RECOVERY OF LOST PREMIUMS IN FAILED MERGERS

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This article discusses lost premium provisions, often referred to as Con Ed provisions. The article examines the main variants of these provisions and considers how they may conflict with established doctrines in contract and corporate law, potentially rendering them unenforceable. In response, the article evaluates a range of proposed solutions, including incorporating lost premiums into contractual damages, designing reverse termination fees, appointing the company or stockholders as agents to recover lost premiums, and pursuing legislative reform. The article argues that although courts' reluctance to enforce lost premium provisions has surprised transactional lawyers and scholars, this hesitation is principled, grounded in both doctrinal and normative concerns. To help courts navigate the challenges surrounding lost premium recovery more coherently, the article proposes a two-stage framework for evaluating these provisions. Finally, the article contends that the difficulties arise not only from the provisions themselves but also from the remedies pursued. Each proposed solution addresses specific challenges, yet each also encounters limitations or introduces new complications.

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I. INTRODUCTION

Assume that two public companies enter into a merger agreement in which one company agrees to purchase all issued and outstanding shares of another (the seller or "target") at a specified market premium. What happens if the acquirer walks away from the deal? Can the premium that was negotiated for the target shareholders be recovered? If so, who is entitled to bring a suit to recover the lost premium — the target company or its shareholders? These questions emerge from the nature of public company mergers, where

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the merger agreement is negotiated and entered into by the board of directors. The dispersed shareholders are not parties to the contract. Yet, they stand to benefit from the deal. Specifically, the target's shareholders are entitled to receive the premium negotiated by their board once the deal is closed. To minimize the risk of the buyer backing out, the target's board often employs deal protection mechanisms, including provisions for recovering lost premiums if the acquirer wrongfully terminates the agreement.

This article discusses lost premium provisions, often referred to as Con Ed provisions. I explore how these provisions have faced increasing scrutiny in New York, Delaware, and Canada, where courts have grappled with the recovery of lost premiums in failed deals. I examine the primary variants of these provisions and explore how they may conflict with established contract or corporate law doctrines, potentially rendering them unenforceable. Additionally, I discuss potential solutions to these issues, including integrating lost premiums into contractual damages, designing reverse termination fees, designating the company or stockholders as agents in the recovery of lost premiums, and legislative fixes. While the article is comparative in scope and engages with American literature and jurisprudence, it aims to be particularly relevant to the Canadian context. Therefore, I remain cognizant of the Canadian mergers and acquisitions (M&A) transactional space and detail the challenges and potential solutions to lost premium provisions within this context.

Lost premium provisions have generated significant controversy, particularly following the recent Court of Chancery decision *Crispo v. Musk*,[1] which, to the surprise of many M&A practitioners, found the relevant provision unenforceable.[2] Discontent with the *Crispo* decision extends beyond the M&A community into the academic sphere as well. Dhruv Aggarwal et al. predict that preventing the target from collecting lost premiums could "lead to possibly too many breaches."[3] Jonathan Chan and Martin Petrin argued that lost premium provisions are "both doctrinally defensible and economically sensible," suggesting that courts should not follow precedents that have found such provisions unenforceable.[4] The concerns surrounding the *Crispo* decision were so significant that they prompted the Delaware General Assembly to amend the Delaware General Corporation Law (DGCL) to ensure the enforceability of lost-premium provisions.[5]

However, I take a different position. The courts' reluctance to enforce lost premium provisions is, in fact, defensible. Typically, the language of merger agreements broadly excludes third party rights. The right to receive merger premiums is stipulated as a narrow exception to this principle, often vesting in shareholders only after the deal has closed.[6] As

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1 304 A (3d) 567 (Del Ct Ch 2023) [*Crispo*].

2 Hunton Andrews Kurth, "Delaware Court Addresses Ability to Sue Buyers for Lost Premiums in M&A Deals" (16 November 2023), online: [perma.cc/5BCS-H4D8].

3 Dhruv Aggarwal, Albert H Choi & Geeyoung Min, "Contractual Remedies in Mergers" (2025) European Corporate Governance Institute, Working Paper No 789/2024 at 3.

4 Jonathan Chan & Martin Petrin, "Lost-Premium Damages in M&A: Delaware's New Legal Landscape" (2025) 42:33 Yale J on Reg Bulletin 33 at 35, 48.

5 Edward B Micheletti & Lauren N Rosenello, "'Busted Deals' and Damages: Court of Chancery Clarifies Who Can Recover 'Lost-Premium' Damages" (December 2023), online: [perma.cc/LP6F-D84K] (commenting on *Crispo*, *supra* note 1 and discussing practitioners' concerns with the decision); US, SB 313, *An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law*, 152nd General Assembly, Reg Sess, Del, 2023-2024, s 4 (enacted) [2024 DGCL Amendments] (amending the DGCL to ensure the enforceability of lost-premium provisions).

6 See e.g. *Tiffany & Co v LVMH Moët Hennessy-Louis Vuitton SE*, Delaware 2020-0768 (Del Ct Ch 2020) (Verified complaint) [*Tiffany* Complaint]; Securities and Exchange Commission Archives, "Agreement and Plan of Merger by and among Tiffany & Co, LVMH Moet Hennessy-Louis Vuitton SE & Breakfast

the doctrine of privity currently stands in Canada, shareholders cannot sue to enforce the right to premiums under the merger agreement. While this outcome may appear harsh, it makes sense from a contract law perspective. Shareholders have not exchanged any promises under the contract; they merely receive a benefit that follows from the performance of a promise by a contracting party, in this case, the payment of a merger premium by the buyer. Essentially, why should shareholders be entitled to enforce their right to the premiums if the seller cannot sue shareholders directly should the target breach the contract? However, beyond contractual interpretation and privity, the courts' skepticism of lost premium provisions rightfully mirrors deeper normative concerns, including the potential for widespread litigation by individual shareholders, constraints on the board's ability to fulfill its fiduciary duties, the risk of compromising the board's control over the litigation asset, and the potential for double recovery.

These concerns arise from the board-centric structure of modern corporate law, in which the board serves as the central decision-making authority over corporate affairs, including merger transactions and the selection of remedies for breach.[7] The board's independence from individual shareholders is not merely a governance preference, but a legally mandated feature of corporate statutes, ensuring that corporate decision-making remains insulated from fragmented shareholder interests. When faced with a breach of a merger agreement, the board may opt to revive the deal or pursue an alternative transaction, potentially securing an even higher premium for shareholders. Allowing shareholders to recover lost premiums while these efforts are still underway undermines the board's authority, disrupts the firm's decision-making process, and enables recovery for losses that have neither fully materialized nor been weighed against alternative remedies. To assist courts in approaching the challenges associated with recovery of lost premiums coherently, I propose a two-stage framework for evaluating lost premium provisions.

After discussing the typology of lost premiums and the judicial skepticism they have attracted, I explore three potential solutions: a novel approach to drafting the lost premium provision, the use of reverse termination fees, and agency workarounds, as seen in recent Delaware legislative reforms. Each solution is effective in addressing certain challenges, yet each also faces limitations in addressing others or creates new challenges.

The first solution involves narrowly crafting the lost premium provision to grant enforcement rights to shareholders only if the board opts not to pursue specific performance. This strategy helps mitigate the risk of individual shareholders initiating lawsuits directly against the acquirer while the board is trying to compel acquisition completion. However, its effectiveness is questionable given the barriers imposed by the doctrine of privity on the enforcement of contractual rights by third parties. Conversely, the second solution avoids enforceability issues, but the size of the termination fee must be significantly smaller than that of the lost premium provisions to avoid being deemed unenforceable as a penalty. There exist different variants, such as two-tier fees and those

Holdings Acquisition Corp and Breakfast Acquisition Corp, Exhibit 2.1" (2019); s 10.7, online (pdf): [perma.cc/RNH2-48PF] [LVMH & Tiffany Agreement].

7 *Canada Business Corporations Act*, RSC 1985, c C-44, s 102(1) [*CBCA*]; *Business Corporations Act*, RSO 1990, c B 16, s 115(1) [*OBCA*]. See generally *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame*, [1906] 2 Ch 34 (CA (Eng)) [*Automatic*]; *Manson v Curtis*, 223 NY 313 at 322–23 (1918); Stephen M Bainbridge, "Director Primacy" in Claire A Hill & Brett H McDonnell, eds, *Research Handbook on the Economics of Corporate Law* (Cheltenham: Edward Elgar, 2012) at 17–19; Tomer S Stein, "The Merging of Ownership and Control" 59 Ga L Rev [forthcoming in 2025] at 4, 11–12, online: [perma.cc/EKP3-KP47].

coupled with specific performance, which have expanded their scope to offer better protections for targets. Nevertheless, the availability of such remedies extends beyond the contract itself and often depends on the court's discretion. Lastly, the third solution employs agency to circumvent privity issues, but introduces additional doctrinal and policy uncertainties.

The aim in scrutinizing these solutions is not to imply that the challenges associated with lost premium recovery are insurmountable. Rather, these challenges are interdependent, and often more complex than they appear. Workarounds that M&A practitioners or even legislative bodies, such as the Delaware General Assembly, develop often focus on one aspect of the problem while neglecting others or inadvertently creating new, unforeseen complications. I therefore aim to advance the public discourse by offering a balanced analysis that recognizes both the innovative aspects of these solutions as well as their limitations.

II. KEY JUDICIAL DECISIONS ON LOST PREMIUM RECOVERY

Three key decisions, two from Delaware and one from Canada — *Consolidated Edison, Inc. v. Northeast Utilities*,[8] *Crispo v. Musk*, and *Cineplex v. Cineworld*[9] — illustrate the judicial challenges in enforcing lost premium provisions when courts have denied recovery. Through examining the significant facts and rulings of these cases, three crucial insights emerge regarding lost premium provisions.

Firstly, the manner in which lost premium provisions are drafted significantly affects their judicial interpretation. Merger agreements generally assert that they do not confer rights on third parties unless explicitly stated. The right of shareholders to a merger premium often stands as an exception. However, this exception needs to be interpreted narrowly to adhere to the "no-third-party-beneficiary" principle explicitly chosen by the contracting parties.

