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Short-Form Mergers in Delaware

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ABSTRACT

This article analyzes the ramifications of the Delaware Supreme Court's decision in Glassman v. Unocal Exploration Corp. *that limited a minority shareholder's remedy in the short-form merger context normally to that of appraisal. This decision stands in marked contrast to the invocation of the entire fairness test that applies in parent-subsidiary long-form mergers. Nonetheless, important issues remain outstanding after* Glassman, *including the continued critical role of adequate disclosure, the determination of fair value, the viability of the "loss state remedy" theory, a parent corporation's increased use of the tender offer as a means to consummate a short-form merger, and the availability of appropriate relief, including rescissory damages, when fraud is perpetrated in the short-form merger setting. While applauding the Delaware Supreme Court's decision in facilitating the effectuation of short-form mergers, and hence in providing increased assurance of commercial certainty, Professor Steinberg posits that the Delaware courts' keen scrutiny with respect to the adequacy of disclosure in this context is crucial in order to provide minority shareholders some meaningful degree of protection.*

In *Glassman v. Unocal Exploration Corp.*,[1] the Delaware Supreme Court held that, "absent fraud or illegality, appraisal is the exclusive remedy available to a minority stockholder who objects to a short-form merger."[2] Accordingly, once a parent corporation owns at least ninety percent of the outstanding shares of another corporation, a cash-out merger may be effected, thereby eliminating the subsidiary corporation's minority shareholders.[3] The fair dealing component of the entire fairness test

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[1]777 A.2d 242 (Del. 2001).

[2]*Id.* at 248 (interpreting DEL. CODE ANN. tit. 8, § 253 (2001)).

[3]In relevant part, the Delaware short-form statute, section 253, provides:

(a) In any case in which at least 90% of the outstanding shares of each class of the stock of a corporation . . . is owned by another corporation . . ., the corporation having such stock ownership may . . . merge the other corporation . . . into itself . . . by executing, acknowledging and filing, in accordance with § 103 of this title, a certificate of such ownership and merger setting forth a copy enunciated in *Weinberger v. UOP, Inc.*[4] has no application in the short-form merger context.[5] Shares held by minority shareholders receive fair value pursuant to the statutory appraisal process.[6]

I. EXCLUSIVITY OF APPRAISAL REMEDY

In overruling its 1979 decision in *Roland International Corp. v.*

> of the resolution of its board of directors to so merge and the date of the adoption; provided, however, that in case the parent corporation shall not own all the outstanding stock of . . . the subsidiary corporation . . . the resolution . . . shall state the terms and conditions of the merger, including the securities, cash, property, or rights to be issued, paid, delivered or granted by the surviving corporation upon surrender of each share of the subsidiary corporation. . . .
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> . . . .
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> (d) In the event that all of the stock of a subsidiary Delaware corporation . . . is not owned by the parent corporation immediately prior to the merger, the stockholders of the subsidiary Delaware corporation party to the merger shall have appraisal rights as set forth in § 262 of this title.

DEL. CODE ANN. tit. 8, § 253 (2001).

[4]457 A.2d 701, 711 (Del. 1983) (explaining that fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained"). *Accord* McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000); Kahn v. Tremont Corp., 694 A.2d 422, 430-31 (Del. 1997); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985). *See generally* MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 15.04 (2001) (discussing fair dealing under *Weinberger* and its progeny).

[5]*Glassman*, 777 A.2d at 248. The Delaware Supreme Court explained:

