THE EFFICIENCY OF SPECIFIC PERFORMANCE IN STOCK-FOR-STOCK MERGERS

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ABSTRACT

This article analyzes IBP, Inc. v. Tyson Foods, Inc. *in light of the considerable body of law and economics literature that has developed over the past forty years and posits an economic framework for analyzing the remedy of specific performance in corporate control transactions. The efficiency of specific performance in corporate control transactions turns on a number of factors, including whether the remedy is being sought by a buyer or seller, the form of the consideration, and the relative sizes of the parties involved. Stock-for-stock mergers, and other corporate control transactions involving stock consideration, present unique challenges because of the difficulty of monetizing the harm to the seller's shareholders in the event that the transaction is not consummated.*

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I. INTRODUCTION

Since *IBP v. Tyson Foods, Inc.* (*IBP*) was decided in 2001, commentators have devoted considerable thought to the impact of the case on material adverse effect clauses and deal protections for buyers and sellers.[1] In awarding specific performance to the target of a stock-for-stock merger, however, *IBP* also prompts the question of whether such a free approach toward specific performance is economically efficient. This article analyzes *IBP* in light of the considerable body of law and economics literature that has developed over the past forty years,[2] and posits an economic framework for analyzing the remedy of specific performance in corporate control transactions.

II. *IBP V. TYSON FOODS*

On January 1, 2001, Tyson Foods, Inc. (Tyson or Tyson Foods), the leading chicken distributor, agreed to acquire control of and merge with

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[1]*See, e.g.*, Steven S. Bartels & Kenda K. Tomes, *MAC Clauses: Kill or Close the Deal*, 20 ACCA DOCKET No. 9, at 36 (2002); Gregory Bishop, *Changed Circumstances or Buyer's Remorse? Delaware Says the Deal Stands*, BUS. L. TODAY, Mar.-Apr. 2002, at 49; Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899 (2003); Rod J. Howard, *MACs and MAEs—Allocating the Risk of Changes Between Signing and Closing in Recent Technology M&A Agreements*, *in* DRAFTING CORPORATE AGREEMENTS 2001-2002, at 329 (PLI Corp. Law & Practice Course, Handbook Series B0-0164, 2002); Christopher J. Zinski, *Mergers and Acquisitions of Financial Institutions: A Primer on Deal Points*, 119 BANKING L.J. 311 (2002); Yair Y. Galil, Survey, *MAC Clauses in a Materially Adversely Changed Economy*, 2002 COLUM. BUS. L. REV. 846 (2002); Jonathan M. Grech, Comment, *"Opting Out": Defining the Material Adverse Change Clause in a Volatile Economy*, 52 EMORY L.J. 1483 (2003); Kari K. Hall, Comment, *How Big is the MAC?: Material Adverse Change Clauses in Today's Acquisition Environment*, 71 U. CIN. L. REV. 1061 (2003); Recent Cases, *In re* IBP, Inc. Shareholders Litigation v. Tyson Foods, Inc., *No. 18373, 2001 Del. Ch. LEXIS 81 (June 15, 2001)*, 115 HARV. L. REV. 1737 (2002); Sherri L. Taub, Note, *"Buyer's Regret" No Longer: Drafting Effective MAC Clauses in a Post-*IBP *Environment*, 24 CARDOZO L. REV. 849 (2003).

[2]*See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 2.1, at 23-24 (6th ed. 2003) (describing the history of the modern law and economics movement).

IBP, Inc. (IBP), a leading producer of beef and pork products.[3] A number of major accounting irregularities, however, soon surfaced within an IBP subsidiary, DFG Foods (DFG). As a result of fraud in DFG, IBP took a relatively minor $66 million asset impairment charge in its year 2000 10-K (leaving IBP with $4.4 billion in total assets) and reduced net earnings by $9.6 million (leaving net earnings of $135 million).[4] As a result of these write-downs, together with the failure of IBP's special committee counsel to promptly forward a Securities and Exchange Commission (SEC) comment letter questioning the accounting treatment of the DFG subsidiary, Tyson sought to terminate the merger agreement and tender offer by invoking the agreement's "material adverse effect" (MAE) provision.[5] In addition, Tyson filed suit against IBP in the Delaware Court of Chancery, arguing that the agreement had been fraudulently induced.[6]

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[3]*In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 21-22 (Del. Ch. 2001). The IBP/Tyson merger was structured as a two-step cash-stock merger consisting of a $30 per share cash tender offer by Tyson Foods for 50.1% of IBP's shares, followed by a back-end statutory merger, pursuant to Delaware General Corporate Law (DGCL) § 251, in which each remaining share of IBP stock would be exchanged for approximately $30 worth of Tyson stock. IBP, INC., TENDER OFFER STATEMENT ON SCHEDULE TO OF LASSO ACQUISITION CORPORATION AND TYSON FOODS, INC. (filed with the Securities and Exchange Commission (SEC) Jan. 5, 2001), Exhibit D-4, at 4-7. To the extent the tender offer was oversubscribed, IBP's shareholders would receive pro rata treatment sufficient to make Tyson the 50.1% owner of IBP. *Id.* Following a successful tender offer, IBP agreed to permit Tyson's designees to be appointed so as to constitute a majority of IBP's board of directors. *Id.* at 11. Following board and shareholder approval of the merger pursuant to DGCL § 251, all IBP shares held by IBP (as treasury stock) and by Tyson would be cancelled. Each remaining share would be converted into $30 worth of Tyson common stock pursuant to a collared floating exchange ratio (meaning that IBP's shareholders would receive $30 worth of Tyson common stock for each of their IBP shares unless Tyson's stock price varied outside a set range, in which case the exchange ratio would be modified per the terms of the merger agreement). *See id.* at 12-13. Following the merger, IBP would become a wholly owned subsidiary of Tyson. *Id.* at 12.

[4]IBP, INC., ANNUAL REPORT ON FORM 10-K FOR THE FISCAL YEAR ENDED DEC. 30, 2000 (filed with SEC Mar. 30, 2001), at 17, 22, F-4 to F-5.

[5]*IBP*, 789 A.2d at 50-52. MAE and material adverse change (MAC) clauses are often used in merger agreements to protect one or both of the parties from the possibility that the other party will suffer a material harm between signing and closing. *See generally* Howard, *supra* note 1, at 329-431. Although the difference between an MAE and a MAC is generally cosmetic (particularly when the MAC is defined to include "changes" as well as "effects"), an MAE clause arguably sweeps broader than a MAC, since

> the realization of a risk may arguably constitute a material adverse "effect" but may arguably not constitute a material adverse "change" (either in whole or in part), on the theory that the existence of the risk—or the existence of some degree or element of risk—pre-dated the signing of the agreement and was known to the parties.

Id. at 356.

[6]*IBP*, 789 A.2d at 51-52.

IBP disputed Tyson's allegations and sought to have the original merger agreement specifically enforced.[7]

On June 15, 2001, Vice Chancellor Leo E. Strine, Jr. found that Tyson had improperly terminated the agreement, holding that an MAE clause should be looked at from the long-term perspective of a reasonable buyer.[8] Viewed from this perspective, the court found DFG's overstatements relatively insignificant in light of IBP's overall performance and size,[9] and further implied that Tyson was seeking to terminate the merger agreement because of general market weakness and "buyer's regret,"[10] rather than unforeseen and material company-specific problems.[11]

Having found Tyson in material breach of the merger agreement, the Delaware Court of Chancery ordered Tyson to specifically perform under the agreement and complete its merger with IBP.[12] Although specific performance had historically been a remedy sought by a *buyer* claiming that its intended purchase was a unique asset that could not adequately be monetized, the court found that this logic applied, at least in the present case, with equal force to *sellers* (such as IBP) for whom a significant portion of the consideration was the acquiring company's stock.[13] Given this, and given the speculative nature of any assessment of damages (which would likely be "staggeringly large"), the *IBP* court determined that specific performance was an appropriate remedy.[14]

III. OVERVIEW OF CASE LAW ON SPECIFIC PERFORMANCE

The equitable rules governing specific performance in the sale or exchange of corporate securities is a product of the principles established

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[7] *Id.* at 51.

[8] *Id.* at 68.

[9] *See supra* note 4 and accompanying text.

[10] *IBP*, 789 A.2d at 22.

[11] *Id.* at 70.

[12] *Id.* at 84. For a Delaware Court of Chancery holding similarly characterizing a proposed merger as a "unique acquisition opportunity . . . the loss of . . . [which] cannot be quantified," see *True North Communications, Inc. v. Publicis S.A.*, 711 A.2d 34, 44-45 (Del. Ch. 1997). *Id.* at 45.

[13] *IBP*, 789 A.2d at 82-83. Although Tyson's counsel failed to brief the issue of specific performance, counsel for IBP did address the issue, arguing that "unless specific performance is ordered, shares of the combined company simply will not exist and IBP's shareholders will forever be deprived of the benefit of their bargain." Pretrial Brief of Cross-Claim Plaintiff IBP, Inc. at 56, *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001) (No. 18373).

[14] *IBP*, 789 A.2d at 83.

by the common law over matters of personalty and real estate.[15] Historically, specific performance has been viewed as an extraordinary remedy available only when a plaintiff lacked an adequate remedy at law or would otherwise suffer an irreparable injury.[16] Modern courts, however, will typically examine both legal and equitable remedies in a particular case and choose whichever is most likely to effect substantial justice.[17] Moreover, despite frequent rhetoric in judicial opinions about the discretionary nature of equitable relief and the requirement that a substantial risk of irreparable injury be shown before specific performance or an injunction will be granted, courts routinely award specific performance to enforce contracts to sell businesses or franchises.[18]

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[15]*See* 8 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 947 (Walter H.E. Jaeger ed., 3d ed. 1957).

