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Exclusivity of Appraisal--The Possibility of Extinguishing Shareholder Claims

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EXCLUSIVITY OF APPRAISAL - THE POSSIBILITY OF EXTINGUISHING SHAREHOLDER CLAIMS

The author compares the Ohio and Delaware responses to shareholder actions challenging conduct triggering the appraisal remedy provided dissenting shareholders by statute. She asserts that the appraisal remedy should not be shareholders' exclusive form of relief in all cases where the remedy may be triggered. She offers the Delaware courts' approach to exclusivity in support of her proposition, and she criticizes the Ohio law on exclusivity of appraisal by comparison.

INTRODUCTION

Because corporations are shifting capital structures, investors are given various means of avoiding the impact of proposed changes. States have enacted statutes granting stockholders a right to appraisal of their stock upon their dissent from certain decisions of directors, even when a majority of the shareholders vote to approve the decision.[1] Exclusivity of appraisal occurs when a court refuses

1. *See* 12b WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.2 (perm. ed. rev. vol. 1990) (discussing those changes which enable dissenting shareholders to employ the appraisal remedy); Model Bus. Corp. Act Ann., § 13.02 (1984) (listing corporate changes which trigger the appraisal process) [hereinafter MBCA Ann.]. *See generally* William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69 (discussing the change from requiring unanimous shareholder consent to majority consent in fundamental decisions and the effect that change has on the efficiency of the corporation and wealth maximization); Norman D. Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROBS. 307 (1958) (discussing the development of fundamental changes in corporations and their effect on shareholders, as well as appraisal remedies when shareholder contractual rights are usurped). For a listing of changes that trigger appraisal in each state, see Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 831-33 (1984) (listing such corporate activity as the decision to merge or consolidate, sell all or substantially all corporate assets, sell corporate stock or

to entertain a claim challenging the appraisal-triggering decision, even though, had appraisal not been triggered, the claim could have been pursued in a court-originated action.[2] In other words, if exclusivity is applied, challenges to director decisionmaking in the appraisal-triggering event cannot be pursued in what would be a collateral judicial action. The only remedy available to a dissenting stockholder is the valuation and buy-out of his corporate shares.

As a result of exclusivity of the appraisal process, a court may extinguish certain shareholder claims. For example, exclusivity may effectively extinguish shareholder claims alleging that director misconduct prior to the appraisal-triggering event resulted in the shares being devalued. This effect results if a court, because of the availability of appraisal, (1) refuses to entertain a claim based on director conduct other than the decision to engage in the appraisal-triggering event on particular terms, or (2) limits its inquiry in the process to finding the value of shares at the time of the appraisal-triggering event. If a court applies exclusivity in this way, claims

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amend the charter which results in the loss of accrued dividends); Allan W. Vestal, *The Rights of Dissenting Shareholders: Protecting the Owners Manning Forgot*, 37 KAN. L. REV. 349 (1989) (critiquing three articles which argue that shareholders are in no need of dissenters' rights statutes).

2. For examples of sources discussing exclusivity of the appraisal process, see MBCA Ann. § 13.02 (1985); *see generally* FLETCHER, *supra* note 1, § 5906.3 (discussing statutory appraisal as an exclusive remedy); Joseph M. Coleman, *The Appraisal Remedy in Corporate Freeze-outs: Questions of Valuation and Exclusivity*, 38 SW. L.J. 775 (1984) (arguing that the exclusivity of appraisal remedy is an obstacle to insuring that minority shareholders receive their fair share when a corporation merges and exploring alternatives to appraisal); Robert L. Dunn, Steinberg v. Amplica: *The California Supreme Court Holds Appraisal to be the Dissenting Shareholder's Exclusive Remedy*, 22 U. S.F.L. REV. 293 (1988) (discussing the effect of *Steinberg v. Amplica* which held that a stockholder claiming fraud and breach in connection with a merger can only resort to appraisal as a remedy); Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875 (arguing that appraisal should be the exclusive remedy available to shareholders); Heideki Kanda & Saul Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. REV. 429 (1985) (discussing availability of appraisal and whether access should affect availability of other legal remedies); Seligman, *supra* note 1 (proposing a federal proceeding to partially or fully replace the state appraisal remedy); James Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964) (discussing whether exclusivity allows the majority to forcibly acquire the interest of an unwanted minority stockholder and whether minority stockholders may seek judicial review of the proposed majority action); David Cohen, *Comment, Valuation in the Context of Share Appraisal*, 34 EMORY L.J. 117 (1985) (critiquing the Delaware Supreme Court case *Weinberger v. UOP, Inc.* which called for a review [and replacement] of outdated valuation techniques); *see also* Elliot J. Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of* Weinberger v. UOP, Inc., 8 DEL. J. CORP. L. 1 (1983) (analyzing *Weinberger v. UOP*).

will be extinguished even though the cash requested as damages in collateral actions is not a function of an alleged misvaluation decision by directors in setting the terms of the appraisal-triggering event, but rather compensation for the directors' separate, preappraisal misconduct. Moreover, the shareholder actions are lost notwithstanding the fact the court would have entertained the claim but for the fortuity of an intervening appraisal-triggering event.[3]

This note examines conditions necessary to invoke "exclusivity" of the appraisal process in Ohio and Delaware in light of recent case law in both states. Part I of this note briefly sets forth the historical background of the appraisal proceeding.[4] Part II analyzes current Delaware case law and formulates a rule regarding exclusivity of appraisal.[5] Part III analyzes Ohio law in light of the recent case *Stepak v. Schey*,[6] and Part IV compares Ohio's approach to exclusivity with that followed in Delaware.[7] The note highlights both the ways in which *Stepak* retains similarities to Delaware law and the significant way in which it differs from Delaware, especially when a plaintiff seeks cash in excess of the appraised share value. This note argues that, unlike Ohio law, Delaware's approach appropriately balances the rights of both the minority shareholders and the corporation. Furthermore, Delaware's approach does not destroy shareholders' remedies for redress of a preappraisal loss of share value caused by director misconduct separate from setting the terms of the appraisal-triggering event.

I. APPRAISAL REMEDY

A. Historical Background

The appraisal remedy developed as a result of changes in the common law rights of corporate shareholders. Historically, effecting certain changes in a corporation, such as consolidations, mergers, substantial transfers of assets and certain amendments to corporate charters, required unanimous consent.[8] Shareholders who disagreed

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3. For examples of separate value-reducing misconduct, see *infra* text accompanying notes 61-63.

4. *See infra* text accompanying notes 8-65.

5. *See infra* text accompanying notes 66-132.

6. 553 N.E.2d 1072 (Ohio 1990). *See infra* text accompanying notes 133-76.

7. *See infra* text accompanying notes 177-209.

8. Armstrong v. Marathon Oil Co., 513 N.E.2d 776, 781-82 (Ohio 1987), *cert. denied*, 111 S. Ct. 1076 (1991); FLETCHER, *supra* note 1, § 5906.1 at 342; Michael G. Schinner, *Dissenting Shareholder's Statutory Right to Fair Cash Value:* Armstrong v. Marathon Oil

with such changes could rely upon courts of equity to enjoin these corporate decisions.[9] Courts upheld the unanimity requirement because they viewed each stockholder as having a vested property right in the corporation, entitling him or her to determine what changes should occur in the corporation.[10] Shareholders were also thought to need protection from a corporation's directors and from the other shareholders if there were a vote on the appraisal-triggering event.[11] Despite its benefits, unanimous consent proved too restrictive of corporations' ability to respond to economic and commercial growth[12] because it enabled a "minority [shareholder] to establish a nuisance value for its shares by refus[ing] to cooperate."[13] A single shareholder could effectively block transactions that were beneficial to both the corporation and the shareholders.[14]

In an attempt to balance the competing interests of shareholders, courts created exceptions to the unanimity requirement[15] and

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Co., 22 AKRON L. REV. 261, 265 (1989) (discussing the impact of *Armstrong* on Ohio shareholders). *See also* authorities cited *supra* note 1.

9. Cohen, *supra* note 1, at 119.

10. *Armstrong*, 513 N.E.2d at 781; *see* Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42 (1858) (equity holding that without unanimous consent, merger of two railroads functions as an act of dissolution and any dissenting shareholder must receive security for his interest); Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 226-27, (1962) (discussing the traditional notions of stock ownership). More recently, the Delaware Supreme Court revisited the vested rights theory. *See* Singer v. Magnovox Co., 380 A.2d 969, 977-78 (Del. 1977) (holding that a shareholder has rights not only in the value of his investment, but also in its form, and that without a valid business purpose, a merger is invalid); Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983) (overruling the business purpose test requirement and returning to the principles of Stauffer v. Standard Brands Inc., 187 A.2d 78 (Del. 1962) and David J. Greene & Co. v. Schenley Ind., 281 A.2d. 30, 36 (Del. 1971), which did not inquire into whether directors had a valid business purpose for entering into a transaction).

11. *See generally* FLETCHER, *supra* note 1, § 5906.1 n.1, at 343 (discussing the need to protect shareholders from "victimization by the majority"); Schinner, *supra* note 8; Vestal, *supra* note 1, at 357-59 (discussing the traditional rationale for dissenting shareholders' rights as protection from the majority).

12. *See Armstrong*, 513 N.E.2d at 782 (citing in particular the expansion in the late nineteenth century as resulting in a need for larger financial structure).

13. FLETCHER, *supra* note 1, § 5906.1, at 343 n.1; *see also* Schinner, *supra* note 8, at 265 (minority shareholders had the ability to exercise a "tyrannical" hold on the corporation).

14. *See* J. Steven Rogers, Note, *The Dissenting Shareholder's Appraisal Remedy*, 30 OKLA. L. REV. 629, 629-31 (1977) ("To allow the decision of a single stockholder to impede the making of such decisions would not only have an adverse effect on the vitality of the corporation, but would in effect negate the rights of the majority to exercise control of the majority to exercise control over corporate affairs to which their ownership of shares entitles them." *Id.* at 630.).

15. *See* Cohen, *supra* note 1, at 119-20 (discussing exceptions such as cash sales of

allowed shareholders to dissent from the corporate change and recover the cash value of their shares.[16] States eventually passed statutes that allowed corporations to undergo fundamental changes in structure with less than a unanimous shareholder vote.[17] Concurrently, states enacted statutes allowing minority shareholders to receive the cash value of their shares through an appraisal proceeding.[18] This change was intended to protect dissenting shareholders from being forced (1) to accept consideration based on a valuation they believed the directors and, if a vote were held, the majority shareholders had incorrectly placed upon their shares, or (2) to invest in an enterprise different from that they had intended to invest in whether or not the stock had been properly valued.[19] Protection from the second situation is important only if the investor's needs could not be met by divestment from the present firm and reinvestment in another firm in the market.[20] This latter concern does not arise when the appraisal-triggering event requires shareholders to sever their investment in the firm in exchange for cash, which is the kind of appraisal-triggering event upon which this note focuses. In this subset of cases where cash replaces the investment, the appraisal remedy is only one method by which dissenting shareholders may express their right to disagree about the valuation put upon their shares in setting the terms of the appraisal-triggering event.

