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Executive Compensation

The authors of this article represented Valeant Pharmaceuticals in litigation before the Delaware Chancery Court where the company sought the return of bonuses and other damages that resulted from compensation decisions made by self-interested directors. The bonuses were evaluated under the entire fairness standard, rather than the business judgment rule, which usually protects compensation decisions. The opinion has been described as ''a rare example of a case in which a court awards damages against a director for having approved excessive compensation.'' The article will appear in the May 2007 issue of *Journal Reports: Law & Policy*, in BNA's Executive Compensation Library on the Web.

Valeant Pharmaceuticals: A Case Study in the Perils of Self-Interested Compensation and the Restrictions on Bonus Awards

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In a post-trial opinion, the Delaware Court of Chancery ordered Adam Jerney, the former president of Valeant Pharmaceuticals International f/k/a ICN Pharmaceuticals, Inc.,[1] to return to the company the full amount of a $3 million bonus awarded to him in 2002.[2] The court also ordered Jerney to pay a portion of the bonuses paid to nondirector employees and the expenses of a special litigation committee investigation,

[1] Valeant was represented in the litigation by the authors of this article, Michael Hanrahan and Paul Fioravanti, with Gary Traynor and Laina Herbert of Prickett, Jones & Elliott, P.A.

[2] *Valeant Pharmaceuticals Int'l v. Jerney*, C.A. No. 19947, Mem. Op., 2007 WL 704935, (Del. Ch. March 1, 2007)

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and to return attorneys' fees and expenses the company advanced for his defense of the litigation. With prejudgment interest, the judgment against Jerney totaled more than $6 million. As one commentator has noted, the opinion ''is a rare example of a case in which a court awards damages against a director for having approved excessive compensation.''[3]

The bonus to Jerney was part of more than $47 million in cash awards paid to ICN's management, directors, and employees from proceeds of a partial initial public offering (IPO) of ICN's Ribapharm subsidiary. Each of the board's outside directors, including all three members of the compensation committee, received a bonus of $330,050. ICN's founder, chairman and CEO Milan Panic received more than $33 million.[4] After a special litigation committee determined the company should pursue claims for the bonuses by taking over an existing derivative action, the company sought return of the bonuses and other damages.[5]

The Significance of the Opinion.

The *Valeant* decision reconfirmed Delaware's strict standards for evaluating self-compensation awarded by interested directors. Because every director received a bonus, there were no disinterested and independent directors. Consequently, the bonuses were evaluated under the entire fairness standard, rather than the business judgment rule which usually protects compensation decisions. Thus, the opinion illustrates ''the significant risks that directors face when entire fairness is the standard of review'' and ''the dangers of transactions that confer material benefits on outside directors, thereby resulting in the loss of business judgment rule protection.''[6] Because of the failure to structure the transaction to avoid entire fairness review and the numerous other glaring flaws in the process, the liability aspect of the *Valeant* opinion reads like ''a case study in how *not* to handle transaction-linked bonuses.''[7]

Professor Hamermesh found the remedial aspects were the most interesting part of the decision.[8] Because so few executive compensation cases go to trial and fewer still result in judgments against directors and officers, the Delaware courts do not often consider remedy-related issues. *Valeant* determined that Jerney's disgorgement of the bonus he personally received did not implicate Delaware's Uniform Contribution Among Tortfeasors Law or common law contribution rights because his obligation to disgorge what he personally received through self-dealing was not a joint liability with the other former directors.[9]

The court also contemplated the allocation among directors as joint tortfeasors for liability for the bonuses paid to nondirectors and for the costs of the special litigation committee, though the company's tactical decision to seek only Jerney's pro-rata share limited the issues actually decided. The court's determination of the allocation of joint defense costs between Panic and Jerney is, as Professor Hamermesh has observed, ''another rarely addressed issue.''[10]

The most significant element of the decision may be the court's discussion of the report of the compensation expert upon which the bonuses were purportedly based. This part of the opinion may serve as a warning to compensation committees and boards in evaluating such reports, even where compensation decisions are made by disinterested and independent directors.

