Give Me Back My Money: A Proposed Amendment to Delaware's Prepayment System in Statutory Appraisal Cases

*By R. Garrett Rice**

In 2016, the Delaware General Assembly amended section 262 of the Delaware General Corporation Law to provide surviving corporations with the option to prepay stockholders in appraisal cases. Specifically, the amendment gives a surviving corporation the option to pay, in advance of a trial, to determine the stock's fair value, whatever amount per share that it chooses. Doing so cuts off the statutory interest on the prepaid amount, which theoretically should disincentivize investors from filing appraisal petitions solely to turn a profit from the statutory interest rate—a strategy known as "interest-rate arbitrage." But in amending the statute, the General Assembly did not specify whether the petitioning stockholders must return to the corporation any amount by which the prepayment exceeds the court's determination of fair value. The resulting ambiguity has not only caused uncertainty among litigants and costly motion practice in the Delaware Court of Chancery—a consequence, ironically, that the legislative amendment was aimed at avoiding—but has also diminished the amendment's effect on curbing interest-rate arbitrage and, more generally, appraisal arbitrage.

This article explores the history behind the prepayment amendment, including the evolution of Delaware's appraisal statute and two Court of Chancery cases in which the Court foresaw the need for an effective prepayment system. This article also examines the legislative history of the 2016 amendment and other scholars' suggestions for dealing with the statutory ambiguity. Finally, the article offers a new model for legislative reform, one that retains section 262's core and advances the policy objectives that underlie Delaware's appraisal system.

Contents

* J.D. Washington & Lee University School of Law; B.A. Lafayette College. Garrett Rice is a corporate litigator at Ross Aronstam & Moritz LLP in Wilmington, Delaware. Before entering private practice, Mr. Rice was a law clerk for Chief Justice Leo E. Strine, Jr. of the Delaware Supreme Court. The views and opinions expressed herein are those of the author and do not necessarily represent the views of his firm or its clients. The author would like to thank Jacob Fedechko, Nathan Kenison, and Michael Sirkin for their insightful comments and valuable suggestions. The author also wishes to thank his wife, Lauren, for her unconditional support.

I. Introduction

Striking a balance in corporate law is often easier said than done. One of the oldest and most debated examples of this is the need to balance stockholders' interests with those of other corporate constituencies like communities and employees.[1] Another is finding the right middle ground between statutory mandates and flexibility for corporations.[2] Statutory appraisal proceedings are no different. Legislatures are tasked with drafting statutes that achieve a balance between varying policy concerns. On the one hand, there is a need to avoid unjustly enriching a surviving corporation with an interest-free "loan" equal to the fair value of a petitioner's shares, which the corporation will not have to pay to that petitioner until after a trial years later. On the other hand, interest-rate arbitrage is a real concern.[3] The latter policy interest causes particular apprehen-

1. *See* Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. Corp. L. 637, 638–40 (2006); Edward D. Rogers, *Stringing the Wrong Balance: Constituency Statutes and Corporate Governance*, 21 Pepp. L. Rev. 777, 779 (1994); Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 Va. L. & Bus. Rev. 163, 164 (2008).

2. Delaware's model is more of the latter than the former. *See* Leo E. Strine, Jr., *The Delaware Way*, 30 Del. J. Corp. L. 673, 674 (2005) ("[T]he Delaware approach to corporate law keeps statutory mandates to a minimum. And even some of the mandatory terms are subject to being overridden through charter and bylaw provisions. In particular, our law gives corporate planners tremendous power to use the charter . . . to vary otherwise mandatory terms.").

3. *See generally* Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 Wash. U. L. Rev. 1551 (2015) [hereinafter *Appraisal Arbitrage*]; *infra* Part II.C.

sion in Delaware, where interest accumulates in appraisal cases at "5% over the Federal Reserve discount rate."[4] As the Court of Chancery accurately observed in one recent case, "where market rates of return are low, the opportunity for . . . a near risk-free return five percent above the Federal Discount rate may penalize a respondent corporation, and may create perverse litigation and investment incentives, including encouragement of litigation of cases without significant potential for an award above the merger consideration, and even arbitrage of appraisal claims."[5]

The Delaware General Assembly attempted to reconcile these dueling policy concerns in 2016 by limiting corporations' exposure to—and thus petitioning stockholders' access to—large amounts of interest in appraisal cases. As amended, section 262 of the Delaware General Corporation Law (the "DGCL") permits the surviving corporation to prepay petitioning stockholders an amount of the corporation's choosing. That prepayment discontinues the accrual of interest, as to the amount of prepayment, that the company would otherwise owe the petitioners after the Court of Chancery makes a fair value determination.[6] Importantly, the surviving corporation has the option of whether to make a prepayment, and if it chooses to do so, has sole discretion as to the amount it will prepay.[7]

In amending the statute, the General Assembly did not specify whether petitioning stockholders must return to the corporation any "overpayment," i.e., the amount, if any, by which the prepayment exceeds the court's determination of fair value.[8] Predictably, this statutory gap has several negative repercussions, including uncertainty for litigants, additional motion practice and corresponding delays in appraisal litigation, and minimal incentive for surviving corporations to prepay.

Before rushing to conclusions about what next steps, if any, Delaware should take in revisiting its appraisal statute, it is important to understand the context in which the statute operates. For example, a basic understanding of the history of, and rationales for, both Delaware's appraisal statute and its relatively new statutory interest rate is essential to comprehend the policy interests at play in this area of the law. Only after understanding those policy goals is it fair to critique Delaware's statutory appraisal scheme and suggest reform. This article does just that, and proposes a sensible amendment to section 262 that would clarify that petitioning stockholders must return any amount of overpayment, without interest, to the surviving corporation that prepaid them.

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4. DEL. CODE ANN. tit. 8, § 262(h) (2018). Notably, this set interest rate is a relatively new addition to section 262, which previously gave the Court of Chancery discretion to award a percentage of interest that the court deemed fair. *See* Huff Fund Inv. P'ship v. CKx, Inc., C.A. No. 6844-VCG, 2014 WL 545958, at *2 (Del. Ch. Feb. 12, 2014); *infra* notes 33–40 and accompanying text.

5. *Huff*, 2014 WL 545958, at *2.

6. *See* Jay B. Kesten, *The Uncertain Case for Appraisal Arbitrage*, 52 WAKE FOREST L. REV. 89, 92 (2017) (explaining that the amended "statute seeks to deter questionable appraisal claims by curbing any distortionary influence of statutory interest awards").

7. *See* DEL. CODE ANN. tit. 8, § 262(h); *infra* Part III.B.

8. For example, if the deal price is $10 per share, the surviving corporation decides to prepay stockholders $9 per share, and the Court of Chancery later determines that fair value is $8.50, section 262 is silent as to whether the petitioning stockholders must return the $0.50 by which the prepayment exceeds fair value.

Part II offers a brief history of the appraisal remedy in Delaware, and explores the sharp rise in the number of appraisal cases in Delaware and distinguishes between appraisal arbitrage and interest-rate arbitrage.[9] Turning to interest-rate arbitrage specifically, Part III examines the history behind the 2016 prepayment amendment, including two Court of Chancery opinions that foresaw the need to curb appraisal petitioners' incentives to prolong litigation for the additional interest, and the amendment's legislative history, which clarifies the General Assembly's intentions in amending section 262.[10] Part IV explores the effect the prepayment amendment has already had on appraisal litigation, including how litigants have dealt with the ambiguity regarding overpayment.[11] Part V examines how other jurisdictions approach the prepayment issue in appraisal litigation and what scholars have suggested Delaware do to improve section 262.[12] Part V continues by outlining this article's suggested legislative amendment, which is consistent with both the policy concerns that gave rise to the prepayment amendment and the Court of Chancery's concerns regarding non-dispositive motion practice.[13]

II. A Primer on Appraisal and Appraisal Arbitrage

A statutory appraisal right permits stockholders of corporations to seek a judicial determination of the fair value of their shares upon the happening of certain major events that they voted against, such as a sale of the corporation.[14] To petition a court for appraisal, however, a dissenting stockholder must forego the consideration it would otherwise be entitled to upon the closing of a transaction.[15]

A. A Brief History of Appraisal in Delaware

Appraisal started popping up as a remedy for stockholders in the late 1800s, with most U.S. states adopting some form of appraisal statute by the early 1900s.[16]

9. *Infra* Part II.B–C.
10. *Infra* Part III.
11. *Infra* Part IV.
12. *Infra* Part V.A–B.
13. *Infra* Part V.C.
14. In the Court of Chancery's more elegant language, "[t]he appraisal statute affords the dissenters the right to a judicial determination of the fair value of their shareholdings." Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 296 (Del. 1996).
15. "This is not a trivial matter economically; recovery can be delayed substantially if the case goes to trial." Kesten, *supra* note 6, at 96. But as discussed below, most jurisdictions require an acquiring corporation to prepay appraisal petitioners what the corporation believes is fair value. *See* Desiree M. Baca, Note, *Curbing Arbitrage: The Case for Reappraisal of Delaware's Appraisal Rights*, 13 N.Y.U. J.L. & Bus. 425, 461–62 (2017) (surveying all fifty states); *infra* Part V.A.
16. *See* Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1558 n.30; Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 Geo. L. Rev. 1, 14, 55–57 (1995); *see also* Joseph L. Weiner, *Payment of Dissenting Stockholders*, 27 Colum. L. Rev. 547, 547–48 (1927) ("In a majority of the states, . . . dissenters may claim cash payment from the corporation equal to 'the value of their stock' as determined by appraisal.").

Writing in 1937, future U.S. Supreme Court Justice Wiley Rutledge described the appraisal remedy as still "a relatively new device."[17]

The Delaware General Assembly first adopted an appraisal statute in 1899,[18] making Delaware the fifth state to provide stockholders with this remedy.[19] As was the case in many states,[20] Delaware's appraisal statute "developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions."[21] Section 262's purpose has shifted over time, how-

17. Wiley B. Rutledge, Jr., *Significant Trends in Modern Incorporation Statutes*, 22 WASH. U. L.Q. 305, 341 (1937). By the early 1960s, every U.S. state had a statutory appraisal remedy except West Virginia, which followed suit a decade later. *See* Bayless Manning, *The Shareholders' Appraisal Remedy: An Essay for Frank Coker*, 92 YALE L.J. 223, 226 & n.4 (1962). But these statutes varied significantly from one another, were rarely used, and did "not loom very important." *Id.* at 262; *see also* Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L. REV. 420, 421 (1930) ("The statutes of the various states are unlike in scope."). The early appraisal statutes were so inconsequential that some believed the legal community could "live along with the *status quo*" despite the "sickly condition" of those statutes. Manning, *supra*, at 262; *see also* Thompson, *supra* note 16, at 4 ("Before long the [appraisal] remedy would be criticized as being both duplicative and incomplete in its protection of shareholders, and even somewhat random as to the transactions to which it would apply. By the 1960s, it was left for dead."). Even as the twentieth century came to an end, appraisal statutes were of "limited use." Thompson, *supra* note 16, at 10. For a more comprehensive study of the appraisal remedy's origin and evolution, see Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. LEGIS. 79, 86–93 (1995) [hereinafter *Back to the Future*].

18. Charles K. Korsmo & Minor Myers, *Interest in Appraisal*, 42 J. CORP. L. 109, 113 (2016) [hereinafter *Interest in Appraisal*]; Randall S. Thomas, *Revising the Delaware Appraisal Statute*, 3 DEL. L. REV. 1, 4 (2000); *see also* The General Corporation Law, ch. 273, § 56, 21 Del. Laws 445, 462–63 (1899). This enactment was part of Delaware's adoption of an entirely new corporation law. *See* Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 249 (1976) [hereinafter *A Brief History*]. "The appraisal remedy currently encoded in the Delaware corporate law bears almost no resemblance to the original 1899 statute." Thomas, *supra*, at 10. Under the 1899 statute, for example, three appointed appraisers determined the fair value of shares instead of a judge. *See id.* at 5; *see also* Charlotte K. Newell, *The Legislative Origins of Today's Appraisal Debate*, DEL. LAW., Summer 2017, at 12, 13 ("In these early years, the Court of Chancery was largely a bystander to the appraisal process."). The General Assembly has made major amendments to Delaware's appraisal remedy over the years, including a 1943 amendment that brought the Court of Chancery into the proceedings and a 1967 amendment that narrowed the scope of events that trigger appraisal rights. *See* Newell, *supra*, at 13; Thomas, *supra*, at 6–9.

19. Only New York (1890), Maine (1891), Kentucky (1893), and New Jersey (1896) beat Delaware to the punch. *See* Thompson, *supra* note 16, at 55.

20. *See* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941) ("At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation law. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to cooperate. To meet the situation, legislatures authorized the making of changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, [appraisal statutes . . . were widely adopted."); *see also* Daniel R. Fischel, *The Appraisal Remedy in Corporate Law*, 1983 AM. BAR FOUND. RES. J. 875, 877; Hideki Kanda & Saul Levmore, *The Appraisal Remedy and the Goals of Corporate Law*, 32 UCLA L. REV. 429, 434 (1985); Manning, *supra* note 17, at 228; Weiner, *supra* note 16, at 557; Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 614 (1998). *But see* Thompson, *supra* note 16, at 14 ("Appraisal statutes are often presented as having been enacted in tandem with statutes authorizing consolidation or merger by less than unanimous vote, but there was a significant difference in the spread of the two statutes.").

21. Ala. By-Prods. Corp. v. Cede & Co. *ex rel.* Shearson Lehman Bros., 657 A.2d 254, 258 (Del. 1995); *see also In re* Appraisal of Transkaryotic Therapies, Inc., C.A. No. 1554-CC, 2007 WL 1378345, at *3 (Del. Ch. May 2, 2007) ("Historically, all major corporate decisions required unan-

ever,[22] and today it acts "to protect the contractual rights of shareholders who object to a merger and to fully compensate shareholders who object to a merger and to fully compensate shareholders for any loss they may suffer as a result of a merger."[23] True to that purpose, "[t]he issue in appraisal is fair value; nothing more and nothing less."[24] The subset of transactions challenged in recent

imous shareholder consent. . . . [T]he Legislature created appraisal rights in an effort to compensate minority holders for the loss of the veto power and to give dissenters the right to demand fair value of shares."); Salomon Bros. v. Interstate Bakeries Corp., 576 A.2d 650, 652 (Del. Ch. 1989) ("[Section 262's] purpose was to replace the stockholder's veto power with a means of withdrawing from the company at a judicially determined price."); Root v. York, 39 A.2d 780, 810 (Del. Ch. 1944) (suggesting that "the real primary purpose of [Delaware's appraisal statute] is to protect the contractual rights of stockholders, objecting to a corporate merger"); Chi. Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934) ("In compensation for the lost [veto] right a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.").

Additional reasons for the appraisal remedy's origin have been suggested. One alternative explanation is the need to ensure that cashed-out stockholders receive fair value for their shares. *See* Siegel, *Back to the Future*, *supra* note 17, at 94–97; Thomas, *supra* note 18, at 3; *see also Ala. By-Prods. Corp.*, 657 A.2d at 258 ("The remedy is intended to provide those shareholders who dissent from a merger on the basis of inadequacy of offering price with an independent judicial determination of the fair value of their shares."). Another is the need to facilitate transactions. *See* Manning, *supra* note 17, at 227; Thompson, *supra* note 16, at 11 ("Statutory appraisal provisions arose at the end of the [nineteenth] century as part of an effort to facilitate the business combinations of railroads and other businesses that could benefit from large pools of capital."). *But see* Siegel, *Back to the Future*, *supra* note 17, at 97. In reality, early legislatures were likely motivated by some blend of these policy incentives. *See* Manning, *supra* note 17, at 230 ("The appraisal statutes may be viewed as a bulwark for the rights of the minority, or as a lubricant to speed the spread of majoritarianism. Of course the statutes might do both, depending upon their administration and application."); Thomas, *supra* note 18, at 16 ("Over time, appraisal has served three purposes—providing liquidity, checking majority oppression, and facilitating the market for corporate control.").

22. *See* Thompson, *supra* note 16, at 4 (explaining that today appraisal "serves an entirely different purpose from the original remedy"); *see also* Thomas, *supra* note 18, at 16 ("At a time when there were few developed markets for securities, providing minority shareholders with liquidity through appraisal made sense. Today, with the growth of national securities markets, most corporate investments are highly marketable, and in many instances minority shareholders may no longer need such protection.").

23. *Transkaryotic*, 2007 WL 1378345, at *3; *see also* Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 296 (Del. 1996) ("[Delaware's appraisal statute's] legislative purpose is to provide equitable relief for shareholders dissenting from a merger on grounds of inadequacy of the offering price."). The appraisal remedy also presently (1) "protect[s] minority shareholders from unfair fundamental transactions involving conflicts of interests," Wertheimer, *supra* note 20, at 711–12; *see also* James J. Park, *Reassessing the Distinction Between Corporate and Securities Law*, 64 UCLA L. Rev. 116, 150 & n.142 (2017); (2) provides an avenue "to reconcile differing shareholder preferences with respect to transactions that alter the risk of a firm's shares," Peter V. Letsou, *The Role of Appraisal in Corporate Law*, 39 B.C. L. Rev. 1121, 1174 (1998); and (3) is an effective "tool for uncovering suspiciously non-arm's-length bargains or side payments to the target's managers, guiding future fiduciary suits, and, generally, deterring misbehavior." Kanda & Levmore, *supra* note 20, at 443–45; *see also* Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1598 ("Just as the market for corporate control can serve as a check on agency costs from managerial shirking, appraisal rights can serve as a back-end check on abuses by corporate managers, controlling shareholders, or other insiders in merger transactions.").