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assets where no profit was expected and sales of assets for the stock of other corporations). *See generally* Carney, *supra* note 1, at 86-94 (discussing the judicial change resulting in the exceptions).

16. *Armstrong*, 513 N.E.2d at 782; Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42 (1858) (court granted injunction of merger until dissenting shareholders received security for their stock).

17. *Armstrong*, 513 N.E.2d at 782; FLETCHER, *supra* note 1, § 5906.1, at 342; Rogers, *supra* note 14, at 630.

18. FLETCHER, *supra* note 1, § 5906.1, at 342. *See generally* Vorenberg, *supra* note 2 (discusses the statutory appraisal remedy adopted by all states at time of the article except West Virginia). *But see* Kanda & Levmore, *supra* note 2, at 430-31 (discussing whether the connection between dissolution of the unanimity requirement and adoption of the appraisal remedy is as contemporaneous as has been traditionally implied).

19. FLETCHER, *supra* note 1, § 5906.1, at 342-43. *But cf.* Fischel, *supra* note 2, at 878 (analyzing whether protection from a change in the character of a shareholder's investment is a legitimate concern).

20. Ronald J. Coffey, *Firm Opportunities: Property Right Assignments, Firm Detriment, and the Agent's Performance Obligation*, 13 Canada-U.S. L.J. 155, 182 (1988). For a more in-depth discussion of when investors need protection from management decisions that have no impact on the market value of the investment, see *id.* at 180-83.

B. The Appraisal Process

The appraisal remedy requires the corporation to buy the dissenting shareholders' stock at the appraised price.[21] "Value,"[22] "fair value,"[23] and "fair cash value"[24] are terms commonly used to describe the cash value paid to a dissenter for his stock.[25] Statutes differ as to what types of corporate changes trigger the appraisal process.[26] Once triggered, the procedure for the appraisal process for dissenting shareholders is set forth in detail by state statute.[27] The stockholder must follow statutorily-prescribed guidelines or risk losing the appraisal process as a remedy.[28]

1. Valuation

While statutes detail the appraisal proceedings and provide for either the court or the parties to appoint appraisers,[29] the statutes generally do not set forth in the same detail the method for valuing the dissenting shareholders' stock.[30] Many states define the value of dissenter's stock as "market value,"[31] a term often regarded as synonymous with 'stock market value' when the stock is traded on a national securities exchange.[32] Other jurisdictions have

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21. *Armstrong*, 513 N.E.2d at 782; FLETCHER, *supra* note 1, § 5906.1, at 343; Melvin A. Eisenberg, *The Structure of the Corporation: A Legal Analysis* 69 (1976).

22. *See, e.g.*, DEL CODE ANN., tit. 8, § 262(f) (1983).

23. *See, e.g.*, FLA. STAT. ANN. § 607.247(3) (1977); MBCA Ann. § 13.01.

24. *See, e.g.*, OHIO REV. CODE ANN. § 1701.85(5) (Baldwin 1990).

25. *Armstrong*, 513 N.E.2d at 783; Manning, *supra* note 10, at 231. Although different terms are used to describe the amount received by the dissenter for his shares, the argument has been made that the distinctions are meaningless, as they are used to indicate the same worth. Warren v. Baltimore Transit Co., 154 A.2d 796, 799 (Md. 1959); Norman D. Lattin, *Remedies of Dissenting Shareholders Under Appraisal Statutes*, 45 Harv. L. Rev. 233, 259 (1931).

26. *See supra* note 1.

27. Vestal, *supra* note 11, at 354-57. *See, e.g.*, OHIO REV. CODE ANN. § 1701.85(5)(B).

28. *See* FLETCHER, *supra* note 1, § 5906.7 (listing general procedures necessary for pursuing the appraisal process).

29. *See generally id.* at § 5906.8 (discussing methods of appointing appraisers adopted by various states).

30. *See generally* Prentice-Hall, Corporations, § 2724 (1991) (discussing various methods of valuing dissenters' shares in the appraisal proceeding); Lattin, *supra* note 25, at 258-70 (describing the historical basis of share valuation through appraisal).

31. *See* Lattin, *supra* note 25, at 258 (dividing statutes into three categories based on their interpretation of value).

32. In addition to stock market value as a means of valuing a dissenting stockholders' shares, many state statutes provide for an exception to the appraisal process when the

adopted a more flexible version of the stock market value, the "willing buyer, willing seller" test.[33] This test still puts significant emphasis on the stock market value of the stock, but allows for adjustment of the market value or construction of a hypothetical market when valuing closely-held stock or stock which is not actively traded.[34] Another common method of valuation is the "Delaware block approach" in which the court weighs net asset value, net earnings value and market value, and assigns percentage weights to each in determining share value.[35] The "Delaware block approach" was the exclusive test used in Delaware prior to *Weinberger v. UOP, Inc.*[36] Although not overruled, the Delaware Supreme Court held in *Weinberger* that the "Delaware block method" will no longer exclude other methods of valuation accepted by the financial community.[37]

2. Breadth of the Appraisal Inquiry

The breadth of the inquiry in the appraisal proceeding varies among the states. In Ohio and Delaware, the inquiry is quite narrow. For example, *Armstrong v. Marathon Oil, Inc.*[38] construed the Ohio appraisal statute, Revised Code section 1701.85(c), as it

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stock is listed on a stock exchange or otherwise substantially traded. *See* Seligman, *supra* note 17, at 834 (listing the states which recognize the stock market exception to the appraisal process). The stock market exception has been widely criticized as not providing shareholders with adequate valuation of their shares. *See* MBCA Ann., § 13.02 at 1368-69 (discussing its elimination of the stock market exception); Eisenberg, *supra* note 21, at 80-82 (arguing that the stock market is not likely to protect the stockholder who owns a large block of shares). *Cf.* Fischel, *supra* note 2, at 884-85 (discussing various criticisms of the stock market exception).

33. *See, e.g.*, OHIO REV. CODE ANN. § 1701.85(c) (defining the fair cash value of a share as the amount a willing seller, under no compulsion to sell, would be willing to accept, and a willing buyer, under no compulsion to purchase, would be willing to pay). This test is often referred to as the 'hypothetical market test'. *See generally Armstrong*, 513 N.E.2d at 783-89 (discussing various methods of valuation).

34. *Armstrong*, 513 N.E.2d at 788-89.

35. Diedre A. Burgman & Paul N. Cox, *Reappraising the Role of the Shareholder in the Modern Public Corporation: Weinberger's Procedural Approach to Fairness on Freezeouts*, 1984 WIS. L. REV. 593, 610-12. This method has been criticized in recent years. *See* Manning, *supra* note 10, at 232; Schinner, *supra* note 8, at 267-68; Note, *Minority Shareholders and Cashout Mergers: The Delaware Supreme Court Offers Plaintiffs Greater Protection and a Procedural Dilemma, — Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983), 59 WASH L. REV. 119, 123 (1983).

36. 457 A.2d 701, 712 (Del. 1983).

37. *Id.* at 712-13 (stating that "all relevant factors" will be considered when determining the value of a dissenter's stock).

38. 513 N.E.2d 776 (Ohio 1987), *cert. denied*, 111 S. Ct. 1076 (1991).

relates to compensation payable to dissenting shareholders.[39] The court found that the statute requires "payment of the fair cash value to a shareholder for his shares as of the day prior to the vote of the shareholders."[40] The statute further requires that any subsequent appreciation or depreciation in share value be excluded.[41] The court held that in the case of a corporation whose stock is sufficiently traded, the stock market price is the correct price to determine value.[42] In the case of a closely-held corporation whose stock is infrequently traded, the court should apply a hypothetical market valuation to determine value.[43] Indeed, the court noted the narrowness of such an inquiry by stating that "the scope of analysis is fairly narrowed such that the parties may . . . predict the outcome of the proceedings."[44] The court noted that "the legislature has evidenced a specific intent to narrow price considerations to those pertinent to the willing buyer-willing seller standard."[45]

Delaware case law has also indicated the narrowness of the appraisal inquiry. *Weinberger v. UOP, Inc.*[46] established the exclusivity of appraisal in Delaware for dissenting shareholders when determining the value of their shares,[47] but the holding must be viewed in light of later cases. For example, *In re Shoe-Town, Inc. Stockholders Litigation*[48] explained the impact of *Rabkin v. Philip A. Hunt Chemical Corp.*[49] and *Cede & Co. v. Technicolor, Inc.*[50] in clarifying the *Weinberger* holding. "[A]ppraisal is often inadequate where a complaint alleges unfair dealing that if true affects the price being challenged . . . . [B]reaches of the duties of loyalty and care, raise issues which an appraisal cannot address."[51] Indeed, the *Cede* court found that in an "appraisal action the only

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39. *Id.* at 781.

40. *Id.* at 784.

41. *Id.* at 788.

42. *Id.* at 787 (basing this conclusion upon a determination that stock exchange prices are nearly identical to the actual value due to an active market for the stock).

43. *Id.* at 789.

44. *Id.* at 788. A narrow inquiry would foster pre-appraisal settlement and decrease the costs to all shareholders.

45. *Id.* at 798.

46. 457 A.2d 701 (Del. 1983).

47. *See infra* notes 74-80 and accompanying text (discussing the *Weinberger* approach to exclusivity of appraisal).

48. No. 9483 Consolidated, 1990 Del. Ch. LEXIS 14, at *11-12 (Feb. 12, 1990).

49. 498 A.2d 1099 (Del. 1985).

50. 542 A.2d 1182 (Del. 1988).

51. *In re* Shoe-Town, 1990 Del. Ch. LEXIS 14 at *12.

litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger . . . and the only relief available is a judgment against the surviving corporation for the fair value of the [dissenting shareholders'] shares."[52]

Thus, it is evident that the limited inquiry in appraisal cannot address the merits of claims based on conduct that has caused a pre-appraisal decrease in share value. If the appraisal process could be expanded to take into account the value of claims. based on conduct other than the misvaluation of shares that has reduced their value, then the availability of appraisal would be more useful.[53] The problem of extinguishment would not exist if those claims could be heard in an appraisal proceeding and any amount accorded the shareholders tacked onto the value of shares reckoned as of the appraisal date. However, without such an expansion, appraisal only provides a forum for adjudication of the value of shares due to director's misvaluation conduct.

