Appraisal Waivers

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Jill E. Fisch

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I presented preliminary versions of this paper at the 2019 BYU Winter Deals Conference, the PE/VC Subcommittee of the 2019 ABA Business Law Section Annual Meeting, and the 2019 Corporate and Securities Litigation Workshop at Boston University and I received many helpful comments at each. I am also grateful for thoughtful comments by Brian Broughman, Larry Hamermesh, Peter Molk, and Eric Talley. Kevin Hayne provided excellent research assistance.

Abstract

A judicial determination of fair value in a private company can be a difficult and imprecise process. This difficulty coupled with variations in way mergers are negotiated and structured and the potential for conflicts of interest lend uncertainty to appraisal proceedings. As a result, corporate participants have powerful reasons to seek to limit the uncertainty associated with an appraisal proceeding ex ante. The response has been the growing use of shareholder agreements that limit appraisal rights.

Appraisal waivers also offer a potentially attractive solution to a somewhat different concern, the growth of appraisal litigation in publicly traded companies. As with private companies, public companies face the problem that appraisal proceedings involve substantial cost and uncertainty. Although courts and commentators have grappled with how best to calculate fair value and the impact of that methodology on the incentives of participants in the merger process, they have failed to reach consensus. Appraisal waivers provide an alternative approach - a market-based mechanism to determine the efficient level of merger litigation.

Public companies have not followed the lead of private companies, however, in using appraisal waivers. As this Article explains, the likely reason is the impracticality of using shareholder agreements in public companies and a concern that appraisal waivers in a charter or bylaw would be invalid.

This Article considers both the normative and legal case for appraisal waivers. It argues that, with appropriate procedural protections – specifically the requirement that such waivers take the form of charter provisions -- appraisal waivers are normatively desirable. It then questions whether distinguishing between the use of appraisal waivers in private and public companies is appropriate and argues that it is not. The source of this distinction is a potential difference in the scope of private ordering available through shareholder agreements as opposed to the charter or bylaws, a difference that this Article critiques.

The Article concludes that, under current law, the legal status of appraisal waivers is unclear. Given the potential value that such waivers provide, and the particular value that market discipline would bring to the scope and structure of such waivers, the Article argues for legislation validating a corporation's authority to limit or eliminate appraisal rights in its charter.

Keywords: Law & economics, publicly vs. privately held corporations, mergers & acquisitions, M&A, securities valuation, appraisal arbitrage, shareholder litigation, corporate charters & bylaws, Delaware General Corporation Law, DGCL, Model Business Corporation Act, MBCA

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[*] Saul A. Fox Distinguished Professor of Business Law, University of Pennsylvania Law School. I presented preliminary versions of this paper at the 2019 BYU Winter Deals Conference, the PE/VC Subcommittee of the 2019 ABA Business Law Section Annual Meeting, and the 2019 Corporate and Securities Litigation Workshop at Boston University and I received many helpful comments at each. I am also grateful for thoughtful comments by Brian Broughman, Larry Hamermesh, Peter Molk, and Eric Talley. Kevin Hayne provided excellent research assistance.

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Introduction

Appraisal proceedings present some of the most difficult issues in corporate litigation. The circumstances under which shareholders have the right to be cashed out at fair value and the appropriate methodology for determining fair value have been the subject of extensive judicial and academic commentary[1] and have generated repeated legislative efforts to refine the scope of the statutory remedy.[2] Despite this attention, appraisal law remains uncertain, creating the potential for costly and burdensome litigation.[3]

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[1] See, e.g., Alison Frankel, *Appraisal litigation after Aruba? It's still a bad bet for shareholders*, Reuters, Apr. 17, 2019, https://www.reuters.com/article/us-otc-appraisal/appraisal-litigation-after-aruba-its-still-a-bad-bet-for-shareholders-idUSKCN1RT2N4 (describing most Delaware Supreme Court's opinion in *Verition Partners v. Aruba Networks* as "extraordinary").

[2] See, e.g., Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 Vand. L. Rev. 339, 354-59 (2017) (describing 2016 amendments to Delaware appraisal statute and additional amendment proposals and advocating more extensive legislative reform).

[3] See, e.g., Matthew Evans Miehl, *Note, The Cost of Appraisal Rights: How to Restore Certainty in Delaware Mergers*, 52 Ga. L. Rev. 651, 673 (2018) .(describing the "systemic uncertainty that corporate buyers in Delaware face" due to appraisal risk); Joel Seligman, *Reappraising the Appraisal Remedy.*, 52 Geo. Wash. L. Rev. 829, 830

Participants in private corporations have sought to address this uncertainty through contractual provisions that limit or eliminate the exercise of appraisal rights.[4] These provisions, which include drag-along rights, fair price provisions and explicit appraisal waivers, are examples of private ordering -- efforts by corporations and their participants to tailor their governance rules and structures to their particularized needs.[5] Courts have widely upheld firm-specific private ordering, reasoning that it is consistent with a contractual approach to corporate law.[6] Commentators too generally support private ordering as producing efficient firm-specific rules as well as facilitating valuable experimentation and innovation in corporate governance.[7]

The Delaware Chancery Court recently considered an issue of first impression – the enforceability of provision waiving the appraisal rights of common shareholders in a privately-held corporation. In *Manti Holdings, LLC v. Authentix Acquisition Co*., the court held that a shareholder agreement waiving appraisal rights was enforceable and did not violate public policy, at least on the facts of the case at bar in which the waiver was clear and unambiguous, the parties were sophisticated, advised by counsel, and waived their appraisal rights in exchange for consideration.[8] The *Manti* decision is important for the support it

(1984) (citing "the highly unpredictable standards for valuation, which make it difficult for either side in an appraisal proceeding to predict the outcome of the proceeding accurately").

[4] See, e.g., Sean Babar, *The Enforceability of Appraisal Rights Waivers*, FORD. J. OF CORP. & FIN. L. BLOG, Mar. 31, 2019. https://news.law.fordham.edu/jcfl/2019/03/31/the-enforceability-of-appraisal-rights-waivers/ (describing use of appraisal waivers by private equity and venture capital companies).

[5] See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOKLYN L. REV. 1637, 1638 (2015) (defining private ordering as "the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law)").

[6] See Jill E. Fisch, *Private Ordering and the Role of Shareholder Agreements* (forthcoming 2021) (describing judicial receptivity to firm-specific private ordering).

[7] See, e.g., D. Gordon Smith, Matthew Wright, & Marcus Kai Hintze, *Private Ordering with Shareholder Bylaws*, 80 FORD. L. REV. 125, 174 (2011) (explaining that private ordering "enables each corporation to become a laboratory of corporate governance, experimenting with different models of shareholder participation and ultimately producing a diversity of governance forms and practices.").

[8] 2018 Del. Ch. Lexis 318; 2019 Del. Ch. Lexis 307.

provides to private companies seeking to control the exercise of appraisal rights through shareholder agreements.[9]

The extension of appraisal waivers to public companies offers a potentially attractive solution to a somewhat different problem, that of excessive appraisal litigation, sometimes termed appraisal arbitrage.[10] Appraisal litigation involving public companies is, for various reasons, primarily an issue for target companies incorporated in Delaware.[11] Between 2012 and 2016, the quantity of appraisal litigation in Delaware quadrupled.[12] The Delaware cases were filed primarily by sophisticated

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[9] See, e.g., Christopher B. Chuff, *Contracting Out of Appraisal Rights*, HARV. L. SCHOOL FOR. ON CORP. GOV., Oct. 23, 2018, https://corpgov.law.harvard.edu/2018/10/23/contracting-out-of-appraisal-rights/ ("The court's decision . . . brings further certainty to private equity and venture capital investors whose investments include drag-along rights with appraisal waivers.").

[10] Appraisal arbitrage has been defined as "the practice of purchasing shares of stock after announcement of a merger, with a view to exercising the statutory right to an award of "fair value" in lieu of the merger price." Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies*, 73 BUS. LAW. 961 (2018).

[11] Delaware is home to the majority of publicly-traded corporations. Delaware law is distinctive with respect to merger litigation in two ways, however. First, unlike many states, the Delaware statute provides an appraisal remedy to shareholders of a publicly-traded target company in a cash-out merger. See John Jenkins, *Appraisal Rights: The Complicated World of Corporate Law's Consolation Prize*, DEAL LAWYERS, May-June 2011, at 2 ("Delaware's version of the market out denies appraisal rights to a shareholder of an actively traded corporation only if the merger consideration is also actively traded stock"). Second, several decisions have reduced the scope of other types of litigation challenging the adequacy of merger litigation, leaving appraisal as, in some cases, the only viable option. See, e.g., Matthew Cain, Jill Fisch, Steven Davidoff Solomon & Randall Thomas*, Mootness Fees*, 72 VAND. L. REV. 1777 (2019) (summarizing decisions that "reduced the attractiveness of merger litigation in Delaware").

[12] David F. Marcus, et al., Cornerstone Research, *Appraisal Litigation in Delaware: Trends in Petitions and Opinions, 2005-2018* (2019), https://www.cornerstone.com/publications/reports/appraisal-litigation-delaware-2006-2018.

hedge funds and private equity funds,[13] many of whom purchased their stakes after the announcement of the merger.[14]

The use by hedge funds of appraisal litigation as an investment strategy has generated criticism of the structure of Delaware's existing appraisal statute and proposals for legislative reform.[15] In 2016, the Delaware legislature adopted amendments to the statute in an effort to reduce appraisal arbitrage.[16] The growth in appraisal litigation has also led some commentators to urge the Delaware courts to restrict the scope of the appraisal remedy such as by adopting a presumption, under certain circumstances, that the merger price constitutes fair value.[17]

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[13] *Id.* See also Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of Dell and DFC Global*, 68 EMORY L.J. 221, 223 (2018) ("The dollar value at stake in appraisal claims has grown dramatically, as has the sophistication of the dissenting stockholders"); Hamermesh & Wachter, *supra* note 10 ("Much of this growth has been driven by specialized players in the appraisal arbitrage field, one of whom (Merion Capital) by itself accounted for 36% of the face value of all appraisal claims during the measurement period (2009-2016)").

[14] Marcus et al., *supra* note 12, at 5 (explaining that the funds' strategy of appraisal arbitrage "involves purchasing shares after the record date and filing appraisal petitions with the goal of receiving an award greater than the deal price as well as statutory interest.").

[15] See, e.g., Trevor S. Norwitz, *Delaware Legislature Should Act to Curb Appraisal Arbitrage Abuses,* CLS BLUE SKY BLOG, Feb. 10, 2015, https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.23846.15.pdf (stating that "The Delaware General Assembly should correct the appraisal rights regime as a matter of urgency").

[16] See Paul Bork & Dean F. Hanley, *Latest Amendments to Delaware Law Revise Appraisal Rights*, SECURITIES ALERT, FoleyHoag LP, Aug. 17, 2016, https://foleyhoag.com/publications/alerts-and-updates/2016/august/latest-amendments-to-delaware-law-revise-appraisal-rights (describing appraisal arbitrage and observing that "[t]he amendments to Section 262 reflect an effort to limit the use of appraisal rights for this kind of arbitrage.").

[17] See, e.g., Stephen Bainbridge et al., *Brief of Law and Corporate Finance Professors as Amici Curiae in Support of Reversal, DFC Global Corp. v. Muirfield Value Partners, L.P.* (Jan. 6, 2017), at 16. (proposing amount awarded in appraisal proceeding depart from deal price only "where the transaction price bears indications of misinformation or bias."); Guhan Subramanian, *Using the Deal Price for Determining "Fair Value" in Appraisal Proceedings*, in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (2019) (advocating that courts "defer entirely to the deal price when the deal process is good . . . but cast a "hard look" as to whether the deal process included an adequate market canvass, meaningful price discovery, and an arms-length negotiation").

It is unclear, however, that either courts or legislatures are well-positioned to determine the appropriate scope of the appraisal remedy.[18] In an era in which corporate law has increasingly endorsed private ordering which relies primarily on voluntary investor behavior and the capital markets to discipline value-decreasing contractual terms, the prospect of addressing the appraisal remedy through private ordering is worth consideration.

In public companies, however, appraisal waivers are unprecedented. One likely reason is uncertainty about whether a court would uphold a charter provision or bylaw that purported to eliminate shareholders' appraisal rights. The Delaware appraisal statute, 8 Del. C. § 262, does not explicitly authorize corporations to reduce or eliminate appraisal rights.[19] Corporations might therefore perceive statutory appraisal rights to be a mandatory component of corporate law – one that is not susceptible to private ordering.[20]

The *Manti* court largely avoided the issue by concluding that the shareholder agreement in question "did not restrict the appraisal rights of the classes of stock held by the Petitioners; instead, the Petitioners, by entering the SA, agreed to forbear from exercising that right."[21] Nonetheless, on reargument, the court rejected the argument that § 262 constituted a mandatory provision of Delaware law that could not be waived ex ante. Instead the court held that, on the facts before it, a waiver was consistent with the statute, noting "that the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights."[22]

The *Manti* court's analysis has limited application to the public company context, in which an appraisal waiver would, by necessity, have to take the form of a charter or bylaw provision and in which the contractual features that *Manti* emphasized – that the parties to the

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[18] See, e.g., Sam Glasscock III, *Ruminations on Appraisal*, 35 DEL. LAWYER 11 (2017), http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf (asking the question: "If a stockholder's right to appraisal upon dissent from a 'clean' merger is stripped, the question is whether such a regime will limit the flow of capital to corporations").
[19] 8 Del. C. § 262 (2020).
[20] See generally Fisch, *supra* note 6 (discussing extent to which corporate law contains mandatory rules that are not subject to private ordering).
[21] Manti Holdings, LLC v. Authentix Acquisition Co., 2018 Del. Ch. LEXIS 318, *11-12,
[22] Manti Holdings, LLC v. Authentix Acquisition Co., 2019 Del. Ch. LEXIS 307, *11.

shareholder agreement were informed, sophisticated and advised by counsel – are not present. The extension to public companies raises two broader and related questions – should appraisal rights be subject to private ordering and, if so, does current law permit such private ordering through the charter and bylaws? This Article addresses both questions in the affirmative but concludes that appraisal waivers should be limited to charter provisions to provide sufficient procedural protection for the rights of minority shareholders.

The Article proceeds as follows. Part I briefly reviews the appraisal remedy and identifies the problems that have arisen in appraisal litigation including appraisal arbitrage and the methodology for determining fair value. Part II describes how private companies have used shareholder agreements to limit appraisal litigation through provisions including drag-along rights and appraisal waivers. Part III considers the policy case for appraisal waivers and concludes that corporations should be able to limit or eliminate appraisal rights through private ordering.

Having made the policy case for appraisal waivers, the Article considers in Part IV the legal question flagged by the *Manti* court -- whether appraisal rights are a mandatory component of corporate law. The Article identifies the primary arguments for and against reading the current statute to permit private ordering. Ultimately, the Article concludes that existing case law on the mandatory/enabling distinction can be read to support either conclusion. This legal uncertainty is problematic both because it has a potential chilling effect on the adoption of appraisal waivers in public companies and because of the deficiencies of shareholder agreements as a vehicle for appraisal waivers.[23] Instead, the Article argues in Part V for the amendment of appraisal statutes to provide that corporations can modify, limit or eliminate appraisal rights, but that they can do so only through a charter provision.

