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WHEN GOOD MERGERS GO BAD: CONTROLLING CORPORATE MANAGERS WHO SUFFER A CHANGE OF HEART

Celia R. Taylor *

I. INTRODUCTION

We are living in volatile times both politically and economically. Uncertainty plagues the United States economy and scandals rock the corporate world. Much attention is now focused on corporate behavior, including rules and standards governing the actions of corporate management. Now more than ever, the laws governing corporate action need examination and understanding. One important area for such consideration is how corporate managers should behave when their corporation considers undergoing a merger or acquisition.

Few events in corporate affairs are as significant as a merger or acquisition. For the corporations involved, such a transaction fundamentally alters their daily existence. After the completion of the merger, the existence of one corporation will dissolve and the other will operate in a new structure. In addition to altering corporate form, mergers and acquisitions have a profound impact on people. The lives of officers, directors, shareholders, employees, customers, vendors, and other corporate participants are affected to various degrees. Merger parties spend large amounts of time and money examining the legal and business implications of engaging in a transaction. While this examination takes place, circumstances may change. The recent downturn in the United States and world economies caused many merger parties to reconsider their plans.

So what happens when a merger goes sour? How should directors and officers respond? Although it is not at all unusual for difficulties to arise during the process—for example, hostile bidders enter the picture, or bidding structures change—the rules governing corporate management behavior when this occurs frequently are analyzed inadequately. As discussed below, most legal guidance in this area focuses on corporate law and addresses the fiduciary duties of directors engaging in mergers. Largely ignored in the cases—although increasingly the topic of academic debate— is the role contract law plays in the process and the impact those rules have on directors. This article argues that, in general, courts are undervaluing contract law doctrine. An over-emphasis on corporate fiduciary duties may permit corporate directors to breach agreements without bearing costs that would otherwise attach.

This article examines these issues through the lens of the recent decision of the Court of Chancery of Delaware in *IBP, Inc. v. Tyson Foods, Inc.*, to show that this undervaluation of contract doctrine is not necessary. *Tyson* is helpful in this area because it facilitates a detailed discussion about the duties of directors engaging in mergers at a time when corporate management behavior merits close scrutiny. By looking at *Tyson*, this article explores much broader issues of the interplay of corporate and contract law in governing corporate behavior when merger parties change their minds about the advisability of a transaction.

When an aborted merger is challenged in court, decisions examining appropriate directorial action tend to address the situation where a seller attempts to withdraw from a merger agreement because a “better” offer is presented. However, this addresses only half the equation. What should be done when the buyer in a merger decides the deal is no longer to its liking? The

2. 789 A.2d 14 (Del. Ch. 2001).
3. See, e.g., Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153 (3d Cir. 1999) (granting specific performance of merger contract to acquiring corporation given uniqueness of target company and difficulty in determining monetary damages); Peabody Holding Co. v. Costain Group PLC, 813 F. Supp. 1402 (E.D. Mo. 1993) (holding that plaintiffs were entitled to permanent injunction against defendants' sale of business it contracted to purchase).
question of how to deal with a rejected seller is largely unresolved. That is the precise question that the Court of Chancery of Delaware faced in Tyson. To fully grasp the implications of that decision, a basic understanding of the complex issues mergers raise is helpful.

While the business aspects of every merger necessarily will differ depending on the corporations involved, the legal standards governing the process of conducting a merger are more certain and uniform. Corporate law in every jurisdiction stipulates technical steps that require compliance, such as shareholder approval of the transaction. Compliance with these procedural issues is merely a small part of the decision making process. Directors—who bear the primary responsibility for deciding whether to permit their corporation to participate in a merger—must be concerned about substantive issues of shareholder welfare, fairness, and compliance because corporate law imposes fiduciary duties upon them. The law is clear that directors bear certain duties while engaging in the merger process, commonly understood to include the duties of care and loyalty. Corporate law provides general parameters for those duties, but does not state them with great precision. Many courts and commentators have tried to clarify the issue, with varying degrees of success.

Relative rights and obligations are particularly complex in the merger context due to an intricate web of governing laws. In addition to corporate law, contract law concerns are critical to the merger process. Contract law strongly supports notions of "freedom of contract" in the market place, allowing parties to freely

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4. See, e.g., COLO. REV. STAT. § 7-111-103 (2001); DEL. CODE ANN. tit. 8, § 251(c) (2001); MISS. CODE ANN. § 79-4-11.04(b) (Cum. Supp. 2001); N.C. GEN. STAT. § 55-11-02(a), -03(a) (2000); OHIO REV. CODE ANN. § 1701.78(d) (Anderson 2001); see also, e.g., MODEL BUS. CORP. ACT § 11.04(b)-(h) (1999) (requiring board and shareholder approval for a merger of two or more corporations).

craft the terms and conditions of their relationships. Merger agreements are heavily negotiated, complex documents. Once completed, contract law dictates that each merger party assumes the rights and obligations detailed in their agreement. In addition, contract law provides a remedy for the breach of any agreement made. It provides the framework necessary to protect merger parties during the period of vulnerability between contractual agreement and full performance.6

The problem for directors is that the obligations imposed on them by contract law and those imposed by corporate law may conflict. Contract law demands that directors either honor their commitments or pay the price of breach, while corporate law duties may demand that directors dishonor their merger agreement. If that action is justified under corporate law, has a breach of contract occurred? Does compliance with corporate duties justify non-performance of the merger agreement? If so, the merger party wishing to proceed with the transaction may be out of luck because justified non-performance under a contract is not a breach and does not entitle the non-breaching party to remedy.7 The tensions created by the conflicting demands of corporate and contract law in the merger area and the possible remedies for resolving the conflict often are not raised or addressed, providing directors with insufficient guidance.8

In Tyson, the Court of Chancery of Delaware reduced this lack of guidance by requiring specific performance of a merger agreement between IBP, Inc. (“IBP”) and Tyson Foods, Inc. (“Tyson”), despite Tyson’s attempts to withdraw.9 The opinion sends a strong message in support of valuing contract law principles in a corporate setting. This is a message that needs to be heard. Contract values are subordinated routinely to corporate principles

6. Protection during this period of vulnerability is one of the prime functions of contract law and is relevant in all contexts where the promised future performance encourages present reliance. A common example in a different context is the period of vulnerability encountered by parties in a real estate transaction where a future exchange of property is contingent upon the happening of specified events.

7. 9 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 443 (1979).


when mergers are involved. This is unnecessary and improperly devalues contract doctrine. *Tyson* is an important example of an appropriately balanced approach.

In this case, the court granted a request for specific performance of a merger over the protests of the purchasing company.\(^{10}\) The opinion is important for its consideration of both practical and theoretical applications of doctrine. On the practical level, it articulates standards to apply when a jilted seller in a merger seeks remedy. It is noteworthy in this regard due to the present lack of authority discussing the compensation of a thwarted seller. This situation becomes more common during market downturns.\(^{11}\)

*Tyson* is also valuable on the theoretical level, exemplifying how correct application of the appropriate doctrine enables proper analysis and strengthens all areas of the law. Too often when a merger is the subject of dispute, parties and courts leap to apply corporate doctrine without adequate concern for contract law. *Tyson* properly avoids this pitfall, thereby valuing the different requirements and concerns of both contract and corporate law.

*Tyson* is noteworthy for its careful analysis of two specific issues. First, it provides an in-depth discussion of the material adverse effect clause contained within the parties' merger agreement and how such a clause should be interpreted.\(^{12}\) Second, it considers whether specific performance is an appropriate remedy when a buyer wants to walk away from a deal that the seller still favors.\(^{13}\) This somewhat uncommon position of party interests gives the court a chance to expand the doctrine on specific performance. It is particularly important given the strong indications that the number of jilted sellers will increase in the future—evidenced by the fact that "deals blow up at twice the rate of last year."\(^{14}\) Reasons for the increasing number of failed mergers in-

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10. *Id.* at 84.
11. The tragic events of September 11, 2001 highlight this likelihood. See Andrew Ross Sorkin & Jonathan D. Glater, *Merger Deals are Stalled Amid Doubt*, N.Y. TIMES, Sept. 17, 2001, at C1 ("[C]ompanies began quietly asking their lawyers . . . if and how they can back out of transactions . . . ").
13. *Id.* at 82-84.
14. Thor Valdmanis, *Details Count If Deals Fall Apart: More Companies Carefully Craft Merger Agreements*, USA TODAY, July 17, 2001, at B3. The aborted merger of United Airlines and US Airways was headed down this road until it became clear that the De-
clude the flagging economy and the large number of deals of very high value contemplated over the last five years. Regardless of the precise cause of deal breakdowns, the likelihood of more suits by sellers seeking specific performance makes the *Tyson* court's analysis of the issue important. To help frame the legal reasoning of the opinion, a brief overview of the nature of the dispute is useful.

