

# SQUEEZE-OUT MERGERS AND THE "NEW" APPRAISAL REMEDY

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As the title to Professor Steinberg's and Ms. Lindahl's article suggests, the Delaware Supreme Court's decision in *Weinberger v. UOP, Inc.*,<sup>1</sup> has produced a "new" law of squeeze-out mergers. This "new" law is the latest judicial response to the possibility of majority shareholder overreaching of minority shareholder rights in a squeeze-out merger. It is the third such judicial effort since statutory and judicial changes in the 1960s completed the legitimization of cash-out mergers.<sup>2</sup> In contrast to courts in the two previous eras, the *Weinberger* court emphasized the appraisal process, albeit a new and improved version, as the primary protection for minority shareholders who have been victimized by the flexibility bestowed upon majority shareholders by the cash-out merger laws. This Article surveys this "appraisal era" in the law of squeeze-out mergers. Part I places the *Weinberger* approach within the historical context of prior law regulating squeeze-out mergers. Part II focuses on the Delaware court's use of the appraisal statute to remedy breaches of fiduciary duty, in particular, an insider's conflict of interest, a process which substitutes the statutory procedure for the broad flexible concepts developed by the courts of equity. Part III suggests that even if the appraisal statute can perform this broader func-

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1. 457 A.2d 701 (Del. 1983).

2. Cash-out mergers and squeeze-out mergers are roughly synonymous terms that refer to mergers by which majority shareholders eliminate one or more of the other owners of the enterprise by forcing the minority to exchange their equity position in a corporation for cash or some other non-equity interest. (To the extent that "squeeze-out" includes transactions which use non-cash, but non-equity participation, it may be a broader term.) Other writers use "freeze-out" or "take-out" to describe the same type of transactions. See Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1193 (1964) (freeze-out has come to imply a purpose to force a liquidation or sale of a stockholder's shares not incident to some other wholesome business goal); Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 625 n.3 (1981) (sees take-out as neutral term and squeeze-out or freeze-out as more pejorative).

tion in publicly held corporations, the *Weinberger* approach is not appropriate for closely held corporations. In closely held corporations, shareholders enter the enterprise with much different expectations and greater potential exists for the majority shareholder to abuse the minority because of the greater uncertainty in valuing shares.

### I. JUDICIAL RESPONSES TO THE LEGITIMIZATION OF SQUEEZE-OUT MERGERS

Modern state statutes governing fundamental corporate changes reflect an evolution toward simplified procedures that provide greater flexibility for managers to structure corporate transactions and less opportunity for minority shareholders to prevent or delay such changes.<sup>3</sup> These statutory developments make it easier for directors and controlling shareholders to utilize mergers and other fundamental corporate changes to squeeze out minority shareholders. *Weinberger* can be understood better if placed within this historical context.

At common law unanimous shareholder consent was a prerequisite to fundamental changes in a corporation. Each shareholder had a contract that created vested rights in the corporation and the corporation could not change these rights without the shareholder's consent.<sup>4</sup> This

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3. One commentator gave the following argument for statutes that relax the requirements for fundamental corporate changes:

As a corporation loses its neighborhood aspect and takes on the character of a political institution, it is of national concern that the corporation have flexibility to adapt itself to new challenges and new problems arising in our ever-changing economy. It becomes necessary that rearrangement of its capitalization with the shifting tides of business need should be accomplished like other practical decisions. This means that changes can be made by the majority within the procedural limitations set up by statute to safeguard the minority from abuse. No veto by a small group can be tolerated. However suitable the rule of unanimity might be for a partnership, it is wholly unsuited to political institutions.

Gibson, *How Fixed are Class Shareholder Rights?*, 23 LAW & CONTEMP. PROBS. 283, 291 (1958). See Folk, *State Statutes: Their Role in Prescribing Norms of Responsible Management Conduct*, 31 BUS. LAW. 1031, 1042 (1976) (state statutes reveal a "pattern of increasing managerial discretion and diminishing shareholder rights"); see also Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purpose*, 1980 AM. B. FOUND. RESEARCH J. 69; O'Neal & Magill, *California's New Close Corporation Legislation*, 23 UCLA L. REV. 1155 (1976); Schulman & Schenk, *Shareholder's Voting and Appraisal Rights in Corporate Acquisition Transactions*, 38 BUS. LAW. 1529 (1983).

4. See, e.g., *Voeller v. Neilston Warehouse Co.*, 311 U.S. 531, 535 n.6 (1941); *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, 595-96 (1921); *Kean v. Johnson*, 9 N.J. Eq. 401, 409 (N.J. Ch. 1853); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROBS. 307 (1958).

The highwater mark of the "vested rights" theory was perhaps reached in the Delaware case of

rule enabled arbitrary or unscrupulous shareholders, often a small minority, to use the nuisance value of their shares to exact unfair concessions from the majority by blocking or threatening to block desirable corporate changes. In response most states enacted statutes that authorized nonunanimous approval of charter amendments, mergers, consolidations, sales of substantially all of the corporation's assets or other fundamental corporate actions.<sup>5</sup> Many modern statutes require only a vote of a bare majority of shares to approve a merger.<sup>6</sup>

When legislators abrogated the unanimous shareholder consent rule, they often enacted appraisal or dissenters' rights statutes, which gave dissenting shareholders the option to withdraw from the enterprise and receive fair value for their shares whenever the majority shareholders changed the fundamental nature of the enterprise.<sup>7</sup> One commentator described the considerations leading to the enactment of the early appraisal statutes as follows:

It was also realized that it was necessary to afford some relief to dissenters; that, though a small group should not be able to prevent the majority from doing with the corporation what they thought wise, yet the minority should not be forced to continue in an enterprise radically different from the venture on which they originally embarked, or in an essentially altered state. The result in most jurisdictions was a compromise conferring on the dissenters the right to receive cash value of their stock and provid-

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Keller v. Wilson & Co., 21 Del. Ch. 391, 412, 190 A. 115, 125 (1936). The court held that a preferred shareholder's right to accumulated dividends must, where the law at the time the stock was issued did not provide for their elimination, "be regarded as a vested right of property secured against destruction by the Federal and State constitutions." More recent decisions, however, seem to have been virtually abandoned the vested rights theory. See *Hariton v. Arco Electronics, Inc.*, 41 Del. Ch. 74, 76, 188 A.2d 123, 125 (1963); *Federal United Corp. v. Havender*, 24 Del. Ch. 318, 332-35, 11 A.2d 331, 338-39 (1940); see also *Hottenstein v. York Ice Mach. Corp.*, 136 F.2d 944, 951 (3d Cir. 1943), cert. denied, 325 U.S. 886 (1945); cf. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RESEARCH J. 875, 878 n.10 (describes *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) as a modern expression of the vested rights theory).

