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Corporation Law—Weinberger v. UOP, Inc.: Delaware Reevaluates State-Law Limitations on Take Out Mergers

The evolution of modern, "liberal" corporation acts has elicited a spirited debate among commentators and practitioners ever since New Jersey enacted the first modern liberal corporation act in 1896. Recently, this debate has been particularly acute with regard to the propriety of take out mergers.


3. The merger in which a majority stockholder pays cash as consideration for all, or substantially all, the remaining publicly held minority shares has been variously described as a take out, cash out, squeeze out, and freeze out. References to the majority stockholder as the possessor of coercive power is not limited or confined to a person or persons owning a majority of the voting stock in the target corporation but includes those whose control of the enterprise through stock ownership and domination of the proxy machinery effectively enables them to determine the terms of the merger. Brudney & Chirelstein, A Restatement, supra note 2, at 1358 n.10. This note will use the term "take out" to describe this transaction.

There are generally three situations in which a take out merger can occur: (1) two-step or second step mergers, (2) going private transactions, and (3) mergers of affiliates (parent-subsidiary mergers). Two-step take out mergers involve a controlling public corporation—as opposed to a controlling individual or group of individuals—that acquires another public corporation through the culmination of a single plan effected over a short time. In the typical two-step merger scenario, an attacking corporation offers to purchase greater than 50% of the shares of a target corporation. After a successful tender offer, the attacking corporation merges the target corporation into itself or a subsidiary.

A "true" going private transaction is one by which an individual or a group of individuals controlling a public corporation undertake a corporate transaction in order to acquire, either immediately or on a deferred basis, the entire equity interest in the corporation. The corporate transaction may take any one of several forms: a merger, a reverse split or other form of charter amendment, a sale of assets, or a dissolution. In a typical going private transaction, the founder of a company that had previously gone public elects to reverse his steps and restore the corporation to the status of sole ownership.

A. BORDEN, GOING PRIVATE § 1.02, at 1-3 (1982). Finally, a merger of affiliates involves a proposed take out merger between a parent corporation and a subsidiary corporation that the parent has controlled for an extended period of time. Brudney & Chirelstein, A Restatement, supra note 2, at 1370. As such, mergers between affiliates are distinguished from two-step mergers because
and the appropriate judicial and legislative role in protecting minority stock-

parent-subsidary mergers are not the product of an arm's length deal. *Id.* at 1371. In the typical parent-subsidary merger, the parent corporation controls a majority of the subsidiary's board of directors either through interlocking directorates or by officers of the parent sitting as members of the subsidiary's board. *Id.* at 1370.

An excellent historical perspective on the law of take out mergers is provided in Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. Rev. 624 (1981). Professor Weiss divides the historical evolution of take out mergers into four phases. Phase I was characterized by the common-law vested rights approach in which one stockholder in a corporation could block all other stockholders from making any fundamental changes in the corporation's business or charter. *Id.* at 626. This approach was based on the interpretation of the corporate charter as a contract both among the corporation's stockholders and between the state of incorporation and the corporation. *Id.* at 627-29. See also Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 Am. B. Found. Research J. 69, 77-82.

Phase II was the beginning of liberalization in which state legislatures recognized that unanimous stockholder approval requirements "created the potential for tyranny by the minority, thus impeding economic progress by blocking desirable commercial transactions." Weiss, *supra*, at 629. States responded by passing statutes providing for "sales of assets, mergers and consolidations, and voluntary liquidations, when approved by a corporation's board of directors and a majority or supramajority (rather than all) of [the] stockholders." *Id.* The courts, however, did not hesitate to exercise their equitable powers in this phase to limit perceived abuses of the statues, as the following passage indicates:

> "With reference to the power given to the majority or a certain proportion to dissolve, to sell all the assets, to merge or consolidate, . . . the courts have generally implied equitable limitations to reach just results. The wide powers granted [by statute] have not been interpreted to be unrestricted. . . . The use of these devices by the majority . . . has, as a rule, been strongly disapproved. Where merger or consolidation has been sought, fair terms and equality of treatment have been required, and the stockholder has not been forced to take the value of his shares except when these conditions have been met, and, of course, any others that the statute has prescribed." *Id.* at 631 (quoting Lattin, *Equitable Limitations on Statutory or Charter Powers Given to Majority Stockholders*, 30 Mich. L. Rev. 645, 664-65 (1932)).

Phase III was marked by the first cash merger statutes. Florida was the first state to adopt a cash merger statute. *Id.* at 632. The statute provided that merger or consolidation agreements "may provide for the distribution of cash, notes or bonds, in whole or in part, in lieu of stock to stockholders of the constituent corporations or any of them." Act of June 1, 1925, ch. 10096, § 36, 1925 Fla. Laws 134 (current version codified at Fla. Stat. Ann. § 607.214 (West 1977)). There is some question, however, whether the early cash merger statutes were intended to authorize take outs:

> [The conclusion most consistent with the available evidence is that the first cash merger statutes were enacted as part of a general effort to provide additional flexibility in the structuring of mergers, particularly since cash clearly could be used in bona fide business combinations accomplished by sales of assets. There is no evidence that the draftsmen of [these early] cash merger statutes anticipated that the statutes would be construed to authorize take outs, and a significant amount of evidence suggests that the draftsmen viewed take outs to be generally prohibited.

Weiss, *supra*, at 641.

Finally, phase IV is characterized by the legitimization of cash take out mergers. The first cash merger statute interpreted to authorize cash take out was the New York short-form merger provision for gas and electric companies holding more than 95% of their subsidiary's stock. *Id.* at 641-43. See Act of May 28, 1936, ch. 778, § 12(1), 1936 N.Y. Laws 1658 (current version codified at N.Y. Bus. Corp. Law § 901(a)(1) (McKinney 1963)). This provision was justified by the New York State Joint Legislative Committee because "the consolidation of operating companies . . . is desirable to effectuate greater economies, more efficient management and rate reductions." *Id.* (quoting Jt. Legislative Committee to Investigate Utilities, Report, Doc. No. 78, 159th Sess. 149 (1936), reprinted in 19 N.Y. Legis. Documents (1936)). Although the statute was passed in 1936, the first case challenging the statute's constitutionality was Beloff v. Consolidated Edison Co., 300 N.Y. 11, 87 N.E.2d 561 (1949). The court rejected plaintiff's vested-right claim and "upheld the statute on the ground that 'the merged corporation's shareholder has only one real right; to have the value of his holding protected, and that protection is given him by his right to an appraisal.'" Weiss, *supra*, at 643 (quoting *Beloff*, 300 N.Y. at 19, 87 N.E.2d at 564). In a similar challenge to the Delaware short-form merger statute the Delaware Supreme Court re-
holders. Since Delaware is considered the leader in the "race to the bottom," considerable attention was focused on the Delaware Supreme Court's opinion in Singer v. Magnovox Co. The Singer court concluded that a proposed take out merger "made for the sole purpose of freezing out minority stockholders, [was] an abuse of the corporate process," even though the merger complied literally with the Delaware corporation statutes. Thus, the court held that a merger, undertaken without any purpose other than the elimination of the minority stockholders, was a violation of the fiduciary duty owed by the majority stockholders to the minority. In Weinberger v. UOP, Inc., however, the court rejected the Singer "business purpose" test as a departure from previous case law and concluded that no "additional meaningful protection is afforded minority shareholders by the business purpose require-

ected a stockholder's challenge to a take out merger. Coyne v. Park & Tilford Distillers Corp., 38 Del. Ch. 514, 154 A.2d 893 (1959). In Coyne the court relied on the state's reserved power to amend corporate statutes to hold that the statute did not unconstitutionally deprive plaintiffs of their vested constitutional rights. Id. at 521-22, 154 A.2d at 897-98. The court also rejected plaintiffs' contention that "expulsion of a shareholder from the enterprise in which he has invested is contrary to the settled policy of the law." Id. at 517, 154 A.2d at 895; see Weiss, supra, at 650-51.


