Direct or Derivative: Does It Matter After Gentile v. Rossette?

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The distinction between direct and derivative claims has been the source of considerable litigation in the Delaware courts through the years. Whether a claimant has standing to sue directly or derivatively is not always clear. Accordingly, the courts have developed various tests designed to resolve the question. The most recent articulation by the Delaware Supreme Court of the test to determine whether a claim is direct or derivative is found in the 2004 case of Tooley v. Donaldson, Lufkin, & Jenrette, Inc. The Delaware courts seem content with this test, having applied it over 30 times. The Tooley test provides that the determination of whether a claim is direct or derivative "must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" One recent case, however, indirectly drags a skeleton out of the Delaware case law closet. That skeleton is the concept of "special injury."
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Gentile v. Rossette,8 which concerned a stock-dilution claim, arose after Tooley.9 The Delaware Supreme Court held that the stock dilution claim was direct,10 although dilution claims are typically derivative claims.11 The effect of holding that the dilution claim was direct was that the shareholder plaintiffs could bring the claim on their own behalf, rather than on behalf of the corporation. In reaching this decision, the Gentile court followed a 1993 Delaware Supreme Court case,12 In re Tri-Star Pictures, Inc. Litigation.13 Tri-Star relied heavily on the special injury analysis14 to determine the nature of a claim.15 The application of the Tri-Star analysis in the Gentile supreme court decision is unexpected because the Tooley court explicitly discarded the Tri-Star special injury test in 2004.16

This Note first reviews the differences between direct and derivative claims. Part II.B recounts the history of the different tests courts have used to determine whether a claim is direct or derivative. Specifically, Part II.B.6 analyzes the current test, the Tooley test, Delaware courts are using in corporate law cases. Part II.C presents the focal case of this Note, Gentile v. Rossette. Part II.C.1 recounts the factual background of Gentile. Part II.C.2 examines the analysis of Gentile by the Delaware Court of Chancery (Gentile I),17 followed by the analysis of Gentile by the Delaware Supreme Court (Gentile II)18 in Part II.C.3, overturning the court of chancery decision. Part III analyzes the Gentile II decision. This Part scrutinizes the analysis of Gentile II and examines different possibilities for analyzing future claims similar to those brought in the Gentile case. In Part IV, this Note explores possible solutions for the direct/derivative problems presented by the Gentile II decision. This Note then recommends that the direct/derivative distinction is outdated, no longer serves a purpose, and that Delaware should eliminate it. However, the most important requirements of the derivative claim, the contemporaneous ownership requirement19 and the heightened pleading requirements,20 remain as

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9. Id. at 93.
10. Id. at 101-03.
11. See, e.g., Kramer v. W. Pac. Indus., 546 A.2d 348, 353 & n.6 (Del. 1988) (holding that claims of waste that amount to dilution are derivative).
14. See infra notes 72–91 and accompanying text. Delaware courts intermittently used the special injury inquiry when analyzing cases determining whether a claim was derivative or direct. Tri-Star used this inquiry. Tri-Star, 634 A.2d at 330. The court in Gentile later used the underlying analysis without mentioning the term special injury. Gentile II, 906 A.2d at 101-03.
19. Contemporaneous ownership is a requirement that someone bringing a claim derivatively must be a shareholder at the time of the disputed transaction and at the time the plaintiffs bring the suit. See DEL. CODE ANN. tit. 8, § 327 (2006); Parnes v. Bally Ent. Corp., 722 A.2d 1243, 1245 (Del. 1999) (stating that “[s]ince a stockholder suing derivatively is bringing a corporate claim . . . the stockholder must maintain his or her status as a stockholder in order to continue the litigation”).
20. In a derivative suit, plaintiffs face heightened pleading requirements. See Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984) (setting out the requirements for when a plaintiff may claim demand futility as opposed to
obstacles to eliminating the distinction. This Note also addresses possible alternatives to the current derivative requirements.

II. BACKGROUND

A. Direct Versus Derivative Claims

Distinguishing between direct and derivative claims has been a challenging task for the Delaware courts.\(^{21}\) Since the chancery court in *Elster v. American Airlines, Inc.*\(^ {22}\) first used the term “special injury,”\(^ {23}\) the Delaware courts have used different tests to try to distinguish between direct and derivative claims, and the distinctions were not always clear.\(^ {24}\) Even similar fact patterns have produced differing results, often slicing the distinction quite thin.\(^ {25}\)

1. Fundamental Characteristics of Derivative and Direct Claims

In determining whether a claim is direct or derivative, the initial inquiry is the following: To whom does the claim belong?\(^ {26}\) A derivative claim is a claim belonging to the corporation, which an individual or group of individuals brings on behalf of the corporation.\(^ {27}\) Contrast this with a direct claim, which is a claim belonging to an individual (or class of individuals) that is appropriately brought by that individual (or class) on his or her (or their) own behalf.\(^ {28}\) The recovery in a derivative suit “must go to the corporation,” and the recovery in a direct suit “flows directly to the stockholders, not to the corporation.”\(^ {29}\)

Consider a typical example for each type of claim, which together provide bookends making demand on the board to bring suit). Plaintiffs must either seek permission from the board of directors to bring a claim on behalf of the corporation against the board, or plead facts with sufficient particularity to show that the board is unable to determine appropriately whether a suit should be brought or not. \(^ {id}\) This is shown by proving that directors are interested in the transaction, are beholden to someone who is interested, or were uninformed in their decision making process. \(^ {id}\) This latter requirement is the “demand futility standard.” \(^ {id}\)

21. See Agostino v. Hicks, 845 A.2d 1110, 1117 (Del. Ch. 2004) (stating that “[t]he distinction between direct and derivative claims is frustratingly difficult to describe with precision”); Heyman & Enerio, supra note 2, at 156–66 (outlining the historical perspective of the direct/derivative distinction).


23. See Heyman & Enerio, supra note 2, at 156 (noting that the special injury was coined by the *Elster* decision).

24. See Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036-39 (Del. 2004) (noting the different tests that were used through the years to determine whether a claim was direct or derivative).

25. Compare Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 353 (Del. 1988) (holding that pre-merger stock option grants and golden parachutes were not part of the merger agreement and did not affect the entire fairness of the merger; therefore the claims were derivative in nature), with Parnes v. Bally Ent. Corp., 722 A.2d 1243, 1246 (Del. 1999) (holding that a director’s individual demands went against the entire fairness of the merger and the claims were therefore direct claims for the shareholders).

26. Heyman & Enerio, supra note 2, at 156.

27. See Tooley, 845 A.2d at 1036 (“The derivative suit has been generally described as ‘one of the most interesting and ingenious accountability mechanisms for large formal organizations.’”).

28. See id. (explaining the differences between direct and derivative claims and some of the possible consequences plaintiffs face if they characterize their claim incorrectly).

29. \(^ {id}\)
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for the “vast sea of varying shades of gray” between the archetypal examples. A typical example of a derivative claim is one brought by a shareholder on behalf of the corporation against the corporation’s board of directors for waste of the corporation’s assets. If a corporation sells assets for insufficient consideration, shareholder plaintiffs could bring a claim for waste on behalf of the corporation. The sale harms the corporation because it parts with valuable assets and receives nothing in return. Consequently, a party making a claim seeks redress for the company’s loss rather than an individual’s loss. Any loss an individual suffers in this situation would be indirect. Thus, the company, not the individual, recovers on the suit.

On the other hand, an example of a direct claim is one brought by an individual shareholder against a corporation’s board of directors for a breach of duty to disclose. For example, if the shareholders receive incomplete information before voting for a merger, the nondisclosure would directly injure the shareholders deprived of an opportunity to vote their shares meaningfully. The incomplete information does not injure the company in any way that a remedy can redress; therefore, the only redress available is for the individual stockholders.

The determination of whether a claim is direct or derivative is fact sensitive, which makes laying out a bright-line test difficult. As will be shown, the tests, terminology, and distinctions for derivative and direct claims ebb and flow, but in each of them, the courts consider the same underlying issues, such as the nature of the injury and the person or entity that suffered the injury. Gentile v. Rossette is a recent application of the Tooley test, the current direct/derivative test in Delaware. Gentile provides an example of the ever-evolving direct/derivative distinction.

B. Pre-Gentile Delaware Direct/Derivative Jurisprudence: Rise and Fall of the “Special Injury”

Courts and commentators have explained the history of the direct/derivative analysis several times. However, an abbreviated version is appropriate for the analysis that

30. Heyman & Enerio, supra note 2, at 156.
31. Id. see, e.g., Elster v. Am. Airlines, Inc., 100 A.2d 219, 223 (Del. Ch. 1953) (holding that waste is a derivative claim).
32. See Kramer v. W. Pac. Indus., 546 A.2d 348, 353 (Del. 1988) (stating that corporate waste is “a direct wrong to the corporation that is indirectly experienced by all shareholders”).
33. Heyman & Enerio, supra note 2, at 156. See, e.g., In re Tri-Star Pictures, Inc. Litig., 634 A.2d 319, 327 (Del. 1993) (holding that shareholders voting without adequate information constitutes a direct injury to shareholders).
34. See supra note 25 and accompanying text (comparing two cases with similar fact patterns, Kramer and Parnes, that come to two different conclusions).
35. See infra Part II.B.
follows in Part III of this Note. This recitation is by no means an exhaustive documentation of the distinctions.

