A Theory of Corporate Remedies

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Abstract

Corporate law scholarship finely parses fiduciary duties and judicial findings of breach thereof. Yet it largely ignores the matter of judicial choice of remedies. This Article supplies the first systematic treatment of the subject. It covers public corporations and divides them into two categories, those with separated ownership and control and those with control shareholders. For the separated ownership and control category we use information economics to propose a four-step remedial pecking order designed to economize on enforcement costs by reducing evidentiary uncertainty and the risk of error. Injunctive and other specific relief come first, disgorgement of private gains comes second, then compensatory damages, and finally rescissory damages. Nominal damages, made available to plaintiffs who establish a breach but cannot sustain the burden to prove financial injury, play an important backstop role, making it possible to sustain an exacting burden of proof on awards of disgorgement, compensatory damages, and rescissory damages while simultaneously maintaining a vigorous private enforcement apparatus. We offer a contrasting analysis of controlled companies. Here deterrence trumps cost as a policy concern and large damage awards make a governance contribution. We accordingly remit remedial choice to disciplined judicial discretion. Finally, we extend the logic of the pecking order to propose a forfeiture rule: given separated ownership and control, representative plaintiffs who could have sought a pre-closing injunction but held back from doing so should forfeit access to large damage awards based on speculative valuations.

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INTRODUCTION

On January 30, 2024, the Delaware Chancery Court ordered rescission of stock options with a potential value of $56 billion[1] earlier awarded as compensation by Tesla, Inc. to its chief

[1] Tom Hals, Jan Wolfe and Abhirup Roy, *Musk Wins Appeal that Restores 201A Tesla Pay Deal Now Worth About $139 Billion*, REUTERS, Dec. 19, 2025 available at https://www.reuters.com/sustainability/boards-policy-

executive officer, Elon Musk.[2] The decree rested on three substantive findings: that Musk, despite ownership of only 21.9 percent of the stock, effectively controlled Tesla;[3] that defective disclosures had been made in connection with the shareholder ratification of the compensation scheme; and that the scheme was not otherwise entirely fair.[4] Musk, not one to be denied, promptly put into motion Tesla's reincorporation from Delaware to Texas and loudly suggested that other corporations do the same. A "DExit" followed.[5] Among others, Bill Ackman took Pershing Square to Nevada, while Brian Armstrong and Coinbase followed Tesla to Texas.[6] It was the most destabilizing response to a Delaware judicial ruling since *Smith v Van Gorkom*[7] caused a liability insurance crisis in 1985.[8] But no thundering herd of reincorporating companies followed Ackman and Armstrong out the door. Delaware lawmakers quickly had gone into damage repair mode, inserting new barriers to fiduciary litigation into the General Corporation Law,[9] barriers that would have prevented the litigation over Musk's stock options in the first place.[10] Meta, which had loudly announced dissatisfaction with its Delaware incorporation early in 2025,[11] pronounced itself

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regulation/musk-wins-appeal-restores-2018-tesla-pay-deal-worth-56-billion-2025-12-19/#:~:text=The%202018%20pay%20package%20is,Tesla%20investor%20Deepwater%20Asset%20Management.

[2] Tornetta v. Musk, 310 A.3d 430, 544–48 (Del. Ch. 2024), *rev'd sub nom* In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 (Del.).

[3] *Id*. at 497–520.

[4] *Id*. at 520–44.

[5] Lora Kolodny, Despite Coinbase Departure, Only 28 Companies have Left Delaware This Year, CNBC, Nov. 14, 2025 available at https://www.cnbc.com/2025/11/14/despite-coinbase-departure-only-28-companies-left-delaware-this-year.html.

[6] An outward reincorporation was challenged in the Delaware courts on the ground of breach of breach of fiduciary duty. The Delaware courts rejected the challenge, ruling that the business judgment standard of review applied absent "well-pled allegations of a material, non-ratable benefit flowing to the directors or controllers." *See* Maffei v. Palkon, 339 A.3d 705, 744 (Del. 2025).

[7] 488 A.2d 858 (1985) (holding that a board of directors had violated the duty of care in connection with the approval of a merger).

[8] *See e.g*., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1, 50–51 (stating that D&O insurance premiums increased more than tenfold between 1984 and 1986).

[9] Lora Kolodny, *Meta's Potential Exit from Delaware had Governor Worried Enough to Call Special Weekend Meetings*, CNBC, Mar. 19, 2025 available at https://www.cnbc.com/2025/03/19/meta-billions-of-dollars-at-stake-in-overhaul-delaware-corporate-law.html. The bill, S.B. 21, was later enacted. *See* Delaware General Assembly, *Senate Substitute 1 for Senate Bill 21* available at https://legis.delaware.gov/BillDetail/141930 (reporting passage and signing on Mar. 25, 2025). The relevant sections of the bill appear in DEL. CODE ANN. tit. 8, sec.144.

[10] The legislation, known as S.B 21, *see* Del. Gen. Assembly, Senate Bill 21, Feb. 17, 2025 available at https://legis.delaware.gov/BillDetail/141857, substantially broadened the safe harbor for self-dealing transactions in section 144 of the Delaware Code. *See* DEL. CODE. ANN., tit. 8, §144. One provision limits actions against control shareholders to one who "owns or controls a majority in voting power of the outstanding stock of the corporation" or "has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock." ID., §144(e)(2).

[11] Mike Isaac & Eli Tan, *Meta Said to Explore Incorporating in a Different State*, N.Y. TIMES, Jan.31, 2025 available at https://www.nytimes.com/2025/01/31/technology/meta-incorporation-delaware.html.

reassured and stayed put. In 2025, only 28 companies decamped.[12] The DExit crisis, it seemed, had passed. The final chapter in the narrative ended on December 19, 2025, when the Delaware Supreme Court, in a *per curiam* opinion, finally reversed the Chancery Court' ruling in the Musk case.[13] The Court reported that its members could not reach agreement on any of the possible substantive grounds for reversal.[14] They turned instead to the remedy, holding that equitable recission had been inappropriately applied.[15] Musk's options (now worth up to $139 billion)[16] were reinstated accordingly and the plaintiff awarded nominal damages of $1.[17]

Thus did the resolution of corporate law's most famous case in a generation turn on its least explored branch of doctrine, the law of remedies. While we have rich analyses of fiduciary duties, standards of review, and governance processes, there is no body of theory addressing corporate law's remedial dimension. Remarkably, despite the centrality of remedies in practice, basic questions about the choice among injunctions, damages, or other relief have received no systematic attention. This Article tackles the questions, providing the first general account, combining jurisprudential and economic analysis to address both corporate legal theory and the concerns of lawyers and judges. It focuses on fiduciary litigation respecting publicly traded corporations under Delaware law, the domain that captures what matters most in American corporate litigation.

We break the caselaw into two categories. First come fiduciary breaches at corporations under separated ownership and control and governed by independent boards. As to these we develop a pecking order of corporate remedies that constrains and channels judicial remedial discretion. Second come fiduciary breaches at controlled companies and a sharply contrasting analysis. Here we remit remedial choice to disciplined judicial discretion under a set of open-ended standards.

The Article builds on a ground up theoretical reconstruction. We take received notions about the functions and purposes of remedies, notions articulated in the private law contexts of torts, property, and contracts, and adapt them to the legal arrangements, incentive structures, and valuation problematics characteristic of corporate organizations. This exercise of transposition has three theoretical points of reference: (1) the leading theoretical statement on remedial choice in private law, the Calabresi-Melamed framework of property rules and liability rules,[18] (2) economics, and (3) epistemics.

Our first theoretical inquiry takes up Calabresi and Melamed's dichotomy between property rules and liability rules.[19] With a property rule, a right is typically vindicated in court by

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[12] Lora Kolodny, Despite Coinbase Departure, Only 28 Companies have Left Delaware This Year, CNBC, Nov. 14, 2025 available at https://www.cnbc.com/2025/11/14/despite-coinbase-departure-only-28-companies-left-delaware-this-year.html.

[13] In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 at *18 (Del.)

[14] *Id*. at *9.

[15] *Id*. at *13–*16.

[16] *See* Hals, et al., *supra* note 1.

[17] 2025 WL 3689114 at *17.

[18] Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral* 85 HARV L. REV. 1089 (1972).

[19] *Id.*

an injunction or specific performance. With a liability rule, a right can be taken without consent as long as an objectively determined price is paid, leaving the right to be vindicated in court by money damages. We show that the Calabresi-Melamed framework loses much of its explanatory power when applied to the corporate form because the property rights are transferred to a legal entity and the shareholders hold a highly mediated set of rights. It follows that we should expect corporate law's ordering of remedies to respond to the firm's internal incentive problems rather than reflect the Calabresi-Melamed framework.

Our second theoretical inquiry turns to economic theory to search for normative bases for privileging one remedial mode over the other. We begin with existing analyses of remedies for breach of bilateral contracts.[20] With contracts, remedies serve to encourage contracting and lower prices by deterring breach and redressing injury. All other things equal, damages dominate injunctive relief because they import a stronger deterrent payoff even as both remedies eliminate a misallocated trade. All other things are not equal, however, because enforcement costs are borne by the victim and so become another variable in the analysis. It follows that damages dominate injunctive relief only when the facts supporting a judicial valuation are readily detectable and enforcement costs accordingly are low. In contrast, when the facts are difficult to detect, relief in the form of an injunction or rescission dominates damages because it eliminates the misallocated trade at a lower informational cost with a lower risk of judicial error.

We transpose these variables to the corporate context, focusing on officer and director liability in firms with separated ownership and control and independent boards. The results are surprising. The purposive analysis works differently because a robust governance system already deters fiduciary breaches. In addition, the dollars and cents that redress the injured party, here the shareholders, flow differently: Damages awards are in large measure funded by liability insurance and indemnification, which in turn are funded by the corporation itself for salutary reason that the liability shield mitigates the risk aversion of the corporation's decisionmakers. The result is that the shareholders fund their own redress. Finally, the injured party does not itself act as enforcer. Enforcement is nominally conducted by representative plaintiffs, but in reality managed by plaintiff's lawyers with skewed incentives, actors who seek to maximize on their own fee revenue rather than the value of the firm. Four points follow. First, because governance safeguards rather than judicial wealth transfers are the principal source of ex ante discipline, a remedy that is expensive to verify and highly variable is dominated unless it reliably prevents harms the governance system cannot avert. Second, because adjudication cost is a firm cost, the law of remedies should minimize verification expenditure. Third, in corporate contexts, compensatory damages do not hold the preferential position they occupy in contractual contexts. Fourth, the law of remedies must be responsive to incentive problems on the enforcement side.

Our third theoretical inquiry turns to the process of adjudication and the problem of judicial error. We assert that judges are ill-equipped to determine the value of compensatory damages in corporate contexts. Our analysis distinguishes corporate law's value-dependent rules from its

[20] Here our immediate inspiration is Albert H. Choi & Kathryn E. Spier, *Remedies for Non-Disclosure in Asset Sales: Voidance vs. Damages*, ssrn working paper (Sept. 1, 2025) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5433938. *Cf.* Holger Spamann, *Monetary Liability for Breach of the Duty of Care*, 8 J. LEG. ANAL. 337 (2016) (discussing an optimal liability regime for breaches of the duty of care).

process-based rules.[21] Value-dependent rules predicate director liability on a court's ex post assessment of transactional value, drawing adjudicators into epistemically uncertain territory. Process-based rules predicate liability on identifiable procedural defects[22] and accordingly reduce uncertainty. The distinction, we argue, also is critical at the remedial stage of an officer or director case. This is not because the nature of the rule violated determines the choice of remedy, as in Calabresi and Melamed. It instead follows from the fact that judges are ill-equipped to determine compensatory and rescissory damages because the calculations implicate the same epistemic uncertainties as do value-dependent rules.

At the bottom line, our theoretical inquiry raises a sequence of serious questions about the efficacy of compensatory and rescissory damages in comparison to alternatives such as injunctive relief, profit disgorgement, and nominal damages. More particularly: Compensatory and rescissory damages (1) are expensive and unreliable in the ascertainment in a context where the cost is internalized by the corporation; (2) are prone to cause perverse effects because their *in terrorem* effect reinforces the risk aversion of decision-makers and so inhibits productive investment; and (3) make only an interstitial and secondary contribution respecting the deterrence of officer and director misconduct.

In light of these concerns, we advance a pecking order theory of remedies for breach by officers and directors. Its objective is to minimize incentive distortions and enable remedial responses at the lowest feasible cost of verification. The organizing principle is informational. There are two reasons for this. First, a remedy that is less information-intensive is cheaper to administer and, because its costs are borne internally by the corporation, its selection tends to enhance value. Second, when a remedy requires information that courts are epistemically unequipped to evaluate, the risk of judicial error is magnified with distortionary results for the incentives of risk averse managers, who will veer toward suboptimal low variance projects. This, too, depresses corporate value. As we go down the pecking order, each level requires a more elaborate description of the underlying breach and therefore absorbs more judicial effort, requires more expert evidence, and creates a greater risk of error. A court should descend the ladder only when the facts it can verify become harder to observe.[23]

Injunctions and other forms of specific relief sit at the top of the pecking order. They require the least extensive judicial information gathering and preserve the parties' ability to continue a transactional process under clarified rules, but are feasible only prior to the closing of a tainted transaction. The order's lower tiers are occupied by the various damage calculations. In the first lower tier comes the restitutionary remedy of profit disgorgement. Disgorgement strips observable private gains without forcing the court to price the entire transaction. At the second level we find the value-based monetary award of compensatory damages. At the lowest level we encounter another value-based and even more speculative remedy, rescissory damages. These last two should be resorted to only where reliable market anchors exist.

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[21] Here we draw on William W. Bratton & Simone M. Sepe, *Substance and Process in Corporate Law: Theory and History*, 50 J. CORP. L. 893, 902–906 (2025).

[22] *Id*.

[23] *Cf.* Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 728‑30 (1996).

The burden of proof lies on the plaintiff at all levels, opening up the awkward possibility of *injuria sine damno*: A plaintiff could establish liability but fail to make a case for either an injunction or damages. There follow negative implications for enforcement incentives: the plaintiff's lawyer has successfully played its enforcement role at the case's liability stage but has neither conferred a concrete benefit on the shareholders nor generated a recovery pool to fund a fee. Delaware here squares the circle with nominal damages, *per se* awards which supply an expressive yet low-variance sanction and fund fee awards without requiring informational inputs and costs.

Our lexicographic ordering lowers social cost even as it respects courts' epistemic limits and simultaneously deters opportunism. To back it up, we suggest that a plaintiff who has both the information and opportunity to seek a pre-closing injunction against a suspect transaction but who chooses to wait until after a transaction closes to preserve the optional value of a damage award forfeit the right to pursue the claim.

We include a separate discussion of controlling shareholder duties. Here the purposive framework works differently, moving back in the direction of the contractual framework to elevate deterrence and redress as policy concerns. There are two reasons for this: first, the governance system works less reliably, and second, the control party bears the litigation costs. It is a situation unsuited to the pecking order's stable ranking of remedies for, depending on the facts, compensatory damages can dominate injunctive relief. The better prescription is therefore disciplined discretion. The courts should retain flexibility to choose among injunctive relief, rescission, and monetary relief in light of the informational posture and expected incentive consequences of the particular case. Here representative plaintiffs and their attorneys who forego seeking a pre-closing injunction should not be subject to forfeiture of claim.

The Article proceeds as follows. Part I lays theoretical foundations. Section A begins by looking at the corporate form through Calabresi-Melamed's lens of property and liability rules. Section B goes on to an economic analysis that sharply distinguishes between remedial choice in contractual contexts and in corporate contexts. Section C introduces the distinction between value-dependent and process-based rules and transposes its underlying logic to the remedial context, showing that value-dependent calculations increase the risk of judicial error.

Part II develops the pecking order for companies with separated ownership and control. It explains why injunctive relief should be the default response, why disgorgement orders belong at the middle tier, and why value-dependent damages occupy the bottom tier. The discussion shows how each step down the ladder increases the informational burden on the court and the attendant risk of judicial error. We show how Delaware law structures remedies in a manner consistent with the pecking order, pragmatically gravitating toward remedies that are easier to administer and less prone to speculative error. We also discuss how timing influences Delaware's remedial choices: Once a transaction has closed and third-party rights have vested, courts are loath to unravel deals or impose open-ended damages that upset settled expectations, reinforcing Delaware's tendency to favor forward-looking process incentives over heavy-handed ex post price corrections.

Part III redeploys Part I's analytical framework in the control shareholder context with markedly different results. Here deterrence matters above all. The pecking order's cost-based channeling serves no purpose and judicial discretion returns to the fore.

Part IV builds on the pecking order framework to propose a procedural forfeiture rule. The rule is designed to deter strategic delay by plaintiffs who might otherwise sit back and wait for a tainted deal to close and then sue for windfall damages. Requiring representative plaintiffs to act promptly or lose the chance of a large ex post award would better align with incentives of private enforcers with social welfare.

Part V concludes.

I. PRIVATE LAW REMEDIES IN CORPORATE CONTEXTS: THEORETICAL ADJUSTMENTS

Although to our knowledge no one has yet conducted a theoretical analysis of remedial choice in the context of corporate fiduciary law,[24] there are antecedent analyses in private law more generally. The most prominent is Calabresi and Melamed's discussion of property and liability rules. We review it in Section A, showing that it cannot be applied in corporate contexts due to an added layer of structural complexity. We go on in Section B to an economic analysis of remedial choice in the wake of breach of contract, showing that it provides a start point for a bespoke picture of incentives operative in respect of fiduciary litigation. We introduce a third theoretical perspective in Section C, distinguishing process-based rules from value-based rules. We contend that the former provide a cheaper and more accurate basis for findings of fiduciary liability and show that the policy concerns underlying the distinction have implications for the choice of remedy.

A. Property and Liability Rules

The traditional frameworks of private law—contract, tort, and property—map onto corporate law in surprising ways. Nowhere is this more evident than in the application of Calabresi and Melamed's distinction between property rules and liability rules. According to Calabresi and Melamed, property entitlements can be taken only with the owner's consent and are vindicated with injunctive relief, while liability entitlements can be taken without consent upon the payment of an objectively determined price in the form of money damages. Any analysis of remedial choice in private law must work through Calabresi and Melamed, given the strong and generally accepted tie they establish between different rights and different remedies.

