THE FINANCIAL ARTICULATION OF A FIDUCIARY DUTY TO BONDHOLDERS WITH FIDUCIARY DUTIES TO STOCKHOLDERS OF THE CORPORATION†

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I. INTRODUCTION

The premise of this Article is that there should be coherence between the theoretical structures of corporate finance and corporate fiduciary law. Because corporate finance is grounded in science, and because corporate fiduciary law is grounded in public policy, this Article views corporate fiduciary law as a corrective of corporate-financial anomalies. Under this view, the identification of a corporate-financial anomaly points to the superimposition of corporate fiduciary law on that anomaly.

A central dogma of corporate practice views the for-profit corporation as properly seeking to maximize the value of its stock without direct regard for the value of other classes of its securities. This dogma operates through three assumptions: (1) that a managerial fiduciary duty to stockholders does not also imply corresponding duties to the corporation’s other classes of securityholders, (2) that equitable ownership of the corporation’s assets by stockholders does not also imply corresponding ownerships by the corporation’s other classes of securityholders, and (3) that maximizing the value of the corporation’s stock is equivalent to maximizing the value of the corporation’s assets.

This Article challenges this central dogma and its operational assumptions on grounds of incongruity with and derivative unfairness under the established theoretical structure of corporate finance.


Also, this Article sketches a new line of development for corporate law based upon a new fiduciary articulation which reconciles the corporate conflict of interest between "bondholders" and stockholders. Because of the national influence of Delaware's law of corporations and because of the elegance of the generalized fact pattern in Weinberger v. UOP, Inc., this Article employs aspects of Weinberger in an illustrative discussion of the new fiduciary articulation.

II. THE CORPORATE-FINANCE FRAMEWORK

A. CORPORATE CURRENT-MARKET-VALUE MAXIMIZATION

An operating decision "efficiently" uses corporate assets when it maximizes their present value; an operating decision "wastes" corporate assets when it reduces their present value. Corporate "financing decisions" are decisions regarding methods of providing capital to the corporation. Corporate debt is "risky" when there is a chance that the corporation might not be able to make full payments on all its debt promises. A "side payment" is a transfer of wealth between classes of the corporation's securityholders.

A central problem for the corporation is that there is, in general, no way of directly constructing managerial objectives from the diverse preferences of the corporation's securityholders. This

6. The term "bond" is used herein for all debt securities. See Am. Bar Found., Commentaries on Indentures 7 n.3, 8 (1971). For a discussion of the "investment contract" definition of a security, see Schneider, The Elusive Definition of a Security, 14 Rev. Sec. Reg. 981 (1981) (discussing the definition of security under the federal securities laws). For a discussion of investor interest in bonds, see Ehrlich, The Smorgasbord of Bonds: Something for Almost Every Palate, Bus. Wk., —, 122 (Dec. 30, 1985). The distinction between debt and equity is irrelevant to the conflict of classes of securityholders having nested claims on the corporation's assets and cash flow. The term "stocks" is used herein as a parallel to the term "bonds," and means "shares of stock" or "stock."


8. 457 A.2d 701, 704-08 (Del. 1983).

9. In other words, the decision selects the use with the largest present value of its expected value. See E. Fama & M. Miller, The Theory of Finance 180 (1972). The expected (mean) value is the sum over all outcomes of each outcome times the chance of that outcome occurring. See id.

10. In other words, the decision selects a use with a present value of its expected value which is less than the present value of the assets. See Stiglitz, Some Aspects of the Pure Theory of Corporate Finance: Bankruptcies and Take-Overs, 3 Bell J. Econ. & Mgmt. Sci. 458, 460-62 (1972).

11. See E. Fama & M. Miller, supra note 9, at 109, 150-57.

12. Id. at 152 n.5, 179.

13. See id. at 179-80. A "side payment" is a payment made on the side.

problem is solved, in general, by a rule of corporate current-market-value maximization which states that “given perfect capital markets, optimal operating decisions for a firm at any point in time involve maximizing the market value of those securities outstanding before the operating decision is made.” If the corporation complies with this rule and efficiently uses corporate assets, then all of the corporation’s securityholders agree on the corporation’s operating decisions and are indifferent about the corporation’s financing decisions. Therefore, this rule is a ground for independent professional decision-making by corporate officers and directors.

An anomaly in this rule occurs when there exists risky debt without side payments because of the possibility that an operating decision which efficiently uses corporate assets to maximize the current market value of the corporation might not also maximize the separate current market values of the corporation’s bonds and stocks. The significance of this anomaly depends on the facts of each case. The manifestation of this anomaly through a corporate policy of inefficient use of corporate assets is rectified by the capital market: capital market anticipation of such a policy is reflected in the market values of the corporation’s securities, and such a policy makes a corporate takeover profitable under a takeover policy of efficient use of corporate assets.

When maximizing the current market value of the corporation does not also maximize the current market value of its stocks, then the current market value of the corporation’s stocks can be maximized by: (1) inefficiently using corporate assets, or (2) efficiently using corporate assets with a bondholder-to-stockholder side payment. If there is a significant chance of corporate bankruptcy, then these means respectively transform into: (1) wasting corporate assets, or (2) preserving corporate assets with a bondholder-to-stockholder side payment.

15. E. FAMA & M. MILLER, supra note 9, at 69-73. For a discussion of unanimity theorems, see De Angelo, Competition and Unanimity, 71 AM. ECON. REV. 18, — (1981).
16. E. FAMA & M. MILLER, supra note 9, at 176. For a discussion of perfect capital markets, see id. at 3-41, 176-78.
17. Id. at 69, 145, 176.
18. See id. at 69, 74-75.
19. Id. at 71, n.4, 178-80.
22. See E. FAMA & M. MILLER, supra note 9, at 180.
B. THE BLACK-SCHOLES CONCEPTION OF THE CORPORATION

An "option" is "[a] contract giving its holder the right to buy or sell . . . [something] at a predetermined price and predetermined time period." A "call option" is an option to buy. A "compound option" is "an option on an option." "Synergy" means that the total effect of a combination is greater than the sum of the individual effects of the components of that combination before that combination occurred. A "nonsynergistic merger" is a merger without corporate market value synergy: the market value of the combined corporation equals the sum of the premerger market values of the corporations merging. An "efficient capital market" is a capital market in which "any new information reaching the market concerning asset values is immediately impounded into security prices." The "debt capacity" of a corporation is the profile of the maximum market value of bonds that the corporation can have outstanding in the capital market for a range of interest rates.

Aristotle said that "the house is there that men may live in it, but it is also there because the builders have laid one stone upon another." The Black-Scholes option-pricing framework is an example of such a duality because it scientifically describes both option prices and the bondholder-stockholder corporate-financial mechanism. This framework is based on postulates regarding the capital
market, and its usefulness cannot be evaluated independently of the capital market efficiency on which it is grounded.

In the Black-Scholes scientific conception of the corporation, the stockholders own a call option, with operational control, on the bondholders’ ownership of the corporate assets and cash flow. Under this view, there is a dynamic mathematical “distribution of ownership between the stockholders and bondholders.” The corporation’s stock is a compound option when the corporation issues finite-maturity risky coupon bonds; the stock of the combined corporation in a nonsynergistic merger is a compound option. Also, in general, corporate debt capacity is synergistic in nonsynergistic mergers.

C. UNANTICIPATED WEALTH EXPROPRIATIONS

In general: “Bond protective contractual provisions” seek to fix existing corporate conditions (under which original bond purchase prices and bond interest rates are fixed) in order to restrict possible corporate acts which might adversely affect the value of their bonds, and they seek to force a preferred remedy (such as bond buyback, bond renegotiation, or corporate bankruptcy) when the value of their bonds significantly deteriorates. The contract (termed on “indenture”) containing these provisions (termed “covenants”) is negotiated between the corporation representing the stockholders who control it and a separate corporation (termed a “trustee”) representing the bondholders. “Bond pricing” is the coordinate determination

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32. Galai & Masulis, supra note 27, at 54-55. “Subsequent modification of the basic Black-Scholes model . . . shows that the analysis is quite robust with respect to relaxation of the basic assumptions under which the model is derived. No single assumption seems crucial to the analysis.” Smith, Jr., supra note 31, at 4.


35. Smith, Jr., supra note 31, at 43.

36. Geske, supra note 31, at 542 (stating: “At every coupon date, until the final payments, the stockholders have the option of buying the next coupon or forfeiting the firm to the bondholders.”).


38. In other words, the debt capacity of the combined corporation in a nonsynergistic merger is generally greater than the sum of the premerger debt capacities of the corporations merging. Stapleton, supra note 29, at 15, 18, 24-25.