5. See, e.g., CONN. GEN. STAT. ANN., §§ 33-355, 33-360(b), 33-372(d), 33-376(c) (West 1981); N.Y. BUS. CORP. LAW, §§ 903(a)(2), 909(a)(3), 1001 (McKinney 1968); OHIO REV. CODE ANN., §§ 1701.71(A), 1701.79(B), 1701.86(E) (Page 1978).

6. See, e.g., CAL. CORP. CODE § 903(a)(4)-(6) (West 1955); DEL. CODE ANN. tit. 8, § 242(b)(2) (Replacement Volume 1983); FLA. STAT. ANN. § 608.18(1) (West 1984); MICH. STAT. ANN. § 21.197(615) (Callaghan 1983); N.J. REV. STAT. § 14A:9-3(2)(d) (1974); N.Y. BUS. CORP. LAW, § 804(a)(3) (McKinney 1963); OHIO REV. CODE ANN., § 1701.71(b) (Page 1978); MODEL BUSINESS CORP. ACT § 60(e) (1979).

7. See Manning, *The Shareholder Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 246-47 (1962).

ing for an appraisal where no agreement could be reached.<sup>8</sup>

The early statutes that authorized mergers and consolidations contemplated that the shareholders of the constituent companies would receive shares in the surviving corporation.<sup>9</sup> While the provisions of these appraisal statutes gave minority shareholders the option to have the corporation buy their shares, the corporation could not force the minority shareholders to sell. Subsequent amendments to the merger statutes permitting cash as consideration in a merger<sup>10</sup> and authorizing "short-form" mergers<sup>11</sup> provided a direct mechanism for the majority shareholder to eliminate minority shareholders involuntarily from the enterprise through a cash payment, subject only to the minority shareholders' right to pursue the appraisal option. While some evidence suggests the legislatures did not intend these changes to authorize the elimination of minority shareholders,<sup>12</sup> courts came to interpret the

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8. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. REV. 420, 421 (1930). See also *Chicago Corp. v. Munds*, 20 Del. Ch. 142, 149, 172 A. 452, 455 (1934) (dissenting shareholder given the option to retire and receive value of stock); M. EISENBERG, *THE STRUCTURE OF THE CORPORATION* § 7.2 (1976) ("The appraisal right is a mechanism admirably suited to reconcile . . . the need to give the majority the right to make drastic changes . . . to meet new conditions as they arise, with the need to protect the minority against being involuntarily dragged along into a drastically restructured enterprise in which it has no confidence.").

9. See *Coyne v. Park & Tilford Distillers Corp.*, 38 Del. Ch. 514, 517, 154 A.2d 893, 895 (1959) (the early Delaware statute did not permit the payment of cash for shares surrendered in a merger or consolidation; it provided that "the merger agreement must state the manner of converting the shares of each of the constituent corporations into shares of the resulting corporation").

10. See Weiss, *supra* note 2 at 632-41. Florida's corporate code provided for distributions of cash, notes or bonds as early as 1925 while three other states added similar provisions in the next decade. Widespread use of cash as permissible consideration in long-form mergers, however, did not occur until the 1960s. New York authorized cash as consideration in its long-form merger statute in 1961, Delaware in 1967, New Jersey in 1968, and the Model Business Corporation Act in 1969. Legislatures authorized cash as consideration for short-form mergers somewhat earlier.

11. See W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 1464 (5th ed. 1980). A short-form merger statute typically permits a company to merge with a subsidiary of which it owns 90 percent, requiring only the approval of the parent company's board of directors. Under the terms of the merger, the parent can designate that minority shareholders will receive cash for their shares instead of equity securities in the surviving corporation.

12. See Weiss, *supra* note 2, at 641. Professor Weiss suggests that the legislative purpose of short-form merger statutes and permitting cash as consideration was to provide corporate managers with greater flexibility in structuring corporate combinations, but not to effect a squeeze-out. See also Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CALIF. L. REV. 1072, 1097 n.69 (1983).

Another commentator concluded that changes in the federal tax laws, which permitted triangular mergers and other more complex reorganizations to be treated as nontaxable reorganizations, motivated state legislatures to enact cash short-form merger statutes:

I do not believe that anyone in these amendments foresaw what has developed since then. The drafters of the [New York] legislation that permitted the use of cash consider-

provisions as permitting that result.<sup>13</sup>

As the flexibility given to the majority shareholders increased, courts recognized the potential for abuse, particularly when the appraisal proceeding could be avoided or did not produce fair value, and imposed equitable limits on the majority's broad statutory squeeze-out powers.<sup>14</sup> Some federal courts responded by using an anti-fraud provision of the federal securities law, the versatile rule 10b-5,<sup>15</sup> to reach unfair actions by directors and controlling shareholders who owed fiduciary duties to the corporation and its minority shareholders.<sup>16</sup> Federal courts applied this "new fraud" concept when a controlling shareholder used a short form merger statute to squeeze out minority shareholders in situations where the appraisal remedy was inadequate and the transaction lacked a business purpose.<sup>17</sup>

The Supreme Court called a halt to this broad interpretation of se-

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ation in a merger as a means of providing greater flexibility under the tax law probably did not foresee that it would also be used as a means to eliminate minority shareholders. Nevertheless, it was not long before that potential was recognized.

Robinson, *Elimination of Minority Shareholders*, 61 N.C.L. REV. 515, 517 (1983).

13. See e.g., *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 9, 187 A.2d 78, 80 (1962) (real purpose of short-form merger act was to give the majority shareholder a convenient means to cash out the minority); *David J. Greene & Co. v. Schenley Indus. Inc.*, 281 A.2d 30, 35 (Del. Ch. 1971) (principle extended to long-form merger); *Wilcox v. Stern*, 18 N.Y.2d 195, 201-02, 219 N.E.2d 401, 404, 273 N.Y.S.2d 38, 43 (1966) (minority shareholders can be cashed out in short-form mergers). *But see Weiss*, *supra* note 2, at 651 (*Stauffer* statement of purpose for short-form merger statute unsupported by legislative authority; short-form merger statute enacted largely to simplify and facilitate parent-subsidary mergers where they promoted operational efficiency).

