NOTES

CORPORATIONS—MERGER—LONG FORM MERGER FOR SOLE PURPOSE OF ELIMINATING MINORITY INTEREST CONSTITUTES ACTIONABLE FIDUCIARY BREACH; VALID MERGER REQUIRES SHOWING OF BUSINESS PURPOSE AND ENTIRE FAIRNESS—*Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

In 1974, The Magnavox Company (Magnavox) and North American Philips Corporation (North American) were Delaware corporations engaged in the production and marketing of a variety of related electronic products.[1] On August 28 of that year, North American Philips Development Corporation (Development), a wholly-owned subsidiary of North American,[2] advanced a tender offer[3] of $8.00 per share for all Magnavox common stock.[4] Development had been in-

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[1] Singer v. Magnavox Co., 367 A.2d 1349, 1351 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Both companies manufactured electronic components utilized in various types of consumer home entertainment products. 367 A.2d at 1351. In addition, Magnavox was also committed to the production of a wide range of electronic equipment for commercial industry and the United States Department of Defense. Appendix to Appellee's Brief at B20, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) [hereinafter cited as Appendix to Appellee's Brief].

[2] Singer v. Magnavox Co., 367 A.2d 1349, 1351–52 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977).

[3] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). A tender offer is a device commonly used by one corporation in an attempt to secure controlling interest in another. Generally, such an offer is in the form of a public overture to the stockholders of the target corporation to exchange their shares for a specified consideration, usually cash or securities. Note, *The Developing Meaning of "Tender Offer" Under the Securities Exchange Act of 1934*, 86 HARV. L. REV. 1250, 1251 (1973). The frequent success of such solicitations results not only from the premium rate of the consideration tendered, but also from the coercive threat of a subsequent merger that often accompanies such an offer. Brudney, *A Note on "Going Private,"* 61 VA. L. REV. 1019, 1040–41 (1975). Should a shareholder fail to avail himself of a tender offer and a merger be subsequently effected, the shareholder may lose not only his right of equity participation, but also the opportunity to secure a premium rate of return upon divestment of his holdings. *Id.* For additional discussion on the nature of tender offers, see R. JENNINGS & H. MARSH, SECURITIES REGULATION 736–48 (4th ed. 1977); Note, *supra* at 1254–60.

[4] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). The original offer gave notice to Magnavox shareholders that Development intended to secure all "equity interest" in their corporation. North American Philips Development Corp. Tender Offer, September 10, 1974, at 8 [hereinafter cited as Development Tender Offer (#1)].

In an apparent attempt to pressure the shareholders into accepting the solicitation,

corporated by North American on August 21, 1974, for the express purpose of making this tender offer.[5] The Magnavox board of directors, expressing dissatisfaction with the proposed price of the offer[6] and the unilateral manner in which it was conceived, urged shareholders to reject the proposal.[7] Subsequent negotiations, however, produced a compromise agreeement under which the Magnavox board retracted its opposition to the tender offer.[8] In accordance with the offer as modified, Development obtained 14,967,429 shares of Mag-

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the offer noted the possible consequences of Development's successful acquisition of the desired interest in Magnavox. Potential effects included the possibilities that: (1) Magnavox shares might be delisted by the New York Stock Exchange; (2) the market for Magnavox stock might decline; and (3) information rights secured by the New York Stock Exchange and the Securities Exchange Act of 1934 might be forfeited. Development Tender Offer (#1) at 6.

The statement also advised of alternative actions that might be used to acquire the entire interest in Magnavox should the original tender offer prove unsuccessful. In addition to open market purchases and tender or exchange offers, Development also stated that it would consider "a merger, a sale or exchange of assets, liquidation or some other transactions regarding [Magnavox]" in order to effectuate its goal. *Id.* at 8. With reference to such alternative actions, the statement cautioned that they "may be on terms different from those of [the original] [o]ffer and may include the payment of more or *less* cash or the exchange of securities." *Id.* (emphasis added). The inclusion of such factors within a solicitation statement is a subtle form of coercion that is commonly used to induce the sale of stock in tender offer transactions. Brudney, *supra* note 3, at 1041.

[5] Singer v. Magnavox Co., 367 A.2d 1349, 1351–52 (Del. Ch. 1976), *aff'd in part, rev'd in part,* 380 A.2d 969 (Del. 1977). No other business functions were contemplated as it was intended that Development would serve only as a holding company for the Magnavox stock obtained through the ensuing tender offer. 367 A.2d at 1351–52.

[6] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part,* 380 A.2d 969 (Del. 1977). At that time, Magnavox common stock had a book value of over $11.00 per share. 367 A.2d at 1352. Actually, the tender price per share exceeded the existing market price for Magnavox stock. On August 28, 1974, the last trading day before the offer was announced, the closing market valuation for Magnavox stock on the New York Stock Exchange was $6⅛ per share. North American Philips Development Corp. Tender Offer, September 17, 1974, at 5 [hereinafter cited as Development Tender Offer (#2)]. After the announcement of the offer the market price fluctuated between $7⅞ and $8⅜ per share. *See id.*

[7] Singer v. Magnavox Co., 367 A.2d at 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part,* 380 A.2d 969 (Del. 1977). The terms of the offer were proposed solely by North American personnel. Magnavox management was not consulted at any time prior to the actual offer. 367 A.2d at 1352.

Magnavox shareholders were informed of this opposition in a letter issued by the Board of Directors on August 30, 1974. The letter also advised shareholders to "defer hasty actions which would foreclose the possibility of tendering their shares at a more favorable price." Letter from R.H. Platt to Magnavox stockholders (Aug. 30, 1974).

[8] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part,* 380 A.2d 969 (Del. 1977). The offer, as modified, raised the tender price to $9.00 per share. Development Tender Offer (#2), *supra* note 6, at 1. Additional terms required Magnavox to extend two-year employment contracts to 16 of its officers, some of whom were later named as defendants in the case. *Id.* at 1, 6.

navox stock, representing nearly 84.1% of all outstanding shares.[9]

Upon completion of the tender offer transaction, Development, with the cooperation of the Magnavox board, undertook actions preparatory to effecting a merger of Magnavox and T.M.C. Development Corporation, a subsidiary corporation completely owned and controlled by Development.[10] Despite apparent conflicts of interest,[11] the proposed merger was unanimously approved by the Magnavox board of directors.[12] On June 27, 1975, Magnavox shareholders were sent "notice of a special meeting" concerning the merger, and a proxy statement dealing with various aspects of the transaction.[13] The merger was approved at a special shareholders meeting held on July 24, 1975.[14]

Mr. and Mrs. Louis Singer, owners of Magnavox common stock during the merger transaction, instituted suit in the Delaware Court

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[9] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Although this was a sizeable controlling interest, it was decidedly short of the 90% share required under Delaware statutory law for Magnavox to have effected a short form merger, *i.e.*, one which may be consummated without shareholder approval. *See* DEL. CODE tit. 8 § 253 (1975 & 1976 Cum. Supp.). *See also* note 13 *infra*.

[10] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Also a Delaware corporation, T.M.C. Development was created through Development on May 8, 1975 "for the sole purpose of merger with and into Magnavox." 367 A.2d at 1352.

[11] *See* Singer v. Magnavox Co., 367 A.2d 1349, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Four of the nine members of the Magnavox board were also engaged as directors of North American. Three others had received employment contracts pursuant to the terms of the tender offer, in addition to stock options in North American contingent upon completion of the merger. 367 A.2d at 1353. As a result, at the time of the merger "Magnavox was controlled by directors who were controlled by Development and North American." *Id.* It should be noted that such inducements are ordinarily sufficient to dispel the presumption of good faith normally afforded the decisions of corporate directors. *See* note 50 *infra*.

[12] Singer v. Magnavox Co., 367 A.2d 1349, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977).

[13] Singer v. Magnavox Co., 367 A.2d 1349, 1352 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). In regard to the key considerations of the proposed merger the proxy statement advised that: (1) Development's 84.1 percent ownership of Magnavox would assure the majority approval required by statute. *See* Appendix to Appellee's Brief, *supra* note 1, at B7. *See also* DEL. CODE tit. 8, § 251 (1975 & 1976 Cum. Supp.). (2) Upon execution of the merger public shareholders would receive $9.00 for their individual shares, the receipt of which would effectively divest them of all interest in Magnavox, Appendix, *supra* at B8; (3) the book value of Magnavox common stock was $10.16 on March 13, 1975, *id.*; (4) minority shareholders dissatisfied with merger options could seek relief under the appraisal provisions of DEL. CODE tit. 8 § 262 (1975 & 1976 Cum. Supp.). Appendix, *supra* at B10–11. For a discussion of appraisal rights see note 74–79 *infra*.

[14] Singer v. Magnavox Co., 367 A.2d 1349, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977).

of Chancery[15] as individual plaintiffs and as representatives of a class of similarly situated shareholders.[16] It was alleged in the complaint that the merger was fraudulent because it served no purpose other than the exclusion of the minority class[17] and that the defendants had breached their fiduciary duty[18] to the minority shareholders by agreeing to a merger price that was grossly inadequate.[19] The relief sought in the action was the rescission and nullification of all merger related transactions or, in the alternative, compensatory damages for losses incurred as a result of such transactions.[20] The defendants responded with a motion to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted since all aspects of the merger were in conformity with applicable Delaware statutory law.[21]

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[15] Singer v. Magnavox Co., 367 A.2d 1349, 1349 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977).