5. The attempt by state legislatures to develop the most liberal general corporation act has been characterized as the race to the bottom. See supra note 1. The leader in the race to the bottom is considered to be Delaware because the Delaware Act is considered the least restrictive act with regard to the interests of the corporation. See Cary, supra note 1, at 663-70.


7. Singer, 380 A.2d at 980.

8. Singer involved a challenge to a long-form merger authorized by Del. Code Ann. tit. 8, § 251 (1983). The court described § 251 as follows:

Section 251 authorizes a merger and any judicial consideration of that kind of togetherness must begin from that premise.

Section 251 also specifies in detail the procedures to be followed in accomplishing a merger. Briefly, these include approvals by the directors of each corporation and by "majority [vote] of the outstanding stock of" each corporation, followed by the execution and filing of formal documents. The consideration given to the shareholders of a constituent corporation in exchange for their stock may take the form of "cash, property, rights or securities of any other corporation." § 251(b)(4). A shareholder who objects to the merger and is dissatisfied with the value of the consideration given for his shares may seek an appraisal under 8 Del.C. § 262. Singer, 380 A.2d at 973-74. The court concluded that "[i]n this appeal it is uncontroversed that defendants complied with the stated requirements of § 251." Id. at 975.


10. 457 A.2d 701 (Del. 1983) (en banc) [hereinafter cited as Weinberger III], rev'd 426 A.2d 1333 (Del. Ch. 1981) [hereinafter cited as Weinberger II]. In Weinberger I, 409 A.2d 1262 (Del. Ch. 1979), plaintiff's complaint was dismissed. See infra note 16. Weinberger III was decided just five and one-half years after Singer.
ment." Instead, the court announced a newly formulated fiduciary fairness test based on the "entire fairness" of the transaction. To ensure the effectiveness of this test and to balance the corporate necessity of finality in merger transactions with the need for minority stockholder protection, the court liberalized the appraisal proceeding and mandated stockholder objections to this basic remedy.

This note examines the development of the business purpose test and analyzes the Weinberger court's rejection of it. It concludes that the court's failure to resolve the underlying policy considerations relevant to the various types of take out mergers and the internal inconsistencies in the court's reasoning provide inadequate guidance for the lower courts and undermine the precedential value of the Weinberger decision.

Plaintiff in Weinberger, a former stockholder of UOP, challenged a merger effected by The Signal Companies, Inc., UOP's former majority stockholder. On behalf of the class composed of all UOP stockholders who, as of the date the merger was effectuated, had not exchanged their shares for the merger price, plaintiff's amended complaint attacked the transaction on the

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12. An appraisal is a judicial proceeding in which the court determines the fair value of the minority stockholder's interest. In Delaware the relevant statutory language is in Del. Code Ann., tit. 8, § 262 (1983). Section 262 provides that any stockholder who has complied with the technical standing requirements of subsections (d), (e), (f), and (g) and has "neither voted in favor of the merger or consolidation nor consented thereto in writing . . . shall be entitled to an appraisal by the Court of Chancery of the fair value of his shares of stock." Id. § 262(a). If the consideration for the minority stockholders' shares is cash or cash and debt securities, appraisal is available as of right irrespective of the number of stockholders of the corporation or whether the shares are listed on a national exchange. Id. § 262(b)(2). In addition, the appraisal right is guaranteed if the merger is a short-form merger pursuant to § 253. Id. § 262(b)(3). See also infra note 48. Furthermore, a corporation may provide in its certificate of incorporation that stockholders be given appraisal rights when certain major corporate events occur, such as a merger or consolidation. Id. § 262(c).
13. See infra note 66.
14. Both The Signal Companies, Inc. and UOP, Inc. were incorporated in Delaware. The merger was effected between UOP and Sigco, Inc., a wholly-owned subsidiary of The Signal Companies. Weinberger II, 426 A.2d at 1335. "As a result of the merger, UOP, as the surviving entity, became the wholly-owned subsidiary of Signal, and UOP's former minority stockholders were paid the sum of $21 per share for their former interests in UOP." Id.
15. The merger was effectuated on May 26, 1978. Originally, plaintiff William Weinberger sought to represent the class of all UOP stockholders who, as of May 26, 1978, had not exchanged their shares for the merger price. Id. After the trial, plaintiff filed a motion seeking "to enlarge the class so as to include all former stockholders of UOP as of the time of the merger," id., including those stockholders who had exchanged their shares for the $21 merger price. Since the trial court entered judgment in favor of UOP, Signal, and Lehman Brothers, the Chancellor did not consider plaintiff's motion to enlarge the class. Id. at 1363. The Delaware Supreme Court, however, ordered that plaintiff's request to enlarge the class be granted on remand. Weinberger III, 457 A.2d at 715.
16. In a pretrial ruling the Chancellor had ordered the complaint dismissed for failure to state a cause of action. Weinberger III, 457 A.2d at 703 n.4. Plaintiff had not alleged specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority. Weinberger v. UOP, Inc., 409 A.2d 1262 (Del. Ch. 1979) [hereinafter cited as Weinberger I].
theory that the majority’s offer of twenty-one dollars per share was grossly inadequate. Defendants were The Signal Companies, Inc., \textsuperscript{17} UOP, Inc., \textsuperscript{18} and Lehman Brothers Kuhn Loeb, Inc.\textsuperscript{19}

Signal acquired its 50.5 percent interest in UOP in 1975 following friendly arm’s length negotiations between the boards of Signal and UOP.\textsuperscript{20} After this share purchase, Signal nominated seven of the thirteen UOP directors.\textsuperscript{21} Although Signal did not anticipate acquisition of the remaining 49.5 percent of UOP’s outstanding shares at the time of the initial purchase, Signal’s inability to find suitable investments or realistic acquisition opportunities for its excess cash caused the company to consider obtaining all of UOP’s stock. To evaluate this alternative, Signal’s management instigated a feasibility study. The study was performed by two officers of Signal who were also directors of Signal and UOP.\textsuperscript{22} They concluded that Signal should acquire the remaining

17. The trial court described Signal as follows:

Signal is a diversified, technologically based company operating through various subsidiaries. Two of its wholly-owned subsidiaries are The Garrett Corp. and Mack Trucks, Inc. The former is engaged in the design, engineering, manufacture and sale of transportation related equipment and services, including those involved in the aerospace industry. The latter is similarly involved in the area of heavy-duty motor trucks and truck tractors. Through substantial investments in other companies Signal is also engaged in the manufacture of industrial products, land development, radio and television broadcasting, entertainment and shipping. Its stock is publicly held and is listed on the New York, Philadelphia and Pacific Stock Exchanges. \textit{Weinberger II,} 426 A.2d at 1335.

18. The court described UOP as follows:

UOP, formerly known as Universal Oil Products Co., is a diversified industrial company which, as of the beginning of 1978, was engaged in six major lines of business. These included petroleum and petrochemical services and related products, construction, fabricated metal products, transportation equipment products, chemicals and plastics, and other products and services including land development, lumber products, and a process for the conversion of municipal sewage sludge into organic soil supplements. Its stock was publicly held and was listed on the New York Stock Exchange at the time. \textit{Id.} at 1335.

