"LIPSTICK ON A PIG": SPECIFIC PERFORMANCE CLAUSES IN ACTION

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The black letter law in the U.S. is that money damages are the preferred remedy for contract breach and that specific performance is reserved for extraordinary circumstances. Contract theory tells us that default rules generally reflect what a majority of contracting parties would agree to had they considered the matter. But do contracting parties agree with the law's preference for money damages over specific performance? In a dataset of more than 1,000 M&A contracts, we find that in over 80% of transactions, parties choose specific performance as their preferred remedy. Using interviews with senior M&A lawyers, we seek to unpack the reasons why parties are contracting around the law's distaste for specific performance and the default rule of money damages.

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INTRODUCTION

The common wisdom surrounding specific performance in U.S. contract law is that it is disfavored.[1] Instead, the favored remedy for contract breach is money damages—specifically, expectation damages.[2] Specific performance is then an equitable remedy to be granted by courts only in exceptional circumstances where money damages are inadequate.[3]

Further, not only does the law disfavor specific performance as a remedy, but so did early versions of the theory of efficient breach.[4] The efficient breach argument is often the first explanation that casebooks and treatises give to first-year contracts students for why the specific performance remedy is generally disfavored.[5] But the efficiency theory stands on flimsy grounds.[6] The efficient breach model, under plausible assumptions about transaction costs, information asymmetries, strategic behavior, and rates of judicial error, does not actually predict that parties will clearly prefer money damages to specific performance in a wide variety of cases.[7] That, in turn, makes it harder to tell a neat theoretical story for why money damages are the default remedy—if parties would not (and in fact, do not) contract for money damages in the case of a breach, why would the law provide that as the default? Plus, the reality is that many foreign jurisdictions (civil law ones in particular) have specific

1. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 370 (3d ed. 2002) ("It is hornbook law that equity will not act if there is an adequate remedy at law."); E. ALLAN FARNSWORTH, CONTRACTS 737 (4th ed. 2004) ("[S]pecific performance should generally not be required, at least where compensation in damages is an adequate substitute for the injured party"); TRACEY E. GEORGE & RUSSELL KOROBKIN, A COMMON LAW APPROACH TO CONTRACTS 498 (2d ed. 2017) ("[T]he principle that damages are the standard remedy for contractual breach, and that injunctive relief is extraordinary, remains black letter contract law in this country to this day.").

2. GEORGE & KOROBKIN, *supra* note 1, at 481.

3. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 108 (5th ed. 2013) ("[S]pecific performance is an extraordinary remedy, not generally available to the promisee.").

4. For the classic justifications for the anti-specific performance default rule on efficiency grounds, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 88–89 (2d ed. 1977); Antony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 365 (1978).

5. *E.g.*, SCOTT & KRAUS, *supra* note 3, at 113; GEORGE & KOROBKIN, *supra* note 1, at 481; CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 988 (9th ed. 2019); NADELLE GROSSMAN & ERIC ZAKS, CONTRACTS IN CONTEXT: FROM TRANSACTIONS TO LITIGATION 689 (2019) ("Courts also favor monetary damages because it allows for efficient breaches.").

6. SCOTT & KRAUS, *supra* note 3, at 113–14; Daniel Markovitz & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939, 1944 (2011).

7. *See* Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975, 1013 (2005).

performance as the default remedy.[8] So despite the ubiquity of distaste for specific performance as a remedy in Anglo-American black letter law, the theoretical explanation for its disfavor is shaky.

Given that theory does not provide a justification for the default,[9] it seems logical to ask whether empirical evidence supports the default rule. Indeed, since the discussion is about whether the default rules are optimal for contracting parties, empirical evidence regarding the preferences of actual contracting parties should be relevant. This is so for two reasons. First, contracting parties—especially sophisticated commercial parties—are plausibly thought to pursue contract terms that maximize their joint welfare.[10] Second, because contract law is generally seen as trying to maximize the welfare of the parties, it presumably sets default rules that reflect what a majority of parties would have contracted for had they considered the matter.[11] This would seem to be particularly important where the default rule is "sticky"—where opting out not only requires bargaining over the contract term, but may also require that the party demonstrate the inadequacy of the default option to the court, as in the case of money damages.[12]

Despite the practical nature of the question of whether parties prefer the default rule, there is but a single article, by Ted Eisenberg and Geoffrey Miller from 2015, that examines whether contracting parties in fact choose money damages over specific performance across a range of contract types.[13] Using the Securities and Exchange Commission's (SEC) database of 8-K filings of material contracts relating to securities offerings, Eisenberg and Miller constructed a dataset made up of contracts entered into by sophisticated commercial parties (loan agreements, merger agreements and so on).[14] They do not find the dominance of money

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8. *See, e.g.*, Leon Yehuda Anidjar, Ori Katz & Eyal Zamir, *Enforced Performance in Common Law Versus Civil Law Systems: An Empirical Study of Legal Transformation*, 68 AM. J. COMPAR. L. 1, 1–2 (2020).

9. The "extraordinary" nature of specific performance is not a default in the traditional sense, but rather an artifact of the general disfavoring of equitable remedies in favor of remedies at law.

10. *See* Theodore Eisenberg & Geoffrey P. Miller, *Damages Versus Specific Performance: Lessons from Commercial Contracts*, 12 J. EMPIRICAL LEGAL STUD. 29, 32 (2015).

11. *E.g.*, Avery Katz, *Virtue Ethics and Efficient Breach*, 45 SUFFOLK U. L. REV. 777, 784–85 (2012) (explaining that expectation damages may be justified as a default rule on the ground that it provides the remedy that a majority of parties would contract for had they been forced to explicitly contract over the matter).

12. Since specific performance requires the use of the court's "equity power," opting out of the money damages default requires that the parties demonstrate to the court that the money damages (the remedy at law) would be inadequate. On the concept of "sticky" defaults, see Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523, 1566 (2016).

13. Eisenberg & Miller, *supra* note 10, at 32.

14. *Id.* at 30–31.

damages that one might expect based on the current state of the black letter law. Rather, they find considerable variation in what parties choose as a remedy. In some settings, such as loans, the preference is for money damages. But in others, such as merger and acquisition (M&A) transactions, the results are more ambiguous, with as many as 50% of the contracts showing an explicit preference for specific performance.[15] The question is, then, what is different about M&A agreements? More specifically, what is different about the roughly 50% of M&A agreements in which parties contracted around the default rule? Eisenberg and Miller's article thus served as an invitation to dig deeper into the M&A data.

One explanation for what distinguishes M&A agreements that include specific performance provisions from other contracts is that the damages in question—for example, the loss of the value that would have been created by the synergies between the two companies planning to merge—are hard for a court to estimate.[16] That is, it may be that some M&A transactions are so unique in terms of the special value they create that the value of the transaction is not readily ascertainable.[17] This conjecture supports the common law exception to the default rule of money damages, which provides for specific performance when the item being contracted for is so unusual that the monetary value for its loss cannot be calculated with adequate confidence.[18]

It is also possible, however, that the common law default is misplaced—at least if the goal is a majoritarian default rule. From this perspective, the Eisenberg and Miller findings might reveal that parties do not, in fact, generally prefer money damages to specific performance, not because the subject of the contract is in any sense unique, but because the default itself is inefficient and these sophisticated parties are willing to exert effort to contract around it.

15. *Id.* at 32.

