DISTINGUISHING INDIVIDUAL AND DERIVATIVE
CLAIMS IN THE CONTEXT OF BATTLES FOR
CORPORATE CONTROL:
LIPTON v. NEWS INTERNATIONAL, PLC

I. INTRODUCTION

Many significant consequences flow from a court's determination of whether a shareholder-plaintiff has asserted an individual action or a derivative action on behalf of the corporation.1 In Delaware, a determination that a cause of action is derivative subjects the plaintiff to the burdensome requirements of Chancery Rule 23.1.2 Additionally, any recovery will accrue to the corporation rather than to the plaintiff individually.3 Moreover, a court's characterization of a cause of action as derivative can lead to dismissal without ever reaching the merits of the plaintiff's allegations.4 Whether or not the cause of action is individual or derivative can usually be answered with relative ease.5 However, the Delaware


2. This entails, among other requirements, that a prior demand must be made on directors, and if no demand is made, the plaintiff must allege facts to show that demand was futile. See Aaronson v. Lewis, 473 A.2d 805 (Del. 1984). Furthermore, Chancery Rule 23.1 requires both court approval of settlements and notice to shareholders, except if the dismissal is without prejudice or with prejudice to the plaintiff only. Del. Ch. Ct. R. 23.1 (1987). See also Lipton v. News Int'l, Plc, 514 A.2d 1075 (Del. 1986) (emphasizing notice requirement of Chancery Rule 23.1); infra note 141 (text of Del. Ch. Ct. R. 23.1).


4. See, e.g., Lewis v. Anderson, 477 A.2d 1040 (Del. 1984) (since plaintiff lacked standing to pursue purely derivative causes of action, court did not reach merits of plaintiff's claim); Covin v. Bresler, 741 F.2d 410 (D.C. Cir. 1984) (since plaintiff's claim of corporate mismanagement could only be pursued derivatively under Delaware law, court did not reach merits of plaintiff's allegations which were brought individually).

5. See, e.g., Bokat v. Getty Oil Co., 262 A.2d 246 (Del. 1970) (allegations of corporate mismanagement are derivative actions); Abelow v. Symonds, 38 Del. Ch. 572, 156 A.2d 416 (Del. Ch. 1959) (wrongful withholding of dividends clearly an individual cause of action); Colonial Sec. Corp. v. Allen, No. 6778 (Del. Ch. Apr. 18, 1983) (plaintiff's attack on compensation agreements is clearly derivative because it is an injury to the corporate treasury).
courts have recently been faced with situations which are difficult to characterize. This is especially true in the context of actual or perceived battles for corporate control. In these cases, the plaintiff's cause of action can be characterized as individual or derivative depending upon the type of duty which allegedly has been breached. This, in turn, is influenced by the plaintiff's position as either a corporate raider or merely as an aggrieved shareholder. The difficulty inherent in classifying causes of action in this context is exacerbated when a plaintiff skillfully drafts pleadings which fail to express whether the plaintiff is suing in an individual or derivative capacity.

The general rule in Delaware is that a plaintiff may bring an individual action only if he suffers a "special injury" distinct from that suffered by other shareholders. Application of the rule, however, has produced arguably inconsistent results. The difficulty and consequences of characterizing causes of action in the corporate control context is exemplified by the Delaware Supreme Court's decision in Lipton v. News International, Plc. In Lipton, the court confronted the question of whether the plaintiff in the underlying action had been prosecuting individual or derivative claims, and thus whether his

---


7. See infra notes 59-113 and accompanying text.

8. See Balotti & Finkelstein, supra note 1, § 13.6 (showing that whether a claimed infringement of the right to conduct a proxy solicitation is an individual or derivative claim may depend upon whether the action taken is alleged to breach a duty owed to the stockholder directly or one owed generally to the corporation).


10. See Lipton, 514 A.2d at 1081 (Moore, J., concurring).


12. Compare Crane Co. v. Harasco Corp., 511 F. Supp. 294 (D. Del. 1981) (although plaintiff suffered an injury distinct from that suffered by other shareholders, it was not a sufficient basis, under Delaware law, for maintaining individual action) with Moran v. Household Int'l, Inc., 490 A.2d 1059 (Del. Ch.) (if plaintiff had suffered an injury distinct from other shareholders, suit to redress injuries could be brought individually), aff'd, 500 A.2d 1346 (Del. 1985).


14. Id. at 1078-79.
private settlement with the defendant-corporation was violative of the notice and court approval provisions contained in Chancery Rule 23.1.\textsuperscript{15} In a decision which contained both a majority and concurring opinion, the supreme court held that although the plaintiff's complaint in the underlying action set forth both individual and derivative causes of action, he had proceeded to litigate only his individual action.\textsuperscript{16} Accordingly, the court found that the private settlement of the plaintiff's individual claims was not subject to the derivative rules governing notice and court approval.\textsuperscript{17} Consequently, the court rejected the proposed intervenor's motion to vacate the stipulated dismissal in the underlying action for failure to comply with Chancery Rule 23.1.\textsuperscript{18}

This comment will first provide a general overview of derivative and individual causes of action. The "special injury" test used in Delaware to distinguish individual from derivative causes of action will be discussed, with emphasis on its application in the corporate control context. This comment will then discuss the supreme court's decision in \textit{Lipton}, followed by an evaluation of the rationale underlying both the majority\textsuperscript{19} and concurring opinions.\textsuperscript{20}

\section{BACKGROUND}

\subsection{Derivative Actions}

In a derivative action,\textsuperscript{21} the claim belongs to the corporation, but the litigation is conducted by a stockholder as the corporation's

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1079. Chancery Rule 23.1 regulates derivative actions in Delaware. \textit{See Del. Ch. Ct. R.} 23.1 (1983). This rule requires, \textit{inter alia}, that shareholders be notified of any proposed dismissals or compromise of a derivative action except when no compensation is provided to the plaintiff or the plaintiff's attorney. \textit{Id.} The rule also requires court approval of any dismissal or compromise. \textit{Id.}
\item \textit{Lipton}, 514 A.2d at 1080.
\item \textit{Id.} \textit{See also supra} note 15 (notice and court approval provisions of Del. Ch. Ct. R. 23.1 (1987)).
\item \textit{Lipton}, 514 A.2d at 1080.
\item Justice McNeilly authored the majority opinion, in which Justice Horsey joined.
\item Justice Moore authored a concurring opinion.
\item The derivative action has been the subject of exhaustive discussion by commentators. \textit{See}, e.g., Coffee & Schwartz, \textit{Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform}, 81 Colum. L. Rev. 261 (1981); Cox, \textit{Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of Zapata and the ALI Project}, 1982 Duke L.J. 939; Dent, \textit{The Power of Directors to Terminate Shareholder}
\end{enumerate}
\end{footnotesize}
representative. The stockholder is merely a nominal plaintiff. Because a derivative claim belongs to the corporation, it is treated as a corporate asset. Characterizing derivative claims as corporate assets has significant consequences. For example, recovery usually accrues to the corporation, and in the event of a merger, the claim, by operation of law, becomes an asset of the surviving corporation. This devolution of the claim to the surviving corporation can severely jeopardize the plaintiff's standing to pursue a derivative action if he is a stockholder of the dissolved corporation.


24. E.g., Bokat, 262 A.2d at 249.

25. See Eshleman v. Keenan, 22 Del. Ch. 82, 194 A. 40, aff'd, 23 Del. Ch. 234, 2 A.2d 904 (1937). But see Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581 (1948) (personal recovery awarded in derivative action where defendant requested personal recovery in order to deny recovery to those shareholders who were themselves wrongdoers or were not otherwise deserving of equitable relief). Other exceptional circumstances will permit personal recovery in a derivative action. See, e.g., Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir.) (derivative action recovery allowed to go directly to shareholders and not to corporation, in order to avoid unjustly enriching defendants who owned substantial amounts of the corporation's stock), cert. denied, 349 U.S. 952 (1955). See also W. FLETCHER, supra note 6, § 5953 (other circumstances permitting personal recovery of derivative claims).