19. “Lehman Brothers Kuhn Loeb, Inc. is an investment banking firm with a long-standing business relationship with UOP.” \textit{Id.} James W. Glanville, a partner of Lehman Brothers, was a UOP director. \textit{Id.} at 1338. Lehman Brothers was retained to give a “fairness opinion” regarding the $21 per share offered by Signal. \textit{Weinberger III,} 457 A.2d at 706. Prior to the final oral argument before the Delaware Supreme Court, plaintiff dropped his complaint against Lehman Brothers. \textit{Id.} at 703 n.3.

20. As a result of these negotiations Signal agreed to purchase 1.5 million of UOP’s authorized but previously unissued shares at a price of $21 per share. This purchase was contingent, however, upon the success of a cash tender offer by Signal for 4.3 million publicly held shares of UOP. Although 78.2\% of the publicly held shares were tendered at this time (approximately 7.8 million), Signal purchased only enough shares to become a 50.5\% majority stockholder. \textit{Weinberger II,} 426 A.2d at 1336.

21. At the annual meeting following the share purchase, Signal nominated only six of the thirteen UOP directors. Five were directors or employees of Signal and the sixth, a partner in the investment banking firm of Lazard Freres & Co., had been one of Signal’s representatives in the negotiations with UOP. Later in 1975, the president and chief executive officer of UOP, who also held a seat on the UOP board, retired. Signal named Crawford, a long-time employee and senior executive vice president of the Garrett Corp., see supra note 17, to replace him as president and board member. \textit{Weinberger II,} 426 A.2d at 1336.

22. \textit{Weinberger II,} 426 A.2d at 1337. These officers were: Arledge, vice president and director of planning for Signal, and Chitiea, senior vice president and chief financial officer of Signal. \textit{Weinberger III,} 457 A.2d at 705. This feasibility study played a critical role in the supreme
shares of UOP at any price up to twenty-four dollars per share.\textsuperscript{23}

After the feasibility study had been concluded, Signal's executive committee was convened to consider the acquisition through a take out merger. The committee consulted with Crawford, UOP's president and chief executive officer,\textsuperscript{24} before determining that an acquisition price of twenty to twenty-one dollars per share would be fair to Signal and the minority stockholders of UOP.\textsuperscript{25} On February 28, 1978, Signal issued a press release announcing that "negotiations" were being conducted with UOP for the purpose of acquiring the outstanding minority shares for cash.\textsuperscript{26}

Following this public announcement, Crawford retained Lehman Brothers\textsuperscript{27} to render a fairness opinion about the price offered by Signal. After con-

\begin{itemize}
  \item \textit{Weinberger III, 457 A.2d} at 705. The report described the advantages to Signal of the acquisition and outlined the purposes of the merger as follows:
    \begin{enumerate}
    \item Provides an outstanding investment opportunity for Signal—(Better than any recent acquisition we have seen).
    \item Increases Signal's earnings.
    \item Facilitates the flow of resources between Signal and its subsidiaries—(Big factor—works both ways).
    \item Provides cost savings potential for Signal and UOP.
    \item Improves the percentage of Signal's 'operating earnings' as opposed to 'holding company earnings'.
    \item Simplifies the understanding of Signal.
    \item Facilitates technological exchange among Signal's subsidiaries.
    \item Eliminates potential conflicts of interest.
    \end{enumerate}
  \end{itemize}

\textit{Id.} at 708 (parentheses indicate handwritten comments of Arledge).

\textsuperscript{24} See \textit{supra} note 21. As a courtesy to UOP's president, Crawford was invited to attend the executive committee meeting. Prior to the meeting, Crawford met privately with Signal's board chairman Walkup, and President Shumway. They asked Crawford for his reaction to the proposed price range of $20 to $21 per share. Crawford indicated that he thought the offer was "generous," but that certain internal problems might develop at UOP if its employees were not given some assurances of their future position in a wholly owned Signal subsidiary and its key personnel were not compensated for their incentive stock options which could be wiped out by a merger. \textit{See Weinberger III, 457 A.2d} at 705.

\textsuperscript{25} At the time of the first public announcement, UOP's stock was trading at $14.50 per share. The highest market price for the years 1974-1978 was $18.75 in 1974. The average high trading price during those years was $17.05, and the average closing price was $13.20. \textit{See Weinberger II, 426 A.2d} at 1361-62.

\textsuperscript{26} \textit{See Weinberger III, 457 A.2d} at 706. At trial plaintiff contended that the use of the word "negotiations" was misleading because Crawford immediately agreed to the suggested price range of $20 to $21 per share. \textit{Weinberger II, 426 A.2d} at 1350-51. He contended that the evidence did not reveal anything that could be considered negotiation. Plaintiff further contended that UOP's subsequent modification of their proxy statement to shareholders was evidence of misleading press releases. \textit{Id.} at 1351. UOP had replaced the word "negotiations" with "discussions" when the SEC sought details of the negotiations. \textit{Weinberger III, 457 A.2d} at 706-08. Although the supreme court did not hold that these discrepancies constituted misleading information, the court did note that the result might have been different had an independent negotiating board consisting of the non-Signal UOP board members been used. \textit{Id.} at 709 n.7. \textit{See infra} notes 92-98 and accompanying text.

\textsuperscript{27} Two reasons were given by Crawford for the selection of Lehman Brothers.

First, the time schedule between the announcement and the board meetings was short (only three business days) and since Lehman Brothers had been acting as UOP's investment banker for many years, he felt that it would be in the best position to respond on such short notice. Secondly, James W. Glanville, a long-time director of UOP, was also a partner of Lehman Brothers and had long acted as a financial advisor to UOP. Craw-

tacting UOP's outside directors, and after various contacts with Signal officers, Crawford advised Signal's chairman that "as a result of his communications with UOP's non-Signal directors, it was his feeling that the price would have to be the top of the proposed range, or $21 per share, if the approval of UOP's outside directors was to be obtained." On March 6, 1978, just four business days after the initial public announcement, Signal and UOP's boards of directors adopted resolutions agreeing to the proposed merger at a price of twenty-one dollars per share. By the terms of the merger proposal, consummation of the merger required approval of a "majority of UOP's outstanding minority shares voting at the stockholders' meeting at which the merger would be considered, and that the minority shares voting in favor of the merger, when coupled with Signal's 50.5% interest would have to comprise at least two-thirds of all UOP shares." The merger was approved by UOP's minority stockholders at their annual meeting on May 26, 1978.

Following the UOP stockholder approval of the merger, plaintiff attacked the validity of the transaction and sought to set the merger aside or, in the alternative, to receive money damages. During the eleven day trial, plaintiff

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29. On the date that the merger was to be approved, both boards convened. Telephone communications were maintained so that the dual directors could participate in both meetings. Walkup, Signal's board chairman, attended the UOP meeting to present Signal's views and answer any questions the non-Signal UOP directors might have. On the advice of counsel, Signal's UOP directors abstained from voting. (The only exceptions were Crawford, UOP president, and Signal's Lazard Freres & Co. representative, who voted in favor of the transaction.). See id. at 706-07.
30. See id. at 707. The effect of this voting structure was to neutralize the majority's voting power by giving the minority veto power over the transaction.
Professor Borden has maintained that neutralized voting, absent proof of faulty disclosure, would be effective against a judicial attack. See Borden, supra note 2, at 1039. In a recent treatise, A. BORDEN, GOING PRIVATE (1982), he renews this opinion and supports his view with the court's analysis in Weinberger I and II. Borden's reasoning flows from a practical view of the judicial analysis:

Where a majority in interest of the minority, interested enough to express its views at the shareholder meeting, elects to accept that higher price [the offering price is invariably above the market price], a court would have to possess an unusual degree of confidence in its own financial acumen to say to the approving majority that their securities must relapse in price to their pre-going private announcement market level because the judge, as pater familias, doesn't think it is good for them . . . .