Second, the analysis clearly delineates the crucial distinction between the contracting parties — the buyer and the target corporation — and third parties such as shareholders. Within the merger agreement, only the two corporations involved exchange representations, warranties, and covenants. Shareholders, in contrast, do not partake in any exchanges of promises under the contract. Instead, they receive benefits resulting from the performance of a promise by a contracting party, notably the payment of the merger premium by the buyer. Importantly, if the seller company violates any covenants, the buyer's recourse is against the target company, not its shareholders. Likewise, this distinction is mirrored in the treatment of losses; courts are careful not to confuse the losses incurred by the seller corporation with those incurred by third party beneficiaries.[10]

Third, lost premium provisions must not be considered in isolation; they exist within the broader framework of public company governance, where the board retains the authority to negotiate, execute, and select remedies or alternatives as deemed appropriate. Courts strive to interpret these provisions in a manner that aligns with the board-centric

8 *Consolidated Edison, Inc v Northeast Utilities*, 426 F (3d) 524 (2nd Cir 2005) [*Con Ed*].
9 *Cineplex v Cineworld*, 2021 ONSC 8016 [*Cineplex*].
10 *Con Ed*, *supra* note 8 at 531; *Crispo*, *supra* note 1 at 583–84.

model of corporate governance, ensuring that the board's discretion in fulfilling its fiduciary duties is respected and maintained.

A. *CONSOLIDATED EDISON, INC. V. NORTHEAST UTILITIES*

The case arose from a failed merger between Consolidated Edison, Inc. (Con Ed) and Northeast Utilities (NU), whereby Con Ed agreed to purchase all of NU's outstanding shares at a USD$1.2 billion premium over the market price.[11] Just before the planned closing, Con Ed declared that NU had "suffered a material adverse change," which had significantly reduced NU's valuation, and consequently withdrew from the merger.[12] This led both parties to file lawsuits against each other that ultimately centred on whether the USD$1.2 billion shareholder premium could be sought as damages for Con Ed's alleged breach of the merger agreement.[13] The district court ruled that both the NU shareholders and NU, acting on behalf of its shareholders, had the right to sue for the premium in the event of a wrongful failure to close the merger.[14] This decision was grounded in the merger agreement designating the shareholders as the intended third party beneficiaries and stipulating that NU could litigate on their behalf.[15]

On appeal, the United States Court of Appeals for the Second Circuit reversed the decision. The Court recognized that although NU shareholders were third party beneficiaries, their right to receive the merger premium would only materialize at the "NU Effective Time": the point when the merger was completed.[16] The Second Circuit focused on discerning the intent of the contracting parties by closely examining the contract's provision on third party rights, which stated that there were no third party rights except for two specific carve outs.[17] The first exception, which dealt with the personal liability of the directors, officers, and trustees from both companies, was not relevant to this case. The second exception granted stockholders standing to enforce the right to receive cash or stock in the post-merger entity, but this right was not conferred until the merger was completed.[18]

Since the carve out did not come into effect, the court enforced the no-third-party-beneficiaries provision. Ultimately, the Court held that

> [i]f we were to find a third-party right for shareholders to seek damages for breach of the duty to merge before the NU Effective time, that right would overwhelm the careful arrangements that the Agreement makes for that contingency and would unduly limit the signatories' own freedom of action to accept or hazard the contractual consequences of non-performance.[19]

The Second Circuit further determined that none of the provisions concerning breach and termination supported a shareholder's right to sue Con Ed.[20] The Court interpreted that

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11 *Con Ed*, *ibid* at 526.
12 *Ibid*.
13 *Consolidated Edison, Inc v Northeast Utilities*, 249 F Supp (2d) 387 at 390 (NY Dist Ct 2003) [*Con Ed* Dist Ct I]; *Consolidated Edison, Inc v Northeast Utilities*, 318 F Supp (2d) 181 at 183, 185 (NY Dist Ct 2004) [*Con Ed* Dist Ct II].
14 *Con Ed* Dist Ct I, *ibid* at 416–19.
15 *Ibid*.
16 *Con Ed*, *supra* note 8 at 527.
17 *Ibid* at 528.
18 *Ibid*.
19 *Ibid* at 530.
20 *Ibid*.

the contracting parties intended to limit any damages arising from a breach to predetermined amounts specified as either a termination fee or an expense reimbursement fee.[21] The Court found that "[n]one of these provisions contemplate the NU shareholders' right to sue [Con Ed] for the lost $1.2 billion premium; and any such right would overwhelm the specified and limited remedies available to each party in the event of breach and termination of the Agreement."[22] The Court further noted that even in the event of a willful and material breach, the damages were limited to those suffered by the contracting parties themselves, thereby excluding non-parties such as NU's shareholders.[23]

B. *CRISPO V. MUSK*

In this case, a Twitter shareholder who held 5,000 common shares filed a lawsuit against Elon Musk for breaching the merger agreement to acquire Twitter as well as a breach of fiduciary duty by Musk as a controlling shareholder of Twitter. He originally sued for both specific performance of the merger agreement and monetary damages.[24] The Delaware Court of Chancery dismissed the claim of breach of fiduciary duty and held that the plaintiff did not have standing to sue for specific performance.[25] The dismissal, however, left open the possibility of the Twitter shareholders seeking damages under the agreement's provision that granted them third party beneficiary status.[26] When Musk reversed his decision and chose to complete the merger, the plaintiff pivoted strategy, seeking a USD$3 million "mootness fee," claiming that his lawsuit influenced Musk's decision to proceed with the merger.[27] Mootness fees can be awarded when the lawsuit results in a corporate benefit, but only if the suit was meritorious at the time of filing.[28] The award would depend on whether the plaintiff had standing under the merger agreement to claim the lost premium.

The Court of Chancery held that the plaintiff was not entitled to the mootness fee as the suit was not meritorious when filed.[29] The merger agreement included a provision, the "Lost Premium Provision,"[30] which stated that the termination of the agreement would not

> relieve any party hereto of any liability or damages (which the parties acknowledge and agree shall not be limited to reimbursement of Expenses or out-of-pocket costs, and, in the case of liabilities or damages payable by Parent and Acquisition Sub, would include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders) (taking into consideration all relevant matters, including lost stockholder premium, other combination opportunities and the time value of money), which shall be deemed in such event to be damages of such party, resulting from any knowing and intentional breach of this Agreement prior to such termination.[31]

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21 *Ibid* at 531.
22 *Ibid*.
23 *Ibid*.
24 *Crispo*, *supra* note 1 at 567.
25 *Crispo v Musk*, 2022 WL 6693660 at *16 (Del Ct Ch 2022).
26 *Crispo*, *supra* note 1 at 571.
27 *Ibid*.
28 *Allied Artists Pictures Corp v Baron*, 413 A (2d) 876 at 878 (Del Sup Ct 1980).
29 *Crispo*, *supra* note 1 at 586.
30 *Ibid* at 572.
31 Twitter Inc., Current Report (Form 8-K), (25 April 2022) Exhibit 2.1, s 8.2, online (pdf): [perma.cc/7FM2-64QP].

The Court of Chancery identified two reasonable, but competing interpretations of this provision. The first interpretation deemed the provision unenforceable, reasoning that the merger agreement did not explicitly designate the target shareholders as third party beneficiaries and that it was implausible to allow the target company to seek the merger premium. Notably, the target company had "no right or expectation to receive the merger consideration."[32] Instead, at the "Effective Time," when the merger was consummated, Twitter shares would be converted into the right to receive the merger consideration.[33] Under this framework, neither cash nor stock would pass to or through Twitter; instead, the merger premium would be paid directly to the target shareholders.[34] Under the other construction, the target shareholders were third party beneficiaries of the agreement, but their right to seek the lost premiums would only vest if the remedy of specific performance was not available.[35] Essentially, the right to enforce the Lost Premiums provision would be only vested in the target shareholders if the target company had abandoned the deal and was no longer pursuing specific performance.[36] Consequently, under both interpretations, the plaintiff lacked standing to sue.[37] Under the first interpretation, the plaintiff lacked standing at the time the suit was filed because the merger agreement did not designate him as a third party beneficiary. According to the second interpretation, the plaintiff lacked standing to enforce the Lost Premiums provision so long as the target continued to pursue a claim for specific performance.[38]

C. *CINEPLEX V. CINEWORLD*

This case arose from a plan of arrangement in which Cineworld, the second largest cinema chain globally, based in the United Kingdom, aimed to acquire Cineplex, Canada's largest cinema operator.[39] In December 2019, the parties signed an arrangement agreement where Cineworld, through an acquisition subsidiary, would purchase all issued and outstanding shares of Cineplex for CAD$2.8 billion, or CAD$34 per share.[40] This price was a 42 percent premium over Cineplex's share price at that time.[41] The proposal received overwhelming approval from 99.9 percent of Cineplex's shareholders and 99.6 percent of Cineworld's shareholders in February 2020.[42] A week later, the deal seemed poised for completion following approval from the Ontario Superior Court of the plan of arrangement, contingent on Cineworld securing approval under the *Investment Canada Act* (*ICA*) from the relevant Canadian authorities.[43] However, with the emergence of the COVID-19 pandemic in 2020, and subsequent shutdowns of cinemas throughout Canada, Cineplex's business outlook significantly worsened. On 12 June 2020, Cineworld terminated the

32 *Crispo*, *supra* note 1 at 584.
33 *Ibid* at 584.
34 *Ibid*.
35 *Ibid* at 585.
36 *Ibid*.
37 *Ibid*.
38 *Ibid*.
39 *Cineplex*, *supra* note 9 at para 1.
40 *Ibid* at para 15.
41 *Ibid*.
42 Cineplex Inc., News Release, "Cineplex Shareholders Approve Transaction with Cineworld" (11 February 2020), online (pdf): [perma.cc/8B9T-8MR5].
43 Cineplex Inc., News Release, "Cineplex Receives Court Approval for Arrangement with Cineworld" (18 February 2020), online (pdf): [perma.cc/PX3B-K7DB]; RSC 1985, c 28 (1st Supp).

agreement, citing breaches of operating covenants in the arrangement agreement, and withdrew its application for *ICA* approval.[44]

