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Note

NODAK BANCORPORATION v. CLARKE: REDEFINING THE RIGHTS OF MINORITY SHAREHOLDERS IN A FREEZE-OUT MERGER UNDER THE NATIONAL BANK ACT

I. INTRODUCTION

Section 215a(a) of the National Bank Act authorizes national and state banks to merge, upon the affirmative vote of the majority shareholders of each participating bank and with the approval of the Comptroller of Currency, into national banking associations.1 Section 215a(b) entitles

1. 12 U.S.C. § 215a(a) (1988). Section 215a of the National Bank Act, entitled “[m]ergers of national banks or State banks into national banks,” provides in pertinent part:

(a) Approval of Comptroller, board and shareholders; merger agreement; notice; capital stock; liability of receiving association

One or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association. The merger agreement shall—

(1) be agreed upon in writing by a majority of the board of directors of each association or State bank participating in the plan of merger;

(2) be ratified and confirmed by the affirmative vote of the shareholders of each such association or State bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State bank if the laws of the State where it is organized so require, at a meeting to be held on the call of the directors, after publishing notice of the time, place, and object of the meeting for four consecutive weeks in a newspaper of general circulation published in the place where the association or State bank is located, or, if there is no such newspaper, then in the newspaper of general circulation published nearest thereto, and after sending such notice to each shareholder of record by certified or registered mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice, but any additional notice shall be given to the shareholders of such State bank which may be required by the laws of the State where it is organized. Publication of notice may be waived, in cases where the Comptroller determines that an emergency exists justifying such waiver, by unanimous action of the shareholders of the association or State banks;

(3) specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association; and

(915)
dissenting shareholders to the cash value of their shares in the merged corporation. Sections 215a(c) and (d) provide detailed methods for the

(4) provide that the receiving association shall be liable for all liabilities of the association or State bank being merged into the receiving association.


A national bank is defined as a “corporate entit[y] charged with duties to the public, and [is] more than a mere private corporation for profit.” Michie, supra, Ch. 15, § 1, at 2. National banks are privately owned, but are instrumentalities of the federal government and operate as fiscal agents for the federal government. Id. at 3. Congress created national banks for the public purposes of providing a uniform and national currency, establishing a market for general government loans and promoting other fiscal policies of the United States. Id. at 3-4.

The United States banking industry operates as a dual system, consisting of national banks, which are chartered and examined by the Office of the Comptroller of the Currency, and state banks, which are chartered and regulated by state agencies. Pitts & Cranmore, supra, at 789. The National Bank Act of 1864, Act of June 5, 1864, Ch. CVI, 13 Stat. 99 (1864), created the national banking system, in order to “foste[r] a policy of competitive equality between national and state chartered banks.” Pitts & Cranmore, supra, at 789-90. National banks operate pursuant to state laws except to the extent that such laws are inconsistent with federal laws under the National Bank Act. Id. at 790.

A bank consolidation is “a transaction in which two or more preexisting [bank] institutions join together and create a new [bank] institution.” Id. at 811 & n.137. A bank merger is “a transaction in which one of the pre-existing [bank] institutions survives with the other(s) disappearing into it.” Id.

The statutory provisions for mergers and consolidations involving national banks are dependent on whether the transaction involves a merger or consolidation and whether the resulting bank is a national or state bank. Id. Section 214a governs mergers and consolidations in which a state bank is the surviving bank institution. 12 U.S.C. § 214a (1988). Section 215 governs consolidations in which a national bank is the newly created entity. 12 U.S.C. § 215 (1988). Section 215a governs mergers in which a national bank is the surviving entity. 12 U.S.C. § 215a (1988). NoDak Bancorporation v. Clarke, 998 F.2d 1416 (8th Cir. 1993), involved the merger of two national banks, and therefore § 215a is the applicable provision analyzed in this Note.

2. 12 U.S.C. § 215a(b) (1988). Section 215a(b) of the National Bank Act provides in pertinent part:

(b) Dissenting shareholders

If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating in the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the share so held by him when such merger shall be approved by the Comptroller upon written request made.
appraisal and sale of the dissenting shareholders' interests.  

Recently, federal courts have begun to address the issue of whether, through the use of a freeze-out merger technique, a national or state bank's majority shareholders may require the minority shareholders to take cash for the value of their shares instead of shares in the newly

to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.

Id.

3. 12 U.S.C. §§ 215a(c)-(d) (1988). Sections 215a(c) and (d) of the National Bank Act provide in pertinent part:

(c) Valuation of shares

The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

(d) Application to shareholders of merging associations: appraisal by Comptroller; expenses of receiving association; sale and resale of shares; State appraisal and merger law

If, within ninety days from the date of consummation of the merger, for any reason one or more of the appraisers is not selected as herein provided, or the appraisers fail to determine the value of such shares, the Comptroller shall upon written request of any interested party cause an appraisal to be made which shall be final and binding on all parties. The expenses of the Comptroller in making the reappraisal or the appraisal, as the case may be, shall be paid by the receiving association. The value of the shares ascertained shall be promptly paid to the dissenting shareholders by the receiving association. The shares of stock of the receiving association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the receiving association at an advertised public auction, and the receiving association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholders. The appraisal of such shares of stock in any State bank shall be determined in the manner prescribed by the law of the State in such cases, rather than as provided in this section, if such provision is made in the State law; and no such merger shall be in contravention of the law of the State under which such bank is incorporated. The provisions of this subsection shall apply only to shareholders of (and stock owned by them in) a bank or association being merged into the receiving association.

Id.
merged national bank. In \textit{Lewis v. Clark}, the United States Court of Appeals for the Eleventh Circuit held that minority shareholders may not, over their objections, be frozen out and required to take cash for their shares, because § 215a does not expressly grant statutory authority for freeze-out mergers. The United States Court of Appeals for the Eighth Circuit, however, recently addressed the issue of cash-only freeze-out mergers in \textit{NoDak Bancorporation v. Clarke} and interpreted § 215a differently. The \textit{NoDak} court held that a freeze-out merger requiring minority shareholders to accept solely cash in exchange for their shares is not inconsistent with the statutory language of § 215a and, therefore, should be permitted.

This Note examines the development of freeze-out mergers and the legislative history and judicial interpretations of § 215a of the National Bank Act. Specifically, this Note considers the issue of whether the Eighth Circuit's decision in \textit{NoDak} is not inconsistent with the National Bank Act's statutory scheme. This Note also considers \textit{NoDak} in light of the Eleventh Circuit's decision in \textit{Lewis}. Further, this Note addresses the effects of \textit{NoDak} on determining minority shareholders' rights in freeze-out mergers under the National Bank Act. Finally, this Note suggests an alternative that balances the rights of both the minority and majority shareholders. This alternative would permit freeze-out mergers to occur while ensuring that minority shareholders receive a fair value for their shares.

4. For a further explanation and discussion of freeze-out mergers, see infra notes 29-54 and accompanying text.
5. 911 F.2d 1558 (11th Cir. 1990) (per curiam).
6. \textit{Id.} at 1560. For a further discussion of the \textit{Lewis} decision, see infra notes 64-72 and accompanying text.
7. 988 F.2d 1416 (8th Cir. 1993).
8. \textit{Id.} at 1420.
9. \textit{Id.} For a further discussion of \textit{NoDak}, see infra notes 73-142 and accompanying text.
10. For a discussion of the historical common law treatment of minority shareholders and the development of freeze-out mergers, see infra notes 15-54 and accompanying text. For a discussion of the legislative history and judicial interpretations of § 215a of the National Bank Act, see infra notes 55-72 and accompanying text.
11. For a further discussion of the National Bank Act's statutory scheme, see infra notes 55-57 and accompanying text.
12. For a further discussion of the Eleventh Circuit's decision in \textit{Lewis}, see infra notes 64-72 and accompanying text.
13. For a further discussion of the Eighth Circuit's decision in \textit{NoDak}, see infra notes 73-142 and accompanying text. For a discussion of the impact of freeze-out mergers on minority shareholder rights, see infra notes 147-57 and accompanying text.
14. For a discussion of an alternative to \textit{NoDak}, see infra notes 158-72 and accompanying text.
II. BACKGROUND

A. Historical Perspective: Traditional Common Law Treatment of Minority Shareholders

Both the historical changes that have taken place in corporation law and the techniques that have been used to combine corporations set the stage for consideration of minority shareholders' rights in freeze-out mergers under the National Bank Act. \(^{15}\) In the mid-nineteenth century, at common law, a corporation could only affect a merger or similar transaction if it had the unanimous consent of its shareholders. \(^{16}\) Courts viewed the corporate charter as a contract, both among the corporation's shareholders and between the corporation and the state, under which every shareholder had vested rights. \(^{17}\) A shareholder's vested rights in-

15. National bank mergers involve compliance with a complicated matrix of federal and state laws including corporation, securities and banking regulations. Pitts & Cranmore, supra note 1, at 789. The bank merger procedures under the National Bank Act are determined by the laws of the jurisdictions of the participating banks. Tortoriello, supra note 1, at 77. For a merger involving a bank holding company, state corporate law governs. Id. For a bank merger in which the acquired bank is a state bank, state banking law governs. Id. Finally, for bank mergers in which the acquired bank is a national bank, § 215a of the National Bank Act is the governing provision. Id.


For an in-depth discussion of the development of shareholder consent requirements to effect a merger or other fundamental corporate changes, see O'Neal, supra, § 3.03, at 217-21; William J. Carney, Fundamental Corporate Changes, Minority Shareholders, and Business Purposes, 1980 AM. B. FOUND. RES. J. 69, 77-82 (1980); Norman D. Lattin, Remedies of Dissenting Stockholders Under Appraisal Statutes, 45 HARV. L. REV. 233, 234-44 (1931); Irving J. Levy, Rights of Dissenting Shareholders to Appraisal and Payment, 15 CORNELL L.Q. 420, 420-22 (1930).


Corporation law has long reflected the contractual rights of partnerships and joint stock associations in which no power can be exercised without the consent of all. Carney, supra note 16, at 77. The rights of shareholders were treated similar to property rights that could not be altered or impaired by legislative enactment. Id. at 77-78. States and shareholders viewed the corporation as tangible property created by a sovereign legislature and owned equally by all the shareholders. Bayless Manning, The Shareholders' Appraisal Remedy: An Essay for Frank Coker, 72 YALE L.J. 223, 246 (1962). Any fundamental change, such as a merger, that occurred without unanimous consent, violated the common law and threatened the shareholders' constitutional right of freedom of contract to maintain an equity interest in a corporation. Charles A. Lynch, A Concern for the Interest of Minority Shareholders
cluded the right to maintain an equity interest in the corporation.\textsuperscript{18}

In the late nineteenth century, the common law rule of unanimous shareholder consent proved to be a formidable restriction on American corporate growth.\textsuperscript{19} Therefore, state legislatures enacted statutes permitting authorization of a merger or a similar transaction by less than unanimous consent.\textsuperscript{20}

\textit{Under Modern Corporation Laws}, 3 J. Corp. L. 19, 19 (1977); see also Manning, supra, at 246 (discussing nineteenth century view on mergers and shareholders' constitutional right of freedom of contract).

18. Accord Farmers' Loan & Trust Co. v. New York & N. Ry., 44 N.E. 1043, 1051 (N.Y. 1896) (enjoining controlling stockholders from foreclosing mortgage on corporate property when controlling shareholder caused corporation to default on bonds to acquire corporation's assets); see Wright v. Oroville Gold, Silver, & Copper Mining Co., 40 Cal. 20, 29 (1870) (holding majority shareholders could not force minority shareholders to relinquish their equity interest in corporation); see also Kean, 9 N.J. Eq. at 413-14 (holding proposed sale of corporation without minority shareholder approval is defective because majority shareholders are not empowered to force company to sell its assets solely because majority wishes to terminate its investment).


Unanimous shareholder consent was required for corporate changes such as a sale of all or substantially all of a corporation's assets, fundamental changes in the nature of the business by corporate charter amendment, mergers or consolidations, or changes in a corporation's capitalization. Levy, supra note 16, at 420. State legislatures began to recognize that the requirement for unanimous consent for fundamental changes in a corporation's organization created potential problems. Weiss, supra note 17, at 629. A minority shareholder who exercised his or her single vote could enjoy a tyrannical hold on a corporation and impede economic progress by blocking any desirable commercial transactions. \textit{Id.} From the corporation's standpoint, shifting markets and varying financial requirements demanded "an ability to adapt to changes and periodically to reorganize corporate structure in order to remain competitive in the marketplace." Rogers, supra, at 630. To allow the decision of a single stockholder to impede the making of a necessary business decision would have an adverse effect on the vitality of the corporation. \textit{Id.}
mous consent, if approved by the corporation's board of directors and a majority or supermajority of its shareholders. These statutes typically granted dissenting shareholders an appraisal right—the right to relinquish their stock in return for its appraised cash value instead of exchanging their stock for stock in the newly-merged corporation.

Despite the availability of minority shareholders' appraisal rights, many courts remained hostile to majority shareholders' attempts to force out minority shareholders. For example, in *Southern Pacific Co. v. Bo-


21. See, e.g., 21 Del. Laws 273 (1899); 1896 N.J. Laws 185. Early merger and consolidation statutes generally did not create the potential for minority shareholders to be frozen out of the newly merged corporation because all shareholders were entitled to receive common stock in the surviving corporation. Robert B. Thompson, Squeeze-Out Mergers and the "New" Appraisal Remedy, 63 Wash. U. L.Q. 415, 418 (1984); Elliot J. Weiss, Balancing Interests In Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc., 8 Del. J. Corp. L. 1, 4 (1983). Nevertheless, one commentator has suggested that such a potential still existed. Jeffrey A. Fillman, Cash and Property as Consideration in a Merger or Consolidation, 62 Nw. U. L. Rev. 837, 852-53 (1968). For example, Fillman has suggested that in a stock-for-stock merger, the minority shareholders could be offered consideration so inadequate that they are effectively forced to accept the cash appraised value for their shares instead of stock in the merged corporation. Id. at 852. Also, controlling shareholders desiring to freeze-out minority shareholders could issue short-term debt or fractional shares to the minority shareholders in exchange for the minority shareholders' shares, thereby effectively preventing the minority shareholders' participation in the newly-merged company. Id. at 853.

