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Case against Cash-Outs in National Bank Mergers: A Critical Analysis of NoDak Bancorporation v. Clarke

Lori J. Carlson

Comment

The Case Against Cash-Outs in National Bank Mergers: A Critical Analysis of *NoDak Bancorporation v. Clarke*

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A battle over the fate of the largest bank in a rural North Dakota community[1] recently ended in defeat for the bank's minority shareholders. The majority shareholder of the closely-held[2] Liberty National Bank voted to eliminate the minority shareholders[3] through a "cash-out" merger transaction.[4] The

1. Liberty National Bank & Trust reported the largest net income of all banks located in Dickinson, North Dakota, for the first quarter of 1994. LACE FINANCIAL CORP., QUARTERLY BANK AND SAVINGS & LOAN RATING SERVICE 160 (Mar. 1994). Liberty National Bank's reported net income for that period was $340 million, exceeding the next largest bank by $40 million. *Id.*

2. Closely-held entities are variously defined as enterprises with only a few shareholders, enterprises with no active market for their shares, and enterprises where all shareholders are active in the management and conduct of the business. 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.02, at 4-5 (3d ed. 1992) [hereinafter O'NEAL'S CLOSE CORPORATIONS]. State statutes often define closely-held corporations as those having no more than 35 shareholders. *See, e.g.,* N.D. CENT. CODE § 10-19.1-01(6) (1993). Shareholders of closely-held corporations often approach their investment in the corporation differently than their counterparts in publicly-held corporations. One commentator noted that:

> [u]nlike the typical shareholder in a publicly held corporation, who may be simply an investor or a speculator and does not desire to assume the responsibilities of management, the shareholder in a close corporation considers himself or herself as a co-owner of the business and wants the privileges and powers that go with ownership.

1 O'NEAL'S CLOSE CORPORATIONS, *supra*, § 1.08, at 31. Moreover,

> [i]n a publicly held corporation, power to control the corporation is relatively unimportant to the shareholder-investor; in a close corporation, the power to control corporate activities or at least to veto changes in directors, officers and employees and in the methods of operating the business may be vital to the shareholder-owner.

1 *id.* at 32.

3. Twelve shareholders owned all of Liberty National Bank's outstanding stock. Brief for Plaintiff/Appellee NoDak Bancorporation at 2, NoDak Bancorporation v. Clarke, 998 F.2d 1416 (8th Cir. 1993) (Nos. 92-2502, 92-2505, 92-2508, 92-2509). The majority shareholder, Dickinson Bancorporation, owned approximately 73% of the outstanding stock, NoDak Bancorporation owned ap-

minority shareholders, who wanted to retain their interest in the bank and continue their participation in the bank's management,[5] filed suit to prevent the cash-out transaction.[6] In *NoDak Bancorporation v. Clarke*,[7] the Eighth Circuit reversed the district court[8] and held that the majority shareholder could cash-out the minority shareholders.[9] In reaching its decision, the Eighth Circuit expressly rejected an earlier Eleventh Circuit opinion[10] that prohibited cash-outs in national bank mergers.

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proximately 21% of the stock, and 10 other individuals owned the remaining 6% of the stock. *Id.*

4. Cash-outs are also referred to as take-outs, squeeze-outs, and freeze-outs. Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624, 625 n.3 (1981). Cash-out mergers force minority shareholders to accept cash for their shares rather than maintain an interest in the newly merged business. *See* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 5:04 (2d ed. 1991) [hereinafter O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS] (describing the process of a cash-out merger transaction). Majority shareholders may execute cash-outs by transferring their interest to a shell corporation, then approving a merger of the original corporation with the shell corporation and forcing the minority shareholders of the original corporation to exchange their interests for cash. *See* 1 *id.* at 23 (describing Matteson v. Ziebarth, 242 P.2d 1025 (Wash. 1952) (en banc), one of the first reported cases in which the majority shareholder approved a merger with a dummy corporation to eliminate the minority interest).

5. Prior to the cash-out transaction, all twelve of Liberty National Bank's shareholders were members of the Board of Directors. Brief for Plaintiff/Appellee NoDak Bancorporation at 6, *NoDak* (Nos. 92-2502, 92-2505, 92-2508, 92-2509). After the cash-out transaction, Dickinson Bancorporation was Liberty National Bank's sole shareholder. *Id.*

6. Before filing suit, NoDak Bancorporation, one of the minority shareholders, filed a complaint with the Office of the Comptroller of the Currency ("OCC"). NoDak Bancorporation v. Clarke, 998 F.2d 1416, 1418 (8th Cir. 1993). The OCC is the federal agency charged with approving national bank mergers. *See infra* notes 21, 37 and accompanying text (describing the OCC's role in supervising national banks and approving national bank mergers). The complaint filed with the OCC argued that the proposed mergers should be denied on three grounds: "(1) the proposed merger lacked a legitimate business purpose, (2) [the] majority shareholders had breached their fiduciary duty to the minority shareholders, and (3) the plan would result in a squeeze out of the minority shareholders for less than fair value." *NoDak*, 998 F.2d at 1418. The OCC considered and rejected the complaint, and the merger took place in January 1991. *Id.* NoDak Bancorporation filed suit in federal district court in June 1991. *Id.*

7. 998 F.2d 1416 (8th Cir. 1993).

8. *Id.* at 1425. The district court relied on Lewis v. Clark [sic], 911 F.2d 1558 (11th Cir. 1990) (per curiam), for its decision. *NoDak*, 998 F.2d at 1425. *See infra* notes 59-67 and accompanying text (discussing *Lewis*).

9. *NoDak*, 998 F.2d at 1419.

10. *Lewis*, 911 F.2d at 1558. *See infra* notes 59-67 and accompanying text (discussing *Lewis*).

NoDak raises the issue of the propriety of cash-out transactions in national bank mergers. Determining the permissibility of cash-outs holds significant implications for the rights of minority shareholders. Because cash-out transactions permit majority shareholders to secure complete control over banks engaging in such transactions, cash-outs also have a significant impact on the distribution and control of banking resources. The control of those resources may, in turn, generate serious economic ramifications, particularly in rural communities that depend on a relatively small pool of banking resources to meet their economic needs.

This Comment argues that the *NoDak* court reached the wrong conclusion regarding the permissibility of cash-outs. Part I of this Comment outlines the history surrounding bank merger legislation, the interpretation of that legislation by both federal agencies and courts, and applicable trends in corporate law. Part II describes the *NoDak* court's analysis. Part III demonstrates that the court's opinion is flawed in three respects: it failed to recognize congressional policy underlying banking legislation, it granted unnecessary deference to federal agency interpretations of that legislation, and it relied on outdated corporate law regarding cash-out transactions. This Comment concludes that cash-out transactions in national bank mergers unnecessarily restrict the rights of minority shareholders and, when such mergers involve closely-held entities, contradict congressional policy regarding the distribution of banking resources. This Comment proposes prohibiting cash-out transactions involving closely-held national banks.

I. DEVELOPMENT OF BANKING REGULATIONS AND POLICIES

A. HISTORY OF BANKS AND BANKING

1. Promoting the Diffusion of Banking Resources

Today's banking industry, which consists primarily of small, closely-held banks,[11] results from congressional policies

11. Small banks are generally defined as those that hold less than $100 million in assets. *See* DONALD R. FRASER & JAMES W. KOLARI, THE FUTURE OF SMALL BANKS IN A DEREGULATED ENVIRONMENT 2-4 (1985) (citing studies that characterize banks with less than $100 million in assets as small banks). In 1990, 75% of all banks held less than $100 million in assets. FEDERAL DEPOSIT INSURANCE CORP., STATISTICS ON BANKING 26 (1990) [hereinafter STATISTICS ON BANKING]. Although no means exist to precisely identify the total number of closely-held as opposed to publicly-held banks, the majority of banks are

designed to limit concentrations of banking resources and to promote community control over banks. These congressional policies surfaced shortly after the American Revolution, when many perceived large, powerful banks as a threat to democracy.[12] In response to these fears, Congress promoted widespread stock ownership of the Bank of the United States,[13] the lone federal bank. The states, too, encouraged the diffusion of bank owner-

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closely-held. *See* PETER S. ROSE, THE CHANGING STRUCTURE OF AMERICAN BANKING 40-41 (1987) (describing the closely-held nature of most American banks). For a general description of the importance of small banks to the American economy, see FRASER & KOLARI, *supra*, at 2-4.

12. Opposition to large banks first arose when Congress approved the charter for the Bank of North America in 1782. EDWARD L. SYMONS, JR. & JAMES J. WHITE, BANKING LAW TEACHING MATERIALS 7 (2d ed. 1984). While opponents of the federal bank claimed the bank engaged in favoritism, by providing services only to business people, inherent in their opposition was the belief "that so powerful an institution . . . contradicted the democratic ideal." *Id.* The opposition successfully forced the repeal of the Bank of North America's charter. *Id. See also* Arthur E. Wilmarth, Jr., *Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banks*, 77 IOWA L. REV. 957, 969-71 (1992) (describing the uneasiness Americans have always felt regarding concentrations of banking power); Betsy Boyce Brainerd, Comment, Northeast Bancorporation, Inc. v. Board of Governors: *Green Light For Regional Interstate Banking*, 35 AM. U. L. REV. 387, 391 (1986) (discussing the distrust Americans have always harbored for large concentrations of wealth).

Largely due to the efforts of Alexander Hamilton, Congress established another national bank in 1791 when it chartered the First Bank of the United States. SYMONS & WHITE, *supra*, at 11-12. This bank met with similar political opposition as the Bank of North America, however, and its charter expired without being renewed. *Id.* at 13. Congress's last effort to establish a federal bank occurred in 1816, when Congress approved a charter for the Second Bank of the United States. *Id.* This bank, along with its charter, expired due to political opposition headed by President Andrew Jackson. *Id.* at 14, 21. In vetoing the renewal of the charter of the Second Bank of the United States, President Jackson stated that "[i]t is easy to conceive that great evils to our country and its institutions might flow from such a concentration of power in the hands of a few men." *Id.* at 16 (quoting President Jackson's message to veto the bank recharter, July 10, 1832).

13. The charter for the First Bank of the United States prohibited any individual from owning more than 1,000 of the 25,000 authorized shares of stock. Carl Felsenfeld, *The Bank Holding Company Act: Has It Lived Its Life?*, 38 VILL. L. REV. 1, 54 (1993) (citing the Act to Charter the Bank of the United States, ch. 10, §§ 1-2, 1 Stat. 191, 192 (1791), *reprinted in* 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES (Herman E. Krooss ed., 1969) [hereinafter HISTORY OF BANKING AND CURRENCY]). The charter for the Second Bank of the United States encouraged an even greater diffusion of bank ownership; the charter prohibited any individual from owning more than 3,000 of the 350,000 authorized shares of bank stock. *Id.* (citing the Act to Charter the Second Bank of the United States, ch. 44, §§ 1-2, 3 Stat. 266, 267 (1816), *reprinted in* 1 HISTORY OF BANKING AND CURRENCY, *supra*).

ship through widespread stock ownership.[14] Moreover, the states promoted increasing the number of banks to support and further stimulate the expanding American economy.[15] This process dispersed banking resources among numerous banks as well as numerous bank shareholders.