> [W]e must decide whether a minority stockholder may challenge a short-form merger by seeking equitable relief through an entire fairness claim. Under settled principles, a parent corporation and its directors undertaking a short-form merger are self-dealing fiduciaries who should be required to establish entire fairness, including fair dealing and fair price. The problem is that § 253 authorizes a summary procedure that is inconsistent with any reasonable notion of fair dealing. In a short-form merger, there is no agreement of merger negotiated by two companies; there is only a unilateral act—a decision by the parent company that its 90% owned subsidiary shall no longer exist as a separate entity. The minority stockholders receive no advance notice of the merger; their directors do not consider or approve it; and there is no vote. Those who object are given the right to obtain fair value for their shares through appraisal.
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> The equitable claim plainly conflicts with the statute. If a corporate fiduciary follows the truncated process authorized by § 253, it will not be able to establish the fair dealing prong of entire fairness. If, instead, the corporate fiduciary sets up negotiating committees, hires independent financial and legal experts, etc., then it will have lost the very benefit provided by the statute—a simple, fast and inexpensive process for accomplishing a merger. We resolve this conflict by giving effect the intent of the General Assembly. In order to serve its purpose, § 253 must be construed to obviate the requirement to establish entire fairness.

Id. at 247-48 (citations omitted).

[6]*See id.* at 247-48.

Najjar,[7] holding that appraisal is not a minority shareholder's sole remedy in a short-form merger, the Delaware Supreme Court's rationale in *Glassman* is a retreat in shareholder protection under Delaware law.[8] No longer does the majority shareholder bear the burden of entire fairness in a short-form merger.[9] In the short-form merger context, use of the meaningful minority shareholder protective mechanism of an independent negotiating committee has become a relic of the past.[10] In this setting, "absent fraud or illegality,"[11] appraisal is deemed a sufficient remedy for providing fair value to minority shareholders.[12] However, because many shareholders fail to perfect their right to appraisal,[13] they will be relegated to the consideration offered by the majority shareholder.[14]

On the other hand, the *Glassman* decision facilitates the effectuation of related-party mergers with an increased assurance of commercial certainty.[15] Thus, the prospect of lawsuits alleging breach of fiduciary duty

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[7]407 A.2d 1032 (Del. 1979). *Roland* adopted the *Singer* principles in the short-form merger context. *Id.* at 1033 (relying on Singer v. Magnovox Co., 380 A.2d 969 (Del. 1977)). Although *Weinberger*, 457 A.2d at 715, overruled *Singer*'s business purpose test, both *Roland* and *Singer* remained good law for the proposition that minority shareholders in either a short-form or long-form merger were not relegated to appraisal if certain breaches of fiduciary duty were shown.

[8]*See Glassman*, 777 A.2d at 247-48.

[9]*Id.*

[10]*See* Kahn v. Lynch Communication Sys., Inc., 638 A.2d 1110, 1117 (Del. 1994) ("[T]he special committee must have real bargaining power that it can exercise with the majority shareholder on an arms length basis."); Rabkin v. Olin Corp., 586 A.2d 1202 (Del. 1990) (special committees can protect minority interests); Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985) (recognizing the importance of independent bargaining in protecting shareholder interests); *Weinberger*, 457 A.2d at 709-10 n.7 (stating that "the result here could have been entirely different if [the subsidiary] UOP had appointed an independent negotiating committee of its outside directors to deal with [the parent] Signal at arm's length").

[11]In this context, the term "fraud" appears to signify actual rather than constructive fraud. By contrast, among *Weinberger*'s exceptions to appraisal are "gross and palpable overreaching, self-dealing, and deliberate waste of corporate assets." *See Weinberger*, 457 A.2d at 714. Unless these breaches of fiduciary duty rise to the level of actual fraud or illegality, appraisal seems to be the exclusive remedy in short-form mergers. *See Glassman*, 777 A.2d at 247-48.

[12]*Glassman*, 777 A.2d at 247-48.

[13]*See* Enstar Corp. v. Senouf, 535 A.2d 1351, 1354 (Del. 1987) (requiring that demand for appraisal under Delaware law must be made by the stockholder of record, and asserting that "[t]he legal and practical effects of having one's stock registered in street name cannot be visited upon the issuer"). *See also* MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 83 (1976); F. HODGE O'NEAL, "SQUEEZE OUTS" OF MINORITY SHAREHOLDERS: EXCLUSION OR OPPRESSION OF BUSINESS ASSOCIATES 610 (1975); STEINBERG, *supra* note 4, § 15.06; Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 233 (1962).