Id. § 4.06, at 4-17. This "reality" seems to have been recognized by the Weinberger III opinion. The court stated that "where corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority." Weinberger III, 457 A.2d at 703.
31. There were 11,488,302 shares outstanding as of the record date of the meeting, 5,688,302 of which were owned by Signal. Although only 56% of the minority shares voted at the meeting (3,208,652 shares), 51.9% of the total minority (2,953,812 shares) voted for the merger. Signal's stock and the minority shares voting for the merger totaled 76.2% (8,642,114 shares). Weinberger III, 457 A.2d at 708.
32. Over 3000 pages of testimony were offered at trial, and the trial exhibits comprised several volumes. Post-trial briefing and argument were extensive. The trial court concluded that "it would be difficult to believe that anything worth arguing about has been omitted." Weinberger II, 426 A.2d at 1363.
offered evidence to support his allegations that: (1) no legally proper purpose for the merger existed; (2) Signal had abused its majority position by disseminating misleading proxy information and press releases; (3) UOP's Signal-controlled board had failed to execute its fiduciary duty to its stockholders; and (4) the true value of the minority shares was not less than twenty-six dollars per share. The court of chancery rejected each of these contentions and held that "the terms of the merger were legally fair to the plaintiff and other minority stockholders of UOP."\textsuperscript{33}

On appeal, the Delaware Supreme Court addressed the following questions: (1) whether a plaintiff in a suit challenging a take out merger must allege specific acts of fraud, misrepresentation, or other items of misconduct to demonstrate the unfairness of the merger terms to the minority; (2) whether the burden of proof shifts from the majority stockholder to the plaintiff when the merger has been approved by an informed vote of a majority of the minority stockholders; (3) whether the merger was fair in terms of the adequacy of defendants' disclosures; (4) whether the price offered by the majority was fair to the minority stockholders; and (5) whether the requirement of a legitimate business purpose for the merger was still the law of Delaware.\textsuperscript{34}

The court first approved the Chancellor's conclusion that a plaintiff in a suit challenging a take out merger must allege specific acts of fraud, misrepresentation, or other misconduct when the complaint reveals that the approval or rejection of the merger was left to the minority stockholders.\textsuperscript{35} Second, the court shifted the ultimate burden of proof to the plaintiff when the corporate action taken was approved by an informed vote of the minority stockholders.\textsuperscript{36} This shifting of the burden of proof is closely tied to the third inquiry. The court concluded that Signal failed to establish that the vote of the minority was an informed vote.\textsuperscript{37} Since material information relating to the bargaining positions of Signal and UOP was withheld, the court held that the merger did not meet the test of fairness and, thus, no burden shifted to plaintiff

\textsuperscript{33} Id.
\textsuperscript{34} Weinberger III, 457 A.2d at 703.
\textsuperscript{35} Id. See also Weinberger II, 426 A.2d at 1342; Weinberger I, 409 A.2d at 1267. In Weinberger I the Chancellor stated this proposition as follows:

As I see it, under Singer, a complaint does not have to allege the particulars of why a merger is unfair so long as it alleges a use of its position by a majority shareholder to cash-out the minority on inadequate terms for no sufficient business purpose other than to get rid of them. Such general allegations coupled with factual assertions showing a use of the majority position is sufficient to state a cause of action and to place the burden on the majority shareholder, as part of its fiduciary duty, to prove the fairness of the merger terms as opposed to requiring the plaintiff to prove that they were unfair. But where the complaint fails to charge a use of its majority position by a shareholder to bring about a predetermined result affecting the minority, and simply charges, in essence, that the terms of the merger proposed by the majority shareholder were unfair, then it seems to me that the burden should then be on the plaintiff to allege and prove the unfairness, or to allege fraud or some other basis for condemning the terms of the merger plan.

Id.
\textsuperscript{36} Weinberger III, 457 A.2d at 703.
\textsuperscript{37} Id. See infra notes 92-94 and accompanying text.
by virtue of the minority stockholder vote.\textsuperscript{38}

The fourth question addressed by the supreme court concerned the adequacy of the price offered by the majority. The court rejected the long-standing "Delaware block"\textsuperscript{39} approach to valuation applied by the Chancellor and announced a liberalized appraisal proceeding based on any generally accepted techniques used in the financial community and the courts.\textsuperscript{40} Finally, the court reconsidered and rejected the business purpose requirement enunciated in Singer.\textsuperscript{41} The supreme court, en banc, reversed the Chancellor's findings that both the circumstances of the merger and the price paid the minority stockholders were fair, and remanded the case for further proceedings consistent with its opinion.\textsuperscript{42}

The Weinberger decision represents a further modification of the developing law of take out mergers. At common law, stockholders had a veto power over all fundamental changes in the corporation's business or charter.\textsuperscript{43} The evolution of modern liberal corporation acts, however, rejected this vested rights approach.\textsuperscript{44} Although courts initially had required equity consideration in merger transactions, by the late 1960s many states recognized the right of a majority stockholder or group of stockholders to effectuate a merger and eliminate the minority stockholders by exchanging their shares for cash.\textsuperscript{45}

The first Delaware case upholding a cash take out merger was Coyne v. Park & Tifford Distillers Corp.\textsuperscript{46} decided in 1959. In Coyne plaintiffs contended that "expulsion of a shareholder from the enterprise in which he has invested . . . is contrary to the settled policy of the law,"\textsuperscript{47} and that section 253,\textsuperscript{48} which authorized short-form mergers for cash, was unconstitutional as applied since the minority stockholders were deprived of vested contractual rights.\textsuperscript{49} The supreme court rejected these contentions and concluded that the statute clearly authorized cash alone as consideration in a short-form

\textsuperscript{38} Weinberger III, 457 A.2d at 703.
\textsuperscript{39} See infra note 89.
\textsuperscript{40} Weinberger III, 457 A.2d at 703-04, 712-13.
\textsuperscript{41} Id. at 704, 715.
\textsuperscript{42} Weinberger III, 457 A.2d at 715.
\textsuperscript{43} See Weiss, supra note 3.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} 38 Del. Ch. 514, 154 A.2d 893 (1959). Plaintiff in Coyne challenged a short-form merger by Schenley Industries, Inc., the 96% majority stockholder of Park & Tifford Distillers Corp.
\textsuperscript{47} Id. at 517, 154 A.2d at 895.
\textsuperscript{48} The Delaware short-form merger statute, DEL. CODE ANN. tit. 8, § 253 (1983), authorizes a merger of a 90% owned subsidiary into its parent without prior notice. In a § 253 short-form merger the parent corporation can merge its subsidiary corporation into itself by executing, acknowledging, and filing a certificate of ownership and merger setting forth a copy of the resolution of its board of directors authorizing the merger. If the subsidiary corporation is not wholly owned, however, the resolution "shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered, or granted by the surviving corporation upon surrender of each share of the subsidiary corporation or corporations not owned by the parent corporation." Id.
\textsuperscript{49} Plaintiffs argued as follows:
Each acquired his shares before the passage of the 1957 amendment. When he bought his stock Section 251 permitted only the conversion of shares into shares in a
merger. The court upheld the constitutionality of the statute under the "reserved power" of the Delaware statutes.

Four years later, in Stauffer v. Standard Brands, Inc. the court reaffirmed Coyne and implied that, absent circumstances which the court could not anticipate, appraisal was the stockholders' exclusive remedy in short-form mergers.

Indeed it is difficult to imagine a case under the short merger statute in which there could be such actual fraud as would entitle a minority to set aside the merger. This is so because the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise. Thereafter the former shareholder has only a monetary claim. This power of the parent to eliminate the minority is a complete answer to plaintiff's charge of breach of trust against the directors.  

