

# RECENT DEVELOPMENTS IN DELAWARE CORPORATE LAW

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## I. INTRODUCTION

The General Corporation Law of the State of Delaware<sup>1</sup> applies to over 130,000 corporations, including a majority of the "Fortune 500" companies.<sup>2</sup> Thus, recent developments in that law are of some interest. This article presents a brief synopsis of both the statutory and case law under the Delaware General Corporation Law through 1981, 1982 and the first half of 1983.<sup>3</sup> No attempt has been made to summarize areas of the law. Rather, this comment discusses the wide range of corporate issues addressed by the Delaware Court of Chancery, the Delaware Supreme Court, and the Federal District Court for the District of Delaware, all of which are experienced in corporate matters.

## II. RECENT DEVELOPMENTS

### A. Stock and Stockholders

#### 1. Derivative Suits

The Delaware courts tightened the requirements both to bring

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1. DEL. CODE ANN. tit. 8, §§ 101-398 (1974).

2. Fortune, May 2, 1983, at 226.

3. Cases discussing Delaware jurisdiction, particularly those arising under DEL. CODE ANN. tit. 8, § 382 (1974) ("doing business"); DEL. CODE ANN. tit. 10, § 3104 (1978) (a "long arm" statute); and DEL. CODE ANN. tit. 10, § 3114 (1977) (director's consent to service of process), are not discussed herein. There have been several recent decisions relevant to these statutes and issues. See generally Transportes Aereos de Angola v. Ronair, Inc., 544 F. Supp. 858 (D. Del. 1982); Magid v. Marcal Paper Mills, 517 F. Supp. 1125 (D. Del. 1981); Moore v. Little Giant Indus., Inc., 513 F. Supp. 1043 (D. Del. 1981); Lutz v. Fishbein, No. 80-482 (D. Del. June 2, 1981); Istituto Bancario Italiano Spa v. Hunter Eng'g Co., 428 A.2d 19 (Del. Ch. 1981), *aff'd in part and rev'd in part*, 449 A.2d 210 (Del. 1982); Kaufman v. Albin, 447 A.2d 761 (Del. Ch. 1982); Tabas v. Crosby, 444 A.2d 250 (Del. Ch. 1982); Hill v. Equitable Trust Co., No. 82-220 (D. Del. May 3, 1983); Pettinaro Constr. Co. v. Fries Correctional Equip., Inc., No. 82-123 (D. Del. Aug. 30, 1982); Rhone-Poulenc S. A. v. Morton-Norwich Prod., Inc., No. 6742 (Del. Ch. Apr. 1, 1982), *reprinted in* 7 DEL. J. CORP. L. 496 (1982); Rothchild Int'l Corp. v. Liggett Group, Inc., No. 6239 (Del. Ch. July 14, 1981), *reprinted in* 6 DEL. J. CORP. L. 421 (1981); Aneco Reins. Co. v. Federated Dev. Co., No. 6483 (Del. Ch. June 23, 1981); Meeker v. Bryant, No. 6245 (Del. Ch. May 12, 1981), *reprinted in* 6 DEL. J. CORP. L. 388 (1981).

and to dismiss derivative suits. Holdings in the Delaware Court of Chancery and in the Federal District Court for the District of Delaware enforced the rule<sup>4</sup> that, in the absence of facts showing directors' self-interest or bias, a derivative plaintiff must first make a demand on the board of directors before bringing a derivative suit.<sup>5</sup> However, where a defendant made a motion to dismiss for failure to make demand or allege with particularity reasons for not doing so, the chancery court granted the plaintiff leave to amend his complaint to plead with more specificity the alleged futility of making a demand on the defendant's board of directors.<sup>6</sup>

Section 327<sup>7</sup> of the General Corporation Law expresses the policy that in order to bring a derivative suit the plaintiff must either be a stockholder at the time of the transaction complained of, or have his stock thereafter devolved upon him by operation of law. In *Brown v. Automated Marketing Systems, Inc.*,<sup>8</sup> the court held that section 327 deprived a stockholder of standing to attack a merger where the shares were purchased after the public announcement of the merger proposal. In *Chirlin v. Crosby*,<sup>9</sup> the court found that plaintiffs lacked standing because the alleged diversion of corporate opportunity had occurred before plaintiffs became shareholders; as the court rejected plaintiffs' attempt to style a single event (the construction of a tall bridge) as a continuing wrong.

In *Zapata Corp. v. Maldonado*,<sup>10</sup> the Delaware Supreme Court held that an independent committee of the board of directors of a Delaware corporation has the power to seek dismissal of a derivative action. The court, however, imposed a two-part test to be used in determining whether an action should be dismissed on the motion of the independent committee. The first part of the test requires a hearing concerning the independence and good faith of the committee in reaching its conclusion that the action should be dismissed and the reasonableness of that conclusion.<sup>11</sup> The second part of the test re-

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4. DEL. CH. CT. R. 23.1; FED. R. CIV. P. 23.1.

