THE EXIT THEORY OF JUDICIAL APPRAISAL

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ABSTRACT

For many years, we and other commentators have observed the problem with allowing judges wide discretion to fashion appraisal awards to dissenting shareholders based on widely divergent, expert valuation evidence submitted by the litigating parties. The results of this discretionary approach to valuation have been to make appraisal litigation less predictable and therefore more costly and likely. While this has been beneficial to professionals who profit from corporate valuation litigation, it has been harmful to shareholders, making deals costlier and less likely to be completed.

In this Article, we propose to end the problem of discretionary judicial valuation by tracing the origins of the appraisal remedy and demonstrating that its true purpose has always been to protect the exit rights of minority shareholders when a cash exit is otherwise unavailable, and not to judge the value of the deal. Judicial appraisal should not be a remedy for dissenting shareholders when a market exit or equivalent protection is otherwise available.

While such reform would be costly to valuation litigation professionals, their loss would be more than offset by the benefit of such reforms to shareholders involved in future corporate transactions. Shareholders presently have adequate protections, both from private arrangements and legal doctrines involving fiduciary duties.

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** Professor of Law & Director of Bankruptcy Studies, St. John's University School of Law. We thank Stephen Bainbridge and Leo Strine for very helpful comments, and we also thank Professor Robert T. Miller for his extensive and insightful comments not only on this article but also on another, related article that is still in progress. Finally, we owe intellectual debts to the late professor Bayless Manning for his original thinking, and to the late Ernest Folk for his considerable efforts, concerning the appraisal remedy. Any errors remain, of course, our own.

INTRODUCTION

Imagine reinventing the shareholders' appraisal remedy in today's world. The first insight might be that corporations are different-some publicly held and widely traded on liquid securities markets, while closely held corporations are often held by individuals or families that work closely together for their common good as shareholders.[1] Publicly held corporations' shares are often held by large institutions, where portfolios are widely diversified and relations with other shareholders and even

1. The seminal work on this subject was by F. Hodge O'Neal. *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCS: LAW AND PRACTICE, (3d ed. 1958).

management are virtually nonexistent.[2] In the closely held corporation, collaboration and trust among shareholders are essential to success. In the publicly held corporation, what one might call the "Wall Street Rule" is often observed: If you do not like the management, you sell the stock. By contrast, no such remedy exists for shareholders of most closely held corporations.

Now consider a merger—for clarity's sake, a merger negotiated at arm's length—with no conflicts of interest added by a dominant shareholder. In all cases, directors are obliged to act in the best interests of all shareholders as a body.[3] Shareholders are protected by their own voting power to approve or disapprove a proposed merger. The merger consideration may be either shares of stock or more commonly in today's world, cash. For the merger to be approved, there must be the promise of mutual gains from trade, however obtained. But there may be a minority of shareholders who disagree, for any number of personal reasons, including differences of opinion about "fair value."

In a publicly held corporation, the solution for dissenting minority shareholders is easy: their participation in public markets (i.e., the "Wall Street Rule") enables dissenting shareholders to sell their stock before (or after) the merger occurs if it is a stock-for-stock transaction. Where the merger is for cash, shareholder exit is automatic and will apply to all shareholders, whether approving or dissenting. The majority's judgment about fair value governs, as it does generally in free markets, from which dissenters as to price are always free to exit at a market value. The Wall Street Rule thus protects shareholder exit—a shield for dissenting

2. Except for activist private equity investors over the past decade or more, which are often motivated by the opportunity for changes of control. But the growth and power of proxy advisory firms is evidence that even most institutional investors outsource their decision-making processes about internal governance. The United States Office of Government Accountability estimates that clients of the top five proxy advisory firms account for about $41.5 trillion in equity throughout the world. U.S GOV'T ACCOUNTABILITY OFF., GAO-07-765, CORPORATE SHAREHOLDER MEETINGS: ISSUES RELATING TO FIRMS THAT ADVISE INSTITUTIONAL INVESTORS ON PROXY VOTING 13 (2007), http://www.gao.gov/new.items/d07765.pdf (cited in Matthew Fagan, Note, *Third-Party Institutional Proxy Advisors: Conflicts of Interest and Roads to Reform*, 51 U. MICH. J.L. REFORM 621, 621 (2018)).

3. Subject to the agency costs of managers whose employment may be at risk, of course, but modified by their own stock interests in the company and their golden parachutes. This discussion is about voluntary mergers, where those costs have apparently been overcome. In any event, these costs were present when the shareholders invested, and were reflected in the market price at all times.

shareholders that is justified by what we shall call here the "Exit Theory" of shareholder protection.

However, a market exit may not always be available to or otherwise protect shareholders. When a dominant shareholder sets the terms of a merger in which it will receive better (or at least different) treatment than the minority, the Wall Street Rule may not work. This is because the efficient market price of public shares will reflect the prospective damage from the terms of the deal.[4] In that case, any sale or exchange of minority shares will not obtain for the shareholders what they thought they had before-a pro rata share of a more valuable enterprise. To the extent that directors are controlled by the dominant shareholder, they will be liable for any unfair favoritism that such a conflict causes on a theory of breach of fiduciary duty. In Delaware, at least, the dominant shareholder will also be held liable, theoretically as principal for the acts of its agents, although this reasoning has not been made explicit in the Delaware jurisprudence.[5] Under current corporate law in most states, the dominant shareholder can avoid charges of conflict of interest by conditioning the deal upon approval by disinterested directors and/or shareholders.[6] But this was not always so. Hence the law's historical need to protect shareholder exit rights via judicial appraisal, which allows dissenting shareholders to recover the "fair value" of their shares.

Part I of this Article reviews the origins and justification for creating an extra-contractual exit for dissenting shareholders through judicial appraisal. This began at a time when a ready exit through active stock

4. To be clear, we are referring to semi-strong form efficient markets, which reflect all publicly available information. To add further clarity, notions of market prices involve the intersection of supply and demand curves, one rising and the other falling. Those investors not buying or selling at the current market price are described as either inframarginal or extramarginal, but the hard fact is that the market price at any given moment is the only price available.

5. *See generally* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), and its progeny. As Vice Chancellor Laster wrote in *Firefighters' Pension Sys. v. Presidio, Inc.*, "Delaware cases have not analyzed the extent to which a controlling stockholder owes a duty of care." 251 A.3d. 212, 285 (Del. 2021). Some cases make clear that the liability is vicarious, based on the liability (or exculpation) of the controlling stockholders' directors. *Id.* at 285 n.26 (citing Shandler v. DLJ Merchant Banking, Inc., 2010 WL 2929654, at *16; Abraham v. Emerson Radio Corp., 901 A.2d 751, 759 (Del. Ch. 2006)).

6. *See, e.g.*, MODEL BUS. CORP. ACT §§ 8.60-8.63 (AM. BAR ASS'N 2016); DEL. CODE ANN. tit. 8 § 144 (2022); Fliegler v. Lawrence, 361 A.2d 218 (Del. 1976). We omit discussion of the protections of the federal securities laws' antifraud provisions here to focus solely on state law.

markets was virtually impossible. We show that the original purpose of this appraisal mechanism was to protect shareholder exit rights. In other words, it was the Exit Theory and not a concern that market exits do not protect "fair value" that is what originally motivated the creation of the appraisal remedy.

Part II discusses the role that modern markets and laws permitting new merger techniques play in protecting shareholders in publicly held corporations. Given existing law governing conflicts of interest, internal corporate protections, and the vigilance of market participants, this Article argues that there is not any basis to believe that courts can provide dissenters with a "fairer" price through appraisal.

Part III treats the role of disinterested board and shareholder rule in protecting shareholder rights. It reviews the difficulties courts face in valuation.

Part IV examines why cash mergers of public companies have been treated differently than stock mergers in Delaware, distinct from the Model Act's consistency. It explains Delaware's inaction on exempting cash mergers from appraisal as a result of interest group politics, with the local corporate bar unwilling to relinquish the lucrative cottage industry that appraisal has become.

Part V concludes.

I. ORIGINS AND JUSTIFICATIONS FOR APPRAISAL

A. DOCTRINAL ORIGINS OF APPRAISAL (THE "EXIT THEORY")

The concept of appraisal of the shares of dissenters in mergers arose in an era when corporate charters were regarded as contracts between and among the state and all of the shareholders.[7] As a result, important mergers in railroads and other developing industries generally required the unanimous consent of shareholders to proceed.[8] It became apparent that allowing a single dissenter to block otherwise valuable transactions was neither good judicial nor legislative policy. Corporate founders could have sought majority rule and exit rights in charters, but apparently did not. The courts moved first: in *Lauman v. Lebanon Valley Railroad Company*, the court analogized a merger to the sale of assets and dissolution of a company, which did not require unanimity, and allowed

7. *See generally* Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

8. William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 5 AM. BAR. FOUND. RES. J. 69, no. 1, 1980, at 77-82.

the proposed merger to proceed, provided the dissenter was provided the same value he or she would receive in an asset sale, and issued an injunction until the corporation gave security for the payment "when its value shall be ascertained."[9] *Lauman* expressly stated the contractual rationale for an exit: that the shareholder had contracted to be in one corporation for a specific purpose and could not be forced into another without his consent.[10] Manning put it differently: "[h]ow *could* a man who owned a horse suddenly find that he owned a cow?"[11] The *Lauman* court analogized this shareholder action to a suit in partition of jointly owned real property (where there presumably was no market for an undivided joint interest in realty).[12] Where a statute authorized a majority

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9. Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42, 49 (1858). *See also* State *ex rel.* Brown v. Bailey, 16 Ind. 46 (1861) (citing *Lauman*). The mention of "ascertainment" of value appears to be a throw-away line, with no explanation given of how value should be ascertained. The opinion provided that the corporation deposit an amount "giving security to the plaintiff, in double the market value of his stock." *Lauman*, 30 Pa. at 49 (suggesting that market value was a knowable amount). There were difficulties with that assumption, as we shall discuss.

