CORPORATE LAW—CHIPPING AWAY AT THE DELAWARE BLOCK: A CRITIQUE OF THE DELAWARE BLOCK APPROACH TO VALUATION OF DISSENTERS' SHARES IN APPRAISAL PROCEEDINGS

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I. Introduction

When certain major corporate transactions occur, such as merger, consolidation, or sale of all or substantially all assets, every state provides dissatisfied or dissenting shareholders with a statutory appraisal process. During the appraisal process a court, or its appointed appraiser, will ascertain the value of the dissenters' shares, and a court will order the corporation to purchase those shares at the judicially assessed amount. Unfortunately, legislatures have offered little guidance in the valuation of corporate shares.

1. See infra note 35 and accompanying text. The events required to trigger such provisions vary from state to state. All states include merger and consolidation. However, some states do not provide appraisal rights in the event of a sale of assets. E.g., DEL. CODE ANN., tit. 8, §§ 262(a) and (b) (1983). A discussion of the mechanics involved in invoking appraisal rights is beyond the scope of this note. Interested readers are referred to W. FOLK, THE DELAWARE GENERAL CORPORATION LAW 372-80 (1972).

2. While some states require a court appraisal of the dissenter's shares, see, e.g., DEL. CODE ANN., tit. 8, § 262(h) (1983), many other states allow the court to appoint an appraiser or board of appraisers. See, e.g., MD. CORPS. & ASS'NS CODE ANN. § 3-210(a) (1975); N.J. STAT. ANN. § 14A:11-8(c) (West 1969); TEX. BUS. CORP. ACT ANN., art. 5.12C (Vernon 1980). In those states, where judicially appointed appraisers are allowed, the appraiser's findings are subject to review. See, e.g., In re Bickerton v. N.Y. Theatre Co., 232 N.Y. 1, 133 N.E. 41 (1921) (New York no longer permits court appointed appraisals); Martignette v. Sagamore Mfg. Co., 340 Mass. 136, 163 N.E.2d 9 (1959).


4. See infra notes 36-56 and accompanying text. Surprisingly, many courts resolved the matter of what was taken similarly. Courts agreed that what was being taken was an individual's aliquot share in a going concern. Chicago Corp. v. Munds, 20 Del. Ch. 142,
Originally, courts and appraisers would use one of three methods of valuing stock (or business enterprises): net asset value, net earnings value, and market value. The majority of courts have now come to accept, however, "an eclectic or compromise theory of appraisal, whereby the value of the business is supposed to depend to some extent" on each of the above three methods. The appraiser first obtains a value from each of the three methods, then weights those values according to the facts of a particular case. This method is known in common parlance as the "Delaware block approach" or the "weight-
For roughly forty years, courts have commonly invoked the Delaware block approach to valuation with little or no justification. In recent years, a small number of critics have emerged to question the accuracy and reliability of the Delaware block approach.

This essay will first provide a brief history of appraisal rights. Second, the essay will describe how the Delaware block approach is used as a valuation technique in light of the objectives of the appraisal statutes in order to establish a foundation on which to examine the effectiveness of the statutes. The basic thesis of this essay is that the Delaware block approach is an inaccurate and suspect means of valuation which often undervalues corporate shares. Lastly, this essay suggests that a better alternative exists, which is more accurate than the Delaware block approach and more complementary to the objectives of the appraisal statutes. Specifically, the essay advocates the use of the discounted cash flow method as a more accurate means of valuing dissenters' shares.

II. BACKGROUND

A. Appraisal Rights

In the mid-nineteenth century, before the time of the great

exclusive appraisal valuation method and accorded it significant precedential reverence. Weinberger v. UOP, Inc., 457 A.2d 701, 712-13 (Del. 1983); see also Rosenblatt v. Getty Oil Co., 493 A.2d 929, 934 & n.6 (Del. 1985). Oddly enough, the U.S. District Court of Hawaii was the first to refer to the weighting methodology adopted in Delaware as the Delaware block approach:

... those stock appraisal situations wherein what this court calls the Delaware "block" weighting methodology is used, i.e., the market price, investment value, and net asset value methods ... are independently blocked off and separately valued. Then these "block" values are each weighted to obtain a final valuation figure.


12. Id. at 1033.
13. See generally, id. (the fallacy of the approach lies in its requirement that separate and competing values be compromised). Comment, supra note 3, at 777-88.
trusts,14 corporations were ordinarily small, relatively unsophisticated organizations15 resembling in many respects a closely knit partnership.16 With the tremendous growth of working capital in the late nineteenth century and the expansion of corporate enterprise, the common law that had evolved to regulate the affairs of smaller, more traditional businesses proved inadequate for the larger concerns of the industrial boom.17 At common law, for instance, since "one shareholder in a corporation could block all others from making any fundamental change in the corporation's business,"18 unanimous consent of the shareholders was necessary in most jurisdictions to effectuate basic changes.19 The corporate charter was seen as a contract among the


16. Id. The author intentionally qualifies the term "partnership" since, to practitioners and scholars in the field of business law, it is not necessarily true that partnerships are small and unsophisticated. Unlike the partnerships of Professor Levy's day, modern partnerships are often large and highly complex enterprises. Basile, Admission of Additional and Substitute General Partners to a Limited Partnership: A Proposal for Freedom of Contract, 1984 ARIZ. ST. L. REV. 235, 236 & n.3 (1984). The image intended is that of a "Ma and Pa's General Store": a small enterprise composed of very few shareholders and possibly fewer still who actively manage the business. See Note, Valuation of Dissenting Shareholders' Interests in a Merged or Consolidated Corporation, 81 U. PA. L. REV. 985, 985 (1933).

17. See generally Weiner, Payment of Dissenting Stockholders, 27 COLUM. L. REV. 547 (1927)(common law requirements were too inflexible to accommodate change).


Professor Lattin referred to the unanimity requirement as the rule of Natusch v. Irving. N. LATTIN, THE LAW OF CORPORATIONS 571 & n. 4, 576 (2d ed. 1971). The Natusch case involved a partnership, and from that case evolved the principle, later applied to corporations, that unanimous action of the partners was necessary in order to alter the partnership contract. Natusch v. Irving, 47 Eng. Rep. 1196 (1824). The rule of Natusch flourished as an unbudging majority rule well toward the close of the nineteenth century. See, e.g., Abbot v. American Hard Rubber Co., 33 Barb. 578, 582-84 (N.Y. 1861). The monolithic rule began to crumble at the turn of the century in the face of the surging spirit of economic boom. The rule was echoed in Professor Thompson's monumental treatise on corporate
shareholders through which each shareholder was granted certain vested rights,\textsuperscript{20} including control of major corporate affairs.\textsuperscript{21} While corporate actions wrought without unanimous consent were ultra vires, courts often refused to nullify them and effectively provided the corporation with a means of freezing out a troublesome minority.\textsuperscript{22} A frozen out shareholder's only remedy was a suit at law, usually for conversion, or in equity against the corporation.\textsuperscript{23}

Common law principles proved unduly burdensome to large corporations consisting of many shareholders and, in effect, hindered economic growth both for the companies and the country.\textsuperscript{24} Jurists and scholars first saw the need for appraisal rights during an early twentieth century utilitarian trend away from individual protections toward group rights or majoritarianism.\textsuperscript{25} Substantial economic justification

\textsuperscript{20} The doctrine of vested rights which mandated unanimous consent derived from old and well established principles of contract law. Weiss, \textit{supra} note 18, at 627.

\textsuperscript{21} \textit{Id.; Note, supra} note 19, at 1453. Unanimous consent was necessary for such changes as a sale of all or substantially all of a corporation's assets, a change in the nature of the business by charter amendment, a merger or consolidation, or a change in the corporation's capitalization. Levy, \textit{supra} note 15, at 420.


\textsuperscript{23} Weiner, \textit{supra} note 17, at 562; Lattin, \textit{supra} note 3, at 234 n.1 (1931). In such actions "[t]he minority stockholders are . . . entitled to demand their fair share of the transaction and to be placed upon terms of equality with the majority." Tanner v. Lindell Ry., 180 Mo. 1, 21, 79 S.W. 155, 159 (1904)(citing J. STORY, \textit{COMMENTARIES ON EQUITY PLEADINGS}, § 1261-62 (8th ed. 1870)).

\textsuperscript{24} Levy, \textit{supra} note 15, at 420. For a history of the business corporation in light of social and economic issues, see J. \textit{HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION} (1970)(corporations, between 1890 and 1930, were increasingly seen as valuable engines of economic growth, and the desire for such growth served as a considerable justification for abandoning the unanimity requirement). The common law restrictions on the majority were seen increasingly as "serious impediments to the sweeping reorganizations in structure which modern needs had made the order of the day." 12B W. \textit{FLETCHER, supra} note 10, § 5906.1 at 342.

\textsuperscript{25} Manning, \textit{supra} note 3, at 226-27; \textit{see also A. BERLE & G. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY} 68, 112-16 (1932) (in the evolution of business enterprises, the increasing growth in businesses necessitated a dislocation of the three entrepreneurial functions of business structure (1) ownership of interests in business, (2) having power over it, and (3) involvement in operations traditionally seated in the individual, such that the proprietor first became separated from an active operational role, \textit{i.e.,} with the advent of a general partner, and finally became separated from control itself, \textit{i.e.,}
supported such a change. In order to create a business environment conducive to economic expansion, legislatures in most states either abrogated or modified the common law doctrine of vested rights among shareholders, thereby permitting corporate governance by the majority. Yet some courts held such statutes invalid insofar as they failed to provide the dissenters with cash payments. Consequently, legislatures in the modern corporation. Simply put, the needs of the many came to outweigh the needs of the few. For interesting discussions of majority power and the protection of minority interests, see Allau v. Consolidated Oil Co., 16 Del. Ch. 318, 147 A. 257 (1929); Kavanaugh v. Kavanaugh, 226 N.Y. 185, 123 N.E. 148 (1919); and Tanner v. Lindell Ry., 180 Mo. 1, 79 S.W. 155 (1904).

