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SPECIAL ISSUE

Thoughts of a Jewish-American Plaintiffs' Lawyer on the Past and Present of Stockholder Litigation

Joel Edan Friedlander

In this speech (with added textual footnotes) delivered at Harry Radzyner Law School, Reichman University, in Herzliya, Israel on December 26, 2023, I discuss the question whether longstanding restrictions on Delaware stockholder litigation, proposed new restrictions, and basic features of Delaware's stockholder litigation regime are appropriately targeted to discourage socially unproductive manifestations of stockholder litigation, or whether they reflect the historical disposition of the corporate defense bar that all stockholder suits are strike suits, or disdain toward the stockholder plaintiffs' bar.

Judge Rosen-Ozer, Professors Licht and Shapira, distinguished guests, thank you for the opportunity to speak today about stockholder litigation. It is truly an honor and a pleasure to be here with you, and to be teaching at Harry Radzyner Law School. There is nowhere I would rather be.

On a personal note, this is my second occasion presenting on the stockholder plaintiff perspective to an Israeli audience. Thirteen years ago, I was on a panel at Hebrew University, with Vice Chancellor Laster and others. At that time, as I understood it, Israel was seeking to encourage more stockholder litigation and was looking to Delaware as a model. I was eager to attend in part because I had just gotten involved with Jewish National Fund USA, and I wanted to see projects that JNF was funding. The day before the conference, I visited Sderot and Ofakim; the day after, I visited Metula and Hula. Now, poignantly, I share a hotel in Tel Aviv with evacu-

ated families from Netiv HaAsara and the North.¹

In the brief time we have today, I would like to put current disputes in stockholder litigation in historical context.

My favorite text on American stockholder litigation is a law review article published in 1937 by a Harvard-educated, New York practitioner named Harris Berlack.² Berlack's obituary in The New York Times noted that he had been active in Jewish organizations.³

Berlack's 1937 article described stockholder derivative actions as "universally reviled and deplored."⁴ He dissected "the iniquities ascribed to stockholders' suits," and he despaired of reforming them.⁵ Berlack advocated replacing stockholder litigation with a government agency that would investigate corporate wrongdoing.⁶ Essentially the reverse of what happened in Israel.

The sources of Berlack's despair were two-fold.

First, notable features of stockholder litigation incentivize strike suits. Lawyers representing small stockholders are necessarily paid on a contingent basis. Little information is available at the outset about a potential claim. Litigating is very expensive and uncertain. Defense costs are high. For these reasons, the only lawyers willing to bring stockholder actions tended to be less experienced, less successful, and "sometimes less scrupulous."⁷ The unscrupulous path, Berlack wrote, was to initiate a case "based on any wisp of smoke" and then "indicate, tactfully or otherwise, that their stock may be purchased at a price, and the suit withdrawn."⁸

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¹ Boris Lozhkin, *The Royal Beach Hotel in Tel Aviv Is a Refugee Reception Center Now*, MEDIUM (Nov. 1, 2023), <https://borislozhkin.medium.com/the-royal-beach-hotel-in-tel-aviv-is-a-refugee-reception-center-now-3bee99e543a8>.

² Harris Berlack, *Stockholders' Suits: A Possible Substitute*, 35 U. MICH. L. REV. 597 (1937).

³ Harris Berlack, *a Lawyer Active in Jewish Groups*, N.Y. TIMES, p. 47 (Dec. 5, 1968).

⁴ Berlack, *supra* note 2, at 599.

⁵ *Id.*

⁶ *Id.* at 607-14.

⁷ *Id.* at 603. See also *id.* at 607 (describing stockholders' suits as "a proceeding in which there can be no honest financial reward commensurate with the initiative and effort required"). Nonetheless, in a footnote, Berlack refers to a recent New York case in which the trial court awarded plaintiffs' counsel a "substantial allowance"—fees and expenses of 25% of the amount recovered, or "over \$400,000" for a "recovery in the neighborhood of \$1,700,000"—in recognition of the risk involved. *Id.* at 603 n.16.

