Dissenting Shareholders' Rights Under the Indiana Business Corporation Act: Jurisprudential Interpretations of the Exclusivity Provision

I. Introduction

Indiana recently revised its Business Corporation statute and greatly liberalized the procedures by which a shareholder may dissent from a corporate action.[1] However, a dissenting shareholder who employs these procedures will find that the statutory remedy is limited, in that the statute makes the right to dissent and obtain payment for a fair value of shares the *exclusive* remedy.[2] The statute further confines the availability of this remedy to closely held corporations, or to publicly held corporations which provide an optional grant of this remedy by an act of the Board of Directors.[3] This limitation could produce inequitable results, particularly when applied against a minority shareholder who considers himself an active participant in the corporation's affairs.[4]

When corporate leadership decides to engage in a transaction that materially alters the nature or form of the enterprise, those shareholders who do not favor the transaction face a dilemma. They must decide whether to accept the action without complaint, sell their shares on the market, move to enjoin the corporate action, or demand an appraisal and payment of the value of their shares from the corporation.[5] All states have statutes which govern the dissenting shareholders' appraisal remedy,[6] yet often the scope of any given statute is questionable.

Scholars do not know exactly how or where the first appraisal action occurred,[7] but generally accept that the appraisal remedy arose upon

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[1]Ind. Code §§ 23-1-44-1 to -20 (1988). The entire Indiana Business Corporation Law, Ind. Code §§ 23-1-17-1 to -54-2 (1988), is generally based upon the Revised Model Business Corp. Act (1984).

[2]Ind. Code § 23-1-44-8(c) (1988). *See infra* notes 64-67 and accompanying text.

[3]Ind. Code § 23-1-44-8(a)(5) (1988). For the purposes of this Note, a corporation is defined as a closely held corporation or a publicly held corporation which has granted the dissenters' right to its shareholders. *See infra* notes 87-95 and accompanying text.

[4]Most investors in large publicly held corporations view themselves as passive investors who contribute capital in exchange for possible dividends. Shareholders in a closely held corporation, on the other hand, are often employees of the business and consider themselves to be "owners." *See* R. Clark, Corporate Law 761-62 (1986).

[5]*Id.* at 499-530. *See also* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1191 (1964) [hereinafter *Exclusiveness*].

[6]In addition to the fifty states, the District of Columbia and Puerto Rico also have dissenters' statutes. 3 Model Business Corp. Act Ann. 1369-70 (Supp. 1987).

[7]*See* Kanda & Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. Rev. 429 (1985) [hereinafter *Goals of Corporate Law*].

the abolishment of the requirement of unanimity for corporate action.[8] This remedy allowed dissenting shareholders who no longer wished to remain vested in a fundamentally different enterprise to demand payment for their shares from the corporation.[9] If the corporation refused to pay, the dissenting shareholders could enjoin the corporate action.[10] As economic theory and corporate law developed, this constant threat of injunction began to be viewed as a burden too heavy for the modern corporation.[11] The need for flexibility of management and control in the modern corporation are now deemed to be superior to the wants of a minority shareholder.

In an often cited commentary, Professor Manning points out that the goals and policies of modern appraisal statutes no longer protect either the dissenting shareholder or the corporation.[12] American commercial law no longer recognizes the investor as an "owner," but rather as one who has a "claim" against the corporation.[13] Dissenting shareholders generally will not give up the benefit of their shares pending appraisal, while the corporation, prior to announcing any type of corporate change, often has a very difficult time determining the number or tenacity of dissenters.[14] Because the appraisal remedy is a product of nineteenth-century corporate law, Professor Manning concluded that the entire remedy should be restructured under purely economic terms.[15]

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[8]Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 228-29 (1962) [hereinafter *Essay*].

[9]Gabhart v. Gabhart, 267 Ind. 370, 380, 370 N.E.2d 345, 352 (1977).

[10]*See* State v. Bailey, 16 Ind. 46 (1861).

[11]Echoing James Madison's fear of tyranny under the desires of an unrestricted majority, Professor Manning states:

> In political terms these statutes fill a basic democratic need to protect a dissident minority from the overwhelming power of the majority. A solicitous judiciary will use the injunction to protect the minority against the most heinous acts of the majority. Where the majority is not heinous but merely obnoxious, the dissenter is given a lesser remedy—the option to force the corporation to pay him off and let him go his way.

Essay, *supra* note 8, at 226. *See also* 3 Model Business Corp. Act Ann. introductory comment at 1354-55 (Supp. 1987). The authors of the Revised Act have attempted to structure a statute which weighs the equities between the wants of the dissenter and the wants of the corporation.

[12]*See generally Essay*, *supra* note 8.

[13]*Id.* at 299. A shareholder who considers himself an owner would generally be an investor who also is employed by the corporation, or is actively involved in the company's daily affairs. A shareholder who possesses a "claim" in a corporation, on the other hand, is one who merely invests capital in an enterprise, regardless of whether that corporation is closely or publicly held. *See infra* notes 160-212 and accompanying text.

[14]*See Essay*, *supra* note 8, at 232-35.

[15]*Id.* at 260.

More recently, however, other commentators have pointed out that with the increased ease of procedure employed under modern appraisal statutes, the focus is now upon allocation of risks and transaction costs.[16] Under a purely economic analysis, an appraisal is advantageous for *all* shareholders of a corporation.[17] However, for this analysis to stand, the statute which provides the remedy must meet certain requirements.[18] The statute should specifically define the types of transactions which trigger the remedy,[19] should establish procedures which provide the corporation with fair notice of which shareholders intend to dissent from a proposed action[20] and should allow dissenters to retain rights under their shares until the payment is finalized.[21] The statute should also reasonably define how the shares are to be valued,[22] and (as much as practical) should make appraisal the exclusive remedy.[23] If a statute specifies all of these things, then all parties can factor these elements into the price that they are willing to pay for a share in the enterprise.[24] By implicitly agreeing to the limits of an appraisal *ex ante*, both majority and minority shareholders can profit.

Parties who bargain at arm's length generally are allowed to provide for a limitation of remedies,[25] but corporate statutes are often viewed as permissive guidelines, set down by the sovereign, for the benefit of entrepreneurs who wish to incorporate under the laws of that jurisdiction.

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[16]Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. B. FOUND. RES. J. 875, 878-81 [hereinafter *Appraisal Remedy*]. *See also Goals of Corporate Law*, *supra* note 7.

[17]*See infra* notes 197-99 and accompanying text.

[18]An example of such a statute is the REVISED MODEL BUSINESS CORP. ACT §§ 13.01 to 13.31 (1984) which was adopted by the Committee on Corporate Laws of the Section of Corporation, Banking & Business Law of the American Bar Association.

[19]3 MODEL BUSINESS CORP. ACT ANN. § 13.02 (Supp. 1987).

[20]*Id.* § 13.21. *See infra* notes 33-37 and accompanying text.

[21]3 MODEL BUSINESS CORP. ACT ANN. § 13.25 (Supp. 1987). Under some statutes, a dissenter cannot collect dividends once an appraisal proceeding is initiated. *See infra* notes 29-32 and accompanying text.

[22]3 MODEL BUSINESS CORP. ACT ANN. § 13.01(3) (Supp. 1987). *See also infra* notes 96-148 and accompanying text.

[23]3 MODEL BUSINESS CORP. ACT ANN. § 13.02(b) (Supp. 1987). This exclusivity provision states that "[a] shareholder entitled to dissent and obtain payment for his shares under this chapter may not challenge the corporate action as unlawful or fraudulent with respect to the shareholder or the corporation." *Id.*

[24]This, of course, assumes that all investors are infinitely rational beings who consider every conceivable element when valuing their investments. *See infra* notes 197-201 and accompanying text.