16. *Id.* at 68–69; *see also* Matthew Cain, Antonio J. Macias & Steven Davidoff Solomon, *Broken Promises: The Role of Reputation in Private Equity Contracting and Strategic Default*, 40 J. CORP. L. 565, 573–74 (2015) (finding, in a sample of private equity M&A transactions, that over 90% of the contracts allowed for the specific performance remedy for the target).

17. Eisenberg & Miller, *supra* note 10, at 68–69. Along these lines is the exception in the common law for real property transactions, where specific performance is granted to buyers more readily than in other cases. *See* Hanoch Dagan & Michael Heller, *Specific Performance* 34 (Columbia L. Sch., Columbia Pub. L. Rsch. Paper No. 14-674, 2020), https://scholarship.law.columbia.edu/faculty_scholarship/2664 [https://perma.cc/R4TZ-CFCF]. Further, Douglas Laycock's research finds that courts have long been willing to grant injunctive relief in a broad array of transactions akin to an M&A transaction. *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 40 (1991) (reporting on grants in cases involving franchises, businesses, closely held stock, and controlling blocks of publicly held stock).

18. Eisenberg & Miller, *supra* note 10, at 36.

Curious to understand Eisenberg and Miller's findings in the M&A context, we decided to build on their study by collecting more data on M&A contracts. We collected data for a single type of contract—M&A agreements—for ten years (2010–19). We then went deeper into the data in two different ways. First, we go beyond coding for the presence or absence of a specific performance clause to code details on the underlying transactions, hoping that that might help us answer our core questions about whether, why, and how parties in this area are using specific performance clauses. Among these details are variables about the type of deal (e.g., whether the deal was strategic or financial and whether the consideration was all cash or included some rollover equity), the parties involved (e.g., one operating company acquiring another or a private equity firm acquiring an operating company), and the details of the actual contractual provision (e.g., what language did the parties use to attempt to bypass the law's explicit preference for money damages). Second, we conducted interviews with M&A lawyers who draft these contracts, asking about the why and how of contracting around the money damages default.

Our findings are as follows. The use of specific performance clauses in the type of M&A deals examined by Eisenberg and Miller (transactions involving a public company) has become ubiquitous. From the roughly 50% that they found in their examination of transactions in 2002, the percentage of contracts including specific performance provisions increased to between 85% and 95% for the 2010–19 period.[19]

As to the reasons for the rejection of the default, the M&A practitioner literature suggests a couple of possibilities. On the buyer side, the explanation has to do with synergies, that the increased value created by combining two companies is something that courts are unable to measure and compensate for.[20] On the seller side, we see another version of the synergy argument: that when sellers receive stock in the surviving or acquiring company as consideration for the sale, courts do not do an adequate job of measuring the damage to the seller from breach.[21] To better understand that synergy story, we cut the data in a variety of ways, such as by examining contracting for the specific performance remedy in contracts for synergy-based deals versus financial ones and in contracts for stock deals versus cash ones. But no matter how we did so, we found little variation in the levels of use of specific performance clauses across categories of contracts. The clause has become standard in this market.

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19. *Id.* at 52; *see infra* p. 367, Table 1.

20. Stephen L. Ascher & Andrew J. Lichtman, *Availability of Specific Performance to Jilted M&A Parties*, LAW360 (July 22, 2016, 12:07 PM), https://jenner.com/system/assets/publications/15424/original/Ascher%20Lichtman%20Law360%20July%202016.pdf?1469542237 [https://perma.cc/64NT-QRXE].

21. *Id.*

The two foregoing observations, that (a) there is a high rate of contracting for the specific performance remedy and (b) that it does not vary as a function of categories of transactions lead to another question: How do parties draft their contracts in order to bypass the preference in the black letter for the money damages remedy? To answer this question, we looked at the details of the contract clauses themselves but also drew from interviews with lawyers who draft and litigate these types of provisions. While acknowledging the black letter's preference for money damages, respondents explained that courts in jurisdictions like Delaware also have a strong interest in giving parties their preferred remedies.[22] Further, some lawyers explained that, in order to ensure that the court gave parties their preferred remedy, it was important to recite the correct formula—for example, the parties explicitly agree, ahead of time and in the contract, that "irreparable injury" would be caused if specific performance were not granted following a breach and there is no need for the posting of a bond.[23] Dressing up the provision in this way allows the court and the lawyers to square the divergent realities of party preference and black letter law by nodding at tradition. In response to our asking whether the black letter taught in the standard first-year contracts class was wrong, one senior lawyer explained:

> I would not say that it is wrong. The law does prefer money damages. [But one learns how to get around that. To be granted the remedy] [o]ne has to pay homage to history, perform the right rituals. It is like saying at the front of the contract that the parties acknowledge that there has been "full and adequate consideration." You are in the south, so you know the expression "putting lipstick on a pig."[24]

The Article proceeds as follows. Part II describes the data collection process. Part III reports findings from the quantitative data. Part IV reports on the qualitative data. Part V concludes.

Before proceeding, we note the inspiration for this Essay: the University of Wisconsin Law School tradition of legal realist contract scholarship.[25] That tradition is exemplified by the willingness to go into the field and find out both what real world contracting parties do and say about what they do. We hope that what follows lives up, in a small way, to the tradition of scholars at Wisconsin, like Stewart Macaulay, Bill

22. Interviews on file with author.

23. Interviews on file with author.

24. Interviews on file with author.

25. *See generally* Kenneth B. Davis, Jr., *Law In Action: A History*, WIS. L. SCH., https://media.law.wisc.edu/m/yjgxz/law_in_action_a_history_davis.pdf [https://perma.cc/LUN9-SCGD] (last visited Feb. 25, 2021).

Whitford, Marc Galanter, and scholars elsewhere who have worked in this tradition, such as Ted Eisenberg and Geoff Miller.

I. DATA DESCRIPTION

For quantitative data on M&A contracts, we utilized the "What's Market" database on Westlaw.[26] This database contains contracts filed with the SEC to comply with the requirement that public reporting companies disclose their entry into material definitive agreements to shareholders through filing of a Form 8-K report.[27] Eisenberg and Miller also used contracts filed with 8-Ks as a data source for the article whose insights we seek to build on.[28]

For each of the years between 2010 and 2019, we randomly collected fifty contracts from the public acquisitions database and fifty contracts from the private acquisitions database for a dataset of 1,000 deals. The public database contains data for purely public deals (transactions between two companies with securities traded on a public exchange) while the private database includes deals with at least one non-public party.[29] We note that the "private" acquisition database is not fully private—the documents are filed on form 8-K only because one of the parties to the transaction is required to file them as part of their obligation as a public company.[30] Data on purely private deals is difficult to obtain since parties do not make these contracts public.[31]

Eisenberg and Miller's study did not delve into the language of the specific performance provisions that they counted, but we noted in our data collection that some contracts include what might be considered strong provisions (where the contract says that the parties are "entitled to" specific performance) while others include a weaker provision (where the

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26. *See, e.g.*, M&A AGREEMENTS IN THE OIL AND GAS INDUSTRY, Westlaw, What's Market (database updated Dec. 2016); M&A AGREEMENTS IN THE AEROSPACE AND DEFENSE INDUSTRY, Westlaw, What's Market (database updated Dec. 2016).

27. *Form 8-K*, SEC, https://www.sec.gov/fast-answers/answersform8khtm.html [https://perma.cc/9SWS-XBMM] (last visited Feb. 25, 2021).

