

## “PROPER PURPOSE” FOR INSPECTION OF CORPORATE STOCK LEDGER

The current merger movement greatly exceeds in numbers and in total assets any other such movement ever experienced in the United States.<sup>1</sup> Controlling interests have been acquired by three primary methods: proxy contests,<sup>2</sup> public exchange offers,<sup>3</sup> and cash tender offers.<sup>4</sup> Under each of these methods of corporate acquisition, the acquiring corporation must correspond with individual stockholders of the corporation to be acquired. Thus, access to the target corporation's stocklist or stock ledger, which contains the names and addresses of all record shareholders and the number of shares held by each, is a normal prerequisite to obtaining control.

Under state corporate law a shareholder has a right to inspect the corporate books and records, including the stocklist of his corporation.<sup>5</sup> Thus, a corporation seeking control of a publicly held company need only acquire a few shares of the target's stock and then demand access to the shareholder list.<sup>6</sup> However, since the lists are in the physical custody of the incumbent officers who have a vested interest in the corporation's continued existence,<sup>7</sup> the lists are

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1. Burck, *The Merger Movement Rides High*, FORTUNE, Feb. 1969, at 79, 80.

In 1968 there were 10 times as many mergers as in 1950; and in the last two years the number has doubled. The total number in 1968 was over 4000. *Id.* Total mergers in 1969 rose 37 percent over 1968. The Philadelphia Evening Bulletin, Jan. 6, 1970, at 45, col. 1.

2. Under this method, the corporation seeking control solicits proxies from the shareholders of the target corporation. The proxy statement either calls for a merger or for the ouster of the present directors of the target and the election of directors who support a merger. See generally *Studebaker Corp. v. Allied Prods. Corp.*, 256 F. Supp. 173 (W.D. Mich. 1966).

3. The acquiring corporation offers to exchange its stock for the stock of the shareholders of the target corporation at a favorable rate. See *Hearings on Problems in the Securities Industry Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 91st Cong., 1st Sess. 13-14 (1969).

4. Such an offer normally consists of a bid by the acquiring corporation to the individual shareholders of the target corporation to buy their shares in the company, usually at a figure well above the market price.

Cash tender offers or takeover bids have become the primary means of obtaining control of a corporation. See S. REP. NO. 550, 90th Cong., 1st Sess. 2 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 2 (1968). See also Cohen, *Tender Offers and Takeover Bids*, 23 BUS. LAW. 611 (1968); Hamilton, *Some Reflections on Cash Tender Offer Legislation*, 15 N.Y.L.F. 269 (1969).

5. All states recognize the existence of such a right. See 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2213 (perm. ed. rev. vol. 1967) [hereinafter cited as FLETCHER].

6. See *General Time Corp. v. Talley Indus.*, 43 Del. Ch. 531, 240 A.2d 755 (Sup. Ct. 1968); *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855 (Del. Ch. 1969).

7. See Albrook, *The Frustrations of the Acquired Executive*, FORTUNE, Nov. 1969, at 152.

rarely given after a single request.<sup>8</sup> When the right to inspect is refused, the requesting corporation must seek judicial enforcement.<sup>9</sup> Most of the recent litigation under these inspection statutes has revolved around the propriety of the attempted inspection.

#### COMMON LAW AND EARLY STATUTORY INSPECTION RIGHTS

At common law a shareholder had a qualified right which entitled him to inspect corporate books and records, including the stock ledger, for a proper purpose in good faith at a proper time and place.<sup>10</sup> The right was based upon his beneficial ownership of the corporate assets and the corresponding right to protect his interests as a shareholder.<sup>11</sup> If the shareholder making the inspection demand had to go to the court, he had the burden of allgcing and proving that the purpose for the inspection was proper.<sup>12</sup>

As a result of dissatisfaction over resistance by corporate officers in allowing the right of inspection to minority shareholders,<sup>13</sup> most

8. See Newman, *Inspection of Stock Ledgers and Voting Lists*, 16 Sw. L.J. 439, 440, 458 (1962).

9. When officers of a corporation deny a shareholder the right of access to the stocklist, the remedy to enforce the right is mandamus. See notes 16-17 *infra* and accompanying text.

A state court is the forum for the action since the Federal Rules abolished the remedy of mandamus. FED. R. CIV. P. 81(b). *But see* *Susquehanna Corp. v. General Refractories Co.*, 250 F. Supp. 797 (E.D. Pa. 1966). In a diversity case where the relief sought was enforcement of a right to examine the books and records of a Pennsylvania corporation, the court held that while under the All Writs Act, 28 U.S.C. § 1651 (1964), mandamus could not be used "except in aid of an applicable federal statute," the relief here requested was in the nature of a mandatory injunction, permissible since the applicable state law provided a similar remedy. The state law label of "mandamus" was held not to govern the federal characterization. See *also* *Stern v. South Chester Tube Co.*, 390 U.S. 606 (1968). See generally 2 L. LOSS, *SECURITIES REGULATION* 1001-06 (1961).

The enforcement of the inspection rights of shareholder lists has been the subject of more litigation than any other individual right of the shareholder. See 2 G. HORNSTEIN, *CORPORATION LAW AND PRACTICE* § 611 (1959).

10. *E.g.*, *Guthrie v. Harkness*, 199 U.S. 148 (1905); see H. BALLANTINE, *CORPORATIONS* §§ 159-60 (rev. ed. 1946); 5 FLETCHER § 2214; 2 G. HORNSTEIN *supra* note 9, §§ 611-12.

11. See *Guthrie v. Harkness*, 199 U.S. 148, 155 (1905); *State ex rel. Boldt v. St. Cloud Mill Producers' Ass'n.*, 200 Minn. 1, 273 N.W. 603 (1937).

12. Courts have generally held that shareholders retain the common law right of inspection unless specifically deprived of it by statute or by some authorized provision of the articles or charter or by some duly authorized and valid by-law. See *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257 (1926); *Ochs v. Washington Heights Fed. Savings & Loan Ass'n*, 17 N.Y.2d 82, 215 N.E.2d 485, 268 N.Y.S.2d 294 (1966); 5 FLETCHER § 2214, at 790.