[25]*See, e.g.*, Brademas v. Real Estate Development Co., 175 Ind. App. 239, 370 N.E.2d 997 (1977), wherein the court concluded that a clause in the contract which excluded certain equitable remedies was enforceable, even though specific performance is usually available in real estate disputes.

Investors, by choosing to incorporate under the statutes of a given state, have, in essence, agreed to follow a set "form" contract for the governance of their business. Chapter 44 of the new Indiana Business Corporation Law[26] substantially decreases the burdens of dissent under previous law.[27] Because of this new-found ease in exercising dissenters' rights, an increase in this type of activity will occur. Although the statute is clearly written and unambiguous on its face, it remains to be seen exactly how an Indiana court will interpret the statute's scope.[28]

This Note will first discuss the procedures available under the new dissenters' statute. It will then examine the exclusivity provision in light of the theories utilized by Indiana courts under the previous law, and the theories employed by courts from other jurisdictions. It will further examine the permissible valuation considerations available in a dissenters' action. It will conclude with an evaluation of the exclusivity provisions in the context of arguments based upon property ownership and purely economic considerations. It is the central thesis of this Note that the exclusivity requirement should be enforced against all shareholders except those very few who are active participants in the enterprise, who also would be irreparably harmed by the illegal activities of the majority.

II. New Procedures

Under the previous Indiana dissenters' statute,[29] dissenters were relegated to using the procedures then in force for eminent domain proceedings.[30] If they chose to dissent from the majority's opinion, the dissenting shareholders gave up all voting and dividend rights to which they were otherwise entitled.[31] The dissenters also lost entitlement to interest payments for the value of their shares between the time they initiated the proceedings and the final judgement.[32] Therefore, because the corporation paid no interest, dissenters often settled their claims early, rather than endure the costly, inefficient and lengthy eminent domain proceeding.

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[26]Ind. Code §§ 23-1-44-1 to -20 (1988).

[27]*See infra* notes 29-32 and accompanying text.

[28]The comments to the Business Corporation Law were published in 1988. Although not binding authority, the comments are a great help in determining legislative intent. *See* Ind. Code Ann. §§ 23-1-17-1 to -54-2 (West Supp. 1988).

[29]Ind. Code § 23-1-5-7 (repealed 1987).

[30]*Id.* §§ 32-11-1-1 to 32-11-1-13. Eminent domain proceedings are particularly cumbersome in a shareholder's appraisal action because the statute requires three appraisers who are "freeholders of the county." *Id.* § 32-11-1-4. Every county may not have three qualified appraisers who could properly value shares in a corporation.

[31]*Id.* § 23-1-5-7 (repealed 1987).

[32]*See* General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

Unlike previous Indiana law, the new dissenters' statute outlines specific and simple procedures to be followed by all parties, and is a much needed improvement over eminent domain procedures. When the leadership of a corporation contemplate any transaction that could trigger dissenters' rights,[33] and when such action is to be presented at a shareholders' meeting, all shareholders who are eligible to assert dissenters' rights must be notified before the meeting.[34] If the corporate action does not require a shareholders' vote,[35] then notice must be given within ten days of the corporate action.[36] This dissenters' notice must state where a demand for payment of shares is to be sent, and by what date the demand must be received.[37]

A shareholder who wishes to dissent from the proposed action must then send a demand for payment of shares to the corporation and deposit his shares as instructed by the dissenters' notice.[38] The new statute explicitly states that a dissenter loses no rights to the shares until the corporation takes the proposed action.[39] As soon as the corporation receives the payment demand, or as soon as it takes the proposed action, it must pay the dissenter the amount the corporation determines to be the fair value of the dissenter's shares.[40]

If the dissenter decides that the payment received is less than the fair value of the shares, he may make a second demand for payment of what he declares to be the fair value (less any amount already paid).[41] The second demand must be made within thirty days of the initial payment or offer of payment, or the shareholder will be deemed to have waived all rights to demand further payment.[42] Upon receipt of this second demand for payment, the corporation has sixty days in which to petition a court for a judicial appraisal of the value of the shares.[43] If the corporation does not bring suit within sixty days, it must pay the dissenter the amount requested in the second demand letter.[44]

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[33]IND. CODE § 23-1-44-8 (1988). *See infra* notes 58-62 and accompanying text.

[34]IND. CODE § 23-1-44-10(b) (1988).

[35]An example of such an action would be a sale of certain assets, where such authority is granted to the corporate management in the Articles of Incorporation or Bylaws.

[36]IND. CODE §§ 23-1-44-10(b) and -12 (1988).

[37]*Id.* § 23-1-44-12.

[38]*Id.* § 23-1-44-13.

[39]*Id.* § 23-1-44-13(b).

[40]*Id.* § 23-1-44-15. The statute makes no provision for delay. The corporation must pay the claim within sixty days from the date set for demanding payment. *Id.* § 23-1-44-18(a)(2).

[41]*Id.* § 23-1-44-18.

[42]*Id.* § 23-1-44-18(b).

[43]*Id.* § 23-1-44-19(a).

[44]*Id.*

If the corporation chooses to sue, the court may, at its discretion, appoint an appraiser.[45] Each party is allowed discovery rights and the right to present evidence.[46] The dissenter collects any amount greater than that first paid by the corporation, plus interest, if the court determines the initial payment was insufficient.[47]

The court may assess costs against either party and in any amount the court finds equitable.[48] The corporation must pay costs if the court decides it "did not substantially comply with the requirements"[49] of the statute, while the dissenters must pay costs if the court finds that they acted "arbitrarily, vexatiously, or not in good faith"[50] while pursuing their rights. If most dissenters' demands are characterized as "good faith" differences in opinion over the value of shares, then corporations will bear a heavier burden in proving that their initial low payments were substantially in compliance with the statutory requirements.

The new statute also clarifies the rights of beneficial owners who wish to dissent from a proposed action.[51] Now, a record shareholder may assert dissenters' rights for fewer than all of his shares, as long as the record shareholder asserts these rights "with respect to all shares beneficially owned by any one (1) person."[52] If the beneficial shareholder wishes to assert his own dissenters' rights, then he must provide the corporation with the record shareholder's written consent.[53]

If a shareholder acquires stock in the corporation after notice of the transaction which could give rise to dissenters' rights, the corporation may withhold payment to that shareholder if he later tries to dissent.[54]

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[45]*Id.* § 23-1-44-19(d).

[46]*See id.*

[47]*Id.* § 23-1-44-19(e). For the purposes of the dissenters' statute, interest "means interest from the effective date of the corporate action until the date of payment, at the average rate currently paid by the corporation on its principal bank loans or, if none, at a rate that is fair and equitable under all the circumstances." *Id.* § 23-1-44-4. This provision for interest payments remedies the unfairness in the previous statute, pointed out over twenty years ago in *General Grain, Inc. v. Goodrich*, 140 Ind. App. 100, 109, 221 N.E.2d 696, 701 (1967), wherein the court stated:

> This glaring injustice of the Indiana Act is a matter for the General Assembly, but this court should not concern itself with either the expediency nor need for corrective legislation. The court is charged with the responsibility to interpret and construe legislative enactments, and it is beyond the power of the court to legislate by judicial fiat.

[48]Ind. Code § 23-1-44-20 (1988).

[49]*Id.* § 23-1-44-20(b)(1).

[50]*Id.* § 23-1-44-20(b)(2).

