Vi. Going Private - A Public Concern

ment or in favor of the person seeking corporate control . . . ."[100]

The Supreme Court has granted certiorari in *Mosinee Paper Corp. v. Rondeau*, and in all likelihood will decide the case in 1975.[101] Moreover, the Second Circuit's damage award in *Chris-Craft Industries, Inc. v. Piper Aircraft Corp.* will most assuredly be contested.[102] Hopefully the resolution of these two cases will end the era of the pro forma injunction while providing a responsible formula to calculate damages in the tender offer situation.*

VI. GOING PRIVATE — A PUBLIC CONCERN

During the past year a number of small and medium sized corporations have repurchased their outstanding shares for the purpose of "going private."[1] Such repurchases reduce the number of the corporation's shares and centralize ownership in fewer shareholders.[2] The motivation for going private may be the elimination of unwanted minority shareholders,[3] freedom from the disclosure requirements of the federal securities laws,[4] or simply self-investment because of currently reduced stock prices.[5] Although the concept of reducing the

[100] 500 F.2d at 1020, *quoting* GAF Corp. v. Milstein, 453 F.2d 709, 717 n.6 (2d Cir. 1971), *cert. denied*, 406 U.S. 910 (1972).

[101] 500 F.2d 1011 (7th Cir.), *cert. granted*, 43 U.S.L.W. 3348 (U.S. Dec. 16, 1974).

[102] BANGOR PUNTA CORP., REPORT FOR SIX MONTHS ENDING MARCH 31, 1975. Bangor Punta management assured its shareholders that every avenue would be explored in an attempt to reverse or substantially modify the damage award.

* The Supreme Court reversed *Mosinee Paper*, stating that the securities laws were not meant to provide incumbent management with a tool to maintain corporate control. Rondeau v. Mosinee Paper Corp., ___ U.S. ___, 95 S.Ct. 2069, 2067 (1975).

[1] *See* Brodsky, *Corporate and Securities Litigation — Going Private*, N.Y.L.J., Feb. 5, 1975, at 1, col. 1; Kerr, *Tender Offers and Going Private — Ending Public Shareholding an Issue*, N.Y.L.J., Dec. 16, 1974, at 25, col. 3; Kessler, *Elimination of Minority Interests by Cash Merger*: Two Recent Cases, 30 BUS. LAW. 699 (1975); Note, *Going Private*, 84 YALE L.J. 903 (1975).

[2] Stone, *A Corporation's Repurchase of Its Own Shares*, 49 LAB BULL. 106 (1974).

[3] *See* Bryan v. Brock & Blevins Co., 490 F.2d 563 (5th Cir.), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3209 (U.S. Oct. 15, 1974). The controlling shareholders, directors and officers attempted to buy out the plaintiff's interest in the corporation. When he refused to sell, a scheme was created to divest him of his interest through use of the merger provisions of the state corporation law.

[4] *See* Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974). The company involved made an exchange offer to its shareholders to reduce their number sufficiently to avoid the federal securities laws registration requirements. *See* note 11 *infra*.

[5] *See* Broder v. Dane, CCH FED. SEC. L. REP. ¶ 94,875 (S.D.N.Y. Nov. 21, 1974). Controlling shareholders and directors made an exchange offer to public shareholders to tender back shares at a price significantly above the current market price, yet

public holding of shares is not new,[6] the recent increase in the number of such transactions and the potential abuse of the rights of minority shareholders has caused a wave of litigation involving going private.[7]

The increase in the number of companies going private is perhaps a natural result of the many new public offerings which occurred during the prosperous late 1960's and early 1970's.[8] When these companies went public, investors purchased not only a present interest in the enterprise, but also a speculative interest in the future prosperity of the company.[9] In all likelihood the offerings were subject to the registration requirements of the Securities Act,[10] and the companies involved became subject to the reporting requirements of the Exchange Act.[11]

With the decline in market prices it has become profitable for companies to reacquire their securities, usually at a fraction of the price at which they were issued.[12] Moreover, if the total number of

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substantially below the price at which the securities were originally sold.

[6] *See, e.g.*, Lebold v. Inland Steel Co., 125 F.2d 369 (7th Cir. 1941), *cert. denied*, 316 U.S. 675 (1942). *See generally* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964).