[16]*See* 5A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: A COMPREHENSIVE TREATISE ON THE WORKING RULES OF CONTRACT LAW § 1139 (1964).

[17]*See* RESTATEMENT (SECOND) OF CONTRACTS § 359 cmt. a (1981).

[18]*See, e.g.*, Allegheny Energy, Inc. v. DQE, Inc. 171 F.3d 153, 163, 165 (3d Cir. 1999) (vacating decision of trial court and holding that specific performance was an appropriate remedy in a merger between two public companies since the merger was a "unique, non-replicable business opportunity," and rejecting the argument that specific performance is appropriate only for the sale of non-public companies that are difficult to value); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 984 F.2d 223, 227 (7th Cir. 1993) (affirming an award of specific performance that required a seller to convey all of its shares in a privately owned subsidiary to a buyer with whom it had formerly contracted, reasoning that the business in question was a unique asset and the lack of an active public market in the shares made valuation unduly speculative); Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc., 832 F.2d 214, 223-25 (1st Cir. 1987) (upholding an award of specific performance in the sale of a minor league baseball franchise, reasoning that the franchise was a unique business and measuring any lost profits would be difficult); C&S/Sovran Corp. v. First Fed. Sav. Bank, 463 S.E.2d 892, 894-95 (Ga. 1995) (affirming award of specific performance in merger between two public companies since the termination provisions of the merger agreement did not exculpate the defendant from its initial breach of the merger agreement); DeBauge Bros. v. Whitsitt, 512 P.2d 487, 489 (Kan. 1973) (affirming order of specific performance in sale of bottling franchise "since the real and personal properties to be conveyed were unique and were not available to plaintiff from any other source"); Cochrane v. Szpakowski, 49 A.2d 692, 694 (Pa. 1946) (affirming order of specific performance in sale of restaurant and liquor license since "a similar restaurant and liquor business to the one in question could not be purchased in the market, and therefore could not be reproduced by money damages"); 3 DAN B. DOBBS, LAW OF REMEDIES, DAMAGES—EQUITY—RESTITUTION § 12.16(7), at 389 (2d ed. 1993) ("[T]he buyer of a business may be granted specific performance since its operation and its value as a going concern are difficult to estimate.") (footnote omitted); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.6 (2d ed. 1998) (stating that specific performance is appropriate in sale of business where lost profits cannot readily be ascertained); M.T. Van Hecke, *Changing Emphases in Specific Performance*, 40 N.C. L. REV. 1, 3-4 (1961) (surveying the case law in 1961, and finding unanimous support for courts granting specific performance in the sale of businesses, generally on the ground that (1) the business in question was unique, (2) its value was uncertain, (3) it had special value to the purchaser, or (4) no ready substitute existed in the market); *cf.* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 243 (1991) ("[A] well-advised plaintiff with any plausible need for specific relief

At common law, where the property that is the subject of a contract is unique or otherwise unavailable for purchase in the market, equity's threshold test for specific performance will generally be met.[19] Thus, where the property in question is publicly traded stock, specific performance will be inappropriate to the extent the shares can be purchased in the open market.[20] On the other hand, monetary damages will generally be an inadequate remedy (1) where the corporation is closely held (and thus the shares not publicly traded); (2) where the contract involves shares sufficient to secure control of the company; or (3) where the contract involves so many shares that were money damages to be awarded and the promisee to attempt to cover in the market, the price of the securities would be forced up beyond the promisee's actual damages award.[21]

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can always show irreparable injury."). *But see, e.g.,* Miller v. LeSea Broadcasting, Inc., 87 F.3d 224, 230 (7th Cir. 1996) (Posner, C.J.) (denying specific performance where the suit arose from the attempted sale of a business since the *process* of sale provided a reasonably accurate valuation such that monetary damages *were* sufficiently definite to meet the legal test of adequacy—"[i]n a case in which, although the contract is for the sale of an entire business, the buyer's negotiations to resell the property enable his loss from the breach to be exactly monetized, the case for specific performance collapses") (citations omitted); Mid-Continent Tel. Corp. v. Home Tel. Co., 319 F. Supp. 1176, 1189, 1193-95, 1198 (N.D. Miss. 1970) (declining to award specific performance in merger between a public and private company; although a letter agreement between the parties agreeing to merge was sufficient to constitute a "meeting of the minds" and to permit a claim for damages, specific performance was inappropriate since too many terms were left unresolved and the merger might yet be disapproved by regulatory authorities); *cf.* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c (1981) ("[S]ubstitute transaction[s] afford[ ] a basis for proving damages with reasonable certainty . . . .").

[19] 11 WILLISTON, *supra* note 15, § 1419.

[20] 5A CORBIN, *supra* note 16, § 1148; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c, illus. 6 (1981) (indicating that specific performance will generally be inappropriate where the goods in question are fungible and available for purchase in the market); EDWARD YORIO, CONTRACT ENFORCEMENT: SPECIFIC PERFORMANCE AND INJUNCTIONS § 12.2.1.1 (1989) ("[W]here the stock is readily available on the market, damages are normally adequate to compensate the injured party for the loss caused by the breach.") (footnote omitted).

[21] *See, e.g.,* King v. Stevenson, 445 F.2d 565, 572 (7th Cir. 1971) (upholding the trial judge's determination that money damages would not compensate the plaintiff for the loss of his stock, even though the stock was available for purchase in the open market, since forcing the plaintiff to attempt to acquire the stock in the open market would have driven up its price "sharply and artificially"); Burns v. Gould, 374 A.2d 193, 197 (Conn. 1977) ("Generally contracts for the transfer of stock are not specifically enforceable because damages will suffice. When the stock, however, is that of a closely held corporation, which is difficult to value in money, specific performance may be the only just remedy.") (citations omitted); *In re* Estate of Brown, 289 A.2d 77, 81 (Pa. 1972) (holding that specific performance was appropriate in sale of shares in a family business where the stock would be difficult to value and money damages would not prevent outsiders from becoming shareholders in the business); Peters v. Wallach, 321 N.E.2d 806, 810 (Mass. 1975) ("Equity will . . . enforce specific performance of an agreement to sell closely held stock not purchasable in the market.") (citations omitted); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. c, illus. 7 (1981) (indicating that specific performance is appropriate in sale of corporate stock that is difficult to value and not readily obtainable in the market); 5A

IV. LAW AND ECONOMICS

A. *Introduction*

Central to the economic approach to analyzing contractual remedies is a basic respect for the rationality of the parties. Parties are given the power to make binding promises under the theory that such promises, in general, are the most efficient means to satisfy individual wants.[22] Moreover, as Ronald Coase has pointed out, in a frictionless world with no transaction costs, the choice between damages, specific performance, and any other remedy would be irrelevant because the parties would simply bargain around any default rule to maximize their joint value (which would then be allocated according to some governing principle).[23]

CORBIN, supra note 16, § 1148 (1964 & Supp. 2001) (arguing that specific performance in the sale of a public company's stock was appropriate where forcing the plaintiff to purchase the disputed shares in the market with the proceeds from an eventual money damages award would have inflated the price to "some enormous and unascertainable value," thus rendering the damages award inadequate); DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, DAMAGES—EQUITY—RESTITUTION § 12.18, at 884 (1st ed. 1973) ("Shares of stock in a closed corporation, with potential for control or at least unique corporate position, are . . . subject to specific performance at the buyer's insistence, and this result seems especially justified where, as usually is the case, such shares are not obtainable in the market.") (footnote omitted); YORIO, *supra* note 20, § 12.2.1.1 (1989 & Supp. 2004) ("[D]amages may be inadequate and specific performance is commonly granted" for shares of close corporations that are unavailable in the market.). *But see, e.g.*, Giordano v. Markovitz, 531 N.W.2d 815, 817 (Mich. Ct. App. 1995) (In rejecting a claim for specific performance that arose from a contract involving the transfer of shares in a close corporation having only three shareholders, the court found that even though the defendants had breached an enforceable ownership agreement with the plaintiff, "[i]n this case, there is no reason why money damages for plaintiff's breach of contract claim would not be sufficient to avoid injustice. Further, the strained relations among the parties also renders specific performance inadvisable."); *cf.* Brandon Grinsted, Comment, *The Evolution of Court-Ordered Mergers: An Equitable Remedy or a Marriage Made in Hell?*, 53 MERCER L. REV. 1647, 1672 (2002).

> If the breaching company begins to loath its counterpart during litigation, it may ultimately utilize the merger or acquisition as a means to completely eliminate the representatives of the target company. If this occurs, can we honestly say that the innocent party was compensated by the decree of specific performance?

Id.

[22]*See* Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 508-09 (1989).

[23]*See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960). On the other hand, there *are* transaction costs associated with renegotiating a contract (e.g., legal fees, search costs for new acquisition opportunities, etc.). Moreover, even if one accepts Coase's assumptions that legal rights are well defined, that there are no transaction costs, and that alternative courses of action are apparent to all parties, *see id.* at 2-15, Coase's theorem holds only that a particular default rule will have zero *allocative* effect. ROBERT E. SCOTT & DOUGLAS L. LESLIE, CONTRACT LAW AND THEORY 92-93 (2d ed. 1993). That is, Coase's theorem does not speak to the distributional effect that a given legal rule will have. *Id.* Assumedly, then, while the parties will

Under the dominant common law approach, damages, and in particular expectation damages, have been the preferred remedy. That is, an injured party should be compensated to the extent of its injured expectations, and should be put in the same position it would have enjoyed had the contract been performed.[24] Although some have argued for greater consideration to be given to damages measures other than expectancy (e.g., restitutionary[25] or reliance interests[26]), the better practice, as explained in the next two paragraphs, is to confine the choice of contractual remedies to expectation damages and specific performance.

