

# WHEN A BAILOUT IS A TAKING: CAN TAKINGS SOLVE THE PROBLEM OF THE GOVERNMENT AS CONTROLLING SHAREHOLDER?

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## INTRODUCTION

The United States' financial crisis left a massive cleanup bill in its wake and its victims are still searching for someone to pick up the tab. The late 2000s saw extensive government involvement in the marketplace, including direct investment in auto companies and financial institutions.<sup>1</sup> In the eye of the storm, shareholders and non-shareholders welcomed, and even demanded, federal intervention. As the sky clears, some commentators are questioning whether the government's actions were appropriate.<sup>2</sup> Even the beneficiaries of the government's assistance are looking for compensation, resulting in public pushback.<sup>3</sup>

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1. See Sharon Silke Carty, *After Crash and Government Control, Rebirth for GM*, BLOOMBERG BUSINESSWEEK, Nov. 17, 2010, 8:10 PM, <http://www.businessweek.com/ap/financialnews/D9JI6TKO0.htm> ("By June 2009, GM had filed for bankruptcy. It emerged relieved of most of its debt but mostly owned by the government and saddled with a damaging nickname: 'Government Motors.'").

2. See Gretchen Morgenson, *Greenberg Sues U.S. Over A.I.G. Takeover*, N.Y. TIMES, Nov. 21, 2011, at B2, available at [http://www.nytimes.com/2011/11/22/business/greenberg-sues-us-over-aig-takeover.html?\\_r=0](http://www.nytimes.com/2011/11/22/business/greenberg-sues-us-over-aig-takeover.html?_r=0) ("Critics have called the Fed's decision [to bailout A.I.G.] a backdoor bailout for prosperous institutions that had dealings with A.I.G. . . . [These institutions] included Goldman Sachs, the French bank Société Générale and Deutsche Bank.").

3. See Matthew Phillips, *Forget Gratitude: AIG Considers Suing U.S. Over Bailout*, BLOOMBERG BUSINESSWEEK, Jan. 8, 2013, <http://www.businessweek.com/articles/2013-01-08/forget-gratitude-aig-considers-suing-u-dot-s-dot-over-bailout> ("At the behest of its former chief executive, Maurice Greenberg, AIG (AIG) is considering joining a lawsuit filed by its shareholders against the government. . . . Greenberg, 87, will try to persuade the AIG board that the terms of the company's \$182 billion government bailout were too onerous, the interest rates were too high, and ultimately, that AIG shareholders got a raw deal.").

These events highlight what Professors Kahan and Rock have called the “problem of the government as a controlling shareholder.”<sup>4</sup> Corporate law’s traditional fiduciary duties of care and loyalty appear to be inapplicable when the United States takes a controlling position in a company. Not to be dissuaded, Maurice “Hank” Greenberg, former CEO of American International Group (AIG), has decided to test a novel theory in court—that AIG’s rescue constituted an unconstitutional taking of property from AIG and its shareholders’ property<sup>5</sup>—suing the United States for, at one point, roughly fifty-five billion dollars.<sup>6</sup> Though he has received some bad press, some observers are applauding Greenberg’s willingness to find new shareholder protections.<sup>7</sup>

This Comment analyzes the extent to which the Takings Clause can protect shareholders from government overreach and fill the void left by the absence of fiduciary duties. Section I briefly explains the problems related to government control of a corporation. Section II introduces takings jurisprudence and discusses the facts of the *Starr* case, as well as the takings theory the court applied. Section III applies federal takings law, informed by the *Starr* case, to the facts of key fiduciary law cases but adjusts the facts to include the government as controlling shareholder. The Comment then compares the results under fiduciary law, primarily Delaware’s, to the results under the hypothetical takings claims. On balance, the Takings Clause imposes limitations on the federal shareholder, but only under narrow conditions, which significantly limit its applicability relative to the state fiduciary duties and leave the minority shareholder unprotected.

## I. THE PROBLEM OF THE GOVERNMENT AS CONTROLLING SHAREHOLDER

The financial crisis saw several instances of government ownership in firms, from Citigroup to General Motors. The surge in government equity stakes has displayed the tension between state fiduciary law and federal law. Several commentators have addressed the issues arising when the government takes a controlling position in a corporation.<sup>8</sup> The problems

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4. Marcel Kahan & Edward B. Rock, *When the Government Is the Controlling Shareholder*, 89 TEX. L. REV. 1293, 1317 (2011).

5. *Starr Int’l Co. v. United States*, 106 Fed. Cl. 50, 54 (2012).

6. Jonathan Stempel, *Greenberg Doubles Claims in AIG Bailout Lawsuit vs U.S. to \$55 Billion*, REUTERS, Mar. 12, 2013, 3:42 PM, <http://www.reuters.com/article/2013/03/12/us-aig-greenberg-lawsuit-idUSBRE92B10H20130312>.

7. See Phillips, *supra* note 3 (“Crass as [Greenberg’s suit] may be, it would be a smart business move [to return value to shareholders].”).

8. See, e.g., Kahan & Rock, *supra* note 4, at 1295-99 (providing an introduction to the

stem from a combination of the sovereign immunity of the United States, federal preemption, and corporate charter politics.

First, “[t]he United States, as sovereign, is immune from suit save as it consents to be sued[.]”<sup>9</sup> The primary waivers of sovereign immunity stem from the Federal Tort Claims Act (FTCA),<sup>10</sup> the Administrative Procedure Act (APA),<sup>11</sup> and the Tucker Act.<sup>12</sup> An extensive discussion of the FTCA and APA is beyond the scope of this Comment. However, neither statute provides a promising route to a suit for breach of fiduciary law.<sup>13</sup> The Tucker Act waives sovereign immunity as to claims for money damages against the United States, and grants exclusive jurisdiction to the Court of Federal Claims for claims over ten thousand dollars.<sup>14</sup> While this waiver, like others, does not incorporate state fiduciary law, it is the primary means to sustain a takings claim against the United States.<sup>15</sup>

Also, state fiduciary law is unlikely to apply in most cases of government bailouts, especially when the vehicle for the bailout is a federal agency. When a lawsuit involves federal entities, such as the Federal Reserve banks, carrying out congressionally provided powers, federal common law will normally apply.<sup>16</sup> Federal courts will not incorporate

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problem); J.W. Verret, *Treasury, Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 299-307 (2010) (using the example of the government’s Citigroup bailout to explain the problem).

9. *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citing *United States v. Thompson*, 98 U.S. 486 (1878), *United States v. Lee*, 106 U.S. 196 (1882), *Kansas v. United States*, 204 U.S. 331 (1907), *Minnesota v. United States*, 305 U.S. 382, 387 (1939), *Kiefer & Kiefer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388 (1939), and *United States v. Shaw*, 309 U.S. 495 (1940)).

10. 28 U.S.C. § 1346 (2006).

11. 5 U.S.C. § 702 (2006).

12. 28 U.S.C. § 1491 (2006).

13. *See Kahan & Rock, supra* note 4, at 1325-1346 (discussing the shortcomings of these statutory regimes).

14. *See* 28 U.S.C. § 1491:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

The U.S. Court of Appeals for the Federal Circuit reviews the decisions of the Court of Federal Claims.

15. *See* GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 329 (4th ed. 2006) (“The Tucker Act not only is presumptively available, but also is presumptively the exclusive vehicle by which to seek compensation for a taking.”).

16. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (“Since the [Small Business Administration and the Farmers Home Administration] derive their authority to effectuate loan transactions from specific Acts of Congress passed in the exercise of a ‘constitutional function or power,’ their rights, as well, should derive from a

state law into those rules of decision “[where the] application of state law would frustrate specific objectives of . . . federal programs.”<sup>17</sup> Given that instances of government control often result from dire threats to the national or global economy, a court, either state or federal, is unlikely to insert itself into a rescue situation and disrupt the federal government’s goals.<sup>18</sup>

The politics of corporate charters also plays into the inapplicability of state fiduciary law. Many states, most importantly Delaware, depend on the revenue from corporate charter taxes. Congress, however, would be able to federalize corporate law through the interaction of the Commerce and Supremacy clauses.<sup>19</sup> Even if a plaintiff could drag the United States before the Delaware Court of Chancery, the court would likely be unwilling to uphold the plaintiff’s claims as a political matter.<sup>20</sup> For these reasons, the disgruntled minority shareholder is left searching for a creative avenue for relief. Takings claims present one such option.<sup>21</sup>

## II. TAKINGS JURISPRUDENCE

This section provides a background in takings law principles and describes the takings theory presented in *Starr Int’l v. United States*.<sup>22</sup> Synthesizing the sprawling body of takings jurisprudence presents difficulties for even the most adept commenters,<sup>23</sup> but this section provides

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federal source.”) (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943)).

17. *Kimbell*, 440 U.S. at 728. In those cases, “[The court] must fashion special rules solicitous of those federal interests.” *Id.*

18. See, e.g., *Starr Int’l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 214-15 (S.D.N.Y. 2012) (holding Delaware fiduciary law inapplicable on grounds of both federal common law and as a matter of federal preemption); Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law: Bear Stearns, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 744-745 (2009) [hereinafter Kahan & Rock, *Prevent Hard Cases*] (explaining “Delaware’s dilemma” in being caught between disrupting its own fiduciary law and undercutting the government’s plans for Bear Stearns).

19. See Kahan & Rock, *supra* note 4, at 1324 (“Delaware’s franchise-tax business lives by the grace of the federal government. Congress could, in one fell swoop, wipe out this business by federalizing corporate law.”) (citing Mark Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588, 600-07 (2004)).

20. See *id.* (noting that members of Delaware’s judiciary are aware of the state’s interests — one being to avoid “annoying” the federal government).

21. Other commenters have also discussed the possibility of a takings claim. J.W. Verret analyzed it briefly and identified some significant shortcomings. Verret, *supra* note 8, at 308. Kahan and Rock noted the Tucker Act’s cause of action for a takings claim, and the creative potential for such a claim. Kahan & Rock, *supra* note 4, at 1341 n. 201.

22. 106 Fed. Cl. 50 (2012).

23. Cf. Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 310 (2007) (“Any effort to distill a body of case law as sprawling as that construing Fifth Amendment Takings Clause is sure to leave some unsatisfied.”) (internal

a starting point from which to discuss the *Starr* case in the Court of Federal Claims. In that case, the court focuses its analysis on the *Penn Central*<sup>24</sup> factors and provides an indication as to how courts will look at cases of government ownership in the future.

#### A. Background Primer on Takings

To understand the nature of these lawsuits, some background in takings jurisprudence is necessary. The Supreme Court elucidated the background principle of the Takings Clause in *Armstrong v. United States*.<sup>25</sup> The constitutional provision “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>26</sup> However, the law must identify important limitations to prevent citizens from challenging every government action.<sup>27</sup> The Fifth Amendment requires compensation for government action when (1) the government engages in a taking, which can be either possessory or regulatory, (2) it takes property, and (3) the taking is for public use.<sup>28</sup>

Whether the government has crossed the threshold to a taking is often unclear.<sup>29</sup> The classic case of a taking is the physical ousting of a landowner from his property. For some time, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property.”<sup>30</sup> The U.S. Supreme Court then developed the concept of a “regulatory taking” in *Pennsylvania Coal v. Mahon* to account for government actions that are not physical, but nevertheless go “too far.”<sup>31</sup> Defining “too far” is the source of much of the apparent disarray in takings jurisprudence.<sup>32</sup> A

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footnote omitted).

24. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 104 (1978).

25. 364 U.S. 40 (1960).

26. *Id.* at 49.

27. *See Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law.”).

28. ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 8.4.1, at 656 (4th ed. 2011).

29. *See Penn Cent.*, 438 U.S. at 123 (“The question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.”).

30. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992).

31. 260 U.S. at 415 (1922).

