COMMENT

ALABAMA BY-PRODUCTS CORP. v. CEDE & CO.: SHAREHOLDER PROTECTION THROUGH STRICT STATUTORY CONSTRUCTION

I. INTRODUCTION

In the last decade there have been thousands of merger transactions worth, in total, over $1 trillion.\(^1\) A majority of the funds exchanged in these transactions are paid to dissenting shareholders who choose to redeem their stock rather than have a continued interest in the new entity.\(^2\) Shareholders electing this cash exit are at the mercy of the corporation, which sets the price of the stock, relying only on the directors’ fiduciary duty to redeem the shares at a fair value.\(^3\) The concept of fair value is elusive because it is subject to a variety of methods of determination. Additionally, corporations have a vested interest in undervaluing the stock. However, states have established statutory appraisal rights to ensure that dissenting shareholders are compensated for their proportionate interest in the sold corporation.\(^4\)

Appraisal rights provide for judicial determination of the fair value\(^5\) of the shares held by a shareholder dissenting from certain transactions.\(^6\) As an appraisal proceeding is purely statutory, courts mandate strict compliance with the procedure to perfect such rights.\(^7\) Although the goal

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\(^2\)Id. at 1 & n.3. This proves especially true in that the 1990s mergers are motivated by diversification, in contrast to those of the 1980s which were motivated by fiscal considerations and the 1970s which were driven by tactics. ISADORE BARMASH, A NOT-SO-TENDER OFFER: AN INSIDER’S LOOK AT Mergers AND THEIR Consequences 6 (1995) (examining the tobacco mogul RJR Industries’ purchases of a freight forwarder, vodka and wine companies, and a fast food fried chicken manufacturer). *See also* Andrea Knox, Are MegaDeals Good or Bad Deals, PHILA. INQUIRER, Apr. 7, 1996, at D1 (discussing the economic success and variety of recent mergers).


\(^5\)The fair value is to be determined independent of the proposed activity to which the stockholder objects. Kaye v. Pantone, Inc., 395 A.2d 369, 374-75 (Del. Ch. 1978).

\(^6\)See DEL. CODE ANN. tit 8, § 262(b) (1995).

\(^7\)Alabama By-Products v. Cede & Co., 657 A.2d 254, 257 (Del. 1995).
of appraisal is an orderly and efficient exit from the corporation, complications have arisen from the extensive use of "nominee" and "street name" ownership.8

Using these ownership methods, brokers title jumbo stock certificates in their names so that shares may be bought and sold on behalf of the investor without physically transferring certificates and re-registering stock following each transaction.9 In turn, the broker deposits the shares in a central depository,10 and thus, the record owner is the depository.11 The result is a complex chain of record and beneficial ownership not reflected in the corporate books. Complications arise when the broker or beneficial owner attempts to exercise rights reserved exclusively for the "recordholder."12 For example, appraisal rights may be perfected only by the recordholder which, as indicated above, is often the depository.

Part II addresses the evolution of securities holding systems and the concept of an inadvertent tender. In particular, section A explains the use

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8The depository is listed as registered owner of the security on the books of the corporation where the stock is held in nominee name. Thus, the investor does not "own" the actual securities held by its financial intermediary. Instead, she owns a "securities entitlement" in the aggregate number of shares of a particular stock, or fungible bulk, controlled by that financial intermediary. Jeanne L. Schroeder, Is Article 8 Finally Ready This Time? The Radical Reform of Secured Lending on Wall Street, 1994 COLUM. BUS. L. REV. 291, 368. The investor is termed the "beneficial owner" of property or quasi-property interest in such securities. Id. at 371. See also 17 C.F.R. § 240.13d-3 (1995) (SEC Rule 13d-3) (defining beneficial owner as "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares" voting power and/or investment power).

Approximately 10% of domestic corporation stock was held in nominee and street name accounts by 1937, increasing to 20% by 1956 and 30% by the 1970s. LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 2085-86 n.427 (1989) (citing J. Robert Brown, The Shareholder Communication Rules and the Securities and Exchange Commission: An Exercise in Regulatory Utility or Futility?, 13 J. CORP. L. 683 (1988)). Equity shares exceeded $1 trillion and debt exceeded $400 billion in registered depositories by the end of 1984. Id. As of 1989, up to 62% of all outstanding shares and public debt securities of many New York Stock Exchange listed companies are held of record by Depository Trust Company (DTC). ABA Ad Hoc Committee on Uncertificated Debt Securities, First Report on Uncertificated Debt Securities, System Credit Risk and Sample Uncertificated Debt Indenture, 46 BUS. LAW. 909, 918 (1991) (citing Telephone Interview with Anthony Saldano, Supervisor, Proxy Department, The Depository Trust Company (Nov. 8, 1989)).

9See infra part II.A. For instance, financial intermediaries use depositories to receive payments and other distributions generated by the securities underlying the investor's entitlement. U.C.C. § 8-505 cmt. 1 (1994).

10Securities depositories serve their participants by providing a system for handling securities within an automated, book-entry system. See infra part II.A.

11Id.

12These rights include the right to vote, the right to receive dividends and the right to inspect the corporate books. See Salt Dome Oil Co. v. Schenck, 41 A.2d 583, 588 (Del. 1945).
of modern holding systems, followed by a discussion of the case law interpreting the Delaware appraisal remedy\textsuperscript{13} in section B. Part III analyzes the recent Delaware Supreme Court holding in \textit{Alabama By-Products Corp. v. Cede & Co.}\textsuperscript{14} where the court ruled that stockholders with perfected appraisal rights are entitled to share in an appraisal award despite an inadvertent tender of their stock by the recordholder. Part IV analyzes this holding in light of the holdings in \textit{Southern Production Co. v. Sabath}\textsuperscript{15} and \textit{Dofflemyer v. W.F. Hall Printing Co.}\textsuperscript{16} and concludes that the effects of \textit{Alabama By-Products} will be similar to \textit{Chokel v. First National Supermarkets.}\textsuperscript{17} Part IV also evaluates the potential ramifications on the corporate duty to monitor share redemption, the automated processing system, and shareholder action during a pending appraisal proceeding.

\section*{II. BACKGROUND}

\subsection*{A. Development of Securities Holding Systems}

The original concept of a corporation was a group of various investors with membership rights represented by stock certificates.\textsuperscript{18} Ownership interests were executed by delivery of the certificates from the seller to the buyer and completed by a notation on the corporate books.\textsuperscript{19} While the investor class was relatively restricted, this mechanism of physical transfer and re-registration was sufficient.\textsuperscript{20} However, as investment methods diversified, so did shareholder use of brokers and agents.\textsuperscript{21} While the participants in the securities industry increased exponentially, the processing system remained unchanged.\textsuperscript{22}

\textsuperscript{13}The focus on Delaware law is based on the fact that "over 40\% of the companies listed on the New York Stock Exchange are incorporated in Delaware." \textsc{R. Franklin Balotti} & \textsc{Jesse A. Finkelstein}, \textsc{Delaware Law of Corporations and Business Organizations F-1} (perm. ed. rev. vol. 1991).

\textsuperscript{14}657 A.2d 254 (Del. 1995).

\textsuperscript{15}87 A.2d 128 (Del. 1952); \textit{see infra} notes 187-99 and accompanying text.

\textsuperscript{16}432 A.2d 1198 (Del. 1981); \textit{see infra} notes 200-03 and accompanying text.

\textsuperscript{17}660 N.E.2d 644 (Mass. 1996); \textit{see infra} notes 204-18 and accompanying text.

\textsuperscript{18}\textsc{U.C.C.} art. 8, prefatory note (1994).

\textsuperscript{19}Id.

\textsuperscript{20}\textsc{Egon Guttman}, \textsc{Modern Securities Transfers 2-1} (3d ed. 1987).

\textsuperscript{21}See \textsc{Martin Torosian}, \textsc{Securities Transfer: Principles and Procedures 114} (4th ed. 1983).

\textsuperscript{22}For example, a national securities transfer clearance and settlement system did not exist and there was little coordination among the various processing systems at that time. Proposed SEC Rules on Processing Tender Offers Within National Clearance and Settlement
Stock exchanges in the 1960's bull market increased to such levels that it was virtually impossible to transfer stock certificates quickly enough to keep up with ongoing trading. The manual certificate system was paralyzing the securities industry. In response, Congress sanctioned the use of a national securities transaction clearance and settlement system. The Securities and Exchange Commission advocated operations


The crisis occurred in two phases. In 1964, the New York Stock Exchange reported an average daily volume of 4.89 million shares. LOSS & SELIGMAN, supra note 8, at 2899 (1989). By 1968, the average daily volume was 12.97 million shares with an all-time high volume of 14.9 million shares traded in December 1968. Id. (citing Securities Industry Study, Report of Subcommittee on Commerce and Finance, House Committee on Interstate and Foreign Commerce, H.R. REP. NO. 92-1519, 92d Cong., 2d Sess. 3 (1972); 35 SEC ANN. REP. 1 (1969); H. BARUCH, WALL STREET SECURITY RISK 86 (1971)). Horror stories of stock certificate piles "halfway to the ceiling," seven-day-work weeks for clerical personnel, and round-the-clock processing caused the exchanges to shorten the trading day for a period in August 1967 and for the first six weeks of 1968. Id. at 2899-900 (citing SEC, Study of Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. No. 92-231, 92d Cong. 1st Sess. 219, 222 (1971)).

The consensus is that the back office crisis was primarily caused by broker-dealer firm mismanagement during the volume surge of 1964-68. Id. at 2904 n.17. Managers focused on business production while sacrificing handling and processing. Id. For a stinging criticism of naivety of literal historical accounts of the 1960's "paper crunch," see Jeanne L. Schroeder, Is Article 8 Finally Ready This Time?, 1994 COLUM. BUS. L. REV. 291, 312 n.42 (arguing the colloquial term "paper work" includes any form of clerical work, including computer entries).


25Schroeder & Carlson, supra note 24, at 568 n.40 (citing S. REP. No. 75, 94th Cong., 1st Sess. 1 (1975)).

Congressional intent to eliminate the use of certificates was clearly stated in the 1975 amendments to the Securities and Exchange Act which commands the SEC to "use its authority under [the Act] to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities." Securities Exchange Act of 1934, amended by, 15 U.S.C. § 78q-1(e) (1994) [hereinafter Exchange Act]. To this end, the SEC must include in its annual fiscal report to Congress any steps the SEC has taken and
that would facilitate access to and use of clearing corporations and securities depositories by broker-dealers, banks, and transfer agents. Clearly, development of an alternative system that could minimize the physical movement of stock certificates, facilitate book-entry settlement of transactions, and provide for better communication among participants was imperative. By the 1970s, recordkeeping and processing functions were automated.

