

Spring 1970

Reformation in Corporate Law: Equal Opportunity Must be Afforded Minority Stockholders in any Transaction in Shares by Those in Control: Jones V. II. F. Ahmanson

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Recommended Citation

O'Connor, Michael D. (1970) "Reformation in Corporate Law: Equal Opportunity Must be Afforded Minority Stockholders in any Transaction in Shares by Those in Control: Jones V. II. F. Ahmanson," *Indiana Law Journal*: Vol. 45 : Iss. 3 , Article 6.

Available at: <https://www.repository.law.indiana.edu/ilj/vol45/iss3/6>

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REFORMATION IN CORPORATE LAW: EQUAL OPPORTUNITY
MUST BE AFFORDED MINORITY STOCKHOLDERS IN ANY
TRANSACTION IN SHARES BY THOSE IN CONTROL:
JONES v. H. F. AHMANSON

In the recently decided California case, *Jones v. H. F. Ahmanson and Co.*,¹ Chief Justice Traynor unabashedly adopted a broad new principle of corporate law for the regulation of majority or controlling stockholders in any transaction in shares where control of a corporation is material. Controlling stockholders of a savings and loan association created a public market for their stock by forming a new corporation, and were held to have violated a fiduciary standard of "good faith and inherent fairness"² by denying minority shareholders an equal opportunity to exchange their stock on the same basis accorded the controlling group.³ The express adoption of a broad "good faith and inherent fairness" standard for governing control shareholders signals a radical innovation in the law of corporations. Although several commentators have advocated adoption of a rule of equal opportunity in some form,⁴ never before has it been so frankly recognized by courts as in the "inherent fairness" test of *Ahmanson*.

In the principal case plaintiff brought an action on behalf of herself individually and all similarly situated minority stockholders of United Savings and Loan Association.⁵ Defendants were United Financial Corporation⁶ and fifteen individuals, all of whom were past or present stockholders, officers or directors of the Association. As a group, defendants controlled United Financial which in turn controlled the Association. Stock of the Association was not actively traded⁷ because of its high

1. 76 Cal. Rptr. 293 (1969), *rev'd*, 81 Cal. Rptr. 592, 460 P.2d 464 (1969) [hereinafter cited as *Ahmanson*].

2. 81 Cal. Rptr. at 602, 460 P.2d at 474.

3. *Id.* at 606, 460 P.2d at 478.

4. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957); Jennings, *Trading in Corporate Control*, 44 CAL. L. REV. 1 (1956); Leech, *Transactions in Corporate Control*, 104 U. PA. L. REV. 725 (1956). *But see* Javaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. CHI. L. REV. 420 (1965).

5. Hereinafter referred to as the Association.

6. United Financial Corporation of California is a Delaware holding company. 81 Cal. Rptr. at 594, 460 P.2d at 466.

7. Transactions which did occur were primarily among existing stockholders and fourteen of the nineteen defendants comprised 95 per cent of the market prior to 1959. *Id.* at 595, 460 P.2d at 467.

book value,⁸ the closely held nature of the Association, and the failure of management to provide investment information and assistance to stockholders, brokers or the public.⁹

Because of the wide-spread investor interest in savings and loan stock, particularly in the early 1960's, such stock, when publicly marketed, had enjoyed a steady increase in price. To capitalize on this situation, defendants incorporated United Financial and exchanged their Association shares for those of United Financial.¹⁰ After the exchange, United Financial held 85 per cent of the Association's stock, and more than 85 per cent of United Financial's earnings and the book value of its shares reflected ownership of the Association stock.¹¹

Minority stockholders of the Association were not offered an opportunity to exchange their shares. The control group made a public offering of United Financial shares,¹² and offered to acquire Association stock from minority stockholders at less than book value, and at prices lower than those which a derived block of United Financial shares would have commanded on the market.¹³ Moreover, after dividends of seventy-five dollars and fifty-seven dollars for the years of 1959 and 1960 respectively were paid to Association stockholders, that is, during the period of initial public distribution of United Financial shares, the Association's president, then a director of both Association and United Financial, notified the minority stockholders of the Association that, in accord with pre-1959 practice, only a four dollar per share annual dividend would be paid in the future.¹⁴

8. The Association retained most of its earnings in tax-free reserves with the result that book value increased substantially. For example, between 1959 and 1966, book value rose from \$1,131 to \$4,143.70 per share. *Id.* at 594, n.2, 460 P.2d at 466.