32. *See id.* at 416 (explaining that when a regulation becomes a taking “is a question of degree — and therefore cannot be disposed of by general propositions.”); *see also* David Zaring, *A Lack of Resolution*, 60 *EMORY L.J.* 97, 132 (2010) (noting that “[i]n cases where a regulatory scheme does not involve a physical invasion or occupation of property, the Supreme Court has generally been unable to develop any set formula for determining when justice and fairness require that economic injuries caused by public action result in a

regulation that results in a permanent physical intrusion into a person's property<sup>33</sup> or that deprives the owner of all its economic benefits<sup>34</sup> are takings which categorically require compensation. There are, however, other takings that may fall short of a "total taking"<sup>35</sup> but are nevertheless compensable. To identify those scenarios, the Supreme Court has

identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."<sup>36</sup>

If a person acquires property that is encumbered by common law regulations, then the acquirer may not challenge the regulation as a taking.<sup>37</sup> The potential takings claims resulting from government-controlled companies would likely present this last, *Penn Central*-type claim.

In certain cases, the court will ask whether the burdens the government imposes on the citizen's property are roughly proportionate to the government's interest in the regulation. In *Nollan v. California Coastal Commission*, the government required a landowner to grant the public an easement to access a beach as a condition for a building permit.<sup>38</sup> The Court held that the regulation went beyond the government's police power. It could, for example, require certain development standards so that the building would not affect the beach. The easement requirement imposed by the municipality, however, resulted in a "permanent physical occupation."<sup>39</sup> Later, in *Dolan v. City of Tigard*, the Court clarified the test.<sup>40</sup> First, courts should ask whether there is a "nexus . . . between a legitimate state interest and the permit condition" created by the city.<sup>41</sup> Then, courts ask whether there is "rough proportionality" between the

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compensable taking.") (internal quotations omitted).

33. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.").

34. *Lucas*, 505 U.S. at 1019.

35. *Id.* at 1030.

36. *Connolly v. Pension Benefit Guarantee Corp.*, 475 U.S. 211, 224-25 (1986) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 104 (1978)). But see *Lucas*, 505 U.S. at 1016 n.7 (criticizing the imprecision in analyzing the diminution in the value of the property interest).

37. *Palazzolo v. Rhode Island*, 533 U.S. 606, 640 n.3 (2001) (Stevens, J., concurring and dissenting).

38. 483 U.S. 825, 827 (1987).

39. *Id.* at 831.

40. 512 U.S. 374, 383-88 (1994).

41. *Id.* at 386 (quoting *Nollan*, 483 U.S. at 837).

development exactions and the government's interest in regulation.<sup>42</sup> To meet that standard, the government must show "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."<sup>43</sup> This rule appears useful to Starr and other shareholders requesting scrutiny of government ownership. Courts, however, have not applied the test outside the context of land use exactions. As discussed later, the Court of Federal Claims was unwilling to extend the rule outside those boundaries in *Starr*.<sup>44</sup>

The second criterion, whether what the government has taken was property, refers to the whole of the "group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."<sup>45</sup> Traditionally, the court looks to "existing rules or understandings that stem from an independent source such as state law to define the . . . interests that qualify for protection . . . under the [Takings Clause]."<sup>46</sup> Value alone is not sufficient to provide property status.<sup>47</sup> Rather, the court determines "whether or not the alleged property had the hallmark rights of transferability and excludability, which indicia are part of an individual's bundle of property rights."<sup>48</sup> These definitions of property impose a significant limitation on the extent to which takings will be able to replicate fiduciary law.

Finally, the government takes property for public use when it uses the property for a "legitimate purpose of government" and the use of the property to achieve that goal is rational.<sup>49</sup> Importantly, the Fifth Amendment itself does not prohibit the public taking in the first place, but requires only adequate compensation.<sup>50</sup> While the government may not merely take a private person's property and transfer it to another private party, even if it fairly compensates the first party,<sup>51</sup> the government may

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42. *Dolan*, 512 U.S. at 388.

43. *Id.* at 391.

44. *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 82 (2012).

45. *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945).

46. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992) (internal quotations omitted).

47. Lack of market value, however, does not preclude property status. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 157 (1998).

48. *Members of Peanut Quota Holders Ass'n, Inc. v. United States*, 421 F.3d 1323, 1330 (Fed. Cir. 2005).

49. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984).

50. *See First English Evangelical Lutheran Church of Glendale v. County of L.A., Cal.*, 482 U.S. 304, 314 (1987) ("[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").

51. *See Kelo v. City of New London*, 545 U.S. 469, 477 (2005) ("[I]t has long been accepted that the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation.").



take one's private property for a public use as long as the government adequately compensates the party who was deprived of her property.<sup>52</sup> Some history may suggest that there might be an exception to the Takings Clause in times of emergency, but those cases were not readily accepted at the time and have been largely rejected today.<sup>53</sup> *Starr* presents the case of government intervention in the market for the purpose of stabilizing a financial system on the point of collapse. In at least one of the alleged takings, the Government transferred property to a private party.<sup>54</sup> The government cannot shield itself with an emergency exception. Even if the Court of Federal Claims finds a taking, it will not completely reverse the government's action, but it may require the government to compensate shareholders.

### *B. Relevant Facts in Starr*

The *Starr* case arose from the government's bailout of AIG in the fall of 2008, as the country was in the midst of what has been dubbed the "Great Recession."<sup>55</sup> AIG's struggles arose from their credit default swap business and resulting collateral risk. The resulting liquidity problems and collapse disrupted the financial markets and the government intervened after private arrangements failed. The government provided a loan to AIG and received an equity stake in the company and also provided for the winding up of some of AIG's outstanding derivative contracts.<sup>56</sup>

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52. *Id.* at 477.

53. Compare *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 153 (1952) (finding no taking where "the sole objective of destroying property of strategic value to prevent the enemy from using it to wage war more successfully"), with *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (requiring compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it") and *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (finding a taking in the confiscation of a coal mine, even though it was war time); see also CHEMERINSKY, *supra* note 28, at 661-62 (discussing these cases in more detail).

54. See *infra* II.C.3.b. for the description of the Maiden Lane III transactions.

55. See Bernard Condon & Paul Wiseman, *AP IMPACT: Recession, Tech Kill Middle-Class Jobs*, BLOOMBERG BUSINESSWEEK, Jan. 23, 2013, <http://www.businessweek.com/ap/2013-01-23/ap-impact-recession-tech-kill-middle-class-jobs> ("Five years after the start of the Great Recession, the toll is terrifyingly clear: Millions of middle-class jobs have been lost in developed countries the world over.").

56. For additional overviews of the AIG bailout, see U.S. GOV'T ACCOUNTABILITY OFFICE, *FINANCIAL CRISIS: REVIEW OF FEDERAL RESERVE SYSTEM FINANCIAL ASSISTANCE TO AMERICAN INTERNATIONAL GROUP, INC.* (2011), [hereinafter GAO REPORT] and William K. Sjoström, Jr., *The AIG Bailout*, 66 WASH. & LEE L. REV. 943 (2009).

### 1. AIG's Credit Default Swap Business and its Collateral Risk

The collapse of the real estate market and the resulting Lehman Brothers bankruptcy shook the foundations of many financial institutions, including AIG. As 2008 began, AIG and its subsidiaries were writing \$47.1 billion in net premiums, employed approximately 116,000 people,<sup>57</sup> and serviced more than seventy-six million customers.<sup>58</sup> AIG remains a massive organization of subsidiaries that provides life insurance and financial planning services to institutions and individual customers in over 130 countries.<sup>59</sup>

AIG, like many other financial institutions, entered into derivative contracts through a subsidiary, AIG Financial Products (AIGFP), to insure its clients' financial transactions.<sup>60</sup> One such derivative contract is a credit default swap (CDS), wherein AIG assumed the risk of default on a set of debt securities.<sup>61</sup> Some of these CDSs referenced collateralized debt obligations (CDOs), structured investment products which themselves referenced other assets, commonly fixed-income assets.<sup>62</sup> These underlying assets often included the now infamous mortgage-backed securities (MBSs) exposed to subprime mortgage debt.<sup>63</sup> Swap contracts generally require counterparties to deliver collateral to one another as the value of the underlying assets changes. The collateral requirement of the CDS contracts posed an additional liquidity risk to AIG beyond the risk of outright default.<sup>64</sup>

### 2. Financial Collapse and AIG's Ensuing Liquidity Problems

AIG's risk exposure soared as the real estate market collapsed in 2007 and the resulting global financial crisis took hold. As of December 31,

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57. Am. Int'l Group, Annual Report (Form 10-K), at 3 (Feb. 28, 2008) [hereinafter AIG Form 10-K 2008].

58. *Actions Related to AIG*, FED. RESERVE BANK OF N.Y. 3, <http://www.newyorkfed.org/aboutthefed/aig/index.html> (last visited Apr. 7, 2013).

59. Am. Int'l Group, Preliminary Prospectus Supplement to Prospectus Dated June 29, 2012 (Final Prospectus Supplement), at S-1 (Aug. 3, 2012).

60. Am. Int'l Group, Annual Report (Form 10-K), at 132 (Mar. 2, 2009) [hereinafter AIG Form 10-K 2009]. As with traditional insurance contracts, AIG would receive periodic payments, though that is where the similarities end.

61. *Id.*

62. *Id.* at 132-34; GAO REPORT, *supra* note 56, at 5.

63. AIG Form 10-K 2008, *supra* note 57, at 122.

64. *See id.* ("Certain of these credit derivatives are subject to collateral posting provisions."). These contracts require parties to deliver to one another marketable assets, if not solely cash or cash equivalents, which can cause massive liquidity strain.

2007, AIGFP held \$527 billion in notional value of credit default swaps.<sup>65</sup> Of that amount, seventy-nine billion dollars in notional were “multi-sector CDOs” containing \$61.4 billion in exposure to domestic subprime mortgages.<sup>66</sup> AIG reported an unrealized market valuation loss of over eleven billion dollars that year.<sup>67</sup> “In the second half of 2008, AIG experienced an unprecedented strain on liquidity” driven, in part, by collateral calls from AIGFP’s CDO counterparties.<sup>68</sup> *Starr* contends that, during this time, the government withheld access to the Federal Reserve’s discount window even as it provided access to other institutions.<sup>69</sup> On September 15, Lehman Brothers Holdings Inc. filed for bankruptcy, sending shock waves through the financial system.<sup>70</sup> The following day AIG failed to secure a private solution to its liquidity problems.<sup>71</sup>

### 3. The Government’s Deal with AIG

The terms of the rescue form the core of the *Starr* litigation. The government’s deal with AIG involved both (a) a loan from the Federal Reserve Bank of New York (FRBNY) and (b) the government receiving a sizable equity stake in AIG. It also involved the closing of certain outstanding derivative contracts. *Starr* has argued that each of these provisions constituted a government taking.

#### *a. FRBNY’s Loan Facility and Equity Stake*

On September 16, 2008, the government offered AIG access to the Federal Reserve discount window on specific terms.<sup>72</sup> The government offered AIG: (a) an FRBNY revolving credit facility to AIG of eighty-five billion dollars, secured by AIG’s assets, (b) a requirement that the government be given control of AIG as controlling lender and controlling shareholder, and (c) a provision that the government receive nearly an

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65. *Id.*

66. *Id.*

67. *Id.*

68. AIG Form 10-K 2009, *supra* note 60, at 40. S&P, Moody’s, and Fitch all downgraded AIG’s long-term debt on September 15, 2008. *Id.*

69. Verified Class Action Complaint at ¶ 42, *Starr Int’l Co. v. United States*, 106 Fed. Cl. 50 (2012) (No. 11-779C) [hereinafter Complaint].

