MINORITY SHARES UNDER THE LOUISIANA BUSINESS CORPORATION ACT: EXPULSION, OPPRESSION, AND FIDUCIARY DUTY

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I. EXECUTIVE SUMMARY

The enactment of the Louisiana Business Corporation Act of 2014 (BCA), effective January 1, 2015, revolutionized the treatment of minority shareholders under Louisiana law. This Article analyzes those changes in depth.

A. LOUISIANA BUSINESS CORPORATION LAW 1968–2014

Between 1968 and 2014, corporations were governed by the Louisiana Business Corporation Law (LBCL). Neither the LBCL nor Louisiana case law afforded minority shareholders a remedy for "oppression" by their corporation or its controlling shareholders.[1]

With respect to dissenters' rights under the LBCL, non-consenting shareholders were entitled to demand the judicially-determined "fair cash value" of their shares in only two situations: (1) when less than 80% of the total voting power approved a merger or sale of all assets, or (2) in the case of a short-form merger when the subsidiary was at least 90% owned by the parent company.

1. Glenn G. Morris, *Model Business Corporation Act as Adopted in Louisiana*, 75 LA. L. REV. 983, 1020 (2015) (stating that there was no oppression remedy under Louisiana law prior to the BCA and quoted with approval by the court in *Woodard v. Woodard Villa, Inc.*, No. 15-1777; 16-1119, 2017 WL 2177898, at *9–10 (W.D. La. May 16, 2017).

LBCL § 131 unconditionally prohibited courts from staying a proposed corporate action for which dissenters' rights were available; further, it did not make clear whether "fair cash value" meant before or after discounts for minority and lack of marketability, and it did not provide for dissenters' rights with respect to a reverse share split or merger or asset sale approved by 80% or more of the total voting power.[2] It also did not authorize corporations to offer elective dissenters' rights with respect to charter amendments, require the corporation to pay a non-consenting shareholder the amount it conceded to be the fair cash value of the dissenter's shares until after litigation established both the obligation and the amount to be paid, or expressly state that dissenters were entitled to interest.[3]

The LBCL contained no provisions relating expressly to callable common shares. In practice, callable common shares were not issued.

No Louisiana case held that controlling shareholders owed a fiduciary duty to minority shareholders. The LBCL provided that directors owed a fiduciary duty to shareholders, as well as to their corporation,[4] but case law did not address the tension between the directors' duty to shareholders generally versus their duty to the subset of minority shareholders.

Minority shareholder derivative litigation against directors under the LBCL was governed exclusively by case law, which permitted a shareholder to maintain a derivative proceeding without prior demand on the directors for action, provided the plaintiff named the entire board as defendants.[5]

B. LOUISIANA BUSINESS CORPORATION ACT OF 2014

The BCA is based on the 2010 version of the Model Business Corporation Act (MBCA). It applies to all existing Louisiana corporations. The BCA expressly authorizes the issuance of callable common shares. It enacted the MBCA's highly articulated regime governing fiduciary duty and derivative proceedings to which directors and officers are subject, a novel remedy for oppressed minority shareholders, and the MBCA's

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2. LA. STAT. ANN. § 12:131 (2010) (repealed 2014).
3. *Id.*
4. LA. STAT. ANN. § 12:91 (2010) (repealed 2014).
5. GLENN G. MORRIS & WENDELL H. HOLMES, BUSISNESS ORGANIZATIONS § 34:11, *in* 8 LOUISIANA CIVIL LAW TREATISE 261 (2d ed. 2017)

enhanced appraisal rights for shareholders who elect not to consent to certain shareholder-approved corporate actions.[6]

This Article analyzes the relationship between Expulsion Transactions and appraisal rights, compares Expulsion Transactions with the unique BCA shareholder oppression remedy, and addresses the fiduciary implications of both.[7]

Unlike the LBCL, the BCA authorizes the creation of callable common shares, which can be used as an Expulsion Technique. Because callable common shares are an unfamiliar form of security, Part III of this Article explores the nature and history of callable common shares in general, the BCA's authorization of callable common shares, and the extent to which a charter amendment imposing a call right de novo on a sole common class is enforceable against the holders of outstanding shares.

Also, unlike the LBCL, the BCA authorizes a corporation at its option to provide in its charter, bylaws, or a board resolution that a shareholder is entitled to appraisal rights where not otherwise required by law. This Article argues that a call right imposed de novo by charter amendment on all shares of a single class of common shares is enforceable against non-consenting holders of outstanding shares, provided the corporation offers statutory appraisal rights with respect to the adoption of the charter amendment.

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6. Richard P. Wolfe, *The Fiduciary Duty of Directors and Officers Under the Louisiana Business Corporation Act of 2014*, 60 LOY. L. REV. 523, 553–69 (2014) (addressing the BCA fiduciary duty regime for directors and officers, which includes complex procedural rules governing derivative shareholder proceedings). Importantly, the BCA enacted a "universal demand" requirement under which a shareholder must make written demand on the board for action in all cases, even if demand would be futile, and wait ninety days before filing any derivative proceeding against a director. This article did not discuss whether (1) controlling shareholders owe any duty to minority shareholders, or (2) directors owe a fiduciary duty to minority shareholders distinguishable from the duty they owe all shareholders generally. Those topics are examined here.

7. The term "Expulsion Transaction" is used in this Article to refer to any involuntary conversion by corporate action of all of a minority shareholder's common shares into cash or property. The term "Expulsion Technique" is used to refer to recognized forms of corporate action by which Expulsion Transactions are implemented. These are the squeezeout merger, the reverse share split, and callable common shares. The unique shareholder oppression remedy enacted by the BCA was reviewed by Professor Douglas K. Moll, a recognized authority on shareholder oppression in closely held corporations. *See* Douglas K. Moll, *Shareholder Oppression and the New Louisiana Business Corporation Act*, 60 LOY. L. REV. 461 (2014).

Part IV discusses the statutory mechanics of the three shareholder Expulsion Techniques recognized by the BCA: squeezeout merger, reverse share split, and callable common shares. It also deals with the history and structure of BCA § 1340, which bars minority shareholder proceedings against a corporation, its directors, or its controlling shareholders in connection with a shareholder-approved corporate action where non-consenting shareholders were entitled to appraisal rights. Unlike the LBCL, BCA § 1340 permits a court, even where appraisal rights were available, to either enjoin prior to or rescind after shareholder approval of a corporate action that was not authorized or approved in accordance with the applicable provisions of Part 10, 11, or 12 of the BCA, the charter, the bylaws, or the authorizing board resolution.[8]

The most notable feature of the BCA appraisal process is that it resolves all dissenters' rights issues that were either adverse to the non-consenting shareholder or ambiguous under the LBCL in favor of the non-consenting shareholder and against the corporation. This change, taken in conjunction with the unique shareholder oppression remedy created by BCA § 1435, substantially enhances minority shareholders' rights and, therefore, their bargaining position as compared to the LBCL.

On the other hand, BCA §§ 1340 and 1435–37 establish a precisely articulated regime governing the availability of new minority shareholder rights.[9] This Article investigates whether these blackletter limitations on new minority shareholder rights will, or should be, interpreted by the courts literally or whether they are subject to a constraining fiduciary duty.

Part V deals with the fiduciary implications—as distinguished from the blackletter law—of (1) the BCA oppression remedy and (2) the three Expulsion Techniques mentioned above, insofar as they relate to minority shareholders as a subset of all shareholders.

Section V(A) reviews the position taken by the MBCA and its Official Comments concerning duties owed by controlling shareholders to minority shareholders. The MBCA neither affirms nor denies such duties and defers to existing Louisiana case law on the subject.

8. LA. STAT. ANN. § 12:1-1340 (2015).
9. LA. STAT. ANN. §§ 12:1-1340, -1435 to -1437 (2015).

Section V(B) examines laws outside of Louisiana that concern duties owed by controlling shareholders to minority shareholders. For a clear analysis, this section organizes the body of case law into four distinct categories and suggests that all four are, in one form or another, addressed by express provisions of the BCA.

Section V(C) discusses pre-2015 Louisiana case law regarding duties owed to minority shareholders. This section argues that prior to enactment of the BCA, controlling shareholders who were not directors (NDC Shareholders) owed no duty as such to minority shareholders. However, prior to 2015, *Duncan v. Moreno Energy, Inc.* recognized a viable cause of action for violation of directorial fiduciary duty to minority shareholders where the plaintiff can establish an independent breach separable from a consummated transaction as to which dissenters' rights were available.[10] Because the analysis adopted by the *Duncan* court is not inconsistent with the BCA, this section explains how courts can apply that same analysis today.

Section V(D) examines the scope of fiduciary duty to minority shareholders under the BCA, taking into account the differences between the BCA and the MBCA. This topic reviews those blackletter provisions of the BCA—considered as a unique version of the MBCA especially tailored for Louisiana—which facially disaffirm any duty to minority shareholders that might otherwise be implied under the MBCA as to either oppression or Expulsion Transactions. The discussion suggests that NDC Shareholders as such owe no fiduciary duty to minority shareholders under the BCA.

Section V(D)(6) proposes that, under the BCA, directors owe a duty to minority shareholders, distinct from the duty they owe all shareholders, only in a limited circumstance: in a transaction, (1) as to which appraisal rights were not available, (2) that is a "Zero-Sum Game,"[11] (3) in which the gains or losses of the majority are exactly balanced by offsetting losses or gains of the minority, (4) where the directors have discretion to determine which shareholders win the Zero-Sum Game, and (5) the exercise

10. Duncan v. Moreno Energy, Inc., 08-786, p. 1 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778.

11. The two principal examples of such a Zero-Sum Game are (1) dissolution implicating a transfer of corporate assets at a bargain price to an affiliate of the majority shareholders, and (2) the issuance to majority shareholders only of additional shares at a price below their fair value.

by the directors of their discretion, however resolved, will not adversely affect the best interests of the corporation.

Finally, Section V(E) describes minority shareholder remedies available under the BCA for breach of directorial fiduciary duty. This section outlines the circumstances under which a corporate action with available appraisal rights may be enjoined prior to shareholder approval or rescinded after consummation, argues that damage claims for oppression are unconditionally barred, and notes that the BCA does not prescribe litigation procedures for non-derivative minority shareholder claims. Part VI recapitulates in greater detail the outline in this Executive Summary.

II. INTRODUCTION

Corporate law can be viewed as a traffic signal operating at the intersection of the law of contract and the law of agency.[12] Under this view, the shareholders of a corporation are conceived as parties to a horizontal contractual relationship, while the directors are regarded as agents in a vertical relationship with the shareholders.

Under the law of contract, all parties must consent to any amendment of their agreement. A corporation's charter (or articles of incorporation) constitutes the notional contract between and among its shareholders as owners of the corporation. Unlike contract law, however, business corporation statutes grant the majority shareholders the right to amend the corporation's charter over the objection of the minority, subject to bright-line statutory rules of public order, which are supplemented by default rules that apply only to the extent shareholders do not affirmatively regulate the amendment right by private ordering in the charter. Contract law also imposes on the contracting parties a mutual duty of good faith and fair dealing, but not a fiduciary duty.

Agency law, on the other hand, views directors as agents of the shareholders. Business corporation statutes confer on directors the authority to exercise all corporate powers and to manage the business and affairs of the corporation. The statutes do not, however, confer on directors the authority reserved to

12. *See generally, e.g.*, Albert H. Choi & Geeyoung Min, *Amending Corporate Charters and Bylaws*, VA. L. & ECONS. RES., Paper No. 2017-21; U. PENN., INST. FOR L. & ECON. RES., Paper No. 17-37 (2017).

shareholders to approve charter amendments, mergers, share exchanges, conversions, sales of substantially all assets, or dissolution. Consistent with the law of agency (or mandate), corporation statutes treat directors as fiduciaries of the shareholders, not as contract parties subject only to a lesser duty of good faith and fair dealing.

The default rule of corporate law, which allows the majority shareholders to amend the charter over the objection of the minority, is generally subject to four public-order limitations. They are (1) a contract-based duty of good faith and fair dealing; (2) a duty of advance disclosure of proposed charter amendments; (3) a prohibition against retroactive amendments; and, in certain cases, (4) a right of the objecting minority to opt out by surrendering all of their shares in exchange for a cash payment equal to fair value.[13]

The fourth limitation—the right of an objecting minority shareholder to opt out of the corporation by surrendering his shares for cash—generally applies to any proposed merger or sale of substantially all assets of the corporation. This so-called "appraisal right" is not available for all charter amendments. Moreover, where the appraisal right is available, its benefits to the minority vary widely from jurisdiction to jurisdiction.

Contemporary corporate law has recognized the right of majority shareholders to "expel" minority shareholders, not only by cash merger, but also by reverse share split or by a charter amendment imposing a call right on common shares, i.e., a discretionary right by the directors to selectively redeem some, but not all, shares at a stipulated price.

Minority shareholders of a corporation whose shares are publicly traded in a liquid market differ radically from minority shareholders of a non-public corporation. This is because a public company minority shareholder has a built-in "market out," i.e., a right to sell his shares in the public market at a time and price of his own choosing if he is dissatisfied with management, disapproves of a proposed charter amendment or merger, seeks liquidity, or for any other reason. Minority shareholders of a non-public corporation, on the other hand, have no assured means of disposing of their shares at a fair value in any situation other than a proposed transaction as to which appraisal rights are

13. *See, e.g.*, Choi & Min, *supra* note 12, at 7.

available.

By hypothesis, every minority shareholder lacks the voting power to determine corporate policy. The minority is therefore structurally disadvantaged vis-à-vis the majority. A fundamental issue presented in corporate law is how to set the balance of power between majority and minority shareholders in a way that recognizes both the right of the majority to determine corporate policy and the right of the minority to realize some form of value for their investment.

Corporate law must also address the related issues of how to allocate the majority's power between shareholders as principals and directors as their agents and how to allocate statutory limitations on corporate governance between rules of public order and default rules subject to private ordering. A number of courts and some legislatures have chosen to allocate the balance of power by recognizing a minority shareholder's right to demand that the corporation redeem his shares for cash at fair value if he can prove, even in a non-transactional context, that he has been "oppressed" by majority shareholder conduct incompatible with a duty of good faith and fair dealing.

The net result of the corporate rules is that the majority shareholders have the power to expel minority shareholders at will, subject to the obligation of paying them fair value for their shares. However, minority shareholders of a non-public corporation have no exit strategy because, except where appraisal rights are available, they have no right to require the corporation to purchase their shares without establishing in a judicial proceeding that they have been "oppressed" in violation of a duty owed to them.

Some courts grappling with the plight of the minority shareholder of a non-public corporation have held that the majority shareholders owe a fiduciary duty, rather than merely a duty of good faith and fair dealing, to the minority shareholders. Other courts have failed to distinguish directors' fiduciary duty to all shareholders from their duty to the minority as a subset of all shareholders, to distinguish directors' fiduciary duty to the minority from the majority's lesser duty of good faith and fair dealing to the minority, or to distinguish the duty owed to the minority in a transactional versus a non-transactional context. In addition, most legislatures and courts have failed to articulate a workable definition of actionable oppression, and they have struggled to devise an appropriate remedy for minority shareholders after a court has determined they were oppressed.

These unresolved questions present a host of issues for any corporation statute. They include formulating rules of limitation on charter amendments and on the majority's right to expel minority shareholders, specifying transactions as to which appraisal rights are available and defining fair value for appraisal purposes, distinguishing majority shareholders' duty of good faith and fair dealing from directors' fiduciary duty, and determining whether and how to define oppression in relation to minority shareholders of non-public corporations, among others.

The 1968 Louisiana Business Corporation Law in effect from 1969 to 2014 resolved (or ignored) these issues in a manner that was not uncommon when the statute was drafted. That was fifty years ago. The Business Corporation Act of 2014 approaches these issues in a manner radically different from the 1968 statute and in many ways different from the law of any other state. This Article will compare, explain, and explore the differences between these two statutes insofar as they relate to minority shares.

Part III of this Article provides an in-depth look at callable common shares as a minority shareholder expulsion technique. Part IV offers a general discussion of minority shareholder expulsion techniques under the 2014 statute and their relationship to appraisal rights. Part V explores the fiduciary implications of shareholder oppression and expulsion transactions under the 2014 statute. Part VI summarizes the principal points of the Article.

III. CALLABLE COMMON SHARES

A callable common share is one subject to a charter clause granting the corporation's board a discretionary right to "call," or purchase, the share at a specified fixed or formula price for cash.[14]

A. WERE CALLABLE COMMON SHARES PERMISSIBLE UNDER THE PRE-2015 LOUISIANA BUSINESS CORPORATION LAW?

Under LBCL § 55 in effect prior to 2015, the board of a Louisiana corporation, acting alone, had the power and authority—subject to statutory net worth limitations, loan agreement covenants, and charter restrictions—to redeem any of

14. *See* Note, *Callable Common Stock*, 68 HARV. L. REV. 1240 (1955).

the corporation's outstanding shares that were offered to it for purchase by any shareholder.[15] Further, LBCL § 24(C)(5) granted authority for the charter to contain "any provisions restricting the transfer of shares or for the optional or compulsory sale and purchase of shares among the shareholders and the corporation or any of them."[16]

An issue arose under the LBCL, however, as to whether a Louisiana corporation with only one class of common stock had the necessary statutory authorization to provide in its charter that all of its common shares were callable by the board at any time on a discretionary basis, for any reason or for no reason, at a fixed or formula price, i.e., a "Full Call." Specifically, this doubt arose under § 51(C), which says, "Except as otherwise provided . . . in the articles . . . each share shall be in all respects equal to every other share . . . ."[17] The "equality" requirement cast doubt on the validity of a single common class of which every share was, by the terms of the charter, subject to a Full Call. If all the common shares were called, no one would be entitled to vote or to receive the assets upon dissolution, but if by the terms of the charter only some, but not all, common shares were callable, the common shares would not all be of the same class, as required by § 51(C) (absent an express charter provision distinguishing some common shares from other common shares).

Some might say these concerns were misplaced because LBCL § 31(A) provided that a corporation may amend its articles "to include or change any provision authorized by this Chapter."[18] Further, § 31(C)(2)(b) provided that, with a two-thirds vote of the affected class's voting power present, a charter amendment may "[c]reate[ ] . . . any right in respect of the redemption of . . . [a shareholder's] shares."[19]

Finally, as noted above, LBCL § 24(C)(5) permitted the charter to contain "any provisions . . . for the . . . compulsory sale . . . of shares among the shareholders and the corporation."[20] These LBCL sections read together could arguably authorize even a corporation having only a single class of common shares to include a Full Call in its charter, either *ab initio* or by

15. LA. STAT. ANN. § 12:55 (2010) (repealed 2014).
16. LA. STAT. ANN. § 12:24(C)(5) (2010) (repealed 2014).
17. LA. STAT. ANN. § 12:51(C) (2010) (repealed 2014).
18. LA. STAT. ANN. § 12:31(A) (2010) (repealed 2014).
19. LA. STAT. ANN. § 12:31(C)(2)(b) (2010) (repealed 2014).
20. LA. STAT. ANN. § 12:24(C)(5) (2010) (repealed 2014).

amendment.

1. DID A FULL CALL CONSTITUTE A SHARE TRANSFER RESTRICTION?

A second difficulty arose under LBCL § 59(B), enacted in 2005, which provided that a charter clause imposing a restriction on the transfer of shares "does not affect shares issued before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction."[21] So, even if a Full Call in an original charter was presumed valid, the question was whether a charter amendment creating de novo a Full Call was deemed to "impose restrictions on the transfer . . . [of outstanding] shares" (hereinafter "Old Shares") within the meaning of § 59(B).[22]

If the Full Call imposed a share transfer restriction, it would not be enforceable as to Old Shares that were not voted in favor of the amendment. Importantly, the LBCL did not contain a provision analogous to BCA § 1001(B), which states, "A shareholder . . . does not have a vested property right resulting from any provision in the articles of incorporation . . . ."[23]

2. VESTED RIGHTS

A further source of concern was LBCL § 173(A).[24] It provided that while the LBCL applied to all corporations existing on its effective date, nevertheless "this Chapter shall not be construed to impair or affect any . . . right accruing, accrued, or acquired . . . prior to January 1, 1969."[25] The concern was that, notwithstanding the amendment authority conferred by LBCL § 31, shareholders of corporations created before 1969 might have a vested right under § 173(A)—separate and apart from the prohibition in § 59(B) on the enforcement of new transfer restrictions against Old Shares—not to be subjected by amendment to a de novo Full Call.

3. THE LIMITED CALL

Despite these reservations about the legality of a single common class subject to a Full Call, it was generally agreed that

21. LA. STAT. ANN. § 12:59(B) (2010) (repealed 2014).
22. *Id.*
23. LA. STAT. ANN. § 12:1-1001(B) (2015).
24. LA. STAT. ANN. § 12:173(A) (2010) (repealed 2014).
25. *Id.*

a corporation had authority under LBCL § 24(C)(5) to provide in its charter that common shares are subject to call only under specified circumstances.[26] Such a call might provide that all shares are subject to a discretionary right of call by the board of directors at a fixed or formula price only if an act or omission by its holder, within his control, violated a reasonable requirement or prohibition described with specificity in the charter that was necessary or appropriate to protect the corporation's particular business (Limited Call).[27]

For example, there was general agreement on the validity of a clause in the charter that granted the corporation authority to (1) make an S election for federal income tax purposes and (2) thereafter, at the discretion of the board, call the common shares of a shareholder who attempted to transfer them in violation of a prohibition in the charter designed to block any transfer that would terminate the S election.

The reasoning was that the exercise of the Limited Call was authorized by LBCL § 24(C)(5) and was, as a practical matter, subject to control by the shareholder because the corporation could exercise the call only by reason of that shareholder's discretionary act or omission in violation of a specific charter requirement of which he had prior notice.[28]

B. CALLABLE COMMON SHARES UNDER MBCA PRIOR TO 2010

Official Comment C under MBCA § 6.01 says:

> Earlier versions of the MBCA and the statutes of many states contained a direct or indirect prohibition against callable voting shares or callable common shares.[29]

Thus, as a matter of policy, all versions of the MBCA adopted prior to the 2010 version prohibited the issuance of a class of common shares all subject to a Full Call. Further, § 6.27 of the MBCA did—and currently does—contain a provision similar to LBCL § 59, discussed above, authorizing a charter to contain restrictions on share transfers, provided the restriction "does not affect shares issued before the restriction was adopted, unless the

26. *See* LA. STAT. ANN. § 12:24(C) (2010) (repealed 2014).

27. DEL. CODE ANN. tit. 8, § 202(d) (West, Westlaw through 81 Laws 2018, chs. 200–53); LA. STAT. ANN. 12:59(D) (2010) (repealed 2014).

28. *See* LA. STAT. ANN. § 12:24(C)(5) (2010) (repealed 2014); MORRIS & HOLMES, *supra* note 5, at § 29:3.

29. MODEL BUS. CORP. ACT § 6.01 cmt. (c) (AM. BAR ASS'N 2010).

holders of the [Old] Shares are parties to the restrictive agreement or voted in favor of the restriction."[30]

C. CALLABLE COMMON SHARES UNDER DELAWARE AND OTHER STATE LAW

Prior to the 2010 MBCA, callable common shares had been addressed by few states. Only Delaware's corporation statute dealt systematically with callable common shares. Other states that addressed the issue by statute were New York, California, and New Jersey. Of those three, only New Jersey's statute appeared to affirmatively authorize a Full Call. Although neither the Massachusetts nor the Ohio statute addressed callable common shares, court decisions in both states dealt obliquely with the subject.

Delaware General Corporation Law (DGCL) § 151(b), enacted in 1990, authorizes the creation of a single class of callable common shares. All of the shares may be made callable at any time at the discretion of the board—i.e., a Full Call—subject only to the limitation that "immediately following any such redemption the corporation shall have outstanding 1 or more shares of 1 or more classes or series of stock, which share, or shares together, shall have full voting powers."[31]

The motivation for the 1990 authorization by DGCL § 151(b) of a class of common shares subject to a Full Call was probably twofold. First, in *Greene v. E. H. Rollins & Sons*, the Chancery Court invalidated a charter clause providing for the compulsory sale of common shares to the corporation as an unreasonable restriction on alienability.[32] In *Petty v. Penntech Papers, Inc.*, the same court found no business rationale to support a corporation's selective redemption of its preferred stock where the board voted to redeem all shares except their own to maintain control.[33]

These decisions cast a shadow on the validity of callable common stock under the DGCL. Given that by 1990 public companies had begun to issue classes of callable common stock in addition to at least one class of non-callable common stock, the

30. *See* LA. STAT. ANN. § 12:1-627(A) (2015); MODEL BUS. CORP. ACT § 6.27 cmt. (c) (AM. BAR ASS'N 2007).