28. Eisenberg & Miller, *supra* note 10, at 30–31.

29. We note that acquisitions consummated by a certain class of public companies will not be in our data set—large, public companies that are serial acquirers. Because filing is only required for "material" transactions, corporations of a certain size (Facebook, for example) will rarely have to file, because very few acquisitions would meet the "materiality" threshold. *See* MATERIAL ADVERSE EFFECT (MAE), PRACTICAL LAW, Westlaw (2021).

30. *How to Read an 8-K*, SEC (Jan. 26, 2021), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/how-read-8 [https://perma.cc/8K9T-B2B5].

31. HAROLD BIRNBAUM, LEE HOCHBAUM, BRIAN WOLFE, & DANIEL BRASS, DAVIS, POLK & HARDWELL LLP, PRIVATE M&A: UNITED STATES 331 (2020), https://www.davispolk.com/sites/default/files/ma2020united_states.pdf [https://perma.cc/WE7L-Y8KA].

contract says that the parties are "entitled to seek" specific performance), which one might argue is not a true specific performance clause. While some interviewees suggested "entitled to seek" opens the door for more mischief in court,[32] we have not seen evidence that the two provisions are treated differently. Since both indicate an explicit consideration of the specific performance remedy in the negotiation and drafting process, we have counted both as specific performance clauses for our purposes. We also note that some contracts made specific performance available with conditions or limits as reported below in Table 1.[33] We consider both the general specific performance provisions and those that contain some limitations, conditions, or carveouts[34] as specific performance clauses unless otherwise noted.

32. Interviews on file with author.

33. In our data a few deals specified that specific performance was available to only one party. However, this was rare, and such provisions appeared in fewer than 10% of deals.

34. The following is an example of the conditions or carveouts on the availability of specific performance:

> (b) Notwithstanding the foregoing, it is acknowledged and agreed that the Company shall be entitled to seek specific performance of Parent's obligations pursuant to the terms of this Agreement to cause the Equity Financing to be funded to fund the Merger and to consummate the Merger only in the event that each of the following conditions has been satisfied: (i) Parent and Merger Sub are required to complete the Closing pursuant to Section 1.2, (ii) the Debt Financing has been funded or will be funded at the Closing if the Equity Financing is funded at the Closing, (iii) Parent and Merger Sub fail to complete the Closing in accordance with Section 1.2 and (iv) the Company has irrevocably confirmed that if specific performance is granted and the Equity Financing and Debt Financing are funded, and Parent and Merger Sub otherwise comply with their obligations hereunder, then the Closing will occur.

AGREEMENT AND PLAN OF MERGER AMONG PICASSO PARENT COMPANY, INC., PICASSO MERGER SUB, INC., AND BWAY HOLDING COMPANY, Section 8.7 (Mar. 28, 2010), Westlaw, What's Market.

Table 1. Use of Specific Performance Clauses Across Time

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**	**2018**	**2019**
No Specific Performance Clause	18%	13%	19%	13%	12%	7%	4%	2%	4%	12%
Specific Performance Clause with Conditions	29%	10%	14%	10%	18%	20%	16%	7%	16%	24%
General Specific Performance Clause	53%	77%	77%	77%	81%	74%	79%	91%	80%	64%

Given these surprising results, we decided that, rather than conjecturing about what the results meant, we should speak with the lawyers who were drafting these clauses. In total, we interviewed thirty senior M&A lawyers to collect qualitative data.[35] Interviews averaged about thirty minutes, with some going up to an hour and a half. We promised all interviewees that what they said was not for attribution. We also sent them a graph showing our basic findings on the extensive use of the specific performance remedy in the contracts in our dataset. To begin our conversation, we explained that we were interested in understanding the disjunction between what is taught in the typical law school contracts class (that specific performance is a disfavored remedy) and what we found in the contracts of both public and private M&A deals (where nearly 100% of the contracts ask for specific performance). From that point, we allowed our respondent to talk, interjecting periodically to get additional detail on two core questions: (1) why they were contracting for specific performance at such high rates and (2) whether they thought that the standard claims about specific performance as a disfavored damages remedy were plain wrong.

35. We define "senior" as a lawyer with more than six years of experience. Over 90% of our respondents, though, were partners at their firms with over ten years of experience. We initially tried to talk to a random set of the lawyers who were identified by name in the M&A contracts on What's Market. That strategy failed, in that none of them responded to our emails. We next turned to a random set of graduates of the Duke Law School in the M&A field and the authors of practitioner articles on the topic. Here we had success, in that everyone we contacted responded.

II. DATA ANALYSIS

As described above, our data collection shows that sophisticated parties do include specific performance as a remedy in the overwhelming majority of contracts. Below, we analyze this through both quantitative data (obtained through coding deals from Westlaw's What's Market database) and qualitative data (obtained through practitioner interviews).

A. Quantitative Data

Despite what generations of law students have learned in their first-year contracts class, we find that money damages are not always the parties' favored remedy for contract breaches. Our data reveals that across all M&A deals, regardless of whether the transacting parties are public or private, whether the transaction is anticipated to generate financial or strategic value, whether the consideration is cash or stock, which law firms represent the parties, or what law governs the contract, the percentage of M&A contracts that include a provision explicitly stating the parties' preference for specific performance in case of a breach was well over Eisenberg and Miller's 50%.[36]

Our initial question was whether parties have continued to contract around the damages default in a manner that is consistent with Eisenberg and Miller's findings. That is, we wanted to understand whether and at what rate parties are contracting for specific performance as the remedy for either the buyer, the seller, or both parties to the contract. We wanted to know whether those numbers had changed in more recent years and, if possible, why. If it did turn out that parties were contracting around the money damages default at high rates, that would suggest that the standard story taught in first-year contracts classes—that specific performance is an extraordinary remedy that is rarely granted—might no longer hold. After all, if a majority of players in this highly sophisticated area were choosing specific performance rather than money damages, that may bring into question the claims that parties preferred money damages and that specific performance was rarely granted.

We find that parties' selection of specific performance over the expectation damages default has become more pervasive than Eisenberg and Miller observed in their data from 2002. Figure 1 shows the occurrence of specific performance provisions in public and private M&A contracts in the years 2010–19, as well as, for reference purposes, our prediction based on Eisenberg and Miller's 2002 data. Eisenberg and Miller found that roughly 50% of the merger and acquisition contracts provided for a remedy of specific performance in data from 2002.[37] For

36. *See supra* p. 367, Table 1; Eisenberg & Miller, *supra* note 10, at 52 tbl.3.

37. Eisenberg & Miller, *supra* note 10, at 52 tbl.3.

the period 2010–19, for public and private deals combined, we find that percentage to be in the 85–95% range.