The Article concludes that existing efforts by private companies to use shareholder agreements to limit appraisal rights is evidence that such limitations are potentially efficient. Legal clarity would enable a more robust exploration of this issue. Allowing public companies to amend their charters to adopt appraisal waivers would enlist market

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[23] I explore the problems with using shareholder agreements to implement firm-specific corporate governance in Fisch, *supra* note 6.

discipline into evaluating the merits of the appraisal remedy and reduce the burden imposed on courts by existing appraisal statutes.

I. The Appraisal Remedy

A. Background

Appraisal has its roots in corporate law statutes adopted in the late 1880s that adopted the appraisal remedy in conjunction with eliminating the requirement that shareholders unanimously consent to a merger.[24] Today, all fifty states provide dissenting shareholders with an appraisal remedy, although the nature of the remedy and the circumstances in which it applies vary substantially.[25] The appraisal remedy is limited to shareholders who dissent from a corporate transaction – that is, shareholders who do not vote their stock in favor.[26] Statutes typically contain various procedural requirements necessary for a shareholder to pursue his or her appraisal rights.[27] If the requirements are met, a dissenting shareholder is entitled to be paid, in cash, the judicially-determined fair value of his or her shares.[28]

The original purpose of the appraisal remedy was to provide liquidity for shareholders in situations in which the nature of the business in which they had invested was undergoing a fundamental change.[29] In

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[24] Charlotte Newell, *The Legislative Origins of Today's Appraisal Debate*, DEL. LAWYER (Summer 2017), at 12, http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf.

[25] See, e.g., Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 556 (Ky. 2011) ("Dissenters' rights statutes . . . exist in some form in every state, and in the vast majority of the states, protection is accorded by an appraisal remedy . . . ."); Athlon Sports Communs., Inc. v. Duggan, 549 S.W.3d 107, 118 ("Every state now has statutes that provide some form of appraisal remedy; these are referred to as "dissenters' rights" statutes").

[26] See, e.g., Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 663 (1998) ("The appraisal remedy allows the shareholder a 'way out' of an investment involuntarily altered by a fundamental corporate change.").

[27] See, e.g., 8 Del. C. § 262(d) (2020) (setting forth procedures required to perfect appraisal rights).

[28] Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. ON LEGIS. 79, 79 (1995).

[29] See, e.g., Jenkins, *supra* note 11 at 1 (explaining that appraisal rights initially were intended to provide shareholders with "a judicial route to liquidity").

some states, appraisal rights are triggered only in connection with mergers or similar transactions; in other states, appraisal rights apply to a broader range of changes such as charter amendments or the sale of a significant percentage of the corporation's assets.[30] Most states adopted appraisal statutes in conjunction with statutory amendments that reduced the threshold for shareholder approval of such transactions from unanimous consent to majority or supermajority approval.[31] The rationale was that a shareholder who objected to "the welding of his corporation with another" should be free to exit the enterprise entirely.[32]

Over time, the importance of providing liquidity has decreased as a rationale for appraisal, and the remedy has instead shifted to a tool for protecting the fair value of a minority shareholder's interest in a corporation.[33] The two dominant (and distinctive) approaches to appraisal are reflected in the Delaware corporate statute and the Model Business Corporation Act (MBCA).[34] Academic commentary has focused primarily on Delaware appraisal law for several reasons: Delaware is unique in providing appraisal rights in certain public-company mergers, more than 60 % of publicly-traded companies are incorporated in Delaware, and Delaware is also the state of incorporation for most large private companies.[35] Nonetheless, the MBCA's alternative approach provides important insights into how best to understand both appraisal rights and the potential impact of appraisal waivers on those rights.

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[30] See Siegel, *supra* note 28 at 91-92 (summarizing variation among the states as to which transactions trigger appraisal rights).

[31] See, e.g., Robert C. Clark, CORPORATE LAW 443-44 (1986) ("Historically, appraisal rights seem to have been given to shareholders as the quid pro quo for abandonment of the old nineteenth century rule that major corporate changes like mergers require the unanimous consent of all the shareholders.");

[32] Chicago Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934),

[33] See, e.g., Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law.*, 84 GEO. L.J. 1, 4 (1995) (appraisal's "original liquidity purpose has almost completely disappeared").

[34] See, e.g., Mary Siegel, *The Model Business corporation Act at Sixty: An Appraisal of the Modern Business Corporation Act's Appraisal Rights Provisions*, 74 LAW & CONTEMP. PROB. 231, 231 (2011) (explaining that "the two statutes are diametrically opposed on many key elements"); Jenkins, supra note 11 at 4 ("Appraisal rights statutes are one area of corporate law where Delaware's influence is far from pervasive.").

[35] Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1061 (2000).

Delaware takes a limited approach, providing statutory appraisal rights only in connection with a merger or consolidation.[36] Appraisal rights in Delaware are not exclusive; shareholders can pursue a claim for breach of fiduciary duty either as an alternative to or in conjunction with a demand for appraisal.[37] The Delaware statute entitles shareholders who dissent from a merger to a judicial determination of "fair value."[38] The concept of fair value and the methodology for determining fair value have generated substantial case law and commentary, which will be discussed in more detail in the following section.

The Delaware statute provides a "market out," as do most appraisal statutes, which eliminates appraisal rights for shareholders in publicly-traded companies.[39] The Delaware statute is distinctive, however, in that it restores appraisal rights to such shareholders if they receive cash as the merger consideration.[40] As a result, a substantial number of third party mergers in Delaware public corporations trigger appraisal rights; it is these transactions that provide the basis for appraisal arbitrage.

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[36] See Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 613 n. 2 (1998) (comparing Delaware's approach to the broader approach of the MBCA and the states that follow it); Siegel, supra note 34, at 234 ("Only two jurisdictions, however, follow the Delaware statute in providing mergers as the sole statutorily-required appraisal trigger.").

[37] Appraisal is, however, the exclusive remedy in short-form mergers in Delaware. See Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001) (holding that "absent fraud or illegality, appraisal is the exclusive remedy available to a minority stockholder who objects to a short-form merger").

[38] 8 Del. C. § 262(a) (2020).

[39] See Onyeador, *supra* note 2 at 359 (reporting that 37 states have adopted a market out exception to appraisal rights).

[40] See *id*. (terming this the "cash carve-out"). Delaware substantially revised its corporate law in 1967, and one of the proposals of the revision committee was a recommendation that Delaware eliminate the appraisal remedy entirely for publicly-traded companies, based on the rationale that the stock market provided dissenting shareholders with both an exit opportunity and an established value – the market price. Newell, *supra* note 24, citing Folk Report, http://www.delawarebarfoundation.org/wp-content/uploads/2017/09/DeLawSUM17-FINAL.pdf The Delaware legislature did not adopt this recommendation, a decision except in the case of stock-for-stock mergers, a distinction that puzzled the revision committee and continues to puzzle commentators. Id. Professor Ernest L. Folk III, the reporter for the revision project, also proposed eliminating appraisal rights unless otherwise provided in a corporation's charter. Randall S. Thomas, *Revising the Delaware Appraisal Statute*, 3 DEL. L. REV. 1, 7 (2000).

With respect to private ordering, the Delaware statute authorizes a corporation, in its charter, to provide additional appraisal rights, although the statute seemingly does not permit a bylaw or board resolution to confer additional appraisal rights.[41] Nothing in the Delaware statute explicitly authorizes a corporation to limit or eliminate appraisal rights.

In 2016, Delaware adopted two amendments to its appraisal statute in response to concerns about appraisal arbitrage. The first is a de minimis threshold for appraisal actions in publicly-traded companies eliminates appraisal in such companies unless the number of shares entitled to appraisal exceeds 1% of the company's outstanding shares, is valued at more than $1 million (based on the value of the merger consideration) or the transaction involves a short form merger.[42] The second amendment allows a corporation to pre-pay an amount to dissenting shareholders prior to the entry of judgment in the appraisal proceeding and to thereby stop the accrual of interest at the statutory rate.[43]

The MBCA was first published in 1950, and its goal was to provide "greater clarify for a variety of transactions through bright line rules and safe harbors."[44] States following the MBCA approach generally provide appraisal rights in connection with a variety of transactions including not just mergers but also share exchanges, a sale or disposition of substantially all the corporation's assets, amendments to the corporation's charter, and conversion or domestication.[45]

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[41] See 8 Del. C. § 262(c) (2020).
[42] 8 Del. C. § 262(g) (2020).
[43] 8 Del. C. § 262(h) (2020). Some commentators had suggested that the statutory formula for the calculation of statutory interest made appraisal litigation profitable for investors even in cases in which the merger consideration constituted fair value. See Charles K. Korsmo & Minor Myer, *Interest in Appraisal*, 42 IOWA J. CORP. L. 109, 111 (2016) ("Critics contend that this interest rate has been a prime driver of the increase in appraisal activity, with sophisticated "appraisal arbitrageurs" parking money in appraisal claims in order to take advantage of what critics contend is an above-market interest rate.").
[44] William J. Carney & George B. Shepherd, Symposium: *The Mystery of the Success of Delaware Law: The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 57.
[45] MBCA § 13.02(a) Siegel, *supra* note 34, at 232 (describing transaction triggers in the MBCA); id. at 234 (summarizing degree to which adopting states follow the MBCA's approach to transaction triggers).

Three features of the MBCA are distinctive relative to Delaware law. [46] First, The market-out rule under the MBCA provides that appraisal rights are not available to the holders of shares that are listed on a national securities exchange or held by a sufficiently large number of shareholders.[47] Unlike Delaware, the market-out rule does not exempt transactions involving cash consideration. The 1999 revisions to the MBCA, however, limited the market-out exception to transactions that did not involve a conflict of interest.[48] As of 2011, thirty-six state statutes had adopted some form of market-out exception, and eleven limit that exception to non-conflict transactions.[49]

Second, the MBCA provides that, in transactions subject to appraisal and in which the market-out does not apply, appraisal shall be the exclusive remedy.[50] A substantial number of states have followed this approach and expressly provide that, with limited exceptions, in cases in which the appraisal remedy applies, it is the exclusive way to challenge a transaction.[51]

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[46] The MBCA also contains a variety of procedural differences from the Delaware statute. For example, Delaware does not require a corporation to pay dissenting shareholders until the conclusion of the appraisal proceeding (although statutory interest accrues during the proceeding). The MBCA does not delay compensation until the outcome of the appraisal proceeding but requires the corporation to pay dissenting shareholders its estimate of the fair value of their stock, plus interest, within thirty days of the appraisal demand. MBCA § 13.24. In addition, the MBCA places the initial obligation on the corporation to determine fair value. If the shareholder is dissatisfied with the corporation's decision and demands a judicial valuation, it is the corporation's obligation to commence an appraisal proceeding. MBCA § 13.30.

[47] MBCA § 13.02(b).

[48] Siegel, *supra* note 34.

[49] *Id.*

[50] See, e.g., Mitchell Partners, L.P. v. Irex Corp. The MBCA provides additional exceptions for transactions that are not in compliance with the procedures required by the statute or the corporations charter as well as transactions that are "procured as a result of fraud, a material misrepresentation, or an omission of a material fact necessary to make statements made, in light of the circumstances in which they were made, not misleading." MBCA §13.40(b)(2) (2019).

[51] Thirty-three states expressly provide that the appraisal remedy is the exclusive remedy in some circumstances. Of these, twenty-two jurisdictions have provisions comparable to § 13.02(b) of the Revised Model Act's language providing the appraisal remedy is exclusive except where the corporation action is "unlawful [or illegal] or fraudulent." Julie Gwyn Hudson, *Comment: The Exclusivity of the Appraisal Remedy Under the New North Carolina Business Corporation Act: Deciding the Standard of Review for Cash-Out Mergers*., 69 N.C.L. REV. 501, 503 (1992). Again, however, several states have adopted different approaches. See McMinn v. MBF Operating

Third, the MBCA provides corporations with somewhat greater explicit freedom than the Delaware statute to modify statutory appraisal rights. Section 13.02(a)(5) authorizes a corporation to provide appraisal rights in certain other transactions through charter provision, bylaw or board resolution. In addition, section 13.02(c) authorizes a corporation, through a charter provision, to limit or eliminate appraisal rights for preferred stockholders, but the statute provides that such a charter amendment will not apply to transactions that occur within a year of its adoption.[52]

B. Appraisal and Fair Value

The critical component of an appraisal proceeding is the determination of fair value. As a result, both commentators and the courts themselves have focused extensively on the appropriate methodology for this determination.[53] The Delaware courts have consistently explained that "fair value is the value of the company to the stockholder as a going concern,"[54] and the court's task is to determine the most reliable measure of fair value. Delaware has developed the most extensive jurisprudence on what constitutes fair value in appraisal proceedings, and other courts consistently look to Delaware decisions for guidance.[55]

Acquisition Corp., 142 N.M. 160, 168 (N.Mex. Sup. 2007) (considering and rejecting exclusivity despite clear statute and failure to adopt MBCA amendments).

[52] The provision further limits waivers to cases in which the preferred stock has the right to vote separately on the transaction giving rise to the appraisal rights. Notably, many statutes tie appraisal rights to the power to vote on a transaction and, as a result, the right of non-voting preferred to exercise appraisal rights, in the absence of an explicit provision of such rights in the certificate of designation, may not be clear. See, e.g., Application of Harwitz, 192 Misc. 91, 94 (N.Y. Sup. 1948) ("preferred nonvoting stockholders acquire no appraisal rights under [the N.Y. statute]").

[53] See, e.g., Onyeador, *supra* note 2, at 340 ("appraisal arbitrage has sparked a close look at Delaware courts' methodology in appraisal proceedings")

[54] Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 132–33 (Del. 2019).

[55] See, e.g., Reynolds Am. Inc. v. Third Motion Equities Master Fund Ltd., 2020 NCBC 35, *312 ("Although Delaware's appraisal statute, 8 Del. C. § 262, is not identical to section 55-13-30, the two statutes each require a determination of "fair value" and are sufficiently similar that the Court finds decisions of the Delaware courts under section 262, although not binding, to be helpful guidance in interpreting the North Carolina appraisal statute and deciding the fair value of RAI's shares in this action").

As VC Laster explained, the statutory task of making "a single determination of a corporation's value introduces an impression of false precision into appraisal jurisprudence."[56] Valuation is not a precise science, all valuation methodologies have inherent limitations and law-trained judges are themselves limited in their ability to evaluate valuation evidence. As a result, it is perhaps easier to understand the judge's task as determining "the most reasonable value in *light of all the relevant evidence and based on considerations of fairness*."[57] This task, however, opens appraisal litigation to a wide-ranging exercise in valuation. As one Delaware court observed, "fair value has become a jurisprudential, rather than purely economic, construct."[58]

For many years, courts commonly used the so-called Delaware block method to value stock in appraisal proceedings.[59] The Delaware block method required courts to determine the corporation's value using three separate methods: asset value, earnings value, and market value. The court would then decide on a proportionate weight to be given to each of these three valuations and determine the fair value of the corporation according to a weighted average of the three values., in which fair value was based on a weighted average of market value, asset value, and earnings value.[60] Delaware's block method was highly influential, and many jurisdictions followed Delaware's approach.[61] Because the block method tended to undervalue stock,[62] this

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[56] In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303

[57] Cede & Co. v. Technicolor, Inc., 2003 WL 23700218, at *2 (Del. Ch. Dec. 31, 2003), as revised (July 9, 2004) (emphasis added).