Some courts invalidated early merger statutes because such statutes did not provide the dissenting minority shareholders with cash payments for their shares. See, e.g., Lauman v. Lebanon Valley R.R., 30 Pa. 42, 48-49 (1858) (holding that dissenting shareholders cannot be compelled to accept stock of merged corporation, but are entitled to cash value of shares); Winfree v. Riverside Cotton Mills, 113 Va. 717, 724 (1912) (holding that dissenting shareholders are not required to exchange old shares for shares of newly-merged company, but are entitled to cash value of shares). Consequently, in most states, legislatures enacted statutes that gave dissenters the right to request an appraisal where the majority and minority shareholders could not reach an agreement as to the value of the dissenters' shares and to demand the appraised cash value for their shares. Fletcher, supra note 19, § 5906.10, at 376; Levy, supra note 16, at 421; Allred, supra note 19, at 197-98.

Today, all states and the District of Columbia have statutes that provide for dissent and appraisal rights upon the occurrence of specified events. Fletcher, supra note 19, § 5906.10, at 376; Michael G. Schinner, Dissenting Shareholders' Statutory Right to Fair Cash Value: Armstrong v. Marathon Oil Co., 22 Akron L. Rev. 261, 265 n.32 (1989); Allred, supra note 19, at 198 n.32-33. Although these statutes vary in scope and form, nearly all provide for appraisal rights upon a merger or consolidation.

22. Weiss, supra note 17, at 629; Julie Gwyn Hudson, Comment, The Exclusivity of the Appraisal Remedy Under the North Carolina Business Corporation Act: Deciding the
23. the United States Supreme Court considered a minority shareholders' challenge to a merger in which the controlling shareholders of a corporation attempted to exclude the minority shareholders from equity participation in the newly merged corporation. In 1913, the minority shareholders of the old Houston Company brought suit in the Supreme Court of New York against Southern Pacific, old Houston Company's majority shareholder. The minority shareholders sought to have Southern Pacific declared the trustee for them in the stock of the newly-merged Houston Company and for an accounting. The United States Court of

Standard of Review for Cash-Out Mergers, 69 N.C. L. Rev. 501, 506 (1991). Weiss stated that the courts' hostility to freeze-out mergers was due to the fact that "no state legislature expressly granted [the power] to a corporation or its majority shareholders ... to force minority [shareholders] to relinquish ... [their] interest." Weiss, supra note 17, at 629; see, e.g., Southern Pac. Co. v. Bogert, 250 U.S. 483, 492 (1919) (requiring that controlling shareholders offer minority shareholders equity interest in merged corporation); Small v. Small, 157 N.E. 261, 264 (N.Y. 1927) (same). Courts considered "the preservation of minority shareholders' equity interests to be necessary to stimulate investment, to enforce the [fiduciary] obligations of [majority] shareholders ... or to [enforce] the state legislatures' presumed intent to approve only real dissolutions, not ... transactions that [do not] involve changes in the nature ... of the dissolved corporation's business." Weiss, supra note 17, at 630; see, e.g., Ervin v. Oregon Ry. & Navigation Co., 27 F. 625, 635 (C.C.S.D.N.Y. 1886) (granting minority shareholders lien on property expropriated by majority based on majority shareholders' fiduciary duty to minority shareholders to allow them to participate in gain from sale of property); In re Paine, 166 N.W. 1036, 1038-39 (Mich. 1918) (granting minority shareholders injunction against dissolution by majority shareholders because state legislature did not intend to allow dissolution of successful company); Kavanaugh v. Kavanaugh Knitting Co., 128 N.E. 148, 152-53 (N.Y. 1919) (granting cause of action to minority shareholders frozen out in reorganization because majority shareholders approved reorganization in bad faith and for personal gain, in violation of fiduciary duties to minority shareholders); Theis v. Spokane Falls Gaslight Co., 74 F. 1004, 1007 (Wash. 1904) (granting minority shareholders injunction against fraudulent dissolution by majority shareholders of solvent business where dissolved corporation's business would continue in new corporation formed by majority shareholders).


24. Id. at 498. Southern Pacific Company (Southern Pacific) dominated the Houston & Texas Central Railway Company, electing directors and officers through one of its subsidiaries, which was a majority owner of the Houston Company stock. Bogert v. Southern Pac. Co., 226 F. 500, 502 (E.D.N.Y. 1915), aff'd, 244 F. 61 (2d Cir. 1917), modified, 250 U.S. 483 (1919). In 1888, pursuant to a reorganization agreement, Southern Pacific dissolved the Houston Company and transferred its liabilities to Houston & Texas Railway Company. Id. at 504. The old Houston Company's bonds were exchanged for bonds of the new company, and all of the old Houston Company's stock was delivered to Southern Pacific. Id. at 505. However, the old Houston Company's minority shareholders did not receive any shares in the new Houston Company. Id. at 506.


26. Id. The case was originally removed to the United States District Court for the Eastern District of New York, where the court, after a hearing on the evidence, entered a decree for the minority shareholders. Id. at 487 (citing Bogert v. Southern Pacific Co., 226 F. 500, 512 (E.D.N.Y. 1915), aff'd, 244 F. 61 (2d Cir. 1917), modified, 250 U.S. 483 (1919)). On appeal, the United States Court of Appeals for
Appeals for the Second Circuit held that the majority shareholders owed a fiduciary duty to the minority shareholders and, on appeal, the United States Supreme Court affirmed.27 The Supreme Court suggested that the majority shareholders' fiduciary obligation is best fulfilled by requiring the majority to offer the minority shareholders a stock interest in the new corporation.28

### B. The Development of Freeze-Out Mergers

After World War II, the position of minority shareholders eroded as newly enacted cash merger statutes permitted only cash, rather than stock in the newly-merged corporation, to be distributed to the minority shareholders of the corporations involved in the transaction.29 The concept of

the Second Circuit affirmed the decree. *Id.* (citing Bogert v. Southern Pacific Co., 244 F. 61, 65 (2d Cir. 1917), modified, 250 U.S. 483 (1919)).

27. *Id.* at 487-88.

28. See *id.* The Supreme Court stated:
The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors. If through that control a sale of the corporate property is made and the property acquired by the majority, the minority may not be excluded from a fair participation in the fruits of its sale.

*Id.* (footnote omitted).


In 1936, New York was the first state to adopt a short-form merger statute that permitted the use of cash. Weiss, supra note 17, at 641; Hudson, supra note 22, at 507 n.32; see also Act of May 28, 1936, ch. 778, § 1(1), 1936 N.Y. Laws 1658 (current version at N.Y. Bus. Corp. Law § 905(a)(3) (McKinney 1986) (short-form merger statute)). A short-form merger statute permits: (1) a corporation that owns at least 90% of the stock of another corporation to merge the two corporations upon approval vote by the acquiring corporation’s board of directors; and (2) cash to be the only form of consideration paid by the parent to the minority shareholders under the merger plan. W. CARY & M. EISENBERG, CASES AND MATERIALS ON CORPORATIONS 1120 (6th ed. 1988). Long-form merger statutes have no threshold ownership requirement but do require the directors and shareholders of both corporations to vote on the proposed merger. Hudson, supra note 22, at 507 n.32. In 1957, Delaware adopted a short-form merger statute, modelled after the New York statute, that permitted cash as consideration in a merger. Weiss, supra note 17, at 648; see also Act of June 5, 1957, ch. 121, § 253(a), 51 Del. Laws 186 (1957) (current version at Del. Code Ann. tit. 8, § 253(a) (1991) (allowing cash as merger consideration)).
the freeze-out merger was developed pursuant to these new statutes.\textsuperscript{30} Frequently employed as a method of eliminating minority shareholders, the freeze-out merger derived its name from the fact that the minority shareholders who are forced to take cash for their shares are "frozen out" of the merged corporation.\textsuperscript{51} This freeze-out merger results in the majority shareholders owning a 100% equity interest in the surviving


30. Weiss, \textit{supra} note 17, at 650; Hudson, \textit{supra} note 22, at 507. A freeze-out merger is often also described as a "take-out," "squeeze-out" or "cash-out" merger. See, \textit{e.g.}, Thompson, \textit{supra} note 21, at 415 n.2 (discussing various terminology used to describe corporate transactions designed to eliminate minority shareholders from continued equity participation). For purposes of this Note, the term "freeze-out" merger will be used consistent with the terminology in \textit{NoDak}.


Weiss provides an excellent historical overview by tracing the development of freeze-out mergers through five phases. Weiss, \textit{supra} note 17, at 627-80. In phase one, under the vested rights doctrine, every shareholder had the right to retain his or her stock interest in a corporation, as well as the right to veto any fundamental corporate change. \textit{Id.} at 627-29. In phase two, which involved a retreat from the vested rights doctrine, legislatures permitted a corporation’s board of directors to authorize any change in a corporation’s business or charter, provided it was approved by a majority or supermajority of the corporation’s shareholders. \textit{Id.} at 629-31. In phase three, legislatures began to liberalize corporate laws further by enacting statutes that allowed the use of cash as consideration in mergers. \textit{Id.} at 632-41. In phase four, states enacted additional cash merger statutes that the courts interpreted as expressly authorizing freeze-out mergers. \textit{Id.} at 641-57. In phase five, the courts began to apply a business purpose and fairness test to determine the validity of a freeze-out merger. \textit{Id.} at 658-80. In a subsequent article, Weiss discusses phase six of the development in which courts seek to protect minority shareholders through a liberalized appraisal process rather than through the determination of whether the proposed transaction was properly motivated. Elliot J. Weiss, \textit{The Law of Take Out Mergers}: Weinberger v. UOP, Inc. \textit{Others In Phase Six,} 4 CARDOZO L. REV. 245 (1983).

Commentators have suggested that legislatures, in enacting the first cash merger statutes, did not intend either explicitly or implicitly to authorize freeze-out mergers as a means of eliminating minority shareholders. Courts, however, have interpreted cash merger statutes to permit


A multi-step freeze-out merger involves two separate transactions. McGarrity, supra, at 681. The first transaction involves the acquiring corporation making a tender offer to the target corporation’s shareholders to obtain a controlling interest in the target. Id. In the second transaction, the acquiring corporation with a controlling interest in the target then votes to merge the target into the acquiring corporation. Id. The acquiring corporation gives cash consideration to the target corporation’s shareholders who sold their shares in the tender offer, resulting in the acquiring corporation obtaining 100% ownership in the target. Id. 681-82. However, the minority shareholders of the target corporation, who refused to sell their shares in the tender offer, are frozen out from an equity interest in the newly-merged corporation. Id. at 682.

In a parent-subsidiary freeze-out merger, the parent corporation merges the subsidiary into the parent by using a short-form merger statute, which requires that the parent own a specified percentage in the subsidiary, usually 90-95%. Id. at 682 & n.18. The short-form merger statute allows the parent to freeze-out the subsidiary’s minority shareholders by requiring them to take cash for their equity interest. Id. at 683. For a discussion of the development of short-form merger statutes, see supra, note 29.

In a going private merger, the owners of the original target corporation are its controlling shareholders at the time of the proposed merger. McGarrity, supra, at 683. The controlling shareholders create a shell corporation and transfer its controlling interest in the target in exchange for shares in the shell corporation. Id. The shell corporation, having the controlling interest in the shell, then votes to merge the target into the shell. Id. Because the shell corporation gives cash in exchange for the shares in the target, the minority shareholders of the original target are frozen out from an equity interest in the newly-merged corporate entity (i.e., the shell corporation). Id. The controlling shareholders then own 100% of the shell corporation. Id. The going private merger often allows the controlling shareholder to take the merged corporation off a public stock exchange and avoid SEC reporting requirements and expenses. Id. at 683 & n.23.

33. Thompson, supra note 21, at 418; Hudson, supra note 22, at 507. Weiss, however, contended that the first cash mergers statutes implicitly authorized and facilitated freeze-out mergers. See Weiss, supra note 17, at 633 (stating that “it can be argued that [because] mergers usually contemplate the continuation of one of the merging corporations, allowing cash to be used as the sole consideration in a merger must serve the purpose of authorizing take outs of minority shareholder”). Weiss stated that the “first cash merger statutes were enacted as part of a general effort to provide additional flexibility in the structuring of mergers,” because cash could be used to effect a business combination or reorganization that resulted in a
the elimination of minority shareholders. The earliest case supporting a freeze-out under a cash merger statute was Beloff v. Consolidated Edison, Co. Beloff was a former minority shareholder of Consolidated Edison. Having been frozen out under New York's short-form merger statute, Beloff brought a suit challenging the constitutionality of the statute, claiming that it altered his vested right to retain his shareholder status. On appeal, the New York Court of Appeals affirmed the intermediate appellate court's decision and held that a shareholder did not have a vested right to continue his or her shareholder status after a merger. Rather, the court of appeals stated that "the merged corporation's shareholder has only one

freez out of minority shareholders. Id. at 641; see also Victor Brudney, Equal Treatment of Shareholders in Corporate Distributions and Reorganizations, 71 Cal. L. Rev. 1072, 1097 n.69 (1983) (noting that long-form and short-form merger statutes contemplated payment of cash to all shareholders, thereby allowing freeze-outs of minority shareholders). One commentator suggested that federal tax law changes in the 1960s, which permitted certain types of reorganizations to be nontaxable, motivated state legislatures to amend merger statutes to allow cash to be used as consideration. Russell M. Robinson, II, Elimination of Minority Shareholders, 61 N.C. L. Rev. 515, 517 (1983). Robinson also notes that the legislatures "probably did not foresee that [cash merger statutes] would be used as a means to eliminate minority shareholders." Id.