[16] Singer v. Magnavox Co., 367 A.2d at 1351 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). The plaintiffs claimed to represent all persons who held such shares on the day before the merger. 367 A.2d at 1351. Magnavox, North American Philips Corporation and certain management personnel of the Magnavox Company were named as defendants in the suit. *Id.* at 1350–53.

[17] Singer v. Magnavox Co., 367 A.2d 1349, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). The plaintiffs contended that no business purpose was advanced by the transaction as the merger served only to transfer the entire equity interest in Magnavox to North American through the forcible elimination of the minority class of public shareholders. 367 A.2d at 1353.

[18] Singer v. Magnavox Co., 367 A.2d 1349, 1353, 1361–62 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). For a discussion of the fiduciary obligation owed by directors and majority shareholders to minority shareholders, see notes 43–44 *infra* and accompanying text.

[19] Singer v. Magnavox Co., 367 A.2d 1349, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). An additional allegation in the complaint asserted that the proxy procedure utilized in effectuating the merger was misleading and thus violative of the Delaware Securities Act, DEL. CODE tit. 6 § 7303 (1975). 367 A.2d at 1353. This claim was dismissed by the court of chancery, *id.* at 1361, which dismissal was subsequently affirmed by the Delaware supreme court, Singer v. Magnavox Co., 380 A.2d 969, 982 (Del. 1977).

[20] Singer v. Magnavox Co., 367 A.2d at 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977).

[21] Singer v. Magnavox Co., 367 A.2d 1349, 1351, 1353 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). The defendants contended that the merger transaction was sanctioned by and in accordance with the provisions of DEL. CODE tit. 8 § 251 (1975 & 1976 Cum. Supp.). 367 A.2d at 1353. Section 251(a) expressly recognizes that "[a]ny 2 or more corporations existing under the laws of [Delaware] may merge into a single corporation . . . ." DEL. CODE tit. 8 § 251(a) (1975). The defendants asserted that the cash conversion of minority shares was authorized by the statutory allowance "for the payment of cash in lieu of the issuance or recognition of fractional shares, interests or rights" in the corporation surviving or resulting from the merger. DEL. CODE tit. 8 § 251(b)(5)(1975 & 1976 Cum. Supp.). In response to the alleged inadequacy of the conversion price, the defendants asserted that the exclusive recourse for those dissatisfied with the offered consideration was to seek judicial appraisal under DEL.

The court of chancery granted the motion to dismiss, holding that the allegation of lack of business purpose was an insufficient ground for finding the merger fraudulent.[22] With regard to the allegation as to the inadequacy of merger price, the court declared that statutory appraisal was the sole relief available to dissenting shareholders and that an action for fiduciary breach was inappropriate where the only issue in dispute between the parties was the fairness of the offered price.[23] On appeal, the Supreme Court of Delaware, in *Singer v. Magnavox Co.*,[24] reversed the vice chancellor's holdings with respect to the purpose of the merger and the attendant claim for relief.[25] In the opinion of the court, a long form merger pursuant to section 251 of the Delaware Code, with "the sole purpose of freezing out minority stockholders," constituted an exploitation of corporate control and an actionable breach of fiduciary duty.[26]

Corporate mergers effected solely for the purpose of freezing out[27] minority shareholders have frequently been the subject of judi-

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CODE tit. 8 § 262 (1975 & 1976 Cum. Supp.). *See* 367 A.2d at 1361–62. This section provides that stockholders who have not voted in favor of or consented to the proposed merger may demand that the court of chancery render an appraisal of their shares, "determining their fair value exclusive of any element of value arising from the accomplishment or expectation of the merger." DEL. CODE tit. 8 § 262(b)(1),(c),(f).

[22] Singer v. Magnavox Co., 367 A.2d 1349, 1358, 1362 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Although the court admitted that the situation was "fundamentally inequitable," it found that, under existing legal principles, there was no basis for judicial inquiry into the motivation for the corporate merger. 367 A.2d at 1358. In rejecting the "no valid business purpose" argument advanced by the plaintiffs, the court distinguished the cited supportive authorities, noting that none of those cases had dealt with merger transactions. 367 A.2d at 1354. The court also dismissed as inapplicable the then current developments in the regulation of corporate fraud under rule 10b-5 of the Securities Exchange Act of 1934. *See* 367 A.2d at 1357–58; *cf.* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (absence of misrepresentation or nondisclosure breach of fiduciary duty does not constitute violation of anti-fraud provisions of SEC rule 10b-5). *See also* Note, 8 SETON HALL L. REV. 762 (1977); Note, 89 HARV. L. REV. 1917 (1976).

[23] Singer v. Magnavox Co., 367 A.2d 1349, 1361–62 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977). Concerning the sufficiency of a judicial appraisal, the court held that statutory revision was an issue for the legislature and that the court was bound by precedent holding the statute to be "an adequate remedy." 367 A.2d at 1362.

[24] 380 A.2d 969 (Del. 1977).

[25] *Id.* at 980, 982.

[26] *Id.* at 980. Recognizing the established fiduciary duty owed by majority shareholders and directors to minority shareholders, the court held that it would scrutinize merger transactions in light of a standard of " 'entire fairness' " under the circumstances. *Id.* Accordingly, the court stated that statutory compliance and evidence of a valid business purpose would not necessarily insulate a merger transaction from judicial review. *Id.*

[27] In general terms, a "freeze out" is the employment of corporate control to force elimination of a minority stockholder interest in a corporation. *See* 2 F. O'NEAL, CLOSE

cial concern under Delaware law.[28] Though traditionally reluctant to review the motivation behind corporate transactions,[29] Delaware courts have long viewed freeze out actions with suspicion.[30] Initially, this judicial skepticism was a vestige of the common law view that each shareholder possessed a vested interest in the corporate entity and that changes in its organization could be effected, therefore, only with unanimous shareholder approval.[31] Although the common law concept of vested shareholder rights has been generally superseded by modern statutory enactments allowing greater flexibility in corporate operations,[32] certain equitable considerations remain significant

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CORPORATIONS § 807 (1958); Note, *Freezing Out Minority Shareholders*, 74 HARV. L. REV. 1630, 1630 (1961). One authority has qualified such a displacement of the minority interest by viewing it as "a liquidation . . . not incident to some other wholesome business goal." Vorenburg, *Exclusivness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1192–93 (1964).

It should be recognized that freeze outs may also be accomplished by means other than statutory merger. Techniques commonly utilized include the sale of assets, dissolution and reverse stock splits. For further discussion of these and other freeze out devices see generally F. O'NEAL, "SQUEEZE-OUTS" OF MINORITY SHAREHOLDERS (1975); Borden, *Going Private—Old Tort, New Tort or No Tort*, 49 N.Y.U.L. REV. 987 (1974).

[28] *See, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952); Pennsylvania Mut. Fund, Inc. v. Todhunter Int'l, Inc., Civ. Action No. 4845, letter opinion (Del. Ch. Aug. 5, 1975); David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 157 A. 396 (Ch. 1928).

[29] *See, e.g.*, Keenan v. Eshleman, 23 Del. Ch. 234, 243–45, 2 A.2d 904, 908–09 (Sup. Ct. 1938); Havender v. Federal United Corp., 23 Del. Ch. 104, 2 A.2d 143 (Ch. 1938), *aff'd on rehearing*, 24 Del. Ch. 96, 103–04, 6 A.2d 618, 622 (Ch. 1939), *rev'd on other grounds*, 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940); Gans v. Delaware Terminal Corp., 23 Del. Ch. 69, 75, 2 A.2d 154, 156 (Ch. 1938). According to Professor Folk, this reluctance may be a reflection of judicial deference to legislative endorsement of authorized mergers and the beneficial impact they may have upon the business community. E. FOLK, THE DELAWARE CORPORATION LAW: A COMMENTARY AND ANALYSIS 332 (1972); *see* Bruce v. E.L. Bruce Co., 40 Del. Ch. 80, 82, 174 A.2d 29, 30 (Ch. 1961); MacCrone v. American Capital Corp., 51 F. Supp. 462, 466 (D. Del. 1943).

[30] *See, e.g.*, Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56, 156 A. 183, 187 (Ch. 1931); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 178–79, 157 A. 396, 398–99 (Ch. 1928); Allied Chem. & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 13–14, 120 A. 486, 491–92 (Ch.), *preliminary injunction dissolved*, 14 Del. Ch. 64, 122 A. 142 (Ch. 1923).

[31] *See* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941); Reynolds Metals Co. v. Colonial Realty Corp., 41 Del. Ch. 183, 188–89, 190 A.2d 752, 755 (Sup. Ct. 1963); Allied Chem. & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 11, 120 A. 486, 489–90 (Ch.), *preliminary injunction dissolved*, 14 Del. Ch. 64, 122 A. 142 (Ch. 1923).