[51]*Id.* § 23-1-44-6. A beneficial shareholder is one whose stock is actually held by another nominated record shareholder, such as The Depository Trust Company or a brokerage firm.

[52]*Id.* § 23-1-44-9(a).

[53]*Id.* § 23-1-44-9(b).

[54]*Id.* § 23-1-44-17(a).

This holder of "after-acquired" dissenters' rights must then either accept the corporation's first offer of payment "in full satisfaction of [his] demand,"[55] or wait until a final judicial determination before he receives any payment at all.[56] The purpose of this provision is to prevent speculation after the announcement of the proposed corporate action.[57]

The more important aspects of the dissenters' statute, as with any statute, will be how, when and in what manner it will be applied. Transactions which trigger dissenters' rights under this statute include a consummation of a plan of merger[58] or a plan of share exchange,[59] a sale or exchange of all (or substantially all) of the corporation's assets,[60] an approval of a control share acquisition,[61] and any action from which any shareholder may dissent as provided in the corporation's bylaws, articles of incorporation or directors' resolution.[62] The "market exception" provision, which excludes dissenters' rights from holders of shares which are widely traded, has been retained from previous law.[63] A shareholder with dissenters' rights under the statute, however, has only the right to dissent and receive payment of fair value as his exclusive remedy.[64]

III. Exclusivity

The provision for absolute exclusivity of remedy will likely be the most troublesome aspect of the new statute. The initial draft of the Business Corporation Law presented to the study commission[65] included a disclaimer to the exclusivity section. This disclaimer stated that the dissenter's right to payment for a fair value for his shares is exclusive unless the action is "unlawful or fraudulent with respect to the shareholder or the corporation."[66] This disclaimer was stricken from the bill as presented to the General Assembly,[67] and therefore the statute as promulgated appears to be absolutely exclusive.

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[55] *Id.* § 23-1-44-17(b).

[56] *Id.* § 23-1-44-19.

[57] 3 Model Business Corp. Act Ann. § 13.27 official comment at 1417 (Supp. 1987).

[58] Ind. Code § 23-1-44-8(a)(1) (1988).

[59] *Id.* § 23-1-44-8(a)(2).

[60] *Id.* § 23-1-44-8(a)(3).

[61] *Id.* § 23-1-44-8(a)(4).

[62] *Id.* § 23-1-44-8(a)(5).

[63] *Id.* § 23-1-44-8(b). *See infra* notes 87-92 and accompanying text.

[64] Ind. Code § 23-1-44-8(c) (1988).

[65] Draft of November 5, 1986, Legislative Services Agency Preliminary Draft No. 5501/DI 41.

[66] *Id.* § 23-1-42-8(b). This is the exact language found also in the Model Act. *See* 3 Model Business Corp. Act Ann. § 13.02(b) (Supp. 1987).

[67] Engrossed House Bill No. 1257-LS 9283/DI 33, presented to the 1986 Indiana General Assembly on January 8, 1986.

A. *Previous Indiana View:* Gabhart v. Gabhart

The leading Indiana case which dealt with the exclusivity of dissenters' rights prior to the enactment of the new statute is *Gabhart v. Gabhart.*[68] The case arose when several shareholders voted to merge a corporation into another "shell" corporation and pay a minority shareholder cash for his shares of the liquidated company.[69] This type of cash out merger is often referred to as a "freeze-out" or "squeeze-out."[70] The minority shareholder brought suit claiming that the transaction was actually a "*de facto*" dissolution, accomplished for no legitimate business purpose, but rather solely to "freeze-out" an unwanted minority shareholder.[71]

The Indiana Supreme Court stated that "in a bonafide merger proceeding a dissenting or non-voting shareholder is limited to the means provided by statute for the realization of his equity."[72] The court implied, however, that a merger which advanced no corporate interest *could* be enjoined by a minority shareholder, if that shareholder could show the merger had no valid business purpose.[73] The court indicated that the then leading Delaware case of *Singer v. Magnavox, Co.*,[74] was too expansive in considering the "entire fairness" of corporate action to minority shareholders.[75] The court concluded that "[w]e do not believe the judiciary should intrude into corporate management *to that extent.*"[76] From this, it can be presumed that an Indiana court will intrude upon some managerial actions which advance no valid corporate interests. Although the freeze-out of a troublesome minority shareholder is viewed as a legitimate corporate interest under *Gabhart*, and Indiana courts are

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[68]267 Ind. 370, 370 N.E.2d 345 (1977).

[69]*Id.* at 376, 370 N.E.2d at 349.

[70]*Id.* at 383, 370 N.E.2d at 353. *See also Exclusiveness*, *supra* note 5, at 1192.

[71]*Gabhart*, 267 Ind. at 383, 370 N.E.2d at 353.

[72]*Id.* at 388, 370 N.E.2d at 356.

[73]The court concluded by stating:

> [W]e further hold that a proposed merger which has no valid purpose, which we construe to mean a purpose intended to advance a corporate interest, and which merger would eliminate or reduce a minority shareholder's equity, may be challenged, as a *de facto* dissolution, by shareholders entitled to vote upon an issue of dissolution. Such shareholders may enjoin a dissolution to be effected by procedures other than those provided by statute for that purpose.

Id.

[74]380 A.2d 969 (Del. 1977).

[75]*Gabhart*, 267 Ind. at 388, 370 N.E.2d at 356.

[76]*Id.* (emphasis added). The Official Comment states that the General Assembly specifically made dissent the exclusive remedy in response to the Indiana Supreme Court's holding in *Gabhart*. Ind. Code Ann. § 23-1-44-8 official comment at 168 (West Supp. 1988). It does, however, seem to be logically inconsistent to deny equitable relief to a dissenter, even in the light of unlawful or fraudulent conduct, while still allowing equitable relief for managerial misconduct. *See infra* notes 168-83 and accompanying text.

not apt to be concerned over a simple "fairness" issue brought before them by a dissenter, it is clear that certain acts by the majority will not be tolerated.

B. Delaware View: Weinberger v. U.O.P., Inc.

In 1983, the Delaware Supreme Court ended its reliance upon the *Singer* doctrine of "entire fairness" to the minority shareholder.[77] In *Weinberger v. U.O.P., Inc.*,[78] the court stated that a minority shareholder could no longer simply allege "unfairness" when seeking judicial review of a merger. Instead, the dissenter who challenges the corporate action as being unfair must "allege specific acts of fraud, misrepresentation or other items of misconduct" to demonstrate the unfairness of the merger terms to the minority.[79] The court also broadened the scope of the types of valuation techniques which are to be used in an appraisal proceeding.[80]

The decisions in *Weinberger* and *Gabhart* focus upon the level of managerial misconduct that will trigger judicial intervention. This same type of analysis must be used to determine the willingness of a court sitting in equity to enjoin an action under Indiana's new statute. Of the fifty-two appraisal statutes in force throughout the United States,[81] all are written to be the exclusive dissenters' remedy, unless equitable considerations provide otherwise.[82] The Connecticut statute states that appraisal is the sole remedy.[83] This statute, drafted by Professor Manning,[84] was held to be *absolutely* exclusive when a minority shareholder attempted to attack a merger in a direct suit.[85] Given the same situation, an Indiana court could also regard the literal language of a statute as controlling, and therefore award only the fair value of shares and no equitable relief. However, before a conclusion can be drawn about whether an Indiana court will allow a minority shareholder to be "dragged kicking and screaming against his will"[86] into a cash-out merger, a few other provisions of the new statute should be analyzed.