Although the court's statement was unsupported by legislative authority, "following Stauffer the generally accepted view was that section 253 not only authorized, but was enacted to expedite, take out mergers."  

In 1967 Delaware amended its general corporation act to authorize the use of cash as consideration in long-form mergers. Prior to this amendment, the Delaware courts had imposed broad general fiduciary standards of corpo-

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50. Id. at 519, 154 A.2d at 896. This conclusion has been criticized by Professor Weiss as without merit in light of the support cited by the court. Weiss, supra note 3, at 651. He states that the court's conclusion that 

"[s]ince 1941, Delaware had allowed use of 'shares or other securities' in long-form mergers, which made it possible 'to terminate a shareholder's stock interest by issuing redeemable bonds or similar monetary obligations.' [was a conclusion] unsupported by any Delaware cases and also contrary to the New Jersey courts' interpretation of the comparable provisions of the New Jersey statute."

Id. (quoting Coyne, 38 Del. Ch. at 517, 154 A.2d at 895).

51. Coyne, 38 Del. Ch. at 521, 154 A.2d at 897. The court noted that the Delaware general corporation law "may be amended or repealed, at the pleasure of the legislature." Id. (quoting Del. Code Ann. tit. 8, § 364 (repealed 1967)) (now codified at Del. Code Ann., title 8, § 394 (1983)). This statute, the court found, "authorize[s] the enactment of statutes changing the rights of stockholders in respect of shares acquired prior to such enactment." Id. at 522, 154 A.2d at 897.

52. 41 Del. Ch. 7, 187 A.2d 78 (1962).

53. Id. at 10-11, 187 A.2d at 80.


55. The Delaware long-form merger statute, Del. Code Ann. tit. 8, § 251 (1983), governs the merger of two or more corporations when the merger does not involve a greater than 90% parent corporation.

Section 251 authorizes the merger of two or more domestic corporations pursuant to an agreement of merger or consolidation adopted, executed, and filed in accordance with the provisions of Del. Code Ann. tit. 8, §§ 103, 251(c) (1983). To initiate the merger process, the board of directors of each corporation must approve an agreement of merger or consolidation. Id. § 251(b). Once this has been accomplished, the agreement of merger or consolidation is submitted to the stockholders of each corporation at an annual or special meeting called for the purpose of acting on the agreement. If the agreement is approved by a majority of the outstanding stock of each corporation, the merger is deemed approved and is effective upon the filing of the agreement of merger consolidation.
rate duty and loyalty to corporations on both sides of a long-form merger transaction. In *Sterling v. Mayflower Hotel Corp.*, decided in 1952 before both *Coyne* and *Stauffer*, the court considered whether the terms of a proposed merger of the Mayflower Hotel Corporation into its parent corporation, Hilton Hotels Corporation, was fair to the minority stockholders of Mayflower. After recognizing the "settled rule of law" that Hilton, as the majority stockholder of Mayflower, occupied a fiduciary position in relation to the minority stockholders, the Delaware Supreme Court concluded that "[s]ince Hilton stands on both sides of the transaction, they bear the burden of establishing its entire fairness." As such, the merger was subjected to "the test of careful scrutiny by the courts."

Although the supreme court never rejected the applicability of *Sterling's* "entire fairness" standard to cash take out mergers after 1967, most observers believed that the *Coyne* and *Stauffer* line of cases relegated the minority stockholders in long-form, as well as short-form mergers, to the appraisal remedy as their exclusive protection and recourse.

Given most observers' assumption that a minority stockholder's exclusive remedy in a take out merger was an appraisal of his shares, the court's opinion in *Singer v. Magnavox Co.* was a dramatic reversal in favor of minority stockholders. The court rejected the notion that appraisal was the exclusive remedy in a take out merger was an appraisal of his shares, the court's opinion in *Singer v. Magnavox Co.* was a dramatic reversal in favor of minority stockholders. The court rejected the notion that appraisal was the exclusive

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57. *Id.*
58. *Id.* at 298, 93 A.2d at 109-110.
59. *Id.*
60. *Id.*
62. 380 A.2d 969 (Del. 1977). *Singer* involved a two-step takeover attempt by North American Philips Corporation (North American). Following a successful tender offer by North American Philips Development Corp. (Development), a subsidiary of North American, Development sought to eliminate the remaining minority shareholders (approximately 15.9% of the total outstanding stock) of The Magnavox Company. Plaintiff, a minority stockholder of Magnavox, alleged that: (1) the merger was fraudulent in that it did not serve any business purpose other than the forced removal of public minority stockholders at a grossly inadequate price; (2) defendants breached their fiduciary duties in approving the merger at a cash price they knew to be grossly inadequate; and (3) the merger was accomplished in a manner violative of the antifraud provisions of the Delaware Securities Act, *see* DEL. CODE ANN. tit. 6, § 7303 (1983). Since *Singer* was considered a complete break with past precedent, numerous notes, articles, and comments have interpreted its effect. *See supra* notes 3, 4 & 6.
63. Many observers have speculated on possible reasons for the sudden reversal by the Delaware Supreme Court. *See* Arsh, *supra* note 4; Brudney & Chirelstein, *A Restatement, supra* note 2; Goldman & Wolfe, *supra* note 2; McBride, *supra* note 6; Weiss, *supra* note 3; Comment, *supra* note 4; and Notes cited in *supra* note 6. The two most persuasive reasons are: the implied threat of federal solutions if state law failed to provide adequate protection to minority stockholders, and the perceived inadequacies of the statutory appraisal remedy under the Delaware block approach to valuation.

In Sante Fe Indus., Inc. v. Green, 430 U.S. 462 (1977), the Supreme Court rejected plaintiffs' allegations that the breach of fiduciary duty by a majority stockholder in a short-form merger states a cause of action under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (1982), and the corresponding rule 10b-5, 17 C.F.R. § 240.10b-5 (1982), absent conduct that "can be fairly viewed as 'manipulative or deceptive.'" *Sante Fe*, 430 U.S. at 473-74. The Court concluded, however, as follows:
remedy for minority stockholders who objected to a long-form merger that technically complied with the statutory requirements. In addition the court rejected defendants' contention that their offer of fair value fully discharged the parent corporation's fiduciary obligations. The court concluded that a long-form merger, "made for the sole purpose of freezing out minority share-

As the Court stated in Cott v. Ash . . . : "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation."

We thus adhere to the position that "Congress by § 10(b) did not seek to regulate transactions which constitute no more than internal corporate mismanagement." Superintendent of Ins. v. Banker's Life & Casualty Co, 404 U.S. at 12. There may well be a need for uniform federal fiduciary standards to govern mergers such as that challenged in this complaint. But those standards should not be supplied by judicial extension of § 10(b) and Rule 10b-5 to "cover the corporate universe."

Santa Fe, 430 U.S. at 479-80 (citations omitted).

The second pre-Singer indication that federal restrictions were imminent was proposed rules 13e-3A and 13e-3B in 1975. SEC Release No. 33-5567, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,104 (Feb. 6, 1975). These proposed "going private" rules covered a broad spectrum of corporate transactions that had the effect of removing any class of equity security from the public market. A. Borden, supra note 3, at § 2.05.

Proposed Rule 13e-3A required that consideration offered to security holders must "constitute fair value as determined in good faith by the issuer or its affiliate, and shall be no lower than the consideration recommended jointly by two qualified independent persons." Proposed Rule 13e-3B, on the other hand, required that there be a "valid business purpose" for the transaction and that the terms of such transaction be "fair."

Id.