40. See AMER. BAR FOUND., supra note 6; AM. BAR ASS’N COMM. ON DEV. IN BUSINESS FINANCING, SECTION OF CORP., BANKING AND BUS. L., Model Simplified Inden-
regarding a bond’s purchase, interest, and redemption payments. “States of nature” are eventualities or possible future outcomes. “Variance” is a measure of dispersion around the expected (mean) value of outcomes.\textsuperscript{41}

The anomaly in the rule of corporate current-market-value maximization—generalized to conditions wherein the current market value of the corporation increases, remains the same, or decreases—is the basis of the bondholder-stockholder corporate conflict of interest.\textsuperscript{42} Bond protective contractual provisions are a signal (indicator) to the capital market that the stockholder-controlled corporation will conform to the rule of corporate current-market-value maximization and efficiently use corporate assets. In general, this signal is reflected in the market values of the corporation’s securities.\textsuperscript{43}

When the original bondholders lend money to a firm, they take cognizance not only of the returns in the different states of nature of the firm under its present management but also of the chance of a take-over bid, a new management which would make an alternative set of decisions. They must take into account all the possible take-over bids, and the resulting dispersion in the possible returns from the firm may be very large indeed.\textsuperscript{44}

Thus, ex ante contractual specificities in bond pricing might be ex post imperfect—even if they are ex ante perfect—because of unanticipated changes in facts, possibilities, and probabilities affecting the value of the bonds.\textsuperscript{45} Bondholder-stockholder side payments which are caused by such contractually unanticipated changes are...
"unanticipated wealth expropriations" because they are a consequence of the failure of contractual ordering to provide perfect protection for bondholders' and/or stockholders' wealth.\textsuperscript{46} Because the variables in the Black-Scholes option-pricing framework admit of changes which are not contractually anticipated by bond pricing in the capital market, "unanticipated changes in any of these variables can affect the market value of the stockholders' and bondholders' claims" evaluated under this framework.\textsuperscript{47} For example, the Black-Scholes option-pricing framework has shown that in a nonsynergistic merger between two firms containing only pure coupon bonds and equity in their capital structure, the possible wealth transfer effects are:

(i) from stockholders to short and long-term debtholders

(ii) from stockholders and long-term debtholders to short-term debtholders

(iii) from stockholders and short-term debtholders to long-term debtholders

and (iv) from long-term debtholders to stockholders and short-term debtholders.

The above wealth-expropriation effects . . . carry through even when the bonds receive coupon payments and when the variance of returns on the merged firm changes after retirement of short-term debt.\textsuperscript{48} Bondholder-stockholder unanticipated wealth expropriations might also occur in corporate divestitures, issuances and retirements of bonds and stocks, spin-offs, etc.\textsuperscript{49}

Unanticipated wealth expropriations can be neutralized by side payments among the classes of securityholders involved in the expropriations.\textsuperscript{50} Investors are economically unaffected by an unanticipated wealth expropriation when they own equal proportions of the classes of securities affected by that expropriation.\textsuperscript{51}

\textsuperscript{46} See Galai & Masulis, supra note 27, at 55 n.5, 61-62, 68 n.43.

\textsuperscript{47} Smith, Jr., supra note 31, at 45.

\textsuperscript{48} K. Shastri, supra note 26, at 3.

\textsuperscript{49} Galai & Masulis, supra note 27, at 62-66, 69-71.

\textsuperscript{50} Id. at 55 n.5, 62, 70; K. Shastri, supra note 26, at 55-56. See E. Fama & M. Miller, supra note 9, at 71-72 n.4, 155 n.10, 179. These side payments include new unanticipated wealth expropriations. See Galai & Masulis, supra note 27, at 69, 70, 78-79.

\textsuperscript{51} Galai & Masulis, supra note 27, at 62 & nn.27-28.
D. EFFICIENT MARKET PORTFOLIOS

Risk (variance) has two components: diversifiable risk (which is risk that can be eliminated by investment diversification) and covariance risk (which is the nondiversifiable residual risk). A "risk-averse" investor eschews specified risk (the variance of outcomes in an investment) in favor of its economically equivalent certainty (the expected value of the investment), whereas a "risk-liking" investor seeks such risk as against such certainty. A "risk-neutral" investor is indifferent to such risk or to such certainty.

The intertemporal capital-asset-pricing model can be developed from the addition of three postulates to those of the Black-Scholes option-pricing framework: (1) all investors are risk-averse, (2) all investors have restricted mathematical forms of risk aversion and/or all investments have restricted mathematical forms of returns, and (3) all investors simultaneously possess identical investment facts and beliefs. In the intertemporal capital-asset-pricing model, all investors agree on the price of instantaneous covariance risk and all investors own (in varying quantities) equal proportions of each corporation's securities invested in. "[O]ptimum portfolios for all investors" are combinations of a
riskless asset with an efficient market portfolio which "consists of all assets in the market, each entering the portfolio with weight equal to the ratio of its total market value to the total market value of all assets." These combinations of a riskless asset and the efficient market portfolio vary in accordance with each investor's degree of risk aversion. Investors are indifferent to all wealth expropriations within the efficient market portfolio because all investors own equal proportions of all assets within the efficient market portfolio.

III. STOCKHOLDER WEALTH EXPROPRIATIONS FROM BONDHOLDERS

A. THE EXPROPRIATION TENDENCY

In the Black-Scholes conception of the corporation, the exercise price on the stockholders' call option regarding corporate assets and cash flow is the payment due the bondholders. Assume that corporate assets (including cash flow) have equal chances for values which are equally greater than and less than their expected value.

In the case of two classes of corporate securities such as bonds and stocks, the Black-Scholes conception of the corporation might be thought of as stockholders owning the corporate form (call option on the corporate substance) and bondholders owning the corporate substance (assets and cash flow). The mechanism of this form-substance distinction—and more generally of the nesting of ownerships of corporate assets and cash flow by classes of the corporation's securityholders—implies an inherent corporate tendency for unanticipated wealth expropriations from bondholders which the classical conception of stockholder equitable ownership of the corporate substance fails to discern.

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61. Id.
62. Id. If investors also own nonmarketable assets, then investors own combinations of a riskless asset with both marketable and nonmarketable assets. Jensen, supra note 59, at 380-82 (discussing Mayers' model). A portfolio having zero covariance with the market portfolio can be substituted for the riskless asset. Black, Capital Market Equilibrium with Restricted Borrowing, 45 J. Bus. 444, — (1972).
63. Galai & Masulis, supra note 27, at 62 & n.27, 71 n.50. Investor indifference to such wealth expropriation exists only when all investors own efficient market portfolios or when all investors in the classes of securities involved in the expropriations own equal proportions of those securities. Id. at 62 & nn.27-28.
64. See supra notes 34-37 and accompanying text. The appropriate time when value adjustment would be made is upon comparing debt payments with corporate returns.
65. The classical conception's objection that it cannot be explained why corporate events such as takeovers might be deleterious to bondholders, see Easterbrook & Fischel, supra note 2, at 1190, is overcome by the explanation of the generalized anomaly in the rule of corporate current-market-value maximization intensified through the expropriation tendency by risk-averse stockholders.
A risk-averse stockholder equitable owner of such corporate assets would not seek unanticipated increases in their instantaneous variance because increased variance equally increases the chances for decreased values along with increased values. However, a risk-averse stockholder equitable owner of a call option on such assets would seek, ceteris paribus, unanticipated increases in their instantaneous variance when the call option's exercise price is (1) greater than the expected value of such assets, because increased variance increases the chances for exercising the call option, and (2) less than the expected value of such assets while the corporation's asset instantaneous covariance risk and capital-structure-unaffected market value are constant, because increased variance decreases the instantaneous covariance risk of the corporation's stocks and increases their market value.

Situation (1) admits of unanticipated wealth expropriations from bondholders through waste of corporate assets because there is a significant chance of corporate bankruptcy when the call option's exercise price is greater than the expected value of the corporation's assets. Situation (2) admits of unanticipated wealth expropriations from bondholders through: (a) wealth redistributions because an increase in the stocks' market value correspondingly decreases the bonds' market value, and (b) inefficient use of corporate assets because of the chance "that a more profitable

66. A risk-averse (decreasing positive marginal utility of wealth with increasing wealth) individual would not desire to participate in an investment having an equal chance of equal gain or loss because the increase in utility from such gain is less than the decrease in utility from such loss: the net utility from such chances is less than the utility of not taking such chances. See supra note 53.

67. "Ceteris paribus" means "if all other relevant things (as factors or elements) correspond or remain unaltered." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 368 (1976).

68. Increased variance (dispersion) increases the portion (tail) of the profile (distribution) of chances of asset values above the call option's exercise price.


70. Galai & Masulis, supra note 27, at 56 & n.10, 58-60, 62-64, 71 & n.52 (discussing the conjoint use of the Black-Scholes option-pricing model and the intertemporal capital-asset-pricing model).

71. Id. at 59-60, 63-64, 71 & n.53. For examples that the concept of decreasing stockholders' covariance risk by increasing the risk of corporate bankruptcy is apparently foreign to our commentators, see Easterbrook & Fischel, supra note 5, at 1442; McDaniel, Bondholders and Corporate Governance, 41 BUS. LAW. 413, 433-34 (1986). Diversifiable risk becomes economically irrelevant to risk-averse stockholders through their investment diversification in the efficient capital market.

72. See supra notes 10, 23 and accompanying text.

73. Galai & Masulis, supra note 27, at 58-60, 63-64, 71 & n.53.
investment project will be rejected in favor of a project with a higher variance of . . . returns."\textsuperscript{74}

B. THE BONDHOLDER-\textit{WEINBERGER} HYPOTHETICAL

1. \textit{Factual Aspects of Weinberger}

A "first-step acquisition" is the establishment of a less than complete stock-ownership position in a corporation which becomes the basis for a subsequent attempt to increase that stock-ownership position; a "two-step acquisition" is the establishment of complete stock ownership of a corporation by the integration through the second step of two individually less than complete stock-ownership positions. A "cash-out merger" is a merger in which the nonacquiring stockholders of the stock-acquired corporation receive money as the sole consideration for their stock and their elimination as stockholders. The "share price" is the amount of money for which a share of stock is able to be bought or sold or is otherwise valued. The "premium over the market price" is the amount of money above the market price of a security that a buyer is willing to pay, or a seller is willing to accept, in exchange for that security. "Majority stockholder" status results when one corporation acquires more than fifty percent of another corporation's stock: the stock-acquiring corporation becomes the "parent corporation" and the (partially or wholly) stock-acquired corporation becomes the "subsidiary corporation." A "dual parent-subsidiary director" is an individual who is simultaneously a member of the board of directors of both the parent corporation and its subsidiary corporation.