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continued

Second, lawyers who brought stockholder suits were scorned. The corporate defense bar drew no distinction between good cases and bad cases, or between the lawyers who brought them. Berlack wrote: “To the large corporation law offices in the neighborhood of Wall Street or State Street or LaSalle Street, every stockholders’ suit is ipso facto a strike suit.”⁹ Perhaps we can add Rothschild Boulevard to that list. He continued: “the upstart who dares to question the conduct of corporate affairs is cast outside the pale of common decency.... For the reputable business man or lawyer to participate in even the most thoroughly justified and socially praiseworthy of these proceedings, is to bring down upon his head the violent wrath of the financial gods and their legal prophets; especially if the plaintiff’s holdings are relatively small, there is no limit to their denunciation.”¹⁰

Berlack’s 1937 article is discussed in a 2010 law review article by Lawrence Mitchell (now known as Ezra Wasserman Mitchell) entitled *Gentleman’s Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation*.¹¹ Mitchell criticized Berlack for hiding his real problem with stockholder litigation practice: anti-Semitism. Major law firms representing corporate defendants did not hire Jews.¹² Stockholder plaintiffs tended to be represented by lower-

class Jewish lawyers trying to make a dollar during the Great Depression. Mitchell’s thesis is that upper-class Protestant corporate lawyers were repulsed by their interactions with lower-class Jewish plaintiffs’ lawyers, and that the first statutory restrictions on stockholder derivative actions, adopted in New York State in 1944, were motivated by anti-Semitism. The 1944 legislation created the contemporaneous ownership requirement and required the posting of security to cover the defendants’ expenses.

What is the relevance of this history? Obviously, social conditions have changed. Jewish lawyers have risen to the top of the corporate defense bar; Jewish law professors advocate for restrictions on stockholder litigation; there is a corporate defense bar in Israel. Seeking to restrict stockholder suits is not anti-Semitic.

Nevertheless, what I take from Berlack and Mitchell, as applied to my own experience, is that there is a sociological dimension to disputes over stockholder litigation. Stockholder plaintiffs today tend to be individual investors or representatives of public pension funds.¹³ They occupy a very different strata in American society than do the officers and directors of the largest corporations.¹⁴ The stockholder plaintiffs’ bar is sociologically distinct from the defense bar in identifiable ways, though there is some cross-pollination.

I wonder to what extent longstanding restrictions on Delaware stockholder litigation—such as the contemporaneous ownership requirement,¹⁵

⁸ *Id.* at 604-05.

⁹ *Id.* at 605.

¹⁰ *Id.* at 605-06.

¹¹ Lawrence E. Mitchell, *Gentleman’s Agreement: The Antisemitic Origins of Restrictions on Stockholder Litigation*, 36 *QUEEN’S L.J.* 71 (2010).

¹² In 1935, the Nazi lawyers who drafted the Nuremberg Laws traveled to the United States, and when they disembarked in New York City they were treated to a reception at the Bar of the City of New York. JAMES Q. WHITMAN, *HITLER’S AMERICAN MODEL: THE UNITED STATES AND THE MAKING OF NAZI RACE LAW* 132, 134 (2017); Ira Katznelson, *What America Taught the Nazis*, *ATLANTIC* (Nov. 2017).

¹³ The sociology was very different in the hostile takeover era, when major precedents were created by hostile bidders represented by the most prestigious law firms. See, e.g., *Hilton Hotels Corp. v. ITT Corp.*, 978 F. Supp. 1342 (D. Nev. 1997) (successful *Blasius* claim prosecuted by Wachtell, Lipton, Rosen & Katz); *Revlon, Inc. v. MacAndrews & Forbes Hldg’s*, 506 A.2d 173 (Del. 1986) (prosecuted by Skadden, Arps, Slate, Meagher & Flom); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.3d 946 (Del. 1985) (prosecuted by Richards, Layton & Finger); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.3d 651 (Del. Ch. 1988) (prosecuted by Morris, Nichols, Arshat & Tunnell and Weil, Gotshal & Manges).

