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## Minority Shareholders and Cashout Mergers: The Delaware Court Offers Plaintiffs Greater Protection and a Procedural Dilemma—Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983)

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**MINORITY SHAREHOLDERS AND CASHOUT MERGERS:  
THE DELAWARE COURT OFFERS PLAINTIFFS GREATER  
PROTECTION AND A PROCEDURAL DILEMMA—*Weinberger  
v. UOP, Inc.*, 457 A.2d 701 (Del. 1983).**

In *Weinberger v. UOP, Inc.*,<sup>1</sup> the Delaware Supreme Court rewrote much of that state's law governing minority shareholders' rights in cashout mergers.<sup>2</sup> The court provided a much more flexible appraisal remedy and discarded several principles of Delaware law, most notably the "Delaware block" valuation method and the *Singer* business purpose rule.<sup>3</sup> Without expressly saying so, the court appears to have also created a new equitable "fairness" action which promises to eliminate the "election" dilemma presented by the appraisal statute.<sup>4</sup>

Before *Weinberger*, Delaware law allowed a minority shareholder, dissatisfied with a cashout merger, to seek either the sure but conservative remedy of an appraisal action or the less certain but more liberal remedy of an equitable action.<sup>5</sup> The new fairness action combines allegations of unfair price and unfair dealing. However, the court appears to ground plaintiffs' monetary remedies in the appraisal statute which was designed only to remedy unfair price. More important, the court requires plaintiffs to follow the technical procedures outlined in the appraisal statute. While these procedures allow sufficient time for allegations of unfair price, they would severely limit the time allowed for discovery for the more complex fair dealing allegations. Hence, plaintiffs may lose access to this new remedy because they properly followed the court's instructions for seek-

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

2. "Cashout mergers" involve a displacement of minority stockholders by majority stockholders. The minority stockholders are involuntarily divested of their equity interest in return for cash. While several other terms have been used to describe this or analogous proceedings, this Note will track the language of the *Weinberger* court. See *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983); W. CARY & M. EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 1517 n.1 (1980) ("freeze out" or "squeeze out" is used, especially where the transaction is intended principally to eliminate the minority shareholder); cf. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 625 n.3 (1981) [hereinafter cited as Weiss, *Historical Perspective*] ("take-out"); Brudney & Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357 (1978) ("freezeouts"); Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192-93 (1964) ("freeze-out").

3. See *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *rev'g in part and aff'g in part* 367 A.2d 1349 (Del. Ch. 1976). The *Singer* court held that a complaint which alleges that a merger was effected solely to eliminate the minority interest states a cause of action for breach of fiduciary duty. See *infra* text accompanying notes 21-30; see also *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979); *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121 (Del. 1977).

4. DEL. CODE ANN. tit. 8, § 262 (Supp. 1982). The statute is reprinted in the Appendix to this Note.

5. See *infra* text accompanying notes 87-104.

ing it. In this Note, the new “combined” action will be examined in order to determine how prospective claimants may avail themselves of its remedies.

## I. THE CONTROVERSY IN *WEINBERGER*

William Weinberger, a dissatisfied minority shareholder in a parent-subsubsidiary merger, brought a class action for rescission of the consummated merger or, in the alternative, for “equitable rescission” in the form of money damages or stock in the surviving corporation.<sup>6</sup> Signal Corporation (Signal) had become interested in acquiring its subsidiary, Universal Oil Products Company (UOP).<sup>7</sup> Two UOP directors, who were also Signal officers and board members, used UOP-generated information to prepare a study of the merger’s feasibility for Signal. Based on that study, Signal directors determined that purchase of outstanding shares for up to twenty-four dollars per share was a good investment and offered the shareholders twenty-one dollars per share. Signal-UOP directors did not disclose this feasibility study<sup>8</sup> and several other elements material to the pre-merger dealings to the non-Signal UOP directors and shareholders.<sup>9</sup>

Weinberger charged that the merger failed to meet the *Singer* business purpose test.<sup>10</sup> He further charged that Signal had abused its majority position by misrepresentation and nondisclosure of the means by which the merger price had been negotiated. He also contended that UOP’s Signal-controlled board had breached its fiduciary duty by failure to negotiate a higher price and by failure to require an appraisal of the UOP shares before agreeing to the merger terms.<sup>11</sup> Finally, Weinberger’s expert finan-

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6. *Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1334–35 (Del. Ch. 1981), *rev’d*, 457 A.2d 701 (Del. 1983).

7. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 705 (Del. 1983). Signal owned 50.5% of the total shares before the purchase. *Id.* at 704.

8. The supreme court discussed at length the failure to disclose this study, considering it “a primary issue mandating reversal.” *Id.* at 708.

9. The fairness opinion regarding the price offered the minority shareholders had been hastily generated in three days. *Id.* at 706–07. The “negotiations” consisted of the Signal-appointed president and chief executive officer of UOP agreeing that \$20 to \$21 per share was a fair price, but advising the Signal officers and directors that the value of the stock option incentives of key UOP personnel would need protection. *Id.* at 705.

10. See *infra* notes 21–30 and accompanying text. His basis for the allegation was that the merger advanced only Signal’s economic interests, while ridding the majority of the minority shareholders. *Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1341 (Del. Ch. 1981), *rev’d*, 457 A.2d 701 (Del. 1983).

11. 426 A.2d at 1341.

cial analyst employed two commonly accepted methods of financial valuation to show that the price was unfair.<sup>12</sup>

On appeal, the supreme court held that Signal's misrepresentations and failures to disclose constituted a breach of fiduciary duty.<sup>13</sup> Therefore, Weinberger could seek equitable remedies as well as money damages.<sup>14</sup> Moreover, any valuation method commonly accepted in the financial community could be used in the new liberalized appraisal proceeding.<sup>15</sup> The court then announced that the new "expanded appraisal remedy," coupled with the "fairness test" and chancery's traditional discretion, had supplanted the business purpose rule.<sup>16</sup>

## II. RIGHTS OF DISSATISFIED MINORITY SHAREHOLDERS BEFORE *WEINBERGER*

For over a century,<sup>17</sup> legislatures and courts have attempted to reconcile the corporate majority stockholders' right, when faced with new conditions, to make radical alterations to the enterprise with the minority shareholders' right to protect their original investments.<sup>18</sup> Appraisal statutes, which implicitly recognize the majority's almost unlimited power to alter the course of the enterprise, represent an attempt to assure minority shareholders an opportunity to withdraw their investments after a judicial appraisal of worth.<sup>19</sup> Hence, a minority shareholder facing the prospect of a cashout merger traditionally had three alternatives: (1) accept the mer-

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12. *Id.* at 1356. One method involved a discounted cash flow analysis; the other method involved a comparison of the premium paid above the market price for shares in 10 tender offer-mergers.

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

14. *Id.* at 714.

15. *Id.* at 713.

16. *Id.* at 715.

17. See Weiss, *Historical Perspective*, *supra* note 2, at 626-80. Weiss discusses five phases of merger law, beginning with the vested rights theory that a single dissenting shareholder could block a merger, and concluding with the *Singer* line's use of the business purpose rule to ameliorate the harsh results suffered by minority shareholders when forced to choose either to accept the merger price or to seek appraisal. In a subsequent article, Weiss argues that *Weinberger* inaugurates the sixth phase of development in which the court seeks to protect minority shareholders through a liberalized appraisal process rather than through a determination of whether the proposed merger was properly motivated. Weiss, *The Law of Take Out Mergers: Weinberger v. UOP, Inc. Ushers In Phase Six*, 4 CARDOZO L. REV. 245 (1983) [hereinafter cited as Weiss, *Phase Six*].