3. Exclusivity

State statutes differ in their express statements regarding the exclusivity of the appraisal remedy.[54] Some state statutes are silent on whether the appraisal remedy is exclusive.[55] In such a case, the judiciary ordinarily provides that appraisal is exclusive only if certain conditions have been met.[56] Other states provide statutorily that even in cases where the claim is based upon misvaluation of shares by the directors, the appraisal remedy is not exclusive if fraud or illegality is involved.[57] The underlying theo-

52. *Cede*, 542 A.2d at 1187. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1143 (Del. 1989) also establishes the insufficiency of the appraisal process for remedying any claims, corporate or direct, based on alleged director misconduct other than improperly determining the value of shares. It stated that the plaintiff's claim "relate[d] directly to the fair value of his stock, not to the validity of the merger itself." *Id.*

53. *See, e.g.*, Walter J. Schloss Associates v. Arkwin Ind., 460 N.E.2d 1090, 1091 (N.Y. 1984) (suggesting the possibility of opening up the appraisal inquiry).

54. *See generally* MBCA Ann. §13.02 at 1373-74, 1374.2-1379; Prentice-Hall, *supra* note 30, at §2724 (setting forth the positions of several states regarding exclusivity of the appraisal process); Vorenberg, *supra* note 2, at 1189 (arguing that appraisal is not a minority shareholder's exclusive remedy).

55. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262(f); OHIO REV. CODE ANN., § 1701.85.

56. *See infra* text accompanying notes 81-119.

57. *See, e.g.*, Rosenstein v. CMC Real Estate Corp. 522 N.E.2d 221, 225 (Ill. App. Ct. 1988) (holding that absent allegations of fraud or other illegality, statutory appraisal provisions of Wisconsin business corporation law provided shareholders with exclusive remedy); N.Y. BUS. CORP. LAW, § 623(k) (McKinney 1986); MBCA Ann. §13.02(b); *see also* FLETCHER, *supra* note 1, § 5906.3, at 354 (identifying states which recognize an exception

ry accepts the principle of exclusivity, but does not accept that a corporation should be permitted to proceed unlawfully or fraudulently because of its ability to "pay off" the dissenting shareholder through the appraisal proceeding or through the terms of the transaction.[58] Finally, some statutes expressly state that appraisal is an exclusive remedy, without providing exceptions.[59] The judiciary in these states have refused to recognize exceptions to the statutes.[60] When a state provides a dissenting shareholder with the exclusive remedy of appraisal, either by statute or judicial construction, extinguishment of the shareholder's various other claims may occur regardless of the time and circumstances at the claims' origin.

Exclusivity is particularly dangerous where appraisal ineffectively accounts for the devaluation of shares. As the discussion of valuation has shown, the appraisal process is designed to assign a value to dissenters' shares. However, it only provides the dissenter with a method of avoiding the impact of a director decision that, in setting the terms of the appraisal-triggering transaction, assigns a value to shares below that which they are actually worth at the time of appraisal. Other share-value-reducing harms allegedly occurring through the directors' separate misconduct, reflected in share value at appraisal time, will not be taken into account.

One such example of separate misconduct occurs when the value of firm assets are affected prior to a decision of what the

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to the exclusivity of the appraisal process in cases involving fraudulent transactions); *see generally* Coleman, *supra* note 2, at 794 (analogizing the effect as "lower[ing] the status of a minority shareholder to that of a holder of a note prepayable at the will of the lender").

58. MBCA Ann., § 13.02 at 1366; *see also* Kahn v. Columbus Mills, Inc., 371 S.E.2d 908, 910 (Ga. App. 1988) (allowing shareholders to pursue a proceeding collateral to appraisal even though they had accepted payment for their stock).

59. *See, e.g.*, CALIF. CORP. CODE, § 3012 (West 1990); CONN. GEN. STAT. ANN. § 33-373(f) (1987); PA. STAT. ANN., tit. 15, § 1515(k) (Purdon 1987).

60. *See* Steinberg v. Amplica, Inc., 729 P.2d 683 (Cal. 1986) (holding that despite the plaintiff's claims of fraud and breach of fiduciary duty, appraisal was the shareholder's exclusive remedy); *see also* Yanow v. Teal Indus., 422 A.2d 311 (Conn. 1979) (holding that CONN. GEN. STAT. §§ 33-373 to -374 entitle a dissenting shareholder only to payment for the value of his shares under the statutory appraisal proceeding); *In re* Jones & Laughlin Steel Corp., 412 A.2d 1099, 1104 (Pa. 1980) (finding the shareholders' remedy limited to the appraisal process but "not condon[ing] the manner in which the appellants and other minority shareholders were deprived of their equitable interest in [the corporation]"). *But see* Schloss Assocs. v. C & O Ry., 536 A.2d 147, 153 (Md. App. Ct. 1988) (noting that even in Pennsylvania, "the courts have allowed at least injunctive relief under special, compelling circumstances").

assets are worth. In this instance, the value of the shares has been adversely affected so that appraisal cannot account for devaluation because appraisal sets the value after the harm has occurred. A claim that excess compensation has been paid to officers through golden parachute provisions illustrates such pre-appraisal misconduct causing misvaluation.[61] A second example exists when a firm is deprived of all the assets to which it is entitled because the shares were issued for less than adequate consideration.[62] Third, even if the new shares are issued for adequate consideration, the issuance may discourage bidding in a control share market and regardless of any effects on the value of firm assets, cause a reduction in share value by influencing the supply-demand features of the share market.

All three examples describe settings where the value of shares is diminished by director conduct other than determining share value when setting the terms of an appraisal-triggering event. The first two examples show how shares can be devalued by decisionmaking that affects the value of firm assets. Claims based on such conduct often, though not always, must be pursued as corporate claims either derivatively or nonderivatively.[63] In the third example, the allegation is that share value has been reduced independently of effects on the value of firm assets; such a claim would be direct, leading to personal recovery by shareholders.[64] In all three cases, the relief sought may be cash in the amount of the share value reduction. However, such cash relief represents not

61. *See, e.g., infra* text accompanying notes 154-56. *Cf.* Fisher v. Steelville Community Banc-Shares, Inc., 713 S.W.2d 850, 853 (Mo. App. 1986) (stating that "allegations that a majority shareholder, who controlled the corporate directors, caused dividends to be withheld and depressed the value of the stock of a minority shareholder for the purpose of acquiring that stock state a cause of action" for misconduct which decreased the value of the shares before the merger).

62. *See, e.g., infra* text accompanying notes 147-51.

63. *See infra* text accompanying notes 120-32 (discussing why claims that are corporate will never be subject to exclusivity in Delaware); *see also infra* text accompanying notes 188-205 (discussing whether extinguishment might be acceptable with respect to claims that are normally corporate).

64. *See* Smith v. Van Gorkom, 488 A.2d 858, 884 (Del. 1985) (noting that (1) the grant of an option had foreclosed the bidding market and (2) only one subsequent offer was received and this resulted from officers' efforts to solicit the negotiations). *Cf.* Lipton v. News Int'l, PLC, 514 A.2d 1075 (Del. 1986) (finding a claim that issuance to a third party of 19% of the company's stock interfered with the plaintiff's voting rights was a direct claim); Williams v. Geier, Civ. No. 8456, (Del. Ch. May 20, 1987) (LEXIS, States library, Del. file) (finding that (1) a plan relating to a recapitalization did not limit the transferability of household shares, but rather impacted prospective purchasers and (2) such a claim was a direct claim).

merely the loss from directors' failure to give sufficient value to shares, but the diminution in value due to wrongdoing other than misvaluation of shares.

These three examples of share devaluation caused by events prior to appraisal of the shares are not likely to be redressed in appraisal. This lapse results because statutes fail to describe appraisal in a way that permits trial of the merits of claims that directors' conduct, other than misvaluation of the shares themselves, caused the shares to decrease in value by the time the valuation decision was made.[65] Thus, unless shareholders can pursue these claims in actions collateral to appraisal, the claims are in danger of extinguishment.

II. EXCLUSIVITY OF THE APPRAISAL PROCESS IN DELAWARE

A. Weinberger v. UOP, Inc.

In 1983, the Delaware Supreme Court decided *Weinberger v. UOP, Inc.*,[66] forming the basis for the current law on appraisal in Delaware. In *Weinberger*, the plaintiff brought a class action suit[67] challenging the elimination of UOP's minority shareholders following a cash-out merger between UOP and Signal Companies, Inc., its majority shareholder.[68] The plaintiff sought to rescind the merger or, in the alternative, to receive rescissionary damages in the form of money or stock in the surviving corporation.[69] Originally, Signal invested its excess cash by purchasing 50.5% of UOP's stock, but later expressed an interest in obtaining the remainder of UOP's shares.[70] Two Signal executives, who also served as Signal board members and directors of UOP, prepared a feasibility study regarding a merger of UOP into Signal. The report stated that a price up to $24 a share would be a good investment

65. *See supra* notes 38-53 and accompanying text (discussing the narrowness of the appraisal inquiry).

66. 457 A.2d 701 (Del. 1983).

67. A class action suit is merely a collection of direct claims. For a discussion of the distinction between corporate and direct claims, see *infra* notes 120-32 and accompanying text.

68. *Weinberger*, 457 A.2d at 703.

69. Weinberger v. UOP, Inc., 426 A.2d 1333, 1335 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. 1983).

70. *Weinberger*, 457 A.2d at 704-05.

for Signal.[71] UOP retained Lehman Brothers to give a fairness opinion regarding an offer by Signal of $20-$21 per share for UOP stock.[72] The proposed merger was approved at $21 per share by the outside directors of UOP, but no disclosure regarding the feasibility study was ever made to non-Signal directors or UOP shareholders.[73]

The court held that in a cash-out merger,[74] the appraisal remedy is exclusive with respect to claims by dissenting shareholders when the only allegation is that the directors have failed to appropriately determine the cash value of the shares.[75] The court stated that it was returning to the principles of *David J. Greene & Co. v. Schenley Industries, Inc.*[76] and *Stauffer v. Standard Brands, Inc.*,[77] cases holding that appraisal is exclusive when the "real relief sought is the recovery of the monetary value of [the] plaintiff's shares . . . [and] [t]he dispute reduces to nothing but a difference of opinion as to value."[78] This principle alone rules out exclusivity with respect to claims based on director decisionmaking that has already resulted in a diminution of share value when the time arrives for determining value under the appraisal mechanism. The court also expanded the category of claims not subject to exclusivity by holding that the appraisal remedy is not adequate in actions challenging directors' share valuation decisions "where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved."[79]

By the court's language, its holding would not extend to claims based on conduct other than the board's failure to arrive at a proper valuation of its stock in a cash-out dissent-triggering event. Moreover, the court said nothing to imply that the avail-

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71. *Id.* at 705.
72. *Id.* at 706.
73. *Id.* at 707-09.
74. *See generally* Elliott J. Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of* Weinberger v. UOP, Inc., 8 DEL. J. CORP. L. 1, 8-25 (1983) (discussing the history of cash-out mergers).
75. *Weinberger*, 457 A.2d at 714. For a list of transactions triggering appraisal, see DEL. CODE ANN., tit. 8, §§ 251, 252, 254, 257, 258.
76. 281 A.2d 30, 35 (Del. Ch. 1971).
77. 187 A.2d 78 (Del. 1962).
78. *Id.* at 80.
79. *Weinberger*, 457 A.2d at 714. *Accord* Rosenstein v. CMC Real Estate Corp., 522 N.E.2d 221, 225 (Ill. App. 1988) (holding appraisal under Wisconsin law exclusive absent fraud or other illegality occurring prior to the merger); Sifferle v. Micom Corp., 384 N.W.2d 503, 509 (Minn. Ct. App. 1986) (holding that appraisal is a shareholder's exclusive remedy unless the merger is fraudulent).

ability of dissenter's rights would affect claims, for money or otherwise, based on other prior or simultaneous director conduct. Hence, *Weinberger* said nothing about judicial recourse for director behavior that may have caused a decrease in share value prior to the appraisal. Such a conclusion follows because the appraisal process is not statutorily described in such a way as to permit valuation when director misconduct devalued shares prior or simultaneous to the appraisal triggering event.[80]

Subsequent case history has further refined and explained the conditions under which appraisal is the exclusive remedy in a cash-out merger. Absent these conditions, the claim will not be subject to exclusivity. The post-*Weinberger* cases develop the conditions of exclusivity by classifying cases on the basis of the different types of decisionmaking being challenged and the format (corporate or direct) for redressing the alleged harm.

