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APPRAISAL RIGHTS: ALLOWANCE FOR PREJUDGMENT INTEREST

J. KIRKLAND GRANT*

At common law, certain extraordinary corporate changes¹ could be made only with the unanimous approval or acquiescence of all shareholders.² Each shareholder thus had, in effect, a veto power over these extraordinary changes. This rule was based on the theory that the shareholder had invested in a continuing enterprise which should not be fundamentally altered against his will.³ Otherwise, it was

*Associate Professor of Law, University of South Carolina School of Law.

¹ The various corporate actions which are viewed as fundamental or extraordinary normally include:

- (a) a merger or consolidation;
- (b) a sale or exchange of property and assets, not in the usual and regular course of business, for a consideration other than cash; or
- (c) an amendment to the articles of incorporation, particularly changes in the corporate purposes, extension of corporate life, reduction of the number of directors, change in the corporate financial structure or in the rights of shareholders.

See, e.g. H. HENN, *LAW OF CORPORATIONS*, 694, 697-98 (2d ed. 1970).

² E.g., *Voeller v. Neilston Co.*, 311 U.S. 531, 535 n.6 (1941); *Geddes v. Anaconda Copper Mining Co.*, 254 U.S. 590, 595-96 (1921); Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233, 234 (1931) [hereinafter Lattin]; Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420 (1930) [hereinafter Levy].

³ See *Chicago Corp. v. Munds*, 20 Del. Ch. 142, 172 A. 452 (Ch. 1934), where the court stated that:

When a stockholder buys stock it is to be supposed that he buys into a corporation as a going concern. He does not buy on the theory that he is about to participate in a contemplated liquidation of the corporation's assets. He buys an aliquot share of a business, and he probably takes into account, or should at least take into account, not alone its present asset condition and earning power but as well its future prospects as a continuing enterprise. When a merger proposal is put through with which he chooses to dissociate himself, he is forced out of his investment and compelled to abandon his association with a business of which he was a part owner. As to him, the going concern is done. Others have decreed its cessation against his will.

Id. at 149-50, 172 A. at 455.

thought, his corporate investment would be subject to unreasonable risk after initial capital commitment.⁴ In practice, however, this strict rule hindered otherwise legitimate corporate activities and, as a result, modern statutes were adopted in fifty states and the District of Columbia⁵ which took this veto power from the individual shareholder-

⁴ *Id.*

⁵ ALA. CODE tit. 10, §§ 21 (62), 21 (73) (Cum. Supp. 1974); ALASKA STAT. §§ 10.05.426, 10.05.456 (1974); ARIZ. REV. STAT. ANN. §§ 10-347, 10-363 (1956); ARK. STAT. ANN. §§ 64-707, 64-804 (1966); CAL. CORP. CODE §§ 4300 (West Supp. 1975), 5007 (West 1955); COLO. REV. STAT. ANN. §§ 31-5-13, 31-7-8 (1963); CONN. GEN. STAT. ANN. §§ 33-373, 33-374 (Supp. 1975); DEL. CODE ANN. tit. 8, § 262 (1975); D.C. CODE ENCYCL. ANN. § 29-927i (1966); FLA. STAT. ANN. § 608-23 (Supp. 1975-76); GA. CODE ANN. § 22-120 (1970); HAWAII REV. STAT. §§ 417-19 to 417-22 (1968), 417-23 (Supp. 1974), 417-24 to 417-30 (1968); IDAHO CODE §§ 30-150, 30-156 (1967); ILL. ANN. STAT. ch. 32, §§ 157.70, 157.73 (Smith-Hurd Supp. 1975-76); IND. ANN. STAT. §§ 23-1-5-7, 23-1-6-5 (Burns 1972); IOWA CODE ANN. §§ 496A.77, 496A.78 (1962); KAN. STAT. ANN. §§ 17-6703(d), 17-6712 (1974); KY. REV. STAT. ANN. § 271A.405 (Baldwin 1973); LA. REV. STAT. ANN. § 12:131 (West Supp. 1975); ME. REV. STAT. ANN. tit. 13-A, § 909 (1974); MD. ANN. CODE art. 23, § 73 (1973); MASS. GEN. LAWS ch. 156B §§ 76, 77, 82(e), 83(f), 85 (1970), 86-89 (Supp. 1975), 88-98 (1973); MICH. STAT. ANN. 450.1763-450.1771 (1974); MINN. STAT. ANN. §§ 301.40, 301.44 (1969); MISS. CODE ANN. §§ 5309-171, 5309-172 (Cum. Supp. 1972); MO. ANN. STAT. §§ 351.405, 351.455 (Vernon 1966); MONT. REV. CODES ANN. §§ 15-2273, 15,2274 (1967); NEB. REV. STAT. §§ 21-2079, 21-2080 (1970); NEV. REV. STAT. §§ 78.505, 78.507, 78.510, 78.515, 78.520, 78.521 (1973); N.H. REV. STAT. ANN. §§ 294:76-294:80 (1966); N.J. STAT. ANN. §§ 14A.11-1 to 14A.11-3 (Supp. 1975-76), 14A.11-4, 14A.11-5 (1970), 14A.11-6 (Supp. 1975-76), 14A.11-7 to 14A.11-11 (1969); N.M. STAT. ANN. §§ 51-28-3, 51-28-4 (Supp. 1973) N.Y. BUS. CORP. LAW § 623 (Supp. 1975); N.C. GEN. STAT. § 55-113 (1975); N.D. CENT. CODE §§ 10-20-08, 10-20-11 (1960); OHIO REV. CODE ANN. §§ 1701.84-85 (1971); OKLA. STAT. ANN. tit. 18, §§ 1.157-.161 (1953); ORE. REV. STAT. §§ 57.432, 57.437, 57.442, 57.445 (1974); PA. STAT. ANN. tit. 15, § 1515 (Supp. 1974-75); R.I. GEN. LAWS ANN. §§ 7-1.1-73, 7-1.1-74 (1970); S.C. CODE ANN. § 12-16.27 (Cum. Supp. 1974); S.D. COMPILED LAWS ANN. §§ 47-6-23 to 47-6-39 (1967); TENN. CODE ANN. §§ 48.909-48.916 (Supp. 1974); TEX. BUS. CORP. ACT ANN. arts. 5.11-5.13 (Supp. 1974-75); UTAH CODE ANN. §§ 16-10-75, 16-10-76 (1973); VT. STAT. ANN. tit. 11, §§ 2003-2004 (Cum. Supp. 1972); VA. CODE ANN. §§ 13.1-75, 13.1-76, 13.1-78 (Supp. 1975); WASH. REV. CODE ANN. §§ 23A.24.030, 23A.24.040 (1969); W. VA. CODE ANN. §§ 31-1-122, 31-1-123 (Cum. Supp. 1974); WIS. STAT. ANN. §§ 180.72 (Supp. 1974-75); WYO. STAT. ANN. §§ 17-36-71, 17-36-72 (1965).

Some states provide, however, that unless the certificate of incorporation provides otherwise, statutory appraisal is unavailable if the shares are listed on a national securities exchange, *e.g.*, DEL. CODE ANN. tit. 8, § 262(k) (1975); NEV. REV. STAT. § 78.521 (1973); UTAH CODE ANN. § 16-10-75 (1973), or are held by more than a specified number of owners, *e.g.*, DEL. CODE ANN. tit. 8, § 262(k) (1975); LA. REV. STAT. ANN. § 12-131(B)(3) (1969), MICH. STAT. ANN. § 450.1762 (1974). Thus, while appraisal is provided, it exists in these jurisdictions for only the small, closely-held enterprise or a slightly larger counterpart: the over-the-counter company. Shareholders in listed companies are precluded from appraisal, even though the market value of their interest may be decreased due to the very action to which they object. This is the case because the market prices of the shares so listed will reflect the market place evaluation of the proposed corporate change almost immediately upon its announcement. *See* Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 231-39 (1962) [hereinafter cited as Manning].

Delaware has an interesting statutory scheme for appraisal. Title 8, § 262, the major provision for appraisal, is limited to merger and consolidation actions. Other sections cover appraisal in conjunction with other corporate changes: § 251—short-form mergers, § 253—parent-subsidiary mergers, § 271—sale of assets and § 303—Federal

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er and substituted in its place the appraisal remedy.⁶ Under the appraisal remedy, a dissenting stockholder has the right to demand, in exchange for his corporate interest, the actual value of his capital investment in a corporation upon the occurrence of a fundamental corporate change.⁷ Shareholders thus have the option of either remaining in the enterprise or refusing to participate in the new venture.⁸ If the latter alternative is selected, the shareholder will receive, in cash, the value of his stock, neither enhanced nor encumbered by the proposed corporate action.⁹ In sum, the appraisal statutes recognize the desirability of allowing corporate flexibility and mesh with other liberal state statutes which allow the corporation to grow, both externally and internally, with a minimum of legal restrictions.¹⁰ The appraisal statutes also prevent injustice to minority shareholders by taking cognizance of the inherent right of a shareholder to object to fundamental corporate changes in a manner which protects his capital investment.¹¹

Predictably, the major question in most appraisal proceedings is the dollar valuation of the dissenter's stock holding. The market value cannot be used since the price of the shares will be affected by the act triggering the appraisal. Furthermore, in the case of some shares, there is no market. Techniques and guidelines have thus evolved, both judicially and statutorily, for determining the value of the holding.¹² The statutory procedures normally require that, within a prescribed period after the occurrence of the act for which the appraisal is sought, the dissenting shareholder must notify the corporation of his election to have his shares "bought out."¹³ In many juris-

reorganizations. DEL. CODE ANN. tit. 8, §§ 262, 251, 271, 303 (1975).

