Lessons from *Johnson & Johnson v. Guidant*  
*by Christopher Austin*  
A recent U.S. District Court opinion, *Johnson & Johnson v. Guidant Corp.*, contains a few important lessons for M&A practitioners.

Building on Bridges: Bridge Equity Challenges the Traditional Approach of Banks in Financing Transactions, Offering Them New Opportunities - and New Risks  
*by Jeffrey Karpf, Tibir Sarkar, Evan Schwartz and Paul Tiger*  
The beginning of 2007 saw leveraged buyouts get larger and more lucrative for banks as financial sponsors pushed the boundaries on participation terms and developed new concepts such as “bridge equity”. While the future of bridge equity is less certain, this article describes various aspects of bridge equity to consider.

Left at the Altar – Creating Meaningful Remedies for Target Companies  
*by Victor Lewkow and Neil Whoriskey*  
Two years ago, in *Con Edison v. Northeast Utilities*, the Second Circuit decided that, absent clear contractual language to the contrary, neither the shareholders of a target company nor the target company itself (on behalf of its shareholders) could collect lost shareholder premium as damages for a breach of a merger agreement. While most public company merger agreements continue to include only a “no third party beneficiary” provision and to otherwise be silent on this topic, a variety of provisions have found their way into at least some agreements in the attempt to address this perceived issue. This article examines some of the most popular formulations of these provisions, as well as the key alternative remedy of specific performance.

Voting at Annual Meetings  
*by Janet Fisher and Mary Alcock*  
Accurately determining whether a matter has been approved by shareholders and whether a quorum exists has become an increasingly complex matter. This article provides a practical guide to the key questions and includes a chart describing the method for the tabulation of votes under various standards.

New Delaware Executive Compensation Case Law: Emerging Standards for Compensation Decision-Making  
*by Katie Sykes and Anna Gercas*  
Recent Delaware case law has included a number of important executive compensation decisions and may indicate the emergence of a less deferential judicial approach on compensation matters. Some practical proposals that boards and compensation committees may find useful to consider in structuring executive compensation programs and decision-making processes are discussed in light of these decisions.
Lessons from *Johnson & Johnson v. Guidant*

*by Christopher Austin*

Johnson & Johnson (“J&J”) agreed to acquire Guidant in November of 2005. J&J’s merger agreement with Guidant contained a standard “no-shop” provision that, among other things, prohibited Guidant from providing information to other potential bidders unless the Guidant Board of Directors received a “takeover proposal” that the Guidant Board determined was, or was reasonably likely to lead to, a “superior proposal.”

Boston Scientific (“BSC”) thereafter submitted a proposal to acquire Guidant for a price higher than that offered by J&J. In order to address potential antitrust concerns, BSC announced in its proposal that it planned to divest certain of Guidant’s businesses, but did not name a potential purchaser of such businesses. In response to its proposal (and as permitted by J&J’s merger agreement), Guidant provided BSC with access to confidential information regarding Guidant. The following month, BSC confirmed its proposal to acquire Guidant and announced that Abbott had agreed to acquire the Guidant businesses that BSC intended to divest. After several rounds of bidding, BSC was the successful bidder for Guidant, Abbott agreed to acquire the divested businesses, the J&J merger agreement was terminated and Guidant paid J&J a $705 million termination fee as provided in the J&J/Guidant merger agreement.

After completion of the acquisition, J&J brought an action against Guidant for breach of the J&J merger agreement and against BSC and Abbott for tortious interference with the merger agreement. The basis for the action was the allegation that Guidant, either directly or through BSC, provided confidential information to Abbott regarding the divested businesses and that, in doing so, Guidant breached (and BSC and Abbott tortiously interfered with) the “no-shop” provision since Guidant was only permitted to provide information to a competing bidder that had made a “takeover proposal” and Abbott had not made any such proposal.

Guidant, BSC and Abbott made a motion to dismiss J&J’s claim. The court dismissed the claim against BSC and Abbott for tortious interference but permitted the breach of contract claim against Guidant to continue. The court’s opinion contains a few important lessons for M&A practitioners.

• *Even a “technical” breach is a breach.* Guidant argued that J&J’s claim should be dismissed because, even if the provision of information to Abbott was a breach, it was purely “technical” and “immaterial” (i.e., the failure to name Abbott as a participant in BSC’s takeover proposal). The court rejected this position, noting that an “easily preventable breach may nonetheless be material” and noted that Abbott’s proposed purchase of the divested businesses would itself have been large enough to qualify as a “takeover proposal” under the definition contained in the J&J/Guidant merger agreement. The decision highlights the importance of parties to merger agreements taking pains to carefully comply with all of the provisions of the agreement.

• *Beware of the word “willful”.* The J&J/Guidant merger agreement contained a relatively standard term providing that, after
termination of the agreement, no party would be liable for a pre-termination breach unless the breach was “willful”. Guidant argued that J&J’s claim should be dismissed since the word willful meant that the breach had to be “malicious” and its actions in providing information to Abbott did not meet this standard. J&J responded that “willful” simply means “intentional” and that Guidant had certainly intended to provide information to Abbott. The court concluded that “willful” is a “notoriously ambiguous word, which can indicate any number of mental states” and refused to dismiss J&J’s claim on this basis.

- **The importance of applicable law in tortious interference claims.** Tortious interference claims are governed by state law and there is a very important difference in the law of various states. In particular, some states (e.g., New Jersey) require that, in order to sustain a claim against a party for interfering with a contract to which it was not a party, the interfering party must have acted with malice and pursuit of its own economic interest is not malice. Other states (e.g., New York) do not require any such showing of malice by the interfering party. In this case, the tortious interference claim against BSC was dismissed since the court concluded that under the either of the states whose law might apply – Indiana (the governing law of the merger agreement) or New Jersey (the location of the alleged victim (J&J)) – a showing of malice was required and BSC’s was simply acting in its own economic interest in topping the J&J agreement.


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Building on Bridges: Bridge Equity Challenges the Traditional Approach of Banks in Financing Transactions, Offering Them New Opportunities - and New Risks*  
by Jeffrey Karpf, Tibir Sarkar, Evan Schwartz and Paul Tiger

As leveraged buyouts (LBOs) in the United States get ever larger and more lucrative for banks, financial sponsors continue to push the boundaries on participation terms and develop new concepts, such as “bridge equity”, which test the banks’ traditional appetite for risk. The bridge equity structure has gained prominence in the United States during the past year, becoming a widely used tool for sponsors in their buyout bids.

Conceptually similar to bridge debt financing, bridge equity involves the bank taking a portion of the sponsors’ equity commitment on a short-term basis, until permanent equity investors are found. In the context of a public offer, the sponsor will require a firm commitment to fund the equity from the bank similar to its own commitment in order to fulfill its cash confirmation requirements. If all goes well the bank would aim to sell its equity commitment before the closing of the transaction so as to avoid funding its commitment. If not, the bank will be required to fund the commitment and purchase the previously agreed amount of equity in the acquiror (usually a special purpose vehicle (SPV) set up by the sponsor) and then seek to sell the equity purchased within a given time.

Spreading the Risk

While the concept of bridge equity has been around in the United States since the late 1980s, its renewed use in leveraged transactions has owed much to changes in the buyout market during the past few years. As the bidding consortiums used by many sponsors in the United States from 2004 through to 2006 began to come under increased anti-competition scrutiny from U.S. authorities, sponsors looked for a new way of spreading equity risk for some of the largest transactions.

Blackstone’s acquisition of Chicago-based Equity Office Properties (EOP) Trust in November 2006 officially announced the return of bridge equity as a financing tool. This $39bn (£19.31bn) transaction, at the time the largest ever announced LBO, contained a commitment by a consortium of banks to purchase approximately $3.5bn (£1.73bn) of bridge equity.

The EOP deal was followed quickly by the announced $45bn (£22.29bn) purchase of Dallas-based energy company TXU Corp by Kolberg Kravis Roberts & Co and Texas Pacific Group - the deal that surpassed EOP as the largest LBO in history. This deal contained a bridge equity commitment of approximately $1bn (£495.24m).

These two mega-deals solidified the role of bridge equity as an important tool in the U.S. buyout market for the first half of 2007 and were followed by significant bridge equity roles in the buyouts of First Data, Alltel and Dollar General Corporation.

The Pros and Cons

For the banks, the provision of bridge equity can sometimes be the price of admission to a lucrative debt financing role, but it has the
significant downside that it may well have to fund the equity commitment from its own balance sheet and be left with an unwanted equity stake. For the private equity firms, the obvious advantage is to reduce the size of their equity position and free up fund resources for other transactions.

Key to successful bridge equity financing is the way the sell-down process of the bank’s equity is managed. Sometimes the bank will decide to keep a portion of the equity for itself as a “hold” or “core” position. In most cases, however, the banks will be asked to provide equity commitments in amounts greater than they would be prepared to hold permanently, so there will inevitably be a syndication or sell-down process of the excess, which is the bridge equity. In addition, in the case of certain attractive deals, sponsors have required that any hold equity desired by a bank will reduce the sponsor’s commitment rather than the bridge commitment of the bank.

The Sell-Down

In most cases there will be agreed general sell-down principles applicable throughout the sell-down period, such as requiring that sales are only made to investors so that the sales do not require any registration of the securities under the U.S. securities laws and are structured so as not to create any tax or regulatory issues. To avoid certain U.S. securities law issues, the investors are generally required to be both “accredited investors”, under the U.S. Securities Act of 1933, and “qualified purchasers”, under the U.S. Investment Company Act of 1940. Often the sponsor will want to syndicate bridge equity first to limited partners in its funds and require that they are provided with preferential treatment in the initial stage of the sell-down period.

