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Selling Stock and Selling Legal Claims: Alienability as a Constraint on Managerial Opportunism

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SELLING STOCK AND SELLING LEGAL CLAIMS: ALIENABILITY AS A CONSTRAINT ON MANAGERIAL OPPORTUNISM

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Abstract

Scholars have long recognized the importance of market forces as a tool for disciplining the management of public corporations and reducing agency costs. If managers loot or otherwise mismanage the firm, the firm's stock price will suffer, raising its cost of capital and leaving managers exposed to the threat of a hostile takeover. In recent decades, changing patterns of stock ownership have threatened the viability of this market check on mismanagement. Institutional investors, and particularly index funds, own an increasing portion of publicly traded firms, and face substantial liquidity and other barriers to simply selling their positions. To the extent this phenomenon attenuates market reactions to mismanagement, stockholders will have to look elsewhere for protection.

More fundamentally, market discipline cannot effectively deter wrongdoing in final period transactions like mergers. Stockholders must look to legal remedies—such as fiduciary duty class actions or appraisal proceedings—for deterrence against managerial sloth or opportunism in connection with mergers. Historically, though, these remedies have been rendered ineffective by an agency problem (between stockholders and plaintiffs' attorneys) every bit as problematic as the one (between stockholders and management) the remedies are intended to address. Recently, however, a new market has arisen with the potential to render these remedies more effective. If, instead of selling their shares, stockholders can sell their legal claims—as they are beginning to do in appraisal actions—agency costs in merger litigation can be reduced and managerial opportunism more effectively deterred.

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Introduction

When a stockholder in a public company is dissatisfied with how the company is being managed, the classic response is for her to simply sell her shares. So classic is this response that it has come to be known as the "Wall Street Rule"—unhappy investors should not get involved; they should get out.[1] While the reluctance of major stockholders to get involved in management is often lamented, in practice the ability of stockholders to easily sell their shares in a reasonably efficient market provides excellent protection against mismanagement. If a company's managers serve stockholders poorly—whether as a result of incompetence, sloth, or disloyalty—the company's stock price will suffer, putting the firm at a competitive disadvantage and exposing management to the prospect of a takeover.[2] The mere existence of a market for stock thus serves to alleviate the agency problem that inevitably arises from the separation of ownership and control that characterizes the modern public company.[3] The apparent effectiveness of market discipline is one of the primary justifications for the largely "hands off," enabling nature of corporate law.

In recent decades, however, the rise of institutional shareholding has led some to question whether this market discipline will continue to be effective. Today, a relatively small number of large institutions own the majority of the shares in most large public companies.[4] The concern is that large institutional investors will find it impractical to liquidate their large positions, and will thus be unable to simply sell in the face of mismanagement. The concern is particularly acute for index funds, which make up an increasing percentage of institutional stockholders. Not only do such funds face liquidity constraints, but by their very nature they do not seek to identify mispriced securities in the first place. If the increasing dominance of such funds reduces the market's ability to detect and price mismanagement, the disciplining effects of the market will also be reduced.

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1. *See* Louis Lowenstein, *Beating the Wall Street Rule with a Stick and a Carrot,* 7 ANN. REV. BANKING L. 251, 251 (1988) ("The Wall Street Rule, which has been immutable for as long as any of us can remember, dictates that shareholders not take an active role in corporate affairs. Love'em or leave'em.").

2. *See, e.g.*, Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 275 (1977).

3. *See* ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 281-87, 289-99, 352-57 (1932).

4. *See* discussion *infra* Part II.

These concerns are ill-founded. Market efficiency does not require all investors, or even most investors, to be actively engaged in attempting to price securities. To the extent increased holdings by some types of institutional investors renders markets less efficient, the resulting inefficiency will represent a profit opportunity for other sophisticated investors. Any disequilibrium created by changing patterns of shareholding is likely to be self-correcting.

The more serious shortcoming of market discipline is that it is unlikely to be effective in final period transactions.[5] The most common final period transaction for corporate managers is a merger. Following a merger, the target company will typically have no immediate exposure to either the capital markets or the market for corporate control. The target company's managers will be wholly immune to market discipline, whatever their sins of omission or commission in arranging the merger. The law has long recognized that market discipline will be inadequate in merger scenarios. Delaware law, for example, provides for more searching scrutiny in fiduciary duty class actions involving such transactions, at least in theory.[6] In practice, however, fiduciary duty class actions have been ineffective in policing agency problems inside the corporation, because they have been crippled by agency problems *outside* the corporation—namely, between the dispersed stockholders who own the legal claims and the plaintiffs' lawyers who control them.

Even here, however, the stockholder's right to sell offers a potential solution. After a merger has been announced, it is too late for a stockholder to sell her shares and be protected—whatever harm has been done will already be reflected in the stock price.[7] It need not, however, be too late for the stockholder to sell her legal claims. A specialist aggregator of legal claims could buy up claims and prosecute them more effectively than dispersed stockholders, in particular by better monitoring the plaintiffs' attorneys and curtailing the agency problems that have rendered merger

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5. *See* Stephen M. Bainbridge, *The Geography of Revlon Land*, 81 FORDHAM L. REV. 3277, 3291 (2013).

6. *See* discussion *infra* Section III.A.

7. *See* Jeff Goetz, *A Dissent Dampened by Timing: How the Stock Market Exception Systematically Deprives Public Shareholders of Fair Value*, 15 FORDHAM J CORP. & FIN. L. 771, 794 ("[S]ince most shareholders that might wish to dissent from the transaction learn about the transaction when the rest of the market does—at the time of public announcement—they can only sell their shares after that announcement . . . . Consequently, dissenting shareholders will only be able to sell their interests in the company after the merger's value has become incorporated into the company's share price.") (footnote omitted).

litigation ineffectual. The ability to sell to such an aggregator would provide injured stockholders with compensation for injuries due to managerial opportunism and, more importantly, help deter such wrongdoing in the first place. A back-end market in legal claims promises to provide at least some of the discipline that the front-end market for securities cannot provide in the merger context.