II. BACKGROUND OF *TYSON*

The course of merger negotiations between IBP, the nation's number one beef and number two pork distributor, and Tyson Foods, the country's leading chicken distributor, is long and complex. What follows is an abbreviated overview of significant events relevant to the disputed merger agreement.

IBP and Tyson entered into a merger agreement (the "Merger Agreement") after an active auction for IBP pitted Tyson against Smithfield Foods, the largest pork producer in the country. Throughout the auction, Tyson received information about the business and financial conditions of IBP. This information revealed many problems, including, among others, a downturn in the beef industry that would generally affect IBP's profitability, projections indicating that IBP would fall far short of its fiscal year 2000 earnings estimates, and evidence of accounting fraud in an IBP subsidiary, DFG, in the amount of approximately $30 million. DFG's problems were the subject of discussions between IBP and the Securities Exchange Commission ("SEC"). Furthermore, in connection with the accounting fraud alleged, DFG...
was the subject of an asset impairment study, which led to the reporting of an impairment charge of $60.4 million. This charge indicated that DFG's cash flow would be significantly less than expected. After all of these difficulties were disclosed, Tyson—despite harboring doubts about IBP's management and operations—raised its bid for IBP by $4.00 per share.

During final negotiations at the end of December 2000, it became clear that Tyson had outlasted Smithfield. Tyson's final offer to IBP on December 31, 2000 was structured to include a "Cash Offer" of $30 per IBP share, coupled with an "Exchange Offer" in which Tyson would offer $30 of its stock for each share of IBP stock to all shareholders who wished to remain investors in the venture. The Cash Offer was on the table first and scheduled to close no later than February 28, 2001, unless closing conditions were not satisfied as of that date. If the Cash Offer did not close by February 28, Tyson then would offer the Cash Election Merger option in which each IBP shareholder would be eligible to receive either $30 in cash, $30 in Tyson stock, or a combination of the two per share of IBP stock owned. The Cash Election Merger was to close on or before May 15, 2001, unless defined closing conditions were not satisfied. IBP ultimately accepted Tyson's offer and the Merger Agreement was executed on January 1, 2001. On January 12, 2001 Tyson's board of directors met and approved the Merger Agreement.

22. Id. at 49.
23. Id. at 22.
24. Id. at 39. Smithfield initially bid $30 per IBP share, to be paid in full with Smithfield stock. Id. The $28.50 per share all cash offer put forward by Tyson was considered superior by IBP's special committee (on advice from J.P. Morgan). Id. Smithfield came back with a $32 stock bid. In response, Tyson added $1.50 per share to its cash offer. At this point, Smithfield dropped out. Id.
25. Id. at 40.
26. Id.
27. Id.
28. Id. Conditions to closing included a requirement that no "Material Adverse Effect" had occurred between execution of the Merger Agreement and closing of the offer. Id. "Material Adverse Effect" ("MAE") was defined as "any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a Material Adverse Effect... on the condition (financial or otherwise), business, assets, liabilities or results of operations of [IBP] and [its] Subsidiaries taken as a whole..." Id. at 65 (citation omitted).
29. Id. at 40.
30. Id. at 44.
son's shareholders met and approved the transaction.\textsuperscript{31} The directors advised the stockholders that the merger would be beneficial to them and to the financial community, even in light of the risks attendant to the deal.\textsuperscript{32} By this time, however, Tyson's desire to acquire IBP had cooled, for reasons that would be disputed at trial. Neither Tyson nor IBP had positive first quarter results in 2001, mostly due to overall industry decline.\textsuperscript{33} Additionally, it was discovered that a letter sent from the SEC to IBP's outside counsel on December 29, 2000, which raised serious concerns about IBP's financial affairs, had not been disclosed prior to entry into the Merger Agreement.\textsuperscript{34} The existence of this letter was not made known to IBP management or Tyson until after the Merger Agreement was signed on January 1, 2001.\textsuperscript{35} Therefore, Tyson signed the Merger Agreement without specific knowledge of the SEC's concerns, but proceeded to obtain board and shareholder approval after receiving notice of those concerns.

The Cash Offer did not close on February 28, 2001.\textsuperscript{36} Although some express conditions necessary for closing were satisfied as of that date,\textsuperscript{37} Tyson claimed that IBP's failure to provide definitive financial statements prevented Tyson from going forward.\textsuperscript{38} Tyson argued that IBP's failure to provide the data made it impossible for them to comply with the SEC requirements calling for an acquiring corporation to provide pro forma financial information before the SEC will authorize a merger.\textsuperscript{39} Tyson terminated the Cash Offer on February 28, 2001, but did not make a determination that IBP had breached the Merger Agreement.\textsuperscript{40} Pursuant to the terms of the Merger Agreement, Tyson then was required to

\begin{itemize}
\item 31. Id.
\item 32. Id. at 45.
\item 33. Id. at 48. The negative earnings trend continues to plague Tyson, which reported a fiscal third-quarter earnings drop from 9 cents per diluted share compared with 18 cents per share a year ago. See Tyson Foods Earning Fall, ORLANDO SENTINEL, July 31, 2001, at C5.
\item 34. Tyson, 789 A.2d at 43.
\item 35. Apparently the SEC letter was sent by e-mail to IBP's outside counsel. Id. The outside counsel looked at it briefly on-line and concluded that it was not necessary to send it to anyone, including his associates, Tyson, or IBP. Id.
\item 36. Id. at 47.
\item 37. For example, Tyson had received at least 50.1% of IBP shares and obtained all required approvals. Id. at 79.
\item 38. Id.
\item 39. Id.
\item 40. Id. at 47.
\end{itemize}
move forward with the Cash Election Merger, scheduled to close on or before May 15, 2001.\textsuperscript{41}

On March 28, 2001, with the SEC concerns about DFG unresolved, and both IBP and Tyson facing declining market performance, Don Tyson, the founder and controlling shareholder of Tyson Foods, called a meeting of Tyson management and directors whereupon it was determined that Tyson should not complete the merger.\textsuperscript{42} Upon receiving this instruction, Tyson’s counsel sent a letter to IBP notifying them that Tyson considered the Merger Agreement rescinded or terminated as of that date.\textsuperscript{43} IBP immediately responded with a suit to enforce the Merger Agreement.\textsuperscript{44}

After lengthy discovery and trial, the Chancery Court of Delaware, through Vice Chancellor Strine, reached the following conclusions:

- The Merger Agreement and related contracts were valid and enforceable contracts that were not induced by any material misrepresentation or omission;
- The Merger Agreement specifically allocated certain risks to Tyson, including the risk of any losses or financial effects from the accounting improprieties at DFG, and these risks cannot serve as a basis for Tyson to terminate the Agreement;
- None of the non-DFG related issues that the SEC raised constitute a contractually permissible basis for Tyson to walk away from the Merger;
- IBP has not suffered a Material Adverse Effect within the meaning of the Agreement that excused Tyson’s failure to close the Merger; and
- Specific performance is the decisively preferable remedy for Tyson’s breach, as it is the only method by which to adequately redress the harm threatened to IBP and its stockholders.\textsuperscript{45}

Of these findings, those with the greatest import for future cases and for merger parties seeking to avoid litigation are those relat-
ing to the material adverse effect clause and its allocation of risk between the parties and the conclusion that specific performance is the appropriate remedy for a jilted seller. Each of these findings presents an area where careful attention to both contract and corporate law is required.

III. MATERIAL ADVERSE EFFECT CLAUSES

A. MAE Clauses Generally

Material Adverse Effect ("MAE") clauses commonly are included in merger agreements to protect the parties from changes in circumstances that may occur between the time of directorial approval of the agreement and consummation of the transaction. This window of time may be lengthy and cautious parties will try to allocate risk while they wait. A typical MAE clause, as the one in Tyson, defines material adverse effect as "any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a Material Adverse Effect'... 'on the condition (financial or otherwise), business, assets, liabilities or results of operations of [IBP] and [its] Subsidiaries taken as a whole...."