The ICN Compensation Committee's retention of its compensation expert was tainted by management's involvement. Rather than consider whether bonuses were appropriate and, if so, the proper bonus amounts, the consultant simply sought justifications for management's bonus plan, despite the inability to find comparable transactions. Most importantly, the compensation consultant's report was based on inflated values of the Ribapharm subsidiary provided by management and the inaccurate assumption that the bonuses could be based on the entire value of Ribapharm. Moreover, the report addressed the original form of bonuses considered—Ribapharm options—not the board's last-minute switch to cash bonuses.

The *Valeant* decision may provide guidance both as to how and by whom a compensation expert should be selected and how the reliability and legitimacy of the consultant's advice should be assessed. Finally, as discussed below, the court's discussion of the effect of 8 *Del. C.* § 141(e)[11] in an entire fairness case and the interrelationship of that section to 8 *Del. C.* § 144[12] should provide guidance to corporate practitioners.

Background of the Bonuses.

ICN was a pharmaceutical company whose most significant product was the anti-viral medication Ribavirin.[13] As a result of pressure from activist stockholders, ICN developed a restructuring plan to divide the Company into three separate entities, including a subsidiary

[3] Lawrence Hamermesh, ''A 'Valeant' Effort,'' The Harvard Law School Corporate Governance Blog, March 27, 2007, http://blogs.law.harvard.edu/corpgov/.

[4] Through pre-trial settlement, the company recovered a substantial part of the bonuses paid to the director defendants except Panic and Jerney. Panic settled after trial.

[5] The *Valeant* case ''is one of the rare situations in which a special litigation committee has realigned the company as plaintiff and pursued the claims originally brought by a stockholder plaintiff as a derivative action.'' Travis Laster, ''Delaware Chancery Court Decision: Compensation Not Fair,'' *The Corporate Counsel.net Blog*, March 14, 2007. In *Valeant* and most of the other instances, a change in control occurred, and the new board determined to pursue the claims against former officers and directors. *See, e.g.*, *Telxon Corp. v. Meyerson*, 802 A.2d 257, 259 (Del 2002). Computer Associates may be the next company to pursue such a course. William M. Bulkeley and Charles Forelle, ''Directors' Probe Ties CA Founder to Massive Fraud,'' *Wall St. J. Online* (April 14, 2007); Alex Berenson, ''CA Says Its Founder Aided Fraud,'' N.Y. Times (April 14, 2007).

[6] Laster, *supra* note 5.

[7] Stephen M. Bainbridge, ''Eviscerating DGCL 141(e),'' http://www.professorbainbridge.com, April 2, 2007.

[8] Hamermesh, *supra* note 3.

[9] *Valeant*, Mem. op. at 39-40 & n.48.

[10] Hamermesh, *supra* note 3.

[11] § 141(e) provides:

A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

[12] See *infra*, note 31, describing the three safe harbors under § 144's entire fairness rule.

[13] *Valeant*, Mem. op. at 3.

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called Ribapharm, which would hold ICN's Ribavirin and related anti-viral assets.[14] ICN planned to conduct an IPO of a minority interest in Ribapharm and then later spin-off ICN's majority interest in Ribapharm to ICN's stockholders.[15] To satisfy ICN's dissident stockholders and avoid a proxy fight, ICN and Panic agreed that Panic and other senior managers of ICN would have no executive or board positions with Ribapharm.[16] The Ribapharm IPO was unusual because (i) Ribapharm was not a new or emerging venture but represented the core of ICN's business and (ii) ICN's senior management would have no role in the spun-off entity.[17]

The lead underwriter of the Ribapharm IPO estimated a Ribapharm IPO price in the range of $13 to $15 per share and the value of Ribapharm at around $2.25 billion, with the possibility that the value could rise to over $3 billion if there were several profitable quarters following the IPO.[18] However, on April 11, 2002, the day before the IPO, this underwriter informed ICN that the IPO would have to be priced at $10 per share. Thus, the IPO went forward at a price that placed a total equity value on Ribapharm of only $1.5 billion, not the $2.25 billion that had been projected or the $3 billion value it was hoped would be achieved eventually.[19]

