WEINBERGER TO *RABKIN*: FINE TUNING THE DOCTRINE OF CORPORATE MERGERS

I. INTRODUCTION

In recent years, the Delaware courts have been embroiled in controversy over the complex relationship between majority and minority shareholders of a corporation in the throes of a merger. Section 251 of the Delaware Code[1] states that two (or more) Delaware corporations may merge into a single corporation upon the performance of certain procedures. Briefly, these procedures include obtaining approvals by each corporation's directors, the majority vote of the outstanding stock of each corporation, and the filing of formal documents.[2] The merger is consummated by the surrender of one corporation's stock in exchange for cash, property, rights, or securities of another corporation.[3] Any shareholder not satisfied with the terms of the exchange, upon fulfilling several initial requirements, may seek a judicial appraisal of the value of his stock under section 262.[4]

Under this merger statute, it would seem that a corporate merger could be attained simply by the perfunctory procurement of a number of approvals. The courts, however, have not made it quite so easy because they have consistently considered an additional element when mergers are contested. The additional consideration is the fiduciary obligations owed by the majority stockholders in handling the property of the minority.[5] Until recently, that fiduciary obligation was satisfied by adhering to the Delaware Supreme Court's requirement that a merger which "cashes out" a minority shareholder evidence some valid business purpose.[6]

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1. DEL. CODE ANN. tit. 8, § 251 (1981).
2. *Id.* § 251(a)-(c).
3. *Id.* § 251(b).
4. *Id.* § 262.
5. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. 293, 93 A.2d 107 (1952). In *Sterling*, a minority shareholder of Mayflower attempted to enjoin the merger of Mayflower and its parent corporation Hilton Hotels. The proposed merger involved an exchange ratio of one share of Hilton stock for each share of Mayflower. *Id.* at 296-97, 93 A.2d at 110. The court held that the majority shareholders and the directors of Mayflower owed the minority a fiduciary duty in dealing with the latter's property, and unfairness in the terms of the merger constituted a breach of the duty. *Id.* at 303, 93 A.2d at 109-10.
6. *See* Roland Int'l Corp. v. Najjar, 407 A.2d 1032, 1037 (Del. 1979); Singer v. Magnavox Co., 380 A.2d 969, 980 (Del. 1977); Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121, 1125 (Del. 1977).

In the recent case of *Weinberger v. UOP, Inc.*,[7] the Delaware Supreme Court abandoned the requirement that a proper business purpose be shown and reinforced the proposition that appraisal is a disgruntled shareholder's primary remedy.[8] The court realized, however, that in certain instances, particularly in cases of fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, and gross and palpable overreaching, such a remedy might prove inadequate.[9] Thus, the court established the means of dealing with these situations by creating a quasi-appraisal remedy which examines the entire fairness of the merger transaction in terms of fair dealing and fair price.[10] This note will examine the state of the *Weinberger* holding in light of its application in more recent decisions.

II. THE LIBERALIZED APPRAISAL REMEDY

The abandonment of the business purpose requirement in *Weinberger* was not predicated so much on the impropriety of the earlier standard as on its questionable usefulness.[11] An obvious problem presented by the business purpose rule was the vagueness of its terms.[12] Whether a collateral attack on any merger could be brought

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7. 457 A.2d 701 (Del. 1983).

8. *Id.* at 715. The court stated that after the date of its decision, "the provisions of 8 *Del. C.* §262, as herein construed, shall govern the financial remedy available to minority shareholders in a cash-out merger." *Id.*

9. *Id.* at 714 (citing Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56-57, 156 A. 183, 187 (1931)).

10. The primary purpose for the adoption of the quasi-appraisal remedy is not to combat instances of fraud or manipulation in a merger transaction. Rather, the quasi-appraisal remedy was instituted to allow a recovery for those plaintiffs who abjured their right to an appraisal on the basis of the Delaware courts' earlier, more flexible attitude under *Singer* toward the availability of the class action suit in lieu of an appraisal. For this reason, the *Weinberger* court specifically limited the application of the quasi-appraisal remedy to cases pending at the time of the *Weinberger* decision. *Id.* at 714. That this remedy would be available in the future can only be inferred from the court's recognition of the fact that the appraisal remedy may be inappropriate in cases of fraud, misrepresentation, etc. *Id.*

11. *Id.* at 715. The court stated that "we do not believe that any additional meaningful protection is afforded minority shareholders by the business purpose requirement." *Id.*

12. One of the principal problems with the *Singer/Tanzer* approach was the difficulty the courts were having in articulating what constituted a proper business purpose or when such a merger would be entirely fair. *See* Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of* Weinberger v. UOP, Inc., 8 DEL. J. CORP. L. 1, 37 (1983) [hereinafter cited as Weiss].

The *Singer* court specifically avoided defining what would constitute a proper business purpose, deeming this unnecessary for its present purposes. *Singer*, 380

and litigated in any instance depended upon the court's interpretation of the motives of the majority shareholders.[13] The business purpose approach, then, succeeded only in granting minority shareholders an alternative route to litigation if, for example, their appraisal rights were unperfected or in some way unsatisfactory to them.[14]

The primary means by which *Weinberger* rendered the business purpose rule ineffective was through the liberalization of the appraisal remedy. Section 262(h) of the Delaware General Corporation Law states that in determining the fair value of a stockholder's shares, "the Court shall take into account all relevant factors."[15] In past decades, the valuation of corporate shares was accomplished through the use of such formulae as the "Delaware Block," or weighted average method, in which the elements of value were assigned a particular weight and the resulting amounts added to determine the value per share.[16] The court rejected this method "to the extent it excludes other generally accepted techniques used in the financial community"[17] and, in so doing, attempted to revitalize the appraisal remedy by abolishing total reliance on what it considered an outmoded practice.[18]

A.2d at 980 n.11. The *Tanzer* court affirmed the chancery court's denial of injunctive relief in a take-out merger, finding that a parent's interest in long-term debt financing was a valid business purpose within the confines of *Singer*. *Tanzer*, 379 A.2d at 1124. In Young v . Valhi, 382 A.2d 1372, 1377-78 (Del. Ch. 1978), however, the chancery court enjoined a cash merger on the ground that the "basic purpose" of the merger was to eliminate certain minority shareholders, despite the majority's contention that the true purpose was to garner tax savings. *Id.* at 1378. Thus, an economic benefit to a corporation which would result from a merger was not enough to ensure that the merger was effected for a proper business purpose. *Young* thus illustrates one court's willingness to make such a determination in the absence of clear-cut guidelines.