[14]*See Glassman*, 777 A.2d at 247-48.

[15]*Id.* at 248 (holding that there is no requirement to establish entire fairness in short-form mergers).

in the short-form merger context becomes greatly diminished. If adequate disclosure is provided to minority shareholders to enable them to ascertain whether to perfect their right to appraisal,[16] short-form mergers will rarely be subject to successful minority shareholder challenge in breach of fiduciary duty actions.[17]

II. INCREASED USE OF TENDER OFFERS

The *Glassman* decision also provides significant comfort to a less than ninety percent controlling shareholder who contemplates cashing-out the minority shareholders. Under a scenario that will become far more common, the controlling shareholder will make an all-share, all-cash tender offer for the shares that the shareholder does not currently own. Open market purchases, although at times practicable, frequently will not be feasible due to the available float and potential impact on the stock's market price. Thus, through means of a tender offer (which will involve the Securities and Exchange Commission's (SEC) going-private and/or tender offer rules[18]), the majority shareholder will seek to attain at least ninety percent ownership of the subsidiary. Once it reaches the ninety percent level, the controlling shareholder can effect a short-form cash-out merger, thereby eliminating the minority shareholders.[19]

The foregoing acquisition technique may comply with Delaware law. A majority shareholder may make a tender offer for the minority's shares

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[16]*Id.* ("Although fiduciaries are not required to establish entire fairness in a short-form merger, the duty of full disclosure remains . . . .") (citing Malone v. Brincat, 722 A.2d 5 (Del. 1998)).

[17]Such breaches of fiduciary duty must rise to the level of fraud or illegality in order for minority stockholders in a short-form merger not to be relegated solely to their appraisal remedy. *See id.* at 247-48.

[18]*See* 17 C.F.R. §§ 240.13e-3, 13e-4 (2002). Generally, the SEC's going private rules proscribe deceptive, fraudulent or manipulative acts or practices in connection with such transactions and set forth filing, disclosure, and dissemination mandates. More extensive rules apply if the subject issuer is publicly-held. Going Private Transactions, Securities Exchange Release No. 16075, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,166 (Aug. 2, 1979). *See* Howing Co. v. Nationwide Corp., 972 F.2d 700 (6th Cir. 1992) (allowing minority shareholder action under Rule 13e-3 in freeze-out merger); ARTHUR BORDEN, GOING PRIVATE (1982 & Supp.); Neliva Kofele-Kale, *The SEC's Going Private Rules: Analysis and Developments*, 19 SEC. REG. L.J. 139 (1991) (providing detailed analysis of Rule 13(e)'s effect on going-private transactions in light of the *Howing* decision).

[19]*See* Jesse A. Finkelstein, *Recent Delaware Court Decisions Show Path to Avoid Entire Fairness Review in Subsidiary Buy-Out Transactions*, 33 Sec. Reg. & L. Rep. (BNA) 1151, 1152 (2001).

under Delaware law without being subject to a "fair price" standard,[20] provided that the transaction is deemed noncoercive and that adequate disclosure is provided to minority shareholders. Hence, in a noncoercive transaction, the fiduciary tender offeror satisfies its obligations in this context by making adequate disclosure to the minority shareholders which enables such shareholders to make an informed investment decision on whether to tender their shares.[21] Nonetheless, Delaware authority exists supporting the proposition that in certain circumstances, even if adequate disclosure is provided, a tender offer made by a controlling shareholder may be deemed coercive,[22] thereby constituting a breach of fiduciary duty.[23]

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[20]*See Glassman*, 777 A.2d at 248 ("Where the only choice for the minority stockholders is whether to accept the merger consideration or seek appraisal, they must be given all the factual information that is material to the decision.").