B. Conditions Necessary to Invoke Exclusivity

Several conditions concerning decisionmaking that triggers appraisal must be met in order for appraisal to be a dissenting shareholder's exclusive remedy. First, *Weinberger* held that the appraisal-triggering event must be an all cash freeze-out.[81] Later Chancery court decisions, however, have expanded the scope of exclusivity of appraisal to include transactions involving payments of part cash and part securities. For example, in *Porter v. Texas Commerce Bancshares, Inc.*,[82] the plaintiffs challenged a merger in which the shareholders were to receive both cash and securities in exchange for their stock. The court stated that most of the plaintiffs' complaint was based on inadequacy of the merger price, a claim for which appraisal was their exclusive remedy. Despite the focus of the plaintiffs' case, the court did not relegate the claim to appraisal, because the plaintiffs established a nondisclosure claim.[83] One concern raised by *Porter* is the possibility that courts will allow exclusivity of appraisal where the appraisal-triggering event calls solely for the receipt of securities. Because no identified cash value for securities exists and appraisal only provides for a

80. *See supra* text accompanying notes 38-53 (discussing the narrowness of the appraisal inquiry).
81. *Weinberger*, 457 A.2d at 714.
82. Civ. No. 9114, 1989 Del. Ch. LEXIS 130 (Oct. 12, 1989).
83. *See infra* text accompanying notes 94-96 (discussing the nondisclosure claim).

cash remedy, it is questionable whether the valuation procedure provided by appraisal would prove adequate in a case involving securities alone. As a result of recent decisions such as *Porter*, it is no longer clear that appraisal-triggering terms must call for receipt of all cash in order to subject the shareholder's claim exclusively to appraisal.

A second condition of exclusivity requires that a shareholder's claim asserted collaterally to appraisal allege only that the directors inaccurately valued the shares that are to receive cash; the claim must not challenge other director decisionmaking. A claim challenging wrongful behavior other than incorrect share valuation would not be subject to appraisal according to the appraisal statute itself.[84] The appraisal statute sets forth the procedure by which a dissenting shareholder can adjudicate the value of his shares. If valuation of these shares is not at issue, then the availability of the appraisal process is of little significance.

However, certain exceptions to this second condition are recognized. Even if the shareholder's claim is limited to a challenge of director decisionmaking related to valuation of his shares, the collateral claim will not be precluded by appraisal if such decisionmaking was accompanied by (1) deception by the directors or shareholders (if the shareholders had a choice to make), (2) conflict of interest in decisionmaking by the directors or shareholders, or (3) waste. Illustrations of each exception follow.

In *Cede & Co. v. Technicolor, Inc.*,[85] plaintiffs who had originally dissented from a cash-out merger requested an appraisal proceeding to determine the value of their shares. They subsequently brought a collateral judicial action against the directors for breach of fiduciary duty, alleging fraud in connection with the vote to approve the terms of the merger.[86] The action for fraud was considered a direct claim.[87] In its ruling consolidating both actions for discovery and trial purposes, the court discussed the difference between the claims.[88] The court stated that an appraisal proceeding and a rescissory suit for fraud "serve different purposes and are designed to provide different, and not interchangeable, reme-

84. DEL. CODE ANN., tit. 8, § 262.
85. 542 A.2d 1182 (Del. 1988).
86. *Id.* at 1185.
87. *Id.* at 1183.
88. *Id.* at 1187.

dies."[89] An appraisal proceeding is a legislative remedy which provides the shareholder with the court's determination of the intrinsic value of the stock.[90] In contrast, a remedy for fraud is more expansive than a determination of fair value, allowing "whatever relief the facts of a particular case may require."[91] The court reasoned that "appraisal is limited to the payment of fair value of the shares, [and a] determination of fair value does not involve an inquiry into claims of wrongdoing in the merger."[92] To allow fraud claims to be brought into the appraisal proceeding would "impermissibly broaden the legislative remedy."[93] Therefore, even when a claim is based on a misvaluation by directors, the appraisal proceeding is the incorrect forum in which to litigate the claim if there were a basis for nondamage forms of relief.

Another example of deception which has been found sufficient to establish a claim outside the appraisal proceeding is failure to disclose material facts during the course of a merger. In *Porter v. Texas Commerce Bancshares,*[94] the plaintiff alleged that failure to disclose the existence of a "when-issued" market and facts relating to this market constituted a breach of a duty of candor by the directors.[95] The court held that if the facts were true, they would establish a claim that could not be adjudicated within the appraisal proceeding.[96] Appraisal is a substitute for a shareholder taking the cash specified by the terms of the cash-out transaction and recovering the difference between the cash received and the true value of the stock, but it does not provide for nondamage forms of relief or for a determination of whether deception existed.

Rabkin v. Philip A. Hunt Chemical Corp.[97] illustrates the exception to exclusivity recognized in cases of misvaluation accompanied by a conflict of interest. In *Rabkin*, a class action suit was brought on behalf of the minority shareholders of Hunt challenging the cash-out merger of Hunt with Olin Corporation, its majority stockholder.[98] Three directors had dual memberships on the boards

89. *Id.* at 1186.
90. *Id.*
91. *Id.* at 1187.
92. *Id.* at 1189.
93. *Id.*
94. Civ. No. 9114, 1989 Del. Ch. LEXIS 130 (Oct. 12, 1989).
95. *Id.* at *19-20.
96. *Id.* at *23-24.
97. 498 A.2d 1099 (Del. 1985).
98. *Id.* at 1100.

of Hunt and Olin.[99] These directors failed to disclose the existence and content of a memorandum prepared by an Olin officer and given to the three Olin directors who were also on the board of Hunt.[100] The memorandum summarized the pros and cons of a merger with Hunt and revealed Olin's intent to acquire the remainder of Hunt's stock.[101] The court analogized the situation to that in *Weinberger* and found that on the face of the complaint, the three Olin directors' compliance with their "duty of loyalty to Hunt"[102] was questionable. The conduct of these directors implied a form of domination over the remaining Hunt directors, and established a potential conflict of interest claim.[103] The conflict of interest meant the transaction did not occur through arms-length negotiations, making nondamage forms of relief available and heightening the level of scrutiny applied to the transaction.[104]

The trial court, relying on *Weinberger*, granted the defendant's motion to dismiss the claims, reasoning that "absent claims of fraud or deception a minority stockholder's rights in a cash-out merger [are] limited to an appraisal."[105] The supreme court overturned the decision, finding the lower court's interpretation of *Weinberger* too narrow and stating that "*Weinberger's* mandate of fair dealing does not turn solely on issues of deception."[106] Rather, the court identified "these are issues which an appraisal cannot address . . . ."[107] Thus, although the court found that the directors' decision regarding valuation of the stock was the subject of the challenge, it declined to limit the minority shareholders' remedy only to appraisal because other issues, such as unfair dealing,[108] could not be addressed by the appraisal proceeding.[109]

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99. *Id.* at 1101.
100. *Id.* at 1101-02.
101. *Id.*
102. *Id.* at 1106.
103. *Id.*
104. *Id.* The special scrutiny applied to cases where directors have divided loyalties is called the "entire fairness standard." *Id.*
105. *Id.* at 1103.
106. *Id.* at 1104-05.
107. *Id.* at 1106.
108. Fair dealing was an issue in *Rabkin* because of the conflict of interest among the directors. *Id.* at 1101.
109. *Id.* at 1106-07. *See* Seagraves v. Urdstadt Prop. Co., No. 10307, 1989 Del. Ch. LEXIS 155, at *11 (Nov. 13, 1989) (holding that a claim of unfair dealing "if true, would establish an actionable breach of fiduciary duty affecting the merger price that could not be redressed in an appraisal"); *In re* Shoe-Town Inc. Stockholders Litig., No. 9483, 1990 Del. Ch. LEXIS 14, *12 (Feb. 12, 1990) ("appraisal is often inadequate where

Rabkin also illustrates that the presence of waste or overreaching would not subject a claim challenging valuation misconduct to exclusivity. The *Rabkin* plaintiffs sought to enjoin the proposed merger between Hunt and Olin and enforce a contractual right to receive $25 per share.[110] The plaintiffs claimed that their contractual right was destroyed by Olin's purposeful timing of the merger so that Olin would avoid a one-year commitment to pay a set price of $25 for Hunt stock.[111] Viewing the Hunt directors' failure to enforce the pre-existing contract as waste, the court noted that the "plaintiffs [were] not arguing questions of valuation which [were] the traditional subjects of an appraisal."[112] In addition to establishing conflict of interest, therefore, the plaintiffs sufficiently alleged a claim of waste and were not relegated to appraisal as their exclusive remedy.[113]

The final condition necessary to invoke exclusivity is that the plaintiff seek cash relief and not allege facts sufficient to warrant nondamage relief. For example, in *Norberg v. Young's Market Co.*,[114] shareholders sought in a class action to enjoin a cash-out merger[115] and obtain an award of money damages.[116] The plaintiff alleged no conflict of interest or waste, and the court held moot a claim of non-disclosure because the defendants agreed to make further disclosures.[117] Moreover, the court found that the plaintiff failed to establish the two elements necessary to support an order for injunctive relief.[118] As a result, the court held that damage relief was sufficient and that appraisal was the plaintiff's exclusive remedy notwithstanding his plea for injunctive relief.[119]

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a complaint alleges unfair dealing that if true affects the price being challenged").