26. See supra note 24 and accompanying text. The trend proved appealing for political and historical reasons as well. See infra note 27; Manning, supra note 3, at 226-27.

27. Thompson, Squeeze-Out Mergers and the “New” Appraisal Remedy, 62 WASH. U.L.Q. 415, 417-18 (1984); 12 B. W. FLETCHER, supra note 10, § 5906.1. One force behind the abrogation of the unanimity rule is said to have come from the once fashionable trend of associating political theory with corporate governance. Manning, supra note 3, at 226. Thus, an oft-cited reason for the abrogation of the common law rule and a counterbalancing provision for appraisal rights is a peculiarly American preference for rule by the majority majoritarianism — on the one hand, and a desire to protect a dissident minority once a system of majority rule is established on the other. Id. at 226-27. See also Letter from Madison to Jefferson, Oct. 17, 1788, in 14 THE PAPERS OF THOMAS JEFFERSON 16, 19-21 (Boyd ed. 1958) (“It is much more to be dreaded that the few will be unnecessarily sacrificed to the many.”).

Majoritarianism also served to lessen significantly the very real problem under the unanimity rule of tyranny of the minority. Such “tyranny” often arose in the form of blackmail whereby individuals holding relatively few shares would stonewall the desires of the majority unless they were convinced, by the proper consideration, to join the majority. This gave a few shares a significant “nuisance value.” See In re Shore, 67 A.D.2d 526, 531, 415 N.Y.S.2d 878, 882 (1979)(citing Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941); In re Timms, 200 N.Y. 177, 181, 93 N.E. 522, 523 (1910); 12B W. FLETCHER, supra note 10, § 5906.1; Note, The Dissenting Stockholders’ Appraisal Statute: Influence of Cost and Interest Provisions Upon the Efficacy of the Remedy, 50 B.U.L. REV. 57 (1970)). See also Thompson, supra note 27, at 417.

The problem of minorities holding back corporate expansion must have been significant, since in some states the courts modified the common law requirement of unanimity well before legislative action to provide for majority rule where transactions were fair. See Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 142 N.W. 434 (1913); Bowditch v. Jackson Co., 76 N.H. 351, 82 A. 1014 (1912); Cohen v. Big Stone Gap Iron Co., 111 Va. 468, 69 S.E. 359 (1910). Such was especially so in industrial states, where the courts were protective of corporate expansion. “At common law,” one court maintained, “the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances or quantity.” Treadwell v. Salisbury Mfg. Co., 73 Mass. (7 Gray) 393, 404 (1856).

28. Winfree v. Riverside Cotton Mills, 113 Va. 717, 75 S.E. 309 (1912). Cf. Hale v. Cheshire R.R. Co., 161 Mass. 443, 37 N.E. 307 (1894) (in a case in which the legislature approved consolidation by special act, the court rejected the claims of dissenting shareholders seeking greater cash awards than what the majority had approved). For instance, in an early Pennsylvania case where the state legislature approved a railroad company merger without any mention of relief for the dissenters, the court reasoned that the legislature had meant to provide such relief but did not through careless oversight. The court then en-
tures acted quickly to provide dissenting shareholders with some form of relief. In most jurisdictions, statutes were enacted which gave dissenter the right to ask "for an appraisal where no agreement as to

joined the merger, but only until the dissenters were fairly cashed out. Lauman v. Lebanon Valley R.R. Co., 30 Pa. 42, 48-49 (1858).

29. The first statutes providing for dissenters’ rights were extremely limited in scope as they were applicable only in cases involving railroads, ferries, piers, docks, or stockyards. See e.g., 1861 PA. LAWS, No. 657, at 703; N.J. ACTS 1878, ch. 49, at 59; 1883 N.J. LAWS, ch. 198, at 243 (cited in Manning, supra note 3, at 246 n.38).

General provision appraisal rights statutes, such as for consolidations and mergers, were enacted by most states between 1896 and 1926. See, e.g., 1896 N.J. LAWS, ch. 185, § 108, at 312; 21 DEL. LAWS 1899, ch. 273, § 56, at 463; 22 DEL. LAWS 1903, ch. 85, § 20 (cited in Manning, supra note 3, at 246 n. 38. See also Weiner, supra note 17, at 547 n.2.

While entreat the majoritarians, courts and commentators recognized the lack of choice forced upon the prospective dissenter and likened the dissenter’s plight to that of the victim of a government condemnation or taking. See, e.g., Alhenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934); Prall v. United States Leather Co., N.J. Misc. 967, 143 A. 382 (1928), aff’d, 105 N.J.L. 646, 146 A. 916 (1929); In re Morris Canal & Banking Co., 104 N.J.L. 526, 141 A. 784 (1928). For instance, one Illinois appraisal statute provided that “the practice and procedure [of appraisal valuation] thereon shall be the same, so far as practicable, as that under the eminent domain laws.” Pridmore v. Whiting Corp., 268 Ill. App. 592, 595 (1932)(citied in 2 BONBRIGHT, supra note 8, at 829 n.40) (quoting ILL. ST. 1931, ch. 32, ~ 73, p. 747 (Cahill ed.).

One commentator attempts to distinguish the two situations by arguing that (1) in eminent domain situations the government is paying the dislodged party from outside funds, while the corporation pays in the dissenter situation; and (2) in an appraisal the dissenter is forced to surrender a business opportunity, including more than mere assets, e.g., future dividends or capital gains, while an eminent domain valuation concentrates on asset values, “since the compensation is meant to enable the owner to obtain other tangible property as a substitute.” Note, supra note 19, at 1455. But the underlying premises of the above arguments are not entirely valid. For instance, in the first argument, the taker is paying the dislodged party in both scenarios, and it is of little importance that the taker is the government in one instance and a corporation (of which the dissenter is no longer a part) in the other. Moreover, regarding the second argument, it is not necessarily true that a dislodged party is given only asset value in an eminent domain proceeding. See e.g. Kimball Laundry Co. v. United States, 338 U.S. 1 (1945) where the court suggested that the dislodged party in a public taking was to be given a proportion of capitalized earnings in order to compensate for lost going concern value. Id. 16-21. All losses are recoverable in eminent domain cases as long as they are proved with reasonable certainty.

In confronting the problem as a taking, courts and legislators were next concerned with what exactly was taken. See, e.g., In re West Waterway Lumber Co., 59 Wash. 2d 310, 314, 367 P.2d 807, 810 (1962); Alhenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934); In re Northwest Greyhound Lines, Inc., 41 Wash. 2d 672, 251 P.2d 607 (1952). One commentator explains that the taking analogy jives well with the “nineteenth century mind’s” view of the corporation and fundamental changes therein. Manning, supra note 3, at 244-46. Contrary to the modern view of the corporation as an “aggregation of human beings and economic assets, a particular kind of social organism that in this society carries out a variety of economic and other functions,” the nineteenth century mind saw the corporation as a legal construct, “as something quite separate from the economic enterprise, three dimensional, virtually alive, a little sacred because of its ’immortality’ and connection with ’sovereign.’ ” Id. at 244-45. In short, the corporation was observed, discussed, and regulated in a levitated sense of abstraction, isolated from the forces with
value could be reached” between the majority and the minority shareholders and to demand the fair cash value of their share. The appraisal statutes raised the significant problem of determining the value of a share of stock. Today all fifty states, the District of Columbia which it interacted, both socially and economically. Professor Manning provided an illustrative digression:

If the Legislature created a particular corporation in the shape of a horse, the horse “could not” moo. It was not that the enterprise should not violate a legislative prescription; it was that the “corporation” could not do so as a matter of inherent capacity. The horse eschews mooing because it is not in its nature to moo; not because some regulatory authority has ordered it to . . . whinny. . . . [Thus in] a corporate merger . . . [i]t the shareholders of corporation A somehow became shareholders of corporation B and no longer shareholders of corporation A. The mere statement of such a preposterous proposition did violence to fundamental principles. How could a man who owned a horse suddenly find that he owned a cow?

Id. at 245-46 (emphasis added).

30. 12B W. FLETCHER, supra note 10, § 5906.1, at 343. “The purpose of these statutes is to protect the property rights of dissenting shareholders from actions by majority shareholders which alter the character of their investment.” Id. at 343; see also Weiss, supra note 18, at 629-41.

Commentators have likened the appraisal remedy to damages in that such statutes are designed to recompense the dissenter with what he lost. 2 BONBRIGHT, supra note 8, at 824, 830 (contemplating a likening to restitutionary damages). See also Jones v. Missouri Edison Co., 144 F. 765, 779-80 (6th Cir. 1906). In the author’s opinion, such comparisons are wasted mental efforts since whether appraisal remedies are or are not like damages is irrelevant. In either case the problem is valuing what the shareholder has lost. Moreover, drawing analogies from the concept of damages is inapposite to the appraisal setting where the courts are not necessarily looking to a party who is at fault, but rather to two parties with a difference of opinion.