5. See *Weiss v. Temporary Inv. Fund, Inc.*, 516 F. Supp. 665 (D. Del. 1981); *Stepak v. Dean*, 434 A.2d 388 (Del. Ch. 1981); *Richardson v. Graves*, No. 6617 (Del. Ch. June 17, 1983); *Stepak v. Dean*, No. 6315 (Del. Ch. May 21, 1982), reprinted in 7 DEL. J. CORP. L. 509 (1982).

6. *Kaufman v. Albin*, 447 A.2d 761 (Del. Ch. 1982).

7. DEL. CODE ANN. tit. 8, § 327 (1974).

8. No. 6715 (Del. Ch. Mar. 22, 1982), reprinted in 7 DEL. J. CORP. L. 466 (1982).

9. No. 6632 (Del. Ch. Dec. 7, 1982).

10. 430 A.2d 779 (Del. 1981). See also Note, *Zapata Corp. v. Maldonado, A Limitation on the Use of Delaware's Business Judgment Rule in Stockholder Derivative Suits*, 6 DEL. J. CORP. L. 80 (1981).

11. 430 A.2d at 788.

quires an exercise of the court's own business judgment and consideration of "matters of law and public policy" in determining whether the action should be dismissed.<sup>12</sup> The second part of the test is not mandatory but lies within the discretion of the court. The supreme court sought to "steer a middle course between those cases which yield to the independent business judgment of a board committee . . . [and those] which would yield to unbridled plaintiff stockholder control."<sup>13</sup>

The chancery court in *Abbey v. Computer & Communications Technology Corp.*<sup>14</sup> interpreted *Zapata* so that "limited discovery" may be ordered to facilitate inquiry into the independence and good faith of a special litigation committee. The court held that a derivative plaintiff is not entitled to discovery as a matter of right, but only in the discretion of the trial court. The court refused to permit the extensive discovery sought by plaintiff; it limited discovery to depositions of the committee and production of documents the committee had used in the course of its investigation. In *Pompeo v. Hefner*,<sup>15</sup> the chancery court applied *Zapata* in granting a stay of discovery pending the decision of a one-man special litigation committee on whether to move to dismiss the action. Plaintiff argued that the "committee" could never be truly independent, since he was subject to removal at any time without cause by Hugh Hefner, a sixty-seven percent shareholder. The court rejected this argument, noting that the question of independence is to be determined when the court reviews the litigation committee's decision. Citing *Abbey*, the court also refused to allow plaintiff to participate in the functions and deliberations of the committee.

Pursuant to chancery court rules,<sup>16</sup> a proposed settlement of a derivative action must be reviewed by the court, and the court will exercise its own business judgment as to the reasonableness of the settlement after considering the nature of the claims and the possible defenses. In *Goldman v. Aegis Corp.*,<sup>17</sup> a stipulation of settlement provided that defendants would not propose any additional or further stock option plans for approval by the stockholders. The court opined that the only valid ground upon which it might refuse to approve the settlement was that defendants had agreed to purchase the stock of one of the plaintiffs. The court, however, ultimately approved the proposed settlement but held that its approval had no ef-

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12. *Id.* at 789.

13. *Id.* at 788.

14. No. 6941 (Del. Ch. Apr. 13, 1983).

15. No. 6806 (Del. Ch. Mar. 23, 1983).

16. DEL. CH. CT. R. 23.1.

17. No. 6427 (Del. Ch. May 3, 1982).

fect on the adjudication of the validity of the repurchase agreement. In *Valhi v. PSA, Inc.*,<sup>18</sup> the court declined to impose a constructive trust on the consideration received by Valhi from PSA pursuant to a settlement agreement between them, since the settlement was fair to the PSA shareholders and because Valhi had made no profit in the settlement at the expense of the stockholders of PSA. In *Moses v. Pickens*,<sup>19</sup> the court, applying its business judgment, found to be fair and reasonable a settlement under which T. Boone Pickens agreed to surrender his option on 1,200,000 shares of Mesa Petroleum common stock, thereby benefiting the corporation by approximately \$4 million.

## 2. Consent, Ratification, and Disclosure

Action taken by consent under section 228<sup>20</sup> is valid only if the consent is signed by stockholders of record on the date the action was taken.<sup>21</sup> In *Grynnberg v. Burke*,<sup>22</sup> the chancery court found an equitable or other interest in stock is insufficient to support action by consent.