For a general discussion of statutory appraisal rights, see Manning, *supra*, at 239-260; Skolar, *Some Observations on the Scope of Appraisal Statutes*, 13 BUS. LAW. 240 (1958). An earlier viewpoint is reflected in Levy, *supra* note 2.

⁶ Voeller v. Neilston Co., 311 U.S. 531, 535 n.6 (1941); e.g., Lattin, *supra* note 2, at 237; Levy, *supra* note 2 at 420-21. These enactments are listed in note 5 *supra*.

⁷ The appraisal statutes provide that the value of the dissenter's shares shall be determined as of a particular date, usually the day before the vote authorizing the corporate action, e.g., LA. REV. STAT. ANN. § 12:131(E) (West Supp. 1975); N.Y. BUS. CORP. LAW § 623(h) (4) (Supp. 1975); the day of the vote, e.g., ARIZ. REV. STAT. ANN. § 10-347 (1956); MD. ANN. CODE art. 23 § 73 (1973); or the effective date of the transaction, e.g., DEL. CODE ANN. tit. 8, § 262(b) (1975).

⁸ Appraisal as the exclusive remedy invoked in cases where fundamental corporate change is undertaken is generally the rule. However, in certain instances injunctive relief is available to prevent such corporate action. E.g., Cole v. National Cash Credit Ass'n, 18 Del. Ch. 47, 56-57, 156 A. 183, 187-88 (1931) (inequitable treatment of minority); Outwater v. Public Serv. Corp., 103 N.J. Eq. 461, 467-68, 143 A. 729, 732 (Ch.), *aff'd*, 104 N.J. Eq. 490, 146 A. 916 (Cl. Err. & App. 1929) (fraud); Wheatley v. A.I. Roof Co., 147 Ohio St. 127, 145, 69 N.E.2d 187, 196 (1946) (ultra vires activity).

⁹ E.g., Lattin, *supra* note 2 at 234.

¹⁰ See Note, 60 YALE L.J. 337, 337-38 (1951).

¹¹ Voeller v. Neilston Co., 311 U.S. 531, 535 n.6 (1941).

¹² E.g., Application of Del. Racing Ass'n, 42 Del. Ch. 406, 413-25, 213 A.2d 203, 208-14 (Sup. Ct. 1965); DEL. CODE ANN. tit. 8 § 262 (1975).

¹³ E.g., DEL. CODE ANN. tit. 8, § 262 (1975); N.Y. BUS. CORP. LAW § 623 (Supp.

dictions, the corporation must then, within a specified period, make an offer for the shares.¹⁴ If the corporation and the dissenting shareholder cannot agree as to the value of the shares, the dissenter may then petition for court appraisal to determine the value of his investment.¹⁵ After what may be a lengthy¹⁶ evaluation by the court or court-appointed appraisers,¹⁷ a value is determined for the shares which the corporation is required to pay, and the shareholder is required to accept.¹⁸ Considerable delay, therefore, may transpire before the dissenting shareholder actually receives cash in payment for his shares.¹⁹ This delay gives rise to a second major question which has not yet been fully answered in all jurisdictions: Is the dissenting stockholder entitled to receive interest on an appraisal award, and if so, what are the specific details of the recovery?²⁰

This article will demonstrate that prejudgment interest on appraisal awards is a necessary element in the equitable compensation of a dissenting shareholder. It will be shown that in the absence of such interest the appraisal award fails to represent the fair value of the dissenter's corporate holding. In addition, it will be shown that a failure to award such interest allows the corporation to realize a windfall through the cost-free use of the dissenter's capital during the appraisal period. Specifically, this article will examine several questions regarding the payment of interest in appraisal actions. Should interest on the award be required? If so, from what date, on what amount, and at what rate should interest be computed? Should interest be compounded? Who determines the interest award—the court or the appraiser? Finally, statutory language will be suggested which, if adopted, would have the effect of both providing for interest and clarifying the details which surround an interest award.

1. SHOULD INTEREST ON THE APPRAISAL AWARD BE REQUIRED?

Most statutes originally made no provision for the awarding of

1975); OHIO REV. CODE ANN. § 1701.85 (1971).

¹⁴ *E.g.*, CAL. CORP. CODE § 4304 (West 1955); N.Y. BUS. CORP. LAW § 623(g) (Supp. 1974-75).

¹⁵ *E.g.*, DEL. CODE ANN. tit. 8, § 262 (1975).

¹⁶ *See* Comment, 1 Sw. L. J. 207, 214-17 (1947).

¹⁷ The court may appoint appraisers to receive evidence and recommend a decision as to value. The court, however, is normally the final arbiter on this issue. *See* text *infra* at notes 131-40.

¹⁸ *E.g.*, DEL. CODE ANN. tit. 8, § 262(f) (1975); N.Y. BUS. CORP. LAW § 623(h) (1963).

¹⁹ *See* Comment, 1 Sw. L.J. 207, 214-17 (1947).

²⁰ It is clear that *after* the appraisal judgement has been enrolled or entered by the court, interest is payable in accordance with the relevant legal interest statute either from a date specified by such judgment or from the date of entry. For example, N.Y. CIV. PRAC. § 5003 (1963) provides: "Every money judgment shall bear interest from the date of its entry. Every order directing the payment of money which has been docketed as a judgment shall bear interest from the date of such docketing."

interest in appraisal proceedings.²¹ This statutory silence resulted in diverse treatment of the interest issue by the state courts. Some courts held that despite the absence of express statutory authorization, interest could be awarded as a proper element of the appraisal remedy.²² Most courts, however, emphasizing the statutory character of the appraisal remedy, held that absent express statutory authority, they were without power to award interest.²³ These decisions were based on the theory that the legislative body, in recognizing the desirability of allowing fundamental corporate change presumably had considered, and therefore must have rejected, notions of the payment of interest to one who would disrupt the enterprise by demanding a return of his capital.²⁴

For example, at one time the Delaware appraisal statute did not provide for interest recovery²⁵ and the courts of that state uniformly held that the right of appraisal was a wholly statutory remedy whose contours were defined exclusively by that statute.²⁶ In *Mead v. Pacific Gamble Robinson Co.*,²⁷ the court noted that the statute directed the surviving corporation to pay, within three months after the merger, the value of the stock at the date of the merger.²⁸ It was held that, in the event that court appraisal was sought, the statutory silence with respect to prejudgment interest meant that the appraisal amount was collectible "as other debts are by law collectible" if payment were not made within sixty days of the appraisal judgment.²⁹ The court therefore held that the corporation was entitled to a period of sixty days from the date of the appraisal judgment before default in payment thereof could occur.³⁰ Thus, only after this sixty-day period had run would interest be recoverable.³¹ This result was based on the fact that prior to the expiration of the sixty-day period, the corporation had

²¹ *E.g.*, ch. 437 § 44 [1903] Mass. Acts and Resolves 438-39; ch. 787 §§ 21, 87 [1923] Laws of N.Y. 1386, 1406. See Note, 37 VA. L. REV. 901 (1951).

²² *E.g.*, *Skipwith v. Federal Water & Gas Corp.*, 185 Misc. 248, 252-54, 56 N.Y.S.2d 804, 806-08 (Sup. Ct. 1945); *Craddock-Terry Co. v. Powell*, 181 Va. 417, 457, 25 S.E.2d 363, 380 (1943).

²³ *Meade v. Pacific Gamble Robinson Co.*, 30 Del. Ch. 509, 58 A.2d 415, 418 (Sup. Ct. 1948); *In re Jassen Dairy Corp.*, 2 N.J. Super. 580, 586-88, 64 A.2d 652, 655-56 (1949 Law Div.); *Pittston Co. v. O'Hara*, 191 Va. 886, 900-01, 63 S.E.2d 34, 39-40 (1951).

²⁴ *E.g.*, *In re Jassen Dairy Corp.*, 2 N.J. Super. 580, 586-88, 64 A.2d 652, 655-56 (1949).

