WEINBERGER v. UOP, INC.: ITS PRACTICAL SIGNIFICANCE IN THE PLANNING AND DEFENSE OF CASH-OUT MERGERS

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I. INTRODUCTION

The Delaware Supreme Court has rewritten the theory of the law on parent-subsidiary cash-out mergers in its recent decision in *Weinberger v. UOP, Inc.*.[1] The practical impact of the decision, however, is less clear. On the one hand, proponents of cash-out mergers may benefit by the court's relegation of dissenting minority shareholders to a statutory appraisal proceeding under the Delaware Code[2] (*if* indeed that is what *Weinberger* does).[3] On the other hand, the holding of the case turns upon a rigorous application of traditional standards imposed by Delaware law upon corporate fiduciaries for the protection of minority interests.[4] The court placed particular emphasis on the requirement that all material information be disclosed to minority shareholders, especially proprietary information concerning the subsidiary which the parent has acquired by virtue of its controlling position.[5]

This article will explore the implications of the decision in the contexts of planning a cash-out merger and defending it from attack. Mergers are more likely to withstand judicial scrutiny if the subsidiary's minority shareholders are represented by an independent negotiating committee of outside directors when the terms of the merger are considered and established,[6] and if the merger is conditioned upon approval by a majority of the minority shareholders.[7] A liberalized appraisal remedy[8] may or may not be exclusive even where minority

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1. 457 A.2d 701 (Del. 1983).
2. DEL. CODE ANN. tit. 8, § 262 (1974).
3. *See infra* text accompanying notes 63-73.
4. *See infra* text accompanying notes 54-62.
5. *Weinberger*, 457 A.2d at 703, 707, 708-12.
6. *See infra* text accompanying notes 32-53.
7. *See infra* text accompanying notes 54-62.
8. *See infra* text accompanying notes 63-73.

approval has not been obtained.[9] To the extent the new appraisal is in fact exclusive, new defensive arguments may be available in federal securities actions as well.[10] In general, *Weinberger* has placed paramount emphasis on the full disclosure of all material facts to the minority shareholders. In all of these areas, a good defensive posture to any attack can be established only if the right decisions have been made as to what must be disclosed and to whom.

II. THE FACTUAL BACKGROUND OF THE DECISION

The *Weinberger* decision resulted from the appeal of the post-trial judgment in defendants' favor in a shareholder class action attacking the cash-out merger between UOP, Inc. (UOP) and its majority owner, The Signal Companies, Inc. (Signal).[11] The Delaware Supreme Court initially affirmed the judgment of the court of chancery.[12] After rehearing the case *en banc*, the supreme court issued the current decision[13] reversing the chancery judgment and remanding the case to the court of chancery where the "plaintiff will be permitted to test the fairness of the $21 price by the standards we herein establish, in conformity with the principle applicable to an appraisal—that fair value be determined by taking 'into account all relevant factors.'"[14]

Some years before the merger challenged by the *Weinberger* complaint, Signal acquired a 50.5% interest in UOP and elected seven members of UOP's thirteen member board of directors.[15] In early February 1978, Signal requested two of its representatives on UOP's board to study the feasibility of Signal's acquisition of the balance of UOP's outstanding shares.[16] The supreme court found that these Signal representatives submitted a written report to Signal's senior management concluding that it would be a good investment for Signal to purchase those shares at any price up to $24 per share.[17]

On February 28, 1978, Signal informed UOP's chairman of the board that it was contemplating a merger with UOP at a price of

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9. *See infra* text accompanying notes 74-85.

10. *See infra* text accompanying notes 86-92.

11. Weinberger v. UOP, Inc., 426 A.2d 1333 (Del. Ch. 1981).

12. Weinberger v. UOP, Inc., No. 58,1981 (Del. Feb. 9, 1982), *withdrawn*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

13. The opinion was issued on February 1, 1983.

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

15. *Id.* at 704-05. One of the seven directors elected by Signal also served as UOP's president and chief executive officer.

16. *Id.* at 705. These men were directors of both Signal and UOP.

