An Appraisal of Appraisal Rights in Delaware

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Shareholders dissatisfied with the corporation’s decision to merge or consolidate may seek redress by asking a court to assign a fair value to their shares. The right to an appraisal is longstanding and “entirely a creature of statute.” Exercising the right, however, entails certain risks. Under Delaware law, the process is uncertain and can result in a value less than what was offered in the merger. In addition, the process may take years to complete, with shareholders remaining unpaid until completion of the judicial valuation process.

Shareholders, therefore, must make a difficult calculation in determining whether to exercise appraisal rights. Nonetheless, reports have suggested that hedge funds and other professional investors have targeted appraisal rights as a method of enhancing their return. These investors at least sometimes make tactical purchases of stock in target companies in order to obtain these rights. Some even wait until after the record date but before the shareholder vote to buy the shares subject to appraisal rights.

Shareholders exercising appraisal rights, including speculative investors, presumably do so because they believe that the process will re-

3. See infra Part I.A.
4. Steven Davidoff Solomon, Fine Legal Point Poses Challenge to Appraisal Rights, DEALBOOK, NEW YORK TIMES (May 30, 2014, 2:59 PM) (discussing how Merion Capital, a hedge fund, “is exercising appraisal rights as a business strategy.”). See also LATHAM & WATKINS, LLP, Appraisal Arbitrage: When Will it Become a New Hedge Fund Strategy?, M&A DEAL COMMENTARY, 1–2 (May 2007), (suggesting that the Delaware Court of Chancery’s decision in In re Appraisal of Transkaryotic Therapies, Inc. created a “new ‘market’ in appraisal rights” by holding that investors who purchase shares in the target company after the record date “may assert appraisal rights so long as the aggregate number of shares for which appraisal is being sought is less than the aggregate number of shares that either voted no on the merger or didn’t vote on the merger.”), available at http://www.lw.com/upload/pubcontent/_pdf/pub1883_1.pdf. See also In re Appraisal of Transkaryotic Therapies, Inc., No. Civ.A. 1554–CC, 2007 WL 1378345 (Del. Ch. May 2, 2007).
sult in a more favorable valuation. Empirically, they appear to be correct. An examination of reported appraisal cases over the last five years indicates that fair value generally exceeds the merger price, sometimes by a considerable amount. Even where shareholders receive only a modest improvement over the merger price, they benefit through a highly favorable interest rate mandated by statute.

Part I of this paper provides an overview of appraisal rights. It includes a discussion of appraisal-triggering events, the applicable process, the consequences of exercising appraisal rights, and the methodologies developed by the courts to value the shares. Part II.A discusses the actual results of judicial valuations of shares in cases resolved over the last five years, and examines the rationale the court supplies in making this determination. Finally, Part II.B proposes that the subjective nature of the court’s determination of fair value of the dissenting shareholders’ shares actually benefits shareholders in Delaware.

I. OVERVIEW OF APPRAISAL RIGHTS

Appraisal rights are a statutory remedy available to minority shareholders of a corporation who object to the price paid for their shares in a merger or consolidation. The remedy enables dissenting shareholders to require the acquirer to repurchase their stock at a price equivalent to “the fair or intrinsic value of the corporation’s stock immediately before the merger.” The statute assigns to the courts the final authority to determine “fair value.”

These rights arose out of the common law requirement that prohibited a corporation from making a “fundamental organic change” without unanimous shareholder approval. An inflexible approach, states eventually abrogated from this authority and provided appraisal rights as an alternative. First appearing in the 1920s, appraisal statutes were only put to common use in the 1960s.
The process of exercising appraisal rights generally involves three distinct steps: a triggering event, notice and exercise, and judicial valuation of the shares. Statutes differ in a number of fundamental ways, most commonly with respect to the triggering events and the timing of the payment to dissenting shareholders.