I. Lipton v. News International

The Delaware Supreme Court first analyzed the direct/derivative distinction as a substantive matter in *Lipton v. News International*. The transaction at issue was the stipulated dismissal of claims between defendant News International (News) and Warner Communications, Inc. (Warner). Two Warner shareholders brought a claim as intervenors alleging that the claims dismissed between News and Warner (the News claims) were derivative in nature and the dismissal precluded other shareholders from potentially bringing the claims derivatively on behalf of the corporation.

The *Lipton* court relied on two previous Delaware Court of Chancery cases for its direct/derivative analysis: *Elster v. American Airlines, Inc.* and *Moran v. Household International, Inc.* The *Lipton* court focused on reconciling the analyses of the aforementioned cases in determining whether a claim is direct or derivative. The *Lipton* court stated that “[t]o determine whether a complaint states a derivative or an individual [direct] cause of action, [the court] must look to the nature of the wrongs alleged in the body of the complaint . . . .”

*Elster* and *Moran* approached the issue of what constituted an individual cause of action in two different ways. First, the *Elster* court used the term “special injury” to describe the type of injury that was direct in nature. The *Elster* court identified two types of special injuries: “[(1) a] wrong inflicted upon [a claimant] alone or [(2)] a wrong affecting any particular right which he is asserting.” The *Elster* court also identified a third type of special injury that occurs when “a wrong affect[s] the stockholders and not the corporation.” The *Lipton* court ignored this third type of special injury. Later, the

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37. Heyman & Enerio, supra note 2, at 156.
39. *Id.* at 1077.
40. *Id.* at 1076.
43. *Lipton*, 514 A.2d at 1078.
44. *Id.* (emphasis added) (citing *Elster*, 100 A.2d at 223, and *Moran*, 490 A.2d at 1069-70).
45. *Id.*
46. As will be seen throughout Part II.B, infra, special injury proved a source of consternation in Delaware direct/derivative litigation since the *Lipton* opinion expanded it from its origin in *Elster*. Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1038 n.21 (Del. 2004) (stating that the “special injury” test is ultimately discarded). The Delaware courts have followed, ignored, and ultimately done away with the special injury concept. See id. (rejecting the special injury inquiry of *Tri-Star*); *In re Tri-Star Pictures, Inc.*, Litig., 634 A.2d 319, 332 (Del. 1993) (holding that the plaintiffs’ claim qualified as a special injury and was therefore direct); Kramer v. W. Pac. Indus., 546 A.2d 348, 355 (Del. 1988) (holding that the plaintiffs’ claim was derivative without mentioning special injury); *Lipton*, 514 A.2d at 1079 (stating that the plaintiff suffered a special injury that qualified the claim as direct).
47. *Lipton*, 514 A.2d at 1078 (citing *Elster*, 100 A.2d at 223).
48. *Id.* (quoting *Elster*, 100 A.2d at 223). In *Lipton*, the claimants were asserting a contractual right.
49. *Lipton*, 514 A.2d at 1079.
50. *Elster*, 100 A.2d at 222; see Heyman & Enerio, supra note 2, at 160 (noting that the *Lipton* court
The Lipton court ultimately conflated the two-pronged Moran test into the Elster special injury test to determine whether a claim was direct or derivative, but scholars Heyman and Enerio note that the Lipton court “did not specify what other criteria (beyond the search for ‘special injury, in whatever form’) should be used in making such a determination.” The Lipton court then held News’ dismissed claims were for “harm to one of its contractual rights,” to wit, its ability to vote and exert control in Warner and, therefore, the claims were direct because they constituted a special injury. The Lipton court stated that the “substantive validity” did not make the claim direct, but rather “the [direct/derivative] inquiry . . . is to the nature of the claim and not to its merit.”

2. Kramer v. Western Pacific Industries, Inc.

Lipton established that the test for determining whether a claim was direct or derivative was the special injury inquiry of Elster, which encompassed the two-pronged test of Moran. In Kramer v. Western Pacific Industries, the direct/derivative inquiry ignored the special injury from Lipton, and instead concentrated on an independent inquiry into the nature of the injury. In Kramer, the plaintiffs challenged the issuance of stock options to two members of Western Pacific’s board. After a protracted bidding process, Western Pacific entered into a merger agreement with Danaher. Kramer, a Western Pacific shareholder, challenged the stock options issued to Western Pacific’s board members as excessive and “directly attack[ed] the fairness of the merger terms” because of the excessiveness of the stock options, but did not attack the fairness of the merger price or process. Therefore, the court concluded that the plaintiffs cast their complaint in terms of corporate waste.

Kramer, decided less than two years after Lipton, held that “[t]he distinction between derivative and individual action rests upon the party being directly injured by the alleged wrongdoing.” The Kramer court quoted the Moran two-pronged test and neither mentioned nor addressed the third situation constituting a special injury in Elster).

51. Heyman & Enerio, supra note 2, at 160.
52. Lipton, 514 A.2d at 1078 (quoting Moran v. Household Int’l, Inc., 490 A.2d 1059, 1070 (Del. Ch. 1985)).
53. Id.
54. Heyman & Enerio, supra note 2, at 160.
55. Lipton, 514 A.2d at 1079.
56. Id. at 1079 n.4.
57. See id. at 1079 (stating that special injury was the appropriate inquiry when examining direct/derivative controversies); see also Heyman & Enerio, supra note 2, at 160 (noting that the possibility of the third situation giving rise to a direct claim in Elster was not addressed by the Lipton court).
59. Id. at 349.
60. Id.
61. Id. at 350 n.2.
62. Id. at 352.
63. Kramer, 546 A.2d at 351.
revived the third special injury from Elster: 64 that for a direct claim, a plaintiff “must be injured directly or independently of the corporation.” 65 The Kramer opinion did not mention special injury in its direct/derivative analysis of the plaintiff’s claim. 66

The Kramer court held that the plaintiff’s claim of excessive compensation to the Western Pacific directors prior to the Western Pacific and Danaher merger was merely a claim for waste and not a challenge to the fairness of the merger itself; therefore, the claim was only derivative. 67 The Kramer court went on to state the per se rule that a waste claim is a direct injury to the corporation and is only an indirect injury to shareholders. 68 The Kramer court also stated that if the plaintiffs had made valid attacks against the merger process (challenging either fair price or fair dealing) they could have brought the claim directly. 69 The preceding example shows how subtle the direct/derivative distinction can be. The plaintiffs’ claim was for waste because Western Pacific issued the excessive stock options prior to the merger, and therefore the claim was derivative in nature. 70 If, however, the stock options had been part of the merger transaction, the claim would have been direct. 71

3. In re Tri-Star

Even though the Kramer court did not mention the term special injury in its direct/derivative analysis, the court in Tri-Star relied heavily on the “special injury” term and fleshed out its meaning. 72 The Tri-Star court stated, “It is well settled that the test used to distinguish between derivative and individual harm is whether the plaintiff suffered ‘special injury’” and that a controlling shareholder’s manipulation of the corporate actions was a special injury to the minority shareholders. 73 It is interesting that the Tri-Star court indicated that the special injury test was well settled. Five years earlier, the Kramer court did not mention special injury in its analysis, but rather relied on the two prongs of Moran and the “direct” and “independent from the corporation” injury

64. See supra notes 50-51 and accompanying text.
65. Kramer, 546 A.2d at 351.
66. See id. at 354 (stating plaintiff’s contention that his “claim should also be construed . . . as asserting a ‘special injury’ to the shareholder”). This mention of special injury in plaintiff’s contention was the only mention of special injury in the opinion.
67. See id. at 355. It is important to note the consequence of characterizing plaintiff’s claim as a waste claim instead of an attack on the fairness of the merger. A claim attacking the fairness of a merger is not only derivative rather than direct, but is also subject to the “entire fairness” standard. See Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1981) (stating that a merger not conducted at arm’s length is subject to the entire fairness test). This standard does not afford the protection of the business judgment rule. See In re Cox Comm’ns, Inc., S’holders Litig., 879 A.2d 604, 606 (Del. 2006) (noting that in a going private merger, the directors are not afforded business judgment protection).
68. See Kramer, 546 A.2d at 353 (restating the well-settled rule that where there is solely a waste of a corporation’s assets, it is a claim properly belonging to the corporation and, therefore is, by its nature, a derivative claim).
70. Kramer, 546 A.2d at 353.
71. Id. at 354.
73. Id. at 330 (emphasis added).
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from Elster.74

The issue in Tri-Star involved a combination of Coca-Cola’s Entertainment Sector and Tri-Star (the Combination).75 Coca-Cola, before the Combination, was a 36% stockholder in Tri-Star.76 Coca-Cola had “effective control of Tri-Star with 56.6% of the common stock under their command”77 pursuant to two voting agreements, one with Home Box Office (HBO) and the other with Technicolor and Rank. After the transfer of the Entertainment Sector’s undesirable assets, Coca-Cola increased its equity in Tri-Star from 36% to 80%, effectively making Coca-Cola the majority shareholder.78 The transfer agreement between Coca-Cola and Tri-Star came with restrictive amendments to Tri-Star’s certificate of incorporation and bylaws.79 Ultimately, the seven directors of Tri-Star and a majority of the minority shareholders approved the Combination and the amendments.80

Twenty months after the Combination, Sony and Coca-Cola entered into a merger agreement.81 Prior to the consummation of the Sony merger, plaintiffs brought suit against Coca-Cola, Tri-Star, HBO, and others for breach of loyalty in the Combination.82 After consummation, the court of chancery dismissed plaintiffs’ allegations because their claims were solely derivative.83 Accordingly, plaintiffs lost standing pursuant to the Delaware rule that a claimant must be a contemporaneous shareholder to sue derivatively.84

The issue for the Delaware Supreme Court in Tri-Star related only to the Combination and not the fairness of the merger.85 The Tri-Star court stated that special injury was the proper test for determining whether a claim was direct or derivative and cabined the meaning of special injury within the Moran two-pronged test.86 The Tri-Star

74. Kramer v. W. Pac. Indus., 546 A.2d 348, 351-53 (Del. 1988). This proclamation is important in light of the Tooley test and the later analysis of the Gentile II case. The Gentile II court, as will be discussed, resurrects the Tri-Star rationale after the Tooley court explicitly rejected the Tri-Star “special injury” conceptualization of the direct/derivative analysis. Gentile v. Rossette (Gentile II), 906 A.2d 91, 101-02 (Del. 2006). See infra Part III.

