



SECURITIES REGULATION & LAW



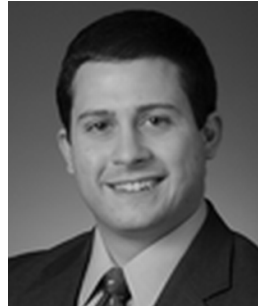
VOL. 42, NO. 31

REPORT

AUGUST 2, 2010

MERGERS AND ACQUISITIONS

The Business Strategy Immunity and Its Application Beyond Hostile Transactions



BY RICHARD B. KAPNICK, COURTNEY A. ROSEN AND ZACHARY A. MADONIA

Richard B. Kapnick and Courtney A. Rosen are partners, and Zachary A. Madonia is an associate at Sidley Austin LLP in Chicago, where their practices include litigation involving mergers and acquisitions, breaches of fiduciary duties, securities fraud and bankruptcy. The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP. This article has been prepared for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers. Copyright for this article is retained by the authors.

When a client has serious concerns about producing its most sensitive business information during litigation, corporate counsel should consider whether the business strategy immunity applies. The business strategy immunity generally protects from disclosure information concerning a party's highly confidential business strategies, the premature disclosure of which would result in severe harm.¹ This doctrine, once known as the "white knight privilege," initially arose in the context of target companies defending against hostile bids for corporate control. In that context, the immunity protects against the premature disclosure of business plans, proposals, or alternatives actively under consideration by the target company or the acquiror.

¹ See, e.g., *Parsons v. Jefferson-Pilot Corp.*, 141 F.R.D. 408 (M.D.N.C. 1992); *Stena Fin. B.V. v. Sea Containers, Ltd.*, 131 F.R.D. 361 (D.D.C. 1989); *BNS Inc. v. Koppers Inc.*, 683 F. Supp. 454 (D. Del. 1988); *Grand Metro. PLC v. Pillsbury Co.*, Nos. 10319, 10323 (Consol.), 1988 WL 130637 (Del. Ch. Nov. 22, 1988); *Dedde v. Orrox Corp.*, No. 6409, 1981 WL 15121 (Del. Ch. Apr. 8, 1981).

Generally, it protects a party's ongoing deliberations against the risk that the information disclosed in litigation will undermine a party's competitive position in ongoing negotiations.² While the business strategy immunity is often asserted in litigation arising out of proposed hostile transactions, it has also been invoked in broader litigation contexts. This article outlines the scope of the business strategy immunity and explains why counsel in other settings seeking to shield certain materials from discovery may consider utilizing this doctrine.

I. Background on the Business Strategy Immunity

The business strategy immunity is a specific application of the test required for a protective order under Federal Rule of Civil Procedure Rule 26(c) or its state equivalent. That test requires a balancing of "the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the [other party] if discovery is permitted; and the stage of the company's efforts as well as the stage of the litigation."³

The business strategy immunity was first developed in the context of target companies defending against hostile contests for corporate control.⁴ Courts applied the immunity to limit discovery surrounding target companies' attempts to evade a transaction proposed by a hostile bidder. In many cases, the target's primary option was to solicit competing bids from so-called "white knights" who might offer an alternative transaction on more favorable terms.⁵ Hence, the immunity's original name, the "white knight privilege."

At a fundamental level, courts have shielded this type of information to protect shareholder interests.⁶ Courts recognize that, in contests for corporate control, "the board of directors of a target company continues to have an ongoing responsibility to manage the corporation and, in the face of such a contest, that responsibility may entail the exploration of alternative transactions that would better promote corporate and shareholder welfare."⁷ Were a hostile bidder allowed to discover the nature of those alternative transactions, or the identity of potential white knights, then the board's ability to negotiate effectively with the hostile bidder and with parties to the alternative transactions could be significantly undermined.⁸ For example, if a hostile bidder learns the

value that a target's board places on its own stock, then the bidder is unlikely to make a bid above that figure, which could deprive the shareholders of legitimate value that they may otherwise have received.⁹ Alternatively, allowing discovery into the alternative strategies being considered by a target's board of directors could allow the hostile bidder to "take preemptive measures to prevent the [target] from mounting a counter offensive," which "would seriously impair, if not destroy, the [target] board's ability to negotiate a higher offer for its shareholders."¹⁰ Even allowing a hostile bidder to learn identities of other bidders could have a serious chilling effect on the number of potential white knights.¹¹ For any number of reasons, parties to potential alternative transactions may have serious reservations about entering into negotiations if takeover litigation threatens confidentiality, which could further hurt shareholder value by reducing the likelihood that a target's board can come up with a more favorable, alternative transaction.