¹⁴ Consider, for example, *In re The Boeing Company Derivative Litigation*, C.A. No. 2019-0907-MTZ, which involved among the most prestigious plaintiffs and defendants. The co-lead plaintiffs were the Comptroller of the State of New York, on behalf of the New York State Common Retirement Fund, and the Fire and Police Pension Association of Colorado. The director defendants included Boeing CEO Dennis Muilenburg, former White House Chief of Staff Ken Duberstein, former Blackstone senior managing director David Calhoun, former AIG CEO Edward Liddy, former Medtronic CEO Arthur Collins, former Vice Chairman of the Joint Chiefs of Staff Edmund Giambastiani Jr., former United States Trade Representative Susan C. Schwab, former Aetna CEO Ronald William, former Continental Airlines CEO Lawrence Kellner, Duke Energy CEO Lynn Good, former Ambassador to Japan Caroline Kennedy, and former Amgen CEO Robert Bradway. The Court of Chancery issued a scathing opinion denying the director defendants’ motion to dismiss. *In re Boeing Co. Deriv. Litig.*, C.A. No. 2019-0907-MTZ, 2021 WL 4059934, at *34 (Del. Ch. Sept. 7, 2021) (“Electing to follow management’s steady misrepresentations that the 737 MAX fleet was safe and airworthy, the Board treated the crash as an ‘anomaly,’ a public relations problem, and a litigation risk, rather than investigating the safety of the aircraft and the adequacy of the certification process.”) (footnote omitted). Nonetheless, in the immediate aftermath of that decision, defendant Good received a Legend in Leadership Award from the Yale School of Management’s Chief Executive Leadership Institute. Eda Baker, *Lynn Good wins SOM leadership award while facing negligence lawsuit for time at Boeing*, *YALE NEWS* (Oct. 7, 2021, 1:23 a.m.), cited in Roy Shapira, *Max Oversight Duties: How Boeing Signifies a Shift in Corporate Law*, 48 *J. CORP. L.* 121, 137 (2022).

Joel Friedlander

Herewith, Mr. Friedlander's entry in the directory of partners at Friedlander & Gorris:

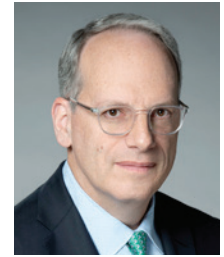
Mr. Friedlander has 30 years of experience litigating breach of fiduciary duty actions and contract disputes relating to the control of Delaware entities. The Best Lawyers in America recognized him as "Lawyer of the Year" in Wilmington, Delaware for Litigation - Mergers and Acquisitions (2017 and 2020) and Bet-the-Company Litigation (2022). Mr. Friedlander has been profiled in *The Wall Street Journal* and named "Litigator of the Week" in *The Am Law Litigation Daily*. He repeatedly has been selected for annual inclusion in The Best Lawyers in America, Benchmark Litigation, Chambers & Partners, and Delaware "Super Lawyers".

Lecturer, University of Pennsylvania Carey Law School, University of Michigan Law School, Harry Radzyner Law School in Israel

Adviser, American Law Institute, Restatement of the Law, Corporate Governance

Friedlander and Gorris

- Recognized by Benchmark Litigation as "Delaware Firm of the Year" for 2015 and 2017
- Obtained two of the largest cash settlements of stockholder actions in the history of the Court of Chancery: \$275 million, on behalf of Activision Blizzard, Inc; \$237.5 million on behalf of The Boeing Company
- Obtained and collected a \$98 million final judgment, after affirmance on appeal, against RBC Capital Markets, LLC



Joel Friedlander
Friedlander & Gorris

or the continuous ownership requirement,¹⁶ or the contours of the demand requirement,¹⁷ or the use of special litigation committees¹⁸—are analytically or empirically sound. Are these restrictions appropriately targeted to socially unproductive manifestations of stockholder litigation? Or do they reflect the defense bar mentality that every stockholder suit is a strike suit, or disdain toward the stockholder plaintiffs' bar? The same questions can be asked of recent proposals to restrict the availability of money damages, to restrict access to books and records, or to make it easier to dismiss cases involving controlling stockholders.