75. In re Tri-Star, 634 A.2d at 322. The Entertainment Sector was undesirable to Coca-Cola and the combination with Tri-Star was designed to get the Entertainment Sector off of Coca-Cola’s balance sheet. Id. An asset combination is a business combination alternative to the typical merger.

76. Id.
77. Id. (emphasis added).
78. Id.

79. In re Tri-Star, 634 A.2d at 323. The amendments include the following: a classified board, elimination of the stockholders’ right to act by written consent under Del. Code Ann. tit. 8, § 228 (2007), and a 66.67% super-majority voting requirement for certain stockholder actions. In re Tri-Star, 634 A.2d at 323.

80. Id. at 324. Of the seven directors, four were either Coca-Cola executives or stockholders. Id. Also, the voting agreements effectively assured that the transfer agreement would be approved. Id.

81. Id.
82. In re Tri-Star, 634 A.2d at 325.
83. Id.
84. See Del. Code Ann. tit. 8, § 327 (2006); see, e.g., Parnes v. Bally Entm’t Corp., 722 A.2d 1243, 1245 (Del. 1999) (stating that a stockholder suing derivatively must maintain status as a stockholder to initiate and continue litigation).

85. In re Tri-Star, 634 A.2d at 326 (noting the plaintiff’s insistence that the amended complaint demonstrated that “Coca Cola used its control of Tri-Star to implement a self-dealing combination adverse to the interests of the minority shareholders”).

86. Id. at 330; see supra text accompanying note 52.
court conceded that a claim for waste is a derivative claim, but went on to state that “a claim of stock dilution with a corresponding reduction in a stockholder’s voting power is an individual claim.” The court then determined that the waste claim, coupled with the uninformed approval of the Combination, injured the minority Tri-Star shareholders individually while benefiting the controlling shareholder—i.e., Coca-Cola—thereby creating a special injury to plaintiffs.

The Tri-Star court applied only Lipton’s special injury inquiry without even citing the more recent Kramer decision and referred to the special injury test as “well settled.”

It should be apparent from the above discussion that the court has not been clear as to how direct/derivative cases are to be distinguished. The direct/derivative distinctions tend to be fact driven, and the concept defies blanket statements or easy categorizations.

4. Grimes v. Donald

Three years after Tri-Star, in Grimes v. Donald, the Delaware Supreme Court once again eschewed the special injury test in favor of the Kramer and Moran tests and effectively ignored the recent Tri-Star decision and the more historic Lipton decision. The Grimes court essentially reverted to the test espoused in Kramer, that “the distinction depends upon ‘the nature of the wrong alleged and the relief, if any, which could result if the plaintiff were to prevail.” The court held that the recovery in the case would “not accrue to the corporation” and was, therefore, direct. The recovery in question was an injunction stopping the board from abdicating its duties in favor of a single board member. The Grimes court did, however, mention the well-settled rules that “due care, waste, and excessive compensation . . . are derivative.” From Grimes, one notes another pendulum swing away from the special injury inquiry back to the analysis of Kramer and Moran.

88. Granting shares to Coca-Cola for assets that were worth less than represented to Tri-Star constituted the waste claim against Tri-Star. Id.
89. This uninformed approval is to be distinguished from voting power dilution:

Voting power dilution is a harm distinct and separate from that suffered by the minority shareholders due to the alleged nondisclosures made by the defendants in their proxy materials. The harm from voting power dilution goes to the impact of an individual stockholder’s vote, the latter harm goes to a stockholder’s right to cast an informed vote.

Id. at 330 n.12.
90. Id.
91. See Agostino v. Hicks, 845 A.2d 1110, 1118 (Del. Ch. 2004) (noting that the Tri-Star court employed the special injury test and did not cite Kramer).
93. Id. see also Heyman & Enerio, supra note 2, at 162.
94. Grimes, 673 A.2d at 1213 (quoting Kramer v. W. Pac. Indus., Inc., 546 A.2d 348, 352 (Del. 1988)).
95. Id.
96. Id. at 1212; see Heyman & Enerio, supra note 2, at 163 (noting that “the [Delaware] Supreme Court relied on the proposition that ‘courts have been more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief’”).
97. Grimes, 673 A.2d at 1213 (citing Kramer, 546 A.2d at 535).
98. Id.
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5. Parnes v. Bally Entertainment Corp.

Shortly after the Grimes decision, Parnes v. Bally Entertainment Corp. went back to the test in Kramer for the determination of whether unfair dealing in the course of a merger was a derivative or direct suit.\(^99\) The Parnes court cited Kramer, but distinguished the facts from Kramer by stating the plaintiff’s claim “directly challenges the fairness . . . and the price in the . . . merger,”\(^100\) and therefore the plaintiffs stated a direct claim. Whereas in Kramer, the “complaint did not question the fairness of the price . . . or the manner in which the merger agreement was negotiated.”\(^101\)

The decision in Parnes seemed to be an initial step towards a merits-based approach in determining whether a claim is direct or derivative, and possibly opened the door to abolishing the distinction altogether. The court also noted that “it does not necessarily follow that the complaint adequately states a claim for relief.”\(^102\) The court then went through an analysis as to whether the plaintiffs pled sufficient facts to rebut the presumption of business judgment.\(^103\) After already concluding that Parnes brought a direct claim, the court then determined, “[T]he complaint states a claim challenging the fairness of the Bally/Hilton merger and challenging the Bally directors’ approval of the merger as having lacked a rational basis.”\(^104\) Thus, the court’s analysis resembles the type of demand futility analysis that would take place before allowing a claimant to bring a derivative claim.\(^105\)

6. A New Direction: Agostino and Tooley

The decisions in Agostino v. Hicks\(^106\) and Tooley v. Donaldson, Lu\(\&\)kin, & Jenrette, Inc.,\(^107\) took the direct/derivative inquiry in a new direction by laying out the test to apply in every case in which a direct/derivative determination is at issue.\(^108\) Agostino was a Delaware Court of Chancery decision\(^109\) and Tooley, less than a month later, was a Delaware Supreme Court decision.\(^110\) Both courts were adverse to the special injury concept outlined above.\(^111\) These cases mark a shift in the case law toward what has been

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\(^100\) Id. at 1245.
\(^101\) Id.
\(^102\) Id. at 1246.
\(^103\) Id. (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), that stated the business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the best interests of the company”); see infra note 105.
\(^104\) Parnes, 722 A.2d at 1247.
\(^105\) See Aronson, 473 A.2d at 814-15 (stating that “demand futility is inextricably bound to issues of business judgment, but stated the test to be based on allegations of fact, which, if true, ‘show that there is a reasonable inference’ the business judgment rule is not applicable for purposes of a pre-suit demand”) (citation omitted). See supra note 20 for a discussion of demand futility.
\(^106\) Agostino v. Hicks, 845 A.2d 1110 (Del. Ch. 2004).
\(^108\) Id.
\(^109\) Agostino, 845 A.2d at 1110.
\(^110\) Tooley, 845 A.2d at 1031.
\(^111\) See Id. at 1039 (rejecting the special injury inquiry for direct/derivative inquiries); Agostino, 845 A.2d at 1121 (stating that special injury should no longer be the test for direct/derivative inquiries). The Tooley court ultimately rejected the special injury test that was part of the Lipton and Tri-Star analyses. Tooley, 845 A.2d at
termed a merits-based analysis of whether a claim is direct or derivative.112

a. Agostino v. Hicks

The Agostino court began its analysis of the direct/derivative distinction by recalling the history of the derivative and direct dichotomy.113 Thereafter, it set forth the prospective requirements for determining the nature of a claim.114 The initial step in determining whether a claim is direct or derivative is straightforward: the analysis should begin with the “body of the complaint”115 instead of looking to how plaintiffs “characterize their claims.”116 The court then tried to reconcile the history of the direct/derivative distinction with the direction the court intended to go with its direct/derivative inquiry.117 The chancery court discarded the notion of using the special injury inquiry118 in favor of “asking whether the plaintiff has suffered injury ‘independent of any injury to the corporation.’”119 The Agostino court eventually settled on the following inquiry: “Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?”120 This inquiry became an important tool in the analysis of the Tooley decision weeks later.121