A. Triggering Events in Delaware

Under Delaware law, appraisal rights are automatically triggered by some but not all mergers. The market-out exception eliminates appraisal rights in mergers with companies that are widely traded. That exception, in turn, does not apply where the consideration is paid in cash. Delaware also allows for private ordering with respect to appraisal rights. A corporation may, through its certificate of incorporation, pro-
vide for appraisal rights “for the shares of any class or series of its stock.”"^{26}

B. The Appraisal Process in Delaware

Shareholders seeking to assert appraisal rights must conform to a number of procedural requirements.\(^{27}\) Specifically, they must provide the corporation with pre-merger notice, hold the shares continuously through the effective date of the transaction, and not vote in favor of the proposed merger or consolidation.\(^{28}\) Failure to take any of these steps results in waiver of the right to an appraisal.

i. The Process for Seeking an Appraisal

The initial obligation with respect to appraisal rights falls on the corporation.\(^{29}\) The corporation must provide notice of appraisal rights at least twenty days before the shareholder meeting seeking approval of the transaction.\(^{30}\) Notice must include a copy of the statute and provide a detailed explanation of the process for perfecting appraisal rights.\(^{31}\) If the corporation does not fulfill these requirements, the court may nonetheless permit shareholders to seek a quasi-appraisal remedy.\(^{32}\)

Although not required by statute, directors have, as a matter of fiduciary duty, an obligation to disclose to shareholders “the available material facts that would enable them to make an informed decision, pre-merger, whether to accept the merger consideration or demand appraisal.”\(^{33}\) Material facts are those in which there is a “substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”\(^{34}\) For example, companies may have an obligation to provide financial disclosure in the pre-merger notice.\(^{35}\)

\(^{26}\) [DEL. CODE ANN. tit. 8, § 262(c) (2013)].
\(^{27}\) See id. at § 262(a).
\(^{28}\) See id.
\(^{29}\) See id. at § 262(d)(1).
\(^{32}\) See BALOTTI & FINKELSTEIN, supra note 30. Quasi appraisal actions arise where the statutory requirements for an appraisal action have not been met but dissenting shareholders are nonetheless allowed to petition a court for a determination of fair value. Robert B. Schumer, Quasi-Apraisal: The Unexplored Frontier of Stockholder Litigation?, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Scott Hirst, ed., Feb. 21, 2012, 9:34 AM), http://blogs.law.harvard.edu/corpgov/2012/02/21/quasi-appraisal-the-unexplored-frontier-of-stockholder-litigation/. The availability of a quasi-appraisal differs from case to case, but is generally recognized in cases where the corporation fails to make the requisite disclosures, and it has directly affected the shareholders’ decision of whether to seek an appraisal. Id.
\(^{33}\) BALOTTI & FINKELSTEIN, supra note 30.
\(^{34}\) In re Orchard Enters., Inc. Stockholder Litig., 88 A.3d 1, 17 (Del. Ch. 2014).
\(^{35}\) See generally Gilliland v. Motorola, Inc., 859 A.2d 80 (Del. Ch. 2004) (holding that Motorola, Inc. did not satisfy its disclosure duty when it failed to provide any financial information).
Prior to the vote on the consolidation or merger, a dissenting shareholder must submit a written demand, allowing the corporation to assess the “appraisal risk” before proceeding with the transaction. The demand must “reasonably inform the corporation” of the shareholder’s identity and intent to seek an appraisal. Shareholders are entitled to notification of approval of the transaction and can withdraw their demand anytime within sixty days of the effective date. Shareholders may also request a written statement setting out the number of shares subject to appraisal.

ii. Commencement of Appraisal Proceeding

The corporation or dissenting shareholder may file a petition with the Court of Chancery requesting a determination of fair value of the shares within 120 days of the effective date of the transaction. The corporation has twenty days to submit a consolidated list of the names of the shareholders demanding payment for their shares. The Chancery Court has the authority to determine the shareholders entitled to exercise appraisal rights.