[32] *See* Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 228–29 (1962). Removal of minority interest has been sanctioned by the legislative enactment of long form and short form merger statutes. *E.g.*, DEL. CODE tit. 8 §§ 251, 253 (1975 & 1976 Cum. Supp.). State legislatures, through the enactment of corporate statutes limiting voting procedures, authorizing cash payment for shares, and restricting the relief available to dissenters to statutory appraisal, have substantially ab-

in judicial evaluations of attempts by majority shareholders to freeze out minority interests.[33] For example, in the 1929 case of *Allaun v. Consolidated Oil Co.*,[34] a Delaware chancery court examined a sale of corporate assets that effectively displaced the minority investors.[35] Although the chancellor upheld the legality of the sale,[36] he strongly suggested that absent a valid business purpose a similar action would be restrained in equity, "regardless of the fairness of price."[37] *Allaun*

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rogated the common law rights of minority shareholders. *See* Brudney, *supra* note 3, at 1022 n.12; Lattin, *Minority and Dissenting Shareholder's Rights in Fundamental Changes*, 23 LAW & CONTEMP. PROB. 307, 308–10 (1958). Such statutes have been interpreted by some as being an expression of legislative mandate that mergers be to some "extent . . . encouraged and favored." MacFarlane v. North American Cement Co., 16 Del. Ch. 172, 178, 157 A. 396, 398 (Ch. 1928). A more acerbic view, however, was advanced by one court which suggested that "the very purpose of the [short form merger] statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise." Stauffer v. Standard Brands Inc., 41 Del. Ch. 7, 10–11, 187 A.2d 78, 80 (Sup. Ct. 1962). In light of such attitudes, the once "vested rights" of a minority shareholder "are now 'fixed' only in the sense that they continue until changed by the vote of a specified majority in a manner provided by statute." Gibson, *How Fixed are Minority Class Shareholder Rights?*, 23 LAW & CONTEMP. PROB. 283, 283 (1953). The broad protection afforded to corporate management and controlling shareholders under Delaware law has been soundly criticized however, for its treatment of minority shareholder interests. *See generally* Cary, *Federalism and Corporate Law—Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

[33] Under the common law, a single shareholder had the power to effectively veto any merger involving a corporation in which he possessed an equity interest. When the necessities of commercial expansion required the extinguishment of such power, the shareholder was "compensated" by the grant of the right to judicial appraisal of his holdings. Chicago Corp. v. Munds, 20 Del. Ch. 142, 149, 172 A. 452, 456 (Ch. 1934). Although statutory in nature, appraisal generally incorporates basic equitable principles through its provision for an objective determination of the fair value of a shareholder's interest. *See* notes 74–79 *infra* and accompanying text.

[34] 16 Del. Ch. 318, 147 A. 257 (Ch. 1929).

[35] *Id.* at 322–24, 147 A. at 260. The assets of the corporation were liquidated in an effort to satisfy outstanding credit notes. *Id.* at 322–23, 147 A. at 259. The plaintiff, a minority shareholder, contended that the sale was fraudulent, *id.*, in that the liquidation was a self-dealing action by the majority shareholders calculated to eliminate the minority interest through the manipulation of corporate control. *Id.* at 323, 147 A. at 259–60.

[36] *Id.* at 328–30, 147 A. at 262–63. Applying the business judgment standard, *see* note 50 *infra*, the Chancellor declared that the plaintiffs had "fail[ed] to overcome the presumption which exists in favor of the fairness of the price which the responsible authorities in the selling company have determined upon." 16 Del. Ch. at 329–30, 147 A. at 263.

[37] *Id.* at 323–24, 147 A. at 260. In considering the possibility of granting equitable relief, the Chancellor surmised that

> if the sale is only a "freezing out" one by which the majority use their power to sell to themselves in another guise and thereby carry on in the business without their former associates of the minority, equity would doubtless restrain it regardless of the fairness of price.

Id. (dictum). For a discussion of business purpose in freeze out actions see notes 57–73 *infra* and accompanying text.

and other early decisions revealed that the courts had not fully withdrawn the protection which had been afforded minority shareholders prior to modern codification of corporate law.[38]

In addressing litigation commenced by minority shareholders challenging freeze out actions, the courts of Delaware have focused primarily upon the issue of fairness[39] and the subsidiary considerations of the existence of a proper business purpose[40] and availability of statutory appraisal.[41] These categories of inquiry have formed the nucleus of the freeze out issue under Delaware law.

Because freeze out actions by definition involve situations where the controlling faction stands to benefit from the exercise of corporate power, the issue of fairness has emerged as the foremost concern in minority challenges to such actions.[42] Recognizing the fiduciary duty imposed on corporate directors[43] and controlling shareholders,[44] De-

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[38] *See, e.g.*, Starring v. American Hair and Felt Co., 21 Del. Ch. 380, 384, 191 A. 887, 890 (Ch. 1937), *aff'd per curiam*, 22 Del. Ch. 394, 2 A.2d 249 (Sup. Ct. 1937) (questioning the equity of a stock redemption plan "when the avowed purpose is simply to get rid of certain stockholders of a given class whose presence in the stockholding group is undesirable to the rest"); Keller v. Wilson & Co., 21 Del. Ch. 391, 412, 190 A. 115, 125 (Sup. Ct. 1936) (shareholder's right to receive dividends accumulated during time when law did not authorize their elimination "regarded as a vested right of property secured against destruction by the Federal and State Constitutions"); Outwater v. Public Service Corp., 103 N.J. Eq. 461, 468, 143 A. 729, 732 (Ch. Div. 1928), *aff'd per curiam*, 104 N.J. Eq. 490, 146 A. 916 (Ct. Err. & App. 1929) (freeze out merger enjoined as "unwarranted and oppressive" infringement upon the reserved rights of the minority shareholders).

[39] *See, e.g.*, Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952); Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 231, 83 A.2d 595, *rev'd*, 33 Del. Ch. 82, 90 A.2d 660 (Sup. Ct. 1952); Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 32 A.2d 148 (Ch. 1943); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 A. 183 (Ch. 1931).

[40] *See, e.g.*, Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (Sup. Ct. 1964); Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 99 A.2d 236 (Ch. 1953); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 157 A. 396 (Ch. 1928).

[41] *See, e.g.*, David J. Greene & Co. v. Schenley Indus. Inc., 281 A.2d 30 (Ch. 1971); Stauffer v. Standard Brands Inc., 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962); Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (Sup. Ct. 1940).

[42] E. FOLK, *supra* note 29 at 333. In the opinion of Professor Folk, fairness is "[t]he chief issue considered by the Delaware courts" in evaluating merger transactions for possible oppression of the minority interest. *Id. See also* Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 156 A. 183 (Ch. 1931); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 157 A. 396 (Ch. 1928).

[43] *See* Keenan v. Eshleman, 23 Del. Ch. 234, 243–44, 2 A.2d 904, 908 (Sup. Ct. 1938); Lofland v. Cahall, 13 Del. Ch. 384, 389, 118 A. 1, 3 (Sup. Ct. 1922); Bowen v. Imperial Theatres, 13 Del. Ch. 120, 128, 115 A. 918, 922 (Ch. 1922).

In regard to this fiduciary obligation the courts of Delaware have long required that

> [c]orporate officers and directors . . . not . . . use their position of trust and confidence to further their private interests. While technically not trustees, they

laware courts have traditionally couched their analysis of freeze out transactions in terms of fairness to the minority interest.[45] The application of this standard was perhaps best expressed in 1952 by the Delaware supreme court in *Sterling v. Mayflower Hotel Corp.*[46] The litigation in *Sterling* arose when minority shareholders in the Mayflower Hotel Corporation challenged the proposed consolidation of Mayflower with the Hilton Hotels Corporation.[47] Under the terms of the merger agreement, the Mayflower shareholders were to remit their holdings on a share-for-share basis in exchange for stock in the surviving Hilton enterprise.[48] Principally, the plaintiffs objected to

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> stand in a fiduciary relation to the corporation and its stockholders. A public policy . . . has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything work that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it . . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest.

Guth v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939).

[44] *See* David J. Greene & Co. v. Dunhill Int'l Inc., 249 A.2d 427, 434–35 (Del. Ch. 1968); Marks v. Wolfson, 41 Del. Ch. 115, 123–24, 188 A.2d 680, 685 (Ch. 1963); Bennett v. Breuil Petroleum Corp., 34 Del. Ch. 6, 12, 99 A.2d 236, 239 (Ch. 1953).

"Control" as used in this context describes those situations where a single shareholder, or collection of shareholders, possess or can marshall enough votes to effectively dictate the direction of corporate policy. *See* 2 F. O'NEAL, *supra* note 27, at § 1.02. Addressing such a situation, a Delaware chancery court stated that

> [o]rdinarily the directors speak for and determine the policy of the corporation. When the majority of stockholders do this, they are, for the moment, the corporation. Unless the majority in such cases are to be regarded as owing a duty to the minority such as is owed by the directors to all, then the minority are in a situation that exposes them to the grossest frauds and subjects them to most outrageous wrongs.

Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 12–13, 120 A. 486, 491 (Ch. 1923). See also Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 58–59, 156 A. 183, 188 (Ch. 1931).

[45] *See, e.g.*, David J. Greene & Co. v. Dunhill Int'l Inc., 249 A.2d 427, 430 ("fairness is the established criterion for judicial review of interested merger transactions"); Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 134, 32 A.2d 148, 151 (Ch. 1943) (all aspects of merger must be examined to determine fairness); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 57, 156 A. 183, 187 (Ch. 1931) (court will enjoin merger if it "works a manifest wrong to the" minority); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 180, 157 A. 396, 400 (Ch. 1928) (court should intercede if merger is "grossly unfair" to minority); Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 1, 12–13, 120 A. 486, 491 (Ch. 1923) (majority stockholders may not commit "outrageous wrongs" against the minority through merger transactions).

