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Too Close for Comfort: Minority Shareholder Litigation against Close Corporations after McMinn v. MBF Operating Acquisition Corp. and Peters Corp. v. New Mexico Banquest Investors Corp.

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TOO CLOSE FOR COMFORT: MINORITY SHAREHOLDER LITIGATION AGAINST CLOSE CORPORATIONS AFTER *MCMINN V. MBF OPERATING ACQUISITION CORP.* AND *PETERS CORP. V. NEW MEXICO BANQUEST INVESTORS CORP.*

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I. INTRODUCTION

Minority shareholders in close corporations recently won a round against the majority shareholders who freeze them out, but it was not a complete knockout for those holding the smaller sum of shares. In *McMinn v. MBF Operating Acquisition Corp.*,[1] the New Mexico Supreme Court decided that if those in control of closely held corporations violate their fiduciary duties toward those shareholders not in control, the aggrieved parties are not limited to the mere appraisal value of their shares but instead can sue for a panoply of common law claims.[2] This vastly increases the liability for majority shareholders who force out, or in corporate terminology, freeze out, their former colleagues. One year after issuing *McMinn*, the supreme court decided *Peters Corp. v. New Mexico Banquest Investors Corp.*,[3] which spelled out *McMinn*'s limitations and will likely prevent revenge lawsuits between sophisticated shareholders.

Who will this affect and how will it change business as usual in New Mexico? Every close corporation that might be contemplating a shake-up or break-up needs to understand the new rules of the game to avoid protracted litigation. A close corporation is generally a small business that is incorporated with shares held by a tight-knit group of owners, such as a handful of longtime business associates or family members.[4] The shares are not traded publicly. A freeze-out is the process "by which the majority shareholders or board of directors oppresses the minority shareholders in an effort to compel them to liquidate their investment in terms favorable to the controlling shareholders."[5] A similar corporate action is a squeeze-out, which is "an attempt to eliminate or reduce a minority interest in a corporation."[6] Angry partners, divorcing spouses, and ousted shareholders are under the new regime and will likely need to consult an attorney in order to know which actions constitute a freeze-out and/or squeeze-out, and which actions violate

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1. 2007-NMSC-040, 164 P.3d 41.
2. *Id.* ¶ 45, 164 P.3d at 54.
3. 2008-NMSC-039, 188 P.3d 1185.
4. The American Law Institute defines "closely held corporation" as "a corporation the equity securities of which are owned by a small number of persons, and for which securities no active trading market exists." AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS & RECOMMENDATIONS § 1.06 (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE].
5. BLACK'S LAW DICTIONARY 691 (8th ed., 2004).
6. *Id.* at 1439.

fiduciary duties that trigger a minority shareholder's right to sue for claims beyond simply appraising and paying the fair value of the shares.

This article reviews New Mexico's minority shareholder dissent and appraisal statute; early case law involving litigation in closely held corporations; the recent court of appeals and supreme court cases interpreting and construing the appraisal statute (*McMinn* and *Peters*); and other states' approaches to dissent and appraisal. After discussing the court decisions, the author endeavors to explain why New Mexico's courts have arrived at various conclusions so that the practitioner can apply both the black-letter law and the underlying, unspoken judicial rationales to situations presented by clients. Many such situations involving litigation in close corporations vacillate between Golden Rule common sense and technical legal advice, and the recent court decisions in New Mexico require that counsel be able to explain both approaches to clients who are shareholders and/or directors of close corporations. Tight deadlines—as short as ten days—to use or lose certain rights demand that the attorneys be able to counsel clients on proposed corporate actions before they occur. Potential advice to clients and legislative recommendations conclude the article.

II. MINORITY SHAREHOLDER STATUTORY DISSENT AND APPRAISAL RIGHTS

A. Historical Perspective

At common law, certain corporate actions required unanimity among the shareholders, which essentially allowed the dissenting shareholders to have veto power.[7] Legislative bodies have eliminated the minority shareholder's common-law veto power over corporate actions, but in exchange these same lawmakers granted dissenting shareholders the right to depart from the changed corporation and walk away with the fair value of their shares.[8] The original purpose of the appraisal statute was to allow dissenting minority shareholders to convert their company ownership to cash so that they could exit the corporation without losing value as a result of the corporate action.[9] In New Mexico, dissenting and departing shareholders have had a statutory right since 1905 to have their shares appraised at the time that they exchange their corporate shares for cash.[10] That right predated statehood and the state constitution.[11] In 1983, New Mexico adopted the American Bar Association Model Business Corporation Act[12] (ABA Model Act) as its

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7. *E.g.*, Smith v. First Alamogordo Bancorp, Inc., 114 N.M. 340, 342, 838 P.2d 494, 496 (Ct. App. 1992) (citing Steinberg v. Amplica, Inc., 729 P.2d 683, 687 (1986) (en banc)).

8. *See id.* at 342, 838 P.2d at 496.

9. *See* Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L. J. 1, 12–13 (1995).

10. An Act to Regulate the Formation and Government of Corporations for Mining, Manufacturing, Industrial and Other Pursuits, 1905 N.M. Laws 142, 182–84.

11. New Mexico adopted its state constitution on January 21, 1911. *See* N.M. CONST. One year later, on January 6, 1912, it became the forty-seventh state. *See* New Mexico Office of the State Historian, http://www.newmexicohistory.org (last visited April 19, 2009).

12. Sections 53-15-3 and 53-15-4 of the New Mexico Statutes address the rights of dissenting shareholders. The compiler's notes indicate that these sections are "patterned after" Sections 80 and 81 of the American Bar

Business Corporation Act. As of this writing, New Mexico's twenty-six-year-old law is still in place. It is now several versions out of date from the ABA Model Act, which has been updated several times; proposed amendments to New Mexico's law are discussed in this article's Legislative Recommendations section.

B. New Mexico Business Corporation Act Dissent and Appraisal Provision

New Mexico's Business Corporation Act (Business Corporation Act) spells out a shareholder's right to dissent from mergers, consolidations, sales, exchanges, and other corporate actions that fundamentally change the corporate structure.[13] Dissenting and departing shareholders can receive "fair value" payment for their shares. The Business Corporation Act[14] states:

> Any shareholder of a corporation may dissent from, and obtain payment for the shareholder's shares in the event of, any of the following corporate actions:
> (1) any plan of merger or consolidation…;
> (2) any sale or exchange of all or substantially all of the property and assets of the corporation…;
> (3) any plan of exchange…;
> (4) any amendment of the articles of incorporation which materially and adversely affects the rights appurtenant to the shares of the dissenting shareholder…;
> (5) any other corporate action taken pursuant to a shareholder vote with respect to which the articles of incorporation, the bylaws or a resolution of the board of directors directs that dissenting shareholders shall have a right to obtain payment for their shares.[15]

The statute does not capture how cantankerous these corporate actions can be. In concrete terms, a wife and mother shareholder who divorces the head of the family's corporate ranch is not only giving up her shares in the close corporation, but she could be losing her officer status in the corporation, her full-time job and salary, her right to live in the house owned by the corporation, and all benefits that might flow from being an employee–stockholder, such as meals and a company vehicle.[16] When the family part of family business falls apart, the business side needs an appraisal proceeding conducted by a level-headed neutral party. The appraisal statute, and a neutral party to apply it, increases in importance as the shareholders' ability to make decisions based on their duties to each other decreases.

The next statutory section describes the steps of registering dissent with the majority's decision and then demanding fair value for the minority's shares. The process begins even before the shareholder knows whether he or she is in the minority. "Any shareholder electing to exercise his right of dissent shall file with

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Association Model Business Corporation Act. NMSA 1978, §§ 53-15-3, 53-15-4 (1983) (compiler's notes). The notes do not specify the year of the ABA Model Business Corporation Act from which these sections were derived.

13. NMSA 1978, § 53-15-3 (1983).

14. NMSA 1978, §§ 53-11-1 to 53-18-12 (2001).

15. NMSA 1978, § 53-15-3(A) (1983).

16. *See* McCauley v. Tom McCauley & Son, Inc., 104 N.M. 523, 529–32, 724 P.2d 232, 238–41 (Ct. App. 1986).

the corporation, prior to or at the meeting of shareholders at which the proposed corporate action is submitted to a vote, a written objection to the proposed corporate action."[17] Within ten or twenty-five days, depending on the type of corporate action, the dissenting shareholders may make a demand.[18] If shareholders fail to make a demand, they are bound by the corporate action.[19] If shareholders demand payment to cash out, they relinquish other shareholder rights, such as voting.[20] The corporation also has only ten days to respond to dissenting shareholders.

> [T]he corporation…shall make a written offer to each such shareholder to pay for such shares at a specified price deemed by the corporation to be the fair value thereof. The notice and offer shall be accompanied by a balance sheet of the corporation, the shares of which the dissenting shareholder holds, as of the latest available date and not more than twelve months prior to the making of the offer, and a profit and loss statement of the corporation for the twelve-months' period ended on the date of the balance sheet.[21]

If the dissenting shareholders and the corporation do not agree,

> [T]he corporation shall…file a petition in any court of competent jurisdiction in the county in this state where the registered office of the corporation is located praying that the fair value of the shares be found and determined….The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value. The appraisers shall have such power and authority as specified in the order of their appointment or on an amendment thereof.[22]

The court's judgment can include "interest at such rate as the court may find to be fair and equitable," dating from the day of the corporate action.[23]

In theory, the corporation must then pay the agreed-upon "fair value" to the dissenting shareholder. The fair value theory is simple; it is the nuts and bolts that complicate the matter. If the dissenting shareholders and a corporation agree on the fair value, the process is smooth. However, there are two ways that the process can be derailed. First, "fair value" can be a contested dollar amount, especially because the stock is likely only valuable to people already associated with the close corporation. For example, stock in a family ranching operation is not publicly traded and likely not attractive to many buyers outside the family. Second—and the subject of this article—depending on how the majority effected the corporate action, the minority shareholder can litigate for much more than fair value. For example, personal vendettas disguised as corporate actions will open the courthouse doors to an examination of damages caused by the majority shareholders or corporation.[24]

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17. NMSA 1978, § 53-15-4(A).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* § 53-15-4(C).
22. *Id.* § 53-15-4(E).
23. *Id.* § 53-15-4(F).
24. *See* McCauley v. Tom McCauley & Son, Inc., 104 N.M. 523, 524, 724 P.2d 232, 233 (Ct. App. 1986) (awarding damages for fraud and breach of fiduciary duty to plaintiff shareholder whose ex-husband and former in-laws froze her out of a closely held corporation).