9. *Id.* at 594, 460 P.2d at 466.

10. Defendants received a "derived block" of 250 United Financial shares for each share of Association stock. *Id.* at 595, 460 P.2d at 467.

11. Consequently, the former majority stockholders of the Association became majority stockholders of United Financial and continued to control the Association through the holding company.

12. In June, 1960, United Financial made its first public offering with a large portion of the proceeds thus derived distributed as a return of capital to the original stockholders of United Financial. This distribution was equivalent to \$927.50 for each derived block of shares. 81 Cal. Rptr. at 595, n.6, 460 P.2d at 467.

13. For example, shortly after the first public offering, defendants offered to purchase Association stock for \$1,100 a share. At that time, each share of Association stock had a book value of \$1,411.57 and earnings of \$301.15. Also, a derived block of United Financial shares then commanded \$3,700 per block exclusive of the \$927.50 return of capital. *Id.* at 596, 460 P.2d at 468.

14. *Id.* It is curious that the plaintiff evidently did not allege oppression and "freeze-out" by the defendants since Traynor fails to address himself to that issue. Yet, a combination of the disparity between the price offered for Association stock and its book value, plus the decrease in dividends would seem to indicate a possible freeze-out situation. Because savings and loan associations do not usually give dividends as a result

On the basis of these facts plaintiff contended that the defendants had breached a fiduciary duty owed by the majority or controlling stockholders to the minority by using their power to control the Association for their own advantage to the detriment of the minority, by creating United Financial, by establishing a public market for its shares which rendered Association stock unmarketable except to United Financial, and then by refusing either to purchase plaintiff's stock at a fair price or exchange the stock on the same basis which was afforded the defendants.¹⁵

Plaintiff was unsuccessful in the District Court of Appeals.¹⁶ While recognizing that traditional corporate doctrine imposes a fiduciary responsibility with the power of control, the court held that an actionable violation of these duties would occur only in limited circumstances. It was found that those circumstances were not present in the instant case even though the "defendants derived a special benefit in making use of their power of control,"¹⁷ since actual control of the Association remained with the defendants by virtue of their control of United Financial.¹⁸ In other words, plaintiffs were defeated because there had been no transfer of control. Further, the court held that the defendants had "no duty toward Association or its stockholders to provide a favorable market or value for Association stock."¹⁹ Consequently, even though the court admitted that it was an "unpraiseworthy practice to exclude from the money making scheme . . . [those] stockholders who [had] helped to build up the Association,"²⁰ plaintiff was not entitled to relief.

Reversing, Justice Traynor noted the ". . . inadequacy of traditional theories of fiduciary obligation as tests of majority stockholder responsibility to the minority . . ."²¹—particularly the "transfer of control" doctrine. In times of increasingly complex transactions in the business and financial community, Justice Traynor concluded that the principle of good faith and inherent fairness should apply to any ". . . transactions wherein controlling shareholders seek to gain an advantage in the sale or

of special tax exemptions, it is arguable that the decrease was simply motivated by a desire to bring Association back in line with the rest of the industry. However, the sudden change under the circumstances plus the position of the Association's president as an interlocking director might indicate a freeze-out. *See generally*, F. O'NEAL and J. DERWIN, *EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES: SQUEEZE OUTS IN SMALL ENTERPRISES* (1961).

15. 81 Cal. Rptr. at 597, 460 P.2d at 469.

16. 76 Cal. Rptr. 293.

17. *Id.* at 298.

18. *Id.*

19. *Id.*

20. *Id.*

21. 81 Cal. Rptr. at 601, 460 P.2d at 473.

transfer or *use* of their controlling block of shares. . . ."²² (Emphasis added.)

