

## Deconstructing *Duff and Phelps*

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### I. INTRODUCTION

Asked to take stock of Judge Posner's contribution to the law of business, one immediately thinks about his contribution to the reconceptualization of antitrust and the development of law and economics. Asked to write about his most famous corporate law case, one faces a more difficult task. While Posner undoubtedly has written many learned and ingenious corporate law opinions, his only canonical opinion is his dissent from Judge Easterbrook's majority opinion in *Jordan v Duff and Phelps, Inc.*<sup>1</sup>

*Duff and Phelps* considers whether a closely held firm must disclose to an employee-shareholder inchoate merger negotiations before buying shares from that shareholder, pursuant to an agreement that required the shareholder to sell back shares at a set price upon leaving the firm. The majority wanted to decide this case on simple grounds by employing a close-corporation exception to the general rule for publicly traded firms that no disclosure is required until the deal is basically done, because premature disclosure might destroy the deal or even prevent it from happening in the first place. The court concluded that disclosure yields less potential mischief in closely held firms, and that this militates in favor of earlier disclosure. To get here, however, Posner's dissent cleverly forces the majority to find a duty to disclose running from the firm to its employee-shareholder, which leads the court to address issues of employment-at-will and implied duties of good faith and fair dealing, and how they interact with federal securities laws. The result is an opinion that fundamentally alters corporate law for the worse.

The legal combat between the two judges, which the third member of the panel calls "lucid," "cogent," and "ingenious,"<sup>2</sup> provides not

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<sup>1</sup> 815 F2d 429, 444-52 (7th Cir 1987) (Posner dissenting). The case is featured in the leading casebook on corporate law, see William A. Klein, J. Mark Ramseyer, and Stephen M. Bainbridge, *Business Associations: Agency, Partnerships, and Corporations* 651 (Foundation 6th ed 2006) (presenting *Duff and Phelps* as a key case on abuse of control), has been cited in well over one hundred subsequent cases and in over 150 law review articles, and is a staple of legal education. Westlaw search, Feb 2007.

<sup>2</sup> See *Duff and Phelps*, 815 F2d at 443 (Cudahy concurring).

only insight into Judge Posner's legal mind, but also fodder for an analysis of the current state of fiduciary duties, insider trading law, and other corporate law puzzles.

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Before getting to the meat of the case, it is worth pausing momentarily to consider the peculiarity of this case in Judge Posner's oeuvre. For one, Posner dissents are rare; he dissented in only about 1 percent of the over 7,100 cases he has heard since his appointment in 1981, averaging only four dissents per year.<sup>3</sup> Courts of appeals judges with similar tenure are more than twice as likely to dissent.<sup>4</sup> Posner's low rate cannot obviously be explained by collegiality or practice on the Seventh Circuit—the court average is just under 2 percent.<sup>5</sup> Perhaps Posner is particularly persuasive on the judges he sits with, but this is the subject for another essay.

Another reason this case is odd is that a disagreement between Judges Posner and Easterbrook is exceptionally rare: of the over 1,400 cases the two have heard together, they have reached different decisions only about forty times.<sup>6</sup> Disputes are even more rare when one of the two writes the majority opinion: specifically, Judge Posner has dissented from a majority opinion written by Judge Easterbrook only nine times (out of over three hundred cases where Easterbrook wrote the majority); and Judge Easterbrook has dissented from a majority opinion written by Judge Posner only eleven times (out of over 380 cases where Posner wrote the majority).<sup>7</sup>

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<sup>3</sup> All searches in this paper used the Westlaw database for the particular circuit court and were conducted on February 7, 2007; all search queries were "PANEL(name)" and "DISSENT(name)," unless otherwise indicated, and required some culling of cases where the judge in question did not author or join the dissent.

<sup>4</sup> Among Judge Posner's peers are judges Cardamone (1.3 percent) and Winter (1.5 percent) of the Second Circuit; Garwood (2.1 percent) and Higginbotham (0.7 percent) of the Fifth Circuit; Reinhardt (5.2 percent) and Pregerson (3.7 percent) of the Ninth Circuit; and Seymour (1.4 percent) of the Tenth Circuit.

<sup>5</sup> This figure represents the average number of dissents for active judges.

<sup>6</sup> Compiled from search queries "PANEL(Easterbrook) & DISSENT(Posner /s dissenting) % DISSENT(Easterbrook /s dissenting)" and "PANEL(Posner) & DISSENT(Easterbrook /s dissenting) % DISSENT(Posner /s dissenting)."

<sup>7</sup> Compiled from search queries "JUDGE(Easterbrook) & PANEL(Posner) & DISSENT(Posner /s dissenting) % DISSENT(Easterbrook /s dissenting) % CONCURRENCE(Easterbrook /s concurring)" and "JUDGE(Posner) & PANEL(Easterbrook) & DISSENT(Easterbrook /s dissenting) % DISSENT(Posner /s dissenting) % CONCURRENCE(Posner /s concurring)."

Posner's dissent is even more striking since Easterbrook is one of the world's foremost corporate law scholars,<sup>8</sup> and we might expect deference from judges with less expertise in such cases. We can guess the reason Posner chose to fight his friend and colleague (both on the bench and at The University of Chicago Law School) on such sacred ground by their academic backgrounds and the types of arguments they make. Posner sees the case as one governed by basic contract law; Easterbrook sees the case as one governed by corporate and federal securities law. This isn't surprising since these are their respective academic specialties: Posner's history as a scholar is primarily focused on the common law, while Easterbrook teaches and writes more narrowly about corporate and securities laws.<sup>9</sup> We might go further and speculate that Posner's stand here on common law grounds notwithstanding Easterbrook's expertise is an attempt to preserve the force of common law principles and reasoning in the face of an increasingly specialized and federalized law, but, again, this is for another time.

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Turning back to the case, the basic facts are as follows: Jordan worked as an investment analyst with Duff and Phelps ("D&P"), a small, private Illinois corporation. Like most closely held corporations, D&P had two key governance characteristics: first, it paid out almost all of its profits in salary, leaving a very modest dividend; and second, it combined risk-bearing and management functions in a very small set of individuals.

