CORPORATE LAW — APPRAISAL RIGHTS — DELAWARE SUPREME COURT REVERSES DISMISSAL FOR SHAREHOLDERS SEEKING APPRAISAL IN MERGER WITH PRECLOSING DIVIDEND. — *In re GGP, Inc. Stockholder Litigation*, 282 A.3d 37 (Del. 2022).

Enacted in 1899 to replace the mandate that consolidations receive unanimous shareholder approval,[1] section 262 of the Delaware General Corporation Law[2] provides dissenting investors of merger targets with "appraisal rights" that entitle them to a judicially determined valuation of their shares.[3] Once a "sleepy backwater" of corporate law,[4] the statute has received growing attention as it has become an increasingly vital safeguard against director exploitation.[5] Despite appraisal's "disciplinary effect,"[6] the Delaware Supreme Court has lately reined in the doctrine's potency with decisions enforcing contractual waivers of such rights[7] and limiting valuations to the transaction's price.[8] In *In re GGP, Inc. Stockholder Litigation*,[9] the court further clarified the statute by applying it to a novel merger providing a substantial "pre-closing dividend" conditional on the deal's success.[10] While the shareholders prevailed,[11] the narrow survival of the motion to dismiss with unanswered concerns in the dissent raises doubts about the longevity of appraisals.

In 2017, mall operator GGP, Inc. (GGP) entered strategic merger negotiations with real estate company Brookfield Property Partners, L.P. (Brookfield).[12] During these parties' correspondence, Brookfield insisted the agreement include an "appraisal rights closing condition" that would have permitted it to terminate the deal if a certain number of shares exercised appraisal rights.[13] But GGP rejected these requests, and the parties eventually reached a proposal (later approved by 94% of votes unrelated to Brookfield[14]) offering $23.50 per share without the

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1 Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 19 (Del. 2017).

2 DEL. CODE ANN. tit. 8, § 262(a) (2022).

3 *See id.* ("Any stockholder . . . who has [not] voted in favor of the merger . . . shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares . . . .").

4 Guhan Subramanian, *Appraisal After* Dell, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 222, 222 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019).

5 *Id.* at 235 ("Appraisal is the only . . . check against a deficient deal process.").

6 Steven J. Cleveland, *Appraisal Rights and "Fair Value*," 43 CARDOZO L. REV. 921, 965 (2022).

7 *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1204 (Del. 2021).

8 *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 35 (Del. 2017); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 349 (Del. 2017).

9 282 A.3d 37 (Del. 2022).

10 *Id.* at 48; *see* GGP Inc., Definitive Proxy Statement (Schedule 14A), at 207 (June 26, 2018) [hereinafter GGP Proxy].

11 *See In re GGP*, 282 A.3d at 44.

12 *See* GGP Proxy, *supra* note 10, at 21, 58–60.

13 *Id.* at 72–74.

14 *See* GGP Inc., Current Report (Form 8-K), Item 5.07(1) (July 26, 2018).

clause.[15] Importantly, in its 344-page proxy statement, GGP disclosed Brookfield would conduct its acquisition through a "pre-closing dividend" — forming 98.5% of the deal price[16] — followed by a trivial "per share merger consideration" shortly thereafter.[17] The proxy cautioned that shareholders were "entitled to exercise appraisal rights *solely in connection with the merger*"[18] and contained a section titled "Appraisal Rights in the Merger"[19] (Appraisal Rights Notice) stating the following:

> If the [merger is] completed, GGP common stockholders who comply exactly with the applicable requirements and procedures of Section 262 . . . will be entitled to demand appraisal of their GGP common stock and receive *in lieu of the per share merger consideration* a cash payment equal to the "fair value" of their GGP common stock . . . . [A]ppraised value may be *greater than, the same as or less than the per share merger consideration*.[20]

Taking issue with the italicized language,[21] several shareholders sued Brookfield and various GGP leaders in the Delaware Chancery Court,[22] claiming the defendants designed "a contrived scheme to dissuade [plaintiffs] from exercising appraisal," as investors could seemingly seek "only 1.5% of the [total merger] consideration."[23] They accordingly alleged the defendants breached their fiduciary duty by either "failing to provide . . . a fair summary of" such rights or "intentional[ly] thwarting" them altogether.[24]

Writing for the court, Vice Chancellor Slights stated he could consider the preclosing dividend as a "relevant factor" in his appraisal[25] and conceded the proxy "could have been more clearly drafted."[26] Nevertheless, since the Appraisal Rights Notice encouraged investors to seek counsel and "reflect[ed] the unremarkable observation that . . . the court's adjudicated valuation is difficult to predict," he held the proxy properly disclosed appraisal rights and dismissed the claim.[27]

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15 GGP Proxy, *supra* note 10, at 70, 76.