Control of the sell-down process is another key issue. Both parties would normally like control: the sponsor because it wants control over the identity of its co-investors in the investment; and the bank because it wants to reduce its exposure to the bridge equity quickly and with little interference from the sponsor. Information rights to assist any sell-down are also important.

The banks will usually require sponsors to provide certain information and related rights in connection with their sales prior to the closing of the transaction, as is customary in U.S. private placements, although it is not as detailed as the information generally provided in private sales pursuant to Rule 144A of the Securities Act. The bank will also require further information rights, often including the Securities and Exchange Commission’s Rule 10b-5 and other legal opinions and comfort letters post-closing after the sponsor has control of the target in order to assist the sell-down process and marketing effort.

Lead Manager

Often the sponsor will take control of the initial sell-down process through a lead manager. The lead manager will coordinate sales of the bridge equity on a pro rata basis and the sponsor will determine to whom the lead manager will sell. After this initial effort the banks are often left to sell whatever portion of their bridge commitment remains. This is often done through a separate Delaware or Cayman Islands SPV, with the bank marketing the interests to sophisticated investors while requiring significant minimum subscription amounts. In the United States there might need to be additional structuring considerations given to issues of U.S. withholding tax for foreign co-investors.
If the underlying buyout is being accomplished by tender offer, then consideration also must be given to the U.S. tender offer rules. Because the best price rule requires shareholders to receive the same consideration for their publicly traded shares, providing certain of these shareholders with the opportunity to acquire interests in the acquiror through the sell-down may be considered a violation of the best price rule. In these circumstances, the sell-down is often deferred until such time as the tender offer has been completed in order to avoid the possibility of inadvertently including a shareholder of the target in the sell-down.

The Future for Bridge Financing

With the recent downturn in the U.S. debt markets, there has been some degree of backlash against equity bridge financing. The trouble in the debt markets, coupled with a few recent deals in which bridge equity banks had to fund their commitments as they were unable to fully sell down their commitments prior to the closing, has made the market for equity bridges somewhat less certain going forward. While there has been much discussion during the past few weeks about banks taking bridge loans on their own balance sheets because of problems finding buyers for the debt in certain outstanding U.S. deals, the same issues have arisen for bridge equity. The volatile debt market could potentially alter the balance of power between sponsors and bridge equity providers, enabling the banks to demand more favorable terms or extinguish their appetite for this form of financing for the time being.

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Two years ago, in *Con Edison v. Northeast Utilities*,¹ the Second Circuit decided that, absent clear contractual language to the contrary, neither the shareholders of a target company nor the target company itself (on behalf of its shareholders) could collect lost shareholder premium as damages for a breach of a merger agreement. Ever since that decision, some targets’ counsel have been searching for that clear contractual language, in the hope that their clients will not be limited to seeking out-of-pocket expenses in the event of a breach.² While an informal survey indicates that most public company merger agreements continue to include only a “no third party beneficiary” provision and to otherwise be silent on this topic, a variety of provisions have found their way into at least some agreements in the attempt to address this perceived issue. This article will examine some of the most popular formulations of these provisions, as well as the key alternative remedy of specific performance.

I. Anti-Con Edison Language Formulations.

While there are several major variants of the anti-Con Edison remedies language, none that we have seen grant to target shareholders the right to enforce the merger contract directly or to collect damages directly if buyer refuses to close.³ The reason for this should be apparent – neither buyer nor target has any interest in permitting target stockholders to pursue claims for breach independently. Target will want to preserve for itself the right to control this critical litigation – including the right to settle such litigation, with a settlement taking many potential forms. Buyer will not want to negotiate/litigate with potentially unorganized and uncoordinated groups of shareholders should a breach be alleged.

One approach is that taken in the Aquila/Great Plains Energy merger, where target was permitted to pursue damages “on behalf of its stockholders” in the event of a material and willful breach by buyer.⁴ This language is typically phrased as an exception to the standard “no third party beneficiary” provision of the merger agreement, and would appear to make target an agent of its shareholders in seeking to collect damages.

Another alternative that has appeared in some merger agreements does not grant target shareholders status as third party beneficiaries, but rather attempts to measure damages to target by reference to “lost shareholder premium”⁵ or to the “benefit of the bargain lost by a party’s shareholders”⁶ arising from a willful breach of the merger agreement. There have also been a number of agreements that combine the “agency” approach with the “damages definition” approach.⁷

While these approaches have obvious appeal to a target, and while it is hard not to have sympathy with targets’ attempts to contract for remedies provisions that will give them a clearer claim for more than out-of-pocket expenses, the introduction of anti-Con Edison language into merger agreements raises a number of issues, and may not accomplish what is intended. These alternative provisions are discussed below. To the best of our knowledge, none of them have yet been tested in litigation.⁸
II. The “Agency” Approach.

Provisions that would make target shareholders third party beneficiaries of buyer’s promises have the advantage of creating on behalf of target shareholders a recognized contractual claim for damages. Generally, there should be no legal obstacle to naming a class of shareholders as third party beneficiaries. However, there are questions that could be raised with respect to the right of target to act “on behalf of the shareholders” in enforcing those rights.

Although these provisions do not use the word “agent”, it is hard to see what other theory would permit suit to be brought “on behalf of” shareholders. But it is far from clear that target, without the consent of each shareholder, may simply appoint itself as the agent of the shareholders. Nor is it clear that the agency relationship, if established, could not be revoked at will by the shareholders or by any shareholder as to itself, or, if the appointment of target as agent were deemed valid, that the shareholders would not have some right to control the enforcement by target of the third party beneficiary rights. Finally, if target is acting as agent in seeking damages, is it then obligated to distribute any damages collected from buyer to its shareholders, or at least ask shareholders if they want it?

In short, although it is clear that the parties can agree that target can name its shareholders as third party beneficiaries of buyer’s promises, it is not clear that target can then irrevocably appoint itself agent of the shareholders for purposes of controlling the enforcement of the shareholders’ third party beneficiary rights. While it seems unlikely that a court would permit the third party beneficiary language to remain in effect if it invalidated the language authorizing solely target to pursue any claims, a shareholder plaintiff may well be prepared to litigate the question. Thus a buyer agreeing to such a provision may be running the risk of becoming embroiled in uncertainty as to who has the power to bring suit or settle any dispute regarding buyer’s failure to close. This uncertainty could, among other things, discourage buyer and target from agreeing to settle by having the acquisition proceed at a lower price, as has occurred in a number of situations.

An additional question one could ask about these “agency” provisions is precisely which set of shareholders enjoys third party beneficiary status. This was an issue in Con Edison, with target taking the position that it represented shareholders as of the date of any judgment, and a shareholder plaintiff taking the position that the claims against Con Edison properly belonged to shareholders as of the date of the breach, arguing that such claims were not transferred with the transfer of shares. The court in Con Edison did not resolve this, but it is not a trivial question.

If one assumes that the damages will be deemed to have occurred at the time of breach, then the claims would presumably belong to the shareholders as to the date of breach, as the lower court had decided in Con Edison. As these shareholders will inevitably be different from the shareholders existing as of the date of judgment, target would have duties to both current and former shareholders with potentially differing interests, unless the litigation claim is deemed transferred with the shares. This possibility would make it difficult for a target board to decide on its settlement strategy.
III. Defining Damages

A. General

Remedies for contract claims are meant to put the contracting parties into the same position they would have been in if the contract had been fully performed. The anti-Con Edison remedies language is trying to solve the very basic problem that the shareholders are not parties to a merger agreement (and are expressly stated not to be third party beneficiaries), and thus do not suffer contractual damages. The court’s refusal in Con Edison to recognize contract damages based on shareholder losses was based on specific language in the merger agreement.14 However, even if there is express language defining losses to target to include losses to its shareholders, it is far from clear under common law principles of contracts that this would be valid, as it is well established that the object of damages is to compensate parties to the contract. Measuring target’s damages by reference to losses suffered by third parties is not something that in other situations would generally be thought enforceable.

There is, however, an argument that damages for a breach of a merger agreement should be different. The merger agreement is, after all, an instrument of corporate law as well as contract law, and corporate law permits target to enter into a merger agreement for the benefit of its shareholders (and to spend money, agree to pre-closing business covenants and agree to pay a breakup fee in certain circumstances), provided that completion of the merger itself is subject to shareholder approval. The benefits of the agreement flow primarily and directly to shareholders of target, so it is natural that the primary damages suffered upon a breach by buyer would be the damages suffered by the shareholders. It is possible that a court, in recognition of the role of mergers under corporate law, would permit parties to a merger agreement to agree that losses suffered by target shareholders should be taken into account in determining damages to target, without creating a potential collective action problem by naming the shareholders as third party beneficiaries. This, presumably, is the reasoning behind the “damages definition” language that has been included in some recent merger agreements, but as noted above, none of this language has yet been tested in litigation. Although precise language varies, there are two general approaches to drafting damages provisions focusing on “lost shareholder premium” and provisions referring more generally to shareholders’ loss of the “benefit of the bargain.”

B. Lost Shareholder Premium

Provisions defining damages to include “lost shareholder premium” may be both over-inclusive and under-inclusive as a measure of contract damages. Let us assume for a moment that a court in calculating damages suffered by target would, given the right contractual language, permit the inclusion of damages suffered by target’s shareholders, and examine what the appropriate measure of “lost shareholder premium” might be in two scenarios.

Let us start with a scenario where target has run a full auction process and selected the highest bidder, who agrees to pay $50 per share for a company with 100 million shares outstanding. The next highest bid was $49 per share. The pre-announcement market price was $45 per share. Buyer refuses to close as result of an alleged material adverse change. A court ultimately determines that, although there was an adverse event, it was not (quite) a MAC.
effect of the near-MAC event reduces the “inherent value” of target by 20% or more (which is quite possible given the common exclusions of industry-wide events from MAC definitions). The stock, post-breach, is trading at $40.