13. N. LATTIN, R. JENNINGS, & R. BUXBAUM, *CORPORATIONS CASES & MATERIALS* 424 (4th ed. 1968).

states enacted, in the latter part of the nineteenth century, statutes expressing the right of inspection by shareholders in unqualified terms.<sup>14</sup> Generally the courts found that such statutes vested the shareholder with an absolute right to inspect the books regardless of motive or purpose.<sup>15</sup> From the face of the state statutes, proper purpose was not a condition of access, and the right of the shareholder could not be denied by insiders even on the grounds of improper or illegal purpose. However, despite the fact that the right of inspection was absolute, the remedy which the shareholder sought, a writ of mandamus, did not allow absolute enforcement. When the shareholder who was denied this absolute inspection right sought mandamus to compel its recognition, most courts concluded that the extraordinary writ of mandamus had never been issued as a matter of right but always in the court's discretion.<sup>16</sup> Therefore, while the right was an absolute one, the writ to enforce the right would not be issued when the shareholder's motive or purpose was improper.<sup>17</sup>

The development of Delaware law was similar to that of most jurisdictions. The Delaware courts held that the unqualified language of their state statute<sup>18</sup> had the effect of making the right of inspection

14. A good example is the early Delaware statute. "The original or duplicate stock ledger containing the names and addresses of the stockholders, and number of shares held by them, respectively, shall, at all times, during the usual hours of business, be open to the examination of every stockholder . . ." Law of March 22, 1929, ch. 135, § 29 [1929] Del. Laws 391.

15. *E.g.*, Johnson v. Langdon, 135 Cal. 624, 67 P. 1050 (1902); Venner v. Chicago City Ry., 246 Ill. 170, 92 N.E. 643 (1910); Henry v. Babcock & Wilcox Co., 196 N.Y. 302, 89 N.E. 942 (1909); State *ex rel.* Dempsey v. Werra Aluminum Foundry Co., 173 Wis. 651, 182 N.W. 354 (1921). In discussing New York's statute, Law of May 7, 1897, ch. 384, § 53, [1897] N.Y. Laws 314, which was a model for many other states, the New York Court of Appeals noted that

. . . the Legislature could make the stockholder's privilege of inspection dependent upon the motive or purpose with which it is sought; but it has not seen fit to do so. The language of the statute is plain and mandatory. It recognizes an absolute right in the stockholder and imposes an absolute duty upon the corporation and the custodian of the stock book. The law requires no statement or proof of any particular intent upon the part of the person demanding the inspection. Henry v. Babcock & Wilcox Co., 196 N.Y. 302, 305, 89 N.E. 942, 943 (1909).

16. See note 9 *supra*.

17. *E.g.*, Guthrie v. Harkness, 199 U.S. 148, 155 (1905); State *ex rel.* Costello v. Middlesex Banking Co., 87 Conn. 483, 88 A. 861 (1913); Shea v. Sweetser, 119 Me. 400, 111 A. 579 (1920); Bruning v. Hoboken Printing and Publishing Co., 67 N.J.L. 119, 50 A. 907 (Sup. Ct. 1902). *But see* Venner v. Chicago City Ry., 246 Ill. 170, 92 N.E. 643 (1910); State *ex rel.* Dempsey v. Werra Aluminum Foundry Co., 173 Wis. 651, 182 N.W. 354 (1921) (inspection statutes gave the shareholder an absolute right, and consequently no discretion existed with the court to deny a writ of mandamus).

18. See note 14 *supra*.

by a shareholder absolute. Despite the absolute language of the statute, however, it was not meant to remove the courts' discretion in mandamus, and, accordingly, the writ should be issued only for a proper purpose.<sup>19</sup> The statute did affect the procedure for obtaining mandamus. Under common law the writ was issued only after an affirmative pleading of proper purpose; however, since the statute was absolute in its terms creating the right, the shareholder seeking inspection no longer had to allege proper purpose in his writ, but, instead, the burden shifted to the corporation of alleging improper purpose or motive in its return.<sup>20</sup> Unfortunately, the situation was complicated by the rules that in mandamus the allegations in the writ which were not denied in the return were taken as true<sup>21</sup> and that the answer to the writ was conclusive and was presumed to be true.<sup>22</sup> Thus, if it were averred in the return to the writ that the purpose of the shareholder in seeking inspection was improper, the answer had to be considered true and the writ denied.<sup>23</sup> The courts reasoned that since mandamus was a summary writ, there was no procedure whereby the merits of the issues raised could be determined.<sup>24</sup> The result was that the shareholder's statutory, absolute right of access to the corporate books and records could be defeated by a mere allegation of improper purpose. Responding to this situation, the legislature enacted an amendment to the mandamus procedure which provided that upon the filing of an application for the writ by the relator and the return by the defendant, any question of fact which

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19. *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257 (1926); *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773 (1922); *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. 570, 101 A. 433 (Super. Ct. 1917); *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, 17 Del. Ch. 325, 154 A. 457 (Ch. 1931).

20. *See, e.g., State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773 (1922).

21. *Bay State Gas Co. v. State ex rel. H. Content & Co.*, 20 Del. 238, 56 A. 1114 (1902).

22. *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773, 774 (1922); *McCoy v. State ex rel. Allee*, 16 Del. 543, 36 A. 81 (1897); *State ex rel. National Bank v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 A. 449 (Super. Ct. 1913).

The Delaware Supreme Court noted:

The return to the alternative writ, if it does not show a compliance with the mandate of the writ, must set forth either a positive denial of the truth of the allegations contained in the writ, or state other facts sufficient in law to defeat the relator's right . . . . In the State of Delaware the common law rule prevails that the return of the alternative writ is conclusive and is to be taken as true for the purpose of the case. *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. 379, 385-86, 77 A. 16, 19 (1910), quoting WOOLLEY, DELAWARE PRACTICE § 1662.