Notwithstanding these benefits, book-entry transfers and the use of central depositories convoluted corporate transactions and created chains of ownership. Consider this in the context of a simple merger

any progress made toward terminating the tangible movement of securities certificates in connection with the settlement of securities transactions, and any suggestions the SEC has to eliminate securities certificates. Exchange Act 23(b)(4)(E), 15 U.S.C. § 78w(b)(4)(E) (1994). The House Subcommittee on Commerce and Finance envisaged replacement of the five-day settlement period with a one-day settlement period, more efficient ownership transfers, and abolishment of mail delivery, physical handling, and security theft. LOSS & SELIGMAN, supra note 8, at 2907 & n.21 (citing Securities Industry Study, Report of Subcommittee on Commerce and Finance, House Committee on Interstate and Foreign Commerce, H.R. REP. NO. 92-1519, 92d Cong., 2d Sess. 70 (1972)).

The American Bar Association Committee on Stock Certificates also encouraged revision of model corporate codes to lessen or discontinue the use of stock certificates and recommended use of book-entry or uncertificated stocks. David A. Kessler, Investor Casualties in the War For Market Efficiency, 9 ADMIN. L.J. AM. U. 1307, 1313-14 (1996).

Clearing corporations accept securities deposits from various participants and effect transfers among the participants by book-entry deliveries. Kessler, supra note 25, at 1317 n.47. Depositories retain the physical certificates that are transferred by bookkeeping entries. TOROSIAN, supra note 21, at 116.

Proposed SEC Rules, supra note 22, at 817 n.2.

Another rationale offered for eliminating the use of physical certificates was the notable growth of certificate thefts. Michael E. Don & Josephine Wang, Stockbroker Liquidations Under the Securities Investor Protection Act and Their Impact on Securities Transfers, 12 CARDOZO L. REV. 509, 511 (1990).

The intent to eliminate physical transfers is evident in § 17A(e) of the Securities Exchange Act of 1934 which states: "[T]he [SEC] shall use its authority under this title to end the physical movement of securities certificates in connection with the settlement among brokers and dealers of transactions in securities." Proposed SEC Rules, supra note 22, at 817 n.2.

Proposed SEC Rules, supra note 22, at 5 & n.4.

Id.

This modernization was not without its victims. Sudden changes to computerized facilities often caused destructive results including liquidation of well-established broker-dealers. LOSS & SELIGMAN, supra note 8, at 2905 & n.17 (discussing the failure of Goodbody & Company; McDonnell & Company; Amott, Baker & Company; Schwabacher & Company; and Fusz-Schmelze & Company) (citing SEC, Study of Unsafe and Unsound Practices of Brokers and Dealers, H.R. Doc. No. 92-231, 92d Cong., 1st Sess 120-121 (1971); BARUCH, supra note 23, at 106-10, 112, 192-96, 199; C. WELLES, THE LAST DAYS OF THE CLUB 172-209 (1975)).
A corporation intending to merge with and absorb another corporation may efficiently manage the share exchanges through the use of a transfer agent. The "letter of agreement" between the corporation and transfer agent governs their relationship and sets forth the procedure for processing letters of transmittal, surrendered securities, and payments to tendering shareholders.

To accept a tender offer, a recordholder of the target company’s stock must redeem his shares for the merger consideration. Where the stock is titled in the name of the depository’s nominee on behalf of the broker, who in turn holds the securities on behalf of the investor/beneficial owner, the broker accepts the terms of the offer by delivering letters of transmittal to the depository. Remitted along with this letter are voluntary offering instructions requesting the depository to transfer the securities to be redeemed by book-entry to the bidder’s transfer agent. Securities delivered through the depository are thus subject to the terms of the offer, the letters of transmittal, and the agreement between the depository and the transfer agent. After making book-entry delivery of those securities, the depository forwards the original certificates to the transfer agent.

Subsequently the agent delivers the merger consideration to the broker’s depository for the surrendered securities. Payment to the depository can be made at the same time it is made to stockholders who accepted the tender offer directly with the bidder’s transfer agent. Then, the depository distributes the payments to its participants either through the depository’s money settlement system or by book-entry.

There are numerous benefits of automated voluntary offering procedures similar to those delineated above. First, when book-entry services continue uninterrupted during a tender offer, settlement of heavy

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31 Torosian, supra note 21, at 114. These fiduciaries are collectively referred to as participants except where a distinction is required.

32 Proposed SEC Rules, supra note 22, at 819 n.19.

33 The depository is under no duty to examine transmittal letters or voluntary offering instructions but will comply with a broker’s instruction to the extent that the broker has a sufficient free position in its account. Id. at 823 n.48. Otherwise, the depository will reject the instruction. Id.

34 After making book-entry deliveries of those securities, the depository forwards to the transfer agent the brokers’ letters of transmittal and voluntary offering instructions. Proposed SEC Rules, supra note 22, at 823 n.49. Thus, the depository and agent undertake daily control of all offer and acceptance activity processed through the depository, and retain a cumulative record of all instructions submitted by each broker. Id.

35 Because depositories register their shares in the names of their nominees, distributions are issued by the bidder’s agent to the nominees and then distributed by the depositories to their appropriate participating brokers. Id. at 823-24 n.55.
trading activity can occur quickly and efficiently. There is no need for large withdrawals of securities certificates from the depository for settlement purposes.36 Therefore, certificates are immobilized and securities control is optimized. Additionally, book-entry provides expedited payment to the depository through the depository's money settlement system or by book-entry to brokers.

The success of the centralized depository and automated book-entry system is evidenced by its widespread use. Today, depositories hold the largest segment of publicly traded shares.37 Accordingly, upon inspection of its stock registration list, a corporation likely sees a majority of its shares titled in the name of a nominee or depository, followed by brokerage houses and individual investors.38 Thus, the corporation is unaware of the ultimate beneficial owners of its shares.

The intricacies of this chain of ownership are of little import because of the statutory and common law right of the stock issuer to rely on corporate books to determine record ownership.39 Consequently, when it comes to the exercise of fundamental rights associated with stock ownership, the corporation is entitled only to the action of the record owner, i.e., the depository.40 This concept of record ownership is

36 For example, if the target's securities underlying acceptances are part of an automated transfer program, such as the Fast Automated Securities Transfer (FAST) program, certificates for those securities need not even be forwarded by the depository to the transfer agent after expiration of the offer. Pursuant to FAST, the depository and the transfer agent agree that multiple "jumbo certificates" will be maintained by the transfer agent. These jumbo certificates are prepared in the name of the depository's nominee's name to be exchanged intermittently for new jumbo certificates when the amount of the depository's interest changes significantly. ABA Ad Hoc Committee, supra note 8, at 918-19. This permits swift trades. Id.

37 U.C.C. art. 8, Prefatory Note 2 (1994). In particular, between 60% and 80% of the outstanding shares of all publicly traded companies are held of record by Cede & Co. Id. at 2-3. Cede & Co. is the nominee name of the DTC, which is a limited purpose trust company acting on behalf of roughly 600 participating broker-dealers and banks. Id. at 3. The three other major depositories are Midwest Securities Depository Co., Pacific Securities Depository Trust Co., and Philadelphia Depository Trust Co. Proposed SEC Rules, supra note 22, at 817 n.5.

38 U.C.C. art. 8, Prefatory Note 3 (1994).

39 The record owner is the individual in whose name the shares are registered on the corporate books. LARRY D. SONDERQUIST, INVESTOR'S RIGHTS HANDBOOK 253 (1993).

40 Salt Dome Oil, 41 A.2d at 584. The court reasoned:
It is obvious that the only persons who are integrated with the corporation as stockholders are those persons who are stockholders of record on the stock books of the corporation. To hold otherwise would lead to corporate chaos. The holder of a "street certificate" . . . is not a stockholder, although he has been given an irrevocable assignment of his transferor's rights. . . . His rights as against the corporation are inchoate only until the transfer is consummated by the surrender of the indorsed certificate and the issue of a new certificate
especially critical to appraisal rights afforded to shareholders under state statutory schemes.

B. Appraisal Rights

Appraisal is a limited statutory remedy affording shareholders objecting to certain corporate transactions the right to a judicial determination of the fair value of their shares.\(^{41}\) Although numerous theories have been advanced regarding the underlying purpose of the remedy,\(^{42}\) the Delaware courts have posited that the remedy was created

in his name. Until then he is not entitled to the privileges or emoluments of stockholders . . . .

\(^{40}\)Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1186 (Del. 1988). Typical appraisal triggering transactions include mergers, share exchanges, sales or exchanges of all or substantially all corporate property, and certain amendments to the articles of incorporation. See REVISED MODEL BUS. CORP. ACT § 13.02 (Supp. 1996).

\(^{41}\)One theory is to prevent the majority from exercising undue influence over the minority. Calio, supra note 1, at 3.

A second theory is that a contract is formed between the corporation and the shareholder at the time of the shareholder’s investment. Singer v. Magnavox, 380 A.2d 969, 977-78 (Del. 1977). A shareholder has an interest not only in the value of the shares but also in the corporate form itself. As a result, a transformation in corporate form is an unbargained-for transformation of the investment. MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 76-77 (1976). Accordingly, a shareholder should be afforded an opportunity to disinvest. \(\text{Id. See also Reynolds Metals Co. v. Colonial Realty Corp.}, 190 A.2d 752, 755 (Del. 1963) (stating that appraisal rights were formulated to compensate objecting shareholders for loss of their common law, unilateral power to prevent a merger).