[46] 33 Del. Ch. 293, 93 A.2d 107 (Sup. Ct. 1952).

[47] *Id.* at 296–98, 93 A.2d at 108–09.

[48] *Id.* at 297, 93 A.2d at 109.

the exchange ratio, alleging disparity in the valuation of the two securities.[49]

In reviewing the transaction, the *Sterling* court declared that the interested parties to a merger must sustain "the burden of establishing [the] entire fairness" of the transaction.[50] Although similar fairness standards had been used previously,[51] the *Sterling* decision was significant for its delineation of the scope of judicial inquiry.[52] Em-

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[49] *Id.*

[50] *Id.* at 298, 93 A.2d at 109–10. Delaware generally applies a business judgment standard to corporate transactions based upon the presumption that any decision made by the board of directors or controlling shareholder faction "is formed in good faith and inspired by a bona fides of purpose." Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 58, 156 A. 183, 188 (Ch. 1931); *see* Bulbulia & Pinto, *Statutory Responses to Interested Directors' Transactions: A Watering Down of Fiduciary Standards?*, 53 NOTRE DAME LAW. 201, 217 (1977). In reference to judicial examinations of such transactions the Delaware supreme court has stated that

> we find ourselves in the twilight zone where reasonable businessmen, fully informed, might differ. We think, therefore, we are precluded from substituting our uninformed opinion for that of experienced business managers of a corporation who have no personal interest in the outcome [of the proposed corporate action].

Beard v. Elster, 39 Del. Ch. 153, 165–66, 160 A.2d 731, 738–39 (Sup. Ct. 1960); *see* Cheff v. Mathes, 41 Del. Ch. 494, 504, 199 A.2d 548, 555 (Sup. Ct. 1964); Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 325, 147 A. 257, 261 (Ch. 1929); Allied Chemical & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 64, 73, 122 A. 142, 146 (Ch. 1923), *dissolving preliminary injunction granted in* 14 Del. Ch. 1, 120 A. 486 (Ch.); *cf.* Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 133, 32 A.2d 148, 151 (Ch. 1943) (minority stockholders who charge fraud must sustain burden of "clearly demonstrat[ing]" that the transaction "emanate[d] from acts of bad faith").

This presumption of good faith and disinterest may be rebutted however, and the scrutiny of the courts invoked upon an affirmative showing of

> "fraud, actual or constructive, such as improper motive or personal gain or arbitrary action or conscious disregard of the interests of the corporation and the rights of its stockholders," . . . or "bad faith in the transaction," or . . . the transaction [being] "so manifestly unfair as to indicate fraud," or . . . " 'gross and palpable overreaching.' "

E. FOLK, *supra* note 29, at 76 (footnotes omitted). *See also* note 134 *infra*.

At the time of the merger agreement in *Sterling*, Hilton held the controlling equity interest in Mayflower and exerted substantial influence on the Mayflower board of directors. 33 Del. Ch. at 296–98, 93 A.2d at 108–09. Acknowledging this parent-subsidiary relationship and the apparent conflict of fiduciary duties, the defendant corporation and its interested directors conceded that their actions were no longer insulated from judicial review by the business judgment rule. *Id.* at 298, 93 A.2d at 109–10.

[51] *E.g.*, Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 133–34, 32 A.2d 148, 151 (Ch. 1943); Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56–58, 156 A. 183, 187 (Ch. 1931); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172 , 178–79, 157 A. 396, 398–99 (Ch. 1929).

[52] *See* 33 Del. Ch. at 298, 304–07, 93 A.2d at 110, 113–14. The court directed its discussion to evaluating the fairness of the conversion ratio of the stock exchange between the parent and subsidiary corporations, despite the availability of appraisal relief. *Id.*

phasizing the value of the compensation received by the minority,[53] the court evaluated the adequacy of that consideration using an equitable standard of fairness under the circumstances.[54] The court rejected the contention that the procedure for determining the propriety of the merger was necessarily limited to a single method of valuation.[55] Instead, it declared that all pertinent terms and factors must be scrutinized in order " '[t]o arrive at a judgment of the fairness of the merger.' "[56]

Judicial inquiries relative to the fairness of freeze out mergers have repeatedly attempted to integrate the elusive notion of business purpose.[57] This concept is of particular significance in light of modern

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[53] *Id.* at 298–301, 93 A.2d at 110–11. The task of determining the comparative values of the stocks constituted the central consideration in the court's resolution of the fairness issue. *Id.* at 305, 93 A.2d at 114.

[54] *Id.* at 305–07, 93 A.2d at 114.

[55] *Id.* at 304–05, 93 A.2d at 113–14. The plaintiffs attempted to characterize the consolidation as a liquidation of Mayflower's assets for the benefit of the interested fiduciaries. *Id.* at 301, 93 A.2d at 111. They contended that the disparity in the comparative valuation of the assets surrendered to Hilton and stock received in return evinced the fraudulent nature of the transaction. *Id.* In refusing to accept this proposition, the court illustrated the essential distinction between a merger and a sale of assets. The court stated that

> [a] merger ordinarily contemplates the continuance of the enterprise and of the stockholder's investment therein, though in altered form; a sale of all assets . . . ordinarily contemplates the liquidation of the enterprise. In the first case the stockholder of the merged corporation is entitled to receive directly securities substantially equal in value to those he held before the merger; in the latter case he receives nothing directly but his corporation is entitled to receive the value of the assets sold.

Id. at 303, 93 A.2d at 112.

In the opinion of the court the transaction was clearly a merger, an exchange of stock between two going concerns. *See id.* at 303–05, 93 A.2d at 112–13. Consequently, the scope of the inquiry into the fairness of that exchange could not be limited to an analysis of liquidation value. A broader scope of inquiry was required, "all relevant factors [concerning the merger action] must be considered." *Id.* at 305, 93 A.2d at 114.

[56] *Id.* In making this statement the court cited Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 134, 32 A.2d 148, 151 (Ch. 1943). In *Porges*, a Delaware Court of Chancery reviewed the substantive fairness of merger terms which operated to transfer the power of corporate control from one equity class to another. *Id.* The court declared that the realm of inquiry should not be restricted to an examination of the changes in the relative valuations of the classes of stock. The court viewed factors of control such as voting rights, pre-emptive rights and the conversion of the equity classes, as significant aspects of the merger warranting consideration in any determination of the transactions's fairness. *See id.*

[57] *See, e.g.*, Tanzer v. International General Indus., Inc., 379 A.2d 1121 (Del. 1977); Singer v. Magnavox Co., 367 A.2d 1349 (Del. Ch. 1976), *aff'd in part, rev'd in part*, 380 A.2d 969 (Del. 1977); Pennsylvania Mut. Fund, Inc., v. Todhunter Int'l, Inc., Civ. Action No. 4845, letter opinion (Del. Ch. Aug. 5, 1975); Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 32 A.2d 148 (Ch. 1943); MacFarlane v. North American Cement Corp., 16 Del. Ch. 172, 157 A. 396 (Ch. 1929). *See also* Bryan v. Brock & Blevins Co., Inc., 490

legislation which permits corporate mergers without requiring an affirmative showing of any business necessity for effecting such a consolidation.[58] In this regard, the courts of Delaware have often been confronted with the question of whether compliance with the mandate of the relevant statute should insulate a merger transaction lacking a valid business purpose from judicial review of its fairness to the minority interest.[59] For example, in *MacFarlane v. North American Cement Corp.*,[60] the court of chancery investigated charges that a stock allocation scheme, initiated pursuant to a corporate merger, discriminated between the stockholder classes.[61] Evaluating the transac-

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F.2d 563 (5th Cir. 1964), *cert. denied*, 419 U.S. 844 (1974); Grimes v. Donaldson, Lufkin & Jenrette, Inc., 329 F. Supp. 1393 (N.D. Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975) (applying Delaware law).

[58] *See, e.g.*, DEL. CODE tit. 8 § 253 (1975 & 1976 Cum. Supp.). The short form merger under Delaware law was designed as a vehicle through which a parent corporation possessing a 90 percent equity interest in a subsidiary could employ a merger to effectively expel the minority stockholders in the subsidiary from the enterprise upon the tender of cash or securities for the minority's equity holdings. Balotti, *The Elimination of the Minority Interests by Mergers Pursuant to Section 251 of the General Corporation Law of Delaware*, 1 DEL. J. OF CORP. LAW 63, 65 (1977). In reviewing a section 253 merger, one Delaware court declared that "the very purpose of [section 253] is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise." Stauffer v. Standard Brands Inc., 41 Del. Ch. 7, 10–11, 197A.2d 78, 80 (Sup. Ct. 1962). *See also* Application of Delaware Racing Ass'n, 42 Del. Ch. 406, 412, 213 A.2d 203, 208–09 (Sup. Ct. 1965); Braasch v. Goldschmidt, 41 Del. Ch. 519, 524–25, 199 A.2d 760, 764 (Ch. 1964).