23. *See cases cited note 22 supra.*

24. *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. 570, 581, 101 A. 433, 437 (Super. Ct. 1917); *see note 22 supra.*

should arise would be heard and determined by the superior court.<sup>25</sup> In this manner the superior court was vested with the power to look to the facts to ascertain the propriety of an inspection-demand.<sup>26</sup>

#### “PROPER PURPOSE” AS AN ELEMENT OF MODERN INSPECTION STATUTES

Modern inspection statutes have moved away from the absolute language of the early statutes and expressly condition the right of inspection upon a showing of at least a “proper purpose.” Some of the state statutes, as interpreted, provide for two classes of shareholders, who are treated differently for the purposes of deciding which party has the burden of establishing the propriety or impropriety of the inspection.<sup>27</sup> If the shareholder making the demand is a record holder of stock for a certain amount of time or holds a certain percentage of the outstanding stock, then once he alleges a proper purpose, the burden shifts to the corporation to establish that an improper purpose is really present. If the shareholder does not meet either the percentage or time requirement, then his burden remains as it was under the common law of inspection,<sup>28</sup> and he must establish the propriety of his purpose.<sup>29</sup> Such restrictions appear to be aimed at assuring that a legitimate purpose related to the shareholder’s interest in his capacity as a shareholder is present.

The purpose for the inspection of corporate records, including stocklists, is, therefore, the decisive factor in determining whether the inspection will be granted to a shareholder. Early English common law required that there be a particular controversy or dispute before the right of inspection would be granted, and then it was only granted for the purposes of that particular dispute.<sup>30</sup> Most American

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25. DEL. CODE ANN. tit. 10, § 564 (1953).

26. For an application of the amended statute, see *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170 (Super. Ct. 1931).

27. E.g., N.Y. BUS. CORP. LAW § 624 (McKinney 1963); ORE. REV. STAT. § 57.246 (1953). The Model Act, on which many recent state corporations acts have been based, requires that in order to inspect, the shareholder must have been of record for at least six months immediately preceding his demand or be a holder of record of at least 5 percent of all the outstanding shares of the corporation. Under the Model Act, the burden is on the requesting party to state the purpose for which it is requested, and it must be for a “proper purpose” at a reasonable time. ABA-ALI MODEL BUS. CORP. ACT § 46 (1960).

28. See text accompanying note 12 *supra*.

29. ABA-ALI MODEL BUS. CORP. ACT § 46 (1960). See generally *Rosentool v. Bonanza Oil & Mine Corp.*, 221 Ore. 520, 352 P.2d 138 (1960).

30. *King v. Master & Wardens of Merchant Tailor’s Co.*, 2 Bar. & Ad. 114, 109 Eng. Rep. 1086 (K.B. 1831); *Regina v. Saddlers’ Co.*, 10 Week. Rptr. 87 (C.P. 1861).

courts have never held that a dispute need be shown but instead have looked to the interests of all the shareholders, rather than to those of just the demandant.<sup>31</sup> Generally the courts have found that it is a proper purpose to gain access to a shareholder list for communication with other shareholders concerning corporate business. Particular types of communication for which inspection has been granted are: solicitation of proxies or influencing voting in anticipation of a shareholders' meeting;<sup>32</sup> solicitation of shareholders to join in a derivative suit;<sup>33</sup> dissemination of information concerning a proposed merger;<sup>34</sup> formation of a protective committee of preferred shareholders;<sup>35</sup> and solicitation to buy shares of the company's stock from other shareholders.<sup>36</sup> Purposes which have been found to be improper include curiosity,<sup>37</sup> harassment,<sup>38</sup> and the sale of shareholders' lists as a business.<sup>39</sup> Furthermore,

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31. See *Fulle v. White Metal Mfg. Co.*, 13 N.J. Misc. 591, 180 A. 231 (Sup. Ct. 1935): "[I]nspection of the books of a corporation . . . will be ordered only when 'a case is presented which indicates not only a *bona fide* desire to safeguard the interests of all stockholders but a probability that the interests of all will be served by the proposed investigation.'" *Id.* at 592, 180 A. at 231 (emphasis added, citations omitted).

32. A shareholder may contact other shareholders regarding a corporate meeting for the election of directors, seek proxies to change the management, discuss a suit against directors for mismanagement, enlist aid in enjoining a proposed sale of corporate assets, solicit proxies favoring the election of a new management opposed to or in favor of a proposed merger, discuss a plan of recapitalization, enlist support in enforcing the shareholders' right to dividends, or solicit proxies for the purpose of gaining control of the upcoming meeting. 5 FLETCHER § 2223.

33. *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235 (Super. Ct. 1941).

34. *Hanrahan v. Puget Sound Power & Light Co.*, 332 Mass. 586, 126 N.E.2d 499 (1955).

35. *Kahn v. American Cone & Pretzel Co.*, 365 Pa. 161, 74 A.2d 160 (1950).

36. *E.L. Bruce Co. v. State ex rel. Gilbert*, 51 Del. 252, 144 A.2d 533 (1958); *Florida Tel. Corp. v. State ex rel. Peninsular Tel. Co.*, 111 So. 2d 677 (Fla. 1959); *Crouse v. Rogers Park Apt.*, 343 Ill. App. 319, 99 N.E.2d 404 (1951). *But see Laidlaw & Co. v. Pacific Ins. Co.*, 52 Misc. 2d 122, 275 N.Y.S.2d 125 (Sup. Ct. 1966). The *Laidlaw* court held that a solicitation for sale of stock would not benefit either the company or the shareholders and therefore denied inspection. This decision has been criticized for adopting too narrow a view of "benefit." See Weeks, *Business Associations*, 19 SYRACUSE L. REV. 353, 354-55 (1968). In his criticism, the author states that the court mistakenly concluded that personal gain and corporate benefit were never the same, a conclusion which would be contrary to the very basis on which most businesses are founded. The author viewed proper purpose as being shown by an argument that better management might result from the acquired shares. In any event, the denial to inspection in such case might be more disruptive to corporate life than the alternative of a proxy contest. *Id.* at 355.