110. *Rabkin*, 498 A.2d at 1105.

111. *Id.*

112. *Id.* This language also implies that corporate claims are not subject to exclusivity of appraisal. The traditional subjects regarding valuation in appraisal are those relating to the amount of share value at the appraisal date, not to issues like corporate decisionmaking which relate instead to how the shares got to be worth the amount at which they are appraised.

113. *Id.* at 1107.

114. Civ. Nos. 11,208, 11,253, 1989 Del. Ch. LEXIS 174 (Dec. 19, 1989).

115. *Id.* at *3.

116. *Id.* at *15.

117. *Id.* at *3.

118. *Id.* at *12-13. A plaintiff seeking injunctive relief must prove that the plaintiff would suffer irreparable harm if the injunction does not issue and that the harm to the plaintiff would outweigh the harm to the defendants if injunctive relief is granted.

119. *Id.* at *16-17. The court noted that if inadequate disclosures had been at issue, irreparable harm could have been established and the plaintiffs would not have been rele-

C. Corporate v. Direct Claims

The conditions necessary to invoke exclusivity of appraisal in Delaware raise the implication that only direct claims can be subject to exclusivity. Thus, the claim format is often useful in determining broad categories of cases that are not subject to the Delaware principles of exclusivity. A corporate claim may be brought either nonderivatively by the directors or derivatively by the shareholders, and is the form of action pursued when harm to investors is best remedied by relief flowing to the corporation rather than to individual investors.[120] Conversely, direct claims are appropriate where the nature of the harm requires that an award be made directly to the shareholder.[121]

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gated to appraisal. *Id.* at *16 n.2. *Cf.* Cede & Co. v. Technicolor, Inc., 542 A.2d 1182 (Del. 1988) (holding that the dissenters could raise both appraisal and fraud actions as alternative means of recovery); Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985) (acknowledging the inadequacy of the appraisal remedy where defendants are charged with bad faith and procedural unfairness but not with deception); Porter v. Texas Commerce Bancshares, Civ. No. 9114, 1989 Del. Ch. LEXIS 130 (Oct. 12, 1989) (holding that to the extent the complaint made allegations in addition to the inadequacy of the merger price, relief otherwise unavailable in an appraisal action may be granted).

120. A corporate claim is further complicated by the fact that a stockholder pursuing the claim derivatively is subject to a loss of standing to pursue the claim if the claim is brought after a merger. For example, in *Kramer v. Western Pacific Ind.*, 546 A.2d 348 (Del. 1988), the plaintiff alleged waste of corporate assets because of inappropriate stock options and golden parachutes received by two of the company's directors. *Id.* at 350. The court characterized the claims as derivative corporate claims, pointing out that whether a claim is corporate "must be 'determined from the nature of the wrong alleged' and the relief, if any, which could result if plaintiff were to prevail." *Id.* at 352-53 (citing Elster v. American Airlines, Inc., 100 A.2d 219, 221-23 (Del. Ch. 1953)). The court held that because the plaintiff was no longer a shareholder and did not fit into one of the two exceptions set forth in Lewis v. Anderson, 477 A.2d 1040, 1046 n.10 (Del. 1984), he did not have standing to pursue a claim on behalf of the corporation. *Id.* at 354-55. The two *Lewis* exceptions are: "(i) if the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of the standing to bring a derivative action; or (ii) if the merger is in reality merely a reorganization which does not affect plaintiff's ownership in the business enterprise." *Id.* at 354. *Cf.* Cede & Co. v. Western Airlines, Inc., 1989 Fed. Sec. L. Rep. (CCH) 94,751 (Del. Sept. 11, 1989). Although the standing issue is a problem different from exclusivity, with respect to corporate claims, it might be argued that loss of standing might render insignificant any concern about extinguishment of claims by exclusivity. *But see infra* text accompanying notes 188-205.

121. *See Kramer*, 546 A.2d at 351-52 (discussing the nature of the distinctions between corporate and direct claims). If returning relief directly to the shareholder circumvents the directors' discretion over the corporation's asset pool and the limits on their discretion and performance obligations, then the claim is properly pursued in the corporate claim format. Circumstances may dictate however, that the recovery be returned directly to the shareholder. For example, in the event a firm's asset pool has been diminished, if the rights of other shareholders or creditors are adequately protected through means other than the

Post-*Weinberger* cases maintain that claims characterized as corporate claims, and which must be pursued as such, will not be subject to the exclusivity of appraisal. That is, a Delaware court should not refuse to entertain these claims on the basis that appraisal is a plaintiff's only forum. With one exception, *Cavalier Oil Corp. v. Harnett*,[122] post-*Weinberger* decisions have held that misconduct properly pursued in the corporate claim format cannot be litigated in an appraisal proceeding, even though entitlement to appraisal fortuitously happens to be triggered before the corporate claim is tried.

In *Cavalier Oil*, a minority stockholder sought appraisal following his dissent from a cash-out merger.[123] Both the stockholder, Harnett, and the corporation appealed the decision determining the fair value of his shares.[124] The relevant issue was whether Harnett could assert a seizure-of-corporate-opportunity claim, an action which would normally be pursued as a corporate claim, in the appraisal proceeding.[125] The court held that, because of the unusual facts of the case, the corporate opportunity claim could be considered in the appraisal proceeding, notwithstanding its previous rulings that such claims "impermissibly expand[ed] the appraisal remedy."[126]

Focusing on the prior consent of the parties allowing corporate claims to be included in the appraisal proceeding, the court found that the derivative-like claim in *Cavalier Oil*, unlike most derivative claims, could be satisfactorily redressed in the appraisal action.[127] According to the court, "[t]he wrongdoing alleged by Harnett relate[d] directly to the fair value of his stock, not to the

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directors' discretion, then these circumstances should entitle a shareholder/plaintiff to direct recovery. Additionally, if the firm's assets are being withdrawn at the time the assets are being sold and payments for net assets are being made by the purchaser directly to shareholders, no policy is served by requiring pursuit of a claim in the corporate format.

122. 564 A.2d 1137 (Del. 1989).

123. *Id.* at 1139.

124. *See id.* The Court of Chancery valued Harnett's stock at $347,000. The corporation offered $93,950. Cavalier appealed and Harnett cross-appealed the court's decision. *Id.*

125. *See id.* at 1142 (the court held that Harnett's corporate opportunity claim was not barred by res judicata).

126. *Id.* at 1143. Earlier rulings disallowed claims for breach of fiduciary duty, common law fraud, unfair dealing, misrepresentation, self-dealing, waste of corporate assets and gross overreaching. *See* Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099 (Del. 1985) and Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

127. *Id.*

validity of the merger itself."[128] The court even indicated how the potential corporate claim had become direct. In describing the harm suffered by Harnett, the court stated that his claim was "viewed as more personal than derivative . . . in view of his status as sole minority shareholder whose claims of fraud are directed against the two controlling shareholders."[129] Therefore, although *Cavalier Oil* allowed what was originally a corporate claim to be asserted in the appraisal proceeding, it did so only because of the unusual facts of that case. The court recognized that corporate claims cannot normally be brought within the appraisal proceeding and even direct claims that are based on misconduct other than valuing shares cannot be remedied through appraisal.[130]

Thus, the Delaware cases demonstrate that only direct claims which also fulfill the conditions for challenges to decisionmaking will be subject to exclusivity. No corporate claim would be subject to exclusivity under Delaware standards because all corporate claims are based on conduct other than alleged director misvaluation of shares, and only claims based on alleged director misvaluation are subject to exclusivity.[131] Therefore, a claim is subject to exclusivity of the appraisal process in Delaware only when the claim is direct and the relief sought is monetary, and then only when the challenged decision (1) relates to misvaluation at the appraisal date and (2) is free of deception, conflict of interest and waste. No other direct claims are subject to exclusivity.

Because Delaware exclusivity is limited to claims that are based on director determination of share value for purposes of an appraisal-triggering event and because such a claim would always be direct, the corporate quality of a claim serves as a reliable proxy for identifying one subset of claims that are not subject to Delaware exclusivity. The direct quality of a claim cannot alone, of course, be a proxy for application of exclusivity. Only a subset of direct claims — those which challenge director determination of consideration to be received in exchange for shares and are free from deception, conflict of interest or waste — are subject to exclusivity. All other direct claims survive. Moreover, claims that are

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128. *Id.*

129. *Id.*

130. *See supra* text accompanying notes 38-53.

131. For example, claims that shares have been issued for inadequate consideration or that assets of a firm have been depleted prior to a valuation decision are claims based on nonmisvaluation conduct. *See supra* text accompanying notes 61-65.

not subject to exclusivity may well pray for cash relief, but that factor makes them no less immune from exclusivity. It is the type of conduct upon which a claim is based that determines whether or not exclusivity applies.

Exclusivity, if applied only to the narrow category of direct claims defined by Delaware restrictions, makes appraisal merely a "substitute" for a collateral judicial action for damages that could have been based on a valuation decision by directors afforded the business judgment rule.[132] However, if exclusivity is extended beyond the Delaware restrictions on the doctrine, the exclusivity of appraisal extinguishes claims by cutting off collateral judicial pursuit of them without furnishing a substitute.

III. EXCLUSIVITY OF THE APPRAISAL PROCESS IN OHIO

A. *Stepak v. Schey* -- The Facts

In light of the recent case *Stepak v. Schey*,[133] Ohio has taken a far different approach to exclusivity of appraisal than Delaware. Delaware has been careful not to cause claims based upon wrongful conduct that may have diminished the value of shares prior to appraisal to be extinguished by its application of the exclusivity of the appraisal process. In contrast, Ohio has caused extinguishment by failing to distinguish between claims on the basis of the decision being challenged (and, as a shortcut, their "corporate" or "direct" nature).

In *Stepak*, the plaintiff (Stepak) brought an action against the Scott & Fetzer Company, certain of its directors and Berkshire Hathaway, Inc. (Berkshire), Scott & Fetzer's new sole shareholder.[134] Stepak alleged three claims.[135] First, Stepak claimed that Scott & Fetzer had granted a lock-up option to Berkshire at an inadequate price with the intent to discourage other

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132. *See, e.g., In re* Resorts Int'l Shareholders Litig. Appeals, 570 A.2d 259, 266-67 (Del. 1990) (confirming the trial court's findings that "the contested transactions . . . had been approved by an independent and disinterested special committee and therefore would be accorded the presumption of the business judgment rule's application[]" and that claims of waste of corporate assets were unmerited).

133. 553 N.E.2d 1072 (Ohio 1990).

134. *Id.* at 1073.

