the acquirer's merger subsidiary or the target) becomes a wholly-owned subsidiary of the buyer, assuming all the assets and operations of the target.[77] The contracting parties to the merger agreement are the buyer, the target, and the merger sub. Importantly, the target's shareholders are emphatically *not* parties to the agreement. Not only that, merger agreements almost always expressly stipulate that, except in very narrow circumstances,[78] the agreement does not confer any rights to third parties, including the target's shareholders. Figure 1 presents a graphical illustration of the structure of mergers involving public targets, indicating that target shareholders are neither contracting parties nor third-party beneficiaries ("No TPB").

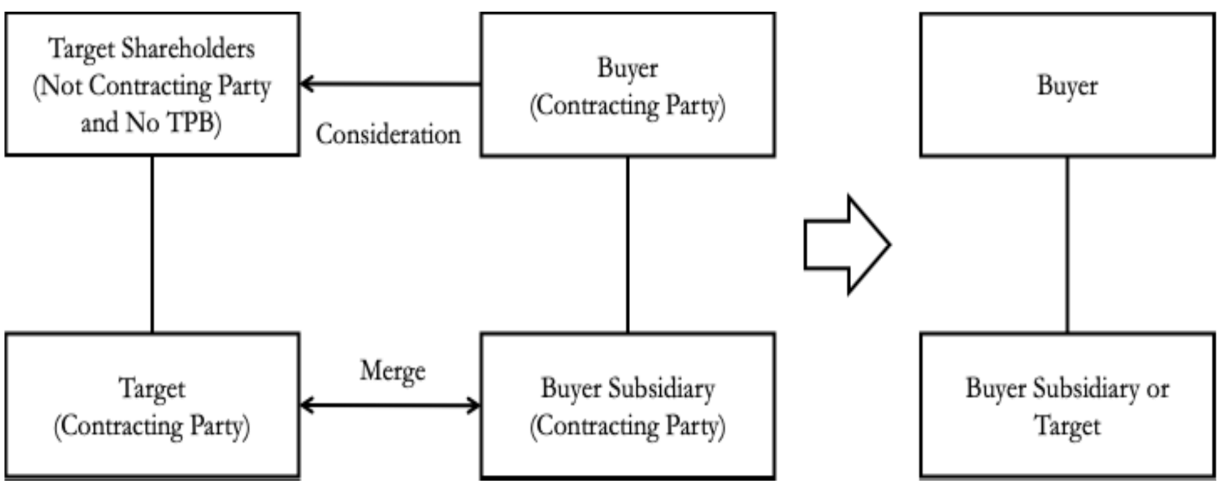

Figure 1: The Contractual Structure of Mergers with Public Targets

The exclusion of target shareholders from being contracting parties *or* third-party beneficiaries under the merger agreement has significant consequences. While the target shareholders are the intended recipients of the merger consideration—they are the ones who receive consideration from

[77] In the case of a reverse triangular merger, the target is the surviving corporation, while in forward triangular mergers, the merger subsidiary is the surviving company and the target disappears.

[78] The narrow circumstances typically include: (1) allowing the target shareholders to receive the promised consideration *after* the merger has become effective, and (2) allowing the target directors and officers to continue receiving the benefits of the director and officer insurance.

the buyer—their exclusion from contractual or third-party status means they do not have the right to bring a lawsuit against the buyer in case the merger fails to be consummated. Therefore, if the buyer breaches the merger agreement and the deal fails to close, target shareholders may not have the ability to sue the buyer under contract law to recover the premium they would have received had the deal been completed. The target corporation is also hamstrung in its ability to recover a "lost premium" from a breaching buyer. Pursuant to the merger agreement, the target corporation is not entitled to receive merger consideration because the proceeds go directly to its shareholders. In the event that the buyer breaches the agreement and the merger fails to be consummated, the target corporation, as a contracting entity, is arguably not entitled to any compensation, because it suffered little or no harm.[79]

At least initially, it seems nobody—neither the target corporation nor its shareholders—can hold the buyer accountable for walking away from the merger. This would be an untenable situation, and the market has developed strategies to hold buyers accountable for cancelling mergers. Buyers typically will not accept allowing target shareholders to have third-party beneficiary status. This is because almost every Delaware merger already faces litigation from shareholders' attorneys. Many commentators view such lawsuits as frivolous and designed to extract settlements rather than to litigate genuine breaches of duties to the shareholders.[80] Buyers may thus anticipate that granting target shareholders third-party beneficiary status will further incentivize frivolous lawsuits and increase the litigation expenses associated with completing the transaction.[81] However, transactional lawyers realized that some contractual remedy for lost premia had to be worked out. Without such a solution, if the target corporation is not suffering any tangible harm from the buyer's breach, the buyer could have almost complete freedom over whether to close the transaction or simply walk away from the deal. The only limitation to such freedom would be for the target corporation to receive specific performance or a contractually stipulated reverse termination fee as a remedy. Deal lawyers needed to find a way to allow target shareholders to receive the lost merger premium.

A solution to this problem emerged in response to a 2005 decision by the Second Circuit called *Consolidated Edison v. Northeast Utilities*.[82] The *Consolidated Edison* case involved a merger where the buyer had withdrawn from the transaction, and the merger agreement contained the usual language excluding target shareholders from enjoying any third-party beneficiary status. The Second Circuit ruled that when a merger agreement does not recognize the target shareholders as third-party beneficiaries, the target cannot sue the breaching buyer to collect the lost premium, unless the merger agreement specifically allows for such.[83] The decision sparked concern among deal lawyers, and pushed them to create innovative workarounds, called "*Con Ed* provisions." The provisions came in three varieties. First, merger agreements could grant shareholders *limited* third-party beneficiary status,

[79] The target has made expenditures, such as legal costs, in reliance of the agreement, but this pales in comparison to the premium promised to the shareholders.
[80] *See* Matthew D. Cain, Jill E. Fisch, Steven Davidoff Solomon & Randall S. Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603 (2018).
[81] More broadly, previous empirical analysis using data from U.S. federal and state courts has shown that grants of third-party beneficiary status have led to an increase in litigation in recent years. *See* Alan Schwartz & Robert E. Scott, *Third-Party Beneficiaries and Contractual Networks*, 7 J. LEGAL ANAL. 325, 334 (2015) (discussing over 1,400 cases where such litigation occurred).
[82] 426 F.3d 524 (2d Cir. 2005).
[83] For an in-depth discussion of the case, see Ryan D. Thomas & Russell E. Stair, *Revisiting* Consolidated Edison—*A Second Look at the Case That Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers*, 64 BUS. LAW. 329 (2009).

with this status exclusively pertaining to their entitlement to assert a contractual right to the lost premium. Second, the merger agreement could explicitly allow the target company to sue on behalf of its shareholders, as its shareholders' "agent," to recover the lost premium. Third, the merger agreement to define damages resulting from breach to include lost premia.[84]

The third type of provisions, commonly referred to as a "lost premium" provision, was found to be the more attractive solution and became widely used.[85] The lost premium provision contained in the merger agreement for Elon Musk's acquisition of Twitter is typical of this type of *Con Ed* workaround. Section 9.7 of the agreement first expressly disclaimed third-party beneficiary status for target shareholders, making no exception for suing to recover lost premia in case the merger was cancelled.[86] Section 8.2 of the agreement, titled "Effect of Termination," states that when the agreement is terminated, the agreement will become "null and void." At the same time, the provision went on to state that:

> [N]o such termination shall relieve any party hereto of any liability or damages (which the parties acknowledge and agree shall not be limited to reimbursement of Expenses or out-of-pocket costs, and, in the case of liabilities or damages payable by Parent and Acquisition Sub, would *include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders*) (taking into consideration all relevant matters, *including lost stockholder premium*, other combination opportunities and the time value of money), which shall be deemed in such event to be damages of such party, resulting from any *knowing and intentional breach* of this Agreement prior to such termination.[87]

The combined effect of expressly disclaiming third-party beneficiaries and allowing the target corporation (Twitter) to collect damages (including "the benefits of the transaction…lost by [Twitter's] stockholders" for buyer's "knowing and intentional breach" was that, while Twitter shareholders may not be able to bring a lawsuit in case the buyer "knowingly and intentionally" breached the agreement, Twitter could collect the lost premium on behalf of its shareholders. Twitter's damages were contractually stipulated to include the premium its shareholders had lost upon the buyer's cancellation of the deal.

The Twitter deal typified the lost premium provision approach to the vexing problem of guaranteeing remedies for lost premium in case a buyer breached a merger agreement with a public target. For almost two decades after the Second Circuit's 2005 decision, deal lawyers assumed that the *Con Ed* provisions they had crafted would suffice to ensure that the target (and its shareholders) would not be left without any remedy in case the buyer breached the merger agreement and the deal fell apart. The target could exercise its right under the lost premium provision to sue the buyer; it could disburse this recovered premium to target shareholders; and buyers (and the targets) benefited by avoiding the potentially frivolous litigation that would have resulted from granting target shareholders third-party beneficiary status. Lost premium provisions thus provided benefits for targets, buyers, and target shareholders.

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[84] *See generally id.* (explaining the three types of *Con Ed* provisions).
[85] *See id.*
[86] Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022, available at: https://www.sec.gov/Archives/edgar/data/1418091/000119312522120461/d310843dex21.htm. Section 9.7 of the merger agreement, titled No Third-Party Beneficiaries, states: "…this Agreement is not intended to and *shall not confer upon any Person other than the parties hereto any rights or remedies hereunder*" (emphasis added).
[87] *Id.* at Section 8.2 (emphasis added).

B. *Crispo v. Musk*

Notwithstanding the comfort that the deal lawyers took from the lost premium provisions, uncertainties remained. The original *Consolidated Edison* decision involved a deal governed by New York law, and it was not entirely clear whether *Con Ed* provisions responding to that decision would be upheld in Delaware.[88] Transactional lawyers seemed to operate with an assumption that the Delaware courts would honor such a provision. Deals governed by Delaware law routinely featured *Con Ed* provisions, and there was no sign that the state's judiciary disfavored these contractual innovations. Deal lawyers' expectations that the courts would uphold the ability of target shareholders to recover lost premia were, however, dashed in the 2023 case of *Crispo v. Musk*, where the Chancery Court held that deals governed by Delaware law could not define damages to include lost premia in the event of buyer breach.[89]

The *Crispo* case stemmed from an application for a $3 million mootness fee by Luigi Crispo, a Twitter stockholder, against Elon Musk. Crispo had earlier filed a lawsuit in response to Musk's attempts to withdraw from the Twitter deal. His lawsuit sought to force Musk to either complete the merger or let Twitter recover the premium on behalf of its shareholders, as specified in the lost premium provision. Now that Musk had consummated the merger, Crispo's application for a mootness fee asserted that his earlier lawsuit had been meritorious and was at least causally related to Musk's eventual decision to close the transaction. In deciding whether the plaintiff-shareholder had standing and whether the plaintiff lawyers were entitled to the mootness fee, the Chancery Court addressed the enforceability of the *Con Ed* lost premium provision contained in the merger agreement.