The nascent market for appraisal rights offers a glimpse of this promise. Appraisal statutes give a stockholder the right to dissent from some forms of merger transactions, refusing the merger consideration and instead requesting a court declare the "fair value" of her shares.[8] Crucially, a stockholder can preserve appraisal rights even if she buys her shares *after* a transaction has already been announced. Effectively, this means that existing stockholders can sell their appraisal rights to aggregators known as appraisal arbitrageurs. Although a relatively new phenomenon, the available evidence so far suggests that so-called "appraisal arbitrage" is not characterized by the same pathologies that plague the traditional merger class action, and serves as a better tool of enforcement of the substantive law. To the extent the market forces driving appraisal arbitrage can be introduced to the fiduciary duty class action, it, too, could function as a more effective check on managerial incompetence and opportunism. The right to sell claims could at least partially fill the role for final period transactions that the right to sell stock serves in the ordinary course.

This article proceeds as follows: Part I provides a brief explanation of how stockholders' ability to sell their shares can deter mismanagement. Part II considers the risk that increasing institutional ownership of public companies will dilute deterrence, and concludes that the risk is small. Part III explains how the ability to sell shares fails to deter managerial opportunism in final period decisions like mergers, and briefly introduces the traditional legal mechanisms addressed to the problem. Part IV explains how the right to sell legal claims could address managerial opportunism in final period transactions, and gives the real-world example of appraisal arbitrage.

I. The Right to Sell Stock as a Constraint on Mismanagement

One of the defining characteristics of the modern public corporation is the separation of ownership and control.[9] The stockholders own the corporation, while the managers—directors and officers—control it. As in

8. *See* DEL. CODE ANN. tit. 8, § 262 (2011).
9. *See* BERLE & MEANS, *supra* note 3, at 119-25.

any situation where one person is given control of assets for the benefit of another, this arrangement leads to a pervasive agency problem. If the interests of the managers and the stockholders are not perfectly aligned (which they never are), there is a risk managers will pursue their own interests at the expense of the interests of the stockholders.[10] This managerial opportunism—which can be lumped under the catch-all term "shirking"—can take many forms, ranging from indifferent and slothful performance of one's assigned tasks, to over-consumption of perquisites, to outright stealing.[11]

The agency problem at the heart of the public corporation is hardly a secret. The total amount lost to agency costs—including the amounts spent attempting to reduce shirking monitoring or bonding mechanisms—threatens to be exceedingly large. This is especially so, given that stockholders are unlikely to be effective in monitoring for mismanagement. Even if an individual stockholder possessed the expertise and resources to effectively monitor management, he would recoup only a very small portion of every dollar spent doing so. This collective action problem gives each stockholder an incentive to remain passive, hoping to free-ride on the monitoring efforts of other stockholders.[12]

Reducing agency costs is one plausible role for corporate law. For the most part, however, corporate law has not taken up this challenge. Delaware, home to the majority of public companies, has a corporate code that is almost exclusively enabling rather than regulatory in nature, and other states have largely followed suit.[13] Furthermore, judicial review of

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10. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1164, 1169-70 (1981) [hereinafter Easterbrook & Fischel, *The Proper Role*] ("Corporate managers (which include both officers and members of the board), like all other people, work harder if they can enjoy all of the benefits of their efforts. In a corporation, however, much of the benefit of each manager's performance inures to someone else, whether it be shareholders, bondholders, or other managers.").

11. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1416 (1989) [hereinafter Easterbrook & Fischel, *The Corporate Contract*] ("[M]anagers can divert income to themselves, stealing and mismanaging at the same time. Diversion and sloth may be subtle, but they exist.").

12. *See* Easterbrook & Fischel, *The Proper Role*, *supra* note 10, at 1171 ("Because other shareholders take a free ride on any one shareholder's monitoring, each shareholder finds it in his self-interest to be passive.").

13. *See* Winter, *supra* note 2, at 252 ("[M]ost state corporation laws are 'enabling' rather than regulatory. That is, they 'enable' private parties to accomplish incorporation on terms which they freely choose. As a result, state laws do not impose extensive mandatory

alleged mismanagement—as embodied by the Business Judgment Rule—is deferential almost to the point of non-existence.[14] By the 1970s, the seeming helplessness and vulnerability of stockholders had led to sustained calls for greater substantive regulation of corporate managers, whether in the form of federally enacted mandatory governance rules, or greater judicial scrutiny of alleged mismanagement, or both.

The picture of investor helplessness, however, was highly incomplete, in that it ignored the powerful constraints placed on management by the ability of stockholders to sell their shares. As Albert O. Hirschman famously suggested, members of an organization typically face a choice between "exit" and "voice."[15] Consider a social club where membership is generally highly desirable, but which has a policy—say, no alcohol on Sundays—some of the members find objectionable. If the social club is the only one in town, the dissatisfied members have a strong incentive to get involved—to exercise "voice"—in trying to get the policy changed. Imagine, however, there is another club across the street, identical in all respects except that it also serves alcohol on Sundays. Members who do not like their club's policy can exercise their ability to "exit" and simply cross the street. If the clubs are dependent on their members for revenue, they will be forced to compete with each other to adopt policies that members will find congenial. Importantly, even if the members have no formal say in how the clubs are run, their ability to exit will create a powerful incentive for the clubs to adopt policies that will attract members.

Stockholders in publicly traded companies can exit with extreme ease. If they are dissatisfied with one investment, they have thousands of near-perfect substitutes available to them.[16] In any reasonably efficient market, the ease with which stockholders can exit their investment puts a powerful constraint on mismanagement.[17] A company that is badly managed—

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restrictions upon the discretion of corporate management, although such restrictions may be written into a corporate charter.").

14. *See generally* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 100-02 (2004).

15. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

16. *See* West v. Prudential Sec., Inc., 282 F.3d 935, 939 (7th Cir. 2001).