Expectation damages is a superior remedy to other monetary damages measures because it provides a bright-line rule in contractual negotiations—parties can sign a contract and know that they are bound. A reliance- or restitution-based damages remedy, on the other hand, would create uncertainty as to when a contractual relationship had actually begun and thus when a promisee could cease dealing with other potential promisors.[27] Such a regime would be inefficient since a promisee would remain uncertain as to what its remedy would be if the promisor failed to perform until the promisee had completed an uncertain amount of performance had elapsed so as to create significant reliance interests.[28] Thus, awarding expectation damages encourages parties to make and rely on contracts without worrying that a court will later consider their reliance insufficient to merit damages in the event of the other party's breach.[29]

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share the gain from a renegotiation, they may not share it in the same proportion as in the initial contract. *Id.*

[24]*See* RESTATEMENT (SECOND) OF CONTRACTS § 347 & cmt. a (1981); 5 CORBIN, *supra* note 16, § 1002; 3 FARNSWORTH, *supra* note 18, § 12.8; 11 WILLISTON, *supra* note 15, § 1338.

[25]*See, e.g.*, John P. Dawson, *Restitution or Damages?*, 20 OHIO ST. L.J. 175 (1959).

[26]*See, e.g.*, L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937); P.S. ATIYAH, PROMISES, MORALS, AND LAW 202-03 (1981).

[27]*See* Douglas Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention*, 9 REV. LITIG. 473, 492 (1990).

[28]*See id.*

[29]*See* E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147 (1970). *But cf.* ATIYAH, *supra* note 26, at 203 ("[I]t is probably no exaggeration to suggest that non-recognition of the moral or legal obligation created by mutual executory promises would *not* lead to very disastrous results.") (emphasis added). A classic, perhaps even limit, example of the law's willingness to compensate a party for its injured expectations, even with minimal reliance, is *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. Ct. App. 1987), in which the trial court awarded $7.5 billion in compensatory damages to Pennzoil for Texaco's tortious interference with a planned Pennzoil-Getty merger, even though reliance on the original merger agreement had been minimal. *See id.* at 784-87; *see generally* Laycock, *supra* note 27 (analyzing the remedial aspect of *Texaco v. Pennzoil*).

In addition, it may be more efficient for some contracts *not* to be performed.[30] Measuring damages by expectancy approximates a promisee's actual economic loss and generally provides an incentive for promisors to breach only efficiently.[31] Moreover, any monetary damages measure other than expectation will underdeter inefficient breaches: "If recovery for breach of contract were limited to protection of restitution and reliance interests, a party could frequently profit through repudiation of one agreement and entry into another offering him a larger share of a smaller joint gain."[32] Or, put more simply, "a standard rule of reliance damages would appear to induce breach more often than necessary."[33]

B. *Law and Economics Arguments Favoring Expectation Damages*

Efficient breach theory is relevant not only for understanding why Judge Richard Posner and a number of other commentators[34] favor expectation damages over reliance or restitutionary interests, but also for understanding why they favor expectation damages over specific performance. As alluded to earlier, the basic intuition behind the theory of efficient breach is that "[b]reaching is more efficient than performing when the costs of performing exceed the benefits to all parties."[35] Efficient breach thus encourages the efficient allocation of productive resources.[36] In the words of Justice Holmes:

> The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the

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[30]*See* POSNER, *supra* note 2, § 4.9, at 119.

[31]*See id.* § 4.9, at 122.

[32]Robert L. Birmingham, *Breach of Contract, Damage Measures, and Economic Efficiency*, 24 RUTGERS L. REV. 273, 285 (1970); *see also* Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341, 363 (1984) (arguing that of the restitution, reliance, and expectations measures for damages, only expectancy provides the incentives necessary to encourage efficient breaches). *But cf.* POSNER, *supra* note 2, § 4.9, at 122-23 (acknowledging that expectation damages may induce overreliance by promisees engaged in risky ventures).

[33]Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 1163 (2001) (footnote omitted).

[34]*See supra* notes 27-33 and accompanying text.

[35]ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 238 (3d ed. 2000).

[36]*See* Birmingham, *supra* note 32, at 284 ("Repudiation of obligations should be *encouraged* where the promisor is able to profit from his default after placing his promisee in as good a position as he would have occupied had performance been rendered.") (emphasis added); *see also* Kaplow & Shavell, *supra* note 33, at 1163 ("Requiring contracts to be performed, even when performance would be highly undesirable, would result in needless social waste.") (footnote omitted).

> promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.[37]

Thus, despite the claims of a number of commentators,[38] "[a]ll in all, our

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[37]OLIVER WENDELL HOLMES, JR., THE COMMON LAW 301 (1881); *see also* Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544, 547 (1903) (Holmes, J.) ("If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. . . . The motive for the breach commonly is immaterial in an action on the contract.") (citations omitted); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it,—and nothing else."). In a not too favorable gloss on Holmes's approach to contractual breach, Grant Gilmore has noted that

> [t]he theory seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Since the ideal was not attainable, the compromise solution was to restrict liability within the narrowest possible limits. . . . The equitable remedy of specific performance was to be avoided so far as possible . . . .

GRANT GILMORE, THE DEATH OF CONTRACT 15 (Robert K.L. Collins ed., 2d ed. 1995) (footnote omitted).

[38]*See, e.g.*, CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 16 (1981) ("An individual is morally bound to keep his promises because he has intentionally invoked a convention whose function it is to give grounds—moral grounds—for another to expect the promised performance.") (footnote omitted); Randy E. Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179, 180, 183 (1986) [hereinafter Barnett, *Contract Remedies*] (arguing on moral grounds for making specific performance the default remedy in breach of contract actions since it is the remedy that most non-lawyers believe to be the normal result of entering into a contractual relationship); Daniel Friedmann, *The Efficient Breach Fallacy*, 18 J. LEGAL STUD. 1, 13-14 (1989) (arguing that allowing parties to breach contracts at their discretion is equivalent to ceding them a private right of eminent domain); Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second* Restatement, 81 COLUM. L. REV. 111, 138 (1981).

> [I]t is simply right that one get what he was promised. This is not the place to figure out why we enforce promises, but surely there is a reason beyond efficient allocation of resources. The origins of enforcement may be religious, or religion may have been used to achieve utility, but I think that today most people believe that one should stand by one's word.

Id. (footnotes omitted); *cf.* LAYCOCK, *supra* note 18, at 258 ("I do believe that the moral argument for specific performance is based on the entitlement created by promises, and that it is principally this sense of moral entitlement that motivates the judges in the irreplaceability cases."). (It is, however, worth noting that Fried is arguing for greater acceptance of the "will theory" of promissory obligations rather than specific performance per se. *See* Anthony T. Kronman, *A New Champion for the Will Theory*, 91 YALE L.J. 404, 404-06 (1981) (book review); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 272, 304-05 (1986) (discussing Fried's articulation of the will theory).) *But cf.* Kaplow & Shavell, *supra* note 33, at 1136.

> [P]romises are not, after all, meant by those who make them to be kept in all circumstances; promises are meant to be broken whenever promisors find it in their interest to do so, as long as they pay a "correct" amount of damages.

system of legal remedies for breach of contract . . . has shown a marked solicitude for men who do not keep their promises."[39]

The rationale for using economic efficiency as the criterion for setting default rules (as opposed to the moral course charted by Peter Linzer and others[40]) is set out by Judge Posner and Andrew M. Rosenfield:

> The use of economic efficiency as a criterion for legal decision-making is of course controversial. In the area of contract, however, the criterion is well-nigh inevitable once it is conceded that the parties to a contract have the right to vary the terms at will. If the rules of contract law are inefficient, the parties will (save as transaction costs may sometimes outweigh the gains from a more efficient rule) contract around them. A law of contract not based on efficiency considerations will therefore be largely futile.[41]

The legal remedy of expectation damages puts a disappointed promisee in the position for which it bargained (i.e., the position the non-breaching party would have enjoyed had the contract been performed).[42] The equitable remedy of specific performance, on the other hand, threatens to deter efficient breaches. As Paul G. Mahoney explains: "It would then seem clear that expectation damages are preferable to specific performance, because the latter would sometimes result in performance even though

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> Indeed, under this interpretation, a promisor has not actually broken his promise, because paying damages qualifies as performance. Therefore, if one is concerned about the principle of autonomy that animates many promise-keeping fairness notions, one arguably should reject specific performance in favor of whatever remedy the parties would have preferred—that is, the remedy under which they are better off.

Id. (footnote omitted).

[39]Farnsworth, *supra* note 29, at 1216.

[40]*See supra* note 38.

[41]Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89 (1977). *But see* FRIED, *supra* note 38, at 101 n.20 ("Property and contract may or may not be efficient; they are right."); *see also* Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 602, 603 (1980).

> Wealth maximization also dictates a good deal of wholesale slaughter. All those who are unproductive, who cost more than they produce, must go. In particular, wealth maximization requires that we destroy the mentally retarded and the mentally ill who are institutionalized. . . . [W]ealth maximization like utilitarianism simply ignores questions of equity and justice.