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[77]Singer v. Magnavox, Co., 380 A.2d 969 (Del. 1977).

[78]457 A.2d 701 (Del. 1983).

[79]*Id.* at 703.

[80]*Id. See also infra* notes 109-27 and accompanying text.

[81]*See supra* note 6.

[82]3 Model Business Corp. Act Ann. § 13.02 statutory comparison at 1372-73 (Supp. 1987).

[83]Conn. Gen. Stat. Ann. § 33-373 (West 1987).

[84]*See Goals of Corporate Law*, *supra* note 7 and accompanying text.

[85]Yanow v. Teal Industries, Inc., 178 Conn. 262, 422 A.2d 311 (1979). The court concluded that had the legislature intended for any equitable exceptions to apply, it would have provided for such exceptions within the statute.

[86]*Essay*, *supra* note 8, at 261.

C. *The Market Exception and Risk Assessment*

Indiana has retained the "market exception" for shares which are listed on a United States securities exchange.[87] This exception has also been broadened to include those shares which are traded on NASDAQ or similar markets.[88] The Indiana legislature obviously places great faith in the ability of the market to value shares. Following this presumption, there can be no real issue of valuation if the corporation's shares are widely traded.[89] A shareholder may not appreciate the direction in which the corporation is proceeding, but it is more economical to sell shares on the market than to formally dissent from the action. This "market exception" was removed from the Model Act in 1978 because of the mistrust of the ability of the then "demoralized" market to accurately value shares.[90] By choosing to retain and expand this exception, Indiana has, in effect, chosen to offer dissenters' rights only to shareholders of closely held corporations. This limitation could greatly strengthen an argument for absolute exclusivity if one can presume that holders of shares in closely held corporations are better informed about corporate control *before* investing in the enterprise.[91] Given the American legal demand for "notice," and the goals of modern dissenters' statutes to provide adequate "notice," it is presumed that an investor in a closely held corporation could more easily acquaint himself with corporate risks, and thereby devalue the price he is willing to pay for a share in the enterprise.[92]

A second portion of the new statute also impacts risk assessment by allowing a board of directors, on its own initiative, to create dissenters' rights to any corporate action.[93] This optional grant of dissenters' rights should increase the flow of information between investors and management, and thereby ease the tension felt when shareholders seek information about corporate affairs. Additionally, when a shareholder is

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[87]Ind. Code § 23-1-44-8(b)(1) (1988). The previous "Stock Market" exception was found in Ind. Code § 23-1-5-7 (1982) (repealed 1987).

[88]NASDAQ is the National Association of Securities Dealers, Inc. Automated Quotations System, Over-the-Counter Markets-National Markets Issues. *Id.* § 23-1-44-8(b)(2).

[89]*See* Note, *A Reconsideration of the Stock Market Exception to the Dissenting Shareholder's Right of Appraisal*, 74 Mich. L. Rev. 1023 (1976).

[90]Conard, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80, and 81)*, 33 Bus. Law. 2587, 2595-96 (1978) [hereinafter *Amendments*]. Given the tumultuous events of October, 1987, perhaps the market may again become "demoralized."

[91]The Securities Exchange Act of 1934 was specifically designed to control misrepresentations in the exchange of publicly traded securities. 15 U.S.C. § 78 (1982).

[92]*See* Easterbrook & Fischel, *Close Corporations and Agency Costs*, 38 Stan. L. Rev. 271 (1986) [hereinafter *Close Corporations*].

[93]Ind. Code § 23-1-44-8(a)(5) (1988).

notified "up front" about possible dissenters' rights, or potential corporate dealings, he could again discount the value of his shares in reliance upon this information.[94] Furthermore, if an event triggering dissenters' rights does occur, and the shareholder has *bargained* for this right, then he is more apt to settle the claim, thereby decreasing transaction costs for all parties involved.[95]

D. Valuation

The valuation provision in the new statute has been liberalized.[96] Historically, courts have valued shares by using the "Delaware block" approach.[97] In using this method, a court first estimates market value, projected earnings and assets, then applies a weighted multiplier to each factor.[98] Each estimated value is then multiplied by the weight factor, and the sum total of the products is taken to be the appraised value.[99] This method is usually employed to offset any unfairness which could arise from using only market value, because market value reflects only a price based upon available information.[100] The use of this technique has been modified to a great degree in recent years,[101] to correct inadequacies in certain situations.[102]

To ensure that a dissenting shareholder will not be in any way affected by the transaction from which he dissents, Indiana's new valuation provision mandates that the fair value is to be calculated from a point in time immediately before the transaction occurs.[103] To further ensure fairness, the statute also makes it clear that this calculated value must exclude "any appreciation or depreciation in anticipation of the corporate action *unless exclusion would be inequitable*."[104] The exclusion

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[94]R. Posner, Economic Analysis of Law 324-26 (2d ed. 1977).

[95]*See id.* at 306.

[96]Ind. Code § 23-1-44-3 (1988).

[97]However, after the Delaware Supreme Court's decision in *Weinberger v. U.O.P., Inc.*, 457 A.2d 701 (Del. 1983), the "Delaware block" approach is no longer the only admissible valuation method. *See infra* notes 112-19 and accompanying text; *see also* Note, *"Fair-Value" Determination in Corporate "Freeze-Outs," and in Security and Exchange Act Suits:* Weinberger, *Other, and Better Methods*, 19 Val. U.L. Rev. 521 (1985) [hereinafter *"Fair-Value" Determination*]; Francis I. DuPont & Co. v. Universal Cities Studios, Inc., 312 A.2d 344 (Del. Ch. 1973).

[98]*See "Fair-Value" Determination*, *supra* note 97, at 527.

[99]*Id.* at 528.

[100]*See* Endicott Johnson Corp. v. Bade, 37 N.Y.2d 585, 338 N.E.2d 614, 376 N.Y.S.2d 103 (1975).

[101]*See* Weinberger v. U.O.P., Inc., 457 A.2d 701 (Del. 1983).

[102]For example, market value is difficult to estimate for closely held corporations. *See generally "Fair-Value" Determination*, *supra* note 97.

[103]Ind. Code § 23-1-44-3 (1988).

[104]*Id.* (emphasis added).

of appreciation and depreciation is consistent with previous Indiana law,[105] but the phrase, "unless exclusion would be inequitable," is borrowed from the Revised Model Business Corporation Act.[106]

This phrase was added to the Model Act in 1978 to deal specifically with the problems encountered in corporate "freeze-outs."[107] The comments to this amendment state that such considerations are to be employed only when a shareholder is "excluded against his will from continued participation in the altered enterprise."[108] The current comments to the Model Act[109] explain this exception by incorporating by reference the reasoning of the Delaware Supreme Court in *Weinberger*,[110] wherein it was held that elements of rescissory damages could be employed if the court decides that such a remedy is equitable.[111]

Of much greater importance, however, was the *Weinberger* court's holding that the "Delaware block" method of calculating an appraisal value is no longer the preferred technique in all situations.[112] Now courts may admit into evidence an appraisal value based upon any acceptable valuation method.[113] Any value which incorporates a price based upon appreciation or depreciation due to the proposed action will be excluded under Delaware's valuation statute.[114] However, the court interpreted this provision to refer only to "speculative elements of value,"[115] thereby implying that a limited change in value based upon the transaction itself would be permissible. Many courts have since employed the reasoning of *Weinberger* to declare fair value based upon the discounted cash-flow method,[116] investment value[117] and price-earning ratios,[118] as well as the traditional weighted-average approach.[119]

On remand in *Weinberger*, the Delaware Court of Chancery concluded that rescissory damages were too speculative, and awarded one dollar per share as fair compensation for the failure of the directors to

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[105]*See* General Grain, Inc. v. Goodrich, 140 Ind. App. 100, 221 N.E.2d 696 (1967).