10. *Lauman*, 30 Pa. at 45-46:

> If the principle of the association is violated by a majority of its members, by a departure from its original purposes, or by a refusal, or voluntarily produced inability to proceed, any stockholder may treat such a matter as equivalent to a dissolution, at least as regards him, and for such a case the law provides a means of securing to him his share of the property, or its value.
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> Then, what valid objection can a dissenting shareholder of a private corporation have to such an arrangement as the one now proposed?
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> He may object that his co-corporators have no power to make a new contract for him, and thereby constitute him a member of a new and different corporation; for it is of the very nature of a contract relation that it can be instituted only by the real parties to it . . . .

11. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 246 (1962-63).

12. *Lauman*, 30 Pa. at 48.

to approve a merger, objecting shareholders were presumed to have consented to the merger, as they purchased their shares under this rule.[13] Throughout the 19th and into the early 20th century this approach became accepted: where the majority was granted the power of approval, some states granted appraisal rights to dissenters.[14] Bayless Manning observed that appraisal statutes became the norm over time.[15]

Why grant dissenting shareholders an exit remedy when the majority has approved a transaction–presumably based on benefits they all expect? One explanation is historical: older charters contained specific purposes clauses, that like other charter provisions, could only be changed with unanimous shareholder consent, so a dissenter might be trapped in a new form of enterprise to which he or she had not consented.[16] Another might be the predominance of closely held enterprises with personal relationships, analogous to partnerships where unanimous consent was required for admission of new members. Another might well be the fear of majority self-dealing in mergers or other combinations-a well-known issue even by the early 20th century.[17] Requiring appraisal values to exclude the effects of a merger on the value of a company's stock provided protection for minorities from being exploited. Recent Delaware opinions seem to have recognized this.[18] One might have thought that it

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13. 2 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 951, at 909 (2d ed. 1886).

14. 5 SEYMOUR D. THOMPSON & JOSEPH W. THOMPSON, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 6060, at 884-85 (2d ed. 1910).

15. Manning, *supra* note 11, at 226.

16. *See* Carney, *supra* note 8, at 69 n.1.

17. *See id.* at 71-72. Until 2016 the Model Act followed this approach for public companies, denying appraisal rights in publicly traded corporations where exit was simple, but restoring them where the merger was an "interested transaction." MODEL BUS. CORP. ACT § 13.02(b)(4). Indeed, *Lauman*, was such a case, where the surviving corporation owned a majority of the shares of the acquired corporation.

18. In Dell, Inc. v. Magnetar Glob. Event Driven Master Fund, Ltd., 2017 Del. LEXIS 518, at *24, the Delaware Supreme Court stated that "the key inquiry is whether the dissenters got fair value and were not exploited." As Vice Chancellor Laster stated in *Verition*, referring to *Dell*, "the reference to 'dissenters' in this sentence strikes me as odd because the dissenters have opted not to receive the merger consideration. By seeking appraisal, they avoided the possibility of being 'exploited' by the deal." Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 Del. Ch. LEXIS 52, at *70 n.338 (citing *Dell*, 2017 Del. LEXIS 518, at *24) *rev'd*, 2019 Del. LEXIS 197, at *36. He also stated that "[w]ith a reliable market price as the base line, an arms-length deal at a premium is non-exploitive. By definition, it provides stockholders with 'fair compensation for their shares' defined as 'what they deserve to receive based on what would be fairly given to

would provide a disincentive for quarreling over whether the gains from a disinterested majority-approved merger were large enough, but it has generally failed to do so. Ultimately, we reject all these justifications, on the ground that other provisions of corporate law provide full protection for shareholders in publicly held corporations.

B. MARKET JUSTIFICATIONS FOR JUDICIALLY SUPERVISED EXITS

Another 19th century justification for the appraisal remedy may well have been the absence of exit alternatives. As Robert Thompson has observed, "[t]he focus was on facilitating desirable corporate changes while providing liquidity to those who chose not to continue in a business fundamentally different from the one in which they had originally invested."[19] Stock markets received little attention from historians or economists over a very long period, resulting in little information about mid-19th century markets.[20] In 1840, the New York Stock Exchange listed 112 stocks, with average daily trading volume of 4,266 shares for all of them or 38 shares per firm.[21] There was a boom in railroad stocks and bonds that were listed in the early 1850s, many financed by English capital, which held 26 percent of railroad stocks by 1853.[22] But even in the boom years of the early 1850s, total trading volume for all stocks was not much more than 7,000 shares per day.[23] In the *Lauman* case, the Lebanon Valley Railroad was in the process of completing the construction of its line when the controlling shareholder, the Philadelphia and Reading Railroad Company, entered into a merger agreement to

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them in an arm's-length transaction.'" *Id*. at *40 (quoting DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017)).

19. Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 3-4 (1995).

20. Richard Sylla, *U.S. Securities Markets and the Banking System, 1790-1840*, FED. RSRV. BANK ST. LOUIS REV. 83 (May/June 1998). The author attributes this in part to the greater regulatory interest in banks, producing more government documents. *See id.*

21. Stuart Banner, *The Origin of the New York Stock Exchange, 1791-1860*, 27 J. LEGAL STUD. 113, 117 (1998).

22. ROBERT SOBEL, THE BIG BOARD: A HISTORY OF THE NEW YORK STOCK MARKET 57 (1965). Another author has reported that by 1886 there were about 60 railroad firms, four express companies, and nine miscellaneous companies listed. JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 86 (1970).

23. SOBEL, *supra* note 22, at 58.

absorb the Lebanon Valley Railroad Company.[24] The Philadelphia and Reading Railroad was directly controlled by groups of English investors and was apparently traded on the New York Stock Exchange.[25] It seems likely that Lauman had no ability to exit from the Lebanon Valley Railroad, still at the organizational stage and controlled by a block of investors. Thus, if the exchange ratio undervalued his stock, as it well might have, he had no exit. Because it was a stock for stock deal, absent self-dealing problems, Bayless Manning would have argued that if the public market for the Philadelphia and Reading Railroad's stock were liquid enough, the plaintiff had a post-merger exit option.[26] But such liquidity only arrived in the late 1850s.[27] The idea of a national market for stocks with sufficient information so that the market price reflected all publicly available information was over a century away.[28] The Pink Sheets, providing bid/ask quotes from brokers in the over the counter

24. Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42, 42 (1858).

25. SOBEL, *supra* note 22, at 57.

26. Manning, *supra* note 11, at 240. The Reading line "extended south from the mining town of Pottsville to Reading and then onward to Philadelphia, following the gently graded banks of the Schuylkill River for nearly all of the 93-mile (150-km) journey." BERT PENNYPACKER, READING COMPANY IN COLOR VOLUME 2 38 (2002). The line contained double track upon its completion in 1843. *Id.* Lauman may have lived to regret his exit. By 1871, the Reading was the largest company in the world, with $170,000,000 in gross value. Reading Company, WIKIPEDIA https://en.wikipedia.org /w/index.php?title=Reading_Company&oldid=1117494943 (last visited Oct. 26, 2022). Much of its increased value came from its vertical integration with booming coal mines and its ability to supply growing demand in Philadelphia, as use of firewood declined. *Id.* We have been unable to locate any information on the trading volume of its stock at the time of the Lebanon Valley merger.

27. Samuel F. B. Morse and associates built a telegraph line between New York and Philadelphia (the location of a stock exchange) in 1844, which was not profitable for 2 years, until brokers discovered its value, and was later extended to other exchanges. SOBEL, *supra* note 22, at 52-53. The addition of express services for delivery of securities made nationwide trading through the New York Stock Exchange possible by the end of the 1850s. *Id.*

28. While the New York Stock Exchange had some mandatory disclosure requirements, it was only with the 1964 amendment of Section 12(g) of the Securities Exchange Act in 1934 that such requirements became relatively universal in trading markets. H.R. REP. NO. 88-1418 (1964).

market did not begin until 1913.[29] NASDAQ, originally created simply to provide bid/ask quotes electronically, originated in 1971.[30]

II. MODERN MARKETS AND MODERN LAWS

A. INTERNAL CORPORATE PROTECTIONS

Since the *Lauman* decision in the mid-19th century, corporate laws moved away from the minority protection of unanimous consent to general rules of majority rule. In ordinary business decisions the board, elected by a majority, had full control. One source of protection for minorities has been classification of shares to elect a discrete portion of the board, and where that was absent, cumulative voting that allowed a discrete and organized minority to place directors on the board. Preferred stock with discrete voting power also could be used, with class approval required for fundamental changes. Further protection could come from supermajority quorum and voting requirements for board and shareholder action. Participating preferred stock can provide for class voting, put rights and a share in the gains of common stock. In close corporations, shareholder agreements or charter provisions could provide procedures and terms for exit, a subject for another article.

Modern times have introduced new innovations. Initially bidders were able to "coerce" target shareholders with a two-tier bid that promised a lower price in the second stage takeout merger.[31] The era of hostile tender offers to be followed by such cash-out mergers introduced bylaw and charter amendments to require approval of a majority of the minority where a bidder gained control, followed by "fair price" amendments that set a floor on a takeout price no lower than the highest price a bidder had paid to obtain control.[32] When institutional investors began to resist some

29. Jason Fernando, *National Quotation Bureau (NQB)*, INVESTOPEDIA https://www.investopedia.com/terms/n/national-quote-bureau.asp (last updated July 27, 2022) [https://perma.cc/HX97-YC3D].