31. For other discussion of the problem, see 2 J. BONBRIGHT, supra note 8, at 826-36; E. FOLK, supra note 1, at 372-97 (1972); Lattin, supra note 3, at 233; Levy, supra note 15; Robinson, Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares, 32 COLUM. L. REV. 60 (1932); Weiner, supra note 17; Comment, supra note 19; Comment, Valuation of Dissenting Stockholders’ Shares Under An Appraisal Statute, 23 MO. L. REV. 223 (1958); Comment, Corporations—Standard of Valuation of Dissenters’ Stock Under Appraisal Statutes, 51 MICH. L. REV. 713 (1953); Comment, supra note 3; Note, Appraisal Statutes—An Analysis of Modern Trends, 38 VA. L. REV. 915 (1952); Note, Appraisal of Stock Where Certain Stockholders Have Dissented—Basis For Determining Value, 23 ST. JOHN’S L. REV. 325 (1949); Note, Stock Appraisals: The Dissenting Stockholder and the Concept of Value, 16 BROOKLYN L. REV. 86 (1950); Note, Appraisal Rights: Compensation to Shareholders Dissenting from Mergers and Consolidations, 40 CAL. L. REV. 140 (1952); Note, Judicial Valuation in Corporate Mergers and Consolidations, 47 HARV. L. REV. 847 (1934); Note, Appraisal of Shares of Dissenting Stockholders in Consolidation—American General Corporation v. Camp, et al., 1 MD. L. REV. 338 (1937); Note, Determination of the Value of Dissenting Stockholders’ Shares—Chicago Corporation v. Munds (Del. 172 Atl. 452), 9 TEMP. L. Q. 239 (1935); Note, The Dissenting Shareholder’s Appraisal Remedy, 30 OKLA. L. REV. 629 (1977).

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33 and some United States overseas possessions provide dissenter and appraisal rights upon the occurrence of certain prescribed events.35

B. Objectives of Appraisal Statutes: Defining “Value”

All of the appraisal statutes provide that the dissenter’s shares must be assessed in terms of “value,” yet no statute adequately de-


35. While the statutes may vary considerably in scope and form, nearly all include a consolidation or merger as a triggering event. Manning, supra note 3, at 226. Other events include change in corporate purposes, change in preference of shares, sale of assets, and issuance of stock to employees. Weiner, supra note 17, at 548.

Some commentators have advocated the repeal of all appraisal statutes arguing that appraisal is an anachronism in today’s system of sophisticated and reliable markets. Manning, supra note 3, at 226. Other events include change in corporate purposes, change in preference of shares, sale of assets, and issuance of stock to employees. Weiner, supra note 17, at 548.

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36. Legislators evidently gave little thought to the semantical pitfalls created by the
fines the term. Given the fact that "value" cannot be defined without resort to synonyms or lengthy philosophical discourse, it is probable that legislators intended the ordinary meaning of the term—"dollar amount or the equivalent" or "price". While a number of academics have studied the meaning of "value" in great detail, some in order to assist in judicial valuation techniques, it is doubtful that legislators addressed their choice of language with such exacting scrutiny. Therefore, to clarify the objectives of appraisal statutes, it would make better sense to concentrate on the modifiers used in connection with the term "value," since the meanings of words find their term and left it undefined. To add to the confusion, some legislatures have been so careless as to use different terms interchangeably within the same statute. See, e.g., ALA. CIV. CODE § 7043 (c.1925)(cited in Robinson, supra note 31, at 67-68)(using such terms as "actual value," "full market value," "true market value," and "true value" only sentences apart). In construing a similarly garbled tax valuation statute, the New York Court of Appeals reasoned that "[t]he value of property is determined by what it could be bought and sold for, and there could be no doubt but that these various expressions as used in the statutes all are intended to mean the actual value of the property." People ex. rel. Manhattan Ry. Co. v. Barke, 146 N.Y. 304, 312-13, 40 N.E. 996, 998 (1895)(emphasis added).

37. 1 BONBRIGHT, supra note 8, at 14.
39. 1 BONBRIGHT, supra note 8, at 13-15. "The worth of a thing is the price it will bring." Id. at 15. "Value" has been defined, in ordinary usage, as "the monetary worth of something." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2530 (unabr. ed. 1976).
42. Given the wide disparity in wording and substantive provisions in the appraisal statutes, some commentators question whether legislatures were guided by any articulable objectives at all. See Kanda & Levmore, supra note 10, at 433. One explanation for such great disparity is that legislatures were attempting to mend an entirely novel problem and their legislation was somewhat experimental. Experts writing at the time of much initial appraisal rights legislation suggest that legislatures were concerned that allowing for majority rule posed constitutional problems, in that not giving dissenters rights was confiscatory and inconsistent with shareholders' contract rights. See BALLANTINE, BALLANTINE ON CORPORATIONS 700 (2d ed. 1946); Levy, supra note 15, at 421 & n.5; Dodd, Dissenting Shareholders and Amendments to Corporate Charters, 75 U.PA. L. REV. 584 (1927). Therefore, in order to address the constitutional problem, legislatures desired to compensate minority shareholders and to provide a middle-of-the-road alternative to the extremes of being forced to acquiesce to the majority or prevent the change. Levy, supra note 15, at 427. See also 12 B W. FLETCHER, supra note 10, § 5906.1 at 342-43. In hastening to correct the constitutional problem, legislatures glossed over the mechanical detail necessary for judicial implementation. Levy, supra note 15, at 427. One commentator suggests that legislators borrowed heavily from the English Companies Act of 1862 and in so doing neglected to tailor provisions to local needs. See id.
origins in the purposes for which they are used.\textsuperscript{43}

Examples of expressions used by legislatures include "value,"\textsuperscript{44} "fair value,"\textsuperscript{45} "fair cash value,"\textsuperscript{46} and "fair market value."\textsuperscript{47} Appropriately, courts have subdivided these phrases into those that contain the word "market" and those that do not.\textsuperscript{48} More importantly, in searching for what the correct dollar amount should reflect, courts have distinguished between "fair market value" and "market value."\textsuperscript{49}

Additionally, in states where statutes provide merely the term "value," courts have interpreted the statutes to mean "fair value."\textsuperscript{50}

\textsuperscript{43} I BONBRIGHT, supra note 8, at 10-14; Bonbright, supra note 41, at 518.
\textsuperscript{48} Lattin, supra note 3, at 258-60; Weiner, supra note 17, at 560-62; Robinson, supra note 31, at 66-77.
\textsuperscript{49} 2 BONBRIGHT, supra note 8, at 828, 834-35; Comment, Valuation of Dissenting Stockholders' Shares Under an Appraisal Statute, 23 Mo. L. REV. 223, 231 (1958). One court stated that under some circumstances, "the market quotations should be considered but not accepted as decisive of a fair market price." In re Fulton, 257 N.Y. 487, 493, 178 N.E. 766, 768 (1931).
\textsuperscript{50} See Lattin, supra note 23, at 259-60; Robinson, supra note 31, at 67-68.
The practice of reading fairness into the valuation process, whether
the statute provides for "fair value" or not, suggests that a "fair value"
is different from a "value." In noting such a distinction, legislatures
and courts point to a purpose in providing for fair value, namely, to
avoid figures derived from forced sales. Instead, legislatures and
courts contemplate the mythical willing buyer and willing seller arriv­
ing at a mutually acceptable price, neither having been compelled to
transact. Courts have referred to the above conceptualization as a
share's "intrinsic" value. Since the dissenters' ouster can be likened
easily to a forced sale in the absence of an appraisal remedy, the intrin­
sic value concept is important in that the amount the majority offers
the dissenters may not be fair.

Thus, one objective of all appraisal statutes is to require the cor­
poration to pay the dissenter the cash amount on which a willing
buyer and willing seller, neither being compelled to transact, would
agree for the exchange of an interest in a going concern equivalent to
that surrendered by the dissenter.

C. Origins of the Delaware Block Approach

Since the right to appraisal is purely a statutory remedy, the
history of valuing businesses (and stock therein) in dissenter situations
necessarily begins with such statutes. Yet, the appraisal statutes
failed to provide for any specific valuation procedure. Consequently,
courts, in valuing dissenters' shares, looked to existing stock valuation
techniques in order to fulfill legislative objectives. Judicial valuation

51. See In re Dupignac's Estate, 123 Misc. 21, 27, 204 N.Y.S. 273, 276 (1924).
52. In re Tudor City Fifth Unit, Inc., 17 A.D.2d 794, 794, 232 N.Y.S.2d 758, 760
1950).
55. The "going concern" here is the corporation before the change to which the dis­
  senter objected.
56. Still greater definition is available. For instance, the interest with which the will­
ing buyer and willing seller will be concerned will always be a minority interest, since only
the dissent of a minority will invoke the remedy of the appraisal statute. This arrangement
means that the 'control' value of the minority's shares will usually not be significant, which
in turn allows for the possibility that a fair value for the dissenter's shares will be lower
than the amount offered by the majority. But see Kanda & Levmore, supra note 10, at 433
(authors suggest that "appraisal may have been underestimated or misunderstood because
drafters and courts sitting in review never have linked appraisal to any particular goal of
corporate law").
57. Manning, supra note 3, at 226.
58. See supra notes 29-30.
of shares was common in such areas as tax assessment, 59 cases involving a corporation's conversion of a minority holder's shares, 60 and cases of contested sales of assets. 61

Judicial definition of ambiguous appraisal statute terms came slowly. 62 In earlier cases, some courts concluded that some form of asset value (sales/market or replacement less depreciation and obsolescence) and capitalized earnings were the best indicators of value. 63 Other courts looked primarily to exchange quotations or market value of a company's shares, if established and reliable figures were available. 64 Still, most courts determined that no one formula existed ex-
clusively for valuing dissenters' shares. Of paramount importance, however, is that at some point most courts began to agree that no one factor should be decisive, but rather that a number of factors or methods of valuation should be considered together, perhaps even averaged.

III. THE DELAWARE BLOCK APPROACH TO VALUATION

The landmark decision of *Tri-Continental Corp. v. Battye* set forth the procedure for determining the dissenter's aliquot share of a business under the Delaware block approach:

The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earnings prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value.

too many accidental circumstances entering into the making of market prices to admit them as sure and exclusive reflectors of 'fair value.' " Chicago Corp. v. Munds, 20 Del. Ch. 142, 150-52, 172 A. 452, 455 (1934). *See also* American Seating Co. v. Bullard, 290 F. 896 (6th Cir. 1923); American General Corp. v. Camp, 171 Md. 629, 190 A. 225 (1937); Reesler v. Security Savings & Loan Co., 147 Ohio St. 480, 72 N.E.2d 259 (1947).