\textit{Weinberger} represents the generalized fact pattern of a two-step acquisition in which the first-step acquisition and the second-step cash-out merger have equal share prices with approximately equal premiums over their market prices and in which majority stockholder and dual parent-subsidiary director statuses result from the first-step acquisition.\textsuperscript{75}

The merger seems to have been nonsynergistic because both corporations were conglomerates (economically diversified)\textsuperscript{76} and pure conglomerate mergers have no market value synergy.\textsuperscript{77} At the time when the market price of the subsidiary's stock was $14.50 per

\textsuperscript{74} Id. at 71. In other words, there is a chance that stockholders could "benefit from projects whose net effect . . . [is] to reduce the total value of the firm." Jensen & Meckling, \textit{supra} note 20, at 337 n.43.

\textsuperscript{75} \textit{Weinberger v. UOP, Inc.}, 457 A.2d 701, 704-08 (1983).

\textsuperscript{76} Id. at 704.

\textsuperscript{77} Galai & Masulis, \textit{supra} note 27, at 66 & n.38, 68.
share, dual parent-subsidiary directors had inside information "that it would be a good investment for [the parent] to acquire the remaining 49.5% of [the subsidiary's] shares of any price up to $24 each." Because efficient market "theory is concerned with how the market reacts to disclosed information and is silent as to the optimum amount of information required or whether that optimum should be achieved on a mandatory or voluntary basis," this ($14.50 v. $24) share price discrepancy is consistent with the existence of an efficient capital market. The merger seems to have occurred in an efficient capital market because the stocks of both corporations were publicly traded on the New York Stock Exchange, and this exchange is more or less an efficient capital market.

The parent corporation did not contemplate merging with the subsidiary corporation until almost three years after their stock purchase bargaining in the first-step acquisition. "No functional bright line can be drawn to offer an easy operational distinction between a merger contemplated as a second step at the time control was acquired and a merger which was not so contemplated but is stimulated by events after the acquisition of control." The positioning of unanticipated wealth expropriations might be a distinguishing financial feature between anticipated and unanticipated mergers. Unless the parent sells its stocks in the subsidiary to the extent that its status as the majority stockholder is extinguished, the parent arguably is the only realistic purchaser for the aggregate of the subsidiary's minority stocks. Second-step acquisition unanticipated wealth expropriations might occur because, at the time of the purchase of the parent's or subsidiary's securities, the capital market: (1) perceives the parent as not completely acquiring the subsidiary's stocks, (2) ambiguously perceives the parent as completely and not completely acquiring the subsidiary's stocks, or (3) overreacts to the perception of the parent as completely acquiring the subsidiary's stocks. The approximate equality between the subsidiary's stock

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78. Weinberger, 457 A.2d at 706.
79. Id. at 705.
81. Weinberger, 457 A.2d at 704.
83. Weinberger, 457 A.2d at 704-05.
84. Brudney, supra note 2, at 1119 n.144.
86. See Galai & Masulis, supra note 27, at 70.
market price of “a fraction under $14 per share” before the $21 per share first-step acquisition\(^8\) and its stock market price of $14.50 per share before the $21 per share cash-out merger\(^8\) is consistent with the view that the capital market perceived the parent as not intending to completely acquire the subsidiary's stocks because otherwise the share price before the $21 per share cash-out merger arguably would have been around $21 instead of $14.50. This apparent capital market perception is consistent with the fact that the parent did not contemplate merging with the subsidiary until almost three years after their stock purchase bargaining in the first-step acquisition.\(^8\)

Thus, *Weinberger* represents the generalized fact pattern of a surprise nonsynergistic parent-subsidiary cash-out merger occurring in an efficient capital market.\(^9\)

2. *Dicta Aspects of Weinberger*

*Weinberger* involves a class action in equity, on behalf of merger-objecting subsidiary stockholders who were eliminated as stockholders by operation of the merger statute,\(^9\) challenging the fairness of the parent-subsidiary cash-out merger.\(^9\) Although *Weinberger*’s holding is irrelevant to the bondholder-stockholder focus of this Article,\(^9\) aspects of *Weinberger*’s views are relevant.\(^9\)

*Weinberger* states that “a more liberal approach [to securities valuation] must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court.”\(^9\) *Weinberger* thereby opens the door to issues, detected by the Black-Scholes option-pricing framework, concerning unanticipated wealth expropriations among classes of corporate securities.\(^9\) *Weinberger*: (1) affirms a fiduciary duty of loyalty (with “good management”) on corporate officers and directors to the corporation,\(^9\) (2) affirms a fiduciary duty of loyalty (with “complete candor”) on corporate officers and directors to the

\(^{87}\) *Weinberger*, 457 A.2d at 704.

\(^{88}\) Id. at 708.

\(^{89}\) Id. at 704-05.

\(^{90}\) *See supra* text accompanying notes 75-89.

\(^{91}\) DEL. CODE ANN. tit. 8, § 251 (1974).

\(^{92}\) *Weinberger*, 457 A.2d at 703.

\(^{93}\) For a statement of the narrow definition to be given to court determinations, see H. BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS 37 (1912) and K. LLEWELLYN, THE BRAMBLE BUSH 42 (1960).

\(^{94}\) For a statement of the persuasive authority of dicta, see K. LLEWELLYN, supra note 93, at 42.

\(^{95}\) *Weinberger*, 457 A.2d at 713.

\(^{96}\) A. Barkey, *supra* note 1, at 6, 10.

\(^{97}\) *Weinberger*, 457 A.2d at 710.
corporation’s stockholders,98 (3) states that statutory appraisal “shall govern the financial remedy available to minority shareholders in a cash-out merger,”99 (4) finds that “there is a legislative intent to fully compensate shareholders for whatever their loss may be, subject only to the narrow limitation that one can not take speculative effects of the merger into account,”100 (5) states that “elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered” in the statutory appraisal,101 (6) states that in the statutory appraisal proceedings, “[w]hen the trial court deems it appropriate, fair value also includes any damages, resulting from the taking, which the stockholders sustain as a class,”102 (7) states that if the statutory appraisal remedy is inadequate, then the courts may “fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages.”103

3. The Bondholder-Weinberger Hypothetical: Facts

“Nonsubordinated bonds” are bonds having a corporate payment priority equal to that of other bonds while contractually established payment priorities operate among the corporation’s bonds.104 The covariance between two returns equals the product of the positive square root of each return’s variance times the “correlation coefficient.”105 The correlation coefficient can vary from +1 to 1: +1 means perfect correlation, 0 means no correlation, and −1 means perfect inverse correlation.106

Imagine two for-profit Delaware corporations—each having one

100. Weinberger, 457 A.2d at 714.
101. Id. at 713.
102. Id. “Weinberger does not say when it would be appropriate to include this private eminent domain element of damages in the value determination. . . . Other than rescissory damages, it is difficult to imagine any damages that the court could have been contemplating." Berger & Allingham II, A New Light on Cash-Out Mergers: Weinberger Eclipses Singer, 39 BUS. LAW. 1, 18-19 (1983).
103. Weinberger, 457 A.2d at 714 (stating that courts may fashion such a remedy “particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved”).
105. M. SPIEGEL, supra note 41, at 82.
106. Id.
class of publicly-traded stocks and one class of risky publicly-traded
pure-discount bonds with conjointly equal bond maturities—identical
in every respect but for less than perfect correlation of returns be-
tween them. 107 The bond purchase prices and the bond protective
contractual provisions do not anticipate a cash-out merger, the issu-
ance of nonsubordinated bonds and the retirement of stocks. 108 The
capital market conforms to the Black-Scholes option-pricing frame-
work and more or less to the intertemporal capital-asset pricing
model. For each corporation, and for the combined corporation re-
resulting from their merger, the corporate asset instantaneous covari-
ance risk and capital-structure-unaffected market value are
constant. 109

One corporation obtains both dual parent-subsidiary director and
(50.5%) majority stockholder control of the other corporation. 110 The
capital market perceives that these corporations will not undergo a
cash-out merger with the issuance of nonsubordinated bonds and the
retirement of stocks. 111 These corporations undergo a surprise non-
synergistic cash-out merger three years later. 112 The cash-out share
price equals the market price of the shares before the capital market
was aware of the surprise cash-out merger proposal. 113 Several days
after the date of the merger, 114 the combined corporation makes the
publicly announced decision 115 to issue a specified amount of non-
subordinated bonds, which will conjointly mature with the original
bonds, and to use their proceeds for the merger cash-out, other speci-
fied stock retirements, and maintaining a constant market value for
the combined corporation. 116 Also, the combined corporation
publicly announces that it is instituting, through such bond issuance
and stock retirements and through other means, a "prospective
contingency plan" 117 of defense against corporate takeover so as "to

107. See Galai & Masulis, supra note 27, at 62.
109. See supra note 70 and accompanying text.
110. See supra text accompanying note 75.
111. See supra text accompanying notes 87-89.
112. See supra text accompanying notes 76-77, 89-90.
113. See Galai & Masulis, supra note 27, at 68.
114. See supra text accompanying note 101.
115. This emphasizes that the bond pricing of the new bonds will fully reflect (fair-
market-value impound) the new risks associated with the new facts. See E. FAMA &
M. MILLER, supra note 9, at 78-79 n.31; Galai & Masulis, supra note 27, at 79 n.66. Cf.
Prokesch, supra note 2, at D4, col. 6 (statement of Mr. Kingman D. Penniman, Vice-
president, McCarthy, Crisanti & Maffei) (stating, regarding Phillips Petroleum's re-
structuring: "Those holding the debt issued to finance the recapitalization have fared
fairly because the interest paid reflects the new market risks.").
116. See Galai & Masulis, supra note 27, at 63-69.
1346 (Del. 1985).
FIDUCIARY DUTY TO BONDHOLDERS

protect the corporation from a perceived threat to corporate policy and effectiveness." 118 The combined corporation fully complies with all contractual obligations under all bond protective contractual provisions. 119