[59] *See, e.g.*, Cheff v. Mathes, 41 Del. Ch. 494, 503–04, 199 A.2d 548, 554 (Sup. Ct. 1964); Bennett v. Propp, 41 Del. Ch. 14, 21–22, 187 A.2d 405, 409 (Sup. Ct. 1962); Starring v. American Hair & Felt Co., 21 Del. Ch. 380, 384, 191 A. 887, 890 (Ch. 1937), *aff'd per curiam*, 21 Del. Ch. 431, 2 A.2d 249 (Sup. Ct. 1939); Potter v. Sanitary Co. of America, 22 Del. Ch. 110, 115–117, 194 A. 87, 89 (Ch. 1937); Allaun v. Consolidated Oil Co., 16 Del. Ch. 318, 325, 147 A. 257, 261 (Ch. 1929).

Professor Lattin is of the opinion that judicial examinations of the underlying purposes of corporate transactions are motivated by a desire to protect the equity position of the minority. Lattin, *Equitable Limitations on Statutory Charter Powers Given to Majority Shareholders*, 30 MICH. L. REV. 645, 646 (1932). Fundamental to this view is

> the proposition that the majority or controlling security holders occupy a fiduciary relationship to the remainder . . . . So long as the controlling group has the interest of the whole at heart, seeking to make the venture the greatest success possible for the fused mass, whether it be through a sale of all the corporation's assets, a merger or . . . change in fundamental powers, . . . the propriety of the act is incontestable. However, as soon as the controlling interest favors itself or some other group it . . . fails to act for the best interests of the mass. At this point, . . . we may infer that the fiduciary duty is violated.

Id. at 648–649 (footnote omitted). *See also* Note, *supra* note 27, at 1646.

[60] 16 Del. Ch. 172, 157 A. 396 (Ch. 1928).

[61] *Id.* at 172–77, 157 A. at 396–98. The action in *MacFarlane* centered upon the consolidation of two Delaware corporations, the North American Cement Corporation (North American) and the Pennsylvania-Dixie Cement Corporation. *See id.* at 173, 157 A. at 396. Under the merger plan, the outstanding stock of North American was to be

tion,[62] the court held that considerations of fairness would require the enjoining of the merger if it were determined that "its real and only purpose [was] to promote the interests of one class of stockholders to the detriment, or . . . expense of another . . . even though the latter [was] in the decided minority."[63] Although the court failed to find such motivation,[64] the Chief Justice went on to suggest that it would not be beyond the equitable power of the court to prevent such a consolidation where a plausible business purpose was conspicuously absent and there was an affirmative showing of fraud.[65]

The business purpose approach utilized in *MacFarlane* was reiterated in 1953 by the court of chancery in *Bennett v. Breuil Petroleum Corp.*[66] The dispute in *Bennett* centered upon an attempt by a minority shareholder to block a stock issue plan advanced by the controlling majority stockholder.[67] The plaintiff alleged that the reor-

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reclassified as common stock in the consolidated enterprise. *Id.* at 176–77, 157 A. at 398. This reclassification was to be effected on an exchange ratio of two shares of North American preferred for one share of common stock in the newly formed company. The common stockholders of North American were to receive two shares in the consolidated corporation in exchange for each of their shares. *Id.* at 175–77, 157 A. at 397–98. The reclassification scheme was challenged by the plaintiffs, North American's preferred stockholders, who alleged that the terms of the stock allocation plan were "grossly unfair and fraudulent," in regard to the respective valuations of the equity classes of North American. *Id.* at 172–77, 157 A. at 396–98.

[62] *Id.* at 178–83, 157 A. at 398–400. The court prefaced its discussion of the contested transaction by emphasizing the legislative endorsement of corporate mergers under Delaware law. *Id.* at 178, 157 A. at 398. *See also* note 26 *supra* and accompanying text. In the opinion of the Chief Justice, this approval, coupled with the protections afforded by the good faith presumptions of the business judgment rule, weighed heavily in favor of the validity of such transactions. *See* 16 Del. Ch. at 178, 157 A. at 398. *See also* note 45 *supra* and accompanying text. Accordingly, the court suggested that a merger should fail as fraudulent only upon a showing that it was "grossly unfair" to minority shareholders. 16 Del. Ch. at 178, 157 A. at 398.

[63] 16 Del. Ch. at 178, 157 A. at 398.

[64] *Id.* at 181–82, 157 A. at 400. The central consideration in regard to the purpose of the merger in *MacFarlane* was the benefit of the transaction to the overall corporate entity. The court acknowledged that the benefits of the consolidation were not equally apportioned between the equity classes. It declared, however, that the discrepancy was not of such magnitude as to justify the injunction of an action "which would be advantageous for the stockholders as a whole." *Id.* at 182, 157 A. at 400.

[65] *See id.*

[66] 34 Del. Ch. 6, 99 A.2d 236 (Ch. 1953).

[67] *Id.* at 8, 99 A.2d at 237. The plaintiff held a substantial, but distinctly minority, equity interest in the Breuil Petroleum Corporation. The stock issue to which he advanced his challenge was a financial reorganization arrangement proposed by the majority stockholders. Under the terms of the plan the par value of the corporation's stock was to be reduced by 60% in conjunction with an increase in the number of total shares outstanding. Though subject to certain restrictions, shareholders of record were entitled to maintain their level of investment through pro rata subscriptions in the new market issues. *Id.* at 11, 99 A.2d at 238–39.

ganization scheme was designed to freeze out the minority interest through the issuance of stock at a "grossly inadequate" price.[68] The chancellor prefaced his review of these allegations by noting "that action by majority stockholders having as its primary purpose the 'freezing out' of a minority interest is actionable without regard to the fairness of the price."[69] From this premise, the court proceeded to examine the possible motives for the stock issue and the relative fairness of the proposed consideration.[70] The court was reluctant to insulate the transaction from judicial review through application of the business judgment rule[71] because there existed "a substantial factual dispute as to the legal propriety of the motives of the corporate defendant and its controlling stockholder."[72] In denying the defendant's motion for summary judgment, the court stated that questions concerning the nature of the defendants' interest and the purpose of the contested action were matters requiring judicial determination on the merits.[73]

Another consideration which has weighed heavily in judicial decisions as to the fairness of freeze out mergers attempted under Delaware law is the availability of appraisal relief.[74] A creature of statute,[75] appraisal is clearly a reflection of the legislative endorsement of

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[68] *Id.* at 8, 10–12, 99 A.2d at 237, 238–39. Had the plaintiff failed to exercise his option to increase his holdings on a pro rata basis, his equity in the corporation would have been greatly diminished. Because of the substantial difference between the par values of the outstanding stock and the new issue, additional market subscriptions to the corporation would work only to debilitate the value of the plaintiff's existing equity interest. *Id.* at 14, 99 A.2d at 240.

[69] *Id.* at 12, 99 A.2d at 239.

[70] *Id.* at 12–15, 99 A.2d at 239–41.

[71] *See* note 50 *supra*.

[72] 34 Del. Ch. at 12, 99 A.2d at 239. Significant questions as to the interest and motives of the defendants in the management of corporate assets were raised in the pleadings and by affidavits filed with the court. *See id.* at 12–15, 99 A.2d at 239–41.

[73] *Id.* at 12–13, 16, 99 A.2d at 239–40, 242.

[74] *See* E. FOLK, *supra* note 29, at 395–97. In an attempt to prevent the potential abuse engendered by the legislative authorization of corporate mergers, a majority of the states have enacted appraisal statutes designed to afford those shareholders objecting to a merger an opportunity to receive the fair value of their holdings. *See* F. O'NEAL, *supra* note 24, at § 5.27. Under such statutes, corporations are generally required to purchase, at a judicially determined value, the shares of those stockholders who dissent from a contemplated merger or consolidation action. Vorenburg, *supra* note 27, at 1189–92; *Recent Developments in the Law of Corporate Freeze-outs*, 14 B.C. INDUS. & COMM. L. REV. 1252, 1255–56 (1973).

[75] *See, e.g.*, DEL. CODE tit. 8 § 262 (1975 & 1976 Cum. Supp.). In general terms, the Delaware appraisal statute provides that upon receiving formal notice of consolidation or merger, dissenting shareholders have 20 days within which to present to the corporation a written demand of payment for the stock in their possession. *Id.* § 262(a), (b). If a dispute subsequently arises in regard to the value of the stock, the shareholder may

corporate mergers.[76] Shareholders objecting to a consolidation are, "[a]s a general proposition," obliged to elect between acceptance of the organic change and judicial appraisal of their holdings.[77] Although statutory mergers are vulnerable in equity upon a showing of fraud,[78] modern case law reveals that it has become increasingly difficult for dissenting shareholders to sustain the burden of such a demonstration.[79]

Depending upon the nature of the transaction and issues in controversy, some Delaware courts have refused to consider the substantive fairness of certain merger actions. Such a refusal was explicitly made by the Delaware supreme court in *Stauffer v. Standard Brands, Inc.*[80] Examining a short form merger action,[81] the *Stauffer*

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request that the issue be submitted to a judicially appointed appraiser who shall render an objective decree of value. *Id.* § 262(c),(d),(e).

[76] *See* note 74 *supra*. Appraisal relief was initially intended to serve as a "safety value" for minority shareholders in the event of control exploitation by the majority class. 58 COLUM. L. REV. 1030, 1037 n.13 (1958). *See also* note 74 *supra*. This protection has become increasingly significant in view of the enactment of modern short form merger statutes which expressly limit the relief available to dissenting shareholders to such judicial appraisal. *See, e.g.*, DEL. CODE tit. 8 § 253 (1975 & 1976 Cum. Supp.).