²⁵ 35 Del. Laws ch. 85, § 20 (1927), as amended, 40 Del. Laws ch. 148, § 8 (1937), as amended, 43 Del. Laws ch. 132 § 16 (1943); see E. FOLK, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS 389 (1972) [hereinafter cited as Folk].

²⁶ *Meade v. Pacific Gamble Robinson Co.*, 30 Del. Ch. 509, 58 A.2d 415 (Ch. 1948); *In re General Realty & Util. Corp.*, 29 Del. Ch. 480, 52 A.2d 6 (Ch. 1947).

²⁷ 30 Del. Ch. 509, 58 A.2d 415 (Ch. 1948).

²⁸ *Id.* at 512, 58 A.2d at 416.

²⁹ *Id.* at 513, 58 A.2d at 417, construing 35 Del. Laws ch. 85, § 20 (1927), as amended, 40 Del. Laws ch. 148, § 8 (1937), as amended, 43 Del. Laws ch. 132, § 16 (1943).

³⁰ 30 Del. Ch. at 514, 58 A.2d at 418.

³¹ *Id.* at 515, 58 A.2d at 418.

violated no duty which it owed to the dissenting shareholder:

[T]he law action interest cases and also cases cited involving mergers or sales of assets which were *ultra vires* or otherwise illegal [are inapplicable]. Because of the absence of provisions for interest in the statute and because the actual provisions seem inconsistent with its allowance, we conclude that the benefits afforded stockholders who do not wish to go along with a merger do not include interest upon the appraisers' award.³²

Similarly, the Maryland statute,³³ construed in *American General Corp. v. Camp*,³⁴ provided that the corporation was entitled to thirty days from the date of court confirmation of the appraiser's award before payment of the award was required.³⁵ After that period had expired, the statute provided that the amount of the award became a decree against the corporation.³⁶ In interpreting this statute, the court noted that:

All the stockholder is entitled to receive is the value of his stock as represented by the amount of the award. He is not entitled to receive more in the form of interest until after the expiration of the thirty day period, because the statute expressly provides that the *amount* of the *award* shall be the lien, which inferentially excludes any interest from accruing during the period before the amount of the award becomes a decree. Since the stockholder has no enforceable right to the money until the corporation has withheld or deprived the stockholder of what is due him for thirty days after the confirmation, there is no reason nor principle for interest to be chargeable until the corporation is in default.³⁷

In some cases, a request for interest has been denied on the theory that until appraisal is completed, the appraisal amount is merely an unliquidated claim representing no definite sum upon which interest may be calculated.³⁸ Under this theory, the amount of the debt for the dissenter's shares is not established until there is either an acceptance of a settlement offer or a final judgment in the appraisal proceeding.³⁹ The unliquidated sum theory was thus held to preclude the recovery of interest during this interim period unless

³² *Id.* at 514-15, 58 A.2d at 418.

³³ Ch. 551 §§ 35, 36 [1935] Laws of Md.

³⁴ 171 Md. 629, 190 A. 225 (1937).

³⁵ Ch. 551 §§ 35, 36 [1935] Laws of Md.

³⁶ 171 Md. at 641, 190 A. at 230.

³⁷ *Id.* at 641-42, 190 A. at 230-31.

³⁸ *E.g.*, *American Gen. Corp. v. Camp*, 171 Md. 629, 190 A. 225 (1937); *In re Erlanger*, 237 N.Y. 159, 142 N.E. 571 (1923).

³⁹ *American General*, 171 Md. at 641, 190 A. at 230; *In re Erlanger*, 237 N.Y. 159, 142 N.E. 571, 573 (1923).

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such recovery was expressly provided for by statute.⁴⁰

This reasoning is not persuasive in light of the fact that courts have frequently recognized the compensatory nature of interest recovery in other analogous types of actions where the amount of damage was unliquidated.⁴¹ In tort actions, interest may be properly awarded if the plaintiff has suffered an injury to his pecuniary interests resulting in distinct and measurable financial loss.⁴² This is true despite the fact that a dollar amount cannot be determined prior to judgment.⁴³ Similarly, in contract actions and other claims for money due, interest has been recoverable as an element of damages.⁴⁴ Finally, appraisal actions can be analogized to eminent domain cases, which require the accrual of interest from the time of property disposal until the final payment of the award.⁴⁵ These decisions directly support the dissenting shareholder's claim for interest recovery despite the fact that until appraisal is completed, the appraisal award is unliquidated.

Most of the recent corporation statutes do expressly provide for the inclusion of prejudgment interest on appraisal awards. Twenty-three states,⁴⁶ as well as the Model Business Corporation Act,⁴⁷ provide for interest and state that the payment of such interest shall be either at an "equitable" or at a "fair and equitable" rate, set at the discretion of the court. Statutes of ten states provide, in seemingly man-

⁴⁰ *American General*, 171 Md. at 641, 190 A. at 230; *In re Erlanger*, 237 N.Y. 159, 165-66, 142 N.E. 571, 573 (1923).

⁴¹ See, e.g., *Chesapeake & O. Ry. v. Elk Ref. Co.*, 186 F.2d 30 (4th Cir. 1950) (tort); *Betzer v. Olney*, 14 Cal. App. 2d 53, 57 P.2d 1376 (Dist. Ct. of App. 1936) (contract); *Fell v. Union Pac. Ry.*, 32 Utah 101, 88 P. 1003 (1907) (tort).

⁴² C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 56 at 222-223 (1935).

⁴³ *Id.*

⁴⁴ E.g., *Miller v. Robertson*, 266 U.S. 243, 258 (1924); *Spalding v. Mason*, 161 U.S. 375, 395 (1896); *Curtis v. Innerarity*, 47 U.S. (6 How.) 146, 154 (1848).

⁴⁵ E.g., *State v. Painter*, 120 W. Va. 846, 199 S.E. 372 (1938).

⁴⁶ CONN. GEN. STAT. ANN. §§ 33-374 (Supp. 1975); GA. CODE ANN. § 22-1202 (1970); KY. REV. STAT. ANN. § 271A.405 (Baldwin 1973); ME. REV. STAT. ANN. tit. 13-A, § 909 (1974); MICH. STAT. ANN. 450.1768 (1974); MISS. CODE ANN. § 5039-171 (Cum. Supp. 1972); MONT. REV. CODES ANN. 15-2274 (1967); N.J. STAT. ANN. § 14A.11-9 (1969); N.M. STAT. ANN. § 51-28-4 (Supp. 1973); N.Y. BUS. CORP. LAW § 623 (Supp. 1975); OHIO REV. CODE ANN. § 1701.85 (1971); ORE. REV. STAT. § 57.445 (1974); PA. STAT. ANN. tit. 15, § 1515 (Supp. 1974-75); R.I. GEN. LAWS ANN. § 7-1.1-74 (1970); S.C. CODE ANN. § 12-16-27 (Cum. Supp. 1974); S.D. COMPILED LAWS ANN. § 47-6-24 (1967); UTAH CODE ANN. § 16-10-76 (1973); VT. STAT. ANN. tit. 11, § 2004 (Cum. Supp. 1972); VA. CODE ANN. §§ 13.1-75, 13.1-78 (Supp. 1975); WASH. REV. CODE ANN. § 23A.24.040 (1969); W. VA. CODE ANN. § 31-1-123 (Cum. Supp. 1974); WIS. STAT. ANN. § 180.72 (Supp. 1974-75); WYO. STAT. ANN. § 17-36-72 (1965).

Three states have not incorporated the word "equitable" into their interest provisions, yet it would appear that such a standard is implied. DEL. CODE ANN. tit. 8, § 262 (1975); KAN. STAT. ANN. § 17-6712(h) (1974); MASS. GEN. LAWS ch. 156B § 95 (1970). For example, Delaware provides for the payment of interest to dissenters as follows: "The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto." DEL. CODE ANN. tit. 8, § 262(h) (1975).

⁴⁷ ABA-ALI MODEL BUS. CORP. ACT § 81 (1974).

datory language, that the appraisal award shall be the value "together with interest thereon to date of judgment" or "plus interest."⁴⁸ Statutes of four jurisdictions expressly set the rate of interest.⁴⁹ Eight states have no interest provision at all.⁵⁰ No statutes, however, have been construed to require payment of interest on appraisal awards in all cases.