31. DEL. CODE ANN. tit. 8, § 151(b) (West, Westlaw through 81 Laws 2018, chs. 200–53).

32. Greene v. E. H. Rollins & Sons, 2 A.2d 249, 254 (1938).

33. Petty v. Penntech Papers, Inc., 347 A.2d 140, 143–44 (Del. Ch. 1975).

Delaware bar may have considered it prudent to eliminate any doubt created by these decisions as to the validity of callable common stock.

Second, the 1990 Delaware legislature perhaps intended, by enacting § 151(b) to bolster DGCL §§ 202(b)–(c)(4), which authorizes charter provisions that "[o]bligate[ ] the holder of the restricted securities to sell or transfer an amount of restricted securities to the corporation . . . or cause[ ] . . . the automatic sale or transfer of an amount of restricted securities to the corporation" for any of the purposes described in § 202(d), which include facilitating an S election.[34] That is, the 1990 enactment of § 151(b) may have been intended in part to make indisputably clear that it was permissible for a corporate charter to create either (1) a *second class* of common stock of which every share was subject to a Full Call, or (2) a *single* class of common stock of which every share save one was subject to either a Full Call or a Limited Call (i.e., pursuant to DGCL § 202), as a means of enforcing a restriction "for a reasonable purpose" that prohibited either (1) the transfer of stock to certain classes of persons who could not satisfy or (2) the continued ownership of stock by existing shareholders who no longer satisfied specified non-corporate regulatory requirements applicable to the corporation's share ownership.[35] Typical examples include restrictions governing real estate investment trusts, documented vessels of the United States engaged in coastwise shipping, and S corporations.[36]

The New York and California corporation statutes have long provided that a corporate charter may authorize one or more classes of shares that are callable so long as the corporation has a class of common shares outstanding that is not callable.[37] In other words, those statutes authorize a class of common shares subject to a Full Call if, and only if, there is another class of common shares outstanding, none of which are subject to a Full Call.

The New Jersey statute has gone further by providing that a

34. DEL. CODE ANN. tit. 8, §§ 151(b), 202(b)–(c)(4) (West, Westlaw through 81 Laws 2018, chs. 200–53).

35. DEL. CODE ANN. tit. 8, § 202(d) (West, Westlaw through 81 Laws 2018, chs. 200–53).

36. *Id.*

37. N.Y. BUS. CORP. LAW § 512(a) (McKinney 2018); CAL. CORP. CODE § 402 (West 2018).

corporate charter may authorize a single class of common shares, all of which may be subject to a Full Call, ignoring the problem presented by a redemption of 100% of the class.[38]

Despite the absence of statutory authority, a leading Massachusetts case, *Lewis v. H.P. Hood & Sons, Inc.*, upheld a board's good-faith decision by unanimous vote to exercise a call as to some, but not all, shares pursuant to a Full Call authorization in the charter.[39] In effect, the *Hood* case upheld the validity of callable common shares as a matter of common law.

Finally, an Ohio lower court stated in dicta that the Ohio corporation statute permits a Full Call with respect to any class of shares, including a sole class of common.[40]

D. CALLABLE COMMON SHARES UNDER THE 2014 BUSINESS CORPORATION ACT

The 2010 revision of the MBCA, on which the BCA is based, reversed the position of prior model business corporation acts by authorizing the creation of a single common class of shares, all of which are callable at any time at the discretion of the board at a fixed or formula price, i.e., a Full Call.

1. BCA AUTHORIZES CALLABLE COMMON SHARES

More particularly, BCA § 601(C) says:

> The articles of incorporation may authorize one or more classes or series of shares that meet any of the following criteria: . . . (2) Are redeemable . . . as specified in the articles of incorporation, at the option of the corporation . . . or upon the occurrence of a specified event . . . .[41]

This subsection confers corporate authority analogous to that conferred by LBCL § 24(C)(5) before 2015.

BCA § 601(C)(2) is supplemented by BCA § 603(C)—which was perhaps based on DGCL § 151(b) and had no analog in the

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38. N.J. STAT. ANN. § 14A:7-6(1) (West, Westlaw through L.2018, c. 9 and J.R. No. 4).

39. Lewis v. H. P. Hood & Sons, Inc., 121 N.E.2d 850 (1954) (finding that although the plaintiff was the only stockholder whose common stock was called, the provision affected the quality of the common stock rather than the alienability and was not contrary to the corporation laws of the Commonwealth nor to public policy).

40. Browder v. Mutual Tool & Die, Inc., 263 N.E.2d 785, 787 (C.P. 1970).

41. LA. STAT. ANN. § 12:1-601(C) (2015 & Supp. 2018).

LBCL—providing that:

> At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights, and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.[42]

Official Comment 3(C) under MBCA § 6.01 confirms that BCA § 603(C) expressly sanctions a single class of common shares subject to a Full Call.[43] BCA §§ 601(C) and 603(C) thus eliminate the concerns that arose under the LBCL as to whether a Full Call of common shares is theoretically valid and whether Old Shares have a "vested right" not to be subject by amendment to a Full Call. BCA § 601(E) authorizes the inclusion of provisions in an original charter that create either or both (1) a Limited Call as to all shares and (2) a Full Call that the board has discretion to exercise only as to specified shares.

2. DEFINING CLASSES OF SHARES UNDER BCA § 601

The first paragraph of the Official Comment under MBCA § 6.01 enunciates the drafters' philosophy that § 6.01 should use "more general language to reflect the actual flexibility in the creation of classes and series of shares that exists in modern corporate practice."[44] This philosophy, which is consistent with DGCL § 151(b), discussed above, is confirmed by Official Comment 3(C) under MBCA § 6.01, which states that the MBCA "permits the creation of redeemable or callable shares without limitation."[45]

It is not unusual for a corporate charter to create two separate classes of common shares, one voting and the other nonvoting, often one convertible into the other but not vice versa. A class of common shares of a non-public company subject to a Full Call, however—as distinguished from a Limited Call—is unusual.

42. LA. STAT. ANN. § 12:1-603(C) (2015).

43. The comment states, "The MBCA . . . permits the creation of redeemable or callable shares without limitation (subject only to the provisions that the class, classes or series of shares described in section 6.01(b) must always exist and that at least one share of each class and series with those rights must be outstanding under section 6.03." MODEL BUS. CORP. ACT § 6.01(c) cmt. 3(C) (AM. BAR ASS'N 2013).

44. MODEL BUS. CORP. ACT § 6.01 cmt. (AM. BAR ASS'N 2013–2014).

45. MODEL BUS. CORP. ACT § 6.01(c) cmt. 3(C) (AM. BAR ASS'N 2013); *see* DEL. CODE ANN. tit. 8, § 151(b) (West, Westlaw through 81 Laws 2018, chs. 200–53).

The first issue under the BCA is how to define "common shares" for purposes of considering the implications of their callability. The issue arises because BCA § 601 never uses the term "common shares."[46] The statute speaks only in terms of "shares," "classes of shares," and "series of shares within a class."[47] Thus, how does one define "common shares" under the BCA to determine the enforceability of a de novo Full Call against Old Shares?

The issue can be significant because callability is a routine feature of preferred shares but not of common shares. What, therefore, is the technical difference between common and preferred shares that affects their callability, and how does one determine whether a class of shares issued under the BCA is common or preferred for purposes of evaluating a call feature? BCA § 1301(6) defines "preferred shares" as "a class or series of shares whose holders have preference over any other class or series with respect to distributions."[48]

In a corporation's equity capital structure, the class of securities exclusively entitled to (1) unlimited voting rights and (2) the distribution of its net assets upon dissolution, after the payment of all prior limited claims of creditors and preferred shareholders, is invariably thought of as common shares. These two characteristics of "common shares" are addressed under the BCA as follows.

BCA § 603(C) says:

> At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution must be outstanding.[49]

BCA § 601(A) says:

> If more than one class . . . of shares is authorized, the articles . . . must prescribe a distinguishing *designation* for each class . . . . Except to the extent varied as permitted by this Section, all shares of a class . . . must have terms . . . that are

46. LA. STAT. ANN. § 12:1-601 (2015 & Supp. 2018).
47. *Id.*
48. LA. STAT. ANN. § 12:1-1301(6) (2015 & Supp. 2018).
49. LA. STAT. ANN. § 12:1-603(C) (2015).

identical with those of other shares of the same class . . . .[50]

It is a standard drafting convention for any corporate charter authorizing the issuance of more than one class of shares to satisfy the statutory mandate of § 601(A) by "designating" as "common" the class or classes of outstanding shares required by § 603(C) to "have unlimited voting rights" and be "entitled to receive the net assets of the corporation upon dissolution."[51] This drafting convention is recognized by Official Comment 1 under MBCA § 6.01.[52]

The MBCA comment suggests the designation "common" because the "distinguishing designation" and "the terms, including the preferences, rights, and limitations" of any class of shares that do *not* "have unlimited voting rights" and are *not* "entitled to receive the net assets . . . upon dissolution" are required by BCA § 601(A) to be "prescribed" by the charter.[53] And, as indicated above, BCA § 1301(6) defines "preferred shares" as those entitled to a preference over another class or series with respect to distributions.

The term "net assets," as used in § 603(C), means the residue of assets after all other creditor and shareholder claims have been satisfied.[54] The charter can "prescribe" the terms—insofar as they include any entitlement to receive assets in dissolution—of any class *not* entitled to receive the net assets upon dissolution only by carving out from the net assets a right to receive a specified determinable—and therefore limited because not residual—amount and by designating that class as something other than "common."

The right of a class of shares to receive a carved-out specified determinable amount of assets upon dissolution is necessarily preferred to the dissolution rights of the class entitled to receive the net assets, even though that "preferred" right is limited to the lesser of its amount or the available assets remaining after paying creditors. This carved-out asset right is "preferred"

50. LA. STAT. ANN. § 12:1-601(A) (2015 & Supp. 2018) (emphasis added).

51. LA. STAT. ANN. § 12:1-601(A) (2015 & Supp. 2018).

52. "If both the fundamental characteristics [i.e., unlimited voting rights and entitlement to receive net assets upon dissolution] are placed exclusively in a single class of shares, that class may be described simply as 'common shares.'" MODEL BUS. CORP. ACT § 6.01(c) cmt. 1 (AM. BAR ASS'N 2013).

53. MODEL BUS. CORP. ACT § 6.01(a)–(b) (AM. BAR ASS'N 2013).

54. LA. STAT. ANN. §§ 12:1-603(C), -1409(A) (2015).

because the specified determinable amount of the distribution must be calculated, deducted, and paid from the tentative net assets in order to determine the amount of actual net assets to which the common holders are entitled in dissolution. It is therefore all but unavoidable—and is the usual drafting convention—for the charter to designate as "preferred" any class entitled to receive a limited amount of assets in dissolution.[55]

The net result is that under BCA § 601, the charter must provide, expressly or by implication, that the holders of not less than one class of voting common shares are entitled to receive the entire net assets of the corporation upon dissolution. Accordingly, the exercise of a Full Call with respect to fewer than all shares of such a class permits the board to arbitrarily discriminate among its holders by summarily eliminating the right of some, but not all, outstanding shares to receive a pro rata share of the residue of the assets of the corporation in dissolution (or in a statutory merger or sale of substantially all its assets).

3. WOULD CALLABLE COMMON SHARES EVER BE CREATED UNDER AN ORIGINAL CHARTER?

Common shares subject to a Full Call are unlikely to be created in the original charter of a non-public corporation, despite being authorized by the BCA, except under limited circumstances. An example is a call exercisable only after a specified future date or event certain at a price not less than the statutory "fair value" of the shares on the date of call (i.e., fair value as defined in BCA § 1301(4) to mean value determined using customary valuation concepts without discounting for lack of marketability or minority status) (Statutory Fair Value).[56]

In any case where:

(1) the issuer is a non-public company,

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55. It is possible to create a class of so-called participating preferred that is entitled to share *pari passu* with the common class in the distribution in dissolution of the net assets remaining after the satisfaction of the asset preference of the participating preferred.

56. It is also possible that some variation of these specifications might be attractive to purchasers of a sole class of common shares subject to a Full Call. For example, a call exercisable not earlier than the first anniversary of issuance at a price equal to the greater of the issue price or the Statutory Fair Value on the exercise date might be of interest. Another example is shares callable after a future date at the greater of the issue price or the value determined as of the exercise date under a specified formula.

(2) a Full Call is created de novo by charter amendment,

(3) the exercise of the Full Call as to Old Shares is not barred by BCA § 627, and

(4) the call is immediately exercisable[,]

it is appropriate to consider the Full Call a species of Expulsion Technique as to the Old Shares.[57]

4. IS A FULL CALL THAT WAS CREATED DE NOVO BY CHARTER AMENDMENT UNDER THE BCA ENFORCEABLE AGAINST *HOLDERS* OF OLD SHARES?

Notwithstanding the general authority conferred by BCA § 601(C), it is nevertheless unclear whether the adoption of a charter amendment creating de novo a Full Call—as distinguished from a Full Call included in the original articles—would be enforceable against Old Shares that did not vote for the amendment. The question is important because majority shareholders could cause the corporation to adopt a charter amendment imposing a Full Call on all common shares as an Expulsion Technique, similar in effect to either a reverse share split or a squeezeout merger.[58] If controlling shareholders have the requisite corporate authority to approve a squeezeout merger or a reverse share split over the objection of non-consenting minority shareholders, it is difficult to see what principle precludes the majority from imposing a Full Call on non-consenting shares by charter amendment (assuming the call price is not materially inconsistent with Statutory Fair Value).

BCA § 1001(B) supports the position that the Full Call charter amendment validly imposes the call on Old Shares because it provides that no shareholder has a vested property right resulting from any charter provision (i.e., no vested right in

57. *See generally* F. HODGE O'NEAL & ROBERT B. THOMPSON, 1 OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 5:12, Westlaw (database updated May 2018).

58. Callable common stock has been issued by public companies for many years. *See e.g.*, *NASD Notice to Members 00-33*, FINRA 215 (May 2000), http://www.finra.org/sites/default/files/NoticeDocument/p004108.pdf. On April 24, 2000, NASD adopted a new rule interpretation to require confirmation disclosure of callable common stock. But these are not Full Calls as defined above because in each case the issuer had outstanding another class of non-callable common. The fiduciary implications, as distinguished from the share transfer restriction implications, of a charter amendment creating a Full Call are discussed in Part V.

being free of a Full Call).[59] However, the Official Comment under MBCA § 10.01 said:

> The only exception to this unlimited power of amendment is section 6.27, which provides that without the consent of the holder, amendments cannot impose share transfer restrictions on previously issued shares.[60]

The question presented with respect to Old Shares by a charter amendment creating de novo a Full Call is whether the call is a "share transfer restriction" within the meaning of BCA § 627. If it is, BCA § 627 renders it unenforceable against Old Shares (at least according to the Official Comment under MBCA § 10.01 quoted above). If, on the other hand, the Full Call is not a "share transfer restriction," BCA § 1001(B) renders the Full Call enforceable against even Old Shares that have not consented to it.

The first argument that the de novo Full Call is enforceable against Old Shares is that its exercise is not a transfer. For that reason, it does not impose a "share transfer restriction"; rather, the exercise of any call causes an extinguishment of the existence of the called shares because BCA § 631(A) provides that where a corporation acquires its own shares, they "constitute authorized but unissued shares," i.e., shares that are neither issued nor outstanding and, therefore, no longer exist.[61] The difference between transfer and extinguishment by call has economic significance because a transfer leaves every shareholder's percentage equity interest unchanged, while an extinguishment by call increases every shareholder's percentage equity by his pro rata portion of the called shares.

On the other hand, the MBCA § 10.01 Official Comment quoted above says a charter amendment that imposes a transfer restriction on shares is not enforceable against Old Shares if, and to the extent that, such enforceability is limited by BCA § 627. The Full Call charter amendment is therefore unenforceable against Old Shares because paragraph (D)(1) of BCA § 627 provides that a restriction on transfer within the meaning of that section includes a restriction that "[o]bligate[s] the shareholder first to offer the corporation . . . an opportunity to acquire the

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59. LA. STAT. ANN. § 12:1-1001(B) (2015).
60. MODEL BUS. CORP. ACT § 6.27 cmt. (AM. BAR ASS'N 2013).
61. LA. STAT. ANN. § 12:1-631(A) (2015).

restricted shares."[62] A Full Call imposes such an obligation on the holders of all outstanding callable shares "to offer the corporation . . . an opportunity to acquire the . . . shares" at any time.[63] The Full Call therefore constitutes a transfer restriction within the meaning of BCA § 627(D)(1) notwithstanding that its exercise extinguishes the called shares. (Indeed, the exercise of a Limited Call authorized by BCA § 627(D)(2) will extinguish the called shares, just as in the case of a Full Call.) The Official Comment under MBCA § 10.01 thus renders the Full Call unenforceable against Old Shares.

It is true that BCA § 627(D)(1), quoted above, includes as a share transfer restriction an obligation on the holder of Old Shares "first to offer the corporation . . . an opportunity to acquire the restricted shares." Properly read, however, that provision describes as a share transfer restriction within the meaning of § 627(D)(1) *only a right of first refusal or a right of first offer* in favor of the corporation. Such a right cannot come into existence unless and until a holder of Old Shares, on his own motion, initiates a proposed sale of the shares. If, therefore, the owner of shares subject to a share transfer restriction described in § 627(D)(1)—a Limited Call—elects not to offer his shares for sale to anyone, but rather to retain them indefinitely, the exercise of a Full Call would never trigger the share transfer restriction against which § 627(D)(1) protects the Old Shares. Section 627(D)(1) therefore does not bar the exercise of a Full Call with respect to Old Shares.

There is a second rebuttal that the Full Call *is* a share transfer restriction against which § 627(D)(1) protects Old Shares. The § 627 prohibition is derived from "the common law rule that . . . [share transfer restrictions] constituted restraints on alienation and should be strictly construed."[64] The imposition of a Full Call on Old Shares reduces their attractiveness to a buyer and, therefore, their value. The Full Call should accordingly be strictly construed as a prohibited restraint on alienation.[65]

This argument is moot if the charter amendment creating the Full Call stipulates a call price not less than the estimated

62. LA. STAT. ANN. § 12:1-627(D)(1) (2015).
63. *Id.*
64. MODEL BUS. CORP. ACT § 6.27 cmt. (AM. BAR ASS'N 2013).
65. *See, e.g.*, *In re* P.K. Smith Motors, Inc., 50,357, p. 19 (La. App. 2 Cir. 3/9/16); 188 So. 3d 324, 337.

Statutory Fair Value of the Old Shares on the exercise date as determined in a manner similar to, but not identical with, appraisal rights (Estimated Fair Value). This is because Statutory Fair Value is greater than "fair market value," which is the highest discounted price an informed and willing buyer would offer for the same shares not subject to a Full Call. The effect of the Full Call is therefore to increase, rather than depress, the value of the Old Shares.[66]

5. ENFORCEABILITY OF FULL CALL AGAINST *TRANSFEREES* OF OLD SHARES

In the event a determination is made that a Full Call constitutes a share transfer restriction, those shares are (1) not callable and (2) freely transferable by the record owner to any transferee who lacks "actual knowledge" of the Full Call.[67]

When the corporation issues a new share certificate to any transferee of Old Shares, however, it might choose to inscribe a legend on the certificate directing attention to the Full Call provision in its charter.[68] The right to inscribe such a legend is problematic if the Full Call is considered a share transfer restriction. In *Sandor Petroleum Corp. v. Williams*, for example, the court held that a charter provision "restricting the sale of its previously unrestricted stock was, therefore, unauthorized and invalid in so far as it denied appellee's right to sell at a price which he could have secured in the open market."[69] A transferee of Old Shares who receives a share certificate reflecting notice of a Full Call might view the shares he has purchased without knowledge of the call as having a value lower than the price he paid. If the transferee objected to the corporation's notice, a court persuaded that the Full Call was a share transfer restriction might therefore hold that the legend on the transferee's certificate is an unreasonable restriction on the transferor's right to "sell at a price which he could have secured in the open market" and, accordingly, that the transferee acquired the shares

66. The argument advanced in this paragraph is persuasive only if the call price of the Old Shares is not less than their Estimated Fair Value on the exercise date.

67. *See* LA. STAT. ANN. §§ 12:1-601 to -602 (2015 & Supp. 2018), 10:8-204 (2003); Miller v. Lake Arthur Reclamation Co., Ltd., 558 So. 2d 333, 337 (La. Ct. App. 1990).

68. *See, e.g.*, B & H Warehouse, Inc. v. Atlas Van Lines, Inc., 490 F.2d 818, 826 (5th Cir. 1974) ("[T]he restriction would have been valid had it been in effect when B & H obtained its stock . . . .").

69. Sandor Petroleum Corp. v. Williams, 321 S.W.2d 614, 619 (Tex. Civ. App. 1959).

free of the Full Call.

The outcome of such litigation would likely depend in part on the call price of the shares. If the call price is equal to or greater than the Estimated Fair Value on the exercise date, the transferee's argument that the inscription of the call legend on his certificates is an unreasonable restriction on his right to "sell at a price which he could have secured in the open market" is unconvincing.[70]

If the corporation intends to inscribe a legend on the certificate issued in transfer of Old Shares to a transferee, best practice suggests that it inform all shareholders at the time of adoption of the Full Call charter amendment that whenever in the future any unlegended certificate representing Old Shares is tendered for transfer, it must be accompanied by a letter from the proposed transferee addressed to the corporation stating the transferee had actual knowledge at the time he acquired an ownership interest in the shares that:

> (1) the charter of the corporation provides the shares are callable at any time at the discretion of the board at a specified call price, and
>
> (2) the share certificate to be issued in the name of the transferee will bear a legend so indicating.

If the corporation elects to proceed in this way, the transferee may refuse to sign the letter, demand an unlegended certificate, and, if the corporation declines to remove the legend, file a mandamus suit seeking relief.[71]

6. USE OF APPRAISAL RIGHTS TO NULLIFY BCA § 627 PROTECTION OF OLD SHARES

Appraisal rights are the ultimate weapon by which the corporation may, but is not required to, nullify any protection against a Full Call arguably afforded to Old Shares by BCA § 627. A corporation may voluntarily grant appraisal rights with respect to any charter amendment for which such rights are not mandatory.[72] No provision of the BCA makes appraisal rights

70. The same might also be true if the call price is equal to the greater of (1) the Statutory Fair Value on the charter amendment date or (2) the Estimated Fair Value on the exercise date.

71. *See* LA. CODE CIV. PROC. ANN. art. 3864 (2017).

72. LA. STAT. ANN. § 12:1-1302(A)(5) (2015).

mandatory with respect to a charter amendment instituting a Full Call.

As fully explained later, BCA § 1340 provides in substance that with respect to any corporate action as to which appraisal rights are available—whether mandatory or voluntary, exercised or not—appraisal rights shall be a minority shareholder's exclusive remedy against the corporation, its directors, or its controlling persons "in connection with the corporate action" with respect to which the appraisal rights were available.[73] If appraisal rights will be offered, the notice or proxy statement for the meeting of shareholders to vote on the Full Call charter amendment should disclose prominently, in addition to the information required by BCA § 1320, that shareholder approval of the amendment will have the effect of subjecting all Old Shares to the Full Call, even though (1) a holder of Old Shares did not exercise the proffered appraisal rights, and (2) no notice of the Full Call appears on the front or back of share certificates representing Old Shares.[74]

It is possible a holder of Old Shares might forego the proffered appraisal rights and bring suit at the time of exercise of the call alleging that the exercise, as distinguished from the charter amendment, constituted a breach of fiduciary duty by the controlling shareholders.[75] The risk of such a claim could be largely eliminated by stipulating a call price equal to the Statutory Fair Value of the shares on the date of adoption of the charter amendment, unless upon exercise the holder of called shares requests a determination of Estimated Fair Value as of the call date, in which case the latter shall be the call price.