37. 5 FLETCHER § 2226.1.

38. *Id.* § 2226.4.

39. See *General Time Corp. v. Talley Indus.*, 43 Del. Ch. 531, 533, 240 A.2d 755, 756 (Sup. Ct. 1968); *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773 (1922); *Eaton v. Manter*, 114 Me. 259, 95 A. 948 (1915).

commentators and court dicta express the view that courts should refuse to enforce the right of inspection where the purpose involves an unlawful scheme of the demandant.<sup>40</sup>

Courts for the most part have purported to view all the facts and circumstances to see if the demand of the shareholder seeking inspection was made in good faith or whether there was an ulterior purpose behind the demand.<sup>41</sup> However, even if there is a strong possibility that the shareholder may use the list for an improper purpose, such as for commercial reasons,<sup>42</sup> inspection will be granted if an otherwise proper purpose has been established.<sup>43</sup> Nor is the fact that a shareholder is a business competitor or in control of a competing corporation a defense to inspection if an otherwise proper purpose is shown.<sup>44</sup>

Recent Delaware decisions have allowed inspection of the stock ledger by a shareholder for purposes which were alleged by the defendant corporation to be in furtherance of an illegal conspiracy. The new Delaware statute requires only that a proper purpose be alleged by the demandant and defines such purpose as one reasonably related to the shareholder's interest as a stockholder.<sup>45</sup> It also places the burden of proof on the corporate officers to establish that the inspection is really for an improper purpose.<sup>46</sup> The Delaware courts appear to be refusing to go behind the pleadings to determine if there is an improper purpose motivating the request for inspection.

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40. *E.g.*, *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 520, 115 A. 773, 776 (1922); *Morris v. Broadview, Inc.*, 385 Ill. 228, 235, 52 N.E.2d 769, 771 (1944); *Annot.*, 15 A.L.R.2d 11 (1951).

41. *See Newman, supra* note 8, at 459.

42. *See cases cited note 39 supra.*

43. *Hanrahan v. Puget Sound Power & Light Co.*, 332 Mass. 586, 126 N.E.2d 499 (1955) (inspection granted to a securities dealer); *Morris v. United Piece Dye Works*, 137 N.J.L. 262, 59 A.2d 660 (Sup. Ct. 1948); *Bundy v. Robbins & Myers, Inc.*, 38 Ohio Op. 77, 75 N.E.2d 717 (Ct. App. 1947).

44. *E.L. Bruce Co. v. State ex rel. Gilbert*, 51 Del. 252, 144 A.2d 533 (1958); *Mayer v. Cincinnati Economy Drug Store*, 89 Ohio App. 512, 103 N.E.2d 1 (1951).

45. DEL. CODE ANN. tit. 8, § 220 (Supp. 1968) provides that "[a]ny stockholder . . . shall upon written demand under oath stating the purpose thereof, have the right . . . to inspect for any proper purpose the corporation's stock ledger . . . . A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder."

The statute does not require a minimum amount of time for which the shareholder must be a record holder, nor is there a requirement that the demandant be a record owner of a certain percentage of stock in order to exercise the right of inspection. *Compare* text accompanying notes 28-29 *supra*.

46. DEL. CODE ANN. tit. 8, § 220(c) (Supp. 1968). The burden is on the shareholder seeking inspection to establish his proper purpose for inspection of corporate books and records other than its stocklist. *Id.*

In *General Time, Corp. v. Talley Industries*,<sup>47</sup> a record shareholder of General Time, Talley Industries, on being denied access to General Time's stock ledger by its officers, instituted suit under the Delaware statute. The stated purpose for the inspection was the solicitation of proxies to be used to oust the management of General Time.<sup>48</sup> Suspecting that Talley's purpose for the inspection was a preliminary step in a move to acquire control of General Time, the General Time directors sought to defeat the right of access to its shareholder list by establishing that although the stated purpose of Talley was proper, it had other purposes which were improper and illegal. In order to establish violations of the Securities Exchange Act of 1934<sup>49</sup> and the Investment Company Act of 1940,<sup>50</sup> General Time sought to have the president of Talley answer questions directed at proving that Talley had purchased its shares of General Time and sought to acquire control of General Time by unlawful means.<sup>51</sup> The Talley president refused to answer the questions on the grounds that they were not directed to the primary purpose for which the list was desired, the solicitation of proxies to oust General Time's management. The Delaware Supreme Court sustained the president's refusal to answer stating that it would not look at the facts to see if Talley had a further improper purpose abetted by illegal action. The court stated that any secondary purpose in seeking the list was totally irrelevant once the shareholder had established that he was a record shareholder and his primary purpose was reasonably related to that status.<sup>52</sup>

Even though it has been generally held by courts and commentators that inspection will not be granted for illegal purposes,<sup>53</sup> the *General Time* court adopted a reasonable view in allowing inspection even though it was alleged by the defense that Talley had violated federal securities laws. At the time of the state

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47. 43 Del. Ch. 531, 240 A.2d 755 (Sup. Ct. 1968).

48. *Id.* at 532, 240 A.2d at 756.

49. 15 U.S.C. §§ 78j(b), 78p(a) (1964).

50. 15 U.S.C. §§ 80a-13, 80a-17 (1964).

51. The questions asked of Talley's president were: (1) What other persons or entities, known to the officers of Talley Industries, owned stock in General Time; (2) whether the funds with which Talley Industries purchased General Time stock were borrowed; and (3) whether Talley Industries wanted a merger with General Time, and, if so, when was the idea first conceived. 43 Del. Ch. at 532-33, 240 A.2d at 756.

52. 43 Del. Ch. at 533, 240 A.2d at 756.