These statutes have, in many instances, been interpreted liberally. In *Manning v. Brandon Corp.*,⁵¹ the South Carolina Supreme Court was called upon to apply that state's interest provision.⁵² The court noted that the appraisal statute "gives the consolidated corporation one of the highest rights known to the law, that of taking the property of a stockholder over his objection This statute should be construed liberally in favor of the stockholder, so as to carry out the manifest theory of the act"⁵³

The Delaware interest provision,⁵⁴ adopted to overcome the restraints perceived in that state's prior appraisal statute,⁵⁵ has also been construed liberally. In *Felder v. Anderson, Clayton & Co.*,⁵⁶ the court noted that "since the corporation has had the use of the dissenting stockholders' money from the date of the merger . . . interest should generally be allowed as a matter of course."⁵⁷ In *Felder*, the corporation had offered \$395 per share while the stockholders had demanded \$1,000 per share. The appraised value was \$432.09 per share.⁵⁸ The court found it not unusual that the stockholders had proffered an exaggerated view of the value of their stock, and that they were not attempting to force an extortionate settlement by abuse of the appraisal process, a process which a dissenter has every right to

⁴⁸ ALA. CODE tit. 10, §§ 21(62), 21 (73) (Cum. Supp. 1974); ALASKA STAT. §§ 10.05.426, 10.05.456 (1974); ARK. STAT. ANN. §§ 64-707, 64-804 (1966); COLO. REV. STAT. ANN. §§ 31-5-13, 31-7-8 (1963); ILL. ANN. STAT. ch. 32 §§ 157.70, 157.73 (Smith-Hurd Supp. 1975-76); MO. ANN. STAT. § 351.405 (Vernon 1966); N.C. GEN. STAT. § 55-113 (1975); N.D. CENT. CODE §§ 10-20-08, 10-20-11 (1960); TENN. CODE ANN. § 48.915 (Supp. 1974); TEX. BUS. CORP. ACT ANN. art. 512 (Supp. 1974-75). Although Louisiana and Oklahoma do not expressly provide for interest, they do so by implication. See LA. REV. STAT. ANN. § 12:131(G) (1969); OKLA. STAT. ANN. tit. 18, § 1.159 (1953).

⁴⁹ HAWAII REV. STAT. § 417-25 (1968); IOWA CODE ANN. § 496A.78 (1962); NEB. REV. STAT. § 21-2080 (1970); D.C. CODE ENCYCL. ANN. § 29-927i(c) (1966).

⁵⁰ ARIZ. REV. STAT. ANN. §§ 10-347, 10-363 (1956); CAL. CORP. CODE § 4311 (1955); FLA. STAT. ANN. § 608.23 (Supp. 1975-76); IDAHO CODE §§ 30-150, 30-156 (1967); IND. ANN. STAT. §§ 23-1-5-7, 23-1-6-5 (Burns 1972); MINN. STAT. ANN. § 301.40 (1969); NEV. REV. STAT. § 78.510 (1973); N.H. REV. STAT. ANN. § 294:76 (1966).

⁵¹ 163 S.C. 178, 161 S.E. 405 (1931).

⁵² Act of April 14, 1925, 34 Laws of S.C. 246.

⁵³ 163 S.C. at 186, 161 S.E. at 408.

⁵⁴ DEL. CODE ANN. tit. 8, § 262(h) (1975) provides in pertinent part: "The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock"

⁵⁵ See text at notes 25-32 *supra*.

⁵⁶ 39 Del. Ch. 76, 159 A.2d 278 (Ch. 1960).

⁵⁷ *Id.* at 89, 159 A.2d at 286.

⁵⁸ *Id.* at 90, 159 A.2d at 286.

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invoke.⁵⁹ Since the appraised value exceeded the corporation's highest cash offer, the court concluded that it could exercise its discretion and either grant or deny interest.⁶⁰ This decision was controlled by the fact that the company had had "the unrestricted use of the stockholders' 'money' during the period of the appraisal."⁶¹ "Interest," the court reasoned, "really represents damages for the delay in payment and compensation for the use of plaintiffs' money."⁶²

There are limits to the liberal attitude of the courts in interpreting the recent appraisal statutes, however. This was demonstrated in *Loeb v. Schenley Industries, Inc.*,⁶³ where the Delaware court rejected a motion by the shareholders to require the corporation to pay a minimum value either agreed to by the parties or stipulated by the court for the purpose of reducing the amount of interest for which the corporation ultimately would be liable at the completion of the appraisal proceedings.⁶⁴ The dissenters, owning less than five percent of the stock of Schenley Industries, objected to a merger of that corporation into a subsidiary of Glen Alden which held substantially all of the Schenley shares.⁶⁵ The shareholders petitioned the court for partial summary judgment to set a value which they claimed was uncontroverted on the present record and to fix thereafter the minimum value for their shares.⁶⁶ The summary judgment would also have ordered payment of such value pending adjustment resulting from the formal appraisal, which, presumably, would result in additional compensation for surrender of their shareholder status.⁶⁷ The court concluded that the provisions of Delaware law provided an orderly method for withdrawal from a corporation by shareholders who dissent and that this method was neither unfair nor partial.⁶⁸ Noting that the statute was an exclusive remedy, the court stated that:

No basis exists in either the statute itself or in the case law construing such statute for such an abridgment of the

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 92, 159 A.2d at 287; *accord*, *Swanton v. State Guar. Corp.*, 42 Del. Ch. 477, 485-86, 215 A.2d 242, 247 (Sup. Ct. 1965); *Sporborg v. City Specialty Stores, Inc.*, 35 Del. Ch. 560, 571, 123 A.2d 121, 127 (Ch. 1956).

The Pennsylvania Supreme Court, in interpreting its state's interest provision, PA. STAT. ANN. tit. 15, § 1515 (Supp. 1974-75), noted that:

the better view, as well as the intent of the statute, is to allow interest as a matter of course in all cases absent the existence of some inequitable situation. "Since the corporation has had the use of the dissenter's money without his consent from the time he demanded appraisal, it seems that interest is justified."

O'Connor Appeal, 452 Pa. 287, 298, 304 A.2d 694, 701 (1973).

⁶³ 285 A.2d 829 (Del. Ch. 1971).

⁶⁴ *Id.* at 830-31.

⁶⁵ *Id.* at 831 n.1.

⁶⁶ *Id.* at 830.

⁶⁷ *Id.*

⁶⁸ *Id.*

duties of appraisal conferred on the appraiser and the Court. . . . [T]he right to an appraisal in a merger proceeding is entirely a creature of statute. Petitioners having chosen such course of action, they are remitted in the interim to their right to interest, the unfair procedure which formerly denied objecting stockholders their right to interest pending appraisal having been remedied by statute.⁶⁹

The plaintiffs in *Loeb* had also contended that their motion for partial summary judgment should be granted because the surviving corporation had taken action which threatened its financial security, and hence, its ability to ultimately satisfy the appraisal award.⁷⁰ The court noted that these charges of financial insecurity were purely conjectural and that it was highly unlikely that the surviving corporation would act to undermine its assets to the extent that it would be unable to pay the value of less than five percent of the stock.⁷¹ If, however, a dissenter can demonstrate that there are substantial problems regarding the solvency of the enterprise which is obligated to pay him, it is suggested that the partial summary judgment route may be desirable. *Loeb* only found this argument inapplicable; it did not reject it.⁷²

It is not the position of the corporation codes that a court may never, in its discretion, deny the payment of interest on an appraisal award.⁷³ Such a discretionary denial could be based on two rationales. First, any return on the dissenting shareholder's investment should be limited to that amount which represents a "normal" corporate dividend. Since a corporation's dividend rate may be considerably less than the rate paid by the corporation on borrowed funds, this limitation would avoid giving the dissenter, when compared to other shareholders, a disproportionate reward for the use of his money which was earmarked for corporate activities. This limitation also recognizes the differences between income and growth investments—a factor which should enter into the valuation of a dissenter's investment. For example, if the corporation has habitually paid no dividends, or only very minimal dividends, in comparison to earnings, the retained earnings probably have been reinvested in the corporation resulting in higher compound earnings. This reinvestment and its impact upon future earnings already may have been taken into account by the court in the computation of the value of the dissenter's shares. To this extent, additional compensation in the form of interest should not be granted, even though this treatment may not recognize the true creditor status of a dissenting shareholder. Put simply, interest recovery may be disallowed where the judicial valuation has

⁶⁹ *Id.* at 831.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *E.g.*, DEL. CODE ANN. tit. 8 § 262(h) (1975).

taken into account the future growth of the investment during the appraisal period.

Second, some states require the court to disallow interest if the shareholder's rejection of the corporation's settlement offer was "arbitrary" or "vexatious."⁷⁴ Such statutes recognize that as to a bona fide claimant, the appraisal process is appropriate, but that dissenters should not threaten an intensive probe of corporate records in order to blackmail the corporation into an exorbitant settlement to avoid bothersome and costly appraisal proceedings.⁷⁵

The Model Act provides only that the judgment shall include interest "at such rate as the court may find to be fair and equitable in all the circumstances."⁷⁶ However, the Act provides in the next paragraph for the assessment of the costs and expenses of any appraisal proceeding as the court "may deem equitable against any or all of the dissenting shareholders . . . if the court shall find that the action of such shareholder in failing to accept [the corporation's settlement] offer was arbitrary or vexatious or not in good faith."⁷⁷ The fact that this "arbitrary or vexatious" phrase has been omitted from the interest paragraph may persuade some judicial interpreters to conclude that the draftsmen of the Model Act did not intend to vest discretion in the courts to refuse, in toto, the awarding of interest. It appears, however, that the better view would be to allow such a refusal based upon the "fair and equitable" language contained in the interest provision. Clearly, an arbitrary or vexatious rejection of the initial corporate offer could be the basis for a court finding that a "fair and equitable" rate of interest was zero.