On which side of the line should we place the rights of public company shareholders? At first glance, it seems appropriate to analogize shareholders' rights in a company to ordinary property interests: shareholders "own" stock and, indirectly, the residual value of the firm, suggesting that they should enjoy property-rule protection and with it the ability to prevent

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[24] For a treatment for comparison, *see* Albert H. Choi & Kathryn E. Spier, *supra* note 20. Choi and Spier compare avoidance and damages and remedies for fraud in connection with a sale of assets, showing formally that damages have stronger deterrent effect but suffer the disadvantage of leaving an inefficient transaction in place. For a similar treatment in the conceptually related area of antifraud damages, *see* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 315–52 (1991). *See also* Spamann, *supra* note 20 (discussing the problem of excessive damages for duty of care violations); Daniel B. Kelly, *On Disgorgement and Punitive Damages in Trust Law*, 107 IOWA L. REV. 2079 (2022) (commending the deterrent properties of trust law's allowance of an election of either compensatory damages or disgorgement in cases of trustee violations of the duty of loyalty).

unwanted transfers or expropriations of firm value.[25] However, the operation of the corporate form prevents this direct extension of the Calabresi–Melamed framework, particularly when the corporation's equity is publicly traded and widely held.

In practice, shareholders hold a highly mediated set of rights. The corporation itself, as a separate legal entity, holds title to corporate assets. The shareholders own their shares, which confer voting and economic rights but not direct control over the assets.[26] Corporate decisions—whether to merge, sell assets, or issue new shares—are made by directors or controlling shareholders, not by each shareholder individually.[27] As a result, shareholders' interests in corporate transactions are often not protected by property rules. To illustrate, consider a cash consideration merger pursuant to which a controlling shareholder or third-party buyer acquires all outstanding shares. A dissenting minority shareholder will be forced to give up her stock in exchange for the merger price, even if she believes the price is too low. She cannot block the transaction. Instead, her statutory recourse is to demand appraisal, which results in an ex post judicial valuation of her shares. In Calabresi–Melamed terms, the minority shareholder has an entitlement not to be expropriated, but not an entitlement protected by a property rule because the shareholder cannot block the merger if procedural requirements are met. Bu the corporate structure does give the shareholder the right to challenge the amount of the payout.[28] This is the basic characteristic of a liability rule regime.

This is not to say that property-rule protection is foreign to corporate law. In some contexts, shareholders do enjoy something akin to a property rule, usually through the availability of injunctive relief. For example, the dissenting shareholder in the cash merger case can seek a preliminary injunction before a merger closes on the ground that the directors breached their duties by conducting a flawed sale process. Delaware courts often entertain such pre-closing injunction requests, recognizing that after a merger is consummated it may be impossible to return the parties to their prior positions.[29] By granting an injunction, a court in effect gives shareholders an interim mode of property-rule protection. Although the plaintiff shareholder has no right to veto the transaction, the transaction cannot proceed until the shareholder's objections are addressed, whether with corrective disclosures or improved deal terms.[30] But the right grounding the injunctive proceeding is not intrinsically property-based, for in a case where the merger closes unimpeded, the same shareholder can bring an action for damages.

Our analysis of corporate remedies must address the choice between injunctions and damages, just as do Calabresi and Melamed. Any resemblance ends there. With Calabresi and

[25] Zohar Goshen, *Voting (Insincerely) in Corporate Law*, 2 THEORETICAL INQUIRIES L. 815, 821–23 (2001) (showing that shareholder voting confers "property-rule" protection).

[26] *Cf.* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

[27] *Cf.* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301 (1983).

[28] *Cf.* William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69, 80–82 (1980) (showing that dissenting shareholders cannot block mergers or asset sales and are confined to appraisal, a liability-rule monetary remedy).

[29] *See infra* notes 63–64 and accompanying text.

[30] Similarly, certain shareholder rights—like the right to inspect books and records or to have an annual meeting of shareholders—are protected by the availability of relief in the form of a court order compelling the corporation to comply. *See* DEL. CODE ANN., tit. 8 §§ 211(c), 220.

Melamed, the remedy follows from the nature of the right within a model encompassing multiple substantive regimes. In this context, only one substantive regime—corporate fiduciary duties—is on the table for inspection and, as we have seen, there is no *a priori* basis for tying the regime to either injunctions or damages. It follows that, when remedial choices must be made, they can be choices untethered to the character of the substantive right traversed by the breach. But it does also not follow that there never is a tie between the nature of the fiduciary breach and the choice of remedy. When we shift from the choice between injunctive relief and damages to the matter of choosing among the menu of calculative alternatives on the damages menu, we will see cases where the appropriate award addresses and follows from the breaching conduct.[31]

B. Economics: Incentives and Redress

Private law remedies, viewed in economic terms, serve two basic purposes. First, they deter undesirable conduct ex ante by reducing the expected payoff from a breach of duty. Second, they redress allocational errors ex post by transferring value to an injured party. Each of property rules and liability rules pursue both purposes, but with differing emphases. Liability-rule protection in the form of monetary damages leans toward deterrence: by threatening an ex post cash transfer, it reduces the potential injurer's expected return from breach before action is taken. Property-rule protection in the form of injunctive relief, specific performance, or rescission or avoidance of an executory contract, leans toward redress: when a violation is detected, the court restores (or largely restores) the status quo ante and thereby corrects an allocative error. This may occur with diminished deterrent impact—despite the court's intervention, the miscreant may walk away incurring little more than an opportunity cost.

The discussion that follows looks at remedies for fiduciary breach through these deterrent and allocational lenses. The analysis proceeds from the simple to the complex, using remedies for breach of contract as a base point and then introducing complications related to corporate ownership structure and governance.

1. Contract Remedies

Which is better in bilateral contractual contexts, liability-rule protection in the form of compensatory, rescissory or restitutionary damages or property-rule protection in the form of injunctive relief, specific performance, or rescission? Certainly, the mere availability of a judicial remedy, whether damages or an injunction, raises the buyer's willingness to contract ex ante by reducing expected downside risk. Thus do remedies enlarge the contracting space and raise transaction prices. But the choice between the two remedial modes implicates an additional factor—the cost of enforcement through adjudication. Adjudication cost comes into the welfare analysis in two ways. First come the victim's incentives. Under the American Rule, a lawsuit's plaintiff bears her own costs.[32] It follows that as the cost of contract enforcement goes up, the less likely is the victim to seek to enforce in the first place and the less intense is the system's deterrent effect. Second, as the facts concerning the transaction and its performance become more difficult to detect they become more expensive to establish in court. It follows that as the costs rise, the

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[31] *See infra* notes 95–97 and accompanying text.

[32] *See, e.g.*, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 269–71 (1975).

likelihood of judicial error increases and with it the possibility of inefficient deterrence and insufficient redress. Significantly, the cost burden differs with the remedy selected. When the relevant facts supporting a judicial valuation are readily available and market pricing is reliable, damages will dominate injunctive relief. The reason is that damages, when easily calculated, give more bang for the buck because they more strongly deter opportunism and thereby make it less likely that bad trades will occur in the first place. Contrariwise, when the relevant facts are difficult to detect and prove, the judicial pricing of a counterfactual transaction will be noisy and expensive. Here relief in the form of an injunction or rescission can dominate damages because it eliminates the misallocated trade at a lower informational cost with a lower risk of judicial error.[33]

2. Corporate Fiduciary Remedies

We turn now to the enforcement of the fiduciary duties of corporate officers and directors and consider the interplay of deterrence, allocative redress, and enforcement costs in respect of the selection of an appropriate remedy. We will see that this is a markedly different institutional environment from that of a two-party contract, so much so that there is a definite tilt in favor of injunctive intervention over damages. The analysis addresses publicly traded companies under separated of ownership and control.

Consider first performance incentives and deterrence. In the context of publicly traded companies, the principal disciplining forces come not from ex post money judgments but from a multi-layer governance architecture. Directors must submit to periodic board elections and the pressures of the labor and reputation markets. Officers also feel this market pressure, along with the pull of incentive compensation arrangements, the constraints of internal controls, the potential negative effects of shareholder votes, and the underlying threat of the market for corporate control. These mechanisms operate continuously. Litigation, in contrast, is episodic. It follows that heavy damage awards at best make only a secondary contribution as deterrents in officer and director cases.

Heavy ex post damages also can be counterproductive. To see why, we turn to the standard economic incentive picture applied in corporate governance. Diversified shareholders are viewed as risk neutral while officers and directors are viewed as risk averse. Equity compensation plans are recommended because they move the officers and directors who select the corporation's projects in the direction of risk neutrality, better aligning their incentives with those of the shareholders. How does the risk of officer and director liability for breach of fiduciary duty impact this incentive alignment? Diversified shareholders are indifferent to idiosyncratic adjudication risk so long as error is not systematically biased or correlated with macro stress. Boards and executives, in contrast, are anything but indifferent. It follows that the insertion into the mix of the possibility of significant personal officer and director liability in respect of corporate decision-making moves the decision-makers' incentives back in the direction of risk aversion. Moral hazard in the form of a preference for low-variance, lower-value projects could result when a higher-value investment option carries even a whiff of fiduciary taint. There could also be an adverse selection problem if high reputation candidates who have more to lose foreswear service on boards. The background

[33] For a formal model working with these variables in the context of a fraudulently induced asset sale, *see* Choi & Spier, *supra* note 20. For a contrasting analysis, *see* Alan Schwartz, *The Case for Specific Performance,* 89 YALE L.J. 271 (1979) (arguing that specific performance should be "routinely" available).

of statutory law, case law, and internal contracting reflects these concerns:[34] Corporations can opt out of director exposure to damages for breaches of the duty of care;[35] directors' and officers' liability insurance is pervasive;[36] and indemnification is permitted and routine.[37]

Redress also operates differently in corporate contexts. The fact pattern where the victim brings the successful lawsuit and the miscreant directly compensates the victim out of its own pocket is more the exception than the rule. One reason for this is structural: If the corporation is the victim of the fiduciary breach, the enforcement action is derivative and damages are paid to the corporation rather than to the shareholders. Not all fiduciary actions are derivative, however: If the fiduciary breach injures the shareholders directly, then the shareholders are the plaintiffs and technically are the recipients of a damage award. But even in this case the alignment of economic interests little resembles that of a contract case. There are two reasons. First, where, in a contract case, the breaching party pays the judgment, with fiduciary enforcement against officers and directors the cost of the judgment ultimately falls on the shareholders themselves even as they are the litigation's direct or indirect beneficiaries. This is because the governance system deflects economic harm stemming from litigation away from the targeted fiduciaries. The monetary shock incident to a large damage award is diffused through insurance contracts, indemnification provisions and, ultimately, the equity capital of diversified shareholders. D&O carriers write diversified books on a portfolio basis and price systemic exposure into future premiums.[38] Because most public companies purchase coverage and diversified investors tend to own stock portfolios tracking broad indices, the incidence of large awards is dissipated across the market. Higher future premiums are then capitalized into operating costs and, by extension, into share prices market-wide. When an officer or director defendant is found to be liable but has acted in good faith, indemnification provisions recycle cash from the corporate treasury to director or officer's pocket to cover their litigation, settlement, and damages costs.[39] This transfer is a deadweight cost to the company that reduces residual cash flows to the very shareholders whose interests a damages award purports to vindicate. The transfer thus resembles a commons tragedy.

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[34] These points hold even with insurance, because adjudicated damages carry reputational consequences that coverage cannot fully mute. False positives are especially costly: headline awards can distort selection and effort more than their actuarial value suggests.

[36] See *infra* text accompanying note 38.

[37] *See* DEL. CODE ANN., tit. 8, §145. Spamann, *supra* note 20, presents a novel analysis of these matters, suggesting that in some circumstances the enforcement of the duty of care can enhance the overall monitoring environment provided that internal corporate legislation contains liability exposure by stipulating a partial damages recovery.

[38] *See* TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 77‑80 (2010) (showing that D&O insurers pool losses across a diversified portfolio and recoup large payouts through future premiums, so the economic incidence of big verdicts is ultimately shifted to the corporation and its shareholders); Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Market*, 74 U. CHI. L. REV. 487, 488‑89 (2007) (reporting that virtually all securities-fraud settlements are paid within D&O policy limits, with insurers pricing coverage on a portfolio basis); Bernard S. Black, Brian R. Cheffins & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1059‑60 (2006) (finding that outside directors almost never make out-of-pocket payments because indemnification and insurance absorb the loss).

[39] DEL. CODE ANN., tit. 8, § 145(a).

Second, even as shareholders, in their capacity as residual interest holders, pay a litigation tax to themselves, their representative counsel captures a private rent. Fiduciary litigation respecting public companies proceeds on a representative basis. Given dispersed holdings, no single shareholder will have an incentive to bear the cost of enforcement. Enforcement accordingly occurs by means of a derivative or class action initiated by a plaintiff's lawyer on behalf of the shareholder group as a whole. The impact on economic incentives is profound. In a contract action, the plaintiff has a pure financial incentive to maximize the return on a deal gone wrong and hence the value of the plaintiff firm. In a fiduciary case, the representative plaintiff has an incentive to maximize the value of the litigation rather than the value of the injured firm. The resulting calculation may or may not approximate that of a plaintiff suing directly. For a plaintiff's lawyer, enforcement cost is risk capital and its return on investment comes in the form of its fee. It follows that enforcement cost reduction rises to the first rank in strategic calculations and a given remedial result is attractive only to the extent it enhances the projected fee. If a large damages payoff adds costs without a commensurate return in the fee award, the lawyer will target a lower cost remedy. Contrariwise, if a large damage award can be yielded based on a modest investment, the lawyer will forego pursuit of an injunctive remedy that makes the firm more valuable by avoiding harm. Meanwhile, the job of micro-managing enforcement incentives falls on the courts in connection with their application of the rules on awards of attorney's fees to successful plaintiff's lawyers. The court must find a middle way. If the plaintiffs' bar is undercompensated, the level of fiduciary enforcement is inefficiently low. With overcompensation, in contrast, the plaintiffs' bar has an incentive to invest in marginal claims, an investment ultimately financed at the shareholders' expense.

3. Implications for Remedial Choice

We suspect that most come to the topic of remedies for breach of fiduciary duty with an expectation that damages will play the central role—this is, after all, a liability regime. The foregoing picture of corporate governance incentives and enforcement economics upends this expectation in three ways. First, in corporate contexts, governance safeguards rather than judicial wealth transfers are the principal source of ex ante discipline. It follows that a remedy that is expensive to verify and highly variable is dominated unless it reliably prevents harms the governance system cannot avert. Second, adjudication cost is in substantial part a firm cost. It follows that remedial design should minimize verification expenditure. Third, the enforcing party is not the interest holder but the lawyer, an actor with selective incentives. While it shares an interest in cost reduction with the shareholder beneficiaries, its pursuit of its own bottom line may or may not align with the shareholder interest.

There follows a remedial preference for injunctions and other directive orders over damages. A design that privileges directive intervention over-compensation enhances firm value in three ways: (1) it avoids the cost of valuation battles; (2) it reduces the variance that distorts selection and effort in the boardroom; and (3) it increases investors' willingness to supply capital by reducing expected losses from occasional governance failures.

C. Value-Dependent and Process-Based Rules

We have seen that when choices are made among remedies in the context of litigation against officers and directors, concerns about cost and variance reduction can dominate concerns about deterrent impact. We proceed in this Section to deepen our picture of variance, addressing the problem of judicial error.

We begin with the right and the judge's determination of breach before proceeding to the selection of remedies. The risk of error at the liability phase of the case increases or decreases with the fact pattern. A *value-dependent* cause of action implicates a higher risk. Here the fiduciary breach depends on a decision's economic merits, with the court deciding whether the outcome was substantively fair or caused a loss in value.[40] The risk of error decreases when the action is *process-based*, that is, when the breach follows from noncompliance with a legally mandated decision-making prerequisite or procedural safeguard operating regardless of a decision's economic outcome.

To illustrate the difference between value- and process-based approaches, we look to the recent evolution of the control shareholder duty, comparing the formulation at the beginning of this century from that prevailing today. During the earlier period, the "entire fairness" standard of review applied to transactions between a corporation and a controlling shareholder. The defending controller had to show fair dealing on the transaction's process side and fair price on its substantive side. If the defendant showed fair dealing, the burden shifted to the plaintiff to show an unfair price. If the process was flawed and fair dealing could not be shown, the defendant retained the burden to show that the price was fair.[41] Either way, a fully litigated case called on the court to assess the transaction's financial outcome, with the result often turning on inputs from dueling valuation experts. The Delaware courts shifted to a more process-based approach in *Kahn v. M&F Worldwide Corp*.,[42] a 2014 case referred to as *MFW*. Under *MFW*, the controlling shareholder can deflect entire fairness scrutiny by deploying a cleansing mechanism: If the transaction's approval was from the outset conditioned on approval by a committee of independent directors and follow up ratification by the vote of a majority of the corporation's disinterested shareholders, with both bodies acting on full information and not subject to coercion, then the transaction receives business judgment review. Successful process compliance avoids any substantive value inquiry and virtually assures dismissal of the case. The result is contingent, however. If the controller fails to comply with the procedural template, the standard of review reverts to entire fairness and a possible trial on the transaction's substantive merits.

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[41] *See* Kahn v. Lynch Communication Systems, Inc., 638 A.2d 1110, 1118–1121 (Del. 1994).

[42] 88 A.3d 635 (Del. 2014).

The shift toward a process-based approach[43] implies a decrease in the risk of adjudicative error. Why is this? A substantive standard like entire fairness requires the judge to evaluate a transaction's merits, ascertaining whether sufficient value has been produced. Such an inquiry demands a benchmark model of an economically appropriate outcome. Unfortunately, however, there is no consensus in economic theory as to how to determine the value of a complex corporate transaction. There is neither a general, determinate valuation metric nor a consensus as to which corporate decision-making structure maximizes value. Companies accordingly undertake projects and transactions in environments of uncertainty, where no clear market price reveals whether a decision was fundamentally value-enhancing or value-destroying.[44] Shareholders pay managers to make business judgments that effectively navigate these uncertain shoals.