17. *Id.*

$20 to $21 per outstanding minority share.[18] UOP's chairman believed the price range to be fair, but asked that steps be taken to protect the employment and incentive compensation of key UOP personnel.[19]

Meetings of the Signal and UOP boards were scheduled for March 6, 1978, to act on the proposed merger.[20] In the interim, UOP retained Lehman Brothers Kuhn Loeb, Inc. (Lehman Brothers) to prepare an opinion on the fairness of the proposed merger price of $20 to $21 per share.[21] UOP's outside (non-Signal) directors were informed by telephone of Signal's proposal, and Signal was thereafter advised that UOP's outside directors would not approve the transaction at a price of less than $21 per share.[22]

On March 6, 1978, both the Signal and UOP boards met to consider the merger. Telephone communications were maintained between the meetings. Signal's board unanimously adopted a resolution authorizing Signal to propose to UOP a cash merger at $21 per share.[23] The offer was conditioned upon approval both by a majority of the minority shares voting and by a two-thirds vote of all UOP shares.[24] UOP's board then considered and approved the proposal. Signal's representatives on UOP's board participated in its deliberations but abstained from voting.[25]

In approving the merger, UOP's board had before it UOP's financial data for 1974-1977, UOP's most recent financial statements, market price information, and budget projections for 1978.[26] "In addition they had Lehman Brothers' hurriedly prepared fairness opinion letter finding the price of $21 to be fair."[27] The Delaware Supreme Court expressly found that Signal's "feasibility study," which concluded that UOP was a good investment for Signal at any price up to $24 per share, was *not* disclosed at UOP's board meeting.[28]

UOP's board recommended to the minority shareholders that they approve the merger.[29]

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18. *Id.*
19. *Id.* On that date the closing price of UOP common stock, which was traded on the New York Stock Exchange, was $14.50 per share. *Id.* at 706.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 707.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 708.

> The proxy statement indicated that the vote of UOP's board in approving the merger had been unanimous. It also advised the shareholders that Lehman Brothers had given its opinion that the merger price of $21 per share was fair to UOP's minority. However, it did not disclose the hurried method by which this conclusion was reached.[30]

On May 26, 1978, the merger was approved by 76.2% of UOP's outstanding shares which consisted of Signal's shares and 51.9% of the total minority. Only 2.2% of the minority shares were voted against the merger.[31]

III. THE INDEPENDENT NEGOTIATING COMMITTEE AS A CURE FOR THE CONFLICT OF INTEREST AND NONDISCLOSURE PROBLEMS CITED IN *WEINBERGER*

In deciding that the facts surrounding the proposed merger were not fairly presented to UOP's minority shareholders, the Delaware Supreme Court cited the short notice given to UOP's board,[32] the fact that negotiations over the terms were "modest at best,"[33] the undisclosed "rush imposed on Lehman Brothers by Signal's timetable," and "the rather cursory preparation" of that firm's fairness opinion.[34] However, the principal reason for the supreme court's reversal seems to have been the nondisclosure to UOP's board and minority stockholders of the feasibility study which concluded that UOP was a good investment for Signal at any price up to $24 per share. The court explained the significance of this omission as follows:

> Certainly, this was a matter of material significance to UOP and its shareholders. Since the study was prepared by two UOP directors, using UOP information for the exclusive benefit of Signal, and nothing whatever was done to disclose it to the outside UOP directors or the minority shareholders, a question of breach of fiduciary duty arises. This problem occurs because there were common Signal-UOP directors participating, at least to some extent, in the UOP board's decision-making processes without full disclosure of the conflicts they faced.[35]

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30. *Id.*
31. *Id.*
32. *Id.* at 711.
33. *Id.*
34. *Id.* at 712.
35. *Id.* at 709. The court referred to the point as "a primary issue mandating

Citing several landmark Delaware decisions,[36] the court determined that the nondisclosure of the report violated the authors' duty, as UOP directors, of undivided loyalty to UOP,[37] notwithstanding their potentially conflicting duties as directors of Signal.[38] Specifically, the directors were found to have violated their duties to disclose all material information to UOP and its shareholders,[39] and to refrain from using inside UOP information for the exclusive benefit of Signal.[40]