Either of the above rationales may lead a court to conclude that an award of interest would be inappropriate. This would probably occur upon a motion by the corporation to disallow the shareholder's request for interest. In the absence of these discretionary factors, interest should be awarded in appraisal proceedings. The shareholder has committed his investment fund to a corporation for the purpose of earning a return. Since most jurisdictions statutorily terminate dividends and other incidents of corporate ownership upon the dissenter's filing of his demand for payment,⁷⁸ interest recovery is

⁷⁴ GA. CODE ANN. § 22-1202 (1970); ME. REV. STAT. ANN. tit. 13-A, § 909(G) (1974); MD. ANN. CODE art. 23, § 73 (1973); N.J. STAT. ANN. § 14A:11-9 (1969); N.Y. BUS. CORP. LAW § 623 (Supp. 1975); S.C. CODE ANN. § 12-16.27(i)(6) (Cum. Supp. 1974); TENN. CODE ANN. § 48.915 (Supp. 1975).

⁷⁵ See, e.g., *Application of Deutchmann*, 111 N.Y.S.2d 140, *aff'd*, 279 App. Div. 642, 107 N.Y.S.2d 1008 (1951); *Marcus v. R.H. Macy & Co.*, 297 N.Y. 38, 74 N.E.2d 228 (1947).

⁷⁶ ABA-ALI MODEL BUS. CORP. ACT § 81 (1974).

⁷⁷ *Id.*

⁷⁸ E.g., DEL. CODE ANN. tit. 8, § 262(j) (1975); LA. REV. STAT. ANN. § 12:131(H) (1969); MASS. GEN. LAWS ch. 156B § 96 (1973); N.Y. BUS. CORP. LAW § 623(e) (1963).

Between the time of demand and final payment, the stockholder may be in limbo—a stockholder in name only with none of the ordinary incidents or rights of such ownership. See *Johnson v. Baldwin*, 221 S.C. 141, 158, 69 S.E.2d 585, 593 (1952).

necessary if the shareholder is not to be cut off from *all* return on his investment. Jurisdictions which fail to award interest ignore this proprietary nature of the dissenting shareholder's investment. If he is allowed no return, then his capital is sterilized and his investment, as an investment, is worthless. The result is that even large stockholders, although able to absorb the costs of appraisal proceedings, may find that the loss of investment income either forces a sale or necessitates acquiescence in the corporate action. If he chooses to sell in the open market, assuming there is a market for the stock, the dissenter might receive a price considerably less than the book or appraisal value of the shares, due to the nature of the industry or of the particular corporation, the market conditions, or the block of stock being traded. Just compensation, the avowed policy of the appraisal remedy,⁷⁹ is not accomplished where the only available procedure results in the stagnation of capital.

In addition, money awarded years after the filing of a dissent is clearly not equivalent to recovery at the time of the dissent. Full compensation demands that account be taken of the period between the dissent and the payment of the appraisal amount. In effect, there must be a recognition of the "time value" of money in any determination of fair and equitable compensation.⁸⁰

Finally, it is clearly inequitable for the corporation to retain, cost-free, the dissenter's invested funds during the period of the appraisal proceeding. It is suggested that the allowance of such a retention encourages the corporation to make a tender of payment, or settlement offer, in an amount much less than the stock's fair value for the purpose of retaining, at no cost, the dissenter's capital contribution for the lengthy appraisal period.⁸¹ Therefore, in accordance with fairness, equity, and the statutory purpose of appraisal statutes, the courts must recognize the dissenter's ownership rights in the investment fund which is to be valued, and provide a return on this value in the form of an interest award.

II. FROM WHAT DATE SHOULD INTEREST BE COMPUTED?

In most jurisdictions, the dissenting shareholder who elects the appraisal remedy forfeits all rights incident to equity ownership⁸² and,

where a derivative suit brought by a stockholder alleging director mismanagement was dismissed on the ground that, after demand for payment, the dissenter had ceased to be a stockholder and thus did not have the requisite standing to sue.

⁷⁹ See text at notes 1-10 *supra*.

⁸⁰ *E.g.*, *Felder v. Anderson, Clayton & Co.*, 39 Del. Ch. 76, 92, 159 A.2d 278, 287 (Ch. 1960).

⁸¹ However, while the appraisal process has some impact in this regard, the avoidance of detailed examination of corporate books and records, possible liability for costs, appraiser's and attorney's fees, and possible adverse effects on the market prices of its securities due to unwelcome publicity may all also bear on the corporation's decision regarding the desirability and amount of its initial offer for a dissenter's shares.

⁸² See statutes cited in note 78 *supra*.

in effect, appears to become a creditor of the corporation entitled to the appraised value of his shares plus interest.⁸³ The appraisal statute should thus specify the precise date at which the dissenter's status as a shareholder terminates and his status as a creditor begins. This may be accomplished by clearly defining the date on which interest on the appraisal award begins to accrue. A clear definition is necessary to ensure that the dissenter is provided with a fair return on his corporate investment. If there is a lapse in the transition from shareholder to creditor, the dissenter is denied interest as well as dividend distribution. His capital is thus sterilized and his investment made worthless. Conversely, if there is an overlap in the transition from shareholder to creditor, the dissenting shareholder receives interest as well as dividends, thus realizing a windfall at the expense of the corporation.⁸⁴

⁸³ See Note, 21 VA. L. REV. 825, 826-27 (1935). Creditor status would protect the dissenter in the event the corporation became insolvent during the appraisal. It is not clear under the current appraisal statutes, however, whether the shareholder becomes a general creditor of the corporation, sharing with all other creditors in any distribution of assets upon liquidation. It is arguable that the shareholder making demand should thereafter be granted only a prior position to all other holders of the same class and series of stock. This would place him in priority to those shareholders who have approved the corporate action, which may have contributed to the insolvency, but subordinates him to other corporate creditors. Otherwise, he is subject to the risk of losing the value of his shares or will be required to share equally in liquidation with all other shareholders who have approved the action to which he dissents.

⁸⁴ In an unreported New York case, *Ames v. Godchaux Sugars Inc.*, (N.Y. Sup. Ct. filed Jan. 15, 1930), *aff'd*, 228 App. Div. 801, 239 N.Y.S. 917 (1930), noted in 32 COLUM. L. REV. 60 (1931), the court noted:

"If the statute permitted interest to run from [the date changes were made], the date as of which the appraisal was made, the situation would be comparatively simple. In that event, it could not very well be argued that the dissenting shareholders should be entitled to both interest and dividends. The fact that the award draws no interest between [the date changes were made in the cumulative rights of preferred stock] and the date of confirmation would seem to lend considerable weight to [the dissenters'] argument that the benefits received by other stockholders should be participated in by them until the award is paid. . . ."

32 COLUM. L. REV., *supra* at 63-64; cf. *Martignette v. Sagamore Mfg. Co.*, 340 Mass. 136, 143, 163 N.E.2d 9, 13 (1959).

If the dissenter is entitled to dividends in lieu of interest during the period of appraisal, it is necessary, however, to distinguish distributions which are allocable to earnings accrued prior to the dissent, from those which were accrued after the dissent. If distributions are to be paid out of surplus which existed prior to the dissent, the dissenting shareholder should not be entitled to them since this surplus will be considered in computing the value of the dissenter's holding. See note 7 *supra*. See also Robinson, *Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares*, 32 COLUM. L. REV. 60, 62-66 (1932); Note, 21 VA. L. REV. 825, 827-28 (1935). However, if dividends are paid out of earnings accrued subsequent to the dissent, the dissenter should be entitled to share in these later profits since the corporation has had the use of his funds, which were invested at risk in the enterprise. While it can be argued that "because the value of [the dissenter's] stock is fixed as of the date of his dissent . . . he cannot share in subsequent profits or be charged with subsequent losses," *Ames v. Godchaux Sugars Inc.*, (N.Y. Sup. Ct. filed Jan. 15, 1930), *aff'd*, 228 App. Div. 801, 239 N.Y.S. 917 (1930), noted in 32 COLUM. L. REV. 60, 63-64 (1931), the fact that his funds have been used by the corporation, subjecting him to possible loss, mandates compensation.