From early in the IPO process, ICN's management began planning for a substantial grant of Ribapharm options to ICN management and all the ICN directors.[20] When the intent to award 8,350,000 options to ICN's management and directors was publicly disclosed in an SEC filing on March 21, 2002, there was immediate and strong investor opposition.[21] On March 28, 2002, the ICN board referred the option grant to ICN's compensation committee. At the board's direction, the committee retained Towers Perrin as a compensation consultant to advise the committee on the proposed option grant. The committee met five times in early April.[22]

At an April 10, 2002, meeting that lasted only 15 to 20 minutes, the committee confirmed its support for the Ribapharm option grant but hastily suggested as an alternative changing the bonuses from Ribapharm options to $55 million in cash.[23] Towers Perrin, which did not consider cash bonuses, was not invited to attend this meeting or the subsequent board meeting.[24] The switch from options to cash was ''a necessary accommodation to rebellious investors'' to facilitate the IPO by shifting the cost of the bonuses entirely to ICN, while dramatically reducing the overhang of the Ribapharm options and Panic's potential interest in Ribapharm.[25]

At the April 10, 2002, board meeting, Panic tried to push the bonus proposal through the board.[26] Though one director proposed limiting the bonus pool to $10 million, the board reduced the pool only slightly to $50 million in cash.[27] Notably, the bonuses were approved prior to the setting of the IPO price. When ICN learned on April 11 that the IPO would be priced at only $10 per share, counsel advised Panic that the board should revisit the bonus authorization in light of the price change.[28] Panic ignored that advice, and the board never reconsidered the bonuses.[29] Panic later reallocated the bonus pool to increase his bonus and those of a few others, while reducing or eliminating bonuses for some employees.[30]

Legal Standards.

Pursuant to 8 *Del. C.* § 144 and Delaware case law, the court evaluated Jerney's liability under the entire fairness standard.[31] Because of the absence of an independent compensation committee or other independent protections (e.g., disinterested stockholder approval), Jerney had the burden of proving that the bonuses were entirely fair.[32] Consistent with Delaware precedent, Vice Chancellor Lamb held that the directors' self-interested compensation decision was outside the protection of the business judgment rule and therefore ''subject to the same entire fairness review as any other interested transaction.''[33] To meet this high level of careful judicial scrutiny, self-interested directors must prove both fair dealing (i.e., fairness in the process, including timing, initiation, structure, negotiation, disclosure and approval) and fair price (i.e., fairness of the economic and financial considerations).[34]

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[14] *Id.* at 4-5.
[15] *Id.* at 5.
[16] *Id.* at 5-6.
[17] *Id.* at 6-7.
[18] *Id.* at 6.
[19] *Id.* at 7.
[20] *Id.* at 8.
[21] *Id.* The grant was to include 5,000,000 options for Panic, 500,000 options for Jerney and 50,000 options for each outside director. *Id.* At an IPO price of $14 per share, the 8.35 million options had an estimated fair market value of $53.7 million. *Id.*
[22] *Id.* at 9.
[23] *Id.* at 9, 13. The compensation committee's suggestion of $55 million in cash bonuses was based upon the erroneous assumption of a $3 billion valuation for Ribapharm. *Id.* at 14.
[24] The absence of the compensation expert from a committee or board meeting does not, in and of itself, preclude reliance on the expert's analysis. *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 769, 35 EBC 1705 (Del. Ch. 2005), *aff'd*, 906 A.2d 27, 59-60, 37 EBC 2756 (Del. 2006).
[25] *Valeant*, Mem. op. at 13-14.
[26] *Id.* at 14.
[27] *Id.*
[28] *Id.* at 14, 34. Ultimately, Panic lost a proxy contest, control of the board changed, and the new board determined to abandon the spin-off of Ribapharm. *Id.* at 15.
[29] *Id.* at 14, 34.
[30] *Id.* at 14-15, 34.
[31] *Id.* at 23-25. Section 144 provides three safe harbors that prevent a transaction from being void or voidable because of director self-interest: disinterested director approval; disinterested stockholder approval, and post-hoc judicial review for entire fairness. *Id.* at 23-24.
[32] *Id.* at 24.
[33] *Id.* (citing *Telxon Corp. v. Myerson*, 802 A.2d at 265). Application of the business judgment rule is frequently outcome determinative. *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989); *see also Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361, 1371 (Del. 1995). While imposition of the entire fairness standard is not outcome determinative per se, the likelihood of director liability increases dramatically when the stringent burden of proof rests on the directors. *Compare Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993), and *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1163 (Del. 1995), *with* Mills Acquisition, 559 A.2d at 1280-81, and *Kahn v. Tremont Corp.*, 694 A.2d 422, 428-429 (Del. 1997); *see also Kahn*, 694 A.2d at 434 (Quillen, J. concurring) (noting that while burden of proving entire fairness is not necessarily outcome determinative, it can be of critical importance to the ultimate result).
[34] *Valeant*, Mem. op. at 25.