27. It is well established that as a general rule in a merger, the plaintiff of the dissolved corporation loses his standing to maintain a suit in a derivative capacity because he ceases to be a shareholder at the commencement of the action. See Lewis, 477 A.2d at 1049; Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385 (D. Del. 1984) (applying Delaware law), aff'd, 769 F.2d 152 (3d Cir. 1985). But see Bershad v. Hartz, No. 6960 (Del. Ch. Jan. 29, 1987) (citing exception to the rule where plaintiff challenges the fairness of the merger directly), reprinted in 13 Del. J. Corp. L. 210 (1988); Bokat, 262 A.2d at 249 (enumerating two recognized exceptions: (1) where merger is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise).
Historically, the derivative action was developed by equity to compel the assertion of a corporate right of action against the directors or other wrongdoers when the corporation refused to sue. Thus, the action is one for specific enforcement of an obligation owed by the corporation to the stockholders to assert its right of action. Essentially, the derivative action recognizes the shareholders' right to enforce corporate rights arising out of the corporation's refusal to sue.

In response to the infringement upon the board of directors' authority to manage the business and affairs of the corporation, which is inherent in a derivative action, Delaware has developed prerequisites for bringing a derivative suit. These requirements are embodied in the General Corporation Law and the rules of the court of chancery and are intended to balance the right of shareholders to enforce corporate rights against the authority of a board of directors to make decisions concerning litigation on behalf of the corporation. First, the plaintiff must have continuous ownership of shares from the time of the transaction complained of through the duration of the litigation. Second, a plaintiff must exhaust internal

31. Aronson, 473 A.2d at 811-12. As the court in Aronson stated: By its very nature the derivative action impinges on the managerial freedom of directors. Hence, the demand requirement of Chancery Rule 23.1 exists at the threshold, first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits. Thus, by promoting this form of alternative dispute resolution, rather than immediate recourse to litigation, the demand requirement is a recognition of the fundamental precept that directors manage the business and affairs of corporations.
32. See generally Aronson, 473 A.2d at 811. See also Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981) ("managerial . . . [authority] encompasses decisions regarding whether to initiate, or to refrain from entering litigation"). Id.
corporate remedies before resorting to derivative litigation.36

The exhaustion requirement, imposed by both Chancery Court Rule 23.137 and recent Delaware Supreme Court decisions,38 is an acknowledgment that the board of directors, and not stockholders, retains the ultimate authority regarding a corporation's litigation posture.39 The requirement may be satisfied either by demanding that the board of directors bring the action or by pleading with particularity the exceptional circumstances which would excuse demand because of its futility.40 However, it is well established that the business judgment rule41 will normally protect a board's decision to either refuse to bring suit42 or to terminate litigation after demand

by plaintiffs who acquire their stock after the cause of action has arisen on behalf of the corporation and who intend to bring the derivative action in the hope of procuring lucrative attorney's fees or disrupting corporate affairs. See generally Schreiber v. Bryan, 396 A.2d 512, 516 (Del. Ch. 1978); Aronson, 473 A.2d at 811-12.

36. Aronson, 473 A.2d at 811; Welch, supra note 1, at 151.

37. Del. Ch. Ctr. R. 23.1 (1987) provides, in relevant part, that the "complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and the reasons for his failure to obtain the action or for not making the effort." Id. The rule also provides for notice to shareholders of any compromise or dismissal of the action, and court approval of such compromise or approval. Id. See also Hutchison v. Bernhard, 43 Del. Ch. 139, 220 A.2d 782 (1965); Papilsky v. Berndt, 466 F.2d 251 (2d Cir.), cert. denied, 409 U.S. 1077 (1972); Haudek, The Settlement and Dismissal of Stockholders' Actions—Part I, 22 Sw. L.J. 767 (1968).


39. Aronson, 473 A.2d at 812; Zapata, 430 A.2d at 782, 786.

40. See Aronson, 473 A.2d at 814. Demand will be considered futile, and thus excused, when the plaintiff alleges facts which would create a "reasonable doubt that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." Id.

41. The business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Id. at 812. If the plaintiff fails to rebut this presumption, a board's business judgment, including decisions concerning litigation, will not be disturbed. Id.

42. In a situation where demand is not excused, a board's decision to refuse to bring suit as requested by the shareholder will be protected by the business judgment rule. See Zapata, 430 A.2d at 784 & n.10 ("When stockholders, after making demand and having their suit rejected, attack a board's decision as improper, the board's decision falls under the 'business judgment' rule and will be respected if the requirements of the rule are met." Id. at n.10.). Accord Aronson, 473 A.2d at 813.
has been excused.\textsuperscript{43} Thus, a shareholder who attempts to litigate a derivative action opposed by the board of directors will only be able to do so if the shareholder can rebut the presumption that the board's decision is protected by the business judgment rule.\textsuperscript{44}

B. Individual Actions

While the derivative action is brought on behalf of the corporation, an individual or direct action is brought by a shareholder in his own right to redress an injury sustained directly by him, or all persons similarly situated, for which either he or the class is entitled to relief.\textsuperscript{45} Although the plaintiffs in a class action must comply with the requirements of Chancery Court Rule 23,\textsuperscript{46} some commentators argue that these requirements are not as burdensome as those imposed by Chancery Rule 23.1.\textsuperscript{47} Furthermore, "unlike a derivative action, a direct action is not subject to a motion to dismiss by either the corporation or a special litigation committee on the ground that prosecution of the suit is not in the corporation's best interests."\textsuperscript{43}

\textsuperscript{43} In a situation where demand has been excused, the board of directors has the power to appoint a committee of disinterested directors to determine whether the derivative action should be pursued or dismissed. \textit{Zapata}, 430 A.2d at 786. If the committee concludes that dismissal is in the best interests of the corporation, and the court concludes in its business judgment, that the committee is independent, acted in good faith, and that a motion to dismiss is in the corporation's best interests, the derivative litigation will be dismissed. \textit{Id.} at 786-89. Thus, it is clear that even in a demand-excused case, a board of directors retains managerial authority to make decisions regarding corporate litigation. \textit{Aronson}, 473 A.2d at 813.


The function of the business judgment rule is of paramount significance in the context of a derivative action. It comes into play in several ways— in addressing a demand, in the determination of demand futility, in efforts by independent disinterested directors to dismiss the action as inimical to the corporation's best interests, and generally, as a defense to the merits of the suit.

\textit{Id.}

\textsuperscript{45} Individual actions may be maintained by a shareholder personally or by the shareholder as a class action. \textit{See} W. Fletcher, \textit{supra} note 6, § 5908. If a class action is commenced, it is subject to the class action requirements of Court of Chancery Rule 23. Del. Ch. Ct. R. 23 (1983). \textit{See infra} note 46.

\textsuperscript{46} A discussion of the class action requirements is beyond the scope of this note.

\textsuperscript{47} \textit{Balotti} & \textit{Finkelstein}, \textit{supra} note 1, § 13.6.

\textsuperscript{48} \textit{Id.} \textit{See also supra} notes 42-43 (discussion of authority of a board of directors to dismiss derivative suits).
Moreover, the stockholder suing directly does not have to aver that he is a shareholder at the time he brings the suit.\(^{49}\)

### C. Special Injury Test

In Delaware, as in most jurisdictions, no mechanical rule has been promulgated which would distinguish derivative from individual causes of action.\(^{50}\) Rather, Delaware courts have used a special injury test, which contemplates an analysis of the alleged injury suffered by the aggrieved shareholder.\(^{51}\) The shareholder will be permitted to bring the action in his individual capacity only when the shareholder alleges an injury separate and distinct from that suffered by other shareholders\(^{52}\) or a wrong involving a contractual right which exists independently of any right of the corporation.\(^{53}\) If the alleged wrong implicates both individual and derivative claims, the shareholder may litigate either action.\(^{54}\)

Traditionally, the determination of whether the wrong alleged constitutes a special injury to the plaintiff was based on allegations contained within the body of the complaint.\(^{55}\) While the caption and prayer for relief might help to make the determination, courts have been reluctant to accept the plaintiff’s stated designations if the

\(^{49}\) Elster, 34 Del. Ch. at 99, 100 A.2d at 222; Note, Distinguishing Between Direct and Derivative Shareholder Suits, 110 U. Pa. L. Rev. 1147, 1149 (1962).

\(^{50}\) This lack of clarity was acknowledged by the court in Abelow v. Symonds, 38 Del. Ch. 572, 156 A.2d 416 (1959), when it stated, “[T]he line of distinction between derivative suits and those brought for the enforcement of personal rights . . . is often a narrow one . . . .” Id. at 578, 156 A.2d at 420.