In this scenario, probably the most common scenario in which buyer would be found to have breached, target would presumably want to collect more than the $5 per share premium, since shareholders have been arguably damaged by at least $10 per share. In this respect, such shareholder premium language appears to be under-inclusive as a measure of damages.

Let us alter the scenario by assuming that no MAC or near MAC occurs, but that buyer willfully breaches the contract by not closing due to its failure to obtain financing (assuming there was no financing condition in the merger agreement) but that the second bidder is still willing to pay $49 (or is now willing to pay $47). Whether or not the target accepts the $49 (or $47) offer, it would seem that damages measured by the $5 per share original transaction premium would be excessive.

This example illustrates the equitable reason why the “lost” shareholder premium should not simply be the difference between the offer price and the pre-announcement price – the shareholders continue to control target and would as a group be entitled to the value of any control premium that may be paid in a subsequent transaction. What is “lost” in terms of shareholder premium, where there is no MAC or other deterioration of target business, might be better measured as the difference between the contract price and what someone else would be willing to pay. This, in turn, leads to the question of whether target would have a duty to mitigate damages on behalf of the shareholders, or whether it is free to announce that it is no longer interested in seeking a sale of itself?

C. “Benefit of the Bargain” for Shareholders

Since “shareholder premium” can be inadequate or excessive, as indicated above, another approach to defining damages is by referencing more generally the benefit of the bargain lost by the target’s shareholders “to the extent proven” and specifically taking into account “other combination opportunities.” While this is clearly preferable to language only referencing the premium, it too leaves many questions. For example, in measuring damages, how relevant are the other bids that had been made to acquire target? Does target have a duty to mitigate and see if such bidders are still willing to buy? Should a new acquiror really receive as an asset the ability to pursue the lawsuit against the initial bidder, even though that breach created its acquisition opportunity? Is the initial post-breach stock price the only relevant, or is it relevant where the stock price settles a few days later, or as it becomes clearer whether other bidders will come forward? Since the existence and potential recovery or settlement of this very lawsuit will affect the post-breach market price, how does a court take that into account? Should the court look to the target’s intrinsic value? And, in a stock-for-stock transaction with a fixed exchange ratio, as of what date should the acquiror’s stock be valued?

Thus, while general “benefit of the bargain to shareholders” language seems preferable to “premium” language if there is to be any language attempting to define target damages by reference to shareholder damages, it too leaves many open questions, and, as noted earlier, may not be valid.
IV. Specific Performance.

In short, as Vice Chancellor Strine concluded in *IBP v. Tyson*, “[a] damages award can, of course, be shaped; it will simply lack any pretense to precision”.¹⁹

This lack of precision was one of the factors that led Vice Chancellor Strine to order specific performance in *Tyson*. Requiring buyer to consummate the merger agreement, as the court did in *Tyson*, provides a legally simple solution to all of these complications – a solution that Vice Chancellor Strine concluded should be as available to targets as it has been in the past to buyers.

So why do some targets believe they need anti-*Con Edison* language? Targets presumably value the option of being able to demand damages from a breaching buyer (assuming those damages include some element of damages to shareholders) because it strengthens target’s bargaining hand in any settlement negotiations, provides an alternative to spending months in litigation limbo while a judge decides whether target should be sold (time spent in this uncertain state will certainly not be good for business) and provides a “backup” remedy in the event that specific performance (which, after all, is a fairly drastic remedy in a merger context) is not available. Note that the court in *Tyson* gave significant weight to factors other than the imprecision of a damages remedy in evaluating the availability of specific performance – weighing the possible effect of the forced merger on stockholders, management and other constituencies of the merger parties, whether the merger agreement represented a unique opportunity, and whether the merger “still [made] strategic sense”.²¹

Notably, the *Tyson* merger agreement did not expressly authorize specific performance, but most recent public merger agreements (other than merger agreements in private equity transactions) do.

The scarier the potential damages may be to buyer (both in terms of size and collectibility), the more useful they will be to target. However, the anti-*Con Edison* remedies language does not provide a costless option. In addition to the difficulties described above, the language itself could undercut the entitlement of target to a specific performance remedy, because the language suggests that target has an adequate remedy at law. This factor may be especially important where the merger agreement does not expressly provide that specific performance is available as a remedy to target. One possible way to finesse this problem is to provide that the anti-*Con Edison* language will only be effective if specific performance is not available as a remedy.²²

V. Conclusion.

The anti-*Con Edison* remedies provisions are designed to reconcile contract law with the corporate law construct represented by the merger agreement. Using either the “agency” approach or the “damages definition” approach however may entail additional risks both to buyer and target – particularly the risk that target shareholders are able to claim a directly enforceable third party beneficiary right, the risk that target ends up with conflicting sets of duties to two sets of shareholders, and the risk that the specific performance remedy is undermined. There is also the risk to target that the provision is simply unenforceable. Until a court has blessed one approach or the other (or both), it remains to be seen whether contractual provisions agreed between parties are sufficient to accomplish this reconciliation. It is safe to say that none of these provisions will provide certainty to the parties.

2. The Court in Con Edison concluded that lost shareholder premium was not available as damages because the merger agreement limited any damages in excess of expense reimbursement to damages "suffered by the party, not by non-parties, and therefore, not by NU's shareholders." Id. at 531. Given this reading, it is difficult to see what damages target itself would suffer in the event a merger agreement were breached, other than out-of-pocket expenses.

3. Some merger agreements (including the agreement in Con Edison) have exceptions to the "no third party beneficiary" language that authorize post-closing, individual shareholders to sue the surviving company and/or parent for payment of the merger consideration. Such provisions are generally unnecessary, because former shareholders should have such a right under the merger provisions of applicable corporate law.

4. The merger agreement provided that "This Agreement is not intended to, and does not, confer upon any Person, other than Parent, the Company [and] Merger Sub . . . any rights or remedies hereunder, other than the right of the Company, on behalf of its stockholders, to pursue damages in the event of Parent's or Merger Sub's breach of this agreement which is (i) material and (ii) willful or knowing . . . " Agreement and Plan of Merger, dated as of February 6, 2007, among Aquila, Inc., Great Plains Energy Incorporated, Gregory Acquisition Corp., and Black Hills Corporation.

5. Upon "termination of the Agreement..., this Agreement shall forthwith become void and there shall be no liability on the part of any party hereto...; provided, however, that nothing herein shall relieve any party from liability for any willful and material breach hereof, which, in the case of Parent, shall include any liability to the Company for lost shareholder premium." Agreement and Plan of Merger, dated as of November 5, 2006, by and among Abbott Laboratories, Parthenon Acquisition Corp. (f/k/a S&G Nutrionals, Inc.) and Kos Pharmaceuticals, Inc.

6. Parties shall not "be relieved or released from any liabilities or damages (which the parties acknowledge and agree shall not be limited to re-imbursement of expenses or out of pocket costs, and may include to the extent proven the benefit of the bargain lost by a party's shareholders (taking into consideration relevant matters, including other combination opportunities and the time value of money) which shall be deemed in such event to be damages of such party) arising out of a willful breach of any provision of this Agreement." Agreement and Plan of Merger dated as of October 8, 2005 by and between Mercantile Bankshares Corporation and The PNC Financial Services Group, Inc.

7. Freeport-McMoran/Phelps Dodge (November 18, 2006) (disclaiming third party beneficiary rights other than "the right of the Company's shareholders to . . . recover, solely through an action brought by the Company, damages from Parent in the event of a willful or intentional breach of this Agreement by Parent, in which event the damages recoverable by the Company for itself and on behalf of its shareholders (without duplication) shall be determined by reference to the total amount that would have been recoverable by holders of the Company Stock if all such holders brought an action against Parent and were recognized as intended third party beneficiaries hereunder.

8. While this article for simplicity assumes a one-step merger agreement, the situation is more complicated for a two-step merger agreement. Tender offers involve a direct offer (typically by a wholly owned subsidiary of buyer) to each shareholder to purchase its shares if certain conditions are met; and if it is possible that each shareholder might be permitted to sue the offeror for any failure to live up to that promise. Although the typical offer to purchase language attempts to avoid such contractual claims, it cannot eliminate possible disclosure related claims. The existence of potential direct claims by shareholders could complicate the use of anti-Con Edison language and any ability of bidder and target to settle a lawsuit following an alleged breach by bidder of its obligation to purchase shares tendered in the tender offer.

9. If shareholders did have a contractual right to direct their agent, query how the shareholders would coordinate in giving such direction absent the well-established corporate voting mechanism, which regulates the corporate duties of target to its shareholders, not the contractual duties between target and its shareholders.

10. The Guidant/Johnson & Johnson situation provides a recent example.

11. The court in Con Edison noted that while they did not need to decide which set of shareholders should enjoy third party beneficiary status, "each claim is arguable". Con Edison, 426 F.3d at 529, note 2. The lower court decided that the plaintiff representing shareholders as of the date of the breach had the better of the argument. Id. at 526.


14. "[T]hat article reflects the parties' intent (i) to limit the damages resulting from a breach of the Agreement to those owed to each other;" Con Edison, 426 F.3d at 531.

15. Many MAC definitions exclude changes in law and events affecting the economy or the relevant industry generally. So intrinsic value can fall very substantially without constituting a MAC.