The court focused on the tripartite structure of the merger agreement in analyzing the validity of lost premium provisions under Delaware law. According to the court, since only the Twitter shareholders are entitled to receive the promised consideration, but the shareholders were not granted third-party beneficiary status under the agreement, the *Con E*d provision was not enforceable.[90] The reason was contract law's anti-penalty doctrine: the court held that the target had no expectation to receive the merger consideration (which was destined to go to its shareholders) and that the target would thus not suffer a substantial amount of harm from the buyer's breach.[91] Therefore, defining its damages to include this lost premium would be akin to imposing a penalty on a breaching buyer that is unenforceable under contract law.[92] According to the court, therefore, the plaintiff-shareholder did not have a meritorious claim to begin with and was not entitled to a mootness fee.

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[88] See Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries, and Divisions* § 15A (2022) ("The Con Ed standing/damages issue certainly appears to be a problem in New York; whether it will be followed in Delaware is still an open question").
[89] Crispo v. Musk, 2023 Del. Ch. LEXIS 466 (Del. Ch. 2023).
[90] The other possible interpretation that the Chancery Court dealt with was that, the Con Ed provision does make Twitter shareholders third party beneficiaries but only when the merger agreement is terminated and specific performance is not available. Since the agreement was never terminated and the transaction ultimately closed, the plaintiff-shareholder's right to bring suit never vested.
[91] *Cf.* Maziar Peihani, *Recovery of Lost Premiums in Failed Mergers*, ALTA. L. REV. 2 (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5172893. ("[B]eyond contractual interpretation and privity, the courts' skepticism of lost premium provisions rightfully mirrors deeper normative concerns, including the potential for widespread litigation by individual shareholders, constraints on the board's ability to fulfill its fiduciary duties, the risk of compromising the board's control over the litigation asset, and the potential for double recovery").
[92] *Cf.* Jonathan Chan & Martin Petrin, *Lost-Premium Damages in M&A: Delaware's New Legal Landscape*, 42 YALE J. ON REG. BULL. 33, 42 (2025) ("Lost-premium provisions reflect the intent of both parties in a merger to estimate the actual damages

It is important not to overstate the significance of the lost premium provisions invalidated by the Chancery Court. For starters, as written, the lost premium provision does not seem to impose an affirmative obligation on a breaching buyer to pay the lost premium to the target. The Twitter merger agreement, for instance, states that the damages "payable by Parent" would "include the benefits of the transaction…lost by the Company's stockholders," taking into consideration all relevant factors, "*including* lost stockholder premium."[93] This is in contrast to the approach in other types of liquidated damages, such as target or reverse termination fees, where, once the conditions of the fees are satisfied, the obligation to pay the fee is unconditional. Given this "optionality,"[94] even if the liability provision were not to explicitly mention the possibility of collecting the lost premium, prior to *Crispo*, one may expect a disappointed target to persuade a court that its damages ought to include lost premia. In other words, it is not entirely clear how much the lost premium phrase, by merely stating the *possibility* of collecting a lost premium, was really contributing to the liability provision before *Crispo*. Regardless, after the Chancery Court opinion, disappointed targets could not argue that their damages included the premium their shareholders had lost out on, regardless of whether the merger agreement included a lost premium provision.

Despite the uncertainty and optionality associated with a lost premium clause, *Crispo* presented an opportunity for deal lawyers to protect their clients through further contractual innovation.[95] Most importantly, the two other *Con Ed* provisions remained available. As explained in the previous Section, one such *Con Ed* provision is to loosen the no third-party beneficiary provision. Instead of completely excluding target shareholders from third-party beneficiary status, the merger agreement could include a narrower and more tailored third-party beneficiary status for them. Specifically, the agreement can recognize third-party rights for target shareholders only when the buyer's material or intentional breach leads to the termination of the agreement.[96] This narrow third-party right grant would then allow the target shareholders to pursue other remedies, including specific performance, for the buyer's breach and recover the lost premium—a damage they, unlike the target corporation, would actually have suffered.

A targeted grant of third-party beneficiary status could thus ensure that target shareholders are compensated while avoiding violations of the anti-penalty doctrine. An issue with this proposal is that the acquirer could still be wary of the prospect of frivolous litigation. After all, enterprising plaintiff's attorneys could still attempt to bring direct claims against the buyer by citing any of its actions as an

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suffered, making them conceptually more akin to permissible liquidated damages provisions than unenforceable penalties").

93 *See* Agreement and Plan of Merger by and among X holding I, Inc., X Holdings II, Inc., and Twitter, Inc. on April 25, 2022, section 8.2 Effect of Termination (emphasis added).

94 In the Twitter transaction, the relevant portion of the Effect of Termination section states that the Parent and Acquisition Sub would be liable for damages, which "tak[es] into consideration all relevant matters, including lost stockholder premium…." Even if such a phrase were absent, in litigation, the target will presumably introduce the evidence of lost premium in calculating the damages for the buyer's material breach.

95 *See* Andre G. Bouchard et al., *Delaware Court of Chancery Questions Enforceability of Con Ed Provisions*, PAUL, WEISS (Nov. 13, 2023), https://www.paulweiss.com/insights/client-memos/delaware-court-of-chancery-questions-enforceability-of-con-ed-provisions ("[*Crispo*] alleviate[s] practitioners' concerns that Con Ed, if followed in Delaware, would foreclose upon any party's ability to recover lost-premium damages, and confirms that with proper drafting, Delaware courts will permit stockholders themselves to recover such damages against a wrongfully terminating buyer under the merger agreement, at least where specific performance is not an available remedy").

96 Another possibility was to recognize the shareholders' third-party beneficiary status when the target has sought specific performance, but the court has denied that relief. In fact, post-*Crispo*, many merger provisions contained this variation.

alleged "breach."[97] However, such concerns may be overblown. Vice Chancellor Travis Laster of the Delaware Chancery Court, for instance, has stated in public writings that granting target shareholders would not necessarily trigger frivolous litigation, because exclusive forum provision bylaws would require resulting lawsuits to be brought in Delaware.[98] In other words, even if plaintiff's attorneys brought multiple lawsuits invoking a tailored third-party beneficiary status for target shareholders, forum selection bylaws would restrict these lawsuits to Delaware courts, where the expert judiciary would be best positioned to dismiss frivolous litigation.

The other surviving type of Con Ed provision is to explicitly grant the target corporation the exclusive right to sue a breaching buyer, by making the target its shareholders' "agent" to collect the lost premium. For example, when adopting the merger agreement at a shareholder's meeting, the target stockholders can vote to create an agency relationship with the target company. More aggressively, the target can attempt to create this agency relationship unilaterally when the target enters into a merger agreement with a buyer. This agency designation solution, however, leaves at least a few questions unanswered. If the agency relationship has not been created before the shareholders' meeting, it is unclear what would happen if the buyer were to (materially or intentionally) breach the agreement before a target shareholder meeting has taken place. For another, certain deals, such as a two-step transaction, do not require a shareholder vote under Delaware corporate law.[99] It is also not entirely clear whether a majority of the target shareholders can create an agency relationship (by approving the proposed merger) for all stockholders, or if a unanimous vote is needed.[100] Finally, whether such a relationship can be created *unilaterally* by the target management through an agreement with the buyer before the shareholders' meeting is quite unclear.

The best path forward was not clear after the Chancery Court decision. Nevertheless, deal lawyers spearheaded contractual and legislative responses to *Crispo*.[101] On the contractual side, while there are many variations, deal lawyers began adopting provisions that would, first, recognize the shareholders' right to receive consideration as a third party beneficiary (as a narrow carve-out to the general no third party beneficiary provision), but *also* only allow the target corporation to bring suit to enforce such a provision. The narrow recognition was sometimes conditioned on the target seeking and failing to receive specific performance as a remedy. These provisions threaded the needle in preserving a contractual remedy against buyers who withdraw from mergers while avoiding frivolous litigation. By framing the recovery of lost premia as a consequence of target shareholders' contractual rights, these provisions were possibly immune to being challenged under the anti-penalty doctrine. Moreover, the novel post-*Crispo* contractual responses limited the prospect of excessive litigation by restricting the right to sue the buyer for lost premium to the target corporation, rather than allowing

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97 *See* Kling & Nugent, *supra* note 88, at § 15A.03 ("It is one thing to have a single litigation with the target itself….It is quite another to have to deal with hundreds of lawsuits all around the country from disgruntled target shareholders").

98 *See* Travis Laster, *Crispo and Its Discontents*, LINKEDIN (June 1, 2024); *see also* Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383 (2020) (explaining the evolution and role of exclusive forum bylaws in Delaware law).

99 *See* Del. Code Ann. tit. 8, § 251(h) (2024).

100 Instead of trying to create an agency relationship using a merger agreement, another proposal is to create that relationship through a charter or a shareholder-adopted bylaw provision. Similar challenges will likely arise under this proposal.

101 *See* Steven M. Hass et al., *Delaware Court Addresses Ability to Sue Buyers for Lost Premiums in M&A Deals*, HUNTON ANDREWS KURTH LLP (Nov. 16, 2023), https://www.hunton.com/insights/legal/delaware-court-addresses-ability-to-sue-buyers-for-lost-premiums-in-m-and-a-deals. Some of the strategies were also discussed in the *Crispo* decision. See *Crispo v. Musk*, 2023 Del. Ch. LEXIS 466, 19 – 21 (Del. Ch. 2023).

individual shareholders and their attorneys to bring suit.[102] Some provisions also expressly recognized the target as an agent of the shareholders for the purposes of collecting the remedy, despite the substantial doubts about such designations explained above.[103] Overall, a sizeable number of deal lawyers energetically responded to *Crispo* by engineering innovative contractual workarounds to the Chancery Court decision.