Cineplex sued for breach of contract.[45] The Ontario Court of Justice, after finding that Cineplex had not violated the operating covenants and that Cineworld had wrongfully repudiated the agreement, addressed the matter of remedies.[46] The Court found that specific performance was unavailable as Cineworld had terminated the agreement and withdrawn its application for *ICA* approval, effectively preventing Cineplex from seeking such a remedy.[47] Consequently, monetary damages remained the only available remedy. The Court then proceeded to the quantification of damages: CAD$1.24 billion for lost synergies and CAD$5.5 million for transaction costs.[48]

Notably, the Court rejected Cineplex's alternative claim for the loss of shareholder consideration, which had been valued at CAD$1.32 billion by Cineplex's expert. Central to the Court's decision was Section 8.10 of the Arrangement Agreement, which defined the limited rights of shareholders as third party beneficiaries, stating:

> Except as provided in Section 2.14, Section 4.4, Section 4.12 and Section 8.20 which, without limiting their terms, are intended as stipulations for the benefit of the third Persons mentioned in such provisions (such third Persons referred to in this Section 8.10 as the "Third Party Beneficiaries") *and except for the rights of the Affected Securityholders to receive the applicable consideration following the Effective Time pursuant to the Arrangement (for which purpose the Company hereby confirms that it is acting as agent on behalf of the Affected Securityholders)*, the Parties intend that this Agreement will not benefit or create any right or cause of action in favour of any Person, other than the Parties and that no Person, other than the Parties, shall be entitled to rely on the provisions of this Agreement in any action, suit, proceeding, hearing or other forum.
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> Despite the foregoing, the Parties acknowledge to each of the Third Party Beneficiaries their direct rights against the applicable Party under Section 2.14, Section 4.4, Section 4.12 and Section 8.20, which are intended for the benefit of, and shall be enforceable by, each Third Party Beneficiary, his or her heirs and his or her legal representatives. *For the purposes of Section 2.14, Section 4.4 and Section 4.12, the Company confirms that it is acting as agent on behalf of the Third Party Beneficiaries under those sections, and agrees to enforce such provisions on behalf of such Third Party Beneficiaries.*[49]

The Court made a number of observations on this provision. First, shareholders would only have the right to receive consideration if the transaction closed.[50] Second, as third party beneficiaries, shareholders had no right to enforce the agreement or sue Cineworld for breach.[51] The Court noted a distinction between Cineplex shareholders and other third party beneficiaries, such as debt financiers, who were entitled under the agreement to assert their rights directly against Cineworld or to sue for breach.[52] Third, Cineplex was appointed

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44 *Cineplex*, *supra* note 9 at para 3.
45 *Ibid* at para 4.
46 *Ibid* at para 7.
47 *Ibid* at para 158.
48 *Ibid* at paras 173–182.
49 *Ibid* at para 162 [emphasis in court decision]; SEDAR+ Archives, "Notice of Special Meeting of Shareholders to be Held on February 11, 2020 and Management Information Circular" (3 January 2020) at App C, s 8.10, online: [perma.cc/YB5A-NW6G] [Cineplex MIC].
50 *Cineplex*, *supra* note 9 at para 163.
51 *Ibid*.
52 *Ibid*; Cineplex MIC, *supra* note 49 at App C, s 8.20.

as the agent for shareholders solely to collect the consideration once the transaction closed, not to pursue claims for the premium if the transaction failed.[53] The Court emphasized, "[i]f the parties had wanted to appoint Cineplex as the shareholders' agent to enforce their rights on Cineworld's failure to close, they could have done so."[54]Additionally, the Court rejected other arguments put forth by Cineplex, such as the necessity of different treatment because the transaction was structured as a plan of arrangement and the adoption of the "transferred loss" principle from English law.[55] The Court found that these arguments did not change the analysis, which was based on the explicit definition of third party rights in the agreement.[56]

Building on the insights from the cases discussed above, a two-stage framework can be developed to determine whether shareholders can recover lost premiums in future cases before Canadian courts. In the first stage, the court must assess whether the parties clearly intended to grant shareholders the right to lost premiums. If the right to premiums is expressly contingent upon the completion of the merger, then shareholders will have no claim if the merger fails.

If the inquiry survives this initial stage, the analysis moves to the second stage, which consists of two steps. First, the court must determine whether shareholders as third parties have standing to sue for lost premiums. This question is explored further below and will be explored more fully in a subsequent article, but for now, it suffices to note that the current legal landscape suggests the answer is more likely no than yes, as the principled exception to privity adopted by the Supreme Court of Canada only allows third parties to defend against claims rather than initiate them. However, if the court determines that shareholders have standing to sue, the final step is to consider whether any residual policy concerns should preclude their claim. Chief among these policy concerns is the risk of undue interference with the target board's authority to pursue remedies for breach, abandon the transaction, and enter into a new merger that may even provide shareholders with a better premium than the failed deal.

III. LOST PREMIUM PROVISIONS: TYPOLOGY AND THE CASE FOR JUDICIAL RELUCTANCE

The lost premium provisions can be traced back to the Second Circuit's decision in *Con Edison v. Northeast Utilities*, which as discussed above established that, in the absence of explicit contractual language stating otherwise, a target company could not claim lost shareholder premium as damages for a breach of a merger agreement.[57] Searching for a solution, M&A lawyers representing targets began drafting provisions which made it clear that parties intended for the buyers to be liable for lost stockholder premiums in the event

[53] *Cineplex*, *supra* note 9 at para 164.
[54] *Ibid*.
[55] *Ibid* at paras 165–168.
[56] *Ibid* at para 168.
[57] *Con Ed*, *supra* note 8 at 531.

of a deal falling through.[58] In *Crispo v. Musk*, the Chancery Court noted that these so-called Con Ed provisions fell into three primary types.[59]

The first approach involved granting shareholders direct third party beneficiary status.[60] However, Delaware courts are hesitant to confer such status to stockholders.[61] Although merger agreements position stockholders as beneficiaries, the board is obligated to secure the best deal possible.[62] In exercising its fiduciary duties, the board should not be constrained by the possibility that individual stockholders might directly sue a buyer under a merger agreement,[63] and further, the board should retain its decision-making authority over the corporation, including "decisions whether to initiate, or refrain from entering, litigation."[64] US courts have widely concurred that widespread litigation by public shareholders could undermine the board's ability to manage and settle any lawsuits effectively.[65] Furthermore, it is improbable that a buyer would consent to expose itself to potential lawsuits from thousands of the target company's shareholders.[66]

Arguably, the hesitancy in granting shareholders direct third party beneficiary status extends to the Canadian legal landscape. Canadian corporate statutes assign the primary responsibility for managing the corporation to the board of directors.[67] As an extension of this broad authority, the board of the target company holds the power to decide whether to pursue a merger, choose a merger partner, and negotiate the terms of the merger agreement. Although shareholder approval is ultimately required, shareholders do not initiate the merger; rather, the board alone retains the authority to negotiate the merger terms.[68] This allocation of powers aligns with the separation of ownership and management in public

58 Kevin Miller, "The ConEd Decision — One Year Later: Significant Implications for Public Company Mergers Appear Largely Ignored" (2006) 10:9 M&A Lawyer 1. See also Latham & Watkins, *The Book of Jargon: Global Mergers & Acquisitions*, 1st ed (New York: Latham & Watkins, 2018) sub verbo "Con Edison Provisions" for a discussion of Con Ed provisions.

59 *Crispo*, *supra* note 1 at 580.

60 *Ibid* at 580–81.

61 *Ibid* at 575; *Orban v Field*, 1993 WL 547187 at *9 (Del Ct Ch 1993) [*Orban*]; see also *Amirsaleh v Board of Trade of City of New York, Inc*, 2008 WL 4182998 at *4 (Del Ct Ch 2008) quoting *Orban*, *ibid* at *9.

62 *Crispo*, *supra* note 1 at 576.

63 *Aronson v Lewis*, 473 A (2d) 805 at 811 (Del Sup Ct 1984).

64 *Zapata Corp v Maldonado*, 430 A (2d) 779 at 782 (Del Sup Ct 1981) interpreting *DE Code*, tit 8, Corporations, § 141(a) [DGCL].

65 *Kaplan v Peat, Marwick, Mitchell & Co*, 540 A (2d) 726 at 730 (Del Sup Ct 1988) [*Kaplan*]; see also the US Supreme Court in *Daily Income Fund, Inc v Fox*, 464 US 523 at 530 (1984) (stating "actions brought by minority stockholders could, if unconstrained, undermine the basic principle of corporate governance that the decisions of a corporation—including the decision to initiate litigation—should be made by the board of directors or the majority of shareholders"); see generally the opinion of Vice-Chancellor Wigram in *Foss v Harbottle* (1843), 2 Hare 460 [*Foss*].

66 See *Hawes v Oakland (City of)*, 104 US 450 at 452 ("the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who possesses the requisite citizenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles"); see also *Foss*, *ibid*.

67 *CBCA*, *supra* note 7, s 102(1); *OBCA*, *supra* note 7, s 115(1); *Business Corporations Act*, SBC 2002, c 57, s 136(1).

68 *CBCA*, *ibid*, s 183(1).

corporations and adheres to the business judgment rule, which grants broad deference to the board's decisions.[69]

The reluctance to allow target shareholders to sue for lost premiums is further reinforced by established M&A practice. A board that is not constrained by stockholder litigation may have the flexibility to revive a deal, ultimately securing a better outcome for shareholders. This was exemplified in LVMH Moët Hennessy-Louis Vuitton SE's (LVMH) acquisition of Tiffany & Co (Tiffany). Although the original merger for USD$135.00 per share, reached after Tiffany rejected three offers made by LVMH, was abandoned in the wake of the COVID-19 pandemic — allegedly due to Tiffany's poor performance and mismanagement during early 2020 — leading to litigation in the Delaware Court of Chancery, the parties ultimately renegotiated a slightly lower purchase price and successfully closed the transaction.[70]

Another example is the Dow Chemical Company and Ramses Acquisition Corp.'s (collectively "Dow") acquisition of Rohm and Haas Company (R&H). When Dow refused to close the deal for a USD$78.00 per share buyout of R&H shareholders, which they had signed on 10 July 2008, R&H initiated litigation in the Delaware Court of Chancery.[71] R&H successfully obtained an expedited trial date; Dow capitulated, and on the first scheduled day of trial the Court entered a consent order requiring Dow to close the deal at the full price, plus additional consideration, which was completed on 1 April 2009.[72]

Even when a failed deal cannot be revived, the target board still retains the ability to sell the company to another buyer at a potentially higher valuation. This was the case in Tribune Media Co.'s (Tribune) attempted acquisition by Sinclair Broadcast Group, Inc. The original USD$3.9 billion — USD$35.00 per share plus additional consideration — deal collapsed in August 2018 due to regulatory challenges, but Tribune was later acquired by Nexstar Media Group, Inc. for approximately USD$4.1 billion — demonstrating that the board, free from shareholder litigation constraints, was able to achieve a better financial outcome for shareholders.[73]

69 *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68 at para 64 [*Peoples*]; *Maple Leaf Foods Inc v Schneider Corp*, (1998) 42 OR (3d) 177 at 192 (ONCA). See also Stephen Bainbridge, *Mergers and Acquisitions*, 4th ed (St Paul: West Academic, 2021).

