The Dangers of Equitable Remedies

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While Delaware jurisprudence is renowned for its clarity and sophistication, one area of its corporate case law is, by design, uncharacteristically ambiguous: equitable remedies. One Delaware judge summarized his equitable powers as follows: "[T]his court will use its 'broad discretion to tailor [a remedy] to suit the situation as it exists.' As Delaware has long recognized, 'the Court of Chancery [has] the inherent powers of equity to adapt its relief to the particular rights and liabilities of each party.'”¹ The most well known of the equitable remedies is the Schnell doctrine.²

which allows the court to invalidate conduct that is technically in compliance with applicable law if the court deems that conduct to be inequitable. Perhaps less well known is the equitable remedy of quasi-appraisal rights. Courts use that doctrine to grant shareholders the equitable equivalent of an appraisal remedy even though they did not perfect their appraisal rights. Although equitable remedies, by definition, require great flexibility, this article questions whether these equitable remedies have morphed beyond even reasonably flexible parameters, and if so, what concerns these elastic doctrines raise.

The Schnell doctrine was born when a group of directors, in full compliance with the applicable law, manipulated the electoral machinery to thwart a proxy fight and thereby entrench themselves in power. Since Delaware courts carefully guard and preserve shareholder voting rights, the Schnell court created the doctrine to restrict directors from employing technically legal conduct that serves to deprive the shareholders of their fundamental right to vote. Unfortunately, subsequent courts have applied the Schnell doctrine in a myriad of fact patterns unrelated to the original fact pattern of protecting shareholder voting rights from overreaching directors. Similarly, the Delaware Supreme Court created quasi-appraisal rights in Weinberger v. UOP. In that case, the court altered the valuation methodology for appraisal rights. Since the shareholders in that appraisal-triggering transaction could not have foreseen the court’s changes, the supreme court created quasi-appraisal rights “only for this case” and for other possible appraisal cases then in the pipeline. Despite going private transactions and the collision of the Schnell doctrine, doctrine of independent legal significance, and law governing controlling-shareholder fiduciary duties).


4 Delaware, like all states, has a specific process which must be met in order to perfect appraisal rights. See Cede & Co. v. Technicolor, 542 A.2d 1182, 1186 (Del. 1988) (“An appraisal proceeding is a limited legislative remedy intended to provide shareholders dissenting from a merger on grounds of inadequacy of the offering price with a judicial determination of the intrinsic worth (fair value) of their shareholdings.”). See generally Del. Code Ann. tit. 8, § 262 (2008).

5 See, e.g., MM Co. v. Liquid Audio, 813 A.2d 1118, 1127 (Del. 2003) (“This Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors.”); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659-60 (Del. Ch. 1988) (noting that “[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests” and that “Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights”).

6 Schnell, 285 A.2d 437.

7 Siegel, supra note 2, at 411-12.

8 457 A.2d 701 (Del. 1983).

9 Id. at 714.

10 Id. at 714-15 (applying the holding to “(1) this case; (2) any case now pending on
explicitly creating a temporal limit for quasi-appraisal rights, courts have continued to use the remedy.\(^1\) In addition, some courts have offered quasi-appraisal rights that exceed the scope of the remedy that *Weinberger* created.\(^2\)

Three significant concerns arise when courts distort the intended boundaries of equitable remedies. First, equitable doctrines allow courts not only to create law, but also to empower that law to supersede statutes that legislatures have created. Second, these doctrines disturb predictability in law. Under the *Schnell* doctrine, judges may invalidate otherwise legal conduct, and, under quasi-appraisal rights, judges may offer the parties a windfall not available in the statutory appraisal remedy. Finally, in the extreme, if equitable remedies can take any form and apply in any situation, they supplant the need for any other law.

Raising these concerns about equitable remedies does not mean that courts should not create and use such remedies. Instead, these concerns suggest that equitable remedies need to be carefully cabined to specific facts and judiciously used. Part I of this article will discuss the original parameters of the *Schnell* doctrine, and how it has become a "run-away" remedy.\(^3\) Part II will discuss how quasi-appraisal rights expanded beyond the scope and timeframe that *Weinberger* intended for this remedy.\(^4\) Part III will identify and explore the interplay of these remedies with other equitable and legal doctrines.\(^5\)

I. The *Schnell* Doctrine

A. The origins of the *Schnell* doctrine

The *Schnell* doctrine originated in a case that carries its name, *Schnell v. Chris-
The case involved attempts by insurgent shareholders to wage a proxy fight, and responses by the directors to thwart those efforts. Specifically, the directors moved the date and the location of the corporation’s annual meeting: Shortening the time frame before the annual meeting gave the insurgents less time to prepare and solicit proxies, and moving the location to a cold, snowy climate was designed to dampen attendance at the meeting. Since the directors’ actions were consistent with the corporate statute and the corporation’s charter, the chancery court found no problem with the board’s actions. In reversing the chancery court, the Delaware Supreme Court argued that “inequitable action does not become permissible simply because it is legally possible.” The supreme court found the directors’ conduct to be inequitable because they intentionally manipulated the electoral process to thwart the shareholder insurgency; once the court concluded that the directors were trampling on the hallowed ground of the shareholders’ franchise, the supreme court would not permit these directors to hide behind the niceties of the corporate statute. Therefore, the Delaware Supreme Court created the Schnell doctrine to allow courts to invalidate conduct that is technically legal:

Thus, satisfying the explicit terms of the corporate statute and relevant documents would not provide a safe harbor; the court reserved the power to intervene if the fiduciary’s conduct was unfair despite its legality. If fiduciaries played a game of ‘gotcha,’ the courts would play their trump card.

Many cases where Delaware courts have invoked the Schnell doctrine have, like the original case, involved attempts by directors to frustrate shareholder voting rights. For example, there are several cases, like Schnell, in which the court invalidated attempts by directors to move the date of the shareholder meeting to thwart a proxy fight. In other cases, directors passed advance notice provisions regarding nominations for directors in a way that made a proxy fight actually, or almost, im-

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16 285 A.2d 437 (Del. 1971).
19 Siegel, supra note 2, at 412.
20 See Aprahamian v. HBO & Co., 531 A.2d 1204 (Del. Ch. 1987) (finding that directors postponing the meeting were unable to show that the postponement was in the best interest of the stockholders); Lerman v. Diagnostic Data, Inc., 421 A.2d 906 (Del. Ch. 1980) (finding that incumbent management amending bylaws to leave setting of the date of the annual meeting to the discretion of the board of directors was inequitable); cf. State of Wis. Inv. Bd. v. Peerless Sys. Corp., C.A. No. 17637, 2000 Del. Ch. LEXIS 170, at *1, *53 (Dec. 4, 2000) (invoking Schnell where a shareholder meeting was adjourned and subsequently reconvened because the board’s proposal was unlikely to pass at the initial meeting).
It should come as no surprise to anyone familiar with Delaware corporate law that Delaware courts arduously and thoroughly protect shareholder voting rights. As the Delaware Chancery Court explained, "[M]atters involving the integrity of the shareholder voting process involve consideration not present in any other context in which directors exercise delegated power." 22

Before applying the Schnell doctrine to invalidate directors' actions, however, courts have to evaluate the magnitude of the alleged inequitable, but legal, conduct. Delaware courts did not invalidate the directors' conduct under the Schnell doctrine in either Stahl v. Apple Bancorp Inc. 23 or Dolgoff v. Projectavision, Inc., 24 even though both of those cases involved directors whose change of the shareholder meeting date impacted directly 25 or indirectly 26 on the shareholder franchise. In both Stahl and Dolgoff, the chancery courts did not find the defendants' strategic maneuvers to be inequitable under the Schnell doctrine because, in both cases, the election process proceeded and the new process eventually permitted shareholders to vote. 27 Similarly, Delaware courts have not invalidated all director conduct aimed at controlling the director nomination process. In Accipiter Life Sciences Fund, L.P. v. Helfer, 28 the chancery court denied plaintiff relief, concluding that while plaintiff claimed to have missed the announcement of the upcoming meeting because the directors had included that information in a press release devoted to financial information, the plaintiff could have easily accessed the information. 29 Although noting that Delaware courts had previously applied the Schnell doctrine to cases involving meeting dates, the court in Accipiter held it would use its Schnell powers only "where compelling

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21 See Lerman v. Diagnostic Data, Inc., 421 A.2d 906 (Del. Ch. 1980) (finding that a change to a seventy day notice requirement, when the meeting was already set for sixty-three days away, was invalid, and also noting that requiring shareholders to be "shelf-ready" for a proxy fight in order to meet whatever date the board picked was inequitable); Linton v. Everett, No. 15219, 1997 Del Ch. LEXIS 117 (Del. Ch. July 31, 1997) (noting that although notice of the shareholder meeting complied with Delaware law, the thirty days notice, in this case, was an inequitable manipulation of the election process).
25 Stahl v. Apple Bancorp, Inc., 579 A.2d 1115 (Del. Ch. 1990) (responding by moving the date because the directors were losing the proxy fight).
26 Dolgoff v. Projectavision, Inc., C.A. No. 14805, 1996 Del. Ch. LEXIS 24 (Feb. 29, 1996) (holding the annual meeting early in order to have a director's term that would expire at this meeting occur earlier in the year).
27 Dolgoff, 1996 Del. Ch. LEXIS 24, at *24-26 ("[W]hile the board had strategic aims in calling a [director']s meeting for February, those were not inappropriate or inequitable...."); Stahl, 579 A.2d at 1123 ("Defendant's decision does not preclude plaintiff or any other Bancorp shareholder from effectively exercising his vote....").
28 905 A.2d 115 (Del. Ch. 2006).
29 Id. at 117.
circumstances suggest that the company unfairly manipulated the voting process in such a serious way as to constitute an evident or grave incursion into the fabric of the corporate law."\textsuperscript{30}

B. Subsequent cases expand the scope of the Schnell doctrine

Although the Delaware Supreme Court in \textit{Stroud v. Grace}\textsuperscript{31} described the \textit{Schnell} doctrine as limited primarily to those situations where "boards of directors deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote,"\textsuperscript{32} the \textit{Schnell} doctrine, on its face, has no subject-matter limits. Thus, some courts have used the doctrine in a myriad of contexts unrelated to directors intruding on the shareholder franchise. When cases cite \textit{Schnell} without invalidating defendant's conduct, the courts' citing can only be explained as a warning to fiduciaries of the courts' unbridled power. For example, in \textit{Delaware Insurance Guaranty Association v. Christiana Care Health Services, Inc.},\textsuperscript{33} the chancery court cited \textit{Schnell} in considering whether the successor corporation in a merger became the insured party under an insurance policy.\textsuperscript{34} Similarly, in \textit{Farahpour v. DXK, Inc.},\textsuperscript{35} the chancery court, citing \textit{Schnell}, suggested it could invalidate a corporation's conversion from a nonprofit, nonstock corporation to a for-profit stock corporation even though the conversion was in full compliance with Delaware statutory law.\textsuperscript{36} Finally, the chancery court cited to the \textit{Schnell} doctrine referencing the directors' attempt to redeem preferred shares, even though the directors acted according to the specific terms delineated in the corporation's charter.\textsuperscript{37} As such, one noted scholar wrote that using the \textit{Schnell} doctrine in such an indiscriminate way has trivialized the doctrine to become "a kind of universal solvent for courts and plaintiffs."\textsuperscript{38}