The decision to offer appraisal rights at any time should not be made lightly. If, in the course of the appraisal process, the non-consenting shareholders and the corporation are unable to reach agreement on the fair value of their shares, the BCA requires the corporation to commence a summary judicial

73. LA. STAT. ANN. § 12:1-1340(C) (2015).

74. It would be prudent for the notice to explain that under BCA § 1340 the appraisal right regarding the vote on the charter amendment is the exclusive remedy of any objecting shareholder against the corporation, its directors, and its controlling persons "in connection with" the approval of the amendment. It would also be prudent for the notice to state that the board recommends that any shareholder who objects to the charter amendment consider asserting appraisal rights because if the amendment is approved at the meeting, all Old Shares will immediately become subject to call at the call price any time thereafter at the discretion of the board.

75. *See* LA. STAT. ANN. § 12:1-1340 (2015).

proceeding to determine their Statutory Fair Value.[76] The court is empowered to appoint an appraiser to file a written report on fair value, and the non-consenting shareholders are entitled to discovery rights.[77] The default rule provides that the court shall assess court costs, including the appraiser's fees, against the corporation and is empowered to assess the shareholders' attorneys' fees against the corporation if it finds it acted arbitrarily, vexatiously, or not in good faith.[78]

From a larger standpoint, the holder of Old Shares electing not to consent to a Full Call charter amendment as to which appraisal rights were available is in no worse position, and should therefore be entitled to no greater rights, than a holder of Old Shares who does not consent to a squeezeout merger or a reverse share split. If it is lawful for either of the latter two corporate actions to eliminate Old Shares, provided appraisal rights are available, it can hardly be unlawful for the same Old Shares to be eliminated by the exercise of a Full Call where appraisal rights were available as to the charter amendment that created it.

7. FULL CALL WITH RESPECT TO A PREFERRED CLASS

A Full Call, although unusual in relation to common shares, is a frequent feature of preferred shares. The terms of preferred shares, which must be specified in the charter, customarily include detailed provisions relating to dividend and asset preferences; voting and conversion rights; redemption, put, and call rights; and protective covenants limiting the corporation's authority to amend the rights of the preferred or to issue additional shares having rights superior or equal to those of the preferred.[79]

Such terms of any preferred class, or any series of any preferred class, are customarily negotiated, immediately prior to the issuance of the entire class or series in one or more tranches, between the corporation and a representative of the prospective preferred purchasers. For that reason, it would be unusual for anyone to purchase additional shares of a preferred series or class from the corporation after their initial issuance, and it would be equally rare for charter provisions governing issued preferred

76. LA. STAT. ANN. § 12:1-1330(A) (2015).
77. LA. STAT. ANN. § 12:1-1330(D) (2015).
78. LA. STAT. ANN. § 12:1-1331 (2015).
79. LA. STAT. ANN. §§ 12:1-601(A), -602, -1005(8) (2015 & Supp. 2018).

shares to be subsequently amended in any manner adverse to the interests of their holders. Accordingly, the question of whether a legacy holder of Old Shares is protected by BCA § 627 against a de novo Full Call created by charter amendment does not arise in relation to preferred shares, which are typically freely transferable subject only to limitations imposed by the securities laws or a negotiated voting agreement with other shareholders.

Charter clauses governing preferred shares often permit or require the corporation to redeem or call some or all of them on or before a specified date. The time when, and price at which, such a call right is exercisable are invariably specified in the charter in a manner that takes into account the time value of money, as well as the business plans and expectations of the corporation and the preferred purchasers at the time of issue.[80] Part of the reason for such precision is that almost all preferred shares are issued with an expectation that they will remain outstanding for only a limited period, often five to seven years. In that regard, the preferred charter clause usually includes an exit strategy for the corporation or the preferred holders, or both, that contemplates the elimination of the entire preferred series or class by put, call, redemption, conversion, etc., prior to dissolution of the corporation. A Full Call initiated by charter amendment with respect to preferred shares would, therefore, be superfluous.

Under the BCA, no material rights of any class of issued preferred shares, regardless of whether the charter authorizes them to vote, can be altered without the approval of at least a majority of the outstanding shares of that class.[81] The net result is that the question of whether the exercise of a Full Call as to Old Shares is barred by BCA § 627 arises in practice only as to common but not as to preferred shares.

E. SUMMING UP EXERCISABILITY OF FULL CALL AS TO OLD SHARES UNDER BCA

Common stock subject to a Full Call was rarely, if ever, issued under the LBCL before 2015. For that reason, the exercisability under the LBCL of a Full Call as to Old Shares never arose in practice. The BCA now authorizes a corporation to issue callable common shares.[82] Further, the BCA confirms the

80. *See, e.g.*, William W. Bratton & Michael L. Wachter, *A Theory of Preferred Stock*, 161 U. PA. L. REV. 1815 (2013).

81. LA. STAT. ANN. § 12:1-1004(D) (2015).

82. LA. STAT. ANN. § 12:1-601(C) (2015 & Supp. 2018); MODEL BUS. CORP. ACT

authority of a corporation to issue only one class of common shares all subject to call—or a Full Call—provided at least one share entitled to full voting power and to a distribution of the net assets upon dissolution of the callable class remains outstanding at all times.[83]

In the event a Full Call is not included in the original charter, the BCA provides that no shareholder has a vested property right resulting from any charter provision (e.g., no shareholder has a vested property right in *not* being subject to a Full Call).[84] Therefore, a Full Call of Old Shares may be instituted de novo by charter amendment: "The only exception to the unlimited power of amendment is section 6.27, which provides that without the consent of the holder, amendments cannot impose transfer restrictions on previously issued shares."[85] A Full Call adopted by charter amendment, rather than in the original charter, is therefore enforceable against Old Shares except to the extent the Full Call is deemed to impose a "transfer restriction" on the Old Shares.[86]

If the Old Shares are protected by BCA § 627 against an exercise of the Full Call while they remain registered in the name of their legacy holder, they may also be protected from call in the hands of a transferee of the legacy holder.[87] Subject to the discussion in Part V below, the corporation can eliminate any potential protection against the Full Call to which the legacy holder of Old Shares may arguably be entitled under BCA § 627 by voluntarily making appraisal rights available to shareholders with respect to the approval of the charter amendment creating the Full Call. Under BCA § 1340, appraisal rights, where offered, are the exclusive remedy of any minority shareholder "in connection with" the adoption of the Full Call charter amendment, not only against the corporation itself but against its directors and controlling persons as well.

IV. BCA EXPULSION TECHNIQUES, INCLUDING CALLABLE COMMON SHARES, AND THEIR

§ 6.01 cmt. 3(C) (AM. BAR ASS'N 2013).

83. LA. STAT. ANN. § 12:1-603(C) (2015).

84. LA. STAT. ANN. § 12:1-1001(B) (2015).

85. LA. STAT. ANN. § 12:1-1001(B), cmt. (b) (2015); MODEL BUS. CORP. ACT § 10.01 (AM. BAR ASS'N 2013).

86. *See supra* Section III.D.4 (analyzing whether such a Full Call constitutes a "transfer restriction" within the meaning of BCA § 627).

87. *See supra* Section III.D.5.

RELATIONSHIP TO APPRAISAL RIGHTS

This Part will first describe the three principal types of BCA Expulsion Techniques in common use. Next, it will explain in detail how BCA § 1340 differs significantly from MBCA § 13.40 and, where appraisal rights are offered in connection with an Expulsion Transaction, how the BCA affords strong protection to a corporation against potential claims by expelled shareholders. Finally, Part IV will compare appraisal rights applicable to a Full Call with appraisal rights applicable to the other two common Expulsion Techniques, the merger and the reverse share split.

A. Types of BCA Expulsion Techniques

Three common types of minority shareholder Expulsion Techniques are authorized by the BCA: the squeezeout merger, the reverse share split, and callable common shares.[88] Although the objective of all three is to expel minority shareholders, the techniques differ significantly in their feasibility and effects, depending on the circumstances.

1. Squeezeout Merger

A squeezeout merger is a merger of a pre-existing corporation (Oldco) into a newly-formed corporation (Newco), all of whose shares are owned by the majority shareholders of Oldco. The Oldco minority receives cash, rather than Newco shares, in the merger. A squeezeout merger offers a high degree of selectivity as to which minority shareholders will be expelled. As a practical matter, non-consenting shareholders who are dissatisfied with the price paid by the corporation for their shares will be entitled to negotiate with the corporation as to an additional amount to be paid for their shares.[89] If that fails, the dissatisfied dissenters are entitled to a judicial appraisal.[90]

From the standpoint of majority shareholders, the principal objection to the squeezout merger arises because the formation of the Newco requires the issuance of its securities to all Oldco shareholders who will not be squeezed out. Where only one or two shareholders will be expelled, but a large number will remain, it may be difficult to document the availability of an exemption under § 4 from registration under the Securities Act

88. LA. STAT. ANN. §§ 12:1-1302(A)(4), (1), -601(C)(2) (2015 & Supp. 2018).
89. LA. STAT. ANN. §§ 12:1-1324, -1326 (2015).
90. LA. STAT. ANN. § 12:1-1330 (2015).

for the initial issuance of the Newco shares to Oldco shareholders who will remain. Alternatively, even where a securities exemption can arguably be documented as to all Newco shareholders, the documentation process is often expensive and requires significant cooperation from shareholders in executing documents. Where that cooperation is difficult to obtain, or where some Newco shareholders are minors, or both, a squeezeout merger may not be attractive.

2. REVERSE SHARE SPLIT

The reverse share split is accomplished by means of a charter amendment reclassifying all outstanding common shares into a smaller number and redeeming the resulting fractional shares for cash.[91] For example, a corporation with 1,000 old shares outstanding could reclassify them into 100 new shares, i.e., a one-for-ten reverse split.[92] Each holder of *ten or more* old shares would receive one or more new shares, plus cash in an amount equal to the assumed value of the fractional new share into which his nine or fewer remaining old shares were reclassified. Each holder of *fewer than ten* old shares would be entitled to only a fraction of one new share and, therefore, only cash in exchange for all of his old shares.[93]

The reverse share split is most practicable where the corporation has a small number of controlling shareholders who wish to expel a substantial number of minority owners all holding fewer than a specified minimum number of shares.[94] That situation occurs sometimes in land companies organized a century or more ago, where numerous small holders who have inherited their shares have no interest in the company and represent an administrative burden on the corporation or complicate future corporate planning. In some cases, it may be politic for the corporation to commission an independent appraisal of the value of its shares to avoid disputes with small holders, but it is not a requirement because the statutory process itself requires a court-appointed appraiser if the corporation and dissenting shareholders are unable to agree on a fair value.[95]

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91. O'NEAL & THOMPSON, *supra* note 57, at § 5:15.
92. *See, e.g.*, *id.*; *see also*, R. FRANKLIN BALOTTI & JESSE A. FINKLESTEIN, 1 DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS § 8.5, Westlaw (3d ed. Supp. 2018).
93. O'NEAL & THOMPSON, *supra* note 57, at § 5:15.
94. *Id.*
95. LA. STAT. ANN. § 12:1-1330(D) (2015).

From the standpoint of the Securities Act, the reverse share split is markedly more convenient than the squeezeout merger. The issuance by the corporation of new shares in exchange for old shares is exempt from registration under the Securities Act by reason of § 3(a)(9), which exempts "any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange."[96] So far as the fractional shares resulting from the split are concerned, Rules 152a and 236 under the Securities Act provide an exemption from registration for (1) the offer and sale by the corporation to its shareholders of fractional shares resulting from a reverse share split, (2) the offer and sale by the recipients of such fractional shares among themselves, through a matching process arranged by the corporation, for the purpose of combining fractions into whole shares, and (3) the offer and sale by the corporation of a sufficient number of additional whole shares to provide funds for distribution to shareholders in lieu of issuing fractional shares that exceed the number acquired by other shareholders in the matching process.[97] The matching process reduces the amount of cash the corporation is required to pay for fractional shares.

Unlike the squeezeout merger, the reverse share split cannot be selective among shareholders except with respect to the size of their shareholdings.[98] Accordingly, a reverse share split may be unattractive because it cashes out some shareholders whom the controlling shareholders want to include in the post-split control group. The advantage of the reverse share split over the squeezeout merger, however, is that it does not require the issuance of shares of a Newco. For that reason, it does not require documentation of exemptions from the requirement of registration under the Securities Act for Newco securities.

3. CALLABLE SHARES

The third Expulsion Technique is the imposition by charter amendment of a Full Call on Old Shares, as discussed in Part III.[99] This technique has two significant advantages for the majority shareholders. First, the documentation requirements are generally less demanding than those of the squeezeout

96. 15 U.S.C. § 77c(a)(9) (2012).
97. 17 C.F.R. §§ 230.152a, 230.236 (2018).
98. BALOTTI & FINKLESTEIN, *supra* note 92, at § 8.5.
99. LA. STAT. ANN. § 12:1-627(A); *see supra* Sections III.D–E.

merger and a reverse share split. Second, the Full Call offers a high degree of selectivity as to which shareholders the corporation expels by exercising the call.[100] In that regard, the Full Call resembles the squeezeout merger and differs from the reverse share split.

The first disadvantage of callable shares is that the exercisability of the call may be barred by BCA § 627 as to Old Shares, unless the corporation voluntarily offers appraisal rights to shareholders who dissent from the charter amendment instituting the Full Call.[101] Appraisal rights for a Full Call amendment are permitted but not required by BCA § 1302(A)(5).[102] If a corporation elects to offer appraisal rights, some shareholders whom the control group does not wish to expel may exercise those rights. On the other hand, if the corporation elects not to offer appraisal rights, a post-amendment call of Old Shares owned by a legacy shareholder or his transferee may draw a § 627 lawsuit.

The second disadvantage of the Full Call is that some members of the control group may object to allowing their own shares to be subject even theoretically to a call. This concern can be addressed in some cases by a shareholder agreement under which the control group agrees to vote their shares in such a way that precludes the call of their own shares and limits the number of shares callable within any consecutive twelve-month period.

The third disadvantage of the Full Call is that it requires two separate steps to eliminate minority shares—a vote on a charter amendment followed by a discretionary call of selected shares[103]—whereas the squeezeout merger and reverse share split eliminate minority shares in a single stroke upon adoption of the relevant transaction document by shareholder vote.[104]

Finally, in order to submit the charter amendment to shareholders for approval, the corporation must devise a clause establishing the call price, either in a fixed amount or by formula. A call price less than the price offered by the corporation for the fair value of the shares, under BCA § 1322(B)(2)(c), prior to the appraisal process would likely make an objective justification

100. *See generally*, O'NEAL & THOMPSON, *supra* note 57, at § 5:16.
101. *See supra* Section III.D.4.
102. LA. STAT. ANN. § 12:1-1302(A)(5) (2015).
103. O'NEAL & THOMPSON, *supra* note 57, at § 5:16.
104. *See id.* at §§ 5:4, 5:15.

advisable.

B. BCA § 1340 Affords a Corporation Strong Protection for Expulsion Transactions Provided Appraisal Rights Are Offered

The BCA requires appraisal rights for both a reverse share split[105] and a squeezeout merger.[106] Appraisal rights are not mandatory, however, for the creation of a Full Call on Old Shares by charter amendment; they may be conferred at the option of the corporation.[107]

Subject to the discussion in Part V below, an offer of appraisal rights moots a claim that the Full Call amendment will constitute a share transfer restriction as to Old Shares whose enforceability is barred by BCA § 627. As noted in the Official Comment to MBCA § 13.40:

> The theory underlying this section generally is that when a majority of shareholders has approved a corporate change, the corporation should be permitted to proceed even if a minority considers the change unwise or disadvantageous.[108]

In the case of any transaction for which statutory appraisal rights are available, whether in the form of a statutory merger, a reverse share split, or a Full Call, the BCA facially eliminates any post-consummation cause of action by the non-consenting shareholders to challenge the legality of the Expulsion Transaction against the corporation, its directors, or its controlling shareholders, unless the action alleges that the transaction was not authorized or approved in accordance with applicable law, the charter, the bylaws, or the enabling resolutions.[109] To be more precise, the non-consenting shareholder has the right to bring:

(a) *after receipt of notice but prior to shareholder approval of the Expulsion Transaction*, an injunction suit against any or all of the corporation, its directors, or its controlling shareholders to

105. LA. STAT. ANN. § 12:1-1302(A)(4) (2015); *see also* LA. STAT. ANN. §§ 12:1-1001(A)–(B), -1003(A)(3) (2015).

106. LA. STAT. ANN. § 12:1-1302(A)(1)(a) (2015); *see also* LA. STAT. ANN. §§ 12:1-1102(A)–(C)(3), -1104(5) (2015).

107. LA. STAT. ANN. § 12:1-1302(A)(5) (2015); *see also* LA. STAT. ANN. §§ 12:1-1001(A)–(B), -1003(A)(3) (2015).

108. MODEL BUS. CORP. ACT § 13.40 cmt. (AM. BAR ASS'N 2013).

109. LA. STAT. ANN. § 12:1-1340(C), (E)(1) (2015).

block consummation of the corporate action on any grounds, including (i) a breach of fiduciary duty of care, candor or loyalty, or (ii) an action unauthorized by or not in accordance with BCA Chapter 9, 10, 11, or 12, the charter, the bylaws, or the enabling board resolutions,

(b) *following shareholder approval but prior to consummation of the Expulsion Transaction*, (1) an injunction suit against any or all of the corporation, its directors, or its controlling shareholders to block consummation of the corporate action, but only on the grounds described in clause (a)(ii) above, and (2) assuming consummation does not occur, a damage suit against any or all of the directors and the controlling shareholders, but not against the corporation, on any grounds described in clause (a)(i) above, and

(c) *following consummation of the Expulsion Transaction*, either (1) a suit against the corporation to rescind it, or (2) a damage suit against any or all of the corporation, its directors or its controlling shareholders, but in either case only on the grounds described in clause (a)(ii) above.[110]

The failure of a corporate action to be "authorized and approved in accordance with the applicable provisions of . . . chapter 9, 10, 11, or 12" is limited to "procedural defects in approving the action, such as a failure to obtain the votes required by statute."[111]

Thus, BCA § 1340 prohibits a non-consenting minority shareholder(s) aggrieved by a consummated Expulsion Transaction that has been authorized and approved in accordance with the applicable statute, charter, bylaws, and resolutions, and as to which appraisal rights are available from bringing a proceeding to rescind the transaction or to claim damages against

110. Official Comment 3(E) under MBCA § 2.02 states that, "[S]ection 2.02(b)(4) [which authorizes an optional charter clause eliminating directorial liability for money damages for breach of the fiduciary duty of care] . . . is applicable only to money damages and not to equitable relief." MODEL BUS. CORP. ACT § 2.02 cmt. 3(E) (AM. BAR ASS'N 2013). This principle precludes charter exculpation from barring a shareholder injunction or rescission proceeding with respect to a corporate action, even though the claim is care-based. Section 1340(C), on the other hand, *does* bar under certain circumstances such care-based shareholder injunction and rescission proceedings, stating, "[T]he shareholder shall not have any other cause of action for damages *or any other form of relief* against the corporation, or any director . . . or controlling person of the corporation in connection with the corporate action." LA. STAT. ANN. § 12:1-1340(C) (2015) (emphasis added).

111. MODEL BUS. CORP. ACT § 13.40 cmt. (AM. BAR ASS'N 2013).

the corporation or its directors, officers, or controlling persons by reason of its consummation.[112] Appraisal rights under the MBCA and the BCA provide an exceptionally strong remedy for a minority shareholder entitled to exercise them—far stronger than dissenters' rights under LBCL § 131.[113] For that reason, appraisal rights offer full protection for the financial interests of minority shareholders.[114]

C. Comparison of Appraisal Applicable to Full Call With Appraisal Applicable to Merger or Reverse Share Split

Expulsion of minority shareholders by squeezeout merger or reverse share split operates automatically in a single step triggered by the shareholder vote approving the transaction.[115] Accordingly, there can be no doubt as to the event that triggers statutory appraisal rights and fixes the time schedule for their exercise.

The adoption of a Full Call by charter amendment, however, does not in and of itself expel minority shareholders. Rather, the amendment merely authorizes the board to exercise the Full Call from time to time in its discretion as to selected shares. Shareholders are expelled only if, as, and when the board exercises the call after the adoption of the charter amendment. The issue presented by this two-step process is whether voluntary appraisal rights granted by the corporation pursuant to BCA § 1302(A)(5) with respect to approval of a Full Call charter amendment (1) must be exercised, if at all, only with respect to the adoption of the charter amendment or (2) may, at the option of the corporation, be made exercisable by the holders of the called shares only at the time of, and with respect to, the post-amendment exercise of the call.

Section 1302(A)(5) provides that voluntary appraisal rights can be made available with respect to "[a]ny other amendment to

112. LA. STAT. ANN. § 12:1-1340 (2015).

113. *Compare* LA. STAT. ANN. §12:1-1301 (2015) *to* LA. STAT. ANN. § 12:131 (repealed 2014).

114. Official Comment 1 (Overview) to MBCA § 13.01 states "Chapter 13 . . . is designed to increase the frequency with which assertion of appraisal rights leads to economical and satisfying solutions . . . primarily by simplifying and clarifying the appraisal process, as well as by motivating the parties to settle their differences in private negotiations without resort to judicial appraisal proceedings." MODEL BUS. CORP. ACT § 13.01 cmt. (AM. BAR ASS'N 2013).

115. *See* LA. STAT. ANN. §§ 12:1-1003(A)(1), -1104(5) (2015).

the articles of incorporation, merger, share exchange, or disposition of assets . . . ."[116] The statute does not authorize appraisal rights with respect to the exercise of a Full Call or with respect to any comparable action. Nothing in the Official Comments to MBCA Subchapter 13A or § 13.02 suggests that the statute authorizes the voluntary grant of appraisal rights with respect to any corporate event other than those mentioned.[117]

The BCA authorizes the optional grant of appraisal rights with respect to (1) a charter amendment, (2) a merger, (3) a share exchange, or (4) a disposition of assets. All four of these events occur by reason of a single shareholder vote. For that reason, voluntary appraisal rights triggered as to Old Shares, not by the shareholder vote adopting the amendment, but rather by one or more post-amendment exercises of the Full Call, may be suggestive of litigation. Accordingly, the prudent course for a corporation with respect to a Full Call charter amendment is to limit the exercisability of statutory appraisal rights to the approval of the amendment only, and not to extend appraisal rights to any post-approval exercise of the call as to Old Shares.

As suggested above, however, a corporation could grant the holders of called Old Shares the functional equivalent of statutory appraisal rights as of the call date by providing in its Full Call charter amendment a procedure similar to appraisal for determining the Estimated Fair Value of the shares as of the call date.[118] The disadvantage of an Estimated Fair Value procedure as of the call date in lieu of appraisal rights is that it does not confer the preemptive protection against a shareholder proceeding granted by BCA § 1340 to the corporation, its directors, and its controlling shareholders where statutory appraisal rights are available.[119]

D. STRUCTURE AND HISTORY OF BCA § 1340

BCA § 1340 is entirely different from MBCA § 13.40.[120] It is unique to Louisiana, just as the oppression remedy in BCA § 1435 is unique to Louisiana, and it has no parallel in the MBCA or in

116. LA. STAT. ANN. § 12:1-1302(A)(5) (2015).

117. *See* MODEL BUS. CORP. ACT ch. 13A cmts., § 13.02 cmt. (AM. BAR ASS'N 2013).

118. *See supra* Sections III.D.4, 6.

119. A full treatment of § 1340 is found above in Section IV.B and below in Section IV.D.

120. *Compare* LA. STAT. ANN. § 12:1-1340 (2015) *to* MODEL BUS. CORP. ACT § 13.40 (AM. BAR ASS'N 2013).

the law of any other state.

1. IMPACT OF ADDING BCA §§ 1340(B) & (C)

The general rule in both BCA § 1340(A) and MBCA § 13.40(a) is that the legality of a proposed or completed corporate action described in BCA § 1302(A) may not be contested, enjoined, or set aside in any proceeding commenced by a shareholder after the shareholders have approved it.[121] The following analysis of the remainder of BCA § 1340 and MBCA § 13.40 is important to understanding the BCA's qualification of this general rule.