C. Legislative Amendment after *Crispo*

In addition to the contractual "solutions," legislative advocacy was an important part of the corporate bar's response to *Crispo*. While deal lawyers were exercising their contractual creativity in response to the *Crispo* decision, the Corporation Law Section of the Delaware State Bar Association made a formal proposal on March 28, 2024, to amend the Delaware General Corporation Law to override the Chancery Court decision.[104] The Delaware legislature approved these changes, and the state's Governor signed the amendment into law on July 17, 2024. The modified DGCL § 261 came into effect on August 1, 2024,[105] and effectively neutralized the impact of the *Crispo* decision.[106]

The amended DGCL § 261(a) states that a party to a merger agreement that "fails to perform its obligations under such agreement" would be subject, "in addition to any other remedies available at law or in equity, to such penalties or consequences as are set forth in the agreement of merger or consolidation (which penalties or consequences may include an obligation to pay to the other party …the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive pursuant to the terms of such agreement…)" The provision also provided for the "appointment, at or after the time at which the agreement of merger or consolidation is adopted by the stockholders of a constituent corporation…of 1 or more persons…as representative of the stockholders of a constituent corporation…for the delegation to such person or persons of the sole and exclusive authority to take action on behalf of such stockholders pursuant to such agreement," and clarified that the appointment of such a representative would be "irrevocable and binding on all such stockholders from and after the adoption of the agreement of merger."[107]

The amended DGCL § 261(a) thus validates two provisions in merger agreements. First, the merger agreement can now include a provision for "penalties or consequences" against a party for failing to perform or consummate the merger. The statutory provision explicitly countenances "such penalties or consequences" to include the premium lost by target shareholders due to the buyer's breach terminating the merger agreement. The provision thus overrides the Chancery Court's decision and ensures that merger agreements can define the target's damages to include lost premia,

[102] *See* Dhruv Aggarwal, Albert H. Choi & Geeyoung Min, *Contractual Remedies in Mergers*, J.L. & ECON. (forthcoming 2026), https://ssrn.com/abstract=4810882.
[103] *See supra* notes 99–100 and accompanying text.
[104] *See* Richards, Layton & Finger, *2024 Proposed Amendments to the General Corporation Law of the State of Delaware* (Mar. 28, 2024), https://www.rlf.com/2024-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/.
[105] *See* Nicholas O'Keefe, *Delaware Enacts Controversial Market Practice Amendments to Its General Corporation Law*, FOLEY & LARDNER LLP (July 18, 2024), https://www.foley.com/insights/publications/2024/07/delaware-market-practice-amendments-general-corporation-law/.
[106] *See* Aggarwal, Choi & Min, *supra* note 102.
[107] Del. Code Ann. tit. 8, § 261(a) (2024). Interestingly, § 261(a) also provides that the target corporation "shall be entitled to retain the amount of such payment so received." *Id.* § 261(a)(1)(ii). If penalties are collected by the non-breaching corporation, therefore, that corporation does not need to distribute the penalties to its shareholders. This resolves another uncertainty that was not addressed: even when a target corporation is allowed to collect the lost premium, whether it had an obligation to distribute the proceeds to its shareholders, and, in case yes, to which shareholders.

notwithstanding the anti-penalty doctrine. Lost premium damages are not the only example of "penalties or consequences" the breaching party would face. Presumably, § 261(a)(1) allows for provisions to include termination fees that either party must pay if it breaches the agreement and the merger fails to close. § 261(a)(1) also preserves "any other remedies available at law *or in equity*."[108] This reinforces Delaware courts' willingness to honor the parties' stipulation of specific performance. Second, the merger agreement can now appoint one or more persons (e.g., the target corporation) as the "representative" of the stockholders with the exclusive authority to enforce the rights of the stockholders, including the right to receive payments, and such appointment will be effective at the time of the execution of the merger agreement and will be binding on all shareholders.

Collectively, § 261(a) represents a vindication of the contractarian principle in merger remedies. Whether the parties contracted for lost premium damages or specific performance, the amended statute tells the courts to uphold the bargain they arrived at via private ordering. By allowing targets to define their own damages to include premia lost by their shareholders, and placing no caps on these lost premium amounts, the legislative amendment departs from the Chancery Court's analysis of the tripartite structure of public mergers and the court's invocation of the anti-penalty doctrine. Similarly, despite previous concerns about designating the target corporation as its shareholders' agent for collecting the lost premium, the amended statute provides for such a designation at any time beginning from when the shareholders approve the agreement. Moreover, such designation would be binding even on shareholders who did not vote to approve such delegation of authority to the target corporation. Finally, reinforcing the contractarian spirit of § 261(a), nothing in the language of the statute suggests that it is limited to cases of "knowing" or "intentional" breach by the buyer. Instead, all the mechanisms described in the section are triggered whenever the breaching party "fails to perform its obligations under such agreement." This lack of a materiality or intent requirement emphasizes how radical the statutory amendment is and the extent to which it has moved deals jurisprudence in a contractarian direction.

III. Implications of *Crispo* and the Amended DGCL

The DGCL amendment effectively neutralizes the *Crispo* decision with respect to the lost premium provision, and Delaware law now allows an injured target to collect the lost premium from a breaching buyer. As we have argued elsewhere, we believe this is a desirable outcome.[109] However, the amendment, along with the case law (including *Crispo*), has generated a new set of questions about the intersection of corporate and contract laws. To begin with, given that the amendment is an enabling (rather than a mandatory) provision, the transacting parties will need to include a lost premium provision in their merger agreement. In case the parties decide not to include a lost premium or other damages provision, we would assume that, under *Crispo*, the anti-penalty doctrine will still apply, and the target will not be able to receive the lost premium on behalf of its shareholders. Also, the amendment effectively brings back the *Con Ed* provision and renders some of the contractual innovations adopted by transactional lawyers in response to *Crispo* unnecessary. Harnessing the newly expanded contractual freedom engendered by the statute, a merger agreement can contain a broad no third-party beneficiary provision with a lost premium provision, as was the case in most transactions prior to *Crispo*.

[108] *Id.* § 261(a)(1) (emphasis added).
[109] *See* Aggarwal, Choi & Min, *supra* note 102.

There are important issues to consider when analyzing the amended DGCL. According to the statute, the agreement may provide that "a party to the agreement that fails to perform its obligations…shall be subject to…such penalties or consequences as are set forth in the agreement,"[110] which "may include" the lost premium. This raises at least two issues. First, the enabling provision contemplates that any remedy provision is against a party who "fails to perform" its contractual obligations. The contractually stipulated remedy provision is predicated on there being a breach. Second, the provision expressly allows parties to contract for "penalties or consequences" without any limitation, expressly bypassing the anti-penalty doctrine. Therefore, given that there is no limitation on how large the "penalties" can be, the statute seems to imply that, so long as the remedy provision is being triggered in response to one party's breach, the transacting parties may be free to set the remedy at any level they desire. Punitive damages may be possible, despite centuries of precedent disallowing punitive damages in contract law.[111]

A. Implications for Termination Fees and Other Liquidated Damages

The *Crispo* case, and the subsequent amendments to the Delaware corporate code, were motivated by concerns about the lost premium provisions. Interestingly, the most consequential impact of these changes may be for another category of liquidated damage provisions: termination fees. Both reverse and target termination fees serve a number of purposes. An important reason for the target termination fee is to compensate the initial bidder when the target chooses to sell itself to a competing buyer. In principle, this termination fee compensates the buyer for the costs incurred in identifying the target as a suitable acquisition, only to be outbid by a competing buyer (i.e., for being a "stalking horse"). On the other side of the ledger, reverse termination fees usually compensate the target when the buyer is unable to secure financing or receive the necessary regulatory approval to close the transaction, or has materially breached the agreement.

Under existing practice, termination fees can be triggered either in accordance with the agreement (i.e., when there is no breach of the agreement) or subsequent to a breach. What is important is not whether there was a breach of the agreement, but rather whether a stipulated condition (such as no regulatory approval or sale to a third-party buyer) is satisfied. An example of a situation triggering a termination fee without any breach is when the merger agreement allows the target board a "fiduciary out," i.e., the ability to withdraw from or to change its recommendation regarding the merger if it accepts a competing offer that provides superior financial value to its shareholders. The agreement can compel the target to pay a termination fee if it accepts a superior offer even though the agreement specifically gives the target board a fiduciary out, and the target board would not be breaching the contract by accepting a superior bid. Termination fees may also be triggered by one party's breach of the merger agreement. For instance, a buyer may agree in the merger agreement to make "reasonable best efforts" to secure financing to close the deal and pay a reverse termination fee if it is unable to do so. If a court finds that the buyer did not, in fact, make "reasonable best efforts," the reverse termination fee would be triggered by the buyer's breach of the reasonable best efforts covenant in the merger agreement.[112]

[110] *See* Del. Code Ann. tit. 8, § 261(a) (2024).
[111] *See Restatement (Second) of Contracts* § 355 (""Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 636–44 (1999) (documenting the traditional disfavor for punitive contractual damages in U.S. courts).
[112] *See* Weinstein, *supra* note 29, at 1093-94 ("Parties also often agree to so-called efforts covenants or cooperation clauses that allocate the burden and costs of seeking antitrust clearance to one or both parties").

While termination fees can be triggered with or without there being a breach, the application of DGCL § 261(a) is limited to instances involving a breach. This is, in our view, a significant and underexplored shift in Delaware law. While DGCL § 261(a) deals with remedies conditional on there being a breach of contract, the holding in *Crispo* presumably still applies to all liquidated damages in merger remedies, including termination fees. The main holding in *Crispo* invalidated the *Con Ed* lost premium provision for violating the anti-penalty doctrine. However, as discussed earlier, through a series of court cases (starting from *Brazen*), Delaware courts have also treated termination fees as liquidated damages, thereby subjecting them to the anti-penalty doctrine. Applying the Chancery Court's reasoning in *Crispo*, an excessively high termination fee provision is unenforceable under the anti-penalty doctrine. Particularly in the case of reverse termination fees, as with lost premium damages, the economic harm from a failed merger is primarily suffered by target shareholders, while the fee is paid to the target company itself, which may have suffered little harm. The *Crispo* holding suggests that large, or even reasonably-sized, reverse termination fees could be invalidated as penalties.[113]

The amended DGCL § 261(a) cures this problem only when the reverse termination fee is being triggered due to the buyer's breach, in which case the merger agreement can provide for a reverse termination fee of virtually any magnitude to be directly payable to the target, unrestrained by the anti-penalty doctrine. On the other hand, if the target is contractually entitled to receive a reverse termination fee in the absence of the buyer's breach of the agreement, DGCL § 261(a) would not apply. With *Crispo*'s application of the anti-penalty doctrine untouched by subsequent legislative amendments in the absence of a contractual breach, such reverse termination fee can presumably be challenged.[114] In sum, when we combine the holding of *Crispo* and the new DGCL § 261(a), Delaware's law of merger remedies has become bifurcated. If a termination fee is being triggered in response to one party's breach of the agreement, under DGCL § 261(a), the fee is not subject to the anti-penalty doctrine and there are potentially no limits on how large it can be. On the other hand, if a termination fee is being triggered in the absence of a breach, DGCL § 261(a) does not apply, and not only could the basic validity of the fee be contested, but the traditional anti-penalty doctrine would also limit its permissible size.