\textsuperscript{30} \textit{Id.} at 127.
\textsuperscript{31} 606 A.2d 75 (Del. 1992).
\textsuperscript{32} \textit{Id.} at 91; see also \textit{In re The MONY Group, Inc. S'holder Litig.}, 853 A.2d 661, 676 (Del. Ch. 2004) (reasoning that, due to the \textit{Schnell} doctrine, a board cannot agree to structural devices, such as high termination fees, that coerce shareholders to vote in favor of a transaction).
\textsuperscript{33} 892 A.2d 1073 (Del. 2006).
\textsuperscript{34} \textit{Id.} at 1078 n.20 ("It goes without saying that a sham transaction designed simply to avoid [a net-worth provision of the Delaware Insurance Guaranty Association Act] will not stand.").
\textsuperscript{35} 635 A.2d 894 (Del. 1994).
\textsuperscript{36} \textit{Id.} at 901; see also infra note 203 (explaining the court's invocation of \textit{Schnell} as an admonition to the board to avoid inequitable conduct).
\textsuperscript{38} Douglas M. Branson, \textit{Indeterminancy: The Final Ingredient in an Interest Group Analysis of Corporate Law}, 43 VAND. L. REV. 85, 100 (1990) (illustrating the indiscriminate use of the \textit{Schnell} doctrine with Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985), where the chancery court applied \textit{Schnell} to reject defendant's claim that while defendant had con-
Furthermore, while some cases have utilized the *Schnell* doctrine to invalidate director conduct far afield from voting cases, other cases have exceeded even those boundaries because they applied the *Schnell* doctrine to conduct by parties who are fiduciaries, but who are not directors. For example, in *Rabkin v. Philip A. Hunt Chemical Corp.*,\(^3^9\) the supreme court applied the *Schnell* doctrine to invalidate a controlling shareholder's attempt to avoid a contractual commitment it had made to pay a fixed price if it effectuated a freeze-out merger within a one-year period.\(^4^0\) Similarly, the chancery court in *Hollinger International Inc. v. Black*\(^4^1\) invalidated bylaw amendments effected by the controlling shareholder. Citing *Schnell*, the chancery court argued that the disputed bylaws "were clearly adopted for an inequitable purpose and have an inequitable effect."\(^4^2\) The chancery court also used the *Schnell* doctrine to defeat a controlling shareholder's motion to dismiss a complaint alleging the controlling shareholder attempted to effectuate a transaction that would cause delisting of the stock and the cessation of dividend payments.\(^4^3\) Finally, the Delaware Chancery Court was willing to apply the *Schnell* doctrine to a recent controlling-shareholder tender offer, in *In re Pure Resources, Inc., Shareholders Litigation*.\(^4^4\) While ultimately concluding that the tender offer was not inequitable,\(^4^5\) the court in *Pure Resources* clearly articulated its belief not only in the applicability of the *Schnell* doctrine to a controlling-shareholder tender offer, but also in the potency of the doc-

\(^3^9\) 498 A.2d 1099 (Del. 1985).

\(^4^0\) *Id.* at 1106-07; cf. *Smith v. SPNV Holdings, Inc.*, Consol. C.A. Nos. 8395, 8080, 1987 Del. Ch. LEXIS 505, at *8* (Oct. 28, 2007) (citing *Schnell* and explaining that unfair dealing by a controlling shareholder, which might arise if a merger is timed to favor the controlling shareholder, "is not permitted regardless of the action's legality"). *But see Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407, 409 (Del. 1985) (citing *Schnell* but concluding that a majority shareholder's enactment of restrictive bylaws protecting the majority shareholder was not inequitable).

\(^4^1\) 844 A.2d 1022 (Del. Ch. 2004).

\(^4^2\) *Id.* at 1080.

\(^4^3\) *Seagraves v. Urstadt Prop. Co.*, Consolidated C.A. No. 10307, 1989 Del. Ch. LEXIS 155, at *11-12* (Nov. 13, 1989, revised Dec. 4, 1989) (rejecting defendant's motion to dismiss for failure to state a claim because the plaintiff's complaint sufficiently alleged that the defendant's conduct, while not legally improper, was inequitable).

\(^4^4\) 808 A.2d 421 (Del. Ch. 2002).

\(^4^5\) The court in *Pure Resources* concluded that transactions like the one at hand required four conditions in order to qualify as non-coercive under *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35 (Del. 1996), and the proposed transaction failed one of them. *Pure Resources*, 808 A.2d at 445-46 (finding the proposed exchange offer coercive because the offer was not conditioned on approval by a majority of the target corporation's unaffiliated shareholders). Although citing *Schnell*, the court did not apply the doctrine to invalidate the transaction.
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In sum, the Schnell doctrine originally invalidated director conduct that, while legal, had the purpose and effect of disenfranchising shareholders. In contrast, courts currently use the Schnell doctrine to invalidate conduct completely unrelated to such disenfranchisement, as well as conduct by controlling shareholders. The following section explores the ramifications of the expansion of this equitable doctrine.

C. Uses and abuses of the Schnell doctrine

If we understand why the Schnell doctrine is problematic, the concern about its expansion to become a “universal solvent for courts and plaintiffs” becomes self-evident. The doctrine raises two main concerns. First, the doctrine has neither boundaries nor guideposts to indicate whether legal conduct is nevertheless inequitable. The doctrine simply empowers judges to utilize their equitable powers to effectuate the result they instinctively believe is correct by labeling the conduct as inequitable. An expansive view of the doctrine would allow courts to nullify any conduct by any fiduciary. Such a result creates uncertainty for fiduciaries whose compliance with the corporate statute and the relevant corporate documents may, after the fact, be deemed inequitable and therefore invalid by virtue of the Schnell doctrine. Similarly, the doctrine creates uncertainty for transaction planners who can assure their clients that the transaction is legal but not necessarily equitable. The Schnell doctrine further encourages shareholders to sue and poke holes in a transaction, using the doctrine as their spear. These concerns caused the Delaware Supreme Court in Alabama By-Products Corp. v. Neal to warn the lower courts that a capacious view of the Schnell doctrine and other equitable principles could “imperil” the stabili-

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46 Pure Resources, 808 A.2d at 434 (holding that the Schnell doctrine could override the statutory doctrine of independent legal significance); see discussion infra Part III; see also Berger v. Intelident Solutions, Inc., 911 A.2d 1164, 1174-75 (Del. Ch. 2006) (citing to Schnell in denying defendants’ motion to dismiss in a case where a controlling shareholder manipulated the timing of the proxy process in a cash-out merger to preclude the minority from realistically exercising statutory appraisal rights).

47 Branson, supra note 38.

48 588 A.2d 255 (Del. 1991). In Alabama By-Products Corp. v. Neal, the Delaware Supreme Court also cautioned courts to limit the Schnell doctrine to cases that “threaten the fabric of law” or would “deprive a person of a clear right.” Id. at 258 n.1. In a thoughtful article, Justice Jacobs commented that it is difficult for a court to know what would “threaten the fabric of law,” and that no equitable relief should be needed to prevent the loss of a “clear right.” Jack B. Jacobs, The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence, 8 Del. L. Rev. 1, 11 (2005).
Second, the Schnell doctrine allows judges to be super-legislators. Based solely on their instincts regarding what is inequitable, judges may invalidate an act or transaction even though the statute permits it. In a very thoughtful article, Vice Chancellor Strine addressed this concern, finding such invalidation on a case-by-case basis acceptable. In contrast, the Vice Chancellor reasoned that courts should not use the Schnell doctrine to make a rule forbidding something that the statute permits, because the latter use of the doctrine would convert judges into legislators:

[A] determination that a legally permitted action should be enjoined requires the court to find that there was a specific breach of an equitable duty. That does not necessarily mean that the judge must conclude that the directors acted for a disloyal purpose. But, at a minimum, it requires the court to articulate why the directors did not fulfill their fiduciary duties in the circumstances they confronted. ... The corollary to Schnell forbids end-running that job by declaring that what the directors did is, instead of being circumstantially inappropriate, in fact altogether forbidden because the judge believes that is the correct policy, rather than because the legislature has actually adopted that policy.

Furthermore, while these concerns are compelling, they do not yet depict the full scale of problems concerning the Schnell doctrine. One of the greatest concerns is expanding the doctrine to invalidate actions by controlling shareholders, instead of director misconduct. Such an expansion is nothing short of illogical. The doctrine is

49 See Ala. By-Products Corp., 588 A.2d at 258 n.1 (“The invocation of equitable principles... must be exercised with caution and restraint.”); see also, e.g., Nixon v. Blackwell, 626 A.2d 1366, 1380-81 (Del. 1993) (declining to use the court’s equitable powers to mandate equal liquidity rights among all shareholders where neither the statute nor the corporation’s governing documents provide such rights); STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1131, 1137 n.2 (Del. 1991) (chastising the chancery court for “resuscitat[ing] plainly void stock,” the supreme court stated: “Again, we emphasize that our courts must act with caution and restraint when granting equitable relief in derogation of established principles of corporate law.”).

50 Leo E. Strine, Jr., If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable To Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft, 60 BUS. LAW. 877, 904 (2005) (arguing that if courts eschew a case-by-case application of Schnell in favor of crafting general prohibitions of legally permitted conduct, “they risk stifling useful innovation and disabling fiduciaries from using their best business judgment in the widely disparate circumstances that their companies face”).

51 Id. For a discussion about whether Vice Chancellor Strine violated his own warning, see Siegel, supra note 2, at 430-31 (arguing that in Pure Resources, Vice Chancellor Strine invoked Schnell to create a per se rule of law).
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geared at preserving the shareholders' fundamental right to vote regardless of the technically legal, but nevertheless disabling, conduct by directors. Controlling shareholders would not, however, undermine shareholder voting rights since the vote is the source of their power. Moreover, although both controlling shareholders and directors are fiduciaries, that label is where their similarities end. Specifically, unlike the typical fiduciary, controlling shareholders have bought stock in their own interests and have not undertaken to act in the best interests of the minority shareholders. Instead, courts have imposed such duties on these shareholders in order to constrain their power, while simultaneously recognizing that controlling shareholders have a right to consider their own self-interests. The Schnell doctrine's invalidation of legal conduct, therefore, seems disturbingly out of place, because courts need a more nuanced monitor that can balance the controlling shareholder's competing interests. In contrast to the Schnell doctrine's inflexibility, a fiduciary duty analysis routinely calibrates opposing interests. The chancery court's reasoning in Young v. Valhi seems to recognize this difference between fiduciary analysis and the Schnell doctrine. In Young, the court cited Schnell but enjoined the controlling-shareholder's proposed merger on grounds that the controlling shareholder had violated his fiduciary duty of loyalty by "technically correct but devious corporate action . . . ."

In sum, the Schnell doctrine serves an important function when it prevents directors from disenfranchising their shareholders. Once the courts apply the doctrine to non-voting cases, however, the concerns about the doctrine outweigh its value. These concerns increase when courts apply the doctrine to controlling-shareholder transactions, because the complexity of controlling-shareholder fiduciary duties is incompatible with the Schnell doctrine. Moreover, such criticisms of the inapplicability of the Schnell doctrine outside its original use do not necessarily validate the variety of conduct in which directors and controlling shareholders engage. Instead, when the Schnell doctrine is—or should be—inapplicable, the courts still have

52 See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "fiduciary" as "[a] person who is required to act for the benefit of another person . . . .")
53 See Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1993) (requiring a controlling shareholder to meet the entire fairness standard of review if the shareholder stands on both sides of a transaction).
54 See Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987) ("Stockholders in Delaware corporations have a right to control and vote their shares in their own interest . . . . Clearly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority.").
55 382 A.2d 1372 (Del. Ch. 1978).
56 Id. at 1378, 1378-79 (determining that the controlling shareholder purposefully evaded a provision in the corporate charter that was intended to protect the minority shareholders from unwanted mergers).
the well-worn fiduciary duty tools to monitor properly directors and controlling shareholders.