Id.; *see generally Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

[42]5 CORBIN, *supra* note 16, § 992; 11 WILLISTON, *supra* note 15, § 1338.

nonperformance would result in greater joint wealth."[43] On the other hand, as Coase and others have noted, if renegotiating costs are low, specific performance should be no less efficient than awarding expectation damages.[44]

C. *Law and Economics Arguments Favoring Specific Performance*

Against the arguments of Posner and Holmes, some have argued that specific performance should be the routine remedy for breach of contract.[45] One commentator has attacked the use of expectations damages to encourage efficient breaches for "its conclusion that the remedy provides a perfect substitute for the right, when in truth the purpose of the remedy is to *vindicate* that right, not to replace it."[46] Preferring expectation damages to specific performance thus entitles the wrongdoer (i.e., one who has consciously chosen to breach a contract) to in effect purchase that right.[47] For efficient breach theorists, "[t]he legal system could thus be viewed only as establishing a set of prices, some high and some low, which then act as the only constraints to induce lawful conduct."[48]

Douglas Laycock has argued that Posner and Holmes, beyond merely making a faulty normative argument, also fail to describe accurately the current state of the law. Surveying more than 1,400 cases, Laycock discovered none that both denied specific performance while simultaneously acknowledging that a plaintiff would be unable to cover the goods in question.[49] Thus, for Laycock, the efficient breach theory has relevance only where monetary damages *are* in fact adequate (and thus the theory is inapposite with respect to the judicial choice between legal and equitable relief, which is theoretically awarded only when legal remedies are *in*adequate).[50] Or as Laycock summarizes: "Efficient breach theory is an academic theory of what the law might be, or of what some people think

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[43]Paul G. Mahoney, *Contract Remedies: General*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 117, 125-26 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[44]*See* Coase, *supra* note 23, at 15; Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271, 291-92 (1979); *see also supra* note 23.

[45]*See, e.g.*, Barnett, *Contract Remedies*, *supra* note 38, at 180, 183; Ulen, *supra* note 32, at 343-44; *cf.* Schwartz, *supra* note 44, at 306 ("If the law is committed to putting disappointed promisees in as good a position as they would have been had their promisors performed, specific performance should be available as a matter of course to those promisees who request it.").

[46]Friedmann, *supra* note 38, at 1 (emphasis added).

[47]*Id.*

[48]*Id.*

[49]*See* LAYCOCK, *supra* note 18, at 247.

[50]*See id.* at 246-51.

the law should be. But it is not the law."[51]

The case for specific performance, as Alan Schwartz has noted, is based on a two-pronged argument that questions both the day-to-day adequacy of monetary damages (as determined by a court) and urges that courts accord parties' choices greater respect.[52] On the first point, the objection to expectation damages is that such awards are frequently undercompensatory and fail to account for incidental damages, which are difficult to monetize.[53] Where the property in question is unique, the likelihood of undercompensation is much greater even if the object of the contract can be monetized because such property tends to generate higher ex ante search costs (e.g., looking for a new merger partner), an expense for which expectation damages generally do not provide full compensation.[54]

This argument applies with particular force to mergers. Even Mahoney, while indicating his preference for expectation damages over specific performance, concedes that to the extent courts systematically underestimate damages to a promisee, "the monetary remedy will result in too much breach, just as specific performance results in too much performance."[55] Richard Craswell, too, acknowledges that, in practice, "traditional expectation damages are often undercompensatory . . . . Consequently, remedies that appear 'overcompensatory' . . . may in fact be closer to a truly compensatory award."[56] Thus, to the extent courts frequently misestimate damages, specific performance has the virtue of "leav[ing] prices to markets, not to courts."[57] Moreover, such a remedy should be no less efficient than expectation damages since Coasian

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[51]*Id.* at 260. Along parallel lines, Farnsworth has noted that Holmes and Posner's description of the law with respect to efficient breach is clearly *not* the law in civil regimes, which operate on the premise that specific performance should be routinely available as a remedy for breach of contract. *See* 3 FARNSWORTH, *supra* note 18, § 12.4 & n.23.

[52]*See* Schwartz, *supra* note 44, at 274-78.

[53]*See id.* at 276; *see also* Linzer, *supra* note 38, at 136 ("When people make bargains that *they* thought valuable when executed, courts, after the fact, should not apply incomplete notions of value by limiting the remedy to money damages. Such a limit is unfair and will often lead to an inefficient result . . . ."); *cf.* LAYCOCK, *supra* note 18, at 253-54 (arguing that if damages are not fully compensatory, long-term contractual expectations may be undermined and parties deterred from relying on contracts).

[54]*See* Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 363-64 (1978).

[55]Mahoney, *supra* note 43, at 126; *see also* William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299, 300 (1985) ("Breach may be excessive with a damages rule if courts underestimate the value of performance to the plaintiff and award an inadequate sum.").

[56]Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 662 (1988).

[57]COOTER & ULEN, *supra* note 35, at 245.

bargaining should be expected to take place between the parties to achieve an efficient solution, provided of course that transaction costs are not prohibitively high.[58]

Schwartz's second point is essentially an *ipso facto* argument—the mere fact that the non-breaching party is seeking specific performance rather than expectation damages indicates that monetary damages are *not* adequate to give the promisee the benefit of its bargain (at least in the mind of the promisee).[59] Moreover, given the difficulties attendant on any specific performance order that would compel performance from an unwilling promisor (a particular concern in the case of a merger with a hostile acquirer), this argues, *a fortiori*, that monetary damages really *must* be inadequate compared to performance on the contract.[60] To the extent that a party intimately involved in a transaction favors specific performance over monetary damages, this should be given more weight than a court's third-party judgment that monetary damages will suffice.[61]

On the other hand, one of the main arguments against the wider availability of specific performance is that promisees may use such remedies to demand inefficient performances. Schwartz makes a strong argument, however, that this fear is groundless and that promisees will demand specific performance only when their losses cannot be adequately monetized.[62] Schwartz points out that the ban on specific performance clauses is based on two propositions: first that supracompensatory relief (i.e., relief in excess of a party's actual expectation damages) is inefficient, and second that promisees want supracompensatory relief.[63] Schwartz argues that only the first proposition is true.[64]

Considering first the competitive market, in which all parties possess the same information and breaches are instantly detectible, Schwartz argues that promisees will choose an efficient damages measure, rather than an

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[58]*See id.* at 241, 244-45. As noted earlier, however, the presence of Coasian bargaining and an allocationally efficient outcome does not speak to whether such a resolution will be distributionally fair. *See supra* note 23.

[59]*See* Schwartz, *supra* note 44, at 277. *But cf. infra* note 62 and accompanying text.

[60]*See* Schwartz, *supra* note 44, at 277.

[61]*Id. But see* Grinsted, *supra* note 21, at 1672.

> If the breaching company begins to loath its counterpart during litigation, it may ultimately utilize the merger or acquisition as a means to completely eliminate the representatives of the target company. If this occurs, can we honestly say that the innocent party was compensated by the decree of specific performance?

Id.

[62]*See* Alan Schwartz, *The Myth that Promisees Prefer Supracompensatory Remedies: An Analysis of Contracting for Damage Measures*, 100 YALE L.J. 369, 371 (1990).

[63]*Id.* at 370.

[64]*Id.*

inefficient one that entitles them to supracompensatory remedies (whether in the form of a liquidated damages clause in excess of the promisee's actual damages or an award of specific performance that is used to extract from the promisor a payment in excess of the promisee's actual damages in exchange for not forcing the promisor to perform on a losing contract).[65] Since sellers (promisors) will earn zero economic profit in market equilibrium (because of the pressures of competition), it follows that buyers (promisees) will receive any surplus that is generated from contracting.[66] Consequently, promisees will want this surplus to be as large as possible, which favors choosing the most efficient damages remedy.[67] Although Schwartz recognizes that promisees might, *ceteris paribus*, prefer supracompensatory remedies to expectation damages, he argues that promisees will not demand supracompensatory remedies because such remedies will ultimately be priced into the contract by promisors now forced to hedge against being forced to perform on a losing contract.[68]

Schwartz argues that the above relationship holds true even under conditions of imperfect markets, in which parties operate with incomplete information about one another's actions and preferences.[69] In this situation, promisees have the option of contracting for liquidated damages that equal, exceed, or fall short of the value of performance. The latter case is readily dispensed with because promisees will generally not agree to undercompensatory damages remedies because that would induce breach too often and leave them with inadequate damages (although this may sometimes be balanced out by a lower contract price).[70] Schwartz's more important argument, however, is that even under conditions of imperfect markets, promisees will not seek *supra*compensatory damages.[71]

To simplify Schwartz's argument slightly, Schwartz posits a world in which sellers (promisors) are ignorant of the value that buyers

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[65]*See id.* at 373-75.

[66]*Schwartz*, *supra* note 62, at 373-74.

[67]*See id.*

[68]*See id.* at 375; *see also* Kaplow & Shavell, *supra* note 33, at 1144, 1145.

> [A]ny notion of fairness that reflects concerns for rewarding, punishing, or protecting a party to a contract will in an important sense be moot. The reason is that different contract remedies will result in different contract prices. . . . [T]he attempt to punish particular behavior ex post will be reflected in the price negotiated ex ante, so that the class that is to be subject to the prospect of punishment is compensated for this possibility at the time of contracting.

Id. (footnote omitted).

[69]*See* Schwartz, *supra* note 62, at 377.

[70]*See id.* at 378-79.