While the bifurcated approach to termination fees is most obvious with respect to reverse termination fees, the statute has implications for target termination fees as well. Longstanding and fundamental corporate law doctrine has limited target termination fees to approximately 4–5% of deal value.[115] This is because, in the merger context, Delaware law places limits on the contractual

[113] As mentioned earlier, in the Twitter transaction, Musk was contractually obligated to pay a $1 billion reverse termination fee when, for instance, Musk would be unable to secure financing. *See supra* note 39. Although this issue did not come up in litigation, applying the court's reasoning, it seems quite likely that this reverse termination fee would have been struck down using the anti-penalty doctrine.

[114] Of course, here, perhaps the contractual solutions that were adopted by the practitioners in the aftermath of *Crispo* could potentially save the day. In the provisions that were adopted in a large fraction of mergers after Crispo, the agreements would often (1) narrowly recognize the target shareholders' right as a third party beneficiary but (2) give the exclusive right to enforce such a remedy to the target corporation. See Aggarwal, Choi & Min, *supra* note 102.

[115] *See* Fernán Restrepo & Guhan Subramanian, *The New Look of Deal Protection*, 69 STAN. L. REV. 1013, 1016 (2017). The case law has largely focused on target termination fees. So long as the termination fee is being triggered when there is an alternate buyer and so long as the size of the target termination fee is "reasonable," courts have held that agreeing to such a termination fee is not in violation of directors' fiduciary duty. In *Brazen*, for instance, the termination fee, at $550 million, was about 2% of Bell Atlantic's (target's) market valuation and the court ruled that the size was reasonable. In *Phelps Dodge Crop. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999), the Delaware Chancery Court criticized a

protections any buyer can demand from the target board. To ensure that target shareholders obtain the maximum value from a merger, Delaware case law ensures that termination fees do not become so excessively high that a competing bidder with a higher valuation for the target firm is dissuaded from making a superior bid.[116] For example, if a target termination fee in an announced merger agreement were, say, 10% of deal value, even a potential buyer with a significantly higher valuation of the target corporation could be scared off from making a rival bid. This is because consummating the competing bid would entail the target paying the initial bidder the large termination fee, decreasing the target's value for the new bidder.

Similar to the analysis for reverse termination fees, the impact of the post-*Crispo* statutory amendment on target termination fees depends on whether these fees are triggered in the presence or absence of a breach. Presumably, when the target is not in breach of an agreement but the target termination fee is nevertheless triggered, the traditional anti-penalty doctrine will apply. Therefore, in the absence of a breach, courts are only likely to uphold reasonable target termination fees, and the traditional 4-5% ceiling from existing case law is likely to apply. The new statutory scheme's effect on target termination fees gets murkier when these fees are triggered because the target breached the agreement. Under DGCL § 261(a), the merger agreement can impose a penalty on the target for such a breach, and, with this statutory command, the traditional reasonableness restriction will no longer apply. The statute could thus override the traditional case law-based cap of approximately 5% of the deal value, and the parties can set a far larger termination fee. Given that such large termination fees could deter competing bids from potential bidders with higher valuations for the target, the application of DGCL § 261(a) to target termination fees could impede the efficient allocation of resources in the market for corporate control. Corporate law considerations will continue to impose a restraint based on the size of target termination fees, which we will discuss below.

DGCL § 261(a) also has implications for the ability of contracting parties to combine different types of remedies. Merger agreements often obligate the breaching party to reimburse the expenses of the non-breaching party, in addition to any termination fee that the breaching party has to pay. Traditionally, transactional lawyers have been concerned about combining expense reimbursement and the termination fee, out of concern for the potential application of the anti-penalty doctrine. Judges may view the combination of the reimbursement and the termination fee as collectively being too high, and constituting punitive damages that would be impermissible under the anti-penalty doctrine. Under DGCL § 261(a), however, so long as the termination fee provisions are being triggered in response to one party's breach of the agreement, the combination of expense reimbursement and termination fee is much more likely to be upheld, since the anti-penalty doctrine no longer functions to limit the magnitude of the combination of these remedies.

Table 1 summarizes our discussion of the amended DGCL § 261(a)'s impact on merger contracting in Delaware law. In the absence of a breach by either party, merger remedies remain more

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6.3% termination fee as "seem[ing] to stretch the definition of reasonableness…beyond its breaking point." *Id.* at *2. In *In re Comverge, Inc.*, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014), the Chancery Court characterized a 5.6% target termination fee as "test[ing] the limits of what this Court has found to be within a reasonable range for termination fees." *Id.* at *14. One type of target termination fee that the courts have been more hostile to is "no-vote" termination fee, that obligates the target to pay even when no competing offer has been made to the target. With respect to reverse termination fees, on the other hand, because buyer shareholders do not usually get to vote on the transaction and the termination fee deals with other issues, such as financing and regulatory approval failure, it is likely to receive deferential business judgment review.

[116] *See* Restrepo & Subramanian, *supra* note 115, at 1015.

or less the same as before the statutory amendment: common law precedents apply, and the anti-penalty doctrine imposes limits on the size of termination fees. With respect to the lost premium provisions or other damages provisions triggered upon the buyer's or target's "knowing" or "intentional" ("bad conduct") breach (and subsequent termination), the second row shows that DGCL § 261(a) will apply and the anti-penalty doctrine will place no limitations on the size of the damages. At the same time, the third and fourth rows indicate that, with respect to termination fees, a crucial issue is whether the party has breached the merger agreement. In case there was a breach, DGCL § 261(a) would apply, and the traditional application of the anti-penalty doctrine is suspended. On the other hand, if there was no breach, the anti-penalty doctrine would have its constraining effect on the size of the target or reverse termination fees. The last row shows the implication on specific performance provisions, which we will discuss more below.

Remedy Type	Example of Underlying Circumstance	Applicable Law	Anti-Penalty Doctrine Applies?
Lost Premium Provision	Knowing or Intentional Breach	DGCL § 261(a)	No
Target Termination Fee	Sale to Competing Buyer and Breach of No-Shop Clause	DGCL § 261(a)	No
	Sale to Competing Buyer and Valid Exercise of Fiduciary Out	Common Law (*Brazen*, *Crispo*)	Yes
Reverse Termination Fee	Failed Regulatory Approval and Buyer's Insufficient Effort	DGCL § 261(a)	No
	Failed Regulatory Approval and Buyer's Sufficient Effort	Common Law (*Brazen*, *Crispo*)	Yes
Specific Performance	Breach	Possibly DGCL § 261(a)	No

Table 1: Implications of *Crispo* and DGCL § 261(a) on Merger Remedies

The amended corporate code's effect on merger contracting will not just be static. One would reasonably expect that parties will adapt their behavior in order to take advantage of their newfound contractual freedom under § 261(a). One possibility is to include stricter provisions and hard-to-fulfill covenants in merger agreements, such that the injured party's counsel could plausibly claim that any termination fee would have been triggered by a breach of these merger provisions.[117] Once a court accepts that there was a breach, § 261(a) comes into play, and the parties are free to stipulate large damages. For a reverse termination fee, for instance, the parties could impose more stringent obligations on the buyer to make a strong effort to close the transaction. One example of such a provision is the "hell or high water" clause, which typically requires the buyer to take whatever steps

[117] At the same time, they would likely stipulate that the termination fee is the exclusive remedy in case of breach.

necessary to ensure it receives antitrust and other regulatory approvals.[118] Given how difficult it is for buyers in many deals to receive regulatory approvals, and the fact that the hell or high water provision gives acquirers little excuse in case they fail to secure such approvals, the target can easily show that the buyer breached this provision if the authorities do not approve the merger. In this case, the validity and size of the reverse termination fee will likely be immune to challenge under § 261(a). While we still need to see how much ingenuity future transactional lawyers will exhibit in adjusting contracting practice in response to the statutory amendments, it is plausible that § 261(a) will incentivize merging parties to opportunistically expand the definition of "breach" to benefit from the statutorily granted contractual freedom.

B. Implications for Specific Performance Provisions

What about specific performance provisions? Similar to the discussion on termination fees, assuming that a specific performance provision gets triggered as a result of one party breaching the merger contract—which is normally the case—the provision will likely fall under the purview of DGCL § 261(a). Note that under DGCL § 261(a), the party that "fails to perform its obligations" under the agreement "shall be subject, in addition to any other remedies available at law or in equity, to such penalties or consequences as are set forth in the agreement."[119] Although the precise meaning of the word "consequences" is unclear,[120] one could make a persuasive argument that "consequences" include the possibility of specific performance. Therefore, the fifth row in Table 1 above shows that specific performance, which invariable arises when a party has breached (or is going to breach) the merger agreement, could become far more likely to be ordered under the contractarian regime instituted by § 261(a).

Regardless of whether "consequences" encompasses specific performance, § 261(a) explicitly contemplates that courts will order this remedy, by preserving "any other remedies available…in equity." As discussed earlier, Delaware courts have become increasingly willing to order specific performance, often citing specific performance clauses in merger agreements as justification. In fact, Delaware judges have sometimes exceeded the Restatement's contractarian approach in favor of specific performance, ordering this remedy without even addressing whether the more traditional remedy of monetary damages (including liquidated damages) would have been sufficient.[121] Hence, even if specific performance is not part of the "consequences" envisaged by § 261(a), the amended statute is consistent with Delaware courts' increasing willingness to order specific performance.

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[118] *See* Stephen Fraidin, Joel Mitnick & Ross Steinberg, *Hell or High Water Provisions in Merger Agreements: A Practical Approach*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 25, 2022), https://corpgov.law.harvard.edu/2022/05/25/hell-or-high-water-provisions-in-merger-agreements-a-practical-approach/.
[119] *See* Del. Code Ann. tit. 8, § 261(a) (2024).
[120] The Delaware Senate synopsis of the bill does not provide any clarification on what they might have meant by "consequences." In a recent Limited Liability Company (LLC) case, where the parties had contracted ex-ante for specific contractual remedies (use of "voidance" as a remedy), the Delaware Chancery Court was inclined to allow equitable defenses against the contractual remedy, while the Supreme Court adhered to a strict interpretation of contractual terms, affirming that clear and unambiguous terms in the LLC agreement can render noncompliant acts incurably void. *See* XRI Inv. Holdings LLC v. Holifield, 283 A.3d 581 (Del. Ch.). In merger transactions, it is unlikely that an injured party would seek voidance of the contract. But, following the reasoning of the LLC case, it seems quite likely that, under § 261(a), the courts would interpret the specific performance provision as a provision stipulating "consequences as…set forth in the agreement."
[121] *See supra* Section I.B.