II. Quasi-Appraisal Rights

A. The origins of the quasi-appraisal remedy

The first mention of quasi-appraisal rights occurred in Weinberger v. UOP, Inc. In that case, a minority shareholder challenged a parent-subsidiary cash-out merger and sought rescissory damages. While agreeing with plaintiffs that some directors had breached their fiduciary duty of loyalty, the Delaware Supreme Court rejected plaintiff's request for rescissory damages. Instead, the court held that plaintiff's remedy in a cash-out merger is limited to his appraisal rights "as hereinafter construed." The court in Weinberger then liberalized the valuation methodology in the appraisal remedy to encompass "any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court." Although holding that the statutory appraisal remedy was to provide the standard remedy in a cash-out merger, the supreme court then gave mixed signals on what conduct that remedy would address. On the one hand, the supreme court reasoned that situations involving fraud, misrepresentation or self-dealing might require equitable or monetary relief instead of appraisal rights. On the other hand, despite having carved self-dealing transactions out of the scope of appraisal, the court in Weinberger nevertheless relegated this plaintiff to the appraisal remedy despite finding that the defendant had, in fact, been self-dealing and breached its fiduciary disclosure obligations.
The *Weinberger* plaintiff, however, had not demanded appraisal rights in the merger that was now three years old. Although appraisal rights have numerous drawbacks for dissenting shareholders, surely one of the most prominent was that the pre-*Weinberger* appraisal methodology had been restricted to the conservative "Delaware block method" that *Weinberger* specifically overruled. Since plaintiff had forsaken his appraisal remedy three years ago, the court in *Weinberger* created a "quasi-appraisal" remedy "co-extensive with the liberalized valuation and appraisal methods we herein approve." "

While the supreme court in *Weinberger* thus created an equitable remedy in order to give these plaintiffs the functional equivalent of appraisal rights, the court also carefully specified five classes of plaintiffs who could demand quasi-appraisal rights, limiting the remedy "only to (1) this case; (2) any case now pending on appeal to this Court; (3) any case now pending in the Court of Chancery which has not yet been appealed but which may be eligible for direct appeal to this Court; (4) any case challenging a cash-out merger, the effective date of which is on or before February 1, 1983; and (5) any proposed merger to be presented at a shareholders' meeting, the notification of which is mailed to the stockholders on or before February 23, 1983." In other words, the Delaware Supreme Court in *Weinberger* intended for the quasi-appraisal remedy to have a short life, limited solely to the group of plaintiffs who had made their decision on whether to demand appraisal rights prior to or shortly after the court's substantial modification in *Weinberger* of the appropriate valuation methodology and the proper parameters of the appraisal remedy. *Weinberger* thus purports to permit this limited class of plaintiffs who lost their equity interest in a merger to pursue a quasi-appraisal remedy. Although future courts disagreed, *Weinberger* did not except from this class those shareholders who had not demanded

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64 The "Delaware block method" is a way to value shares using a weighted average of three separate valuations of the corporation: one based on asset value; one based on earnings value; and one based on market value. Barry Wertheimer, *The Shareholder's Appraisal Remedy and How Courts Determine Fair Value*, 47 Duke L.J. 613, 625 & n.67 (1998) (positing that the Delaware block method routinely undervalued corporations due to the criteria used to determine the value of the shares).


66 Id. at 714-15 (emphasis added). The specified dates in the *Weinberger* window derive from the date *Weinberger* was decided: February 1, 1983.

67 See discussion *infra* notes 76-79 (discussing Bershad and Kahn).
appraisal rights (as indeed, the Weinberger plaintiff had not) or who did not raise any claims of misconduct or acquiesced to the merger in any way. In fact, the supreme court remanded the matter to the chancery court, ordering the lower court to grant the plaintiff's motion to enlarge the plaintiff class to include all minority shareholders, regardless of whether they had tendered their stock in the merger.

Weinberger left open three questions relevant to this article: first, which shareholders had standing to sue for quasi-appraisal rights; second, what was the scope of the appraisal remedy, and, by extension, the quasi-appraisal remedy; and third, whether the supreme court intended the quasi-appraisal remedy and process to mimic the highly-structured appraisal remedy or whether the court intended for the quasi-appraisal instead to be interchangeable with broad equitable relief. Addressing the first issue two years after Weinberger, the Delaware Chancery Court faced an issue related to a class of plaintiffs who fell within Weinberger's five categories. In Patents Management Corp. v. O'Connor, plaintiff corporation elected not to demand its appraisal rights, and instead sued in a class action for rescission of the merger or rescissory damages, alleging unfair dealing in a conflict-of-interest long-form merger. The effective date of the merger preceded the supreme court's decision in Weinberger, but the plaintiff filed its lawsuit after the decision. Having decided both that plaintiff's complaints could be remedied by the enlarged quasi-appraisal remedy created in Weinberger, and that the merger date was within one of the five categories for which the supreme court created quasi-appraisal rights, the court in Patents proceeded to consider whether plaintiff nevertheless lost this equitable remedy by not demanding appraisal rights after the supreme court decided Weinberger. The defendant in Patents argued that since Weinberger was decided several months before plaintiff filed suit, plaintiff had been afforded due notice that its remedy was to be found in appraisal rights, and plaintiff had failed to perfect those rights.


69 Weinberger, 457 A.2d at 715.

70 Under Delaware corporate law, a shareholder must follow very specific steps in order to perfect appraisal rights. If a shareholder does not comply with each of the steps, the shareholder loses his right to the statutory appraisal remedy. See Del. Code Ann. tit. 8, § 262 (2008). Until recently, it was unclear whether shareholders granted quasi-appraisal rights would be required to follow the same steps prescribed in the appraisal statute in order to effectuate quasi-appraisal rights. In Berger v. Pubco Corp., C.A. No. 3414, 2009 Del. LEXIS 345 (July 9, 2009) (en banc), the Delaware Supreme Court answered this question in the negative. See infra notes 129–36 and accompanying text.

71 No. 7110, 1985 Del. Ch. LEXIS 454 (June 10, 1985).

72 Id. at *7.
court noted the appeal in defendant's argument because the Weinberger plaintiffs—unlike the plaintiff at hand—could not foresee the court's changes to the appraisal remedy; nevertheless, the court in Patents held that plaintiff was entitled to quasi-appraisal rights. The court reasoned that in creating its five categories of plaintiffs who were entitled to this equitable remedy, the supreme court in Weinberger did not expect courts to examine whether each plaintiff within these five categories had due notice of the changes in the appraisal remedy prior to foregoing his or her appraisal rights. Significantly, the court in Patents hinged its decision to offer this plaintiff quasi-appraisal rights on its recognition that the supreme court in Weinberger had decided to permit this equitable remedy only to "a limited number of plaintiffs."

Two other cases of plaintiffs who were grandfathered into Weinberger's quasi-appraisal remedy involved issues of standing. In Bershad v. Curtiss-Wright Corp, the Delaware Supreme Court held that plaintiffs who had either voted for the merger or who had tendered their shares had acquiesced in the transaction; therefore, the supreme court would not grant standing to these plaintiffs to attack the fairness of the merger once the court did not find any disclosure violation. In other words, the court concluded that the quasi-appraisal remedy was available only to those shareholders who would be eligible for appraisal rights but had not demanded them. The court differentiated this case from Weinberger, because the defendants at hand had not breached a fiduciary duty as they had made a full disclosure of all material facts regarding the merger. Similarly, in Kahn v. Household Acquisition Corp., the Delaware Supreme Court found that the defendants had not breached their fiduciary duties in connection with a freeze-out merger and further affirmed the chancery court's determination to exclude from quasi-appraisal rights those shareholders who voted for the merger. The supreme court in Kahn, however, reversed the chancery court's decision to exclude from quasi-appraisal those shareholders who surrendered their

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73 Id. at *7-8.
74 Id. at *7.
75 Id. Similarly, the Delaware Supreme Court in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1984), awarded plaintiffs a quasi-appraisal proceeding because the plaintiffs satisfied the requirements of the Weinberger window.
76 535 A.2d 840 (Del. 1987).
77 Id. at 848. In contrast to the supreme court, the Delaware Chancery Court in Bershad had excluded certain plaintiffs from the group that could demand quasi-appraisal rights based not on the doctrine of acquiescence, but because it understood the quasi-appraisal remedy to replicate the appraisal remedy. Therefore, if plaintiffs could not demand their appraisal rights because they had, with full disclosure, foregone those rights, the court would not now afford these shareholders quasi-appraisal rights. Bershad v. Curtiss-Wright Corp., C.A. Nos. 5827, 5830, 1983 Del. Ch. LEXIS 461, at *18-19 (Mar. 21, 1983).
78 591 A.2d 166 (Del. 1991).
stock for the merger consideration but who had not voted for the merger.79 Differentiating this case from Bershad, the court in Kahn reasoned that it would not deny standing to these shareholders due to the unique facts of the case at hand: at the inception of this litigation, the court of chancery, in denying a preliminary injunction, suggested that the minority shareholders could accept the merger consideration and still proceed with a class action. As a result, the supreme court in Kahn acknowledged that the facts of the case mandated its holding, and those facts were unique.

Regarding the second question Weinberger left open, namely, what conduct would appraisal rights remedy, two supreme court cases after Weinberger quickly pared the appraisal remedy to issues involving only misvaluation, rather than misconduct. In Rabkin v. Philip A. Hunt Chemical Corp.,80 the court held that, as the “traditional subjects of appraisal” are questions of valuation, defendant’s manipulative conduct had to be remedied outside of appraisal.81 Several years later, in Cede & Co. v. Technicolor, Inc.,82 the Delaware Supreme Court again held that appraisal could not remedy any claims of unfair dealing or fraud, as the appraisal remedy could only deal solely with determining the fair value of stock.83 Instead, the supreme court held that it could remedy any other claim and award any damages sustained by the shareholders, including rescissory damages, through equitable actions.84 Having so reasoned, the supreme court attempted to clarify why, in Weinberger, it had relegated the defendant’s breach of fiduciary duty to the appraisal proceeding. Although clearly differentiating the scope of appraisal actions from equitable actions, the supreme court in Cede noted that “[i]n a fraud claim, the approach to determining relief may be the same as that employed in determining fair value” under an appraisal action,85 and further explained in a footnote that the court found that the particular breach of fiduciary duty case in Weinberger could have been remedied in an appraisal proceeding.86 Moreover, the court held that shareholders who had accepted the merger consideration, as well as shareholders who had demanded appraisal rights, could seek redress for fraud or other actionable misconduct.87 The supreme court

79 Id. at 168.
80 498 A.2d 1099 (Del. 1985).
81 Id. at 1105–06.
82 542 A.2d 1182 (Del. 1988).
83 Id. at 1189.
84 Id. at 1190.
85 Id. at 1187.
86 Id. at 1182 n.9.
87 Id. at 1188 (“Fairness and consistency require equal recourse for a former shareholder who accepts a cash-out offer in ignorance of a later-discovered claim against management for breach of fiduciary duty and a shareholder who discovers such a claim after electing appraisal rights”).
The Dangers of Equitable Remedies

It is significant, however, that the supreme court in Rabkin and Cede differentiated the appraisal remedy from equitable actions but never once used the term "quasi-appraisal rights." The quasi-appraisal remedy has the peculiar—and perhaps inherently contradictory—mix of features that are designed, on the one hand, to replicate the appraisal remedy, but on the other hand, to provide equitable relief. As a result, there are two possible responses to Weinberger's open third question: one, should its newly created quasi-appraisal action function simply as a class action replacement for appraisal rights in limited circumstances? or two, should the quasi-appraisal remedy function as an equitable remedy for any shareholder who is wronged in an appraisal-triggering transaction, provide broad relief, and be available without shareholders undertaking the risks inherent in the appraisal process? After the supreme court decided both Rabkin and Cede, the chancery court in Kahn seemed to choose option one: the quasi-appraisal remedy is simply a class action for appraisal rights. In Kahn, the chancery court differentiated the quasi-appraisal claim from an entire fairness claim. The implication of this differentiation was that the scope of quasi-appraisal and appraisal were identical, namely disputes on valuation, but the quasi-appraisal remedy could not encompass claims of wrongdoing. If Kahn is correct, then post Weinberger, the quasi-appraisal remedy should have been limited to plaintiffs in the Weinberger window who alleged claims of misvaluation; quasi-appraisal rights should not have been viewed as an avenue for providing a broad equitable remedy for any misconduct that happened to occur in an appraisal-triggering transaction.