The stockholders may be bound where they consent to or ratify actions based on knowledge of all "germane" information. In *Fisher v. United Technologies Corp.*,<sup>23</sup> the court of chancery found that the disclosures in a proxy statement regarding a merger were adequate and reasonable. The court applied the disclosure standard, imposed by the Delaware Supreme Court in *Lynch v. Vickers Energy Corp.*,<sup>24</sup> that all information, "such as a reasonable shareholder would consider important in deciding whether to sell or retain stock" must be disclosed.<sup>25</sup> The federal district court, in *Jacobs v. Hanson*,<sup>26</sup> held the stockholders' unanimous approval of a sale with full knowledge of the facts bars them from complaining later. The court noted that a corporation is under no duty to disclose possible corporate wrong-

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18. No. 5730 (Del. Ch. Feb. 26, 1982), *reprinted in* 7 DEL. J. CORP. L. 516 (1982).

19. No. 6242 (Del. Ch. Nov. 10, 1982).

20. DEL. CODE ANN. tit. 8, § 228 (1974).

21. The use of consents in a battle for corporate control was thoroughly analyzed in *Pabst Brewing Co. v. Jacobs*, 549 F. Supp. 1068 (D. Del. 1982), *aff'd*, 707 F.2d 1392 (3d Cir. 1982).

22. No. 5198 (Del. Ch. Aug. 13, 1981).

23. No. 5847 (Del. Ch. May 12, 1981), *reprinted in* 6 DEL. J. CORP. L. 380 (1981).

24. 383 A.2d 278 (Del. 1977).

25. *Id.* at 281.

26. 525 F. Supp. 292 (D. Del. 1981).

doings, matters which could not affect the stockholders' judgment, or matters of which the stockholders should reasonably be aware.<sup>27</sup>

The court will not enjoin an annual stockholders' meeting on the basis of allegations that the notice of the meeting was accompanied by a misleading statement concerning the corporation's financial picture, unless it is clear that stockholders were in fact deceived or misled by such statement. In *Nerken v. Solarex Corp.*,<sup>28</sup> the court held that it was impossible to determine whether any stockholders were deceived or misled by the notice given prior to the meeting. Initially, Solarex sent a notice to the stockholders describing the company as prosperous. Prior to the meeting, however, the stockholders were subsequently sent another notice, with audited financial statements, which disclosed a deteriorating financial condition. The court refused to assume that the stockholders were misled into giving management their proxies, and observed that a proxy can be revoked, superseded by another proxy, or superseded by actual appearance at the meeting.

### 3. Inspection Rights

The court of chancery, in *Mills v. Fruit Auction Sales Co.*,<sup>29</sup> upheld the right of a stockholder to inspect the books and records of his corporation in order to value his stock or to determine if there had been mismanagement of the corporation. In *Carroll v. CM&M Group, Inc.*,<sup>30</sup> however, the court qualified this right by limiting inspection rights to documents which pertain to the value of stock, and the court refused to permit inspection of documents which would place the shareholder in "a position tantamount to being a corporate director without having been so elected."<sup>31</sup>

A stockholders' demand for inspection of the corporation's stock list may be considered moot, as in *Levy v. Recognition Equipment Inc.*,<sup>32</sup> where a stock list has already been made available pursuant to section 219.<sup>33</sup> However, in *Vista Resources, Inc. v. Camelot Industries Corp.*,<sup>34</sup> the court held that while the availability of a list of the

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27. *Id.*

28. No. 6788 (Del. Ch. Apr. 30, 1982), reprinted in 7 DEL. J. CORP. L. 489 (1982).

29. No. 6468 (Del. Ch. Oct. 1, 1981), reprinted in 7 DEL. J. CORP. L. 209 (1982).

30. No. 6351 (Del. Ch. Sept. 24, 1981), reprinted in 7 DEL. J. CORP. L. 181 (1982), aff'd, 453 A.2d 788 (Del. 1982).

31. *Id.* at 9.

32. No. 6705 (Del. Ch. Feb. 26, 1982).

33. DEL. CODE ANN. tit. 8, § 219 (1974).

34. No. 6744 (Del. Ch. Mar. 30, 1982), reprinted in 7 DEL. J. CORP. L. 522 (1982).

stockholders of record who would be permitted to vote at the meeting might moot a demand based solely upon an intent to contact stockholders with regard to an impending stockholders' meeting, a stockholder who wants the list to contact other stockholders about an ongoing tender offer is entitled to inspect a current list. The court in *Odyssey Partners v. Trans World Corp.*<sup>35</sup> rejected defendant's argument that plaintiff was not entitled to a stock list because it had (allegedly) violated the Federal Securities and Exchange Act of 1934. In *Leroy v. Hardwicke Cos.*,<sup>36</sup> the court granted plaintiff's demand for a stock list, finding that plaintiff's desire to communicate with stockholders to determine their views on management's performance and defendant's financial difficulties was a proper purpose. The court in *Badger v. Tandy Corp.*<sup>37</sup> held that access to a list of stockholders for "hunting" purposes is not within the scope of section 220, because it is not reasonably related to plaintiff's interest as a stockholder.