24. Sunrise Partners Ltd. P'ship v. Rouse Props., Inc., C.A. No. 12609-VCS, 2016 WL 7188104, at *3 (Del. Ch. Dec. 8, 2016); *see also* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 370–71 (Del. 2017) ("Capitalism is rough and ready, and the purpose of an appraisal is not to make sure that the petitioners get the highest conceivable value that might have been procured had every domino fallen out of the company's way; rather, it is to make sure that they receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's-length transaction.").

years, however, indicates that many petitioners are more interested in turning a profit from the appraisal proceedings than investigating the legitimacy of the merger consideration offered.[25]

Consistent with the national trend,[26] few utilized Delaware's appraisal remedy in the early years.[27] Even when appraisal petitions were filed in past decades, "[t]he vast majority of litigated appraisal cases involve[d] conflicts of interest."[28] The relatively small number of petitions filed was due in small part to the expense of appraisal proceedings, which resulted in most petitioners being large stockholders.[29] Appraisal petitioners also lacked (and arguably still lack) settlement leverage compared to that of most corporate plaintiffs because appraisal petitioners "are limited to receiving the fair value for their shares," which means that the threat of an equitable remedy like an injunction is absent.[30] But like

Indeed, consistent with the limited nature of Delaware's appraisal remedy, section 262 is limited to cash-out mergers and other transactions in which stockholders receive consideration other than stock. *See* Del. Code Ann. tit. 8, § 262(b) (2018). Some scholars and practitioners have called for reform in Delaware that would broaden the triggers for appraisal. *See, e.g.*, Stuart M. Grant & Michael J. Barry, *Delaware's Appraisal Statute: A Relic in Need of Reform*, Del. Law., Spring 2008, at 29; Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1557, 1604–05; Siegel, *Back to the Future*, *supra* note 17, at 113; Wertheimer, *supra* note 20, at 617. But Delaware's narrowing of those rights has been a historical development. *See* Hariton v. Argo Elecs., Inc., 188 A.2d 123, 124 (Del. 1963); Seligman, *A Brief History*, *supra* note 18, at 284.

Limiting appraisal to certain transactions makes Delaware's statute significantly narrower than those in most other jurisdictions. *See* Kesten, *supra* note 6, at 95; Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions*, 74 L. & Contemp. Probs. 231, 233–34 (2011) [hereinafter *Appraisal of the MBCA*]. *Compare* Del. Code Ann. tit. 8, § 262 (2018), *with* Model Bus. Corp. Act Ann. § 13.02(a)(3) (2017). Nevertheless, the idea of Delaware's so-called "market exception" is logical in that securities can be viewed as a closer substitute for cashed-out shares than cash itself. *See* Kanda & Levmore, *supra* note 20, at 437–41. In other words, section 262 "protect[]s inframarginal value by identifying those situations in which substantial inframarginal value is most likely to be at stake." *Id.* at 446.

25. *See* Kesten, *supra* note 6, at 125 ("Throughout 2015 and 2016, appraisal petitioners challenged sixty-three public company transactions. More than 93% of the deals challenged involved arm's length transactions, many of which carried important indicia of propriety such as significant presigning market checks and go-shop periods.").

26. *See supra* note 17.

27. *See* Newell, *supra* note 18, at 12 (noting that until 2007, Delaware's appraisal statute "enjoyed a relatively sleepy history").

28. Siegel, *Back to the Future*, *supra* note 17, at 109.

29. *See* Kesten, *supra* note 6, at 99 ("[U]ntil very recently, appraisal was largely a dead letter. According to this literature, most shareholders are unlikely to seek appraisal in most transactions, especially public corporations, due to several factors that render the remedy uneconomic for all but the largest blockholders."); Norman D. Lattin, *A Reappraisal of Appraisal Statutes*, 38 Mich. L. Rev. 1165, 1169 (1940) ("That fact that [an appraisal] suit is likely to be an expensive one for a losing stockholder is the best protection possible against strike suits."); James Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 Harv. L. Rev. 1189, 1201 (1964) (explaining that "resort to appraisal will, even under the best of the statutory procedures, often give the stockholder less than his stock is worth" because "the procedure involves delay and uncertainty, with responses which may cut into his recovery"); *see also* Green v. Santa Fe Indus., Inc., 533 F.2d 1283, 1297–98 n.4 (2d Cir. 1976) (Mansfield, J., concurring) ("Under state law the only recourse available to the aggrieved shareholders is to initiate an appraisal proceeding, thereby hoping to be awarded the full value of their lost shares. In light of a variety of factors common to state appraisal laws, it is generally agreed that they provide an unrealistic remedy.").

30. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1564 (citing Cede & Co. v. Technicolor, Inc., 542 A.2d 1182, 1187 (Del. 1988); Nagy v. Bistricer, 770 A.2d 43, 55 (Del. Ch. 2000)); *see also*

the trend nationally, appraisal's popularity in Delaware picked up steam as the twentieth century came to a close.[31]

For current purposes, it is crucial to observe the role that interest rates have played in Delaware's appraisal statutes through the years. The early versions of that statute did not provide for an award of interest to appraisal petitioners, and the Court of Chancery denied requests for interest on that basis[32] until the General Assembly finally gave the court discretion to award prejudgment interest in 1949.[33] But even after Delaware's appraisal law began to permit the court to award interest, the court did not always utilize that ability.[34] Moreover, when the court chose to award interest, section 262 provided it with no guidance on how to calculate the suitable rate of interest in a given case.[35] The Del-

Stanley Onyeador, Note, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339, 353 (2017) (observing that "appraisal actions . . . reach trial at an unusually high percentage compared to other merger litigation"). Petitioners often use the very threat of accumulating interest, however, as leverage in settlement negotiations. *See* Abigail Pickering Bomba et al., *Proposed Appraisal Statute Amendments Would Permit Companies to Reduce Their Interest Cost—Likely to Discourage "Weaker" Appraisal Claims and Make Settlement of "Stronger" Claims Harder*, FRIED FRANK M&A BRIEFING 2 (Mar. 23, 2015), http://www.friedfrank.com/siteFiles/Publications/FINAL%20-%203-23-2015%20-%20Proposed%20Appraisal%20Statute%20Amendments.pdf (noting the statutory interest rate "undoubtedly has been a factor in the calculus relating to the bringing and settlement of appraisal claims").

31. The increase of appraisal petitions filed in Delaware was likely attributable to, at least in part, the Delaware Supreme Court's "seminal decision" in *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983). *Technicolor*, 684 A.2d at 296. One commentator believes that *Weinberger* "marked the enthronement of a revitalized appraisal remedy for use as a check on majority power in cash-out settings." Thompson, *supra* note 16, at 23. Others accurately observe that *Weinberger* "revolutionized appraisal law, and like many revolutions left an array of messy puzzles that persist to this day." Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 121 (2005) [hereinafter *Fair Value of Cornfields*].

32. *See, e.g.*, *In re* Gen. Realty & Utils. Corp., 52 A.2d 6, 16 (Del. Ch. 1947) (affirming appraiser's decision not to award interest); Meade v. Pac. Gamble Robinson Co., 51 A.2d 313, 318–19 (Del. Ch. 1947) ("Frankly, if I were free to do so, I would allow interest on the appraisers' award, since in my opinion the equities militate in the complainant's favor in that the corporation can have the use of complainant's capital . . . for a period during which he may also be deprived of the attributes of stock ownership.").

33. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 113–14 (citing *In re Gen. Realty*, 52 A.2d at 16); Thomas, *supra* note 18, at 7 n.18; *see also* DEL. CODE ANN. tit. 136, § 7 (1949) ("The Court may, on application of any party in interest, determine the amount of interest, if any, to be paid upon the value of the stock of the stockholders entitled thereto."); Sporborg v. City Specialty Stores, Inc., 123 A.2d 121, 127 (Del. Ch. June 8, 1956) (applying this statute).

34. *See* Thompson, *supra* note 16, at 41 (writing in 1995 that "[i]nterest payments have become common only in recent years"). On the national level, awarding interest to appraisal petitioners had become common by the mid-1980s, with forty-eight states' appraisal statutes providing for interest payments. Joel Seligman, *Reappraising the Appraisal Remedy*, 52 GEO. WASH. L. REV. 829, 862–63 (1984) [hereinafter *Reappraising*]. Today, interest is seen by most as a necessary component to an appraisal statute because it "serves to avoid an undeserved windfall to the respondent in an appraisal action, who 'would otherwise have had free use of money rightfully belonging to' the petitioners." Merion Capital, L.P. v. 3M Cogent, Inc., C.A. No. 6247-VCP, 2013 WL 3793896, at *25 (Del. Ch. Mar. 19, 2013) (quoting Lane v. Cancer Treatment Ctrs. of Am., Inc., C.A. No. 12207-NC, 2004 WL 1752847, at *36 (Del. Ch. July 30, 2004)).

35. *See* Ala. By-Prods. Corp. v. Cede & Co. *ex rel.* Shearson Lehman Bros., 657 A.2d 254, 267 (Del. 1995) ("The decision to award either pre-judgment or post-judgment interest is entirely within the discretion of the Court of Chancery."); Rapid-Am. Corp. v. Harris, 603 A.2d 796, 808 (Del. 1992) (holding that the Court of Chancery has "absolute discretion to determine the form of interest it will award in a statutory appraisal action"); Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 114

aware Supreme Court provided limited direction,[36] but appraisal opinions were less than consistent.[37] Not only did scholars suggest a statutory rate, but Chancellor Chandler called for a change to the statute as well:

> In Delaware's growing body of appraisal case law, many pints of toner fluid (and typewriter ribbon ink before that) have been spilled as a result of attorneys arguing over the appropriate interest rate to be applied and judges analyzing the arguments and determining that rate. A commentator's recent suggestion has strong intuitive appeal: "Because the dissenting shareholder is entitled to payment as of the transaction date, and often does not receive full payment until much later, appraisal litigation often involves a skirmish over the amount of interest the corporation must pay the shareholder as a result of this delayed payment. In many cases, the litigants and courts have expended considerable energy resolving the interest rate that should be applied in this context. A statutorily defined rate of interest would simplify matters and eliminate this counterproductive expenditure of resources. The rate chosen must be fair, and able to respond to market conditions, rather than fixed at a level that becomes outdated. An interest rate tied to the prime rate would be a workable solution."[38]

("When awarding interest, the court had to confront three basic questions: (1) what rate of interest, (2) whether the interest was simple or compound, and (3) if compound, what compounding interval. Before 2007, the resolution of these issues was left wholly to the Court of Chancery, which was 'empowered to award interest in an appraisal action at whatever rate (and compounding interval, where relevant) the court deem[ed] equitable.'" (quoting Le Beau v. M.G. Bancorporation, Inc., C.A. No. 13414, 1998 WL 44993, at *12 (Del. Ch. Jan. 29, 1998))).

In some states, courts still retain "broad latitude . . . in prescribing the interest rate." Baca, *supra* note 15, at 449; *see also* Seligman, *Reappraising*, *supra* note 34, at 863 (surveying all state appraisal statutes and observing that they vary widely regarding the calculation of interest).

36. *See* Universal City Studios, Inc. v. Francis I. duPont & Co., 334 A.2d 216, 222–23 (Del. 1975) ("The stockholders contend that the law envisages in an appraisal proceeding, that interest be awarded on the basis of benefits received by the corporation through the use of plaintiff's invested money. . . . The rule was correctly relied on below that the purpose of interest is to fairly compensate plaintiffs for their inability to use the money during the period in question. Therefore it was proper to focus on what would have been the rate of interest at which a prudent investor could have invested money rather than focusing on how much it would have cost the corporation to borrow the money." (citation omitted)).

37. *See* EDWARD P. WELCH ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 262.11[B] (6th ed. 2017). *Compare* Bell v. Kirby Lumber Corp., 413 A.2d 137, 149 (Del. 1980) (affirming "award of 7% simple interest"), *and* Appraisal of Shell Oil Co., C.A. No. 8080, 1990 WL 201390, at *38 (Del. Ch. Dec. 11, 1990) (10 percent annual interest), *and* Pinson v. Campbell-Taggart, Inc., C.A. No. 7499, 1989 WL 17438, at *22 (Del. Ch. Feb. 28, 1989) (10.5 percent annual interest), *and* Robins & Co. v. A.C. Israel Enters., Inc., C.A. No. 7919, 1985 WL 149627, at *12 (Del. Ch. Oct. 2, 1985) (10.35 percent annual interest), *with* Francis I. duPont & Co. v. Universal City Studios, Inc., 343 A.2d 629 (Del. Ch. 1975) (5.23 percent annual interest), *and* Swanton v. State Guar. Corp., 215 A.2d 242, 247 (Del. Ch. 1965) (5 percent annual interest).

38. ONTI, Inc. v. Integra Bank, 751 A.2d 904, 926 n.85 (Del. Ch. 1999) (quoting Wertheimer, *supra* note 20, at 709–10); *see also* Andaloro v. PFPC Worldwide, Inc., C.A. Nos. 20336, 20289, 2005 WL 2045640, at *21 (Del. Ch. Aug. 19, 2005) ("I decline the plaintiffs' invitation for me to undertake my own unguided adventure in the weedy field of judicial interest rate setting. Because parties on both sides of cases of this kind ordinarily have little economic incentive to rationally address the complexities raised by the current statutory regime, it would seem that the crafting of a specific legislative interest formula, which also addresses the frequency of compounding, for use in appraisal proceedings is both feasible and desirable for all affected constituencies.").

It was not until 2007 that, in an effort to avoid costly litigation over the appropriate interest rate in each given case,[39] the General Assembly amended section 262 to set the interest rate at "5% over the Federal Reserve discount rate."[40] The 2007 amendment answered Professor Wertheimer's and Chancellor Chandler's call,[41] and the interest rate it set remains the statutory rate today.[42]

Importantly, interest in Delaware appraisal cases is designed to compensate petitioners for their loss of use of the fair value of their shares during the pending litigation and to ensure that the acquirers are not unjustly enriched.[43] Interest, therefore, was "not designed to increase the statutory recovery of the principal award."[44]

Nevertheless, empirical evidence reveals that the current statutory interest rate overcompensates appraisal petitioners. For example, the interest rate has consistently "compensated appraisal petitioners for more than the time value of money and for more than a bond-like claim."[45] Indeed, the statutory rate has been "higher than the yield on corporate bonds with maturity and credit risk that cor-

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39. *See* CORP. LAW COUNCIL, EXPLANATORY PAPER: SECTION 262 APPRAISAL AMENDMENTS 6 (Mar. 6, 2015), https://www.lowenstein.com/files/upload/DGCL%20262%20Proposal%203-6-15%20Explanatory%20Paper.pdf (explaining that the 2007 "amendment was designed to simplify the appraisal proceeding and limit the amount of time previously spent by the parties, the court and experts on determining a proper rate of interest").

40. DEL. CODE ANN. tit. 8, § 262(h) (2018). The Federal Reserve discount rate is the rate at which the Federal Reserve loans to commercial banks. As of December 2017, the discount rate is 1.75 percent. In the last twenty years, the discount rate has been as high as 6.25 percent (June 2006 through July 2007) and as low as 0.5 percent (December 2008 through January 2010). Historically, the Federal Reserve adjusts the discount rate only a quarter point at a time. For a graphic representation of the historical discount rate, see *Interest Rates, Discount Rate for United States*, FED. RESERVE ST. LOUIS, https://fred.stlouisfed.org/series/INTDSRUSM193N (last visited June 19, 2018).

41. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 119 ("The new amendment did precisely what judicial and academic commentary had proposed: the amendment established that petitioners are presumptively entitled to receive interest at a variable rate . . . .").

42. *See* DEL. CODE ANN. tit. 8, § 262(h).

43. *See* Bell v. Kirby Lumber Corp., 413 A.2d 137, 149 (Del. 1980) ("The purpose of interest is to fairly compensate the stockholders for the inability to use the money during the entire period in question."); Gilbert v. MPM Enters., Inc., 709 A.2d 663, 674 (Del. Ch. 1997) ("An award of interest may be said to support two goals. First, the award compensates petitioner for the loss of the use of the fair value of his shares during the pendency of the proceeding. Second, the award forces the corporation to disgorge any benefits it obtained from the use of the fair value of petitioner's shares during the pendency of the proceeding."); *see also* Craig Boyd, Comment, *Appraisal Arbitrage: Closing the Floodgates on Hedge Funds and Activist Shareholders*, 65 U. KAN. L. REV. 497, 508–09 (2016) ("The statutory interest provided in section 262 is meant to compensate dissenting shareholders while waiting for an appraisal claim to come to fruition.").

44. Francis I. duPont & Co. v. Universal City Studios, Inc., 343 A.2d 629, 634 (Del. Ch. 1975). Nor is the statutory interest rate intended to punish respondent corporations. *See* Rapid-Am. Corp. v. Harris, 603 A.2d 796, 808 (Del. 1992) ("The court must only award interest to fairly compensate dissenting shareholders for their losses incurred during the pendency of an appraisal. There is no punitive aspect of an appraisal proceeding.").

45. Gaurav Jetley & Xinyu Ji, *Appraisal Arbitrage—Is There a Delaware Advantage?*, 71 BUS. LAW. 427, 454 (2016); *see also* Baca, *supra* note 15, at 431 (observing that the statutory rate "more than reimburses for the time value of the appraised shares alone"); Richard A. Booth, *The Real Problem with Appraisal Arbitrage*, 72 BUS. LAW. 325, 339 (2017) ("[A]s of February 2017, a thirty-year U.S. government bond pays only about 3.1% and a BBB corporate bond pays only about 3.7%. Thus, arbs make money while they wait for the appraisal award, often enough to compensate for an award that turns out to be less than the merger price (as sometimes happens).").

respond to risk of appraisal."[46] The high interest rate makes appraisal a particularly attractive option "in a low-yield environment,"[47] even though it is conceivable that Delaware's statutory rate could undercompensate appraisal petitioners in an investor-friendly market.[48] Because of this tendency to overcompensate dissenting stockholders—and the interest-rate arbitrage that has accompanied it—many have called for an amendment to lower the statutory interest rate.[49]

B. An Appraisal Rollercoaster: The Number of Appraisal Petitions Filed

As mentioned above,[50] throughout the twentieth century and even into the 2000s, stockholders rarely used the appraisal remedy.[51] But through 2016, "Delaware [was] in the midst of a sea change in appraisal litigation" in which appraisal "litigation [was] undergoing a period of explosive growth" driven by "a new group of sophisticated investors who appear to specialize in pursuing ap-

46. *Id.* at 431. "[T]he Delaware statutory rate easily exceeded the yield of investment-grade corporate bonds . . . in recent years. In fact, the statutory rate has also been higher than the BB-rated yield (which is below investment grade). In 2013 and 2014 in particular, the Delaware statutory rate was about twice the average yield of the BB-rated credit. Thus, in cases where the credit of the acquiring company . . . is rated BB or higher, the statutory rate appears to overcompensate petitioners for a bond-like claim." *Id.* at 454. "[T]he statutory rate more than compensates the petitioner on a risk-adjusted basis as well." *Id.* at 431; *see also* Wei Jiang et al., *Appraisal: Shareholder Remedy or Litigation Arbitragez*, 59 J.L. & Econ. 697, 701 (2016) ("This [statutory] interest rate is significantly higher than that available on many fixed-income investments."); *id.* at 709 (observing that Delaware has a "decidedly above-market rate of interest").