In Tooley, before even stating the facts, the Delaware Supreme Court announced the “law to be applied henceforth in determining whether a stockholder’s claim is derivative or direct.”122 The Tooley court stated that determining whether a claim is derivative or direct “must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders,
individually).”123 It is apparent that the court’s statement was a definitive proclamation of the standard the courts were to apply going forward when determining whether a claim is direct or derivative, and that it swept away some other older tests and inquiries.124

The Tooley court stated that its test was “well embedded in [Delaware] jurisprudence.”125 The Tooley court also looked favorably on the inquiry set forth in Agostino.126 The Agostino inquiry assists in answering the first prong of the Tooley test.127 “The second prong of the analysis should logically follow.”128 In other words, once the plaintiffs establish who suffered the injury, it should be clear that the relief would logically flow to the injured party.129 Ultimately, the court noted that the courts in Grimes, Kramer, and Parnes employed the correct analyses and that “a court should look to the nature of the wrong and to whom the relief should go.”130

The Tooley court expressly disapproved two concepts that clouded the direct/derivative distinction in previous Delaware case law.131 The first was the concept of special injury, as applied in Elster, Lipton, and Tri-Star.132 The second was the concept that a claim is per se derivative if something affects all shareholders equally.133

Agostino and Tooley did not promulgate conceptually new tests. Those cases restated the clearest, most logical, and easiest to apply parts of tests applied through the years.134 The goal of introducing the newly worded Tooley test was to present a clear and concise rubric for courts to employ going forward.135 The Tooley decision did away with concepts that were essentially making the direct/derivative analysis difficult and imprecise.136 It will be seen, however, that even with a concise statement of the law, it is still difficult to determine whether a claim is derivative or direct.137

123. Id.
124. Id.
125. Id. at 1035 (citing Kramer v. W. Pac. Indus., Inc., 546 A.2d 348 (Del. 1998)). This Note focuses on the lack of clarity in direct/derivative jurisprudence. The Tooley court looked to the same cases as this Note—i.e. Kramer, Parnes, and Grimes—and observed that, although it had not been proclaimed in a straightforward manner, the elements of this new test had previously been there. Tooley, 845 A.2d at 1035. The court went on to clear the field further by rejecting the special injury test which had muddied the water up to that point. Id. at 1038 n.21.
126. Id. at 1036.
127. Id.
128. Id.
129. Tooley, 845 A.2d at 1036.
130. Id. at 1038. Although the wording of the inquiries in Grimes, Kramer, and Parnes were not the same, the analyses were similar and the results were in line with the Tooley test. Id. at 1037-39.
131. Id. at 1037-38.
132. Id. at 1038-39. “In the Tri-Star case, however, this court lapsed back into the ‘special injury’ concept, which we now discard.” Tooley, 845 A.2d at 1038 n.21.
133. Id. at 1039. The concept that an injury affecting all shareholders alike was a per se derivative claim was the result of Bokat v. Getty Oil Co., 262 A.2d 246 (Del. 1970). The Tooley court stated that this analysis was inaccurate and confusing. Tooley, 845 A.2d at 1037.
134. Tooley, 845 A.2d at 1038.
135. See id. at 1036 (explaining that the standard needs to be clear, simple, and consistent).
136. Id. at 1036-38. Those concepts were the special injury test and the characterization of claims as per se derivative when transactions affected all shareholders equally.
137. See infra Part III.
C. The Gentile Decision

1. Gentile v. Rossette: Factual Background

Plaintiff John A. Gentile and defendant Douglas W. Bachelor were acquaintances and co-workers contemplating the creation of a new software company in 1995. Bachelor consulted with a friend of Gentile, co-defendant Pasquale David Rossette, about the idea of starting a new software company. Rossette eventually agreed to provide the initial investment for what would later become SinglePoint, a Delaware corporation. SinglePoint was unable to develop a viable product and maintain financial stability, so it continually turned to Rossette for additional capital in the form of loans.

By March 2000, Rossette had contributed over $3 million in capital to SinglePoint. Rossette received promissory notes as consideration for the loans. The promissory notes were convertible into shares of SinglePoint stock at Rossette’s option. The original conversion rate for the promissory notes was $1.33 per share. This rate declined to $0.75 per share in November 1997, and again declined to $0.50 per share by October 1999.

In March 2000, Rossette converted the debt owing to him into shares of SinglePoint stock. Bachelor, representing the company, and Rossette, representing himself, negotiated the conversion. Ignoring the contractual rate of $0.50 per share, the directors negotiated a price of $0.05 per share. Once the two directors negotiated the price, they then authorized the conversion of $2,220,951 of debt into SinglePoint shares at the $0.05 per share rate.

The conversion caused the company to increase its authorized shares of common stock from 10 million shares to 60 million shares. A majority of the minority shareholders authorized the increase of shares, but they were unaware of the underlying purpose of converting $2.2 million of debt to Rossette into shares at the negotiated rate of $0.05 per share.
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not enough shares to transfer to Rossette.\(^{152}\) The conversion significantly increased Rossette’s share of the company’s equity.\(^ {153}\) “Before the conversion, Rossette held approximately 61.19% of the company’s equity; after the conversion he held 93.49%.”\(^ {154}\)

The proclaimed impetus for the conversion was to make the company more attractive to potential investors.\(^ {155}\) The level of debt owing to Rossette in March 2000 allegedly deterred third party investment in SinglePoint.\(^ {156}\) The debt conversion allowed SinglePoint to solicit favorable offers from possible acquirers.\(^ {157}\) In May 2000, two months after the conversion, Rossette and Cofiniti negotiated a merger wherein Cofiniti would acquire SinglePoint.\(^ {158}\) The consideration for the shareholders in this agreement was 0.49 shares of Cofiniti stock for each share of SinglePoint stock.\(^ {159}\) Rossette, as majority shareholder, also received unique inducement to ensure consummation of the deal.\(^ {160}\) Rossette received an agreement on a put option\(^ {161}\) requiring Cofiniti to purchase 360,000 shares at five dollars per share.\(^ {162}\)

SinglePoint released an Information Statement to the shareholders of SinglePoint regarding the upcoming merger with Cofiniti.\(^ {163}\) The Information Statement noted that the merger would pass, because “several of our large stockholders, representing in the aggregate approximately 96.8% of our outstanding common stock, have agreed to vote their shares in favor of the merger.”\(^ {164}\) SinglePoint also required a majority of the minority shareholders to vote on the merger.\(^ {165}\) The shareholders approved the merger, and the corporations completed the merger on October 23, 2000.\(^ {166}\)

The plaintiff shareholders soon after commenced an action for breach of fiduciary duty in the Delaware Court of Chancery.\(^ {167}\) The claim challenged the following: (1) the debt conversion as a dilution of the economic value and the voting power of the minority interest and (2) the put options unique to Rossette.\(^ {168}\) The defendants moved for summary judgment, basing their claim on the assumption that the plaintiffs’ claims were derivative in nature and that they had lost standing to bring such claims.\(^ {169}\) The

\(^{152}\) Id.
\(^{153}\) Id.
\(^{154}\) Gentile II, 906 A.2d at 95. Consequently, the minority shareholders’ equity was decreased (or diluted) from 38.81% to 6.51%. \(\text{Id.}\)
\(^{155}\) Id. at 94.
\(^{156}\) Id.
\(^{157}\) Id.
\(^{158}\) Gentile II, 906 A.2d at 95.
\(^{159}\) Id. SinglePoint also became a wholly-owned subsidiary of Cofiniti. \(\text{Id.}\)
\(^{160}\) Id. at 95. “Rossette made it clear that ‘for me to accept the terms and conditions of the Merger as set forth they [Cofiniti] would have to provide me the proper inducement to do so.’” \(\text{Id.}\)
\(^{161}\) A put option is an option to sell shares of a company for which the owner (in this case Rossette) has the power to require the issuer to pay a set contract price, regardless of the market value of the shares at the time the option is exercised.
\(^{162}\) Gentile II, 906 A.2d at 95.
\(^{163}\) Id.
\(^{164}\) Id. (quoting an information statement issued by SinglePoint on October 13, 2000).
\(^{165}\) Id. at 95.
\(^{166}\) Id.
\(^{167}\) Gentile II, 906 A.2d at 96.
\(^{168}\) Id.
\(^{169}\) Id.
defendants went on to state they were also entitled to judgment on the merits.170

2. Gentile I: Court of Chancery Decision

The Delaware Court of Chancery opinion stated that the first claim171 brought by the plaintiffs, the debt conversion claim, was derivative in nature and, therefore, the shareholders could only bring the claim derivatively.172 Furthermore, Gentile I held that because the company no longer existed as SinglePoint but rather as a wholly owned subsidiary of Cofiniti, the plaintiffs lacked the requisite standing to bring such a derivative claim.173 The court, however, did hold that the second claim, the unique put option in favor of Rossette, was a direct claim regarding the fairness of the subsequent merger.174 Neither party subsequently appealed the latter decision.175

a. The Debt Conversion Claim: Derivative or Direct?