In a footnote containing some of the most important language in the *Weinberger* opinion, the court suggested a means to resolve at least some of these difficulties:

> Although perfection is not possible, or expected, the result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm's length. Since fairness in this context can be equated to conduct by a theoretical, wholly independent, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.[41]

An independent negotiating committee of the subsidiary's outside directors would, by definition, exclude directors affiliated with the parent. It also would prevent the parent from holding an unfair advantage in the use of relevant information it had obtained about the subsidiary. As cases cited by the court make clear, the subsidiary's

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reversal," *id.* at 708, and devoted 7 pages of its 13 page opinion to discussing its implications. *Id.* at 703, 707, 708-12.

36. Bastian v. Bourns, Inc., 256 A.2d 680, 681 (Del. Ch. 1969), *aff'd*, 278 A.2d 467 (Del. 1970); David J. Greene & Co. v. Dunhill Int'l, Inc., 249 A.2d 427, 431 (Del. Ch. 1968); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. 1952); Gottleib v. Heyden Chem. Corp., 91 A.2d 57, 57-58 (Del. 1952); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939).

37. *Weinberger*, 457 A.2d at 710.

38. *Id.* at 710-11 (citing Warshaw v. Calhoun, 221 A.2d 487, 492 (Del. 1966); Levien v. Sinclair Oil Corp., 261 A.2d 911, 915 (Del. Ch. 1959), *aff'd in pertinent part*, 281 A.2d 717 (Del. 1971)).

39. *Weinberger*, 457 A.2d at 710 (citing Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977)).

40. *Weinberger*, 457 A.2d at 711 (citing Lank v. Steiner, 224 A.2d 242, 244 (Del. 1966); Brophy v. Cities Serv. Co., 70 A.2d 5, 7 (Del. Ch. 1949)).

41. *Weinberger*, 457 A.2d at 709-10 n.7 (citations omitted).

independent committee can retain its own independent advisers, including investment bankers, lawyers, appraisers, and accountants.[42] Access to advice of this nature would enable the subsidiary's committee to make the same use of the subsidiary's financial data as did the parent which the Delaware Supreme Court found relevant to judicial determination of fair price in *Weinberger*.[43]

All information relating to the subsidiary should, of course, be available to its own independent negotiating committee. The extent to which this information should be disclosed to minority shareholders has been addressed in a variety of decisions often limited to the facts of a given case, which *Weinberger* has nothing new to add.[44]

One problem presented by *Weinberger* is whether the parent corporation, as majority shareholder, has a duty to disclose what the minority shares may be worth to it. The Delaware Supreme Court repeatedly decried the fact that "the minority stockholders were denied the critical information that Signal considered a price of $24 to be a good investment."[45] This language can be read in either of two ways: (1) as relating to the objective value of UOP (i.e., Signal should have disclosed information showing that UOP at $24 per share would have been a good investment for anyone), or (2) as relating to the subjective worth of UOP to Signal itself (i.e., Signal should have disclosed that, for reasons of its own, it was willing to pay $24 for UOP shares regardless of what they were worth to anyone else).

Support for the subjective test may be found in *Lynch v. Vickers*,[46] relied upon in *Weinberger*, which held that a majority shareholder's tender offer materials should have disclosed its board resolution authorizing open market purchases at $3 per share more than the tender offer price.[47] Similarly, the liberalized valuation inquiry approved in *Weinberger* arguably makes the parent's interests pertinent since the trial court may now consider nonspeculative elements of value arising from the merger, including the nature of the unified enterprise.[48]

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42. Harriman v. E.I. duPont de Nemours & Co., 411 F. Supp. 133, 142 (D. Del. 1975); Puma v. Marriott, 283 A.2d 693, 694 (Del. Ch. 1971).

43. *Weinberger*, 457 A.2d at 712.

44. *See generally Lynch*, 383 A.2d at 281. The Securities and Exchange Commission has taken the position that cash flow analyses routinely used in corporate boardrooms can be misleading if sent to shareholders, particularly "where 'cash flow' data is presented on a per share basis." 5 FED. SEC. L. REP. (CCH) ¶¶ 72,961-72,964.