\(^{51}\) See, e.g., Elster, 34 Del. Ch. at 98, 100 A.2d at 222 (injuries suffered by plaintiff consist of injuries to corporation and stockholders as a class); Bokat, 262 A.2d at 249 (injury to corporate stock through corporate mismanagement falls equally upon all stockholders); Cowin, 741 F.2d at 414 (same).

\(^{52}\) Moran, 490 A.2d at 1070. See also Bokat, 262 A.2d at 249 (“When an injury to corporate stock falls equally upon all stockholders, then an individual stockholder may not recover for the injury to stock alone, but must seek recovery derivatively on behalf of the corporation.” Id. (citations omitted)).

\(^{53}\) Moran, 490 A.2d at 1070; Elster, 34 Del. Ch. at 98-99, 100 A.2d at 222. In Lipton, the Delaware Supreme Court approved of the test provided in the text, but it went a step further by stating, “We must look ultimately to whether the plaintiff has alleged ‘special’ injury, in whatever form.” Lipton, 514 A.2d at 1078.

\(^{54}\) Balotti & Finkelstein, supra note 1, § 13.6. See also Elster, 34 Del. Ch. at 100, 100 A.2d at 222.

\(^{55}\) Lipton, 514 A.2d at 1078; Elster, 34 Del. Ch. at 101, 100 A.2d at 223 (“The nature of the wrong alleged is what controls, not the pleader’s assertion of an intention to sue as representative of the stockholders rather than in the right of the corporation . . . .” Id.).
substance of the complaint indicates otherwise.\(^{56}\) In *Lipton*, the court relied on the plaintiff’s purported intention to pursue an individual action in light of the court’s finding that the plaintiff had pleaded both individual and derivative actions.\(^{57}\) Thus, it seems that when the complaint alleges both causes of action the intent of the plaintiff will play a critical role in determining whether the claim actually prosecuted is derivative or individual.\(^ {58}\)

### III. Corporate Control Context

The distinction between individual and derivative actions is especially difficult for courts to draw when a suit challenges takeover defenses adopted either in response to a specific threat or as a preventive mechanism.\(^{59}\) Although it seems well settled that a plaintiff who is actively involved in a proxy fight has standing to bring an individual action,\(^{60}\) this is not so where the plaintiff is attempting to assert control through the tender offer process.\(^{61}\) In this situation, the same special injury test has produced arguably inconsistent results.\(^ {62}\)

Several actual or perceived control contests highlight the courts’ difficulties. For example, in *Condec Corp. v. Lunkenheimer Co.*,\(^ {63}\) plaintiff, Condec Corporation, had made a tender offer and received tenders for a controlling percentage of the defendant Lunkenheimer Company’s common stock.\(^ {64}\) Condec’s control over Lunkenheimer was frustrated, however, when Lunkenheimer’s management contracted to sell the company’s assets to a third party.\(^ {65}\) In the context of that agreement, Lunkenheimer issued 75,000 additional shares of

---

56. See W. Fletcher, *supra* note 6, § 5912.
57. *Lipton*, 514 A.2d at 1079.
58. See *infra* notes 169-78 and accompanying text.
61. See *infra* notes 63-89 and accompanying text.
62. Id.
63. 43 Del. Ch. 353, 230 A.2d 769 (1967).
64. Id. at 357, 230 A.2d at 772. The successful offer gave Condec “slightly more than half” of Lunkenheimer’s outstanding common stock. Id.
65. Id.
its stock. Condec argued that the issuance of the additional shares served no legitimate corporate purpose but was designed to entrench management and to frustrate Condec's control of Lunkenheimer. More importantly, the court permitted Condec to prosecute the action in an individual rather than a derivative capacity. The court held that Condec need not prove an injury to the corporation, as would have been the case if Condec had attacked the spending of corporate funds for the purchase of its own stock. Instead, the court reasoned that an individual action was proper because Condec was "a stockholder with a contractual right to assert voting control being deprived of such control . . . ." 

Although the result in Condec Corp. might have been correct, the court's reasoning for allowing the tender offeror to pursue his claims in an individual capacity is questionable. First, the body of the complaint referred to the stock issuance as serving an improper corporate purpose. Historically, this type of allegation is found in a derivative complaint. Second, the court discussed Condec's "contractual rights" without specifying with whom Condec had a contract or the terms of the contract. It is suggested that the only "contract"

66. Id. at 358, 230 A.2d at 772-73.
67. Id. at 359, 230 A.2d at 773.
68. Id. at 362, 230 A.2d at 775. The court also stated that "the immediate result of the issuance of 75,000 additional shares of Lunkenheimer stock was to abort the effect of Condec's apparently successful campaign for tenders of a majority of Condec's stock." Id.
69. Id. at 365-66, 230 A.2d at 777. Although the court did not directly discuss plaintiff's individual standing, it implied that this was an individual action. Id.
70. Id. at 365-66, 230 A.2d at 777. It is well established that any attack on corporate spending must be asserted derivatively, the rationale being that injury affects all shareholders equally. See, e.g., Kramer v. Western Pac., No. 8675 (Del. Ch. Sept. 11, 1987) (waste of corporate assets is a derivative claim), reprinted in 12 Del. J. Corp. L. 1087 (1987); Colonial Sec. Corp. v. Allen, No. 6778 (Del. Ch. Apr. 18, 1983) (attack on compensation agreements is an injury to corporate treasury). See generally W. Fletcher, supra note 6, § 5923.
72. Id. at 359, 230 A.2d at 773. The complaint also alleged that the sale of the assets "was not made in good faith or in the exercise of prudent judgment but was made with precipitous haste with insufficient consideration or opportunity for consideration of the interest of the corporation or its stockholders." Id.
73. See W. Fletcher, supra note 6, § 5924 (discussing allegations of improper corporate purpose as usually appearing in a derivative complaint).
74. Condec Corp., 43 Del. Ch. at 366, 230 A.2d at 777.
was between Condec and those Lunkenheimer shareholders who tendered to Condec's offer. Once Condec performed its obligations under the contract to take up and pay for the shares tendered, it would become the corporation's majority stockholder, with its rights defined by the corporation law and Lunkenheimer's certificate of incorporation. 75 Although Condec had certain expectations which were improperly upset by Lunkenheimer's management, 76 technically there was no breach of any contract between Condec and the corporation. Nevertheless, the result in Condec Corp. was probably correct because Condec did suffer an injury independent of the corporation and its other stockholders. 77 The court's analysis would have been more logical if it had discussed the special injury suffered by Condec independent of Lunkenheimer or its other stockholders, rather than a wrong involving a "contractual" right. 78

If Condec was not suing in its capacity as a hostile acquiror, it would not have been in a position to suffer an injury separate and distinct from that of other Lunkenheimer shareholders. The Condec Corp. reasoning is interesting in light of a case involving a tender offeror who was unsuccessful in his effort to assert control. 79 Unlike the plaintiff in Condec Corp., who was attempting to convert tendered shares into voting control, Crane Co. v. Harsco Corp. 80 involved an offeror who had not reached a stage where the tender shares could be used to assert control. The tender offeror, Crane Company, sued the target company, Harsco Corporation, in an effort to prevent it from completing the purchase of its own stock from professional traders. 81 Crane alleged in part that the purchase would constitute a breach of fiduciary duty because it was designed to entrench management. 82 Crane brought an individual action, averring that it suffered special injury because Harsco was attempting

75. See generally W. Fletcher, supra note 6, § 5715.
76. Certainly, Condec had expected to convert tendered shares into corporate control, which was improperly thwarted by management's unlawful stock issuance.
77. See supra notes 50-58 and accompanying text (discussing special injury test).
78. See Moran, 490 A.2d at 1070 (outlining when action can be maintained as an individual action as opposed to a derivative action).
80. Id.
81. Id. at 297-98. Crane also alleged numerous violations of federal securities laws under the Williams Act. Id. at 298-99.
82. Id. at 303.
to frustrate Crane's right to acquire additional shares through a tender offer.\textsuperscript{83} The United States District Court for the District of Delaware rejected Crane's contention that the action could be brought individually.\textsuperscript{84} The court correctly distinguished Condec Corp. on the ground that this was not a situation where the issue of new stock deprived the successful offeror of control.\textsuperscript{85} The court stated, "[T]he 'right' to make a tender offer is not a contractual right owed to the shareholder by the corporation."\textsuperscript{86}

The district court apparently misstated Delaware corporate law when it held that although Crane suffered an injury distinct from that of other stockholders, this alone was not a sufficient basis for an individual action.\textsuperscript{87} Since the court found that the complaint alleged injury to both Crane individually and to the corporation, thus satisfying the requirement of a special injury,\textsuperscript{88} standing to maintain an individual action should have followed, notwithstanding the fact that the corporation might suffer an injury from the same wrong.\textsuperscript{89} Crane Co. illustrates the quandary faced by courts attempting to distinguish situations where the alleged breach can be viewed either as a duty owed primarily to the corporation or as one owed directly to the stockholders. Even if the court had not misstated Delaware law, its task would have been difficult.

