University of Dayton Law Review

Volume 16 | Number 3 Article 8

4-1-1991

Corporate Law: Ohio's Newest Claim Outside of an Appraisal for Dissenting Shareholders in a Merger Situation - Breach of Fiduciary Duty

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Recommended Citation
Kinsella, David L. (1991) "Corporate Law: Ohio's Newest Claim Outside of an Appraisal for Dissenting Shareholders in a Merger Situation - Breach of Fiduciary Duty," *University of Dayton Law Review*: Vol. 16: No. 3, Article 8.
Available at: https://ecommons.udayton.edu/udlr/vol16/iss3/8

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CORPORATE LAW: OHIO'S NEWEST CLAIM OUTSIDE OF AN APPRAISAL FOR DISSENTING SHAREHOLDERS IN A MERGER SITUATION—BREACH OF FIDUCIARY DUTY—*Stepak v. Schey*, 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

I. INTRODUCTION

Appraisal statutes provide shareholders with a right to have the value of their shares judicially determined and to be paid that amount in cash.[1] These statutes have been described as providing the only appropriate remedy for shareholders who are dissatisfied with the price agreed upon in a merger or acquisition.[2] Such a limitation on possible remedies has been justified by the Ohio Supreme Court because it reduces the "harassment potential" of "vexatious lawsuits" by preventing dissenting shareholders from bringing non-appraisal actions which in reality are attempts to receive more money for their stock.[3] Despite these reasons, courts have allowed remedies which do not arise from the appraisal statutes.[4] For example, Ohio courts have traditionally recognized that illegal, fraudulent, or *ultra vires*[5] transactions are actiona-

1. R. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS § 17.9.2 (1989).

2. *See generally* Steinberg v. Amplica, Inc., 42 Cal. 3d 1198, 729 P.2d 683, 233 Cal. Rptr. 249 (1986) (discussing statutory remedies); Walter J. Schloss Assocs. v. Chesapeake & Ohio Ry., 73 Md. App. 727, 536 A.2d 147 (1988) (discussing statutory remedies); Note, *Corporate law; In a merger situation where a shareholder was aware of all facts which constituted the basis of the claim of corporate fiduciary misconduct, an appraisal proceeding was the shareholder's exclusive remedy: Steinberg v. Amplica, Inc.*, 14 PEPPERDINE L. REV. 1048, 1048-54 (1987).

3. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 409, 513 N.E.2d 776, 788 (1987).

4. *See* Cottle v. Storer Communication, Inc., 849 F.2d 570, 574 (11th Cir. 1988) (directors' decisions are not protected where there is a showing of either fraud, bad faith, or abuse of discretion); Herskowitz v. Nutri/System, Inc., 857 F.2d 179, 187 (3rd Cir. 1988) (appraisal coexists with common law causes of action and appraisal is not enacted to provide a shield for such conduct); Mullen v. Academy Life Ins. Co., 705 F.2d 971, 973-75 (8th Cir. 1983) (a fiduciary duty is independent of statute and may be enforced in an action other than appraisal); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir. 1980) (action arises if director places himself in a position of conflicting loyalty); Ohio Drill & Tool Co. v. Johnson, 498 F.2d 186, 192 (6th Cir. 1974) (it does not matter if corporation suffered no loss, if the directors breached their duty and profited from it); Seagrave Corp. v. Mount, 212 F.2d 389, 397 (6th Cir. 1954) (appraisal is not exclusive where constructive fraud can be shown); Radol v. Thomas, 556 F. Supp. 586, 593 (S.D. Ohio 1983), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) (appraisal is not exclusive where defendants occupy a fiduciary relationship); Coggins v. New England Patriots Football Club, 397 Mass. 525, 533, 492 N.E.2d 1112, 1117-18 (1986) (appraisal is not exclusive where violations of fiduciary duties are found).

5. *Ultra vires* acts are those actions taken by the corporation that are beyond the purposes or powers of the corporation. W. KLEIN & J. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 136 (4th ed. 1990).

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ble by shareholders outside of the appraisal statute.[6] Additionally, at least two non-Ohio courts allow for breach of fiduciary duty actions where the directors have failed to obtain the best obtainable price in merger and acquisition situations.[7]

Prior to *Stepak v. Schey*,[8] Ohio courts had not specifically held that an action for breach of fiduciary duty could be maintained outside of Ohio's appraisal statute. This note analyzes the status of an action for breach of fiduciary duty outside the statutorily prescribed right of appraisal following the Ohio Supreme Court's *Stepak* decision.[9] The first section of this note reviews the basic fiduciary duties a director owes to a corporation. Application of the appraisal statutes and the recognized exceptions also are discussed. Next, this note traces the application of the rule of best obtainable price. Following that discussion, this note analyzes the majority, concurring, and dissenting opinions in *Stepak* and the Ohio Supreme Court's apparent reluctance to allow an additional action in all but a few cases.

II. FACTS AND HOLDING

In *Stepak v. Schey*[10] Barnett Stepak brought an action personally as a shareholder and on behalf of the common shareholders of the Scott & Fetzer Company.[11] The defendants were Scott & Fetzer, some of its officers and Berkshire Hathaway, Inc., Scott & Fetzer's new sole shareholder.[12] Stepak alleged that Scott & Fetzer granted Berkshire a lock-up option[13] to acquire Scott & Fetzer common shares[14] at a speci-

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6. *See, e.g., Radol*, 556 F. Supp. at 594 (S.D. Ohio 1983). Ohio's appraisal statute, OHIO REV. CODE ANN. § 1701.85 (Anderson Supp. 1990), has been interpreted by Ohio courts as providing an exclusive remedy, unless the transaction was illegal, fraudulent, or *ultra vires*. *See* Johnson v. Lamprecht, 133 Ohio St. 567, 578, 15 N.E.2d 127, 132 (1938) (in dismissing the case the court noted that the plaintiffs had failed to allege fraud or illegality); Vulcan Corp. v. Westheimer & Co., 14 Ohio Op. 274, 276, 34 N.E.2d 278, 280 (1938), *appeal dismissed*, 135 Ohio St. 136, 19 N.E.2d 901 (1939) (the relief provided in the appraisal statute is exclusive to a minority shareholder in the absence of fraud or illegality); Williams v. National Pump Co., 46 Ohio App. 427, 432, 188 N.E. 756, 758, *appeal dismissed*, 126 Ohio St. 457, 186 N.E. 403 (1933) (the appraisal statute "provide[s] a remedy for the objecting stockholders, and we are of the opinion that the remedy so provided is exclusive").

