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Ellen V. Kittredge

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CORPORATIONS—MERGERS—DELAWARE REDEFINES "ENTIRE FAIRNESS" TEST FOR CASH-OUT Mergers AND SUGGESTS MORE LIBERAL APPRAISAL REMEDY

Weinberger v. UOP, Inc. (Del. 1983)

As a result of having sold one of its wholly-owned subsidiaries, Signal Companies, Inc. ("Signal") was able to acquire a 50.5% interest in UOP, Inc. ("UOP"). Three years later, having been unsuccessful in finding other suitable investments for its excess cash, Signal sought to buy the balance of UOP's outstanding shares.

In February of 1978, Signal's management requested that a feasibility study be conducted concerning the possible acquisition of UOP's remaining outstanding stock. A report was prepared by two officers of Signal who served on the boards of directors of both Signal and UOP. The report, based on UOP data, concluded that the remaining shares of UOP would be a good investment for Signal at any price up to twenty-four dollars per share.

1. Weinberger v. UOP, Inc., 426 A.2d 1333, 1335 (Del. Ch. 1981). Due to the sale, Signal received $420 million in cash. Id.

2. Id. at 1336. Signal is a corporation engaged in diverse activities, operating through its subsidiaries. Id. at 1335. Its stock is listed on the New York, Philadelphia and Pacific Stock Exchanges. Id. UOP, formerly known as Universal Oil Products Company, is a diversified industrial company involved in petroleum and petrochemical services and products, construction, fabricated metal products, transportation equipment, chemicals, plastics, and other products and services including land development, lumber products and waste treatment. Id. Its stock was listed on the New York Exchange. Id.

Signal's acquisition of its 50.5% interest in UOP was the result of arm's-length negotiations which culminated in a plan by which Signal would purchase 1.5 million of UOP treasury shares at $21 per share, contingent upon Signal's successful tender offer for 4.3 million of publicly held shares of UOP at the same price. Id. at 1336. Even though the tender offer of $21 per share for UOP stock was over-subscribed, Signal limited its purchase to 4.8 million tendered UOP shares, which, when added to the 1.5 million shares it purchased from UOP, gave Signal a 50.5% interest in the outstanding shares of UOP. Id.

Immediately following its 50.5% acquisition, Signal nominated six men to UOP's thirteen-man board of directors. Of these thirteen directors, five were either Signal directors or employees, and the sixth was an investment banker who represented Signal in the negotiations for the acquisition of its majority interest in UOP. Id. When the chief executive officer of UOP retired during that year, Signal replaced him in his executive and director's capacity with a senior vice president of one of Signal's wholly-owned subsidiaries. Id.

3. Id. at 1337.

4. Id. Two of the Signal executives who requested the feasibility study were also UOP directors. Weinberger v. UOP, Inc., 457 A.2d 701, 705 (Del. 1983).

5. 426 A.2d at 1337.

6. Id. Just prior to the Signal executive committee meeting where negotiations for the cash merger with UOP were authorized, UOP's president, who served on the board of directors of both Signal and UOP, indicated in a private meeting with Sig-
After four days of limited "negotiations," Signal's board proposed a cash merger offering UOP shareholders twenty-one dollars per share and requiring approval by a majority of UOP's outstanding minority shares, as well as two-thirds of all outstanding UOP shares. That same day, with copies of the proposed merger agreement, UOP financial statements, and a "fairness opinion" prepared by Lehman Brothers before them, UOP's non-executive committee members, that a price of $20 to $21 per share was "generous" and should be considered by UOP shareholders. He also expressed his concern that the merger provide for the continued employment of and benefits for UOP employees. On February 28, 1978, the Signal executive committee authorized negotiations for a cash acquisition of the minority ownership in UOP.

During the four "business days" between February 28 and March 6, 1978, the merger plan came to fruition. During this time two press releases were issued stating that Signal and UOP were "negotiating." In fact, in only one conversation was price discussed. In that conversation UOP's president suggested that the price per UOP share should be at the upper end of the $20 to $21 range. No higher price than that originally proposed was ever sought. Also during this period, UOP retained Lehman Brothers Kuhn Loeb, Inc. to render a fairness opinion. Because the time available was short (by the time Lehman Brothers was retained, there remained three business days and a weekend in which to investigate and submit an opinion), it was felt that Lehman Brothers was an appropriate firm to render the opinion since it had served as UOP's investment banker and since one of its partners was on the board of directors of UOP and had acted as its financial advisor for several years.

The merger was to be effectuated between UOP and Sigco, Inc., a wholly-owned subsidiary of Signal. As a result of the merger, UOP, the surviving entity, would become a wholly-owned subsidiary of Signal and its former minority shareholders would receive $21 per share for their former interest in UOP.

The Lehman Brothers "fairness opinion" was characterized by the court as "rather cursory" and "hurried" where speed was the hallmark. Additionally, the opinion letter was drafted with a blank for the fair price to be filled in at a later date. This blank was filled in either just prior to, or during the March 6, 1978 meeting.

In their deliberations concerning the terms of the proposed merger, the chancellor stated that "the primary factor considered by those concerned was the comparison of Signal's 1978 proposal with the situation prevailing at the time of the 1975 tender offer." Just before the 1975 Signal tender offer, UOP shares were trading just below $14. Signal's offer of $21 per share at that time was oversubscribed. Following Signal's acquisition, UOP suffered an unanticipated loss of $35 million. By early 1978, UOP data indicated that it was in essentially the same financial condition it had been in 1974 and was showing comparable earnings. In fact, at the time of the merger proposal, UOP stock was trading at $14.50 per share, a similar price. As the chancellor stated, "It is fairly clear that these factors, taken in conjunction with the financial information available and made available to the independent members of UOP's board as well as the fairness opinion supplied by Lehman Brothers, caused the general feeling to be that if $21 per share was an unnecessarily high price to have paid in 1975, it was a fair price to pay for the minority shares in 1978 under comparable circumstances."
Signal directors resolved to accept the terms of the merger.\(^\text{10}\) Two months later, 76.2% of the outstanding UOP shares, including the requisite majority of minority shares, voted in favor of the merger.\(^\text{11}\) By the terms of the agreement, the merger became effective on that date, and each share of the minority's outstanding stock was converted to a right to receive twenty-one dollars in cash.\(^\text{12}\)

Thereafter, William Weinberger, a former UOP shareholder, instituted a class action against Signal, UOP and Lehman Brothers.\(^\text{13}\) The class action plaintiffs sought to set aside the merger on the grounds that Signal, as a majority shareholder of UOP, had breached its fiduciary duty to UOP's minority shareholders by using the corporate machinery to cash them out at an unfair price without a proper business purpose.\(^\text{14}\)

After a full trial, the chancery court entered judgment for the defend-

\(^\text{10}\) 426 A.2d at 1340. Two directors of UOP, who also sat on the Signal board, left the UOP board meeting in order to promote uninhibited discussion of the merger by UOP's non-Signal directors. \textit{id.} Likewise, the other four directors of UOP, who were also directors of Signal, were not involved in UOP's discussion concerning the terms of the merger. \textit{id.} On advice of counsel, five of the six UOP directors who were also Signal directors abstained from voting. \textit{id.} All five indicated that if they had voted, they would have voted in favor of the merger. \textit{id.} However, two UOP directors who were nominated by Signal, one of whom was also a Signal director, voted in favor of the merger. \textit{id.}

\(^\text{11}\) \textit{id.} Even though both boards had acted swiftly on the proposed merger, the plan was not submitted to the UOP shareholders until their annual meeting on May 26, 1978. 457 A.2d at 707-08. As of the record date for the annual meeting, there were 11,488,302 shares of UOP common stock outstanding. 426 A.2d at 1340. Signal did not own 5,688,302 of those shares. \textit{id.} Fifty-six percent of the minority shares were voted, of which 2,953,812 (92% of the voting minority shares) voted in favor of the merger, while 254,840 (8% of the voting minority shares) voted against it. \textit{id.} When Signal voted all of its shares in favor of the merger, the result was that 76.2% of the outstanding shares voted in favor of the merger, with only 2.2% opposing. \textit{id.}


\(^\text{13}\) 426 A.2d at 1344-35. The plaintiffs sued on behalf of all UOP shareholders as of the merger date who had not exchanged their shares for the merger price. \textit{id.} at 1335. They subsequently filed a post-trial motion to enlarge the class to include all former shareholders of UOP other than Signal. \textit{id.}

The plaintiffs' theory of liability as to Lehman was based on conspiracy and conflict of interest. \textit{id.} at 1341. The plaintiffs contended that Lehman had engaged in a conspiracy with Signal and the Signal-controlled management of UOP to make it appear as if Lehman had given a "considered and impartial opinion" on the fairness of the merger price. \textit{id.} Shortly before their final oral argument, the plaintiffs dropped Lehman from the case. 457 A.2d at 703 n.3. The Delaware Supreme Court, therefore, did not consider the theory of liability against Lehman. However, the activities of Lehman, as those activities impacted on the liability of the other defendants, did remain at issue. \textit{See id.} at 707.

\(^\text{14}\) 426 A.2d at 1340-41. The plaintiffs sought to set aside the merger, or in the alternative, equitable recission in the form of either money damages or a stock interest in Signal. \textit{id.} at 1335. The plaintiffs also contended that the UOP board should have required an appraisal of the UOP shares prior to its agreement on the merger terms, and should have considered the value of certain UOP assets in determining the fairness of the merger price. \textit{id.} at 1341. In addition, the plaintiffs alleged that
After a full trial, the chancery court entered judgment for the defendants. On appeal, the Delaware Supreme Court initially affirmed. After the press releases and proxy materials issued by both UOP and Signal were misleading, the chancellor found that (1) Signal's purpose in proposing the merger was not legally improper; (2) there was insufficient evidence that Signal or UOP had misrepresented any material facts; (3) there was insufficient evidence to support a finding that the UOP board had breached its fiduciary duty; and (4) there was an evidentiary basis from which it could be concluded that the merger price was fair.

The chancellor's final conclusion was based on expert opinions as to the fairness of the merger price proffered by witnesses of both plaintiffs and defendants. The plaintiffs' expert used both a comparative analysis of premiums paid over market price in similar mergers and a discounted cash-flow analysis to arrive at his conclusion that the value of the minority shares was not less than $26 per share at the time the merger was approved. This comparative analysis involved a comparison between the merger price and the premium which was paid above the market price in other mergers or tender offer combinations which had resulted in 100% ownership within a similar time period. In determining market price under this method, the plaintiffs' expert attempted to factor out any distortion in price which might have resulted from leaks to the public of an impending merger. By deducting this true market price from the actual price paid, the plaintiffs' expert could determine the premium. The median premium price paid in comparable transactions using this method was determined to be 74%. The plaintiffs' expert applied the 74% premium rate to the price at which UOP stock was trading just before the merger proposal was announced and found that the fair price for UOP minority shares was between $25.65 and $27.30.

The discounted cash-flow method of valuation was also employed by the plaintiffs' expert. This type of analysis is designed to reduce to present value a projected cash-flow. Using 1977 UOP cash-flow figures, as well as a UOP five-year plan, the plaintiffs calculated the net free cash from operations and capitalized this figure by means of a discount factor to determine its present value. Once the present value of net free cash was determined, excess liquidity and extraordinary items were added. This composite figure was then divided by the number of outstanding shares to arrive at a fair value between $25.21 and $28.09 per share.

The defendants' experts, on the other hand, determined that the $21 price was fair by utilizing the standard "Delaware block approach" to valuation in appraisal proceedings and computing an appropriate premium. For a discussion of the Delaware block approach, see notes 38-40 and accompanying text infra.

In finding the cash-out price fair, the court also considered the vote of the majority of the minority shares approving the merger. It stated that the chancellor's view that the minority shareholders' vote approving the merger was "simply another element that must be considered as part of the overall picture in evaluating the terms of the merger for entire fairness to the minority" [was] correct at a minimum. The court found it "unneces-

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a rehearing en banc, the supreme court reversed and remanded the case for a determination of the fair value of the minority's shares, holding that the standard to be applied to a cash-out merger is one of entire fairness which requires proof of fair dealing and fair price and, absent evidence of fraud or similar misconduct, will be evaluated in an appraisal proceeding, using valuation techniques generally accepted in the financial community and the courts. Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

A statutory merger is one method by which a minority shareholder's interest in a corporation effectively may be eliminated. To consummate a merger designed to eliminate the interests of minority shareholders, a corporation may employ procedures set forth in a state's merger statute which often provide, inter alia, for cash or other securities as a form of consideration for the minority shareholders' interest. By merging a corporation into its necessary to consider in this case arguments by the defendants that greater legal effect [was] warranted." Id.