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88 Id. at 1189.
89 At least one article, Greta Fung, *A Common Goal from Two Different Paths: Protection of Minority Shareholders in Delaware and Canada*, 57 ALB. L. REV. 41, 52-53 (1993), reads the Cede court's discussion of equitable remedies to be interchangeable with quasi-appraisal rights. This article, however, fails to recognize that the court in Cede never used the term "quasi-appraisal rights." Id. at 53.
91 Id. at *3; see also In re Best Lock Corp. S'holder Litig., 845 A.2d 1057, 1080 (Del. Ch. 2001) (reasoning that this statement from the chancery court opinion in Kahn implied that "shareholders excluded from a quasi-appraisal may still have had standing to pursue an entire fairness claim.").
B. Subsequent cases expand the life of quasi-appraisal rights

Although the supreme court in Weinberger could not have been clearer that it intended the quasi-appraisal remedy to apply only to the five categories of temporally-limited cases that the court had delineated, quasi-appraisal rights did not suffer the natural death that the supreme court in Weinberger had directed. Two factors confuse the issue of why the quasi-appraisal remedy did not suffer its due fate. First, not a single court that offered quasi-appraisal rights to shareholders outside of the Weinberger window made any mention either of this temporal limitation or of its own justification for disregarding this restriction. Second, as discussed above, although Kahn differentiated the quasi-appraisal remedy from other equitable remedies, some courts, like the supreme court in Cede, offered equitable remedies in an appraisal-triggering transaction without calling the remedy “quasi-appraisal rights.” This failure in Cede to clearly identify its chosen remedy has led at least some scholars to assume that equitable remedies and quasi-appraisal rights are interchangeable terms, and since no temporal limitations exist for equitable remedies, they—and quasi-appraisal rights—were freely available outside of the Weinberger window.

In March, April, and September of 1991, eight years after Weinberger and well outside the timeframe of the five categories of cases to which that court would grant quasi-appraisal rights, the Delaware Chancery Courts relied on the availability of quasi-appraisal rights in three cases to deny preliminary injunctions in tender offers, which, if successful, were to be followed by mergers. A common take-over technique is for the offeror to make an offer to the target stockholders for all of the target stock, and if the offeror is successful in buying at least 90% of the target stock, the offeror effectuates a short-form merger of the target into the offeror. While neither the target board nor its shareholders have voting rights under Delaware’s short-form merger statute, target shareholders are entitled to appraisal rights. In each Delaware Chancery Court case—Steiner v. Sizzler Restaurants International Inc., In Re Ocean Drilling

93 See supra notes 89–91 and accompanying text.
94 See, e.g., Fung, supra note 89, at 51 n.56 (stating, consistent with the interchangeability of quasi-appraisal and equitable remedies, that quasi-appraisal is a more expansive remedy than statutory appraisal because quasi-appraisal may also include rescissory damages); cf. Silverstein & McBride, supra note 68, at 69 (describing the quasi-appraisal remedy as an “extraordinary equitable remedy” providing the appraisal remedy to shareholders who failed to perfect appraisal rights).
95 DEL. CODE ANN. tit. 8, § 253 (2008).
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and Tsivelekidis v. On-Line Software International Inc.—the minority shareholder sought a preliminary injunction to prevent the completion of the tender offer, claiming that the offeror had made inadequate disclosure. In each case, the chancery court denied the requested injunction, arguing (among other things) that an injunction was not needed because quasi-appraisal rights could provide an adequate monetary remedy to plaintiffs who tender their shares and, in so doing, abandon the possibility of a statutory appraisal proceeding if they ultimately prove the alleged disclosure violation.

In the first of these three cases, Steiner, Chancellor Allen was not concerned that these plaintiffs were outside the Weinberger window, as he simply assumed that quasi-appraisal rights were an available alternative to granting an injunction. Instead, Chancellor Allen's main concern was when an injunction for disclosure violations is an appropriate remedy in a tender offer. He reasoned:

Where a court with some confidence determines early-on that a disclosure is, or quite likely is, deficient, the response that most surely will fulfill the law's policy mission will be corrective disclosure. Where corrected disclosure can be made before corporate action is taken, the cost and inherent risk of error that unavoidably accompanies a legal remedy—counter-factual determinations (i.e., what would have happened if disclosure had been made) and damage or 'quasi-appraisal' calculation—is avoided. Thus, corrective disclosure . . . is a favored remedy.

In Steiner, however, Chancellor Allen refused to enjoin the transaction because he believed that plaintiff's disclosure claims were weak. One month later, in Ocean Drilling, the chancery court again refused to order a preliminary injunction and assumed the availability of quasi-appraisal rights even for "tendering shareholders where a showing can be made that the controlling stockholder or board have breached their fiduciary duties to the minority shareholders . . . the 'irreparability' of any harm caused by the defendants' conduct is limited to a large extent by the availability of the quasi-appraisal remedy." Finally, five months after Ocean Drilling,

100 See Steiner, 1991 Del. Ch. LEXIS 35, at *10 (describing the plaintiff's claim that undisclosed financial data contained material information as "pure speculation").
the chancery court in Tsivelekidis again denied plaintiff's request for a preliminary injunction to halt the closing of a cash tender offer, arguing that the denial would not harm plaintiff, for even if plaintiff ultimately prevailed in his claims, the court could award quasi-appraisal rights to those shareholders who had tendered their stock.\textsuperscript{102} As in Steiner, the court's view in Tsivelekidis that the plaintiff's claims were weak influenced the court to deny the requested injunction.\textsuperscript{103}

Four years later, in Arnold v. Society for Savings Bancorp, Inc.,\textsuperscript{104} the Delaware Chancery Court again discussed the quasi-appraisal remedy. This case culminated after years of litigation involving the merger of Bancorp into Bank of Boston. When the chancery court denied Arnold, a Bancorp shareholder, his request to enjoin the merger,\textsuperscript{105} the merger was effectuated. Thereafter, when both parties moved for summary judgment, the court granted summary judgment for the defendants.\textsuperscript{106} When plaintiff appealed that decision, the Delaware Supreme Court reversed in part, finding that the Bancorp directors had made materially misleading disclosures in the proxy statement soliciting the vote on the merger. The supreme court held, however, that the exculpation provision in the corporate charter shielded the directors from liability\textsuperscript{107} but remanded the case to the chancery court to determine whether or not a remedy existed against the corporate defendants. In this context, the chancery court considered whether plaintiff could recover damages for conversion of his Bancorp stock, through rescission of the merger, or quasi-appraisal rights. The chancery court in Arnold held that plaintiff could not get quasi-appraisal rights since he had no statutory right to appraisal as a result of this particular merger; therefore, any disclosure violations did not influence plaintiff to elect or abjure any appraisal rights.\textsuperscript{108} At no


\textsuperscript{103} Id. By contrast, in Morton, the chancery court agreed to schedule a preliminary injunction hearing in connection with a merger where the court found that plaintiff alleged a colorable claim that the directors violated their fiduciary duty of disclosure. 1995 Del. Ch. LEXIS 162, at *10. Rejecting defendants' argument that an injunction was unnecessary because the court could always award quasi-appraisal rights if the plaintiffs successfully proved their disclosure violation, the court, quoting Steiner, text accompanying note 99, instead reasoned that if a court believes there is a credible disclosure violation, requiring corrective disclosure before the corporate action is taken is a better remedy than the quasi-appraisal remedy. Morton, 1995 Del. Ch. LEXIS 162, at *8-9.

\textsuperscript{104} C.A. No. 12883, 1995 Del. Ch. LEXIS 86 (June 15, 1995).


\textsuperscript{107} Arnold v. Soc'y for Sav. Bancorp, Inc. (Arnold III), 650 A.2d 1270, 1290 (Del. 1994). The corporate charter at issue contained a provision that shielded the directors from shareholder suits seeking monetary damages for certain breaches of fiduciary duty. Consequently, although the directors violated their duty of care, the corporate charter exculpated them.

time, however, did the court in Arnold consider that the quasi-appraisal remedy was unavailable because plaintiff’s case was outside of the timeframe for such actions under Weinberger. Furthermore, the court recharacterized plaintiff’s claim for quasi-appraisal as “actually a request for an award of compensatory damages.”109 The court of chancery held that if plaintiff proved a cause of action, such as aiding and abetting, against these defendants, then the court “may employ the quasi-appraisal remedy as a method of establishing Plaintiff’s loss.”110 Such reasoning clearly conflicts with Kahn:111 the chancery court in Arnold classified quasi-appraisal rights as interchangeable with equitable remedies that might be available in a non-appraisal triggering transaction.

The quasi-appraisal remedy also surfaced in three short-form merger cases involving improper disclosure.112 The first was in 1995, a month after Arnold was decided. In Nebel v. Southwest Bancorp, Inc.,113 plaintiff instituted a class action seeking rescissory damages for alleged unfair dealing, unfair price, and failure to provide an accurate copy of the appraisal statute in connection with a short-form merger.114 While sustaining the class action, the court rejected plaintiff’s requested remedy. Given that the short-form merger could occur without plaintiff’s vote, the court reasoned that the claims of unfair dealing were not actionable, and the issues of price and loss of appraisal rights could be remedied through quasi-appraisal rights.115 In other words, since the inadequate notice had no effect on the defendant’s ability to consummate the transaction, the plaintiffs could not receive rescissory damages. Instead, the inadequate notice impacted only whether plaintiffs chose to demand their appraisal rights. Thus, the court offered the plaintiff class quasi-appraisal rights in order to proximate the rights they had abjured.116 Similarly, in 2005, in Gilliland v. Motorola, Inc.,117 as well as recently in 2008, in Berger v. Pubco Corp.,118 the chancery

LEXIS 86, at *20 (June 15, 1995).
110 Id. at *21 (emphasis omitted).
111 See supra notes 90–92 and accompanying text (explaining that Kahn did not equate quasi-appraisal remedy with broad equitable relief remedying any misconduct).
113 1995 Del. Ch. LEXIS 80.
114 Id. at *2.
115 Id. at *19–21.
116 Id. at *20–21.
117 873 A.2d 305.
courts required defendants to fix their disclosure violations and again offered plaintiffs quasi-appraisal rights. Unlike Nebel, however, in Gilliland the alleged disclosure violation relating to appraisal was not an inaccurate copy of the appraisal provisions, but instead was a lack of disclosure relating to the corporation’s financial condition.119 Therefore, plaintiff argued that since shareholders were unable to decide whether to take the merger consideration or instead demand appraisal rights, they were entitled to quasi-appraisal rights to remedy the directors’ breach of the duty of disclosure.120 The court, relying on Nebel, agreed and provided plaintiff with a quasi-appraisal remedy intended to closely mimic the statutory appraisal process.121 Berger was factually similar both to Nebel and Gilliland: like Nebel, the defendant in Berger provided plaintiffs with an incorrect version of the appraisal statute, and like Gilliland, defendant omitted some information that the court found material to plaintiffs when faced with the decision of whether to demand their appraisal rights.122 Consistent with the factual similarities, the Berger court awarded the plaintiffs a quasi-appraisal remedy based on the Gilliland’s structured quasi-appraisal remedy.123