16. In the recent Southern District of New York case of Johnson & Johnson v. Guidant Corp., the court found the use of the term "willful" to be ambiguous – it could either mean "with malice," or simply "intentional." Slip Copy, 2007 WL 2456625 (S.D.N.Y.) at 7. In at least one recent transaction, "intentional" or "willful" breaches have been defined to exclude breaches occurring as a result of a good faith action – for example, the good faith declaration of a MAC by buyer, even if the court eventually finds that no MAC occurred. Agreement and Plan of Merger dated as of May 1, 2007 by and between The BISYS Group, Inc., Citibank N.A. and Buckeye Acquisition Sub, Inc.
Determining what someone else would be willing to pay for target would result in an interesting factual inquiry. If a target in this second scenario is marketing itself to other potential buyers or issuing equity, it is unlikely to argue too strenuously that buyer was significantly overpaying.

Also, as an empirical matter, while common wisdom in the past always held that a failed deal will drive down the market price of target, this was no doubt due at least in part to the fact that no one was paying the control premium in ordinary trading once the prospect of a merger went away — not necessarily as a result of any permanent damage to the intrinsic value of the shares.

The Wall Street Journal reported earlier this year (prior to the downturn in private equity deals) that this phenomena seemed to have been reversed in recent months, with target share prices actually rising in a number of cases after announcement of a failed deal. If this trend continued, it may be another reason for targets, as well as buyers, to be wary of measuring damages based on market prices. Jason Singer, ‘Broken Deals’ Become Rockets — What Happens When a Merger Falls Apart? The Stock May Take Off From the Ruins, Wall St. J., March 7, 2007, at C1.

18 See Note 6 above for sample language.
19 789 A.2d 14 (Del. Ch.) at 83.
20 While Vice Chancellor Strine decided Tyson in only 10 weeks from the day the buyer announced it would not close, not all courts may move that quickly.
21 Id. at 79, 87.
22 See, e.g., Agreement and Plan of Merger, dated as of February 4, 2007, by and between State Street Corporation and Investors Financial Services Corp.
Calculating whether a matter has been approved by shareholders and determining whether a quorum exists can generate substantial confusion. Depending on the matter before the shareholder, a shareholder may (i) vote for, (ii) vote against, (iii) abstain from voting or (iv) withhold its vote with regard to the matter being voted on. Shares are frequently held through brokers, creating the possibility of broker discretionary votes and broker non-votes and introduces an added layer of complexity. Yet these rules are fundamental to understanding current discussions about proxy access and shareholder proposals.

Accurately determining whether a quorum exists and tabulating votes are governed by provisions of federal securities law, state corporate law, the company’s certificate of incorporation and bylaws and stock exchange regulations. This is a practitioner’s guide to the following questions:

- What are the quorum and shareholder approval requirements?
- What are broker non-votes and under what circumstances can brokers vote even though the beneficial owner has not provided voting instructions (i.e., discretionary broker voting)?
- What should be included in the numerator and denominator when calculating quorum and vote requirement?

This note assumes that (1) the company is incorporated under the laws of Delaware, (2) the company’s certificate of incorporation and bylaws do not modify the “default” quorum and shareholder approval requirements under the Delaware General Corporation Law (the “DGCL”), (3) the company has a class of securities registered pursuant to § 12 of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) and (4) the company’s stock is listed on the New York Stock Exchange (the “NYSE”) or quoted on the Nasdaq Stock Market (“Nasdaq”).

A summary chart describing the tabulation of votes under the various shareholder approval standards described in this note is attached at Annex A.

**Quorum Requirements and Shareholder Approval Thresholds**

**Quorum Requirement.** The “quorum” is the number of shares that must be present, in person or by proxy, in order for business to be transacted at the meeting.

Section 216(1) of the DGCL states that unless otherwise provided by the certificate of incorporation or bylaws, a quorum for a shareholders meeting consists of “a majority of the shares entitled to vote, present in person or by proxy. . . .” Section 216 further provides that neither the certificate of incorporation nor the bylaws may set a quorum requirement of “less than one-third of the shares entitled to vote at the meeting, except that, where a separate vote by class or series or classes or series is required, a quorum shall consist of no less than one-third of the shares of such class or series or classes or series.”
Section 310.00 of the NYSE Listed Company Manual generally requires companies to set the quorum at a majority of outstanding shares for any meeting of holders of common stock.

Nasdaq Marketplace Rule 4350(f) states that “each issuer shall provide for a quorum as specified in its bylaws for any meeting of the holders of common stock; provided, however, that in no case shall such quorum be less than 33¹/₃% of the outstanding shares of the company’s common voting stock.”

Shareholder Approval Thresholds. There are four different statutory thresholds for shareholder approval pursuant to the DGCL:

- Election of directors (DGCL § 216(3)) – Unless a certificate of incorporation or the bylaws provide otherwise, a plurality of the votes of the shares present in person or by proxy at the meeting and entitled to vote on the election of directors. (Effective August 2006, § 216 was amended to allow the election of directors by a majority vote).

- Removal of directors (DGCL §141(k)) – A majority of the shares entitled to vote at an election of directors.

- Charter amendment (DGCL § 242(b)(1)); merger or consolidation (DGCL § 251(c)); transfer of all or substantially all of the assets (DGCL § 271(a)); dissolution (DGCL § 275(b)) – A majority of the outstanding stock entitled to vote on the matter.

- All other matters (DGCL § 216(2)) – A majority of shares present in person or by proxy at a meeting and entitled to vote on the matter.

Each of these statutory thresholds may be modified by the certificate of incorporation. The statutory thresholds set forth in §§ 216(3) and 216(2) may also be modified by the bylaws. In July 2006, § 216 was amended to provide that a bylaw amendment adopted by stockholders that specifies the votes necessary for the election of directors may not be further amended or repealed by the board of directors.

The rules of the NYSE and Nasdaq require that certain specified matters be approved by shareholders. In those instances, different voting thresholds may be applicable. Section 312.07 of the Listed Company Manual states that, “where shareholder approval is prerequisite to the listing of any additional or new securities of a listed company, the minimum vote which will constitute shareholder approval for listing purposes is defined as approval by a majority of votes cast on a proposal in a proxy bearing on the particular matter, provided that the total vote cast on the proposal represents over 50% in interest of all securities entitled to vote on the proposal.” Nasdaq Marketplace Rule 4350(i)(6) states that, “[w]here shareholder approval is required, the minimum vote which will constitute shareholder approval shall be a majority of the total votes cast on the proposal.”

Certain matters may be proposed for approval by shareholders for tax purposes. In those circumstances, the thresholds will be determined by the applicable tax rules.

Discretionary Broker Voting and Broker Non-Votes

Brokers can have a significant impact on the outcome of shareholder voting because the predominant form of share ownership in the United States is indirect ownership through brokers.

Under Delaware law (and the corporate law of most other states), only the legal owners of
stock on the record date are entitled to vote shares or grant proxies in connection with a shareholder meeting. In the United States, depositaries such as DTC usually hold legal title to securities on behalf of the banks and brokers that are its participants. However, depositaries are merely vehicles used to facilitate the administrative burden of securities transfers and do not wield any voting power. Therefore, the depositaries execute an omnibus proxy in favor of their participants (the banks and brokers) shortly after a company’s voting record date to provide the participants with the power to vote shares.

Subject to certain exceptions, stock exchange regulations generally prohibit member organizations (i.e., brokers and banks) from voting shares unless they beneficially own such shares. However, NYSE Rule 452 gives brokers who are members of the NYSE “discretionary” authority to vote such shares if two conditions are met: (i) the subject matter of the vote has been deemed “routine” by the NYSE and (ii) the broker has not received voting instructions from the beneficial owner by the tenth day preceding the meeting date. The NYSE classifies management proposals as either routine or non-routine.

Routine matters include any matter that is not non-routine. NYSE Rule 452.11 defines matters as non-routine if they fall into one of 18 categories such as a proxy contest, mergers and consolidations, the authorization or issuance of stock or the approval of stock plans. The NYSE always considers shareholder proposals to be non-routine. A “broker non-vote” occurs when a broker has not received voting instructions from its client and is barred from exercising its discretionary authority to vote the shares because the proposal is non-routine. Broker non-votes cannot occur on a routine proposal. Where a single proxy form contains both routine and non-routine proposals, the NYSE permits brokers to vote in the absence of instructions if they physically cross out those portions where they have no voting discretion (the crossed out portions are the broker non-votes).

Although the NASD does not have a rule for Nasdaq brokers that parallels this rule, the NYSE rule applies to member firms (i.e., the brokers), not to listed companies, and therefore its reach extends to Nasdaq-listed companies as well as to NYSE-listed companies.

Tabulation Issues

There are two issues that arise in the context of any shareholder meeting: (i) whether the quorum requirement is met and (ii) whether the proposal received enough “For” votes to pass. The manner in which abstentions and broker non-votes should be treated may be unclear.

Abstentions. An “abstention” represents a shareholder’s affirmative choice to decline to vote on a proposal other than the election of directors. Under Delaware law, abstentions are considered “present” and “entitled to vote”; the shareholder has simply affirmatively determined not to vote on the particular matter. Therefore, they are included in the quorum calculations. Where passage requires a majority of the shares “entitled to vote” at the meeting or “present and entitled to vote on the subject matter” for passage, abstentions will have the effect of votes cast against the proposal. However, where passage requires the affirmative votes of a majority of the “votes cast,” it is not entirely clear under Delaware law whether an abstention should be counted as a vote cast or not.
Broker Non-Votes. Broker non-votes are not considered “votes cast” and therefore have no impact when a “majority of votes cast” is required. However, the shares underlying broker non-votes are considered to be “present” at the meeting because the broker has properly executed and returned the proxy. Are broker non-vote shares considered as “entitled to vote” for Delaware law purposes? Unlike abstentions, broker non-vote shares seem not to be “entitled to vote on the subject matter” and therefore should be excluded from any calculations based on that standard (i.e. they are not considered to be votes against the matter; they are simply ignored when determining whether a matter has been approved). In Berlin v. Emerald Partners, the Delaware Supreme Court examined whether the quorum and voting approval requirements set forth in a corporate charter had been satisfied. The court held that shares of stock that were represented at a stockholder meeting by “limited proxies” which did not empower the proxy holder to vote on the proposal were present at the meeting for quorum purposes but did not qualify as “voting power present” at the meeting for approval purposes. Although the court was construing a provision in a certificate of incorporation and not § 216, the generally accepted position among practitioners is that, under Delaware law, broker non-votes are not “entitled to vote.”