135. *Id.* At the point in the proceedings where exclusivity is asserted, the court does not render a decision based on sufficiency of the pleading of the merits of the claims. Rather, only a superficial examination of pleadings is made to determine the nature of the claims being alleged. *Id.* at 1074.

bidder's attempts to acquire the company.[136] He alleged that the option had the effect of placing a cap on the amount the shareholders could realize for their shares.[137] Second, Stepak asserted that Scott & Fetzer directors inappropriately received benefits worth $30,000,000 from a special compensation package attained through unfair dealing and manipulation.[138] Stepak alleged that this money should have been paid to the shareholders as consideration for the merger.[139] Third, Stepak claimed that the directors breached their fiduciary duties in structuring the transaction resulting in an unfair distribution of the company's assets to the shareholders. The shareholders therefore, were unable to obtain a fair price for their stock.[140] The plaintiff did not allege that a conflict of interest occurred, nor did any exist; Berkshire did not vote on the merger and an independent board at Scott & Fetzer approved the compensation package. The plaintiff sought to recover compensation in the form of damages for the directors' breach of fiduciary duty in adversely affecting the bidding process and the premium price that would have been received for the stock had the merger not been structured to benefit the directors.[141]

The defendants filed a motion to dismiss the claim on two separate grounds. First, the defendants argued that the plaintiff was merely asking for more money and was, therefore, barred by the Ohio appraisal statute. Second, the defendants argued that the plaintiff did not have standing to pursue a derivative claim.[142] The trial court granted the defendant's motion to dismiss the plaintiff's claims without a written decision.

The court of appeals reversed, holding that the plaintiff was not directly challenging the determination of fair value of the stock

136. *Id.* at 1073.
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. Brief for Appellees at 7, 15, Stepak v. Schey, 553 N.E.2d 1072 (Ohio 1990).
142. *Stepak*, 553 N.E.2d at 1073. The defendants argued that the plaintiff's second claim was one that should have been pursued derivatively as a corporate claim. Therefore, by the defendant's own admission, the claim did not deal only with misvaluation of shares in the merger. Under Delaware law, the second claim would not have been subject to exclusivity. *See supra* notes 120-32 and accompanying text (indicating that corporate claims are not subject to exclusivity). It is apparent the defendant did not think the exclusivity of appraisal would apply, and it therefore argued that the plaintiff lacked standing to pursue the claim. Brief for Appellants at 21, *Stepak*, 553 N.E.2d at 1072. For further discussion of the standing issue, *see infra* notes 188-205 and accompanying text.

and, therefore, that appraisal was not the plaintiff's sole remedy.[143] The court found that the plaintiff's fraud claims were sufficient to withstand a motion to dismiss and also that the claims were direct claims not subject to a loss of standing.[144]

The supreme court reversed again, holding that, because the plaintiff sought to recover cash in excess of that provided by the terms of the merger, his only remedy was an appraisal proceeding to determine the fair value of his stock.[145] The plurality maintained that the plaintiff could allege his claims as separate causes of action outside the appraisal proceeding provided that the claims did not seek to change the fair value amount determined by the proceeding, which the plurality seems to equate with asking for cash beyond what the shares were worth as of the appraisal date.[146] The court's holding, however, eliminated the plaintiff's ability to receive cash damages for harms resulting from the directors' decisionmaking activity beyond the scope of the merger process but nevertheless affecting the value of the stock.

B. Characterization of Claims

As illustrated in the previous examination of Delaware law, to determine whether appraisal should be a shareholder's exclusive remedy, it is necessary to determine the format of the claim and to determine whether the challenged conduct resulted in a misvaluation of the shareholder's stock.[147] Stepak's first claim al-

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143. *Stepak*, 553 N.E.2d at 1073. The court relied on Armstrong v. Marathon Oil Co., 513 N.E.2d 776 (Ohio 1987) (holding that appraisal is a shareholder's only remedy for determining the value of his stock in a cash-out merger). The *Armstrong* court seemed to recognize the Delaware distinctions regarding exclusivity of appraisal. It cited Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099 (Del. 1985) and Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) as support for allowing "additional cause[s] of action outside the statutory guidelines[]," then stated that the issue narrowed to whether appraisal was the exclusive means for determining the price of shares. *Armstrong*, 513 N.E.2d at 797-98.

144. *Stepak*, 553 N.E.2d at 1073.

145. *Id.* at 1075.

146. *Id.*

147. For a discussion of the significance of the differences between corporate and direct claims, see *supra* notes 120-32 and accompanying text. If the claim is direct, the plaintiff's post-merger standing to pursue the claim is not subject to challenge. On the other hand, if the claim is a corporate claim, it should not be subject to exclusivity of the appraisal process, but it might be subject to termination due to the shareholder-plaintiff's loss of standing. *See infra* notes 188-205 and accompanying text; *see also* Adair v. Wozniak, 492 N.E.2d 426, 428 (Ohio 1986) (stating that "a court must preliminarily determine if the pleadings state injury to the plaintiff upon an individual claim as

leged that the lock-up option,[148] by foreclosing competitive bidding for the Scott & Fetzer shares, was improper. Stepak alleged that the lack of competitive bids effectively placed a cap on the price he could receive for his shares.[149] Stepak claimed that by adversely affecting the bidding process, the directors' conduct amounted to a breach of fiduciary duty.[150] This claim is similar to the third example discussed earlier[151] in which the issuance of new shares could discourage bidding in the control share market, even if adequate consideration was given for the shares. Stepak's allegation illustrates conduct that harms share value by means other than decreasing the value of firm's assets. Therefore, the claim alleges damage to the Scott & Fetzer shareholders for which the appropriate remedy is to grant relief directly to the shareholders instead of indirectly through the corporation. In short, Stepak's action constituted a direct claim. However, even though the claim was direct, it should not have been subject to exclusivity because the director misconduct Stepak alleged was not a misvaluation of shares for purposes of determining the cash to be received in the merger. In Delaware, because the claim did not challenge valuation

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distinguished from an injury which indirectly affects the shareholders or affects them as a whole"). Both the appellee and the appellant in *Stepak* recognized the significance of the distinction between corporate and direct claims and addressed the nature of the claims in their briefs. *See* Brief for Appellee at 15-17, Stepak v. Schey, 553 N.E.2d 1072, (Ohio 1990) (No. 88-1940); Brief for Appellants at 19-27, Stepak v. Schey, 553 N.E.2d 1072 (Ohio 1990) (No. 88-1940).

It is interesting to consider whether claims brought by shareholders of closely-held corporations will now be subject to exclusivity in light of the court's decision in Crosby v. Beam, 548 N.E.2d 217 (Ohio 1989). *Crosby* held that claims of breach of fiduciary duty in a close corporation which were previously pursued in the corporate claim format may now be brought as direct claims. If *Stepak* held that corporate claims converted to the direct claim format were subject to appraisal, then claims by shareholders of closely-held corporations may now be subject to the same rule of appraisal, and those shareholders may avoid the termination of standing.

148. *See generally* Note, *Lock-up Options: Toward a State Law Standard*, 96 HARV. L. REV. 1068 (1983) (discussing various state approaches toward lock-up options).

149. Brief for Appellee at 6, Stepak v. Schey, 553 N.E.2d 1072 (Ohio 1990) (No. 88-1940). The appellants argued that the lock-up option was in fact a binding sale with a flexible time of performance. Brief for Appellants at 7-8, Stepak v. Schey, 553 N.E.2d 1072 (Ohio 1990) (No. 88-1940). *Cf.* Smith v. Van Gorkom, 488 A.2d 858, 883-84 (Del. 1985) (finding that a press release revealing the purchase of one million shares by a prospective acquirer and completion of financing for the merger "had the clear effect of locking [the company's] [b]oard into the . . . [a]greement" and indicating that directors cannot claim the bidding process has been kept open after they have granted a lock-up option).

150. *Stepak*, 553 N.E.2d at 1073.

151. *See supra* text accompanying notes 61-65.

by the directors, it would not be subject to exclusivity of appraisal.

In the alternative, if Scott & Fetzer had received inadequate compensation for the option, Stepak should have pursued the claim in the corporate claim format because the asset pool would have been diminished. Allowing relief to return directly to the shareholders in such a case would circumvent the directors' discretion regarding the distribution of assets. Therefore, public policy requires that relief return to the shareholder through the corporation.[152] This policy would not be implicated by director misvaluation of shares at the date of appraisal because no corporate claim would arise for director misvaluation of shares.[153] Therefore, even if the claim were characterized as alleging inadequate consideration for the option, it should not be subject to exclusivity according to Delaware principles. Delaware law clearly holds that no corporate claims are subject to exclusivity, and thus, under either classification, Stepak's first claim would escape exclusivity of appraisal.

Stepak's second claim alleged that the compensation paid to Scott & Fetzer executives was improper because the amount allegedly exceeded the value of services rendered to the corporation. Stepak's second claim is similar to another example discussed above[154] in which the alleged wrongful conduct was not that the shares were misvalued at the appraisal date, but that the assets of the firm were depleted prior to appraisal. When a firm's asset pool is diminished, policy usually requires that relief return to the corporation.[155] The *Stepak* court however, failed to recognize depletion of corporate assets as a corporate claim and found appraisal to be the exclusive remedy.[156] As a result, corporate claims, which will always be based on conduct other than misvaluation of shares, could be subject to exclusivity of the appraisal process.

Stepak's final claim alleged that the shareholders did not receive their fair proportion of the value of the assets and business, thus preventing them from obtaining a fair price for their

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152. *See supra* text accompanying notes 120-21 and note 121.

153. *See supra* text accompanying notes 120-32.

154. *See supra* text accompanying note 62.

155. *But see supra* note 121 (providing examples of exceptions to this standard).

156. However, the plaintiff pleaded the claim as direct in order to avoid procedural obstacles and termination of standing. Brief for Appellee, Stepak v. Schey, 553 N.E.2d 1072 (Ohio 1990) (No. 88-1940). *Cf. supra* note 147 (discussing the defendant's characterization of the plaintiff's second claim).

stock.[157] As a result, the plaintiff charged that the directors breached their fiduciary duty to the shareholders.[158] Unlike Stepak's first two claims, this claim could be characterized as an attack on the valuation of shares. By allegedly not giving shareholders their fair proportion of the assets' value, the directors did not take the steps necessary to properly value the shares. Because the claim involved a misvaluation decision by the directors, it is necessarily direct; a claim challenging valuation of shares is never properly pursued in the corporate claim format.[159] In accordance with Delaware case law, because Stepak's third claim was based on misvaluation conduct by the directors and was not accompanied by deception, conflict of interest or waste, it should have been subject to exclusivity of appraisal.

C. Opinions of the Court

The plurality opinion by Justices Moyer, Sweeney and Resnick did not limit exclusivity to cases based on an alleged misvaluation of shares, nor did it recognize a distinction based on the format of the claims. The court's holding ultimately failed to restrict exclusivity to cases where appraisal is simply a substitution of forums. Rather, the plurality held that Stepak's claims were merely issues regarding the valuation of the stock.[160] The holding suggests that regardless of whether other claims are involved, if valuation of the stock is an issue, the claim is subject to exclusivity of appraisal.