7. Edelman v. Fruehauf Corp., 798 F.2d 882, 887 (6th Cir. 1986); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

8. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

9. *Id.*

10. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

11. *Id.* at 9, 553 N.E.2d at 1073.

12. *Id.*

13. A lock-up option is an option or right granted to a takeover party to purchase additional shares of the target's stock at specified prices. R. HAMILTON, *supra* note 1, § 17.12.2.

14. Common shares are the proprietary units of ownership in a corporation and represent the residual ownership interest in the corporation. R. HAMILTON, *supra* note 1, § 15.2.

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fied price as a part of the merger agreement between the two entities.[15] The plaintiff alleged that the lock-up option was illegal because no consideration was given, and it was intended to thwart attempts of other potential bidders to purchase Scott & Fetzer common shares at a price higher than that offered by Berkshire.[16] Stepak did not identify any alternative bidders who offered or could have offered a price higher than the $60.45 per share price offered by Berkshire.[17]

Stepak further alleged that $30 million in benefits were paid to Scott & Fetzer executives as a result of the merger agreement.[18] Prior to their vote to approve the merger, the shareholders were informed of the benefits in the form of contingent compensation, stock options, and severance agreements that would accrue to the directors and officers of Scott & Fetzer as a result of the merger.[19] The contingent compensation contracts had been in effect prior to the merger.[20] They provided that certain corporate officers would receive compensation based on the difference between the market price at the time the contracts were entered into and the price received by shareholders in the sale of the company.[21] Stepak contended that if the defendants had not engaged in unfair dealing and manipulation the $30 million in benefits would have been conferred upon the shareholders of Scott & Fetzer as additional consideration resulting from the merger.[22]

Finally, the plaintiff alleged that the structuring of the merger constituted a breach of the defendants' fiduciary duties to the Scott & Fetzer shareholders.[23] Stepak concluded that as a result of the alleged actions, he and the other common shareholders of Scott & Fetzer had been and would be damaged because they had not and would not receive "their fair proportion of the value of the [company's] assets and business."[24] He also stated that he and the other shareholders had been and would be prevented from obtaining a fair market price for their common stock.[25]

At trial, the defendants moved to dismiss the plaintiff's claims on the grounds that they were barred by Ohio Revised Code section

15. *Stepak*, 51 Ohio St. 3d at 9, 553 N.E.2d at 1073.

16. *Id.* at syllabus.

17. Appellants' Opening Brief at 6, Stepak v. Schey, 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990) (No. 88-1940).

18. *Stepak*, 51 Ohio St. 3d at 9, 553 N.E.2d at 1073.

19. Appellants' Opening Brief at 9, *Stepak* (No. 88-1940).

20. *Id.*

21. *Id.*

22. *Stepak*, 51 Ohio St. 3d at 9, 553 N.E.2d at 1073.

23. *Id.*

24. *Id.*

25. *Id.*

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1701.85,[26] Ohio's appraisal statute.[27] The defendants further alleged that the plaintiff's claims were derivative in nature and therefore belonged to the corporation and could not be pursued by one who was no longer a shareholder.[28] In an unwritten decision, the trial court granted the defendants' motion.[29] The Court of Appeals for Cuyahoga County reversed and held that the plaintiff's complaint was not barred by the decision in *Armstrong v. Marathon Oil Co.*,[30] because it "was not a direct challenge to determination of the fair value of the stock."[31] The court of appeals stated that Stepak made allegations that, to the financial detriment of the shareholders, the directors had engaged in unfair dealing by granting an illegal lock-up option which prevented competitive bidding and that they had engaged in self-dealing by the illegal payment of substantial benefits to the officers and directors.[32] Finally, the court concluded that the plaintiff's claims were "tantamount to fraud" and that he could maintain a personal action, exclusive of a derivative claim, because he was injured personally when "his shares were bought out pursuant to the merger."[33] The court of appeals certified the record of the case to the Ohio Supreme Court for review.[34]

The supreme court reversed the court of appeals' decision and reinstated the dismissal of the case by the trial court.[35] The majority opinion stated that "an action for breach of fiduciary duty may be maintained notwithstanding R.C. 1701.85 [the appraisal statute]; however, such action may not seek to overturn or modify the fair cash value determined in a cash-out merger."[36] The majority concluded that the plaintiff was essentially challenging the sufficiency of the value paid for his shares in the cash-out merger and was thus merely asking for more money.[37] Therefore, based on the supreme court's prior holding in

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26. Ohio Rev. Code Ann. § 1701.85 (Anderson Supp. 1990).

27. *Stepak*, 51 Ohio St. 3d at 9, 553 N.E.2d at 1073.

28. *Id.*

29. *Id.*

30. 32 Ohio St. 3d 397, 513 N.E.2d 776 (1987). In *Armstrong*, the Ohio Supreme Court stated that provable injury under any type of action is "compensable so long as it does not seek to modify the fair cash value determined" and that such an action is to be maintained outside an appraisal proceeding. *Id.* at 422, 513 N.E.2d at 798.

31. *Stepak*, 51 Ohio St. 3d at 9, 553 N.E.2d at 1073-74.

32. *Id.*

33. *Id.* at 9, 553 N.E.2d at 1074.

34. *Id.*

35. *Id.* at 11, 553 N.E.2d at 1075.

36. *Id.* at 10, 553 N.E.2d 1074. A cash out merger has been defined as a transaction where some shareholders are compelled to accept cash or property for their shares while other shareholders retain or receive equity interests in the continuing business. R. Hamilton, *supra* note 1, at 542.

37. *Stepak*, 51 Ohio St. 3d at 11, 553 N.E.2d at 1075.

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Armstrong, appraisal was his only remedy.[38] The concurring opinion spelled out what must be proven to maintain an action for breach of fiduciary duty and declared that Ohio does not follow the rule laid out in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[39] *Revlon*[40] established that directors have a duty to obtain the highest possible price for the corporation's stock.[41] The dissenting opinion argued that the plaintiff had not merely asked for more money.[42] It stated that the majority effectively "leave[s] shareholders without a remedy where management, in breach of its fiduciary duty, eliminates" potential higher bidders.[43] The dissenting opinion called for the Ohio Supreme Court to adopt the rule laid out in *Revlon*.[44] To properly address the Ohio Supreme Court's decision in *Stepak v. Schey*, the scope of directors' fiduciary duties, the appraisal statute and its applications, and the duty to obtain the best obtainable price must be examined.