16 *In re* GGP, Inc. S'holder Litig., C.A. No. 2018-0267, 2021 WL 2102326, at *1 (Del. Ch. May 25, 2021).

17 *See* GGP Proxy, *supra* note 10, at 5–6, 56; *In re GGP*, 282 A.3d at 48–49.

18 GGP Proxy, *supra* note 10, at 15 (emphasis added).

19 Corporations subject to section 262 must notify shareholders of their appraisal rights. DEL. CODE ANN. tit. 8, § 262(d)(1) (2022).

20 GGP Proxy, *supra* note 10, at 335 (emphasis added).

21 Appellants' Corrected Opening Brief at 37, *In re GGP*, 282 A.3d 37 (No. 202, 2021).

22 Consolidated Verified Third Amended Stockholder Class Action Complaint ¶¶ 1, 22–35, *In re* GGP, Inc. S'holder Litig., C.A. No. 2018-2067 (Del. Ch. May 25, 2021).

23 *Id.* ¶ 304.

24 *Id.* ¶¶ 303, 305. This claim would entitle the plaintiffs to "quasi-appraisal," a doctrine extending the remedy to those "who, by tendering their shares on a materially uninformed basis, were prevented from seeking appraisal." Gilliland v. Motorola, Inc., 873 A.2d 305, 311 (Del. Ch. 2005).

25 *In re GGP*, 2021 WL 2102326, at *31. Delaware's appraisal-rights statute directs the Chancery Court to "take into account all *relevant factors*" when "determining . . . fair value." DEL. CODE ANN. tit. 8, § 262(h) (2022) (emphasis added).

26 *In re GGP*, 2021 WL 2102326, at *33.

27 *Id.* at *32.

The Delaware Supreme Court reversed in relevant part.[28] Writing for the majority, Justice Traynor[29] first recounted that the court cannot affirm a dismissal if the plaintiff would "be entitled to recover under any *reasonably conceivable* set of circumstances."[30] Emphasizing that the Court of Chancery must conduct appraisals by estimating "the value of the corporation at the time of the merger as if it had not occurred,"[31] the court concluded a proper valuation should include the preclosing dividend, as this payment was conditioned on the merger's approval.[32] And although acceptance of merger consideration normally constitutes a forfeiture of the shareholder's appraisal right,[33] the plaintiffs did not waive this power by receiving the *mandatory* preclosing dividend.[34]

Justice Traynor next reiterated that corporate directors must "disclose fully and fairly all material information,"[35] which Delaware courts define as information raising "a substantial likelihood that a reasonable stockholder would consider it important in deciding how to vote."[36] Analyzing the Appraisal Rights Notice, he labeled the disclosure "misleading," as it "explicitly correlated" the fair value of investors' shares with just the per-share merger consideration and suggested the preclosing dividend would be excluded.[37] Justice Traynor then deemed such misinformation material because it obfuscated GGP's valuation to shareholders and conceivably caused some to believe they could not qualify for appraisal under a de minimis exception in Delaware law.[38] Addressing the defendants' assertion that they need not share "specula[tion] about how a court might decide hypothetical legal issues,"[39] the

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[28] *In re GGP*, 282 A.3d at 71. The court affirmed four dismissals without discussion, *id.*, as three claims relied on the incorrect premise of Brookfield being a controlling shareholder, *In re GGP*, 2021 WL 2102326, at *24, and the remainder alleged unjust enrichment, *id.* at *35.

[29] Justice Traynor was joined by Chief Justice Seitz and Justice Valihura.

[30] *In re GGP*, 282 A.3d at 54 (emphasis added) (quoting Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC, 27 A.3d 531, 535 (Del. 2011)).

[31] *Id.* at 57 (citing Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 298 (Del. 1996)).