C. Exclusivity Language in the New Mexico Appraisal Statute

In addition to tight deadlines and details for the notice and demand provisions, the very language of New Mexico's current statute complicates the matter by suggesting that a dissenting shareholder's exclusive remedy is statutory appraisal.

> A shareholder of a corporation who has a right under this section to obtain payment for his shares shall have no right at law or in equity to attack the validity of the corporate action that gives rise to his right to obtain payment, nor to have the action set aside or rescinded, except when the corporate action is unlawful or fraudulent with regard to the complaining shareholder or to the corporation.[25]

This provision is based on the ABA Model Act.[26] However, the ABA excised this exclusivity provision from its Model Act.[27] Not all states' appraisal statutes include an outdated exclusivity provision like New Mexico's statute, which leads to discrepancies in case law across the nation addressing dissenting minority shareholder remedies beyond appraisal. For example, the Louisiana appraisal statute does not even mention that appraisal should be the sole remedy and does not address how courts should handle claims for breach of fiduciary duties or fraud.[28] The Louisiana court that considered whether appraisal should be the exclusive remedy in Louisiana therefore started from a different analytical framework than the New Mexico courts that reviewed the exclusivity issue.[29] The New Mexico statute appears to declare that if appraisal is available, then other options are foreclosed unless there is fraud or illegality.[30] It then spells out the march to the courthouse.[31] Litigation may be inevitable given that shareholders who have been outvoted and find themselves leaving the close corporation, voluntarily or involuntarily, are not always happy about the circumstances and are tempted to push the limits of the exclusivity language.

While the ABA deleted entirely the exclusivity language from the Model Act, the American Law Institute (ALI) rejected exclusivity only in regard to close corporations. The ALI generally recommends that appraisal is the exclusive remedy, both for transactions when directors and controlling shareholders are interested in the transaction[32] and for when a majority shareholder is a party.[33] However, "the exclusivity provisions of this Section [7.25] are not applicable to closely held

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25. NMSA 1978, § 53-15-3(D).

26. *Id.* § 53-15-3 (compiler's notes). The note does not specify the year of the ABA Model Business Corporation Act. Since New Mexico's statute has not been amended since 1983, New Mexico's act is most likely based on the 1969 revision of the Model Act. *See* MODEL BUS. CORP. ACT ANN. preface (2008).

27. MODEL BUS. CORP. ACT ANN. §§ 13.01 cmt., 13.40 annot.

28. *See* LA. REV. STAT. ANN. § 12:131 (1994 & Supp. 2009); Yuspeh v. Koch, 840 So. 2d 41, 46 (2003).

29. *See Yuspeh*, 840 So. 2d at 47–48.

30. *See supra* note 25 and accompanying text.

31. *See* NMSA 1978, § 53-15-4(E) (1983) ("If…a dissenting shareholder and the corporation do not so agree, then the corporation…may…file a petition in any court of competent jurisdiction…praying that the fair value of the shares be found and determined."). This statutory section also provides the timeframes in which the shareholders and the corporation must act. *Id.*

32. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.24.

33. *Id.* § 7.25.

corporations."[34] The ALI considers both past judicial reasoning and future legislative action in forming its opinion on appraisal as an exclusive remedy.

> Judicial interpretations have gone part way toward adapting the remedy to its modern use, but the hangover from the earlier use leaves a legacy of confusion in which modern courts misunderstand the remedy and inappropriately shift the balance between majority and minority shareholders. Judges today assume that appraisal was intended as an exclusive alternative to fiduciary duty when that is not the way appraisal traditionally functioned nor is it the way current appraisal procedures permit today's remedy to function. The result is greater freedom for majority shareholders to direct the enterprise and less review of conflict of interest situations inherent in squeeze-out transactions.
>
> Appraisal should not be exclusive until there is comprehensive legislative treatment of the remedy based on the context in which it is applied today. This would include: (1) Making appraisal available for all types of transactions by which squeeze-outs are accomplished (and if market exceptions are continued they should not apply to conflict transactions), (2) incorporating a valuation standard (such as exclusion of minority discounts and inclusion of appreciation flowing from a cash-out) that takes into account the possibility of majority self-dealing, and (3) replacing procedures suspicious of minority claims with those that would facilitate prompt and complete payment of a minority's interest in the corporation.[35]

In two early New Mexico cases judges did develop fiduciary duty principles despite the allusion in the statute to exclusivity involving close corporations.

III. CASE LAW PRIOR TO *MCMINN* AND *PETERS*

During New Mexico's territorial period, dissenting shareholders generally had a common-law veto power over corporate actions.[36] Over time, minority shareholders in New Mexico lost the veto power but gained an early version of the appraisal statute. Following statehood, New Mexico advanced to a modern-day appraisal statute and developed case law construing that statute. Up until the last few years, the business community had not presented the appellate courts with many novel questions regarding splits in close corporations. The two cases discussed here, however, are building blocks to the current *McMinn* and *Peters* opinions. The hybrid statutory and common law scheme now in place for dissenting shareholders means the nuances of the cases, old and new, create the governing law.

A. McCauley v. Tom McCauley & Son, Inc.

In *McCauley v. Tom McCauley & Son, Inc.*,[37] the plaintiff experienced a marital and corporate divorce all in one. During the relative marital and corporate bliss,

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34. *Id.*

35. Thompson, *supra* note 9, at 54.

36. There are not any reported cases regarding shareholder litigation in New Mexico during the territorial period. However, prior to the first appraisal statute, the common law granted veto power to dissenting shareholders. *See* McMinn v. MBF Operating Acquisition Corp., 2007-NMSC-040, ¶ 3, 164 P.3d 41, 43 (suggesting that the current appraisal laws replace dissenting shareholders' common law veto power with the right to payment for their shares).

37. 104 N.M. 523, 724 P.2d 232 (Ct. App. 1986).

plaintiff served as a corporate director of the family cattle ranch business, maintained the books and accounts, conducted the household chores, and cooked and cleaned for some of the hired help.[38] After the plaintiff moved off the ranch, she claimed that her family members committed oppressive conduct with respect to her shareholder rights.[39] The court of appeals agreed that the defendant directors and majority shareholders—such as plaintiff's ex-husband, ex-in-laws, and sons still on the ranch—intended to freeze-out plaintiff from their closely held family corporation.[40] It appeared that the ex-husband wanted his ex-wife out of the picture, both personally and professionally, because during divorce proceedings he said that the former Mrs. McCauley "would never get a damned dime from the corporation."[41] After her departure, Mr. McCauley accused the former Mrs. McCauley of embezzlement, had her removed from her post as Secretary–Treasurer, and even though the spouses held the same number of shares, he collected a dividend ten times greater than the dividend given to his ex-wife.[42] In lieu of what was due to her for her corporate shares, the mother, former wife, and former daughter-in-law received only $600 and a few sides of beef.[43]

The *McCauley* Court reviewed the oppressive conduct section of the Business Corporation Act:

> The district courts may liquidate the assets and business of a corporation:
> (1) in an action by a shareholder when it is established that:
> (a) the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
> (b) the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
> (c) the shareholders are deadlocked in voting power…; or
> (d) the corporate assets are being misapplied or wasted….[44]

The *McCauley* trial court found that the majority engaged in oppressive conduct against the dissenting shareholder.[45] Even though the statute mentioned only liquidation, the trial court did not limit itself to that drastic remedy. Rather than simply ordering corporate dissolution as the minority's remedy for the majority's wrong, the trial judge allowed the defendant majority to choose one of three options: liquidation, partition and reorganization, or purchase of the dissenting shareholder's outstanding interests in the corporation.[46] The majority in control chose to have the corporation purchase the plaintiff's shares.[47] Defendants appealed the trial court's finding of oppressive conduct, but the court of appeals affirmed the

38. *Id.* at 525, 724 P.2d at 234.
39. *Id.* at 526, 724 P.2d at 235.
40. *Id.*
41. *Id.* at 530, 724 P.2d at 239.
42. *Id.* at 530–31, 724 P.2d at 239–40.
43. *Id.* at 531, 724 P.2d at 240.
44. NMSA 1978, § 53-16-16 (1967).
45. *McCauley*, 104 N.M. 523, 524, 724 P.2d 232, 233.
46. *Id.*
47. *Id.*

trial court, concluding that substantial evidence existed for the trial court to find that the defendants acted oppressively.[48]

The *McCauley* appellate judge also opined, "We initially approve the trial court's recognition of remedies not specifically stated in the oppressive conduct statute."[49] In other words, once the majority behaves badly toward the minority, such as removing a shareholder from her director post or not paying her dividends like the other shareholders, the court system has more freedom to craft an appropriate remedy. *McCauley* serves as a harbinger of the New Mexico Supreme Court's *McMinn* opinion, the subject of this article, in which the court also went beyond the statutory appraisal remedy.

McCauley is also an early warning of the costs of breaching a fiduciary duty. After trial and an appeal that favored the *McCauley* shareholding minority, the majority's offer of a few sides of beef and $600 to the exiting shareholder certainly looked paltry compared to the court decision that could have resulted in liquidating the ranch assets or partition and reorganization of the family business.

B. Walta v. Gallegos Law Firm, P.C.

While *McCauley* involved a family that incorporated as a business, *Walta v. Gallegos Law Firm, P.C.*[50] concerned a business that incorporated the tensions and infighting of a family. In *Walta*, the named partner of the firm, Gene Gallegos, owned 50 percent of the corporation's shares, and attorney Mary E. Walta held 25 percent, the second largest share.[51] Three other attorney shareholders owned the remaining 25 percent.[52] After approximately four years practicing together, Gallegos and Walta disagreed on the firm's financial management, and the relationship went down a steep hill.[53] As tensions rose prior to the firm break-up, the majority shareholder, Gallegos, said to the future plaintiff, Walta, "I am sick and tired of you nagging at me. You remind me of one of my ex-wives, and the same thing is going to happen to you that happened to her if you don't be quiet."[54] Gallegos offered to buy back all the shares in order to become the sole shareholder of the firm;[55] the shareholders apparently assented to the buy-out; and then Gallegos rehired everybody except Walta.[56]

Not surprisingly, Gallegos and Walta did not agree on the dollar amount Gallegos owed Walta for her shares. Gallegos valued Walta's stock at $20,000, the amount she had paid to purchase it.[57] Walta valued her shares at $52,000.[58] The jury awarded Walta $62,550 in compensatory damages, apparently relying in part on Gallegos's own expert who at trial valued Walta's stock at more than double what

48. *Id.* at 532, 724 P.2d at 241.
49. *Id.* at 527, 724 P.2d at 236.
50. 2002-NMCA-015, 40 P.3d 449.
51. *Id.* ¶ 4, 40 P.3d at 451.
52. *Id.*
53. *Id.* ¶¶ 4–6, 40 P.3d at 451.
54. *Id.* ¶ 6, 40 P.3d at 451–52 (internal quotation marks omitted).
55. *Id.* ¶ 8, 40 P.3d at 452.
56. *Id.* ¶ 23, 40 P.3d at 454.
57. *Id.* ¶ 20, 40 P.3d at 454.
58. *Id.* ¶ 25, 40 P.3d at 455.