14. Some courts were influenced by transactions in which public stockholders who had invested in companies during "hot issues" markets were squeezed out of these corporations at a much lower price only a short time later during a period in which the markets were generally depressed. See e.g., *Berkowitz v. Power/Mate Corp.*, 135 N.J. Super. 35, 342 A.2d 566 (1975); see also Address by A.A. Sommer Jr., SEC Commissioner, "Going Private: A Lesson in Corporate Responsibility, Notre Dame Law School (Nov. 14, 1974), reprinted in, [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,010 at 84,695.

15. 17 C.F.R. § 240.10b-5 (1984).

16. See e.g., *Green v. Santa Fe Indus. Inc.*, 533 F.2d 1283, 1287 (2d Cir. 1976) (short-form merger; 10b-5 reaches "breaches of fiduciary duty by a majority against a minority without any charge of misrepresentation or lack of disclosure"), *rev'd*, 430 U.S. 462 (1977); *Marshel v. AFW Fabric Corp.*, 533 F.2d 1277 (2d Cir.) (proxy statement fully disclosed lack of corporate purpose of merger of corporation into a wholly owned subsidiary of the controlling shareholders; the court found that the merger violated rule 10b-5), *vacated and remanded*, 429 U.S. 881 (1976); *Bryan v. Brock & Blevins Co.*, 343 F. Supp. 1062 (N.D. Ga. 1976) (proposed squeeze-out merger a course of business that would operate as fraud or deceit), *aff'd*, 490 F.2d 563 (5th Cir. 1974) (relying on state law).

17. *Green v. Santa Fe Indus., Inc.*, 533 F.2d 1283, 1287 (2d Cir. 1976) (10b-5 reaches breaches of fiduciary duty by a majority against minority shareholders without any charge of misrepresentation or lack of disclosure), *rev'd*, 430 U.S. 462 (1977).

curities fraud in its watershed 1977 decision, *Santa Fe Industries, Inc. v. Green*.<sup>18</sup> Significantly, the Court based its decision on the limits of the federal securities statute and not on any substantive approval of the majority shareholder's activity. The Court suggested that a need for federal fiduciary standards may exist, but held that the federal courts can not create these standards under the language of section 10b of the Securities Exchange Act of 1934.<sup>19</sup>

Responding to this and other more explicit calls for federal action to preempt traditional state law regulation,<sup>20</sup> the Delaware Supreme Court broadened the use of state law fiduciary duty concepts to limit the majority's statutory rights. In *Singer v. Magnavox Co.*,<sup>21</sup> the court held that a merger for the sole purpose of squeezing out minority shareholders was a breach of the majority shareholder's fiduciary duty.<sup>22</sup> Further, the court reduced its prior emphasis on appraisal proceedings and permitted the minority shareholders challenging a merger to bring suits in equity for damages or other relief.<sup>23</sup> Subsequent cases produced two not necessarily complimentary results. On one hand, courts defined the "business purpose" aspect of a majority shareholder's fiduciary duty so broadly that any transaction could meet this test.<sup>24</sup> On the other hand, courts permitted plaintiffs alleging such fiduciary duty claims to bring suits in equity and avoid cumbersome appraisal proceedings even when their only disagreement with the majority was over

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18. 430 U.S. 462 (1977).

19. *Id.* at 479.

20. In addition to the Supreme Court's reference to possible federal legislation, movement in that direction had been spurred by Professor William Cary's critical article of Delaware's corporate laws. Cary, *Federalism and Corporate Law: Some Reflections on Delaware*, 83 *YALE L.J.* 663 (1974).

21. 380 A.2d 969 (Del. 1977).

22. *Id.* at 978.

23. In *Singer*, the court held that a complaint which alleges that the majority completed a merger solely to freeze out minority shareholders "states a cause of action for violation of a fiduciary duty for which the court may grant such relief as it deems appropriate." *Id.* at 980. The *Singer* court expressly overruled any inconsistent statements in *Stauffer v. Standard Brands, Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (1962), which held that appraisal was plaintiff's exclusive remedy.

24. See, e.g., *Weinberger v. UOP Inc.*, 426 A.2d 1333, 1349, *rev'd on other grounds*, 457 A.2d 701 (Del. 1983) (legitimate business interests of the majority in securing the best investment opportunity for its capital, realizing significant tax, accounting and insurance savings, and eliminating possible conflict of interest problems are proper purposes); *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121, 1123-25 (Del. 1977) (cash-out merger designed solely to serve business interests of majority shareholder has valid business purpose); *Weiss*, *supra* note 2, at 671 n.300 (business purpose test may be virtually interpreted out of existence).

the value of their shares.<sup>25</sup>

In *Weinberger v. UOP, Inc.*,<sup>26</sup> the Delaware Supreme Court introduced the latest chapter of the squeeze-out merger story. The court abandoned business purpose as a requirement for mergers and provided the minority shareholders with a broader standard for the determination of value in the appraisal process.<sup>27</sup> The court's new direction reflected its realization that the business purpose standard, as interpreted by the courts, offered little protection to minority shareholders.<sup>28</sup> The decision also represented the court's acceptance of a view previously expressed by Justice Quillen: If shareholders were really complaining about inadequate price for their stock, the court "should not foster an unnecessary damage forum because of any judicial limitations placed on the statutory appraisal procedure. Rather we should encourage the legislatively established valuation process to be open to generally accepted techniques of valuation used in other areas of business or law."<sup>29</sup> In *Weinberger*, the court updated the outmoded Delaware appraisal procedure to reflect modern financial and legal learning. The court rejected the "Delaware Block" method of valuation and substituted an approach that permitted proof of value by "any techniques or methods that are generally considered acceptable in the financial community and otherwise admissible in court, subject only to our interpretation of 8 Del. C. § 262(h)."<sup>30</sup>

Having attempted to cure the deficiencies that prevented a minority shareholder from receiving a fair price in an appraisal proceeding, the court then limited the non-appraisal remedies a minority shareholder might pursue.<sup>31</sup> The court variously described this new improved appraisal procedure as, "the remedy,"<sup>32</sup> "the basic remedy,"<sup>33</sup> and the

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25. See *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1039-40 (Del. 1979) (Quillen, J., dissenting).