Some of the subsidiary's stockholders dissent from the cash-out merger agreement and perfect their appraisal rights. 120 These stockholders and some of the original bondholders are risk-neutral and risk-liking investors 121 (during the time span of these events) 122 who possess unique investment facts and beliefs. 123 Arbitrarily, the net financial effect before the date of appraisal is, ceteris paribus, that stockholders gain wealth 124 and original bondholders lose corresponding wealth 125 because of unanticipated wealth expropriations in which: (1) stockholders lose wealth and original bondholders gain corresponding wealth due to the merger per se, 126 and (2) stockholders gain wealth and original bondholders lose corresponding wealth due to the cash-outs per se. 127

A dispute over these gains and losses arises from the Delaware appraisal proceedings. Assume, representation by the original bondholders (Contractual Creditors), the dissenting stockholders (Ap-

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118. Id. at 1076.
120. See supra text accompanying note 99.
121. This locally neutralizes a postulate of the intertemporal capital-asset-pricing model. See supra notes 56-57 and accompanying text.
122. This emphasizes the problem that if rules of law were to distinguish between risk-averse and non-risk-averse investors in favor of the latter, see Easterbrook & Fischel, Corporate Control Transactions, 91 Yale L.J. 698, 711-14 (1982), then a risk-averse investor — whose risk averseness is determined in court by testing that investor — can always allege, perhaps truthfully, that at a relevant past time the investor was risk-neutral or risk-liking. The fact of past inadequate risk diversification supports such an allegation even though the investor's true state of mind at that time is unknown. Furthermore, an investor might be inherently risk-averse, risk-neutral, and risk-liking because "[a] utility function need not be everywhere concave or everywhere convex." H. Markowitz, supra note 52, at 218. E. Fama & M. Miller, supra note 9, at 203; Friedman & Savage, supra note 53.
123. This locally neutralizes a postulate of the intertemporal capital-asset-pricing model. See supra note 58 and accompanying text.
124. This mimics a synergistic merger with respect to stockholders. See Brudney & Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297, 308-09, 313-25 (1974).
125. See Farrell, supra note 45, at 113 (stating that "for every stock owner who benefits from a stock buyback, acquisition, or leveraged buyout, there is a luckless holder of debt"); Weberman, Redmail, Forbes 173, 173 (Oct. 7, 1985) (stating: "In a lot of these big takeovers the acquired stockholders make a killing, but holders of the existing bonds take a hosing.").
126. See Galai & Masulis, supra note 27, at 66, 68. This mimics a "negative"-synergistic merger with respect to stockholders. See Lorne, A Reappraisal of Fair Shares in Controlled Mergers, 126 U. Pa. L. Rev. 956, 976 (1978).
127. See Galai & Masulis, supra note 27, at 69.
praisal Creditors), and the combined corporation (Debtor). Contractual Creditors seek compensation regarding the cash-outs per se loss. Appraisal Creditors seek compensation regarding the merger per se loss and the cash-outs per se gain. Debtor seeks not to compensate Contractual Creditors and Appraisal Creditors. The following selective arguments might be made:

IV. A FIDUCIARY LAW SOLUTION
A. THE BONDHOLDER-WEINBERGER HYPOTHETICAL: ARGUMENTS
1. Debtor Speaks Regarding Contractual Creditors

Our law is clear: Bondholders (Contractual Creditors) have no standing to maintain a claim for breach of fiduciary duty because bondholders are not equitable owners of the corporation’s assets and because corporate officers and directors owe a fiduciary duty only to those who are such equitable owners. "The stockholders of a corporation are the equitable owners of its assets . . ."

"There is a generally accepted picture of corporate debt relationships under which the entire responsibility for governance falls to the contract drafter." Thus, if a “fiduciary duty of good faith and fair dealing” to bondholders were to be imposed on the parent-suc-

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128. Because bondholder wealth is affected, the bondholders might be permitted to speak either directly or indirectly or by parallel litigation. Bonds are deemed “shares of stock” when the bonds can vote, etc., and such voting bondholders of the subsidiary might dissent from the cash-out merger agreement and seek appraisal. See DEL. CODE ANN. tit. 8, § 221 (1974). “Once a stockholder perfects his appraisal rights, he loses his status as a stockholder and becomes a creditor of the corporation.” Berger & Allingham II, supra note 102, at 21 (citing Braasch v. Goldschmidt, 41 Del. Ch. 519, 766 A.2d 760, 766 (1994)).

129. This case does not involve a claim of fraud, see Harff v. Kerkorian, 347 A.2d 133, 133-34 (Del. 1975) (involving allegations of intentional looting of the corporation), or a claim of misconduct regarding bondholder equity conversion rights, see Pittsburgh Terminal Corp. v. Baltimore & Oh. R.R., 680 F.2d 933, 935 (3d Cir.), cert. denied, 459 U.S. 1056 (1982); Van Gemert v. Boeing Co., 520 F.2d 1373, 1374-75 (9th Cir.), cert. denied, 423 U.S. 947 (1975); Green v. Hamilton Int’l Corp., 437 F. Supp. 723, 722-29 (S.D.N.Y. 1977), or a corporation in bankruptcy, see Pepper v. Litton, 308 U.S. 295, 296-302 (1939). The view that “if expropriation is the game, fraud is its name,” McDaniel, supra note 71, at 445, seems to be in error because it is too broad, for example, “in an action at law for deceit or fraudulent misrepresentation an intent to defraud must be established.” Harman v. Masonian Int’l, Inc., 442 A.2d 487, 499 (Del. 1982).


cessor corporation in a parent-subsidiary cash-out merger because of its control over both corporations agreeing to merge, then this fiduciary duty would be “discharged as a matter of law” when there is full corporate compliance with all obligations under all bond protective contractual provisions. Because Debtor has fully complied with all its obligations under all bond protective contractual provisions, such a fiduciary duty would be discharged if it were imposed. Also, postmerger cash-outs (stock retirements) which are outside of the merger agreement are not subject to such a fiduciary duty because they are outside of parent-successor control over both corporations agreeing to merge. Because bondholders could have avoided adverse economic effects resulting from the cash-outs by investing in efficient market portfolios or in equal proportions of the corporation’s bonds and stocks, they assumed the risks of their bonds by choosing not to so invest.


134. See supra text accompanying note 119.


136. See id.

137. See supra notes 51, 63 and accompanying text. Whether all investors can own either efficient market portfolios or equal proportions of the corporation’s affected classes of securities are questions of fact regarding the capital market. Compare Brudney, supra note 2, at 1099-1102 (stating that sufficient stock diversification is factually unlikely, etc.) with E. FAMA, supra note 28, at 253-54 (comparing substantial diversification benefits with randomly selected New York Stock Exchange portfolio containing under sixteen different stocks).

138. This is a coercive risk-diversification policy: diversify in a special way or else suffer expropriations by the corporation(s) invested in. For portfolio arguments regarding equal treatment for investors, compare Easterbrook & Fischel, supra note 122, at 711-14 (presenting a stock diversification argument for “allowing the gains from corporate control transactions to be apportioned unequally” because “risk averse investors can reduce the risk of losses without extinguishing profitable-but-risky transactions”) with DeMott, Current Issues in Tender Offer Regulation: Lessons From the British, 58 N.Y.U.L. Rev. 945, 983 n.191 (1983) (presenting a stock diversification argument that a “fund that mimics the composition of the market as a whole” might “not gain as often as it loses when corporate control is sold on terms that treat shareholders unequally”) and McDaniel, supra note 71, at 436 (stating that “wealth transfers from bondholders to stockholders” involve risk that “cannot be eliminated by [bond] diversification”) and id. (stating that “a mutual fund [of bonds and stocks] is not a perfect substitute for a diversified portfolio”). For a review of the Easterbrook & Fischel gain-keeping stock-diversification argument, see Bebchuk, Toward Undistorted Choice and Equal Treatment in Corporate Takeovers, 98 HARV. L. REV. 1693, 1784 (1985); Coffee, Jr., Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer’s Role in Corporate Governance, 84 COLUM. L. REV. 1145, 1216-21 (1984). Another form of the assumption-of-risk view focuses on the partial anticipation of corporate events through the bond protective contractual provisions: bondholders are deemed to assume the entire risk of an uncertain future event when they show awareness of its possibility of
Regarding Appraisal Creditors

Weinberger states that in the statutory appraisal proceedings, "[w]hen the trial court deems it appropriate, fair value also includes any damages, resulting from the taking, which the stockholders sustain as a class."139 Because both Debtor's and Appraisal Creditors' equity underwent a simultaneous merger per se loss of wealth,140 Debtor did not "take" this wealth from Appraisal Creditors.141 Because Contractual Creditors gained Appraisal Creditors' wealth from the merger per se loss,142 Appraisal Creditors should look to Contractual Creditors for such merger per se loss compensation and not to Debtor.

Weinberger states that "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered" in the statutory appraisal.143 Because the cash-outs per se gain resulted from a financing decision made several days after the date of the merger144 and therefore was not "known or susceptible of proof as of the date of the merger,"145 it should not be considered in the statutory appraisal. Weinberger states that if the statutory appraisal remedy is inadequate, then the courts may "fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages."146 Because the cash-outs per se gain results from conditions under which the corporation has not gained wealth147 and because Appraisal Creditors bear no investment risk148 resulting from stock ownership under the increased corporate debt which is intertwined with such gain,149 Appraisal Creditors should not share occurrence. See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (stating: "The Notes covenants specifically contemplated a waiver to permit sale of the company at a fair price. The Notes were accepted by the holders on that basis, including the risk of an adverse market effect stemming from a waiver.").

Should "fair price," or fair value, include unanticipated wealth expropriations?