D&P let some employees invest in firm stock—including Jordan, who by the time he quit held about 1 percent of the firm's outstanding equity—but restricted their trading rights in order to maintain this governance model. The shareholder agreement Jordan signed did two things: first, it provided that employee-shareholders were subject to the background at-will employment regime and received no employment rights from holding shares; and second, it stated that employees

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<sup>8</sup> The year before *Duff and Phelps* was decided, Easterbrook coauthored the leading law review article to this day on close corporations. See generally Frank H. Easterbrook and Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 Stan L Rev 271 (1986).

<sup>9</sup> Posner's most famous contribution to academic law is his theory of negligence and his contribution to the law and economics of torts and other common law subjects. See generally Richard A. Posner, *Economic Analysis of Law* (Aspen 6th ed 2003). Easterbrook is the coauthor of the most famous corporate law text, see generally Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law* (Harvard 1991), and teaches corporate law and advanced regulation of securities.

who left the firm were required to sell back shares at their book value measured on a certain date.<sup>10</sup>

The typical reason firms offer employees equity is to link their fortune to the financial health of the firm. But for illiquid stocks, a book-value buyout price with no ancillary employment rights attached is a weak mechanism to do this. Book value will substantially underestimate the fair value of a firm most of the time, and, as discussed below, there is no guarantee that minority shareholders would be entitled to share in any control premium paid in the event of a takeover. So although the agreement may have provided some slight retention and compensation incentive function, the purchase of stock was more akin to a capital contribution than an investment—it was an obligation, not an opportunity.<sup>11</sup>

The scope of this contract was implicated when Jordan decided to leave the firm for personal reasons.<sup>12</sup> He quit in November 1984, but was allowed to stay until the close of the year in order to receive the annual adjustment to book value made on December 31. All that D&P told him before he left was that the firm's prospects looked good, and that he should think about sticking around. He didn't, and in turn received book value, about \$120 per share.

What Jordan didn't know was that in the months before he quit, D&P was in talks to sell the firm at a substantial premium over book value to Security Pacific, a publicly traded firm. Although that deal was dead by the time Jordan quit, other negotiations were contemplated. Shortly after Jordan quit, D&P publicly announced its sale to a Security Pacific subsidiary, which if consummated might have made Jordan's shares worth much more than he was paid.

When Jordan heard the news, he sued under the antifraud provisions of the federal securities laws (§ 10(b) of the Securities Exchange Act of 1934<sup>13</sup> and SEC Rule 10b-5<sup>14</sup>), claiming that the firm had a duty to disclose the possibility of a merger prior to buying his shares. He

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<sup>10</sup> Courts give firms wide latitude in crafting these agreements, even when extreme, since they serve several functions essential to firm formation and survival. See Easterbrook and Fischel, *The Economic Structure of Corporate Law* at 228–29, 233 (cited in note 9) (“Because the firm's principal investors also manage, it is often necessary to restrict the investors' ability to alienate their shares.”).

<sup>11</sup> This interpretation of the stock purchase is in accord with D&P's policy according to people familiar with the firm.

<sup>12</sup> See *Duff and Phelps*, 815 F2d at 432.

<sup>13</sup> 15 USC § 78j(b) (2000) (“It shall be unlawful . . . [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.”).

<sup>14</sup> 17 CFR § 240.10b-5(b) (2006) (“It shall be unlawful . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading . . . in connection with the purchase or sale of any security.”).

argued that the firm, as his fiduciary, could not trade against him with superior information.

As it turns out, the deal with the subsidiary—like the one with the parent—fell through. Over a year after Jordan quit, however, D&P ultimately acquired itself in a management-led buyout. Had Jordan been employed by D&P at this time, and had the deal been structured as it was, Jordan's shares would have been valued at about \$2,000 per share.

## II. *DUFF AND PHELPS* AND THE CASE LAW

Based on the briefs, the parties thought the issue in the case was when firms are obligated to disclose merger negotiations to shareholders of close corporations. The rule for public companies—the so-called price-and-structure rule—recognizes that disclosing too early might scare off potential buyers, and therefore disclosure is not required since all shareholders are better off *ex ante* under a rule of nondisclosure until the terms of the deal are finalized.<sup>15</sup> Since an agreement in principle wasn't reached until several months after Jordan quit, D&P argued that disclosure was unnecessary. Jordan's case presented a variation on this rule, however, since one of the two firms involved, D&P, was a private firm. The risk of letting the cat out of the bag might be smaller in this case, and therefore a more liberal disclosure regime might be tolerable.

Quite to the parties' surprise, the case turned instead on whether or not D&P could fire Jordan. Posner, who pushed the court in this direction, argued that since Jordan was employed at will, the firm could fire him at any time for any reason, including to make more profit for the firm or certain shareholders from the merger, and therefore disclosing to him the existence of a potential merger was pointless. In other words, disclosure requirements presume the recipient can use the information, and since Jordan couldn't necessarily use it because he could be fired before acting on it, D&P had no duty to disclose it.<sup>16</sup> Easterbrook's only response was that if the firm followed this course it would be acting opportunistically in a way that would violate its duty of good faith and fair dealing toward its employee-shareholder.<sup>17</sup>

Easterbrook is correct that even when public policy concerns are not implicated, there are certain instances when firing an employee is

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<sup>15</sup> See *Flamm v Eberstadt*, 814 F2d 1169, 1175–78 (7th Cir 1987) (adopting the price-and-structure rule for public companies because of its certainty benefits and the possible negative effects of premature disclosure).

<sup>16</sup> See *Duff and Phelps*, 815 F2d at 447 (Posner dissenting).

<sup>17</sup> *Id.* at 438–39 (majority).

a violation of the most laissez-faire at-will regime. The classic case is a salesman who has earned a commission but is fired before he can collect. The commission is payment for past performance, and courts imply a term of good faith and fair dealing in the parties' employment contract if those terms aren't spelled out.

The standard explanation for this rule is that courts are confident that the parties would have agreed to this bargain had they actually sat down and dickered over this possibility, and the gap-filling can reduce overall transaction costs. In other words, no salesman would agree to work on commission knowing that the firm could willy-nilly take the profits for itself, so courts can provide the efficient contract to all parties at lower overall cost.