This difficulty was readily acknowledged by Vice-Chancellor (now Justice) Walsh in a takeover battle between Pantry Pride and Revlon. In \textit{MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.},\textsuperscript{90} plain-

\begin{itemize}
  \item \textsuperscript{83} \textit{Id.} at 304.
  \item \textsuperscript{84} \textit{Id.}
  \item \textsuperscript{85} \textit{Id.} (citing Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (1967)).
  \item \textsuperscript{86} \textit{Id.} Similarly, in \textit{Moran}, 490 A.2d at 1070, \textit{aff'd}, 500 A.2d 1346 (Del. 1985), the chancery court held that "shareholders do not possess a contractual right to receive takeover bids." \textit{Id.} (emphasis added).
  \item \textsuperscript{87} \textit{Crane Co.}, 511 F. Supp. at 304. This holding by the district court was expressly rejected by the chancery court in \textit{Moran}. See \textit{Moran}, 490 A.2d at 1070 n.4.
  \item \textsuperscript{88} \textit{Crane}, 511 F. Supp. at 304.
  \item \textsuperscript{89} \textit{See generally Moran}, 490 A.2d at 1070 n.4 (reasoning that if the shareholder and the corporation suffer injury from the same wrong, the shareholder should be allowed to maintain an individual action); \textit{Elster}, 34 Del. Ch. at 99, 100 A.2d at 222 (same).
  \item \textsuperscript{90} No. 8126 (Del. Ch. Oct. 9, 1985).
\end{itemize}
tiff, Pantry Pride, brought suit in the court of chancery seeking to invalidate a poison pill adopted by Revlon’s board of directors. Pantry Pride, a hostile tender offeror, alleged in part that the poison pill was statutorily invalid, and that certain provisions of the pill constituted an unauthorized amendment of Revlon’s certificate of incorporation.

In addressing these two allegations, the court noted that there was “little doubt” that Pantry Pride’s attack on the poison pill was intended to assist its tender offer. The court implied that the poison pill’s validity might affect the success or failure of Pantry Pride’s bid to control Revlon. In this respect, Pantry Pride might suffer an injury distinct from that suffered by other Revlon shareholders. On the other hand, the injury resulting from the poison pill could be deemed an injury common to all shareholders because of the pill’s deterrent effect. Justice Walsh articulated these differing interpretations when he stated, “[The allegations] which attack the [poison pill] as unauthorized under the [Delaware General Corporation Law] may be viewed as stating individual claims. But may they also be deemed derivative claims because of the possible effect of the [poison pill] on other shareholders?”

The court distinguished Pantry Pride’s position vis-à-vis the corporation from that of the plaintiff in Moran v. Household International, Inc. In Moran, a poison pill was adopted not to thwart a specific threat, but rather as a preventive mechanism to deter possible takeover overtures. Plaintiff Moran, the largest shareholder in Household, attacked the adoption of a poison pill in part on the ground that a majority of Household’s directors manipulated the corporate machinery to entrench themselves in office by restricting the share-

91. Pantry Pride is an affiliate of MacAndrews & Forbes Holdings, Inc. Revlon, No. 8126, slip op. at 1.
92. Id. The poison pill adopted by Revlon is known as a Note Purchase Rights Plan. See generally Comment, Shareholder Rights Plans: Do They Render Shareholders Defenseless Against Their Own Management, 12 Del. J. Corp. L. 991 (1987) (thorough discussion of poison pills).
93. Revlon, No. 8126, slip op. at 7.
94. Id. at 9.
95. Id.
96. Id. Justice Walsh implied that if the poison pill injured all shareholders equally, the injury must be redressed in a derivative action.
97. 490 A.2d 1059 (Del. Ch.), aff’d, 500 A.2d 1346 (Del. 1985).
98. Id. at 1071. The Household board of directors was concerned that the company might be vulnerable to a “two-tier, bust-up” tender offer.
holders' right to engage in a proxy contest.\textsuperscript{99} Moran brought the action in an individual capacity.\textsuperscript{100}

Justice Walsh, sitting by designation as vice-chancellor, rejected Moran's contention that an injury of this kind could be redressed in an individual action.\textsuperscript{101} Initially, the court set forth the special injury test for determining whether a plaintiff can sue individually.\textsuperscript{102} The court distinguished the present case from one where the plaintiff is actively involved in waging a proxy battle, or has made a tender offer for control.\textsuperscript{103} Moran was not presently engaged in a proxy contest, nor had he commenced a tender offer.\textsuperscript{104} Moreover, the court held that since the poison pill did not directly prohibit proxy battles, any harm that might occur as a result of the poison pill would accrue to the corporation.\textsuperscript{105} Hence, the wrong alleged neither constituted a special injury to Moran nor did it injure a contractual right he had with the corporation.\textsuperscript{106} Justice Walsh stated, "[B]ecause the plaintiffs are not engaged in a proxy battle, they suffer no injury distinct from that suffered by other shareholders . . . ."\textsuperscript{107}

Moran also contended that since the poison pill would deprive shareholders of their right to receive and consider takeover proposals, an individual action would be proper.\textsuperscript{108} In response, the court stated because shareholders do not possess a "contractual" right to receive takeover bids, "absent an allegation that the [poison pill] directly restricts transferability, there is no deprivation of a distinct contractual right of the shareholders."\textsuperscript{109} Thus, according to the chancery court, Moran's claim could only be brought derivatively.\textsuperscript{110}

---

100. Id. at 1069.
101. Id. at 1069-70.
102. The court stated that in order to bring "an individual action, the plaintiff must allege 'either an injury which is separate and distinct from that suffered by other shareholders,' or a wrong involving a contractual right of a shareholder . . . ." Id. at 1070 (citations omitted).
103. Id. ("There is no allegation that [plaintiff] desires to employ [its 5% stock holding in Household] as a means of gaining control of Household.").
104. Id.
105. Id.
106. Id.
107. Id.
108. Id.
109. Id.
110. Moran also alleged that the rights plan was statutorily invalid and that he, as a director of Household, had individual standing to protect Household's shareholders. Id. at 1070-71. Both arguments were rejected as a basis for an
It could be argued that Moran should have been permitted to proceed individually because, like the plaintiff in *Condec Corp.*, he might have had expectations which were hampered by Household's adoption of a poison pill. Although the expectations were not contractual, it is reasonable to characterize them as involving a special injury. Moran may have hoped that a third party, or even his own company, was contemplating making a tender offer at a premium price for Household. This contemplation should not, however, govern the characterization of the action. It is suggested that a plaintiff must be in a more concrete position to embark on a takeover contest if he is to successfully claim that he is suffering from a special injury.

*Condec, Revlon, Crane,* and *Moran* illustrate that the plaintiff's position vis-à-vis the company can have a dispositive effect on how a court will characterize the action. This approach is sound because the plaintiff's position will necessarily dictate the alleged harm and the duty supposedly breached. If the plaintiff is actively involved in a control contest, whether by proxy battle or tender offer, a defensive tactic will directly and uniquely harm the plaintiff. On the other hand, if the company is not the immediate subject of a control contest, the harm accrues to all shareholders equally as well as to the corporation.

The courts’ problems arise, however, in determining whether the plaintiff is attempting to assert control or is merely an aggrieved shareholder. Moreover, the problem is exacerbated when a court is called upon to determine the “intention” of a plaintiff who has artfully pleaded both types of actions.

IV. *Lipton v. News International, PLC*

At the heart of the supreme court’s dilemma in *Lipton v. News International, PLC* was the determination of the plaintiff’s position in relation to the company, and his subjective intent to prosecute either a derivative or an individual cause of action. The court first had to

---

111. If, for example, a target company adopts a measure designed to dilute the plaintiff’s voting strength, it is fair to assume that plaintiff's alleged injury would be different than that suffered by other shareholders.
112. See *Moran*, 490 A.2d at 1070.
113. See infra notes 130-33 and accompanying text.
114. 514 A.2d 1075 (Del. 1986).
determine whether News International (News) was litigating as a corporate raider attempting to take control of Warner Communication, Inc. (Warner), or whether it was merely prosecuting a claim as an aggrieved shareholder. The answer to this question would be dispositive of whether News could privately settle its dispute with Warner without complying with the derivative action requirements of Chancery Rule 23.1. In permitting News and Warner to privately settle, the court impliedly endorsed the position that News was litigating its claims as a corporate raider. More importantly, the court relied on News' purported intention not to assume derivative status in determining which cause of action it actually prosecuted.