In a dissenting opinion, Justice Duffy stated that Lehman had a duty to exercise reasonable care in rendering its opinion that the merger was fair and equitable to the UOP minority. Id. at 7-8 (Duffy, J., dissenting). Justice Duffy thought that a trial was required on the issue of the reasonableness of Lehman's care given the haste with which the fairness opinion was prepared, the opinion's disregard of an internal memorandum prepared for Signal shortly after its 1975 tender offer which had concluded that UOP stock was worth $21 to Signal just after UOP's $35 million loss, and its failure to explain why the same price offered in 1975 was fair in 1978 after UOP's performance significantly improved in 1976 and 1977. Id.

Justice Duffy also stated that the lower court's conclusion that the price paid to the UOP minority was fair should have been reversed due to the chancellor's failure to consider "the benefit flowing to Signal 'as a result of becoming the 100 percent owner' of UOP." Id. at 9 (Duffy, J., dissenting). In Justice Duffy's view, "fairness" required that Signal pay for what it had received, "the equitable ownership of assets which had belonged to others." Slip op. at 10 (Duffy, J., dissenting). Justice Duffy felt that "as far as the public stockholders were concerned, the mechanics were merger in form but liquidation in fact." Id. He noted that the chancellor had given little weight to the net cash value of UOP, as determined by the plaintiffs' expert, because Signal had no plan to liquidate UOP. Id. As read by Justice Duffy, this meant that "the [majority] held that fairness to the minority was determined, not by an objective standard but by what Signal had not planned at the time of trial." Id. at 10, n.4 (Duffy, J., dissenting).

17. Chief Justice Herrmann and Justices McNeilly, Quillen, Horsey and Moore constituted the court en banc. Justice Moore wrote the opinion of the court.


19. See, e.g., DEL. CODE ANN. tit. 8, §§ 251, 253 (1974 & Supp. 1982). The statutory framework for mergers in Delaware is set out in the Delaware General Corporation Law. See DEL. CODE ANN. tit. 8, §§ 251-58 (1975 & Supp. 1982). Section 251 relates to "long-form" mergers, where neither constituent corporation has more than a 90% interest in the other, while § 253 relates to mergers where one of the constituent corporations owns at least 90% of the outstanding shares of each class of stock of the other. Id.

In a long-form merger, the boards of directors of each corporation are required to adopt a merger agreement. Such agreement may provide for the exchange of shares in the constituent corporation for shares or securities in the surviving corporation or for "cash, property, rights or securities of any other corporation," and gener-
majority shareholder, or into a subsidiary of its majority shareholder, and exchanging the minority shares for cash or other terminable interests in the surviving corporation, upon the effective date of the merger, the minority shareholders no longer own an interest in either the constituent or the surviving corporation.  

Use of the statutory framework for the consummation of a merger to eliminate minority shareholder interests was approved by the Delaware Supreme Court in Coyne v. Park & Tilford Distillers Corp. In that case, the short-form merger statute was held to be more than procedural in nature; it conferred a substantive right to merge and eliminate minority interests by distributing cash for stock surrendered in a merger. The court noted that the same statute also served to protect the eliminated minority by providing

ally, the agreement must be ratified by a majority vote of the stockholders. Id. § 251. Section 253, like its long-form counterpart, provides for the conversion of minority shares into "securities, cash, property or rights." Id. § 253(a). However, a short-form merger does not require a stockholder vote; rather, the board of directors of the controlling corporation need only resolve to merge and file copies of the executed merger agreement. Id. § 253. For a discussion of the long and short-form merger requirements, see E. Folk, The Delaware General Corporation Law (1972).


21. 38 Del. Ch. 514, 154 A.2d 893 (1959). The Coyne plaintiffs sought to enjoin the consummation of the short-form merger of Park & Tilford with Schenley Industries, its 96% majority shareholder. Id. at 516, 154 A.2d at 894. The plaintiffs argued that the issuance of cash for their shares would result in their expulsion from an enterprise in which they had invested, a consequence contrary to “the settled policy of the law.” Id. at 517, 154 A.2d at 895. To support their position they contended that the recently amended short-form merger statute should be construed in light of the existing long-form merger procedure which limited the use of cash as consideration for the acquisition of fractional shares. Id.


23. 38 Del. Ch. at 519, 154 A.2d at 896. The court found that the amendment to the short-form merger statute, which allows securities, cash or other consideration to be distributed to minority shareholders, was “a change of substance” and that the contemplated merger was plainly authorized by the statutory language. Id. The plaintiffs “vested rights” theory was, therefore, rejected on the ground that the state had reserved power to amend corporate charters, a power which the plaintiffs had accepted with purchase of their stock. Id. at 520, 154 A.2d at 897-98. For a discussion of the vested rights theory, see note 35 infra.
RECENT DEVELOPMENTS

These principles were reaffirmed four years later in *Stauffer v. Standard Brands, Inc.* In that case, the minority shareholders of a subsidiary which had been merged into its parent had not challenged the propriety of the parent corporation’s use of the short-form merger statute to eliminate their interest in the surviving corporation. Rather, they sought to set aside the merger on the grounds that the price offered for their shares was so low as to constitute constructive fraud. Initially, the court reasoned that since the dispute centered on the value of the plaintiffs’ shares, their sole remedy was an appraisal. The court then recognized its equitable power to deal with fraud in the merger context, but found that no illegality or overreaching had

24. 38 Del. Ch. at 520, 154 A.2d at 897. For a discussion of a dissenting shareholder’s appraisal rights, see notes 34-40 and accompanying text infra.

25. 41 Del. Ch. 7, 187 A.2d 78 (Del. 1962). In *Stauffer*, minority shareholders challenged the short-form merger of Planter’s of Delaware and Standard Brands. Id. at 8, 187 A.2d at 79. Standard Brands had acquired over 90% of Planter’s Nut and Chocolate Company, by buying both individually-held shares for $105 per share and a block of about 50% of Planter’s shares, held by certain trusts for $115 per share. Id. at 9, 187 A.2d at 79. Subsequently, Standard Brands created a wholly-owned subsidiary, Planters of Delaware, and merged the two “Planters” companies on a share-for-share exchange. Id. Thereafter, Planters of Delaware and Standard Brands merged, cashing out the minority shareholders of Planter’s of Delaware at $105 per share. Id. at 9, 187 A.2d at 79-80. The plaintiffs contended that the real value of their shares was between $150 and $160 per share. Id. at 9, 187 A.2d at 80.

26. Id. at 8, 187 A.2d at 80. For a statement of the circumstances in which Delaware courts found litigants entitled to equitable relief from a merger due to constructive fraud, see Porges v. Vadsco Sales Corp., 27 Del. ch. 127, 32 A.2d 148 (Del. Ch. 1943) (merger between parent corporation and wholly owned subsidiary to effect recapitalization of parent would not be enjoined where no misrepresentation, concealment, deception or purpose to promote interests of one class of stock to the detriment of another shown); Cole v. National Cash Credit Ass’n, 18 Del. Ch. 47, 156 A. 183 (Del. Ch. 1931) (duty of stockholder complaining of terms of merger to elect appraisal rights does not arise where the merger was not authorized by law, or was induced by fraud, or where the terms have resulted from a breach of trust or maladministration which works a manifest wrong to complainants or shows a conscious abuse of discretion, or where it is shown that those who engineered the merger or whose voting influence is great enough to accomplish it, are themselves beneficiaries of alleged inequity); MacFarlane v. North Am. Cement Corp., 16 Del. Ch. 172, 157 A. 396 (Del. Ch. 1928) (court should not prevent merger approved by stockholders unless it is clear that it would be so injurious and unfair to minority complaining stockholders as to be shocking, and court is convinced that it is so grossly unfair as to be fraudulent); Allied Chem. & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 1, 120 A. 486 (Del. Ch. 1923) (inadequacy of price must be so gross as to lead court to conclude that it resulted not from honest error of judgment but rather from bad faith or reckless indifference to rights of others interested). For a general discussion of the ability of dissenting stockholders to attack a merger on the basis of fraud, see 15 FLETCHER CYC. CORP. § 7160 (rev. Perm. ed. 1983); F. O’NEAL, supra note 18, § 5.29.

27. 41 Del. Ch. at 9, 187 A.2d at 80. The court agreed with the chancery court’s analysis that the relief sought by the plaintiffs was the recovery of the monetary value of the plaintiff’s shares. Id. While the chancery court had rejected the concept of constructive fraud as grounds for a challenge of a short-form merger since an appraisal was available, the Delaware Supreme Court held that the fraud exception to the exclusivity of the appraisal remedy applied to all mergers. Id. at 10, 187 A.2d 78, 80.
been shown.\textsuperscript{28} The court went on to state that it would be “difficult to imagine” a case where there could be such actual fraud which would entitle the minority to equitable relief since the very purpose of the short-form merger statute was to “provide the parent corporation with a means of eliminating the minority.”\textsuperscript{29}

In \textit{David j. Greene & Co. v. Schenley},\textsuperscript{30} the chancery court applied the principles of \textit{Coyne} and \textit{Stauffer} to a long-form merger which effectively eliminated minority shareholders’ interests.\textsuperscript{31} The court in \textit{Greene} held that the minority shareholders’ right to enjoin the long-form merger was co-extensive with the right of a cashed-out minority in a short-form merger: where no fraud or blatant overreaching is demonstrated, their recourse is limited to an appraisal.\textsuperscript{32} Applying this rule, the court determined that the \textit{Schenley} plain-
tiffs, who had alleged constructive fraud, were not entitled to equitable relief since the defendants had demonstrated that the amount being offered the minority approximated the fair value of their shares.\textsuperscript{33}

The appraisal remedy, to which the Coyne, Stauffer and Schenley plaintiffs were relegated, is entirely a creature of statute.\textsuperscript{34} In general, appraisal stat-

\begin{itemize}
\item \textsuperscript{33} 281 A.2d at 32-35. Since the defendant-acquiror, was also the controlling stockholder of the corporation to be acquired, the Schenley court stated that "the rule applicable in all instances of corporate self-dealing, namely that when officers and directors stand on both sides of a transaction complained of, . . . they bear the burden of establishing its entire fairness, and it (the transaction) must pass the test of careful scrutiny by the courts" was applicable. \textit{Id.} at 32 (quoting Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 298, 93 A.2d 107, 110 (Del. 1952) (action by minority shareholders of subsidiary challenging exchange ratio of stock-for-stock merger into its parent corporation wherein court required interested defendant to prove entire fairness of merger terms: that upon the merger the minority stockholder would receive the substantial equivalent in value of what he held prior to the merger). \textit{See also} Keenan v. Eshelman, 23 Del. Ch. 234, 2 A.2d 904 (Del. 1938); Gottlieb v. Heyden Chemical Corp., 38 Del. Ch. 82, 90 A.2d 660 (Del. 1952) (business judgment rule not applicable to corporate action where majority of directors conferring benefit on themselves, rather, burden on directors to prove transaction in good faith and that its intrinsic fairness will withstand a searching and objective analysis). In its application of the principles of \textit{Sterling}, the Schenley court determined that

the matter to be decided is the fair value of the offer being made to plaint-
tiffs . . . and whether or not this amount approximates the fair value of the shares of Schenley which the plan proposes to eliminate . . . unless the fair value of Schenley stock is so much greater than the total amount offered, or that plaintiffs . . . are being otherwise deprived of clear rights or otherwise so taken advantage of by those charged with a fiduciary duty towards them as to constitute a form of constructive fraud, or the like, then it would ap-
pear that the parties are merely in dispute as to value, for which an appraisal
should be adequate.

281 A.2d at 33. In addition, the court commented that in determining the fair value of the plaintiff's stock, "the basic reality of Glen Alden's control of Schenley should be considered, that is, that the merger laws of Delaware put the plaintiffs on con-
structive notice that they could be lawfully eliminated." \textit{Id.} at 35.