34. See Yanow v. Teal Indus., Inc., 422 A.2d 311, 317 (Conn. 1979) (holding that appraisal rights are exclusive remedy for dissenters under Connecticut short-form merger statute); Stauffer v. Standard Brands, Inc., 187 A.2d 78, 80 (Del. 1962) (noting that Delaware's short-form merger statute provides majority shareholders with convenient method to freeze-out minority shareholders); David J. Green & Co. v. Schenley Indus., Inc., 281 A.2d 30, 35-36 (Del. Ch. 1971) (allowing freeze-out of minority shareholders' interests under Delaware's long-form merger statute); Coyne v. Park & Tilford Distillers Corp., 154 A.2d 893, 896-97 (Del. Ch. 1959) (holding that purpose of Delaware's short-form merger statute is to allow parent to pay minority shareholders cash and thereby eliminate minority shareholders' interest in merged corporation); Teschner v. Chicago Title & Trust Co., 522 N.E.2d 54, 56 (Ill. 1984) (stating that purpose of short-form merger statute is "to provide the parent corporation with a means of eliminating the minority shareholders' interests in the subsidiary"); Pupecki v. James Madison Corp., 382 N.E.2d 1030, 1035 (Mass. 1978) (refusing to enjoin freeze-out asset sale and stating that appraisal is exclusive remedy in absence of fraud); Wilcox v. Stern, 219 N.E.2d 401, 404 (N.Y. 1966) (stating that New York merger statute "clearly anticipates a 'cash payout' by which minority stockholders may be frozen out of continued participation in the merged corporation"); Beloff v. Consolidated Edison Co., 87 N.E.2d 561, 565 (N.Y. 1949) (holding minority shareholder's only right is to appraisal); Blumenthal v. Roosevelt Hotel, Inc., 115 N.Y.S.2d 52, 57 (Sup. Ct. 1950) (refusing to enjoin freeze-out asset sale because minority shareholders have appraisal remedy); Blumner v. Federated Dep't Stores, Inc., 99 N.Y.S.2d 691, 694 (Sup. Ct. 1950) (same).

35. 87 N.E.2d 561 (N.Y. 1949).

36. Id. at 563.

37. Id. at 564-65. The trial court and the appellate court held that the statute was constitutional and dismissed Beloff's cause of action. Id. at 563.

38. Id. at 564. The Court of Appeals noted that the state legislature has the right under the state constitution to alter, suspend or repeal the charters of the corporation. Id. The court also noted that the constitutional provision that grants legislatures the authority to alter corporate charters is part of the contract or charter of every New York corporation. Id.
real right; to have the value of his [or her] holding protected, and that protection is given him [or her] by the right to an appraisal.\(^{39}\)

In light of the state courts' increasing support for freeze-out mergers, minority shareholders sought relief in the federal courts.\(^{40}\) Minority shareholders claimed that freeze-out mergers resulted in an undervaluation of their shares, thereby violating the antifraud provisions of the federal securities laws.\(^{41}\) At first, these minority shareholders achieved some

39. Id. at 564. The court stated:

[The minority shareholder] has no right to stay in the picture, to go along into the merger, or to share in its future benefits. [The minority shareholder] has no constitutional right to deliberate, consult or vote on the merger, to have prior notice thereof or prior opportunity to object thereto.

Id. at 564-65.

The Beloff court further noted that such restrictions are a result of the shareholder’s “status as a member of [the] minority.” Id. at 565. The court stated that only the legislature can authorize any needed reforms for the minority shareholders. Id. Accordingly, the court concluded by holding that the merger did not deprive the minority shareholders of their property rights without the due process of law or impair their contract rights. Id.

40. Mary Siegel, Tender Offer Defensive Tactics: A Proposal for Reform, 36 Hastings L.J. 377, 402-07 (1985); Weiss, supra note 21, at 25. State courts did not enforce majority shareholders' fiduciary duties and forced minority shareholders to seek injunctive relief in federal courts under claims of securities fraud for breach of fiduciary duty. Thompson, supra note 21, at 419; McCarrity, supra note 32, at 693. For a discussion of federal court cases involving freeze-out mergers, see infra notes 42-54 and accompanying text.


It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . . .

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990), provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
limited success in the federal courts.\textsuperscript{42} In \textit{Santa Fe Industries, Inc. v. Green},\textsuperscript{43} however, the United States Supreme Court stated its current position that absent fraud, a fully disclosed freeze-out merger does not fall within the limits of the federal securities law, and therefore is allowed.\textsuperscript{44}

In \textit{Santa Fe}, the minority shareholders of a subsidiary of Santa Fe Industries, Inc., a Delaware corporation, were frozen out in a merger and forced to accept an appraised cash value for their shares.\textsuperscript{45} The minority shareholders asserted that their stock interests were fraudulently appraised at an inadequate price.\textsuperscript{46} Further, the minority shareholders claimed that the merger constituted a "device, scheme or artifice to defraud" in violation of section 10(b) of the Securities and Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b-5.\textsuperscript{47} The minority shareholders also claimed that Santa Fe undertook the merger without any prior notice and that the merger lacked any justifiable business purpose because the merger's sole purpose was to eliminate the minority shareholders.\textsuperscript{48} The United States District Court for the Southern District of New York dismissed the case, finding that Santa Fe had made full disclosure.\textsuperscript{49} The Second Circuit reversed the district court's decision

\footnotesize{(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.}

\textit{Id.}


\textsuperscript{43} 430 U.S. 462 (1977).

\textsuperscript{44} \textit{Id.} at 473.

\textsuperscript{45} \textit{Id.} at 466.

\textsuperscript{46} \textit{Id.} at 467. The sum Santa Fe offered was $150 per share and the price the minority shareholders suggested was $772 per share. \textit{Id.}

\textsuperscript{47} \textit{Id.} For the pertinent text of § 10(b) and Rule 10b-5, see \textit{supra} note 41.

\textsuperscript{48} \textit{Santa Fe}, 430 U.S. at 468.

\textsuperscript{49} Green v. Santa Fe Indus., Inc., 391 F. Supp. 849, 854-55 (S.D.N.Y. 1975), \textit{rev'd}, 533 F.2d 1283 (2d Cir. 1976), \textit{rev'd}, 430 U.S. 462 (1977). Specifically, the district court held that because Santa Fe made full disclosure of the transaction,
in part, stating that Rule 10b-5 encompassed both informational and constructive fraud.\textsuperscript{50} The Second Circuit held that the minority shareholders' complaint stated a federal cause of action because the appraisal remedy under Delaware law was inadequate and Santa Fe lacked a business purpose in consummating the merger.\textsuperscript{51}

On appeal, the United States Supreme Court reversed the Second Circuit on the grounds that Santa Fe made full disclosure of the merger to the minority shareholders, therefore there were no "deceptive [or] manipulative" practices in violation of Rule 10b-5.\textsuperscript{52} The Supreme Court held that the minority shareholders' sole remedy, if dissatisfied with the terms of the merger, was to seek an appraisal proceeding as provided under Delaware state law.\textsuperscript{53} As a result, federal courts forced minority shareholders to accept limited redress in state courts.\textsuperscript{54}

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there was no § 10(b) violation. \textit{Id}. The court also held that Rule 10b-5 does not override Delaware corporate law procedures, which do not require prior notice or a business purpose for a short-form merger. \textit{Id}. at 853.


51. \textit{Id}. at 1291.


53. \textit{Id}. at 474 n.14. The Court explained that it would be inappropriate for the federal courts to interpret Rule 10b-5 to prohibit transactions that are permissible under state law and are neither deceptive or manipulative. \textit{Id}. at 473-76. Interpreting the statutory language of Rule 10b-5, the Supreme Court stated:

Absent a clear indication of congressional intent, we are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden. . . . There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to 'cover the corporate universe.' \textit{Id}. at 479-80 (footnote omitted). Although the \textit{Santa Fe} Court suggested the need for federal fiduciary standards, it concluded that federal courts could not create such standards under the language of Rule 10b-5 and § 10(b) of the Securities Exchange Act of 1934. \textit{Id}. at 478-79; see also Bruce Martin Mundorf, Note, Santa Fe Industries, Inc. v. Green: The Supreme Court Reaffirms the Necessity of Non-Disclosure to Maintain an Action Under Rule 10b-5, 5 DEL. J. CORP. L. 76 (1979) (discussing Rule 10b-5 and breach of fiduciary aspects of \textit{Santa Fe}); Note, \textit{Suits for Breach of Fiduciary Duty Under Rule 10b-5 After Santa Fe Industries, Inc. v. Green}, 91 HARV. L. REV. 1874 (1978) (same).

54. Siegel, supra note 40, at 402; Weiss, supra note 17, at 657. Under the threat of possible congressional action to create federal fiduciary standards as suggested in \textit{Santa Fe}, the Delaware Supreme Court responded through a series of landmark decisions that expanded the use of state fiduciary duties to limit majority shareholders' statutory rights in freeze-out mergers. Thompson, supra note 21, at 420; see also Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979); Singer v. Magnavox Corp., 380 A.2d 969 (Del. 1977); Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977).

Following the \textit{Santa Fe} decision, the Delaware Supreme Court, in \textit{Singer}, held that compliance with the long-form merger statutes would no longer validate a freeze-out merger. \textit{Singer}, 380 A.2d at 980. Specifically, the court stated that a
C. The National Bank Act and Freeze-Out Mergers

Although the states have enacted the majority of corporation and bank merger statutes, § 215a of the National Bank Act governs mergers involving national banks. Section 215a does not specifically address freeze-out mergers. However, the legislative history of § 215a indicates Congress' intent to simplify the consolidation of national banks. Additionally, amendments to § 215a in 1952 and 1959 attest to Congress’ desire to facilitate the merger of national banks.

long-form merger, "made for the sole purpose of freezing out minority stockholders, is an abuse of the corporate process; and . . . [supports] a cause of action for violation of fiduciary duty." Id. The court required majority shareholders to satisfy their fiduciary duties to minority shareholders by establishing a valid business purpose for freeze-out mergers. Id. In addition, the court required the majority shareholders to prove that the freeze-out mergers are entirely fair to the minority shareholders under the "entire fairness" test established in Sterling v. Mayflower Hotel Corp., which refers to the court's scrutiny of the entire fairness of the transaction as a whole. Id. at 976 (citing Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109-10 (Del. 1952)); see also Roland, 407 A.2d at 1036 (holding that fiduciary requirements of Singer are equally applicable to short-form freeze-out mergers).

The Singer business purpose test was eroded in Tanzer, where the Delaware Supreme Court held that the business purpose test is satisfied even if the merger serves only the interest of the majority shareholders. Tanzer, 379 A.2d at 1123. In Tanzer, the court found that the majority shareholders' self-interested motive of effecting a merger to obtain long-term financing was a valid business purpose. Id. at 1123-24.

In Weinberger, the Delaware Supreme Court established a new standard for freeze-out mergers. Weinberger, 457 A.2d at 703. Reversing Singer, Roland and Tanzer in part, the Weinberger court held that majority shareholders did not need a valid business purpose to effect a freeze-out merger, but if a freeze-out merger involved a conflict of interests, the majority shareholders must establish the "entire fairness" of the transaction through a fair price and fair dealing for the minority shareholders. Id. at 711. The Weinberger court shifted the burden of proving fraud or unfairness on the minority shareholders if the freeze-out had been approved by an informed vote of the minority shareholders. Id. at 703. If the minority shareholders could not specify acts of "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching," the minority shareholders' sole remedy was a statutorily mandated appraisal as modified by Weinberger. Id. at 714-15. For a further discussion of the Weinberger "entire fairness" test and appraisal remedy, see infra notes 162-67 and accompanying text.


It is the purpose of this bill to remove the necessity of liquidation and permit the consolidation to take place upon the affirmative vote of the stockholders of each association, such consolidation being permitted under the charter of either of the existing banks. Proper provision is made by the proposed law to protect any dissenting stockholder in either corporation, who does not desire to be connected with the consolidated bank.

Id.

Caselaw interpreting the various sections of the National Bank Act indicates that courts have adopted the view that the appraisal process adequately protects shareholders.\(^5\) For example, in *Bloomington National Bank v. Tefler*,\(^6\) the majority shareholders of Bloomington National Bank attempted to gain 100% ownership of the bank through a reorganization plan involving a merger.\(^7\) The minority shareholders, frozen out in the merger without appraisal rights, claimed that the reorganization violated the National Bank Act.\(^8\) On appeal, the United States Court of Appeals

gressed intended to bring the National Bank Act in parity with state statutes. 1952 U.S.C.C.A.N. at 2154.