A third rationale is to protect the minority from the majority’s undervaluation of the pre-transaction stock. Schwenk, supra note 4, at 674. Undervaluation is a tool used by the majority to fulfill its promises of greater returns on investment thus enticing shareholders to approve the proposed transaction. \(\text{Id.}\)

A fourth rationale is that appraisal protects the majority from the minority. The unanimous consent common law requirement to approve a transaction permitted a shareholder to obtain greater return on his investment by refusing to consent to the transaction and obtaining an injunction to halt the corporate activity. Pressured by time constraints, the corporation was forced to purchase the injunction by cashing out the dissenting shareholder. \(\text{Id. at 654 (citing Windhurst v. Central Leather Co., 138 A. 772 (N.J. Ch. 1927), aff’d per curiam, 153 A. 402 (N.J. 1931), as an early example of “corporate buccaneers” buying shares solely to dissent from a transaction in the hope of receiving a windfall to withdraw their opposition). For a more recent finding of shareholders purchasing stock solely to benefit from appraisal rights, see generally Salomon Bros. Inc. v. Interstate Bakers Corp., No. 10,054, 1992 WL 94367 (Del. Ch. May 1, 1992), reprinted in 18 DEL. J. CORP. L. 756 (1993). See also Henry F. Johnson & Paul Bartlett, Jr., Is a Fistful of Dollars the Answer? A Critical Look at Dissenters’ Rights Under the Revised Model Business Corporation Act, 12 I.L. & COM. 211, 212 (1993) (explaining that the Revised Model Act “seeks to balance the interests of the
to compensate for the shareholders' loss of the common law right to veto fundamental corporate transactions.\textsuperscript{43}

Section 262 of the Delaware General Corporation Law (DGCL) affords this remedy to shareholders who have complied with the statutory requirements. Although the requirements are to be "liberally construed for the protection of objecting stockholders,"\textsuperscript{44} Delaware courts have required strict compliance for appraisal entitlement to vest.\textsuperscript{45}

Before a shareholder is entitled to perfect appraisal rights, he must satisfy four prerequisites.\textsuperscript{46} First, the shareholder must be a stockholder of record.\textsuperscript{47} Section 262(a) defines a stockholder as "a holder of record of stock in a stock corporation and also a member of record of a non-stock corporation."\textsuperscript{48}

majority and minority shareholders\textsuperscript{a}). Appraisal rights avoid this bad faith holdout by reducing the outright prevention and delay of the transaction. See Schwenk, supra note 4, at 654.

\textsuperscript{43}Salt Dome Oil, 41 A.2d at 587. See also Schenley Indus., Inc. v. Curtis, 152 A.2d 300, 301 (Del. 1959) (explaining that the change in Delaware statute to permit the merger of two or more corporations without the consent of all the shareholders necessitated the right to appraisal in order to protect the contractual rights of the dissenting stockholders); 12B WILLIAM M. FLETCHER, FLETCHER Cyclopedia of the Law of Private Corporations \textsuperscript{2}§ 5906.10 (perm. ed. rev. vol. 1993) (footnote omitted) (reaffirming the idea that the appraisal remedy is "entirely the product of statute").

In the nineteenth century, corporations were recognized as a form of partnership, and thus each shareholder was vested with a contract right to prevent a proposed change in the corporate form. William J. Carney, \textit{Fundamental Corporate Changes, Minority Shareholders, and Business Purposes}, 1980 AM. B. FOUND. RES. J. 69, 78, 87 (noting a judicial exception to the unanimity requirement for dissolution where there was no expectation for profit). This, however, led to unjust results in the instance where a corporate change was prevented despite approval by all other shareholders. \textit{Id.} at 80. In recognition of this injustice, courts awarded the fair value of a shareholder's stock when the shareholder sued for injunctive relief to halt the transaction. Norman D. Lattin, \textit{Remedies of Dissenting Stockholders Under Appraisal Statutes}, 45 HARV. L. REV. 233, 234-36 (1931). Thus, the cash award compensated the minority shareholder for his loss of veto right. \textit{Salt Dome Oil}, 41 A.2d at 587 (citing Chicago Corp. v. Munds, 172 A.2d 452, 452 (Del. Ch. 1934)); Siegel, supra note 3, at 86-90. See also Hidecki Kanda & Saul Lemov, \textit{The Appraisal Remedy and the Goals of Corporate Law}, 32 UCLA L. REV. 429, 434 (1985) (reaffirming the conventional view that dissenting stockholders receive the right to appraisal in exchange for giving up their right to veto a fundamental corporate change).

\textsuperscript{44}Raab v. Villager Indus., Inc., 355 A.2d 888, 891 (Del. 1976).

\textsuperscript{45}Enstar Corp. v. Senouf, 535 A.2d 1351, 1355-56 (Del. 1987).

\textsuperscript{46}DEL. CODE ANN. tit. 8, § 262(a) (1995). A shareholder demanding appraisal has the burden of proving that he or she is entitled to appraisal. See Alabama By-Products v. Neal, 588 A.2d 255, 256 (Del. 1991).

\textsuperscript{47}DEL. CODE ANN. tit. 8, § 262(a) (1995). Shareholders must maintain their record ownership through the effective date of the transaction. See \textit{Enstar}, 535 A.2d at 1353.

\textsuperscript{48}DEL. CODE ANN. tit. 8, § 262(a) (1995). See also Carl M. Loeb, Rhoades & Co. v. Hilton Hotels Corp., 222 A.2d 789, 792 (Del. 1966) (stating that only a registered owner is a "stockholder" within the meaning of § 262(a)).
Despite a seemingly clear definition, a mass of litigation has focused on who may assert appraisal rights. This is partially due to the chain of ownership described in part II(A) of this article. Delaware has avoided many of the issues surrounding chain of ownership by allowing corporations to rely on stock ledgers to determine which stockholders are entitled to exercise shareholder rights. Accordingly, the corporation is permitted to disregard any action taken by any party other than the record holder. Consequently, an attempt to perfect appraisal rights by any party not a record owner may be rejected. This requirement, in addition to providing certainty to the corporation, ensures that the dissent is "bona fide."

49 See supra notes 18-40 and accompanying text.


Where a corporation doubts the existence of agency on behalf of a stockholder, it may inquire into the terms of that agency. Reynolds, 190 A.2d at 755 (interpreting Zeeb v. Atlas Powder Co., 87 A.2d 123 (Del. 1952)). Accordingly, if a corporation receives contradictory proxies, and a demand for appraisal with regard to shares of one proxy, the corporation may inquire as to the agency of the broker. Id.

52 Salt Dome Oil, 41 A.2d at 583. See also Helen M. Richards, Cede & Co. v. Technicolor, Inc.: A Whole New Ball Game for Dissenting Shareholders, 14 Del. J. Corp. L. 999, 1004-05 (1989) (observing that a dissenting stockholder must be sure to follow the statute to the minute detail if he wishes to take advantage of the appraisal remedy, including the requirement that he be a "stockholder of record"); In re Engle, No. 4896, slip op. at 6-7, reprinted in 4 Del. J. Corp. L. at 540 (denying beneficial owner’s demand for appraisal where shares were held of record in street name and broker did not demand appraisal on behalf of this beneficial owner); Carico v. McCrory Corp., No. 5160, slip op. at 2 (Del. Ch. July 13, 1978), reprinted in 4 Del. J. Corp. L. 595, 598 (1979) (denying claim where person objecting to merger and demanding appraisal neither knows the name of the record holder nor has communicated this name to the corporation).

53 Zeeb, 87 A.2d at 126.
Second, the shareholder must not vote in favor of, or otherwise consent to, the transaction.\textsuperscript{54} Third, the shareholder must continuously hold the shares through the effective date of the transaction.\textsuperscript{55} Fourth, appraisal rights must be perfected.\textsuperscript{56} If these critical predicates are satisfied,\textsuperscript{57} the shareholder is presumed entitled to appraisal.

If the proposed transaction must be approved at a shareholder meeting, the corporation must provide notice of the availability of appraisal.\textsuperscript{58} The dissenting shareholder must then deliver written demand for appraisal prior to the date of the scheduled vote.\textsuperscript{59} If a triggering transaction may be approved by written consent\textsuperscript{60} or is a short-form

\begin{footnotesize}
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\item \textsuperscript{54}Del. Code Ann. tit. 8, § 262(a) (1995). The fundamental reason for denying standing to a stockholder who has assented to the proposed transaction is based on the principles of estoppel or acquiescence. Kahn v. Household Acquisitions Corp., 591 A.2d 166, 176 (Del. 1991). The shareholder cannot be permitted to approve a transaction and then seek equitable relief by challenging the approval. Id. at 176-77.
\item \textsuperscript{55}Del. Code Ann. tit. 8, § 262(a) (1995).
\item \textsuperscript{56}Del. Code Ann. tit. 8, § 262(d) (1995).
\item \textsuperscript{57}A shareholder's proof of compliance with the statutory requirements affords the shareholder an "absolute right to proceed under the statute." Kaye, 395 A.2d at 375 (citing In re Northeastern Water Co., 38 A.2d 918 (Del. Ch. 1944)). A shareholder will be denied appraisal, despite satisfying these prerequisites if the shares are listed on a national exchange or held by more than 2,000 record holders. Del. Code Ann. tit. 8, § 262(b)(1) (1995). This exception is commonly referred to as the market-out, or stock market, exception. Denial of the appraisal remedy in these instances is justified on the theory that the market will determine the fair value of the stock. Siegel, supra note 3, at 96.
\item This exception, however, fails to account for market swings which might leave the shareholder with less than fair value. Richards, supra note 52, at 1004 & n.35. In fact, the stock market and the mergers and acquisition influences are inapposite. A falling stock market triggers merger activity. Barbash, supra note 2, at 10. Conversely, higher stock prices inflate base bidding prices, thus complicating broker offers. Id. Accordingly, a shareholder denied judicial appraisal under the market out exception is also denied fair value for his shares because the merger likely would not have occurred but for the low market price. Siegel, supra note 3, at 96.
\item Del. Code Ann. tit. 8, § 262(b) (1995). Zeeb, 87 A.2d at 125 (citing Stephenson v. Commonwealth & S. Corp., 168 A. 211 (Del. 1933)); see also Engle, No. 4896, slip op. at 4, reprinted in 4 Del. J. Corp. L. at 538 (stating that the purpose of the written demand for the appraisal requirement is to let the corporation and its stockholders determine the maximum possible number of dissenting stockholders). The corporation is charged with the duty of fully informing and properly instructing the shareholder as to the exact method of executing and propounding an objection and demand for payment. Raab, 355 A.2d at 895.
\item Numerous written demands for appraisal prior to the vote on the proposed transaction may affect the corporate decision to consummate the transaction. Zeeb, 87 A.2d at 125. But see Carico, No. 5160, slip op. at 1, reprinted in 4 Del. J. Corp. L. at 597 (denying appraisal where written demand was made on corporation's transfer agent).
\end{enumerate}
\end{footnotesize}
merger, the corporation must notify the shareholder of appraisal availability prior to the transaction's effective date, or within ten days thereafter. Likewise, after this notice, the shareholder must make a written demand for appraisal.