In recognizing the business strategy immunity, courts prevent hostile bidders from using the machinery of litigation discovery to acquire an unfair advantage. In this context, a confidentiality order alone is insufficient to prevent a company's most sensitive business information from being used in an unfair manner in negotiations outside of litigation. As Chancellor Allen of the Delaware Chancery Court stated:

I do not regard confidentiality orders as providing absolute protection. If they did, there would be no need to attempt to evaluate competing claims in this setting, for the words written on a page would afford the protection of a guarded vault. We must operate, however, in a world more closely aligned with a reality in which mistakes occur and in which trust is sometimes abused for advantage.¹²

In the context of takeover litigation, where strategic negotiations occur both separate from and simultaneously with the lawsuit, the risk of mistake or abuse of trust can be devastating. Even an order limiting dissemination to attorneys cannot always offer adequate protection because there is no practical way to segregate an attorney's duty to zealously represent the client from the responsibility to maintain confidentiality under a court order.¹³ Once an attorney becomes apprised of sensitive information, it becomes part of the factual background that is relied upon to advise the client. The only effective protection is to bar discovery in its entirety albeit for a limited time.¹⁴

² See *Grand Metro.*, 1988 WL 130637.

³ *Id.* at *2.

⁴ The first reported opinions discussing the business strategy immunity were issued in the 1980s. See, e.g., *Coastal Corp. v. Texas E. Corp.*, 707 F. Supp. 280 (S.D. Tex. 1989); *BNS Inc.*, 683 F. Supp. 454. Prior to that time, the business strategy immunity consisted of a "body of oral rulings [and] orders" that had not been pulled together in any "comprehensive [or] instructive" way. *Computervision Corp. v. Prime Computer, Inc.*, No. Civ. A. 9513, 1988 WL 909326, at *1 (Del. Ch. Jan. 26, 1988).

⁵ See *BNS Inc.*, 683 F. Supp. at 457-58.

⁶ *Grand Metro.*, 1988 WL 130637, at *2 ("We have repeatedly recognized that disclosure of such efforts, while they are ongoing, may be detrimental to shareholder interests.")

⁷ *Id.* at *2.

⁸ *BNS Inc.*, 683 F. Supp. at 457 (holding that discovery "would seriously impair, if not destroy, the Koppers board's ability to negotiate a higher offer for its shareholders").

⁹ See *NiSource Capital Mkts., Inc. v. Columbia Energy Group*, No. Civ. A. 17341, 1999 WL 959183, at *1 (Del. Ch. Sept. 24, 1999).

¹⁰ *BNS Inc.*, 683 F. Supp. at 457.

¹¹ See *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 191, 194 (D. Del. 2004) ("[The target's] assertion of oppression centers on the potential 'chilling effect' the disclosure of documents relating to third-party bids . . . will have on future bids for its acquisition.")

¹² *Gioia v. Texas Air Corp.*, No. 9500, 1988 WL 18224, at *3 (Del. Ch. Mar. 3, 1988).

¹³ See *id.* at **2-3.

¹⁴ See *id.* at *3. Limiting disclosure to litigation attorneys also does not solve the problem given the frequent and necessary interactions between litigation and transactional attorneys in the context of a contest for corporate control.

II. Application of the Immunity in Corporate Transactions

Although many of the cases discussing the business strategy immunity have arisen in Delaware state court, the doctrine is no stranger to the federal courts.¹⁵ The first comprehensive articulation of the business strategy immunity in federal court occurred in 1988 in *BNS Inc. v. Koppers Co., Inc.*¹⁶ In that case, the board of the target company, Koppers Co., Inc., had rejected hostile bids of \$45 and \$56 per share from BNS Inc. The District Court of Delaware considered whether the hostile bidder was entitled to discovery of information related to the target board's assessment of the adequacy of the bidder's most recent \$60 offer (on which the board had not yet taken a position) as well as certain defensive measures that the board was considering.¹⁷ The threshold issue was whether to apply Delaware or federal law. If the "white knight privilege" existed as a substantive privilege under Delaware law, then Delaware law would supply the rule of decision. Otherwise, federal law would control. Citing to the Delaware Chancery Court's opinion in *Computervision Corp. v. Prime Computer*,¹⁸ the court determined that the "white knight privilege" is not a state law privilege, but arises from the court's procedural power to limit discovery under Rule 26(c) of the Federal Rules of Civil Procedure.¹⁹

Recognizing that Rule 26(c) requires balancing "the countervailing legitimate interests and accommodating the needs of both parties," the court weighed the bidder's need for the information versus the harm that would befall the target if the information were disclosed.²⁰ The court first determined that the target faced significant harm if it had to disclose its assessment of the adequacy of the bidder's offer: "[i]f [the defendant] were to be compelled to produce documents about what its position should be on the [tender] offer, it could destroy its ability to act in the best interest of

its shareholders . . . [by] destroy[ing] [its] ability to negotiate a higher offer for its shareholders."²¹ Importantly, the court found that the bidder had no need for this information unless and until the target actually rejected the bid.²² On balance, then, the interests of the target clearly outweighed those of the bidder and the court chose to apply the business strategy immunity.

