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CURBING ARBITRAGE: THE CASE FOR REAPPRAISAL OF DELAWARE'S APPRAISAL RIGHTS

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Touted as the new frontier in shareholder activism, appraisal arbitrage has increasingly found its way into corporate litigation. Arbitrageurs have created a burgeoning industry in which shareholders can profit by exercising their dissenters' rights in merger transactions. In response to the spike in appraisal activity in recent years, proposals have come before the Delaware legislature to amend its appraisal statute to curb strategic exercise of appraisal rights. While novel reforms may indeed deter arbitrage, other states have long had provisions on their books deterring this type of behavior. This Note examines how specific statutory mechanisms, most notably withdrawal rights, interest rate calculations, and after-acquired share provisions can either incentivize or deter appraisal arbitrage and how often these mechanisms are employed in jurisdictions other than Delaware. Even though Delaware is most often regarded as the "gold standard" of corporate law, these alternative jurisdictions can actually serve as a model for Delaware to improve its appraisal statute to reduce incentives for shareholders to engage in appraisal arbitrage.

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Introduction

Corporate law grants minority shareholders particular rights.[1] One such right is the ability to dissent from certain merger transactions and to receive the judicially determined fair value of their shares in lieu of the merger consideration.[2] This mechanism allows majority rule to prevail in the determination of whether the merger should proceed, while simultaneously opening the door for minority rights by protecting minority shareholders from coercive transactions. It also paves the way for arbitrageurs to take advantage of those rights. From this minority right, a new style of shareholder activism has increasingly taken hold in the form of appraisal arbitrage.

Simply put, appraisal arbitrage occurs when shareholder activists and hedge funds acquire a target company's shares after a merger announcement (but before the merger is consummated) with the express intention of asserting appraisal

1. Certain transactions require approval of the majority of the minority, and minority shareholders have the right to bring derivative suits and exercise appraisal rights. *See* Del. Code Ann. tit. 8, § 262(d)(1) (2016); *In re* Wheelabrator, 663 A.2d 1194 (Del. Ch. 1995).

2. *See* Del. Code Ann. tit. 8, § 262(b)(2) (2016) (limiting appraisal rights to transactions where the consideration is anything but shares of stock in the surviving corporation, shares of stock in a third party firm, or cash for fractional shares only).

rights in order to profit.[3] Originally, appraisal rights were designed to guard minority shareholders from the tyranny of the majority shareholders. Instead, professional arbitrageurs see appraisal actions as another form of investment.[4]

This creation of a new vehicle for short-term investors raises the significant question: is this activity socially beneficial or is it rent-seeking behavior with little or no economic value? It seems clear that the current Delaware appraisal mechanisms do not work especially well to curb this strategic behavior. The flexible timing in the statute, generous interest rate payouts, and a track record of rewarding higher appraisal share values all give arbitrageurs adequate incentives to profit in ways Delaware corporate law never intended. If appraisal arbitrage is not socially beneficial, the next question that arises is: how might it be contained or reduced?

Advocates of appraisal arbitrage argue that arbitrage serves a useful purpose. The ability of shareholders to engage in appraisal arbitrage may operate as an incentive for buyers to pay a fair price in mergers. This alone will not dissuade arbitrageurs from acting opportunistically, however. The high statutory interest rate on appraisal awards makes arbitrage a useful gamble even if the buyer and seller negotiate a fair price. Because courts are imperfect at determining "fair value," arbitrageurs may take the chance that the court awards a higher value. If the court does not, then the interest rate gives some insurance against a bad result. Furthermore, risks of appraisal arbitrage may add to the transaction's costs since the buyer does not know what it may have to pay for some part of the company's shares. The buyer should also take the litigation costs of a potential appraisal action into account. At the margin, this appraisal tax might even decrease the number of deals that take place. Finally, when arbitrageurs get short-term gain from investing in the target company's stock after a merger is announced, they take away from the returns of long-term investors of either the target or the acquiring company.

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3. Appraisal arbitrageurs can turn a profit by strategically voting against a proposed transaction only to then litigate or settle for a premium over the deal price. *See* Abigail Pickering Bomba et al., *New Activist Weapon—A Look at Appraisal Arbitrage Cases*, LAW 360 (Aug. 7, 2014), http://www.law360.com/articles/564814/new-activist-weapon-a-look-at-appraisal-arbitrage-cases.

4. *Id.*

Thus, if one concludes that the appraisal arbitrage phenomenon is not beneficial to society or investors as a class, the question becomes: how may it be sensibly curtailed? In that inquiry it makes sense to look beyond the state of Delaware for possible ideas. Delaware is not alone in this problem. Generally, many states look to Delaware in matters of corporation law; it is seen as the gold standard.[5] However, in the case of appraisal rights statutes, non-Delaware jurisdictions ("alternative jurisdictions") may actually afford more protection to minority shareholders than Delaware, particularly in this relatively new age of appraisal arbitrage. By exploring how appraisal mechanisms compare across states and on which dimensions they differ, this Note contends that alternative jurisdictions can actually help Delaware improve its appraisal rights statute to deter incentives for appraisal arbitrage. Part I recounts appraisal arbitrage's recent rise to prominence as a new frontier for shareholder activism. Part II sets out the various ways in which arbitrageurs can take advantage of appraisal rights under the traditional Delaware appraisal statute. Part III addresses whether this arbitrage is truly problematic, highlighting the tension between appraisal arbitrage being value reducing for merger transactions, while simultaneously serving as a corporate governance check to ensure the board of directors looks out for the interests of the minority shareholders. Part IV provides a comprehensive look at how specific mechanisms in alternative state regimes either incentivize or deter appraisal arbitrage. Part V highlights the implications and reforms to be implemented in Delaware.

I.
THE RISE OF APPRAISAL ARBITRAGE

Appraisal arbitrage has increasingly found its way into the minds of activists and academics alike. With the emergence of repeat players in the appraisal game and ever increasing appraisal actions (both in size and frequency) in the Delaware Chancery Court, appraisal arbitrage continues to garner acclaim in both the press and legal discourse.

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5. *E.g.*, DEBORAH E. BOUCHOUX, FUNDAMENTALS OF BUSINESS ORGANIZATIONS FOR PARALEGALS 95 (3d ed. 2010) (claiming also that Delaware considers itself the "Incorporating Capital of the World").

Repeat players, termed "bulge bracket" appraisal petitioners for their size and profitability, continue to bring appraisal cases to turn a profit. More than 80% of shareholders bringing appraisal actions have already filed previous claims, and three funds have already brought more than ten appraisal actions each.[6] Most reputedly, Merion Capital has become one of the most active appraisal petitioners in terms of dollars at stake.[7] As of 2013, it had raised $1 billion for its fund to pursue appraisal claims.[8] Some of its investments in target companies have been so large that they have triggered the SEC's Schedule 13G requirements by crossing the 5% threshold.[9] Merion serves as the paradigmatic hedge fund engaged in appraisal arbitrage, but others such as Verition Capital, Magnetar, and Merlin also take large dissenting positions in merger transactions, seemingly committed to appraisal as an investment strategy.[10]

As a result, appraisal litigation has surged in recent years. From 2004 to 2010, on average, appraisal actions occurred in nine transactions, in approximately 5% of all appraisal-eligible claims.[11] By 2013, the probability of an appraisal action tripled. Now, about twenty-two appraisal petitions are filed per year. Moreover, the value of these claims has increased tenfold: in 2013, the value of claims totaled $1.5 billion.[12]

Despite the increase in appraisal activity, appraisal litigation remains focused on a small set of transactions. Out of the eighty-six transactions eligible for appraisal in 2014, petition-

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6. Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1572 (2015).

7. Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation* 29 (Brooklyn Law Sch., Research Paper No. 431, 2016), https://www.lowenstein.com/files/upload/Appraisal%20Rights%20Litigation_.pdf.

8. Steven Davidoff Solomon, *New Form of Shareholder Activism Gains Momentum*, N.Y. TIMES, Mar. 5, 2014, at B5; *see also* Steven Epstein et al., *Delaware Appraisal: Practical Considerations*, BUS. LAW TODAY (Oct. 2014), http://www.americanbar.org/publications/blt/2014/10/keeping_current_epstein.html.

9. Korsmo & Myers, *supra* note 7 (stating that all Merion purchases of target stock disclosed on Form 13Gs after the announcement of the merger).

10. *Id.*

11. *Id.*

12. *Id.*

ers filed only thirteen (15.1%) in the Delaware courts.[13] Of course there are more appraisal demands than appraisal litigation in a given year; according to some practitioners, as many as one in every four appraisal demands settles without a public filing.[14] Shareholders still tend to focus on cases with abnormally low premiums where there is more reason to suspect opportunism. Insider buyouts are also twice as likely to have appraisal litigation, reflecting the increased probability that the minority shareholders may have been mistreated in the buyout.[15]

Media coverage has picked up on this phenomenon as well. Touted as a new form of the ever-evolving shareholder activism, appraisal arbitrage has found its way into mainstream business media.[16] Famous (or perhaps infamous) shareholder activists such as Carl Icahn have publicly threatened to exercise appraisal rights, attracting the attention of news outlets such as *The New York Times*, *The Wall Street Journal*, and other publications.[17] As proposals to curb this form of arbitrage continue to surface, appraisal arbitrage is likely to linger in the public's mind for some time to come.

II.
Creating Conditions for Appraisal Arbitrage

Appraisal arbitrage occurs for several reasons. First, the high statutory interest rate creates generous payouts that accumulate over the protracted time of appraisal litigation. Arbitrageurs also use time to their advantage because the Delaware appraisal statute allows for some flexibility as to when arbitrageurs can buy up shares, including after the merger has been announced. Under this regime, not only can shareholders continue to buy up shares in order to strategically dissent them, but the benefit of time gives the arbitrageur more information as to whether dissenting her shares will be a worthwhile investment in the first place. Lastly, the Delaware Chan-

13. *Id.* at 9.