[21]Finkelstein, *supra* note 19, at 1152. *But see* Joseph v. Shell Oil Co., 482 A.2d 335, 341 (Del. Ch. 1984), *aff'd*, 498 A.2d 1117 (Del. 1985) (refusing to limit remedy to appraisal where the shareholder's disclosures are inadequate); *In re* Siliconix Inc. S'holders Litig., No. 18,700, 2001 Del. Ch. LEXIS 83 (Del. Ch. June 19, 2001) (requiring a showing of inadequate disclosure or coercion in order to obtain a preliminary injunction); Cottle v. Standard Brands Paint Co., Nos. 9341, 9405, & 9151, 1990 Del. Ch. LEXIS 40, at *16 (Del. Ch. Mar. 22, 1990), *reprinted in* 16 DEL. J. CORP. L. 702, 715 (1991) (limiting required disclosures to material existing facts).

[22]*See* Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, 1062 (Del. Ch. 1987) (holding, *inter alia*, that issuer self-tender offer was coercive); Kahn v. United Sugar Corp., No. 7313, 1985 Del. Ch. LEXIS 522, at *17 (Del. Ch. Dec. 10, 1985), *reprinted in* 11 DEL. J. CORP. L. 908, 917 (1986) (finding method of determining tender price to be coercive). In *Cottle*, the Delaware Court of Chancery opined on this issue:

> A claim for coercion must state that plaintiffs, the tendering stockholders, "were wrongfully induced by some act of the defendants to sell their shares for reasons unrelated to the economic merits of the sale." Thus, a two-tier tender offer in which the buyer plans to freeze out non-tendering stockholders, giving them subordinated securities in the back end, is coercive. Similarly, a "tender offer structured so as to afford shareholders no practical choice but to tender for an unfair price" or one at "a fair price, but structured and timed so as to effectively deprive stockholders of the ability to choose a competing offer—also at a fair price—that the shareholders might have found preferable" is coercive.
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> Actionable coercion does not exist, however, simply because a tender offer price is too good to pass up. Further, a self-tender offer at a premium above the shares' market price does not appear to be actionably coercive, even if paying that premium may adversely affect the market value of the remaining outstanding shares, provided that the offering materials make full disclosure of such an adverse effect.

Cottle, 1990 Del. Ch. LEXIS 40, at *9-*10 (citations omitted). For a more narrow view, see *In re Siliconix Inc. S'holders Litig.*, 2001 Del. Ch. LEXIS 83, at *58-*65. *See generally* Dennis J. Block & Jonathan M. Hoff, *The Doctrine of Inequitable Coercion Under Delaware Law*, N.Y.L.J., Apr. 22, 1999, at 5 (discussing claims of fiduciary breach based on the theory of inequitable coercion).

[23]*See Eisenberg*, 537 A.2d at 1062; *Kahn*, 1985 Del. Ch. LEXIS 522, at *18, *reprinted in* 11 DEL. J. CORP. L. at 918. In the tender offer followed by cash-out merger scenario orchestrated by a majority shareholder, the price paid in the tender offer should be a relevant factor in determining fair value in the appraisal proceeding. *Weinberger*, 457 A.2d at 713-14.

III. IMPORTANCE OF ADEQUATE DISCLOSURE

Disclosure in this context is vitally important. Adequate disclosure enables minority shareholders to make informed decisions about whether to accept the consideration offered or to seek appraisal.[24] The duty of candor, even where shareholder action is not sought, has been established in Delaware,[25] imposing upon the subject fiduciary the obligation to disclose all material facts germane to the minority shareholder's determination of whether to undertake the appraisal route.[26] The integrity of the shareholder decision-making process itself is at stake rather than the saddling of monetary liability or sanctions on an allegedly culpable party;[27] therefore, the objective sufficiency of the information disclosed should be the applicable standard.[28] In other words, upon proof that minority shareholders were presented with a materially deficient disclosure by the controlling shareholder, those shareholders who had not perfected their

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See generally Theodore N. Mirvis, *Two-Tier Pricing: Some Appraisal and "Entire Fairness" Valuation Issues*, 38 BUS. LAW. 485 (1993) (illustrating the variety of factors used to determine fair value).

[24]*See Glassman*, 777 A.2d at 248.