Later that year, the Delaware Chancery Court articulated its own business strategy immunity standard that, in large part, followed its federal counterpart. *Grand Metropolitan PLC v. The Pillsbury Company*²³ centered around whether the target's board had acted in good faith in resisting a hostile bidder's \$60 per share cash tender offer, and whether the board's actions, including the adoption of a poison pill, were reasonable.²⁴ The bidder sought discovery of details relating to the "possibility of proposing" a transaction with a white knight, which the target resisted, citing the "white knight" or "business strategy privilege."²⁵ Like the District Court of Delaware, the Chancery Court anchored the courts' authority to grant business strategy immunity in the comparable Rule 26(c) of the Delaware Rules of the Court of Chancery.²⁶

Chancellor Allen instructed the Delaware courts to engage in a "balance of interests approach" that:

[A]ttempts to evaluate the importance of the matter sought to be discovered to the party seeking it; the risk of nonlitigation injury that might occur to the target corporation if discovery is permitted; and the stage of the company's efforts, as well as the stage of the litigation.²⁷

Balancing the interests of the bidder and the target, the Chancery Court decided not to apply the immunity.²⁸

The *Grand Metropolitan* court recognized that, unlike in *BNS Inc.*, Pillsbury's board had already rejected the \$60 tender offer. As such, the "efforts by [the target]" to locate a white knight were "relevant to the reasonableness of the board's judgment that [the bidder's] \$60 [per share] cash offer constitutes a 'threat' and . . . is 'inadequate.'"²⁹ Whether to apply the immunity turned on "the risk of nonlitigation injury that might occur" to the target from disclosure. The court distin-

¹⁵ See, e.g., *BNS Inc.*, 683 F. Supp. 454; *Parsons*, 141 F.R.D. at 418-20; *Stena Fin. B.V.*, 131 F.R.D. 361. For example, the business strategy immunity has been applied in federal district courts in Delaware, the Middle District of North Carolina, the District of Columbia, the Southern District of Indiana, and the Southern District of New York. *Corning Inc.*, 223 F.R.D. at 193-94; *Parsons*, 141 F.R.D. at 418-19; *Stena Fin. B.V.*, 131 F.R.D. at 362; *IPALCO Enters., Inc. v. PSI Res., Inc.*, 148 F.R.D. 604, 607-08 (S.D. Ind. Apr. 27, 1993); *E.On AG v. Acciona, S.A.*, No. 06 Civ. 8720 (DLC), 2007 WL 316874, at *6 n.10 (S.D.N.Y. Feb. 5, 2007); *In the Matter of a Subpoena, Dated Oct. 2, 1987 Issued to: PaineWebber Inc.*, 117 F.R.D. 352 (S.D.N.Y. 1987).

¹⁶ 683 F. Supp. 454.

¹⁷ *Id.* at 455-56. In *BNS Inc.*, the parties agreed that the identity of third parties with whom the target was currently negotiating were protected. *Id.* at 456. At issue were defensive measures other than ongoing negotiations. *Id.* at 455-56.

¹⁸ 1988 WL 909326, at *1 ("Suffice it for the moment simply to say that the concept is more nearly like the limited immunity to discovery accorded attorneys' work product in the sense that a balancing process between plaintiffs' need and alternatives and the importance of the counterbalancing confidentiality interest of defendant is involved than it is a true privilege.")

¹⁹ *BNS Inc.*, 683 F. Supp. at 457. FRCP 26(c) provides in pertinent part: "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c).

²⁰ *Id.* at 457.

²¹ *Id.*

²² *Id.* ("It follows [that] BNS will have a critical need for documents which contain information relative to all defensive alternatives being pursued by the Koppers board. Weighed against this need is the possible detriment to Koppers shareholders. If BNS were privy to advance disclosure of Koppers [sic] strategy in its formative stages, it conceivably could take preemptive measures to prevent Koppers from mounting a counter offensive.")

²³ 1988 WL 130637.

²⁴ *Id.* at *1.