If specific performance provisions are indeed covered under DGCL § 261(a)'s definition of "consequences," the recent amendments raise novel contract law issues akin to our discussion regarding termination fees in the preceding Section. Assume that one of the parties has indeed breached the merger agreement, triggering the application of § 261(a). If the parties had included a specific performance provision in their merger agreement, and specific performance is one of the "consequences" written into § 261(a), it is quite likely that the injured party can insist that the court order the breaching party to specifically perform the stipulated obligations, including possibly, closing the transaction. This would be a doctrinally significant change in how specific performance is typically administered under contract law principles. As explained earlier, the choice between monetary damages and specific performance has historically been subject to the court's discretion.[122] The Restatement, describing the settled law of contractual remedies, states "[b]ecause the availability of equitable relief was historically viewed as a matter of jurisdiction, the parties cannot vary by agreement the requirement of inadequacy of damages."[123] However, a strict adherence to the text of § 261(a) would minimize, or even eliminate, the court's discretion and instruct the courts to enforce the specific performance provision. Such an assault on traditional judicial discretion over remedies would also be in keeping with the aggressively contractarian spirit of the statutory amendment, which allows the merging parties to design their own remedies in case the deal does not close.

The revised § 261(a) may represent a significant acceleration in Delaware's doctrinal evolution in favor of ordering specific performance in merger cases. Existing case law, such as the *Snow Phipps* case discussed in Section I.B.,[124] was characterized by courts applying their traditional discretion in a manner that favored specific performance, sometimes without even analyzing whether damages would be adequate. On the other hand, the § 261(a) approach we describe here is distinguished by parties being able to use the merger agreement to tie the court's hands and force it to order specific performance. While pre-*Crispo* jurisprudence reflected an organic and gradual judicial movement toward favoring specific performance on a case-by-case basis, the legislative amendments may herald a wave of merger litigation where courts *must* order specific performance, even if they would otherwise have thought that liquidated damages were the superior remedy.

C. Corporate Law Issues

Some of DGCL § 261(a)'s thorniest implications relate to its effect on directors' and officers' fiduciary duties under corporate law. There is a fundamental tension here. The statutory amendment seeks to maximize contractarian freedom by removing or attenuating the traditional obstacles such as the anti-penalty doctrine and the court's discretion over specific performance. Through § 261(a), Delaware's legislature has made it permissible for merging parties to specify a range of remedies in a merger agreement. However, corporate law does not limit itself to what is permissible within the four corners of a contract or even a statute like § 261(a). Instead, as Adolf Berle, one of the founders of modern corporate law scholarship, wrote in 1931, "corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules."[125] The animating philosophy of corporate law lies in courts examining the actions of directors and officers beyond simply verifying that they comply with the text of the statute, such as the DGCL. Courts ask whether corporate managers have been prudent in making their decisions, and ensure that

[122] *See id.*
[123] *Restatement (Second) of Contracts* § 359 cmt. a.
[124] *See* Snow Phipps Grp., LLC v. KCAKE Acquisition, Inc., 2021 WL 1714202 (Del. Ch. Apr. 30, 2021).
[125] A.A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

they have not been disloyal to shareholders or acted in a manner incompatible with shareholders' best interests.

The "twice tested" nature of corporate law jurisprudence can be seen in the case law regarding termination fees. As discussed earlier,[126] if a termination fee (especially a target termination fee) is unreasonably large, the court can declare that the directors have breached their fiduciary duty. Nothing in the actual language of the DGCL limits the size of termination fees. However, courts have consistently held that target directors' fiduciary duties forbid them from agreeing to target termination fees deemed to be coercive, preclusive, or unreasonably disproportionate.[127] This is because courts want to preserve the possibility that a superior bid by a competing acquirer can come along undeterred by the termination fee, providing better value for the target shareholders if it succeeds in acquiring the company instead of the initial buyer (or forces the initial buyer to raise its offer).[128] At first glance, DGCL § 261(a) seems to be at odds with this longstanding philosophy. Taken at face value, the new statute expressly allows the parties to contract for—and secure—a penalty, even if a court would otherwise have viewed this remedy as compromising the target board's fiduciary duties. If merger agreements can now include target termination fees in excess of 5% of deal value in case the target breaches the agreement and accepts a competing bid, one could be concerned that the merging parties' newfound contractual freedom could harm target shareholders' ability to receive the maximum possible value for their shares.

Despite the contradictions between the actual text of the statute and the existing case law, the synopsis of Delaware Senate Bill 313 provides some assurance that legislators foresaw this clash between contractarianism and fiduciary obligation. The synopsis states, in part, that "§ 261(a)(1)…does [not] alter the fiduciary duties of directors in connection with determining whether to approve, perform or enforce any…provision requiring a corporation to pay a termination fee or lost premium damages under certain circumstances."[129] This seems to imply that the usual judicial review standards would apply to any termination fee provision. With respect to the target termination fee, as discussed earlier, a robust body of case law disallows the target board from promising an unreasonably large fee. Thus, the synopsis supports capping the target termination fees at approximately 5% of deal value.

The story is different with respect to other liquidated damages. The first issue relates to the permissible magnitude of liquidated damages the parties can stipulate in case one party intentionally or knowingly breaches the agreement (liquidated damages based on "bad conduct"). For instance, in the Twitter transaction, if Twitter were to "knowingly" or "intentionally" breach the agreement, Twitter would likely have been responsible for full expectation damages to Musk, and not just the target termination fee. Notwithstanding the robust set of cases dealing with how large target termination fees can be, there is little to no guidance regarding these additional, and higher, damages measures. Hence, even if the synopsis informs the operation of the § 261(a) regime and preserves

[126] *See supra* Section I.A.

[127] While not central to our analysis, as a technical matter, the disproportionality of large termination fees would cause it to be struck down under step two of the *Unocal/Unitrin* test under Delaware law. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).

[128] *See* Restrepo & Subramanian, *supra* note 115, at 1015. Delaware's judicial policy of disfavoring deal protection devices that force the target company from committing to the initial bidder, and foreclosing the possibility of a competing bidder, can also be seen in the seminal case of Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

[129] Senate Bill 313, 152d Gen. Assemb. (Del. 2023–2024) (enacted July 17, 2024), amending Del. Code tit. 8, §§ 122, 147, 232, 261, & 268 (effective Aug. 1, 2024).

limits on target termination fees, buyers may be able to secure large target payments in case of breach by framing the liquidated damages as damages for "knowing" or "intentional" breach.

The existing corporate law doctrine also does not impose any meaningful size restrictions on *reverse* termination fees. As discussed earlier, reverse termination fees are paid by the buyer if it is unable to close the transaction—typically because it was unable to secure regulatory approval or could not secure the necessary financing. Unlike large target termination fees, large reverse termination fees do not present similar fiduciary issues. This is largely because buyer shareholders do not, in most cases, have the opportunity to vote on the transaction,[130] and reverse termination fees are normally triggered not based on buyer selling itself to a different party. The lower salience of fiduciary issues surrounding reverse termination fees helps explain why these provisions have been subject to more deferential judicial review as compared to target termination fees. Indeed, Delaware courts analyzing reverse termination fees have applied the business judgment rule—the most deferential and pro-defendant standard in corporate law.[131] Given that the Senate Bill synopsis purports to maintain the *existing* fiduciary duty constraints faced by directors, it seems likely that parties have much more leeway in stipulating the size of a reverse termination fee. If a party breaches the merger agreement and § 261(a) applies, courts will presumably honor a reverse termination fee even if it is very large under the deferential business judgment rule. As we discuss in the next Part, the inclusion of high reverse termination fees could be a matter of concern, as it over-commits buyers to mergers even when breaching merger agreements would be privately efficient or socially optimal.

As a matter of legal interpretation, some may question the relevance of the synopsis for Senate Bill 313 when adjudicating the meaning of the DGCL amendments. Textualists, for instance, eschew reliance on legislative materials like committee reports and synopses, given that the legislature only enacted the *text* of the statute, and these sources often do not accurately reflect the legislative body's intent.[132] A textualist reading would thus ignore the synopsis and focus on the text of § 261(a), which seems to allow for unlimited target as well as reverse termination fees. As the preceding discussion shows, however, we have analyzed the legislation assuming that Delaware's Chancery Court (which is

[130] The reason for this is that, in almost all cases of mergers with public targets, buyers utilize a merger subsidiary. One of the reasons buyers use these subsidiaries is to bypass the need for approval by their shareholders. However, there are a few exceptions where buyer shareholders vote on the transaction. When the buyer needs to issue a sufficiently large number of its own stock, the buyer may be subject to a shareholder vote by stock exchange listing rules. *See* NYSE Listed Company Manual § 312.03 (2024). A merger may also require the buyer to amend its charter, again necessitating a vote. In these cases, however, the buyer shareholders are technically not approving the merger, but rather approving either the stock issuance or charter amendment. Therefore, the fiduciary duties involved (if any) are not analogous to those faced by target shareholders confronting a deal with a large target termination fee.

[131] See ABA Model Merger Agreement § 7.3 (stating, with respect to reverse termination fees, "[a]s a legal matter, the fiduciary constraints on the size of termination fees and circumstances under which they are payable by targets are not generally applicable to determining the appropriate size and payment instances of reverse termination fees payable by the buyers. Buyer boards must, however, exercise their business judgment with respect to this determination, observing the duties of care and loyalty."). Unlike target termination fees, there is very little case law on the question of how large a reverse termination fee can be. In *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, the Delaware Chancery Court was faced with the possibility of upholding a $126.5 million reverse termination fee that constituted about 15.75% of the target's equity valuation (of $803 million). The plaintiff, Vintage Capital Management, argued that the termination fee was a "penalty" and would result in a "windfall" to the defendant, Rent-A-Center, while the defendant sought to enforce the payment of the fee. Although no final decision was made, the court noted that the reverse termination fee in the case was "enormous," and stated that it was possible that the implied covenant of good faith and fair dealing could be used to preclude the recovery of the termination fee. According to the court, the implied covenant of good faith and fair dealing "serves primarily to fill gaps, including providing terms so obvious that contracting parties fail to include them." *Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc.*, 2019 Del. Ch. LEXIS 87 (2019).