This conclusion is not obvious. For example, one might argue, contra the rule, that it would be reasonable for the salesman to rely on the reputation of the employer and on his value to the firm as a deterrent to such opportunism. Moreover, the rule may serve as a weapon for poor salesmen (or salesmen who have pushed through questionable deals) to obtain leverage over an employer about to fire them. Therefore, a better defense of the rule might be that not paying is conduct that is in direct contravention of the purpose of the contract: commissions are designed to motivate employees, and a rule allowing nonpayment is perverse because "the better the performance by the employee, the greater the temptation to terminate."<sup>18</sup>

At first blush, the analogy to this line of cases seems inapposite since Jordan's shares don't look like unpaid sales commissions but rather unvested stock options. The typical options case involves an employee who is terminated prior to full vesting of his shares, meaning that he can't capitalize on their rise in value. Courts hold that unvested shares are, unlike commissions, not "earned" until vested, and therefore firms can make employment decisions, even ones that make the firm or other shareholders better off at the expense of the employee, irrespective of any shareholding rights.<sup>19</sup> The cases are short on reasoning, but we can see how the purpose of the vesting schedule—to induce the employee to stay—is not fundamentally frustrated by a policy allowing the firm to buy back unvested shares from employees whom it doesn't want to stay.

*Duff and Phelps* looks similar to the vesting cases. The book-value algorithm for valuation, like the vesting schedule, encouraged

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<sup>18</sup> *Wakefield v Northern Telecom, Inc.*, 769 F2d 109, 112–13 (2d Cir 1985) (holding that a firm cannot fire an employee to avoid paying him his commission).

<sup>19</sup> See, for example, *Harrison v NetCentric Corp.*, 433 Mass 465, 744 NE2d 622, 630 (2001) ("[U]nvested shares are not earned compensation for past services, but compensation contingent on [ ] continued employment.").

Jordan to perform well and to stay, since he would get a nominal return if he were fired or quit. Unlike the sales commission cases, this purpose is not frustrated by the firm's option to fire bad employees.

One difference between the vesting cases and *Duff and Phelps* is that Jordan's shares did not get more valuable simply from the passage of time—it was as if they were unvested and the vesting schedule was at the discretion of the firm. If this characterization is fair, we might have reason to doubt that Jordan would ever agree to such seemingly one-sided terms. But Jordan's contract served other purposes too. First, it minimized the parties' expected ex ante contracting costs, since it eliminated, or so they thought, the involvement of courts in the process of determining how much shares were worth in the event of a departure. Many courts find this is a sufficient ground for upholding contracts even in cases with obvious opportunism and egregious facts.<sup>20</sup>

Second, D&P viewed the purchase of shares as a capital contribution instead of an investment opportunity, making the buyback provision a form of insurance on Jordan's contribution.<sup>21</sup> Finally, as Posner points out, the contract did leave open the possibility that Jordan would profit from a rise in firm value, for example, if he stayed or were valuable enough for the firm to keep him around, and at some point a situation presented itself whereby someone would buy the shares for more than book value.<sup>22</sup> Jordan thus would be relying on his own value and the firm's reputation to prevent opportunism. We can't know the relative weight of these factors in the parties' bargain, but the complicated mix gives us reason to doubt the court's ability to fashion a better bargain than the parties' explicit one.<sup>23</sup>

We could stop here: Jordan's shares look more like unvested stock options than an unpaid commission, and so as a doctrinal matter the implied good faith analysis of the majority is misplaced. So where did the court get its reasoning? Like most bad law, it got its start innocently enough in a tough case that morphed through misinterpretation

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<sup>20</sup> See, for example, *Gallagher v Lambert*, 74 NY2d 562, 549 NE2d 136, 137 (1989) ("Plaintiff got what he bargained for—book value for his minority shares . . . . There [is] no basis presented . . . to interfere with the operation and consequences of this agreement between the parties."). See also text accompanying notes 33–36.

<sup>21</sup> There was, after all, some chance that the market value of the firm's shares might be less than book value when Jordan left the firm. Although unlikely, this buyout formula would protect Jordan from losing his capital contribution in the event the firm fell on very hard times.

<sup>22</sup> See *Duff and Phelps*, 815 F2d at 448 (Posner dissenting) ("Jordan gambled that he was and would continue to be such a good employee that he would be encouraged to stay long enough to profit from the firm's growth.")

<sup>23</sup> See *id.* at 448 ("The relationship that the parties created aligned their respective self-interests better than the legal protections that the court devises today.")

and overextension into a general rule unjustified by the reasoning of the case on which it was based. It starts with a case called *Wilkes v Springside Nursing Home, Inc.*,<sup>24</sup> which Easterbrook cites approvingly.<sup>25</sup>

In *Wilkes*, four people formed a corporation to own and operate a nursing home. Each owned equal shares, worked at the facility in some limited capacity, and drew salaries instead of dividends. None of them had employment contracts or shareholding agreements. Given the potential for conflict and deadlock, this was not smart business planning. In fact, after a dispute, three decided to oust the fourth by denying him a salary (which was really disguised dividends), not re-electing him as a director, and buying out his shares at a very low price. Analogizing to partnership law, notwithstanding the fact that the parties chose the corporate form, the court invented an intermediate level of fiduciary duty for close corporations,<sup>26</sup> and held that the firing was a breach owed by the three to the fourth.

The outcome in *Wilkes* is sensible, in that the parties' implicit bargain—to take salaries for menial jobs instead of dividends to reduce tax liabilities—was clearly frustrated by the squeeze out, and the court could therefore be confident that the parties would have agreed ex ante to prevent such opportunism had they negotiated over this possibility. Unfortunately, the court's approach to get to the right result muddled the law by creating a new class of duties that have been expanded to situations far beyond the facts of *Wilkes*.

For example, to the *Duff and Phelps* court, this case stands for the general proposition that majority shareholders owe minority shareholders the utmost duty of good faith, meaning they can't fire them in order to deny them profits from a potential rise in the value of their shares. Whether or not we think *Wilkes* was rightly decided—and there are strong grounds to think that the creation of “hybrid” duties is terrible public policy<sup>27</sup>—there are good reasons to doubt the analogy from *Wilkes* to *Duff and Phelps*, as will be evident when we examine *Wilkes*'s progeny.

As a doctrinal matter, *Wilkes*'s hybridization of forms and duties is eschewed by many courts. Delaware, for one, rejects this hybridization on the theory that a default rule encouraging potential investors to negotiate for specific terms will lead to lower overall contracting

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<sup>24</sup> 370 Mass 842, 353 NE2d 657 (1976).

<sup>25</sup> See *Duff and Phelps*, 815 F2d at 438 (majority).