[106]3 Model Business Corp. Act Ann. § 13.01(3) (Supp. 1987).

[107]*See Amendments*, *supra* note 90, at 2600-01.

[108]*Id.* at 2601.

[109]3 Model Business Corp. Act Ann. § 13.01 official comment at 1358 (Supp. 1987).

[110]Weinberger v. U.O.P., Inc., 457 A.2d 701 (Del. 1983).

[111]*Id.* at 714.

[112]*Id.*

[113]*Id.* at 712-13.

[114]8 Del. Code § 262(2)(h) (1983).

[115]*Weinberger*, 457 A.2d at 713.

[116]Dermody v. Sticco, 191 N.J. Super. 192, 465 A.2d 948 (1983).

[117]Richardson v. Palmer Broadcasting Co., 353 N.W.2d 374 (Iowa 1984).

[118]Zokoych v. Spalding, 123 Ill. App.3d 921, 463 N.E.2d 943 (1984).

[119]Perlman v. Permonite Manufacturing Co., 568 F. Supp. 222 (N.D. Ind. 1983), *aff'd*, 734 F.2d 1283 (7th Cir. 1984).

pass on important information.[120] The Chancery court's decision then, in essence, followed the holding in *Tri-Continental Corp. v. Battye*,[121] that "the stockholder is entitled to be paid for that which has been taken from him, viz., *his* proportionate interest in a going concern."[122] By awarding the one dollar per share value as damages, the Chancellor rejected the "discounted cash-flow" method first sought by the plaintiffs, instead giving them an amount sufficient to cover damages arising from a failure to disclose.[123] This specific rejection of plaintiff's valuation technique left the minority with shares valued at twenty-one dollars per share, as opposed to the price of twenty-four dollars per share which the defendant's valuation had estimated to be a fair price.[124]

The Chancellor decided that a minority shareholder should not be given a price which reflects the premium which the majority puts on the control shares of the corporation. This view reflects the theory that the controlling shareholders would never be willing to pay a premium price for "noncontrol" shares.[125] However, if a true "fairness in valuation" approach is applied, the majority should be forced to pay an amount which any third party would be willing to offer.[126] When a minority shareholder is willing to retain his shares which are valued at price X on the market, one can assume that the shareholder values his shares at some amount greater than X. If the minority is able to bargain at arm's length with a party to receive an amount in excess of X, then that amount should be the value which the majority should pay when the minority dissents.[127] Negotiations and judicial proceedings will always increase the transaction costs for any given shareholder; therefore, the minority would probably be willing to settle for a lesser amount.

For example, suppose a shareholder owns 40 percent of the outstanding stock in a publicly traded corporation which has granted dissenters' rights.[128] The market price is $10.00 per share, but the shareholder values it at $11.00 per share because he depends upon the dividends as his sole source of income. The majority will not pay the shareholder's

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[120]Weinberger v. U.O.P., Inc., No. 5642 (Del. Ch. January 30, 1985), *cited in* Weinberger v. U.O.P., Inc., 517 A.2d 653, 654 (1986).

[121]74 A.2d 71 (Del. 1950).

[122]*Id.* at 72 (emphasis added).

[123]*Weinberger*, 517 A.2d at 654.

[124]Weinberger v. U.O.P., Inc., 457 A.2d 701, 709 (Del. 1983).

[125]*See* Chazen, *Fairness from a Financial Point of View in Acquisitions of Public Companies: Is "Third Party Sale Value" the Appropriate Standard?* 36 Bus. Law 1439 (1981).

[126]*See generally* Weiss, *Balancing Interests in Cash-Out Mergers: The Promise of* Weinberger v. U.O.P., Inc., 8 Del. J. Corp. L. 1 (1983).

[127]*Id.*

[128]*See supra* note 3 and accompanying text.

value or market value for non-control shares,[129] but the shareholder may find a purchaser who is willing to risk the $11.00 per share value for such a large proportion of the stock. The search for this third party and the ensuing negotiations may be time-consuming and expensive. To avoid this increase in transaction costs, the shareholder will settle with the corporation.

In the context of a closely held corporation, where no available market exists for its shares,[130] the minority faces a greater dilemma. With no third party available, the minority is compelled to negotiate only with the corporation, which will have little incentive to meet the dissenters' price. Although a passive investor may be willing to settle after the corporation's compromise offer,[131] a shareholder who considers himself an owner will expect more than a simple cash-out. This is particularly true if the shareholder is also an employee of the corporation. The "fairness in valuation" doctrine will award an equitable amount for the dissenting employee's shares, but cannot be expanded to cover a loss in salary or other expectations.[132]

The Delaware Supreme Court refused to apply this liberalized "fairness in valuation" standard in *Rabkin v. Philip A. Hunt Chemical Corp.*[133] In *Rabkin*, the Vice Chancellor had dismissed a dissenters' suit to enjoin a cash-out merger.[134] The Supreme Court reversed and remanded, stating that the scope of the holding in *Weinberger* did not mandate dismissal of a suit alleging breaches of fiduciary duties.[135] The Court held that "[t]hese allegations, unrelated to judgmental factors of valuation, should survive a motion to dismiss"[136] because the issues of procedural fairness are actually of broader concern.[137] In conclusion, the court pointed out that although questions of valuation are often the preponderant considerations,[138] this should not preclude a court in equity from exercising its broad discretion when matters of fact (fraud, misrepresentation, self-dealing, etc.) are specifically stated in a complaint.[139]

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[129]The corporation also may not have enough cash on hand to purchase such a large portion of its own stock at such a price.

[130]*See generally* R. Clark, *supra* note 4, at 762.

[131]*See supra* notes 38-44 and accompanying text.

[132]*See infra* notes 162-187 and accompanying text.

[133]498 A.2d 1099 (Del. 1985).

[134]*Id.* at 1100.

[135]*Id.*

[136]*Id.*

[137]*Id.* at 1105.

[138]*Id.*

[139]The court stressed its earlier conclusion in *Weinberger* by stating:

> [W]hile a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation

This type of analysis can also be used by a dissenter under the Indiana statute.[140]

New York amended its appraisal statute in 1982 to liberalize the share valuation method.[141] The New York statute allows a court to "consider the nature of the transaction . . ., the concepts and methods then customary . . . for determining fair value of shares . . . and all other relevant factors."[142] In *Alpert v. 28 Williams St. Corp.*,[143] the New York Court of Appeals held that all factors in an appraisal proceeding are relevant and that "[e]lements of future value arising from the accomplishment or expectation of the merger which are known or susceptible of proof as of the date of the merger and not the product of speculation may also be considered."[144] The court did conclude, however, that "[f]air dealing and fair price alone will not render the merger acceptable . . . there exists a fiduciary duty to treat all shareholders equally."[145]

Commentators have praised these liberal provisions as expansions of economic freedom for both corporate management and shareholders.[146] Some assert that a dissenter will be fairly compensated, and the corporation thereby truly made cost efficient, only by valuing the dissenters' shares using *all* available elements (even factors arising speculatively from the transaction).[147] The question remains, however, whether a court in a jurisdiction which specifically defines dissenters' rights as the exclusive remedy, will allow equity *only* in valuation, or whether equity[148] may still be employed to enjoin a transaction altogether.

> on the historic powers of the Chancellor to grant other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved.