²⁵ *Id.* at *3. The court also reiterated its holding from *Computervision Corp.* that "the 'business strategy privilege' or 'white knight privilege' is not technically a privilege in the sense that proof of certain elements creates something akin to an entitlement, but is in the nature of a qualified immunity to discovery similar to the attorney's work product doctrine." *Id.* at *2.

²⁶ *Id.* at *2. Rule 26(c), like its federal counterpart, permits a court to regulate discovery by making any order "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense . . ." Del. R. Ct. Ch. 26(c).

²⁷ *Id.* at *2.

²⁸ *Id.* at *3.

²⁹ *Id.*

guished between white knights that “excite[d] a still lively interest”—that is, where “discussions may in good faith be said to be ongoing”—and potential white knights for whom the target was merely considering the “possibility of proposing” a transaction. The court recognized that discovery of ongoing negotiations of alternative transactions could easily derail them and applied the business strategy immunity with respect to those discussions. In the case of terminated discussions of potential alternative transactions, the court found the risk of harm too attenuated and permitted discovery.³⁰

Since *BNS Inc.* and *Grand Metropolitan*, courts have applied the “balancing of interests approach” when determining whether to apply the business strategy immunity³¹ by (1) evaluating the importance of the information to the party seeking it, and (2) assessing the risk of harm to the party opposing discovery. Courts do not consider either inquiry in isolation.

Relevance of the Information. In evaluating whether to apply the business strategy immunity, the courts first focus on the relevance of the information sought to the litigation. Discovery is likely to be denied when the information has minimal relevance.³² This often turns on the nature and the stage of the litigation.³³ For example, in *NiSource Capital Markets, Inc. v. Columbia Energy Group*,³⁴ a hostile bidder had brought a *Unocal*³⁵ challenge against a share repurchase program that the target’s board had adopted in response to the bidder’s tender offer. The Delaware Chancery Court found that to state a *Unocal* claim at the pleadings stage, the bidder did not need to allege anything con-

cerning the target’s internal valuations.³⁶ Instead, the bidder only needed to allege that the target had not recommended that the shareholders approve the offer, despite the fact that it was above market.³⁷

On the other hand, even if the information sought has relevance to actually-litigated issues, a court may deny discovery so long as the adjudication of those issues is not immediately required. For example, in *Parsons v. Jefferson Pilot Corp.*, the Middle District Court of North Carolina granted plaintiff’s request for business strategy immunity from disclosing sensitive information related to a proxy contest even though the information was relevant to the defendant’s affirmative defenses.³⁸ Under the circumstances, this holding was justified because the court deferred any ruling on the defendant’s affirmative defenses “until such a time as [the defendant] may have discovery” of the relevant documents.³⁹

In evaluating the business strategy immunity, courts sometimes consider the motive behind the discovery request.⁴⁰ Simply because information has some conceivable relevance to litigation does not preclude the possibility that the party seeking the information is primarily interested in advancing its business interests outside of litigation. This possibility of overreaching was recognized in *NiSource*, where the court denied discovery of valuation information in part because the bidder’s chairman had made public statements in a newspaper article, indicating that he would “find out the sales price suggested by [the target’s] investment advisors through the discovery process in the Court of Chancery.”⁴¹ In denying the discovery request, the court noted that this was exactly the “sort of behavior” that the business strategy immunity was designed to prevent.⁴²

Risk of Harm. When courts evaluate the harm to the party asserting the immunity, two issues predominate. The first involves the nature of the information on which discovery is sought. The relevant question is whether the disclosure of the information would threaten a non-litigation injury, such as unfairly undermining a party’s negotiating position. In *Computervision Corp.*, the Delaware Chancery Court defined the “core region of data protected by [the immunity]” as:

[I]nformation disclosing or relating to a functioning board’s ongoing consideration of alternatives to the present offer, including information relating to possible ‘white knights’ or negotiations with such third parties, information relating to alternative forms of transactions such as self-tenders or recapitalizations or information relating to negotiating strategies with respect to improving the [bidder’s] offer.⁴³

³⁶ See *NiSource*, 1999 WL 959183, at *2 (“The plaintiffs do not need the internal valuations of the target company to pursue their [*Unocal*] claim . . .”).

³⁷ *Id.* at *2.

³⁸ 141 F.R.D. at 419-20.

³⁹ *Id.* at 420.

⁴⁰ See, e.g., *NiSource*, 1999 WL 959183, at *3.

⁴¹ *Id.* (internal quotations omitted).