<sup>26</sup> See *Wilkes*, 353 NE2d at 663 (requiring that majority stockholders accused of breaching their good faith duty to minority stockholders show a “legitimate business purpose” for their actions).

<sup>27</sup> Making corporations look more like partnerships reduces the contracting space of parties and the clarity of choice of business forms. This raises overall transaction costs for promoters.



costs when including court decision and error costs.<sup>28</sup> This supposition is supported by the aftermath of *Duff and Phelps*. The facts that led to *Duff and Phelps* spawned numerous other cases, as a variety of disgruntled former employees sued under similar theories. For example, an employee given a choice by D&P to keep his job or be fired for running a competitor business from his D&P desk sued on the ground that had he known about the merger possibility, he would have chosen D&P over his illicit start up.<sup>29</sup>

In this vein, an alternative holding could have relied on the voluntariness of Jordan's "investment" and Delaware's forcing rule to give Jordan only what he bargained for: at-will employment and book value upon leaving, short of active fraud on the part of D&P. This would be based on the theory that Jordan could have bargained for disclosure or other specific informational rights before his sale, and the court should not give him these rights for free.<sup>30</sup> Perhaps Jordan didn't negotiate for these rights because they are valuable and he would have had to make other tradeoffs (such as a reduced salary) that he was unwilling to make. Or perhaps, as the fact that every shareholder signed the same contract suggests, Jordan lacked any bargaining power on this issue, and therefore court gap-filling in his favor was unwarranted.<sup>31</sup>

It is doubtful that Jordan failed to negotiate because he was unsophisticated or couldn't imagine a scenario where he would want such rights—he was an investment analyst, after all. In the general case, there is reason to believe that investors in close corporations—especially insiders like Jordan—need less protection than public shareholders do when it comes to bargaining or antifraud laws. Bargaining for public

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<sup>28</sup> See *Nixon v Blackwell*, 626 A2d 1366, 1379 (Del 1993) (en banc) ("It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted."). See also *Riblet v Nagy*, 683 A2d 37, 39 (Del 1996) ("*Wilkes* has not been adopted as Delaware law.>").

<sup>29</sup> See *Guy v Duff and Phelps, Inc.*, 672 F Supp 1086, 1088–89 (ND Ill 1987). Other cases involved age discrimination claims and wrongful termination claims morphing into federal securities fraud cases. See, for example, *Smith v Duff and Phelps, Inc.*, 5 F3d 488, 489–90 (11th Cir 1993) (remanding for trial former employee's federal securities fraud claim that he was coerced into retirement); *McLaury v Duff and Phelps, Inc.*, 691 F Supp 1090, 1097, 1099 (ND Ill 1988) (upholding a former employee's allegedly wrongful termination based on federal securities fraud and age discrimination claims).

<sup>30</sup> In the typical disclosure case—say, whether a homeowner should disclose something to a buyer—the parties are bargaining at arm's length. In this case, the parties had a preexisting contractual relationship, which militated in favor of requiring the parties to bargain about the obviously foreseeable possibility of the firm's value differing from book value.

<sup>31</sup> For a theory on why contracting parties without bargaining power should not be bailed out by courts in gap-filling cases, see Omri Ben-Shahar, *A Bargaining Power Theory of Gap-Filling* 4, 19–21 (unpublished draft, 2006) (arguing that a "bargain-mimicking" theory to fill gaps in purely distributive contract terms will save transaction costs).

shareholders is more costly. They suffer from collective action and free-rider problems, higher informational costs, and other maladies, and have lower incentives to bargain in the first place.<sup>32</sup>

The willingness of courts to look past the plight of sympathetic minority shareholders and enforce only the four corners of their shareholding contracts reached its apogee in *Gallagher v Lambert*,<sup>33</sup> which, had it been an Illinois precedent at the time of *Duff and Phelps*, may have been dispositive.<sup>34</sup> An employee of a closely held firm entered into an employment agreement, which replicated an at-will default regime, and a buy-sell agreement, which provided that for the first three years of his employment (until January 31, 1985), his shares would have to be sold back at book value if his employment ended, and after that date, would be valued under a buy-back formula that would have increased his buyout price from about \$90,000 to over \$3 million. It isn't difficult to see where this is going: on January 10, 1985, just three weeks shy of pay dirt, the firm fired him and claimed that it only had to pay the pre-January 31 price for the shares. The New York Court of Appeals agreed, holding that the plain language of the parties' agreement defined the fruits to which the employee was entitled.<sup>35</sup> The policy purpose for this seemingly incredible result is certainty—the parties provided a formula to value the shares at all future times, and to disrupt this is to increase contracting costs for all parties.<sup>36</sup>

The case looks remarkably similar to *Duff and Phelps*: the firm in *Gallagher* did precisely what Posner said D&P could do, and what Easterbrook admits would, if true, win the day for D&P. *Gallagher* reiterates the growing consensus of important business courts in New York and Delaware—and even the Massachusetts courts that started this mess innocently enough in *Wilkes*—that minority shareholders in close corporations who sign bad deals won't be bailed out by the courts.<sup>37</sup> Here again, the policy rationale is that these investors have

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<sup>32</sup> See Easterbrook and Fischel, 38 *Stan L Rev* at 277–79 (cited in note 8) (describing the different monitoring costs of public and closely held corporations as a result of their different distributions of management and risk bearing).

<sup>33</sup> 74 NY2d 562, 549 NE2d 136 (1989).

<sup>34</sup> See *id.* at 138 (“There being no dispute that the employer had the unfettered discretion to fire plaintiff at any time, we should not redefine the precise measuring device and scope of the agreement.”).

<sup>35</sup> See *id.* at 137.

<sup>36</sup> See *id.* at 138 (“[P]arties contract between themselves in advance so that there may be reliance, predictability and definitiveness between themselves on such matters.”).

<sup>37</sup> See, for example, *Blank v Chelmsford Ob/Gyn, PC*, 420 Mass 404, 649 NE2d 1102, 1105 (1995) (finding, where an employee-shareholder with an employment contract that mimicked an at-will regime was bought out at a contract price far below market value, that “questions of good faith and loyalty . . . do not arise when all the stockholders in advance enter into agreements concerning termination of employment and for the purchase of stock of a withdrawing . . . stock-

the incentives and the power to bargain on their own, and therefore need less protection than minority shareholders in public firms.