13. *See* Weiss, *supra* note 12, at 43 (*Singer* line of cases can be seen to have had two negative effects: creating uncertainty and promoting unnecessary litigation).

14. The requirements for perfection of appraisal rights are set forth *infra* at note 25. In short, appraisal may not be sought by a minority shareholder who does not make a proper demand within the statutorily prescribed period or who does not vote against the merger at the stockholders' meeting. If a shareholder's appraisal right was thus unperfected, his only recourse after *Singer* was that provided in a legal action under the business purpose rule. Even if his appraisal rights were perfected, however, a minority stockholder might prefer litigation to the appraisal process. DEL. CODE ANN. tit. 8, § 262(d) (1981).

15. DEL. CODE ANN. tit. 8, § 262(h) (1981).

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

17. *Id.*

18. *Id.* "It is time we recognize (that the Delaware Block method is outmoded) in appraisal and other stock valuation proceedings and bring our law current on the subject." *Id.*

Under the new "liberalized" appraisal remedy, the appraiser considers such aspects as "market value, asset value, dividends, earning prospects, the nature of the enterprise, and any other facts which were known of which could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation."[19] As to the elements of future value, the court imposed only the restriction that speculative evidence would not be included.[20]

The adoption of such a valuation method in appraisal proceedings was considered by the court not only to be grounded in reality, but also to be consistent with the purpose of section 262.[21] The liberalization of the proceeding is notable because it recognizes that a shareholder's equity interest in a corporation cannot be valued solely by the current trading value.[22] The shareholder, when cashed out, immediately loses all future rights and benefits he may receive from participation in the corporation's business. Under the liberalized appraisal method, the valuation of the shares approaches that which a minority shareholder would have received if the transaction had been bargained for at arm's length.[23] Thus, dissenting shareholders to a merger are better assured a fair return for their stock, regardless of the business purposes of the majority.

The adoption of the liberalized appraisal remedy clearly was intended to serve the dual purpose of ensuring a fair return to dissatisfied minority shareholders and to reduce the amount of litigation engendered by the business purpose rule.[24] However, the liberalized appraisal remedy presents its own problems. Even when a cashed-out minority shareholder is procedurally able to avail himself

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19. *Id.* at 713.

20. *Id.* The court stated, however, that this restriction was meant to be interpreted narrowly, excluding only "pro forma" data. *Id.*

21. *Id.*

22. The market value of stock is only one of the considerations in the valuation method prescribed in *Weinberger*. *Id.* at 713. *See supra* text accompanying note 19.

23. The importance of approximating arm's-length conditions in the valuation of the stock of the minority interests can be seen in the supreme court's statement that the result it reached could have been entirely different had UOP appointed an independent negotiating committee. *Weinberger*, 457 A.2d at 709 n.7.

24. After liberalizing the appraisal remedy, the *Weinberger* court limited most future actions to the statutory appraisal method, stating: "Thus, we return to the well established principles of *Stauffer v. Standard Brands, Inc.* and *David J. Greene & Co. v. Schenley Indus., Inc.*, mandating a stockholder's recourse to the basic remedy of an appraisal." *Weinberger*, 457 A.2d at 715 (citations omitted).

of the appraisal remedy,[25] he must still consider pragmatic problems such as litigation expense and delay while the price of his shares is established. In many instances, a shareholder may conclude that the burden of an appraisal outweighs the gain he stands to receive. In contrast, the corporation stands in a much greater position to defend its proposed valuation and would undoubtedly press for the lowest valuation of the shares possible.

A less frequent but even more devastating drawback to the appraisal remedy occurs in instances in which the majority shareholders secure an inequitable price through some form of unfair dealing. Often removed from the day-to-day operation of the business, a minority shareholder may be unable to protect his interest because he is insufficiently sensitized to questionable business practices of majority shareholders. Furthermore, it is considerably easier for majority shareholders to conceal false or misleading activity than it is for minority shareholders to discover such activity.[26] With its focus on price, the appraisal remedy simply leaves no room for consideration of unfair dealing.

The difficulty in detecting unfair dealing becomes critical in light of the procedural demands placed on a minority shareholder seeking appraisal. That minority shareholder must not have voted in favor of the merger and must have demanded the appraisal within a relatively short time.[27] Therefore, the minority shareholder may be placed in a position in which he may have involuntarily waived his appraisal right by not objecting to the merger. If the minority shareholder is unwittingly placed beyond the reach of the appraisal statute, it is questionable whether he has a remedy at all.

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25. The procedural requirements for the perfection of appraisal rights are listed in DEL. CODE ANN. tit. 8, § 262(d) (1981). The statute provides that within 10 days of a merger, the shareholders must be given notice of their appraisal rights. These rights must be exercised within 20 days of the demand. In order to be eligible for appraisal, the shareholder must not have voted in favor of the merger. *Id.*

26. An example of the subtle means by which majority interests may seek to mislead the minority may be seen in the dubious value of the fairness opinion prepared by Lehman Brothers in the *Weinberger* case. That the opinion letter was hastily prepared is an understatement. In fact, the letter was delivered with the price left blank. Either directly before or during the UOP directors' meeting, the final form of the opinion was typed and the price inserted. *Weinberger*, 457 A.2d at 707. The simple fact that a corporation could find an investment banking team to prepare such a report demonstrates the facility with which the majority interest of a corporation may find support for its preordained decisions. The question that must be asked is how a minority shareholder could possibly see through such complex machinations and object in a proper and timely manner.