[58] Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd, 177 A.3d 1, 20 (Del. 2017).

[59] Tri-Continental Corp. v. Battye, 74 A.2d 71 (Del. 1950); see Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 IOWA J. CORP. L. 119, 124 (2005) ("for decades prior to 1983, courts measured the intrinsic value of stock using the Delaware block method").

[60] See, e.g., Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 348-52 (Del. Ch. 1973) (determining fair value by Delaware block method), aff'd, 334 A.2d 216 (Del. 1975).

[61] See, e.g., Don S. Clardy, *Comment: Valuation of Dissenters' Stock Under the appraisal Remedy – is the Delaware Block Method Right for Tennessee?* 62 TENN. L. REV. 285, 298-299 (1995) ("In the post-World War II period, Delaware courts and virtually all other jurisdictions began to use the Delaware Block Method in appraisal proceedings").

[62] See, e.g., Newell, *supra* note 24 (explaining that courts expressly distinguished between the block method and fair value).

methodology was an important factor limiting the frequency of appraisal litigation.[63]

In the *Weinberger* decision, the Delaware Supreme Court replaced the block method, holding that fair value should be determined with "proof of value by any techniques or methods which are generally considered acceptable in the financial community."[64] The appropriate valuation methodology to be used in appraisal cases continues to be the subject of ongoing development and legal uncertainty.

Following *Weinberger*, most courts began to rely primarily on the discounted cash flow (DCF) methodology.[65] Under the DCF method, the value of the corporation is calculated by determining "present value of the discounted stream of future free cash flows that the asset can generate."[66] The challenge with the DCF methodology is that it is largely based on assumptions – such as assumptions about future cash flows and the choice of an appropriate discount rate – rather than objective historical facts.[67]

In appraisal proceedings, the parties typically present valuation analyses prepared by expert witnesses, and the assumptions employed by those experts may differ dramatically.[68] Concern over the potential imprecision of many of these methodologies, as well as the recognition that "paid valuation experts have assumed more of an advocacy role, and less of a traditional expert witness role (as illustrated by the wide deltas

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[63] See, e.g., Wertheimer, *supra* note 36 at 625 (explaining that the valuation methodology used in appraisal cases "powerfully explains the relative dearth of pre-1983 appraisal proceedings."); Elmer J. Schaefer, *The Fallacy of Weighting Asset Value and Earnings Value in the Appraisal of Corporate Stock*, 55 S. CAL. L. REV. 1031, 1036-40 (1982) (stating that "the weighting method [used in the block method] always undervalues corporate stock").

[64] Weinberger v. UOP, Inc., 457 A.2d 701, 713-14 (Del. 1983).

[65] See Hamermesh & Wachter*, supra* note 59, at 125 ("[T]he court of chancery has increasingly come to favor 'discounted cash flow' (DCF) analysis of modern finance theory as the core approach to measuring value.")

[66] *Id.* at 125.

[67] See, e.g., In re Appraisal of Petsmart, Inc., 2017 WL 2303599, *33 (Del. Ch. 2017) (explaining the difficulty of using DCF analysis where management's projections "are saddled with nearly all of these telltale indicators of unreliability").

[68] See, e.g., In re Emerging Communs., Inc. S'holders Litig., 2004 Del. Ch. LEXIS 70, *40-41 (observing that the experts' "widely differing valuations of the same company result from quite different financial assumptions that each sponsoring side exhorts this Court to accept.").

we regularly see in their valuation conclusions)"[69] led the courts to search for indicators of fair value based on prices paid by willing market participants. This has led to increased consideration of the merger or deal price and unaffected trading price.[70] Several more recent Delaware opinions consider the circumstances under which either or both of these prices are reliable indicators of fair value.

The cases rely most heavily on deal price as the best indicator of fair value. For example, in *DCF Global*, the Delaware Supreme Court reversed a chancery court decision that had calculated fair value by equally weighing deal price, the DCF valuation, and a comparable companies valuation, concluding that the lower court's reasons for failing to give greater weight to the deal price were not supported by the record.[71] Although the court expressly warned that deal price need not always be the exclusive or best evidence of fair value, it observed that it was improper to ignore "the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value, and that second-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous."[72] Similarly in *Dell*, the Supreme Court again concluded that the chancery court had given insufficient weight to deal price. The *Dell* court explained the basis for its reasoning that deal price was, at least in the context of the case before it, a more reliable indicator than DCF, noting as well as "the obvious lack of credibility of the petitioners' DCF model."[73] The court remanded with the instruction that the Vice Chancellor could "enter judgment at the deal price if he so chooses, with no further proceedings."[74]

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[69] Blueblade Capital Opportunities, LLC v. Norcraft Cos., Inc., 2018 Del. Ch. LEXIS 255, *32 n. 179.

[70] Although experts in appraisal litigation commonly present a comparable companies analysis as well, courts rarely place substantial weight on the valuation produced by this analysis, largely because of the difficulty establishing a suitable peer group. See, e.g., In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271, *72 (explaining that "nearly every text in the record states that the accuracy of a multiples-based valuation depends entirely on the existence of comparable peers" and giving the comparable companies analysis no weight based on the court's finding that Jarden had no comparable peers).

[71] DFC Global Corp. v Muirfield Value Partners, L.P. 172 A.2d 346, 388 (Del. 2016).

[72] *Id.* at 366.

[73] Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 36 (Del. 2017).

[74] *Id*. at 44

The use of deal price involves two complications. The first is determining the circumstances under which a court is justified in deferring to deal price as the most reliable indicator of fair value. On the one hand, the courts have emphasized the fact that the negotiation of a merger, particularly by an arms-length third party buyer, is likely to lead to robust pricing. The likelihood that the buyer has access to all material information about the target, including non-public information, strengthens this claim.[75] On the other hand, not every deal process is robust. To the extent that a deal process is flawed, the resulting merger price may not be fair.[76] The courts have identified the components of a reliable sales process as including "evidence of market efficiency, fair play, low barriers to entry, [and] outreach to all logical buyers…."[77] While the presence of multiple bidders is evidence of a reliable deal process, even a single bidder process may be acceptable if the process includes a suitable market check.[78]

The second complication is the fact that, in most cases, a deal itself creates value – the so-called synergies of the merger. In an arms-length third-party merger, these synergies will be shared by the shareholders of the two companies.[79] As a result, the deal price received by the target shareholders exceeds fair value. To be faithful to the statutory language, a calculation of fair value should subtract these

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[75] See, e.g., Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 138 (Del. 2019) ("[W]hen th[e] market price is further informed by the efforts of arm's length buyers of the entire company to learn more through due diligence, involving confidential non-public information, and with the keener incentives of someone considering taking the non-diversifiable risk of buying the entire entity, the price that results from that process is even more likely to be indicative of so-called fundamental value.")

[76] See, e.g., In re Appraisal of SWS Group, In re Appraisal of SWS Grp., Inc., 2017 Del. Ch. LEXIS 90 (Del. Ch., May 30, 2017), aff'd sub nom. Merlin Partners, LP v. SWS Grp., Inc., 2018 Del. LEXIS 77 (Del., Feb. 23, 2018) (rejecting reliance on merger price based on flawed sales process).

[77] *Dell,* 177 A.3d at 35.

[78] See, e.g., In re Stillwater Mining Co., 2019 Del. Ch. LEXIS 320, *71-72. The *Stillwater* court provided further guidance, explaining that "the deal price will provide persuasive evidence of fair value in an appraisal proceeding involving a publicly traded firm if the sale process would satisfy enhanced scrutiny in a breach of fiduciary duty case." *Id*. at *72.

[79] Hamermesh & Wachter, *supra* note 59 at 142.

synergies.[80] Calculating synergies, however, reintroduces an element of imprecision into the valuation process because the calculation is not a market-based process and relies instead on the type of judgment associated with the DCF methodology.[81] Recent decisions have allocated the burden of establishing deal synergies on the respondent and, as a result, have frequently refused to subtract any synergies from the merger price.[82]

The alternative to deal price is "unaffected market price."[83] In *Aruba I*, the Chancery court determined that unaffected market price was

[80] See, e.g., Global GT LP v Golden Telecom, Inc., 993 A2d 497, 507 (Del Ch 2010) (stating that deriving an estimate of fair value requires the exclusion of "any synergies or other value expected from the merger giving rise to the appraisal proceeding itself")

[81] See, e.g., Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 Del. Ch. LEXIS 52, *5, rev'd by Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 2019 Del. LEXIS 197 (Del. 2019) ("Estimating synergies requires exercises of human judgment analogous to those involved in crafting a discounted cash flow valuation."); Raffaele Fiorentino & Stefano Garzella, *The Synergy Valuation Models: Towards the Real Value of Mergers and Acquisitions*, 124 INT'L RES. J. FIN. & ECON. 71, 72 (2014) ("[T]heoretical and empirical research still lacks a common understanding of the effectiveness of synergy valuation models in M&A."); Hamermesh & Wachter, *supra* note 10, at 983 (identifying three different approaches to calculating synergies).

[82] See, e.g., In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303, *122 ("[Respondent] bore the burden of proving a downward adjustment for synergies."); *Stillwater Mining*, 2019 Del. Ch. LEXIS 320, *140-41("[Respondent] failed to meet its burden of proof to establish a quantifiable amount that the court should deduct from the deal price."). But see In re Panera Bread Co., 2020 Del. Ch. LEXIS 42, *92 (concluding that "respondent has proven deduction of cost and tax synergies of $11.56 per share by a preponderance of the evidence").

[83] See, e.g., Alex Pena & Brian JM Quinn, *Appraisal Confusion: The Intended and Unintended Consequences of Delaware's Nascent Pristine Deal Process Standard*, 103 MARQ. L. REV. 457, 507-8 (2019) (arguing that courts should "look to unaffected stock price rather than merger price for indications of fair value" and observing that using unaffected market price reflects "a return to the roots of appraisal before the recent attentions given to it by the financial industry"). There are, however, problems with unaffected market price. The public trading price may reflect a minority discount and, even if it does not, the parties to a deal may have access to material non-public information that, if released, would affect stock price. See Brian J. Broughman, et al., *Amicus Brief of Law and Finance Professors in Verition Partners v. Aruba Networks* (Appraisal Lawsuit) (October 3, 2018), https://ssrn.com/abstract=3302116 (identifying these and other concerns about the use of unaffected trading price in appraisal proceedings).

the best indicator of fair value because the target's shares "were widely traded on a public market based upon a rich information basis…."[84] The Delaware Supreme Court reversed this decision, however, in a decision that strongly suggested that deal price, at least under the circumstances present in the case, was more reliable.[85] Notwithstanding that decision, in *Jarden*, the chancery court again relied on unaffected market price based on its determination that flaws in the deal process made deal price unreliable.[86] The *Jarden* court noted that, because the market for Jarden's stock was efficient and that the market price reflected all material information, "Jarden's Unaffected Market Price is a powerful indicator of Jarden's fair value on the Merger Date."[87]

The calculation of fair value in the private company context is even more difficult.[88] Private companies obviously lack an unaffected market price that can be used as a reference point.[89] In addition, although public companies produce and disclose a variety of financial information in a standardized format, the quality of private company financial information varies substantially.[90] In addition, private company shareholders may have distinctive interests or expectations that potentially affect the determination of fair value. Finally, private companies often have substantial or controlling shareholders that are involved in the merger negotiations and that may have interests that

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[84] Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 2018 Del. Ch. LEXIS 52, *98.
[85] See Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019) (holding that the chancery court had provided insufficient bases for failing to give greater weight to deal price).
[86] In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271.
[87] *Id*. at *63
[88] For an example, see In re ISN Software Corp. Appraisal Litig., 2016 Del. Ch. LEXIS 125, *8 (observing that "The gap between the expert valuations is wide—alarmingly so—ranging from $106 million to $820 million").
[89] Similarly, private companies frequently lack public company peers whose prices can be used for comparison. See *id.* at *10 (noting that "ISN has no public competitors")
[90] See *id.* at *15 (observing that DCF calculation was complicated by the fact that "ISN itself did not regularly create long-term financial projections"); Laidler v. Hesco Bastion Envtl., Inc., 2014 Del. Ch. LEXIS 75, *29-30 (using a "direct capitalization of cash flow analysis because of "the lack of comparable companies or transactions upon which to base an analysis, and the lack of management projections upon which to conduct a DCF")..

differ from those of the minority stockholders. As a result, the deal process is less likely to be reliable.[91]

Efforts to value shares of private companies in other contexts, contexts that are less fraught than mergers, illustrate the challenges. For example, private companies that issue stock to employees are required to provide 409A valuations every twelve months.[92] Although these valuations are supposed to reflect the fair value of the stock, they are notoriously open to manipulation.[93] Similarly, many investors, such as mutual funds, are required, for regulatory purposes, to determine the fair value of the stock they own in private companies. Reports suggest that these valuations vary dramatically among sophisticated investors even with respect to the shares of late stage private companies with significant operating track records.[94]

C. Public Company Appraisal Arbitrage

Uncertainty both about the valuation methodology a court will employ and how it will apply that methodology increases the potential for appraisal litigation.[95] Moreover, appraisal litigation is time-consuming, costly and difficult. Significantly, because an appraisal proceeding does not require allegations of misconduct, appraisal claims

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[91] See, e.g., Laidler v. Hesco Bastion Envtl., Inc., 2014 Del. Ch. LEXIS 75, *22 ("to defer to an interested controlling stockholder's determination of fair value in a transaction such as this would render [the appraisal] remedy illusory"). See also Pena & Quinn, *supra* note 83 at 509 (observing that "private companies will neither have the benefit of merger price nor unaffected stock price for purposes of valuation," requiring courts to fall back upon traditional metrics such as DCF).

[92] See, e.g., Yifat Aran, *Making Disclosure work for Start-up Employees*, 2019 COLUM. BUS. L. REV. 867, 947 (describing the 409A valuation process).

[93] *Id*. at 949-50 ("these valuations are highly inaccurate and can be negotiated down by the company.").

[94] See, e.g., Jean Eaglesham & Coulter Jones, *Mutual Funds' Embrace of High-Profile Unicorns Backfires*, WALL ST. J., Oct. 11, 2019, https://www.wsj.com/articles/mutual-funds-embrace-of-high-profile-unicorns-backfires-11570786202 (observing that valuation of We shares in 2018 by large asset management firms varied by as much as 67%).

[95] Cf. William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 269-70 (1976) (explaining, as uncertainty in the law increases, "parties to a dispute would find it more difficult to forecast the outcome of litigation, and litigation would increase").

are not readily dismissed at the pleadings stage, and the terms of the transaction are not protected by the business judgment rule.