45. *Weinberger*, 457 A.2d at 712; *see also id.* at 705, 707, 708-11.

46. Lynch v. Vickers Energy Corp., 383 A.2d 278 (Del. 1977).

47. *Id.* at 281-82.

48. *Weinberger*, 457 A.2d at 713. *See infra* text accompanying notes 63-73.

It is far from clear, however, whether a rule requiring a parent to disclose the upper limit of what it is prepared to pay is either workable or fair to the parent and its shareholders. If, as stated in *Weinberger*, fairness in cash-out mergers can be equated to arm's-length bargaining between two independent boards of directors,[49] then the parent's willingness to pay *more* than the objective value of the stock should be no more material than a minority shareholder's willingness to accept *less*.[50] The court's observation that the result "could have been entirely different if UOP had appointed an independent negotiating committee"[51] suggests that any obligation of the parent to disclose what it would ultimately be willing to pay would not arise if the minority had active, independent representatives negotiating for it.[52] Indeed, the duty of disclosure that was apparently decisive in *Weinberger* was the duty which the Signal-appointed UOP board members owed to UOP's board of directors, rather than the duty which Signal owed as majority shareholder to the other shareholders of UOP.

It will be argued from the minority's standpoint that a cash-out merger is a forced sale. The majority shareholder may be the only realistic purchaser for minority shares, and has the power to propose and effect a cash-out merger when it chooses to do so. This might justify requiring more extensive disclosure to the minority than would be expected in a genuine arm's-length transaction. These concerns could be satisfied in part by conditioning the merger upon approval by a majority of the minority shares, thus making it more difficult for a dissenter to argue that the merger was a forced sale. Still, the court's declaration that UOP minority approval was meaningless absent disclosure of what their stock was worth to Signal,[53] means that the parent must carefully consider the risks of withholding any of its

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49. *Weinberger*, 457 A.2d at 709-10 n.7.

50. In ordinary commercial bargaining, neither side would volunteer what it was prepared to settle for. If both parties are fully informed as to the characteristics of the property they are negotiating about, and neither is under undue pressure to buy or to sell, the price should end up somewhere between the maximum amount that the buyer is prepared to pay and the minimum amount the seller is willing to accept.

51. *Weinberger*, 457 A.2d at 709-10 n.7.

52. *Lynch v. Vickers* can be distinguished on the same basis. That case involved a tender offer by the majority shareholder to acquire the outstanding minority shares. *Lynch*, 383 A.2d at 281-82. In tender offers, unlike negotiated mergers, "the protection afforded by an independent fiduciary's careful security is notably absent." *See* Goldman & Wolfe, *In Response to a Restatement of Corporate Freezeouts*, 36 WASH. & LEE L. REV. 683, 693 (1979).

53. *Weinberger*, 457 A.2d at 712.

own studies that later judicial review may deem material to the shareholders' decision.

As a practical matter, the parent's burden of showing the fairness of the transaction will decrease in direct proportion to the number of safeguards employed in structuring the transaction. The easiest merger agreements to defend will be those in which the minority is represented by an independent negotiating committee with access to independent advice, and which contain a condition that the merger be approved by a majority of the minority shares. In such cases the minority has both the sophistication and leverage (i.e., the option to walk away) necessary to engage in meaningful arm's-length bargaining with the parent.

IV. THE EFFECT OF APPROVAL OF THE MERGER BY A MAJORITY OF THE MINORITY SHARES

The Signal-UOP merger was conditioned upon approval by a majority of the minority UOP shares voted[54] and, in fact, was approved by an absolute majority of the outstanding minority shares, whether or not voted.[55] While holding that minority approval is meaningless absent full disclosure of material facts, the court stated that "where corporate action has been approved by an informed vote of a majority of the minority . . . the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority."[56]

The court did not state that it is essential for a merger to be conditioned upon majority-of-minority approval in order to shift the burden of proof. Dissident shareholders will argue that it should be so conditioned, since minority shareholders may not take their vote seriously enough if they perceive approval of the merger as a foregone conclusion based on the parent's controlling interest.[57] Conversely, proponents of the merger will argue that *Weinberger* means what it says: ratification in fact by a majority of the minority is sufficient to shift the burden of proving unfairness to the plaintiff, even if such approval was not necessary to effect the merger. Defendants can go even further and claim that where the merger was conditioned upon approval by a ma-

54. *See supra* note 24 and accompanying text.