18. W. CARY & M. EISENBERG, *supra* note 2, at 1454. One commentator has argued that the problem is better perceived as requiring a balancing between the need for corporate flexibility and the need to preserve public confidence in the securities market, especially during periods when firms are going private. Note, *Singer v. Magnavox and Cash Take-Out Mergers*, 64 VA. L. REV. 1101, 1119-20 (1978). This apparent indifference to the intrinsic value of minority shareholders' claims has not been endorsed elsewhere in the literature.

19. Conard, *Amendments of the Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80, and 81)*, 33 BUS. LAW. 2587, 2592 (1978).

ger price, (2) sell the shares on the market, if one existed, or (3) seek appraisal.<sup>20</sup>

#### A. *Substantive Protection: The Business Purpose Rule and Appraisal*

This was the legal setting in Delaware prior to *Singer v. Magnavox Co.*<sup>21</sup> Based on the majority's fiduciary obligation to the minority, the *Singer* court held that a merger was subject to close judicial scrutiny whenever minority shareholders alleged that the purpose was improper, regardless of whether the "relevant statutory formalities have been satisfied."<sup>22</sup> The *Singer* court thereby created an equitable cause of action for the dissatisfied minority shareholder in which the shareholder needed only to allege breach of fiduciary duty, based on an improper merger purpose, to receive a fairness hearing.<sup>23</sup> However, the business purpose test

20. The serious deficiencies of each of these alternatives have been fully discussed elsewhere. See, e.g., M. EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* 69-84 (1976); Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 *YALE L.J.* 223 (1962); Vorenberg, *supra* note 2; Note, *Valuation of Dissenters' Stock Under Appraisal Statutes*, 79 *HARV. L. REV.* 1453 (1966).

21. See, e.g., Balotti, *The Elimination of the Minority Interests By Mergers Pursuant to Section 251 of the General Corporation Law of Delaware*, 1 *DEL. J. CORP. L.* 63 (1976) (detailing both the statutory history and judicial treatment of Delaware merger law); Weiss, *Historical Perspective*, *supra* note 2, at 626-57; Note, *Delaware Corporation Law: Weinberger v. UOP, Inc.—A Limit On Singer Fairness Standards?*, 42 *U. PITT. L. REV.* 915 (1981) (discussing the original Delaware chancery decision, reported at 409 A.2d 1262 (Del. Ch. 1979)).

22. *Singer v. Magnavox Co.*, 380 A.2d 969, 979 (Del. 1977). The court ruled that mere proof of a legitimate purpose, without more, would not discharge that duty. When called upon in such cases, the court would "scrutinize the circumstances for compliance with the *Sterling* rule of 'entire fairness' and, if it finds a violation thereof, will grant such relief as equity may require." *Singer*, 380 A.2d at 980. The court distinguished an earlier line of cases which had held that an appraisal proceeding was the minority's only remedy unless fraud were alleged. To the extent those cases seemed "to be in conflict with what is said herein they must be deemed overruled." *Id.* at 978, 979 (citing *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Del. 1962); *Federal United Corp. v. Havender*, 24 Del. Ch. 381, 11 A.2d 331 (Del. 1940); *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30 (Del. Ch. 1971)).

23. The *Singer* court declined to announce whose business purpose must be served. *Singer*, 380 A.2d at 980 n.11. In *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121 (Del. 1977), a virtual companion case to *Singer*, see Weiss, *Historical Perspective*, *supra* note 2, at 657, 663, the court announced that the majority, notwithstanding its director control, could vote its shares according to its own interests. *Tanzer*, 379 A.2d at 1123. The majority, however, had to demonstrate that its purpose was bona fide, and not a subterfuge designed solely to eliminate the minority interest. *Id.* at 1124. The majority also had to bear the burden of proving the "entire fairness" of the merger. *Id.* at 1125.

The two cases provoked considerable critical comment. The court later observed that, during 1978 alone, the *Singer* decision had given "rise to some twenty-one (21) separate law review articles, comments and notes." *Singer v. Magnavox Co.*, No. 4929, slip op. at 2 (Del. Ch. Aug. 20, 1980) (opinion approving settlement, as quoted in Weiss, *Phase Six*, *supra* note 17, at 248 n.24). See, e.g., Brudney & Chirelstein, *supra* note 2; Goldman & Wolfe, *In Response to A Restatement of Corporate*

addressed only a small range of corporate mergers, in part because the majority was seldom unable to show some economic purpose beyond a desire to eliminate the minority.<sup>24</sup> Moreover, the highly subjective elements in the business purpose test frustrated parties seeking predictability and efficiency.<sup>25</sup>

One critic suggested that the *Singer* court may have found the business purpose test an attractive alternative to grappling with the thorny problem of valuation raised by Delaware law.<sup>26</sup> The “Delaware block” method,<sup>27</sup> used for decades in appraisal proceedings,<sup>28</sup> had come under considerable attack in recent years.<sup>29</sup> Even as the *Singer* line of cases was developing,

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Freezeouts, 36 WASH. & LEE L. REV. 683 (1979); Terrell & Ranney-Marinelli, *What Constitutes A Valid Purpose For A Merger?*, 51 TEMP. L.Q. 852 (1978); Note, *supra* note 18.

24. Weiss argues further that the Delaware court may have also sought to bar “going private” mergers. Weiss, *Historical Perspective*, *supra* note 2, at 667. That view, however, is difficult to reconcile with *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121 (Del. 1979), and leads to anomalous results. Weiss, *Historical Perspective*, *supra* note 2, at 668–69.

25. Weiss, *Historical Perspective*, *supra* note 2, at 671. Brudney & Chirelstein, *supra* note 23, at 1356, have followed several authorities in identifying the three main types of mergers: (1) two-step mergers, (2) mergers of long-held affiliates, and (3) going private mergers. *Id.* at 1356 n.8. *But see* Goldman & Wolfe, *supra* note 23, at 690–95 (arguing that Brudney’s and Chirelstein’s analysis, while assuring greater predictability for merger transactions, would lead to less accurate judicial results because of its reliance on the superficial form of the merger to reveal its purposiveness); *see also* Weiss, *Historical Perspective*, *supra* note 2, at 668. The court’s condemnation of a “classic ‘going private’ transaction” in *Roland Int’l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979), represents a judicial interest in barring all mergers which serve only to realign ownership interests and eliminate the minority shareholders.

26. Weiss, *Historical Perspective*, *supra* note 2, at 670–71. Weiss stated:

Rather than grapple with this [valuation] problem, the Delaware courts may reach highly subjective decisions, based largely on their assessment of the fairness of the transaction before them, as to whether to emphasize a transaction’s take out characteristics and hold it does not have a proper purpose, or to stress its economic functions and hold it has a proper purpose. *Id.* at 670. While facilitating the courts’ ability to “do equity,” the business purpose test neither promotes predictability nor reduces litigation. Moreover, the fairness issue may sometimes be only covertly considered because it was framed in terms of purpose. *Id.* at 670–71.

27. This method entails the weighting of asset value, market value, and earnings value, and adding the resulting amounts “to determine the value per share.” *Weinberger v. UOP, Inc.*, 457 A.2d 701, 712 (Del. 1983). *See generally* Schaefer, *The Fallacy of Weighting Asset Value and Earnings Value In The Appraisal of Corporate Stock*, 55 S. CAL. L. REV. 1031 (1982).