26. 457 A.2d 701 (Del. 1983).

27. *Id.*

28. *Id.* at 715.

29. *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1040 n.12 (Del. 1979) (Quillen, J. dissenting). See also *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 150 (Del. 1980) (Quillen, J. concurring) (suggesting appraisal process can consider questions of entire fairness and motive).

30. 457 A.2d at 713.

31. *Id.* at 715 (return to the well-established principles mandating a stockholder's recourse to the basic remedy of appraisal).

32. *Id.* at 703.

33. *Id.* at 715.

plaintiff's "monetary remedy."<sup>34</sup> Any alternative relief depended on a showing of "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross or palpable overreaching."<sup>35</sup>

The *Weinberger* decision represents a distinct movement by the Delaware court toward the view that a shareholder has only a financial interest in the corporation, which the majority can take so long as the majority pays a fair price.<sup>36</sup> By broadening a court's valuation standards, the *Weinberger* court sought to insure that the appraisal process produced a "fair value," which approximated real world value. This result would remove the prospect that an artificially low appraisal price would tempt majority shareholders to initiate a merger transaction to acquire the minority shareholders' interest in the company at a bargain price.<sup>37</sup>

The court combined this broadened valuation standard with certain procedural safeguards, which the opinion encouraged: full disclosure, an independent negotiating committee, and approval of the transaction by a majority of minority shareholders.<sup>38</sup> This combination promotes a bargaining process that allows the parties to decide for themselves what is a fair price and resorts to appraisal when the parties fail to reach agreement.<sup>39</sup>

Delaware is not alone in its attempt to reinvigorate the statutory appraisal remedy. A recent New York statute<sup>40</sup> and the Revised Model Business Corporation Act<sup>41</sup> both include streamlined procedures that seek to provide dissenting shareholders fair value. They also attempt to avoid delays, uncertainties, and legal expenses that make judicial appraisals prohibitive for the small investors and leave them at the mercy of a majority squeeze-out. This renewed emphasis on statutory efforts to protect minority shareholders represents a significant turn-about from twenty years ago when prominent commentators were writ-

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34. *Id.* at 714.

35. *Id.*

36. *Id.* at 703. The court's conclusion that "the remedy available under our law to minority shareholders in a cash-out mergers [is] . . . appraisal" recognizes the propriety of excluding the minority if fair price is paid and perhaps fair dealing. *Id.*

37. See W. CARY & M. EISENBERG, *supra* note 11, at 1456.

38. 457 A.2d at 711-12.

39. See Burgman & Cox, *Reappraising the Rule of the Shareholder in the Modern Public Corporation: Weinberger's Procedural Approach to Fairness in Freeze Outs*, 1984 WIS. L. REV. 593, 652-65; see also REVISED MODEL BUSINESS CORP. ACT, Intro. Comment to Chapter 13 (1984).

40. N.Y. BUS. CORP. LAW § 623 (McKinney 1963 & Supp. 1984-85).

41. REVISED MODEL BUSINESS CORP. ACT, Chapter 13 (1984).

ing off the appraisal remedy.<sup>42</sup> It also represents a significant change from five or ten years ago when federal and state courts developed alternative rights for minority shareholders because the statutory procedure provided so little protection for the minority.<sup>43</sup> The following section discusses whether this new emphasis on appraisal will be successful in protecting minority shareholders.

## II. PROTECTION OF MINORITY SHAREHOLDERS IN THE POST-*WEINBERGER* APPRAISAL ERA

The *Weinberger* court clearly emphasized appraisal as the primary method to resolve majority-minority disputes in squeeze-out mergers. A corollary to the court's position is that fiduciary duty will play a reduced role in the regulation of fundamental corporate changes. Under this view the wrong is not that the majority takes the minority's interest, but that it takes the interest without paying fair value. To assure fair value the court relied on the expanded appraisal standard and expanded bargaining which the court encourages through its discussion of procedural fairness. The court appeared reluctant to allow a minority shareholder to seek relief outside the appraisal process unless the defendant's conduct makes it impossible for the appraisal standard to work (such as where the defendant's fraud hides the value of the company or defendant's misrepresentations induce a minority shareholder to forego the appraisal proceeding).<sup>44</sup>

While the new emphasis on appraisal in *Weinberger* is clear, the court discussed the reduced role for fiduciary duty in a more confusing manner. The court's holding continues to subject a majority shareholder to a fiduciary duty in a squeeze-out merger, but the court suggests that the usual remedy for breach of that duty is appraisal. This interplay between breach of fiduciary duty and the appraisal remedy merits detailed consideration because it illustrates an evolution of the

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42. See, e.g., Manning, *supra* note 7, at 260 (appraisal remedy is of virtually no economic advantage to the usual shareholder except in highly specialized situations).

43. See *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (1979) (Quillen, J., dissenting) (suggestion that the *Singer* damage remedy was a response to insufficient appraisal procedures); Greene, *Corporate Freeze Out Mergers, A Proposed Analysis*, 28 STAN. L. REV. 487, 499 n.37 (1976) (*Green v. Santa Fe* seen as a reaction to insufficient state law appraisal remedy).

44. See *Rabkin v. Philip A. Hunt Chem. Corp.*, 480 A.2d 655, 660 (Del. Ch. 1984) ("where, as here, there are no allegations of non-disclosure or misrepresentations, *Weinberger* mandates that the plaintiffs' entire fairness claims be determined in an appraisal proceeding").

appraisal procedure to providing a remedy for breaches of fiduciary duty, a purpose appraisal did not originally serve.