17. This argument was most famously made by Ralph K. Winter, Jr. in 1977. Winter argued that firms whose managers profited at the expense of stockholders "must be less than earnings of comparable corporations" whose management was faithful, placing them "at a disadvantage in raising debt or equity capital," with the ultimate result being that "their share price will decline, thereby creating a threat of a takeover which may replace management." Winter, *supra* note 2, at 256.

whether due to disloyalty, incompetence, or otherwise—will produce lower earnings than it otherwise would. As a result, investors will be willing to pay less for the company's securities, and the stock price will decline.[18] As a result, the company will face a higher cost of capital and be at a disadvantage competing against other, better-managed firms. Even where the company does not need to raise additional capital by issuing new securities, a depressed stock price will expose managers to the prospect of being ejected in a takeover. A mismanaged company offers a juicy profit opportunity. If the company's stock is worth substantially less than it would be under different management, a takeover specialist can take over the firm at a discount and profit by installing better managers.[19] As Professor Fischel and Judge Easterbrook put it in an influential 1989 article: "Managers may do their best to take advantage of their investors, but they find that the dynamics of the market drive them to act as if they had investors' interests at heart. It is almost as if there were an invisible hand."[20]

Of course, the "invisible hand" is not almighty. Its power to discipline management is limited to the extent the takeover market is inefficient, and to the extent that the securities markets themselves are inefficient in pricing mismanagement. This suggests that regulatory corporate law may still have a beneficial role to play, though the benefits of restrictions on management discretion would need to be weighed against the costs.[21] In practice, however, the stockholders' right to sell is a powerful protective mechanism and is sufficient to forestall any broad move toward a more regulatory corporate law.[22]

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18. *See* Easterbrook & Fischel, *The Corporate Contract*, *supra* note 11, at 1419 ("If managers promise to return but a pittance, the investors will not put up very much money. The investors simply pay less for the paper the firms issue. There is therefore a limit on managers' efforts to enrich themselves at investors' expense.").

19. *See* Easterbrook & Fischel, *The Proper Role*, *supra* note 10, at 1173 ("Prospective bidders monitor the performance of managerial teams by comparing a corporation's potential value with its value (as reflected by share prices) under current management. When the difference between the market price of a firm's shares and the price those shares might have under different circumstances becomes too great, an outsider can profit by buying the firm and improving its management."); *see also* Manne, *supra* note 2, at 113.

20. *See* Easterbrook & Fischel, *The Corporate Contract*, *supra* note 11, at 1419.

21. *See generally* Winter, *supra* note 2, at 258-62 (discussing "[t]he costs and benefits of restricting management discretion" and criticizing proponents of greater regulation for "either assum[ing] that no costs will fall upon shareholders or merely undertak[ing] a cursory 'eyeballing' of the potential costs").

22. *See* Bainbridge, *supra* note 5, at 3291 ("The law is able to defer to most director decisions because agency costs are adequately constrained by market and other extralegal

II. The Rise of Institutional Shareholding as a Threat to the Right to Sell

Recent decades have seen a dramatic shift in patterns of stock ownership. Fifty years ago, individual households owned approximately 85% of public company stock. The 1970s and 1980s saw a dramatic surge in institutional ownership which, after a pause in the early 1990s, resumed in the 2000s. At present, institutions hold approximately 70-80% of U.S. corporate equity, with the largest amounts held by mutual funds and pension funds.[23] A smaller—but rapidly growing—share is held by so-called "exchange-traded funds" ("ETFs").[24] As the name suggests, ETFs are investment funds that issue shares that are traded on public exchanges. Most ETFs are index funds that simply attempt to track the performance of some index—such as the S&P 500—by holding a weighted portfolio of the index securities.[25]

The increasing dominance of institutional stockholders could, in theory, cause market discipline to lose some of its force. Institutional investors are, in many cases, less able to exercise their right to sell because—with their large holdings—they are more constrained in their ability to sell by limits on liquidity.[26] This loss of liquidity could conceivably be offset by an

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forces."). For general analyses of the effects of selling shares on corporate governance, see Robert Parrino et al., *Voting with Their Feet: Institutional Ownership Changes Around Forced CEO Turnover*, 68 J. FIN. ECON. 3 (2003); Anat R. Admati & Paul C. Pfleiderer, *The 'Wall Street Walk' and Shareholder Activism: Exist as a Form of Voice*, 22 REV. FIN. STUD. 2445 (2009).

23. *See* Jose Azar et al., *Anti-Competitive Effects of Common Ownership* 1 (Ross School of Business Paper No. 1235, Mar. 15, 2017), https://ssrn.com/abstract=2427345); Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 10-11 (2010).

24. *See* William A. Birdthistle, *The Fortunes and Foibles of Exchange-Traded Funds: A Positive Market Response to the Problems of Mutual Funds*, 33 DEL. J. CORP. L. 69 (2008).

25. *See* Actively Managed Exchange-Traded Funds, Investment Company Act Release No. 25258, 66 Fed. Reg. 57614 (Nov. 15, 2001).