Prior to 1952, federal law provided that any shareholder dissenting to a proposed merger could obtain the cash value of the shares held, that is, both the dissenters holding the acquired bank stock and dissenters who held the acquiring bank stock. \(^9\) However, many state statutes provided that only the dissenters who held acquired bank shares were entitled to cash appraisal rights. \(^10\) Therefore, consolidation under federal law was less advantageous than under state law because the banks were more likely to pay appraisal value to dissenters. \(^11\) Congress enacted the change to \$215a(b) to ensure parity between the federal and state systems by granting appraisal rights only to dissenters who had held the acquired bank’s stock. \(^12\)

Similarly, when Congress last amended the merger provisions of the National Bank Act in 1959, the Senate Report stated:

> The amendments … were intended only to improve the procedural and technical provisions relating to consolidations and mergers. The committee did not intend to affect in any way the substantive authority of banks to consolidate or merge, or the substantive authority of the Comptroller of the Currency to review and approve such consolidations and mergers. \(^13\)

\(^5\) See, e.g., NoDak Bancorporation v. Clarke, 998 F.2d 1416, 1423 (8th Cir. 1993) (holding that minority shareholders are adequately protected through appraisal process); Boone v. Carlsbad Bancorporation Inc., 972 F.2d 1545, 1553 (10th Cir. 1992) (noting that Comptroller’s appraisal of dissenting shareholders’ interest is appropriate remedy); Bloomington Nat’l Bank v. Tefler, 916 F.2d 1305, 1308 (7th Cir. 1990) (stating that appraisal right provides adequate protection to minority shareholders); Beerly v. Department of Treasury, 768 F.2d 942, 946 (7th Cir. 1985) (noting that appraisal process protects shareholders by giving the cash equivalent of relinquished stock ownership), \textit{cert. denied}, 475 U.S. 1010 (1986); Nehring v. First DeKalb Bancshares, Inc., 692 F.2d 1138, 1141 n.8 (7th Cir. 1982) (noting that dissenting shareholders’ rights are protected through appraisal under \$215a(c)). \textit{But see} Lewis v. Clark, 991 F.2d 1558, 1561 (11th Cir. 1990) (per curiam) (holding that without express statutory authority allowing freeze-out mergers, minority shareholders are not adequately protected through appraisal rights). For a further discussion of *Bloomington*, see \textit{infra} notes 59-63 and accompanying text. For a further discussion of *Lewis*, see \textit{infra} notes 64-72 and accompanying text. For a further discussion of *NoDak*, see \textit{infra} notes 73-142 and accompanying text.

\(^6\) 916 F.2d 1305 (7th Cir. 1990).

\(^7\) \textit{Id.} at 1307.

\(^8\) \textit{Id.} The United States District Court for the Southern District of Indiana granted summary judgment to the minority shareholders. \textit{Id.} The district court held that the reorganization violated \$215a of the National Bank Act by not giving the minority shareholders appraisal rights. \textit{Id.}
for the Seventh Circuit affirmed the district court's decision that Bloomington's action of reacquiring its capital stock at a price significantly lower than the current stipulated value violated the dissenting shareholders' appraisal rights provided by the National Bank Act. 62 The Seventh Circuit indicated that the minority shareholders were not adequately protected in such a reorganization plan because the minority shareholders were frozen out in violation of their appraisal rights. 63

Despite increasing judicial acceptance of freeze-out mergers, the United States Court of Appeals for the Eleventh Circuit, in Lewis v. Clark, 64 reinstated the traditional view of minority shareholders' rights by providing complete protection for minority shareholders. 65 In Lewis, the Comptroller approved a bank merger in which Lewis State Bank's minority shareholders received cash in exchange for their shares, while the majority shareholders received stock in the newly-merged national bank. 66 The minority shareholders brought an action in district court challenging the Comptroller's decision. 67 On appeal, the United States Court of Appeals for the Eighth Circuit reversed the district court. 68 The Eleventh Circuit held that absent express statutory authority, the Comptroller of the Currency has no authority to approve a freeze-out merger of a bank where the minority shareholders are forced to take cash instead of stock in the merged bank. 69 The Lewis court adopted the equity tradition of protect-

62. Id. Specifically, the court stated:
Bloomington has attempted to do nothing more than squeeze-out the minority shareholders by repurchasing its stock and reducing it to fractional shares through a reverse stock split, thereby necessitating the bank's purchase of the fractional shares. The district court correctly concluded that the bank's plan "was, at best, a clever little scheme having only the color of legality and cannot be upheld."
Id. at 1308-09 (quoting Bloomington National Bank v. Telfer, 699 F. Supp. 190, 194 (S.D. Ind. 1988)).

63. Id. at 1308. The Seventh Circuit noted that "courts have recognized Congress's [sic] interest in protecting the rights of a bank's minority shareholders. Congress has provided appraisal rights to those stockholders when attempts are made to eliminate them." Id. (citing Beerly v. Department of Treasury, 768 F.2d 942, 944-45 (7th Cir. 1985), cert. denied, 475 U.S. 1010 (1986)).

64. 911 F.2d 1558 (11th Cir. 1990) (per curiam).
65. Id. at 1561.
66. Id. at 1559-60.
67. Id. at 1560. The district court upheld the Comptroller's approval of the merger. Id.
68. Id.

69. Id. The Lewis court noted that § 215a of the National Bank Act authorizes the use of cash as consideration for stock in mergers. Id. at 1560-61. However, the statute does not specifically state that the minority shareholders are required to accept cash "where not all stockholders are required to accept cash." Id. at 1561 (emphasis added). The Eleventh Circuit concluded by stating that it did "not discern the permissive and explicit authority from Congress that is necessary to support the Comptroller's approval of the take out merger in this banking case." Id. (citing Bloomington National Bank v. Telfer, 699 F. Supp. 190, 193-94 (S.D. Ind. 1988)).
ing minority shareholders set forth in Bogert. The Eleventh Circuit further stated that "if owners of the same class of stock are to be treated differently, there should be some specific decision to that effect by Congress." In addition, the Lewis court refused to accept the emerging view that minority shareholders are adequately protected in a bank merger through appraisal rights.

III. **NoDak Bancorporation v. Clarke**

In NoDak Bancorporation v. Clarke, the Eighth Circuit considered whether the merger of two national banks in North Dakota, which required the minority shareholders of the acquired bank to accept cash in exchange for their stock, was inconsistent with § 215a of the National Bank Act. NoDak, a minority shareholder, contended that the merger violated § 215a because it denied the minority shareholders any possibility of receiving shares in the merged corporation. The Eighth Circuit examined the legislative history and statutory language of § 215a, as well as the Eleventh Circuit's holding in Lewis v. Clark, to determine the validity of the merger and whether the merger was not inconsistent with the National Bank Act.

Prior to the merger at issue, Liberty National Bank and Trust Company of Dickinson (Liberty) operated as a national bank in North Dakota. Dickinson Bancorporation, Inc. (Dickinson), a bank holding company, was the majority shareholder in Liberty. Minority shareholders included private individuals and NoDak, also a bank holding company.

70. Id. Specifically, the Eleventh Circuit disagreed with the district court's opinion that because the control position of the minority shareholders was dissimilar to that of the majority, the minority was not entitled to equal treatment. Id. The Lewis court noted that the district court's position was contrary to the "long standing equity tradition of protection of minority shareholders in American jurisprudence." Id. (citing Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-88 (1919)).

71. Id.

72. Id. The Lewis court stated that in the absence of legislative history rejecting the traditional view of protecting minority shareholders, it cannot be said that the legislature intended to depart from that tradition. Id. (citing Aaron v. SEC, 446 U.S. 680, 709-12 (1980) (Blackmun, J., concurring in part and dissenting in part)). For a discussion of the emerging view that minority shareholders are adequately protected through appraisal rights, see supra notes 58-63 and accompanying text.

73. 998 F.2d 1416 (8th Cir. 1993).

74. Id. at 1420. For the pertinent text of 12 U.S.C. § 215a, see supra notes 1-3.

75. NoDak, 998 F.2d at 1418.

76. 911 F.2d 1558, 1561 (11th Cir. 1990) (per curiam). For a further discussion of Lewis, see supra notes 64-72 and accompanying text.

77. NoDak, 998 F.2d at 1419-21.

78. Id. at 1417.

79. Id.

80. Id. Specifically, Dickinson owned 73% of Liberty's outstanding shares. Id. NoDak and private individuals owned 21% and 6%, respectively. Id.
In January 1990, Liberty's board of directors approved a merger plan in which Liberty would merge with an interim bank called the New Liberty National Bank (New Liberty).81 Under the proposed merger plan, the resulting bank would operate under the existing name of Liberty National Bank and Trust Company.82 The plan also required the minority shareholders in the original Liberty to exchange their shares for cash, thereby leaving Dickinson as Liberty's sole shareholder upon the completion of the merger.83 In March 1990, pursuant to the National Bank Act, Liberty initiated and sought approval of the proposed merger from the Office of the Comptroller of the Currency (Comptroller).84 Not wishing to cash in its equity interest, NoDak filed a written objection to the proposed merger plan with the Comptroller.85 NoDak set forth the following arguments: (1) the proposed merger lacked a legitimate business purpose; (2) Liberty's majority shareholders had breached their fiduciary duties to the minority shareholders; and (3) the plan would squeeze out the minority shareholders who would receive less than the stock's fair market value.86

The Comptroller rejected NoDak's three arguments and, in August 1990, granted preliminary approval to Liberty's proposed merger plan.87

81. Id. at 1418. New Liberty was a wholly-owned subsidiary of Dickinson, created solely for facilitating the merger. Id.
82. Id.
83. Id. As a minority shareholder, NoDak objected to this plan because NoDak did not want to cash out its equity interest. Id.
84. Id. Section 215a(a) requires approval of a proposed bank merger by the Comptroller. 12 U.S.C. § 215a(a) (1988). For the pertinent text of § 215a(a) of the National Bank Act, see supra note 1.
85. NoDak, 998 F.2d at 1418.
86. Id. In March 1990, NoDak also commenced a state action in the North Carolina District Court for Stark County against Liberty National Bank and Trust Company and its shareholders, which included F.L. Clarkson, Ralph Roshau, Kenneth Mann, James Tracy, Robert D. Tracy, Alan Hann and Dickinson Bancorporation, "alleging a breach of fiduciary duties and entitlement to a substantial dividend." NoDak Bancorporation v. Clarkson, 471 N.W.2d 140, 141 (N.D. 1991). The district court dismissed the action on the grounds that the matter was preempted by 12 U.S.C. § 215a of the National Bank Act. Id. However, NoDak contended that its complaint for the declaration of a dividend was an independent cause of action and not pre-empted by § 215a. Id. at 144. The district court held that the dividend declaration was not a separate cause of action but was "inextricably intertwined with the merger issue that is subject to the administrative procedures provided in § 215a for the approval of the proposed organization, merger and the appraised value of NoDak's shares." Id. at 144-45.
87. NoDak, 998 F.2d at 1418. The Comptroller responded to NoDak's arguments in a memorandum dated July 13, 1990. Id. In the memorandum, the Comptroller rejected NoDak's argument that the merger lacked a legitimate business purpose. Id. The Comptroller also determined that the proposed merger met all the proper evaluative factors required by the National Bank Act and that the Board of Director's merger decision had a valid business purpose. Id. For the text of the evaluative factors that the Comptroller considers in analyzing a merger, see infra note 115 and accompanying text.

Regarding NoDak's allegation of breach of fiduciary duties, the Comptroller held that the merger plan met all of the procedural requirements of § 215a(a)-(b). NoDak, 988 F.2d at 1418. Responding to NoDak's final argument, the Comptroller
In October 1990, NoDak asked the Comptroller to review his decision in view of the Eleventh Circuit's recent decision in Lewis v. Clark.\(^8\) The Comptroller rejected NoDak's request and the merger took place in January 1991.\(^8\)

In June 1991, NoDak filed suit against the Comptroller in district court alleging the Comptroller's approval of the merger was arbitrary and not in accordance with the National Bank Act.\(^9\) NoDak argued that the terms of the merger did not permit the minority shareholders the opportunity to receive shares in New Liberty or Dickinson and, therefore, abused the minority shareholders' statutory rights.\(^9\) Accepting the Lewis rationale, the district court granted summary judgement in favor of NoDak, holding that the Comptroller lacked authority to approve the merger because it froze out the minority shareholders by requiring them to take cash instead of shares in New Liberty.\(^9\) The Comptroller, Dickinson and the surviving New Liberty bank appealed the decision to the Eighth Circuit.\(^9\) NoDak was the first time the Eighth Circuit addressed the issue of whether a merger in which the minority shareholders are required to accept cash in exchange for their stock is consistent with § 215a

also noted that NoDak's interest was not being frozen out and would be protected by § 215a(c), which provides an appraisal process to value NoDak's shares. \(\text{id.}\)

Under the original merger proposal, NoDak's interest was appraised at $1,644 per share. \(\text{id.}\) at 1419 n.3. After the merger agreement was amended, the appraised value was increased to $1,790 per share. \(\text{id.}\) Exercising its rights under § 215a(c), NoDak sought a final and binding appraisal from the Comptroller. \(\text{id.}\) The Comptroller appraised NoDak's interest at $2,215.67 per share, resulting in a total value of $1,870,025.48. \(\text{id.}\) For the pertinent text of 12 U.S.C. § 215a(c), see supra note 9.

88. NoDak, 998 F.2d at 1418. For a discussion of Lewis, see supra notes 64-72 and accompanying text.

89. NoDak, 998 F.2d at 1418. Specifically, the Comptroller noted that approval was proper "in light of the substantive and procedural provisions of the National Bank Act and the Lewis decision did not change that conclusion." \(\text{id.}\)

90. Id. NoDak filed the suit in the United States District Court for the District of North Dakota. \(\text{id.}\) at 1416. The district court decision is unpublished.

91. \(\text{id.}\)

92. \(\text{id.}\) For a further discussion of Lewis, see supra notes 64-72 and accompanying text.