Between 2006 and 2018, 34 appraisal cases went to trial in Delaware.[96] The average time from when the appraisal petition was filed until the trial court opinion was issued was 2 years, 8 months.[97] Litigated cases result in lengthy trial court opinions as courts assess "all the relevant evidence" about value which includes, as a result of the effort to determine the reliability of the deal price, a detailed analysis of the strengths and weakness of the deal process.[98] That record is often reevaluated and frequently overturned on appeal.[99]

Appraisal litigation involving Delaware-incorporated public companies (in which there no market out for cash mergers) has also increased due to the rise of appraisal arbitrage.[100] The number of appraisal filings began to increase dramatically, beginning in 2011.[101] As Korsmo and Myers report, "During 2015, more than $2 billion of stock dissented in Delaware, and in 2016, 20% of public company transactions faced an appraisal claim"[102] The volume of both merger filings and deals challenged continued to grow in 2017.[103]

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[96] Marcus, et al., *supra* note 12. The trials have continued in 2019. See, e.g. In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303; In re Appraisal of Jarden Corp., 2019 Del. Ch. LEXIS 271; In re Stillwater Mining Co., 2019 Del. Ch. LEXIS 320.

[97] Marcus, et al., *supra* note 12.

[98] See, e.g., In re AOL Inc., 2018 Del. Ch. LEXIS 63 (50 pages) (all using LEXIS pagination); In re Appraisal of Columbia Pipeline Grp., Inc., 2019 Del. Ch. LEXIS 303 (144 pages); In re Appraisal of Dell Inc., 2016 Del. Ch. LEXIS 81 (169 pages); In re DFC Global Corp., 2016 Del. Ch. LEXIS 103 (69 pages).

[99] See, e.g., Verition Partners Master Fund, Ltd. v. Aruba Networks, Inc., 210 A.3d 128 (Del. 2019).

[100] Prior to approximately 2010, appraisal litigation in public companies was infrequent, and practitioners and commentators relatively little attention to the appraisal remedy in public deals. See Craig Boyd, *Appraisal Arbitrage: Closing the Floodgates on Hedge Funds and Activist Shareholders*, 65 KAN. L. REV. 497, 502 (2016) ("Over the past decade, appraisal claims have had a limited presence in Delaware courts"); see also Wei Jiang, Tao Li, Danqing Mei, & Randall Thomas, *Appraisal: Shareholder Remedy or Litigation Arbitrage?,* 59 J. LAW & ECON. 697, 699 (2016) (documenting that appraisal "petitions increase from 2-3 percent of eligible deals in the early 2000s to around 25 percent in the 2010s.").

[101] Korsmo & Myers, *supra* note 13.

[102] Id.

[103] Potter, Anderson Corroon LLP, *2017 Year in Review: The State of Appraisal in the*

Several developments likely contributed to the increase in filings[104] – the favorable statutory interest provision, the *Transkaryotic* decision,[105] and reductions in the viability of traditional merger litigation.[106] Although commentators debate the relative importance of these developments,[107] the increase in filing volume is undisputed.[108]

Because of the cost and complexity of the valuation process, small shareholders rarely pursue appraisal claims in public companies.[109] Instead, "that hedge funds are by far the dominant force among the appraisal petitioners, especially after 2010…."[110] Hedge funds are particularly well-positioned to litigate the complex valuation issues in appraisal cases. In addition, competition among hedge fund managers

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Delaware Courts, http://www.potteranderson.com/media/publication/819_Potter_Anderson_2017_Year_in_Review.pdf

104 See, e.g. Jiang, et al., *supra* note 100, at 715 ("Some legal scholars argue that the landscape of appraisals changed dramatically around 2007-8, after the landmark Transkaryotic ruling and the 2007 amendment to the Delaware appraisal statute that set the default prejudgment interest rate").

105 In re Appraisal of Transkaryotic Therapies, Inc., 2007 Del. Ch. LEXIS 57. In *Transkaryotic*, the court held that shares acquired after the public announcement of a merger were eligible for appraisal. The MBCA and most states other than Delaware do not provide appraisal rights for after-acquired shares. See Desiree M. Baca, *Note, Curbing Arbitrage: The Case for Reappraisal of Delaware's Appraisal Rights*, 13 N.Y.U. J.L. & BUS. 425, 455 ("In thirty states, shareholders must certify in their demand payment that they had purchased their shares prior to the announcement of the merger,").

106 Decisions like *In re* Trulia, 129 A.3d 884 (Del. Ch. 2016). and Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015). made it more difficult both to win a lawsuit challenging a merger and for plaintiffs' attorneys to recover fees in connection with the settlement of such a lawsuit. See Matthew D. Cain, Jill Fisch, Steven Davidoff Solomon & Randall Thomas, *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 606-7 (2018) (explaining the effect of these decisions on the difficulty of a successful recovery in cases challenging the fairness of a merger).

107 See, e.g. Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1553 (2015) (claiming, based on empirical analysis of appraisal filings, to "confidently dismiss" efforts to explain the increase in merger filings by either the *Transkaryotic* decision or the new statutory interest rate in appraisal cases).

108 See, e.g. Jiang, et al., *supra* note 100 (documenting the increase).

109 Unlike class action claims, appraisal claims can only be brought on behalf of dissenting shareholders, which reduces the potential recovery and, for plaintiffs' attorneys, the potential size of the fee award in a successful case.

110 Jiang et al., *supra* note 100, at 704.

has increased the attraction of appraisal litigation as an investment strategy. Since 2004, the number of hedge funds has more than doubled, and the financial crisis of 2008 led to a low interest rate environment, an increase in passive investing and a number of other industry changes that hurt hedge fund performance.[111] Appraisal litigation offered an attractive and relatively low risk strategy, a strategy that was facilitated by the interest rate available in litigation.[112]

At least some commentators have argued that appraisal arbitrage is abusive and creates a need to modify or eliminate statutory appraisal rights.[113] Similarly, the Delaware courts' recent move in valuation methodology from DCF toward measures such as deal price minus synergies can be understood both as a way to make the appraisal process more objective and as a way of reducing the potential return to hedge funds from appraisal litigation.[114]

Some commentators have also expressed concern that the risk of appraisal litigation has adverse effects on the quality of deals. For example, buyers concerned about the risk and potential cost of appraisal litigation may include a merger-out provision that enables them to terminate the deal if a sufficient number of shares demand appraisal.[115] Another possibility is that buyers will negotiate a lower deal price in order to retain funds to pay off shareholders that demand appraisal.[116]

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[111] Barry Ritholtz, *The Financial Crisis Killed Hedge-Fund Performance*, BLOOMBERG, Sept. 17, 2018, https://www.bloomberg.com/opinion/articles/2018-09-17/hedge-funds-blame-the-financial-crisis-for-shrinking-performance.

[112] See Jiang, et al,, *supra* note 100, at 727 (reporting that "over half of the returns to appraisal filings come from prejudgment interest accruals rather than valuation improvements").

[113] See, e.g., Jay B. Kesten, *The Uncertain Case for Appraisal Arbitrage*, 52 WAKE FOREST L. REV. 89, 90 (2017) (describing six cases in which "appraisal arbitrageurs challenged seemingly unobjectionable mergers").

[114] See, e.g., Justine Drohan, *The Delaware Shift in Appraisal Fair Value Methodology* (working paper 2020).

[115] See Audra Boone, Brian Broughman & Antonio J. Macias, *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J. LAW & ECON. 281, 312-12 (2019) (describing and empirically examining use of appraisal out clauses); Guhan Subramanian, *Using the Deal Price for Determining 'Fair Value' in Appraisal Proceedings*, in THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? (2020) https://ssrn.com/abstract=2911880 (noting that an appraisal out clause has never been triggered).

[116] Kesten, *supra* note 113 at 129 (observing that "acquirers might view the costs of those claims as a form of deal tax and self-insure by lowering their bids").

This practice has the potential to cause price discrimination in the merger terms; the small and passive investors who do not seek appraisal receive a lower price, while the hedge funds are able to obtain a higher premium.[117]

The other side of these arguments is the claim that appraisal litigation serves a useful role in disciplining participants in a merger. Several empirical studies find that the quality of the merger process is related to the strength of the appraisal remedy and that legislative or judicial decisions that restrict appraisal rights hurt shareholders.[118] This Article returns to the issue in Part III below and argues that the potential costs of regulatory change to address potential excesses in merger litigation counsel in favor of a private ordering solution.

II. Private Ordering Solutions to Appraisal

Appraisal litigation is relatively infrequent[119] in the venture-backed private company context.[120] To a degree, this may be surprising. Mergers have overwhelming eclipsed IPOs as the most likely exit event for a start-up company, and there are thousands of private company

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[117] See, e.g., Boone, et al., *supra* note 115, at 283 (describing such "price discrimination" could "shift[] economic returns away from passive investors and toward arbitrage hedge funds" but finding no evidence of such price discrimination); Kesten*, supra* note 113 at 127 ("appraisal arbitrage perniciously redistributes value from acquirers and ordinary shareholders to the arbitrageurs.").

[118] See, e.g., Boone, et al., *supra* note 115 at 285 (finding that "a strong appraisal regime increases returns to target shareholders."); Scott Callahan, Darius Palia, & Eric Talley, *Appraisal Arbitrage and Shareholder Value*, 3 J. L. FIN & ACCT'G 147 (2018) (shareholders tend to receive higher premia as the strength of the appraisal remedy increases) See also Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J. L. ECON. & ORG. 543 (2019) (developing model showing that judicial deference to deal price in appraisal litigation undercuts the ability of appraisal to serve as a de facto reserve-price in a merger and therefore reduces shareholder welfare).

[119] But see In re Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013) (involving appraisal and breach of fiduciary duty claims by 5% stockholder in merger in which the common stockholders received nothing).

[120] This article does not address the use of appraisal in closely-held corporations. Such corporations, which typically operate in a manner very similar to partnerships raise a variety of distinctive issues. See George D. Hornstein, *Judicial Tolerance of the Incorporated Partnership*, 18 L. & CONTEMP. PROBS. 435, 435 (1953) (describing the distinctive legal issues of closely-held corporations).

mergers per year.[121] In addition, virtually every private company merger triggers statutory appraisal rights because the market out exception does not apply either in Delaware or under the MBCA.[122] The rationale for appraisal is also more compelling in private companies, as shareholders lack both a readily-ascertainable market price as some benchmark of value and the liquidity of a market sale as an alternative to the merger consideration.

One reason for the limited attention is that appraisal arbitrage is largely a non-event for deals involving the sale or merger of private companies. There is no public market for shares in private companies, and indeed, there may be no public announcement of the merger itself. As a result, hedge funds do not have the opportunity to buy into a private company's stock after a merger has been announced for the purpose of bringing an appraisal claim. A second factor is that many private company participants are repeat players who are subject to reputational constraints.[123] The risk that a party will be excluded from future investment opportunities both limits opportunistic behavior and reduces an investor's willingness to challenge the fairness of a transaction through litigation.[124]

A third factor that limits appraisal litigation is the prevalence of contractual limitations on the right of shareholders to bring appraisal cases.[125] These contractual limitations typically take the form of

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[121] See, e.g., Steve Blank, *When Founders Go Too Far*, HARV. BUS. REV. (Nov.-Dec. 2017), https://hbr.org/2017/11/when-founders-go-too-far ("In 2016 there were 3,260 acquisitions of technology companies and only 98 tech IPOs, according to CB Insights").

[122] See, e.g., Jeff Wolters, *Delaware Law for Venture-Backed Companies: 2017 Year in Review*, Morris Nichols VC/PE Update, Jan. 2018. http://www.mnat.com/files/BylinedArticles/2018_DelawareLawforVentureBackedCompanies2017YearinReview_January2018.pdf ("in private company mergers … every merger triggers appraisal rights,").

[123] See Vladimir Atanosov, Vladimir Ivanov & Kate Litvak, *Does Reputation Limit Opportunistic Behavior in the VC Industry? Evidence from Litigation against VCs*, 67 J. FIN. 2215 (2012) (discussing how reputational constraints reduce opportunism by VCs and documenting the fact that VCs involved in litigation suffer declines in future business opportunities).

[124] *Id*.

[125] There are other reasons. For example, private company investors, particularly VC funds face reputational constraints – they are repeat players who are interested in being involved in future deals. See Blank, *supra* note 121 (noting that, because of the increasing supply of private capital and the limited number of attractive start-ups, VC

shareholder agreements, which are widely used in startup companies.[126] Although few judicial decisions have determined the extent to which these provisions constitute enforceable limits on shareholders' statutory appraisal rights, their use is evidence that, at least in the startup world, market participants view private ordering as an attractive tool for dealing with the cost and uncertainty of appraisal litigation.[127] This Part describes the most common forms of contractual limitations on appraisal rights and the extent to which courts have analyzed their validity.

The drag-along provision is most common form of limitation on appraisal rights used by startups.[128] Drag-along provisions require shareholders, in specified conditions, to vote their stock in favor of a merger. Typically, the conditions required to trigger the vote are board approval of the merger, support for the merger by a specified percentage of the other shareholders, or both. Some drag-along provisions also

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funds have less power and are more deferential to the interests of founders). See also Matthew Lynley, *Very Famous VC Bill Gurley Says Startup Boardrooms Are Now Just Filled With *Clapping Hand Noise*,* TECHCRUNCH (Feb. 14, 2018), https://techcrunch.com/2018/02/14/very-famous-vc-bill-gurley-says-startup-boardrooms-are-now-just-filled-with-clapping-hand-noise/. (observing that "What the venture capitalist is afraid of is losing the next big one."). Private companies also provide less potential for legal fees and are therefore less likely to be attractive to plaintiffs' lawyers.

[126] Shareholder agreements take a variety of forms including purchase agreements, financing agreements, and shareholder rights agreements – all of which this article will term shareholder agreements. See Jill. E. Fisch, *Private Ordering and the Role of Shareholder Agreements*, working paper (2020) (discussing the various types of shareholder agreements).

[127] Concededly, some contractual provisions such as drag-along rights provide value to start-up participants beyond limiting appraisal. See, e.g., Robert B. Little & Joseph A. Orien, *Issues and Best Practices in Drafting Drag-Along Provisions*, HARV. L. SCH. FOR. ON CORP. GOV., Dec. 14, 2016, https://corpgov.law.harvard.edu/2016/12/14/issues-and-best-practices-in-drafting-drag-along-provisions/ (describing issues that can be addressed through an appropriately-drafted drag-along provision).

[128] See, e.g., Douglas G. Smith, *The Venture Capital Company: A Contractarian Rebuttal to the Political Theory of American Corporate Finance*, 65 TENN. L. REV. 79, 128 (1997) (observing that "venture capital agreements often contain … drag-along rights,"); Steven B. Gorin, *Shareholders Agreements for Closely-Held Corporations*, 2018, SA011 ALI-CLE 2629 (observing that "shareholder agreements often contain a 'drag-along' right"); Joseph A. Bartlett, Ross Barrett & Michael Butler, Advanced Private Equity Term Sheets and Series A Documents, § 7.03[4], at 7-10 (2004) (describing survey results reporting that venture capital funds "always" or "often" demand and receive drag-along rights sixty-five percent of the time)..

specify conditions such as a minimum price or require that all shareholders receive equal consideration for the provision to be triggered.