70. Kristina Cooke, *US STOCKS - Wall Street Mauled by Lehman Bankruptcy, AIG Fears*, REUTERS, Sept. 15, 2008, <http://uk.reuters.com/article/2008/09/15/markets-stocks-idUKN1529545420080915>.

71. AIG Form 10-K 2009, *supra* note 60, at 4. For a more detailed timeline of events leading up to the Government’s action, see GAO REPORT, *supra* note 56, at 14.

72. GAO REPORT, *supra* note 56, at 7-8.

eighty percent stake in AIG.<sup>73</sup> AIG and the FRBNY signed a Credit Agreement on September 22, 2008, consistent with those terms.<sup>74</sup> A trust was established to which AIG would make interest payments and to which AIG issued Series C Preferred Stock convertible to common stock.<sup>75</sup> AIG was to receive five hundred thousand dollars in purchase price for these shares “with an understanding that additional and independently sufficient consideration was also furnished to AIG by the [FRBNY] in the form of its lending commitment.”<sup>76</sup> The preferred stock was issued to a trust established for the sole benefit of the United States Treasury.<sup>77</sup> Although the ownership stake would permit the trust “to elect all of AIG’s directors,”<sup>78</sup> the U.S. District Court for the Southern District of New York found that the government did not manifest its control of AIG.<sup>79</sup>

AIG and the Trust signed a subsequent Stock Purchase Agreement to facilitate the conversion of the preferred stock to common shares.<sup>80</sup> There

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73. *Id.* at 7-8, 102 n.136.

74. Credit Agreement Between American International Group, Inc., Borrower, and Federal Reserve Bank of New York, Lender 1 (Sept. 22, 2008), *available at* [http://www.newyorkfed.org/aboutthefed/aig/pdf/original\\_credit\\_agreement.pdf](http://www.newyorkfed.org/aboutthefed/aig/pdf/original_credit_agreement.pdf) [hereinafter Credit Agreement].

75. AIG Credit Facility Trust Agreement Among Federal Reserve Bank of New York., and Jill M. Considine, Chester B. Feldberg & Douglas L. Foshee, Trustees 1 (January 16, 2009), *available at* <http://www.newyorkfed.org/newsevents/news/markets/2009/AIGCFTAgrreement.pdf> [hereinafter Trust Agreement]; *see also* Press Release, Am. Int’l Group, AIG Notice (Sept. 26, 2008), [http://media.corporate-ir.net/media\\_files/irol/76/76115/releases/092608a.pdf](http://media.corporate-ir.net/media_files/irol/76/76115/releases/092608a.pdf) (noting that the preferred stock would be convertible to common stock “following a special shareholders meeting to amend AIG’s restated certificate of incorporation”); *The A.I.G. Bailout Takes Shape*, N.Y. TIMES DEALBOOK, Sept. 24, 2008, 9:23 AM, <http://dealbook.nytimes.com/2008/09/24/the-aig-bailout-takes-shape/> (outlining the terms of AIG’s deal with FRBNY); *A.I.G.: So Many Questions*, N.Y. TIMES DEALBOOK, Sept. 18, 2008, 10:46 AM, <http://dealbook.nytimes.com/2008/09/18/aig-so-many-questions/> (detailing some of the legal questions pertaining to the AIG’s deal).

76. Am. Int’l Grp., Quarterly Report (Form 10-Q), at 10 (May 7, 2009).

77. AIG Form 10-K 2009, *supra* note 60, at 26.

78. *Id.* at 27. The Trust Agreement provided that the trustees controlling the stock would have the “exclusive right to vote the Trust Stock.” Trust Agreement, *supra* note 75, at 6. Additionally, the Agreement prohibited the Trustees from voting “to elect . . . as members of the board of directors of [AIG] only persons who are not, and have not been within one year of their nomination, officers, directors, or senior employees of the FRBNY or the Treasury Department.” *Id.* at 7.

79. *Starr Int’l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 252 (S.D.N.Y. 2012).

80. Series C Perpetual, Convertible, Participating Preferred Stock Purchase Agreement Between AIG Credit Facility Trust and American International Group (March 1, 2009), *available at* <http://www.sec.gov/Archives/edgar/data/5272/000095012309003734/y74794exv10w91.htm>

was, however, one snag in this plan. AIG's certificate of incorporation did not authorize enough common shares to convert the government's preferred shares.<sup>81</sup> The charter only authorized five billion common shares, of which around three billion had been issued or reserved.<sup>82</sup> According to Starr, only about 40% of the Government's shares could be issued on the conversion.<sup>83</sup> Under Delaware law, an increase in the number of authorized shares requires a shareholder vote, with common shareholders voting as a class, to amend the charter.<sup>84</sup>

The shareholders had an opportunity to vote on proposals to amend the charter to increase the number of authorized shares of common stock at the June 30, 2009 meeting.<sup>85</sup> The vote to increase the number of authorized shares failed with the common stockholders voting as a separate class. The proxy statement, however, also contained a proposal "to effect a reverse stock split of AIG's outstanding common stock at a ratio of one-for-twenty."<sup>86</sup> The reverse stock split passed with the government's controlling vote participating.<sup>87</sup> The split reduced the number of issued common shares to 150 million, thereby leaving around 4.85 billion shares authorized

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81. See Amended and Restated Certificate of Incorporation of American International Group, Inc. 2 (June 30, 2009) (authorizing 5.1 billion shares). This issue did not hamper the issuance of the preferred shares because AIG had a "blank check" provision in their charter for preferred share issuance. *Id.* at 2-4.

82. *Id.* at 2; American International Group, Proxy Statement 65 (June 5, 2009), available at [http://www.aig.com/Chartis/internet/US/en/2009proxy\\_tcm3171-440898.pdf](http://www.aig.com/Chartis/internet/US/en/2009proxy_tcm3171-440898.pdf) [hereinafter Proxy Statement].

83. Complaint, *supra* note 69, at ¶ 97.

84. DEL. CODE ANN. tit. 8, § 242 (West 2014).

85. See Proxy Statement, *supra* note 82, at 64-70 (explaining proposed amendments to AIG's Certificate of Incorporation). In that proxy card, AIG stated, "[t]he primary purpose of the reverse stock split is to increase the per share trading price of AIG Common Stock." *Id.* at 66.

86. American International Group, Notice to Annual Meeting of Shareholders to be Held June 30, 2009 (June 5, 2009), available at [http://www.aig.com/Chartis/internet/US/en/2009proxy\\_tcm3171-440898.pdf](http://www.aig.com/Chartis/internet/US/en/2009proxy_tcm3171-440898.pdf). A reverse stock split accomplishes two goals: reducing the number of outstanding shares and increasing the per share stock price. This proposal meant, for example, that a holder of twenty common shares would receive one share after the split. Generally, there is no economic effect of a stock split, as the company's value has not changed, although frequently there are financial justifications for engaging in such a maneuver. *Cf.* Michael Russnow, *AIG Proposed Reverse Stock Split: Shareholders Should Vote This Down as a No-Brainer*, HUFFINGTON POST, June 27, 2009, 5:42 AM, [http://www.huffingtonpost.com/michael-russnow/aig-proposed-reverse-stoc\\_b\\_221801.html](http://www.huffingtonpost.com/michael-russnow/aig-proposed-reverse-stoc_b_221801.html) (mentioning the potential for new issuance and dilution).

87. See Lila Zuill, *AIG Reverse Stock Split Fails to Boost Shares*, REUTERS, July 1, 2009, <http://in.reuters.com/article/2009/07/01/idINN0149895120090701> (noting the occurrence of the reverse stock split and commenting on subsequent drop in AIG's share price).

and unissued.<sup>88</sup> The government converted its preferred shares on January 14, 2011, at the closing of the Recapitalization Plan.<sup>89</sup> Starr contends that this conversion “completed” the government’s taking of the shareholders’ economic and voting interest in their shares.<sup>90</sup> The Trust went on to appoint eight of AIG’s twelve directors by November 2011.<sup>91</sup> From then until September 2012, the Government significantly wound down its position in AIG, though the board composition had not changed through June 26, 2013.<sup>92</sup>

*b. Maiden Lane III Transactions*

Apart from the reverse stock split and subsequent conversion to common shares, Starr also complained of the government’s “backdoor bailouts” of AIG’s counterparties.<sup>93</sup> The FRBNY had created a special purpose fund, Maiden Lane III (ML III), to resolve issues related to AIG’s CDS contracts.<sup>94</sup> FRBNY debated three capital structures for ML III: (1) AIG contributes equity, and FRBNY contributes a loan to fund ML III’s purchase of the underlying CDOs; (2) AIG contributes equity, and both FRBNY and AIG’s counterparties contribute a loan to fund the CDO purchase; and (3) AIG contributes equity, and FRBNY contributes a guarantee to secure ML III’s guarantee of any CDO contracts that might default.<sup>95</sup> The latter two options likely would have cost less for AIG in the end, but would have required significant negotiations with AIG’s counterparties.<sup>96</sup> Ultimately, FRBNY decided on the first option. AIG contributed five billion dollars in equity, to be exhausted first, and FRBNY provided \$24.3 billion in a loan facility.<sup>97</sup> ML III then purchased the underlying CDO contracts for par value (face value of the contract), less the collateral protection already posted by AIG.

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88. Proxy Statement, *supra* note 82, at 65.

89. Press Release, Fed. Reserve Bank of N.Y., New York Fed Ends AIG Assistance with Full Repayment (Jan. 14, 2011), *available at* <http://www.newyorkfed.org/newsevents/news/aboutthefed/2011/oa110114.html>; *see also* AIG Recapitalization: Summary of Terms of September 30, 2010 1 (Sept. 2010), *available at* [http://www.newyorkfed.org/aboutthefed/aig/pdf/Recapitalization\\_Summary\\_Terms.pdf](http://www.newyorkfed.org/aboutthefed/aig/pdf/Recapitalization_Summary_Terms.pdf) (authorizing the conversation).

90. Complaint, *supra* note 69, at ¶ 101.

91. *Starr Int’l Co. v. United States*, 111 Fed. Cl. 459, 466 (2013) [hereinafter *Starr Int’l Co. II*].

92. *Id.* at 465.

93. Complaint, *supra* note 69, at ¶ 103.

94. *Id.* at ¶ 112.

95. GAO REPORT, *supra* note 56, at 59.

96. *See id.* at 61 (discussing the relative merits of each structure).

97. *Id.* at 64.

Accounts differ as to how this decision to pay par value was made,<sup>98</sup> but some matters are clear. FRBNY had contacted some of AIG's counterparties to discuss a discount purchase price for the CDOs. After initial pushback from the counterparties, FRBNY ultimately offered to purchase the assets at par value without a loan contribution from the counterparties. According to a U.S. Government Accountability Office (GAO) report, "[t]he counterparties' differing situations and varying perceptions of the benefit of ML III participation might have offered an opportunity to lower the amount FRBNY lent to ML III if FRBNY had been able to negotiate individually with the counterparties based on their individual circumstances."<sup>99</sup> FRBNY officials were concerned with having a deal in place before the November 10, 2008 target date.<sup>100</sup> Engaging in lengthy discount negotiations would mean risking additional collateral requirements, credit downgrades, and further market disruption.<sup>101</sup> One official noted that "any further downgrades to AIG's long-term credit rating would have been catastrophic and would most likely have led to an AIG bankruptcy."<sup>102</sup> Officials were also concerned about the propriety of the FRBNY pushing for discounts, the valuation of an appropriate discount from par, and the FRBNY's lack of bargaining power in the negotiations.<sup>103</sup>

Starr maintains that the FRBNY decision to forgo concessions from AIG counterparties and to pay close to par value for the CDOs constituted a taking. The complaint refers to these payments as "backdoor bailouts" to the financial institutions on the other side of the contracts.<sup>104</sup> The Special Inspector General for the Troubled Asset Relief Program (SIGTARP) addressed the issue in a November 17, 2009 report. It recognizes that then-President of FRBNY Timothy Geithner and FRBNY's general counsel denied any intent to facilitate a bailout of AIG's counterparties. The report maintains:

[i]rrespective of their stated intent, however, there is no question that the *effect* of FRBNY's decisions—indeed, the very *design* of the federal assistance to AIG—was that tens of billions of dollars of Government money was funneled inexorably and directly into AIG's counterparties.<sup>105</sup>

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98. See *id.* at 72 (detailing the much different stance of AIG's counterparties).