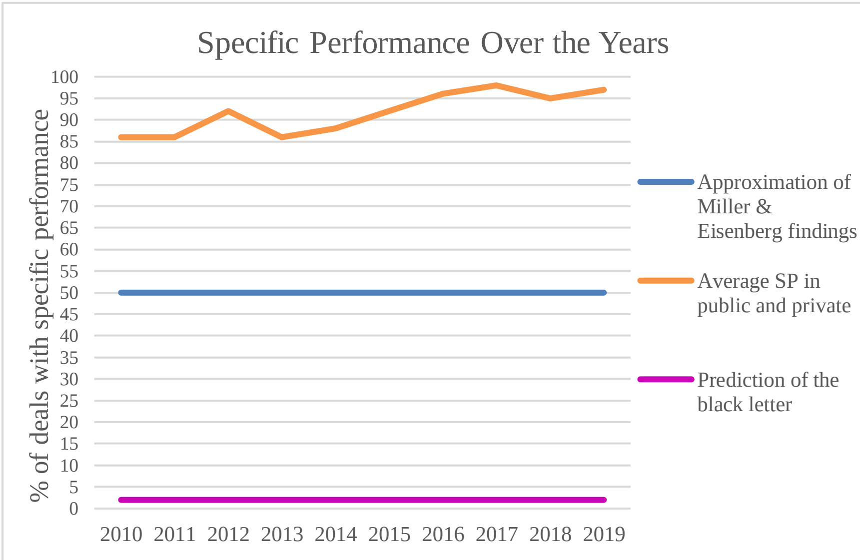

Figure 1. Rate of Contracting for Specific Performance (2010–19)

We found similar results when we separate out public and private deals. In Figure 2, we see that transactions involving one private party have a lower overall percentage than public transactions, but still higher than the Eisenberg and Miller result. The contracts for public M&A deals have included specific performance provisions at rates approaching 100% for the entire decade, and, over the same period, there has been an increase in the inclusion of specific performance provisions in contracts for private M&A deals. Yet, even at the beginning of the decade, three quarters of the private deals included specific performance as their explicit preferred remedy. It appears that specific performance had become the market standard in both the public and private M&A spaces by 2010 at least.

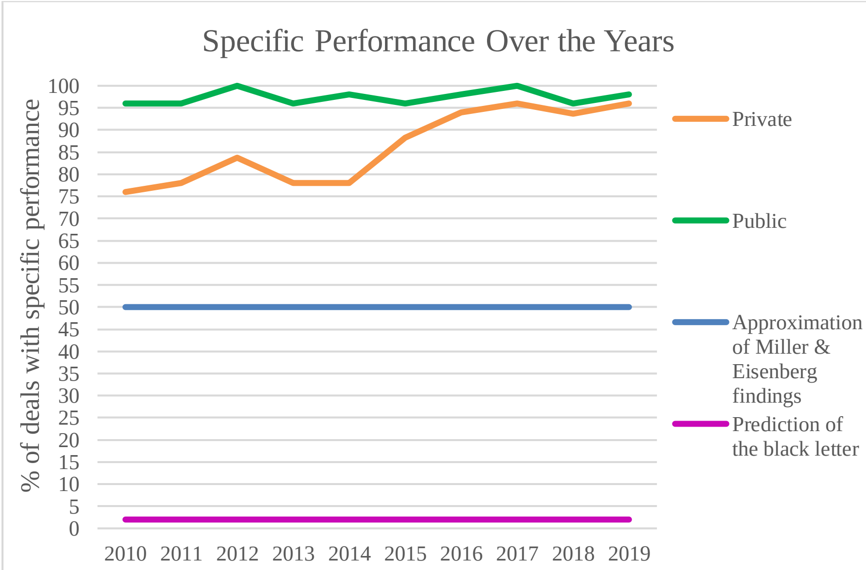

Figure 2: Specific Performance Provisions in Public Versus Private Transactions

The data reported in Figures 1 and 2 shows that the vast majority of M&A contracts—between 85% and 90% in every year—contract around the money damages default and specify specific performance as the preferred remedy.

As noted earlier, one might wonder whether the foregoing findings are consistent with the traditional doctrinal framework because M&A deals often involve synergies and the value of these synergies cannot easily be estimated by a court.[38] So, if Amazon is trying to buy Whole Foods, the argument might be that the synergies between Amazon's distribution network and Whole Foods' expensive specialty foods is so special that there is no easily ascertainable dollar amount that would compensate the parties for the failure of the deal. If all of the deals in which the parties are contracting for specific performance turn out to be synergistic, then an argument can be made that our findings are consistent with the standard doctrine.

There are a few ways to examine the foregoing theory using our data. First, one can separate the deals that are anticipated to generate synergies from those that are purely financial. Strategic transactions involve a purchaser identifying a target company whose acquisition provides

38. *See* Ascher & Lichtman, *supra* note 20 (making the synergy argument on the buyer side).

benefits to the purchaser's business that are not purely economic.[39] Strategic buyers are interested in how a target company fits into the buyer's long-term business plan.[40] Disney, for example, seeks to acquire Pixar precisely because of the potential for greatness that Disney and Pixar's businesses *combined* could have. This is in contrast to purely financial transactions, where a buyer is looking to add monetary value to its portfolio and generate a handsome return for its investors.[41] To a financial buyer looking to acquire Pixar, it would not matter whether Pixar makes movies or glass bottles, only that it generates large returns for the buyer and its investors.

Under the "synergies make an M&A deal unique" justification for the use of the specific performance clause, we might expect to see a contractual preference for specific performance in synergistic but not purely financial deals. It makes sense that sophisticated parties would opt for specific performance when the value of the deal comes from the unique combination of two businesses. The synergy of these two unique entities, as many of our respondents explained, is much like a contract to purchase a painting by an old master—an example sometimes given in first-year contracts classes as a situation where specific performance would be justified. The parties chose each other for a reason, and if the deal falls through, it will be impossible to replicate this match that would result in the anticipated synergies. This argument for specific performance based on uniqueness seems less plausible, though, in the context of purely financial transactions.

To test whether the use of the specific performance clause is largely concentrated in synergistic deals, we used the What's Market database's synergistic or financial categorizations. Separating deals based on this categorization, we discovered that the use of the clause is similar across synergistic and financial deals. Of our data, which included public and private transactions, 91% of strategic deals included specific performance clauses and 99% of financial deals included specific performance clauses.[42]

39. *See* Daniel Liberto, *Strategic Buyer*, INVESTOPEDIA, https://www.investopedia.com/terms/s/strategic-buyer.asp (Jan. 26, 2021).

40. *See id.*

41. *See* Alexandra Twin, *Financial Buyer*, INVESTOPEDIA (Aug. 30, 2019) https://www.investopedia.com/terms/f/financial-buyer.asp [https://perma.cc/R4HR-NP8V].

42. *See infra* Figure 3.

Figure 3. Specific Performance Clauses in Strategic versus Financial Transactions

To confirm this finding another way, we identified transactions in which a publicly traded business development company (BDC) had set up a shell corporation to buy a company that had been identified as undervalued. This is the quintessential picture of a purely financial transaction—an acquisition consummated simply for the purpose of adding an investment to the BDC's portfolio in order to generate a return for its investors. Here, the argument about unique synergies is weak at best. In the event of breach, one would expect the private equity fund to simply pocket a break-up fee (or an award of money damages) and move on to identifying a new opportunity for investment. However, in a subset of data on financial transactions done exclusively by the top fifteen private equity firms from a private acquisitions database,[43] 95% of the contracts included a specific performance provision.[44] That is, the rate of contracting for specific performance in private equity transactions is consistent with the use of the provision in other transactions in our data set, which seems inconsistent with the view that synergies are what drives use of the provision.

43. As ranked by Private Equity International. *PEI 300*, PRIV. EQUITY INT'L, https://www.privateequityinternational.com/database/#/pei-300 [https://perma.cc/P2WG-P4P3] (last visited Feb. 26, 2021).

44. *See infra* Figure 4.