26. *See, e.g.*, John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277, 1288–89 (1991) (suggesting that "'exit' has become more difficult, because institutional investors, who increasingly own large unmarketable blocks, must accept substantial price discounts in order to liquidate these blocks."); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 572-73 (1990) ("Large institutions are increasingly abandoning the 'exit' alternative to voice—the 'Wall Street Rule' that investors should sell their stock if they don't like the managers. They're too big to sell large portions of their portfolio, and know it."); *see also* Ira M. Millstein, *On the Making of Pension Funds as 'Patient Capitalists,'* DIRECTORS & BOARDS, Winter 1990, at 15 (concluding that pension funds "cannot dispose of large blocks of stock easily").

increasing resort to "voice," but given the weakness of traditional mechanisms of stockholder control, the substitution would be partial at best. Moreover, institutional investors such as mutual funds and pension funds are increasingly eschewing "active" money management. Instead of trying to beat the market by identifying mispriced securities, they are increasingly assuming that the market is efficient and seeking to piggy-back on that efficiency by simply creating a low-cost, well-diversified portfolio. In doing so, money managers are belatedly bending to a half-century of academic research showing that active management does not create any value for investors, after factoring in fees and expenses.[27]

ETFs represent the logical extreme of this passive strategy, explicitly aiming to replicate some broad market index and making no pretense at valuing individual stocks. At the limit, if the entire market were made up of ETFs, nobody would actively seek to price securities and the market would lose the very efficiency that makes ETFs work in the first place.[28] Relevant to the issues at hand, the disciplining effect of the right to sell described in Part II arose out of the assumption that the shares of mismanaged companies would trade at a discount. That is, the market can only deter managerial opportunism if it can detect and price mismanagement. Market discipline can only serve as a constraint on mismanagement if the market is reasonably efficient.

Concerns that increasing institutional shareholding will impair market efficiency, however, are overblown. Inaccurate market prices represent a profit opportunity. If some institutional investors cease to identify and discount prices for mismanagement, outsized profits will be available for other sophisticated investors who do. Just as prices cannot remain perfectly accurate without destroying the profit incentives that create accuracy in the first place, they also cannot stray too far from accuracy without attracting arbitrageurs who would profit from the inaccuracy.[29] What prevails is an

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27. *See, e.g.*, Eugene F. Fama & Kenneth R. French, *Luck Versus Skill in the Cross-Section of Mutual Fund Returns*, 65 J. FIN. 1915 (2010); Burton G. Malkiel, *Returns from Investing in Equity Mutual Funds 1971 to 1991*, 50 J. FIN. 549 (1995).

28. *See* Coffee, *supra* note 26, at 1340 ("If all, or nearly all, institutional investors were to adopt passive trading strategies, there would simply be no market—or at least not an efficient one."). Even Nobel Prize-winning economist William Sharpe, who has a claim to being the father of index investing, has worried in interviews that the increasing dominance of passive investing could reduce market efficiency. *See* Mark Dowie, *The Best Investment Advice You'll Never Get*, S.F. MAG. (Jan. 18, 2008) (claiming that Sharpe "believes we'd even start to see a decline in market efficiency if index funds rose to 50 percent of total investments"), http://www.modernluxury.com/san-francisco/story/the-best-investment-advice-youll-never-get.

29. John Coffee puts it as follows:

equilibrium level of disequilibrium, where an additional dollar spent detecting and correcting inaccurate prices would yield a dollar in profits.[30] Even a very small proportion of active investors can be sufficient to maintain the price efficiency necessary to discipline mismanagement. As a result, stockholders have little to fear from the growth of institutional shareholding.[31]

III. Final Period Decisions and the Limits of the Right to Sell as Stockholder Protection

Though stockholders have little to fear from the rise of institutional shareholding, the right to sell shares is not a panacea against managerial wrongdoing. In particular, market discipline is only effective to the extent that managers are exposed to the market on an ongoing basis.[32] As a result, the right to sell can provide little protection against managerial opportunism

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> Economic theory suggests that if indexed investing were to become the predominant strategy for institutions, other investors would be enabled to pursue more profitable trading strategies. Thus, there seems considerable reason to believe that institutional investors will divide along a continuum whose poles are represented by (1) indexed investors . . . and (2) active traders who may find that the growth of indexed trading increases the opportunities available for profitable short-term trading.

Coffee, *supra* note 26, at 1340 (footnote omitted).

30. *See* Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393, 393 (1980) (explaining that markets must retain an equilibrium level of disequilibrium because markets cannot remain efficient without an incentive to seek out new information to correct mispricings). *See generally* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984).

31. That is not to say that the increasing dominance of institutional shareholding is entirely unproblematic. It has been persuasively argued, for example, that substantial cross-holdings by institutional investors can be expected to lead to anti-competitive effects. Consider, for example, if the same handful of institutional investors owns 50% of the shares of all of the major airlines. Those investors would prefer that the airlines refrain from competing and instead engage in price-fixing and other anti-competitive behaviors that would increase profits at the expense of consumer surplus, and may use their influence to encourage management to pursue such a course. *See generally* Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016). This phenomenon, however, would not be a manifestation of the corporate agency problem. It would actually be a product of corporate managers being faithful to the interests of stockholders, to the detriment of consumers and the broader economy.

32. *See* Bainbridge, *supra* note 5, at 3292 ("In repeat game settings, the actors' decisions are constrained by the threat that cheating in one turn will be punished by the other party in future turns.").

in final period decisions. The most important type of final period decision is a merger in which the company is acquired.[33] Managers can improperly divert benefits to themselves in a merger—in the form of large change-of-control payments, continued employment contracts, participation in the buy-out at sweetheart prices, etc.—without fear of any market sanction. Stockholders' right to sell provides no deterrence.

A. Legal Protections and the Failure of the Merger Class Action

Delaware law recognizes the acute conflict of interest in merger transactions and the inadequacy of market deterrence. In response, Delaware courts have attempted—in *Unocal*, *Revlon*, and their progeny—to protect stockholders by employing a more searching standard of review in merger cases.[34] In place of the typical, highly deferential, Business Judgment Rule standard of review, the Delaware courts have crafted what has been called an "intermediate" or "enhanced business judgment" standard of review in takeover cases.[35] In theory, this more searching judicial review of management actions in the merger context promises to deter wrongdoing and reduce agency costs where the right to sell cannot.

In practice, however, the merger class action has been a major disappointment. In fact, merger class actions suffer from an agency problem of their own, between the stockholders and the plaintiffs' attorneys.[36] Despite the availability of a contingency fee, the incentives of the plaintiffs' attorneys often diverge sharply from those of the stockholders in at least three ways. First, because it costs little to file a claim and they lack any

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33. *See id.* ("In contrast [to operational decisions in an ongoing enterprise], structural decisions—such as corporate takeovers—present a final period problem entailing an especially severe conflict of interest.").

34. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 186 (Del. 1986). *Unocal* and *Revlon* essentially dealt with the flip-sides of the conflict of interest in merger transactions. *Unocal* involved the defensive efforts managers may take to stave off a takeover, 493 A.2d at 955, thus thwarting the disciplining effect of the market for corporate control discussed in Part II. *Revlon* involved the duties of management in a merger scenario to secure the best deal for stockholders, as opposed to diverting value to themselves. 506 A.2d at 185.

35. *See* MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW, 547 (1995). Professor Bainbridge has called the Unocal/Revlon approach a "conditional business judgment rule," in that it requires boards to demonstrate good faith and reasonable grounds for their judgments before the court will ultimately defer to those judgments. *See* Bainbridge, *supra* note 5, at 3294-300.

36. *See generally* Charles Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do the Merits Matter?*, 75 OHIO ST. L.J. 829, 840-43 (2014) [hereinafter Korsmo & Myers, *The Structure of Stockholder Litigation*].

interest in the enterprise being sued, plaintiffs' attorneys have little incentive to avoid bringing low-quality claims in an attempt to settle them for nuisance value. Second, because the plaintiffs' attorneys are unlikely to be fully "diversified," they tend to be risk-averse, willing to settle even strong cases quickly.[37] Third, and perhaps most seriously, plaintiffs' attorneys "have every incentive to maximize the portion of the economic value of a settlement going to [themselves], even at the expense of the shareholders."[38] Meanwhile stockholder efforts to monitor the attorneys are hampered by the same collective action problems that arise in the corporate governance context. The attorneys will virtually always have a financial stake in the claims that dwarfs that of any individual stockholder in a widely held public company.

The result for many years was that almost every merger of any size faced a fiduciary duty class action, with the vast majority settling quickly for supplemental disclosures of dubious value—and, of course, generous attorney's fees.[39] Following several years of outcry, the Delaware courts

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37. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (noting that "plaintiff's class and derivative attorneys function essentially as entrepreneurs who bear a substantial amount of the litigation risk"); James D. Cox et al., *Does the Plaintiff Matter?*, 106 COLUM. L. REV. 1587, 1593 (2006) (explaining that "a settlement offer that provided recovery of the attorney's tangible and opportunity costs could loom larger than the prospect of aggressively pursuing the action to a more lucrative prospective judgment or settlement").

38. Korsmo & Myers, *The Structure of Stockholder Litigation*, *supra* note 36, at 842; Randall S. Thomas & Robert B. Thompson, *Empirical Studies of Representative Litigation*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF CORPORATE LAW 152, 155 (Claire A. Hill & Brett H. McDonnell eds., 2012) ("[I]f suits were being driven too much by lawyer interests, representative litigation could result in the attorney initiating suits with too little merit, settling strong suits for too little, and structuring the settlement so the costs are not borne by the actual wrongdoers."); Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multi-Jurisdictional Litigation*, 106 NW. L. REV. 1753, 1762 (2012) ("Shareholder suits under both state and national law are most frequently representative, meaning that the typical case involves one named plaintiff and, importantly, one or more law firms for that prospective representative seeking to speak for a large body of shareholders. This can lead to litigation agency costs, for example, if agents bring what are perceived as strike suits or settle meritorious suits too cheaply." (footnote omitted)).

39. *See* Jill E. Fisch, Sean J. Griffith & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 557 (2014) ("Shareholder litigation challenging corporate mergers is ubiquitous, with the likelihood of a shareholder suit exceeding 90%. The value of this litigation, however, is questionable. The vast majority of merger cases settle for nothing

responded in two ways. First, in October 2015, the Delaware Supreme Court in *Corwin* held that a fully informed, uncoerced vote of the majority of disinterested stockholders would result in a post-merger damages action being reviewed under the deferential Business Judgment Rule standard rather than the usual *Revlon* standard.[40] Second, in the January 2016 *Trulia* opinion, the Court of Chancery held that merger class action settlements would be rejected unless they provided a "plainly material" benefit to stockholders.[41] The result has been a sharp drop in Delaware merger class action filings in 2016.[42]

Although *Corwin* and *Trulia* have probably worked to reduce the volume of nuisance litigation in Delaware, they can do little to address the more pernicious problem of quick, cheap settlement of meritorious actions. Indeed, *Corwin* may work to make it more difficult for even meritorious suits to succeed by allowing what amounts to a Hobson's choice to insulate a merger from judicial scrutiny. The result is that traditional judicial remedies do little to make up for the lack of market discipline in final period transactions such as mergers.

B. The Right to Sell Cannot Provide Compensation for Already Completed Mismanagement

It is worth mentioning that although the right to sell provides *deterrence* against mismanagement, it cannot actually provide stockholders with *compensation* for mismanagement that already occurred. Assume, for example, the CEO of a public company steals or otherwise destroys $100 million in value through her mismanagement. If the market is reasonably efficient, the stock price will go down to reflect the destruction in value as soon as it is publicly known. By then, however, it is too late for a stockholder to sell her shares to escape the consequences of the CEO's actions—the horse has already left the barn. The same is true in the case of an abusive merger. If management announces that it has agreed to a merger

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more than supplemental disclosures in the merger proxy statement. The attorneys that bring these lawsuits are compensated for their efforts with a court-awarded fee.").

40. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312-14 (Del. 2015).

41. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884, 898-99 (Del. Ch. 2016).

42. CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2015 AND 1H 2016 M&A LITIGATION, 1 (2016) (finding that the percentage of challenged deals fell from more than 90% to 64% in the first half of 2016). Early evidence suggests, however, that much of the drop is a result of suits migrating out of Delaware to other jurisdictions. *See generally* Sean J. Griffith, *Private Ordering Post-*Trulia*: Why No Pay Provisions Can Fix the Deal Tax and Forum Selection Provisions Can't*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES (forthcoming 2017).

for inadequate consideration, the relevant stock's trading price will immediately reflect the inevitability of the merger price unless it is clear the transaction is unlikely to be approved. A dissatisfied stockholder's right to sell does not offer a "safety valve" allowing her to escape the merger's consequences.