In reaching its decision, the plurality relied on *Rabkin v. Philip A. Hunt Chemical Corp.*[161] to state that "[s]uch valuation questions are the traditional subjects of an appraisal."[162] However, the plurality misapplied *Rabkin*. In *Rabkin*, the court overturned a decision to limit the plaintiffs' cause of action to appraisal and found that the plaintiffs' claim did not involve valuation issues which were traditional subjects of appraisal.[163] The court found

157. *Stepak*, 553 N.E.2d at 1073.

158. The term fiduciary duty is usually used in this context to represent conflict of interest claims. However, the *Stepak* court showed no appreciation of how the term fiduciary duty is used. No conflict of interest was present in *Stepak*.

159. *Cf.* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1146 (Del. 1989) (holding that "the question of entitlement to a specific number of shares is alien to an appraisal action under Delaware law").

160. *Stepak*, 553 N.E.2d at 1073-75.

161. 498 A.2d 1099 (Del. 1985).

162. *Stepak*, 553 N.E.2d at 1075 (citing *Rabkin*, 498 A.2d at 1105).

163. *Rabkin*, 498 A.2d at 1105.

that although the plaintiffs' claim involved valuation issues, it was also based upon the directors' conflict of interest. For this reason, the Delaware court allowed the plaintiffs' to pursue their claim outside appraisal.[164] It noted that "[t]here is no challenge to any method of valuation" but rather a challenge to other decisionmaking attributes, namely those which affected the value arrived at by the directors.[165] The *Stepak* plurality failed to recognize the *Rabkin* court's distinction, and it clearly misread the decision.

Issues regarding cash entitlements can be divided into two categories, those involving disputes over the valuation at the time of exchange solely due to directors' decisions setting the terms of the exchange and those that cause a diminution in the value of shares because of some separate harmful conduct. Stepak's third claim falls into the first category, for example, because it dealt only with a misvaluation decision by the directors in determining the proportion of the business the plaintiff was to receive. Conversely, Stepak's first and second claims are examples falling within the second category because they alleged misconduct apart from the valuation of the shares. In addition, all three examples given in this note's discussion of exclusivity[166] demonstrate share devaluation that occurs prior to appraisal: excess compensation payments to officers or directors, shares issued for inadequate consideration, and the issuance of shares that discourage bidding in the control share market which causes a reduction in share value. Each of these claims fall within the second category.

The plurality's holding failed to recognize these distinctions between Stepak's claims, resulting in a two-step process of extinguishing shareholder claims. The plurality held that if a cash award is requested in the collateral judicial claim, no value-reducing misconduct can be redressed in a judicial proceeding collateral to appraisal. This rule applies even though the cash sought is not a function of alleged misvaluation decisions by directors, but instead is compensation for their separate misconduct in causing value, at the time of valuation, to be lower than it would have been without the separate misconduct.[167] It also applies if the cash sought is a

164. *Id.* at 1107-08.

165. *Id.* at 1105.

166. *See supra* text accompanying notes 54-65.

167. For a discussion of whether Stepak's plurality or a coalition of Wright, Holmes, Brown and Douglas might change if conflict of interest, deception, or waste were well

function of misvaluation accompanied by conflict of interest. With no way to handle the resolution of claims other than misvaluation, or the relief implications of deception, conflict of interest or waste in connection with misvaluation in an appraisal proceeding, extinguishment of these claims occurs. In short, the *Stepak* court does not differentiate between possible causes of the components of a cash relief request. Instead, it concludes that if cash is requested, the plaintiff must base his claims upon a decision by directors to misvalue shares (value them too low) in setting the terms of the appraisal-triggering event.

Indeed, the plurality's language indicates that it did not carefully consider Stepak's first and second claims. The plurality stated that it was considering "whether an action for breach of fiduciary duty, *essentially* alleging that the board of directors . . . failed to obtain the highest possible price in a cash-out merger, may be maintained outside the appraisal statute. *At the core* of plaintiff's action . . . is the allegation that the price . . . paid . . . is inadequate."[168] Such language ignores the true meaning of Stepak's first two allegations. The effect of the holding is to extinguish the plaintiff's remedy in cases where some other types of wrongful activity affected the price shareholders received for their stock or where misvaluation was accompanied by deception, conflict of interest or waste.

Holmes and Wright, concurring in the syllabus and judgment of the plurality, agreed that the plaintiff could not recover on the claim as it stood.[169] The concurrence stated that the plaintiff's action sought more than a determination of fair cash value, but because he had not previously sought to enjoin the merger or shown unlawfulness, *ultra vires* acts, fraud or non-disclosure, he was unable to recover.[170] The court's language may suggest a recognition of the *Rabkin* exceptions to exclusivity regarding misvaluation claims where deception, conflict of interest or waste are involved. If true, had a conflict been present in this case, the concurring justices, Holmes and Wright, and the dissenting justices, Douglas and Brown might have formed a coalition sufficient to approve a remedy other than appraisal.

Holmes and Wright suggested certain remedies the plaintiff

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pleaded, see *infra* text accompanying notes 169-76.

168. *Stepak*, 553 N.E.2d at 1075 (emphasis added).

169. *Id.* at 1078.

170. *Id.* at 1079.

should pursue to succeed in an action for breach of fiduciary duty: (1) disgorgement of profits resulting from the breach, (2) enjoining the merger in conjunction with a claim for damages, or (3) rescission of the merger and/or damages in the case of unlawful, *ultra vires*, or fraudulent acts by the directors or officers when accompanied by nondisclosure of pertinent facts.[171] To suggest that the plaintiff could obtain damages after pursuit of a claim at equity, however, is contrary to the basic principles of the relationship between law and equity. Claims of relief in equity are entertained when no adequate remedy, such as damages, exists at law. Therefore, to suggest that the plaintiff first bring an injunction to stop the merger and then obtain damages reflects a lack of understanding of the relationship between law and equity.[172]

Dissenting Justices Brown and Douglas recognized the effect of the plurality's holding when they noted that "[t]he majority fail[ed] to perceive the distinction between a limited attack on the failure to obtain fair cash value for shares and a charge of unfair dealing which results in elimination of the highest and best purchaser."[173] They stated that appraisal does not provide a remedy when the shareholders have been deprived of the best offer for their shares.[174] They also stated that the majority had eliminated the shareholders' remedy for their injury.[175] Indeed, the dissent rightly noted that in the case of a merger, "[i]f corporate management engages in a bid-rigging scheme which deprives shareholders of a premium over market price, a complaint cannot be made *without* challenging the price paid for the stock[]," but that this "does not automatically convert the action to a simple demand for the 'fair cash value' of a stockholder's shares."[176]

171. *Id.* at 1078.

172. *See* Norberg v. Young's Market Co., Civ. Nos. 11,208, 11,253, 1989 Del. Ch. LEXIS 174 (Dec. 19, 1989) (denying the plaintiff's motion for a preliminary injunction because the plaintiff would not suffer irreparable harm if the injunction were not issued), *appeal denied*, 571 A.2d 787 (1990); Sealy Mattress Co. of N.J. v. Sealy Inc., 532 A.2d 1324 (Del. Ch. 1987) (sustaining plaintiff's motion for a preliminary injunction because the plaintiff would suffer irreparable harm if the merger were allowed); Scattergood v. Perelman, No. 90-3451, 1990 U.S. Dist. LEXIS 6482 (E.D. Pa. May 29, 1990) (denying plaintiff's motion for a preliminary injunction due to a lack of showing of irreparable harm), *rev'd in part and aff'd in part*, 945 F.2d 618 (3d Cir. 1991) (appeal of denial of injunction vacated as moot).

173. *Stepak*, 553 N.E.2d at 1080.

174. *Id.* at 1080.

175. *Id.*

176. *Id.* at 1079.

IV. COMPARISON

A. Exclusivity

Unlike the Ohio approach to exclusivity per *Stepak*, Delaware has recognized the possibility of extinguishing shareholder's claims by exclusivity of the appraisal process[177] and has been conscious not to allow such a result. For example, in *Cavalier Oil Corp. v. Harnett*,[178] the court allowed a corporate opportunity claim, normally not addressable in appraisal, to be subject exclusively to appraisal solely because of the unusual facts of the case.[179] The court recognized that appraisal does not provide an adequate forum for corporate claims, but stated that "[i]n the present case a fair value determination in an appraisal action will satisfactorily redress the claimed wrongdoing."[180]

Conversely, in *Rabkin v. Philip A. Hunt Chemical Corp.*,[181] the court found two separate reasons why the plaintiffs' claim should not be subject to exclusivity of appraisal. First, the claim involved misconduct other than valuing the shares, and second, even if the conduct was misvaluation only, conflict of interest was present, triggering another exception to exclusivity. The court stated that the plaintiff could pursue his claim for breach of fiduciary duty outside the appraisal process and address conduct other than misvaluation, "[o]therwise we face the anomalous result that stockholders who are eliminated without appraisal rights can bring class actions, while in other cases a squeezed-out minority is limited to an appraisal . . . regardless of the degree of procedural unfairness employed to take their shares."[182] Therefore, in developing the basis for the conditions for exclusivity of appraisal, Delaware is conscious not to apply exclusivity where the appraisal process cannot provide a forum that can inquire into, or provide a remedy for, the wrongfulness and impact of the decisionmaking being

177. Delaware law regards appraisal as a shareholder's exclusive remedy when a cash freeze-out results and the only basis for a claim is that the directors (free of deception, conflict of interest or waste), misvalued the shares that are to receive cash. *See supra* text accompanying notes 66-133.

178. 564 A.2d 1137 (Del. 1989).

179. For a detailed discussion of the facts of the case, see *supra* notes 122-30 and accompanying text.

180. *Cavalier*, 564 A.2d at 1143.

181. 498 A.2d 1099 (Del. 1985).

182. *Id.* at 1108.

challenged. Delaware is careful to make appraisal a "substitution" for the preempted collateral judicial claim.

B. Requirements for Exclusivity Left Intact

The *Stepak* court has left few of the Delaware requirements for exclusivity intact. First, *Stepak* does not require that the claim alleged challenge misconduct other than valuation of the shares. Stepak's first and second claims challenged nonmisvaluation conduct which, in Delaware, would have afforded him a forum collateral to appraisal, but which the Ohio court held were still subject to exclusivity.

Second, *Stepak* did not involve a conflict of interest. However, the language of the plurality assumed the breach of fiduciary duty alleged by the plaintiff.[183] If the *Stepak* court used the term "breach of fiduciary duty" in the same manner as Delaware to indicate conflict of interest, then they acknowledged the exception to exclusivity in cases of conflict of interest, but chose not to follow it. If true, it would appear that no exception exists in Ohio for claims accompanied by conflict of interest. Alternatively, if the court meant that a breach of fiduciary duty can exist without conflict of interest, then a larger exception was created. Only subsequent decisions will indicate which stance the court adopted.