65. *See, e.g.*, Matter of Marcus, 191 Misc. 808, 77 N.Y.S.2d 529 (Sup. Ct. 1948)(while a presumption exists that market value is correct, shareholders may attempt to refute it using a number of other methods); *In re Behrens*, 61 N.Y.S.2d 179 (Sup. Ct.), aff'd, 271 A.D. 1007, 69 N.Y.S.2d 910 (1st Dept. 1946)(even if reliable, market alone cannot be used as basis of appraisal valuation).


68. 31 Del. Ch. 523, 74 A.2d 71 (Del. 1950).

69. *Id.* at 526, 74 A.2d at 72. By intrinsic value, the court means more than mere liquidation value. Intrinsic value incorporates both the value of a corporation's assets and the value of its future earning capacity. Oliver Wendell Holmes, Jr., long ago alluded to the essence of intrinsic value in National Bank of Commerce v. New Bedford, 155 Mass. 313, 315-16, 29 N.E. 532, 533 (1892). *See supra* note 60.
Ordinarily, the appraiser will isolate the factors relevant to each of three different methods of valuing enterprises: (A) net asset value, (B) capitalized earnings, and (C) market value. After arriving at a dollar amount for each measure, the appraiser will assign a weight to each measure's resulting figure. As there is no rule of thumb as to the actual numbers to be assigned, the particular weight given each measure is determined by the facts of each case. The appraiser multiplies each factor by its respective weight, and the resulting figures are then added together to obtain the value of the enterprise (or the dissenters' shares). The court will weight the factors, it is said, to ensure that no single factor will be controlling and that the effect of defects in any one will be minimized.

70. While courts long ago realized that a number of factors are important to the willing buyer and willing seller in determining value, *Tri-Continental Corp.*, 31 Del. Ch. at 526, 74 A.2d at 72, they also recognized the distinction between a factor affecting value and a means of measuring value. See, e.g., Allied Chem. & Dye Corp. v. Steel & Tube Co., 14 Del. Ch. 64, 68-69, 122 A. 142, 146 (1923). Still, the three most popular methods of valuation are often referred to as factors. *Folk, supra* note 1, at 380.


72. *Folk, supra* note 1, at 380.


74. *Folk, supra* note 1, at 380. For example, suppose the appraiser makes the following determination with respect to a hypothetical business: asset value of the company equals $3.5 million; earnings value equals $3 million; and market value (number of outstanding shares times the per share market price) equals $3.2 million. Suppose further that the appraiser assigns weights as follows: 60 percent to earnings; 20 percent to asset value; and 20 percent to market value. Thus:

<table>
<thead>
<tr>
<th>Factor</th>
<th>Value</th>
<th>Weight</th>
<th>Result</th>
</tr>
</thead>
<tbody>
<tr>
<td>Asset value</td>
<td>$3,500,000</td>
<td>20%</td>
<td>$700,000</td>
</tr>
<tr>
<td>Earnings value</td>
<td>3,000,000</td>
<td>60%</td>
<td>1,800,000</td>
</tr>
<tr>
<td>Market value</td>
<td>3,200,000</td>
<td>20%</td>
<td>640,000</td>
</tr>
<tr>
<td><strong>Total value</strong></td>
<td><strong>$3,140,000</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Where _t_ is the number of shares outstanding and _n_ is the number of shares held by dissenter _Y_, _Y_ is entitled to payment of the product of the following equation:

\[
\frac{\$3,140,000}{t} \times n
\]

A. Asset Value

Central to valuing an operational entity's assets is the need to value them on a going-concern basis, which is to say that a group of assets is presumed to have a greater value as part of a cohesive, integrated whole than they would were they sold as separate, individual units. Nevertheless, some courts continue to value assets individually. Problems arise when no market exists for particular assets. Ordinarily, in such instances, a court will compute the present cost of replacing the asset, discounting for such matters as depreciation and obsolescence.

B. Earnings Value

The capitalized earnings approach represents a method by which the future income of the enterprise is estimated on the basis of past earnings. The procedure involves two steps: averaging past earnings and capitalizing the resulting average by a multiplier. As a rule, earnings for the five years immediately preceding the precipitat-

76. For a more complete discussion of asset valuation, see Note, supra note 19, at 1457-60; Note, supra note 71, at 634-37; 12B W. FLETCHER, supra note 10, at § 5906.14.
77. Goodwill and other intangible assets are ordinarily included in asset valuation. Alhenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934); In re Seaich, 170 A.D. 686, 156 N.Y.S. 579 (1915), aff'd, 219 N.Y. 634, 114 N.E. 1083 (1916).
79. FOLK, supra note 1, at 381. "By 'fair market value', the Delaware courts mean the price that would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, after consideration of all available uses and purposes of the assets in question . . . ." Nathan & Shapiro, Legal Standard of Fairness of Merger Terms Under Delaware Law, 2 DEL. J. CORP. L. 44,56 (1977). See also Poole v. N.V. Deli Maatschappij, 243 A.2d 67, 70 (Del. 1968).
81. 12B W. FLETCHER, supra note 10, at § 5906.15; Comment, supra note 3, at 780-81. For a more complete discussion of earnings valuation, see Note, supra note 19, at 1464-68; Note, supra note 71, at 637-39; .
82. Bell v. Kirby Lumber Corp., 413 A.2d 137, 146-47 (Del. 1980); Note, supra note 19, at 1464.
ing event are used to derive an average earnings figure. The reciprocal of the multiplier should be roughly equal to the rate of return a prudent investor would demand in making an investment in a particular business to yield a particular return.

C. Market Value

The Delaware block approach also places significant weight on a share's market value if the figure is reliable. However, the Delaware Court of Chancery long ago established the doctrine that market value alone should not control. Once determined, market figures will


COURTS prefer to average earnings over several years in order to balance extraordinary profits and losses. Adams v. R.C. Williams & Co., Inc. 39 Del. Ch. 61, 67, 158 A.2d 797, 800 (1960)(two years is insufficient); 1 A. DEWING, THE FINANCIAL POLICY OF CORPORATIONS 376 (5th ed. 1953). However, too many years has been held to be distortive, since more recent figures are thought to be more accurate indicators of future earnings. Woodward v. Quigley, 257 Iowa 1077, 1093-94, 133 N.W.2d 38, 47, modified on rehearing, 257 Iowa 1104, 136 N.W.2d 280 (1965)(ten years is distortive).

The author suggests that courts use a weighted average whereby the credibility of more recent years as future indicators is emphasized at the expense of the less indicative older figures, which are weighted less. Such an approach would tend to increase the predictive value of the resulting figure. See, e.g., Rosenblatt v. Getty Oil Co., 493 A.2d 929, 941 (Del. 1985)(approving of weighted average).


Establishing the multiplier is the most contentious phase of the Delaware block approach largely because of the lack of objectivity in the process by which it is derived. Gibbons v. Schenley Industries, Inc., 339 A.2d 460, 471 (Del.Ch. 1975)(the multiplier is invariably "difficult and imprecise"). See also Note, supra note 19, at 1467; Comment, supra note 3, at 780.

87. 12B W. FLETCHER, supra note 10, at § 5906.13; Comment, supra note 3, at 781. For a more complete discussion of market value issues, see Note, supra note 19, 1460-64; Note, supra note 71, at 639-40.

88. FOLK, supra note 1, at 385-86.

89. Chicago Corp. v. Munds, 20 Del. Ch. 142, 150-52, 172 A. 452, 455-56 (1934). See also Martignette v. Sagamore Mfg. Co., 340 Mass. 136, 140-42, 163 N.E.2d 9, 12-13 (1959); Comment, supra note 48, at 230. The Munds decision was issued during the Great Depression and must be considered in that context. At the time, valuation at market would have resulted in a windfall to the majority shareholders who prompted the claimant's dissent. Banks, Measuring the Value of Corporate Stock, 11 CAL. L. REV. 1, 28-29 (1974). For other decisions similar to that of Munds, see Jacques Coe & Co. v. Minneapolis-Moline Co., 31 Del. Ch. 368, 75 A.2d 244 (1950); Alhenius v. Bunn & Humphreys, Inc., 358 Ill. 155, 192 N.E. 824 (1934); Republic Finance & Investment Co. v. Fenstermaker, 211 Ind.
then be adjusted to eliminate extraordinary matters of influence on market value.\(^91\) Where market values are either not available or unreliable, the court will ascribe little or no weight to the value.\(^92\) A corporation’s history of paying dividends may or may not be reflected in the market value.\(^93\) For instance, where one company demonstrated a history of not paying dividends, the court weighted the zero dividends value independently.\(^94\)

### D. Recent Appraisal of the Delaware Block

Recently, dissenting shareholders have questioned the reliability and the validity of the Delaware block approach in court.\(^95\) All juris-

\(^{91}\) In Delaware, a court will refer to actual exchange or listing quotations. In their absence, however, the court will “reconstruct” a market value. In re Delaware Racing Ass’n, 42 Del. Ch. 406, 419, 213 A.2d 203, 211 (Del. 1976). Reconstructing a market figure is done by “discounting the net asset value [which is a figure representing the total value of a company’s assets less prior claims] of the common stock on the day of merger.” Tri-Continental Corp., 31 Del. Ch. at 530, 74 A.2d at 74. See e.g., Estate of Newcomer v. United States, 447 F.Supp. 1368 (W.D. Pa. 1978)(estate tax case).