As the economy grew, concentration of banking resources posed less of a threat to democracy and more of a threat to the economy. Successful banks provided a positive economic stimulus, but bank failures were economically devastating.[16] Control of banking resources, therefore, held serious implications for the economy. Individual bank performance was particularly critical in small communities dependent on a single bank for their banking needs.[17] Congressional focus turned towards alleviating the potential debilitating economic effects of banking activities.

2. The National Bank Act

Congress determined that the banking industry needed uniformity to provide economic stability.[18] Consequently, Congress passed the National Bank Act ("NBA"),[19] which provides a uniform set of banking regulations[20] and permits banks that comply with the regulations to become national banks. The NBA

14. Felsenfeld, *supra* note 13, at 56-57 (describing state legislative provisions designed to encourage widespread bank ownership).

15. *See* SYMONS & WHITE, *supra* note 12, at 21 (describing how state governments encouraged the establishment of more banks to foster commercial and industrial growth). Between 1829 and 1834, the total number of state banks grew from 329 to 506. *Id.*

16. Lax banking regulations that permitted the over-extension of credit exacerbated the financial pressures of the Revolution. *Id.* at 6. Similar laxities led to the depression of 1837. *Id.* at 22. Numerous bank failures in the 1930s fueled the Great Depression. *Id.* at 35-36.

17. During the mid-1800s, "wildcat banking" surfaced in some small, isolated communities where unscrupulous bankers could take advantage of those requiring banking services. FRASER & KOLARI, *supra* note 11, at 7.

18. Individual states approved widely varying banking regulations and permitted various forms of currency. SYMONS & WHITE, *supra* note 12, at 12-13, 21-23. These various regulations and forms of currency not only created confusion, they also created economic instability. *Id.* Although strict banking regulations in some states promoted economic stability, lax regulations in other states led to numerous state bank failures. *Id.* at 22-23. Consequently, Congress determined that some uniformity in both regulation and currency was required. *Id.* at 24.

19. The NBA was originally passed as the National Currency Act of 1863. SYMONS & WHITE, *supra* note 12, at 23. The NBA focused on establishing economic stability, but the driving force behind its passage was the need for funds to finance the Civil War. *Id.* at 24. The NBA is now codified at 12 U.S.C. §§ 21-220 (1988).

20. The regulations require prospective national banks to:

also established the Office of the Comptroller of the Currency ("OCC"), which supervises all national banks and ensures that the banks comply with NBA regulations.[21]

The NBA also promotes the diffusion of banking resources. Instead of concentrating all national banking resources in one central bank, the NBA allows resources to be dispersed across an unlimited number of national banks.[22] The NBA also permits an unlimited number of individuals to form a single national bank,[23] thereby encouraging widespread ownership of national banking resources.

Although the NBA provides the foundation for establishing a system of national banks, it does not displace state banks.[24] Even today there exists a dual banking system consisting of both

> (1) maintain a reserve against deposits, (2) maintain a deposit with the OCC in return for national bank notes, (3) limit the number of national bank notes issued, (4) divest their real estate holdings (unless such holdings are required for the transaction of business or are acquired through foreclosures), (5) be available as a depository for government funds, (6) comply with capital requirements and loan restrictions imposed by the OCC, and (7) maintain a reserve in proportion to liabilities.

SYMONS & WHITE, *supra* note 12, at 24.

21. Congress created the OCC as a new office in the Treasury Department. *Id.* Duties of the OCC include approving requests by national banks to undertake actions such as establishing branch banks, changing corporate control, or changing the structure of the organization. 1 MICHAEL P. MALLOY, THE CORPORATE LAW OF BANKS § 1.3.1, at 37 (1988). National bank examiners from the OCC's office make periodic on-site examinations of national banks to ensure that the bank's activities comply with regulations. 1 *id.* at 38.

22. The NBA includes no restrictions on the number of national bank charters that may be issued. *See* 12 U.S.C. § 21 (describing the procedure for obtaining a national bank charter).

23. The precursor to the NBA provided that "associations for carrying on the business of banking may be formed by any number of persons." Felsenfeld, *supra* note 13, at 57 n.285 (quoting Act of Feb. 25, 1863, ch. 58, § 5, 12 Stat. 665, 666). The original form of the NBA appeared in the Act of June 3, 1864, ch. 106, 13 Stat. 99. Currently, the NBA provides that "[a]ssociations for carrying on the business of banking . . . may be formed by any number of natural persons, not less in any case than five." 12 U.S.C. § 21.

24. SYMONS & WHITE, *supra* note 12, at 24. Congress did impose substantial taxes on state bank currencies to eliminate state banks. *Id.* at 25. Although this move effectively eliminated state-issued currencies, it did not hinder state bank operations, as state banks began to rely on deposit funds to finance their daily operations. *Id.*

state and national banks.[25] The majority of banks today, however, are national banks.[26]

3. Bank Merger Regulations

As the banking industry continued to develop, banks engaged in more sophisticated transactions, such as mergers. The NBA in its original form, however, did not specifically permit merger transactions. Banks seeking to merge were therefore forced to first dissolve and then jointly request a new charter.[27] In response to this trend, Congress amended the NBA to specifically permit mergers.[28] Congress further amended the NBA to require a public auction of the shares of those stockholders not wishing to participate in the successor bank.[29] Although the legislative history of the auction provision does not reveal Congress's intent for including the regulation, the auction provision

25. State banks are permitted to be members of the national banking system without exchanging their state charters for national charters. *Id.* at 27. Participation in the national banking system may include membership in the Federal Reserve System and the Federal Deposit Insurance Corporation ("FDIC"). *Id.* The Federal Reserve System was designed to establish a uniform monetary and credit policy in the wake of the panic years of 1873, 1893, and 1907 when national banks were unable to meet the cash demands of the public. *Id.* at 25, 48. The FDIC was created to protect consumer assets after numerous banks failed during the Depression, and provides insurance for member banks' deposits so long as the members comply with FDIC regulations. *Id.* at 36, 43. The Federal Reserve Board, the FDIC, and the OCC comprise the three main federal banking regulatory agencies. *Id.* at 42.

26. In 1990, there were 50,815 commercial banks and branch offices in the United States. STATISTICS ON BANKING, *supra* note 11, at 24-25. Of these, 27,300 had national charters. *Id.*

27. Congress noted the difficulties associated with such transactions when it amended the NBA to permit mergers, stating that "[i]t is the purpose of this bill to remove the necessity of liquidation and permit the consolidation to take place upon the affirmative vote of the stockholders of each [bank]." H.R. REP. No. 408, 65th Cong., 2d Sess., at 1 (1918).

28. *Id.*

29. The public auction provision provides that:

> [t]he shares of stock of the consolidated banking association which would have been delivered to such dissenting shareholders had they not requested payment shall be sold by the consolidated banking association at an advertised public auction . . . and the consolidated banking association shall have the right to purchase any of such shares at such public auction, if it is the highest bidder therefor, for the purpose of reselling such shares within thirty days thereafter to such person or persons and at such price not less than par as its board of directors by resolution may determine. If the shares are sold at public auction at a price greater than the amount paid to the dissenting shareholders, the excess in such sale price shall be paid to such dissenting shareholders.

12 U.S.C. § 215a(d).

coincides with congressional desire to disperse bank ownership interests.[30]

As mergers gained increasing popularity in the 1950s and 1960s,[31] Congress recognized the need for additional merger regulation. Rather than further amend the NBA, Congress passed the Bank Merger Act ("BMA")[32] and its counterpart, the Bank Holding Company Act ("BHCA").[33] The BMA and the BHCA provide identical regulations for governing the mergers of national banks and bank holding companies,[34] respectively. The NBA and the BMA work together to regulate national bank mergers;[35] the NBA and the BHCA regulate mergers of banking holding companies.[36]

The BMA and the BHCA each prohibit mergers that tend towards monopolization, reduce competition, or restrict trade in the banking industry.[37] The broader goal of the BMA and the

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30. Although the public auction provision allows the public a fair opportunity to purchase ownership interests in the successor bank and thus encourages the diffusion of banking resources, the provision does not guarantee the diffusion of those resources. The provision allows the target bank itself to bid at the public auction, and will award the target bank shares if it submits the highest bid. *Id.*

31. A merger trend developed in the 1950s that continued to grow in the 1960s. SYMONS & WHITE, *supra* note 12, at 510. The trend was based in part upon the use of mergers and acquisitions to establish branch banks. *Id.*

32. The BMA, originally passed in 1960, is codified at 12 U.S.C. § 1828 (1988 & Supp. V 1993). Commentators noted that "[t]he Bank Merger Act of 1960 (BMA) was intended to address the increasing trend toward bank mergers, a development that had troubled Congress for several years prior to the passage of the act." 2 MALLOY, *supra* note 21, § 9.2, at 799.

33. The BHCA, originally passed in 1956, is codified at 12 U.S.C. §§ 1841-50 (1988 & Supp. V 1993).

34. Bank holding companies are companies that hold banks as well as nonbank subsidiaries. SYMONS & WHITE, *supra* note 12, at 341. Although the nonbank subsidiaries may undertake activities other than banking, those activities must meet the criteria defined by the BHCA or be closely related to banking. *Id.*

35. 12 U.S.C. § 215c(a) (1988 & Supp. V 1993) states: "Subject to sections 1815(d)(3) and 1828(c) of this title and all other applicable laws, any national bank may acquire or be acquired by any insured depository institution." The Supreme Court, in reviewing a proposed merger of national banks shortly after the BMA was enacted, recognized that the proposed merger was governed by both the BMA and the NBA. *See* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 332 (1963) (discussing proposed bank merger and finding that applicable federal law included 12 U.S.C. § 215 and 12 U.S.C. § 1828).

36. *See supra* note 35 (quoting 12 U.S.C. § 215c(a)).

37. The applicable provision of the BMA prohibits:

> (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

BHCA, and the impetus behind their passage, is to protect the economy from the possible detrimental effects of the concentration of banking resources.[38] The Supreme Court noted that the legislation "was designed to prevent the concentration of banking resources in the hands of a few financial giants."[39] In a subsequent opinion, the Court further commented that the legislation reflects the nation's traditional desire to disperse the control of banking[40] and to "[retain] local, community-based control over banking."[41]

> (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless [the responsible regulatory agency] finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

12 U.S.C. § 1828(c)(5) (1988). An identical provision is included in the BHCA, 12 U.S.C. § 1842(c)(1) (1988 & Supp. V 1993). The Comptroller of the Currency has the authority to approve bank mergers resulting in a national bank. 12 U.S.C. § 1828(c)(2) (1988).

38. SYMONS & WHITE, *supra* note 12, at 174-75. A recent House report stated that "the fear of concentration of financial power . . . led to the passage of the [BHCA]." H.R. REP. No. 157 (IV), 102d Cong., 1st Sess., at 104 (1991). The Senate Report on the amendment to the BHCA in 1956 stated that "adequate safeguards should be provided against undue concentration of control of banking activities . . . in view of the significant part played by banking in our present national economy." S. REP. No. 1095, 84th Cong., 2d Sess., at 1 (1956), *reprinted in* 1956 U.S.C.C.A.N. 2482.

39. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 46 (1980).