[32] *Id.* at 59–60; GGP Proxy, *supra* note 10, at 207 ("[T]he consummation of . . . the pre-closing dividend will be conditioned upon . . . receipt by GGP of a written notice from [Brookfield] to the effect that all conditions set forth in the merger agreement have been satisfied . . . .").

[33] *See* DEL. CODE ANN. tit. 8, § 262(k) (2022) ("[N]o person who has demanded appraisal rights . . . shall be entitled . . . to receive payment of dividends or other distributions . . . .").

[34] *In re GGP*, 282 A.3d at 61. Indeed, Delaware's appraisal-waiver provision contains an explicit exception for "dividends or other distributions payable to stockholders of record at a date which is prior to the effective date of the merger." Tit. 8, § 262(k).

[35] *In re GGP*, 282 A.3d at 62 (quoting Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992)).

[36] *Id.* at 63 (quoting Loudon v. Archer-Daniels-Midland Co., 700 A.2d 135, 142 (Del. 1997)).

[37] *Id.* at 66.

[38] *Id.* at 66–67. The relevant portion of the de minimis exception reads as follows:

> [The Court of Chancery] shall dismiss the proceedings as to all holders of such shares who are otherwise entitled to appraisal rights unless (1) the total number of shares entitled to appraisal exceeds 1% of the outstanding shares of the class or series eligible for appraisal, [or] (2) the value of the consideration provided in the merger, consolidation or conversion for such total number of shares exceeds $1 million . . . .

Tit. 8, § 262(g).

[39] Appellees' Answering Brief at 3–4, *In re GGP* (No. 202, 2021).

court held the proxy already contained legal advice through its Appraisal Rights Notice and was thereby "required to be correct and complete" in such disclosures.[40] Finally, given Brookfield's earlier attempts to include an appraisal-rights closing condition and the defendants' failure to supply an alternative justification for their transaction's structure, Justice Traynor found sufficient evidence of such misleading information being intentional for the plaintiffs' claims to survive dismissal.[41]

Dissenting in part, Justice Montgomery-Reeves[42] agreed with both treating the preclosing dividend as merger consideration and concluding that the receipt of such payment did not waive appraisal rights.[43] However, stressing that omitted facts "must contribute meaningfully to the 'total mix' of information available" to be material,[44] she took issue with Justice Traynor labeling the proxy "misleading" for three reasons.[45] First, the Appraisal Rights Notice explicitly mentioned just the per-share merger consideration because it "accurately reflect[ed]" that shareholders need not forgo the preclosing dividend to exercise appraisal.[46] Second, other disclosures in the proxy expressly considered this dividend part of the transaction's total consideration,[47] thereby adequately asserting the payment was "'in connection with' the merger."[48] Lastly, considering the clarity in Delaware's laws on appraisal rights[49] and the plaintiffs' compelling argument that the proxy elsewhere included the preclosing dividend in merger consideration, shareholders could not reasonably conclude that an appraisal would exclude such a distribution.[50] Justice Montgomery-Reeves ended by stating that, even if the proxy misguided some investors into believing they fell within Delaware's de minimis exception, the plaintiffs waived such an argument by failing to specifically raise it in their complaint to the Chancery

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[40] *In re GGP*, 282 A.3d at 69.

[41] *Id.* at 70–71. While "good faith erroneous judgment" of a disclosure concerns the duty of care, Zirn v. VLI Corp., 681 A.2d 1050, 1062 (Del. 1996), *intentional* violations implicate the duty of loyalty, O'Reilly v. Transworld Healthcare, Inc., 745 A.2d 902, 915 (Del. Ch. 1999). GGP's charter exculpates directors from personal liability for breaches of fiduciary duty, GGP Inc., Second Amended and Restated Certificate of Incorporation 4 (May 17, 2017), but Delaware forbids extending such exculpation to the duty of loyalty, tit. 8, § 102(b)(7)(i).

[42] Justice Montgomery-Reeves was joined by Justice Vaughn.

[43] *In re GGP*, 282 A.3d at 71 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[44] *Id.* at 73 (quoting Ehlen v. Conceptus, Inc., C.A. No. 8560, 2013 WL 2285577, at *2 (Del. Ch. May 24, 2013)).

[45] *Id.* at 79.

[46] *Id.* at 74–75.