99. *Id.* at 85.

100. *Id.* at 73.

101. *Id.*

102. OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLE ASSET RELIEF PROGRAM, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 13 (2009) [hereinafter SIGTARP REPORT].

103. GAO REPORT, *supra* note 56, at 73-74.

104. Complaint, *supra* note 69, ¶ 103.

105. SIGTARP REPORT, *supra* note 102, at 30.

### C. *The Takings Theory in Starr International*

*Starr* presents a unique way of looking at takings claims as a substitute for the lack of fiduciary protections. The particular facts of the case are critical to understanding the court's opinion on the Government's motion to dismiss. The takings claims principally stem from two sources: (1) the government's acquisition of AIG's common stock; and (2) certain transactions with AIG's swap counterparties. The court's opinion largely turns on the definition of property and when the plaintiff can claim the government took that property. The court's method of analyzing this case provides an important example for the potential replication of fiduciary claims in other circumstances of government ownership.

#### 1. Arguments in the U.S. Court of Federal Claims

Starr filed both direct and derivative claims in the U.S. Court of Federal Claims on November 21, 2011, arguing that the United States had violated its and AIG's rights under the Due Process, Equal Protection, and Takings Clauses.<sup>106</sup> Only the takings claims are relevant here. Starr argued that the government required AIG to convey a 79.9% equity stake in the company without adequate compensation to common shareholders, the government allegedly took advantage of the market conditions to coerce AIG into the Credit Agreement, and AIG received only \$500,000 for the Series C Preferred Shares, which had a market value of about twenty-three billion dollars.<sup>107</sup> Half of a million dollars was not adequate compensation for the preferred shares, even taking into account the government's loan. The government had already received adequate compensation for the loan, because AIG had agreed to pay 14.5% in interest (a rate well above market rates and discount rates charged to other financial institutions) and fully secured the loan with AIG's assets.<sup>108</sup> Since AIG had already supplied consideration for the loan, it was effectively uncompensated for the additional equity stake, thus constituting an unconstitutional taking. Starr argued that the reverse stock split and subsequent conversion "completed" the government's taking of the shareholders' property<sup>109</sup> in what it called a "backdoor conversion[.]"<sup>110</sup>

In addition, Starr argued that the ML III transactions were executed for the purpose of bailing out AIG's counterparties, many of whom were

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106. *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 54 (2012).

107. *Id.* at 56-57.

108. *Id.* at 57.

109. Complaint, *supra* note 69, ¶ 101.

110. *Id.* at ¶ 103.



other major financial institutions.<sup>111</sup> Starr maintains that FRBNY controlled and managed the ML III. FRBNY allowed AIGFP's counterparties to retain the entirety of the collateral posted to ML III and paid par value to cancel the CDS contracts, in order to effect a "backdoor bailout" of those counterparties.<sup>112</sup> Starr maintains that these contracts could have been cancelled for far less cost to AIG.<sup>113</sup> Once the CDOs were in the ML III fund, FRBNY received the majority of the returns despite the fact that AIG funded "approximately [sixty percent] of the par value purchase price" through its collateral posting and five billion dollars in equity.<sup>114</sup> The ML III structure contained a "waterfall" provision specifying that the proceeds from the transactions would first pay for ML III's expenses, then to repay the FRBNY's loan to ML III.<sup>115</sup> Any "residual interests" were to be split between FRBNY, which was to receive two-thirds of the proceeds, and AIG, which was to receive the remaining third.<sup>116</sup> Because the two-thirds share was provided after the loan and expenses were already paid to the government, Starr alleges that FRBNY appropriated two-thirds of those residual interests without justification.<sup>117</sup>

The government first argued, on motion to dismiss, that Starr had not adequately specified what events constituted a taking.<sup>118</sup> Starr's argument that the government's actions in the "aggregate" constituted a taking was not an adequate pleading because it could not specify when the taking took place.<sup>119</sup> Next, the government argued that its actions were not of the sort necessary to state a taking claim. In its view, there are only two kinds of takings: (1) "physical invasion or appropriation of private property," and (2) takings resulting from unduly burdensome regulations.<sup>120</sup> A physical taking means "required acquiescence [where] the owner is forced to surrender the property under threat of legal sanction."<sup>121</sup> AIG freely accepted the government's offer of an eighty-five billion dollar loan instead of enduring a likely bankruptcy. A taking does not follow from the fact that turning down the terms of the government's offer would entail

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111. *Id.* at ¶ 103-108 (referencing statements from former Treasury Secretary Robert Paulson, Federal Reserve Chairman Ben Bernanke, Treasury Secretary Timothy Geithner, and then-AIG CEO Edward Liddy).

112. *Id.* at ¶ 131-32.

113. *Id.* at ¶ 117.

114. *Id.* at ¶ 121.

115. *Id.* at ¶ 118.

116. *Id.* at ¶ 119.

117. *Id.* at ¶ 121.

118. Defendant's Motion to Dismiss at 24, *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012) (No. 11-779C) [hereinafter Motion to Dismiss].

119. *Id.*

120. *Id.* at 26.

121. *Id.* at 27 (internal quotations and citation omitted).

substantial sacrifice or disadvantage.<sup>122</sup> Although Starr alleged adverse action from the government if the offer had been rejected, any compulsion AIG felt was created by its own business risks, not by the government.<sup>123</sup> The government, furthermore, rejected the contention that it had compelled AIG to accept its terms, maintaining that AIG's decision "was an exercise of business judgment, not an involuntary action."<sup>124</sup> Compensating AIG for the risks it created would run counter to the *Armstrong* justification for takings claims.<sup>125</sup> Moreover, the conversion itself cannot be a taking because AIG received preferred shares in exchange for giving AIG common shares to the government.<sup>126</sup> Regarding the ML III claims, the government argued that Starr failed to allege what the government did to cause the transactions. AIG consented to the establishment of the ML III vehicle and took the financing to complete the transactions.<sup>127</sup>

Furthermore, the government disputed the fact that it took a property interest from either Starr or AIG. It argued that neither Starr nor AIG possessed a property right in the FRBNY's loan or "a loan based upon any particular terms."<sup>128</sup> FRBNY had no obligation to provide a loan to AIG, only the discretion to provide it, so no property interest could attach.<sup>129</sup> Likewise, FRBNY could have legally denied access to any loan. Also, the statute authorizing FRBNY to make loans does not specify particular terms for those loans.<sup>130</sup>

As to Starr's property interests, the government argued, Starr lost nothing because it retains its shares in AIG. Even if the government's conversion to common shares diminished shareholders' value, Starr's common stock does not entitle it to a certain value or percentage share in the corporation, so it did not possess a property interest.<sup>131</sup> Furthermore,

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122. *Id.* at 27-28 (citing *Cal. Hous. Sec., Inc. v. United States*, 959 F.2d 955, 959 (Fed. Cir. 1992); *Evans v. United States*, 74 Fed. Cl. 554, 558-64 (2006), *aff'd*, 250 Fed. App'x 321 (Fed. Cir. 2007); *Turntable Fishery & Moorage Corp. v. United States*, 52 Fed. Cl. 256, 263 (2002)).

123. Motion to Dismiss, *supra* note 118, at 29. The government argued that "[i]t has become settled law that the mere stress of business conditions will not constitute duress where the defendant was not responsible for those circumstances." *Id.* (internal quotations and citation omitted).

124. *Id.* at 30.

125. *Id.* at 31. The government argued that "[t]he rescue of AIG cannot be distorted into a taking" because fairness does not require that losses resulting from the rescue be borne by the public when a private party is the intended beneficiary of the rescue. *Id.*

126. *Id.* at 32.

127. *Id.* at 33.

128. *Id.* at 34.

129. *Id.* at 34-35 (citing *Hearts Bluff Game Ranch, Inc. v. United States*, 2012 WL 148692, at \*1-2 (Fed. Cir. 2012)).

130. *Id.* at 35-36 (citing Federal Reserve Act, 12 U.S.C. § 343 (2006)).

131. *Id.* at 37 (citing *Broad v. Sealaska Corp.*, 85 F.3d 422, 430 (9th Cir. 1996)).

although Starr alleges that the government took control of AIG, Starr's common stock interest did not include the right to prevent another party from taking control or from diluting the common shares.<sup>132</sup> In that way, Starr's interest did not include the right to exclude — a fundamental property right.<sup>133</sup> Finally, any business or investment interest that Starr may have had in the value of the shares was merely a collateral interest, which cannot form the basis for a takings claim.<sup>134</sup>

Likewise, the government did not take a property interest during the ML III transactions. Starr failed to allege that it or AIG owned the ML III proceeds that it says the government took. The government characterized ML III as merely an obligation for AIG to pay money, which does not support the notion that it is a property interest.<sup>135</sup> Any “residual interest” that AIG may have received was merely “an abstract sum of money potentially capable of being counted,” rather than a vested property right.<sup>136</sup> Furthermore, the government argued that AIG never had a right to receive any more than one-third of the residual interests in ML III. Therefore, even if the residual interests were property rights, the government did not take them.<sup>137</sup>

## 2. Suit in the Court of Federal Claims

In January 2012, the Court of Federal Claims issued an opinion on the government's motion to dismiss.<sup>138</sup> The court granted the motion to dismiss as to the Due Process and Equal Protection claims. Critically, however, the court denied the motion as to the takings claims, with few exceptions.<sup>139</sup> The court found that Starr had identified the taking itself with adequate specificity. First, the government “imposed” the Credit Agreement on AIG in order to take the preferred stock.<sup>140</sup> Second, the reverse stock split diluted the common stock, taking the majority control

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132. Motion to Dismiss, *supra* note 118, at 37.

133. *See* Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (describing the right to exclude others as “one of the most essential sticks in the bundle of rights that are commonly characterized as property”).

134. Motion to Dismiss, *supra* note 118, at 38.

135. *Id.* at 39.

136. *Id.*

137. *Id.* at 40.

138. *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 50 (2012). Starr also filed a claim in the U.S. District Court for the Southern District of New York. That complaint was dismissed for failure to state a claim. *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 202 (S.D.N.Y. 2012).

139. *Starr Int'l Co.*, 106 Fed. Cl. at 55. The court also denied any claims that would be duplicative of one another. *Id.*

140. *Id.* at 68.

from the common shareholders.<sup>141</sup> Third, Starr had established that the ML III transactions constituted a taking.<sup>142</sup> Finally, the conversion of the preferred shares to common shares “completed the Government’s taking.”<sup>143</sup> This last alleged taking could not be meritorious if the second allegation is valid, since the equity interest would already have been taken. Therefore, the court only recognized three alleged takings here.<sup>144</sup>

*a. Economic and voting interests of AIG common shareholders*

The Court of Federal Claims found a property interest in the economic and voting powers of the AIG common shares.<sup>145</sup> Notably, the U.S. Constitution does not define the property interests protected by the Fifth Amendment.<sup>146</sup> “[B]ackground principles and existing rules or understandings that stem from an independent source such as state law . . . define the range of interests that qualify for protection as property under the Fifth Amendment.”<sup>147</sup> The court analyzed the transferability and excludability of common shares, as these qualities are “part of an individual’s bundle of property rights.”<sup>148</sup> Delaware law supports the transferability of the equity and voting power of common shares.<sup>149</sup>

Exclusion was a more complicated matter. Some scholars have considered the right to exclude the most important or even the sole condition for a property interest.<sup>150</sup> The court defined the issue as whether common shareholders had a right to prevent dilution of their shares “through a separate class vote or otherwise . . .”<sup>151</sup> Delaware corporate law does not guarantee common shareholders a class-wise vote on the reverse stock split. Starr claimed, however, that AIG had represented before the Court of Chancery that the common shareholders would have a separate vote on any proposal affecting the number of authorized shares or

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141. *Id.*

142. *Id.*

143. *Id.* at 69 (internal quotations omitted).