Gallegos had offered to Walta prior to the litigation.[59]

Also prior to the litigation, instead of willingly opening the books and records to the colleague to whom he owed a fiduciary duty, Gallegos "purposely omitted a valuation for the collectible accounts receivables and did not disclose that fact to Walta."[60] Walta successfully sued for $100,000 in punitive damages because of these facts, in addition to the compensatory damages for the fair value of her shares.[61]

When these and other facts were presented to the court of appeals,[62] the judges recognized minority shareholder rights beyond the statute, just as the *McCauley* judges had. Judge Bustamante placed the minority shareholder rights in a legal framework that is familiar to business lawyers: the court declared that shareholders and directors of close corporations have a fiduciary duty to each other much like partners do:

> [W]e hold as a matter of New Mexico law that a majority shareholder, as well as an officer or director of a close corporation, when purchasing the stock of a minority shareholder, has a fiduciary obligation to disclose material facts affecting the value of the stock which are known to the purchasing shareholder, officer, or director by virtue of his position, but not known to the selling shareholder.[63]

In order to come to this conclusion, the court of appeals relied on a decision from the Massachusetts Supreme Judicial Court[64] and a recent case from its own court regarding partnership disclosure.[65] In New Mexico, partners have an affirmative duty to share information.[66] As for the six-figure punitive damages, the court of appeals held that Gallegos's breach of fiduciary duty was consistent with the punitive damages standard of "a culpable mental state."[67] Since Walta presented sufficient evidence to the jury, and the jury believed her, the $100,000 punitive damages award stood.[68] The New Mexico Supreme Court denied certiorari.[69]

Thus, the controlling shareholder got a bill for more than eight times what he originally thought it would cost him to restructure the law firm, not including his costs and fees to litigate at the trial and appellate levels. Such an expensive and final outcome from the court reminds controlling shareholders of the limits of their control when negotiating a dissenting shareholder's exit from the corporation and also during the litigation process.

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59. *Id.* ¶¶ 21, 28, 40 P.3d at 454, 455.
60. *Id.* ¶ 53, 40 P.3d at 460.
61. *Id.* ¶¶ 53–55, 40 P.3d at 460–61.
62. The court of appeals panel consisted of Judges Bustamante, Bosson, and Alarid.
63. *Id.* ¶ 45, 40 P.3d at 458–59.
64. Donahue v. Rodd Electrotype Co. of New England, 328 N.E.2d 505, 511 (Mass. 1975).
65. *Walta*, 2002-NMCA-015, ¶ 44, 40 P.3d at 458 (citing Fate v. Owens, 2001-NMCA-040, ¶ 25, 27 P.3d 990, 998).
66. *See Fate*, 2001-NMCA-040, ¶ 25, 27 P.3d at 998 ("A partner, as a fiduciary, is required to fully disclose material facts and information relating to partnership affairs to the other partners, even if the other partners have not asked for the information.").
67. *Walta*, 2002-NMCA-015, ¶ 55, 40 P.3d at 461.
68. *Id.* ¶¶ 64–65, 40 P.3d at 462.
69. *Id.*, *cert. denied*, 131 N.M. 619, 41 P.3d 345 (2007).

IV. *MCMINN V. MBF OPERATING ACQUISITION CORP.*

A. Facts, Trial Court, and Court of Appeals Proceedings

Like *Walta*, *McMinn* involved one shareholder leaving the organization and being offered cash for his shares, and the remaining shareholders organizing a new company without him. Rory McMinn, Frank Sturges, and Mark Daniels founded MBF Operating Corporation (MBF).[70] They carried on for approximately a decade as business partners, corporate directors, and equal shareholders. McMinn left the business in order to serve the New Mexico Public Regulatory Commission, and the service was in conflict with actively governing MBF.[71] He placed his 333 shares in a blind trust, and the trustee requested that Sturges and Daniels purchase McMinn's shares so that McMinn could cash out of the corporation. Sturges and Daniels, with their combined 666 shares, controlled the corporation and decided to restructure MBF in such a way as to cancel McMinn's shares, pay him what they considered fair value, and create a new MBF without McMinn. Sturges and Daniels hired an uncertified appraiser who lacked financial and accounting experience.[72] Based on the appraisal, the controlling shareholders offered McMinn approximately $134,000 for his 333 shares.[73] McMinn's trustee determined that his cashed-out shares were worth much more than what Sturges and Daniels were willing to pay.[74]

McMinn did not pursue his remedies under the detailed appraisal statute. Rather, he sued for breach of fiduciary duties, oppressive conduct, prima facie tort, unjust enrichment, and punitive damages.[75] His claims spanned the timeframe from before, during, and after his former colleagues merged his shares out of existence.[76] MBF moved for summary judgment on the exclusivity of the appraisal statute as McMinn's sole remedy. The trial judge rejected that analysis.[77] McMinn argued that Sturges and Daniels overpaid themselves and devalued the company in order to remove McMinn for a low price.[78] The jury awarded $864,000 in compensatory damages and another $20,000 for punitive damages.[79]

Both parties appealed. The court of appeals[80] reversed the trial court and held that McMinn's exclusive remedy against the corporation was the appraisal statute, at least for cases not involving fraud or illegality. The panel did not consider *McCauley* or *Walta*. Instead, the court of appeals read the appraisal statute and its exclusivity provision[81] and reviewed the indicia of legislative intent to make the

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70. McMinn v. MBF Operating Acquisition Corp., 2007-NMSC-040, ¶ 5, 164 P.3d 41, 43.
71. *Id.* ¶ 6, 164 P.3d at 43.
72. *Id.* ¶ 8, 164 P.3d at 44.
73. *Id.* ¶ 10, 164 P.3d at 44.
74. McMinn v. MBF Operating, Inc., 2006-NMCA-049, ¶ 10, 133 P.3d 875, 878, *rev'd*, 2007-NMSC-040, 164 P.3d 41.
75. *Id.*
76. *McMinn*, 2007-NMSC-40, ¶ 11, 164 P.3d at 44.
77. *Id.*
78. *Id.* ¶ 12, 164 P.3d at 44.
79. *Id.* ¶ 12, 164 P.3d at 45.
80. Judges Wechsler, Pickard, and Fry comprised the court of appeals panel.
81. A shareholder of a corporation who has a right under this section to obtain payment for his shares shall have no right at law or in equity to attack the validity of the corporate action that

statute the exclusive remedy unless there is fraud or illegality.[82] The court of appeals decided that McMinn had not presented evidence of fraud or illegality that would allow his case to be an exception to the general rule, so the general rule that the appraisal statute is the exclusive remedy applied to McMinn.[83] Because McMinn chose the courthouse rather than the statutory appraisal remedy, the judges held that McMinn "took the risk of being held to the amount offered in the merger and is now bound by the terms of the corporation action."[84] The court's adherence to a strict statutory analysis rather than weighing the equities and reviewing similar decisions returned the power to the majority shareholders.[85]

B. Supreme Court's Analysis and Holding

The New Mexico Supreme Court reversed the court of appeals decision. In *McMinn v. MBF Operating Acquisition Corp.*,[86] the unanimous court[87] decided that non-controlling shareholders who dissent in a merger are not necessarily restricted to the corporate appraisal statute. The *McMinn* opinion allows a non-controlling minority shareholder to sue for common law claims in addition to asserting statutory rights.

The supreme court looked broadly at the purpose of the appraisal statute, decided that the legislature intended to protect minority shareholders, and concluded that shareholders as plaintiffs should be afforded more, rather than fewer, options at trial.[88] To reach its conclusions, the supreme court relied on other minority shareholder litigation in New Mexico courts in the last decade. Justice Bosson returned to *Walta*, the court of appeals decision on which he had concurred, which held that close corporations are like partnerships.[89] Thus, the relationship among shareholders involves trust and confidence such that controlling shareholders have a fiduciary duty to non-controlling shareholders. The justices took issue with the court of appeals' *McMinn* decision that exclusivity was the presumption.

> We think this approach to interpreting the statute is too confined in its focus solely on the text, without a view toward the underlying goals, purposes, and policy of the statutory remedy. Strict application of such a presumption overlooks the purpose of the appraisal statute, which, as we discuss in depth later in this Opinion, was designed to protect dissenting shareholders from oppression by the majority; not make them even more vulnerable to the majority. Appraisal must be viewed in its historical context and addressed not simply as a new right and remedy unavailable at common law, but rather as a right granted in exchange

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> gives rise to his right to obtain payment, nor to have the action set aside or rescinded, except when the corporate action is unlawful or fraudulent with regard to the complaining shareholder or to the corporation.

NMSA 1978, § 53-15-3(D) (1983).

82. McMinn v. MBF Operating, Inc., 2006-NMCA-049, ¶ 19, 133 P.3d at 875, 880–81.

83. *Id.* ¶¶ 29–33, 133 P.3d at 883–84.

84. *Id.* ¶ 36, 133 P.3d at 884.

85. *See id.*

86. 2007-NMSC-040, 164 P.3d 41.

87. Justice Bosson authored the opinion. Justices Serna, Maes, and Chavez concurred. New Mexico Court of Appeals Judge Castillo, sitting by designation, also concurred.

88. *Id.* ¶ 45, 164 P.3d at 54.

89. *See supra* Section III.B.

> for the loss of a right at common law—the right of a dissenting shareholder to veto and block a merger.[90]

The supreme court also struck a different balance of power between the majority and the minority regarding not just the dollar value for the shares, but who has the power to decide which shareholders stay in the corporation. If a shareholder dissents from a corporate action, finds herself in the minority, and fails to request the fair value of her shares to cash out, is she still a shareholder? Can the majority shareholders oust any shareholder who voted against their proposed corporate action? Or can the shareholder who discovers, after the votes are tallied, that she is in the minority, choose to stay in the corporation despite her no vote? According to the supreme court, if the exclusivity provision of the dissent and appraisal statute is taken to the extreme, then majority shareholders might think that if there are dissenting shareholders, that the majority can force an appraisal and cash out the dissenters, even if the minority shareholders have not asked for an appraisal. Not every shareholder will choose to jump ship and demand fair value or file a lawsuit for various claims. Some minority shareholders will choose to stay with the closely held corporation, even if they were outvoted on a particular issue. The supreme court concluded that if a dissenting shareholder does not invoke her rights to an appraisal, then she remains a shareholder.[91]

The supreme court also noted that if the appraisal remedy were truly exclusive in all cases in which a minority shareholder dissents from a corporate action, then majority shareholders can use the statute's exclusivity provision as a strategic tool, rather than statutory appraisal being the minority's protection.[92] Majority shareholders could avoid being held accountable for any and all actions that precede a split vote on a corporate action. For example, McMinn had voiced concerns regarding the lack of a dividend policy, lack of profit sharing, and the generous salaries collected by the other two shareholders prior to the proposed change in corporate structure.[93] Such complaints could easily be the basis for McMinn's common law claims against Sturges and Daniels. But if the majority shareholders moved to reform the corporation before McMinn could file suit, if McMinn then dissented from the reformation, and if courts upheld the statutory appraisal remedy as the exclusive remedy, then the majority could use the statute to shield themselves from assorted bad acts preceding the divisive vote.