The institutional competence of courts is simply not suited to this kind of speculative business decision-making. Judges are trained to find facts and apply law, not to serve as ersatz economists reconstructing hypothetical transactional or business planning scenarios. It is unsurprising, then, that when courts venture into substantive value judgments, the outcomes can appear *ad hoc* or unprincipled, varying widely with the predilections of the decision-maker or the

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[43] The dichotomy between value-dependent and process-based approaches recurs throughout corporate fiduciary law. For a review, *see* Bratton & Sepe, *supra* note 21, at 902–906. The duty of care provides another cogent illustration. Nominally, it appears as a substantive, culpability-based regime grounded in a gross negligence standard. In operation it is process-based. So long as directors act in the corporation's best interest and adhere to a couple of procedural norms, informing themselves adequately and moving forward with deliberation, they suffer no liability and pay no damages even if the decision turns out poorly. *See id.* at 914–916. At the bottom line, the approach tracks that of *MFW*: adequate process forestalls substantive judicial inquiry into transactional merits and thus the need for judicial valuation.

[44] In theory, a perfectly informed and complete market could provide objective prices as a guide. In an Arrow-Debreu world of complete markets, every risk and future state is priced, and one might reasonably expect to use market prices to evaluate whether a transaction added value. Unfortunately, markets in the real world are far from complete. General equilibrium theory, the formal economic model of an idealized complete market economy, teaches that when markets are incomplete market prices become an unreliable guide to true economic value. For a discussion of the relevance to corporate law of general equilibrium theory and market incompleteness, *see* William W. Bratton & Simone Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 694–722 (2020). We cannot escape this indeterminacy by turning to simplified economic models. Outside the pristine but impractical framework of general equilibrium, economists use partial equilibrium models, valuation models, and game-theoretic analyses to evaluate transactions and business decisions. These models, however, can yield conflicting prescriptions. Results depend on built-in assumptions about behavior, information, and market structure. *Id*. at 696–99.

Consider, as an example, the two leading partial equilibrium models of corporate governance. One model assumes managers are prone to self-serving "moral hazard" and conclude that empowering independent shareholders increases efficiency. *See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (introducing the concept of agency costs). The competing model assumes that adverse selection is the critical issue. The premise is that managers who expect swift shareholder retribution for short-term missteps rationally become myopic, allocating capital only to safe, quick-payoff projects and passing up investments whose returns materialize later. The model thereby implies that granting managers greater discretion while shielding them from immediate shareholder pressure enhances efficiency, precisely the opposite result of the moral hazard model. *See* Jeremy C. Stein, *Efficient Capital Markets, Inefficient Firms: A Model of Myopic Corporate Behavior*, 104 Q.J. ECON. 655, 667 (1989) (modeling suboptimal investment where managers maximize a weighted average of near-term stock prices and long-run value); *see also* Jeremy C. Stein, *Takeover Threats and Managerial Myopia*, 96 J. POL. ECON. 61, 63–67 (1988) (showing formally that, even absent agency costs, managers of the firm threatened by a takeover will sell an underpriced asset). Each model's outcome hinges on specific parameters—change the assumptions about how investors and managers behave, or about what information they have, and the recommended governance policy flips. In sum, partial equilibrium exercises are highly sensitive to their inputs, a classic underdetermination problem.

quality of advocacy. The background of epistemic weakness is masked by evidentiary submissions—elaborate presentations by competing economic experts.[45] These complicate the picture without importing either reliable theoretical grounding or evidentiary certainty.

Market prices can provide significant inputs in value-dependent determinations, but not determinative ones. Let's say that a company's stock price declines one percent on the day it discloses a self-dealing transaction with its CEO. The decline could have multiple causes and will be based on incomplete information and so does not signal a substantively unfair contract on a *per se* basis. Nor does it measure actual injury to the company due to the contract and so is not the damage measure. Or let's say that a controlling shareholder engineers a cashout merger of a controlled company, paying a premium of fifteen percent over the market price per share. The premium tells us that there is value on offer without providing the measure of an "appropriate" selling price needed in fiduciary litigation. Alternatively, consider a munificent compensation arrangement awarded to a CEO after a year in which the company's stock was one of the market's top performers. The high stock price signals that this is indeed a successful CEO. But it does not tell us how much is too much.

If judges cannot dependably determine whether a transaction or decision was substantively "good" or "bad" for shareholders, how can corporate law protect investors and police management? The answer—and the emerging trend in modern corporate jurisprudence—is to shift the focus of fiduciary review to the ex ante decision-making process and away from the ex post substantive outcome. Procedural rules in corporate law set requirements for *how* decisions are made, rather than specifying *what* decision should be made. They include rules ensuring that conflicted transactions are approved by disinterested directors or shareholders, mandates that boards inform themselves of all material information, and requirements of full disclosure and fair dealing in a transaction's negotiation. Such rules are value-independent—they do not require a court to decide whether the price was high enough or the business strategy sound enough, only whether the decision-makers followed a specified decision-making protocol. Judges are institutionally well-suited to enforce them, for the job involves familiar tasks within the core competence of legal reasoning.[46]

Summing up, value-dependent rules put courts in the position of backseat dealmaker, determining after the fact what the terms should have been, where process-based rules position

[45] An adjudicator, lacking domain expertise, must largely accept the factual predicates supplied by retained experts, thereby endowing those experts with wide-ranging discretion. In theory, an adversarial exchange among partisan experts can yield an abductively supported "best explanation," mitigating the adjudicator's epistemic deficit. *See* Mathias Dewatripont & Jean Tirole, *Advocates*, 107 J. POL. ECON. 1, 2‑5 (1999) (setting forth a formal model showing how competition among biased experts can improve decision quality); *see* also Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18, 23 (1986) (advancing a mechanism-design analysis of decision making based on self-interested information providers). In practice, however, the robustness of any such abduction depends on the reliability and objectivity of the criteria used to select the prevailing account. Where those criteria are vague or manipulable, the outcome often turns on pragmatic contingencies: expert reputation, perceived affiliation, or the adjudicator's intuitive sense of credibility, rather than demonstrable epistemic soundness.

[46] *See* Bratton & Sepe, *supra* note 21, at 903–904, which observes that process-based rules hinge on a straightforward conditional (if the prescribed approval procedure was followed, the transaction is valid), and argues that courts, drawing on routine legal skills, are well positioned to verify procedural compliance.

courts as referees of fair play, ensuring the rules of the game were followed. Our thesis is that, wherever possible, the law should prefer to set and enforce process-based rules.[47]

What does this conclusion imply respecting the choice of remedy?

The initial implication is that, as in Calabresi and Melamed, the remedy should follow from the right with one set of remedies tied to process violations and another to substantive violations. But, as a matter of Delaware law, there tend[48] to be no mandatory ties between rights and remedies: the Chancery Court is accorded the power to "fashion any form of equitable and monetary relief as may be appropriate"[49] and the standard of review on appeal of an award to the Supreme Court is abuse of discretion.[50] A fiduciary case thus begins *de novo* at the remedies phase, where it turns out that different remedies have different properties. The distinction between process and value repeats itself, some remedies being process-based while others are value-based. Let us run the list of remedial alternatives in the context of a case where a merger implicates a breach of duty due to a failure adequately to shop the company and a failure to disclose a material fact in connection with the shareholders' ratification vote. The timing of the litigation is a critical determinant of remedial choice. If the action proceeds before the merger closes, injunctive intervention is a possibility. This might be an order delaying the shareholder vote until the omissions are cured by supplemental disclosures or until such time as the negotiating process has been cleansed. The intervention is process-based in two senses. First, the court makes no attempt to price the deal. Second, the order addresses a transactional process. The court's job is to ensure that the process is sound so that any price that emerges comes from the parties themselves and can be trusted as the product of fairness.

Now let us assume that the merger has just closed. The set of remedial choices shifts fundamentally. It is too late for injunctive intervention and relief must come in monetary form. There are two choices, one value-dependent and the other process-based. The value-dependent remedy is a compensatory damages award based on the difference between the value of the firm in the wake of the transaction and the value of the firm in the absence of the transaction. Alternatively, and particularly in the event of a failure of proof respecting a compensatory damages

[47] We do not claim to be the first commentators to assert that process should trump substance. *See* Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 DEL. J. CORP. L. 1, 5–19 (2020) (arguing against fair price validation on the ground that liberality built into substantive review results in an excessively lax fiduciary regime). *See also* Jonathan R. Macey, *"Fair is Fair" in Corporate Law*, ssrn working paper available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5139995 (arguing that the standard should no longer require fair process and fair price but proceed on an either/or basis, with minority shareholder approval sufficing on the process side and consistency with an arm's length bargain sufficing on the substantive side); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of* Smith v. Van Gorkom *and the Business Judgment Rule*, 96 NW. L. REV. 675 (2002) (using the shift to process-based review as the basis for a policy critique of the rational economic actor).

[48] The controlling shareholder duty is the one exception. *See infra* text accompanying note 150

[49] Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

[50] *See, e.g.*, RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 866–867 (Del. 2015).

award, a court might award nominal damages,[51] a token sum such as $1 per share. Such an award is appropriately denominated process-based because it entails no transactional valuation.[52]

D. Summary

We began our theoretical survey with a reference to Calabresi and Melamed's distinction between property and liability rules and an indelible tie between the nature of the right and the appropriate remedy. Our analysis shows that this approach, however fundamental to understanding of property and tort law, has no traction in corporate contexts. We proceeded to an economic analysis, contrasting the function of remedies in contractual and corporate contexts, to draw two conclusions. First, where contract remedies serve to deter and redress, the primary function of corporate remedies is allocative—to prevent or unwind value-decreasing transactions. Second, because the firm bears the enforcement cost, courts choosing among remedies should bring to bear the same discipline applied whenever the corporation makes an expenditure, choosing the least costly instrument that reliably neutralizes the harm. We further complicated the cost picture in this Part's final section, showing that one remedy, compensatory damages, stands out as higher cost due to the variance incident to the valuation exercise bound up in the award's calculation.

II. A PECKING ORDER OF CORPORATE REMEDIES

This Part sets out a pecking order theory of remedies for corporations with separated ownership and control. It builds on the analysis in Part I, employing an economic template, drawn from mechanism design theory, that distinguishes among remedies according to the cost of verification. It goes on to apply the template to the grab bag of remedies available to courts adjudicating fiduciary questions, ordering them with injunctions and other specific relief at the top of the pecking order and damage remedies at the bottom. Within the damages category, process-based calculations are preferred over value-dependent measures.[53] We take up controlling shareholder duties in Part III.

A. Remedies as Verification Technologies

The idea of a "pecking order" comes from finance theory. The theory predicts an order of preference respecting the raising of new capital, taking into account the impacts of transaction costs and information asymmetries. The corporation turns first to earnings retention because the money comes ready, without transaction costs. New borrowing comes next due to tax advantages and an accompanying signal of strength—the lender must have concluded that the borrowing corporation has the wherewithal to pay the loan. New equity comes last due to a negative signal—

[51] *See infra* notes 123–137 and accompanying text.

[52] The court also can reduce the nominal figure to less than $1. *See* In re Columbia Pipeline Group, Inc. Merger Litigation, 299 A.3d 393, 498 (Del. Ch. 2023) (awarding $0.50 per share based on a review of the merger negotiation).

[53] We note that the analysis is the same whether the cause of action is direct or derivative.

the managers of the borrowing corporation may be selling more shares because they believe them to be overpriced on the stock market.[54] The preferences are not absolute and can change depending on the circumstances. For example, earnings may have to be paid out to maintain a dividend or an excess of debt can force a stock offering despite a hit to the stock price due to the negative signal.[55]

Our remedies pecking order also addresses the problem of selection from a menu of alternatives. But there are some important differences. It applies ex post rather than ex ante and, because it concerns the application of positive law rather than a matter of business judgment, it has a normative edge, requiring engagement with the remedial purposes and characteristics described in Part I. Our analysis there pointed to a bottom line—cost reduction is the dominant concern when remedial choices are made in this context.

We submit that the most relevant cost in this context is the cost of information, drawing on the logic and vocabulary of information economics. We view the set of available remedies as an endogenous menu of enforcement technologies. Each technology can be distinguished by the costly informational bandwidth required in applying it and by the social loss generated when the remedy is applied inaccurately. We have seen that both these distinguishing factors map to firm costs: directly, through insurance and indemnification arrangements, and indirectly, through

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[54] *See* Stewart C. Myers, *Capital Structure*, 15 J. ECON. PERSP. 81, 92–93 (2001) (describing a pecking order of corporate finance). *See also* WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 307–313 (10th ed. 2025).

[55] ID.

director and officer risk aversion.[56] Adjudicators accordingly should seek to minimize both. As with the economic analysis in Part I, deterrence and redress operate as secondary concerns.[57]

Solving the remedial problem as an information problem yields an ordinal selection rule: each remedy should be paired with the domain in which its signal-to-noise ratio is highest. The court proceeds lexicographically. It begins with the most coarse, least information-intensive, and least-cost test capable of sustaining a sanction that is both legally permissible and incentive compatible. The court advances to a more elaborate test only if the cheaper test fails to sustain an appropriate sanction. Skipping steps squanders verification resources without a commensurate

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[56] More rigorously, let a risk-averse director with Arrow–Pratt coefficient $r>0$ face a random personal sanction S_R induced by a judicially chosen remedy R. The sanction is net of any indemnification and insurance, so that the director bears a fraction $\theta \in [0,1]$). Write $\mu: = E[S_R]$ and $\sigma^2: = Var[S_R]$. Under the standard small-risk approximation, the director's certainty equivalent of compensation minus exposure is $CE_R \approx w - \theta \mu - (1/2) r \theta^2 \sigma^2$. It follows that for a fixed μ an increase in the variance of remedial exposure σ^2 reduces the certainty equivalent by $(1/2) r \theta^2 \Delta \sigma^2$. *See* John W. Pratt, *Risk Aversion in the Small and in the Large*, 32 ECONOMETRICA 122, 123–28 (1964) (developing the Arrow–Pratt measure and the small-risk risk-premium approximation).

Let us now complicate the picture by adding noisy adjudicative results. There is a false-positive probability α_R and a false-negative probability β_R, along with measurement error in damages. As a result, the sanction becomes less tightly correlated with true misconduct. Holding expected sanctioning constant by adjusting award levels, additional error induces a mean-preserving spread of S_R, i.e., higher σ^2, which a risk-averse director prices as a risk premium $\rho_R \approx (1/2) r \theta^2 \sigma^2$. The firm ultimately must compensate the manager for this premium, either directly in cash compensation, satisfying the participation constraint $w \geq w_0 + \rho_R$, or indirectly via insurance premiums and indemnity payments that the firm funds. On agency costs ultimately borne by the firm, *see* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *cf.* Tom Baker & Sean J. Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers' Liability Insurance Marke*t, 74 U. CHI. L. REV. 487 (2007).

The same mechanism also generates incentive distortions moral hazard in project choice. Suppose the director chooses between projects H and L, where the net present values are $V_H > V_L$, but with different exposure distributions $(\mu(H), \sigma(H)^2)$ and $(\mu(L), \sigma(L)^2)$. The director's private objective embeds the risk premium, so H is privately optimal only if $V_H - \theta \mu(H) - (1/2) r \theta^2 \sigma(H)^2 \geq V_L - \theta \mu(L) - (1/2) r \theta^2 \sigma(L)^2$.

Greater judicial error–i.e., a higher difference $\sigma(H)^2 - \sigma(L)^2$–can flip this inequality, leading a risk-averse board to select the lower-variance project L even though it yields a lower firm value, $V_L < V_H$. This distortion is an agency cost borne by the firm's shareholders. Heterogeneity in directors' risk aversion further yields adverse selection: as σ^2 rises, the risk premium required by more risk-averse candidates, who often are more cautious or have higher reputations, will increase, shrinking the set of candidates for whom the participation constraint binds at any given wage. It follows that the firm must either raise compensation, step up its provision of indemnification and insurance, or accept a lower average director type.

Because these costs are functions of σ^2, remedial design should be disciplined like any other corporate expenditure: subject to reliably neutralizing the harm, select the remedial instrument that, given the costs of information acquisition, minimizes the variance of judicially imposed exposure, thereby reducing the risk premia and selection distortions that the firm must finance. For support we cite the general result that accuracy has independent social value in adjudication and that legal commands should trade off ex ante promulgation costs against ex post information-gathering costs, considerations that map onto the variance of sanctions faced by risk-averse agents. *Cf.* Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (formalizing the welfare value of accuracy net of administrative costs); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (comparing information acquisition burdens under rules and standards).

[57] *See supra* text accompanying notes 33–39.

reduction in expected error because the extra precision is redundant relative to the sanction actually required.

Injunctive and specific relief dominate when the state space collapses to a binary boundary condition. The restitutionary remedy of profit disgorgement is first best when unilateral rent extraction is observable but the full counterfactual surplus is not. Valuation-based damages are admissible solely in residual states. When the effects of a violation cannot feasibly be priced, the courts award nominal damages.

The enforcement pecking order doubles as a screening device—plaintiffs with solid cases will gravitate to higher ranked remedies. Assume that plaintiffs' incentives are undistorted[58] and that each step's evidentiary burden is common knowledge. Plaintiffs armed with bright-line proof will rationally move for an injunction, knowing that the court will have little difficulty granting the request. Those who can document only the fiduciary's private benefit, but not the firm's full counterfactual surplus will gravitate toward disgorgement. Litigants lacking either must shoulder the expense and variability of a valuation battle, which is an unattractive, costly bet unless they believe the upside is substantial. This self-selection mechanism disciplines the fiduciary's behavior ex ante. If she anticipates that cheap evidence of a binary violation will trigger swift, low-cost injunctive relief, she invests just enough in procedural hygiene to avoid such interference. In effect, the clearest violations face undiluted sanctions.[59]

The pecking order framework adapts to local institutional capacity. In a legal environment with limited discovery and generalist judges, bottom step fact-finding will be noisy and very expensive. It follows that the accuracy premium that could justify valuation-based awards will rarely materialize and that most disputes should terminate at disgorgement or result in nominal damages. By contrast, specialist commercial courts more skilled at sifting evidence face lower incremental error when they undertake valuation and can therefore afford to resort to it occasionally. What never changes is the ordering principle itself: one escalates informational demands only when the cheaper test plainly fails. The hierarchy thus functions as an institution-agnostic revelation mechanism, aligning deterrence and redress with adjudicative competence and ensuring that the legal system purchases only the quantum of information worth its price.[60]

Summing up, the pecking order is designed to proffer the least costly enforcement technology. At each step in the order—injunction and rescission at the top, then disgorgement of profits, and finally value-dependent damages—the framing of the remedy demands a successively richer description of the underlying breach and therefore extracts a higher "informational rent" in the form of judicial time, expert evidence, and risk of error. We descend the pecking order, step by step, in the remainder of this Part.