\item \textsuperscript{34} Manning, \textit{The Shareholder's Appraisal Remedy: An Essay for Frank Coker,} 72 \textit{Yale L.J.} 223, 226 (1962). For a discussion of \textit{Coyne, Stauffer and Schenley}, see notes 21-33 and accompanying text supra. Historically, Delaware has recognized the right to appraisal only in the case of a merger or consolidation. E. FOLK, supra note 19, at 372-73. The circumstances which give rise to appraisal rights have been curtailed over time and currently are contained in \textit{Del. Code Ann. tit. 8, § 262(b)} (Supp. 1982). \textit{See} E. FOLK, supra note 19, at 383. Generally, that section provides that the stockholders of a constituent corporation in a long-form merger are entitled to appraisal rights, unless their stock is 1) listed on a national securities exchange; or 2) held of record by more than 2,000 stockholders; or 3) is in the survivign corpora-
tion and was not required to be voted in approving the merger. \textit{See Del. Code Ann. tit. 8, § 262(b)(1)} (Supp. 1982). However, the statute also provides that, notwithstanding the above, appraisal rights shall be available for shares of stock in a constituent corporation if the stockholders are required by the merger terms to accept anything except: 1) shares in the surviving corporation; 2) shares in a corporation listed on a national exchange or held of record by more than 2,000 stockholders; or 3) cash in lieu of fractional shares described in 1) and 2). \textit{See id. § 262(b)(2).} Thus, stockholders who are required by the merger terms to accept cash are entitled to appraisal rights. The statute further provides that appraisal rights are available to
utes were originally enacted to provide relief to shareholders who dissented from corporate action but were unable to block that action, due to the relaxation of the common law requirement that corporations obtain unanimous shareholder approval of fundamental corporate changes.\textsuperscript{35} Under the Delaware appraisal statute, a dissenting shareholder who has "perfected" his appraisal rights is entitled to the judicially determined value of his shares.\textsuperscript{36}

stockholders of a subsidiary corporation in a short-form merger, provided that immediately prior to the merger the parent corporation does not own all of the stock in the subsidiary. \textit{See id.} § 262(b)(3).

\textsuperscript{35} See generally, 13 FLETCHER Cyc. CORP. § 5906.1 (rev. Perm. ed. 1980); O'NEAL, supra note 18 at § 5.27; W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS Ch. 10, § 1(c) (5th ed. 1980). At common law a corporation could not engage in a merger or other fundamental corporate change without the unanimous consent of stockholders. Recognizing the modern corporations' need for flexibility, all of the states eventually enacted statutes permitting less than unanimous approval of these basic corporate changes. As explained by the Delaware Supreme Court:

When the idea became generally accepted that, in the interest of adjusting corporate mechanisms to the requirements of business and commercial growth, mergers should be permitted in spite of the opposition of minorities, statutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another.


\textsuperscript{36} DEL. CODE ANN. tit. 8, § 262 (Supp. 1982). The method for perfecting appraisal rights has undergone much legislative change in Delaware. Prior to amendments to the statute occurring in 1976, the process of perfecting the appraisal remedy had been labeled "tortuous", "unattractive and complex", and "inferior." \textit{See} E. FOLK, supra note 19, at 375; Manning, \textit{supra} note 34, at 231. \textit{See also} Green v. Santa Fe Indus., Inc., 533 F.2d 1283 (2d Cir. 1976) (Mansfield, J., concurring), rev'd, 430 U.S. 462 (1977). For a discussion of \textit{Santa Fe} see notes 41-52 and accompanying text \textit{infra}. The dissenting shareholder was required to object to the merger in writing prior to the vote on the proposed transaction. \textit{Del. Code Ann. tit. 8, § 262(b)} (Supp. 1982). Once the objection was made, the shareholder could not vote in favor of the merger. \textit{Id.} Even though the shareholder had objected to the transaction and refrained from voting in its favor, the statute required that he or she make a written demand for payment within 20 days after notice of the filing of the merger agreement had been given by the corporation. \textit{Id.} Assuming that appraisal rights were perfected by the foregoing, if the corporation and the shareholder were unable to agree
The statute directs that the court consider "all relevant factors" bearing upon the value of the shareholder's stock, "exclusive of any element of value arising from the accomplishment or expectation of the merger."37 The Delaware courts interpreted this language as requiring a determination of the

on the value of the dissident shares, either one could then file a petition in the court of chancery demanding valuation by an appraiser. Id. at § 252(c). For a discussion of the technicalities and complexity of issues arising under the procedure described above, see E. Folk, supra note 19 at 375-77; Kerr & Letts, Appraisal Procedures for Dissenting Delaware Stockholders, 20 Bus. Law. 1083, 1085-90 (1965).

In an apparent response to judicial opinion, in 1976 the legislature amended the procedures required for perfecting the appraisal remedy. 60 Del. Laws 371 (1976) (codified as amended at Del. Code Ann. tit. 8, § 262(d) (Supp. 1982). See W. Cary & H. Eisenberg, supra note 35, at 1461 n.4 (citing Raab v. Villager Indus., Inc., 355 A.2d 888 (Del.), cert. denied 429 U.S. 853 (1976); Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1297 n.4 (2d Cir. 1976) (Mansfield, J., concurring), rev'd, 430 U.S. 462 (1977)). As currently codified, the process requires that the corporation notify shareholders of their appraisal rights not less than 20 days prior to the date approval is sought on the transaction. Del. Code Ann. tit. 8, § 262(d) (Supp. 1982). The notification is to contain a copy of the appraisal statute, thus enabling previously uninformed shareholders to act. Id. Once notified and prior to any vote on the proposed transaction, the shareholder must make a general written demand of the corporation which would reasonably inform the corporation of the shareholder's intent to demand an appraisal. Id. If the shareholder has refrained from voting in favor of the merger, either the corporation or the shareholder may file a petition in the Court of Chancery demanding an appraisal of the value of all dissenters' shares. Id.

The Delaware statute originally required the determination of value of the dissenter's stock be made by a court-appointed appraiser. See Del. Code Ann. tit. 8, § 262(f) (Supp. 1982). After the parties had an opportunity to present evidence of value, the appraiser was to file his report with the court. See id. The chancery court, after hearing any objections then determined the value of the stock by decree. Id. In 1976, the legislature revised this procedure by requiring the chancery court to make the sole determination of value. 60 Del. Laws 371 (1976) (codified as amended at Del. Code Ann. tit. 8, § 262 (Supp. 1982)).

Once the proceedings have begun, the Delaware courts have historically disregarded any issues other than valuation. See Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980) (entire fairness of merger giving rise to appraisal proceeding not an issue to be considered); Kaye v. Pantone, Inc., 395 A.2d 369 (Del. Ch. 1978) (counterclaim for malicious prosecution against dissenting shareholder denied); Lichtman v. Recognition Equip., Inc., 295 A.2d 771 (Del. Ch. 1972) (permitting injection of issues requiring proceedings of adversarial nature could only serve to complicate sole issue of valuation). But see Lebman v. Nat'l Union Elec. Corp. 414 A.2d 824 (Del. Ch. 1980) (proper business purpose existed for merger underlying appraisal proceeding). For a general discussion of the use and application of the Delaware appraisal statute, see Grant, The Delaware Appraisal Statute, 6 Del. J. Corp. L. 590 (1981).


(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.

Id.
value of a dissident shareholder's proportionate interest in a "going concern." To make this determination, the Delaware courts employed a method commonly known as the "Delaware block approach." Under this approach, a dollar figure was assigned to the relevant value factors (market value, asset value and earnings value) followed by the assignment of an appropriate weight to each element of value, from which a weighted average value of the merging corporation was derived.

Believing that the Delaware appraisal remedy did not adequately protect their interests, plaintiff-shareholders in Santa Fe Industries v. Green sought to enjoin a short-form merger on the grounds that the merger violated section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. Plaintiffs argued that both the gross undervaluation of their shares, and...
and the merger itself, although complying with Delaware Law, constituted fraudulent and deceptive practices within the meaning of Rule 10b-5. The Second Circuit held that even though there had been full disclosure, a cash-out merger with no valid corporate purpose was fraudulent in itself. While the Supreme Court reversed the Second Circuit, commentary by the Court and Judge Mansfield, who had concurred with the Second Circuit, shed some light on existing Delaware Law.

In addition to highlighting the problems that could be created by misuse of the Delaware merger statute, Judge Mansfield disclosed what he felt were the inadequacies of the Delaware appraisal remedy. He noted that the effective date of the merger, the minority shareholders of Kirby were informed of the merger terms which provided for a $150 payment for each share of Kirby. They were also informed that, if dissatisfied with the price, they could seek appraisal. The plaintiff, using financial information that had also been disclosed, determined that the Kirby stock was worth at least $772 per share.

43. Id. at 466.
44. Green v. Santa Fe Indus., 533 F.2d 1283, 1285 (2d Cir. 1976), rev'd, 430 U.S. 462 (1977). The plaintiff claimed that the Delaware short-form merger procedure as applied to the Kirby merger constituted a “device, scheme, or artifice to defraud” due to the gross undervaluation of the Kirby stock. Further, plaintiff contended that the merger itself violated Rule 10b-5 because the elimination of the minority shareholders was accomplished by a breach of fiduciary duty by the majority shareholders due to their forcing the plaintiffs to sell their stock at a price far below its value with no proper purpose.

45. Id. at 1287. The Second Circuit held that neither nondisclosure nor misrepresentation was an essential element of an action brought under Rule 10b-5. It found that the plaintiffs were forced sellers of securities in interstate commerce and that there was a causal connection between the alleged breach of fiduciary duty and the alleged injury to the minority shareholders.

46. 430 U.S. at 474, 476. The Supreme Court held that the language of Rule 10b-5 required a showing of manipulation or deception. For a complete discussion of the facts and decisions in the Santa Fe case, see Note, Sante Fe Industries, Inc. v. Green: The Supreme Court Reaffirms the Necessity of Non-Disclosure to Maintain an Action Under Rule 10b-5, 3 DEL. J. CORP. L. 76 (1977). See also Ferrara Steinberg, A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism, 129 U. PA. L. REV. 263 (1980).

47. 533 F.2d at 1294-96 (Mansfield, J., concurring). By “going public” when the market is high and cashing out minority shareholders when the market is depressed, Mansfield found that the majority is able to manipulate the purchase and sale of stock to its benefit and to the detriment of the public shareholders, involuntarily depriving them of their investment. (citing Vorenberg, Exclusiveness of the Dissenting Shareholder’s Appraisal Right, 77 HARV. L. REV. 1189 (1964)). Furthermore, the majority are able to unilaterally set the terms of the merger and have an incentive to fix the price below the fair value of the public shareholders’ interest. 533 F.2d at 1295 (citing Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 HARV. L. REV. 297, 298 (1974)). See also W. CARY & M. EISENBERG, supra note 35 at 1456-59. Cary and Eisenberg have stated that “many aspects of the approach taken in [appraisal] cases is highly questionable, and the result may be a gross undervaluation, as compared to real world values. This in turn diminishes the usefulness of the appraisal right, and opens up the possibility of manipulation, by those in control, to squeeze out the minority at unfairly low prices.” Id. at 456.

48. 533 F.2d at 1297 n.4.
under the appraisal statute, cashed-out minority shareholders were not entitled to any gain resulting from the merger. Any economic gain was distributed solely to the insiders. 49 Furthermore, Judge Mansfield was troubled by several procedural inadequacies: 1) the inability of a dissenting shareholder who initiates proceedings to share his costs with fellow dissenters; 2) the exclusion of attorneys fees from any recovery; 3) the lengthy nature of the proceedings; and 4) the limited availability of discovery. 50 Although the

49. Id. See Brudney & Chirelstein, supra note 47, at 297 (fiduciary obligation of fairness requires that in parent-subsidiary mergers, public stockholders of subsidiary be paid a price which includes their pro rata share of any gain accruing to merged corporation as a result of merger, analogizing division of gain to that required of trustee managing trust accounts on behalf of separate beneficiaries having similar objectives); Fischel, The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law, 76 NW. U.L. REV. 913 (1982) (freeze-out is mechanism enabling purchasers of control to recoup costs of acquiring control by appropriating any gains from the transfer of control, therefore, to increase frequency of these value added transactions, majority should not be required to share any gains resulting from its acquisition of 100% control with frozen out shareholders); In addition, Judge Mansfield criticized the retrospective application of the "Delaware block approach" which required the earnings of the merged corporation to be determined on an historical basis. 533 F.2d at 1297 n.4 (citing Francis I. duPont & Co. v. Universal City Studios, 312 A.2d 344 (Del. Ch. 1973)). See also Schaefer, supra note 401, at 1031 (using weighted average of the value of the corporation when assets used in their best use and value of the corporation when assets employed in less profitable results in undervaluation); Weiss, The Law of Takeout Mergers: A Historical Perspective, 56 N.Y.U. L. REV. 624 (1981) (weighting method ignores insider's capabilities of maximizing efficiency of corporation after a merger).