The *Weinberger* court recognized that a squeeze-out merger between a parent and a subsidiary gives rise to fiduciary obligations on the part of the parent because the parent is on both sides of the transaction.<sup>45</sup> The court suggested that the parent (in this case Signal Company), could satisfy its fiduciary obligation if it structured the transaction on an arms-length basis with an independent negotiating committee representing the subsidiary.<sup>46</sup> This procedure would, in effect, remove the self-dealing. Because Signal did not use this procedure the court judged its conduct by the inherent fairness test and found that its conduct fell short of that standard.<sup>47</sup>

The court also affirmed the Chancellor's conclusion that the majority's fiduciary duty usually requires it to carry the burden of proof that the transaction is fair, but that an informed vote in favor of the plan by a majority of minority shareholders entirely shifts the burden to the plaintiff to show a lack of fairness.<sup>48</sup> While a majority of the minority approved the transaction in *Weinberger*, the vote was not an informed one. Therefore, the court refused to shift the burden of proof.<sup>49</sup>

These principles of fiduciary obligation are consistent with prior Delaware law.<sup>50</sup> The important factor in *Weinberger* was how fiduciary obligations relate to remedy. Signal clearly had a fiduciary obligation to the minority and the court found that Signal breached its duty. According to the court, the remedy for such a breach of duty was appraisal, which is, of course, the same remedy available to the minority if the majority had met its fiduciary duty (e.g., if the majority had used an independent negotiating committee or obtained an informed vote of a majority of the minority shareholders). The court did not go so far as to say that appraisal can remedy all breaches of fiduciary duty. Indeed, it clearly stated that additional remedies beyond appraisal may be available "in certain cases, particularly where fraud, misrepresentation,

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45. 457 A.2d at 710.

46. *Id.* at 709 n.7.

47. *Id.* at 711.

48. *Id.* at 703.

49. *Id.*

50. *See, e.g.*, *Michelson v. Duncan*, 407 A.2d 211, 224 (1979) (burden shifts to plaintiff if corporate transaction approved by informed vote of majority of the minority); *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 299, 93 A.2d 107, 110 (1952) (majority shareholder's duty of fairness in merger).

self-dealing, deliberate waste of corporate assets or gross or palpable overreaching is involved.”<sup>51</sup> Yet in *Weinberger*, a case that clearly involved self-dealing, the court relegated the plaintiffs to an appraisal type remedy suggesting that the *Weinberger* court believed that the appraisal statute should provide the usual remedy for breach of fiduciary duty.<sup>52</sup>

Commentators disagree on the capability of appraisal to provide a remedy for breach of fiduciary duty. Victor Brudney and Marvin Chirelstein stated:

Appraisal is predicated more on the conception of managerial incompetence in valuing an old enterprise and negotiating a price for it than on the notion of a conflict of interest which results in a diversion of a portion of the merger proceeds to a controlling parent . . . it neither serves nor is designed to serve as a remedy for fiduciary misbehavior at which a fairness challenge is directed.<sup>53</sup>

In a more recent commentary, Daniel Fischel viewed appraisal as particularly useful in situations where the majority shareholder has a conflict of interest. Fischel argued that appraisal can best be understood as “an implied contractual term that sets the minimum price at which the firm or a part thereof can be sold in situations where certain groups are more likely to attempt to appropriate wealth from other groups than to maximize the wealth of the firm.”<sup>54</sup>

*Weinberger* suggests the Delaware’s court’s movement in the direc-

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51. 457 A.2d at 714.

52. *Id.* The court refers to its award as a “quasi-appraisal” remedy because the time for perfecting the statutory appraisal right had long since passed. This remedy gives the plaintiff “fair value” as determined under the appraisal standard, regardless of the plaintiff’s failure to comply with the procedural requirements of the appraisal statute. The court extends this same quasi-appraisal right to any then currently litigated, pending, or proposed merger because plaintiffs in those cases may have relied on the pre-*Weinberger* law and failed to perfect their right to appraisal. But for any later mergers the court says “the provisions of 8 Del.C. § 262, as herein construed, respecting the scope of an appraisal, and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cash-out merger,” *Id.* at 715. See also *Rabkin v. Philip A. Hunt Chem. Corp.*, 480 A.2d 655, 660 (Del. Ch. 1984) (“where, as here, there are no allegations of non-disclosures or misrepresentations, *Weinberger* mandates that the plaintiffs’ entire fairness claims be determined in an appraised proceeding”).

53. Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 307 (1974).

54. Fischel, *supra* note 4, at 876. Fischel seeks to turn appraisal remedy from an *ex post* approach, which focuses on the perceived need for protection of minority shareholders once a transaction has been announced, to an *ex ante* approach, which also considers the effect the remedy has on the “probability . . . [that] the transaction tak[es] place, the terms on any transaction, and the agency costs of management in the event no transaction occurs.” *Id.* at 878.

tion of using the appraisal statute to check management conflict of interests, which courts traditionally have regulated by fiduciary duty concepts. If courts intend to use appraisal to enforce fiduciary duties and not just to check managerial incompetence, courts and legislatures should adjust the standard for ascertaining value and the procedural requirements of the appraisal process because the statutes were not written with this broader purpose in mind.

### A. Standards for Determining Fair Value

The *Weinberger* court's updating of appraisal standards included two elements not traditionally included in appraisal recovery: post-transaction value of the merged company and rescissory-type recovery. Courts should consider both elements if they are going to use appraisal to remedy a breach of fiduciary duty.

Pre-*Weinberger* Delaware law (and the current law in other states) determined the value of dissenters' shares immediately before the merger and excluded any gain or loss in anticipation of the merger.<sup>55</sup> The *Weinberger* court emphasized that its "all relevant factors" test included consideration of "future prospects" of the merged corporation.<sup>56</sup> Commentators have read this language to support an appraisal award based on the amount that would be realized by minority shareholders if a third party purchased the corporation in an arms-length transaction.<sup>57</sup> Other commentators have viewed the term "all relevant factors" as including some sort of sharing between the majority and minority of the gain produced by the transaction.<sup>58</sup>

This broadening of the appraisal standard may reflect the change in the purpose of appraisal statutes discussed above. Appraisal statutes

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55. See DEL. CODE ANN. tit. 8, § 262(b) (Replacement Volume 1983) (Court of Chancery "shall appraise the shares determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger"). In *Weinberger* the court interpreted the exception narrowly, stating that it was "designed to eliminate use of *pro forma* data and projections of speculative variety relating to completion of a merger." 457 A.2d at 713. Other states have similar provisions for determining value immediately before the effectuation of the merger. See H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 349 (3d Ed. 1983).

56. 457 A.2d at 714.

57. See, e.g., Weiss, *The Law of Take Out Mergers: Weinberger v. UOP, Inc. Ushers in Phase Six*, 4 CARDOZO L. REV. 245, 252 (1983) (*Weinberger* did not clearly require a parent to pay as much for the minority interests in a subsidiary as the minority shareholder would realize if the subsidiary were sold to a third party in an arm's-length transaction, but the opinion suggests that the court was sympathetic to such a value measurement).