In determining fair value, the court takes into account “all relevant factors.” Relevant factors are those “known or ascertainable as of the merger date that illuminates the future prospects of the company.” They include “assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s

37. BALOTTI & FINKELSTEIN, supra note 30. Specifically, the pre-merger notice informs the corporation of the number of dissenting shareholders and the number of shares demanding an appraisal. See id. at § 262(e). The shareholder must make the request within 120 days from the effective date of the merger. See also BALOTTI & FINKELSTEIN, supra note 30. The corporation must mail the statement within ten days after the delivery period for demands for appraisal, or within ten days of the shareholder’s request. Id.
38. DEL. CODE ANN. tit. 8, § 262(d)(1) (2013). There is, however, no “specific” form the shareholder must use. Id.
39. BALOTTI & FINKELSTEIN, supra note 30. Within ten days after approval of the transaction, the surviving corporation must inform each dissenting shareholder who submitted a written appraisal as of the merger’s effective date. See DEL. CODE ANN. tit. 8, § 262(d)(1) (2013).
40. See id. The corporation must mail the statement within ten days from the effective date of the merger. See also BALOTTI & FINKELSTEIN, supra note 30. The corporation must mail the statement within ten days after the end of the delivery period for demands for appraisal, or within ten days of the shareholder’s request. Id.
41. See DEL. CODE ANN. tit. 8, § 262(e) (2013). If filed by a dissenting shareholder, the shareholder must serve a copy of the petition to the corporation. Id.
42. See DEL. CODE ANN. tit. 8, § 262(f) (2013). The Court of Chancery may hold a hearing and determine the number of shareholders who have complied with the statutory requirements and are therefore entitled to appraisal rights. See id. at § 262(g). Every dissenting shareholder bears the burden of proving fulfillment of the statutory prerequisites. BALOTTI & FINKELSTEIN, supra note 30.
43. See DEL. CODE ANN. tit. 8, § 262(h) (2013).
stock.”46 The court cannot, however, take into consideration any value resulting from the completion or expectation of the merger or consolidation.47

At trial, both parties must establish their proposed valuation by a preponderance of the evidence.48 The court can accept either valuation model, create its own, or use independent judgment to determine fair value.49 Payment to shareholders occurs only after judicial determination of fair value, a period that can take years.50 Shareholders, however, receive interest calculated from the effective date of the merger through the day of payment.51 The statute imposes an interest rate equal to 5% over the Federal Reserve discount rate.52

C. Valuation Methodologies

Fair value is “the value of the Company to the stockholder as a going concern, rather than its value to a third party as an acquisition.”53 The courts seek only to determine the value of “what has been taken from the shareholder.”54 The calculation looks to the value at “the point just before” the transaction55 and thus excludes the effect of the merger or consolidation.56 The approach also excludes discounts that arise from the sale of a minority position.57

i. Methodologies

Fair value depends upon the selected valuation method (or methods).58 Courts consider “all generally accepted techniques of valuation used in the financial community.”59 Three methods are most common:

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47. See DEL. CODE ANN. tit. 8, § 262(h) (2013).
49. See id. at *3.
50. See, e.g., Appraisal of the Orchard Enters., 2012 WL 2923305 (wherein the appraisal process took three years from the date of the company’s initial payment to shareholders).
51. See DEL. CODE ANN. tit. 8, § 262(h) (2013).
52. See id. Courts allow the rate unless there is good cause not to. Id.
56. DEL. CODE ANN. tit. 8, § 262(h) (2013).
57. See, e.g., Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) (“The application of a discount to a minority shareholder is contrary to the requirement that the company be viewed as a ‘going concern.’”).
58. Notably, the Model Business Corporation Act’s appraisal provision seeks to increase economical and satisfying solutions in appraisal actions by “motivating the parties to settle their differences in private negotiations without resort to judicial appraisal proceedings.” MODEL BUS. CORP. ACT § 13.01 cmt. 1 (2002) (emphasis added).
discounted cash flow analysis (DCF); comparable companies analysis; and the comparable transactions analysis.\textsuperscript{60}

