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IN THE

SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM B. WEINBERGER AND EDWARD U. NOTZ,	)	
Plaintiffs Below Appellants,	)	
v.	)	No. 90, 1985
UOP, INC., THE SIGNAL COMPANIES, INC. AND SIGCO INCORPORATED,	)	
Defendants Below, Appellees.	)	

PLAINTIFFS' MOTION FOR REHEARING *EN BANC* OR FOR REARGUMENT OF THE COURT'S JULY 9, 1985 ORDER OF AFFIRMANCE

A. Background of This Motion

On February 1, 1983, this Court handed down its landmark *en banc* opinion in *Weinberger v. UOP, Inc.*, Del. Supr., 457 A.2d 701, 714 (1983) (hereafter "*Weinberger,* Supr.__"), which redefined and restated Delaware law of damages in cashout merger cases and held that the wronged UOP stockholders are entitled to a "liberalized appraisal" of the fair value of their shares, as well as further equitable relief if, after applying appraisal standards, the appraisal remedy was not "adequate."[1] The opinion was widely reported and commented upon as a major development in Delaware corporate law and the outcome on remand was eagerly awaited since it would clarify the opinion's implications.

After retrial solely on the issue of damages, the Court of Chancery issued an unreported letter opinion. Numerous legal and factual deficiencies in that opinion were delineated in the

1. While this Court's unanimous opinion did not decide damages, it strongly inferred that, based on the record before it, this Court believed that the Arledge-Chitiea Report indicated that the value of the UOP shares was not less than $24.00 per share. (*Weinberger,* Supr., 709).

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plaintiffs' opening brief in support of their appeal. *Weinberger v. UOP, Inc.*, Del. Ch., C.A. No. 5642, Brown, C. (January 30, 1985) (hereafter "*Weinberger*, Chan.__"). Not only did the Court below decline to award rescissory damages, it failed entirely to carry out this Court's specific mandate that the UOP stockholders were entitled to a quasi-appraisal proceeding equivalent to the statutory appraisal remedy (i.e., a determination of the fair value of their shares as of the time of the merger) *(Weinberger*, Chan. *20)*. Instead, the only relief the lower Court awarded was a $1.00 per share penalty for fiduciary wrongdoing[2], which it justified by incorrectly interpreting this Court's opinion as granting the lower Court "complete discretion" in the award of damages in cashout mergers, including discretion to dispense with any finding of fair value *(Weinberger*, Chan. 4, 25).

To discharge their fiduciary duties, the plaintiffs and their attorneys could not do anything other than file an appeal and a detailed opening brief (hereafter "PB") and appendix to protect the rights of the wronged UOP stockholders. Moreover, as Delaware corporate practitioners, counsel could not let an opinion so inconsistent with this Court's opinion, §262 and Delaware damage law become final for all time without taking all possible steps to make certain that this Court understood the full implications of the lower Court's opinion.

The defendants then filed a stock motion for affirmance under Supreme Court Rule 25(a)(iii) cleverly re-asserting what the lower Court erroneously advanced as legal justification for its decision: namely, that this Court had authorized that damages be a totally discretionary decision of the trial court. Though the motion's premise was clearly contrary to the unanimous opinion of this Court in *Weinberger*, the plaintiffs were powerless to call this to the Court's attention because under Rule 25 only this Court itself could permit plaintiffs to respond. *Ingersoll v. Rollins*, Del.

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2. This token award is a resounding economic victory for Signal, the wrongdoer. The Chancellor found that since the merger, Signal took $80 million in dividends and $157 million in cash out of UOP, (*Weinberger*, Chan. 24). Against this, the UOP stockholders are awarded only $1.00 per share, or approximately $5.6 million, plus interest for only 2 of the 7 years since the merger. While this is a significant sum, this Court should not be blind to the fact that, not only the wronged UOP stockholders, but also critics of Delaware law and the corporate and academic world will recognize, if the affirmance stands, that this Court in the end allowed Signal (and the reversed Chancellor) to prevail by leaving the UOP stockholders with minimal recompense. The message will be clear: in Delaware, breaches of fiduciary duty will pay off handsomely for Signal and other majority stockholders, even if they are found liable.