58. See Burgman & Cox, *supra* note 39, at 646-52.

were designed as a remedy for a minority shareholder who had elected to forego the opportunity to continue in the modified enterprise.<sup>59</sup> In that situation, a court should determine the value of the minority's interest independent of any change in the value of the corporation brought about by the transaction. A shareholder who voluntarily rejects the opportunity to participate in an enterprise is not entitled to share in any potential success brought about by the change in the enterprise. When the majority forces the minority out and does not give the minority the option of participation in the new enterprise, appraisal of the minority's interest should include consideration of "future prospects" of the enterprise.<sup>60</sup> Not only must the appraisal process value the dissenter's interest in the pretransaction enterprise, but it must also account for the value of the shareholder's right (if any) in continued participation, which the majority has taken from the shareholder involuntarily. To the extent that minority shareholders have a right to continued participation, they can claim a portion of the gain created by the transaction.<sup>61</sup>

The pretransaction standard probably would deny the minority any portion of the gain from the transaction.<sup>62</sup> Allocating all the gain produced in a squeeze-out merger to corporate managers and majority shareholders may reward those who "uncover potential value increasing transactions" and contribute to efficiency in the market for corporate control, which ultimately increases the welfare of shareholders as a group.<sup>63</sup> Such a rule, however, leaves open the possibility of harm to

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59. See, e.g., *Lynch v. Vickers Energy Corp.*, 429 A.2d 497, 505-06 (1981); *supra* notes 6-9 and accompanying text.

60. Whether the minority was voluntarily or involuntarily squeezed out will not always be clear. The majority may give the minority an option to continue but on terms so unattractive that the minority feels effectively forced out. See *Harman v. Masonite Int'l Inc.*, 442 A.2d 487 (Del. 1981); see also Burgman & Cox, *supra* note 39, at 664 (appraisal function in either obvious or subtle force out should do more than assess the pretransaction value of a shareholder's interest).

61. See Burgman & Cox, *supra* note 39, at 623-52 (comparing shareholder's right to participation under theories that view shareholder as an owner or a lender of capital or under a utilitarian perspective). Compare Easterbrook & Fischel, *Corporation Control Transactions*, 91 YALE L.J. 698 (1982) (arguing that exclusion of gain maximizes shareholders value) with Brudney, *supra* note 12 (arguing for equal treatment of all shareholders when a public corporation reallocates participation in the enterprise).

62. See, e.g., DEL. CODE ANN. tit. 8 § 262(h) (Replacement Volume 1983); ILL. REV. STAT. ch. 32 §§ 157.70 & 157.73 (1983); N.Y. BUS. CORP. LAW, § 623(h)(4) (McKinney Cum. Supp. 1983).

63. See Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 928 (1982).

the minority when the insider knows of material inside information or when the market does not effectively value the enterprise and a controlling shareholder pushes through a merger to obtain shares at a bargain price.<sup>64</sup>

*Weinberger's* language suggests a standard that provides minority shareholders with at least a portion of the gain created by the transaction.<sup>65</sup> While the opinion does not state that minority shareholders must always receive a proportionate share or any portion of the gain, the court's discussion of "future prospects" in the context of its treatment of "fair dealing" indicates that its formula has particular use in situations involving self-dealing by the majority shareholder. It would be consistent with this language in *Weinberger* to interpret the statute as creating a presumption that the minority shareholders should receive a proportionate share of the gain from the merger. The majority shareholder can rebut this presumption only if there is sufficient proof of arms-length bargaining that otherwise distributes the gain between majority and minority shareholders. Hypothetically, a minority shareholder may bargain away a right to continued participation in exchange for less than a proportionate share of the gain if such a bargain was necessary to induce a value-increasing transaction. In a squeeze-out merger, where the majority shareholder selects the times for and the terms of the transaction and does not engage in arms-length bargaining with the minority, the court should not assume that the minority shareholders would forego all of the gain; instead the court should resolve any doubts against the majority shareholder.

Such an approach is consistent with common law doctrine that resolved doubts against fiduciaries in a conflict of interest situation.<sup>66</sup> The Revised Model Business Corporation Act supports a similar result by providing an exception to the appraisal statute's exclusion of gain created by the transaction if the exclusion would be "inequitable." The inequitable exception apparently was included for cases like *Weinberger* where there is an absence of fair dealing or fair price.<sup>67</sup>

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64. See Brudney & Chirelstein, *supra* note 53, at 308-09.

65. See *supra* notes 57 & 58 and accompanying text.

66. See generally H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* § 238 (3d ed. 1983).

67. Section 13.01 of the 1984 *Revised Model Business Corporation Act* defines fair value to exclude "any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable." The Official Comment to Chapter 13 of the 1983 exposure draft stated the exception was inserted to deal with "squeeze out situations" in which the dissenter is excluded against his will from continued participation in the altered enterprise by some method like a "cash

The rescissory measure of recovery goes a step further.<sup>68</sup> This standard measures the value of the minority's stock at a time subsequent to the transaction, as is usually done in a "pure" rescission situation.<sup>69</sup> The rescissory measure may permit minority shareholders to recover a proportionate share of the value created by the transaction to the extent that this increased value is reflected in the stock's value on the subsequent date. The same arguments advanced above to support consideration of future prospects also provide support for an award based on a rescissory measure. The rescissory remedy goes further, because it also permits the minority shareholders to recover any increase in value of the shares they gave up caused by events unrelated to the merger, such as a positive change in the stock market or economy as a whole.<sup>70</sup> Such use of rescission is sometimes characterized as an undeserved wind-fall.<sup>71</sup> It is, however, a fundamental principle of the law of restitution or unjust enrichment that a fiduciary cannot benefit from a breach of fiduciary duty.<sup>72</sup>

Unjust enrichment principles require a defendant to return any benefit gained by the infringement of another's interest or by causing a plaintiff to suffer a loss.<sup>73</sup> Yet even from an unjust enrichment perspective, the rescissory measure of recovery for squeeze-out mergers raises some problems. If the court views the squeeze-out statutes as giving the majority shareholder the right to take the minority's shares conditioned on paying fair value, the only gain from the breach of the fiduciary duty is the difference between what the majority paid for the shares and "fair value." If compliance with fiduciary duty would not have prevented the majority from taking the minority's interest, but only would have changed the terms of the merger, it is difficult to attribute

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merger." The final draft changed that comment to refer to *Weinberger's* discussion of all relevant factors and rescissory damages.