The comparable companies and comparable transactions analyses are alike in that they both look to similarly situated enterprises.\textsuperscript{61} The former analysis compares the corporation to publicly traded companies using “price multiples of each corporation’s stock against selected benchmarks.”\textsuperscript{62} The latter analysis “requires finding similar transactions, quantifying those transactions through financial metrics, and applying those metrics to the company at issue in order to arrive at a value.”\textsuperscript{63} Both methods raise concerns over reliability. Not enough data always exists to make adequate comparisons. Moreover, different stages of growth may make comparisons problematic.\textsuperscript{64}

The DCF method is “probably the most prominent and frequently used” method of appraisal.\textsuperscript{65} The model presumes that “the value of a company is equal to the present value of its projected future cash flows.”\textsuperscript{66} The method looks to cash flow projections over a specified period of time, typically five years, plus a terminal value, multiplied by a discount rate.\textsuperscript{67} The terminal value entails a calculation of the present value of all of the company’s future cash flows commencing after the specific projection period.\textsuperscript{68}

The applicable discount rate seeks to establish the present value of projected cash flows and terminal value.\textsuperscript{69} This step “has a profound ef-

\textsuperscript{60} Appraisal and Alternative Valuation Methods, PRACTICAL LAW, http://us.practicallaw.com/2-568-9286 (last visited Dec. 11, 2014). Other methods include: the comparable company approach; the segmented valuation approach; the comparable acquisition approach; earnings value; market value; and asset value. See generally Harvard Law Review Association, supra note 20.


\textsuperscript{65} Wertheimer, supra note 13, at 628.

\textsuperscript{66} BALOTTI & FINKELSTEIN, supra note 55.

\textsuperscript{67} See generally U.S. Cellular Operating Co., 2005 WL 43994. The amount does not take into account the taxes paid on any earnings. See In re Radiology Assocs., Inc. Litig., 611 A.2d 485, 495 (Del. Ch. 1991) (“Therefore, in applying the discounted cash flow approach, I use cash flows that neither include a deduction for taxes nor a corresponding adjustment (i.e., an addition) for taxes.”).

\textsuperscript{68} See Jay W. Eisenhofer and John L. Reed, Valuation Litigation, 22 DEL. J. CORP. L. 37, 113 (1997).

\textsuperscript{69} See U.S. Cellular Operating Co., 2005 WL 43994, at *15.
fect on the share price in an appraisal action."\textsuperscript{70} The discount rate is usually industry-specific and derived from the corporation’s weighted average cost of capital.\textsuperscript{71}

After computing the present value, the courts will add any non-operating assets.\textsuperscript{72} Then, “the total of these figures is divided by the number of shares outstanding, and the resulting amount is the fair value per share of the company.”\textsuperscript{73} Since the DCF method seeks to denote the present value of the company’s cash flow, the result “fully reflects the value of the company as a going concern”\textsuperscript{74} As a result, adjustments to reflect a minority discount or the added value of the merger are unnecessary.

ii. Subjectivity and Uncertainty

Despite primary reliance on a single method of valuation, the “problems endemic to an appraisal proceeding . . . cannot be eliminated by the choice of [a particular] methodology.”\textsuperscript{75} Such problems stem from the fact that the appraisal value represents a mere estimation of the “fair value” of a company, which is “dependent on the assumptions underlying the calculations employed.”\textsuperscript{76}

The DCF analysis entails significant uncertainty. For example, to determine the prospective cash flows of an enterprise, courts look to “historical data, operating trends, and other relevant factors, but it is still nothing more than a prediction of future events.”\textsuperscript{77} Likewise, computing the applicable discount entails underlying assumptions that can lead to uncertainty.\textsuperscript{78} Calculation of terminal value has also been described as “exercises in guesswork and subjectivity.”\textsuperscript{79}