47. Jiang et al., *supra* note 46, at 703.

48. For example, Professor Booth contends that arguments that Delaware's statutory interest rate overcompensates appraisal petitioners "fails to recognize that appraisal petitioners—investors in common stocks—expect average returns of about 11%." Booth, *supra* note 45, at 339. Because investors can expect 11 percent returns, Booth argues, "paying 5% for as long as the appraisal proceeding lasts is a good deal for the acquirer." *Id.* Booth also asserts that Delaware's statutory interest rate "makes much sense" because it "splits the difference between short-term rates (now near zero) and the 11% (or so) supply-side discount rate." *Id.* at 339–40. Although Professor Booth makes a good point in that it is possible for investors to achieve a higher yield in a bull market than in appraisal proceedings, he fails to account for the relative risk of investing in common stocks versus appraisal. Namely, funds in the stock market are subject to economic downturn and unpredictable fluctuations whereas tying money up in appraisal is (or at least was until recently) a risk-averse strategy. *See infra* notes 93–94 and accompanying text (explaining the low risk of appraisal petitioners receiving less than merger consideration).

49. *See, e.g.*, Baca, *supra* note 15, at 450; Jetley & Ji, *supra* note 45, at 432–33.

50. *See supra* note 17.

51. *See* Jiang et al., *supra* note 46, at 698 ("Appraisal litigation was uncommon until the mid-2000s."); *id.* at 701 ("Historically, appraisal was infrequently used: from 1977 to 1998 only an average of 14 appraisal petitions were filed annually in Delaware, many by individual shareholders acting without legal counsel, which were quickly dismissed."); Seligman, *Reappraising*, *supra* note 34, at 829 ("Between 1972 and 1981 there were 16,479 completed mergers involving United States concerns. . . . Yet, during this period only twenty or so reported state court decisions involved an appraisal valuation[, six of which were Delaware decisions]."); *see also* Manning, *supra* note 17, at 238 ("Altogether, the dissenter's appraisal statutes do not seem to work out very well in their practical administration. At best they are of modest and infrequent help to the dissenting shareholder, and they can be a distinct threat to others who have a stake in the enterprise.").

praisal claims."[52] 2017 brought with it a "sea change" of its own, primarily in the form of Delaware Supreme Court decisions headlined by *DFC*[53] and *Dell*.[54] It is important to understand the reasons for these swings in appraisal's popularity in Delaware, particularly because it underscores both (1) the role that interest-rate arbitrage has played in the number of appraisal petitions filed in recent years, and (2) the volatile nature of the appraisal remedy, which makes an appraisal resurgence possible at any time.

1. A Sharp Uptick in Appraisal Petitions from the Mid-2000s to 2016

Indeed, the percentage of appraisal-eligible transactions for which at least one appraisal petition was filed rose dramatically from the mid-2000s to 2017.[55] According to one empirical study, that rate grew from 5 percent between 2004 and 2010 to over 10 percent in 2011 to over 15 percent in 2013.[56] Another study pegs the percentage of appraisal-eligible deals for which an appraisal petition was filed as rising tenfold from 2000 to 2014, topping out at 20 to 25 percent of qualifying transactions.[57]

Perhaps more significantly, the amount of money involved in appraisal cases increased 1000 percent from 2004 to 2013.[58] Similarly, the gross number of appraisal petitions filed in Delaware has grown steadily, from an average of nine

52. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1567; *see also* Boyd, *supra* note 43, at 503 ("[I]n the past decade, there has been a dramatic increase in the amount of appraisal claims brought by minority shareholders. . . . The phenomenon is due to the overwhelming growth of specialized litigation used by repeat hedge funds and activist shareholders designed to take advantage of minority shareholder appraisal statutes."); Jiang et al., *supra* note 46, at 698 ("Since [the mid-2000s], there has been a surge of [appraisal] petitions, often filed by a small group of hedge funds.").

53. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017).

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

55. *See* Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1570; *see also* Jetley & Ji, *supra* note 45, at 428. Looking beyond Delaware, there are several reasons for the uptick in use of the appraisal remedy, including the diminishing availability of federal securities law remedies and the fact that "appraisal statutes have been amended to reduce somewhat the procedural burdens placed on dissenting shareholders." Wertheimer, *supra* note 20, at 621, 626; *see also* Siegel, *Back to the Future*, *supra* note 17, at 81.

56. *See* Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1570; *see also* Steven Epstein et al., *Delaware Appraisal: Practical Considerations*, Bus. L. Today, Oct. 2014, at 1, 1 ("Through 2010, the number of appraisal petitions filed in Delaware roughly paralleled overall merger activity, with appraisal rights being asserted in about 5 percent of the transactions for which they were available. In 2011, the rate of petitions doubled to 10 percent. In 2013, 28 petitions were filed in Delaware, representing 17 percent of appraisal-eligible transactions.").

57. *See* Jiang et al., *supra* note 46, at 704 ("In the first 3 years of the sample period [of 2000 to 2014], there were about five appraisal petitions each year, accounting for 2–3 percent of all eligible deals. During the last 4 years of the sample, there were about 20 appraisal petitions each year, or 20–25 percent of all eligible deals.").

58. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1571; *see also* Epstein et al., *supra* note 56, at 1 ("The amounts at stake have increased as well, with the value of dissenting shares seeking appraisal in 2013 ($1.5 billion) being 10 times the value of dissenting shares in 2004, and more than five times the value of dissenting shares at their highest point in the last five years."); Kesten, *supra* note 6, at 101 (observing that "the aggregate size of [appraisal] cases has also increased over time").

petitions annually from 2004 to 2010, to twenty-two petitions per year from 2011 to 2014, to fifty-one petitions in 2015, to seventy-seven petitions in 2016.[59]

Through this "golden age of appraisal," the demographic of appraisal petitioners changed along with the number of petitions filed. The number of repeat petitioners increased sharply, with over 8 percent of appraisal cases between 2011 and 2013 involving at least one repeat petitioner.[60] Additionally, hedge funds and other sophisticated investors—many of which make up the so-called "bulge bracket" of repeat appraisal petitioners[61]—filed more petitions, which helps explain the surge of dollars tied up in appraisal litigation.[62] Savvy investors even created institutions, such as Merion Capital, for the sole purpose of engaging in appraisal arbitrage.[63] On the flip side, however, relatively small and non-institutional investors have been unable to break into the appraisal bubble.[64]

59. Kesten, *supra* note 6, at 101; *see also* Newell, *supra* note 18, at 12 (observing the "exponential rise in appraisal filings in the last decade").

60. Kesten, *supra* note 6, at 101. "Indeed, every appraisal case filed in 2013 involved at least one repeat petitioner." Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1573.

61. Baca, *supra* note 15, at 429 (internal quotation marks omitted).

62. *See* Jiang et al., *supra* note 46, at 701 ("Appraisal today has evolved into a standalone litigation-based investment strategy by a specialized group of hedge funds."); Onyeador, *supra* note 30, at 349 (explaining that "the value of dissenting shares held by hedge funds doubled to over $2 billion between 2014 and 2015"); *see also* Afra Afsharipour, *Reevaluating Shareholder Voting Rights in M&A Transactions*, 70 OKLA. L. REV. 127, 140 n.66 (2017) ("[A]ppraisal actions have gained some steam due to certain sophisticated investors, particularly hedge funds, acting as dissenting shareholders."); Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, 127 YALE L.J. FORUM 543, 556 (2017) ("The appraisal remedy has been growing in popularity as hedge funds seek to gain the spread between the merger price and the 'fair value' assessed by the Chancery Court.").

63. *See* Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 67586, at *1 (Del. Ch. Jan. 5, 2015) ("Petitioners Merion Capital LP and Merion Capital II LP . . . are self-described 'event-driven investment' funds, or, in the words of the Respondent, 'hedge fund[s] that specialize[] in appraisal arbitrage.'"); Epstein et al., *supra* note 56, at 1 ("A number of funds have been established that are devoted exclusively to appraisal actions as independent investment opportunities."); Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies* 5 (Working Paper, Dec. 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086797 [hereinafter *Finding the Right Balance*] ("Much of this growth [in appraisal] has been driven by specialized players in the appraisal arbitrage field, one of whom (Merion Capital) by itself accounted for 36% of the face value of all appraisal claims [from 2009 to 2016]."); Kesten, *supra* note 6, at 105 ("Multiple investment funds have been raised primarily to pursue appraisal arbitrage strategies."); Onyeador, *supra* note 30, at 349 (noting that "[a]s of early 2015, Merion Capital had approximately $1 billion under management in several active appraisal cases, indicating that appraisal actions offer significant economic returns relative to the risks posed").

64. *See* Turner v. Bernstein, 776 A.2d 530, 547–48 (Del. Ch. 2000) ("Moreover, § 262 is chock-full of disadvantages for shareholders, especially ones who own relatively small blocks. Most significant, of course, is the fact that a stockholder who seeks appraisal must forego all of the transactional consideration and essentially place his investment in limbo until the appraisal action is resolved."); Thomas, *supra* note 18, at 27–28 ("Under current law, appraisal is a useful remedy only for wealthy minority investors. The simple fact is that these cases are too expensive for many shareholders with relatively small stakes in the corporation. Although the named petitioner can spread its costs of prosecuting an appraisal action over the entire group of shareholders seeking appraisal, . . . a small shareholder will only find an appraisal petition cost-justified where many thousands of shares are also seeking this remedy."); Ronald Barusch, *Dealpolitik: Is Delaware Law Rigged Against the Small Shareholder?*, WALL ST. J. (June 7, 2016), https://blogs.wsj.com/moneybeat/2016/06/07/dealpolitik-is-delaware-law-rigged-against-the-small-shareholder/ ("Appraisal is not a process designed for the small investor. . . . The end result [of Delaware's appraisal law] is that retail shareholders are generally

The reasons scholars and practitioners have offered for the surge in appraisal activity are varied. One explanation is a dramatic uptick in appraisal arbitrage.[65] Another, more nuanced, explanation is that investors view the new statutory interest rate as a means of making a profit, a phenomenon known as "interest-rate" arbitrage, which the next section explores further.[66]

2. A Drop-off in Appraisal Petitions Beginning in 2017

As 2016 came to a close, so did the rise in the number of Delaware appraisal petitions. In large part, this decline was a response to two significant Delaware Supreme Court decisions.[67] In August 2017, the Delaware Supreme Court decided *DFC*. There, the Supreme Court reversed the Court of Chancery's determination that the fair value of DFC's shares was $10.21, which had represented a 7.5 percent premium over deal price.[68] Four months later, the Delaware Supreme Court reversed the Court of Chancery's decision in *Dell* that had also awarded a substantial premium over deal price—over 28 percent.[69]

left high and dry unless there's an obvious procedural error, while hedge funds and other sophisticated investors can afford to navigate the complex appraisal process.").

65. *See, e.g.*, Epstein et al., *supra* note 56, at 1 ("Most of this increased activity is due primarily to the rise of appraisal arbitrage as a weapon of shareholder activists seeking alternative methods of influence and value creation in the M&A sphere."); Jason Mei, Note, *Appraisal Arbitrage: Investment Strategy of Hedge Funds and Shareholder Activists*, Dev. Banking L. 83, 83 (2015); Onyeador, *supra* note 30, at 352 ("This irresistible 'win-win' economic incentive was integral to the recent spike in appraisal-challenged mergers—regardless of whether these mergers merited appraisal."); Robert S. Reder & Blake C. Woodward, *Delaware Supreme Court Refuses to Establish a Presumption Favoring Deal Price in Statutory Appraisal Proceedings*, 71 Vand. L. Rev. En Banc 59, 60 (2018) (observing the "significant rise in the frequency of appraisal proceedings in recent years" and attributing "[t]his phenomenon . . . directly to the intervention of so-called appraisal arbitrageurs, activist hedge funds and other avant-garde investors seeking to profit from use of the appraisal remedy"). *But see* Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1580.

66. *See infra* Part II.C.2.

67. Although the Delaware Supreme Court's decisions have no doubt impacted the number of appraisal petitions being filed, other factors have also played a part in the recent decline. For example, in the first half of 2017—before the Supreme Court decided either *DFC* or *Dell*—eighteen deals were challenged via appraisal petitions, compared with twenty-seven over the first half of 2016. Matthew Schoenfeld, *The High Cost of Fewer Appraisal Claims in 2017: Premia Down, Agency Costs Up*, 8 Harv. Bus. L. Rev. Online 1, 2 (2018). One potential explanation for that pre-*DFC* decrease is historically low deal premia. *See id.* at 1. Regardless, the key point is that a variety of factors have likely contributed to the recent decline in the number of appraisal petitions being filed in Delaware.

68. *See* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 360–61 (Del. 2017). The Delaware Supreme Court remanded the case "to the Chancellor to reassess his conclusion as to fair value in light of our decision." *Id.* at 388–89.

69. *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1 (Del. 2017). Rather than "give in to the temptation to dictate" using the deal price as fair value, the Delaware Supreme Court gave "the Vice Chancellor the discretion on remand to enter judgment at the deal price if he so chooses, with no further proceedings. If he decides to follow another route, the outcome should adhere to our rulings in this opinion, including our findings with regard to the DCF valuation. If he chooses to weigh a variety of factors in arriving at fair value, he must explain that weighting based on reasoning that is consistent with the record and with relevant, accepted financial principles." *Id.* at 44.

The earthquake that was *DFC* and *Dell* brought with it substantial aftershocks as well.[70] In February 2018, the Court of Chancery adhered to "Aruba's thirty-day average unaffected market price" in awarding $17.13 per share, which was 8 percent below the $24.67 merger consideration.[71] Eight days later, the Court of Chancery determined that the fair value of AOL shares was $48.70, again a discount to the $50.00 deal price.[72] And that same day, the Delaware Supreme Court affirmed the Court of Chancery's decision to award $6.38 per share to SWS appraisal petitioners, below the $6.92 merger consideration.[73]

One can hardly blame investors for more selectively filing appraisal petitions following this string of corporation-friendly decisions. But despite the end of the appraisal renaissance in Delaware, the problems that contributed to the previous rise must be addressed to prevent a future resurgence of unmeritorious appraisal petitions.[74] The remainder of this article aims to do just that, by identifying the weeds in section 262 and proposing an efficient way to pluck them out, thereby making room for the rest of the appraisal petitions to bloom.

C. Appraisal Arbitrage vs. Interest-Rate Arbitrage

The distinction between "appraisal arbitrage" and "interest-rate arbitrage" is an important one. Although this article targets reform specifically at the latter, interest-rate arbitrage is a component of the more general appraisal arbitrage. Indeed, many commentators refer to the two concepts as one and the same. Therefore, before having a robust discussion of how appraisal law can limit arbitrageurs' incentives, it is necessary to understand the discrete concepts and the effects that each has on potential transactions, appraisal proceedings, litigants, and the courts.

70. *DFC* and *Dell* were also preceded by the Court of Chancery's decision in *ACP Master, Ltd. v. Sprint Corp.*, C.A. Nos. 8508-VCL, 9042-VCL, 2017 WL 3421142 (Del. Ch. July 21, 2017), an occasionally overlooked opinion in which the court awarded $2.13 following a transaction that paid stockholders $5.00 per share. *See id.* at *1.

71. Veriton Partners Master Fund Ltd. v. Aruba Networks, Inc., C.A. No. 11448-VCL, 2018 WL 922139, at *1–2 (Del. Ch. Feb. 15, 2018).

72. *See In re* Appraisal of AOL, Inc., C.A. No. 11204-VCL, 2018 WL 1037450, at *21 (Del. Ch. Feb. 23, 2018). In both *Aruba* and *AOL*, the Court of Chancery heeded the Delaware Supreme Court's guidance in *Dell* and *DFC*, in which the Supreme Court "endorse[d] using the market price of a widely traded firm as evidence of fair value." *Aruba*, 2018 WL 922139, at *1; *see also AOL*, 2018 WL 1037450, at *1, *8 (quoting the reasoning in *DFC* for concluding "that the best evidence of fair value was the deal price" and "evaluating whether the transaction here is *Dell* Compliant"); *see also* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., C.A. No. 11448-VCL, 2018 WL 2315943, at *10 (Del. Ch. May 21, 2018) ("[T]he opinions in *Dell* and *DFC* did not just mention the efficient capital markets hypothesis in passing. Both devoted considerable space to the subject, and both seemed quite forceful in their endorsement of market prices as an indicator of value."). Whether the Court of Chancery continues to discount synergies by adopting a company's market price, absent evidence that "stockholders were exploited," remains to be seen. *Aruba*, 2018 WL 922139, at *2.

73. *See In re* SWS Grp., Inc., C.A. No. 10554-VCG, 2017 WL 2334852, at *1 (Del. Ch. May 30, 2017), *aff'd sub nom.* Merlin Partners, LP v. SWS Grp., Inc., No. 295, 2017 (Del. 2018).

74. After all, if the seven-month span of August 2017 through February 2018 was able to cause such rapid changes, there is little standing in the way of an opposite shift at some future point.