[132] *See* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 438 (2005).

a court of equity) will treat the synopsis as at least persuasive evidence for § 261(a), incorporating the fiduciary limits on the magnitude of target termination fees.

Another issue is the potential clash between the express statutory language and existing principles of judicial review. Can the revised statute override the fiduciary obligations that traditionally preoccupy corporate law jurists? While the issue is not entirely settled, a few precedents suggest an affirmative answer. One example is DGCL § 146, which allows the parties to contractually stipulate for a "force-the-vote" provision.[133] Force-the-vote provisions obligate the target to hold a shareholders' meeting to vote on the proposed merger, even if the target board has changed its recommendation to the shareholders and decided not to support the merger. In principle, agreeing to such a provision can constitute a breach of fiduciary duty. Nevertheless, § 146 allows parties to bargain for a force-the-vote provision in merger agreements.

The second example is DGCL § 113, which authorizes Delaware companies to adopt proxy reimbursement bylaws.[134] Companies adopt these bylaws to set the rules for when and how much they will reimburse shareholders who run director candidates against management.[135] This statutory amendment effectively codified, but also departed from, the Delaware Supreme Court's reasoning in *CA, Inc. AFSCME Employee Pension Plan*.[136] In that case, the Court emphasized that proxy reimbursement bylaw would "need to contain a provision that reserves the directors' full power to discharge their fiduciary duties."[137] However, § 113 contains no express requirement that proxy reimbursement bylaws include a fiduciary out clause, allowing companies to adopt contractual terms that may constrain or override directorial discretion otherwise protected by fiduciary duty principles.[138] The examples of DGCL § 146 and § 113 both seem to support the proposition that the legislature has broad authority in shaping the application of common law based fiduciary obligations on corporate agents, even when it means overriding prior decisions by corporate law jurists. The extent to which § 261(a) can curtail the traditional reach of fiduciary case law is thus open to question.

IV. Issues with the Contractarian Approach

How should we view the recent expansion of contractual freedom in the largest and most systemically important corporate transactions? Will DGCL § 261(a)'s lenient approach toward liquidated damages and specific performance provisions increase the joint surplus of the merging parties while protecting other constituents, including target shareholders? Conventional law and economics scholarship, which is contractarian in principle and emphasizes the benefits from the freedom of contract, would argue that sophisticated commercial parties will attempt to maximize the surplus from the transaction, and this will lead to the parties adopting the optimal contract terms. After the DGCL amendment, advocates of contractarianism should expect that merger agreements would include remedy provisions that maximize the joint surplus of the buyer and the seller.[139] More specifically, a contractarian would argue that the parties will choose the remedy that is optimal for

[133] *See* Del. Code Ann. tit. 8, § 146 (2024). *See also* ABA Model Merger Agreement Section 4.6(a) (stating that the target corporation "shall take all action necessary under all applicable Legal Requirements to call, given notice of, and hold a meeting of the holders of Company Common Stock to vote on a proposal to adopt this Agreement").
[134] Del. Code Ann. tit. 8, § 113 (2024).
[135] *See* Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 383–87 (2018).
[136] CA, Inc. v. AFSCME Employees Pension Plan, 953 A. 2d 227 (Del. 2008).
[137] *Id*, at 236 n. 20.
[138] Del. Code Ann. tit. 8, § 113 (2024).
[139] *See, e.g.*, Schwartz & Scott, *supra* note 20, at 552 ("the [contracting] parties will want only to maximize the total surplus").

both and also efficient. The parties would, for instance, choose optimally sized termination fees to eliminate costly and unnecessary litigation, to induce the right level of investment in reliance on the agreement, and to allow for efficient breach. This would maximize social welfare.

While this is an intuitively attractive proposition, the contractarian solution may not be as robust as it appears. In particular, this Part discusses three plausible scenarios where the traditional contractarian approach may not hold. The first is when the contracting parties do not possess all relevant information about the transaction (the problem of *incomplete information* and *asymmetric information*). It is quite plausible that the parties do not choose efficient contract terms, especially when one party is better informed about the transaction than the other. The second scenario where contractarianism's assumption that parties select optimal terms falls apart is when the corporate managers' incentives are not aligned with those of the shareholders. This is called the problem of *agency costs*, a foundational concept in corporate law and finance.[140] The third scenario is when the merger agreement imposes costs on non-contracting third parties, a phenomenon called *third-party externalities*. When a contract imposes costs on third parties (who are not parties to the contract), the contracting parties who are aware of such consequences could agree to terms that, although optimal for them, may be socially inefficient when third parties' interests are taken into account.

When any of the three issues—asymmetric information, agency costs, or third-party externalities—is present, the case for contractarianism becomes more tenuous. It becomes much less likely that an agreement—voluntarily entered into by sophisticated, transacting parties—will ensure a socially optimal, efficient outcome.[141] More specifically, and directly relevant to this Article's analysis, we believe that the amended Delaware statute, along with the courts' deference towards specific performance provisions, do not satisfactorily address these concerns.

A. Problems of Incomplete Information

First, unhindered party autonomy to select remedies will accentuate the information problem, including the problems of asymmetric information. When two contracting parties are not fully informed of all relevant parameters of the transaction, and one party has an informational advantage over the other, this can lead to contract failures and prevent the parties from adopting optimal contract terms. For instance, a buyer who is overconfident about being able to close the transaction may be inclined to promise an unreasonably large reverse termination fee. Such an "over-signaling" can be inefficient by preventing the buyer from walking away from the transaction when the transaction later becomes inefficient after the agreement has been signed.[142] The opposite, under-signaling, is also

[140] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[141] There is a fourth scenario where one could doubt the benefits of contractarianism: when certain parameters of the transaction are not verifiable, and due to non-verifiability, the contract becomes incomplete and possibly inefficient. This is known as the "verifiability" problem in contract theory. *See* Oliver Hart & John Moore, *Incomplete Contracts and Renegotiation*, 56 ECONOMETRICA 755 (1988). For instance, with respect to parameters such as merger synergies, it is quite likely that while the buyer may be certain of the potential synergies from the merger, they are very difficult to verify or prove in court. *See* In re Appraisal of Columbia Pipeline Grp., Inc., 2019 WL 3778370 (Del. Ch. Aug. 12, 2019) (exploring difficulty of estimating synergies in mergers); In re Appraisal of Stillwater Mining Co., 2019 WL 3943851 (Del. Ch. Aug. 21, 2019) (same). We do not explore the verifiability problem at length in this Article.

[142] There is a large literature on how asymmetric information can lead to inefficient signaling and incomplete contracts. For instance, financial economists Philippe Aghion and Benjamin Hermalin show how one party can engage in costly "over-signaling" to the counter-party to receive more advantageous contract terms and banning the parties from such private signaling can be efficient. *See* Philippe Aghion & Benjamin Hermalin, *Legal Restrictions on Private Contracts Can Enhance*

possible. Even when it is efficient for the parties to agree to a termination fee, they may be wary of sending a "bad signal" and choose not to do so. For example, a target may not insist on a sufficient reverse termination fee from the buyer, to signal that there are no skeletons in its closet. Instead, to show confidence in its attractiveness as an acquisition target, the target may not ask for a reverse termination fee or settle for a lower fee. The absence of reverse termination fees, or their small magnitude, could embolden the buyer to withdraw from the transaction ex post, therefore inducing inefficient merger terminations. Upon buyer withdrawal, the lack of an appropriate reverse termination fee could also lead to the target being undercompensated. In fact, based on our interviews with transactional lawyers, this fear of sending a bad signal may have been the reason some transactional lawyers were unwilling to impose a contractual workaround after the *Crispo* decision invalidated the "lost premium" *Con Ed* provision, even if the lack of a workaround would lead their clients to possibly suffer inefficient termination and suboptimal compensation.[143]

DGCL § 261(a) can worsen the consequences of both over- and under-signaling in merger agreements. In the over-signaling example where the buyer committed to an inefficiently high reverse termination fee, courts applying § 261(a) will possibly uphold even astronomically high reverse termination fees, as we explained in Section III.C. Therefore, buyers would be incentivized to close mergers even when it would have been more efficient for them to breach, for fear of being liable for the large reverse termination fee. Turning to the under-signaling scenario involving targets setting low reverse termination fees, courts following the contractarian diktats of § 261(a) may hold that even a small fee is the target's exclusive remedy, if the merger agreement says so. Instead of receiving a more favorable remedy, such as specific performance, the target in this case may be undercompensated and receive the small reverse termination fee it committed to because it was under-signaling at the time it entered into the merger agreement.

B. Agency Cost Concerns

Second, the new merger contractarianism may encourage corporate directors and officers to pursue their own interests at the expense of the shareholders, deepening agency costs at publicly traded target corporations. As an example, suppose that a target CEO or directors wish to enter into a merger that is not in the best interests of their shareholders. They may be motivated by the prospect of a large financial payout for themselves if the merger goes through, or have secretly negotiated continued employment with the acquirer. Under current doctrine, Delaware courts vigilantly police such conflicts of interest as potential violations of the fiduciary duty of loyalty. They apply enhanced scrutiny to such mergers if the plaintiff's attorneys successfully show such conflicts of interest on the part of directors and officers.[144] However, with the revised DGCL § 261(a), conflicted directors or officers can include a specific performance provision that, if unquestioningly honored by courts, can virtually guarantee

Efficiency, 6 J.L. ECON. & ORG. 381 (1990). Kathy Spier, on the other hand, show that when contracting is costly, even though it is efficient for the parties to contract for potentially adverse outcomes (such as a merger failure), the parties may hesitate to contract for fear of sending an adverse signal to the counterparty. *See* Kathy Spier, *Incomplete Contracts and Signaling*, 23 RAND J. ECON. 432 (1992). Finally, Albert Choi and George Triantis show how rational parties can agree to inefficient non-price terms in the presence of asymmetric information and lopsided bargaining power. *See* Albert H. Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012).

143 See Aggarwal, Choi & Min, *supra* note 102 (showing how the adoption rate of "contractual fixes" in response to *Crispo* was lower than 60% among Delaware deals). This is consistent with the thesis in Spier, *supra* note 142, who predicts incomplete adoption of efficient contract terms for fear of sending adverse signals to the counterparty.

144 *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (Del. 1995).

that the deal will close. Similarly, they can promise an acquirer an excessively high target termination fee, although, as discussed in Section III.C., there is some evidence that fiduciary constraints on these fees persist even after the enactment of § 261(a).[145] If there are agency costs between target managers and shareholders, the extensive contractual freedom under § 261(a), and the courts' inclination to uphold specific performance provisions, can inefficiently reduce the chances of the target being sold to a competing buyer, even when selling to the competitor would be more beneficial from the shareholders' perspective.