55. *See supra* note 31 and accompanying text.

56. *Weinberger*, 457 A.2d at 703 (citing Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979)).

57. *See* Richards, *Protection of Majority Interests*, 4 DEL. J. CORP. L. 728, 733 (1979).

jority of the minority, no one can bring a shareholder class action absent an allegation that material facts were not disclosed before the minority vote.[58] Where the majority shareholder refrains from exercising its powers to control or bring about corporate action (i.e., by conditioning a merger on the approval of a majority of the minority shares), it arguably should not be required to bear the *Sterling-Singer* burden of demonstrating the fairness of the transaction to the minority.[59] In such circumstances, the court of chancery held at the outset of the *Weinberger* litigation that a plaintiff cannot state a *Singer* cause of action merely by alleging that the terms and purposes of a merger are unfair.[60]

Of course, a dissenting shareholder will still be free to seek his statutory appraisal remedy[61] regardless of how the merger was structured or how many of his fellow shareholders voted for the merger. In cases where the issue is something other than majority-of-minority approval, *Weinberger* purports to limit dissidents in most mergers to an appraisal remedy anyway.[62] Nonetheless, structuring a merger to require approval by a majority-of-minority shares voting on a proposed merger will clearly facilitate subsequent defense of the merger in Delaware courts.

V. THE LIBERALIZED APPRAISAL REMEDY UNDER *WEINBERGER*

While the *Weinberger* decision may limit the scope of judicial review for entire fairness established by the *Sterling-Singer* line of cases, it apparently has greatly liberalized the statutory appraisal remedy. This

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58. *See* Weinberger v. UOP, Inc., 409 A.2d 1262, 1266-68 (Del. Ch. 1979). In this decision, the court of chancery dismissed the original complaint in *Weinberger*. Plaintiff ultimately prevailed on an amended complaint which raised for the first time the disclosure issues discussed in the text. The supreme court opinion in *Weinberger* noted the chancellor's decision without comment. *See also* Harman v. Masoneilan Int'l, Inc., 442 A.2d 487, 495 (Del. 1982).

59. *See* Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952). These cases generally hold that since majority stockholders occupy a fiduciary relation to minority stockholders, the burden of showing fairness of a proposed merger falls on the shoulders of the majority stockholder. To meet this burden the majority must show sufficient fairness to "pass the test of careful scrutiny by the courts." *See* 93 A.2d at 109.

60. *Weinberger*, 409 A.2d at 1267. Under *Singer*, a complaint did not have to allege the particulars of why a merger was unfair so long as it alleged that the majority shareholder did not have a proper purpose to support the merger, and that the merger price was inadequate.

61. DEL. CODE ANN. tit. 8, § 262 (1974). In general, the dissenting shareholder is free to challenge the adequacy of the price offered for his shares, even where fairness of the merger is not at issue.

62. *See infra* text accompanying notes 63-85.

result, though not unanticipated,[63] represents a significant departure from previous cases interpreting the appraisal statute.[64] The valuation inquiry in appraisal proceedings will no longer be limited to the "weighted average method [otherwise known as the "Delaware block" method,] wherein the elements of value, i.e., assets, market price, earnings, etc., were assigned a particular weight and the resulting amounts added to determine the value per share."[65] Instead, the door is now open to all "generally accepted techniques used in the financial community and the courts."[66] The Delaware Supreme Court expressly found that plaintiff's discounted cash flow method of valuing UOP's stock should have been taken into account, noting that similar analyses had been performed by Signal in its own evaluation of the merger.[67] The court did not address the merits of plaintiff's other approach to valuation, "a comparative analysis of the premium paid over market in ten other tender offer-merger combinations,"[68] but indicated that "plaintiff's evidence should be part of the factual mix and weighed as such" by the court of chancery on remand.[69]

The Delaware Supreme Court also countenanced proof of all elements of value not of a speculative variety such as "elements of future value, including the nature of the enterprise, . . . [and] any damages, resulting from the taking, which the stockholders sustain as

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63. *See* Bell v. Kirby Lumber Corp., 413 A.2d 137, 150-51 (Del. 1980) (Quillen, J., concurring) (encouraging the consideration of all factors relevant to determining the intrinsic value of a shareholder's interest in a going concern), *cited in Weinberger*, 457 A.2d at 713.