50. 533 F.2d at 1297-98 n.4. At the time Judge Mansfield filed his concurring opinion, the Delaware appraisal statute contemplated the apportionment of costs of the proceedings, exclusive of attorneys' and experts' fees, as appears to be equitable. DEL. CODE ANN. tit. 8, § 262(h) (1975). The general rule by the courts was that, absent evidence of bad faith on the part of the dissenting shareholder, the corporation bears the costs of the proceeding. E. FOLK, supra note 19, at 389. Attorneys' fees and experts' fees were only to be paid by the petitioning dissenters; non-petitioning dissenters received the appraisal value of their shares without having to absorb part of the expenses for attorneys and experts. Id. Because the statute called for a determination of value by an appraiser, followed by review of that determination by the chancery court, the appraisal process was both lengthy and expensive. See Crompton, Changes in the Merger Provisions of the Delaware General Corporation Law Since 1967, 3 DEL. J. CORP. L. 303, 305 (1978). Discovery by dissenting shareholders was within the discretion of the court. DEL. CODE ANN. tit. 8, § 262(e) (1975). As one commentator noted, the crucial valuation evidence is normally held by the corporation and unavailable to dissenting shareholders, making it difficult to establish a higher stock value than that offered by management. Brudney, A Note on Going Private, 61 VA. L. REV. 1019, 1024 n.21 (1975). While the statute did not allow interim payments to dissenters, it did provide for the payment of interest from the effective date of the merger to the payment date. DEL. CODE ANN. tit. 8, § 262 (1975).

The 1976 and 1981 amendments to the appraisal statute have addressed some of Judge Mansfield's criticisms. Section 262(j) now permits the court to order all or a portion of the expenses incurred by any stockholder, including attorneys' and experts' fees, to be charged pro rata against the value of all the shares entitled to an appraisal. DEL. CODE ANN. tit. 8, § 262(j) (Supp. 1982). Thus the "free-rider" problem has been eliminated and the proceedings more closely resemble a class action brought on behalf of all those dissenting shareholders who have perfected their appraisal rights. The time delays previously encountered in appraisal proceedings have been amelio-
Supreme Court was reluctant to extend section 10(b) and Rule 10b-5 to "cover the corporate universe,"\(^5\) it implied its dissatisfaction with appraisal as a remedy for cashed-out shareholders by noting that "there may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged. . . ."\(^5^2\)

In an apparent reaction to the restrictive approach to the appraisal remedy,\(^5^3\) the possibility of federal regulation of the fiduciary standards governing mergers,\(^5^4\) and the lack of judicial scrutiny into the entire fairness of cash-out mergers,\(^5^5\) the Delaware Supreme Court handed down a trilogy of opinions which reexamined the protections to be afforded minority shareholders in cash-out mergers.\(^5^6\)

The first decision of this trilogy was *Singer v. Magnavox Co.*\(^5^7\) The transaction at issue in *Singer* was the long-form merger of Magnavox into a shell corporation which had been created by North American Phillips Corporation, the majority shareholder of Magnavox.\(^5^8\) Alleging that the sole pur-

rated to some extent by the provision dispensing with the mandatory appointment of an appraiser, thus placing all proceedings before the chancery court, and the provision enabling all dissenters to participate in pretrial proceedings and trial upon the appraisal until those entitled to appraisal have been determined, thus enabling discovery to proceed at the same time that qualification determinations are being made. *Id.* § 262(h). See also Crompton, *supra* at 305. The availability remains at the chancellor's discretion. *Del. Code Ann.* tit. 8, § 262(h) (Supp. 1982).

\(^5^1\) 430 U.S. at 479-80.

\(^5^2\) *Id.*

\(^5^3\) See notes 46-49 and accompanying text *supra*.


\(^5^5\) One commentator has suggested that contemporary opinion felt that *Staufer* and its progeny rendered a review of the entire fairness of an interested cash-out merger unnecessary when appraisal rights were available to dissenting shareholders. *See Weiss, supra* note 49, at 655 (citing Arsh, *Minority Stockholder Freezeouts Under Delaware Law*, 32 *Bus. Law* 1495 (1977); Balotti, *The Elimination of the Minority Interests by Mergers Pursuant to Section 251 of the General Corporation Law of Delaware*, 1 *Del. J. Corp. L.* 63, 67-77 (1976)). As contemporaneously explained by Professor Folk, despite the reaffirmation of the entire fairness standard in *David J. Greene & Co. v. Dunhill Int'l, Inc.*, the *Schenley* decision indicated that the Delaware courts would be likely to pay only "lip service" to it. *E. Folk, supra* note 19 at 334-36 (1st ed. 1972) (citing David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 431 (Del. Ch. 1968) (parent-subsidiary merger); *Schenley*, 281 A.2d at 30. For a discussion of *Schenley*, see notes 30-33 and accompanying text *supra*.

\(^5^6\) For a discussion of these decisions, see notes 57-74 and accompanying text *supra*.

\(^5^7\) 380 A.2d 969 (Del. 1977).

\(^5^8\) *Id.* at 971. North American Phillips Corporation (North American), a subsidiary of Phillips, a Dutch electronics corporation, incorporated North American
pose of the merger was the elimination of the Magnavox minority shareholders at a grossly inadequate price, the plaintiffs, minority shareholders of Magnavox, sought an order nullifying the merger and compensatory damages.59 The Delaware Supreme Court rejected the defendants' assertion that appraisal was the plaintiffs' exclusive remedy.60 Instead, the court applied fiduciary principles to the merger, which required a demonstration of the "entire fairness" of the transaction.61 The court held that a majority Development Corporation (Development) for the sole purpose of making a tender offer for Magnavox stock. Id. Magnavox withdrew its opposition to the merger after negotiations resulted in both an increase in the price per share offered and the provision of employment contracts for some of the Magnavox officers. Id. As a result of its tender offer, Development acquired 84.1% of Magnavox's outstanding common stock. Id. Subsequently, Development created T.M.C. Development Corporation (TMC) for the purpose of acquiring the remaining equity interests in Magnavox. Id. The Magnavox directors, four of whom were directors of North American and three others of whom had employment contracts with Magnavox and options to purchase North American stock upon the merger's consummation, unanimously agreed to the merger. Id. at 972. Notice of the stockholder meeting for approving the merger was sent to shareholders with a proxy which disclosed that the book value of their stock was in excess of the merger price per share and that the shareholders had appraisal rights. Id. In addition, the shareholders were informed that the merger would be approved as a result of Development's ability to vote the requisite number of shares. Id. At the shareholders' meeting, the requisite approval was obtained and the merger was consummated. Id.

59. Id. The plaintiffs prayer for injunctive relief was based on their contention that the merger was unfair because Development obtained a disproportionate amount of the gains to be recognized from the merger. Id. at 978. The plaintiffs also asserted that the defendants, as controlling stockholders, had breached their fiduciary duty to the minority shareholders by approving the merger at a cash price which they knew to be inadequate. Id. at 971. In addition, the plaintiffs contended that the merger was violative of the anti-fraud provisions of the Delaware Securities Act. Id. (citing DEL. CODE ANN. tit. 6, § 7303 (1975)). This final cause of action was dismissed on jurisdictional grounds. Id. at 980-82.

60. Id. at 977 (citing Vorenberg, supra note 47, at 1189). Many commentators have viewed the court's citation to Vorenberg as evidence of its discontent with the appraisal remedy. See, e.g., Note, Singer v. Magnavox Co.; Delaware Imposes Restrictions on Freezeout Mergers, 66 CALIF. L. REV. 118, 131 n.65 (1978). The court reasoned that because shareholders have a legally protected interest in the form as well as the value of their investment, the majority cannot eliminate the minority interest without a valid purpose. Id. at 978. Thus, the court set forth the minority shareholder's right to a continued equitable participation in the corporate enterprise, which right arises from fiducial principles, not fact of stock ownership. Id. For criticism of this reasoning, see Fischel, supra note 49, at 913. In dismissing the defendant's argument, the Singer court attempted to distinguish Stauffer and Schenley on the grounds that neither case involved an expulsion of minority shareholders where the only purpose of the merger at issue was their elimination. 380 A.2d at 978. However, the court did state that any statements contained therein which were inconsistent with its opinion were overruled. Id. at 979. For a discussion of the Stauffer and Schenley cases, see notes 25-33 and accompanying text supra.

61. 380 A.2d at 976. The court stated that statutory compliance with the merger statute would not insulate the merger from review. Id. at 975 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437 (Del. 1971); Guth v. Loft, 23 Del. Ch. 255, 5 A.2d 503 (Del. 1939)). Rather, the court asserted that as a majority shareholder, the defendants owed the minority a fiduciary obligation which "is the cornerstone of plaintiffs' rights in [the] controversy and the corollary, of course, is that it is likewise
shareholder’s use of the corporate machinery for the sole purpose of eliminating minority stockholders was not a valid business purpose and was, therefore, a breach of its fiduciary duty to the minority. In addition, the court concluded that entire fairness could not be proven by a valid business purpose alone; the circumstances of the merger and its terms must also meet the standard of entire fairness. Finally, the Singer court established that if a court finds that a majority shareholder has breached its fiduciary duty by violating either of these two prongs of the entire fairness standard, it is free to grant such relief as equity may require.

In Tanzer v. International General Industries, Inc., the court elaborated upon the “business purpose test” which it had set forth in Singer. The Tanzer plaintiffs had sought a preliminary injunction against a cash-out merger which they alleged was for the sole benefit of the parent corporation. The Delaware Supreme Court held that a freeze-out merger which serves the sole interest of the majority shareholder has a proper business purpose. The court cautioned, however, that the purpose for the merger must

the measure of duty owed by the defendants.” Id. (citing Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Del. 1952) (majority shareholder in interested merger has burden of proving entire fairness); Bastian v. Bourns, Inc., 256 A.2d 680 (Del. Ch. 1969), aff’d, 278 A.2d 467 (Del. 1970) (fiduciary duty of majority stockholder who controlled both parties to merger required that interests of minority stockholders be dealt with in entirely fair manner); David J. Greene & Co. v. Dunhill Int’l, Inc., 249 A.2d 427 (Del. Ch. 1968) (intrinsic fairness is litmus test of interested merger)).

62. 380 A.2d at 978. The court reasoned that since the use of the corporate machinery to perpetuate control violates fiduciary principles, “[b]y analogy, if not a fortiori, the use of corporate power solely to eliminate the minority” is likewise a violation of fiduciary duty. Id. at 980 (emphasis in original). For a discussion of this analysis, see Weiss, supra note 49, at 624. For a discussion of the origins and utility of the business purpose test, see Carney, supra note 35, at 69.

63. 380 A.2d at 980. While the majority did not elaborate upon how a determination of entire fairness was to be made, Justice McNeilly, in his concurring opinion, stated that the court should scrutinize “the business purpose, or economic necessity, desirability and feasibility involved, evidence of self-serving, manipulation, or over-reaching, and all other relevant factors of intrinsic fairness or unfairness.” Id. at 982 (McNeilly, J., concurring).

64. Id. at 980.

65. 379 A.2d 1121 (Del. 1977).

66. Id. at 1123-25. For a discussion of the business purpose test as set forth by the Singer court, see note 62 and accompanying text, supra.

67. 379 A.2d at 1122. The plaintiffs in Tanzer were stockholders of Kliklok Corporation (Kliklok), 87% of which was owned by International General Industries, Inc. (IGI). Id. To acquire the remaining shares of Kliklok, IGI formed a shell corporation, KLK, which it merged with Kliklok. Id. Under the terms of the merger KLK was to receive all of the Kliklok stock and the minority was to be paid $11 per share. Id. at 1123. The plaintiffs sought to preliminarily enjoin the merger arguing that a freeze-out merger imposed on a subsidiary by a parent corporation, if designed for the sole benefit of the parent, was a violation of the fiduciary duty owed by the parent to its subsidiary. Id. As asserted by the plaintiffs and found by the lower court, the sole purpose for the merger was to facilitate long-term debt financing by the parent, IGI. Id. at 1123-24.

68. Id. at 1123-24. The court based its holding on the grounds that IGI had a
be *bona fide*, that is, it must not be a subterfuge, the real purpose of which is to eliminate unwanted stockholders from the enterprise.\(^{69}\)

fundamental right to vote its shares in its own interest. *Id.* at 1123 (citing Ringling Bros.-Barnum & Bailey Comedy Shows v. Ringling, 29 Del. Ch. 610, 622, 53 A.2d 441, 447 (Del. 1947) (shareholder may exercise wide liberality of judgment in voting his shares and may vote for his own motives so long as he violates no duty owed to fellow shareholders); Heil v. Standard Gas & Elec. Co., 17 Del. Ch. 214, 216, 151 A. 303, 304 (1930) (when voting, stockholder may admit personal profit, whims and caprice into his motive, so long as no advantage is obtained at expense of fellow stockholders); Allied Chem. & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 1, 11, 120 A. 486, 491 (1923) (subject to fairness rule, majority has right to sell corporate assets over objection of minority shareholders)).