1. Appraisal Arbitrage

"'Appraisal arbitrage' is a phrase commonly used to denote an investment strategy whereby an investor acquires an equity position in a cash-out merger target with the specific intention of exercising the statutory appraisal right."[75] Appraisal arbitrageurs are therefore sophisticated investors that typically buy a large number of a target's shares for the very purpose of seeking appraisal of those shares and turning a profit.[76]

Appraisal arbitrage is not a new investment strategy.[77] But the amount of appraisal arbitrage in recent years has increased along with, if not more than, the rise in appraisal petitions generally.[78] This increase is likely attributable to the success appraisal arbitrageurs have had, at least at least until the recent string of company-friendly decisions.[79] And just as institutional investors have come to dominate the overall appraisal landscape, hedge funds are the primary culprits of appraisal arbitrage.[80]

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75. Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 67586, at *1 (Del. Ch. Jan. 5, 2015).

76. *See* Jiang et al., *supra* note 46, at 698 (describing appraisal arbitrage as when "the appraisal process [acts] not as providing a remedy but rather as an arbitrage in which professional investors (arbitrageurs) buy stock in a company on the brink of an acquisition and then petition the judge for a price increase—or settle their case quietly in exchange for a sweetened price for their shares"); Kesten, *supra* note 6, at 111 ("[A]rbitrageurs are not the dispossessed minority who dissent from a transaction—they are voluntary participants in these deals who buy stock with full knowledge of the transaction and its terms.").

77. *See* Salomon Bros. Inc. v. Interstate Bakeries Corp., 576 A.2d 650, 654 (Del. Ch. 1989) ("I find nothing inequitable about an investor purchasing stock in a company after a merger has been announced with the thought that, if the merger is consummated on the announced terms, the investor may seek appraisal."), *appeal refused*, 571 A.2d 787 (Del. 1990) (Table); *see also* Joseph v. Shell Oil Co., C.A. No. 7450, 1985 WL 21125, at *2 (Del. Ch. Feb. 8, 1995) (discussing concerns over appraisal arbitrageurs and noting that "the interests of arbitrageurs and of long-term investors are not antagonistic as a matter of law").

78. *See* Baca, *supra* note 15, at 428–30 (discussing the recent boom in appraisal arbitrage); Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 5 ("The practice of engaging in appraisal arbitrage did not emerge on a large scale . . . until 2007, but when it did, the previously inhospitable and relatively rarely used appraisal remedy became a hot litigation commodity."). If the Court of Chancery continues to give significant weight to the deal price in a majority of appraisal decisions—which seems likely following *Dell* and its progeny—"the increased use of the merger price may or may not discourage appraisal arbitrage overall." Philip Richter & Robert C. Schwenkel, *A Study of Recent Delaware Appraisal Decisions: Part 1*, LAW360 (July 28, 2015), https://www.law360.com/articles/683402/a-study-of-recent-delaware-appraisal-decisions-part-1; *see also* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 35 (Del. 2017) (warning against departing from deal price when a robust sale process yields no bidders willing to buy the company at the supposed fair value).

79. *See* Baca, *supra* note 15, at 437–38 ("On average, appraisal actions have a little more than 10% premium over the merger price, with the median outcome a little less than 2% over the merger price."); Jiang et al., *supra* note 46, at 699 ("Petitioners enjoyed nonnegative gross returns throughout the sample period, with an average (median) annualized return of 32.9 percent (19.3 percent), which suggests that appraisal has been a profitable litigation arbitrage.").

80. *See* Jiang et al., *supra* note 46, at 699 ("Hedge funds dominate the appraisal arbitrage strategy, accounting for three-quarters of the dollar volume involved in all appraisal petitions in recent years. The top seven hedge funds file petitions accounting for over 50 percent of the dollar volume . . . .").

Most commentators see the increase in appraisal arbitrage as a problem that requires some type of statutory response,[81] and the Court of Chancery has also hinted at the need for reform.[82] Alternative views, however, are that the solution to the appraisal arbitrage problem lies with the court instead of the legislature,[83] and that appraisal arbitrage can be beneficial because it can "at the very least serve as a check on poor corporate governance."[84]

The uptick in appraisal arbitrage, in turn, is attributable at least in part to the Court of Chancery's decision in *In re Appraisal of Transkaryotic Therapies, Inc.*[85] In *Transkaryotic*, the Court of Chancery held that stockholders who acquire shares after the record date of a transaction, but before the transaction's effective date, have standing under section 262 to petition for appraisal of those shares.[86]

81. *See, e.g.*, Baca, *supra* note 15, at 448 (noting that "Delaware is not the gold standard for curbing appraisal arbitrage" and recommending legislative reform); Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1554 ("[I]t is natural to fear that the increase in appraisal arbitrage is an ominous development."); Onyeador, *supra* note 30, at 340–41 (arguing that "appraisal arbitrage has . . . uncovered a need for additional legislative reform").

82. *See* Kurz v. Holbrook, 989 A.2d 140, 174 (Del. Ch. 2010) ("In some circumstances, Delaware corporations should benefit from looking through DTC to the holdings of the participant banks and brokers. Reducing the number of shares available for appraisal arbitrage is one area that springs to mind."), *aff'd in part, rev'd in part sub nom.* Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377 (Del. 2010).

83. *See* Booth, *supra* note 45, at 350 ("[A]ppraisal arbitrage may indeed be unduly encouraged, but the problem is one of valuation practice, not of governing law.").

84. Baca, *supra* note 15, at 445; *see also* Claudia H. Allen et al., *Proceedings of the 2016 Delaware Business Law Forum: A Review and Debate of the Public Policy Implications of Delaware Law*, 72 BUS. LAW. 755, 760 (2017) ("On a conceptual level, participants at the [2016 Delaware Business Law] Forum fundamentally disputed whether appraisal arbitrage was a socially destructive or socially beneficial phenomenon."); Booth, *supra* note 45, at 348 ("[A]ppraisal works best if appraisal arbitrage is possible. In the absence thereof, bidders may reckon that many potential dissenters will decline to exercise their appraisal rights. If the bidder is thus required to pay a fair price only to some dissenting stockholders, the bidder comes out ahead. But appraisal arbitrage fixes this market failure."); Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 7, 9 (finding "no basis in existing statutes or precedent to conclude that appraisal arbitrage offends some well-established moral or legal precept"); Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1555–56 (contending "that the rise of appraisal arbitrage is, on balance, a beneficial development" because "appraisal arbitrage solves the same collective action problems that class action and other aggregate litigation seeks to solve, but without generating a serious agency problem in the process").

85. C.A. No. 1554-CC, 2007 WL 1378345 (Del. Ch. May 2, 2007). The link between the increase in appraisal arbitrage and *Transkaryotic* is seemingly a consensus among the judiciary and academic commentators. *See, e.g.*, *In re* Appraisal of Dell, Inc., 143 A.3d 20, 36 (Del. Ch. 2016), *aff'd in part, rev'd in part sub nom.* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1 (Del. 2017); Baca, *supra* note 15, at 433–34; Boyd, *supra* note 43, at 504–06; Epstein et al., *supra* note 56, at 1; Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 4–5; Jiang et al., *supra* note 46, at 702; Mei, *supra* note 65, at 84–85; Steven Davidoff Solomon, *Delaware Effort to Protect Shareholders May End Up Hurting Them*, N.Y. TIMES: DEALBOOK (May 24, 2016), https://www.nytimes.com/2016/05/25/business/dealbook/delaware-effort-to-protect-shareholders-may-end-up-hurting-them.html.

86. The court reasoned:

> Must a beneficial shareholder, who purchased shares after the record date but before the merger vote, prove, by documentation, that each newly acquired share (*i.e.*, after the record date) is a share not voted in favor of the merger by the previous beneficial shareholder? The answer seems simple. No. Under the literal terms of the statutory text and under longstanding Delaware Supreme Court precedent, only a record holder, as defined in the DGCL, may claim and perfect appraisal rights.

Transkaryotic, 2007 WL 1378345, at *3.

Because "the record date almost always precedes circulation of the company's proxy statement soliciting votes for the merger,"[87] this decision "created a timing advantage for activist shareholders and hedge funds to delay purchasing a target company's shares until the very last minute."[88] One can analogize this ability to purchase shares after the record date to a call option because "an appraisal arbitrageur is likely to wait as long as possible prior to buying the target stock in order to reduce the risk (primarily the risk of the deal failing) and thereby to maximize the return."[89]

In the decade since the *Transkaryotic* decision, sophisticated investors have taken advantage of the timing loophole that the opinion created.[90] For its part, the Court of Chancery has recognized the silliness of allowing stockholders to purchase shares after the record date.[91] Nevertheless, the court has expressed hesitancy to step on the General Assembly's toes.[92]

Although *Transkaryotic* led to a rise in appraisal arbitrage, investors engaged in arbitrage before 2007 and would likely still be using the practice today even if the General Assembly closed the *Transkaryotic* loophole. Indeed, on a more general level, appraisal arbitrage exists because the "downside risk" in appraisal

87. Kesten, *supra* note 6, at 102.

88. Mei, *supra* note 65, at 85; *see also* Baca, *supra* note 15, at 435 ("[I]nvestors . . . have an incentive to wait to purchase shares until after the record date due to the information-rich proxy statement that will be delivered shortly thereafter."); Epstein et al., *supra* note 56, at 1 ("With this timing advantage, investors can review information in the company's proxy statement . . . , can assess any preclosing shareholder litigation that has been commenced, and can evaluate market, industry, and target company conditions at a time much closer to the merger closing date . . . ."); Onyeador, *supra* note 30, at 344 ("Section 262 therefore permits an opportunistic individual to seek higher merger consideration by acquiring appraisal-eligible shares *after* the shareholder vote—but *before* the effective date—and relying on the statutory interest rate to hedge against the downside risk of lower judicially determined merger consideration.").

89. Jetley & Ji, *supra* note 45, at 430; *see also* Kesten, *supra* note 6, at 128 ("Appraisal rights are akin to a call option written by acquirers. The strike price is the cost of purchasing the target's stock pre-closing and the value of the option is the ultimate award granted by the court."). *But see* Booth, *supra* note 45, at 329.

90. *See* Jetley & Ji, *supra* note 45, at 438 (providing examples).

91. *See* Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 67586, at *5 (Del. Ch. Jan. 5, 2015) ("Theoretically, . . . absent a share-tracing requirement 'an appraisal arbitrageur, like Merion, [could] purchase[] most or all of a corporation's shares after the record date without securing proxies or revocations of proxies, and then [seek] appraisal for those shares even though the record-date holder voted them for the merger.'" (citation omitted)).

92. For example, the court deferred to the General Assembly in *Merion Capital LP v. BMC Software, Inc.*:

> [T]he General Assembly may not have picked a fail-safe method to achieve its goals; it may not have fully considered the theoretical possibility that shares acquired after the record date not voted in favor of the merger by the acquirer may nonetheless have been so voted by the seller, leading, hypothetically, to the number of shares for which appraisal is sought exceeding the number not voted for the merger. . . . Had the General Assembly intended the statute to include a share-tracing requirement, I conclude it would have explicitly written that requirement into the governing standing provision.

Id. at *7; *see also Transkaryotic*, 2007 WL 1378345, at *5 ("Respondents . . . argue that this decision will 'pervert the goals of the appraisal statute by allowing it to be used as an investment tool for arbitrageurs as opposed to a statutory safety net for objecting stockholders.' . . . To the extent that this concern has validity, relief more properly lies with the Legislature.").

cases has been described based on empirical evidence as "modest"[93] and "relatively small."[94] Although the Court of Chancery has started to show signs that it may more frequently award below deal price in the future,[95] arbitrageurs can still hedge their bets via the statutory interest rate.[96] At the very least, appraisal arbitrageurs have significantly greater upside—and less risk—than investors "picking up pennies off the railway track."[97]

As one might expect, appraisal arbitrage creates several policy concerns. One can sort these concerns into two groups. The first contains the dangers that actual appraisal arbitrage creates. Perhaps the obvious risk in this bucket is that appraisal arbitrage spawns nuisance appraisal petitions akin to the nuisance disclosure litigation that was prevalent in Delaware before *Trulia*[98] and its progeny.[99] But there is another danger that is arguably more hazardous from a policy perspective, and it is one that appraisal arbitrageurs themselves recognize: the risk that so many stockholders dissent from a transaction for arbitrage-related reasons that the transaction is inadvertently voted down and stockholders therefore lose the opportunity to seek appraisal. The Court of Chancery recently articulated this risk:

> Shortly after the deal was announced, certain Petitioners started accumulating shares for appraisal investment funds. The world of appraisal arbitrage does not lack for irony: Included in these Petitioners' solicitations of investments was the disclosure that a prime investment risk to their business strategy of dissent from the merger

93. Jetley & Ji, *supra* note 45, at 429.

94. Kesten, *supra* note 6, at 116; *see also id.* (explaining that it is "exceptionally rare" for the Court of Chancery to "conclude that fair value was materially below the merger price," and that the court has reached such a result "only once in a public company appraisal case" since 2010); Jennifer McLellan, Note, *An Appraisal of Appraisal Rights in Delaware*, 92 DENV. U. L. REV. ONLINE 109, 121 (2015) (examining appraisal cases decided between 2010 and 2015 and finding that "the Court of Chancery rarely places a fair value at less than the price obtained in the offering"). *But see* Baca, *supra* note 15, at 436 ("Engaging in appraisal arbitrage is not risk-free.").

95. *See supra* Part II.B.2.

96. *See* Boyd, *supra* note 43, at 509 ("The statutory interest rate is a substantial mitigating factor when a shareholder is faced with the substantial risks of bringing an appraisal claim."); Jiang et al., *supra* note 46, at 720 (surveying 126 appraisal cases between 2000 and 2014 and finding "that the total raw returns (before costs are considered) are highly lucrative, given the low investments in target shares" and that "100 percent of deals provide nonnegative raw returns"); *id.* at 727 ("[T]he interest accrual essentially ensures that the appraisal arbitrageurs never receive negative raw returns, and, in the absence of it, petitioners would have lost money on 7 percent of the deals in our sample.").

97. STEPHEN DAVIS, JON LUKOMNIK & DAVID PITT-WATSON, WHAT THEY DO WITH YOUR MONEY: HOW THE FINANCIAL SYSTEM FAILS US AND HOW TO FIX IT 38 (2016) (using this analogy to explain banks' reasoning in investing in subprime mortgages leading to the 2008 financial crisis); *see also id.* ("It seems like easy money, just lying there, waiting for you to pick it up. The train is usually far away, but every once in a while it is a lot closer than it looks—and the damage is extreme.").

98. *In re* Trulia, Inc. Stockholder Litig., 129 A.3d 884 (Del. Ch. 2016).

99. Nuisance appraisal petitions would carry "the possible twist that the main beneficiaries are opportunistic financiers rather than opportunistic attorneys." Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1600; *see also* Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 46 (observing "that appraisal litigation (especially where driven by appraisal arbitrage) is structurally superior to class action litigation in the sense that there is less concern that the litigation will be driven by counsel").

was that a majority of stockholders would do the same. In that case, the deal would not close and they would remain investors in SWS as a going concern.[100]

Scholars have likewise picked up on the risk that appraisal arbitrage could prevent otherwise economically efficient deals if enough stockholders dissent in the hopes of landing a premium on the merger price through appraisal.[101] Although appraisal arbitrageurs' tactics may not have yet prevented an otherwise economically beneficial transaction, the inherent risk of such a result is not outside the realm of possibility and highlights the need for reform.

The second, more subtle group of dangers associated with appraisal arbitrage contains those risks that the well-known threat of the practice presents, particularly for potential acquirers.[102] The most significant such risk is that the increasing probability of at least one appraisal petition following a qualifying merger—which is the natural result of frequent appraisal arbitrage—may drive down the transaction price because potential acquirers know that a costly appraisal proceeding is likely forthcoming.[103] Put differently, the risk is that "acquirers will come to view the risk of appraisal as essentially a tax that raises the costs of acquiring a company, and reduce the amount they are willing to pay for the company accordingly."[104] The added cost of looming appraisal proceedings may also add an ele-

100. *In re* SWS Grp., Inc., C.A. No. 10554-VCG, 2017 WL 2334852, at *8 (Del. Ch. May 30, 2017), *aff'd sub nom.* Merlin Partners, LP v. SWS Grp., Inc., No. 295, 2017 (Del. 2018).

101. *See* Booth, *supra* note 45, at 348 ("[I]t could be argued that appraisal arbitrage encourages stockholders to vote against a proposed deal because they know they will get the merger price anyway if the deal succeeds. But the obvious risk is that the deal may fail if too many stockholders vote against it."); Epstein et al., *supra* note 56, at 1 ("Companies face significant risks that an appraisal proceeding may . . . lead to the transaction not being approved by the requisite stockholder vote (even more problematic if the required vote is a majority of all outstanding minority shares, since stockholders who want to seek appraisal cannot vote in favor of the merger).").

102. *See* Adam B. Frankel, *Reflections on Appraisal Litigation*, DEL. LAW., Spring 2017, at 21 (observing that "the costs [of appraisal arbitrage] are becoming one-sided, with acquirers shouldering a greater burden").

103. *See* Allen et al., *supra* note 84, at 760 (noting that because of appraisal arbitrage, "purchasers may be incentivized to hold something back from the purchase price"); Fischel, *supra* note 20, at 879 (observing "that the existence and contours of an appraisal remedy will affect both the probability of certain transactions and their terms"); Mei, *supra* note 65, at 89 ("The increase in appraisal claims directly increases the risk to buyers that there may be excessive post-closing costs incurred through the appraisal action."); Onyeador, *supra* note 30, at 356 ("[A]ppraisal arbitrage creates significant liquidity risk for acquirers . . . . Therefore, anticipating the aforementioned value-destroying risks, acquirers may underprice the merger in initial negotiations, stripping value from long-term target stockholders and placing it in the hands of predatory arbitrageurs—an outcome antithetical to policy goals of the appraisal remedy.").

104. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1600; *see also* Boyd, *supra* note 43, at 516 (observing that appraisal arbitrage "has become a standard 'deal tax' on merger transactions"); Epstein et al., *supra* note 56, at 2 ("The obvious advice is that buyers need to build into their financial models the possibility of an appraisal award after the transaction closes."); Kesten, *supra* note 6, at 92 ("If appraisal litigation is increasingly an exercise in rent seeking or interest rate arbitrage, it threatens to impose an inefficient transaction tax on certain mergers and may deter some worthwhile transactions altogether.").