The *Stepak* court did appear to follow Delaware by requiring that appraisal apply only if the plaintiff seeks money damages. Unlike Delaware though, *Stepak* did not distinguish between claims for cash relief resulting merely from a misvaluation decision, and cash relief requested to compensate plaintiff for nonmisvaluation harm to share value. The language of the plurality suggests that if relief other than damages were sought, the shareholder would be able to pursue his claim outside the appraisal proceeding. The plurality found that the plaintiff's request for relief from the alleged illegal lock-up option and inappropriate payments depleting corporate assets was "merely asking for more money . . . [and] must be brought under the appraisal statute."[184]

The failure of the court to disaggregate causes of harm remedied by monetary relief is clear error. Asking for cash to solve a problem other than misvaluation or for deception, conflict of interest or waste accompanying misvaluation is not an attempt to modi-

183. *See Stepak*, 553 N.E.2d at 1074.
184. *Id.* at 1075.

fy the determination of fair cash value of shares as of the appraisal date. The court, however, did not recognize this distinction. According to the plurality, "this is not to say that causes of action which seek compensation other than the value of a dissenter's shares of stock are not maintainable. Provable injury under whatever theory asserted is compensable so long as it does not seek to overturn or modify the fair cash value determined."[185] Such reasoning is flawed, however, because no attempt to get "compensation" for preappraisal wrongdoing would ever not be an attempt to "modify" fair cash value. The court's language suggests that if the plaintiff had sought relief other than damages, the plurality would have found that he sufficiently stated a claim for relief.[186] In addition, the language of the concurrence indicating the remedies necessary to successfully pursue an action for breach of fiduciary duty (disgorgement of profits, enjoining the merger prior to its happening or rescission of the merger)[187] demonstrates that they, too, would have joined Holmes and Wright if nondamage relief were sought. Therefore, it appears that if the plaintiff had not sought damages, but instead sought to enjoin the merger, possibly the whole court would have afforded the plaintiff relief.

Since Ohio, unlike Delaware, does not require that only direct claims be subject to exclusivity, nor that the claim limited to the appraisal remedy challenge misconduct only in valuing the shares, corporate claims may now be subject to exclusivity. Also, the court's decision is unclear as to whether an exception to exclusivity based on conflict of interest exists in Ohio; the plurality did not address the presence of a conflict of interest in *Stepak* or indicate what affect the existence of a conflict of interest may have had on their decision. However, the requirements that the dissent-triggering event be, at least in part, a cash-out proposal and that the claim be for monetary relief still appear common to both jurisdictions.

C. The Relevance of Extinguishing Corporate Claims

Despite the possible extinguishment of corporate claims, it could be argued that, because a court may terminate a claim due to a lack of standing, no severe elimination of rights occurs. This

185. *Id.* at 1074 (citing Armstrong v. Marathon Oil Co., 513 N.E.2d 776, 798 (1987), *cert. denied*, 111 S. Ct. 1076 (1991)).

186. *See also supra* text accompanying notes 167-71.

187. *See also supra* text accompanying note 171.

contention is incorrect for several reasons.

First, jurisdictions differ as to when the loss of standing occurs.[188] For example, in Delaware, "a derivative shareholder must not only be a stockholder at the time of the alleged wrong and at time of commencement of suit but . . . he must also maintain shareholder status throughout the litigation."[189] Two exceptions to this general rule exist: "(1) where the merger itself is the subject of a claim of fraud; and (2) where the merger is in reality a reorganization which does not affect plaintiff's ownership of the business enterprise."[190] Ohio also requires that the plaintiff be a shareholder at the time of the transaction complained of, that the plaintiff adequately represent the interests of the other shareholders and that the suit not be dismissed without the approval of the court.[191] In contrast, California law allows subsequent purchasers of stock to pursue derivative claims in limited circumstances: (1) if there is a strong prima facie case in favor of the plaintiff pursuing the claim; (2) no similar claim has been or is likely to be pursued; (3) the plaintiff acquired the shares before disclosure of the wrongdoing; (4) without pursuit of the claim, the defendant will retain a benefit from his misconduct and (5) relief will not result in unjust enrichment to the corporation or its shareholders.[192] Because standing requirements differ from state to state, many corporate claims will escape standing cut-off. Therefore, extinguishment of corporate claims by the exclusivity of the appraisal process is a significant elimination of shareholders' rights.

Second, occasionally claims that were initially corporate will become redressable in the direct claim format because the policy compelling the use of the corporate format is no longer present. For example, in *Crosby v. Beam*,[193] the plaintiffs alleged that the

188. *See* FLETCHER, *supra* note 1, §§ 5942-43 (setting forth the relevant statute or rule for each of the fifty states); *see generally* MBCA Ann. § 7.40 (describing various issues surrounding the procedural requirements of maintaining derivative suits).

189. Lewis v. Aronson, 477 A.2d 1040, 1046 (Del. 1984) (citing Heit v. Tenneco, Inc., 319 F. Supp. 884 (D. Del. 1970); Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982); Harff v. KerKorian, 324 A.2d 215 (Del. Ch. 1974); Braasch v. Goldschmidt, 199 A.2d 760 (Del. Ch. 1964)).

190. *Id.* at 1046 n.10.

191. OHIO R. CIV. P. 23.1.

192. CAL. CORP. CODE § 800(b) (West 1990).

193. 548 N.E.2d 217 (Ohio 1989). Oregon has also recognized that a corporate claim can "convert" to a direct action under certain conditions. *See* Watson v. Button, 235 F.2d 235, 236 (9th Cir. 1956). The *Watson* court held that where the rights of creditors and other shareholders were not prejudiced, a claim normally pursued in the corporate format

defendants "improperly expended corporate funds"[194] of the Seascape Building Company, a closely-held corporation. The plaintiffs were minority shareholders of Seascape and the defendants were its controlling shareholders, officers and directors.[195] Seascape was voluntarily dissolved and the corporate assets transferred to a trust. It was from this transaction that the plaintiffs' claims arose.[196] The defendants argued that the plaintiffs' claims could only be pursued as a derivative action and that the plaintiffs did not have standing to pursue a derivative claim.[197]

The court held that the plaintiff could pursue the claims individually.[198] It focused on the heightened fiduciary duty between majority and minority shareholders in a closely-held corporation, analogizing the duty to that required in a partnership.[199] The court noted that "a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery."[200] Additionally, Seascape had no creditors, therefore rendering moot the policy concerns regarding protection of creditors' rights.[201] Moreover, because the corporation was dissolved and termination payments made, no corporation existed to receive an award.

In addition, it cannot be argued that corporate claims will always be pursued by the successor corporation, as there may be no incentive for the successor to pursue the claims. If a purchaser has been given a discount on the purchase price paid to shareholders for giving up the right to receive claims from the seller, the purchaser would not be inclined to pursue such claims. For example, in *Stepak v. Schey*,[202] Berkshire had no incentive to pursue the action brought by Stepak because it extracted a benefit

could be pursued individually by a shareholder. *Id.* Not to permit such a suit "would allow a director to misappropriate funds and leave those injured without a remedy." *Id.*

194. *Id.* at 218.

195. *Id.*

196. *Id.*

197. *Id.* The defendants argued that the first plaintiff, Crosby, could not pursue the claim because he had transferred his shares to the second plaintiff, Church, before the action began, and that Church could not bring claims based on misconduct that had occurred before his acquisition of the stock. *Id.*

198. *Id.* at 221.

199. *Id.* at 220.

200. *Id.* at 221.

201. *See supra* text accompanying notes 120-32 (discussing the policy considerations behind corporate and direct claims).

202. 553 N.E.2d 1072 (Ohio 1990).

from Scott & Fetzer in exchange for allowing Scott & Fetzer management to take the allegedly excessive compensation paid to them.[203] As a result, Berkshire could be perceived as aiding and abetting the conduct underlying the claims and would not pursue a claim in which it would be exposed as a wrongdoer.[204] Therefore, the claim would convert to a direct claim because only the shareholders would pursue a claim against the directors.

Finally, redress to the successor often would not benefit those who suffered the reduction in value resulting from nonmisvaluation conduct. For example, a party in Berkshire's position should not succeed to the corporation's claims if it paid a lower price to shareholders as a result of the wrongful compensation withdrawals benefitting the corporation's directors. Recovery would, under that assumption, be a windfall to the successor.[205] Recovery by the successor would not make whole the shareholders who had realized their losses in the "sale" of their shares to it.

The argument that no severe elimination of rights occurs with respect to corporate claims that may be subject to a loss of standing weakens when applied to the situations outlined above. Therefore, when arguing that no severe elimination of rights has occurred, it is important to note that jurisdictions differ as to when loss of standing occurs and what appears to be a corporate claim could "convert" to a direct claim in light of termination of the firm.

CONCLUSION

As a result of the Ohio Supreme Court's failure to distinguish among claims based on whether the underlying allegations (1) relate only to misvaluation at the appraisal date, (2) relate to misvaluation but are accompanied by deception, conflict of interest or waste, or (3) relate to misconduct that diminished share value

203. *Id.* at 1073.

204. *Cf.* Porter v. Texas Commerce Bancshares, Civ. No. 9114, 1989 Del. Ch. LEXIS 130 (Oct. 12, 1989). In *Porter*, the plaintiffs alleged that the value paid for their shares by the purchaser was less than the shares were worth because claims owned by the company against the directors were not reflected in the price paid. *Id.* at *8. The court found that the transaction was negotiated at arm's-length and that the shareholder, in such a case, is not entitled to a price that is "fair" or "adequate." *Id.* at *14.

205. *See* Bangor Punta Operations v. Bangor & A.R. Co., 417 U.S. 703, 710 (1974) (recognizing a "settled principle of equity that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions").

other than by misvaluing shares, extinguishment of claims that fall into the latter categories can occur by exclusivity of the appraisal remedy. Without a remedy for these claims, harms are left unredressed. Furthermore, corporations may seize the opportunity to use appraisal-triggering transactions to rid themselves of nonmisvaluation dissenters' claims, when the plaintiff requests cash relief, through the two-step process of extinguishment.[206] Appraisal-triggering transactions then become a shield, offering directors and officers protection from liability for misconduct. Courts should not permit directors and officers to escape liability for misconduct in this manner, but instead should carefully distinguish between the categories of claims and not allow requests for cash relief to color the nature of the claim. Surely our courts are able to recognize the distinctions outlined in this note and not apply exclusivity where appraisal cannot provide an adequate remedy for the misconduct being challenged.

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206. *See supra* text accompanying notes 167-68.

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