\(^{69}\) 379 A.2d at 1124. The court found that the benefit of facilitated long-term debt financing that would accrue to the parent as a result of the merger was a *bona fide* business purpose which did not violate the rule of *Singer*. *Id.* at 1125. *See also* Dower v. Mosser Indus., 648 F.2d 183 (3d Cir. 1981) (under Delaware law elimination of minority to increase profits from a new venture was a proper business purpose); Coleman v. Taub, 487 F. Supp. 118 (D. Del. 1980), rev'd, 638 F.2d 628 (3d Cir. 1981) (termination of minority shareholder's derivative suit by elimination of minority shareholder not a *bona fide* business purpose for merger); Field v. Allyn, 457 A.2d 1089 (Del. 1983) (elimination of minority shareholders in order to assure lender's ability to honor financial commitments was proper business purpose); Young v. Valhi, Inc., 382 A.2d 1372 (Del. Ch. 1978) (tax savings that could be accomplished by other means and elimination of remote potential conflicts of interest not a valid business purpose). For contemporaneous commentary on the practical effects of the business purpose test in planning a merger, see Terrell, *Planning a Cash Merger After Singer*, 4 DEL. J. CORP. L. 720 (1979). *See also* McBride, *Delaware Corporate Law: Judicial Scrutiny of Mergers—The Aftermath of Singer v. The Magnavox Company*, 33 BUS. LAW. 2231 (1978).

The *Tanzer* court went on to emphasize the dual nature of the *Singer* test by remanding the case for judicial scrutiny of the "entire fairness" as to all aspects of the transaction. 379 A.2d at 1125. The court reasoned that given the fiduciary duty owed by IGI to the minority stockholders of Kliklok, the plaintiffs were entitled to a *Singer* fairness hearing even though the court had affirmed the chancellor's denial of preliminary injunctive relief. *Id.* The court stated that the chancery court's earlier inquiry into the fairness of the merger in terms of the price to be paid to the minority was too restrictive and that the second prong of the *Singer* test required scrutiny of "all aspects" of the transaction. *Id.*

On remand, the chancery court was directly confronted with two issues yet unresolved by the Delaware Supreme Court: 1) the proper allocation of the burden of proving entire fairness of a merger which was ratified by a majority of the minority shareholders; and 2) the proper method of determining whether or not the merger was "entirely fair." *Tanzer v. International Gen. Indus., Inc.*, 402 A.2d 382, 386-87 (Del. Ch. 1979). Turning first to the burden of proof, the chancery court recognized that if the merger had not been ratified by the minority shareholders, the burden would lie on the dominant stockholder to prove entire fairness since he stood on both sides of the transaction. *Id.* at 386 (citing *Singer*, 380 A.2d at 969; Harriman v. E. I. Du Pont de Nemours & Co., 411 F. Supp. 133 (D. Del. 1975)). The court avoided the parties' arguments concerning the effect of minority ratification by equating the "entire fairness" review, required by the supreme court's opinion, with "intrinsic fairness," which places the burden of the proponent of the merger with careful scrutiny by the court. 402 A.2d at 386 (citing Harriman v. E. I. Du Pont de Nemours & Co., 411 F. Supp. 133 (D. Del. 1975); Nathan & Shapiro, *Legal Standards of Fairness of Merger Terms Under Delaware Law*, 2 DEL. J. CORP. L. 44 (1977)).

Confronting the meaning of "entire fairness" the court surveyed the case law and found it to be of "limited guidance." *Tanzer*, 402 A.2d at 387. In evaluating the
In the third of its trilogy of opinions, Roland International Corp. v. Najjar, the Delaware Supreme Court reasoned that the fiduciary obligations owed in an interested merger do not change with the amount of shares owned by the majority; therefore, it applied the principles of Singer and Tanzer to a short-form merger. In reaching this conclusion, the court rejected the
decision of the court inquired into eight criteria suggested by the parties: 1) the purpose of the merger; 2) alternatives to the merger; 3) independent recommendations as to the fairness of the merger price; 4) disclosure to the minority shareholders; 5) whether or not the corporation had "gone private" when the stock was trading at a low price after its public issue at a high price; 6) the method of financing the transactions; 7) the existence of appraisal rights; 8) and the possibility of appropriation of the benefits of the merger. Id. at 389-95. With regard to the last criteria, the court specifically rejected the plaintiffs' claim that in order to be fair the price offered to the minority should reflect a sharing of the "synergistic effect" of the merger itself between the majority stockholder and the minority. Id. at 395. See Brudney & Chirelstein, supra note 47, at 318-20 (expressing view that if merger transaction results in a benefit to majority by way of savings or synergistic effects, that savings should be shared between the entities involved). The chancery court found that placing a value on the benefits accruing from the transaction was too speculative an exercise and could only practically be considered in an appraisal hearing which precluded its consideration. Tanzer, 402 A.2d at 395. The chancery court further found that the defendants had sustained their burden of proof of entire fairness of the merger by showing that there was a valid business purpose: approval by a majority of the minority, and a fair price which included a premium. Id.

70. 407 A.2d 1032 (Del. 1979).

71. Id. The court stated that the "short-cut to merger afforded by § 253 may not be used to short-circuit the law of fiduciary duty." Id. at 1036 (citing Note, Allegation that Majority Shareholders Effected a Merger for the Sole Purpose of Freezing Out Minority Shareholders States a Cause of Action for Breach of Fiduciary Duty, 46 GEO. WASH. L. REV. 877, 892 (1978)). See also Kemp v. Angel, 381 A.2d 241 (Del. Ch. 1977) (court refused to preliminarily enjoin short-form merger but directed case to go to trial for inquiry into entire fairness of merger in light of recent case law, implying applicability of Singer and Tanzer in the short-form merger context).

The facts of Roland were described by the court as a classic example of "going private." Tanzer, 407 A.2d at 1037. Hyatt Corporation and the individual defendants owned 97.6% of the stock of Roland International Corp. (Roland). Id. at 1033. The defendants created Landro Corporation (Landro) for the purpose of merging with Roland. Id. Subsequent to the creation of Landro, the owners of the 97.6% block of Roland stock contributed their Roland stock to Landro in exchange for a like number of Landro shares. Id. As a result, the contributors owned all of the outstanding shares of Landro, with Landro owning 97.6% of Roland. Id. Landro and Roland shared a common board of directors. Id. The board and shareholders of Landro then authorized the merger of Landro and Roland in which the minority shareholders of Roland would receive $5.25 per share. Id. Hence, the minority shareholders of Roland were cashed out. Id.

The court noted recent commentary suggesting that different standards of review be given depending on the type of merger before the court. Id. at 1034 n.4. See Brudney & Chirelstein, A Restatement of Corporate Freezeouts, 87 YALE L.J. 1354, 1359 (1978) (freezeouts require safeguards for minority which take various forms depending on type of merger but since going private transactions are of small value and high risk they should be prohibited); Note, Singer v. Magnavox and Cash Take-out Mergers, 64 VA. L. REV. 1101, 1113 (1978) ("any ruling on cash take-out mergers should reflect the various interests and positions of the parties by varying the level of judicial scrutiny with the factual situation in which the merger arose."). But see Goldman & Wolfe, In Response to A Restatement of Corporate Freezeouts, 36 WASH. & LEE L. REV. 683
fendants’ arguments premised on Stauffer that the short-form merger statute presumed a valid business purpose and that the statutory elimination of stockholder approval of the merger terms foreclosed their right to object to the transaction. 72 Even though the Roland plaintiffs had requested money damages as opposed to an injunction or recission, the court held, over a strong dissent, 73 that the rules established in Singer and Tanzer were nonetheless applicable to the challenged short-form merger. 74

(1979) (rejecting the Brudney and Chirelstein classification for determining validity of purpose of merger as overly conclusive and subject to so many possible exceptions as to be of limited utility). The court recognized that such an approach would maintain corporate flexibility but stated that the duty owed by the majority stockholder does not depend upon the type of merger involved. 407 A.2d at 1034 n.4. The court stated that the “basic concepts underlying the fiduciary duty—that corporate property belongs (in the equitable sense) to all shareholders (not just majority shareholders), and that those in control of the corporate machinery are accountable to all owners of the corporate property—do not suggest otherwise.”Id.

72. 407 A.2d at 1035-36. While the court agreed that the short-form merger provided a tool for eliminating the minority, it reiterated that the Singer court had not read Stauffer “as approving a merger accomplished solely to freeze-out the minority without a valid business purpose.” Id. at 1036 (quoting Singer, 380 A.2d at 978 (emphasis added)). The court added, however, that in holding the Singer principles applicable to a short-form merger it followed that “any statement in Stauffer inconsistent with that holding is overruled.”Id. at 1036.

73. Id. at 1037 (Quillen, J., dissenting). Justice Quillen criticized the majority’s formalization of the broad equitable principles contained in Singer into rules requiring fairness hearings “without express reference to any specific allegations.”Id. at 1038 (Quillen, J., dissenting) (footnote omitted). While recognizing the “enormity” of the fiduciary problem, Justice Quillen stated that its recognition should not “trigger a series of mechanics more akin to legislative detail and administration regulation than equitable review,” but rather an inquiry turning on the facts of the case. Id. at 1039 (Quillen, J., dissenting). Noting that the plaintiff had not sought continued equitable participation in the corporation or injunctive relief, Justice Quillen viewed the complaint as being directed to an allegedly inadequate price for the minority shares. Id. Significantly, Justice Quillen concluded his dissent by stating that the court “should not foster an unnecessary damage forum because of any judicial limitation placed on the statutory appraisal procedures. Rather, [the court] should encourage this legislatively established valuation process to be open to generally accepted techniques of evaluation used in other areas of business and law.”Id. at 1040 n.12 (Quillen, J., dissenting). See also Bell v. Kirby Lumber Corp., 413 A.2d 137, 151 (Del. 1980) (Quillen, J., concurring) (since concept of “entire fairness” arose in valuation context in Sterling, it should be applied to statutory appraisal proceedings to encourage the flexibility implicit in the traditional standard). For a discussion of Bell v. Kirby, see Comment, Bell v. Kirby Lumber Corp.: Ascertaining “Fair Value” Under the Delaware Appraisal Statute, 81 COLUM. L. REV. 426 (1981).

74. 407 A.2d at 1037. The public shareholders of Roland were offered cash or, alternatively, their appraisal rights. Id. at 1033. The plaintiffs chose neither alternative, but instead, brought a class action five months after the merger date on behalf of all minority stockholders. Id. at 1033-34. Plaintiffs claimed that the majority shareholders had breached their fiduciary duty to the minority by deciding to “go private” for the sole purpose of cashing out the minority at an inadequate price. Id. One commentator has argued that Roland can be read as evidencing the court’s recognition of the inadequacy of the appraisal procedure for assessing “entire fairness.”See Weiss, supra note 49, at 672. He points out that the Roland court implicitly criticized evaluation procedures when it stated that the majority could not discharge its fiduciary duty by relegating the minority to appraisal when “the timing of [the
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Singer and its progeny, while providing an alternative forum for determining the fairness of the terms of a cash-out merger, provided little guidance to the lower courts in the manner of assessing those terms. In *Lynch v. Vickers Energy Corp.*, the Delaware Supreme Court addressed the proper measure of damages in a breach of fiduciary duty action. *Lynch* did not involve a merger, but rather, arose out of the first step in a two-step plan to eliminate the public shareholders of TransOcean Oil Co. Vickers, the majority shareholder of TransOcean, had made a tender offer for all of the outstanding shares of TransOcean stock, at what the plaintiffs alleged to be a grossly inadequate price. In its first review of the case, the court held that

merger] is entirely within the control of the majority." *Id.* (quoting Roland Int'l Corp. v. Najjar, 407 A.2d at 2034).

75. For a discussion of the *Tanzer* chancery court's approach to the meaning of "entire fairness" when applied to a merger, see note 69 supra.

76. 429 A.2d 497 (Del. 1981) ("Lynch I").

77. *Id.* at 500.

78. *Id.* at 504 n.6. Vickers' offering circular disclosed that if it were unable to acquire all of the outstanding stock of the TransOcean minority by tender offer, it intended to acquire the remainder by merger. *Id.* The extent to which the court equated the Vickers plan to a merger may or may not be revealed by its reference to the Vickers tender offer as a "merger." *Id.* at 504 n.6.