Posner, seeing the intuition years before the cases bear it out, makes this argument to a certain degree, noting that Jordan's stockholder agreement, coupled with the at-will contract provided by the State of Illinois, created an arrangement (what Posner calls "shareholder at will") that "is incompatible with an inference that Duff and Phelps undertook to keep him abreast of developments affecting the value of the firm."<sup>38</sup> Easterbrook parries weakly, acknowledging that "parties may contract with greater specificity for [ ] arrangements" other than the implied fiduciary duties the court imposes, but emphasizing that in this case "Jordan was an employee at will; he signed no contract."<sup>39</sup>

While true, it is hard to see why this matters. Posner rightly points out that Jordan did sign a stockholder agreement that explicitly gave him no employment rights. Perhaps more fundamentally, it is unclear why it should matter whether Jordan and D&P signed an employment contract or merely availed themselves of the default contract provided by state law. If all that killed an employee's similar claim in a Massachusetts follow-on case decided years after *Wilkes* was that he signed an employment contract that provided that he was to be employed "until either party shall have given written notice to the other that he (it) wishes to terminate the contract,"<sup>40</sup> which is effectively employment-at-will, a written contract seems like a flimsy basis for distinguishing Jordan's case.

*Wilkes* can also be distinguished on two other grounds. First, the four cofounders in *Wilkes* entered into no contracts relevant to how disputes would be handled, so it is reasonable for courts to apply standard gap-filling analysis—deciding the terms the parties would have agreed to had they bargained. Since it is likely that four individuals starting a firm together on equal terms and with equal investments would want to protect against precisely the type of behavior that occurred in that case, courts are not out of bounds in implying such obligations on coventurers. In *Duff and Phelps*, by contrast, the parties explicitly bargained about certain terms to cover potential eventual-

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holder" despite a fiduciary duty "of the utmost good faith and loyalty" among stockholders in a close corporation).

<sup>38</sup> *Duff and Phelps*, 815 F2d at 447 (Posner dissenting).

<sup>39</sup> *Id.* at 436 (majority) ("It is a violation of duty to steal from the corporate treasury; it is not a violation to write oneself a check that the board has approved as a bonus.").

<sup>40</sup> *Blank*, 649 NE2d at 1104 (defining the terms of the employment contract referred to in note 37). See also *Riblet*, 683 A2d at 37 ("[A]lthough majority stockholders have fiduciary duties to minority stockholders *qua* stockholders, those duties are not implicated when the issue involves the rights of the minority stockholder *qua* employee under an employment contract.").

ties like those that came to pass. While willing to bail out the under-contracted, courts should be reluctant to intervene in cases where the parties entered into contracts touching on the specific issues presented in the case.

Second, *Wilkes* involved significantly greater stakes from the standpoint of individual and societal welfare. A conflict among firm founders goes to not only the willingness of promoters to make large investments of capital (human and otherwise), but also the livelihood and financial security of the founders. In Jordan's case, by contrast, the issue was not about general rules of business formation or his ability to make a living, but was merely a question of whether his contribution to the firm would return a reasonable amount or an unbelievable amount. The law, especially the costly judicial system, should be more aggressive in protecting the fairness of transactions that implicate business formation and individual high stakes, as opposed to those that we can safely assume will be adequately policed by market forces. Posner's way of saying this is, in classic style, much pithier and wittier than we mortals can match: the court disrupts the corporate law, he writes, over concern with "the possibility that corporations will exploit their junior executives, which may well be the least urgent problem facing our nation."<sup>41</sup>

### III. *DUFF AND PHELPS* AND OTHER LAW

There are several alternative grounds on which the result in *Duff and Phelps* can be criticized, some of which Posner suggests and some he leaves unanalyzed.

#### A. Did Jordan Have Tag-Along Rights?

The court's holding rests on the assumption that Jordan, if he stayed with the firm until the merger was consummated, would have received a pro rata distribution of the merger proceeds. Easterbrook writes matter-of-factly that "[i]f Jordan had been an employee on [the day the merger closed], . . . he would have received \$452,000 in cash."<sup>42</sup> This is not necessarily true. The controlling shareholders of D&P could have arranged a "sale" to an acquirer in several ways that would not share the spoils with Jordan or other minority shareholders. For example, the acquiring firm could buy a control stake in D&P, say 51 percent of the shares, at a price that included a control premium, while

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<sup>41</sup> *Duff and Phelps*, 815 F.2d at 449 (Posner dissenting).

<sup>42</sup> *Id.* at 433 (majority).

maintaining minority shareholders under the terms of their original stockholder agreements.

There is no duty for the majority to share this premium with the minority: there are no rules of pro rata distribution of profits to non-selling shareholders;<sup>43</sup> there is no “all holders” rule requiring offers to buy stock to be made to every shareholder on a pro rata basis, as there is regarding tender offers for public companies under the Williams Act;<sup>44</sup> and there is no basis for a suit by minority shareholders to seek disgorgement of a control premium.<sup>45</sup> Tag-along rights are valuable and are readily negotiated as part of business deals, and the fact that Jordan chose not to negotiate for them in his agreement suggests that the court should be reluctant to rewrite the parties’ bargain to give them to him for free.

The implication of this goes to disclosure: the more likely it is that the firm can exclude Jordan from participating in any change-of-control premium, the less valuable any disclosure would be to him. Given that Jordan had no rights, necessarily, to tag along, and given that the merger was not a sure thing, the firm would have to tell him something like, “We are in negotiations for a merger that might or might not happen, and if it does, you might or might not get bought out at a premium.” This equivocal and ambiguous statement wouldn’t be of much use to Jordan, and it looks similar to the comment D&P made when Jordan told the firm he was quitting: “[D&P] said that the firm had a good potential for growth and that Jordan’s shares would rise in value if he stayed.”<sup>46</sup> Of course, Jordan could ask for details about the merger, but courts generally bless a “no comment” policy in

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<sup>43</sup> See *Zetlin v Hanson Holdings, Inc.*, 48 NY2d 684, 397 NE2d 387, 389 (1979) (holding that minority stockholders are not entitled to share in a premium paid for a controlling interest in a corporation).

<sup>44</sup> Pub L No 90-439, 82 Stat 454 (1968), codified as amended at 15 USC § 78n(d)(6) (2000 & Supp 2002).