III. Background

A. *Fiduciary Duties*

1. Generally

It is a long established principle in Ohio that directors of a corporation have a fiduciary obligation to the corporation and are held liable to shareholders or the corporation if corporate funds or property are wasted or mismanaged due to their inattention to these fiduciary duties.[45] There are two separate duties which constitute the obligation of directors: care and loyalty.[46]

2. Duty of Care - The Business Judgement Rule

Ohio has codified the duty of care in Ohio Revised Code section 1701.59(B).[47] Section 1701.59 requires that a director perform his duties "with the care that an ordinarily prudent person in a like position would use under similar circumstances."[48] The statute requires that it

38. *Id.*
39. *Id.* at 14, 553 N.E.2d at 1078.
40. 506 A.2d 173 (Del. 1986).
41. *Stepak*, 51 Ohio St. 3d at 14, 553 N.E.2d at 1078.
42. *Id.* at 15-17, 553 N.E.2d at 1079-80 (Brown, J., dissenting).
43. *Id.* at 15-16, 553 N.E.2d at 1079 (Brown, J., dissenting).
44. *Id.* at 16-17, 553 N.E.2d at 1079 (Brown, J., dissenting).
45. Stepak v. Schey, 51 Ohio St. 3d 8, 11-12, 553 N.E.2d 1072, 1076 (1990); *accord* Radol v. Thomas, 772 F.2d 244, 256 (6th Cir. 1985) *cert. denied*, 477 U.S. 903 (1986); *see also* Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir. 1980); Nienaber v. Katz, 69 Ohio App. 153, 43 N.E.2d 322 (1942).
46. *See* cases cited *supra* note 45.
47. Ohio Rev. Code Ann. § 1701.59(B) (Anderson Supp. 1990).
48. *Id.*

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be proven that the director violated his duty of care "by clear and convincing evidence."[49] The Sixth Circuit has said that "in evaluating a director's compliance with the duty of care, Ohio courts adhere to the business judgment rule."[50] This is the standard under which courts have reviewed corporate decision-making.[51]

The business judgement rule declares that a court will not inquire into the wisdom of actions taken by disinterested directors in the absence of fraud, bad faith, or abuse of discretion.[52] One commentator has said that a presumption arises "that disinterested directors have met all the required standards of conduct" where the business judgment rule is applicable.[53] This judicial deference to the business decision-making of directors may be justified by the belief that corporate directors must have "sufficient discretion to develop business strategies that may enhance the company's effectiveness and profitability."[54] Judicial inquiry into business decision-making would discourage the pursuit of business strategies because while such strategies will inevitably involve some risk, it is a risk that the company must be willing to accept if it is to grow and prosper.[55]

3. Duty of Loyalty

The duty of loyalty has been codified in Ohio Revised Code section 1701.59(B).[56] This statute requires that the director perform his duties in good faith, in a manner he reasonably believes to be in, or not opposed to, the best interests of the corporation.[57] There is a long estab-

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49. *Id.* § 1701.59(C).

50. Radol v. Thomas, 772 F.2d 244, 256 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *see also* Gruber v. Chesapeake & Ohio Ry., 158 F. Supp. 593, 603 (N.D. Ohio 1957); Apicella v. PAF Corp., 17 Ohio App. 3d 245, 247, 479 N.E.2d 315, 318 (1984); Ohio Nat'l Life Ins. Co. v. Struble, 82 Ohio App. 480, 485, 81 N.E.2d 622, 625, *appeal dismissed*, 150 Ohio St. 409, 82 N.E.2d 856 (1948).

51. Note, *Corporate Auctions and Directors' Fiduciary Duties: A Third Generation Business Judgement Rule*, 87 MICH. L. REV. 276, 280 (1988).

52. *See generally* Walter, *The Directors' Business Judgement Rule - The Final Act?*, 22 SUFFOLK U. L. REV. 649, 650-51 (1988).

53. Note, *supra* note 51, at 281.

54. *Id.*

55. *Id.* One commentator has noted that "[i]n the context of merger, takeover, and shareholder's derivative action . . . [several] cases have affirmed . . . a more onerous standard of care on the director," and this trend toward a stricter test for such transactions has been predicted to continue indefinitely. Walter, *supra* note 52, at 685-86.

56. OHIO REV. CODE ANN. § 1701.59(B) (Anderson Supp. 1990).

57. *Id.*

> [A] director, in determining what he believes to be in the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following:
>
> (1)The interests of the corporation's employees, suppliers, creditors, and customers;
>
> (2)The economy of the state and the nation;

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lished principle in the common law that directors owe a fiduciary duty to the corporation and that "good faith and full disclosure to shareholders do not insulate a director from liability if he has placed himself in a position of conflicting loyalties to the corporation and his own private interest."[58] Since directors owe a duty of loyalty to the corporation, they are not entitled to the protection of the business judgement rule when they are personally interested in a corporate control transaction which is the subject of their business judgment.[59] A director is "interested" in the transaction when the outcome of the transaction would directly and materially affect his position with the company or his personal financial interests.[60] The Second and Sixth Circuits, and at least one commentator, have stated that "[o]nce a prima facie showing is made that directors have a self-interest in a particular corporate transaction, the burden shifts to them to demonstrate that the transaction is fair and serves the best interests of the corporation and the shareholders."[61] The Sixth Circuit has also stated that the directors' burden of showing that a transaction is fair and in the best interests of shareholders is dependent upon the plaintiff "showing that the directors have acted in bad faith or without the requisite objectivity."[62] Consequently, before the directors need to defend their actions, the plaintiff must show either that the directors had a self-interest in the transaction or had acted in bad faith or without objectivity.

B. *The Appraisal Statute*

1. Reason for the Remedy

Appraisal statutes were enacted in reaction to changes in corporate structure which the common law could not accomodate. The common law required that fundamental corporate changes could occur only after the shareholders had unanimously consented.[63] In today's society, allowing a single shareholder to prevent needed changes in a corpora-

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(3)Community and societal considerations.

(4)The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.

Id. § 1701.59(E).

58. Radol v. Thomas, 772 F.2d 244, 257 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *see also* Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 264 (2nd Cir. 1984); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir. 1980); Seagrave Corp. v. Mount, 212 F.2d 389, 397 (6th Cir. 1954).

59. *Radol*, 772 F.2d at 257; *see also Norlin*, 744 F.2d at 264.

60. *Radol*, 772 F.2d at 257.

61. *Norlin*, 744 F.2d at 264; *see also Radol*, 772 F.2d at 257; Note, *supra* note 51, at 300-01.

62. *Radol*, 772 F.2d at 257.