[7] Address by Commissioner A. A. Sommer, Jr., Notre Dame Law Advisory Council Lecture, Nov. 14, 1974, (reprinted at CCH FED. SEC. L. REP. ¶ 80,010 [hereinafter cited as Address by Commissioner Sommer]). Commissioner Sommer stated that the elimination of private interests in the going private transactions are both immoral and illegal. The Commissioner urged the courts to take an active role using the securities laws to regulate these activities. *See also*, Brodsky, *Corporate and Securities Litigation — Going Private*, N.Y.L.J., Feb. 5, 1975, at 1, col. 1; Kerr, *Tender Offers and Going Private — Ending Public Shareholding an Issue*, N.Y.L.J., Dec. 16, 1974, at 25, col. 3.

[8] *See* note 12 *infra*.

[9] *Cf.* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189, 1201-02 (1964); Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 231-32 (1962).

[10] Securities Act of 1933 § 5, 15 U.S.C. § 77e (1970) [hereinafter cited as Securities Act].

[11] Securities Exchange Act of 1934 § 12(a), 15 U. S.C. § 78*l*(a) (1970) [hereinafter cited as Exchange Act], provides for registration by the issuer of any security traded on a national exchange. Exchange Act § 12(g), 15 U.S.C. § 78*l*(g) (1970), provides generally for the registration by the issuer of securities traded in, or through the instrumentalities of, interstate commerce where the issuer has total assets in excess of $1,000,000 and a class of equity security held by more than 500 persons.

[12] *See, e.g.*, Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974). The company was organized in 1966. When the first public offering was made in 1968, the public invested $7,173,250 of which the officers and directors netted $5,866,370 in return for their share of the corporation sold to the public. A second public offering was made in 1971 in which the public invested $7,258,823.25, and the directors realized $6,841,649. The company prospered briefly; its common stock sold for a high of 27-⅞ in 1972, but dropped to 5-½ prior to the exchange offer in September of 1974. The exchange offer by management provided for $3 in cash and $8 principal

shareholders of a company reporting under the Exchange Act is reduced below 300, the company is no longer subject to the reporting requirements of that Act.[13] This eliminates the burdens of the federal filing requirements on the company as well as the shareholder protections afforded by the disclosure requirements.[14] Further, the company's shares may be delisted or no longer traded over the counter, thereby freeing the company from compliance with other sections of the federal securities laws,[15] and greatly reducing the shareholder's investment liquidity.[16]

A company may go private in various ways. It may attempt to acquire outstanding shares by soliciting a voluntary tender back to the company by the shareholders. This may take the form of a cash tender offer[17] or an exchange offer of a debt security for outstanding

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amount of 10% subordinated sinking fund debentures maturing in 1984. The debentures were limited to an aggregate principal amount of $11,240,064. Effectively the officers and directors were able to repurchase those shares sold to the public at a "fraction of the original cost to the public shareholders." *Id.* at 97,092.

[13] Exchange Act § 12(g)(4), 15 U.S.C. § 78*l*(g) (4) (1970).

[14] The general philosophy of the federal securities laws has been that a balance between protection of the investor and minimum government interference in the securities market can best be struck through requiring full disclosure of relevant data by the issuer, thus allowing the investor to make an informed decision on his investments. American Sumatra Tobacco Corp. v. SEC, 110 F.2d 117 (D.C. Cir. 1940). *See generally* Cohen, *"Truth in Securities" Revisited*, 79 HARV. L. REV. 1340 (1966); Douglas & Bates, *The Federal Securities Act*, 43 YALE L.J. 171 (1933); Heller, *Disclosure Requirements Under Federal Securities Regulation*, 16 BUS. LAW. 300 (1961); Kripke, *The SEC, The Accountants, Some Myths And Some Realities*, 45 N.Y.U.L. REV. 1151 (1970).

[15] Securities registered on a national exchange and registered with the Commission pursuant to Exchange Act § 12(a) may be relieved from further compliance with the federal registration requirements upon application by the issuer to the Commission when such stock has been withdrawn from the exchange. Exchange Act § 12(d), 15 U.S.C. § 78*l*(d) (1970).

[16] Liquidity of investment, the ability to sell at will, is one of the prime motivations to invest in a public corporation, especially when the security purchased is listed on one of the stock exchanges or traded on the over-the-counter market. In those cases the investor is assured of finding a ready purchaser for his holdings should he desire to sell. However, when a corporation goes private and its shares are withdrawn from the exchange or the over-the-counter market, the ability of the stockholder to sell his interest decreases. As the ownership of the corporation becomes more concentrated, the market for shares in the corporation contracts. *See* Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974); Broder v. Dane, CCH FED. SEC. L. REP. ¶ 94,875 (S.D.N.Y. Nov. 21, 1974); Address by Commissioner Sommer, *supra* note 7, at 84,695-96.