As Berlack recognized, one signifier is rhetoric. I once litigated a stockholder class action outside of the State of Delaware, in a small city in the Midwest. When ruling against us, the judge used an extended metaphor about how "oppor-

tunistic" big-city class action lawyers challenging a private equity buyout had "somehow descend[ed] upon a situation in crisis," much as "maggots" had "somehow appear[ed]" on a dead mouse in his garage.¹⁹ During a fee dispute in Delaware, Vice Chancellor Strine remarked: "I feel queasy a lot of the times when I examine applications for attorneys' fees.... But I have to get right in there, take my Maalox, ignore the vile smell, and see whether a fee should be awarded."²⁰ He made that comment as a backhanded way of complimenting my fee application, which he said, "isn't even close to having an aroma that makes me queasy."²¹ Similarly, a defense lawyer friend introduced me to an audience by saying that I am "a plaintiff's lawyer, but one of the good ones."

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¹⁵ 8 Del. C. § 327.

¹⁶ Lewis v. Anderson, 477 A.2d 1040, 1045 (Del. 1984).

¹⁷ Aronson v. Lewis, 473 A.2d 805 (Del. 1984), modified in United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034 (Del. 2021).

¹⁸ Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

¹⁹ *In re Shopko Stores, Inc. S'holder Litig.*, Case No. 05 CV 677, tr. at 24 (Wisc. Circ. Ct. Sept. 2, 2005). In an echo of Berlack, the Court also accepted defense counsel's characterizations of plaintiffs' counsel's arguments. *Id.* at 23 ("And I heard several times in argument, what is not a particularly flattering observation, which is that certain arguments that had been maintained were referred to as lawyer's arguments, and the clear inference was that they are arguments without substance."). Several years later, the Wisconsin judge apologized to me about his maggot analogy.

²⁰ Transcript of Argument & Ruling on Motion to Dismiss at 52, Tweedy, Browne Glob. Value Fund v. Hollinger Int'l Inc., No. 086-N (Del. Ch. Feb. 9, 2006), quoted in Walter Olson, *Delaware Court Hails Non-Aromatic Fee Request*, OVERLAWYERED (Apr. 20, 2006), <https://www.overlawyered.com/2006/04/delaware-court-hails-non-aromatic-fee-request/>, and Elena Cherney, *When Investors Help Find Fraud, What's It Worth?*, WALL ST. J. (Mar. 16, 2006, 11:00 PM).

²¹ *Id.*

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continued

A decade or so ago, there were a relative handful of good plaintiff cases amidst a sea of junk litigation. The Delaware Court of Chancery used to routinely indulge settlements of M&A litigation reached during the pendency of M&A transactions that delivered no obvious value to stockholders. They were modern forms of strike suits. During this same period, other plaintiffs' lawyers succeeded in some cases in establishing damages or obtaining large settlements after a transaction closed. I called this phenomenon "the two-tiered plaintiffs' bar."²²

Most notably, then-Vice Chancellor Strine assessed damages of \$1.26 billion in a challenge to a conflicted merger involving Southern Peru Copper Corporation.²³ Vice Chancellor Laster assessed damages of \$4.17 per share against an investment bank that aided and abetted a board's breach of fiduciary duty in the sale of Rural/Metro Corporation,²⁴ and he assessed damages of \$148 million against the controlling stockholder of Dole Food Company for using fraudulent projections to buy out the public stockholders.²⁵

Today, in Delaware, much of the junk litigation has been eliminated, pleading standards have tightened, and there is greater overall professionalism of the plaintiffs' bar. If Harris Berlack were practicing in Delaware today, he would be treated respectfully, the practice might reward his talents, and he probably would not recommend the abolition of stockholder litigation. The judges work conscientiously to distinguish good cases from bad cases, and good arguments from bad arguments. The development of corporate law doctrine reflects a generalized respect for the role of stockholder litigation, and the need for incentives and procedures that reward good lawsuits while deterring abuses.