28. *See, e.g., In re General Realty & Utils. Corp.*, 29 Del. Ch. 480, 52 A.2d 6, 14–15 (1947), *cited in* *Weinberger*, 457 A.2d at 712; *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 141 (Del. 1980) (*citing* *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71 (Del. 1950)).

29. *See generally* Schaefer, *supra* note 27. Schaefer argues that the Delaware method, by not accounting for the fact that the corporation’s intrinsic value should be the higher of earnings value or asset value, fails to recognize the most profitable use of the corporation’s resources. If asset value is higher, rational stockholders would liquidate. If earnings value is higher, rational stockholders would continue in their investments, unless offered a price which ignores asset value in favor of the corporation’s earnings potential. If it can be determined, market value should be weighted with the higher of asset value and earnings value so that they “may represent adequate, independent estimates of the true value of a corporation.” *Id.* at 1036 n.9. *But see* M. EISENBERG, *supra* note 20, at 81 (quoting *Chicago Corp. v. Munds*, 20 Del. Ch. 142, 172 A. 452, 455 (1934), for the proposition that deficiencies in the market preclude market value from being a fair reflection of value). For further criticism of

the Delaware court itself had evidenced some uneasiness with relegating the shareholder to appraisal.<sup>30</sup>

### B. *A Dissatisfied Minority Shareholder's Procedural Dilemma*

The *Singer* line, however, still forced dissatisfied minority shareholders to elect a remedy. If they alleged only inadequate merger price, they could seek appraisal under section 262.<sup>31</sup> If they alleged improper purpose, they could seek equitable and monetary relief for breach of fiduciary duty.<sup>32</sup> While each remedy had particular advantages, neither could be pursued in conjunction with the other.<sup>33</sup>

Plaintiffs seeking appraisal normally have the period between the announcement of the merger and the merger vote in which to perfect their appraisal rights by submitting a written demand for appraisal.<sup>34</sup> Unless plaintiffs withdraw their demands within the statutory time limits,<sup>35</sup> they

the Delaware block method, see W. CARY & M. EISENBERG, *supra* note 2, at 1456; Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 305-07 (1974); Manning, *supra* note 20, at 232-33.

30. In *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979), the court held that the existence of the statutory appraisal remedy did not relieve the defendants of their fiduciary duty. *Id.* at 1034. In *Lynch v. Vickers Energy Corp.*, 429 A.2d 497 (Del. 1981) (*Lynch II*), the court awarded the plaintiff "rescissory damages," the gain which the parent corporation had realized from the improper merger. *Id.* at 501. Because only historical earnings were admissible in appraisal proceedings, *e.g.*, *Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344, 348 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975), the court stretched to distinguish the breach of fiduciary duty in *Lynch II* from an earlier fraudulent misrepresentations decision, *Poole v. N.V. Deli Maatschappij*, 43 Del. Ch. 283, 224 A.2d 260 (Del. 1966), in which the plaintiff received only the statutory appraisal remedy.

Rarely, however, would fraudulent misrepresentation not constitute a breach of fiduciary duty. Weiss, *Historical Perspective*, *supra* note 2, at 674 n.317. The only part of the court's distinction which made sense is the recognition that the plaintiff in *Poole* had sought out-of-pocket damages, whereas the plaintiff in *Lynch II* was expressly seeking rescission or its monetary equivalent, rescissory damages. *Lynch II*, 429 A.2d at 500-01.

Nevertheless, while the plaintiff was allowed to introduce post-merger evidence of price, the *Lynch II* court presumed that the evidence would be evaluated using the traditional "weighted average" method. *Id.* at 505 (suggesting that the chancellor's assignment of a weight of 40% to both market value and asset value overvalued the market figure and undervalued the asset figure). *But see id.* at 507-08 (Quillen, J., dissenting).

31. *E.g.*, *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30, 35 (Del. Ch. 1971); *see also Schaefer*, *supra* note 27, for a discussion of deficiencies of the appraisal remedy.

32. *E.g.*, *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

33. *See infra* notes 34-43 and accompanying text.

34. Typically, the corporation need only give a 20-day notice of the effective merger date. DEL. CODE ANN. tit. 8, § 262(d)(1) (Supp. 1982) (reprinted in the Appendix to this Note). If the merger is approved pursuant to DEL. CODE ANN. tit. 8, § 253 (1974) (the short form merger statute), or DEL. CODE ANN. tit. 8, § 228 (1974) (written consent of stockholders in lieu of meeting), the stockholder must submit a written appraisal demand within 20 days of the date on which the corporation mailed notice of the shareholder's appraisal rights. DEL. CODE ANN. tit. 8, § 262(d)(2) (Supp. 1982).

35. Within 60 days after the merger date, plaintiffs may unilaterally withdraw their appraisal demands and accept the terms of the merger. DEL. CODE ANN. tit. 8, § 262(e) (Supp. 1982).

lose stockholder status and become creditors,<sup>36</sup> and are foreclosed from bringing derivative actions as stockholders of a corporation.<sup>37</sup>

This, however, is not the only remedy shareholders relinquish by demanding appraisal. The Delaware courts have generally held that a section 262 action can only address the valuation of the defendant's stock.<sup>38</sup> One cannot, in an appraisal proceeding, assert a right which is not found in the statute.<sup>39</sup> Theoretically, the statute's goal—avoiding complexity<sup>40</sup>—does not prevent plaintiffs from bringing two entirely separate actions in sequence. However, that strategy would result in inefficient judicial administration and would be contrary to contemporary wisdom concerning joinder of actions.<sup>41</sup>

Thus, dissenting minority shareholders who seek appraisal have foregone the possibility of any remedy for unfair dealing. One federal district court, interpreting Delaware law, bluntly stated that resort to the appraisal remedy limits plaintiffs to that procedure and forecloses any equitable action.<sup>42</sup> For many plaintiffs, dissatisfied only with the price, this does not create a major obstacle. However, as *Weinberger* demonstrates, plaintiffs often will not know if they can challenge the fairness of the majority's dealings until after they have perfected their statutory appraisal rights.<sup>43</sup>

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36. *E.g.*, *Southern Prod. Co. v. Sabath*, 32 Del. Ch. 497, 87 A.2d 128, 132 (Del. 1952) (citing the precursor of § 262). The current code denies the dissenting shareholder the right to vote his stock or receive dividend payments or other stock distributions, unless payable before the merger date. DEL. CODE ANN. tit. 8, § 262(k) (Supp. 1982); *see also* *Braasch v. Goldschmidt*, 41 Del. Ch. 519, 199 A.2d 760, 766 (1964).

37. *Braasch v. Goldschmidt*, 199 A.2d at 766.

38. *Id.*; *see also* *Lichtman v. Recognition Equip. Inc.*, 295 A.2d 771, 772 (Del. Ch. 1972).

39. *Lichtman*, 295 A.2d at 772 (citing *Meade v. Pacific Gamble Robinson Co.*, 29 Del. Ch. 406, 51 A.2d 313 (1947), *aff'd*, 30 Del. Ch. 509, 58 A.2d 415 (Del. 1948)).

40. *Lichtman*, 295 A.2d at 772 (quoting *In re Northeastern Water Co.*, 28 Del. Ch. 139, 38 A.2d 918 (1944)); *see also* *Kaye v. Pantone, Inc.*, 395 A.2d 369, 375 (Del. Ch. 1978).

41. *See, e.g.*, Friedenthal, *Joinder of Claims, Counterclaims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 1 (1970).