[17] In a cash tender offer the company offers holders of its securities a premium price for their holdings. *Cf.* Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974). *See generally IV* TENDER OFFER, *supra*.

shares, as in *Broder v. Dane*.[18] In *Broder* the controlling shareholders and management of the company held 70 percent of the outstanding stock, while the remaining 30 percent was held by public investors. The majority shareholders invited a tender back by the public shareholders in exchange for nonconvertible subordinated debentures.[19] While termed a "voluntary" going private, the coercive impact on the shareholder to tender his shares is apparent. Although the shareholder in *Broder* was not compelled to tender, the stock was subject to delisting and by refusing to tender his shares the stockholder faced ownership of stock with potentially glacial liquidity.[20]

Stronger measures are available to eliminate minority shareholders against their will. An "involuntary freezeout" may take the form of a reverse stock split,[21] a cash merger,[22] or a short form merger.[23] Under any of these methods the majority can effectively eliminate the minority shareholders' interest in the company, leaving a former shareholder with only cash.[24] Regardless of whether "voluntary" or "involuntary" methods are used to eliminate minority shareholders, the exclusion of minority shareholders by going private presents questions of corporate responsibility ripe for resolution under either federal or state law, or both.[25]

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[18] CCH FED. SEC. L. REP. ¶ 94,875 (S.D.N.Y. Nov. 21, 1974).

[19] *Id.* at 96,988.

[20] *See* note 16 *supra*.

[21] If the majority shareholders hold a sufficient number of shares they may call for a reverse stock split of bizarre proportions. In states that prohibit fractional shares all shareholders who have less than the amount of shares called for in a reverse will be forced to accept cash for their investment. *See North Central Co.'s Plans a 1-for-500 Reverse Split*, Wall Street Journal, Sept. 9, 1974, at 16, col. 4.

[22] In the typical cash merger situation the corporation is merged into a second corporation in which the majority also has a controlling interest. The majority shareholders are thus able to retain control of the original corporation through their control of the second. The minority shareholders are, however, forced to accept cash for their investment. *See* Bryan v. Brock & Blevins Co., 490 F.2d 563 (5th Cir.), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3209 (U.S. Oct. 15, 1974); Grimes v. Donaldson, Lufkin & Jenrette, Inc., CCH FED. SEC. L. REP. ¶ 94,722 (N.D. Fla. July 15, 1974).

[23] When permitted under state law, *see, e.g.*, DEL. CORP. L. ANN. § 243 (1973), a parent corporation which owns a specified percentage of a subsidiary, usually 90%, may merge the subsidiary into the parent without a vote of the minority shareholders of the subsidiary corporation, and simply pay the subsidiary's minority shareholders the fair market value of their investment. Therefore, a majority group which holds the requisite percentage may transfer all of its holdings to a dummy corporation created solely for the merger and merge the original corporation into the dummy. *See* Levine v. Biddle Sawyer Corp., CCH FED. SEC. L. REP. ¶ 94,816 (S.D.N.Y. Oct. 7, 1974).

[24] *See generally* Vorenberg, *Exclusiveness of the Dissenting Stockholder's Appraisal Right*, 77 HARV. L. REV. 1189 (1964).

[25] *See generally* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*,

Use of the federal securities laws to regulate going private transactions was proposed in a speech by SEC Commissioner A. A. Sommer, Jr.[26] The Commissioner suggested that the elimination of minority shareholders was subject to the antifraud provisions of Rule 10b-5 of the Exchange Act.[27] He reasoned that when a corporation goes public and solicits capital from the investing public it makes an implied promise to protect the shareholder's interest and that, "absent the most compelling business justification," it will do nothing to interfere with the liquidity of the investment.[28] Thus, he contended that Rule 10b-5 places a quasi-fiduciary responsibility on the management and majority shareholders of public corporations, and absent a compelling business purpose, the elimination of minority shareholders in going private transactions is a violation of this duty.[29]

However, the courts that have considered going private transactions have not agreed with Commissioner Sommer's analysis. These courts have noted that the securities laws merely require full and fair disclosure,[30] and have therefore examined only the sufficiency of the disclosure.[31] In none of the cases did the court examine the justification for the transaction under Commissioner Sommer's quasi-fiduciary responsibility theory.[32]

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83 YALE L.J. 663 (1974); Brodsky, *Corporate and Securities Litigation — Going Private*, N.Y.L.J., Feb. 5, 1975, at 1, col. 1; Address by Commissioner Sommer, *supra* note 7.

[26] Address by Commissioner Sommer, *supra* note 7.

[27] *Id.* at 84,698.

