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The most fundamental and perplexing question in all of corporate law is how to ensure that the board of directors and corporate officers faithfully serve the interests of the corporation and its owners, the shareholders. A primary means of answering that challenge has been the implication and enforcement of directors' and officers' fiduciary duties to the corporation by means of the shareholder derivative action.

Almost from its inception, however, the derivative suit has been subject to jaundiced treatment by companies, legislatures, and courts. The result is a costly, tortured derivative suit process unrelated to the merits of the underlying claims or any potential remediation. Simply put, the state of the derivative suit process today reflects both bad corporate governance and inefficient public policy.

This Article proposes a transformation of how derivative litigation is handled in the United States today. A recommended federal status posits three fundamental reforms to the derivative claim process.

The first reform is a universal demand requirement to recognize board autonomy and provide a means for alternative dispute resolution of corporate claims. The second reform is an expansion of the conception of the special litigation committee. This reform would allow the subject board of directors to name a committee composed of independent persons, not current directors, to

investigate the derivative claim and determine how it should be resolved. In this manner, concern over structural bias in the derivative claims process can be modified. The third reform places the various standards of review currently employed by the courts with an explicit delineation of the standards to be used by the courts in reviewing any action by the company to reject, settle or terminate the derivative claim.

The statutory solution proposed here both remedies the current derivative suit dysfunction and also provides a means of effectively meeting the derivative suit's original and still crucial purpose of providing a necessary means for holding corporate boards and officers accountable.

Branding Taxation .... *Xuan-Thao Nguyen* **399**
Jeffrey A. Maine

Branding is important not only to businesses, but also to the economy. The intellectual property laws and tax laws should thus further the legitimate goals of encouraging and protecting brand investments while maintaining a sound tax base. Intellectual property protections for branding depend on advertisement and enforcement, both of which demand significant amounts of private investment by firms. Although one would expect similar tax treatments of both categories of investment, the categories are actually treated as vastly different for federal income tax purposes. Under the current tax system, advertising costs incurred to foster brand equality are generally expensed whereas litigation costs incurred to protect that enhancement of value are generally capitalized and amortized over time (with the exception of costs related to unfair competition claims, which have been held to be currently deductible). This Article explores these and other tax distinctions for brand building and brand enforcement and makes appropriate recommendations when current rules lack theoretical justification. The chief recommendations are as follows: First, the tax law should be changed to require the capitalization of advertising campaign expenditures that strengthen, restore, or elevate a brand. Such expenditures can be analogized to improvement costs of tangible property, which have long been considered nondeductible capital expenditures. Second, the current tax distinction *between trademark infringement claims and unfair competition claims merely elevates form over substance. If substance is to prevail in tax jurisprudence, the litigation costs associated with both actions should be capitalized, reflecting that both are brought primarily to establish the taxpayer's trademark and not to recover income.*

When Peace Is Not the Goal of a
Class Action Settlement .... *D. Theodore Rave* 475

On the conventional account, a class action settlement is a vehicle through which the defendant buys peace from the class action lawyer. That single transaction will preclude future litigation by all class members. But peace, at least through preclusion, may not always be the goal. In a recent Fair Credit Reporting Action (FCRA) case, In re Trans Union Privacy Litigation, *the parties agreed to a class action settlement that did* not *preclude individual claims. The 190 million class members surrendered only their rights to participate in a future class or aggregate action; they remained free to march right back into court and sue, as long as they did so individually. Why would the defendant shell out tens of millions of dollars in a settlement without getting peace in return? This Article argues that the negotiating parties recognized that he valuable commodity in this transaction was not peace, but aggregation itself. And they figured out a way to "unbundle" aggregation from preclusion of the underlying claims and transact only in the former. In effect, they crafted an ex post version of the class action waivers that have become ubiquitous in consumer arbitration clauses since the Supreme Court's controversial decisions in* AT&T Mobility v. Concepcion *and* American Express Co. v. Italian Colors. *Defendants like this sort of settlement structure for the same reason they like defendant to buy off the risk of firm-threatening liability without paying for total peace. Even though individual claimants remain free to go it alone in litigation if they so choose—and the FCRA's statutory damages and attorneys' fees provisions make this a realistic option—the defendant is betting that most claimants won't bother. This Article addresses why class counsel would be willing to go along with such a settlement structure and the conditions under which a reviewing court would be willing to approve it under Rule*

23. It then uses the ex post class action waiver as a lens to critique the more familiar ex ante version in consumer arbitration clauses. Even though claimants have an empowered agent—class counsel—bargaining on their collective behalf, courts would be unlikely to accept a class action settlement that bars aggregation, but does not resolve the underlying claims, if those claims are so small that individual litigation would be unrealistic. Yet that is exactly what the Supreme Court allowed in the ex ante context in Italian Colors *when it enforced a class action waiver found in the defendant's contract of adhesion to bar class claims that were not viable in individual litigation.*

ESSAY

Managing Cyber Risks .... *Kristin N. Johnson* 547

Cyber risks are as pervasive as the technology that facilitates their execution. The threat of cyber attacks or plots to deploy cyber weapons against critical government entities, private businesses and domestic and international infrastructure resources creates a most significant risk management concern. Pernicious, perilous and ubiquitous, cyber risks have merged as the newest risk management frontier. While the consequences of cyber attacks against individual financial institutions may be alarming, the interconnectedness of the largest financial institutions in the global economy and their shared dependence on technology render these businesses and the systems that execute their transactions shockingly vulnerable. Because of the unique danger such risks pose in financial markets—threatening the loss of billions of dollars, paralysis of global capital and credit markets and a possible domino-effect of solvency crises among banks and shadow banks—this Essay argues that cyber risks constitute a special class of systemic risks.