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[58] We will relax this assumption in Part IV, exploring distortions stemming from a plaintiff's lawyer's interest in maximizing its fee.

[59] This mirrors the "no distortion at the top" property of second-best screening models, under which the highest (clearest) types receive undistorted treatment. *See* Michael Mussa & Sherwin Rosen, *Monopoly and Product Quality*, 18 J. ECON. THEORY 301, 314 (1978); David P. Baron & Roger B. Myerson, *Regulating a Monopolist with Unknown Costs*, 50 ECONOMETRICA 911, 919–920 (1982); JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 279 (1993).

[60] *Cf.* Louis Kaplow, *Private versus Social Costs in Bringing S*uit, 15 J. LEGAL STUD. 371 (1986); Steven Shavell, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

B. *Injunctions and Other Specific Relief*

We begin at the top of the pecking order with injunctions and other forms of specific relief.[61]

1. Injunctions

In corporate disputes, an injunction can take various forms: a court may enjoin a shareholder vote on a merger, prohibit a board of directors facing a control challenge from enforcing deal protection devices, or compel directors soliciting proxies to make corrective disclosures. The interventions directly address an unfolding situation, preserving the status quo ante long enough to let internal governance processes work properly.

Why place injunctions at the apex of our pecking order for corporate remedies? First, this is the enforcement mode that extracts the lowest informational rent in the form of judicial time, expert evidence, and risk of error. The judge faces issues that admit crisp, verifiable evidence—binary questions which can be answered with a relatively low expected error: Were material facts withheld? Was a conflict unmitigated? Is a shareholder vote imminent?[62] Second, an injunction prevents harm before it happens or before it becomes irreparable. Consider a case involving a violation of the *Revlon*[63] duty to get the best price in a sell-side merger. Once the merger-in-process closes there is no route back to the status quo:[64] the target entity ceases to exist, funds and properties change hands, and third-party rights, like those of the target's creditors or employees or the acquirer's new shareholders, may intervene. An ex post unwind, whether actual or constructive, is exponentially more difficult, both legally and practically, than a temporary block that corrects an ongoing process.

Now let us compare a preliminary injunction to ex post compensation in this *Revlon* context. A mandated pause in the transaction process attacks the problem with surgical precision,[65] correcting the errant merger process. Once the order is in place, the court exits the pricing arena. The burden shifts to the parties to maximize for themselves through bargaining[66] based on an

[61] For an example of specific relief, *see* Tornetta v. Musk, 310 A.3d 430, 544–47 (Del. Ch. 2024), rev'd sub nom In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 (Del.) (ordering rescission of a stock option grant).

[62] If the issue does not admit of crisp verifiable evidence and material facts are disputed by the parties, preliminary relief is likely to be inappropriate and an ex post trial on the merits will required. *See* C & J Energy Services, Inc. v. City of Miami Gen'l Employees', 107 A.3d 1049, 1071-1072 (Del. 2014).

[63] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[64] For an example, *see* Strassburger v. Early, 752 A.2d 557, 570–580 (Del. Ch. 2000) (ruling that actual recission was not feasible two years after a stock repurchase conducted for the benefit of a controlling shareholder).

[65] Delaware courts emphasize the availability of pre-closing equitable remedies as a justification for their stringent posture respecting the board's conduct in the lead-up to the transaction. *See* Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 312 (2015) ("*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind….").

[66] *See* Calabresi & Melamed, *supra* note 18, at 1092–94 (defining injunctions as the paradigmatic form of property-rule protection because the entitlement can be surrendered only for a privately negotiated price); Ronald H.

enriched information set.[67] The acquirer may raise the bid, the target may cleanse the process by making supplemental disclosures[68] or by re-shopping the company,[69] or the two parties may abandon the deal altogether. Throughout, the court merely enforces procedural integrity and leaves substantive valuation to decentralized negotiation under conditions of clarified rights, thereby minimizing adjudicative error while harnessing private information to reallocate the transactional surplus.

From a deterrence perspective, the possibility of an injunction motivates both directors and shareholders in salutary ways, reinforcing the internalization of fiduciary norms before a breach occurs. Sell-side directors, knowing that a court might halt a deal that is tainted by conflicts or informational gaps, have a strong incentive to attend to process from the outset. They will, ideally, structure negotiations to be above-board, ensure transparency, and obtain any required approvals in proper form to avoid judicial interference.

Injunctions and other forms of specific relief also are uniquely suited to policing the meta-rules that underwrite the day-to-day corporate governance game. When directors obstruct the operation of the governance system,[70] whether by stonewalling a vote, weaponizing a poison pill without proportional justification, or otherwise entrenching themselves, the injury is constitutional rather than pecuniary.[71] Only a decree that compels the election or removes the pill can restore the collective decision-making channel; no quantum of after-the-fact cash can resurrect a vote that never occurred. The same logic governs statutory entitlements such as inspection rights.[72] The legal good at stake is informed participation rather than a wealth transfer. Courts therefore deploy mandatory injunctions to open the books, ensuring that the governance structure continues to function in real time.[73]

Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1, 15–19 (1960) (showing that when transaction costs are low, such an initial allocation induces bargaining toward an efficient outcome).

[67] For an example, *see* In re Topps Co. Shareholders. Litigation, 926 A.2d 58, 91–93 (Del. Ch. 2007) (describing the negotiations possible in the wake of a tailored injunction).

[68] This is the modal outcome in Delaware merger litigation, so much so that the courts have developed a doctrine that applies strict scrutiny to settlements including supplemental disclosures. *See* In re Trulia, Inc. Stockholder Litigation, 129 A.3d 884 (Del. Ch. 2016); Anderson v. Magellan Health, Inc., 298 A.3d 734 (Del. Ch. 2023).

[69] *Cf.* In re Del Monte Foods Co. Shareholders Litigation, 25 A.3d 813, 843–845 (Del. Ch. 2011) (including a bar on application of a termination fee in a twenty-day injunction for the purpose of facilitating a topping bid).

[70] The classic case is Schnell v. Cris-Craft Industries, Inc. 285 A.2d 437, 439–440 (Del. 1971) (granting injunction against advancement of date of shareholders meeting by entrenching board).

[71] Injunctions are the lead tool in cases involving tender offer defenses. *See, e.g.*, Paramount Communications Inc. v. QVC Network Inc., 637 A.2d 34 (Del. 1994) (affirming grant of injunction against defensive measures); City Capital Associates Ltd. Partnership v. Interco Inc., 551 A.2d 787, 797–804 (Del. Ch. 1988) (granting injunction where defending management invoked poison pill against noncoercive tender offer).

[72] DEL. CODE ANN., tit. 8, § 220(b).

[73] ID., tit. 8, § 220(c) ("The Court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, an existing list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court deems appropriate.").

We turn now to the countervailing costs. Injunctions can have perverse effects. A pre-closing order can disrupt a transaction that a super-majority of shareholders prefer,[74] create tactical leverage for holding out by blockholders or managers, or even destroy a positive net present value opportunity by causing an acquirer to pull its bid off the table.[75] These hazards counsel restraint and stringent gating conditions. Delaware mitigates the risk set through the tripartite preliminary injunction test: plaintiffs must demonstrate (i) a reasonable probability of success on the merits,[76] (ii) irreparable harm absent intervention[77] and (iii) a balance of equities that tilts toward preserving the entitlement's preservation rather than immediate consummation of the transaction.[78] The test's third prong operationalizes a comparative-statics inquiry. Courts ask whether blocking the transaction imposes a larger welfare loss than allowing a procedurally tainted but otherwise value-adding merger to proceed subject to a later action for damages.[79] Where the target has no alternative bidders and faces secular decline, the equity calculus could favor damages over a halt, effectively relegating the dispute to a lower remedial tier.[80] Conversely, where conflict distortion plausibly masks superior bids or where process defects undercut informed shareholder consent, the directive intervention dominates because it suspends the deal and invites renegotiation under clarified rules.[81] Thus, the design logic is not that injunctions are ubiquitous, but that their credible availability disciplines fiduciaries ex ante and supplies the system's most precise corrective in the event of misallocation of decisional authority.

2. Other Specific Relief

Corporate remedies should privilege allocative efficiency. Here, at the pecking order's top rung, the objective is to eliminate a value-decreasing transaction at low information cost and low

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[74] *See, e.g.*, Kohler v. NetSpend Holdings, Inc., 2013 WL 2181518, at *22–*23 (Del. Ch.) (finding a Revlon violation but not granting an injunction on the ground that a risk of a loss of premium to the shareholders could result). *Cf.* In re Netsmart Technologies, Inc. Shareholders Litigation, 924 A.2d. 171, 207–209 (Del. Ch. 2007) (narrowly tailoring the terms of an injunction); In re Cysive Inc. Shareholders Litigation, 836 A.2d 531, 557 (Del. Ch. 2003) (suggesting that an injunction should not issue in the absence of a higher bid and in light of the company's cash burn rate).

[75] *Cf.* Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786 (Del. Ch. 2007) (describing a board of directors which delayed a shareholder vote because it feared that a negative vote would result in the revocation of the bid).

[76] *See, e.g.*, In re Lear Corp. Shareholder Litigation, 926 A.2d 94, 110 (Del. 2007).

[77] *See, e.g.*, E.I. du Pont de Nemours and Co. v. Bayer CropScience L.P., 958 A.2d 245, 258 (Del. Ch. 2008).

[78] *See, e.g.,* E.I. du Pont de Nemours and Co. v. Bayer CropScience L.P., 958 A.2d 245, 258 (Del. Ch. 2008).

[79] *See* In re Netsmart Technologies, Inc. Shareholders Litigation, 924 A.2d 171, 207–210 (Del. Ch. 2007) (discussing prevailing considerations respecting decisions regarding injunctions in merger cases).

[80] *See, e.g.,* In re Toys "R" Us, Inc. Shareholder Litigation, 877 A.2d 975, 1023 (Del. Ch. 2005) ("[T]he bottom line is that the public shareholders will have an opportunity [...] to reject the merger if they do not think the price is high enough in light of the Company's stand-alone value and other options.").

[81] *See, e.g.*, QVC Network, Inc. v. Paramount Communications, Inc., 635 A.2d 1246, 1273 n. 50 (Del Ch. 1993) ("Since the opportunity for shareholders to receive a superior control premium would be irrevocably lost if injunctive relief were not granted, that alone would be sufficient to constitute irreparable harm."), *aff'd,* 637 A.2d 34 (Del. 1994).

variance. An injunction operates ex ante and prevents the transaction's consummation. An order of rescission unwinds the transaction ex post.[82]

As with injunctions, collateral damage is a concern.[83] Delaware's equitable rescission standard reflects this when it requires that all parties be restored to the position they occupied before the challenged transaction.[84] This limits the remedy's zone of application, for complicated transactions like mergers cannot be neatly unwound.[85] Even a simple transaction like a stock repurchase will not be rescindable if the selling shareholder already has passed the cash consideration to its shareholders as a dividend.[86]

When is the *status quo ante* recoverable and when can the clock not be turned back? This became the crucial question in the Elon Musk case, *Tornetta v. Musk*.[87] The Chancery Court reasoned that the offending stock options could be erased from the board with minimal disruption. Said the Court, "no third-party interests are implicated, the entire Grant sits unexercised and undisturbed, and exercised shares would be subject to the Five-Year Hold Period."[88] From a systemic point of view, this was a reasonable conclusion, for the unwinding of unexercised option would not jar the capital markets. There were even incidental benefits for the company—the dilution of earnings per share incidental to the option grant would be reversed and a $2.3 billion accounting charge would be restored.[89] The Supreme Court took a much stricter, more literal view about incidental disruption.[90] Although the options had not been exercised, several years' worth were vested and in-the-money. To wipe them out meant leaving Musk unpaid for the six years following the approval of the compensation scheme. The fact, stressed by the Chancery Court, that Musk had made billions on his stockholding during the same period was neither here nor there. The *status quo ante* simply could not be retrieved.[91]

3. Summary

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[82] *See, e.g.,* Firefighters' Pension Sys. of Kans. City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 251 (Del. Ch. 2021) ("A finding that a transaction is not entirely fair thus could lead to transaction-based relief, such as an injunction, rescission, or an equitable modification of the transaction's terms.").

[83] So is speculation. If the consideration potentially returnable through rescission may increase in value, a plaintiff might well wait and see before mounting a challenge. Such a delay could prompt the court to refuse the requested relief. *See* Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 177 (Del. 2002).

[84] *See, e.g.*, Strassburger v. Early, 752 A.2d 557, 578–79 (Del. Ch. 2000).

[85] *See, e.g.,* MacMillan v. Intercargo Corp., 768 A.2d 492, 500 (Del. Ch. 2000) (refusing post-closing rescission of cashout merger to plaintiff's who sought pre-closing injunction).

[86] *See* Strassburger v. Early, 752 A.2d 557, 578–79 (Del. Ch. 2000).

[87] Tornetta v. Musk, 310 A.3d 430, 546–48 (Del. Ch. 2024), *rev'd sub nom* In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 (Del.) *See supra* text accompanying notes 1–17.

[88] 310 A.3d at 547.

[89] *See* In re Tesla, Inc. Derivative Litigation, __ A.3d.__, 2025 WL 3689114, at *13 (Del.).

[90] *Id*. at *12 (Del.) ("Delaware courts have recognized impracticability of the remedy when a transaction's complexity makes it impracticable to unwind, or 'impossible to "unscramble the eggs."').

[91] *Id*. at *13–*16.

Ex ante prevention has definite advantages over ex post unwinding. Had a plaintiff gone to court to enjoin the shareholders' meeting ratifying Musk's compensation plan, the defective disclosures might have been corrected and the transaction appropriately cleansed. Early intervention translates substantive fiduciary duties into live constraints. It corrects breaches when they are still reversible, preserves the fluidity of bargaining, invites renegotiation under clarified constraints, and averts the valuation noise that accompanies ex post monetary reconstruction. Far from being an exotic remedy, the injunction amounts to an essential first rung on corporate law's remedial ladder.

The Delaware courts act in accordance with this prescription, albeit without joining us to make an affirmative statement of a *preference* for injunctive intervention. Significantly, we encountered no statement of *disfavor*. Delaware fiduciary law manifests none of the anti-interventionist hostility that one finds in contract law, which requires that an injunction be justified by an affirmative finding of the inadequacy of damages protection.[92] When the Delaware courts reject an application, there tend to be two reasons: Either the plaintiff has a weak case and so fails the likelihood of success requirement,[93] or the court finds that a decree cannot be framed so as to avoid collateral damage.[94] The courts do not require a showing of the inadequacy of damages as a component of irreparable harm—a breach of fiduciary duty by itself suffices.

C. Damages

If an injunction is not feasible or if a breach is only discovered or proven after the fact and unwinding is impracticable, courts must turn to damages, which occupy the pecking order's lower levels. Not all damages are created equal. Our pecking order is as follows: (1) profit disgorgement, (2) compensatory damages, and (3) rescissory damages. The plaintiff bears the burden of proving all three. If it fails to do so, there is a possible consolation prize in the form of nominal damages—a $1 per share award that memorializes the breach and funds an attorney's fee.

The primary organizing principle is cost, with deterrence and redress coming to bear as secondary concerns. More particularly, the court should seek to minimize the cost of marshalling the information needed to apply the remedy and the social loss incidental to the remedy's inaccurate application. It follows that courts should favor process-based calculations anchored

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[92] RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981). The factors considered in this determination are difficulty of proof, the availability of substitute performance, and the difficulty of collection. ID. § 360. Tort law does not replicate this contra presumption. *See* RESTATEMENT (SECOND) OF TORTS § 936 (1979).

No conflict between contract and fiduciary law should be inferred, The situations are different. Contract law favors transactional divorce, judging that parties should be cashed out of dysfunctional relationships rather than ordered to continue dealing with one another, possibly for long periods. Judicial intervention in corporate fiduciary contexts does tend to implicate this concern. In any event, the justificatory burden ramps up as the terms of the judicial decree become more aggressive. For example, if facts are disputed, a mandatory injunction cannot be imposed as preliminary relief; a trial on the merits is necessary. *See* C & J Energy Services, Inc. v. City of Miami Gen'l Employees', 107 A.3d 1049, 1071-1072 (Del. 2014).

[93] *See, e.g.*, Mercier v. Inter-Tel (Delaware), Inc., 929 A.2d 786 (Del.Ch. 2007); In re Family Dollar Stores, Inc. Stockholder Litigation, 2014 WL 7246436 (Del. Ch.) at *23; In re CheckFree Corp. Shareholders Litigation, 2007 WL 3262188 (Del. Ch.) at *4.

[94] *See, e.g.,* In re Dollar Thrifty Shareholder Litigation, 14 A.3d 573 (Del. Ch. 2010); In re Netsmart Technologies, Inc. Shareholders Litigation, 924 A.2d 171, 209–210 (Del. Ch. 2007).

in concrete, observable consequences of the breach instead of inherently speculative exercises in value reconstruction. Thus does the pecking order favor disgorgement, which is process-based, over compensatory and rescissory damages, which are value-dependent. Our description of the various damage calculations continues to reference Delaware law.

1. Disgorgement

We consider first *disgorgement*, a form of restitutionary relief.[95] When fiduciaries profit from their own misconduct, the law can require them to surrender the profit to the injured party, assuring that the miscreant does not emerge better off from the breach.[96] Because the amount corresponds to a recorded gain—often traceable in accounting or trading data—it can be verified forensically.[97] The information problem is inverted accordingly: rather than proving that the firm was underpaid, the plaintiff shows that the fiduciary was overpaid. The difference matters greatly in court. It is much easier to take the miscreant's financials and reconstruct the profit[98] than it is to reconstruct the "but for" market price of the entire firm. Disgorgement, in short, annihilates the expected payoff from disloyal behavior with minimal informational load. It accordingly is the preferred remedy whenever an injunction is unavailable and the private benefit is measurable.