93. NoDak, 998 F.2d at 1418. The Eighth Circuit reviewed the district court's grant of summary judgment de novo. \(\text{id.}\) (citing United States ex rel Glass v. Metrionic, Inc., 957 F.2d 605, 617 (8th Cir. 1992)). The Eighth Circuit stated that the standard of review in this case was whether the Comptroller's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." \(\text{id.}\) at 1419 (quoting 5 U.S.C. § 702 (1988)). The NoDak court stated that it owed no deference to the district court's legal conclusion on the National Bank Act. \(\text{id.}\) (citing First National Bank of Fayetteville v. Smith, 508 F.2d 1371, 1374 (8th Cir. 1974), cert. denied, 421 U.S. 930 (1975)). However, the NoDak court further noted that "[t]he Comptroller of the Currency's interpretation of the National Bank Act is entitled to great deference." \(\text{id.}\) (quoting Independent Bankers Ass'n of American v. Clarke, 917 F.2d 1126, 1129 (8th Cir. 1990) and Arkansas State Bank Commissioner v. Resolution Trust Corp., 911 F.2d 161, 174 (8th Cir. 1990)).
of the National Bank Act.\textsuperscript{94}

The Eighth Circuit commenced its analysis by focusing on the statutory language of § 215a of the National Bank Act.\textsuperscript{95} The appellants, the Comptroller, Dickinson and the surviving New Liberty Bank, argued that stock and cash, individually or in combination, are acceptable methods of compensation in a merger under the National Bank Act and, thus, minority freeze-out mergers are permissible.\textsuperscript{96} NoDak contended, however, that the Act does not specifically allow an acquiring bank to offer stock in exchange for a portion of the acquired bank's shares and, at the same time, give cash to eliminate the remaining shares of the same class of stock.\textsuperscript{97} Additionally, NoDak argued that the auction provisions of the Act rendered the minority freeze-out merger "inconsistent with the statutory scheme."\textsuperscript{98} NoDak concluded its argument by noting that "the overriding purpose" of the merger provisions of the National Bank Act were "to protect minority shareholders' rights" and that a freeze-out merger, which is "inherently unfair and contrary to the legislative intent," represented an abuse of those rights.\textsuperscript{99}

In addressing NoDak's first argument, that freeze-out mergers are inconsistent with the National Bank Act, Circuit Judge Magill, writing for the majority of the court, acknowledged that the merger provisions of the National Bank Act are susceptible to two different reasonable interpretations and that the statute does not specifically address freeze-out mergers.\textsuperscript{100}

First, the statute could be interpreted to mean that cash may only be used

\textsuperscript{94} Id. at 1417. Circuit Judge Magill noted that the NoDak case presented "one distinct issue of first impression for this court." Id.

\textsuperscript{95} Id. at 1419-21. For the pertinent statutory provisions of § 215a of the National Bank Act, see supra notes 1-3.

\textsuperscript{96} NoDak, 998 F.2d at 1419. The appellants further argued that because cash could be given in exchange for the acquired bank's stock, freeze-out mergers are clearly acceptable under the National Bank Act. Id. For the pertinent text of 12 U.S.C. § 215a(a)(3), see supra note 1.

\textsuperscript{97} NoDak, 998 F.2d at 1419.

\textsuperscript{98} Id. For the pertinent text of the auction provisions of the National Bank Act, 12 U.S.C. § 215a(d), see supra note 3.

\textsuperscript{99} D.9Dak, 998 F.2d at 1419-20.

\textsuperscript{100} Id. at 1420. For the pertinent text of the merger provisions of the National Bank Act, 12 U.S.C. § 215a(a)-(d), see supra notes 1-3. The Eighth Circuit interpreted the statute under the test established in Chevron, U.S.A., Inc. v. National Resource Defense Council, Inc., 467 U.S. 837 (1984). NoDak, 998 F.2d at 1420. Specifically, the Chevron Court noted that when a court reviews an agency's construction of a statute that a court administers, a court is confronted with a two-pronged analysis. Chevron, 467 U.S. at 842. The first question requires the court to address whether Congress has spoken directly to the precise issue at hand. Id. If Congress has, then the court and the agency must give effect to the "unambiguously expressed intent of Congress." Id. at 842-43. If, however, the statute is silent or ambiguous with respect to the specific issue, "the court does not simply impose its own construction of the statute as would be necessary in the absence of an administrative interpretation," but rather the question for the court is "whether the agency's answer is based on a permissible construction of the statute." Id. at 843.
when the minority shareholders vote to exchange stock for cash.\textsuperscript{101} Second, the language could be interpreted to mean that the statute authorizes freeze-out mergers because cash is listed as an acceptable method of compensation.\textsuperscript{102} The court stated that “the statute does not have to specifically allow freeze out mergers for them to be acceptable. They only need to be not inconsistent with the statute taken as a whole.”\textsuperscript{103} The court further noted that for freeze-out mergers to be inconsistent with the statute, there must be some indication that Congress did not approve of the acquiring bank giving the acquired bank’s minority shareholders solely cash for their shares.\textsuperscript{104} The court determined that the plain language of the statute gave no indication that Congress did not approve of cash-only freeze-out mergers.\textsuperscript{105} Therefore, the court concluded that the plain language of the statute, supported the interpretation that freeze-out mergers are permissible and not inconsistent with the National Bank Act.\textsuperscript{106}

\textsuperscript{101} \textit{NoDak}, 998 F.2d at 1420 (citing Elliot J. Weiss, \textit{The Law of Take Out Mergers: A Historical Perspective}, 56 N.Y.U. L. Rev. 624, 632-33 (1981)). Weiss, in his analysis of the first cash merger statutes, noted that an interpretation permitting cash to be used as consideration only when the minority shareholders voted to exchange their stock interests for cash is “consistent with the courts’ traditional hostility to take outs.” Weiss, \textit{supra} note 17, at 633.

\textsuperscript{102} \textit{NoDak}, 998 F.2d at 1420 (citing Elliot J. Weiss, \textit{The Law of Take Out Mergers: A Historical Perspective}, 56 N.Y.U. L. Rev. 624, 632-33 (1981)). Weiss also suggested that because merger statutes usually contemplated the continuation of one of the merging corporations, “allowing cash to be used as the sole consideration in a merger must serve the purpose of authorizing take outs of minority shareholders.” Weiss, \textit{supra} note 17, at 633. Another commentator has supported Weiss’ interpretation and has also asserted that state cash merger statutes reflect a preference for “corporate democracy” because no single shareholder could veto a transaction. Borden, \textit{supra} note 31, at 1027. Borden has also argued that allowing one shareholder’s vote to veto a transaction would “be contrary to the policy of corporate democracy implicit in the [cash merger] statutes.” \textit{Id}.

\textsuperscript{103} \textit{NoDak}, 998 F.2d at 1420.

\textsuperscript{104} \textit{Id}.

\textsuperscript{105} \textit{Id}. Specifically, the court noted:

\textit{[T]he language of § 215a(a)(3) clearly anticipates that cash may be used, and there is nothing to suggest that it may not be used in combination with stock. By placing these two forms of compensation in the same sentence each followed by the parenthetical phrase “(if any),” it is certainly not unreasonable of the Comptroller to interpret the statute to allow that stock may be exchanged for some acquired shares while cash may be exchanged for others. Therefore, the plain language of the statute inclines us towards appellants’ view.}


\textsuperscript{106} \textit{NoDak}, 998 F.2d at 1420. The majority also concluded that the federal regulations governing national bank mergers, the legislative history of the National Bank Act’s merger provisions and existing case law support the interpretation that freeze-out mergers are permissible. \textit{Id}. For the majority’s discussion of the federal regulations governing national bank mergers, see \textit{infra} notes 115-18 and accompanying text. For the majority’s discussion of the legislative history of § 215a of the National Bank Act, see \textit{infra} notes 119-23 and accompanying text.
Likewise, the Eighth Circuit rejected NoDak's second argument, that the public auction provisions of the National Bank Act make freeze-out mergers inconsistent with the statute.\textsuperscript{107} Specifically, NoDak contended that § 215a(d) requires the Comptroller to give the dissenting shareholders the opportunity to bid at an auction on the stock the dissenting shareholders would have been entitled to receive had they not been offered cash alone.\textsuperscript{108} NoDak concluded that because dissenting shareholders always retain the right to purchase their shares back at auction, dissenting shareholders should not be forced to cash out.\textsuperscript{109} The court determined that a plain language reading of the auction provisions reveals that § 215a(d) only applies when dissenting shareholders are initially offered stock, but reject it and request a cash payment instead.\textsuperscript{110} The court reasoned that because the statute does not address a situation like the present one, in which dissenters wish to retain their equity interest but are only offered cash for their shares, the statute does not forbid it.\textsuperscript{111}

The Eighth Circuit noted that, unlike the mandatory appraisal process where the appraisal committee or Comptroller must undertake a valuation of the dissenting shareholders' stock in every possible transaction, the auction provisions only apply when shares would have been delivered to the dissenters if they had not requested cash.\textsuperscript{112} Because the merger plan never included an offer of stock to the dissenting shareholders or a request for cash, the court concluded that the auction provisions were not applicable to this case.\textsuperscript{113} The Eighth Circuit also stated that "[t]he minority shareholders are still adequately protected by the mandatory appraisal provisions for their stock under section 215a(c)."\textsuperscript{114}

Having analyzed the pertinent statutory language of the National Bank Act, the Eighth Circuit then addressed Nodak's contention that freeze-out mergers are inconsistent with the federal regulations under the Act.\textsuperscript{115} The court stated that the Comptroller has "not indicated any an-

\textsuperscript{107} NoDak, 998 F.2d at 1420. For the pertinent text of the auction provisions of 12 U.S.C. § 215a(d), see supra note 3.

\textsuperscript{108} NoDak, 998 F.2d at 1420.

\textsuperscript{109} Id.

\textsuperscript{110} Id. The Eighth Circuit concluded that the auction provisions do "not address a situation where the dissenters have not been offered stock and are offered only cash instead." Id.

\textsuperscript{111} Id.

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at 1421 (emphasis added). For the pertinent text of the appraisal provisions under 12 U.S.C. 215a(c), see supra note 3.

\textsuperscript{115} NoDak, 998 F.2d at 1421-22. The federal regulations under the National Bank Act, 12 C.F.R. § 5.33 (1992), entitled "Merger, consolidation, purchase and assumption," provide in pertinent part: "A merger which would not have a substantially adverse effect on competition and which would be beneficial to the merging [banks] and to the public normally will be approved." Id. § 5.33(b)(1). The regulations, as provided in § 5.33(b)(2)(i)-(vi), then list the following six factors that the Comptroller must consider in evaluating a merger application:
tipathy towards freeze out mergers," but instead has implemented rules to expedite 100% ownership through the use of an interim national bank.\textsuperscript{116} Therefore, the court decided that by allowing the use of interim banks, the Comptroller's interpretation of the statute endorses the use of freeze-out mergers.\textsuperscript{117} The Eighth Circuit decided that it would not depart from this interpretation because it was consistent with the statute's wording and with the federal regulations.\textsuperscript{118}

The Eighth Circuit next considered NoDak's argument that "the National Bank Act's legislative history does not support the conclusion that freeze out mergers are acceptable."\textsuperscript{119} The Eighth Circuit determined that although the Act's legislative history does not contain direct statements about freeze-out mergers, it does reveal Congress' intent to facili-

\begin{enumerate}
\item The effect of the transaction upon competition;
\item The convenience and needs of the community to be served;
\item The financial history of the merging banks;
\item The condition of the merging banks, including capital, management and earnings prospects;
\item The existence of insider transactions; and
\item The adequacy of disclosure of the terms of the merger.
\end{enumerate}

\textit{Id.} The court noted that these evaluative factors "do not include consideration of any vested rights that minority shareholders conceivably have to retain their shares in the surviving entity." \textit{NoDak}, 998 F.2d at 1421. Accordingly, the Eighth Circuit concluded that 12 C.F.R. \textsection 5.33 does not indicate that freeze-out mergers are inconsistent with \textsection 215a of the National Bank Act. \textit{Id.}

116. \textit{NoDak}, 998 F.2d at 1421. The Eighth Circuit stated that federal regulation 12 C.F.R. \textsection 5.21, entitled "Organization of an Interim National Bank," is also applicable to the merger at issue. \textit{Id.} Section 5.21(a) states that "[a]n Interim National Bank is a new national bank which is organized solely to facilitate the creation of a bank holding company or the acquisition of 100% of the voting shares of a bank." 12 C.F.R. \textsection 5.21(a) (1992). The court further noted that in the Comptroller's announcement of this rule,

the Comptroller stated that it was extremely difficult for a bank holding company to obtain 100% ownership of a bank's stock via a straight tender offer . . . Therefore the rule was revised in order to 'eliminate duplication and delay in charter applications filed solely to facilitate . . . the acquisition of 100% of the outstanding voting shares of an existing bank.' \textit{NoDak}, 998 F.2d at 1421 (quoting 46 Fed. Reg. 16,661 (Mar. 13, 1981)). The Eighth Circuit concluded by stating that through the enactment of 12 C.F.R. \textsection 5.21, the Comptroller contemplated a bank holding company acquiring 100% ownership of a national bank and that the Comptroller enacted these regulations to streamline the acquisition process. \textit{Id.}


118. \textit{Id.} at 1422. Specifically, the Eighth Circuit recognized that a court should not interfere with an agency's interpretation, "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." \textit{Id.} at 1421-22 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

119. \textit{Id.} at 1422.
tate and simplify national bank mergers and consolidations. Specifically, by examining the legislative history of the National Bank Act's merger provisions as enacted in 1918 and amendments to the Act in 1952 and 1959, the court concluded that Congress sought to "simplify and expedite" the bank merger process. The court determined that by disallowing freeze-outs, one dissenter could "effectively veto" any proposed merger plan, even if it was beneficial to a majority of shareholders. The court concluded that "[s]uch a situation would not encourage bank consolidation, it would stifle it."

The court next addressed NoDak's contention that allowing freeze-out mergers would violate the true purpose of the Act, that is, the protection of minority shareholder rights. The court noted that protection of minority shareholder interests, while not the only purpose of the Act, is provided for through the appraisal process and the auction provisions, when applicable. The court stated that in the absence of any indication from Congress to the contrary, it must conclude that Congress intended the appraisal process to provide "adequate protection" for minority shareholders because it is the only mandatory provision.