[47] *E.g.*, GGP Proxy, *supra* note 10, at 6 ("[A]s a result of receiving *the pre-closing dividend and the per share merger consideration*, unaffiliated GGP common stockholders . . . will be entitled to receive . . . *total consideration* of up to $23.50 . . . ." (emphases added)).

[48] *In re GGP*, 282 A.3d at 77 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[49] *See, e.g.*, La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1192 (Del. Ch. 2007) (applying section 262 to a dividend conditional on a merger's approval because "the label 'special dividend' [was] simply cash consideration dressed up in a none-too-convincing disguise").

[50] *In re GGP*, 282 A.3d at 78–79 (Montgomery-Reeves, J., concurring in part and dissenting in part).

Court.[51] Consequently, she would have affirmed the dismissal of their claims.[52]

In re GGP seemingly involved fact-specific debates over a novel merger inconsequential to corporate law overall, but its wanting defense of appraisal rights more broadly signaled the doctrine's waning protection against exploitative consolidations. Just one vote shy of a majority,[53] the dissent sought to reject such rights through narrow interpretations of the proxy and overconfidence in investors' legal expertise. Combined with the court's enforcement of appraisal-rights waivers[54] and tendency to center valuations around the transaction's price,[55] the dissent would introduce another avenue to curtail the doctrine with misleading disclosures — further threatening this safeguard for minority shareholders.[56]

The dissent first misapplied Delaware's "reasonably conceivable" pleading standard by finding undue clarity in the proxy. Beginning with the Appraisal Rights Notice, the dissent correctly interpreted this section's *first* mention of the per-share merger consideration to describe an exception in Delaware's appraisal-waiver law.[57] But this reading does not extend to the proxy's later statement that "appraised value may be greater than, the same as or less than the per share merger consideration."[58] Although shareholders need only forgo the per-share merger consideration to *qualify* for appraisal, the correct reference frame for the *appraised value* should include the preclosing dividend.[59] Additionally, regarding the dissent's finding that the proxy elsewhere implied the preclosing dividend was "in connection with the merger,"[60] this construal does not eliminate other feasible interpretations.[61] Indeed, one need look no further than the proxy's defined terms as shareholders could have inferred "per share *merger consideration*"[62] to include all payments

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[51] *Id.* at 79; *see* DEL. SUP. CT. R. 8 ("Only questions fairly presented to the trial court may be presented for review . . . .").

[52] *In re GGP*, 282 A.3d at 71 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[53] *See id.* at 42 (syllabus); *id.* at 71 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[54] *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1204 (Del. 2021).

[55] *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 19 (Del. 2017); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 349 (Del. 2017); Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 142 (Del. 2019).

[56] *See* Subramanian, *supra* note 4, at 235.

[57] *In re GGP*, 282 A.3d at 74–75 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[58] GGP Proxy, *supra* note 10, at 335.

[59] This is especially true as courts increasingly defer to deal prices in appraisals. *See* Wei Jiang et al., *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. REV. 2133, 2166–67 (2020).

[60] *In re GGP*, 282 A.3d at 75 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[61] While "reasonably conceivable" is inherently subjective, the court has described it as "broad," Spence v. Funk, 396 A.2d 967, 968 (Del. 1978), and lower than the federal "plausibility" standard, *see* Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC, 27 A.3d 531, 537 (Del. 2011). Such a generous test should intuitively allow multiple readings of the same complicated document.

[62] GGP Proxy, *supra* note 10, at vi (emphasis added).

"in connection with the merger,"[63] implying excluded disbursements — such as the preclosing dividend — would be left out. From this phrase and the Appraisal Rights Notice, it is "reasonably conceiv-able" the proxy misled investors into thinking the preclosing dividend would not be considered in a valuation. But according to the dissent, shareholders should have easily been able to eliminate such confusion by relying on the proxy's limited accurate portrayals in its 344 pages of information.[64]