14. *Id.*

15. *Id.*

16. *See* Liz Hoffman, *Wall Street Law Firms Challenge Hedge-Fund Deal Tactic*, Wall St. J., Apr. 6, 2015; Steven Davidoff Solomon, *Delaware Courts Pause on the Deal Price Do-Over*, N.Y. Times, Feb. 19, 2015.

17. *See, e.g.*, Ronald Barusch, *Dealpolitik: Is Dell Headed for Record-Breaking Delaware Appraisal Case?*, Wall St. J., Feb. 11, 2013.

cery Court has a track record of rewarding higher appraisal share values, which may embolden shareholder activists and hedge funds to engage in this arbitrage strategy. Each of these will be discussed in turn.

A. *Interest Rate*

Perhaps the most obvious benefit of appraisal arbitrage is the added bonus of a high statutory interest rate. When dissenting shareholders successfully pursue appraisal litigation under Delaware law, the surviving company must pay the fair value of shares as of the effective date of the merger plus a statutory interest rate on the appraisal award. The statutory interest rate compensates the shareholders for the additional time in which they have not been employed during the course of the appraisal proceeding as the merger consideration to which they have been determined to be entitled.[18] The statutory rate currently sits at the Federal Discount Rate plus 5%.[19] This more than reimburses for the time value of the appraised shares alone.[20] Bear in mind that appraisal litigation can be protracted, with the average time to resolution in Delaware appraisal actions averaging 3.6 years, including a multi-day trial, extensive expert testimony, and post-trial briefing and arguments.[21] Compounded quarterly, the time value of the award can generate significant revenues. In perhaps the most famous appraisal arbitrage case, *In re Appraisal of Transkaryotic Therapies, Inc.*, 11.3 million shares demanded appraisal, receiving interest of $147.6 million, or $13 per share in a settlement.[22] In major cases such as this, the interest payout alone can be quite

18. Guarav Jetley & Xinyu Ji, *Appraisal Arbitrage—Is There a Delaware Advantage?*, 71 BUS. LAW 427 (2016).

19. DEL. CODE ANN. tit. 6, § 2301(a) (2016) (technically it is "5 percent over the Federal Reserve discount rate including any surcharge thereon or the contract rate, whichever is less."). As the Federal Reserve recently increased interest rates, the rate on appraisal cases currently sits at 6%.

20. Hedge funds averaged about a 4.11% rate of return in 2015, much less than the Federal Discount Rate plus 5% (the Delaware statutory interest rate on appraisal actions). Julia La Roche, *Hedge Funds Are Getting Whacked Worse than at any Time Since the Financial Crisis*, BUS. INSIDER (Oct. 15, 2015), http://www.businessinsider.com/hedge-funds-returns-in-2015-2015-10.

21. Jetley & Ji, *supra* note 18, at 48.

22. George S. Geis, *An Appraisal Puzzle*, 105 NW. L. REV. 1635, 1639–40 (2011).

large, and generate further interest in the idea of appraisal arbitrage as a viable option.

The interest rate may also overcompensate given the risk involved in appraisal actions. Studies have suggested that corporate bonds with comparable credit risk are lower than the statutory appraisal rate.[23] Higher interest rates on awards in an otherwise low-interest rate environment may only exacerbate arbitrage opportunity.[24] The misalignment of risk and return in appraisal litigation can itself provide incentives large enough for shareholders to engage in arbitrage.

This may not always be the case, however. Even if the interest rate provides more than adequate compensation for the risks involved in appraisal litigation, a broader view would show that other arbitrage costs may counteract any financial benefit gained from interest payouts alone. For example, the arbitrageur will incur costs of targeting a company ripe for an effective appraisal action, both in terms of research costs and costs of purchasing large blocks of shares in the target company. Beyond that, the arbitrageur will face the usual costs of the litigation itself, often over the course of several years. Therefore, while the benefit of the statutory interest may not solely determine whether a shareholder decides to engage in arbitrage, it may be one of several factors in combination that makes the arbitrage profitable.

B. *The Ability to Delay Investment*

But if interest rates alone are not enough for a shareholder to engage in arbitrage, another way arbitrageurs realize economic benefits is through their ability to delay investment in the target company's shares after the record date. Under the Delaware appraisal statute, shareholders may purchase shares after the announcement of the merger is made and must submit a written demand seeking appraisal before the shareholder vote is taken.[25]

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23. Jetley & Ji, *supra* note 18, at 48–50 (determining that a three-year period with credit ratings of BB or higher serve as comparison to the risk involved in appraisal actions).

24. *See, e.g.*, Kirkland & Ellis, *Appraisal Rights – The Next Frontier in Deal Litigation?* (May 1, 2013), http://www.kirkland.com/siteFiles/Publications/MAUpdate_050113.pdf.

25. DEL. CODE ANN. tit. 8, § 262(d)(1) (2016).

Rather than acknowledge the benefit of delay, the Chancery Court has given more leeway to arbitrageurs waiting to buy up shares. For example, in the biggest appraisal action to date, *Transkaryotic*, hedge funds acquired nearly 10 million shares of the target company after the record date of the transaction.[26] In fact, by the end of the transaction, nearly one third of Transkaryotic's shareholders demanded appraisal rights.[27] Shire, the acquiring corporation, attempted to kick out some of these dissenting shares on the basis that they had been acquired too late. To qualify for appraisal, shares must not be voted in favor of the merger. But given the way shares are held today in common electronic pools, it is not possible to determine if any one share that is held in this common form (under Cede & Co.) was in fact voted for or against the merger. In *Transkaryotic*, it was held that shares could be eligible for appraisal so long as the total number of shares seeking appraisal was less than the total shares that voted against the merger or did not vote at all.[28] Although the hedge fund could not show that these newly acquired shares had been voted against or abstained from the merger vote,[29] the court held they would be entitled to appraisal.

In light of *Transkaryotic*, defense-side law firms heralded the decision as a "major new chapter in the appraisal rights remedy" and claimed that it could "potentially revolutionize the use of appraisal rights."[30] Academics found interesting implications as well. Some, like George Geis, have argued that the ability to acquire shares after the record date and still exercise appraisal rights has given rise to a short-term market for

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26. *In re* Appraisal of Transkaryotic Therapies, Inc., C.A. No. 2776 (Del. Ch. 2008).

27. *Id.*

28. *Id.*

29. *See* Latham & Watkins LLP, *"Empty Voting" and Other Fault Lines Undermining Shareholder Democracy: The New Hunting Ground for Hedge Funds*, M&A Deal Commentary (Apr. 2007), https://www.lw.com/upload /pubcontent/_pdf/pub1878_1.commentary.empty.voting.pdf. The hedge fund could not determine who voted which shares because of the phenomenon of empty voting, which gives the record shareholder the ability to hedge economic ownership while retaining voting rights. *Id.*

30. *See* Latham & Watkins LLP, *Appraisal Arbitrage: Will it Become a New Hedge Fund Strategy?*, M&A Deal Commentary (May 2007), https://corpgov.law.harvard.edu/wp-content/uploads/2007/05/20070525%20Appraisal%20Arbitrage—A%20New%20Hedge%20Fund%20Strategy.pdf.

appraisal claims.[31] One could expect that after the record date but before the shareholder vote, target shares would trade equal to the expected value of an appraisal claim.[32]

Transkaryotic also gives large shareholders the flexibility to calculate how many shares are necessary to push the deal through, while still maintaining a sizeable chunk of appraisal shares. In *Transkaryotic*, the record shareholder Cede held about 83% of Transkaryotic's stock: it voted 12.9 million shares in favor of the merger, 9.9 million against, and withheld about 7 million votes.[33] Combined with minority shareholders' affirmative votes, the deal was approved by 52%, just enough for the deal to happen and allow for an appraisal action to follow.[34] With either plurality or majority shareholder voting, it may be relatively easy for a large shareholder to manipulate the outcome of a merger vote with an eye toward appraisal.

Subsequent case law has only reaffirmed the possibility of arbitrage. In *In re Appraisal of Ancestry.com*, Vice Chancellor Glasscock declined to adopt a proposed share-tracing requirement that would undo *Transkaryotic*.[35] On the same day, the Chancery Court held in *Merion Capital v. BMC Software* that nothing in the appraisal statute requires a shareholder to prove its specific shares seeking appraisal were not voted in favor of the merger,[36] while it remains open to the respondent company to prove that shares *were* voted in favor.[37] Given the way shares are held electronically today, this burden will often be untenable; acquirer companies like Shire in *Transkaryotic* will have no legal recourse against appraisal arbitrage.

The ability to purchase shares after the record date gives strategic investors better information (i.e. new information

31. Geis, *supra* note 22, at 1638.

32. Korsmo & Myers, *supra* note 6, at 1556.

33. *In re Appraisal of Transkaryotic Therapies*, C.A. No. 2776 at 1.

34. Geis, *supra* note 22, at 1636.

35. *See In re* Appraisal of Ancestry.com, Consol. C.A. No. 8173-VCG (Del. Ch. Jan. 5, 2015).

36. *See* Merion Capital v. BMC Software, C.A. No. 8900-VCG (Del. Ch. Jan. 5, 2015).

37. In *Merion* and its predecessors, the Chancery Court has left open the question of what would occur should the number of shares presented for appraisal actually outnumber the amount of dissenting shares. *See* Steven M. Hecht, *Delaware Chancery Reaffirms Appraisal Arbitrage Strategy*, APPRAISAL RTS. LITIG. BLOG (Jan. 7, 2015), http://www.appraisalrightslitigation.com /2015/ 01/07/delaware-chancery-reaffirms-appraisal-arbitrage-strategy/.

arising after the record date and closer to the day in which they must decide whether to exercise appraisal rights).[38] New information may be brought to light, either through investigations into the target company or through exogenous factors such as general market conditions or regulatory approvals. Even if no new developments occur during this time, investors will still have an incentive to wait to purchase shares until after the record date due to the information-rich proxy statement that will be delivered shortly thereafter. The proxy materials detail the ongoing transaction, including financial forecasts and valuations by the target's advisors.[39] Akin to a call option,[40] this better information can help investors more accurately determine the expected value of bringing an appraisal action.[41]

The "wait and see" approach also provides an opportunity for a signaling function. Because appraisal arbitrageurs are increasingly becoming repeat players specializing in this kind of scheme or investment, their reputation as bulge bracket appraisal petitioners makes the threat to go to trial more credible.[42] If an experienced mutual fund dissents its shares, it may signal to other undecided shareholders that the deal price is undervalued, or at the very least, the expected gain from appraisal litigation is greater. It is questionable, however, how much this occurs in practice. Because arbitrageurs can wait up to sixty days after the deal closes to withdraw their appraisal under Delaware General Corporate Law (DGCL) section 262(k), they have an incentive to wait until the eleventh hour to decide whether to exercise their appraisal rights. Given the tight time frame between hearing of the hedge fund's decision to dissent and the shareholders' vote, it's unclear how many shareholders would take their votes into account.