[77] Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56, 156 A. 183, 187 (Ch. 1931).

[78] *Id.* In reference to those situations in which a dissenting shareholder may not be obligated to make the statutory appraisal election, the courts have recognized that "[t]he exercise of the statutory right of merger is always subject to nullification for fraud." *Id.*

[79] *See, e.g.*, Stauffer v. Standard Brands, Inc., 41 Del. Ch. 7, 187 A.2d 78 (Sup. Ct. 1962); David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1968). The broad language and legislative endorsement of statutory merger provisions invited liberal interpretations by the courts which, in turn, effectively restrained dissenting shareholders in their pursuit of equitable relief. In a holding that typified the response of the Delaware judiciary, the court, in MacCrone v. American Capital Corp., 51 F. Supp. 462 (D. Del. 1943), declared that when

> the required statutory majorities have the right to merge two or more corporations, there is a presumption of bona fides of purpose with a resultant burden on dissidents to demonstrate that the terms of the merger are so unfair as to amount to constructive fraud.

Id. at 466 (footnote omitted).

Other courts have saddled dissenters with a heavier burden which required "the unfairness [to] be of such character and . . . so clearly demonstrated as to impel the conclusion that it emanates from acts of bad faith or a reckless indifference to the rights of others interested, rather than from an honest error of judgment." Porges v. Vadsco Sales Corp., 27 Del. Ch. 127, 133, 32 A.2d 148, 151 (Ch. 1943).

This permissive attitude, which constitutes the major obstacle confronting shareholders seeking to challenge corporate mergers, has been manifest in judicial decisions restricting dissidents to appraisal relief. *See Stauffer*, 41 Del. Ch. at 10–11, 187 A.2d at 80; *Schenley*, 281 A.2d at 35–36; Bruce v. E.L. Bruce Co., 40 Del. Ch. 80, 82–83, 174 A.2d 29, 30–31 (Ch. 1961).

[80] 41 Del. Ch. 7, 197 A.2d 78 (Sup. Ct. 1962).

[81] *Id.* at 8–9, 187 A.2d at 79. In that action, Standard Brands attempted to consolidate one of its subsidiaries into the enterprise by means of a short form merger trans-

court considered the contention that minority shareholders in a subsidiary corporation were entitled to equitable relief due to alleged inadequacy of consideration.[82] In affirming the chancery court's dismissal of the action,[83] the supreme court held that relief in equity should not lie when the matter at issue involves only "a difference of opinion as to value,"[84] and that statutory appraisal was the "exclusive" recourse of those shareholders challenging the fairness of price in short form merger situations.[85]

The permissive attitude of the Delaware courts toward appraisal relief was demonstrated again in *David J. Greene & Co. v. Schenley Industries, Inc.*,[86] wherein the Delaware Court of Chancery reviewed a long form, "interested merger" designed to eliminate the minority shareholders of the Schenley corporation.[87] The complaint in *Schenley* alleged that Alden, owner of approximately 86% of the outstanding Schenley common stock, attempted to effect a section 251, long form, merger with a subsidiary corporation also owned by Alden.[88] Pursuant to the terms of the proposed merger, the minority

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action. *Id.* at 9, 187 A.2d at 79. Standard Brands, possessing the 90% equity interest in the subsidiary required by section 253 of title 8 of the Delaware Code proceeded to purchase the minority interest in the subsidiary on a cash-for-stock basis. *Id.*

[82] *Id.*, 187 A.2d at 80. The consideration dispute stemmed from charges that the amount tendered for the subsidiary stock was "so grossly inadequate" that it constituted a fraud as to the minority interest. *Id.*

[83] *Id.* at 11, 187 A.2d at 80.

[84] *Id.* at 9–11, 187 A.2d at 80. In light of the fact that there was no evidence of unlawful conduct on the part of the defendants, the court responded to the charges of inadequate consideration by stating "that the real relief sought [was] the recovery of the monetary value of the plaintiff's shares—relief for which the statutory appraisal provisions provided an adequate remedy." *Id.* at 9, 187 A.2d at 80.

[85] *Id.* Addressing the issue of relief, the state supreme court agreed with the vice chancellor's analysis of section 253 and endorsed his view that appraisal was the exclusive remedy available to the plaintiffs under the statute. 41 Del. Ch. at 9–11, 187 A.2d at 80. The court recognized that section 253 was patterned after the short form merger statute of New York. 41 Del. Ch. at 10, 187 A.2d at 80; *see* Coyne v. Park & Tilford Distillers Corp., 37 Del. Ch. 558, 564, 146 A.2d 785, 788 (Ch. 1958), *aff'd*, 38 Del. Ch. 514, 154 A.2d 893 (Sup. Ct. 1959). *Compare* DEL. CODE tit. 8 § 253 (1975 & 1976 Cum. Supp.) *with* N.Y. BUS. CORP. LAW 623 (McKinney 1963). Following precedent set in New York and adopted in Delaware in *Coyne*, the *Stauffer* court concluded that absent a showing of "illegality or [fraudulent] overreaching," relief should be limited to judicial appraisal. 41 Del. Ch. at 10, 187 A.2d at 80; *see Coyne*, 38 Del. Ch. at 521–22, 154 A.2d at 897–98.

In explaining its decision not to enjoin the merger, the *Stauffer* court reasoned that under its interpretation of section 253, "the very purpose of the statute is to provide the parent corporation with a means of eliminating the minority shareholder's interest in the enterprise." 41 Del. Ch. at 10–11, 187 A.2d at 80.

[86] 281 A.2d 30 (Del. Ch. 1971).

[87] *Id.* at 32–33.

[88] *Id.* at 31.

shareholders were to receive cash and subordinated debentures as consideration for the surrender of their equity interest in Schenley.[89] After examining the merger terms, the vice chancellor rejected the contention that the consideration tendered for the minority shares was so unfair as to warrant relief in equity.[90] In refusing to enjoin the consolidation action,[91] the court stated that the issue in controversy was simply a "dispute as to value, for which an appraisal should be adequate."[92] Relying upon the decision in *Stauffer*, the court concluded that where the controversy was limited to the issue of fairness of price, the rights of minority shareholders under section 251 (long form merger statute) were equivalent to those available under section 253 of the Delaware Code (short form merger statute).[93] Although the court failed to cite any authority in support of this proposition, the significance and possible ramifications of the statement were clear. By equating the remedies available in a section 251 merger with those afforded in a section 253 situation the court effectively sanctioned the use of long form, "cash out" mergers where the only reason for the transaction was the elimination of the minority equity class. Apparently, the traditional judicial inquiry as to the business purpose of section 251 mergers between interested parties was no longer required in all cases.[94] The *Schenley* court, in declining to apply the standard of fairness employed in *Sterling*[95] to the interested merger

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[89] *Id.* at 31–32. Claiming self-dealing and inadequacy of consideration, the plaintiffs named both Alden and Schenley as defendants in their derivative and representative suit to enjoin the effectuation of the merger. *Id.*

[90] *Id.* at 32. The plaintiffs had requested that the court grant "preliminary and permanent injunctive relief" to prevent the consummation of the contemplated consolidation. *Id.*

[91] *Id.* at 36. In the opinion of the court, the plaintiffs had failed to make the requisite showing of "a reasonable probability of . . . ultimate success on final hearing." *Id.* at 35.

[92] *Id.* at 33. Because the central issue in controversy was the question of relative stock valuation the court declared that appraisal was the appropriate relief

> unless the fair value of Schenley stock [was] so much greater than the total amount offered, or that [the] plaintiffs and other minority stockholders [were] being otherwise deprived of clear rights or . . . taken advantage of by those charged with a fiduciary duty towards them as to constitute a form of constructive fraud . . . .

Id.

[93] 281 A.2d at 35. *Compare Schenley*, *id.* (evaluating § 251 long form merger) *with Stauffer*, 41 Del. Ch. at 10–11, 187 A.2d at 80 (evaluating § 253 short form merger). *See also* notes 80–85 *supra* and accompanying text.

[94] *See* 281 A.2d at 32–33, 35; *see also* E. FOLK, *supra* note 29, at 381 n.61; Balotti, *supra* note 58, at 73, 77.

[95] 281 A.2d at 32–33. The *Schenley* court distinguished *Sterling* as involving a dispute as to the relative value of two whole corporations. *Id.* In contrast, the controversy in *Schenley* centered on the value of the cash and debentures tendered in exchange for

situation, effected a substantial curtailment of the protection previously afforded to minority interests.[96] The decision in effect insulated certain interested corporate transactions from the judicial scrutiny to which they had been subjected in the past.[97] Absent a showing of "fraud or blatant overreaching,"[98] a shareholder challenging such an interested transaction was restricted in his pursuit of satisfaction to the provisions of statutory appraisal.[99]

The considerations of fairness, business purpose and the availability of appraisal relief were prime factors in the *Singer* court's discussion of the obligations arising between the parties to a merger effected under section 251 of the Delaware Code.[100] Emphasizing the fiduciary duty[101] which controlling shareholders and corporate directors owe to minority shareholders,[102] the *Singer* court held that a long form merger executed with the single intention of eliminating the minority interest presented a cause of action for which equitable relief might be granted.[103]

Schenley stock. *Id.* at 33. In the opinion of the court, the principal issue thus presented was the determination of "the fair value of the offer being made to [the] plaintiffs and other minority stockholders of Schenley and whether or not this amount approximate[d] the fair value of the shares of Schenley which the plan proposes to eliminate." *Id.* at 32–33. Having thus narrowed the issue, the *Schenley* court found the broad inquiry used in *Sterling* inappropriate and relegated the dispute to appraisal proceedings. *Id.*

[96] *Compare id.* at 35 *with Sterling*, 33 Del. Ch. at 298, 93 A.2d at 109–10. In reference to the rights of the minority interest, the court declared that each shareholder in *Schenley* was under "constructive notice" that his holdings were subject to divestment in the event of a lawful corporate merger. 281 A.2d at 35.