The related repercussion, of course, would be that "minority shareholders who do not seek appraisal would receive less than they would have in a world with no appraisal." Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1600. The inverse of this concern, which is that acquirers could pay more to a target's stockholders in an effort to avoid appraisal litigation, seems unlikely given that "there is no clear financial motive for issuers, on the margin, to preempt appraisal filings by offering ment of uncertainty to already complicated transactions[105] and, even more significantly, can deter otherwise beneficial transactions altogether.[106] Finally, the availability of appraisal arbitrage following *Transkaryotic* contradicts "Delaware's discomfort with the notion of purchasing a lawsuit."[107]

2. Interest-Rate Arbitrage

Interest-rate arbitrage is best thought of as a subcategory of appraisal arbitrage. Appraisal arbitrageurs look to profit from the difference between the deal price and the overall payment that the surviving company makes following the court's decision, a payment that includes the court-determined fair value along with accompanying interest.[108] Interest-rate arbitrageurs, meanwhile, aim to profit so-

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more generous premiums ex ante." Jiang et al., *supra* note 46, at 723; *see also id.* ("[T]here is not a single case in which preempting appraisal filings is financially more attractive for the issuer. Such an outcome is not surprising, given that the higher acquisition premium would be paid to all shareholders, while the ex post remedy from an appraisal goes to the dissenting shareholders only.").

Additionally, it is important to observe that the risk of scaring off potential acquirers or driving the purchase price higher is not a risk exclusive to appraisal arbitrage, but rather a concern that appraisal arbitrage heightens. Indeed, the potential of appraisal itself can dampen a potential buyer's interest in a target:

> Even though the company may be economically very strong, it may not be able to go ahead with the merger at all if the aggregated claim of dissenting shareholders under the appraisal statutes comes to a high figure. This means that for purposes of planning its course of action, and deciding whether to go ahead with the merger, the management needs to know as soon as possible what the total cash demand is likely to be. And here is the rub. The answer obviously depends upon the claim procedure prescribed in the appraisal statute. But under the procedures of many of the statutes, claimants are not required to file their claims until some time after the merger. The situation is both circular and dangerous.

Manning, *supra* note 17, at 235; *see also* Thompson, *supra* note 16, at 21 ("The exercise of appraisal could drain the corporation of cash. To prevent injustice to the entire group, management needed to know how many shareholders were going to elect this right.").

105. *See* Allen et al., *supra* note 84, at 760 ("[P]urchasers desire certainty as to what they are 'giving' and 'getting,' but appraisal arbitrage clouds that certainty because purchasers face the risk that a sizeable (yet unknowable at the time of negotiations) amount of money will be awarded to appraisal petitioners several years after closing."); Epstein et al., *supra* note 56, at 1 ("Appraisal arbitrage . . . can have a significant effect on the certainty and ultimate price paid in deals."); Letsou, *supra* note 23, at 1149 (posturing that because "the number of shareholders who will seek appraisal (and therefore the amount of cash which must be raised) cannot be easily predicted in advance, appraisal rights introduce new uncertainty into the job of planning corporate transactions").

106. *See* Baca, *supra* note 15, at 443 ("Buyers may shun otherwise sensible deals if merger announcements routinely bring about appraisal costs."); Fischel, *supra* note 20, at 881 ("Shareholders are the losers if these costs [of appraisal] deter value-increasing transactions."); *see also* Lattin, *supra* note 29, at 1183 ("The corporation must know within a reasonably short time how many shareholders there are who insist upon being paid off so that the plan can be promptly abandoned if the drain on the corporate treasury will be too great.").

107. Kesten, *supra* note 6, at 111 (citing Ala. By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 264 n.12 (Del. 1995)); *see also* Harff v. Kerkorian, 324 A.2d 215, 218 (Del. Ch. 1974) (reasoning that "the purchasing of shares in order to maintain a derivative action designed to attack a transaction which occurred prior to the purchase of stock" was "considered a pure evil"), *aff'd in part, rev'd in part*, 347 A.2d 133 (Del. 1975).

108. *See* Kesten, *supra* note 6, at 127 (analyzing appraisal data and hypothesizing "that appraisal arbitrageurs are engaged in a combination of interest rate arbitrage and rent seeking, coupled with a portfolio approach to litigation in which a small number of big 'wins' generate sufficient return on investment to support a larger number of losses").

lely from the interest rate itself.[109] In other words, interest-rate arbitrage is based on the theory "that an investor could park money in an appraisal claim, and even if the court found the merger price to represent fair value, the investor would receive an attractive return."[110]

The distinction between appraisal arbitrage and interest-rate arbitrage is a fine veneer—a line that can begin to blur because some arbitrageurs will be motivated *in part* by the statutory interest rate, but not *exclusively*.[111] That is, a statutory interest rate that fluctuates with the Federal Reserve discount rate—such as Delaware's statutory rate—will attract some new investors to the arbitrage game, but will also persuade some existing arbitrageurs to engage in the practice more frequently or otherwise to a larger extent.[112] One can accurately classify the former group of investors as interest-rate arbitrageurs, but the latter are the more classic appraisal arbitrageurs with one foot in the interest-rate arbitrage door. The proposal that this article offers is designed to curtail both the strict interest-rate arbitrageurs and the appraisal arbitrageurs that the statutory interest rate influences to some degree.[113]

Some academics and practitioners have expressed their doubts that investors would actually purchase shares of a corporation for which a sale has been announced solely to have them appraised and make a profit from the statutory interest rate that accumulates during the pendency of the litigation.[114] But most

109. *See* Frankel, *supra* note 102, at 21.

110. Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1580.

111. *See* Jiang et al., *supra* note 46, at 726 (confirming through empirical data "that appraisal arbitrage has become a backdoor interest rate arbitrage").

112. *See* Baca, *supra* note 15, at 431 (asserting that one reason for appraisal arbitrage in Delaware is "the added bonus of a high statutory interest rate"); Brian M. Lutz & Jefferson E. Bell, *Hurdles in Appraisal Actions for Companies Sold in "Robust" Auction*, DEL. BUS. CT. INSIDER 2 (Feb. 17, 2015), http://www.gibsondunn.com/publications/Documents/Lutz-Bell-Hurdles-in-Appraisal-Actions-DBCI-2.17.2015.pdf ("[W]hile arbitrageurs face increased challenges in demonstrating that the fair value of a company exceeds the market price . . . , cases of appraisal arbitrage will no doubt continue so long as these investors are deemed to have standing to bring such claims . . . and the favorable statutory interest rate that applies in these cases continues to present arbitrage opportunities.").

113. *See infra* Part V.C.

114. *See, e.g.*, Booth, *supra* note 45, at 340 ("To be sure, the odds of realizing an appraisal gain may be better than fifty-fifty. . . . But it is difficult to see how a rate of return that is half what the market otherwise pays is more likely to benefit an investor whose money is tied up until payment. The real wonder is that appraisal arbitrage has become such a force at the lower rate."); Grant & Barry, *supra* note 24, at 29 ("While § 262 does attempt to provide some recompense to shareholders for the lost use of funds through an award of interest, the award of a fixed amount of interest is unlikely to match the risk profile that the former shareholder, now an unsecured creditor, is asked to assume during the appraisal process."); Korsmo & Myers, *Appraisal Arbitrage*, *supra* note 3, at 1580 ("In our view, the statutory interest rate cannot account for the rise in appraisal activity. . . . [I]t is unlikely that a five percent premium over the federal funds rate would represent an attractive return under the circumstances, given the substantial risks associated with an appraisal proceeding. . . . While the statutory rate no doubt is better than what petitioners could get in a money market account, it likely undercompensates them for the risk of their position."); *id.* at 1580–81 ("The idea that sophisticated investors are pouring hundreds of millions of dollars into risky appraisal proceedings to chase above-market interest rates simply is not credible."); Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 123 ("An aggressive version of this claim—that appraisal petitioners are chiefly motivated by the statutory interest rate—does not withstand scrutiny . . . ."); Stephen Davidoff Solomon, *Delaware Courts Pause on the Deal Price Do-Over*, N.Y. TIMES DEALBOOK (Feb. 19, 2015),

commentators have a more skeptical view.[115] Even the court has expressed its suspicion that the statutory interest rate has caused the increase in appraisal petitions.[116] Recent empirical research shows a strong correlation between the interest rate in appraisal cases and the number of appraisal petitions filed, evidence that interest-rate appraisal arbitrage is real and that the court's concern is warranted.[117] A thorough survey of Delaware appraisal cases also reveals that in arbitrage cases, the majority of arbitrageurs' profit comes from the accumulation of interest, not any difference between the deal price and the court-determined fair value.[118]

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https://www.nytimes.com/2015/02/20/business/dealbook/delaware-courts-pause-on-the-deal-price-do-over.html ("Despite the minimum guaranteed upside and the essential protection on the downside, these cases will still give pause to hedge funds. The ability to score quick settlements still remains, but at the end of the day, a 5.75 percent return is not going to cut it for a hedge fund, even in a zero-interest rate environment.").

115. *See, e.g.*, Thomas Kirchner, Merger Arbitrage: How to Profit from Global Event-Driven Arbitrage 419 (2d ed. 2016) ("It appears that a number of investors who use appraisal arbitrage file a petition for arbitrage specifically to earn the 5 percent interest rate spread while not expecting to receive an increase in the merger consideration. Essentially they view appraisal as a high yield investment."); Baca, *supra* note 15, at 432 ("Higher interest rates on awards in an otherwise low-interest rate environment may only exacerbate arbitrage opportunity."); Boyd, *supra* note 43, at 503–04 ("[T]he method of calculating interest on pending claims in section 262(h) provides additional incentive for arbitrageurs to bring claims against merging corporations."); Epstein et al., *supra* note 56, at 2 ("In addition to the phenomenon of appraisal arbitrage, discussed above, the well above market statutory interest payable on appraisal awards—5 percent above the Fed discount rate, compounded quarterly and accruing from the closing date of the transaction to the date the appraisal award is actually paid—has encouraged the filing of appraisal petitions."); Kesten, *supra* note 6, at 90–91, 115 (finding that "the statutory interest rate appears to drive at least some appraisal petitions" because "it likely overcompensates appraisal arbitrageurs" and describing six appraisal cases between 2013 and 2016 in which the Court of Chancery settled on the deal price as fair value but the petitioners "nevertheless received the merger price for their shares plus a significant award of statutory interest"); McLellan, *supra* note 94, at 110 ("Even where shareholders receive only a modest improvement over the merger price, they benefit through a highly favorable interest rate mandated by statute."); Onyeador, *supra* note 30, at 354 (posturing that "though appraisal arbitrageurs *should* pursue only transactions with a greater probability of target-shareholder oppression to better align with the remedy's intent, these petitioners seem to adopt a quantity-over-quality approach, challenging transactions that do not necessitate the protection of the appraisal remedy"); Jonathan G. Rohr, *Corporate Governance, Collective Action and Contractual Freedom: Justifying Delaware's New Restrictions on Private Ordering*, 41 Del. J. Corp. L. 803, 827 (2017) ("In recent years, appraisal arbitrage has been on the rise, fueled largely by Delaware's statutory interest rate of 5% over the Federal Reserve discount rate . . . ."); *see also* Bomba et al., *supra* note 30, at 2 ("There has been a concern that a significant portion of appraisal petitions are motivated primarily or even exclusively by the interest factor itself . . . . Indeed, the interest on an appraisal award can itself represent a significant additional premium above the merger price . . . .").

116. *See* Transcript at 18, *In re* ISN Software Corp. Appraisal Litig., C.A. No. 8388-VCG (Del. Ch. Sept. 26, 2013) (expressing a "concern about whether the interest rate that the Legislature has set encourages these types of appraisal cases and would also encourage or incentivize a slow walk toward the finish line").

117. *See* Jiang et al., *supra* note 46, at 724–25 (surveying all Delaware appraisal cases from 2000 to 2014, and concluding: "Excess Yield, which is defined as the spread between the federal discount rate plus 5 percentage points and the yield on 2-year US Treasury notes, is positively correlated with the emergence of appraisal petitions in both the full and post-2007 samples. Moreover, the economic magnitude of the correlation is substantial: every percentage-point increase in the excess yield is associated with a 1.3-percentage-point increase in the marginal probability of an appraisal filing in the full sample.").

118. *See id.* at 726–27 ("[T]he greater part (53.4 percent) of the returns to appraisal arbitrage in trial cases are from interest accrual rather than a higher valuation awarded by the court.").

Under the current statutory regime, interest-rate arbitrage shows no signs of slowing down.[119] The practice's continued popularity is unsurprising given that the existence of significant arbitrage opportunities reveals an efficiency in Delaware's appraisal system.[120] Only by changing the system itself can we combat the problem.

III. How We Got Here: The History Leading to the Amendment

The process of amending the DGCL is unique among state statutory schemes. Specifically, the General Assembly normally defers to the Corporation Law Council's (the "Council") recommended annual amendments.[121] In practice, this means that accomplished Delaware attorneys are drafting amendments to the DGCL.[122] These experienced members of the Delaware bar are keenly aware of the relevant Court of Chancery and Delaware Supreme Court decisions, and in most cases have first-hand experience with the policies at issue.[123] Because of this unique structure, it is perhaps unsurprising that the most recent amendment to section 262 followed the Court of Chancery's theorizing that a statutory change could help solve the interest-rate arbitrage problem.

A. The Court of Chancery's Foresight Preceding the Amendment

Given the limited role appraisal played in corporate litigation in the mid-twentieth century, it is quite impressive that the Court of Chancery saw the writing on the wall regarding prepayment nearly sixty years ago. But that is indeed what occurred. And

119. *See* Kesten, *supra* note 6, at 92 (noting that "over 93% of appraisal petitions filed against public companies during 2015 and 2016 challenged arm's length transactions"); Arthur H. Rosenbloom & Gilbert E. Matthews, Delaware Appraisal Litigation—Non-Arm's-Length Transactions, Arm's Length Transactions and the *Anna Karenina* Principle 11–14 (Mar. 11, 2018) (unpublished manuscript available at https://corpgov.law.harvard.edu/wp-content/uploads/2018/03/Rosenbloom-Matthews-Del.-Appraisal-Litigation.pdf) (surveying Delaware appraisal cases from 1997 to February 2018).

120. *See* Lucian A. Bebchuk & Allen Ferrell, *Rethinking* Basic, 69 Bus. Law. 671, 678 (2014) (explaining that "the absence or presence of arbitrage opportunities" is "the key criterion for market efficiency").

121. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 125 ("In most years, amendments proposed by the Council are enacted by the legislature almost as a matter of course."); Strine, *supra* note 2, at 679 ("In practice, our legislature and governor defer in the making of statutory law to the corporate law council of the Delaware State Bar Association.").

122. *See* Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 Colum. L. Rev. 1749, 1755 (2006) ("[F]or decades now the function of identifying and crafting legislative initiatives in the field of corporate law has been performed by the Corporation Law Section of the Delaware State Bar Association. In particular, it is the governing body of the Corporation Law Section—its Council—that develops such initiatives.").

123. As such, even if those "in the legal academy—and the corporate legal academy—have become less relevant to those who make corporate law," corporate law practitioners have maintained their sway. Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 Wash. & Lee L. Rev. 1119, 1162 (2017).

the court's thoughts on a potential prepayment option then reemerged shortly before the amendment's adoption.

1. *Felder v. Anderson, Clayton & Co.*

In 1960, Chancellor Seitz foresaw the issue of litigants filing appraisal petitions for the interest benefits appraisal offers. In *Felder v. Anderson, Clayton & Co.*,[124] the court was faced with appraising shares of Southland Cotton Oil Company ("Southland"), which was merged into Anderson, Clayton & Co. ("Anderson") in 1955.[125] At the time, section 262 left to the court the decision of whether to award the Southland petitioners interest.[126] Thus, the court in *Felder* had to determine "the right of the stockholders to be awarded interest on the appraised value of their shares."[127] Explaining "that the undue lapse of time in conducting the appraisal proceedings cannot be ascribed to any 'legal fault' on the part of the stockholders," the court decided "that the facts called to [its] attention do not require that the court exercise its discretion in favor of denying interest."[128]

Despite the court's decision to award interest, Anderson argued that "the interest should only be allowed on the difference between the company's $395 offer and the appraised value."[129] The court rejected that argument, reasoning instead that "[t]he company had the unrestricted use of the stockholders' 'money' during the period of the appraisal."[130] The court suggested, however, that the General Assembly could amend section 262 to permit corporations to cut off interest through prepayment:

> Under the facts I do not think the court is justified in concluding that the interest should only be allowed upon the difference between the company's offer and the appraised value. It may be that the [appraisal] statute should be amended to permit the corporation to pay immediately the minimum amount which the parties agree is involved. But that is not a matter for the Court.[131]

124. 159 A.2d 278 (Del. Ch. 1960).

125. *See id.* at 280.

126. *See id.* at 286 ("Under 8 *Del. C.* § 262(h) the matter of allowing interest is left to the court's discretion."). As discussed above, the General Assembly amended section 262 to permit the Court of Chancery to award interest in 1949. *See supra* note 33 and accompanying text. Notably, Chancellor Seitz believed that awarding interest was the equitable thing to do. *See Felder*, 159 A.2d at 286 ("Since the corporation has had the use of the dissenting stockholders' 'money' from the date of the merger, I think interest should generally be allowed as a matter of course.").

127. *Felder*, 159 A.2d at 286.

128. *Id.*

129. *Id.*

130. *Id.*; *see also* Sporborg v. City Specialty Stores, 123 A.2d 121, 127 (Del. Ch. 1956) (Seitz, C.) ("I believe simple interest should be allowed here for the full period from the effective date of the merger to the date of payment. I decline to engage in a prolonged analysis of the record to attempt to fix blame for the fact that the matter was clearly drawn out too long. The fact is that the defendant Corporation had the use of plaintiffs' money during this period without any ownership obligation toward plaintiffs.").