40. Northeast Bancorporation, Inc. v. Board of Governors of the Fed. Reserve Sys., 472 U.S. 159, 177 (1985).

41. *Id.* at 160. Several circuit courts, including the Eighth Circuit, have also acknowledged that the BMA and the BHCA were designed to limit the concentration of banking resources. In analyzing the BHCA, the Fifth Circuit noted that:

> [w]hile . . . the protection of savings and the extension of credit are useful and even essential to our economic wellbeing, we as a nation have often been distrustful of the concentrated economic power that may accrue to the organizations that provide those services. This feeling . . . has been written into the law by Congress; the Bank Holding Company Act, 12 U.S.C. Sect. 1841 et seq. is an expression of that sentiment.

Alabama Assoc. of Ins. Agents v. Board of Governors of the Fed. Reserve Sys., 533 F.2d 224, 231 (5th Cir. 1976), *vacated in part on other grounds*, 558 F.2d 729 (5th Cir. 1977), *and cert. denied*, 435 U.S. 904 (1978).

In County Nat'l Bancorporation v. Board of Governors of the Fed. Reserve Sys., 654 F.2d 1253, 1257 (8th Cir. 1981) (en banc), the Eighth Circuit stated that "the BMA was passed to control the concentration of banking resources."

B. NATIONAL BANK MERGERS AND THE PERMISSIBILITY OF CASH-OUTS

Bank merger legislation provides that dissenting shareholders who do not wish to be associated with the successor bank may receive cash value for their shares.[42] Because cash-out transactions did not emerge until after passage of both the NBA and BMA,[43] however, neither the NBA nor the BMA specifically addresses the rights of dissenting stockholders who wish to retain their interest in the successor bank.

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42. When the NBA was initially passed to permit bank mergers, the House Report stated that the law included "[p]roper provision . . . to protect any dissenting stockholder in either corporation, who does not desire to be connected with the consolidated bank." H.R. REP. No. 408, 65th Cong., 2d Sess., at 1 (1918). The appraisal provision of the NBA provides that protection. The applicable provisions state:

> (b) Dissenting shareholders. If a merger shall be voted for at the called meetings by the necessary majorities of the shareholders of each association or State bank participating the plan of merger, and thereafter the merger shall be approved by the Comptroller, any shareholder of any association or State bank to be merged into the receiving association who has voted against such merger at the meeting of the association or bank of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of merger, shall be entitled to receive the value of the shares so held by him when such merger shall be approved by the Comptroller upon written request made to the receiving association at any time before thirty days after the date of consummation of the merger, accompanied by the surrender of his stock certificates.
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> (c) Valuation of shares. The value of the shares of any dissenting shareholder shall be ascertained, as of the effective date of the merger, by an appraisal made by a committee of three persons, composed of (1) one selected by the vote of the holders of the majority of the stock, the owners of which are entitled to payment in cash; (2) one selected by the directors of the receiving association; and (3) one selected by the two so selected. The valuation agreed upon by any two of the three appraisers shall govern. If the value so fixed shall not be satisfactory to any dissenting shareholder who has requested payment, that shareholder may, within five days after being notified of the appraised value of his shares, appeal to the Comptroller, who shall cause a reappraisal to be made which shall be final and binding as to the value of the shares of the appellant.

12 U.S.C. § 215a.

43. The use of cash-out transactions in the corporate context did not fully develop until the 1970s. *See* Weiss, *supra* note 4, at 650-57 (describing the development of cash-out mergers under state corporate laws). Although it is not clear when cash-out mergers first arose in the context of national bank mergers, litigation related to cash-out mergers of national banks did not develop until the 1980s. *See* Bloomington Nat'l Bank v. Telfer, 699 F. Supp. 190 (S.D. Ind. 1988) (holding that a reverse stock split in a proposed national bank merger was impermissible). *See infra* note 58 (describing reverse stock splits).

1. Agency Interpretations

The OCC, in its role as the regulatory agency responsible for national bank mergers, has determined that cash-out mergers are permissible.[44] The OCC bases its conclusion on the statutory language in the NBA at section 215a(a)(3), which states that merger agreements must document "the amount of stock (if any) to be allocated, and cash (if any) to be paid" to the shareholders of the target bank.[45] According to the OCC, this language indicates that Congress anticipated the use of cash as consideration in mergers and accepted the possibility of cash-out mergers.[46]

Traditionally, courts granted great deference to regulatory agency interpretations. The Supreme Court articulated this doctrine of deference in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[47] In *Chevron,* the Court held that when Congress fails to address a specific issue in drafting a statute, the courts will accept a regulatory agency's interpretation of the statute so long as it promotes a "permissible" construction of the regulation.[48] A "permissible" construction "represents a rea-

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44. The OCC's co-regulator, the Federal Reserve, at one time opposed cash-out merger transactions. In reviewing a merger proposal between a state member bank of the Federal Reserve and a bank holding company, the Federal Reserve rejected the request in part because it would result in the cash-out of the minority shareholders. BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM, 58 FED. RESERVE BULL. 717 (1972). In reaching its decision, the Federal Reserve stated that "there is an obvious inequity of forcing a result on minority shareholders without any balancing benefits." *Id.* at 719. The Federal Reserve analyzed the proposed merger in light of the relevant statutes (12 U.S.C. § 1828) and also in light of the impact on the "public interest." *Id.* The Supreme Court established the public interest test, according to the Federal Reserve, as the ultimate test in determining whether a proposed merger should be approved. *Id.* (citing United States v. Third Nat'l Bank, 390 U.S. 171, 184 (1968)).

45. The full text of the NBA states:

> The merger agreement shall—specify the amount of the capital stock of the receiving association, which shall not be less than that required under existing law for the organization of a national bank in the place in which it is located and which will be outstanding upon completion of the merger, the amount of stock (if any) to be allocated, and cash (if any) to be paid, to the shareholders of the association or State bank being merged into the receiving association . . . .

12 U.S.C. § 215a(a).

46. *See* NoDak Bancorporation v. Clarke, 998 F.2d 1416, 1419 (8th Cir. 1993).

47. 467 U.S. 837 (1984).

48. *Id.* at 843. Where Congress has explicitly left a gap in regulations, the deference due to the agency's interpretation is even greater, for here Congress intended that the agency fill that gap. *Id.* at 843-44. Where Congress implicitly leaves such a gap, deference due is somewhat less. *Id.* at 844.

sonable accommodation of conflicting policies that were committed to the agency's care"[49] and does not contradict congressional intent as evidenced by the statute or its history.[50] When Congress specifically addresses an issue, however, the regulatory agency must adhere to the language of the statute.[51]

The Supreme Court's application of the *Chevron* doctrine, however, is very uneven. In an exhaustive review of the Court's post-*Chevron* decisions, one commentator concluded that the Court applied the *Chevron* doctrine in only half of its cases involving regulatory agency interpretations.[52] The Court's inconsistent application of the doctrine is evident in the context of banking legislation.[53] In one instance, the Supreme Court deferred to the Federal Deposit Insurance Corporation's definition of "insured deposit" while admittedly ignoring the plain language of the statute defining such deposits.[54] In another situation, the Court rejected the Federal Reserve's definition of "bank" as contained in the BHCA, even though the BHCA provided no clear definition, and the Federal Reserve's definition did not appear to be contrary to congressional intent.[55] The Court also rejected the Federal Reserve's definition of "security,"[56] despite any indication that the definition contradicted congressional intent. Although the Court has not formally over-

49. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 383 (1961)).

50. *Id.*

51. *Id.* at 842-43.

52. Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992). Merrill's study included 90 Supreme Court decisions from 1984 through 1990 in which at least one Justice acknowledged that a question of deference to an agency interpretation was present. *Id.* at 981. Merrill concluded that the Court's failure to consistently apply the doctrine indicates that "the *Chevron* revolution—although real—is a tenuous one." *Id.* at 985.

53. *See* Linda B. Matarese, *Has the Chevron Deference Made a Difference When Courts Review Federal Banking Agency Interpretations of the Glass-Steagall Act?*, 33 How. L.J. 195 (1990) (reviewing the deference of courts to the federal banking agencies before and after *Chevron*).

54. *See* FDIC v. Philadelphia Gear Corp., 476 U.S. 426, 427, 438-39 (1986) (upholding *Chevron* while deferring to a long-standing definition of "deposit" developed by the FDIC that does not comport with the statutory definition provided by Congress).

55. *See* Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 367-68 (1986) (rejecting the Federal Reserve's definition of "bank").

56. *See* Securities Indus. Assoc. v. Board of Governors of the Fed. Reserve Sys., 468 U.S. 137 (1984) (rejecting the Federal Reserve's definition of "security").

turned *Chevron*, it appears hesitant to grant broad interpretative powers to regulatory agencies as mandated by *Chevron*.[57]

2. Judicial Interpretations

Prior to *NoDak*, only one circuit court directly considered the permissibility of cash-outs in national bank mergers.[58] In *Lewis v. Clark* [sic], the Eleventh Circuit determined that cash-outs result in unequal treatment of shareholders of same class stock.[59] Cash-outs permit some shareholders to retain their interest in the business, while forcing others out of the business, namely the minority shareholders.[60] According to the *Lewis* court, permitting shareholders of equal standing to be treated differently "seems to fly in the face of well settled equality-of-treatment principles."[61]

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57. *See* Merrill, *supra* note 52, at 970 (concluding that the Court is afraid of the "draconian" implications of the *Chevron* doctrine, which in the extreme would alter the balance of powers by permitting regulatory agencies to say what the law is).

58. Two years prior to *NoDak*, the Supreme Court was presented with an issue related to cash-out transactions in Virginia Bankshares, Inc. v. Sandberg, 111 S. Ct. 2749 (1991). In *Virginia Bankshares*, a minority shareholder claimed that the bank violated the Securities Exchange Act ("SEA") when it issued misleading proxy information to obtain shareholder approval for a cash-out merger transaction. *Id.* at 2752-53. The Court addressed only the alleged SEA violations and whether a minority shareholder could show the causation necessary to establish compensatory damages. *Id.* at 2755. The issue of the permissibility of the cash-out transaction was not before the Court and the Court did not address it. *Id.* at 2749.

In Bloomington Nat'l Bank v. Telfer, 699 F. Supp. 190 (S.D. Ind. 1988), the court was likewise confronted with an issue related to cash-outs, namely, the impact of a reverse stock split on the appraisal rights of minority shareholders. Reverse stock splits occur when the majority shareholders approve a reduction in the number of the corporation's outstanding shares (i.e., every 100 shares now equal 1 share). 1 O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 4, at § 5:10. The majority shareholders can authorize a reduction so substantial that minority shareholders are left with fractional shares. 1 *id.* Many state corporation laws prohibit fractional shares; thus, the majority shareholders must then purchase the fractional shares; eliminating the minority's interest in the corporation. 1 *id.* The *Bloomington* court found reverse stock splits a "clever little scheme having only the color of legality," and prohibited the proposed transaction. *Bloomington*, 699 F. Supp. at 194.

59. 911 F.2d 1558 (11th Cir. 1990) (per curiam).