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38. Jetley & Ji, *supra* note 18, at 10 (finding on average that there are fifty-fourt days between public announcement of the transaction and the record date and thirty-two days between the record date and the shareholder's meeting to vote on the transaction).

39. *See Mergers*, U.S. SECURITIES AND EXCHANGE COMMISSION (Jan. 15, 2013), https://www.sec.gov/answers/mergers.htm.

40. For a more detailed exposition of how the ability to delay can be modeled as a call option, see AVINASH K. DIXIT & ROBERT S. PINDYCK, INVESTMENT UNDER UNCERTAINTY (1994).

41. Jetley & Ji, *supra* note 18, at 14–15.

42. Korsmo & Myers, *supra* note 7, at 29.

The signaling function may be more prevalent after the merger closes. Delaware's appraisal statute allows dissenting shareholders to decide whether to accept the deal price or exercise their appraisal rights up to sixty days after the deal closes.[43] Not only does this further extend the benefit of delay for dissenting shareholders, but it also provides them with a hindsight advantage by allowing them to exercise their appraisal rights and then opt out virtually cost-free if they determine that the deal price will be higher than the expected judicially-imposed fair value. Under Delaware law, dissenting shareholders have a right to demand a statement of the aggregate number of shares demanding appraisal.[44] Provided the shareholder has initially dissented from the merger, he or she may try to glean more information regarding which other shareholders have decided to forego the merger price. Practically speaking, the shareholder may wish to confirm the existence of other dissenting shareholders that can spread out the costs of litigating an appraisal claim. Of course, these evaluations would be discounted by the risk that the other dissenting shareholders will not exercise their right to accept the merger price.

On the same side of the coin, having up-to-date information can help minimize arbitrageurs' exposure to risk as well. Engaging in appraisal arbitrage is not risk-free. Arbitrageurs must factor in the costs of lengthy litigation and identifying an investment opportunity. There is also the possibility that the parties to the merger will fail to close the deal. As with any investment, arbitragers face the risk the appraisal action will not result in a higher price.[45] For example, Cypress Semiconductor acquired Ramtron International Corporation.[46] When deciding on a deal price, the parties factored in synergistic value from the transaction, yet under the Delaware Code, the statutory fair value is to be determined excluding these syner-

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43. DEL. CODE ANN. tit. 8, § 262(e) (2016).

44. *Id.*

45. *See* Berger v. Pubco Corp., 976 A.2d 132, 141–42 (Del. 2009); Gilliland v. Motorola, Inc., 873 A.2d 305, 309 (Del. Ch. 2005).

46. Joint Press Release, Cypress Semiconductor Corp. & Ramtron Int'l Corp. (Sept. 19, 2012) (Cypress's Current Report on Form 8-K, filed Sept. 12, 2012), https://www.sec.gov/Archives/edgar/data/849502/0001193125 12396132/d413527dex991.htm.

gies.[47] Dissenting shareholders in the Ramtron acquisition brought an appraisal action, only for a judge to determine that they should receive $3.07 as opposed to the deal price of $3.10.[48] In a study cataloging appraisal actions from 2010 to 2013, the judge deemed that the fair market value was lower than the deal price in two out of nine cases.[49] While some of these risks cannot be assuaged by the additional time to buy target shares, most of them can be at least reduced with the input of additional, timely information.

C. *The Court's Computation of Fair Value*

The Delaware Chancery Court has gained a reputation for awarding appraisal values in excess of the deal price. The medium premium achieved in appraisal actions is not much below 100%,[50] although on occasion the Chancery Court has awarded a fair market value in excess of three or four times what the parties agreed to in the merger.[51] Because of the flexible nature of determining fair value, commentators have likened the appraisal process to a lottery or casino-like process.[52]

Some empirical studies find that the Delaware Chancery Court tends to award "fair market" values in excess of the transaction price.[53] One study showed that nearly 80% of appraisal actions that went to trial since 1993 resulted in higher prices for dissenting shareholders.[54] On average, appraisal actions have a little more than 10% premium over the merger

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47. DEL. CODE ANN. tit. 8, § 262 (2016).

48. Liz Hoffman, *M&A Price Bump Lawsuit Backfires, Sounding Note of Caution*, WALL ST. J. (Jul. 1, 2015), http://blogs.wsj.com/moneybeat /2015/07/01/ma-price-bump-lawsuit-backfires-sounding-note-of-caution/.

49. Fried, Frank, Harris, Shriver & Jacobson LLP, *New Activist Weapon—The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications* 1 (June 18, 2014), http://www.friedfrank.com/siteFiles/Publications/FINAL%20-%206182014%20TOC%20Memo%20-%20New%20Activist%20Weapon—%20The%20Rise%20of%20Delaware%20Appraisal%20Arbitrage.pdf.

50. Kirkland & Ellis, *supra* note 24.

51. *See, e.g.*, Borruso v. Comms. Telesystems Int'l, 753 A.2d 451 (Del. Ch. 1999) (awarding a 3027% premium to a dissenting shareholder).

52. Korsmo & Myers, *supra* note 7, at 1602.

53. Jetley & Ji, *supra* note 18, at 4–5.

54. Liz Hoffman, *Hedge Funds Wield Risky Legal Ploy To Milk Buyouts*, WALL ST. J. (Apr. 13, 2014), http://www.wsj.com/articles/SB10001424052702303887804579500013770163966?cb=logged0.05828729015775025.

price, with the median outcome a little less than 2% over the merger price.[55]

Although these statistics indicating an appraisal premium may be accurate, appraisal actions are brought in the first place because dissenting shareholders feel the transaction price per share is too low. Shareholders (both genuine dissenters and arbitrageurs) must be convinced that the merger price is sufficiently low that they will be adequately compensated over the litigation expenses incurred. If the abnormally low-priced transactions are the ones ending up in appraisal litigation, it is no surprise that the court tends to award higher fair values than the merger price. Even if the Chancery Court does tend to award higher values, there appears to be a lurking selection bias, and it is unclear how much weight an investor would place on this uncertain information.

What explains this wide variance in fair market and deal valuations? First, courts are not exceptionally well-suited for sifting through financial analysis, nor do they care to assume that as their primary function.[56] One may wonder then, what makes courts better evaluators of a fair market price than those in the financial community who devote their careers to valuation of companies. In order to retain independent judgment and financial expertise, the court may appoint its own experts to aid in the valuation process.

Another partial explanation of this phenomenon is the false precision of the fair market value. The Delaware Chancery Court is statutorily required to pinpoint the "fair value" for the merger, a specific price.[57] In reality though, the value of the transaction likely falls within a range of viable prices, and the actual deal price within the range may depend on the negotiating ability of the parties.[58] If the actual deal price falls on the lower end, it may be that much easier for dissenting shareholders to show that the transaction necessitates a higher

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55. Korsmo & Myers, *supra* note 7, at 1602.

56. *See, e.g.*, *In re* Ancestry, No. 8173-VCG, 2015 Del. Ch. LEXIS 21 (Del. Ch. Jan. 30, 2015) ("I have commented elsewhere on the difficulties if not outright incongruities, of a law trained judge determining fair value of a company in light of an auction sale, aided by experts offering wildly different opinions on value.").

57. DEL. CODE ANN. tit. 8, § 262 (2016).

58. *See* ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 17 (2000).

price, even if the actual initial price fell within the range of acceptable deal prices to both parties.

Compounding this issue, the method that the Chancery Court uses to determine the fair market value of dissenting shares in an appraisal action may also distort what is "fair value." In appraisal litigation, the court must use "any legitimate valuation methodology used by the financial community."[59] Because this is such a wide open standard, no party in an appraisal action can be fully sure which method the court will use. Generally, the Chancery judges tend to use the discounted cash flow method, as it is widely accepted in the financial industry.[60] The discounted cash flow method requires one to make certain assumptions and projections, which themselves can be highly uncertain, such as information as to how the company would have performed if the merger had not occurred.[61] Moreover, the court, unlike the investment bankers advising M&A deals, tends to use the supply-side equity risk premium as an estimate of the company's cost of equity in its discounted cash flow valuation.[62] Supply-side equity risk premiums refer to stock market returns driven by factors linked to the productivity of firms. Investment bankers tend to use historical equity risk premiums, which generally result in lower valuations of fair value. The divergence in assumptions can lead to disparate valuations; experts' valuation for respondents, on average, fell 22% below the merger price (with a median valuation 16% below the merger price).[63] Conversely, petitioners' experts value dissenting shares 186% above the merger price on average (with a median of 78% above the merger price).[64] Academics such as Guarav Jetley and Xinyu Ji

59. Weinberger v. UOP, Inc., 457 A.2d 701, 712–13 (Del. 1983) (doing away with the previous Delaware block valuation, which averaged together market value, asset value, and earnings value to determine the fair value of the equity of a company).

60. Mark E. Betzen & Matthew R. Shurte, *An Ounce of Prevention: Managing the Increased Threat of Appraisal Proceedings Under Delaware Law*, JONES DAY (2005), http://www.jonesday.com/newsknowledge/publicationdetail.aspx?publication=2716 (noting that an alternative valuation technique values a corporation's stock on the basis of purportedly comparable companies and may be used with, or in lieu of, the discounted cash flow model).

61. *See* Epstein et al., *supra* note 8.