⁴² *Id.* (“This Court has always been hesitant to grant discovery where the information disclosed may not be used for proper legal purposes, but rather for practical business advantages. . . . The Court’s desire to prevent this sort of behavior, and its emphasis on maintaining a level playing field for both bidder and target, has often lead this Court to narrowly tailor discovery. *Gioia, supra*. It is largely this concern that gave rise to the business strategy immunity, and it is in this spirit as well that I deny plaintiffs’ discovery request.”).

⁴³ *Computervision Corp.*, 1988 WL 909326, at *1 n.1.

³⁰ *Id.*

³¹ See, e.g., *Corning Inc.*, 223 F.R.D. at 194; *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, Civ. A. No. 13241, 1995 WL 214359 (Del. Ch. Mar. 24, 1995); *Parsons*, 141 F.R.D. 408; *Vitro v. Anchor Glass Container Corp.*, Civ. A. No. 11016, 1989 WL 108406 (Del. Ch. Sept. 20, 1989).

³² *BNS Inc.*, 683 F. Supp. at 458 (barring discovery into a board’s assessment of the adequacy of a hostile offer unless and until the offer is rejected).

³³ See, e.g., *id.*; *NiSource*, 1999 WL 959183, at *2; *Parsons*, 141 F.R.D. at 420.

³⁴ 1999 WL 959183.

³⁵ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (Enhanced judicial scrutiny of “a defensive measure to thwart or impede a [corporate] takeover” requires “reasonable grounds for believing that a danger to corporate policy and effectiveness existed” and “it must be reasonable in relation to the threat posed.”).

Note to Readers

The editors of BNA’s *Securities Regulation & Law Report* invite the submission for publication of articles of interest to practitioners.

Prospective authors should contact the Managing Editor, BNA’s *Securities Regulation & Law Report*, 1801 S. Bell St. Arlington, Va. 22202-4501; telephone (703) 341-3889; or e-mail to sjenkins@bna.com.

At issue was whether a hostile bidder would be precluded from discovering “the basis for the determination by [the target’s board] that the [bidder’s] initial offer was inadequate.”⁴⁴ The court concluded that financial information relating to a previously rejected offer was not part of the “core region of data protected by this concept” and denied business strategy immunity.⁴⁵

On the other hand, valuation information relating to active offers is at the core of the immunity. For example, in *NiSource*, a bidder sought production of a target company’s highly confidential financial information, which included the target’s internal valuations.⁴⁶ In deciding to apply the immunity, the Delaware Chancery Court recognized the danger threatened: if a bidder got access to a target’s internal valuations, then that bidder would know the target’s reservation price, which would make it impossible for “arms-length bargaining between the parties.” Moreover, the bidder would not “offer a price per share that exceeds the value the target itself places on its own stock.”⁴⁷ As such, the shareholders would be unfairly denied the chance at obtaining a premium that the bidder might have paid if it remained unaware of the reservation price.⁴⁸

The second issue that comes up when evaluating the harm to the party asserting the immunity is a question of timing: namely, is there a sufficiently “lively” interest in the confidential information such that the party would actually be harmed by the disclosure?⁴⁹ This question is revisited throughout the litigation: even if the court grants immunity initially, it may allow discovery later if the threat of harm recedes⁵⁰ and vice-versa.⁵¹ The party seeking protection must establish that it has a sufficiently lively interest.⁵² For example, as shown in *Grand Metropolitan*, if a particular strategy has not materialized, or any consideration of it has terminated, then courts will be less likely to grant protection.⁵³ Such is the case when there are no ongoing negotiations between a target and a potential alternative suitor and where the possibility that negotiations will resume is remote. Similarly, if a particular strategy under consideration by the board has been foreclosed by

subsequent events, then business strategy immunity may no longer be appropriate.

The simple fact is that whenever there is no ongoing or imminent prospect of the alleged harm occurring, business strategy immunity does not apply. For example, in *Cincinnati Bell Cellular Sys. v. Ameritech Mobile Phone Servs. Co. of Cincinnati, Inc.*, the plaintiff attempted to dissolve a partnership in which it was a limited partner and in which the defendant was the majority owner.⁵⁴ During the litigation, the defendant requested that the plaintiff disclose its valuation of the partnership as well as of its other businesses.⁵⁵ Plaintiff asserted business strategy immunity, arguing that the defendant, as a competitor and a potential purchaser of plaintiff’s businesses, might gain an unfair advantage from learning the plaintiff’s internal valuations.⁵⁶ The Delaware Chancery Court disagreed, finding that the “speculative threat” that the defendant may “at some time in the future” seek to acquire the plaintiff or one of its affiliates was insufficient to establish the business strategy immunity.⁵⁷