Generally, MAE clauses give a party the right to terminate a merger agreement upon the occurrence of an event or events specified in the clause during the pendency of the merger. A representative MAE clause might define material adverse effect as "any change or effect that is materially adverse to the business, financial, condition, assets, properties, operations or results of operations... which will prevent... the fundamental and basic

46. The findings on fraud and misrepresentation are clearly important to the outcome of this case. However, they are very fact-specific and particular to the transaction between these parties.
47. Shareholder approval typically is required for legal completion of a merger. In addition, various regulatory approvals may be necessary depending on the context of the transaction.
49. See supra note 28.
50. Tyson, 789 A.2d at 65 (alteration in original) (quoting the IBP-Tyson merger agreement).
operation of such business.\textsuperscript{51} The right of termination means that non-completion of the merger is not a breach by that party, but justified non-performance.\textsuperscript{52}

It is important to recognize the power of an MAE clause. If successfully invoked, such a clause prevents a finding of breach of contract. Given the potentially high costs associated with a breach, these clauses are important protective devices. Despite their enormous significance, they are not the subject of much discussion or analysis by commentators. Writers are beginning to acknowledge the growing importance of MAE clauses,\textsuperscript{53} but remarkably, there is little guidance on governing legal standards or the "best" drafting techniques.

What is certain with regard to MAE clauses is that merger parties consider them essential. They are usually the products of intense negotiation because the motivations of sellers and buyers are diametrically opposed.\textsuperscript{54} Sellers will seek to include an MAE clause that is as narrow as possible and strictly limits those events that qualify as materially adverse. A narrow MAE clause keeps the buyer obligated in the most possible circumstances. Further, a narrow, seller-friendly MAE may try to protect a seller


\textsuperscript{52} This does not mean that a buyer who walks away from the deal will not suffer any consequences. Merger agreements commonly include "break-up" fees—amounts due to the seller if the deal is not consummated for any reason, including justified non-performance. For more discussion of these fees, see John C. Coates IV & Guhan Subramanian, A Buy-Side Model of M&A Lockups: Theory and Evidence, 53 STAN. L. REV. 307 (2000); Jonathan T. Wachtel, Comment, Breaking Up Is Hard to Do: A Look at Brazen v. Bell Atlantic and the Controversy over Termination Fees in Mergers and Acquisitions, 65 BROOK. L. REV. 585 (1999). A recent example of these fees is the $50 million break-up fee United Airlines had to pay when it terminated its merger agreement with US Airways after receiving notice that the transaction would not receive anti-trust clearance. See David Armstrong, United Could Lose $1 Billion This Year, S.F. CHRON., Aug. 12, 2001, at E1; Melanie Coffee, United Airlines, US Airways Call off Merger After Government Opposes It, CHARLESTON GAZETTE, July 28, 2001, at A1.

\textsuperscript{53} See, e.g., Joel I. Greenberg & A. Julia Haddad, The Material Adverse Change Clause, 225 N.Y. L.J. 77, Apr. 23, 2001, at S5 (noting "pervasive use of material adverse change provisions in acquisition agreements"); Halloran & Rowland, supra note 51, at 12 ("Material adverse change provisions in merger agreements are changing . . . because of the high volatility experienced in stock trading prices and in economic and market conditions . . . .").

from downturns in general economic conditions. An MAE clause may exclude "changes, events, violations, inaccuracies, circumstances and effects that are caused by conditions affecting the United States economy as a whole or affecting the industry in which [a merger party] competes as a whole, which conditions do not affect such entity in a disproportionate manner." The rationale behind this exclusion is that the risk of bad economic performance should not be placed on the seller if the seller is not responsible for it. Therefore, sellers should not be penalized for overall market conditions that are generally beyond their control.

Buyers, of course, prefer broad MAE clauses that include an expansive definition of material adverse effect. Expansive MAE clauses provide buyers with greater opportunities to escape from what later may be regarded as a bad deal. To the extent that the clauses are buyer friendly, they, in some sense, create an option contract under which the buyer remains at great liberty to walk away from the transaction. Buyers resist MAEs that carve out a general market downturn from the material adverse effect definition. They argue that it is impossible to determine whether the harm to the seller's fortunes, which causes them to seek termination, was a result of the seller's management or general market forces. Uncertain about cause, the risk of downturn should be placed on the seller. Furthermore, to the buyer, the cause of the decline in the seller's position is irrelevant. Regardless of the cause, the buyer no longer will receive what it bargained for at the time it entered into the initial merger agreement.

B. Interpretation of MAE Clauses

From these widely divergent positions, merger parties negotiate strenuously to draft a clause with which all parties can live. However, even when MAE clauses are negotiated and drafted carefully, they often become a basis for dispute, as was the case in Tyson. Whether a material adverse event has occurred is often a matter of factual interpretation and reasonable parties can honestly disagree. Unfortunately, for parties contemplating a

55. Halloran & Rowland, supra note 51, at 13 (emphasis omitted).
56. Many expect these disagreements to surface as merger parties dispute whether the events of September 11, 2001 constitute an MAE. See Sorkin & Glater, supra note 11. There is also speculation that MAE clauses drafted post-September 11th will include "acts
merger agreement, the law interpreting MAE clauses is not particularly helpful for drafting purposes and the impact of an MAE clause can be hard to predict.  

This may stem in part from confusion about what body of law—contract or corporate—should prevail in their interpretation. MAE clauses are clearly creatures of contract law. Corporate law also may be relevant if directors invoke an MEA clause to justify non-performance of a merger because they believe that the transaction is no longer in the best interests of their entity. If the transaction is considered adverse, then, arguably, fiduciary duties compel the directors not to proceed. By applying standard contract doctrine to the clause, it may be determined that the invocation of the MAE clause is appropriate. The danger is that corporate law concerns will cloud contractual analysis. A strict contractual analysis, applying an objective standard of interpretation, should be utilized to determine if subsequent events constitute an MAE. Given courts’ tendencies to defer to corporate law concerns, it is possible that MAE clauses will be interpreted improperly. If fiduciary duties are considered, then a subjective inquiry may be made into the directors’ beliefs about the meaning of MAE clauses.

Consider, for example, an MAE clause that allows termination of the deal when events negatively impact the business or operations of a merger party (in essence, the type of clause at issue in Tyson). Directors may allege that their interpretation of “material adverse effect” must prevail because they have a fiduciary duty to prevent harm to their shareholders. This may color a court’s application of an objective analysis of the clause at issue and enable an MAE clause to be more freely invoked. Consideration of corpo-


57. See, e.g., Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp., 889 F.2d 621 (5th Cir. 1989) (finding a dramatic price drop in the market not enough to trigger an MAE clause); Pine State Creamery Co. v. Land-O-Sun Dairies, Inc., No. 5:96-CV-170-30, 1997 U.S. Dist. LEXIS 22035 (E.D.N.C. Dec. 22, 1997) (finding that an MAE clause did not include changes in the operating profits or losses of corporation); Borders v. KRLB, Inc., 727 S.W.2d 357 (Tex. App. 1987) (finding that a radio station’s loss of over half of its audience did not trigger the MAE clause).

58. Interpretive rules of contract state that the objective approach shall be used to interpret disputed terms except in special circumstances, such as when one party knows or has reason to know of a different meaning attached by the other party. See generally Restatement (Second) of Contracts § 201 (1981).
rate duties could tip the scales improperly when questions of interpretation are close.

If MAE analysis is not clouded by corporate fiduciary duty arguments, contract doctrine provides the proper framework for interpretation. As the Tyson court understood, a court must engage in careful parsing of the language of the MAE clause itself and of the language of the merger agreement in which the clause appears.\textsuperscript{59} The goal is to effectuate the parties' intentions as expressed through their choice of contractual language. Achieving this goal is a complex process and not all judges will engage in it the same way.\textsuperscript{60} A party may argue that an MAE clause is unambiguous and therefore not subject to interpretation because of the "plain meaning rule." This rule essentially states that if contractual language is unambiguous, a court must give it its ordinary meaning and may not engage in further interpretive inquiry.\textsuperscript{61} Imagine an MAE clause stating that a material adverse effect justifying termination of the transaction shall be deemed to occur if the stock price of the target corporation drops more than $1 per share between signing and completing the merger. Because it is possible to determine objectively whether that event occurs, the plain meaning rule would apply. A merger party would be unsuccessful in an attempt to argue that it intended the stock price to have to drop $1.50 before non-performance was justified. The problem with the plain meaning rule is that the language is rarely unambiguous. In the absence of an objective formula, the question of intent becomes subject to debate.\textsuperscript{62}

If the language of the MAE clause is found to be ambiguous within the context of the merger agreement, courts must try to determine what the parties meant to include within it. In reaching a conclusion, courts should

look to all the relevant circumstances ... including the state of the world ... the state of the law ... all writings, oral statements, and other conduct by which the parties manifested their assent, together

\textsuperscript{59} See 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.11, at 283–84 (2d ed. 1998) ("The agreement is therefore to be read as a whole and ... words used repeatedly have a meaning that is the same throughout the contract ... ").