60. *Id.*

61. *Id.* at 1561. Because same class shareholders were treated equally at the time Congress approved the NBA, and because neither the legislation itself nor the history surrounding its passage indicated that Congress "intended to depart from that tradition," the court refused to allow such unequal treatment. *Id.* The court concluded that "if owners of the same class of stock are to be treated differently, there should be some specific decision to that effect by Congress." *Id.*

The court considered and rejected the OCC's argument that section 215a of the NBA authorizes cash-out transactions because it permits the use of cash as consideration in mergers.[62] According to *Lewis*, section 215a "merely authorize[s] the use of cash as consideration for stock in mergers; [it does] not say that the minority can be *required* to accept cash where not all stockholders are required to accept cash."[63] The court further found that it owed no deference to the OCC, because the agency exceeded its authority in allowing unequal treatment of same class shareholders without congressional approval.[64]

The *Lewis* court also rejected the district court's reliance on case law governing publicly-held entities.[65] The proposed cash-out transaction presented in *Lewis* involved two closely-held banks.[66] Due to the unique nature of closely-held entities, the *Lewis* court determined that case law regarding publicly-held entities did not apply.[67]

C. CASH-OUTS IN THE CORPORATE CONTEXT

Due to the structural and transactional similarities between banks and corporations,[68] courts frequently look to relevant corporate law for guidance in resolving banking issues that banking legislation did not address.[69] As neither the text of federal

62. *Id.* at 1560-61.

63. *Id.*

64. *Id.* The court cited Bloomington Nat'l Bank v. Telfer, 699 F. Supp. 190 (S.D. Ind. 1988), to support its decision to reject the OCC's position. *See supra* note 58 (discussing *Bloomington*). The *Bloomington* court rejected the OCC's determination that reverse stock splits are permissible. *Bloomington*, 699 F. Supp. at 193-94.

65. *Lewis*, 911 F.2d at 1560. The district court relied on Beloff v. Consolidated Edison Co., 87 N.E.2d 561 (N.Y. 1949), and Grimes v. Donaldson, Lufkin & Jenrette, Inc., 392 F. Supp. 1393 (N.D. Fla. 1974), *aff'd*, 521 F.2d 812 (5th Cir. 1975).

66. *Lewis*, 911 F.2d at 1559-60.

67. *Id.* at 1560.

68. Banks and corporations are structurally similar in that they are owned by shareholders and are governed by a board of directors. *See* 1 MALLOY, *supra* note 21, §§ 2.2, 3.2 (describing the chartering process for national banks and the role of the board of directors). Banks and corporations are transactionally similar in that they both enter into the same types of transactions, including mergers. *See* 2 *id.* §§ 9.1-9.4 (describing the merger process for national banks).

69. *See* Gaff v. FDIC, 814 F.2d 311, 315 (6th Cir. 1987), *modified*, 933 F.2d 400 (6th Cir. 1991) (looking to corporate law to determine whether the plaintiff had standing to pursue a direct claim for damages against a national bank under federal banking law); Adato v. Kagan, 599 F.2d 1111, 1116-17 (2d Cir. 1979) (same); Schey v. Trans Pacific Nat'l Bancorporation, 217 Cal. App. 3d 432 (1990) (turning to general rules of corporate law after finding that the NBA was silent as to the powers of an executive committee); Smart v. Woodward, 441 So.

bank merger legislation nor its history directly addresses the permissibility of cash-out mergers,[70] corporate law provides an additional means of evaluating such transactions. Although corporate law governing cash-outs of closely-held entities is most relevant to the *NoDak* court's decision, a brief review of the treatment of minority shareholders in general is necessary to understand the treatment of minority shareholders in closely-held entities.

1. Expanding the Rights of Minority Shareholders

The rights of minority shareholders have changed dramatically over time. Traditionally, each shareholder held a vested right in the corporation.[71] Thus, corporations could not enter into merger transactions without the unanimous approval of the shareholders.[72] State legislatures recognized that this approach severely restricted economic progress,[73] and passed laws that allowed corporations to enter into merger transactions with the approval of a simple majority of shareholders.[74] Courts interpreted these statutes as an authorization of cash-out transactions.[75] Consequently, such transactions reduced the rights of

2d 460, 464-65 (La. Ct. App. 1983) (looking to corporate law to define a shareholder of record in a national bank). *See also* NoDak Bancorporation v. Clarke, 998 F.2d 1416, 1424 (8th Cir. 1993); *Lewis*, 911 F.2d at 1560 (analyzing corporate law regulating cash-out mergers).

70. *See supra* note 43 and accompanying text (describing the emergence of cash-out transactions).

71. Weiss, *supra* note 4, at 627. This rule was founded on the belief that the corporate charter was a contract among all the corporation's shareholders. *Id.*

72. A single dissenting shareholder could therefore prevent any change to the corporate form, unless the remaining stockholders could buy the shareholder out. *Id.* As a result, the minority shareholders exerted a significant amount of control over the corporation's acts. *Id.* The difficulties for the corporation in attempting to take action were further compounded by the fact that strike suits were sometimes initiated by minority shareholders who purchased their shares after the corporation announced its proposed action. *Id.* at 629 n.31.

73. Corporations that wanted to expand their business into new areas or acquire existing businesses could not do so unless 100% of their stockholders agreed to the expansion or acquisition. *Id.* at 629.

74. *Id.* Statutes passed in New York, New Jersey, and Delaware permitted the use of cash as consideration in mergers, but did not expressly permit cash-out mergers. *Id.* at 649 n.150. The primary purpose of the statutes was to provide corporations "with greater flexibility in structuring corporate combinations." *Id.* at 649.

75. *Id.* at 641, 648, 650-52. *See also* 1 O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 4, § 5:03, at 19 n.3 (citing Stauffer v. Standard Brands, Inc., 187 A.2d 78 (Del. 1962), David J. Greene & Co. v. Schenley Indus.,

minority shareholders to the receipt of fair cash value for their shares.[76]

As merger activity increased, courts recognized the harshness of limiting the minority shareholders' remedy to receiving cash value for their shares. Difficulties in assessing the value of the shares, the ability of the majority shareholders to manipulate the elements impacting share value, and the increasing use of cash-outs solely to eliminate minority interests led courts to fashion remedies to expand the rights of minority shareholders.[77] A number of jurisdictions have followed two of those methods, the fairness test[78] and the business purpose test.[79]

Inc., 281 A.2d 30, 35 (Del. Ch. 1971), and Willcox v. Stern, 219 N.E.2d 401 (N.Y. 1966), for the proposition that courts began interpreting state statutes to allow cash-out mergers).

76. *See* Weiss, *supra* note 4, at 652-54 (discussing the trend in judicial decisions that eventually resulted in limiting the rights of minority shareholders to a fair appraisal for their shares).

77. *See id.* at 654-55, 662 (describing the ease with which majority shareholders can exploit the minority shareholders through cash-out transactions and the inaccuracy of market prices in valuing shares). *See also* 1 O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 4, at § 3:02 (describing methods of indirectly eliminating minority shareholder interests, including withholding dividends, removing the minority shareholders from positions of employment, and siphoning off profits to interests favorable only to the majority shareholders). State courts did not react to the rising level of minority shareholder oppression, however, until the Supreme Court in Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) sent a strong message calling for additional minority shareholder protection. *See* Weiss, *supra* note 4, at 655-58 (describing the *Santa Fe* decision and its impact on corporate cash-out mergers). The Delaware courts were the first to provide some form of additional relief for minority shareholders. *See* Singer v. Magnavox, 380 A.2d 969 (Del. 1977) (determining that cash-outs designed solely to eliminate the minority shareholders represented an abuse of the corporate form and a violation of fiduciary duty), *overruled by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (en banc), *aff'd*, 497 A.2d 792 (Del. 1985). Commentators who viewed cash-outs as a mechanism for minority shareholder oppression applauded the efforts of the courts to protect the minority shareholders. *See* Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L.J. 1354, 1357-58 (1978) (concluding that cash-outs "involve the distinct possibility that a self-interested majority stockholder or control group has ruled unfairly, and [cash-outs] require special safeguards to ensure that minority stockholders receive equal . . . treatment.").

78. The Delaware Supreme Court developed the test in *Weinberger*, 457 A.2d at 711. Because there are a substantial number of corporations chartered in Delaware, this state developed a large body of corporate law, and its decisions pertaining to corporate transactions typically generate a large following. Thus far, a number of jurisdictions follow the fairness test, including Maine, Maryland, Pennsylvania, and Nevada. *See* Drobbin v. Nicolet Instrument Corp., 631 F. Supp. 860, 880 (S.D.N.Y. 1986) (applying Nevada law); *In re* Valuation of Common Stock of McLoon Oil Co., 565 A.2d 997, 1003-05 (Me. 1989); Walter J. Schloss Assoc. v. The Chesapeake & Ohio Ry. Co., 536 A.2d 147, 155-

Only a limited number of jurisdictions have followed a third method, the equal treatment doctrine.[80]

The fairness test prohibits cash-outs if the majority shareholders fail to deal fairly with the minority shareholders on either a substantive or a procedural level.[81] When the same directors represent majority shareholders on both sides of the merger transaction, the directors are "required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[82] Thus, the burden of establishing "fair

57 (Md. Ct. Spec. App. 1988); *In re* Glosser Bros. Inc., 555 A.2d 129, 134-35 (Pa. Super. Ct. 1989).

79. The Delaware Supreme Court also developed this test. *See* Singer v. Magnavox, 380 A.2d 969, 975-76, 978-80 (Del. 1977) (holding that courts must scrutinize merger transactions to determine whether they are fair to the minority shareholders), *overruled by Weinberger*, 457 A.2d at 715. *See also* Weiss, *supra* note 4, at 648-63 (describing the *Singer* decision and its impact on minority shareholders). The Delaware courts later rejected this test in favor of the fairness test developed in *Weinberger*. Although the Delaware courts abandoned the business purpose test, New York and Massachusetts continue to follow the test. As there are a substantial number of corporations chartered in these two jurisdictions, the business purpose test continues to play a major role in defining the rights of minority shareholders. *See* Coggins v. New England Patriots Football Club, Inc., 492 N.E.2d 1112, 1117 (Mass. 1986) (finding that "[u]nlike the Delaware court . . . we believe that the 'business purpose' test is an additional useful means under our statutes and case law for examining a transaction in which a controlling stockholder eliminates the minority interest in a corporation"); Alpert v. 28 Williams St. Corp., 473 N.E.2d 19 (N.Y. 1984) (holding that where the sole purpose of the merger is to reduce the number of shareholders, cash-outs will be prohibited).

80. The *Lewis* court relied on this doctrine. *See supra* notes 59-67 and accompanying text (discussing *Lewis*).

81. The court's inquiry into whether the merger is fair includes analysis of procedural issues such as the timing of the transaction, how the transaction was initiated, how the merger was structured, how its terms were negotiated and disclosed, and how approval of the merger was obtained. *Weinberger*, 457 A.2d at 711. The merger, however, is also scrutinized for the majority's candor in dealing with the minority, the possible conflicts of interest, and the potential for majority shareholders with superior knowledge of corporate information to mislead the minority shareholders. *Id.* A showing of fraud or deceit is not necessary to show the unfairness of a deal. *See* Rabkin v. Philip A. Hunt Chemical Corp., 498 A.2d 1099 (Del. 1985) (clarifying the fairness test developed in *Weinberger*), *aff'd*, 586 A.2d 1202 (Del. 1990).

82. *Weinberger*, 457 A.2d at 710 (citing Gottlieb v. Heyden Chemical Corp., 91 A.2d 57, 57-58 (Del. 1952)). The court further stated that "[t]he requirement of fairness is unflinching in its demand 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." *Id.* (citing Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 110 (Del. 1952); Bastian v. Bourns, Inc., 256 A.2d 680, 681 (Del. Ch. 1969), *aff'd*, 278 A.2d 467 (Del. 1970) (per curiam); David J. Greene & Co. v. Dunhill Int'l Inc., 249 A.2d 427, 431 (Del. Ch. 1968)).

dealing" rests on the directors and majority shareholders, as opposed to the minority shareholders.