The same logic applies to reimbursement of *out-of-pocket costs* or *other actual losses*.[99] These are identifiable expenses causally connected to the breach, for example, legal and banking fees wasted on a conflicted negotiation. They reference the plaintiff's injury rather than the defendant's gain and in that regard belong in the same category as compensatory damages. But,

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[95] Restitution conceivably could be the basis for an independent cause of action which the corporation sues not for breach of fiduciary duty but for restitution incident to a breach of fiduciary duty. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (2011). In such a case, the remedy would follow directly from then right, as in Calabresi and Melamed. We do not observe this mode of framing cases in Delaware fiduciary law, however. There restitution is a remedy for breach of fiduciary duty.

[96] There is no requirement of a showing of injury to the corporation. *See e.g*., Kahn v. Kohlberg Kravis Roberts & Co., 23 A.3d 831, 840 (Del. 2011).

[97] Thorpe v. CERBCO, Inc. 676 A.2d 436 (Del. 1996), provides a good example. The court there identified disloyal usurpation yet found no net diminution in corporate value. But it did require the breaching defendant to disgorge a fee pocketed in connection with the transaction in question. *Id*. at 445. The classic statement can be found in *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (1939) (" If an officer or director of a corporation, in violation of his duty as such, acquires gain or advantage for himself, the law charges the interest so acquired with a trust for the benefit of the corporation, at its election, while it denies to the betrayer all benefit and profit. The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation. Given the relation between the parties, a certain result follows; and a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty.")

[98] Or, in another case, prove a secret side payment, a discounted conversion price, or an undisclosed fee.

[99] We here use the terms in general use. In Delaware the term "out-of-pocket" loss is used in respect of compensatory damages. *See, e.g*., In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1, 42 (Del. Ch. 2014).

viewed empirically, they should be categorized with disgorgement, for they can be proven forensically by reference to the plaintiff's financial records.[100]

2. Compensatory Damages

Disgorgement occurs only when an identifiable financial benefit has been purloined. We now turn to value-dependent measures, first encountering *compensatory* calculations based on the court's projection of a better bargain.

Here the information problem is acute. The judge must conjure a counterfactual price environment, fixing on the price would have resulted had the fiduciary behaved impeccably in an arm's-length market.[101] *Revlon* litigation provides a good example.[102] Where plaintiffs allege that directors failed to secure the best available price in a sale process, the court calculates the difference between the consummated deal price and the higher figure that a properly conducted auction would supposedly have produced, thereby inserting judicial judgment into an imagined auction that never transpired. The calculation can be based on an independent valuation of the company,[103] or evidence of bids made during the merger process.[104] Alternatively, and more speculatively, the court can project the value of a topping bid that might have been made in the course of compliant sale process.[105] A closely conceptually related calculation is *quasi-appraisal*,[106] employed in cases where a controlling shareholder uses a merger to cash out the minority. The court determines the fair value of the shares as of the merger date and then orders the defendant to pay the difference between that judicially assessed value and the merger consideration, thereby requiring a full-scale valuation exercise akin to statutory appraisal,[107] an exercise that inevitably entails a choice among competing valuation models.

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[100] *See, e.g.*, Valeant Pharmaceuticals International v. Jerney, 2007 WL 2813789 at *15–*16 (Del. Ch.) (awarding in a case involving improper bonus payments made to directors, in addition to disgorgement of the bonus, the director's pro rata share of the fees and expenses of the special litigation committee that took over a derivative action on the corporation's behalf).

[101] ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (6th ed. 2016).

[102] A conflicted insider sale at a measurable premium is another common fact pattern. *See, e.g.*, Americas Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012), *aff'g* In re Southern Peru Copper Corp. Shareholder Derivative Litigation, 52 A.3d 761 (Del. Ch. 2011).

[103] *See* RBC Capital Markets LLC v. Jervis, 139 A.3d 816, 866–868 (Del. 2015) (affirming an award based on fair value of the shares using the same methodologies employed in an appraisal proceeding). There are also ground up valuations. *Rural/Metro* presents a good example, with the court. *See also* In re Rural/Metro Corp. Stockholders Litigation, 102 A.2d 205, 224–226 (Del. Ch. 2014) ("running the arithmetic" based on an exhaustive trial record).

[104] *See* In re Mindbody, Inc. Stockholder Litigation, 332 A.3d 349 (Del. 2024) (affirming an award of $1 based on acquirer employees' bets regarding the figure most likely to result within a range of $36.50 to $40).

[105] *See* In re Del Monte Foods Co. Shareholders Litigation, 2011 WL 2535256, at *14–*16 (June 27, 2011) (describing a strategy for calculating the value of the opportunity to procure a topping bid).

[106] For a description of the remedy, *see* In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1, 42-53 (Del. Ch. 2014).

[107] For an interesting example, *see* In re PLX Technology Inc., 2018 WL 5018535 (Del. Ch.), where the plaintiff asked for quasi appraisal in respect of a conflict-tainted merger. The Court found that the target was worth less than the merger price. Hence, no damages were awarded. *Id*. at *55–*56.

These "intrinsic value" exercises are notoriously error-prone and carry a risk of perverse effects. An inflated result overcompensates shareholders and effectively imposes a penalty on directors, acquirers, or insurers that exceeds the actual harm, chilling otherwise efficient transactions by injecting liability risk that rational entrepreneurs cannot price in advance. The award reverberates through capital markets as a cautionary tale against value-creating deals.

Despite these problems, Delaware views compensatory damages as a "normal" entitlement in the wake of fiduciary breach.[108] The claimant must still surmount a burden, demonstrating a clean causal link between the fiduciary violation and the price delta and then quantify that delta non-speculatively. Certainty is not required, however. One court, faced with a batch of pre-merger value projections showing ranges of possible outcomes, reconstructed a merger price by picking figures from within the ranges.[109] There is also some flexibility respecting the severity of the burden of proof: Fraud is likely to trigger lenience.[110] Even so, outsize damage awards are rare[111] and a finding under entire fairness review that the defendants failed to prove transactional fairness does not guarantee a compensatory windfall. Chancery Court opinions often conclude that a tainted process produced a fair price,[112] leaving the plaintiff shareholders without a demonstrable loss.

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[108] *See* Strassberger v. Early, 752 A.2d 557, 579 (Del Ch. 2000) ("The traditional measure of damages is that which is utilized in connection with an award of compensatory damages, whose purpose is to compensate a plaintiff for its proven, actual loss caused by the defendant's wrongful conduct. To achieve that purpose, compensatory damages are measured by the plaintiff's 'out-of-pocket' actual loss. Thus, where a merger is found to have been effected at an unfairly low price, the shareholders are normally entitled to out-of-pocket (i.e., compensatory) money damages equal to the 'fair' or 'intrinsic' value of their stock at the time of the merger, less the price per share that they actually received.")

[109] *See* In re Dole Food Co., Inc. Stockholder Litigation, 2015 WL 5052214, at *44–*46 (Del. Ch. August 27, 2015) (adding $2.74 to a merger price of $13.50 for a 16.9 percent price increase).

[110] Id. at *44 ("An award exceeding the fair value of the plaintiffs' shares may be appropriate 'particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.'")

[111] There is one famous large numbers case: Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1249–1252 (Del. 2012), *aff'g* In re Southern Peru Copper Corp. Shareholder Derivative Litigation, 52 A.3d 761 (Del. Ch. 2011) (awarding $1.347 billion in respect of the sale at an inflated price of a company by a controlling shareholder). The award was the result of a weighted average of three valuations: (1) a discounted cash flow valuation based on a modification of a valuation proffered by the plaintiff, (2) a counteroffer made by a special committee during the course of the flawed deal process, and (3) a comparable companies valuation using companies identified by the special committee's investment banker. 51 A.3d at 1249–1252. *Southern Peru* is an outlier, however. Compare a list of the eight largest judgments and settlements yielded in 2015: the range is $32.5 million to $275 million. *See* Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 624–25 (2017).

[112] *See, e.g.*, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1179–1180 (Del. 1995); Thorpe v. CERBCO, Inc. 676 A.2d 436 (Del. 1996); Weinberger v. UOP, Inc., 1985 WL 11546, at *10–*11 (Del. Ch); In re Trados Inc. Shareholder Litigation, 73 A.3 17, 78 (Del. Ch. 2013); In re Nine Systems Corporation Shareholders Litigation, 2014 WL 4383127, at *52 (Del. Ch. September 4, 2014), *aff'd* Fuchs v. Wren Holdings LLC, 129 A.3d 882 (Del. 2015); In re PLX Technology Inc., 2018 WL 5018535, at *55–*56 (Del. Ch.).

3. Rescissory Damages

At the lowest rung we encounter a second value-dependent measure—a *rescissory* calculation based on a hypothetical unwind of the challenged transaction.[113] Here the remedial aim is restitutionary, but not, as with disgorgement, based on historical results.

The exercise is subjunctive. The court seeks to restore the plaintiff to the position she would occupy today had a tainted transaction never occurred rather than to compensate by reference to where the plaintiff would have been with a fair transaction as of the date of the closing. The measure seeks to monetize rescission's "restore-the-world" intuition when an actual transactional unwinding is infeasible, attempting to claw back every dime of appreciation that might have found its way into the plaintiff's pocket had the transaction never occurred. The court must hypothesize an alternative scenario as of the time of the closing and then project the business forward to establish the hypothetical scenario's present-day value. There is a lot of estimating to be done. Assume that we are constructively unwinding a merger that occurred three years ago. The judge must estimate how the unmerged firm would have been managed for three years, taking into account external factors such as interest rates, industry cycles, and technological changes which would have influenced the counterfactual management choices. Having done that, the court considers how the markets would have valued the business scenario thus posited. All of these projections having been made, the court must compress its complex, path-dependent narrative into a single number. Much of the narrative being unverifiable, the resulting award will reflect the chosen valuation model or the court's assumptions more than any demonstrable loss.[114] There is an even greater risk of overcompensation than with compensatory damages: Rescissory counterfactuals are prone to capture post-closing appreciation attributable to market forces rather than fiduciary misconduct, inviting awards that dwarf the loss at the time of breach and, in effect, force the wrongdoer to disgorge gains earned simply by holding the asset over time.

An inflated award becomes a windfall and discourages value-adding transactions. And the risk of upside error is high. The history of the remedy in the Delaware courts is instructive: It has gone from favored status to disuse across the decades. In 1981, the Delaware Supreme Court, reflecting a normative impulse to erase all illicit rent, asserted that rescission is the "preferable remedy."[115] The Court withdrew the preference quickly enough, disavowing it when remanding *Weinberger v. UOP, Inc.* in 1983.[116] The remand proved instructive. The Chancery Court, called upon to impose rescissory damages by the plaintiffs, balked due to evidentiary difficulties.[117] It instead conducted a quasi-appraisal looking to award the difference between the merger price and the pre-closing value of the company. But the plaintiffs failed to prove value above the merger price. In the end the Chancellor awarded nominal damages of $1 per share.[118]

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[113] For a description and history of the remedy, *see* In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1, 38–42 (Del. Ch. 2014).

[114] *Cf.* Bratton & Sepe, *supra* note 21, at 114–18.

[115] Lynch v. Vickers Energy Corporation, 429 A.2d 497, 501 (Del. 1981)

[116] Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

[117] Weinberger v. UOP, Inc., 1985 WL 11541, at *3 (Del. Ch.).

[118] *Id.* at *9–*10 (referencing the opinion of a defendant's expert that he would have opined at the time of the merger that paid $21 that the company was worth $20-$22).

The courts thereafter erected conceptual barriers in the way of rescissory recoveries. They are tied to culpable breaches and so are per se unavailable in duty of care cases.[119] There is also a notable tendency to cut off access where the plaintiff has delayed bringing a lawsuit until well after a closing, the implication being that the delaying plaintiff is looking to cherry-pick cases where the post-closing enterprise has been particularly successful.[120] Any remaining "preference" for rescissory damages is limited to extreme cases "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved."[121]

Indeed, we have encountered no reported cases that feature actual judicial rescissory calculations.[122] While the Delaware courts acknowledge the theoretical availability of rescissory damages, their actual existence appears to lie in the opaque world of settlement practice. This presumably is because the plaintiff bears the burden to demonstrate a surgically documented causal chain that ties breach to post-closing accretion and to persuade the court that no narrower remedy can suffice.

In sum, rescissory awards have been effectively end-loaded as a quasi-punitive last resort, so high is the bar confronting plaintiffs seeking to meet the burden to prove them. In Delaware law, as in our pecking order, they take last place.

4. Nominal Damages

What happens when a plaintiff's lawyer brings a post-closing class action and establishes a breach of fiduciary duty but fails to sustain the burden to prove a case for damages, whether restitutionary, compensatory, or rescissory? Or, coming at the matter from another angle, how is this lawyer going to get paid?

An outright award of attorney's fees, chargeable to the defendant, is possible. Delaware courts, exercising their equitable powers, often suspend the American Rule and require breaching fiduciaries to bear the plaintiff's litigation costs. Such an order both reimburses enforcement effort and imposes a financial sanction without inviting speculative valuation. But, unless a damages judgment has generated a pot of cash to fund the award, the lawyer will need to show bad faith,

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[119] *See* Cinerama, Inc. v. Technicolor, Inc., 663 A.2 1134 (Del. Ch. 1994), *aff'd,* 663 A.2d 1156 (Del. 1995).

[120] *See* Strassberger v. Early, 752 A.2d 557 (Del. Ch. 2000); Gaffin v. Teledyne, Inc., 1990 WL 195914, at *17 (Del. Ch. Dec. 4, 1990), *aff'd in part,* 611 A.2d 467 (Del. 1992).

[121] *See* Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099, 1104 (Del. 1995).

[122] Neither of the two most prominent cases discussing rescissory recoveries, In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1(Del. Ch. 2014) and Strassburger v. Early, 752 A.2d 557 (Del. Ch. 2000), actually includes a damages calculation.

fraud, or other unjustified conduct on the defendant's part.[123] Restating, cash on the table facilitates the fee awards needed to sustain fiduciary enforcement by representative plaintiffs.

It does not follow, however, that a plaintiff's lawyer who has established a breach of duty but has failed to prove restitutionary, compensatory, or rescissory damages walks home unpaid absent a showing of bad faith. The Delaware courts hold a consolation prize in reserve for these cases: *nominal damages* of a symbolic $1 per share.[124]

One dollar is next to nothing, of course. But $1 times 10,000,000 or 100,000,000 shares is a significant sum,[125] a sum more than sufficient to fund a generous attorney's fee. Multiplication by the number of shares is not automatic, however. A "rational basis" must be shown,[126] and there are rare cases where no "basis" is established and the plaintiff gets the $1 peppercorn instead of a recovery pool.[127]

Either way, a nominal award entails no transactional valuation and accordingly joins profit disgorgement in our category of process-based remedies. Since it is by definition fixed, it is very cheaply ascertained. There is only one possible calculative question, which goes to the possibility of a higher or lower multiplier: Instead of $1 per share, the court could award $0.50 per share,[128] $2 per share,[129] or $3 per share.[130] The courts make this selection with a view to the relative magnitude of the resulting cash pool. They aim for two percent to four percent of the company's equity market capitalization[131]—not a bite out of the corporate *corpus*, perhaps, but certainly a sting thereon.

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[123] Delaware courts follow the American Rule under which parties fund their own expenses, but consider fee shifting where "(1) the presence of a 'common fund created for the benefit of others;' (2) where the judge concludes a litigant brought a case in bad faith or through his bad faith conduct increased the litigation's cost; and (3) cases in which, although a defendant did not misuse the 'litigation process in any way, ... the action giving rise to the suit involved bad faith, fraud, "conduct that was totally unjustified, or the like" and attorney's fees are considered an appropriate part of damages.' More generally, a Vice Chancellor may award fees in the limited 'circumstances of an individual case [that] mandate that the court, in its discretion, assess counsel fees 'where equity requires.'" Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Est. Fund, 68 A3d. 665, 687 (Del. 2013). Bylaws shifting fees to plaintiffs, approved by the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014), are now prohibited by statute. See DEL. CODE ANN., tit.8, §§ 102(b)(6), 109(b).

[124] *See, e.g.,* Smith v. SPNV Holdings, Inc., 1990 WL 84218 at *17 (Del. Ch. June 19, 1990) (awarding $3 per share due to tie to value of undisclosed information); Gaffin v. Teledyne, Inc., 611 A.2d 467, 475–476 (Del. 1992) (affirming an award of $1 per share in respect of a disclosure violation).

[125] *See* In re Columbia Pipeline Group, Inc. Merger Litigation, 299 A.3d 393, 495 (Del. Ch. 2023) ("From a defendant's standpoint, the award is not nominal.").

[126] *See* Oliver v. Boston University, 2006 WL 1064169 at *34–*35 (Del. Ch.).

[127] The Delaware Supreme Court's award in its reversal of the case about Elon Musk's stock options is the outstanding example. *See* In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 at *17 (Del.).

[128] The court also can reduce the nominal figure to less than $1. *See* In re Columbia Pipeline Group, Inc. Merger Litigation, 299 A.3d 393, 498 (Del. Ch. 2023) (awarding $0.50 per share based on a review of the merger negotiation).

[129] *See* Smith v. Shell Petroleum, Inc., 1990 WL 186446, at *5 (Del. Ch. Nov. 26, 1990).

[130] The courts test the gross payment against the equity market capitalization of the company. *See* In re Columbia Pipeline Group, Inc. Merger Litigation, 299 A.3d 393, 495-497 (Del. Ch. 2023) (discussing precedent and reporting a percentage range from 1.96 percent to 4.7 percent).