The inherent lack of objectivity has the practical result of transforming appraisal proceedings into a ballet of experts.\textsuperscript{80} These experts, even while relying on the same methodology can reach starkly contrasting conclusions. For example, in \textit{Neal v. Alabama By-Products Corp.},\textsuperscript{81} both

\begin{itemize}
\item \textsuperscript{70} \textsc{Balotti} \& \textsc{Finkelstein}, \textit{supra} note 52 (quoting Crescent/Mach I P’ship, L.P. v. Turner, No. Civ.A. 17455–VCN, 2007 WL 1342263 (Del. Ch. May 2, 2007)).
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textsc{Balotti} \& \textsc{Finkelstein}, \textit{supra} note 55. For example, excess working capital—the “amount of working capital beyond the amount an entity needs to fund its business”—is a non-operating asset. In re Radiology Assocs., Inc. Litig, 611 A.2d 485, 495–96 (Del. Ch. 1991).
\item \textsuperscript{73} \textsc{Balotti} \& \textsc{Finkelstein}, \textit{supra} note 55.
\item \textsuperscript{74} \textit{Id.}
\item \textsuperscript{75} \textit{Wertheimer, \textit{supra} note 13, at 629.}
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{Id.}
\item \textsuperscript{78} See \textsc{Eisenhofer} \& \textsc{Reed}, \textit{supra} note 68.
\item \textsuperscript{79} \textit{Wertheimer, \textit{supra} note 13, at 630.}
\item \textsuperscript{80} \textit{Id.} at 629.
\item \textsuperscript{81} CIV. A. No. 8282, 1990 WL 109243 (Del. Ch., Aug. 1,1990).
\end{itemize}
parties’ experts used models based upon net assets and discounted future returns, yet obtained vastly differing results. The “widely divergent” views on assets and liability forced the court “to pick and choose among the competing contentions, in search of a reasonable, and fair, value.”

II. EMPIRICAL ANALYSIS OF APPRAISAL ACTIONS SINCE 2010

Shareholders invoking appraisal rights, therefore, face a number of risks. A dissenting shareholder “loses the traditional benefits of stock ownership,” such as the right to receive payment of dividends and other distributions on the shares. The change in status essentially places the shareholder’s investment “in limbo” until the resolution of the appraisal action. Moreover, Delaware defers any payment until the determination of fair value. As a result, the dissenting shareholders become subject to the company’s credit risk. Mostly, however, shareholders face uncertainty with regard to the outcome. Because courts do not take the merger price into account, fair value can be less than the amount paid to other shareholders.

Finally, shareholders generally must absorb the expenses associated with the appraisal process, although not court costs.

Shareholders do uniquely benefit from one aspect of the statutory framework. Although not paid until after the determination of “fair value,” shareholders receive a statutory interest rate calculated from the date of closing until the award is actually paid. Statutory interest “serves to avoid an undeserved windfall to the respondent in an appraisal action, who would otherwise have had free use of money rightfully belonging to

82. See id. at *8–9.
83. Id. at *9.
84. BALOTTI & FINKELSTEIN, supra note 30 (quoting Ala. By-Pros. Corp. v. Cede & Co., 657 A.2d 254, 258–59 (Del. 1995)). For the most part, this change in shareholder status occurs on the effective date of the merger. Id.
86. Id. Under the Model Business Corporation Act, in contrast, a dissenting shareholder must receive an amount in cash equal to the corporation’s estimate of fair value within 30 days. See MODEL BUS. CORP. ACT § 13.24 (2002). If the dissenting shareholders demand further payment and the court proceeds with an appraisal hearing, the shareholders will receive the remainder of the “fair value” at the end of the proceeding. Id. Unlike under the Delaware statute, this means that the only payment withheld from dissenting shareholders is the disputed amount. Id.
87. BALOTTI & FINKELSTEIN, supra note 30.
88. Specifically, “[t]he costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances.” DEL. CODE ANN. tit. 8, § 262(j) (2013). The court can charge the expenses “pro rata against the value of all the shares entitled to an appraisal.” Id.
89. Absent bad faith, the court typically allocates court costs to the surviving corporation. Siegel, supra note 21, at 240. See also Tri-Cont’l Corp. v. Battye, 74 A.2d 71, 77 (Del. 1950); Meade v. Pac. Gamble Robinson Co., 58 A.2d 415, 418 (Del. 1948).
the petitioners. . . . the respondent derived a benefit from having the use of the petitioners’ funds at no cost.”