62. Jetley & Ji, *supra* note 18, at 8.

63. Korsmo & Myers, *supra* note 7, at 19–20.

64. *Id.*

argue that the difference in valuation methods may allow arbitrageurs to gain from the valuation gap created by this variance in methodology.[65]

In at least five decisions, including some of the most recent appraisal opinions such as *CKx*, *Ancestry.com*, *Autoinfo*, and *MBC Software*, the Chancery Court has either awarded the deal price as the fair value of the dissenting shares or found it to be the most reliable indicator of fair value.[66] Fair value measured by the merger price, under the Merger Price Rule, intuitively makes sense in that the fair market value is equal to the amount a player in the market is willing to pay (pricing in all known risks). One must wonder then about what purpose appraisal actions serve at all. The newest research actually shows that not only is the merger price valuation the strategic equivalent of nullifying appraisal rights altogether, but that it can even undercompensate dissenting shareholders.[67]

This trend of deferral to the price the parties negotiated may have a couple explanations. First, these may be weaker cases than their predecessors. All these Merger Price Rule cases took place during the rapid rise in appraisal litigation between 2011–2013 and were brought by repeat players to appraisal actions.[68] These repeat petitioners could have possibly been swept up in the new trend and pursued appraisal actions more aggressively than they had in the past. Alternatively, but not mutually exclusively, another explanation focuses on the disposition of the Chancery Court. In the midst of defense-side law firms decrying appraisal actions through corporate law panels, and blog postings advocating for reforms in Delaware before arbitrage becomes too unwieldy, the court may be send-

65. Jetley & Ji, *supra* note 18, at 30.

66. *See* LongPath Capital, LLC v. Ramtron Int'l Corp., No. 8094-VCP, 2015 WL 4540443, at *1 (Del. Ch. June 30, 2015) (calculating fair value at a small discount of the merger price); *see also* Merion Capital LP v. BMC Software, Inc., No. 8900-VCG, 2015 WL 6164771, at *18 (Del. Ch. Oct. 21, 2015); Merlin Partners LP v. AutoInfo, Inc., No. 8509-VCN, 2015 WL 2069417, at *18 (Del. Ch. Apr. 30, 2015); *In re* Appraisal of Ancestry. com, Inc., No. 8173-VCG, 2015 WL 399726, at *2 (Del. Ch. Jan. 30, 2015); Huff Fund Inv. P'ship v. CKx Inc., No. 6844-VCG, 2013 WL 5878807, at *15 (Del. Ch. Nov. 1, 2013).

67. Albert Choi & Eric Talley, *Appraising the 'Merger Price' Appraisal Rule* 1 (Va. Law & Econ., Research Paper No. 2017-01, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888420.

68. Korsmo & Myers, *supra* note 7, at 23.

ing a message, both to the critics of appraisal arbitrage and the Delaware legislature, of its ability to "staunch a perceived gold rush" in appraisal arbitrage without the need for legislative intervention.[69]

The suggestion that the Chancery Court can moderate the amount of appraisal activity taking place in Delaware most closely aligns with the outcome of the most recent headliner appraisal arbitrage case, *In re Appraisal of Dell Inc.*[70] In May 2016, Vice-Chancellor Laster held in an appraisal proceeding that the value of Dell was 28% higher than its negotiated merger price. The court cited, among others, the following reasons for the valuation gap: management buyouts such as Dell present different concerns than arms' length transactions,[71] the financial bidders only focused on the short-term internal rate of return (IRR) that is not as encompassing as section 262's fair value, and the special committee negotiated the deal price based on the company's stock and not its next best alternative to a negotiated acquisition.[72] The novelty of the opinion, however, lies in the fact that Laster found no evidence of self-dealing on behalf of Dell.[73] Originally, appraisal rights were designed to protect minority shareholders from management's self-dealing. Here, Dell made an effort to exact the highest bid for its shareholders (thereby surviving the enhanced scrutiny test[74]), and yet, the highest bid was still not (nor even close) to the deemed "fair market value" in the appraisal action. The Vice Chancellor explained, "the concept of fair value under Delaware law is not equivalent to the economic concept of fair market value. Rather, the concept of fair value for purposes of Delaware's appraisal statute is a largely judge-made creation, freighted with policy considerations."[75]

69. *Id.* at 24.

70. *In re* Appraisal of Dell, C.A. No. 9322-VCL (Del. Ch. Ct. May 31, 2016).

71. *Id.* at 60.

72. *Id.* at 75.

73. *Id.*

74. The enhanced scrutiny standard examines the "adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision" and "the reasonableness of the directors' action in light of the circumstances . . . ." *See* Paramount Commc'ns v. QVC Network, 637 A.2d 34, 45 (Del. 1994).

75. *In re Appraisal of Dell*, C.A. No. 9322-VCL at 43 (citing Finkelstein v. Liberty Digital, Inc., 2005 WL 1074364, at *12 (Del. Ch. Apr. 25, 2005)).

Thus, under *Dell*, the judge—not the market—has become the ultimate arbiter of a fair deal price, and the court is merely the next forum to negotiate a higher deal premium for activist shareholders.

III.
Is Appraisal Arbitrage Really a Problem?

Before concerning oneself with ways that alternative statutory frameworks may curb appraisal arbitrage, it is first worth asking whether the practice of appraisal arbitrage is a legitimate investment strategy in the first place.

A. *Appraisal Arbitrage as Value Reducing*

Like any form of arbitrage, this practice undermines the statutory aim of appraisal. Originally adopted as a result of a compromise in the nineteenth century when corporate law moved from unanimous approval of mergers, appraisal statutes were enacted to protect minority shareholders.[76] Now, appraisal rights are used to quibble over the correct price. Not only does this depart from the original intention of appraisal rights, but it gives a remedy for an insufficient price that is not available in other corporate situations.[77] Likened to greenmail,[78] appraisal arbitrage has been seen as meritless strike suits that distort the merger process. After *Transkaryotic*, it is simply too easy for arbitrageurs to buy up chunks of stock and

76. Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Court Determine Fair Value*, 47 Duke L.J. 613, 614–15 (1998) (stating that merger votes originally required unanimous consent and appraisal was provided as a remedy for the loss of the individual right of veto).

77. Most decisions are protected by the business judgment rule, which means that as long as the board of directors fulfills its duties of loyalty, care, and good faith, shareholders will not be able to second guess the merits of the decision. *See, e.g.*, D. Gordon Smith, *The Modern Business Judgment Rule* (BYU Law, Research Paper Series No. 15-09, 2015), https://papers.ssrn .com/sol3/ papers.cfm?abstract_id=2620536.

78. Abigail Pickering Bomba et al., *Shareholder Activism in M&A—Checklists . . . and the Future*, Fried Frank M&A Briefing (2014), http://www.fried frank.com/siteFiles/Publications/Final%20-%207-10-2014%20TOC%20 Memo%20-%20Shareholder%20Activism%20in%20MA %20Checklists.pdf. Greenmail is the practice of buying enough shares in a company to threaten a takeover, forcing the owners to buy them back at a higher price in order to retain control. *See* Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 Yale L.J. 1, 13 (1985).

claim that it was those shares that were not voted at the shareholders' meeting.

Critics also see arbitrage as value-reducing because it essentially imposes an appraisal tax on transactions.[79] Buyers may shun otherwise sensible deals if merger announcements routinely bring about appraisal costs, which will result in social welfare loss if buyers abandon synergistic mergers that, absent the risk of appraisal, would otherwise be a good deal. In fact, the tax may be more real than theoretical in scenarios where the firm simply decides to pay off investors to avoid the litigation expenses and negative reputational effects of a prolonged appraisal action.

One particular example of the appraisal tax occurred in Dell's going-private transaction in 2013. In this deal, Carl Icahn and others threatened to seek appraisal rights of shares that they acquired after the announcement of the merger and effectively blocked the deal from going through, leading to a $400 million increase in the price of the merger itself.[80] Thus, a threat alone may induce companies to "pre-settle" with potential arbitrageurs to avoid the reputational harm and litigation costs of a protracted appraisal claim.

As a counterargument, some contend that if acquirers price the deal fairly then it is unlikely that shareholders will bring an appraisal suit in the first place.[81] Yet, the problem with this argument is that reasonable merger prices lie along a spectrum of prices. Simply because a deal price is fairly priced, albeit on the lower end of reasonably acceptable market prices, does not mean arbitrageurs will not believe that they can persuade a court to award a higher fair market value of their shares.

The threat of an appraisal arbitrage tax also creates deal uncertainty. Parties must consider the probability that an appraisal action will occur, whether the cost of litigating the appraisal claims will exceed closing costs to complete the transaction, and the uncertainty as to how a court will determine fair market value of the shares. All of these risks will be priced into the transaction in the form of an appraisal tax.

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79. Bomba et al., *supra* note 78.
80. *See* Epstein et al., *supra* note 8.
81. Korsmo & Myers, *supra* note 6, at 1600.

Nonetheless, parties can contract away the risk of appraisal arbitrage. They can rid themselves of the risk altogether by structuring the transaction in a way that does not allow for appraisal rights, such as an asset sale transaction or triangular merger.[82] Yet corporate restructuring can be complex, and various tax, liability, shareholder, or other structural concerns may dictate that a statutory merger, aside from appraisal concerns, would otherwise work best. By avoiding appraisal rights, the risk of appraisal arbitrage further limits the possible deal structures available to the parties.