The *McMinn* decision is consistent with both the ABA Model Act[94] and the ALI's view on how to holistically determine fair value.[95] The ALI recommends a statutory interpretation method[96] and raises the following concerns:

> Many statutes instruct the appraisal court to determine "fair value" as of the moment immediately before the event giving rise to appraisal. Depending on how these statutes are interpreted, they may have two potentially unfortunate

90. *McMinn*, 2007-NMSC-040, ¶ 16, 164 P.3d at 45.
91. *Id.* ¶ 25, 164 P.3d at 48.
92. *Id.* ¶ 41, 164 P.3d at 53.
93. *Id.* ¶ 38, 164 P.3d at 52.
94. *See* MODEL BUS. CORP. ACT ANN. § 13.01(4) (2008).
95. *See* PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.22 cmt. a.
96. *Id.* § 7.22 cmt. b.

> implications: (1) events prior to appraisal, including self-dealing transactions that reduced firm value, are never to be considered, and (2) prospective synergy gains from the merger or other transaction are also to be disregarded….
>
> First, considerations of both fairness and efficiency dictate that the appraisal court be permitted to consider conduct by controlling shareholders that has unjustly enriched them or depleted firm value.[97]

In *McMinn*, the justices also considered the equities of the parties. There is an old lawyer's adage that says, when the law is on your side, pound the law; when the facts are on your side, pound the facts; when neither are on your side, pound the table. Perhaps the facts were not favorable or did not present persuasive arguments for defendant MBF, because MBF did not pound the facts and argue that MBF's offer of $134,000 was a fair valuation or that the jury's decision to award $864,000 was not supported by substantial evidence. Instead, MBF attempted to pound the law, arguing for a strict application of the appraisal statute's exclusivity provision. The justices, however, apparently received this strategy more as pounding the table, because in considering the fundamental fairness of using the appraisal statute to exclude a minority shareholder's non-statutory claim, Justice Bosson noted, "What was designed as a shield to benefit minority shareholders who had lost their power to veto fundamental corporate transactions, would be transformed into a sword for majority oppression of the minority. Such a result is contrary to longstanding common law principles of fiduciary duty."[98]

The supreme court and the court of appeals appear to agree that if the parties behave well toward each other and obey their fiduciary duties, the appraisal statute is the exclusive remedy.[99] The two appellate courts disagree on whether there is a presumption for or against exclusivity once the waters between the parties become muddied. The court of appeals opined that a presumption in favor of exclusivity exists, but the supreme court has suggested that there is not a presumption of exclusivity. In fact, if there is evidence of a breach of fiduciary duties, the supreme court indicated that there is a presumption in favor of concomitant common law claims to accompany the appraisal statute.[100]

The supreme court reinstated the jury's verdict in favor of McMinn and against MBF. The high court remanded part of the *McMinn* decision to the court of appeals to consider whether the trial judge correctly excluded the dissenting shareholder's expert witness testimony and whether the trial judge should have awarded attorneys' fees to the dissenting shareholder.[101] After the final appeal and judicial opinion reinstating the jury's award, the majority shareholders were on the hook for more than six times their offer to their former colleague, plus their trial and appellate litigation costs. If the court of appeals awards attorneys' fees on remand to the dissenting shareholder who won at trial and at the supreme court, the tab will

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97. *Id.* § 7.22 cmt. e.

98. *McMinn*, 2007-NMSC-040, ¶ 41, 164 P.3d at 53.

99. *See id.* ¶ 3, 164 P.3d at 43; McMinn v. MBF Operating, Inc., 2006-NMCA-049, ¶ 18, 133 P.3d 875, 880, *rev'd*, 2007-NMSC-040, 164 P.3d 41.

100. *McMinn*, 2007-NMSC-040, ¶¶ 15–16, 164 P.3d at 45.

101. According to the court of appeals web page with slip opinions, nothing has been reported. *See* Court of Appeals Slip Opinions, http://coa.nmcourts.gov/disclaimer.htm (last visited November 1, 2009).

increase. This outcome demonstrates that minority shareholders who plead claims that are distinct from the fair value of the share price and who can present evidence of breach of a fiduciary duty will pose a credible threat in the litigation arena. Since the supreme court held that the appraisal statute is not the exclusive remedy for dissenting shareholders, corporations and shareholders can now be sued for breach of fiduciary duty and other common law claims.

V. *PETERS CORP. V. NEW MEXICO BANQUEST INVESTORS CORP.*

A. Facts, Trial Court, and Court of Appeals Proceedings

Compared to the small business cases above, the *Peters* litigation is significantly more complicated because of the structure of the parties involved. New Mexico Banquest Corporation (Banquest) existed as of 1980.[102] In 1982, the shareholders agreed to form New Mexico Banquest Investors Corporation[103] (Banquest Investors) as a holding company for Banquest. The goal of this structure was to facilitate investment by a Spanish bank, Banco Bilbao de Vizcaya ("BBV"). During the time period relevant to the litigation, BBV owned 39.6 percent of Banquest Investors, Edward Bennett owned 17.7 percent of the Banquest Investors shares, Bennett's family owned 4.4 percent, and the shareholders collectively known as the Peters Group—the Peters Corporation, Milo L. McGonagle, Jr., and E.W. Sargent—owned less than 5 percent of the Banquest Investors shares.[104]

In 1983, long prior to the litigation, BBV, Bennett, the Peters Group, and other shareholders signed shareholder agreements that put Bennett in charge of both Banquest and Banquest Investors. The agreements also specified that if BBV desired to sell its Banquest Investors stock, the other shareholders had the right to buy a pro rata share of BBV's stock in Banquest Investors.[105] In 1985, BBV decided to sell its stock and notified Bennett.[106] Bennett decided that neither he nor his family would purchase their pro rata share. Instead, Bennett decided that Banquest Investors would redeem BBV's shares.[107] Bennett discussed the matter with legal counsel, the Board of Directors, and select shareholders. Bennett did not consult the Peters Group. The Peters Group did not learn of Bennett's plan to redeem BBV's shares until they received proxy material regarding a special shareholder meeting.

At that special meeting, the shareholders voted to ratify the BBV redemption. However, the Peters Group dissented from the redemption of BBV's shares.[108] Even though the Peters Group had been shareholders for approximately thirteen years,[109] they decided to sell their Banquest Investors shares and requested fair value in

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102. N.M. Banquest Investors Corp. v. Peters Corp., 2007-NMCA-065, ¶ 2, 159 P.3d 1117, 1119, *aff'd*, 2008-NMSC-039, 188 P.3d 185.

103. Banquest had approximately sixty-eight shareholders, which can still be a close corporation. *Id.* ¶¶ 2–3, 159 P.3d at 1119–20.

104. *Id.* ¶ 3, 159 P.3d at 1120.

105. *Id.* ¶ 4, 159 P.3d at 1120.

106. *Id.* ¶ 5, 159 P.3d at 1120.

107. *Id.*

108. *Id.* ¶ 7, 159 P.3d at 1121.

109. *Id.* ¶ 3, 159 P.3d at 1120.

accordance with the appraisal statute.[110] As usual, the closely held corporation and the dissenting shareholders did not agree on a dollar amount for fair value of the dissenter's shares and they took their argument to the courthouse. Banquest Investors petitioned the district court for a fair value determination.[111]

The trial judge awarded fair value to the dissenters and added 10 percent interest, compounded annually.[112] Even though the Peters Group won fair value and a favorable determination on interest payments, they appealed the issues that the trial judge did not find in their favor. The Peters Group had asked the court to order Banquest Investors to pay a control premium, in addition to the fair value for their shares. As explained by the supreme court, "A control premium is [a] premium paid for shares carrying the power to control a corporation. A control premium typically refers to the additional amount a buyer would pay for a block of shares that would give the buyer control of a corporation."[113] Since the Peters Group did not own enough shares to control the corporation—it owned just 3.3 percent—it was not entitled to any control premium.[114]

The Peters Group also sued Bennett for fraud, breach of fiduciary duty, and punitive damages.[115] The trial judge found that Bennett had breached his fiduciary duty to the Peters Group by telling the Board of Directors and some shareholders about the proposed redemption, but then keeping that information from the Peters Group until distributing the special-meeting proxy materials. However, the trial judge did not award any damages for this breach.[116]

The court of appeals[117] affirmed the trial court on all issues. In deciding not to award a dime beyond what the appraisal statute allowed, the court of appeals relied upon its *McMinn* opinion, which had not yet been reversed by the supreme court.[118] After the court of appeals denied any additional damages in both *McMinn* and *Peters*, the supreme court reversed the court of appeals in *McMinn*. This opened the door for the Peters Group to appeal to the supreme court in hopes that the justices would conclude that the Peters Group was also entitled to additional damages beyond fair value of the shares.

B. Supreme Court's Analysis and Holding

The supreme court used *Peters*'s facts to put parameters on its *McMinn* decision, which reigned in any litigious hopes of dissenting shareholders and likely calmed the fears of runaway litigation in light of *McCauley*, *Walta*, and *McMinn*. The

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110. *Id.* ¶ 7, 159 P.3d at 1121; NMSA 1978, § 53-15-4 (1983).

111. *Peters*, 2007-NMCA-065, ¶ 9, 159 P.3d at 1121.

112. *Id.* ¶ 46, 159 P.3d at 1131.

113. Peters Corp. v. N.M. Banquest Investors Corp., 2008-NMSC-039, ¶ 47, 188 P.3d 1185, 1198 (quoting *Peters*, 2007-NMCA-065, ¶ 16, 159 P.3d at 1123).

114. *Id.* ¶ 49, 188 P.3d at 1198.

115. *Id.* ¶ 11, 188 P.3d at 1190.

116. *Id.* ¶ 13, 188 P.3d at 1190.