[71]*See id.*

(promisees) attach to whatever the seller is selling.[72] Schwartz further assumes that a seller would prefer to sell to the buyer who most highly values whatever the seller is selling (since the seller can charge *that* buyer the highest price).[73] Assuming, as a further simplifying (though non-critical) assumption, that the seller is the one drawing up the contract, the seller will propose the liquidated damages clause that most closely matches the value it believes the buyer attaches to performance.[74] Thus, a seller will assume that a buyer who demands (or, if applicable, proposes) a large liquidated damages clause values the product highly and accordingly will pay a high price. For that reason, a buyer will not demand a supracompensatory liquidated damages clause since that will indubitably be associated in the mind of the seller with a contract price that exceeds the actual value of performance to the buyer (i.e., the seller will attempt to charge the buyer the contract price associated with the value of performance to that buyer for whom the higher liquidated damages clause *would* be appropriate).[75] Thus, even under conditions of imperfect markets, buyers will not propose liquidated damages clauses that exceed their true value of performance.[76]

Although Schwartz's argument is primarily an apology for unlimited party autonomy in adopting liquidated damages clauses, it maps closely onto arguments for the greater availability of specific performance, and the argument *is* convincing from an ex ante standpoint.[77] (In fact, in some ways, the argument is even more convincing with respect to specific performance because negotiating a specific performance clause is likely to be less costly to parties than arriving at a particular dollar value for a liquidated damages clause.[78]) The argument, however, is potentially

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[72]*See id.*

[73]Schwartz, *supra* note 62, at 378.

[74]*See id.*

[75]*See id.*; *cf.* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 489-91 (1970) (describing scenario in which transactions fail to occur because car buyers believe cars to be worth less than sellers know them to be).

[76]*See* Schwartz, *supra* note 62, at 378-79.

[77]*See id.* at 387. Schwartz also cites "impressionistic evidence" suggesting that specific performance is sought no more frequently in those civil regimes in which the remedy is more readily available. *See id.* at 389; *see also* 3 FARNSWORTH, *supra* note 18, § 12.4 & n.23 (noting that specific performance is routinely available as a remedy for contractual breaches in civil regimes). One problem with Schwartz's argument for unlimited party autonomy in crafting liquidated damages clauses is that he leaves unanswered the question of how the judicial process should respond to liquidated damages clauses that are set so high that a promisor simply cannot pay. Whereas specific performance is generally within a promisor's power, even if undesirable from the promisor's point of view, excessive liquidated damages payments may simply lie beyond a promisor's means. In that situation, it is unclear how a court could compel adherence to such a clause. *Cf. infra* note 81.

[78]*See* Schwartz, *supra* note 44, at 291.

troubling from an ex post standpoint. Schwartz argues that ex post, promisees will not demand inefficient performances since "bad faith promisees seldom could make credible extortion threats."[79] While this may be true in many cases, it really does not speak to whether a particular promisee that somehow finds itself in this position will behave opportunistically.[80] Nevertheless, Schwartz's argument is powerful and suggests that specific performance clauses should be enforced and that specific performance in general should be more readily available.[81]

Moreover, one of the central insights of the law and economics approach to analyzing contractual remedies is to presume that parties are rational, and that they will conform their behavior to whatever rules exist in a system.[82] Thus, the presumption that justice can ever truly be ex post is, in a sense, a chimera. While in any particular suit, a court can

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[79]Schwartz, *supra* note 62, at 389.

[80]It is worth noting that Schwartz and Ulen, while both arguing for the greater availability of specific performance, take different stances on the question of what is an appropriate default remedy. Schwartz does not oppose a default remedy of monetary damages since "[p]romisees generally prefer damages when the market offers good substitutes for the promisor's performance" (since specific performance may take much longer to obtain than a damages remedy). *Id.* at 388. However, where the intent of the parties is to the contrary, Schwartz clearly favors permitting specific enforcement. *See id.* at 387-89. Ulen, on the other hand, favors specific performance as the default remedy, arguing that specific performance is both more efficient than monetary damages and more consonant with the ex ante preferences of the parties (although Ulen, too, would permit parties to *elect* to vary this default remedy). *See* Thomas S. Ulen, *Specific Performance*, *in* 3 NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 481, 482 (Peter Newman ed., 1998); Ulen, *supra* note 32, at 343-44; *see also* Barnett, *Contract Remedies*, *supra* note 38, at 180, 183 (arguing that specific performance should be the default remedy for breach of contract since it is the remedy that most non-lawyers believe to be the normal result of entering into a contractual relationship).

[81]Schwartz does acknowledge some limits on his thesis, at least from the perspective of permitting parties to bind themselves to specific performance in personal services contracts, and concedes that if taken too far, his thesis may impose an intolerable burden on liberty and perhaps even violate the Thirteenth Amendment. *See* Schwartz, *supra* note 44, at 297. On the other hand, Kronman seems less concerned about this: "Slavery is objectionable largely because it involves near-total control. By contrast the domination an employer exercises is partial and limited—the employer only controls certain aspects of his employee's life." Kronman, *supra* note 54, at 372; *cf.* Calvin R. House, *Good Faith Rejection and Specific Performance in Publishing Contracts: Safeguarding the Author's Reasonable Expectations*, 51 BROOK. L. REV. 95, 130-40 (1984) (arguing for specific performance in publishing contracts). Where the parties are sophisticated business entities, however, as in *IBP*, the common law's suspicion of specific enforcement of personal services contracts, *see, e.g.*, 11 WILLISTON, *supra* note 15, § 1423, seems misplaced.

[82]*Cf.* Kaplow & Shavell, *supra* note 33, at 1008.

> Individuals select what level of care to take, which affects the likelihood of accidents; they decide whether to enter into contracts (and at what price) and whether to breach; and they choose whether to commit criminal acts. Each of these decisions, moreover, may plausibly be influenced by what legal rule actors anticipate will be applied ex post . . . .

Id. (footnote omitted).

theoretically ignore the effect of its decision on future litigants (subject to customary constraints such as appellate review), in a system in which other parties look to that court's decision to guide their behavior, even an "ex post" remedy will inevitably have ex ante effects (if only on other prospective litigants). That is why, despite the possibility that certain promisees may behave opportunistically ex post, a court's focus should be primarily ex ante in deciding which is the most efficient contractual remedy.[83]

V. AN ECONOMIC ANALYSIS OF *IBP V. TYSON FOODS*

A. *Hypothetical Consent*

In devising a damages remedy, a court should seek to determine that remedy for which the parties would have contracted ex ante if given the opportunity.[84] The mechanism for doing this is to choose the rule that maximizes the expected value of the transaction for the parties involved.[85] Although each party individually cares only for its own profit, maximizing the potential profit of the contract by choosing the most efficient default rule increases the wealth created by the contract that the parties can then divide amongst themselves.[86]

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[83]*Cf.* POSNER, *supra* note 2, § 2.2, at 26.

> [T]he judge . . . cannot ignore the future. The legal ruling will be a precedent influencing the decision of future cases. The judge must therefore consider the probable impact of alternative rulings on the future behavior of people engaged in [similar] activities . . . . Thus, once the frame of reference is expanded beyond the immediate parties to the case, justice and fairness assume broader meanings than what is just or fair as between this plaintiff and this defendant.

Id.; *cf.* Posner & Rosenfield, *supra* note 41, at 89.

> The use of economic efficiency as a criterion for legal decision-making is of course controversial. In the area of contract, however, the criterion is well-nigh inevitable once it is conceded that the parties to a contract have the right to vary the terms at will. If the rules of contract law are inefficient, the parties will (save as transaction costs may sometimes outweigh the gains from a more efficient rule) contract around them. A law of contract not based on efficiency considerations will therefore be largely futile.

Id.

[84]*See* Richard Craswell, *Contract Law: General Theories*, *in* 3 ENCYCLOPEDIA OF LAW AND ECONOMICS 1, 3 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000); *see also* COOTER & ULEN, *supra* note 35, at 202 (arguing that courts should "[i]mpute the terms to the contract that the parties would have agreed to if they had bargained over all the relevant risk") (emphasis omitted).

[85]*See* Craswell, *supra* note 84, at 3.

[86]*See* Posner & Rosenfield, *supra* note 41, at 89.

Employing this line of reasoning, Vice Chancellor Strine in *IBP* found it relevant that Tyson Foods would likely have "prefer[red]" specific performance to a "huge" damages award that would be of "no value to Tyson."[87] The court apparently found decisive the fact that Tyson was arguing that the merger still made strategic sense, even while arguing that it did not have to go through with it.[88] To some extent, Tyson may have been in a Catch-22, since claiming that the merger made no strategic sense would likely have presented an impediment to a subsequent bid for IBP, both in terms of selling any future IBP bid to the Street, and with respect to convincing Tyson's own board of directors that such a deal made sense for Tyson's long-term shareholders. Tyson was not opposed to a merger with IBP per se, just to a merger with IBP at the agreed-upon purchase price of $30 per share,[89] and since an enormous damages award would have left Tyson saddled with debt and with nothing to show for it, specific performance in this case seems consonant with the theory of hypothetical consent.

According to Anthony Kronman, the current state of the law with which the *IBP* court dealt succeeds quite well in supporting the ex ante intent of most parties.[90] That is, with respect to non-unique goods, most promisees will be indifferent between money damages and specific performance, whereas promisees will prefer specific performance where the property with which the contract concerns itself is unique.[91] Similarly, from the promisor's (i.e., seller's) perspective, were promisees (i.e., buyers) to lack confidence that they would receive specific performance on contracts concerning unique goods, they would factor in this risk by demanding a much lower price. For this reason, promisors will prefer that specific performance be the remedy for unique goods in order not to reduce the purchase price artificially.[92]

On the other hand, although the intent of the parties clearly must play a significant role in the resolution of contractual disputes, it need not be dispositive, since "[t]o frame, supervise, and enforce a decree . . . consumes more judicial resources than a judgment for damages does, even in cases in

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[87] *In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 83 n.204 (Del. Ch. 2001).