NYSE and Nasdaq. It should be noted that under the NYSE rule, broker non-votes are considered “entitled to vote” and that under both NYSE and Nasdaq rules, abstentions are treated as votes cast. As a result of shareholder approval standards, a matter may have been approved under state corporate law but rejected under the rules of NYSE or Nasdaq.

No Show/No Proxy. Shares of any shareholder who fails to appear at the meeting in person or by proxy, including by reason of a proxy not having been properly completed, are not present for purposes of the quorum. Such shares will not have any effect on a vote if the approval threshold is based upon the majority of the votes cast or votes present and entitled to vote. However, where a matter is required to be approved by a majority of the shares entitled to vote, the absence of these votes will have the effect of counting as “no” votes.

Disclosure Requirements

The proxy rules adopted under the Exchange Act impose certain disclosure requirements regarding voting. Item 21(a) of Schedule 14A states that a company must “as to each matter which is to be submitted to a vote of security holders,” disclose “the vote required for approval or election, other than for the approval of auditors.” Although Item 21 does not require disclosure of applicable quorum requirements, many companies include such disclosure nonetheless. Item 21(b) of Schedule 14A requires disclosure of “the method by which votes will be counted, including the treatment and effect of abstentions and broker non-votes under applicable state law as well as registrant charter and by-law provisions.”

When a proposal requires approval under NYSE or Nasdaq rules, the vote required for such approval under their rules should be disclosed as well as the vote required by state law or the company’s certificate of incorporation or bylaws.

* * *

We are in an environment of increased focus on shareholder involvement in corporate decisions. This theme is playing out in many different
contexts that derive from different sources, such as for example, corporate majority vote policies for directors, an SEC proposal to eliminate broker discretionary voting in director elections, say-on-pay shareholder and legislative proposals, and exchange regulations and tax requirements concerning shareholder approval of executive compensation arrangements. Especially in light of the different sources of these requirements, particular emphasis on understanding the subtleties of the vote tabulation rules and on precision in proxy disclosure and application of those rules is imperative.

1 With two exceptions (California and Missouri), a withheld vote is not a category recognized under state law but is a type of vote derived from the Securities and Exchange Commission (“SEC”) proxy rules. Lang, “The Director Election Process: Alternatives and Analysis,” in Insights: The Corporate and Securities Law Advisor (September, 2004).

2 See, e.g., In re Giant Portland Cement Company, 21 A.2d 697 (Del. Ch. 1941) (“The right to vote shares of corporate stock having voting powers has always been incident to legal ownership”).


4 See, e.g., Rules 450 and 452 of the NYSE.

5 In June 2006, the NYSE proposed an amendment of NYSE Rule 452 and the corresponding NYSE Listed Company Manual Section 402.08 to eliminate broker discretionary voting for the election of directors by adding the election of directors to the list of non-routine matters. The proposed amendment, if finalized, will be applicable to proxy voting for shareholder meetings held on or after January 1, 2008, except to the extent that a meeting was originally scheduled to be held in 2007 but was adjourned to 2008.

6 Over the years, the NYSE has provided informal guidance to companies and brokers as to whether particular matters should be considered routine or non-routine. Many companies voluntarily consult with the NYSE when unsure about whether a particular matter will be deemed routine.

7 For directors, the choice is limited to “For” or “Withhold.”

8 See Licht v. Storage Technology Corp., 2005 WL 1252355 (Del. Ch. May 6, 2005) at footnote 28 (comparing conflicting cases and a treatise on the question). Other states have squarely addressed the issue. See N.Y. Business Corporation Law at § 614(b) stating “Except as otherwise provided in the certificate of incorporation or the specific provision of a by-law adopted by the shareholders, an abstention shall not constitute a vote cast.”
Annex A

The following chart illustrates how “yes,” “no,” abstentions, broker non-votes and no shows are calculated when determining whether a matter has been approved by shareholders:

**Delaware - Quorum test (DGCL § 216(1))** - A majority of the shares entitled to vote, present in person or by proxy, shall constitute a quorum at the meeting.

<table>
<thead>
<tr>
<th>Yes Votes</th>
<th>No Votes</th>
<th>Abstentions</th>
<th>Broker Non-Votes</th>
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**Delaware - Election of directors (DGCL § 216(3))** – Unless a certificate of incorporation or a by-law provides otherwise, a plurality of the votes of the shares present in person or by proxy at the meeting and entitled to vote on the election of directors.

<table>
<thead>
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<th>Yes Votes</th>
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<td>Denominator</td>
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**Delaware - Removal of directors (DGCL §141(k))** - An affirmative vote of a majority of the shares entitled to vote at an election of directors.

<table>
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<tr>
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<th>No Votes</th>
<th>Abstentions</th>
<th>Broker Non-Votes</th>
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**Delaware - Charter amendment (DGCL § 242(b)(1)); merger or consolidation (DGCL § 251(c)); transfer of all or substantially all of the assets (DGCL § 271(a)); dissolution (DGCL § 275(b))** - An affirmative vote of a majority of outstanding shares entitled to vote thereon.

<table>
<thead>
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<th>Yes Votes</th>
<th>No Votes</th>
<th>Abstentions</th>
<th>Broker Non-Votes</th>
<th>No Shows</th>
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</table>
Delaware - All other matters (DGCL § 216(2)) – An affirmative vote of a majority of shares, present in person or by proxy at a meeting and entitled to vote on the matter.

<table>
<thead>
<tr>
<th>Yes Votes</th>
<th>No Votes</th>
<th>Abstentions</th>
<th>Broker Non-Votes</th>
<th>No Shows (Not Present/No Proxy)</th>
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NYSE § 312.07 – Prong 1: A majority of votes cast on a proposal in a proxy bearing on the particular matter.

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<thead>
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NYSE § 312.07 – Prong 2: Total vote cast on the proposal represents over 50% in interest of all securities entitled to vote on the proposal.

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<th>No Votes</th>
<th>Abstentions</th>
<th>Broker Non-Votes</th>
<th>No Shows (Not Present/No Proxy)</th>
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NASDAQ Rule 4350(i)(6) – Minimum vote requirement: A majority of the total votes cast on the proposal.

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<th>Yes Votes</th>
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<th>Abstentions</th>
<th>Broker Non-Votes</th>
<th>No Shows (Not Present/No Proxy)</th>
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New Delaware Executive Compensation Case Law:
Emerging Standards for Compensation Decision-Making

by Katie Sykes and Anna Gercas

During the first few months of 2007, a series of important executive compensation decisions emerged from the Delaware courts.1 In this article, we discuss the increasing significance of state corporate law jurisprudence on executive pay – a topic that is more visible and controversial than ever. In light of the emerging case law, we suggest some practical proposals that boards and compensation committees may find useful to consider in structuring executive compensation programs and decision-making processes.2

As we have noted in earlier editions of the Mergers & Acquisitions and Corporate Governance Report,3 shareholder challenges to executive pay under Delaware law have traditionally been an uphill battle. It is well settled doctrine that compensation decisions made in good faith by an informed, independent board of directors are matters of business judgment that the courts will not second-guess. It is therefore noteworthy that the Delaware Chancery Court permitted shareholder claims to advance beyond the motion to dismiss stage in several of these new cases. In one of the cases, Tyson, the plaintiffs also succeeded in defeating a defense motion for summary judgment, and in another, Jerney, a director and officer of the company was even found liable on the merits and ordered to pay significant damages.4

In our discussion of the 2006 Viacom decision, we speculated as to whether that case indicated a shift away from a deferential approach to directors’ executive pay decisions. The new cases can be read as further evidence of such a change. They also indicate that state corporate law is increasingly significant as the basis for shareholder remedies in the executive pay area. Admittedly, the recent spate of executive compensation cases could be seen as a coincidental run of especially bad facts rather than a trend towards a more aggressive judicial approach to pay decisions. The facts in some of the cases are striking. In Sample, according to plaintiffs’ allegations, the company’s top three executives adopted an equity incentive plan that increased the company’s outstanding shares by almost half and promptly granted the entire share increase to themselves as equity awards. In Jerney, shareholders successfully fought two proxy battles against the existing management team and undertook a reorganization in which the unprofitable part of the company, together with the unwanted executives, would be jettisoned, whereupon the board approved a deal bonus to those same executives worth $55 million, or approximately 2.2% of the deal value.

Nevertheless, the new case law comes at a time when executive compensation – not only the amounts involved but also the decision process and corporate culture behind the numbers – is subject to increased scrutiny and interrogation on a number of fronts. In this context, the new case law offers guidance that should be considered even by companies and boards whose compensation practices, in contrast to those challenged in the cases, are responsible and well designed. These include the following:

• The increasing importance of careful and ongoing attention to state director independence requirements and whether they are met in the context of specific decisions. Ensuring that compensation decisions are entitled to business judgment...
protection under state law may involve more subtle and sustained analysis than determining whether directors are independent under other legal and listing requirements (such as Section 162(m) of the Internal Revenue Code, Rule 16b-3 under the Securities Exchange Act, and stock exchange director independence rules);

- The need to for compensation committees who make use of outside compensation consultants to select their own consultants and to make use of the consultants’ advice judiciously, with attention to the ways in which the process could be, or be perceived as, tainted by management influence;

- The complex issues that can be raised by valuing compensation in an era when compensation products are increasingly complex and sophisticated; and

- The possibility that even an executive or director who has not participated in any wrongdoing or violated any legal obligations could be forced to repay compensation that was improperly paid by the company, on a theory of unjust enrichment.