[131] We infer the two-to-four rule from the extended discussion in *Columbia Pipeline*, *id.*

Nominal awards show up most often in suits involving disclosure failures or other process flaws.[132] In the core case, a proxy statement issued in connection with a shareholder vote on a merger contains a material misstatement. The misstatement undeniably causes economic harm to the shareholders, but, because there is no plausible way to measure the quantum of injury, there is no way the plaintiff can sustain the burden of proof to establish a specific dollar damages figure. A $1 per share award facilitates formal recognition of the infliction of economic harm despite the failure of proof, filling in the void that results in a case of *injuria sine damno*.[133]

Recall that the policy framework derived in Part I privileges cost minimization over deterrence and redress subject to a *caveat* respecting enforcement incentives. Nominal damages neatly fit the framework. First, they sustain enforcement incentives by funding the fee petitions of plaintiffs successful at the liability phase of the case.[134] Second, they are generated cheaply and without risk of error, there being neither a valuation nor other calculation required. Third, the financial sting associated with the loss of two to four percent of shareholders' equity imports cognizable deterrence against all but the most judgment-proof actors.[135] Fourth, the coupling of a money judgment with the antecedent finding of a breach of duty magnifies the litigation's negative reputational implications for the members of the defending board. Fifth, the payment of a damage claim negatively impacts the company's profile with insurers, increasing the direct costs of operation. The possibility of such a judgment operates as a shadow cost that needs to be internalized ex ante by a board deciding whether cutting procedural corners is cost effective.[136]

All of this leads to one final and extremely important question: If nominal damages are so cheap and precise, why not make them the preferred mode of damage calculation and put them at the top of the damages phase of the pecking order? We do something close to the opposite, putting them at the bottom and off to one side, there to be held in reserve for a case where the damages plaintiff fails to make an affirmative case for a more generous award. Let us accordingly run the counterfactual and hypothesize a pecking order with nominal damages in first place. The result is stark: Nominal damages become the *exclusive* measure of damage on a de facto basis. Since there is next to nothing to calculate, the judge can always come up with a number. Only in a case where the defendant sustains the burden to show that the corporation is *un*damaged by the breach would

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[132] *See, e.g.*, Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135, 142 (Del. 1997) ("where directors have breached their disclosure duties in a corporate transaction that has in turn caused impairment to the economic or voting rights of stockholders, there must at least be an award of nominal damages"); Gaffin v. Teledyne, Inc., 611 A.2d 467, 475–476 (Del. 1992) (affirming an award of $1 per share in respect of a disclosure violation).

[133] It does not follow, however, that nominal damages are universally available in the wake of a breach. For example, if a breach occurs in respect of a merger engineered by a controlling shareholder but the evidence shows that the target was worth less than the merger price, then there is no damage, period. *See* In re PLX Technology Inc., 2018 WL 5018535, at *55–*56 (Del. Ch.) (finding a fiduciary breach occurred where the target was worth less than the merger price and awarding no damages); In re Nine Systems Corporation Shareholders Litigation, 2014 WL 4383127, at *52 (Del. Ch. September 4, 2014) (ruling zero return in a case where plaintiff attempted to make a case for compensatory damages but failed to so because the court finds that the transaction in question was fairly priced).

[134] Delaware applies a benefit rule in awarding attorney's fees to a representative plaintiff's lawyer. There is a range of possible calculations of the benefit. *See* In re Dell Technologies Inc. Class V Stockholders Litigation, 300 A.3d 679, 692–726 (Del. Ch. 2023).

[135] Lewis A. Kornhauser, *The Incentives of Lawyers in Litigation*, 63 N.Y.U. L. REV. 950 (1989).

[136] *See* Janet C. Alexander, *Do the Merits Matter? A Study of Settlement in Securities Class Actions*, 43 STAN. L. REV. 497 (1991).

such an award be inappropriate.[137] There accordingly never would be a reason to go down the pecking order to consider a more complex, expensive, and risky mode of compensation. Certainty would be enhanced and costs would be reduced even as enforcement incentives would be preserved.

It is a surprisingly strong case. But, unfortunately, the attractions dissipate upon reflection. As a practical matter, we would emerge with a remedial menu featuring only two items—injunctions and nominal damages. Imagine such a menu in operation. It would not take long before a CEO manipulating a sale process for personal gain would be seen walking away with unjust gains well in excess of the nominal amount. Nor would it take very long to see a counterparty walk off with a windfall from a very one-sided bargain. The inevitable result would be expansion of the menu to include disgorgement of profits, consequential damages, and rescissory damages.

A more sensible ordering of the four damages alternatives accordingly extends to the plaintiff the opportunity to access the three big-ticket measures while simultaneously imposing a barrier in the form of an exacting burden of proof. Only when a plaintiff cannot meet the burden to prove any one of the three (or makes no attempt to do so) does the court make a nominal award. This ordering synchronizes perfectly with our policy framework, which subordinates deterrence and redress to cost in relative salience in the context of separated ownership and control without eliminating them from view. The concern with cost and error leads us to rank disgorgement above consequential damages and consequential damages above rescissory damages. Concern with deterrence and redress leads us to refrain from eliminating their availability by placing nominal damages first in the ranking. Placed off to the side in the fallback position, they both assure robust enforcement incentives (the plaintiff's lawyer who manages to establish liability always gets paid) and support the maintenance of an exacting burden of proof as the court moves down the pecking order (if the plaintiff's lawyer who establishes liability gets paid in any event, then there is no reason to relax strict verification standards attending disgorgement, consequential damages, and rescissory damages).

D. Interface with Delaware Law

Delaware fiduciary law does not offer much in the way of formal instructions respecting the choice among the various remedial alternatives. As we have seen, it delegates a power to fashion "appropriate" relief to the Chancery Court and then leaves matters over for case-by-case determination.[138] Even so, a pattern can be detected. The courts, through many litigated disputes, have fashioned what amounts to an informal epistemic algorithm governing when to proceed in

[137] Nominal damages are universally and automatically available in the wake of a breach. For example, if a breach occurs in respect of a merger engineered by a controlling shareholder but the evidence shows that the target was worth *less* than the merger price, then there is no damage, period. *See* In re PLX Technology Inc., 2018 WL 5018535, at *55–*56 (Del. Ch.) (finding a fiduciary breach occurred where the target was worth less than the merger price and awarding no damages); In re Nine Systems Corporation Shareholders Litigation, 2014 WL 4383127, at *52 (Del. Ch. September 4, 2014) (ruling zero return in a case where plaintiff attempted to make a case for compensatory damages but failed to so because the court finds that the transaction in question was fairly priced).

[138] *See* Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983), quoted in the text accompanying note 49 *supra*.

policing mode and rely on directive control and when to order that money change hands and in what amount. The operative principle is moderation.

We see nominal judgments where breach is clear but loss is indeterminate, compensatory awards where a clean value reference exists, and a rare resort to rescissory measures. No damages pecking order is enunciated, but we see nothing inconsistent with our pecking order approach. The pattern reflects an appreciation of process-based calculation and a commitment to match the remedy to what courts can verify. The resulting equilibrium deters opportunism without converting the courtroom into a roulette wheel of conjectural valuations, preserving both the credibility of fiduciary law and the informational integrity of the adjudicative process. It should not be written off as the "slack" response of a management-favorable jurisdiction. Far from giving fiduciaries a free pass, the scheme confirms that liability can stand independent of speculative valuation, thereby safeguarding procedural integrity without luring courts into reconstructing economic universes they are not equipped to model. It is a system of norm enforcement constrained by proof.

The roots of this system of enforcement management can be found in the courts' finely calibrated allocation of evidentiary burdens. The plaintiff first must meet the burden to trigger entire fairness review. Then the burden shifts to the defendant to prove substantive and procedural fairness.[139] The shift ameliorates the outsider plaintiff's asymmetric information disadvantage. But the facilitation stops once breach is confirmed and the question goes to the remedy. The

[139] The scheme is described as follows in In re Orchard Enterprises, Inc. Stockholder Litigation, 88 A.3d 1, 24 (Del. Ch. 2014) (citations omitted):

> When a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion." . . . "[T]he defendants bear the burden of proving that the transaction with the controlling stockholder was entirely fair to the minority stockholders." . . . The defendants may seek to lower the standard of review from entire fairness by showing that the controller did not stand on both sides of the transaction. One means of accomplishing this is by using procedural devices such as (i) the creation of a sufficiently authorized board committee composed of independent and disinterested directors or (ii) the conditioning of the transaction on the affirmative vote of a majority of the shares owned by stockholders who are not affiliated with the controller.
>
> If a controller agrees up front, before any negotiations begin, that the controller will not proceed with the proposed transaction without both (i) the affirmative recommendation of a sufficiently authorized board committee composed of independent and disinterested directors and (ii) the affirmative vote of a majority of the shares owned by stockholders who are not affiliated with the controller, then the controller has sufficiently disabled itself such that it no longer stands on both sides of the transaction, thereby making the business judgment rule the operative standard of review. . . . If a controller agrees to use only one of the protections, or does not agree to both protections up front, then the most that the controller can achieve is a shift in the burden of proof such that the plaintiff challenging the transaction must prove unfairness.

evidentiary initiative reverts to the plaintiff, who must quantify loss with non-speculative precision.[140]

The sequence operates as a risk management tool. By placing the fairness burden on conflicted fiduciaries, Delaware facilitates policing by easing the path to liability. By placing the onus on plaintiffs to quantify loss, Delaware limits large payouts to cases where measurable harm can be demonstrated. The combination encourages early concessions and narrow settlements, thereby lowering the probability of variance heavy judgments.

Attorney's-fees jurisprudence also follows this pattern of calibrated enforcement. As we have seen, under the corporate-benefit doctrine plaintiffs who secure no monetary relief, nominal monetary relief, or procedural reforms may recover fees from the defendant or the corporation.[141] By decoupling lawyer compensation from shareholder payout, Delaware encourages meritorious suits even where damages are unavailable, without skewing incentives toward speculative jackpot hunting. Even when the shareholders pocket only a symbolic dollar, the enforcing lawyer obtains market-based compensation. The structure's overarching commitment lies more with protecting process integrity than with facilitating wealth redistribution.

Delaware's moderation also becomes apparent when we compare injunctive and specific relief to monetary relief. Here the timing is critical. Before a subject transaction closes, injunctions are the primary policing tool and ex ante value maximization is the immediate goal.[142] But once the transaction crosses the closing threshold, moderation becomes apparent as the courts

[140] *See, e.g.*, Leo Investments Hong Kong Limited v. Tomales Bay Capital Anduril III, L.P., __A.3d__, 2025 WL 1807887 (Del. Ch. June 30, 2025) ("A claim for breach of fiduciary duty is an equitable tort. The basic elements of a common-law tort are familiar: The plaintiff must prove existence of a duty, a breach of that duty, injury, and a causal connection between the breach and injury that is sufficient to warrant a remedy, such as compensatory damages."). The allocation to the plaintiff is emphatically reconfirmed in In re Tesla, Inc. Derivative Litigation, __ A.3d.__, 2025 WL 3689114, at *15–*16 (Del.). The Chancery Court, ordering rescission of Elon Musk's stock option grants, had put the burden on the defendant to show that a portion of the economic value of the grant amounted to fair compensation to Musk: "the trial court found that their 'fail[ure] to identify any logically defensible delta between the unfair Grant and a fair one' was fatal to the court's ability to fashion a remedy of partial rescission." *Id*. at *15. The burden should have been on the plaintiff: "That was not a problem of the Defendants' making. It was the Plaintiff's burden to establish an entitlement to rescission as a *form* of relief and his entitlement to any alternative remedies." *Id.*

[141] *See, e.g.*, In re Nine Systems Corporation Shareholders. Litigation, 2014 WL 4383127, at *52 (Del. Ch. September 4, 2014) (stating that a plaintiff who establishes an unfairly structured transaction but does not establish an unfair price "may justify shifting certain of the plaintiffs' attorneys' fees and costs to the defendants who breached their fiduciary duties"), *aff'd* Fuchs v. Wren Holdings LLC, 129 A.3d 882 (Del. 2015); Saliba v. William Penn Partnership, 2010 WL 1641139, at *1 (Del. Ch. Apr. 12, 2010) ("Because defendants conducted the sale in a clearly conflicted manner that resulted in a breach of fiduciary duty, I find and conclude that it would be unfair and inequitable to require plaintiffs to shoulder the costs incurred in demonstrating the unfairness of this sales process. For that reason, I award plaintiffs all of their attorneys' fees and the portion of costs that they have paid in connection with the court-appointed expert witnesses. Those who violated their fiduciary obligations and were the cause of this litigation are the parties who properly should bear the fees and costs made necessary solely by reason of their faithless conduct."), *aff'd* 13 A.3d 749 (Del. 2011).

[142] *See, e.g.,* In re Toys "R" Us, Inc. Shareholder Litigation, 877 A.2d 975, 1023 (Del. Ch. 2005) ("[T]he bottom line is that the public shareholders will have an opportunity [] to reject the merger if they do not think the price is high enough in light of the Company's stand-alone value and other options."); QVC Network, Inc. v. Paramount Communications, Inc., 635 A.2d 1246, 1273 n. 50 (Del Ch. 1993) ("Since the opportunity for shareholders to receive a superior control premium would be irrevocably lost if injunctive relief were not granted, that alone would be sufficient to constitute irreparable harm."), *aff'd,* 637 A.2d 34 (Del. 1994).

seek to avoid causing incidental harm.[143] Thus does Delaware enunciate a flat rule barring the unwinding of closed mergers.[144]

The famous cases of *Corwin v. KKR Financial Holdings, LLC*. [145] and *Kahn v. M&F Worldwide Corp*.[146] extend and deepen the before and after pattern. Informed, disinterested approval ex ante cleanses most defects, averting potential judicial interference and leaving the business in repose ex post. The rule is epistemic as much as formal: once the shareholders have expressed their preference, there is no justification for entertaining a retrospective judicial valuation mired in noise. Only a showing that undermines the quality of the shareholder process can justify piercing the business judgment shield, and even then the court proceeds surgically to avoid broad collateral damage.

Summing up, Delaware's remedial pattern features two dividing lines—before and after, and quantifiable and nonquantifiable. Pre-closing enforcement employs procedural screens—independent-committee approval, informed shareholder votes, and preliminary injunctions. After closing, doctrinal filters sort residual defects into two classes—those that can still be addressed because quantifiable harm is demonstrable, and those that must be tolerated because further intervention would rest on conjecture and threaten transactional stability. Priority goes to remedies whose information requirements match judicial competence, thereby enforcing fiduciary norms without unduly constraining management's discretionary space.

E. Implications for Shareholder Value

We foresee heated policy objections to the pecking order, in particular its relegation of value-dependent damages to the bottom rung. A large damages verdict is often imagined as a precision guided missile aimed at the culpable fiduciary and thus a central pillar of incentive compatibility. (Indeed, we will see it serve that function when we compare damages for breach of controlling shareholder duties in Part III.) It would seem to follow that reducing the level of enforcement threat misaligns incentives while simultaneously and unjustifiably reallocating money from the shareholders' pockets to those of officers and directors.

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[143] *See* Strassberger v. Early, 752 A.2d 557, 578 (Del Ch. 2000) ("Rescission requires that all parties to the transaction be restored to the *status quo ante, i.e.,* to the position they occupied before the challenged transaction."); MacMillan v. Intercargo Corp., 768 A.2d 492, 500 (Del. Ch. 2000) (refusing post-closing rescission of cashout merger to plaintiff's who sought pre-closing injunction).

[144] *See* MacMillan v. Intercargo Corp., 768 A.2d 492, 500 (Del. Ch. 2000) (refusing post-closing rescission of cashout merger to plaintiff's who sought pre-closing injunction). A parallel logic governs improperly authorized share issuances that have diffused into public float: the Chancery Court orders forward-looking cancellation of any unissued void stock or tailors compensatory relief, sparing bona-fide transferees and inviting the parties to re-price claims through bargaining. *See* In re Lordstown Motors Corp., 290 A.3d 1, 12–15 (Del. Ch. 2023) (validating improperly authorized stock pursuant to section 205(d) of the Delaware Corporation Law).

[145] 125 A.3d 304 (Del. 2014).

[146] 88 A.3d 635 (Del. 2014). *MFW* permits a merger involving a controlling shareholder to receive business judgment scrutiny based on the combination of approval by disinterested directors and ratification by a majority of fully informed and uncoerced disinterested shareholders. *Corwin* applies to transaction not involving a controlling shareholder and makes business judgment review available based on ratification by disinterested shareholders. 125 A.3d at 305–306.

Appearances can be deceiving, however. Recall Part I's welfare analysis: the corporation bears the cost of enforcement, a risk of high damages reinforces unproductive risk aversion; meanwhile, deterrence and redress are secondary concerns. The pecking order follows directly from this welfare alignment. High value-based damages awards resemble a circular flow of funds. What exits the defendant's right pocket re-enters her left pocket—either as an indemnified actor, as a shareholder of the defendant firm, or as an investor in peer firms that absorb the insurance externality. Injunctions, disgorgement, and nominal damages display a markedly different financial pattern. Injunctions block the detrimental transaction or force real-time price improvement, reallocating surplus directly to the shareholders with minimal leakage. Disgorgement strips the private benefit at its source, nullifying managerial rent without socializing loss. Nominal damages, although paid out of the treasury, are by construction too small to distort ex ante business decision-making even as they both deliver expressive condemnation and fund private enforcement.

There follows a strong case that the pecking order enhances shareholder value. A low-variance remedial regime reduces the discount that investors apply for legal risk, thereby lowering the cost of capital. More importantly, predictable remedies sharpen the screening role of procedure. A manager who knows that significant post-closing damages are rare but pre-closing injunctions are highly likely has an incentive to invest in better process, even when she cannot predict the substantive merits of every decision. The pecking order therefore acts as a self-enforcing contract between courts, managers and the market: judges promise not to second-guess value unless forced, and managers promise to supply the procedural information that keeps the judiciary out of valuation territory.

We concede that in a world following the pecking order some shareholders may, in edge cases, receive less than the hypothetical full surplus they might have captured in a frictionless world. The trade-off is deliberate: routine judicial guesswork about "lost" value inflates litigation option value, encourages strike-suit behavior, and chills value-creating risk taking.[147] By prioritizing clear, process-based remedies, the law can preserve transactional predictability, husband costs, and still get a deterrent payoff. Over time, the feedback loop is positive: because fiduciaries internalize the cost of procedural lapses ex ante, there follow improvements in disclosure precision, auction quality, and negotiation independence, all of which narrow the distribution of potential allocational errors. Sacrificing the elusive promise of perfect ex post cash compensation thus buys systemic gains in incentive alignment, capital-market confidence, and the integrity of corporate deal making.