<sup>45</sup> Shareholders can allege “oppression” as a ground for remedies in a very limited class of cases. See *Hollis v Hill*, 232 F3d 460, 465 n 8 (5th Cir 2000) (providing three definitions of “oppression” courts have used in this context: unfair behavior by the majority, violation of fiduciary duty, and disappointment of the minority’s reasonable expectations). In addition, under certain deal structures, such as a freeze-out merger, minority shareholders can seek appraisal of the value of their shares, which generally, and even in Delaware, does not include a minority discount reflecting the lack of a control premium. See *Cavalier Oil Corp v Harnett*, 564 A2d 1137, 1144–45 (Del 1989) (refusing to apply a minority discount to a minority shareholder’s admittedly less marketable stock in an appraisal action). This asymmetry—majority sellers can sell for a premium but minority shares are not discounted in an appraisal proceeding—is odd and may not be sensible, but this is a subject for another time.

<sup>46</sup> *Duff and Phelps*, 815 F2d at 445 (Posner dissenting).

such cases,<sup>47</sup> further undercutting the *Duff and Phelps* court's move in the direction of access to equal information.

This argument is analytically the same as Posner's argument that Jordan's at-will status made any potential disclosure worthless to him. As we have seen, the majority countered Posner's argument with the claim that firing Jordan to deny him a share of the merger premium would be "opportunistic,"<sup>48</sup> and was thus an untenable basis on which to deny him disclosure rights. The same might be said of structuring the merger in a way that deprived minority shareholders of a control premium, but this is clearly not illegal. Despite smacking of opportunism, D&P and its merger partner could exclude Jordan from that which the court tells him he is entitled to receive. It is difficult to see why Jordan's employment status should be protected by federal securities laws (that is, the court implies that he can't be fired to make other shareholders better off), when he bargained for no additional employment rights, and when other rights of the firms and shareholders involved allow them to take the premium regardless of Jordan's employment status.

Given the close similarity of this argument to Posner's at-will argument, it is somewhat odd that he did not make it. Perhaps he viewed it as too speculative given the facts as they transpired—the buyer of D&P eventually paid the same price for each and every share of stock. But it is possible that the buyer did this only because it knew it was not buying the shares of Jordan and the other employees who quit or were fired around the same time. We cannot know what the buyer of D&P would have done had it known of the court's holding before structuring the transaction, but it is certainly possible that it would have designed the transaction differently. In any event, this possibility is not substantively different or more speculative than Posner's argument that D&P could theoretically fire Jordan, notwithstanding that it showed no signs of that inclination, choosing instead to be nice to him as he was leaving.

Furthermore, the transaction-structuring possibility raises the question of what D&P should have done differently in this case. Given that D&P could have structured Jordan out of any merger upside,

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<sup>47</sup> See, for example, *McCormick v Fund American Companies, Inc.*, 26 F3d 869, 874–75, 884 (9th Cir 1994) (holding that firms do not have an affirmative obligation to disclose details about merger negotiations to executive shareholders even when pressed).

<sup>48</sup> For an argument that it was Jordan who was acting opportunistically by quitting and then later suing for a share of the merger consummated after his departure, see *Duff and Phelps*, 815 F2d at 450 (Posner dissenting) ("The majority says that 'understandably Duff & Phelps did not want a viper in its nest, a disgruntled employee remaining only in the hope of appreciation of his stock.' I call that 'viper' an opportunist.").

what should D&P have told Jordan? The rule the court announces mandates that firms tell employee-shareholders about mergers that might happen, notwithstanding the fact that there is nothing in law or in fact that suggests that minority shareholders must participate in the fruits of such transactions.

The mischief here should be obvious. Say that D&P, believing that the initial merger pending with Security Pacific would go through (it did not), told Jordan that he would participate on a pro rata basis in the merger, and therefore he should stick around.<sup>49</sup> If the deal fell through (which it did), and a subsequent buyer offered to buy only the shares of a majority of holders, Jordan may have sued for a share of the control premium on fraudulent inducement grounds or a theory of promissory estoppel. D&P obviously did not want to, at the preliminary negotiations stage, lock itself into a particular deal structure since this would potentially destroy overall shareholder value. In this light, the choice to be ambiguous seems fairly sensible.

Perhaps more interestingly, the court-mandated obligation to disclose decreases the flexibility of the firm to make employment decisions at a crucial period in its existence, something that may make the firm less valuable to any potential acquirer and therefore destroy value for shareholders as a group. We might therefore expect employee-shareholders to agree to permit nondisclosure (since it increases overall shareholder value) and rely on their own performance to keep them valuable to the firm.

To understand this, consider D&P's options for how to treat each employee-shareholder when faced with a buyout offer. D&P—or, more accurately, the buyer—would logically want to take along employees whose value to the new firm would exceed the costs of their continued employment. Importantly, the buyer and seller may have different views on this. Requiring disclosure to all D&P employees, regardless of whether they will be valuable to the new firm, and limiting the ability to fire employees in the preconsummation period (what the majority says would be opportunistic conduct), means that even “bad” employees (from the perspective of the buyer) will be guaranteed to profit from the merger and to have jobs with the acquirer, for a while at least. In other words, Jordan might be viewed as a bad employee to the buyer (because he was showing his disloyalty to the firm by quitting), and would therefore be precisely the type of employee

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<sup>49</sup> Even silence here—“We might merge, which might be good for you”—yields the same result, since Jordan might reasonably assume from silence as to specifics that he would participate in any premium.

whom a buyer would want to cut out of the deal's upside, but can't.<sup>50</sup> *Duff and Phelps* is wrongheaded insofar as it suggests that firms can't fire the Jordans of the world regardless of the employer's or buyer's assessment of their value. The rule in effect freezes employment decisions during this period and forces buyers that want to deny the control premium to particular employees to do so through deal structuring. The efficiency of such a forcing rule is highly suspect,<sup>51</sup> and is a consideration the court utterly ignores.

#### B. Did Jordan Consent to Being Traded against with Superior Information?

One thing upon which Easterbrook and Posner agree is that the parties could, through contract, waive any duties to disclose; they simply disagree about whether Jordan did so in this case. This is a pretty remarkable leap, as it seems to run afoul of the ban on waiver found in both the law of fiduciaries<sup>52</sup> and the securities laws.<sup>53</sup> It is also the most noteworthy aspect of the case because it predicts (by about two decades) the Supreme Court's analysis in *United States v O'Hagan*.<sup>54</sup>

As a general matter, federal insider trading law looks to state law for the existence of a duty to be breached; in the absence of a clear duty—one, for example, founded on a fiduciary relationship—there can be no liability from the use of material, nonpublic information. In *O'Hagan*, the Court held that even when there is such a duty, disclosure of trading intentions eliminates liability (at least under the mis-

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<sup>50</sup> In the several cases that arose from the buyout(s) of D&P, each plaintiff-employee had acted in a way that showed disloyalty to the firm or that the employee's value to the firm was very low. For an example, see note 29 and accompanying text.