Findings of Unfair Dealing.

The court found that ''the bonus transaction was the product of unfair dealing by Panic, Jerney and the other interested parties.''[35] The court summarized its findings that Jerney had not proven fair process, stating:

> The transaction was initiated by management. It was structured so that everyone, including even the board members and the members of the compensation committee, would receive a bonus. The structure was not negotiated. Everyone involved had an interest in the transaction. The few who opposed it achieved only minor concessions and still voted in favor of it and accepted their shares. Finally, and perhaps most perniciously, the board, the compensation committee, and outside experts were given and relied on inflated and misleading information provided by management led by a recalcitrant CEO who stood to benefit most from the transaction.[36]

The court found that the process was tainted by Panic's involvement, concluding that:

> The entire process from the initial idea of awarding bonuses to the final reallocation of the bonus pool was dominated by Panic.[37]

Moreover, the process was undertaken to justify the bonuses rather than to determine if bonuses were appropriate and in what amounts.[38] Prior to board involvement, Panic and management increased Panic's allocation, added bonuses for every director and included other employees ''such as Jerney's and Panic's secretaries and support staff.''[39] Thus, the $50 million plus bonus pool was ''clearly established and even disclosed in Ribapharm's March 2002 Form S-1 filing, before the board took any action or even considered the matter.''[40]

The court also held there was unfair dealing with respect to the compensation committee. The three compensation committee members were self-interested and not independent because (i) they all would receive bonuses and (ii) two of them were close friends with Panic for years and were engaged in undisclosed negotiations with Panic for consulting contracts with the company.[41] The committee also did not act independently.[42] Instead, the committee process was ''designed simply to justify a predetermined outcome dictated by Panic and ICN's management.''[43] The committee was directed by the board to use a compensation expert retained months earlier by ICN's general counsel, who was slated to receive a bonus of 350,000 options worth $2.3 million. The committee was apparently not told that ICN's general counsel had already asked the consultant to consider the options and believed the consultant had already concluded that the options were justified.[44]

The court also found Towers Perrin's work did not support fair dealing. The Towers Perrin consultant testified that he struggled to ''come up with a framework that made sense'' because it was ''unprecedented'' that ''you would give options in the spun entity to parent company execs that would have no involvement with the ongoing enterprise.''[45] When the consultant suggested a reduction of Panic's bonus due to a lack of precedent, Panic made it clear that his bonus was predetermined and that the consultant's job was to find a rationale for it.[46]

The court found that management controlled the information provided to the consultant, and the consultant's analysis was skewed by reliance on a $2.5 to $3 billion valuation of Ribapharm provided by management, when the expected value based on the IPO was lower and the expected incremental value created by the IPO/spin-off was even less.[47] The court found that the Towers Perrin report relied upon by the committee and ICN board contained no comparable transactions where officers and directors received bonuses in connection with a transaction of this type.[48] Furthermore, the report provided no opinion at all on cash bonuses, but was expressly limited to consideration of the option bonus proposal.[49]

The court also rejected the rationales for the bonuses Jerney presented at trial through expert testimony and expert reports.[50] The court found that Valeant's expert demonstrated that Jerney and Panic were not underpaid vis-à-vis comparable executives.[51] The Vice Chancellor also rejected Jerney's attempt to justify the bonuses as in lieu of options in the spin-off or as an offset to purported dilution of existing ICN options in the spin-off.[52] He also did not accept the opinions of Jerney's experts that Panic and Jerney were entitled to bonuses ''as restructuring experts,'' noting that overseeing the IPO and spin-off were part of their jobs as executives and that ICN had retained an investment banking firm to provide restructuring advice.