The rights of the minority shareholders expand further under the business purpose test. The business purpose test permits cash-out transactions only if undertaken for a valid business purpose.[83] According to this test, the elimination of minority shareholders is not a valid business purpose;[84] therefore, the test prohibits mergers designed exclusively to eliminate minority shareholders.[85] The equal treatment doctrine provides even greater protection for minority shareholders. This doctrine requires that all shareholders holding the same class of stock be

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Some commentators recommended that the fairness test required in dealings between minority and majority shareholders prior to the merger should extend to fairness in sharing "merger gains." Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 313-23 (1974). Merger gains are those increases in value that accrue as a result of the merger. *Id.* at 308-09. Instead of merely providing a pre-merger share price to those minority shareholders who want to be cashed out, sharing merger gains would also require that any post-merger gain in stock price be allocated between the minority and majority shareholders. *Id.* at 321. At least one court advocates this approach. *See* Mills v. Electric Auto-Lite Co., 552 F.2d 1239 (7th Cir.), *cert. denied*, 434 U.S. 922 (1977).

83. *Singer*, 380 A.2d at 978-80, *overruled by Weinberger*, 457 A.2d at 715.

84. The *Singer* court stated that a "merger, made for the sole purpose of freezing out minority stockholders, is an abuse of the corporate process; and [is] . . . a . . . violation of a fiduciary duty" owed by the majority shareholder to the minority shareholders. *Singer*, 380 A.2d at 980.

85. *Id.* Not all commentators agree that *Singer* left a lasting impact. According to some commentators, "*Singer* has been consigned to oblivion . . . ." FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 136 (1991). *But see* Richard A. Booth, *Management Buyouts, Shareholder Welfare, and the Limits of Fiduciary Duty*, 60 N.Y.U. L. REV. 630, 632 n.9 (1985) (arguing that the fairness test now used by the Delaware courts is equivalent to the business purpose test); Deborah A. DeMott, *Down the Rabbit-Hole and into the Nineties: Issues of Accountability in the Wake of Eighties-Style Transactions in Control*, 61 GEO. WASH. L. REV. 1130, 1138 (1993) (arguing that several jurisdictions still require a valid business purpose to support a cash-out merger transaction); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact Upon Valuation Of Minority Shares*, 65 NOTRE DAME L. REV. 425, 436 n.79 (1990) (citing Leader v. Hycor, Inc., 479 N.E.2d 173 (Mass. 1985), and Alpert v. 28 Williams St. Corp., 473 N.E.2d 19 (N.Y. 1984), for the proposition that the business purpose test is still valid in New York and Massachusetts); Mary Siegel, *Tender Offer Defensive Tactics: A Proposal for Reform*, 36 HASTINGS L.J. 377, 404-05 (1985) (describing the continued compliance of the Delaware courts with the fairness requirements outlined in *Singer* although they have abandoned the business purpose test).

treated equally;[86] thus, it prohibits cash-outs of entities with only one class of stock.[87]

2. Providing Additional Protection for Minority Shareholders of Closely-Held Entities

a. *Rationale For Providing Additional Protection*

Minority shareholders of closely-held corporations typically receive more protection than their counterparts in publicly-held corporations. Courts and legislatures alike[88] provide this additional protection in part because no active market exists for the shares of closely-held corporations.[89] Absent such a market, valuing shares for purposes of cash-out transactions presents difficulties and may result in unfair compensation.[90] Moreover, cashed out shareholders cannot buy back their shares on the open market. Thus, the shareholders must rely on the courts, as opposed to the market, to remedy the effects of cash-out mergers.

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86. Some commentators have called for the adoption of the equal treatment doctrine as the only method to ensure that majority shareholders treat the minority fairly. *See* Brudney & Chirelstein, *supra* note 77, at 1356 n.9, 1356-57.

87. This doctrine has created much controversy among commentators because of its similarity to the long abandoned vested rights doctrine. *See, e.g.*, EASTERBROOK & FISCHEL, *supra* note 85, at 110-11 (arguing that fair treatment of shareholders is sufficient; equal treatment of shareholders may not be in the best interests of the entity).

88. Commentators have also recognized that the differences between closely-held and publicly-held corporations call for different treatment. *See* Melvin Aron Eisenberg, *Contractual Freedom In Corporate Law: Articles & Comments; The Structure Of Corporation Law*, 89 COLUM. L. REV. 1461 (1989) (arguing that the differences between publicly-held and closely-held corporations require differing sets of governing rules); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456 (1985) (arguing that the business judgment rule, which typically acts to validate decisions made by corporate directors to enter into cash-out merger transactions, should not apply to closely-held corporations as the rule is premised on the concept that dissenting shareholders can voice their approval or disapproval by buying and selling the corporation's stock on the open market).

89. *See* WILLIAM L. CARY & MELVIN ARON EISENBERG, CORPORATIONS CASES AND MATERIALS 1195-96 (6th ed. 1988) (describing the breakdown of traditional reasoning regarding the ability of cashed out shareholders to repurchase their shares when there is no available market for those shares). *See also* Exadaktilos v. Cinnaminson Realty Co., Inc., 400 A.2d 554, 560-61 (N.J. Super. Ct. Law Div. 1979) (determining that rationale underlying a state statute affording additional protection to shareholders of closely-held corporations is grounded on the inability of such shareholders to remedy the situation by selling their shares on the open market and the confidential relationships that typically exist among shareholders of closely-held corporations).

90. 1 O'NEAL'S CLOSE CORPORATIONS, *supra* note 2, § 1.08.

The close and confidential relationships that exist among shareholders of closely-held corporations present yet another reason for providing additional protection to such shareholders.[91] Such relationships may create a dependency on fellow shareholders or on the corporation itself; the shareholders may rely on the corporation for their means of employment or their position in the community.[92] Cash-out transactions, therefore, may have a detrimental impact on the shareholders' earning potential or status in the community.

b. *Methods of Providing Additional Protection*

Courts provide additional protection to minority shareholders of closely-held corporations in several different forms. Some courts limit the application of the business purpose test to closely-held corporations.[93] Other courts apply an expanded version of the business purpose test to closely-held corporations, holding that even when the business purpose test is met, shareholders of closely-held corporations can protest the merger on the grounds that the same goal could be achieved with a less adverse impact on the minority's interest.[94] Still other courts hold that the confidential relationships among shareholders of closely-held corporations demand a higher level of fiduciary duty among such shareholders than exists among shareholders of publicly-held corporations.[95]

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91. 1 *id.*

92. One commentator noted the importance of the closely-held corporation's ability to provide employment for the shareholders:

> Employment by the corporation is often the shareholder's principal or sole source of income. Providing for employment may have been the principal reason why the shareholder participated in organizing the corporation. Even if shareholders in a close corporation anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive an immediate return in the form of salaries as officers or employees of the corporation rather than in the form of dividends on their stock.

1 *id.* § 1.08, at 31-32. Even when the shareholder is not dependent on the corporation for employment, participation in the corporation may provide the shareholder with a certain social prestige. 1 *id.*

93. *See, e.g.*, Bryan v. Brock & Blevins, Co., Inc., 490 F.2d 563 (5th Cir. 1974) (applying Georgia law and holding that the business purpose test was not met when the majority shareholders of a closely-held corporation attempted to effect a cash-out merger by merging with a shell corporation).

94. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1975).

95. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514-15 (Mass. 1975) (holding that the similarities between closely-held corporations and partnerships require that stockholders in the close corporation owe one another substantially the same fiduciary duty that partners owe to one another).

State legislatures also recognize that different rules should apply to closely-held corporations than to publicly-held corporations. At least one state requires unanimous shareholder approval of any merger of a closely-held corporation.[96] Other states, including North Dakota, permit courts to dissolve closely-held corporations when the majority shareholders have treated the minority shareholders unfairly.[97]

II. *NODAK BANCORPORATION V. CLARKE*

In *NoDak Bancorporation v. Clarke*,[98] the Eighth Circuit addressed the issue of cash-outs in national bank mergers. The

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96. MD. CODE ANN., CORPS. & ASS'NS § 4-601 (1993).

97. The North Dakota statute provides that the courts may dissolve corporations when "[t]he directors or those in control of the corporation have acted fraudulently, illegally, or in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders, directors, or officers, or as employees of a closely held corporation." N.D. CENT. CODE § 10-19-115(1)(b)(2) (1993). The statute further provides that:

> [i]n determining whether to order equitable relief or dissolution, the court shall take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner in the operation of the corporation and the reasonable expectations of the shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other.

N.D. CENT. CODE § 10-19.1-115(3) (1993).

See also N.J. REV. STAT. § 14A:12-7(1)(c) (1993) (granting courts the power to dissolve corporations with 25 or fewer shareholders when those in control of the corporation treated one or more of the minority shareholders unfairly); S.C. CODE ANN. § 33-18-400(a)(1) (Law. Co-op. 1991) (granting courts the power to dissolve closely-held corporations when those in control of the corporation acted in a manner unfairly prejudicial to the minority shareholders). Other states provide that courts can dissolve closely-held corporations at the request of a complaining shareholder where dissolution is necessary to protect the rights or interests of the complaining shareholder. CAL. CORP. CODE §§ 1800(a)(2), 1800(b)(5) (Deering 1993); N.Y. BUS. CORP. LAW § 1104-a(b)(2) (Consol. 1993). California provides some additional protection by requiring that cash-out mergers of corporations in which the majority shareholders own more than 50% but less than 90% of the corporation be approved by the California Commissioner of Corporations. 1 O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 4, § 5:04. The Commissioner must determine if the terms and conditions of the merger are fair, just, and equitable. 1 *id.* The drafter of the California provision stated that "there will probably be relatively few transactions in which . . . [the commissioner] will be willing to make the finding of fairness." 1 *id.* (quoting 2 MARSH'S CALIFORNIA CORP. LAW § 18.24, at 529). Many states grant authority to the courts to dissolve closely-held corporations when the majority shareholders oppress the interests of the minority. *See* WILLIAM H. PAINTER, BUSINESS PLANNING PROBLEMS AND MATERIALS 125-26 (3d ed. 1994) (stating that 37 states grant courts the power to dissolve closely-held corporations when those in control of the corporation oppress the minority shareholders).

98. 998 F.2d 1416 (8th Cir. 1993).

majority shareholder of the closely-held Liberty National Bank ("Liberty"), Dickinson Bancorporation ("Dickinson"), established a separate interim bank to facilitate a merger transaction.[99] Dickinson, acting as the majority shareholder of Liberty, then approved a cash-out merger transaction with the interim bank that would eliminate the interests of all minority shareholders, including NoDak Bancorporation ("NoDak").[100] The successor bank appeared identical in all respects to the original Liberty except that Dickinson was its sole shareholder.[101]

NoDak, a closely-held corporation whose principal shareholder served as a member of Liberty's Board of Directors,[102] objected to the merger. NoDak wanted to retain its active role in managing and directing Liberty's activities. NoDak alleged that the majority shareholders breached their fiduciary duty[103] to the minority shareholders, and that federal banking legislation prohibited cash-out merger transactions. The *NoDak* court did not specifically address the allegations of the breach of fiduciary duty, but acquiesced in the OCC's determination that the merger was permissible.[104]

The *NoDak* court's analysis focused primarily on the introductory language of the NBA at section 215a(a).[105] The court

99. *Id.* at 1417.