Supr., 269 A.2d 213 (1970). The clear purpose of Rule 25 is to dispose summarily of appeals which on their face have no merit. Rule 25 should not foreclose an appeal from the first direct application of the fair value and rescissory damage principles of this Court's landmark *Weinberger* decision.

Beyond the unfair result in this case, the Order of affirmance will, under the recent amendment to Supreme Court Rule 17, be precedent. Therefore the Order, in a stroke, makes the Chancellor's unreported decision, totally altering Delaware law on damages, binding precedent in all future appraisal and quasi-appraisal cases, and permits the Chancellor to disregard §262's direction to determine fair value and substitute whatever discretionary amount he subjectively comes up with, even if that award (as here) is far less than fair value. Since *Weinberger, Supr. 714* strongly emphasized the legislative intent of §262 that stockholders get full compensation for the fair value of their stock and obviously sought to make appraisal a meaningful remedy again, the corporate and academic world can only be puzzled by this Court's summary affirmance of an unreported opinion which eviscerates the fair value (and rescissory) damage principles so recently announced in *Weinberger.* That bewilderment will be compounded by the fact that the Court's Order of affirmance totally overlooks a principal reason presented in the plaintiffs' opening brief as to why the opinion of the Chancellor should not be allowed to stand—the lower Court's failure to determine the fair value of the UOP stock on the date of the merger.

To attempt to right the injustice imposed by the lower Court on the UOP stockholders and to make certain that this Court recognizes (1) the far reaching and disastrous consequences its affirmance will have on subsequent merger cases, and (2) the adverse comment the affirmance is likely to prompt concerning the lack of stability and fairness of damages under Delaware merger law, the plaintiffs have again filed a motion for rehearing *en banc* or for reargument.

The following are the reasons why this Court should (1) grant rehearing *en banc* or reargument and rescind its Order of affirmance, (2) decide the issues raised by plaintiffs' appeal after full briefing and argument and an in depth consideration of these important questions, and (3) announce whether the unanimous *Weinberger* opinion still states the Delaware law of cashout merger damages or the unreported letter opinion of the lower Court repudiating *Weinberger* and §262 in favor of a totally discretionary and inadequate measure of damages now is the Delaware law of damages in cashout mergers.

B. This Court's July 9, 1985 Order Totally Ignores Plaintiffs' Arguments IB and IV That the Court Below Failed to Determine Fair Value

The fundamental purpose of 8 *Del.C.* §262, the Delaware appraisal statute, is to entitle stockholders by law to an appraisal of their shares. The statute provides that the Court of Chancery *shall* determine and award the fair value of the shares as of the date of the merger. 8 *Del.C.* §262(a),(h),(i). When this Court liberalized and expanded the acceptable methods of proving fair value, it did not (and indeed could not) change the statutory requirement that the Court of Chancery make a determination of and award the fair value of the shares on the date of the merger. The purpose of the quasi-appraisal remedy created in *Weinberger*, Supr., 714, was to preserve the right of UOP's stockholders to receive fair value for their shares.

The lower Court, on remand, made no finding of the fair value of the UOP shares as of the merger. (PB 29-33, 57). Thus, it did not perform the task mandated by §262 and specifically required by this Court in this very case. Indeed, as a review of points IB and IV of the plaintiffs' opening brief shows, the Chancellor simply rejected plaintiffs' fair value evidence for the reasons set forth in his prior opinion (that was reversed on appeal) and said that it was "unnecessary" to even review defendants' evidence or plaintiffs' proof of the inaccuracy of that evidence "because of the approach that I take in deciding the monetary damage aspect of the case." (*Weinberger*, Chan., pp. 16-20).[3]

This Court, in affirming by summary order the opinion and order of the Court below, did not consider, address or decide the points raised in IB and IV of plaintiffs' opening brief.