The Model Act⁸⁵ and statutes of several states⁸⁶ provide that interest shall accrue from either day of or the day before the approval of the proposed corporate action. Other statutes provide different dates⁸⁷ or are silent⁸⁸ as to the time span for interest computation. Delaware, for example, does not provide specifically for the date on which interest begins to accrue.⁸⁹

Statutes which expressly define the accrual period are desirable because they leave little room for confusion. One date which lends itself to a bright-line test is the date on which the majority votes on the proposed corporate change. Similarly clear is the date on which the merger or other agreement is filed.⁹⁰ The utilization of these dates not only results in the uniform treatment of all dissenters, but also facilitates corporate and judicial determinations regarding the period of accrual. For these reasons, the suggested dates are clearly preferable to the date on which the individual gave notice of election to dissent, a date which may be subject to dispute.

One group of statutes provides that interest shall be recoverable from a date fixed by the court.⁹¹ These statutes provide no guidance to either the corporation or the dissenting shareholder. Furthermore, complete discretion to take into account such factors as whether the suit was brought for purposes of harassment or whether the dissenting shareholder has failed to accept a fair and reasonable corporate settlement offer is unnecessary in fixing the *accrual period*, where the court has the power to set the *rate* of interest at a "fair and equitable" rate.⁹² It is in the exercise of this power to determine a "fair and equitable" rate that the court should more appropriately scrutinize the bona fides of the dissenter's pursuit of the appraisal remedy.

If the specific language of the Model Act⁹³ was adopted in all states, there would be little confusion regarding the period of interest accrual on appraisal awards.⁹⁴ This has not been done, however, and

⁸⁵ ABA-ALI MODEL BUS. CORP. ACT § 81 (1974) provides in pertinent part that: "The judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment."

⁸⁶ *E.g.*, ALA. CODE tit. 10, §§ 21(62), 21(73) (Cum. Supp. 1974) (day before vote); N.Y. BUS. CORP. LAW § 623 (Supp. 1975) (day of vote).

⁸⁷ *E.g.*, HAWAII REV. STAT. § 417-25 (1968) (upon filing of merger agreement); TENN. CODE ANN. § 48.915 (Supp. 1974) (upon expiration of demand period).

⁸⁸ *E.g.*, KAN. STAT. ANN. § 17-6712 (1974); PA. STAT. ANN. tit. 15, § 1515 (Supp. 1974-75).

⁸⁹ DEL. CODE ANN. tit. 8, § 262(h) (1975).

⁹⁰ *E.g.*, HAWAII REV. STAT. § 417-25 (1968).

⁹¹ *E.g.*, DEL. CODE ANN. tit. 8, § 262(h) (1975); OHIO REV. CODE ANN. § 1701.85 (1971).

⁹² Jurisdictions which provide for interest at a fair and equitable rate are listed in note 46 *supra*.

⁹³ See note 85 *supra*.

⁹⁴ But see *Goldberg v. Arrow Electronics, Inc.*, 42 A.D.2d 890, 347 N.Y.S.2d 597 (1973), where it was argued by the dissenter that interest should accrue on the value of his shares from the date of the shareholder vote authorizing the plan of merger to the

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as a result, at the present time, there is in many states serious and needless uncertainty over determination of the appraisal period.

III. ON WHAT AMOUNT SHOULD INTEREST BE COMPUTED?

The alternatives available to the court in determining the amount upon which interest should be computed are limited. Prior to the date of judgment there are usually two ascertainable "values" upon which interest might be computed: the corporation's settlement offer and the shareholder's counter offer. Clearly, neither of these amounts will necessarily be equivalent to the subsequent appraised worth of the dissenter's corporate interest. Despite the fact that it remains an unliquidated amount during the appraisal process,⁹⁵ this latter sum should be the basis of the interest computation since it represents the amount of capital retained by the corporation.

In *Felder v. Anderson, Clayton & Co.*,⁹⁶ however, the corporation argued that the interest award should be computed only upon the difference between its initial settlement offer and the final judgment in the appraisal action.⁹⁷ The Delaware court rejected the argument,⁹⁸ finding that such a position was unsupported by the Delaware statute⁹⁹ which, like the Model Act¹⁰⁰ and some other appraisal statutes,¹⁰¹ was silent on the issue.¹⁰² Clearly, the acceptance of such an argument would encourage a corporation to delay settlement, since it would have the interest-free use of the major portion of the dissenter's investment.¹⁰³

The accrual of interest upon the appraised value of the dissenter's corporate holding must be distinguished from the accrual of interest upon an award of costs, expenses, and attorney's and expert witness' fees. Since the awarding of these latter charges is generally discretionary,¹⁰⁴ there is no *right* of recovery prior to the

date of the abandonment thereof. *Id.* at 891, 347 N.Y.S.2d at 599. The New York statute, N.Y. BUS. CORP. LAW § 623(h)(6) (1963), provided for mandatory interest on the amount of the award from the date of shareholder vote but was silent as to interest in the event the corporate change proposed was afterward abandoned. The court refused to award interest. 42 A.D.2d at 891, 347 N.Y.S.2d at 599. Thus, in an unusual situation, even statutes which appear clear may prove ambiguous.

⁹⁵ See text at notes 38-40 *supra*.

⁹⁶ 39 Del. Ch. 76, 159 A.2d 278 (Ch. 1960).

⁹⁷ *Id.* at 90, 159 A.2d at 286.

⁹⁸ *Id.*; accord, *Vought v. Republic-Franklin Ins. Co.*, 117 Ohio App. 389, 392, 192 N.E.2d 332, 334 (1962).

⁹⁹ DEL. CODE ANN. tit. 8, § 262(h) (1975).

¹⁰⁰ ABA-ALI MODEL BUS. CORP. ACT § 81 (1974).

¹⁰¹ E.g., N.Y. BUS. CORP. LAW § 623(h)(6) (1963).

¹⁰² 39 Del. Ch. at 90, 159 A.2d at 286.

¹⁰³ See Note, 79 HARV. L. REV. 1453, 1472 (1966). But see *Austin v. City Stores Co.*, 89 Pa. D. & C. 75, 81 (C.P. 1954).

¹⁰⁴ E.g., DEL. CODE ANN. tit. 8, § 262(h) (1975); N.Y. BUS. CORP. LAW § 623(h)(7) (1963).

judgment.¹⁰⁵ This situation is thus clearly distinguishable from the payment of the fair value of the dissenter's shares, an obligation of the company which immediately arises upon filing of the shareholder's notice of dissent.

IV. AT WHAT RATE SHOULD INTEREST BE COMPUTED?

While statutes in a few jurisdictions expressly set rates which are to be applied in all appraisal actions,¹⁰⁶ most provide that interest shall be computed at a rate which the court finds fair and equitable considering all the circumstances.¹⁰⁷ Delaware, for example, does not fix the interest rate, the matter being left to judicial discretion.¹⁰⁸ This absence of a definite statutory rate gives rise to the question of what rate should be applied by the courts. Should the legal rate, the market rate, or some other rate of interest be charged against the corporation for its retention of the shareholder's investment?¹⁰⁹ The trial court's answer to this question is very important because the matter is within the discretion of the court and will not be disturbed on appeal absent an arbitrary or capricious determination.¹¹⁰

In confronting this problem, some courts have adopted the legal

¹⁰⁵ *E.g.*, *Tome Land & Improvement Co., (NSL) v. Silva*, 86 N.M. 87, 91, 519 F.2d 1024, 1028 (1973).

¹⁰⁶ See statutes listed in note 49 *supra*.

¹⁰⁷ See statutes listed in note 46 *supra*.

¹⁰⁸ DEL. CODE ANN. tit. 8, § 262(h) (1975). In *Sporborg v. City Specialty Stores, Inc.*, 35 Del. Ch. 560, 123 A.2d 121 (Ch. 1956), the Delaware court noted:

The parties disagree on the rate of interest to be allowed. No evidence was presented to me as to the going rate of money during the period involved. This obligation, as I read the statute, rested with the stockholders. I do not believe the statute necessarily calls for the legal rate. Otherwise, there would have been no purpose to the use of language which appears to leave the matter open.

Id. at 571, 123 A.2d at 127.

Professor Folk notes: "Under Delaware law, the court will not employ any arbitrary presumption as to the interest rate [such as applying the legal or statutory rate], but will seek to find a rate which will clearly compensate plaintiffs for the fact that they were deprived of the use of their money." E. FOLK, *THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS*, 389-90 (1972).

¹⁰⁹ The legal rate is set by statute and normally applies to unpaid judgments. See *e.g.*, N.Y. CIV. PRAC. § 5003 (1963), the text of which is set forth at note 20 *supra*. It is not the standard referred to in any of the appraisal statutes, but it is referred to in several cases as a justification for the rate set. *E.g.*, *Brown v. Hedahl's-Q B & R, Inc.*, 185 N.W.2d 249, 259 (N.D. 1971). There is no relationship between the legal and market rates of interest. For example, the legal rate in South Carolina has been 6% since 1932. Prime rates of four to six month commercial borrowings of quality companies set by U.S. banks have ranged from 3% to 12% from 1955 and did not meet or exceed 6% until mid-1966, after which they again briefly dropped to below 5% before beginning the spiral to 12% in 1974. See *Federal Reserve Historical Chart Bk., Sept. 1971*, Wall St. J., July 5, 1974 at 2, col. 2.