30. Dock Treece, *What Is NASDAQ?*, BUS. NEWS DAILY https://www.businessnewsdaily.com/3403-nasdaq.html (last updated Sept. 19, 2022) [https://perma.cc/3VDP-U9S9].

31. Martin Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 19 (1987).

32. These amendments typically set a prohibitively high voting requirement for takeout mergers, unless the required "fair price" was offered, which reduced the voting requirement to the statutory level. *See generally* William J. Carney, *Shareholder*

of these proposals, managers turned to state legislatures, which adopted similar rules that management could opt into (or out of) without a shareholder vote.[33]

Activist investment funds have constrained managers in another way, by contesting mergers they deemed to be at too low a price for shareholders. These contests took the form of proxy fights to change the size and make-up of the board, as well as public opposition to merger proposals.[34]

B. APPRAISAL LAWS' ADJUSTMENTS TO MODERN MARKETS

Bayless Manning described appraisal remedies as the act of giving the majority permission to act, rather than protection for the minority.[35] He described this as the "willingness to play for the rebound in history."[36] It also had the effect of allowing dissenters to exit from newly combined enterprises in which they did not intend to invest, providing some liquidity in an era when markets were limited in depth and liquidity.[37] As Manning described appraisal statutes, "[t]hese are bail-out provisions; when certain events occur, some shareholders are given a put against the corporation."[38] The Delaware Chancellor agreed with this analysis in *Chicago Corporation v. Munds*, stating that:

> [S]tatutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another. In compensation for the lost right a provision was written into the modern statutes giving the

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Coordination Costs, Shark Repellents, and Takeout Mergers: The Case Against Fiduciary Duties, 1983 AM. BAR RES. J. 341 (1983).

33. William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 750-54 (1998).

34. *See generally* Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007).

35. Manning, *supra* note 11, at 229; *see also* Norman D. Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 43 HARV. L. REV. 233, 237 (1931) (the purpose has been "[t]o placate the dissenting minority and, at the same time, to facilitate the carrying out of changes of a desirable and extreme sort."); JAMES D. COX & THOMAS LEE HAZEN, 4 TREATISE ON THE LAW OF CORPORATIONS § 22:24 (3d ed. 2010) ("[I]t appears the purpose is even more to aid and protect the majority.").

36. Manning, *supra* note 11, at 229.

37. Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 667 (1998).

38. Manning, *supra* note 11, at 226.

> dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.[39]

In today's era of cash mergers, the structure of the merger itself assures that right.

1. A Change Manning Did Not Anticipate - Cash Consideration in Mergers

After Ernest Folk—reporter for Delaware's changes in the 1960s—recommended expanding (or clarifying) permitted merger consideration,[40] in 1967 Delaware amended Section 251(b) to permit merger consideration to include cash or securities of other corporations.[41] This was followed by amendment of the Model Act, similarly to permit merger consideration to include "cash or other property."[42]

2. Delaware's Incomplete and Inexplicable Response and the Exploitation Theory

Manning's analysis of the justification for excluding publicly traded shares on both sides of a merger-the ready availability of exit—was taken to heart by Delaware and by the American Bar Association's Committee on Corporate Laws as well.

By the 1960s and 1970s, appraisal became subject to a variety of criticisms. Ernest Folk advocated for the Exit Theory and stated that "muddled theory and inconsistent treatment has always been characteristic of the appraisal right in all jurisdictions."[43] Folk recommended elimination of appraisal on all publicly traded companies in reliance on the protection the market would offer the minority. "Stated generally, this Report recommends, as a minimum, dropping the cash-for-

39. 172 A. 452, 455 (Del. Ch. 1934).

40. ERNEST L. FOLK, III, REVIEW OF THE DELAWARE GENERAL CORPORATION LAW FOR THE DELAWARE CORPORATION LAW REVISION COMMITTEE 1965-1967, at 195 (1968) [hereinafter FOLK REPORT].

41. ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW (1972) [hereinafter FOLK BOOK].

42. *See* J. Patrick Garrett, *The Revised Model Business Corporation Act: Comment and Observation: Merger Meets the Common Law*, 63 TEX. L. REV. 1509, 1515 (1985). *See generally* Willard P. Scott, *Changes in the Model Business Corporation Act*, 24 BUS. LAW. 291 (1968) (discussing changes to 1969 Model Act).

43. FOLK REPORT, *supra* note 40, at 196-97.

dissenters with respect to shares listed on any exchange or subject to the expanded jurisdiction of the S.E.C. under the Securities Acts Amendments of 1964,"[44] that required registration of corporations meeting minimum requirements, under Section 12(g) of the Securities Exchange Act. Folk's report was not fully implemented: rather the exclusion from appraisal was limited to shareholders receiving shares of stock in a publicly traded corporation meeting those requirements - listing on an exchange or owned by 500 (now 2,000) or more shareholders, a standard that has been frozen in time except for the minimum number of shareholders. Oddly, while Folk recommended eliminating appraisal for companies with relatively liquid securities, based on the disclosure protections of the Exchange Act, he omitted explicit discussion of mergers where the consideration is to be cash, as he had recommended perhaps because recipients of cash for their shares got the same protection as recipients of publicly traded securities, or that the cash merger was about to be created, and simply was not considered in this context. If liquidity is the key to exit, then a cash merger fully accomplishes the exit goal.

Apparently, the committee members gave no reason for rejecting the logic of his recommendation, leaving cash mergers subject to appraisal rights, although such mergers by definition provide both exit and liquidity. Professor Folk wrote:

> I am somewhat puzzled by the import of the final clause of 262(k) . . . . I take it to mean that if stockholders do not receive shares (or securities) of the surviving or new corporation, then 'this subsection,' which denies the appraisal remedy in certain circumstances, 'shall not be applicable'; and therefore that such shareholders are entitled to the appraisal remedy. I must be missing something, but I wonder if this is the intent of the provision?[45]

In hindsight, with the modern proliferation of appraisals in cash mergers, one can only wonder if the committee members were, in Manning's words, "play[ing] for the rebound in history," less for their corporate clients than for the collective wealth of the bar.[46] The evidence of this effect came later. The Delaware courts have recently been swamped with a wave of appraisal petitions, even as other forms of

44. *Id.* at 198.

45. Charlotte K. Newell, *The Legislative Origins of Today's Appraisal Statute*, 35 DEL. L. 12, 14 (2017) (quoting Letter from E. Folk to R. Corroon, Dec. 20, 1966).

46. Manning, *supra* note 11, at 229.

merger and acquisition litigation have abated, due to the increasingly clear bright lines and safe harbors for fiduciary behavior that these courts have evolved in recent years.[47]

Enter the Anti-Exploitation theory: the advent of a modern corporation law in the late 1960s apparently inspired later tinkering by the Delaware Law Revision Committee. In 1976 "fair" was added to qualify value in Section 262(a),[48] and in 1981 the floodgates were opened when Section 262(h) was amended to instruct courts to consider "all relevant factors," without any further instructions or limits.[49] Ironically, the first employment of appraisal involved a majority shareholder dominated transaction, where other legal protections were available.[50]

Now the opaque nature of legal standards has turned from precontractual board duties to appraisal cases.[51] Dissenting shareholders

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47. As other forms of merger litigation decline, due to a safe harbor creating increased deference under the business judgment rule, appraisal filings in Delaware increased from 20 cases in 2012 to 48 in 2016, a 240 percent increase in 4 years. *Appraisal Risk in Private Equity Transactions*, PAUL WEISS: PRIV. EQUITY DIG., no. 19, May 2017, at 1, https://www.paulweiss.com/media/3977122/may-2017-pe-digest-r15.pdf. *See generally* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014). A recent study showed that appraisal petitions increased from about 2 percent of deals in the early 2000s to around 25 percent in the 2010s. The top seven hedge funds seeking appraisal accounted for over 50 percent of the dollar value in all appraisals. Wei Jiang et al., *Reforming the Delaware Appraisal Statute to Address Appraisal Arbitrage: Will it Be Successful?*, 59 J.L. & ECON. 697, 699 (2016). Another study shows that multiple petitions are being filed in these cases, with 77 petitions in 2016. Michael Greene, *Dealmakers Eye Safeguards Amid Rising Valuation Challenges*, BLOOMBERG L., Apr. 18, 2007, at 1. The Supreme Court's recent (if erroneous) reliance on deal price in *Aruba* seems to have quelled this storm. *See* No. 11448, 2018 WL 922139, at *1-2 (Del. Feb. 15, 2018). *See generally* Jonathan Macey & Joshua Mitts, *Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets*, 74 BUS. L. 1015 (2019). Consider also the further dampening effect of the Supreme Court's even more recent decisions in *Fir Tree Value Master Fund, LP v. Jarden Corporation*, 236 A.3d 313, 335 (Del. 2020), which affirmed a valuation based on the unaffected, pre-deal price, and in *Brigade Leveraged Capital Structures Fund v. Stillwater Mining Co.*, 240 A.3d 3, 17 (Del. 2020), which affirmed a valuation based on deal price.

48. 60 Del. Laws ch. 371, § 9 (1976).

49. 63 Del. Laws ch. 25 (1981).