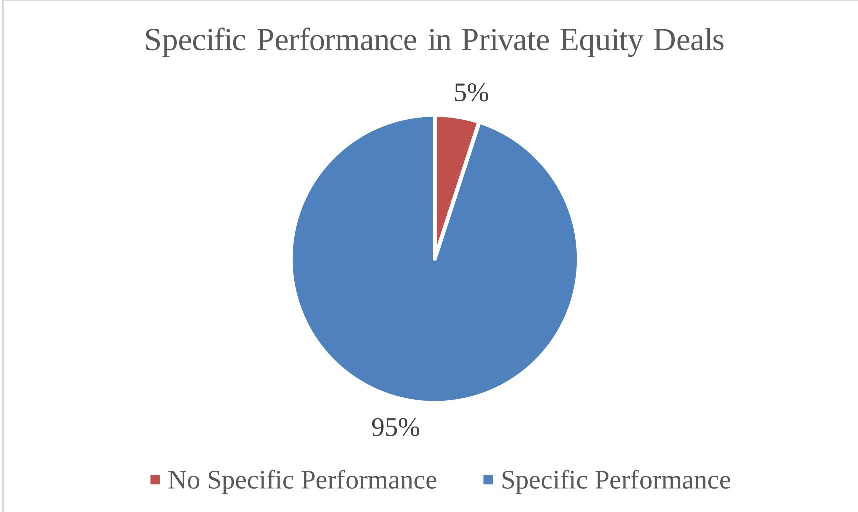

Figure 4. Specific Performance in Private Equity Firm Deals.

From the seller's perspective, it seems that the synergy theory would apply to an even narrower set of transactions. In transactions where the seller is receiving cash consideration, it seems implausible that money damages would be insufficient to compensate the seller regardless of the synergies that may result from the acquisition. In these cases, the seller is exiting the company and has agreed upon a price at which it is willing to do so. But, if the seller is receiving stock in the new company as consideration for the transaction, it too may benefit over the long term from the synergies created by the merger. Therefore, in stock-for-stock transactions, the way to solve the inadequate damages problem may be to explicitly contract for the specific performance remedy.[45] To examine this question, we separated out transactions with at least some stock consideration from those with all cash consideration. We should see explicit contracting for specific performance in the former and not in the latter. After all, in the latter, the sellers contracted for cash, which should make the determination of appropriate money damages relatively simple to calculate. However, we find high incidence of specific performance provisions, regardless of the type of consideration to be paid to the seller.[46] In fact, we find almost the exact same incidence of specific performance

45. *See* Jordan A. Goldstein, *The Efficiency of Specific Performance in Stock-for-Stock Mergers*, 29 DEL. J. CORP. L. 747, 758–59, 770–71 (2004); Asher & Lichtman, *supra* note 20.

46. *See infra* Figure 5.

in these two categories.[47] Consideration simply does not bear on whether or not parties' contract for specific performance.[48]

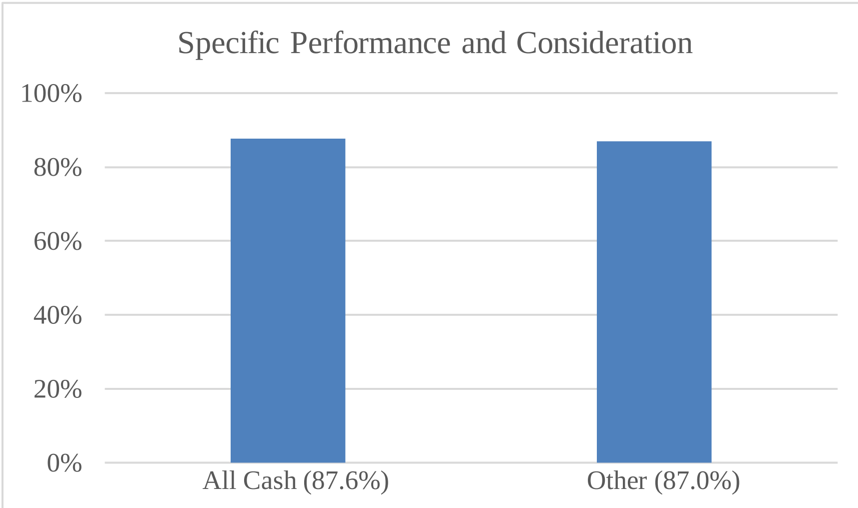

Figure 5. Specific Performance in All-Cash Transactions.

Given the high use of the specific performance provision even in transactions where the synergies argument (and the uniqueness doctrine) does not clearly apply, one might wonder how parties actually contract around the default rule.

To reconcile the parties' preference for specific performance with the law's preference for money damages, parties include various recitals in their specific performance clauses, essentially agreeing in advance that the elements of specific performance have been met and waiving the argument that monetary damages are the most appropriate. In a typical specific performance provision, the parties agree that "irreparable damage would

47. *See infra* Figure 5.

48. Another argument we have found in the practitioner literature for why the target company in a merger transaction should negotiate for specific performance as a remedy is that courts sometimes will not give a jilted target company's shareholders an adequate remedy on the grounds that the shareholders are not intended to be third party beneficiaries of the merger agreement. Therefore, some practitioners argue that specific performance is the best way to ensure adequate relief for selling shareholders. *See* Jaculin Aaron & Alan Goudiss, *The Challenges for Sellers in Obtaining Effective Remedies in M&A Transactions*, BNA BLOOMBERG MERGERS AND ACQUISITIONS L. REP., 2–3 (2012). But others propose a more direct solution—making explicit in merger agreements that the target company does have a right to pursue claims for damages on behalf of its shareholders if the acquirer fails to consummate the merger. *See* Kevin Miller, *The ConEd Decision – One Year Later: Significant Implications for Public Company Mergers Appear Largely Ignored*, 10 M&A LAW. 1, 4–5 (2006).

occur in the event that any of the provisions of [the] Agreement were not performed in accordance with their specific terms or were otherwise breached, and that monetary damages, even if available, would not be an adequate remedy" and agree not to "oppose the granting of an injunction, specific performance or other equitable relief on the basis that any other party hereto has an adequate remedy at law or that any award of specific performance is not an appropriate remedy for any reason at law or in equity."[49] In fact, 93% of deals that contained a specific performance clause specify that a breach would cause "irreparable harm," and 55% include a promise not to challenge the granting of specific performance, usually specifying that specific performance cannot (or will not) be challenged on the grounds that an adequate remedy at law is available.

As Figure 6 demonstrates, the use of these recitals has increased in the last ten years. The overall number of recitals in specific performance clauses has increased over time. Given its centrality in the conception of specific performance, we would have expected recitals on the "uniqueness" of the deal to have been ubiquitous. However, while a small percentage of deals included "uniqueness" language, much more common was the stipulation to irreparable harm, which seems to be growing increasingly standard. While 81% of deals contained agreements about irreparable harm in the case of breach in 2010, 90% of deals contained such statements in 2019. From both our interviews and the data, it seems that a "standard" form specific performance clause has not yet gained prominence. These clauses mostly contain the usual elements of stipulations of irreparable harm and promises not to challenge, along with a waiver of the requirement to post a bond, but there has not yet emerged a single common phrasing or set of phrasings to accomplish this. It is possible that the complexity of the clause has grown as it has been included in more contracts and as lawyers have had a chance to add their own flourishes. But the variations in the specific language used for these common elements, in addition to the growth over time in the use of these "magic words," suggest that these clauses are still bargained over between sophisticated parties even as their inclusion has become "market standard."[50]

49. AGREEMENT AND PLAN OF MERGER, GOLDMAN SACHS BDC, INC., EVERGREEN MERGER SUB, INC., GOLDMAN SACHS MIDDLE MARKET LENDING CORP., AND GOLDMAN SACHS ASSET MANAGEMENT, L.P., Section 11.8 (Dec. 9, 2019), Westlaw, What's Market.