<sup>51</sup> Using deal structure to solve the Jordan problem may add unnecessary complexity, may be costly to design and implement, and may be too blunt a tool in that it may harm a larger class of employee-shareholders than necessary to achieve the buyer's aims. To this last point, the buyer may be able to narrowly tailor the structure or to make employees it doesn't mean to harm whole in other ways, but this may raise transaction costs significantly, perhaps even enough to kill a deal that would benefit all shareholders.

<sup>52</sup> See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 Duke L J 879, 887 (“[F]iduciary obligation sometimes operates precisely in opposition to intention as manifest in express agreements.”). If it is true that majority shareholders owe minority shareholders “fiduciary duties,” as typically understood in the trust context, these are not waivable. See *id.* at 923 (“A provision in a trust instrument cannot relieve a trustee of liability for any profit derived from a breach of trust.”). But here corporate law may be simply sloppy, and “fiduciary duties” might just mean something else—an obligation to refrain from self-dealing—that may be waived in certain cases.

<sup>53</sup> See Securities Exchange Act of 1934 § 29(a), codified at 15 USC § 78cc(a) (2000) (“Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.”).

<sup>54</sup> 521 US 642, 653–55 (1997) (accepting the misappropriation theory as a basis for insider trading liability under § 10(b) of the Securities Exchange Act).



appropriation theory) because deception is a crucial element of liability that is negated by consent.<sup>55</sup>

The view that securities laws are waivable (to some extent) by contractual definition of rights at the state-law level is more readily accepted after *O'Hagan*, but when Posner first suggested it in *Duff and Phelps*, it was a radical notion. As a normative matter, it is a perfectly sensible conclusion. Given the benefits of private ordering in business formation, courts encourage parties to freely contract under state law to arrange the affairs of closely held firms. If those contracts create specific rights and obligations that include exceptions to equal treatment or other fiduciary-imposed standards, the federal laws that piggyback on state law duties should adjust accordingly. As long as the parties to a face-to-face securities transaction are sophisticated—have access to information, can ask questions, and don't otherwise need special protection—there is no reason why they should not be able to waive explicit or implicit duties owed to them by the other transacting party.

A recent court of appeals case is illustrative. In *McCormick v Fund American Companies, Inc.*,<sup>56</sup> an executive and large shareholder sold his shares back to the firm prior to retirement. Before doing so, he asked the firm for specific information related to pending merger talks but the firm declined and he sold. Later, when the merger came to pass, he sued under Rule 10b-5, just like Jordan. The court rejected his claim, noting that the executive's knowledge of what he didn't know amounted to a waiver of any claims that the firm had a duty to disclose.<sup>57</sup> This holding butts right up against *Duff and Phelps*, in that it would be strange to suggest that a "no comment" policy could insulate a firm from the *Duff and Phelps* rule.

The reasoning in *McCormick* provides the foundation for much over-the-counter securities practice today, including the use of "big boy" letters, which state that the parties know that one of them may have more information but since they are "big boys," they agree to waive any claims arising out of the information asymmetry. Courts have, by and large, upheld these provisions as enforceable, if not as a claim waiver of any securities law violations, at least as a nonreliance provision that undercuts any fraud claim.<sup>58</sup>

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<sup>55</sup> See *id.* at 653–54 (“[I]f the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no ‘deceptive device’ and thus no § 10(b) [of the Securities Exchange Act] violation.”).

<sup>56</sup> 26 F3d 869 (9th Cir 1994).

<sup>57</sup> See *id.* at 884 (noting the background knowledge the plaintiff had as a “sophisticated businessman” who was at the time a former CEO of a subsidiary of the defendant and a current member of the defendant's board).

<sup>58</sup> See, for example, *Harsco Corp v Segui*, 91 F3d 337, 339 (2d Cir 1996) (affirming the dismissal of federal securities fraud claims for lack of reasonable reliance where sophisticated

The contract Jordan signed has the spirit of an *ex ante* waiver or version 1.0 “big boy” letter. By agreeing to take book value, Jordan was in effect consenting to trades with the firm at a set price in cases in which one or both parties would know that the fair value of the shares exceeded book value. Although it was theoretically possible that the shares would be worth book value (or less) when Jordan left the firm and had to sell them back, this was an unlikely possibility at the time of contracting because enterprise value exceeds book value in most firms that are not distressed or in bankruptcy.<sup>59</sup> This argument is even more powerful when we consider the standard industry practice of using the amount paid to purchase the shares, which is often nominal (\$0.01), as the buyout price. In this case, every state of the world in which a buyout happens will involve informational asymmetries akin to those that the *Duff and Phelps* court held give rise to federal liability.

The only upside of the *Duff and Phelps* rule is that it might force the parties to bargain more specifically over disclosure—for example, by using an explicit “big boy” letter—but this is a costly overlay on what appears to already be a fairly struck bargain, and it raises overall transaction costs because it allows courts room to intervene in cases where they find the terms of the bargain or the implementation unfair. Since parties cannot know these exact contours in advance, the result is more uncertainty and higher contracting costs.

### C. Can There Be Insider Trading in Options?

A final consideration is whether applying insider trading law makes sense for the type of contract the parties signed. Jordan’s stockholder agreement was an options contract: Jordan sold a “call” option to D&P, giving the firm the right to buy his shares at book value at any time; and he bought a “put” option from D&P, giving him

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parties explicitly delineated the representations that were and were not made); *Jensen v Kimble*, 1 F3d 1073, 1074 (10th Cir 1993) (holding that the failure to disclose information prior to a stock transaction was not deceptive where the buyer advised the seller that he had information but would not disclose it). But see *AES Corp v Dow Chemical Co*, 325 F3d 174, 180 (3d Cir 2003) (refusing to hold as a matter of law that nonreliance provisions are sufficient to immunize any Rule 10b-5 claims).