Drag-along provisions facilitate a sale or merger of the company by reducing the percentage of shares required to accomplish a transaction. Drag-along rights both prevent a hold-up problem by the minority shareholders when the majority shareholders negotiate a deal[129] and encourage the majority stockholder to adhere to the requirements necessary to trigger the drag-along, implicitly improving the fairness of the price and process for the minority shareholders.[130]

Technically drag-along provisions are a form of voting agreement. As such, they fall within the scope of statutes that explicitly authorize shareholder voting agreements. Significantly, drag-along provisions do not expressly speak to dissenting shareholders' appraisal rights. Instead, drag-along provisions operate indirectly by eliminating the ability of a shareholder to dissent from a merger. Because statutory appraisal rights are limited to dissenting shareholders,[131] if a shareholder must vote in favor of a merger pursuant to the terms of the drag-along provision, the theory is that such shareholder will not be eligible for appraisal rights.[132] As one commentator observes, although academics

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[129] John Agogliati III & Ross Hurwitz, *Tag-Along And Drag-Along Rights: A Valuation Analyst's View*, LAW360 (May 12, 2015), ("Drag-along provisions can prevent a situation where minority shareholders have the ability to block a sale of the company that was otherwise initiated by the controlling shareholder or a majority of the other shareholders.")

[130] Corporate Finance Institute, *Drag Along Rights*, https://corporatefinanceinstitute.com/resources/knowledge/deals/drag-along-rights/

[131] See, e.g., 8 Del. C. § 262(a) (restricting appraisal rights to any shareholder "who has neither voted in favor of the merger or consolidation nor consented thereto in writing").

[132] See, e.g., Brian Broughman & Jesse M. Fried, *Carrots & Sticks: How VCs Induce Entrepreneurial Teams to Sell Startups*, 98 CORNELL L. REV. 1319, 1331, n. 50 (2013) ("To the extent that common shareholders have agreed to vote their shares as directed by the VCs, and the shares are voted in favor of a transaction, the common shareholders may lose their right to appraisal, which is generally available only to shareholders who vote against the transaction"); See also Lisa R. Stark, *Side-Stepping Fiduciary Issues in Negotiating Exit Strategies for Preferred Stock Investments After Trados*, Amer. Bar Found, 2013, (observing that drag-along provisions can be used to limit the board's exposure for breach of fiduciary duty).

have argued that drag-along provisions therefore operate as implicit appraisal waivers, courts have not addressed the issue.[133]

One potential concern is that waivers of statutory rights must be knowing and explicit. Whether a drag-along would therefore qualify as an explicit waiver of the right to seek appraisal is unclear. Dicta from a 2016 Delaware chancery court decision is instructive. In *Halpin v. Riverstone National, Inc.* a controlling stockholder used its voting power to effectuate a merger by written consent [134] Although Riverstone had a shareholder agreement that contained a drag-along, because of the merger structure, the transaction did not involve a formal shareholder vote. Accordingly, the court held that the drag-along was not triggered and that it need not consider whether a drag-along provision was the equivalent of a waiver of appraisal rights.

The *Halpin* court noted that the question of whether common stockholders may "ex ante contractually commit to a waiver of the appraisal rights provided by statute" was unresolved by prior case law. It observed that prior case law spoke to the question of whether preferred shareholders could contract out of their appraisal rights,[135] but that "whether a common stockholder may contractually waive its statutory appraisal rights for consideration to be set later by a controlling stockholder" was a different and 'interesting legal issue.'"[136] On the facts before it, however, the court determined that it was unnecessary to resolve that question.[137] In particular, the court observed that case law required that any waiver of the shareholders' statutory appraisal right be clear and that the language of the drag-along provision "lacks the clarity to compel a waiver."[138]

Shareholders can also limit appraisal rights through contractual provisions that designate the consideration shareholders will receive in a

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[133] Steve Hecht, *Can Drag-Along Provisions Be Used To Stifle Appraisal Rights?,* Appraisal Rights Litigation Blog, Dec. 16, 2014, https://www.appraisalrightslitigation.com/2014/12/16/can-drag-along-provisions-be-used-to-stifle-appraisal-rights-2/ ("we are not aware of any case in Delaware or New York that has decided whether a drag-along clause can be enforced to effectively waive appraisal rights on the part of the shareholder being dragged along to consent to the deal.").
[134] Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49.
[135] *Id*. at *16 and n.23.
[136] *Id*. at *27.
[137] *Id*.
[138] *Id*. at *35 n. 55.

merger or how that consideration will be determined. As John Coates has explained, these contractual provisions can take various forms such as "fair price charter provisions, entering into buy/sell agreements, or issuing redeemable stock."[139] An example of this type of provision was found in *Ford Holdings*, in which the certificate of designation for the preferred stock explicitly stated that the preferred stockholders would receive the liquidation preference plus any accrued and unpaid dividends in the event of a cash out merger.[140] Chancellor Allen concluded that this contractual language determined the consideration that the shareholders were entitled to in the event of a merger and that the shareholders were "not entitled to anything additional."[141] Charter provisions or provisions in the certificate of designation for preferred stock may also provide that a merger or other transaction triggers a redemption right or a conversion of the preferred stock, on designated terms or at a designated price.[142]

A third option is an explicit waiver of appraisal rights or an agreement to refrain from bringing an appraisal proceeding.[143] As noted above, the court in *Halpin* relied on the fact that the contractual drag-along had not been triggered to conclude that the shareholders had not waived their appraisal rights. The possibility that a transaction could be structured in a way that did not trigger drag-along rights or involve a shareholder vote highlighted the potential value of an explicit appraisal waiver, and following the *Halpin* decision, explicit waivers became more common, as practitioners sought to address *Halpin*'s conclusion that the existence of a drag-along provision alone might be held not to constitute

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139 See John C. Coates IV, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251 (1999) (observing that issuers can contract around judicial determinations of fair value by "fair price charter provisions, entering into buy/sell agreements, or issuing redeemable stock".).

140 In re Appraisal of Ford Holdings, Inc., Preferred Shares, 698 A.2d 973, 978 (1997).

141 *Id*.

142 See, e.g., Gearreald v. Just Care, Inc., 2012 Del. Ch. LEXIS 91, C.A. No. 5233-VCP, at 8-9 (Del. Ch. Apr. 30, 2012) (upholding, in an appraisal, a charter provision allowing company, in connection with a merger, to convert preferred shares to common stock).

143 Notably, the NVCA Model Venture Capital Voting Agreement provides suggested separate language for drag-along provisions and explicit appraisal waivers. See NYCA Model Voting Agreement (updated Jan. 2018) §3.2(e), https://nvca.org/download/5094/ (providing model language for appraisal waiver).

an explicit waiver.[144] Nonetheless, those in the legal community expressed uncertainty over the extent to which appraisal waivers were valid, and, if so, whether they could be used to eliminate the appraisal rights of common as opposed to preferred stockholders.[145]

This issue was finally addressed by the Delaware chancery court in the *Manti* case.[146] Petitioners in *Manti* were common stockholders who sought appraisal following a "company sale," in which the merger proceeds were to be distributed pursuant to the waterfall provision in the charter under which they would receive little or nothing. Petitioners had signed a shareholder agreement providing that they would "refrain from the exercise of appraisal rights with respect to such transaction."[147]

The court concluded that the appraisal waiver was clear and unambiguous: "No contracting party, agreeing to the quoted language, would consider itself free to exercise appraisal rights in light of Board approval of a contractually-compliant Company Sale."[148] The court concluded that the terms of the shareholder agreement had been met and further held that the company, which was a party to the shareholder agreement, could enforce those terms.

Petitioners subsequently moved for reargument of the *Manti* decision, arguing that the waiver of appraisal rights was not enforceable because it was contrary to Delaware law.[149] They argued that a waiver of statutory appraisal rights is invalid under the DGCL and inconsistent

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[144] See, e.g., Robert C. Schwenkel, et al., *Court Leaves Open Whether Appraisal Rights May Be Waived By Agreement—Halpin v. Riverstone*, 19 M&A LAW. 16 (2015), https://www.friedfrank.com/siteFiles/Publications/Court%20Leaves%20Open.pdf (observing that "Controllers seeking to enforce a waiver of appraisal rights through a drag-along should: include in the drag-along agreement an explicit acknowledgment by the minority stockholders that they waive their appraisal rights if the drag-along is invoked").

[145] See, e.g., Ryan Taylor, *The Implications of Halpin v. Riverstone National for Drafting and Exercising Drag-Along Provisions*, Weil Global Private Equity Watch, Apr. 28, 2015, https://privateequity.weil.com/insights/the-implications-of-halpin-v-riverstone-national-for-drafting-and-exercising-drag-along-provisions/ ("While waiting for the courts to ultimately rule on the validity of prospective waivers of appraisal rights by common stockholders, practitioners and private equity professionals should take a cautious approach when drafting and exercising rights under provisions that purport to require stockholder participation or voting in a merger").

[146] Manti Holdings, LLC v. Authentix Acquisition Co., 2018 Del. Ch. LEXIS 318

[147] *Id*. at *4.

[148] *Id*. at *5.

[149] Manti Holdings, LLC v. Authentix Acquisition Co., 2019 Del. Ch. LEXIS 307

with public policy. Relying on *Ford Holdings*, the court found that Delaware law permitted a waiver of statutory rights, at least on the facts of the case at bar where the waiver was clear and unambiguous and where the petitioners were sophisticated investors who were fully informed and represented by counsel when they signed the SA."[150] Notably, the court considered and rejected petitioners' claim that appraisal rights are a mandatory feature of Delaware law that is not subject to private ordering. Instead, the court observed that "the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it require a party to exercise its statutory appraisal rights.[151]

Commentators have characterized *Manti* as "bring[ing] additional certainty to private equity and venture capital." Significantly, *Manti* both upholds the contractibility of appraisal rights under Delaware law and accepts the proposition that this contractual analysis applies to common as well as preferred stockholders. Both the rationale and effect of the *Manti* decision are, at this point, unclear, and VC Glasscock explicitly limited his analysis in *Manti* to the circumstances of the case.[152] Notably, the broader implications of *Manti* for the permissibility of explicit appraisal waivers depend on several factors, including the extent to Manti is context-specific, the extent to which the holding is predicated on the conclusion that statutory appraisal rights are subject to private ordering, and the degree to which this conclusion would apply in the context of a public company that sought to implement an appraisal waiver through a charter or bylaw provision. This Article addresses those issues in Part VI below. Before doing so, however, the Article considers, in more detail, the policy case for appraisal waivers.

III. The Policy Case for Appraisal Waivers

The debate over appraisal litigation focuses on how to get the appraisal remedy right. As commentators have observed, appraisal operates to discipline both the merger price and the deal process by providing a mechanism by which minority shareholders can challenge

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[150] *Id*. at *11. The court noted that it "need not decide whether a waiver of appraisal would be upheld in other circumstances." Id.

[151] *Id*. *11.

[152] See *id.* at *10 ("in light of the specific facts here, I find that waiver of appraisal rights is permitted under Delaware law").

deals that are unfair. If the appraisal remedy is too restrictive, shareholder welfare will be adversely affected. If appraisal is available, however, in cases in which it is unnecessary to protect investor welfare, then the complex task of creating and evaluation multiple valuation methodologies is not cost-justified.

One issue is determining the circumstances under which appraisal is warranted. Commentators have debated the need for appraisal in transactions involving publicly-traded corporations – a debate that led to the market-out exception.[153] As noted above, states have taken very different approaches to the scope of that exception. Similarly, critiques have questioned the need for appraisal in transactions involving a robust merger process, particularly in the absence of a controlling stockholder or other type of conflict of interest transaction. For example, Vice-Chancellor Glasscock observes that the classic justification for appraisal is when minority stockholders have been squeezed out at an unfair price but that there is "little to recommend extending an appraisal right to dissenters in the case of a 'clean' merger."[154]

Moreover, because of the complexity of the valuation process, a potential cost of allowing appraisal litigation is the potential variability of the outcome. The likelihood of abusive litigation increases to the extent that the valuation methodology in appraisal proceedings creates uncertainty about the court's determination of fair price.[155] For example, the Delaware Supreme Court observed in Dell that "each party—petitioners and the Company—enlisted highly paid, well-credentialed experts to produce DCF valuations. But their valuations landed galaxies apart—diverging by approximately $28 billion, or 126%."[156]

These concerns have led to legislative responses. Both the Delaware appraisal statute and the appraisal provision in the MBCA

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[153] See Newell, *supra* note 24.
[154] Glasscock, *supra* note 18 at 10. Vice-Chancellor Glasscock defines a clean merger as "stock that trades freely, determination by an untainted board that the merger represents greater than standalone value, and exposure to a market" *Id.* at 9.
[155] See, e.g. *id*. at 29 (observing that "appraisal arbitrage is no better or worse than the underlying appraisal cause of action: whether that action promotes efficiency or not, the effect -- good or ill -- is simply magnified by the availability of arbitrage").
[156] Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 36 (Del. 2016).

have been amended on multiple occasions.[157] In Delaware, the legislature amended the appraisal statute most recently in 2016.[158] The amendments made two changes. First, they created a de minimis exemption to appraisal rights in public company mergers, barring claims when the number of shares seeking appraisal is less than 1% of the outstanding shares.[159] Second, they provided an acquiror the option to prepay some or all of the merger consideration to the petitioner up front, thereby eliminating the accrual of statutory interest on the amount of the prepayment.[160]

Although commentators have noted that the prepayment provision in particular reduces the potential return that appraisal arbitrageurs can obtain through the payment of interest, they have warned that the amendments do not go far enough to reduce the risk of abusive litigation and noted their potential to create other problems such as increasing the arbitrageur's liquidity during the pendency of the appraisal proceeding.[161] In addition, the statute does not specify what happens if the prepayment amount exceeds the judicially-determined fair value. Accordingly, in *Panera Bread*, where respondent in accordance with the statute prepaid the merger price and subsequently established that deal price exceeded fair value, the court refused to order a refund of the excess.[162]

The MBCA was amended most recently in 2006 to shift the focus of the appraisal remedy toward self-dealing in conflict of interest transactions.[163] Specifically, the market-out exception to appraisal in public company mergers was eliminated in transactions involving a conflict of interest.[164] As with other amendments to the MBCA,

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[157] Newell, *supra* note 24 (describing history of Delaware appraisal statute); Robert B. Thompson, *Appraisal and the Model Business Corporation Act*, 74 LAW & CONTEMP. PROB. 253, 264-66 (2011) (describing amendments to the MBCA appraisal provision).
[158] See, e.g., Onyeador, *supra* note 2, at 357-8 (describing and evaluating the 2016 amendments).
[159] 8 Del. C. § 262(g).
[160] 8 Del. C. § 262(h).
[161] Miehl, *supra* note 3, at 667-8.
[162] See, e.g., In re Panera Bread Co., 2020 Del. Ch. LEXIS 42, *106 ("Here, the only permissible conclusion is fortunately a logical one: the General Assembly intended to omit a refund mechanism.").
[163] Thompson, *supra* note 157 at 266 ("The 2006 changes make clear the shift of appraisal away from liquidity toward fiduciary-duty policing of conflict of interest").
[164] Id. In addition, the exclusivity of the appraisal remedy would not apply in conflict transactions unless there was a "cleansing action." *Id.*

however, states exhibit substantial variation in the degree to which they adopt them. Thus, only a minority of MBCA states followed the MBCA's move to eliminate the market-out in conflict of interest transactions. Of the 36 states that provide a market-out exception to appraisal rights, only eleven limit it to non-conflict situations.[165]

Despite these efforts, there are reasons to question whether any state has gotten the appraisal remedy "right" and whether empirical studies have the capacity to answer that question. Legislative and judicial reform efforts present the ongoing risk of regulatory error. Indeed, the degree of variation among state corporation statutes with respect to the structure of the appraisal remedy suggests a lack of consensus as to the optimal approach. In addition, as the preceding discussion notes, the role of appraisal is a product of ongoing market developments. The combination of the rise of hedge funds and low market interest rates both contributed to the growth of appraisal litigation as an investment strategy. Other market developments such as the growth in passive investing strategies, the concentration of ownership in the hands of a small number of asset managers, and the increase in the number of large companies that are staying private may also affect the manner in which appraisal rights should be structured.