53. See note 40 *supra* and accompanying text.

court action to gain access to General Time's stocklist, a General Time action was pending against Talley in a United States District Court in New York<sup>54</sup> which charged Talley with the same violations of the Securities Exchange Act and Investment Company Act that General Time attempted to use as a defense to Talley's right of inspection. It had been held in Delaware that a state court should not adjudicate issues arising under the Securities Exchange Act and the associated regulations.<sup>55</sup> Therefore, if the Delaware court had refused inspection simply because of alleged illegal action which could not be adjudicated on the merits in its courts, the shareholder's right of inspection would have been defeated by the mere allegation of a federal securities law violation even though the federal court adjudication might later exonerate the demandant.<sup>56</sup> Clearly such a result was not intended by the legislature when "proper purpose" was codified in the Delaware corporate statute.<sup>57</sup> The alleged

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54. 43 Del. Ch. at 533 n.\*, 240 A.2d at 756 n.\*. See note 56 *infra*.

55. *American Hardware Corp. v. Savage Arms Corp.*, 37 Del. Ch. 59, 136 A.2d 690 (Sup. Ct. 1957); *Standard Power & Light Corp. v. Investment Associates*, 29 Del. Ch. 593, 606, 51 A.2d 572, 579 (Sup. Ct. 1947). These decisions were based upon section 27 of the Securities Exchange Act of 1934 calling for exclusive jurisdiction in federal tribunals. 15 U.S.C. § 78aa (1964). See 3 L. Loss, *supra* note 9, at 2005.

56. When Talley's alleged violations of federal securities law were finally litigated in the federal courts, it was found that there had been no violation of the 1934 Act for false or misleading statements in proxy materials. *General Time Corp. v. Talley Indus.*, 403 F.2d 159 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969). But a violation was found of section 17(d) of the Investment Company Act of 1940, 15 U.S.C. §§ 8a-17(d) (1964), which was enacted to protect the shareholders of underwriters. *SEC v. Talley Indus.*, 399 F.2d 396 (2d Cir. 1968), *cert. denied*, 393 U.S. 1015 (1969). However despite the violation, there was no reason to declare void the election at the shareholders' meeting of General Time where a slate nominated by Talley had won election, since the election had no detrimental effect upon the underwriter's shareholders. *SEC v. General Time Corp.*, 407 F.2d 65, 67 (2d Cir. 1968), *cert. denied*, 393 U.S. 1026 (1969). Thus if the Delaware court had not allowed inspection, a statutory right would have been denied even though the claim of an improper, illegal purpose adversely affecting the interests of shareholders could not be sustained. The situation would be similar to that which existed when the Delaware courts would not look to the substance of a return to a writ of mandamus and would disallow inspection on a mere allegation of improper purpose. See text accompanying notes 21-24 *supra*.

57. See *Pacific Ins. Co. v. Blot*, 267 F. Supp. 956 (S.D.N.Y. 1967). Plaintiff corporation in a federal forum asserted that the defendant had acquired shares of the corporation stock in transactions which violated § 10 of the Securities Exchange Act and rule 10b-5. It asked for an injunction against defendant "using or relying" on any such shares "for the purpose of compelling the disclosure of the stock records of plaintiff corporation in a proceeding in a New York state court." In allowing inspection, the court stated that even if his purchase violated the Act it "seems unnecessarily drastic and potentially unsettling for the securities markets and corporate affairs" not to allow inspection under a state created right. 267 F. Supp. at 958 (citing *Amicus Curiae Memorandum of the SEC* at p. 10).

violation of federal securities law is collateral to the inspection proceeding and was correctly viewed as such by the Delaware court.<sup>58</sup> There are other forums available to adjudicate the alleged violations and other remedies if the alleged violations were found to exist which would fully safeguard those interests which the federal statutes were designed to protect.<sup>59</sup>

In *Northwest Industries v. B.F. Goodrich Co.*,<sup>60</sup> the Delaware Supreme Court upheld Northwest's refusal to allow Goodrich access to its stocklist. The court's rationale was not that Goodrich's purpose was improper but that the request for inspection was not specific enough on its face. Four days after acquiring shares in Northwest, Goodrich sought access to Northwest's stocklist for the stated purpose of enabling Goodrich "to communicate with the [Northwest] stockholders . . . with reference to a special meeting of the stockholders of the company."<sup>61</sup> The request was denied by Northwest on the grounds that the actual purpose was to block an impending takeover by Northwest and keep its incumbent management in office. The chancery court, relying on *General Time*, granted inspection holding that to communicate with stockholders was a "proper purpose," and therefore the existence of a secondary purpose was irrelevant.<sup>62</sup> Without viewing the propriety of the purpose, the Delaware Supreme Court reversed on the grounds that Goodrich in its demand for inspection did not state the substance

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58. *Cf. Trans World Airlines, Inc. v. State ex rel. Porterie*, 54 Del. 582, 183 A.2d 174 (1962). See also *State ex rel. Armour & Co. v. Gulf Sulphur Corp.*, 233 A.2d 457 (Del. Super. Ct. 1967).

59. If in such a federal court proceeding it was found that the allegations were true, the court could enjoin demandant from soliciting proxies or taking any other action which the court might deem to be in furtherance of the illegal conspiracy. See generally 2 L. Loss, *supra* note 9, at 931-73.

See also *SEC v. National Sec., Inc.*, 393 U.S. 453 (1969), holding that the merger of two insurance companies, allegedly accomplished through false and misleading proxy statements, could be challenged under the anti-fraud provision of § 10(b) of the Securities Exchange Act and rule 10b-5; *Electronic Specialty Co. v. International Controls Corp.*, 409 F. 2d 937, 946 (2d Cir. 1969), allowing a target corporation standing to seek judicial relief for alleged violations of the Securities Exchange Act of 1934 by an acquiring corporation in a cash tender offer, thereby allowing management to fight a tender offer with stockholders' money.

If a proxy statement fails to disclose intent to liquidate assets after the merger and the extent to which liquidation value exceeded the going-concern value, then it is in violation of the anti-fraud provision of the Securities Exchange Act, and a minority stockholder can bring the action. *Gerstle v. Gamble-Skogmo, Inc.*, 298 F. Supp. 66 (E.D.N.Y. 1969).