27. DEL. CODE ANN. tit. 8, § 262(d) (1981).

III. *WEINBERGER*'S QUASI-APPRAISAL REMEDY

The Delaware courts have long recognized that complete compliance with the mandates of a statute does not, in every case, make an action legally valid.[28] In fact, the *Weinberger* court, in spite of its seeming insistence on the exclusivity of the appraisal remedy, actually granted the cashed-out minority relief from outside the appraisal statute through use of what it called a "quasi-appraisal" remedy.[29] The court, however, was not so clear on the availability of that remedy to future cashed-out shareholders.

Crucial to an understanding of the availability of the quasi-appraisal remedy is the history preceding the *Weinberger* decision. Before *Weinberger*, minority shareholders were able to attack the terms of a merger in a class action under the business purpose rule.[30] As a result, while *Weinberger* was pending, many such shareholders may have abjured their right to appraisal in favor of relief under another cause of action. It would have been patently unfair to such shareholders to exclude them from any relief because of the sudden abandonment of the business purpose rule. Such was the case in *Weinberger* and, as a result, the court fashioned a remedy which it believed approximated the appraisal remedy. The court stated:

> While the present state of these proceedings does not admit the plaintiff to the appraisal remedy per se, the practical effect of the remedy we do grant him will be co-extensive with the liberalized valuation and appraisal methods we herein approve for cases coming after this decision.[31]

The above language seems to suggest that the future availability of the quasi-appraisal remedy will be limited to only those parties who are in the same shoes as the plaintiffs were in *Weinberger*. Bolstering this interpretation is the fact that the court specifically limited the application of the remedy to cases challenging a cash-out merger which had been filed prior to the date of the *Weinberger* decision.[32] For cases brought after *Weinberger*, the court limited the remedy to appraisal unless for some reason—notably fraud, misre-

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28. *See* Singer v. Magnavox Co., 380 A.2d 969, 975 (Del. 1977); Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).
29. *Weinberger*, 457 A.2d at 714.
30. *See supra* note 6 and accompanying text.
31. *Weinberger*, 457 A.2d at 704.
32. *See supra* note 10.

presentation, self-dealing, gross and palpable overreaching, or deliberate waste of corporate assets—the appraisal remedy proved inadequate.[33] Although attempting to grant relief coextensive with the appraisal remedy, the court prescribed a method of analysis for the chancellor extending beyond the ordinary scope of an appraisal. In the first instance, the court stated that the chancellor may fashion a remedy granting any kind of equitable and monetary relief that may be appropriate, including rescissory damages.[34] The basis of this relief, however, would not rest simply on an analysis of the fairness of the valuation of the shareholder's stock, but also on the fairness of the process by which the merger came into being.[35]

This concept of fair dealing reflects the Delaware Supreme Court's emphasis on full disclosure as a means of ensuring fair dealing and includes the duty of complete candor.[36] Under this analysis, the chancellor should consider any pertinent evidence with respect to the evolution and structure of the merger transaction, including such factors as who initiated the merger,[37] whether there were time constraints,[38] to what degree the negotiations could be considered to have been at arm's length,[39] whether there was any conflict of interest[40] and, perhaps most important—whether there was sufficient disclosure to the minority shareholders.[41]

IV. APPRAISAL VERSUS QUASI-APPRAISAL

Both the appraisal and quasi-appraisal remedies, as envisioned by the *Weinberger* court, primarily seek to assure the cashed-out minority shareholder a fair return for his interest in the corporation

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

34. *Id.* A cause of action under the fairness doctrine of *Weinberger*, then, could also conceivably result in injunctive relief—another remedy closed to minority shareholders in an appraisal proceeding. *Id.*

35. *Id.* at 711. "The concept of fairness has two basic aspects: fair dealing and fair price." *Id. See infra* note 37.

36. *Weinberger*, 457 A.2d at 711 (citing Lank v. Steiner, 224 A.2d 242, 244 (Del. 1966) (proposition that one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy)).

37. *Id.* "[Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 712.

41. *Id.*

in a merger transaction.[42] However, as discussed previously, appraisal may often be considered a remedy of last resort.[43] With its focus on fair dealing, the quasi-appraisal remedy would be much preferable because the parties to whom allegations of fraud, misrepresentation, and manipulation are directed would be made parties to the action.[44] If misconduct is actually found, these parties bear the burden of compensating the aggrieved parties, rather than the corporation.[45] In addition, the broader range of relief from which the chancellor could choose in the quasi-appraisal proceeding would promote more equitable forms of compensation than a mere return of capital.

However preferable, the quasi-appraisal remedy as described in *Weinberger* must be considered first in terms of availability. The court heralded its decision as a return to the principles of *Stauffer v. Standard Brands, Inc.*,[46] a case in which the Supreme Court of Delaware drew a very hard line for minority shareholders dissatisfied with the terms of a short-form merger.[47] The court stated that the very purpose of the short-form merger statute was to provide the parent corporation with the means of eliminating the minority shareholders' interest in the enterprise.[48] Consequently, when the minority's dissatisfaction principally concerned the valuation of their shares, the only appro-

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42. *Id.* at 712-13. Thus, the court expressed a willingness to include proof of value of stock by any techniques or methods which are generally considered acceptable in the financial community. *Id.* at 713.

43. *See supra* notes 25-27 and accompanying text.

44. This is precisely the argument raised by plaintiffs in Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985).

In that case, the minority shareholders of Philip A. Hunt Chemical Corporation challenged a cash-out merger with the Olin Corporation on the grounds that the price offered was grossly inadequate because the acquiring corporation unfairly manipulated the timing of the merger to avoid a one-year commitment to a higher price per share. In this instance, the minority argued, an appraisal would be inadequate because:

> (1) the alleged wrong-doers are not parties to an appraisal proceeding, and thus are not personally accountable for their actions; (2) if such misconduct is proven, then the corporation should not have to bear the financial burden which only falls upon it in an appraisal award; and (3) overreaching and unfair dealing are not addressed by an appraisal.