In addition, the appropriate scope of the appraisal remedy may vary depending on firm-specific characteristics. To the extent that appraisal rights protect liquidity interests, those rights are more important for shareholders who hold illiquid shares. The distinction today does not depend entirely on public company status; rather, share liquidity exists along a spectrum in which the shares of some public companies are thinly-traded and the shares of some large private companies enjoy considerable liquidity.[166]

As the 2006 amendments to the MBCA recognize, the importance of appraisal also depends on ownership structure. Minority stockholders in corporations with a controlling stockholder or a control group may be more vulnerable to self-dealing in connection with a merger. Concerns of self-dealing increase in the context of freeze-outs or when majority stockholders receive different merger consideration than minority stockholders. Control is not the only relevant aspect of

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[165] Siegel, *supra* note 34, at 248.

[166] Elizabeth Pollman, *Information Issues on Wall Street 2.0*, 161 U. PA. L. REV. 179, 182 (2012) (detailing the growth of secondary markets in private company stock and estimating their "the total transaction volume in the billions").

ownership structure. The value of appraisal rights may also depend on the identity and characteristics of the shareholder base as a whole – the shareholders' ability to identify and vote against suboptimal transactions, the shareholders' investment horizon, and the extent to which shares are held by intermediaries who may face a conflict in voting on a merger.

Finally, the importance of appraisal rights may vary based on the nature of the company and the industry.[167] Share price volatility may increase the risk of opportunistic merger timing. Industry characteristics affect the likelihood of a merger and the availability of comparable transactions to serve as metrics of fair value. Shareholders in new economy companies with substantial information asymmetries about future growth may need greater protection than shareholders in corporations with predictable cash flows.

Both the apparent difficulty in establishing an optimal appraisal remedy and the degree to which what is optimal depends on firm-specific characteristics suggest that private ordering may be preferable to regulation in determining the availability of appraisal rights. Private ordering allows corporations to tailor their governance structures – typically through charter and bylaw provisions – to meet their individual needs.[168] Corporate law broadly supports private ordering through statutory provisions that authorize a substantial degree of firm-specific tailoring. Common examples of private ordering include dual-class voting structures, classified boards of directors, forum selection provisions and majority voting. Private ordering facilitates efficient customization through rules that vary based on firm-specific differences.[169] Private ordering also allows innovation and experimentation and reduces the risk of regulatory error associated with mandatory regulation.[170]

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[167] See, e.g. Jordan M. Barry & John William Hatfield, *Pills and Partisans: Understanding Takeover Defenses*, 160 U. PA. L. REV. 633, 692 (2012) (demonstrating through model that "Shareholders' and Insiders' preferences [with respect to takeover defenses] depend on the Target's particular characteristics, and there are instances in which both groups prefer the same level of defenses.").

[168] See Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOKLYN L. REV. 1637, 1638 (2015) (defining private ordering as "the adoption of issuer-specific rules that are contractual in nature (as opposed to statutes, agency rules, or decisional law)").

[169] See *id*. at 1639 (describing the advantages of private ordering).

[170] See *id*. (citing bylaws responding to board adoption and use of poison pills as an example of innovation through private ordering).

As noted in Part II, private companies currently engage in extensive private ordering with respect to appraisal rights by including fair price provisions, drag-along rights and explicit appraisal waivers in their shareholder agreements. These provisions enable firms that view the existing scope of the appraisal remedy as either too expansive or too uncertain to adopt greater predictability by contract. The advantage of these provisions is that corporate participants can agree in advance to insulate a transaction from the prospect of a subsequent challenge through an appraisal proceeding. This empowers a target company to negotiate a merger without a concern that the acquirer will lower the deal price so as to leave money available to pay dissenting shareholders. It eliminates the need to include an appraisal-out term. And, to the extent that some transactions may be deterred by the risk of appraisal litigation, a target with an appraisal waiver makes itself more attractive to prospective buyers.

Allowing appraisal rights to be subject to private ordering does not mean that all firms could or should eliminate appraisal rights entirely; it simply would provide corporate participants with the option of limiting or eliminating appraisal rights on a firm-specific basis. Importantly, appraisal waivers also need not be all-or-nothing provisions. An appraisal waiver can designate that it will only apply in certain conditions. For example, the waiver might only apply if a merger received approval by a supermajority of the shareholders or approval by a majority of the minority shareholders.[171] The waiver could exclude transactions in which management or a controlling stockholder is the buyer. If corporate participants are wary that a controlling shareholder will receive a disproportionate share of the gains associated with a merger, they can structure an appraisal waiver that only applies if the controlling shareholder's consideration is identical to that of the minority shareholders. Similarly, to reduce the risk that VC fund will structure a merger to extract all of the value from a corporation – as in the *Trados* situation[172] -- employee-shareholders' appraisal waivers can be conditioned on their receiving a specified minimum price per share. Or the waiver might only be triggered if the merger process included

[171] This would be akin to the majority of the minority condition necessary to obtain business judgment protection for a transaction involving a controlling stockholder under the standard set out in Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).
[172] In re Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).

specified safeguards such as multiple bidders or some other form of market test.

In addition, appraisal waivers can be coupled with alternative mechanisms for addressing a given concern. For example, rather than using appraisal rights to address differential treatment of shareholders, the corporate charter could contain a requirement that, in a merger, all shareholders receive equal consideration.[173] A charter could establish a supermajority voting requirement for mergers to ensure the support of the minority shareholders.[174] And a charter could provide that a merger triggered redemption rights, at a specified price, to ensure liquidity for shareholders in a private company. Similarly, appraisal waivers can be efficiently packaged with other governance provisions. For example, corporate participants might limit restrictions on transferability, increasing liquidity for existing shareholders, if they have the assurance that the potential purchasers – who are strangers to the enterprise – will lack the capacity to hold up a future transaction by exercising appraisal rights.

The advantages of predictability, firm-specific tailoring and limiting regulatory area counsel in favor of extending appraisal waivers to the public company context. As in private companies, appraisal waivers would reduce the distortionary effect that the prospect of appraisal litigation might have on the terms of a merger. Appraisal waivers would reduce the potential for price discrimination between the passive investors who accept the deal price and hedge funds that litigate in an effort to obtain a higher premium. And appraisal waivers would eliminate the potential cost of an appraisal proceeding in clean mergers.

As with appraisal waivers in the private company context, a public company appraisal waiver could be limited to specific contexts or require specified conditions. For example, the waiver might apply only to mergers involving an arms-length negotiated transaction with an independent third-party acquirer and exclude transactions involving a

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[173] See, e.g., Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J. F. 543, 547 (2017) (describing and evaluating the costs and benefits of equal treatment clauses).

[174] A supermajority requirement would be expected to increase the size of the premium, reducing the need for appraisal). See, e.g., Audra Boone, Brian Broughman & Antonio J. Macias, *Shareholder approval thresholds in acquisitions: Evidence from tender offers,* 53 J. CORP. FIN. 225 (2018) (considering the extent to which a supermajority approval requirement may result in a higher deal premium).

controlling shareholder or a management group buy-out. The waiver might also depend on the merger consideration exceeding a threshold price such as a specified premium over the pre-announcement trading price. [175]

Appraisal waivers also allow a corporation to dictate, in advance, the appropriate procedures by which a merger is to be negotiated by stipulating those procedures as conditions for the application of the waiver. The waiver might require that the merger include specified process protections such as an auction, a shopping period, the use of an independent special committee or other indicia of fairness. If, for example, an issuer believes that the standards set out in *Dell* warrant a dereference to the price reached in a deal negotiated in accordance with those standards, compliance with the *Dell* standards can be the predicate condition for waiver of the appraisal remedy.[176] Issuers can also specify a valuation methodology as an alternative to the existing uncertainty about the methodology by which the courts determine fair value.

Critically, an issuer's choice of contract terms would be transparent and subject to market discipline. Shareholders can evaluate the effect of an appraisal waiver both on the prospect of a merger and on the merger price and can factor that into the price that they are willing to pay for the issuer's shares.[177] Prospective bidders would be able to determine the conditions under which an appraisal waiver would apply and structure the deal negotiation process accordingly.[178] Moreover,

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[175] In theory, appraisal waivers may be most appropriate in situations in which process of negotiating the merger has been "clean." See Glasscock, *supra* note 18 at 10. The process of drafting a charter provision that identifies a clean merger process with sufficient clarity ex ante is nontrivial, however.

[176] See Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 35 (Del. 2017) (explaining that Dell's sale process featured ""fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes . . . .").

[177] See, e.g., Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1562 (1989) ("A charter term that significantly affected risk or return should be noticed by the informed investor, in the same way that any other business factor would be noticed. . . . and we would readily observe price effects for significant variations from the standard form."),

[178] Although appraisal waivers technically govern the rights of the acquirer by limiting the ability of target company shareholders to obtain more than the negotiated deal price, there are reasons to believe that the terms of deals are negotiated in the shadow of the availability of appraisal rights. As a result, a target should be able to obtain more favorable deal terms if the acquirer need not factor in the potential cost of appraisal.

because the terms of any particular appraisal waiver can vary, firms and their shareholders would be able to evaluate the extent to which specific process protections are valuable to shareholders. The variation in these terms would be reflected in stock price. Merger waivers would thus, in the words of then-Vice Chancellor Strine, enable "the market [to] assess what works best without the high costs that come with the imposition of an unproven, invariable mandate."[179]

IV. Are Appraisal Waivers Legal?

The preceding part defends allowing firms to limit or eliminate shareholder appraisal rights through private ordering. The courts have broadly recognized that corporate law imposes some limits on private ordering – these limits are common described as mandatory features of corporate law.[180] Accordingly, this part considers the question of whether statutory appraisal rights, under existing law, are mandatory, or can be tailored by individual corporations.

A. The Appraisal Statute Itself

Although the precise boundary between mandatory and enabling features of corporate law is somewhat unclear, courts have generally begun their analysis with the text of the statute. The Delaware appraisal statute, §262 provides that a shareholder who meets the statutory conditions and complies with the required procedures to perfect his or her appraisal rights "shall be entitled to an appraisal." The use of the term shall has been viewed, by at least some courts as conveying that a particular statutory right is mandatory.[181] In addition, section 262(c)

See Miehl, *supra* note 3, at 669-71 (describing potential mechanisms for acquirer to engage in self-help *to avoid "the risk of exorbitant post-closing costs").*

[179] Leo E. Strine, Jr*., One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?,* 66 BUS. LAW. 1, 7 (2010).

[180] See Bernard S. Black, *Is Corporate Law Trivial? A Political and Economic Analysis*, 84 NW. U.L. REV. 542, 543 (1990) (describing "mandatory corporate law" as corporate law rules that are not "waivable by contract among the relevant parties").

[181] See, e.g., H-M Wexford LLC v. Encorp, Inc., 832 A.2d 129, 152 (Del. Ch. 2003) (reasoning that the requirements of section 228 (c) are mandatory because "the word 'shall' is a mandatory term"); Speiser v. Baker, 525 A.2d 1001 (Del. Ch. 1987)

includes language expressly authorizing corporations, through a charter provision, to extend appraisal rights to a broader range of transactions than those required by the statute, but contains no comparable language authorizing charter provisions that restrict or eliminate appraisal rights. The implication is that the statute's failure to authorize appraisal waivers means that such waivers are not permitted.

This negative implication is not the only possible approach. Indeed, other sections of the Delaware statute contain express limitations on private ordering. For example, 8 Del. C. § 102(f) prohibits fee shifting charter provisions in connection with internal corporate claims. Similarly, Section 102(b)(7) bars a charter provision that limits or eliminates director liability for a breach of the duty of loyalty. Accordingly, it is plausible to read section 262's silence as permissive rather than prohibitive. As the court observed in *Jones Apparel* that "for section 102(b)(1) to have meaning, it must not be limited to altering default provisions in statutory sections that contained 'magic words' permitting contrary provisions."[182]

The *Manti* court followed the guidance suggested by the language from *Jones Apparel*. Relying on the absence of an express statutory provision on the contractual waiver or modification of appraisal rights, the court observed that "the DGCL does not explicitly prohibit contractual modification or waiver of appraisal rights, nor does it require a party to exercise its statutory appraisal rights."[183] The court therefore concluded that the appraisal waiver in the case before it served "to supplement the DGCL, and is not inconsistent with, nor contrary to, the DGCL.[184]

Notably, the text of the Delaware statute does not distinguish between the appraisal rights of preferred and common stockholders. [185] As *Manti* noted, Chancellor Allen held in *Ford Holdings* that a preferred stockholders could fix the fair value of their shares in the event of a

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(interpreting as mandatory the language of section 211 stating that a corporation "shall" hold an annual meeting).

[182] Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 856-60 (2008), citing Jones Apparel, 883 A.2d at 848.

[183] Manti Holdings, LLC v. Authentix Acquisition Co., 2019 Del. Ch. LEXIS 307, *11

[184] Id.

[185] See also 2 DELAWARE CORPORATION LAW AND PRACTICE § 36.07 (2018) ("As a general rule, preferred stock possesses the same appraisal rights as common stock.").

merger through a provision in the certificate of designation.[186] This provision, the *Manti* court concluded, "effectively" waived the shareholders' right to an appraisal and, as such served a precedent that appraisal waivers, where clear, were permitted under section 262.[187]

Concededly, *Manti*'s holding was narrow. The court explained: "I need not decide whether a waiver of appraisal would be upheld in other circumstances."[188] Its analysis also differs from that of prior courts. For example, in upholding the provision in *Ford Holdings*, Chancellor Allen explicitly emphasized that preferred stock is different and that his holding "deals only with the appraisal remedy for preferred stock."[189] The court specifically noted that "preferred stock is a very special case."[190] The court in *Halpin* emphasized this language in observing in dicta that case raised an "interesting legal issue as to whether a common stockholder may contractually waive its statutory appraisal rights for consideration to be set later by a controlling stockholder."[191]

Whether subsequent courts will both follow the *Manti* court's analysis of the statute and apply it in different contexts remains to be seen. A further complication is that the Delaware courts have only considered the legality of appraisal waivers in the context of shareholder agreements involving private companies. Delaware precedent suggests, albeit frequently in dicta, that shareholder agreements may be subject to different analysis than a charter or bylaw provision and that, in some cases, shareholders have broader power to waive their rights through a shareholder agreement. [192] Whether the case law concerning appraisal

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[186] In re Appraisal of Ford Holdings., Inc. Preferred Stock, 698 A.2d 973 (Del. Ch.1997)

[187] *Manti* at *10. Significantly, Chancellor Allen held in *Ford Holdings* that appraisal rights are a "mandatory provision[] of Delaware law"). *Ford Holdings*, 698 A.2d at 976.