Remarkably, Chancellor McCormick and Vice Chancellor Laster have favorably cited Mitchell's article on the anti-Semitic origins of the contemporaneous ownership requirement and advocated for its statutory repeal.²⁶

A lesson I draw from the last few years of Court of Chancery practice is that there is no equilibrium in favor of rewarding good cases and dismissing meritless cases. Some plaintiffs' lawyers will always look for opportunities to settle cases early rather than incur the costs of litigation. Defense lawyers will always argue for restricting entire categories of stockholder claims, or for new restrictions on the prosecution of stockholder claims.

Perhaps the most influential recent law review article respecting stockholder litigation was co-authored by former Chief Justice and Chancellor and current defense practitioner Leo Strine.²⁷ He and his co-authors argue for doctrinal innovations and new statutes that supposedly "will enhance the ability of Delaware's hard-working and expert courts to do equity that makes not just case-specific, but also systemic, sense."²⁸

Without delving into the merits of their proposals, I am struck by the absence of careful cost-benefit analysis, empirical observation, or scholarly study supporting them. Instead, there is a professed goal to "reduce rent-seeking in the litigation process."²⁹

- They refer to "the shareholder plaintiffs' bars efforts to develop litigation tactics that offer potentially lucrative fee awards in the M&A field," following the decline in certain other forms of M&A litigation.³⁰
- They refer to "two prior waves of meritless litigation,"³¹ which occurred at a time when the rules and procedures respecting the judicial administration of M&A litigation were very different.³²

²² Joel E. Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877, 904-10 (2016).

²³ See, e.g., *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

²⁴ *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 226 (Del. Ch. 2014), *aff'd sub nom. RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

²⁵ *In re Dole Food Co., Inc. S'holder Litig.*, Cons. C.A. No. 8703-VCL, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).

²⁶ *SDF Funding LLC v. Fry*, C.A. No. 2017-0732-KSJM, 2022 WL 1511594, at *6 & n.23 (Del. Ch. May 13, 2022); *Bamford v. Penfold*, L.P., C.A. No. 2019-0005-JTL, 2020 WL 967942, at *24 n.18 (Del. Ch. Feb. 28, 2020).

²⁷ Lawrence A. Hamermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321 (Spring 2022) [hereinafter *Optimizing*].

²⁸ *Id.* at 380.

²⁹ *Id.* at 327.

³⁰ *Id.* at 368.

³¹ *Id.* at 338 n.80.

³² As the authors note, a well-titled law review article describes how challenges to squeeze-out mergers used to be initiated immediately after a controlling stockholder made an initial public proposal to buy out the minority and then settled in conjunction with a special committee of directors negotiating for a higher price. Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (2004). Now, plenary litigation challenging a

- Due to that history, they assert that their predictions of “excessive transaction costs, increased D&O insurance costs, and contrived settlements” “are based in empirics, not irrational fears.”³³
- They note: “If a plaintiff can state any viable claim against any defendant, the suit proceeds to expensive, time-consuming discovery, and gives the plaintiffs’ lawyers leverage to extract a settlement and its accompanying attorneys’ fee.”³⁴
- In each case, the presiding judge was complimentary of the results achieved.³⁹

I find it interesting that corporate law reformers who wish to further restrict stockholder litigation are quick to point to unproductive cases. They rarely, if ever, address cases that yielded substantial recoveries. They do not argue why it would be better for stockholders and the legal system if a particular judicial opinion respecting fiduciary misconduct had not been rendered, or if a particular sum had not been recovered, or how that same recovery could be obtained under a more restrictive regime.⁴⁰ Such arguments are not found, for example, in the law review article co-authored by Leo Strine.⁴¹

This takes me back to Mitchell’s article in which he concluded that the statutory restrictions on derivative lawsuits in 1944 were founded on anti-Semitism, or prejudice, in part because the empirical basis for the restrictions was so insubstantial.

Putting aside any disagreements on the future of Delaware law, I would like to discuss three specific subject areas that I understand are of relevance to Israeli practice and that allow the Delaware system to work reasonably well.

1. Fee Awards

The two bases for a fee award in Delaware stockholder litigation are the common fund doctrine and the *Stockholder Litigation* →

But the cost of stockholder litigation, and the award of attorneys’ fees, is only one side of the coin. One must look at the merits of the cases, the size of the monetary recoveries, and the deterrence effects on fiduciary misconduct.