42. *Lachman v. Bell*, 353 F. Supp. 37, 42 (S.D.N.Y. 1972). The court cited two Delaware decisions which are not exactly on point. The first, *Loeb v. Schenley Indus., Inc.*, 285 A.2d 829 (Del. Ch. 1971), dealt with a dissenter's motion for payment of minimum value of shares, pending the final outcome of the § 262 appraisal proceeding. The court declined to exercise its equity powers to expand the rights expressly granted under the statute. The second case, *Meade v. Pacific Gamble Robinson Co.*, 29 Del. Ch. 406, 51 A.2d 313, 320-21 (1947), *aff'd*, 30 Del. Ch. 509, 58 A.2d 415 (Del. 1948), involved a claim for interest on an appraisal award computed from the effective date of the merger. The court held that the plaintiff was limited to remedies which the statute expressly provided. Hence, while the equities might have called for a remedy, the statute foreclosed an interest award. 51 A.2d at 316.

43. Not only must plaintiffs act within a short time to perfect their appraisal rights, *see supra* note 34, but only after perfecting those rights can they, at the court's discretion, be allowed "discovery or other pretrial proceedings." DEL. CODE ANN. tit. 8, § 262(h) (Supp. 1982). In an earlier case involving the same transaction the chancellor, granting the defendant's motion to dismiss for failure to state a claim, acknowledged that *Weinberger* through discovery might have facts to support an



If one follows the case law, appraisal under section 262 offers sorely wronged plaintiffs a remedy for their price woes and the hardly salutary knowledge that they have been treated even more shabbily than they had imagined, making the price for that knowledge the loss of the remedy.

### III. THE COURT'S REASONING

The *Weinberger* case provided an opportunity for the court to address major legal problems with cashout mergers. The defendant majority shareholders were able to show several sound business purposes for the merger sufficient to meet the *Singer-Tanzer* requirement.<sup>44</sup> The plaintiff had rejected his appraisal rights in pursuit of a *Singer-Tanzer* cause of action,<sup>45</sup> alleging "grossly inadequate" price, improper purpose, and failure to disclose material facts.<sup>46</sup> Additionally, the plaintiff had pressed the court by offering a technique of valuation leading to a "fair price" significantly higher<sup>47</sup> than the defendant's figure, which was based on the traditional Delaware block method.<sup>48</sup>

#### A. *Fiduciary Duty*

Examining the defendant's performance as a fiduciary,<sup>49</sup> the court declared that, in the absence of arm's-length bargaining, the majority owes a fiduciary duty to the minority.<sup>50</sup> In addition, a director who is on both sides of a transaction bears "the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."<sup>51</sup> Delaware law requires "undivided and unselfish loyalty to the corporation."<sup>52</sup>

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action in "fraud, deception and misrepresentation." *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1267 (Del. Ch. 1979).

44. The undisclosed feasibility study indicated several synergistic and other benefits attending such a merger. *E.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 708 (Del. 1983).

45. *Id.* at 703, 714.

46. *Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1341 (Del. Ch. 1981), *rev'd*, 457 A.2d 701 (Del. 1983).

47. \$25.21 to \$30.59 per share. 426 A.2d at 1358.

48. \$13.87 to \$18.75 maximum. *Id.* at 1361-62.

49. *Weinberger*, 457 A.2d at 703-09. Ignoring the business purpose rule entirely, the court discussed at great length the feasibility study, *see id.* at 708-09, and the majority's failure to disclose the study to outside UOP directors or minority shareholders, while retaining some involvement in the UOP board's decisionmaking process. *Id.* at 709 n.7.

50. *Id.* at 710.

51. *Id.* Hence, one who serves as a director of both a parent corporation and its subsidiary must either ensure the establishment of an independent negotiating structure, *id.* at 710-11, or refrain from participation in negotiations. *Id.* However, given the strong language the court used to characterize the majority's fiduciary duty, neither withdrawal nor establishment of the negotiating committee would have discharged the Signal-designated UOP directors from their duty of "complete candor," which required disclosure of the feasibility study. The court had twice stated that the report was based

### B. Fairness

Finding that Signal's directors had failed to meet their fiduciary obligation, the court proceeded to identify the two elements of a "fairness" analysis.<sup>53</sup> The concept of fairness embraces both fair dealing<sup>54</sup> and fair price.<sup>55</sup> The court, however, stressed the unity of a fairness analysis. Ultimately, "fair dealing" and "fair price" were simply different aspects of "entire fairness" and could not be formally separated.<sup>56</sup> While "in a non-fraudulent transaction . . . price may be the preponderant consideration outweighing other features of the merger,"<sup>57</sup> the test should not be "bifurcated," even though the court itself might analyze each aspect separately.<sup>58</sup>

The court's terse discussion of valuation, under the heading of "fair price," represents a striking new development in Delaware law.<sup>59</sup> The court concluded that "to the extent [the Delaware block method] excludes other generally accepted techniques used in the financial community and the courts, it is now clearly outmoded."<sup>60</sup> In justifying its expansion of the valuation procedure, the court observed that Signal's feasibility study had not employed the Delaware block method to evaluate the merger's possibilities; rather, it had employed a method "essentially" like Weinberger's examination of earnings potential.<sup>61</sup>

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on UOP information. *See id.* at 708–09. Presumably, the preparers of the report had access to that information by virtue of their roles in UOP, not their roles in Signal. If that is true, then by the court's standard the study would still have to be disclosed.

52. *Id.* at 710 (quoting *Guth v. Loft, Inc.*, 23 Del. Ch. 255, 5 A.2d 503, 510 (Del. 1939)).

53. *Weinberger*, 457 A.2d at 711. The court's language and analysis of "fairness" closely tracks that of Nathan & Shapiro, *Legal Standard of Fairness of Merger Terms Under Delaware Law*, 2 DEL. J. CORP. L. 44, 45–48 (1977), which the court cited.

54. "Fair dealing" involves the timing, initiation, structuring, and negotiation of the merger, as well as how these and other material elements were disclosed to the other interested parties. *Weinberger*, 457 A.2d at 711. It also includes the procedures for securing directors' and stockholders' approval of the merger. *Id.* at 712.

55. "Fair price" ultimately involves an evaluation of the financial and economic features of the cashout merger, for example, the subsidiary's "assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock." *Id.* at 711.

56. *Id.*

57. *Id.*

58. *Id.*

59. The court noted that the plaintiff's expert had employed two basic valuation techniques, "a comparative analysis of the premium paid over market in ten other tender offer-merger combinations, and a discounted cash flow analysis." *Id.* at 712. The chancellor had treated the valuation problem as if it had arisen in an appraisal proceeding, which mandated the use of the Delaware block method employed by the defendants. *Id.* While overruling precedent which required the strict application of that valuation method, the court acknowledged that a breach of fiduciary duty ordinarily required the same approach to valuation that an appraisal proceeding required. *Id.* at 714.

60. *Id.* at 712.