In 1977 a new version of rule 13e-3 was proposed. SEC Release No. 33-5884 [1977-1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,366 (Nov. 17, 1977). This proposal required both "substantive and procedural fairness" and provided that any rule 13e-3 transaction that was "unfair to unaffiliated security holders" was a "fraudulent, deceptive, or manipulative act." A. Borden, supra note 3, at § 2.08. Although the rule that was eventually adopted, 17 C.F.R. § 240.13e-3 (1983); see also SEC Release No. 33-6100 [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,166 (Aug. 2, 1979); retreated substantially from the substantive regulation of its prior drafts, the threat of federal action prior to Singer was real. (Rule 13e-3, as adopted, seeks to regulate going private transactions by requiring detailed disclosure of their fairness.) See also Gannon, supra note 4, at 56.

The second explanation for the court's about face in Singer was the growing perception that the appraisal remedy was wholly inadequate to protect minority stockholders. As early as 1964, Professor Vorenberg criticized the appraisal remedy as a justification for rejecting substantive merger requirements. Vorenberg, Exclusiveness of the Dissenting Stockholder's Appraisal Right, 77 Harv. L. Rev. 1189 (1964). Professor Vorenberg argued that: (1) even under the best of statutory appraisal procedures, forced resort to an appraisal often will give the stockholder less than his stock is worth; (2) a stockholder may have some other relationship with the corporation that will be jeopardized; and (3) in many cases the most serious consequence to a stockholder forced to take cash when the majority chooses to be rid of him will be the impact of federal capital gains taxes payable on any appreciation in value of his stock. Id. at 1200-05.

64. Singer, 380 A.2d at 975-77.

65. The court rejected defendants' contention that because the stockholder's right is exclusively in the value of his investment, an appraisal, which by definition results in fair value for the shares, was the exclusive remedy.

This argument assumes that the right to take is coextensive with the power to take and that a dissenting stockholder has no legally protected right in his shares, his certificate or his company beyond a right to be paid fair value when the majority is ready to do this. Simply stated, such an argument does not square with the duty stated so eloquently and so forcefully by Chief Justice Layton in Guth [v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503 (1939)].

Singer, 380 A.2d at 977-78. The duty established in Guth is quoted infra note 80.
holders, is an abuse of the corporate process and a violation of the fiduciary duty owed to the minority stockholders. Thus, to meet the parent corporation's fiduciary duty after Singer, the majority stockholder was required to establish a valid business purpose for the merger and demonstrate that the circumstances satisfied the standard of entire fairness enunciated in Sterling.

Shortly after the Singer decision was announced, the court broadened the scope of the business purpose test. In Roland International Corp. v. Najjar the court rejected Roland's contention that the Delaware short-form merger statute conclusively presumed a proper purpose. The court concluded that "the principles announced in Singer with respect to a § 251 merger apply to a § 253 merger.

Although Singer's business purpose test was announced less than six years before the Delaware Supreme Court considered Weinberger, the Weinberger court summarily rejected its application to take out mergers as "new to our law of mergers and . . . a departure from prior case law." In light of the persuasive precedential value of the Delaware courts' interpretations of the Delaware corporation statutes, this flip-flopping in the Delaware Supreme Court's opinions is troublesome. The confusion inherent in the court's announcement of the business purpose requirement, and evidenced by the subsequent interpretation and application of this standard, circumscribed the

66. Singer, 380 A.2d at 980. The court concluded that, "a § 251 merger, made for the sole purpose of freezing out minority stockholders, is an abuse of the corporate process; and the complaint, which so alleges in this suit, states a cause of action for violation of a fiduciary duty . . . ." Id. Although this holding has commonly been referred to as a "business purpose" test, the Singer court clearly did not intend this requirement to be a business purpose test, per se. This conclusion follows from the fact that the original version of the opinion established a business purpose test, but this language was subsequently removed by the court and the above quoted phrase was put in its place. See Note, Singer v. Magnavox and Cash Take-Out Mergers, supra note 6. Since most commentators use the phrase "business purpose," as did the court in Weinberger III, this note adopts the phrase with the above caveat.

67. Singer, 380 A.2d at 980.
68. Id. at 980. See supra text accompanying notes 57-60.
69. 407 A.2d 1032 (Del. 1979).
70. Id. at 1036.
71. Roland contended that the Stauffer court held that the very purpose of § 253 is to give the 90% owner a tool for eliminating the minority interest in the enterprise. The court rejected defendant's argument that Stauffer should control, concluding that any statement in Stauffer inconsistent with the holding that the principles announced in Singer were also applicable to a short-form merger was overruled. Najjar, 407 A.2d at 1036.
72. The court rejected the business purpose test in the third and final part of the opinion, after the substantive issues had been resolved.

Weinberger III, 457 A.2d at 715 (citations omitted).
73. Id.
74. See supra notes 62-71 and accompanying text.
75. In Tanzer v. International Gen. Indus., 379 A.2d 1121 (Del. 1977), the court was asked to resolve an issue explicitly left open by Singer, namely, whether a merger made primarily to advance the business purpose of the majority stockholder is a violation of the fiduciary duty. See
thrust and effect of Singer. 76

Unfortunately, the court's analysis in Weinberger suffers from similar internal inconsistencies and the same lack of clarity that contributed to the demise of Singer. 77 This confusion is a direct result of the court's failure to resolve the fundamental issues underlying the law of take out mergers, namely: (1) what is the nature of a stockholder's interest in the corporation? and (2) what public policies are important to consider in developing an appropriate standard for evaluating take out mergers? 78 Although the ultimate resolution of these questions is the subject of extensive debate and significant disagreement, 79 in order for the court to balance the interests of majority and minority stockholders, provide an element of certainty in corporate transactions, and avoid protracted litigation, the court must make explicit its underlying assumptions.

In Weinberger the court announced that, henceforth, the appropriate fiduciary standard is the test of entire fairness enunciated in Sterling, absent the Singer requirement that the elimination of minority stockholders not be the sole purpose of the merger. The Weinberger court's concept of entire fairness as it relates to take out mergers is rooted in the majority stockholder's duties of loyalty, honesty, and good faith. 80 "The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction,

Singer, 380 A.2d at 980 n.11. The court concluded that Singer could not be read to eliminate the majority stockholder's right to vote its shares in its own interest. As such, the Tanzer court held that the majority "need not sacrifice its own interest in dealing with a subsidiary; but that interest must not be suspect as a subterfuge, the real purpose of which is to rid itself of unwanted minority shareholders in the subsidiary." Tanzer, 379 A.2d at 1124.

The chancery court applied this test in Young v. Valhi, Inc., 382 A.2d 1372 (Del. Ch. 1978), to enjoin a cash merger that would have eliminated the 45% interest of the minority in Valhi. The court based its holding on the reasoning that the basic purpose of the merger was to eliminate the minority. The court rejected defendant's argument that the merger would lead to tax savings for the majority and avoid potential conflicts of interest, saying that these conflicts were "somewhat contrived." Id. at 1377-78. At least one commentator has stated that this opinion "represents a striking deviation from the Delaware courts' customary reluctance to second-guess corporate managers' business judgments." Weiss, supra note 3, at 669 n.291.

76. Professor Weiss argued that the court's decisions applying the business purpose test may reflect highly subjective decisions based largely on their assessment of the fairness of the individual transaction in front of the court at the time. Weiss, supra note 3, at 670-71. This view may explain the differences in the court's seemingly strong business purpose requirement in Young v. Valhi, Inc., 382 A.2d 1372 (Del. Ch. 1978), see supra note 75, and the seemingly weak application in Weinberger II. Weiss, supra note 3, at 671 n.300.

77. See generally Arsh, supra note 4; Brudney & Chirelstein, A Restatement, supra note 2; Goldman & Wolfe, supra note 2; McBride, supra note 6; Weiss, supra note 3; Comment, supra note 4; and Notes cited in supra note 6.