The plaintiffs contended that the price at which the shares were converted was “inadequate and caused SinglePoint to issue ‘vastly more stock than it should have.’”176 The court in Gentile I stated that a showing of no or grossly inadequate consideration for a stock issuance is a direct injury to the corporation and shareholders are derivatively injured.177 The court went on to state that a claim of dilution, “without more, cannot convert a claim traditionally understood as derivative, into a direct one.”178 In this case, the conversion reduced the minority’s share from 38.81% to 6.51%.179 The court reasoned that because the minority shareholders were minority shareholders both before and after the conversion of Rossette’s debt, the minority shareholders’ “voting power was not materially changed.”180 Additionally, the court noted that any issuance of additional stock would be a reduction of proportional voting power and, therefore, dilution is an inherent consequence in all stock issuances.181 Thus, the shares issued as part of the conversion would have diluted the other shareholders’ voting power, regardless of their valuation.182

The Gentile I court relied on the recent Tooley test to determine whether the claim was direct or derivative in nature.183 The Gentile I court stated that the harm and remedy

170. Id.
172. Gentile II, 906 A.2d at 96.
173. Id.
174. Id. at 97 n.12.
175. Id. at 96-97.
176. Gentile I, 2005 Del. Ch. LEXIS 160, at *19. The inadequate price claim is supported by Gentile v. SinglePoint Fin., No. 18677-NC, 2003 Del. Ch. LEXIS 21 (Del. Ch. Mar. 5, 2003), which held that the price per share was $5.51. Id. at *27.
178. Id. (quoting In re J.P. Morgan Chase, 906 A.2d 808, 819 (Del. Ch. 2005)); see also id. at *19-20 (stating “[a] dilution claim may be direct, however, if voting rights are harmed”).
179. Id. at *10.
180. Id. at *20 (emphasis added).
182. Id.
would both run to SinglePoint rather than the plaintiff shareholders.\footnote{Gentile I, 2005 Del. Ch. LEXIS 160, at *22.} The court further stated the following:

That loss, while hurting the shareholders in the sense that any corporate loss hurts shareholders, was the Company’s loss; the remedy would be either to cancel the shares . . . or to require the acquirer to pay fair value . . . . Thus, this is an instance where the Company suffered the harm and any remedy would be for the benefit of the Company. As such, under Tooley, the claim is derivative.\footnote{Id. at *23.}

Therefore, the court concluded the claim was derivative rather than direct.\footnote{Id. at *23.}

3. Gentile II: Delaware Supreme Court Decision\footnote{Gentile v. Rossette (Gentile II), 906 A.2d 91 (Del. 2006).}

The Delaware Supreme Court in Gentile II held that the plaintiffs’ debt conversion claim was both direct and derivative in nature, and therefore the court of chancery erroneously dismissed the claim as solely derivative.\footnote{Id. at 99.} The Delaware Supreme Court determined, counter to Gentile I, that the dilution of voting rights has to be real, but not necessarily material.\footnote{Id. The court defines material dilution as the “reducible[s] the public stockholders’ voting power from majority to minority status.” Id. at 102-03.} The Gentile II court also held that its decision fit within the Tooley framework, because the plaintiff shareholders both suffered the injury and would benefit from relief granted.\footnote{See In re Tri-Star Pictures, Inc., Litig., 634 A.2d 319, 326-27 (Del. 1993) (holding that it is a direct injury when defendants engage in action that manipulatively dilutes the cash value and voting rights of the minority stockholders).}

\textit{a. The Debt Conversion Claim: Derivative or Direct?}

In Gentile II, the Delaware Supreme Court relied heavily on Tri-Star, a case that the court of chancery did not mention in its analysis.\footnote{Gentile II, 906 A.2d 91.} The plaintiffs argued that their case was indistinguishable from Tri-Star, and was therefore controlling.\footnote{Id. at 101.} The defendants vehemently disagreed.\footnote{Id.}

The Delaware Supreme Court framed the issue in Gentile II as “[W]here a Tri-star type transaction reduces the voting power of the corporation’s public shareholders, must the reduction be from majority to minority stockholder status, for the public shareholders to have standing to assert a direct claim against the fiduciaries responsible?”\footnote{Id. at 101. This question gets to the heart of the materiality addressed in the court...}
of chancery. The inquiry, worded in another way, could be, “Does the dilution have to be material?” The supreme court answered this question in the negative for three reasons: (1) a requirement of reduction from majority to minority status has no support in Delaware case law; (2) materiality has no place in determining whether a claim is derivative, direct, or both; and (3) the result fits within the Tooley framework.

i. Change from Majority to Minority Shareholder Status

The Delaware Supreme Court stated that no authority existed for the proposition that voting dilution claims were only direct when a transaction dilutes the public stockholders share of the company from majority to minority status. The Delaware Supreme Court further noted that Tri-Star—the case that provided the analytical framework for the supreme court’s opinion in Gentile II—does not compel a finding of such dilution either. According to the Delaware Supreme Court, the facts in Gentile were similar to the facts presented in Tri-Star. Both Gentile and Tri-Star involved initial minority-status public shareholders before the alleged dilutions occurred. The Gentile II court noted that there was no specific mention of degree or extent of reduction necessary to make a claim direct in Tri-Star.

ii. Materiality Does Not Determine Whether a Claim is Derivative, Direct, or Both

The Gentile II court focused on the nature of the breach of duty and the harm inflicted without quantifying the harm. The court held that “[a] rule that focuses on the degree or extent of the expropriation, and requires that the expropriation attain a certain level before the minority stockholders may seek a judicial remedy directly, denigrates the gravity of the fiduciary breach . . . .” The court was concerned that a materiality requirement would implicitly approve certain types of breach.

iii. Gentile II: The Result Fits within the Tooley Framework

The Delaware Supreme Court held that the minority shareholders suffered an injury...
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that direct litigation could possibly redress. According to the Delaware Supreme Court, the Tooley test in this case tended to show that both a derivative and a direct action could be brought by the plaintiffs. However, since SinglePoint no longer existed, the remedies available to the corporation were no longer available. Consequently, the individual shareholders could only bring the claim directly.

Also, the Gentile II court explicitly overruled Behrens v. Aerial Communications, Inc. Behrens is a chancery court opinion with facts strikingly similar to those in Gentile. Behrens held that a minority interest that declined from 20% already “inhabited the region of ‘virtual [voting power] oblivion,’” and therefore the dilution claims brought by the minority interest plaintiffs were derivative in nature. The Gentile II court claimed that Behrens did not take cognizance of the individual injury to the minority stockholders, and was therefore inconsistent with what Gentile II required in the analysis.

It is important at this point to recall the current state of the law. The Tooley court pronounced a test for Delaware courts to apply in all cases in which the distinction between direct claims and derivative claims is at issue. The Tooley court also explicitly discarded the special injury concept of Tri-Star. However, the Gentile II court, although not mentioning the term “special injury”, seems to bring this concept back through its reliance on Tri-Star. Therefore, although the Delaware Supreme Court has purported to announce a straightforward test, the direct/derivative inquiry is as cloudy now as it was in the past.

III. ANALYSIS

Although the Delaware Supreme Court cabins much of its analysis within the Tri-Star framework, the analysis should begin and end with the Tooley test, which encompasses the inquiry set out in Agostino. The Tooley opinion mandates this analysis. Further, the Tooley court specifically disapproved of the special injury

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206. Gentile II, 906 A.2d at 103.
207. Id.
208. Id.
209. Id.
211. Compare Behrens, 2001 Del. Ch. LEXIS 80, at *2-5 (holding that a minority comprising less than fifty percent was not directly injured by a combination that diluted their holdings), with Gentile II, 906 A.2d at 94-96 (holding that a minority comprising less than fifty percent was directly injured by a combination that diluted their holdings).
212. Behrens, 2001 Del. Ch. LEXIS 80, at *18 (referencing a reduction of voting power to “virtual oblivion” described in Tri-Star).
213. Id.
214. Gentile II, 906 A.2d at 103 n.28.
216. Id. at 1038 n.21.
217. See Gentile II, 906 A.2d at 101-03 (stating that the Gentile II plaintiffs brought Tri-Star claims and were therefore direct).
218. Tooley, 845 A.2d at 1033. “[The court] set forth in [Tooley] the law to be applied henceforth in determining whether a stockholder’s claim is derivative or direct.” Id.
concept as espoused in *Tri-Star* and discarded it entirely.\(^{219}\) The fact that *Tooley* set forth the test the Delaware courts were to use “henceforth” and explicitly discarded the special injury concept of *Tri-Star*,\(^{220}\) *Gentile II*’s apparent return to *Tri-Star* is questionable.

Under the *Tooley* analysis, the court determined whether a claim is direct or derivative by considering the following: “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?”\(^{221}\) In *Gentile II*, the Delaware Supreme Court, although initially stating that the *Tooley* test was the appropriate approach, did not utilize the *Tooley* test in its analysis until the end of its opinion.\(^{222}\) *Gentile II* instead favored the *Tri-Star* analysis.\(^{223}\)

In analyzing the dilution claim in *Gentile*, this Note structures the analysis according to the *Tooley* framework, while addressing the rationale the Delaware Supreme Court used in holding that plaintiffs’ dilution claim was direct.