<sup>59</sup> The average ratio of market value to book value for the largest 7,700 firms in the United States in 2006 was over 5, with a median of 2; only distressed or bankrupt firms are the exception. The overall ratio for the economy was about 3. See *Earnings: Book Value and Sales Multiple Averages by Country*, online at [http://pages.stern.nyu.edu/~adamodar/New\\_Home\\_Page/data.html](http://pages.stern.nyu.edu/~adamodar/New_Home_Page/data.html) (visited Sept 29, 2007). For financial services firms, like D&P, the average is about 8, with a median of about 2. See *id.*

the right to sell his shares at book value at any time.<sup>60</sup> In effect, Jordan bought insurance against a decline in firm value (Jordan's put), while being able to capitalize on an increase in firm value, subject to his remaining valuable to and staying with the firm (the firm's call). Thus, the fundamental legal/policy question in the case is whether the implied covenant of good faith and fair dealing should apply to these types of options contracts.

Insider trading law has bite for run-of-the-mill options contracts only at the time of purchase. In the classic case, a statutory insider who has material, nonpublic information buys or sells options in order to profit from knowledge that the price of the underlying stock is going to rise or fall.<sup>61</sup> There is no claim in *Duff and Phelps* that there were actionable informational asymmetries at the time Jordan signed his shareholder agreement. If there were such a claim, *Duff and Phelps* would be easy and uninteresting.

The other relevant time period for options contracts is when the rights granted under them are exercised. But for typical options there can be no liability here because the price must have already moved to its publicly informed price in order to profit under the option, and therefore there is no insider trading, just exercising the agreed-to rights. In most cases, the only sensible time to ask whether the holder violated Rule 10b-5 is at the time the options contract was executed, not when the options were exercised.

*Duff and Phelps* offers a wrinkle: the option exercise was tied to employment and the illiquidity makes value more difficult to determine. As a doctrinal matter, the operative question when employment and shareholding are lumped together is whether shareholding is incidental to employment or vice versa. The seminal case is *Ingle v Glamore Motor Sales, Inc.*,<sup>62</sup> where the court held that employment law, in this case an at-will regime, trumped any obligations arising from share ownership when an employee was only incidentally a shareholder.<sup>63</sup> The policy logic is, as discussed above, that foundational contracts and parties warrant greater protection than employees brought in later who are primarily employees and not owners.

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<sup>60</sup> Posner recognizes this essential feature. See *Duff and Phelps*, 815 F2d at 447 (Posner dissenting) ("By signing the stockholder agreement Jordan gave Duff and Phelps in effect an option . . . to buy back his stock at any time at a fixed price.").

<sup>61</sup> Many of the most famous insider trading cases involve options trading of this kind. See, for example, *O'Hagan*, 521 US at 647-48 (describing a defendant's use of options to capitalize on nonpublic knowledge of his firm's client's planned tender offer for the Pillsbury Company).

<sup>62</sup> 73 NY2d 183, 535 NE2d 1311 (1989).

<sup>63</sup> See *id.* at 1313 ("A minority shareholder in a close corporation . . . who contractually agrees to the repurchase of his shares upon termination . . . acquires no right from the corporation . . . against at-will discharge.").

Another reason for separation of employee and shareholder rights is the unworkability of a rule that layers securities fraud on employment decisions like those in *Duff and Phelps*. Consider the case of D&P's CEO, who signed the same contract Jordan did and who is contemplating retirement. Inevitably the CEO will have private information about the true value of the firm: specifically, whether it exceeds, is the same as, or is less than book value. Under the *Duff and Phelps* rule, the only time the CEO could make a retirement choice free from potential civil (or even criminal!) liability is when he knows that the value is the same as, or not materially different from, book value. (Hint: never.<sup>64</sup>) Because it would be impossible to make the retirement decision independently from knowledge of firm value, the only choice would be to take the decision away from the executive, which seems fanciful.

Here is where the *Ingle* rule has traction: In cases where shareholding is not ancillary to employment, like in *Wilkes*, then courts will impose fairness restrictions on how promoter-shareholders can deal with each other. In cases where employees are merely given shares as compensation or retention tools of the firm, the courts will force the parties to contract and will enforce the letter of those contracts.

Firms faced with the *Duff and Phelps* rule might do one of several things. First, they might simply give less equity to employees, or they might tie buyouts to some fairly determined "market" price (which is the same thing). It isn't clear at all that this is a desirable policy objective. Second, they might freeze all employment decisions when the firm is in periods of uncertain future value. This, of course, is not only hugely inefficient, but also impossible to implement—how would a firm forbid an employee from quitting? It seems far better to require firms to follow a general rule—like the price-and-structure rule—and refrain from actively misleading employee-shareholders. This preserves freedom of contract at the agreement and employment decision time. Some employees will win, by timing exit decisions well, and others, like Jordan, will lose. But this eventuality should be apparent at the time the parties write the contract, and if individual employees want greater protection, they can bargain for it.

#### IV. CONCLUSION

In *Duff and Phelps*, Posner is at his best and perhaps at his worst. His reasoning eclipses the narrow issues presented by the facts, mak-

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<sup>64</sup> As of the end of 2005, only nine out of the largest 7,000 firms in the United States had a market value to book value ratio of exactly 1 (0.1 percent of firms). See *Earnings: Book Value and Sales Multiple Averages by Country* (cited in note 59).

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ing compelling arguments about a range of issues that courts would not otherwise come around to, if at all, for decades. His style is breezy, witty, and draws on a range of legal materials and types of thinking. When you read the opinion, you think how fun it would be to be his colleague or clerk—although not necessarily one of the litigants. The downside is that his analytical and doctrinal innovations propel the court into a holding that eats up more legal space than it needs to and creates a set of unneeded and nettlesome duties that make corporate law less clear and certain.

On the merits, Jordan's contract, which was the same as every employee-shareholder, would not be fundamentally frustrated by the lack of an implied term—as in the salesman commission cases. The court should have been less confident about reading in contractual terms since Jordan did bargain, unlike the plaintiff in *Wilkes*, and was primarily an employee, as opposed to a founder-shareholder. Although *Duff and Phelps* is still good law, subsequent cases, like *Gallagher* and *O'Hagan*, have carved back on its reach. Posner's genius was to see the path of the law in advance of its march. His dissent, although cited in a nontrivial number of cases, did not provide the explicit intellectual or doctrinal foundation of any of these cases, but his reasoning can be said to have predicted their results.