\(^{94}\) Delaware courts have recognized that a company’s dividend payment record bears significantly on the business’s value. However, one court stated that “dividends are so closely related to earnings that they largely reflect the same value factor,” and proceeded to eliminate dividends as an independent consideration. Felder v. Anderson Clayton & Co., 39 Del. Ch. 76, 88-9, 159 A.2d 278, 285 (1960). See Note, supra note 71, at 641-42 and Note, supra note 19 at 1469 for an abstract of a number of Delaware opinions and their treatment of dividends as a factor in valuation.

\(^{95}\) See, e.g., Heller v. Munsingwear, Inc., 33 Del. Ch. 593, 598-99, 98 A.2d 774, 777-78 (Del. 1953); In re Delaware Racing Racing Ass’n, 42 Del. Ch. 406, 423, 213 A.2d 203, 213 (Del. 1965)(the court averaged in a fourth and separate dividend value of zero to reflect the corporation’s past failure to pay dividends). But see In re Olivetti Underwood Corp., 246 A.2d 800, 804 (Del. Ch. 1968)(Corporation’s failure to pay dividends on absence of dividends not given independent consideration by the court).
dictions confronting the matter have followed the landmark decision of *Weinberger v. UOP, Inc.* 96 In *Weinberger* the court held, among other things, that to the extent the Delaware block approach “excludes other generally accepted techniques used in the financial community and the courts, it is now clearly outmoded.” 97 The recent *Rosenblatt v. Getty Oil Co.* 98 decision, however, left no doubt that the Delaware block approach is still an acceptable means of valuing stock in disserter/appraisal situations. 99 Interestingly, courts have adopted the Delaware block method since the *Weinberger* decision, noting that *Weinberger* did not reject the block approach to valuation. 100

IV. A CRITIQUE OF THE DELAWARE BLOCK APPROACH

Courts in Delaware have used the Delaware block approach for the past forty years, especially during the 1960’s and 1970’s. 101 A number of courts throughout the country have adopted the Delaware block approach 102 largely because it is conceptually rather simple and relatively easy to administer. 103 Nonetheless, the method has become


96. 457 A.2d 701 (Del. 1983).

97. *Id.* at 712. Recent cases and commentary have erroneously interpreted the language in *Weinberger* as the Delaware Supreme Court’s rejection of the Delaware block approach. See, e.g., Sarrouf v. New England Patriots Football Club, No. 121012, at 3 (April 24, 1985) (Mass. Super. Ct. decision, Norfolk, Young, J.); R. HAMILTON, supra note 86, at 44.

98. 493 A.2d 929 (Del. 1985).


101. Schaefer, supra note 11, at 1033; Comment, supra note 3, at 779.


103. Comment, supra note 3, at 779.
the object of considerable criticism as to both its reliability and its validity. 104

A. Recent Criticisms of the Delaware Block

One argument posed by commentators and courts alike is that the Delaware block approach, as used by most courts today, is a corruption of the method originally devised in Delaware courts. 105 According to this argument, the Delaware block focuses on only three values and ignores many additional relevant factors. 106 The argument is fallacious, however, for as a number of courts have observed in the past, one need not weight each and every factor independently in order to consider it. Rather, many factors are considered at each stage in the Delaware block approach, such as when weighting the values 107 or

104. See generally Schaefer, supra note 10 (the Delaware block approach always undervalues shares); Comment, supra note 3, (fails to consider all factors relevant to valuation). This note draws on methodology widely used in survey research. Thus, the author must advert to a critical conceptual distinction between reliability and validity. A technique of measurement is reliable when it yields the same measure each time it is applied to the same object. BABBI, THE PRACTICE OF SOCIAL RESEARCH 113-14 (3d ed. 1983). Professor Babbi provides the following illustrative example:

Suppose, for example, that I asked you to estimate how much I weigh. You look me over carefully and guess that I weigh 165 pounds. . . . Now let's suppose I ask you to estimate the weights of 30 to 40 other people, and while you're engrossed in that, I slip back into line wearing a clever disguise. When my turn comes again, you guess 180 pounds. . . . That little exercise would have demonstrated that having you estimate people's weights was not a very reliable technique.

Suppose, however, that I had loaned you my bathroom scale to use in weighing people. No matter how clever my disguise, you would presumably announce the same weight for me both times, indicating that the scale provided a more reliable measure of weight than guessing.

Id. at 114.

It is important to note, however, that reliability does not guarantee accuracy. One could recalibrate the "empty" weight of the scale to five pounds, and while the scale would be no less reliable, it would yield inaccurate measures. Id. Validity, on the other hand, has to do with a technique's capacity to measure what it purports to measure. Id. at 117-18. For instance, Professor Babbi's scale would be a valid measure of one's weight but would be invalid as a means of, say, measuring one's height.


107. See Bell v. Kirby Lumber Corp., 413 A.2d 137, 145 (Del. 1980); Universal City Studios, Inc. v. Francis I. duPont & Co., 334 A.2d 216, 218 (Del. 1975); Gibbons v. Schen-
choosing a multiplier.\textsuperscript{108}

The three standards that have received almost universal recognition in appraising the intrinsic value of stock under statutes of this type are (1) market value, (2) net asset value, and (3) investment (or earnings) value. \ldots  `All relevant factors' \ldots  can be considered under one or more of these three standards.\textsuperscript{109}

A further assault against the citadel of the Delaware block depicts the approach as an inflexible, formulaic\textsuperscript{110} approach to valuation in an area where no one method of valuation should control.\textsuperscript{111} "The ascertainment of value \ldots  is not a matter of formulae, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."\textsuperscript{112} Courts outside Delaware tend to see the approach taken in Delaware as an attempt to denominate a fixed set of factors as indicative of value.\textsuperscript{113} Yet courts that employ the Delaware block contend that "[i]t is unwise to attempt to state every factor that may bear on the value of stock."\textsuperscript{114} In fact, the Delaware courts have not attempted to list every decisive valuation factor. Quite some time ago, the Delaware Supreme Court maintained that "the appraiser and courts must [consider] all factors and elements \textit{which reasonably might enter into the fixing of value}."\textsuperscript{115} As articulated above, just because an appraiser does not "block off" and value separately a particular factor should not suggest that the appraiser never considered it in the valua-

\begin{itemize}
  \item \textsuperscript{109} Woodward v. Quigley, 257 Iowa 1077, 1081-82, 133 N.W.2d 38, 40 (1965).
  \item \textsuperscript{110} It is quite correct to think of a formula as an equation composed of a fixed integration of variables and mathematical functions. Such a formula or equation is useful only to the extent that the values plugged into the variable positions within the equation are precise. A formula loses its utility when the variables plugged into it are not reflective of the values they are meant to represent. \textit{See e.g.}, WEBSTER'S \textit{THIRD NEW INTERNATIONAL DICTIONARY} 894 (unabridged ed. 1976)(definition of "formula").
  \item \textsuperscript{111} Roessler v. Security Savings & Loan Co., 147 Ohio St. 480, 484-85, 72 N.E.2d 259, 261 (1947).
  \item \textsuperscript{112} Standard Oil Co. v. So. Pacific Co., 268 U.S. 146, 156 (1925).
  \item \textsuperscript{113} \textit{Id.}; Northern Acceptance Trust 1065 v. Amfac, Inc., 59 F.R.D. 116, 127 & nn.31-33 (D. Hawaii 1974).
  \item \textsuperscript{114} Robbins v. Beatty, 246 Iowa 80, 91, 67 N.W.2d 12, 18 (1954).
  \item \textsuperscript{115} Tri-Continental Corp., 31 Del. Ch. at 526, 74 A.2d at 72 (emphasis added); \textit{accord} Universal City Studios, Inc. v. Francis I. du Pont & Co., 334 A.2d 216, 218 (Del. 1975); \textit{In re} Delaware Racing Ass'n, 42 Del. Ch. 406, 415, 213 A.2d 203, 209 (Del. 1975).
\end{itemize}
tion process. The Delaware courts have long been aware that their valuation methodology is inherently subjective and have never considered the Delaware block approach to be excessively formulaic.

B. Unreliability and Subjectivity of the Delaware Block Approach

What then is wrong with the Delaware block approach? It suffers from two critical shortcomings. First, the approach is unnecessarily random and subjective in that it averages together three very different methods, each possessing its own inaccuracies. To the extent that each major valuation component of the block approach is inaccurate, so is the final computation yielded by the Delaware block approach. Second, and much the result of the first, the Delaware block approach often undervalues a dissenter's shares. It often undervalues because it almost always averages a liquidation value together with other values reflective of the business as a going concern. Such an overemphasis on liquidation acts as an anchor, ensuring that the Delaware block approach will always yield conservative estimates of value. Moreover, while choosing the higher of either asset or earnings value may be a more acceptable alternative to the Delaware block approach, such a method has its own significant shortcomings.

The first criticism of the Delaware block approach stems from the process of mathematically averaging three very different measures of corporate worth. As each of the three values derived in the approach is often suspect, averaging them together only compounds their predictive unreliability. Most significantly, the approach's requirement of mathematically weighting values infuses an additional and unnecessary element of subjectivity into the valuation process.

Historically, courts did not contemplate the use of weighted averages in appraisal cases. Rather, each court ordinarily mentioned that a number of factors were to be considered. Significantly, earlier courts realized the independence of each of the factors mentioned,
and it is unlikely that any court contemplated the mathematically integrated methodology of the Delaware block. Courts realized, for instance, that an assets valuation approach was an entirely different means of obtaining a value than a capitalized earnings approach. As one court observed, while market prices, net asset value, and net earnings should all be considered in valuing property, this is not to say that they must all be averaged to come up with yet a different number. Instead, the court can choose to base its final assessment of value on figures derived from one, some, or all of the factors considered. In short, the earlier cases indicate that a judge or an appraiser should consider the various factors individually as opposed to plugging them into a mathematical equation.