63. *See* Griesse v. Lang, 37 Ohio App. 553, 555-56, 175 N.E. 222, 224 (1931).

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tion would make the corporate form unworkable because it would be nearly impossible for *all* the shareholders of a large corporation to agree on any particular action.[64] In fact, "all states have provided by statute that unanimity is no longer a requisite to approval by the shareholders of such fundamental changes in the corporate structure as merger or sale of assets."[65] In accordance with this response, Ohio enacted the appraisal statute, General Code 8628-72, which was subsequently renamed and amended as section 1701.85 of the Ohio Revised Code.[66] The appraisal statute provides dissenting shareholders the right to be paid the fair cash value of their shares.[67] Consequently, while the majority shareholders may approve fundamental changes, the dissenting shareholders are compensated for the dilution of their rights through the allowance of an appraisal action.[68]

2. Application of the Appraisal Statute

As noted in the preceding paragraph, the right to an appraisal in Ohio is governed by section 1701.85 of the Ohio Revised Code.[69] The shareholder or corporation must properly bring the issue before the common pleas court.[70] The court will then determine whether the shareholder is entitled to the fair cash value of his shares, and the court may appoint an appraiser to collect evidence and "recommend a decision on the amount of the fair cash value."[71] Fair cash value is to be determined "as of the day prior to that on which the vote by the shareholders was taken . . . [and] is the amount which a willing seller, under no compulsion to sell, would be willing to accept, and which a willing buyer, under no compulsion to purchase, would be willing to

64. *See Id.*

65. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 402-03, 513 N.E.2d 776, 782 (1987).

66. OHIO REV. CODE ANN. § 1701.85 (Anderson Supp. 1990).

67. *Id.* For a discussion of current types of appraisal statutes see Kanda & Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. REV. 429, 445-463 (1985).

68. *See generally* Opdyke v. Security Savings & Loan, 99 N.E.2d 84 (Ohio App. 1951), *aff'd*, 157 Ohio St. 121, 105 N.E.2d 9 (1952) (state savings and loan shareholders entitled to appraisal where corporation changes form to a federal savings and loan).

69. OHIO REV. CODE ANN. § 1701.85 (Anderson Supp. 1990). The vote as to a proposed transaction must have taken place and the result must be known, and the shareholder's share(s) must not have voted in favor of the proposal. *Id.* § 1701.85(A)(2). "[T]he shareholder shall deliver to the corporation a written demand for payment to him of the fair cash value of the shares as to which he seeks relief, stating . . . the amount claimed by him as the fair cash value of his shares." *Id.* If the shareholder and the corporation cannot agree on the fair cash value of the share(s), either the shareholder or the corporation may file an action which may be joined by other dissenting shareholders. *Id.* § 1701.85(B).

70. *Id.*

71. *Id.*

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pay."[72] Any appreciation or depreciation resulting from the merger, consolidation, or acquisition must be excluded from the determination of the fair cash value of the stock.[73] Since the statute states that such effects will be excluded, the Ohio Supreme Court stated that "[t]he valuation remedy clearly is a remedy that does not give dissenting shareholders any element of value attributable to the transaction from which they have dissented."[74]

3. Exceptions to an Appraisal

Although appraisal statutes are intended to satisfy the rights of dissenting shareholders, some courts have interpreted the relevant statute as allowing for some exceptions to the remedy.[75] As to the exclusiveness of appraisal as a remedy, one commentator has stated that there are four types of state statutory provisions: non-exclusive, exclusive, presumptive, and silent statutes.[76] In nineteen state statutes the appraisal remedy is non-exclusive for actions alleging fraud or illegality.[77] The appraisal remedy is made exclusive in only three state statutes.[78] If the plaintiff fails to exercise the statutory appraisal right, the third type of statute, the presumptive statute, provides that the shareholder: (1) shall be bound by the corporate action; (2) is bound by the corporate action; or (3) is conclusively presumed to have acquiesced in the corporate action.[79]

Lastly, six states have enacted silent appraisal statutes which do not mention whether the appraisal remedy is exclusive.[80] Ohio is one of these six states.[81] Where the appraisal statute is silent as to its exclu-

72. *Id.* at § 1701.85(C).

73. *Id.*

74. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 410, 513 N.E.2d 776, 788 (1987).

75. *See* cases cited *supra* note 4.

76. Dunn, *Steinberg v. Amplica: The California Supreme Court Holds Appraisal to be the Dissenting Shareholder's Remedy*, 22 U.S.F. L. REV. 293, 306-07 (1988).

77. *Id.* at 307. These states are Colorado, Georgia, Idaho, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, South Carolina, Texas and Virginia. *Id.*

78. *Id.* at 310. These states are Pennsylvania, Connecticut and California. *Id.* For a thorough discussion of the California statute see *Steinberg v. Amplica, Inc.*, 42 Cal. 3d 1198, 729 P.2d 683, 233 Cal. Rptr. 249 (1986). *See also* Note, *supra* note 1, at 1048-54.

79. Dunn, *supra* note 76, at 309-10.

> States having a "shall be bound" statute are Alabama, Alaska, Arkansas, District of Columbia, Florida, Iowa, Kentucky, Mississippi, Missouri, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. States having a "conclusively presumed" statute include Indiana, Louisiana, and Nevada ("deemed to have assented"). The Maryland statute simply states that the shareholder "is bound."

Id. (footnotes omitted).

80. *Id.* at 308. These six states are Arizona, Delaware, Illinois, Kansas, Ohio, and Oklahoma. *Id.*

81. *Id.*

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siveness, courts generally have allowed for remedies outside the appraisal statute.[82] Shareholders may seek another remedy outside the appraisal statute where transactions are illegal, fraudulent, or *ultra vires*, or where there is constructive fraud or a conflict of interest by the directors.[83] For the first time, in *Stepak v. Schey*, the Ohio Supreme Court allowed an action for breach of fiduciary duty outside Ohio's appraisal statute.[84] The remaining five states which have enacted silent appraisal statutes have not yet addressed the availability of an action for breach of fiduciary duty outside their statutes.[85]

While the Ohio Supreme Court, prior to *Stepak v. Schey*, had not directly addressed the issue of whether an action for breach of fiduciary duty can be maintained outside the appraisal statute, [86] several courts in other states and the federal circuit had considered it.[87] In *Walter J. Schloss Associates v. Chesapeake & Ohio Railway*,[88] the Court of Special Appeals of Maryland agreed with the plaintiffs' contention that the Maryland appraisal statute does not limit them to payment of fair value even after the merger is consummated.[89] The Maryland court allowed the plaintiffs to sue in the alternative for rescissory or other damages where they alleged fraud, breach of fiduciary obligation, overreaching, or lack of fair dealing.[90] The court, however, agreed with the Delaware Supreme Court's *Weinberger v. UOP, Inc.*[91] decision which

82. *See* cases cited *supra* note 4.