This predicament may seem obvious, but Delaware law occasionally appears not to appreciate it. For example, Delaware's appraisal statute contains a so-called "market out" exception, making appraisal unavailable when the merger consideration is entirely in the form of marketable securities.[43] Some commentators defend this exception on the grounds that any stockholder dissatisfied with the securities offered as merger consideration can simply sell them.[44] Similarly, in the class action context, a series of cases hold that heightened *Revlon* scrutiny is not available if a high enough percentage of the merger consideration is in the form of stock.[45] The distinction, however, makes no sense. If the merger consideration is inadequate, it is inadequate, whatever form it may come in. The fact that market securities can be valued and sold easily is irrelevant—nothing, after all, is easier to value and sell than cash.[46]

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43. DEL. CODE ANN. tit. 8, § 262(b) (2011).

44. *See* JEFFREY HAAS, CORPORATE FINANCE 90 (2014) ("The market-out exception recognizes that the market is superior to a judge when it comes to fairly valuing the shares of dissenting public stockholders. If those stockholders are to receive stock as merger consideration, the market-out exception encourages them to simply cash out before the merger is consummated by selling their shares in the open market. When dissenting public stockholders are forced to receive cash as merger consideration, by contrast, the market may not provide a fair valuation.").

45. *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150-51 (Del. 1989); *In re* Smurfit-Stone Container Corp. S'holder Litig., No. 6164-VCP, 2011 WL 2028076, at *12 (Del. Ch. May 20, 2011); QVC Network, Inc. v. Paramount Commc'n, Inc., 635 A.2d 1245, 1266-67 (Del. Ch. 1993).

46. *See* Charles R. Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279, 332 (2016) [hereinafter Korsmo & Myers, *Reforming Modern Appraisal Litigation*] ("A target stockholder might feel shortchanged not because she is getting stock . . . but because she is not getting enough of it. Just as easily as they could be underpaid in cash, target stockholders could be underpaid in stock of Exxon Mobil or in postage stamps or in anything else, for that matter."). Vice Chancellor Travis Laster has made the same point in the Revlon context. J. Travis Laster, *Revlon Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 39-40 (2013) ("Negotiated acquisitions are bargaining situations. Value is not conferred charitably on sell-side stockholders; it must be extracted. . . . In a cash deal, the gain-sharing takes the form of a higher dollar figure. In a stock deal, the gain-sharing takes the form of a larger share of the post-transaction entity. In either case, the gains are allocated through negotiation.").

The inability of the right to sell is not particularly important in many circumstances, where deterring managerial wrongdoing is the far more salient public policy goal. In the merger context, however—where market deterrence is not available—compensation may be all that can be hoped for. Moreover, if the compensation is paid *by* the responsible managers (directly or indirectly) via a judicial proceeding, the prospect of compensation can also serve a deterrence function.

IV. The Right to Sell Legal Claims as a Constraint on Mismanagement

As Part III explains, the right to sell one's shares serves as little protection in final period scenarios like mergers. Even where the right to sell shares is unhelpful, however, the right to sell *legal claims* offers potentially real protection. In particular, the right to sell legal claims to a specialist aggregator offers a potential mechanism for overcoming the agency problems that render merger litigation ineffective.[47]

The class action mechanism overcomes two fundamental problems. First, and most obviously, it economizes on judicial resources by avoiding duplicative litigation of common questions of law and fact. Second, it overcomes collective action problems. In a stockholder suit, for example, a large number of individual stockholders may have suffered harms that are smaller than the cost of bringing and winning a lawsuit. As a result, it is not in the interest of any one stockholder to bring a claim, and the injured parties will go uncompensated (and the wrongdoers will go undeterred). The class action mechanism aggregates these claims into a single action, potentially turning what would be a large mass of negative-value claims—if each had to be litigated separately—into a single positive-value claim.[48]

As shown in Part III, unfortunately, the class action has failed to live up to its promise in the merger context. To the extent legal claims can be bought and sold, however, specialist financiers could accomplish a similar

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47. For an extended treatment of the idea introduced in this part, see generally Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with a Market for Legal Claims*, 101 IOWA L. REV. 1323 (2016) [hereinafter Korsmo & Myers, *Aggregation by Acquisition*].

48. *See, e.g.*, William T. Allen, *Commentary on the Limits of Compensation and Deterrence in Legal Remedies*, 60 LAW & CONTEMP. PROBS. 67, 73 (1997) ("[T]he class action is the preeminent innovation allowing the compensatory goal to serve the deterrent function more effectively."); Stephen Berry, *Ending Substance's Indenture to Procedure: The Imperative for Comprehensive Revision of the Class Damage Action*, 80 COLUM. L. REV. 299, 299 (1980) (noting that the class damage action has been "hailed by some as the most important procedural innovation of this century").

aggregation of claims simply by buying them from their original owners: aggregation by acquisition. Doing so would solve the same problems as procedural aggregation—avoiding duplicative litigation and transforming multiple negative-value claims into one positive-value claim—but would do so without creating a vicious agency problem. The buyer—unlike the plaintiffs' attorneys in a class action—would actually *own* the claims as well as control them.

In the context of stockholder litigation, claims could be bought and sold simply by buying and selling the relevant stock. For some types of stockholder claims, this would likely be unwieldy, in that an aggregator buying a company's stock to pursue a legal claim would also be exposed to the risk of owning the company.[49] Fortunately, this problem is not much of an obstacle in merger litigation, where the company is disappearing and the primary issue of concern to a claim-purchaser would simply be the adequacy of the merger consideration. As explained above, in non-merger situations, where the company will continue as a public enterprise, market discipline functions as an effective constraint on mismanagement. There is little need for effective legal constraints, and claim aggregation would be superfluous. That is, aggregation by acquisition is particularly practicable in the merger context, precisely where it is most needed.