Another partial solution would be to include appraisal-closing conditions as a contractual countermeasure.[83] But even with this provision in place, appraisal arbitrage is arguably value-reducing. Creating appraisal-closing conditions may protect against litigation costs, but may also increase ex ante transaction costs by the need to draft around these contingencies. A typical appraisal-closing condition might say that the transaction can be abandoned if more than twenty percent of the shares demand appraisal.[84] However, the inclusion of an appraisal-closing condition may make the offer less attractive, and thus value-reducing, to the seller. With appraisal-closing conditions, deal uncertainty can actually increase because in the interim between signing and closing, neither party knows whether the appraisal closing condition will be triggered.[85] Thus, even if appraisal-closing conditions reallocate risk of appraisal from the buyer to the seller,[86] both parties still face the

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82. *See* Terry v. Penn Cent. Corp., 668 F.2d 188 (3d Cir. 1981); Hairton v. Arco Elecs., Inc., 188 A.2d 123 (Del. 1963); *see also* Andrew Ross Sorkin, *Who Decides 'Fair Value?' in Dell's Case, a Judge*, N.Y. TIMES, June 7, 2016 (quoting Marty Lipton, "Private equity firms should be expected to ask whether they face routine appraisal exposure in Delaware, no matter how robust the auction, and therefore seek out alternative transaction structures to cap and price their risk (or exit the market entirely).").

83. *See* Andrew J. Noreuil, *Dissenting-Shareholders Clauses May Become More Common*, LAW 360 (Feb. 20, 2014), http://www.law360.com/articles/510471/dissenting-shareholders-clauses-may-become-more-common.

84. *See* Paul G. Mahoney & Mark Weinstein, *The Appraisal Remedy and Merger Premiums*, 1 AM. L. & ECON. REV. 239, 242 (1999).

85. Victor Lewkow, *Negotiating Appraisal Conditions in Public M&A Transactions*, HARVARD LAW SCH. FORUM ON CORP. GOVERNANCE & FIN. REGULATION (Nov. 23, 2016), https://corpgov.law.harvard.edu/2016/11/23/negotiating-appraisal-conditions-in-public-ma-transactions/.

86. Bomba et al., *supra* note 78, at 5.

possibility that the transaction will fail as a result of appraisal arbitrageurs.

B. *Appraisal Arbitrage as a Corporate Governance Check*

The arguments in favor of arbitrage largely parallel those in favor of broader shareholder activism. Even if arbitrage occurs, some contend that it can provide value to a transaction and at the very least serve as a check on poor corporate governance.[87]

Ownership ambiguity and amplified appraisal activity might be seen as a protection against abusive freeze-out mergers because it gives investors the ability to band together to generate more meaningful appraisal claims.[88] *Weinberger v. UOP, Inc.* aimed to mitigate the coercive freeze-outs with appraisal rights. Moreover, if appraisal actions protect minority shareholders, they will be willing to pay more for the shares in the first place.

Appraisal activists may also be an effective corporate governance tool by serving as a monitoring function on controlling shareholders. When parties consummate a merger at a fair price, there may be little incentive for outside investors to buy into the target and bring an appraisal action. But if a controller tries to expropriate value from dissenting shareholders by offering a low price, then outside activist investors will have an incentive to purchase target shares and bring forth an appraisal claim. In fact, this was the case when Carl Icahn swooped in to purchase target shares in *Transkaryotic* after the record date but before the shareholder vote.[89] Much as in the market for corporate control, appraisal actions can function as a disciplinary check on managers when they engage in an underpriced freeze-out merger.[90] Moreover, appraisal actions can serve as a defense against "sloth, negligence, or otherwise unconscious bias in the sales process" of a third party transaction.[91]

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87. Korsmo & Myers, *supra* note 7, at 42.

88. *See* Geis, *supra* note 22, at 1639.

89. David Benoit, *Carl Icahn's 'No Brainer' May Actually Require a Lot of Brains*, WALL ST. J. (Jul. 11, 2013), http://blogs.wsj.com/moneybeat/2013/07 /11/carl-icahns-no-brainer-may-actually-require-a-lot-of-brains/.

90. Korsmo & Myers, *supra* note 7, at 43.

91. *Id.*

In order for appraisal actions to effectively serve the dual roles of monitoring controlling shareholders and being a check on negligence in the sale process, arbitrage, some argue, is necessary.[92] Arbitrageurs can buy up large amounts of shares after the merger announcement and overcome the collective action problems that would otherwise accompany an appraisal case. Without these increasingly expert repeat players, dissenting shareholders are faced with the costs of litigation. Unlike a traditional class action, dissenters cannot just simply go along with the lead plaintiff, but rather they must individually assert appraisal rights.[93] In buying up a sizeable block of shares, arbitrageurs can spread the fixed costs of litigation across a broad base of shares, thereby decreasing the costs for smaller, individual shareholders as well.[94] Appraisal arbitrage can solve these issues without generating class action agency problems between attorneys and the dissenting shareholders in the process.[95]

Moreover, the possibility of appraisal actions may in fact benefit the controlling shareholder in addition to minority investors. If a market for appraisal actions develops in the window between the record date and the shareholder vote, the ability to exercise appraisal rights (and arbitrage) creates value in the target shares. In the long run, the higher price of these shares would more accurately reflect the value of shares, and this increased value would increase the efficiency of the capital markets as a whole.

If appraisal arbitrage is indeed an effective corporate governance check, then the usefulness of appraisal statutes that deter arbitrage should be questioned. Perhaps most famously, Bayless Manning described appraisal statutes as "of virtually no economic advantage to the usual shareholder except in highly

92. *Id.* at 3.

93. Edward M. McNally, *Are Appraisal Cases Coming Back?*, MORRIS JAMES (July 17, 2013), http://www.morrisjames.com/newsroom-articles-184.html.

94. Korsmo & Myers, *supra* note 6, at 1599.

95. In class actions, attorney–client conflicts occur because the class representatives cannot monitor the attorney, thereby creating an agency problem. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency*, 54 U. CHI. L. REV. 877, 883 (1987) ("It's no secret that substantial conflicts of interest between attorney and client can arise in class action litigation.").

specialized situations."[96] Modern commentary follows suit. Critics complain that it is easy to avoid appraisal rights[97] and that appraisal statutes are procedurally complex[98] and unnecessary now that that capital markets have developed since the inception of appraisal rights. Despite their faults, appraisal statutes may have finally found their usefulness, albeit as an unintended result.

While this Note does not aim to outline in detail the steps required to address the larger issue of shareholder activism, understanding the normative arguments surrounding appraisal arbitrage sets the stage for what types of statutory mechanisms, as already implemented by other states, Delaware should ultimately adopt, if any.

IV.
Alternative Approaches: Mechanisms to Curb Arbitrage

Most appraisal cases occur in Delaware, as it is the most influential corporate law jurisdiction and home to more than half of all publicly traded companies in the United States and more than two-thirds of the Fortune 500 companies.[99]

Admittedly, appraisal cases in non-Delaware jurisdictions remain outliers, despite the overall increase in appraisal actions. Because of the scarcity of appraisal case law elsewhere, it is difficult to say with certainty that the alternative jurisdictions have directly led to less appraisal arbitrage. Still, appraisal cases do occasionally crop up in alternative jurisdictions, permitting comparative analyses between the practical outcome in the alternative jurisdiction and the theoretical outcome in Delaware.[100]

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96. *See* Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 Yale L.J. 223, 260 (1962).

97. *Id.*

98. *See* Jesse Fried & Mira Ganor, *Agency Costs of Venture Capitalist Control in Startups*, 81 N.Y.U. L. Rev. 967, 1004 (2006); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 798–99 (2003).

99. Laura Anthony, *Mergers and Acquisitions; Appraisal Rights*, Legal & Compliance LLC (Nov. 10, 2015), http://securities-law-blog.com/2015/11/10/mergers-and-acquisitions-appraisal-rights/.

100. Alison Frankel, *How To Squelch Appraisal Arbitrage, Minnesota Style*, Reuters (Dec. 17, 2015), http://blogs.reuters.com/alison-frankel/2015/12/17/how-to-squelch-appraisal-arbitrage-minnesota-style/ (projecting the

Moreover, despite the dearth of non-Delaware appraisal actions, all states retain appraisal statutes.[101] Many of these are modeled after the Model Business Corporation Act (MBCA), which along with Delaware General Corporation Law (DGCL) serves as a template for legislators faced with drafting or revising appraisal statutes.[102] Even though the vast majority of states either follow the Delaware or MBCA approach, it would be insufficient to merely compare the two of them. First, states may cherry-pick which provisions they desire from either the MBCA or DGCL, or both. Second, a binary comparison would only highlight the differences between two statutes. By tackling a state-by-state comparison, a more comprehensive view can be gleaned as to the prevalence of specific provisions that either deter or incentivize appraisal arbitrage and where Delaware fits along the spectrum of arbitrage-friendly or arbitrage-hostile statutes. Therefore, while an empirical study of the relationship between various states' appraisal statutes and their ability to curb arbitrage is impractical, an incentive analysis of six recurring statutory mechanisms—interest rates, withdrawal rights, information on other dissenters, the timing of payment for dissenters' shares, after-acquired shares, and litigation costs—shows that Delaware is not the gold standard for curbing appraisal arbitrage, should the state wish to be.

A. *Interest Rates (a Reprise)*

As previously mentioned, appraisal arbitrageurs can theoretically profit from appraisal litigation from the mere fact that the corporation will be required to pay the fair value of dissenting shares, plus accrued interest. When comparing Delaware's five percent premium over the Federal Discount Rate to interest rates of other states, Delaware actually seems to fall somewhere near the lower end of the spectrum in terms of the amount of interest rate owed to dissenting shareholders.[103]

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outcome of the Caribou Coffee acquisition had it been a Delaware corporation).

101. Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 4, 614 (1998).

102. In fact, drafters of the MBCA actually derided the Delaware statutes and asserted the superiority of their own work. *See* Jeffrey M. Gorris et al., *Delaware Corporate Law and the Model Business Corporation Act: A Study in Symbiosis*, 74 DUKE L.J. 107, 107–08 (2011).

103. *See infra* Appendix.

When examining the array of interest rates, states tend to fall within three categories. Like Delaware, some states use the statutory rate of interest employed by the state for a variety of issues, related and unrelated to appraisal rights.[104] Other states require the corporation to pay interest "at the average rate currently paid by the corporation on its principal bank loans."[105] And yet other states grant broad latitude to courts in prescribing the interest rate, and simply provide that interest shall be paid "at a rate that is fair and equitable under the circumstances."[106]

Naturally, the higher rate of interest will appeal more to arbitrageurs because they can profit more from the time they exercise their appraisal rights to the time the corporation pays the dissenter. Beyond the value of the interest alone, arbitrageurs must factor in risk, including the risk of a low interest rate, into their calculations whether to pursue appraisal. Or, put another way, arbitrageurs will value the certainty of knowing the interest rate they can expect. This is particularly so because in arbitrage cases, the arbitrageur is not motivated solely by the fact that the deal price of the shares may be underpriced, but rather they are incentivized by making money off of the appraisal right.