117. The court of appeals panel consisted of Judges Alarid, Bustamante, and Vigil. Chief Judge Bustamante and Judge Alarid both served on the *Walta* panel, six years earlier.

118. The court of appeals decided *McMinn* in March 2006. It decided *Peters* in March 2007. The New Mexico Supreme Court reversed *McMinn* in June 2007, which then called into doubt the court of appeals decision in *Peters*.

justices,[119] again unanimously, concluded that while the *McMinn* freeze-out situation merited a damages award that considered more than just the appraisal statute, the dealings between Bennett, Banquest Investors, and the Peters Group did not. The supreme court distinguished both the facts and law, and examined issues that did not arise in *McMinn*.

The trial court held that, like the majority shareholders who breached their fiduciary duties to minority shareholders in *McMinn*, Bennett breached his fiduciary duty to the Peters Group, the minority shareholders. However, in contrast to the *McMinn* case, none of the three courts that reviewed *Peters* awarded any damages for this breach of fiduciary duty. The majority Banquest Investors shareholders did not freeze out the Peters Group; the Peters Group made their own decision to cash out.[120] Bennett and the majority shareholders also did not engage in any self-dealing with the redemption action.[121] Banquest Investors and BBV conducted arms-length transactions.[122] The justices reiterated their position that when a majority shareholder breaches his or her fiduciary duty to a minority shareholder, the remedy is "compensatory damages measured by the fair value of the former shareholder's shares."[123] "Fair value" is a deceptively simple term between shareholders even before any litigation begins, and the term as used in judicial opinions also has layers of complexity. Simplified arithmetic illustrates how the court held that majority shareholders in both *McMinn* and *Peters* breached their fiduciary duty, and how both minority shareholders were entitled to the fair value of their shares. Yet it seems like McMinn got a better deal than the Peters Group.

For example, assume that fair value of a Company X share was worth $100. However, the Company X controlling shareholders paid excessive salaries to the shareholder–executives in control, which reduced the true share value to just $75 each. Furthermore, when the minority shareholder wanted to cash out, the majority shareholders hid information about accounts receivable and would not allow the minority shareholder full access to the accounting records. Then the majority shareholders offered only $50 for each share. The minority shareholder would likely become a plaintiff and sue for both a statutory appraisal and damages from breach of fiduciary duty. After full discovery and trial testimony, it is reasonable to expect that the trial court would award compensatory damages equivalent to the fair value of the shares, $100 each, and also a punitive damages award due to the majority shareholder's self-dealing and deceptive conduct.

Compare that to a hypothetical Corporation Y. Assume that Corporation Y's shares are also worth $100 each. Corporation Y's majority shareholder conceived of a restructuring plan that would benefit the corporation, and on the advice of

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119. Justice Bosson authored the opinion. Justices Serna and Chavez concurred. New Mexico Court of Appeals Judge Pickard and Thirteenth Judicial District Court Judge Martinez-Olguin, both sitting by designation, also concurred.

120. *Peters*, 2008-NMSC-039, ¶ 25, 188 P.3d at 1195. In the appellate opinions, there was not even a suggestion that the majority encouraged the Peters Group departure or would have made difficult their continued involvement in the corporation.

121. *Id.* ¶ 27, 188 P.3d at 1193.

122. *Id.* ¶¶ 26–28, 188 P.3d at 1193–94.

123. *Id.* ¶ 30, 188 P.3d at 1194 (quoting McMinn v. MBF Operating Acquisition Corp., 2007-NMSC-040, ¶ 47, 164 P.3d 41, 55) (internal quotation marks and emphasis omitted).

counsel, the most powerful majority shareholder did not tell the non-controlling shareholders about the proposed restructuring until the last possible moment and only by formal channels. The shareholder vote on the corporate action revealed that not everybody agreed with the controlling shareholder, and the dissenters asked to cash out. Corporation Y valued the shares at $100 each and offered that amount to the dissenters. The dissenters sued for remedies under the appraisal statute and damages arising from the controlling shareholder's breach of fiduciary duty to them, including punitive damages. One might expect that the trial court would find that even though the controlling shareholder breached his or her fiduciary duty to the dissenters, that breach did not negatively affect the share price, so that the dissenters are entitled to $100 per share. The trial judge might also determine that the controlling shareholder's decision not to tell the dissenters until the last minute about the proposed corporate action was ill-advised, but does not satisfy the punitive damages standard, and does not award anything beyond compensatory damages.

In both cases, the remedy for a breach of fiduciary duty was the fair value of the shares. The key difference is that in Company X's situation, the fiduciary duty breach also devalued the shares, so those breaches had to be considered at the same time as the fair value determination. With Corporation Y, the breach did not affect the share price and therefore did not have any bearing on a compensatory damages award that should equal the fair value of the shares.

Because the Peters Group had been made whole by receiving fair value, the court rejected their other claims. They argued that they were entitled to disgorgement,[124] based on the fact that the corporation and the remaining shareholders bought BBV shares at a favorable price.[125] If the Peters Group had stayed in the corporation, rather than opting to cash out after dissenting, the Peters Group also would have had the opportunity to purchase their pro rata BBV shares at the same price.[126] In order for the Peters Group to have had a viable disgorgement claim, the Peters Group could not voluntarily leave the corporation and then argue that it was entitled to the benefits that it could have had if it remained a shareholder in the corporation.[127] On the request for disgorgement of profits received by Bennett and Banquest Investors as a result of not informing the Peters Group until soon before the corporate vote, the supreme court noted that "the Peters Group is *already*…in the same position as it would have been had there been full disclosure."[128] If the Peters Group received fair value for its shares for leaving the corporation and then a court awarded the profit it would have been entitled to had it remained a shareholder, the Peters Group

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124. BLACK'S LAW DICTIONARY 501 (8th ed. 2004) (defining disgorgement as "[t]he act of giving up something (such as profits illegally obtained) on demand or by legal compulsion").

125. *See Peters*, 2008-NMSC-039, ¶ 39, 188 P.3d at 1196.

126. *Id.* ¶ 41, 188 P.3d at 1197.

127. *See id.* ¶ 39, 188 P.3d at 1196.

128. *Id.* The supreme court observed that there were several impediments to the Peters Group exercising its right to buy BBV shares. One, the shareholder agreement had a provision that required all the shareholders to exercise their rights to purchase their pro rata shares, and Bennett and his family had already decided not to, which renders moot the Peters Group's preference. Two, the Peters Group did not have the cash to purchase the shares. Three, the regulatory body may not have approved the Peters Group acquisition of another banking institution in Santa Fe. *Id.* ¶¶ 8, 35, 188 P.3d at 1189, 1195.

would have received double-recovery.[129] The court's avoidance of double-recovery is consistent with the analysis of the ALI:

> The traditional justification for denying dissenting shareholders the right to share in post-merger or synergy gains has been an estoppel argument: because the dissenting shareholders decided to seek appraisal and exit the firm, they could not expect, it was argued, to share in the gains that those who chose to remain would receive; in effect, these shareholders could not have it both ways.[130]

The Peters Group shareholders also sought punitive damages against Banquest Investors. The trial court found that Bennett did not act with evil motive or a culpable mental state, nor were his actions malicious or done with intent to harm the Peters Group.[131] Both the court of appeals and the supreme court agreed. Because Bennett's actions were not in the same category as deeds that must be judicially punished, like McCauley shorting his ex-wife out of dividends or McMinn's former business partners reorganizing to eliminate his shares, Bennett did not need to pay the Peters Group punitive damages.[132] Additionally, in response to the Peters Group claim for a control premium, the supreme court, like the two lower courts, denied the request because sale of a controlling share was not an issue.[133]

The parties also disputed the interest award. A trial court's decision to award interest—simple or compound—on six-figure or multi-million dollar awards can significantly change the amount a corporation owes to a dissenting shareholder, and should be considered when contemplating financial risk. The appraisal statute provides that "[t]he judgment shall include an allowance for interest at such rate as the court may find to be fair and equitable, in all the circumstances, from the date on which the vote was taken on the proposed corporate action to the date of payment."[134] The statute does not specify whether the court should award simple or compound interest. The trial judge awarded 10 percent interest compounded annually.[135] Banquest Investors, the payor of the interest to the Peters Group after long litigation, appealed that decision. Both appellate courts decided that the trial judge acted within his discretion in choosing to compound the interest.[136] As applied to these circumstances, "it is simply not credible in today's financial markets that a person sophisticated enough to perfect his or her appraisal rights would be unsophisticated enough to make an investment at simple interest—in fact, even passbook savings accounts now compound their interest daily."[137]

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129. *Id.* ¶ 39, 188 P.3d at 1196. Double recovery is a "judgment that erroneously awards damages twice for the same loss, based on two different theories of recovery" or "[r]ecovery by a party of more than the maximum recoverable loss that the party has sustained." BLACK'S LAW DICTIONARY 1302 (8th ed. 2004).

130. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.22 cmt. e.

131. *Peters*, 2008-NMSC-039, ¶ 44, 188 P.3d at 1197–98.

132. *Id.*

133. *Id.* ¶ 49, 188 P.3d at 1199.

134. NMSA 1978, § 53-15-4(F) (1983).

135. *Peters*, 2008-NMSC-039, ¶ 51, 188 P.3d at 1200.

136. *Id.* ¶¶ 51–52, 188 P.3d at 1200.

137. N.M. Banquest Investors Corp. v. Peters Corp., 2007-NMCA-065, ¶ 45, 159 P.3d 1117, 1131, *aff'd*, 2008-NMSC-039, 188 P.3d 185 (quoting ONTI, Inc., v. Integra Bank, 751 A.2d 904, 926 (Del. Ch. 1999)).

VI. RECONCILING THE NEW MEXICO SUPREME COURT'S DECISIONS IN *MCMINN* AND *PETERS*

One must read between the lines to see the key distinguishing factor between McMinn, who walked away with nearly a million dollars of compensatory and punitive damages as a result of trial court and supreme court decisions, and the Peters Group, who could not convince even one of the three courts that they visited that they should receive anything beyond straightforward appraisal value and interest. The supreme court has presented legal reasons that adhere to the rule of law and that sufficiently explain the analytical differences between the *McMinn* and *Peters* outcomes. It has reviewed legislative intent in statutes, case-law precedent, and opinions from other jurisdictions deciding cases with similar facts. All enforce the idea that the rule of law triumphs. But the difference is not so much the law as the facts. It is much easier to understand the different outcomes after considering the players and their relative power to determine when the supreme court will take a more expansive view of available remedies.

McCauley, *Walta*, *McMinn*, and *Peters*, on their face, do not offer an obviously consistent and predictable doctrine. However, an aggregate view reveals common themes that, if applied correctly, do provide a roadmap to predictability for New Mexico's close corporations and their shareholders. Consider minority status, judicial philosophy on statutory interpretation, and the role of the courts in policing the relationship between the proverbial little guy and corporate America.