[97] Despite the affirmative showing of "interest" in the transaction, the court refused to examine the merger under the standards of intrinsic fairness announced in *Sterling*. *See* 281 A.2d at 32–33. This refusal in effect extended the good faith presumption of the business judgment rule to such interested merger actions, thus limiting the scope of judicial inquiry relative to the propriety of the transaction. *See* E. FOLK, *supra* note 29, at 333–36.

[98] 281 A.2d at 35.

[99] *Id.* For additional discussion of statutory appraisal, see notes 74–79 *supra* and accompanying text.

[100] *See* 380 A.2d 969, 976–78 (Del. 1977).

[101] *Id.* at 972–73. The fiduciary relationship between the parties represented a crucial consideration in the *Singer* decision. Unlike the chancery court which dismissed the plaintiffs' complaint for failing to make an adequate showing of fraud, the supreme court found that a viable cause of action was presented based upon the defendants' breach of their fiduciary obligations to the plaintiff. *Id.* at 975, 980.

[102] *Id.* at 972–73. Citing the fiduciary standards long recognized under Delaware law, the court characterized the corporate directors and majority shareholders as quasi-trustees sworn " 'to protect the interest of the corporation committed to [their] charge [and] to refrain from doing . . . injury to the corporation, or to deprive it of profit or advantage.' " *Id.* at 976–77, 980 (quoting from Guth v. Loft, Inc., 23 Del. Ch. 255, 270, 5 A.2d 503, 510 (Sup. Ct. 1939). For further discussion of fiduciary duties, see notes 43–44 *supra* and accompanying text.

[103] 380 A.2d at 980. Analogizing to the common law concept of vested shareholder

Addressing the allegations that the Magnavox merger was fraudulent,[104] the court premised its review of the transaction upon the settled proposition "that even complete compliance with the mandate of statute" will not place an action beyond the scope of judicial scrutiny.[105] Guided by this principle, the court struck a balance between the statutory authorization of corporate mergers and the fiduciary obligations owed to the minority shareholders.[106] The court found that the defendants, as interested parties "standing on both sides of the merger transaction,"[107] were required to sustain the burden of showing fairness of their actions with respect to the minority interest.[108] In this regard, the court stated that the mere calculation of "fair value"[109] afforded dissenting shareholders through judicial appraisal alone was insufficient to satisfy the burden so imposed, because it excludes consideration of myriad, non-monetary, collateral factors which often influence investment decisions.[110] Rejecting the contention that appraisal was the exclusive available remedy,[111] the court recognized the need for a broader scope of inquiry to ensure the integrity of section 251 merger transactions.[112] Accordingly, the *Singer* court invoked the standard advanced in *Sterling*, stating that such mergers were subject to judicial examination for their " 'entire fairness' " under the circumstances.[113]

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rights, the court declared that "just as a minority shareholder may not thwart a merger without cause, neither may a majority cause a merger . . . for the sole purpose of eliminating a minority." *Id.* at 978.

[104] *Id.* at 972.

[105] *Id.* at 975. The court acknowledged that the "cash-out" terms of the Magnavox consolidation were expressly within the statutory authorization of section 251(b)(4). *Id.* at 973; *See* DEL. CODE tit. 8 § 251(b)(4) (1975 & 1976 Cum. Supp.). The court also recognized that the defendants had complied with the procedural requirements of the statute, but cautioned that such compliance would not render the transaction "legally unassailable." *See* 380 A.2d at 975. *See also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

[106] *See* 380 A.2d at 978.

[107] *Id.* at 976.

[108] *Id.*

[109] *Id.* at 977.

[110] *Id.* The defendant's argument that relief should be limited to appraisal under section 262 was rejected because it failed to consider the "form" of the plaintiffs' investment and the attendant benefits of such equity holdings. *See id.* The court reasoned that factors such as the tax consequences of the shareholders' displacement and the forfeiture of future profit opportunities represented important considerations that should not be excluded from the determination of the propriety of the relief. *See id.* For a discussion of the inadequacies of appraisal relief, *see* Vorenburg, *supra* note 27, at 1201–04.

[111] 380 A.2d at 977.

[112] *See id.* at 978, 980.

[113] *Id.* at 980; *see* 33 Del. Ch. 293, 298, 93 A.2d 107, 109–10 (Sup. Ct. 1952). *See also* notes 46–56 *supra* and accompanying text.

The most significant aspect of the *Singer* court's analysis of the Magnavox merger was its treatment of the concept of business purpose. Refusing to apply the narrower standard of scrutiny used in *Stauffer*[114] and *Schenley*,[115] the Delaware supreme court rejected the chancery court's view that lack of "business purpose" failed to constitute adequate grounds for enjoining such merger transactions under Delaware law.[116] Employing a more expansive review based upon the fiduciary relationship existing between the majority and minority stockholders, the *Singer* court declared that it is a breach of fiduciary duty *per se* to effectuate a long form merger for the *sole* purpose of freezing out the minority equity interest.[117] The court further stated that regardless of the business interests they purport to promote, such consolidations must satisfy the test of entire fairness set forth in *Sterling* or become vulnerable in equity to those who would advance a challenge.[118]

Signaling a return to the standards of fairness under Delaware corporate law, the *Singer* decision effectively recognized the need to provide more comprehensive protection for minority shareholders in long form freeze out merger situations.[119] This recognition was echoed in a subsequent Delaware decision, *Tanzer v. International General Industries, Inc.*[120] In *Tanzer*, the Delaware supreme court examined a long form merger effected pursuant to a valid business purpose of the majority stockholder.[121] Relying heavily upon its deci-

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Despite attempts by the court to distinguish prior law, the holding in *Singer* casts serious doubt upon the continued viability of previous cases wherein dissenters from long form merger relegated to an exclusive remedy of appraisal. 380 A.2d at 979. *See* David J. Greene & Co. v. Schenley Indus., Inc., 280 A.2d 30 (Del. Ch. 1968); Bruce v. E.L. Bruce Co., 40 Del. Ch. 80, 174 A.2d 29 (Ch. 1961). Professor Folk suggests that both *Schenley* and *Bruce* are expressly overruled by the supreme court's decision in *Singer*. Folk, *Holdings by State Court Grounded in Prior Law*, N.Y.L.J. Dec. 19, 1977, at 29 col. 5, 41 col. 6.

[114] *See* notes 80–85 *supra* and accompanying text.

[115] *See* notes 86–99 *supra* and accompanying text.

[116] 380 A.2d at 975. In holding that Delaware law would impose a stricter standard of regulation to " 'cash-out' ", "freeze-out" mergers, the court declared that "if it is alleged that the purpose [of the merger] is improper because of the fiduciary obligation owed to the minority, the [courts are] duty-bound to closely examine that allegation." *Id.* at 979.

[117] *Id.* at 980.

[118] *Id.*

[119] *See* Folk, *supra* note 113, at 41 col. 6. Prior to the decision in *Singer*, Professor Folk was of the opinion that under Delaware corporate law the trend was away from the application of the standards of intrinsic fairness. E. FOLK, *supra* note 29, at 334–35. *See generally* Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971); Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883 (Del. 1970); Chasin v. Gluck, 282 A.2d 188 (Del. Ch. 1971); David J. Greene & Co. v. Schenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971).

[120] 379 A.2d 1121 (Del. 1977).

[121] *Id.* at 1122–23. The *Tanzer* litigation resulted from an attempt by International

sion in *Singer*, the supreme court held that where a business purpose was clear,[122] such a merger did not constitute a *per se* violation of the fiduciary duty of the controlling shareholder and, therefore, might be permissible under Delaware law.[123] Notwithstanding this holding, however, the *Tanzer* court declared that even an affirmative showing of a "bonafide purpose" would not insulate such a merger from "judicial scrutiny for 'entire fairness' as to all aspects of the transaction."[124] In the opinion of the court, this logical extension of the entire fairness mandate established in *Sterling* and reaffirmed in *Singer* was required by the pervading fiduciary duty of the majority stockholders.[125]

The decisions in *Singer* and *Tanzer* clearly establish that, despite compliance with statutory procedure, interested merger transactions will be subject to judicial scrutiny for their entire fairness under the circumstances. It has been contended that the impact of these holdings may be substantially limited by the failure of the courts to present a clear definition of business purpose.[126] A careful reading of the cases reveals, however, that precise standards and guidelines may be

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General Industries, Inc. (IGI) to effectuate a section 251 cash-out merger between Kliklok Corporation, a subsidiary corporation in which IGI owned 81% of the common stock, and KLK Corporation, a shell corporation formed by IGI to facilitate the consolidation. *See id.* at 1122. The plaintiffs, minority stockholders in Kliklok, as majority stockholder, had violated its fiduciary duty by effectively freezing out the minority interest through a merger which served only the purposes of the parent corporation. *Id.* at 1122–23.