Lastly, the Eighth Circuit considered the Eleventh Circuit's decision in Lewis v. Clark. The Eighth Circuit noted that the district court deciding the NoDak case based its entire opinion on Lewis. The court stated that it disagreed with the Lewis court's holding because the Lewis court "improperly framed the inquiry." Specifically, the court stated that "[t]he question is not whether there is explicit authority to allow freeze out mergers; the question is whether freeze out mergers are inconsistent with the purpose of facilitating and expediting national bank consolidation to allow minority shareholders to veto a proposed plan which the majority of the stockholders of the acquiring and the acquired bank have approved." Id. The court explained:

Without any further indication from Congress, we must conclude that Congress deemed the appraisal process adequate protection for minority shareholders in a situation such as this because it is the only mandatory provision. This court will not read into the statute greater rights for the minority than those protections the legislature specifically provided.

Id.

Id.

Id. For a further discussion of the Lewis decision, see supra notes 64-72 and accompanying text.

NoDak, 998 F.2d at 1423. For a discussion of NoDak's district court proceedings, see supra notes 90-92 and accompanying text.

NoDak, 998 F.2d at 1423.
with the National Bank Act."  

The Eighth Circuit also disagreed with the Lewis court’s traditional view on the protection of minority shareholders, as set forth in Bogert. The court explained that although complete protection of minority shareholders’ interests was the traditional view, the law no longer conforms to this view and the modern view permits freeze-out mergers of banks, provided that minority shareholders are given appraisal rights. Rather than adhere to “an outmoded view of merger law,” the Eighth Circuit decided to embrace “the modern view that comports more naturally with the language of the statute itself, the legislative history, and the regulations enacted by the administrative agency legitimately entrusted with interpreting the statute.”

The Eighth Circuit recognized that the Lewis court is the only court to have directly addressed the specific issue of minority shareholder rights in a freeze-out merger under § 215a of the National Bank Act. Despite this fact, the court noted that the Bloomington decision, in which the Seventh Circuit suggested that freeze-out mergers fully comply with the Act, provided that minority shareholders receive appraisal rights. The

130. Id. The NoDak court emphasized that “[t]here need not be explicit authority as long as all the existing requirements of the National Bank Act are satisfied.” Id.

131. Id. (citing Southern Pacific Co. v. Bogert, 250 U.S. 483, 487-88 (1919)). For a further discussion of Bogert, see supra notes 23-28 and accompanying text. The NoDak court also stated that it disagreed with the Lewis court’s position that for the minority shareholders to be treated differently from the majority shareholders, there must be some specific authority by Congress to permit freeze-out mergers. NoDak, 998 F.2d at 1423. The court further noted that in § 215a(c) of the National Bank Act, Congress provided explicit authority to protect minority shareholders through ample appraisal rights. Id. Specifically, the NoDak court stated: “In our view, if Congress wished to prohibit this type of merger it could have done so and may still do so through amendments. Until it does, however, it is not inconsistent with the existing law as written and as reasonably interpreted by the Comptroller.” Id.

132. NoDak, 998 F.2d at 1423. The court observed that the traditional view in which “minority shareholders have a vested right” in a corporation’s participation was “discredited.” Id. at 1424 (quoting Coleman v. Taub, 638 F.2d 628, 634 (3d Cir. 1981)). Likewise, the court stated that “the common-law rule that gave each shareholder the power to veto a merger” was equally “obsolete.” Id. (quoting Coleman v. Taub, 638 F.2d 628, 634 n.6 (3d Cir. 1981)). The Eighth Circuit noted that its comments on the outmoded traditional view address state corporate reorganization law and not banking statutes. Id. (emphasis added). However, the court noted that because banks are frequent participants in freeze-out mergers, the same issues and reasoning also apply to banks. Id. For a discussion of the traditional common law view of complete protection of minority shareholders rights and the development of the modern view that permits freeze-out mergers provided dissenting minority shareholders have appraisal rights, see supra notes 16-54 and accompanying text.

133. NoDak, 998 F.2d at 1424.

134. Id.

Eighth Circuit understood the *Bloomington* decision to support the conclusion that freeze-out mergers are permissible if minority shareholders are given appraisal rights. The majority concluded its analysis by stating that freeze-out mergers are not inconsistent with the National Bank Act and that the Comptroller has the authority to approve the present merger transaction. Accordingly, the Eighth Circuit reversed the district court’s grant of summary judgment and remanded the case.

Judge Heaney dissented, criticizing the majority for ignoring the courts’ long standing interest in protecting minority shareholder rights and allowing the bank to disparately treat minority and majority shareholders. Accepting the Eleventh Circuit’s traditional view of the protection of minority shareholder rights as set forth in *Lewis*, Judge Heaney stated that Congress would have explicitly amended the language of § 215a if it had wanted to provide for freeze-out mergers. Judge Heaney also criticized the majority’s conclusion that unequal treatment is permissible because the value of the majority shareholders’ stock is greater than the value of the minority shareholders’ interest. Lastly, Judge Heaney agreed with the Eleventh Circuit’s holding in *Lewis* and concluded that, “without express statutory authority, the Comptroller has no authority to approve a merger [that] requires the holders of stock of equal stand-

136. *NoDak*, 998 F.2d at 1424.
137. *Id.* at 1425. The Eighth Circuit decided that “[t]he Comptroller has interpreted the Act to allow freeze out mergers, provided adequate appraisal occurs.” *Id.* Further, “[c]ourts should defer to an agency’s construction of its own statutory mandate.” *Id.* (quoting Board of Governors of Fed. Reserve Sys. v. First Lincolnwood Corp., 439 U.S. 254, 251 (1978)). The court also stated that the Comptroller of Currency is charged with enforcing banking laws to such an extent that courts should defer to his or her conclusions regarding the meaning of the banking laws. *Id.* (citing Investment Co. Inst. v. Camp, 401 U.S. 617, 627 (1971)).
138. *Id.* at 1425.
139. *Id.* at 1425 (Heaney, J., dissenting).
140. *Id.* at 1426 (Heaney, J., dissenting).
141. *Id.* at 1425-26 (Heaney, J., dissenting). The majority noted that the National Bank Act does demand that the minority shareholders receive a fair appraisal of the value of its interest and that it set out appraisal rules to ensure this result. *Id.* at 1423-24. The majority concluded that the appraisal process rules were followed in this case. *Id.* While the court’s position on the actual value of the minority interest is unclear, the majority does appear to support the position that the appraisal remedy “does not give dissenting shareholders any element of value attributable to the transaction from which they dissent.” *Id.* (quoting FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 194 (1991)). The majority also appears to support the position that if the federal law contained such a valuation requirement, the effectiveness of the market for corporate control and allocating capital would be reduced. *Id.* at 1424-25 (citing Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698 (1982)). In his dissent, Judge Heaney departed from the majority’s position on freeze-out mergers and the appraisal remedy, arguing that the majority based “its inequitable treatment of the minority shareholder in this case on an unjustified obeisance to the Chicago School of Economics.” *Id.* at 1425 (Heaney, J., dissenting).
ing to take different forms of consideration.”

IV. ANALYSIS

In *NoDak*, the Eighth Circuit presumed that the minority shareholders were adequately protected by the mandatory appraisal provisions of § 215a(c). In doing so, the court did not consider the possibility that the appraisal process may not, in itself, adequately protect the interests of the minority shareholders. The majority concluded that the Comptroller had the authority to approve the merger and that based on legislative history and case law, the transaction was not inconsistent with the National Bank Act.

At the other extreme, Judge Heaney, in his dissent, insisted on a literal interpretation of § 215a and refused to give any weight to evolving case law permitting freeze-out mergers of banks. Judge Heaney also failed to consider the legislative history of the merger provisions of the National Bank Act and the Comptroller’s interpretation, and insisted that § 215a be interpreted according to congressional intent at the time the Act was passed. Consequently, both the majority and dissenting opinions ignored the need to promote a proper balancing of the opposing interests, by ensuring that the minority shareholders are adequately protected through the appraisal process while, at the same time, allowing freeze-out mergers to take place.

The impact of the Eighth Circuit’s decision in *NoDak* can be assessed by considering both the benefits of mergers to the corporation as a whole and to the economy, and the burdens mergers may place on the minority shareholders. From the corporate viewpoint, freeze-out mergers allow greater flexibility and expedite the consolidation process. By freezing

142. Id. at 1426 (Heaney, J., dissenting) (quoting Lewis v. Clark, 911 F.2d 1558, 1561 (11th Cir. 1990) (per curiam)).
143. Id. at 1424-25.
144. Id. at 1425. For a further discussion of the majority opinion, see supra notes 95-138 and accompanying text.
145. *NoDak*, 988 F.2d at 1425 (Heaney, J., dissenting). For a further discussion of Judge Heaney’s dissenting opinion, see supra notes 139-42 and accompanying text.
146. *NoDak*, 998 F.2d at 1425 (Heaney, J., dissenting).
147. Greene, supra note 32, at 487-88; Norman D. Lattin, *The Minority Stockholder and Intra-Corporate Conflict*, 17 Iowa L. Rev. 313, 324 (1932); McGarry, supra note 32, at 699. Greene suggests that freeze-out mergers provide a necessary and flexible means of acquisition and transfer. Greene, supra, at 487. Greene also asserts that the common law rule of unanimous shareholder consent for mergers was “abolished to enhance corporate ‘flexibility’” by allowing majority shareholders to effect necessary business changes that provide for business and commercial growth. Id. at 487 n.3. Greene argues that corporate combinations would be unlikely if the acquiring corporation did not have the ability to eliminate minority interests in the acquired corporation. Id. at 488. This commentator also notes that cash as consideration in mergers and short-form merger statutes “furthers this trend towards flexibility.” Id. at 488 n.3; see also Manning, supra note 17, at 227 (noting that freeze-out mergers give greater mobility to minority shareholders in
out minority shareholders, the corporation may avoid potential conflicts with dissenting shareholders who could otherwise delay or prevent efficient merger transactions. In this regard, freeze-out mergers not only minimize potential conflicts in corporate transfers, but also provide the corporate flexibility necessary for beneficial mergers to take place by eliminating the dissenting minority shareholders in a target corporation.

In addition to enhancing flexibility and minimizing potential conflict in corporate transfers, freeze-out mergers provide several other benefits. Freeze-out mergers, and mergers in general, provide a corporation with a less expensive means to enter new product or geographic markets, to achieve greater economies of scale and to acquire skilled management in areas of interest. Mergers also often increase management efficiency approving corporate actions); Note, The Short Merger Statute, supra note 20, at 596 (stating that "the demand for corporate 'flexibility' " has resulted in short-form merger statutes and other merger statutes that require less than unanimous shareholder consent).


One commentator has noted that mergers can also eliminate the possibility of conflicts of interest in a parent-subsidiary relation. Carney, supra note 16, at 107. For example, when both the parent and subsidiary are operating companies with joint operations, there may be some problems between the acquisition regarding the allocation of joint cost that can be subject to attack by the minority shareholders. See, e.g., Schilick v. Penn-Dixie Cement Corp., 507 F.2d 374, 378 (2d Cir. 1974) (accusing parent of allocating excess interest cost to subsidiary), cert. denied, 421 U.S. 976 (1975). Also, where the parent and subsidiary are engaged in related fields, corporate opportunity allocation problems can also be at conflict. See, e.g., Schilick, 507 F.2d at 379 (describing conflicts in merger proposal where subsidiary claimed parent depressed subsidiary's stock value); Sinclair Oil, 280 A.2d at 719-21 (describing conflict between parent and subsidiary, both operating in oil business, when parent denies subsidiary industrial development opportunities); Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 885-86 (Del. 1970) (describing conflicts between parent and subsidiary in oil allocations).

Another commentator has noted that "[c]orporations seeking normal mergers are reluctant to risk conflict" with dissenting shareholders in a target corporation. McGarrrity, supra note 32, at 699. This commentator has also suggested that "[f]reeze out mergers make ordinary mergers more practical" by allowing corpora- tions to eliminate nonconsenting shareholders. Id.

149. See, e.g., Grimes, 399 F. Supp. at 1400 (listing benefits of parent-subsidiary merger to include reduction in salaries, legal, accounting, public relation expenses and savings in franchise tax, stock transfer fees); Tanzer Economic Assocs. Inc. Profit Sharing Plan v. Universal Food Specialties, Inc., 383 N.Y.S.2d 472, 483 (Sup. Ct. 1976). The benefits found in the merger of Libby, McNeil & Libby into a unit
of Nestlé's included: (1) improved management and corporate planning due to increased availability of resources; (2) increased availability of management experience; (3) savings due to economies of scale in centralized procurement of raw materials; (4) marketing economies resulting from joint advertising, distribution and warehousing; (5) avoidance of duplication in departments and personnel; and (6) greater diversity of products could be offered which would result in leveling of cyclical demand. Id.; see also Schulwolf v. Cerro Corp., 880 N.Y.S.2d 957, 962 (Sup. Ct. 1976) (stating that merger between parent and subsidiary allows for efficiency through combination of management and resources); Carney, supra note 16, at 106 (stating that mergers increase economies of scale by eliminating duplicative functions); The Urge to Merge—Where Has It Come from and Where Is It Going?, 35 BUS. LAW. 1417, 1429 (1980) (listing several advantages of mergers which include opportunity to acquire companies and improve their efficiency, opportunity for increased competition, financing for companies otherwise unable to obtain it, and opportunity to obtain economies of scale); McGarrity, supra note 32, at 699 (stating merger benefits include: (1) diversification and expansion of products, business areas and geographic markets; (2) procurement of skilled management, and (3) economies of scale); Nancy Garlock & Charles Rudy, Comment, Protection of Minority Shareholders from Freezeouts Through Merger, 22 WAYNE L. REV. 1421, 1423-24 (1976) (stating advantages of freezing out minority shareholders include operating economies and increased management efficiencies).