78. Virtually every commentator who has discussed the law of take out mergers has argued that the transaction should be analyzed in accordance with the nature of the take out. Numerous legislative and judicial schemes have been proposed to analyze going-private transactions, second step mergers, and parent-subsidiary mergers. See Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, supra note 2; Brudney & Chirelstein, A Restatement, supra note 2; Goldman & Wolfe, supra note 2; Greene, supra note 2; Weiss, supra note 3. Although courts have recognized these commentators' views, they have refused to apply their analyses. See, e.g., Najjar, 407 A.2d at 1034 n.4.

79. See Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, supra note 2; Brudney & Chirelstein, A Restatement, supra note 2; Goldman & Wolfe, supra note 2; Greene, supra note 2; Weiss, supra note 3.

80. Singer, 380 A.2d at 977. The classic definition of this standard was stated by Chief Jus-
he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." This concept of entire fairness has two components: fair dealing and fair price. To ensure that minority stockholders receive fair value for their shares, however, the court supplemented this entire fairness standard with a liberalized appraisal remedy in which "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court" can be considered. Because of internal inconsistencies in the entire fairness standard and the liberalized appraisal proceeding together with the incompatibility of these concepts as expressed, the application of the Weinberger opinion to a given factual situation is unclear.

Although the court indicated that the entire fairness standard is not a bifurcated test, the method of analysis applied by the court is clearly indicative of a two prong test. First, the court considered the question of fair dealing and concluded that the Chancellor's findings—that Signal did not misuse its position as the majority stockholder of UOP to disseminate less than candid proxy information, or violate its corresponding fiduciary duty—must be
reversed. Then the court considered the trial court's treatment of the price offered by Signal and concluded that the Chancellor's valuation approach was no longer the law of Delaware. Because the trial court had not considered plaintiff's evidence, the determination that the price offered was fair was reversed.

The supreme court's conclusion that "the record does not establish that this transaction satisfies any reasonable concept of fair dealing" was based on four factors surrounding the circumstances of the merger. The merger was: (1) entirely initiated by Signal, (2) presented to and approved by UOP's board under severe time constraints, (3) conducted without any serious negotiations, and (4) based on wholly incomplete disclosure since the Signal feasibility study was not discussed with the outside directors of UOP or disclosed to the UOP stockholders. The court's reasoning with regard to each of these considerations is based on Signal's fiduciary duty and the corresponding responsibility of the Signal-nominated directors to disclose "all information in their possession germane to the transaction in issue."

Although the record taken as a whole seems to support the court's conclusion that the transaction does not meet the requirements of fair dealing, any inference that each of the individual factors considered alone is sufficient to constitute a violation of the fair dealing requirement is inappropriate. First, every parent-subsidiary merger is, by definition, initiated by the parent corporation. Second, that the transaction is completed within a short time is not significant if all other elements of the transaction are deemed fair. Third,

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91. *Id.* at 714.

92. *Id.* at 712.

93. *Id.* at 711-12.

94. *Id.* at 710 (quoting Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977)).

95. The merger proposal was ratified and approved by UOP's board of directors four days after the proposal was announced. The short period of time is unexplained because the proposal was not presented to the stockholders until their next annual meeting on May 26, 1978, almost three months after board approval. *Id.* at 706-707.

96. The length of time that a proposal is under consideration should not have any bearing on the outcome of the case if the terms of the offer are fair. Although the short time allowed for consideration of the transaction in this case is unexplained, all parties involved in the consideration of the offer were intimately familiar with UOP's business. *See supra* note 27.
that negotiations in the sense of an offer and counteroffer were not conducted is not surprising in a parent-subsidiary merger since the parent corporation's offer is necessarily colored by the parent's awareness of its fiduciary duty. Finally, the feasibility study results are arguably of no consequence to the fairness of the merger since the study concerned the benefits of the merger to Signal, not UOP.

Two further observations regarding the majority stockholder's failure to satisfy its fiduciary obligations must be noted. The court mistakenly implied that the majority can satisfy its fiduciary duty by: establishing an artificial independent negotiating structure, or by abstaining from any participation in the transaction. The fiduciary obligation of UOP's Signal-nominated directors, however, arose out of their relationship as directors of UOP and Signal's majority ownership, not out of the failure to establish an independent bargaining group of outside directors or their participation in the negotiation process. The most important element of the court's finding that the transaction did not meet the fair-dealing standard, however, was the failure of Signal's UOP directors to notify the outside directors or UOP stockholders of the results of their feasibility study. The court stated that, "with the well-established Delaware law on the subject, and the Court of Chancery's findings of fact here, it is inevitable that the obvious conflicts posed by Arledge and Chitea's preparation of their 'feasibility study,' derived from UOP information, for the sole use and benefit of Signal, cannot pass muster." Thus, to the extent that the court implied that "the result here could have been different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm's length," or abstained from participating in the consideration of the matter, the court's analysis is internally inconsistent and contrary to the settled law of the fiduciary obligations of majority stockholders.

97. See supra note 26. The trial court rejected plaintiff's allegations that no negotiations had taken place. In so doing, the Chancellor interpreted "negotiations" in very broad terms, rather than focusing on price offers and counteroffers. See Weinberger II, 426 A.2d at 1351-52. Finally, in light of the majority stockholder status of Signal, the Chancellor recognized that Signal "could not start at a price below that which it truly felt to be the fair value of UOP's shares and bargain upward." Id. at 1354. Since Signal wore two hats as the majority shareholder of UOP and the acquiring company, "it had to take care that it did not propose to pay more than was fair and reasonable for the UOP shares." Id. In light of Signal's dual fiduciary duty to its stockholders and the minority stockholders of UOP, it is not surprising that the only negotiations involved non-price considerations like employee stock ownership and incentive plans as well as the assurance of future employment for UOP's key personnel.

98. See supra note 23. If, as the Weinberger III opinion suggests, a shareholder's sole interest is in the value of his shares and he is thus relegated to an appraisal remedy, see infra notes 115-122 and accompanying text, then the results of the report are arguably of no interest to the UOP shareholders.

99. Weinberger III, 457 A.2d at 709-10 n.7.
100. Id. at 711.
101. See supra note 80.
102. See supra notes 22-25 and accompanying text.
103. Weinberger III, 457 A.2d at 711.
104. Id. at 709-10 n.7.
105. Id. at 710.
stockholders and directors.\textsuperscript{106}

The second aspect of the entire fairness standard is the requirement of fair price.\textsuperscript{107} The court concluded that the appropriate approach to valuing the minority shares was the same as that in an appraisal proceeding.\textsuperscript{108} As such, the resolution of the fair price aspect of entire fairness is dependent on the court's new liberalized appraisal techniques.\textsuperscript{109} Since the Chancellor rejected the plaintiff's evidence as not "correspond[ing] with either logic or the existing law,"\textsuperscript{110} the court concluded that "there can be no finding at the present stage of these proceedings that the price is fair."\textsuperscript{111}

In rejecting the Chancellor's determination that the price offered by Signal was fair, the court declared that the long-standing Delaware block approach to valuation was "clearly outmoded,"\textsuperscript{112} and "[i]t is time we recognize this in appraisal and other stock valuation proceedings and bring our law current on the subject."\textsuperscript{113} Furthermore, the court, after reviewing the legislative history of the appraisal statute and the application of the remedy to take out mergers, concluded that "the provisions of § Del.C. § 262, as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority stockholders in a cash-out merger."\textsuperscript{114} Because of inconsistencies in the court's enumeration of the minority stockholder's remedy and the court's misinterpretation of the appropriate elements of value that can be considered in an appraisal award, the application of the appraisal remedy to take out mergers and its relationship to the entire fairness test is uncertain.