C. The Issues on Appeal Are Not Issues of Judicial Discretion

Signal's motion to affirm misleadingly stated that this Court's prior opinion gave unbridled discretion to the Chancellor to use whatever standards he wanted in determining damages. This misstatement seems to have led this Court to affirm on the basis that the award of damages in a cashout merger is entirely a mat-

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3. The lower Court's award of interest from the date of this Court's opinion rather than the merger date 5 years earlier further shows the Chancellor made no determination of fair value as of the merger date.

ter of judicial discretion.[4] However, what this Court held in *Weinberger*, Supr., 714, is that in appropriate cases, where even the liberalized appraisal did not provide a full remedy, the Court of Chancery could and indeed should exercise its historical equity powers in a discretionary manner to fashion an *additional* damage award or other relief for the wronged stockholders. The distinction between what this Court authorized the lower Court to do and what the lower Court did represents a fundamental distortion of *Weinberger*.

This Court decided that the UOP stockholders were entitled to a liberalized quasi-appraisal of the fair value of their shares because (*Weinberger*, Supr. 714):

> "Obviously, there are other litigants, like the plaintiffs, who abjured an appraisal and whose rights to challenge the element of fair value must be preserved."

The quasi-appraisal was to be "co-extensive" with the statutory appraisal remedy requiring a fair value determination and could include rescissory damages. (*Weinberger*, Supr., 704, 714). This Court did not say the Chancellor had discretion to substitute his subjective views of appropriate damages for the mandatory fair value determination. Rather, this Court said that if, after applying the approved fair value and rescissory standards, it did not appear that the UOP stockholders had received full and satisfactory relief, the Chancellor could award additional relief to remedy any inadequacy in the appraisal remedy (*Weinberger*, Supr., 714):

> "While a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such *other* relief as the facts of a particular case may dictate. *The appraisal*

4. The only cases defendants cited in support of their motion, *Jerry L. C. v. Lucille H. C.*, Del. Supr., 448 A.2d 223, 225 (1982) also and *Thornton v. State*, Del. Supr., 408 A.2d 126 (1979), are not in any way relevant to plaintiffs' appeal. Neither involved a remand after the Supreme Court had made findings and rulings establishing the law of the case. At most, their holdings establish that the specific issues of family law and criminal law involved were discretionary. Significantly, in both cases this Court issued a written opinion explaining why, based on statutory and case law, the issues were discretionary and controlled by established law.

> *remedy we approve may not be adequate* in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets or gross or palpable overreaching are involved. Cole v. National Cash Credit Association, Del. Ch., 156 A. 183, 187 (1931). *Under such circumstances,* the Chancellor's powers are complete to furnish any form of equitable or monetary relief as may be appropriate, including rescissory damages." (Emphasis added.)[5]

The Court also made it perfectly plain that the fair value determination was mandatory, not discretionary (Id.):

> "Until the $21 price is measured on remand by the valuation standards mandated by Delaware law, there can be no finding at the present stage of these proceedings that the price is fair.***
>
> "On remand, the plaintiff will be permitted to test the fairness of the $21 price by standards we herein establish in conformity with the principle applicable to an appraisal—that fair value be determined by taking 'into account all relevant factors' [see 8 *Del .C.* §262(h), supra]."

This Court's unexplained summary affirmance of the Chancellor on grounds that he had discretion to decline to make a fair value determination is at odds with §262 and at odds with the central principle carefully worked out and delineated in this Court's prior unanimous opinion: both §262 and this Court's opinion guarantee that stockholders are entitled to an appraisal remedy, the heart of which is a determination of the fair value of the shares as of the time of the merger. There was no discretion to ignore the requirement that fair value be determined and awarded.