Id. at 1104.

45. *Id.* at 1104.

46. 41 Del. Ch. 7, 187 A.2d 78 (Del. 1962).

47. *Id.* at 80. DEL. CODE ANN. tit. 8, § 253 (1981), authorizes the merger of a subsidiary and parent company without a shareholders' vote of either corporation when the parent company owns 90% of the outstanding shares of each class of the subsidiary corporation.

48. *Stauffer*, 41 Del. Ch. at 10-11, 187 A.2d at 80.

priate remedy was appraisal.[49] The minority shareholder was left in the wake of the decision with a considerably lessened right to participate in corporate affairs. Although this treatment of the participation rights of the minority has been argued as contrary to legislative intent,[50] the opinion can be viewed as a move toward a greater judicial respect for the need of the controlling interest of a corporation to be unhindered in its capacity to transact business.[51]

The question that immediately arises is whether the court, in returning to *Stauffer*, has abandoned its concern for the fiduciary obligations espoused in *Singer v. Magnavox Co.*,[52] in which the court held that a corporation may not use majority power to push through a merger at an unfair price without some valid business purpose other than simply to freeze out minority stockholders.[53] Although abandoning the requirement of a valid business purpose in such a transaction,[54] the *Weinberger* court held that the breach of the fiduciary obligation of full disclosure of germane information,[55] when coupled with unfair price, was sufficient to avail plaintiffs of the quasi-appraisal remedy.[56] Accordingly, the use of majority power to push a merger through at an unfair price should be afforded the same treatment if the court should interpret such action as the violation of another fiduciary standard—the abuse of control.[57]

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49. This approach was extended to long-form mergers in David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971). Here the court held that objecting shareholders had "rights . . . no greater . . . than under the so-called short-merger statute." *Id.* at 35.

50. *See* Weiss, *supra* note 12, at 19 (Delaware short-form merger statute enacted to simplify and facilitate parent-subsidiary mergers where they promoted operating efficiency, not simply to expedite take-out mergers).

51. *Id.* Although Weiss argues to the contrary, he admits that the generally accepted view after *Stauffer* was that § 253 not only authorized, but was enacted to expedite, take-out mergers. *Id.*

52. 380 A.2d 969 (Del. 1977).

53. *Id.* at 980.

54. *Weinberger*, 457 A.2d at 715. The court stated, "[W]e do not believe that any additional meaningful protection is afforded minority shareholders by the business purpose requirement of the trilogy of *Singer, Tanzer, Najjar*, and their progeny. Accordingly, such requirement shall no longer be of any force or effect." *Id.*

55. The *Weinberger* court used the definition of "germane" information that was used in Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977): "[I]nformation such as a reasonable shareholder would consider important in deciding whether to sell or retain stock." *Weinberger*, 457 A.2d at 710.

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

57. *See* Prickett & Hanrahan, Weinberger v. UOP, Inc.: *Delaware's Effort to Preserve a Level Playing Field for Cash-Out Mergers*, 8 DEL. J. CORP. L. 59, 64-65 (1983) [hereinafter cited as Prickett & Hanrahan].

The return to *Stauffer*, then, cannot be viewed as an abandonment of concern for the fiduciary obligations owed to the minority by the controlling interest of a corporation. As previously mentioned, the court expressly recognized that in certain instances the appraisal remedy may provide insufficient relief, particularly in cases of fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching.[58] However, obtaining standing to secure review of compliance with those fiduciary standards has been severely hampered by *Weinberger*. To bring an action under the fairness doctrine, the plaintiff is required to allege specific violations.[59] While this requirement should substantially limit the filing of frivolous actions, it will proportionately increase the number of shareholders seeking appraisal.

The difficulty in detecting fraudulent or manipulative behavior, however, should also be a consideration. For example, it has been suggested that if a minority shareholder with a perfected appraisal right should in the course of the appraisal proceedings detect violative behavior, he should then be able to transform his action to one under the fairness doctrine.[60] It would be interesting to plot the outcome of such a review if, in fact, no fraud is found. Because the test of the fairness of a merger transaction in terms of fair dealing and fair price is not a bifurcated one,[61] it would be reasonable to assume that the finding of fair dealing should not preclude the court from an evaluation of the fairness of the price alone. Since the plaintiff has presumably met the burden of pleading—that is, he has produced some evidence demonstrating a basis for invoking the fairness doctrine, the *total* fairness of the transaction must be reviewed.[62] The abandonment of the appraisal action on the grounds of a good faith but mistaken suspicion of unfair dealing should not preclude a plaintiff from all relief when, for example, the time for perfection of his appraisal right has expired.[63]

Thus, the opportunity for minority shareholders to seek the aid of the courts under the fairness doctrine in the future rests, to a great extent, on the courts' interpretation of what allegations are

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

59. *Id.* at 703.

60. *See* Prickett & Hanrahan, *supra* note 57, at 64-65.

61. *See Weinberger*, 457 A.2d at 714. *See also* Prickett & Hanrahan, *supra* note 57, at 81.

62. *See* Prickett & Hanrahan, *supra* note 57, at 80-81 .

63. *Id.*

sufficient to meet the burden of pleading. The clearest interpretation of *Weinberger* suggests that minority shareholders will not be precluded from bringing a class action if they can show that material facts about the merger were falsely stated or undisclosed. The crucial question left to the future is how the court will treat other allegations of a breach of fiduciary duty, such as self-dealing, deliberate waste, and gross and palpable overreaching. In short, how will the courts treat the less detectable forms of misconduct?