The purpose of the written demand is to inform the corporation, and its other shareholders, of the potential number of objectors and their cash claims. Because notice occurs prior to a formal demand, it will be deemed satisfactory if it affords the corporation a reasonable indication of the intending dissenters. A vote against the transaction, however, does not constitute written demand to perfect appraisal rights.

Once appraisal rights are perfected, the shareholder is vested with two "mutually exclusive rights"; the right to accept merger consideration, or the right to file a petition for judicial appraisal. Only after one of these rights is exercised, or sixty days beyond the effective date of the transaction, is the shareholder committed to dissent. Accordingly, at any time prior to satisfaction of the requisite elements, or within sixty days of the effective date of the transaction, the shareholder may abandon pursuit of appraisal and accept the merger consideration.

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66 Id. The Delaware Supreme Court distinguished the purposes of the pre-vote objection from the written demand for payment "in determining the requisite formality and technicality of execution." Raab, 355 A.2d at 891. The pre-vote objection is designed to merely notify the corporation of possible dissenters, whereas the demand for payment is "the last step in the final transaction between the corporation and its stockholder." Id. Accordingly, strict compliance with the demand for payment is required. Id.
67 Zeeb, 87 A.2d at 127. If a corporation is aware of the potential cash claims, it may forego the pre-vote transaction. Id. Additionally, it may influence the disposition of other voting shareholders. Stephenson v. Commonwealth & S. Corp., 168 A. 211 (Del. 1933).
68 Cf. Abraham & Co., 204 A.2d at 742, aff'd, Olivetti Underwood Corp. v. Jacques Coe & Co., 217 A.2d 683 (Del. Super. Ct. 1966) ("[T]he statutory ceremony of objection and demand is mandatory and the court is not free to construct a demand in the absence of any words of that general tenor.").
69 Id.
71 Once this commitment to dissent is made, the shareholder loses the traditional rights of stock ownership including the right to vote and the right to receive dividends or other distributions. Del. Code Ann. tit. 8, § 262(k) (1995). The corporation gains a corresponding right to the shareholder's stock upon payment of fair value therefor. Southern Prod. Co., 87 A.2d at 134. These rights and entitlements are converted only as to the stock subject to the appraisal action. Thus, a shareholder can perfect appraisal rights to only a portion of his shares, while retaining full ownership benefits as to the remainder of the shares held. See id.
72 Zeeb, 87 A.2d at 127. See also UMS Partners, Nos. 94J-12-159H-17-076 & 95E-01-
Perfection of appraisal rights is an irrevocable election to withdraw from the corporation, except when the shareholder strictly complies with the statutory withdrawal procedure.70 A perfected shareholder who fails to comply with the statutory withdrawal procedure relinquishes the merger consideration until completion of the appraisal proceeding.71 Accordingly, his status is no longer that of a member or owner of the corporation, but that of a creditor.72 Likewise, the corporation has a corresponding right to receive the shareholder's stock upon payment of fair value.73

The Delaware courts have consistently held that any stockholder who has tendered his shares to the corporation in exchange for merger consideration is thereafter barred from participating in the appraisal proceeding.74 The fact that stock may be surrendered by the broker or record owner without the consent or knowledge of the beneficial owner is irrelevant to the corporation,75 and is considered a matter between the

043, 1995 Del. Super. LEXIS 250, at *3-4 (explaining that after 60 days have passed, the shareholder can no longer accept the merger).

70Southern Prod., 87 A.2d at 134.

[A]ny stockholder who has submitted his shares to the corporation and received in exchange the consideration provided for under the terms of the merger cannot thereafter be a party to any appraisal proceedings. This is true even if the surrender of the shares was accomplished by a brokerage house or other record owner, without the consent of the beneficial owner.

Id. (citations omitted).

72Southern Prod., 87 A.2d at 134. As a creditor denied the use of his investment, the statute vests the appraising court with the power to award interest on the appraised value. Del. Code Ann. tit. 8, § 262(i) (1995). The interest rate to be awarded is that at which a "prudent investor" would have invested rather than the rate at which the corporation would have paid to borrow the same sum. Universal City Studios Inc. v. Francis I. duPont & Co., 334 A.2d 216, 222 (Del. 1975). Following this rule, the courts have averaged a return from a diverse portfolio of short to long term Treasury bills, savings accounts in commercial banks and mutual savings banks, Moody's triple A corporate bond averages, and the Dow Jones industrial common stock average. See Lebman v. National Union Elec. Corp., 414 A.2d 824, 829 (Del. Ch. 1980) (rejecting plaintiffs' argument for a higher rate because they were "seasoned and successful investors" thus limiting interest award to "prudent investor").

73Southern Prod., 87 A.2d at 134.
74Abraham & Co. v. Olivetti Underwood Corp., 204 A.2d 740 (Del. Ch. 1964). See also Engle, No. 4896, slip op. at 6-7, reprinted in 4 Del. J. Corp. L. at 539 (citing Abraham & Co., 204 A.2d at 742-43). In Engle, the beneficial owner, Ellsworth Petty, objected in writing to the merger. Id. However, his broker, the listed record holder of the stock, never registered objection on his behalf nor demanded appraisal. Id. Accordingly, his claim was held to be unperfected thus preventing his pursuit of appraisal. Id.

75Salt Dome Oil, 41 A.2d at 585-89.
broker and the beneficial owner. Recently, this longstanding practice was scrutinized by the Delaware Supreme Court in *Alabama By-Products v. Cede & Co.*

III. *Alabama By-Products v. Cede & Co.*

A. The Facts

Alabama By-Products Corporation (ABC), a Delaware corporation, maintained two classes of stock traded over the counter which were unlisted on a national exchange. Between 1977 and 1984, the average bid for ABC stock fluctuated between $47 and $75 per share. In 1977, ABC was targeted for acquisition by Drummond Company (Drummond), an Alabama corporation.

In private negotiations between September 1977 and February 1978, Drummond directly purchased approximately 263,967 shares of ABC stock. During this time, Drummond also acquired a controlling interest in Alabama Chemical Products Company (ACPC), a holding company maintaining approximately 63% of the outstanding voting shares of ABC stock. In these purchases, Drummond paid the equivalent of $110 per share. In December 1984, Drummond made a tender offer for all outstanding ABC stock at $75 per share, acquiring 90% of ABC’s

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76 *In re Enstar,* 604 A.2d at 413.
77 657 A.2d 254 (Del. 1995).
78 *Neal v. Alabama By-Products Corp.,* No. 8282, 1990 Del. Ch. LEXIS 127, at *2-3 (Del. Ch. Aug. 1, 1990). The fact that the stock was unlisted on a national exchange is significant in that appraisal rights are not available if the shares are traded on a national exchange or held by over 2,000 record holders. *See supra* note 56.
79 *Neal,* 1990 Del. Ch. LEXIS 127, at *3. At all relevant times, there were approximately 757,300 voting shares and 1,000,000 non-voting shares authorized, issued, and outstanding. *Id.* (Thus the market out exception was inapplicable. *See supra* note 56.).
80 *Id.* at *2-3.
81 *Neal,* 1990 Del. Ch. LEXIS 127, at *3.
82 *Id.* Eventually Drummond caused the liquidation of ACPC which resulted in the distribution of the ABC voting shares to ACPC stockholders, including Drummond. *Id.* at *3-4.
83 *Id.* at *3. As of December 31, 1977, slightly after the mid-point of this acquisition period, the book value of ABC’s stock was $55.47 per share. *Id.*
84 *Id.* at *6.

Neither ABC nor Drummond solicited a fairness opinion from an independent financial analyst. *Id.* Nor was a committee of ABC independent directors named to scrutinize and comment on the transaction. *Id.* Rather, the ABC board voted to leave the fairness determination to each shareholder. *Id.*
outstanding shares. On August 13, 1985, Drummond forced a short-form merger and cashed the minority shareholders out at $75.60 per share.

On the date of the merger, Cede & Co. (Cede) was the record holder of 400 shares of ABC stock for Merrill Lynch, Pierce, Fenner & Smith, Inc. (Merrill Lynch shares) which, in turn, held the stock for its investors. Cede also held of record 2,440 shares owned by Shearson Lehman Brothers, Inc. (Shearson shares), also held on behalf of their investors.

On August 21, 1985, ABC issued a merger notice pursuant to section 262(d)(2) of the DGCL, informing stockholders that appraisal demands must be made by, or on behalf of, the record holder. Nearly

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59 Id. This amount was a combination of the 1984 tender offer price of $75 per share and a 1985 $6.00 quarterly dividend that "had been missed." Id. at *6-7.
61 Id.
62 See supra note 59 and accompanying text.

Under Delaware law, only the holder of record . . . is entitled to seek appraisal of the fair value of the Class A Common Stock or Class B Common Stock (as the case may be) registered in such holder's name. Stockholders who were the beneficial but not registered owners of Shares as of the effective time of the Merger and who wish to exercise such appraisal rights are advised to consult promptly with their record owners as to the timely exercise of such rights.

The demand for appraisal must be executed by or for the holder of record, fully and correctly, as such holder's name appears on the holder's stock certificates. . . . An authorized agent, including one or more joint owners, may execute the demand for appraisal for a holder of record; however, such agent must identify the record owner or owners and expressly disclose in such demand that the agent is acting as agent for the record owner or owners.

A record holder such as a broker who holds Class A Common Stock or Class B Common Stock as nominee for beneficial owners, some of whom desire to demand appraisal, must exercise appraisal rights on behalf of such beneficial owners with respect to the Shares held for such beneficial owners. In such case, the written demand for appraisal should set forth the number of shares of Class A Common Stock and Class B Common Stock covered by it. Unless a demand for appraisal specifies a number of shares of Class A Common Stock or Class B Common Stock, such demand will be presumed to cover all Class A Common Stock or Class B Common Stock (as the case may be) held in the name of such record owner.