\textsuperscript{60} Id. § 7.7, at 257 ("Judges are not of a single mind in approaching this task of determining the expectations of the parties. They differ in their faith in the reliability of language and in the inherent meaning of words.").

\textsuperscript{61} See id. § 7.12, at 292.

with any prior negotiations between the parties and any applicable
course of dealings, course of performance, or usage.63

These interpretative rules mandate that the process of deter-
mining the meaning and effect of an MAE clause is very language
and fact specific and goes far towards explaining the unpredict-
able effect of MAE clauses. Parties that draft with a proper un-
derstanding of the rules of contract interpretation and the knowl-
edge that corporate fiduciary duties play no role in this area may
be able to reduce the ambiguity of these clauses. This is not to
suggest that better drafting will remove all uncertainty. Given
the complexity of interpretation, there may be no magic language
guaranteed to accomplish a particular goal. However, studying
cases such as Tyson can reduce some of the uncertainty.

C. MAE Clause Contained in the IBP/Tyson Foods Merger
Agreement

Recall that the Tyson Merger Agreement defined a material
adverse effect as "any event, occurrence or development of a state
of circumstances or facts which has had or reasonably could be
expected to have a Material Adverse Effect" . . . 'on the condition
(financial or otherwise), business, assets, liabilities or results of
operations of [IBP] and [its] Subsidiaries taken as a whole . . . ."64
The non-occurrence of an MAE was a condition to closing. If one
did occur, Tyson was legally justified in terminating the Merger
Agreement and would not be in breach of contract upon doing so.

Tyson relied on this clause in its attempt to justify its refusal to
consummate the purchase of IBP.65 Tyson first argued that the
decline in IBP's fourth quarter performance in 2000 and first
quarter performance in 2001 constituted a material adverse effect
because it showed the poor financial condition of IBP.66 It further
argued that the $60 million plus impairment charge taken in
connection with DFG constituted a second material adverse ef-
fact.67 If neither of these events, in isolation, rose to the level of a

63. FARNSWORTH, supra note 59, § 7.10, at 275.
64. IBP, Inc. v. Tyson Foods, Inc. (In re IBP, Inc. S'holders Litig.), 789 A.2d 14, 65
(Del. Ch. 2001) (alteration in original) (quoting the IBP-Tyson merger agreement).
65. Id.
66. Id.
67. Id.
material adverse effect, Tyson alleged it was “virtually indisputable” that the two taken together crossed that threshold.\textsuperscript{68}

The Chancery Court of Delaware was quick to differ with the assertion that the question of whether an MAE had occurred was “indisputable.”\textsuperscript{69} Vice Chancellor Strine noted that determining whether an MAE had occurred “require[d engaging] in an exercise that is quite imprecise” and that proper application of the words in the MAE clause was “dauntingly complex.”\textsuperscript{70} The focus of the court’s discussion was on the poor performance of IBP.\textsuperscript{71} On one hand, Tyson’s argument appeared to make sense. There is no doubt that IBP had suffered poor performance during the quarters in question.\textsuperscript{72} Much of this poor performance was apparently attributable to unfavorable market conditions rather than poor operations at IBP.\textsuperscript{73} However, the MAE clause was drafted broadly and did not carve out a decline in overall market or economic conditions.\textsuperscript{74} Therefore, the MAE clause could be reasonably interpreted to place the risk of market fluctuations on IBP.\textsuperscript{75} Under that approach, Tyson’s non-performance under the Merger Agreement was justified if IBP’s condition had worsened significantly from the condition it was in on December 25, 1999—the date stipulated by the Agreement as defining the baseline for measuring whether an MAE had occurred—and the time that Tyson attempted to walk away from the merger. Neither party disputed that this had happened.\textsuperscript{76} IBP’s poor performance during the last quarter of 1999 and first quarter of 2000 put it in a significantly worse position than it reported on December 25, 1999.\textsuperscript{77}

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 71.
\textsuperscript{70} Id. at 65.
\textsuperscript{71} See id. at 66–70. With regard to Tyson’s allegation that the $60 million impairment charge constituted a material adverse effect, IBP claimed that a one-time, non-cash charge could not be considered material especially since IBP had taken similar large charges in the recent past. Id. at 70. Additionally, DFG was only a small fraction of IBP’s overall business and even a total shutdown would have little impact on IBP overall. Id. Vice Chancellor Strine accepted IBP’s position with little discussion. See id. at 71.
\textsuperscript{72} See id. at 66–70.
\textsuperscript{73} See id. at 70–71.
\textsuperscript{74} Id. at 66.
\textsuperscript{75} See id.
\textsuperscript{76} See id. at 69–70.
\textsuperscript{77} See id. at 31.
However, the court did not read the MAE clause in isolation, finding that it was ambiguous and needed interpretation.78 The Merger Agreement contained other qualifying language with respect to what events would constitute an MAE.79 That language required the court to determine whether an MAE had occurred by examining the condition of IBP on December 25, 1999, as affected by specific disclosures made in IBP's warranted financials and the Merger Agreement itself.80 With those disclosures taken into account, the question of what time frame should be considered when determining whether a material adverse effect occurred became less certain. The financials included clear disclosure of the cyclical nature of the industry and revealed that IBP's actual earnings did not always reach its projections.81 The critical issue for the court became whether a failure to meet short-term earnings projections constituted an MAE in light of historic long-term fluctuations. If only short-term performance was relevant, Tyson might prevail.82 If long-term trends were considered, one or two quarters of poor performance would probably not be sufficient to constitute a material adverse effect.83 The language of the Merger Agreement did not specify whether short or long-term performance was the intended measuring tool.84 Furthermore, precedent in interpreting similar clauses conflicted and provided no clear guidance to the court.85

The court ultimately concluded, hesitantly, that the rational approach was to consider the long-term history of IBP's performance.86 This result can be supported on several grounds. First, this approach obeys, to the fullest degree possible, the maxim that contracts are to be construed as a whole.87 No one clause of

78. See supra notes 34–45 and accompanying text.
79. See Tyson, 789 A.2d at 42–43.
80. See id. at 66.
81. See id. at 67.
82. See id.
83. Id.
84. See id. at 42–43.
86. Tyson, 789 A.2d at 71.
87. In addition to the MAE clause, Vice Chancellor Strine examined language contained in IBP's warranted financial statements and various schedules to the Merger Agreement that addressed issues of market risk allocation. See id. at 56–57.
the Merger Agreement was permitted to take precedence over another and each clause's meaning was considered in context.

Second, after careful examination of the Merger Agreement in its entirety, the Chancellor concluded, "negotiating realities ... suggest that contractual language must be read in the larger context in which the parties were transacting." This approach is in accord with the "overarching principle of contract interpretation" that a court should look at all relevant circumstances surrounding the transaction. This includes circumstances specific to the parties, such as prior negotiations or dealings, and those existing in the world at large. Looking through this broad lens, the court determined that the parties' relationship required application of long-term economic performance. Tyson was not a short-term speculator, but an acquiror looking to purchase the company as part of its long-term strategy. With that understanding, "[i]t is odd to think that a strategic buyer would view a short-term blip in earnings as material, so long as the target's earnings-generating potential is not materially affected by that blip or the blip's cause."

In addition, finding long-term performance as an appropriate measure is a reasonable, logical conclusion. An interpretation of contractual terms leading to a reasonable result is preferred over one that has a contrary effect. The Tyson court's approach set IBP's status at the time of signing the Merger Agreement as the baseline for determining whether a material adverse effect had occurred. This approach is logical; if the condition of IBP was

88. Id. at 67.
89. See FARNSWORTH, supra note 59, § 7.10, at 275.
90. See id.
91. Tyson, 789 A.2d at 67.
   In the interpretation of a promise or agreement or a term thereof, the following standards of preference are generally applicable:
   (a) an interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . .

Id.
93. Tyson, 789 A.2d at 66. This baseline is the only appropriate one that can be used since by definition, material adverse effects are changes that occur after a merger agreement is executed but before it is completed. Arguably, Tyson did not know of the true status of IBP when this baseline was set. For Tyson to prevail on that theory, however, they needed to show some evidence of fraud in the transaction, a hurdle they were unable to surmount. See id. at 72. Tyson also might have argued that it was mistaken about IBPs
materially adverse to Tyson's interests prior to this time, it simply would have refused to sign the Merger Agreement. Therefore, it is reasonable to conclude that Tyson intended the MAE to include only events occurring after it executed the Merger Agreement and prior to closing. Thus, that choice of baseline is preferred.94

Finally, the court's conclusion also supports the interpretative maxim that "[w]ords and other conduct are interpreted in light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight."95 Looking at the purpose of the merger, the court concluded that Tyson rationally was more concerned with the long-term earnings of IBP, as it would be "odd to think that a strategic buyer would view a short-term blip in earnings as material, so long as the target's earnings-generating potential is not materially affected by that blip or the blip's cause."96

The court reasoned that, generally, MAE clauses should be interpreted from a seller-friendly perspective, reasoning that in a heavily negotiated contract, as merger agreements invariably are, where sophisticated parties deal with each other at arms' length, and with the advice of highly skilled experts, the long standing notion of caveat emptor "applies [in] full force."97 An MAE clause should protect the buyer only if overall earnings of the target are threatened in a "durationally significant manner" in the eyes of a "reasonable purchaser."98 Ultimately, Vice Chancellor Strine found that while he was "confessedly torn about the correct out-

true status at the time of entry, but under the doctrine of mistake it would bear the risk of that mistake and be unable to void the Merger Agreement on that ground. See RESTATEMENT (SECOND) OF CONTRACTS §§ 151–154 (1981).

94. Tyson, 789 A.2d at 66.
96. Tyson, 789 A.2d at 67. If buyers were concerned with protecting themselves against any short-term downturn, they could draft their MAE clause to cover that contingency.
97. Id. at 72–73.
98. Id. at 68. With hindsight, it may seem odd that Tyson did not negotiate a more favorable MAE clause to permit it to withdraw from the Merger Agreement if IBP's performance declined for any reason, regardless of fault. Negotiations took place in a bull market, and it might seem logical that IBP would agree to such a broad clause. However, as noted, MAE clauses generally are negotiated heavily and parties are aware that markets fluctuate greatly. Further, the strength of the market strongly induced Tyson to desire acquiring IBP because Tyson sought market dominance at a time when the market was favorable.
come" with regard to the "true" meaning of the MAE clause, inter-
pretative rules of contract law favored IBP's position.99

Using a seller-friendly interpretative approach for broadly
drafted MAE clauses does not mean that the purchaser can never
prevail on their claim that an MAE has occurred. It simply places
the burden on the buyer. Tyson proved unable to meet that bur-
den.100 Although it argued that the decline in IBP's performance
in recent fiscal quarters was sufficiently severe to constitute an
MAE, Tyson's own analysts concluded that this negative trend
was part of a regular business cycle.101 Historically, IBP had large
variations in earnings that should have put Tyson on notice. The
court noted that "[a]lthough IBP may not be performing as well
as . . . Tyson had hoped," it appeared to be capable of performing
within historic ranges.102 Because the court interpreted the MAE
clause as requiring Tyson to demonstrate an unanticipated ad-
verse impact, the historic swings were relevant and precluded a
finding that an MAE had occurred.103 This finding was based on
careful application of contract law.104

99. Id. at 71.
100. Id.
101. See id.
102. Id.
103. See id. at 70–71.
104. See id. at 65–71. By rooting its decision strongly in contract law, Tyson makes it
    clear that merger parties have the power to draft any form of MAE they choose, but that
    they must use great care in drafting. First, it is essential that parties pay close attention
to internal consistency of terms. Because courts will interpret contracts as a whole, terms
should be attributed the same definition whenever they appear in the merger agreement.
This suggests that more attention should be paid to the interrelation between the main
text of a merger agreement and any attachments since those documents ordinarily will be
treated as part of the contract. Additionally, if a word is intended to have something other
than its usual definition, parties must be careful to clearly say so. For example, the term
"business" generally will be construed to include not only the physical assets associated
with a company, but the process of exploiting those assets, which includes the financial
activities of operations. See Pine State Creamery Co. v. Land-O-Sun Dairies, Inc., No. 98-
2441, 1999 U.S. App. LEXIS 31529, at *10 n.1 (4th Cir. Dec. 2, 1999) (refuting the argu-
ment that "business" referred solely to physical assets of a corporation).

Because it is often poor financial performance that arguably triggers an MAE clause,
parties should pay close attention to the definition of materiality in this regard. All busi-
nesses are subject to fluctuations in performance and, as Tyson makes clear, that fact will
be taken into account by courts in determining whether a downturn in performance is suf-
ciently serious to justify invocation of the MAE clause. If parties want to exclude events
caused by general economic conditions and/or industry specific events from the definition
of material adverse effect, they should spell that out fully. Parties might attempt to cir-
cumvent this problem by including specific thresholds either by dollar amount or percent-
age change in earnings that would automatically qualify as material.
It is worth noting that Vice Chancellor Strine did not allow corporate fiduciary duties to cloud contract doctrine. The assertions of Tyson's directors could be viewed as expressing their belief that decline in economic performance adversely impacted shareholder value. If corporate doctrine creeps into the analysis of contractual obligation, its concerns of fiduciary obligation to maximize shareholder wealth might have tipped the scales in Tyson's favor. The Tyson court avoided that error with this issue and with the significant issue of determining appropriate remedies for failed mergers.

IV. SPECIFIC PERFORMANCE

A. Appropriateness of an Award of Specific Performance to a Jilted Seller

In addition to addressing the proper method of interpreting the MAE clause, the Tyson court considered the question of what award should be given to a jilted seller in a merger. 105

105. See Tyson, 789 A.2d at 82–84. Before turning to the suitability of specific performance as a remedy for a jilted seller, the court examined several other bases asserted by Tyson as justifying their non-performance of the Merger Agreement. It first considered the issue of whether Tyson was entitled to rescind the Agreement due to fraud. Id. The court concluded that it was not. Id. at 72. Unlike the situation confronting the court with respect to the proper interpretation of the MAE clause, the law on fraud is clear. The court broke no new ground on this issue. Tyson had agreed that “it could not use any oral or written due diligence information (or omissions therefrom) as a basis for a lawsuit unless that issue was covered by a specific provision of a subsequent, written contract.” Id. at 73. Tyson tried to analogize this clause to a boilerplate merger or contract integration clause, id. at 73 n.180, because “there has been a tendency to deny such clauses conclusive effect.” E. ALLAN FARNSWORTH, CONTRACTS § 7.3, at 436 (3d ed. 1999). The court refused to treat this clause similarly, reasoning that the agreement at issue “is a short and important contract knowingly entered into . . . Tyson thus seeks to have this court relieve it of a risk it assumed with full knowledge and to deprive IBP of its legitimate contractual expectations.” Tyson, 789 A.2d at 73 n.180. In light of this clause, Tyson could not claim that it relied on any assurances of IBP that were not included as specific promises in the Merger Agreement. See id. Because the basis of Tyson’s fraud claims depended on statements not reduced to writing, they could not prevail and rescission was not allowed. Id. at 74. Tyson made several other arguments contending that it was entitled to rescission. See id. at 74–78. Each of these related to actions specific to IBP and Tyson, and would have no relevance in later cases. For this reason, they are not discussed in depth. In brief, Tyson claimed that certain financial projections were false and misleading, that there were deficiencies in the due diligence process, and that IBP failed to disclose a comment letter from the SEC. See id. The comment letter addressed issues already mentioned in the due diligence process, including inventory problems at DFG, compliance with SEC accounting guidelines, and IBP’s reporting of its business segments. Id. at 22. The court rejected each
Having concluded that Tyson breached the Merger Agreement, the choice before the court was between the specific performance sought by IBP and money damages.¹⁰⁶

Specific performance is not the preferred method of awarding damages in a contract action.¹⁰⁷ Generally, the goal of contract damages is to protect the expectation interests of the parties by ensuring that a damage award leaves the non-breaching party in as good a position as it would have been had the contract been performed.¹⁰⁸ In the usual case, this goal can be satisfied by giving the non-breaching party an award of money damages equal to the amount of loss suffered under the contract.¹⁰⁹ Generally, contract damages are considered to be substitutional—a non-breaching buyer can take the damages and purchase substitute goods in the market, which, theoretically, puts it in the position it would have been in had the contract been performed.¹¹⁰

of these claims and found that rescission of the Merger Agreement was not warranted. Id. at 74–78.