139. *Weinberger*, 457 A.2d at 713.
140. See supra note 126 and accompanying text.
141. Cf. United States v. Willow River Power Co., 324 U.S. 499, 511 (1945) (holding that a mean-variance change in height of river was not a "taking" of property); Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980) (discussing the "nexus of contracts perspective" in which "ownership of the firm is an irrelevant concept").
142. See supra text accompanying note 126.
143. *Weinberger*, 457 A.2d at 713.
144. See supra text accompanying notes 114-16, 127.
146. Id. at 714.
147. See supra text accompanying note 116.
148. Cf. Lorne, supra note 126, at 987 (providing an argument against synergistic merger gain sharing).
149. See supra text accompanying notes 116, 127.
in this net cash-outs per se gain.

2. **Appraisal Creditors Speak Regarding Contractual Creditors**

   Debtor's argument regarding Contractual Creditors is incorporated by reference herein.150

**Regarding Debtor**

*Weinberger* finds that "there is legislative intent to fully compensate shareholders for whatever their loss may be, subject only to the narrow limitation that one cannot take speculative effects of the merger into account."151 Because of this legislative intent, Debtor should fully compensate appraisal Creditors, within or without the appraisal statute, for their nonspeculative merger per se loss.152

*Weinberger* states that "elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and not the product of speculation, may be considered" in the statutory appraisal.153 Although the cash-outs per se gain154 is not "known or susceptible of proof as of the date of the merger,"155 this gain is nonspeculative and known as of the date of appraisal.156 *Weinberger* states that if the statutory appraisal remedy is inadequate, then the courts may "fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages."157 Because statutory appraisal does not adequately compensate Appraisal Creditors for the loss of their pro rata share of the present value as of the date of the merger of the nonspeculative gross cash-outs per se gain which proceeds from the (synergistic) corporate debt capacity as of the instant of the merger,158 Appraisal Creditors seek such compensation outside of statutory appraisal.

3. **Contractual Creditors Speak**

   It is basic that "our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."159 Because the established theoretical structure of corpo-

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150. Incorporating supra notes 129-38 and accompanying text.
152. For a statement of the merger per se loss, see supra text accompanying note 126.
154. For a statement of the cash-outs per se gain, see supra text accompanying note 127.
156. See supra text accompanying notes 124, 127.
158. See supra notes 38, 153-56 and accompanying text.
rate finance is grounded in science, our corporate law should be brought into congruity with it by adoption into our law of the implications of the rule of corporate current-market-value maximization and the Black-Scholes scientific conception of the corporation.

A generic managerial fiduciary duty to bondholders proceeds from the rule of corporate current-market-value maximization: Weinberger affirms a fiduciary duty of loyalty (with "good management") on corporate officers and directors to the corporation;\textsuperscript{160} in equivalent economic language, there is a generic managerial fiduciary duty to efficiently use corporate assets and maximize the current market value of the corporation.\textsuperscript{161} Weinberger affirms a fiduciary duty of loyalty on corporate officers and directors to the corporation's stockholders;\textsuperscript{162} in equivalent economic language, there is a generic managerial fiduciary duty to maximize the current market value of the corporation's stocks.\textsuperscript{163} These generic managerial fiduciary duties logically proceed from the rule of corporate current-market-value maximization: "optimal operating decisions for a firm at any point in time involve maximizing the market value of those securities outstanding before the operating decision is made."\textsuperscript{164} Because bondholders and stockholders are equal (interchangeable) securityholders under this rule,\textsuperscript{165} the generic managerial fiduciary duty to maximize the current market value of the corporation's stocks implies that there is a corresponding generic managerial fiduciary duty to maximize the current market value of the corporation's bonds. When the anomaly in the rule of corporate current-market-value maximization occurs and the generic managerial fiduciary duties to the corporation and its stockholders conflict,\textsuperscript{166} then this generic managerial fiduciary duty to bondholders logically exists as the means to reconcile the conflict and restore the rule by an implied bondholder-to-stockholder side payment.\textsuperscript{167}

Translating the Black-Scholes conception of the corporation into the language of our corporate law, equitable ownership of the corporation's assets and cash flow corresponds to the seniority (priority) of claims by classes of the corporation's securityholders on those assets and cash flow.\textsuperscript{168} Because, in general, bondholders and stockholders

\begin{footnotes}
\item[161] See supra notes 9, 17-18 and accompanying text.
\item[162] Weinberger, 457 A.2d at 710.
\item[163] See supra notes 9, 17-18 and accompanying text.
\item[164] E. Fama & M. Miller, supra note 9, at 176 (emphasis added).
\item[165] See supra notes 14-18 and accompanying text.
\item[166] See supra note 19 and accompanying text.
\item[167] See supra note 22 and accompanying text.
\item[168] See supra notes 31-37.
\end{footnotes}
have first and residual claims respectively on the corporation's assets and cash flow, they are correspondingly the first and residual equitable owners of the corporation's assets and cash flow. Because corporate officers and directors owe fiduciary duties to the equitable owners of the corporation's assets and because, in general, bondholders are the first equitable owners of the corporation's assets under the Black-Scholes conception of the corporation, corporate officers and directors owe fiduciary duties to bondholders which correspond to those owed to stockholders. Given the foundation of a bondholder-management fiduciary relation which proceeds from the rule of corporate current-market-value maximization and the Black-Scholes conception of the corporation, the "fiduciary formula" permits compensation to bondholders (Contractual Creditors) for their cash-outs per se loss:

Fiduciary law creates causes of action for the entrustor against the fiduciary, even if the parties did not contract. The courts can provide protection to the entrustor by imposing on the fiduciary obligations that the parties would have agreed upon if the costs of contracting or the nature of the relation had not precluded them from doing so. But for the nature of the bondholder-management fiduciary relation in which perfect ex ante foresight with perfectly specified bond pricing is not possible, the bondholders and management would have agreed upon bond pricing which would obligate the corporation to compensate the bondholders for wealth which otherwise and now is unanticipatedly expropriated from the bondholders because the efficient capital market would have impounded this expropriation into such bond pricing.

169. V. BRUDNEY & M. CHIRELSTEIN, CASES AND MATERIALS ON CORPORATE FINANCE 79-81 (2d ed. 1979). "The claims of the various investment securities upon the earnings and assets of the enterprise are defined in the portion of the investment contract which sets forth the amount of such claims and prescribes their priority vis-a-vis other claimants." Id. at 79.


171. See supra notes 168-69 and accompanying text.

172. For a statement of the cash-outs per se loss, see supra text accompanying note 127.

173. Frankel, Fiduciary Law, 71 CALIF. L. REV. 795, 825 (1983). The term "entrustor" means "the party to whom the fiduciary owes fiduciary duties." Id. at 800 n.17.

174. See supra notes 44-46 and accompanying text.

175. See supra notes 28, 43 and accompanying text. Also, but for the nature of the bondholder-management fiduciary relation in which bondholders have unequal bargaining power with management, see Brody, supra note 39, at 19, col. 1, and Farrell, supra note 45, at 114, the bondholders and management would have agreed upon expropriation countermeasures (e.g., bond buyback, bond renegotiation, bond substitution) which would obligate the corporation to compensate the bondholders for wealth which otherwise and now is unanticipatedly expropriated from the bondholders be-
Such compensation to bondholders is the logical counterpart of our corporate law's policy of permissive managerial resistance to takeovers because it offsets the loss of the unrestricted capital market takeover mechanisms which rectifies the policy manifestation of the anomaly in the rule of corporate current-market-value maximization. Furthermore, such compensation is consistent with a public policy of competitive business maneuver. If the bondholders and the corporation were to continuously recontract, then the alternatives would be for the bondholders to receive such net compensation through bond pricing in the efficient capital market or for bond protective contractual provisions which would "severely restrict the actions of the firm." The view that "the most obvious and important characteristic of long-term debt financing is that the holder ordinarily has not bargained for and does not expect any substantial gain in the value of the security to compensate for the risk of loss" becomes irrelevant in this context because: (1) the components of bond pricing are functionally equivalent and impound the publicly known information regarding expected gain and risk.

cause management does so act or contract when the bondholders have more or less equal bargaining power with management. See Brody, supra note 39, at 19, col. 1; Farrell, supra note 45, at 114. 176. For a statement of the policy of permissive managerial resistance to takeovers, see Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 n.10 (Del. 1985); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350 (Del. 1985). See generally Veasey, Business Judgment Rule: The New Incarnation, Legal Times, March 10, 1986, at 25, col. 1. Debtor has instituted takeover defenses which restrict a possible takeover by the bondholders or others. See supra text accompanying notes 117-18. 177. See supra notes 21, 43-44 and accompanying text. 178. In general, for-profit corporations compete with other for-profit corporations for business. The public policy supporting such competition is manifested in the federal antitrust laws. 179. See supra notes 28, 43-44 and accompanying text. 180. Galai & Masulis, supra note 27, at 55 n.5. See Jensen & Meckling, supra note 20, at 338 (stating: "To completely protect the bondholders . . . these [bond protective contractual] provisions would have to be incredibly detailed and cover most operating aspects of the enterprise including limitations on the riskiness of the projects undertaken."). Such restrictive contractual provisions are analogous to the imposition of common law or statutory law rules. "[A]lthough the legal rules can protect against fraud and particularly blatant forms of self-dealing by management, they cannot do much more without denying the company the benefits of management's expertise in making major corporate decisions." DeMott, supra note 138, at 1012 (summarizing the view of professional managerial prerogatives regarding mergers and tender offers stated in Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. LAW. 101, 116-20 (1979)). "[T]he design of specific legal rules governing the terms of mergers . . . affecting managerial interests appears very costly if not impossible. In such areas, regulation cannot feasibly go beyond very general rules, such as the requirement of 'fairness,' without creating severe obstacles to efficient managerial decision-making." Anderson, Conflicts of Interest: Efficiency, Fairness and Corporate Structure, 25 UCLA L. REV. 738, 790 (1978) (discussing statutory rules). 181. AM. BAR FOUND., supra note 6, at 1.
through investor bargaining in the efficient capital market,\textsuperscript{182} and (2) investors in all investment vehicles expect appropriate gains from their investments.\textsuperscript{183}