**The New Prominence of State Law in Compensation Disputes**

A notable feature of recent executive pay litigation is the prominence of state law, rather than federal securities law, as the basis for shareholder claims. Even in cases initiated in federal district court and involving allegations of securities law violations, state law issues can play a central role.\(^5\)

This trend might be surprising given the traditional difficulties plaintiffs have faced in obtaining relief under corporate law in compensation matters. However, in the context of the current executive pay scandals there are obvious practical reasons why state law may be more attractive to plaintiffs than the federal securities laws. Unlike the accounting irregularities at the center of major securities fraud cases in the past few years, stock option and other compensation abuses seldom involve amounts of money that are very material on a company-wide basis, and companies that have been the target of option backdating allegations or have engaged in other controversial compensation practices often have not seen the significant declines in their stock prices that would form the basis of recovery in a securities fraud class action.

The most prominent recent pay controversies involve stock option granting practices such as backdating and “spring-loading” (timing option grants just before the release of positive news about the company to take advantage of an immediate increase in the share price). Such cases, in particular those that involve “spring-loading,” are often unpromising as the basis for a shareholder claim under federal securities law. The share prices of many companies implicated in option investigations either have not declined dramatically or have bounced back after a temporary decline – indeed, some investors have seen a price drop following backdating news as a buying opportunity, on the theory that the price decline might not reflect a fundamental financial weakness at the company.\(^6\) And in cases of opportunistic timing of option grants to coordinate with the release of news to the public and benefit executives, the basis for any claim or enforcement action under federal securities law is unclear.\(^7\) Similarly, where non-option compensation has been criticized, such as at The Home Depot and Pfizer, shareholders have complained only that executives were richly rewarded despite mediocre stock performance, and not that stock prices declined sharply or were artificially inflated through false or incomplete disclosure.\(^8\)
When shareholders challenge executive compensation, typically their argument is that wealth was extracted from the company to enrich its executives in excess of what would have been justified by the company’s compensation goals. This type of claim does not fit well into the framework of a typical securities fraud case, where the shareholders’ complaint is that they were misled into buying stock at an inflated price and impoverished when the stock price declined. In many ways, state corporate law, which governs the conduct of directors and officers as agents and fiduciaries of the shareholders and the limits of their decision-making authority, is the more apt framework for resolving disputes about compensation.9

**Director Independence**

Under Delaware law, compensation decisions made by an independent compensation committee or board are difficult to challenge successfully. Delaware law “presumes that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company,” presumptions that can be rebutted “if the plaintiff shows that the directors breached their fiduciary duty of care or of loyalty or acted in bad faith.”10 Unless the business judgment presumptions are rebutted, the plaintiff can only prevail if the transaction constitutes waste.11 Waste is a very high standard; the plaintiff “must overcome the general presumption of good faith by showing that the board’s decision was so egregious or irrational that it could not have been based on a valid assessment of the corporation’s best interests.”12

However, the protection of the business judgment rule is lost if compensation is not approved by a majority of disinterested and independent directors. The burden of proof then shifts to the defendant directors to establish that the transaction was “entirely fair” to the corporation. To meet this test the defendants must show that the transaction involved both “fair dealing” and a “fair price” to the corporation.13 The recent Delaware cases reaffirm that entire fairness review applies to compensation decisions approved by interested directors; indeed, in *Jerney* the defendant conceded that he bore the burden of proving that the challenged transaction was entirely fair.14

A similar analysis applies to the issuance of stock options. Under a line of Delaware cases dating back to the emergence of options after the Second World War,15 grants of stock options are voidable unless the corporation can be expected to receive consideration in return for the options that bears “some reasonable relation to the value of the right given.”16 Section 157(b) of the Delaware General Corporation Law (“DGCL”) expressly provides that the judgment of the directors as to the sufficiency of consideration for options or “[i]n the absence of actual fraud in the transaction, the judgment of the directors as to the consideration for the issuance of such rights or options and the sufficiency thereof shall be conclusive.” Delaware courts have interpreted this section to bar any claim for relief unless the grant of options constitutes waste – meaning in this context that “no person of ordinary, sound business judgment would say that the consideration received for the options was a fair exchange for the options granted.”17 However, if it is alleged that the directors were interested or shareholder ratification was improperly obtained, compensatory option plans and grants are exposed to more stringent review and are valid only if it is established that the corporation can
reasonably expect to obtain a benefit proportional to the value of the benefit given to the option recipients.\(^{18}\)

In addition to being the foundation of the business judgment rule, director independence is a key factor in other contexts, including: ratification of interested transactions under Section 144 of the DGCL (which requires approval by a majority of disinterested directors in good faith with all the material facts having been disclosed), and the requirement that the plaintiff in a shareholder derivative action make a demand on the board (which is excused if the plaintiff pleads particularized facts creating a reasonable doubt that a majority of the board of directors is independent or that the challenged payments are not protected by the business judgment rule).

Companies and boards should bear in mind that directors who may qualify as independent for purposes of the relevant securities, tax and stock exchange rules may not be independent in the context of a particular transaction under Delaware law. Independence requirements under the Sarbanes-Oxley Act, NYSE and NASDAQ listing standards, Rule 16b-3 under the Securities Exchange Act of 1934 (“Exchange Act”) and Section 162(m) of the Internal Revenue Code (“Code”) are all based on the director’s status as an “outsider” with respect to the corporation.\(^{19}\) The rules generally focus on the director’s relationship with the company. For example, for purposes of Rule 16b-3 under the Exchange Act a “non-employee director” is a director who is not employed by and does not otherwise receive compensation from the corporation (except director fees or amounts under the disclosure threshold of $120,000 that applies to transactions with related parties). Taking a similar approach, the regulations under Section 162(m) of the Code define an “outside director” as someone who is not an employee or former officer of the corporation, or a former employee who is receiving compensation for past services, and does not receive remuneration from the corporation other than director fees. The NYSE listing standards adopt a broader perspective, requiring the board to determine affirmatively that the director has no “material relationship” with the company\(^{20}\) based on a consideration all relevant facts and circumstances, including persons and organizations with which the director has an affiliation. However, the ultimate question still concerns the relationship between the director and the company.\(^{21}\)

A significant practical consequence of this approach is that it is often possible to determine with reasonable confidence in advance, based on the director’s history (or lack thereof) in connection with the company, whether he or she meets the “outsider” test. Another is that a director’s ties to persons other than the corporation itself, such as an executive or a majority shareholder, will not necessarily be picked up by the independence screen; while such ties, depending on the circumstances, could affect a determination of independence under the NYSE listing standards, they are not relevant to whether a director is a “non-employee director” for Rule 16b-3 purposes or an “outside director” under Section 162(m).

Under Delaware law, by contrast, a director’s independence is assessed in the context of each decision the director makes. Independence cannot be determined “ex ante, before a conflict arises”\(^{22}\) but is examined in light of the particular transaction at issue. Depending on the facts, a director may have an interest in the transaction, in that he stands to gain financially from it in a way that other shareholders do not.\(^{23}\) The concept of independence under
Delaware law encompasses not only the director’s personal financial interest but also whether he is beholden to or under the influence of another person who is not neutral in the transaction but is motivated by personal interest or extraneous considerations.

Thus, factors that might not be relevant to whether the director is an “outsider” with respect to the company – but which, nevertheless, from a common sense point of view might compromise a director’s ability to act in the best interests of the corporation in a specific context – can be determinative in assessing director independence under Delaware law. Independence may be undermined by close business ties or even personal friendships with members of management in a situation where the director is charged with making a decision that affects the interests of those members of management. For example, in the recent stock option backdating scandal involving William McGuire, the CEO of UnitedHealth, the chair of the compensation committee that approved option grants to McGuire had significant ties to McGuire. The director managed assets for McGuire and accepted an investment of $500,000 from McGuire to help repurchase his money management firm. Because these ties were to McGuire and not to the corporation, they would not prevent the director from qualifying as independent for purposes of the securities and tax rules and listing standards, but a Delaware court might conclude the director was “beholden” to McGuire and therefore not independent in setting McGuire’s compensation. Another relevant factor is a context of past obligations or facts that suggest an expectation of a “quid pro quo” in the future. In Jerney, the compensation committee was not independent because two members, who were close personal friends of the CEO, “were in the process of negotiating with Panic about lucrative consulting deals to follow the completion of their board service” and one of them “had on many separate occasions directly requested stock options from [the CEO].”

Because director independence plays such a central role in the emerging state law jurisprudence on compensation, and in light of the growing trend of litigating such cases, it has become more important than ever for companies and boards to pay close attention to director independence standards under applicable state law (in addition to any other requirements that may apply) in connection with compensation-related and other decisions. Ideally, this should include careful analysis in the context of each significant decision of all the factors that could compromise the director’s neutrality or subject his decision to influence by someone with a personal interest in the outcome.