144. *Id.*

145. *Id.* at 75.

146. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005).

147. *Starr Int’l Co.*, 106 Fed. Cl. at 72 (internal quotations omitted).

148. *Id.* (internal quotations omitted).

149. *Id.* at 73 (citing *Schreiber v. Carney*, 447 A.2d 17, 25 (Del. Ch. 1982), which held that “Delaware law has for quite some time permitted stockholders wide latitude in decisions affecting the restriction or transfer of voting rights.”).

150. *See, e.g.*, WILLIAM BLACKSTONE, 2 COMMENTARIES \*2 (defining property as “that sole and despotic dominion which one man claims and exercises over the external thing of the world, in total exclusion of the right of any other individual in the universe.”).

151. *Starr Int’l Co.*, 106 Fed. Cl. at 73.

the par value of common shares.<sup>152</sup> The Court of Federal Claims interpreted the Court of Chancery's order to mean that the shareholders maintained protection from the dilution of their shares as well.<sup>153</sup> On this basis, the court determined that AIG's shareholders had a cognizable right to exclude vested in their common shares.<sup>154</sup>

In addition to these interests, the Court of Federal Claims found Delaware case law to support a cognizable property interest in equity and voting power.<sup>155</sup> The court cited a series of Delaware cases involving equity dilution, where a controlling or influential shareholder causes the corporation to issue stock for inadequate consideration, thereby diluting the economic value of all the shares.<sup>156</sup> In those cases, Delaware has sustained a dual, direct, and derivative breach of fiduciary duty claim "premised on the theory that the corporation, by issuing additional stock for inadequate consideration, made the complaining stockholder's investment less valuable."<sup>157</sup> The court considered these cases as further evidence of a property right in the equity value of common shares. As for the voting power of the shares, the court also found Delaware cases supporting a protected property interest.<sup>158</sup> For the foregoing reasons, the court found a cognizable property right in the economic and voting interest in the AIG common shares.<sup>159</sup> Either through the Share Agreement or the subsequent reverse stock split, Starr identified a taking of that property interest.<sup>160</sup>

*b. Collateral Posted by AIG*

Starr asserted in a derivative action that AIG could have negotiated down the value of the collateral posted to its counterparties from face value. The government, according to Starr, directed AIG to give up the full value of that collateral, \$32.5 billion in cash, rather than negotiate the value to around sixty percent of the value.<sup>161</sup> In Starr's view, this constituted a

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152. *Id.*

153. *Id.* The court disclaimed any final determination on the shareholder's right to a vote on the reverse stock split, but assumed the truth of the allegations. *Id.* at 73-74.

154. *Id.* at 74.

155. *Id.*

156. *Id.* (citing *Feldman v. Cutaia*, 951 A.2d 727 (Del. 2008); *Gatz v. Ponsoldt*, 925 A.2d 1265 (2007); *Gentile v. Rossette*, 906 A.2d 91 (2006); *In re Tri-Star Pictures, Inc. Litig.*, 634 A.2d 319 (1993)).

157. *Starr Int'l Co.*, 106 Fed. Cl. at 74 (internal quotations omitted).

158. *Id.* at 75 (citing *In re Gaylord Container Corp. S'holders Litig.*, 747 A.2d 71, 81 (Del. Ch. 1999) and *Oliver v. Bos. Univ.*, 2006 Del. Ch. LEXIS 75, at \*76 (2006)).

159. *Starr Int'l Co.*, 106 Fed. Cl. at 75.

160. *Id.* This claim, as far as it constituted a derivative claim, was later dismissed as discussed below. *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 466 (2013).

161. *Starr Int'l Co.*, 106 Fed. Cl. at 75.

taking. The court decided that the collateral would be a property interest subject to Fifth Amendment protection, although it held the question of the parties' ownership of those rights for the fact-finding stage.<sup>162</sup> AIG had posted the collateral to secure specific swap transactions. While general obligations to pay money do not constitute an unconstitutional taking of property, "[A] specific sum of money, 'derived from ownership of particular deposits in an established account,' is a protectable property interest under the Fifth Amendment."<sup>163</sup> There may not have been any separate account in which counterparties held the collateral, but the court considered the pledge of security to create a "constructive account."<sup>164</sup> Additionally, the fact that the parties could transfer the collateral pursuant to the ML III transactions supported its property status.<sup>165</sup> The court ultimately decided that AIG had alleged a property interest in the difference between par value and the potentially lower negotiated value, which Starr could put forth in a derivative action.<sup>166</sup>

*c. Voluntariness of the transactions*

The government argued that AIG and the shareholders consented to the transactions at issue, thereby foreclosing a taking claim.<sup>167</sup> The court had already found that the reverse stock split was not executed with the previously promised shareholder vote,<sup>168</sup> and so it held that the shareholders did not consent to the reverse stock split.<sup>169</sup> The U.S. District Court for the Southern District of New York had found that Starr did not plead adequate control by the government, largely because the government did not formally control AIG's board of directors.<sup>170</sup> Starr, therefore, had to argue that the government obtained *de facto* control through coercive dealings with AIG's management. Starr had argued that FRBNY had restricted AIG's access to its discount window while taking an aggressive stance in

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162. *Id.*

163. *Id.* at 75-76 (citing *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1339-40) (quoting *Adams v. United States*, 391 F.3d 1212, 1224-25 (Fed. Cir. 2004)).

164. *Starr Int'l Co.*, 106 Fed. Cl. at 76.

165. *Id.* (citing *Hearts Bluff Game Ranch, Inc. v. United States*, 669 F.3d 1326, 1330 (Fed. Cir. 2012), which recognized that a core indicator of a property right is the "ability to sell, assign, transfer, or exclude.").

166. *Starr Int'l Co.*, 106 Fed. Cl. at 76. These claims, as discussed below, were later dismissed for lack of standing. *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 469 (2013).

167. *Starr Int'l Co.*, 106 Fed. Cl. at 76.

168. *Id.* at 74.

169. *Id.* at 77.

170. *Starr Int'l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 255 (S.D.N.Y. 2012).

negotiations.<sup>171</sup> The court found that Starr had adequately pleaded the government's coercion in the acceptance of the loan agreement.<sup>172</sup> However, the court left open the issue of whether the loan agreement was the result of AIG's own risky business practices, such that the public should not have to bear the burden of its bailout.<sup>173</sup> Furthermore, the court did not decide the matter of the voluntariness of the ML III transactions because of the factual issues involved.<sup>174</sup>

*d. Rough Proportionality Test*

Starr additionally argued that the court should apply *Dolan's* "rough proportionality" test,<sup>175</sup> but the court refused to apply it in this case.<sup>176</sup> Starr maintained that AIG already provided adequate consideration for the loan with the high interest rate and the security in AIG's assets. The additional equity stake made the compensation disproportionate.<sup>177</sup> In other words, what AIG's shareholders received in the transaction was disproportionately smaller than what they gave up. Although the test seems to align well with the facts of the case, the court declined to expand the Supreme Court's jurisprudence by applying the test outside the context of land use exactions.<sup>178</sup> Furthermore, the court stated that the factual predicates for the rough proportionality test were not present. The test requires that the government impose a choice between the offered deal and some exertion of regulatory power, such as declining a permit to develop a property.<sup>179</sup> Therefore, the court found that Starr cannot sustain a takings claim based on the rough proportionality test.

*e. Dismissal of Derivative Claims*

On April 5, 2013, AIG, as nominal defendant, filed a motion to

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171. *Starr Int'l Co.*, 106 Fed. Cl. at 56.

172. *Id.* at 79.

173. *Id.* at 79-80.

174. *Id.* at 80; *see also* Ben Prostress & Michael J. De La Merced, *Rescued by a Bailout, A.I.G. May Sue Its Savior*, N.Y. TIMES DEALBOOK, Jan. 7, 2013, 10:30 PM, <http://dealbook.nytimes.com/2013/01/07/rescued-by-a-bailout-a-i-g-may-sue-its-savior/> (discussing the fact-intensive forthcoming trial, in preparation for which Starr is "[s]eeking [sixteen] million pages in documents from the government.").

175. *Dolan v. City of Tigard*, 512 U.S. 372, 388 (1994) (requiring a "rough proportionality" between the development exactions and the government's interest in regulation).

176. *Starr Int'l Co.*, 106 Fed. Cl. at 81-83.

177. *Id.* at 80-81.

178. *Id.* at 81-82. (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-47 (2005)).

179. *Starr Int'l Co.*, 106 Fed. Cl. at 82.

dismiss the derivative claims for lack of standing.<sup>180</sup> The court granted the motion, dismissing the claims related to the ML III transactions and to the taking of the economic and voting rights in the shares, as far as they constituted derivative claims.<sup>181</sup> Starr had initially claimed that the demand requirement was excused as futile because the Government had controlled AIG, so its appointees to the Board could not be expected to join a derivative suit against the United States.<sup>182</sup> However, after the Government had disposed of its controlling shares, Starr had agreed on September 5, 2012 to make a demand on AIG's board, but reserved the right to challenge AIG's subsequent refusal.<sup>183</sup> AIG's board ultimately refused the demand after extensive discussion by it and its Regulatory, Compliance and Public Policy Committee; counsel by three separate law firms; and briefings from all parties involved.<sup>184</sup> AIG's board being entitled to business judgment protection,<sup>185</sup> Starr had a high bar to meet in arguing that the demand was futile.

In rendering this decision, the court was quick to point out its concerns. It was concerned about AIG's use of experts' opinions to evaluate Starr's likelihood of success, without those experts possessing all the facts in a very fact-dependent case, and the role of the US Treasury's briefings.<sup>186</sup> Most notably, however, the court pointed out the "media frenzy" that accompanied AIG's demand discussions, and admonished those "public figures and elected officials who apparently lacked any understanding that AIG was *required* to consider entry into the

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180. *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 465 (2013). The Government also moved to dismiss all of Starr's other claims. *Id.* "[T]o have standing to sue individually, rather than derivatively on behalf of the corporation, the plaintiff must allege more than an injury resulting from a wrong to the corporation." *Kramer v. W. Pac. Indus.*, 546 A.2d 348, 351 (Del. 1988).

181. *Starr Int'l Co. II*, 111 Fed. Cl. at 482-83.

182. *Id.* at 464. To pursue a derivative claim, a shareholder must either demand that the corporation's board of directors pursue the claim and receive a wrongful refusal, or argue that the demand is excused for futility because the directors are conflicted. *Wood v. Baum*, 953 A.2d 136, 140 (Del. 2008).

183. Exhibit A: Agreement By And Between Starr International Co., Inc. and American International Group, Inc. 2-3, *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50 (2012) (No. 11-779C) [hereinafter "Demand Agreement"]. The circumstances of that agreement are not clear. Starr must have believed it had a chance to convince AIG to join its suit and wanted to make it easier for AIG to hear its argument. *See id.* at 3 (explaining that the parties' intention was "to provide the AIG Board with sufficient time to consider all of the derivative claims in an orderly process and to avoid a preliminary dispute concerning the demand excused issue.").

184. *Starr Int'l Co. II*, 111 Fed. Cl. at 467-69.

185. *Id.* at 465.

186. *Id.*



lawsuit . . . .”<sup>187</sup> Despite these concerns and the public pressure on AIG’s board to refuse the suit, the court granted the motion to dismiss on these claims.