Should risk-neutral and risk-liking investors (such as Appraisal Creditors and Contractual Creditors),\textsuperscript{184} with or without their possession of unique investment facts and beliefs, be penalized by permissive (judicially tolerated) wealth expropriations because of “the existence of diversification—not its employment”?\textsuperscript{185} The question can be recast as follows: should investors’ risk-neutral and risk-liking states of mind be penalized? (The penalization of states of mind is the domain of the theory of criminal law.)\textsuperscript{186} To penalize such investors would be to punish mental nonconformity with procrustean idealized mathematical conditions regarding risk averseness and efficient market portfolios in an otherwise completely noncriminal context.\textsuperscript{187} Such penalization is perverse and unfair because these investors are the victims and not the perpetrators of such wealth expropriations.\textsuperscript{188} Risk diversification does not rationally “exist” for risk-neutral and risk-liking investors. Moreover, such penalization is contrary to a reasonable fiduciary “constraint that no investor be made worse off by the transaction.”\textsuperscript{189} “The requirement that everyone receive at least the value of his investment under existing conditions serves much the same function as the rule against

\begin{itemize}
\item \textsuperscript{182} See supra notes 28, 43-44, 59-60 and accompanying text.
\item \textsuperscript{183} Risk-averse investors seek gains which are related to investment covariance risks, whereas risk-neutral investors seek the greatest expected gains and risk-liking investors seek the greatest possible gains. Risk-averse investors dominate the market-clearing prices for securities in the efficient capital market; bond economic gains and losses are determined from such market-clearing prices.
\item \textsuperscript{184} See supra text accompanying notes 121-22.
\item \textsuperscript{185} Easterbrook & Fischel, supra note 122, at 713.
\item \textsuperscript{186} American civil law is directed toward damages, whereas American criminal law is directed toward states of mind. In general, an objective truth finder regarding an individual’s state of mind would obviate the requirement for an “act” or “harm” under the theory of our criminal laws — pure thought crimes would exist — because the “act” and “harm” are not relevant per se but only as indicators of the individual’s forbidden state of mind. If the “act” were central to our criminal laws, then the “act” would be penalized without the requirement for a concurrent forbidden state of mind. If “harm” were central to our criminal laws, then “insanity” would not be a defense because it does not undo the “harm”; and the crimes of “attempt,” “conspiracy,” and “solicitation” would not exist because there is no “harm” per se in these crimes. For a definition of these quoted terms and for a discussion of criminal law theory, see J. Hall, Law, Social Science and Criminal Theory (1982), and J. Hall, General Principles of Criminal Law (2d ed. 1960).
\item \textsuperscript{187} See supra notes 54-58 and accompanying text.
\item \textsuperscript{188} There exists a corporate financing policy under which unanticipated wealth expropriations either do not occur or are neutralized. Galai & Masulis, supra note 27, at 66 & n.37, 68-69; K. Shastri, supra note 26, at 55-57.
\item \textsuperscript{189} Easterbrook & Fischel, supra note 122, at 715.
\end{itemize}
On these grounds and because "inequitable action does not become permissible simply because it is legally possible," Contractual Creditors seek such compensation under a new fiduciary articulation which requires the corporation and its officers and directors to: (1) maximize the present value of the returns, evaluated with respect to all eventualities, on corporate assets, and (2) make corporate side payments so all classes of the corporation's securityholders receive more or less as much wealth as such classes would otherwise attain through alternative nonexpropriating corporate decisions.

B. WHAT IS FAIR?

Appraisal Creditors' argument applies Weinberger's general language to Debtor and Debtor's argument applies Weinberger's specific language to Appraisal Creditors. Appraisal Creditors' and Debtor's argument applies existing law and a coercive risk-diversification policy to Contractual Creditors. Contractual Creditors' argument applies financial and fiduciary theory to Appraisal Creditors and Debtor.

What is fair? An advocate's answer to this question might be "Who is my client?" A scientist's answer to this question might be "What is the problem?" Because fairness within a system arguably means congruence with the postulates of that system and because

190. Id.
192. "As long as the total market value of the firm has increased . . . those who are better off receive more than enough to compensate in turn those who are worse off and so induce the latter to go along with the decision." E. Fama & M. Miller, supra note 9, at 71-72 n.4. Cf. Myers, Determinants of Corporate Borrowing, 5 J. Fin. Econ. 147, 158 (1977) (discussing renegotiation of the bond contracts). Part (1) forbids the corporate policies of inefficient use of corporate assets and waste of corporate assets; part (2) compels rectification of unanticipated wealth expropriations resulting from corporate decision making. Because a corporate policy of waste of corporate assets is grossly impermissible on public policy grounds, side payments would not be made under the alternative policy of preserving corporate assets. See generally supra notes 22-23 and accompanying text. (An alternative corporate decision includes remaining with the status quo.) The new fiduciary articulation is operationally consistent with the duty of the board of directors to seek "the maximization of the company's value at a sale for the stockholders' benefit," Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (stating that directors' duties of loyalty and care to stockholders were violated by asset-option lock-up and no-shop agreements which had as their principal object the protection of bondholders through interfering "with getting the best price for the stockholders at a sale of the company"), because it requires directors to maximize the value of corporate assets and to make corporate side payments so stockholders receive as much wealth as they would otherwise attain through alternative nonexpropriating corporate decisions.

193. See T. Kuhn, The Structure of Scientific Revolutions 109-10, 148 (2d ed. 1970) (stating the proposition that different paradigms perceive and solve different problems regarding common underlying facts).
only Contractual Creditors' argument is logically congruent with the applicable theoretical structure of corporate finance, Contractual Creditors state the fair position from the viewpoint of corporate finance. The new fiduciary articulation is fair to all classes of the corporation's securityholders because it compels efficient use of corporate assets with side payments so as to maximize gains and minimize losses for all such classes.

The "transactions-costs view" that a managerial fiduciary duty to bondholders should be created on the ground of the costs involved in contracting for bond protective contractual provisions and without the foundation of a bondholder-management fiduciary relation seems to be in error because: (1) the transactions costs aspect of the fiduciary formula cannot impose duties (obligations) without the foundation of a fiduciary relation, and (2) such transactions costs and their bond protective contractual provisions become irrelevant through bond pricing in the efficient capital market fully reflecting the extent to which bond protective contractual provisions are less than perfect or do not exist. Furthermore, the transactions-cost view cannot solve the problem of the transformation of perfect ex ante contractual specificities in bond pricing into imperfect ex post contractual specificities because: (1) a fully protected contract (in
which the extent of protection is determined by and correspondingly allocated to the specific risks anticipated)\textsuperscript{199} is not a continuous process of recontracting, and (2) the transactions costs aspect of the fiduciary formula cannot admit of a continuous recontracting notion when the parties agree, or seek to agree, on fixed bond pricing.\textsuperscript{200}

In the transactions-costs view, the fiduciary duty to bondholders is coterminous with the contractual obligation to bondholders\textsuperscript{201} because a fiduciary duty created on the ground of the costs of contracting is logically subsumed into the fact of such contracting. In contrast, the new fiduciary articulation is not limited in its application by bond contractual obligations.

V. THE NEW FIDUCIARY ARTICULATION

A. GLOBAL WEALTH MAXIMIZATION

The generalized anomaly in the rule of corporate current-market-value maximization defines the new fiduciary articulation because it specifies what is to be rectified. Because this generalized anomaly applies generally to the corporation,\textsuperscript{202} its new fiduciary articulation counterpart correspondingly applies generally to our corporate law. This new fiduciary articulation requires the corporation and its officers and directors to: (1) maximize the present value of the returns, evaluated with respect to all eventualities, on corporate assets, and (2) make corporate side payments so all classes of the corporation's securityholders receive more or less as much wealth as such classes would otherwise attain through alternative nonexpropriating corporate decisions.\textsuperscript{203} By its terms, the new fiduciary articulation solves by external imposition the following problem:\textsuperscript{204}

\begin{itemize}
  \item \textsuperscript{199} Cf. Posner, supra note 53, at 508 (1976) (indicating that overprotection of creditors is possible).
  \item \textsuperscript{200} See supra note 173 and accompanying text.
  \item \textsuperscript{201} See supra note 173 and accompanying text.
  \item \textsuperscript{202} See supra note 42 and accompanying text.
  \item \textsuperscript{203} For the limitation on corporate side payments while there is a significant chance of corporate bankruptcy, see supra note 192.
  \item \textsuperscript{204} The classical conception's, see supra text accompanying note 65, objection that it is necessary to maintain "the idea that agents (managers) are accountable to their
Stockholder use (or misuse) of production/investment policy frequently involves not some action, but the failure to take a certain action (e.g., failure to accept a positive net present value project). Because of this, investment policy can be very expensive to monitor, since ascertaining that the firm's production/investment policy does not maximise the firm's market value depends on magnitudes which are costly to observe. Solutions to this problem are not obvious. For example, if the indenture were to require the bondholders (rather than the stockholders) to establish the firm's investment policy, the problem would not be solved; the bondholders, acting in their self interest, would choose an investment policy which maximized the value of the bonds, not the value of the firm.205

The new fiduciary articulation formalizes the evolutionary separation of corporate management from rank-and-file stockholder control.206 It benefits employees, communities, and national economic organization because it implicitly forbids corporate decisions which increase the risk of corporate bankruptcy without correspondingly maximizing the present value of the corporation's assets.207 In general, it inherently overrides bond protective contractual provisions because such provisions restrict the corporation's freedom to

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principals (shareholders)," Easterbrook & Fischel, supra note 2, at 1191, conceded does not apply to bondholders because managers are also their agents, see id. at 1195; and is otherwise overcome by: (a) the rule of corporate current-market-value maximization in which bondholders and stockholders are interchangeable with respect to management, and (b) the Black-Scholes conception of the corporation in which bondholders are, in general, the first equitable owners of the corporation's assets and cash flow. The objection regarding "prejudice [to] shareholders by decreasing the incentive of management to act in their best interest," id. at 1192, is overcome by the express requirements of the new fiduciary articulation. Additional objections regarding unknowable future decisions by possible takeover successors, how to balance possible gains and losses, etc., see id. at 1190-91, are likewise overcome by the express requirements of the new fiduciary articulation.