V. RECENT APPLICATIONS OF *WEINBERGER*

Certainly the most widely applied holding of *Weinberger* has been its revamped approach to the valuation of the shares of a minority shareholder in instances of a freeze-out. In *Walter W.B. v. Elizabeth P.B.*,[64] the Supreme Court of Delaware extended the valuation technique of *Weinberger* to the realm of the closely-held family corporation, stating that the valuation of corporate shares upon division, whether a private or public company, is not a "mechanical or rigid endeavor,"[65] and that a "cardinal precept" is that a stockholder is entitled to be paid the fair value of that which has been taken from him.[66] Such fair value, in this particular case, included consideration of the date at which such value is affixed in the context of the division of marital property.[67] Thus, although the date of the divorce was used to determine what constituted the parties' marital property, the trial judge was held to have acted within his discretion when he valued the property as of the date of the division and not of the divorce.[68]

In the context of mergers, the primary impact of *Weinberger* has been upon the courts' willingness to apply the fairness doctrine. In *Green v. Santa Fe Industries, Inc.*,[69] the United States District Court for the Southern District of New York granted summary judgment in favor of the majority shareholders of a corporation, thereby denying relief to members of the minority dissenting from a short-form merger on the basis of fraud and breach of fiduciary obligation.[70] The basis

64. 462 A.2d 414 (Del. 1983).
65. *Id.* at 415-16.
66. *Id.* at 416 (citing *Weinberger*, 457 A.2d at 712-13).
67. *Id.*
68. *Id.* at 415-16.
69. 576 F. Supp. 269 (S.D.N.Y. 1983).
70. *Id.*

for the decision was the court's conclusion that *Weinberger*'s limitation on the retroactivity of its remedy was prompted by the possibility of minority reliance on *Singer* in abjuring the right to an appraisal.[71] Since the plaintiffs in the instant case could not have relied on *Singer* in abandoning their appraisal action,[72] the court held that *Weinberger* barred relief for their state law cause of action.[73]

To better understand the reasoning of the *Green* court, it must be viewed in a broader perspective. The statutory short-form merger, perhaps the ultimate form of self-dealing in the merger context,[74] involves the removal of a number of minority shareholders by a vastly greater majority.[75] Due to the great disparity in equity interests, the legislature permits parent-subsidiary mergers without a shareholder vote.[76] Apparently viewing the minority's right to participate in the corporation as negligible, the drafters of the statute expressly provided the caveat that minority shareholders in the transaction may seek an appraisal if dissatisfied with its terms.[77] In addition, in the case of the short-form merger, there are a few instances in which a minority dissent could be based on some type of fraud.[78]

In so holding, the *Green* court did not reject *Weinberger*'s statement that in some cases involving breaches of fiduciary duties, the appraisal remedy may not be satisfactory. It simply noted that the only instance in which the fiduciary standards of the majority could have been breached would have been by making such a ridiculously low valuation as to constitute constructive fraud.[79] In addition, the court

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71. *Id.* at 271-72.

72. *Id.* at 272. The plaintiffs could not rely on *Singer* because they initiated the action before *Singer* was decided. In fact, the plaintiffs did originally seek appraisal, but made the tactical decision to abandon that course of action in favor of a class action suit. For these reasons, the court held that their right to challenge fair value need not be preserved. *Id.*

73. *Id.*

74. In a short-form merger, the parent company controls all aspects of the transaction. There is no need for shareholder approval in either the parent or the subsidiary.

75. *See* DEL. CODE ANN. tit. 8, § 253. *See supra* note 47.

76. *See* Coyne v. Park & Tilford Distillers Corp., 38 Del. Ch. 514, 154 A.2d 893 (Del. 1959) (first example of judicial tolerance of such a transaction in Delaware).

77. DEL. CODE ANN. tit. 8, § 253(d) (1981).

78. The opinion of the courts has been that, in a short-form merger transaction, a dissenting minority shareholder's complaint generally involves price. In this context, perhaps the only conceivable misconduct that can be alleged is the establishing of an exchange price so low as to constitute constructive fraud. *Schenley*, 281 A.2d at 33.

79. *See id.*

took notice that in a separate appraisal proceeding the court had held that the majority's valuation of the minority shares was the result of an orderly and deductive process in accordance with the approved methodology properly accepted by the appraiser.[80] Thus, failing to prove the basis for an action grounded on breach of either fair dealing or fair price, the minority's action could not be entertained by the court.

The next major application of the fairness doctrine occurred in *Susman v. Lincoln American Corp.*,[81] involving the challenge of a mandatory cash-out merger on the basis of unfair price and material misrepresentations and omissions. Notably, the case presents an initial examination of the burdens imposed by *Weinberger*. As mentioned previously, the plaintiff challenging the terms of a cash-out merger must first come forward with specific allegations of fraud and some basis for invoking the fairness doctrine.[82] The fairness of the transaction having thus been disputed, the burden then shifts to the defendant to prove the entire fairness of the transaction.[83] If, however, the actions of the controlling interests are approved by a majority of the minority shareholders under conditions of full disclosure, the burden shifts back to the minority to prove the transaction was unfair.[84]

In passing upon the respective burdens of each party, the *Susman* court noted an ambiguity in the *Weinberger* tally. It noted that *Weinberger* failed to specify whether it required a majority of an *absolute* majority of the shares outstanding or of the shares *actually voted* to shift the burden back to the plaintiffs.[85] Although the court did not attempt to resolve this issue,[86] it did cite a current Delaware case holding that where the merger structure provided the minority shareholders with all material information and complete veto power, a majority of the voted minority shares is sufficient.[87]

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80. *See Green*, 576 F. Supp. at 269, 271 n.1.

81. 578 F. Supp. 1041 (N.D. Ill. 1984).

82. *Weinberger*, 457 A.2d at 703.

83. *Id.*

84. *Id.*

85. *Susman*, 578 F. Supp. at 1041.