BCA § 1340 contains two key subsections, (B) and (C), that do not appear in the MBCA.[122] Section 1340(B) makes the appraisal rights available to corporate actions under § 1302(A) the exclusive remedy of a non-consenting shareholder.[123] Additionally, § 1340(C) provides that

> the shareholder shall not have any other cause of action for damages or for any other form of relief against the corporation, *or any director, officer, employee, agent, or controlling person of the corporation* in connection with the corporate action.[124]

BCA §§ 1340(B)–(C) thus facially provide an almost impenetrable defense against non-consenting shareholder claims for damages, whether asserted against the corporation, its directors, or its controlling persons, with respect to any validly consummated sale of control or Expulsion Transaction.

The language of BCA § 1340(C) is generally parallel to BCA § 1435(L), which similarly limits a shareholder's *oppression* remedy to payment for the Statutory Fair Value of his shares.[125] The difference in impact between § 1435(L) and §§ 1340(B)–(C) is that the individual shareholder may elect the oppression remedy, whereas only the majority shareholders can elect the expulsion

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121. LA. STAT. ANN. § 12:1-1340 (2015). As noted in the Official Comment to MBCA § 13.40, in the case of public company transactions, this general rule also applies where the "market out" under BCA § 1302(B) is available, even if appraisal rights are not available: "[T]he market out justif[ies] imposing the same limitation on post-shareholder approval remedies that apply when appraisal is available." MODEL BUS. CORP. ACT § 13.40(a) cmt. (AM. BAR ASS'N 2013).

122. *See* LA. STAT. ANN. § 12:1-1340(B)–(C) (2015).

123. LA. STAT. ANN. § 12:1-1340(B) (2015).

124. LA. STAT. ANN. § 12:1-1340(C) (2015) (emphasis added).

125. *Compare* LA. STAT. ANN. § 12:1-1340(C) *to* -1435(L) (2015).

remedy.[126]

Subsections (B) and (C) of BCA § 1340 did not originate with the Law Institute Corporations Committee (Committee), which drafted the statute. Rather, they were introduced late in the legislative process by a senate floor amendment sponsored by Senator Danny Martiny on behalf of one of his constituents.[127] The Committee was afforded an opportunity to review the senate floor amendment before the enactment of the BCA, however, and did not object to it because the amendment is consistent with and enhances the general rule of BCA § 1340(A) that there can be no collateral attack on a shareholder-approved corporate action as to which appraisal rights or a market out were or would be available.

2. IMPACT OF OMITTING MBCA §§ 13.40(B)(2)–(3) FROM BCA § 1340

Another major difference between MBCA § 13.40 and BCA § 1340 arises not because the Louisiana drafters added novel provisions to the MBCA—as in the case of BCA §§ 1340(B)–(C) discussed above—but because of the Committee's decision to reject MBCA §§ 13.40(b)(2)–(b)(3) in BCA § 1340(E) (which corresponds to MBCA § 13.40(b)).[128]

As indicated above, the general rule of MBCA § 13.40(a) and corresponding BCA § 1340(A) is that the legality of a corporate action described in BCA § 1302(A) may not be "contested . . . enjoined, set aside or rescinded . . . by a shareholder after the shareholders have approved the corporate action."[129] This general bar against collateral attack on a shareholder-approved action as to which appraisal rights or a market out were or would be available does not apply under the MBCA, however, in any of the four cases carved out in MBCA § 13.40(b).

The Committee accepted two of the four MBCA carveouts—those in §§ 13.40(b)(1) and 13.40(b)(4)—from the general rule in § 13.40(a) prohibiting collateral attack.[130] The carveouts in

126. *See generally* LA. STAT. ANN. §§ 12:1-1340(B), -1435(L) (2015 & Supp. 2018).

127. *See* Glenn G. Morris, *Model Business Corporation Act as Adopted in Louisiana*, 75 LA. L. REV. 983, 1051–52 n.428 (2015); H.B. 319, 40th Leg., Reg. Sess. (La. 2014).

128. *Compare* MODEL BUS. CORP. ACT §§ 13.40(b)(1), (4) (AM. BAR ASS'N 2013) *to* LA. STAT. ANN. § 12:1-1340(B)–(C) (2015).

129. LA. STAT. ANN. § 12:1-1340(A) (2015).

130. *Id.*; *see* MODEL BUS. CORP. ACT § 13.40(b)(1), (4) (AM. BAR ASS'N 2013).

MBCA §§ 13.40(b)(2)–(b)(3) apply, respectively, to a corporate action (1) procured "as a result of fraud, a material misrepresentation, or an omission of a material fact" or (2) that is an "interested transaction," a term defined in MBCA § 1301(5.1) to mean a conflict of interest transaction.[131]

The Committee rejected MBCA §§ 13.40(b)(2)–(3) and omitted them from BCA § 1340(E) (which corresponds to MBCA § 13.40(b)).[132] The Committee reasoned that if the general rule of MBCA § 13.40(a) (BCA § 1340(A)) is appropriate—i.e., no collateral shareholder attack permitted on a shareholder-approved corporate action where appraisal or a market out was or would be available—then it would be bad policy to undermine that general rule with the exceptions in §§ 13.40(b)(2)–(3).[133]

a. MBCA § 13.40(b)(2)

More particularly, the Committee's view was that MBCA § 13.40(b)(2) should be excluded from BCA § 1340(E) for three reasons. First, its test is too subjective: How would a defendant establish that a corporate transaction as to which appraisal rights were or would be available was *not* procured "as a result of . . . a material misrepresentation"? The vague standard in § 13.40(b)(2) invites such a claim, which undermines the policy of BCA § 1340(A) by permitting a non-consenting shareholder to avoid the "no collateral attack" rule and rescind consummated corporate action.

Second, the reasoning behind the MBCA § 13.40(b)(2) carveout is puzzling because a material misrepresentation in a proxy statement would be a breach of the directors' duty of candor to shareholders, if any. But the MBCA does not mention any such duty owed by directors to shareholders. Quite the contrary, Official Comment 3 to MBCA § 8.30 says:

> The Act does not seek to codify such a duty [of disclosure to shareholders], but leaves its *existence* and scope, the circumstances for its application, and the consequences of any failure to satisfy it, to be developed by courts on a case-by-case basis.[134]

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131. MODEL BUS. CORP. ACT §§ 13.40(b)(2)–(3), 1301(5.1) (AM. BAR ASS'N 2013).

132. *Contrast* LA. STAT. ANN. § 12-1340(E) (2015) *with* MODEL BUS. CORP. ACT § 13.40(b)(2)–(3) (AM. BAR ASS'N 2013).

133. See LA. STAT. ANN. § 12:1-1340 cmt. (2015).

134. MODEL BUS. CORP. ACT § 8.30 cmt. 3 (AM. BAR ASS'N 2013) (emphasis added).

If neither the MBCA nor the BCA concedes the *existence* of a directorial duty of disclosure to shareholders, why should the breach of such a duty—assuming it exists—be the basis for MBCA § 13.40(b)(2) to attack the validity of a shareholder-approved consummated corporate action?

Third, a state-law cause of action for misrepresentation in the context of a corporate action is appropriate only if the misrepresentation influences a meaningful decision by the shareholder to his disadvantage. Where the corporation is non-public, a misrepresentation cannot affect the outcome of the shareholder vote because in that case the minority vote is irrelevant and, therefore, not a meaningful decision.

If non-consenting shareholders of a non-public corporation elect appraisal rights, any misrepresentation made to them would be moot because it is within their power to seek a judicial appraisal of their shares in a proceeding in which they have discovery rights that would detect the misrepresentation and permit a determination of Statutory Fair Value without regard to it.[135] Only if the non-consenting shareholders elect to waive their appraisal rights in reliance on the misrepresentation and, as a result, accept an inadequate transaction price, could the misrepresentation have influenced a meaningful decision by them to their disadvantage.

In such a case, the deceived minority have a federal cause of action for securities fraud pursuant to Rule 10b-5 under the Securities Exchange Act of 1934 (1934 Act) to recover monetary damages equal to the shortfall in the price caused by their reliance on the misrepresentation.[136] That federal cause of action is not barred by BCA § 1340 and is more effective than a state-law cause of action either under MBCA § 13.40(b)(2) to enjoin or rescind a corporate action or against the directors for breach of a fiduciary duty of candor whose existence under the BCA is uncertain.[137]

Where the corporation is public, § 14 of the 1934 Act requires the corporation to provide shareholders with a proxy statement in advance of the vote on a corporate transaction describing it and disclosing the circumstances under which the transaction was

135. *See* LA. STAT. ANN. § 12:1-1330(D) (2015).
136. 17 C.F.R. § 240.10b-5 (2018).
137. As to the federal remedy, *see, e.g.*, MORRIS & HOLMES, *supra* note 5, at § 22:9–10; O'NEAL & THOMPSON, *supra* note 57, at § 8.1.

negotiated.[138] The proxy statement is subject to federal antifraud liability under 1934 Act Rules 14a-9, 10b-5 and—if the transaction is a "going private" one—Rule 13e-3.[139] The federal antifraud claims can be asserted in either an injunction suit prior to consummation of the transaction, which confers greater leverage on the complaining shareholders, or a post-consummation suit for damages.[140]

b. MBCA § 13.40(b)(3)

The Committee excluded MBCA § 13.40(b)(3) because it thought that a shareholder-approved conflict of interest transaction (an "interested transaction") that was not also approved by qualified directors (as defined in BCA § 143) should not be subject to injunction or post-consummation rescission any more than an arm's-length transaction as to which there was no conflict. The reasons are as follows.

The sole function of the "interested transaction" definition in MBCA § 13.01(5.1) is to grant non-consenting shareholders of *public corporations* in conflict transactions appraisal rights (under MBCA § 13.02(b)(4)) to which they would otherwise not be entitled because they already have a market out.[141] If under MBCA § 13.02(b)(4) those shareholders are given *both* a market out *and* appraisal rights because the transaction is an "interested" one, what policy is served by MBCA § 13.40(b)(3), which confers on them yet a third remedy of suing to enjoin or rescind any shareholder-approved transaction *because its terms were not approved by a committee of qualified directors*?[142]

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138. *See* 17 C.F.R. § 240.14a-3 (2018).

139. *See, e.g.*, SEC v. National Securities, Inc., 393 U.S. 453 (1969); Howing Co. v. Nationwide Corp., 826 F.2d 1470 (6th Cir. 1987).

140. *See, e.g.*, O'NEAL & THOMPSON, *supra* note 57, at § 5:36.

141. MODEL BUS. CORP. ACT § 13.01(5.1) (AM. BAR ASS'N 2013). *See* LA. STAT. ANN. § 12:1-1301 cmt. (2015 & Supp. 2018).

142. MBCA § 13.40(b)(3), which was rejected in the BCA, enhances the rights of non-consenting shareholders with respect to "interested transactions" that have not received qualified director approval by according them a right to seek injunction or post-consummation rescission of the transaction. MODEL BUS. CORP. ACT § 13.40(b)(3) (AM. BAR ASS'N 2013). In that context, however, it is counterintuitive that MBCA § 13.01(5.1) inappropriately excludes short-form mergers entirely from its definition of "interested transaction." MODEL BUS. CORP. ACT § 13.01(5.1) (AM. BAR ASS'N 2013). The result is that under the MBCA, non-consenting minority shareholders in short-form public corporation mergers—because they have a market out—are entitled *neither* to appraisal rights *nor* to the MBCA § 13.40(b)(3) right to seek rescission of a merger not approved by qualified directors. *See* LA. STAT. ANN. § 12:1-1301 cmt. (2015 & Supp. 2018). The Committee reversed these rules in BCA

As a practical matter, all public corporations appoint a committee of qualified directors to approve the terms of any "interested transaction" to reduce the risk of injunction suits. For that reason, there is little likelihood of an "interested transaction" involving a public corporation that has not been approved in advance by qualified directors and, therefore, little likelihood of there ever being *any* transaction covered by MBCA § 1340(b)(3), even if that paragraph had been included in the BCA.

Further, as indicated above in the discussion of MBCA § 13.40(b)(2), 1934 Act § 14 requires all public corporations to provide their shareholders in advance of voting on a transaction with a proxy statement describing the transaction and disclosing the circumstances under which it was negotiated.[143] Such proxy statements invariably disclose whether the transaction was approved by a committee of qualified directors and provide a detailed account of the committee's actions.[144]

Also as indicated above, antifraud Rules 14a-9 and 10b-5 under the 1934 Act provide shareholders with pre- and post-consummation federal remedies for the misstatement or omission of a material fact in the proxy statement, whether relating to a transaction that was approved by a committee of qualified directors or to one that was not.[145] Accordingly, the bar imposed

§ 1301(5.2) and § 1302(A)(1)(b) by including short-form mergers in the definition of "interested transaction," thereby granting appraisal rights to those non-consenting minority shareholders. In the case of an "interested transaction" (*other than* a short-form merger) involving a public corporation, both BCA § 1302(B)(4) and MBCA § 13.02(b)(4) grant non-consenting shareholders appraisal rights, as well as a market out. (As indicated earlier in this Article, BCA § 1301(5.2) and § 1302(A)(1)(b)—unlike the MBCA—extend appraisal rights to non-consenting minority shareholders in short-form mergers). Given these circumstances, the benefit of the post-shareholder-approval injunction or rescission right conferred on shareholders by MBCA § 13.40(b)(3)—rejected in the BCA—in the case of "interested transactions" (other than short-form mergers) whose financial terms have not been approved by qualified directors appears illusory, superfluous and, in any case, insignificant compared with the threat that right poses to the security of transactions.

143. *See* 17 C.F.R. § 240.14a-3(a)–(i) (2018).

144. The proxy statement offers public corporation shareholders an opportunity to evaluate the fairness of the terms of the transaction, as well as to review the opinions of the financial press on that subject. Shareholders are therefore in a position to make an informed decision on a timely basis whether to accept the transaction terms, sell into the market, or exercise their appraisal rights. These alternatives are all available without resort to the MBCA § 1340(b)(3) right to seek post-shareholder-approval injunction or rescission of a public corporation "interested transaction" because it was not approved by qualified directors, a type of transaction unlikely ever to occur and even less likely to be enjoined or rescinded by a court.

145. *See* 17 C.F.R. §§ 240.14a-9, 240.10b-5 (2018).

by BCA §§ 1340(B)–(C) on state-law remedies against the corporation, its directors, and control persons with respect to a transaction offering both appraisal rights and a market out does not seem unfair or inappropriate.

In the case of a *private company*, all corporate actions for which mandatory appraisal rights are available (other than a sale of control to an unaffiliated purchaser) are by definition "interested transactions," as to which non-consenting shareholders do not have a market out but do have appraisal rights. As with MBCA § 13.40(b)(2) discussed above, enhanced appraisal rights are the gold standard for redressing minority fairness issues in private companies.[146] In any case, private companies often have no qualified directors with respect to an interested transaction and, even if they do, it is awkward for the qualified directors to engage in a meaningful negotiation of financial terms with the majority. Hence, the "interested transaction" exception in MBCA § 13.40(b)(3) to the general rule in § 13.40(a) of no collateral attack has no more legitimate function for a private company than for a public one.

3. OVERALL RESULT OF LOUISIANA'S MODIFICATION OF MBCA § 13.40

As discussed above, the Committee made its decision to exclude MBCA §§ 13.40(b)(2)–(3) from BCA § 1340 before it became aware that the legislature would add proposed new §§ 1340(B)–(C) (also discussed above) to BCA § 1340 by a senate floor amendment shortly before enactment.[147] That is, the Committee assumed—in rejecting MBCA §§ 1340(b)(2)–(3) carveouts for transactions procured by material misrepresentation or that involved a conflict of interest—that the *directors and controlling shareholders* of the corporation would in both cases remain exposed to possible non-consenting shareholder claims, notwithstanding that under the general rule of BCA § 1340(A) the shareholder-approved corporate action itself would be incontestable.[148] The late addition of §§ 1340(B)–(C) to the BCA, however, had the unanticipated effect of facially eliminating the non-consenting shareholders' damages remedy in

146. *See supra* Section III.D.6.

147. *See supra* Section IV.D.1.

148. The Committee's assumption is consistent with the Official Comment under MBCA § 13.40, which says: "Section 13.40 . . . does not address remedies, if any, that the shareholders may have against directors or other persons as a result of the corporate action . . . ." MODEL BUS. CORP. ACT § 13.40 cmt. (2013) (AM. BAR ASS'N).

the case of a material misrepresentation or conflict of interest transaction, not only against the corporation, but also against its directors and controlling shareholders. The resulting statutory structure nevertheless seems sound, because if appraisal rights are conceived as a quid pro quo for the majority's right to expel non-consenting minority shareholders, the latter should not retain a "back door" after completion of the corporate action to bring collateral state-law claims against affiliates of the corporation for monetary damages asserting that their role in the transaction was wrongful, even though the transaction itself is incontestable.

Finally, the exclusiveness of the appraisal remedy under BCA § 1340 is parallel with the exclusiveness of the remedy under BCA § 1435 for the redress of oppression. Both sections differ radically from related provisions of the MBCA.[149]

The unresolved question is whether courts will interpret BCA § 1340 literally as written—as a complete bar to all non-consenting minority shareholder claims under state law against the corporation, its directors, and its control persons in connection with a corporate action as to which appraisal rights or a market out were available (other than one not authorized or approved in accordance with law or the charter or bylaws)—or will courts instead entertain such claims to the extent they are based on an alleged breach of fiduciary duty or fraud by either the directors or the controlling persons, or both, in proposing and consummating the transaction. In other words, are directors and controlling persons subject to a fiduciary duty that trumps the literal bar imposed by BCA § 1340 to non-consenting minority shareholder claims under state law against the corporation, its directors, and its control persons in any case where appraisal rights or a market out were available? That question is addressed in Part V below.

149. More particularly, § 1435(L) provides that "the right to withdraw in accordance with this Section . . . is the exclusive remedy for oppression." LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018). Consistent with that rule, where a shareholder invokes the § 1435 oppression remedy, BCA § 437(B) requires the court to stay "any proceeding in which a shareholder . . . alleges a cause of action against the corporation, or against a director, officer, agent, employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation [i.e., a derivative action] or to the shareholder." LA. STAT. ANN. § 12:1-1437(B) (2015).

V. FIDUCIARY IMPLICATIONS OF SHAREHOLDER OPPRESSION AND EXPULSION TRANSACTIONS

Part V addresses the fiduciary implications under the BCA of the oppression remedy and two Expulsion Techniques, the reverse share split and the squeezeout merger. These two techniques have in common that each achieves the same result by involuntarily eliminating the common share ownership of a select group of some, but not all, non-consenting minority shareholders in a single stroke by shareholder vote. The Full Call, on the other hand, achieves the result of expulsion only if, as, and when the call is exercised, as distinguished from when the charter amendment authorizing the Full Call is adopted.

Part III of this Article dealt with whether callable common shares are authorized by the BCA and, if so, whether a Full Call may lawfully be imposed on Old Shares. This Part asks whether, assuming a Full Call may lawfully be imposed on Old Shares because appraisal rights are granted, the *exercise* of the Full Call will or may abridge a fiduciary duty, if any, owed to the holders of the called shares.

BCA § 1435 addresses exclusively the problem of the oppressed minority shareholder who affirmatively wishes to sell his shares but is involuntarily trapped with no exit strategy.[150] The problem for the oppressed minority shareholder addressed by § 1435 is the opposite of the expulsion of non-consenting minority shareholders who would have preferred to remain instead of being cashed out.[151] The oppressed minority shareholder and the expelled minority shareholder nevertheless share the same remedy under the BCA: a purchase of their shares by the corporation for Statutory Fair Value, defined in BCA § 1301(4) as

> the value of the corporation's shares determined . . . using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and without discounting for lack of marketability or minority status.[152]

The respective situations of the oppressed and the expelled minority shareholders differ, however, in that the corporation *automatically* becomes obligated by reason of appraisal rights to

150. For a review of § 1435, *see* Moll, *supra* note 7.
151. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).
152. LA. STAT. ANN. §§ 12:1-1301(4), -1435 (2015 & Supp. 2018).

pay the *expelled* shareholder the Statutory Fair Value of his shares, whereas the *oppressed* shareholder is entitled to demand the redemption of and payment for his shares as of right only if he satisfies the burden of proof in a judicial proceeding that he has been oppressed.[153] Two points about the BCA oppression remedy are relevant here.

First, the oppression remedy is facially exclusive. BCA § 1435(L) says, "[T]he right to withdraw in accordance with this Section . . . is the exclusive remedy for oppression."[154] Louisiana 2014 Revision Comment (l) to BCA § 1435 states, "[T]his Section rejects the treatment of oppression as a breach of fiduciary duty that may justify an action for damages against the corporation, the directors or others in control."[155] In other words, a minority shareholder is unconditionally foreclosed by the literal wording of BCA § 1435 and the revision comments from bringing suit against the corporation, the directors, or the controlling shareholders alleging a breach of fiduciary duty by reason of oppression.[156] Other than § 1435, there is no such thing as a minority shareholder cause of action for oppression under the BCA as drafted—or for breach of fiduciary duty by reason of oppression—regardless of what form that alleged oppression may take.[157]

Instead, a minority shareholder who considers himself oppressed is entitled by § 1435(D) to assert a right to withdraw and offer his shares for sale to the corporation at a price determined by the shareholder, payable immediately in cash.[158] If the corporation declines the offer, the shareholder has the

153. LA. STAT. ANN. § 12:1-1435(B)(1)–(2) (2015 & Supp. 2018) ("A corporation engages in oppression of a shareholder if the corporation's distribution, compensation, governance, and other practices, considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder. Conduct that is consistent with the good faith performance of an agreement among all shareholders is presumed not to be oppressive. The following factors are relevant in assessing the fairness and good faith of the corporation's practices: (1) The conduct of the shareholder alleging oppression. (2) The treatment that a reasonable shareholder would consider fair under the circumstances, considering the reasonable expectations of all shareholders in the corporation.").

154. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

155. LA. STAT. ANN. § 12:1-1435 cmt. 1 (2015 & Supp. 2018).

156. LA. STAT. ANN. § 12:1-1435 cmts. (2015 & Supp. 2018).

157. *See* LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018). Section 1435 is a rule of public order that can be voided only by unanimous shareholder agreement. *See* LA. STAT. ANN. § 12:1-1435(J) (2015 & Supp. 2018).

158. LA. STAT. ANN. § 12:1-1435(D) (2015 & Supp. 2018).

option either to withdraw it or file a proceeding under § 1435(G) alleging oppression in which he has the burden of proof.[159] If the court determines, after trial on the merits, that the acts and omissions alleged and proven by the shareholder do not constitute oppression within the meaning of § 1435(B), the shareholder has no alternate remedy under the BCA as drafted.[160] If, on the other hand, the corporation accepts the offer but declines the price, the parties are encouraged by precise statutory rules to negotiate the price.[161] If negotiations do not resolve the issue, either party is authorized by BCA § 1436(A)(1) to file suit to determine by summary proceeding the Statutory Fair Value of the shares, thereby establishing the price at which they shall be sold to the corporation.[162]

Second, the BCA oppression remedy confers important negotiating leverage on the minority shareholder, even if it is never invoked. A shareholder's position in a Louisiana corporation prior to the enactment of the BCA was characterized in *Gruenberg v. Goldmine Plantation, Inc*. as follows: "Our substantive law . . . offers no remedy for the minority shareholder with substantial holdings who is out of control and trapped in a closed corporation."[163]

BCA § 1435, however, offers the minority shareholder the elective right to demand at any time that the corporation immediately redeem his shares at their Statutory Fair Value for cash on the ground of oppression.[164] The controlling shareholders know the minority are empowered to invoke the oppression remedy, should they so choose, at any time. That knowledge will induce some corporations to offer the minority an acceptable price in informal negotiations to avoid the expense, uncertainty, disruption, and publicity attendant upon litigation alleging that the corporation wrongfully oppressed the minority.

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159. LA. STAT. ANN. § 12:1-1435(G) (2015 & Supp. 2018).

160. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018) ("Without limiting any remedy available on other grounds, the right to withdraw in accordance with this Section and R.S. 12:1-1436 is the *exclusive remedy for oppression*. An allegation of oppression, as such, does not provide an independent or additional basis for an action by a shareholder to recover damages from the corporation or its directors, officers, employees, agents, or controlling persons.") (emphasis added); *see* LA. STAT. ANN. § 12:1-1436 (2015 & Supp. 2018).