60. 260 A.2d 428 (Del. Sup. Ct. 1969).

61. *Id.*

62. *Id.* at 429; see *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855 (Del. Ch. 1969).

of its intended communication in a manner sufficient to enable Northwest or the courts to determine whether there was a reasonable relationship between its purpose and Goodrich's interest as a shareholder.<sup>63</sup> The court reasoned that it would be "difficult, if not impossible" for Goodrich to show such a relationship within so few days after acquiring its stock in Northwest.<sup>64</sup>

The chief justice dissented<sup>65</sup> concluding that the Delaware inspection statute "gives a practically absolute right of inspection"<sup>66</sup> and that to "communicate with his fellow stockholders" is a purpose germane to the status of a shareholder. He felt that the length of time Goodrich held its stock before making the demand was immaterial.

Despite the fact that the purpose for which Goodrich sought inspection was apparent to both the defendant corporation and the court,<sup>67</sup> the supreme court's emphasis on the substance of the demand is justifiable if it is viewed only as instructing the Delaware bar on the proper form in which a demand for inspection should be made under the new corporation statute.<sup>68</sup>

As for the supreme court's dicta concerning the obvious difficulty of establishing a proper purpose in such a short time lapse,<sup>69</sup> the court appears to have misread the legislative intent behind the inspection provision. The Delaware legislature

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63. 260 A.2d at 429.

64. *Id.*

65. *Id.*

66. *Id.*

67. *But cf.* The Wall St. Journal, Feb. 4, 1969, at 2, cols. 2-3.

In another development yesterday, Goodrich announced that "as a stockholder of Northwest" it is asking for a list of holders so it can communicate with them "with reference to a special stockholders meeting." A Goodrich spokesman declined to say how much Northwest stock Goodrich owns *or precisely why the company* wants the list. This left it unclear whether Goodrich would seek to call a Northwest stockholder meeting itself or was referring to a special meeting Northwest has said it will call to vote on a 3-for-1 stock split and additional shares to implement the offer for Goodrich. *Id.* (emphasis added).

68. Before the 1967 enactment, the Delaware inspection statute did not on its face require an allegation of a proper purpose in order to gain access to the stocklist. See note 14 *supra*.

The chancellor in *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 857-58 (Del. Ch. 1969) (discussed *infra* notes 74-95 and accompanying text), commented upon the need to be able to dispose of a case simply by viewing the affidavit: "[the inspection provision] contemplates summary proceedings and the accelerated scheduling of cases under it emphasizes prompt processing and disposition . . . Administration of the statute will present special difficulties if the 'purpose' clause permits open-end litigation."

69. See text accompanying note 64 *supra*.

deliberately chose not to include a time period which must elapse in order for a shareholder to demand inspection, despite the fact that the Model Act,<sup>70</sup> which the legislature used as the basic framework of their corporate act,<sup>71</sup> contained such a provision. Although the first four drafts of the proposed inspection statute by the Delaware Corporate Law Revision Committee called for the burden of proof to be entirely upon the shareholder in establishing a proper purpose,<sup>72</sup> the statutory language as finally enacted clearly shows that the legislature intended to place the burden of proof upon the resisting corporation to establish that the inspection of the stock ledger was for an improper purpose once the shareholder has complied with the provisions of the statute respecting the form and manner of making the demand.<sup>73</sup>

*Mite Corp. v. Heli-Coil Corp.*,<sup>74</sup> demonstrates how inspection of another corporation's stocklist can be used for broad defensive, as well as offensive, purposes in battles over corporate acquisitions and control. In order to acquire control of Heli-Coil, Mite wanted to solicit offers from other Heli-Coil shareholders to exchange their stock for Mite stock. A day after becoming the registered owner of 100 Heli-Coil shares, Mite demanded access to Heli-Coil's stock ledger and stocklist. Heli-Coil countered by acquiring 100 shares of Mite and nine days later making a similar demand for inspection of the stocklist of Mite. Each corporation resisted the other's demand, resulting in an action being brought in the chancery court to compel inspection. The chancellor held that each corporation could examine the stocklist of the other.<sup>75</sup>

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70. ABA-ALI MODEL BUS. CORP. ACT § 46 (1960).

71. See Arsht & Stapleton, *Delaware's New General Corporation Law: Substantive Changes*, 23 BUS. LAW. 75 (1967); Canby, *Delaware's New Corporation Law*, 39 PA. B. ASS'N Q. 380 (1968); Note, *The New Delaware Corporation Law*, 5 HARV. J. LEGIS. 413 (1968).

72. See Delaware General Corporation Law (draft no. 4, May 6, 1965).

73. DEL. CODE ANN. tit. 8, § 220 (Supp. 1968). It is also interesting to note that the fact that General Time made its demand for access to the list the same day it became a record stockholder was not even mentioned by the supreme court as being relevant in its opinion in *General Time*. See Memorandum in Opposition to Application for an Order Compelling Inspection, *Talley Indus. v. General Time Corp.*, No. 34 (Del. Ch. Mar. 18, 1968). See also *Trans World Airlines, Inc. v. State ex rel. Porterie*, 54 Del. 582, 183 A.2d 174 (1962), granting inspection to a record owner of stock even though he had purchased the stock 13 days before the demand for the sole purpose of communicating with the other stockholders about a pending suit.

74. 256 A.2d 855 (Del. Ch. 1969).

75. *Id.*

Mite's avowed purpose for demanding access to the stocklist was to communicate with other shareholders of Heli-Coil in order to solicit offers to exchange their stock for stock of Mite.<sup>76</sup> Relying on an earlier Delaware decision,<sup>77</sup> the chancellor found this to be a proper purpose. He viewed as irrelevant the fact that Mite's shares in Heli-Coil allegedly had not been registered under federal securities law<sup>78</sup> and that Mite had admittedly acquired the 100 Heli-Coil shares solely to enable it to demand inspection of Heli-Coil's stocklist for the purpose of acquiring control of the corporation.<sup>79</sup> The chancellor stated that, if the purpose is proper, "[i]t is not made improper because the first shares were purchased as a prelude to a demand of the list"<sup>80</sup> or because Mite may have violated some federal law in acquiring the stock.<sup>81</sup> The sole determining factors were that Mite was a record holder of Heli-Coil stock and that inspection of the stocklist was demanded for a proper purpose.