[25]Malone v. Brincat, 722 A.2d 5, 14 (Del. 1998). *See* McMullin v. Beran, 765 A.2d 910, 917 (Del. 2000); Lynch v. Vickers Energy Corp., 383 A.2d 278, 279 (Del. 1978). *See generally* Lawrence A. Hamermesh, *Calling Off the Lynch Mob: A Corporate Director's Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087 (1996) (identifying and discussing the development and application of fiduciary disclosure duty); Mark Klock, *Litigating Securities Fraud as a Breach of Fiduciary Duty in Delaware*, 28 SEC. REG. L.J. 296 (2000) (analyzing *Malone*).

[26]*See Glassman*, 777 A.2d at 248. *See also* Stroud v. Grace, 606 A.2d 75, 84-87 (Del. 1992) (arguing that Delaware's duty of candor offsets the relevant protections to shareholders under federal laws).

[27]*See Malone*, 722 A.2d at 9 (holding that "directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder violate their fiduciary duty, and may be held accountable in a manner appropriate to the circumstances").

[28]Interpreting *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1978), and *Stroud v. Grace*, 606 A.2d 75 (Del. 1992), the Delaware Supreme Court in *Malone* opined:

> An action for a breach of fiduciary duty arising out of disclosure violations in connection with a request for stockholder action does not include the elements of reliance, causation and actual quantifable [sic] monetary damages. Instead, such actions require the challenged disclosure to have a connection to the request for shareholder action. *The essential inquiry in such an action is whether the alleged omission or misrepresentation is material.* Materiality is determined with respect to the shareholder action being sought.

Malone, 722 A.2d at 12 (emphasis added). *Cf.* Ash v. LFE Corp., 525 F.2d 215, 220 (3d Cir. 1975) (stating that "the objective sufficiency of the disclosure" is the standard in actions seeking injunctive relief under the federal proxy provision, Section 14(a) of the Securities Exchange Act). Note that the Delaware Supreme Court in *Glassman* viewed the short-form merger at issue as involving shareholder action. *See Glassman*, 777 A.2d at 248 ("Although fiduciaries are not required to establish entire fairness in a short-form merger, the duty of full disclosure remains, in the context of this request for stockholder action.").

right to appraisal should have the election to opt for the monetary equivalent of that remedy (in lieu of being relegated to the consideration paid in the short-form merger). Of course, if materially false information was knowingly disseminated by the controlling shareholder to the minority (thereby constituting fraud or illegality), a breach of fiduciary duty would exist,[29] giving rise to appropriate relief, including the availability of rescissory damages.[30]

IV. DETERMINATION OF FAIR VALUE

The determination of "fair value" in an appraisal proceeding compensates the minority shareholder for the "taking."[31] Reaffirming *Weinberger* with respect to the scope of appraisal,[32] the Delaware Supreme Court in *Glassman* opined that "[t]he determination of fair value must be based on *all* relevant factors, including damages and elements of future value, where appropriate."[33] Importantly, if a controlling shareholder times

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[29]*See Malone*, 722 A.2d at 14.

[30]*Weinberger*, 457 A.2d at 714. "Generally, a rescissory damages award allows the plaintiff to recover the value of the stock at the time of resale or at the time of judgment and does not limit the plaintiff to the stock's value at the time of the merger." Marc I. Steinberg & Evalyn N. Lindahl, *The New Law of Squeeze-Out Mergers*, 62 WASH. U. L.Q. 351, 379 (1984).

[31]*Glassman*, 777 A.2d at 246.

[32]*See id.* at 248:

> "[W]e . . . reaffirm *Weinberger's* statements about the scope of appraisal. The determination of fair value must be based on *all* relevant factors, including damages and elements of future value, where appropriate. So, for example, if the merger was timed to take advantage of a depressed market, or a low point in the company's cyclical earnings, or to precede an anticipated positive development, the appraised value may be adjusted to account for those factors. We recognize that these are the types of issues frequently raised in entire fairness claims, and we have held that claims for unfair dealing cannot be litigated in an appraisal. But our prior holdings simply explained that equitable claims may not be engrafted onto a statutory appraisal proceeding; stockholders may not receive rescissionary relief in an appraisal. Those decisions should not be read to restrict the elements of value that properly may be considered in an appraisal.