Commentators note that the benefits of a going-private merger vary from those of a multi-step or parent-subsidiary merger. See, e.g., William J. Harmon, Note, Corporate Freezeouts: A New Limitation Imposed by the "Entire Fairness" Standard, 1978 U. ILL. L. REV. 686, 695 (stating that benefits of going-private merger differ slightly from parent-subsidiary freeze-out merger); McGarrity, supra note 32, at 699 (noting that benefits of going-private merger are not as great as when two entities combine in multi-step or parent-subsidiary merger). For a discussion of the three major types of freeze-out mergers, multi-step, parent-subsidiary, and going-private mergers, see supra note 32.

Going-private mergers do produce some corporate benefits such as increased business efficiency through the elimination of duplicative functions, the elimination of SEC compliance costs and stock exchange requirements, and increased stock value. Harmon, supra, at 695. The resulting increased stock value enhances stock option plans used to attract good employees and improves a corporation's ability to finance growth and increase profits. Id.; see also Victor Brudney, A Note on "Going Private", 61 VA. L. REV. 1019, 1048 (1975) (noting that increased stock value results from increased earnings and book value per share due to reduction in number of shares outstanding); Note, Going Private, 84 YALE L.J. 903, 906 (1975) [hereinafter Note, Going Private] (stating that justifications for going-private freeze-out merger may include leveraging effect and positive effect on earnings per share due to reduced number of shares outstanding).

In addition to the benefits noted above, multi-step and parent-subsidiary freeze-out mergers, which involve the combination of two entities, may result in the benefit of synergy because the merger may enhance the value of the combined entities. See, e.g., Brudney & Chirelstein, supra note 30, at 1367 (stating that merger between affiliates may result in benefit of synergy, in contrast to a going-private freeze-out merger which "simply shifts publicly owned stock onto the hands of the insiders and produces no economic gains to the enterprise that can be regarded as significant"); Mark Mininberg, Achieving Fairness in Corporate Cash Mergers: Weinberger v. UOP, Inc., 16 CONN. L. REV. 95, 99 (1983) (suggesting that mergers increase the value of each corporation because synergy produced by merger of two or more corporations will enhance merged corporation's financial strength and stimulate earnings beyond those possible by two independent corporations); McGarrity, supra note 32, at 699 (stating that synergy is "the principle that the whole is greater than the sum of its parts, and a multi-step or parent-subsidiary merger produces a synergistic effect because the merger increases the value of
and reduce or eliminate the conflict inherent in the majority-minority relationship within a corporation.\(^{150}\) From a broader economic viewpoint, mergers are instrumental in the efficient allocation of capital in a dynamic economy, which can lower the cost of capital, enhance corporate profits and efficiency, and stimulate economic growth and employment.\(^{151}\)

On the other hand, freeze-out mergers also possess the potential for abuse by majority shareholders and may result in harm to minority shareholders.\(^{152}\) The controlling shareholders may employ the freeze-out trans-

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150. Carney, \textit{supra} note 16, at 106-07; Harmon, \textit{supra} note 149, at 695; McGarrity, \textit{supra} note 32, at 685. Harmon has suggested that parent-subsidiary freeze-out mergers create management efficiencies by eliminating duplicative functions. Harmon, \textit{supra} note 149, at 695. In addition, commentators have suggested that freeze-out mergers may promote management efficiency by eliminating conflicts of interests inherent in the fiduciary standards that are applicable to all parent-subsidiary transactions. \textit{Id.}; McGarrity, \textit{supra} note 32, at 695; Kent T. van den Berg, \textit{Note, Approval of Take-out Mergers by Minority Shareholders: From Substantive to Procedural Fairness, 93 YALE L.J. 1113, 1118 (1984)}. Van den Berg asserts that majority shareholders face conflicting obligations and tensions. \textit{Id.} Specifically, the majority shareholders have fiduciary duties to the minority shareholders. \textit{Id.} However, when courts do not permit the freezing out of minority shareholder interests, the majority shareholders may forego a merger that may represent a valuable opportunity for the corporation. \textit{Id.}

151. Carney, \textit{supra} note 16, at 106-07, Mininberg, \textit{supra} note 149, at 99; McGarrity, \textit{supra} note 32, at 695. Carney has suggested that a merger between complementary companies may offset cyclical fluctuations and develop "steadier earnings and dividend patterns that may ultimately reduce the cost of capital." Carney, \textit{supra} note 16, at 106. Carney has also stated that "capital may be allocated to the most profitable opportunities in the most efficient ways by the combined firm." \textit{Id.} (citing Armon A. Alchian & Harold Demsetz, \textit{Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777 (1972)}). Other commentators have suggested that successful mergers can finance growth and increase profits. Brudney, \textit{supra} note 149, at 1048, Note, \textit{Going Private, supra} note 149, at 906; Harmon, \textit{supra} note 149, at 695; McGarrity, \textit{supra} note 32, at 699. Another commentator has suggested that, in general, mergers will increase business efficiency, which will benefit not only the corporations and shareholders involved, but also consumers and the economy. Carney, \textit{supra} note 16, at 109.

152. Harmon, \textit{supra} note 149, at 695; McGarrity, \textit{supra} note 32, at 698. Various harms and abuses result from the majority shareholders’ dominant position on both sides of the freeze-out merger. Harmon, \textit{supra} note 149, at 695. Harmon has suggested that minority shareholder freeze-outs violate the majority shareholders’ fiduciary duties and harm the minority shareholders in three ways. \textit{Id.} First, Harmon stated that through the use of a freeze-out merger, the majority uses its control to wrongfully terminate the minority shareholders participation in the corporation. \textit{Id.} Second, through the elimination of the minority shareholders, the majority shareholders accure all of the economic benefits of the merger. \textit{Id.} at 697. Third, minority shareholders may incur certain costs inherent in a freeze-out merger, such as the expense and risk associated with finding a replacement invest-
action for their own benefit, rather than the benefit of the corporation.\textsuperscript{153} Additionally, a freeze-out merger transaction may result in the minority shareholders feeling coerced, as their preferences for participation in the corporation are not addressed and they are forced to accept cash for their shares.\textsuperscript{154} If the value of the shares has increased over the purchase price, the minority shareholder also may face a tax liability on an unplanned capital gain.\textsuperscript{155} Most importantly, the minority may not be offered a fair

ment and the legal fees if the minority shareholders seek an appraisal of their interests. \textit{Id.} at 698-99. Another commentator, Brudney, has also suggested that minority shareholders who are forced to sell their stock interest in a freeze-out merger are not treated equally with majority shareholders who retain their stock interests because the minority shareholders are confronted with the risk, uncertainty and cost of finding an equivalent investment. Brudney, \textit{supra} note 149, at 1029.

\textsuperscript{153} Note, \textit{Going Private}, \textit{supra} note 149, at 1034-35; McGarrity, \textit{supra} note 32, at 685. In a going-private merger, the potential for benefits accruing to the majority are even greater than in a multi-step or parent-subsidiary merger. McGarrity, \textit{supra} note 32, at 700. Controlling shareholders have insider information about the corporation that enable them to execute a merger at a time that is most beneficial to the majority. \textit{Id.} Controlling shareholders can also abuse a merger transaction by electing to go private at a turning point in the corporation's growth, but before the investing public perceives the growth potential. Brudney & Chirelstein, \textit{supra} note 30, at 1368. Consequently, the majority shareholders cannot participate in a merged corporation's potential growth and the minority shareholders will be the exclusive beneficiaries. McGarrity, \textit{supra} note 32, at 700; \textit{see also} Note, \textit{Going Private}, \textit{supra} note 149, at 922-23 (suggesting that true motive for going-private mergers may be personal gain for controlling shareholders while benefit to corporation is unclear).

\textsuperscript{154} See, \textit{e.g.}, Brudney & Chirelstein, \textit{supra} note 30, at 1357 (stating that "freezeouts, by definition, are coercive: minority shareholders are bound by majority rule to accept cash or debt in exchange for their common shares even though the price they receive may be less than the value they assign to those shares"); Harmon, \textit{supra} note 149, at 689 (noting that appraisal remedy may not consider minority shareholders' preference for participation in merged corporation).

\textsuperscript{155} Greene, \textit{supra} note 132, at 490 & n.12; Lynch, \textit{supra} note 17, at 55; Harmon, \textit{supra} note 149, at 698. Lynch has stated that tax considerations are one of the greatest influences in investment decisions. Lynch, \textit{supra} note 17, at 55. This commentator has asserted that all the adverse tax consequences are borne by "the selling minority shareholder, even though the transaction was undertaken entirely for the benefit of the majority." \textit{Id.} Lynch has explained that I.R.C. § 1033(a) protects taxpayers from recognizing capital gains in other instances of involuntary conversions such as destruction, condemnation, theft or seizure, but provides the minority shareholders no protection from the adverse tax consequences resulting from a freeze-out merger. \textit{Id.} Harmon has explained that the income tax consequences vary with the structure of the freeze-out merger. Harmon, \textit{supra} note 149, at 698 n.85. However, because majority shareholders are in control of the transaction, the freeze-out merger is often structured to be tax-free to the majority shareholders and unlikely to be tax-free to the minority shareholders. \textit{Id.} A freeze-out merger can only be tax-free if the transaction qualifies as a "reorganization" under the Internal Revenue Code. I.R.C. § 368(a) (1993). The various tax consequences of freeze-out mergers are not within the scope of this Note. For an in-depth discussion of the tax consequences of various types of mergers, see Boris B. Bittker & James S. Eustice, \textit{Federal Taxation of Corporations and Shareholders} §§ 14.02-14.58 (5th ed. 1987); Tortoriello, \textit{supra} note 1, at 89-98.
price for their shares or the controlling shareholders may attempt to manipulate the price of the firm's shares to reduce payment to the minority shareholders. Because the appraisal remedy under § 215a of the National Bank Act precludes the minority from retaining an equity interest in the merged corporation, it is imperative that the appraisal process accurately reflect the fair value of the minority interest.

By allowing freeze-out mergers, courts accept the fact that some de-

156. Lynch, supra note 17, at 53-56; Harmon, supra note 149, at 691. Harmon has explained that many freeze-outs may reduce or eliminate the number of shares held by outsiders. Harmon, supra note 149, at 691 & n.39. The reduction in stock trading may reduce shareholder liquidity. Id. This effectively results in price manipulation because the "[l]ack of liquidity may lower the market price of the stock or even make it unmarketable at any price for certain periods of time," thereby affecting the price minority shareholders will receive for their stock interest. Id.

157. See 12 U.S.C. § 215a(c) (1988). Originally, courts and appraisers used one of three valuation methods: net asset value, net earnings value and market value. Schinner, supra note 21, at 267. The majority of courts now accept a compromise appraisal process where the stock's value is based on each of the three methods. See, e.g., Piemonte v. New Boston Garden Corp., 387 N.E.2d 1145, 1148 (Mass. 1979) (utilizing a weighting method appraisal process); Blasingame v. American Materials, Inc., 654 S.W.2d 659, 668 & n.1 (Tenn. 1983) (same). The court or appraiser first obtains a value for each of the three methods and assigns a weight to those values according to its relative importance to the facts of a particular case. Schinner, supra note 21, at 267. This weighting method is known as the "Delaware Block Approach" and is "based on the premise that no one factor is determinative of value and that each value should carry some, but not conclusive weight." Id.

Under § 215a of the National Bank Act, an appraisal process is used that is similar to the Delaware Block Approach. See 53 Fed. Reg. 32,967 (Aug. 22, 1988). On August 22, 1988, the Comptroller issued Banking Bulletin 88-14 (the "Appraisal Bulletin"), which describes the methods used to estimate the value of a bank's shares when the acquired bank's minority shareholders dissent from the merger. 53 Fed. Reg. 32,967 (Aug. 22, 1988). According to the Appraisal Bulletin, the Comptroller determines share value based on one or more of the following methods: (1) market value (if there are recent prices for a sufficient number of recent transactions among non-insiders under normal trading circumstances); (2) capitalized earnings or "investment value" (i.e., estimated annual earnings times a price/earnings ratio typical for comparable institutions); and (3) adjusted book value (i.e., book value per share times the average market price to book value ratio of comparable institutions). Id. at 32,967-68. If more than one method is used, the Comptroller applies varying weights to reach an overall valuation. Id. The Comptroller assigns a weight to each one of the valuation methods used "based on how accurately the given method is believed to represent market value." Id. at 32,968.

Although courts have used the Delaware Block Approach for over four decades, this approach came under attack in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). In Weinberger, the Delaware Supreme Court addressed the inadequacies of the Delaware Block Approach and restructured the valuation method. Id. at 703-04, 712-13. The Weinberger court disallowed the Delaware Block Approach to the extent that it did not permit the use of other valuation techniques generally accepted in the business community. Id. at 712-13. The Weinberger court described the Delaware Block Approach as "clearly outmoded" and did not reflect the intent or purpose of the Delaware appraisal statute, which includes an evaluation of "all relevant factors." Id. Specifically, under title 8, § 262(h) of the Delaware Code, the Court of Chancery.

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gree of harm does occur to the minority shareholders. However, courts have approved these transactions because of the substantial benefits accruing to the corporation as a whole and to the economy. Although courts are justified in supporting freeze-out mergers, greater protection for minority shareholders seems warranted. This greater protection, how-

shall appraise the shares, determining fair value exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, 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.


Courts have responded to the Weinberger decision in various ways. Some courts have refused to modify the use of the Delaware Block Approach. See, e.g., Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940 (Del. 1985) (stating that "Weinberger did not abolish the block formula, only its exclusivity as a tool of valuation"); Leader v. Hycor, Inc., 479 N.E.2d 173, 178 (Mass. 1985) (stating that Delaware Block Approach for valuing closely held stock is not outmoded); Blasingame, 654 S.W.2d at 668 & n.1 (holding that Weinberger does not alter use of Delaware Block Approach).