Serious problems with the Delaware block approach lie in the reliability of its three constituent parts, namely, the validity and accuracy of the asset, earnings, and market valuation methods.

1. Asset Valuation

Significantly, the Delaware block methodology mandates that the value of a company's assets impact upon the company's overall value. As Delaware courts have noted, the asset value to be measured by the courts and appraisers is "theoretical[ly a] liquidating value to which the share would be entitled upon the company going out of business." Yet virtually all courts, including those in Delaware, agree that appraisal valuations should value a business as a go-


123. Warren v. Baltimore Transit Co., 220 Md. 478, 487, 154 A.2d 796, 801 (1959). "Having considered the relevant factors bearing on fair value, they [the appraisers] were not obliged to average them; rather, they could give such weight to one or more as they determined the facts indicated." Id. Passages of the Warren opinion immediately preceding the above quote clearly indicate that the judge has used the term "weight" subjectively and did not contemplate mathematical weighted averages, the approach employed in Delaware. Id. See also Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 308, 93 A.2d 107, 115 (Del. 1952).


125. See, e.g., Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 A. 452 (1934); Allied Chem. & Dye Corp. v. Steel & Tube Co. of America, 14 Del. Ch. 64, 68-69, 122 A. 142, 146 (1923); In re Fulton, 257 N.Y. 487, 178 N.E. 766 (1931). For more recent cases, see, e.g., Southdown, Inc. v. McGinnis, 89 Nev. 184, 510 P.2d 636 (1973) (no weight required as long as all relevant factors are considered).

126. See supra notes 68-80 and accompanying text.

ing concern. A stockholder does not purchase shares in a corporation in anticipation of participating in a liquidation of corporate assets. Rather, he invests in the future prospects of a going concern. A liquidation value represents the very antithesis of recognition of a business as a going concern. Therefore, in the event the going concern value exceeds an enterprise’s liquidation value, the Delaware block will consistently undervalue dissenters’ shares.

The argument used to justify the consideration of asset value with respect to any business is that liquidation is an actual possibility. An investment at some point in the future may well end in liquidation of the firm’s assets. Thus, before the appraiser could weight each value, he must consider the dissenting shareholder’s objectives. Delaware case history, however, does not support such an argument. In most Delaware appraisal cases, the court gave significant weight to asset value. While a few corporations in such cases included land holding companies and one company was actually in liquidation, the bulk of the businesses valued were going manufacturing or service businesses. Such businesses should not have been accorded such a high probability of liquidation in the valuation process. In fact, the case history indicates that the weight courts has assigned to asset value have varied more as a result of the value’s reliability than its predictive worth as to the probability of a liquidation.

v. Fenstermaker, 211 Ind. 251, 6 N.E.2d 541 (1937)(going value should be considered in addition to liquidation value).


In determining this value, the fact that the property, if the mortgages had been foreclosed, would have left nothing for stockholders, is not the true test, much less is it controlling; but it is the fair market value of the property, in its then condition as an established and going business.

American Seating Co. v. Bullard, 290 F. 896, 902 (6th Cir. 1923). See also Note, supra note 71, at 634, and supra notes 80-85.

129. Chicago Corp. v. Munds, 20 Del. Ch. 142, 150, 172 A. 452, 455 (1934).

130. See Folk, supra note 1, at 381; Schaefer, supra note 11, at 1040.


[The weight assigned to market value might correspond to the probability that the shareholder would have sold her stock; the weight for earnings value to the probability that she would have retained her shares for a considerable period of time; and the weight for asset value to the probability of corporate liquidation.

Schaefer, supra note 11, at 1073.

132. Note, supra note 19, at 1468.

133. See Note, supra note 71, at 641-42.


135. See Note, supra note 71, at 641-42.

136. See, e.g., Heller v. Munsingwear, Inc., 33 Del. Ch. 593, 98 A.2d 774 (1953)
One critic suggests that an appraiser should determine value as the higher of either the asset or the earnings figures. By not doing so, it is claimed that the Delaware block approach necessarily undervalues the shares of an enterprise. But such an argument ignores the fact that asset valuation should be restricted to liquidation and dissolution, as the proper measure of value in dissenters' actions is that of a going concern. While it is true that weighting various valuation techniques often undervalues corporate shares, it does not follow that an appraiser must rely solely on asset value. Again, such an approach requires the appraiser to second guess shareholder objectives. Consequently, the asset value of a business is typically of little use in valuing a going business in a dissenter's appraisal proceeding.

2. Market Value

Market valuation is virtually worthless in situations where either no market exists or only thin or irregular trading is evidenced. Even when established market quotations exist, the market valuation technique is problematic.

In criticizing the many terms that jurisdictions use to avoid a market valuation, such as "fair value," "fair cash value," and "intrinsic value," a California court reasoned that market value is the most reliable means of valuation:

We do not know what those terms or others like them mean, and we suspect that the writers who advocate them do not know either. They use them because they distrust the market as a gauge of value. Yet realistically, under our economic system, the value of any item


137. Schaefer, supra note 11, at 1038-39. Professor Schaefer argues that since a weighted average of asset and earnings values will always result in an appraisal value somewhere between the two, "[t]he value of the corporation should be equal to the higher of the two values, since the higher value represents the more profitable use of the corporation's resources." Id. Professor Schaefer calls such an approach the best-use value of the corporation. Id. at 1039.

138. Id. at 1040.

139. Professor Schaefer claims that appraisers use a best-use approach in the bankruptcy context, id., but bankruptcy is not analogous because there the appraisers are trying to get the highest figure possible for the protection of the creditors.

140. 12B W. FLETCHER, supra note 10, § 5906.14, at 397.

141. Note, supra note 19, at 1460 (citing American General Corp. v. Camp, 171 Md. 629, 190 A. 225 (1937)). See also American Seating Co. v. Bullard, 290 F. 896 (6th Cir. 1923).


of property on any given date, in monetary terms, is what it can be sold for in a free and fair market.\textsuperscript{144}

The California court's statement rests on the assumption of an efficient capital market and the efficient capital market hypothesis rests on the proposition "that all available, relevant information about a company's financial prospects is fully and virtually instantaneously reflected in the market price of the company's securities."\textsuperscript{145} While tremendous amounts of empirical data have been gathered in support of the efficient capital market hypothesis,\textsuperscript{146} recent market behavior has not confirmed the hypothesis.\textsuperscript{147} For instance, throughout the summer of 1985, average listed stocks on the New York Stock Exchange were trading at about 70 per cent of their underlying asset

\begin{footnotesize}
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  \item \textsuperscript{144} Id. at 774, 8 Cal. Rptr. at 601-02.
  \item \textsuperscript{146} For a brief synopsis of such research, see Note, The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry, 29 STAN. L. REV. 1031, 1041-57 (1977).
  \item \textsuperscript{147} For criticisms of the efficient capital market hypothesis, see Lowenstein, Pruning Deadwood in Hostile Takeovers: A Proposal For Legislation, 83 COLUM. L. REV. 249 (1983); Eisenberg, The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking, 57 CAL. L. REV. 1, 82, 86 (1969). See also In re Valuation of Common Stock of Libby, 406 A.2d 54, 60 (Me. 1979).
\end{itemize}
\end{footnotesize}
value.\textsuperscript{148} The fair value of a business should never be less than the business's liquidation value. How could a truly efficient capital market miss the mark so widely?

Another line of reasoning suggests that either the efficient capital market hypothesis is inapplicable to real market activities, or tender offerers are irrational in offering target shareholders a premium above market.\textsuperscript{149} The fact is that tender offerers act quite rationally in offering such premiums, since the market has proved to undervalue American enterprise. The corollary refutes the efficient capital market hypothesis.

It is true that price movements related to general economic conditions may reflect the changing attitudes of investors toward the value of the particular company, but price changes caused by profit taking, by sudden buying on the strength of a rumor, or by the bandwagon psychology of a bull or bear market may have little to do with the intrinsic worth of the company.\textsuperscript{150}

Moreover, just as the market today may undervalue businesses, it may as in yesteryears overvalue businesses.\textsuperscript{151} It is fair to conclude that the accuracy of any market valuation technique is inevitably suspect.

3. Capitalized Earnings Value

Of the three techniques combined in the Delaware block approach, the capitalized earnings method is said to be the least objectionable,\textsuperscript{152} since it most approximates the figure upon which a willing buyer and willing seller would agree.\textsuperscript{153} On the contrary, the reliability of the earnings valuation method is suspect.

What are earnings? Accountants determine earnings by subtracting all operating expenses from operating revenues. The differ-

\textsuperscript{148} Kinsley, You Won't Find an Efficient Market on Wall Street, WALL ST. J., July 18, 1985, col. 2, at 25. The reasoning commonly given for such market behavior is the investing public's general feeling that management is using corporate assets inefficiently. \textit{Id.}

\textsuperscript{149} See Kinsley, supra note 148, at 25.

\textsuperscript{150} Note, supra note 19, at 1464.

\textsuperscript{151} See In re Fulton, 257 N.Y. 487, 493-94, 178 N.E. 766, 768-69 (1931); Chicago Corp. v. Munds, 20 Del. Ch. 142, 150-52, 172 A. 452, 455-56 (Ch. 1934).