The amended statute can also accentuate agency costs at publicly traded *acquirers*. As discussed earlier,[146] even if it is interpreted with the aid of the synopsis for Senate Bill 313, § 261(a) likely allows merger agreements to include virtually uncapped reverse termination fees, payable by the buyer in case it is unable to consummate the transaction. This creates a possibility for conflicted agents on the buyer side. Buyer's managers may wish to pursue a merger for their own personal interests rather than those of the shareholders and would be more inclined to agree to a large reverse termination fee to commit to the merger. When challenged in litigation, the managers will get the beneficial business judgment review protection under corporate law, and their companies may consummate the transaction for fear of paying the large reverse termination fee. Such conflicts between acquirer corporations and their managers are not a remote possibility. The financial economics scholarship has long documented the phenomenon of "empire building," characterized by CEOs acquiring several other companies to build their personal business "empire," even if doing so is inadvisable for their company's profitability.[147] DGCL 261(a) could thus exacerbate agency problems for both target and buyer corporations.

C. Third Party Externalities

Third, expanded contractarian freedom in merger contracting can increase negative externalities for third parties who are not signatories to the merger agreement. When the target and a buyer agree to a large termination fee or a specific performance provision, § 261(a) and the courts' permissive attitude toward allowing these remedies can discourage a third-party buyer from successfully purchasing the target even when the third-party buyer may value the target more than the initial buyer. Even if the incentives of agents at the target and the initial bidder are perfectly aligned with their own shareholders and they try to maximize the returns for them, they would be inclined to agree to a large termination fee or a strong specific performance provision in order to extract higher payments from third-party buyers, which can, in turn, lead to contractual inefficiency.[148]

As a numerical example, suppose the target's valuation is \$100, the initial buyer values the target at \$120, and the parties initially agree upon a merger price of \$110. Suppose that a new third-party buyer appears, and an auction process takes place between the new buyer and the initial buyer,

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[145] *See supra* Section III.C.

[146] *See id.*

[147] *See* Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986).

[148] This is consistent with the economic analysis in Albert H. Choi, *Deal Protection Devices*, 88 U. CHI. L. REV. 757 (2021). According to the framework in that paper, a large termination fee essentially functions as a rent extraction mechanism. By agreeing to large termination fees, the parties discourage potential buyers with relatively low valuations from bidding. However, they also force buyers with relatively high valuation to bid more. So long as the gain from the higher bids from high-valuation bidders exceeds the loss from shutting out low-valuation bidders, the parties will engage in this rent extraction behavior. The analysis is similar in spirit to monopoly pricing, where a monopolist, by raising its price above the cost, shuts out the low-value customers from purchasing but extracts more from the high-value customers.

with bidding starting from the publicly announced price of $110.[149] In the absence of any termination fee, the new buyer will be able to purchase the target when the new buyer values the target at more than $120. To see this, suppose the new buyer values the target at $130. When the auction ensues, the initial buyer will drop out when the commonly observed bid reaches $120, and the new buyer will be able to purchase the target at a price slightly above $120. If the new buyer's valuation of the target is less than the initial buyer's valuation, it is also clear that the initial buyer will retain the target. If the new buyer values the target at $115, for instance, the initial buyer will outbid the new buyer with a price slightly above $115.

Importantly, so long as the target termination fee is less than $10 (which is equal to the initial buyer's expectation damages, i.e., the difference between this bidder's valuation of the target ($120) and the initial merger price ($110)), we will still have the efficient outcome of selling the target to the buyer with a higher valuation. Suppose the termination fee is $10. With this remedy, the initial buyer would be indifferent between purchasing the target at $110 (which yields the buyer $10 of surplus, the difference between its valuation of the target and the merger price) or walking away with a $10 termination fee. Hence, when the auction starts at $110, the initial buyer will drop out immediately and the new buyer will be able to acquire the target. The initial buyer will collect $10 of termination fee from the target and walk away from the auction. What would it take for the new bidder to agree to purchase the target for $110? Recall that the termination fee of $10 is paid by the target company, therefore reducing its value by $10. Therefore, to buy the target at the $110 price, the new bidder's valuation of the company must be at least $120 (the $110 price plus the $10 termination fee). Thus, with a $10 termination fee, we achieve an efficient allocation of the target to the competing bidder, with a valuation for the target that is greater than or equal to that of the initial buyer.

	No Target Termination Fee	$10 Target Termination Fee	$20 Target Termination Fee
Joint Profit of Target and Buyer	$20	$20	Larger than $20
Inefficient Sale of Target?	No	No	Possible

Table 2: Impact of Target Termination Fee on Competing Bids

However, when the target termination fee exceeds the $10 expectation damages for the initial buyer, there are significant negative externalities for competing bidders. For example, assume that the termination fee was instead $20. In this case, if bidding still began at the initial merger price of $110, the initial buyer would still be willing to drop out immediately, since the $20 fee *exceeds* its $10 surplus from the merger. However, for a competing bidder to be willing to purchase the target for $110, its own valuation would now have to be at least $130 (the sum of the $110 price and the $20 termination fee). Therefore, raising the termination fees from $10 to $20 would preclude bids from competing bidders whose valuations for the target were at least $120 but less than $130. Note that competing

[149] In technical terms, this would be an "English auction" between at least two interested buyers, where an auctioneer starts from a lower price and then gradually increases it, with each increase announced publicly, until there is only a single bidder who remains interested. This remaining bidder obtains the auctioned good (in our case, the target company) for the price at which the second-last bidder dropped out of the auction. *See* VIJAY KRISHNA, AUCTION THEORY 2 (2002).

buyers with these valuations would now be precluded from making a bid even though their valuation of the target exceeds that of the initial bidder. A contracting regime like § 261(a), which is more permissive of large termination fees, will hence generally raise the price that the new buyer has to pay for the target, and make it less likely that the target's assets are controlled by those who value them most highly. The target and the initial bidder can increase their own joint surplus, while extracting higher payments from third-party buyers and thus imposing negative externalities on these competitors,[150] and the larger surplus allows the buyer and the target to increase the acquisition price to share this (expected) surplus. Table 2 summarizes this analysis.

The target and initial buyer's ability to include expansive and binding specific performance provisions could similarly impose negative externalities on third-party competing bidders. Although a specific performance provision does not impose a direct "transactional tax" by reducing the value of the target like a termination fee, it can impose an indirect encumbrance on the transaction. When the initial buyer is entitled to specific performance as a remedy, and this equitable remedy is highly likely to be enforced under a contractarian regime like § 261(a), the new buyer may be forced to negotiate with the target *and* the initial bidder to make sure it prevails and ends up acquiring the target. Such negotiations will give the initial bidder leverage to capture additional surplus from the competing bidder, greater than its expected return if it had purchased the target itself. Finally, the target and the initial bidder can combine large termination fees and expansive specific performance provisions to extract surplus at the expense of later bidders. For instance, if the merger agreement contains a large termination fee *and* a specific performance provision, making it likely under § 261(a) that a court would order the target to sell itself to the first bidder, the new buyer will have no option but to pay the termination fee in order to make the initial buyer walk away from the transaction, leading to the inefficiencies described above.

Competing bidders are not the only third parties who could experience negative externalities under the new merger remedies regime. While there can be many examples of other third parties, we focus on the impact on the competition (more specifically, antitrust) authority and the consumers. Consider the case of reverse termination fees that are triggered based on the buyer's inability to obtain antitrust approval. An important aspect of a reverse termination fee is that it often incentivizes the buyer to put in the efforts of securing the antitrust approval, to close the transaction, and to avoid having to pay the reverse termination fee. In other words, a large reverse termination fee can serve as an important incentive mechanism for the parties to make sure that the buyer will do whatever is necessary to secure the necessary approval.[151]

However, as discussed earlier,[152] after the enactment of § 261(a), there is a concern that parties will be able to contract for, and obtain, reverse termination fees that are far higher than the historical norm, if the target is able to argue that the buyer breached the merger agreement. As explained in Section III.A, the target could do so by using "hell or high water" clauses, which require the buyer to

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[150] The possible efficiency losses will be even greater if the initial buyer and the new buyer are not symmetrically informed of the respective buyers' valuations. For instance, suppose the initial buyer does not know how much the new buyer is willing to pay for the target, and the initial buyer makes a take-it-or-leave-it offer to the new buyer. It is quite likely that the offer will be sufficiently high in order to induce the new buyer to reject, even though the new buyer values the target more than the initial buyer.

[151] *See* Scott A. Sher & Valarie Hogan, WILSON SONSINI GOODRICH & ROSATI, *Getting the Deal Done: Antitrust Risk-Shifting Provisions in Merger Agreements*, https://www.wsgr.com/a/web/131/sher_fall11.pdf, at 67 ("a high [reverse termination] fee can… incentivize the buyer to take all actions necessary to obtain regulatory approval").

[152] *See supra* Section III.C.

do *anything* it can to ensure it receives antitrust approval, and make it very likely that the buyer will be held to have breached the merger agreement if the deal does not receive antitrust clearance. If the reverse termination fee in the event of contractual breach is too large, it could have detrimental effects on the antitrust authority's efforts to block anticompetitive mergers.[153] While reverse termination fees in general increase a buyer's commitment to a deal, an excessively large reverse termination fee can function as an "over-commitment" device. If the buyer knows that its failure to receive antitrust clearance would, under a hell or high water provision, be deemed a breach of the contract and trigger a large reverse termination fee, a reasonable expectation is that the buyer will more vigorously challenge the antitrust authority's negative determination.

Given that the U.S. Department of Justice (DOJ), Federal Trade Commission (FTC), and other antitrust regulators have limited budgets, a flood of vigorous legal challenges by acquirers desperate not to pay reverse termination fees would consume scarce regulatory resources and the time and attention of their personnel. Because U.S. antitrust regulators often lose high-profile litigation, even in cases involving mergers they characterize as anticompetitive,[154] it is plausible that at least some anticompetitive mergers will be completed as a result of this increase in legal challenges to regulatory action.[155] Moreover, aggressive litigation in some mergers featuring high reverse termination fees could tie up DOJ or FTC attention and resources, allowing other potentially anticompetitive deals to slip through the cracks while regulators are distracted. Ultimately, the third parties who will experience negative externalities because of an increase in anticompetitive mergers are consumers, employees, and suppliers, who will generally pay higher prices or receive lower wages or prices, due to higher corporate concentration and less competition.[156] Large reverse termination fees, such as those permitted by § 261(a), can thus be harmful to competition policy and impose negative externalities on these stakeholders.