Some courts have adopted a more liberal appraisal process and allow the use of several factors to determine the appraised value. See, e.g., Dermody v. Sticco, 465 A.2d 948, 950 (N.J. Super. Ct. 1983) (holding that all relevant factors to be considered in arriving at fair value); Alpert v. 28 St. Williams Corp., 473 N.E.2d 19, 27 (N.Y. 1984) (stating that factors used in appraisal proceeding would include, but not be limited to net asset value, book value, earnings, market value and investment value); Armstrong v. Marathon Oil Co., 513 N.E.2d 776, 783-84 (Ohio 1987) (holding that factors to consider in appraisal process include "[n]et asset value; going concern value; liquidation value; net equity value; earnings value of the stock or dividends prospects; the nature of the enterprise and its relative position within the particular industry; post-merger gains or synergistic gain; tax benefits to all concerned; and recession and equitable concerns").

158. See, e.g., Ervin v. Oregon Ry. & Navigation Co., 27 F. 625, 631 (C.C.S.D.N.Y. 1886) (noting that freeze-outs violate shareholders’ vested right to continued participation in the profits of the corporation); Kellogg v. Georgia-Pac. Paper Corp., 227 F. Supp. 719, 724 (W.D. Ark. 1964) (noting that the price minority shareholders receive for their shares may not be fair if determined by controlling majority shareholders); Kavanaugh v. Kavanaugh Knitting Co., 125 N.E. 148, 151-52 (N.Y. 1919) (noting that freeze-out of minority shareholders at an improper low price violates the fiduciary duty of majority to minority). For a further discussion of the specific harms to minority shareholders, see supra notes 152-57 and accompanying text.

159. See, e.g., Sinclair Oil Corp. v. Leven, 280 A.2d 717, 719-20 (Del. 1971) (noting that parent-subsidiary freeze-outs promote business efficiency by eliminating conflicts of interests inherent in fair dealing standards that parent must meet in all transactions with its subsidiary); Getty Oil Co. v. Skelley Oil Co., 267 A.2d 883, 886-88 (Del. 1970) (same); Banzer Economic Assocs. Inc., Profit Sharing Plan v. Universal Food Specialties, Inc., 383 N.Y.S.2d 472, 483 (Sup. Ct. 1976) (noting that merged corporation benefits from potential tax savings, enhanced market value and increased intrinsic value derived from elimination of minority shareholders). Freeze-out mergers are often justified because the benefits to the corporation outweigh the burdens placed on the minority shareholders. Brudney, supra note 149, at 1027-28; Lattin, supra note 147, at 323-24; McGartry, supra note 32, at 698. For a further discussion of the benefits of freeze-out mergers, see supra notes 147-51 and accompanying text.

160. McGartry, supra note 32, at 700. This protection is especially needed in a going-private merger where the minority shareholders cannot reinvest in the
ever, should not be in the form of a subjective balancing test requiring the controlling shareholders in a corporation to prove that the potential benefits from the merger outweigh the harm borne by the minority shareholders who have been eliminated from the corporation. Likewise, it would not be productive to subject the proposed merger to some type of "business purpose test," requiring the controlling shareholders to prove that the merger transaction possesses a valid business purpose for it to take place. Such tests would discourage mergers through increased costs and greater uncertainty, and would likely reduce the substantial benefits that arise from merger activity.\(^{161}\)

Rather than applying a balancing or business purpose test, satisfactory protection for minority shareholders could be achieved by ensuring that the "entire fairness test," as established in *Weinberger v. UOP, Inc.*,\(^ {162}\) is applied to freeze out mergers in the banking industry.\(^ {163}\) The "entire fairness test" is comprised of two basic components, fair dealing and fair price.\(^ {164}\) Fair dealing relates to all relevant and pertinent information concerning the merger transaction, such as how it was initiated, negotiated, structured and disclosed, and how the approval of the directors and shareholders was obtained.\(^ {165}\) Fair price concerns the financial and economic implications of the proposed merger and addresses those factors that determine the inherent value of the firm's common equity, such as asset values, earnings and future prospects for the firm.\(^ {166}\) Because minority shareholders are precluded from participation in the merged firm, the issue of price is paramount.\(^ {167}\)

To better ensure that the minority's shares are valued fairly in a freeze-out merger, Congress should amend the National Bank Act and

\(^{161}\) For a discussion of other problems associated with going private mergers, see *supra* note 149.

\(^{162}\) For a discussion of the business purpose test as presented in *Singer*, see *supra* note 54. In *Weinberger*, the Delaware Supreme Court overruled the *Singer* business purpose test and noted that the test had already been "virtually interpreted out of existence" and would no longer be considered part of Delaware law. *Weinberger*, 457 A.2d at 715. For a discussion of the evolution of cases from *Singer* to *Weinberger*, see *supra* note 54.

\(^{163}\) In *NoDak*, the Comptroller concluded that the proposed merger had a valid business purpose because all of the proper evaluative factors required under the National Bank Act had been met. *NoDak Bancorporation v. Clarke*, 998 F.2d 1416, 1418 (8th Cir. 1993). For the text of 12 C.F.R. § 5.33(b), listing the six evaluative factors to be considered in determining the validity of a bank merger under the National Bank Act, see *supra* note 115.

\(^{164}\) *Weinberger*, 457 A.2d 701 (Del. 1983).

\(^{165}\) *Weinberger*, 457 A.2d at 711.

\(^{166}\) *Weinberger*, 457 A.2d at 711.

\(^{167}\) The *Weinberger* court also recognized that "in a nonfraudulent transaction . . . price may be the preponderant consideration outweighing other features of the merger." *Weinberger*, 457 A.2d at 710.
adopt an appraisal policy similar to that employed in New York state.\textsuperscript{168} Under the New York appraisal valuation statute, dissenting minority shareholders receive a value for their shares, based on contemporary valuation techniques, equal to what the shares would be worth if the firm were merged in an arm's length transaction.\textsuperscript{169} If this standard is adopted in bank freeze-out mergers, minority shareholders will receive a value for their shares that reflects the price premium normally associated with a merger.\textsuperscript{170} A price that includes the merger premium will not only more

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  \item[\textsuperscript{168}] See N.Y. Bus. Corp. Law § 623(h)(4) (McKinney 1986). For the pertinent text of § 623(h)(4), see infra note 169. The appraisal remedy advocated in this Note expands upon the “entire fairness test” in Weinberger and ensures that minority shareholders receive a price for their shares that reflects the merger premium. Some commentators have suggested that the Weinberger decision was influenced by the New York appraisal statute allowing “all relevant factors” to be employed in the appraisal process. Arthur Borden, Delaware Court Rights a Fresh Script for New Going Private Performances, N.Y.L.J., June 6, 1983, at 29, col. 1; Diane M. Morello, Note, Reappraising Minority Shareholder Protection in Freezeout Mergers: Weinberger v. UOP, Inc., 58 St. John’s L. Rev. 144, 160 (1983).
  \item[\textsuperscript{169}] Weiss, supra note 17, at 684; McGarrity, supra note 32, at 696; Morello, supra note 168, at 161. The statute gives courts the right to consider the nature of the transaction and the corporation’s motive for the transaction when valuing the minority shareholder interests. N.Y. Bus. Corp. Law, § 623(h)(4). Section 623(h)(4) of New York’s Business Corporation Law provides in pertinent part:
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    In fixing the fair value of the shares, the court shall consider the nature of the transaction giving rise to the shareholder’s right to receive payment for shares and its effects on the corporation and its shareholders, the concepts and methods then customary in the relevant securities and financial markets for determining the fair value of shares of a corporation engaging in a similar transaction under comparable circumstances and all other relevant factors.
    \end{quote}

  \item[\textsuperscript{170}] See Weiss, supra note 17, at 684 (stating that New York statute “eliminate[s] the controlling shareholders' ability to effect [freeze-outs] solely to earn arbitrage profit available because of differences” between price willing purchaser would be prepared to pay for company in transaction negotiated at arm’s length and price “conceptually unsound valuation formulas suggest represent ‘fair value’”); McGarrity, supra note 32, at 696-97 (stating that New York appraisal statute “protects minority shareholders from majority shareholders who may attempt to take advantage of an undervalued market price”). In addition, commentators have noted that the legislative drafters of the New York statute intended for dissenting minority shareholders to receive a portion of the merger premium. Weiss, supra note 30, at 251-52; McGarrity, supra note 32, at 696 & n.111. The drafters' comments to the New York statute state:
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    [C]ourts should determine fair value by reference to the nature and effects of the transaction giving rise to the shareholder’s right to dissent . . . . The case law interpretation of fair value has not always reflected the reality of corporate business combinations. These transactions involve the sale of the corporation as a whole, and the corporation’s value as an entirety may be substantially in excess of the actual or hypothetical market price for shares trading among investors. The experience has demonstrated that large premiums over market price are commonplace in mergers and in acquisitions.
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fully reflect fair market value, but minority shares will no longer be treated differently than controlling shares, from a valuation perspective.\textsuperscript{171} Additionally, the controlling shareholders’ ability to “cheat” minority shareholders by manipulating the price of the firm’s common stock will be lessened considerably if Congress adopts the New York appraisal

\textsuperscript{171} Under the appraisal process the Comptroller uses to value dissenting shareholders’ stock in a merger under the National Bank Act, the Comptroller does not include merger premiums for control in the valuation of shares on the ground that the purchase premiums depend “entirely on the acquisition or control plan of the purchasers, and such payments are not regular or predictable elements of market value.” 53 FED. REG. 32,967, 32,968 (Aug. 22, 1988).

Commentators disagree as to whether the merger premium should be included in the price received by dissenting minority shareholders in freeze-out mergers. Thompson argues that when majority shareholders force minority shareholders to give up their shares without the option of continued participation in the merged firm, the valuation of a minority shareholder’s interest should reflect the firm’s “future prospects.” Thompson, supra note 21, at 427. Thompson also argues that the appraisal process must “account for the value of the shareholder’s right (if any) in continued participation, which the majority has taken from the [minority] shareholder voluntarily.” \textit{Id}. Furthermore, Thompson contends that while freeze-out mergers may enhance the welfare of the shareholders as a group and contribute to efficiency in the market for corporate control, valuation of the minority interest based on a pre-merger standard could result in majority shareholders forcing minority shareholders to accept an inadequate price. \textit{Id}. at 427-28.

Another commentator has argued that fiduciary principles require that minority stockholders share in any premium that occurs as a result of the synergistic benefits of a merger. Morello, supra note 168, at 158-89. Morello has suggested that an appraisal of minority shares based on an arm’s length transaction standard would ensure that the minority shareholders receive adequate consideration for their shares. \textit{Id}. at 162. Additionally, Brudney and Chirelstein have contended that because a freeze-out merger often result in a new corporation with a greater value than either firm could have realized as separate entities, a pro-rata share of this increased value should accrue to minority shareholders. Victor Brudney & Marvin A. Chirelstein, \textit{Fair Shares in Corporate Mergers and Takeovers}, 88 HARV. L. REV. 297, 322 (1974).

Mininberg has argued that minority stockholders should receive the post-merger value of their shares. Mininberg, supra note 149, at 116-17. Because the minority shareholders do not control the timing of the merger, Mininberg has suggested that the appraisers or courts should consider, in valuing the minority shareholders interests, “when the rational shareholder, having knowledge of the merger, would have decided to sell.” \textit{Id}. at 117. Mininberg has contended that in establishing value, a single valuation formula, such as the Delaware Block Approach, is inadequate because it cannot possibly accommodate all factors relevant to the determination of share value at a given point in time. \textit{Id}.

However, Easterbrook and Fischel have argued that the fiduciary principle does not require that merger gains be shared equally between shareholders. Frank H. Easterbrook & Daniel R. Fischel, \textit{Corporate Control Transactions}, 91 YALE L.J. 698, 731 (1982). According to Easterbrook and Fischel, the fiduciary principle is satisfied if some investors receive a premium for their shares while the remaining investors do not suffer a loss. \textit{Id}. Easterbrook and Fischel have also contended that an unequal division of gains from merger and other corporate control transactions facilitates wealth maximization by providing an incentive for a group, in this case the majority shareholders, to undertake risk. \textit{Id}.
Freeze-out mergers can provide substantial benefits not only to the corporation but, in a broader sense, to the economy. Although minority shareholders may be precluded from future participation in the merged firm and may be forced to accept cash for their shares, the benefits resulting from merger transactions appear to outweigh these harms, provided that the minority shareholders receive a fair value for their shares. In NoDak, the Eighth Circuit recognized the benefits that often result from merger activity and appeared to have considered them in arriving at its decision. Under the National Bank Act, the Comptroller can employ one or more of several valuation methods in the appraisal of the minority shareholders' interests, some of which are not market-based. Most importantly, the Comptroller does not have to consider any premium that arises from the merger in the valuation of the minority shareholders' interest.

To ensure the fair valuation of the minority's shares, full disclosure of all relevant information associated with the merger and a market-based appraisal process, which includes a merger premium, are required. The freeze-out merger should not be a means by which wealth can be transferred from the minority to the majority shareholders, but rather, a means by which financial and physical capital can be effectively allocated and consolidation and efficiency gains can be achieved.

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172. For a discussion of the potential for price manipulation in freeze-out mergers, see supra note 156 and accompanying text.
173. For a discussion of the benefits of freeze-out mergers, see supra notes 147-51 and accompanying text.
174. For a discussion of the need for a fair valuation of minority shareholders' interests which takes into account the merger premium, see supra notes 168-72 and accompanying text.
175. NoDak, 998 F.2d at 1422-23. For a discussion of the Eighth Circuit's decision in NoDak, see supra notes 73-142 and accompanying text.
177. For a discussion of the need to include a merger premium in the valuation of dissenting minority shareholders' interests under the National Bank Act, see supra note 171 and accompanying text.
178. For a discussion of a market-based valuation process as presented in the Weinberger "entire fairness test" and the New York appraisal statute which includes a merger premium, see supra notes 162-72 and accompanying text.