161. LA. STAT. ANN. § 12:1-1436 (2015 & Supp. 2018).

162. LA. STAT. ANN. § 12:1-1436(A)(1) (2015 & Supp. 2018).

163. Gruenberg v. Goldmine Plantation, Inc., 360 So. 2d 884, 887 (La. Ct. App. 1978).

164. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).

The mere existence of the oppression remedy, therefore, and the minority shareholder's option whether and when to assert it provide the minority an important bargaining chip that significantly enhances their ability to negotiate a fair price for shares they wish to sell—without the necessity of judicially asserting a right to withdraw by reason of oppression.[165] Moreover, the existence of the oppression remedy will in some cases have the *in terrorem* effect of discouraging oppression in the first place.[166]

A. MBCA Position Regarding Controlling Shareholder Duty to Minority Shareholders

The MBCA contains extensive provisions in Chapters 7 and 8 dealing with the fiduciary duty owed by directors and officers to the corporation and its shareholders. The MBCA does not, however, contain provisions dealing with duties, if any, owed by NDC Shareholders to *minority* shareholders. The Official Comment under MBCA § 10.01 addressed this issue in the context of the shareholders' plenary power under § 10.01 to amend the corporate charter, as follows:

> Minority shareholders are protected from the power of the majority to impose onerous or objectionable amendments in several ways. First, such shareholders may have the right to vote on amendments by separate voting groups. . . . Second, a decision by a majority shareholder or a control group to exercise the powers granted by this section in a way that may breach a duty to minority or non-controlling interests may be reviewable by a court under its inherent equity power to review transactions for good faith and fair dealing to the minority shareholders . . . .[167]

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165. In *Woodard v. Woodard Villa, Inc.*, No. 15-1777; 16-1119, 2017 WL 2177898, at p. *19 (W.D. La. May 16, 2017), the court held that plaintiff shareholders in a § 1435(G) oppression suit were entitled to a jury trial on the oppression issue based on garden-variety allegations of oppression. A corporate defendant normally prefers to avoid a jury trial on such an issue.

166. For avoidance of doubt, a derivative shareholder suit is not an alternative remedy for the expulsion of minority shareholders because the shareholders' cause of action is not derivative in character. That is, any recovery made by the minority shareholders based on alleged wrongful expulsion would be payable to the plaintiffs individually or as a class, not to the corporation. Accordingly, the complex rules governing derivative litigation under the BCA are inapplicable to minority shareholder claims based on alleged wrongful expulsion.

167. MODEL BUS. CORP. ACT § 10.01 rev. cmt. (AM. BAR ASS'N 2013) (citing McNulty v. W. & J. Sloane, 184 Misc. 835, 54 N.Y.S.2d 253 (Sup. Ct. 1945) (citing other non-Louisiana cases)).

The Official Comment under paragraph 2 of Subchapter 8F of the MBCA, which deals with directors' conflicting interest transactions, states: "[S]ubchapter F does not address a claim that *a controlling shareholder* has violated a duty owed to the corporation or minority shareholders."[168]

Along the same lines, the Official Comment under § 3.04, which deals with *ultra vires*, says:

> *Similarly, corporate action is not ultra vires under section 3.04 merely because it constitutes a breach of fiduciary duty* . . . . These transactions . . . are not ultra vires with respect to the corporation, and cannot be attacked under section 3.04. They may be enjoined because of breach of the *fiduciary* duty, not because the transaction exceeds the powers or purposes of the corporation.[169]

The only substantive description in the MBCA comments of a notional "fiduciary duty" owed by NDC Shareholders to minority shareholders appeared in the comment under § 10.01 as quoted above.[170] That comment refers to possible judicial review of transactions for "good faith and fair dealing to the minority shareholders."[171] But good faith and fair dealing are not uniquely fiduciary duties; rather, they are duties owed by all contracting parties to each other in performing their respective obligations under a contract.[172]

Fiduciary duties, on the other hand, require the fiduciary, when acting in that capacity, to prefer the best interests of his beneficiary to his own.[173] A famous characterization of fiduciary duty is that of Justice Frankfurter in *SEC v. Chenery Corp.*:

> To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are

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168. MODEL BUS. CORP. ACT cmt. § 8(F)(2) (AM. BAR ASS'N 2013) (emphasis added).

169. MODEL BUS. CORP. ACT § 3.04 cmt. (AM. BAR ASS'N 2013) (emphasis added).

170. MODEL BUS. CORP. ACT § 10.01 rev. cmt. (AM. BAR ASS'N 2013).

171. *Id.*

172. *See, e.g.*, E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 443 (Del. 1996) (en banc) ("Although the [good faith and fair dealing] Covenant is a generally acknowledged principle, its precise contours are not fixed.").

173. *See* Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939) ("The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest.").

the consequences of his deviation from duty?[174]

The reticence of the MBCA drafters in dealing with a notional duty owed by NDC Shareholders to minority shareholders is perhaps attributable to the fundamental difference between the relationship of controlling to minority shareholders, on the one hand, and that of a director to his corporation, on the other hand. NDC Shareholders are entitled by statute to vote their shares exclusively in their own interest, just as is every other shareholder.[175] A corporate director, on the other hand, is subject to an undivided duty to exercise his authority exclusively in the interest of the corporation and its shareholders generally.[176]

The source of a corporate director's fiduciary duty is the principal-agent relationship he has voluntarily accepted with respect to the corporation and its shareholders. However, NDC Shareholders, as such, are not agents for minority shareholders. Any duty the law imposes on the NDC Shareholders in favor of the minority constitutes a limitation on the statutory right of the majority to vote their shares in their own interests.

As indicated above, the relevant MBCA Official Comments, particularly under § 10.01, in effect disclaim any intent that the MBCA affirmatively recognize, deny, define, or regulate a general duty owed by controlling to minority shareholders.[177] MBCA Official Comment 1 under § 8.30 says:

> In determining the corporation's "best interests," the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups within the shareholder body or having other cognizable interests in the enterprise may differ.[178]

If directors, in exercising their fiduciary duties under the MBCA, are deemed to have "wide discretion in deciding how to

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174. SEC v. Chenery Corp., 318 U.S. 80, 85–86 (1943).

175. LA. STAT. ANN. §§ 12:1-601(A), -721(A) (2015 & Supp. 2018).

176. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993) ("Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally.") (citations omitted).

177. *See* MODEL BUS. CORP. ACT § 10.01 cmt. (AM. BAR ASS'N 2013).

178. MODEL BUS. CORP. ACT § 8.03 cmt. 1 (AM. BAR ASS'N 2013).

weigh near-term opportunities versus long-term benefits," as well as in deciding whether to prefer the interests of one group within the shareholder body over another, NDC Shareholders, not being statutory fiduciaries, are presumably entitled to even wider discretion.

On the other hand, the quoted comment indicates that nothing in the MBCA is intended to abridge or limit the traditional power of courts to review transactions for good faith and fair dealing to minority shareholders. Thus, if Louisiana courts have historically recognized a duty owed by NDC Shareholders to minority shareholders as a matter of non-statutory law, the Official Comment takes the position that that jurisprudence survives the state's adoption of the MBCA in the form of the BCA.[179]

B. SCOPE OF DUTY OWED BY CONTROLLING TO MINORITY SHAREHOLDERS AND REMEDIES UNDER NON-LOUISIANA CORPORATE LAW

The irreconcilable conflict between the NDC Shareholders' statutory right to vote their shares as they please and the notional duty (fiduciary or otherwise) that the majority is said to owe the minority in exercising their control, has been the subject of extensive litigation. Some forty states have addressed the issue by statute.[180] The circumstances giving rise to minority shareholder complaints against the majority vary widely, but they fall into four general categories.[181]

1. CONFLICT OF INTEREST TRANSACTIONS NOT INVOLVING DISSOLUTION, OPPRESSION, OR EXPULSION

The first category of complaints arises from non-dissolution conflict of interest transactions involving either a public or private corporation in which the NDC Shareholders have exercised their control to (1) authorize transactions between the corporation as an ongoing business and entities under majority control on terms less favorable to the corporation than would have been available from unaffiliated third parties or (2) seize for themselves business opportunities properly belonging to the

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179. *See infra* Section V.C.

180. *See, e.g.*, O'NEAL & THOMPSON, *supra* note 57, at iii–viii; Moll, *supra* note 7, at 469.

181. These categories are not differentiated in the general discussion of the subject in 2 O'NEAL & THOMPSON, *supra* note 57, at § 7:3.

corporation. For this category of abuse, which involves intentional damage by the NDC Shareholders to the corporation as an ongoing entity, rather than specifically to the interests of the minority, the latter have a well-established judicial remedy: the shareholder derivative proceeding, a forum in which the defendant directors have the burden of proving the fairness to the corporation of their challenged transactions.[182]

To be sure, derivative proceedings must be brought against directors in their capacity as fiduciaries, rather than against NDC Shareholders as such. In practice, however, the majority selects the directors and, therefore, bears the economic consequences of the board's action in authorizing any unfair transaction with an entity controlled by the NDC Shareholders.[183]

2. OPPRESSION OF MINORITY SHAREHOLDERS

The second category of complaints is described in Louisiana 2014 Revision Comment (d)(1) under BCA § 1435 as asserting that "the directors or others in control have behaved in a way that is incompatible with a genuine effort to be fair to the complaining shareholder."[184] The party claimed to have been wronged is not the corporation, as in the first category above, but rather the complaining minority shareholder(s) individually. The claim, therefore, is not derivative. These claims arise only in private corporations because shareholders of public corporations have a market out. The gravamen of second-category complaints may be described as *systematic mismanagement of shareholder relations*—as distinguished from a single conflict of interest transaction implicating the majority—that disproportionately disadvantages the minority.

Most of these complaints are based on one or more of the following acts: excluding the minority from corporate employment, withholding dividends, excessive compensation to majority employees, not disclosing material information, pursuing unprofitable business activities, failing to exploit the

182. *See* MODEL BUS. CORP. ACT § 8.31 cmt. (AM. BAR ASS'N 2013) ("[W]here fairness of a director's conflicting interest transaction . . . is asserted by a defendant director as a defense . . . the burden of establishing that the transaction was fair to the corporation . . . is placed on the interested director under § 8.61(b)(3)."); *see* MODEL BUS. CORP. ACT § 8.61(b) cmt. 2 (AM. BAR ASS'N 2013) ("Under section 8.61(b)(3) the interested director has the burden of establishing that the transaction was fair.").

183. *See, e.g.*, Burton v. Exxon Corp., 583 F. Supp. 405, 414–15 (S.D.N.Y. 1984).

184. LA. STAT. ANN. § 12:1-1435 cmt. (d)(1) (2015 & Supp. 2018).

corporation's business opportunities, or declining an attractive offer to sell control to an unaffiliated purchaser. Such activities, where judicially determined to be wrongful, are usually referred to collectively as "oppression," meaning the use of majority power to frustrate the reasonable expectations of the minority by artificially reducing the value of their shares relative to the majority.

Regardless of whether mismanagement complaints are governed by a targeted corporate oppression statute, such as BCA § 1435, or by non-statutory case law, sale of the minority shares is the customary judicial remedy—short of dissolution—for a successful claim because courts have no means of exercising continuous oversight of the majority's future business judgments concerning employment, entrepreneurial risk-taking, capital expenditures, dividend policy, sale of control, and similar matters that would otherwise be necessary to judicial protection of minority interests.[185] Consequently, a court that has determined alleged mismanagement of a private corporation constitutes wrongful oppression has little alternative other than dissolution to ordering a purchase of the minority shares by the corporation at a price deemed fair.

3. Expulsion of Minority Shareholders for Less Than Fair Price

The third category of minority shareholder complaints arises because the price paid to the minority for their shares in an Expulsion Transaction is alleged to be less than fair. The usual basis for such complaints is that the method chosen to value the minority's shares improperly understates their value; in many cases, this is done by imposing minority or lack of marketability discounts, or both, on the going concern value of the minority shares.[186]

4. Wrongful Majority Conduct in Expulsion and Dissolution Transactions

The fourth category of complaints arises from misstatements or omissions of material fact that were the proximate cause of a financial detriment to the minority in either (1) an Expulsion Transaction because the minority were wrongfully denied, or declined to exercise, appraisal rights or (2) a dissolution

185. *See, e.g.*, Moll *supra* note 7, at 494–95.

186. *See infra* Sections V.C.6, D.1

proceeding (in which appraisal rights are never available) because it involved a transfer of corporate assets to an entity controlled by the majority on terms less favorable to the minority than would have been available from an unaffiliated third party. These complaints come in two flavors.

The first flavor is breach of the fiduciary duty of candor, or disclosure, that directors and liquidators owe shareholders when soliciting specific shareholder action (e.g., the vote on merger, charter amendment, or dissolution). A classic statement of the rule is found in *Brincat v. Malone*: "The duty of disclosure obligates directors to provide the stockholders with accurate and complete information material to a transaction or other corporate event that is being presented to them for action."[187]

The second flavor of fourth-category complaints arises not from alleged misstatements or omissions of static facts, but rather from specific acts or omissions by the directors shortly prior to an Expulsion Transaction that change the pre-existing situation so as to disproportionately reduce the value of minority shares as of the Expulsion Transaction appraisal date. The most common example is dilution of the minority's holdings by issuing additional shares to the NDC Shareholders or their nominees at a bargain price.[188]

First and fourth category claims differ in the following respect: in the former, the wrongful majority conduct can be adequately redressed in a derivative proceeding by disgorgement of ill-gotten profit to an active corporation in which majority and minority have parallel ongoing interests. In fourth-category cases, however, the minority have surrendered 100% of their shares in a transaction pitting the interests of the minority against those of the majority in a Zero-Sum Game in which an

187. Brincat v. Malone, 722 A.2d 5, 10 (Del. 1998); *see also* Yuspeh v. Koch, 02-698, p.12 (La. App. 5 Cir. 2/25/03); 840 So. 2d 41, 48 ("The duty imposed on a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts that materially affect his rights and interests."). Official Comment 3, § 8.30(c) under MBCA § 8.30 states, "The requirement that a director disclose information to other directors as set forth in section 8.30(c) is different from any common law duty the board may have to cause the corporation to make disclosures to shareholders under certain circumstances. The Act does not seek to codify such a duty of disclosure, but leaves its existence and scope, the circumstances for its application, and the consequences of any failure to satisfy it, to be developed by courts on a case-by-case basis." MODEL BUS. CORP. ACT § 8.03 cmt. 3 (AM. BAR ASS'N 2013).

188. For a discussion of pre-BCA Louisiana law concerning dilution complaints, see *infra* Section V.C.

alleged price benefit seized by the controlling shareholders created an equivalent loss to the minority.[189]

5. SALE OF SHARES ONLY PRACTICAL REMEDY FOR ALL NON-DERIVATIVE MINORITY CLAIMS

Regardless of the nature or source of the minority's non-derivative claims—whether grounded on oppression, an unfair Expulsion Transaction price, or misstatement or omission of material fact—the only practicable remedy for an act by the NDC Shareholders (or by the directors acting for them) judicially determined to have been wrongful is a sale of the minority's shares. Hence, in practice, all successful minority claims of the second, third, and fourth categories resolve themselves into a judicial determination of the appropriate or fair price the corporation (or the majority) should pay for the minority shares. As Professor Moll has pointed out:

> A buyout of the oppressed investor's stockholdings is the most common remedy for oppression. In general, courts prefer buyouts because they provide a mechanism for a shareholder to extricate his investment from a venture without having to liquidate the business.[190]

6. FULL MEASURE OF DAMAGES IN ANY COMPELLED SALE OF MINORITY SHARES IS LIMITED TO STATUTORY FAIR VALUE

Where the relevant corporation statute provides a comprehensive judicial procedure for determining whether actionable oppression of minority shareholders has occurred and the appropriate price to be paid by the corporation for minority shares in the context of *either* an oppression *or* an Expulsion Transaction—as does the BCA—claims by the minority that the majority has committed a "breach of fiduciary duty" are fully remediable by implementation of the statutory valuation and

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189. A Zero-Sum Game is a mathematical representation of a situation in which each participant's gain or loss of utility is exactly balanced by the losses or gains of utility of the other participants. The leading Louisiana cases addressing fourth-category complaints are *Noe v. Roussel*, 310 So. 2d 806, 818–19 (La. 1975) and *Levy v. Billeaud*, 443 So. 2d 539, 544 (La. 1983). Both involved liquidators who caused a transfer of substantially all the corporation's assets in dissolution to an entity controlled by the majority at a bargain price unfair to the minority. In both cases, the supreme court imposed damages on the liquidator broadly equivalent to a fair price for the minority shares.

190. Moll, *supra* note 7, at 494.

payment procedure.[191] No penumbral "breach of fiduciary duty" claim by the minority can be asserted outside that procedure.[192]

More particularly, in second-category *oppression* cases the comprehensive BCA § 1435 statutory scheme specifies in advance the (1) elements of the cause of action, (2) judicial procedure for resolving the claim, (3) burden of proof, and (4) method of determining fair value of shares (including time of payment to shareholder and time periods within which each party must act in negotiating).[193] By precisely defining the cause of action and its remedy, the statutory scheme is presumed to exhaust all recoverable damages for minority "breach of fiduciary duty" claims that can be asserted with respect to the allegedly oppressive action.

In third-category and fourth-category *Expulsion Transactions*, the enhanced statutory appraisal method under BCA §§ 1320–31 for determining the value of and method of payment for minority shares is automatically applicable.[194] It includes interest at the judicial rate from consummation of the corporate action until payment is made and therefore similarly exhausts all minority "breach of fiduciary duty" claims that can be asserted with respect to the corporate action not consented to by the minority.[195]

In fourth-category *dissolution* cases, as distinguished from Expulsion Transactions, the same logic applies. As a practical matter, the *Noe, Levy,* and *Yuspeh* courts awarded the complaining minority damages against the defendants equal in substance to the fair value of the minority shares after adjusting for the challenged self-dealing transaction.[196] To put it another way, the maximum measure of damages to which the minority are entitled in exchange for their shares in any sale, whether resulting from oppression, an Expulsion Transaction, or a conflicted dissolution, is limited to fair value, as defined in BCA

191. LA. STAT. ANN. §§ 12:1-1302(A), -1330, -1301(4), -1435(D) (2015).

192. LA. STAT. ANN. § 12:1-1435 cmt. 1 (2015), states: "[T]his Section rejects the treatment of oppression as a breach of fiduciary duty that may justify an action for damages against the corporation, the directors or others in control."

193. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).

194. LA. STAT. ANN. § 12:1-1320 to -1331 (2015).

195. *Id.*

196. *See* Noe v. Roussel, 55413, 55418 (La. 4/25/75); 310 So. 2d 806, 825–26; Levy v. Billeaud, 443 So. 2d 539, 545 (La. 1983); Yuspeh v. Koch, 02-698, p. 15 (La. App. 5 Cir. 2/25/03); 840 So. 2d 41, 49–54.

§ 1301(4), plus interest.[197] For that reason, there is no persuasive basis for a supplemental minority cause of action for breach of a generalized "fiduciary duty" owed by the majority in relation to oppression or expulsion.

7. DO CONTROLLING SHAREHOLDERS OWE A NON-TRANSACTIONAL FIDUCIARY DUTY TO MINORITY SHAREHOLDERS?

Directors and liquidators, by statute, owe shareholders an unqualified fiduciary duty not to unilaterally set transactional terms that unfairly favor their own interests at the expense of the corporation.[198] A director or liquidator of a corporation voluntarily obligates himself to an undivided duty of loyalty to the shareholders.[199]

Alternatively, NDC Shareholders do not obligate themselves as fiduciaries for minority shareholders. Every duty a court imposes on NDC Shareholders to the minority constitutes an ad hoc limitation of the NDC Shareholders' otherwise inherently unlimited statutory voting right to elect all directors, reclassify common shares as callable, authorize a reverse share split, pursue new lines of business, sell substantially all assets, merge, execute a share exchange, or dissolve.[200]

Accordingly, where a comprehensive statutory oppression and enhanced appraisal remedy is provided—as in the BCA—there is no persuasive role under that statute for a non-transactional fiduciary duty owed by *NDC Shareholders* to minority shareholders of the kind to which directors and officers are subject by virtue of their office.[201] There is similarly no persuasive rationale in case law from other states reviewed in the O'Neal & Thompson treatise for suggesting that NDC

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197. LA. STAT. ANN. § 12:1-1301(4) (2015 & Supp. 2018).

198. LA. STAT. ANN. §§ 12:1-830(A), -831(A)(2)(a), (c), -1409 (2015 & Supp. 2018).

199. LA. STAT. ANN. §§ 12:1-830(A), -831(A)(2)(a), (c) (2015 & Supp. 2018).

200. Louisiana public policy favors of freedom of contract: "Parties are free to contract for any object that is lawful, possible, and determined or determinable." LA. CIV. CODE. ANN. art. 1971 (2018).

201. Most non-derivative minority shareholder claims of breach of fiduciary duty are brought against directors or liquidators individually, as well as—or instead of—against NDC Shareholders as such. To the extent, therefore, a transaction challenged by the minority was proximately caused by wrongful acts or omissions of the directors or liquidators—as distinguished from acts or omissions exclusively by the NDC Shareholders as such—the directors or liquidators are liable and a supplemental action against NDC Shareholders would be superfluous.

Shareholders should be subject as such to any non-transactional fiduciary duty to minority shareholders.[202]

To recapitulate, the argument under general principles of corporate law against non-transactional fiduciary duty of NDC Shareholders is:

> (1) the NDC Shareholders are not agents for, and have not voluntarily assumed any duty to, the minority;
>
> (2) the existence of any duty is contingent on the distinction between "controlling" and "minority" shares, which is fluid and subject to change;
>
> (3) minority shareholders are protected by the enforceable fiduciary duty owed to them by directors and liquidators;
>
> (4) any "fiduciary" duty owed by NDC Shareholders to minority shareholders restricts the majority's statutory right to vote their shares as they choose; and
>
> (5) no ascertainable standard defines the scope of a non-transactional quasi-fiduciary duty owed by NDC Shareholders.[203]

These issues are discussed in more detail in Section V(D)(6) below.

C. PRE-2015 LOUISIANA CORPORATE CASE LAW REGARDING MINORITY SHAREHOLDERS

The Louisiana Civil Law Treatise states:

> [M]ajority shareholders are entitled to substantial flexibility in order best to realize the fruits of their investment, even in the face of disagreement by the minority . . . . [N]o Louisiana opinion has to date expressly recognized the existence of any general mutual fiduciary duty owed by shareholders in closely-held corporations to one another, akin to partners of general partnerships.[204]

202. *See generally* O'NEAL & THOMPSON, *supra* note 57.

203. *See, e.g.*, Paula J. Dalley, *The Misguided Doctrine of Stockholder Fiduciary Duties*, 33 HOFSTRA L. REV. 175, 220–22 (2004).

204. GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS

In other words, this treatise takes the position that Louisiana non-statutory corporate law has not historically recognized or imposed a fiduciary duty on NDC Shareholders toward the minority. Consistent with that view is the decision in *Gruenberg v. Goldmine Plantation, Inc.*, in which minority shareholders sought to force involuntary dissolution of a corporation whose principal asset was a riverfront plantation that the majority refused to sell or develop.[205] The court held:

> We appreciate the frustrations of the minority who are locked into a financial situation in which they have a substantial interest but no control. Appellants suggest the shareholders be equated to partners and be permitted to disengage from the corporation as they could were Goldmine operated as a partnership. Our substantive law provides for involuntary dissolution but offers no remedy for the minority shareholder with substantial holdings who is out of control and trapped in a closed corporation.[206]

No Louisiana case has held or suggested that NDC Shareholders as such owe a general fiduciary duty to minority shareholders. Accordingly, there is no basis in pre-2015 Louisiana corporate law for asserting the existence of such a duty.[207] Given that the BCA substantially enhanced both the substantive and the procedural rights of minority shareholders in relation to oppression and Expulsion Transactions, it would be counter-intuitive for a Louisiana court called upon to adjudicate a case under the BCA to suggest that NDC Shareholders as such owe a duty to the minority based on pre-2015 case law.[208]

1. *YUSPEH V. KOCH*

Two early cases, *Giraud v. Gillis, Ellis & Baker, Inc.* and *McCall v. McCall Enterprises, Inc.*, held that dissenters' rights under LBCL § 131 were the exclusive post-consummation remedy available to a minority shareholder who objected to a statutory merger.[209] Both decisions rejected fiduciary challenges to a

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§ 22.08, *in* 7 LOUISIANA CIVIL LAW TREATISE 576 (1999).