131. *Felder*, 159 A.2d at 286.

After Chancellor Seitz offered his insight regarding a prepayment option, the idea took a back seat to the many developments in corporate law that occurred over the next half century, even as the General Assembly established a statutory rate of interest in appraisal cases.[132] The prepayment idea would, however, eventually reemerge.

2. *Huff Fund Investment Partnership v. CKx, Inc.*

In 2014—fifty-four years after *Felder*—Vice Chancellor Glasscock echoed Chancellor Seitz's conception of a prepayment amendment to section 262. In *Huff Fund Investment Partnership v. CKx, Inc.*,[133] the appraisal respondent CKx, Inc. ("CKx") asked the court to order the petitioner Huff Fund Investment Partnership ("Huff") "to accept a payment of what [Huff] considers the undisputed portion of the value of its stock, in order to stop, in part, the running of interest at a legal rate."[134] In other words, CKx wanted the court to unilaterally decide that an appraisal respondent could force petitioners to accept prepayment and thereby stop the accrual of interest on the portion of that prepayment.[135] As the court noted, CKx sought "the equitable analog of an offer-of-judgment rule," which is available in federal court and the Delaware Superior Court, but not in the Court of Chancery.[136]

In support of its argument that the court should require Huff to accept a prepayment, CKx cited concerns that the statutory interest rate would "penalize" CKx and unjustly enrich Huff.[137] Although the court agreed with CKx that "compared with fault-based litigation, the opportunities for rent-seeking in appraisal actions are comparatively high,"[138] it noted that imposing on appraisal petitioners an obligation to accept prepayment was a task better suited for the Legislature.[139] Because the General Assembly had not included a prepayment

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132. *See supra* notes 40–42 and accompanying text.

133. C.A. No. 6844-VCG, 2014 WL 545958 (Del. Ch. Feb. 12, 2014).

134. *Id.* at *1.

135. Understanding the logic of CKx's desire to prepay and Huff's lack of enthusiasm about accepting prepayment does not require advanced legal thinking, or for that matter even a law degree. From the surviving corporation's perspective, it is unfair to provide petitioners with a low-risk interest incubator that they can use to fund the litigation. And appraisal petitioners have little incentive to voluntarily accept prepayment because the statutory interest rate provides them with important settlement leverage.

136. *Id.*; *see also* FED. R. CIV. P. 68 ("At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. . . . If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made."); DEL. SUPER. CT. CIV. R. 68.

137. *Huff*, 2014 WL 545958, at *2.

138. *Id.*

139. *See id.* ("[F]actors that tend to create perverse litigation incentives in these actions deserve close consideration by policy makers.").

rule in the statute,[140] CKx was asking the court to take action that was "incompatible with the statute."[141]

Despite the court's decision to deny CKx's motion, the court observed "the potential utility" of forcing appraisal petitioners to accept interest-tolling prepayments.[142] Indeed, the court was "sympathetic to the incentives driving [the] [m]otion."[143] The court's sympathy was, at the very least, understandable from a policy perspective. But neither the court nor litigants had to wait long for a legislative response.

B. The 2016 Amendment and Its Legislative History

The General Assembly answered the calls for prepayment in its 2016 amendment of section 262.[144] Effective August 1, 2016, section 262 provides as follows:

> At any time before the entry of judgment in the proceedings, the surviving corporation may pay to each stockholder entitled to appraisal an amount in cash, in which case interest shall accrue thereafter as provided herein only upon the sum of (1) the difference, if any, between the amount so paid and the fair value of the shares as determined by the Court, and (2) interest theretofore accrued, unless paid at that time.[145]

140. *See id.* at *3 ("With respect to the appropriate interest rate and accrual period in connection with statutory appraisal, the General Assembly has made its call."); *id.* ("I am aware that equitable principles may support such a tolling of interest, in certain situations. However, where the General Assembly has provided a specific standard governing interest awards, such a statutory directive must trump those considerations. Here, the General Assembly has, in enacting Section 262(h), determined the appropriate way to compensate appraisal petitioners for their lost investment opportunity, and to prevent the respondent corporation from being unjustly enriched by the use of the petitioner's capital . . . .").

141. *Id.* It is easy to observe the similarities between Chancellor Seitz's and Vice Chancellor Glasscock's analyses in *Felder* and *Huff*, respectively. Both judges saw the writing on the wall regarding the need for prepayment in appraisal cases, but neither wanted to overstep the judiciary's role in the separation of powers. *See* Evans v. State, 872 A.2d 539, 547 (Del. 2005) ("[T]he doctrine of separation of powers is integral to the fabric of the Delaware Constitution."); Trs. of New Castle Common v. Gordy, 93 A.2d 509, 517 (Del. 1952) ("It admits of no doubt that from the beginning our state government has been divided into the three departments, legislative, executive and judicial. It is likewise true that, generally speaking, one department may not encroach on the field of either of the others." (citation omitted)); *see also* Randy J. Holland, The Delaware State Constitution 91–94 (2d ed. 2017).

142. *Huff*, 2014 WL 545958, at *1.

143. *Id.* at *3. Perhaps seizing on this language, at least one appraisal respondent filed a motion similar to CKx's soon after the court decided *Huff*. *See* Brief in Support of Respondent's Motion for Entry of a Judgment or, in the Alternative, for an Order Stopping the Accrual of Statutory Interest at 11–13, Merion Capital L.P. v. Lender Processing Servs., Inc., C.A. No. 9320-VCL (Del. Ch. Aug. 26, 2014) (requesting that the court order appraisal petitioners to accept prepayment equal to the merger consideration after petitioners refused to accept any prepayment that would cut off accrual of interest). Because the court did not have to rule on that motion, we will never know whether a different judge would have departed from *Huff* in the name of equity.

144. Although Delaware waited until 2016 to provide for prepayment in the DGCL, the idea of prepaying appraisal petitioners is nothing new. *See* Siegel, *Appraisal of the MBCA*, *supra* note 24, at 235 ("The concept of prepaying the fair value of the stock has a long history in the MBCA. Both the 1978 and 1984 revisions of chapter 13 required prepayment; the Committee's 1999 revision simply reaffirmed this requirement and fine-tuned the language.").

145. Del. Code Ann. tit. 8, § 262(h) (2018). In addition to this prepayment language, the General Assembly added a so-called "*de minimis* exception," under which "the Court 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

Importantly, the General Assembly specified in its summary of the bill that "there is no . . . inference that the amount so paid by the surviving corporation is equal to, greater than, or less than the fair value of the shares to be appraised."[146] Acquirers therefore have the option to argue at trial that the shares' fair value is less than the prepayment amount. And although the 2016 amendment's official legislative history is otherwise scant, in proposing that amendment the Council eliminated any doubt that it is designed to curb interest-rate arbitrage:

> Because respondent corporations would have this option [to prepay], the incentive for interest rate arbitrage will be dampened without compromising the interests of pre-existing equity holders. The reason for that is that interest rate arbitrage investors cannot depend on receiving the statutory rate as to most of the merger consideration, because a respondent could immediately tender, for example, 75% of the transaction price, thus reducing the petitioners' ability to get the statutory rate as to the bulk of the amount likely to be due at the end of the proceeding. As a result, the amendment better ensures the appraisal actions will be motivated by a genuine interest in proving that the transaction price was unfair.[147]

As discussed below, immediate reactions to this amendment varied throughout the legal community.[148] In general, practicing attorneys' thoughts on the prepayment option divided along plaintiffs' lawyer and defense lawyer lines.[149] But that is to be expected. From an objective perspective, what is important in evaluating the 2016 amendment's merits are the policy interests discussed above in Part II. Therefore, Part IV compares those policy goals to the prepayment amendment's effects, and Part V recommends reform based on those objectives.

IV. The Unintended Consequence: Litigation Over the Statutory Ambiguity

In the short time since its adoption, the 2016 amendment has rightfully been met with praise, as it represents a step in the right direction in appraisal reform and, more specifically, deterring interest-rate arbitrage.[150] Empiricists, for example, view the prepayment amendment as a positive development that will help

or series eligible for appraisal, (2) the value of the consideration provided in the merger or consolidation for such total number of shares exceeds $1 million, or (3) the merger was approved pursuant to § 253 or § 267." *Id.* § 262(g). For an analysis of the *de minimis* exception's implications, see Jiang et al., *supra* note 46, at 723–25.

146. H.B. 371, 148th Gen. Assemb., 2016 Reg. Sess. (Del. 2016).

147. Corp. Law Council, Explanatory Paper, *supra* note 39, at 6; *see also* Rohr, *supra* note 115, at 827.

148. *See infra* notes 150–52 and accompanying text.

149. *See* Allen et al., *supra* note 84, at 760 ("Perhaps not surprisingly, attendees [at the 2016 Delaware Business Law Forum] who typically represent corporations and their boards of directors viewed the amendments as not going far enough, whereas those who typically represent stockholders viewed the amendments as unnecessary and overly restrictive.").

150. *See, e.g.*, Jetley & Ji, *supra* note 45, at 427 (commending the amendment as "a practical way to address concerns regarding the statutory rate").

curtail interest-rate arbitrage.[151] Several justified concerns about unintended adverse effects, however, have accompanied that applause. Perhaps chief among them is the worry that prepaying appraisal petitioners could embolden appraisal arbitrage by funding litigants up front.[152] More generally, the 2016 amendment is widely viewed as not having done enough to curb either appraisal arbitrage or interest-rate arbitrage.[153] But without even exploring what negative results section 262 in its current form *could* bring, examining the consequences the statute has *already* had highlights the need for legislative reform.

A. Uncertainty's Effects on Litigation

The root of many of the 2016 amendment's undesirable effects is the ambiguity that the amendment created. Although the amendment leaves room for interpretation in multiple ways,[154] for present purposes the relevant ambiguity concerns whether appraisal petitioners must return any amount of overpayment after the court issues its fair value determination.[155] Even before the 2016 amendment was officially adopted, commentators predicted that any prepayment "would presumably be non-refundable."[156] But given that the Model Busi-

151. *See* Jiang et al., *supra* note 46, at 700 ("Overall, we conclude that the revised Delaware appraisal statute should have a positive role as a shareholder remedy.").

152. *See* Boyd, *supra* note 43, at 527 ("[T]he prepaying of interest before the close of appraisal litigation might lead to the encouragement of appraisal arbitrage."); Jetley & Ji, *supra* note 45, at 427 ("[P]aying appraisal claimants a portion of the target's fair value up front is akin to funding claimants' appraisal actions, which may end up encouraging appraisal arbitrage.").

153. *See* Allen et al., *supra* note 84, at 760 (explaining that participants in Delaware's 2016 Business Law Forum "generally found [the 2016 amendment] unsatisfactory"); Baca, *supra* note 15, at 427 ("It seems clear that the current Delaware appraisal mechanisms do not work especially well to curb this strategic behavior."); Frankel, *supra* note 102, at 21 ("Appraisal arbitrageurs still have plenty of incentives to pursue appraisal litigation, thereby increasing the risk for acquirers."); Newell, *supra* note 18, at 13 (asserting that the General Assembly has "declined to directly tackle appraisal arbitrage"); Solomon, *supra* note 85 ("The [2016] overhaul also does not fix the problems with appraisal actions. . . . [T]hese revisions may not even deter hedge funds from exercising appraisal rights, the ostensible impetus for these changes.").

154. By way of example, section 262 provides no guidance as to what constitutes "prepayment." Does a surviving corporation need to send a check or can it set the money aside in an interest-bearing account pending the court's decision? The former seems more logical, but the statute gives no direction. Additionally, can payment be made to the petitioners' counsel, or does each dissenting stockholder need to be paid directly? It is easy to see how disputes regarding payment mechanics can quickly become complex. Perhaps a general practice will emerge as companies take advantage of the ability to prepay. But for now, many questions remain unanswered. These other issues are beyond the scope of this article, but would be interesting subjects for future work.

155. Identifying this ambiguity is not a slight to the Council or the General Assembly. Although Professor Easterbrook has advanced the utopian-like proposal that "the domain of the statute should be restricted to cases anticipated by its framers and expressly resolved in the legislative process," no legislative body can foresee all future ambiguity and uncertainty in a new statute. Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 544 (1983).

156. Bomba et al., *supra* note 30, at 1; *see also id.* at 4 ("A company would need to take into account the degree of confidence it has, and at what stage of the proceeding it has it, as to what the likely range of the ultimate appraisal award will be—so that the company does not pay more in the Upfront Payment than the amount ultimately awarded (since, as noted, any excess amount presumably would be forfeited)."); Boyd, *supra* note 43, at 526 (speculating that any overpayment "would be presumably forfeited").

ness Corporation Act (the "MBCA") expressly permits appraisal petitioners to keep any overpayment, it is fair to wonder why the General Assembly would not have specified as much if that were its intention.[157]

Stemming from this uncertainty regarding the return of overpaid funds is motion practice in the Court of Chancery regarding the final destination of such capital. For example, in *Artic Investments LLC v. Medivation, Inc.*,[158] the surviving corporation filed a thirty-seven-page motion in which it argued, based on an unjust enrichment theory, that the court should rule that the appraisal petitioners would have to refund any amount of overpayment after trial.[159] Although the parties eventually stipulated that the petitioners would return any overpayment,[160] costs and fees accumulate quickly in corporate litigation and the time spent squabbling on this issue no doubt occupied many billable hours of attorneys' time.[161] And, just as significantly, additional motions and briefs in the Court of Chancery pile on to an already overburdened judiciary.[162]

157. There is, admittedly, a reasonable argument to be made that by failing to specify that any overpayment must be returned to the surviving corporation, the General Assembly chose to place the risk of overpayment on the company. In other words, perhaps failing to provide for the final destination of any excess prepayment was no oversight at all, but rather a conscious choice on the General Assembly's part. But that argument fails to give the amendment's drafters enough credit. Even leaving aside that the drafters were no doubt aware of the MBCA's prepayment provision and would have had little incentive to leave open for interpretation an issue on which the MBCA is crystal clear, major ambiguities of this sort in the DGCL are as scarce as hen's teeth. To be sure, the Court of Chancery engages in statutory interpretation from time to time. But many of the ambiguities that arise would have been hard to foresee at the time the statute was drafted. Nevertheless, to the extent that the General Assembly deliberately placed the risk of overpayment on the surviving corporation, that was the wrong choice. As explained below, requiring the interest-free return of any overpayment better meets the policy objective of deterring interest-rate arbitrage. *See infra* Part V.C.

158. C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch.).

159. *See* Brief for Respondent at 24, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. Mar. 28, 2017) (Trans. ID 60395853) ("Here, absent the use of the Court's equitable powers to fashion a clear right to obtain a refund, Petitioners would be unjustly enriched by a windfall profit if the amounts prepaid by Medivation were to exceed the Court's fair value determination . . . .").

160. *See* Stipulation Regarding Merger Consideration Payment Terms, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. June 26, 2017) (Trans. ID 60778133); Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS, 2007 WL 2800743 (Del. Ch. June 27, 2017) (Order).

161. *See* Booth, *supra* note 45, at 348 n.79 ("Appraisal litigation is expensive and time consuming for both petitioners and defendants."). For those readers who are unaware of the potential cost of attorney time, consider that the hourly rate approved in Court of Chancery fee award cases has been averaged around $400, and been as high as $1,300. Jason W. Adkins, Note, *A Guide to Predicting the Calculation of Attorneys' Fees Under Delaware Law for Shareholder Suits*, 37 DEL. J. CORP. L. 501, 515 & n.93 (2012) (surveying fee award cases between 1990 and 2012).

162. *See* 2016 ANNUAL REPORT OF THE DELAWARE JUDICIary 27–28, http://courts.delaware.gov/aoc/AnnualReports/FY16/doc/Chancery2016.pdf (illustrating the Court of Chancery's increasing caseload). Indeed, as this article goes to print, Delaware's Judicial Nominating Commission recently began accepting applications for two newly created Vice Chancellor positions to help handle the Court of Chancery's heavy workload. *See* Jeff Montgomery, *Del. Chancery Court's 2 New Seats Likely to Be Filled Soon*, LAW360 (July 5, 2018), https://www.law360.com/articles/1060302/del-chancery-court-s-2-new-seats-likely-to-be-filled-soon. And the Court of Chancery has expressed a preference for fewer non-dispositive motions, and recently enacted a rule change that decreases the maximum length of briefs regarding such motions. *See* Memorandum from Delaware Court of Chancery to Members of the Delaware Bar, The Court of Chancery Amends Rule 171(f) (June 30, 2017),

Another result of the uncertainty regarding overpayments and the corresponding motion practice is a further delay in appraisal proceedings. In *Medivation*, for example, a full ninety days elapsed between the respondent's brief on this subject and the eventual stipulation.[163] Even without this added delay, there is an increasing need to shorten the time that appraisal proceedings take from start to finish, which is often two or three years and can be as long as twelve years.[164] By comparison, under Delaware's original appraisal statute, cases took a total of three months.[165] Abbreviating the length of appraisal proceedings—and accordingly getting dissenting stockholders paid sooner rather than later—has been a needed reform since before appraisal statutes even had much relevance.[166] But despite scholars' calls for reform to the appraisal timeline, they are dragging on longer than ever.[167] Providing clarity on the endpoint for any overpayments will at least eliminate one potential litigable issue.

In sum, the 2016 amendment has had several unintended effects apart from the concerns over the statute's likely shortcoming as it pertains to disincentivizing interest-rate arbitrage. Because certainty in appraisal law is critical, additional reform in Delaware is needed.[168]

B. Stipulations: An Imperfect Solution

As mentioned above, one approach a surviving corporation can take to ensuring that the petitioning stockholders return any overpayment is to include a clawback provision in a stipulation that the parties file with the court.[169] Indeed, some litigants have employed this very tactic.[170] But petitioning stockholders

http://courts.delaware.gov/rules/pdf/Chancery-Rule-171(f)-Announcement.pdf (reducing word limits for motions not made under Rules 12, 23, 23.1, or 56, along with oppositions to and replies in support of such motions, effective August 1, 2017).