[188] *Manti* at *11.

[189] In re Appraisal of Ford Holdings, 698 A.2d 973, 977

[190] *Id.* at 977. See also *id.* ("All of the characteristics of the preferred are open for negotiation; that is the nature of the security."). Similarly, in *Metromedia*, the court upheld a contractual designation of the merger consideration to be paid to preferred stockholders rather than conducting its own independent valuation under the appraisal statute but emphasized the fact that its holding involved the rights of preferred stockholders. In re Appraisal Metromedia Int'l Grp., Inc., 971 A.2d 893 (Del. Ch.2009)

[191] Halpin v. Riverstone Nat'l, Inc., 2015 Del. Ch. LEXIS 49, *26

[192] See, e.g., Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance* (June 2020 draft), at 3, (making this claim).

waivers depends on this distinction and, if so, whether that distinction warrants different legal analysis are beyond the scope of this Article, and I address them elsewhere.[193]

The language of the MBCA differs somewhat from the Delaware statute. Section 13.02 provides that a shareholder "is entitled to appraisal rights." The MBCA goes further than the Delaware statute in authorizing corporations to supplement statutory appraisal rights – section 13.02(a)(5) states that a corporation may provide appraisal rights with respect to "any other merger, share exchange, disposition of assets or amendment to the articles of incorporation" and permits that expansion of appraisal rights to take the form of a charter provision, bylaw or board resolution. Moreover, the MBCA expressly authorizes a charter provision that limits or eliminates appraisal rights, but only for preferred shareholders that have the right to vote separately on the action giving rise to such appraisal rights.[194] The official comment to the text conveys the negative implication of this provision: "Chapter 13 does not permit the corporation to eliminate or limit the appraisal rights of common shares."

Notably at least one state adopted the MBCA language but modified its treatment of appraisal waivers.[195] The Maryland statute was

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Although courts consciously evaluate shareholder agreements through a contractual lens in which the waiver of statutory or even constitutional rights is permitted, the number of actual cases in which courts have enforced provisions in shareholder agreements that would not be permitted in the charter and bylaws is limited. See Fisch, *supra* note 126 (describing case law on enforceability of shareholder agreements).

[193] See Fisch, *supra* note 126 (arguing that courts require corporations to use charter and bylaw provisions for private ordering and refuse to enforce efforts to use shareholder agreements to circumvent any statutory limits). Language in the chancery court's decision in *Salzberg* also suggests that, because the corporation is a creature of state law, the ability of corporate participants to arrange their rights and powers by private contract is limited. See Sciabacucchi v. Salzberg, 2018 Del. Ch. LEXIS 578, *42 ("The contract that gives rise to the artificial entity and confers these powers is not an ordinary private contract among private actors. The certificate of incorporation is a multi-party contract that includes the State of Delaware.")

[194] Such a provision, if adopted through an amendment to the charter, does not apply to any corporate action within a year after the amendment. MBCA § 13.02.

[195] See Ryan Stoker, Guest Post: *Minority Stockholders Beware – Disappearing Appraisal Rights in Maryland, Appraisal Rights* Litig. Blog, Feb. 19, 2019, https://www.appraisalrightslitigation.com/2019/02/19/guest-post-minority-stockholders-beware-disappearing-appraisal-rights-in-maryland/ (last visited June 8, 2020) (terming the ability of a Maryland corporation to eliminate shareholder appraisal rights through a charter provision "unique").

amended in 2000 to provide that statutory appraisal rights do not apply if a corporation's "charter provides that the holders of the stock are not entitled to exercise the rights of an objecting stockholder under this subtitle."[196] The statute thus allow private ordering with respect to the appraisal rights of both common and preferred stockholders (but only in the charter) and eliminates the delayed effective date provided by the MBCA for the adoption of an appraisal waiver.

The court in *Egan v. First Opportunity Fund*,[197] relied on this provision to uphold a process in which a corporation first submitted a proposed charter amendment to its shareholders that eliminated appraisal rights and immediately thereafter asked them to approve a merger that, but for the charter amendment, would have triggered appraisal rights. Although the court noted that the charter amendment "was presented for the purpose of facilitating the merger transaction,"[198] it found that the amendment was "was adopted in accordance with the literal requirements of the Maryland corporation statute," and was therefore valid.[199] Accordingly the court dismissed the petitioners' demand for appraisal.[200]

The stark difference between the language of the Maryland statute and that of the MBCA, as well as the official comment to the MBCA, strongly suggest that corporate efforts to limit the appraisal rights of common stockholders through private ordering are not permitted under the MBCA. Egan likely illustrates exactly the type of transaction that the MBCA was designed to prevent.

The extent to which Delaware courts would interpret its statute, which is less explicit than the MBCA is unclear. Recent Delaware decisions have upheld innovative efforts at private ordering in the absence of express statutory authorization.[201] Indeed, the Delaware Supreme Court recently reiterated the broadly permissive nature of the Delaware statute in upholding a charter provision providing exclusive federal court jurisdiction for claims arising under §11 of the Federal

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196 Md. Ann Code Corps. & Ass'ns. Art. § 3-202(c)(4).

197 Egan v. First Opportunity Fund, Inc., 2016 Md. Cir. Ct. LEXIS 12, Case No. 24-C-14-008132 (Cir. Ct. Balt. City, Apr. 22, 2016),

198 Id. at *19

199 Id. at *20.

200 Id. at *26.

201 See, e.g. Boilermakers Local 154 Retirement Fund v. Chevron Corporation, 73 A.3d 934 (Del. Ch. 2013) (upholding forum selection bylaw despite the absence of clear statutory language that the topic was the appropriate subject of a bylaw).

Securities Act of 1933.[202] In *Salzberg v. Sciabacucchi*, the Court observed the Delaware statute grants corporations wide latitude in adopting firm-specific charter provisions that address the operations of the corporation and the powers of its shareholders.[203] It explained that the Delaware statute is "broadly enabling"[204] and that, because charter amendments require shareholder action, "Delaware's legislative policy is to look to the will of the stockholders in these areas."[205]

Given the broad enabling text of section 102(b)(1), the *Salzberg* explained that the scope of permissible charter provisions was subject to only two constraints – an express statutory limitation or Delaware public policy. Given that the Delaware statute does not directly prohibit appraisal waivers at least to the same degree as the MBCA, the Delaware courts are likely to consider public policy considerations in addition to the statutory text in evaluating the legality of appraisal waivers. This Article turns next to those considerations.

B. Public Policy Considerations

As the *Salzberg* Court noted, even in the absence of textual limits, courts have repeatedly asserted that some provisions of corporate law are mandatory as a matter of public policy. The precise extent to which public policy imposes limits on private ordering is unclear. [206] As the Court explained in *Sterling*, "A precise delimitation of the scope of the proviso is difficult to formulate; the limits of 'public policy' are ill-defined and changing."[207]

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[202] Salzberg v. Sciabacucchi, 2020 Del. LEXIS 100.
[203] Id. at *9-10.
[204] Id. at *14.
[205] Id. at *15, quoting Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).
[206] This Article does not advocate complete freedom of contract in corporate law. Commentators have identified significant policy arguments in favor of mandatory rules. See, e.g., Leo E. Strine, Jr. & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, in RESEARCCH HANDBOOK ON PARTNERSHIPS, LLCS, AND ALTERNATIVE FORMS OF BUSINESS ORGANIZATIONS 11 (Mark Lowenstein & Robert Hillman eds., 2014) .This Article merely argues that those policy arguments should not be applied to preclude private ordering with respect to appraisal rights.
[207] Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952).

Salzberg cited with approval a law review article identifying only three areas[208] in which the courts appear impose such public policy limits on the otherwise enabling approach to Delaware corporate law – "cases concerning the rights of stockholders to periodically elect directors, to inspect books and records, and directors' duty of loyalty."[209]

The authors of the article, Welch and Saunders, attempted to discern the policy considerations motivating the cases in these areas.[210] The authors observed the right of shareholders periodically to elect directors is a fundamental component of corporate law, thereby explaining the prohibition on provisions that have the effect of establishing permanent directors.[211] Similarly they reason that inspection rights are "necessary to allow stockholders-the owners of Delaware corporations-to monitor their fiduciaries' discharge of management duties."[212] Finally, although they concede that the directors' duty of loyalty is widely understood to be mandatory, they nonetheless identify at least three ways in which corporate law offers directors some degree of protection from liability for breaches of the duty of loyalty, tempering the policy case in favor of its immutability.[213] Accordingly, the authors concluded that, as a descriptive matter, the scope of mandatory corporate law based on public policy considerations is quite limited.

The significance of public policy considerations may be further reduced when private ordering takes the form of a charter provision. A variety statutory provisions explicitly limit modifications to the statutory

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[208] Another area in which the statute appears to reflect public policy limits on private ordering is with respect to the scope of indemnification permitted by §145(f). See Waltuch v. Conticommodity Servs., Inc., 88 F.3d 87 (2d Cir. 1996). Although *Waltuch* is a Second Circuit decision, Delaware commentators "resoundingly agree" that the scope of 145(f) is limited by public policy. Kurt A. Mayr, II, *Note, Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification under Delaware Law in Waltuch v. Conticommodity Services Inc.*, 42 VILL. L. REV. 223, 269 (1997).

[209] Salzberg v. Sciabacucchi, 2020 Del. LEXIS 100 n. 55, citing Welch & Saunders, *supra* note 182, at 856-60

[210] Welch & Saunders, *supra* note 182, at 857-64

[211] *Id*. at 857.

[212] *Id*. at 858.

[213] *Id*. at 858.

default to the charter.[214] The rationale for this appears to be twofold. First, a charter provision (unlike a bylaw) requires shareholder approval. Accordingly, as the Delaware Supreme Court explained, permitting more extensive private ordering in the charter is consistent with "Delaware's legislative policy . . . to look to the will of the stockholders in these areas.[215] Second, charter amendments requires affirmative and joint action by both the board of directors and the shareholders. Accordingly, neither the board nor the shareholders can act unilaterally, the board's authority to adopt a charter provision is constrained by its fiduciary duties[216] and the "the stockholders control their own destiny through informed voting."[217] As the Court put it "This is the highest and best form of corporate democracy."[218] This Article incorporates these considerations by proposing, in Part V, that appraisal waivers be permissible only if implemented through a charter provision.

One may argue, nonetheless, that appraisal rights are different from other corporate governance provisions in that they have a distinctive role in protecting minority shareholders who disagree with the outcome of the democratic process.[219] One possible rationale for broad deference to shareholder voting is the existence of a mechanism for dissenting shareholders. Moreover, even the actual consent shareholders manifest through the voting process may be limited due to concerns over asymmetric information and rational apathy, particularly in the public corporation.[220]

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[214] See, e.g., 8 Del. §102(b)(7) (requiring that director exculpation provisions be contained in the charter); 8 Del. §122(17) (requiring that waivers of the corporate opportunity doctrine be in the charter).
[215] Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996) (explaining that §102(b)(7) incorporates this policy).
[216] Moreover, the standard for judicial review of the board's actions may be heightened, depending on the context in which the charter provision is adopted. See *id.* at 1388 (considering the appropriate standard for review of the board's action in approving a charter amendment and recommending it to the shareholders).
[217] *Williams v. Geier*, 671 A.2d at 1381.
[218] *Id.*
[219] See, e.g., David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?,* 41 DEL. J. CORP. L. 461, 492-93 (2017) (observing that one justification for mandatory corporate law rules is that they "might protect vulnerable parties to the corporate contract (especially shareholders) from exploitation that could occur under a private-ordering regime.").
[220] See In re Appraisal of Ford Holdings, 698 A.2d 973, 977 n. 8 ("Notably the explanation most often pressed forward for the efficiency of mandatory terms in

Four considerations mitigate against the claim that these distinctive features compel mandatory protection of appraisal rights. First, as noted above, charter provisions limiting appraisal rights require board approval, and the directors' action both in approving such a provision and recommending it to shareholders would be subject to the board's fiduciary duties. Second, as noted above, the 2016 amendments to the Delaware statute require that a minimum of 1% of the outstanding shares petition for appraisal thereby eliminating appraisal rights for the most disempowered shareholders. Third, one might look to LLC law in which appraisal rights are entirely contractual and the statute does not provide any appraisal rights by default.[221] Although some investors in LLCs may be more sophisticated than corporate shareholders, LLCs may be publicly traded and the legislature's decision not to protect passive LLC investors automatically is indicative of its view of the importance of appraisal rights.[222] Fourth, unlike shareholder election or inspection rights, appraisal rights are remedial rather than structural. Appraisal rights do not play a primary role in influencing corporate operating decisions or ensuring director accountability for those decisions.

Ultimately, however, the legislature may be better positioned than the courts to consider the relative merits of these policy considerations. The legislature may also be well-positioned to consider appraisal waivers in light of the general statutory trend toward facilitating greater private ordering as well as to compare appraisal waivers to other corporate law features such as charter provisions limiting the scope of the corporate opportunity doctrine. Consequently,

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corporate law is that the consent to modified terms of a corporate contract through a corporate election may (in the case of public corporations particularly) not really constitute the sort of agreement that we ought to enforce because of the existence of asymmetrical information and rational apathy on the part of widely disaggregated shareholders of public companies.").

[221] See 6 Del. § 18-210 (1998) (recognizing contractual appraisal rights).

[222] Notably, appraisal waivers are common in both private and publicly-traded LLCs. See, e.g., Woodcrafters Home Products Holding, LLC, Amended and Restated Limited Liability Company Agreement dated Jan. 4, 2010, at 51 (privately-held) ("No Member shall be entitled to any appraisal rights . . . ."); Travel Centers of America L.L.C. Operating Agreement dated May 13, 2010, at 48 (publicly-traded) ("Shareholders are not entitled to dissenters' rights of appraisal in the event of a merger, consolidation or conversion involving the Company, a sale of all or substantially all of the assets of the Company or the Company's Subsidiaries, or any other transaction or event.").

in Part V, the Article calls for explicit legislation authorizing appraisal waivers.

V. Legitimizing Appraisal Waivers

The preceding discussion suggests that, although there are plausible arguments for the legality and enforceability of appraisal waivers under current law, there is nonetheless substantial uncertainty. That uncertainty has likely contributed to the failure of public companies to adopt charter or bylaw provisions that limit or eliminate statutory appraisal rights.[223] Widespread use of appraisal waivers in private company shareholder agreements provides evidence however that appraisal waivers are potentially valuable. Accordingly, this Article argues for legislation explicitly authorizing corporations to adopt appraisal waivers. For the reasons detailed below, the Article argues that appraisal waivers should be implemented exclusively through provisions in corporate charters.