83. *Id.*

84. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

85. Dunn, *supra* note 76, at 308.

86. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

87. *See generally* Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Mullen v. Academy Life Ins. Co., 705 F.2d 971 (8th Cir. 1983); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738 (6th Cir. 1980); Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983); Walter J. Schloss Assocs. v. Chesapeake & Ohio Ry., 73 Md. App. 727, 536 A.2d 147 (1988).

88. 73 Md. App. at 727, 536 A.2d at 153.

89. *Id.* at 738, 536 A.2d at 153. In *Schloss*, the merger of two subsidiaries of CSX Corporation was contested by the minority shareholders of one of the subsidiaries, the Baltimore and Ohio Railway Company (B & O), who claimed that the $113 per share price offered to them was grossly inadequate. *Id.* at 733, 536 A.2d at 150. The directors of B & O subsequently approved the plan of merger and the payment of $124 per share for the minority shareholders of B & O after these shareholders instituted an action with, among others, claims of breach of fiduciary duty to the minority shareholders. *Id.* at 736, 536 A.2d at 151.

90. *Id.* at 738, 536 A.2d at 153.

91. 457 A.2d at 701 (Del. 1983). At issue in *Weinberger* was a proposal by a 50.5% parent to purchase the remaining 49.5% of the subsidiary. *Id.* at 705. The officials of the parent, who were also directors of the subsidiary, had suggested in a report that a purchase of up to $24 per share would be a good investment for the parent, but the parent decided to offer only $21 per share. *Id.* at 707-08. The report was never shared with the minority shareholders, and the $21 price was approved. *Id.* at 708. The difference between the $21 per share and $24 per share constituted over $17 million to the minority shareholders. *Id.* at 709.

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indicated that the plaintiff must allege specific acts of misconduct to demonstrate the unfairness of the merger terms to the minority.[92] The *Weinberger* court concluded that the appraisal remedy is exclusive for minority shareholders in a merger.[93] It recognized, however, that the appraisal "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."[94] The *Weinberger* court did not explain why it found that these types of cases might be inadequately remedied by the appraisal statute. In discussing the application of *Weinberger* in *Rabkin v. Philip A. Hunt Chemical Corp.*,[95] the Delaware Supreme Court articulated that "mere allegations of 'unfair dealing,' " with regard to a corporate merger, "without more, cannot survive a motion to dismiss"; however, "averments containing 'specific acts of fraud, misrepresentation, or items of misconduct' " must be carefully examined.[96] The court in *Schloss*, taking into account the decisions in *Weinberger* and *Rabkin*, found that the plaintiffs' averments were wholly inadequate because they were merely conclusory and were "essentially a complaint over price - the amount and how it was established" for which appraisal was an adequate remedy.[97]

Several courts have addressed the availability of an action for breach of fiduciary duty outside the appraisal statute where there has been a breach of the duty of loyalty.[98] Some of these courts have stated that a director is liable for breach of fiduciary duty even if the director acted without actual fraudulent intent if the director placed himself in a position of conflicting loyalties and subsequently violated his or her primary obligation to the corporation.[99] For example, in *Seagrave*

92. *Schloss*, 73 Md. App. at 743, 536 A.2d at 155; *see also Weinberger*, 457 A.2d at 703.

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

94. *Id.*

95. 498 A.2d 1099 (Del. 1985). In *Rabkin*, a class action was brought on behalf of the minority shareholders of Hunt Chemical Corporation challenging the merger of Hunt with its majority stockholder, Olin Corporation. *Id.* at 1100. When Olin bought 63.4% of the outstanding stock, it promised to pay $25 per share if it acquired the remaining Hunt stock within one year thereafter. *Id.* at 1101. A year and twenty-six days later Olin offered to pay $20 per share. *Id.* at 1102. The minority shareholders instituted an action claiming "that the price offered was grossly inadequate because Olin unfairly manipulated the timing of the merger to avoid the one year commitment." *Id.* at 1103.

96. *Id.* at 1105.

97. Walter J. Schloss Assocs. v. Chesapeake & Ohio Ry., 73 Md. App. 727, 748, 536 A.2d 147, 158 (1988).

98. *See* Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir. 1980); Seagrave Corp. v. Mount, 212 F.2d 389, 397 (6th Cir. 1954).

99. *Ohio Drill*, 625 F.2d at 742. *See also* Ohio Drill & Tool Co. v. Johnson, 498 F.2d 186, 191-92 (6th Cir. 1974); *Seagrave*, 212 F.2d at 397; Nienaber v. Katz, 69 Ohio App. 153, 158, 43 N.E.2d 322, 325 (1942).

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Corp. v. Mount,[100] because certain directors who had approved the transaction stood to gain from the deal, the Sixth Circuit invoked the equitable doctrine of constructive fraud.[101] Under this doctrine, acts done in good faith may amount to constructive fraud even though the director had no intent to harm the corporation, if the acts were done by a director who had a conflict between his fiduciary obligations and his own private interests.[102] A court may then take appropriate action to prevent the harm resulting from such actions, regardless of the director's good intentions.[103]

In *Radol v. Thomas*,[104] the Court of Appeals for the Sixth Circuit, applying Ohio law, discussed the principle that a director owes a fiduciary duty to the corporation and noted that "good faith and full disclosure to shareholders do not insulate a director from liability if he has placed himself in a position of conflicting loyalties to the corporation and his own private interest."[105] In *Radol*, shareholders of Marathon Oil Company brought an action claiming that the directors of Marathon had breached their fiduciary duty to the shareholders by structuring the merger of Marathon Steel and United States Steel in a manner that preserved their control over Marathon.[106] The *Radol* court took notice of the fact that *Seagrave* and *Ohio Drill & Tool Co. v. Johnson*[107] "appl[ied] the rule that directors owe a duty of loyalty to the corporation and are not entitled to the discretion permitted by the business judgment rule when they are interested in a corporate control transaction which is the subject of their business judgment as directors."[108] The *Radol* court, however, declined to accept the plaintiff's allegations of breach of the duty of loyalty based on a mere assertion "that [a] stock option agreement and employment assurance alone placed the directors in a position of conflicting loyalties so that the burden of proof shifted to the defendants" to show that the transaction was fair.[109] The court stated the general rule that "directors carry the

100. 212 F.2d 389 (6th Cir. 1954).