163. *See* Brief for Respondent, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. Mar. 28, 2017) (Trans. ID 60395853); Stipulation Regarding Merger Consideration Payment Terms, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. June 26, 2017) (Trans. ID 60778133).

164. *See* Jetley & Ji, *supra* note 45, at 452 n.86 (surveying Delaware appraisal cases and finding that "the time to resolution ranges from 1.9 to 12.1 years, with an average of 3.6 years"); *see also* Epstein et al., *supra* note 56, at 2 ("A key limiting factor to the attraction of appraisal actions has been the long period of time that a dissenting shareholder has its investment tied up while the proceeding is pending. The process usually lasts at least two years and involves a multi-day trial on the merits with extensive testimony from financial experts on both sides, as well as post-trial briefing and arguments.").

165. Thomas, *supra* note 18, at 4–5.

166. *See* Manning, *supra* note 17, at 262 ("Legislative reform should concentrate on accelerating the procedures involved."); Thompson, *supra* note 16, at 41 ("Appraisal litigation can drag on for a considerable time, and some states, including Delaware, make no provision for minority shareholders to be paid until the litigation is over.").

167. *See* Thomas, *supra* note 18, at 2 ("It is time for Delaware law to return to a simplified and expedited appraisal process that would provide dissenting shareholders in a limited number of extraordinary corporate transactions with a summary trial on the issue of the value of their stock within a relatively short time period.").

168. *See* Booth, *supra* note 45, at 348 n.82 ("In the end, more certainty means more deals."); Lattin, *supra* note 29, at 1187 ("A[n appraisal] statute must be practical. It must inform both the corporation and the dissenting shareholder of the exact rights which each has.").

169. *See supra* note 160 and accompanying text.

170. *See, e.g.*, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS, 2017 WL 2800743 (Del. Ch. June 27, 2017) (Order).

have little incentive to agree to such a stipulation because facilitating a prepayment cuts off the petitioner-friendly interest rate.[171] It is therefore in petitioners' best interests to never stipulate to return any overpayment and, in refusing to do so, effectively stonewall appraisal respondents from prepaying an amount over what they will contend fair value is at trial. On the flip side, a surviving corporation is unlikely to throw in the towel and agree that it will simply forfeit any amount of overpayment following a judicial decision that fair value is less than the prepayment. Finally, stipulations cannot be the answer if a party has to write and file a motion and accompanying brief to create leverage for the other side to cave in.[172]

The alternative scenario involving a stipulation is for the parties to agree that the surviving corporation is making a prepayment as per section 262(h), and for both parties to reserve their rights regarding whether the surviving corporation has the right to claw back any overpayment.[173] In essence, such a stipulation is nothing more than an agreement by the parties to punt the issue until after trial. Admittedly, that approach has the upside of avoiding the costs and time of litigation on the issue absent an actual need to fight about it, which will indeed be rare if acquirers decline to prepay more than the merger consideration.[174] But a stipulation of this sort does nothing to reduce the uncertainty inherent in the 2016 prepayment amendment, and does not incentivize appraisal respondents to prepay more than their anticipated worst-case scenario fair value.[175] In turn, saving the overpayment issue for later is a less than ideal method for slowing down interest-rate arbitrage.

V. How We Fix It: A Simple, Clarifying Statutory Amendment

The realization that lessening the risks for stockholders in appraisal cases—and increasing the potential reward—will encourage vexatious petitions has been

171. *See* Brief for Respondent at 13, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. Mar. 28, 2017) (Trans. ID 60395853) ("Medivation has sought confirmation from Petitioners that they will return any prepaid amounts that exceed the Court's fair value determination with respect to the Appraisal Shares. . . . In response, Petitioners have disputed any such refund right and refused to even discuss the mechanics of any such refund.").

172. In *Medivation*, for example, the surviving corporation had to do just that. *See supra* notes 158–60 and accompanying text.

173. *See, e.g.*, Coliseum Capital Partners, L.P. v. Accuride Corp., C.A. No. 2017-0002-JRS, 2017 WL 2494921, at *1 (Del. Ch. June 8, 2017) (Order) ("WHEREAS, the parties are reserving all rights and arguments regarding Accuride's entitlement to claw back a portion of the Prepayment if the Court determines that the fair value of Accuride on November 18, 2016 was less than $2.58 per share [the amount of prepayment] . . . ."); *id.* at *2 ("Except as expressly set forth herein, the parties have reserved all rights and arguments and waived none, including all rights and arguments regarding Accuride's entitlement to claw back a portion of the Prepayment if the Court determines that the fair value of Accuride on November 18, 2016 was less than $2.58 per share.").

174. *See supra* note 96 and accompanying text (explaining the scarcity of appraisal proceedings in which the court has determined that fair value is less than the deal price).

175. *See* Boyd, *supra* note 43, at 526 (explaining that because the prepayment amendment "fail[s] to include a 'claw-back mechanism' for a company to recoup any overpaid interest it provides to an appraisal litigant . . . , corporations must be careful not to overpay litigants because any excess payment would be presumably forfeited").

around nearly as long as the first appraisal statute.[176] As the brief history above demonstrates, there have been several bumps in the road as legislatures around the country have struggled to craft their respective appraisal remedies in a way that balances the policies for which appraisal exists with the need to curtail arbitrageurs and other shrewd investors from taking advantage of the remedy.[177] In Delaware, the recent prepayment amendment has, at least in theory, dissuaded some amount of interest-rate arbitrage.[178] Simultaneously, however, the amendment has brought with it a host of new issues, including litigation over whether appraisal petitioners must return any amount of overpayment.[179] These problems are significant enough that the General Assembly needs to amend section 262 once again, and this article's suggested approach to reform is below.[180] Before crafting a solution from scratch, however, it is useful to observe how other states have addressed the return of any overpayment and what solutions scholars have advanced in terms of improving the statute.[181]

A. How Other States Approach the Overpayment Issue

All fifty states and the District of Columbia have some sort of appraisal remedy for stockholders of corporations that are acquired by other companies.[182] Roughly two-thirds of states have based their appraisal statutes on the MBCA.[183] That number is noteworthy given that the DGCL and the MBCA can be described as "polar alternatives" when it comes to appraisal.[184] The MBCA, for example, has long required prepayment of what the corporation believes is fair value.[185] And under the

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176. *See* Levy, *supra* note 17, at 443 ("As has been pointed out, arbitrarily to tax such costs against the corporation might encourage objecting stockholders to use the remedy for blackmailing the corporation with unreasonable demands.").

177. *See supra* Part II.

178. *See* Frankel, *supra* note 102, at 21 (explaining that the 2016 amendment "provides some relief to acquirers and helps to discourage statutory interest rate arbitrage, but problems remain").

179. *See supra* Part IV.

180. *See infra* Part V.C.

181. *See* Baca, *supra* note 15, at 428 ("Generally, many states look to Delaware in matters of corporation law; it is seen as the gold standard. However, in the case of appraisal statutes, non-Delaware jurisdictions . . . may actually afford more protection to minority shareholders than Delaware, particularly in this relatively new age of appraisal arbitrage.").

182. *See* Kanda & Levmore, *supra* note 20, at 431 ("Appraisal remains firmly embedded in American corporate law, and is a remedy available in every American jurisdiction in at least some settings."); Siegel, *Appraisal of the MBCA*, *supra* note 24, at 234 ("All jurisdictions offer appraisal rights for mergers, as does the MBCA."); Wertheimer, *supra* note 20, at 614 ("Every state corporate statute contains at least some sort of appraisal remedy . . . ."); *see also* Don S. Clardy, Comment, *Valuation of Dissenters' Stock Under the Appraisal Remedy—Is the Delaware Block Method Right for Tennessee?*, 62 Tenn. L. Rev. 285, 285 & n.3 (1995) (collecting appraisal statutes).

183. Baca, *supra* note 15, at 461–62; Siegel, *Appraisal of the MBCA*, *supra* note 24, at 238.

184. Michael P. Dooley, *Rethinking Appraisal*, Del. Law., Spring 2008, at 28.

185. *See* Siegel, *Appraisal of the MBCA*, *supra* note 24, at 235 ("The concept of prepaying the fair value of the stock has a long history in the MBCA. Both the 1978 and 1984 revisions of chapter 13 required prepayment; the Committee's 1999 revision simply reaffirmed this requirement and fine-tuned the language.").

MBCA, stockholders get to keep any overpayment.[186] The practical effect is exactly what a reasonable mind would expect—corporations claim that fair value is a nominal amount to ensure they pay no more than the court will determine the shares are worth.[187]

The trend among non-MBCA jurisdictions is to not require surviving corporations to make any prepayment.[188] A number of those states "require the corporation to *offer* to pay its estimate of fair value of the stock prior to the conclusion of the appraisal proceedings."[189] But that rule functions not as a prepayment, but instead acts more as a requirement that the acquirer make a settlement offer at some point before the court issues its decision.[190] The remaining non-MBCA states, including Delaware, require neither a prepayment nor an offer of payment at any time during the appraisal proceedings.[191]

Unfortunately, this brief survey provides little aid in the quest for a workable solution to prepayment in Delaware. If section 262 *required* prepayment, Delaware could board the MBCA train and allow stockholders to retain any overpayment.[192] But under that model, corporations are justifiably weary of making substantial prepayments, which would do little to disincentivize interest-rate arbitrage.[193] Moreover, determining whether other jurisdictions' appraisal law is any more effective than Delaware's is difficult given the relative dearth of appraisal cases in other states.[194] In the end, Delaware will likely need to be the pacesetter rather than a conformer when it comes to finding an effective prepayment solution for appraisal cases.

B. Previously Suggested Models of Reform

This article is not the first to call for legislative reform to section 262 since the General Assembly adopted the 2016 amendment, and it is unlikely to be the last. Most notably, Professors Korsmo and Myers have offered their suggested ap-

186. *See* Siegel, *Appraisal of the MBCA*, *supra* note 24, at 236; *see also* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 125 (noting that the MBCA "treats the cash payment as an undisputed amount").

187. *See* Siegel, *Appraisal of the MBCA*, *supra* note 24, at 236 ("[K]nowing that its payment of fair value will be a sunk cost will cause a corporation to be judicious about the amount it declares to be the fair value of the stock.").

188. *See id.* at 238 (surveying all fifty states and explaining that none of the sixteen states that do not follow the MBCA approach require prepayment).

189. *Id.*

190. *See id.* ("These jurisdictions, however, differ materially from the MBCA's prepayment requirement because these jurisdictions do not require prepayment; instead, if a shareholder rejects the corporation's offer to pay as inadequate, that shareholder will not receive any payment until the conclusion of the appraisal proceedings.").

191. *See id.* (observing that nine states do "not require the corporation to make any payment or offer of payment until the conclusion of the appraisal proceedings").

192. *See supra* note 186 and accompanying text.

193. *See supra* note 187 and accompanying text.

194. *See* Baca, *supra* note 15, at 447 ("[A]ppraisal cases in non-Delaware jurisdictions remain outliers, despite the overall increase in appraisal actions. Because of the scarcity of appraisal case law elsewhere, it is difficult to say with certainty that the alternative jurisdictions have directly led to less appraisal arbitrage.").

proach, which includes the following key components: (1) an appraisal respondent has the option to prepay, as exists currently;[195] (2) a prepayment is not treated as a concession that the prepayment equals fair value;[196] (3) an appraisal petitioner must repay, with interest, any amount by which the prepayment exceeds the judicially determined fair value;[197] (4) an appraisal petitioner has the option to accept a prepayment and "walk away";[198] (5) a company must elect whether to prepay within thirty days from a transaction's effective date;[199] and (6) the interest rate paid by a petitioner on the amount of overpayment or by a respondent on the amount of underpayment is the target's weighted average cost of capital ("WACC").[200]

Although this thoughtful approach has merit in many respects,[201] such sweeping reform is likely unnecessary to align Delaware's appraisal law with its policy objectives.[202] Leaving aside the first two components—which are already part of the current statute[203]—the proposal strikes the target but misses the bullseye. First, the idea that an appraisal petitioner must repay the amount by which the prepayment exceeds fair value, if any, is admirable and, indeed, is a key piece of this article's proposal.[204] But requiring dissenting stockholders to pay back any overpayment *with interest* runs against the grain of the policy objectives that reform must satisfy. As Korsmo and Myers acknowledge, tacking interest on to the amount of overpayment gives "the surviving company an incentive to engage in strategic behavior, paying *more* than their best estimate of fair value."[205] Put differently, this idea is likely to lead to interest-rate arbitrage *by the surviving company*, i.e., "reverse interest-rate arbitrage."[206]

Second, the Korsmo and Myers proposal seeks to lessen the risk of reverse interest-rate arbitrage by providing appraisal petitioners with the option to take the prepayment and walk away, but such an option could open the floodgates to nuisance appraisal petitions if surviving companies start making prepayments

195. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 136–37 (asserting that with this component in place, "the importance of the interest rate is vastly diminished").

196. *See id.* at 138 ("The amount of the initial payment should not constitute a concession by the company of the minimum fair value of the company.").

197. *See id.* at 138–39 (reasoning that this component "preserve[s]" the "[t]wo-sided litigation risk" in appraisal proceedings).

198. *See id.* at 139–40 (predicting that the option to walk away with the prepayment would "counteract any incentive for the surviving company to overpay" that is created by the third component).

199. *See id.* at 140–41 (arguing that a time limitation will promote the progression of appraisal proceedings).

200. *See id.* at 142–44 (justifying the target's WACC by noting that "the parties will be computing this figure anyway as part of their valuation cases" and "the court itself will already be choosing a WACC in performing its own valuations").

201. For example, it identifies the correct objectives of an optimal interest rate, including one that does "not distort minority stockholders' decision to dissent in the first place" and "make[s] the parties indifferent to the passage of time." *Id.* at 132.

202. *See* Baca, *supra* note 15, at 460 ("Delaware has no need to try to enact something extreme.").

203. *See supra* note 146 and accompanying text (explaining that any prepayment is not a concession by the company that fair value is, at a minimum, the amount of the prepayment).

204. *See infra* Part V.C.

205. Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 139–40.

206. For a potential solution to this apparent Catch-22, see *supra* Part V.C.

even marginally above the deal price. Companies that want to avoid being on the hook for a large statutory interest bill will be incentivized to pay not what they truly believe the target is worth, but the price they suspect the court will land on. Given that nearly half of recent appraisal decisions have landed on a fair value that exceeds the merger consideration[207]—including some in which the court has settled on a substantial premium[208]—regular prepayments above the deal price are not out of the realm of possibility even in a post-*DFC* and post-*Dell* world. Savvy investors are already the norm in the appraisal arena,[209] and one can imagine a world in which dissenting stockholders file appraisal petitions in all eligible transactions with the intention to hold the surviving companies ransom, searching for a better deal.[210] Because more nuisance litigation is not what Delaware needs,[211] an option for petitioners to walk away with any prepayment should not be included in legislative reform to Delaware's appraisal law.

Third, a statutory requirement that surviving companies make the prepayment election within a specified window is unnecessary. Because the statutory interest rate is compounded quarterly starting on a transaction's effective date, appraisal respondents already have all the incentive they need to make a prepayment decision as quickly as possible.[212]

Finally, departing from an established statutory interest rate, be it the current interest rate of 5 percent over the Federal Reserve discount rate or another, would be unwise due to the subjective and unpredictable nature of a case-by-case method such as using the WACC from the discounted cash flow ("DCF") calculation.[213] Indeed, the Delaware Supreme Court recently warned of "the hazards that always come when a law-trained judge is forced to make a point estimate of

207. *See* Kesten, *supra* note 6, at 119–20 (examining eleven public company appraisal decisions between 2013 and 2016 and finding that five resulted in a fair value above the deal price, five resulted in a fair value equaling the deal price, and one resulted in a fair value that was 1 percent below the deal price); *see also* McLellan, *supra* note 94, at 110 ("An examination of reported appraisal cases over the last five years indicates that fair value generally exceeds the merger price.").

208. *See, e.g.*, Towerview LLC v. Cox Radio, C.A. No. 4809-VCP, 2013 WL 3316186 (Del. Ch. June 28, 2013) (awarding nearly a 20 percent premium).

209. *See supra* note 63 and accompanying text (observing that funds dedicated to appraisal arbitrage already exist).

210. In other words, providing stockholders with this type of "hold-out power" "would further heighten the danger of opportunistic suits," and thereby permit stockholders "to exact a ransom for allowing the corporation to proceed with the transaction." Jeffrey G. MacIntosh, *Designing an Efficient Fiduciary Law*, 43 U. Toronto L.J. 425, 439 n.34 (1993).

211. *See* Jiang et al., *supra* note 46, at 698 ("[T]he appraisal remedy would not be socially desirable if it is used to unduly inflate acquisition costs, including those from frivolous lawsuits . . . .").

212. *See* Del. Code Ann. tit. 8, § 262(h) (2018) ("[I]nterest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly . . . .").

213. *See* Arun Kumar Basu & Malayendu Saha, Studies in Accounting and Finance: Contemporary Issues and Debates 71 (2013) (articulating that a DCF valuation is "highly subjective and potentially unreliable and biased"); W. Todd Brotherson et al., *Company Valuation in Mergers and Acquisitions: How Is Discounted Cash Flow Applied by Leading Practitioners?*, 24 J. Applied Fin. 43, 44 (2014) ("[T]he application of DCF is often far from 'routine'; it requires art and judgment in the face of inherently uncertain business forecasts."); Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 18–19 (observing "the tendency of litigation experts to present 'wildly divergent' DCF valuations" and the accompanying result of that tendency, which is that "the result of DCF analysis is highly susceptible to wide swings based on seemingly small variations in the inputs to the analysis" (citation omitted)); Rosen-

fair value based on widely divergent partisan expert testimony."[214] Korsmo and Myers intelligently recommend a number for the interest rate that both parties and the court will already be computing in most appraisal cases due to the court's longstanding preference for the DCF valuation method[215]—at least until recently.[216] But an unknown interest rate would unnecessarily complicate litigation strategy, especially if the law resembled Korsmo's and Myers' proposal, under

bloom & Matthews, *supra* note 119, at 5 ("Unfortunately, DCF suffers from fact that it merely gives the *illusion* of precision.").

214. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 37 (Del. 2017); *see also id.* ("When an asset has few, or *no*, buyers at the price selected, that is not a sign that the asset is stronger than believed—it is a sign that it is weaker. This fact should give pause to law-trained judges who might attempt to outguess all of these interested economic players with an actual stake in a company's future."); *In re* Appraisal of Dole Food Co., 114 A.3d 541 (Del. Ch. 2014) ("[T]he court is obligated to determine the fair value of the subject corporation's shares. But as this court's opinions frequently have observed, the past and current members of this court are 'law-trained judges,' not valuation experts." (quoting Laidler v. Hesco Bastion Envtl., Inc., C.A. No. 7561-VCG, 2014 WL 1877536, at *1 (Del. Ch. May 12, 2014)) (internal citations omitted)); Finkelstein v. Liberty Dig., Inc., C.A. No. 19598, 2005 WL 1074364, at *12 (Del. Ch. Apr. 25, 2005) ("The judges of this court are unremittingly mindful of the fact that a judicially selected determination of fair value is just that, a law-trained judge's estimate that bears little resemblance to a scientific measurement of a physical reality.").

215. *See* ACP Master, Ltd. v. Sprint Corp., C.A. Nos. 8508-VCL, 9042-VCL, 2017 WL 3421142, at *31–39 (Del. Ch. July 21, 2017) (using the DCF method exclusively to determine fair value); Owen v. Cannon, C.A. No. 8860-CB, 2015 WL 3819204, at *16 (Del. Ch. June 17, 2015) ("[T]he DCF valuation methodology has featured prominently in this Court because it is the approach that merits the greatest confidence within the financial community." (internal quotation marks omitted)); Baca, *supra* note 15, at 439 ("Generally, the Chancery judges tend to use the discounted cash flow method . . . ."); Wertheimer, *supra* note 20, at 628 (describing the DCF valuation method as "probably the most prominent and frequently used post-*Weinberger*").

216. In the last year, the court has placed the DCF valuation on a lower pedestal. In *Aruba*, for example, the Court of Chancery interpreted the Delaware Supreme Court's decisions in *DFC* and *Dell* to mean that assuming an efficient market, the evidence of fair value that "the unaffected trading price provides . . . is more reliable than the single estimate of any one individual, be he a knowledgeable market participant, corporate insider, valuation professional, or trial judge." *Aruba*, 2018 WL Veriton Partners Master Fund Ltd. v. Aruba Networks, Inc., C.A. No. 11448-VCL, 2018 WL 922139, at *24 (Del. Ch. Feb. 15, 2018). It is difficult to argue that this interpretation of the Supreme Court's decisions is incorrect. In *DFC*, for example, the Delaware Supreme Court explained: "Market prices are typically viewed [as] superior to other valuation techniques because, unlike, e.g., a simple person's discounted cash flow model, the market price should distill the collective judgment of many based on all the publicly available information about a given company and the value of its shares." DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 369–70 (Del. 2017); *see also id.* at 370 ("[A] single person's own estimate of the cash flows are just that, a good faith estimate by a single, reasonably informed person to predict the future. Thus, a singular discounted cash flow model is often most helpful when there isn't an observable market price."); *Dell*, 177 A.3d at 16 (explaining that "the efficient market hypothesis long endorsed by this Court . . . teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst, especially an expert witness who caters her valuation to the litigation imperatives of a well-heeled client"); *id.* at 26 ("When . . . an appraisal is brought in cases like this where a robust sale process of that kind in fact occurred, the Court of Chancery should be chary about imposing the hazards that always come when a law-trained judge is forced to make a point estimate of fair value based on widely divergent partisan expert testimony."); Reder & Woodward, *supra* note 65, at 70 (observing the post-*DFC* "underlying assumption that, when the Chancery Court is faced with a choice between deal price and a discounted cash flow analysis . . . , a sliding metric balancing the quality of the sales process with the reliability of the projections utilized in the discounted cash flow analysis ought to be employed").

which either side could end up owing interest to the other.[217] In sum, their thoughtful model includes some commendable components, but attempts a "Hail Mary" when a five-yard handoff could get Delaware into the end zone.

An alternative, more general idea is that the 2016 prepayment amendment, without any additional changes, largely obviates any worry over an inflated interest rate and the General Assembly should just give it time to start taking effect.[218] But that idea overlooks the fact that section 262 is currently silent regarding the return of any overpayment, which means that acquirers will shy away from prepaying significant portions of the deal price and the current interest rate will remain a concern. The key component this theory lacks is a requirement that appraisal petitioners must return any amount by which a judicially determined fair value exceeds a prepayment, which would significantly curtail the incentive for interest-rate arbitrage. Coincidentally, that same adjustment forms the core of this article's suggested reform to Delaware's appraisal law.[219]

Another oft-contemplated solution is to lower the statutory interest rate.[220] But decreasing the interest rate would risk deterring genuine dissenting stockholders from using the appraisal remedy.[221] Indeed, section 262's prescribed interest rate is already lower than the rate for appraisal cases in most states,[222] which go as high as 12 percent.[223] Thus, although the 5 percent premium over the Federal Reserve discount rate has further incentivized arbitrage in Delaware, the search for a workable solution should continue beyond this proposal.[224] Delaware's appraisal statute needs more than just a Band-Aid.

One more alternative is an improved method for deducting synergies in determining fair value.[225] The proponents of this approach attempt to strike a balance between "promot[ing] appraisal (and appraisal arbitrage) in cases where it represents a genuine check on a process for determining the merger price that lacks assurances that the price is fair" and "discourag[ing] appraisal where the

217. *See supra* note 197 and accompanying text.

218. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 137 ("[T]he danger of setting the interest rate too high largely dissipates in the presence of an option to prepay.").

219. *See infra* Part V.C.

220. *See, e.g.*, Baca, *supra* note 15, at 450 ("If legislators truly wish to curb frivolous suits, amending the appraisal statute to include a low, but statute-based interest rate would be most appropriate."); Boyd, *supra* note 43, at 526 (contending that the 2016 "amendment creates problems for corporations, which would not exist if the Bar simply reduced the overall interest rate in section 262(h)"); *supra* note 49 and accompanying text.

221. *See* Korsmo & Myers, *Interest in Appraisal*, *supra* note 18, at 128 (asserting that "[u]sing the interest rate as a makeshift sluice for controlling the volume of appraisal litigation would be a mistake" because, among other reasons, doing so "would deform the incentives facing petitioners and respondents alike, creating opportunities for strategic behavior in litigation").

222. *See* Baca, *supra* note 15, at 448 ("Delaware actually seems to fall somewhere near the lower end of the spectrum in terms of the amount of interest rate owed to dissenting shareholders.").

223. *See id.* at 449 (citing NEB. REV. STAT. § 45-104).

224. Of course, Delaware could return to the pre-2007 system of allowing the Court of Chancery to determine the appropriate interest rate on a case-by-case basis. Doing so could deter arbitrage by increasing "the risk of a low interest rate." *Id.* at 449. But it would also bring back increased risk for genuine appraisal petitioners and protracted litigation over the proper interest rate. *See supra* notes 35–42 and accompanying text.

225. *See generally* Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63.

process for determining the merger price provides assurances that the price is fair."[226] To find that middle ground, one needs to offset the lifeboat that the statutory interest rate provides to arbitrageurs.[227] Scholars have suggested that a consistent approach to accounting for synergies could achieve that balance.[228] The problem with this proposal, however, is one that its proponents themselves identify—the court's "erratic" treatment of synergies in cases dating back decades.[229] Unless one can advance a formulaic approach to dealing with synergies, the prospect of a 180 degree pivot in this area seems remote.[230]

Lastly, some have called for Delaware to move to the MBCA's model of appraisal law, which would require acquiring companies to prepay petitioners the amount that the company believes is fair value.[231] One concern with the MBCA's approach is that requiring prepayment helps to fund appraisal petitioners, and in doing so may encourage appraisal arbitrage.[232] And although a prepayment requirement technically "reduces the amount that is in dispute,"[233] in practice surviving corporations in MBCA jurisdictions prepay only that amount which is beyond disagreement because they know that they will be unable to claw back any amount of overpayment.[234] As such, the MBCA model dilutes neither the number of litigable issues in appraisal proceedings nor the amount of money in dispute. Indeed, the practical inability of surviving corporations to prepay an amount at or above the deal price limits the extent to which such statutes can deter interest-rate arbitrage.

These critiques of alternative proposals for appraisal reform in Delaware are not intended to imply that they deserve no consideration or lack thoughtfulness.

226. Hamermesh & Wachter, *Finding the Right Balance*, *supra* note 63, at 13–14. As noted above, *supra* note 84, Professors Hamermesh and Wachter believe that appraisal arbitrage "should remain a mechanism to make the appraisal remedy viable where the remedy can serve as a check on self-serving opportunism or even a disinterested failure to conduct a reasonable sales process." *Id.* at 67. Although a debate regarding the existing checks on merger price—and those such checks that a utopian society would employ—is beyond the scope of this article, the policies for discouraging appraisal arbitrage identified above outweigh any benefit the practice offers in terms of adding another level of insurance on that price.

227. *See id.* at 46–47 ("[W]ith a statutory presumption of an award of fully compensatory prejudgment interest, appraisal arbitrageurs would suffer little or no downside and could afford to be discriminating in targeting deals tainted by conflict of interest or process failures.").

228. *See id.* at 47.

229. *Id.* at 48; *see also id.* (observing the "remarkably little clarity or consistency in the case law . . . about how to apply [synergies]").

230. This skepticism is in no way a criticism of the court's ability to reach appropriate fair value determinations in appraisal cases. Conversely, it recognizes the difficulty that is inherent in a system in which law-trained jurists must grapple with academic valuation techniques. *See In re* Appraisal of Dole Food Co., 114 A.3d 541, 555 n.8 (Del. Ch. 2014); *see also supra* note 214 and accompanying text.

231. *See, e.g.*, Grant & Barry, *supra* note 24, at 29 (advocating for the adoption of the MBCA's prepayment rule); Thomas, *supra* note 18, at 29–30 (same).

232. *See* Siegel, *Appraisal of the MBCA*, *supra* note 24, at 236 (noting that the MBCA's prepayment requirement "arms shareholders with some money—the undisputed fair value—which shareholders may use to continue their fight with the corporation"); *supra* note 152 and accompanying text (explaining the danger that requiring prepayment in appraisal will fund litigants).

233. Siegel, *Appraisal of the MBCA*, *supra* note 24, at 236.

234. *See supra* note 187 and accompanying text.

Instead, each commentator that has advanced a suggestion should be commended for recognizing that changes to section 262 are needed, and for presenting creative and novel ideas that add to the continuing appraisal reform dialogue. What follows is another addition to that dialogue—one that offers an improvement on the current version of Section 262 and previously suggested models for legislative reform.

C. A Modest Amendment Tailored to the Issues Delaware Faces

To this point, this article has focused on providing the necessary context to the history of Delaware's appraisal remedy and identifying the issues that arbitrageurs are currently causing. Perhaps detecting the problems is progress in and of itself.[235] But spotting a problem is of little use without a proposed solution, which is what follows next. The Council should recommend, and the General Assembly should adopt, an amendment to section 262 under which appraisal petitioners must return any amount by which the court-determined fair value exceeds an acquirer's prepayment. Further, that prepayment need not be accompanied by any interest. Section 262 will otherwise remain in its current form.[236]

Before rationalizing this proposal, it is useful to quickly review the reasons why reform is needed and the goals that an amendment must strive to meet. An amendment should reduce the incentive for interest-rate arbitrage, which, in turn, should curb the amount of appraisal arbitrage more generally.[237] Additionally, Delaware's appraisal system needs to avoid unnecessary and burdensome motion practice in the Court of Chancery.[238] Section 262 must also provide litigants with certainty as to how the statute operates and what it requires of each party.[239] Finally, any reform should abbreviate the amount of time that appraisal cases take to go from the filing of petitions to a trial and accompanying decision.[240]

The Proposed Amendment meets each of these needs. First, appraisal petitioners must return any amount of overpayment under the Proposed Amendment, which has numerous effects. Providing clarity as to the future of any overpaid funds—regardless of whether a statute specifies that petitioners may keep those funds or must return them—provides parties with needed clarity. That certainty will enable, among other things, appraisal respondents to make informed decisions about whether to prepay and, if so, how much to prepay. Similarly, this added clarity will reduce the amount of motion practice in the Court of Chancery and the accompanying legal costs and Court resources.[241] This, in turn, will shorten the amount of time that appraisal proceedings take from start to finish.

235. *See* Robert A. Leflar, *Sources of Judge-Made Law*, 24 Okla. L. Rev. 319, 327 (1971) ("The need for change must be felt before the change occurs.").

236. For simplicity's sake, this proposal is referred to hereafter as the "Proposed Amendment."

237. *See supra* Part II.C.

238. *See supra* Part IV.A.

239. *See* Boyd, *supra* note 43, at 526 (observing that although the 2016 amendment "may provide a way for corporations to limit an appraisal petitioner's statutory interest, the amendment leads to an unclear and unreliable evaluation for corporations"); *supra* Part IV.A.

240. *See supra* Part IV.A.

241. *See* Christian J. Henrich, *Game Theory and* Gonsalves*: A Recommendation for Reforming Stockholder Appraisal Actions*, 56 Bus. Law. 697, 722 (2001) ("Because section 262's objective is protecting

Because clarity in either direction would achieve many of the policy goals outlined above, one may wonder why the Proposed Amendment includes a requirement that appraisal petitioners return overpaid funds rather than retain them. The answer, quite simply, is the need to disincentivize interest-rate arbitrage. The 2016 prepayment amendment made progress in this direction by shrinking the motivation for shrewd petitioners to delay proceedings in an effort to accumulate interest.[242] But Delaware needs to go further, and the Proposed Amendment does just that. By requiring appraisal petitioners to return any overpayment, acquiring corporations will be more comfortable making prepayments in the first place. With an increased frequency of prepayments, investors will have less motivation to engage in interest-rate arbitrage.[243] Thus, mandating that petitioners must return any amount of overpayment will, among other things, further the 2016 amendment's purpose.[244]

Second, the Proposed Amendment specifies that the appraisal respondents do not receive interest with the return of any overpayment. This component of the Proposed Amendment is aimed not at a deficiency in the current statute, but rather as a means of preventing an additional problem. Specifically, awarding interest on top of any return of overpayment would encourage corporations to prepay far more than the stock's plausible fair value. Such excessive prepayments would open the door for the kind of reverse-interest-rate arbitrage described above.[245] Fighting fire with fire does nothing to advance the ball forward.[246]

At first blush, the Proposed Amendment may seem too basic or, alternatively, too simple to be an effective solution. The Proposed Amendment would require less change to section 262 than most previous suggestions for reform.[247] But

minority shareholders, increasing the costs of the action when other, better means of improving the quality of appraisal decisions are available does not make sense.").

242. *See supra* Part III.B (detailing the 2016 amendment and its accompanying legislative history).

243. The inverse, of course, is also true. If the General Assembly amended Section 262 to allow appraisal petitioners to keep any overpayment, corporations would have less incentive to prepay. Consequently, prepayments would be rare and interest-rate arbitrage would thrive. *See* Baca, *supra* note 15, at 455 ("[W]hen the statute disallows payment by a shareholder to the corporation for an excess award, arbitrageurs can choose to pursue appraisal rights with little downside risk.").

244. *See* Brief for Respondent at 27, Artic Invs. LLC v. Medivation, Inc., C.A. Nos. 2017-0009-JRS, 2017-0010-JRS (Del. Ch. Mar. 28, 2017) (Trans. ID 60395853) ("Without assurance of a refund, appraisal respondents are unlikely to fully utilize this new statutory right . . . . Uncertainty regarding entitlement to a refund would defeat the purpose of the amendment and frustrate the clear intent of the Delaware Legislature.").

245. *See supra* notes 205–06 and accompanying text.

246. Perhaps a natural counterproposal to outlawing all interest on the amount of any overpayment returned would be to place a cap on the amount of overpayment for which interest may accrue. For example, in cases where the court's fair value determination is less than the merger price, the legislature could permit appraisal respondents to receive interest on the difference between those two numbers but not on any amount by which the prepayment exceeded the merger price. Such an approach has merit because it would, hypothetically, curtail reverse-interest-rate arbitrage more than the Korsmo and Myers proposal. Nevertheless, it still provides respondents with an incentive to prepay the full merger price regardless of the number at which their experts calculate fair value. The Proposed Amendment's approach of not entitling respondents to interest on any part of returned overpayments is simpler and, more importantly, does more to end the arbitrage whack-a-mole that interest in appraisal proceedings has caused.

247. *See supra* Part V.B.

needlessly complicating matters would be unproductive. What matters is the effect an amendment will have, not the number of words it changes in the statute. In the end, the Proposed Amendment is a practicable solution to an area of the law in which improvement is badly needed.

VI. Conclusion

In the last 120 years, the General Assembly has acted swiftly to amend Delaware's appraisal remedy when policy concerns necessitated doing so. But resting on their laurels would not be the "Delaware way."[248] In the short time since the 2016 amendment became effective, attorneys have had to devote valuable time and resources fighting about how to interpret section 262's new prepayment provision. Meanwhile, the uncertainty has left the door open for interest-rate arbitrage. Although reform is needed, a complicated amendment is not. The Proposed Amendment is modest and straightforward: Appraisal petitioners must repay to surviving corporations any amount by which a prepayment exceeds the court's determination of fair value, but petitioners need not pay any interest on that amount. The current version of section 262 that is superior to the antiquated law under which the court had to determine the appropriate interest rate in each case. There is more work to do, however, if section 262 is going to rise to the high bar Delaware has set for itself. Striking a balance in corporate law is often easier said than done. But that balance is attainable for Delaware's appraisal law, and there is no reason to delay.

248. Michael Houghton, *Frank Biondi and the Financial Center Development Act*, Del. Law., Spring 2011, at 24, 25.