64. DEL. CODE ANN. tit. 8, § 262 (1982). *See, e.g.*, *In re* General Realty & Utils. Corp., 52 A.2d 6, 14-15 (Del. Ch. 1947).

65. *Weinberger*, 457 A.2d at 712.

66. *Id.* This holding will likely lead to a battle of the experts as to what such techniques are.

67. *Id.*

68. *Id.*

69. *Id.* at 714. We question the pertinence of "the premium paid over market" in one transaction to the fairness of the price paid in another transaction, involving entirely different corporations whether or not in the same industry. We also question whether the minority is entitled to any "premium" that cannot be justified on independent grounds.

> All the investment bankers today tell you, well, you have to give the minority some premium. I submit that the flip side of this is that the minority is being given a premium above the value of the stock and the shareholders of the majority company are suffering. Indeed, in a number of recent transactions in which I have been involved, the true insiders believe that the proper suit to be brought would have been by the shareholders of the majority company for giving away too much to the minority in an effort to make the transaction bullet-proof.

See Richards, *supra* note 57, at 730.

a class."[70] Taking a liberal view of the facially restrictive language of the Delaware Code,[71] the court stated that "[o]nly the speculative elements of value that may arise from the 'accomplishment or expectation' of the merger" should be excluded in the determination of fair value.[72]

After *Weinberger*, it will be much more difficult to predict an upper limit of exposure in an appraisal action brought by one or more minority shareholders. As a practical matter, however, unresolved valuation issues under the new appraisal proceeding may be less significant in the near future than the question whether, and under what circumstances, a dissident shareholder may pursue alternative remedies in the court of chancery.[73]

VI. IS APPRAISAL NOW A DISSIDENT SHAREHOLDER'S EXCLUSIVE REMEDY?

After *Weinberger*, minority shareholders no longer have an absolute right to continued participation in the corporate enterprise as such. Majority shareholders are not required to demonstrate a business purpose for cash-out mergers,[74] and dissident shareholders ostensibly will be relegated to the newly liberalized appraisal remedy most of the time.[75]

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70. *Weinberger*, 457 A.2d at 713.

71. DEL.CODE ANN. tit. 8, § 262(h) (1982).

> [T]he Court of Chancery: shall appraise the shares, determining their *fair* value exclusive of any element of value arising from the accomplishment or expectation of the merger, together with a fair rate of interest, if any, to be paid upon the amount determined to be the *fair* value. In determining such *fair* value, the Court shall take into account all relevant factors . . . .

Weinberger, 457 A.2d at 713 (emphasis added).

72. *Weinberger*, 457 A.2d at 713-14. The door may now be open to proof of synergistic increments in value of the combined enterprise, so long as these are not speculative and are susceptible of proof at the time of the merger. *See* Brudney & Chirelsteon, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974). In view of this significant liberalization of valuation under the appraisal statute, *Weinberger* overruled Lynch v. Vickers Energy Corp., 429 A.2d 497, 505-06 (Del. 1981), to the extent that it purported to prescribe rescissory damages as the "single measure." Rescissory damages were defined in *Lynch* as "damages which are the monetary equivalent of rescission." *Id.* at 501. In a merger case impossible to rescind in fact, rescissory damages were measured in *Lynch* by the money value of the stock at the time of trial. *Id.* at 501-03.

73. *See infra* text accompanying notes 74-85.

74. *Weinberger*, 457 A.2d at 715, *overruling in part* Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Roland Int'l Corp. v. Najjar, 407 A.2d 1032 (Del. 1979); and Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977). Under *Singer* and *Tanzer*, majority shareholders were required to show a legitimate business purpose for the merger.

