- At the time of the shareholder meeting, dissenting shareholders must either abstain or vote against the proposed merger. Within a relatively short period of time following shareholder approval of the proposed merger, dissenting shareholders must notify the company in writing of their intent to demand payment in cash for their shares.
- As a final matter, dissenting shareholders must continue to hold their shares through the effective date of the merger.

In order to appreciate the costs and delay associated with shareholders exercising their statutory right of appraisal, we will briefly examine the mechanics involved in perfecting this right as part of the materials at the end of this chapter. We will also examine the nature of the judicially supervised appraisal proceeding that will be instituted to resolve any disputes between the company and the dissenting shareholder over the valuation of the dissenter's shares.

PROBLEM SET NO. 1—STATUTORY (OR DIRECT) MERGERS UNDER DELAWARE LAW AND THE MBCA

A. Stock for Stock Mergers

1. Merger Consideration Comprising 30 Percent of Bidder's Stock—(Plain Vanilla) Stock for Stock Merger (See Diagram 1—Appendix A). Target Co., a closely held concern, plans to merge into Bidder Co., another closely held firm. The plan of merger calls for Target shareholders to receive shares of Bidder common stock comprising 30 percent of the voting power of Bidder shares that were outstanding immediately before closing on the proposed merger with Target. In addition, Target and Bidder each have a plain vanilla capital structure, consisting of only one class of voting common stock outstanding. Moreover, Bidder has sufficient authorized and unissued shares to complete the transaction.

a. Which corporation is to survive?
b. What action is required by the boards of Bidder and Target:
   (1) Under Delaware law?
   (2) Under the MBCA?
c. Do the shareholders of Bidder and Target have the right to vote:
   (1) Under Delaware law?
   (2) Under the MBCA?
d. Do the shareholders of Bidder and Target have the right to dissent:
   (1) Under Delaware law?
   (2) Under the MBCA?
e. What action would be required (under either Delaware law or the MBCA) if Bidder did *not* have a sufficient number of authorized shares to complete the proposed merger with Target?

c. Do the shareholders of Bidder and Target have the right to dissent:

(1) Under Delaware law?
(2) Under the MBCA?

4. Assume that Pharmacia, a publicly traded company, plans to merge with Pfizer, another publicly traded company, in exchange for shares comprising only 13 percent of the voting power of Pfizer's outstanding common stock before the merger is completed.

a. What action is required of the boards of Pfizer and Pharmacia in order to validly consummate this merger:

(1) Under Delaware law?
(2) Under the MBCA?

b. Do the shareholders of Pfizer and/or Pharmacia have the right to vote:

(1) Under Delaware law?
(2) Under the rules of the NYSE?
(3) Under the MBCA?

c. Do the shareholders of Pfizer and/or Pharmacia have the right to dissent:

(1) Under Delaware law?
(2) Under the MBCA?

B. Cash Mergers: Merger Consideration Consists of All Cash (See Diagram 2—Appendix A)

1. Target Co., a closely held concern, plans to merge into Bidder Co., another closely held concern. The plan of merger calls for the three shareholders of Target to receive all cash. Target and Bidder each have a plain vanilla capital structure, consisting of only one class of voting common stock outstanding.

a. What action is required by the boards of Bidder and Target:

(1) Under Delaware law?
(2) Under the MBCA?

b. Do the shareholders of Bidder and Target have the right to vote:

(1) Under Delaware law?
(2) Under the MBCA?

c. Do the shareholders of Bidder and Target have the right to dissent:

(1) Under Delaware law?
(2) Under the MBCA?

2. Assume that Chef America, Inc., a company incorporated under the MBCA, has decided to merge into Nestlé, Inc., an NYSE-listed, Delaware corporation, in exchange for $2 billion in cash.

Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), the parent corporation is obligated to deal fairly with the minority shareholders of the subsidiary and to pay a fair price for the minority shares. As a general proposition, the Delaware courts are more willing to scrutinize this type of transaction to assure that the parent company does not use its position of control to take advantage of the minority shareholders. We will analyze the entire fairness standard in more detail as part of our discussion of the *Weinberger* case later in this chapter.

PROBLEM SET NO. 2—SHORT FORM MERGER

1. Assume that Parent Co. owns 92 percent of the outstanding voting common stock of Target Co. Parent Co. now proposes to acquire the remaining 8 percent of Target Co. common stock that it does not own by cashing out the minority shareholders of Target in a short form merger in which Parent survives. Target and Parent each have only one class of voting common stock outstanding, and each is closely held. (*See Diagram 3—Appendix A.*)

a. What action is required by the boards of Parent and Target:
   (1) Under Delaware law?
   (2) Under the MBCA?

b. Do the shareholders of either Parent or Target have the right to vote:
   (1) Under Delaware law?
   (2) Under the MBCA?

c. Do the shareholders of Parent and Target have the right to dissent:
   (1) Under Delaware law?
   (2) Under the MBCA?

d. Assume—for purposes of this question only—that the shares of both Parent and Target are listed for trading on the NYSE. Do the shareholders of either Parent or Target have the right to dissent:
   (1) Under Delaware law?
   (2) Under the MBCA?

e. Is this short form merger accomplished on a downstream basis or an upstream basis? *(Hint:* Which corporation is to survive and which is to disappear?)