[88] *See id.* at 83.

[89] *See id.* at 84; *cf. id.* at 83 ("Tyson Foods is still interested in purchasing IBP, but wants to get its original purchase price back and then buy IBP off the day-old goods table.").

[90] *See* Kronman, *supra* note 54, at 365-69.

[91] *See id.* at 366.

[92] *See id.* at 366-67. *But see* Ulen, *supra* note 32, at 375-76 (arguing that the current state of the law *fails* to comport with the ex ante preferences of promisees since it makes *uniqueness* the test for specific performance rather than whether the promisee assigns a *subjective valuation* to the promisor's performance).

which the contract is definite and complete and the duties imposed are straightforward and easy to evaluate."[93] Thus, a court need not automatically give effect to parties' attempts to shunt such costs onto the public. One way to force parties to internalize these costs, suggested by both Schwartz and Thomas Ulen, would be to privatize any extensive judicial supervision that may accompany complex specific performance orders (e.g., those governing a forced merger between two publicly traded companies) by appointing special masters and billing their costs to one or both of the parties.[94]

Edward Yorio counters that this does not make specific performance efficient; it merely privatizes its inefficiency.[95] However, to the extent that the parties bear the costs of a judicial remedy, they should be presumed to act rationally in choosing the most efficient damages remedy, whether that be specific performance or money damages.[96] In addition, despite Yorio's argument that some promisees may be willing to engage in inefficient behavior out of spite or vindictiveness,[97] such an objection to Schwartz's and Ulen's arguments seems unacceptably paternalistic, particularly when dealing with contracts in a non-consumer context, such as *IBP*, since it interferes with the parties' own incentives to choose the most efficient outcome.[98] Thus, one approach to future *IBP*s would be to require the parties themselves to bear the costs of any extensive oversight that follows from being ordered to specifically perform a merger agreement.

A counterargument is that allowing parties to merger agreements or other sales of corporate control untrammeled freedom in seeking specific performance may in fact be harmful to the parties and their respective constituencies.[99] For example, a recent law review comment has argued

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[93]YORIO, *supra* note 20, § 3.2.3 (footnote omitted).

[94]*See* Schwartz, *supra* note 44, at 293-94 ("Courts . . . can eliminate much of this opportunity cost by appointing special masters. This practice would also shift any additional resource costs of specific performance primarily to the parties.") (footnote omitted); Ulen, *supra* note 32, at 401 ("The use of court-appointed special masters to oversee equitable decrees is one means of achieving this privatization, but one that, despite its attraction to economists, does not find much favor in the legal fraternity.") (footnote omitted).

[95]YORIO, *supra* note 20, § 23.3.3.

[96]*See* Schwartz, *supra* note 44, at 293 ("[T]he administrative costs that the specific performance remedy imposes on *the parties* should not count against its wider use, because those costs will be incurred only when *the parties* perceive them to be lower than the gains from equitable relief.") (emphases added).

[97]*See* YORIO, *supra* note 20, § 23.2.3.2.

[98]*But see infra* notes 100-02 and accompanying text; *cf.* YORIO, *supra* note 20, § 23.2.3.2 n.29 (arguing that to permit promisees to satisfy vindictive urges by demanding specific performance turns compensation into a tautology, in which compensation is whatever the promisee claims it to be).

[99]*See* Grinsted, *supra* note 21, at 1648, 1670-73.

that

> [t]he decisions in *Tyson*, *Allegheny*, and *C&S* failed to adequately consider the possible adverse effects of a compulsory merger between two companies. In many cases, litigation will cause the companies to perceive each other in a negative light. If the court forces the two companies to merge, the effect will be similar to placing two fighting children in a small room. . . . If the breaching company begins to loath its counterpart during litigation, it may ultimately utilize the merger or acquisition as a means to completely eliminate the representatives of the target company. If this occurs, can we honestly say that the innocent party was compensated by the decree of specific performance?[100]

This concern, however, largely misses the point. To compare representatives of multi-billion dollar public companies to *children*, and to deny them the autonomy of seeking the contractual remedy that they believe is in their companies' best interests, is paternalism *par excellence*. Although parties may occasionally demand inefficient performances out of spite, the most powerful corrective against such outcomes will generally be to let that party bear the cost of its legal "victory."[101] Even if there is a possibility that a merger may fail because the parties so dislike one another,[102] it is not clear that a court can do a more competent job of evaluating the future prospects of the merged entity than the parties themselves.

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[100] *Id.* at 1670-71, 1672.

[101] *But cf. supra* note 98; *infra* notes 126-37 and accompanying text.

[102] *Cf. In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 83-84 (Del. Ch. 2001).

> Probably the concern that weighs heaviest on my mind is whether specific performance is the right remedy in view of the harsh words that have been said in the course of this litigation. Can these management teams work together? The answer is that I do not know. . . . What persuades me that specific performance is a workable remedy is that Tyson will have the power to decide all the key management questions itself. It can therefore hand-pick its own management team. While this may be unpleasant for the top level IBP managers who might be replaced, it was a possible risk of the Merger from the get-go and a reality of today's M&A market.

Id. But cf. 11 WILLISTON, *supra* note 15, § 1423 (noting that equity has historically refused to grant specific performance for personal service contracts since a court may be unwilling to compel "the continuance of a close personal relationship now grown hostile and bitter as a result of the controversy and resulting litigation").

B. *Remedy for Buyer*

To see how the various theories discussed above would have relevance to future *IBP*-like transactions, consider some hypotheticals. The first set deals with the remedies available to a buyer. Take the case of Company B_1, which has agreed to merge with Company S_1 for $30 per share. Company B_2 now comes along offering Company S_1's shareholders $35 per share, thus inducing Company S_1 to break its agreement with Company B_1 (this article will ignore, for present purposes, claims of tortious interference, a concept that is beyond the scope of this article and not fully accounted for in the law and economics literature).[103]

Under this scenario, regardless of the form of the consideration (e.g., stock versus cash or debt), Company B_1 is being denied the benefit of its bargain, which was essentially the purchase of a particular business. The fact that this involves a merger rather than merely an asset sale or the purchase of a stand-alone company is functionally irrelevant since monetizing Company B_1's lost opportunity is difficult if not impossible because any estimate of Company S_1's future profits and its effect on Company B_1's business will be inherently speculative.[104] While it is possible that Company B_1 is seeking specific performance for some inefficient reason (e.g., spite, to extort a payment in exchange for *not* forcing the other party to perform, or to warn future contractual partners that the penalty for breach will be specific performance),[105] the difficulty in measuring damages, together with the fact that real property is likely part of the acquisition (and thus, at common law, not monetizable),[106] makes specific performance an appropriate remedy in this case.

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[103]*See, e.g.*, Friedmann, *supra* note 38, at 20 ("There is . . . a marked incongruity between the 'right' to break a contract theory and the tort of interference with contractual relations . . . .") (footnote omitted).

[104]*See supra* note 18 and accompanying text; *cf. infra* notes 112-21 and accompanying text.

[105]*See* YORIO, *supra* note 20, §§ 4.3.3, 23.2.3.2; Edward Yorio, *In Defense of Money Damages for Breach of Contract*, 82 COLUM. L. REV. 1365, 1373 (1982); *cf.* Ulen, *supra* note 32, at 347-49 (suggesting that fear of reputational injury may deter breaches of contract).

[106]*Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1981) (stating that at common law, a particular piece of land was generally regarded as unique and not subject to cover by any amount of money, thus making any award of money damages inadequate and specific performance an appropriate remedy for breaches of contracts to convey real property interests); 3 FARNSWORTH, *supra* note 18, § 12.6 ("Land was viewed by English courts with particular esteem and was therefore singled out for special treatment.") (footnote omitted).

C. *Remedy for Seller*

If the above scenario is modified such that it is Company B_1 that breaches because it finds a new company (Company S_2) that it believes will be a better merger-partner, the form of consideration matters a great deal more than in the previous case. To the extent that the consideration is all cash, specific performance will generally be inappropriate as a remedy for Company S_1 since money is fungible.[107] That is, specific performance will be unnecessary since monetary damages are de facto equivalent to specific performance where Company S_1 is not seeking a stake in a combined entity that would not exist but for the merger, but rather is seeking only cash consideration for its shareholders.[108]

Where, however, a significant portion of the consideration is the acquiring company's stock, matters become much more complex. First, consider the case where Company B_1 is much larger than Company S_1 (i.e., a "whale-minnow" merger). In that case, the stock that the shareholders of Company S_1 are to receive under the contract (i.e., the shares of the combined entity) are not very different from the pre-merger stock of Company B_1 (assuming that Company S_1 is not going to revolutionize Company B_1's business model). Where these assumptions hold, specific performance is unnecessary because cover is available in the marketplace. That is, were Company S_1's shareholders to receive the cash value of Company B_1's shares at the time of the merger, Company S_1's shareholders could simply purchase Company B_1's shares in the market. Since we are assuming a whale-minnow merger, these pre-merger (really no-merger) shares should perform similarly to how post-merger shares *would* have performed.

It is true that if money damages are awarded rather than specific performance, Company S_1 *will* be deprived of the chance to participate in a combined Company B_1-S_1 going forward. But that mistakes who the "true" party to the action is. The economic beneficiary of a merger is not Company S_1 per se, but its owners. From the standpoint of Company S_1's owners (i.e., its shareholders), Company S_1's owners are in roughly identical positions if the merger goes through, or if they instead purchase similarly valued shares of the acquirer in the market (again, this is all

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[107] *But cf. infra* notes 126-37 and accompanying text.