100. *Id.* The use of a shell corporation established by the majority shareholders to facilitate a merger and eliminate the interests of the minority shareholders is a typical form of a cash-out transaction. *See supra* note 4 (describing cash-out transactions). This form as used in *NoDak* permitted the successor bank to operate under the existing name of Liberty National Bank and to assume all the operations of the existing Liberty National Bank. *NoDak*, 998 F.2d at 1417-18.

101. *NoDak*, 998 F.2d at 1418.

102. Brief for Plaintiff/Appellee NoDak Bancorporation at 2, *NoDak* (Civil Action No. A1-91-163).

103. NoDak Bancorporation alleged, among other things, that Liberty deliberately distorted its financial position shortly before the merger to adversely impact the appraisal value of the minority's shares, intentionally withheld dividends to finance the anticipated cash-out of the minority, and initiated and approved the merger transaction without the knowledge of the minority shareholders. Brief for Plaintiff/Appellee NoDak Bancorporation at 3-5, *NoDak* (Nos. 92-2502, 92-2505, 92-2508, 92-2509).

104. In discussing the allegations of breach of fiduciary duty, the court stated that "the Comptroller [OCC] found that the merger plan met all the procedural requirements of the National Bank Act, 12 U.S.C. § 215a(a) and (b), and the Comptroller [OCC] would not impose additional requirements." *NoDak*, 998 F.2d at 1418. Without reviewing the allegations, the court held that the OCC's decision regarding the cash-out was permissible. *Id.* at 1419.

105. The portion of the text analyzed by the court is at 12 U.S.C. § 215a(a): "[O]ne or more national banking associations or one or more State banks, with the approval of the Comptroller, under an agreement not inconsistent with this

found this language significant because it permits OCC-approved mergers that are "not inconsistent" with the NBA.[106] Invoking the *Chevron* doctrine,[107] the court concluded that the OCC's interpretation of section 215a(a)(3) of the NBA as congressional authorization of cash-outs was not inconsistent with the NBA.[108] Accordingly, *NoDak* held that cash-outs are permissible.[109]

The court considered and rejected NoDak's argument that cash-outs are inconsistent with section 215a(d) of the NBA. This section mandates that "[t]he shares of stock of the [successor bank] which would have been delivered to such dissenting shareholders had they not requested payment shall be sold . . . at an advertised public auction."[110] The court held that this provision applies only when the successor bank initially offers stock to the dissenting shareholders, but the shareholders specifically request cash payment.[111] Because, in *NoDak*, the successor bank never offered stock to the dissenting stockholders, the court held that this provision did not apply to the Liberty merger.[112]

The court further found that the legislative history surrounding the NBA supported its holding permitting cash-outs.[113] The court determined that Congress's primary goal in passing the NBA was to expedite national bank mergers.[114] The

subchapter, may merge into a national banking association located within the same State, under the charter of the receiving association."

106. The court commented that "[i]t is significant that the statutory language uses a double negative, allowing any type of merger agreement 'not inconsistent with this subchapter.'" *NoDak*, 998 F.2d at 1419.

107. *Id.* at 1420. The court invoked the doctrine because it found that one of the provisions of the NBA, § 215a(a)(3), was "susceptible to the two different readings offered by the litigants." *Id.* *See supra* note 45 (citing the full text of the statute). Dickinson and the OCC argued that the mention of two different forms of compensation indicated that either form was acceptable, and that cash-outs are therefore permissible. *NoDak*, 998 F.2d at 1420. NoDak argued that because the provision did not specifically address cash-outs, it could not permit them. *Id.*

108. *Id.*

109. *Id.*

110. 12 U.S.C. § 215a(d). *See supra* note 29 (citing the full text of the statute).

111. *NoDak*, 998 F.2d at 1420.

112. *Id.* The court also found that the mandatory appraisal provision at 12 U.S.C. § 215a(c) adequately protected the interests of the minority shareholders, making the protection provided by the public auction provision unnecessary. *Id.* *See supra* note 42 (citing the full text of § 215a(c)).

113. *NoDak*, 998 F.2d at 1422-23.

114. *Id.* at 1422. The court reviewed the 1918 amendment to the NBA, which permitted mergers, as well as more recent amendments made in 1952

court reasoned that cash-out transactions expedite mergers by removing possible delays caused by minority shareholder disapproval.[115]

Finally, the *NoDak* court looked to relevant case law regarding cash-out transactions. The court expressly rejected the reasoning and holding of *Lewis*.[116] *NoDak* found the *Lewis* court's reasoning that same class shareholders be treated equally tantamount to recognizing that all shareholders possess vested rights in the business.[117] Citing a treatise on corporate law, the court found that authorities abandoned this view in favor of the "modern" view that minority shareholders' rights include only the right to the fair cash value of their shares.[118] The court therefore found that modern corporate law further supported its holding that cash-outs are permissible.[119] The *NoDak* dissent, however, found the *Lewis* court's reasoning persuasive. The dissent agreed with *Lewis* that the tradition of equitable treatment for minority shareholders that existed at the time Congress passed the NBA required adherence to that tradition unless Congress explicitly authorized a departure.[120] According to the dissent, because Congress had not expressly allowed such a departure, cash-out mergers are impermissible.[121]

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and 1959. The court determined that these amendments were designed "to encourage bank consolidation." *Id.*

115. *Id.*

116. *Id.* at 1423. *See supra* notes 59-67 and accompanying text (discussing the *Lewis* holding).

117. *NoDak*, 998 F.2d at 1423.

118. *Id.* at 1423-24 (citing Weiss, *supra* note 4, at 690-91; EASTERBROOK & FISCHEL, *supra* note 85, at 134).

119. *NoDak*, 998 F.2d at 1423-24. The court found further support for its decision in Bloomington Nat'l Bank v. Telfer, 699 F. Supp. 190 (S.D. Ind. 1988). *See supra* notes 58, 64 (discussing *Bloomington*). In dicta, the *Bloomington* court indicated that minority shareholders may be cashed out so long as they are given appraisal rights. *Bloomington*, 699 F. Supp. at 194. The *Lewis* court relied upon this same decision in reaching its conclusion that cash-outs are impermissible. *See supra* note 64 (discussing the *Lewis* court's reliance on *Bloomington* as authority for rejecting the OCC's position.)

120. The dissent stated that "[t]he majority has, in fact, found no traces that Congress intended to depart from this tradition, but bases its inequitable treatment of the minority shareholder in this case on an unjustified obeisance to the Chicago School of Economics." *NoDak*, 998 F.2d at 1425 (Heaney, J., dissenting).

121. *Id.*

III. AN ALTERNATE ANALYSIS OF THE PERMISSIBILITY OF CASH-OUTS

In reaching its conclusion that cash-outs in national bank mergers are permissible, *NoDak* made three critical errors. First, the court failed to acknowledge congressional policy underlying bank merger regulations regarding the distribution of banking resources. Second, the court misapplied the *Chevron* doctrine. Third, the court failed to recognize the most recent trend in state law governing corporate mergers. Consequently, the court reached the wrong result regarding the permissibility of cash-outs.

A. Banking Legislation Indicates Cash-Outs are Impermissible

The *NoDak* court's analysis of the permissibility of cash-outs focused on whether cash-out mergers are "inconsistent" with the NBA.[122] The court's analysis, however, failed to consider congressional policy inherent in the NBA. Consequently, *NoDak* misinterpreted two critical provisions of the NBA, sections 215a(d) and 215a(c). Moreover, the court misread the legislative history surrounding the NBA and ignored the applicability of the BMA.

1. Cash-Outs are Inconsistent with Congressional Policy

The long history leading up to the NBA's passage indicates congressional suspicion of large concentrations of banking resources.[123] Although Congress did not contemplate mergers when it initially approved the NBA, congressional distrust of concentrated resources did manifest itself in the NBA in two respects: the NBA encourages the diffusion of banking resources across both an unlimited number of national banks and an unlimited number of bank shareholders. Cash-out mergers concentrate banking resources among fewer shareholders, namely the majority shareholders, and therefore contradict Congress's desire to disperse banking resources across numerous bank shareholders.[124] Prohibiting cash-outs, on the other hand, alleviates the effects of concentrated resources. Although such

122. *Id.* at 1419.

123. *See supra* notes 11-43 and accompanying text (describing the historical background of the NBA).

124. *See supra* notes 22-23 and accompanying text.

mergers still reduce the total number of banks,[125] they do not reduce the number of bank shareholders. Rather than concentrating resources in the hands of the majority shareholders, these mergers represent a combination of resources, with the same number of shareholders controlling the total amount of resources both before and after the merger.[126]

Some cash-out transactions may produce a limited impact on the concentration of resources among majority shareholders. Resources of banks with a multitude of shareholders remain widely dispersed among the large number of majority shareholders even after a cash-out merger.[127] When one or more of the bank's remaining shareholders is itself a corporation with widely dispersed shares, there may be little danger of resource concentration among majority shareholders. Moreover, the effects of a cash-out may be eliminated if the bank's stock remains available on the open market and the successor bank does not act to reduce its number of outstanding shares. Cashed out shareholders may simply repurchase their shares on the market

125. Mergers achieved through the use of shell banks would not reduce the total number of banks as the shell is created only to facilitate the merger. *See supra* note 4 (describing the use of a shell corporation to accomplish a merger).

126. A simple example illustrates the point. In a potential merger of Target Bank and Successor Bank, each with $100 million in assets, the concentration of those assets among shareholders depends entirely on whether cash-outs are permitted or prohibited. If Target Bank and Successor Bank each have only two shareholders prior to the merger, one representing a 90% interest and another a 10% interest, the total of the assets of the two banks is $200 million, controlled by four separate shareholders. After a merger that prohibits cash-outs, Successor Bank holds $200 million in assets, still controlled by four shareholders, as was the case prior to the merger. After a merger that permits cash-outs, Successor Bank has $180 million in assets, now controlled by only two shareholders ($20 million having been paid out to the minority shareholders). If the minority shareholders are able to reinvest their cash in the bank, this process redistributes control. When the cash-out involves a closely-held entity (such as Liberty National Bank), however, the minority shareholders would be unable to repurchase their interest in the bank. *See infra* notes 127-129 (discussing the implications of cash-outs for closely-held corporations).

The concentration of resources compounds as Successor Bank increases in value (which, presumably, is what the majority shareholders anticipate when they approve the cash-out). When Successor Bank increases in value to $250 million, in a cash-out scenario each of the remaining two shareholders controls $125 million. If the cash-out is prohibited, when Successor Bank reaches $250 million, each of the majority shareholders controls only $112.5 million, while each of the minority shareholders controls $12.5 million. The concentration of wealth in the hands of the majority shareholders in a cash-out scenario continues to increase as the value of Successor Bank increases.

127. Cash-outs may even be desirable when widespread ownership encumbers the corporation's decision making process or increases the difficulty of communication to shareholders.

after the merger. In such cases, cash-out transactions do not defeat congressional policy regarding the diffusion of banking resources and are therefore permissible.