205. Smith, Jr. & Warner, supra note 39, at 130 (footnote omitted). Accord W. KLEIN, supra note 20, at 190 (stating, with respect to bondholder-stockholder, common stockholder — preferred stockholder and option/warrantholder — stockholder corporate conflicts of interest: "There appears to be no fully satisfactory solution to the problem that may be created by this kind of prospective conflict. . . . [I]t appears to have received little analytic attention.").

206. See A.A. BARLE & G.C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 119-125, 356-57 (1932); Fama, supra note 141, at 290; Jensen & Meckling, supra note 20, at 343-51, 353. For a review of schools-of-thought (models) regarding corporate governance, see Mangrum, In Search of a Paradigm of Corporate Social Responsibility, 17 CREIGHTON L. REV. 21, 26-49 (1983). The "public interest" model's concern about the separation of corporate ownership and control, see id. at 33 is theoretically overcome by a "scientific" model (the new fiduciary articulation) which integrates financial theory with the "contract" and "rights" models of corporate governance.

207. See supra notes 71, 73-74 & 192 and accompanying text.
maximize returns on corporate assets\textsuperscript{208} in competitive business maneuver;\textsuperscript{209} the continuing managerial fiduciary duties under the new fiduciary articulation cannot be contracted away by the parties because they are superimposed on public policy grounds.\textsuperscript{210} The new fiduciary articulation requires immunization (e.g., by book-entry changes in bond redemption value) of the corporation's securities from unanticipated wealth expropriations resulting from corporate decisions, but it does not require immunization from all unanticipated changes in risk or value because it speaks solely to corporate decision making.

The new fiduciary articulation is the economic functional equivalent of the bundle (vector) of possible corporate fiduciary duties because the essential concern for all investors in the for-profit corporation is wealth maximization. Conflicting ideals create elaborate systems of learning which disappear when these conflicts are resolved:\textsuperscript{211} "[T]he rules that govern the managers' duty of care have been distinguished from the rules governing the duty of loyalty.... The duty of loyalty and the duty of care... are treated differently, with the business judgment rule covering only the latter."\textsuperscript{212} With respect to the integrated managerial activity of decision making,\textsuperscript{213} it is a conflict of ideals to: (1) have a judicial hands-off policy of supporting managerial prerogatives through an operationally advisory fiduciary duty (duty of care with the business judgment rule),\textsuperscript{214} (2) have a judicial hands-on policy of supporting rectification of investor grievances through an operationally compulsory fiduciary duty (duty of loyalty with the entire-fairness careful-scrutiny rule),\textsuperscript{215}

\textsuperscript{208} See supra note 180 and accompanying text.
\textsuperscript{209} See supra note 178 and accompanying text.
\textsuperscript{210} Bond contractual provisions regarding corporate payment priorities do not restrict corporate operations and thus would not be overridden by the new fiduciary articulation.
\textsuperscript{211} T. ARNOLD, THE FOLKLORE OF CAPITALISM 364-65 (1937).
\textsuperscript{215} See Weinberger, 457 A.2d at 710. For a statement of the entire-fairness careful-scrutiny rule, see infra text accompanying note 240.
(3) allocate the burden of proof under the operationally compulsory fiduciary duty so as to reconstitute the operationally advisory fiduciary duty, and (4) sometimes allocate the burden of proof under the operationally advisory fiduciary duty in a manner which resembles such allocation under the operationally compulsory fiduciary duty. An underlying theoretical reason for the conjointment of such conflicting ideals seems to be that our adversarial procedural structure — in which issue resolution occurs through dialectical alternation under a neutral (nondirected or passive) adjudicator — is partially inappropriate for the adjudication of problems in which there is an intertwining of issues.

By its terms, the new fiduciary articulation points to: (a) derivative claims for its part (1) breach because the corporation is the legal owner of its assets, and (b) individual claims for its part (2) breach because side payments are an inherent incident of corporate security ownership under it. Because there cannot be a basis for a derivative claim without a corresponding individual claim for side payment by some securityholder and because there can be a

216. See infra text accompanying notes 247-49.

217. See Unocal Corp., 493 A.2d at 954-58 (discussing and enhanced duty of care with the business judgment rule based, in part, on duty of loyalty consideration, stated in Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)). “While the business judgment rule may be applicable to the actions of corporate directors responding to takeover threats, the principles upon which it is founded — care, loyalty and independence — must first be satisfied.” Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (footnote omitted).

218. See Fuller, Adjudication and the Rule of Law, 1960 PROC. AM. SOC'Y INT'L L. 1, 3-5 (discussing polycentric problems). For other considerations, compare Moran v. Household Int'l, Inc., 490 A.2d 1059, 1074 (Del. Ch.) (stating that “[b]ecause the role of a fiduciary ordinarily does not admit of any conflicting interests or conduct the business judgment rule seeks to accommodate that status to the realities of the business world.”), aff'd, 500 A.2d 1346 (Del. 1985) with Easterbrook & Fischel, supra note 2, at 1199 (stating that the rationales underlying the business judgment rule are “the inability of courts to make better business decisions than managers” and “the inefficiency that would result were managers encouraged to disregard the costs of gathering information and making decisions”). Given our adversarial procedural structure, the dichotomy between monocentric (justiciable) and polycentric (nonjusticiable) problems is a ground under the new fiduciary articulation for the use of a generic business judgment rule and of a generic entire-fairness careful-scrutiny rule: in general, business problems essentially are polycentric (this would be the presumption of a business judgment rule) except for possible conflicts between fiduciary duties, etc., which essentially are monocentric (this would be the presumption of an entire-fairness careful-scrutiny rule).

219. Cf. Abelow v. Symonds, 38 Del. Ch. 572, 578, 156 A.2d 416, 420 (1959) (stating that individual claims are “designed to enforce common rights running against plaintiffs’ own corporation or those dominating it, while” derivative claims are designed “for the purpose of remedying wrongs to the corporation itself”). For a discussion of the characterization of stockholder claims as derivative or individual, see Welch, Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation, 9 J. CORP. L. 147, 148 & nn.1-3, 149-69 (1984).
basis for an individual claim for side payment without a corresponding derivative claim by some securityholder, the individual claim overrides the derivative claim. For example, there cannot be a derivative claim regarding a nonsynergistic merger per se because the corporation's assets (market value) are not damaged, but there can be an individual claim for side payment regarding an unanticipated wealth expropriation in such a merger. What do such individual claims mean for corporate governance? The answer to this question is to be found in the logical extension of Weinberger's views.

B. PROCEDURAL FAIRNESS

1. Additional Factual Aspects of Weinberger

Four dual parent-subsidiary directors — in differing internal combinations — requested, performed, and discussed a feasibility study on the parent's acquiring the subsidiary's remaining publicly held shares. This feasibility study used the subsidiary's "information for the exclusive benefit of" the parent and concluded "that it would be a good investment for [the parent] to acquire the remaining 49.5% of [the subsidiary's] shares at any price up to $24 each." The subsidiary's president, a dual parent-subsidiary director who participated in the parent's executive committee meeting which

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220. Also, a securityholder might recast a derivative claim into an individual claim for side payment if there is a procedural advantage (e.g., application of an entire-fairness careful-scrutiny rule instead of a business judgment rule) in doing so.


222. See supra note 48 and accompanying text.

223. Weinberger, 457 A.2d at 705. There were seven parent designee directors (six dual parent-subsidiary directors) on the subsidiary's thirteen member board of directors, Id. at 704-05.

224. Id. at 709.

225. Id. at 705.
responsively authorized its management to arrange for a subsidiary cash-out merger within the price range of $20 to $21 per share and to present a merger proposal to the parent's board of directors four business days later,\textsuperscript{226} retained an investment banking firm to provide a fairness opinion on the prospective cash-out merger offer.\textsuperscript{227} He did not at any time seek a cash-out share price higher than $21 per subsidiary share;\textsuperscript{228} there was no parent-subsidiary bargaining over the cash-out share price.\textsuperscript{229}

The parent and subsidiary boards of directors met — separately, but with telephone contact maintained between the meetings — to consider the cash-out merger proposal.\textsuperscript{230} The parent formally proposed to the subsidiary a $21 per share cash-out merger agreement requiring that the minimum number of the subsidiary's majority of the minority shares voting for the merger equal about two-thirds of all the subsidiary's minority shares.\textsuperscript{231} The subsidiary's investment banking opinion letter, which was hurriedly prepared during the four business day span, found the $21 share price to be fair.\textsuperscript{232} Although the parent's feasibility study with its $24 subsidiary share price valuation "was made available to" dual parent-subsidiary directors,\textsuperscript{233} it was not discussed at the subsidiary's board meeting\textsuperscript{234} nor shared with the subsidiary's nonparent designee directors.\textsuperscript{235} The subsidiary's board of directors, with the active nonvoting participation and support of its parent designee directors, adopted a resolution to accept the parent's $21 per share cash-out merger offer.\textsuperscript{236}

The cash-out merger agreement was approved by a majority vote of the subsidiary's minority shares at the subsidiary's annual meeting fifty-nine business days later.\textsuperscript{237} The subsidiary's proxy statement regarding this cash-out merger agreement vote did not disclose: (1) "the circumstances surrounding the rather cursory preparation of the [investment banking] fairness opinion" while "the impression was given [the subsidiary's] minority that a careful study had been made,"\textsuperscript{238} and (2) "the critical information that [the parent]
considered a price of $24 to be a good investment.’’