Unlike Nebel, however, the chancery courts in Gilliland and Berger would not certify plaintiffs’ proposed class of all minority shareholders.124 The court in Gilliland was determined to have the quasi-appraisal remedy proceed on a track that paralleled the appraisal process. Vice Chancellor Lamb held that quasi-appraisal rights

119 Gilliland, 873 A.2d at 308.
120 Complaint ¶ 11, Gilliland, 873 A.2d 305 (C.A. No. 411-N). Although plaintiff argued that the stockholders “were forced to make an uninformed investment decision,” the court disagreed, concluding that most stockholders made an “informed choice to forego their appraisal remedy.” Gilliland, 873 A.2d at 308.
121 Gilliland, 873 A.2d at 311-12.
122 Berger, 2008 Del. Ch. LEXIS 63, at *1; see Gilliland, 873 A.2d at 308 (“[T]he defendants breached their fiduciary duty of disclosure by not providing any disclosure relating to [the corporation’s] financial condition to the stockholders faced with the decision of whether to take the cash or demand appraisal.”); Nebel, 1995 Del. Ch. LEXIS 80, at *16 (noting that the last page of the provided Delaware appraisal statute was inadvertently taken from another state’s appraisal statute).
124 At different points in the opinion, the court in Gilliland speculated about the decision in Nebel to certify the class of minority shareholders. The court in Gilliland first said that the court in Nebel “did not consider whether the technical breach alleged alone justified the certification of a class of all persons whose shares were cashed-out in the merger.” Gilliland, 873 A.2d at 311. Later in the opinion, the court in Gilliland opined about Nebel’s certification of the class, “It is possible that this aspect of the Nebel decision was driven by the allegations of gross unfairness and the ‘manifestly’ improper valuation methodology employed by the majority stockholder.” Id. at 312; cf. Turner v. Bernstein, 768 A.2d 24 (Del. Ch. 2000) (mentioning briefly quasi-appraisal rights in the context of whether the plaintiffs’ case could proceed as a class action and deciding in this case it could).
should mimic the three critical components of appraisal rights: its “opt-in” feature, its risk feature whereby the court’s determination of the stock’s fair value may give shareholders less than the merger price, and its methodology for determining fair value. Thus, the court deferred certifying the class until it determined which shareholders were willing to opt-in and post some portion of the money they had received in the transaction in the event that the valuation was, in fact, lower than the transaction price. The chancery court in Berger chose to follow Gilliland’s approach of mirroring the appraisal remedy.

Since defendants did not appeal the chancery court’s holdings that they had committed disclosure violations or that quasi-appraisal was the proper remedy, the sole issue on appeal in Berger was the appropriate process for the exercise of quasi-appraisal rights. In an en banc decision, the Delaware Supreme Court reversed the chancery court’s order regarding the process that these shareholders must use. Instead of requiring shareholders to mimic the appraisal process, the Delaware Supreme Court held that these plaintiffs could receive the difference between the merger price and the stock’s fair value without either opting into the proceeding or escrowing any portion of the merger consideration.

The Delaware Supreme Court in Berger wrestled with the policy considerations resulting from the competing models for the quasi-appraisal process delineated in Nebel and Gilliland, and the concomitant benefits flowing to plaintiffs or defendants, respectively. Examining the competing processes ordered by the lower courts in Nebel and Gilliland, the Delaware Supreme Court first acknowledged the similarities between the two processes: both would require defendants to make supplemental disclosure, and both would permit minority shareholders to seek the difference between the merger consideration and the appraised value of their shares. The differences between the two processes, however, underscore which side would benefit from each process. The supreme court considered the opt-in/opt-out feature,

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125 Gilliland, 873 A.2d at 312-14.
126 Berger, 2008 Del. Ch. LEXIS 63, at *19.
128 Id. at *27-34.
129 In Berger, the Delaware Supreme Court listed and quickly dismissed two other possible remedies: one, a “replicated appraisal” proceeding whereby minority shareholders electing appraisal would formally demand appraisal rights; and two, a remedy similar to the one afforded in suits arising under a “long form” cash out merger, namely, a shareholder class action proceeding whereby fiduciary conduct is scrutinized under entire fairness review. Id. at *18-20.
130 Id. at *26.
and concluded that while neither option burdens the defendant corporation, shareholders are considerably disadvantaged by an opt-in system because they may fail to opt-in properly.131 As such, the supreme court reasoned that it was "self evident which alternative is optimal."132 Regarding the escrow provision, the supreme court agreed with defendants' argument that shareholders would receive a "dual benefit" if they could retain the merger proceeds while they litigate the fair value of the stock.133 Nevertheless, the supreme court reasoned that the "dual benefit" accruing to these shareholders would not be inequitable considering that defendants had violated their disclosure obligations,134 and noted that minority shareholders enjoy that same dual benefit when they bring a class action to challenge a long-form merger based on defendants' alleged breach of fiduciary duty.135 In essence, the Delaware Supreme Court concluded that if a windfall to one side must occur, it is more equitable to benefit innocent shareholders rather than wrongdoing defendants.136

While the Delaware Supreme Court in Berger created a quasi-appraisal process that favored those plaintiffs, the court concluded its opinion with a caveat. The court ordered the quasi-appraisal remedy to operate in a fashion beneficial to shareholders "in the circumstances presented here."137 Elaborating upon circumstances which might warrant a different quasi-appraisal process, the supreme court summarized its holding by concluding:

If only a technical and non-prejudicial violation of 8 Del. C. § 253 had occurred, the result might be different. In some circumstances, for example, where stockholders receive an incomplete copy of the appraisal statute with their notice of merger, the Gilliland remedy might arguably be supportable.138

In sum, the Delaware Supreme Court in Berger did not decide that the process in all quasi-appraisal proceedings would be uniformly pro-plaintiff. Instead, the Delaware Supreme Court held that where the defendant committed serious disclosure violations in a short-form merger, the quasi-appraisal process should be

131 See id. at *29 (noting that shareholders who fail to opt-in properly forfeit their opportunity for recovery).
132 Id. at *30.
133 Id. at *31.
134 Id.
135 Id.
136 Id.
137 Id. at *34. In considering whether to impose an opt-in with a partial escrow requirement or an opt-out system with no escrow requirement, the Delaware Supreme Court stated, "[c]onsiderations of utility and fairness impel us to conclude that the latter is the more appropriate remedy for the disclosure violation that occurred here." Id. at *27 (emphasis added).
138 Id. at *35–36.
shareholder friendly, and in dictum, speculated that mere technical violations might warrant a different process. In essence, the court ordered that this equitable remedy be used in an equitable way; that, in turn, requires the chancery court to make fact-specific determinations to fashion the appropriate quasi-appraisal process.

C. Uses and abuses of the quasi-appraisal remedy

It is a bit surprising that the small number of quasi-appraisal cases unearth so many concerns about this equitable remedy. First and most obvious is that in most of the cases, plaintiffs were not part of the class to whom Weinberger specifically limited quasi-appraisal rights. Other than Patents, Bershad, and Kahn, which recognized that the remedy was limited to a specific class created in Weinberger, none of the other cases discussed that the plaintiffs at hand were not within the class for whom Weinberger created quasi-appraisal rights. These three cases, however, raise the question of standing. As noted above, Weinberger did not put any qualifications—other than temporal—on the plaintiff class that could be awarded quasi-appraisal rights. While the court in Patents agreed that the temporal qualification was the only limitation on the quasi-appraisal class, neither Bershad nor Kahn accepted that Weinberger’s offer of quasi-appraisal rights was otherwise without qualification. Instead, both Bershad and Kahn further limited standing to those shareholders in the Weinberger window that had not acquiesced to the transaction.

139 The chancery court has also awarded quasi-appraisal rights in a unique situation where an estate could not demand its appraisal rights. In In re PNB Holding Co., C.A. No. 28-N, 2006 Del. Ch. LEXIS 158 (Aug. 18, 2006), the executor of the estate was the corporate defendant which failed to find a replacement executor who could demand the estate’s appraisal rights even though the executor knew the beneficiaries, as individuals, were demanding their appraisal rights. As the estate did not perfect its appraisal rights, the court held that it was not entitled to those rights. Id. at *118. The court, however, granted the estate quasi-appraisal rights because the defendant had wrongfully deprived the plaintiff-estate of its appraisal rights. Id. at *118--19.


141 See supra notes 66-69 and accompanying text (discussing limits Weinberger imposed on use of a quasi-appraisal remedy).

142 See Patents Mgmt. Corp. v. O’Connor, C.A. No. 7110, 1985 Del. Ch. LEXIS 454, at *6–8 (June 10, 1985) (“Because the effective date of the present cash-out merger was January 21, 1983, the plaintiff is therefore entitled to the quasi-appraisal remedy established in Weinberger.”).


144 Kahn, 591 A.2d at 177; Bershad, 535 A.2d at 848; see also Fung, supra note 89, at 55-
Second, the supreme court in *Weinberger* created the quasi-appraisal remedy to replicate the appraisal remedy which plaintiffs had eschewed based on old information on how appraisal valuation would be computed and what conduct would be remedied. Other than arguably the plaintiffs in *Patents*, Bershad, and Kahn, there was no such misunderstanding, nor could there be, since all other cases under consideration were post-*Weinberger* cases and outside of the *Weinberger* window; in these other cases, plaintiffs had fair notice of *Weinberger*'s significant revision to appraisal valuation. What, then, was the premise for awarding quasi-appraisal rights in subsequent cases when the original purpose of the remedy no longer existed? Rather than plaintiffs foregoing the appraisal remedy because its valuation methodology was outdated, the closest parallel to *Weinberger* might be plaintiffs' misunderstanding about whether they had an appraisal remedy at all. Such a misunderstanding could derive from a technical violation of the appraisal notice provisions, as in *Nebel* (inaccurate copy of the appraisal statute) and *Berger* (outdated copy of the appraisal statute). In such a fact pattern, plaintiffs did not demand their appraisal rights because presumably, they did not know they had them. Quasi-appraisal rights put these shareholders in the position they would have been in had defendant properly provided notice of appraisal rights.

More often, however, quasi-appraisal cases are not cases where the defendant has failed to notify adequately plaintiffs of their appraisal rights. Instead, the primary fact pattern is that defendant allegedly violated its fiduciary duty to disclose, and that violation impacted plaintiffs' process of deciding whether to take the merger consideration or demand appraisal rights, as in *Gilliland* and *Berger*. Those courts reasoned that regardless of the type of disclosure violation, the quasi-appraisal remedy makes sense in a short-form merger: since plaintiffs' sole remedy is appraisal, their equitable substitute should be quasi-appraisal.

This logic has some appeal because in a short-form merger, plaintiffs have no vote and thus no ability to stop the transaction. Therefore, courts ought not to rescind the inevitable transaction or award rescissory damages. Moreover, the supreme
court in *Glassman v. Unocal Exploration Corp.* held that controlling shareholders do not have to prove fairness in a short-form merger, thereby solidifying appraisal rights as the appropriate remedy in these transactions. Even in this limited fact pattern, however, concerns about awarding quasi-appraisal rights may arise if one considers the numerous ways that quasi-appraisal rights can provide a windfall to plaintiffs. The major source of such concerns relates to the process for awarding quasi-appraisal rights.