The case before us, in which no sale or transfer of actual control is directly involved, demonstrates that the injury anticipated by these authors can be inflicted with impunity under the traditional rules and supports our conclusion that the comprehensive rule of good faith and inherent fairness to the minority in any transaction where control of the corporation is material properly governs controlling shareholders in this state.²³

The court found that this standard was violated by the defendants. Besides limiting the benefit derived from creating a public market to themselves, the defendants' course of action also harmed the minority stockholders. The successful public marketing of United Financial shares restricted what market had previously existed for Association stock. The mere fact that a public market existed for United Financial stock, and one did not for Association stock would lead investors to prefer the former.²⁴ Further, it became virtually certain that no equivalent market could or would be created for Association stock, since the defendant had control of the Association and would not desire to have public trading in Association stock in competition with United Financial shares.²⁵

Admittedly, there would be no way the defendants could prevent the minority stockholders from also forming a holding company and making their own public offering. But, practically speaking, such a venture would fail. Investors would be unwilling to buy shares when one holding company already had control and was offering shares on the public market. Thus, the court held that when "no market exists, the controlling shareholders may not use their power to control the corporation for the purpose of promoting a marketing scheme that benefits themselves alone to the detriment of the minority."²⁶

Since resolution of the principal case turned on a determination of the nature and extent of fiduciary responsibility of majority or controlling stockholders, a brief examination of traditional doctrine is necessary to illustrate the novelty of *Ahmanson*, and to highlight what Justice

22. *Id.*

23. *Id.* at 602, 460 P.2d at 474.

24. United Financial shares were registered with the SEC. 81 Cal. Rptr. at 596, 460 P.2d at 468.

25. *Id.* at 604, 460 P.2d at 476.

26. *Id.* at 604, 460 P.2d at 476.

Traynor referred to as the "inadequacy of traditional theories of fiduciary obligation."²⁷

In two situations fiduciary responsibilities traditionally have been imposed on controlling stockholders: "Conflicts of interest" and "transfer of control." The former covers all dealings *between* a corporation and a controlling stockholder. The imposition of a fiduciary duty on control stockholders in this situation has been based on two grounds.²⁸ A direct approach is based on equitable principles that one who holds a position of superiority and influence over the interests of others is a fiduciary and his obligation runs to the minority stockholders.²⁹ In the alternative, if officers and directors owe fiduciary duties, the controlling stockholder who dominates the corporation through his influence over directors and officers is subject to identical responsibility.³⁰

The nature of this obligation was described in *Pepper v. Litton*:³¹

A director is a fiduciary . . . so is a dominant or controlling stockholder or group of stockholders. . . . their dealings *with the corporation* are subjected to rigorous scrutiny and where any of their contracts or engagements with the corporation is challenged, the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.³² (Emphasis added.)

This formulation has generally been accepted as the essence of the controlling stockholder's fiduciary responsibility.³³ This is the standard adopted by Justice Traynor. Yet, the factual circumstances in cases cited by Traynor which adopt this standard and the facts in the principal case clearly diverge, since the cited cases all involved commercial trans-

27. *Id.* at 601, 460 P.2d at 473.

28. H. HENN, CORPORATIONS 382 (1961); Note, *The Fiduciary Relation of the Dominant Shareholder to the Minority Shareholders*, 9 HASTINGS L.J. 306 (1958).

29. HENN, *supra* note 27 at 382. An illustration of this approach is *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-88 (1919): "The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors."

30. HENN, *supra* note 27 at 382. An illustration of this approach is *Zahn v. Transamerica Corp.*, 162 F.2d 36, 46 (3d Cir. 1947) in which the relationship between the directors and dominant stockholder was characterized by the phrase "puppet-puppeteer."

31. 308 U.S. 295 (1939).

32. *Id.* at 306.