Application to Bidders. Courts have extended business strategy immunity to cover the confidential strategies of *bidders* as well. In *Atlantic Research Corp. v. Clabir Corp.*, the target sought discovery of a hostile bidder’s ongoing strategies and plans.⁵⁸ The bidder refused, asserting the business strategy immunity. In response, the target argued that the immunity was only available to target corporations and that hostile bidders could not invoke its protection.⁵⁹ The Delaware Chancery Court disagreed, holding that business strategy immunity applied equally to protect the strategies and plans of hostile bidders as it did to protect those of target corporations.⁶⁰ Applying the balancing test, the court protected the bidder’s “ongoing strategies and plans—that is, live strategies and plans.”⁶¹

III. Application of the Immunity Outside of Hostile Transactions

The business strategy immunity has been applied in a variety of situations outside the hostile takeover context. The key inquiry is whether the same considerations that justify it in takeover litigation are present: the serious and imminent threat of harm arising from premature disclosure, and the inadequacy of a confidentiality order to address that threat of harm.

Proxy Contests. Parties to litigation involving proxy contests, especially those in which corporate control is contested, have interests at stake comparable to parties who have asserted the business strategy immunity in takeover litigation.⁶² For example, in *Dolphin Ltd.*

⁴⁴ *Id.* at *1.

⁴⁵ *Id.*

⁴⁶ 1999 WL 959183, at *1. See also *Dolphin Ltd. P’ship I, L.P. v. InfoUSA, Inc.*, No. Civ. A. 1709-N, 2006 WL 1071518, at *1 (Del. Ch. Apr. 11, 2006) (Board evaluation materials relating to potential sale of company “contain highly sensitive, non-public information concerning valuation and strategic alternatives, including potential strategic partners.”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Grand Metro.*, 1988 WL 130637, at **2-3; see also *BNS Inc.*, 683 F. Supp. at 457 (holding that when the board is actively reviewing an alternative, its interest in confidentiality is very high and disclosure of its deliberations could harm its ability to act in the best interest of the stockholders).

⁵⁰ See *Parsons*, 141 F.R.D. at 420 (“The Court will protect from discovery, at this time, any documents which reveal an ongoing strategy of the respondents with respect to a contest for control . . . The limitation thus stated by the Court – at this time – is critical.”) (emphasis in original).

⁵¹ See *Computervision Corp.*, 1988 WL 909326, at *1 (“This ruling [denying the immunity] is, therefore, not intended to foreclose the defendant from hereafter asserting a ‘white knight privilege’ . . .”).

⁵² See *IPALCO Enters.*, 148 F.R.D. at 607.

⁵³ *Grand Metro.*, 1988 WL 130637, at *3.

⁵⁴ Civ. A. No. 13389, 1995 WL 347799, at *1 (Del. Ch. May 17, 1995).

⁵⁵ *Id.* at *3.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ No. Civ. A. 3783, 1987 WL 758584, at *1 (Del. Ch. Feb. 10, 1987).

⁵⁹ *Id.* at *2.

⁶⁰ *Id.*

⁶¹ *Id.* at *3.

⁶² For instance, in *Dedde v. Orrox Corp.*, the Delaware Chancery Court protected a shareholder bringing a Section 220 proceeding from disclosing his intended strategy and tac-

P'ship v. InfoUSA, the Delaware Chancery Court applied the business strategy immunity in a Section 220 books and records action surrounding a proxy contest.⁶³ The plaintiff shareholder sought discovery of documents concerning the defendant board's evaluation of a sale process. Although plaintiff had previously been denied discovery under the business strategy immunity, plaintiff argued that business strategy immunity was no longer necessary because the board was unlikely to renew its evaluation of the sale process.⁶⁴ Nevertheless, the court refused to grant discovery because the documents contained "highly sensitive, non-public information concerning valuation and strategic alternatives, including potential strategic partners."⁶⁵

Similarly, in *Parsons v. Jefferson Pilot Corp.*, a shareholder brought suit against a corporation alleging that false statements and omissions in proxy materials misled shareholders into approving an amendment to the corporation's stock option plan, which allowed for grants of unrestricted stock to the board and certain officers.⁶⁶ The defendant countered that the lawsuit was "just one tactic in the plaintiff's coordinated assault on the management of [defendant] . . . for the improper purpose of aiding plaintiff and her associates toward their goal of taking control of [defendant] for their own purposes"⁶⁷ The defendant sought discovery concerning this motive, including information about "exactly what [plaintiff] and her associates [had] been doing and planning since . . . they publicly began their campaign to oust current management"⁶⁸ Citing the business strategy immunity, plaintiff refused to disclose information concerning "any contemplated proxy contest."⁶⁹ After recognizing the competing interests between the defendant's need for the information to "fairly prepare for trial" and plaintiff's need for protection "to be able to carry out an ongoing strategy in the context of a . . . proxy contest," the Middle District Court of North Carolina granted business strategy immunity for any documents which revealed "an ongoing strategy of [the plaintiff] with respect to a contest for control of [the defendant]."⁷⁰