The court awards shareholders statutory interest on the appraisal award at a rate equal to the Federal discount rate, plus 5%. Absent good cause to find otherwise, the interest applies regardless of the court’s determination with respect to fair value. As a result, some investors will profit even if the court awards an amount that is equal to, or only slightly above, the merger price. For example, in Merion Capital, L.P. v. 3M Cogent, Inc., the court appraised the shares at $0.37 higher than what was received in the merger, yet the statutory interest rate was over seven times greater than the federal discount rate. Declining to adhere to the respondent’s objections to the rate, the Court of Chancery noted, “[t]here are risks to both sides in an appraisal proceeding, however, and the applicable interest rate is only one of them.” In addition, because of the sizable interest rate, “the mere threat of the mounting interest cost can coerce companies into considering unfavorable settlements with stockholders bent on pursuing an appraisal action.”

A. Empirical Evidence

Until recently, “the remedy [of appraisal rights] had been infrequently invoked, at least as measured by reported legal decisions.” Between 1972 and 1981, for example, there were only about 20 reported state court decisions. That, however, has changed, with appraisal actions becoming more common.

Given the subjectivity involved in valuing shares, the benefits to shareholders of asserting appraisal rights remain difficult to predict. The following section, however, seeks to reduce some of the uncertainty. The section analyzes the twelve reported appraisal actions in Delaware that occurred from 2010 through the present and compares the price obtained
in the merger to the fair value determined by the court. Over this period, the Court of Chancery has generally appraised the value of the dissenting stockholder’s shares at a value significantly higher than what was received as consideration for the merger or consolidation. As shown in the appendix, the court set the fair value anywhere from 3% to as much as 149% above the merger price. Moreover, the downside risk seems limited. In four of the cases, the court found that the price paid in the offering was fair.

Two cases set the value below the merger consideration. The unique circumstances of these cases, however, should be taken into account. In In re Trados Incorporated Shareholder Litigation, the company actually valued the common stock at zero and gave a monetary value only to its preferred stock. The $0.10 per share value was only found within some Board meeting minutes, and the court agreed with the company that the shares had no actual value.

Additionally, shareholders considering bringing an appraisal action should not be overly concerned with the court’s decreased fair value price in Gearreald v. Just Care, Inc. In Gearreald, the court determined the fair value of the company was approximately $5.75 million less than what was obtained as cash consideration in the merger. This “decreased” figure is deceiving, however, because it fails to show that $6 million of the $40 million acquisition price was “held in escrow to pay claims against the Company arising during the two-year period following the close of the merger, including appraisal claims and costs.” If the amount held in escrow is taken into account in the company’s initial fair value determination, then it becomes clear that the court did not actually find a decreased value through the appraisal proceeding.

B. Shareholder-Friendly Valuations

In the past five years, shareholders seem more likely to receive a favorable valuation from the Court of Chancery. This occurs most often when the court removes subjective factors from the fair market assessment. For example, in In re Appraisal of the Orchard Enterprises, Inc., one of the court’s main concerns was determining the discount rate. The court noted, “[r]ather than . . . use methods that involve great subjectivity

102. See infra Table: Appraisal Actions 2010–2014.
103. See infra Table: Appraisal Actions 2010–2014.
104. 73 A.3d 17 (Del. Ch. 2013).
105. See id. at 69–70.
106. See id. at 70.
108. See id. at *1.
109. Id. at *3.
110. See id. at *1, *3 ($40 million – $6 million held in escrow = $34 million fair value, and the court determined that $34,244,570 was the fair value of the company).
and lack firm grounding in corporate finance theory, . . . I choose to determine the discount rate using only the CAPM method." In doing so the court rejected both parties’ discount rate valuations, which relied on a number of methods, and opted for a more simplified approach.