Id. at *2-3, reprinted in 14 Del. J. Corp. L. at 806-07.
200 minority shareholders, owning approximately 50,000 voting and 75,000 non-voting shares, respectively, perfected appraisal rights.\textsuperscript{91} Cede, included in this group for the shares it held of record for Merrill Lynch and Shearson, perfected its rights, as well.\textsuperscript{92} On December 3, 1985, the dissenters filed an appraisal action in the Delaware Court of Chancery.\textsuperscript{93} On January 29, 1986, as required, ABC filed a verified list of the name and address of shareholders who registered a demand for appraisal.\textsuperscript{94} Of course, this list included Cede, for both the Merrill Lynch and Shearson shares.\textsuperscript{95}

On May 5, 1987, Merrill Lynch sent a transmittal to ABC's tender/payment agent, AmSouth Bank, N.A. (AmSouth), "authorizing redemption of 400 of the 700 Merrill Lynch shares."\textsuperscript{96} Despite the fact that these shares were subject to appraisal, Merrill Lynch tendered and AmSouth accepted and redeemed the shares for the merger consideration.\textsuperscript{97} This redemption was accomplished without the approval

\textsuperscript{91}Id. at *2-3, reprinted in 14 DEL. J. CORP. L. at 806-07.
\textsuperscript{92}Id. at *7, reprinted in 14 DEL. J. CORP. L. at 808-09. Cede noticed ABC of its demand for appraisal of the shares it held for Shearson by letter dated September 6, 1985. \textit{Alabama By-Products}, 657 A.2d at 255 n.1. There is no indication when Merrill Lynch made its appraisal demand, however, perfection was not at issue. \textit{Id.}
\textsuperscript{93}\textit{Alabama By-Products}, 657 A.2d at 255-56.
\textsuperscript{94}Id. at 256. This verified list is required by § 262(f) which provides in pertinent part: Upon the filing of any such petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which shall within 20 days after such service file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation.

\textsuperscript{95}\textit{Alabama By-Products}, 657 A.2d at 256.
\textsuperscript{96}Neal, 1993 Del. Ch. LEXIS 214, at *3 & n.1, reprinted in 19 Del. J. Corp. L. at 828 & n.1. This authorization was without the knowledge or assent of the beneficial owner, Amy Neal Ager. \textit{Alabama By-Products}, 657 A.2d at 256.
\textsuperscript{97}Neal, 1993 Del. Ch. LEXIS 214, at *2-3, reprinted in 19 Del. J. Corp. L. at 828. The price was the tender offered amount but was not approved by the chancery court. \textit{Id.} at *4.

In an affidavit executed by a former senior vice-president and treasurer of ABC, it was explained that shareholders with perfected appraisal rights frequently tendered their shares for the merger consideration throughout the discovery period of the appraisal action. \textit{Alabama By-Products}, 657 A.2d at 256 n.4. In this instance, the shareholder surrenders the certificate accompanied by a transmittal letter to the tender agent for payment. \textit{Id.} The tender agent then issues a check to the shareholder and notifies the bidder of the surrender without indicating the name of the redeeming shareholder. \textit{Id.} In turn, the bidder reimburses the tender agent for the amount paid to the shareholder. \textit{Id.}

The chancery court further noted that the Paying Agent Agreement between ABC and
of Drummond, or of the chancery court.\footnote{Neal, 1993 Del. Ch. LEXIS 214, at *4 & n.3, reprinted in 19 Del. J. CORP. L. at 829 & n.3.}

On July 30, 1987, the court of chancery entered an order outlining the procedure for distribution of Stockholder Information Forms (SIFs)\footnote{Alabama By-Products, 657 A.2d at 256. Typically, entitlement of shareholders to participate in appraisal is determined at an evidentiary hearing. See Del. Code Ann. tit. 8, § 262(g) (1995). To expedite this procedure, the court may direct the corporation to file a SIF for each shareholder on the verified list. R. Franklin Balotti \& Jesse A. Finkelstein, The Delaware Law of Corporations and Business Organizations § 9.43 \& n.459 (2d ed. Supp. 1995) (citing Huffington v. Enstar Corp., Nos. 7802, 7857, \& 7864 (Del. Ch. Apr. 16, 1985), reprinted in 11 Del. J. CORP. L. 239 (1985)). On the form the corporation indicates whether it will object to that shareholder's qualification for appraisal and the foundation for that objection. Id. This permits the court to anticipate the volume of entitlement contests. Id.} to shareholders seeking appraisal who were listed on the verified list.\footnote{Id. at *3-4, reprinted in 19 Del. J. CORP. L. at 829.} Pursuant to this order, ABC was required to file a SIF for each listed stockholder, noting its objection to that stockholder's participation in the appraisal proceeding.\footnote{Neal, 1993 Del. Ch. LEXIS 214, at *3, reprinted in 19 Del. J. CORP. L. at 829.} The Cede SIF listed Cede as recordholder for 700 Merrill Lynch shares, although 400 had been tendered previously, and for 2,440 Shearson shares.\footnote{Neal, 1993 Del. Ch. LEXIS 214, at *3-4, reprinted in 19 Del. J. CORP. L. at 829.} Cede returned the SIFs to the Register in Chancery noting that its holdings were on behalf of beneficial owners.\footnote{Alabama By-Products, 657 A.2d at 256. Originally Cede received five SIFs because, in addition to the Merrill Lynch and Shearson shares, "Cede had also demanded appraisal" of stock "held for J.C. Bradford \& Co., Chase Manhattan Bank, and Steurne, Agee \& Leach, Inc. as well as shares which it held in its own name." Alabama By-Products, 657 A.2d at 256 \& n.5. Counsel for the appraisal petitioners notified the Register in Chancery that the SIFs were inaccurate because they did not "properly identify the beneficial owners on whose behalf Cede demanded appraisal." Id. at 256. Thereafter, ABC sent Cede revised SIFs, two of which separately identified Cede as the recordholder of the 700 Merrill Lynch shares and 2,440 Shearson shares. Id.} AmSouth provided that AmSouth "[was] not authorized to, and will not, make any recommendation on behalf of ABC or Drummond as to the exercise of the right of surrender or the right to seek appraisal." \footnote{Neal, 1993 Del. Ch. LEXIS 214, at *4, reprinted in 19 Del. J. CORP. L. at 628-29.} Neal, 1993 Del. Ch. LEXIS 214, at *4 & n.3, reprinted in 19 Del. J. CORP. L. at 829 & n.3.

2,440 shares were held by Shearson-Lehman Brothers, Inc. for its customer, Amy N. Ager.

CEDE \& Co. for Merrill Lynch, Pierce, Fenner \& Smith, Inc. who in turn is holding shares of Alabama By-Products Corp. Class B stock.

Harold L. Smyer account number 435-23539 300 shares.

Sidney W. Smyer account number 435-21306 400 shares.
On March 14, 1990, the Shearson shares were surrendered to AmSouth, with Shearson receiving the merger consideration. This exchange occurred without a written revocation of the appraisal demand, and without authorization by the chancery court.

On August 1, 1990, the chancery court appraised the fair value of the shares at $180.67 and ordered that upon submission of the certificates, all stockholders on the verified list would receive the appraised value, plus per annum interest accruing from the date of the merger to the date of payment. Subsequently, Drummond discovered

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Alabama By-Products, 657 A.2d at 256. This is significant in that a shareholder who does not correct or return the SIF is deemed to have assented to the corporation's statements on the form. In re Appraisal of Shell Oil Co., No. 8080 (Del. Ch. Feb. 21, 1986). However, the corporation may revise the form to propound facts unknown at the original filing. In re Appraisal of Enstar Corp., 513 A.2d 206, 209, 211 (Del. Ch. 1986).

Whereas ABC did not object to Cede's appraisal rights relative to the shares held for Merrill Lynch and Shearson, ABC did object to the appraisal demands of Cede for shares it was record holder of on behalf of PaineWebber Incorporated. Alabama By-Products, 657 A.2d at 257; Neal, 1988 Del. Ch. LEXIS 135, at *5, reprinted in 14 DEL. J. CORP. L. at 808.

In this related action, George P. and Elizabeth G. Montis were beneficial owners of non-voting shares of stock of ABC. Id. at *3, reprinted in 14 DEL. J. CORP. L. at 808. Their shares were held on account at PaineWebber by PaineWebber's record holder Cede. Id. at *3-4, reprinted in 14 DEL. J. CORP. L. at 808. An authorized representative of PaineWebber demanded appraisal of these shares by letter which read:

The undersigned hereby demands an appraisal of all of my shares of Alabama By-Products Corporation. The undersigned is record owner of shares of Alabama By-Products Corporation on or prior to August 13, 1985 [the effective date of the merger].

Yours very truly,

/s/ Mark L. Clyne

... These shares are registered in the name of our nominee Cede & Co. This dissent is being made by PaineWebber on behalf of our client(s) the beneficial owners(s) of these shares in question. Address further correspondence to the beneficial owner with copies to PaineWebber.

Client - Beneficial Owner
1) George P. Montis & Elizabeth G. Montis 3938 Bonnington Ct. Atlanta, Georgia 30341 1,750 shares.

Id. at *4, reprinted in 14 DEL. J. CORP. L. at 807-08. Identical letters were sent on behalf of PaineWebber for 1,750 shares beneficially owned by Catherine Gibbons and George and Elizabeth Montis. Id. at *5, reprinted in 14 DEL. J. CORP. L. at 808.

*Neal, 1993 Del. Ch. LEXIS 214, at *4, reprinted in 19 DEL. J. CORP. L. at 829. Similar to Merrill Lynch, Shearson averred that its redemption of these shares was inadvertent. Id. at *4 & n.2, reprinted in 19 DEL. J. CORP. L. at 829 & n.2.

*Id. at *4, reprinted in 19 DEL. J. CORP. L. at 829.

*Neal, 1990 Del. Ch. LEXIS 127, at *65. The difference between the merger consideration and the fair value was $105.07. Id. at *2, *65.

*Id. at *65. Additionally, the costs of the appraisal proceeding, exclusive of expert witness and attorneys' fees, were assessed against Drummond pursuant to DEL. CODE ANN. tit.
that Merrill Lynch and Shearson tendered their shares prior to the resolution of the appraisal proceeding.\textsuperscript{103} Based on this information, Drummond refused to pay the difference between the merger price and the appraised value.\textsuperscript{109}

B. \textit{The Chancery Court Decision}

Merrill Lynch, on behalf of Cede for the Merrill Lynch shares, and Cede, on behalf of the Shearson shares, moved to compel payment of the net appraisal award.\textsuperscript{110} They argued that the additional consideration was due because the earlier share redemption did not comport with the statutory withdrawal requirements.\textsuperscript{111} Merrill Lynch averred that by failing to correct the Merrill Lynch SIF,\textsuperscript{112} Drummond waived its right to object to the supplemental payment.\textsuperscript{113} Drummond argued that petitioners forfeited their rights to the appraised value by accepting the merger consideration and that Merrill Lynch and Shearson failed to comply with the 1991 Order mandating deposit of the certificates as a predicate to receiving the appraised value.\textsuperscript{114}

Noting that the procedure delineated by section 262(k) of the DGCL provides the exclusive method to withdraw from an appraisal proceeding is governed by § 262(k) which provides:

\begin{quote}
if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.
\end{quote}

\textsuperscript{8}, § 262(j) (1995). \textit{Id.} The 12 1/2\% interest rate was determined to be a comparable rate that ABC could have obtained on a low interest loan. \textit{Id.} at *64.