Shareholder Derivative Litigation Parties to shareholder derivative actions also have sought to assert the business strategy immunity. For example, in *Gioia v. Texas Air Corp.*, shareholders brought a derivative action for waste and breach of fiduciary duty against Eastern Air Lines and its parent, Texas Air Corporation, alleging that Eastern and Texas Air had engaged in a scheme to transfer the assets of Eastern to Texas Air.⁷¹ The class name plaintiffs were two of Eastern's pilots, both of

tics "in any proposed proxy fight and . . . inquiry into any area which will provide [the defendant] with information to be used in evaluating [the plaintiff's] capabilities or in formulating defenses against his intended proxy fight." 1981 WL 15121, at *1. The court barred such discovery, except for those documents that plaintiff planned to introduce at trial on his Section 220 inspection request. *Id.*

⁶³ 2006 WL 1071518, at *1.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 141 F.R.D. at 410.

⁶⁷ *Id.*

⁶⁸ *Id.* at 411.

⁶⁹ *Id.* at 418.

⁷⁰ *Id.* at 419-20.

⁷¹ 1988 WL 18224, at *1.

whom were members of the Airline Pilots Association ("ALPA"), an organized labor union. During the litigation, plaintiffs sought production of Eastern's "strike planning documents," the airlines' top secret strategies for responding to an anticipated future pilots' strike.⁷² Defendants argued that revealing their strike contingency planning to the plaintiffs, who were members of the very labor organization with whom the defendants were already having labor issues, posed a significant threat outside of litigation. Because of this, defendants sought to withhold the strike planning documents under the business strategy immunity.⁷³ Plaintiffs argued against application of the business strategy immunity in shareholder actions generally, reasoning that "[t]he policy of enforcing fiduciary duties is said to be more compelling than the policies protecting business confidences."

The Delaware Chancery Court disagreed:

While this court has a long tradition of sensitive protection of legitimate shareholder interests, it is surely a gross mistake to believe that shareholder interests would uniformly, or even perhaps regularly, be advanced by a rule of discovery that automatically required disclosure of confidential business information or plans to shareholders who assume for themselves the role to speak for others in bringing class or derivative litigation.⁷⁴

In applying the Rule 26(c) balancing of interests test, the court noted that the plaintiffs' had not demonstrated much need in the derivative action for the strike planning documents, due to the fact that they had little relevance to the plaintiffs' claims.⁷⁵ The court commented upon the similarity between this case and the corporate takeover context, based on the fact that the plaintiffs, as members of the pilots' union, could use the strike planning documents to gain an unfair advantage in their separate labor dispute with Eastern. As in takeover litigation, this threat could not be adequately addressed by a confidentiality order.⁷⁶

Trust Administration. The Delaware Chancery Court has also applied the business strategy immunity in the context of litigation against a trustee brought by the trust's beneficiaries. In *In the Matter of Heizer Corp.*, the court applied the immunity to prevent disclosure of documents relating to "confidential ongoing attempts by the trustee to dispose of Trust assets."⁷⁷ The trust beneficiaries argued that the business strategy immunity only applies in the corporate takeover context. The court disagreed, finding that "the threat that disclosure of ongoing negotiations with third parties will undermine the [trustee's] ability to successfully conclude those negotiations" required business immunity protection.

⁷² *Id.* at *2.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at *3.

⁷⁶ *Id.* See also *PaineWebber, Inc.*, 117 F.R.D. at 353 (In shareholder derivative action challenging a stock offering as improperly dilutive, "possible future courses of action or arrangements, strategies of the shareholders' group being considered or recommended . . . [are] matters well outside the reasonable and fair scope of the charges in the litigations involved.")

⁷⁷ No. 7949, 1987 WL 19560, at *1 (Del. Ch. Nov. 9, 1987).