86. *Id.* at 1061-62. The basis for the court's decision was that regardless of whether the burden actually shifted, the defendants would prevail. The implications of the shareholder vote on the burden was not a crucial part of the decision. *Id.*

87. *Id.* at 1061 (citing Bershad v. Curtiss-Wright Corp., No. 5827 (Del. Ch. 1983)). It should be noted, however, before determining the importance of this dicta, that when a merger is expressly made conditional on approval of the minority, there is a great incentive for that minority to vote. As a result, such a vote can

Another interesting aspect of the *Susman* opinion is that it provides an example of a transaction that fulfilled the requirements of fair dealing and fair price without having been handled at arm's length in any way.[88] The case differed from *Weinberger* in that the controlling interest in *Susman* completely fulfilled their duty of candor, and there were no undisclosed appraisals that revealed that a better price could have been paid for each share.[89]

With regard to fair price, the court evaluated two differing methods of appraisal yielding somewhat disparate results.[90] The primary difference lay in the number of years each method incorporated into its valuation calculations.[91] The court held that when earnings are calculated into the valuation of shares, there is a preference for averaging the recent earnings over a number of years rather than highlighting a recent rise in those earnings.[92] In addition, the court held that when there is an active market for the stock in question, greater reliance may be placed on the market value in the appraisal process.[93]

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be a reliable indicator of the minority's true opinion of the transaction. The converse is also true—when no vote is required, many shareholders will consider the transaction a foregone conclusion and will acquiesce in the merger or simply fail to vote. Whether such a difference will make a difference in the distribution of burdens remains to be seen.

88. *Id.* at 1062. The court states that the merger transaction was concededly unlike an arm's-length transaction. *Id.*

89. *Id.*

90. *Id.* at 1047. The two appraisals were both prepared in anticipation of litigation by expert witnesses for plaintiffs (the Meigs analysis) and for defendant (the Buchanan analysis). *Id.*

91. *Id.* The Buchanan estimate incorporated an average of earnings over the past four and one-half years in its valuation of the merging corporation. The Meigs estimate did not incorporate previous years into its analysis. *Id.*

92. *Id.* at 1062. The court based this conclusion on a previous ruling with regard to a similar case in Francis I. DuPont & Co. v. University City Studios, Inc., 312 A.2d 344, 349 (Del. Ch. 1973), *aff'd*, 334 A.2d 216 (Del. 1975).

In *University City Studios*, both the majority and minority interests contested the appraiser's valuation of the shares of Universal Pictures Company after its absorption into Universal City Studios in a short-form merger. Although the defendant majority contended that the appraiser's report failed to take into account the decline in the movie industry, and the plaintiff minority conversely asserted that the appraiser did not adequately consider increased revenue from television rights, the court held that the policy of Delaware law was that averaging earnings over the five years immediately preceding the merger should be the rule, not the exception. *University City Studios*, 312 A.2d at 349.

93. *See Susman*, 578 F. Supp. at 1062-63. As support for this proposition, the court relied on Gibbons v. Schenley Indus., Inc., 339 A.2d 460, 467-70 (Del. Ch. 1975).

It is interesting to note the role of the market value in a *Weinberger* analysis. When there is an active market for the shares of a corporation, the market may be the ideal tool for calculating the value of those shares. The market value, however, is only one of the factors that must be considered when valuating shares.[94] In this way, the court may protect the shareholder from a depressed market when the market value does not represent a fair return for future participation in the corporation. An additional problem presented by a depressed market is the danger that the controlling interests of a corporation may seek minority approval of a merger at a low price based on the unrepresentative market price. Conditions similar to these existed in *Smith v. Van Gorkom*,[95] a Delaware decision attacking the business judgment of a board of directors in approving a cash-out merger.

Van Gorkom cast some light on the extent to which information concerning price valuation can be held to be "material" for purposes of the fiduciary duty of disclosure. The primary issue in relation to the *Weinberger* analysis was whether the board action was ratified by an informed shareholder vote.[96] The court concluded that the minority could be considered to have been informed if the defendant could show that all material information concerning the transaction had been disclosed in an atmosphere of complete candor.[97] Such an atmosphere of candor requires complete disclosure of all material information to the minority, not merely the bottom line.[98] However, the court found that the documents and other materials made available to the minority shareholders contained material misrepresentations and omissions which rendered the minority vote virtually

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94. *Weinberger*, 457 A.2d at 713. Under the liberalized standards, the appraiser of stock must consider such factors as market value, asset value, dividends, earning prospects, the nature of the enterprise, and any other facts which were known or could have been ascertained as of the date of merger and which shed any light on future prospects of the merged corporation. *Id.*

95. 488 A.2d 858 (Del. 1985). *See* Gerlach v.Gillam, 37 Del. Ch. 244, 247, 139 A.2d 591, 593 (1958) (settled rule in Delaware is that "where a majority of fully informed stockholders ratify an action of even interested directors, an attack on the ratified transaction normally must fail").

97. *Van Gorkom*, 488 A.2d at 890. The court repeated the requirement that corporate directors owe their stockholders a fiduciary duty to disclose all facts germane to the transaction in an atmosphere of complete candor. In this instance, however, the court states that by "germane," the *Weinberger* court meant "material." *Id.*

98. "Completeness, not adequacy, is both the norm and the mandate under present circumstances." *Lynch*, 383 A.2d at 281.

meaningless.[99] Foremost among the omissions was the failure to notify the minority of the board's lack of any reasonably adequate information indicating the intrinsic value of the company other than a concededly depressed market price.[100]

Rosenblatt v. Getty Oil Co.[101] marked the first case since *Weinberger* in which the Delaware Supreme Court addressed such issues as the allocation of the burden of proof on the fairness issue, the continued viability of the "Delaware Block" method of valuation, and the circumstances necessitating disclosure of the ultimate price prepared to be paid by the majority to eliminate the minority.[102] The basis of the minority's complaint was that the exchange ratio of Skelly Oil Company shares for those of Getty Oil Company in the stock exchange merger was unduly low and the product of self-dealing by Getty.[103]

Having met the initial burden of pleading,[104] the plaintiffs sufficiently challenged the fairness of the transaction and the burden of proving entire fairness shifted to the defendant Getty.[105] Since the merger had been approved by a majority of the minority,[106] the court's initial inquiry concerned the adequacy of the disclosures preceding that vote. The principal point of contention was the defendant's failure to disclose a report of a recent decline in Getty's after-tax earnings.[107] Although the Skelly minority compared this report to the Arledge and Chitea report in *Weinberger*,[108] the court held that

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99. *Van Gorkom*, 488 A.2d at 890-92.