The court then considered whether Tyson had breached the Merger Agreement by refusing to close on its Cash Offer as of February 28, 2001 when the minimum tender condition of 50.1% of IBP shares had been surpassed and Tyson received the required anti-trust clearance. Id. at 79. Tyson argued that it could not comply with SEC conditions necessary to close because it could not provide sufficient financial information about the transaction. Id. SEC regulations state that "[p]ro forma financial information is required in a negotiated third-party cash tender offer when securities are intended to be offered in a subsequent merger or other transaction in which remaining target securities are acquired and the acquisition of the subject company is significant to the offeror." Id. (quoting SEC Schedule TO, Rule 14d-100, Item 10, Instruction 5, 17 C.F.R. § 240, 14d-100 (2002)). In response, IBP argued that Tyson had an obligation under the Merger Agreement to make "reasonable best efforts" to close the Cash Offer and could have complied with SEC requirements by constructing pro forma information, which with inclusion of sufficient qualifications would have passed muster with the SEC. Id. The court ultimately concluded that IBP failed to prove "with the certainty that is required to sustain a finding of contractual breach" that it was unreasonable for Tyson to wait until it received certified financial statements before proceeding with the merger. Id. at 81. It noted that it was unclear that the SEC would accept a registration statement based on projected restatements of financial information. Id. Therefore, the court concluded that Tyson did not breach the Merger Agreement by failing to close the Cash Offer on February 28, 2001. Id. It did, however, breach its agreement to close the alternative Cash Election Merger by May 15, 2001, because, as discussed, it had no justification for non-performance on that date. Id. at 81–82.

¹⁰⁶. There are infrequent situations when it is impossible to grant specific performance, such as when the subject matter of the contract is unique and has been destroyed, or when the performance would require the compulsion of personal services.

¹⁰⁷. See FARNSWORTH, supra note 105, § 12.1, at 756.

¹⁰⁸. Id.

¹⁰⁹. Id.

¹¹⁰. Id. § 12.2.
Due to the court's preference for money damages, a party seeking an award of specific performance must cross a significant threshold by showing the inadequacy of monetary damages. In making that determination, courts consider several factors. These include the difficulty of proving damages with reasonable certainty, the difficulty of procuring a suitable substitute performance by means of an award of money damages, and the likelihood that an award of damages could not be collected.

Before considering the legal standards governing the issue of damages, it is useful to think about why the directors of a jilted seller might seek to qualify for an award of specific performance. It might seem logical that a sufficiently large award of money damages would satisfy them. After such an award, the directors would be compensated for the lost value of the merger and still retain control over their entity. They could re-enter the acquisitions market and find another buyer. If that were to occur, the seller could be in a favorable position. As Tyson shows, however, there are many reasons for the seller to prefer forced consummation of the deal. Tyson faced a dearth of guiding law addressing the interests of sellers in this situation; therefore, the court reasoned from the opposite perspective, where ample precedent exists. It noted that "[i]f the tables were turned and Tyson was seeking to enforce the contract, a great deal of precedent would indicate that the contract should be specifically enforced." When the buyer is the non-breaching party in an acquisition, it generally can argue with success that, absent specific performance, it cannot be made whole because "the target company is unique and will yield value of an unquantifiable nature, once combined with the acquiring company." This assertion rests on a general premise of mergers—the corporation to be acquired offers unique advantages to the acquiring corporation and the com-

111. Precise statements of this general rule vary from jurisdiction to jurisdiction, but the test is consistent. See, e.g., 96 N.Y. Jur. 2d Specific Performance § 50 (1992) ("Courts of equity have decreed specific performance of contracts for the sale of a business, particularly where an award of damages would have been inadequate or impracticable.") (citations omitted).
113. Tyson, 789 A.2d at 82.
bination of the two will create a new and "better" entity.\textsuperscript{115} If that entity does not come into being, the buyer cannot be made whole. The unique nature of the contract's subject matter places the transaction in the special category of contract law where specific performance is appropriate.\textsuperscript{116}

The impossibility of quantifying a deal that will no longer occur—absent an award of specific performance—is the same when the seller is the disadvantaged party. The corporation will still exist and can be sold to a third party, but the price of that subsequent transaction cannot be said with certainty to compensate for the losses arising from the aborted transaction.\textsuperscript{117} This is particularly true when compensation for the original merger included shares of the buyer.\textsuperscript{118} Benefits from a merger are expected to result in higher share prices for the surviving corporation. That increased value was to pass, in some measure, to the seller through the compensation structure. Because the extent of that increase in value cannot be determined, money damages cannot compensate adequately for the loss.\textsuperscript{119}

From a seller's perspective, additional problems arise when a buyer breaches a merger agreement. These added difficulties help explain why a jilted seller will seek an award of specific performance in lieu of money damages. There are numerous intangible harms to the jilted seller when a merger goes bad. When a merger is not consummated, the target company can suffer great harm to its reputation. The buyer's rejection of the deal may leave the impression in the market that the target is "damaged goods" and harm the overall perception of the seller's worth. Recovery from this harm may be difficult, if not impossible, and is not easily quantifiable in a way that allows money damages to compensate for it. It is true that parties often put a price on non-completion of

\textsuperscript{115} See, e.g., Allegheny Energy v. DQE, Inc., 171 F.3d 153, 163 (3d Cir. 1999) (discussing remedy for jilted buyer and finding that the "synergies" of the proposed merger "constitutes a unique, non-replicable business opportunity").

\textsuperscript{116} See 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1142 (1964).

\textsuperscript{117} See Tyson, 789 A.2d at 82–83.

\textsuperscript{118} If consideration for the merger was all cash, it may be argued that specific performance is not necessary because the parties agreed on a valuation prior to breach. That argument may address the problem of valuing a non-existent entity, but does not solve the other problems facing jilted sellers.

\textsuperscript{119} See Tyson, 789 A.2d at 82–84 (stating the court's rationale for an award of specific performance).
mergers through the inclusion of termination or break-up fees.\textsuperscript{120} However, when those provisions are invoked, there is a tacit acknowledgment by the party walking away that it bears some responsibility for the failure. If it did not, it would claim breach by the other party and refuse to pay the predetermined fee. When a party simply refuses to complete a merger, it signals that the other party is at fault and the tone of the break-up is significantly altered. Although a court may ultimately determine that the action of walking away was not justified, that decision is likely to be long delayed. During the pendency of the case, there may be serious negative impact on the seller's position in the market. The decline in perceived value of the non-breaching party, from the time of termination of the merger agreement to the ultimate vindication by court decision, may be impossible to determine.

Furthermore, the seller may have sought a merger because its management wanted to divest ownership and responsibility. An award of money damages does not cause a change in the corporate structure. Even if a subsequent sale to a new purchaser can be completed, the original expectations of the seller's management will not be fulfilled.\textsuperscript{121} Even if the seller's management and others planned to exit post-merger, they likely still care about the fate of an entity in which they have been vested. Concern about the future is even more apparent when management intended to stay. A subsequent sale will leave them in quite a different position than they originally envisioned, thus making monetary damages inadequate. For all of these reasons, it is rational for the non-breaching party in a merger agreement—be they buyer or seller—to seek the extraordinary remedy of specific performance.

B. Specific Performance in Tyson

As discussed, the party seeking specific performance of a merger agreement to date typically has been the buyer. Tyson presented a unique challenge to the Delaware court because the

\textsuperscript{120} A “termination fee” or “break-up fee,” if agreed to, obligates the target corporation to pay a predetermined amount of money to the initial merger partner in the event that the merger is not eventually consummated. See Dennis J. Block et al., 1 The Business Judgment Rule: Fiduciary Duties of Corporate Directors and Officers (1998).