101. *Id.* at 397. In *Seagrave*, feuding directors sought to solidify their positions with the company in the structuring of a purchase of stock of another corporation. *Id.* at 393. The Sixth Circuit held that the personal interests of the controlling directors interfered with the unprejudiced judgment to which the plaintiffs were entitled. *Id.* at 397.

102. *Id.*

103. *Id.*

104. 772 F.2d 244 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

105. *Radol*, 772 F.2d at 257.

106. *Id.* at 246.

107. 625 F.2d 738 (6th Cir. 1980).

108. *Radol*, 772 F.2d at 257; *see also Ohio Drill*, 625 F.2d at 742; Seagrave Corp. v. Mount, 212 F.2d 389, 396 (6th Cir 1954).

109. *Radol*, 772 F.2d at 257.

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burden of showing that a transaction is fair and in the best interests of shareholders only *after* the plaintiff has made a prima facie case showing that the directors have acted in bad faith or without requisite objectivity."[110]

Finally, in *Armstrong v. Marathon Oil Co.*,[111] the Ohio Supreme Court discussed "whether the statutory proceeding under R.C. 1701.85 [Ohio's appraisal statute] is the exclusive means for the determination of the price that shall be paid for those shares held by the dissenting shareholders."[112] *Armstrong* was an action filed by dissenting shareholders of Marathon Petroleum Company challenging the merger between Marathon and a subsidiary of the United States Steel Corporation.[113] The shareholders sought the fair cash value of their stock through an appraisal action and attempted to join other causes of action to the proceeding.[114] The secondary claims asserted that the directors and controlling shareholders of Marathon had breached their fiduciary duties through the initiation, timing, negotiation, structure, and approval of the merger.[115] The *Armstrong* court determined that the appraisal remedy was the exclusive means for determining the value of the dissenters' shares.[116] The court concluded that the legislature intended section 1701.85(C) of the Ohio Revised Code to establish that the market price of the stock is determinative of the fair cash value.[117] The court considered the additional claims involved in *Armstrong* to be an attempt to include other factors in the determination.[118] Further, the court noted: "[T]his 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 utilized is compensable so long as it does not seek to overturn or modify the fair cash value determined."[119]

For the first time, in *Stepak v. Schey*,[120] the Ohio Supreme Court decided that this language in *Armstrong* allowed for the maintenance of an action for breach of fiduciary duty outside an appraisal proceeding.[121] This was in accord with the decisions in a growing number of other courts.[122]

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110. *Id.; see also* Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255, 264 (2d Cir. 1984).
111. 32 Ohio St. 3d 397, 513 N.E.2d 776 (1987).
112. *Id.* at 421-22, 513 N.E.2d at 798.
113. *Id.* at 398, 513 N.E.2d at 778.
114. *Id.*
115. *Id.* at 421, 513 N.E.2d at 797.
116. *Id.* at 421-22, 513 N.E.2d at 798.
117. *Id.*
118. *Id.*
119. *Id.* at 422, 513 N.E. 2d at 798.
120. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).
121. *Id.* at 8, 553 N.E.2d at 1073.

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C. *Obtaining the Best Possible Price*

At least two courts have determined that in certain circumstances directors have a duty to obtain the best possible price for the corporation at its sale.[123] In *Revlon Inc. v. MacAndrews & Forbes Holdings*,[124] the Delaware Supreme Court required that any defensive takeover measures attempted by directors be rationally related to shareholder benefit.[125] Specifically, the *Revlon* court held that "the directors must act as auctioneers whose primary responsibility is to realize the best sale price for the benefit of the stockholders" when the sale or breakup of a target corporation becomes inevitable.[126] In *Edelman v. Fruehauf, Corp.*,[127] the Court of Appeals for the Sixth Circuit, applying Michigan law, interpreted *Revlon* as saying that "[w]hen, in violation of this duty, directors take measures that are intended to put an end to the bidding, those measures may be enjoined."[128] The court allowed an injunction against a leveraged buyout[129] because the directors had not acted in good faith to negotiate the best deal for the shareholders but had acted as interested parties.[130] Prior to *Stepak v. Schey*,[131] the Ohio Supreme Court had not determined whether directors have such a duty to obtain the highest possible price in a merger situation and thus whether a shareholder may maintain an action for the breach of such a duty.

122. *See generally* Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Mullen v. Academy Life Ins. Co., 705 F.2d 971 (8th Cir. 1983); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738 (6th Cir. 1980); Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983); Walter J. Schloss Assocs. v. Chesapeake & Ohio Ry., 73 Md. App. 727, 536 A.2d 147 (1988).

123. *See* Edelman v. Fruehauf Corp., 798 F.2d 882, 887 (6th Cir. 1986); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

124. 506 A.2d 173 (Del. 1986).

125. *Id.* at 182. Some examples of defensive takeover measures include super-majority provisions, board staggerings, poison pills, shark repellents, state anti-takeover statutes, crown jewels, lock-up options, stock lockups, self tenders, greenmail payments, ESOPs, and white knights. For a further discussion of these measures, see W. KLEIN & J. COFFEE, JR., *supra* note 5, at 169-72.

126. Note, *supra* note 51, at 276.

127. 798 F.2d 882 (6th Cir. 1986).

128. *Id.* at 887.

129. A leveraged buyout is a transaction in which incumbent management of a corporation purchases all publicly owned shares of the corporation and makes the corporation privately owned. R. HAMILTON, *supra* note 1, § 17.16. Most of the purchase price is borrowed and is assumed by the now private corporation. *Id.*

130. *Id.*

131. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).

IV. ANALYSIS

A. Introduction

In *Stepak v. Schey*,[132] the Ohio Supreme Court declared that an action for breach of fiduciary duty may be maintained outside the appraisal statute, but the court imposed vague restrictions upon such an action, making its application uncertain. In *Armstrong v. Marathon Oil, Co.*,[133] the court declared that the appraisal remedy was to be considered exclusive but indicated that it would allow actions such as breach of fiduciary duty.[134] The court stated that an action may be maintained "under whatever theory utilized so long as it did not seek to overturn or modify the fair cash value determined."[135] The question then becomes whether Stepak was actually seeking to "overturn or modify the fair cash value."[136] The majority, concurring, and dissenting opinions in *Stepak* analyze the question in different fashions.