Assuming a proper purpose exists for a demand to inspect a corporation's stock list, and the corporation maintains, or has access to, central certificate depository system breakdowns showing beneficial owners of stock, the court of chancery will require production of the breakdowns. Additionally, the court of chancery will require production of computer tapes and daily transfer sheets in possession of the corporation which enable it to communicate with its stockholders.<sup>38</sup>

#### 4. Voting

Section 216 of the General Corporation Law was amended with regard to quorum and voting requirements.<sup>39</sup> Under the new section 216, absent a provision in the certificate of incorporation or bylaws to the contrary, a majority of the shares entitled to vote, in person or represented by proxy, constitutes a quorum. In no event may a quorum consist of less than one-third of the shares entitled to vote. The affirmative vote of the majority of shares represented in person or by proxy at the meeting and entitled to vote constitutes the act of the stockholders. Where a separate vote by class is required, the affirmative vote of a majority of the shares of that class present in person or by proxy constitutes the act of the class.

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35. No. 7125 (Del. Ch. Mar. 23, 1983).

36. No. 7023 (Del. Ch. Jan. 4, 1983).

37. No. 6898 (Del. Ch. Mar. 21, 1983).

38. See *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350 (Del. Ch. 1981).

39. DEL. CODE ANN. tit. 8, § 216 (1974) (amended 1981).

The rules relating to non-stock corporations were similarly amended. Under the new section 215<sup>40</sup> of the General Corporation Law, absent a provision in the certificate of incorporation or bylaws to the contrary, one-third of the members of the corporation constitutes a quorum, and the affirmative vote of a majority of the members present in person or by proxy and entitled to vote constitutes the act of the members. The amendment established no minimum number of members which may constitute a quorum.

The court of chancery will order that an annual meeting of stockholders be held to elect directors where there has been no meeting for thirteen months, even if management believes the company has insufficient funds to conduct a proxy campaign, develop audited financial statements, or take other necessary actions.<sup>41</sup>

Where stockholders of a corporation are deadlocked in the election of directors, the discretionary power of the court to appoint a receiver or custodian pursuant to section 226<sup>42</sup> of the General Corporation Law should be exercised cautiously. If there has been no injury to any vital interest of the stockholders or the corporation, the court will not appoint a custodian.<sup>43</sup>

In order to create a voting trust among stockholders, the provisions of section 218<sup>44</sup> of the General Corporation Law must be closely followed. In *Oceanic Exploration Co. v. Grynberg*,<sup>45</sup> the supreme court defined a "voting trust" under section 218 as "a stockholder pooling arrangement with the criteria that voting rights are separated out and irrevocably assigned for a definite period of time to voting trustees for control purposes while other attributes of ownership are retained by the depositing stockholders."<sup>46</sup>

In *Schreiber v. Carney*,<sup>47</sup> the court of chancery held that vote-buying is not illegal *per se* unless the object or purpose is to defraud or in some way disenfranchise the other stockholders. The court also found, however, that vote-buying must be viewed as a voidable transaction subject to a test of intrinsic fairness.

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40. DEL. CODE ANN. tit. 8, § 215 (1974) (amended 1981).

41. *Meredith v. Security Am. Corp.*, No. 6606 (Del. Ch. Nov. 18, 1981), reprinted in 7 DEL. J. CORP. L. 341 (1982); *Algeran, Inc. v. Connolly*, No. 6557 (Del. Ch. Oct. 5, 1981).

42. DEL. CODE ANN. tit. 8, § 226 (1974).

43. *Giuricich v. Emtral Corp.*, 449 A.2d 232 (1982).

44. DEL. CODE ANN. tit. 8, § 218 (1974).

45. 428 A.2d 1 (Del. 1981).

46. *Id.* at 7.

47. 447 A.2d 17 (Del. Ch. 1982).

### 5. Restrictions on Transfer of Stock

The holding in *Joseph E. Seagram & Sons, Inc. v. Conoco, Inc.*<sup>48</sup> limited restrictions on the transfer of stock, interpreting section 202<sup>49</sup> of the General Corporation Law as prohibiting imposition of a restriction on transfer of outstanding shares of stock without approval of the holders of the stock. In the context of a tender offer by a Canadian corporation for shares of Conoco, Inc., the Federal District Court for the District of Delaware enjoined an attempt by Conoco to impose stock transfer restrictions by imprinting the restriction on certificates representing shares of stock issued prior to the adoption of the restriction. Conoco's board of directors had adopted a bylaw purporting to limit the number of shares of Conoco stock which could be held by aliens and providing that shares transferred to aliens in excess of the bylaw limitation could be held by the aliens solely for the purpose of retransferring them.