\textsuperscript{153} Note, supra note 19, 1464.
ence represents earnings. However, under generally accepted accounting principles recognition of revenues and expenses is not necessarily conditioned upon the actual receipt or dispersal of funds. Accountants have developed a system of deferral and accrual by which they may more readily match revenues with the particular expenses that were necessary to generate those revenues during identifiable time periods. Essentially, the system is based on credit since accountants will attempt to show expenses as they are incurred and "profit as it is earned rather than when the company and the customer get around to paying their bills."155

The earnings figure, accordingly, is of little use in valuing corporate shares for two reasons. First, while we have noted that earnings represents the difference between revenues and expenses for a given time period, we have not yet defined the processes in which revenues and expenses are determined. In fact, generally accepted accounting principles allow for a tremendous amount of manipulation in determining the various revenue and expense account balances. For instance, it is generally understood that the first-in, first-out (FIFO) method of inventory accounting tends to maximize the earnings figure during periods of rising prices.156 Critics of the method charge that the difference between an earnings figure for a company using FIFO and an earnings figure for the same company using the average inventory cost method represents nothing more than inflationary spirals in the marketplace rather than more efficient or more "profitable" operations.157

Critics have also charged that the last-in, first-out (LIFO) method of inventory accounting is suspect in that it allows management great room within which to manipulate its cost of goods sold closing bal-


155. R. BREALEY & S. MYERS, PRINCIPLES OF CORPORATE FINANCE 83-84 (2d ed. 1984). See also Treynor, The Trouble With Earnings, FIN. ANALYSTS J. 42 (reprinted in MODERN DEVELOPMENTS IN INVESTMENT MANAGEMENT 612, 614 (Lorie & Brealey eds. 1978)).

156. Statement No. 6, Inventory Pricing and Changes in Price Levels, promulgated by the Committee on Accounting Concepts and Standards of the American Accounting Association (reprinted in 29 ACC. REV. 188 (1954))(cited in Herwitz, supra note 154, at 454-56).

157. Id.
Management could do so either by buying inventory that it does not need until the following year at the end of the year or by buying only as much inventory as is normally sold (not replenishing inventory until the following year). By buying at the end of the year during periods of rising prices, management can increase significantly the cost of its closing inventory. The value of the closing inventory, valued at the cost of the most recent purchases, will increase the cost of goods sold, thereby decreasing the firm's earnings. On the other hand, management could decide not to repurchase or replenish inventory. Instead, it could maintain a tight margin between inventory and sales volume so as to minimize the inventory on hand at the end of the year. Such a practice, known as LIFO liquidation, has the effect of maximizing earnings. Numerous other expense accounts are likewise subject to manipulation.

The foregoing should demonstrate that the earnings figure is very unreliable as an indicator of either the value of the corporation or its shares. In short, the earnings figure "is a peculiar sort of accounting number that is of relatively little use...except for the fact that [the] government looks at it to calculate a corporation's tax liability." But the earnings figure suffers from a second more fundamen-

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158. Id.
159. Id.
160. Herwitz, supra note 154, at 458.
161. For example, the depreciation expense account is eventually subtracted from the overall earnings figure. This is so even though the expense account involves no cash disbursements:

Depreciation accounting is a system of accounting which aims to distribute the cost...of tangible capital assets, less salvage (if any), over the estimated useful life of the unit (which may be a group of assets) in a systematic and rational manner. It is a process of allocation, not of valuation.

HERWITZ, supra note 154, at 471. How fast an asset will be depreciated is largely up to management. The same can be said of the amortization of accounts for intangible assets. See PRONOUNCEMENTS, supra note 4, APB opinion no. 17, at ¶¶ 27-31. In short, the earnings figure for any company is the bottom line figure of an income statement. Yet many transactions significantly affecting cash are not reflected by the income statement, such as borrowing, the issuance of stock, or the purchase of capital assets:

Obviously, a company's revenues from operations are its primary source of cash, while its expenses are the principal cash drain; hence, estimated future earnings do provide some index to expected cash resources. But this is only a starting point.

HERWITZ, supra note 154, at 71.
162. Kripke, The SEC. The Accountants, Some Myths and Some Realities, 45 N.Y.U. L. REV. 1151, 1176 (1970). ("Translation of financial events into a numerical system is not an objective perception of reality, it is rather a symbolic system devised by man.")
tal flaw as an indicator of the value of corporate shares.

Significantly, value is always a function of return. But investors will never realize a return on their investment in the form of earnings. In fact, the accountant's earnings figure has little if any relationship to the real basis of the value of corporate shares. A real return to the investor will come in the form of cash. Therefore, it makes sense to look at a corporation's cash flow in order to value the dissenter's shares rather than its earnings.

C. Summary

In light of the foregoing criticism, advocates of the Delaware block approach nonetheless maintain that the method averages the three different values so as to mitigate the effects of defects inherent in each. However, the requirement of weighting and averaging together three different values serves only to inject greater subjectivity

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164. See R. Hamilton, supra note 86, 1-7; 1 Bonbright, supra note 8, at 13-15.
166. Id.
167. Corporations don't pay dividends out of earnings, income, or profits, they pay them out of cash. Heath, supra note 154, at 98. "[T]he only benefit of . . . securities to their holders will be the cash flows they are expected to return." K. Boudreaux and H. Long, supra note 163, at 136. Thus, one commentator, while correctly stating that "[o]ne of the prominent considerations of the investor is the return which he will receive," erroneously concluded that it is through an earnings "computation that a true measure of such a value may be achieved." Comment, supra note 49, at 230.
168. K. Boudreaux and H. Long, supra note 163, at 71, 136. See infra notes 176-86 and accompanying text. In the analogous activity of lending, the lending institution, too, is interested in a return on its investment. Gradually, lenders learned that such a return came in neither the form of earnings, nor assets (current or otherwise), nor working capital. Returns come in the form of cash. Heath, supra note 154, at 98-99.
169. Consideration of at least the three factors discussed helps to minimize the effect of defects in any one and to assure that no single computation will be determinative. Note, supra note 19, at 1468; Note, supra note 71, at 640.
The valuation of a going business is inherently a subjective exercise because valuing a going concern requires conjecture in the selection of a capitalization multiplier. Yet, the Delaware block approach opens an entirely separate avenue of subjectivity into the valuation process when it necessitates the weighting of different measures.

While it is clear that appraisers must forever contend with subjective value judgments, the predictive worth of their endeavors pursuant to the Delaware block approach is tremendously undercut by having twice to “guesstimate” when objective standards are lacking. The Delaware block approach is an illusory standard. The degree of subjectivity which it allows affords the opportunity for two appraisers working in accordance with the same “standard” and given the same business data to arrive at widely divergent figures.

Moreover, courts which have used the Delaware block approach have consistently failed to justify mathematically compromising different valuation measures. While few doubt the validity and usefulness of averaging identical or similar means of measurement (for example, averaging several thermometer readings or a law student’s grades), most would look with skepticism on approaches which aver-

170. Note, supra note 71, at 640.
173. One statistician states:

The choice of a value which lies between the estimates of two different models, though it might appear to the layman’s rough sense of compromise to be supported by the results of each, is in reality consistent with the assumption of neither, so that the compromise would lack any evidentiary support.

Finkelstein, Regression Models in Administrative Proceedings, 86 HARV. L. REV. 1442, 1470 (1973). Finkelstein’s objection to compromise is discussed in the more general context of a decisionmaker who has been presented with conflicting economic measurements, the measurements themselves derived from conceptually and procedurally different models or methodologies. See generally id. at 1467-71.

One critic argues that Finkelstein’s objection is incorrect and further, that one could not deduce from it the conclusion that compromising valuation methodologies is wrong. See Schaefer, supra note 11, at 1069-1070 & n.194. But Professor Schaefer provides no convincing justification for his attack on Finkelstein’s theory. Instead, Schaefer reasons that compromises are workable and cites to the use of weighted averages in determining the “official international time.” Id. at 1070 n.193. But Finkelstein’s objection has nothing to do with Professor Schaefer’s example of atomic clocks. Finkelstein’s objection is to the compromising of conceptually and functionally different measures. All of the measures averaged in Schaefer’s example are chosen from identical means of measurement, viz., atomic clocks. In the Delaware block approach, to the contrary, three vastly different means of measurement are averaged which, conceptually, is an invalid procedure, an observation that has yet to be refuted.
age very different means of measurement. Although it is true that there is some overlap in such valuation techniques as assets, earnings, and market, by and large each measures different facets of a business. The implication of such an observation is that an appraiser cannot validly average earnings, market, and asset values but must choose one, or some other figure, as being the valid measure. The critical question must be what dictates that choice.

V. DISCOUNTED CASH FLOW: AN ALTERNATIVE

A. Toward a Purposeful and Less Subjective Valuation Methodology

Recall that the objective of appraisal statutes is to return to the dissenting shareholders the cash equivalent of the investment they would have retained but for the event which precipitated their dissent. A number of courts have intimated that the value of the dissenter's investment approximates the amount upon which a willing buyer and willing seller would agree for the exchange of the dissenter's interest in a going concern.