The Role of Consultants and Advisors

Many compensation committees of public companies solicit advice from outside compensation consultants in setting executive pay packages and making other important compensation decisions. The role that consultants play in compensation decisions has been attracting an increasing amount of scrutiny and criticism from shareholders, regulators and the media. In 2006, the N. Y. Times published an article examining conflicts of interest of purportedly independent executive compensation consultants whose affiliates also provide employee benefits and human resources services to the company (which can involve much larger fees than consulting work for the compensation committee). Since then, the SEC has adopted a new requirement that companies disclose in their proxy statements the role of...
compensation consultants in setting executive pay, the identity of the consultants and other details of their assignments. While the rules do not require disclosure of the consultant’s other work for the company, some companies have volunteered this information. The issue has also attracted the attention of legislators: in early, 2007, Representative Henry Waxman (D. Calif), Chair of the House Committee on Oversight and Government Reform, wrote to compensation consulting firms asking them to identify and describe consulting services provided to the top 250 U.S. companies, including whether the firm provided both executive compensation and other types of services and total annual revenues received for each service. The business press continues to focus the potential conflicts of interest inherent in companies’ engagement of consultants to both advise on executive compensation and manage retirement and other employee benefit plans. As a matter of good governance, some companies are now adopting procedures to minimize potential conflicts of interest, such as through frequent review of possible conflicts and employment of additional advisers with no company ties.

The relative influence and independence of compensation consultants can be an important factor in the Delaware legal analysis of executive compensation. In Jerney, the compensation committee’s reliance on a conflicted consultant contributed to the court’s conclusion that the business judgment presumptions were rebutted and that the entire fairness test could not be met. The compensation committee failed to select its own independent compensation consultant and instead retained a consultant recommended by management which had also, perhaps without the compensation committee’s knowledge, been advising management for several months. The executives who stood to gain from the proposed package also inserted themselves into the process and communicated with the consultant. The court found that the pay package proposed by management for itself was “predetermined” and that the consultant’s job “was to find a rationale to support it.” Nor could the defendant director argue “good faith reliance” under Section 141(e) of the DGCL on the advice of an expert, either of the consultant (whose report was inadequate and biased) or outside counsel (who were not qualified “to opine on the actual substantive fairness of the proposal”). In its focus on manipulation of the process by a purportedly independent consultant, the Jerney court echoed an earlier Delaware case, Official Comm. Of Unsecured Creditors of Integrated Health Servs. Inc. v. Elkins, in which allegations that an executive pressured the outside compensation consultant who made recommendations concerning his compensation package to the board were sufficient to take the board’s compensation outside the aegis of the business judgment rule and subject it to the heightened entire fairness review.

Sample, like Jerney, illustrates the potential pitfalls of relying on the company’s legal counsel for advice on the substantive appropriateness of a compensation package. The facts in that case, at least as alleged, were extreme. The compensation committee was advised by the company’s outside counsel, who had been engaged by the top three executives to advise them on their plan to cause the company to approve the issue a large number of additional shares and then grant the shares to the executives.

Although the facts alleged in Sample are certainly unusual, there are useful object lessons in these cases for all boards.
Independent expert advice remains important to responsible board and committee decision-making, especially on matters such as compensation practices, which present highly technical and multifaceted issues. Compensation committees should focus closely on their procedures for selecting consultants to ensure that they are untainted by the influence of management or other interested parties. As a matter of best practices, it is advisable to consider whether there are any financial ties between affiliates of the consultant and the company or management. Consultant reports should not be accepted uncritically, but should be rigorously reviewed and tested against the director’s own knowledge of market practice and what is appropriate in the company’s particular circumstances. Expert advice is a useful tool, but the case law is a strong caution against using it as a substitute for the director’s exercise of his or her decision-making responsibility. And it is important to ensure that advisors have the proper expertise and qualifications to counsel about the matter in question; an expert is not an expert for all purposes. Also, experts typically are not as familiar with the particular context, circumstances and objectives of a compensation proposal as directors deciding the proposal should be.

**Valuing Executive Compensation**

The Goldman Compl. focuses on another contentious compensation issue: the valuation of compensation elements whose objective worth may not be readily apparent. The plaintiff claimed that the methodology used by the company to determine the value of stock options granted to its executives was flawed. Therefore, the plaintiff alleged, the executives had in reality been paid far in excess of the amounts the compensation committee had determined they should receive based on peer company pay practices and benchmarking analyses by its outside consultant. In addition, the plaintiff alleged that Goldman’s proxy disclosure regarding the value of options granted to the executives falsely understated the amounts involved due to flaws in the underlying valuation formula.

Employing sound methodology to value compensation components, and to measure the factors used to determine compensation payouts (such as company performance targets), is an important aspect of responsible compensation decision-making. *Jerney* also illustrates this point. The bonus pool for the executives in that case was calculated as a percentage of the value of the company, estimated at $2.5 to $3 billion. The court characterized this valuation of the company as “unrealistic and inflated.” The fact that the bonus pool was derived from a flawed valuation was alone sufficient to make the transaction not entirely fair in the *Jerney* court’s judgment.

Determining the “real” value of executive compensation is relevant to the entire fairness analysis, which requires a substantively fair trade between the company and the executive (“fair price”). It can also be an important factor in challenges to option grants, where, as noted above, a court will scrutinize the consideration received by the company relative to the value of the benefit given to the executive if the grant was not approved by a majority of independent directors. But for many of the sophisticated compensation products that companies now use – including stock-based compensation – determining value can be complex and often involves judgments and assumptions that could be open to challenge. The Delaware Chancery Court discussed the difficulty of determining the grant date value of options in *Lewis v. Vogelstein*.
Estimates of option values are a species of “soft information” that would be derived from sources such as the specific terms of a plan (including when and for how long options are exercisable), historical information concerning the volatility of the securities that will be authorized to be optioned, and debatable assumptions about the future...Such estimates are inherently more easily subject to intentional manipulation or innocent error than data concerning historical facts. Such estimates raise threats to the quality and effectiveness of disclosure not raised by disclosure of historical data.36

The court went on to discuss the special complications of applying formulae developed for publicly traded options to value compensatory options, where some important assumptions in the model may be wrong: the options are not transferable, are frequently exercised early in their term (reducing their value), and are affected by stock price volatility in a different way from publicly traded options.37

Recent innovations in option-based compensation products may offer a solution to this conundrum that could be especially attractive given the increasing importance of using a demonstrably well-founded method to value stock-based compensation. Zions Bancorporation has developed a product known as ESOARS (“Employee Stock Option Appreciation Rights Securities”) designed to determine a market-based value for employee stock options by creating a derivative security based on the options that can be traded between arm’s-length parties through an auction system. The Chief Accountant of the SEC indicated in a letter to Zions that in principle market-based valuation of options should be acceptable as a basis for recording stock option expense under Statement of Financial Accounting Standards No. 123 (revised 2004), although Zions’ methodology would require further refinement for these purposes.38 For a discussion of how Zions’ program might be modified and combined with a transferable stock option program like that adopted by Google in December 2006 to unlock the potential of objective, market-based measurement of option value, see our client alert entitled “Anticipating Next Year’s Option Awards: A Thought Piece About Capturing Option Value.”39

Unjust Enrichment

Another trend to watch in cases challenging executive compensation will be the increasingly frequent allegations of unjust enrichment in complaints and references to the doctrine in court decisions. Unjust enrichment is an equitable theory under which a court may order a defendant to disgorge his profits (or may impose a constructive trust to achieve the same end) where there is no legal justification for the payment.40 It bears noting that this theory does not require the defendant to have violated any legal duty, only that there be no good legal basis for his enrichment. Therefore, theoretically at least, an innocent recipient of compensation paid without justification (such as a bonus paid on the basis of false financial statements that the defendant was not involved in preparing) could be ordered to repay the compensation. The Tyson court confirmed this possibility, noting that an unjust enrichment claim “present[ed] an opportunity to assign liability to an individual director without requiring plaintiffs to demonstrate fault with respect to that director” and that unjust enrichment would “allow the Court to force other directors to disgorge...improperly spring-loaded options or profits from related-party

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transactions without having to show a breach of fiduciary duty on the part of a particular director.”41 The case has not yet been decided on the merits, and it will be interesting to see if a court would go so far as actually to require disgorgement from an innocent recipient.

Conclusion

The recent high-profile federal enforcement actions and prosecutions in options backdating cases42 could be taken as a signal that the federal arena is where the most significant legal developments relating to executive compensation are emerging. At the same time, however, a trend appears to be taking shape in the Delaware case law of more robust judicial scrutiny of executive compensation decisions, including careful examination of important elements of the compensation-setting process: reliance on decisions made by “outside” directors, use of compensation experts, and valuation of sometimes complex compensatory instruments. The foregoing analysis of the recent Delaware cases suggests various considerations that companies can take into account with a view to ensuring their compensation processes comply with the spirit as well as the formalities of the applicable standards, and will better withstand the growing risk of shareholder challenge.

1 In the first three months of this year, the Delaware Chancery Court released no fewer than five significant executive compensation decisions. Sample v. Morgan (Del. Ch. Jan. 23, 2007) (“Sample”) involved claims that the board breached its fiduciary duties when it adopted an employee incentive plan that increased outstanding shares by 46% and then immediately granted all the shares to the company’s three top executives. In La. Mun. Police Employees’ Ret. Sys. v. Crawford et al. (Del. Ch. Feb. 23, 2007), the plaintiffs, who were competing against CVS Corp. to acquire Caremark Rx. Inc., sought to enjoin a shareholder vote on the CVS/Caremark merger, claiming, among other things, that the joint proxy statement soliciting shareholder approval for the merger did not adequately disclose a pending investigation into allegations of backdating of stock options issued to Caremark executives (the shareholder vote did proceed and the merger was approved on March 15, 2007). In In re Tyson Foods Inc. Consol. S’tder Liti. ((Del. Ch. Feb. 6, 2007) (“Tyson I”) and 2007 WL 2351071 (Del. Ch. 2007) (“Tyson II”), the court denied, respectively, a motion to dismiss and a motion for summary judgment on derivative claims that Tyson directors breached their fiduciary duties by approving “spring-loaded” stock options (i.e., by timing option grants to precede releases of positive information that caused an increase in the stock price). Ryan v. Gifford, 918 A. 2d 341 (Del. Ch. 2007) (“Ryan”), released on the same day, allowed similar claims regarding stock option backdating to proceed against the board of Maxim Integrated Products. In Valeant Pharm. Int’l v. Jerney, 2007 Del. Ch. Lexis 31 (Del. Ch. Mar. 1, 2007) (“Jerney”), appeal dismissed Jerney v. Valeant Pharm. Int’l, 2007 Del. LEXIS 245, an employee director was held liable based on breach of fiduciary duty and unjust enrichment theories in connection with the approval of a substantial and unjustified deal bonus to management (including himself).