Because of the binding effect of this Court's prior findings and rulings, the Chancellor also was not given the unfettered discretion which is the basis for his other holdings. On remand,

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5 . Signal's selective quotation of this portion of the opinion in its motion to affirm omits the statements indicating that the Chancellor's discretion is to supplement the appraisal remedy, not ignore it.

the Chancellor was required to act in conformity with this Court's opinion; instead, as plaintiffs' opening brief points out (PB 28-33), the Chancellor contradicted this Court's opinion. For example, given this Court's recognition of the legislative and judicial policy of fully compensating shareholders for what was taken from them (*Weinberger*, Supr., 714), the Chancellor did not have discretion to award minimal damages in derogation of his specific findings (*Weinberger*, Chan. p. 24) that Signal had actually received $80 million in dividends and $157 million in non-repayable cash from UOP since the merger.

If the Court, despite §262 and its own previous opinion, is going to confer on the Chancellor new discretionary powers to fix appraisal damages, it should at least explain for the benefit of all Delaware corporations and the corporate bar the reasons for deviating from the appraisal statute and what the Court *en banc* so recently stated in this very case to be the law of damages in Delaware.

D. Rehearing en Banc Should Be Granted Under the Criteria of Rule 4(f)

Rule 4(f) provides, in pertinent part:

"A motion for rehearing under this Rule may be based upon any of the following grounds:

> "i. The proceeding involves a question of exceptional importance;
>
> "ii. Consideration by the Court *en banc* is necessary to secure or maintain uniformity in Supreme Court decisions.
>
> "iii. The case may be controlled by a prior decision of the Court which should be reconsidered or which may be overruled or modified.

First, this Court's summary affirmance of the lower Court's unreported letter opinion, which radically changes the law set out in this Court's unanimous *en banc* opinion, presents issues of "exceptional importance" to Delaware's law of damages, particularly given the intense, widespread interest in this Court's earlier opinion and the outcome of this case.

Second, rehearing is appropriate because the lower Court's opinion is inconsistent with the law of damages in cashout mergers as re-examined, redefined and restated in this Court's opin-

ion. Since Rule 17 makes the Order affirming the lower Court's opinion binding precedent, the necessity for uniformity in Supreme Court decisions requires that rehearing be granted to resolve the disparity between this Court's *en banc* opinion and the summarily affirmed unreported Chancery opinion.

Third, the prior findings and holdings of this Court are res judicata and the law of the case. As such, they should have controlled the lower Court on remand. However, as pointed out in plaintiffs' opening brief, the lower Court's decision is contrary to this Court's adjudications in this very case, as well as established Delaware law in other cases. Thus, this Court's summary affirmance will in effect overrule portions of its original *Weinberger* decision and other cases with drastic effects on this case, other quasi-appraisal cases, and appraisal cases under 8 *Del.C.* §262.

Under each of the three criteria of Rule 4(f), the plaintiffs' motion for rehearing should be granted or the Order of affirmance withdrawn.

CONCLUSION

The Court's Order of affirmance was entered without any opportunity for the plaintiffs to point out why the defendants' motion was incorrect or the devastating change the entry of such an order would have in all quasi-appraisal and appraisal cases. The Order totally overlooked a principal point made in plaintiffs' opening brief—this Court's unanimous opinion in *Weinberger* (as well as §262) requires that the Court below make a finding as to the fair value of the stock at the time of the merger. Since the Order of affirmance will be precedent, the Court will have, by that order, without briefing and without argument, modified and reversed in large part its own recent *en banc* opinion. In view of the importance to the class in this case and the national importance of the corporate law of Delaware on damages, this Court should grant the motion for reargument or for rehearing *en banc* or withdraw its affirming Order.

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ATTORNEY'S CERTIFICATE

The attorneys for the plaintiffs below-appellants certify that the foregoing motion for rehearing *en banc* or reargument is presented in good faith and not for purposes of delay.

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