A. Background Facts

In October 1983, News, headed by K. Rupert Murdoch, began purchasing shares of Warner common stock on the open market. Shortly thereafter, News filed a Schedule 13-D with the Securities and Exchange Commission disclosing that it had acquired a 6.7% equity interest in Warner, thereby making News Warner's largest stockholder. News continued its purchase of Warner stock until it had accumulated approximately 7% of the Warner shares then outstanding.

In an apparent response to News' increased holdings in it, Warner announced that it had entered into an exchange agreement with Chris-Craft Industries, Inc. (Chris-Craft) and BHC, Inc. (BHC), a wholly-owned subsidiary of Chris-Craft. The exchange agreement provided that Warner would transfer shares sufficient to give both Chris-Craft and BHC a 19% voting interest in Warner in exchange for Warner obtaining a stock interest in BHC. This 19% interest,

115. K. Rupert Murdoch, a well-known and controversial corporate raider, is the controlling shareholder of News International, Plc. Id. at 1076.
116. Id. at 1079.
117. The Delaware Supreme Court had never, before Lipton, attached significance to the question of whether the plaintiff intended to prosecute one cause of action instead of the other when a shareholder's complaint supported both causes of action. Id.
118. Id. at 1079-80.
119. Id. at 1076.
120. Id.
121. Id.
122. Id.
if combined with shares already owned or controlled by Warner's management, would effectively give Chris-Craft a veto power over all Warner corporate actions which were subject to a preexisting 80% supermajority voting requirement.\textsuperscript{124} The corporate actions subject to the supermajority voting requirement included the removal of Warner directors.\textsuperscript{125}

As a counter to the exchange agreement, News announced it had filed an intention to acquire at least 25% and up to 49.9% of Warner stock, and that it would consider the possibility of commencing a proxy fight for control of Warner.\textsuperscript{126} More importantly, News, in an effort to enjoin the exchange agreement, instituted an action in the court of chancery against Warner and certain members of its board of directors,\textsuperscript{127} Chris-Craft and its president, and BHC.\textsuperscript{128} News alleged that the exchange agreement deprived News of its voting rights, wasted corporate assets, and constituted a breach of fiduciary duties because it was designed to entrench management.\textsuperscript{129} Significantly, News failed to designate whether it was bringing the action in an individual or derivative capacity.

Although News' pleading was equivocal with regard to whether the action was individual or derivative, Rupert Murdoch, the controlling shareholder of News, assumed a derivative posture in his public statements. Murdoch stated that the exchange agreement was a "dirty deal to me and all the [Warner] shareholders," that it was "a rinky-dink deal, a terrible one for Warner shareholders," and that he had "never seen such mismanagement and corporate waste."\textsuperscript{130} Furthermore, Murdoch proclaimed that "[News] will oppose and expose gross mismanagement, fraud, racketeering and abuse of shareholder funds whenever we find it."\textsuperscript{131} He went as far as to state that News "would go to every court in the country" to prevent implementation of the exchange agreement, which he characterized as "not in the best interest of Warner and its stockholders."\textsuperscript{132} In

\textsuperscript{124} \textit{Lipton}, 514 A.2d at 1076.
\textsuperscript{125} Id.
\textsuperscript{126} \textit{Intervenors' Brief}, supra note 123, at 8.
\textsuperscript{127} \textit{Lipton}, 514 A.2d at 1076-77.
\textsuperscript{128} Id. at 1077.
\textsuperscript{129} Id.
\textsuperscript{130} \textit{Intervenors' Brief}, supra note 123, at 9.
\textsuperscript{131} \textit{Lipton}, 514 A.2d at 1081 (Moore, J., concurring) (quoting public statements made by Murdoch).
\textsuperscript{132} Id.
his public statements, Murdoch did not convey the impression that he sought control of Warner.

A hearing on News' motion to temporarily enjoin consummation of the exchange agreement was held before former Chancellor Brown.133 The court refused to grant injunctive relief, noting that because Chris-Craft apparently had no obligation to vote its Warner stock with Warner's management, the exchange agreement would not "deprive [News] of any voting right or position it now has."134

B. The Settlement and Dismissal

Approximately two months after the hearing on News' motion, News and Warner resolved their differences and entered into an agreement in which Warner purchased all Warner stock owned by News for a premium over market of approximately $45 million.135 In return, News agreed to dismiss with prejudice its purported individual claims against Warner and agreed not to purchase Warner shares for ten years.136 In accordance with their agreement, the parties filed a stipulation of dismissal pursuant to Court of Chancery Rule 41(a)(1).137 The parties made no attempt to comply with the notice and court approval provisions of Chancery Rule 23.1.138

---

134. Id. at 3.
135. Intervenors' Brief, supra note 123, at 12. The agreement also provided that News would be paid approximately $8 million for costs and expenses including litigation expenses. Id.
136. Id.
137. Lipton, 514 A.2d at 1077. Chancery Court Rule 41(a)(1) provides:
(a) VOLUNTARY DISMISSAL; EFFECT THEREOF.
   (1) By Plaintiff; by Stipulation. Subject to payment of costs and the provisions of Rule 23(e) and rule 23.1 an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs or (ii) by filing a stipulation or dismissal signed by all the parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
138. Lipton, 514 A.2d at 1077. Chancery Court Rule 23.1 provides:
In a derivative action brought by 1 or more shareholders or members to enforce a right of a corporation or of an unincorporated association,
C. The Trial Court Decision

Shortly after the stipulation of dismissal was filed, plaintiffs, as "proposed intervenors," filed a motion in the court of chancery to vacate the dismissal and to intervene in the action. The basis of their motion to vacate was that the purchase of News' holdings in Warner constituted a private settlement in contravention of Chancery Rule 23.1, which requires notice, a fairness hearing and court approval of any dismissal of a derivative action. The proposed intervenors named News, Warner, Chris-Craft, and BHC as defending parties. In response, the defendants asserted that News' original and amended complaint set out individual claims, and that furthermore, regardless of the nature of the claims, News' intention to bring solely individual claims precluded the application of Chancery Rule 23.1.

Initially, the court of chancery held that the plaintiff's intention does not control whether a complaint states a derivative or an individual cause of action. Rather, the court correctly noted that it is required to determine the nature of the action from the body of the complaint. After setting forth the special injury test promulgated by the courts in Elster and Moran, the court concluded that News'...
complaint "clearly supports individual as well as derivative causes of action."

The court then held that where a complaint supports both causes of action, the shareholder may proceed with its individual action. The troubling aspect of the case was to determine which cause of action News actually proceeded to prosecute. In making this determination, the court found the plaintiff's intention to be the critical factor. According to the court, if the evidence established that the plaintiff intended to sue individually, he could prosecute only his individual claims. Any derivative claims would be subject to dismissal, unless the plaintiff was "willing and able to assume his fiduciary obligations to other shareholders." In applying these rules to the present case, the court concluded that:

because a plaintiff in this situation never intended to assume a fiduciary relationship to other shareholders, he will not be forced to shoulder such a burden. For this reason, dismissal of derivative claims which are brought in a shareholder's individual capacity are not subject to the requirements of Chancery Rule 23.1.

The court attached great significance to the fact that News had made no effort to comply with the demand requirements of Chancery Rule 23.1. The court rejected the proposed intervenors' argument that Murdoch's public statements provided evidence of Murdoch's intent to assume derivative status. Rather, the court opined this was a common "public relations" tactic in struggles for corporate

145. News Int'l, Plc, No. 7420, slip op. at 5. Individual claims were found because News alleged that Warner's management had obtained, through the exchange agreement, a veto power over actions subject to the 80% supermajority vote requirement, which would constitute a "special injury" to News' contractual voting rights in Warner. Id. Derivative claims were found because News also alleged that the exchange agreement constituted a waste of corporate assets and a breach of duty by Warner management. Id.