50. *See generally* Lauman v. Lebanon Valley R.R. Co. 30 Pa. 42 (1858). As observed earlier in discussion, *supra* note 26, in hindsight, Lauman would probably have been well advised to retain his shares in the new enterprise.

51. *See generally* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 101 (2009) (documenting the indeterminacy of Delaware law involving mergers and acquisitions).

are entitled to dissent and be awarded the "fair value" of their shares, without consideration of any value resulting from anticipation or realization of the merger.[52] In many areas of law, a simple value standard is applied-what a reasonable and informed seller and buyer would agree upon, each being fully informed and under no constraints.[53] But that contemplates a "deal," which is exactly what the appraisal remedy allows shareholders to avoid. In real life markets, involving sufficient information and trading activity, investors must accept the market price as the only one available, whether buying or selling. That price is the result of a large number of "deals" by reasonable and informed investors trading in the market.[54] But in Delaware, judicial valuation of a dissenter's shares ignores the realities of the market.[55] Rejecting market value in favor of "fair value" has become, in the words of former Chief Justice Strine, "a jurisprudential, rather than purely economic, construct."[56] To this court, it seems that every market price is somehow an anomaly, not

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52. 8 DEL. CODE ANN. tit. 8, § 262(h) (2022); *see also*, MODEL BUS. CORP. ACT § 13.01(4)(i) (AM. BAR FOUND. 2002) (defining "fair value"); William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61, 96-99 (2018).

53. This was once the Delaware standard. *See* Poole v. N.V. Deli Maatschappij, 243 A.2d 67, 70 n.1 (Del. 1965).

54. Put another way, this reflects a perfectly competitive market, where single buyers and sellers cannot influence prices. "In such circumstances, a company's stock price 'reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts.' In these circumstances, a mass of investors quickly digests all publicly available information about a company, and in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company." Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 25 (Del. 2017).

55. *In re* Appraisal of Dell, Inc., No. 9322-VCL, 2016 WL 3186538, at *23 (Del. May 31, 2016) (citing Golden Telecom, Inc. v. Glob. GT LP, 11 A.2d 214, 217-18 (Del. 2010)) ("Requiring the Court of Chancery to defer–conclusively or presumptively–to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent."). On the other hand, for reasons we expand upon below, accepting the deal price over the pre-announcement market price also contravenes the unambiguous language of the same statute, which excludes consideration of anticipated or realized effects of the transaction. There is little reason to expect an expert's estimate of synergies to be subtracted from the deal price is more accurate than the market's pre-announcement estimate of value.

56. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 367 (Del. 2017).

to be trusted.[57] The courts' search apparently is for the Holy Grail of strong form efficient market pricing—a non-existent condition.[58] We all live with less than perfect information unless we are insiders. With the most reliable and unbiased information not fully respected, courts enter an area where they are anything but experts, and are often, in the words of Vice Chancellor Glascock, "softened . . . by a liberal arts education."[59] Worse, they receive information from biased experts on each side.[60]

The result seems to be an almost zero, if not negative, sum game for combatants, but at enormous costs to each party (including non-dissenting shareholders) and the judicial system.[61] In two recent decisions Vice Chancellor Laster detailed these costs to all parties.[62] Hundreds of exhibits were filed and dozens of depositions were filed, in addition to testimony of multiple expert witnesses and some fact witnesses. While the trials took 4 and 5 days, hundreds of fact stipulations were filed, so that live testimony was only the tip of the iceberg for the Vice Chancellor.[63] In short, appraisal now produces little value for shareholders of public companies, but has become a profitable cottage industry for Delaware lawyers and expert witnesses. In private companies, shareholders in a Delaware corporation are now able to contractually waive appraisal rights-a clear market reaction to the costs of appraisal.[64]

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57. *See* Fir Tree Value Master Fund LP v. Jarden Corp., 236 A.3d 313, 316 (Del. 2020) ("[I]t is not often that a corporation's unaffected market price alone could support fair value.").

58. *See* discussion *infra* Section III.B.

59. *In re* Appraisal of Ancestry.com, Inc., No. 8173-VCG, 2015 WL 399726, at *19 (Del. Ch. Jan. 30, 2015).

60. Wild disparities in expert valuations are evidenced in Carney & Sharfman, *supra* note 52, at 110.

61. *See generally* Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. Ch. 1993) (valuing a 1983 merger, which resulted in five appeals and remands to the Chancery Court, with a final nine-day trial, ultimately awarding the plaintiff $44,264 more than the original merger price). *See also* WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS: CASES AND MATERIALS, 398–405 (4th ed. 2016). If an attorney was not an expert on appraisal going into this case, he or she certainly was thereafter, not to mention being well compensated for the education.

62. *See generally In re* Appraisal of Stillwater Mining Co., No. 2017-0385-JTL, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019); *In re* Appraisal of Columbia Pipeline Gp., Inc., No. 12736-VCL, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019).

63. *Stillwater Mining Co.*, 2019 WL 3943851 at *1; *Columbia Pipeline Gp., Inc.*, 2019 WL 3778370 at *1.

64. *See generally* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199 (Del. 2021).

3. The Model Act's More Deliberate Response

In 1950 the Committee on Corporate Laws—drafter of the Model Business Corporation Act ("MBCA") departed from the language of the earlier version drafted by the National Conference of Commissioners on Uniform State Laws expressly to permit merger consideration to expand beyond shares to include "other securities or obligations of the surviving corporation."[65] In 1969, following Delaware's lead, the permissible consideration was expanded to include both "equity or debt securities of another party, and, more radically, into cash or other property."[66] In the 1969 revision the Committee followed Delaware's lead, but not quite so boldly, to eliminate appraisal rights only for shares registered on a national securities exchange.[67] As in Delaware there was no consideration of the impact of an all cash merger upon exit and liquidity. One suspects that committee members volunteering their time may not have the ability to see the total impact of one provision upon another. As one-time reporter for the revision of Georgia's version of the Model Business Corporation Act ("Model Act"), one of us can confess to having received several calls after enactment where an attorney asked, "did the committee consider x?" And the answer was typically, "no, but we can recommend technical changes." At the same time, the 1984 revisions provided broader appraisal relief for other fundamental changes, such as asset sales, amendments of articles of incorporation to reduce a class of shares to fractional shares, subject to repurchase, and domestications that fundamentally alter the rights of a class.[68]

The Model Act moved ahead of Delaware in 2010 when the Committee on Corporate Laws, with a more focused attention on remaining issues, amended section 13.02(b)(3) to exclude from appraisal all cash mergers of public corporations.[69] That provision has now been

65. See *Garrett*, *supra* note 42, at 1515.

66. *Id.*

67. See Scott, *supra* note 42, at 302-03. In fairness, this preceded the establishment of the NASDAQ market in 1971, leaving over–the–counter stocks subject to the potential inaccuracies of the Pink Sheets.

68. MODEL BUS. CORP. ACT § 13.02(a) (AM. BAR ASS'N 2016).

69. *See* Comm. on Corporate Laws, ABA Section of Bus. Law, *Changes in the Model Business Corporation Act–Proposed Amendments to Permit Limitations on Separate Group Voting Rights on Certain Mergers, to Delink Voting and Appraisal Rights, and to Make Related Changes*, 65 BUS. L. 1121, 1142 (2010). The official comment explains: "Because section 13.02(b)(3) excludes from the market exception those transactions that require shareholders to accept anything other than cash or

adopted in at least 15 states and the District of Columbia.[70] Here the law has returned to its exit-driven origins.

III. WHERE APPRAISAL IS (AND IS NOT) NEEDED TO PROTECT EXIT RIGHTS

A. STATUTORY AND CONTRACTUAL PROTECTION

Shareholders investing in a company know they will be bound by certain voting rules, usually, in default of particular choices, by a regime of majority rule. Shareholders know that they may not all agree on every issue, but majority rule makes the collective wisdom binding.[71] There is no escaping what one shareholder believes is a bad decision but exit-the Wall Street Rule.

Years ago, the threat to minority shareholders came not from majority decisions, but from the two-tier bid, where a hostile bidder would offer an attractive price to gain control, and a lower price in the takeout merger.[72] While this could be prevented with a "fair price" or "shark repellent" amendment in the charter, not all companies were able to do so because of institutional investor opposition.[73] Delaware eliminated this opposition when it adopted its business combination statute in 1988.[74] It

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securities that also meet the liquidity tests of section 13.02(b)(1), shareholders are assured of receiving either appraisal rights, cash from the transaction, or shares or other proprietary interests in the survivor entity that are liquid." *Id.* at 1146.

70. COLO. REV. STAT. § 7-113-102(2)(c)(2022); CONN. GEN. STAT. § 33-856(b)(3)(2017); D.C. CODE § 29-311.02(b)(3)(2011); IDAHO CODE § 30-29-1302(b)(3)(2019); IOWA CODE § 490.1302.2(c)(1)(2022); 13–C ME. CODE R. § 1303 (2011); MISS. CODE ANN. § 79-4-13.02(b)(4); MONT. CODE ANN. § 35-14-1302(2)(c)(2022); NEB. REV. STAT. ANN. § 21-2, 172 (b)(3)(LexisNexis 2022); N.H. REV. STAT. ANN. § 293-A:13.02(b)(3)(2014); S.D. CODIFIED LAWS § 47-1A-47-1A-1302.1(3)(2022); TENN. CODE ANN. § 48-23-102(c)(2016); VA. CODE ANN. § 13.1-730(B)(3)(2019); W. VA. CODE § 31D-13-1302(b)(3)(2022); WYO. STAT. ANN. § 1 7-16-1303(b)(iii)(2022).