33. *Zahn v. Transamerica*, 162 F.2d 36 (3d Cir. 1947); *Lebold v. Inland Steel Co.*, 125 F.2d 369, *modified* 136 F.2d 876 (7th Cir. 1941); *Burt v. Irvine Co.*, 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965); *Efron v. Kalmanowitz*, 226 Cal. App. 2d 546, 38 Cal. Rptr. 148 (1964); *Remillard Brick Co. v. Remillard-Dandini*, 109 Cal. App. 2d 405, 241 P.2d 66 (1952).

actions between the corporation and control persons, not an adjustment of control itself. In these cases, *Burt v. Irvine Co.*,³⁴ *Efron v. Kalmanowitz*,³⁵ and *Remillard Brick Co. v. Remillard-Dandini*,³⁶ the courts accepted the traditional position which limits the standard of inherent fairness to situations of direct dealings between a corporation and majority stockholder or where the stockholder compels the corporation to take some official action. Traynor, however, extended this doctrine, applying the standard to a situation which only involved transactions in shares by controlling stockholders.

A further ground for distinction of prior case law is that, although the standard purports to govern controlling stockholders solely because of their status as dominant stockholders, the defendants in *Burt*, *Efron*, and *Remillard* were also directors or officers.³⁷ In *Ahmanson*, although some of the defendants did hold managerial positions and one interlocking director, the court places virtually no significance on this fact and deals with the defendants solely as controlling stockholders.

Beyond these distinctions, one must examine the use of a fairness test. Traditionally, courts have found a transaction fair if it has the " earmarks of an arm's length bargain,"³⁸ if it is not one-sided or startling,³⁹ or if the stockholders lose nothing.⁴⁰ In support of Traynor's expansion, however, it seems that more is required to determine fairness. A corporation is owned by all of its stockholders. It is to be operated for their benefit. Therefore, in deciding if a transaction is "fair," the appropriate inquiry should be whether or not the minority stockholders are obtaining the best deal possible.⁴¹ Justice Traynor states that controlling shareholders must use their power of control to benefit "all shareholders proportionately."⁴² Thus, under the circumstances present in *Ahmanson*, for the minority to benefit proportionately they should have had an equal opportunity to exchange their shares.

"Transfer of control" is the second major area of corporate law

34. 237 Cal. App. 2d 828, 47 Cal. Rptr. 392 (1965).

35. 226 Cal. App. 2d 546, 38 Cal. Rptr. 148 (1964).

36. 109 Cal. App. 2d 405, 241 P.2d 66 (1952).

37. In *Burt* and *Remillard*, the stockholders were also directors. In *Efron*, the defendant was a stockholder-president.

38. *Pepper v. Litton*, 308 U.S. at 306, 307 (1959).

39. *Globe Woolen v. Utica Gas and Electric Co.*, 224 N.Y. 483, 491, 121 N.E. 378, 380 (1918).

40. *Case v. New York Central Railroad Co.* 15 N.Y.2d 150, 157-58, 256 N.Y.S. 2d 607, 612, 204 N.E.2d 643, 647 (1965).

41. See, 9 HASTINGS L.J., *supra* note 28 at 313 where the author suggests a similar test of fairness by stating: ". . . the community of interest of all the shareholders imposes upon those in control the obligation to produce the most that can be obtained for all."

42. 81 Cal. Rptr. at 599, 360 P.2d at 471.

where some form of fiduciary responsibility has been imposed on controlling stockholders in relation to the minority. Except in the case of *Ahmanson* few restrictions have been placed on the free transferability of control stock, since the stock was regarded as the private property of the control person,⁴³ and transferability in such cases was deemed a stimulus to the economy.⁴⁴ As a result the courts have resisted predicating liability on so broad a fairness test as that adopted by Traynor. Those limitations which were imposed in the transfer of control situation involved gross profit or unconscionable conduct as in cases of sale of corporate office,⁴⁵ looting,⁴⁶ abuse of a corporate opportunity,⁴⁷ payment of a disguised premium for corporate product,⁴⁸ sale of a corporate asset.⁴⁹ Justice Traynor clearly moves beyond these situations and establishes a general doctrine which governs majority or controlling shareholders in any transactions in shares.