### 6. Class Actions

A person seeking to intervene as a class representative must have been a stockholder of record at the time of the transaction attacked. In *Tanzer v. Cavenham Ltd.*,<sup>50</sup> a potential intervenor who purchased twenty shares which he held in his wife's maiden name, but who was never a stockholder of record, could not meet the qualifications of a class representative and could not be permitted to intervene.

The sole requirement of chancery court rule 23 (a) (4)<sup>51</sup> with respect to class representatives is that a class representative fairly and adequately protect the interests of the class. Thus, in determining whether to certify a class representative, consideration may be given to events which would demonstrate a likelihood that a plaintiff would not, or would not be able to, pursue the litigation as a responsible representative. In *Kahn v. Household Acquisition Corp.*,<sup>52</sup> the court granted the plaintiff's motion for certification as class representative on certain conditions. The plaintiff was seventy-six years old, had a Ph.D. in psychology and relied upon her husband and sons for guidance in business affairs. In *Citron v. E. I. DuPont de Nemours &*

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48. 519 F. Supp. 506 (D. Del. 1981).

49. DEL. CODE ANN. tit. 8, § 202 (1974).

50. No. 5349 (Del. Ch. Mar. 2, 1982), *reprinted in* 7 DEL. J. CORP. L. 518 (1982).

51. DEL. CH. CT. R. 23 (a) (4).

52. No. 6293 (Del. Ch. Jan. 19, 1982), *reprinted in* 7 DEL. J. CORP. L. 324 (1982).

*Co.*,<sup>53</sup> the court granted plaintiff's motion for certification as a class action and rejected defendants' claims that plaintiff's New York attorneys were guilty of barratry and champertous conduct. In *Merritt v. Colonial Foods, Inc.*,<sup>54</sup> the chancery court refused to include in the class both persons who owned shares prior to the tender offer but who sold their shares on the open market between the date of the tender offer and the date of the follow-up merger and persons who purchased shares on the open market subsequent to the tender offer but who sold their shares on the open market prior to the merger.

In determining whether to approve a settlement in a class action, the court must consider whether the proposed settlement is reasonable. In *Lewis v. Fuqua Industries, Inc.*,<sup>55</sup> the court gave considerable weight to the fact that the plaintiffs caused the corporation to send additional information to all stockholders and that plaintiffs activities were to some extent responsible for the abandonment by the corporation of its plan to go private, thus giving the stockholders the option of not selling their shares. In *Tabas v. Crosby*,<sup>56</sup> the court denied three objectors permission to opt out of the class. The court found that due process was assured because the named plaintiff adequately represented the class; the objectors were provided with notice of the proposed settlement and given an opportunity to voice objections; and the court determined, in its business judgment, that the settlement was fair, adequate, and reasonable.

## B. Directors

### 1. Rights

Section 145 of the General Corporation Law, relating to indemnification of officers, directors, employees, and agents, was amended to make explicit that indemnification is available to a director, officer, or employee who is acting as a fiduciary of an employee benefit plan, and that the indemnification may cover excise taxes assessed with respect to serving in such capacities.<sup>57</sup> Section 145(e) was amended to eliminate the requirement that an employee or agent, to whom the expenses of defending a civil or criminal action was paid by the corporation, furnish in advance an undertaking to repay the cor-

53. No. 6219 (Del. Ch. May 18, 1983).

54. No. 6078 (Del. Ch. Feb. 2, 1982), *reprinted in 7 DEL. J. CORP. L.* 345 (1982).

55. No. 6534 (Del. Ch. Feb. 16, 1982), *reprinted in 7 DEL. J. CORP. L.* 478 (1982).

56. No. 6619 (Del. Ch. July 23, 1982).

57. DEL. CODE ANN. tit. 8, § 145 (1974) (amended 1981).

poration for such expenses.<sup>58</sup> The supreme court in *Hibbert v. Hollywood Park, Inc.*<sup>59</sup> held, based upon the particular corporate bylaws pertaining to indemnification, former directors were entitled to reimbursement for proxy contest expenses and indemnification for legal fees and related costs incurred in suits they had filed in an unsuccessful bid for reelection.

Section 220 of the General Corporation Law was amended to codify the common law rights of a director of a Delaware corporation to examine the stock list, books and records of his corporation, and, if necessary, to obtain summary relief in the court of chancery to enforce those rights.<sup>60</sup> In addition, sections 211 and 225 of the General Corporation Law were amended to permit a director to bring an action to require the holding of an annual meeting, to determine the validity of an election of directors, and to determine the right to hold office.<sup>61</sup> In *Gerschel v. Town & Country Management Corp.*,<sup>62</sup> the chancery court, rejecting plaintiff's claim that notice of a special shareholders' meeting was defective, denied the preliminary injunction plaintiff sought to prevent his removal at the meeting.