### 3. Takeaways from the court’s opinion

The *Starr* case provides both an indication of how courts analyze this new breed of takings claims and an example of how takings claims may be used to replace a lack of state fiduciary law. Much of the court’s opinion is devoted to analyzing whether Starr held a property interest that could even be taken. The Court of Federal Claims went to great lengths to assemble a property right in the shares and collateral payments, looking to both first principles of excludability and transferability, along with Delaware case law. The court also rested significant reasoning on the Consent Order from the Court of Chancery, which it interpreted to require a vote on any dilution of the common shareholders’ stake in AIG. Given this case-specific reasoning, courts may not be able to generalize from it in the next case without difficulty.

The court’s willingness to engage in this extensive exercise demonstrates how critical the problem of the government as controlling shareholder is. Mr. Greenburg and his attorney, David Boies, have been clear with the media, as well as the court, about the policy implications of the case.<sup>188</sup> Public sentiment, however, is clearly not on their side.<sup>189</sup> Not only does the action seem ungrateful, but it also seems misplaced. If

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187. *Id.* (emphasis in original); see also Neal Irwin, *AIG Considers Suing Government for Bailing it out, World Implodes in on Itself*, WASH. POST, Jan. 8, 2013, 11:29 AM, <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/08/aig-considers-suing-government-for-bailing-it-out-world-implodes-in-on-itself/> (noting the “head-smacking disbelief that has accompanied public discourse of the news [of AIG’s potential lawsuit],” focusing on comments by Federal Reserve Chairman Ben Bernanke); Steve Schaefer, *AIG: Thank You America, But We May Sue You*, FORBES, Jan. 8, 2013, 9:05 AM, <http://www.forbes.com/sites/steveschaefer/2013/01/08/aig-thank-you-america-but-we-may-sue-you/> (noting that AIG’s board had a duty to its shareholders to consider joining the suit).

188. See Matthew J. Belvedere, *Suing US Over AIG Bailout Is Solid, Says Lawyer*, CNBC, Jan. 10, 2013, 11:49 AM, <http://www.cnbc.com/id/100369044> (noting that Boies told CNBC that the case “is a test of the limits on what the government can demand in return for making loans.”); Zachary Tracer & Elizabeth Bunn, *Boies Likens AIG Takeover to Firefighters Seizing Goods*, BLOOMBERG, Jan. 10, 2013, 9:13 AM, <http://www.bloomberg.com/news/2013-01-10/boies-likens-aig-takeover-to-firefighters-seizing-goods.html> (“[Mr. Boies] . . . said the firm’s takeover was an abuse of authority similar to firefighters seizing possessions they rescued from a flood.”).

189. See Phillips, *supra* note 3 (“The company’s true mistake wasn’t letting the government cram an onerous deal down its throat, it was thinking that it could insure billions worth of corporate debt the same way it insured cars and houses. Sometimes you get what you deserve.”).

shareholders have a problem with a company's financial straits, they should blame their directors, not the government. The court, however, seems to understand the lack of protections shareholders have in cases of government bailouts and is, therefore, not so willing to dismiss the suit. The litigants may not be entirely sympathetic, but that is no reason to create bad law.

The court defined the case largely within the *Penn Central* test, rather than step beyond the current law and expanded the *Dolan* rough proportionality test. *Dolan*'s test protects property owners from the government's imposition of unconstitutional conditions on discretionary public benefits.<sup>190</sup> The court was in accord with precedent to dismiss its application. Furthermore, adding yet another cumbersome test would have significantly impaired the government's ability to negotiate with potential bailout recipients, especially if the court was unclear as to which test would apply. Declining to extend the rough proportionality test gives the government a little more certainty as to how a court will review its actions. If subsequent cases follow the same path, only "total taking[s]"<sup>191</sup> and the *Penn Central* factors will apply to define a taking.

Finally, the issues related to demand excusal raise an additional procedural hurdle for a potential takings plaintiff. In this case, a "rigorous review process and . . . a reasonable decision" were sufficient to uphold a refusal under business judgment review.<sup>192</sup> Even stoking the court's concerns about the public and governmental pressure on the board was not enough to defeat the presumption.<sup>193</sup> While those forces emanate from outside the boardroom, they could have a real effect on a company's ability to generate value to shareholders, yet they are not enough to establish futility.

### III. COMPARING DELAWARE FIDUCIARY DUTIES AND TAKINGS CLAIMS OUTCOMES

The lifecycle of government ownership in a given firm can be divided into three stages: acquisition, management, and disposition. The court's opinion in *Starr* relates most clearly to the acquisition stage of the lifecycle,

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190. *Dolan v. City of Tigard*, 512 U.S. 372, 385 (1994) ("Under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.").

191. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

192. *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 466 (2013); *see also* *Aronson v. Lewis*, 473 A.2d 805, 812-13 (1984) (noting that analysis of demand futility is bound to an analysis under the business judgment rule).

193. *Starr Int'l Co. II*, 111 Fed. Cl. at 477-79.

which is the most natural fit for a takings claim. Takings may also provide some protection for shareholders in duty of loyalty fact patterns and where the company is sold, but on the whole, it is an inadequate substitute for fiduciary law. The fact patterns outlined below track some of the common breaches of fiduciary duties and analyze the outcomes under the Fifth Amendment's Takings Clause. In many of these cases, shareholders could have a claim against the board of directors. In cases of government ownership like *Starr*, however, shareholders are seeking compensation that does not involve the company. Furthermore, the damages could be so large as to make the board judgment-proof.<sup>194</sup> Therefore, while shareholders may have a cause of action against the board, this section will address whether the minority shareholders would have a takings claim against the government on the same facts.

#### *A. Stage One: Acquisition*

*Starr* itself presents the acquisition scenario. The Court of Federal Claims has now opened the door to a compensable taking following the government's acquisition of common shares (given a certain set of facts). Allowing these claims, however, diverges from Delaware law in that fiduciary law does not impose a burden on the buyer of shares until the acquisition is complete. The Delaware courts have developed a doctrine by which minority shareholders may seek damages when a corporation's board of directors issues shares for less than their value.<sup>195</sup> That doctrine, however, imposes a duty on the board, not on the buyer. Generally, the buyer has no fiduciary duties to the corporation or its shareholders until she has taken control. In this way, takings may actually provide an additional layer of shareholder protection not offered by fiduciary law.

#### *B. Stage Two: Management*

Fiduciary law issues also arise in the ongoing management of a corporation. These duties encompass loyalty to the corporation, care in conduct of affairs, and additional protections of shareholder franchise. The Fifth Amendment fails to protect shareholders to the extent that state fiduciary law does. Even where the substantive law might contain comparable safeguards, as in the duty of loyalty cases, the procedural requirements may prevent adequate redress of shareholder injury.

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194. See, e.g., Complaint, *supra* note 69, at 48 (seeking not less than twenty-five billion dollars in damages).

195. See *supra* note 156 and accompanying text.

### 1. Duty of Loyalty

The duty of loyalty protects the interests of the shareholders from self-serving actions of management. Even if fiduciary law did apply to the government, actions taken for the public good would likely not be seen as self-serving. However, if the controlling shareholder is on both sides of a given transaction, then there might be a cognizable duty of loyalty claim.<sup>196</sup> For example, imagine the government owns a majority stake in two American auto companies, AMC and BMC, and controls both boards. Following the government bailout in which it obtained its equity stake, AMC's business has turned around, yet BMC continues to struggle. Citing a public need for at least two strong auto companies on its shores, the government directs AMC to sell some of its top income-producing assets, valued at \$500 million to BMC. In exchange, BMC issues \$1,000 in high-yield debt to AMC.<sup>197</sup> The board convenes no independent negotiating committee and hires no independent counsel or financial experts. The majority of the disinterested directors vote against the merger, though the board still approves the deal. Just to be safe, the board submits the deal to shareholders,<sup>198</sup> which is purely a formality, since the government's shares carry the vote.

Given this scenario, a non-government controlling shareholder would likely be held to have breached its duty of loyalty because the price and process are clearly unfair.<sup>199</sup> A takings claim, however, would be much more difficult. The government's action would deprive the shareholders of the economic value of the AMC assets, to the extent that the corporation was not compensated through the BMC bonds. The shareholders likely invested in the company with the expectation that their best assets would not be given away for next to nothing. Furthermore, the government's action has the character of a taking, in that it is moving the asset from a corporation under its control to another corporation under its control, depriving the AMC shareholders at the benefit of BMC's shareholders and the public at large.

The assets here—likely manufacturing plants, brands, and materials—are certainly property interests of the corporation. AMC can exclude others from their use and transfer them to whomever it chooses. Under the *Starr*

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196. *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 442 (Del. 1996).

197. In order to conduct this secondary bailout of BMC, the transaction necessarily must be unfair. AMC cannot transfer its assets to BMC at their true net present value because it would defeat the purpose of the transfer.

198. See DEL. CODE ANN. tit. 8, § 271 (West 2014) (requiring a shareholder vote for sales of "all or substantially all . . . assets.").

199. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (requiring entire fairness review for duty of loyalty claims against controlling shareholders).

reasoning, the shareholders would likely not be able to maintain a *direct* claim against the government. In this hypothetical scenario, the government caused AMC to transfer its best assets in exchange for very little consideration from BMC. As in *Gatz* and *Rossette*, the controlling shareholder received the benefit from the transaction at the expense of the other shareholders.<sup>200</sup> This hypothetical deal did not, however, involve compensation in the form of stock, and the Delaware courts have been largely unwilling to extend the equity dilution too far.<sup>201</sup> Therefore, unless the shareholder-plaintiff can meet the standards for demand excusal, the claim would not be sustained. The Court of Federal Claims, however, may be more willing to allow a direct suit where the plaintiff merely “seek[s] compensation for the improper extraction of the economic value” of his shares,<sup>202</sup> even if the factual predicates are not fully established. Therefore, a takings claim may be sustained, although it is not clear through which procedural hurdles a shareholder-plaintiff would have to jump.<sup>203</sup>

## 2. The Business Judgment Rule & the Duty of Care

Corporate law’s business judgment rule provides extensive protections for board decisions in the interest of allowing for risk-taking and avoiding recurrent litigation following failed business ventures. In reviewing a challenged course of action, the court

presum[es] that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.<sup>204</sup>

Unless the plaintiff can rebut that presumption by showing a breach of the duty of care or duty of loyalty, “[A] court will not substitute its judgment for that of the board if the . . . decision can be attributed to any rational business purpose.”<sup>205</sup> A shareholder may show a breach of the duty of care

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200. *Gatz v. Ponsoldt*, 925 A.2d 1265, 1280-81 (Del. 2007); *Gentile v. Rossette*, 906 A.2d 91, 102-03 (Del. 2006).

201. See, e.g., *Feldman v. Cutaia*, 956 A.2d 644, 658 (Del. Ch. 2007) (refusing to aggregate the shares held by a company’s directors to find a control block).

202. *Starr Int’l Co. v. United States*, 106 Fed. Cl. 50, 65 (2012).

203. AIG has declined to join Starr’s suit against the United States, jeopardizing Starr’s derivative claims. Michael J. De La Merced, *Greenberg Forges Ahead With Lawsuit Over A.I.G. Bailout*, N.Y. TIMES DEALBOOK, Mar. 12, 2013, 2:06 PM, <http://dealbook.nytimes.com/2013/03/12/greenberg-forges-ahead-with-lawsuit-over-a-i-g-bailout>.

204. *Gantler v. Stephens*, 965 A.2d 695, 705-06 (Del. 2009) (internal quotations omitted).

205. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (internal

if the board of directors acted unadvisedly.<sup>206</sup>

At one point in the history of regulatory takings, courts may have been willing to judge how well the taking accomplished its public purpose. *Agins v. City of Tiburon* set forth a standard for a compensable taking, stating that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”<sup>207</sup> The Supreme Court, however, later rejected the test, criticizing it as derived from the Due Process clause and not fit for a takings analysis.<sup>208</sup> The problem with the test, the Court said, was that it “suggests a means-end test: [i]t asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose.”<sup>209</sup> Furthermore, it “reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights.”<sup>210</sup> As a practical matter,

[t]he *Agins* formula can be read to demand heightened means-end review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations — a task for which courts are not well suited.<sup>211</sup>

Just as the Delaware courts will not second-guess decisions of the board within the requirements of the business judgment rule, takings claims do not present an opportunity for a court to impose its *ex post* decision-making on the government. Likewise, takings do not require that the government acted advisedly. Those judgments are left to the realm of the due process claims. Thus, under the Takings Clause, the government enjoys a similar insulation from attacks on its decision-making, but it is not subject to an attack that it acted without requisite knowledge.

### 3. Protection of Shareholder Votes

Although the Delaware courts have time and again recognized the

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quotations omitted).

206. See *Gantler*, 965 A.2d at 706 (noting that a board must act advisedly for its decision to be entitled to the business judgment presumption). In the context of a merger, for example, the Court of Chancery will generally require that the board have received opinions from both legal counsel and financial experts, such as investment banker(s). See *Smith v. Van Gorkom*, 488 A.2d 858, 872, 876-878 (Del. 1985) (insisting on expert opinions to aid the board of directors).

207. 447 U.S. 255, 260 (1980).

208. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

209. *Id.* at 542 (emphasis in original).

210. *Id.* (emphasis in original).

211. *Id.* at 544.

importance of protecting the shareholder franchise, shareholders are unlikely to find similar protections in cases of government control. Delaware has established that the business judgment rule does not attach to those actions of a board of directors done with the “primary purpose” of interfering with a shareholder vote.<sup>212</sup> Rather than the lenient business judgment rule standard, the board must provide a “compelling justification” for any such action.<sup>213</sup> Similarly, the Court of Federal Claims recognized a property interest in the voting power of shares under certain circumstances. Under Delaware law, shareholders are frequently entitled to a vote.<sup>214</sup>

Starr’s companion complaint in the U.S. District Court for the Southern District of New York presented a similar claim for breach of fiduciary law.<sup>215</sup> Starr argued that the reverse stock split was brought about for the primary purpose of circumventing the class-wise vote that would have been required to increase the number of authorized shares.<sup>216</sup> The court dismissed on the dual basis that Starr had not alleged adequate control of the Federal Reserve Bank and that fiduciary duties do not apply to agencies of the United States.<sup>217</sup>

A shareholder may have a claim against a private board of directors in the same situation, though it is not clear that *Blasius* would apply. In recent years, the Delaware courts have narrowed the applicability of the *Blasius* rule to the point that it may only apply to director elections.<sup>218</sup> Furthermore, the court normally applies it to scenarios where a vote is altogether circumvented. In the alleged scenario, the shareholders did

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212. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 662 (Del. Ch. 1988); *see also* *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 440 (Del. 1971) (reversing the denial of a request for an injunction against a corporation’s plan to change the date of an annual stockholders meeting); *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 777 (Del. Ch. 1967) (finding a violation of fiduciary duty where the corporation issued stock for the purpose of diluting a shareholder’s interest in the company).

213. *Blasius*, 564 A.2d at 661.

214. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251 (West 2014) (providing for a shareholder vote on mergers); *Id.* at § 271 (requiring a shareholder vote for a sale of “all or substantially all of [the corporation’s] property and assets.”).

215. *Starr Int’l Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 211-12 (S.D.N.Y. 2012).

216. *Id.* at 214.

217. *Id.* at 214-15.

218. *See* *Mercier v. Inter-Tel Inc.*, 929 A.2d 786, 809 (Del. Ch. 2007) (interpreting *MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003) “as signaling . . . that the stringency of the *Blasius* approach should be reserved largely for director election contests or election contests having consequences for corporate control.”); *see also* *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 289 (Del. 2010) (declining to extend *Blasius* to the context of Section 220 inspection requests); *Yucaipa Am. Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 330-336 (Del. Ch. 2010) (declining to extend *Blasius* to the adoption of a poison pill).

approve the reverse stock split via the proxy vote, although the government's controlling shares participated.<sup>219</sup> A Delaware court may, however, apply equitable doctrines to find a breach of fiduciary duty.<sup>220</sup> In this scenario, AIG purportedly recommended the reverse stock split due to the risk of de-listing.<sup>221</sup> If the genuine, primary purpose were to avoid the vote on the increase to authorized shares, then the court may find a breach of fiduciary duty.

Starr's suit in the Court of Federal Claims advances a takings claim on the same facts. Insofar as a litigant can claim a property right in his franchise, he would likely have a viable takings claim that would apply in more cases than *Blasius* would. That property right, however, is unlikely to arise in most cases of government control. The court was willing to accept the pleading of a property right in a class-wise vote based on AIG's previous representations to the Court of Chancery.<sup>222</sup> Delaware corporate law does entitle shareholders to a vote in other cases, such as in cases of an increase in the number of authorized shares<sup>223</sup> or in mergers where the shareholder's corporation will not survive,<sup>224</sup> which would be sufficient to create a property right. If the government, however, already holds a controlling position via common shares, then it has little reason to circumvent a shareholder vote. Furthermore, even if the government held preferred shares, Delaware law does not generally provide for a class vote. In the case of amendments to the authorized shares, however, the Delaware code does provide for a class-wise vote.

In *Starr*, however, the shareholders did receive a vote on the amendment to the certificate of incorporation, but the reverse stock split diluted their shares with the government's vote controlling. The Court of Federal Claims held that Starr adequately pleaded a property right in a class-wise vote on the government's conversion to common shares based on AIG's representations in the Court of Chancery.<sup>225</sup> Absent those representations, the shareholders may not have a property right in a class-wise vote, unless the Delaware statutes so provide.<sup>226</sup> Therefore, the

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219. *Starr Int'l Co. v. United States*, 106 Fed. Cl. 50, 58 (2012).

220. *See, e.g., Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (providing the oft-quoted principle that because a course of action is legally possible does not mean it is permissible).

221. *See* Russnow, *supra* note 86 (explaining AIG's "rationale" for the reverse stock split: "if the stock falls below a dollar . . . the New York Stock Exchange may delist them.").

222. *Starr Int'l Co.*, 106 Fed. Cl. at 73.

223. DEL. CODE ANN. tit. 8, § 242(b)(2) (West 2014).

224. *Id.* at § 251.

225. *Starr Int'l Co.*, 106 Fed. Cl. at 73.

226. *Cf.* DEL. CODE ANN. tit. 8, § 242(b)(2) (West 2014) (establishing that "holders of



common shareholders may have a claim in the most egregious cases, such as the government completely disregarding a vote, but in the most likely cases they will not have a cognizable takings claim.

### *C. Stage Three: Disposition*

The government's inevitable discharge of its ownership stake or the sale of the corporation itself presents the clearest need for adequate protections for share value. The Delaware courts have recognized the need to scrutinize these transactions between private parties. In the context of government ownership, however, shareholders continue to face significant hurdles in the protection of their investments. In these cases, the shareholders may have a takings claim.

Since these claims will often be derivative, however, the plaintiffs will be required to fulfill the demand requirements. The pressures from outside the boardroom noted in the *Starr* opinion make it seem as if the plaintiff should never make the demand on the board.<sup>227</sup> However, the standard for excusal is not much more forgiving.<sup>228</sup> Given these circumstances, suits arising from the sale of corporate property will face difficult procedural hurdles.

#### 1. Sale of Control

Fiduciary issues involving the sale of control divide into two major categories: (1) the sale of control to a corporate raider and (2) selling the board or a corporate asset. Courts will generally find a breach of fiduciary duty when the controlling shareholder reaps a premium, usually a conspicuously large payment, to a party whom the seller should have known was going to raid the corporation's assets in bad faith.<sup>229</sup> The

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the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment . . .").

227. See *Starr Int'l Co. v. United States*, 111 Fed. Cl. 459, 470 (2013) ("In making a demand on the board, a shareholder not only tacitly concedes [the] lack of self-interest and independence of a majority of the Board, but expressly concedes both issues.") (internal quotations omitted).

228. See *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984) (stating that the plaintiff must allege "particularized facts [to create] a reasonable doubt . . . that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment.").

229. See *e.g.*, *Gerdes v. Reynolds*, 21 N.E.2d 331, 333-34 (N.Y. 1939) (holding that a controlling shareholder may not sell his control stake for the purpose of personal gain); *Harris v. Carter*, 582 A.2d 222, 235 (Del. Ch. 1990) (holding that a shareholder selling control breaches the duty of care if he "may or should reasonably foresee danger to other shareholders.").

government is unlikely to sell its controlling share to a party who will destroy the company it had worked hard to revive, so a takings claim based on those facts is unlikely.

Scholars used to debate the characterization of the control premium. Professor Berle argued that control itself was a corporate asset, the premium for which should be vested in the corporation.<sup>230</sup> Under that view, shareholders may have a cognizable takings claim for the sale of control itself. However, the courts have largely rejected that view and will allow a controlling shareholder to accept a control premium, which he does not have to share with the minority shareholders.<sup>231</sup> A premium may be invalidated, however, if it reflects the sale of the board<sup>232</sup> or the sale of a corporate asset.<sup>233</sup>

The government, however, may still run into a problem if it appears to be selling the board alone, which can arise when the shareholder receives too high a premium given the number of shares being sold. Fiduciary law accepts that a control of the board will inevitably follow the sale of a significant percentage of shares such that, for example, an agreement that existing directors will resign and appoint their successors is not illegal *per se*.<sup>234</sup> If that ownership percentage falls below the amount whereby control would inevitably flow, however, then it is deemed to be the selling the board itself.<sup>235</sup> The government could find itself in this position if it has drawn down its equity stake below a legally controlling amount, yet still

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230. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 216-19 (1932). *But see* Thomas L. Hazen, *Transfers of Corporate Control and Duties of Controlling Shareholders — Common Law, Tender Offers, Investment Companies — and a Proposal for Reform*, 125 U. PA. L. REV. 1023, 1025 (1977) (explaining some of the critiques of Berle's position).

231. *See* Abraham v. Emerson Radio Co., 901 A.2d 751, 761-62 (Del. Ch. 2006) (“[P]ure control premium envy is not a cognizable claim for a minority stockholder under Delaware law.”); Zetlin v. Hanson Holdings, Inc., 397 N.E.2d 387, 389 (1979) (stating that minority stockholders are not entitled to the opportunity to share equally in any premium paid for a controlling interest in the corporation).

232. *See* Brecher v. Gregg, 89 Misc. 457, 464 (N.Y. Sup. Ct. 1975) (holding that a four percent shareholder who received a control premium was required to forfeit the premium to the company).

233. *See* Perlman v. Feldmann, 219 F.2d 173, 178 (2d Cir. 1955) (invalidating a control premium where it reflected the sale of the going concern value of the company).

234. *See, e.g.,* Essex Universal Corp. v. Yates, 305 F.2d 572, 579 (2d Cir. 1962) (holding that contract for sale of 28.3% of stock of a publicly held corporation, that included a clause giving purchaser the option to require seriatim director resignation, was not invalid *per se* as a matter of state law).

235. *See id.* (requiring a minority shareholder challenging a sale “to show that . . . there was at the time some concretely foreseeable reason why [the buyer's] wishes would not have prevailed in the shareholder voting held in due course.”); *see also* Brecher, 89 Misc. at 464 (invalidating promised resignations by a shareholder who only held four percent of stock).

maintains effective control of the board. This could arise when no other shareholder holds a significant percentage of shares. The government may want to pass control of the board to a shareholder that will not unwind its work with the company. Furthermore, it would likely be under public pressure to break even, at least, on the bailout transaction. For these reasons, the government may hypothetically negotiate a premium in exchange for the current board's appointment of the purchaser's designated directors.