I was surprised to read that one of their proposals was based in part on judicial decisions rendered at the pleading stage in four cases my law firm had brought. Three of the four cases remained pending when their article was published.

- One of the four cases resulted in a post-trial damages judgment of \$1 per share against the former CEO and the buyer, plus a \$27 million partial settlement against two other defendants.³⁵
- The other three cases resulted in settlements of \$35 million,³⁶ \$29.5 million,³⁷ and \$27.5 million.³⁸

squeeze-out merger not subject to a motion to dismiss under the progeny of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (2014), is not joined until after (i) the closing of the transaction, (ii) the completion of document inspections by various plaintiffs under 8 Del. C. § 220, and (iii) adjudication of a leadership contest. See, e.g., Telephonic Oral Argument on Cross-Motions for Appointment of Lead Plaintiffs and Co-Lead Counsel, *In re AVX Corp. S’holders Litig.*, Cons. C.A. No. 2020-1046-SG, tr. at 24 (Del. Ch. Feb. 3, 2021) (“We pressed for documents, the internal documents about AVX’s business. We analyzed very carefully Centerview’s explanation of AVX’s recent business performance and their prospects. And we did a full search of the public record and dug up lots of obscure facts about AVX’s [motive] and their expectations. And what we tried to do, Your Honor, was develop a coherent narrative for how and why the deal-specific projections created by conflicted management at the time of the deal are deflated. And only our complaint really fleshes out the scenario.”). AVX settled for \$49.9 million.

³³ *Optimizing*, *supra*, at 344 & n.106.

³⁴ *Id.* at 368.

³⁵ *In re Mindbody, Inc. S’holders Litig.*, Cons. C.A. No. 2019-0442-KSJ.M.

³⁶ *In re Coty Inc. S’holders Litig.*, Cons. C.A. No. 2019-0336-LVWV.

³⁷ *City of Warren Gen. Emps’ Ret. Sys. v. Roche*, C.A. No. 2019-0740-PAF.

³⁸ *Morrison v. Berry*, C.A. No. 12808-VCG.

³⁹ See, e.g., Transcript of Co-Lead Plaintiffs’ Motion To Approve Settlement, Award Fees, Expenses, and Incentive Fees, and the Court’s Rulings, *In re Coty Inc. S’holders Litig.*, Cons. C.A. No. 2019-0336-LVWV, tr. at 47-48 (Del. Ch. June 13, 2023) (“The matter was only six weeks from trial when it settled. It was a complex case with a lot of moving parts. The tender offer involved a unique transaction structure that created challenges for damages experts on both sides. And exceptional counsel represented the parties on both sides of this case.... I do want to congratulate you. I think this was an exceptional settlement.”).

⁴⁰ I have argued that examples of successful stockholder litigation should be examined as part of any discussion of a proposed reform. Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation As a Tool for Reform*, 72(3) BUS. LAW. 623 (Summer 2017).

⁴¹ The article advocates dismissal of controlling stockholder non-squeeze-out conflicted mergers if approved by a special committee of independent and disinterested directors. *Optimizing*, *supra*, at 340. The authors nowhere explain whether their proposed rule means dispensing with the “controlled mindset” rationale for liability in *Southern Peru*, in which then-Chancellor Strine found after trial that a conflicted merger was unfair because, “[a]fter this game of controlled mindset twister and the contortions it involved, the Special Committee agreed to give away over \$3 billion worth of actual cash value in exchange for something worth demonstrably less, and to do so on terms that by consummation made the value gap even worse, without using any of its contractual leverage to stop the deal or renegotiate its terms.” 52 A.3d at 813. Is the “controlled mindset” no longer a boardroom problem? Strine and his co-authors do not say.

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trine and the corporate benefit doctrine. The theme of both is that bringing about a monetary recovery or a non-monetary benefit to the corporation or its stockholders is compensable. Lawyers will get paid for bringing about a positive result. This may not sound controversial, but I am told that non-compensation is an issue in Israeli practice.

The authors nowhere explain whether their proposed rule means dispensing with the “controlled mindset” rationale for liability in *Southern Peru*. ... Is the “controlled mindset” no longer a boardroom problem? Strine and his co-authors do not say.