\textsuperscript{109}\textit{Id.}

\textsuperscript{110}\textit{Id.} at *1, reprinted in 19 Del. J. Corp. L. at 828.

\textsuperscript{111}\textit{Id.} at *5, reprinted in 19 Del. J. Corp. L. at 830. Withdrawal from an appraisal proceeding is governed by § 262(k) which provides:

\begin{quote}
if such stockholder shall deliver to the surviving or resulting corporation a written withdrawal of his demand for an appraisal and an acceptance of the merger or consolidation, either within 60 days after the effective date of the merger or consolidation as provided in subsection (e) of this section or thereafter with the written approval of the corporation, then the right of such stockholder to an appraisal shall cease. Notwithstanding the foregoing, no appraisal proceeding in the Court of Chancery shall be dismissed as to any stockholder without the approval of the Court, and such approval may be conditioned upon such terms as the Court deems just.
\end{quote}

\textsuperscript{112}The Merrill Lynch SIF reflected the original share holding despite the fact that the Merrill Lynch shares had been previously tendered. \textit{Neal}, 1993 Del. Ch. LEXIS 214, at *5, reprinted in 19 Del. J. Corp. L. at 830.

\textsuperscript{113}\textit{Id.} at *6, reprinted in 19 Del. J. Corp. L. at 830.

\textsuperscript{114}\textit{Id.}
proceeding, Vice-Chancellor Chandler stated that whether the parties complied with the withdrawal procedure would be dispositive to determine whether the plaintiffs were entitled to the net appraisal award. The vice-chancellor isolated the "three most important steps" in withdrawing from an appraisal action: "1) a written request [to the corporation] by the withdrawing party; 2) written approval by the corporation; and 3) approval by the Court of Chancery."116

The court ruled that a redemption cannot be construed as a written withdrawal request to the corporation and found that the parties never filed such a request to withdraw from the appraisal proceeding.117 Second, the court refused to attribute to Drummond AmSouth's acceptance of the shares and would not infer Drummond's tender and payment of the merger consideration as implicit approval by the corporation.118 This was based on the lack of a statutory provision permitting approval in this manner.119 With respect to the Shearson transaction, Drummond never acknowledged that the shares were included in the appraisal proceeding or presented any evidence of its written approval.120 Finally, and most significantly, because there was no prior approval by the court of chancery, the court concluded that the Merrill Lynch and Shearson tenders failed to satisfy the mandated withdrawal procedure.121

Next, the court evaluated Drummond's claim that by surrendering shares for the merger consideration Merrill Lynch and Shearson terminated the right to benefit from the appraisal proceeding and receive the net appraisal award.122 The court distinguished Drummond's precedent by noting that the cases relied on resolved issues of perfection, rather than withdrawal, which was at issue in the case at bar.123

115Id. at *6-8, reprinted in 19 Del. J. Corp. L. at 830-31.
116Neal, 1993 Del. Ch. LEXIS 214, at *9, reprinted in 19 Del. J. Corp. L. at 831 (emphasis added). The court stated that if these fundamental steps were not observed, the statute would become meaningless. Id.
117Id. at *9, reprinted in 19 Del. J. Corp. L. at 832.
118Id.
119Id. at *9-10, reprinted in 19 Del. J. Corp. L. at 832.
121Id. at *9-10, reprinted in 19 Del. J. Corp. L. at 832.
The court was unpersuaded by Drummond's argument that Merrill Lynch and Cede would not have filed suit had the appraised value been less than the merger consideration. The court opined that had the appraised value been less, Drummond could have voided the transactions and compelled Merrill Lynch and Cede to repay the excess of the merger consideration over the appraisal value.

Finally, Vice-Chancellor Chandler considered Drummond's contention that Merrill Lynch and Cede could not comply with the 1991 order to receive the appraised value plus interest because the stock certificates were not susceptible to physical surrender. The court found that the underlying intent of this requirement was to confirm stock ownership. As ownership of the shares and the surrender of the certificates was uncontested, the court found that the purpose of the requirement had been met. Thus, Drummond could not utilize the phrase "upon surrender of the certificates" as a shield to bar Merrill Lynch and Shearson from the net appraisal award.

Based on these findings, Vice-Chancellor Chandler granted petitioners' motion to compel payment of the difference between the merger price and the appraised value of the previously tendered shares, including simple interest accruing from the effective date of the merger to the date of final payment by Drummond.

C. The Delaware Supreme Court

1. The Majority

The Delaware Supreme Court guided its analysis by the underlying history and purpose of the appraisal remedy. The court noted that appraisal was established to compensate shareholders for divestment of the common law right to prevent a fundamental change in corporate

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124 Id.
125 Id. This right to void the transaction is found in Del. Code Ann. tit. 8, § 262(k) (1995).
127 Id.
128 Id.
129 Id.
131 Alabama By-Products, 657 A.2d at 258-59.
structure by withholding consent.\textsuperscript{132} The appraisal demand is an irrevocable election to withdraw from the corporation and receive the fair value of the shares, unless revocation comports with the statutory procedure.\textsuperscript{133}

a. \textit{Strict Compliance Required}

The supreme court examined whether the tenders by Merrill Lynch and Shearson satisfied the "explicit conditions" allowing an appraisal demand to be withdrawn.\textsuperscript{134} The court found that petitioners failed to withdraw in accordance with any of the requisite provisions.\textsuperscript{135} First, the appraisal petition was filed within 120 days of the effective date of the merger;\textsuperscript{136} thus, withdrawal could not be based on a failure to file a petition for judicial appraisal.\textsuperscript{137} Second, Cede did not surrender the shares to Drummond within sixty days of the merger.\textsuperscript{138} Third, the court refused to assess AmSouth's acceptance of the tender as an action undertaken on behalf of Drummond.\textsuperscript{139} Therefore, Drummond never approved the withdrawal as mandated by the statute.\textsuperscript{140}

Moreover, Cede never obtained chancery court approval as mandated by the "plain and unambiguous" statutory language.\textsuperscript{141} The relevant provision codified the common law treatment of appraisal

\textsuperscript{132}Id. (citing Salt Dome Oil, 41 A.2d at 587; Schenley Indus., 152 A.2d at 301).
\textsuperscript{133}Id. (citing Southern Prod., 87 A.2d at 134).
\textsuperscript{134}Id. at 259.
\textsuperscript{135}Alabama By-Products, 657 A.2d at 259.
\textsuperscript{136}Id.
\textsuperscript{137}Appraisal may be denied where the shareholder with perfected appraisal rights fails to file a petition within 120 days after the effective date of the transaction. DELE Code Ann. tit. 8, § 262(k) (1995).
\textsuperscript{138}Alabama By-Products, 657 A.2d at 259 (citing Southern Prod., 87 A.2d at 132). In \textit{Southern Prod.}, the court held that a finding of approval on behalf of the corporation requires that "a decision of corporate policy had to be made on behalf of the corporation." \textit{Southern Prod.}, 87 A.2d at 132.
\textsuperscript{139}This consent was not established because neither Drummond, nor its transfer agent, acknowledged that the shares were subject to the pending appraisal action. \textit{Alabama By-Products}, 657 A.2d at 259. Furthermore, even if AmSouth recognized that the shares were subject to the appraisal proceeding, pursuant to the transfer agent agreement it was prohibited from commenting on behalf of Drummond as to the appraisal rights of the Cede shares. \textit{Id}.
\textsuperscript{140}Id. Thus the court followed the holding in Dofflemeyer, 432 A.2d at 1200 ("[U]nder the express language of § 262(i), a shareholder may not, after the 60-day cutoff period, withdraw from an appraisal and resume the rights to which he would have been entitled as a shareholder, without the written approval of the corporation.").
\textsuperscript{141}Alabama By-Products, 657 A.2d at 260.
proceedings as a class suit for dismissal or settlement purposes.\textsuperscript{142} In fact, the court found the appraisal statute more stringent as it requires court approval "as to any shareholder."\textsuperscript{143} Furthermore, the court of chancery must approve a shareholder's election to withdraw as to all of his stock, or just a portion thereof.\textsuperscript{144} Therefore, the court specifically rejected Drummond's argument that because only a portion of the shares held by Cede were tendered, the remaining shares kept Cede in the appraisal.\textsuperscript{145}

Drummond next argued that Cede was dismissed despite only a partial tender because it could not comply with the section 262(i) requirement that the certificates be tendered for payment of the appraised value.\textsuperscript{146} Accordingly, Drummond argued, after the inadvertent tender, that Cede was still a party to the proceeding, but could not receive the appraised value because the previously tendered shares could not be physically surrendered.\textsuperscript{147}

The court refused to undermine "the spirit, if not the letter, of [s]ection 262" and anticipated a potential shareholder retaining one share in a personal premium settlement, thus avoiding the need for chancery court approval.\textsuperscript{148} To do so, the court reasoned, would constrain the

\textsuperscript{142}Id. Class actions were scrutinized for intrinsic fairness because of their distinctive fiduciary character. Id. (citing Prezant v. DeAngelis, 636 A.2d 915, 921 (Del. 1993)). The court distinguished class actions from appraisal proceedings which are in the nature of a class suit. Id. at 260 & n.10. In class actions, all potential class members are included in the class unless they "opt out" within a determined time period. Id. (citing Prezant, 636 A.2d at 921). In contrast, a shareholder "opts in" an appraisal proceeding by satisfying the statutory appraisal rights perfection requirements. Id.

For an extensive analysis of the Delaware courts' expansion of judicial activism in shareholder class actions, see Gregory W. Werkheiser, Note, Delaware's New Mandate in Class Action Settlements: Expanding the Scope and Intensity of Settlement Review, 20 DEL. J. CORP. L. 496 (1995).

\textsuperscript{143}This prevents a shareholder from abandoning the proceeding once his personal claims are satisfied. Alabama By-Products, 657 A.2d at 260.

\textsuperscript{144}Id. at 261.

\textsuperscript{145}Id.

\textsuperscript{146}Id.

\textsuperscript{147}Alabama By-Products, 657 A.2d at 261.