For example, the term minority, in corporate legal terminology, denotes parties who hold fewer voting shares.[138] However, in New Mexico's line of cases addressing litigation in close corporations, the word also connotes minority in a more general sense of the word. In *McCauley*, for example, the minority shareholder was a woman in the ranching business who was effectively excommunicated from the family corporation. *Walta* similarly presented the courts with a situation of a female law firm partner, and the only woman attorney in her firm.[139] For both of these women, the close corporation was not merely a financial investment; they were earning their livelihood through their association with the corporation. McMinn left for public service and had only a trustee at the table to represent his minority interests against adversaries who held double the number of shares in the company he helped found. The highest New Mexico courts to review these situations found in favor of the minority. By contrast, the principal in the Peters Group, Gerald Peters, was a very savvy investor. His shares in the closely held Banquest Investors represented only cash, not his career or a company that he had created. With comparatively so little on the line, all courts agreed that the appraisal statute and Peters's general position of strength afforded enough protections despite his minority shareholder status.

The supreme court has put its thumb on the judicial scale in favor of shareholders who are minorities in two ways—in the sociological sense and in the count of corporate shares—which suggest that very concrete facts may be predictors for

138. BLACK'S LAW DICTIONARY 1017 (8th ed. 2004) (defining minority as "[a] group having fewer than a controlling number of votes").

139. Walta v. Gallegos Law Firm, P.C., 2002-NMCA-015, ¶ 4, 40 P.3d 449, 551.

when future New Mexico courts will consider more than the text of the statute in order to devise an appropriate remedy. As for understanding the statutory interpretation, the court of appeals' *McMinn* opinion interpreted the statute so strictly that it did not even consider the prior case law considering appraisal. The supreme court's response to the court of appeals highlights differences in core judicial philosophies and the role of the courts in interpreting statutes, embedded in something seemingly as obscure and value-neutral as whether there is a presumption of exclusivity in the appraisal statute. Courts are often considered to be counter-majoritarian bodies in relation to the elected executive and legislature.[140] The New Mexico Supreme Court has fulfilled that role here by being counter-majoritarian in relation to controlling shareholders and the corporate directors. Applied mechanically, the appraisal statute's exclusivity provision could have had harsh effects that were unintended by the legislature and divorced from concepts of fairness and justice. The unanimous supreme court opinion represents flexible thinking in order to interpret the statute so that it is a coherent theory of how those with power in closely held corporations must act toward those who are outvoted.

If one pictures Lady Justice, the omnipresent image of a woman draped in white, eyes obscured by a blindfold, and the scales dangling from one hand, one must wonder, what is she weighing that she cannot see? In minority shareholder litigation in New Mexico, the five supreme court justices are balancing fundamental fairness and the equities involved. What has really been placed on the scales is largely invisible—the judicial thumb in favor of the party in need of protection.

VII. COUNSEL'S ADVICE TO THE NEW MEXICO BUSINESS COMMUNITY AFTER *MCMINN* AND *PETERS*

Future appellate litigation and advice to corporate clients, of course, cannot consist only of painting a picture of who is most deserving of judicial sympathy. Because the governing New Mexico law on minority shareholders is a combination of statutory and complicated, fact-specific case law, lawyers must consider both before advising clients on acceptable corporate actions and likely outcomes. Lawyers certainly have a role in advising clients because the courts have not established hard and fast rules regarding conduct. One commentator summarized the *Walta* court's opinion in a way that is also true of the *McMinn* and *Peters* decisions: the courts "sought to construct broad guidelines rather than rigid standards of conduct. The court began by noting that it did not wish to catalog the specifics of the fiduciary duty owed, but rather sought to place the duty in the context of other recognized standards of lawful conduct."[141]

Prior to any dispute among shareholders, attorneys advising close corporations, directors, and shareholders have two types of advice to provide to their clients: legal and common sense. In terms of the law, prudent lawyerly advice is to adhere to the tenets of partnership law fiduciary duties even when organized as a close

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140. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

141. Camille Romero, Note, *The Fiduciary Duties Owed in a New Mexico Closely Held Corporation:* Walta v. Gallegos Law Firm, P.C., 34 N.M. L. REV. 181, 189 (2004).

corporation: "The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care…."[142] The *Walta* court borrowed from a Massachusetts court's distillation on partnership-law principles and close corporations:

> Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.[143]

In sum, shareholders owe each other a fiduciary duty as they would to the corporation itself.

The common sense advice is to follow the Golden Rule: Do unto other shareholders as you would have them do unto you. In effect, the *McMinn* decision functions as a code of conduct to maintain civility during close corporation restructuring. If all shareholders and directors behave openly and with other shareholders' best interest in mind, the courts will have a minor, if any, role to play. Once the majority abuses its power, it invites the courts, often the protector of minority rights, to step in.

After a dispute arises, and one or more parties prepare for a fight to supplement the appraisal statute, lawyers should ask themselves if their client or the adversary is the type of party that a court usually seeks to protect. Given your client's bargaining power and business sophistication, does the appraisal statute afford your client all the protections it needs in order to effectuate a fair deal? Or is your client likely to appeal to the court's role to level the playing field between those in power and those in the minority? Majority shareholders should ask themselves if it will be perceived that they are abusing their position of power as a majority. If your client's appeal does not appeal to these judicial principles, then a team of the best litigators and corporate attorneys will not cause the court system to strike a better deal than you and your client could negotiate with your adversary. Before filing suit for one red cent beyond the fair value of a client's shares, ask if the client is actually harmed by being outvoted, such as Mrs. McCauley, Ms. Walta, and Mr. McMinn, or if the client is a sophisticated player with other sources of bargaining power, such as the Peters Group.

Any freeze-out, or perceived freeze-out, can be costly because of the appraisal proceeding and potential litigation. If a client is disinclined to be financially

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142. NMSA 1978, § 54-1A-404(a) (1996); *see also Walta*, 2002-NMCA-015, ¶ 35, 40 P.3d at 457.

143. *Walta*, 2002-NMCA-015, ¶ 35, 40 P.3d at 456–57 (quoting Donahue v. Rodd Electrotype Co. of New England, 328 N.E.2d 505, 515 (Mass. 1975)).

generous to his or her fellow shareholders during the preliminary dispute stages, a full exposition of the costs of disagreeability should be explained.[144] Statutory law allows judicial discretion in apportioning the costs if the parties to the negotiation are not reasonable with each other:

> The costs and expenses of any such proceeding shall be determined by the court and shall be assessed against the corporation, but all or any part of the costs and expenses may be apportioned and assessed as the court deems equitable against any or all of the dissenting shareholders who are parties to the proceeding to whom the corporation made an offer to pay for the shares if the court finds that the action of the shareholders in failing to accept the offer was arbitrary or vexatious or not in good faith. Such expenses include reasonable compensation for and reasonable expenses of the appraisers, but exclude the fees and expenses of counsel for and experts employed by any party; but if the fair value of the shares as determined materially exceeds the amount which the corporation offered to pay therefor, or if no offer was made, the court in its discretion may award to any shareholder who is a party to the proceeding such sum as the court determines to be reasonable compensation to any expert employed by the shareholder in the proceeding, together with reasonable fees of legal counsel.[145]

Thus, anytime a close corporation, its shareholders, and directors are presented with a shareholder who asserts his or her dissenter rights to receive fair value and then leaves the company, a close corporation should consult its counsel. So should the dissenting shareholder. In close-knit close corporations, such as family businesses or active business partners, an attorney's involvement may prevent those in power from abusing it as tensions run high. A lawyer can assist a corporation in offering fair value that might prevent the dissenting shareholders from taking the case to a court for a second opinion on the fair value. If the dissenting shareholders do file for the statutory appraisal remedy, they will not have any disincentive to pile on every available common law claim in hopes that something will stick. Finally, acting on the advice of counsel *may* insulate a party from punitive damages.[146]

VIII. COMPARISON TO OTHER STATES

Prior to New Mexico's *McMinn* decision, numerous other states also came to the conclusion that appraisal is not the exclusive remedy for a dissenting shareholder.[147] Thirteen states, including New Mexico, have statutes that make appraisal the exclusive remedy, but twelve of those states, also including New Mexico, have exceptions to the rule.[148] Connecticut maintains that the statutory appraisal remedy

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144. In terms of the litigation budget, the only cost saving feature is that there is not any right to a jury trial. *See* Smith v. First Alamagordo Bancorp, 114 N.M. 340, 838 P.2d 494 (Ct. App. 1992).

145. NMSA 1978, § 53-15-4(G) (1983).

146. Even if a person is acting on the advice of counsel, his or her conduct is still subject to the malicious, fraudulent, or arbitrary standard in determining whether punitive damages will be awarded against them. *See, e.g.*, Lujan v. Pendaries Properties, Inc., 96 N.M. 771, 775, 635 P.2d 580, 584 (1981); *In re* Baker, Bankruptcy No. 7-07-12292 SR, 2008 WL 753758, at *4 (10th Cir. March 19, 2008).

147. *See generally* Stephen J. Paine, *Achieving the Proper Remedy for a Dissenting Shareholder In Today's Economy:* Yuspeh v. Koch, 65 LA. L. REV. 911 (2005).

148. As of 1994,

> The state statutes that do provide for exclusivity are somewhat diverse in the exceptions they

is absolutely exclusive.[149] "In most states the applicable statutes do not expressly address the issue of exclusivity of an appraisal proceeding, and various bases for judicial review have been recognized by the courts."[150]

New Mexico's resolution is consonant with New York's approach of semi-exclusivity of the statutory appraisal remedy. New York's Business Corporation Law, section 623, alludes to exclusivity if the corporation and the dissenting shareholder fail to seek the appraisal remedy. "If such proceeding is not instituted within such thirty day period, all dissenter's rights shall be lost unless the supreme court, for good cause shown, shall otherwise direct."[151] A later portion of the statute also references exclusivity, but also lists the exceptions:

> The enforcement by a shareholder of his right to receive payment for his shares in the manner provided herein shall exclude the enforcement by such shareholder of any other right to which he might otherwise be entitled by virtue of share ownership, except as provided in paragraph (e), and except that this section shall not exclude the right of such shareholder to bring or maintain an appropriate action to obtain relief on the ground that such corporate action will be or is unlawful or fraudulent as to him.[152]

This section of New York's Business Corporation Law served as the model for the ABA Model Act, section 13.02(b).[153] The leading New York court opinion interpreting this section essentially holds that dissenting shareholders cannot skip the appraisal remedy and sue for damages if appraisal is available.[154] There are exceptions to the appraisal remedy, but they are the exceptions clearly stated in the statute: when there is unlawfulness or fraud as to the shareholder asserting a right.[155]

New Mexico's emerging doctrine on the interplay between the appraisal statute and common law claims follows the approach in Delaware,[156] which is well known for its corporate law expertise.[157] More than twenty-five years ago, in *Weinberger v. UOP, Inc.*,[158] the Delaware Supreme Court considered an appeal from a minority

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> specify. Colorado, Georgia, Idaho, New Jersey, New Mexico, New York, Oregon and Texas make the appraisal remedy exclusive except in the case of fraud or illegality. Minnesota and Pennsylvania make the appraisal remedy exclusive except in the case of fraud. Connecticut and Florida make the appraisal remedy exclusive without an exception for either fraud or illegality. California makes the appraisal remedy exclusive except in a transaction with a controlled corporation in which the shareholder does not elect to pursue the appraisal remedy.

PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.24 cmt. a. In 2008, Florida courts changed their position. Exceptions to the exclusivity of appraisal are now allowed in cases in which the minority shareholder alleges unfairness. *See* Williams v. Stanford, 977 So. 2d 722 (Fla. Dist. Ct. App. 2008).

149. *See* Brandt v. Travelers Corp., 665 A.2d 616 (Conn. Super. Ct. 1995).

150. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.24 cmt. a.

151. N.Y. BUS. CORP. LAW § 623(h)(2) (McKinney 2003).

152. *Id.* § 623(k)

153. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.24 cmt. a.

154. *See* Walter J. Schloss Assocs. v. Arkwin Indus., Inc., 460 N.E.2d 1090 (N.Y. 1984). The New York Court of Appeals adopted the dissenting opinion from the Appellate Division of the Supreme Court. *See* 90 A.D.2d 149, 153–62 (N.Y. App. Div. 1982) (Mangano, J., dissenting), *rev'd*, 460 N.E.2d 1090.

155. *Arkwin Indus.*, 90 A.D.2d at 154–55. Some commentators consider the Delaware and New York approaches to now be divergent. They are not the same, but the nuances of the differences are beyond the scope of this article.

156. *See* McMinn v. MBF Operating Acquisition Corp., 2007-NMSC-040, ¶¶ 43–45, 164 P.3d 53–54.

157. *See id.* ¶ 42, 164 P.3d at 53.

158. 457 A.2d 701 (Del. 1983).

shareholder whose shares had been eliminated during a merger.[159] The court held that a plaintiff must allege specific acts of unfairness: fraud, misrepresentation or other misconduct.[160] Once a plaintiff meets the pleading standard, the majority shareholders bear the burden of proving the fairness to the minority.[161] The *Weinberger* court concluded that the transaction in question had been unfair to the minority and that the remedy would be Delaware's appraisal statute,[162] but not a strict interpretation of the appraisal statute and not appraisal alone. "[T]o give full effect" to the appraisal statute, the Delaware Court adopted "a more liberal, less rigid and stylized, approach to the valuation process…."[163]

> While a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such other relief as the facts of a particular case may dictate. The appraisal remedy we approve may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved. Under such circumstances, the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages. [164]

Weinberger has been cited approvingly in many jurisdictions, though not all states have followed *Weinberger*.[165]

Even though New Mexico is in good company by adopting the Delaware approach, the *McMinn* decision has been criticized by the only other state court yet to consider it and publish an opinion.[166] In *Sound Infiniti, Inc. v. Snyder*,[167] the Washington State Court of Appeals was asked to decide if a dissenting shareholder's sole remedy was Washington's appraisal statute or if the shareholder could also maintain other claims.[168] The court concluded that in Washington the appraisal statute is the exclusive remedy. The three shareholders in *Sound Infiniti* were David Hannah, who owned 51 percent; Richard Snyder, who owned 30 percent; and Afshin Pisheyar, who held just 19 percent.[169] Hannah and Snyder actively managed the company and had a falling out with Pisheyar, who was an investor. The controlling shareholders sought to restructure their car dealership business without him. Pisheyar filed suit and alleged that the majority violated their

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159. *Id.* at 703.

160. *Id.*

161. *Id.* The burden shifting is a bit more complex: If a majority of the minority shareholders made an informed vote, then the burden shifts back to the minority shareholder plaintiffs to prove the unfairness of the corporation action. In *Weinberger*, the Delaware Supreme Court held that the minority shareholders did not make an informed vote because information was withheld from them. Thus, the burden remained with the majority. *Id.*

162. DEL. CODE ANN. tit. 8, § 262 (2001).

163. *Weinberger*, 457 A.2d at 704.

164. *Id.* at 714 (citation omitted).

165. *See, e.g.*, Kelly v. Wellsville Foundry, Inc., 2000-Ohio-2667, No. 99-CO-27, 2000 WL 1809021 (Ohio Ct. App. Dec. 6, 2000); Brandt v. Travelers Corp., 665 A.2d 616 (Conn. Super. Ct. 1995).

166. *See* Sound Infiniti, Inc. v. Snyder, 186 P.3d 1107 (Wash. Ct. App. 2008).

167. *Id.*

168. *Id.* at 1109.

169. *Id.*

fiduciary duties to him.[170] As part of his argument that the Washington courts should provide him a remedy beyond the Washington appraisal statute,[171] which was also based on the ABA Model Act (1984 version, newer than New Mexico's statute),[172] Pisheyar relied on New Mexico's *McMinn* decision. The Washington court rejected what they assumed, wrongly, to be *McMinn*'s rationale:

> Pisheyar proposes that we…reach the opposite result based on the rationale of the New Mexico Supreme Court's decision addressing a similar situation. But *McMinn* is not based on the actual language of New Mexico's appraisal statute (also modeled on [ABA Model Act] section 13.02); rather, it relies on the unsupported assertion that the New Mexico legislature intends to amend that statute but simply has not yet gotten around to it. ("[O]ur statute does not reflect legislative attention to the current dilemma," and thus its text may be disregarded). [173]

The *McMinn* decision does not actually claim that the legislature intends to amend the appraisal statute. Instead, the *McMinn* opinion notes the various amendments to the ABA Model Act and then states that the New Mexico appraisal statute "in contrast [to the revised ABA Model Act], remains unchanged since 1983. Thus, our statute does not reflect legislative attention to the current dilemma in which controlling shareholders orchestrate a transaction to remove non-controlling shareholders, regardless of the non-controlling shareholders' desire to retain their interest in the company."[174] While the Washington State Court of Appeals insinuated that the New Mexico Supreme Court may have overstepped judicial bounds, the New Mexico justices were resolving a controversy that had been filed with the courts and that had not been addressed by the legislature in more than twenty-five years. In Washington, the state legislature meets for 165 days every two-year period (105 days in odd-numbered years and sixty days in even-numbered years).[175] By contrast, the New Mexico Legislature meets for only ninety days in every two-year period (sixty days in odd-numbered years and thirty days in even-numbered years).[176] New Mexico also has a relatively small number of lawyer–legislators,[177] and very little shareholder litigation, which makes it fairly unlikely that New Mexico's legislative bodies would direct their attention to

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170. *Id.* at 1110.

171. Section 23B.13.020(2) of the Revised Code of Washington states:

> A shareholder entitled to dissent and obtain payment for the shareholder's shares under this chapter may not challenge the corporate action creating the shareholder's entitlement unless the action fails to comply with the procedural requirements imposed by this title, RCW 25.10.900 through 25.10.955, the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or corporation.

172. *Sound Infiniti*, 186 P.3d at 1112–13.

173. *Id.* at 1114 (citing McMinn v. MBF Operating Acquisition Corporation, 2007-NMSC-040, 164 P.3d 41) (citations omitted).

174. *McMinn*, 2007-NMSC-040, ¶ 32, 164 P.3d at 49–50.

175. *See* Washington State Legislature, Visiting the Legislature, http://www.leg.wa.gov/WorkingwithLeg/ (last visited April 19, 2009).

176. N.M. CONST. art. IV, § 5.

177. After the November 2008 election, attorneys comprised just 11.5 percent of New Mexico's House of Representatives (seventy members and just eight attorney–members). Seven percent of New Mexico's Senators are lawyers (forty-two members and three attorney–members). *See generally* New Mexico State Legislature, http://www.nmlegis.gov/lcs/leg.aspx?T=R (last visited April 19, 2009).

amending the appraisal statute regarding dissenting shareholders. The Washington Court of Appeals was likely unaware of these factors, factors which force New Mexico's highest appellate court to play a comparatively stronger role than many other state's supreme courts.[178] Given the small number of corporate litigation cases in New Mexico, it may continue to be an issue that is more efficiently and expertly resolved by the courts than the legislature. The New Mexico Supreme Court's statement that "our statute does not reflect legislative attention to the current dilemma,"[179] appears to be a benign statement of fact rather than the court's attempt to usurp the legislature's role.

The Washington court was not persuaded by the *McMinn* court's reasoning regarding why appraisal rights and other fiduciary duty claims are distinct:

> Further, the *McMinn* decision is premised on the fact that, in New Mexico, if appraisal is a dissenting shareholder's sole remedy for breach of fiduciary duty, then "controlling shareholders in close corporations potentially could engage in oppressive tactics in breach of their fiduciary duties, and then escape liability for those actions simply by instituting an appraisal-triggering transaction." McMinn, 142 N.M. at 170.
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> While this might be true in New Mexico, it is not true in those jurisdictions with the better-reasoned analyses concerning the scope of the appraisal proceeding. *See, e.g.*, *Bingham Consol. Co. v. Groesbeck*, 105 P.3d 365, 374 (Utah Ct. App. 2004) ("[T]he court may consider evidence of breach of fiduciary duty in an appraisal to assess the credibility of the majority shareholder's proposed valuation."); *HMO-W Inc. v. SSM Health Care Sys.*, 234 Wis.2d 707, 728, 611 N.W.2d 250 (2000) ("When assertions of misconduct such as unfair dealing are intertwined with the value of shares subject to appraisal, a shareholder may make these assertions within the context of an appraisal action."). Indeed, the dissent in *Walter J. Schloss Associates*, upon which [ABA Model Act] 13.02(b) is based, itself adopts this view. ([D]issent in *Walter J. Schloss Associates* stands for proposition that "majority shareholder's fiduciary duty to the minority can be weighed in determining fair value"); *see also Albert Trostel & Sons Co. v. Notz*, 536 F.Supp.2d 969, 982 (E.D. Wis. 2008) (*applying HMO-W*, 234 Wis.2d 707, 611 N.W.2d 250); *Steinberg v. Amplica, Inc.*, 42 Cal.3d 1198, 1209, 233 Cal. Rptr. 249, 729 P.2d 683 (1986) ("nothing in the appraisal statutes to prevent vindication of a shareholder's claim of misconduct in an appraisal proceeding"); *Fleming v. Int'l Pizza Supply Corp.*, 676 N.E.2d 1051, 1057 (Ind. 1997) ("legislature did not foreclose the ability of dissenting shareholders to litigate their breach of fiduciary duty or fraud claims within the appraisal proceeding").[180]

It appears that the differences between New Mexico's position and "better-reasoned analyses," according to the Washington court, are largely semantic. The New Mexico approach allows for an appraisal proceeding and common law claims to

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178. For example, an aggrieved litigant in a state with a legislature that convenes frequently may be able to take his or her concern to an elected official and effect change through the legislative process. In New Mexico or other states in which the legislature meets as infrequently as thirty days per year, the courts are more likely to have the final word on a legal issue.