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

This result stemmed from the court's conviction that the overriding interest of minority shareholders is to be paid a fair price for their stock,[76] and that the business purpose requirement of the *Singer* line of cases[77] had provided little or no protection for the minority in the real world.[78]

If the *Weinberger* court intended to convert most shareholder class actions into appraisal actions, that result may be unrealized for some time. In the short run at least, litigation over the exceptions threatens to swallow the rule that appraisal is the minority's exclusive remedy. The pertinent language is as follows:

> While a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved. Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages.[79]

The clearest message here is that minority shareholders who have not perfected an appraisal remedy will not be precluded from bringing an action (including a Rule 23 class action[80]) if they can show that material facts about the merger were falsely stated or undisclosed. Indeed, the *Cole* decision cited by the court states that "[t]he exercise of the statutory right of merger is always subject to nullification for fraud. The cases so hold."[81] Thus potential state law liability for nondisclosure is as great as it ever was, up to and including rescissory

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76. *Id.* at 711.

77. *See supra* note 74.

78. *Id.* at 715. Some years previously, the Delaware Court of Chancery had interpreted the business purpose test to suggest that "it may be more fair, in appropriate cases, to give the minority stockholders an option to receive stock in the surviving corporation in lieu of cash, if such stock is available." Tanzer v. International Gen. Indus., Inc. 402 A.2d 382, 391 (Del. Ch. 1979). Subsequent case law did not develop the point any further.

79. *Weinberger*, 457 A.2d at 714 (citation omitted). *See also id.* at 711 ("in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger").

80. *See* DEL. CH. CT. R. 23 (class actions).

81. Cole v. National Cash Credit Ass'n, 156 A. 183, 187 (Del. Ch. 1931).

damages to the whole plaintiff class of minority shareholders.

More problematical is the court's suggestion that appraisal may not be adequate in cases of "self-dealing," "deliberate waste," or "gross and palpable overreaching."[82] Plaintiffs are not bashful about using such phrases in any action challenging the adequacy of the price received in cash-out mergers; indeed every parent-subsidiary cash-out merger which does not require the approval of the minority shareholders involves self-dealing in the sense that the parent controls the vote on the transactions. The upshot will surely be that shareholder complaints will be able to state a valid claim for an injunction or rescission or other nonappraisal remedy merely by the routine allegations of nondisclosure and self-dealing, just as they have always done. Only if the courts take a narrow view of the self-dealing exception to the rule that appraisal is the exclusive remedy, will appraisal actions proliferate at the expense of Rule 23 class actions.[83] Conversely, before these matters are clarified, class action plaintiffs who are unable to prove a disclosure violation run the risk of a ruling that *Weinberger* means what it says, and that their exclusive remedy, appraisal, has lapsed because a timely demand was not made.[84]

In this context, approval of the merger by a majority of the minority (whether after the fact or as a condition of the merger) may make a real difference.[85] Absent a valid claim of nondisclosure, a plaintiff would be hard-pressed to contend that a cash-out merger constituted self-dealing or overreaching if that merger had been approved by a majority of the allegedly oppressed minority.

VII. A NOTE ON THE FEDERAL CONSEQUENCES OF THE DECISION

There is no cause of action under the federal securities laws for unfairness or breach of fiduciary duty or for "failure to confess one's corporate wrongdoing" under state law.[86] However, failure to disclose

82. *See supra* note 79 and accompanying text.

83. *See supra* note 80.

84. *See* DEL. CODE ANN. tit. 8, § 262 (1982).

85. *See supra* text accompanying notes 54-62. On the other hand, if most shareholders are to be relegated to appraisal anyway, the practical benefits of securing minority ratification may be superfluous except insofar as an informed shareholder vote might be admissible in the appraisal proceeding to show that the merger price was fair.