71. *See generally* JAMES SUROWIECKI, THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS (2004).

72. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985) (claiming that the debt securities offered in the second step merger were worth less than the front-end cash offer, and thus coercive).

73. *See generally* Carney, *supra* note 32.

74. 8 DEL. CODE ANN. § 203, adopted in 66 Del. Laws ch. 204.

is an opt out statute, so coverage is automatic for incorporating businesses. It prohibits any takeout transaction with an "Interested Stockholder" that acquires 15 percent or more of the company's stock from engaging in a takeout merger unless approved by the company's board before the acquisition, or unless approved by 85 percent of the remaining stockholders-a prohibitive requirement.[75] An older study showed that over 20 states had similar statutes before Delaware's adoption.[76] Under these rules there is no concern about coercion, since unaffiliated directors or shareholders get the last word on the transaction. The only risk is for a shareholder who purchases stock where an existing majority shareholder exists, without the protection of either the statute or a charter amendment. One can only say that the shareholder bought into a stock at a price discounted for the risk.

Many statutes offer similar protection in all dominant shareholder mergers. Del. GCL § 144 conditions the validity of such transactions, at least where the shareholder has board representation on the target, on full disclosure and approval by the board, a committee, or the stockholders.[77] By judicial gloss, Delaware requires ratification by disinterested shareholders.[78] The Model Act's provisions are more explicit about requiring approval by either disinterested ("qualified") directors or shareholders, and not only in mergers, but all interested shareholder transactions.[79] Delaware failed to reach this alternative safe harbor, by judicial decision, requiring both.[80]

Recently shareholders who claimed that a merger agreement was tainted by management and investment advisor conflicts of interest brought a damage suit against corporate executives, directors, the investment adviser, and the successful bidder who was tipped about a

75. 8 DEL. CODE ANN. § 203(b); *see* Chesapeake Corp. v. Shore, 771 A.2d 293, 297 (Del. Ch. 2000) ("Because Shorewood's management controls nearly 24[percent] of the company's stock, the 66 ⅔[percent] Supermajority Bylaw made it mathematically impossible for Chesapeake to prevail in a consent solicitation without management's support, assuming a 90[percent] turnout.").

76. Carney, *supra* note 33, at 753.

77. DEL. CODE ANN. tit. 8, § 144 (2022). Typically, the Delaware courts have ignored the alternative language of the statute, to require approval of both disinterested directors and disinterested shareholders, without any hint of the dominant shareholder intending to proceed without such approval. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014); *see also* Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).

78. Fliegler v. Lawrence, 361 A.2d 218, 222 (Del. 1976).

79. MODEL BUS. CORP. ACT §§ 8.60–8.63 (AM. BAR ASS'N 2016).

80. *See M & F Worldwide Corp.*, 88 A.3d at 645-46.

pending competitive offer.[81] On a motion to dismiss, Vice Chancellor Laster found validly pleaded claims for both the tipping and the failure to disclose this in proxy materials.[82] Accordingly, the damage claims that are not subject to exculpation will proceed to further discovery and a trial. The potential magnitude of personal liability will provide a strong deterrent to future temptations to skirt the duty of good faith.

The Model Act has already recognized that appraisal does not exist for cash mergers of public companies, except in the case of an interested shareholder transaction.[83] Not addressed is the question of whether compliance with the ratification provisions of the act removes a merger from the provisions of the appraisal statute.[84] An informed disinterested shareholder vote should be enough.

In all cash mergers the goal of exit is met by definition. And in many cases of mergers with a dominant shareholder, the goal of adequate compensation is met through disinterested shareholder approval after full disclosure by directors, disinterested or not. In the case of appraisal arbitrage, the petitioners, who purchase after the deal is announced, should be estopped from seeking appraisal, since they were aware of the allegedly inadequate terms before buying. They were investing not in a company, but in a speculative lawsuit.[85]

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81. Firefighters' Pension Sys. v. Presidio, Inc., 251 A.3d. 212, 232-33 (Del. 2021).

82. *Id.* at 291

83. § 13.02(b)(4). The ratification provisions are in §§ 8.60–8.63.

84. Unlike the Georgia Version of the Model Act, GA. CODE ANN. § 14-2-103 (2022), the Model Act does not contain a provision for the independent legal significance of each section. However, courts generally hold that a later and more specific statute trumps a more general one. *See* United States v. Estate of Romani, *523 U.S. 517, 530–31 (1998)* ("[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute . . . ."); Lockhart v. United States, *546 U.S. 142, 149 (2005)* ("When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs . . . ."); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 236 ("[A] specific policy found in a later statute controls the interpretation of an earlier and more general statute. . . .").

85. In an era of extraordinarily low interest rates, some litigants may have been attracted to the interest rate to be paid on the "fair value" determined by the court—five percent above the Federal Reserve discount rate. Section 263(h) was amended in 2016 to permit merging corporations to pay the merger price in cash in advance of a judgment, thus limiting the extraordinary interest to any excess over the merger price. Allison L. Land & Lisa P. Ogust, *Amendments to DGCL Limit Appraisal Proceedings*, DEL. BUS. CT. INSIDER (Aug. 24, 2016).

B. WHY DELAWARE FAILS TO RECOGNIZE THE PROTECTIVE VALUE OF MAJORITY RULE

Delaware case law is replete with litigation alleging that shareholders were not properly and fully informed before facing a merger vote.[86] Some cases arise before the merger is consummated, while others arise as challenges to the protective nature of the shareholder vote approving the merger, in an appraisal setting.[87] These concerns ignore the reality of the Efficient Capital Market Hypothesis ("ECMH"), although the Delaware Supreme Court has given it lip service.[88] It assumes without theory or evidence that market efficiency is exclusively strong form: that market prices reflect *all* information about the value of firms—the strong form of ECMH, rather than what market prices actually reflect—all *publicly available* information-the semi-strong form of ECMH.[89] There is no empirical support for the strong form of ECMH.[90]

Federal law requires the disclosure of information with respect to the purchase or sale of securities on the basis of the information's materiality:

86. *See, e.g.*, Weinberger v. UOP, 457 A.2d 701, 703 (Del. 1983); Verition Partners Fund v. Aruba Networks, 210 A.3d. 128, 133–36 (Del. 2019); DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 367 n.104 (Del. 2017); Cede & Co. v. Technicolor, 542 A.2d 1182, 1187 (Del. 1988); Applebaum v. Avaya, Inc., 812 A.2d 880, 890 (Del. 2002); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 n.12 (Del. 1989); Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 301 (Del. 1996) ("This Court has recognized that the 'market price of shares may not be representative of true value.'" (quoting *Paramount*, 571 A.2d at 1150 n.12 (Del. 1989))).

87. *See, e.g.*, Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015); Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (both applying business judgment deference where shareholder votes were both informed and uncoerced).

88. *See In re* Appraisal of Dell, Inc., 2016 Del. Ch. LEXIS 81, at *65 ("Numerous cases support Chancellor Allen's observations that (i) pricing data from a thick and efficient market should be considered and (ii) *market price alone is not dispositive*." (emphasis added)).

89. *See generally* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383 (1970).

90. *See* Macey & Mitts, *supra* note 47, at 1019. See also studies showing that insiders can earn extraordinary returns on their trading: Jerome B. Baesel & Garry R. Stein, *The Value of Information: Inferences from the Probability of Insider Trading*, 14 J. FIN. & QUANTITATIVE ANALYSIS, 553, 567–69 (1979); Joseph E. Finnerty, *Insiders and Market Efficiency*, 31 J. FIN. 1141, 1142, 1146 (1976); Jeffrey F. Jaffe, *The Effect of Regulation Changes on Insider Trading*, 5 BELL J. ECON. & MGMT. SCI. 93, 114 (1974); Jeffrey F. Jaffe, *Special Information and Insider Trading*, 47 J. BUS. 410, 410 (1974); *see generally* Arthur J. Keown & John M. Pinkerton, *Merger Announcements and Insider Trading Activity: An Empirical Investigation*, 36 J. FIN. 855 (1981).

there is no need to disclose omitted information that would not change the "total mix" of information given to investors.[91] In *Skeen v. Jo-Ann Stores, Inc.*, the Delaware Supreme Court took the same approach: "Omitted facts are not material simply because they might be helpful. To be actionable, there must be a substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided."[92]

Then Vice Chancellor Strine read this quite differently:

> Fearing stepping on the SEC's toes and worried about encouraging prolix disclosures, the Delaware courts have been reluctant to require informative, succinct disclosure of investment banker analyses, in circumstances in which the bankers' views about value have been cited as justifying the recommendation of the board.[93]

It is difficult to draw a conclusion that this relaxation of traditional materiality standards led to an increase in disclosure litigation in connection with mergers, but the increase in litigation based on this relaxation that followed finally led to a reaction by the Delaware Supreme Court. In *Trulia*, the court described a "disclosure settlement" as "the most common method for quickly resolving stockholder lawsuits that are filed routinely in response to the announcement of virtually every transaction involving the acquisition of a public corporation."[94] The court described these announcements as producing a "flurry" of class actions arguing that the directors of the target have breached their fiduciary duties by agreeing to sell at an unfair price.[95] Despite the nature of the substantive claims, the parties frequently agree to settle for attorney's fees and cosmetic disclosure amendments.[96] One of us was a director of a corporation that agreed to be acquired, and before the announcement our experienced attorney assured us that we would be sued, and he had seen as few as two and as many as 20 complaints filed after the deal announcement. He also explained that it would require approximately $250,000 to $275,000 in fees to settle each case. This cottage industry was profitable for (mostly) Delaware attorneys on both sides of the case.