Even within the states that use statutory rates, there is considerable variance. States' interest can range anywhere from 400 basis points above the Federal Discount Rate[107] to twelve percent.[108] Nonetheless, a statutory rate provides dissenting shareholders (both genuine dissenters and arbitrageurs) more certainty of what interest rate they can expect from appraisal litigation.

Unlike the statutory interest rate schemes, interest rates based on the corporation's principal bank loans will vary ac-

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104. *See, e.g.*, CAL. CORP. CODE § 1303 (West 2013).

105. *E.g.*, MASS. GEN. LAWS ANN. ch. 156D, §§ 13.01, 46 (2016).

106. *E.g.*, N.Y. BUS. CORP. LAW § 623 (McKinney 2016) ("In determining the rate of interest, the court shall consider all relevant factors, including the rate of interest which the corporation would have had to pay to borrow money during the pendency of the proceeding. If the court finds that the refusal of any shareholder to accept the corporate offer of payment for his shares was arbitrary, vexatious or otherwise not in good faith, no interest shall be allowed to him.").

107. FLA. STAT. §§ 55.03, 607.1301 (2017).

108. NEB. REV. STAT. § 45-104 (2017).

cording to the individual corporation. In order to discover what the appropriate interest rate will be in any one case, an arbitrageur must find out the principal on the corporation's bank loans, which requires greater investigative costs than knowing the statutory rate in a jurisdiction.

The least certain method, the "fair and equitable" method, gives dissenting shareholders little guidance as to what type of return they will receive from engaging in litigation. As with many other forms of litigation, arbitrageurs may look to prior case law to get a sense of what judges have awarded, but even this provides more uncertainty.

Indeed, higher but also more certain interest rates provide arbitrageurs with the greatest incentive to engage in arbitrage. Yet, simply moving to a more fluid standard may not be a solution either. By reducing certainty, genuine dissenters may be dissuaded from bringing meritorious appraisal claims. As long as the interest rate does not dip below the time value of money, a low interest should not deter genuine dissenters that sincerely want to cash out at the fair market value of their shares and nothing more. If legislators truly wish to curb frivolous suits, amending the appraisal statute to include a low, but statute-based interest rate would be most appropriate.

B. *Withdrawal Rights*

In Delaware, shareholders have the ability to withdraw their appraisal notices well after the deal takes place, even if they have perfected their appraisal rights up to that point.[109] These withdrawal rights give arbitrageurs a no-cost route to exert pressure against the company to obtain a higher deal price.[110] Delaware is not alone in granting this right. Twenty-four states grant shareholders this ability.[111] In actuality, however, the Delaware statute may give a smaller time window in which appraisal-holding shareholding can choose to dissent. Shareholders in Delaware have the option to withdraw up to

109. DEL. CODE ANN. tit. 8, § 262 (2016).

110. Epstein et al., *supra* note 8.

111. *See, e.g.*, N.Y. BUS. CORP. L. § 623(e) (2016). Connecticut, Florida, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Virginia, West Virginia, and Wyoming allow for withdrawal rights; *see also infra* Appendix.

sixty days after the deal.[112] In contrast, in alternative jurisdictions the timeline is more complicated and requires a more nuanced understanding of the technical details of the appraisal process.

As a general matter, the corporation must send an appraisal notice (often also referred to as a dissenters' notice) to all shareholders that may be eligible for appraisal rights no later than ten days after the merger occurs.[113] The appraisal notice will state various items, among them notice that shareholders may exercise appraisal rights, the company's estimated value of the shares, how the corporation calculated the estimate, and various financial statements reaching back as early as sixteen months prior.[114] This disclosure is intended to give investors requisite information to make an informed decision whether to exercise their appraisal rights. Appraisal notices also require the corporation to set a date by which shareholders must choose to dissent, falling between forty and sixty days[115] from the time the appraisal notice is received.[116] Shareholders must then adhere to the requirements for submitting their demand payment. After this back-and-forth process perfects the appraisal right for the shareholder, she can turn around and withdraw the demand, most often up until twenty days after the demand payment is due.[117]

Thus, in actuality, shareholders in alternative jurisdictions can have anywhere from fifty to ninety days after the deal to renege. In these jurisdictions, it is the corporation that sets the pace. By sending out the appraisal notice immediately after the deal happens and setting the date by which shareholders must submit demand payment, the corporation can cut in half the timeline for dissenting shareholders to ultimately withdraw. This may be a valuable tool for companies that are suspi-

112. DEL. CODE ANN. tit 8, § 262 (2016).

113. MODEL BUS. CORP. ACT § 13.20(b).

114. Georgia requires the maximum sixteen months prior of financial information. GA. CODE ANN. § 55-13-20(d)(1) (2017).

115. Some states, such as Alabama, Arkansas, Georgia, Hawaii, Illinois, Indiana, Kentucky, Michigan, Mississippi, Nebraska, New Jersey, Oregon, Rhode Island, Utah, Vermont, and Wisconsin do not follow MBCA's 40–60 day window for dissent, but rather have elongated the period to 30–60 days. *See, e.g.*, HAW. REV. STAT. § 414-353(b)(4) (2015).

116. MODEL BUS. CORP. ACT § 13.22(b)(2)(ii).

117. *Id.* § 13.22(b)(2)(v).

cious that some shareholders may attempt arbitrage, while allowing other companies the ability to prolong the appraisal period so as to give genuine shareholders more time to carefully consider whether they wish to cash out their shares.

C. *Right to Information on How Many Other Shareholders Dissent*

Relatedly, jurisdictions vary in how much information they provide to shareholders that are debating whether to dissent. The majority of disclosure is somewhat standardized, with only slight adjustments, such as how many months prior a corporation must provide its financials, small changes that are unlikely to truly persuade someone to commit arbitrage. Yet, one particular provision may help to tip the scales: in a handful of jurisdictions, shareholders can assert a right to receive a list of all other shareholders who have also submitted their demand payment.[118]

Information regarding other shareholders can be quite useful both by a genuine dissenting shareholder and an appraisal arbitrageur. A shareholder genuinely exercising appraisal rights faces a coordination problem. Appraisal actions do not contain a class action mechanism to help assuage coordination costs. Instead, appraisal-seeking shareholders must individually assert their claims. Depending on the jurisdiction, dissenting shareholders can join an ongoing appraisal claim, or in other statutes, all dissenting shareholders are automatically joined once a shareholder instigates appraisal litigation.[119] This can be helpful to long-term shareholders because they can use cost-spreading amongst all (or many) dissenters to bring an action. It may also serve as a signaling function that because certain influential shareholders have dissented, it would be wise to follow suit.

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118. Twelve states—Delaware, Louisiana, Maine, Massachusetts, Minnesota, New Hampshire, North Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming—give shareholders the right to information regarding other shareholders. It comes as no surprise that these states also maintain withdrawal rights, which may suggest that some states intentionally wanted to provide more dissenter-friendly (and perhaps inadvertently more arbitrage-friendly) provisions as a whole. *See, e.g.*, ME. STAT. tit. 13C, § 1323(2)(B)(4), 1324(2).

119. *Cf.* DEL. CODE ANN. tit. 8, § 262 (2016), where shareholders must individually assert and perfect their appraisal rights independently in order to be eligible for a judicially imposed fair value of their shares.

But arbitrageurs will use this to their advantage. Arbitrageurs may dissent, regardless of whether they believe the dissenting shares' value has been fairly estimated, leading other less informed shareholders into a false sense that the case is genuinely worth litigating. This distortion could be prevented; by removing the right to receive information on other dissenting shareholders from the statute books, at least until the period for withdrawing perfected dissents has elapsed, legislators could remove the advantage of this information for arbitrageurs while still retaining some of the benefit of coordination for genuinely dissenting shareholders.

D. *Timing of Payment and Fair Value*

Fair value turns out not to be a particularly useful metric across states because it is so broadly defined. Most states[120] have adopted the language in *Weinberger*, where the Delaware Supreme Court opined that appraisal valuation could be based on "any techniques or methods . . . generally considered acceptable in the financial community."[121] And while this standard is fairly consistent across jurisdictions, its application is not. Courts disagree on a multitude of valuation techniques, such as whether to include a minority discount, factor in the deal price, or consider goodwill.[122] Even within state jurisdictions, the courts do not apply fair value uniformly. Additionally, valuations of stock price may often turn on individualized facts of the case.[123] While this vast fluidity of fair value pricing could deter uncertain arbitrageurs on the whole, no particular

120. One exception to the Weinberger standard can be found in Ohio's appraisal statute, which requires fair value to be determined as "the amount that a willing seller who is under no compulsion to sell would be willing to accept and that a willing buyer who is under no compulsion to purchase would be willing to pay, but in no event shall the fair cash value of a share exceed the amount specified in the demand of the particular shareholder." OHIO REV. CODE ANN. § 1701.85 (LexisNexis 2017).

121. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

122. Brian R. Potter, *Shareholder Disputes: What Is the Appropriate Standard of Fair Value?*, SRR (2011), http://www.srr.com/article/shareholder-disputes-what-appropriate-standard-value.

123. MINN. STAT. § 302A.471 (2017) No method is recommended because the different methods of measuring value (market, book, replacement, capitalization of earnings, etc.) are neither right nor wrong, but merely appropriate in different situations. *Id.*

state regime rises to the top as a particularly good regime for curbing strategic behavior.