Section 223 of the General Corporation Law was amended to clarify the right of directors elected by a separate class or series of stock to fill any vacancy or newly-created directorship of that class, rather than to require that such vacancies or newly-created directorships be filled by action of the entire board.<sup>63</sup>

## 2. Duties

A director may have a duty to do more than simply abstain from action by the board of directors with which he disagrees. In *Dalton v. American Investment Co.*,<sup>64</sup> the court denied a motion for summary judgment in a derivative action where the defendant directors argued that they could not be held liable for any breach of fiduciary duty resulting from the action of the board because they had abstained from voting on the matter. The court observed that discovery might be necessary to determine whether there was a conflict of interest or other situation which might not protect a director from liability simply be-

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58. 457 A.2d 339 (Del. 1983).

59. H.R. 185, 132d Ass., 1st Sess. (1983).

60. DEL. CODE ANN. tit. 8, § 220 (1974) (amended 1981).

61. DEL. CODE ANN. tit. 8, §§ 211, 225 (1974) (amended 1981).

62. No. 6843 (Del. Ch. July 1, 1982).

63. DEL. CODE ANN. tit. 8, § 223 (1974) (amended 1981).

64. No. 6305 (Del. Ch. June 4, 1981), *reprinted in* 6 DEL. J. CORP. L. 402 (1981).

cause he abstained from voting. In *Conlew v. International Environmental Energy Corp.*,<sup>65</sup> plaintiff sought a preliminary injunction to prevent the individual defendant from diverting a business opportunity of the corporate defendant to himself and others. The chancery court denied the application, holding that plaintiff had failed to establish that the corporation had the financial resources necessary to take advantage of the corporate opportunity itself.

### G. Transactions

#### 1. Tender Offers

Section 203 of the General Corporation Law was changed to provide that any amended tender offer may close twenty days after the date of the original offer if at least ten days have elapsed since the date of the amendment. In addition, the method of delivery of the notice and information statement required by section 203 (a) (1) was clarified.<sup>66</sup>

The Federal District Court for the District of Delaware ruled that the twenty-day pre-commencement notice and waiting period provided in section 203 (a) (1)<sup>67</sup> as applied to tender offers may be invalid as a constitutional matter, at least with respect to tender offers subject to regulation under the Securities Exchange Act of 1934<sup>68</sup> and the rules and regulations promulgated thereunder.<sup>69</sup> The district court's orders are in accord with the recent decision by the United States Supreme Court in *Edgar v. Mite Corp.*,<sup>70</sup> where the divided Court held an Illinois twenty-day pre-commencement notice and waiting period violative of the commerce clause of the United States Constitution, but could not agree on the federal preemption issue under the supremacy clause. In *Burlington Northern, Inc. v. El Paso Co.*,<sup>71</sup> the district court enjoined enforcement of section 203 (a) (3) of the Delaware Tender Offer Act on the grounds that there would be ir-

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65. No. 7000 (Del. Ch. Dec. 3, 1982).

66. DEL. CODE ANN. tit. 8, § 203 (1974) (amended 1981).

67. DEL. CODE ANN. tit. 8, § 203 (a) (1) (1974).

68. 15 U.S.C. §§ 78a-78kk (1976).

69. Joseph E. Seagram & Sons, Inc. v. Conoco, Inc., 519 F. Supp. 506 (1981); Crane Co. v. Harsco Corp., 511 F. Supp. 294 (1981); Whittaker Corp. v. Brunswick Corp., No. 82-37 (D. Del. Jan. 25, 1982); IC Indus., Inc. v. Sunbeam Corp., No. 81-426 (D. Del. Sept. 21, 1981); National Medical Enterprises, Inc. v. Cenco, Inc., No. 81-403 (D. Del. Sept. 18, 1981); Mobil Corp. v. Conoco, Inc., No. 81-319 (D. Del. July 17, 1981); Dome Energy Ltd. v. Conoco, Inc., No. 81-179 (D. Del. May 6, 1981); UA Entertainment, Inc. v. UA-Columbia Cablevision, Inc., No. 81-152 (D. Del. Apr. 15, 1981).

70. 102 S.Ct. 2629 (1982).

71. No. 82-173 (D. Del. Dec. 28, 1982).

reparable injury to the offeror, the offeree stockholders who tendered within the ten day proration period, and investors who had bought and sold in the marketplace in reliance on the currently effective federal timetable.