In Delaware, the size of the award will reflect the risk of the endeavor and the magnitude of the benefit.⁴² Plaintiffs’ counsel will be compensated even if causation is partial or shared with the corporation, such as a special committee of directors.⁴³ It does not matter if a pre-litigation demand is what causes the benefit.⁴⁴ The burden of proof is on the corporation to demonstrate that the litigation had no causal effect on the benefit achieved.⁴⁵

There is a regimented scale of fee awards for

common fund recoveries that rewards continued litigation:

- o 10-15% for pleading stage settlements
- o 15-25% through full fact discovery and expert discovery
- o 25-30% for pre-trial to trial
- o 33% for litigating to judgment⁴⁶

My firm is involved in two pending fee applications that highlight the contours of the law in this area. We are currently seeking compensation for having caused Oracle Corporation to appoint two new independent directors during the pendency of derivative litigation to serve on a special litigation committee.⁴⁷ We are also filing an amicus brief on behalf of three law professors who argue against the idea that the percentage fee award should decline for a very large settlement (in the context of an appeal to reduce a 27% fee award for a pre-trial \$1 billion settlement).⁴⁸

2. Pre-Litigation Access to Corporate Books and Records

An innovation over the past few years is that virtually every stockholder action is now preceded by a demand for books and records under Section 220 of the Delaware General Corporation Law. This is an innovation of necessity by plaintiffs due to heightened pleading standards for challenging transactions.⁴⁹

Some general practices have evolved. Each stockholder makes its own demand, but if multiple stockholders made demands they tend to get the same documents. Board minutes and board packages sent to directors in advance

⁴² *Sugarland Indus., Inc. v. Thomas*, 420 A.2d 142, 149 (Del. 1980).

⁴³ *In re Orchard Enters., Inc. S’holder Litig.*, C.A. No. 7840-VCL, 2014 WL 4181912, at *4 (Del. Ch. Aug. 22, 2014) (“Since *Sugarland*, Delaware decisions consistently have recognized that multiple factors may contribute causally to the creation of a common fund or benefit.... Whatever the scenario, plaintiffs’ counsel only should receive fees for the portion of the benefit to which they causally contributed.”) (footnotes omitted).

⁴⁴ *Bird v. Lida*, 681 A.3d 399 (Del. Ch. 1996) (Allen, C.).

⁴⁵ *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1080 (Del. 1997).

⁴⁶ *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1260 (Del. 2012); *In re Dell Techs. Inc. Class V S’holders Litig.*, 300 A.3d 679, 694-699 (Del. Ch. 2023).

⁴⁷ *In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG.

⁴⁸ *Brief of Amici Professors Baker, Fitzpatrick and Silver in Support of Appellee and Affirmance, In re Dell Technologies Inc. Class V S’holders Litig.*, No. 349, 2023 (Del. Dec. 28, 2023).

⁴⁹ Specifically, the demise of expedited discovery during the pendency of M&A transactions and the recognition of a stockholder vote as a complete defense to a post-closing direct challenge to a sale transaction led to the use of Section 220 as a means to obtain contemporaneous internal documents that might call into question the completeness and accuracy of a proxy statement. See Joel E. Friedlander, *Confronting the Problem of Fraud on the Board*, 75(1) BUS. LAW. 1441, 1470-76 (Winter 2019-2020).

⁵⁰ Strine and his co-authors refer to Section 220 practice as a “new wave of rent-seeking” that demands statutory revision in part because of “companies’ legitimate concern that § 220 is being used as a form of full-blown discovery by plaintiffs who never filed a viable plenary complaint.” *Optimizing, supra*, at 376, 377. The authors assert that companies “find it economically more rational to pay attorneys’ fees to cause a meritless issue to go away rather than expend millions of dollars responding to the § 220 demand or action.” *Id.* at 374. The authors do not point to a single example of a stockholder plaintiff being paid off to withdraw a Section 220 demand, and I am not aware of any such example. The authors do not point to any case in which the Court of Chancery allowed a Section 220 inspection respecting an incipient challenge to a transaction to devolve into the equivalent of plenary discovery. Nor do the authors make any effort to adduce the actual costs of running limited search terms on the electronic records of a single custodian and producing responsive documents.

of board meetings are readily turned over. Depending on the situation, we negotiate or litigate to seek additional specific documents, or categories of documents, from identified persons. Stockholders can litigate to get documents, but the scope of production is often resolved by negotiation.