146. Id., slip op. at 6 (citations omitted).
147. Id. ("The intention of the plaintiff determines whether he brings the suit in his individual or derivative capacity.").
148. Id.
149. Id.
150. Id. See supra notes 36-44 and accompanying text (discussion of the demand requirements of Chancery Rule 23.1).
151. News Int'l, Plc, No. 7420, slip op. at 7.
control. Consequently, the court allowed the private settlement to stand because "News intended to bring only an individual cause of action." 153

D. The Supreme Court Decision

1. The Majority

On appeal to the supreme court, the proposed intervenors described News as a "faithless fiduciary" who received greenmail for dismissing "a derivative suit without court approval, without notice to shareholders and without benefit to the corporation, all in violation of Chancery Rule 23.1." 154 In essence, the proposed intervenors contended that the court of chancery erred in allowing News to use derivative claims as a means of coercing Warner into a private settlement for individual profit, based solely on News' purported intention not to assume the burden of a fiduciary. 155

The majority opinion, authored by former Justice McNeilly and joined by Justice Horsey, refused to view the case in this light. 155 The court was not persuaded by the proposed intervenors' attempt to portray Murdoch as a "faithless fiduciary" who was bought off in exchange for an agreement to abort his takeover attempt. 157 Rather, the court perceived the case as a situation where News, despite pleading both causes of action, proceeded to actually prosecute only the individual action. 158

At the outset, the court interpreted the tests developed in Elster and in Moran. 159 First, the court stated it must look to the nature of the wrongs alleged in the complaint, not to the plaintiff's designation or stated intention. 160 Second, the court found that the term "special injury" developed in Elster encompasses both prongs of the

152. Id. The court stated, "Litigation over corporate control is usually accompanied by orchestrated public relations efforts designed to picture each side as the champion of shareholder interests." Id.

153. Id., slip op. at 7-8.

154. Intervenors' Brief, supra note 123, at 1.

155. Id. at 17.

156. Lipton, 514 A.2d at 1078-79.


158. Lipton, 514 A.2d at 1080.

159. Id. at 1078.

160. Id. The court cited both Elster, 34 Del. Ch. at 100, 100 A.2d at 223, and Moran, 490 A.2d at 1069-70.
Moran test.\textsuperscript{161} Moran, the court stated, teaches that a plaintiff may maintain an individual action only if he complains of an injury distinct from that suffered by other shareholders or a wrong involving one of his contractual rights as a shareholder.\textsuperscript{162} It reasoned, however, that "while Moran serves as a quite useful guide, the case should not be construed as establishing the only test. . . . Rather, as was established in Elster, [the court] must look ultimately to whether the plaintiff has alleged 'special injury,' in whatever form."\textsuperscript{163}

The supreme court applied this special injury requirement in reviewing News' complaint.\textsuperscript{164} It found that News' allegations that the exchange agreement was designed to entrench management and that it constituted a waste of corporate assets clearly stated derivative claims.\textsuperscript{165} However, the court also found that News had pleaded individual claims in its allegations that the exchange agreement violated its voting rights by securing for Warner management veto power over all shareholder actions subject to the 80% supermajority voting requirement.\textsuperscript{166} According to the court, this allegation constituted an individual cause of action because the right to vote is a contractual right which News possessed as a shareholder of Warner independent of any right of Warner.\textsuperscript{167} Furthermore, the court found that News' amended complaint clearly set forth a challenge for control of Warner, which the court implied put News in a position to suffer a harm different from that suffered by other Warner shareholders.\textsuperscript{168}

\textsuperscript{161} Id. In Moran, the court of chancery held that to maintain an individual action, a shareholder must allege either an injury separate and distinct from that suffered by other shareholders, or wrong involving a contractual right, which exists independently of any right of the corporation. Moran, 490 A.2d at 1070. In Elster, the court impliedly defined special injury as a wrong inflicted upon the plaintiff alone or wrong affecting any particular right he is asserting. Elster, 34 Del. Ch. at 99, 100 A.2d at 222.

\textsuperscript{162} Lipton, 514 A.2d at 1078 (quoting Moran, 490 A.2d at 1070).

\textsuperscript{163} Id.

\textsuperscript{164} Id.

\textsuperscript{165} Id. It is well established in Delaware and elsewhere that a claim of management entrenchment amounts to a claim of a breach of fiduciary duty, which is typically a derivative cause of action. See generally W. Fletcher, supra note 6, § 5924. The same rule applies to claims of corporate waste. Id. at § 5926. But see Rabkin v. Hunt Chem. Corp., No. 7547 (Del. Ch. Dec. 4, 1986) (when claim of breach of fiduciary duty is asserted in context of cash-out merger, and claim is asserted by minority shareholders of dissolved corporation, action is individual), reprinted in 12 Del. J. Corp. L. 1156 (1987).

\textsuperscript{166} Lipton, 514 A.2d at 1079.


\textsuperscript{168} Lipton, 514 A.2d at 1079.
Since the court found that News pleaded both causes of action, it proceeded to determine the crucial question concerning which action News actually litigated. The court rejected the proposed intervenors’ argument that News’ declared intention should be irrelevant because it cannot be allowed to avoid its fiduciary duty by merely asserting it never ‘intended to sue derivatively.’ Instead, the court relied on dicta from Elster which explained that in a situation where a plaintiff’s complaint supports both causes of action, the plaintiff, “if he should so desire, may proceed on his claim for the protection of his individual rights rather than in the right of the corporation.”

Relying on Elster, the supreme court held that News “proceeded with its suit individually and not on behalf of Warner.” The court placed significance on the fact that News never made any attempt to comply with Chancery Rule 23.1. Although the court warned, as did the chancery court, that this alone is not determinative, “it is an indication that the plaintiff is pursuing individual, and not derivative claims.” Furthermore, the proposed intervenors’ argument that Murdoch’s public statements constituted evidence of his derivative intent was rejected. Rather, it endorsed the chancery court’s declaration that the statements were part of a public relations campaign aimed at gathering support for News’ fight against Warner management.

The majority justified its holding by explaining that only the individual claims were dismissed with prejudice, and that the private settlement would not adversely affect the viability of any derivative claims brought by News. The court further noted that all of the original parties had stipulated that any derivative claims would survive without prejudice, and that the parties had represented to the court that they would remain subject to the chancery court’s jurisdiction for resolution of all such claims. Thus, the court held that

---

169. See Intervenors’ Brief, supra note 123, at 15-16.
170. Lipton, 514 A.2d at 1079 (quoting Elster, 34 Del. Ch. at 99, 100 A.2d at 222).
171. Id.
172. Id. The court also stated, “[R]ather than plead futility of demand, News argued that it need not comply with Rule 23.1 because it brought individual claims.”
173. Id. at 1079-80.
174. Id. at 1080.
175. Id.
176. Id.
177. Id.
the trial court neither committed legal error nor abused its discretion in permitting News and Warner to settle their dispute without compliance with Chancery Rule 23.1.178

2. The Concurrence

In his concurring opinion, Justice Moore expressed concern that the majority's opinion might be interpreted as sanctioning one set of rules for a large shareholder who, by "guile and artful pleading" gives the impression he is assuming a derivative capacity without any such intention, and another set of rules for the "small stockholder [who] is firmly held to the strictures of Chancery Rule 23.1."179 Justice Moore cautioned that any such interpretation would be ill-advised and contrary to the court's warnings in an earlier case.180 To reinforce his point, he reasoned that if this interpretation was carried to its ultimate conclusion, it would destroy the "efficacious intent of Rule 23.1."181

Unlike the majority, Justice Moore seemed deeply troubled by the derivative posture Murdoch maintained in his public statements, in his Schedule 13-D filing, and in the complaint itself. He contended that the complaint seemed to state a derivative action while "subtly" interjecting language which News relied upon to stake out individual claims.182 After quoting verbatim nine paragraphs of the three-count complaint,183 as well as quoting selected statements

178. Id. Similarly, the court rejected the proposed Intervenors' motion to intervene under Chancery Rule 24. The court stated that absent unusual circumstances, intervention is allowed only in pending actions. Id. The court reasoned that since this case is no longer pending intervention is inappropriate. Id.

179. Id. at 1081.

180. Id. Justice Moore cited the case of Wied v. Valhi, 466 A.2d 9 (Del. 1983), cert. denied, 465 U.S. 1026 (1984), apparently in reference to the fact that the Delaware Supreme Court required a plaintiff, who had received a private settlement, to reinstate derivative and class claims which had been amended out or deleted from the complaint.