A. The Benefits of a Market for Merger Claims

A market for merger claims would have several potential benefits. Most obviously, it would greatly alleviate the agency problems that plague merger class actions. Unlike dispersed stockholders, a specialist aggregator would have both the ability and the incentive to monitor her attorneys and supervise the litigation. By itself, this promises to greatly reduce the incidence of quick settlements unrelated to the merits of the underlying suit, where the lawyers are the only real beneficiaries.

Partly as a consequence, harmed stockholders would receive better compensation. Claim aggregators would be able to assemble a portfolio of claims, rendering them essentially risk-neutral and better able to bear the risk of trial or hold out for a settlement reflecting the true expected value of

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49. *See* Korsmo & Myers, *Aggregation by Acquisition*, *supra* note 47, at 1358 ("An aggregator seeking, for example, to assemble a large position to sue Apple directors' breach of fiduciary duty, would also have exposed themselves to the risk of simply holding Apple's shares. The aggregator, presumably, would be in the business of evaluating and enforcing legal rights, not evaluating makers of laptops and portable telephones. This undesired risk may be expensive or impossible to fully hedge.").

the claim.[50] As a repeat player, an aggregator would also be able to develop specialized expertise and economies of scale in litigating claims. In a competitive market for valuable legal claims, aggregators bidding for shares would result in stockholders receiving the bulk of the additional value a claim gains in the hands of an aggregator.[51]

Finally, claims aggregated by purchase are less likely to be brought for nuisance value. A plaintiffs' attorney utilizing procedural aggregation (a class action) has every incentive to bring a nuisance claim. Doing so is virtually costless—a small filing fee and the opportunity cost of her time. By contrast, a plaintiff who has had to aggregate by purchasing stock will have substantial out-of-pocket expenses at the outset, and consequently real risk if the claim turns out not to be meritorious. Given the real costs an aggregator faces in pursuing a claim, nuisance suits would be largely self-deterring in the absence of a credible threat of achieving a successful result at trial.

Most importantly, more accurate compensation and fewer nuisance suits would also result in better deterrence of mismanagement in the first place.[52] The current situation—where most mergers are challenged and then settled for a relatively small payment to attorneys—provides no effective deterrence at all, because the outcomes are entirely divorced from the merits. Thus, claim sale could function to provide deterrence where market discipline cannot and where legal remedies currently do not.

B. A Market for Legal Claims in Practice: Appraisal Arbitrage

As discussed in Part IV.C, several legal obstacles exist to a full market for legal claims involving mergers. A market for legal claims has, however, begun to emerge in a closely related context: appraisal litigation.[53] An

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50. *See id*. at 1362-66.

51. *See id*. at 1363; Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 736 (2005) ("Plaintiffs will surely pay a premium, in the form of a reduction in the amount received, for moving the risk [of a claim] onto the purchasers of the claims. But in a competitive market, the premium should be equal to the burden of the risk on the purchaser rather than to that on the seller.").

52. *See* Korsmo & Myers, *Aggregation by Acquisition*, *supra* note 47, at 1363-64 ("Taken together, more accurate compensation and more accurate deterrence represent more accurate private enforcement of the substantive law where sale of claims is permitted.").

53. I have examined appraisal litigation in depth in several co-written articles. *See generally* Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551 (2015) [hereinafter Korsmo & Myers, *Appraisal Arbitrage*]; Charles R. Korsmo & Minor Myers, *Interest in Appraisal*, 42 J. CORP. L. 109

appraisal claim allows a stockholder to dissent from a merger, refuse the merger consideration, and instead institute a judicial proceeding where the sole issue is the "fair value" of the stock.[54] Moreover, appraisal claims can be aggregated by purchase: there is no class action mechanism available in appraisal, and an appraisal claim can be purchased by simply buying stock after a merger has been announced. These features make appraisal an effective, natural example of a market for merger claims.

In the first place, the market for appraisal claims is burgeoning and offers a useful proof of concept that such markets are practicable. Upwards of a half-dozen funds are active, the largest of which reportedly raised $1 billion for a fund dedicated to appraisal.[55] Moreover, the dynamics of this market can usefully be compared to the unattractive landscape of merger class actions, and bear out the predictions made above.[56] A relatively small number of mergers are targeted in appraisal—typically fewer than 20% of appraisal-eligible deals—and the decision of an aggregator to bring a claim appears to be strongly related to the adequacy of the merger consideration.[57] A relatively high proportion of appraisal cases goes to trial—as compared to merger class actions—and many cases have resulted in substantial monetary recoveries for stockholders.[58]

C. Barriers to Claim Sale in Merger Class Actions

The example of appraisal suggests that a market for merger claims is practicable and that it can provide at least a partial replacement for the absence of market discipline in the merger context. Nonetheless, appraisal can function as only a partial deterrent, for at least two reasons. First, judgments in appraisal are against the acquirer, rather than management of

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(2016); Korsmo & Myers, *Reforming Modern Appraisal Litigation*, *supra* note 46; Korsmo & Myers, *The Structure of Stockholder Litigation*, *supra* note 36.

54. *See generally* DEL. CODE ANN. tit. 8, § 262 (2011); MODEL BUS. CORP. ACT § 13.02 (AM. BAR. ASS'N, 2007). For a fuller description of appraisal, see Korsmo & Myers, *The Structure of Stockholder Litigation*, *supra* note 36, at 859-67.

55. *See* Korsmo & Myers, *Reforming Modern Appraisal Litigation*, *supra* note 46, at 339 n.226.

56. To be sure, appraisal is not perfectly comparable to a fiduciary challenge to a merger. In particular, an appraisal claim does not formally require the stockholder to show managerial wrongdoing. Appraisal does, however, seek to remedy the same general problem as most merger class actions—inadequate consideration. *See id.* at 333. Moreover, in modern practice, showing some defect in the sales process—even if it is short of culpable wrongdoing—is a crucial part of most successful appraisal cases. *See id.* at 328.

57. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 53, at 1570.

58. Korsmo & Myers, *Reforming Modern Appraisal Litigation*, *supra* note 46, at 282.

the target company, meaning any deterrence will be somewhat indirect. Second, because only dissenting stockholders receive any judicial award above the merger price, deterrence will necessarily be incomplete.[59] The deterring effect of judicial remedies in the merger context could be improved by expanding the right to sell legal claims to fiduciary duty claims.

At present, there are two major obstacles to aggregation by acquisition in merger cases. The first is the so-called "contemporaneous ownership" requirement, which limits the standing of stockholders to bring claims that arose prior to them purchasing their shares.[60] This requirement artificially freezes the universe of potential plaintiffs at the moment of the wrongdoing, and would prevent a specialist aggregator from observing a merger announcement, carefully evaluating the merits of the potential claim, and then deciding whether to invest in aggregating the claims. While the contemporaneous ownership requirement formally applies only to derivative litigation,[61] it comes into play in the class action context as well, with Delaware courts holding that after-acquirers cannot serve as lead plaintiff.[62] Although after-acquirers can still potentially benefit from litigation or settlement,[63] without control over the claim the benefits of aggregation by acquisition would be greatly reduced. The contemporaneous

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59. *See* James D. Cox & Randall S. Thomas, Addressing Agency Costs Through Private Litigation in the U.S.: Tensions, Disappointments, and Substitutes 39-40 (Sept. 2, 2015) (unpublished manuscript), http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6209&context=faculty_scholarship (describing limitations of appraisal remedy).

60. *See* Korsmo & Myers, *Aggregation by Acquisition*, *supra* note 47, at 1357-58.

61. DEL. CODE ANN. tit 8, § 327 (2011) (requiring that a derivative stockholder allege that it held the stock "at the time of the transaction of which such stockholder complains").

62. Dieter v. Prime Comput., Inc., 681 A.2d 1068, 1072-73 (Del. Ch. 1996); *see also* Brock E. Czeschin, *Adequacy of Representation*, *in* 1 R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 13.25 (3d ed. 2011) (citing Leighton v. Lewis, 577 A.2d 753 (Del. 1990)) ("[A] stockholder who purchases shares of stock after the announcement of the challenged merger should not be permitted to maintain a class action challenging the merger since he is not truly a member of the class.").

63. Although precluded from service as lead plaintiff, settlement classes are commonly defined to include transferees. *See In re* Prodigy Comm. Corp. S'holders Litig., No. Civ.A. 19113, 2002 WL 1767543 at *4 (Del. Ch. July 26, 2002) (quoting *In re* Triarc Cos., Class & Derivative Litig., 791 A.2d 872, 878-79 (Del. Ch. 2001)) ("[W]hen a claim is asserted on behalf of a class of stockholders challenging the fairness of the terms of a proposed transaction under Delaware law, the class will ordinarily consist of those persons who held shares as of the date the transaction was announced and their transferees, successors and assigns.").

ownership requirement must be abolished for a merger claims market to flourish, and little or nothing would be lost in abolishing it.[64]

The second obstacle to aggregation by acquisition in merger cases is the mere availability of the class action mechanism as a competing form of aggregation. Where procedural aggregation is available, a class action attorney able to get a court to certify a class will almost always face far lower costs than an acquirer, and will be able to nip any market for claims in the bud. One potential solution is to eliminate the merger class action entirely, given the paucity of evidence that such actions benefit stockholders or deter mismanagement in the merger context. Less ambitiously, however, courts could simply use existing procedural rules to ensure that the availability of procedural aggregation does not interfere with potential aggregation by acquisition. Federal Rule of Civil Procedure 23(b)(3) and its state law analogs require courts certifying a class based on the predominance of common questions to find that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[65] Where aggregation by acquisition is feasible—as it would be in most merger cases—courts should use this provision to avoid certifying classes that would interfere with the workings of a market for merger claims.

Without these obstacles to aggregation by acquisition, the right to sell legal claims promises to generate real constraints on managerial wrongdoing where they otherwise would not exist.

Conclusion

In the ordinary course of business, the ability of stockholders in public companies to simply sell their shares places powerful constraints on mismanagement. If a company's managers are disloyal, or simply fail to manage the company well, the company's falling stock price will place the firm at a competitive disadvantage and expose management to the prospect of being replaced in a takeover. Legal remedies are of decidedly secondary importance in this context. The rise of institutional shareholding does not

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64. For a comprehensive argument against the contemporaneous ownership requirement, see J. Travis Laster, *Goodbye to the Contemporaneous Ownership Requirement*, 33 DEL. J. CORP. L. 673, 673 (2008) (arguing that the rule is "fundamentally incoherent," that it "operates largely at random," and that it "arbitrarily mandates the dismissal of potentially meritorious claims"). *See also* Macey & Miller, *supra* note 37, at 892-94 ("The rationale for the contemporaneous ownership rule . . . appears questionable at best."); Korsmo & Myers, *The Structure of Stockholder Litigation*, *supra* note 36, at 892-94.

65. FED. R. CIV. P. 23(b)(3); *see* DEL. SUPER. CT. CIV. R. 23(b)(3).

threaten the powerful protections created by stockholders' ability to "exit" by selling their shares.

"Exit" can serve as little protection, however, in the context of a merger, where the terms of that exit are unavoidably set by the merger agreement. It is too late to sell after a merger has already been announced. If mismanagement is to be deterred, the deterrence must instead come largely from legal remedies like fiduciary duty class actions. These legal remedies have historically been ineffective, at least partly due to the pervasive agency problems between plaintiffs and class counsel. Supplementing the right to sell stock with the right to sell legal claims, however, promises to imbue legal remedies with real deterrence value in the merger context, precisely where it is most needed.