Instead, it is more helpful to examine the fair value of shares in terms of *when* the corporation is required to pay the fair value of the shares because that timing affects the amount (and consequently the interest rate payout) to be litigated, thereby reducing incentives to arbitrage. Under this framework, states split along two lines. Those like Delaware require the corporation to pay the full fair value of the dissenting shares plus accrued interest at the end of the appraisal litigation.[124] The other line of states, and the MBCA, require the corporation to pay its estimate of the fair market value of shares up front, *before* appraisal litigation begins.[125] At the time of judgment, the corporation will only pay what the court determines to be the excess fair value over what the corporation estimated and already paid to the shareholders, plus accrued interest.

In the latter model, the contested amount is much smaller during the litigation stage. If the parties are only fighting over the differential in share value, it might not be worth it for an arbitrageur to bring a litigation claim. Plus, the accrued interest will be smaller, because it will only be interest accruing on the excess amount since the time the corporation paid its estimated fair value, as opposed to starting interest accrual from the effective date of the transaction. This statutory framework deters arbitrage by reducing incentives to bring appraisal litigation, unless the dissenting shareholder truly believes there is sufficient excess between the corporation's estimate of fair value and court's expected valuation.

Interestingly enough, this "fair value in excess" award only goes in one direction in some jurisdictions. These jurisdictions state that a dissenting shareholder will not be liable to the corporation for any excess the corporation has paid to the shareholder over what the court deems to be fair value.[126] In a Minnesotan case, *Caribou Coffee Company, Inc., v. Richard Fearson*, the acquiring corporation, JAB Holding Company, actually

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124. DEL. CODE ANN. tit. 8, § 262(h) (2016).
125. *E.g.*, MODEL BUS. CORP. ACT § 13.24.
126. MINN. STAT. § 302A.471 (2017).

overpaid the dissenting shareholder Fearson for his shares.[127] JAB offered to buy Caribou Coffee for $16.00 a share, but when Fearson dissented, Caribou Coffee contended there were procedural problems with Fearson's dissent and only offered him $15.03 per share. When the case came before the Minnesota court, the judge valued the shares at $14.45.

Some argue that this statutory scheme dissuades arbitrageurs because it puts arbitrageurs on notice that they could lose money in an appraisal action.[128] Yet, it seems more likely that the opposite is true—that is, these statutory schemes incentivize arbitrageurs to strategically pursue appraisal. The concern that a court will value the shares lower than the value a shareholder could have received by approving the deal is no different from any other jurisdiction, *ceretis paribus.* But when the statute disallows payment by a shareholder to the corporation for an excess award, arbitrageurs can choose to pursue appraisal rights with little downside risk. At the very least, they have a particular price floor for their shares.

Admittedly, Minnesota cases like *Caribou Coffee* are not going to really affect professional appraisal arbitrageurs going after Delaware corporations. Appraisal cases like *Caribou Coffee* are outliers in non-Delaware states. Still, by understanding the incentive mechanisms behind the various alternative jurisdictions' statutes, Delaware can better reconstruct its own appraisal statute to deter arbitrage.

E. *After-Acquired Shares*

Unlike Delaware's section 262, the MBCA includes the concept of after-acquired shares, which provides perhaps the strongest deterrence of appraisal litigation and arbitrage.[129] In thirty states, shareholders must certify in their demand payment that they had purchased their shares prior to the announcement of the merger, either by way of a media announcement or announcement directly to the shareholders themselves.[130] If shareholders wishing to assert appraisal rights

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127. Michael Greene, *Caribou Investors Get Less than Deal Price in Minn. Case*, BLOOMBERG BNA (Jan. 4, 2016), http://www.bna.com/caribou-investors-less-n57982065675/.

128. *See* Frankel, *supra* note 100, at 1.

129. *See* MODEL BUS. CORP. ACT § 13.25.

130. *See, e.g.*, MISS. CODE ANN. § 79-4-1325 (2015); *see also infra* Appendix.

are unable to provide this certification, the corporation may limit their appraisal rights under the state's "after-acquired shares" provision.

After-acquired share provisions give the corporation an option to withhold payment for shares that investors have acquired after the announcement of the merger transaction.[131] Shares acquired after that date may only receive an offer of payment that is conditioned on their full satisfaction of the claim. If the claim goes through litigation, after-acquired shareholders will be entitled to the entire fair value of their shares plus accrued interest (as compared to shareholders who held their shares prior to the merger announcement—they will be awarded the amount that the court finds to be the fair value in excess of the corporation's estimate, plus accrued interest).[132]

Because of this difference in payment methods, it is not clear that this would reduce the incentive for arbitrage under the theory that more interest would accrue because the after-acquired shareholders will not have received any value until the court awards in their favor. At the same time, however, because they have held the shares for less time than their "before-acquired" shareholder counterparts, the interest will accrue over a shorter time horizon. The issue of whether this interest actually incentivizes after-acquired shareholders may come out as a wash, or at least insignificant enough for it to be a real factor in the calculus of whether to engage in arbitrage.

The rationale behind these after-acquired statutes is, after all, to reduce the incentives for arbitrage. As an example, the comments to Massachusetts's after-acquired shares statute explicitly address this concern:

> If the right of unconditional immediate payment were granted as to all after-acquired shares, speculators and others might be tempted to buy shares merely for the purpose of demanding appraisal. Since the function of appraisal rights is to protect investors against unforeseen changes, there is no need to give equally favorable treatment to purchasers who

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131. MODEL BUS. CORP. ACT § 13.25.
132. *Id.*

knew or should have known about the proposed changes.[133]

Of course, corporations do not have to withhold payment of after-acquired shares; they merely have the option to do so. Similar to flexibility that the withdrawal rights time frame gives corporations, the ability to choose whether or not to withhold payment for after-acquired shares gives the corporation discretion depending on how skeptical it finds the dissenting shareholders' intentions. When the circumstances indicate an obstructionist maneuver by the dissenting shareholders, the corporation will be inclined to withhold immediate payment. In most cases, "consideration of simplicity and harmony will dictate immediate payment for after acquired as well as pre-acquired shares."[134]

F. *Litigation Costs Assessed*

Different state regimes as to who should front the costs of appraisal litigation may factor into an arbitrageur's calculus to pursue appraisal rights. Under Delaware law, the costs of the litigation will be distributed as the court finds equitable.[135] In contrast, the MBCA, which forty states follow on this issue, places the costs of the litigation upon the corporation, unless the court finds that the dissenting shareholder acted arbitrarily, vexatiously, or not in good faith.[136] While these two standards sound similar, the fact that the MBCA formulation explicitly acknowledges the possibility of arbitrageurs taking advantage of the appraisal process may make those state courts more acutely aware of the possibility of arbitrage, while rendering the litigation itself more costly for arbitrageurs.

V.
IMPLICATIONS FOR LEADING CORPORATE LAW

Various mechanisms such as low interest rates, lack of withdrawal rights, and after-acquired share provisions in alternative jurisdictions provide better incentives to avoid appraisal arbitrage than the current Delaware statute. If the Delaware

133. MASS. GEN. LAWS ANN. ch. 156D, § 13.25 (2016).
134. Alfred F. Conrad, *Amendments of Model Business Corporation Act Affecting Dissenters' Rights (Sections 73, 74, 80, and 81)*, 33 BUS. LAW. 2587 (1978).
135. DEL. CODE ANN. tit. 8, § 262(j) (2016).
136. MODEL BUS. CORP. ACT § 13.31; *see also infra* Appendix.

Court of Chancery is unwilling to protect against appraisal arbitrageurs, it falls to the state legislature to amend the statute. The Delaware appraisal process has changed continuously over the years, the most recent being in 2009.[137] Since the recent uptick in appraisal arbitrage, several reforms to the Delaware appraisal statute have been proposed. These reforms tend to fall into three categories: the modest proposals to the Delaware legislature in the 2014–2015 and 2015–2016 sessions, more radical reforms recently proposed, particularly by corporate defense law firms (such as doing away with appraisal rights altogether), and those attempting to expand appraisal rights.

Proposals to curb appraisal arbitrage first made their way to the Delaware legislature in 2014. Some of these proposals are similar to already-enacted provisions in alternative jurisdictions, such as changes to the interest rate on appraisal claims. The Delaware State Bar Association Council of the Corporate Law Section recommended that respondents in an appraisal action be given "the option to cut off the accrual of interest by paying to the claimants a sum of money of the corporation's choosing . . . . Interest would only accrue if the judicial award exceeded the amount paid, and then would accrue only on the excess."[138] Although this pre-paying might encourage more arbitrage because it would pre-fund appraisal litigation for arbitrageurs, the overall payout would be less when taking interest into account, just as other states already have the corporation pay its estimate fair value upfront prior to appraisal litigation. Surprisingly, the Delaware legislature did not enact the Bar Association's proposal because it found that arbitrage cases still represent a small portion of overall appraisal actions, and the effectiveness of appraisal rights would be curtailed in genuine circumstances if the appraisal statute were more limited.[139] In the aftermath of the broad exercise of judicial discretion in *Dell* in the summer of 2016, the Delaware legislature reversed course and amended section 262(h) to include this

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137. *See* Geis, *supra* note 22. Delaware has amended its statute thirty-five times since its adoption in 1899. Korsmo & Myers, *supra* note 6, at 1645.

138. Lowenstein Sandler, *Section 262 Appraisal Amendments*, https://www.lowenstein.com/files/upload/DGCL%20262%20Proposal%203-6-15%20Explanatory%20Paper.pdf.

139. *Id.* (perhaps the reason why Delaware continues to retain a mix of both arbitrage-friendly and arbitrage-hostile provisions reflects a sense of ambiguity as to whether appraisal arbitrage is a desirable consequence).

reform, in a way responding to its judicial counterpart.[140] But again, this reform is only following in the established footsteps of the Model Business Corporations Act.