The application of such a doctrine in the principal case raises several questions. First, what sort of obligations does a standard of inherent fairness impose, what is their scope, and when are they imposed? Must minority stockholders always be offered an opportunity to partake in a transaction in shares by controlling or majority stockholders? Secondly, can controlling shares ever be sold for a premium? Finally, what effect will

43. 7 WES. RESERVE L. REV. *infra* note 44 at 476.

44. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); Jennings, *Trading in Corporate Control*, 44 CAL. L. REV. 1 (1956); Note, *Sales of Corporate Control and the Theory of Overkill*, 31 U. CHI. L. REV. 725 (1964); Note, *The Fiduciary Duty of Controlling Shareholders*, 7 WES. RESERVE L. REV. 467 (1956).

45. *Porter v. Healy*, 244 Pa. 427, 91 A. 428 (1918), is the clearest example of a sale of corporate office. Liability turns on whether a director or officer is being paid by an outsider to take some official action to acquire additional shares, with the consideration being a secret side payment. The circumstances usually reveal misrepresentation or non-disclosure.

46. *Gerdes v. Reynolds*, 28 N.Y.S.2d 622 (1941). This case involved a sale of stock at such an exorbitant price as to involve sale of corporate office followed by looting of the corporate assets.

47. The theory of corporate opportunity is best illustrated by the case of *Commonwealth Title Ins. and Trust Co. v. Seltzer*, 227 Pa. 410, 76 A. 77 (1910). Liability was predicated on the ground that the president-stockholder diverted a corporate opportunity to sell directly to the purchaser.

48. The theory of disguised premium for the corporation's product is one way to interpret the famous case *Perman v. Feldmann*, 219 F.2d 173 (2d Cir. 1955). The court based liability on the ground that the purchaser paid for control in order to get the product, therefore the premium should have gone to the corporation or all the stockholders.

49. The corporate asset theory is another way to read *Perman*. This theory was first advanced by A. BERLE AND G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 244 (1932). Essentially the theory says that stock which carries control and sells at a premium is selling a corporate asset: the power to control gives the stock the premium since one who has voting control also has control of the corporate assets. Thus, the premium always belongs to the corporation.

the adoption of an equal opportunity rule have on the marketability of controlling shares? Will the rule established by Justice Traynor prevent any "beneficial" transfers of control and thus be detrimental to the economy? What should be the policy in this area?

In deciding how far Justice Traynor goes, it is possible to read the opinion narrowly and argue that there has been no drastic change. Initially it seems that Traynor has done nothing more than to hold that when a transaction in shares by majority or controlling stockholders is questioned by the minority, the burden of proof is shifted to the controlling group to defend the transaction and to show good faith and inherent fairness. This interpretation is supported by the opinion's use⁵⁰ of *Pepper v. Litton*, which, while establishing a standard of inherent fairness, places the burden of proof on the controlling stockholder.⁵¹ So read, the rule of *Ahmanson* would not require an equal opportunity to participate in all transfer of control situations. Further, the egregious set of circumstances which gave rise to *Ahmanson* severely limits the precedential value of this holding. In any future case, given the complexity of corporate transactions today, controlling shareholders should have little difficulty in finding a rational justification for their conduct and so meet the burden of inherent fairness.

On the other hand, several factors warrant a broader reading of Justice Traynor's opinion. He establishes guidelines for determining what is inherent fairness. In deciding if there has been a duty breached, the test is whether there has been a significant worsening of the minority's position or a significant betterment of the controlling stockholders' position.⁵² If there will be significant damage to the minority, then the controlling shareholders must, at a minimum, make an offer to the minority inviting them to participate in the transaction on the same basis as that afforded the controlling stockholders.⁵³ Thus, in the principal case, the defendants breached their fiduciary duty because they obtained a benefit (creation of a market for their shares) not available to all the stockholders,⁵⁴ to the detriment of the minority (by the foreclosure of a potential public market for Association shares).⁵⁵

Even though equal opportunity is not a per se rule but merely an aspect of inherent fairness, Traynor states that equal opportunity alone does not relieve one of proving inherent fairness :

50. 81 Cal. Rptr. at 599, 460 P.2d at 471.