70 See LVMH & Tiffany Agreement, *supra* note 6 at 1; *Tiffany* Complaint, *supra* note 6 at paras 1, 14–20; *Tiffany & Co v LVMH Moët Hennessy-Louis Vuitton SE*, 2020 WL 5870414 at 10–21 (Del Ct Ch 2020) (No 2020-0768-JRS) (Verified counterclaim and answer to verified complaint); LVMH Moët Hennessy-Louis Vuitton SE, Press Release, "Tiffany and LVMH Modify Merger Price: Tiffany to be Acquired for $131.50 Per Share in Cash" (29 October 2020) at 1, online: [perma.cc/F6NG-N9E9].

71 *Rohm and Haas Company v The Dow Chemical Company & Ramses Acquisition Corp*, 2009 WL 247606 at paras 1, 3 (Del Ct Ch 2009) (No 4309-CC) (Verified complaint).

72 *Rohm and Haas Co v Dow Chemical Co*, 2009 WL 445612 at *1–*2 (Del Ct Ch 2009) (No 4309-CC); *Rohm and Haas Co v The Dow Chemical Co*, 2009 WL 1024662 (Del Ct Ch 2009) (No 4309-CC) (Trial transcript); The Dow Chemical Company, Current Report (Form 8-K), (31 March 2009) at itm 2.01, online (pdf): [perma.cc/Y52S-UMPY].

73 *Tribune Media Co v Sinclair Broadcast Group, Inc*., 2018 WL 3777211 at paras 1, 13, 25, 29, 33–35 (Del Ct Ch 2018) (No 2018-0593) (Verified complaint); Securities and Exchange Commission Archives, "Agreement and Plan of Merger Among Tribune Media Company and Sinclair Broadcast Group, Inc., Dkt 1, Ex A" (8 May 2017) at 5, online (pdf): [perma.cc/2FSG-N2H6]; Tribune Media Co., Current Report (Form 8-K), (4 December 2018) at itm 1.01, online (pdf): [perma.cc/UQZ9-NW6M]; Tribune Media Co., Current Report (Form 8-K), 19 September 2019 at itm 1.01, online (pdf): [perma.cc/2RT7-F4N4].

These examples raise an important question: how could the target's board have successfully navigated these scenarios if shareholders had been able to bring lawsuits for lost premiums? More fundamentally, why should shareholders be entitled to recover lost premiums when the deal can either be revived and successfully closed or when the target is ultimately sold at a higher price? These considerations highlight the inherent tension between the board-centric model of corporate governance in public companies and the notion of allowing target shareholders to recover lost premiums. Notably, these questions do not appear to have been addressed by those who have argued in favour of the enforceability of lost premium provisions.[74]

The second approach involved designating the target corporation as an agent for recovering premiums on behalf of shareholders. This strategy, however, is on "shaky ground," as there is "no legal basis for allowing one contracting party to unilaterally and irrevocably appoint itself as an agent for a non-party for the purpose of controlling that [non-]party's rights," as noted by the Court of Chancery.[75] This approach was not actually at issue in *Crispo*, as the suit was not brought forward by Twitter, but by the plaintiff directly as a third party beneficiary under the merger agreement. The Court's reasoning, however, stands as a matter of agency law.[76] This reasoning also aligns with the Canadian decision, *Cineplex v. Cineworld*, in which the Court determined that Cineplex was only appointed as the shareholders' agent upon the closure of the deal, not for the purpose of recovering lost premium damages if the transaction failed.[77]

The third approach is to define damages resulting from the breach in terms of lost premiums. This approach can take two variants. In the first, shareholders are not granted third party beneficiary status, but rather the damages of the target are defined "by reference to its shareholders' lost merger premium or to the 'benefit of the bargain' lost by its shareholders."[78] This provision will likely be considered a penalty and unenforceable, for the simple reason that such damages are never incurred by the target but by the target shareholders.[79] In other words, only the target shareholders have the right to receive the premium had the merger agreement been performed.

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74 See generally Aggarwal et al, *supra* note 3; Chan & Petrin, "Lost-Premium," *supra* note 4; see also Mark D Director et al, "Delaware Court of Chancery Narrows Enforceability of *Con Ed* Provision" (2023) 27:10 M&A Lawyer 3 at 4 (this client alert briefly mentions "*Crispo* creates uncertainty regarding the enforceability and scope of *Con Ed* provisions intended to benefit stockholders. Targets that want to leverage a *Con Ed* provision to compel a buyer to close should consider making the grant and scope of third-party beneficiary status express, rather than relying on a court to infer such an intent. This approach is likely to raise considerable issues for buyers, however, as they would potentially be subject to multiple stockholder suits, and likely will be difficult for sellers to negotiate successfully").

75 *Crispo*, *supra* note 1 at 581.

76 Neil Whoriskey & Scott Golenbock, "Con Ed is Not Dead in Delaware" (23 November 2023), online: [perma.cc/2755-CHGZ]; FMB Reynolds & Peter Watts, eds, *Bowstead and Reynolds on Agency*, 19th ed (London: Sweet & Maxwell, 2010) at paras 2–001 to 2–003; Ewan McKendrick, ed, *Goode on Commercial Law*, 4th ed (LexisNexis, 2009) at 179–80.

77 *Cineplex*, *supra* note 9 at para 164.

78 *Crispo*, *supra* note 1 at 582, citing Victor Lewkow & Neil Whoriskey, "Left at the Altar: Creating Meaningful Remedies for Target Companies" (2007) 11:9 The M&A Lawyer; Martin D Ginsburg, Jack S Levin & Donald E Rocap, *Mergers, Acquisitions, and Buyouts*, December 2022 ed (Wolters Kluwer, 2022) at para 2501.

79 *Crispo*, *ibid* at 583–84; see *Duncan v Theratx, Inc*, 775 A (2d) 1019 at 1022 (Del Sup Ct 2001) (stating breach of contract damages are limited to the "promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost"); see also Zachary Wolfe, ed, *Farnsworth on Contracts*, 4th ed (Toronto: Wolters Kluwer, 2019) at § 12.20 (stating that where a contractual damages provision provides for a "stipulated sum [that] is significantly larger than the amount required to

The second variant incorporates lost premiums into the damages calculation and grants target shareholders third party beneficiary status. The Court of Chancery's decision implies that this variant could be valid, provided that the third party beneficiary status is granted under exceptionally narrow circumstances, thus avoiding interference with the target's board's control over litigation strategy.[80] Specifically, shareholders will not obtain the third party beneficiary status as long as the specific performance remedy is on the table.[81] This means that they cannot bring a lawsuit for lost premiums as long as the target's board seeks the court to compel the seller to perform the contract. However, if the deal is terminated and specific performance is no longer available — because the court has denied this relief — third party status will then vest in the shareholders, enabling them to file claims for lost premiums.

It is important to note that while the third approach was at issue in *Crispo*, it did not arise in *Cineplex*.[82] While the merger agreement between Cineworld and Cineplex granted third party beneficiary status to Cineplex shareholders, it was solely for the purpose of receiving the merger consideration once the deal closed.[83] In other words, the agreement did not define damages in reference to lost premiums, nor were Cineplex shareholders granted third party beneficiary status for the purpose of enforcing the payment of lost premiums.

IV. EXPLORING REMEDIES FOR ENFORCEMENT DIFFICULTIES

A. INCORPORATING LOST PREMIUMS INTO DAMAGES CALCULATION

Given the previous discussion, the first logical solution is to adopt the second variant of the third model, which incorporates lost premiums into the damages calculation and grants target shareholders third party beneficiary status. This approach neither constrains the board's fiduciary duties nor risks rendering the damages provision a penalty and unenforceable. This solution could be effective under both New York and Delaware law. Under New York law, a contractual promise can be enforced by a third party who is an intended beneficiary of that promise.[84] As long as the language of the contract "clearly evidences an intent to permit enforcement by the third party," New York law upholds this right to effectuate the intention of the contracting parties.[85] Similarly, under Delaware law, the third party beneficiaries can enforce the contractual promises owed to them.[86]

compensate the injured party for its loss," that contractual damages provision constitutes an unenforceable penalty); see also American Law Institute, *Restatement (Second) of the Law of Contracts*(St. Paul: American Law Institute Publishers, 1981), § 347, comment a.

80 *Crispo*, *ibid* at 585.

81 *Ibid.*

82 See generally *Cineplex*, *supra* note 9.

83 *Ibid* at para 163.

84 *Con Ed*, *supra* note 8 at 524; *Fourth Ocean Putnam Corp v Interstate Wrecking Co*, 66 NY (2d) 38 at *43–*44 (NY Ct App 1985) [*Fourth Ocean*].

85 *Fourth Ocean*, *ibid* at *45.