The dissent then transcended the defendants' communications to assert that alternative interpretations of shareholders' appraisal rights were not reasonably conceivable because of the sufficient clarity in Delaware's statute and precedent — a conclusion striking for several reasons. First, the dissent found that prior cases unquestionably extended to, and overwhelmingly supported, the preclosing dividend's inclusion in an appraisal even though the court had never before addressed this matter.[65] The dissent next took issue with the plaintiffs' "convincing[] argu[ment] that the [p]re-[c]losing [d]ividend is merger consideration" because it inherently contradicted their simultaneous assertion that the proxy was misleading.[66] However, such claims are not mutually exclusive; on one hand, shareholders can advocate for the preclosing dividend's inclusion in an appraisal by leveraging Delaware law and *some* of the proxy's text while, on the other, arguing the defendants muddied this realization in other conveyances.[67] But above all, when taken to its extreme, the dissent's logic would render the proxy's required appraisal-rights disclosures irrelevant altogether. If the court can expect shareholders to recognize when Delaware law would override a corporation's incorrect analysis, such information would lose its purpose

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[63] *Id.* at 15. The proxy cautions that its "headings . . . are for convenience of reference purposes only and shall not affect . . . the meaning or interpretation of [the proxy] or any term or provision thereof." *Id.* at A-20. But even if the defined term "per share merger consideration" constitutes a "heading," some of the proxy's substantive disclosures, such as the Appraisal Rights Notice, could still confuse interpretations of the preclosing dividend.

[64] Despite its corporate law expertise, *see* Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 BROOK. L. REV. 1, 28–29 (1995), even the majority described the proxy as a "deeply challenging read," *In re GGP*, 282 A.3d at 48.

[65] *In re GGP*, 282 A.3d at 77 (Montgomery-Reeves, J., concurring in part and dissenting in part). The dissent engaged with two cases: *Louisiana Municipal Police Employees' Retirement System v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007), and *In re Dollar Thrifty Shareholder Litigation*, 14 A.3d 573 (Del. Ch. 2010). *In re GGP*, 282 A.3d at 77–78 (Montgomery-Reeves, J., concurring in part and dissenting in part). While both support the preclosing dividend's inclusion in an appraisal, neither supplies identical disputes; the former held that such a payment triggers appraisal rights without addressing if it would be included in the valuation, *Crawford*, 918 A.2d at 1191–92, whereas the latter did not involve an appraisal altogether, *In re Dollar Thrifty*, 14 A.3d at 575–78.

[66] *In re GGP*, 282 A.3d at 78 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[67] The dissent stated that the plaintiffs "point[] to at least two portions of the Proxy that support" including the preclosing dividend in an appraisal, *id.*, but the proxy could dilute the conspicuousness of both disclosures — and elsewhere provide conflicting inferences — given its length.

as a disclosure.[68] Beyond imposing a burdensome mandate of legal expertise on retail investors,[69] the dissent's standard would problematically enable firms to share misleading information under the façade of transparency.

Through its flawed counterarguments, the dissent advanced a new route for corporations to further curtail appraisals. Recently, the court has narrowed this doctrine by allowing contractual waivers of appraisal rights[70] and tying valuations to the deal's price.[71] While such cases impose substantive limits on the remedy, the dissent exhibited receptiveness to a *procedural* restraint: misleading disclosures. Moreover, this new technique presents the most damaging constraint yet: whereas precedent allows investors to either "price in" contractual waivers ex ante[72] or seek valuations with de facto ceilings,[73] the dissent threatened to eliminate appraisal rights wholesale and ex post. Namely, facing this procedural blockade in addition to their already costly litigation,[74] otherwise-dissenting shareholders could plausibly determine the legal expenditures of an appraisal to outweigh its expected recovery.[75] Alternatively, some might fall prey to the deceptive information and mistakenly believe the judiciary's valuation would be nominal.[76] In either scenario, the shareholders would forgo appraisal even though they would have exercised such rights — and initially bought their shares

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[68] *See* Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 720 (2011) (noting mandated disclosure is intended to "give people good information").

[69] Some scholars have noted that shareholders seeking appraisal tend to be sophisticated rather than merely "Grandma and Grandpa." *E.g.*, Subramanian, *supra* note 4, at 238–39. Even still, this premise of high shareholder competence reflects a larger shift in regulatory power from courts to markets as sophisticated institutional investors become increasingly influential. *See generally* Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263 (2019).

[70] *See* Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1204 (Del. 2021).

[71] *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 19 (Del. 2017); DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 349 (Del. 2017); Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 142 (Del. 2019).

[72] *Cf.* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 27 (2005) (noting, for freezeouts, that "an ex ante pricing adjustment . . . should, on average, compensate minority shareholders fairly, which is all that is needed to address equity concerns and preserve allocational efficiency").