The most obvious inconsistency in the court's analysis of the remedy available to minority stockholders are the statements that "[w]hile a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate,"\textsuperscript{115} and "we return to the well established principles of Stauffer v. Standard Brands, Inc., . . . and David J. Greene & Co. v. Schenley Industries, Inc., . . . mandating a stockholder's recourse to the basic

\textsuperscript{106} See Weinberger III, 457 A.2d at 711, for discussion of fiduciary obligations.

\textsuperscript{107} Id. at 711-15.

\textsuperscript{108} Id. at 712-15.

\textsuperscript{109} Id. at 712-13. The court concluded that the Delaware block approach to valuation was clearly outmoded, noting that the discounted cash flow valuation method adopted by plaintiff's financial expert was precisely the type of analysis employed in the Arledge-Chitiei report. "We 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 . . . ." Id. at 713. This unexpected rejection of the long-standing Delaware block approach appears to have been instigated by Justice Quillen. See supra note 83.

\textsuperscript{110} Weinberger II, 426 A.2d at 1360.

\textsuperscript{111} Weinberger III, 457 A.2d at 714.

\textsuperscript{112} Id. at 712.

\textsuperscript{113} Id. See supra note 109.

\textsuperscript{114} Weinberger III, 457 A.2d at 715.

\textsuperscript{115} Id. at 714.
remedy of an appraisal." Since the court's rejection of the business purpose test implicitly accepts the proposition that a stockholder's interest and right is exclusively the value of his investment and the liberalized appraisal remedy is intended to "fully compensate shareholders for whatever their loss may be," there is no justification for the exercise of any of the Chancellor's inherent equitable powers. Furthermore, to the extent that a stockholder's interest is solely value, there is no justification for consideration of fair dealing in determining what remedy to apply.

Thus, the only conceivable interpretation of the opinion that gives effect to the fair dealing requirement is that the majority's failure to demonstrate that it has met the test of fair dealing will invoke the inherent equitable powers of the Chancellor. This result is contrary to the generally accepted interpretation of the Stauffer and David J. Greene & Co. opinions cited as support for the proposition that a stockholder's recourse is the basic remedy of an appraisal.

In addition to this apparent contradiction, the Weinberger analysis of the elements of value that may be considered in an appraisal proceeding is flawed. Although the court rejected the exclusive monetary formula enumerated in Lynch v. Vickers Energy Corp., the court concluded that value, determined by taking into account all relevant factors, "includes the elements of rescissory damages if the Chancellor considers them susceptible of proof."

The rescissory damages standard in Lynch, however, clearly includes ele-

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116. Id. at 715.
117. In adopting the business purpose test, the Singer court rejected defendants' contention that a stockholder's right is exclusively in the value of his investment.

At the core of defendants' contention is the premise that a shareholder's right is exclusively in the value of his investment, not its form. And, they argue, that right is protected by a § 262 appraisal which, by definition, results in fair value for the shares. This argument assumes that the right to take is coextensive with the power to take and that a dissenting stockholder has no legally protected right in his shares, his certificate or his company beyond a right to be paid fair value when the majority is ready to do this. Singer v. Magnovox Co., 380 A.2d 969, 977-78 (1977). See supra note 65 and accompanying text. This assumption regarding the nature of a stockholder's interest formed the theoretical foundation for the business purpose test.

This implied rejection of the proposition that a stockholder has an interest in the form of his investment is further supported by Weinberger's appraisal mandate. Since an appraisal proceeding can only protect value, the Weinberger opinion ultimately rejects the stockholder's interest as a stockholder.

118. Weinberger III, 457 A.2d at 714.
119. See supra notes 80-106 and accompanying text.
120. The Chancellor's inherent equitable powers include rescission and injunctive relief. The court's opinion does not provide any guidance concerning when these nonmonetary remedies might be invoked.

122. Weinberger III, 457 A.2d at 715. See supra notes 46-54 and accompanying text.
123. See supra note 12.
125. Weinberger III, 457 A.2d at 714.
126. In Lynch the court stated that rescission was not feasible since the merger had been accomplished long before the ultimate decision of the Delaware Supreme Court. The court concluded, however, that a monetary equivalent of rescission was the proper remedy. "[A fair result without requiring rescission] can be accomplished by ordering damages which are the monetary equivalent of rescission and which will, in effect, equal the increment in value that Vickers enjoyed as a result of acquiring and holding the TransOcean stock in issue." Lynch, 429 A.2d at 501.
ments of value that arise "from the accomplishment or expectation of the merger." 127

The *Weinberger* analysis obscures the underlying assumption of the appraisal statute that a stockholder is "entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern." 128 By focusing on subtle changes in the wording of section 262, 129 the court concluded that "only the speculative elements of value that may arise from the 'accomplishment or expectation' of the merger are excluded." 130 If this conclusion is taken to its logical conclusion, however, the appraisal proceeding would ensure that the real economic benefits commonly cited by the commentators as the justification for mergers 131 would be appropriated by the minority stockholders. 132 Rather than take into account the "future prospects of the merged corporation," 133 the court's liberalized appraisal proceeding should focus on the future prospects of the subsidiary corporation as a free-standing going concern and attempt to ensure that the minority stockholders receive an amount equal to their proportionate interest in this going concern. 134

The Delaware Supreme Court's analysis in *Weinberger* is marred by internal inconsistencies and by the failure to enunciate the assumptions underlying its analysis. The court's disavowal of Singer's business purpose test is based on the observation that the case law virtually interpreted the test's effect out of existence. Given Singer's theoretical foundation, that a stockholder's interest is not solely in the value of his shares, however, the rejection of the business purpose test and the corresponding mandate that appraisal is a stockholder's exclusive remedy fundamentally alter the relationship between a stockholder and the corporation. Such a conclusion is unwarranted in the absence of a thoughtful resolution of the public policies relating to mergers and acquisitions and the unique factual situations in which these transactions can arise. 135 Because of the importance of the stability of the Delaware Supreme Court's interpretation of Delaware corporate law, the *Weinberger* analysis and

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127. Del. Code Ann., tit. 8, § 262(h) (1983). See supra note 12. The following simple example illustrates this point. Corporation A, valued at $100 million, proposed to merge with corporation B, valued at $100 million. Corporation A's financial advisors valued the hypothetical corporation A and B at $300 million due to substantial economies of scale and other savings. If the merger is later challenged and rescissory damages were awarded in the amount of $200 million (the incremental value to corporation A), the minority stockholders of corporation B would clearly be receiving value arising "from the accomplishment or expectation of the merger." 128. *Weinberger III*, 457 A.2d at 713 (quoting Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (1950)). 129. See *id.* at 713-14. 130. *Id.* at 713. 131. Numerous economic benefits have been cited by commentators as justification for mergers. Some of the more commonly mentioned benefits include: (1) elimination of potential conflicts of interest between the parent and subsidiary corporation; (2) facilitation of long-term debt financing; (3) tax benefits; (4) economies of scale; (5) improved management; and (6) prevention of duplication of professional and other costs of services. See generally supra notes 2-4. 132. See supra note 127. 133. *Weinberger III*, 457 A.2d at 713 (quoting Tri-Continental Corp. v. Battye, 31 Del. Ch. 523, 526, 74 A.2d 71, 72 (1950)). 134. See *Weinberger III*, 457 A.2d at 713. 135. See supra note 3.
the court's about-face on this issue are troublesome. Both the Delaware courts and other state courts that are called upon to resolve this issue must scrutinize the underlying policy implications of their decisions and explicitly state their assumptions. This scrutiny will ensure a proper balance between the protection of stockholders' interests and the finality of corporate transactions.

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