86 *Insituform of North America v Chandler*, 534 A (2d) 257 at 270 (Del Ct Ch 1987) ("[i]n order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party—whether it be a creditor of the promisee or an object of his or her generosity—should be a material part of the contract's purpose" [emphasis in original]). See also *Madison Realty Partners 7,*

However, the situation is notably different in Canada, where the principle of privity of contract prevents a third party from enforcing the contract or suing under it.[87] While in a cash out merger, the target's board negotiates the merger primarily for the shareholders' benefit, aiming for them to reap the profits of the contract,[88] this business reality does not alter the legal position of the target shareholders. They are not parties to the merger agreement but remain third party beneficiaries. In other words, shareholders may indeed benefit from the merger premium as specified in the merger agreement, yet they lack the standing to enforce the obligations themselves. This limitation reflects the distinction between the right to a benefit and the right to enforce the benefit, which remains reserved solely for the contractual parties.[89]

There are indeed compelling policy reasons for relaxing the doctrine of privity, in light of commercial realities and justice, and the Supreme Court of Canada has developed a principled exception to privity.[90] Under two key Supreme Court decisions, *London Drugs Ltd. v. Kuehne & Nagel International Ltd.* and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, a third party acquires a right to enforce a contractual provision if:

1. The contracting parties intended to extend the benefit in question to the third party; and

2. the activities performed by the third party in relying on the contractual provision are the very activities contemplated as come within the scope of the contract.[91]

Overall, both requirements of the test solely depend on the intention of the parties to confer a benefit and do not even require the third party to provide a benefit.[92]

However, an important limitation of the principled exception is that the third party cannot use it to sue a contracting party but only to defend themselves.[93] *Fraser River* only allows third parties to rely on the principled exception as a shield and not a sword. It

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LLC v Ag ISA, LLC, 2001 WL 406268 at *5 (Del Ct Ch 2001), citing *Guardian Construction Co v Tetra Tech Richardson, Inc*, 583 A (2d) 1378 at 1386–87 (Del Super Ct 1990); *Blair v Anderson*, 325 A (2d) 94 at 96–97 (Del Sup Ct 1974). See also *Dolan v Altice USA, Inc*, 2019 WL 2711280 at *7 (Del Ct Ch 2019); *Arkansas Teacher Retirement System v Alon USA Energy, Inc*, 2019 WL 2714331 at *12 (Del Ct Ch 2019).

87 *Tweddle v Atkinson*, [1861] EWHC J57 (QB); *Dunlop Pneumatic Tyre v Selfridge and Co Ltd*, [1915] AC 847 at 853 (HL (Eng)); *Greenwood Shopping Plaza Ltd v Beattie*, 1980 CanLII 202 at 236–37 (SCC); *Sears v Tanenbaum*, 1969 CanLII 35 (ONCA); *Van Hemelryck v New Westminster Construction & Engineering Co*, [1920] 3 WWR 709 at 715–16.

88 Ryan D Thomas & Russel E Stair, "Revisiting 'Consolidated Edison'—A Second Look at the Case that Has Many Questioning Traditional Assumptions Regarding the Availability of Shareholder Damages in Public Company Mergers" (2009) 64:2 Business Lawyer 329 at 342–43, citing Leo Strine, Address (Securities Regulation Institute Seminar address delivered at Northwestern University School of Law, 24 January 2008) [unpublished, audio no longer available]; Patricia L Olasker, Aaron J Atkinson & Johnathan Bilyk, "'*Con Ed*' Damages in Canadian Public M&A: Revisiting *Cineplex v Cineworld* in Light of Recent Delaware Case Law" (10 January 2024), online: [perma.cc/52N2-P9CR].

89 *Beswick v Beswick*, [1968] AC 58 at 72 (HL (Eng)) [*Beswick*].

90 *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 441, 444–46 [*London Drugs*].

91 *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, 1999 CanLII 654 at paras 31–32 (SCC) [*Fraser River*].

92 Mary Ppasiou "Privity of Contract and Third-Party Beneficiaries in Canadian Shipping" (2024) 102:1 Can Bar Rev 272 at 280–81.

93 *Fraser River* at para 37; *London Drugs* at 440–41.

therefore follows that shareholders cannot sue for the lost premium, even if they are the intended third party beneficiaries of the merger agreement. In some subsequent cases, plaintiffs have successfully relied on the principled exception to enforce a contractual benefit in their favour.[94] A notable example is *Brown v. Belleville*, where the Ontario Court of Appeal decided that a third party could enforce a covenant to maintain a repair to the sewer drainage system, which was promised for their benefit.[95] It has been argued where the contracting parties have clearly intended to confer a benefit on a third party, there is no reason that the third party cannot sue to enforce the benefit.[96]

Yet, the appellate decisions in British Columbia have rejected the proposition that the principled exception can be used as a sword, and even in Ontario some recent decisions from the Ontario Court of Justice have found that the principled position cannot be used as a sword.[97] In sum, privity continues to operate as an established principle of contract law in Canada and as the Fraser River stands, the principled exception grants third parties only a defence and not a sword. While *Brown v. Belleville* further relaxes the doctrine of privity, it is not yet clear whether Canadian law has so evolved to allow third parties to sue as plaintiff to enforce contracts to which they remain strangers.

B. REVERSE TERMINATION FEES

An alternative to a lost premium provision is the reverse termination fee, a common mechanism used to address the risk of one party abandoning a deal.[98] Termination fees generally fall into two categories. The first is a standard termination fee, paid by the target if it cannot complete the sale due to specific triggers. The second is a reverse termination fee, paid by the buyer if it cannot fulfill its obligations as outlined in the agreement. Both fees are triggered by certain events that occur between the signing and closing of the deal.[99]

In the case of a standard termination fee, triggers typically include the seller terminating the agreement to accept a competing offer, the transaction being voted down by the seller's shareholders, or the transaction failing to close within a specified timeframe, such as six months.[100] In the US, the size of standard termination fees is constrained by fiduciary principles, which require the target's directors to maximize shareholder value.[101] While

94 *Brown v Belleville (City)*, 2013 ONCA 148 at paras 110–11 [*Brown*].

95 *Ibid* at paras 110–11.

96 MH Ogilvie, "Re-Defining Privity of Contract: *Brown v. Belleville (City)*" (2015) 52:3 Alta L Rev 731 at 742.

97 *RS II Productions Inc v British Columbia Trade Development Corp*, 2000 BCCA 674 at para 67; *District of Kitimat v Alcan Inc*, 2006 BCCA 75 at para 65; *Holmes v United Furniture Warehouse GP*, 2012 BCCA 227 at para 22; *Cass v 1410088 Ontario Inc*, 2018 ONSC 5439 at para 55; *Arora v Whirlpool Canada LP*, 2013 ONCA 657 at para 39; *Stevens v Nexterra Substructures Incorporated*, 2022 ONSC 370 at para 27; *Coast-to-Coast Industrial Development Co v 1657483 Ontario Inc*, 2010 ONSC 2011 at para 44.

98 Olasker, Atkinson & Bilyk, *supra* note 88.

99 Afra Afsharipour, "Transforming the Allocation of Deal Risk Through Reverse Termination Fees" (2010) 63:5 Vand L Rev 1161 at 1163–64. See also Stephen M Bainbridge & Iman Anabtawi, *Mergers and Acquisitions: A Transactional Perspective*, 2nd ed (St Paul: West Academic, 2023).

100 Houlihan Lokey, *2023 Transaction Termination Fee Study*, (Houlihan Lokey, 2024) at 6, online (pdf): [perma.cc/F7D9-LVH7].

101 Claire A Hill, Brian JM Quinn & Steven Davidoff Solomon, *Mergers and Acquisitions: Law, Theory, and Practice*, 3rd ed (St Paul: West Academic, 2023) at 357; *Paramount Communications v QVC Network, Inc*, 637 A (2d) 34 at 44 (Del Sup Ct 1993); *Revlon, Inc v MacAndrews & Forbes Holdings*, 506 A (2d) 173 at 182 (Del Sup Ct 1986); *In re Toys "R" US, Inc*, 877 A (2d) 975 at 1000, 1017–21 (Del Ct Ch 2005).

Canadian directors are not bound by the short-term interests of shareholders, the structure of Canadian deals suggests that shareholder value maximization remains a paramount consideration for the target's board.[102] Furthermore, Canadian securities laws require the target's board to seek the best possible value for their shareholders.[103] Failure to do so risks having defensive strategies struck down by the securities commissions, which exercise broad public interest jurisdiction over public companies.[104]

The reverse termination fee is a relatively recent development, emerging in the mid-2000s. Common triggers for a reverse termination fee include the buyer's failure to obtain financing, regulatory approvals, or shareholder approval.[105] As a contractual provision, a reverse termination fee can be structured in various ways based on the agreement between the parties. For example, the agreement might include an option-style reverse termination fee, allowing the buyer to walk away for any reason upon payment of the fee. In this approach, the reverse termination fee serves as the sole remedy for the buyer's breach.[106]

An example of an option-style reverse termination fee is the USD$23 billion acquisition of Wrigley by Mars. Structured as a leveraged buyout, the agreement allowed Mars to exit the deal at any time and for any reason, with the USD$1 billion fee being the only remedy.[107] This option-style structure was common before the Global Financial Crisis (GFC) of 2008, when, as Theresa Arnold et al. noted, "private equity funding was in abundance and targets were scarce."[108] In this environment, targets could demand that private equity firms pay a fee if they were unable to close the deal, operating under the assumption that sellers would only walk away if financing or regulatory approvals fell through.[109]

However, the GFC marked a shift; private equity buyers suddenly found themselves obligated to buy targets that were no longer worth their original value.[110] The reverse termination fees provided an exit route for private equity buyers — they could pay the fee and walk away, contrary to the initial assumption that buyers would close unless financing or regulatory approvals fell through.[111] With reputational concerns no longer sufficient to ensure the completion of deals, the design of reverse termination fees evolved to better manage deal risk.[112] One strategic adjustment was to include a caveat in the contract that damages would be uncapped for a willful contract breach. Drafted in this manner, the

[102] *Peoples*, *supra* note 69 at paras 11, 42; *BCE Inc v 1976 Debentureholders*, 2008 SCC 69 at para 39 [*BCE*]; Camden Hutchison, "To Whom are Directors' Duties Owed? Evidence from Canadian M&A Transactions" (2023) 68:2 McGill LJ 123 at 130.

[103] *Take-Over Bids - Defensive Tactics*, OSC NP 62-202 (1997), s 1.1 [*Defensive Tactics*]; Robert Yalden, "Stuck at the Crossroads? The Regulation of Defence Strategies in Canadian M&A" (2020) 63:3 Can Bus LJ 288 at 295–96.

[104] *Defensive Tactics*, *ibid* s 6.

[105] Hill, Quinn & Solomon, *supra* note 101 at 416.