For example, without ever using the term quasi-appraisal rights, the chancery court in *Smith v. Shell Petroleum, Inc.* rejected both plaintiffs' and defendant's proposed remedies after the court found that the defendant corporation had unintentionally violated its disclosure obligations in connection with a short-form merger. Defendant asked the court to recreate the appraisal process after defendant issued corrective disclosure. In contrast, plaintiffs asked the court to grant them the difference between the value they received in the short-form merger and the amount that the then-pending appraisal proceeding ultimately determined to be the fair value of the stock. Moreover, plaintiffs asserted that they should not have to undertake any "mechanical steps," such as returning all or part of the consideration they had already received, in order to obtain the appraised value of their shares. The chancery court rejected plaintiffs' proposed remedy, reasoning that the class members would be far better off than those shareholders who had originally elected appraisal rights because the class members had use of the merger consideration for five years and had never assumed any risks inherent in seeking appraisal rights. Furthermore, plaintiffs' proposed remedy was based on the "unsound" assumption that all class members would have demanded appraisal rights if the defendant had originally made full disclosure. The chancery court cited to its decision in *Joseph v. Shell Oil Co.*, where only half of 1% of the tendered shares were withdrawn after shareholders received revised disclosure documents. The court in *Shell Petroleum* emphasized, "[t]he low percentage of shares withdrawn after receipt of the revised disclosures indicates that, although the additional information disclosed was 'material' in the legal sense of promoting full disclosure, there was little direct causal relationship

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149 777 A.2d 242 (Del. 2001).
150 Id. at 248.
152 Id. at *1, *6.
153 Id. at *5.
154 Id.
155 Id. at *6–7.
156 Id. at *7–8.
157 482 A.2d 335 (Del. Ch. 1984).
between that information and the decision whether to tender.\textsuperscript{159} Rather than accepting either proposed remedy, the court in \textit{Shell Petroleum} fashioned its own equitable remedy, awarding plaintiffs a minimal $2 per share.\textsuperscript{160}

It is notable that the court in \textit{Shell Petroleum} was concerned about the inequities of granting shareholders the equivalent of quasi-appraisal rights when these shareholders had not undertaken any risks in the then ongoing appraisal process.\textsuperscript{161} By extension, it would be an even greater inequity to grant quasi-appraisal rights \textit{after} the appraisal process is completed. Nevertheless, this is exactly the fact pattern in \textit{Nebel}. In that case, the chancery court had already completed its appraisal valuation and determined that the appraised price exceeded the merger price.\textsuperscript{162} The court awarded all shareholders a quasi-appraisal price equivalent to the appraised value.\textsuperscript{163} The court presumably reasoned that it was useless to require shareholders to mimic the appraisal process by posting a portion of the merger consideration and opting in, since all shareholders would opt in for the then known higher price. The court in \textit{Nebel} did not, however, indicate any concerns about this windfall to plaintiffs. Moreover, if one were inclined to afford plaintiffs a windfall recovery, it might be in a case where defendant was guilty of some egregious misconduct, not in a case, like \textit{Nebel}, where the defendant (or his lawyer), although failing to include an accurate copy of the appraisal statute, nevertheless included a complete copy of the process for obtaining appraisal rights under Delaware law.\textsuperscript{164}

It was not until 2005, in \textit{Gilliland v. Motorola, Inc.},\textsuperscript{165} that a Delaware court again recognized the potential concerns raised earlier in plaintiffs’ proposed remedy in \textit{Shell Petroleum} that quasi-appraisal rights, improperly used, can provide a windfall to plaintiffs. \textit{Gilliland} raised two ways that such a windfall can occur: one, when the court certifies the class as all minority shareholders;\textsuperscript{166} and two, when plaintiffs do not assume the risk that the appraisal valuation might result in a price that is lower than the transaction price.\textsuperscript{167} More specifically, the court was concerned that qua-

\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.} at \textsuperscript{*}13–14; \textit{see also infra} notes 170–73 and accompanying text (noting the court’s rejection of defendant’s proposed remedy as well).
\textsuperscript{161} \textit{Shell Petroleum}, 1990 Del. Ch. LEXIS 190, at \textsuperscript{*}7.
\textsuperscript{163} \textit{Id.}
\textsuperscript{164} \textit{See Nebel v. Sw. Bancorp, Inc.}, C.A. No. 13618, 1995 Del. Ch. LEXIS 80, at \textsuperscript{*}17 (July 5, 1995) (calling the violation factually non-material because the information contained in the missing appraisal statute was provided elsewhere in the disclosure).
\textsuperscript{165} 873 A.2d 305 (Del. Ch. 2005).
\textsuperscript{166} \textit{Id.} at 308–09.
\textsuperscript{167} \textit{Id.} at 309.
si-appraisal rights can distort the risk/reward balance factored into the appraisal remedy if, as prior cases had allowed, the remedy becomes a class-action lawsuit that promises a risk-free upside by allowing shareholders the option of the quasi-appraisal valuation or the transaction price. Moreover, if courts fashion the quasi-appraisal remedy to be more plaintiff-friendly than is the statutory appraisal remedy, plaintiffs have an incentive to delay filing their suit until sufficient time has elapsed to make disclosure and shareholder choice an impractical option. Indeed, in Gilliland, the court considered whether plaintiff's one-year delay in filing the complaint should have any bearing on the remedy. Thus, courts need to be mindful of the various ways that quasi-appraisal rights can provide plaintiffs with a windfall recovery.

Although some courts, like Gilliland, have considered the risk of a windfall to the plaintiffs, there is also a legitimate concern that defendants may profit from the quasi-appraisal remedy. As noted above in Smith v. Shell Petroleum Inc., the chancery court also rejected the defendant's proposed remedy, which was correcting its disclosure and recreating the appraisal process. In this proposal, plaintiffs would have to decide either to take the merger consideration or to opt for their appraisal rights, and those opting for appraisal rights would first have to return the merger consideration, with interest, and take their chances with the appraisal process. The court rejected defendant's proposal as unfair because it sought to recreate the appraisal remedy five years after the merger had occurred. The court reasoned that some shareholders, after viewing the corrected disclosure, might want to demand their appraisal rights but might be financially unable to return the consideration received so many years ago. Perhaps most significantly, however, the court found that defendant's proposal would undermine its disclosure obligations; defendants could violate their fiduciary duty to disclose, and if they got caught, issue the disclosure five years later that they should have made originally. This policy concern, no doubt, is amplified in cases where, unlike Shell Petroleum, the court finds that defendant's violations were willful. Thus, courts have not provided a justification for awarding quasi-appraisal rights outside of the Weinberger window, but their deci-

168 Id.
169 Id. at 309-10. If a properly-focused quasi-appraisal remedy is the appropriate remedy, a court might consider sanctioning plaintiff's improper delay with some modification or denial of prejudgment interest, rather than denial of quasi-appraisal rights.
171 Id. at *9-11.
172 Id.
173 Id. at *10-11.
174 Id.
175 Id. at *11.
sions to do so have resulted in concerns about possible windfalls to both sides.

The Delaware Supreme Court's recent decision in Berger v. Pubco Corp.176 resolved these competing policy considerations. As noted above,177 the Delaware Supreme Court decided that at least where defendants commit serious disclosure violations in connection with a short-form merger, courts should employ the quasi-appraisal process that benefits the innocent shareholders.178 The supreme court also stated in dictum, however, that a mere technical violation might warrant a different quasi-appraisal process.179

A third concern about the uses and abuses of quasi-appraisal rights arises when a court factors quasi-appraisal rights into its calculations in deciding whether or not to grant an injunction. In Steiner, Ocean Drilling, and Tsivelekidis,180 the defendants' arguable disclosure violations were not in connection with a short-form merger, but were instead in connection with a tender offer—a transaction that does not provide for appraisal rights. The courts' logic was that if the tender offer is successful, it will be followed by a short-form merger where plaintiffs have appraisal rights. Therefore, if plaintiffs have not tendered their stock in the tender offer, they have the option in the short-form merger of demanding appraisal rights. Alternatively, if they have tendered their stock in the tender offer and are subsequently successful in proving a disclosure violation, they can have quasi-appraisal rights. What the courts miss in this analysis, however, is that the injunction is plaintiffs' only means to compel full disclosure at the time of the transaction. Quasi-appraisal is not an equitable substitute for adequate disclosure when plaintiffs have a choice to accept or reject the proposed transaction. With proper disclosure, the tender offer might not be successful, thereby not allowing the defendants to effectuate a short-form merger and its attendant appraisal rights. Where the transaction needs plaintiffs' willing participation, the only workable remedy is to order new disclosure and allow plaintiffs to make their own investment decision. In Steiner, Chancellor Allen explicitly recognized this point when he reasoned that corrective disclosure is imperative in transactions where shareholders have a choice.181 As a result, chancery courts should exclude quasi-appraisal rights from their consideration of whether to grant a preliminary injunction

177 See supra notes 134-136 and accompanying text.
178 Berger, 2009 Del. LEXIS 345, at *34-35.
179 Id.
180 See supra notes 95-103 and accompanying text.
unless they are quite confident that plaintiffs’ alleged disclosure violations are not viable.

Fourth, these injunction cases raise an important issue regarding the scope of quasi-appraisal rights. As discussed above, these courts argued that the quasi-appraisal remedy would be available to tendering shareholders if they ultimately prove their alleged disclosure violation. For example, the court in Steiner reasoned that the quasi-appraisal remedy was “designed to give each tendering shareholder the equivalent of the appraisal remedy [in such circumstances].” In fact, however, under “such circumstances”—plaintiffs proving defendant breached its fiduciary duty—the quasi-appraisal remedy would exceed the scope of the appraisal remedy, which Rabkin, Cede, and Nebel insist is limited only to issues involving valuation, but not misconduct. Indeed, the chancery court in Nebel stated, “disclosure-based claims are beyond the capability of appraisal to resolve, because the remedies appropriate to such claims would be inconsistent with the relief available in a statutory appraisal.” Instead, “in such circumstances,” quasi-appraisal rights mimic the unspecified equitable remedies the Cede court offered for disclosure violations and other misconduct.

Thus, the Delaware Supreme Court in Berger implicitly placed the quasi-appraisal remedy in the arsenal of available equitable remedies, despite Weinberger’s clear temporal constraints. Berger, and the other quasi-appraisal cases, leaves courts with much to consider about this equitable remedy. While the Delaware Supreme Court in Berger defined the contours of the quasi-appraisal process when defendants commit serious disclosure violations in the context of a short-form merger, Berger left open the question of how the quasi-appraisal process would operate where defendants commit only a technical violation in a short-form merger, as well as the quasi-appraisal process in long-form mergers, where the equities and relief might differ. In so deciding, courts need to consider the possibility of a windfall recovery to

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182 See supra notes 96–98 and accompanying text.
183 Id. at *6.
184 See supra notes 80–88.
185 C.A. No. 13618, 1995 Del. Ch. LEXIS 80, at *7 (July 5, 1995).
186 See supra notes 82–88. In Ocean Drilling, the chancery court described quasi-appraisal as a broad equitable remedy capable of addressing fiduciary duty breaches: “Because a quasi-appraisal remedy is available to even tendering shareholders where a showing can be made that the controlling shareholder or board have breached their fiduciary duties to the minority shareholders,” a remedy will be available to the plaintiffs should the court deny the injunction request. In re Ocean Drilling & Exploration Co. S’holders Litig., C.A. No. 11898, 1991 Del. Ch. LEXIS 82, at *25 (Apr. 30, 1991).
187 See supra notes 136–138 and accompanying text.
188 In contrast to the possible relief available for violations in a long-form merger,
plaintiffs or defendants, as well as policy issues that are concerned with requiring the defendant to make a full disclosure so as to permit plaintiffs to make their own investment decisions. Undoubtedly, part of this evaluation should be the court’s view of whether the defendants are true wrongdoers, as in Berger, and whether the plaintiffs could have brought a timely action to remedy the disclosure violation. Consistent with Berger’s dictum, these hazards of the quasi-appraisal remedy need to be part of a court of equity’s concerns if this equitable remedy is to do more good than harm.