100. *Id.* at 890.

101. 493 A.2d 929 (Del. 1985).

102. *Id.* at 931.

103. The crux of the plaintiff's allegations was that Getty, the surviving corporation of a merger, owed the plaintiffs certain fiduciary duties as the majority shareholder of Skelly.

104. *Getty*, 493 A.2d at 937. The plaintiff showed that the defendant stood on both sides of the transaction and was thus guilty of self-dealing. *Id.*

105. *Id.* at 929. The court agreed with the trial court that the plaintiff's allegations were sufficient to challenge the fairness of the exchange ratio. *Id.* at 937.

106. Again the court was relieved of the responsibility of having to determine whether *Weinberger* required a majority of the minority stock outstanding or a majority of the stock simply voted, because the merger was approved by 89.7% of the minority shares voted and by 58% of the minority shares outstanding. *Id.* at 936.

107. The report in question was prepared by a Getty financial officer and was never disclosed to the Skelly minority. *Id.* at 938.

108. *See Weinberger*, 457 A.2d at 708. The Arledge and Chitea report was a feasibility study performed by two Signal officers, Charles S. Arledge and Andrew J. Chitea, who were also directors of UOP. One of the primary issues mandating

there was no duty to disclose the contents of the Getty report. Not only did the Skelly negotiators know of its contents,[109] but there was no indication that its disclosure could have materially affected the exchange ratio negotiations.[110] In addition, unlike *Weinberger*, the merger was not conditioned on the approval of a majority of the minority shareholders.[111]

The court's treatment of the burden of proof seemed to imply that if a majority of the minority interests vote in favor of the merger, even when such a vote is not required for completion of the merger, the dissenting minority will be forced to carry the burden of proving unfairness.[112] What appeared to be of great importance to the *Getty* court was that all material information as to the value of Getty's stock had been in the hands of Skelly's negotiators.

The next major issue confronted by the court was the continued viability of the "Delaware Block" method of valuation in a merger proceeding. Pointing to *Weinberger*, the court concluded that although it was no longer the exclusive method of stock valuation, the "Delaware Block" method was certainly not precluded from future use.[113] In the present case, not only was this method specifically chosen in order to meet the then existing fairness standards,[114] but the structure of the negotiations was sufficiently adversarial to lend it additional reliability.[115]

It is clear from the *Getty* opinion that the adversarial nature of the merger negotiations negated any claims of unfair dealing or price. What is most interesting in the case is the court's attempt to clear up what it perceived to be a misconception of *Weinberger*. The court unequivocally stated that a majority shareholder has no duty to

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reversal, according to the court, was the use of this study, which had been amassed with the resources of both companies for the sole benefit of Signal. *Id.*

109. *Getty*, 493 A.2d at 938-39.

110. *Id.* at 939.

111. *Id.*

112. Considering the questionable reliability of the minority vote in favor of a merger because it might suspect that the merger is a foregone conclusion, the holding in *Getty* should do much to aid the defense of take-out mergers in the future.

113. *Getty*, 493 A.2d at 940.

114. *Id.* at 934 & n.6. At the outset of negotiations, Getty suggested the use of the "Delaware Block" method specifically in order to meet the then-existing fairness standard. *Id.* at 934.

115. *Id.* at 941. The record indicated that both companies diverted substantial resources to their asset reviews, using hundreds of employees and retaining reputable investment bankers.

disclose its top bid to the minority.[116] In *Weinberger*, the court had held that the failure of a merging company's board of directors to disclose the top price at which the surviving company could profitably accomplish the merger was a material omission and a breach of the fiduciary duty of uncompromising loyalty.[117] The sole basis for this conclusion, according to the *Getty* court, was the fact that the person privy to the information was a board member of the non-surviving corporation appointed by the surviving corporation.[118] The duty of uncompromising loyalty, although expected from a board member, is apparently not required from majority shareholders.[119]

The court cleared up another common misconception concerning the exclusivity of the fairness doctrine in *Rabkin v. Philip A. Hunt Chemical Corp.*[120] In *Rabkin*, the minority shareholders of a corporation challenged a proposed merger on the basis that the price was inadequate because the surviving corporation had unfairly timed the transaction to avoid a one-year commitment to a higher price. Until *Rabkin*, all successful applications of the fairness doctrine had involved some form of deceit.[121] Even actions based on self-dealing had been examined by the courts primarily on the basis of whether parties standing on both sides of the transaction had fulfilled their duty of candor to the minority.[122] What distinguished *Rabkin* was that the transaction was unquestionably nonfraudulent but had been carried out in a manner which suggested deliberate manipulation.[123]

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116. *Id.* at 939.

117. *Weinberger*, 457 A.2d at 709.

118. *Getty*, 493 A.2d at 939.

119. *Id.* The court stated that the *Weinberger* decision had nothing to do with Signal's duty, as the majority stockholder, to the other shareholders of UOP. This interpretation is consistent with *Weinberger*'s suggestion that fairness in a merger transaction can be equated with an arm's-length transaction. In a true bargain transaction, the fact that a majority shareholder will pay more has no greater material relevance than the willingness of the minority to accept less. *See* Payson & Inskip, Weinberger v. UOP, Inc.: *Its Practical Significance in the Planning and Defense of Cash-Out Mergers*, 8 DEL. J. CORP. L. 88, 89 (1983).