61. *Id.* In holding that the "very structured and mechanistic" Delaware block method no longer "exclusively" controlled appraisal and proceedings and stock valuation cases, the court said: "We

While the court declined to estimate actual money damages, it stated that upon remand “the plaintiff’s evidence should be part of the factual mix and weighed as such.”<sup>62</sup> The chancellor was free to consider any of the generally accepted methods of valuation presented, even those which included elements of future value.<sup>63</sup>

### C. Remedies

Weinberger sought “rescissory damages” such as the plaintiff had received in *Lynch v. Vickers Energy Corp. (Lynch II)*.<sup>64</sup> However, the court overruled *Lynch II* to the extent that it limited plaintiffs’ remedies to that formulation of damages.<sup>65</sup> The court stated that the chancellor could use any damage formula which takes “into account all relevant factors.”<sup>66</sup> Although plaintiffs’ money damages ordinarily would be determined by this “more liberalized appraisal proceeding,” the court emphasized its intent to preserve the chancellor’s historic powers to fashion such relief as circumstances might require.<sup>67</sup>

The court stressed that the appraisal statute would govern the scope of this new remedy and the means to perfect it.<sup>68</sup> The court’s choice of au-

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believe that a more liberal approach must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court, subject only to our interpretation of [DEL. CODE ANN. tit. 8, § 262(h) (Supp. 1982)].” *Weinberger*, 457 A.2d at 713. The court went on to quote extensively from an earlier decision, *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71, 72 (Del. 1950) (identifying factors for valuing corporate shares, and reviewing the legislative history of the appraisal statute, DEL. CODE ANN. tit. 8, § 262 (Supp. 1982)), to support the proposition that Delaware law has long required that the court “take into account all relevant factors” of valuation. *Weinberger*, 457 A.2d at 714. The court did not explain why, if it has in fact long acknowledged this mandate, its radical revision of the valuation process was so obviously necessary.

62. *Weinberger*, 457 A.2d at 714.

63. *Id.* at 713. These would include such elements as “the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the proof of speculation.” *Id.* This statement goes to the heart of the valuation process. Under the Delaware block method only historical earnings could be used to determine the weighted earnings figure; prospective earnings were not relevant to the valuation process. *See, e.g., Francis I. duPont & Co. v. Universal City Studios, Inc.*, 312 A.2d 344, 348 (Del. Ch. 1973), *aff’d*, 334 A.2d 216 (Del. 1975); *David J. Greene & Co. v. Dunhill Int’l, Inc.*, 249 A.2d 427, 433 (Del. Ch. 1968).

64. *See generally supra* note 30 and accompanying text.

65. *Weinberger*, 457 A.2d at 714.

66. *Id.*

67. *Id.* This is particularly true where issues of fair dealing are raised. The court stated: “The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.” *Id.*

Only the facts of the case limit the chancellor’s power to grant relief. *Id.* Hence, in *Weinberger’s* case, if the chancellor determines that more than appraisal is warranted, the relief should take the form of monetary damages, the merger being “too involved to undo.” *Id.*

68. *Id.* at 715.

thority<sup>69</sup> for this position indicates its desire to eliminate collateral attacks on mergers, where the plaintiffs are only alleging unfair price.<sup>70</sup> In both *Stauffer v. Standard Brands Inc.*<sup>71</sup> and *David J. Greene v. Schenley Industries, Inc.*,<sup>72</sup> the court emphasized that minority shareholders dissatisfied with the value placed on their shares had recourse only to appraisal.<sup>73</sup> Furthermore, the court, by invoking the “well established principles of *Stauffer*,”<sup>74</sup> might have been emphasizing its intent to require plaintiffs alleging unfair value to meet the technical requirements of section 262 if they wish to perfect their appraisal rights.<sup>75</sup>

### D. Conclusion

By making the new appraisal method shareholders’ exclusive remedy for issues of value, the court did not relegate shareholders to some pre-*Singer* desert of judicial indifference. The court eliminated the Delaware business purpose test<sup>76</sup> by implicitly accepting the chancery’s reading of *Singer*.<sup>77</sup> The court concluded that the test had been “virtually interpreted out of existence.”<sup>78</sup> The fairness test, the new valuation principles, and chancery’s broad remedial discretion better protect minority shareholders than does a search for a proper corporate motive.

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69. *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78 (Del. 1962); *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30 (Del. Ch. 1971).

70. Weiss, *Phase Six*, *supra* note 17, at 257.

71. 41 Del. Ch. 7, 187 A.2d 78, 80 (Del. 1962). In *Stauffer*, the plaintiff returned to this country to discover his minority interest had been cashed out by the majority shareholder in a short form merger. See DEL. CODE ANN. tit. 8, § 253 (1974). Too late to perfect his appraisal rights, he sued to enjoin the merger. *Stauffer*, 187 A.2d at 79. The court was not sympathetic. Characterizing the complaint as “conclusory allegations of oppressive treatment of the minority by the parent corporation,” *id.* at 80, the court concluded that the plaintiff really wanted the money value of his shares. *Id.* Hence, the court found that, absent a showing of fraud or illegality, appraisal was the plaintiff’s only remedy. Moreover, “[t]hat the remedy has been lost is the plaintiff’s own fault.” *Id.*

The court has been rather strict about compliance with the statutory time constraints of § 262. See *Schneyer v. Shenandoah Oil Corp.*, 316 A.2d 570, 573 (Del. Ch. 1974). However, it has liberally construed various other technical requirements. *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 149 (Del. 1980); *Raab v. Villager Indus., Inc.*, 355 A.2d 888, 893–94 (Del. 1976).

72. 281 A.2d 30 (Del. Ch. 1971).

73. *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78, 80 (Del. 1962); *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30, 35 (Del. Ch. 1971); see also *Bruce v. E.L. Bruce Co.*, 40 Del. Ch. 80, 174 A.2d 29, 30 (1961).

74. *Weinberger*, 457 A.2d at 715.

75. See *supra* text accompanying note 68.

76. *Weinberger*, 457 A.2d at 715.

77. The chancery’s reading of *Singer* was that a controlling shareholder may not use his position to cash out a minority shareholder solely to eliminate the minority shareholder. *Weinberger v. UOP, Inc.*, 426 A.2d 1333, 1343, 1348–50 (Del. Ch. 1981), *rev’d*, 457 A.2d 701 (Del. 1983).

78. *Weinberger*, 457 A.2d at 715 (quoting Weiss, *Historical Perspective*, *supra* note 2, at 671 n.300).

The court's lengthy treatment of Signal's breaches of fiduciary duty places controlling corporations on notice that their actions can be subject to scrutiny in a court of equity. Moreover, if the merger price is unfair, the majority risks an appraisal proceeding in which the court may use the same valuation principles which the majority used when it decided that the merger was a good investment.<sup>79</sup>

#### IV. ANALYSIS

The court's new approach promises minority shareholders significantly greater protection than the discarded business purpose rule could provide. Rarely would majority shareholders be unable to demonstrate that the intended merger met some bona fide purpose.<sup>80</sup> However, a fairness analysis of the majority's dealings with the minority allows the court directly to address objectionable behavior without relying on unpredictable investigations into corporate motivation.<sup>81</sup> Admittedly, analyses of fair dealing and even fair price retain a subjective element. Nevertheless, their focus on behavioral and price data promises greater predictability and less litigation for both plaintiffs and defendants.

For several years, Justice Quillen<sup>82</sup> had been urging the court to adopt a more flexible valuation procedure. In *Roland International Corp. v. Najjar*,<sup>83</sup> he dissented, stating that the court should have required the dilatory plaintiff<sup>84</sup> to show why the statutory appraisal remedy was inadequate. He noted that the Delaware block appraisal method was not mandated by the appraisal statute and expressed fear that such judicial limitations on the statutory appraisal procedure were turning equitable actions into "an unnecessary damage forum."<sup>85</sup> As an alternative, Justice Quillen encouraged opening the established valuation process "to generally accepted techniques of evaluation used in other areas of business and law."<sup>86</sup>

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79. See *Weinberger*, 457 A.2d at 712.