As for the Heli-Coil counterclaim, the shareholder's stated purpose was communication with other shareholders of Mite in "connection with the Exchange Offer to be submitted for approval at a special meeting of Mite Corporation stockholders . . . ."<sup>82</sup> Since he viewed this purpose as proper, the chancellor did not consider the substance of Mite's defense but simply held that it was irrelevant that Heli-Coil's real purpose in demanding access to Mite's stocklist may have been to frustrate Mite's takeover bid, although apparently viewing such a purpose as improper. The

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76. *Id.* at 856.

77. *E.L. Bruce Co. v. State ex rel. Gilbert*, 51 Del. 257, 144 A.2d 533 (1958).

78. 256 A.2d at 856, citing *Kerkorian v. Western Air Lines, Inc.*, 253 A.2d 221 (Del. Ch.), *aff'd* 254 A.2d 240 (Del. 1969) and *General Time Corp. v. Talley Indus.*, 43 Del. 531, 240 A.2d 755 (1968). This holding was proper since it could not be determined by the chancellor whether a violation of federal securities law did in fact occur. See notes 55-59 *supra* and accompanying text.

79. 256 A.2d at 856. Desiring to acquire control should not be viewed as an improper purpose. See note 36 *supra*. In *Florida Tel. Corp. v. State ex rel. Peninsular Tel. Co.*, 111 So. 2d 677 (Fla. 1959), the court quite properly pointed out that "protection of [the shareholder's] interest by purchasing additional stock is a perfectly legitimate enterprise . . . . *The desire to gain control is repugnant only to those seeking its retention . . . .*" *Id.* at 681 (emphasis added). It may well be in the best interest of the shareholders to have new management, since takeover bids are usually preceded by "mismanagement." See note 98 *infra*. The court in *Laidlaw & Co. v. Pacific Ins. Co.*, 52 Misc. 2d 122, 275 N.Y.S.2d 125 (Sup. Ct. 1966), apparently lost sight of the purpose of inspection statutes when it found that gaining control of a corporation was an "improper" purpose. See note 36 *supra*.

80. 256 A.2d at 856.

81. *Id.* See text accompanying notes 53-59 *supra*.

82. 256 A.2d at 857.

chancellor reasoned that once a proper purpose for the inspection of the stock records was established, then all other alleged purposes, whether primary or secondary, were irrelevant.<sup>83</sup>

In reaching its decision in *Mite*, the chancellor properly ignored the dicta in *Northwest Industries* concerning the amount of time a demandant must hold its stock, since the legislature clearly did not intend such a requirement.<sup>84</sup> He found instead that there was enough substance on the face of both demands to show a reasonable relationship between the purpose and an interest as a shareholder. Both *Mite* and *Heli-Coil* stated the *purpose* of the desired communication with the other shareholders, not merely the desire to communicate as Goodrich had done in *Northwest Industries*.<sup>85</sup>

Although the holding in *Mite* allowing both corporations the right of inspection appears sound, the chancellor based his decision upon an erroneous interpretation of the statute. The chancellor seems to have overlooked the theory behind the right of inspection. Inspection statutes are designed primarily to protect the interests of the shareholders and to keep them informed of corporate activity which may affect them.<sup>86</sup> Inspection should not be granted if the shareholders' interests obviously would be hurt by the inspection even if a proper purpose appears on the face of the demand. Although the chancery should accept a presumption that the stated purpose for the inspection is the primary or real purpose, it should be willing to hear evidence that it is not. For example, if the stated purpose for the demand is to communicate with other shareholders concerning the ousting of the present directors for allegedly illegal action, the court might accept the presumption that such purpose, being proper, is the real purpose for inspection. However, if the corporation attempting to defeat the inspection is able to show that a similar request has been made 20 times in the previous two months by the same disgruntled shareholder, then the court should exercise its discretionary equitable powers and look to the substance of the defense that the real and primary purpose is harassment and refuse the right of inspection.<sup>87</sup> The same result would follow if the corporation can establish that the primary purpose of inspection is

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83. *Id.* at 858.

84. See notes 69-73 *supra* and accompanying text.

85. Compare text accompanying note 82 *supra* with text accompanying note 61 *supra*.

86. See generally H. BALLANTINE, *supra* note 10, §§ 159-60; 5 FLETCHER §§ 2213, 2215; 2 G. HORNSTEIN, *supra* note 9, §§ 611-12 (1959).

87. Cf. *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. 570, 101 A. 433 (1917).

to aid a competitor or to sell the list. This rationale would also be consistent with the holding in *General Time* since the Delaware courts are unable to consider evidence dealing with the truthfulness of alleged violations of federal securities law which would probably preclude the defendants from introducing evidence on this point.<sup>88</sup> The chancellor in *Mite*, however, was of the view that inspection should be granted if the demandant merely makes an allegation of proper purpose. If inspection is granted solely on such an allegation, then the court is in effect making the right of inspection an absolute one, since a proper purpose can seemingly always be alleged by a demanding party. It appears clearly contrary to legislative intent to allow such a practice since the drafters stated that inspection was to be granted for a "proper purpose." It would indeed be ironic if under Delaware's new corporation statute requiring "proper purpose," an absolute right of inspection resulted, while under the former Delaware statute, which on its face gave an absolute right,<sup>89</sup> the right was conditional upon a proper purpose which was determined by the court looking behind the pleadings.<sup>90</sup>

Although the chancellor indicated in dicta that Heli-Coil's primary purpose of frustrating Mite's takeover bid might be an improper one,<sup>91</sup> he nevertheless granted inspection since a proper purpose was alleged on the face of the demand by Heli-Coil. Even if the primary purpose of Heli-Coil's communication with Mite's shareholders was to frustrate Mite's takeover bid, such a purpose should not be viewed as an improper one. In determining the propriety of purpose, the court should consider the basic rationale and justification for inspection statutes. As previously noted, the purpose of the statutes is to provide for well-informed shareholders.<sup>92</sup> Since the shareholders of Mite must make the determination of whether a merger with Heli-Coil is desirable,<sup>93</sup> Heli-Coil's communication to them concerning the value of the merger would be in their best interests since a view would be expressed which would point out the disadvantages of such a merger—views that the Mite

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88. See text accompanying notes 53-59 *supra*.