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91. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).
92. 750 A.2d 1170, 1174 (Del. 2000).
93. *In re* Pure Res., Inc., Stockholders Litig., 808 A.2d 421, 449 (Del. Ch. 2002).
94. *In re* Trulia, Inc. Stockholders Litig., 129 A.3d 884, 886 (Del. Ch. 2017).
95. *Id.* at 891.
96. *Id.* at 892–93.

As other forms of merger litigation declined, appraisal filings in Delaware increased from 20 cases in 2012 to 48 in 2016, a 240 percent increase in 4 years.[97] A recent study showed that appraisal petitions increased from about 2 percent of deals in the early 2000s to around 25 percent in the 2010s.[98] The top seven hedge funds seeking appraisal accounted for over 50 percent of the dollar value in all appraisals.[99] Another study shows that multiple petitions are being filed in these cases, with 77 petitions in 2016.[100] After a decline in 2017, appraisal cases returned to their 2015 level of 26 cases in 2018.[101] So when one cottage industry (pre-merger class actions) declined, another arose to continue lucrative merger litigation for the Delaware bar. The litigation costs are exacerbated by the Delaware Supreme Court's insistence that pre-announcement market values are not enough to value, because valuation is "jurisprudence"[102] and thus an unpredictable mish-mash[103] and the questionable use of the deal price less synergies estimated by those same experts.[104]

C. THE DIFFICULTIES OF A COURT OF EQUITY IN APPRAISAL.

While Delaware courts have moved closer to respect for deal values, they have repeatedly declined to give up their broad discretion in

97. *Appraisal Risk in Private Equity Transactions*, *supra* note 47.

98. Jiang et al., *Reforming the Delaware Appraisal Statute to Address Appraisal Arbitrage: Will it Be Successful?*, 59 J.L. & ECON. 697, 698–99 (2016).

99. *Id.*

100. Greene, *supra* note 47.

101. David F. Marcus et al., *Appraisal Litigation in Delaware: Trends in Petitions and Opinions*, CORNERSTONE RSCH., 2019, at 1 https://www.cornerstone.com/publications/reports/appraisal-litigation- delaware-2006-2018.

102. DFC Global Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 367 (Del. 2017).

103. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 703 n.17 (1982) ("Fairness is an invulnerable position; who is for unfairness? But for lawyers fairness is 'a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.'" (quoting George Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 4 (1972))). *See generally* Carney & Sharfman, *supra* note 52, at 110 (illustrating differences between pre-announcement merger values and judicial appraisal value).

104. *See In re* Appraisal of Jarden Corp., No. 12456-VCS, 2019 Del. Ch. LEXIS 271, at *6-7, *10 (Del. Ch. July 19, 2019) (where Vice Chancellor Slights based his appraisal on the market value rather than deal value less synergies, because the evidence on synergies was too unreliable). Of course, synergies are estimates of future uncertain outcomes, prohibited by § 262(h), and often estimates turn out to be mistakes.

determining value. Ironically, while relying on a statutory command to consider "all relevant factors" as authority for this discretion, the court has eschewed giving primacy to clear empirical market evidence about value, explaining "the definition of fair value used in appraisal cases is a jurisprudential concept that has certain nuances that neither an economist nor market participant would usually consider . . . ."[105] The court did not deign to identify those "nuances."[106] We have argued that while some evidence may be relevant, in the face of an active and efficient market only market values are material.[107] Chancellor Chandler argued in *Technicolor* that a special master—a neutral appraisal expert—would be able to assess the materiality of the evidence presented by conflicting expert witnesses, an approach that has apparently been ignored since then.[108] We should note that most trial courts of general jurisdiction will face similar problems of expertise in this type of litigation.

With Professor George Shepherd, one of us has previously argued that Delaware jurisprudence involving takeovers and acquisitions has been seriously unpredictable, apparently unbound by any set of coherent principles, other than the courts' own concepts of "fairness."[109] We are pleased that since that time the courts have clarified and apparently stabilized Delaware jurisprudence on some critical issues.[110]

Some of the judicial meanderings have apparently embarrassed the courts. When an appraisal award was 325 percent of the pre-announcement market value, a court later stated that it would be limited

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105. *DFC*, 172 A.3d at 364, 367.

106. *See id.* Macey and Mitts have inferred what is happening when markets are not strong form or semi-strong form efficient. Macey & Mitts, *supra* note 47, at 1045–50. We bypass their discussion because our focus is on exit as the function of appraisal, rather than a search for fundamental efficiency.

107. Carney & Sharfman, *supra* note 52, at 91.

108. Cinerama, Inc. v. Technicolor, Inc., No. 7129, 1999 WL 135242, at *2 (Del. Ch. Feb. 25, 1999).

109. Carney & Shepherd, *supra* note 51.

110. *Compare* C&J Energy Serv's, Inc. v. City of Miami Gen. Emp.'s' *and* Sanitation Emp.'s' Ret. Tr., 107 A.3d 1049, 1053 (Del. 2014) (employing business judgment deference) *with* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1985); *and compare* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014) (employing business judgment deference to a merger with a dominant shareholder where an independent committee and a majority of independent directors approved a cashout merger) *with* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (employing an "entire fairness" standard to such mergers).

to its facts, without explaining or admitting the error of the previous decision.[111]

Some of this confusion stems from the nature of courts of equity:[112]

> Most states have merged their law and equity courts into a single system, and the United States merged its federal law and equity systems in 1938. In contrast with the early law courts, which were bound by strict forms of action, the Chancellors were bound by no law, but only by the demands of justice as they saw it.[113]

As a result, the Delaware courts infrequently cite some statutes in their opinions, such as the safe harbor provision for interested directors.[114] Critics have noted the apparently open nature of Delaware's corporate law, coupled with the indeterminacy and fact-intensive nature of judicial decisions.[115] Some have also noted that judicial decisions, rather than legislative choices, dominate Delaware corporate Law.[116]

We have examined the hostility of the Delaware courts to fully trusting markets as an accurate tool for valuation.[117] Beginning in the era of the Great Depression of the 1930s, the Delaware Supreme Court stated that only "a moment's reflection" was required to refute trusting market values.[118] Later it also introduced the ephemeral notion of "intrinsic

111. Harris v. Rapid-Am. Corp., No. 6462, 1992 Del. Ch. LEXIS 75 (Del. Ch. Apr. 1, 1992), *rev'd in part*, 603 A.2d 796 (Del. 1992), *not followed in* Berger v. Pubco Corp., No. 3414-CC, 2010 Del. Ch. LEXIS 110 at *1 (Del. Ch. May 10, 2010) (declining to extend the rule of *Rapid-American*); *see also* William J. Carney & Mark Heimendinger, *Appraising the Non-Existent: The Courts' Struggles with Control Premiums*, 152 U. PA. L. REV. 845, 854-57 (2003).

112. *See generally* William J. Carney, *The Background of Modern American Business Law*, 32 J. JURIS. 93 (2017) (describing the development of courts of equity).

113. *Id.* at 96-97 (citing JOHN SELDEN, TABLE TALK 43 (Pollock ed., 1927) ("Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the Chancellor's conscience.")).

114. DEL CODE ANN. tit. 8, § 144 (2022).

115. *See* Carney & Shepherd, *supra* note 51, at 74-75.

116. Jill E. Fisch, *Thirteenth Annual Corporation Law Symposium: Contemporary Issues in the Laws of Business Organizations: the Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1077 (2000).

117. *See* Carney & Sharfman, *supra* note 52, at 64.

118. Chicago Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934).

value," (the "holy grail") which has never been explained.[119] Perhaps it is a cover to protect unfettered judicial discretion. As financial economics matured and began to model how markets accurately reflect all publicly available information about a company's expected future earnings,[120] the Delaware Supreme Court declined to admit evidence of modern valuation practices in finance, preferring instead to describe valuation as a matter of law (and not, apparently, fact).[121] It was not until *Weinberger v. UOP, Inc.* that the Delaware Supreme Court abandoned this exclusion of evidence, and instructed the Chancery Court to consider "all relevant evidence."[122] That instruction persists to this day, effectively precluding consideration of the materiality of biased experts' opinions versus the impartiality and rationality of efficient markets. When Vice Chancellor Laster squarely faced this issue, he was reversed, apparently for using only material evidence rather than considering "all relevant factors."[123] Thus a court of equity remains able to ignore facts that simplify decisions and ground them firmly in material facts. One judge attributes these difficulties to the institutional limits of their lack of education in issues of finance.[124] Another attributed them to polarized valuations of experts

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119. Carney & Sharfman, *supra* note 52, at 77-78, 80. The most plausible (if erroneous) explanation might be adoption of the strong form of the Efficient Capital Markets Hypothesis, which posits that markets accurately reflect all information in prices, regardless of public disclosures. A Lexis search provided no further enlightenment, beyond statements that this concept represents "true or intrinsic value" or "fair value."

120. *See generally* JAMES H. LORIE & MARY T. HAMILTON, THE STOCK MARKET: THEORIES AND EVIDENCE (1973).

121. Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 348 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975).

122. 457 A.2d 701, 713 (Del. 1983). This was later reflected in language added to Section 262(h) instructing courts to "take into account all relevant factors." DEL. CODE ANN. tit. 8, § 262(h) (2022).

123. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. 11448-VCL, 2018 WL 922139, *rev'd*, 210 A.3d. 128, 133–36 (Del. 2019).