68. The *Weinberger* court created some confusion over whether rescissory damages should be considered a part of "all relevant factors" in the appraisal process. The court also implied that rescissory damages was among the equitable relief that the Chancellor could grant outside of the appraisal process under the "fraud" exception. 457 A.2d at 714.

69. See G. PALMER, *THE LAW OF RESTITUTION* §§ 3.1, 3.3 (1978).

70. See *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981) (court's use of rescissory measures allowed former minority shareholders to recover the benefit of a rise in prices during the period after the squeeze out).

71. See, e.g., Weiss, *supra* note 57, at 253.

72. See G. PALMER, *THE LAW OF RESTITUTION* § 2.11 (1978).

73. *RESTATEMENT (SECOND) OF RESTITUTION* § 1 (Tent. Draft No. 1 1983).

subsequent market changes to the breach of fiduciary duty.<sup>74</sup> In this context, the rescissory recovery takes on a greater deterrent aspect.<sup>75</sup> Courts can use the possibility of rescissory recovery to provide majority shareholders in a conflict of interest situation an incentive to provide "fair dealing" in a squeeze-out merger. If the majority does not provide these mechanisms, a court not only may divide the gains from the merger in a way favorable to minority shareholders, but it may also impose on the majority any risk of a change in the market between the time of the transaction and the time of judgment.

### B. Procedural Requirements

The expenses associated with the appraisal process and the delay in the minority shareholders receiving any recovery under the statute also pose significant obstacles to the use of the appraisal process as an effective remedy for breach of fiduciary duty. The Delaware statute still requires specific procedures, such as the requirement of a demand by the dissenters prior to the shareholder vote.<sup>76</sup> Moreover, courts have strictly construed these procedural requirements.<sup>77</sup> The length of the

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74. *Cf. Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973). In *Gerstle*, a parent corporation induced shareholders of a subsidiary to vote for a merger with proxies that contained material misrepresentations. The court required the parent to share with the minority shareholder any appreciation of the company's assets that were sold in the nine months after the merger because this was a benefit gained by misrepresentation. The court refused to allow the minority to share in the appreciation of another asset sold nine years after the merger. The court concluded that if there had been adequate disclosure the merger would have gone through, but on different terms, and that the revised terms would not have included any share of the appreciation of the asset sold nine years later. *Id.* at 1305-06.

75. Unjust enrichment may promote deterrence but that does not make it punitive. *See Jones, The Recovery of Benefits Gained from a Breach of Contract*, 99 LAW Q. REV. 443, 456 (1983) ("to be deprived of what you have gained [unjustly] can never be a penal liability . . .").

76. *See* DEL. CODE ANN. tit. 8, §§ 262(a)&(d) (Replacement Volume 1983) (shareholder must neither vote for nor consent to the merger and must make a written demand prior to the vote or within 20 days after notification of the effective date of the merger if approved by the stockholders without a meeting).

77. One commentator has compared court interpretations of appraisal procedures to earlier interpretations of common law pleading rules. *See Weiss, supra* note 2, at 653; *see also* Manning, *supra* note 7, at 231 ("the courts have tended to be increasingly stringent in enforcing the procedural letter as the statutes have grown more complex in their procedural nicety").

The Delaware legislature has amended its merger statute to require a corporation, if the merger requires a shareholder vote, to give pre-vote notice that appraisal rights are available and to include a copy of the appraisal section of the statute. The statute also provides that the shareholder's demand "will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares." DEL. CODE ANN. tit. 8, § 262(d)(1) (Replacement Volume 1983).

appraisal proceedings postpones the minority shareholders receipt of payment, costing them the time value of money.<sup>78</sup> Minority shareholders usually have to pay their own attorneys' fees and possibly other costs of the appraisal process and those costs reduce the ultimate value of the award.<sup>79</sup> While recent changes in the Delaware law provide for the sharing of attorney's fees among all who seek appraisal,<sup>80</sup> those fees may still consume a significant part of any recovery.<sup>81</sup> All of these procedural limitations may enable the majority to purchase the minority shares at less than fair value because even if the appraisal process produces a higher value for shareholders, it may not lead to more money in the minority shareholder's pocket.

If courts are going to use appraisal to remedy a breach of fiduciary duty and to assure fair value, the process should reduce the nonrecoverable costs the minority shareholder must bear. If the majority has breached its fiduciary duty by standing on both sides of the transaction, the court (or legislature) should impose the costs of the appraisal process and plaintiff's attorneys' fees on the corporation. For those same reasons, Delaware should follow the lead of the Revised Model Business Corporation Act and require the corporation to pay any undisputed value amount to minority shareholders immediately instead of at the end of litigation.<sup>82</sup>

### C. Summary

Without the adjustment in the value standards and procedural requirements discussed above the fiduciary duty principles set out in *Weinberger*, and particularly the procedural fairness mechanisms that

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78. The appraisal proceeding may take months or years during which the shareholders will not have use of their money. Interest may be included in the award, but it may only run from the date of judgment or the date of exception to the appraiser's report. *See, e.g., Meade v. Pacific Gamble Robinson Co.*, 30 Del. Ch. 509, 514, 58 A.2d 415, 418 (1948) (from date judgment entered); *Swanton v. State Guar. Corp.*, 42 Del. Ch. 477, 486, 215 A.2d 242, 247 (1965) (from date of exception to appraisers report).

79. The Delaware statute provides that the court may determine the costs of the appraisal and tax it "upon the parties as the court deems equitable in the circumstance." DEL. CODE ANN. tit. 8, § 262(j) (Replacement Volume 1983).

80. *Id.*

81. Even if the court or legislature spreads the burden of attorneys' fees over more than one shareholder, there may be difficulty in obtaining qualified legal counsel to handle the case because an attorney's fees may be based on the amount in controversy, which may be relatively small in appraisal proceedings.

82. REVISED MODEL BUSINESS CORP. ACT § 13.25 (1984).

the opinion encourages, serve little purpose. If a breach of those duties leads only to a traditional appraisal remedy, the majority shareholder has little incentive to comply with those obligations.<sup>83</sup> This Article suggests that the failure to follow these procedural fairness standards should have a practical effect on how the law determines the value of the minority's interest. If defendant's conduct prevents the independent bargaining that would permit the establishment of the fair-market value of the minority's shares, the defendant should not complain if the court or appraiser sets a value at the high end of a range of fairness by awarding the minority a full proportionate share of the gain created by the merger and also imposes the costs of appraisal on the corporation.