[28] *Id.*

[29] *Id. See also*, Loomis, *Greater Activism and Adaption by the SEC*, 29 BUS. LAW. 115 (Special Issue 1974) (recommending expansive use of antifraud provisions to control corporate activity).

[30] *See* Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908, at 97,093 (S.D.N.Y. Dec. 5, 1974) (§ 10(b) and § 14(e) of the Exchange Act are satisfied by full and fair disclosure); Broder v. Dane, CCH FED. SEC. L. REP. ¶ 94,875, at 96,989-90 (S.D.N.Y. Nov. 21, 1974) (§ 14(e) demands only full and fair disclosure for the benefit of investors); Gould v. American Hawaiian Steamship Co., 362 F. Supp. 771, 775 (D. Del. 1973) (proxy solicitation requirements of § 14(e) are satisfied by full disclosure of relevant information).

[31] *Compare* Broder v. Dane, CCH FED. SEC. L. REP. ¶ 94,875 (S.D.N.Y. Nov. 21, 1974) (sufficient evidence of material omissions in tender offer statements in violation of § 14(e) to justify a temporary injunction until supplemental statement issued which will fully inform shareholders of information relevant to the tender offer) *with* Kaufman v. Lawrence, CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974) (no injunction may issue under § 14(e) when full disclosure of relevant information made).

[32] *Cf.* Gould v. American Hawaiian Steamship Co., 362 F. Supp. 771 (D. Del. 1973). In analyzing the duties of directors and shareholders the court stated:

> Although it is clear that the 1934 Act creates fiduciary relationships

In *Kaufman v. Lawrence*[33] the federal court for the Southern District of New York considered an exchange offer made by Wells, Rich, Greene, Inc. in an effort to go private. The company involved was one of those which had gone public in the late sixties, and by taking advantage of the depressed market it was able to free itself from federal regulation and eliminate public shareholders for a fraction of the new issue price.[34] After determining that the prospectus accompanying the tender offer disclosed all material facts, the district court refused to enjoin the transaction. Judge Carter summarized the difficulty confronting the courts in attempting to impose fiduciary obligations on corporations under the federal securities laws:

> [T]here is nothing invalid *per se* in a corporate effort to free itself from federal regulations, provided the means and the methods used to effectuate that objective are allowable under the law. Nor has the federal securities law placed profit-making or shrewd business tactics designed to benefit insiders . . . beyond the pale. . . .
>
> A public company going "private" may indeed raise serious questions concerning protection of the public interest. There is, however, no foundation on the record before me from which the ramifications of that interest within reach of the federal securities laws might conceivably be explored.[35]

The apparent inability of the federal securities laws to reach going private transactions has led several courts to analyze the problem on the basis of state law. In *Bryan v. Brock & Blevins Co.*[36] majority shareholders attempted to force a minority shareholder out of the corporation through use of the state merger statute. The Fifth Circuit found that the proposed merger was a sham, undertaken solely to eliminate the shareholder.[37] Using an analysis similar to Commis-

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> and obligations of corporate directors and establishes a separate and distinct substantive federal law . . ., the Act does so only in the areas it purports to regulate.

362 F. Supp. at 775.

[33] CCH FED. SEC. L. REP. ¶ 94,908 (S.D.N.Y. Dec. 5, 1974).

[34] *See* note 12 *supra*.

[35] CCH FED. SEC. L. REP. ¶ 94,908, at 97,093.

[36] 490 F.2d 563 (5th Cir.), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3209 (U.S. Oct. 15, 1974).

[37] The plaintiff alleged various violations of the federal securities laws, including a charge that the proposed merger was a device or scheme or defraud investors in violation of Rule 10b-5. Although the Fifth Circuit did not consider the federal claim, it asserted jurisdiction over the state claim under the doctrine of pendent jurisdiction. *Id.* at 565, 571.

sioner Sommer's, the court found that the merger was not compelled by a "legitimate business purpose" and therefore was in violation of the state's corporation law.[38] Perhaps the most significant aspect of the *Bryan* "business purpose" requirement is that the state statute[39] construed by the Fifth Circuit is based upon the New York merger statute.[40] If courts construe the New York statute similarly, a significant precedent will be set, at least insofar as sham mergers are used to deprive minority shareholders of their interests.