2. Additional Dicta Aspects of Weinberger

Weinberger states that “where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.” Weinberger views procedural-fairness standards as testing for arm’s-length bargaining in an otherwise self-dealing transaction. Procedural fairness at the subsidiary’s negotiating level includes the dual parent-subsidiary directors’ absolute noninvolvement in the transaction or an independent negotiating committee of outside directors bargaining with the parent at arm’s length. Procedural fairness at the subsidiary’s stockholder level includes neutralized voting, whereby a majority of the subsidiary’s minority shares can approve or disapprove the merger, based on complete disclosure of “all material facts relevant to the transaction” by “those relying on the vote.” Because an informed vote of the majority of the subsidiary’s minority shares approving the merger will shift the burden of proof back to the stockholder “plaintiff attacking the merger,” and because an independent negotiating committee of the subsidiary’s outside directors is “strong evidence” of fairness, these independent means of procedural fairness are strongly mutually reinforcing.

The entire-fairness careful-scrutiny rule logically (by its terms) does not apply while adequate procedural fairness exists because there is no possible conflict of fiduciary duties. Hence, “an acquisition with these procedural protections would be reviewed by the courts under a standard resembling the ‘business judgment’ rule applicable to an acquisition by an unrelated third party.” In other words, the allocation of the burden of proof under an entire-fairness careful-scrutiny standard of judicial review reconstitutes a business

239. Id.
240. Id. at 710. “There is no ‘safe harbor’ for such divided loyalties in Delaware.”
241. For Weinberger’s definition of “entire fairness” in the cash-out merger context, see id. at 711. Cf. Revlon, Inc., 506 A.2d 173, 182 (stating that “the... board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders”).
242. See Weinberger, 457 A.2d at 703, 709-11.
243. Id. at 710-11.
244. Id. at 703, 707.
245. Id. at 703.
246. Id. at 709-10 n.7.
247. See supra text accompanying note 240.
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judgment rule through procedural fairness standards.249

Thus, Weinberger represents the generalized view that a corporate decision requires an entire-fairness careful-scrutiny standard of judicial review, which reconstitutes a business judgment rule through procedural-fairness standards, when there is a possible conflict of fiduciary duties on the corporate decision maker regarding that decision.250

3. The Procedural-Fairness Structure

The foundation of a securityholder-management fiduciary relation proceeds from the rule of corporate current-market-value maximization and the Black-Scholes conception of the corporation.251 The possible conflict of fiduciary duties on management to the classes of the corporation's securityholders proceeds from the generalized anomaly in the rule of corporate current-market-value maximization.252 This possible conflict is reconciled and the rule of corporate current-market-value maximization is restored by the new fiduciary articulation which neutralizes such generalized anomaly.253 An individual claim for side payment ipso facto alleges management's breach of the new fiduciary articulation and the operation of such generalized anomaly with its consequent possible conflict of fiduciary duties. Because of this possible conflict of fiduciary duties, an entire-fairness careful-scrutiny rule with its procedural-fairness reconstituted business judgment rule logically applies to judicial review of individual claims for side payments.254

Thus, an entire-fairness careful-scrutiny rule overrides a business judgment rule in judicial review of individual claims. If there exists only one de facto class of the corporation's securityholders,255

249. See supra text accompanying notes 245-48.
250. See supra text accompanying notes 240-01, 245-49.
251. See supra notes 160-71 and accompanying text.
252. See supra note 42 and accompanying text.
253. See supra notes 19, 22-23, 42, & 192 and accompanying text.
254. See supra notes 218, 250 and accompanying text. In other words, an entire-fairness care-scrutiny rule applies because management stands on both fiduciary sides of a decision involving a possible bondholder-stockholder corporate conflict of interest. An otherwise essentially polycentric (nonjusticiable) management decision is transformed into an essentially monocentric (justiciable) decision between conflicting fiduciary duties which conforms to the monocentric organization of our adjudicatory system. In the Black-Scholes conception of the corporation, each class of securityholders has a call option on the equitable corporate ownership by the immediately senior (prior) class of securityholders. Thus, fiduciary conflicts regarding classes of the corporation's securityholders involve a nesting of monocentric conflicts and not a polycentric conflict.
255. The existence of only one de facto class of the corporation's securityholders would occur, for example, when all investors own either efficient market portfolios or equal proportions of the classes of the corporation's securities.
then the part (2) requirement of the new fiduciary articulation simplifies into a requirement for unilateral side payments. A business judgment rule logically applies to judicial review of individual claims for unilateral side payments because there is no possible conflict of fiduciary duties regarding such claims.\textsuperscript{256}

In an individual claim for side payment, the securityholder would need to allege management's objective failure to meet the side payment requirement of the new fiduciary articulation. This would invoke entire-fairness careful-scrutiny with the burden of proof on management to show its compliance with the new fiduciary articulation. If management can show requisite "procedural fairness," then the burden of proof would shift to the securityholder to show management's noncompliance with the new fiduciary articulation: a reconstituted business judgment rule would apply.

"Entire fairness" in this context logically means compliance with the requirements of the new fiduciary articulation. "Procedural fairness" in this context might include a "fiduciary compliance group" in which: (1) an independent (e.g., tenured for a fixed term) professional management committee makes the corporation's side-payment decisions — this might be "strong evidence" of fairness\textsuperscript{257} and (2) there is representation and veto power (under the new fiduciary articulation) by each class of the corporation's securityholders, with complete disclosure by management of all material facts, regarding such side-payment decisions — this might shift the burden of proof back to the securityholder plaintiff challenging such decisions.\textsuperscript{258}

In other words, some form of participation by the classes of the corporation's securityholders in the ongoing managerial decision-making process seems to be necessary in order to ensure protection of their economic interests.\textsuperscript{259} In this context, a reconstituted

\textsuperscript{256} See supra note 218 and accompanying text. An otherwise essentially monocentric (justiciable) management decision between conflicting fiduciary duties is transformed into an essentially polycentric (nonjusticiable) decision which does not conform to the monocentric organization of our adjudicatory system. Although the new fiduciary articulation's part (2) requirement for side payments might be considered as extinguished when there is only one de facto class of the corporation's securityholders, its function of compelling appropriate corporate class payments continues to apply under such facts. For example, a claim for unilateral side payment seems to be appropriate when there is a wrongful denial of a dividend to the sole de facto class of the corporation's securityholders.

\textsuperscript{257} Cf. \textit{Weinberger}, 457 A.2d at 709-10 n.7, 711.

\textsuperscript{258} Cf \textit{id.} at 703, 707.

\textsuperscript{259} See Jensen \& Meckling, supra note 20, at 338; Smith, Jr. \& Warner, supra note 39, at 130. Whereas bondholder participation on the board of directors might make such bondholders "control persons under the federal securities laws," McDaniel, \textit{supra} note 71, at 441, and " 'insiders' under the federal bankruptcy law," \textit{id.}, bondholder participation in the procedural-fairness structure would not do that because this structure is exclusively directed toward the expropriation consequences of corporate
business judgment rule prevents unjustified paralysis of the corporation. Thus, the objection that a "manager responsible to two conflicting interests is in fact answerable to neither" is overcome by the new fiduciary articulation (securityholders' unanimity) with its procedural fairness structure.

VI. CONCLUSION

Our corporate fiduciary law is incongruous with the corporate-financial structure in which it is operationally embedded. Given the establishment of coherence between the theoretical structures of corporate finance and corporate fiduciary law, adjustment of our corporate fiduciary law to the less-than-ideal conditions of particular cases follows as a matter of course.

Economic conflicts among the classes of the corporation's securityholders proceed from the generalized anomaly in the rule of corporate current-market-value maximization, and such conflicts are intensified through the expropriation tendency by risk-averse stockholders. In particular, bondholder-stockholder unanticipated wealth expropriations are a consequence of the failure of contractual ordering to provide perfect protection for bondholders' and/or stockholders' wealth.

An equal generic managerial fiduciary duty to all the corporation's securityholders arises out of the rule of corporate current-market-value maximization, and managerial fiduciary duties to the classes of the corporation's securityholders arise out of equitable ownerships of the corporation's assets and cash flow by such classes under the Black-Scholes conception of the corporation. Fiduciary law permits compensation and the imposition of a fiduciary obligation regarding bondholder-stockholder unanticipated wealth expropriations resulting from corporate decision-making. This fiduciary obligation is the neutralizing counterpart to the generalized anomaly in the rule of corporate current-market-value maximization. Formalized as "the new fiduciary articulation," it requires the corporation and its officers and directors to: (1) maximize the present value of the returns, evaluated with respect to all eventualities, on corporate assets, and (2) make corporate side payments so all classes of the corporation's securityholders receive more or less as much wealth as decisions which are made by others. (Although side payments through this structure would not be made while there is a significant chance of corporate bankruptcy, see supra note 192, this structure's monitoring function continues to apply under such facts.)

260. Easterbrook & Fischel, supra note 2, at 1192.
such classes would otherwise attain through alternative nonexpropriating corporate decisions.

The new fiduciary articulation subsumes existing corporate fiduciary duties and overrides bond protective contractual provisions which violate its requirements. It implicitly forbids corporate decisions which increase the risk of corporate bankruptcy without correspondingly maximizing the present value of the corporation's assets. Under it, in general, individual claims for side payments override derivative claims; and on entire-fairness careful-scrutiny rule overrides a business judgment rule and reconstitutes a business judgment rule through procedural-fairness standards.