205. Gruenberg v. Goldmine Plantation, Inc., 360 So. 2d 884, 887 (La. Ct. App. 1978).

206. *Id.*

207. *See* MORRIS & HOLMES, *supra* note 5, at § 28:3.

208. *See infra* Section V.D.5.

209. Giraud v. Gillis, Ellis & Baker, Inc., 488 So. 2d 1261 (La. Ct. App. 1986); McCall v. McCall Enterprises, Inc., 578 So. 2d 260 (La. Ct. App. 1991).

merger by non-consenting shareholders who had failed to comply with § 131, which provides that unless a non-consenting shareholder perfects his dissenters' rights in the manner prescribed by that section, "he shall conclusively be presumed to have acquiesced in the corporate action proposed or taken."[210]

Against that background, *Yuspeh v. Koch* adopted a novel approach to the exclusivity of dissenters' rights.[211] The Koch brothers together owned approximately 51% of the shares of a corporation and constituted a majority of its board.[212] They wished to eliminate the other shareholders by a squeezeout merger into a new corporation owned exclusively by them.[213] Approval of the merger required a vote of no less than 60% of the shares.[214] The board authorized the corporation to issue additional shares only to the Kochs sufficient to increase their voting power from a simple majority to 60%.[215] The new shares were issued at what the court held to be a grossly inadequate price without advance notice to the other shareholders.[216] The merger agreement thereafter cashed out the minority shareholders for the same bargain price at which the additional shares had been issued to the Kochs.[217]

Upon learning of the merger, the minority shareholders filed suit alleging fraud by the Kochs and sought damages equal to the true value of their shares.[218] The minority did not, however, exercise their dissenters' rights.[219] A jury awarded substantial damages to the plaintiffs.[220] The Kochs argued on appeal that the plaintiffs' claims were barred by their failure to perfect their dissenters' remedy.[221] The court of appeal, offended by what it considered the Kochs' inappropriate conduct, held that they acted fraudulently and in breach of their fiduciary duty as directors and

210. LA. STAT. ANN. § 12:131 (repealed 2014); McCall v. McCall Enterprises, Inc., 578 So. 2d 260, 262 (La. Ct. App. 1991), *writ denied*, 581 So. 2d 708 (La. 1991).

211. Yuspeh v. Koch, 02-698, pp. 10–16 (La. App. 5 Cir. 2/25/03); 840 So. 2d 41, 47, 48, 50.

212. *Id.* at p. 4; 840 So. 2d at 44.

213. *See generally Yuspeh*, 02-698; 840 So. 2d 41.

214. *Id.* at p. 6; 840 So. 2d at 45.

215. *See generally Yuspeh*, 02-698; 840 So. 2d 41.

216. *Id.* at pp. 12–13; 840 So. 2d at 48.

217. *See generally Yuspeh*, 02-698, p. 1; 840 So. 2d 41.

218. *Id.* at p. 3; 840 So. 2d at 43.

219. *Id.*

220. *Id.* at p. 4; 840 So. 2d at 43–44.

221. *Id.* at p. 11; 840 So. 2d at 47.

ruled:

> Nothing in the language of LSA-R.S. 12:131 or case law states that this [dissenters' right] is a minority shareholder's exclusive remedy for contesting the value of his shares in a merger. Moreover, the statute does not address fraud or breach of fiduciary duty claims . . . . The [defendants'] duty to notify the minority shareholders of [the majority's] purchase . . . [of additional shares at a bargain price came] from their general fiduciary duty to protect the interests of the minority shareholders.[222]

The court disregarded the additional shares the corporation had issued to the Kochs at a bargain price and awarded the plaintiffs damages equal to their proportionate share of the fair value of the corporation calculated by treating the additional Koch shares as though they had never been issued.[223]

A court called upon to decide a case under the BCA on facts similar to *Yuspeh* is unlikely to regard that decision as a relevant precedent. First, the BCA appraisal remedy is more generous and user-friendly than the LBCL dissenters' rights remedy. Second, § 1435(L) by its terms makes the new BCA statutory oppression remedy exclusive.[224] And third, unlike LBCL § 131, BCA § 1340 provides that "appraisal rights . . . are the exclusive remedy of a shareholder [where] appraisal rights are available" and "the shareholder shall not have any other cause of action for damages or any other form of relief against the corporation, or any director, officer . . . or controlling person of the corporation, in connection with the corporate action."[225]

Even if a court adjudicating a case under the BCA on facts similar to *Yuspeh* chose to regard it as relevant precedent, the decision is problematic on its merits. Although the court's decision probably achieved rough justice, its approach undermined the stated policy of LBCL § 131 that a shareholder

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222. Yuspeh v. Koch, 02-698, pp. 11, 16 (La. App. 5 Cir. 2/25/03); 840 So. 2d 41, 47, 50.

223. *Id.* at p. 22; 840 So. 2d at 54.

224. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

225. BCA § 1340(E) provides that the "exclusive remedy" provision of § 1340 does not bar non-consenting shareholders from seeking other remedies where the corporate action was not authorized or approved in accordance with BCA Chapter 11, LA. STAT. ANN. § 12:1-1340(E) (2015), but in *Yuspeh* both the issuance of the new shares and the shareholder vote to authorize the merger complied facially with the LBCL.

who fails to perfect his dissenters' rights shall conclusively be deemed to have acquiesced in the corporate action. If a minority shareholder is permitted, as in *Yuspeh*, to choose between bringing a fiduciary duty suit against the directors or electing BCA appraisal rights, he will be encouraged to adopt the former and forego the latter, even where appraisal affords an adequate remedy, in hopes of extracting a higher settlement in the fiduciary suit.[226]

The underlying problem confronting the *Yuspeh* court was that the Kochs' wrongful conduct was not that they omitted or misstated material facts relating to the proposed merger, which could have been addressed in a dissenters' rights valuation process, but rather they caused the corporation to issue additional shares to themselves independent of, and prior to, the merger. The *Yuspeh* court, by conflating the issuance of additional shares to the Kochs prior to the merger with the merger itself, undermined the exclusivity of the dissenters' rights remedy. An alternate solution to the court's problem that preserves the exclusivity of the dissenters' rights remedy was available, as explained below.

2. *DUNCAN V. MORENO ENERGY, INC.*

Duncan v. Moreno Energy, Inc. involved facts similar to *Yuspeh*.[227] The plaintiff minority shareholders alleged that the directors who approved a short-form squeezeout merger (i.e., parent owns over 90% of shares of merged subsidiary) did so wrongfully in breach of their fiduciary duty to the minority.[228] The plaintiffs did not, however, perfect their rights under the dissenters' rights statute.[229] The court ruled as follows:

> [W]e read the language of La. R.S. 12:131 to stand for the proposition that our legislature has chosen to provide solely a

226. Further, although the *Yuspeh* court did not invalidate the squeezeout merger as such, for valuation purposes, it treated the additional shares issued to the Kochs—which were necessary to approve the merger—as though they had never been issued. If those shares were not issued, how could their votes be counted for purposes of determining whether the merger was lawfully approved? It would seem that either the merger was valid because the additional Koch shares were entitled to vote—and to receive proportional consideration for the merger—or it was invalid because those shares were unlawfully issued.

227. Duncan v. Moreno Energy, Inc., 08-786, pp. 1, 7 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778, 780, 783.

228. *Id.* at pp. 1, 8; 1 So. 3d at 780, 784.

229. *Id.* at pp. 11–12; 1 So. 3d at 785–86.

> monetary remedy to a minority shareholder who has been "frozen out." . . . [W]e find that the plaintiffs have clearly not met the requirements of La. R.S. 12:131, and that they are forever barred, not only from attempting to invalidate the merger between MES and MEI, but are also barred from contesting the value assigned to their former stocks (sic) in MES. *However, Plaintiffs can still recover from Defendants for the damage they may have caused to the value of Plaintiffs' former stocks (sic) in MES. The partial summary judgment below has no bearing on Plaintiffs' claims for monetary damages from Defendants via breach of fiduciary duties or fraud*.[230]

The *Duncan* court thus disagreed with *Yuspeh* but agreed with the *Giraud* and *McCall* courts in holding that the statutory dissenters' rights remedy, whether exercised or not, is an absolute bar to a post-consummation minority shareholder claim of breach of fiduciary duty by the directors in planning and executing a squeezeout merger. On the other hand, the *Duncan* court preserved the substance of the *Yuspeh* court's holding that the directors were personally liable for breach of their fiduciary duty in authorizing the issuance prior to the merger, only to themselves at a bargain price, of the additional shares required to approve it.[231]

The *Duncan* court reached this bifurcated result by treating the complaining minority shareholders' claims as two separate claims for, respectively, (1) the pre-merger dilution "damage the directors may have [wrongfully] caused to the value of Plaintiffs' former stocks in [the merged corporation]" and (2) approving the merger.[232] The court's severance of the plaintiffs' claims enabled it—consistent with pre-*Yuspeh* jurisprudence—to uphold the exclusivity of the dissenters' rights remedy. The *Duncan* plaintiffs' sole remedy with respect to the propriety of the merger and the value of their shares on the date of its approval was dissenters' rights; if the minority failed—as they did—to exercise their dissenters' rights, the maximum consideration they could have received in the merger was limited to the cash-out amount specified in the merger agreement.

230. Duncan v. Moreno Energy, Inc., 08-786, pp. 14–15 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778, 788 (emphasis added).
231. *Id.* at p. 15; 1 So. 3d at 788.
232. *Id.*

But the *Duncan* court said in dicta that the merger did not extinguish the complaining minority shareholders' separable claim against the directors for damages to redress any diminution from a higher previous value to a lower merger-date value of their shares that was proximately caused by the directors' wrongful acts or omissions prior and unrelated to the merger, for example by issuing shares only to themselves at a bargain price, as in *Yuspeh*.[233] The *Duncan* court thus addressed the problem presented by *Yuspeh* in an elegant way that preserved both (1) the statutory exclusivity of the dissenters' rights remedy with respect to the propriety of the merger, and the value of the minority's shares on the merger date, and (2) the minority's separate claim for damages against the directors for breach of their fiduciary duty by reason of wrongful pre-merger acts or omissions that were not an integral part of the merger itself.

The *Duncan* approach has the additional merit, in a squeezeout merger involving two or more of (1) consenting minority shareholders, (2) non-consenting exercisers of dissenters' rights, and (3) complaining non-exercisers of dissenters' rights, of preserving the economic rights of each category to receive the proportionate share of the merger consideration to which each is respectively entitled, because any damages due to the successful complaining minority shareholders will be paid by the defendant directors, rather than deducted from the merger consideration, as it was in *Yuspeh*.

Finally, from a procedural standpoint, the *Duncan* approach improves judicial efficiency by severing any valuation proceeding, demanded by non-consenting shareholders who elect dissenters' rights, from an uncertain claim by some, but not all, shareholders against one or more directors for breach of their fiduciary duty to the plaintiffs, as distinguished from other shareholders.

3. *ARMAND V. MCCALL*

In *Armand v. McCall*, minority shareholders made written demand on the board to assert a derivative claim against a named director for alleged breach of his fiduciary duty.[234] After the board rejected the shareholders' demand, they filed this derivative proceeding against the director.[235] While the suit was

233. Duncan v. Moreno Energy, Inc., 08-786, p. 15 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778, 788 (emphasis added).
234. Armand v. McCall, 570 So. 2d 158, 159 (La. Ct. App. 1990).
235. *Id.* at 160.

pending in trial court, the corporation was merged into its parent.[236] The derivative plaintiffs timely exercised their dissenters' rights with regard to the merger.[237] The trial court dismissed their derivative proceeding on an exception of no cause of action, reasoning that the plaintiffs' exercise of their dissenters' rights caused a forfeiture of their derivative claim.[238] The plaintiffs appealed.[239] The court of appeal agreed with the trial court that "the right to pursue a derivative action is . . . forfeited" by the exercise of dissenters' rights, because the exercise constitutes an agreement to accept the judicially determined value in exchange for 100% of the exercisor's interest in the corporation, including any derivative claim.[240]

The loss of derivative claims resulting from the exercise of dissenters' rights, as in *Armand*, does not adversely affect the bifurcated analysis applied by the *Duncan* court. In a *Duncan* situation, the minority's claim for breach of fiduciary duty by some or all directors is not derivative and, therefore, cannot be forfeited under the *Armand* rule. Rather, the minority's claim in *Duncan* is personal to themselves because it asserts that the defendant directors' wrongful acts or omissions proximately caused a diminution in the value of the minority's shares, as compared with those of the majority. The gravamen of a viable derivative claim, on the other hand, is that the directors' allegedly wrongful acts or omissions caused damage to the corporation as an entity, rather than damage to only certain shareholders.

D. FIDUCIARY DUTY TO MINORITY SHAREHOLDERS UNDER BCA

This section presents the heart of this author's argument that the structure of the BCA sharply limits and defines the scope of the duty owed to minority shareholders as a subset of all shareholders.

1. BCA FAIR VALUATION RIGHT APPLICABLE TO BOTH OPPRESSION AND EXPULSION IS COMPREHENSIVE

The appraisal right offered by BCA § 1302(A) to minority

236. Armand v. McCall, 570 So. 2d 158, 159 (La. Ct. App. 1990).
237. *Id.* at 160.
238. *Id.*
239. *Id.* at 158.
240. *Id.* at 160.

shareholders is mandatory as to every merger, share exchange, disposition of substantially all assets, reverse share split, or domestication by the corporation.[241] The BCA appraisal right is thus a broad-based remedy applicable to every major corporate action, other than dissolution.[242]

The judicial valuation procedure for oppression under BCA § 1436(A)(i) is comparable.[243] "Fair value" in an appraisal proceeding or oppression valuation is defined by BCA § 1301(4) as value determined in accordance with customary valuation techniques "without discounting for lack of marketability or minority status."[244] This is the highest value allowed by any accepted valuation method or legal definition for minority shares of a corporation as a going concern.[245]

BCA § 1324(A) requires the corporation to pay the amount it estimates to be the fair value of a non-consenting shareholder's shares in cash within thirty days.[246] Accordingly, a shareholder entitled to appraisal rights automatically receives the entire undisputed value of his shares at the commencement of the valuation process.[247]

Further, BCA §§ 1324(A), 1326(A), and 1330(A) empower a shareholder who has exercised appraisal rights to (1) demand a price higher than that voluntarily paid by the corporation; (2) utilize a formalized statutory procedure to negotiate a mutually acceptable price with the corporation for his shares; (3) if no agreement on price is reached, require the corporation to commence a summary judicial proceeding at its expense seeking court appointment of an independent expert appraiser to determine the fair value of the disputed shares; and (4) receive interest at the judicial rate on the full amount of the finally determined price from the date of consummation of the corporate action.[248]

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241. LA. STAT. ANN. § 12:1-1302(A) (2015).
242. *See* LA. STAT. ANN. § 12:1-1405(A)(4) (2015). Appraisal with respect to dissolution is unnecessary because BCA § 1405(A)(4) requires a dissolved corporation to distribute its remaining property to its shareholders "according to their interests."
243. LA. STAT. ANN. § 12:1-1436(A)(i) (2015 & Supp. 2018).
244. LA. STAT. ANN. § 12:1-1301(4) (2015 & Supp. 2018).
245. *See, e.g.*, Moll, *supra* note 7, at 497–501.
246. LA. STAT. ANN. § 12:1-1324(A) (2015).
247. LA. STAT. ANN. § 12:1-1326 (2015).
248. LA. STAT. ANN. §§ 12:1-1324(A), -1326(A), -1330(A) (2015).

2. BCA § 1435 ELIMINATES DUTY OF CONTROLLING SHAREHOLDERS WHERE MINORITY SHAREHOLDER ELECTS OPPRESSION REMEDY

BCA § 1435(L) says the statutory oppression remedy provided by that section—which can be invoked only by the shareholder—is "the exclusive remedy for oppression . . . [and] does not provide an independent or additional basis for an action by a shareholder to recover damages from the corporation or its directors, officers, employees, agents, or controlling persons."[249]

Professor Moll has stated that the BCA oppression provisions reflect a great deal of thought and wisely incorporate many of the developments in oppression law over the past few decades. Moreover, the provisions unquestionably improve the rights of minority owners and "signal an important shift in Louisiana's law of closely held corporations."[250]

3. BCA § 1340 FACIALLY ELIMINATES DUTY OF CONTROLLING SHAREHOLDERS IN EXPULSION TRANSACTION WHERE APPRAISAL RIGHTS WERE OFFERED

As explained above in Sections IV(B) and IV(D), BCA § 1340 was drafted specifically for Louisiana to preclude a non-consenting shareholder to whom appraisal rights or a market out were available in connection with a consummated Expulsion Transaction from asserting a post-consummation fiduciary claim against the NDC Shareholders with regard to that transaction.[251] More particularly, BCA § 1340(B)—unlike MBCA § 13.40—provides that appraisal rights "are the exclusive remedy of a shareholder in connection with a corporate action for which . . . appraisal rights [were] available."[252]

Subsection 1340(C)—also unlike MBCA § 13.40—provides that "the shareholder [to whom appraisal rights were available] shall not have any other cause of action for damages or for any other form of relief against the corporation, or any director, officer, employee, agent, or controlling person of the corporation, in connection with the corporate action."[253]

249. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

250. Moll, *supra* note 7, at 509.

251. *See supra* Sections IV.B, D.

252. *Compare* LA. STAT. ANN. § 12:1-1340(B) (2015) *with* MODEL BUS. CORP. ACT § 13.40 (AM. BAR ASS'N 2013).

253. Further, BCA § 1340 intentionally omits MBCA §§ 13.40(b)(2) and (b)(3). The effect of the omission is to confirm the elimination by § 1340(C) of any state-law

4. BCA § 1340 DOES NOT UNREASONABLY LIMIT FUNDAMENTAL INJUNCTION AND RESCISSORY REMEDIES

The BCA affords minority shareholders substantially greater protection than does the MBCA against Expulsion Transactions by requiring for approval the vote of a majority of shares outstanding, not merely a majority of a quorum.[254] BCA § 1340 permits a non-consenting shareholder to bring suit, after notice but prior to approval of an Expulsion Transaction, against the corporation, its directors, and its controlling persons to enjoin the corporate action as to which appraisal rights or a market out will be available in the event of consummation.[255] Such a suit may be based on any or all grounds of (1) breach of fiduciary duty of care, candor, or loyalty, or (2) the transaction was not authorized or will not be approved in accordance with BCA Chapter 9, 10, 11, or 12, the charter, the bylaws, or the enabling board resolutions.[256] In that regard, BCA § 1340(E)(4)(a) has the effect of providing every non-consenting shareholder no less than ten days advance notice of a proposed shareholder approval of the corporate action, thereby assuring a ten-day window within which to file a pre-approval injunction suit based on any of the grounds described above.[257]

Following consummation of an Expulsion Transaction as to which appraisal rights or a market out were available, a non-consenting shareholder remains free under BCA § 1340(E)(1) to seek rescission of the corporate action, at any time prior to expiration of the relevant prescriptive period, on the grounds that the action was not authorized or approved in accordance with BCA Chapter 9, 10, 11, or 12, the charter, the bylaws, or the

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cause of action by a non-consenting shareholder against *directors or NDC Shareholders* (i) following shareholder approval but prior to consummation to enjoin, or (ii) after consummation to rescind, or claim damages with respect to, the Expulsion Transaction based on (A) misrepresentation or omission of a material fact, or (B) absence of qualified director approval of an interested transaction. *Compare* LA. STAT. ANN. § 12:1-1340(C) (2015) *with* MODEL BUS. CORP. ACT § 13.40 (AM. BAR ASS'N 2013).

254. *Compare* LA. STAT. ANN. §§ 12:1-140(25B), -725(C), -1003(A)(3), -1104(5), -1003 cmt. (b), *and* -1104 cmt. (2015 & Supp. 2018), *with* MODEL BUS. CORP. ACT §§ 7.25(a), (c), 10.03(c), 11.04(e), and 10.03 cmt. 3 (Quorum and Voting), 11.04 cmt. 3 (Quorum and Voting) (AM. BAR ASS'N 2013). The BCA requirement is consistent with the Delaware rule. DEL. CODE ANN. tit. 8, §§ 242(b)(1), 251(c) (West, Westlaw through 81 Laws 2018, chs. 200–53).

255. LA. STAT. ANN. § 12:1-1340 (2015).

256. *Id.*

257. LA. STAT. ANN. § 12:1-1340(E)(4)(a) (2015).

enabling board resolutions.[258] Accordingly, a non-consenting shareholder never loses the right to seek rescission of a corporate action that was consummated unlawfully.

Consummation of such a corporate action does, however, facially extinguish the non-consenting shareholder's right to bring either a rescissory or a damage suit with respect to the corporate action against any of the corporation, its directors, or its controlling persons on grounds of breach of fiduciary duty.[259]

5. NDC SHAREHOLDERS OWE NO EXPRESS FIDUCIARY DUTY

The Official Comment under MBCA § 10.01 says: "a decision by a majority shareholder . . . to exercise the powers . . . [to amend the charter] in a way that may breach a duty to minority shareholders may be reviewable by a court . . . for good faith and fair dealing to the minority shareholders."[260] The preliminary note in the Official Comments to MBCA Subchapter 8F says: "[S]ubchapter F [i.e., §§ 8.60–8.63, dealing with *directors'* conflicting interest transactions] does not address a claim that *a controlling shareholder* has violated a duty owed to the corporation or minority shareholders."[261] These Official Comments signal that the MBCA purports neither to create nor abolish any duty by controlling shareholders as such to minority shareholders. The Official Comment under § 10.01 quoted above defers to existing state case law as to the existence of any such duty.[262] No pre-2015 Louisiana authority held or suggested that NDC Shareholders as such owe a fiduciary duty to the minority.

The BCA contains no reference to a fiduciary duty owed by NDC Shareholders as such. BCA § 1435 does, however, provide a unique oppression remedy for minority shareholders where the corporation's practices "are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder."[263] Good faith is defined in the Uniform Commercial Code as "the observance of reasonable commercial standards of fair dealing."[264] Because BCA § 1435

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258. LA. STAT. ANN. § 12:1-1340(E)(1) (2015).

259. A schematic description of the litigation options available to the nonconsenting shareholder appears in Section IV.B.

260. MODEL BUS. CORP. ACT § 10.01 cmt. (AM. BAR ASS'N 2013).

261. MODEL BUS. CORP. ACT sub. ch. 8F (AM. BAR ASS'N 2013) (emphasis added).

262. MODEL BUS. CORP. ACT § 10.01 cmt. (AM. BAR ASS'N 2013).

263. LA. STAT. ANN. § 12:1-1435 (2015).

264. UNIF. COMMERCIAL CODE § 1-201(b)(20), 1 U.L.A. 25 (2012); LA. STAT. ANN.

establishes a novel, comprehensive remedy for minority shareholders expressly targeted at a failure of the corporation, its directors, and its NDC Shareholders to deal fairly and in good faith with minority shareholders, it is difficult to see a basis on which a court could justifiably imply any supplemental non-statutory obligation of fair dealing and good faith owed by the NDC Shareholders to the minority.

a. Non-Transactional Context

In a non-transactional context—i.e., other than a challenged transaction—BCA § 1435 creates a judicially enforceable right of minority shareholders to withdraw from the corporation for oppression.[265] This right is unique to Louisiana and has no analog in the MBCA.