III: The Collision of Doctrines

A. The Schnell Doctrine and the Doctrine of Independent Legal Significance

As detailed above, Delaware courts utilize the Schnell doctrine to invalidate otherwise legal conduct. While the first section raised concerns about the unbridled use of the Schnell doctrine, this section examines whether the Schnell doctrine retains its potency when it collides with another legal doctrine. Specifically, Delaware law has another doctrine, the doctrine of independent legal significance, which states that each section of the corporate statute has equal dignity with all other sections. Therefore, if the statute provides two paths to accomplish the same goal, the appraisal rights are the only remedy available to shareholders in a short-form merger. See Del. Code Ann. tit. 8, § 253 (2009).

189 See supra note 138 and accompanying text.

190 Arnold v. Society for Savings Bancorp, C.A. No. 12883, 1995 Del. Ch. LEXIS 86 (Del. Ch. June 15, 1995), raised yet another concern about the quasi-appraisal remedy. While the quasi-appraisal remedy was designed as an equitable remedy, some courts have used it as a legal remedy. Specifically, the court in Arnold noted that Steiner and Ocean Drilling had involved controlling shareholder tender offers. In those cases, those courts reasoned that if the court ultimately determined that the controlling shareholder had breached its fiduciary duties, it could calculate damages through the quasi-appraisal method. The court in Arnold noted that if the quasi-appraisal remedy is used in this way, “the quasi-appraisal is not an equitable remedy, but a method of calculating legal damages for a fiduciary’s breach of his duties.” 1995 Del. Ch. LEXIS 86, at *18. The court in Arnold objected to such a reconfiguration of the remedy, reasoning that the quasi-appraisal remedy must be used only as an equitable way to recreate the statutory remedy which has somehow been denied or discouraged. Later in the opinion, the court in Arnold stated that “If Plaintiff successfully proves a cause of action . . . against the Corporate defendants, then I may employ the quasi-appraisal remedy as a method of establishing Plaintiff’s loss.” Id. at *21. In other words, the court would consider using the valuation methodology in quasi-appraisal rights in contexts other than those where the plaintiff had not lost his appraisal rights. See also Grace Bros., Ltd. v. UniHolding Corp., C.A. No. 17612, 2000 Del. Ch. LEXIS 101, at *46 (July 12, 2000) (suggesting that “an award of quasi-appraisal damages would be within the realm of possibilities as a remedy” even though the transaction complained of would not trigger appraisal rights).

191 See discussion supra Part I.
directors may choose between these paths, even if one path provides rights to shareholders that the other path lacks. For example, in *Hariton v. Arco Electronics, Inc.*, the directors chose to structure the corporate transaction as an asset sale followed by a liquidation, rather than as a merger. Undeniably, had they chosen a merger, shareholders would have had the option to demand appraisal rights, while the directors' chosen path did not afford shareholders these rights. Nevertheless, the Delaware Supreme Court held that since the legislature had created two paths, they were "of independent and equal legal significance." Therefore, the doctrine of independent legal significance gave the directors the right to choose their preferred path. Similarly, in several cases involving a purchase of stock followed by a short-form merger, the Delaware Supreme Court applied the doctrine of independent legal significance to insulate those transactions from attack that together, these two transactions constitute a de facto merger with its attendant appraisal rights.

Although mergers are perhaps the most famous context for the doctrine of independent legal significance, the Delaware courts have also applied this doctrine to several other fact patterns. For example, in *Leonard Loventhal Account v. Hilton Hotels Corp.*, the Delaware Chancery Court allowed a corporation to enact a poison pill rights plan that met the requirements of the corporate statute, rather than the requirements delineated in a shareholder-approved amendment to the charter. Similarly, the court utilized the doctrine to deny preferred shareholders the right to a class vote under one section of the corporate statute because the doctrine of independent legal significance gave the directors the right to choose their preferred path.

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192 188 A.2d 123 (Del. 1963).
193 Id. at 125 (citing to Langfelder v. Universal Labs., 68 F. Supp. 209, 211 (D. Del. 1946)).
194 Id.
195 Orzeck v. Englehart, 195 A.2d 375 (Del. 1963). For a discussion of this case and the de facto merger doctrine, see Siegel, *supra* note 2, at 432-34 & n.142. See also Rothschild Int'l Corp. v. Liggett Group Inc., 474 A.2d 133, 136-37 (Del. 1984) (applying the doctrine to hold that the corporation could choose between either a liquidation, or, alternatively, a tender offer followed by a merger); Field v. Allyn, 457 A.2d 1089, 1097-98 (Del. Ch. 1983), aff'd, 467 A.2d 1274 (Del. 1983) (holding that the combination of an acquisition of 92.6% of a majority shareholder's stock, a tender offer, and subsequent short-form merger would not be viewed as a sale of assets because under the doctrine of independent legal significance, a transaction cannot be challenged just because it could be achieved in a different way).
196 See, e.g., Rothschild, 474 A.2d at 136-37 ("[A] merger is not equivalent to a sale of assets . . . [because] 'action taken under one section of [the] law is legally independent, and its validity is not dependent upon, nor to be tested by the requirements of other unrelated sections . . . .'") (quoting Orzeck, 195 A.2d at 378)); Hariton v. Arco Elecs., Inc, 188 A.2d 123, 125 (Del. 1963) (validating the directors' choice to reorganize the corporation through a sale of assets rather than a merger by holding the sale-of-assets statute and merger statute to be independent of each other and of "equal dignity"); Orzeck, 195 A.2d at 376-77 (rejecting plaintiff's challenge to the corporation's purchase of all the capital stock of seven companies without affording plaintiff the statutory rights associated with a merger).
dent legal significance protected the corporation's right to proceed under another provision of the statute that did not afford those rights. Moreover, in Nixon v. Blackwell, the Delaware Supreme Court held that the general corporate statutory provisions and the close corporate statutory provisions were of independent legal significance and did not afford shareholders identical rights. Furthermore, courts have applied the doctrine to tender offers, even though they are not statutory trans-

actions.

The doctrine of independent legal significance and the Schnell doctrine are both fundamentally ingrained in Delaware law. These two doctrines, however, are polar opposites. The doctrine of independent legal significance is a rule of statutory construction, while Schnell is an equitable doctrine. The doctrine of independent legal significance makes legislative decisions supreme, while the Schnell doctrine invalidates in a fact-specific situation exactly what the legislature authorized. Furthermore, the doctrine of independent legal significance precludes shareholder litigation, while the Schnell doctrine invites it. As I have described elsewhere, the fundamental differences between these two doctrines run broad and deep:

Judicial abstention versus judicial activism; form versus substance; certainty versus indeterminacy; deterrence versus encouragement of litigation; and ex ante planning versus ex post judicial resolution. Each doctrine assigns an entirely different role to the market and to courts. The doctrine of independent legal significance permits market solutions within the broad parameters of the corporate statute, while the Schnell doctrine permits judicial review and restructuring of those transactions.

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198 Warner Commc'ns Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962, 970 (Del. Ch. 1989) (finding that under the doctrine of independent legal significance, the corporation could choose a course of action to effectuate the merger as long as it complied with Delaware statutory requirements, and in so doing, could lawfully deny preferred shareholders the right to vote in the chosen transaction).
199 626 A.2d 1366 (Del. 1993).
200 Id. at 1380–81.
201 See, e.g., In re Cox Commc'ns Inc. S'holders Litig., 879 A.2d 604, 623 (Del. Ch. 2005) (discussing the doctrine of independent legal significance's application to two transactional routes to going-private—a tender offer followed by a short-form merger, which does not trigger entire fairness review, and a long-form merger, which does trigger such review); cf. C. Stephen Bigler & Blake Rohrbacher, Form or Substance? The Past, Present, and Future of the Doctrine of Independent Legal Significance, 63 Bus. LAW. 1, 12–13 (2007) (discussing the doctrine of independent legal significance and how the Delaware courts use it, particularly in light of Benchmark Capital Partners, IV, L.P. v. Vague, C.A. No. 19719, 2002 Del. Ch. LEXIS 90 (15, 2002), where the court may have ignored its traditional application solely to statutory transactions).
202 Siegel, supra note 2, at 437 (drawing from D. Gordon Smith, Independent Legal Significance, Good Faith, and the Interpretation of Venture Capital Contracts, 40 WILLAMETTE L. REV. [Vol 15:1]
How should a court proceed when these two doctrines intersect? For example, if the Delaware legislature has offered two routes to the same end, could a court choose to invalidate the directors’ choice under the *Schnell* doctrine, claiming that the directors’ choice was inequitable because it did not grant shareholders the rights they would have had under the other route, or would the doctrine of independent legal significance per se validate the directors’ choice? Of the seven cases that cite both doctrines, only one case allowed the *Schnell* doctrine to trump the doctrine of independent legal significance, and two cases said that *Schnell* could trump the doctrine of independent legal significance. Moreover, the one case that allowed the *Schnell*
doctrine to trump the doctrine of independent legal significance, *Esopus Creek Value, L.P. v. Hauf*,\(^{206}\) arose in the context of shareholder voting: could the corporation sell all of its assets in a voluntary bankruptcy so as to avoid the shareholder vote otherwise required for such a sale? The court reasoned that it would not permit this financially healthy company to proceed via its chosen path when its sole motive for filing for bankruptcy was to sell the assets of the company without complying with the statute's requirement for a shareholder vote:

> The protections of the business judgment rule, when coupled with the doctrine of independent legal significance, provide a board with substantial discretion in determining the proper method by which to structure a material corporate transaction. That discretion, however, remains bounded by fundamental principles of equity that 'necessarily limit what a board of directors can do' in its attempt to consummate such a transaction. At the heart of this mandate lies the oft-cited axiom that 'inequitable action does not become permissible simply because it is legally possible.'\(^{207}\)

In contrast, the two cases that said that the *Schnell* doctrine could trump the doctrine of independent legal significance, *In re Pure Resources, Inc., Shareholder Litigation*\(^{208}\) and *Grace Bros. v. UniHolding Corp.*,\(^{209}\) were not voting cases. In *Pure Resources*, the chancery court did not invalidate the controlling-shareholder's disputed conduct and thus never actually applied the *Schnell* doctrine. Nevertheless, the court not only belittled the doctrine of independent legal significance, but also boldly stated that the *Schnell* doctrine had the upper hand should the two doctrines collide:

> The key inquiry is not what statutory procedures must be adhered to when a controlling stockholder attempts to acquire the rest of the company's shares. Controlling stockholders . . . rarely trip over the legal hurdles imposed by legislation. *Nor is the doctrine of independent legal significance of relevance here.* That doctrine stands only for the proposition that the mere fact that a transaction cannot be accomplished under one statutory provision does not invalidate it if a different statutory method of consummation exists. *Nothing about that doctrine alters the fundamental rule that inequitable actions in technical conformity with statutory law can be restrained by equity.*\(^{210}\)

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\(^{206}\) 913 A.2d 593.