Adopting a de minimis requirement has also been considered and recently enacted. Both academics and the Delaware General Assembly set out proposed reforms to carve out appraisal rights for shareholders holding miniscule ownership in the target company. One such proposal states that a shareholder could only seek appraisal if "the total number of shares entitled to appraisal exceeded one percent of the outstanding shares that could have sought appraisal."[141] While rejected in the 2014–2015 legislative session, this precise amendment passed, effective August 1, 2016.[142] Another type of de minimis reform limits appraisal actions to those in which the merger consideration for the total number of shares entitled to appraisal exceeds $1 million.[143] De minimis reforms seek to deter nuisance claims, but they will not curb the concern that large hedge funds are enacting the most potent arbitrage.[144]

A more extreme proposal would rid the DGCL of the appraisal right altogether. In a sense, the Delaware Chancery Court already flirts with this proposal by frequently using the Merger Price Rule. While there are certainly concerns with the valuation process, the statute by and large protects minority shareholders from being stuck holding undesirable shares of a new company. Because arbitrage is, for now, a small percentage of all appraisal cases and mostly limited to meagerly priced deals, getting rid of the appraisal right may severely harm the value of dissenters' rights in corporate law.

This concern, however, is overblown. Legislatures first enacted appraisal rights at a time of illiquid capital markets. Now, if a shareholder dislikes holding shares of the new com-

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140. DEL. CODE ANN. tit. 8, § 262(g) (2016).

141. *Id.*

142. *Id.* § 262(h); *see also* Alison L. Land & Lisa P. Ogust, *Amendments to DGCL Limit Appraisal Proceedings*, DEL. BUS. CT. INSIDER (Aug. 24, 2016), http://www.delbizcourt.com/id=1202765835862/Amendments-to-DGCL-Limit-Appraisal-Proceedings?slreturn=20170025160452.

143. DEL. CODE ANN. tit. 8, § 262(h) (2016); Land & Ogust, *supra* note 142.

144. *See, e.g.*, JAMES D. COX ET AL., CORPORATIONS 595–96 (1997) ("[Appraisal] is rarely the remedy of other than the 'wine and cheese' crowd, for seldom is appraisal sought by investors whose holdings are less than $100,000 . . . .").

pany after a merger, the shareholder need only follow the "Wall Street Rule" and sell his shares, in which he will receive the current fair market value of those shares. Appraisal rights, while a nicety, are not a necessity in the current capital markets. Yet practically speaking, it is unlikely that the entire appraisal right will be erased from the books, especially at a time in which appraisal activity is rapidly increasing.

As noble as these reforms sound, Delaware has no need to try to enact something extreme. Rather, practical reforms have been right in front of Delaware for years—many of the alternative jurisdictions have already long included mechanisms to deter appraisal arbitrage. By looking to modest proposals to decrease the interest rate, disallow withdrawal rates and information regarding other dissenters, and incorporate after-acquired share provisions, Delaware can realistically filter out appraisal arbitrage while still allowing credible appraisal cases to go forward.

Conclusion

Delaware corporate law often overshadows alternative jurisdictions, and rightly so. But even with its well-developed statutes and years of chancery expertise, Delaware corporate law is not perfect. Arbitrageurs have increasingly found their way between the rules embedded in DGCL section 262 to profit off dissenters' rights. The flexibility in the Delaware statute, the interest rate that is not reflective of the amount of risk of an appraisal case, and the uncertainty surrounding courts' valuation of dissenting shares all provide incentives for dissenters to profit off minority rights. And while academics and commentators have proposed various reforms in recent times to deter arbitrage, many states already have similar statutory mechanisms on their books. Despite their usual lack of prominence, non-Delaware states may be one step ahead than the leading body of corporate law in the area of appraisal arbitrage.

Appendix

Jurisdiction	Interest Rate	Withdrawal Rights	Other Dissenters' Information	Timing of Payment	After Acquired Shares	Litigation Costs (BF exception)
Delaware	1	Yes	Yes	Del.	No	No
MBCA	1	Yes	No	MBCA	Yes	Yes
Alabama	1	Yes*	No	Del.	No	Yes
Alaska	1	No	No	Del.	No	No
Arizona	1	No	No	MBCA	Yes	Yes
Arkansas	1	No	No	Del.	No	No
California	1	No	No	Del.	No	Yes
Colorado	2	No	No	Del.	Yes	Yes
Connecticut	1	Yes	No	MBCA	Yes	Yes
Florida	1	Yes	No	Del.	No	Yes
Georgia	3	No	No	Del.	No	Yes
Hawaii	2	No	No	MBCA	Yes	Yes
Idaho	1	Yes	No	MBCA	Yes	Yes
Illinois	2	No	No	MBCA	No	Yes
Indiana	2	No	No	MBCA	Yes	Yes
Iowa	1	No	No	MBCA	No	No
Kansas	3	Yes	No	Del.	No	No
Kentucky	2	No	No	MBCA	Yes	Yes
Louisiana	1	No	Yes	MBCA	Yes	Yes
Maine	1	Yes	Yes	MBCA	Yes	Yes
Maryland	3	Yes*	No	Del.	No	Yes
Massachusetts	2	Yes	Yes	MBCA	Yes	Yes
Michigan	2	No	No	MBCA	Yes	Yes
Minnesota	1	No	No	MBCA	Yes	Yes
Mississippi	1	Yes	No	MBCA	Yes	Yes
Missouri	1	No	No	Del.	No	No
Montana	2	No	No	MBCA	Yes	Yes
Nebraska	1	No	No	MBCA	Yes	Yes
Nevada	1	Yes	No	MBCA	Yes	Yes
New Hampshire	1	Yes	Yes	MBCA	Yes	Yes
New Jersey	3	Yes*	No	Del.	No	No
New Mexico	3	Yes*	No	Del.	No	Yes
New York	3	Yes*	Yes	Hybrid	No	No
North Carolina	1	Yes	Yes	MBCA	Yes	Yes
North Dakota	1	No	No	MBCA	No	Yes
Ohio	3	No	No	Del.	No	Yes

Jurisdiction	Interest Rate	Withdrawal Rights	Other Dissenters' Information	Timing of Payment	After Acquired Shares	Litigation Costs (BF exception)
Oklahoma	3	Yes	Yes	Del.	No	No
Oregon	2	No	No	MBCA	Yes	Yes
Pennsylvania	3	No	No	Del.	No	Yes
Rhode Island	1	Yes*	No	Del.	No	Yes
South Carolina	2	No	No	MBCA	Yes	Yes
South Dakota	1	Yes	Yes	MBCA	Yes	Yes
Tennessee	1	Yes*	Yes	MBCA	Yes	Yes
Texas	1	Yes*	No	Del.	No	No
Utah	1	No	No	MBCA	Yes	Yes
Vermont	2	No	No	MBCA	Yes	Yes
Virginia	2	Yes	Yes	MBCA	Yes	Yes
Washington	2	No	No	MBCA	Yes	Yes
West Virginia	1	Yes	Yes	MBCA	Yes	Yes
Wisconsin	2	No	No	MBCA	Yes	Yes
Wyoming	2	Yes	Yes	MBCA	Yes	Yes

1: Statutory Interest Rate
2: Interest rate equal to corporation's principal bank loans
3: Interest rate that is "fair and equitable"
* With consent of the corporation
Del: Payment of fair value at conclusion of appraisal litigation
MBCA: Payment of estimated fair value prior to start of appraisal litigation

Note: Each of these statutory mechanisms can be found within the state's dissenter's right chapter of their business code. Because states have multiple statutes within its dissenters' rights chapter addressing these mechanisms, the general chapter pertaining to dissenters' rights can be found here in the order that they appear in the Appendix: 8 DEL. CODE. ANN. § 262; MODEL BUS. CORP. ACT § 13; ALA. CODE § 10A-2-13 (2016); ALASKA STAT. § 10.55.109 (2016); ARIZ. REV. STAT. §10-13 (2016); ARK. CODE § 4-27-13 (2015); CAL. CORP. CODE § 1300 (2016); COLO. REV. STAT. § 7-90-206 (2016); CONN. GEN. STAT. § 855-59 (2015); FLA. STAT. §607.1300 (2016); GA. CODE. ANN. § 14-2-1300 (2015); HAW. REV. STAT. § 414-340 (2015); IDAHO CODE ANN. § 30-29-1301 (2016); 805 ILL. COMP. STAT. §5-11 (2016); IND. CODE. § 23-1-44 (2016); IOWA CODE § 490.1300(2016); KAN. STAT. ANN. § 17-78-109 (2015); KY. REV. STAT. ANN. § 13.13 (2015); LA. REV. STAT. § 12:1-1300 (2016); ME. REV. STAT. ANN. TIT. 13C, § 1300 (2016); MD. CORP. & ASSN. CODE § 3-201 (2015); MASS. GEN. LAWS CH. 156 § 46E (2016); MICH. COMP. LAWS § 450.1754-74 (2016); MINN STAT. §302A.471-73 (2016); MISS. CODE. ANN. § 79-4-1300 (2015); MO. REV. STAT. § 351.455 (2016); MONT. CODE ANN. § 35-1-826-39 (2015); NEB. REV. STAT. § 21-2, 171-83 (2015); NEV. REV. STAT. § 78.3793 (2015); N.H. REV. STAT. § 293-A:13 (2016); N.J. REV. STAT. § 14A:11 (2016); N.M. STAT. § 53-15-3 (2016); N.Y. BUS. CORP. L. § 910 (2016); N.C. GEN. STAT. § 55-13 (2015); N.D. CENT. CODE § 10-19.1-87 (2016); OHIO REV. CODE § 1701.84-85

(2016); OKLA. STAT. tit. 18 § 1155 (2016); OR. REV. STAT. § 60.551-94 (2015); 15 PA. CONS. STAT. § 317 (2016); 7 R. I. GEN. LAWS § 7-1.2-12 (2015); S.C. CODE ANN. § 33-13 (2016); S.D. CODIFIED LAWS § 47-1A-13 (2015); TENN. CODE ANN. § 48-23 (2015); TEX. BUS & COM. CODE § 21.460 (2015); UTAH CODE § 16-10A-13 (2016); VT. STAT. ANN. tit. 11A, § 1300; VA. CODE ANN. § 13.1-729-41 (2016); WASH. REV. CODE § 23B.13 (2016); W. VA. CODE § 31D-13 (2016); WIS. STAT. § 180.1323 (2016); WYO. STAT. ANN. § 17-16-1300 (2015).