79. *Id.* at 499-500. The many decisions comprising the *Lynch* case involved the tender offer by Vickers Energy Corporation (Vickers), a wholly-owned subsidiary of Esmark, Inc. (Esmark), for all of the outstanding common stock of TransOcean Oil, Inc. (TransOcean). *Lynch v. Vickers Energy Corp.*, 351 A.2d 570, 571 (Del. Ch. 1976), rev'd, 383 A.2d 278 (Del. 1977) ("Lynch I"), on remand, 402 A.2d 5 (Del. Ch. 1979), aff'd in part, rev'd in part, 429 A.2d at 497 ("Lynch II"). At the time of the tender offer, Vickers was already a 53.5% majority stockholder of TransOcean. 351 A.2d at 571. TransOcean was engaged directly and through its subsidiaries in the business of discovering and exploiting sources of natural gas and petroleum. *Id.* at 572. The circular accompanying the offer disclosed that the net asset value of TransOcean was "not less than $200,000,000 (approximately $16.00 per share) and could be substantially greater." *Id.* at 573-74 (emphasis in original). The offer also disclosed that Vickers' purpose in acquiring more TransOcean common stock was that it believed the TransOcean stock was worth more than its current market price reflected, and therefore, made an attractive long-term investment. *Id.* at 574. The offer also informed TransOcean shareholders that if a substantial amount of TransOcean stock were tendered, an inactive market would remain for the nontendered stock. *Id.* at 572. In addition, the offer disclosed that if fewer than 300 shareholders remained after the tender offer was completed, the stock would be deregistered as permitted by the Securities Exchange Act of 1934. *Id.*

On October 11, 1974, the plaintiff tendered her 100 TransOcean shares in response to Vickers' offer of $12 per share. *Id.* at 571. Even though the holders of 4,460 of the 7,250 minority shares of TransOcean chose not to tender their shares, Vickers was able to increase its interest in TransOcean from 53.5% to 87%. *Id.* at 572. The plaintiff brought a class action on behalf of all shareholders who sold their shares in response to the Vickers tender offer and sought damages for injuries suffered as a result of their sales. *Id.* Plaintiff alleged that Vickers, Esmark and certain directors of TransOcean who did not actively oppose the offer, had breached their fiduciary duty to the minority shareholders of TransOcean by failing to make full disclosure concerning the value of TransOcean's assets and by using their superior bargaining position and control of the corporation to coerce the minority to sell their shares at a grossly inadequate price. *Id.* Specifically, plaintiff claimed that the defendants should have disclosed to the minority that the TransOcean assets had also been val-

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the majority had breached its fiduciary duty by failing to disclose material information in its tender-offer circular.\textsuperscript{80} On remand, the chancery court, in order to measure the damages resulting from the offeror's lack of disclosure,\textsuperscript{81} applied the appraisal approach to valuation to determine the fair value of TransOcean's assets at $250,800,000 by a member of TransOcean's management that Vickers had authorized open market purchases of the TransOcean stock at any price up to $15, and that TransOcean's on-shore and North Sea drilling positions were potentially significant. \textit{Id.} at 574. The plaintiff claimed damages equal to the difference between the $12 tender-offer price and the fair value of their shares, which plaintiff contended would be comparable to their value if determined in an appraisal proceeding. \textit{Id.} at 573.

The chancery court found that since the offering circular emphasized that the value of TransOcean's assets was \textit{"not less than"} $200,000,000 and included a statement that they could be worth more, given the uncertainties inherent in the petroleum business and the dubious assumptions contained in the internal TransOcean valuation, the offering circular furnished the shareholders with the necessary information. \textit{Id.} at 574-75. The court also found that there was no need to disclose Vickers' $15 purchase authorization because the price was in reality a ceiling price on open-market purchases and the average purchase price had been $11.49, the price that was disclosed in the circular. \textit{Id.} at 575. The court also concluded that TransOcean's drilling positions had been fairly represented. \textit{Id.} The court concluded that since Vickers had adequately disclosed the relevant facts and circumstances surrounding the transaction, it had pursued a legitimate course of action. \textit{Id.}

\textsuperscript{80} \textit{Lynch I}, 383 A.2d at 278. The court agreed with the chancellor's conclusion that since Vickers was the majority shareholder of TransOcean it owed a fiduciary duty to the plaintiff which required \textit{"complete candor."} \textit{Id.} at 279. However, the court disagreed with the chancery court's application of the principle. \textit{Id.} It stated as follows:

The Court's duty was to examine what information defendants had and to measure it against what they gave to the minority stockholders, in a context in which \textit{"complete candor"} is required . . . . [T]he limited function of the Court was to determine whether defendants had disclosed all information in their possession germane to the transaction in issue . . . . information such as a reasonable shareholder would consider important in deciding whether to sell or retain stock. \textit{Id.} at 281 (citing TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976)).

As the court explained, the objective of requiring \textit{"complete candor"} is to prevent an insider's use of special knowledge to his advantage and to the detriment of stockholders. \textit{Id.} at 281. The court found that the majority had failed to disclose two critical facts to the minority: 1) the existence of a report made by a member of TransOcean's management which calculated the minimum net asset value of TransOcean significantly higher than that contained in the offer; and 2) the fact that Vickers had authorized open-market purchases of TransOcean shares just prior to the tender offer at a price which was three dollars higher than the offering price. \textit{Id.} at 280.

\textsuperscript{81} 402 A.2d at 11-13. The chancery court concluded that a proceeding similar to that of an appraisal proceeding was appropriate where active fraud had not been proven. \textit{Id.} at 11 (citing Poole v. N.V. Deli Maatchappij, 43 Del. Ch. 283, 243 A.2d 67 (Del. 1966)). The court rejected the plaintiff's argument premised on \textit{Singer} and \textit{Tanzer} that in a cash-out merger, an appraisal proceeding is not equivalent to a fairness hearing on the terms of the merger. 402 A.2d at 10.

The chancellor assigned a 40% weight to the asset and market values and a 20% weight to the earnings value of TransOcean, finding that the TransOcean stock had a fair value of $11.85 per share. \textit{Id.} at 12. Since the tender-offer price was $12 per share the chancellor concluded that the tender offer was fair and that the plaintiffs had not been injured by tendering their shares. \textit{Id.} at 11-13.
value of the minority shares at the time of the tender offer. The plaintiffs appealed the chancery court's determination that they had suffered no damages, and the Delaware Supreme Court reversed, finding that the chancellor had erroneously relied on the appraisal formula to determine whether relief should be granted. The court held that rescissory damages were appropriate in a breach of fiduciary duty context whether or not the plaintiffs had demonstrated an economic loss as a result of their tender. The court did not indicate whether a different valuation method should be employed in measuring the rescissory damages to which the plaintiffs were entitled, nor did it state whether the measure of damages it set forth was applicable in a merger context.

It was against this background that the Weinberger court analyzed the merger between UOP and Signal. The court approved the chancellor's holding that, in transactions between majority and minority shareholders, the majority shareholder has the ultimate burden of proving that the transaction is fair. The concept of fairness was defined by the court in terms of

82. Lynch II, 429 A.2d at 500. The court distinguished Poole v. N.V. Del.& Maatschappij, on the grounds that Poole involved a claim for fraudulent misrepresentation in a cash-out merger which was a different type of claim than one for breach of fiduciary duty. 429 A.2d at 500 (citing Poole v. N.V. Del.& Maatschappij, 43 Del. Ch. 283, 224 A.2d 260 (Del. 1966)). In addition, the court found that the Poole plaintiffs had specifically requested that the appraisal formula for measuring damages be applied. Id. at 501. It is suggested that the significance of the Lynch case lies in the court's statements distinguishing Poole. The court stated that the above-stated differences were important because

the appraisal approach adopted in Poole has a built-in limitation, namely, gain to the corporation resulting from a statutory merger is not a factor which is included in determining the value of the shares, and it was not considered by the Chancellor. But that limitation does not apply when a fiduciary has breached a duty to those to whom it is owed.

Id.

83. Id. at 501, 504. The Delaware Supreme Court concluded that the damages were to be measured by the difference between the tender price and the equivalent value of the stock as of the time of judgment, which was the date the trial for damages ended. Id. at 503, 505.

84. In order to provide some guidance to the trial court, the court stated that "given the fiduciary relationship, the arms-length bargaining employed in the purchases should not have resulted in the minority stockholders receiving less than Vickers was ready to pay strangers for the same stock." Id. at 505. Vickers had authorized open market purchases of TransOcean at the time of its tender offer at any price up to $15. Id. Concerning the method of valuation employed by the chancery court, the court did not proffer a different approach but rather found the assignment of the same weight to asset and market value to be "highly questionable." Id.

85. Id. While justifying its application of rescissory damages in a breach of fiduciary duty case, the court cited Singer as evidence that Delaware recognized and enforced the fiduciary duty owed by a majority stockholder. Id. at 503 n.4. See Harmon v. Masonilan Int'l, 442 A.2d 487 (Del. 1982) (citing Lynch for proposition that rescissory damages are available for breach of fiduciary duty, in a merger context). For critical commentary of the Lynch decisions, see Fischel, supra note 49, at 929-35. See also Schlagman, Recent Developments in Delaware Corporation Law, 6 DEL. J. CORP. L. 513, 515-16 (1981); Weiss, supra note 49, at 673-75.

86. 457 A.2d at 703. Addressing the burden of proof to be assigned in cases
two basic aspects—fair dealing and fair price. Because the court found that the business purpose requirement of Singer, Tanzer, and Roland did not afford minority shareholders any additional meaningful protection, the court declined to include the requirement of a valid business purpose in its definition of fairness, stating that "such requirement shall no longer be of any force or effect." The court found that a primary issue mandating reversal was the preparation of the feasibility study prepared by the Signal-designated UOP directors for the exclusive use of Signal. The court elaborated upon the "long-existing principle of Delaware law" that the Signal-designated directors of UOP owed an uncompromising duty of loyalty to UOP and its shareholders. The interested directors were required to demonstrate their "utmost

challenging a cash-out merger, the court stated that the plaintiff initially must allege specific acts of misconduct which would demonstrate the unfairness of the merger terms to the minority. The ultimate burden of proof rests with the majority shareholder to show by a preponderance of the evidence that the transaction is fair. However, if the merger was approved by a majority of minority shareholders, the ultimate burden of proving unfairness remains on the complaining stockholders.

The chancery court had found that Signal had a valid purpose for the merger since UOP was the best acquisition opportunity it had, and because the merger would increase earnings, facilitate flow of resources between Signal and its subsidiaries, increase tax, accounting and insurance savings, decrease reporting costs to regulatory agencies, and eliminate potential conflict of interest problems. The supreme court agreed with commentators who had suggested that the chancery court's finding has led to the business purpose test being "virtually interpreted out of existence .... " The court also noted that the business purpose requirement was new to the Delaware law of mergers, and was a departure from prior case law.

The court stated that this principle did not vary when applied to persons who act as directors for both a parent and its subsidiary corporation. In that context, the same duty of good management would be owed to both corporations and that duty was to be exercised in light of what would be best for both corporations.

87. Id. at 711 (citing Moore, The "Interested" Director or Officer Transaction, 4 DEL. J. CORP. L. 674, 676 (1979); Nathan & Shapiro, supra note 69, at 46-47). The court cautioned that the inquiry, while structured upon two separate concepts, fair price and fair dealing, should not be bifurcated. However, the court noted that in a non-fraudulent transaction, fair price might be a preponderant consideration.

88. 457 A.2d at 715. The court concluded that the fairness test of Sterling which applied to parent-subsidiary mergers, the expanded appraisal remedy it had set forth, and the broad discretion of the Chancellor to fashion appropriate relief, served adequately to protect minority shareholders.

89. Id. at 710-11 (quoting Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939). The court stated that this principle did not vary when applied to persons who act as directors for both a parent and its subsidiary corporation.

90. Id. at 710-11 (quoting Moore, supra note 69, at 46-47). The court stated that this principle did not vary when applied to persons who act as directors for both a parent and its subsidiary corporation.
good faith” and the “entire fairness” of the transaction because directors common to both Signal and UOP had stood on both sides of, and had participated in, the transaction, and because there had been no attempt to structure the transaction on an arm’s length basis. The court equated this duty of loyalty owed by the interested directors with the requirement set forth in Lynch I which calls for complete disclosure of information that a “reasonable shareholder would consider important in deciding whether to sell or retain stock.”