181. Lipton, 514 A.2d at 1081. The notice and court approval provisions of Chancery Rule 23.1 are designed to discourage private settlement of derivative claims where a fiduciary personally profits to the exclusion of the rightful beneficiaries, which are the corporation and its shareholders. See generally Papilsky v. Berndt, 466 F.2d 251, 258 (2d Cir.), cert. denied, 409 U.S. 1077 (1972) (discussing federal rule of civil procedure substantially similar to Delaware Court of Chancery Rule 23.1).

182. Lipton, 514 A.2d at 1082.

183. Id. at 1082-83. Justice Moore quoted from portions of the complaint in which News alleged that the exchange agreement "reveals a gross waste of corporate
made by Murdoch and deposition testimony of one of Murdoch's chief financial officers, Justice Moore opined that it was "very difficult" to square this case with Moran because both the plaintiffs seemed to be in similar positions.

Although agreeing that a plaintiff who sets out both individual and derivative causes of action should be permitted to proceed with his individual action, Justice Moore warned those plaintiffs who might seek to follow News' arguably specious litigation tactics. He stated:

[W]hen a party seeks to enforce, solely as an individual claim, one having derivative implications, equity and fairness require that the plaintiff so state—clearly and without equivocation—in order that other stockholders may not be led to believe that their rights are being championed when the opposite is the case.

Concluding, Justice Moore stated that although he offered no criticism of the majority's opinion, he hoped that Delaware's tradition of preserving shareholder rights in derivative actions would not be compromised by this decision. Believing that this was not the intent of the majority, Justice Moore stated that he "trust[ed] it will not be the result—and all the latter would imply for the future of Delaware corporate law."

assets”; that it illustrates a clear entrenchment motive; that it is violative of Delaware law; that it infringes upon the voting rights and discriminates against all of Warner's existing shareholders; and that it "constitute[s] a fraud upon plaintiff and other Warner shareholders." Id.

184. Id. at 1081. Justice Moore quoted from public statements reported in The Wall Street Journal, in statements Murdoch made before the Federal Communications Commission, the Public Relations Society of America, as well as from reports in the Chicago Tribune. Id.

185. Id. at 1083-84. According to Justice Moore, "[T]he testimony of one of Mr. Murdoch's chief financial officers supports the derivative nature of News' claims." Id. at 1083.

186. Id. at 1084-85. See also supra notes 97-110 and accompanying text (discussion of Moran).

187. Lipton, 514 A.2d at 1085 (citing Elster, 34 Del. Ch. at 99, 100 A.2d at 222).

188. Id. Justice Moore further stated that "[t]his Court's mandate in Schnell v. Chris-Craft Industries, Inc., Del. Supr., 285 A.2d 437, 439 (1971), that 'in equitable action does not become permissible simply because it is legally possible', finds considerable application to such circumstances." Id.

189. Id. at 1085.

190. Id. The Justice was making an apparent reference to the ominous possibility of federal corporate law replacing Delaware's corporate law in matters of internal corporate governance.
Justice Moore implied he was concurring in the judgment only because of (1) the pendency of companion actions in the court of chancery; (2) the parties' representations that News would submit itself to the jurisdiction of Delaware courts; and (3) the trial court's ruling that settlement and dismissal of this case would not prejudice the rights of any Warner shareholders, other than News, to pursue their pending claims.\(^9\) In the absence of these factors, Justice Moore probably would have dissented rather than concurred.\(^{10}\)

V. Analysis and Evaluation

The *Lipton* decision is difficult to justify in terms of both its ultimate conclusion and in its rationale. It is arguably contrary to established legal rules\(^9\) and to public policy which has traditionally condemned private settlements in situations where a plaintiff has pleaded derivative claims.\(^{11}\) Moreover, the decision may have established dangerous precedent by inadvertently endorsing a plaintiff's manipulative litigation tactics which were part of an overall strategy aimed at coercing the target company into making a private greenmail payment.\(^{12}\)

---

9. Id. at 1081.

10. See generally id.

11. As the *Lipton* court itself correctly noted, a plaintiff's declared intention as to whether or not he is suing in an individual or derivative capacity does not control the characterization of the action. See *Lipton*, 514 A.2d at 1078. However, this is precisely what the court relied on in determining that News prosecuted only its individual action. Id. at 1079-80.

12. See, e.g., Rothenberg v. Security Management Co., 667 F.2d 958 (11th Cir. 1982) (discussing the danger that derivative plaintiff could use the derivative suit as leverage to obtain a favorable settlement in an individual suit); Shelton v. Pargo, Inc., 582 F.2d 1298 (4th Cir. 1978), on remand, 81 F.R.D. 637 (W.D.N.C. 1979) (before federal district court may approve private settlement in individual action, where plaintiff also brought class action, court must first determine whether settling claimant improperly used the class action for unfair personal gain with prejudice to absent class members); Raynor v. LTV Aerospace Corp., 317 A.2d 43 (Del. Ch. 1974) (court refused to approve proposed settlement of individual appraisal suits brought by three dissident shareholders because such settlement ignored the rights of other dissident shareholders who also sought appraisal but did not go so far as to bring individual actions); Clarke v. Greenberg, 71 N.E.2d 443 (N.Y. Ct. App. 1947) (derivative suit plaintiff accountable to the corporation for proceeds obtained through settlement of the derivative action).

13. It is arguable that News was prosecuting the action as a corporate raider. Moreover, News might have used the threat of a derivative action in order to gain leverage and thus extract a greenmail payment from Warner. As Justice Moore wrote, it is most likely not the intent of the majority to endorse such litigation strategy. *Lipton*, 514 A.2d at 1085 (Moore, J., concurring).
The court’s conclusion that News was in a position which would render it subject to potential special injury is open to question. The court failed to explain how News’ position in relation to the corporation was significantly different from the plaintiff’s position in Moran. In both cases, the plaintiffs were neither actively involved in a proxy contest nor deprived of any exercise of a controlling block of stock. Thus, in neither case were the plaintiffs in a position vis-à-vis the corporation to suffer a special injury which would allow them to proceed in an individual capacity.

The Lipton court’s distinguishing of Moran is not persuasive. It found that, unlike the plaintiff in Moran, News alleged harm to a contractual right, which is the proper basis for an individual action. The court did not explain whether News possessed a special contractual right which would distinguish its alleged injury from that suffered by other Warner shareholders. If News did not suffer a special injury to its contractual rights, but rather the injury fell equally upon all Warner shareholders, prior Delaware precedent dictates that the injury should be redressed in a derivative action.

Furthermore, it is unclear from the opinion whether the court believed that News was in a contest for control of Warner. In fact, the court seemed to contradict itself at different points in the opinion. At one point it noted that News’ amended complaint set forth a challenge for control of Warner, while at another juncture it opined

196. See supra notes 97-112 and accompanying text (discussion of Moran).
197. See, e.g., Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971) (action could be brought individually where plaintiff’s alleged injuries were to his right to conduct a proxy contest).
198. See, e.g., Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 230 A.2d 769 (1967) (individual action could be maintained because plaintiff was wrongfully denied control of the corporation).
199. See Lipton, 514 A.2d at 1078-79
200. Id. at 1079. The court stated that.
[News] contends that the Warner/Chris-Craft exchange agreement violated its voting rights by securing for Warner management veto power over all shareholder actions subject to the 80% supermajority voting requirement.
We find that this allegation constitutes special injury to News under Elster, thus forming the basis of a viable individual cause of action against Warner.