The court acknowledged that it is theoretically possible under Delaware law to pay an ''event bonus'' for extraordinary transactions despite the general prohibition on further compensation for past services.[53] However, the court held that the $50 million in bonuses could not be justified by ICN's event bonus policy.[54] Vice Chancellor Lamb found that ICN management, including Panic and Jerney, had already been compensated for the development of Ribapharm through their basic compensation at ICN, previous event bonuses related to Ribapharm assets and annual bonuses that also reflected in part the success of Ribavirin.[55] He further found that the unusual nature of the Ribapharm IPO did not justify a large bonus pool:

> On the contrary, the key distinctions—that the spin-off was of the one major asset of the company, the fact that existing management would not have a role in the spun-off entity, and the overestimation of the value of Ribapharm and

[35] *Id.* at 25-26.
[36] *Id.* at 30.
[37] *Id.*
[38] *Id.* at 26, 29.
[39] *Id.*
[40] *Id.* at 26-27.
[41] *Id.* at 9-10, 27.
[42] *Id.* at 10, 27.
[43] *Id.* at 10, 29.
[44] *Id.* at 10-11, 27. While outside counsel played little role in the committee's work, the general counsel attended all meetings and acted as secretary. *Id.* at 11.
[45] *Id.* at 27.
[46] *Id.* at 12 n.9, 28.
[47] *Id.* at 28.
[48] *Id.* at 11-12.
[49] *Id.* at 13.
[50] *Id.* at 16-20.
[51] *Id.* at 19.
[52] *Id.* at 19-20.
[53] *Compare Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581 (Del. 1948), and *Zupnick v. Goizueta*, 698 A.2d 384, 385-86, 388 (Del. Ch. 1997).
[54] *Valeant*, Mem. op. at 31-32.
[55] *Id.* at 32.

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the projected pricing of the IPO—all cut *against* the award of large bonuses.[56]

Findings on Unfair Price.

While noting that it is possible that the price terms of an interested transaction can be so fair as to overcome a finding of unfair process, the court commented that proving entire fairness is ''exceptionally difficult'' where the pricing terms that result from an unfair process ''cannot be justified by reference to reliable markets or by comparison to substantial and dependable precedent transactions.''[57]

In an entire fairness case, proof of fair price will generally require a showing that the terms fit comfortably within the narrow range of directorial judgment, not at its outer boundaries.[58] The court concluded that the ICN bonuses were financially unfair because the bonuses were not supported by reliable market data or substantial comparable transactions and were not the result of a limited exercise of the board's powers.[59] The court particularly stressed the absence of precedent for the bonuses, concluding that:

> In the end, what is noticeably absent from [Jerney's] expert reports is any comparable transaction that would justify the award of such large bonuses.[60]

Vice Chancellor Lamb concluded that the bonus amounts were financially unfair for several reasons. First, they were based on ''an unrealistic and inflated $2.5 billion to $3 billion value'' for Ribapharm which was its ''potential value that might be achieved after a period of positive results,'' when the initial predicted value even based on a $14 IPO price was only $2.25 billion.[61] Second, the bonuses were unreasonable because any bonus ''should have been calculated with reference to the value added to ICN by the IPO and spin-off and not the total value of Ribavirin or other assets contributed by ICN to Ribapharm.''[62] Third, the substantial reduction in the IPO price demanded a reduction in the size of the bonuses.[63]

No Advice of Experts Defense.