F. Summary

Corporate remedies should privilege allocative efficiency. At the pecking order's top rung, injunctions and other specific remedies directly remove value-decreasing transactions at low information cost and low variance. The pecking order then turns to monetary relief, in four descending steps. The first is disgorgement, which reverses an improper transfer, eliminating moral hazard without the risk of valuation error. At the next two steps we encounter value-dependent compensatory and rescissory damages, which should be resorted to only when exploration of all alternatives higher in the pecking order leaves a demonstrable remedial gap, and even then only

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[147] *See infra* note 188 and accompanying text.

on the strength of robust, market anchored evidence.[148] If a documented topping bid was spurned, or rival valuations generated by an independent auction sit in the record, the gap between the reference point and the consummated price furnishes a low noise metric for recovery. Such crystalline fact patterns, however, are statistical outliers. The modal fiduciary complaint—"another bidder would have paid more" or "intrinsic value exceeded the deal price"—requires the court to synthesize a shadow auction or model the discounted cash flows of a complex enterprise, tasks beset by parameter instability and confirmation bias. Nominal damages, which sit off to the side, serve the objectives of fiduciary enforcement without requiring such valuation gymnastics.

III. CONTROLLER DUTIES

The evaluative framework developed in Part I and the pecking order set out in Part II address the fiduciary duties of directors and officers in corporations with separated ownership and control. They do not consider a distinct and equally important category of corporate fiduciary law, the duty of controlling shareholders. This Part redeploys our purposive framework in the control context and explains why control cases call for greater remedial discretion.

A. Reconsidering the Remedial Concerns

In Part I we contrasted corporate fiduciary remedies with the remedial logic of bilateral contract, where remedies primarily serve to deter breach and redress injury. We argued that remedies for fiduciary breaches by officers and directors should instead (a) serve allocative goals, preventing or unwinding value-decreasing decisions, and (b) be selected with close attention to verification and enforcement costs. Our approach rested on four features of public company governance in the separation of ownership and control setting: (i) Deterrence is already supplied, to a substantial extent, by governance institutions and market discipline; (ii) monitoring and enforcement depend on representative plaintiffs; (iii) enforcement costs are largely internalized by the firm through indemnification and insurance; and (iv) high-variance, valuation-heavy exposure can distort decisionmakers' incentives and inhibit their recruitment.

We now reconsider this analysis in the context of control shareholder duties. The controller's fiduciary duty, like the duty of directors, constrains power. In the directors' case it is the power to manage the business, where in the controller's it is the power to bend the board of directors to its wishes.[149] Where a director's fiduciary duty is owed to the corporate entity, a control shareholder owes its duty directly to the rest of the shareholder group.

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[148] For a case where market price reference works well and yields efficiency gains, *see* Mark J. Roe & Michael Simkovic, *Bankruptcy's Turn to Market Valu*e, 92 U. CHI. L. REV. 285 (2025) (commending reliance on market value by the bankruptcy courts).

[149] There has been much controversy in recent years concerning the existence of control in holders of blocks of less than a majority of the voting shares. *See, e.g.*, Tornetta v. Musk, 310 A.3d 430, 497–520 (Del. Ch. 2024), *rev'd on other grounds sub nom* In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 (Del.) (finding the Elon Musk controlled Tesla while holding only 21.9 percent of the stock). The Delaware legislature intervened with a per se rule. Under DEL. CODE ANN. tit. 8, sec. 144(e)(2)(c), the blockholder must own or control at least one-third of the voting power.

There are two recurrent categories of injury inflicted by controllers: distributional skews and allocative impairments. Distributional injuries result when the controller's power is used to effect an unequal allocation of value within the shareholder group. The classic case is a cashout merger where the controller eliminates the minority's equity position at a price less than the minority's proportionate share of going-concern value.[150] Allocative impairments occur when the controller uses corporate machinery to advance its own business interests at the corporation's expense, whether by entering into a self-dealing transaction, effecting a strategic asset transfer at a bargain price, or making operational decisions that favor the controller's outside interests rather than those of the corporation.[151] The severity of an allocative conflict typically rises as the controller's voting power becomes less coupled to its cash-flow stake: when the controller bears only a fraction of a transaction's economic downside, the temptation to extract private benefits predictably grows. Let us compare three situations—a 51 percent to 49 percent split between the controller to the minority, a 33 1/3 to 66 2/3 percent[152] split, and a dual class common capital structure in which the controller contributes 10 percent of the equity capital but elects the entire board. As we go down this list, the cost to the controller of injury to the company declines steadily.[153] Say, to pose an extreme case, the dual class common controller owns 100 percent of a second company that gets a $200 million benefit from a business decision that causes the controlled company to lose $100 million. The controller ends up $190 million better off while the minority loses $90 million.

The two categories of injury matter for remedial design because they present different timing patterns and informational burdens—and therefore different incentive problems. Distributional skews often crystallize at closing; allocative conflicts often play out over time. Remedies must therefore be chosen with an eye to when judicial intervention is feasible, whether an ex post valuation can be credibly performed, and how the available remedial tools shape the controller's incentives ex ante.

Let us reconsider our four policy concerns in this context. First, does an effective governance system already import deterrence, or might the threat of a large judgment make a cognizable contribution toward better compliance? Given public trading of the minority interest, the incidents of the governance system—independent directors, board committees, and public reporting—remain in place. But the system will not operate as reliably when the board is answerable to a controller. The shareholder-level duty follows from this view. Delaware doctrine

150 The classic case is Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). At the duty's farthest reach, it even covers action taken the by the controller with its own stock, as in Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464 (1969), where the controllers took the company public through a company holding their control block rather than through a public offering made directly by the corporation.

151 Here the classic case is Sinclair v. Levien, 280 A.2d 717 (1971), where the minority shareholders accused the majority, a large oil company, of causing the corporation of paying out the cash flows generated by a diminishing asset rather than reinvesting them in new projects for the benefit of the entity. The claim did not succeed.

152 Cf. DEL. CODE ANN., tit. 8, §144(e)(2) (providing that for a shareholder holding less than majority voting power must own at least one-third of the voting stock to be deemed to be a "controlling shareholder").

153 At the duty's farthest reach, it even covers action taken the by the controller with its own stock, as in Jones v. H.F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464 (1969), where the controllers took the company public through a company holding their control block rather than through a public offering made directly by the corporation.

manifests the point in *Kahn v. M&F Worldwide Corp*.[154] The case famously provides that a controller can obtain business judgment review for a freezeout merger by committing at the outset to a demanding procedural template that channels the transaction through an independent committee and an uncoerced, informed vote of the minority shareholders; absent that structure, there follows searching review under the entire fairness standard. The doctrinal move is revealing: the governance system is treated as capable of disciplining controller opportunism, but only when it is re-engineered, monitored, and insulated from control. For remedial purposes, the implication is that deterrence cannot be relegated to secondary policy status. If the governance system cannot be presumed to deter in a control setting, the remedial system must do more work in shaping incentives than it does in the separation-of-ownership-and-control setting.

We now take up the second and third policy concerns, enforcement incentives and litigation costs. As to the former, the institutional mechanics largely carry over. Dispersed minority shareholders still face a free rider problem respecting enforcement and so continue to rely on representative litigation[155] driven by entrepreneurial counsel. In contrast, the costs may fall very differently. The controlling shareholder, if an officer or member of the board, will be insured and indemnifiable in that capacity. But no such arrangements are available to protect it in its capacity as a shareholder in control.[156] It could follow that the defending controller foots its own bill for its litigation costs and the cost of a judgment. But arrangements could be more complicated. The controller could, say, enter an advisory contract with the company, siphoning to itself a stream of rents adequate to assure that the minority shareholders in effect will be making a *pro rata* contribution to any costs stemming from fiduciary litigation. Cost incidence, in short, is fact dependent in this context, with variant policy implications. On the one hand, given high litigation expenses funded by the controller, the costs weigh in as a positive due to a deterrent effect. On the other hand, to the extent that the controller has arranged to shift expenses back to the corporation, high costs are less likely to deter and could ultimately disserve the interests of the minority shareholders.

We turn finally to the negative impact of high-variance, valuation-heavy exposure on decision-making by risk averse directors. When the controller is the shadow decisionmaker, the relevant "risk preference" is not the personal risk aversion of independent directors but that of the controller. Therein lies an incentive problem, for a controller pursuing private benefits and bearing only a fraction of the costs will be ever ready to impose risk on the minority shareholders. [157] This

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[154] 88 A.3d 635 (Del. 2014). *MFW* permits a merger involving a controlling shareholder to receive business judgment scrutiny based on the combination of approval by disinterested directors and ratification by a majority of fully informed and uncoerced disinterested shareholders. *Corwin* applies to transactions not involving a controlling shareholder and makes business judgment review available based on ratification by disinterested shareholders. 125 A.3d at 305–306.

[155] Of course, the shareholder group could contain a blockholder with a sufficient stake to support voluntary enforcement action, but that is also a possibility given separation of ownership and control.

[156] *See* Aon, *Directors & Officers Liability Insurance*, Pt. II (describing terms of coverage), available at https://www.nacdonline.org/all-governance/governance-resources/governance-research/director-faqs-and-essentials/director-essentials-directors--officers-liability-insurance/.

[157] If, on the other hand, To the extent that the controller refrains from direct imposition of its preferences and robust governance arrangements operate, directorial risk aversion could be problem, but not a problem attending the operation of the control shareholder's duty to the minority stockholders. Rather, any chill would arise from an ancillary claim directed at the board members themselves.

weakens the objection to large damage awards grounded in their potential to chill productive risk-taking. But it does not eliminate variance as a systemic cost: speculative calculations still proceed on epistemic thin ice, resulting in inconsistent outcomes and triggering undue settlement pressure.

B. A Discretionary Approach

The pecking order we develop for corporations with separated ownership and control seeks to economize on information costs and strongly emphasizes the reliability of the court's information. Control cases resist this kind of stable ranking and evidentiary exactitude because this is a context in which the expected deterrent impact should determine the remedial choice. To see why, let us model the control fact pattern as a sequential game under imperfect information. The controller moves first, deciding whether to pursue a conflicted transaction and, if so, how to structure the transactional process. The controller's choices will affect both the probability of a challenge and the quality of the record a court will later observe. Representative plaintiffs move next, deciding whether and how to challenge the transaction in light of the detectable facts. The court moves last, and, given a finding of liability, selects a remedy based on the evidentiary record and the feasibility of directive intervention. In this sequential setting, deterrence is governed by backward induction and expected payoffs. The controller compares the private benefit from opportunism with the expected cost imposed by the remedial system. That expected cost is a function of the likelihood of suit, the likelihood of liability conditional on suit, and the likelihood and magnitude of monetary relief conditional on liability relative to injunctive relief. If damages were never meaningfully on the table or were so rarely imposed or minimal in quantity that they could be ignored, deterrence would weaken. But where the remedial framework makes high damages a live possibility in settings where an injunction is unavailable, impracticable, or insufficient, the probabilistic prospect of paying a large award becomes a powerful ex ante constraint. The controller cannot count on being "saved" by injunctive relief or by a valuation difficulty; it must anticipate that, in some states of the world, the remedial response will be a substantial monetary transfer.[158] That prospect, even under imperfect valuation, can be enough to tilt the controller toward avoidance of the conflict or toward process designs that credibly cleanse it.

The better prescription is therefore disciplined discretion: courts should retain flexibility to choose among injunctive relief, avoidance, and the various forms of monetary relief in light of the available information and expected incentive consequences. Injunctive relief and avoidance retain their distinct advantages: If a transaction can be enjoined before closing or unwound without great disruption, judicial intervention prevents or reverses the distributional skew or allocative impairment. Where injunctive relief is infeasible or too costly, or where avoidance would be destructive because the deal has closed and integration has occurred or third-party reliance is substantial, damages need to be made both credible and deterrent, with high damages on the table as a cognizable possibility. Thus, in a case where an identifiable benefit has been conferred on the controller, the court might nonetheless entertain a case for a higher compensatory amount despite the availability of disgorgement. And, in evaluating that compensatory award, the court need not insist on robust market evidence, a clean transactional counterfactual, or other anchors that reduce speculative error. Economic reconstruction through judicial valuation needs to be kept on the table

[158] *Cf.* Choi & Spier, *supra* note 20 (modeling the victim of a contract breach electing between an injunction or avoidance order and money damages).

as an available tool in the proper case. Finally, as in current Delaware law, the determination of what is "proper" must include a measure of judicial discretion, for there is no one-size-fits-all model of a controlled company.

IV. A Forfeiture Rule

This Part turns to enforcement, focusing on the strategic and collective-action dynamics that pervade corporate disputes and the incentives of plaintiff's lawyers.

A. The Strategic Delay Problem

Shareholders have collective action and free rider problems: An individual shareholder rarely possesses a sufficient incentive to finance legal intervention respecting fiduciary breaches, for the benefits of success are shared pro rata with the rest of the group. Representative litigation counteracts this inertia, even as it carries a separate set of incentive problems. One possible distortion is particularly salient here: in the context of separated ownership and control, derivative and class action plaintiff's lawyers may rationally prefer damages over injunctions, allowing a questionable deal to close to facilitate litigation for a large damages judgment and a large fee.[159] From the lawyer's perspective, the ex post fee windfall vastly exceeds the value of preventing the transaction in the first place, where the opposite is the case from the perspective of social value. The litigation delay both imposes agency costs on the corporation and heightens the risk of judicial error incident to ex post valuation.

The delay also undercuts the pecking order, which privileges speedy intervention, according lexical priority to injunctions and other directive interventions because it is better to forestall a tainted transaction than to reprice it retroactively. Two points follow. First, lawsuits should be filed at the earliest possible stage, and, second, the lawyers who enforce corporate fiduciary law must be incented to move with dispatch.

Unfortunately, it is not at all clear that the lawyers' incentives are properly aligned. To see why not, let us hypothesize a world populated with a single plaintiff's law firm, X & Y LLP. Alpha, Inc. is a publicly traded corporation. A hedge fund, Vulture Partners, owns 20 percent of Alpha's stock. Alpha has announced a cash consideration merger into Beta Corporation over Vulture's objection. In the leadup to the Alpha shareholder vote on the merger, events are unfolding to give rise to a high-value case under *Revlon*. Each of Vulture and X & Y has a financial incentive to bring the *Revlon* lawsuit.[160] Both face a timing choice in so doing—either may seek an injunction immediately or remain passive, allow the deal to proceed, and later sue for value-dependent damages. Vulture's choice will depend on financial analysis. If it thinks the merger price will not be topped, it will wait until after closing because post-closing litigation preserves its merger consideration while opening a pathway to additional cash. If Vulture thinks that a topping bid will emerge, it will seek an injunction to facilitate the bid. X & Y, in contrast, will weigh projected litigation costs against a projected benefit in the form of a risky recovery pool and an attendant

[159] *See infra* notes 167–176 and accompanying text.

[160] Alternatively, Vulture could dissent from the merger and opt for appraisal.

fee. In this case, the numbers work in favor of rolling the dice on ex post damages because the present value of the projected post-closing recovery and fee minus the projected cost of a trial is substantially greater than the present value of the projected post-injunction recovery and fee minus the projected cost of the injunction proceeding.[161] Vulture's incentives align with the those of the shareholder group where X & Y's do not.

Let us now change the facts. Assume that Alpha has no 20 percent blockholder and X & Y is the only possible plaintiff. Assume also that the expected value to X & Y of an injunction proceeding equals the expected value of an action for damages. X & Y may still choose to delay. To see why, we model X & Y's decision to sue as an American call option.[162]

X & Y has two options—one tied to the injunction proceeding and the other to the damages action. The "asset" is the expected fee award in both cases. To purchase and exercise the injunction option is to litigate pre-closing; to purchase and exercise the damages option is to litigate post-closing. X & Y can take one or the other option but not both. The chance of a favorable judgment is 50-50 in both cases. X & Y's downside is a function of the exercise price of the option, which is the cost of bringing the lawsuit. We will assume that the cost is higher in case of the damages action. Since all other things are equal except the exercise price, at this point it looks as if the injunctive proceeding is the better choice because the out-of-pocket cost of exercising the option is lower.

But that need not be case. Option pricing theory teaches that option value (1) increases with the length of time to expiration, and (2) increases convexly with the underlying asset's variance.[163] In this litigation analogue, time to expiry corresponds to the interval between the time of discovery of litigable red flags, and (1) the time the deal closes in the injunction proceeding, and (2) the expiration of the statute of limitations in the damages action. The timing factor thus weighs in favor of the damages action, pushing its option value north. Variance corresponds (1) to the range of possible fee awards in the injunction proceeding, and (2) the range of possible fee awards in the damages action, which in turn depends on the range of possible judicial valuations of lost value. The greater the uncertainty surrounding the amount of the projected fee, the more

[161] The incentives will work differently if we relax the assumption of a single law firm. Given multiple law firms that play uncooperatively, a race to the courthouse is possible because the first law firm to file has an advantage. *Cf.* Matthew D. Cain, et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 610 (2018) ("most large mergers are challenged in multiple lawsuits filed in different courts"). Given multiple law firms that play cooperatively, delay again becomes the likely outcome. Corroborating our working assumption, we note that, in repeated-interaction terms, the plaintiffs' bar behaves like an oligopoly. When the marginal payoff from filing first is uncertain and future cases promise reciprocal opportunities, firms tend to adopt tacit fee-sharing norms and rotate lead roles rather than engage in costly races, so collective delay may dominate pure speed competition even when multiple firms are in the field.

[162] *See* Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637, 645–46 (1973) (demonstrating that, all else equal, an option's value increases monotonically with the time remaining to expiration).

[163] *See* RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 627–630 (14th ed. 2023).

valuable the option, and the stronger the plaintiff's incentive to wait.[164] The value of the expected fee award in the injunctive proceeding will follow from a narrow range of possibilities, while the possible payout range will widen considerably with the damages action, from a fee based on nominal damages to a jackpot award based a billion dollar judgment. The variance incident to the damages action accordingly is considerably higher. Thus does this value factor push the option value of the damages factor north, making delay most attractive precisely in a case where the court is least confident—a perverse coupling of strategic behavior and epistemic weakness. If the timing and variance factors outweigh the exercise price factor in the valuation calculus, then X & Y opts to wait and sue for damages. If we go back to the original fact pattern and change the assumption of equal expected values to raise the expected return of the damages alternative, then the decision to wait is a no brainer.