\(^{207}\) Id. at 603 (quoting from *In re The MONY Group, Inc. S'holder Litig.*, 853 A.2d 661, 676 (Del. Ch. 2004), and *Schnell*, 285 A.2d at 439).

\(^{208}\) 808 A.2d 421.

\(^{209}\) C.A. No. 17612, 2000 Del. Ch. LEXIS 101 (July 12, 2000).

\(^{210}\) *Pure Resource*, 808 A.2d at 434 (emphasis added). In a subsequent case, Vice-
Similarly, in *Grace Bros.*, the chancery court did not actually invalidate a reorganization that the defendant directors effectuated through a stock swap that resulted in delisting of the corporation's stock. Relying on the *Schnell* doctrine, the court indicated that the doctrine of independent legal significance would not shield defendants if plaintiffs ultimately proved that the defendants acted inequitably:

Equally ineffective is the defendants' reliance on the doctrine of independent legal significance. It was long ago settled that inequitable action is not insulated from review simply because that action was accomplished in compliance with the statutory and contractual provisions governing the corporation.\(^{211}\)

The instances where these two doctrines can collide can be minimized, however, if each doctrine remains cabined to its original purpose. As discussed above,\(^{212}\) there are many excellent policy reasons for limiting the *Schnell* doctrine only to those cases where directors attempt to eviscerate shareholders' voting rights. The *Schnell* doctrine's collision with the doctrine of independent legal significance is yet another good reason for limiting the equitable doctrine. If *Schnell* could trump the doctrine of independent legal significance, the latter doctrine would have no authority because a court could simply declare the directors' choice to be inequitable. Furthermore, given the deference Delaware courts normally show to the legislature and the statute,\(^{213}\) one would expect courts to defer to the doctrine of independent legal significance in all but the most extreme cases. Moreover, if the *Schnell* doctrine is cabined to director misconduct in voting cases, that doctrine will rarely intersect with the doctrine of independent legal significance.

**B. Quasi-Appraisal Rights and the Doctrine of Acquiescence**

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The Delaware Chancery Court defined the doctrine of acquiescence as "a showing that the plaintiff, by words or deed, has acknowledged the legitimacy of the defendants' conduct."214 Such acknowledgement is meaningful, however, only when plaintiffs have full knowledge of both their rights and the material facts.215 In Nevins v. Bryan,216 for example, the court held that the doctrine of acquiescence barred a plaintiff from contesting the validity of the election of two directors because the plaintiff, who was also a director, knew all the facts but treated the directors as validly elected up until the time the plaintiff brought suit.217

Only two Delaware cases involve the interplay between quasi-appraisal rights and the doctrine of acquiescence: Bershad v. Curtiss-Wright Corp. and Kahn v. Household Acquisition Corp.218 As noted above,219 both cases involved plaintiffs who were within the Weinberger window for quasi-appraisal rights. Although the supreme court in Weinberger had not imposed any further qualifications on those within the window,220 the supreme court in both Bershad and Kahn superimposed the doctrine of acquiescence onto those eligible for quasi-appraisal rights.221 The court in Bershad held that plaintiffs who had either voted for the merger or who had tendered their shares had acquiesced in the transaction and therefore were ineligible for quasi-appraisal rights.222 The supreme court in Kahn agreed with the holding of Bershad in theory, but made an exception for plaintiffs who had tendered their stock based on facts unique to the case.223 The reasoning underlying these two cases was that the quasi-appraisal remedy should be available only to those who were eligible for appraisal rights; since shareholders who vote for a transaction or surrender their stock in exchange for the merger consideration have forfeited their right to appraisal, similarly-situated shareholders should not be allowed quasi-appraisal rights.

214 Clements v. Rogers, 790 A.2d 1222, 1238 n.46 (Del. Ch. 2001); see also Frank v. Wilson & Co., 32 A.2d 277, 283 (Del. 1943) ("Acquiescence properly speaks of assent by words or conduct during the progress of a transaction . . .").


216 Id.

217 Id. at 246-47.


219 See supra notes 66-79 and accompanying text (discussing the Weinberger's standing issues).

220 See supra notes 141-44 and accompanying text (discussing the additional standing limitation imposed by some post-Weinberger courts).

221 See Bershad, 535 A.2d at 848 ("Since Bershad tendered his shares and accepted the merger consideration, he acquiesced in the transaction and cannot now attack it."); Kahn, 591 A.2d at 177 (considering both acquiescence and estoppel's role in narrowing the plaintiff class).

222 Bershad, 535 A.2d at 848.

223 See supra notes 78-79 and accompanying text.
These holdings, however, are directly contrary to Weinberger, where the court included in the quasi-appraisal class those plaintiffs who had acquiesced to the transaction by tendering their stock. Given Weinberger's holding, the supreme court in Bershad and Kahn had to differentiate why it believed the doctrine of acquiescence trumped quasi-appraisal rights. While the supreme court in Weinberger found the defendant had acted wrongfully, the court in Bershad and Kahn found no misconduct by those defendants; clearly, when there is no misconduct, plaintiffs who vote for a merger or tender their stock cannot claim that they were misled or relied unjustifiably on the defendant's disclosure. Such logic, however, misses the additional issue that while these plaintiffs may not have been misled by defendant's disclosure, these plaintiffs—all in the Weinberger window—may have voted for the transaction and forsaken their appraisal rights without the knowledge that Weinberger had liberalized appraisal valuations.

Although no other Delaware case features the interplay between the doctrine of acquiescence and quasi-appraisal rights, there are a few cases in which the doctrine of acquiescence clashes with plaintiffs' request for equitable relief in connection with a transaction that offered appraisal rights. In contrast to Bershad and Kahn, which had held that the doctrine of acquiescence bars stockholders who tender their stock from receiving quasi-appraisal rights,22 the chancery court in In re Best Lock Corp. Shareholder Litigation225 held the opposite: the doctrine of acquiescence does not bar stockholders who tender their stock from equitable relief if they successfully prove misconduct.226 The court in Best Lock differentiated Bershad by arguing that in that case, plaintiffs challenged only the fairness of the price, which is exactly what an appraisal action covers; when those plaintiffs voluntarily exchanged their shares, they abandoned their appraisal rights and, by extension, deserved to lose their quasi-appraisal rights. The chancery court in Best Lock concluded: "The result in Bershad would, in my opinion, have been different had the plaintiffs raised a colorable duty of loyalty claim, as the plaintiffs in this case have done, or if there had not been a ratifying vote of the minority shareholders."227 The chancery court in Best Lock similarly distinguished its facts from those in Kahn, arguing that those defendants had not breached their fiduciary duties, thereby leaving plaintiffs to challenge only the fairness of the merger price.228 Furthermore, the court in Best Lock reasoned that the doctrine of acquiescence bars plaintiffs who themselves engage in inequitable conduct229

224 See supra notes 218–23 and accompanying text.
225 845 A.2d 1057 (Del. Ch. 2001).
226 Id. at 1081.
227 Id at 1079.
228 Id.
229 Id. at 1080 ("[B]efore a plaintiff's claim will be barred by acquiescence, it must be
or who evince unequivocal approval of the transaction, and neither bar was applicable to the facts at hand.

The chancery court in *Best Lock* then proffered policy reasons as to why the doctrine of acquiescence should not bar tendering shareholders from seeking equitable remedies. The court found it anomalous that:

[A] unanimous ratifying vote of the minority shareholders (when they were still in a position to prevent the merger from happening, if the merger were conditioned on the ratifying vote) did not extinguish an equitable claim but the simple act of tendering shares once the merger was consummated did . . . a ratifying vote seems both to be more voluntary and to provide more unequivocal approval of a transaction than tendering shares in the face of a Hobson's choice between pursing a potentially inadequate appraisal remedy and accepting potentially unfair merger consideration tainted by self-dealing . . . Stated differently, acquiescence (or ratification implied from the actions of shareholders) should not be given greater force than explicit ratification. It would be anomalous, to say the least, to extinguish equitable claims based on implied approval (or acquiescence) when such claims are not extinguished by explicit approval (or ratification). Under defendants' interpretation of *Bershad* and *Kahn*, however, any fully informed shareholder who tendered shares would be barred from pursuing an equitable claim, even if that shareholder explicitly disapproved of the transaction. This cannot be the proper result.

Similarly, the chancery court in *In re PNB Holding Co. Shareholders Litigation* followed *Best Lock* and held that even when defendants made a full disclosure, tendering shareholders lose their right to appraisal but not to equitable relief as long as they did not vote for the merger. Referring to the doctrine, the chancery court reasoned from conflict-of-interest transactions, governed by the Lynch doctrine, whereby informed approval by a majority of the minority shares does not validate the transaction, but serves only to shift the burden of proof to the plaintiffs to prove that the transaction is unfair. The chancery court reasoned that the logic of Lynch has persuaded courts "that the concept of acquiescence cannot logically apply in a case governed by Lynch." *PNB*, 2006 Del. Ch. LEXIS 158, at *78-79. The court found *Lynch* inapplicable to the case at hand.
soned that the doctrine of acquiescence operates:

[W]hen an uncoerced stockholder, acting on an informed basis, casts an affirmative vote in favor of a transaction. If informed, uncoerced stockholders wish to challenge a transaction, the least that can be expected of them is that they not endorse it through a yes vote in the first instance. That is, if a stockholder says ‘yea’ in the election, she cannot say ‘nay’ in court if her vote was informed and uncoerced. The ballot box is the most important place to register opposition, not the courthouse. Therefore, the ... stockholders who cast yes votes are barred by the doctrine of acquiescence from challenging the Merger.235

In contrast, the court held that the doctrine of acquiescence did not bar from equitable relief the group that did not endorse the merger, but instead tendered their stock and accepted merger consideration. The chancery court in PNB reasoned that “[a]cceptance of the merger consideration is simply an abandonment of the appraisal right, no more and no less ...”236 Therefore, these shareholders could seek equitable relief.

In sum, courts agree that tendering stock would bar a shareholder from pursuing appraisal rights, but disagree about whether tendering stock would also bar a shareholder from pursuing an equitable claim. The supreme court in both Bershad and Kahn held that, barring unusual circumstances, the doctrine of acquiescence barred those shareholders who had either voted for the merger or accepted the merger consideration from pursuing an equitable remedy, including quasi-appraisal rights. In contrast, the chancery courts in Best Lock and PNB disagreed; those courts held that the doctrine of acquiescence barred only those shareholders voting for the transaction, but not those tendering their stock in exchange for the merger consideration, although clearly those tendering could no longer demand their appraisal rights. Thus, if quasi-appraisal rights are viewed as an equitable substitute for appraisal rights, as in Kahn, Gilliland, and Berger, those tendering their stock should be deemed to have acquiesced unless there is a disclosure violation that would make such acquiescence meaningless. In contrast, if quasi-appraisal rights are viewed simply as an equitable remedy, as in Steiner, Ocean Drilling, and Tsivelekidis, then the doctrine of acquiescence would not bar tendering stockholders from pursuing a claim for quasi appraisal rights.

236 Id. at *82.
Conclusion

Equitable doctrines play an important role in providing justice to an aggrieved party. The Schnell doctrine restricts directors who attempt to stay within the letter of the law while effectively disenfranchising shareholders. Quasi-appraisal rights provide shareholders with the appraisal remedy they would have had but for some issue that prevented them from knowing the benefits of demanding their appraisal rights, or even that they had them. These equitable doctrines are, however, potent, amorphous, and ambiguous. Unless courts keep a laser-sharp focus on the purpose of these remedies, they threaten to unravel much of the fabric of our law.