D. Corporate Formalities Required for Asset Acquisitions—Under Delaware Law and the MBCA

1. General Background—Asset Acquisitions

In cases involving the sale of a company's assets, a threshold determination must be made in each case as to whether the company proposes to sell *all* or

2. Stock Purchase—in Exchange for 24 Percent of Bidder's Stock (See Diagram 7—Appendix A). Assume the same facts as described in Problem 1, *except* that the parties' stock purchase agreement calls for Nestlé to pay at closing a portion of the $2 billion purchase price in cash, and the balance of the purchase price is to be paid by issuing shares of Nestlé common stock comprising 24 percent of the voting power of Nestlé's outstanding common stock immediately before the issuance is completed.

a. Who are the parties to the stock purchase agreement?
b. What board action is required of Chef America if the company is organized under Delaware law? Under the MBCA?
c. What board action is required of Nestlé, Inc. if Nestlé is organized under Delaware law? Under the MBCA?
d. Do the shareholders of Chef America have the right to vote:
   (1) Under Delaware law?
   (2) Under the MBCA?
e. Do the shareholders of Nestlé have the right to vote:
   (1) Under Delaware law?
   (2) Under the MBCA?
f. How does your analysis of these issues change if shares comprising only 14 percent of the voting power of Nestlé's outstanding stock immediately before the issuance are to be used as the acquisition consideration, and the balance of the purchase price is to be paid in cash?

3. Stock Purchase—in Exchange for 14 Percent of Bidder's Stock (See Diagram 7—Appendix A). The three shareholders of Target Co. plan to sell all of their stock to Bidder Co. in exchange for shares of common stock of Bidder Co., a closely held corporation, comprising only 14 percent of the voting power of Bidder's outstanding common stock immediately before the transaction is completed.

a. What action is required by the boards of Bidder and Target:
   (1) Under Delaware law?
   (2) Under the MBCA?
b. Do the shareholders of Bidder and Target have the right to vote:
   (1) Under Delaware law?
   (2) Under the MBCA?
c. Do the shareholders of either Bidder or Target have the right to dissent:
   (1) Under Delaware law?
   (2) Under the MBCA?

NOTES

1. An Introduction to Hostile Takeovers. Where management of Bidder Co. directly negotiates with management of Target Co., and these negotiations

ing minority shares of the subsidiary by acquiring the remaining shares of Target that the parent company (Bidder) does not own. This second step is often referred to as a *squeeze-out* transaction (i.e., "squeezing out" the minority interest from any continued equity ownership of the subsidiary). Very often, the minority shares will be squeezed out in a second step transaction structured as a cash-out merger. (*See Diagram 12 in Appendix A.*) For reasons that are developed in the problem set in the next section, this back-end, second-step, cash-out merger will often be accomplished as a triangular merger (as reflected in Diagram 12 of Appendix A).

3. Distinguish the "Bust-up Bid" and the "Merger of Equals." In the case of certain LBO deals of the type described earlier in this chapter (*see supra* pp. 72-75), the financial buyer's plan of acquisition often calls for the buyout firm to acquire Target in order to sell off the pieces. This LBO model reflects the financial buyer's determination that, in effect, Target is worth *more* if the pieces are sold off. The proceeds raised from the sale of Target's assets would then be used to reduce the debt that had been borrowed in order to finance the purchase price for Target.

The staff of many LBO firms invest much of their time searching for companies where the trading price reflects that management is underutilizing the present combination of business assets. In these cases, the financial buyer can afford to borrow the funds necessary to pay a premium in order to purchase enough Target Co. shares to give the buyout firm control of Target. In the case of a publicly traded Target Co., this purchase will usually take the form of a tender offer regulated by the federal securities laws, a topic that is addressed in Chapter 6. After obtaining control of Target, the buyout firm would then proceed to dismantle Target by selling off its assets in piecemeal fashion. This type of LBO deal became popular in the 1980s and was widely used to dismantle the large, diversified conglomerates that were established through acquisitions made during the M&A wave of the 1960s. As the dominant business paradigm shifted in the 1980s and 1990s to focus on core business activity, LBO firms and other financial buyers helped accelerate the process of deconglomeration.

In contrast to "bust-up" bids, deals known as "mergers of equals" became quite popular in the M&A market of the 1990s. Perhaps the best known of these *mergers-of-equals* is the AOL-Time-Warner deal. Billed as two firms combining together to be managed under the leadership of *both* companies' CEOs, the deal was deliberately structured to avoid the perception that one firm was acquiring (swallowing up) another company. In very short order, however, critics claimed that this kind of power-sharing arrangement between co-CEOs was doomed to fail. The story of the merger of AOL and Time-Warner validates the truth of this observation, as we shall see when we study this deal and its aftermath in Chapter 7. At this point, suffice it to say that the financial return of this combination proved dismal for the shareholders and, as it turns out, the power-sharing arrangement at AOL-Time-Warner was doomed almost from the very start.