179. *McMinn*, 2007-NMSC-040, ¶ 32, 164 P.3d at 50.

180. Sound Infiniti, Inc. v. Snyder, 186 P.3d 1107, 1114 (Wash. Ct. App. 2008) (citation omitted).

proceed in one lawsuit between the majority and minority shareholders. For example, a plaintiff could file a complaint that specifies "count one: an appraisal" and "count two: a breach of fiduciary duty." The "better-reasoned analyses" appear to prefer that an appraisal is the sole count in a complaint and the facts relevant to fiduciary duty are alleged under the appraisal count. In the scope of a full trial, this appears to be a distinction without a difference. The ALI noted that "the two remedies of appraisal and damages for breach of fiduciary duty should be coordinated and combined,"[181] but does not specify how the complaint should be enumerated.

IX. LEGISLATIVE RECOMMENDATIONS

The *McMinn* court also nudged the legislature to amend the New Mexico Business Corporations Act to address conflict of interest transactions that can easily arise when small groups of shareholders undertake corporate restructuring. The court wrote that the legislature had not revised its appraisal statute "to take into account the changing environment of corporate affairs."[182] Since the supreme court issued its *McMinn* opinion in June 2007, the legislature met in January 2008 and 2009.[183] Neither of these sessions considered any issues regarding corporate law.

Yet there is a good reason for lawmakers to amend New Mexico's appraisal statute. The Land of Enchantment is twenty-five years behind its peers in keeping pace with changes in this area of corporate law.[184] One commentator noted: "[A]ll over the country, dissenters' rights statutes are now being used for purposes that they were never designed to accomplish."[185] Many statutes were not designed to address current problems.

> Even in close corporations most appraisal actions today occur in squeeze-out situations. Similarly, it may be hard to say that appraisal in a going private or roll-up context is not spurred by concerns over conflict of interest where the overwhelming majority of appraisal cases occur. Statutory standards and procedures for appraisal should be directed to the conflict of interest context in squeeze-out situations. Too many of the current rules are carryovers from the earlier period when the primary risk of abuse in the appraisal proceeding was hold-ups by minority shareholders, which is the opposite of the risk in a squeeze-out situation in which majority shareholders with conflicts of interest are setting the terms of cash-out transactions.[186]

This article author suggests that the New Mexico Legislature consider these three paramount points regarding minority shareholder litigation in close corporations: procedural rules, fair value determination, and interest computation.

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181. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.22 rep. note 6.

182. *McMinn*, 2007-NMSC-040, ¶ 30, 164 P.3d at 49.

183. *See* Subject Index, Forty-Eighth Legislature, Second Session, 2008, *available at* http://legis.state.nm.us/lcs/fileExists/BillFinderSubject/SubjectIndex08.pdf (last visited April 19, 2009); Subject Index, Forty-Ninth Legislature, First Session, 2009, *available at* http://legis.state.nm.us/lcs/fileExists/BillFinderSubject/SubjectIndex09.pdf (last visited April 19, 2009).

184. *See supra* note 26.

185. Paine, *supra* note 147, at 920.

186. Thompson, *supra* note 9, at 53–54.

Recommendations are derived from the most current version of the ABA Model Act[187] and from the ALI *Principles of Corporate Governance: Analysis and Recommendations*.[188] This article highlights issues in need of modernization, but does not comprehensively address New Mexico's Business Corporation Act.

A. Procedural Simplification

Both the ABA Model Act and the ALI recommendations are significantly more streamlined and easier to comprehend than New Mexico's existing statute. As an overarching matter, the ALI recommends procedural simplification.[189] "In most jurisdictions today, the exercise of the appraisal remedy is procedurally cumbersome."[190] This is true of New Mexico's current statute, which uses more than 1,500 words and nine sections to explain the legal process of requesting a fair value appraisal.[191] Speaking generally of old appraisal statutes, the ALI commentators noted, "Several of these steps involve an obvious redundancy, and each provides a chance of inadvertent loss of appraisal rights and invites the possibility of collateral litigation."[192] In order to alleviate these problems, the ALI recommendations merely require that the corporation provide notice and that the shareholder respond. The notice requirement is satisfied if the corporation alerts shareholders in advance, describes an easy method for how the shareholder can dissent and request an appraisal, and discloses material facts concerning the transaction.[193] The shareholder's right to dissent is perfected if the shareholder responds in the way the corporation has requested or contacts the corporation in writing.[194] The ABA Model Act essentially makes the same points, though does so with considerably more lawyerly detail than the ALI recommendations, such as specifying more timeframes and exact documents to be shared. [195] The ABA Model Act details in separate sections notice by the corporation to the shareholder, notice of intent to demand payment, appraisal notice and form, perfection of rights, and payment.[196]

The ALI's straightforward, more open-ended approach is appropriate for New Mexico. While states with a greater population and a larger number of large and publicly traded companies might benefit from the detail provided in the ABA Model Act, most of New Mexico's business community would be well served by the user-friendly corporate notice and shareholder response recommendations in the ALI proposals. Close corporations comprised of small business owners will be able to adhere to the ALI procedural requirements that allow room for reasonability and flexibility in their business dealings.

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187. MODEL BUS. CORP. ACT ANN. (2008).
188. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4.
189. *Id.* § 7.23 cmt. c.
190. *Id.* "Today" means 1994.
191. *See supra* section II.B for a summary of the statute.
192. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.23 cmt. c.
193. *Id.* § 7.23(a).
194. *Id.* § 7.23(b).
195. MODEL BUS. CORP. ACT ANN. § 13.20 (2008).
196. *Id.* §§ 13.20–13.24.

B. Fair Value Determination

New Mexico's statute does not attempt to define fair value or even mention what should be considered by a court. The statute punts by noting that the court can appoint an appraiser to determine fair value.[197] Courts have considered various factors, such as net asset value, market value, and investment earnings value,[198] but the current method for arriving at fair value is hardly mechanical or certain. The ABA Model Act provides some parameters for fair value:

> "Fair value" means the value of the corporation's shares determined:
> (i) immediately before the effectuation of the corporate action to which the shareholder objects;
> (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
> (iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles pursuant to section 13.02(a)(5).[199]

The ALI proposal also defers to business practices rather than a set legal process. According to the ALI:

> [F]air value…should be the value of the eligible holder's proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability. Subject to subsections (b) and (c), fair value should be determined using the customary valuation concepts and techniques generally employed in the relevant securities and financial markets for similar businesses in the context of the transaction giving rise to appraisal.[200]

Adoption of either one of these standards would allow courts to ensure that appraisers are following some recognizable valuation process. Further, specific statutory language would assist majority and minority shareholders in pre-litigation negotiations. By knowing what factors courts and appraisers will consider, parties will be able to make a reasonable assessment of their chances at trial and will more likely be able to resolve their differences short of the judicial process.

C. Interest Computation

New Mexico's statute also handles interest computations in an outmoded way. The statute allows for "interest at such rate as the court may find to be fair and equitable."[201] In *Peters*, the court of appeals and the supreme court upheld the trial court's decision that fair and equitable in *Peters* meant 10 percent interest compounded annually.[202] The basis for choosing 10 percent is not explained,

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197. *See* NMSA 1978, § 53-15-4(E) (1983) ("The court may, if it so elects, appoint one or more persons as appraisers to receive evidence and recommend a decision on the question of fair value.").
198. *See* Tome Land & Improvement Co. v. Silva, 83 N.M. 549, 552, 494 P.2d 962, 965 (1972).
199. MODEL BUS. CORP. ACT ANN. § 13.01(4).
200. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.22(a).
201. NMSA 1978, § 53-15-4(F) (1983).
202. Peters Corp. v. N.M. Banquest Investors Corp., 2008-NMSC-039, ¶ 52, 188 P.3d 1185, 1200.

although the rationale for compounding is.[203] For future litigation with different facts (or even the same facts), it is difficult to predict if another judge would find 5 percent or 15 percent to be fair and equitable.

The ABA Model Act provides more guidance than "fair and equitable" by stating that, "'Interest' means interest from the effective date of the corporate action until the date of payment, at the rate of interest on judgments in this state on the effective date of the corporate action."[204] In New Mexico, the interest on judgments is 8.75 percent.[205] The ALI recommends that, "[i]nterest on the amount awarded by the court (less the amount of prepayment) should be paid at the time of the payment of the award and should be computed from the time the relevant transaction is consummated at an appropriate market rate for the corporation."[206] Appropriate market rate is loosely defined in a comment as what the corporation pays on short-term bank debt.[207]

The modernization of procedural rules, fair value calculations, and interest computations in the New Mexico Statutes could bring both corporate business and legal practices into closer alignment with other states that have more developed business communities. Since New Mexico's corporate community, and judicial opinions addressing corporate law, are relatively nascent compared to states like Delaware and New York, strategically borrowing from other jurisdictions could allow New Mexico to move forward without reinventing the wheel.

X. CONCLUSION

New Mexico's legal landscape for dissenting minority shareholders has changed much over the last century, with major developments occurring in the last few years due to novel litigation. The law could remain stable for the foreseeable future, or could shift again if the legislature takes up the cause of modernizing the dissent and appraisal statute. Change or no change, lawyers for both close corporations and shareholders will do well to advise their clients to play fair. Fair, of course, may be as difficult to see as the eyes of the blindfolded Lady Justice.

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203. *Id.* ¶¶ 51–52, 188 P.3d at 1200.

204. MODEL BUS. CORP. ACT ANN. § 13.01(5).

205. NMSA 1978, § 56-8-4(A) (2004). There are two exceptions to this statutory interest rate: "(1) the judgment is rendered on a written instrument having a different rate of interest…(2) the judgment is based on tortious conduct, bad faith or intentional or willful acts…." *Id.*

206. PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 4, § 7.23(e).

207. *Id.* § 7.23 cmt. h.