Subsection 1435(B) defines "oppression" as practices "that are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder."[266] Subsection 1435(L), however, provides that a minority shareholder's right to withdraw under that section is "the exclusive remedy for oppression."[267] Further, Louisiana 2014 Revision Comment (l) under § 1435 says: "Subsection (L) of this Section *rejects the treatment of oppression as a breach of fiduciary duty* that may justify an action for damages against the corporation, the directors or others in control."[268]

If, therefore, (1) a failure by any or all of the corporation, its directors, and its NDC Shareholders to "deal fairly and in good faith" with minority shareholders constitutes oppression as defined in § 1435(B), (2) the "exclusive remedy" under the BCA for oppression is the shareholder's right to withdraw under § 1435, and (3) BCA § 1435(L) "rejects the treatment of oppression as a breach of fiduciary duty" by the corporation, its directors, *or its controlling shareholders*, then in a *non-transactional context* a minority shareholder has no cause of action against NDC Shareholders for breach of a duty to deal with him fairly and in good faith because, to the extent any such duty exists, it has been preempted by the oppression remedy.[269]

10:1-201(B)(20) (2015 & Supp. 2018).

265. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).

266. LA. STAT. ANN. § 12:1-1435(B) (2015 & Supp. 2018).

267. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

268. LA. STAT. ANN. § 12:1-1435 cmt. (l) (2015 & Supp. 2018) (emphasis added).

269. Moll, *supra* note 7, at 501–03. The oppression remedy applies only to acts or

The argument against imposing any other duty on NDC Shareholders in favor of the minority in a non-transactional context might be framed as follows: BCA § 601(B) establishes two, and only two, default rights to which shares of a one-class corporation must in all cases be entitled.[270] The first is "unlimited voting rights," and the second is "to receive the net assets of the corporation upon dissolution."[271] Unless the charter provides otherwise, these are the only two rights to which the holder of a common share is entitled by virtue of ownership of that share. Further, BCA § 601(A) says that unless the charter provides otherwise, "all shares of a class . . . must have . . . rights . . . that are identical with those of other shares of the same class."[272]

Where shareholders are not in unanimous agreement, they can act only at a meeting at which a quorum is present after due notice has been given to all shareholders.[273] The effect of BCA §§ 601 and 721(A), taken together, is a default rule that every outstanding share of a one-class corporation must be entitled to one vote, and only one vote, at such a meeting.[274] Under the default rule of BCA §§ 725(C), 728(A), and 1402(E), shareholders are authorized to take action at such a meeting on non-transactional matters such as the election of directors or dissolution only by a majority (or plurality) of the votes cast.[275]

This exclusive method by which shareholders may act, if at all, on non-transactional matters cannot be altered except by charter amendment.[276] If, therefore, (1) the majority shareholders take no wrongful action to curtail either the unlimited voting rights or the proportional dissolution rights of the minority shares, and (2) BCA § 1435 makes available a comprehensive shareholder oppression remedy at the option of each minority shareholder, any additional non-statutory duty imposed on NDC Shareholders as such in favor of the minority with respect to non-transactional matters conflicts with (1) the mandate of § 601(B)

omissions that occurred after January 1, 2015. Cole v. Sabine Bancshares, Inc., 17-272, (La. App. 3 Cir. 12/06/17); 2017 WL 6029783; Woodard v. Woodard Villa, Inc., 15-1777; 16-1119, 2017 WL 2177898, at *5–7 (W.D. La. May 16, 2017).

270. LA. STAT. ANN. § 12:1-601(B) (2015 & Supp. 2018).

271. *Id.*

272. LA. STAT. ANN. § 12:1-601(A) (2015 & Supp. 2018).

273. LA. STAT. ANN. § 12:1-725(A) (2015 & Supp. 2018).

274. LA. STAT. ANN. §§ 12:1-601, -721(A) (2015 & Supp. 2018).

275. LA. STAT. ANN. §§ 12:1-725(C), -728(A), -1402(E) (2015 & Supp. 2018).

276. Default rules are rules that apply unless changed by the charter.

that every share must have "unlimited voting rights" and (2) the mandate of BCA § 725(C) that shareholder decisions may be made only by majority vote.

b. Transactional Context

In a transactional context, the BCA provides a carefully balanced appraisal remedy for Expulsion Transactions requiring shareholder approval. The enhanced remedy is substantially more favorable to minority shareholders than the comparable dissenters' rights provision of the LBCL.[277] Consequently, notwithstanding the Official Comment under MBCA § 10.01 quoted above, it is difficult to visualize a situation—other than active fraud—in which shareholder approval of any charter amendment as to which appraisal rights were available could "breach a duty to minority shareholders" owed by NDC Shareholders. The same is true of a sale of substantially all assets, mergers, or share exchanges; all of those actions require shareholder approval and appraisal rights for non-consenting shareholders.

Where a corporate action that disparately affects minority shareholders occurs in a transactional context *other than one as to which appraisal rights were available,* the action could have been authorized only by the directors, rather than the shareholders. Accordingly, any claim by a minority shareholder that the corporate action constituted a breach of fiduciary duty owed to him would lie only against the directors, discussed in Section V(D)(6) below, not against the NDC Shareholders as such.

In light of (1) the BCA's substantial expansion of minority shareholder appraisal rights in the context of Expulsion Transactions, (2) the implication in BCA § 1435 that any failure to deal fairly and in good faith with a minority shareholder in a non-transactional context is a species of oppression for which a right to withdraw is the exclusive remedy, and (3) the absence of pre-2015 Louisiana case law recognizing a fiduciary duty owed by NDC Shareholders as such to the minority, it seems unlikely that a court addressing a minority shareholder complaint under the BCA would entertain a fiduciary claim *against NDC Shareholders as such*.

6. DUTY OWED BY DIRECTORS TO MINORITY SHAREHOLDERS

277. LA. STAT. ANN. §§ 12:1-1302(A), -1320 to -1331 (2015).

UNDER BCA

Certain observations in the preceding section are also relevant to the question of whether directors owe a fiduciary duty to minority shareholders, separate and distinct from the directors' fiduciary duty to all shareholders and, if so, the extent of that duty.

a. BCA Blackletter Law: §§ 830–31

The general standard of conduct to which directors are subject is specified in BCA § 830(A).[278] It provides that each director "when discharging the duties of a director, shall act in good faith and in a manner the director reasonably believes to be in the best interests of the corporation."[279] Section 830 does not require that a director act in the best interests of the *shareholders*; only that he act in the best interests of the corporation, a juridical entity with its own patrimony, separate and apart from its shareholders.[280] The identity of shareholders and their relative ownership is subject to change at any time; the corporation retains its separate legal personality regardless of who owns its shares.

MBCA § 8.30 Official Comment recognizes that shareholders may disagree about the proper course of director conduct in any given situation.[281] It provides: "In determining the corporation's 'best interests,' the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups within the shareholder body . . . may differ."[282]

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278. LA. STAT. ANN. § 12:1-830(A) (2015).

279. *Id.*

280. *Id.*

281. MODEL BUS. CORP. ACT § 8.30 cmt (a) (AM. BAR ASS'N 2013).

282. The "wide discretion" vested in directors to decide between near-term opportunities and long-term benefits is subject to two significant limitations. The first, formulated in *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc*., 506 A.2d 173, 182 (Del. 1986), is as follows: "The Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale. The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit." The second limitation arises where a corporation is approaching possible insolvency. It is described as follows in *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P.*, 906 A.2d 168, 175 (Del. Ch. 2006), *aff'd sub nom. Trenwick Am. Litig. Trust v. Billet*, 931 A.2d 438 (Del. 2007), "Even when the firm is insolvent, directors are free to pursue value maximizing strategies, while recognizing that the firm's creditors have become its residual claimants and the

BCA § 830 is merely aspirational. Violation of that section by a director cannot create personal liability in damages. Only a violation of BCA § 831 creates an exposure to personal liability.[283] Sections 831(A)(2)(a) and (e) provide that a director may be liable "to the corporation or its shareholders" for (1) "action not in good faith" or (2) "breach of the director's duties to deal fairly with the corporation and its shareholders that is actionable under applicable law."[284]

MBCA § 8.30 Official Comment states: "[T]he interested director [i.e., in a directorial conflict of interest situation] is still expected to act in good faith, and that duty is normally discharged by observing the obligation of fair dealing."[285] The net result is, if a director complies with the obligation of fair dealing, he has satisfied his duty of good faith to any individual shareholder(s) in any situation, regardless of whether it involves a directorial conflict of interest, subject to § 861 discussed below.

b. Conflict of Interest Under § 861

In a directorial conflict of interest situation, BCA § 861(A) provides that "[a] transaction effected . . . by the corporation . . . may not be the subject of any form of relief, or give rise to an award of damages or other sanctions against a director . . . *in a proceeding by a shareholder or by or in the right of the corporation*, on the ground that the director has an interest respecting the transaction, if it is not a director's conflicting interest transaction," defined in BCA § 860(2) to mean a transaction by the corporation in which a director or a related person had a "material financial interest."[286] "Material financial interest," in turn, is defined in § 860(4) to mean "a financial interest . . . that would reasonably be expected to impair the objectivity of the director's judgment when participating in action on the authorization of the transaction."[287]

Hence, a director's conduct in voting to authorize a

advancement of their best interests has become the firm's principal objective." *See also* N. Am. Catholic Educ. Programming Found. Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007). Neither of these limitations pits the interests of the NDC Shareholders against those of the minority shareholders; both apply equally for the benefit or detriment of all shareholders vis-à-vis third persons.

283. LA. STAT. ANN. § 12:1-831(2015 & Supp. 2018).

284. LA. STAT. ANN. § 12:1-831(A)(2)(a), (e) (2015 & Supp. 2018).

285. MODEL BUS. CORP. ACT § 8.30 cmt. (a) (AM. BAR ASS'N 2013).

286. LA. STAT. ANN. §§ 12:1-861, -860(2) (2015 & Supp. 2018).

287. LA. STAT. ANN. § 12:1-860(4) (2015 & Supp. 2018).

transaction cannot create liability solely on the grounds of a conflict of interest—whether in a derivative suit on behalf of the corporation or directly by a minority shareholder—unless the challenged director or a related person had a financial interest in the transaction of sufficient materiality to impair the objectivity of the director's judgment. For example, a transaction by the corporation with either a person who does not fall within the definition of a related person of the director, or a related person of the director that does not involve sufficient financial materiality to impair the objectivity of the director's judgment in voting to authorize it, cannot create directorial liability in damages to a minority shareholder on the grounds of a conflict of interest.

BCA § 861 is preclusive in any situation where a director's conflict of interest is the basis for a claim of damages or for equitable relief based on his conduct.[288] Hence, even if a transaction creates an appearance of directorial conflict, it cannot result in equitable relief or liability in damages to a minority shareholder or to the corporation on the ground of the conflict, unless the transaction (1) meets the definition of a "director's conflicting interest transaction," and (2) has not been approved by qualified directors under BCA § 862.

c. Duty Owed to Minority Shareholders Versus Duty Owed to Corporation

As noted in Section V(D)(6)(a) above, a director's paramount fiduciary duty is owed to the corporation in preference to its shareholders because the identity of the shareholders is subject to change, and their preferences as to the directors' course of conduct in a particular situation may differ.[289] Where a director's challenged conduct satisfies his fiduciary duty to the corporation, it automatically satisfies his duty to the shareholder body at large. The derivative proceeding is available to redress any breach of that duty.[290] Hence, a director can be liable in damages

288. MBCA § 8.31's Official Comment I on Director Conduct (3. Section 8.31(c)) explains, "[S]ection 8.61 channels all directors' transactional interests into the exclusive treatment for directors' conflicting interest transactions that is therein provided, rejecting an award of damages or other sanctions for interests that do not come within the conceptual framework." MODEL BUS. CORP. ACT § 8.30 cmt. (a) (AM. BAR ASS'N 2013).

289. *See supra* Section V.D.6.a.

290. A cause of action against a director for breach of fiduciary duty that, if successful, would result in an award of damages to the corporation, rather than to any shareholder or body of shareholders less than the whole, is classified as derivative. Procedural rules prohibit a claim classified as derivative from being

to a minority shareholder only with respect to a duty different from that which he owes the corporation. To the extent those duties conflict, the director is obliged to prefer the interests of the corporation to those of individual shareholders.[291] The director, therefore, cannot be liable to an individual shareholder when his challenged conduct was in the best interests of the corporation, even if it was not in the best interests of any individual shareholder.

In order to state a claim for damages for which relief can be granted, a minority shareholder must allege that (1) the directors' challenged conduct constitutes a breach of their duty under BCA § 831(A)(2)(e) to deal fairly and in good faith with him, as compared with more favored shareholders, and (2) the corporation's best interests would not have been adversely affected by treating him equally as well as the favored shareholders.[292] By asserting such a claim, the plaintiff concedes that the directors' challenged conduct does not constitute (1) a breach of their duty of loyalty to the corporation (because if so, it would be derivative), (2) oppression (because if so, it would be barred by BCA § 1435(L)), (3) a transaction as to which shareholders have appraisal rights (because if so, it would be barred by BCA § 1340), or (4) negligence or a failure of oversight (because if so, it would be exculpated by BCA § 832 and Louisiana 2014 Revision Comment (d) thereunder).

(i) Non-Transactional Fiduciary Duty

BCA § 1435, discussed above in Section V(D)(5), provides that minority shareholders, as a subset of all shareholders, have no right of action against the corporation, its directors, or its NDC Shareholders for breach of a non-transactional duty of good faith and fair dealing, except that where (1) a minority shareholder asserts a right to withdraw on grounds of oppression under § 1435(D), and (2) the corporation does not accept his offer to sell his shares, the shareholder may file a proceeding against the

brought on behalf of one or more individual shareholders, rather than on behalf of the corporation as an entity. *See, e.g.*, Atkins v. Hibernia Corp., 182 F.2d 320 (5th Cir. 1999); Nowling v. Aero Services Intern., Inc., 752 F. Supp. 1304 (E.D. La. 1990); MORRIS & HOLMES, *supra* note 5, at § 34:2.

291. *See, e.g.*, International Bhd. of Electrical Workers Local No. 129 v. Tucci, 70 N.E.3d 918 (Mass. 2017); Green v. Freeman, 749 S.E.2d 262 (N.C. 2013); Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 175 (Del. Ch. 2006); N. Am. Catholic Educ. Programming Found. Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

292. BCA § 830(A) requires directors to act in the best interest of the corporation. LA. STAT. ANN. § 12:1-830(A) (2015).

corporation (but not against the directors or controlling shareholders) under BCA § 1435(G) seeking enforcement of the shareholder's right to withdraw.[293]

In a § 1435(G) proceeding, the shareholder would be free to allege, and the court must determine whether, the corporation's practices proven by the shareholder were "plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder," which is the test of oppression set forth in § 1435(B). If the court decides in favor of the shareholder, it would render a partial judgment recognizing the shareholder's right to withdraw on grounds of oppression, whereupon the corporation would be obligated to purchase all his shares at their Statutory Fair Value.[294] A purchase of the shareholder's shares, whether negotiated or judicially determined in a § 1435(G) proceeding, would extinguish all the shareholder's pending and contingent fiduciary claims.[295]

If, on the other hand, the court denies the shareholder's right to withdraw on grounds of oppression, the court is obliged under BCA § 1437(A) to lift any stay then in effect against a pending proceeding in which the shareholder alleged a cause of action against the corporation or a director or controlling person on grounds of a breach of duty owed to the shareholder in his capacity as such.[296] But even if the stay is lifted, the adverse judgment rendered against the minority shareholder in the § 1435(G) proceeding, considered in the light of § 1435(L), would presumably bar him from alleging in any other proceeding the breach of a duty owed by the corporation, the directors, or controlling shareholders to deal with him fairly and in good faith in a non-transactional context. That is, the shareholder would have already litigated and lost the "fair and in good faith" issue in the § 1435(G) proceeding.[297] The judgment in that proceeding rejecting his claim would be res judicata as to any proceeding he might file against the directors for breach of a non-transactional duty of good faith and fair dealing. If it were otherwise, the

293. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).

294. LA. STAT. ANN. § 12:1-1435(G) (2015 & Supp. 2018).

295. Louisiana 2014 Revision Comment (b) under § 1437 says: "If all of the complaining shareholder's shares are purchased, the shareholder's right to pursue any action that is available only to shareholders of a corporation would be terminated, and any action stayed by this provision would then be subject to dismissal on an exception of no right of action." LA. STAT. ANN. § 12:1-1437(B) (2015).

296. LA. STAT. ANN. § 12:1-1437(A) (2015).

297. *See* Moll, *supra* note 7, at 501–03.

"exclusive remedy" clause in § 1435(L) would be meaningless because the shareholder who lost a § 1435(G) proceeding would be free to re-litigate the same issue in a parallel proceeding.[298]

Moreover, Louisiana 2014 Revision Comments (d)(1)–(2) under BCA § 1435 say the statutory definition of oppression is "designed to provide a generous range of discretion to the majority owners in designing corporate policies and operations that are fair . . . . In determining fairness, the interests of all shareholders, not just those of the complaining shareholder, must be considered."[299] This comment is consistent with BCA §§ 601(E) and 601(A): "Any of the terms of shares may vary among holders of the same class . . . so long as such variations are expressly set forth in the articles of incorporation."[300] "Except to the extent varied as permitted by this Section, all shares of a class . . . must have terms, including preferences, rights, and limitations that are identical with those of the other shares of the same class . . . ."[301]

That is, where, as assumed here, the charter does not expressly provide, with respect to a given class, a distinction between the terms of shares held by NDC Shareholders and the terms of shares of the same class held by minority shareholders, the directors in making business judgments to take or not take action are required by BCA § 601 to treat shares held by NDC Shareholders and minority shareholders equally.[302] Accordingly, just as the directors are prohibited by BCA § 601 from arbitrarily discriminating *against* minority shareholders, they are also prohibited from arbitrarily discriminating *in favor of* minority shareholders, and where the two conflict in a non-transactional situation, the majority rules.[303]

(ii) Transactional Fiduciary Duty

As mentioned above, the power to approve Expulsion Transactions is vested not in the directors but in the NDC Shareholders.[304] Accordingly, directors cannot be liable for a breach of fiduciary duty by reason of NDC Shareholder approval

298. *See infra* Section V.E.4.
299. LA. STAT. ANN. § 12:1-1435 cmt. (d)(1)–(2) (2015 & Supp. 2018).
300. LA. STAT. ANN. § 12:1-601(E) (2015 & Supp. 2018).
301. LA. STAT. ANN. § 12:1-601(A) (2015 & Supp. 2018).
302. LA. STAT. ANN. § 12:1-601 (2015 & Supp. 2018).
303. *Id.*; LA. STAT. ANN. §§ 12:1-721(A), -725(C) (2015 & Supp. 2018).
304. *See supra* Section V.D.5.

of an Expulsion Transaction the directors did not control.[305] Even if directors were notionally liable for breach of fiduciary duty in connection with shareholder approval of an Expulsion Transaction, BCA § 1340 provides that the appraisal rights available to non-consenting shareholders with respect to such a transaction, whether exercised or not, are their exclusive remedy for any breach of fiduciary duty by either NDC Shareholders or directors.[306] That is the result reached by the court under pre-2015 law in *Duncan v. Moreno Energy, Inc.* with respect to a dissenters' rights statute facially less preemptive than BCA § 1340.[307]

If Expulsion Transactions are eliminated from the universe of transactions as to which a minority shareholder might properly challenge the conduct of directors, that leaves only transactions other than those as to which appraisal rights were available. If directors are deemed to owe minority shareholders a fiduciary or other duty separate and distinct from the duties they owe the corporation and the NDC Shareholders, respectively, that duty would presumably come into play only where the interests of the NDC Shareholders and the minority are diametrically opposed and mutually interdependent in a Zero-Sum Game transaction requiring directorial approval.

Absent diametrical opposition of controlling and minority shareholder interests, even if the directors acted under a conflict of interest by also being controlling shareholders, their challenged conduct would be entitled to the "generous range of discretion" authorized by the comments under BCA § 1435 quoted above with respect to determining whether a lack of fairness constituted actionable oppression.[308]

So, assuming *arguendo* that directors owe a separate and distinct duty to the minority in a transactional context as to

305. Directors could, of course, be liable in damages for misstatements or omissions of material fact made in anticipation of the shareholder vote on such a transaction, but only if, and to the extent that, the minority shareholder proved damages exceeding the fair value of his shares, as determined in an appraisal proceeding.

306. LA. STAT. ANN. § 12:1-1340 (2015).

307. Duncan v. Moreno Energy, Inc., 08-786 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778.

308. To the same effect is MBCA § 8.30 Official Comment (1. Section 8.30(a)): "In determining the corporation's 'best interests,' the director has wide discretion . . . in making judgments where the interests of various groups within the shareholder body . . . may differ." MODEL BUS. CORP. ACT § 8.30 cmt. (a) (AM. BAR ASS'N 2013).

which appraisal rights were *not* available, that duty is presumably limited to assuring that, in a Zero-Sum Game situation in which (1) any benefit to controlling shareholders immediately disadvantages minority shareholders by an equivalent amount, and (2) the best interests of the corporation are indifferent to the allocation of that benefit between the shareholder groups, the minority shares should be treated equally with, but not more favorably than, the controlling shares.

Thus, the rule might be stated as follows: where a corporate transaction (1) that requires directorial but not shareholder approval, (2) has not received qualified director approval pursuant to BCA § 862, and (3) allocates material financial benefits exclusively among shareholders in their capacity as such (as opposed to proportionally by number of shares held), (4) in accordance with a method chosen by the directors in their sole discretion, (5) whose choice cannot adversely affect the best interests of the corporation, and (6) the method of directorial allocation of benefits automatically creates an offsetting proportional financial detriment to other shareholders (over and above lost opportunity)—i.e., a Zero-Sum Game—good faith and fair dealing require the board to select a method of allocation that treats the minority shares, considered as a voting group, no less favorably than the controlling shares considered as a separate voting group.

7. Relevance of Directors' Duty Owed to Minority Shareholders Under Pre-2015 Louisiana Law

As mentioned in Section V(B)(4) above, the decisions in the pre-2015 *Noe* and *Levy* cases held that liquidators selected by NDC Shareholders owe a fiduciary duty to minority shareholders and that in Zero-Sum Game transactions where the interests of the minority are pitted directly against those of the controlling shareholders, the liquidator is under a duty to assure fair—i.e., equal—treatment of the minority in the allocation of the dissolution proceeds.[309] It can be argued that BCA §§ 1340 and

309. Appraisal rights were not available under the LBCL with respect to dissolution, and the same is true of the BCA. The BCA, however, makes no provision for a liquidator. The directors, rather than a liquidator, are charged with oversight of an out-of-court dissolution and have exclusive authority under BCA § 1402 to determine the terms of dissolution. LA. STAT. ANN. § 12:1-1402 (2015). In the *Noe* case, the supreme court treated the corporate purchaser of the assets in dissolution as the alter ego of the liquidator and rendered judgment imposing money damages against both solidarily in an amount equal to the minority's percentage of the appraised value of the assets. Noe v. Roussel, 310 So. 2d 806, 826 (La. 1975).

1435, taken together, supersede all pre-2015 non-statutory bases for a claim that directors owe a fiduciary duty to minority shareholders, defined as a subset of all shareholders.

If the pre-2015 decisions do survive the enactment of the BCA, however, they are consistent with the foregoing analysis in suggesting that directors owe a duty to minority shareholders to allocate the benefits and detriments from dissolution equally among all shares, only when called upon to approve the terms of a Zero-Sum Game transaction in which the corporation's interests are not adversely affected by the method of allocation.

Yuspeh v. Koch presented a classic example where two defendants constituted a majority of the board and owned 51% of the shares, which were assumed to be worth $5X per share.[310] The defendants voted as directors to have the corporation issue a sufficient number of shares, at a bargain price of $1X per share, only to them as to increase their holdings to the 60% majority required to authorize a squeezeout merger; the minority shareholders were offered the same inadequate $1X per share in exchange for their shares.[311] The defendant directors' actions constituted a breach of duty (1) to the corporation, which should have received $5X, rather than only $1X, from the defendants as consideration for each newly issued share, and (2) to the minority, which should have received $5X for their shares in the squeezeout merger.[312]

The *Duncan* court addressed a fact situation substantially similar to that in *Yuspeh* by reasoning that the minority were entitled to receive only the actual value of their shares at the time of appraisal from the squeezeout merger appraisal proceeding.[313] The *Duncan* court went on to state in dicta that the minority were separately entitled to assert a direct claim against the directors for the diminution in the value of their shares resulting from any breach of fiduciary duty by the directors prior and unrelated to the merger.[314]

But assume, instead of the facts described above, that the

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310. Yuspeh v. Koch, 02-698, pp. 5–8 (La. App. 5 Cir. 2/25/03); 840 So. 2d 41, 44–46.