The Delaware court has carved out an ambitious goal for the appraisal process; but appraisal may not be able to protect the minority without legislative changes<sup>84</sup> and continued flexible judicial interpretation.<sup>85</sup> The procedural fairness protections discussed in *Weinberger* can easily lose their effectiveness. Commentators have expressed concern that independent negotiating committees provide little protection for shareholder interests.<sup>86</sup> Opinions by investment bankers, as the *Weinberger* case illustrates, do little for the minority shareholders.<sup>87</sup> If the court continues to permit the majority shareholders a near absolute right to force out the minority, it should provide independent vigilance to assure that the majority does not manipulate the appraisal process.

### III. *WEINBERGER* AND CLOSELY HELD CORPORATIONS

Even if *Weinberger's* expanded appraisal process provides minority shareholders with sufficient value for their shares to justify allowing the

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83. Professor Weiss has suggested that these procedural fairness standards be given some meaning by preventing any attacks on the merger collateral to appraisal if these procedural fairness standards have been met and no fraud has occurred. Weiss, *supra* note 57, at 259.

84. The *Weinberger* court's interpretation of the Delaware statute to exclude any element of value arising from the merger differs from earlier interpretations of that language. See Lynch v. Vickers Energy Corp., 429 A.2d 497 (Del. 1981); Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980). The statute may require amendment to clarify its meaning.

85. But see Rosenblatt v. Getty Oil Co., New Castle County, No. 5278 (Del. Ch. Sept. 19, 1983), at 51-52 (unreported decision in which Chancellor Brown gave a narrow interpretation to the Supreme Court statement on future prospects).

86. See Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597 (1982); see also Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981) (independent director's committee decision to terminate shareholder's derivative suit requires independent business judgment by court).

87. 457 A.2d at 708. See Steinberg & Lindahl, 62 WASH. U.L.Q. 351 (1984).

majority shareholders the option to squeeze out the minority, the same rule should not apply to squeeze-out mergers involving closely held corporations. The court's conclusion that the appraisal procedures provide the primary protection for minority shareholders rests on the belief that shareholders in public corporations view themselves as mere lenders of capital with only an economic interest in the corporation.<sup>88</sup> Appraisal thus protects the cashed-out shareholders in publically held corporations by providing them the cash equivalent for their shares. Appraisal cannot perform the same function in closely held corporations because of the great difficulty in establishing the cash equivalency for the minority's interests. First, shareholders in a closely held corporation have different expectations about their interest in the entity. They view the corporation not only as an investment, but also as a place of employment. A closely held corporation may be the shareholder's principal or sole source of income.<sup>89</sup> Minority shareholders commonly think of themselves as partners who share responsibility for and control of the corporation in a manner typically associated with ownership.<sup>90</sup> Shareholders who are squeezed out of such enterprises, therefore, lose more than the proportionate value of their shares. If the closely held corporation is a family enterprise, the squeezed-out shareholder may suffer the additional harm of a loss of prestige in family matters.

Second, the valuation of the shares may be very difficult in closely held corporations. There is no public market for the stock to aid the court or appraisers in determining value.<sup>91</sup> Items such as salaries, bonuses, and retirement benefits, which are subject to the control of majority shareholders, can have a major effect on earnings in a closely held corporation and on any determination of value.

These uncertainties increase the possibility that the majority will use the flexibility given to a majority shareholder to propose and structure a squeeze-out merger to take advantage of minority shareholders. The inability of the appraisal remedy to compensate adequately for this risk, together with the different expectations of shareholders require tighter regulation of squeeze-out mergers in closely held corporations than that provided by the *Weinberger* approach. Delaware's retreat

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88. Cf. Manning, *supra* note 7, at 230.

89. See generally F.H. O'NEAL, CLOSE CORPORATIONS § 1.07 (2d ed. 1971).

90. See, e.g., *Donahue v. Rodd Electrotype Co.*, 367 Mass. 578, 328 N.E.2d 505 (1975).

91. See F.H. O'NEAL, *supra* note 89, at § 2.16.

from the *Singer* position increases the need to carve out specific rules for closely held corporations either by statute or subsequent court interpretation.<sup>92</sup>

#### CONCLUSION

*Weinberger* represents an effort to channel majority-minority squeeze-out disputes into the appraisal process. That decision reflects a view that minority shareholders in publicly held corporations have only an economic interest in the corporation and that the majority may take this interest upon paying fair value. The court attempted to prevent misuse of squeeze-out mergers by broadening the appraisal standard and encouraging the use of certain fairness procedures that increase the possibility that a majority shareholder will not unilaterally determine the value of the minority's interest.

The court suggests that the appraisal process can remedy harm from management's conflict of interest in a squeeze-out merger, a task which courts (in *Singer* and elsewhere) have traditionally undertaken using broad, flexible fiduciary duty concepts. If courts intend to use appraisal to remedy conflicts of interest courts (or legislatures, if necessary) should adjust the substantive and procedural requirements of the appraisal process to reflect this broader purpose. Valuation should include the possibility of some sharing of gain created by the merger and, if necessary, rescissory recovery. A presumption of proportionate sharing of the gains from the merger among all shareholders, rebuttable only by clear evidence of an independent negotiating committee, resolves any doubts against managers who are on both sides of the transaction and gives them an incentive to comply with the "fair dealing" procedures emphasized by the court in *Weinberger*. In addition, the courts and legislatures must also prevent the procedural complexity and expense of appraisal from reducing the plaintiff's award, and thus eliminating the minority's incentive to pursue appraisal at all.

Finally, squeeze-out mergers in closely held corporations are based on different assumptions to which the *Weinberger* principles should not apply. Thus, courts seeking to follow *Weinberger* should not apply its principles to closely held corporations.

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92. A number of states, including Delaware, have enacted close corporation statutes. See DEL. CODE ANN. tit. 8, § 342 (Replacement Volume 1983). Such a statute is now included in the *Revised Model Business Corporation Act*. These statutes, however, do not usually limit the flexibility of the majority shareholder to accomplish a merger.