Applying these principles to the facts of Weinberger, the court concluded that the preparation of the feasibility study did not meet the requisite fiduciary standards. The study contained information of material significance to the minority shareholders of UOP since it showed that the range of prices that would make UOP a “good investment” for Signal could have been worth as much as $17,000,000 to the UOP minority shareholders.

Examining the merger for other indicia of fair dealing, the court found that Signal had structured its terms unilaterally. Further, neither the feasibility study nor the manner in which Lehman’s opinion had been prepared was disclosed. On these bases, the court concluded that the cash-out merger between Signal and UOP did not satisfy “any reasonable concept of fair dealing.”


92. 457 A.2d at 710. In a footnote, the court stated that “the result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm’s length.” Id. at 709 n.7 (citing Harriman v. E. I. Du Pont de Nemours & Co., 411 F. Supp. 133 (D. Del. 1975) (merger negotiations between Du Pont and Christiana carried out by independent negotiating committee comprised of persons unconnected with the opposing negotiators, and aided by retention of separate financial advisers for each party to the merger)). The court continued by stating that fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them, it is unfortunate that this course was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm’s length is strong evidence that the transaction meets the test of fairness.

93. Id. at 710 (citing Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 886 (Del. 1970); Johnston v. Greene, 35 Del. Ch. 479, 490, 121 A.2d 919, 925 (Del. 1956); Puma v. Marriott, 283 A.2d 693, 696 (Del. Ch. 1971)).

94. 457 A.2d at 708, 711.

95. 457 A.2d at 709.

96. Id. at 711.

97. Id. at 712. For an explanation of the Lehman opinion, see note 9 supra.

98. 457 A.2d at 712. In examining the transaction for elements of fair dealing, the court also inquired into the evolution of the merger. Id. at 711. The court noted
Turning to the second aspect of fairness—fair price—the court held that valuation was to take place pursuant to the procedures outlined in the Delaware appraisal statute. However, the court, in its exegesis of the Delaware appraisal statute rejected the chancellor’s reliance on the “Delaware block approach” to valuation, stating that “to the extent that [approach] excludes other generally accepted techniques used in the financial community and the courts, it is now clearly outmoded.”

Instead, the court adopted what it viewed as a more “liberal, less rigid and stylized, approach to the valuation process.”

Drawing from long-standing precedent and an analysis of the appraisal statute’s legislative history, the court stated that fair price required “consideration of all relevant factors involving the value of a company” which might also include any damages sustained by the stockholders as a class due to the taking of their shares. The only limit the court placed upon the “relevant factors” to be considered in valuation under its new approach was the statutory exclusion of “any element of value arising from the accomplishment or expectation of the merger.” This limitation was construed narrowly by the court as eliminating the use of speculative data.

that the entire transaction was initiated by Signal and was accomplished pursuant to time constraints imposed by Signal. Id. The court stated that the hurried nature of the transaction was not in itself indicative of a lack of fair dealing. Id. Rather, it was important to scrutinize what had, or had not, occurred during that time period. Id.

99. *Id.* at 713. See DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

100. 457 A.2d at 712-13. The court found it significant that the method which was used by the plaintiffs to value their shares focused on the same analytical factors as the feasibility study conducted by the UOP directors to determine the price Signal should consider offering for UOP. *Id.* at 713. For an explanation of the plaintiffs’ proffered methods of valuation, see note 15 supra. For an explanation of the Delaware block approach to share valuation, see notes 39 & 40 and accompanying text supra.

101. 457 A.2d at 704.

102. *Id.* at 713 (quoting Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (Del. 1950)). The *Tri-Continental* language quoted by the court maintained that the factors to be considered should include “market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which ... could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation.” Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (Del. 1950).

103. 457 A.2d at 713-14. In reviewing the legislative history of the appraisal statute, the court traced the focus of appraisal proceedings from the determination of the “value” of stock to a determination of the “fair value” of stock with a directive to consider “all relevant factors.” *Id.* (citing DEL. CODE ANN. tit. 8, § 262 (Supp. 1982)). From this review, the court discerned a legislative intent to “fully compensate shareholders for whatever their loss may be, subject only to the narrow limitation that one cannot take speculative effects of the merger into account.” 457 A.2d at 714. The court stated that if damages were not to be accounted for, the requirement to consider “all relevant factors” would be eroded. *Id.* at 713.

104. *Id.* at 714 (quoting DEL. CODE ANN. tit. 8, § 262(h) (Supp. 1982)).

105. *Id.* at 713. The court interpreted the Delaware appraisal statute as only eliminating the use of “pro forma data and projections of a speculative variety.” *Id.* Future value, the court stated, was to be considered as long as it was susceptible of
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The supreme court concluded that appraisal should be the appropriate remedy for a shareholder challenging a cash-out merger, and thus it returned to the principles of *Stauffer* and *Schenley*. The court noted, however, that such an approach may not be adequate "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved." Under these circumstances, the court stated that equitable and monetary relief might be appropriate. Given the court's approach to valuation under the appraisal statute, it overruled *Lynch* to the extent it had limited the chancellor's discretion to a single formula for determining monetary damages.

Since the *Weinberger* plaintiffs had foregone their rights to seek an appraisal, the court granted them a "quasi-appraisal remedy" which would allow them to test the twenty-one dollar price obtained for their shares in conformity with the principles of appraisal it had outlined.

In analyzing the *Weinberger* decision, it is submitted that although the court has generally added some consistency to the law surrounding cash-out mergers, the decision has not left the area entirely free from ambiguity. First, in overruling the valid business purpose requirement of *Singer*, the court has eliminated a previously unpredictable standard for determining the propriety of a cash-out merger. The business purpose test, introduced proof. *Id.* Given this approach to valuation, the court stated that the plaintiffs' evidence of the value of their stock, which was based on a discounted cash-flow analysis, should have been considered by the chancellor. *Id.* at 714.

106. *Id.* at 714-15. For a discussion of *Stauffer* and *Schenley*, see notes 25-33 and accompanying text *supra*.

107. 457 A.2d at 714 (citing Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56, 156 A. 183, 187 (Del. Ch. 1931)). For a discussion of the principles espoused in *Cole*, see note 26 *supra*.

108. 457 A.2d at 714.

109. *Id.* In the court's view, the approach to valuation it had set forth included the elements of rescissory damages. *Id.* For a discussion of the *Lynch* measure of damages in a breach of fiduciary duty case, see notes 82-85 and accompanying text *supra*.

110. 457 A.2d at 714 n.8. The court noted that the appraisal statute required that a stockholder perfect his rights to appraisal and then file a petition for appraisal within 120 days after the effective date of the merger. *Id.* (citing DEL. CODE ANN. tit. 8, § 262 (d) & (e) (Supp. 1982)). For a discussion of the manner of perfecting appraisal rights, see note 36 *supra*.

111. 457 A.2d at 714. The court stated that the remedy it was granting to the plaintiff was co-extensive with the valuation and appraisal methods it had approved for later cases. *Id.* at 704. The court recognized that other litigants may have given up their appraisal rights and stated that the remedy fashioned in *Weinberger* would be applicable to 1) any case pending on appeal to the Delaware Supreme Court as of the date of its opinion; 2) any case pending in the court of chancery eligible for direct appeal to the supreme court at the time of the opinion; 3) any case challenging a cash-out merger effective on or before February 1, 1983; and 4) any proposed merger to be presented to stockholders who received notification thereof on or before February 23, 1983. *Id.* at 714-15.

112. For a discussion of the business purpose rule, see notes 62 & 68-69 and accompanying text *supra*. For a discussion of the application of the rule by the lower courts, see note 69 *supra*.
in Singer as a form of minority shareholder protection, was interpreted by the Tanzer court as being dependent on whether the majority would obtain a bona fide benefit from the merger. The bona fides of asserted business purposes, however, were interpreted in such an inconsistent manner as to make the test wholly vacuous since it is difficult to conceive of a merger where those in control would cause its consummation if it benefitted neither the constituent corporations nor their controlling shareholders.

The Weinberger court's approach to valuation in the context of appraisal rights is a clear break from precedent. While the court relied on previous case law and the legislative history of the appraisal statute to substantiate its new approach to valuation, it is submitted that such reliance may not have been justified. The case law used by the court is the same precedent that has been historically cited for mandating that the value of a dissenting shareholder's shares be measured by the value of his proportionate interest in a corporation prior to its merger. Nevertheless, the Weinberger court has used that same law to indicate that an appraisal is to determine the value of a shareholder's proportionate interest in a corporation measured by its value to an acquiror. This perspective on valuation would serve to equate the Singer standard for a fair price, as interpreted by the chancery court in Tanzer, and implied in Lynch, with the determination of fair value

113. For a discussion of the Tanzer interpretation of the business purpose test and its subsequent application, see notes 65-69 and accompanying text supra.
114. For an illustration of the varying effects of the application of the business purpose test, see note 69 supra.
115. For a discussion of the method customarily employed to value shares prior to Weinberger, see notes 37-40 and accompanying text supra.
116. See 457 A.2d at 713-14; notes 102-104 and accompanying text supra.
117. The Weinberger court quoted extensively from Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 74 A.2d 71 (Del. 1950). For an illustration of the Delaware court's prior use of this case, see note 38 supra.
118. 457 A.2d at 712-13. The court stated that what is to be determined is the value of the “company” and it emphasized that a company's “future prospects” must be considered. Id. at 713 (quoting Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (Del. 1950)). The court also stated that rescissory damages would be subsumed within its approach to valuation. Id. at 714. Since rescissory damages measure the value of any gain to an acquirer from an acquisition, it seems clear that the court is directing that value be measured in terms of the value of the shares to the acquiring corporation. In addition, the court noted that the chancery court had rejected the plaintiffs' evidence on the ground that it did not correspond with “either logic or the existing law.” Id. at 712 (quoting 426 A.2d at 1360). Specifically, the chancery court had determined that equating a fair price with that which a controlling shareholder would be willing to pay for 100% ownership would result in a dual standard where the value of a plaintiff's stock for purposes of a fairness hearing would not be equivalent to the value of a plaintiff's stock for the purposes of an appraisal. 426 A.2d at 1359-60. However, the supreme court sanctioned this approach by directing that the chancery court consider the plaintiff's evidence on remand and by indicating the significance of the fact that the feasibility report had determined its fair price range on the same basis. 457 A.2d at 712-14.
119. For a discussion of Tanzer, see notes 65-69 and accompanying text supra.
120. For a discussion of Lynch, see notes 76-85 and accompanying text supra.
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under the appraisal statute. This reconciliation lends consistency to the law by eliminating the possibility that cashed-out shareholders will receive a different "fair price" for their shares depending on whether they assert a Singer-type cause of action or whether they seek an appraisal remedy.

It is submitted that this approach is also consistent with the Delaware Supreme Court's emphasis on fair dealing. Presumably, in negotiating a price on behalf of minority stockholders, an independent negotiating team would seek a price based on what it believed the acquiring majority shareholder would be willing to pay in order to obtain 100% ownership. Thus, any price arrived at by negotiation would generally be greater than the value of a shareholder's proportionate interest in a "going concern" measured without regard to the transaction.

121. On remand in Tanzer, the chancery court determined that the plaintiffs had received a fair price considering that they had been paid a premium over the appraised value of their shares. 402 A.2d at 395. For a discussion of the chancery court decision on remand in Tanzer, see note 69 supra. At least one commentator has observed that Lynch suggested that Singer may have stood for the proposition that an entirely fair price is one which provides for the sharing of gains accruing to the majority from merger with the minority. Easterbrook & Fischel, Corporate Control Transactions, 91 YALE L. J. 698, 724 (1982). But see Tanzer v. International Gen. Indus., 379 A.2d 1121 (Del. 1977) (in denying plaintiffs' request for reargument, the court rejected the argument that plaintiffs should have been entitled to share in gains accruing to the majority from the cash-out of minority shareholder-plaintiffs). For a discussion of the standard for valuation under the appraisal remedy as fashioned by the Weinberger court, see notes 99-105 & 118 and accompanying text supra.

122. If a plaintiff were able to assert a Singer cause of action, he would be entitled to appropriate equitable relief. Such relief would include rescissory damages, the amount of which would exceed the available "damages" in an appraisal proceeding, since an appraisal would not include in its valuation formula any gains from the merger. Compare the discussion of Roland at notes 71-74 and accompanying text supra, and the discussion of the appropriate measure of damages in Lynch, at note 83 and accompanying text supra, with Justice Quillen's dissent in Roland, discussed at note 73 supra, and the method of valuation commonly employed in appraisal proceedings which is discussed at notes 37-40 supra. See also Comment, supra note 69, at 434-37.