This process is relatively efficient. The Court has provided guidance on what generally needs to be produced. Additionally, plaintiffs generally are incentivized to be reasonable in seeking documents, and not to over-litigate the pursuit of documents of marginal value, because at the earliest stage of the case we don't know if a case is worthwhile on the merits.⁵⁰

The document production process yields better complaints. This allows the Court to better assess the merits when ruling on a motion to dismiss. It also allows the Court to better assess which complaint is superior, and who should lead the litigation, if there is a dispute between competing groups of stockholder plaintiffs.⁵¹

The authors do not point to a single example of a stockholder plaintiff being paid off to withdraw a Section 220 demand, and I am not aware of any such example.

3. Special Litigation Committees

More and more frequently, defendants are creating SLCs to investigate derivative claims that survive a motion to dismiss. SLCs used to be disfavored by corporations, due to (i) the expense, (ii) the fear of independent directors selecting their own counsel, who might uncover facts that a plaintiff otherwise would not find, and (iii) the potential of the Court rejecting the SLC's report.⁵²

I should note that I am very skeptical of whether SLCs and their counsel are motivated and willing to perform real investigations into legitimate claims and obtain the emails and text messages from key figures. I am also skeptical

that an SLC investigation enhances the prosecution of meritorious claims.

The reason why the institution of the SLC is not completely a failure is because the SLC needs to present a record of its investigation to the plaintiff and the Court. Plaintiffs are entitled to obtain the report itself and the key documents relied upon by the SLC. Plaintiffs can depose the members of the SLC. SLC independence is investigated. The quality of the investigation is investigated.

In a derivative action against Larry Ellison and Safra Catz at Oracle Corporation, the SLC determined that the claims should be litigated and that plaintiffs' counsel should litigate them. That had never happened before for claims asserted against a sitting Chairman of the Board or a sitting CEO.⁵³ But that rare example is not a positive example of an SLC. The SLC did not seek documents from a key third party until we sought to issue a subpoena. The SLC did not obtain critical emails and text messages from one of the principals. The SLC did not provide us with their interview memos.⁵⁴ The SLC was no real help in prosecuting the case.

In the Boeing derivative litigation, we were able to negotiate a \$237.5 million settlement despite the prospect of an SLC being appointed in the absence of a settlement. My belief was that the facts were sufficiently scandalous, and the claims were sufficiently meritorious, that the defendants would rather avoid the litigation consequences and the public relations consequences of an SLC process. Nevertheless, the prospect of an SLC likely reduced the settlement value of the case.

The Oracle and Boeing situations are both highly unusual, but they at least illustrate how SLCs are not seen as a panacea by defendants to put an end to facially meritorious lawsuits. It is also possible for a reasonable settlement to emerge out of the SLC process. So at least for those reasons I do not completely despair of SLCs, even though they are an expensive roadblock to effective stockholder litigation.

On that happy note, I will conclude.

MA

⁵¹ See *supra* note 32.

⁵² See, e.g., *Sutherland v. Sutherland*, 958 A.2d 235 (Del. Ch. 2008) (rejecting SLC determination for failure to establish that SLC acted in good faith and conducted a reasonable investigation).

⁵³ See *In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG, 2019 WL 6522297, at *18 n.246 (Del. Ch. Dec. 4, 2019) ("I note that the Lead Plaintiff and the Defendants have identified no case pertinent to the issues here, where a special litigation committee has found that it is in the best interests of the corporation for a particular derivative plaintiff to proceed with the litigation.").

⁵⁴ The SLC even opposed turning over the interview memo of Oracle co-CEO Mark Hurd, who died two months after the SLC advised the Court that plaintiffs' counsel should litigate the case on Oracle's behalf.

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