March 15, 2009

Extract from William J. Carney's Mergers and Acquisitions: The Essentials citing Balotti & Tillman's Gazing into the Crystal Ball of Future Developments in Delaware Corporate Law: What if the Past is not Prologue?

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§10.15 STATE LAW DISCLOSURE OBLIGATIONS

A prominent Delaware attorney and author, Frank Balotti, has predicted that disclosure litigation may be the next developing area in Delaware corporate law.142 It may be that this area is developing in Delaware, and perhaps in other states as well, in response to the heightened pleading requirements of the Private Securities Litigation Act, which has raised the bar on pleading fraud with particularity, and especially scienter, without prior access to discovery.143 Or perhaps it represents Delaware’s response to what Marc Roe has characterized as Delaware’s real competition, from the federal government.144 Delaware law has long taken the view that to be actionable as a breach of fiduciary duty under Delaware law admitted material must change the sum of information otherwise provided to stockholders, often citing federal standards for this approach.145 In Shear v. J.C. Penney Stores, Inc. the Delaware Supreme Court stated, in rejecting a complaint that omission of management projections of the company’s performance for the next five years constituted a material omission in violation of directors’ duties:

Appellants are advocating a new disclosure standard in cases where appraisal is an option. They suggest that stockholders

143. Id.
146. B. Franklin Balotti and Mark Barrett Tillison, Going Into the Crystal Ball of Future Developments in Delaware Corporate Law: What is the Bag in Not Prologue?, 15 No. 3 The Corporate Governance Almanac 5 (May/June 2007).