The court held Jerney could not avoid liability by asserting reliance on the advice of experts pursuant to 8 *Del. C.* § 141(e).[64] That statute is not a defense to a claim that is subject to the entire fairness standard, but only one factor in the fairness analysis. To allow expert advice to displace the court's role in determining fairness under § 144(a)(3) would create a statutory conflict between the § 144 and § 141(e).[65]

The court also held that the record lacked credible evidence of any expert advice from counsel or the compensation consultant that the bonuses were entirely fair. The court found no credible evidence that the board was ever advised by outside counsel that the transaction was fair or protected by the business judgment rule, while there was ample basis to conclude that such counsel, in fact, advised the directors that the transaction was subject to entire fairness and might not be found to be entirely fair.[66] Moreover, counsel did not have the expertise to opine on the substantive fairness of the bonuses.

Jerney also could not rely on the compensation consultant's report because (i) the directors retained the consultant at the direction of management and failed to ask about his earlier work, (ii) the scope of the report was limited to an award of options, and (iii) the report was predicated on inflated values for the IPO and the net benefit of the IPO and spin-off to ICN.[67]

Delaware practitioners found the Vice Chancellor's rejection of § 141(e) as a defense to liability in an entire fairness case persuasive.[68] The court cited precedent recognizing that reliance on experts is only a pertinent factor where self-interest requires application of the entire fairness standard.[69] However, Professor Bainbridge has asserted that Jerney should have been ''fully protected'' by § 141(e), and Jerney's purported reliance on the Towers Perrin report should have been ''outcome determinative.''[70]

Professor Bainbridge's assertions rest on an overbroad interpretation to § 141(e), not the plain language of the statute. It is only the directors' reliance on opinions and reports within the expert's competence that is ''fully protected'' by § 141(e). Directors' self-dealing conduct in awarding themselves cash bonuses is not excused by that statute. The Delaware courts have repeatedly recognized that the protection of § 141(e) is ''not without limitation.''[71] For example, a § 141(e) expert report cannot validate waste and cannot be based on inaccurate or incomplete information provided by self-interested fiduciaries.[72]

Moreover, it was not within Towers Perrin's competence to opine that the self-interested bonuses were entirely fair under Delaware law. As *Valeant* reaffirmed, entire fairness requires judicial consideration of both fair dealing and fair price on a combined basis.[73] Professor Bainbridge would instead make one element of the fair price analysis (i.e., an expert report) conclusive not only as to fair price, but as to the overall fairness analysis. This is inconsistent with both § 144 and Delaware's long-standing entire fairness test.

Professor Bainbridge's assertion that ''fully protected'' can only mean ''that 141 (e) trumps'' § 144[74] ignores the principle of statutory construction that provisions of the DGCL are to be harmonized to avoid creating a conflict between the sections.[75] Since expert advice is obtained in virtually every substantial self-interested transaction (from experts who are usually paid substantial amounts), Professor Bainbridge would interpret § 141(e) as effectively preventing the Dela-

[56] *Id.* at 20.
[57] *Id.* at 30-31.
[58] *Id.* at 31.
[59] *Id.* at 35.
[60] *Id.* at 20; *see also id.* at 11-12.
[61] *Id.* at 33.
[62] *Id.* at 33-34.
[63] *Id.* at 34.
[64] *Id.* at 35-36.
[65] *Id.*

[66] *Id.* at 36.
[67] *Id.* at 36-37.
[68] Hamermesh, *supra* note 3; Laster, *supra* note 5.
[69] *Valeant*, Mem. op. at 35-36, citing *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd* 663 A.2d 1156 (Del. 1995), and *Boyer v. Wilmington Materials, Inc.*, 754 A.2d 881, 910 (Del. Ch. 1999).
[70] Bainbridge, *supra* note 7.
[71] *Brehm v. Eisner*, 746 A.2d 244, 261 n.51 (Del. 2000).
[72] *Id.*; *Mills Acquisition*, 559 A.2d at 1283-84.
[73] *Valeant*, Mem. op. at 25.
[74] Bainbridge, *supra* note 7.
[75] *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 906 A.2d 114, 120 (Del. 2006).

ware courts from scrutinizing many self-dealing transactions. For example, an investment banker's fairness opinion would, under Professor Bainbridge's interpretation of § 141(e), preclude judicial review of a going-private transaction approved by a board dominated by directors who are employees of the controlling stockholder.