311. *Id.*

312. *Id.* at pp. 14–16; 840 So. 2d at 49–50.

313. *See* Duncan v. Moreno Energy, Inc., 08-786, p. 14 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778, 788.

314. *See id.* at pp. 4–6; 1 So. 3d at 782–83.

Yuspeh defendants had paid \$5X per share for the new shares issued to themselves and \$5X per share to the minority in the squeezeout merger. In that case, the corporation would have had no derivative claim against the directors because it would have been paid fair value for issuing its additional shares. The minority would have had no direct claim against the directors for breach of duty because they received the fair value of their shares, after taking into account the issuance of additional shares to the controlling shareholders.

Under the facts assumed in the preceding paragraph, would the directors have had a duty to the minority to offer them, along with shares issued to the controlling shareholders, preemptive rights, i.e., a sufficient number of shares at \$5X per share to avoid diluting the minority's voting interest? Doing so would have enabled the minority to block the merger if they exercised their purchase right.

The answer under the BCA should be no. Subsection 630(A) says: "The shareholders of a corporation do not have a preemptive right to acquire the corporation's unissued shares except to the extent the articles of incorporation so provide."[315] The minority were aware prior to the hypothetical issuance of shares and squeezeout merger described above that (1) the controlling shareholders were entitled to elect 100% of the directors, (2) the directors have power under BCA § 621(B) to authorize the issuance of shares to whomever they choose, (3) BCA § 1104 grants the majority shareholders the authority to approve a squeezeout merger at any time, and (4) BCA § 1340 bars a fiduciary claim by the minority following a merger where appraisal rights were available to the minority.

The minority in the hypothetical situation just described could not have had a reasonable expectation that the board, in issuing additional shares, would grant them preemptive rights to which the statute says they are not entitled absent an express requirement in the charter. If the NDC Shareholders or the board were deemed subject to a non-statutory fiduciary duty to accord preemptive rights to minority shareholders, BCA § 630(A) denying preemptive rights except where expressly required by the charter would be meaningless.[316]

The hypothetical transaction described above in which

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315. LA. STAT. ANN. § 12:1-630(A) (2015).
316. *But see* MORRIS & HOLMES, *supra* note 5, at § 28:3.

additional shares are issued only to the controlling shareholders at their $5 fair value is not a Zero-Sum Game because the minority shares do not suffer financial dilution as a result of the issuance. The only detriment to the minority is the loss of their relative voting percentage interest following issuance of the shares.

E. Minority Shareholder Remedies Under BCA for Breach of Directorial Fiduciary Duty

This section assumes a fact situation in which a minority shareholder established the breach of a directorial fiduciary duty owed to him. This section considers the range of remedies that may be available to redress such a breach.

1. Suit Filed After Shareholder Approval to Enjoin or Rescind Corporate Action

BCA § 1340(E)(1) recognizes the right of any shareholder to file a proceeding, either before or after consummation of a corporate action pursuant to shareholder approval, to enjoin or rescind the action on the ground that it was not authorized or approved in accordance with the applicable provisions of (1) BCA §§ 1001–1202, (2) the charter or bylaws, or (3) the authorizing board resolution.[317] A shareholder has standing to file such a proceeding regardless of whether he voted for or against the action, abstained, or failed to perfect appraisal rights.[318] Thus, the statute places a premium on strict compliance by the corporation with the statutory and other formal requirements governing a corporate action as to which appraisal rights are available.[319]

2. Suit Filed Prior to Shareholder Approval of Corporate Action

A dissident shareholder is more likely to litigate the

317. La. Stat. Ann. § 12:1-1340(E)(1) (2015).

318. The Official Comment under MBCA § 13.40 says: "Section 13.40 permits proceedings . . . seeking to enjoin, rescind or set aside corporate action after the action has been approved by shareholders . . . where there are fundamental flaws in the process by which the corporate action was approved." Model Bus. Corp. Act § 13.40 cmt. (Am. Bar Ass'n 2013).

319. Rescission of a consummated corporate action on the grounds described above is rare except under egregious circumstances, particularly where rescission could affect the rights of third parties. Rescission undermines the security of transactions recorded in public records on which the business world relies.

propriety of a corporate action in an injunction proceeding filed after receipt of notice, but before shareholder approval, of the action. Such a proceeding does not present the *Duncan* problem of distinguishing fiduciary from appraisal remedies because under BCA § 1302(A), appraisal rights ripen only upon the consummation of a corporate action.[320] That is, no appraisal rights were available when the injunction suit was filed. The plaintiff in a pre-approval injunction proceeding would therefore be free to challenge the proposed corporate action not only for lack of valid authorization or approval but also for breach of fiduciary duty, including loyalty, care, and candor.[321]

3. EXPULSION TRANSACTION DAMAGE CLAIMS: ROLE OF PRE-2015 LOUISIANA CASE LAW

A court might adopt the *Duncan* approach if it believes the case law is relevant and helpful to adjudicate a minority shareholder's post-consummation fiduciary claim under the BCA. It usefully separates directorial activity in planning and executing a corporate action, for which appraisal is the exclusive remedy, from a prior directorial breach of fiduciary duty that was either unrelated, or arguably related but not integral, to the Expulsion Transaction.

A minority shareholder has standing to bring a separate cause of action for the latter class of claims (unless the challenged conduct falls within the definition of oppression governed by BCA § 1435). The *Duncan* analysis could be applied in such a case regardless of whether the complainant exercised appraisal rights with respect to the corporate action. It is inevitable that such "separate" fiduciary claims will be asserted separately from appraisal because they give the plaintiff two bites at the apple. It is also inevitable that directors will argue, in order to gain the exclusivity protection of §§ 1340 and 1435, that the plaintiffs' claims were either an inextricable part of a related corporate action or within the definition of oppression. Courts will therefore be called upon to decide whether the minority's fiduciary claims are "in connection with" an Expulsion Transaction and, if not, whether they are barred by the exclusivity clause in § 1435(L) for oppression claims. If the

320. LA. STAT. ANN. § 12:1-1302 (2015).

321. Under the reasoning of the *Duncan* case, pre-approval claims based on an alleged directorial breach of fiduciary duty that occurred prior to and separable from the proposed corporate action, however, would not constitute grounds for an injunction, only for post-consummation damages.

claims are deemed not "in connection with" an Expulsion Transaction and do not constitute oppression, the minority would remain procedurally free under *Duncan* to assert them notwithstanding consummation of the corporate action.

The factor a court would likely consider decisive in evaluating the viability under the BCA of a post-consummation transactional fiduciary claim is whether the allegedly wrongful directorial act or omission favored the majority over the minority shareholders in a Zero-Sum Game context where the directors knew and intended that their challenged act or omission would confer a benefit exclusively on the majority that would immediately and necessarily impose an offsetting detriment exclusively on the complaining minority. If the challenged directorial act or omission did confer such a benefit on the majority as a *fait accompli*, not contingent on subsequent events, the court would presumably entertain a post-consummation fiduciary claim separate from the appraisal remedy. Otherwise, the court would likely hold that the plaintiff lacked standing to assert the claim.

4. DAMAGE CLAIMS FOR OPPRESSION ARE BARRED

As explained in Part V above, a minority shareholder's sole remedy for oppression as defined by BCA § 1435(B) is to assert a right under § 1435(D) to withdraw on grounds of oppression and sell his shares to the corporation at fair value.[322] A shareholder has no standing at any time to file a proceeding alleging oppression except under BCA § 1435(G) to enforce a right to withdraw that has been asserted and rejected by the corporation.[323]

A minority shareholder who elects to give notice of withdrawal from the corporation on grounds of oppression under BCA § 1435 is immediately barred from asserting any alternative fiduciary claims of any kind against the corporation, its directors, or its controlling shareholders.[324] That is, prior to the assertion of

322. *See supra* Section V.D.6.c.i.

323. LA. STAT. ANN. § 12:1-1435(G) (2015 & Supp. 2018).

324. BCA § 1437 provides: "On motion by the corporation [following the shareholder's assertion of a right to withdraw] a court shall stay . . . any proceeding in which . . . [the] shareholder, on his own behalf or as a representative of the corporation, alleges a cause of action against the corporation or against a director, officer, agent, employee, or controlling person of the corporation, on grounds of a breach of duty owed by that person to the corporation or to the shareholder in the shareholder's capacity as shareholder." LA. STAT. ANN. § 12:1-1437(A) (2015).

a withdrawal right, a shareholder would be foreclosed by BCA § 1435(L) from filing any claim for damages on grounds of oppression against the corporation, the directors, or others in control.[325] Such a shareholder would not, however, be foreclosed from asserting against the directors (1) a direct claim on grounds other than oppression, such as an individual or class action claim for breach of the duty of good faith and fair dealing in connection with a transaction as to which appraisal rights were not available, or (2) a derivative claim in the right of the corporation.[326]

Once the shareholder asserts a withdrawal right, however, the court will stay under BCA § 1437 any such pending direct or derivative proceeding the shareholder has filed in the right of, or against, the corporation, the directors, or the controlling shareholders, on grounds of breach of duty by any of them, *even though the pending proceeding does not relate to oppression.* If the court renders judgment in a § 1435(G) proceeding rejecting the shareholder's asserted right to withdraw on grounds of oppression, the court is required by BCA § 1437(A) to lift the stay so as to permit the shareholder to resume his other pending proceedings for breach of fiduciary duty on grounds other than oppression.[327]

In neither of these cases, however, can a shareholder simultaneously assert a right to withdraw *and* maintain a suit against any director or NDC Shareholder for breach of fiduciary duty. Accordingly, the separation-of-claims issue addressed by the *Duncan* court cannot arise under the BCA in an oppression context. Because BCA § 1435 prohibits minority shareholder proceedings against a director on grounds of oppression, any shareholder proceeding against a director would likely be limited to transactional, as distinguished from non-transactional, fiduciary claims.[328]

325. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

326. *See* LA. STAT. ANN. § 12:1-1435 cmt. (d)(1) (2015 & Supp. 2018) ("Subsection L does not affect any of the remedies that are available on grounds other than oppression, including the remedies that were available before the special remedy provided by this Section for oppression became effective.").

327. LA. STAT. ANN. § 12:1-1437(A) (2015).

328. A minority shareholder contemplating the future assertion under § 1435(D) of a right to withdraw for oppression would normally be reluctant to institute a non-derivative proceeding against a director for breach of fiduciary duty other than oppression, unless the claim were unusually persuasive. Judicial rejection of the non-derivative claim would weaken the shareholder's future suit for withdrawal on grounds of oppression, because the latter suit must be based on practices that

The central issue on motion practice in any proceeding (other than under § 1435(G)) by a minority shareholder against the directors for breach of a non-derivative, *non-transactional* fiduciary duty—regardless of whether the shareholder has not asserted, or a court has rejected, his claim of a right to withdraw for oppression—is whether the director's challenged conduct constituted oppression as defined in § 1435(B).[329] If it did, then under § 1435(L), it is not actionable.[330]

To put it differently, the question presented by the defendants' exception of no cause of action is whether it is possible under the BCA for a plaintiff shareholder to state a non-derivative claim against directors for a non-transactional breach of duty that falls outside the scope of "practices [that] are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with" the plaintiff.[331] If the directorial conduct challenged by the plaintiff's claim is deemed to be within the scope of that definition, the claim is barred by BCA § 1435(L).[332] The shareholder's only recourse is to assert his statutory right to withdraw under § 1435(D).[333] The comprehensive structure of the § 1435 oppression remedy suggests that, except in rare circumstances, any non-derivative shareholder claim against directors for breach of a non-transactional fiduciary duty describes some species of conduct comprehended by the definition of oppression and is therefore barred.[334]

"considered as a whole over an appropriate period of time, are plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith with the shareholder." That is, the merits of a shareholder claim of oppression are determined based on the corporation's course of conduct over a period of years. If, therefore, the shareholder asserting a right to withdraw has previously litigated and lost a breach of fiduciary duty proceeding against the directors, his oppression suit is weakened because he can no longer rely on the rejected claim as evidence of oppression. *See* LA. STAT. ANN. § 12:1-1435(D) (2015 & Supp. 2018).

329. LA. STAT. ANN. § 12:1-1435(B) (2015 & Supp. 2018).

330. LA. STAT. ANN. § 12:1-1435(L) (2015 & Supp. 2018).

331. BCA § 1435(L) states, "An allegation of oppression, as such, does not provide an independent or additional basis for an action by a shareholder to recover damages from the corporation or its directors, officers, employees, agents, or controlling persons." *Id.*

332. *Id.*

333. LA. STAT. ANN. § 12:1-1435(D) (2015 & Supp. 2018).

334. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).

5. BCA DOES NOT PRESCRIBE LITIGATION PROCEDURES FOR MINORITY SHAREHOLDER CLAIMS

BCA §§ 740–47 establish mandatory procedural rules governing derivative proceedings against directors for breach of fiduciary duty to the corporation.[335] The BCA does not, however, seek to establish procedural rules governing minority shareholder claims against directors for breach of fiduciary duty to the minority plaintiffs. More particularly, Official Comment under MBCA § 8.31 (Note on Directors' Liability) says:

> The Model Act does not undertake to prescribe detailed litigation procedures [except for derivative proceedings] . . . . [T]he local pleading and other rules would govern the plaintiff's effort to satisfy subsection (a)(2)'s [BCA paragraph 831(A)(2)'s] requirements. Consistent with the general rules of civil procedure, the plaintiff generally has the burden under subsection (b) of proving that the director's deficient conduct caused harm resulting in monetary damage or calls for monetary reimbursement . . . .[336]

Further, Official Comment I(2) under MBCA § 8.31 says:

> After satisfying the burden of establishing that the conduct of the director is challengeable under subsection (a), the plaintiff, in order to hold the director liable for money damages under clause (b)(1), has the further burden of establishing that: (i) harm (measurable in money damages) has been suffered by the corporation or its shareholders and (ii) the director's challenged conduct was the proximate cause of that harm.[337]

The comment quoted above refers to BCA § 831(B), which provides that a minority shareholder seeking to hold the director liable for money damages shall also have the burden of establishing both (1) harm to the shareholder was proximately caused by the director's challenged conduct and (2) that the payment sought by the plaintiff is appropriate in the circumstances.[338]

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335. LA. STAT. ANN. §§ 12:1-740 to -747 (2015 & Supp. 2018).
336. MODEL BUS. CORP. ACT § 8.31 cmt. (AM. BAR ASS'N 2013).
337. MODEL BUS. CORP. ACT § 8.31(b) cmt. (AM. BAR ASS'N 2013).
338. LA. STAT. ANN. § 12:1-831(B) (2015 & Supp. 2018).

VI. CONCLUSION

The BCA is based on the 2010 version of the MBCA, which reversed the prohibition in earlier versions against the issuance of callable common shares.[339] Consistent with the 2010 version of the MBCA, BCA §§ 601(C) and 603(C) authorize the charter of a Louisiana corporation having only a single class of common shares to make them all callable at the option of the corporation (a Full Call), provided at least one share remains outstanding at all times.[340]

Against this background, BCA § 627(A) provides that a charter amendment imposing a share transfer restriction is not enforceable against non-consenting shares (Old Shares) issued prior to the adoption of the charter amendment.[341] It is uncertain, however, whether § 627(A) renders a Full Call created de novo by charter amendment unenforceable against shareholders who did not consent to the amendment on the ground that the Full Call is deemed to constitute a share transfer restriction.[342]

Assuming BCA § 627 is deemed to bar the enforcement against Old Shares of a Full Call created by charter amendment, that bar can be eliminated by a corporate election to grant appraisal rights with respect to the charter amendment. This position is consistent with Official Comment 1 (Overview) under MBCA § 13.01, which says:

> On the one hand, through their approval of an amendment to the articles of incorporation, a merger, share exchange or disposition of assets, the majority may change the nature and shape of the enterprise and the rights of *all its shareholders*. On the other hand, shareholders who object to these changes may withdraw the fair value of their investment in cash through their exercise of appraisal rights.[343]

Accordingly, a minority shareholder whose share ownership has been terminated by an Expulsion Transaction, as to which appraisal rights were available (including a Full Call charter amendment), should have no claim against the NDC

339. *See generally* MODEL BUS. CORP. ACT § 6.01 (AM. BAR ASS'N 2016).
340. LA. STAT. ANN. §§ 12:1-601(C), -603(C) (2015 & Supp. 2018).
341. *See* LA. STAT. ANN. § 12:1-627(A) (2015).
342. *See supra* Section III.D.4.
343. MODEL BUS. CORP. ACT § 13.01 cmt. (AM. BAR ASS'N 2013) (emphasis added).

Shareholders or the directors for breach of their duty in authorizing the transaction. BCA § 1340, unlike the MBCA, facially forecloses any claim by the minority against any of the corporation, its directors, and its controlling persons "in connection with" an Expulsion Transaction as to which appraisal rights were available, provided it complied with applicable statutory, charter, bylaw, and board resolution requirements.[344] More particularly, BCA § 1340(C) provides that where appraisal is available, it is "the exclusive remedy of a shareholder" with respect to a consummated corporate action.[345]

The "exclusive remedy" rule of BCA § 1340 is not unreasonable because, as a practical matter, the largest amount a minority shareholder can justify as the total consideration for his shares is their fair value as defined in BCA § 1301(4)—the value using customary and current valuation concepts with no discount for lack of marketability or minority status, i.e., going concern value.[346]

Notwithstanding the "exclusive remedy" rule for shareholder-approved corporate actions, BCA § 1340 interposes no bar to a dissident shareholder's filing suit to enjoin a proposed, or rescind a consummated, corporate action. Such an injunction suit can be filed only after notice, but before shareholder approval, of the corporate action, but the claim may be based on lack of valid authorization or approval, on breach of fiduciary duty with respect to the terms of the transaction, or both.[347] A post-consummation rescission suit by a dissident shareholder, however, is unlikely to survive a motion to dismiss except where the corporate action lacked valid authorization or approval under applicable provisions of the BCA, the charter or bylaws, or the implementing board resolutions.

The BCA does not address the subject of fiduciary duty, if one exists, that NDC Shareholders owe to minority shareholders. The Official Comments under MBCA § 10.01, however, indicate the drafters' intent that in states such as Louisiana that adopt the 2010 version of the MBCA, existing non-statutory state law should continue to govern both (1) the judicial reviewability of

344. LA. STAT. ANN. § 12:1-1340 (2015).

345. LA. STAT. ANN. § 12:1-1340(C) (2015).

346. LA. STAT. ANN. § 12:1-1301(4) (2015 & Supp. 2018).

347. The bar of BCA § 1340(A) does not prevent an injunction suit on any grounds prior to shareholder approval because the bar is conditioned on shareholder approval. LA. STAT. ANN. § 12:1-1340(A) (2015).

Expulsion Transactions on the ground of fairness and (2) the substantive content of any fiduciary duty NDC Shareholders owe to minority shareholders with respect to those transactions.[348]

No Louisiana authority has held or suggested that NDC Shareholders owe a fiduciary duty to the minority. And apart from the specific oppression and expulsion situations for which the BCA provides carefully balanced remedies, there is no persuasive argument under corporate law of other states that NDC Shareholders owe a non-transactional fiduciary duty to the minority. It is therefore unlikely that a Louisiana court would entertain a claim based on breach of an alleged fiduciary duty that NDC Shareholders owe to the minority. Nonetheless, directors, of course, owe a fiduciary duty to all shareholders, including minority shareholders.

The oppression remedy in BCA § 1435 is unique to Louisiana and has no analog in the MBCA. That section defines oppression and provides that a shareholder's exclusive remedy is not to file a judicial proceeding, but rather to notify the corporation that he asserts a right to withdraw on the grounds of oppression and to tender his shares for purchase by the corporation at their fair value, as defined for purposes of the appraisal statute.[349] When a shareholder elects to assert a right to withdraw, the court will stay any pending proceedings by the shareholder against the corporation, its directors, and its controlling shareholders until the asserted right has been resolved.[350]

If the corporation does not accept the withdrawing shareholder's offer, he may file an ordinary proceeding against the corporation to enforce his right to withdraw by proving oppression. In the event the court renders judgment finding oppression and recognizing the shareholder's right to withdraw, but the parties are unable to agree on a price, either party may file a summary judicial proceeding to determine the Statutory Fair Value of the shares. Once that value has been determined by either negotiation or judgment, the corporation is required to purchase the shares at the price so determined.

Pre-2015 Louisiana case law may remain relevant to the judicial analysis under the BCA of non-derivative proceedings by minority shareholders against directors alleging fiduciary claims

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348. MODEL BUS. CORP. ACT § 10.01 cmt. (AM. BAR ASS'N 2013).
349. LA. STAT. ANN. § 12:1-1435 (2015 & Supp. 2018).
350. LA. STAT. ANN. § 12:1-1437(A) (2015).

that are distinguishable from both transactions as to which appraisal rights were available and oppression situations. The dicta in *Duncan v. Moreno Energy, Inc*. states that although statutory appraisal is the exclusive remedy of a non-consenting minority shareholder with respect to the planning and execution of a consummated corporate action, minority shareholders nevertheless retain a separate post-consummation right of action against the directors for certain non-derivative breach of fiduciary duty claims that arose prior to the consummated corporate action.[351] According to the *Duncan* court's dicta, the retained claims are limited to those based on wrongful acts or omissions prior to the corporate action that (1) may have been temporally or otherwise related, but that were not integral, to that corporate action, and (2) had the effect of depressing the value of the minority's shares relative to the majority.[352] A typical claim would allege diluting the value of the minority's ownership by issuing additional shares exclusively to the majority at a bargain price prior to an Expulsion Transaction.

The factor a court would likely consider decisive in evaluating the viability of a post-consummation fiduciary claim is whether the directors' challenged conduct did, or did not, favor the controlling over the minority shareholders in a Zero-Sum Game context in which the challenged conduct of the directors conferred a benefit exclusively on the majority that immediately and necessarily imposed an offsetting detriment exclusively on the complaining minority. If the court determined that the directors conferred such a benefit exclusively on the controlling shareholders, it might hold the directors liable for a breach of the duty of good faith and fair dealing owed to the complaining minority shareholders prior to and separable from an Expulsion Transaction for which appraisal rights were available.

In an oppression context, it is unlikely that a court would entertain a judicial claim by a minority shareholder alleging a breach by the directors of a duty of good faith and fair dealing in a *non-transactional* situation where the plaintiff did not allege oppression as defined in BCA § 1435—for which the right to withdraw is the exclusive remedy—but rather some lesser breach of the duty of good faith and fair dealing.

351. Duncan v. Moreno Energy Inc., 2008-786, pp. 5–7 (La. App. 3 Cir. 12/23/08); 1 So. 3d 778, 782–83.

352. *Id.*

The fundamental question tendered by both appraisal rights for Expulsion Transactions and the statutory oppression remedy is whether a court will entertain a judicial claim of directorial breach of a fiduciary duty of good faith and fair dealing owed to minority shareholders in a context related to, but not expressly based on, an Expulsion Transaction or oppression. Given the comprehensive nature of both the appraisal and oppression remedies under the BCA, it seems likely such a claim would not be successful except in a Zero-Sum Game transactional context.

Finally, assume the adoption of a Full Call charter amendment, subject to appraisal rights, eliminates any right of the holders of Old Shares under BCA § 627.[353] In theory, an argument might be advanced by a minority shareholder whose shares were called pursuant to a one-off exercise by the board that the *exercise* is distinguishable from the *adoption* of the charter amendment because it is an act having independent legal significance, given that the called shares had a different fair value when called than when appraisal rights were made available. Accordingly, the argument would run, the *exercise of the call*, separate and apart from the *adoption of the amendment*, is subject to a fiduciary duty owed to the holder of the called shares by the board that was not extinguished by the appraisal rights. This being so, the argument would continue, the board owed at least a duty of good faith and fair dealing to the holder of the called shares not to exercise the call at a time, or under circumstances, disadvantageous to the holder. The worst case for the majority in that situation is probably that it would be obliged to settle the claim for a payment equal to the excess, if any, of the Statutory Fair Value of the called shares on the call date over their Statutory Fair Value when appraisal rights were made available.

353. LA. STAT. ANN. § 12:1-627 (2015).

VII. APPENDIX