This indicates that shareholders may have an easier time predicting whether benefits will result from appraisal actions, to the extent that the methodology becomes more standardized. Should courts coalesce in adhering to valuation methods with less underlying assumptions imbedded within them, shareholders will face less uncertainty in seeking an appraisal remedy.

Like Orchard Enterprises, the court in Laidler v. Hesco Bastion Environmental, Inc. found an increased fair value of the shareholders’ shares through the appraisal proceeding. In Laidler, the increased valuation turned on the unwillingness of the Chancery Court to exclude entirely non-recurring revenue.

The company’s expert provided a valuation that sought to back “out certain revenues” that former management indicated were non-recurring, such as those generated from the BP oil spill. Rather than make estimates based on unpredictable “non-recurring” or “recurring” environmental disasters in determining future cash flows, the Court instead averaged past cash flows from the prior three years.

These cases suggest that appraisal rights are worth the risk when there is a clear non-subjective basis for arguing for a higher value. When shareholders can readily designate the subjective factors imbedded in the appraisal, they are more likely to obtain a greater price per share than what was received in the merger.

III. CONCLUSION

The court’s determination of fair value is subjective in nature. Nonetheless, certain elements of the valuation process have become more predictable. For the most part, the courts use the cash value with the least amount of speculation involved. Moreover, the courts have appeared unsympathetic to efforts to reduce value through the complete exclusion of non-recurring revenue.

111. Appraisal of the Orchard Enters., 2012 WL 2923305, at *3 ("CAPM" standing for capital asset pricing model).
112. See id. at *1, *3. The court chose to use one method, rather than "shroud [its] determination of fair value in the false precision of averaging the results of three different methods of calculating cost of capital in coming to a single discount rate..." Id. at *3.
113. See infra Table: Appraisal Actions 2010-2014.
115. Id. at *5.
116. Id. at *11.
To the extent that the factors used in determining valuation become more objective, shareholders can better predict the likelihood of a higher valuation. The results over the past five years suggest that shareholders have succeeded in doing so. In the reported cases, the Court of Chancery rarely places a fair value at less than the price obtained in the offering. Finally, greater objectivity benefits all shareholders. Where companies can predict the outcome of a valuation process, they will know that a price below that amount will encourage the exercise of appraisal rights. As scholars have noted, the “mere threat of invoking appraisal rights can lead an acquirer to increase the offer consideration.”

APPENDIX

The table below expresses the price paid in offering, the price obtained through appraisal, and the difference between the two. It also provides active links to each of the cases.