### A. Who Suffered the Injury?

The *Gentile* plaintiffs brought two specific claims against defendants: the debt conversion claim and the unfair dealing during the merger claim.\(^{224}\) The debt conversion claim itself, according to *Gentile II*, has two parts: (1) loss of economic value, and (2) loss of voting power.\(^{225}\) Both losses were to the detriment of the shareholders.\(^{226}\)

It is a well-settled rule in Delaware that a claim of waste is a derivative claim.\(^{227}\) A claim for waste is essentially a claim arising from the mismanagement of corporate assets.\(^{228}\) As *Gentile I* noted, a dilution claim is essentially a claim for waste.\(^{229}\) The terms of the conversion of SinglePoint debt into stock for Rossette were “inadequate and caused SinglePoint to issue ‘vastly more stock than it should have.’”\(^{230}\) Therefore, following well-settled law corporate rules, the claim that the value of plaintiff shareholders’ stock was diluted is a waste claim and, thus, derivative. The analysis, however, does not end there. The *Gentile* plaintiffs couple their economic dilution claim

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219. See id. at 1038 n.21 (noting the *Tri-Star* case lapsed back to the special injury, and stating specifically that it was discarding that concept); see also Agostino v. Hicks, 845 A.2d 1110, 1121 (Del. Ch. 2004) (stating that the special injury concept should be discarded).

220. *Tooley*; 845 A.2d at 1033, 1038 n.21.

221. Id. at 1033.

222. *Gentile II*, 906 A.2d at 102-03.

223. Id. Although the court did not use the term special injury, the direct/derivative analysis employed by the *Gentile II* court was parallel to the special injury analysis of *Tri-Star*. See supra Parts II.B.3, II.C.3.

224. *Gentile II*, 906 A.2d at 96. This Note examines only the first claim, the debt conversion claim, because the *Gentile I* court held that the second claim for unfair dealing during the merger was direct and it was not subsequently appealed. Id. at 97 n.12.

225. Id. at 96.

226. Id. at 99.

227. See Kramer v. W. Pac. Indus., 546 A.2d 348, 353 (Del. 1988) (stating that “Delaware courts have long recognized that actions charging mismanagement which depress the value of stock [allege] a wrong to the corporation”).

228. Id.


230. Id.
with a voting power dilution claim.\textsuperscript{231} Voting power dilution logically follows a claim for economic dilution.

Consider the following example: Corporation $A$ has 10 million shares trading at a value of $10$ per share. The aggregate value of these outstanding shares is $100$ million. If Corporation $A$ subsequently issues another 10 million shares, there are 20 million outstanding shares. Assume now that Corporation $A$ issued the 10 million new shares for consideration totaling $50$ million. The aggregate value is now $150$ million making each share worth $7.50$ instead of the original $10$ per share. The resulting dilution from $10$ to $7.50$ is an obvious economic dilution. The dilution results from the company granting shares for less than the original shares were worth. Assume further that one person, $Z$, owned the original 10 million shares. $Z$, therefore, had 100\% voting control in Corporation $A$ and, unless $Z$ also receives the new 10 million shares, issuing additional shares dilutes his voting control. This injury is not direct—rather, it is a derivative injury resulting from corporate waste. In a popular children’s game, Mouse Trap\textsuperscript{\textregistered}, the result is a mouse being trapped by a cage falling from above.\textsuperscript{232} However, the mouse is not trapped merely because the cage fell on it. For anyone who is familiar with the game, it is clear that the mouse entrapment is a result of someone turning the crank, which causes the boot to kick the bucket, which drops a marble down the ramp, and so on. Much in the same way the game traps the mouse, the transaction occurring upstream dilutes the voting power of Corporation $A$’s voters. In the words of the Tooley court,\textsuperscript{233} a helpful approach to examining this first prong—determining who suffered the injury—is to inquire whether “the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation[.]”\textsuperscript{234} Here, the injury, a reduction in economic and voting power, followed the initial injury to the corporation. The initial injury to the corporation was the waste, whereby the corporation issued too many shares for too little consideration.

The Tri-Star court, however, identified a situation where dilution of voting power was a direct injury: when a shareholder, working in concert with the corporation, causes a corporation to issue shares to said shareholder for inadequate consideration.\textsuperscript{235} The injury is direct when there is voting dilution from the minority shareholders.\textsuperscript{236} The Delaware Supreme Court ran with this idea in Gentile II and held that the facts of Gentile made it a Tri-Star case, and was therefore subject to the same analysis as the Coca-Cola/Tri-Star transfer.\textsuperscript{237} The problem with relying on the Tri-Star analysis is that the Tri-Star court explicitly relied on the concept of special injury,\textsuperscript{238} a concept that both the Agostino and Tooley courts disapproved.\textsuperscript{239} The Tri-Star analysis is difficult to justify when applied to

\begin{footnotes}
\item 231. Gentile v. Rossette (\textit{Gentile II}), 906 A.2d 91, 97-98 (Del. 2006).
\item 232. Mouse Trap is a game for 2-4 players. The game is set-up on a board with various pieces fitting together to form a coherent whole. Without one piece in the system set up, it does not function. Another similar example is a Rube Goldberg system, essentially a contraption with many complex parts designed to accomplish one simple task at the end.
\item 234. \textit{Id}.
\item 236. \textit{Id}.
\item 238. \textit{In re Tri-Star}, 634 A.2d at 330.
\item 239. See Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1038 & n.21 (Del. 2004) (noting
\end{footnotes}
Gentile because the Tri-Star analysis relied on an injury that is dependent on a corporate injury (waste) rather than an independent injury that is required by the Tooley test.240 The conclusion that the conversion injured the corporation directly is vital to the analysis of the second prong of the Tooley test below. Part III.B of this Note, infra, analyzes who would benefit from recovery.

1. Requirement of a Shift from Minority to Majority Shareholder Status

The Gentile II decision focused on two aspects of the voting power dilution claim to try to show that it was the minority shareholders and not the corporation that suffered an injury for purposes of the Tooley test.241 The first argument was that there was no support in Delaware case law to support a requirement of reduction from majority to minority status.242 However, this argument does find support in Delaware case law. In Paramount Communications, Inc. v. QVC Network, Inc.,243 the Delaware Supreme Court noted that a buyer pays a control premium244 when it increases its holdings from minority status to controlling shareholder.245 Further, in Agostino, the court noted that because the plaintiff class was a minority shareholder before the transaction, they would not be entitled to a control premium.246 The Agostino court also held that the transaction involved247 was not a Tri-Star transaction because, at the time of the complaint, the transaction had not occurred and, therefore, the defendant did not reach majority status at the expense of the minority shareholders.248 Thus, by inference, the Agostino plaintiffs could have made out a Tri-Star-styled claim for voting dilution if the transaction had come to fruition. The Agostino court predicated a Tri-Star-styled claim on a change of control.249 This did not occur in Gentile; Rossette was the controlling shareholder before and after the debt conversion transaction.250

The Gentile II court attempted to distinguish the holding of Agostino based on the statement in the Agostino opinion that “the claim in that case was not a Tri-Star claim.”251 However, Gentile II did not dispute the control premium requirement of Agostino.252 The analogy from control premium to the voting power dilution of Gentile is

that the special injury test is a confusing concept and should be discarded); Agostino v. Hicks, 845 A.2d 1110, 1121 (Del. Ch. 2004) (stating that the special injury test should be discarded).

240. In re Tri-Star, 634 A.2d at 324.
241. Gentile II, 906 A.2d at 101-03.
242. Id. at 101.
244. A control premium is an extra cost when someone or some entity is acquiring a controlling interest in a corporation. Paramount Comm’ns., 637 A.2d at 43. The reason for the premium is that control of a corporation has a value above the market value of an individual share in a corporation. Id.
245. See id. (stating that when a single shareholder moves from minority to majority status there should be a premium paid; that premium is called a control premium).
247. The transaction in Agostino was cash infusions into Viasystems by HMTF for promissory notes and options to purchase stock. Id. at 1113-14. If the transaction went through, HMTF would have gone from minority status in Viasystems to a controlling majority status shareholder. Id.
248. Id. at 1124.
249. Id. at 1124 n.65.
250. Gentile v. Rossette (Gentile II), 906 A.2d 91, 95 (Del. 2006).
251. Id. at 101 n.25.
252. Id.
not an heroic leap because the control premium requirement shows that courts place importance on public shareholders changing from an aggregate majority to minority status. This analogy lends support to the argument that the rules are different when the pre-transaction minority remains a minority post-transaction. Therefore, the Gentile II court was incorrect in stating that going from majority to minority status was not a requirement in a Tri-Star style voting dilution claim. Because Gentile II incorrectly held that majority to minority status was not required in Delaware case law, the fact that the plaintiffs in Gentile were minority shareholders both before and after the transaction is an important factor in the analysis of whether their claim was direct or derivative. Because the Gentile plaintiffs had minority shareholder status both before and after the conversion transaction, they cannot make out a Tri-Star claim. Because they cannot make out a Tri-Star claim, the court should have held the stock dilution claim in Gentile was derivative rather than direct.