124. Vice Chancellor Laster reviewed the difficulties the Chancery Court has faced in this area in his *Aruba* opinion, 2018 WL 922139 at *44-45; *see also In re* Appraisal of Ancestry.com, Inc., 2015 Del. Ch. LEXIS 21, at *2, where Vice Chancellor Glascock noted: "I have commented elsewhere on the difficulties, if not outright incongruities, of a law-trained judge determining fair value of a company in light of an auction sale, aided by experts offering wildly different opinions on value." Later he referred to the difficulties of employing a DCF analysis with a mind "softened as it has been by a liberal arts education." *Id.* at *60.

employing the same valuation model, rather than an impartial model of the kind used within firms.[125]

Alternate explanations exist. Recall Professor Ernest Folk's incredulity that the Delaware Corporation Law Revision Committee failed to adopt his recommendation that cash mergers of public companies be excluded from appraisal.[126] The following section deals with the public choice and interest group explanations of the drafting of Delaware law.

IV. INTEREST GROUP THEORIES AND DELAWARE LAW

There is vast literature on the influence of interest groups on corporate law, beginning with William Cary's famous article that categorized the competition for state charters and their franchise revenues as a "race for the bottom" to please corporate managers with lax rules allowing them to extract rents from their corporations and their shareholders.[127] Many modern writers have contested this, arguing that firms that incur excessive agency costs will be less profitable, and will lag behind more efficient competitors.[128] Macey and Miller have described a middle ground, based on interest group theory, where Delaware can allow a certain amount of agency costs due to its dominant position, perceived by many as the most efficient body of law, in part because of its experienced and highly qualified judges.[129] They argue that the bar, which dominates the drafting of provisions of the Delaware General Corporation law, benefits from increasing the amount of Delaware litigation. "The bar should instead favor an equilibrium point of uncertainty at which the marginal increase in bar revenues from litigation fees equals the marginal loss in revenues due to reduced incentives to incorporate in Delaware."[130]

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125. Cede & Co. v. Technicolor, Inc., No. 7129, 1990 WL 161084 at *8 (Del. Ch. Oct. 19, 1990) (where Chancellor Allen decided to choose the most credible expert opinion and make adjustments).

126. Newell, *supra* note 45, at 14.

127. William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974).

128. *See, e.g.*, Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 257 (1977).

129. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 488-89 (1987); *see also* Stephen M. Bainbridge, *Interest Group Analysis of Delaware Law: The Corporate Opportunity Doctrine as Case Study*, *in* CAN DELAWARE BE DETHRONED? EVALUATING DELAWARE'S DOMINANCE OF CORPORATE LAW 120 (Stephen M. Bainbridge et al., eds., Cambridge, 2018).

130. Macey & Miller, *supra* note 129, at 505.

Returning to Professor Folk's wonder about why his suggestion to exclude cash mergers of public corporations from appraisal was not adopted, and the silence of the bar committee to explain this omission from Professor Folk's draft, Macey and Miller provide a powerful answer. Cash mergers have become the dominant form of public corporation merger, and thus a most lucrative source of legal fees for Delaware lawyers. The judiciary's rejection of a simple but extraordinarily accurate measure of "fair value" —pre-merger market value—is evidence of the implicit cooperation of bench and bar in this process.[131] Contrast this with the approach of the Model Act, which has eliminated appraisal for all cash mergers involving public companies.[132] One difference may be the differing compositions of authors. The Delaware corporate bar is primarily a litigation bar, specializing in representation of companies when disputes arise, which can be increased with indeterminate rules and low entry costs for plaintiffs.[133] In contrast, the firms represented on the Committee on Corporate Laws are also engaged in litigation, but this represents a much smaller fraction of their general representation of corporate clients. Many of these transactional lawyers regard litigation as a hurdle to getting deals done, and are more prone to adopt safe harbors, such as excluding cash deals from appraisal.

V. ALTERNATIVE REMEDIES, PAST AND FUTURE

1. HISTORY OF THE EMPLOYMENT OF APPRAISERS

We recognize that our proposal to eliminate appraisal altogether does not address the problem of dissenting shareholders in closely held corporations, where the merger is neither with a public company nor for cash. We begin this analysis with a review of the history of who resolved such cases before appraisal statutes gave the valuation power exclusively to judges.

The seminal case of *Lauman v. Lebanon Valley R.R. Co.*[134] simply denied the right of a dissenting shareholder to block a merger into another

131. Carney & Sharfman, *supra* note 52.

132. *See Changes in the Model Business Corporation Act*, *supra* note 69, at 1142.

133. Macey & Miller, *supra* note 129, at 504-05 (pointing out that the Delaware bar "could stimulate litigation by supplying legal rules that are unclear in application."); *see also* Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85, 90-92 (1990).

134. 30 Pa. 42, 49 (Pa. 1858).

company without his consent. The remedy, analogous to a judicial partition of real property, left open the question of value, simply enjoining the merger and requiring the company to post a bond "and let it be dissolved on the defendants giving security to the plaintiff, in double the market value of his stock, to pay for said stock when its value shall be ascertained."[135] No mention was made of how "market value" should be ascertained, or by whom, assuming the parties could not agree. An early treatise cites only a single New Hampshire decision under a statute that permitted dissenting shareholders in a railroad merger to submit their case to any justice of the New Hampshire Supreme Court for determination of the fair value of the shares.[136] Fletcher added little to our understanding of process: "On sustaining an attack . . . by dissenting stockholders, it seems that the decree should give such stockholders the option to take stock in the new corporation or recover the value of their shares in the old company . . . ."[137] Delaware at one point required appointment of a special master in appraisal cases, which was removed in 1976 and replaced with a grant of power to appoint special masters.[138] This power appears to have been used infrequently, despite the apparent need for greater use.

There is abundant writing about the valuations achieved in appraisal cases, but little about who should determine it.[139] There should be little disagreement about impartiality, which can be obtained either with independent appraisers (in effect, arbitrators) or judges. The perils of using dueling experts are obvious from Delaware's experience. Even where judges are presented with expert testimony, their expertise at sorting out conflicting expert valuations is questionable at best. Chancellor Allen bemoaned this dilemma in *Technicolor*.[140] Early statutes

135. *Id.*

136. THOMPSON & THOMPSON, *supra* note 14, § 6060, at 885, n.8 (citing Douglas v. Concord & M.R.R., 54 A. 883, 884 (N.H. 1903)).

137. WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4799 (1917–1920).

138. *In re* Cinerama Inc., No. 7129, 1999 Del. Ch. LEXIS 32, *1–2 (Feb. 25, 1999) (citing 10 Del. C. § 372 and Chancery Rule 135, which states that "the Court shall have authority in any cause pending in the Court of Chancery . . . to appoint a Master in Chancery . . . .").

139. *See generally* Carney & Sharfman, *supra* note 52. We immodestly cite our own contribution to the literature on valuation.

140. Cede & Co. v. Technicolor, Inc., No. 7129, 1994 WL 161084 at *7-8 (Del. Ch. Oct. 19, 1990). As previously noted, Vice Chancellor Glascock also bemoaned this problem of expecting judges to sort out conflicting expert testimony with a mind "softened as it has been by a liberal arts education." *In re* Appraisal of Ancestry.com, No. 8173-VCG, 2015 Del. Ch. LEXIS 21, at *60 (Jan. 30, 2015).

authorizing the appraisal remedy did not specify how value was to be determined but relied in many cases on outside experts to serve as appraisers, as did Delaware. New Jersey, upon whose statute Delaware's was originally based, called for three appraisers to determine "full market value" of the dissenter's shares.[141] As Manning observed, "none of the statutes attempts to go much further in assigning content to the word 'value,' though a few seek to reassure the shareholder by providing that he is entitled to the 'fair' value."[142] There is no consensus on who should have the final word on valuation. There should be an obvious consensus on the requirement for some basic expertise, or reliance on evidence from efficient markets.

Given the paucity of literature on the question of who should decide, we look at modern evidence of statutory provisions. The Model Business Corporation Act ("Model Act") provides that while appraisal litigation is instituted in a specified local court and "must find the fair value of the shareholder's shares," the court "may appoint one or more appraisers to receive evidence and recommend a decision on the question of fair value."[143] This language appears in most Model Act states.[144] Since most

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141. Section 108 of the New Jersey General Corporation Act of 1896, 1896 N.J. Laws 312, 1902 N.J. Laws 700, as amended by 1920 N.J. Laws 284. Delaware followed this approach in the General Code of 1899, 21 Del. Laws 462 (1899), and in section 61 of the General Corporation Law, 40 Del. Laws 524 (1935).

142. Manning, *supra* note 11, at 231. Rather than look to markets, fair market value was defined by the courts to mean the "price which would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, without any compulsion whatsoever on the seller to sell or the buyer to buy." Poole v. N. V. Deli Maatschappij, 243 A.2d 67, 70 n.1 (Del. 1968) (citing Wilmington Hous. Auth. v. Harris, 93 A.2d 518 (1952)). Because of the abstractions that blurred the importance of evidence of actual transactions, and reliance on various hypothetical models of value, the powerful evidence of actual market prices was ignored. It was only in 1976 that "fair value" was added, 60 Del. Laws 1077, and in 1981 the instruction to take "all relevant factors" into account was added. 63 Del. Laws 36. We assume that this was merely a reflection of the judicial gloss already placed on the statute. *See, e.g.*, Tri-Continental Corp. v. Battye, 74 A.2d 71, 74-76 (Del. 1950); *see also* Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 348 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975).