Id. at 1104 (quoting Weinberger v. U.O.P., Inc., 457 A.2d 701, 714 (Del. 1983)).

[140]The Seventh Circuit Court of Appeals has stated that it can be presumed that Indiana Courts will generally follow the same reasoning employed by Delaware Courts. Dynamics Corp. of America v. CTS Corp., 794 F.2d 250, 253, 256 (1986), *rev'd on other grounds*, 107 S. Ct. 1637 (1987). *See infra* notes 184-87 and accompanying text.

[141]N.Y. Bus. Corp. Law § 623(h)(4) (McKinney 1986).

[142]*Id.*

[143]63 N.Y.2d 557, 473 N.E.2d 19, 483 N.Y.S.2d 667 (1984).

[144]*Id.* at 571, 473 N.E.2d at 27, 483 N.Y.S.2d at 675.

[145]*Id.* at 572, 473 N.E.2d at 27-28, 483 N.Y.S.2d at 676.

[146]*See Goals of Corporate Law*, *supra* note 7. *See also* Note, *Reappraising Minority Shareholder Protection in Freezeout Mergers:* Weinberger v. U.O.P., Inc., 58 St. John's L. Rev. 144, 158-62 (1983).

[147]*See Goals of Corporate Law*, *supra* note 7.

[148]*See infra* notes 166-67 and accompanying text.

IV. Interpretation by an Indiana Court

The method which any given court utilizes to interpret a statute is most often a function of that court's legal philosophy. The various schools of jurisprudential thought which affect American courts have been organized into historical categories, based upon how the courts determine the authority of language.[149] The first school of thought, based largely upon the Analytical Positivist views of Austin and Bentham,[150] holds that the legislature is the sovereign, and once the sovereign speaks through a statute, the courts can do nothing but interpret the statute literally.[151] Legal Realists, on the other hand, claim that courts are largely free from the will of the legislature, because true legislative intent can never be properly ascertained.[152] Finally, followers of the Legal Process School take the middle ground, claiming that the legislative purpose is more controlling than legislative language, thereby allowing broad judicial interpretation constrained by the statutory text.[153] The question of the exclusivity of a dissenter's remedy must then be weighed against the philosophical views held by the Indiana judiciary.

As a matter of interpretation, Indiana courts give great deference to the supposed intent or purpose of the legislature.[154] Indiana seldom publishes legislative histories, however, so the intent of the legislature generally must be inferred from the language of the statute itself.[155] By relying on the plain language of the statute viewed "within the context of the entire act,"[156] Indiana courts favor a more moderate approach, much like the Legal Process advocates who seek to elucidate the legislative *purpose* as a goal in statutory interpretation. Following this method, Indiana courts have stated that a statute will not be read literally when such a reading is not in harmony with other sections of the same act, particularly when all sections were passed by the same legislature.[157] Indiana courts will also perform the "ultimate" construction upon a

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[149]Cox, *Ruminations on Statutory Interpretation in the Burger Court*, 19 Val. U.L. Rev. 287-295 (1985) [hereinafter cited as *Statutory Interpretation*].

[150]*See* D. Lloyd, An Introduction to Jurisprudence 246-319 (5th ed. 1985).

[151]*Statutory Interpretation*, *supra* note 149, at 290-93 & n.9.

[152]*Id.* at 292 & n.14.

[153]*Id.* at 293 & n.17.

[154]*See, e.g.*, St. Germain v. State, 267 Ind. 252, 369 N.E.2d 931 (1977); State *ex rel.* Roberts v. Graham, 231 Ind. 680, 110 N.E.2d 855 (1953); Alvers v. State, 489 N.E.2d 83 (Ind. Ct. App. 1986).

[155]*Alvers*, 489 N.E.2d at 88. *See* cases cited *supra* note 154. In addition, the newly published comments are also helpful in establishing legislative intent. *See supra* note 28.

[156]*Alvers*, 489 N.E.2d at 88.

[157]*See, e.g.*, Selmeyer v. Southeastern Indiana Vocational School, 509 N.E.2d 1150 (Ind. Ct. App. 1987); Ware v. State, 441 N.E.2d 20 (Ind. Ct. App. 1982).

statute[158] and declare it inapplicable to the case in controversy,[159] thereby relying solely upon the facts of the case and general principles of law and equity.

In determining how the new dissenters' rights statute will be construed by an Indiana court, one must also analyze how the court will view the shareholder's expectations. One line of thought essentially tracks the classical notions of share ownership as a "property right."[160] In this analysis, the shareholder owns a tangible piece of property, the ownership of which is threatened by the proposed action of the majority. Another theory employs an economic analysis and concludes that the shareholder merely possesses a claim of "liability" against the corporation.[161] Following this logic, the dissenter needs to show that the corporate action essentially devalues his claim of liability to such an extent that he will be irreparably damaged.

A. Exclusivity Viewed Under a "Property" Theory

A dissenter wishing to employ the "property right" argument to enjoin the corporate action will face great difficulty in avoiding a dismissal because of the "exclusivity" provision of the new statute.[162] The dissenter could make two primary arguments based upon the Indiana courts' methods of statutory construction. The first argument arises from the Indiana judiciary's inclination to read an act "as a whole."[163] The second argument arises from the courts' ability to make a discretionary ruling of inapplicability.[164] In either case, the dissenter must convince the court that the legal rules written into the statute are too harsh. A harsh result, however, is not enough to cause the court to make an exception to a statute. The dissenter must persuade the court that the result is so harsh that the legislature *could not have intended this result.* This would allow the court to consider the legislative purpose[165] of the statute and hold

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[158]*See* Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 534 (1983) [hereinafter *Statutes' Domains*].

[159]Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974) (holding a statute of limitations for medical malpractice to be inapplicable to the specific case).

[160]*See generally* R. POSNER, *supra* note 94. *See also infra* notes 162-87 and accompanying text.

[161]*See generally* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter *One View of the Cathedral*]. *See also infra* notes 188-212 and accompanying text.

[162]IND. CODE § 23-1-44-8(c) (1988).

[163]*See* Selmeyer v. Southeastern Indiana Vocational School, 509 N.E.2d 1150 (Ind. Ct. App. 1987).

[164]*See* Chaffin v. Nicosia, 261 Ind. 698, 310 N.E.2d 867 (1974).

[165]*See supra* notes 154-59 and accompanying text. *See also supra* note 76.

the statute inapplicable in certain situations. When a court makes this type of decision, it can then exercise its equity jurisdiction.

Equity, of course, is much older than the common law,[166] and has always been used to counter the supposed unfairness of applying a strict legal rule to any given set of facts.[167] In appealing to a court in equity, a dissenter could incorporate into his complaint specific allegations against the corporate action. These allegations must, however, arise from some activity other than the corporate action alone. The typical case involves allegations of misrepresentation or breach of fiduciary duty against the corporate directors; therefore, a dissenters' rights case will serve as a fitting example.

Knowing that the new statute makes an appraisal the exclusive remedy, the dissenter could attempt to forgo dissent and move instead for an injunction by alleging that the action constitutes a conflict of interest with respect to one or more of the corporate directors.[168] Such a conflict could arise in situations where the director receives a long term employment contract or a cash out bonus from a surviving corporation in a merger.[169] If such conduct is not disclosed and properly ratified by the directors[170] and shareholders,[171] or if such conduct is not fair to the corporation,[172] then a breach of fiduciary duty has occurred under the Indiana Act.[173] Even ratification by the corporation will not protect the director from allegations of non-disclosure.[174] This misconduct would give the shareholder the right to bring a derivative suit on behalf of the corporation,[175] as long as the corporate action has not yet forced the shareholder out.[176] Therefore, if the court reads the entire Business

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[166]Aristotle spoke of equity as being a corrective form of legal justice. ARISTOTLE, NICOMACHEAN ETHICS *reprinted in* D. Lloyd, *supra* note 150, at 1229-30.