In fact, the Gentile II court’s reliance on Tri-Star to buttress its argument that a shift from majority to minority status is not necessary for a direct claim was unfounded. In Tri-Star, Coca-Cola went from 36.8% ownership to 80%. Gentile II noted that Coca-Cola had effective voting control in Tri-Star because of the voting agreements. However, a major distinction between Tri-Star and Gentile lies in the fact that Coca-Cola and Tri-Star specifically designed the combination to give Coca-Cola a controlling interest in Tri-Star. In stark contrast, in Gentile, Rossette was the controlling shareholder both before and after the transaction. Therefore, the support on which the Gentile II court grounds its argument—the Tri-Star Combination between Coca-Cola and Tri-Star whereby Coca-Cola gained control of Tri-Star—is unreliable in the Gentile situation. Coca-Cola itself went from a minority shareholder to a majority shareholder. Therefore, the Gentile transaction is easily distinguishable from Tri-Star because there was no change from minority shareholder status to majority shareholder status; those who were minority shareholders in SinglePoint before the conversion continued to be minority shareholders after the conversion. Again, because Gentile II should not have deemed the plaintiffs’ claim a Tri-Star claim, the claim is a derivative waste claim.

2. Requirement of a “Material” Reduction in Voting Power

The Gentile II court also determined that the claim was a direct vote dilution claim because a “requirement of a ‘material’ reduction in voting power should play no part in any analysis of whether a claim is direct, derivative, or both.” The Gentile II court implied that putting a degree of injury or quantification on an injury would be, in essence, an approval of a breach of fiduciary duty if the subsequent injury did not cross this supposed “material” threshold. The Gentile II court’s materiality analysis is very

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254. See Gentile II, 906 A.2d at 100 (explaining that Coca-Cola voted in concert with other stockholders).
256. Gentile II, 906 A.2d at 95 (explaining that, prior to the conversion, Rossette held 61.19% of the company, and 93.49% after).
257. In re Tri-Star, 634 A.2d at 322.
258. Gentile II, 906 A.2d at 95 (the minority shareholders’ interest was reduced from 38.81% to 6.51%).
259. Id. at 102.
260. Id.
similar to its previous minority to majority analysis.

The defendants in *Gentile* argued that materiality is necessary.261 Defendants, as well as the *Gentile I* court, defined materiality as a reduction from majority to minority stockholder status.262 The *Gentile II* court, in an attempt to strengthen its argument, bifurcated what was essentially the same argument.263 The requirement for materiality does not run to the seriousness of the underlying breach. As *Gentile II* implied, materiality runs to the analysis of the harm. Assuming there is a breach of duty,264 the breach is material. The degree of injury is what changes between transactions and is susceptible to a materiality requirement and therefore plays a role in the first prong of the *Tooley* test. The harm in *Gentile* was a direct harm to SinglePoint by causing the corporation to overpay for less than adequate consideration.265 Therefore, the injury and subsequent claim was for waste.266

It is important to note that, had SinglePoint not committed waste in the conversion with Rossette and followed either of the originally contracted debt conversion rates, the conversion would still dilute the minority shareholders’ shares. Therefore, any dilution claims, whether economic or voting power dilution, are matters of degree. Given the numbers as presented in *Gentile*, there were six million outstanding shares of SinglePoint stock before the conversion.267 Rossette owned 61.19% of the shares pre-transaction and the minority owned 38.81%.268 If Rossette received the contracted for four million shares,269 then his share total would have been roughly 7.67 million while the minority share total would have remained unchanged at 2.33 million. The total number of shares outstanding had to be at least ten million.270 These numbers translate to roughly 76% ownership for Rossette and 24% for the minority. The resulting numbers are important because they show that waste is the only real injury in this case. In this situation, any conversion would produce at least 76%/24% ownership relationship between Rossette

261. *Id.* at 101.
262. *Id.; Gentile v. Rossette (Gentile I),* No. 20213-NC, 2005 Del. Ch. LEXIS 160, at *20 (Del. Ch. Oct. 20, 2005). One can assume that defendants would not argue with the assumption that in *Tri-Star* the reduction in the minorities’ shares from 63.2% to 20% would be material because there was a shift from majority to minority.
263. See *Gentile II,* 906 A.2d at 101-02 (splitting the argument for reduction from majority to minority shareholder status and the argument for material reduction into two separate arguments).
264. Whether a claim is direct or derivative is a function of who suffered the injury and to whom the recovery would go. See *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004) (promulgating the test for courts to apply when distinguishing direct from derivative is at issue, containing two components: (1) who suffered the harm and (2) who will receive the recovery). Courts do not predicate the direct/derivative distinction on a degree of breach. *Id.* Delaware has other functions that screen degrees of breach, such as providing indemnification under section 102(b)(7) for breach of care, but providing no indemnification for breaches of loyalty or candor. DEL. CODE ANN. tit. 8, § 102(b)(7) (2007). This demonstrates that a materiality analysis runs to the injury rather than the breach itself.
266. See, e.g., *Kramer v. W. Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) (stating the well-settled corporate rule that inadequate consideration is waste).
267. *Gentile II,* 906 A.2d at 94.
268. Rossette’s ownership of 61.19% of six million outstanding shares calculates to Rossette owning 3.67 million shares. Therefore, the six million outstanding shares less those Rossette owned (3.67 million) leaves the minority shareholders owning 2.33 million shares.
269. *Gentile II,* 906 A.2d at 94.
270. The sum of 7.67 million and 2.33 million is 10 million.
and the minority shareholders. Therefore, the minority shareholders would always have been in a situation where their vote did not “count.” In other words, any decision Rossette favored was a fait accompli. With or without the waste, the conversion would have diluted the minority’s share of the company to less than 25%. The fact that the minority’s share is less than 25% is significant, because unless there were any clauses in the company’s articles of incorporation or by-laws requiring over a 75% super-majority to pass any corporate measures, the minority shareholders would never have had veto power. This is true regardless of whether it was at the contract conversion rate or at the wasteful, self-dealing rate.

The indirect injuries, therefore, were to the minority shareholders. In Gentile, the fact that the post-transaction minority was the same as the pre-transaction minority should be an important consideration when analyzing voting rights. In Behrens v. Aerial Communications, Inc., the chancery court, in an opinion written by then Chancellor Jacobs, followed the materiality formulation laid out above when it held that a minority interest that declined from 20% already “inhabited the region of ‘virtual [voting power] oblivion.’”271 The Behrens court went on to note that the “the minority suffered no injury to their voting power because they had no voting control or veto power before the . . . transaction.”272 Therefore, in Behrens, because such a disparity of power existed both before and after the decrease in the minority’s share, there was no material change in the plaintiffs’ positions.273 Although Behrens is no longer good law, it shows an original basis for the “materiality” standard that the Gentile II court found objectionable.274 Interestingly enough, five years after Behrens, Justice Jacobs found himself on the other side, writing the opinion in Gentile v. Rossette,275 overruling his previously well-grounded opinion.

Coming full circle to the original question—who suffered the injury—it is clear that the corporation suffered the injury and that any injuries to the minority shareholders, whether economic or voting power, were merely indirect injuries and necessary consequences resulting from the direct injury to the corporation. Under the Tooley framework, the plaintiffs cannot show an injury to themselves without first showing an injury to the corporation. Furthermore, courts should not recognize a voting power claim in a case where the minority shareholders were minority shareholders both pre- and post-transaction.

B. Who Would Benefit from Recovery or Other Remedy?

The second prong of the Tooley test should logically follow from the first: whoever was injured receives the recovery.276 Assuming—as discussed in the analysis of the first prong of the Tooley test above—that in Gentile the injury was first and foremost an injury to SinglePoint, the recovery would run to the corporation directly and to the shareholders.

272. Id. at *19.
273. Id.
274. Id.
276. See Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004) (presenting the notion that the second prong should logically follow the first prong).
indirectly. If the shareholder plaintiffs brought the claim derivatively before Cofiniti acquired SinglePoint, then the resulting remedy would be a cancellation of the excessive shares, assuming the court deemed the converted shares excessive.\textsuperscript{277} This is the easiest remedy to enforce—rescinding excess shares of a fledgling company—rather than valuing a company where the benefactor was the one who infused SinglePoint with cash.\textsuperscript{278} The problem with this remedy is that SinglePoint no longer exists.\textsuperscript{279} Therefore, there is no remedy for SinglePoint. The \textit{Gentile II} court, noting this unfortunate result of the merger, created an injury and corresponding remedy to compensate the minority shareholders.\textsuperscript{280} The \textit{Gentile II} court stated that the remedy was damages for the fair value of the 40 million shares representing the overpayment.\textsuperscript{281} Interestingly enough, however, the plaintiffs, in their effort to get around the fact that a waste claim is derivative in nature, argued that SinglePoint stock was worthless, seemingly to show that the corporation suffered no injury.\textsuperscript{282} It seems odd that the SinglePoint shareholders would in one breath argue that they were injured because the board issued too many of their valuable shares and because the share value decreased, and in another breath argue that their shares were valueless so as to get around the first prong of the \textit{Tooley} test. The court should not have created a remedy for shareholders who argued that their stock was worthless.