¹¹⁰ *E.g.*, *Tome Land & Improvement Co. v. Silva*, 83 N.M. 549, 554, 494 P.2d 962, 967 (1972); *Lucas v. Pembroke Water Co.*, 205 Va. 84, 92, 135 S.E.2d 147, 152 (1964).

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rate, without examination of the market rate.¹¹¹ However, once the stockholder has dissented, he no longer has the rights of a stockholder, and is normally without return on his invested capital.¹¹² For this reason, the court should not be limited in its consideration to only the prime or legal interest rates. In *Felder*, the Delaware court accepted the "going money rate" as the proper rate for appraisal purposes, but was confronted with the defendant corporation's proposition that that rate should be construed to be what the corporation would receive as a return on its invested capital, i.e., the 2.76% return on corporate funds invested in short-term U.S. Treasury securities.¹¹³ Concluding that "interest really represents damages for the delay in payment and compensation for the use of plaintiffs' money,"¹¹⁴ the court found that the corporation's use of an average rate for government securities was not appropriate to reimburse a dissenting stockholder for the loss of the use of his money, since that return would have no "necessary relationship to the damage resulting from the delay in payment."¹¹⁵ However, the court also found that the dissenting shareholders were seeking unrealistic interest at six percent, since at the time of the litigation, 1960, money was available at rates substantially lower than six percent even to an ordinary borrower at a bank. Furthermore, reasonably safe investments at that time did not yield six percent.¹¹⁶ Based on these factors, the court ultimately determined that a rate of 4.75% should be applied.¹¹⁷

In *Speed v. Transamerica Corp.*,¹¹⁸ a breach of fiduciary duty case, the United States District Court for the District of Delaware applied reasoning similar to that in *Felder*, and stated that courts should base the prejudgment rate of interest on the compensatory character of the award, rather than habitually apply the legal rate of interest:

Aside from contract interest setting the rate, or action involving a statutory rate, interest is not allowed, as such, but is simply an incident of the measure of the amount of damage caused by delay in payment, which obviously depends on the particular facts of each case. . . . But there is no statute or ruling fixing any particular rate to be allowed. [The] determination of just compensation . . . is for the Court to fix upon the rate that it will allow. . . . As early as 1914, state courts were departing from the 6% rate on pre-

¹¹¹ E.g., *Brown v. Hedahl's-Q B & R, Inc.*, 185 N.W.2d 249, 259 (N.D. 1971).

¹¹² See text at note 78 *supra*.

¹¹³ 39 Del. Ch. at 91, 159 A.2d at 287.

¹¹⁴ *Id.* at 92, 159 A.2d at 287.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 93, 159 A.2d at 288.

¹¹⁷ *Id.* See also *Swanton v. State Guar. Corp.*, 42 Del. Ch. 477, 485-86, 215 A.2d 242, 247 (Ch. 1965).

¹¹⁸ 135 F. Supp. 176 (D. Del. 1955), *modified*, 235 F.2d 369 (3d Cir. 1956).

judgment interest because it did not reflect the cost of money¹¹⁹

The court noted that the sole determining factor in interest computation is that the interest must compensate "the plaintiffs for the value of the use of the principal withheld from them."¹²⁰

Over the last few years, several different rates have been applied by the courts depending on the statutory rate, market rates and the status of the participants in the appraisal process.¹²¹ In these decisions, the courts have also imposed a duty on the proponents to assist the appraiser in its determination of the appropriate rate.¹²² The rate applied should recognize the position of both the company as the borrower and the dissenter as the lender; however, because the matter is one which rests in the discretion of the court, the rate applied may be greater than or less than the market rates. Consequently, it would be wise for both the corporation and the shareholder to actively perform their duties in assisting the appraiser by setting out the factors upon which his discretion can be knowingly exercised. Not bound by either side's presentation, the court would then examine the information submitted, together with input from its own experts or appraisers, in order to determine that rate of interest which a private lender in a position similar to the dissenter would require on a loan of like magnitude to the particular corporation.

In some cases this may be the commercial paper or prime rate. However, if the company is not of such a stature as to appeal to institutional lenders, then rates of similar companies which borrow funds on other short-term business loan arrangements with private lenders should be used. For any of these borrowings, compensating bank balances, collateral, line of credit and other charges, equity or profit participation, etc. may be required. All raise the effective rate of interest paid. These costs should be reflected in what the corporation pays for the dissenting shareholder's capital while continuing to subject it to risk during the appraisal period. At the same time, an owner of a small number of shares of minor value should not be allowed interest recovery at the same rate as that paid on large loans. For him, the savings account interest rate might constitute adequate recovery.

Another factor which might be considered in determining the proper rate of interest is the extent to which the fundamental corpo-

¹¹⁹ *Id.* at 199-200.

¹²⁰ *Id.* at 201. *Cf.* *E.I. DuPont de Nemours & Co. v. Lyles & Lang Constr. Co.*, 219 F.2d 328, 342 (4th Cir.), *cert. denied*, 349 U.S. 956 (1955).

¹²¹ *E.g.*, *Swanton v. State Guar. Corp.*, 42 Del. Ch. 477, 486, 215 A.2d 242, 247 (Ch. 1965) (5%); *Sporborg v. City Specialty Stores, Inc.*, 35 Del. Ch. 560, 123 A.2d 121 (1956) (4%). *Tome Land Improvement Co. v. Silva*, 83 N.M. 549, 554, 494 P.2d 962, 967 (1972) (6%); *Lucas v. Pembroke Water Co.*, 205 Va. 84, 92, 135 S.E.2d 147, 152 (1964) (2%).

¹²² *See* *Sporborg v. City Specialty Stores, Inc.*, 35 Del. Ch. 560, 571, 123 A.2d 121, 127 (1956).

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rate change may subject the capital of the corporation to a greater risk of loss. Through a merger, an acquisition, or an amendment of the articles, a formerly conservative and staid corporation may become dynamic, thus increasing the risk to which the capital is subject.

V. SHOULD INTEREST BE COMPOUNDED?

Assuming that the court has allowed interest,¹²³ determined the period of its accrual,¹²⁴ and set the rate at which it will be computed,¹²⁵ the court is still confronted with the question of whether the interest rate should be simple or compound. Since most appraisal statutes provide that interest is recoverable at a rate determined to be fair and equitable,¹²⁶ it is probably within the court's discretion to compute the interest award on either a simple or a compound basis. There is, however, no authority on this subject.¹²⁷

If the accrual period is short or the interest rate is low, the compounding of interest is relatively unimportant. Where the period is long and the rate is relatively high, the difference between using compound and simple interest rates is significant. For example, if one hundred dollars is invested for ten years at a rate of seven percent, the yield would be \$70 if the interest was not compounded and \$96.71 if compounded annually. Thus, the compounding of interest would increase the yield by slightly over thirty-eight percent.

It is submitted that there are persuasive reasons in support of the compounding of interest in appraisal proceedings. Interest is the cost of using money—a rental charge for the use of the funds. Where, as here, interest is not periodically paid out to the creditor, it is necessary to take into account the retention of this accrued interest. This amount is being used by the corporation during the pendency of the appraisal proceedings in the same manner as the principal is being used. Hence, the corporation should also pay interest upon the accrued amount.

In addition, in the absence of compound interest, the corporation could force the dissenter to sell his shares at less than fair value. If the corporation initially makes a low settlement offer, lengthy appraisal proceedings are inevitable. However, the allowance of only simple interest on the appraisal award could, in some cases, result in a situation where it would be more profitable for the shareholder to accept the settlement offer and invest the money in a savings account, drawing interest compounded quarterly, rather than go through the

¹²³ See Part I *supra*.

¹²⁴ See Part II *supra*.

¹²⁵ See Part IV *supra*.

¹²⁶ See note 46 *supra*.

¹²⁷ In *Speed v. Transamerica Corp.*, 135 F. Supp. 176 (D. Del. 1955), which involved an alleged breach of fiduciary duty, the court concluded that compound interest was a punitive device. *Id.* at 199. Because of the novelty of that litigation, such punitive damages were not allowed; simple interest was regarded as adequate compensation. *Id.*

lengthy appraisal process. This result is clearly inconsistent with the purpose of the appraisal statutes which is to guarantee the dissenting shareholder the fair value for his shares and to encourage the corporation to make a fair settlement offer.¹²⁸ Finally, during the pendency of the appraisal proceeding the dissenting shareholder is precluded from other investment opportunities. The appraisal award should thus recognize this fact by including fair interest compounded periodically. Only in this way will the compensatory character of the award be recognized.¹²⁹

Upon judgment, the appraisal action is over and other rules of recovery govern. Regardless of what rate the court applies during the appraisal period, once judgment has been entered, the dissenter is additionally entitled to only the judgment or legal rate of interest.¹³⁰ This rate will, however, be applied on the entire award, including the fair value of the shares, the interest thereon, and the recoverable fees and expenses.