143. MODEL BUS. CORP. ACT § 13.30(d) (AM. BAR ASS'N 2016); *see also* OHIO REV. CODE § 1701.85(B).

144. ALA. CODE § 10A-2-13.30(d); ALASKA STAT. § 10.06.580(c); COLO. REV. STAT. § 7-113-301(4); CONN. GEN. STAT. § 33-871(d); D.C. CODE § 29-311.30(d); FLA. STAT. § 607.1330(4); HAW. REV. STAT. § 415A-10(d); GA. CODE ANN. § 14-2-1330(d); IDAHO CODE § 30-29-1330(d); 805 Ill. Comp. Stat. 5/11.70(g); IND. CODE § 23-1-44-19(d); IOWA CODE § 490.1330.4; KY. REV. STAT. ANN. § 271B.13-300(4); ME. STAT. tit. 13C §

trial court decisions are generally not reported, there is no reliable information about how frequently appraisers are appointed.

The evidence on the appointment of appraisers is thus anecdotal, obtained from a LEXIS and WESTLAW search. In some states, such as Maryland, Texas, and California, judicial appointment of appraisers is mandatory.[145] In others, such as Massachusetts, arbitration is mandatory, by three experts, one appointed by each party and the third by both appointees, and their decision is final.[146] In others, following the Model Act, appointment of appraisers is enabling, with delegation of final authority determined by the order of appointment.[147]

2. THE INCOMPLETE ELIMINATION OF A REDUNDANT APPRAISAL REMEDY

Our thesis is simple: Whenever a dissenter can exit for cash or its equivalent, there is no need for appraisal. This means that whenever a shareholder is to receive cash, whether in exchange for public traded or privately held shares, the fundamental goal of achieving exit has been achieved. Shares in a publicly held company are equivalent to cash, so no appraisal is required to achieve an exit. As Manning wrote: "The appraisal remedy should not be extended except perhaps in demonstrable 'no market' situations."[148]

The Model Act is virtually in compliance with our suggestions. But there is room for improvement under the Model Act. Section 13.02(b)(3) addresses the exclusion from appraisal rights by including both marketable securities of a publicly traded corporation and cash, which

1331.4; MASS. GEN. LAWS ch. 156D, § 1330(d); MISS. CODE ANN. § 79-4-13.30(d); MO. REV. STAT. § 351.930(4); MONT. CODE ANN. § 35-14-1330(4); NEB. REV. STAT. ANN. § 21-2,181(d); NEV. REV. STAT. § 21-2,181(4); N. H. REV. STAT. ANN. § 293-A:13.30(d); N.M. STAT. ANN. § 53-15-4.E; N.C. GEN. STAT. § 55-13-30(d); OHIO REV. CODE ANN. § 1701.85(b); OR. REV. STAT. § 60.591(4); 15 PA. CONSOL. STATS. § 79(c); 7 R.I. GEN. LAWS § 7-1.2-1202(e); S.D. CODIFIED Laws § 47-1A-1330.3; TENN. CODE ANN. § 48-23-301(d); UTAH CODE ANN. § 16-10A-1330(4); VT. STAT. ANN. § 11A-1330(d); VA. CODE ANN. § 13.1-740; WASH. REV. CODE § 23B.13.300(5); W.VA. CODE § 31D-13-1330(c); WIS. STAT. § 180.1330 (4); WYO. STAT. Ann. § 17-16-1330(d).

Although not described here, many limited liability company statutes and professional corporation statutes contain similar language.

145. MD. CODE ANN., CORPS. & ASS'NS § 3-210; TEX. BUS. ORGS CODE ANN. § 10.361; CAL. CORP. CODE § 1304.

146. MASS. GEN. LAWS ch. 156, § 46.

147. MODEL BUS. CORP. ACT § 13.30(d) (AM. BAR ASS'N 2016).

148. Manning, *supra* note 11, at 262.

comports with the approach to an easy exit. But Section 13.02(b)(4) restores appraisal rights where the transaction is an interested transaction, as defined in section 13.01(5.1). Thus, where a dominant stockholder has sufficient control, variously described, the remaining shareholders are entitled to the "fair value" of their shares. This conflicts with the approach to "Directors' Conflicting Interest Transactions" in sections 8.60-8.63, which necessarily includes interested mergers.[149] Section 8.61(b) provides a safe harbor from equitable attack if the transaction was approved in compliance with section 8.62, which generally requires only review and approval by disinterested directors, whether on the full board or a committee. This is not dissimilar to Delaware's approach in cases such as *Kahn v. M & F Worldwide Corp.*, which employed business judgment rule deference under these circumstances.[150]

If the subsidiary board has no independent directors, the corporation can seek a safe harbor under section 8.61(b)(2) by obtaining minority shareholders' approval under section 8.63. Here, shareholders are required to receive full disclosure of the director's conflict, as well as about the transaction. If a majority of the "qualified shares" are voted in favor of the transaction, it is then protected by the safe harbor provision.

If neither of these Model Act safe harbors have been satisfied, then the burden is on the directors to satisfy the court to show that the transaction was "fair," but only to the parent corporation, leaving room for subsidiary shareholders to seek appraisal. Given this approach, appraisal becomes superfluous for cash and mergers involving publicly traded shares, even those with a dominant shareholder or conflicted directors. As Robert Thompson has put it: "In earlier times, policing transactions in which those who controlled the corporation had a conflict of interest was left to the courts through the use of fiduciary duty or statutes that limited corporate powers. Today, that function is left for appraisal in many cases."[151] This is where section 13.02's exclusion fails to recognize the equivalence of an arm's length transaction and an

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149. MODEL BUS. CORP. ACT § 8.60(1)(iii) defines a "director's conflicting interest transaction" to include one which "the director knew that a related person was a party or had a material financial interest." *Id.* For a director of a parent corporation, the "related person" would be covered by subsection (5)(vi), as "an entity that is controlled by an employer of the individual." The difficulty with this interpretation is that the fairness test applies only to the parent under subsection (6), which does not of itself cover any duties that a parent might owe to minority shareholders of the subsidiary.

150. 88 A.3d 635, 654 (Del. 2014).

151. Thompson, *supra* note 19, at 4.

interested shareholder transaction, where the interested transaction has met the standards of section 8.61. This is easily remedied by amending section 8.61(b)(3) to permit appraisal only in cases failing to meet the section 8.61 standards. On the other hand, simply providing a default rule for private resolution of such disputes would eliminate all need for judicial determinations of merger fairness.

We are left with the short form merger, where procedures to satisfy a safe harbor do not exist. Short form mergers do not require any disinterested shareholder approval, and the directors of the acquired company play no role in the process, which is entirely in the hands of the acquiring corporation's board.[152] If neither of these safe harbors have been satisfied, then the burden is on the directors to satisfy the court to show that the transaction was "fair," but only to the parent corporation, leaving room for subsidiary shareholders to seek appraisal. No transaction could more clearly exemplify an "interested transaction." Delaware has held that appraisal is the exclusive remedy in these transactions, since the fair dealing standard of *Weinberger* cannot be met.[153] In Delaware, the protection of the business judgment rule is only obtained if independent directors of the subsidiary control the transaction from initial negotiations to approval, followed by approval of the subsidiary's independent shareholders.[154] Thus we have witnessed the end of the utility of the short form merger, not by amendment by the legislature, but by the court. One can only remark that for the Delaware courts of equity, the absence of statutory appraisal should not present an obstacle to consideration of value, given the language of section 144, requiring establishment of fairness in the absence of disinterested approval.

The solution for Delaware is simple, if difficult. Simply adopt the suggested Model Act approach to the exceptions from appraisal. The difficulty is for the Delaware Corporate Law Committee and the legislature to have the courage to follow the Model Act's approach. This requires the committee to admit that following the Model Act is sometimes the best approach, and, more importantly, to sacrifice the Delaware corporate bar's financial interests to the best interests of investors in Delaware corporations.

An even simpler approach will be offered in a subsequent article, creating default rules for private resolution of merger valuation disputes.

152. DEL. CODE ANN. tit. 8 § 253; MODEL BUS. CORP. ACT § 11.05.
153. Glassman v. Unocal Expl. Corp., 777 A.2d 242, 248 (Del. 2001).
154. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 654 (Del. 2014).

The ultimate object is to remove disputes involving expertise not common to judges.

CONCLUSION

Though formally about "fair value," the appraisal remedy is properly and best understood as originally and truly motivated by a historically justified concern to protect exit rights for dissenting minority shareholders. This "Exit Theory" of judicial appraisal, we have shown, is overwhelmingly supported by the relevant doctrinal and historical evidence. Now that the availability of a market exit protects market value for most dissenting shareholders, while modern fiduciary duty law has evolved to a point that it adequately protects the value of a market exit for dissenting minority shareholders whose rights have been violated by a dominant shareholder, judicial appraisal no longer serves its original purpose to protect shareholder exit. The conclusion therefore follows that corporate law may usefully be reformulated to reflect this reality rather than continue to pursue the elusive Holy Grail of "fair value."

The notion of a "fair" price is illusory and a dangerous diversion from the simple reality of market value.[155] "Fairness" is assured by contractual arrangements on voting and legal rules governing directors' behavior, both in arm's length and interested transactions. Where there are built-in potential conflicts, markets will recognize them and discount stock prices accordingly. In such cases, one can say that a disappointed shareholder who purchased at a discounted price must be content with the results of taking that risk. Many states following the Model Act have nearly reached an exit approach to protecting dissenting shareholders. While some further changes are needed, only Delaware—despite Professor Folk's best efforts—lags in imposing unnecessary costs on both majority and dissenting shareholders.

155. *See supra* Part II.