B. The Majority Opinion

The majority in *Stepak* used the following language in *Armstrong* as the basis for its holding: "[A]n action for breach of fiduciary duty may be maintained notwithstanding R.C. 1701.85; however, such action may not seek to overturn or modify the fair cash value determined in a cash-out merger."[137] The court's conclusion is consistent with several cases within the Third, Sixth, Eighth, and Eleventh Circuits and one state court outside Ohio.[138] The majority then considered whether an action for breach of fiduciary duty may be maintained when the plaintiff is charging breach based on the defendants' failure to obtain the highest possible price.[139] The majority viewed such a claim as essentially only a complaint over the price obtained for the shares.[140] Consequently, the court found that the action was barred by *Armstrong* as an independent claim because the plaintiff was challenging the value paid for his shares in the merger.[141]

The majority, however, gave little guidance to lower courts on what a plaintiff must prove to maintain an action for breach of fiduciary duty action outside the appraisal statute. First, it seems that the

132. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).
133. 32 Ohio St. 3d 397, 513 N.E.2d 776 (1987).
134. *Id.* at 422, 513 N.E.2d at 798.
135. *Id.*
136. *Id.*
137. *Stepak* at 10, 553 N.E.2d at 1074.
138. *See* cases cited *supra* note 4.
139. *Stepak*, 51 Ohio St. 3d at 10-11, 553 N.E.2d at 1075.
140. *Id.* at 11, 553 N.E.2d at 1075.
141. *Id.*

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majority opinion attempted to fashion a narrow disposition of Stepak's claim by focusing on his attempt to get "the highest obtainable price."[142] This essentially forecloses any viable claim where the plaintiff asserts a breach of fiduciary duty by the directors in designing a lock-up option that prevents the targeted corporation from obtaining *any* higher prices. If the breach of duty causes a decrease in the value that would have been obtained by the shareholders had there been no breach, the shareholder cannot complain if the value that is obtained is a fair cash value or better. For example, if corporation A wanted to acquire target corporation C for $20 per share and C's directors had entered into a lock-up option with Corporation B at $10 per share, C's shareholders could not maintain an action for breach of fiduciary duty if the "fair value" of the shares was $10. They would be merely complaining about the price obtained. One commentator has argued that "[s]tate fiduciary duty principles should be applied in a manner that will encourage lock-ups designed to stimulate bidding and will discourage devices that tend to foreclose all bidders but the optionee."[143] Since the transaction involved in *Stepak* was a lock-up option, any other potential bidders for Scott & Fetzer's shares were foreclosed from offering a higher price to the shareholders. If the directors are supposed to act in the best interests of the corporation and its owners, the shareholders, the directors should be required to obtain the best price possible to increase the amount received by the shareholders. The Ohio Supreme Court, however, considered that compelling the directors to obtain the highest possible price would unduly restrict the decision-making capacity of directors.[144] It may be in the best interests of the shareholders that the directors have the ability to fend off a hostile takeover with a defense such as a lock-up option. This would be true where there is a hostile takeover attempt by an individual or a corporation whose interests or management skills are not in accord with the shareholders' interests.

Second, the majority failed to address Stepak's allegations of self-dealing on the part of the defendants who received $30 million in benefits that should have been conferred upon the shareholders. The Court of Appeals for Cuyahoga County noted that Stepak made a relevant allegation of self-dealing.[145] The supreme court did not address this issue specifically. It is not clear whether the majority in the supreme court found that this specific allegation was moot since all the allega-

142. *Id.*

143. Note, *Lock-Up Options: Toward a State Law Standard*, 96 HARV. L. REV. 1068, 1078-79 (1983).

144. *Stepak*, 51 Ohio St. 3d at 14, 553 N.E.2d at 1078 (Holmes, J., concurring).

145. *Id.* at 9, 553 N.E.2d at 1074.

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tions were based upon a complaint merely asking for more money. It is possible that the court determined that the allegations were not supportable because benefits such as contingent compensation, stock options and severance agreements are very common in merger and acquisition situations, and have thus been impliedly consented to by shareholders.[146] Such benefits are frequently negotiated prior to a merger or acquisition agreement for the purpose of reducing the anxiety of executives about their futures and for attracting competent management to the corporations.[147] Finally, the majority opinion did not address the issue of whether Stepak could maintain a personal action as was decided by the court of appeals.[148]

The majority opinion implies that it will be a difficult task for a shareholder to pursue an action for breach of fiduciary duty outside the appraisal statute after the merger has occurred. Unless the plaintiff alleges that his or her shares were undervalued, he or she must be careful to plead specifically as to the breach claimed.[149] He or she must attempt to seek a remedy that will not be interpreted as merely a complaint about price. The majority in *Stepak* failed to delineate which claims challenge the value paid for shares.

C. *The Concurring Opinion*

The concurring opinion in *Stepak*, like the majority, recognized a right of action for breach of fiduciary duty outside the appraisal statute but in doing so attempted to give a clearer road map for future litigants than did the majority.[150] The concurrence carefully pointed out the applicable fiduciary duties and the standards that a shareholder must

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146. *See* Levine & Lykos, Practicing Lawyer Institute, No. 474, Hostile Battles for Corporate Control 127-36 (1985).

147. *Id.*

148. There is some question as to whether a former shareholder who has tendered his shares in a merger transaction may maintain a derivative action or an action individually for breach of fiduciary duty notwithstanding whether the action itself may be brought. A shareholder cannot maintain an individual action for his own benefit against directors who, it is contended, have committed acts damaging to the corporation, or through whose negligence the corporate assets have been wasted and lost. *See generally* Zinn v. Baxter, 65 Ohio St. 341, 62 N.E. 327 (1901). However, it would be possible for a *present* shareholder to maintain a derivative action if the corporate management fails or refuses to enforce a corporate right, commits breaches of trust, is guilty of fraudulent acts, whereby injury is done to the corporation's interests. *Id.* at 364-66, 62 N.E. at 330-31. It is important to note that this is predicated upon a present owner of shares. *Id.* A person who has parted with his shares in the corporation cannot maintain the action. The action can be maintained only by a shareholder while he still owns shares in the corporation. *Id.*; *see also* OHIO R. CIV. P. 23.1.

149. *Stepak*, 51 Ohio St. 3d at 11, 553 N.E.2d at 1075.

150. *Id.* at 12-14, 553 N.E.2d at 1076-77 (Holmes, J., concurring).