123. For a discussion of the court's emphasis on the role an independent negotiating structure would play in ensuring fair dealing, see note 92 supra.


125. However, not consistent with this intention the court directed that on remand the chancellor should consider the plaintiffs' evidence. 457 A.2d at 714. If that evidence included premiums paid for 100% ownership by non-affiliated third parties, the court would be equating third party sale value with fair value. It is suggested that under this standard a controlling corporation would be required to pay an additional amount for the control which it already owned. See Chazen, supra note 124 (distinguishing acquisitions of minority interests by unaffiliated third-party purchasers from similar acquisition by controlling shareholders on the following grounds: 1) a buyer of an entire company purchases a mixture of control and non-control shares while a controlling shareholder only purchases non-control shares; 2) ownership of a company may be worth more to unaffiliated purchasers; and 3) sale to unaffiliated purchasers may be at a competitive, as opposed to arm's length, price). It is submitted, as Chazen suggests, that a third party standard of valuation would compensate minority shareholders for more than their investment expectations. See id. at 1468 (suggesting that minority shareholders would not expect to receive as
A source of ambiguity in the Weinberger opinion is evidenced by the court’s suggestion that valuation procedures might account for any damages suffered by the entire class of minority shareholders as a result of their having been cashed-out.\(^{126}\) It is submitted that reliance upon precedent which directs consideration of “all relevant factors” and the statutory mandate to determine “fair” value is not helpful in deciphering the meaning of the “damages” that are to be considered.\(^{127}\) Several interpretations are possible. On one hand, the damages sustained by a class of cashed-out minority stockholders could require consideration of reinvestment costs, unanticipated income tax assessments, or other costs associated with the transformation of an investment into cash.\(^{128}\) On the other hand, the court could be directing that the determination of “fair” value be accomplished by examining the damages sustained as a result of a controlling shareholder’s breach of fiduci-

\(^{126}\) See note 103 and accompanying text supra.

\(^{127}\) Id.

\(^{128}\) For a discussion of the external costs to dissenting shareholders resulting from cash-outs, and Delaware courts’ unwillingness to account for these costs in appraisal proceedings or fairness hearings, see Brudney, supra note 50 (even if appraisal does ensure fair value of stock it does not treat dissenting stockholder equally with those who retained control after merger since appraisal does not compensate for reinvestment costs, tax disadvantages, or delay); Elfin, supra note 20 (fair price to minority shareholders requires that an equivalent price be paid to the majority, therefore, the minority should receive a premium over pre-merger value plus consideration for tax disadvantages and brokerage fees resulting from being cashed-out to ensure that net funds received by the minority place them in an equivalent position with majority shareholders); Manning, supra note 34, at 233 (tax laws tend to dissuade shareholders from making use of appraisal mechanism); Toms, Compensating Shareholders Frozen Out in Two-Step Mergers, 78 COLUM. L. REV. 548 (1978) (criticizing Brudney and Chirelstein proposal for compensation of minority shareholders, and proposing that fair compensation be determined by evaluating the intrinsic value of merging corporation plus a pro rata share of benefits accruing to the merged corporation and compensation for institutional costs such as taxes (which may require a reinterpretation or revision of the Internal Revenue Code) and reinvestment costs (which may require revisions of state appraisal statutes)). It is recognized that given the uniqueness to each shareholder of the external costs of being cashed-out, such costs would be difficult to determine on a class-wide basis.
ary duty." This latter interpretation is supported by the court's emphasis on the legislative change in the appraisal statute requiring determination of "fair value" rather than "value." It is also supported by the fact that the Weinberger plaintiffs were relegated to a quasi-appraisal proceeding themselves, in a case where a breach of fiduciary duty had been found. It is submitted that additional support for this construction can be found in the court's suggestion that rescissory damages might be available to the plaintiffs even though the remedy it afforded them was co-extensive with an appraisal. 3 While this construction may be supportable by the language of the Weinberger opinion, it is submitted that such an interpretation would mean that the court had effectively overruled prior case law consistently holding that the only issue before the court in an appraisal proceeding is valuation.

This latter construction evinces the need for an examination of the exclusivity of the appraisal remedy as fashioned by the court. Weinberger has mandated that a plaintiff's monetary remedy is ordinarily to be confined to an appraisal. However, if a plaintiff can demonstrate fraud, misrepresentation, self-dealing, deliberate waste, or gross overreaching, the chancellor is free to fashion other forms of relief. While the court may have intended to set forth the available remedies in unambiguous terms, the result of the Weinberger case itself casts considerable doubt on when different forms of relief might be available. The Weinberger plaintiffs had demonstrated a lack of disclosure amounting to a breach of fiduciary duty, thus demonstrating the failure of the defendants to satisfy the fair dealing aspect of "entire fairness," yet were relegated to a remedy co-extensive with appraisal. If the court has determined that damages resulting from a breach of fiduciary duty may be addressed in an appraisal proceeding, then it might be argued that whenever a majority shareholder's lack of fair dealing affects only the price offered to the minority for their shares, an appraisal should be their exclusive remedy. However, it should be noted in discussing the scope of the appraisal remedy, it was the plaintiffs' monetary remedies which the court restricted to appraisal. If the fairness of the price being offered to minority shareholders is clearly determinable on a class-wide basis, it is suggested that any damages resulting from a breach of fiduciary duty are clearly determinable on a class-wide basis.

129. See note 103 supra; Bell v. Kirby Lumber Corp., 413 A.2d 137, 150 (Quillen, J., concurring) (suggesting that since the standard of "entire fairness" arose in a valuation context, the doctrine is applicable in a statutory appraisal proceeding).

130. See notes 109-111 and accompanying text supra.

131. See notes 106 and accompanying text supra.

132. See notes 109-111 & 118 and accompanying text supra.

133. See note 36 supra.

134. See note 106 and accompanying text supra.

135. The court noted that while the issue of entire fairness should not be the subject of a bifurcated inquiry into fair price and fair dealing, it recognized that "in a non-fraudulent transaction . . . , the price may be the preponderant consideration outweighing other features of the merger." 457 A.2d at 711. See notes 107-109 and accompanying text supra.

136. See notes 109 & 111 and accompanying text supra.

137. 457 A.2d at 714. The court stated that "[w]hile a plaintiff's monetary rem-
ers is all that is being challenged, under the Staufer and Schenley rationale, as affirmed by Weinberger, an appraisal would appear to be a plaintiff's exclusive remedy. This may be true even where plaintiffs allege constructive fraud, because the only grounds for disagreement in such a case stems from an allegedly unfair price. However, where plaintiffs seek injunctive relief on the basis of alleged unfair dealing, the availability of that relief would seem to depend, not only on whether the unfairness is equivalent to fraud, but also on whether any resultant injury could not be compensated for, or remedied by an appraisal proceeding. It is submitted that just as the Delaware Supreme Court left the business purpose test open for later interpretation, so has it left the question of appropriate forms of relief subject to subsequent interpretation. Given the questions left unanswered by the Weinberger court, the major impact of the decision will be felt in its implementation by the lower courts. Of major significance to both prospective plaintiffs and the plaintiffs' bar will be lower courts' interpretation of the availability of injunctive relief against a cash-out merger. Considering the impact of the Weinberger approach to valuation, it is submitted that the latitude afforded lower courts in utilizing the available appraisal techniques could well serve the supreme court's policy of ensuring that cash-out mergers are entirely fair and that minority shareholders are edy should ordinarily be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate." Id. The Weinberger plaintiffs had sought rescission and the court's relegation of them to an appraisal proceeding was couched in its finding that the merger was too involved to undo." Id.

138. For a discussion of Staufer and Schenley, see notes 25-33 supra.

139. An example of such circumstances might be where a lack of fair dealing by a controlling shareholder misled minority shareholders into failing to perfect their appraisal rights.

140. It is suggested that the court's citation to the Cole case as support for its finding that equitable relief may be warranted in certain cases, may provide a means for litigants and lower courts to avoid the appraisal remedy more often then the Weinberger court may have intended. See 457 A.2d at 714 (citing Cole v. National Cash Credit Ass'n, 18 Del. Ch. 17, 56 A.2d 183 (Del. Ch. 1931). In Cole, the chancellor held that the election of appraisal rights might not be required when, among other instances, the terms of the merger arose from a breach of trust. Id. For a discussion of the Cole line of cases, see note 26 supra. For a discussion of the business purpose test and its subsequent interpretation by the Delaware Supreme Court, see notes 62-69 & 113-114 and accompanying text supra.

141. The procedural strictures of the appraisal remedy which limit those entitled to seek an appraisal to shareholders who have "perfected" their appraisal rights, and which fail to compensate adequately a shareholder for the transaction costs of an appraisal, serve to reduce the number of shareholders that seek an appraisal and, consequently, the amount of any recovery from which attorneys' fees may be obtained. The probable reduction in available attorneys' fees, when compared to the more lucrative fees available in class actions, may be a disincentive to attorneys to represent shareholders in appraisal proceedings.
afforded the opportunity to demonstrate the true value of their shares. Alternatively, the lack of guidance provided by the *Weinberger* decision could have an inhibiting effect on the progressive approach to valuation it has espoused.

The lower court's implementation of the appraisal statute will, in turn, have a major impact upon the disclosure practices of Delaware corporations. If the purpose of disclosure in this context is to enable a shareholder to make an informed determination of whether or not to accept the terms of a cash-out merger or file a petition for appraisal, then any valuation analyses that might be deemed an appropriate method of valuation in an appraisal proceeding would materially bear upon that shareholder's decision and thus, should be disclosed. Until the parameters of the *Weinberger* approach to valuation are determined, the parameters of the disclosure requirement will remain unknown.

Finally, the court's emphasis on the importance of an independent negotiating structure will clearly impact upon the methods used to consummate a cash-out merger. The court stated that if the interested directors had abstained from participation in the merger, or if an independent negotiating committee had been appointed, the conflicts inherent in the Signal-UOP merger might have been resolved. This observation may well serve to

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142. Given the availability of a wide range of possible valuation techniques, plaintiffs in an appraisal proceeding will no longer be compelled to utilize the "Delaware block approach" which has been criticized for its consistent undervaluation of shareholder interests. However, it is submitted that notwithstanding the court's "liberalized" approach to appraisal, its suggestion that an appraisal serve as a stockholder's "basic recourse" may not ensure the "entire fairness" of cash-out mergers in itself. Given the procedural restrictions of perfecting the appraisal remedy, an appraisal would not seem to ensure fairness if it is determined that all minority stockholders received an inadequate price for their shares, yet compensation is available only for those shareholders who complied with the statutory prerequisites. Certainly, the procedural and practical difficulties in utilizing the appraisal remedy have not been reduced by *Weinberger*.

143. The *Weinberger* court stated that evidence of value that was of a speculative variety was a narrow exception to the appraisal statute's mandate that "all relevant factors" be considered in determining fair value. 457 A.2d at 713. It is noted that this is precisely the reason that the chancery court rejected the plaintiffs' evidence of value based on the discounted cash-flow analysis. 426 A.2d at 1359. The chancery court found that the opportunity for the subjective selection of a discount factor which could dramatically alter the outcome, "rendered [the plaintiff's] discounted cash flow approach unnerving." *Id.* In addition, the *Weinberger* court's rejection of the "Delaware block approach" to valuation may be interpreted narrowly by lower courts faced with valuation procedures which are speculative and/or difficult to implement with certainty. A narrow interpretation might be justified on the basis of the court's statement that the approach "shall no longer exclusively control [appraisal] proceedings." 457 A.2d at 713.

144. As stated by the court in *Lynch* and repeated in *Weinberger*, controlling shareholders who stand on both sides of a merger transaction are required to disclose "all information germane to the transaction in issue." *Id.* at 710 (quoting *Lynch I*, 383 A.2d at 281.

145. See note 92 and accompanying text supra.
undercut the impact of *Weinberger* on controlling shareholders.\footnote{Id.} If a parent corporation utilizes these devices when merging with a subsidiary, the court has indicated that close judicial scrutiny would not be necessary and that the strict disclosure requirements imposed by *Weinberger* might not be applicable.\footnote{Id. But see *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (conclusion of independent committee of directors to dismiss derivative action subject to two prong judicial scrutiny into independence and good faith of committee as well as the merits of the decision made by the independent committee). See also *Brudney, The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597 (1982).} If the *Weinberger* criteria are not applicable, the Delaware Supreme Court may have to shift its focus from “entire fairness” to “entire independence.”

*Ellen V. Kittredge*