50. Based on our interviews, law firm memos, and articles, it seems that while the inclusion of specific performance clauses has become standard, the content of the clauses is still being adjusted as the behavior of parties and courts reveals new weaknesses. Interviews on file with author.

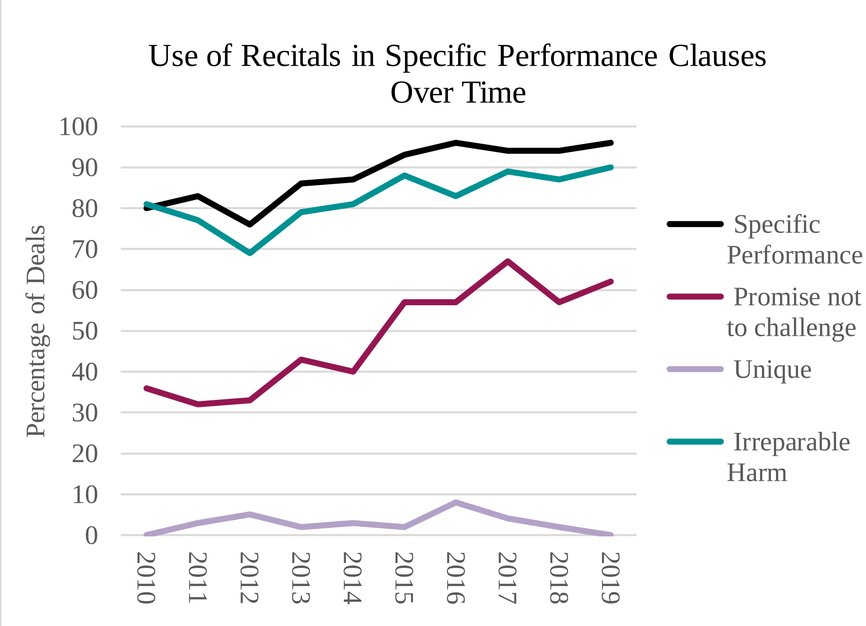

Figure 6. Recitals in the Specific Performance Provision Over Time

The language of these provisions suggests an anticipation by the parties and their lawyers that courts, before simply granting the parties the remedy they asked for, will run through the elements of the black letter rule on specific performance. We would have expected that the rate of use of these recitals would diminish over time, as the use of the clause became more standard and parties became more confident that courts will respect their choice of specific performance as a remedy. But, as shown in Figure 6, that is not the case. This may suggest that parties want to give judges a doctrinal hook with which to rule in their favor, especially as they are asking for an equitable remedy.

It is worth noting that not all jurisdictions are equal when it comes to courts' willingness to enforce specific performance provisions.[51] Federal courts in particular appear resistant to the parties' foray onto the judge's turf in determining remedies.[52] New York courts will often accept the will

51. *See, e.g.*, Daniel E. Wolf & Matthew Solum, *Delaware vs. New York Governing Law — Six of One, Half Dozen of Other?*, M&A UPDATE (Kirkland & Ellis), Dec. 17, 2013, at 1, 2.

52. *See* Stephen J. Shapiro & Aaron J. Fickes, *Contracting for Irreparable Harm May Not Be as Effective as You Think*, *in* 11 BUREAU NAT'L AFFS., CORP. ACCOUNTABILITY REP. 149 (2013); *see also Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1265 (10th Cir. 2004) ("Were we to affirm the district court's finding on irreparable harm, we would in essence be ruling that whenever a party enters into a contract containing some form of exclusivity provision, injunctive relief is automatic upon breach of the clause even when the breaching party has refuted every assertion of specific

of the parties on specific performance but maintain the independence of the judges to look outside the language to ensure that the irreparable harm and insufficiency of money damages are actually present.[53] Delaware judges, by contrast, have signaled that they are inclined to defer to the preferences of the parties over the black letter presumption.[54]

Given that the choice of governing law is dictated by many factors, we would not necessarily expect the parties' desire for specific performance as a remedy to drive the selection of governing law. But one might expect, given the differing treatment of specific performance across jurisdictions, that parties would be more likely to select specific performance when under Delaware's more favorable law than when the contract is governed by the law of another jurisdiction. However, the norm of specific performance is still strong outside the safe waters of Delaware.[55] While 96% of the Delaware-governed contracts include specific performance provisions, 89% of New York-governed contracts do, as do 70% of those governed by a law other than New York or Delaware. Contracting for specific performance has become ubiquitous and is the industry standard even where it is unclear whether the provision would be enforced by a court.

Sophisticated parties in M&A transactions are contracting for specific performance under a variety of jurisdictions and despite the contradiction with black letter law.[56] In fact, the specific performance clauses that these parties use are growing in sophistication. Perhaps as a reflection of the widening gulf between the black letter law on specific

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irreparable harm put forth by the opposing party. We are not willing to go that far."); *Riverside Publ'g Co. v. Mercer Publ'g LLC*, No. C11-1249RAJ, 2011 WL 3420421, at *8 (W.D. Wash. Aug. 4, 2011) (determining that specific performance was not warranted despite the presence of an irreparable harm clause in the contract's specific performance provision).

53. *See* Ascher & Lichtman, *supra* note 20 ("[U]nlike the Delaware Chancery Court, New York courts generally are skeptical of requests for preliminary injunctions in business disputes, except when the plaintiff makes a strong argument that the failure to grant relief quickly will cause irreparable harm."). The growing importance of specific performance in the M&A world was catalyzed by the Second Circuit decision in *Consolidated Edison v. Northeast Utilities* (*ConEd IV*), in which the court held that a jilted target could not recover anything more than deal costs because any further damages were damages to the shareholders, not the company, and the shareholders were third-party beneficiaries who could not sue under the contract. 426 F.3d 524, 530–31 (2d Cir. 2005). This decision sparked the inclusion of the much debated "ConEd provision" but also placed increased attention on specific performance as a remedy. *See, e.g.*, Miller, *supra* note 48.

54. *See, e.g.*, Shapiro & Fickes, *supra* note 52 (discussing the position of Delaware).

55. As could be expected for complex M&A transactions the majority, 69%, of the deals we saw chose Delaware as their governing law. Thirteen percent chose New York law and 18% chose a law other than New York or Delaware to govern their deal.

56. *See* GEORGE & KOROBKIN, *supra* note 1, at 498 (specifying that damages remain black letter law in U.S. courts).

performance and the real world, parties often and increasingly use language in their specific performance clauses that pays tribute to the traditional rule on the availability of specific performance, allowing a judge faced with applying an ancient common law doctrine to a modern business contract to check doctrinal boxes by using the language conveniently included in the contract.[57]

B. Interviews

We next turned to M&A practitioners to help shed light on what is causing this particular market to be in near-absolute consensus over a preference for the supposedly disfavored specific performance remedy. Our thirty interviews all began in a similar fashion. We told our respondents the basics of what we had found in our data analysis. We then explained that we were curious about the disjunction between the narrative from the typical contracts casebooks about specific performance and the data about the use of specific performance in M&A contracts. Contracts casebooks indicate that specific performance is an extraordinary remedy that judges grant rarely, and as a matter of discretion, only in situations where money cannot adequately compensate the injured party following a contract breach.[58] But the use of an explicit specific performance provision in over 90% of the contracts (as of the final years in our data) did not seem to us to qualify as particularly "extraordinary."