Given that both the willing buyer and the willing seller are prudent investors, and assuming that they look largely to the same factors in determining the risk of investment, it follows that each would approach the transaction with roughly the same minimum rate of return necessary to induce each to transact. Of course, since both are prudent investors, they wish to maximize their return, and each will

177. See, e.g., Chicago Corp. v. Munds, 20 Del. Ch. 142, 172 A. 452 (1934). At any give moment, a business is worth what one would pay for it under conditions of equal bargaining power and lack of compulsion to sell. 2 BONRIGHT, supra note 8, at 826-38. Such a price would obviously include future prospects. See National Bank of Commerce v. New Bedford, 155 Mass. 313, 315-16, 29 N.E. 532, 533 (1892).
178. See Gibbons v. Schenley Industries, Inc., 339 A.2d 460, 470-74 (Del.Ch. 1975). The seller has computed his desired return at a time earlier than the transaction between willing seller and willing buyer; nevertheless, he now wishes to sell for no less than the particular price that will yield the return he still desires. If, events have transpired which now make the seller's original calculations of return unreasonable, he will have to recalculate what he can expect to recover given the existing risk. In such an instance both buyer and seller would be calculating their expected rates of return, and they would be basing such calculations roughly on the same factors. If the risk of investment has not changed from the time the seller originally invested, we must assume, other things being equal, that the calculations of both buyer and seller will roughly approximate each other.
179. Miller & Modigliani, Dividend Policy, Growth, and the Valuation of Shares, 34 J. BUS. 411, 412-13 (Oct. 1961)(reprinted in MODERN DEVELOPMENTS IN INVESTMENT
open with significantly different offers the willing buyer's lower since he wishes to reap a greater return than his minimum figure would allow him, the willing seller's higher for the same reason. Moreover, since the willing buyer/willing seller model assumes equal bargaining power, the mythical traders will eventually agree on a figure that approximates their roughly equivalent acceptable minimum rate of return. Thus, to figure out the "value" upon which a willing buyer and a willing seller would agree, one must compute the minimum rate of return acceptable to the prudent investor in light of the risk associated with investing in the particular going concern.\textsuperscript{180}

Again, the prudent investor is interested in a return of cash. Moreover, since the capitalization multiplier is the reciprocal of the chosen rate of return,\textsuperscript{181} a discounted cash flow approach more directly links the rate of return desired by the prudent investor with his desired medium of return cash. Discounted cash flow valuation attempts to predict the future cash flow of a company over a period of years.

On an abstract level, one can approximate cash flow from net earnings. Such an approach would involve either subtracting from or adding to the earnings figures all transaction costs for which no cash actually changed hands. Cash flow represents the difference between cash inflow and cash outflow, a much more restrictive concept than earnings. For example, earnings includes accrued income for which no cash has been received and deferred expenses for which no cash has been dispersed. Thus, to compute cash flow, an appraiser would have to (1) add back to the earnings figure such items as depreciation and amortization expenses and deferred expenses for such items as income tax, rents, and insurance; (2) subtract from the resulting figure all accrued income for which no cash was received such as receivables, and all cash paid out which was not accounted for as an expense under generally accepted accounting principles, such as capital investments and debt service.\textsuperscript{182}

\textsuperscript{180} One common means of determining risk, which is always a subjective endeavor, is to extrapolate from risk-free securities, such as T-bills. For example, if T-bills are currently bearing 9 percent interest, then the prudent investor would expect no less than 9 percent on any investment involving some risk and probably much more than 9 percent for very risky investments.

\textsuperscript{181} See \textit{supra} note 86 and accompanying text.

\textsuperscript{182} See R. Brealey & S. Myers, \textit{supra} note 156, at 83-84; Haynsworth, \textit{Valuation Management} 508, 509 (Lorie & Brealey eds. 1978). Prudent investors are those who "always prefer more wealth to less and are indifferent as to whether a given increment to their wealth takes the form of cash payments or an increase in the market value of their holdings of shares." \textit{Id}.
For the same reasons that one would want to use a five-year weighted average figure in the capitalized earnings method, one would do well to do the same in determining net cash flow. After calculating a weighted average cash flow, the resulting figure will be capitalized through the use of a multiplier.

However, it must be emphasized that little, if any, relationship exists between cash flow and earnings. The means used above to distinguish cash flow from earnings does not represent a practical means for deriving a cash flow figure, since one would have to work with the very expense accounts that were found to be dubious indicators of financial reality. Nonetheless, the discounted cash flow valuation technique represents a valid and accurate means of valuing the dissenter's shares. It sports the appealing feature of minimizing subjectivity and, in fact, necessitates far fewer subjective judgments on the part of the appraiser than does the Delaware block. Even more desirable, the technique focuses on the value of the dissenting shareholder's foregone investment precisely the measure the appraiser statutes seek to establish.

B. Toward a Disclosure System Which Provides Readily Obtainable Valuation Information

Unfortunately, current SEC disclosure provisions do not require management to publish the financial data necessary to compute actual cash flows. How, then, is an appraiser to determine the value of corporate shares based on cash flow? While the dissenter should be able to obtain copies of a firm's actual cash receipts and proof of ex-

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of Business Interests, 33 MERCER L. REV. 457, 478-79 & n.56 (1982). It is also important to note that current SEC disclosure provisions do not require management to publish the necessary financial data with which to compute cash flow. Kripke, Fifty Years of Securities Regulation in Search of a Purpose, 21 SAN DIEGO L. REV. 257, 266-67 & nn.29-32 (1984).

183. See supra note 85 and accompanying text.
184. See supra notes 84-86 and accompanying text.
185. K. BOUDREAUX AND H. LONG, supra note 163, at 71. Realizing the shortcomings of the earnings statement as an indicator of cash flow, the Accounting Principles Board advocated the presentation of a Statement of Changes in Financial Position to better represent a company's flow of funds. PRONOUNCEMENTS, supra note 4, APB Opinion No. 3 (1963). Eight years later, the APB required the publication of a "funds" statement as a matter of generally accepted accounting principles. PRONOUNCEMENTS, supra note 4, APB Opinion No. 19, at ¶ 7 (1971). Yet the APB allowed "funds" to mean not only cash but working capital. Id. at ¶ 10. Such a provision renders the statement useless as a measure of cash flow. See Heath, supra note 154, at 97-100.
186. See supra notes 162-68 and accompanying text.
187. Kripke, supra note 182, at 266-67 & nn. 29-32. See also Heath, supra note 154, at 99 (recommending the required presentation of a Statement of Cash Receipts and Payments).
penditures, it will be the court or appraisers, independent of the parties, who will value the shares. The appraisers should be able to obtain access to such information through the general subpoena powers of the court, from which the appraiser's authority is derived. Moreover, the SEC, under its extensive rulemaking authority, should require the publication of actual cash flow figures in the Securities Act of 1933 registration statements\textsuperscript{188} and the Securities Exchange Act of 1934 periodic reporting documents, such as the Form 10K and Form 10Q.\textsuperscript{189} The accounting and financial records that the SEC currently requires were never meant, either by the companies which maintain them or the SEC which requires their disclosure, to be indicative of value. Rather, companies kept such information as a means of recording fiscal transactions and business performance.\textsuperscript{190} In at least one case, the SEC maintained that a cash flow valuation would be more meaningful than an earnings valuation, since the latter would be distorted by accrual accounting techniques.\textsuperscript{191} It is hoped that, in time, independently audited cash flow statements\textsuperscript{192} will serve as reliable indicators of value and will obviate the need for courts and appraisers to sift through mountains of paper in order to value corporate shares.

The final capitalized or discounted cash flow figure more accurately predicts the worth of a going concern than does the Delaware block approach or any of its constituent valuation methods, including the earnings approach. Not only does net cash flow depict the future availability of the object that the shareholder desires (which an earnings valuation does not), but it does so with less resort to subjective judgment. For example, cash flow ignores such matters as depreciation, amortization, deferral, and accrual, all of which necessitate conjecture. It further eliminates the need to weight variables, a practice that unnecessarily accentuates the subjective character of appraisal valuation.

In all fairness, however, one should not assume that cash flow valuation eliminates subjectivity entirely, for that would be impossible.

\textsuperscript{190} Banks, \textit{supra} note 89, at 2 (1974). Accounting is the art of recording business transactions, not valuing them. \textit{Id}.
\textsuperscript{192} These would be statements different from the Statement of Changes in Financial Position currently required by the SEC for Exchange Act reporting companies in that it would not be based on traditional "expenses" accounts. For a rigorous criticism of the "Funds" Statement, see Heath, \textit{supra} note 154.
In any appraisal proceeding, the appraiser looks not to current value alone, but to a foregone investment in a going concern. Thus, the appraiser will inevitably render personal judgments as to the predictability of future occurrences. The valuation process is based more on conjecture than on mathematical precision and is, therefore, enormously subjective. The objective of the discounted cash flow method is to limit the appraisal process's subjective taint as much as possible.

C. The Fate of the Delaware Block Approach

While courts are liberalizing their appraisal valuation standards by allowing the use of valuation methods other than the Delaware block approach, they refuse to reject the Delaware block approach. It is entirely possible that courts never will reject the approach expressly but, instead, will look to other methods, such as discounted cash flow, as their accuracy and validity are established.

VI. Conclusion

Courts have used the Delaware block approach for decades. Since the approach's inception, courts and commentators seldom have justified either its use or its validity. Recently, however, the Delaware block approach has come under fire, both from courts and academicians. Some have argued weakly that the technique values a company at less than its asset value and fails to consider relevant factors other than assets, earnings, and market values. However, the technique has far greater problems. First, it calls for the compromising of three different valuation techniques a requirement invalid in itself. Second, the

193. R. HAMILTON, supra note 86, at 20. One commentator criticizes the Delaware block approach for requiring the appraiser to look backward at historical values in order to value an enterprise. Comment, supra note 142, at 139. Yet all methods of valuing going concerns succumb to this criticism. While the commentator is correct in asserting that the discounted cash flow "value of a share of stock . . . is the present value of the future benefits to be received from ownership," id. at 132, it is erroneous to suggest that the discounted cash flow method avoids the procedure of looking backward. A reliable discounted cash flow valuation requires the appraiser to compute present and past cash flows regardless of whether he uses receipts and disbursement slips or dividends, see id. at 131-35, as his object of measure. Only after the appraiser has determined past and present measures of value may he begin to measure the future worth of the enterprise. The process is known as discounting or capitalizing and is used in both the Delaware block approach and the discounted cash flow method. See supra notes 81-86 and accompanying text.

194. See supra notes 95-100 and accompanying text.

accuracy and validity of each of the constituent valuation methods employed by the Delaware block approach is suspect, as is any approach that depends on such methods. Moreover, better alternatives than the Delaware block approach exist. Discounted cash flow valuation represents a technique that is both less subjective and more representative of the interests of a prudent investor.

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