Business Torts. The business strategy immunity has also been applied in the business tort realm. For example, in *Corporate Property Associates 8, L.P. v. Amersig Graphics, Inc.*, the Delaware Chancery Court applied the immunity in a fraudulent conveyance action.⁷⁸ The plaintiffs had leased certain property to two of the defendants, ASG and Foote.⁷⁹ A few years later, ASG and Foote transferred virtually all of their assets to AS Memphis and AS Southeast, respectively, two wholly owned subsidiaries of defendant Amersig, in satisfaction of obligations that ASG and Foote owed to Amersig's parent. AS Memphis and AS Southeast chose not to assume liability under the leases, at which point the plaintiffs filed suit. During the litigation, Amersig entered into merger and acquisition negotiations with a third party. The court applied the business strategy immunity to deny plaintiffs access to documents relating to these ongoing negotiations. According to the court, the plaintiffs had not shown that the negotiations were "vital to their case," so they would not be permitted to intrude and possibly compromise Amersig's ongoing negotiations.⁸⁰

On the other hand, in *Corning Inc. v. SRU Biosystems, LLC*, the District Court of Delaware considered applying the business strategy immunity in a tortious interference suit, but ultimately determined that there was not a sufficient risk of harm.⁸¹ In the case, the defendant, SRU, filed a counterclaim against Corning, alleging that it had lost sales because of Corning's tortious interference with its business relationships. Corning sought disclosure of information related to a third-party's attempt to purchase SRU, reasoning that the third-party's bid likely involved an assessment of SRU's sales projections, which could be relevant for determining the extent of the lost sales.⁸² In seeking business strategy immunity, SRU argued that disclosure would deter future bidders and give the defendant an unfair advantage in bidding; or in other words, disclosure would cause the exact harm that the business strategy immunity was created to prevent.⁸³ However, at that time Corning was not actively seeking to acquire SRU and had represented to the court that it had no plans to do so in the future.⁸⁴ In light of this, the court denied business strategy immunity, finding that potential bidders were unlikely to be threatened if Corning had access to documents relating to their bids, because Corning was not presently itself a potential bidder.⁸⁵

⁷⁸ 1995 WL 214359, at *2.

⁷⁹ The facts of this case are from an earlier opinion denying a motion to dismiss. See *Corp. Prop. Assocs. 8, L.P. v. Amersig Graphics, Inc.*, Civ. A. No. 13241, 1994 WL 148269, at **1-2 (Del. Ch. Mar. 31, 1994).

⁸⁰ *Corp. Prop. Assocs. 8*, 1995 WL 214359, at *2.

⁸¹ 223 F.R.D. at 193-94.

⁸² *Id.* at 192.

⁸³ *Id.* at 193.

⁸⁴ *Id.* at 194.

⁸⁵ *Id.*

Bankruptcy. The business strategy immunity has also been applied in bankruptcy litigation to prevent the premature disclosure of a debtor company's internal valuations and sensitive information related to ongoing mergers and acquisitions communications. The potential valuation and alternative transaction issues in bankruptcy proceedings are often comparable to those same issues in the takeover context. In both cases, the premature disclosure of information about potential bidders could compromise negotiations and have a chilling effect on the number of companies who are willing to entertain a possible transaction with a bankrupt company. Likewise, the premature disclosure of internal valuations is problematic to the extent that creditors or other stakeholders in the bankruptcy litigation are also potential purchasers of and investors in the bankrupt company. For example, in *In re Smurfit-Stone Container Corp.*,⁸⁶ the Bankruptcy Court for the District of Delaware protected from discovery the identity of potential mergers and acquisitions partners and the substance of any ongoing negotiations with potential mergers and acquisitions partners, as well as its internal valuations.

IV. Conclusion

The business strategy immunity was created to prevent parties from using sensitive information discovered in litigation to gain an unfair advantage outside of litigation. Application of the immunity requires courts to balance the extent to which the party seeking disclosure needs the information in order to fully and fairly litigate the matter at issue, versus the risk of non-litigation harm to the party seeking the immunity. Both inquiries are time dependent—the party seeking discovery may have to wait until the information becomes highly relevant to an actually litigated issue. In addition, even if a court has already granted business strategy immunity, it may later order production if the particular strategy is no longer viable.

Although originally developed in the hostile takeover context, courts have recognized that the underlying considerations justifying application of the business strategy immunity apply equally in other situations. As noted in this article, courts have protected a party's confidential business strategies or valuation information in proxy contests, shareholder derivative suits, trustee-beneficiary litigation, business tort litigation, and bankruptcies. There is no reason why the immunity would not be available in many other situations as well, so long as the disclosure of a party's confidential business information imminently threatens a non-litigation injury. In any context in which the disclosure of a client's most sensitive business strategies or other information threatens harm outside of litigation, such as by compromising ongoing negotiations, counsel should consider invoking the business strategy immunity.

⁸⁶ No. 09-10235 (BLS) (Bankr. D. Del. 2010).