Below, we report the basics of what we gleaned from hours of interviews. We make no claim that what we report represents the objective truth about what is driving the use of specific performance provisions. However, we think it informative to hear how the actors who draft and litigate over M&A contracts talk about them.[59]

1. SYNERGIES

The most common response we received to our initial question was that M&A transactions involve synergies—they are unique combinations of assets and people, where the failure to consummate cannot be compensated for by money damages. We pushed back, pointing to our analyses described above, including the fact that we see specific performance provisions used at high rates in deals categorized as financial (rather than synergistic), in acquisitions by private equity firms, and in transactions where the seller is receiving all cash consideration.

57. *See supra* p. 367, Table 1.

58. *E.g.*, E. ALLAN FARNSWORTH, CAROL SANGER, NEIL B. COHEN, RICHARD R.W. BROOKS & LARRY T. GARVIN, CONTRACTS: CASES AND MATERIALS 14 (8th ed. 2013).

59. Interviews on file with author.

Our respondents pushed back in turn, explaining to us that M&A transactions, even financial ones, are not like the widget transactions that law professors talk about; money damages, they explained, might suffice when there is a market for the product, but that is not the case with the sale of a company. When we noted that reasonably good estimates of the monetary value of the damage were likely available—including in some of the contracts themselves in the form of break-up fees—interviewees (while not conceding the point) generally pivoted in other directions, described below.

2. "Courts Are Not Comfortable Giving the Damages We Want"

A frequent secondary explanation we heard was that courts are uncomfortable awarding the kinds of big damage amounts (often hundreds of millions of dollars) that jilted parties would typically ask for as damages in a busted M&A deal. In part, our respondents explained, this was because courts are traditionally reluctant to grant speculative damages. Given that speculative damages are the major portion of the damages in most failed M&A transactions—in terms of loss of reputation to the seller and loss of synergistic value to the buyer—specific performance was the best remedy possible. Doctrinally, this argument is different from claiming that courts are not *able* to estimate this value, but to the parties, the unwillingness to grant an appropriate damages number may feel like the same thing.

3. What About Those Termination Fees?

Following the foregoing explanations about how synergies make an M&A deal unique (unlike deals for widgets) and have a value that is impossible to estimate, and how courts were either unwilling or unable to grant appropriately high money damages awards, our next question was generally about the fact that many contracts explicitly specify termination fees. Those, to our reading, looked to be estimates of damages if the deal is not completed. If the parties could estimate how much each side should pay the other for causing a breakup in at least a subset of these cases, how could the claim be made that the only appropriate remedy was specific performance?

We received a few different responses here. One being that it was just a contracting mistake to have both explicit termination fees and claims that there would be irreparable injury if specific performance were not granted in the same contract. More often, we heard that those termination fees (particularly on the buyer side) were focused on situations where the buyer was unable to close the deal because of legitimate failures to get regulatory approvals or a failure of financing to come through despite best efforts. In other words, these termination fees were not liquidated damages provisions and it was an error to talk about them in those terms. They explained further that, in such cases, the buyer walking away did not negatively impact the seller's market for other potential buyers. Hence, a small and fixed termination fee made sense. However, when the buyer was fully able to complete the deal and just did not want to, that was a different case. In such cases of "willful" breach, specific performance or bigger damages were appropriate. No seller, we were told on multiple occasions, wants the buyer to perceive itself to be in possession of an option where it can either complete the transaction or pay a fee and walk away.

4. JILTED TARGETS

We were surprised that a number of our respondents indicated that the inclusion of a specific performance provision was often driven by the seller. We heard repeatedly that sellers fear "being left at the altar" by acquirers because, in the aftermath, they may be seen as "damaged goods" in a subsequent attempt at sale. Several respondents also indicated that the current "seller's market" in the world of private equity increased the bargaining power of desirable targets such that they were able to insist on the inclusion of specific performance provisions. This contradicted what we expected based on either a synergy or a valuation explanation for specific performance in these deals, in that both rely on the unique (and likely speculative) value that the *buyer* is receiving. Buyers generally have the best arguments for "uniqueness" and for lack of a market to value their losses should the deal fall apart. If, as our interviews indicate, it is actually sellers that push for specific performance, this may show that firms value specific performance for reasons outside the common law framework that governs its availability.

5. "DELAWARE IS DIFFERENT"

Last but not least, almost all our respondents noted that "Delaware is different." The majority of M&A contracts are governed by the law of Delaware.[60] Respondents explained that Delaware judges have traditionally been more responsive to the needs of parties in M&A deals than any other jurisdiction is to contractual parties because these corporate transactions provide Delaware with an important source of income and employment. More than two decades ago, starting with *In re IBP, Inc. Shareholders Litigation*[61] in 2001, the Delaware judiciary, according to many of our respondents, began to signal that it was willing to grant the

60. *See* Kyle Chen, Harold S. Haller, Juliet P. Kostritsky & Wojbor A. Woyczynski, *Empirical Study Redux on Choice of Law and Forum in M&A: The Data and its Limits*, J. BUS. & SEC. L., Fall 2015, at 44.

61. 789 A.2d 14 (Del. Ch. 2001).

remedy of specific performance, particularly if it was clear that that was what parties wanted at the outset.[62] In particular, respondents pointed to one judge—Judge Leo Strine—making public appearances at annual meetings of M&A lawyers where he made it clear that the Delaware judiciary was taking a more expansive perspective on the specific performance remedy.[63] That "expansive perspective" was the view that sophisticated parties who know what they are getting into should get what they contract for in the absence of externalities. Still, this observation about the Delaware courts does not explain why parties prefer specific performance over money damages, but it could nevertheless account for the increase in specific performance provisions over time in the M&A world. Parties who can count on their selection of a remedy being respected by the courts may be more likely to include the provision, if that is indeed their preferred provision.

CONCLUSION

At the end of the day, the most consistent explanation we received for why parties wanted specific performance as a remedy was that they did not think that judges would give them the appropriate amount of money damages their bargain demanded. It was not that they preferred the remedy of specific performance to money; it was that the former remedy gave them a better chance of negotiating to their desired amount of money. And, in Delaware, participants felt comfortable predicting that, so long as they drafted their contracts with the right magic incantations, they would be granted what they wanted. So that is what they did. Intriguingly, that practice of drafting for specific performance has spilled over into M&A contracts governed by the laws of other jurisdictions like New York as well.[64]

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62. *Id.* at 82–84 (explaining the propriety of specific performance).

63. The appearances that our respondents referred to were from conferences at Northwestern University in 2008, 2009, and 2010. *See, e.g.*, Ameet Sachdev, *Broken Merger Contracts Consuming Lawyers' Time*, CHI. TRIB., May 6, 2008 (§ 3), at 3 ("[Judge] Leo Strine Jr. . . . put it more bluntly: 'If you're the seller, the specific performance remedy is really the only way you can deliver the benefit of the bargain.'"). Judge Strine indicated his views on this matter as early as 2001. *See In re IBP, Inc. Shareholders Litigation*, 789 A.2d at 21, 84. Best we are aware, only one contracts casebook uses Judge Strine's opinion in the *IBP* case where, to our reading, he signals that Delaware will liberally grant the remedy of specific performance if it is contracted for. *See* ROBERT S. SUMMERS, ROBERT A. HILLMAN & DAVID A. HOFFMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 412–16 (8th ed. 2020).