The imposition of a fiduciary obligation on the majority shareholders to protect the interests of minority shareholders has afforded the minority shareholders even greater protection than the "business purpose" requirement in *Bryan*. In *Jones v. H. F. Ahmanson & Co.*[41] the California Supreme Court considered a marketing scheme created by the controlling shareholders of a corporation to benefit their holdings at the expense of the minority shareholders. Chief Justice Traynor stated:

> Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.[42]

This approach places upon those who control corporations the same broad fiduciary responsibility under state law which Commissioner Sommer suggested the federal securities laws impose. Unlike the "business purpose" approach of *Bryan*, which considers only the motive behind a merger eliminating minority interests, Chief Justice Traynor's theory places upon the majority shareholders an ongoing fiduciary duty to protect minority interests.[43] Under this rationale courts conceivably may examine the fairness of any transaction,

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[38] *Id.* at 571. The Northern District of Florida adopted the "business purpose" principle in justifying a merger under Florida corporation law. Grimes v. Donaldson, Lufkin & Jenerette, Inc., CCH FED. SEC. L. REP. ¶ 94,722 (N.D. Fla. July 15, 1974).

[39] GA. CODE ANN. §§ 22-1001 to 22-1008 (1970).

[40] N.Y. GEN. BUS. LAW § 263 (McKinney 1968).

[41] 1 Cal. 3d 93, 81 Cal. Rptr. 592, 460 P.2d 464 (1969).

[42] 1 Cal. 3d at 108, 81 Cal. Rptr. at 599, 460 P.2d at 471.

[43] Chief Justice Traynor noted that the increasingly complex nature of commercial and corporate transactions necessitates the expansion of fiduciary principles to protect minority shareholders, especially in small and closely held corporations where potential abuse by controlling shareholders is acute. 1 Cal. 3d at 111-12, 81 Cal. Rptr. at 601-02, 460 P.2d at 472-74.

whether voluntary or involuntary, which eliminates minority interests.

The "business purpose" approach used in *Bryan* and the "fiduciary responsibility" imposed on the majority shareholders in *Ahmanson* provide appealing methods of protecting minority shareholder interests in going private transactions.[44] However, the lack of uniformity of state corporation law indicates that neither theory is likely to gain universal application.[45] Also, states generally have been hesitant to impose a fiduciary responsibility on majority shareholders and, moreover, have been unsympathetic toward the precarious investment position of the minority shareholder.[46]

The absence of adequate federal protection for the minority shareholder and the failure of most states to protect his interest from abuse has led to urgings that federal law be expanded, either judicially or legislatively, to cover going private situations.[47] Suggested approaches range from Commissioner Sommer's application of the Rule 10b-5 antifraud provisions[48] to the enactment of "federal fiduciary standards."[49] Although courts have declined so far to require more

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[44] *See* Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Take-overs*, 88 HARV. L. REV. 297 (1974). In this article the authors discuss parent-subsidiary mergers and suggest alternative approaches of supervision.

[45] *See* Comment, *Recent Developments in the Law of Corporate Freeze-Outs*, 14 B.C. IND. & COM. L.J. 1252, 1258 (1973).

[46] *See generally* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663 (1974). The author of this article observed that: "Perhaps there is no public policy left in Delaware corporate law except the objective of raising money." *But see* Levine v. Biddle Sawyer Corp., CCH FED. SEC. L. REP. ¶ 94,816 (S.D.N.Y. Oct. 7, 1974). Although the district court held the complaint stated a cause of action under Rule 10b-5, it did not dismiss the possibility that the merger involved may also have violated fiduciary principles under Delaware corporate law.

[47] *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L. J. 663, 699-705 (1974) (imposition of federal fiduciary standards); Fleischer, *Federal Regulation of Internal Corporate Affairs*, 29 BUS. LAW. 179, 184 (Special Issue 1974) (possible federal chartering of corporations); Loomis, *Greater Activism and Adaption by the SEC*, 29 BUS. LAW. 115 (Special Issue 1974) (expansion of SEC use of § 10(b) antifraud provisions); Comment, Corenco v. Schiavone: *The Cash Tender Offer as Corporate Raider*, 26 MAINE L. REV. 93 (1974) (federal protection of shareholders from corporate raiding). For an early urging of a more active federal role in regulation of corporations see Douglas, *Protecting the Investor*, 23 YALE REV. (N.S.) 521 (1934).

[48] *See also* Bryan v. Brock & Blevins Co., 343 F. Supp. 1062 (N.D. Ga. 1972), *aff'd on other grounds*, 490 F.2d 563 (5th Cir.), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3209 (U.S. Oct. 15, 1974), which held that in the absence of a valid business justification a merger which eliminated minority interests was a scheme or device to defraud and therefore a violation of Rule 10b-5. The Fifth Circuit did not rule on the Rule 10b-5 cause of action. 490 F.2d at 570-71.

[49] Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J.