[108] *Cf.* 5A CORBIN, *supra* note 16, § 1152 (noting that specific performance is generally refused in contracts to lend money); 11 WILLISTON, *supra* note 15, § 1420 (stating that equity will generally not award specific performance on contracts to lend or borrow money); YORIO, *supra* note 20, § 17.1 ("Because money is fungible, damages are usually adequate in all these scenarios [loan contracts, annuity contracts, and insurance contracts] to compensate for the loss caused by the breach.").

assuming a whale-minnow merger).[109]

One counterargument is that forcing a seller to cover in the market may be an incomplete remedy.[110] To the extent that this is a whale-minnow merger, but the consideration at stake represents a significant portion of the public market for Company B_1's stock (for example, if Company B_1 only allows a small fraction of its equity to trade publicly), leaving the shareholders of Company S_1 to cover for themselves in the market may be an inadequate remedy, at least to the extent that the damages award is only for the nominal value of the consideration at the time of contracting. On the other hand, such a difficulty is not insurmountable, and the initial damages award could be toggled upward to reflect the need to account for the dynamic effects that a large purchaser acting to cover in the market would have on Company B_1's stock price.[111]

However, if Company B_1 and Company S_1 are of roughly equal size (i.e., in the case of a "merger-of-equals," or where one company is acting to acquire a similarly sized target, as in *IBP*) and a significant portion of the consideration is the acquiring company's stock, an enormous problem of incommensurability arises. Simply awarding Company S_1's shareholders sufficient funds to purchase the promised value of Company B_1's stock in the market will fail to put Company S_1's shareholders in their promised position.[112] That is because the shares they were due to receive post-merger

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[109]*Cf.* RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 986 (6th ed. 2000) (arguing against diversification as a rationale for mergers since "shareholders can diversify much more efficiently and flexibly on their own") (footnote omitted).

[110]*See supra* note 21 and accompanying text.

[111]*Cf.* BREALEY & MYERS, *supra* note 109, at 952-54 (discussing the impact of merger speculation on a target's stock price); H. RUSSELL FOGLER, ANALYZING THE STOCK MARKET: STATISTICAL EVIDENCE AND METHODOLOGY 97-102 (2d ed. 1978) (discussing the relationship between price and volume); *see generally* CHIENTE HSU, VOLUME AND THE NONLINEAR DYNAMICS OF STOCK RETURNS (1998) (discussing the joint dynamics of stock returns and trading volume).

[112]For a contrary interpretation, see Grinsted, *supra* note 21:

> Courts have neglected to consider the fact that public corporations have a market value that is readily available on the public stock exchange. Stock of public companies is freely traded in the public market everyday; therefore, the net worth of the company can be determined at any given time. If a merger or acquisition agreement is wrongfully terminated, the innocent party's damages can be accurately valued in monetary terms without undue burden or delay. The innocent party is simply entitled to the value of the foregone benefit, which is the value of the company that would have been acquired or otherwise created. For instance, in *C&S* and *Allegheny*, the court *could* have determined that damages would be equal to the net worth of the company at the time of the breach. Such an amount would be the equivalent to the market value of each share multiplied by the number of outstanding shares. The innocent party would essentially receive the market value of the company it would have acquired had the

(i.e., shares of a merged Company B_1-S_1) would not exist *but for* the merger.[113] In addition, to the extent that Company B_1 finds a different company (Company S_2) with which to merge, it is unclear how a court should apportion shares of Company B_1-S_2 to approximate shares of Company B_1-S_1. Finally, at least in the case of strategic mergers, a key rationale for the merger will often be the synergies that come from combining operations of the constituent companies.[114] While determining a value for such synergies is theoretically possible,[115] specific performance in such situations seems a far more administrable remedy[116] and avoids the specter of forcing a court to weigh dueling investment bankers' presentations in which each side comes to court with divergent forecasts of merger benefits that can neither be proved nor disproved in the absence of the merger actually taking place.

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agreement not been terminated.

Id. at 1669. This analysis, however, ignores the valuation of synergies. *See infra* notes 114-21 and accompanying text.

[113]*Cf.* Pretrial Brief of Cross-Claim Plaintiff IBP, Inc. at 56, *In re* IBP, Inc. S'holders Litig., 789 A.2d 14 (Del. Ch. 2001) (No. 18373) ("[U]nless specific performance is ordered, shares of the combined company simply will not exist and IBP's shareholders will forever be deprived of the benefit of their bargain.").

[114]*Cf.* BREALEY & MYERS, *supra* note 109, at 941-46, 950-54 (explaining that establishing a bidding price is a function of estimating the value of the stand-alone target plus merger benefits, e.g., economies of scale and scope, complementary resources, unused tax shields, and eliminating inefficiencies); MCKINSEY & CO. ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 120-21 (3d ed. 2000) (explaining that successful valuation of merger candidates requires an assessment of synergies, as well as of the strategic impact of merging target and acquirer).

[115]*See infra* notes 117-21 and accompanying text.

[116]*See* DOBBS, *supra* note 21, § 12.18, at 885 ("[Specific relief] is probably the form of relief most easily administered in the courts, since it may well avoid time-consuming testimony about damages."); Schwartz, *supra* note 44, at 292 (arguing that specific relief consumes fewer judicial resources than devising damages remedies in complex disputes where damages are difficult to estimate) (citing DOBBS, *supra* note 21, § 12.18, at 885); Ulen, *supra* note 80, at 482 (arguing that specific performance is more efficient than money damages and should be used as a default remedy in most cases because of, *inter alia*, the difficulty of accurately calculating expectation damages); *cf. In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 83 (Del. Ch. 2001).

> [T]he determination of a cash damages award will be very difficult in this case. And the amount of any award could be staggeringly large. No doubt the parties would haggle over huge valuation questions, which (Tyson no doubt would argue) must take into account the possibility of a further auction for IBP or other business developments. A damages award can, of course, be shaped; it simply will lack any pretense to precision. An award of specific performance will, I anticipate, entirely eliminate the need for a speculative determination of damages.

Id. (footnote omitted). *But see* YORIO, *supra* note 20, § 3.2.3 ("To frame, supervise, and enforce a decree . . . consumes more judicial resources than a judgment for damages does, even in cases in which the contract is definite and complete and the duties imposed are straightforward and easy to evaluate.") (footnote omitted).

One possible approach toward making monetary damages adequate would be to look to the historical betas of the particular stocks, together with a weighted average of each's projected pro forma performance along with various stock analyst reports. However, besides being incredibly opaque to many prospective litigants, such an approach would also likely strain judicial resources and risk either under- or overcompensating Company S_1's shareholders.[117] Although lost profits can be established with reasonable certainty through a combination of financial and economic data, market reports, and inferences drawn from comparable businesses and past performance (at least with respect to stand-alone businesses or products),[118] specific performance seems a far more natural and administrable remedy in the case of mergers and other sales of corporate control.

One way of harmonizing the various hypotheticals described above with the case law discussed earlier[119] is to recognize that where the planned merger is one of equals and a significant portion of the consideration is the acquiring company's stock, the selling company's shareholders are de facto *buyers* of a new merged entity. In this sense, then, the stock-for-stock merger-of-equals collapses, from an economic perspective, into the line of cases discussed earlier dealing with the sale of businesses.[120] Moreover, even if the value of the two businesses could individually be monetized, the rationale for a merger is often the synergies between the two companies, and it is by no means clear how such projected synergies should be apportioned between the two entities were a court forced to design a damages remedy.[121]

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[117]*Cf.* YORIO, *supra* note 20, § 12.3.1 ("Courts grant specific performance to avoid the risk of undercompensation inherent in estimating future earnings.") (footnote omitted).

[118]RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. b, illus. 6 (1981); *see also* Perma Research & Dev. v. Singer Co., 542 F.2d 111, 115 (2d Cir. 1976) (permitting the use of "highly technical" computer simulations at trial to estimate product's future profitability); Cardinal Consulting Co. v. Circo Resorts, Inc., 297 N.W.2d 260, 268 (Minn. 1980) (upholding estimate of lost profits of a new business by reference to the demonstrated skill of the business's principals and the profitability of comparable businesses); Ashland Mgmt. v. Janien, 624 N.E.2d 1007, 1012 (N.Y. 1993) (awarding damages based on "realistic estimates of future assets to be managed by the [parties]"); 11 WILLISTON, *supra* note 15, § 1346A ("Evidence of past profits in an established business furnish a reasonable basis for estimating future profits.") (footnote omitted).

[119]*See supra* note 18 and accompanying text.

[120]*See supra* note 18 and accompanying text.

[121]In *IBP*, for example, the dominant rationale for the merger was $250 million in projected synergies, *see In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 50 (Del. Ch. 2001), but it is not clear that there would be any fair or even logical way to apportion these lost synergies between IBP and Tyson in the event that their merger were not consummated.

D. *Form of Acquisition*

Whether a transaction is structured as a sale of assets, a statutory merger, or a stock sale should not affect the above analysis. For example, to the extent that a transaction is structured as a sale of substantially all of the assets of a seller to a similarly sized buyer, the choice of this form of acquisition over a statutory merger or stock purchase would have relevance for appraisal rights and speed of execution,[122] but would have little impact on whether specific performance is called for in the event of a breach of the sale and purchase agreement. The appropriateness of specific performance would turn once again on whether the economic opportunity at stake for the buyer or seller, as the case may be, is monetizable. In other words, if a sale of corporate control were structured as an asset purchase rather than a merger (perhaps to leave behind certain liabilities),[123] and substantially all of the seller's assets were sold for cash, specific performance would generally be available for a buyer, but not for a seller.[124] On the other hand, if substantially all of a seller's assets were sold for stock, specific performance would be available to a buyer under most circumstances, but to a seller only under the conditions discussed *supra*.[125]

E. *Opportunistic Breach*

According to the above analysis, the remedy for breach of a merger agreement should be specific performance only where the aggrieved promisee is either (1) the buyer (regardless of the form of consideration) or (2) the seller in a merger between similarly sized companies where a significant portion of the consideration is the acquiring company's stock. In all other cases, the remedy should be expectation damages. One possible exception to the last statement would be cases of *opportunistic breach* by a buyer engaged in a transaction *other than* a stock-for-stock merger-of-equals (i.e., a transaction in which an aggrieved seller would normally be left only to its remedy at law).