64. In our data, 89% of contracts under New York law chose specific performance. *See supra* notes 51–54 and accompanying text. Intriguingly, this phenomenon also appears to be occurring in Canada. *See* Sara Josselyn, *ABA 2015 Canadian Public Target M&A Deal Points Study – Key Takeaways (Part 2)*, DEAL L. WIRE (Feb. 4, 2016), https://web.archive.org/web/20160811103251/https://www.deallawwire.com/2016/02/04/

The question, then, is what do our findings say about the current default rule? At least in the M&A field, it appears to have gotten unstuck. The cause for this appears to be a combination of the fact that the M&A bar is closely knit, regularly produces materials about common and best practices for members, and is in regular conversation with judges who have a deep understanding of their industry.[65] More generally, what we find in the M&A context seems to connect to Alan Schwartz and Robert Scott's critique of the "default rule project"—the failure of attempts by law reformers via the UCC, the Restatement, and other similar endeavors to come up with transcontextual default rules that will stand the test of time.[66] At least in this case, the common law of contracts, as it has come out of Delaware, may have done a better job of moving toward optimality than the law reform projects such as the UCC and the Restatements.

Ours is but a short symposium message, with preliminary data. Hence, we have a number of thoughts regarding directions further research might take.

There is something of a disjunction between the "folk" understanding of specific performance rule that is often used in 1L contracts classes ("uniqueness") and its actual application in the courts.[67] An analysis of the caselaw might reveal that testing "uniqueness" has applied mainly to sales of *goods* and that the general test is just the inadequacy of damages—which can be influenced by, but isn't dictated by, whether the subject matter of the contract is "unique."[68] A question that Tess Wilkinson-Ryan and Dave Hoffman raise is whether the folk understanding of specific performance being a rarely granted remedy sometimes misleads lawyers into failing to ask for it.[69]

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aba-2015-canadian-public-target-ma-deal-points-study-key-takeaways-part-2 [https://perma.cc/QK89-35HK] (reporting on the variations in specific performance clauses in Canadian M&A contracts).

65. *See, e.g.*, Michael J. de la Merced, *Delaware's Chief Justice Speaks Out on Big Mergers and Investors*, N.Y. TIMES, (Mar. 17, 2016), https://www.nytimes.com/2016/03/18/business/dealbook/delawares-chief-justice-speaks-out-on-big-mergers-and-investors.html [https://perma.cc/NMQ7-B5SM].

66. *See* Schwartz & Scott, *supra* note 12, at 1585–87.

67. *See* Tess Wilkinson-Ryan & Dave Hoffman, *In re IBP Shareholders* Litigation, PROMISES, PROMISES, at 39:45–49:15 (Sept. 24, 2020), https://anchor.fm/tess-wilkinson-ryan/episodes/Promises-Promises-In-re-IBP-Shareholders-Litigation-ek4cla [https://perma.cc/HU2T-RD3P].

68. Judge Posner's analysis in *Walgreen Co. v. Sara Creek Prop. Co.* is an example of the kind of nuanced analysis at least one sophisticated thinker about contract damages considered. 966 F.2d 273, 275–76 (7th Cir. 1992). For Posner, the certainty of damages, the cost of computing them, the potential costs of error, and so on, all mattered. *See id.* Judges in other circuits have similarly awarded specific performance even when the product itself is not particularly unique. *See, e.g.*, *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33, 40 (8th Cir. 1975) (awarding specific performance in a contract for the sale of natural gas because the contract was for a long-term supplier that would be hard to replace).

69. *See* Hoffman & Wilkinson-Ryan, *supra* note 67, at 45:45–49:15.

Our data also raises the question of the how, why, and when M&A contract drafters began to contract around the anti-specific performance default.[70] Multiple respondents pointed to Judge Strine's 2001 opinion in *In re IBP* as having been a key factor in inducing the change, along with subsequent public discussions he had at M&A practitioner conferences.[71] We wonder, though, whether there are additional factors that influenced this deviation from the traditional default rule in M&A contracting, such as the close-knit nature of the M&A bar and high rate of litigation. And those factors perhaps result in many more conversations between transactional lawyers and litigators in this area than others where contract innovation tends to be slower.[72]

A handful of respondents cautioned that specific performance might *not* be the optimal default rule. Specifically, they suggested that the optimal damage provision on the target side may be an option where the target could choose between forcing specific performance and a termination fee.[73] But, they explained, lawyers were perhaps worried that

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70. Our data begins in 2010, by which time contracting for specific performance appears to have already become the norm in the M&A area, with over 80% of deals utilizing it. *See supra* Figure 1. The story of the how, why, and when of the evolutionary process between Judge Strine's opinion in 2001 and the beginning of our data in 2010, however, is missing. Given roughly 50% of M&A contracts were found to utilize specific performance clauses in 2002, there is the possibility that the evolution of this contract drafting practice may have begun even earlier. For a discussion of the availability of the specific performance remedy between 2001 and 2010, see, for example, Steven M. Davidoff, *Lessons from the Dow–Rohm Battle*, N.Y. TIMES (Mar. 10, 2009, 9:30 AM), https://dealbook.nytimes.com/2009/03/10/lessons-from-the-dow-rohm-battle/ [https://perma.cc/HF3C-JCMC].

71. Jonathan Moses, a partner at Wachtell, Lipton, Rosen & Katz, writes:

> One exception to this pattern [of Delaware disfavoring the grant of specific performance] was the seminal case of *In re IBP*, in which the Delaware Court of Chancery ordered Tyson, a leading chicken producer, to complete the acquisition of IBP, a major beef and pork producer. Vice Chancellor Strine, as he then was, rejected Tyson's argument that IBP had suffered a 'material adverse effect' – a major deterioration in IBP's business, as discussed below – that would, under the terms of the merger agreement, allow Tyson to avoid buying it. The court ruled that an award of specific performance, requiring the merger to take place, was preferable to an award of damages that could not be quantified easily.

Jonathan M. Moses, *Drafting M&A Contracts to Minimise the Risk of Disputes*, *in* THE GUIDE TO M&A ARBITRATION 87, 89–90 (Amy C. Kläsner ed., 2d ed. 2020), https://globalarbitrationreview.com/chapter/1213184/drafting-m-a-contracts-to-minimise-the-risk-of-disputes [https://perma.cc/PP8A-K8EQ]. *See, e.g.*, de la Merced, *supra* note 65.

72. For a discussion on these conversations, see Stephen J. Choi, Mitu Gulati & Robert E. Scott, Innovation Versus Encrustation: Agency Costs in Contract Reproduction, (July 18, 2020) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3653463.

73. For a discussion of specific performance versus an option for a termination fee, see Weil Gotshal, *Negotiating Specific Performance and Other Remedies in M&A Deals*, YOUTUBE (Oct. 17, 2014), https://www.youtube.com/watch?v=m4GYFsp5lio

specifying the termination fee amount in an option format would be viewed by some judges as a clear indication that money damages were adequate.[74]

[https://perma.cc/22GJ-EMDY] (showing a mock negotiation between two senior practitioners, Richard Climan and Keith Flaum).

74. Incidentally this concern, in itself, shows the transitional status of contracting for specific performance. Drafters are simultaneously confident enough to specify a specific performance remedy and insecure enough to be reluctant to give the court pause as to whether the traditional element of "inadequacy of remedy at law" has truly been met. Greater confidence in the court's deference to party preference of remedies might give parties the assurance needed to contract for a monetary/specific performance option. But it seems parties have not yet reached this level of security as to the availability of equitable remedies.