89. See note 14 *supra*.

90. See text accompanying notes 18-26 *supra*.

91. 256 A.2d at 857-58.

92. See note 86 *supra* and accompanying text.

93. All jurisdictions require that a plan of merger be approved by the shareholders. 2 FLETCHER § 544 n.55. See also 15 *id.* chs. 61-62.

directors would have no incentive to elucidate.<sup>94</sup> To prevent a target corporation from obtaining the shareholder list of the aggressor in order to effectively present its position is not in harmony with the right of shareholders to be appraised of the positions of competing groups.<sup>95</sup> Therefore, the attempt to foil a takeover bid by presenting unfavorable aspects of the proposed merger should be viewed as a proper purpose to obtain shareholder lists.

Inspection should be allowed by a shareholder wishing to communicate with other shareholders concerning a possible takeover since the protection the shareholder needs against misleading statements resulting from such communication is provided by other means. The Securities Exchange Act of 1934 and its new Williams Amendment<sup>96</sup> requires that the shareholders be given the facts from which to make a determination on the merits of a merger by providing for full, fair, and complete disclosure of the pertinent facts in connection with a tender offer, or a request or invitation for tender, or proxy, or any other solicitations of security holders. If a corporation is attempting a takeover, it is required to issue a statement which describes any plans or proposals to liquidate the target of the takeover, or merger of it into another, or to sell its assets to another corporation, or to make any other major changes in its business or corporate structure.<sup>97</sup> Thus, the shareholder is presented accurate information from which he personally is able to determine his course of action concerning his shares after viewing the

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94. Creating conglomerates tends to increase stock prices long before it increases the economic values on which those prices ultimately depend. In 1967 the average aggressor corporation paid 18 times earnings for the average target, and in 1968, 27 times earnings. Burck, *supra* note 1, at 80.

95. Cf. *Trans World Airlines, Inc. v. State ex rel. Porterie*, 54 Del. 582, 586, 183 A.2d 174, 176 (1962); *Murchison v. Alleghany Corp.*, 27 Misc. 2d 290, 297, 210 N.Y.S.2d 153, 160 (Sup. Ct. 1960), *aff'd* 12 App. Div. 2d 753, 210 N.Y.S.2d 975 (1961).

96. A proxy fight is subject to the regulations promulgated by the SEC under section 14 of the 1934 Act, 15 U.S.C. § 78n (Supp. IV, 1969).

A public exchange offer requires registration of the offered security under the Securities Act of 1933 and advance filing of a prospectus which subsequently must be given to persons being requested to tender their shares for exchange. 15 U.S.C. § 77f (1964).

Regulation of cash tender offers (the "Williams Amendment") came under sections 13 and 14 of the 1934 Act, 15 U.S.C. §§ 78m(d)-(e) & 78n(d)-(f) (Supp. IV, 1969). See *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969).

The fact that these provisions are limited to securities that are registered under the Exchange Act may encourage companies that expect to be the target of a takeover to voluntarily register their securities under the Exchange Act, 15 U.S.C. § 78f (Supp. IV, 1969).

97. 15 U.S.C. § 78m(d)(e); see S. REP. No. 550, 90th Cong., 1st Sess. 3-4 (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. 3-4 (1968); Hamilton, *supra* note 4, at 273-74, 278-85.

facts on both sides. Due to the major consequences which a merger could produce, this decision is one which the shareholder should make, and not the officers of his corporation by attempting to make it impossible for the corporation seeking to gain control to contact the target corporation's shareholders.<sup>98</sup>

An increased concentration of corporate assets and business power is believed by some to be a development against which policy instruments should be brought to bear.<sup>99</sup> However, if that is one's inclination, then it should be done by legislation aimed at dealing with the conglomerate merger rather than by judicial construction of the shareholder inspection statutes to prevent takeover bids as some courts have done.<sup>100</sup> Such construction is inconsistent with these statutes' purpose to insure free disclosure for the protection of the shareholder interests. This protection is not afforded by rejecting a request for inspection on the grounds that it is designed to aid in a corporate takeover which may in fact prove beneficial to the corporation, nor is it afforded by refusing to investigate allegations of possibly harmful motives on the basis that "if a plaintiff established a proper purpose then all others are irrelevant."<sup>101</sup>

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98. Studies have concluded that takeover bids have often been invited by mismanagement of the target company. D. AUSTIN, *PROXY CONTESTS AND CORPORATE REFORM* (Bureau of Business Research, U. Mich., Mich. Bus. Rep. No. 47 (1965)); Taussig & Hayes, *Are Cash Take-Over Bids Unethical?* FINANCIAL ANALYST J., Jan.-Feb. 1967 at 107, 108-09.

99. *Hearings on S. Res. 40 Before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. pt. 2, at 817-30 (1965). Attorney General Mitchell stated that "never has there been a more urgent need for vigorous enforcement of our antitrust laws," *The Wall St. Journal*, Mar. 28, 1969, at 4, cols. 1-2, because "I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers." VITAL SPEECHES OF THE DAY, July 15, 1969, at 592-93; Richard McLaren, the head of the Antitrust Division, feels the need to stop the "current accelerated trend towards concentration by merger and . . . the severe economic and social dislocations attendant thereon." *BUS. WEEK*, Mar. 15, 1969, at 38. See also Burck, *supra* note 1, at 79.

100. See note 79 *supra*.

101. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 858 (Del. Ch. 1969).