[106] Afsharipour, *supra* note 99 at 1202. See also Bainbridge & Anabtawi, *supra* note 99.

[107] Steven M Davidoff, "Wrigley and the Future of M&A," *New York Times DealBook* (1 May 2008), online: [perma.cc/9WKG-4R29].

[108] Theresa Arnold et al, "The Cost of Guilty Breach: Willful Breach in M&A Contracts" (2021) 62 BC L Rev E Supp I-32 at I-42.

[109] *Ibid*.

[110] Steven M Davidoff, "The Failure of Private Equity" (2009) 82:3 S Cal L Rev 481 at 482–83 [Davidoff, "Failure of Private Equity"].

[111] Arnold et al, *supra* note 108 at I-42; Steven M Davidoff, "Where Do Breakup Fees Go from Here?," *New York Times DealBook* (7 April 2008), online: [perma.cc/3KVP-83PS] [Davidoff, "Breakup Fees"].

[112] Houlihan Lokey, *supra* note 100 at 19.

contract aimed to deter buyers from intentionally undermining the deal.[113] The most recent study of the Canadian public company M&A agreements shows that in 40 percent of the deals with a reverse termination fee, the fee constitutes the sole remedy available to the target.[114] In the remaining 60 percent, the target's damages are uncapped in the case of willful or intentional breach.[115] The sizable number of transactions with uncapped liability for willful breach suggest the parties have clearly intended to move away from the optionality inherent in a reverse termination fee.

There are two other mechanisms drafters could incorporate into reverse termination fees to better protect the target against the risk of the acquirer abandoning the deal. The first solution is a two-tiered approach whereby the buyer pays a low fee for triggers outside its control, such as the failure to obtain financing and a significantly higher fee for intentionally tanking the deal.[116] An example of the two-tiered approach was the Neiman Marcus acquisition agreement which provided that the buyer had to pay USD$140.3 million, representing 2.8 percent of the equity value of the transaction if it could not obtain financing.[117] The USD$140.3 million constituted complete and liquidated damages, and the buyer would have no further liability beyond it.[118] However, the agreement provided that the buyer would be liable for damages up to USD$500 million, approximately 9.8 percent of the equity value of the transaction, for willfully breaching the agreement and therefore failing to close the transaction.[119] Although reverse termination fees are not subject to the same fiduciary considerations as termination fees,[120] a large reverse termination fee risks being deemed a penalty, and thus unenforceable, because reverse termination fees essentially function as liquidated damages. Courts will only enforce a stipulated damages clause if it represents the parties' good faith and reasonable estimate of future damages in the event of a breach.[121]

The second strategy involves pairing the reverse termination fee with other remedies. For instance, if the buyer unreasonably refuses to close the transaction, the seller is not restricted to the reverse termination fee and can also seek specific performance.[122] While a detailed examination of specific performance requires extensive space beyond the scope of this paper, the subsequent paragraphs will address key considerations relevant to this discussion.

The Canadian Deal Points Study reveals that 95 percent of definitive agreements include a specific performance provision, with 88 percent of transactions stipulating that parties are entitled to seek specific performance for breaches by the other party. This was indeed the case in the *Cineplex* case, with the definitive agreement stating that "the Parties shall be entitled to seek injunctive and other equitable relief to prevent breaches or

113 Arnold et al, *supra* note 108 at I-43.
114 American Bar Association, *Canadian Public Target M&A Deal Points Study* (2024) at 113.
115 *Ibid*.
116 Davidoff, "Failure of Private Equity," *supra* note 110 at 497–98.
117 Neiman Marcus Group, Inc., Definitive Proxy Statement Relating to Merger or Acquisition (Schedule 14A), (18 July 2005) at 67, online: [perma.cc/XF8X-QLKC].
118 *Ibid*.
119 *Ibid* at 68.
120 Hill, Quinn & Solomon, *supra* note 101 at 416.
121 *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd*, [1993] AC 573 at 578 (JCPC); Harvin D Pitch & Ronald M Snyder, *Damages for Breach of Contract*, 2nd ed (Toronto: Carswell, 1989) (loose-leaf release #2, June 2024) at § 8:6.
122 Afsharipour, *supra* note 99 at 1203.

threatened breaches of this Agreement, and to enforce compliance with the terms of this Agreement."[123] It argued that specific performance was unattainable since Cineworld had withdrawn its application for the necessary regulatory approvals.[124] The Court concurred with this stance, and ruled that Cineplex was entitled to pursue expectation damages.[125]

In their analysis of the *Cineplex* case, Chan and Petrin advocate that courts should order specific performance if the contractual provisions clearly indicate it as the preferred remedy.[126] They find it "surprising that the court dismissed specific performance without more detailed explanation," noting that specific performance could have been a suitable remedy in this case given that the Court itself found that "there was a very high percentage likelihood that *ICA* approval would have been obtained."[127] Further support for this argument can also be found in Delaware courts' readiness to grant specific performance in contested mergers.[128] A leading authority is *In re IBP, Inc., Shareholders Litigation*,[129] where then Vice Chancellor Leo Strine ordered the opposing party, Tyson Foods Inc., to complete its agreed-upon merger with IBP Inc.[130] The Court found that "the determination of a cash damages award will be very difficult in this case," and that awarding specific performance would "entirely eliminate the need for a speculative determination of damages."[131] Delaware courts have also shown readiness to allow targets to obtain specific performance when supported by the parties' contract.[132] An illustrative case is *Snow Phipps Group, LLC v KCAKE Acquisition, Inc.*, where the agreement on specific performance was contingent upon, among other conditions, the funding of debt financing.[133] Chancellor McCormick invoked the prevention doctrine to excuse the financing condition on specific performance.[134] The acquirer, suffering from buyer's remorse, failed to use best reasonable efforts, leading to the financing falling through.[135] Consequently, the Court ordered specific performance, determining that the acquirer's actions had prevented the condition from being fulfilled.[136]

These cases may suggest a modern inclination to respect the parties' preference for specific performance. However, it is important to recognize that the remedy for a breach of contract does not reside within the control of the contracting parties. In common law jurisdictions, monetary damages are typically the primary remedy for contractual breaches, as specific performance is considered an equitable and discretionary remedy, only granted

123 Regal Cineworld Group, "Cineworld Group PLC and 1232743 B.C. Ltd. and Cineplex Inc. Arrangement Agreement" (15 December 2019) s 8.9, online (pdf): [perma.cc/6Y4H-K63X].
124 *Cineplex*, *supra* note 9 at para 4.
125 *Ibid* at paras 157–58.
126 Jonathan Chan & Martin Petrin, "Lost Synergies and M&A Damages: Considering *Cineplex v Cineworld*" (2022) 100:2 Can Bar Rev 274 at 276 [Chan & Petrin, "Synergies"].
127 *Cineplex*, *supra* note 9 at para 181; Chan & Petrin, "Synergies," *ibid* at 287–88.
128 *Cineplex*, *ibid* at para 181; Chan & Petrin, "Synergies," *ibid* at 285.
129 789 A (2d) 14 (Del Ct Ch 2001) [*IBP*].
130 *Ibid* at 82–84.
131 *Ibid* at 83.
132 Davidoff, "Breakup Fees," *supra* note 111.
133 *Snow Phipps Group, LLC v KCAKE Acquisition, Inc*, 2021 WL 1714202 at *25 (Del Ct Ch 2021) [*Snow Phipps*].
134 *Ibid* at *2; see also Robert Anderson, "Limited Specific Performance in the Musk-Twitter Case and Beyond" (22 September 2022) [unpublished manuscript, archived at perma.cc/F73P-S998].
135 *Snow Phipps*, *supra* note 133 at *13, *50.
136 *Ibid* at *56.

when monetary damages are deemed insufficient.[137] This principle is consistently upheld across Delaware, New York, and Canada.[138] An acquirer might indeed argue for the enforcement of a merger agreement based on the target's uniqueness and the irreplaceable value the combination would yield, which cannot be adequately quantified in monetary terms.[139] Yet, advancing arguments based on uniqueness proves more challenging in cash-out mergers, such as those seen in the Twitter or Cineplex, where shareholders solely receive cash for their shares.

Jeffrey Berryman notes that the concept of uniqueness has been particularly persuasive in real estate contracts, where the specific physical and geographical characteristics of the land make it irreplaceable by any substitute.[140] In contrast, it is difficult to argue that cash paid to target shareholders represents unique and non-substitutable goods. Indeed, *IBP Inc.* can be distinguished in this respect as IBP shareholders were given the option to receive USD$30 per share, Tyson stock, or a combination of both.[141] Calculating damages in this scenario would have been exceptionally complex, as IBP shareholders might have opted to maintain a stake in Tyson post-merger, requiring the Court to assess the value of a business combination that never materialized.[142] In this instance, specific performance was deemed preferable as it obviated the need for such speculative calculations.[143]

A more compelling argument for specific performance in cash out mergers lies in the enforcement of obligations to third parties. It can be argued that damages would be an inadequate remedy as target shareholders, who lack privity of contract, would be denied a remedy for breaches of the agreement. Allowing the target company to insist on enforcing the merger agreement ensures that target shareholders receive the premiums promised to them as third party beneficiaries.[144] This perspective aligns with the case of *Beswick v. Beswick*, in which the House of Lords mandated specific performance to secure an annuity

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137 E Allan Farnsworth, "Legal Remedies For Breach of Contract" (1970) 70:7 Colum L Rev 1145 at 1149; Robert J Sharpe, *Injunctions and Specific Performance*, 4th ed (Toronto: Canada Law Book, 2012) at ¶ 7.190 ("[t]he notion of 'inadequacy of damages' as a rationale for specific performance reflects the desire to avoid the injustice which would result from the application of the ordinary rules where these assumptions are not met"); *Butler v Countrywide Finance Ltd*, [1993] 3 NZLR 623 at 631 (HC) ("[i]n the common law tradition, specific performance has, at least until recently, been regarded as an exceptional remedy. In particular, the availability of specific performance has been conditioned on damages being inadequate").