Id.

[33]*Id. See* STEINBERG, *supra* note 4, § 15.05 (discussing the impact of elements of future value, availability of equitable relief, two-tier offers, and the stock exchange exception on fair value); Rutherford B. Campbell, *Fair Value and Fair Price in Corporate Acquisitions*, 78 N.C. L. REV. 101 (1999) (recognizing the inherent tension between moral and economic incentives in determining fair value); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613 (1998) (pointing out the need for statutory and judicial change in light of the *Weinberger* decision). Reflecting on *Weinberger*, the Delaware Supreme Court in *Glassman* explained:

> On the subject of appraisal, the [*Weinberger*] Court made several important statements: (i) courts may consider "proof of value by any techniques or

a short-form merger to take advantage of a depressed price for the corporation's stock or a low point in its cyclical earnings or to precede the public announcement of anticipated positive "news," the appraisal valuation may be adjusted to reflect such factors. Nonetheless, unfair dealing and other equitable claims play no role in an appraisal proceeding; hence, stockholders may not be awarded rescissionary relief in an appraisal.[34]

V. FEDERAL ACTIONS—LOSS STATE REMEDY THEORY

With respect to the application of federal law in the short-form merger setting, lack of adequate disclosure may give rise to a Section 10(b) right of action.[35] In this context, the potential loss of an available state remedy, such as appraisal, may trigger the invocation of Section 10(b).[36] Even though minority shareholders in a short-form merger lack the requisite voting power to prevent the merger's consummation, loss causation may be established by proving that inadequate disclosure lulled such shareholders to bypass an available state remedy that would have protected them from

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> methods which are generally considered acceptable in the financial community and otherwise admissible in court. . . .," (ii) fair value must be based on "all relevant factors" which include not only "elements of future value . . . which are known or susceptible of proof as of the date of the merger" but also, when the court finds it appropriate, "damages, resulting from the taking, which the stockholders sustain as a class;" and (iii) "a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established. . . ."

Glassman, 777 A.2d at 246 (quoting *Weinberger*, 457 A.2d at 713-14).

[34]*Glassman*, 777 A.2d at 248. Such a cash-out transaction by a controlling shareholder having material inside information violates Section 10(b) of the Securities Exchange Act. *See* Chiarella v. United States, 445 U.S. 222 (1980) (recognizing that silence is violative of section 10(b) where there is a fiduciary duty to disclose); William Wang & Marc Steinberg, *Insider Trading* (1996 & 2002 Supp.).

[35]Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2000). *See generally* ALAN R. BROMBERG & LEWIS D. LOWENFELS, SECURITIES FRAUD & COMMODITIES FRAUD (CCH Bus. Law. eds., 2d ed. 1993) (detailing federal securities laws). If a controlling shareholder owning less than ninety percent of the subject corporation's shares makes a tender offer to attain that equity status, such transaction will invoke the SEC's going private and/or tender offer rules. *See supra* note 18.

[36]Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1107 (1991) (leaving open whether a federal court of action lies where shareholders are deprived of state law remedies); Field v. Trump, 850 F.2d 938, 948 (2d Cir. 1998) (recognizing the validation of section 10(b) actions irrespective of the existence of remedies under state law); Healey v. Catalyst Recovery, Inc., 616 F.2d 641, 646 (3d Cir. 1980) (pointing out that loss of state remedies can form the basis for a 10(b) claim); Goldberg v. Meridor, 567 F.2d 209, 221 (2d Cir. 1977) (allowing a 10(b) suit where inadequate disclosure prevents shareholders from protecting themselves).

financial loss, namely that of appraisal.[37] The loss state remedy theory has been embraced by lower federal courts[38] and likely will remain viable in the short-form merger setting.[39]