120. 498 A.2d 1099 (Del. 1985).

121. In fact, the *Rabkin* court addressed the issue as "whether the trial court erred, as a matter of law, in dismissing [the minority's] claims on the ground that absent deception the plaintiffs' sole remedy under *Weinberger* is an appraisal." *Rabkin*, 498 A.2d at 1103.

122. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 298, 93 A.2d 107, 109-10 (Del. 1952); *Getty*, 493 A.2d at 937.

123. The minority stockholders argued that the acquiring corporation, Olin, unfairly manipulated the timing of the merger to avoid a one-year commitment to pay a higher price for minority shares. *Rabkin*, 498 A.2d at 1105.

The lower court granted the defendant's motion to dismiss on the ground that absent claims of fraud or deception, a minority shareholder's right in a cash-out merger is limited to an appraisal.[124] The supreme court reversed, holding that *Weinberger*'s definition of fair dealing, although naturally incorporating the mandate against fraud, was not intended to suggest that deceit was a prerequisite to a cause of action.[125] In short, "fair dealing does not turn solely on issues of deception."[126]

A plaintiff may have difficulty in obtaining a fairness analysis in the case of a nonfraudulent transaction because the gravamen of the complaint will inevitably appear to turn on the issue of price. The *Rabkin* court, however, noted that the surviving corporation's attitude toward the minority, coupled with the apparent absence of any meaningful negotiations about price, were reminiscent of the type of unfair dealings prohibited in *Weinberger*.[127] The facts of the case also indicated self-dealing and the possibility of a breach of the fiduciary duty of candor.[128] Moreover, the resolution of such issues would be impossible if the only remedy allowed were appraisal.[129] In consideration of these factors and the commitment to the principle that inequitable conduct should not be protected merely because it may be legal,[130] the court reversed the chancellor's dismissal of the action and allowed the plaintiffs to have their day in court.[131]

The *Rabkin* court did realize the danger of allowing actions attacking nonfraudulent merger transactions. Nevertheless, the courts may expect to see many transactions challenged on the basis of manipulative conduct. The court was apparently sufficiently concerned with this possibility to take that risk. The court stated that "[a] balance must be struck between sustaining complaints averring faithless acts, which taken as true would constitute breaches of fiduciary duties that are reasonably related to and have a substantial impact upon the price offered, and properly dismissing those allegations questioning judgmental factors of valuation."[132] A contrary

124. Rabkin v. Philip A. Hunt Chem. Corp., 480 A.2d 656, 660-62 (Del. Ch. 1984), *rev'd*, 498 A.2d 1099 (Del. 1985).

125. *Rabkin*, 498 A.2d at 1104-05.

126. *Id.*

127. *Id.* at 1106.

128. *Id.*

129. *Id.*

130. *Id.* at 1107 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971)).

131. *Id.* at 1108.

132. *Id.* at 1107-08.

approach, according to the court, would cause *Weinberger*'s concern for total fairness to lose all force.[133] The court did note, however, that reliance upon the fairness doctrine will be tempered by the sophistication of the courts, and the fact that an ultimate judgment in the defendant's favor will cost the plaintiffs their unperfected appraisal right.[134]

The decision in *Rabkin* represents an interesting accompaniment to *Weinberger*. *Weinberger* allowed a cause of action to be based on the breaches of fiduciary obligations spanning the range from fraud to gross and palpable overreaching. Certainly the language of *Weinberger* suggested that deceit is not a legal prerequisite to a cause of action challenging the fairness of a merger transaction.[135] However, it is difficult to foresee many instances in which minority shareholders would be able to successfully bring such an action. Nevertheless, the *Rabkin* decision represents an instance in which it was possible,[136] and in recognizing this fact, the Supreme Court of Delaware gave notice of the careful scrutiny that will continue to be used in the evaluation of cash-out mergers.

VI. CONCLUSION

The progression of Delaware law reflects the legislature's increased awareness of the need for flexibility in the conduct of corporate affairs, including mergers. The courts, however, have tempered this approach with an adamant concern that such flexibility should not be interpreted so as to allow the controlling interests to run roughshod over the rights of minority shareholders. In *Weinberger v. UOP, Inc.*,[137] this approach culminated in the rule that minority shareholders may contest the terms of a cash-out merger if they can bring forth evidence of fraud, misrepresentation, self-dealing, deliberate waste, and gross and palpable overreaching.

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133. *Id.* at 1108.

134. *Id.* at 1107.

135. "To contend otherwise would be to write gross and palpable overreaching, self-dealing and deliberate waste of corporate assets out of the list of dangers against which an appraisal cannot protect." *See Weinberger*, 457 A.2d at 714.

136. A recent case demonstrating the courts' recognition of the difficulty of ruling on the amenability of nonfraudulent transactions to the fairness doctrine can be seen in Joseph v. Shell Oil Co., 498 A.2d 1117 (Del. 1985). In this case, the court refused to dismiss the plaintiffs' complaint based on corporate overreaching because to do so would foreclose the plaintiffs from any relief from what could be a very serious breach of fiduciary duty.

137. 457 A.2d 701 (Del. 1983).

The problem with this approach, however, was that although it readily allowed minority shareholders to bring claims based on some sort of fraud, it cast serious doubt on the ability to do so where misconduct was less detectable. This difficulty promoted the perception of the fairness doctrine as merely an empty weapon against deception. In *Rabkin v. Philip A. Hunt Chemical Corp.*,[138] the Supreme Court of Delaware refuted this interpretation and reaffirmed the use of the fairness doctrine in any transaction in which there is some indication that there has been a breach of fiduciary duty. Thus, the statutory merger may not necessarily be a foregone conclusion.

Michael Phillips

138. 498 A.2d 1099 (Del. 1985).