138 NYJUR 2nd, *Specific Performance* (New York: Lawyers Cooperative Publishing, 2024) "Circumstances under which specific performance is appropriate" § 2 ("specific performance is appropriate generally when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate or inequitable burden on the breaching party"), citing *Cho v 401-403 57th St Realty Corp*, 752 NYS (2d) 55 (NY Sup Ct App Div 2002). *Butler v Wright*, 186 NY 259 at *261–62 (NY Ct App 1906); *Osborn ex rel Osborn v Kemp*, 991 A (2d) 1153 at 1153, 1158 (Del Sup Ct 2010) (in order to be granted specific performance, "[a] party must prove by clear and convincing evidence that he or she has no adequate legal remedy" [footnotes omitted]); *Domowicz v Orsa Investments Ltd*, [1993] OJ No 2214 at para 49 (ONSC) ("[m]onetary relief constitutes the normal remedy to redress a breach of contract. Only where this remedy is inadequate will a court decree specific performance"); *Joseph Chiavatti Construction Ltd v Palleschi*, 1994 CarswellOnt 723 at para 4 (ONSC) [*Chiavatti Construction*].

139 *IBP*, *supra* note 129 at 82–84.

140 Jeffrey Berryman, *The Law of Equitable Remedies*, 3rd ed (Toronto: Irwin Law, 2023) at 283; *Adderley v Dixon* (1824), 1 Sim & St 607 at 610 (ChD); *Semelhago v Paramadevan*, 1996 CanLII 209 at para 22 (SCC).

141 *IBP*, *supra* note 129 at 21.

142 *Ibid* at 82–83; Anderson, *supra* note 134 at 9.

143 *IBP*, *supra* note 129 at 84.

144 *Beswick*, *supra* note 89; Berryman, *supra* note 140 at 285.

payment to a third party beneficiary.[145] In this case, privity prevented the beneficiary from enforcing the annuity provision and seeking damages.[146] It was therefore held that equity could assist common law through a decree for specific performance, directing the payment of the annuity to the third party beneficiary.[147]

However, the granting of specific performance remains at the discretion of the court.[148] A persistent concern in the authorities is the need for ongoing supervision of the defendant's conduct, along with the potential for future breaches and repeated returns to court.[149] These concerns are weighed differently across various decisions, but the issue of supervision consistently poses a significant challenge to awarding specific performance.[150] Forcing a merger between two public companies may prove to be an unworkable remedy, particularly when it depends on obtaining regulatory approvals or financing, both of which are susceptible to failure. These risks are also considered by the plaintiff, which might help explain why Cineplex did not seek specific performance when Cineworld withdrew its *ICA* application.

Overall, the reverse termination fee acts as an important mechanism to shield the target from deal risk, particularly when damages for willful breach remain uncapped or when the

145 *Beswick*, *ibid* at 59.

146 *Ibid*.

147 *Ibid* at 102.

148 *Chiavatti Construction*, *supra* note 138 at para 6 ("I think that the question of ordering specific performance has to be approached in a reasonably broad way. It is an equitable remedy. It is a remedy that is in the discretion of the Court, and the question before the court is, in this particular case, and on the facts of this particular case, is: is it the appropriate remedy, and is it the best remedy?").

149 Sharpe, *supra* note 137 at 7-17 to 7-18; Berryman, *supra* note 140 at 289–301; *Ryan v Mutual Tontine Westminster Chambers Association*, [1893] 1 Ch 116 at 128 (CA) (UK); *CH Giles & Co Ltd v Morris*, [1972] 1 WLR 307 at 318 (Ch); *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, [1998] AC 1 at 12 (HL) [*Argyll Stores*]; *Kingston (City) v Kingston, Portsmouth and Cataraqui Electric Railway Co*, [1898] OJ No 51 at para 12, 25 (ONCA):

> It is, in substance, an action to compel the performance in specie by the defendants of an agreement amounting to a covenant on their part to do certain acts continuous in their nature and extending over a period of thirty-six years from the present year. These are continuous duties involving personal labour and care of a particular kind; and if the Court should direct their performance in specie it would have to assume their superintendence in order to enforce obedience to its judgment.

Powell Duffryn Steam Coal Co v Taff Vale Ry Co, (1874) LR 9 Ch App 33; *Pollard v Clayton*, (1855) 1 K & J 462 at 544 (ChD):

> But this is an agreement of which the performance must extend over months and years; and for the Court to undertake to superintend its performance would be a stretch of jurisdiction for which there is no precedent, and which would involve the Court in endless applications to prevent and redress misconduct and neglect, real or imaginary, on the part alike of Plaintiff and Defendants.

150 *Centre City Capital Ltd v Bank of East Asia (Canada)*, [1997] OJ No 5218 at para 13 (ONSC):

> With respect to (C) the applicant is requesting that this court make an interlocutory and mandatory order requiring the respondent to occupy the leased premises throughout the term and operate its business continuously and actively in the whole of the leased premises. It can be envisaged that such an order would require supervision, numerous rulings by the court as to whether the Order is being followed, motions for contempt and various other scenarios…. There is a continuing contractual relationship here which does not support the request for a mandatory order.

AL Sott Financial (Newton) Inc v Vancouver City Savings Credit Union, 2000 BCCA 143 at para 11 ("[t]he courts of England and Ontario have been consistent in refusing to make orders requiring a business to be carried on and in holding damages to be an adequate remedy. The reasoning in many cases, including *Argyll Stores* … emphasizes the potential problems in 'supervising' a mandatory order").

fee is coupled with the right to seek specific performance. This fee mitigates the risk of unenforceability associated with incorporating lost premiums into the seller's damages. Additionally, the target's board can directly enforce the reverse termination fee, obviating the need for shareholder litigation and thereby preserving the board's control over the litigation asset.

However, a notable limitation is that the size of the reverse termination fee typically falls well below the potential award of lost premiums. Increasing the fee to align with lost premiums could render it a penalty and, consequently, unenforceable. As previously noted, expectation damages for shareholders are distinct from the losses suffered by the corporation. Therefore, a reverse termination fee cannot reasonably include damages that the corporation, as the contracting party, will not incur. Given this distinction, pairing the fee with specific performance becomes an appealing strategy. While opting for specific performance in their contract does not guarantee that the court will follow this choice, it can influence the court's decision in shaping an appropriate response.[151] The target's board may then request the court to compel the buyer to complete the transaction and deliver the promised premiums to shareholders. Since shareholders do not have privity of contract and cannot directly enforce contractual terms, equity may favour specific performance as it better safeguards the interests of third party beneficiaries, who otherwise might not take measures to protect their own rights.

C. AGENCY AS A WORKAROUND

As previously explained, the relationship between the contracting party and the third party beneficiary cannot be simply recast as a principal–agent relationship. This point is emphasized in both *Crispo* and *Cineplex*, where it is noted that without a legal basis, the target cannot act as an agent for its shareholders to sue for lost premiums.[152] However, in *Crispo*, Chancellor McCormick hinted that corporate law might offer a solution, posing the question, "Would a charter provision designating the company as the stockholders' agent for the purpose of recovering lost-premium damages after failed sale achieve the result intended…?"[153] Despite the brevity and ambivalence of Chancellor McCormick's dictum, a charter provision may indeed be a viable alternative.[154]

This model can be adopted in Canada by amending the target's articles of incorporation to authorize the company to collect lost premiums on behalf of its shareholders. Such an amendment would require special majority approval from the shareholders, thereby establishing a legal basis for conferring authority on the corporation.[155] If one adopts the view that agency can be established simply by the principal conferring authority on the agent, without requiring mutual consent, then shareholders' approval alone would suffice to designate the corporation as an agent for the recovery of lost premiums.[156] Yet, this raises

151 *Height of Excellence Financial Planning Group Inc v Bergen*, 1999 SKQB 142 at para 8.
152 *Crispo*, *supra* note 1 at 581; *Cineplex*, *supra* note 9 at para 164.
153 *Crispo*, *ibid* at 581, n 86.
154 *Ibid*.
155 *CBCA*, *supra* note 7, s 6(2), 173(1)(o).
156 See Rachel Leow, "Clarifying Mutual Consent's Role in Agency Law" (2024) 45:1 Oxford J Leg Stud 1 at 9 ("the agent's consent is not a necessary condition for authority to be conferred on him. Instead, authority can be conferred by the principal unilaterally"); Wolfram Müller-Freienfels, "Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty" (1964) 13:2 Am J Comp L 193 at 203 ("[u]nlike the *contract* which is necessarily a bilateral manifestation of assent, there is no conceptual reason why the grant of agency *power* should not be construed as a unilateral manifestation

the further question: can the target's board, acting for the corporation, disregard this provision? In principle, an agent cannot be compelled to accept agency against its will and may disclaim the role.[157] Canadian corporate law also suggests that the board retains the discretion to decline authority to pursue lost premiums.[158] Since this provision would be entered in the company's articles, it cannot override the board's statutory authority to manage or supervise the corporation's affairs, including determining the appropriate course of action in response to a breach of a merger agreement.[159] Absent a unanimous shareholder agreement stating otherwise, the board remains free to refuse to initiate legal action for lost premiums.[160] This may occur, for instance, if the board determines that renegotiating the deal or pursuing an alternative sale better serves the corporation's interests.

In the context of a plan of arrangement, it has been proposed that a court could appoint the target corporation as an agent.[161] The typical procedure in a plan of arrangement involves the corporation proposing the arrangement to obtain an interim order from the court.[162] This order sets out the necessary conditions for the approval of the plan, which include holding meetings of securities holders, establishing requisite approval thresholds including separate class votes, serving or dispensing notice to interested parties, appointing counsel to represent shareholder interests, and detailing dissent and appraisal rights.[163] Once the conditions outlined in the interim order are met, a final court order can be sought to approve the arrangement.[164] The Supreme Court of Canada held, in *BCE Inc. v. 1976 Debentureholders*, the court will endorse the plan if the statutory requirements are met, the application is made in good faith, and the arrangement is deemed fair and reasonable.[165]

Undoubtedly, plans of arrangement offer greater flexibility in customizing and timing multiple transactional steps, which would be more challenging under other types of transactions, such as a merger.[166] Not only does the court have broad powers to issue any orders it deems fit under the circumstances, but the "fair and reasonable" test also provides

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to the agent by the principal alone"); FMB Reynolds & Peter Watts, *Bowstead and Reynolds on Agency*, 23rd ed (London: Sweet & Maxwell, 2024) at para 2-032:

> It is traditional to state that the agent's assent (or consent) is also required, and to discuss the ways in which this can be implied from acts of the agent, or waived by the principal…. But as regards the position between principal and third party, the relevant act is the conferring of authority. It is suggested above that the basis of agency is a unilateral manifestation of will: a power of attorney, for instance, does not require acceptance by the donee of the power [footnotes omitted].