[167]Historically, equity courts were established as a royal dispensation to remedy the inadequacies of the common law. D. LAYCOCK, MODERN AMERICAN REMEDIES 335 (1985).

[168]IND. CODE § 23-1-35-2 (1988).

[169]*See, e.g.*, Smith v. Van Gorkum, 488 A.2d 858 (Del. 1985) (holding a director liable for failing to adequately disclose all material information to the stockholders before a vote on a merger).

[170]IND. CODE § 23-1-35-2(a)(1) (1988).

[171]*Id.* § 23-1-35-2(a)(2).

[172]*Id.* § 23-1-35-2(a)(3).

[173]*Id.* § 23-1-35-1. *See also supra* notes 154-57 and accompanying text.

[174]Floyd v. Jay County Rural Elec. Membership Corp., 405 N.E.2d 630 (Ind. Ct. App. 1980). The standards by which a director's actions will be judged are ambiguous under the new Act. IND. CODE § 23-1-35-1(a)(2) (1988) provides that a director should act with the care of an ordinarily prudent person, while IND. CODE § 23-1-35-1(e)(2) states that a director will not be held liable for a breach of fiduciary duty unless the action "constitutes willful misconduct or recklessness."

[175]Ross v. Tavel, 418 N.E.2d 297 (Ind. Ct. App. 1981).

[176]The shareholder cannot sue derivatively if he no longer is a shareholder. Gabhart v. Gabhart, 267 Ind. 370, 389-91, 370 N.E.2d 345, 356-57 (1977).

Corporation Law "as a whole," the shareholder could claim that the dissenters' statute is the "exclusive" remedy only at law.[177] Because actions for breach of fiduciary duty are brought in equity, wherein the "substance, not the form"[178] is at issue, the court could more easily establish that the directors' duties provisions[179] of the new Act take precedent over the dissenters' rights provisions.[180]

Following the same logic, a minority shareholder might also argue that the dissenters' rights statute is inapplicable to situations of breach of fiduciary duty. By claiming that a proposed action precipitated by inequitable conduct on the part of a director threatened to deprive the minority of ownership in a corporation, a shareholder could claim that the dissenters' remedy is applicable only where the dissenter is a passive investor.

Indiana courts place a high value upon fiduciary duty between both directors and shareholders.[181] An active shareholder in a closely held corporation could argue that such a breach could potentially deprive him of his share of the ownership of the corporation.[182] This argument would be strongest if the shareholder is also an employee of the corporation, and thereby risks a loss of both investment capital and salary. In pursuing this argument, the shareholder would be advised to alternatively plead for either an injunction or an appraisal, because such a complaint otherwise could be construed as an indication that the proposed action does not threaten irreparable injury.[183] If the court disagrees that the proposed action threatens irreparable injury and dismisses the complaint, the plaintiff is relegated solely to an appraisal.

A court which views the plaintiff's claim as one of "ownership" will weigh the active investor/employee's expectation interests. Before issuing an injunction, this court must determine whether the legal remedy would be adequate.[184] A legal remedy is not adequate unless it is "as

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[177]When law does not give an adequate remedy, equity may be employed to protect the rights of the litigant. *See* D. LAYCOCK, *supra* note 167, at 335-36.

[178]*Ross*, 418 N.E.2d at 304 (quoting Epperly v. E & P Brake Bonding, Inc., 169 Ind. App. 224, 236, 348 N.E.2d 75, 82 (1976)).

[179]IND. CODE §§ 23-1-35-1 to -4 (1988).

[180]*Id.* §§ 23-1-44-1 to -20.

[181]*See, e.g.*, Cressy v. Shannon Continental Corp., 177 Ind. App. 224, 378 N.E.2d 941 (1978); Hartong v. Architects Hartong/Odle/Burke, Inc., 157 Ind. App. 546, 301 N.E.2d 240 (1973).

[182]*See, e.g.*, R. CLARK, *supra* note 4. It can be argued that the lost expectations of the minority shareholder may be worth an increased appraisal value.

[183]The party seeking an injunction must always demonstrate that the proposed action will cause irreparable harm. *See, e.g.*, Lambert v. State, 468 N.E.2d 1384 (Ind. Ct. App. 1984); Koss v. Continental Oil Co., 222 Ind. 224, 52 N.E.2d 614 (1944).

[184]*See* Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065, 1071-72 (1979).

complete, practical and efficient as equity could afford."[185] This shareholder stands to lose not only a percentage of capital investment, but also his human investment. The court will find it difficult to value this lost human interest. A fundamental rule for holding the legal remedy inadequate is the difficulty of measuring damages.[186] The new statute will make it possible to more equitably value the *shares* of the corporation,[187] but it will still be extremely difficult to value the lost expectations of an owner/employee. A court should therefore issue an injunction in situations where the shareholder of a closely held corporation risks losing both investment in financial and human capital, particularly when the risk arises from a breach of managerial duty.

B. Exclusivity Viewed Under a "Wealth Maximization" Theory

A plaintiff who is viewed as a passive investor in a corporation will face different considerations. Under an economic theory, this passive investor will be viewed as one who owns a claim of "liability" against the corporation, rather than one who actually owns "property."[188] Initially, it should be recognized that a court which operates out of a "wealth maximization"[189] analysis of law and economics will not always strictly construe a statute.[190] A court which views the investor's expectations under an economic analysis will look past a claim of "intrinsic value of ownership" and focus more upon the concept of a share being a mere "claim of liability." This focus would cause the court to conclude that a damage award would be sufficient. If the court reaches such a conclusion, the plaintiff could only request that equity be done in valuation of the shares. Because equitable considerations are specifically incorporated into the valuation provision of the new statute,[191] it would be very difficult for this plaintiff to gain an injunction.

If a director of a corporation has breached a fiduciary duty while encouraging a "freeze-out" of minority interests, then a purely economic analysis must be employed to determine whether this was an efficient violation of the law.[192] The breach is efficient if the corporation profits more than it must pay in damages to the minority. Proponents of an economic analysis contend that injunctions should only be issued where

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[185]Terrace v. Thompson, 263 U.S. 197, 214 (1923).

[186]*See* D. Laycock, *supra* note 167, at 345.

[187]*See supra* notes 96-148 and accompanying text.

[188]*See supra* notes 160-61 and accompanying text.

[189]*See generally* R. Posner, *supra* note 94.

[190]*Statutes' Domains*, *supra* note 158, at 546 (strict construction is most applicable to social welfare legislation); *cf.* R. Posner, The Federal Courts 261-93 (1985).

[191]Ind. Code § 23-1-44-3 (1988).

[192]*See* D. Laycock, *supra* note 167, at 16.

the costs of voluntary negotiations are low.[193] This encourages settlement between the parties. However, where such transaction costs are high, the victims should be relegated to their damage remedy.[194] This prevents a total stalemate and the concomitant damage to the corporation. One situation with high transaction costs would be where there are so many dissenters that the corporation could not possibly negotiate with each one individually.[195] Another scenario of high transaction costs is a bilateral monopoly. A bilateral monopoly occurs when no third parties exist with whom the litigants can negotiate.[196] This forces the parties to deal solely with each other. Such a situation often occurs in the context of a closely held corporation, where there is no real market for a dissenter's shares. In either of these situations, if the breach is shown to be efficient, an injunction should be denied and the passive investor should collect only damages.