It seems \textit{Gentile II} allowed the tail to wag the dog by holding that the only available remedy was for SinglePoint shareholders because there was no longer a remedy available to the corporation as a result of the SinglePoint/Cofiniti merger. This holding distorted the \textit{Tooley} test by deciding who benefited from a remedy independent of the first prong: who suffered the injury. The \textit{Gentile II} court attempted to shove this square peg into a round hole by bringing back a special injury analysis—that the \textit{Tooley} court had previously discarded—to justify a remedy that it deemed equitable. In effect, \textit{Gentile II} created an exception to the \textit{Tooley} test that runs as follows: if the appropriate remedy is no longer available due to a subsequent merger, then a special remedy exists for the indirectly injured plaintiffs. The court accomplished this end run around \textit{Tooley} by allowing a claim, which the court should have characterized as derivative, to be brought as a direct claim on behalf of individual shareholders. This result is not undesirable; however, it is not justified by the \textit{Tooley} test that the Delaware Supreme Court promulgated only two years prior. Therefore, the appropriate remedy in \textit{Gentile II} was rescission of the excessive shares.

Rescission makes SinglePoint whole because then it effectively would not have given up more assets than the value of the consideration it received in return.\textsuperscript{283} The recovery would thereafter pass through the corporation to the shareholders, restoring their

\textsuperscript{277}. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983) (approving of rescissory damages as equitable in cases involving corporate waste).

\textsuperscript{278}. \textit{Gentile II}, 906 A.2d at 94 (stating that Rossette, the benefactor, “was the company’s sole source of additional capital . . . on several occasions”).

\textsuperscript{279}. \textit{Id.} at 95-96. SinglePoint merged into Cofiniti and therefore, no longer existed. \textit{Id.}

\textsuperscript{280}. \textit{Id.} at 103.

\textsuperscript{281}. \textit{Id.}

\textsuperscript{282}. \textit{Gentile II}, 906 A.2d at 98.

\textsuperscript{283}. See Gentile v. Rossette (\textit{Gentile I}), No. 20213-NC, 2005 Del. Ch. LEXIS 160 (Del. Ch. Oct. 20, 2005) (holding that the appropriate remedy to make SinglePoint whole would have been rescission of the excess shares issued to Rossette).
equity to the pre-transaction amount. Also, the voting power that was diluted, if any, would be restored by the rescission.

IV. RECOMMENDATION

The Delaware courts have a relatively new standard in place to determine whether a claim is direct or derivative. The Delaware Supreme Court designed the Tooley test to make the direct/derivative determination a simpler, more exacting test. However, this Note demonstrated that applying the Tooley standard still causes problems in determining whether a claim is direct or derivative. The Tooley test simply cannot function as intended if courts insist on bringing back discarded analyses. By indirectly bringing the special injury analysis of Tri-Star into their decision in Gentile II, the Delaware Supreme Court has once again muddied the water.

One possible solution for the Delaware courts is to switch to a completely merits-based system, effectively dropping the direct/derivative distinction. As Delaware attorney Richard M. Donaldson suggested, the Delaware direct/derivative tests have generally moved towards an analysis under Rule 12(b)(6) of the Federal Rules of Civil Procedure, assessing whether a complaint states a claim for which relief may be granted. If a claim has merit and can survive a motion to dismiss, then a court should hear the claim regardless of whether it is derivative or direct in nature. A label does not make a claim more or less valid. The result of Gentile II is equitable; however, it is undesirable given the vehicle used to get there. By allowing plaintiffs to bring a waste claim directly, Gentile II allowed a claim that the court otherwise would not have heard. Thus, dispatching of the direct/derivative distinction is a logical step after Gentile II, which once again blurred the line between direct and derivative claims. Analyzing claims under Rule 12(b)(6) would essentially obviate the need for a direct/derivative distinction.

The obvious problems with this solution lie in the contemporaneous ownership requirement and the heightened derivative pleading requirements. If a plaintiff is no longer a shareholder of the corporation it is suing, or if the company no longer exists, then the plaintiff lacks standing to bring derivative claims. Therefore, plaintiffs cannot bring derivative claims in any case where the corporation is the target in a merger. Additionally, if the company no longer exists, plaintiffs can no longer make demand of the board or plead demand futility. This creates the situation present in Gentile, which forces a court to decide between allowing a direct claim where a derivative claim should be and dismissing an otherwise valid claim. Abandoning the direct/derivative distinction

284. See Tooley v. Donaldson, Lufkin, & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (announcing the test to be applied in cases where the distinction between direct and derivative is at issue).
285. See supra Part III.
286. A Rule 12(b)(6) motion is one for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). Analyzing claims under Rule 12(b)(6) obviates the need for a direct/derivative distinction.
287. See Donaldson, supra note 36, at 409-11 (citing Golaine v. Edwards, No. 15404, 1999 Del. Ch. LEXIS 237 (Del. Ch. Dec. 21, 1999), a pre-Tooley case involving a post-merger claim, and Parnes v. Balley Entm’t Corp., 722 A.2d 1243 (Del. 1999), as evidence of the Delaware courts moving towards a merits-based system). Donaldson notes that the Delaware courts have generally been heading in the direction of a merits-based (or Rule 12(b)(6)) analysis for direct/derivative claims for nearly a decade. Id. This Note suggests that the Delaware courts should no longer imply or hint that a Rule 12(b)(6) analysis is appropriate, but rather that the Delaware courts should explicitly lay out a merits-based test for direct/derivative cases.
allows plaintiffs to bring otherwise valid claims. Additionally, remedies similar to those ultimately decided by the *Gentile II* court are appropriate in these post-merger cases.

An alternative solution is a merger exception to the *Tooley* direct/derivative test. The reason the appropriate remedy—rescission of the excessive shares—was no longer available was because SinglePoint no longer existed after the merger. The court could amend the *Tooley* test to include the following inquiry: if the appropriate remedy is no longer available due to a subsequent merger, then a special direct remedy exists for indirectly injured plaintiffs. Under this approach, *Gentile* comes out the same way, without the necessity of smoke and mirrors. This is appealing because eliminating the contemporaneous ownership requirement and the heightened pleading requirements may not be realistic because those requirements are fundamental to a prototypical derivative claim. Creating the special merger exception keeps the current derivative requirements in place, while still providing an equitable remedy for indirectly injured plaintiffs in a merger situation. However, this is only a limited solution that applies only to post-merger cases similar to *Gentile* and does not remedy all the ills of the current direct/derivative distinction.

V. CONCLUSION

This Note’s conclusion is two-fold. First, after recounting the history of the direct and derivative claim in Delaware, the advent of the *Tooley* test, and the analysis of the recent Delaware Supreme Court decision in *Gentile v. Rossette*, the problems with the direct/derivative distinction live on. The distinctions allegedly were very fact based, but parallel sets of facts produced different results with one slight twist. One can observe the differing results in the pre-*Tooley* cases of *Kramer* and *Parnes* and in the post-*Tooley* case of *Gentile v. Rossette* where the Delaware Supreme Court relied on the discarded analysis of *Tri-Star*. By deciding the stock dilution claim was a direct claim as opposed to a traditional derivative waste claim, *Gentile II* blew the doors off the *Tooley* test, thereby obviating the need to either revisit the *Tooley* test by adding in the merger exception, or abandoning the direct/derivative distinction entirely.

Second, the direct versus derivative discussion is one that has consumed the court for many years. The current design, the *Tooley* test, has merit. The *Tooley* test is a compilation of the most logical and easily applicable standards from the checkered history of the direct/derivative analysis. Unfortunately, the difficulty in application is still apparent. Although there are several reasons for the continued application of the direct/derivative distinction, it is time to move to an entirely merits-based system—similar to what Donaldson suggested. In Donaldson’s discussion of a merits-based system, he suggested that the *Agostino* and *Tooley* decisions left the Delaware courts with

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289. See *Kramer* decision with the *Parnes* decision.
290. *Gentile II*, 906 A.2d at 101-03.
291. See Heyman & Enerio, supra note 2, at 155 (stating that whether a claim is derivative or direct is one of the most litigated issues in the Delaware Court of Chancery).
293. See Donaldson, supra note 36, at 408-11.
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a test that is difficult to distinguish from a Rule 12(b)(6) analysis, because it essentially is an inquiry as to whether a claim is produced for which there is appropriate relief.\footnote{Id. at 408-09.} The \textit{Gentile II} court, by bringing \textit{Tri-Star}, and indirectly, its special injury analysis back to the fore, has seemingly again clouded the distinction between the two types of claims.\footnote{See supra Part III.} The court in \textit{Gentile II} stated that the plaintiffs could have brought the dilution claim either “derivatively or directly.”\footnote{Gentile v. Rossette (\textit{Gentile II}), 906 A.2d 91, 103 (Del. 2006).} Only the happenstance that Cofiniti subsequently acquired the target, SinglePoint, precluded the derivative claim.\footnote{Id.} Consequently, as a “practical matter, the only claim available . . . is a direct action by the plaintiffs.”\footnote{Id.} This statement suggests the convergence—perhaps inevitable—of the direct and derivative style claims, a combination that has heretofore not existed in Delaware case law.\footnote{See Grimes v. Donald, 673 A.2d 1207, 1212-13 (Del. 1996) (stating that the same set of facts could give rise to both a direct and derivative claim). However, the application of this statement has typically been that plaintiffs brought two distinct claims, not that potential plaintiffs could bring one claim either directly or derivatively. Cf. \textit{Gentile II}, 906 A.2d at 103 (holding that plaintiffs could bring single stock dilution claims either directly or derivatively).} Therefore, it is time for the Delaware courts to dispatch of the vexing direct/derivative distinction in favor of an easier to apply, merits-based evaluation of claims.