These mitigating factors are rarely present in cash-out transactions involving closely-held banks. The stock of such banks is typically not widely dispersed and is not readily available for repurchase on the market.[128] These mitigating factors certainly did not exist in the *NoDak* case. Prior to the cash-out, only twelve shareholders owned Liberty stock.[129] Although two of those shareholders were corporations, NoDak and Dickinson, both were closely-held corporations with a limited number of shareholders.[130] Thus, Liberty's stock was never widely dispersed and remained significantly concentrated after the merger, when Dickinson became its sole shareholder. Moreover, the cashed out shareholders of the closely-held Liberty had no opportunity to repurchase their shares on the open market. Consequently, the effect of the merger could not be alleviated. The *NoDak* court's decision to permit the cash-out of Liberty's minority shareholders, therefore, directly contradicts congressional policy regarding the concentration of banking resources.[131]

2. Cash-Outs Defeat the Minority's Election of Cash or Stock

The *NoDak* court's failure to recognize congressional concern regarding the distribution of banking resources led it to misinterpret a critical regulation of the NBA, section 215a(d).

128. *See supra* note 2 (describing the characteristics of closely-held corporations).

129. *Supra* note 3.

130. *See* Brief for Plaintiff/Appellee NoDak Bancorporation at 2, *NoDak* (Nos. 92-2502, 92-2505, 92-2508, 92-2509) (describing the stockholders of Dickinson as six related individuals along with one F.L. Clarkson and his affiliates); Brief for Plaintiff/Appellee NoDak Bancorporation at 2, *NoDak* (Civil Action No. A1-91-163) (describing one F.G. Larson as the principal shareholder, officer, and director of NoDak Bancorporation).

131. There may be instances in which the majority shareholders justifiably wish to eliminate the minority shareholders. When minority shareholders become belligerent and uncooperative, or when personality conflicts between the majority and minority shareholders severely impair the operations of the business, the majority shareholders may wish to remove the minority shareholders. This Comment, however, does not propose that the courts permit or deny cash-outs in such instances based on the equities of the shareholders' positions. Rather, this Comment suggests that the shareholders themselves resolve such conflicts through the use of buy-out arrangements, arbitration clauses, or in the extreme, dissolution of the entity. *See* 1 O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS, *supra* note 4, § 9 (describing methods of resolving dissension and deadlock in closely-held entities).

This provision states that "[t]he shares of stock of the [successor bank] *which would have been delivered* to such dissenting shareholders *had they not requested payment* shall be sold . . . at an advertised public auction."[132] The *NoDak* court determined that this provision applies only when the successor bank initially offers stock to the minority shareholders but those shareholders specifically *request* cash payment.[133] The provision does not apply, according to *NoDak*, to cash-out transactions in which the successor bank never offers stock to the minority shareholders.[134] The court offered no support for its conclusion other than the plain language of the statute.[135]

There is, however, an alternate interpretation of the plain language of the statute. The statute could be construed to mean that minority shareholders are entitled to receive stock in the successor bank *unless* they request cash payment.[136] Because cash-out transactions do not offer shareholders the choice between stock or cash payment, the provision thus interpreted indicates that cash-outs are impermissible. Indeed, unlike *NoDak*'s interpretation, this alternate interpretation of the statute conforms with the policy of preventing concentrations of banking resources by prohibiting cash-outs.

The *NoDak* court's interpretation of section 215a(d) is inconsistent not only with congressional policy regarding the distribution of resources, but also with the preceding provision of the NBA, section 215a(c). According to this provision, "any dissent-

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132. 12 U.S.C. § 215a(d) (emphasis added). *See supra* note 29 (citing the full text of the statute).

133. *NoDak*, 998 F.2d at 1420.

134. *Id.*

135. *Id.*

136. This interpretation is well established for mergers involving bank holding companies. In describing the application of federal banking law to a merger between a shell corporation established by a bank holding company and an existing bank, the author of a leading textbook on banking law stated:

> In exchange for their shares of the target bank, the shareholders will have the choice between receiving shares of the bank holding company [the successor] or payment of the fair market value of their stock if they elect to pursue their appraisal rights under state or federal law .... The purpose of [a] merger between a phantom bank subsidiary [of a bank holding company] and the target bank is to eliminate minority shareholder interests in the resulting subsidiary bank. *This does not necessarily mean a "freeze out" of minority stockholders in the organization of the [bank holding company]. All shareholders of the target bank have the alternative of taking [bank holding company] stock in exchange for their own stock.*

JAMES J. WHITE, BANKING LAW TEACHING MATERIALS 273 (1976) (emphasis added).

ing shareholder who has *requested* payment" for his or her shares may request a reappraisal if dissatisfied with the initial share appraisal value.[137] Extending *NoDak*'s interpretation of section 215a(d) to this provision, minority shareholders in cash-out mergers are not entitled to reappraisal rights, because they did not *request* payment for their shares. Aware of the inequity of this result, the *NoDak* court found that although the auction provision of section 215a(d) does not apply to cash-out mergers, the reappraisal rights incorporated into section 215a(c) apply to all types of mergers.[138] Again, the court offered no support for this distinction other than the plain language of the statute.[139]

Such a distinction is unnecessary, however, under the alternate interpretation of section 215a(d), which permits minority shareholders to retain their interest in the successor bank unless they request payment. Under this interpretation, both sections 215a(c) and 215a(d) apply to all merger transactions. Moreover, this interpretation complies with congressional policy regarding the distribution of banking resources.

3. The Public Auction Provision Encourages the Redistribution of Resources

NoDak further reasoned that, because section 215a(d) of the NBA does not apply to cash-out transactions, cash-out mergers do not require public auctions.[140] According to the court, therefore, public auctions are only required when dissenting stockholders are initially offered stock but instead request cash; auctions are not required when dissenting shareholders are never offered stock. The court offered no rationale for this distinction.

An alternate interpretation of the public auction provision demonstrates that the auction promotes congressional policy encouraging the diffusion of banking resources. Public auctions permit the redistribution of resources consolidated among ma-

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137. 12 U.S.C. § 215a(c) (emphasis added).

138. *NoDak*, 998 F.2d at 1420-21.

139. *Id.* at 1420. The court found the distinction appropriate because, according to the court, the reappraisal provision relates to the value of shares held in the target bank prior to the merger and the auction provision relates to shares held in the successor bank. *Id.* at 1420-21. The *NoDak* court ignored the fact that § 215a(d) expressly requires the reappraisal value to be adjusted to equal the auction price should the auction price exceed the reappraisal value. 12 U.S.C. § 215a(d). Thus, the reappraisal value of shares in the target bank is equivalent to the shares in the successor bank, and the *NoDak* court's distinction breaks down.

140. *NoDak*, 998 F.2d at 1420-21.

jority shareholders when the dissenting shareholders do request cash in exchange for their shares. Rather than simply allowing the majority shareholders to retain control of those shares, public auctions allow others to purchase interests in the successor bank and thus encourage the redistribution of resources.[141] *NoDak*'s decision that the public auction requirement does not apply to certain mergers thus frustrates Congress's attempt to redistribute banking resources.

4. Bank Merger Legislative History Does Not Support Cash-Outs

Although the *NoDak* court ignored the underlying policies of the NBA regarding the concentration of banking resources, it did examine the legislative history of the NBA amendment permitting mergers. After reviewing the House Report accompanying the amendment, the *NoDak* court determined that it was designed to facilitate mergers and "make it easier for banks to consolidate."[142] According to the House Report, however, the purpose of the amendment was merely to "permit" mergers to take place.[143] The *NoDak* court, therefore, mistakenly relied on the history of the NBA as a vehicle to make mergers "easier."[144]

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141. The public auction provision is therefore critical in transactions of closely-held entities such as Liberty. Absent a public auction, there are no ready means for shareholders to purchase stock in closely-held entities. *See supra* notes 88-89 (describing alternate treatment afforded shareholders of closely-held corporations because of the absence of a ready market for their shares).

142. *NoDak*, 998 F.2d at 1422. Even if the intended purpose of the NBA is to make mergers easier, the *NoDak* court made the erroneous assumption that permitting cash-outs achieves this purpose. The *NoDak* court apparently believed that prohibiting cash-outs would allow the minority shareholders to effectively stonewall the merger by refusing to give their consent to the transaction. Prohibiting cash-outs, however, does not increase the voting power of the minority shareholders. The majority shareholders can still approve of a merger transaction without the consent of the minority, whether or not a cash-out merger is permitted. The permissibility of cash-out transactions does, however, affect the number of steps required to complete the merger transaction. Applying the *NoDak* court's reasoning to the typical cash-out merger, the steps required to complete the merger would include: 1) majority shareholder approval of the merger, 2) appraisal of the minority shareholders' interests, 3) reappraisal of the minority shareholders' interests if the minority shareholders are dissatisfied with the initial appraisal, 4) transfer of shares from the target bank to the successor bank. If cash-outs are prohibited, both steps two and three may be eliminated if minority shareholders do not request cash value for their shares. Far from making mergers easier, therefore, the court's decision to permit the cash-out transactions may actually lengthen the merger process.

143. H.R. REP. No. 408, 65th Cong., 2d Sess., at 1 (1918).

144. *NoDak*, 998 F.2d at 1422.

The *NoDak* court also failed to recognize the applicability of the BMA. The NBA specifically states that the NBA and the BMA govern all national bank mergers. The Supreme Court interpreted the BMA to prefer "community-based control" of banking resources.[145] A significant decline in the number of bank owners from the community in which the bank is located threatens community-based control. Because Liberty's merger resulted in the elimination of all but one of its shareholders, the *NoDak* court's decision to permit the cash-out merger significantly diminished community-based control over the bank, thus contravening the preference for community-based control of banking resources outlined in the BMA.

B. Deference to Agency Interpretations

1. Improper Application of the *Chevron* Doctrine

The Eighth Circuit made its second critical mistake in granting deference to the OCC's interpretation of the NBA. The *NoDak* court based this deference on the *Chevron* doctrine. It is not entirely clear, however, whether this doctrine even applies.[146] The Supreme Court has refused to apply the *Chevron* doctrine in numerous cases involving regulatory agency interpretations.[147] Moreover, on two separate occasions the Supreme Court flatly rejected the statutory interpretations of bank regulatory agencies, even though Congress provided no clear indication of its intent.[148] Although the Court has not expressly rejected the *Chevron* doctrine, its failure to consistently apply the doctrine makes its use questionable.

Even if application of the *Chevron* doctrine is appropriate, the Eighth Circuit used the doctrine inappropriately in *NoDak.* Courts should defer to regulatory agencies only when their interpretations represent a "reasonable accommodation of conflicting policies . . . committed to the agency's care."[149] Congress authorized the OCC to evaluate the financial positions of merging banks and the external effects of proposed mergers, including the potential impact on competition and on banking services

145. *See supra* note 41 and accompanying text.

146. *See supra* notes 52-57 and accompanying text (describing the Supreme Court's uneven application of the *Chevron* doctrine).

147. *Supra* note 52 and accompanying text.

148. *Supra* notes 55-56 and accompanying text.

149. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 845 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

provided to the community.[150] If the OCC finds the merging banks in sound financial condition and finds no adverse external effects of the proposed merger, the OCC can approve the merger.[151]

No evidence indicates, however, that Congress authorized the OCC to evaluate the internal effects of mergers.[152] Mergers that adversely impact bank employees or, as in *NoDak*, mergers that adversely impact some of the bank's shareholders raise issues beyond the scope of the OCC's authority. When issues beyond the scope of the agency's duties surface, the *Chevron* doctrine does not require the courts to defer to the agency.[153] Rather, the courts must resolve those questions. The *NoDak* court, therefore, should have resolved the dispute concerning the impact of the proposed cash-out on Liberty's minority shareholders without deferring to the OCC. Although the court could certainly have deferred to the OCC's findings regarding Liberty's financial position and the external impacts of the merger, issues Congress expressly granted to the OCC's care, the court should have undertaken its own analysis regarding the permissibility of cash-outs.

150. 12 U.S.C. § 1828(c)(5) (1988) grants this authority by stating that:

> [t]he responsible agency shall not approve—any proposed merger transaction which would result in a monopoly . . . or any other proposed merger transaction whose effect . . . may be substantially to lessen competition . . . . In every case, the responsible agency shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions . . . .

151. The OCC's authority to approve mergers is located at 12 U.S.C. § 1828(c)(2)(A), which states that "[n]o insured depository institution shall merge or consolidate with any other insured depository institution . . . except with the prior written approval of the responsible agency, which shall be . . . the Comptroller of the Currency [OCC] if the acquiring, assuming, or resulting bank is to be a national bank."

152. *See* 12 U.S.C. § 1828(c) (1988 & Supp. V 1993) (identifying the duties of the OCC, which do not include evaluation of internal impacts of mergers or fairness considerations). The OCC's own regulations indicate that the factors it considers in approving bank mergers are limited. Factors to be considered include:

> (i) The effect of the transaction upon competition; (ii) The convenience and needs of the community to be served; (iii) The financial history of the merging [banks]; (iv) The condition of the merging [banks], including capital, management and earnings prospects; (v) The existence of insider transactions; and (vi) The adequacy of disclosure of the terms of the merger.

12 C.F.R. § 5.33(b)(2) (1994).

153. *Chevron*, 467 U.S. at 845 (quoting *Shimer*, 367 U.S. at 383).

2. Application of the *Chevron* Doctrine Does Not Support the OCC's Position

Even if the use of the *Chevron* doctrine in *NoDak* is appropriate, its application indicates that the OCC's position regarding cash-outs cannot be supported. According to the *Chevron* doctrine, the courts may defer to an agency's interpretation unless the text or history surrounding passage of the statute indicate that Congress would not sanction the interpretation.[154] Here, both the text and the history of banking legislation indicate that Congress would not have advocated cash-outs.

The NBA at section 215a(d) provides that "[t]he shares of stock of the [successor bank] *which would have been delivered* to such dissenting shareholders *had they not requested payment* shall be sold . . . at an advertised public auction."[155] This provision strongly suggests that Congress intended dissenting shareholders to receive stock in the successor bank unless they request cash payment, and therefore indicates that Congress would not sanction the use of cash-outs in bank merger transactions. The long established congressional policy of encouraging the diffusion of banking resources also indicates that Congress would not advocate cash-out transactions.[156] The OCC's determination that cash-outs are permissible, therefore, contradicts the text of the relevant statute as well as congressional policy. Consequently, even under the *Chevron* doctrine, the *NoDak* court should have disregarded the OCC's interpretation of banking legislation.

C. Borrowing from Corporate Law

In its final misstep, the *NoDak* court looked to obsolete corporate law to support its decision that cash-out transactions are permissible. The court looked to the "modern view" of cash-outs[157] and determined that "the [minority] shareholders' only entitlement is to demand an appraisal of their shares."[158] The

154. *Id.*
155. 12 U.S.C. § 215a(d) (1988) (emphasis added).
156. *See supra* notes 12-41 (discussing historical background of banking legislation).
157. North Dakota courts have not developed a body of case law pertaining to cash-out mergers; the *NoDak* court therefore turned to what it considered general trends in corporate law for guidance.
158. *NoDak*, 998 F.2d at 1424 (quoting Easterbrook & Fischel, *supra* note 85, at 134). The majority opinion overlooked a later section in this work devoted exclusively to closely-held corporations. Easterbrook & Fischel, *supra* note 85, at 228-52. The authors state that a separate line of analysis is often

court failed to recognize that the more recent trend in corporate law expands the rights of minority shareholders, particularly shareholders of closely-held entities such as Liberty.

1. The Modern View of Corporate Cash-Outs

The fairness test stands as the most widely accepted means of analyzing cash-out mergers in corporations.[159] To pass this test, the majority must demonstrate that it dealt fairly with the minority shareholders in completing the merger.[160] The *NoDak* court's opinion sheds little light on this issue. Indeed, despite NoDak's allegations that the majority shareholders breached their fiduciary duty to the minority shareholders, the *NoDak* court did not examine the issue of fairness. Rather, the court deferred to the OCC's determination that the merger met all necessary procedural requirements and was therefore permissible.[161]

The fairness test, however, requires the court to analyze issues relating to both procedural and substantive fairness.[162] Moreover, when the same directors represent the majority shareholders on both sides of the merger,[163] as in *NoDak*, the fairness test compels the directors to "demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain."[164] The majority shareholders and directors in *NoDak* may well have failed to pass this stringent test of fairness.

Another method of evaluating cash-out transactions, the business purpose test, requires the majority shareholders to demonstrate some purpose for the merger other than the elimination of the minority shareholders.[165] Based on the *NoDak*

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required when examining the rules governing closely-held corporations. *Id.* at 228.

159. *See supra* notes 78, 81-82 and accompanying text (describing the fairness test and its following).

160. *Supra* notes 81-82 and accompanying text.

161. *NoDak*, 998 F.2d at 1418, 1419. Despite the minority shareholders' request to the OCC to undertake an examination of the fairness of the merger, the OCC merely reviewed the procedural aspects of the merger and granted approval. *Id.* at 1418. *NoDak* concurred in the OCC's evaluation. *Id.*

162. *Supra* note 81.

163. The fairness test developed in Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (en banc), establishes a much more stringent test for those transactions where directors are acting on both sides of the transaction. *See supra* note 82 and accompanying text (discussing the fairness test).

164. *Weinberger*, 457 A.2d at 710 (citing Gottlieb v. Heyden Chemical Corp., 91 A.2d 57, 57-58 (Del. 1952)).

165. *See supra* notes 83-85 and accompanying text (describing the business purpose test).

court's opinion, it appears that the Liberty merger was designed exclusively to eliminate the minority shareholders. The only difference in the successor bank and its predecessor was that Dickinson wholly owned the successor bank.[166] In fact, Dickinson established an interim bank solely to accomplish the merger.[167] Absent additional facts that would indicate another, valid purpose for the merger, the merger in *NoDak* would fail the business purpose test.

A more controversial method for analyzing cash-out mergers, the equal treatment doctrine, requires equal treatment of all shareholders holding the same class of stock.[168] Because all Liberty shareholders held the same class of stock, the doctrine would prohibit the cash-out of Liberty's minority shareholders.[169]

2. The Modern View of Cash-Outs in Closely-Held Corporations

Because Liberty is a closely-held entity,[170] corporate law grants greater protection to its minority shareholders than to shareholders of publicly-held corporations. Cash-out transactions of closely-held businesses may have to pass not only the business purpose test, but also an expanded version of the business purpose test that permits the minority shareholders to demonstrate that any legitimate purpose of the merger could be achieved without a cash-out.[171] Because the only purpose of the Liberty merger appeared to be the elimination of the minority shareholders, the merger would fail both the business purpose test and the expanded business purpose test. The majority shareholders of closely-held corporations may also be required to meet a stringent level of fiduciary duty towards the minority shareholders.[172] Although *NoDak* did not examine this issue, Liberty's minority shareholders alleged specific acts of majority shareholder misconduct that, if true, would demonstrate a

166. *NoDak*, 998 F.2d at 1418.

167. *Id.*

168. *Supra* notes 86-87 and accompanying text.

169. *See* Brief for Plaintiff/Appellee NoDak Bancorporation at 2, *NoDak* (Nos. 92-2502, 92-2505, 92-2508, 92-2509) (stating that all shareholders of Liberty National Bank held the same class of stock).

170. *Id.* The *NoDak* opinion never made reference to the fact that Liberty is a closely-held entity.

171. *Supra* note 94 and accompanying text.

172. *Supra* note 95 and accompanying text.

breach of that fiduciary duty.[173] Such a breach may have been sufficient under North Dakota law to allow the court to dissolve the entity due to unfair treatment of the minority shareholders.[174]

3. *Lewis* and Reliance on the Equal Treatment Doctrine

The *Lewis* court relied heavily on the equal treatment doctrine to support its conclusion that cash-outs in national bank mergers are impermissible.[175] Although the *Lewis* court reached the correct holding, the court could easily have relied on a less controversial and more widely accepted doctrine to reach the same result. Given that *Lewis*, like *NoDak*, analyzed a merger of a closely-held entity,[176] it could have relied on the fairness test, the business purpose test, the expanded version of the business purpose test, or relevant state law regarding closely-held businesses to evaluate the merger.

Unlike the *NoDak* court, the *Lewis* court noted that the distinction between closely-held and publicly-held entities is critical in determining the rights of the entities's shareholders.[177] Unfortunately, *Lewis* made note of this distinction only to discard case law involving cash-outs of publicly-held corporations, and made no effort to review case law involving cash-outs of privately-held entities.[178] Had the *Lewis* court reviewed this case law, it could have supported its holding with a more accepted method of cash-out evaluation and may have induced the entire *NoDak* court, rather than only the dissent, to follow its lead in holding that cash-outs in national bank mergers are impermissible.

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173. *See supra* note 103 (discussing allegations against the majority shareholders).

174. Under North Dakota law, courts have the power to dissolve closely-held entities when those in control of the entity act in a manner unfairly prejudicial to the minority shareholders. N.D. CENT. CODE § 10-19.1-115(1)(b)(2) (1993). In determining whether to dissolve the entity, the courts are to

> take into consideration the duty which all shareholders in a closely held corporation owe one another to act in an honest, fair, and reasonable manner . . . and the reasonable expectations of the shareholders as they exist at the inception and develop during the course of the shareholders' relationship with the corporation and with each other.

N.D. CENT. CODE § 10-19.1-115(3) (1993).

175. Lewis v. Clark [sic], 911 F.2d 1558, 1561 (11th Cir. 1990) (per curiam).

176. *Id.* at 1560-61.

177. *Id.* at 1560.

178. *Id.*

CONCLUSION

The permissibility of cash-out transactions in national bank mergers has significant implications not only for the rights of minority shareholders, but also for the distribution and ultimate control of banking resources. In an opinion that failed to acknowledge congressional policy regarding the distribution of banking resources, yielded unnecessarily to a misguided regulatory agency interpretation, and relied on outdated corporate law that severely restricted minority shareholders' rights, the Eighth Circuit recently concluded that cash-out transactions are permissible.

Congress has long encouraged the diffusion of banking resources across numerous banks as well as across numerous bank shareholders. Cash-out mergers frustrate this policy because they permit banking resources to be concentrated among majority shareholders. This concentration of resources may be minimal when the bank's stock remains widely held even after the cash-out. Moreover, the impact of the cash-out may be alleviated when the bank's stock is readily available for repurchase on the open market. Because these mitigating factors do not apply to closely-held entities, however, cash-out mergers of closely-held national banks contravene congressional policy and are impermissible.