The underlying corporate act, which is the subject of a properly denied injunction, should be an act from which this plaintiff *profited* as a shareholder. Any appraisal proceeding is one which seeks to remedy a situation *ex post*. Such a payment decreases the value of the majority's shares when the corporation settles a dissenter's claim. However, if all parties involved are aware of the availability of an equitable appraisal (whether by court order or by statute), then the parties can bargain for the value of this remedy *ex ante*.[197] The majority thereby effectively purchases the minority's right to an injunction.[198] If the majority is willing to pay a higher price per share in order to have appraisal as the exclusive remedy, then *all* shareholders profit from the transaction.[199] This pricing mechanism thus increases the prices for shares in companies incorporated in jurisdictions which provide an appraisal as the exclusive remedy.

Maximum efficiency is the key to an economic analysis of any corporate action. If a state's corporation statutes are looked upon as a set of standard "form" contracts used to govern a business, then a shareholder becomes bound to those contracts upon investing in the enterprise.[200] Value is increased in this situation because the parties have not had to incur the increased expense of contract negotiations. A minority shareholder gains a lower initial cost under this implied contract

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[193]*See One View of the Cathedral*, *supra* note 161, at 1124-27.

[194]*Id.*

[195]*See* R. Posner, *supra* note 94, at 27-52.

[196]*Id.*

[197]*See Appraisal Remedy*, *supra* note 16, at 873.

[198]*Id.* at 899. *See also* R. Posner, *supra* note 94, at 305-06.

[199]*See Appraisal Remedy*, *supra* note 16, at 873.

[200]*See* R. Clark, *supra* note 4, at 9.

but also incurs an increased risk of loss due to possible unforeseeable changes in the enterprise. Because the shareholder knows that the dissenters' appraisal remedy is exclusive, this increased risk factor should cause him to devalue his shares *ex ante*.[201] The minority shareholder is thus not harmed by a subsequent transaction which triggers the dissenters' remedy, because he paid less value *ex ante* in contemplation of such an event.

This value-increasing theory falters, however, when one of the directors is involved in fraud or self-dealing. In such a situation, all shareholders have paid a higher premium for a share which actually carried a higher risk factor than bargained for. One alternative to dispensing with appraisal as the exclusive remedy, even in a self-dealing case, would be to offer an extra element of damages in addition to the valuation calculation. The new Indiana statute follows such an approach and allows equity to calculate damages along with the fair value.[202] A shareholder who has no true interest in "ownership" would prefer such an equitable damage award. The other alternative would be to allow an injunction when the dissenters suffer more economic harm than the corporation gains. It has been pointed out, however, that such an approach would be too burdensome and speculative, because courts cannot reasonably ascertain the effect of a certain transaction on the value of the corporation's shares.[203]

The increased valuation of shares due to managerial misconduct would be especially valuable when applied to closely held corporations. Because the new dissenters' statute is applicable *only* to closely held corporations[204] (or publicly held corporations which grant the remedy under their articles of incorporation),[205] a court should more closely scrutinize an action which is alleged to be fraudulent. The conduct of a manager of a publicly held firm is generally monitored more closely than that of a manager in a closely held firm, because risk-bearing is more separated from management in a publicly held company.[206] A manager in a closely held corporation, on the other hand, is assumed to have more to lose and, consequently, is usually given more control. If a manager of a closely held corporation breaches a fiduciary duty, then this breach of duty is less likely to be discovered before it is too late for a minority shareholder to act.

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[201]*See Appraisal Remedy*, *supra* note 16, at 899.

[202]Ind. Code § 23-1-44-3 (1988). *See supra* notes 96-111 and accompanying text.

[203]*See Appraisal Remedy*, *supra* note 16, at 901.

[204]Ind. Code § 23-1-44-8(b) (1988).

[205]*Id.* § 23-1-44-8(a)(5).

[206]*See Close Corporations*, *supra* note 92, at 278.

In *Michaels v. Michaels*,[207] the Seventh Circuit Court of Appeals found that although the standards of fraud are the same between the managers of closely and publicly held companies, the manner in which these tests are applied must be different. In *Michaels*, a minority shareholder had agreed to sell his shares to the two majority shareholders, but before the transaction was completed, the majority learned that they could sell the entire enterprise to a third party for a substantial profit.[208] Although a manager in a publicly held firm would not be forced to disclose pre-merger discussions to shareholders, the court concluded that the minority shareholder in a closely held firm *was* entitled to this information.[209]

Other courts have also held that shareholders in closely held corporations owe the minority a higher standard of care than do their counterparts in publicly held firms.[210] However, a desire for fundamental fairness in the day-to-day business activities should not undermine the basic functions of the corporation. A truly "heinous"[211] act by the majority can still be remedied by an appraisal proceeding if that is what the parties bargained for. A passive investor views his share in a corporation as a means to earn profit. Thus, an equitable valuation of shares should add a profit factor onto what such an investor receives under the dissenters' rights statute. A passive investor will devalue his shares depending upon the confidence he has in corporate management. A court proceeding is simply too cumbersome a tool to use to decide what standards the parties would have imposed had they truly bargained *ex ante*.[212] For the passive investor, if a duty has been breached, then equity should only be employed in valuation, not in the use of an injunction.

V. Conclusion

The new dissenters' right statute is a much needed modernization of the previous burdensome law. The expanded and simplified procedures

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[207] 767 F.2d 1185 (7th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

[208] *Id.* at 1192-94.

[209] *Id.* at 1195, 1205. The Seventh Circuit Court of Appeals relied upon the holding in Greenfield v. Heublein, Inc., 575 F. Supp. 1325, *aff'd*, 742 F.2d 751 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985), wherein it was decided that merger negotiations (for publicly held firms) do not become material until the merging companies have agreed upon both price and post-merger structure.

[210] *See, e.g.*, Donahue v. Rodd Electrotype Co., 367 Mass. 578, 328 N.E.2d 505 (1975) ("selective" purchase of stock a *per se* breach of duty); *In re* Kemp & Beatley, Inc., 64 N.Y.2d 63, 473 N.E.2d 1173, 484 N.Y.S.2d 799 (1984) ("reasonable expectations" of minority shareholder are best means to determine oppressive conduct of majority); Meiselman v. Meiselman, 309 N.C. 279, 307 S.E.2d 551 (1983) (entire history of the participants' relationship may be viewed to determine "reasonable expectations").

[211] *See supra* note 11 and accompanying text.

[212] *See Close Corporations*, *supra* note 92, at 296-301.

encourage private settlement, while the liberalized valuation and interest provisions provide greater protection and security to a dissenting shareholder. Whether or not Indiana courts will create judicial exceptions to the exclusivity rule regarding certain corporate or managerial misconduct will depend upon the dissenter's interest in the corporation. A holder of one of three shares in a small "incorporated partnership" for example, will be able to seek equity more easily than one who acts merely as a passive investor.

However, the philosophical determinations made by the court should not be allowed to overshadow these same determinations made by the legislature. Investors and business owners are both expected to be apprised of the laws governing their enterprises. By choosing to incorporate under the Indiana Business Corporation statutes, entrepreneurs have bargained to follow the statutory scheme. All parties should discount the value of their shares, *ex ante*, to increase efficiency and avoid wasteful litigation. The only situation in which an injunction should be issued is when the minority shareholder is both an "owner" and employee of the corporation, and the majority has acted in an illegal manner. In all other situations, the exclusivity requirement should be enforced.

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