80. See Weiss, *Historical Perspective*, *supra* note 2, at 669-71.

81. *Id.*

82. Justice Quillen would eventually be one of the three *Weinberger* justices. *Weinberger*, 457 A.2d at 701.

83. 407 A.2d 1032 (Del. 1979).

84. The plaintiff had failed to submit to the corporation a written demand for appraisal within the 20 days provided under DEL. CODE ANN. tit. 8, § 262(b)(2) (now codified at DEL. CODE ANN. tit. 8, § 262(d)(2) (Supp. 1982)). More than five months later, he sought money damages for an unfair price. *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032, 1039 (Del. 1979) (Quillen, J., dissenting).

85. *Roland Int'l Corp.*, 407 A.2d at 1040 n.12 (Quillen, J., dissenting).

86. *Id.* (Quillen, J., dissenting). In a subsequent case involving exceptions to an appraisal. *Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 151 (Del. 1980) (Quillen, J., concurring), Justice Quillen reemphasized the importance of opening the valuation process to techniques generally accepted in the legal and financial communities.

By expanding the valuation proceedings, the court addressed Justice Quillen's fears. Unless plaintiffs can show that the majority stockholders' manner of dealing was unfair to the minority, plaintiffs will be limited exclusively to the expanded appraisal proceeding.<sup>87</sup> Even if they can show unfair dealing, their remedy is to be based on section 262 appraisal principles, which allow "rescissory damages."<sup>88</sup> In the process of establishing and discarding major features of corporate law, however, the court neglected to identify how dissatisfied shareholders in cashout mergers proceed to claim the remedy the court has provided.

### A. *The Procedural Problem Resulting from Weinberger*

How plaintiffs proceed turns on the resolution of two issues: (1) whether one seeks a fairness analysis by bringing two actions, one for unfair price and one for unfair dealing, or a single action; and (2) how the appraisal statute controls the resultant proceedings. If the *Weinberger* remedy results from a single action, it must be based on equitable principles rather than on the appraisal statute. Section 262 was not written to provide a remedy for fair dealing allegations.<sup>89</sup> Furthermore, the statute's time constraints and limited discovery provisions<sup>90</sup> disadvantage plaintiffs seeking the specific evidence required to allege unfair dealing.<sup>91</sup> As was the case with *Weinberger*, plaintiffs may not even begin to uncover evidence of unfair dealing until some time after they have begun to investigate their unfair price allegations.<sup>92</sup> Nevertheless, the court intended that the appraisal statute be used in some manner to perfect plaintiffs' rights to the new remedy.<sup>93</sup>

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87. *Weinberger*, 457 A.2d at 714.

88. Only where structural, rather than monetary, relief is appropriate will the chancellor have to go beyond appraisal. *Id.* at 714. This also raises indirectly the question of what relief is appropriate where valuation cannot provide a money figure for the proscribed activity. There is some basis for viewing *Lynch II*'s "rescissory damages" as a form of punitive damages. See *Lynch II*, 429 A.2d at 505; Weiss, *Historical Perspective*, *supra* note 2, at 675.

89. See DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

90. *Id.* tit. 8, § 262(d), (e), (h).

91. *Weinberger*, 457 A.2d at 703. The court ruled that the plaintiff had the burden of alleging "specific acts of fraud, misrepresentation, or other items of misconduct" in order to provide "some basis for invoking the fairness obligation." *Id.* If the plaintiff met this burden, the majority shareholder would ultimately assume the burden of proving the merger's fairness by a preponderance of the evidence. *Id.* This burden of showing the merger's unfairness, however, would shift back to the plaintiff if a majority of the minority shareholders had approved the merger by an informed vote. *Id.* Nevertheless, the majority must always show "that they completely disclosed all material facts relevant to the transaction." *Id.*

92. *Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1267 (Del. Ch. 1979) (earlier case involving same merger transaction).

93. *Weinberger v. UOP, Inc.* 457 A.2d 701, 715 (Del. 1983).

The action might be split into a section 262 action for unfair price and an equitable action for unfair dealing. However, current case law prohibits bringing an equitable action if the plaintiff has perfected his appraisal rights.<sup>94</sup> Even if the court overturns the decisional law against joining appraisal and equitable actions, the extent to which the appraisal statute would control the equitable proceeding is unclear.<sup>95</sup>

The court did not clearly state whether it had created a single equitable cause of action for unfairness or two separate ones for unfair dealing and unfair price. But if an action under section 262 will not support an unfair dealing claim, the court is implicitly requiring a second action for the equitable claim. Some of the language in *Weinberger* suggests that this may be the case.<sup>96</sup> The *Weinberger* court recognized that price is "the preponderant consideration" for many shareholders.<sup>97</sup> In declaring that the appraisal statute governs the "financial remedy available to minority shareholders,"<sup>98</sup> the court seemed to be limiting the plaintiff to an appraisal under section 262.<sup>99</sup> Moreover, the court's own warning is fairly direct. *Weinberger* and those others who had relied on a *Singer* action would be allowed to "abjure an appraisal."<sup>100</sup> Thereafter, section 262 would control and the court would adhere strictly to the statutory time limits for bringing the action.<sup>101</sup>

The court also emphasized, however, that the fairness test "is not a bifurcated one," but requires a unified examination of all aspects of fairness surrounding the merger.<sup>102</sup> Splitting the action would violate the

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94. See *supra* notes 34-43 and accompanying text. If knowledgeable or not very risk averse, plaintiffs may opt instead to pursue an equitable action for breach of fiduciary duty. If the court sustains their claim, plaintiffs will be accorded the expanded appraisal remedy and whatever other remedies equity deems appropriate. *Weinberger*, 457 A.2d at 714. However, if they lose, they lose everything. They will be reminded of the plaintiff in *Stauffer* who had only himself to blame for his failure to perfect his appraisal right. *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78, 80 (Del. 1962).

95. The time and discovery constraints might only control the appraisal proceeding. If that were the case, however, the court would then be forced to review the appraisal proceeding to determine what amount of the plaintiff's equitable remedy had already been assessed against the defendant in the earlier proceeding. The court did not discuss the possibility of two new actions generating a duplication of chancery effort.

96. *Weinberger*, 457 A.2d at 711. The court stated that "the provisions of [DEL. CODE ANN tit. 8, § 262 (Supp. 1982)], as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cashout merger." 457 A.2d at 715.

97. *Weinberger*, 457 A.2d at 711.

98. *Id.* at 715.

99. See *supra* note 96.

100. *Weinberger*, 457 A.2d at 714-15.

101. *Id.* at 715.

102. *Id.* at 711; see *supra* text accompanying notes 56-58.

unity of the fairness analysis<sup>103</sup> and require a duplication of judicial efforts as different aspects of the same transaction were separately considered.<sup>104</sup>

### B. *Perfecting a Weinberger Action*

By overruling major precedents and discarding a venerable method of valuation, the *Weinberger* court substantially expanded the protection afforded minority shareholders in cashout mergers. After expanding this protection, presumably the court would not bar prospective plaintiffs at the door because of a technical pleading problem. Until *Weinberger*, the Delaware court had been reluctantly struggling with the valuation problem<sup>105</sup> while expressly trying to establish the fiduciary duty which controlling shareholders owed to minority shareholders.<sup>106</sup> Realizing that the valuation problem could not be isolated from majority shareholders' fiduciary duty, the *Weinberger* court stressed that a fairness analysis should not formally be separated into fair dealing and fair price analyses.<sup>107</sup> The court devoted the bulk of its opinion to an analysis of fair dealing.<sup>108</sup> Given this express concern with controlling abuse of corporate power, the most appropriate cause of action would be brought in equity, not under section 262 which deals only with fair price.<sup>109</sup>

Regardless of its intentions, the court is on the edge of resolving shareholders' most fundamental election dilemma.<sup>110</sup> By offering plaintiffs the expanded appraisal remedy and the equitable protection against unfair dealing in one cause of action, the court is going beyond the provisions of the statute. Until the court clearly establishes the procedure it wishes to

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103. *Weinberger*, 457 A.2d at 711.