\textsuperscript{148}Id. The court factually distinguished and thus rejected Drummond's reliance on LeCompte v. Oakbrook Consol. Inc., No. 8028, 1986 WL 2827 (Del. Ch. Mar. 7, 1986). In LeCompte, the plaintiff shareholder's broker redeemed the shares, without the plaintiff's knowledge, prior to perfection of the appraisal rights. Id. The chancery court denied the plaintiff the appraisal remedy based on her failure to perfect. Id.

The court also found inapposite In re Engle v. Magnavox, No. 4896 (Del. Ch. Apr. 21, 1976), reprinted in 4 DEL. J. CORP. L. 535 (1979). In Engle, the plaintiffs demanded appraisal yet forwarded their shares for the merger consideration; the court found that such action undermined the basic principle supporting the appraisal statute that the shareholder elects "either to accept the merger or to pursue an appraisal of his shares." Alabama By-Products,
application of the statute. Accordingly, the supreme court held that strict compliance with the prerequisites to withdraw from the proceeding once appraisal rights were perfected must be maintained.

Finally, the court found Drummond’s public policy argument unpersuasive. Drummond argued that if the court granted the requested relief, corporations would face a duty to investigate whether any tendered shares are subject to perfected appraisal rights. Because shareholders choose to hold their shares in nominee name, they assume a risk that their broker or nominee will mistakenly tender their shares. To charge the corporation with a duty to monitor the share redemption would be to compromise the systematic administration of the remedy.

While the court agreed that any risk of nominee ownership is assessed against the beneficial owner, it emphasized that it is the corporation’s responsibility to administer share redemptions. To fulfill its custodial responsibility, the corporation need only look to ownership records, and not to the agency of the registered owner. This protects the corporation from the “morass of confusion and uncertainty [of nominee ownership], none of which was of their making.” The statute provides that once appraisal rights are perfected, the corporation need only look to compliance with the statutory prerequisites when confronted with a purported withdrawal. Moreover, the statutory mechanism of stamping shares to indicate non-negotiability further protects the corporation from inadvertent tenders. Therefore, statutory compliance protects both the shareholder and the corporation.

b. Standing

The court concluded its analysis by examining whether a shareholder with perfected appraisal rights loses standing to participate in

657 A.2d at 262. Accordingly, the plaintiff was denied the appraisal value. Id. (emphasis added).

149 Alabama By-Products, 657 A.2d at 261.
150 Id.
151 Id. at 262.
152 Id.
153 Alabama By-Products, 657 A.2d at 262 (citing Enstar, 535 A.2d at 1354-55).
154 Id.
155 Id. (citing In re Enstar, 604 A.2d at 412).
156 Id.
157 Alabama By-Products, 657 A.2d at 262.
158 Id. at 263 (quoting Enstar, 535 A.2d at 1356).
159 Id.
160 Id.
the proceeding by virtue of inadvertently tendering the shares subject to appraisal.\textsuperscript{161} Drummond urged that the rigorous standing requirements applicable to derivative actions be equally applied in appraisal proceedings.\textsuperscript{162} In doing so, Drummond believed that Cede would no longer have standing, and thus not be able to bring an appraisal action.\textsuperscript{163}

The court rejected this argument holding that "any standing requirement based on stock ownership [is] an impossibility."\textsuperscript{164} The court stated that the relation between continuous stock ownership and standing is governed by the statute.\textsuperscript{165} The statutory scheme governing the appraisal action does not require continuous stock ownership, unlike the statute regulating derivative actions.\textsuperscript{166} Accordingly, unless Cede complied with the statutory mandate governing withdrawal, it maintained

\textsuperscript{161} \textit{Alabama By-Products}, 657 A.2d at 264. Standing is a prerequisite to invocation of Delaware court jurisdiction. \textit{Id.} (citing Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1382 (Del. 1991)). This ensures that the litigants have a sufficient interest in and ability to maintain the cause of action. \textit{Id.} (citing Thompson v. Thompson, 90 A.2d 484, 485 (Del. Super. Ct. 1952)).

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} See \textit{Alabama By-Products}, 657 A.2d at 264.

\textsuperscript{164} \textit{Id.} at 266.

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textit{Id.} The court distinguished a derivative action and an appraisal proceeding. The aim of a derivative suit is to preclude an individual from purchasing shares with the isolated intention of striking corporate action which was completed prior to his stock purchase. \textit{Id.} at 264 & n.12 (citing Schreiber v. Bryan, 396 A.2d 512, 516 (Del. Ch. 1978); Harff v. Kerkorian, 324 A.2d 215, 218 (Del. Ch. 1974), \textit{aff’d in part, rev’d in part}, 347 A.2d 133 (Del. 1975); Maclary v. Pleasant Hills, Inc. 109 A.2d 830, 833 (Del. Ch. 1954)). In derivative suits, shareholders prosecute a claim on behalf of the corporation which the corporation refuses to, or is unable to, pursue. \textit{Id.} at 264 (citing Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984)). Fundamentally, it is an intrusion into the managerial realm of the board of directors. \textit{Id.} at 265 (citing Pogostin v. Rice, 480 A.2d 619, 624 (Del. 1984); Aronson, 473 A.2d at 811)). In recognition of this intrusion, Delaware provides that shareholders must satisfy certain requirements before they may bring a derivative suit. \textit{Id.} at 265 (citing Kaplan v. Peat Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988)). The shareholder must make written demand on the corporation to prosecute the claim and be met with refusal, unless demand is excused based on the interestedness of the directors. \textit{Id.} (citing Rules v. Blasband, 634 A.2d 927, 932 (Del. 1993)). Additionally, the shareholder must prove that he was a shareholder at the time of the transaction giving rise to the suit, as well as the time when suit is commenced. \textit{Id.} at 264 (citing DEL. CODE ANN. tit. 8, § 327 (1995)). This continuous ownership requirement ensures sufficient interest to vigorously litigate the claim. \textit{Id.} at 265-66 (citing Portnoy v. Kawecki Beryco Indus. Inc., 607 F.2d 765, 767 (7th Cir. 1979)). In other words, it is intended to encourage arduous prosecution of a corporate claim. \textit{Id.}

In contrast, in an appraisal action the shareholder sues on his own behalf for a judicial determination of the fair value of his shares. \textit{Id.} at 266 (citing Cede & Co., 542 A.2d at 1188; \textit{Southern Prod.}, 87 A.2d at 134). Because appraisal is a purely statutory right, once appraisal rights are perfected, continuous stock ownership is impossible as the shareholder is no longer a member of the corporation. \textit{Id.} Rather, the shareholder is a creditor of the corporation. \textit{Id.}
its standing to prosecute the action, and was unaffected by the inadvertent tender.\endnote{167}

c. Interest

Drummond appealed the chancery court’s award of 12.5% simple interest accruing from the date the appraisal class members surrendered their certificates to qualify for the appraisal judgment to when Drummond made final payment of the net award.\endnote{168} Drummond argued that it would be inequitable to order interest for that period because if Merrill Lynch and Shearson did not tender prematurely, Drummond would have remitted the appraised value and avoided any interest.\endnote{169}

Reviewing the chancery court’s award under an abuse of discretion standard, the supreme court affirmed the award, rejecting Drummond’s argument that interest would afford Merrill Lynch and Shearson a profit for their early tender.\endnote{170} The court stated it was Drummond’s "duty to monitor" the surrender of the certificates pursuant to the July Order, and had Drummond discharged this duty, it would have detected the inadvertent tender.\endnote{171} Moreover, interest compensates the beneficial owners for the inability to access their investment during the appraisal period.\endnote{172} Accordingly, the supreme court affirmed the lower court’s interest award, holding that it was not arbitrary, capricious or otherwise an abuse of discretion.\endnote{173}

\begin{footnotes}
\item[167] Alabama By-Products, 657 A.2d at 266.
\item[168] Drummond did not appeal the rate of interest, but rather the period for which it was assessed. \textit{Id.} at 267. The parties stipulated to November 15, 1991, as the date on which dissenting shareholders were to redeem their certificates so as to qualify for the appraisal award plus interest. \textit{Id.} at 266. Previously, the chancery court had awarded interest on the full appraised value which accrued between the effective date of the merger and the date of Drummond’s final payment. \textit{Id.} Additionally, the court ordered Drummond to pay interest on the difference between the full appraised value and the merger consideration. \textit{Id.} This portion of the interest award was calculated from the respective dates on which Merrill Lynch and Shearson were paid the merger price to the date Drummond made final payment. \textit{Id.}
\item[169] \textit{Id.} at 267.
\item[170] \textit{Id.} (citing \textit{In re Shell Oil Co.}, 607 A.2d 1213, 1221 (Del. 1992)).
\item[171] This is in keeping with general court awards of interest from the date of the merger to the date of payment after appraisal is completed. \textit{Id.} (citing \textit{Bell v. Kirby Lumber Corp.}, 413 A.2d 137 (Del. 1980)).
\item[172] \textit{Alabama By-Products}, 657 A.2d at 267.
\item[173] \textit{Id.} The court indicated that the parties mutually erred; Merrill Lynch and Shearson erred by prematurely surrendering the shares, and Drummond erred by failing to discover this tender. \textit{Id.}
\item[174] \textit{Id.}
\item[175] \textit{Id.} (citing \textit{Shell Oil}, 607 A.2d at 1221; \textit{Rapid-American Corp. v. Harris}, 603 A.2d
\end{footnotes}
2. The Dissent

Justice Duffy was unable to join in the majority's holding based solely on equitable grounds.\(^1\) Relying on the statutory and common law definitions of "stockholder" and strict construction of sections 262(d) and (k), he criticized the majority's misinterpretation and misapplication of the law.\(^2\)

First, the majority's ruling contravened the definition of "stockholder" stated in the appraisal statute.\(^3\) In keeping with the specific definition of "stockholder" of section 262(a)\(^4\) and prior interpretations of this definition,\(^5\) Justice Duffy found that only Cede was a record stockholder for the purposes of appraisal, and once perfected, its appraisal rights were fixed.\(^6\) Because Cede did not thereafter withdraw from the proceeding, the action continued and the section 262(k) prohibition of shareholder withdrawal without court approval was never implicated.\(^7\)

Second, Justice Duffy rebuffed the majority for creating a corporate duty of "oversight" that in turn creates an imbroglio for a corporation participating in an appraisal action.\(^8\) This new duty obligates the

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796, 808 (Del. 1992); Pitts v. White, 109 A.2d 786, 788 (Del. 1954)).

\(^1\)Justice Duffy characterized as "shocking" the disparity between the tender offer amount and the appraised value of the shares. *Alabama By-Products*, 657 A.2d at 267.