\textsuperscript{121} Fulfilling expectations is a basic premise of contract damages. See Farnsworth, supra note 105, § 12.1, 756 (stating that “the expectation interest . . . is said to give the injured party the ‘benefit of the bargain’”).
claim for specific performance was made by the jilted seller.\textsuperscript{122} The unusual posture of the case may explain why Tyson apparently did not consider the possibility that IBP would argue for specific performance and failed to address the issue in its briefs.\textsuperscript{123} Perhaps the lack of careful assessment of this remedy by the parties explains the somewhat summary treatment the court gave it.\textsuperscript{124} The court’s discussion of the suitability of specific performance is noteworthy not for its length or in-depth analysis, but for the result it reaches:

Acknowledging that if Tyson, the buyer, had been the party seeking specific performance, it likely would have been granted, the court concluded that there was not “any compelling reason why sellers in mergers and acquisitions transactions should have less of a right to demand specific performance.”\textsuperscript{125} The court first looked at whether monetary damages would be adequate compensation and concluded that they would not.\textsuperscript{126} The Cash Election portion of the Merger Agreement, which was the payment option at issue at the time of breach, allowed IBP shareholders to elect to receive compensation in cash, in Tyson shares, or a combination of each.\textsuperscript{127} Under this arrangement, if the merger was completed, IBP shareholders had the opportunity to “share in the upside of what was touted by Tyson as a unique, synergistic combination.”\textsuperscript{128} According to the court, the unique nature of the combination between IBP and Tyson made the determination of appropriate monetary damages difficult and speculative.\textsuperscript{129} Therefore, although the court is not explicit in this finding, IBP satisfied the threshold required for specific performance by demonstrating the inadequacy of monetary damages.\textsuperscript{130}

\textsuperscript{122} The situation was unique not only in Delaware but also elsewhere. A search for cases involving jilted sellers seeking specific performance of a merger agreement yielded nothing on point.
\textsuperscript{123} Tyson, 789 A.2d at 82.
\textsuperscript{124} See id. at 82–84.
\textsuperscript{125} Id. at 83.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} See id. This finding should hold true in most merger cases. If the position is accepted, Tyson will support imposing the remedy of specific performance. It is important in this respect to remember that the claim for specific performance arose \textit{after} full approval of the merger agreement. Whether specific performance should be granted when a breach
If this decision is followed by other jurisdictions, it will sound a strong note in favor of specific performance of merger agreements. If every merger creates a new and unique entity and that fact is sufficient to make money damages inadequate, specific performance will be the default remedy when a merger is not completed. The effects that this will have on party negotiations are interesting to ponder.

The court also considered whether specific performance was a practicable remedy. Even if it is determined that specific performance is the correct remedy, the court expressed concern that it may not be possible to grant it. In Tyson, there were clear indications that the merger could take place as originally contemplated. There was evidence suggesting that Tyson still wanted to acquire IBP, but at a price far lower than the original merger price, demonstrating that the protesting party believed specific performance was possible. The court acknowledged that some difficult personality problems might arise if it ordered specific performance. It expressed concern about forcing a merger between two openly hostile parties, but concluded that Tyson ultimately would have the power to decide all management issues and therefore, could solve these problems through removal if necessary. While this may not have pleased IBP executives, it did leave them in the position they would have been in had the merger been consummated, since Tyson would have had the power of replacement post-merger under the terms of the Merger Agreement. Therefore, this outcome seemed fair to the court.

occurs prior to full approval is a different matter.

131. Id.
132. Id.
133. Id. at 47-49.
134. Id. at 83.
135. Id. at 83-84.
136. Id. at 84.
137. Id. This suggests that, after Tyson, parties could argue against specific performance on the ground that it would not be practicable. Although not the subject of this Article, interesting (and potentially harmful) results could flow from such a position if the argument is that management could not function. If managers know of that possibility, they might be encouraged to be more divisive in their attacks on merger parties and to bad-mouth the other corporation more vociferously.
C. Implications of the Decision to Award Specific Performance to a Jilted Seller

The conclusion reached by the Tyson court and the reasoning behind its holding seem uncontroversial. When a contract is breached, careful application of contract law should not give anyone pause. The opinion is important not only for what it says, but also what it does not say. Although the potential to do so was strong, Vice Chancellor Strine did not conflate corporate fiduciary obligations with contract doctrine. Instead, he properly paid close attention to contract law demands and raised issues worthy of closer examination, while he wisely avoided being sidetracked by potentially competing corporate law concerns. Others who look to the Tyson opinion should be careful to understand and appreciate this approach and not misread the decision. To understand why this warning is necessary, the following discussion highlights the ease with which Tyson might be misread and identifies the dangers of doing so.

V. INTERPRETING TYSON

A. Misreading Tyson to Emphasize Corporate Law Concerns

The Tyson opinion is open to a reading that would emphasize corporate law concerns. Many issues addressed by the court go to the heart of corporate doctrine. One of these issues is the degree of consideration that must be given to the interests of various corporate constituencies when a merger is contemplated. The merger process affects the interests of many groups within the corporate structure, including, among others, directors, shareholders, employees, and creditors. The interests of these groups are not always aligned. For example, shareholders may desire a particular merger partner because that party offers the highest

138. Id. at 54–55.
139. See id. at 82 n.200.
140. See id.
141. Id.
142. Id.
144. Taylor, supra note 8, at 562–77.
highest price in the short-term. However, directors and employees may favor a competing party because they believe the long-term "fit" of the two entities will be superior, ultimately yielding the best return.

Corporate law is not necessarily clear about how to balance these competing interests. The only clear directive is that no merger can be consummated without approval from at least a majority of both directors and shareholders. What is unclear is when and how those approvals must be sought. Directors will pass on the transaction in the first instance. What if they refuse an offer? When must shareholders be informed of a merger offer? Upon its receipt? Upon their approval of it? And what if there are competing bids? How much discretion do directors have to recommend a lower priced bid because they believe it offers long-term benefit? In addition to these questions concerning allocation of power and control between directors and shareholders, there are other interests at stake when a merger occurs. Thus, the issue becomes when and how much weight should be given to these other groups?

The Tyson opinion could be read as raising these issues. Consider, for example, the court's allusion to the difficulty of protecting the interests of all constituents affected by the merger. The

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145. Id.
147. Taylor, supra note 8, at 562–77; see generally O'Neill, supra note 143.
150. See O'Neill, supra note 143, at 681–84.
151. Traditionalists would argue that corporate law is clear at least to the extent that no attention need be paid to any constituent group other than shareholders. This position is increasingly under attack. Many jurisdictions now recognize, through corporate constituency statutes, the right of directors to take broader interests into account should they choose to do so. See infra note 155 for a more in-depth analysis of employee rights in the merger context. See also McGinty, supra note 146; O'Neill, supra note 143 at 68–83.
152. IBP, Inc. v. Tyson Foods, Inc. (In re IBP, Inc. S'holders Litig.), 789 A.2d 14, 82
Vice Chancellor refers specifically to the "thousands of employees" of the two corporations, stating, "[t]he impact of a forced merger on constituencies beyond the stockholders and top managers of IBP and Tyson weighs heavily on my mind." Without an in-depth discussion, he concludes that the impact on constituencies other than shareholders "seems tolerable" because "the Tyson constituencies would be better served on the whole by a specific performance remedy, rather than an award of damages that did nothing but cost Tyson a considerable sum of money."

Reading the opinion as a pronouncement on corporate law concerns makes this cursory treatment of constituent interests problematic. First, why mention them at all? Corporate law generally does not recognize groups other than directors and shareholders as having rights in the merger process because those groups (together with the officers) are considered the "core" of the corporation. Creditors may be afforded rights in some special circumstances but beyond that, the interests of external constituents generally receive no special treatment. If Tyson is read as endorsing consideration of broader constituency interests, its precedential impact will be weakened significantly. Not specifically addressed is the issue precisely identifying who those broader constituents are. Should or must the interests of such groups (however identified) always be considered when evaluating claims of breach and remedy in the merger context? If so, at what stage of the process? One specific concern raised when reading Tyson in this manner is whether employees have legal entitlement to a voice in determining the attractiveness of the proposed transaction comparable to the rights of shareholders. Although all of these ideas are worthy of debate about the proper contours of cor-

(153) Id.
(154) Id. at 84.
(155) Although some jurisdictions permit directors to consider other constituencies, including employees, creditors, and the community, Delaware does not. Because the vast majority of corporations are governed by Delaware law, as a general rule only director and shareholder interests are implicated. See O'Neill, supra note 143, at 682. For an example of a statute recognizing broader interests, see MINN. STAT. ANN. § 302A.251 (West 1985 & Supp. 2002).
(156) This may result if the terms of the debt instruments contain provisions granting its holder the right to vote in defined situations.
(157) O'Neill, supra note 143, at 681–82.
(158) See generally O'Neill, supra note 143 (offering conflicting views on whether corporate directors owe a fiduciary duty to employees).
porate fiduciary duty, it seems unlikely that the *Tyson* court intended to open those doors when it was not necessary or relevant to the issue presented.