Indisputably, cyber threats are simply under-theorized. Serving as a précis to a burgeoning cyber risk management literature, this Essay is among the earliest contributions to explore the intersection between cyber risks and systemic risks in financial markets. This Essay forges a pathway for examining the development of cyber risk regulation and identifying promising opportunities to disarm cyberthreats. This Essay analyzes the various risks that financial *institutions face and conventional approaches to manage and mitigate well-known risks. Upon surveying the proposed regulatory and legislative efforts to reduce cyber risks—including the collaborative efforts outlined in the Cybersecurity Information Sharing Act adopted in December of 2015, this Essay rejects the notion that traditional approaches will sufficiently address cyber risk management concerns. This Essay argues that cyber risks require innovative and dynamic strategies that demonstrate the requisite agility to combat cyberthreats.*

NOTES

All Blogs Go to Heaven: Preserving Valuable Digital Assets Without the Uniform Fiduciary Access to Digital Assets Act's Removal of Third Party Privacy Protections .... *Elizabeth D. Barwick* 593

In the age of the Internet, most of us live our lives largely online. As such, one would expect a concomitant increase in concern for privacy, but this is not necessarily the case. It seems that the instantaneous and anonymous nature of the Internet has given rise to thoughtless sharing that simply did not exist when it was necessary to put pen to paper. Understanding that a great deal of our day-to-day activities are now carried out over the Internet, it makes sense that our families and heirs would want or need access to our accounts in the event of our death or incapacitation. The Uniform Fiduciary Access to Digital Assets Act grants virtually unfettered access to a decedent's digital assets that would undoubtedly ease estate administration but the privacy implications of such access are wide reaching and must be considered when formulating a solution to the problem of planning for these assets. It is easy to see how this grant of access could result in the invasion of the privacy of the living. This Note will highlight to extent to which this Uniform Act overlooks the right to privacy of the living in favor of ease of access to the digital assets of deceased Internet users through the use of three hypothetical scenarios and suggest that a balancing of interests might reveal whether the policies behind the current laws, as well as the Uniform Act, are really being furthered by such broad access.

From Ripe to Rotten: An Examination of the Continued Utility of the Ripeness Doctrine in Light of the Modern Standing Doctrine ....*Michael Aaron DelGaudio* 625

First year law students are generally taught that the justiciability doctrines of standing and ripeness perform distinct functions that work together to help courts determine whether an Article III "case or controversy" exists in particular suits. The standing doctrine, it is said, assists courts in this inquiry by determining who can bring suit, whereas the ripeness doctrine assists them by determining when someone can bring suit. This theoretical distinction in the doctrines' functions is based on the original forms the standing and ripeness doctrines took. Over the course of the past century, however, the Supreme Court has altered the standing and ripeness doctrines to a point where the doctrines now seem to serve the same function—both address the propriety of the parties and the timeliness of the suit.

This Note illustrates the convergence in function of the standing and ripeness doctrines over time and argues that because the doctrines no longer perform distinct, complementary functions with regard to justiciability determinations, only one is necessary. This Note further concludes that the ripeness doctrine should merge into the modern standing doctrine, with only the standing doctrine surviving. This conclusion is supported both by the Supreme Court's recognition of the similarity of the doctrines and its preference toward using standing to assess justiciability issues instead of ripeness, and a simple logical progression that illustrates the ripeness doctrine's present lack of usefulness in justiciability law. Although disposing of the ripeness doctrine may seem like a dramatic change to the law of justiciability, the benefit gained by reducing unnecessary complexity in justiciability determinations far outweighs the drawback of eliminating a doctrine that no longer serves a useful purpose.

The Elephant Not in the Room:
Apportionment to Nonparties in
Georgia .... *Michael Koty Newman* 669

Apportionment to nonparties generally concerns defendants alleging that certain nonparties are also at fault for the plaintiffs harm. A defendant's successful allocation of fault to a nonparty results in the defendant shedding a portion of their liability toward the plaintiff. If joint and several liability has been abolished, then this means that the plaintiff will collect less damages from the named defendant. This Note addresses how current practice in Georgia allows the defendant to do this with very little effort. Specifically, this Note takes issue with a recent Georgia Court of Appeals decision, Double View Ventures, LLC v. Polite, *757 S.E.2d 172, 178 (Ga. Ct. App. 2014). That decision ignores precedent and does not adhere strictly to the language of Georgia's apportionment statute. The regime set by this opinion threatens a plaintiff's right to a fair trial. The opinion allows defendants to apportion fault to a nonparty without precisely identifying that party and without presenting evidence on each element of a cause of action. As a result, defendants are allowed to engage in gamesmanship that makes recovery an uphill battle for injured plaintiffs. The Georgia Supreme Court can still correct this appeals court error. All that need be done is requiring that defendants identify the nonparty to the best of their ability under the circumstances and present sufficient evidence to find that nonparty liable to the plaintiff. After this is done, the plaintiff rightly has the burden to show how this nonparty was not at fault. Fairness is the aim of the Georgia apportionment statute, and this Note proposes solutions to bring trials closer to that objective.*

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