[73] *See* Ben Lucy, Note, *Defining Appraisal Fair Value*, 106 VA. L. REV. 1183, 1217 (2020) (stating the court "sets a presumptive cap on appraisal fair value awards: the unaffected trading price").

[74] *See* Lucian Arye Bebchuk, *Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments*, 102 HARV. L. REV. 1820, 1853–54, 1854 n.54 (1989) (discussing the relatively high cost of appraisal-rights litigation relative to shareholders' typical recovery).

[75] Although future plaintiffs might more easily establish a disclosure as misleading by citing to *In re GGP*, such precedent simultaneously strengthens the dissent's argument that shareholders should have independently identified the clarity in Delaware's appraisal-rights doctrine. *In re GGP*, 282 A.3d at 77–78 (Montgomery-Reeves, J., concurring in part and dissenting in part).

[76] Despite the potential for a quasi-appraisal, the court has explicitly extended this remedy to all shareholders on an opt-out basis for only short-form mergers. *See* Berger v. Pubco Corp., 976 A.2d 132, 144–45 (Del. 2009); *see also* DEL. CODE ANN. tit. 8, § 253(a) (2022) (requiring that an acquirer hold at least ninety percent of the target's shares before conducting a short-form merger). In other contexts, investors might be required to opt *into* a quasi-appraisal — preserving the risk that mistaken shareholders fail to pursue the remedy. *Berger*, 976 A.2d at 143.

with the confidence of this doctrine's perceived protection — absent a misleading disclosure.

On a broader level, this split decision illustrated the continued decline of appraisals. Delaware's legislature originally adopted the doctrine to protect shareholders from perceived inadequate deal prices,[77] and appraisals continue to deliver such insurance by effectively setting a price floor on negotiations.[78] Empirical research indicates merger targets receive higher deal premia after events strengthening appraisal remedies without a corresponding deterrent effect on the likelihood of consolidation,[79] suggesting these actions aid all shareholders rather than just dissidents. Yet *none* of the Justices addressed these benefits — including the majority. Instead, they narrowly reversed the shareholders' dismissal without ever acknowledging the doctrine's greater significance. Considering the precarious outlook of appraisals,[80] such a marginal decision fails to decelerate the remedy's fading relevance. Should a similar case arise with stronger facts for the defendants, the dissent could plausibly garner another vote to maintain this decline. In particular, Brookfield's efforts at an appraisal-rights closing condition[81] possibly increased skepticism toward the proxy, and another merger could involve a comparably confusing disclosure without such documented attempts.[82] But even accepting this seeming shareholder victory on its face, the split decision still signaled the court's rising reluctance toward robust appraisal rights.

Although the shareholders in *In re GGP* prevailed, their reversal of a motion to dismiss by one vote hardly forms a resounding success. Rather, it demonstrates the continuously dwindling potency of Delaware's appraisal rights. By shoehorning clarity into the proxy, the dissent muddied the prospects of future appraisals and invited corporations to dilute such rights through procedural creativity. Without further clarity on the topic, shareholders will only be further dissuaded from leveraging this doctrine — stifling a once-meaningful barrier against corporate exploitation.[83] Given the court's gradual erosion of such so-called rights, section 262 seems destined for the sleepy backwater from which it came.

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[77] Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 19 (Del. 2017).

[78] Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J.L. ECON. & ORG. 543, 570 (2018) (noting appraisals "protect[] the dissenting shareholders' rights after the fact" and "affect[] their interest ex ante[] by imposing a de facto price floor . . . on bidding").

[79] Audra Boone et al., *Merger Negotiations in the Shadow of Judicial Appraisal*, 62 J.L. & ECON. 281, 314 (2019) (concluding appraisals confer "an important protection" for shareholders).

[80] *See* Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of* Dell *and* DFC Global, 68 EMORY L.J. 221, 224 (2018) (stating that the court's recent cases "risk[] smothering the fledgling utility of the appraisal remedy in its crib").

[81] *See* GGP Proxy, *supra* note 10, at 72–74.

[82] In any event, this alteration would enable defendant directors to waive monetary liability. *See* Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160–61 (1990) (finding over ninety percent of sampled Delaware firms waived liability within one year of the legislature allowing the waivers).

[83] Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1598 (2015) (deeming appraisal "a back-end check on abuses").