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Citation</th>
<th>Price paid in offering</th>
<th>Price Obtained through Appraisal</th>
<th>Difference in Price</th>
<th>Percentage Increase</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>Laidler v. Hesco Bastion Envtl.</td>
<td>2014 WL 18775 36 (Del. Ch. 2014)</td>
<td>$207.50 per share</td>
<td>$364.24 per share</td>
<td>+ $156.74</td>
<td>75.5%</td>
</tr>
<tr>
<td>2014</td>
<td>Dent v. Ramtron Int’l Corp.</td>
<td>2014 WL 29311 80 (Del Ch. 2014)</td>
<td>$3.10 per share</td>
<td>$3.10 per share</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2013</td>
<td>Merion Capital, L.P. v. 3M Cogent, Inc.</td>
<td>2013 WL 37938 96 (Del Ch. 2013)</td>
<td>$10.50 per share</td>
<td>$10.87 per share</td>
<td>+ $0.37</td>
<td>3.5%</td>
</tr>
<tr>
<td>2013</td>
<td>In re Trados Incorporated Shareholder Litigation</td>
<td>73 A.3d 17 (Del Ch. 2013)</td>
<td>$0.10 per share</td>
<td>$0.00 per share</td>
<td>− $0.10</td>
<td>Decrease</td>
</tr>
<tr>
<td>2013</td>
<td>Towerview LLC v.</td>
<td>No. 4809–</td>
<td>$4.80 per share</td>
<td>$5.75 per share</td>
<td>+ $0.95</td>
<td>19.8%</td>
</tr>
<tr>
<td>Year</td>
<td>Case Name</td>
<td>Citation</td>
<td>Appraiser Interests</td>
<td>Appraiser Offer</td>
<td>Controlled Interests</td>
<td>Controlled Offer</td>
</tr>
<tr>
<td>------</td>
<td>------------------------------------------------</td>
<td>-----------------------------------------------</td>
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</tr>
<tr>
<td>2013</td>
<td>Cox Radio, Inc.</td>
<td>VCP, 2013 WL 3316186 (Del. Ch. 2013)</td>
<td>share</td>
<td>$25.00 per share</td>
<td>$25.00 per share</td>
<td>$25.00 per share</td>
</tr>
<tr>
<td>2013</td>
<td>In re MFW Shareholders Litigation</td>
<td>67 A.3d 496 (Del. Ch. 2013)</td>
<td>$25.00 per share</td>
<td>$25.00 per share</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2013</td>
<td>Huff Fund Investment Partnership v. CKx, Inc.</td>
<td>No. 6844–VCG, 2013 WL 5878807 (Del. Ch. 2013)</td>
<td>$5.50 per share</td>
<td>$5.50 per share</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>In re Appraisal of Orchard Enterprises, Inc.</td>
<td>2012 WL 2923305 (Del. Ch. 2012)</td>
<td>$2.05 per share</td>
<td>$4.67 per share</td>
<td>+ $2.62</td>
<td>127.8%</td>
</tr>
<tr>
<td>2012</td>
<td>Gearreald v. Just Care, Inc.</td>
<td>No. 5233-VCP, 2012 WL</td>
<td>$40 M (whole price)</td>
<td>$34,244.570 (whole price)</td>
<td>– $5,755.430 (whole price)</td>
<td>Decrease</td>
</tr>
</tbody>
</table>

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118. This denotes fair value of the company as a whole. The court did not compute fair value per share (there were 533,792 Series A preferred and 1,479,551 common shares). Gearreald, 2012 WL 1569818, at *1.
<table>
<thead>
<tr>
<th>Year</th>
<th>Case Name</th>
<th>Citation</th>
<th>Current Market</th>
<th>Proposed Purchase</th>
<th>Difference</th>
<th>Percentage increase/ decrease</th>
</tr>
</thead>
<tbody>
<tr>
<td>2011</td>
<td>In re Smurfit-Stone Container Corp. Shareholder Litigation</td>
<td>37 Del. J. Corp. L. 261 (Del. Ch. 2011)</td>
<td>$35.00 per share</td>
<td>$35.00 per share</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>2010</td>
<td>Global GT LP v. Golden Telecom, Inc.</td>
<td>993 A.2d 497 (Del. Ch. 2010)</td>
<td>$105.00 per share</td>
<td>$125.49 per share</td>
<td>$20.49</td>
<td>19.5%</td>
</tr>
<tr>
<td>2010</td>
<td>In re Sunbelt Beverage Corp. Shareholder Litigation</td>
<td>No. 16089–CC, 2010 WL 26539 (Del. Ch. 2010)</td>
<td>$45.83 per share</td>
<td>$114.04 per share</td>
<td>$68.21</td>
<td>148.8%</td>
</tr>
</tbody>
</table>