VI. CONCLUSION

The Delaware Supreme Court's decision in *Glassman* signifies a return to the principles enunciated four decades ago in *Stauffer v. Standard Brands Inc.*[40] that, absent fraud or illegality, appraisal is a minority shareholder's exclusive remedy in a short-form merger.[41] The decision thus facilitates the consummation of mergers that purportedly should prove beneficial to the economy.[42] Minority shareholder protection is provided by the application of "all relevant factors" in the appraisal proceeding to

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[37]*See* United States v. Margala, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,363 (9th Cir. 1981) (allowing a 10(b) suit where inadequate disclosure prevents shareholders from protecting themselves from loss); MARC STEINBERG, UNDERSTANDING SECURITIES LAW § 8.05 (3d ed. 2001).

[38]*See* Wilson v. Great Am. Indus., Inc., 979 F.2d 924, 931 (2d Cir. 1992); Howing Co. v. Nationwide Corp., 927 F.2d 700, 708-09 (6th Cir. 1992). *But see* Isquith v. Caremark Int'l, Inc., 136 F.3d 531, 535 (7th Cir. 1998) (refusing to allow federal securities action absent a showing of deceased market value of the shareholder's stock). *See generally* Marc Steinberg & William A. Reece, *The Supreme Court, Implied Rights of Action, and Proxy Regulation*, 54 OHIO ST. L.J. 67, 102-13 (1993) (explaining the development of the loss state remedy theory).

[39]With respect to the duty of candor under Delaware law and its relationship to the disclosure mandates of the federal securities laws, the Delaware Supreme Court addressed this issue in *Malone v. Brincat*:

> The historic roles played by state and federal law in regulating corporate disclosures have been not only compatible but complimentary. That symbiotic relationship has been perpetuated by the recently enacted federal Securities Litigation Uniform Standards Act of 1998. Although that statute by its terms does not apply to this case, the new statute will require securities class actions involving the purchase or sale of nationally traded securities, based upon false or misleading statements, to be brought exclusively in federal court under federal law. The 1998 Act, however, contains two important exceptions: the first provides that an "exclusively derivative action brought by one or more shareholders on behalf of a corporation" is not preempted; the second preserves the availability of state court class actions, where state law already provides that corporate directors have fiduciary disclosure obligations to shareholders. These exceptions have become known as the "Delaware carve-outs."

Malone, 722 A.2d at 13 (footnotes omitted).

[40]187 A.2d 78 (Del. 1962).

[41]*Id.* at 80. *See Glassman*, 777 A.2d at 247-48.

[42]*See* KENNETH M. DAVIDSON, MEGA-MERGERS (1985); KNIGHTS, RAIDERS & TARGETS (Jack Coffee et al. eds., 1988); Frank H. Easterbrook & Daniel R. Fishel, *The Proper Role of Target Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981); Editorial, *A Happy Jig*, WALL ST. J., Oct. 7, 1985.

ensure that "fair value" is awarded.[43] In order to make this process function properly—facilitating short-form mergers while according minority shareholders fair consideration—adequate disclosure becomes a paramount determinant.[44] Without disclosure of all material facts, minority shareholders may be lulled into inaction, bypassing their appraisal rights.[45] Accordingly, failure to provide adequate disclosure should entitle any shareholder to invoke an appropriate remedy within a reasonable time after becoming aware of such disclosure deficiency.[46] This construction, while recognizing controlling ownership interests, preserves in some measure the legitimate economic interests of minority shareholders.

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[43]*Glassman*, 777 A.2d at 247-48.

[44]*Id.* at 248.

[45]United States v. Margala, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,363 (9th Cir. 1981).

[46]*See supra* notes 16, 20, 24-28 and accompanying text. If such disclosure deficiency is knowingly disseminated to the minority by the majority shareholder, an action for fraud and breach of fiduciary duty may be stated, giving rise to the award of appropriate relief, including rescissory damages. *See supra* notes 29-40 and accompanying text.