104. Both actions would be brought in chancery court. See DEL. CODE ANN. tit. 8, § 262(a) (Supp. 1982); *Weinberger*, 457 A.2d at 714-15.

105. See *supra* note 30.

106. Apparently, this was prompted in part by the United States Supreme Court's less than favorable review of Delaware law. See *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977), cited in *Singer v. Magnavox Co.*, 380 A.2d 969, 976 n.6 (Del. 1977).

107. *Weinberger*, 457 A.2d at 711.

108. *Id.* at 704-12.

109. See DEL. CODE ANN. tit. 8, § 262 (Supp. 1982).

110. Traditionally, when the court spoke of the dissenting shareholders' "election," it was referring to the choice between accepting the merger price or perfecting the right to appraisal. *E.g.*, *Southern Prod. Co. v. Sabath*, 32 Del. Ch. 497, 87 A.2d 128, 134 (Del. 1952); *Lichtman v. Recognition Equip. Inc.*, 295 A.2d 771, 772 (Del. Ch. 1972); *Bruce v. E.L. Bruce Co.*, 40 Del. Ch. 80, 174 A.2d 29, 30 (1961); *Cole v. National Cash Credit Ass'n*, 18 Del. Ch. 47, 156 A. 183, 187 (1931). The election discussed here, however, refers to the dissatisfied plaintiffs' choice between a sure but unattractive appraisal remedy, and a visually unpromising equitable action for fraud or illegality. See, *e.g.*, *Stauffer v. Standard Brands Inc.*, 41 Del. Ch. 7, 187 A.2d 78, 80 (Del. 1962); *David J. Greene & Co. v. Dunhill Int'l, Inc.*, 249 A.2d 427, 430 (Del. Ch. 1968).



follow, however, plaintiffs should treat the technical requirements of section 262 as their procedural model.<sup>111</sup>

Consistent with that model, dissatisfied shareholders should submit to the majority shareholder a timely written statement,<sup>112</sup> rejecting the merger offer and placing the corporation on notice<sup>113</sup> of their intent to pursue a *Weinberger* fairness action.<sup>114</sup> They should then file their claims in equity, demonstrating "some [factual] basis for invoking the fairness obligation."<sup>115</sup> Given the time constraints, most plaintiffs will find specific allegations of unfair price easier to substantiate than charges of unfair dealing.<sup>116</sup> If subsequent discovery yields evidence of unfair dealing, plaintiffs can seek leave to amend their complaints<sup>117</sup> as *Weinberger* did.<sup>118</sup> The parties should then proceed in equity.<sup>119</sup>

## V. CONCLUSION

In revising the appraisal techniques and creating a new equitable action, the Delaware court has gone a long way toward reconciling the in-

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111. Admittedly, the court stated that § 262 "governs" the means for perfecting plaintiffs' financial remedy. *Weinberger*, 457 A.2d at 715. However, as has been demonstrated, this cannot under present Delaware law be reconciled with the court's desire to preserve a unified cause of action for unfairness.

112. This would be, in part, to foreclose a defense of laches, *see Harman v. Masoneilan Int'l. Inc.*, 442 A.2d 487, 503 (Del. 1982), as well as to appear to conform as much as possible to § 262 principles.

113. The statutory requirement, now under § 262(d), that a shareholder submit a written appraisal demand serves to inform both the corporation and other stockholders of the number of potential demandants of cash for their shares. *E.g.*, *Colonial Realty Corp. v. Reynolds Metals Co.*, 40 Del. Ch. 515, 185 A.2d 754, 756 (1962), *aff'd*, 41 Del. Ch. 183, 190 A.2d 752 (Del. 1963). The statute's underlying purpose remains, that is, to inform the corporation of the dissenter's intentions. *See Bell v. Kirby Lumber Corp.*, 413 A.2d 137, 149 (Del. 1980).

114. While the procedural machinations might appear unseemly, plaintiffs could submit a § 262 demand for appraisal with notice of intention to withdraw the submission within the statutorily allowed 60 days if sufficient evidence is found by which to allege a *Weinberger* action. This has two limitations. First, the opportunity for discovery under the statute is controlled by the court's discretion. Second, assuming plaintiffs are permitted discovery, they have imposed upon themselves an unnecessary time constraint.

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

116. Plaintiffs have the merger price and access to financial advice about its fairness. They are less likely at this time to have the requisite information for an unfair dealing allegation.

117. DEL. CH. CT. C.P.R. 15.

118. *See Weinberger v. UOP, Inc.*, 409 A.2d 1262, 1267 (Del. Ch. 1979) (earlier case involving same merger transaction).

119. The only model for the fairness proceeding is the fairness proceeding to which the *Tanzer* court remanded the parties. *Tanzer v. International Gen. Indus., Inc.*, 379 A.2d 1121, 1125 (Del. 1977). On remand, the chancellor declined to find the "easy" holding that a "fairness hearing means a trial." Instead, he found no disputed factual issues remaining and granted the defendant's motion for summary judgment. *Tanzer v. International Gen. Indus., Inc.*, 402 A.2d 382, 385 (Del. Ch. 1979). The implication is that where there are factual disputes a fairness proceeding mandates a trial.

terests of minority and majority shareholders. Dissatisfied shareholders now enjoy significant protection from many potential abuses of corporate power in merger situations. Moreover, majority shareholders can structure their mergers in ways that should yield predictable results, both as to what may be successfully challenged and the cost of that challenge. Majority shareholders, however, may be less than pleased at the prospect of paying an amount closer to market price.

The court should resolve the present pleading problem in the near future.<sup>120</sup> The court might create an interim period, as it did in *Weinberger*, during which it would indulge more pleading discrepancies than would subsequently be the case. If the court concludes, as seems most practical, that a plaintiff should seek a “fairness analysis” by bringing a single equitable action, the legislature should rewrite the appraisal statute to accommodate the enlarged action and plaintiffs’ attendant difficulties in developing evidence for a fair dealing allegation. Failing this, the court could relax its strict adherence to the statutory time limits of section 262. If the court, on the other hand, finds two separate actions more attractive, it should strike down the line of cases which appears to bar the joinder of the two actions.

However, the elimination of a duplicative action promises greater administrative efficiency at no discernible cost to justice. Ultimately, the court and the Delaware legislature must recognize that a *Weinberger* action subsumes an appraisal action under section 262. The court has forced the legislature to rewrite the statute to address violations of fair dealing, as well as fair price. If the legislature does not act, section 262 will continue to serve as a procedural model but will be a substantive dead letter.

*John T. McLean*

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120. If a plaintiff alleging both unfair price and unfair dealing seeks a § 262 remedy, the defendant is likely to move for dismissal. Defendant will allege that plaintiff has failed to state a claim upon which relief can be granted, because a § 262 action provides no remedy for unfair dealing. If the plaintiff, unsure of the unfair dealing claims, brings a *Weinberger* action in which only an unfair price is alleged, the defendant will move for dismissal, claiming that the plaintiff has not perfected a right to appraisal as required by the statute. In either situation, the issue will soon be drawn for the court.