157 Leow, *ibid* at 20–21.

158 *CBCA*, *supra* note 7, s 102(1); *Ringuet v Bergeron*, 1960 CanLII 67 at 683 (SCC) ("[w]hile majority shareholders may agree to vote their shares for certain purposes, they cannot by this agreement tie the hands of directors and compel them to exercise the power of management of the company in a particular way").

159 *CBCA*, *ibid*.

160 *Ibid*; see also *OBCA*, *supra* note 7, s 115(1).

161 *Cineplex*, *supra* note 9 at 164–65.

162 *CBCA*, *supra* note 7, s 192(3).

163 *Ibid*, s 192(4); Jon Levin & Laura Fetter, *Canada Corporations Law Reporter*, (Toronto: LexisNexis, 2025) (looseleaf updated 2025) at ¶ 10,520.

164 Christopher C Nicholls, *Mergers, Acquisitions and Other Changes of Corporate Control*, 3rd ed (Toronto: Irwin Law, 2020) at 109–10.

165 *BCE*, *supra* note 102 at para 156.

166 *12178711 Canada Inc v Wilks Brothers, LLC*, 2020 ABCA 430 at paras 11, 18; *Re: Mid-Bowline Group Corp*, 2016 ONSC 669 at para 39.

it with extensive jurisdiction in reviewing and approving a plan.[167] However, it remains uncertain whether a court would grant an order appointing the target corporation as the agent for collecting the premium without evidence of a contractual agreement in which shareholders have expressly vested such authority in the target. Notably, in *Cineplex*, the Court dismissed the notion that the transaction's structure as a plan of arrangement would alter the analysis concerning agency.[168] Although the Court acknowledged the "fair and reasonable" test for approving a plan, it emphasized this test "does not change the fact that under the arrangement, the consideration was always payable [directly] to the shareholders, not to Cineplex."[169] It is also important to remember that corporate law has long rejected the notion that a corporation acts as an agent for its shareholders, even when the company has only one stockholder.[170]

However, if an amendment to the articles of incorporation explicitly designates the target as the agent for collecting lost premiums and this amendment is included as one of the transactional steps presented to shareholders for approval, it is conceivable that an interim order from the court overseeing the plan of arrangement could validate the agency arrangement. However, the timing of the articles amendment is critical. If the acquirer breaches the agreement before shareholders can vote on the amendment, the target will not have the authority to enforce the lost premiums provision.[171] This approach also must address a technical issue: which shareholders are entitled to the lost premiums? The right to sue for lost premiums accrues at the time of the breach, yet the target typically recovers the lost premiums at a later date, potentially after changes in the shareholder base.[172] Thus, the articles amendment must specify whether the recovered premiums will be distributed to the shareholders as of the breach date or if the claim to lost premiums will be transferable along with share ownership. Finally, in the scenario of a takeover bid, where no shareholder vote on the transaction is required and shareholders merely tender their shares to the offeror, agency will not be achieved unless the articles amendment has been approved at an earlier stage.

D. LEGISLATIVE REFORM

The last option is a statutory change, which could potentially provide more certainty and encounter fewer technical challenges compared to other proposals considered here.[173] This is the approach that Delaware has taken. Notably, the 2024 DGCL Amendments permit a merger agreement to set forth "penalties or consequences," including "an amount representing, or based on the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive pursuant to the terms of such agreement if the merger or consolidation were consummated in accordance with the terms

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167 *CBCA*, *supra* note 7, s 192(4); *TELUS Corp (Re)*, 2012 BCSC 1919 at paras 233, 288; *Protiva Biotherapeutics Inc v Inex Pharmaceuticals Corp*, 2006 BCSC 1729 at para 30; see also the appeal's dismissal, 2007 BCCA 161 at para 21.

168 *Cineplex*, *supra* note 9 at para 165.

169 *Ibid.*

170 *Salomon v Salomon & Co Ltd*, [1897] AC 22 at 56 (HL Eng); see generally *Automatic*, *supra* note 7 (the holding describes directors as managers of the separate legal entity that is the corporation, and as such the shareholders have no means, through ordinary resolution, unless otherwise in the articles, to affect control over the decisions of the directors because shareholders are not, themselves, a "principal").

171 Whoriskey & Golenbock, *supra* note 76.

172 *Ibid*.

173 Micheletti & Rosenello, *supra* note 5.

of such agreement."[174] Further, these amendments also permit the merger agreement to stipulate the appointment of a representative for the shareholders of a constituent corporation. This provision is binding on all relevant shareholders and can only be amended post-merger with the consent or approval of persons specified in the agreement.[175]

Together, these provisions effectively overturn *Crispo*'s findings in two significant ways. First, they enable the corporation, rather than the target shareholders, to sue for lost premiums. By doing so, the amendments transform the shareholders' direct claim to the lost premiums into a corporation's claim. As Travis Laster notes, this approach is odd as "the corporation itself is not injured by the loss of a premium that [it] never would have received in the first place."[176] Put differently, while the amendment addresses the enforcement issues of lost premium provisions, it introduces a more significant conceptual problem that *Crispo* avoided; it grants the corporation standing to sue for a loss it never incurred.

The amendments go further, also allowing the merger agreement to provide for the appointment of "of 1 or more persons (which may include the surviving or resulting entity or any officer, manager, representative or agent thereof) as representative of the stockholders of a constituent corporation" and "for the delegation to such person or persons of the sole and exclusive authority to take action on behalf of such stockholders pursuant to such agreement, including taking such actions as the representative determines to enforce (including by entering into settlements with respect to) the rights of such stockholders under the agreement."[177] In sum, this provision indicates that the merger agreement can provide for a representative shareholder to bring a lawsuit for the lost premium. Interestingly, the second mechanism not only negates the initial mechanism of permitting the corporation to initiate the suit but also risks unsettling the board-centric model of Delaware corporate law by transferring the litigation asset from the board to shareholders. Consequently, it remains unclear what would happen if the target's board sought to continue negotiations with the acquirer or apply to court for specific performance while shareholders simultaneously sue for lost premiums.

V. CONCLUSION

Recovering lost premiums in failed mergers represents a complex interplay of contract law, corporate law, and the selected choice of law. I have argued that although the courts' reluctance to enforce lost premium provisions has surprised transactional lawyers and scholars, this hesitation is principled; it can be attributed to both doctrinal and normative considerations.

First, prematurely enforcing lost premium provisions not only contradicts the intentions of the contracting parties, but also the fiduciary duties of the board, which must remain the central decision-making authority regarding the merger. It is the board, acting on behalf of the target company, that negotiates and enters into the merger agreement. As the contracting entity, the board exchanges promises and makes representations, warranties, and covenants. Consequently, if the merger fails, the board should retain control as the contracting party to determine the best course of action for the corporation, including

174 2024 DGCL Amendments, *supra* note 5, s 4; DGCL, *supra* note 64, s 261(a)(1)(i).
175 DGCL, *ibid.*
176 Travis Laster, "Crispo and Its Discontents" (1 June 2024), online: [perma.cc/X79G-TDQS].
177 DGCL, *supra* note 64, s 261(a)(2)(i).

potential remedies. As I have explained, the board might not only succeed in reviving the deal but could also opt to sell the company to a new buyer, where shareholders would receive the agreed premiums upon closing. Thus, allowing shareholders to sue for lost premiums not only undermines the core governance model of public companies, but also enables shareholders to recover for losses that have not yet materialized, which may be mitigated, or even rectified, by subsequent board actions.

Further courts are justified in upholding the distinction between damages suffered by the corporation — as the contracting party — and those suffered by the shareholders as third party beneficiaries. Refusing a target company's attempt to recover lost premiums, when there is no basis to support an agency relationship between the shareholders and the company, is similarly justified; the corporation is a distinct legal entity from its shareholders, acting as the principal rather than as an agent. This clear delineation ensures that corporate governance and contractual obligations remain appropriately structured and enforced.

To systematically review these multifaceted challenges, I propose a two-stage framework. Initially, the court must determine whether the contracting parties intended to grant shareholders the right to recover lost premiums; if this right was contingent upon the completion of the merger, then no claim exists. Should the claim survive this first stage, the court must then assess whether shareholders have the standing to sue. If standing is established, the final consideration involves whether policy concerns, such as potential interference with the target board's discretion, should preclude recovery.

Interestingly, the difficulties surrounding lost premiums not only arise from the provisions themselves, but also from the attempted remedies. For example, while legislative amendments, such as those in Delaware, offer a quick fix to enforceability issues, they risk undermining the board-centric model of corporate law. A narrowly tailored lost premium provision does not constrain the board's fiduciary duty, yet its enforcement is likely barred by privity issues in Canada. Conversely, reverse termination fees, which avoid the problems of lost premiums, typically must be set much lower than lost premiums to mitigate the risk of being deemed unenforceable as penalties.

Specific performance, as an equitable remedy, provides a strong means of protecting the interests of target shareholders, particularly since they lack privity and may, therefore, be denied contractual damages. However, the discretionary nature of this remedy means courts reserve the power to withhold it, should the remedy necessitate ongoing judicial oversight or repeated court intervention. Agency can only be employed if a shareholder resolution, approving an amendment to an article, designates the target as the agent responsible for collecting lost premiums. The timing of this vote is crucial, as the target cannot recover lost premiums if the acquirer breaches the agreement before the shareholder vote. More importantly, it remains uncertain whether the agent corporation would be legally bound by such a vote. Unless lost premiums are incorporated into a unanimous shareholder agreement, the board retains full discretion and may ultimately choose not to pursue recovery if it determines that doing so is not within the corporation's best interest.

Ultimately, the appropriate remedy for a breach of a merger agreement must be determined by the courts, which will weigh not only the parties' intentions and the language of their agreement, but also the constraints imposed by privity and anti-penalty doctrines under the governing law. Additionally, courts must consider the need to preserve the board’s ultimate decision-making authority over the merger and the inherently discretionary nature of equitable remedies.