[122] *Id.* at 1124–25. In examining the merger transaction the court declared that "the real issue for decision center[ed] around IGI's right to cause a merger 'for a valid business reason' of its own, independent of any corporate interest of Kliklok." *Id.* at 1123. As in *Singer*, the *Tanzer* court struck a balance between the relative interests of the majority and minority stockholders. *Id.* Although the court acknowledged that in both cases the principal concern was the protection of the minority interest, the court also recognized that the majority stockholder "has a [fundamental] right to vote his shares in his own interest, including the expectation of personal profit, limited, of course, by any duty he owes to other stockholders." *Id.* at 1124; *see* Ringling Bros.—Barnum & Bailey Com. Shows v. Ringling, 29 Del. Ch. 610, 621–23, 53 A.2d 441, 447 (Sup. Ct. 1947). After a review of the facts, the supreme court adopted the chancellor's view that " 'the only reason for the merger [was] to facilitate long term debt financing by IGI . . . not [the] freezing out of the minority just for the purpose of freezing out the minority.' " 379 A.2d at 1124.

[123] 379 A.2d at 1124–25.

[124] *See id.* at 1125. Although the defendant's showing of a business purpose was sufficient to withstand the motion for preliminary injunction, the supreme court declared that such a showing "d[id] not terminate the litigation" and remanded the case for "a fairness hearing." *Id.*

[125] *See id.*

[126] Borden, *Some Comments on Singer v. Magnavox*, N.Y.L.J., Oct. 4, 1977, at 1 col. 2; Borden, *Delaware Speaks Out Again on Takeouts*, N.Y.L.J., Oct. 25, 1977, at 1 col. 1.

unnecessary.[127] Read together, *Singer* and *Tanzer* require that any interested merger which purports to advance a business purpose, that is, any purpose other than a desire to expel the minority interest, must satisfy the standard of entire fairness.[128] Transactions which fall within this framework of review, by their very nature, involve parties whose interests are adverse. Quite often, the party invoking the power of corporate process stands to receive a substantial benefit from such an exercise. The "power and right" of the majority to effect a merger transaction is not easily reconciled with the protection which should be afforded the minority interest.[129] It is from this balance that questions arise as to " '[w]hose business' " and " '[w]hose purpose' " a consolidation action should advance.[130] Under *Singer* and *Tanzer*, however, there appears to be no need to delineate the exact boundaries of business purpose.[131] *Singer* declares that upon a threshold showing that the merger serves some purpose other than an arbitrary freeze out of the minority class, judicial review of the transaction will be framed in terms of entire fairness.[132] The natural corollary to this view, articulated in *Tanzer*, is that even an affirmative showing of a valid business purpose will not remove a merger from the realm of entire fairness.[133]

The decision in *Singer* will have a substantial and far reaching effect upon Delaware corporate law. Indeed, *Singer*, in conjunction with *Tanzer*, clearly presents viable guidelines for evaluating the actions of corporate fiduciaries relative to the rights and interests of minority stockholders in freeze out mergers. More importantly, these decisions indicate a renewed willingness on the part of the Delaware judiciary to undertake the more rigorous inquiry of intrinsic fairness in examining interested corporate transactions.[134] The expansive re-

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[127] *See* Singer v. Magnavox Co., 380 A.2d at 976; Folk, *supra* note 119, at 41 col. 2.

[128] *See Tanzer*, 379 A.2d at 1125; *Singer*, 380 A.2d at 980 & n.11; Folk, *supra* note 113, at 41 col. 3.

[129] 379 A.2d at 1123.

[130] 380 A.2d at 976.

[131] *See id.*; 379 A.2d at 1123; Folk, *supra* note 113, at 41 col. 2–3.

[132] 380 A.2d at 976.

[133] 379 A.2d at 1124; *see* 380 A.2d at 980.

[134] The mandate of *Sterling* requiring a review of the entire fairness of a transaction upon a showing of "interest" or possible benefit to an involved corporate fiduciary was substantially eroded by subsequent case law which effectively extended the business judgment rule to interested corporate transactions. For example, in Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883 (Del. 1970), *rev'g* 255 A.2d 717 (Del. Ch. 1969), the Delaware supreme court declared that a parent corporation's dealings with a subsidiary would be insulated by the business judgment rule absent a demonstration of " 'gross and palpable overreaching' which would warrant judicial interference." 267 A.2d at 888. This expansion of the presumption of validity afforded by the business judgment doc-

view called for by the supreme court in *Singer* in the long form merger context is readily adaptable to those situations wherein minority shareholders are threatened with other forms of freeze out action by the controlling equity interest. In fact, the strict judicial scrutiny for entire fairness mandated by *Singer* has been applied to a short form merger situation,[135] despite the fact that the *Stauffer* holding remains undisturbed.[136] *Singer*'s threshold consideration of business

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trine was reiterated in later decisions which held that the standard of intrinsic fairness would be invoked "only when the [parent's] fiduciary duty [was] accompanied by self-dealing [where] the parent receive[d] something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971), *aff'g in part, rev'g in part* 261 A.2d 911 (Del. Ch. 1969). *See also* Chasin v. Gluck, 282 A.2d 188, 192 (Del. Ch. 1971). The cumulative effect of these cases was to impose upon the minority stockholders the heavier burden of establishing both interest and actual self-dealing on the part of corporate fiduciaries to remove a transaction from the business judgment rule and secure judicial hearing relative to the fairness of the action. *See* 282 A.2d at 192.

The recognition of the need for stricter scrutiny of freeze out mergers was manifest in the *Singer* court's emphasis upon the obligations of corporate fiduciaries and the safeguards necessary to prevent the exploitation of corporate power. *See* 380 A.2d at 979–80. In *Tanzer*, the court again questioned the equity of mergers effected between interested parties. *See* 379 A.2d at 1124. Addressing the subject of the business judgment rule, the court noted that although the "rule has its place in . . . intracorporate affairs, it is not the measure of a [parent corporation's] responsibility to minority shareholders in its subsidiary . . . at least when control over corporate assets and processes for merger purposes is at issue." *Id.*

In both *Singer* and *Tanzer* the Delaware supreme court acknowledged that freeze out mergers, even when accomplished to further a legitimate "business purpose," are self-dealing transactions within the definition presented in *Sinclair* and therefore not entitled to the protection of the business judgment rule. *See* 380 A.2d at 980; 379 A.2d at 1124–25. *See also* Sinclair Oil Corp. v. Levien, 280 A.2d at 720. In reviewing such transactions, the court indicated a willingness to undertake a fairness inquiry based solely upon a showing of a merger and allegations of freeze out motive. *See Singer*, 380 A.2d at 980; *Tanzer*, 379 A.2d at 1124–25. Upon such a showing it then becomes incumbent upon the parent corporation to justify its action by proving that the merger is designed to serve a valid business purpose and that it is entirely fair to all interests involved. 380 A.2d at 980; 379 A.2d at 1124–25. *See* Young v. Valhi, Inc., 382 A.2d 1372, 1378–79 (Del. Ch. 1978). Thus, although the breadth of the decisions in *Singer* and *Tanzer* in this regard remains unsettled, it does appear that these decisions do provide an exception to the procedural barriers erected in *Sinclair* and *Getty*, at least in the context of freeze out mergers.

[135] *See* Kemp v. Angel, 381 A.2d 241 (Del. Ch. 1977). In granting a preliminary injunction effectively blocking a section 253 merger, the *Kemp* court cited *Singer* and *Tanzer* as evincing the recent trend of the courts of Delaware toward "defining the fiduciary duty of majority stockholders to the minority, as being over and above statutory requirements." *Id.* at 245.

[136] *See* notes 80–85 *supra* and accompanying text. Under section 253 a parent corporation may, upon board resolution, eliminate minority shareholders in a 90 percent owned subsidiary by a tender of securities or cash for their equity interest. *See* DEL. CODE tit. 8 § 253(a) (1975). Judicial evaluations of section 253 have consistently held that such displacements were expressly contemplated by the legislative mandate. *See* Application of Del. Racing Ass'n, 42 Del. Ch. 406, 412, 213 A.2d 203, 208–09 (Sup. Ct. 1965); Stauffer v. Standard Brands, 41 Del. Ch. 7, 10–11, 197 A.2d 78, 80 (Sup. Ct. 1962).

purpose, coupled with its revival of the standards of entire fairness, represent judicial recognition of, and opposition to, the hardships which often result from corporate freeze outs. While the inherent clash between majority and minority interests will continue to lend color to intracorporate relations, the renewed judicial emphasis upon fiduciary obligations and fairness, rising in the wake of *Singer*, will work to prevent future abuse of corporate process under Delaware law.

Kevin R. Gardner

In enjoining the short form merger in Kemp v. Angel, 381 A.2d 241 (Del. Ch. 1977), pending a showing that it was "entirely fair to [the] minority stockholders," the chancellor stated that he was not bound by the supreme court's ruling in *Stauffer*. 318 A.2d at 245. Such an application of *Singer*'s business purpose and entire fairness standards is inconsistent with the legislative intent and works only to frustrate the recognized purpose of the short form merger statute.