It is interesting to note that Holmes and Posner, both proponents of expectation damages as the appropriate remedy for breach of contract

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[122]*See generally* STANLEY FOSTER REED & ALEXANDRA REED LAJOUX, THE ART OF M&A: A MERGER/ACQUISITION/BUYOUT GUIDE 255-346 (3d ed. 1999) (discussing the relative merits of different transaction structures for sales of corporate control).

[123]*Cf. id.* at 257 ("[I]n an asset sale, as a legal matter, the buyer generally assumes only the liabilities that it specifically agrees to assume.").

[124]*But cf. infra* notes 126-37 and accompanying text.

[125]*See supra* notes 107-21 and accompanying text.

actions, take contradictory stances on this. Holmes, as already described, argues that the only consequence of a contractual breach is that the promisor should pay expectation damages.[126] Posner, on the other hand, argues that "[i]t makes a difference in deciding which remedy to grant whether the breach was opportunistic. If a promisor breaks his promise merely to take advantage of the vulnerability of the promisee[,] . . . we might as well throw the book at the promisor."[127]

The economic rationale articulated by Posner, Holmes, and Allan Farnsworth[128] in favor of permitting breach, notwithstanding the moral arguments of Linzer, Laycock, and Charles Fried,[129] is that where a second seller can generate more value than the first seller (e.g., because the buyer is willing to pay more consideration to the second seller than to the first), the law should permit that second transaction to occur, so long as the initial seller is compensated for its lost expectations. If the buyer breaches, however, not to effect a more economically profitable transaction with a second seller, but simply to *redistribute* value among the original parties, Posner makes the better argument than Holmes that courts should not permit this. Whether it is because breaking promises opportunistically is wrong (although this probably proves too much), whether it is because such breaches add no net wealth to society, or whether it is because of the additional legal costs generated by allowing a buyer to elect to breach a merger agreement and pay damages rather than perform,[130] specific enforcement as a remedy for opportunistic breaches seems appropriate even where the consideration is all cash and the aggrieved party is the seller. (Of course, in practical terms, the net effect of specific performance, from the point of view of the seller, will likely be the same as under expectation damages (i.e., receipt by the seller of the contracted-for purchase price less any applicable mitigation of damages).)[131] At the very least, the arguments

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[126]*See supra* note 37 and accompanying text.

[127]POSNER *supra* note 2, § 4.9, at 118.

[128]*See supra* notes 35-43 and accompanying text.

[129]*See supra* notes 38, 49-51 and accompanying text.

[130]*See* Friedmann, *supra* note 38, at 6-7 (arguing that "efficient breaches" may actually be inefficient to the extent that the litigation and other transactions costs generated by the breach outweigh the net gain to social utility caused by the seller performing for the second buyer, as compared to the first); *see also* Ulen, *supra* note 32, at 384 ("Whether the performance concerns a unique or a fungible good, the court costs associated with specific performance are likely to be *less* than those associated with assessing money damages.") (emphasis added).

[131]Arguably, this is what happened in *IBP* (although, there, the consideration was a combination of cash and stock). Although Tyson Foods claimed an MAE based on fraud in a relatively minor IBP subsidiary and the failure of IBP's special committee counsel to forward promptly an SEC letter to Tyson (a letter that would likely have had little impact on its decision to merge), Tyson's breach (i.e., its failure to go forward with the merger given that no MAE had

made by Holmesian efficient breach theorists (i.e., that expectation damages are everywhere preferable to specific performance in non-real property contracts) lack an economic mooring in the case of opportunistic breach since a breach that seeks to take advantage of a vulnerable seller by forcing a renegotiation of the purchase price adds no net wealth to society.

On the other hand, as previously noted, granting a right to specific performance is not costless and is ultimately something that prospective buyers and sellers will have to pay for,[132] as one or the other hedges against the possibility of experiencing a "regret contingency" and being forced to perform.[133] In addition, the advisability of following Posner's approach toward opportunistic breaches turns in part on whether it is actually feasible for courts to distinguish "efficient" breaches (i.e., those in which a seller breaches and sells goods to a second buyer who values the goods more highly than the first) from "inefficient" ones (i.e., those in which a seller breaches for reasons of spite or otherwise and sells the goods to a second buyer who values the goods *less* highly than the first buyer). To the extent parties are uncertain about the legal system's ability to segregate inefficient or opportunistic breaches from efficient ones, some *efficient* breaches may be deterred since promisors would likely remain uncertain until after the fact as to whether a particular judge might classify an efficient breach as such.[134]

The flip-side of this problem is that there may be scenarios in which promisees induce breach in order to *force* specific performance to gain bargaining leverage. This is of particular concern whenever the cost to the buyer of going ahead with a merger greatly exceeds the benefit to the seller. For example, if the parties agree to an uncollared floating exchange ratio and the buyer then suffers a large drop in its stock price, the buyer will face extensive equity dilution if the merger is completed. In that case, the seller may behave opportunistically by inducing the buyer to breach in order for the seller to obtain an award of specific performance solely for the purpose

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occurred) seemed largely opportunistic and more a matter of simply seeking a better purchase price for itself by citing minor violations by IBP of the merger agreement, rather than Tyson's having found a new merger partner for itself that would create more value for its shareholders and by extension society. *See In re* IBP, Inc. S'holders Litig., 789 A.2d 14, 83 (Del. Ch. 2001) ("Tyson Foods is still interested in purchasing IBP, but wants to get its original purchase price back and then buy IBP off the day-old goods table.").

[132]*See* Craswell, *supra* note 56, at 642; *see also* Kaplow & Shavell, *supra* note 33, at 1145 ("[T]he attempt to punish particular behavior ex post will be reflected in the price negotiated ex ante, so that the class that is to be subject to the prospect of punishment is compensated for this possibility at the time of contracting.").

[133]*See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1271-73 (1980).

[134]*See* Craswell, *supra* note 56, at 666-67.

of extracting a payment from the buyer for *not* merging.[135] Moreover, "[i]f specific performance in fact adds a cost in excess of legal damages, the defendant may seek to avoid that cost by settling for more than the sums [sic] he would be required to pay as damages."[136] It is not clear that there is any global solution to this, other than to use traditional equitable principles, such as "unclean hands,"[137] to deny specific performance to those who would turn the tools of equity into vehicles for extortion. Moreover, it is not clear that this is even a legitimate source of concern; that is, to the extent that the risks in question were allocated to the buyer per the terms of the merger agreement, ordering the merger to be consummated may be entirely appropriate.

VI. CONCLUSION

Law and economics is a useful heuristic for analyzing the remedy of specific performance in the context of mergers and other sales of corporate control. The efficiency of such a remedy turns on a number of factors, including whether specific performance is being sought by a buyer or seller, the form of the consideration, and the relative sizes of the parties involved. Stock-for-stock mergers, and other corporate control transactions involving stock consideration, present unique challenges because of the difficulty of monetizing the harm to the seller's shareholders in the event that the transaction is not consummated. Although some have argued against permitting courts to award specific performance in corporate control

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[135] *See* Bishop, *supra* note 55, at 300; *cf.* Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 279-80 (7th Cir. 1986) (Posner, J.) ("[Where one party] is seeking specific performance in order to have bargaining leverage with [the other party,] . . . we can think of no reason why the law should give it such leverage.").

[136] 3 DOBBS, *supra* note 18, § 12.8(1), at 194 (footnote omitted).

[137] Under traditional principles of equity, specific performance may be denied if a party seeking equitable relief comes into court with "unclean hands." 3 FARNSWORTH, *supra* note 18, § 12.4. Thus, a plaintiff who has behaved immorally or unethically in relation to the matter *sub judice* may be denied specific performance even if such conduct would not have deprived that same plaintiff of its remedies sounding in law. *See* 11 WILLISTON, *supra* note 15, § 1425; *see also* Hawthorne's, Inc. v. Warrenton Realty, Inc., 606 N.E.2d 908, 912-13 (Mass. 1993) ("Specific performance is an equitable remedy which should not be granted when the requesting party has engaged in conduct 'savored with injustice touching the transaction.' ") (quoting Economy Grocery Stores Corp. v. McMenamy, 195 N.E. 747, 748 (Mass. 1935)); Boe v. Rose, 574 N.W.2d 834, 836 (N.D. 1998) ("A litigant seeking the remedy of specific performance is held to a higher standard than one merely seeking money damages, and to receive equity he must 'do equity' and must not come into court with 'unclean hands.' ") (citation omitted); 71 AM. JUR. 2D *Specific Performance* § 91 (2001) ("[S]pecific performance will not be granted if, under the circumstances of the case, the result would be unjust, harsh, inequitable, [or] oppressive . . . . This is so even if . . . the contract is valid and enforceable at law.") (footnotes omitted).

transactions because of a concern that the remedy will be supracompensatory or otherwise inefficient, promisees are generally in better positions than courts to select the most efficient damages remedy, including specific performance where applicable.