Id.
202. Lipton, 514 A.2d at 1079.
that "News has not indicated a desire to use its holdings to gain control of [Warner]."\footnote{203}

Assuming arguendo that News' position did allow it to sue in an individual capacity, the court's reliance on News' purported intention is contrary to the traditional guidelines for determining whether an action is individual or derivative.\footnote{204} As the court itself correctly noted, the body of the complaint, not the pleader's assertion, controls the characterization of the action.\footnote{205} On one hand, the court rejected News' stated intention,\footnote{206} and on the other, inconsistently, made News' professed intention a primary basis for refusing to vacate the stipulation of dismissal between News and Warner.\footnote{207}

The court's reliance on News' "intention" is troubling, and could be interpreted as an implied endorsement of specious litigation tactics.\footnote{208} To allow a plaintiff's subjective intention to control whether or not it can dismiss an action involving derivative claims might emasculate the protections of Chancery Rule 23.1.\footnote{209} Every plaintiff who brings an action which implicates both causes of action might try to justify a private settlement by repudiating any desire to assume the burden of a fiduciary.\footnote{210} As the proposed intervenors argued,

\footnotesize{\begin{itemize}
  \item \footnote{203.} \textit{Id.} If the court perceived News to be a corporate raider, its decision allowing the private settlement seems logical because News would be in a position to suffer a "special" injury. If, however, the court perceived News only as an aggrieved shareholder, then its decision is seriously flawed.
  \item \footnote{204.} \textit{Id.} at 1079-80.
  \item \footnote{205.} \textit{Id.} at 1078 (citing \textit{Elder}, 34 Del. Ch. at 100, 100 A.2d at 223; \textit{Moran}, 490 A.2d at 1069-70).
  \item \footnote{206.} \textit{Id.} ("To determine whether a complaint states a derivative or an individual cause of action, we must look to the nature of the wrongs alleged in the body of the complaint, not to the plaintiff's designation or stated intention." \textit{Id.}).
  \item \footnote{207.} \textit{Id.} at 1079-80. The court placed weight on the fact that News made no effort to comply with the demand requirement of Chancery Rule 23.1.
  \item \footnote{208.} See supra note 195 and accompanying text (noting that this concern was voiced by Justice Moore in his concurring opinion).
  \item \footnote{209.} Chancery Rule 23.1's requirement of shareholder notice and court approval of a compromise or dismissal of derivative litigation is bottomed in the equitable principle that when one undertakes to act for another he must act for that other person's benefit and cannot personally profit at the expense of the beneficiary. Thus, Chancery Rule 23.1 is designed to protect the corporation and its shareholders against the private settlement of representative litigation. See \textit{Wied v. Valhi, Inc.}, 466 A.2d 9 (Del. 1983), \textit{cert. denied}, 465 U.S. 1026 (1984). \textit{Acord Chickering v. Giles}, 270 A.2d 375 (Del. Ch. 1970); \textit{Jaeger v. Muscat}, 221 A.2d 607 (Del. Ch. 1966).
  \item \footnote{210.} According to the court, "A shareholder whose complaint arguably asserts both derivative and individual claims but who eschews any effort to proceed derivatively should be permitted to resolve his individual claim . . . ." \textit{Lipton}, 514 A.2d at 1080.
\end{itemize}}
this is a "classic example of the fox guarding the chicken coop."

Despite the court's conclusion, it is not clear whether News actually intended to sue in its individual capacity. Although the court relied in part on News' intentional noncompliance with Chancery Rule 23.1, this noncompliance should not have been relevant because it merely begs the question presented. Moreover, the evidence seemingly suggests an opposite determination. In addition to the complaint itself, Murdoch's public statements certainly had a derivative tone, as well as the probable effect of leading Warner shareholders to the belief that News was "championing the rights of all [Warner] stockholders." The court's characterization of these statements, and other evidence, as merely public relations tactics is ill advised because it serves to discourage truthful external corporate communication. If a shareholder implicitly notifies other shareholders that he is pressing litigation on their behalf, he should not, under fiduciary principles, be permitted to turn around and terminate the litigation upon receiving a handsome profit in a private settlement. As Justice Moore opined, equity and fairness dictate otherwise.

While not expressly stating it, the court placed great emphasis on the fact that the only claims dismissed with prejudice were individual and not derivative claims. Furthermore, the court justified its decision by noting that not only will the derivative claims survive, but that Warner and News represented that News would remain

211. *Intervenors' Brief, supra* note 123, at 4.
212. *Lipton*, 514 A.2d at 1079-80.
213. News' noncompliance was the basis for the action brought by the Proposed Intervenors. To rely on News' noncompliance does not answer the question of whether News was bound to comply because it privately settled derivative claims.
214. See generally *Id.* at 1081 (Moore, J., concurring).
215. *Id.* at 1080 (court's endorsement of lower court's characterization).
216. As the United States Supreme Court stated:
[A] stockholder who brings suit on a cause of action derived from the corporation assumes a position, not technically as a trustee perhaps, but one of a fiduciary character. He sues, not for himself alone, but as a representative of a class comprising all who are similarly situated. The interests of all in the redress of the wrongs are taken into his hands, dependent upon his diligence, wisdom and integrity. And while the stockholders have chosen the corporate director or manager, they have no such election as to a plaintiff who steps forward to represent them. He is a self-chosen representative and a volunteer champion.

217. See *Lipton*, 514 A.2d at 1085 (Moore, J., concurring).
218. See *Id.* at 1080.
subject to the trial court's jurisdiction for future litigation.\textsuperscript{219} Although there is a certain amount of pragmatism in the court's decision, the fact that the only claims dismissed were individual and that the trial court would retain jurisdiction should not be weighted so heavily in deciding whether to allow a private settlement where a complaint has derivative implications.

Many of the potential shortcomings in the majority's opinion were discussed by Justice Moore in his concurrence. He correctly noted that the majority opinion may be interpreted as sanctioning one rule for the large shareholder and another for the small shareholder.\textsuperscript{220} He warned, "Future reliance on this case as creating that sort of distinction, thus opening the door to collusive settlements, would be ill-advised . . . ."\textsuperscript{221}

Justice Moore's reluctance to permit News to privately settle was appropriate in light of the evidence suggesting that Murdoch was conducting a public campaign on behalf of all Warner shareholders.\textsuperscript{222} Although Murdoch's actions may have been legal, Justice Moore relied upon equitable principles in opining that a plaintiff should not be permitted to mislead his fellow shareholders.\textsuperscript{223} In justifying his resort to the principles of equity and fairness, Justice Moore cited the oft-quoted statement that "inequitable action does not become permissible simply because it is legally possible."\textsuperscript{224}

Although Justice Moore stated that he was not criticizing the majority,\textsuperscript{225} his concurrence did not use any of the majority opinion's logic or rationale. In fact, but for the pending actions in the court of chancery, Justice Moore probably would have dissented. It was only the practical result which persuaded him to concur. This is aptly illustrated by his statement that "[c]ertainly in the past the Court of Chancery has been loath to permit private settlements between litigants in actions having representative overtones."\textsuperscript{226}

Of the two opinions, Justice Moore's is the more persuasive because it acknowledges the inequities in permitting a plaintiff to

\begin{itemize}
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 1081.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. ("The public statements of [Murdoch], clearly conveyed the message that [News] was bringing this action to vindicate the rights of all Warner shareholders, and to protect Warner as a corporate entity.").
\item \textsuperscript{223} Id. at 1085 (Moore, J., concurring).
\item \textsuperscript{224} Lipton, 514 A.2d at 1085 (quoting Chris-Craft Indus., 285 A.2d at 439).
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\end{itemize}
settle an action for personal profit where derivative claims are either pleaded or implicated. Although Justice Moore did concur in the judgment, thus finding that News prosecuted only individual claims, he is at least on record as opposing this type of potentially deceptive litigation technique.

VI. Conclusion

Distinguishing individual from derivative actions in the context of actual or perceived corporate control battles is not an easy task. Many factors can affect the courts' characterization including the position of the plaintiff vis-à-vis the corporation as well as the duty which is alleged to have been breached. Furthermore, as *Lipton* illustrates, a plaintiff's complaint can implicate both causes of action, leaving the court to decide the nebulous question of which action the plaintiff actually intended to prosecute.

This comment has suggested that application of Delaware's "special injury" test has produced arguably inconsistent results. Furthermore, while the courts may have reached the correct results, their rationales are flawed in that contractual relationships were found where none actually existed. Moreover, plaintiffs in seemingly similar positions are inconsistently allowed to pursue individual actions.

These inconsistencies were highlighted by the Delaware Supreme Court's decision in *Lipton*. The *Lipton* court was presented with the unenviable task of deciding whether a corporate raider intended to pursue his individual or his derivative claims. This comment suggests that the *Lipton* court's conclusions and justifications were inconsistent with previous Delaware decisions. In addition, the decision may have inadvertently established precedent which could eventually lead to a compromising of the protection to stockholders afforded by Chancery Rule 23.1.

It is hoped that future litigants will pay heed to the warnings issued by Justice Moore. Delaware should not be on record as permitting a plaintiff to mislead fellow shareholders by assuming a derivative public posture while at the same time entering into a private greenmail settlement for personal profit. As Justice Moore observed, this policy has dangerous implications for the future of Delaware corporate law as it exists today.

*Jonathan Shub*