Disgorgement Remedy.

Vice Chancellor Lamb observed that there are two sources of relief in an unfair self-dealing transaction: the voidability of the transaction and the award of damages for the underlying breach of duty of loyalty.[76] Because Jerney failed to prove entire fairness and his bonus was part of a voidable transaction, disgorgement of the entire $3 million bonus was the appropriate remedy.[77] The court refused to limit recovery to the excess over what might have been a ''fair'' bonus, finding that total disgorgement would neither unjustly enrich the corporation nor work any inequity on Jerney.[78] Valeant's prior settlements with other defendants had not made the corporation whole, nor did the joint tortfeasor releases given to the sitting directors reduce Jerney's liability because his disgorgement obligation arose from his receipt of ICN's money, not just his participation in the decision to authorize the payment.[79]

Liability for Nondirector Bonuses.

As one of 12 directors on the ICN Board, the Court held Jerney liable for one-twelfth of the bonuses paid to nondirectors and the costs of the Special Litigation Committee investigation.[80] Notably, even though Jerney was not the motivating force behind the bonuses, he voted to authorize the bonuses and took his bonus. Therefore, he was liable not only for what he personally received, but for additional damages flowing from his breach of loyalty.

Repayment of Advanced Fees and Costs.

Jerney was also liable under ICN's Certificate of Incorporation and his contractual undertaking to repay the attorneys' fees and expenses advanced to him for the defense of the case.[81] Because Jerney and Panic were jointly represented, the court required Jerney to reimburse Valeant for half of all fees and litigation costs advanced for their defense.[82] Although Panic had faced a potentially larger exposure, the court noted Jerney had been a willing participant in the bonus scheme, and his defense rested importantly on the defense of Panic.[83] Thus, the court determined the equal division was consistent with whatever equitable contribution rights Jerney and Panic would have against each other with respect to their undertakings to repay the advanced amounts.[84]

Conclusion.

The liability aspects of *Valeant* simply reconfirm the perils of pursuing a self-interested transaction without procedural safeguards and the difficulty of meeting the entire fairness burden. The opinion also reconfirms long-standing Delaware law that faithless fiduciaries will be required to make complete restitution of their ill-gotten gains. Moreover, the directors' liability may include improper compensation paid to others and the costs that their conduct inflicted on the corporation. Most importantly, *Valeant* makes clear that expert reports cannot be based on misinformation provided by management, and the award of bonus compensation must take into account such factors as prior salary and bonus payments and the specific value enhancement, properly calculated, derived from a current transaction, rather than an inflated value of all the assets included in the transaction.

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[76] *Valeant*, Mem. op. at 38.

[77] *Id.* at 38-39.

[78] *Id.* at 39.

[79] *Id.* at 39-40. The court held the settlements reached with the other defendants did not trigger apportionment of Jerney's liability under the Delaware Uniform Contribution Among Tortfeasors Law 10 *Del. C.* § 6301 *et seq.* (the Act). Noting that the Delaware Supreme Court has not addressed whether the Act covers fiduciary duty claims, the Court of Chancery held it was plainly inapplicable to Jerney's bonus, which was an unfair, self-dealing transaction, creating a disgorgement obligation that was not a joint liability with any of the former defendants. *Id.* at 40 n.48.

[80] *Valeant*, Mem. Op. at 40-43. In light of joint tortfeasor releases in certain settlements, the greater role that Panic and others played in the bonuses and other factors, the corporation only sought recovery of Jerney's pro-rata share of these items. *Id.* at 40 n.48, 42 n.51. The court found that a director who did not attend the April 10, 2002, board meeting but received a bonus should be included in calculating Jerney's pro-rata share. *Id.* at 40-42.

[81] *Id.* at 39.

[82] *Id.* at 43-46.

[83] *Id.* at 44-45.

[84] *Id.* at 45-46.

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