51. 308 U.S. at 306, 307.

52. See 81 Cal. Rptr. at 601, 602, 604, 606, 460 P.2d at 473, 474, 476, 478.

53. *Id.* at 603, 460 P.2d at 475.

54. *Id.* at 604, 460 P.2d at 476.

55. *Id.* at 604, 606, 460 P.2d at 476, 478.

Had defendants afforded the minority an opportunity to exchange their stock on the same basis or offered to purchase them at a price arrived at by independent appraisal, their burden of establishing good faith and inherent fairness would have been much less.⁵⁶

The foregoing demonstrates that Traynor's application of a standard of good faith and inherent fairness entails much more than a shift in the burden of proof.⁵⁷

Traynor's decision has additional significance in the question of whether controlling shares can ever be sold for a premium. Traynor's rule appears not to require any premium: all that is called for is a significant detriment to the minority⁵⁸ or a significant benefit to the controlling stockholders.⁵⁹ Consequently, since receipt of a premium is presumably a significant benefit, Traynor's rule does suggest that liability would be imposed any time a sale of controlling shares involved a premium, unless minority stockholders were also given an opportunity to sell at the same price.

Adoption of this reading of *Ahmanson* seriously brings into question the status of traditional cases holding that one can pay more for control if control was all that had been sought.⁶⁰ However, one might distinguish *Ahmanson* by suggesting that Traynor intended to cover the peculiarities of a situation involving a holding company and its manipulations to obtain a benefit, rather than a straight transfer of control situation where the affirmative action in procuring such a transaction is ordinarily not originated by the controlling stockholder. It is arguable that the opinion meant to cover both situations by failing to expressly draw the distinction and consistently reiterating that the standard of inherent fairness would apply to any transactions "wherein controlling shareholders seek to gain an advantage in the sale or transfer or use of their controlling block of shares."⁶¹ Furthermore, it is suggested that Traynor's rule should cover both situations. Any distinction would be

56. *Id.* at 604, 460 P.2d at 476.

57. Moreover, additional support for the contention that Traynor's test extends beyond a rule of equal opportunity is his statement that any use to which controlling stockholders put their power to control must benefit "all shareholders proportionately." 81 Cal. Rptr. at 599, 460 P.2d at 471.

58. Which in this instance was not a premium but the destruction of a potential public market for Association shares and the exclusion of the minority from the new market created by the defendants.

59. See *supra* note 52 and text accompanying.

60. A classic case in this area is *Essex Universal Corp. v. Yates*, 305 F.2d 572 (2d Cir. 1962).

61. 81 Cal. Rptr. at 601, 460 P.2d at 473.

artificial or off point if one's concern is with protecting minority stockholders by imposing responsibility upon those with whom the power of control resides.

Another aspect of *Ahmanson* is the extension of appraisal rights to cover the plaintiffs. Traynor views the transfer in control⁶² as accomplishing a fundamental corporate change with respect to the minority: control of a closely held association became an asset of a publicly held holding company with the position of the minority thereby drastically changed.⁶³ Accordingly, relying on the case of *Farris v. Glen Alden Corp.*⁶⁴ as support for the extension of appraisal rights beyond the statutory merger situation, Traynor concludes that the plaintiff should have been entitled to a right of appraisal.

Traynor's conclusion that a drastic corporate change took place is not unassailable. Minority stockholders suffered no dilution in their voting power or equity in the Association. No fundamental changes occurred in the goals of the corporation by the mere formation of the holding company, since the control group remained the same. Moreover, *Farris v. Glen Alden* is easily distinguishable, since in that case a sale of assets was followed by dissolution, whereas in *Ahmanson* there was a continuation of the Association.