Another corporate law issue capable of mistakenly being understood as raised by *Tyson* is proper directorial behavior after a merger has received director and shareholder approval but before it is completed. Can directors argue at that time that completion would not be in the best interests of their shareholders despite their prior approval? Under contract doctrine, once the necessary approvals are received and assuming all other conditions to closing are satisfied, the deal is done. Each party then has the option of completing the transaction, finding a justification for non-performance (most often by alleging that the other party is in breach), or paying damages.

*Tyson* might be seen as changing this landscape. Tyson directors attempted to use corporate fiduciary duty arguments arising after contract completion to justify non-performance. They no longer wanted to acquire IBP because they believed, or stated that they believed, that it would not be in Tyson's best interest. Acquiring a corporation whose profits were flagging would only drag down Tyson's financial position. These arguments, if raised prior to completion, would be given great weight.

Corporate law fiduciary duties of care and loyalty compel directors to act in the best interests of their shareholders. In the time period between director approval of a merger agreement and satisfaction of all conditions to closing, these corporate law concerns trump contractual protection of the merger party. Does *Tyson* suggest that corporate concern with shareholder interests should also be con-

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159. Taylor, *supra* note 8, at 564 n.10.
160. *Id.* at 623–28.
161. *Id.*
163. See, e.g., Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989) (upholding as reasonable the termination of a merger when the board of directors determined that the stock value was inadequate and constituted a danger to corporate policy and effectiveness).
sidered in the post-approval stage? Directors eager to avoid "bad deals" may try to use the decision to support that argument, and it is one that presents opportunities for interesting theoretical debate and analysis over the intersection of corporate and contract law. This debate, however, is likely to raise many complex issues while failing to provide useful guidance or comfort to parties wishing to enter into merger agreements. Greater ease may be found if Tyson is read properly through a contract, rather than corporate, law lens.

B. Properly Reading Tyson to Emphasize Contract Law Concerns

With contract law as the guiding tool used in reaching the conclusion that Tyson had breached the Merger Agreement and that IBP was entitled to a grant of specific performance, the problematic issues mentioned above do not arise. Fiduciary duties do not play a role in contract doctrine. As a general rule, contract law is considered to be "amoral." Parties are free to breach their agreements as long as they are willing to pay the cost of damages for that breach or are willing to bear the risk that a court will order them to do so. Some duties do attach with or without explicit agreement. For instance, all contractual parties are bound by an obligation to act in good faith and to deal fairly with others; however, these duties are very limited. Generally, there is no requirement that parties negotiate in good faith. Also, if parties include language in their agreement defining good faith, the general understanding of the term will not override or modify those explicit contractual terms. Due to strong notions of "freedom of contract," parties otherwise remain free to dictate their own rules of behavior.

166. Tyson, 789 A.2d at 82–83.
167. See Farnsworth, supra note 105, § 12.1, at 756 (explaining that "along with the celebrated freedom to contract goes a considerable freedom to break them as well").
169. See Duncan Kennedy, From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form," 100 Colum. L. Rev. 94, 144 (2000).
170. While parties may not stipulate that they may act in bad faith, they are free to define appropriate good faith behavior. See Riggs Nat'l Bank of Wash. v. Linch, 36 F.3d 370, 373 (4th Cir. 1994).
171. Regan, supra note 8, at 1.
When the *Tyson* court considered whether the Merger Agreement had been breached and the suitability of granting specific performance to the jilted seller, it was not looking at corporate law dictates about directorial fiduciary duties. Instead, it was applying contract law to determine party intent and how to craft an appropriate remedy.\(^1\)\(^2\) This approach strengthens both contract and corporate law. While a merger is undoubtedly a corporate transaction, a merger agreement is a contract subject to the rich body of law governing such instruments. Recognizing this encourages careful consideration and treatment of contract law doctrine that frequently is disregarded when disputes arise in the context of a merger. Because of the corporate setting of mergers, courts usually default to an application of corporate doctrine and its fiduciary duty requirements without due regard to competing contractual interests.

If corporate law concerns of fiduciary duties are permitted to dominate simply because a dispute arises in the merger process, these fundamental principles are undermined.

Under the guise of fiduciary duty, directors can cause their corporations to breach agreements without bearing the costs that otherwise would attach.\(^3\) Although this may protect some shareholders, it subverts the certainty of contract. This undermines the certainty of contract law and muddies the water for directors attempting to draft merger agreements. Of what value is a signed document that parties can freely walk away from?

Careful distinction between the roles of contract and corporate doctrine help make *Tyson* useful to drafting parties. It eliminates the need to second-guess how another court might consider the problematic corporate issues potentially implicated in *Tyson*. This is not to suggest that after *Tyson* there will never be disputes over merger agreements. All contracts are subject to interpretative debate, and with the high stakes involved in mergers, parties are likely to assert their position vigorously.\(^4\) However, to the extent that parties can be guided by this decision, they may be able to avoid later disagreements about their merger agreement or at least minimize the length of time spent fighting about it.

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173. See Taylor, *supra* note 8, at 565; see also Regan, *supra* note 8, at 82–89.
VI. CONCLUSION

Uncertain economic times provide strong incentive to reexamine corporate behavior and the laws that govern it. *Tyson* provides a lens for consideration of proper treatment of failed mergers, an area that to date has not been explored fully. *Tyson* is an important example of the thoughtful balancing of corporate and contract law values in this area. It is a strong assertion of the need to value contract law principles when a proposed merger is not consummated. It successfully demonstrates that the complex web of contract and corporate law relevant to this situation can be navigated, paying due respect to all relevant interests. In reaching its result, the *Tyson* court avoids the common problem of over-emphasizing corporate law fiduciary duties and thereby subverting contract doctrine.

The result does not diminish the importance of corporate doctrine—it clearly still plays a critical role in the merger process. Directors continue to have strong fiduciary duties to their shareholders and cannot act in an uninformed manner when deciding whether to enter into a merger agreement or terminate one to which their corporation is already a party. Those duties should not act in isolation, however, but must be balanced properly with the contractual rights and interests of all parties to the merger. *Tyson* demonstrates clearly that reaching such a balance is not only appropriate, but also possible.

The outcome in *Tyson*—that a reluctant buyer can be forced to complete a planned purchase—is particularly significant now. With great economic uncertainty facing our country and a likely downturn in overall market conditions, we almost undoubtedly will see more failed transactions than we have to date. *Tyson*, by setting precedent that specific performance is the appropriate remedy in such a situation, sounds a loud warning notice. This notice makes clear that when the merger process breaks down after an agreement has been reached, contract law is just as important as corporate law in determining the proper resolution. *Tyson* also makes clear that the standards applied to determine rights and obligations when the seller is the potentially breaching party are the same as when it is the buyer who wants out. Although *Tyson* does not put to rest all of the questions that may arise when a proposed merger is not consummated, it does provide significant guidance.
If *Tyson* is applied, as this article argues it should be, parties will be held to their original intentions and great weight will be placed on the language of the merger agreement. Therefore, parties will be encouraged to draft such agreements carefully and clearly. If directors have trepidation about the future and wish to protect themselves, they must pay particular attention to escape clauses, including those covering material adverse effects. *Tyson* emphasizes the importance of contract doctrine in this area without minimizing corporate directors’ fiduciary duties.

While every failed merger will have to be examined on its own unique facts, *Tyson* gives strong indications of how protective contractual provisions will be treated when a merger fails. The decision ultimately provides a valuable pronouncement on the interaction between contract and corporate principles and a critical guide for future merger parties.