86. Biesenbach v. Guenther, 588 F.2d 400 (3d Cir. 1978) (corporate dependant's failure to disclose a breach of fiduciary duty is not a misrepresentation sufficient to constitute a violation of the 1934 Act); Merritt v. Colonial Foods, Inc., 499 F. Supp. 910, 914 (D. Del. 1980) (citing Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977)

other information which is material because it would have enabled the plaintiff to secure an injunction under state law does create a cause of action under federal law.[87]

Weinberger's impact on this balance between state and federal regulation of mergers is unclear. On the one hand, it purports to relegate most shareholders to appraisal as opposed to injunctive relief;[88] on the other, it strongly insists on full disclosure of information deemed material to a shareholder's vote (but not perhaps to his decision to seek injunctive relief).[89] We predict that mergers that have been consummated after full disclosure of information relating to the value of minority shares would survive federal scrutiny under *Goldberg* and *Healey*.[90] Such mergers would not give rise to injunctive relief under state law because no irreparable harm can be shown (i.e., there is no fraudulent manipulation of the shareholder vote, no right to continue in the corporate enterprise and thus no injury that is not adequately compensable in cash).

Because the valuation inquiry in appraisal actions historically has been narrower than the potential measure of damages in federal securities law actions, it has been held that a plaintiff is not precluded from relitigating the issue of value in federal court after having participated in an appraisal proceeding.[91] The rationale of such decisions has been undercut by the liberalization of appraisal valuation in *Weinberger*.[92]

(allegations of corporate mismanagement or a breach of fiduciary duty, unaccompanied by a claim of deception, misrepresentation, manipulation or nondisclosure, failed to state a cause of action under § 10(b) of the 1934 Act)).

87. Goldberg v. Meridor, 467 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978) (complaint alleging misleading press releases stated claim for relief in view of circumstances, including availability of injunctive relief under state law had dependents not lulled the minority shareholders into security by deceptive disclosure); *Merritt*, 499 F. Supp. at 914 (citing Healey v. Catalyst Recovery of Pa., Inc., 616 F.2d 641 (3d Cir. 1980)). The court relied upon a strong federal interest, as evidenced by the entire field of federal securities regulation, in ensuring a proper flow of information between the parties to a securities transaction. In *Santa Fe*, the Supreme Court noted that there had been no misinformation connected with the merger.).

88. *See supra* note 75 and accompanying text.

89. *See supra* text accompanying notes 74-85. As noted therein, *Weinberger* suggests that "self-dealing" may be grounds for injunctive relief. But Delaware law agrees with federal law (*see supra* note 86) that proxy statements need not become an exercise in "self-flagellation" or "speculat[ion] as to improper motives." Fisher v. United Technologies Corp., No. 5847 (Del. Ch. May 12, 1981), *reprinted in* 6 DEL. J. CORP. L. 380, 386 (1981).

90. *See supra* note 87 and accompanying text.

91. Graham v. Exxon Corp., 480 F. Supp. 12, 14 (S.D.N.Y. 1978). *See also* Dofflemyer v. W.F. Hall Printing Co., 558 F. Supp. 372, 380-81 (D. Del. 1983).

92. *See supra* text accompanying notes 63-73.

IX. CONCLUSION

Weinberger will be perceived by some as a retrenchment from recent innovations designed to foster minority interests in cash-out mergers, because of its abandonment of the *Singer* business purpose test and its ostensible relegation of dissenting minority shareholders to appraisal (however liberalized).[93] In reality, *Weinberger* is an attempt to induce mechanisms of corporate governance to provide more efficient and effective protection for minority interests than had been provided by judicial review under the business purpose test. The decision insists upon full disclosure of material information to minority shareholders and strongly encourages that the minority be given a voice both in the negotiation of a merger and in the final approval of the transaction itself. More predictable rules within that broad mandate are certain to develop in subsequent decisions.

93. Committing minority shareholders to appraisal (if that is what *Weinberger* really does) might incidentally reduce exposure incident to a merger in the following way. Stockholders must "perfect" their right to appraisal under DEL. CODE ANN. tit. 8, § 262(d). Lazy or inattentive shareholders may fail to do so and accept the merger price. The same lazy shareholders might have remained part of a *Singer* class action under Court of Chancery or Federal Rule 23(c)(2), since those rules include all putative members *within* the class unless they take the trouble to opt out. Mandating appraisal in most cases would shift the advantage of shareholder inertia from the plaintiff class representatives to those defending the transaction.