An order preliminarily enjoining the consummation of a tender offer on grounds that no proper business purpose existed was denied in *Klein v. Soundesign Corp.*<sup>72</sup>. Finding the tender offer was adopted to take advantage of tax laws permitting corporations to be taxed under Subchapter S of the Internal Revenue Code, the court of chancery ruled that the majority stockholder had the right to vote its shares in its own interest, thereby creating a substantial benefit for itself. In *FMC Corp. v. R. P. Scherer Corp.*,<sup>73</sup> the plaintiffs sought a preliminary injunction to prevent defendant from amending its charter to require eighty percent stockholder approval for mergers. The district court held that plaintiffs would not suffer irreparable injury even if they were left with a large block of defendant's stock and were unable to consummate the merger, since a post-transaction suit could remedy any loss suffered by their later inability to sell their shares.

## 2. Reclassification

The court of chancery refused in *Societe Holding Gray D'Albion S. A. v. Saunders Leasing System, Inc.*,<sup>74</sup> to enjoin a plan to reclassify existing shares of stock into two classes, one of which had full voting power and one of which had only limited voting power. Although the plaintiff charged that the plan favored the controlling majority stockholders by creating a class of stock that they could sell without reducing their voting power, the court found the reclassification plan to be fair since it treated all stockholders equally.

In *Fleit v. Selinger*,<sup>75</sup> the court of chancery refused to enjoin an issuance of stock to certain controlling stockholders. The court held that the issuance was not wrongful because the stockholders to whom it was issued already possessed voting control and the act of increasing the existing control did not violate any fiduciary obligation of the majority not to freeze-out the minority from participation in the affairs of the corporation.

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72. No. 6636 (Del. Ch. Jan. 21, 1982), *reprinted in* 7 DEL. J. CORP. L. 332 (1982), *appeal refused*, No. 69 (Del. Apr. 14, 1982).

73. 545 F. Supp. 318 (D. Del. 1982).

74. No. 6648 (Del. Ch. Dec. 16, 1981), *appeal refused*, 445 A.2d 338 (Del. 1981).

75. No. 6633 (Del. Ch. Nov. 25, 1981).

### 3. Cash-Out Mergers

The supreme court analyzed the business purpose and fairness requirements of *Singer v. Magnavox Co.*<sup>76</sup> and its progeny in *Weinberger v. UOP, Inc.*<sup>77</sup> In *Weinberger v. UOP, Inc.*, two directors of a subsidiary corporation who were also directors of the parent prepared a feasibility study indicating that a price in excess of what the parent ultimately offered in a cash-out merger would have been a good investment for the parent. This report was not disclosed to the subsidiary's minority shareholders. The minority was also misled into believing that the investment banker had carefully prepared its fairness opinion. The supreme court held that, under these circumstances, approval by a majority of the minority shares was meaningless, and the transaction did not meet the test of fairness. The court also held that, in view of the fairness test, the expanded appraisal remedy set forth in its opinion, and the chancellor's broad discretion to fashion relief, the business purpose requirement of *Singer v. Magnavox Co.* and its progeny would no longer be the law in Delaware. The chancery court in *Smith v. Pritzker*<sup>78</sup> denied rescission of a merger or money damages, finding that the directors did not act recklessly or improvidently, given the market value of the corporation's stock, the business acumen of the directors, the substantial premium over market price which had been offered, and the ultimate effect on the merger price provided by the prospect of other bids for the stock in question.

In *Harman v. Masoneilan International, Inc.*,<sup>79</sup> the court characterized the elements of a *Singer* claim as allegations that (1) the price to the minority was grossly inadequate, (2) the merger lacked any business purpose other than the elimination of the minority, and (3) the majority stockholder used its control over the corporate machinery to effect the merger.<sup>80</sup> In *Roizen v. Multivest, Inc.*,<sup>81</sup> the court enjoined a merger in which the price was nearly half the book value. There the directors (who were also the majority stockholders and would have been the only remaining stockholders after the merger) had unilaterally set the merger price, and the investment banker,

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76. 380 A.2d 969 (Del. 1977).

77. 457 A.2d 701 (Del. 1983).

78. No. 6342 (Del. Ch. July 6, 1982).

79. 442 A.2d 487 (Del. 1982).

80. See also *Fisher v. United Technologies Corp.*, No. 5847 (Del. Ch. May 12, 1981), reprinted in 6 DEL. J. CORP. L. 380 (1981).

81. No. 6535 (Del. Ch. Sept. 25, 1981), reprinted in 7 DEL. J. CORP. L. 214 (1982).

in rendering its opinion as to fairness, simply relied on the directors' analysis of a fair price.

Where a stockholder purchases shares of a corporation after the announcement of a plan of merger, the stockholder's cause of action contesting the merger will be dismissed for lack of standing as in *Brown v. Automated Marketing Systems, Inc.*<sup>82</sup>. While mere delay in bringing an action to rescind a merger does not give rise to the defense of laches, the court of chancery found in *Updyke Associates v. Wellington Management Co.*<sup>83</sup> that when delay works a disadvantage on another party, equitable relief will be denied if it appears that the delay was unreasonable under the circumstances.