With any other seller, shareholders would likely have a derivative claim under fiduciary law for the sale of the board with the premium proceeds paid back to the company.<sup>236</sup> A takings claim would likely also be derivative because the defendant normally pays the excess premium for the sale of control back to the company. Value alone, however, is not enough to confer property status.<sup>237</sup> Shareholders generally maintain the right to elect directors.<sup>238</sup> The company cannot transfer the board seats to anyone it wants or for any compensation it wants, as a shareholder can generally override the board's appointment of directors, given enough shares. On the one hand, Delaware law seems to recognize a property interest in the voting rights of shares.<sup>239</sup> The sale of a board seat obstructs the exercise of those rights by circumventing an election. On the other hand, the voting power of the shares is not permanently affected, as the shareholder could hypothetically exercise his vote at the next shareholder's meeting. The Fifth Amendment, however, does not distinguish between temporary and permanent takings.<sup>240</sup> Shareholders would likely have a takings claim where the government merely sells board seats.

## 2. Sale of the Company

The sale of the entire company presents the clearest need for shareholder protections. A merger will force a payout price on the shareholders, who depend on the board to find the best bid. Delaware fiduciary law accordingly imposes a duty on the board to maximize shareholder value when the Board or controlling shareholder is selling the company.<sup>241</sup> Delaware will also employ an entire fairness standard of

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236. *Brecher*, 89 Misc. at 464 (“[T]he illegal profit belongs to the corporation.”).

237. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 157 (1998).

238. Under Delaware law, at least one class of stock must be entitled to vote. Each share receives one vote unless otherwise specified. DEL. CODE ANN. tit. 8, § 212 (West 2014).

239. *See supra* note 159 and accompanying text.

240. *First English Evangelical Lutheran Church of Glendale v. County of L.A., Cal.*, 482 U.S. 304, 318 (1987).

241. *See, e.g., Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del.

review if the controlling shareholder forces a merger on the minority shareholders without a special negotiating committee, disinterested director approval, or a majority vote by disinterested shareholders.<sup>242</sup>

Recall our struggling auto companies. The government has purchased a controlling stake in the common shares of a failing American auto company. The majority of the directors have strong ties to the government, and they are not considered disinterested or independent. After a period of time, the government decides it cannot turn the company around on its own and, overturning a long history of independence, determines that a merger with another auto company would be the best option. After initial bidding from two major American automakers (which it does not control), the government strikes a deal for a cash-out merger. Before the shareholders meeting, however, a foreign car company makes a significantly higher, all-cash bid. The government does not want to weather the political firestorm that would ensue if it were seen to be selling off a great American asset. It further believes that the employees would fare better under a domestic company, which will keep plants open in the country. For those reasons only, it rejects the bid, recommending the initial deal to the shareholders and voting its shares in favor.

A private board would most likely be held to have violated its fiduciary duties.<sup>243</sup> *Revlon* established that consideration of “non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.”<sup>244</sup> In this scenario, the board, controlled by the government, has put the company on the auction block, triggering the duty to maximize shareholder value. Furthermore, the government, as shareholder, failed to achieve a fair price through fair process because it decided to forgo a higher premium for

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1987) (“[A] shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.”); *see also* *McMullin v. Beran*, 765 A.2d 910, 919 (Del. 2000) (asserting, “When a board is presented with the majority shareholder’s proposal to sell the entire corporation to a third party, the ultimate focus on value maximization is the same as if the board itself had decided to sell the corporation to a third party.”); *Kahn v. Lynch Commc’ns Sys., Inc.*, 638 A.2d 1110, 1113-14 (Del. 1994) (explaining that, in Delaware, a minority shareholder who exercises control over the corporation owes a fiduciary duty to the corporation and other shareholders).

242. *See* *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (imposing an entire fairness review where the controlling shareholder pushes through a merger transaction); *Kahn*, 638 A.2d at 1117 (deciding that the use of a special negotiating committee shifts the entire fairness burden to the plaintiff).

243. *See* *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182-83 (Del. 1986) (requiring the board to maximize shareholder value when it initiates an active bidding process).

244. *Id.* at 182.

reasons other than its minority shareholders. If fiduciary law applied, the government would have breached its duties when it decided to favor workers and politics over shareholders.<sup>245</sup>

The minority shareholders could have a takings claim in this fact pattern. The government is taking their shares for public use in exchange for inadequate compensation. The court would likely see this as a “total taking”<sup>246</sup> since the shareholders are permanently and completely deprived of their shares, but the *Penn Central* factors also point to a taking. The economic impact to the shareholders could be immense. Furthermore, given the *Revlon* rule, shareholders likely had an expectation, at the time of investment, that the company’s board of directors will seek to maximize the value of their shares in any merger agreement. Those expectations might, however, be different if shareholders purchased their shares after the government had taken control.<sup>247</sup> Since the shares are personal property under Delaware law,<sup>248</sup> the property requirement would not be at issue. A stock-for-stock deal would similarly result in a complete taking of the shares. Minority shareholders, however, would have a greater burden to prove inadequate compensation because they could sell the shares.<sup>249</sup> Therefore, the Takings Clause likely provides substantive protections in the merger context similar to Delaware fiduciary law. The remedies for these takings, however, would likely fall short of what a shareholder would seek under a claim for breach of fiduciary duties.

#### *D. A Brief Note on Remedies*

The remedies available in a takings claim generally are not the kinds of remedies that a shareholder would seek in Chancery. Particularly in cases of mergers, shareholders will seek an injunction to stop the actions of the board of directors or controlling shareholder. The Takings Clause, however, does not prohibit the taking altogether, but only requires compensation.<sup>250</sup> In some cases of private control, such as in cases of squeeze-out mergers, the minority shareholders will similarly have no right to an injunction. The Delaware courts, however, have provided for a

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245. *See id.* (“A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.”).

246. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992).

247. The shareholders may have had no expectation of value maximization if they expected fiduciary duties not to apply to the government.

248. DEL. CODE ANN. tit. 8, § 159 (West 2014).

249. The same rationale underlies Delaware’s denial of appraisal rights where the shareholders hold stock that were either publicly or widely traded. *Id.* at § 262(b)(1).

250. *First English Evangelical Lutheran Church of Glendale v. County of L.A., Cal.*, 482 U.S. 304, 314 (1987).

“quasi-appraisal” remedy beyond the statutory appraisal procedures.<sup>251</sup> Just compensation under the Takings Clause is “normally . . . measured by the market value of the property at the time of the taking contemporaneously paid in money.”<sup>252</sup> “Deviation from this measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to [the] owner or public.”<sup>253</sup> In some cases, the fair market value is easy to find, such as a merger where the government declines a topping bid. In other cases, however, where no market test has been performed, finding the fair market value may be more difficult. *Weinberger v. UOP* is famous for opening valuation to “any techniques or methods which are generally considered acceptable in the financial community . . . .”<sup>254</sup> Modern financial analysts generally use discounted cash-flow analysis. Those techniques, however, may be unacceptable in the takings context.<sup>255</sup> Therefore, even if minority shareholders can find a sustainable takings claim, the relief available may not satisfy them.<sup>256</sup>

#### CONCLUSION

The Takings Clause provides an important backstop to highly inequitable government action, but it is unlikely to solve effectively the problem of the government as controlling shareholder. In some ways, it provides protections not available under Delaware fiduciary law in that it imposes burdens on the government’s initial acquisition of shares. It also provides critical protections in the merger and duty of loyalty contexts, when the shareholders are most vulnerable. In other areas, it falls short. While it provides a right to adequate compensation in a merger, a shareholder will not be able to secure injunctive relief. The duty of loyalty protections can become mired in procedural difficulties, and the duty of care protections are completely absent. And where the substantive law is most applicable, as in the sale of the company cases, the procedural

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251. See *Weinberger v. UOP Inc.*, 457 A.2d 701, 714 (Del. 1983) (applying a “quasi-appraisal” where a majority shareholder forced a merger transaction on minority shareholders without fair price or fair process).

252. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (internal quotations omitted).

253. *Id.* (internal quotations omitted).

254. *Weinberger*, 457 A.2d at 713.

255. See, e.g., *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 836 (7th Cir. 1985) (“Cash flow studies may be necessary when there is no other way to find value, but they are not the best way.”).

256. See J.W. Verret, *supra* note 8, at 309 (noting that shareholders seeking an injunction will be disappointed).

requirements and remedies can make sufficient relief impossible.

Courts walk a fine line in bailout cases, and the stakes are high. On the one hand, the court must protect the constitutional right of private parties to receive adequate compensation whenever the government takes its property. On the other hand, the court must be mindful not to impose too high a standard such that it impairs the government's ability to save the national economy in times of crisis. *Starr* exposes that tension. While the public clearly will not shed a tear for the plaintiff, the pleadings expose a government that may have asked for too much in return for its aid.

The best protection for shareholders must come from the government protecting shareholders from itself. A well-planned bailout can protect the interests of shareholders such that the shortcomings of the Takings Clause are never exposed. Professors Marcel Kahan and Edward Rock have suggested certain designs that would “block political interference by reducing the power to interfere, minimizing the opportunities to do so, and increasing the political cost.”<sup>257</sup> They suggest that the government insulate itself from the ongoing business of the corporation by investing in debt rather than equity or “through a legally binding process for the appointment of directors and the voting of shares.”<sup>258</sup> Furthermore, they note that “[b]inding time limits on government ownership are the single most powerful means of insulating firms from political pressure.”<sup>259</sup>

J.W. Verret goes a step further to suggest that the Department of Treasury might set up fiduciary principles for the conduct of a bailout, together with an effective process to sue for violations of those rules.<sup>260</sup> Rather than investing through equity or bonds, Verret suggests the government hold “frozen options” to “limit the inherent drawbacks to the Treasury holding common equity, while also letting the taxpayer participate in the benefits of the bailout . . . .”<sup>261</sup> Like Kahan and Rock, Verret also recommends “a clear timeline for [Government] ownership of . . . stocks through a sunset provision . . . subject to challenge if the

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257. Kahan & Rock, *supra* note 4, at 1360.

258. *Id.* at 1361.

259. *Id.* at 1363. The authors recognize, however, that the quick exits come with tradeoffs. Specifically, if Congress forces the government to pull out too soon, it could undo the work done to save the company. *Id.*

260. Verret, *supra* note 8, at 346 (citing as precedent “the Resolution Trust Corporation (RTC), established to effectuate a government bailout of the savings and loan industry, [which] was created by enabling legislation that significantly waived sovereign immunity.”). Beneficiaries of the RTC were able to sue the RTC for breaches of the fiduciary rules established in the legislation. *Id.* at 346-47.

261. *Id.* at 347. “[Frozen options] are options to purchase common stock that governments are not permitted to exercise, but which subsequent purchasers in the market are permitted to exercise.” *Id.*

Treasury later changes its mind.”<sup>262</sup> He additionally suggests that the Treasury establish a clear sales plan for how it will unwind its ownership.<sup>263</sup> If the Government chooses to implement these suggestions, shareholders will not have to rely on the ill-suited provisions of the Takings Clause.

This Comment has sought to address the extent to which the Takings Clause can protect shareholders as well as state fiduciary law. The Court of Federal Claims, however, will have the first official statement in *Starr*. Whatever its ultimate conclusion, it has already taken the position that, given the right facts, there can be a cognizable takings claim. But *Starr* presents only a fraction of potential takings scenarios. While takings claims can provide an important stopgap in the most egregious cases of government overreach, the doctrine largely falls short of protecting shareholders’ investments.

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262. *Id.* at 350.

263. *Id.*