V. Normative Considerations

The Article has argued that the rising tide of contractarianism in Delaware merger jurisprudence could exacerbate the problems of asymmetric information, agency costs, and third-party externalities. Given these concerns, what should the legislatures and the courts do? We believe it is important for both judges and legislators to recognize that an unbridled contractarian approach to merger remedies can lead to undesirable outcomes. Delaware courts have repeatedly emphasized that the state is a contractarian jurisdiction, and that they will uphold the terms sophisticated parties

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153 This idea is based on Choi & Wickelgren, *supra* note 30. The paper analyzes two effects of committing to a (relatively) large reverse termination fee: (1) potential signaling by the pro-competitive mergers; and (2) commitment to more vigorously contest competition authority's adverse determination. While the former (signaling pro-competitive mergers) can be efficiency enhancing, the latter (commitment to vigorously challenge the competition authority) can be efficiency reducing.

154 *E.g.* Dee-Ann Durbin, *FTC Abandons Biden-Era Effort to Block Microsoft's Acquisition of Activision Blizzard*, Associated Press (May 23, 2023), https://apnews.com/article/ftc-microsoft-activision-b4d6597f3e6a94504edeae7217c75e80 (explaining that the FTC dropped a regulatory action against Microsoft after losing a court case).

155 *See supra* note 29.

156 *See, e.g.*, José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration*, 58 J. HUM. RES. 723 (2023) (providing evidence suggesting corporate concentration is associated with lower employee wages); Zarek Brot-Goldberg, Zack Cooper, Stuart V. Craig & Lev Klarnet, *Is There Too Little Antitrust Enforcement in the U.S. Hospital Sector?*, 6 AM. ECON. REV. INSIGHTS 526 (2024) (claiming that plausibly anticompetitive mergers in the U.S. hospital sector resulted in price increases for consumers); Maryam Fathollahi, Jarrad Harford & Sandy Klasa, *Anticompetitive Effects of Horizontal Acquisitions: The Impact of Within-Industry Product Similarity*, 144 J. FIN. ECON. 645 (2022) (arguing that anticompetitive mergers in concentrated industries harm consumers).

bargained for in a contract.[157] One can therefore see the move toward removing limits on termination fees and other liquidated damages in merger agreements, and deferring to the parties' choice of specific performance as their preferred remedy, as vindicating this longstanding contractarian policy.

A movement toward complete party autonomy in choosing remedies can, however, undermine Delaware's other important policy goals. Delaware jurists have stated that the state's merger law aims not only to support contractual freedom, but also to promote the efficient sale of target's assets[158] and to safeguard target shareholders' ability to receive the best possible returns, while protecting them from managers who would pursue their personal interests in violation of their fiduciary obligations.[159] As was explained in Part IV, each of these important policy goals can potentially be jeopardized by recent changes to Delaware corporate law, which may lead to excessive termination fees that impede efficient dealmaking and increase agency costs between shareholders and managers.[160] Bifurcated enforcement of merger remedies, based on whether a fee is triggered by "breach" or not, injects uncertainty into the deal process and invites opportunistic contract design. While contractarianism remains central to Delaware's jurisprudence, the amended statute can upset the balance between contractual freedom and judicial oversight that protects other core objectives.

A. Legislative Solutions

With respect to the legislators, we present two proposals. First, we propose that the legislature should address the bifurcated regime created by § 261(a). Legislators can clarify that termination fees will be subject to consistent treatment regardless of whether they are triggered by a party's "breach" of the merger agreement. Doing so would reduce parties' incentives to opportunistically insert stringent provisions and definitions to claim that a fee was triggered by a contractual breach. Removing the bifurcated system of merger remedies would also restore predictability to deals jurisprudence and would make it easier to administer for Delaware's judiciary. At the same time, as we have argued elsewhere, preserving the right of the target to collect the "lost premium" on behalf of its shareholders is desirable.[161] One possibility is for the legislature to amend the corporation code to adopt more explicit limits on how large a termination fee can be. Delaware legislators could, for instance, allow the target to recover the expectation damages of its shareholders, while simultaneously limiting these damages under the anti-penalty doctrine. As we discussed in Section III.C, although the synopsis for Senate Bill 313 stated that the DGCL amendments would preserve traditional fiduciary limits on termination fees, given the traditional judicial deference to reverse termination fees (and liquidated damages based on "bad conduct"), the synopsis does seems to impose little meaningful limitation on them. The legislature can revise the corporate code to explicitly extend size limits to these liquidated damage provisions as well.

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[157] *See, e.g.*, Williams Companies, Inc. v. Energy Transfer Equity, L.P., 2016 WL 3576682, at *2 (Del. Ch. 2016) ("Delaware is strongly contractarian, and the presence of a [contractual] provision…must be respected").

[158] *See* Restrepo & Subramanian, *supra* note 115, at 1015.

[159] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (characterizing the duty of the target board as "the maximization of the company's value at a sale for the stockholders' benefit").

[160] Delaware law stresses the primacy of shareholder value and interests over those of other stakeholders. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) ("Having chosen a for-profit corporate form…directors are bound…to promote the value of the corporation for the benefit of its stockholders"). Therefore, our analysis of third-party externalities in Section IV.C., standing alone, may not be sufficient to discredit the contractarianism of § 261(a) as a matter of Delaware policy. However, we think the negative externalities the legislative changes impose on third-party buyers, antitrust regulators, and consumers inform how policymakers should think about the social efficiency of the new contractarian regime.

[161] *See* Aggarwal, Choi & Min, *supra* note 102.

B. Judicial Reforms

Courts can also play an important role in policing the inclusion of inefficient and overly aggressive remedy terms in merger agreements. Applying the traditional anti-penalty doctrine and public policy rationale from the Restatement,[162] courts can invalidate unreasonably large termination fees and other liquidated damages (including those based on "bad conduct"), and also retain their traditional discretion over granting specific performance. To some extent, our proposal calls for the restoration of some of the judicial practices that existed before § 261(a) was amended. Courts have historically invalidated target termination fees exceeding 4-5% of the deal value, citing the preclusive effect these provisions could have on competing bidders.[163] Existing contract law disallows contracting parties from preemptively choosing specific performance to the exclusion of other monetary damages, and instructs courts to retain discretion over the choice of contractual remedy.[164] We argue that the continuation of both these longstanding judicial practices, in modified form, would be desirable.

We also suggest one extension of judicial policing of merger contract terms that goes beyond the historical norm in Delaware. As discussed earlier, judges typically accord a highly deferential business judgment review of reverse termination fees. The rationale for this judicial policy is that large reverse termination fees do not have the same potential downsides as large target termination fees, because they do not preclude competing offers from other bidders (either for the target or the buyer) and do not impede the efficient allocation of resources in the market for corporate control.[165] While this logic makes sense from the corporate law perspective, the Article has argued that large reverse termination fees can have subtle and negative effects on competition policy. Acquirers who are wary of paying excessively large reverse termination fees triggered by a failure to receive antitrust clearance, as we have explained, would be incentivized to aggressively litigate against the competition authority. Such litigation could tie down regulatory resources and attention and possibly allow anticompetitive transactions to go through.[166] Courts could preempt these possible anticompetitive effects by applying contract law's public policy rationale to monitor reverse termination fees.[167]

Conclusion

What remedy should a disappointed party be entitled to when a merger falls apart? There is no simple answer to this question, which implicates fundamental doctrines at the intersection of contract and corporate law. In this Article, we examine Delaware corporate law's recent move toward a contractarian approach to merger remedies, allowing merging parties to design their own remedies. We document how recent amendments to the Delaware corporate law code have bifurcated the judicial treatment of remedies depending on whether they are triggered by one party's breach of the merger agreement. If a court were to hold that a breach has occurred, the new statutory scheme would allow for termination fees even if their size far exceeded the injured party's expectation damages and compel specific performance despite the traditional doctrine that puts specific performance within the court's discretion. Furthermore, the bifurcated approach incentivizes targets and buyers to argue that

[162] *See Restatement (Second) of Contracts* §§ 178 & 356(a)(1).
[163] *See supra* notes 115–116 and accompanying text.
[164] *See Restatement (Second) of Contracts* § 359 cmt. a.; *supra* Section I.B.
[165] *See supra* notes 130–131 and accompanying text.
[166] *See supra* notes 151–156 and accompanying text.
[167] *See Restatement (Second) of Contracts* § 178 (allowing a court to hold a term to be unenforceable on ground of public policy).

the other party breached the merger agreement, so that they can opportunistically secure their preferred remedy.

Advocates of contractarianism in corporate mergers may argue that merging parties' expanded freedom to choose their own remedies would increase the joint surplus and allow the inclusion of optimal terms in the merger agreement. We argue, however, that such optimistic predictions could be misplaced for at least three reasons. First, when the parties are not fully informed of the relevant parameters of the transaction or are asymmetrically informed, there may be no guarantee that their voluntarily chosen terms would be optimal. Second, granting directors and officers at merging parties great discretion over remedies could allow them to overcommit to mergers that reward them personally, while not being in the best interest of their shareholders. Third, even if allowing targets and buyers to select their own remedies would maximize their joint surplus, contracting parties could take advantage of this freedom to impose negative externalities on third parties, such as competing third-party buyers or even antitrust regulators and consumers, employees, and suppliers in the case of anticompetitive mergers.

This Article thus cautions against unbridled contractarianism in corporate mergers, explaining how incomplete information, agency costs, and third-party externalities can collectively undercut the possibility that contractual freedom will lead merging parties to choose privately and socially optimal contractual terms. We argue that the Delaware legislature and courts ought to recognize the potential downsides of unrestrained contractarianism. Specifically, we think legislators ought to clarify that merger remedies will not differ based on whether a remedy was triggered by a party's breach of the merger agreement. Moreover, we suggest that they should amend the corporation code to explicitly state that recent changes to the law of merger remedies preserve the traditional corporate and contract law limits on merger agreements, as well as the courts' discretion over whether to order specific performance. Courts, for their part, should continue to invalidate excessively large termination fees and only order specific performance when they deem monetary damage provisions to be inadequate. We further suggest that courts should invalidate excessively high reverse termination fees tied to the buyer's failure to receive regulatory approval, as these provisions are contrary to public policy due to their potential anticompetitive effects. To restore efficiency, predictability, and fairness in its merger jurisprudence, Delaware should consider a retreat from puritanical contractarianism.

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