#### 4. Sale of Assets

Following the holding in *Gimbel v. Signal Companies, Inc.*,<sup>84</sup> the court of chancery enjoined the sale, without stockholder approval under section 271<sup>85</sup> of the General Corporation Law, of the Canadian subsidiary of a Delaware corporation in *Katz v. Bregman*.<sup>86</sup> Since the subsidiary accounted for 51% of the assets of the corporation, 45% of its sales, and 52% of its pretax net operating income, the court found that the sale would have radically changed the business of the corporation.

#### 5. Appraisals

Section 262<sup>87</sup> of the General Corporation Law, the Delaware appraisal statute, was amended but not substantially changed. The term "fair value" was set forth in section 262 (a) and there were changes in the time for filing the verified list of stockholders and the publication of notice. In addition, section 262 now provides corporations the option to grant appraisal rights in connection with transactions other than mergers, including a sale of assets, charter amendments, or a merger or consolidation, where appraisal rights would otherwise have been denied. The amendments also clarified the jurisdiction of the court of chancery to determine appraisal rights

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82. No. 6715 (Del. Ch. Mar. 18, 1982).

83. No. 6298 (Del. Ch. Feb. 3, 1982).

84. 316 A.2d 599 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974).

85. DEL. CODE ANN. tit. 8, § 271 (1974).

86. 431 A.2d 1274 (Del. Ch. 1981), *appeal refused sub nom.*, Plant Indus., Inc. v. Katz, 435 A.2d 1044 (Del. 1981); *cf.* Desmedt v. Gardner, No. 6430 (Del. Ch. June 26, 1981).

87. DEL. CODE ANN. tit. 8, § 262 (1974) (amended 1981).

granted in a certificate of incorporation. The amendments to the appraisal section are not nearly as significant as the Delaware Supreme Court's statement in *Weinberger v. UOP, Inc.*<sup>88</sup> that a Delaware appraisal proceeding shall be the "basic remedy" in challenges to cash-out mergers. The court abandoned the method that had been used for decades in Delaware to determine the value of stock in an appraisal proceeding. Rejecting use solely of the historical method of weighing the average of asset value, market value, and earning value, the court emphasized that fair value should be determined by methods acceptable to the financial community.

In a class and derivative action alleging violations of federal securities law and breach of fiduciary duty under Delaware law, Judge Stapleton of the federal district court predicted that the Delaware Supreme Court would hold that a stockholder who elects appraisal in ignorance of fraud in the merger will be entitled to rescind that election upon discovery of the fraud, even though his election would otherwise be irrevocable under the appraisal statute.<sup>89</sup>

The chancery court, in *Moffitt v. Wellington Management Co.*,<sup>90</sup> held that a petitioner in an appraisal action must be a stockholder of record at the time of the merger. Additionally, the supreme court, in *Dofflemyer v. W. F. Hall Printing Co.*,<sup>91</sup> held that a petitioning stockholder may not withdraw his appraisal action without consent of the corporation after more than sixty days following the effective date of the merger.

The chancery court in *Steinhart v. Southwest Realty & Development Co.*<sup>92</sup> reiterated the principle that a dissenting stockholder in a merger is entitled to the true or intrinsic value of his shares, determined by reference to market value, asset value, earnings value, and any other facts which are pertinent to the valuation of the dissenting stockholder's interest.

### CONCLUSION

The recent developments in the General Corporation Law have refined, rather than radically changed, existing law. *Weinberger* clarified the *Singer* principles in cash-out mergers, while *Maldonado*

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88. 457 A.2d 701 (Del. 1983).

89. *Dofflemyer v. W. F. Hall Printing Co.*, 558 F. Supp. 372 (D. Del. 1983).

90. No. 6108 (Del. Ch. Apr. 8, 1981).

91. 432 A.2d 1198 (Del. 1981).

92. No. 583 (Del. Ch. Dec. 28, 1981), reprinted in 7 DEL. J. CORP. L. 365 (1982), modified by, No. 583 (Del. Ch. Jan. 20, 1982), reprinted in 7 DEL. J. CORP. L. 378 (1982).

defined the extent of the power of an independent committee of the board of directors of a Delaware corporation to seek dismissal of a derivative action it believed contrary to the best interests of the corporation. Although the basic legal doctrines remain unchanged, the recent amendments of the General Corporation Law and the decisions thereunder by the Delaware courts and the Federal District Court for the District of Delaware reflect a tempered and well-considered response to a wide variety of legal questions in the corporate context and a sensitivity to the need for uniformity and predictability in corporate affairs.