Plaintiff's lawyers, in short, face a moral-hazard problem. Because their payoff scales with fee award magnitude rather than with ex ante harm prevention, they can externalize the downside risk of a bad deal onto the entire class ex ante while preserving the upside of a damage windfall ex post. The equilibrium therefore tilts toward delay even though early intervention would maximize the surplus.

B. Implementation and Limits

Equity abhors a forfeiture.[165] Despite this, we propose a *forfeiture* rule to ameliorate the delay problem and undermine the gratuitous optionality. The rule would require any plaintiff who possesses material information suggestive of a fiduciary breach and enjoys a reasonable window of time to seek injunctive relief to do so or forever lose the right to pursue value-dependent compensatory or rescissory damage awards. Post-closing litigation would remain available for the other monetary remedies—disgorgement of profits and nominal damages. [166] Economically, the rule would move forward the expiration date on the damage litigation option, destroying its embedded time premium and making temporal inertia economically equivalent to renunciation of the high-variance payout.[167] Rational plaintiffs would exercise the option to file for injunctive relief.

This forfeiture rule could be promulgated without legislative action. It amounts to a reformulation of the equitable doctrine of laches, which Delaware courts invoke against plaintiffs

[164] Because a call option's payoff is convex in the underlying asset, its expected value increases jointly with both parameters: the longer the plaintiff can wait and the greater the valuation volatility, the richer the litigation option becomes. *See* Robert C. Merton, *Theory of Rational Option Pricing*, 4 BELL J. ECON. & MGMT. SCI. 141, 149‑52 (1973) (demonstrating analytically that a call option's value is strictly increasing in both remaining time to expiration and the variance of the underlying return). *Cf.* Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1585‑88 (2015).

[165] *See, e.g.*, XRI Investment Holdings LLC. Hollifield, 2022 WL 4350311, at *661 n. 94 (Del. Ch.).

[166] The forfeiture thus extends only to the remedy and not to the claim itself. For an exploration of forfeiture of claim due to in response to opportunistic delay in bringing suit, *see* Saul Levmore, *Strategic Delays and Fiduciary Duties*, 74 VA. L. REV. 863, 871 (1988) (distinguishing reduction of recovery from forfeiture of claim).

[167] STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (2004).

who "unreasonably delay" bringing suit.[168] It accordingly lies within the zone of their equitable power. Indeed, there is direct precedent suggesting that laches come to bear against a plaintiff bringing a disclosure claim who skips an attainable injunction to pursue a damage claim.[169]

There is also indirect precedent. The Delaware law applying to mergers and acquisitions anticipates a forfeiture regime. Appraisal law recognizes a need for speed, allowing petitioners only 120 days after the merger's effective date to file in the Chancery Court.[170] Cutoffs of post-closing damages actions also are built into *Revlon* doctrine. Under *Malpiede v. Townson,*[171] a section 102(b)(7) charter provision blocking actions for damages for breach of the duty of care[172] also cuts off post-closing *Revlon* actions unless the plaintiff can show self-dealing or bad faith on the part of the target managers. As a result, most *Revlon* cases *already* must be filed at the injunctive stage. Finally, delays in filing are taken into account when Delaware Courts select among available remedies.[173] A forfeiture regime would make this an across-the-board approach.

We acknowledge that our forfeiture rule, whether conceived as laches-based or *Revlon*-based, would advance on the precedent as regards both coverage and intensity. The precedents on remedial choice concern disclosure claims, a category notorious for marginal filings on fact patterns bereft of the culpable opportunistic conduct that characterizes the most injurious fiduciary breaches. Our rule would apply across the board, altering the landscape of fiduciary enforcement. And, while we describe it as a laches variant, some significant qualitative differences should be noted. Laches bars a claim for unreasonable delay based on all facts and circumstances.[174] Our rule applies on a *per se* basis, and instead of cutting off a claim for staleness, it herds all claims straight to court to maximize on freshness. Laches also is sensitive to the interests of a defendant who might be prejudiced by delay. In a merger case, the defendant very well might prefer a litigation delay because it wants the deal closed now and is willing to trade a present closing off against the risk of damages later. Our rule applies despite this because it looks toward the effectiveness of the enforcement system as a whole.

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[168] See Lebanon County Employees Retirement Fund v. Collis, 287 A.3d 1160, 1194–95 (Del. Ch. 2022); Harman v. Masoneilan Intern., Inc., 418 A.2d 1004 (Del. Ch. 1980). *See also* Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1, 2–4 (2014) (clarifying that laches functions as an equitable constraint by requiring both unreasonable delay and resulting prejudice, thereby channeling plaintiffs toward timely filing and preserving the doctrinal balance between legal and equitable relief).

[169] *See* Ryan v. Lyondell Chemical Co., 2008 WL 2923427, at *21 n.128 ("where, as here, a shareholder had ample opportunity to seek an injunctive remedy for a perceived disclosure violation, and where there is no evidence of a breach of the directors' duty of loyalty or good faith in connection with the disclosure, it may be appropriate to invoke the doctrine of laches to bar him from pursuing a claim for money damages"). *See also* Nguyen v. Barrett, 2016 WL 5404095, at *7 (Del. Ch. Sept. 28, 2016) (commending preliminary injunction motions as the preferred mode for pursuing disclosure claims and suggesting that failure to pursue the claim pre-closing should result in a waiver); Vento v. Curry, 2017 WL 1076725, at *1 (Del. Ch. Mar. 22, 2017) (describing a motion for a disclosure-based preliminary injunction as the appropriate means of challenging the adequacy of disclosure).

[170] *See* DEL. CODE ANN., tit. 8, § 262(e).

[171] 780 A.2d 1075 (2001).

[172] *See* DEL. CODE ANN., tit. 8, § 102(b)(7).

[173] *See supra* note 120 and accompanying text.

[174] *See* RESTATEMENT (THIRD) OF TRUSTS § 98, comment b (2011).

The burden to justify the rule is steep accordingly. Fortunately, the rule offers substantial benefits. It would reduce the social cost of indeterminate damages while mitigating judicial errors.[175] Early litigation focuses the evidentiary record on contemporaneous market data, transactional documents, and witness recollection, all in high fidelity. Late valuation relies on degraded signals and hindsight bias. A system that compels early adjudication therefore operates at a lower aggregate error variance, improving deterrence accuracy and decreasing noise-based option value in the next round. The substitution of high-incidence, low-signal damages with low-incidence, high-signal process remedies thus enhances allocative efficiency.

The commencement of a forfeiture regime also would result in beneficial behavioral adjustments amongst the cast of characters. Directors would increase upfront procedural rigor—engaging genuinely independent committees, extending auction windows, enhancing disclosure—because the probability of early injunction rises in a forfeiture regime, especially in high-variance contexts. Plaintiff's lawyers would reallocate resources from post-closing damage analytics to pre-closing investigation, improving the informational environment of adjudication. D&O insurers would benefit from reduced tail risk and could pass savings to insureds, lowering the aggregate cost of capital. Market participants would update their beliefs about enforcement intensity, incorporating lower variance into ex ante pricing of corporate control transactions. The cost of capital for compliant firms would fall relative to that of firms skirting procedural safeguards, sharpening market discipline.

Critics will point to four potential perverse effects of a bright-line forfeiture rule: (1) it will precipitate a glut of precautionary injunction motions, overwhelming judicial resources; (2) it will disable litigation in cases where necessary information cannot be discovered at an early stage; (3) it will debilitate the system's enforcement arm by penalizing plaintiff's lawyers; and (4) its very application will leave breaches of fiduciary duty unrecognized and unremedied.

The first problem, the glut of suits, is anything but novel. Delaware has already been through it, having experienced a surfeit of merger challenges during the first two decades of this century.[176] In response, the Delaware courts moved against frivolous complaints by toughening the approval standard governing "disclosure only" settlements.[177] They also enhanced the potency of procedural cleansing in *MFW* and *Corwin*,[178] allowing optional reductions in the standard of review in exchange for procedural rigor. Forfeiture complements these initiatives on the remedial axis by conditioning access to expansive damages on timely invocation of procedural relief. Any further necessary gate-tightening can be effected with strict application of the likelihood of success

[175] *Cf.* Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 4-6 (1994) (showing that expected adjudicative loss equals the weighted sum of *Type I* errors–finding liability where none exists–and *Type II* errors–failing to impose liability where it should lie–and that both error probabilities fall as the variance of judicial valuation is reduced); A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J.L. ECON. & ORG. 99, 100-03 (1989) (defining Type I and Type II errors and demonstrating their joint influence on private enforcement incentives).

[176] *See* Cain, et al., *supra* note 161, at 619–22 (studying litigation rate from 2003 to 2017).

[177] *See* In re Trulia Inc. Stockholder Litigation, 129 A.3d 884 (2016) (requiring litigation settlements to include a narrowly tailored release and supplemental disclosures offered as a benefit to the plaintiff class to address material misrepresentations or omissions).

[178] *See supra* notes 145–146 and accompanying text.

standard for preliminary injunction. If we combine an exacting likelihood of success requirement with a forfeiture rule, low-merit claims will become less attractive because they fail the threshold for preliminary relief while preserving no optional tail upside.

The second, late-discovery problem would have to be directly addressed by the courts applying the rule. Suppose, for example, that decisive information surfaced only day before a merger became effective, much too late for framing a preliminary injunction motion. Clearly, a compensatory damages action should not be blocked. The application of a "reasonable window" test would need to be flexible accordingly, with a materiality-and-timeliness escape hatch. Plaintiffs would forfeit access to damages only if a reasonable lawyer could possess adequate information with sufficient lead time to seek an injunction.

Next comes the question respecting the incentives of plaintiff's lawyers and a possible fall off of enforcement firepower to the detriment of the shareholder interest. The forfeiture rule's objective is the precise opposite, of course—to redirect enforcement energy to most effective point of entry, substituting a social policy objective for the lawyer's objective in maximizing its fee award. Good intentions do not eliminate the possibility of perverse effects, however. The question accordingly is this: Would the reduction of the aggregate fee yield implicated by the rule sufficiently dampen the plaintiff's bar's incentive to sue as to negate the rule's benefits? The answer is an emphatic no. Indeed, the question itself is borderline silly. Delaware's plaintiff's bar does so well financially that the Chancery Court's award practice has surfaced as a policy problem.

Eyebrows were raised in 2023 when the attorneys took home \$266 million out of a \$1 billion settlement in the *Dell Technologies* litigation.[179] But there was nothing novel about the "benefit" theory applied by the court, under which the attorney receives between 10 percent and 33 percent of the recovery pool depending on stage of the litigation.[180] Delaware has consistently favored the benefit approach over the alternative of a quantum meruit calculation based on a multiple of the lawyer's "lodestar" hourly rate.[181] Matters came to a head in 2024 in *Tornetta v. Musk*, when the Chancery Court awarded the plaintiff's counsel a record \$345 million.[182] This time there was no recovery pool to finance the award, the remedy having been rescission. A benefit instead was inferred from a \$2.3 billion accounting adjustment incident thereto.[183] Attorney's fees came up again the next year as the legislature grappled with the DExit crisis. A number of senators tabled a "Concurrent Resolution" which recited that "there are legitimate concerns about whether excessive attorney's fees have been awarded in cases claiming a corporate benefit or common fund

[179] In re Dell Technologies Inc. Class V Stockholders Litigation, 300 A.3d 679 (Del. Ch. 2023).

[180] In re Dell Technologies Inc. Class V Stockholders Litigation, 326 A.3d 686, 693–97 (Del. 2024).

[181] *Tornetta v. Musk,* 326 A.3d 1203, 1253-59 (Del. Ch. 2024).

[182] *Tornetta v. Musk,* 326 A.3d 1203, 1213 (Del. Ch. 2024).

[183] *Id*. at 1260–63.

for stockholders and whether recurring stockholder litigation has become unproductive for investors and corporations."[184] A study was requisitioned, but it is not yet forthcoming.[185] Even so, the Delaware Supreme Court paralleled its reversal of the *Tornetta* remedy by stripping the benefit-based attorney's fee in favor of a lodestar with a four-times multiplier.[186] This presumably leaves counsel with the $54.5 million originally proposed by the defendant.[187] It remains to be seen whether it also implies an across-the-board shift from benefit to quantum meruit, and, if so, the impact on the robustness of fiduciary enforcement. Meanwhile, it would be premature to write off the earning capacity of the Wilmington plaintiff's bar.

Lastly comes the problem of justice denied. "Forfeiture" means that valid claims get cut off, leaving the shareholder victims uncompensated and short of the hypothetical Pareto frontier. But pursuit of nirvana does not always make sense—no system of incomplete-contract governance can guarantee perfect ex post surplus division. We are in cost-benefit territory here and, in our view, the expected social loss from occasional under-compensation is dominated by the dead-weight cost of high-variance optional litigation. The elimination of the option unlocks gain: (1) more robust pre-closing judicial policing and improved deterrence; (2) a tighter the distribution of realized transaction prices around fundamental value and an increase in the value of the control market; and (3) a reduction in deadweight litigation cost incurred by shareholders.[188]

The real question is whether a forfeiture rule should be applied across the board, in control shareholder cases as well as officer and director cases. The argument in favor of general application draws on the option value point: If the control shareholder category implicates prospective awards with larger dollar numbers, then the option value of delay is higher even as the need to avoid injury through early intervention can be more acute. The argument against is by far the more powerful, however. Where the system's central objective is to steer enforcement away

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[184] Delaware General Assembly, Senate Concurrent Resolution 14, Feb. 17,2025 available at https://legis.delaware.gov/BillDetail/141858.

[185] There are some academic contributions. A recent study from Joseph Grundfest and Gal Dor compares high-end Delaware awards with federal awards built on an hourly rate seven times (septuple) and ten times (decuple) greater than a base hourly rate across the period 2000 to 2025. They report that septuples are 23 times more frequent in Delaware than in federal court and decuples are 56 times more frequent. The maximum hourly rate among the federal septuples is $11,290 compared to Delaware's $35,000.[185] Joseph Grundfest & Gal Dor, *Lodestar Multipliers in Delaware and Federal Attorney Fee Awards*, at 2, working paper 2025 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5237545.

These eye-popping numbers have gotten much attention. *See, e.g.*, Deal Book, *Companies Rely on Delaware Courts. Lawyers Reap Huge Fees There,* N.Y. TIMES, June 2, 2025 available at https://www.nytimes.com/2025/06/02/business/dealbook/delaware-courts-legal-fees.html. Although Grundfest and Dor disavow any normative characterization, the numbers suggest a Chancery Court boondoggle. But it is much too early to walk away with a pejorative generalization. Gilda Sophie Prestipino and Michael Klausner, in a response paper, point out that the comparison data set includes only a small set of outlier cases involving big recoveries and that the cases studied amount to only one percent of total case volume in Delaware. Gilda Sophie Prestipino & Michael Kluasner, *Attorneys' Fee Awards in Delaware: A Normative and Empirical Analysis*, working paper 20205 available at at https://dox.doi.org/10.2139/ ssrn.5708222. Drawing on all Delaware cases during the time period, they calculate that aggregate mean and median fees are multiples of 1.864 and 1.43 above the base hourly rate and that even at the 75th percentile the multiple is 2.42. *Id*. at 21–26.

[186] In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 at *17–*18 (Del.).

[187] *Tornetta v. Musk,* 326 A.3d 1203, 1235 (Del. Ch. 2024).

[188] OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE (1995).

from low-information, high-variance valuation claims, as is the case with officer and director duties, remedies play an epiphenomenal role in deterring misconduct. In that setting, deterrence is supplied primarily by governance and market discipline, not by *ex post* monetary awards and a *per se* forfeiture rule fits naturally. In controller cases, forfeiture is harder to justify as a categorical rule. Here either of injunctive relief or damages can dominate depending on informational conditions and the need for deterrent impact. In addition, the conditions that make controller misconduct salient also make early intervention harder to guarantee: information may emerge late; subtle coercion and conflicted dealing can be difficult to prove on an expedited record. It follows that remedy selection is not something the system should pre-commit through procedural forfeiture. It is something the court should decide case by case.[189]

Summing up, a well-framed forfeiture rule for officer and director cases could shift the pecking order from an aspirational ordering to a functional constraint. It would operate less as a punishment than as an architectural adjustment, bringing real-options logic into the enforcement mechanism and making the system's most conjectural remedies available only to parties who first try to avert the harm. If the mechanism worked as intended, it would harmonize two objectives frequently cast as opposites—robust shareholder oversight and transactional finality—thereby advancing a more internally coherent and economically grounded model of corporate governance.

V. Conclusion

We treat remedies not only as a trailing appendage of liability doctrine, but also as an independent governance technology that disciplines actors through the temporal architecture of fiduciary enforcement. We begin with publicly traded companies with separated ownership and control. Here injunctions, viewed as a governance technology, are first-best relief. They also are the juridical equivalent of an options market on misconduct, forcing fiduciaries to internalize downside risk before value can be irreversibly transferred. The damage measures that are not value-dependent—disgorgement and nominal awards—function as low-variance, high-signal price tags on rule-breach, preserving the expressive force of judgment while avoiding the noise of speculative valuation. Full-blown compensatory or rescissory awards occupy the asymptotic tail of this distribution. They should be employed only where both causal precision and systemic insulation coincide, serving chiefly as a shadow price that shapes bargaining in the shadow of the courthouse rather than as an everyday redistributive tool. The results of this governance-based analysis shift markedly when we turn to controlled companies. Here compensatory and rescissory awards rise to coequal status with injunctions. Governance policy is the reason. The deterrent impact of high damages registers as a positive in a controlled environment but a negative with separated ownership and control. Meanwhile, plaintiff's attorneys need to be better fitted into the governance architecture and encouraged to go to court at the earliest opportunity given separated ownership and control.

[189] *Cf.* Levmore, *supra* note 166 at 868 ("the more one is concerned with deterring a wrongdoer's behavior, the less one would want to shift any available deterrence from the wrongdoer to the victim simply because the latter delays with what might be intent to gain a relatively small advantage").

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