## APPENDIX

DEL. CODE ANN. tit. 8, § 262 (Supp. 1982), provides:

§ 262. Appraisal rights.

(a) Any stockholder who has complied with subsection (d) of this section and has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of his shares of stock under the circumstances described in subsections (b) and (c) of this section. As used in this section, the word "stockholder" means a holder of record of stock in a stock corporation and also a member of record of a nonstock corporation; the words "stock" and "share" mean and include what is ordinarily meant by those words and also membership or membership interest of a member of a nonstock corporation.

(b) Appraisal rights shall be available for the shares of any class or series of stock of a constituent corporation in a merger to be effected pursuant to § 251, 252, 254, 257 or 258 of this title:

(1) Provided, however, that no appraisal rights under this section shall be available for the shares of any class or series of stock which, at the record date fixed to determine the stockholders entitled to receive notice of and to vote at the meeting of stockholders to act upon the agreement of merger or consolidation, were either (i) listed on a national securities exchange or (ii) held of record by more than 2,000 stockholders; and further provided that no appraisal rights shall be available for any shares of stock of the constituent corporation surviving a merger if the merger did not require for its approval the vote of the stockholders of the surviving corporation as provided in subsection (f) of § 251 of this title.

(2) Notwithstanding paragraph (1) of this subsection, appraisal rights under this section shall be available for the shares of any class or series of stock of a constituent corporation if the holders thereof are required by the terms of an agreement of merger or consolidation pursuant to §§ 251, 252, 254, 257 and 258 of this title to accept for such stock anything except:

a. Shares of stock of the corporation surviving or resulting from such merger or consolidation;

b. Shares of stock of any other corporation which at the effective date of the merger or consolidation will be either listed on a national securities exchange or held of record by more than 2,000 stockholders;

## Minority Shareholders and Cashout Mergers

c. Cash in lieu of fractional shares of the corporations described in the foregoing subparagraphs a. and b.; or

d. Any combination of the shares of stock and cash in lieu of fractional shares described in the foregoing subparagraphs (a), (b) and (c) of this paragraph.

(3) In the event all of the stock of a subsidiary Delaware corporation party to a merger effected under § 253 of this title is not owned by the parent corporation immediately prior to the merger, appraisal rights shall be available for the shares of the subsidiary Delaware corporation.

(c) Any corporation may provide in its certificate of incorporation that appraisal rights under this section shall be available for the shares of any class or series of its stock as a result of an amendment to its certificate of incorporation, any merger or consolidation in which the corporation is a constituent corporation or the sale of all or substantially all of the assets of the corporation. In such event, the procedures of this section, including those set forth in subsections (d) and (e) of this section, shall apply as nearly as is practicable.

(d) Appraisal rights shall be perfected as follows:

(1) If a proposed merger or consolidation for which appraisal rights are provided under this section is to be submitted for approval at a meeting of stockholders, the corporation, not less than 20 days prior to the meeting, shall notify each of its stockholders entitled to such appraisal rights that appraisal rights are available for any or all of the shares of the constituent corporations, and shall include in such notice a copy of this section. Each stockholder electing to demand the appraisal of his shares shall deliver to the corporation, before the taking of the vote on the merger or consolidation, a written demand for appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends thereby to demand the appraisal of his shares; provided, however, that such demand must be in addition to and separate from any proxy or vote against the merger. Within 10 days after the effective date of such merger or consolidation, the surviving corporation shall notify each stockholder of each constituent corporation who has complied with this subsection and has not voted in favor of or consented to the merger or consolidation of the date that the merger or consolidation has become effective; or

(2) If the merger or consolidation was approved pursuant to § 228 or § 253 of this title, the surviving corporation, either before the effective date of the merger or within 10 days thereafter, shall notify each of the stockholders entitled to appraisal rights of the effective date of the mer-

ger or consolidation and that appraisal rights are available for any or all of the shares of the constituent corporation, and shall include in such notice a copy of this section. The notice shall be sent by certified or registered mail, return receipt requested, addressed to the stockholder at his address as it appears on the records of the corporation. Any stockholder entitled to appraisal rights may, within 20 days after the date of mailing of the notice, demand in writing from the surviving corporation the appraisal of his shares. Such demand will be sufficient if it reasonably informs the corporation of the identity of the stockholder and that the stockholder intends to demand the appraisal of his shares.

(e) Within 120 days after the effective date of the merger or consolidation, the corporation or any stockholder who has complied with subsections (a) and (d), and who is otherwise entitled to appraisal rights, may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. Notwithstanding the foregoing, at any time within 60 days after the effective date of the merger or consolidation, any stockholder shall have the right to withdraw his demand for appraisal and to accept the terms offered upon the merger or consolidation. Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with the requirements of subsections (a) and (d), upon written request, shall be entitled to receive from the corporation surviving the merger or consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after his written request for such a statement is received by the corporation or within 10 days after expiration of the period for delivery of demands for appraisal under subsection (d), whichever is later.

(f) Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the corporation. If the petition shall be filed by the corporation, the petition shall be accompanied by such a duly verified list. The Register in Chancery, if so ordered by the Court, shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the corporation and to the stockholders shown on the list at the addresses therein stated. Such notice shall also be given by 1 or more

## Minority Shareholders and Cashout Mergers

publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in the City of Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices by mail and by publication shall be approved by the Court, and the costs thereof shall be borne by the corporation.

(g) At the hearing on such petition, the Court shall determine the stockholders who have complied with this section and who have become entitled to appraisal rights. The Court may require the stockholders who have demanded an appraisal for their shares to submit their certificates of stock to the Register in Chancery for notation thereon of the pendency of the appraisal proceedings; and if any stockholder fails to comply with such direction, the Court may dismiss the proceedings as to such stockholder.

(h) After determining the stockholders entitled to an appraisal, the Court shall appraise the shares, determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger, together with a fair rate of interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors. In determining the fair rate of interest, the Court may consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding. Upon application by the corporation or by any stockholder entitled to participate in the appraisal proceeding, the Court may, in its discretion, permit discovery or other pretrial proceedings and may proceed to trial upon the appraisal prior to the final determination of the stockholder entitled to an appraisal. Any stockholder whose name appears on the list filed by the corporation pursuant to subsection (f) of this section and who has submitted his certificates of stock to the Register in Chancery, if such is required, may participate fully in all proceedings until it is finally determined that he is not entitled to appraisal rights under this section.

(i) The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto upon the surrender to the corporation of the certificates representing such stock. The Court's decree may be enforced as other decrees of the Court of Chancery may be enforced, whether such surviving or resulting corporation be a corporation of this State or of any other state.

(j) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances. Upon application of a stockholder, the Court may order all or a portion of the expenses incurred by any stockholder in connection with the appraisal

proceeding, including, without limitation, reasonable attorney's fees and the fees and expenses of experts, to be charged pro rata against the value of all the shares entitled to an appraisal.

(k) From and after the effective date of the merger or consolidation, no stockholder who has demanded his appraisal rights as provided in subsection (d) of this section shall be entitled to vote such stock for any purpose or to receive payment of dividends or other distributions on the stock (except dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger or consolidation); provided, however, that if no petition for an appraisal shall be filed within the time provided in subsection (e) of this section, or if such stockholder shall deliver to the corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.

(l) The shares of the surviving or resulting corporation to which the shares of such objecting stockholders would have been converted had they assented to the merger or consolidation shall have the status of authorized and unissued shares of the surviving or resulting corporation.