VI. WHO DETERMINES THE INTEREST AWARD?

Several appraisal statutes¹³¹ include a provision similar to that of the Model Act, which provides that "[t]he court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value."¹³² Some statutes provide that the court must appoint a specified number of appraisers,¹³³ while others provide that the court itself must determine the value of the shares and no provision is made for the appointment of appraisers.¹³⁴

The findings of appraisers, however, are subject to judicial review whether their appointment is mandatory or discretionary.¹³⁵ This review is based on the legislative mandate to include "an allowance for interest at such rate as the court may find to be fair and equitable in all

¹²⁸ See text at notes 1-11 *supra*.

¹²⁹ In determining a "fair and equitable rate" at which to compound interest, the court or appraiser can consider whether delays which have drawn out the appraisal were caused by the dissenter or the corporation. See text at notes 91-93.

¹³⁰ See note 20 *supra*.

¹³¹ See, e.g., CONN. GEN. STAT. ANN. § 33-373 (Supp. 1975); PA. STAT. ANN. tit. 15, § 1515 (Supp. 1974-75); WIS. STAT. ANN. § 180.72 (Supp. 1974-75).

¹³² ABA-ALI MODEL BUS. CORP. ACT § 81 (1974).

¹³³ E.g., DEL. CODE ANN. tit. 8, § 262 (1974) (one appraiser); MD. ANN. CODE art. 23, § 73 (1973) (three appraisers). Four states require three appraisers, one chosen by the corporation, one by the dissenting shareholder and the third chosen by the other two appraisers. IDAHO CODE § 30-150 (1967); MINN. STAT. ANN. § 301-40 (1969); N.H. REV. STAT. ANN. § 294:77 (1966); VT. STAT. ANN. tit. 11, § 2004 (Cum. Supp. 1972).

¹³⁴ E.g., ALA. CODE tit. 10, § 21 (62) (Cum. Supp. 1974); D.C. CODE ENCYCL. ANN. § 29-927i (1966).

¹³⁵ E.g., *Martignette v. Sagamore Mfg. Co.*, 340 Mass. 136, 138, 163 N.E.2d 9, 10 (1959).

the circumstances . . . "136 There is, at present, no authority for complete delegation to appraisers of the power to determine interest recovery, and judicial review or determination on the question of interest is universally in order.

However, the special expertise of the appraisers is recognized, and a presumption in favor of their determination arises, provided that it is in accordance with the statutory commands.¹³⁷ As a result, "courts have been reluctant to disturb appraisers' findings unless the figures are arbitrary or based on unreasonable premises."¹³⁸ The appraisers are closest to the parties and thus it would appear that they are the best judges as to the rate at which interest should be allowed.¹³⁹

Thus, the appraiser can determine (1) whether interest will be allowed, (2) the rate of interest, and (3) whether interest should be simple or compound. Appraisers are competent to determine this latter issue since it, in effect, constitutes a rate determination. As noted above, it is wise for the dissenting shareholder to set forth in the record all the equitable factors working in his favor, together with information regarding what he considers the proper rate.¹⁴⁰ This information not only aids the appraiser in his determination, but also helps to subsequently justify a favorable determination by the appraiser.

VII. SUGGESTED STATUTORY LANGUAGE REGARDING INTEREST RECOVERY IN APPRAISAL ACTIONS

In many states, it has been established by statute that a dissenter is entitled to interest on his appraisal award.¹⁴¹ However, there is still room for confusion in these states as to the details of the interest to which the dissenter is entitled. In addition, there are still several states which make no provision at all for interest in their appraisal statutes.¹⁴² For these reasons, the following statutory language is suggested which provides for interest and clarifies the details of the interest award. The suggested language is based on section 81 of the Model Act.¹⁴³ The changes to the Act are italicized.

[1] The court may, if it so elects, appoint one or more per-

¹³⁶ ABA-ALI MODEL BUS. CORP. ACT § 81 (1974) (emphasis added). See, e.g., DEL. CODE ANN. tit. 8, § 262(h) (1975); N.Y. BUS. CORP. LAW § 623(h)(6) (1963).

¹³⁷ American Gen. Corp. v. Camp, 171 Md. 629, 640, 190 A. 225, 230 (1937). See Comment, 55 MICH. L. REV. 689, 695-96 (1957).

¹³⁸ Note, 79 HARV. L. REV. 1453, 1454 (1966).

¹³⁹ Cf. *id.* at 1454.

¹⁴⁰ See text at notes 121-23 *supra*.

¹⁴¹ See text at notes 46-49 *supra*.

¹⁴² See text at note 50 *supra*.

¹⁴³ The Model Act has been chosen because twenty-five states have adopted it in substance and "it has become a major point of reference in the continuing revision of state corporation acts." Foreword to ABA-ALI MODEL BUS. CORP. ACT (1974).

sons as appraisers to receive evidence and recommend a decision to the court on the questions of fair value, interest recovery, and recovery of costs and expenses. The appraisers shall have such power and authority as shall be specified in the order of their appointment or an amendment thereof

[2] The judgment shall in all cases include an allowance for interest computed on the fair value as determined above, at such rate set and compounded as the court may find to be fair and equitable in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment¹⁴⁴

The proposal grants the court authority to accept an appraiser's decision regarding recovery of interest and reimbursement to either party of any costs and expenses. The suggested revision further specifies that the appraiser's function is only to receive evidence and recommend a decision to the court, which then becomes by statute the final arbiter on all questions. In no respect is the court bound by the appraiser's findings.

The changes further provide for absolute recovery in all appraisal actions of interest on the fair value of the shares from the date of the shareholder vote authorizing the corporate change. This would eliminate any uncertainty regarding recovery of interest, even if the shareholder has in bad faith refused the corporation's initial settlement offer. The court can compensate the corporation for such abuse of the appraisal process by setting a low interest rate or by assessing against the dissenter the expenses and fees incurred in the appraisal. Furthermore, the suggested provision specifically permits the court to allow compound interest recovery, which is very important if the appraisal is drawn out over a lengthy period.

CONCLUSION

Appraisal can be considered an economic substitute for the stock exchange.¹⁴⁵ Its function is to provide a method through which a dissatisfied investor can get out of his corporate investment when he has no other feasible way to do so.¹⁴⁶ However, the courts must pro-

¹⁴¹ In order to clarify the priority of the debt owed to the successful dissenter by a corporation in the event of the insolvency of the latter, see note 83 *supra*, it is also suggested that paragraph 1 of § 81 be amended as follows:

Any shareholder making such demand shall thereafter be a general creditor of the corporation after the date of such demand and be entitled only to payments as in this section provided and shall not be thereafter entitled to vote or to exercise any other rights of a shareholder, except such rights as may be provided for in this section

¹⁴⁵ Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 261 (1962).

¹⁴⁶ *Id.*

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vide interest to a dissenter on his appraisal award, in recognition of the fact that the corporation has had the use of the dissenter's money for what may be a considerable period of time during which the dissenter's investment fund has been sterilized. Otherwise, the cost of appraisal might be too high for the ordinary investor¹⁴⁷ and dissenters will have to acquiesce in the change or prematurely sell their shares rather than wait to obtain the fair value through appraisal. Inequitable treatment of minority shareholders would thus result. In addition, low initial settlement offers and long delays in appraisal proceedings would be to the advantage of the corporation if no interest must be paid to the dissenter.

The mandate for interest recovery should be expressly set forth by the legislature, on the theory that predictability of interest awards would often promote out-of-court settlements. However, the court must also be granted discretionary powers to adequately deal with the interest issue. If the dissenter has unreasonably refused to accept a settlement offer, the court, in its discretion could diminish his recovery in its determination of the applicable rate of interest, and its determination of whether that interest should be compounded. More importantly, the court should possess the equitable power to assess costs and expenses against a dissenter who unreasonably refuses a settlement offer. It should be noted, however, that this assessment of costs and expenses would, in most cases, be an alternative rather than additional penalty for the bad faith pursuit of appraisal. Thus, in those cases where the court does assess costs and expenses, this assessment would usually be a sufficient penalty and interest on the appraisal award should routinely be granted.

¹⁴⁷ See text at notes 77-79 *supra*; SEC, REPORT ON THE STUDY AND INVESTIGATION OF THE WORK, ACTIVITIES, PERSONNEL AND FUNCTIONS OF PROTECTIVE AND REORGANIZATION COMMITTEES, pt. VII, at 590-604 (1938).

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