Legislation would increase predictability as well as providing guidelines as to the circumstances under which such waivers will be enforceable. Legislation would also facilitate the adoption of appraisal waivers by public companies, adoption that offers a market-based alternative to efforts to mediate the scope of appraisal litigation either by regulation or by judicial efforts to adjust the valuation process.

A. Legislative Clarification

Both Delaware and the MBCA have been the subject of frequent amendments designed to modernize and improve the statutory structure. One feature that continues to evolve is the role of private ordering. Both statutes have adopted an increasingly enabling approach in which features of corporate law that were once considered immutable are revisited and, in many cases, converted into default provisions. As one article has observed: "It may be that the mandatory rules that exist today will be loosened tomorrow."[224]

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[223] See also Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIR. LEGAL STUD. 31 (2017) (describing the removal by most public corporations of forum selection provisions when shareholders challenged their legality).
[224] Welch & Saunders, *supra* note 182 at 955.

These statutory modifications or clarifications have responded to a variety of stimuli. One trigger is demand from the business community. For example, corporations faced a crisis in directors' and officers' liability insurance after the Delaware Supreme Court's decision in *Smith v. Van Gorkam*.[225] The high cost and limited availability of insurance led to concerns that corporations would be unable to attract qualified directors.[226] The Delaware legislature responded by adopting §102(b)(7) which authorized corporations to adopt charter provisions limiting or eliminating director personal liability for breaches of the duty of care.[227]

Legislatures have also reacted to changes in the business environment. As Gabriel Rauterberg and Eric Talley explain, "The dot-com era of the 1990s ushered in a wave of novel market-mediated corporate structures [many of which] resulted in extended families of corporate affiliates with partially overlapping ownership, partially overlapping board membership, and partially overlapping lines of business."[228] These structures placed increased pressure on "the canonical 'undivided-loyalty' model of corporate opportunities."[229] As two high-stakes cases made clear, the model was not workable for corporations with overlapping dominant ownership or boards.[230] The Delaware legislature responded in 2000 by amending the statute expressly to authorize waivers of the corporate opportunity doctrine.[231]

Finally, legislatures have recognized that changes are appropriate based on the evolution of the capital markets and the nature of share ownership. The rise of institutional investors, for example, and their growing participation in corporate governance, led to greater efforts to hold directors of public companies accountable through the election process. Institutional investors began to introduce proposals to formalize

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[225] See, e.g., Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1 (1989) (empirically analyzing the reaction in the insurance market to the court's decision).
[226] *Id*.
[227] See *id.* at 7 ("In direct response to these concerns, the Delaware Legislature enacted section 102(b)(7)")
[228] Gabriel Rauterberg & Eric Talley, *Contracting out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1093 (2017).
[229] *Id.* at 1093.
[230] *Id*. at 1094.
[231] 8 Del. C. § 122 (7).

the process by which shareholders could nominate director candidates. The Delaware Supreme Court initially concluded that a so-called proxy access bylaw was beyond the limits of shareholder authority pursuant to section 109.[232] The Delaware legislature responded a year later by enacting two provisions to facilitate proxy access by investors.[233]

Notably, these legislative responses reflected market demand, other states followed Delaware's lead, and corporations widely adopted the contemplated firm-specific provisions. Within two years of Delaware's adoption of §102(b)(7), forty-one states had adopted director exculpation provisions.[234] So, for example, state legislatures followed Delaware's lead in amending their statutes to authorize private-ordering limitations on directors' duty of care, and provisions limiting director liability in accordance with these statutes are ubiquitous in public companies.[235] Similarly, proxy access bylaws are now "mainstream" at large public companies, and their adoption is increasing at smaller public companies as well.[236] Although one might predict waivers of the corporate opportunity doctrine to be relatively rare, Rauterberg and Talley report that "hundreds of public corporations in [their] sample--and well over one thousand in the population--have disclosed or executed waivers."[237]

Similar legislative authorization of appraisal waivers is appropriate. Within Delaware, the context-specific analysis of Manti and the cases on which it relies do not provide sufficient clarity as to the extent to which appraisal waivers will be enforceable and, as a result, do not provide a reliable basis for structuring the terms of a merger. In

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232 CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 229 (Del. 2008) (finding that a proxy access bylaw was invalid).

233 See, e.g., David Skeel, *The Bylaw Puzzle in Delaware Corporate Law*, 72 BUS. LAW. 1 (2016). As Skeel observes, Delaware's adoption of the proxy access legislation was likely also motivated by an effort to limit federal preemption. See id.

234 Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160 (1990)

235 See, e.g., Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Suits*, 57 VAND. L. REV. 1747, 1786 (2004) ("It is very rare for a public company not to have taken advantage of this exculpation.").

236 See Holly J. Gregory, Rebecca Grapsas & Claire Holland, *The Latest on Proxy Access*, HARV. L. SCH. FORUM ON CORP. GOV., Feb. 1, 2019, https://corpgov.law.harvard.edu/2019/02/01/the-latest-on-proxy-access/ ("Proxy access is now mainstream at S&P 500 companies (71%) and is nearly a majority practice among Russell 1000 companies (48%).").

237 Rauterberg & Talley, *supra* note 228 at 1079.

other states, particularly those that follow the MBCA, the statute appears to preclude innovation through appraisal waivers – and the extent to which this language would extend to related terms such as drag-along provisions is uncertain. Given the advantages of encouraging private ordering with respect to appraisal rights, the market demand for contractual waivers, and the prospect that firm-specific innovation will lead to increased efficiency, the case for statutory authorization appears clear. The appropriate structure of that authorization is considered in the next section.

B. Structuring Appraisal Waivers

As Section A explained, the first step in legitimizing appraisal waivers is amending corporation statutes to provide explicitly that shareholder appraisal rights can be modified, limited or eliminated through private ordering. The second step is determining the permissible instrument by which to do so. Statutory provisions vary in the instruments through which they authorize private ordering. As noted above, some statutes restrict firm-specific provisions to the corporate charter, as is the case with 8 Del. C. §§102(b)(7) and 122(17). Other statutes allow private ordering in the charter or bylaws, through board resolutions, and in some cases by contracts such as shareholder agreements.

The foregoing instruments vary in terms of formality and transparency - the charter and bylaws are the governing documents of the corporation, the statute specifies the process by which they are amended, charter amendments must be filed with the state, and bylaw amendments, for public companies, must be filed with the SEC and disclosed to shareholders on a form 8K.

They also vary with respect to whether they require bilateral as opposed to unilateral implementation. Corporate charters are distinctive in that they require both board and shareholder approval to amend. The requirement of joint action reduces the potential for self-dealing or opportunistic behavior by either management or the shareholders. Given that the board's actions are limited by fiduciary duties, board acquiescence operates as a constraint against self-dealing by a controlling stockholder as well.[238] More broadly, joint decisionmaking can promote collaborative information-sharing and debate about the desirability of an appraisal waivers and how it should be structured.[239]

As commentators and the MBCA have observed, a substantial justification for the modern appraisal remedy lies in its role in protecting minority shareholders from abuse of control and self-dealing transactions. Indeed, this concern is highlighted in the 2006 amendments to the MBCA. Minority shareholders can be exploited by other shareholders, by management or by a board responsive to the interests of the majority of the shareholders. A requirement of joint action, coupled with the constraint of fiduciary principles, is a powerful weapon limiting the potential for appraisal waivers to insulate abusive transactions. For these reasons, this Article proposes that the authorizing legislation limit appraisal waivers to exclusively to charter provisions. This approach is consistent with the court's recognition in *Williams v. Geir* that corporate democracy is at its best when private ordering occurs by means of the corporate charter.[240]

Concededly, in Boilermakers, then-Chancellor Strine concluded that a forum selection bylaw unilaterally adopted by the board (which, under the corporation's charter had the authority to amend the bylaws), was valid notwithstanding the absence of shareholder approval. Strine emphasized the flexibility of the bylaws and the ability of shareholders to override board decisions with which they disagreed, either by amending or repealing a board-adopted bylaw or by using their election power to "discipline boards" that act contrary to the shareholders' interests.[241] I have argued elsewhere that Strine's claim is overstated.[242] A variety of practical and legal constraints operate to give boards and shareholders disparate power to adopt and amend the bylaws and, as a

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[238] Moreover, the board's decision to adopt an appraisal waiver that worked to the advantage of a controlling shareholder would likely be evaluated by the courts under a good faith standard.

[239] See, e.g. Jill E. Fisch & Simone Sepe, *Shareholder Collaboration*, 98 TEX. L. REV. 863 (2020) (explaining the value of shareholder/board collaboration in promoting efficient corporate decisionmaking).

[240] Williams v. Geier, 671 A.2d 1368, 1381 (Del. 1996).

[241] See Boilermakers Local 154 Retirement Fund v. Chevron Corp., 73 A.3d 934, 956-957 (describing shareholders' voting power as "a potent tool to discipline boards who refuse to accede to a stockholder vote").

[242] See Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CAL. L. REV. 373 (2018).

result, allowing board-adopted bylaws to implement private ordering is problematic with respect to issues in which such private ordering expands board authority at the potential sacrifice of shareholder interests. Appraisal waivers present the additional complication in that they can also operate to protect self-dealing by a majority of the shareholders. Accordingly, unilateral shareholder action, without the additional protection of board approval, is equally problematic.

Similarly, I have argued that shareholder agreements are, in general, a problematic mechanism for private ordering. Shareholder agreements lack the formality and transparency of traditional corporate governance instruments, their enforceability is likely to depend on context-specific factors such that they do not apply equally to all shareholders, and they import contractual concepts such as affirmative consent and consideration that are inconsistent with the structure of corporate law.[243] I argue that the current use of shareholder agreements that include waivers is a product of the perception that shareholder agreements can be used to implement private ordering provisions that would otherwise be invalid, and I urge courts to reject this practice.[244]

One final point to consider is the mid-stream adoption of shareholder agreements. When a corporation adopts an appraisal waiver before its IPO, "any potential wealth effect can be impounded into the stock price before public investors purchase their shares."[245] A legislative change formally authorizing appraisal waivers could potentially affect the rights of existing shareholders and the value of their stock.[246] Should the mid-stream adoption of an appraisal waiver be treated as the equivalent of a recapitalization or substantive charter amendment under current law and provide current shareholders with an exit remedy such as appraisal?[247]

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[243] Fisch, *supra* note 126

[244] Id.

[245] Romano & Sanga, *supra* note 223, at 32-33. A countervailing concern is the possibility that governance provisions are not efficiently priced in the IPO market. See, e.g., Michal Barzuza, Inefficient Tailoring: *The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131, 145-51 (2018) (raising concerns about inefficient tailoring at the IPO stage).

[246] See, e.g., Romano & Sanga, *supra* note 223 at 32-33 (observing that shareholders lack the opportunity to avoid a negative price effect if a firm adopts a value-decreasing corporate governance provision mid-stream).

[247] Notably, Delaware's Public Benefit Statute originally provided that, if a traditional corporation converted to a Public Benefit Corporation, dissenting shareholders had the

Upon further examination, however, the reasoning behind providing shareholders with such protection is flawed. Legislatures amend corporation statutes frequently, and shareholders invest in corporations with the knowledge that these amendments have the potential to affect their rights and, indirectly the value of their investments.[248] Accordingly, shareholders have no vested rights in the existing scope of their appraisal rights. Indeed, legislation providing that appraisal rights are subject to private ordering would impose no greater a burden on shareholders' rights than more general statutory changes to the scope of the appraisal remedy such as the MBCA's restriction of the market-out exception to transactions not involving a controlling stockholder or Delaware's potential adoption of the MBCA's broader market out that does not exempt cash transactions.[249]

Indeed, when Delaware adopted the Public Benefit Corporation, the statute provided both that a supermajority vote of the shareholders was required to convert a traditional corporation into a Public Benefit Corporation and that dissenting shareholders were entitled to appraisal

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right to seek appraisal. Noam Noked, *DGCL Amended to Authorize Public Benefit Corporations*, HARV. L. SCH. FOR. ON CORP. GOV., Aug. 15, 2013, https://corpgov.law.harvard.edu/2013/08/15/dgcl-amended-to-authorize-public-benefit-corporations/. In 2020, the legislature eliminated the appraisal remedy. See An Act to Amend Title 8 of the Delaware Code Relating to the General Corporation Law, House Bill No. 341, House of Representatives, 150th General Assembly (2020), https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocument?legislationId=48122&legislationTypeId=1&docTypeId=2&legislationName=HB341.

[248] See, e.g., 8 Del. § 394 (reserving to the legislature the right to amend the statute and providing that such amendments shall be part of the charter of every corporation so long as they do not take away a remedy or liability that has "been previously incurred"). Such reservation clauses are a standard provision in corporation statutes. Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, 76 N.C.L. REV. 687, 724-30 (1998). As commentators have observed, these provisions overcome the result in Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), but whether the reserved power can be used by private parties to alter the terms of an existing charter is a different question about which some commentators disagree. See *id*. at 992 ("For almost a century and a half, there has been a split among the highest courts of various states over the question whether the reserved power does or does not sustain a corporation's utilization of permissive post-incorporation legislation in altering the rights of shareholders.").

[249] See generally *id*. (describing extensive statutory changes to shareholders' appraisal rights).

rights.[250] In 2020, the legislature voted to remove both requirements.[251] The legislation imposes a more significant limitation on the appraisal rights of existing shareholders of Delaware corporations who no longer have the right to be cashed out at fair value upon conversation to a corporation that has the legal right to pursue stakeholder or societal interests even at the expense of shareholder value.[252]

Conclusion

The appropriate scope of the appraisal remedy continues to elude courts, commentators, and legislatures, resulting in a body of legal doctrine that is inconsistent and unpredictable. Private ordering offers an alternative to regulatory reform. Private corporations are adopting a variety of contractual tools to limit or eliminate appraisal rights despite the limited judicial guidance as to whether those provisions are enforceable. Extension of these tools to public corporations offers similar potential benefits and has the added advantage of addressing concerns about appraisal arbitrage.

Although there are plausible arguments that appraisal waivers are legal under current Delaware law, the law is unclear. The MBCA expressly prohibits appraisal waivers with respect to common stockholders. This Article argues that appraisal waivers are potentially valuable tools of private ordering, and the state corporation statutes should be amended to authorize their inclusion in corporate charters. Such a move would facilitate experimentation and innovation and develop new evidence on the value of the appraisal remedy.

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[250] Noked, *supra* note 247.

[251] Allison L. Land & Edward B. Micheletti. *Delaware Corporate Law Amendments Address Emergency Powers, Public Benefit Corporations and Other Matters*, Skadden Arps Client Memorandum, June 25, 2020, https://www.skadden.com/insights/publications/2020/06/delaware-corporate-law-amendments

[252] See, e.g., Lide E. Paterno, *Irresponsible Corporate-Responsibility Rules*, 77 U. PITT. L. REV. 499, 520 (2016) ("benefit-corporation statutes were thought to free managers from the perceived constraints of traditional corporate law's shareholder value maximization norm so that the corporations could integrate other stakeholders' interests").

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