Greater support for Traynor's grant of appraisal rights is found in an article by Professor Eisenberg.⁶⁵ Generally, Professor Eisenberg examines a broad variety of financing methods in the face of archaic corporate law and suggests that appraisal rights should cover situations involving a permanent and substantial economic corporate reorganization.⁶⁶ Although Traynor relies essentially on this conception of fundamental corporate change, he departs from Eisenberg to the extent that Eisenberg suggested statutory amendment⁶⁷ as the appropriate remedy. Also of particular interest in extending appraisal rights to situations of fundamental corporate change is that Traynor goes in the opposite

62. See note 43 *supra* and text accompanying.

63. His practical ability to influence corporate decision-making was diminished substantially when control was transferred to a publicly held corporation that was in turn controlled by the owners of more than 750,000 shares. The future business goals of the Association could reasonably be expected to reflect the needs and interest of the holding company rather than the aims of the Association stockholders thereafter. In short, the enterprise into which the minority stockholders were now locked was not that in which they had invested.

81 Cal. Rptr. at 605, 460 P.2d at 477.

64. 393 Pa. 427, 143 A.2d 25 (1958).

65. Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking*, 57 CAL. L. REV. 1 (1969).

66. *Id.* at 118.

67. *Id.* at 146, 147.

direction of Professor Manning, seeming to have relied partly on Professor Eisenberg's article.⁶⁸ Eisenberg not only attacks the Manning thesis⁶⁹ that appraisal rights should be abolished entirely, but also advocates extension of the right. He feels extension is desirable as a matter of policy because it prevents a stockholder from being forced into an enterprise in which he had not originally invested and serves to check unfairness in major corporate reorganizations.⁷⁰ It is possible that Traynor used appraisal merely as a means of determining the appropriate measure of damages. The breadth of the argument, however, suggests an attempt to bolster the arsenal of the minority shareholder.

Any evaluation of Justice Traynor's use of a rule of equal opportunity necessitates a consideration as to what the policy should be regarding transactions in shares and an examination of the possible ramifications such a rule will have on the marketability of controlling shares.

One objection to a rule calling for equal opportunity any time controlling shares are sold for a premium is the traditional doctrine that one should have the "unfettered freedom to transfer shares,"⁷¹ as an attribute of property rights in stock. Yet several commentators have argued that even though a controlling stockholder may set his price, it does not follow that he should be able to sell on terms not generally available to other stockholders.⁷² When a controlling stockholder sells at a premium he is making a unilateral determination that the corporation should gamble on its future prosperity, by his withdrawal, without consulting the remaining stockholders who will be subject to this risk.⁷³ Furthermore, it has been argued that profits from stock sales ought to be regarded as profits of the enterprise and subject to distribution among stockholders as much as profits realized through corporate action.⁷⁴

Further, it has been argued that a rule of equal opportunity would restrict "beneficial" transfers of control:⁷⁵ ". . . there are greater risks [in] restraining sales of controlling shares than [in] permitting new blood to enter the corporation by purchase of control."⁷⁶ This suggestion

68. *Id.*

69. Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 *YALE L.J.* 223 (1962).

70. See Eisenberg, 57 *CAL. L. REV.*, *supra* note 65.

71. Javaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 *U. CHI. L. REV.* 420 (1965); Note, 31 *U. CHI. L. REV.*, *supra* note 44.

72. Andrews, 78 *HARV. L. REV.*, *supra* note 44 at 506.

73. Leech, *Transactions in Corporate Control*, 104 *U. PA. L. REV.* 725, 838 (1956).

74. Andrews, 78 *HARV. L. REV.*, *supra* note 44 at 521.

75. Javaras, 32 *U. CHI. L. REV.*, *supra* note 71; Note, 31 *U. CHI. L. R.*, *supra* note 44.

76. Leech, 104 *U. PA. L. REV.*, *supra* note 73 at 838.

is based on the notion that control persons would be unwilling to sell without a premium and that the purchaser of control might not be willing to extend his offer to all stockholders, if only on account of financing problems. However, in practice, the validity of this point remains to be shown. Perhaps some empirical analysis would be in order on this point to resolve the dispute.

While *Ahmanson* furnishes strong encouragement to advocates of an equal opportunity rule, the extreme nature of its facts may color its value as precedent; at least, however, Traynor's opinion is a frank recognition that law which would have permitted no remedy in such situation is in need of searching examination by the courts.

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