2 In this article we have focused mainly on key points, including practical suggestions, that emerge from the new cases as a group, rather than comprehensively summarizing the factual background or legal analysis in the individual cases listed above. Useful summaries are available elsewhere, including BNA’s Pension & Benefits Daily (see, e.g., eds. of Feb. 14, 2007 (summary of Ryan), Feb. 15, 2007 (summary of Tyson I) and Feb. 26, 2007 (summary of Sample)).


4 Jerney’s appeal was subsequently dismissed because it was not filed on time.

5 For example, on March 16, 2007, a stockholder of Goldman Sachs Group Inc. filed a complaint under Delaware law against directors and executive officers of Goldman Sachs in federal district court, E.D.N.Y. (Bader v. Blankfein, Civil Action No. 07-01130) (“Goldman Compl.”) in which the most significant allegations appear to be based on Delaware corporate law concepts: the directors were not independent or disinterested and the board committed waste.

6 See Joanna L. Ossinger, Buy a ‘Backdating’ Stock? Why Shares Don’t React Like Regulators, Wall St. J., Feb. 2, 2007, at C2, noting that the stock price of Foundry Networks Inc. initially dropped about 10% when the company announced a federal inquiry into its options practice but rebounded while the investigation continued, and that the stock price of Apple, Inc. declined only 2.9% to $57.27 when reports of irregularities in option grants to CEO Steve Jobs surfaced and had gone back up to over $60 within about a month.

7 Spring-loading is viewed by some as a form of insider trading. See, e.g., Iman Anabtawi, Secret Compensation, 82 N.C.L. Rev. 835 (2004). However, it is far from clear that there is a solid legal basis for this analysis in a situation where both parties to the transaction – the company and the executive – possessed the same information. Furthermore, the SEC’s chief accountant has indicated in public statements that “spring-loading” probably does not trigger the need to restate financial results, and one of the
Commissioners, Paul Atkins, has expressed the view that advantageous option timing may be an appropriate way for a company to provide more compensation value with fewer shares. See Floyd Norris, They Deceived Shareholders. Who Care?, N.Y. Times, Oct. 6, 2006, at C1. On the other hand, backdated stock options, while not illegal per se, in virtually all cases have been improperly accounted for as options granted at the money, resulting in false financial disclosures. In addition, backdating implicates various other tax and securities law exemptions that are only available where options are granted at or above fair market value on the grant date. By contrast to the ambiguous status of spring-loading under the federal securities laws, the Delaware Chancery Court indicated in Tyson II that grants of spring-loaded stock options might be considered “inherently unfair to shareholders” and the product of “a scheme inherently beyond the bounds of business judgment.”  2007 WL 2351071 at *4.

8 Indeed, criticism of Pfizer’s executive pay practices escalated after the company “overdisclosed” by voluntarily including in its proxy statement information about its CEO’s retirement package a year before it would have been required to do so under the SEC’s new proxy rules.

9 But see In re CNET Networks, Inc., 483 F. Supp. 2d 947 (N.D. Cal. 2007) (applying Delaware law and granting a motion to dismiss a derivative action based on allegations of option backdating where board of directors took steps to rectify the situation after problems with past option grants came to light, and plaintiffs failed to allege with particularity that defendant directors had intentionally approved mispriced awards). See Brehm v. Eisner, 906 A.2d 27, 52 (Del. 2006) (citations omitted).

10 Id. at 73-74.


12 White v. Panic, 783 A.2d 543, 554 (Del. 2001) (upholding dismissal of a lawsuit that defendant directors breached their duties to the corporation by settling sexual harassment lawsuits against the CEO). Coincidentally this case, like Jerney, involved ICN Pharmaceuticals, Inc. and its CEO, Milan Panic.

13 Winberger v. VOR Inc., 457 A.2d 701, 711 (Del. 1983). The doctrine of entire fairness was developed in the context of corporate transactions, such as mergers, in which a fiduciary stands on both sides of the transaction. The most common situation in which it applies is in the merger context is when a parent corporation acquires the minority-held stock of its subsidiary. Folk on the Delaware General Corporation Law § 251.6.2. For a discussion of the importation of this standard into the compensation context, see the articles cited in note 3 above.

14 Jerney at *27 (Jerney “embraced[d] his burden to prove entire fairness”).


17 Michelon v. Duncan, 407 A.2d 211, 224 (Del. 1979) (citation omitted).


21 NYSE Listed Company Manual, §303A(2)(a) (commentary).

22 Rodriguez, supra note 19.

23 Id. at 25.

24 Id. at 26. “Interestedness” and “independence” are technologically separate categories under Delaware law; Rodriguez analyzes personal financial interest as a “subspecies” of lack of independence; “[w]hen someone has a financial interest in a transaction, there is no need to make any further inquiry into whether the director is independent – i.e., whether there is an extraneous influence that might keep the director from acting in the best interest of the corporation. That handicap is presumed by virtue of the conflicting interest.”

25 Wilmer Hale report at 8.

26 Jerney at 13.


28 Item 407(e) of Regulation S-K.


30 Jerney at *37.

31 Id. at *48.


33 Accordingly, careful director focus may be critical to enabling a company to persuasively describe its compensation philosophy and the manner in which specific decisions fit within that philosophy in the compensation discussion and analysis section of the company’s annual proxy statement.

34 Goldman Compl. at ¶¶ 45, 54-55.

35 Jerney at *44.

36 Lewis v. Vogelstein at 331.

37 Id.

38 See Letter from Conrad Hewitt, Chief Accountant, SEC, to James G. Livingston, Vice President, Zions Bancorporation (Jan. 25, 2007).


40 See discussion of unjust enrichment in our article on the Viacom decision, cited in note 3.

41 Tyson I at 75-76.

42 Gregory Reyes, former CEO of Brocade Communication Sys., Inc., was convicted in the first criminal trial involving backdated stock options.
CG is representing T-Mobile USA in its acquisition of SunCom Wireless Holdings.
Cleary Gottlieb is representing T-Mobile USA in connection with its acquisition of SunCom Wireless Holdings. The transaction is valued at approximately $2.4 billion in cash and assumed debt.

CG represented Bank of America in its investment in Countrywide Financial.
Cleary Gottlieb represented Bank of America in its $2 billion investment in non-voting convertible preferred stock of Countrywide Financial Corporation.

CG is representing Medtronic in its acquisition of Kyphon.
Cleary Gottlieb is representing Medtronic in connection with its acquisition of Kyphon. The all cash transaction is valued at approximately $3.9 billion.

CG represented Hewlett-Packard in its acquisitions of Opsware and Neoware.
Cleary Gottlieb represented Hewlett-Packard, the computer industry giant, in separate acquisitions of Opsware and Neoware. The acquisition of Opsware through a tender offer is valued at approximately $1.6 billion. The acquisition of Neoware is valued at approximately $334 million.

CG is representing People’s United Financial in its acquisition of Chittenden.
Cleary Gottlieb is representing People’s United Financial in its acquisition of Chittenden for approximately $1.9 billion in stock and cash. The combined company will be the largest regional banking franchise headquartered in New England.

CG represented Istithmar PJSC in its acquisition of Barneys New York.
Cleary Gottlieb represented Istithmar PJSC in its approximately $945 million acquisition of Barneys New York from Jones Apparel Group.

CG is representing Veolia Environnement in the acquisition of Thermal North America.
Cleary Gottlieb is representing Veolia Environnement in the $788 million acquisition by its subsidiary Veolia Energy North America of all of the capital stock of Thermal North America from an entity affiliated with the Sowood funds.

CG is representing GS Capital Partners and TPG Capital in their acquisition of Alltel.
Cleary Gottlieb is representing GS Capital Partners and TPG Capital in connection with their agreement to acquire Alltel for approximately $27.8 billion.

CG is representing OMX AB in its combination with Nasdaq Stock Market.
Cleary Gottlieb is representing OMX AB in connection with its combination with Nasdaq Stock Market to form Nasdaq OMX. The trans-Atlantic cash and stock transaction is valued at approximately $3.9 billion.

CG is representing Warburg Pincus in its acquisition of Bausch & Lomb.
Cleary Gottlieb is representing Warburg Pincus in its $4.5 billion acquisition of Bausch & Lomb, a vision care provider.

CG represented Citibank N.A. in its acquisition of The BISYS Group.
Cleary Gottlieb represented Citibank N.A. in its $1.45 billion cash acquisition of The BISYS Group, a leading provider of outsourcing services for hedge funds, mutual funds, insurance companies and retirement plans.

CG represented Breeden Partners in proxy contest (H&R Block).
The proxy contest waged by our client, Breeden Partners, concluded on September 6th, when Breeden Partners elected its slate of three nominees to the Board of Directors of H&R Block at the company’s annual meeting of shareholders.

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