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overcome in a suit for breach of fiduciary duty.[151] The concurring opinion described the duties of care and loyalty that are enunciated in Ohio Revised Code section 1701.59 and how these duties have been interpreted by Ohio courts and the Sixth Circuit.[152] Unlike the majority, the concurring opinion stated explicitly that Ohio does not follow the rule laid out in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[153] that directors are held to a duty to obtain the highest possible price.[154]

The concurrence then stated that, while Stepak had sufficiently stated a cause of action for breach of fiduciary duty, his action failed because of his "untimeliness in asserting certain claims and his failure to request the proper remedy as to other claims."[155] The reasoning of the concurrence may have been that the plaintiff had a variety of other options which he apparently disregarded.[156] These options would include: an action seeking disgorgement of any profits resulting from the breach; an action to enjoin the merger prior to its consummation; an action for rescission of the merger and/or appropriate damages with a showing of unlawfulness, *ultra vires* acts, fraud, or nondisclosure; and simply an action for breach of fiduciary duties brought prior to the consummation of the merger.[157] The concurrence noted that to allow a claim for breach of fiduciary duty when there are other satisfactory remedies "would result in defeating the statutory purpose and intent of Ohio's corporate takeover and merger chapter."[158]

In *Armstrong*, the Ohio Supreme Court noted as a value of appraisal that reduction in costs is one of the purposes of the corporate takeover and merger chapter.[159] Costs avoided may include: (1) those

151. *Id.* The concurring opinion cited the following aforementioned statutes and cases in its discussion of the subjects. *See* OHIO REV. CODE ANN. §§ 1701.59(B),(C),(D) (Anderson Supp. 1990); *see also* Cottle v. Storer Communication, Inc., 849 F.2d 570 (11th Cir. 1988); Norlin Corp. v. Rooney, Pace, Inc., 744 F.2d 255 (2d Cir. 1984); Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738 (6th Cir. 1980); Ohio Drill & Tool Co. v. Johnson 498 F.2d 186 (6th Cir. 1974); Seagrave Corp. v. Mount, 212 F.2d 389 (6th Cir. 1954); Radol v. Thomas, 556 F. Supp. 586, 593 (S.D. Ohio 1983), *aff'd on other grounds*, 772 F.2d 244 (6th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); Gruber v. Chesapeake & Ohio Ry., 158 F. Supp. 593 (N.D. Ohio 1957); Apicella v. PAF Corp., 17 Ohio App. 3d 245, 247, 479 N.E.2d 315, 319 (1984); Ohio Nat'l Life Ins. Co. v. Struble, 82 Ohio App. 480, 485, 81 N.E.2d 622, 625 (1948); Nienaber v. Katz, 69 Ohio App. 153, 43 N.E.2d 322 (1942).

152. *Stepak*, 51 Ohio St. 3d at 12-15, 553 N.E.2d at 1076-78 (Holmes, J., concurring).

153. *Id.* at 14, 553 N.E.2d at 1078 (Holmes, J., concurring). (interpreting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)).

154. *Revlon*, 506 A.2d at 182.

155. *Stepak*, 51 Ohio St. 3d at 14-15, 553 N.E.2d at 1078 (Holmes, J., concurring).

156. *Id.* at 15, 553 N.E.2d at 1078-79 (Holmes, J., concurring).

157. *Id.* at 15, 553 N.E.2d at 1078 (Holmes, J., concurring).

158. *Id.* at 15, 553 N.E.2d at 1079 (Holmes, J., concurring).

159. Armstrong v. Marathon Oil Co., 32 Ohio St. 3d 397, 409-10, 513 N.E.2d 776, 788 (1987).

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borne by the dissenting shareholders in litigation; (2) costs to the majority shareholders of the funds expended in the litigation; and (3) costs incurred by the interruption of corporate reorganizations.[160] It seems logical that a plaintiff such as Stepak need not be afforded a further alternative claim when other sufficient avenues are available to him because he would be exposing corporations and shareholders to unwarranted costs.

D. *The Dissenting Opinion*

The dissenting opinion in *Stepak* declared that the majority ignored the allegations in the complaint and that the majority's rule would leave present and future shareholder litigants without any remedy.[161] In the view of the dissenters, when shareholders are "deprived of the best offer for their shares when self-dealing directors make a sale at fair cash value or better," they are left without a remedy.[162] One could argue that the majority is not ignoring the allegations but is looking to the true aspect of the claim. The majority found that the allegations were based on a mere attempt to receive more money for the shares and thus must be brought in an appraisal proceeding.[163] The dissent called for the adoption of the *Revlon*[164] rule that "[t]he directors owe a duty to the shareholders to obtain the highest price for the shares."[165] The dissent's argument was predicated upon the belief that the dissenting shareholders are entitled to receive the highest price obtainable, and that they are somehow entitled to receive a value over the appraisal fair cash value.[166] The dissent did not present any support that this is the law in Ohio, and apparently wanted the court to create an equitable remedy similar to that established in *Revlon*.[167] The dissent ignored the other remedies of the plaintiff which were described in the concurrence.[168] The argument in the dissent is unfounded, because it wishes to create a right to the highest obtainable price and chooses to ignore other actions which do leave a shareholder with a remedy.

V. CONCLUSION

It is apparent that the majority opinion in *Stepak v. Schey* did not instruct litigants in what they must plead and prove in a cause of ac-

160. *Id.*
161. *Stepak*, 51 Ohio St. 3d at 15-16, 553 N.E.2d at 1079 (Brown, J., dissenting).
162. *Id.* at 16, 553 N.E.2d at 1080 (Brown, J., dissenting).
163. *Id.* at 11, 553 N.E.2d at 1075.
164. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986).
165. *Stepak*, 51 Ohio St. 3d at 16, 553 N.E.2d at 1079-80 (Brown, J., dissenting).
166. *Id.* at 16-17, 553 N.E.2d at 1080.
167. *Revlon*, 506 A.2d at 184.
168. *Stepak*, 51 Ohio St. 3d at 15, 553 N.E.2d at 1078-79.

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tion for breach of fiduciary duty outside the appraisal statute. The majority opinion, however, did not sound the death knell for fiduciary duty actions against directors brought outside the appraisal statute. The court did recognize that such a claim exists, and that while the decision may be limited to actions that do not seek to overturn or modify the fair cash value determined, there are several other avenues that an aggrieved shareholder may pursue. As was described in the concurrence, these other avenues would include: an action seeking disgorgement of any profits resulting from the breach; an action to enjoin the merger prior to its consummation; an action for rescission of the merger and/or appropriate damages with a showing of unlawfulness, *ultra vires* acts, fraud, or nondisclosure; and simply an action for breach of fiduciary duties brought prior to the consummation of the merger.

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