In fact, the Delaware Supreme Court consistently has held that there is no basis for expanding the appraisal remedy by invocation of equitable principles. *Cede & Co.*, 542 A.2d at 1187. *See also* Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1106 (Del. 1985) (stating that fairness and divided loyalties are issues that an appraisal cannot address); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714-15 (Del. 1983) (mandating a stockholder's recourse to the basic remedy of an appraisal). Any application of such principles to overrule established tenets of Delaware corporate law must be employed with hesitation and restraint so as not to unnecessarily jeopardize the stability of Delaware law. *Alabama By-Products*, 588 A.2d at 258 n.1. Rather, equitable principles should be reserved for application only where improper manipulation of the law would deprive a person of a clear right. *Id.*

\(^2\)*Alabama By-Products*, 657 A.2d at 267-68.

\(^3\)*Id.* at 268. Section 262(a) defines "stockholder" as "a holder of record in a stock corporation." *Id.* (quoting DEL. CODE ANN. tit. 8, § 262(a) (1995)).

\(^4\)See *supra* note 48 and accompanying text.

\(^5\)This definition has been interpreted "consistently" by the Delaware courts. *Alabama By-Products*, 657 A.2d at 268 (citing *In re Enstar*, 604 A.2d at 412; *Enstar*, 535 A.2d at 1354). Such an invariable interpretation permits the corporation to examine the corporate books "as the sole evidence of stock ownership." *Id.*

\(^6\)*Id.* ("To state it negatively: neither Shearson Lehman nor Merrill Lynch, nor the customers of either of them, was, at any relevant time, a registered or record holder of the stock.").

\(^7\)*Id.* at 269.

\(^8\)*Id.* at 268.
corporation to "pierce the veil of record ownership" and inquire whether the recordholder was acting on behalf of another intermediary or beneficial owner.\textsuperscript{184} Furthermore, the majority's decision vitiated the common law doctrine that stock ownership is established solely by the corporate books.\textsuperscript{185} This was evident from the majority holding Drummond liable for failing to look beyond Cede's record ownership and for failing to treat the brokers as record owners pursuant to section 262(k) of the DGCL.\textsuperscript{186}

IV. EVALUATION

\textit{Alabama By-Products} was not the first case to present the Delaware courts with an issue of compliance with section 262(i). In \textit{Southern Production Co. v. Sabath},\textsuperscript{187} the Delaware Supreme Court was confronted with a dispute over whether the plaintiff shareholders complied with the statutory withdrawal procedure. Two shareholders, Hermann and Sabath, perfected their appraisal rights following a stock for stock merger.\textsuperscript{188} After the defendant corporation refused their subsequent redemption and demand for exchange of their shares, the shareholders filed a petition for appraisal.\textsuperscript{189} The court of chancery determined that the verified list of stockholders submitted by the defendant governed which shares were entitled to appraisal.\textsuperscript{190} The court ordered all shareholders with perfected appraisal rights to deposit their certificates with the court to be marked with a notice of the pending appraisal.\textsuperscript{191}

Sabath deposited his shares with the court for notation, and thereafter, both Sabath and Hermann individually moved to dismiss the proceeding.\textsuperscript{192} The court granted the motion to dismiss.\textsuperscript{193} The next day, the corporation moved for a stay of dismissal pending appeal, which the court granted subject to certain conditions.\textsuperscript{194} On that same day, the Sabath shares were forwarded to the corporation's transfer agent in

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\item \textsuperscript{184} \textit{Alabama By-Products}, 657 A.2d at 268.
\item \textsuperscript{185} \textit{Id.}
\item \textsuperscript{186} \textit{Id.} at 268-69.
\item \textsuperscript{187} \textit{Id.} at 268-69.
\item \textsuperscript{188} \textit{Id.} at 268-69. 7 A.2d 128, 130-31 (Del. 1952).
\item \textsuperscript{189} \textit{Id.} at 130. The plaintiffs filed written objections prior to the shareholder meeting to approve the merger, and they voted against the merger. \textit{Id.}
\item \textsuperscript{190} \textit{Id.}
\item \textsuperscript{191} \textit{Southern Prod.}, 87 A.2d at 130.
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at 131.
\item \textsuperscript{194} \textit{Id}. The conditions were that Southern Production file an appeal and post bond.
\end{itemize}
\end{footnotesize}
exchange for shares pursuant to the original merger agreement. Likewise, Hermann tendered and converted his shares to common stock of Southern Production, however delivery was halted by Southern Production after it satisfied the conditions required to halt the appeal.

Plaintiffs moved to dismiss the appeal as moot based on the tenders and stock conversions. The court rejected these arguments, stating that because the corporation consistently contested their entitlement to appraisal, the transfer agent's acceptance of the shares could not be construed as an exercise of corporate authority. Furthermore, the shareholder cannot be permitted to benefit from his own inaction.

In Dofflemyer v. W.F. Hall Printing Co., the shareholders sought dismissal of their appraisal action, preferring instead to prosecute fraud in the simultaneous action challenging the merger. The court of chancery denied both the motion to withdraw their appraisal petition, and the subsequent motion to dismiss the appraisal. The supreme court affirmed, relying on the fact that the corporation would not assent to dismissal of the appraisal action. The supreme court did not focus on the chancery court's failure to approve the shareholder's purported withdrawal. However, an inference may be drawn that the supreme court interpreted the chancery court's denial of the shareholder's motion to dismiss as a denial of the shareholder's withdrawal from the appraisal action.

Alabama By-Products, therefore, can be viewed as an affirmation and clarification of the Dofflemyer holding that both the corporation and the chancery court must approve a shareholder's election to withdraw from an appraisal proceeding. Additionally, it stands for the rule that deviation from the statutorily prescribed procedure will not be tolerated.

The likely impact of Alabama By-Products may be similar to that of Chokel v. First National Supermarkets. In Chokel, Merrill Lynch was the recordholder of shares titled on behalf of many investors,

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195 *Southern Prod.*, 87 A.2d at 131. Pursuant to the agreement, each tendered share of the target was converted into one share of Southern Production's preferred stock. *Id.* at 130. Then each of the preferred stock shares were exchanged for 1.8 common stock shares. *Id.*

196 *Id.* at 131.

197 *Id.*

198 *Id.* at 132.

199 *Southern Prod.*, 87 A.2d at 134.


201 *Id.* at 1199.

202 *Id.* at 1199-200.

203 *Id.* at 1201-02. The supreme court did not specify whether the chancery court's denial of the motion to dismiss constituted disapproval of the withdrawal under § 262(i).

including Jeffrey Chokel. Subsequent to perfection of appraisal rights with regard to the Chokel stock, Merrill Lynch tendered a portion of its holdings in the corporation. The corporation thereafter objected to Chokel’s right to appraisal, alleging that the stock surrendered was Chokel’s and therefore, his right to appraisal terminated. Chokel defended and argued that the tendered shares could not be attributed to him because they were held in fungible bulk by Merrill Lynch.

The court made several findings of fact. First, Chokel had properly perfected his appraisal rights. Because the corporation is limited to the corporate books to determine the registered stockholders, and because the corporation could not ascertain whether the shares redeemed where those of the beneficial owner, the internal schemes between Merrill Lynch and its depository could not deprive Chokel of his vested right.

In practice, the Chokel decision and the likely impact of Alabama By-Products achieve the same effect as an appraisal action conducted under the Revised Model Business Code (RMBCA). The RMBCA is substantively identical to the DGCL procedure for invoking the appraisal remedy and perfecting appraisal rights. However, the codes diverge at the point where the transaction is affirmed. The RMBCA provides that upon perfection of appraisal rights, the corporation must prepay the undisputed value of a dissenting stockholder’s shares. Only if the shareholder believes this amount is less than fair may he demand supplemental payments in a judicial action.

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205 Id. at 645.
206 Id. at 646. Merrill Lynch had attempted to physically segregate the Chokel shares from its bulk holding. Id.
207 Id. at 647.
208 The premise of the fungible bulk theory is that shares held by a depository clearing house, such as Cede & Co., cannot be distinguished despite the fact that they are owned by various brokers. Chokel, 660 N.E.2d at 648. As such, the brokers are collective owners of all the shares. Id. See also supra note 8 (discussing the concept of fungible bulk).
209 Id. at 647-48.
210 Id. at 649.
211 Id.
212 See REvised MODEL BUS. CODE ANN. § 13.01 (Supp. 1996) [hereinafter RMBCA].
214 See infra note 215.
215 RMBCA § 13.25(a) (1996) ("[A]s soon as the proposed corporate action is taken, or upon receipt of a payment demand, the corporation shall pay each dissenter . . . the amount the corporation estimates to be the fair value of his shares, plus accrued interest.") (emphasis added).
216 RMBCA § 13.28(a) (1996).
In contrast, the DGCL does not provide for immediate payment of the undisputed value for the shares subject to a perfected appraisal demand. However, the net effect of the Alabama By-Products decision is that the shareholder may tender shares after appraisal right perfection and receive payment. The court did not intimate that good faith on the part of the broker was a factor in its decision. Accordingly, the supreme court’s interpretation of the requirement of chancery court approval of shareholder withdrawal implicitly has granted shareholders a new right to advance payment prior to judicial determination of the fair value.

However, enforcement of the approval requirement may protect the corporation. In particular, a court may likely prohibit withdrawal of a shareholder who has strategically demanded appraisal to force a higher settlement offer, but who has since found an acceptable offer for his shares. Notwithstanding this protection, the corporation and its transfer agent are now burdened with the processing of certificate surrenders. This will be a large burden if merger transactions keep pace with recent statistics.

V. CONCLUSION

In Alabama By-Products, the Delaware Supreme Court expanded the rights afforded beneficial shareholders under the appraisal statute by reaffirming the general rule of strict compliance with statutory procedures. The court greatly mitigated the risks of holding shares in nominee name by permitting a shareholder, who received the merger consideration despite perfection of appraisal rights, to benefit and receive the net appraisal award.

The court burdened corporations, however, with the implicit duty to require deposit of physical certificates during the pendency of an appraisal proceeding. As a result, certainty and orderliness is given priority over the securities industry goal of greatly, if not completely, eliminating the use of physical certificates. The clear message of Alabama By-Products is that strict procedural compliance is required for a shareholder to revoke a final election to pursue an appraisal action, at the expense of the inner-workings of the securities industry.

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217 See Southern Prod., 87 A.2d at 134.
218 See BARMASH, supra note 2, at 5 (stating that in 1993, there were 14,600 merger and acquisition transactions, up from 10,800 in 1989).