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TEXAS LAW ON STOCKHOLDERS' INSPECTION RIGHTS: HOW DOES IT STACK UP AGAINST DELAWARE LAW AND THE MODEL BUSINESS CORPORATION ACT?

by
*James L. Young**

PERHAPS the basic tension within the realm of corporate law is that between the interests of the stockholder on the one hand and the interests of the corporation and its management on the other.¹ The stockholder is a part owner of the corporation, and as such is interested in obtaining as large a return on his capital investment as possible. Corporate management, on the other hand, manages the corporation's day-to-day affairs, and so may desire to pursue strategies that run counter to the interests of the stockholders. In addition, management will often act, at stockholders' expense, in ways that are designed primarily to enable management to maintain its own position rather than to promote the best interests of the corporation. Thus the stage is set for potential strife among and between corporate management and various stockholder factions, each group believing that it alone possesses the wisdom to chart the proper corporate course.

The traditional function of corporate law has been to impose order upon this fundamentally chaotic situation and strike a reasonable balance between the rights of the stockholders and the rights of the corporation and its management. As a result of efforts to create balance and order, a legal framework of specific rights and duties has evolved that is designed to allow each side to protect its own interests without unduly interfering with the rights of the other. An examination of the stockholder's legal right to inspect corporate books and records perhaps most clearly illustrates the operation of this system of checks and balances. The law recognizes the interest of the stockholder in policing the activities of the corporation and its management by giving all stockholders the legal right to examine a corporation's business records in order to gain information that the stockholders can then use to

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1. For a discussion of the legal consequences of the separation of ownership and management and the resulting tension see A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 66-111 (1968).

evaluate the corporation's performance and overall financial health.² The law also recognizes the interest of corporate management in discharging its duties with a minimum of unnecessary interference, and protects this interest by carefully limiting stockholder inspection privileges. The stockholder's right of inspection is an important component of the corporate law's system of checks and balances, since in the modern complex business environment often the only way a stockholder can learn of potential problems that threaten his investment is through examination of the corporation's records.³

As early as 1745 the common law of England recognized the right of a stockholder to inspect corporate records.⁴ With the development of the modern industrial economy and the attendant increase in the importance of the corporation as a vehicle for capital formation the significance of the stockholder's right of inspection has increased, and the need for more certainty in the exercise of this right has become acute. Most American jurisdictions have enacted statutes that limit stockholder access to corporate records by establishing specific legal standards that a stockholder must meet before being entitled to an inspection.⁵ As a result, the goals of predictability and orderly administration of the inspection right have for the most part been achieved; however, the inspection-rights statutes have also proven to be potent weapons in the context of battles for corporate ownership and control.⁶

The purpose of this Article is to examine the stockholder's right to inspect corporate records as it exists under the law of the State of Texas and to compare Texas law on this subject with Delaware law and with the provisions of the 1985 Revised Model Business Corporation Act (MBCA).⁷ Texas is a jurisdiction rapidly increasing in national commercial significance, whereas Delaware is the nation's preeminent corporate law jurisdiction. The provisions of the MBCA represent the consensus of the American Bar Association as to what the law of stockholders' inspection rights should be. This Article focuses on the stockholder's general right of inspection, without discussing other more specialized inspection rights.⁸

2. This right of inspection enables the stockholder to "determine [the corporation's] financial condition, check on its general state of affairs and management, or ascertain who the other shareholders are in order to protect his own or the corporation's overall interests." Lebowitz, *Recent Developments in Texas Corporation Law—Part I*, 28 Sw. L.J. 641, 725 (1974).

3. "Perhaps no right is so fundamental or essential to other intercorporate rights of the shareholder as that of inspection of the books and records of the corporation." Raba & Clark, *Shareholders' Rights*, 5 BAYLOR L. REV. 146, 147 (1953).

4. See Comment, *Shareholder Inspection Rights*, 12 Sw. L.J. 61, 61 (1958).

5. *Id.* "The more recent history of the inspection right has been an effort on the part of the legislatures and the courts to put reasonable limitations upon its use, but still to allow the right to persons using it for socially desirable purposes." *Id.*

6. "[T]here is a continuing tendency to use a [suit to enforce inspection rights] for broad defensive as well as offensive purpose in battles over corporate control and acquisitions." Mite Corp. v. Heli-Coil Corp., 256 A.2d 855, 857-58 (Del. Ch. 1969).

7. REVISED MODEL BUSINESS CORP. ACT (1985) [hereinafter cited as MBCA].

8. See, e.g., TEX. BUS. CORP. ACT ANN. art. 2.27(A) (Vernon 1980) [hereinafter cited as TBCA] (right of access to voting list 10 days prior to stockholders' meeting); *id.* art. 2.30(A)

I. OVERVIEW

A. Texas

The Texas Business Corporation Act (TBCA),⁹ which is the general statutory corporation law of the state,¹⁰ contains specific provisions that address a stockholder's right to gain access to corporate records. Article 2.44(A) specifies the types of records that a corporation must maintain, and the location at which the corporation must keep some of those records.¹¹ A corporation must maintain accounting records and minutes of stockholder and board meetings, and must keep at its registered office or principal place of business a record of its stockholders that includes the names, addresses, and amounts and classes of stock held by each stockholder.¹² Article 2.44(A) also allows the use of modern computerized data storage and retrieval systems for recordkeeping so long as the records can be easily converted into written form.¹³ Article 2.44(B) creates the statutory right of a stockholder to inspect these and other records and also contains standards for the administration of that right.¹⁴ Article 2.44(C) provides a penalty for wrongful de-

(right of access to voting trust agreement on file with corporation). This Article also does not cover the right of a director to examine corporate books and records.

9. TBCA arts. 1.01-11.01 (Vernon 1980), arts. 12.01-.54 (Vernon Supp. 1986).

10. When enacted in 1955 the TBCA represented a comprehensive overhaul of Texas corporate law, which prior to that time had been quite disorganized. The pre-1955 lack of organization and clarity created "conditions which . . . stunted the growth and development of the corporate form in Texas and made so pressing the need for a complete revision of [the] laws." Raba & Clark, *supra* note 3, at 146. With the advent of the TBCA "[t]he relatively incomplete and rather uncertain law on the rights of shareholders' [sic] of Texas business corporations . . . has thus been fully replaced by a comprehensive statute." Sierk, *Shareholders' Rights Under Texas Business Corporation Act*, 26 TEX. B.J. 25, 25 (1963). For a discussion of the thorough revision of the TBCA in 1973, see Doty & Parker, *Changes in the Texas Business Corporation Act and Related Statutory Provisions*, 10 HOUS. L. REV. 1009 (1973).

11. TBCA art. 2.44(A) (Vernon 1980):

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its shareholders and board of directors and shall keep at its registered office or principal place of business, or at the office of its transfer agent or registrar, a record of its shareholders, giving the names and addresses of all shareholders and the number and class of the shares held by each.

12. *Id.*

13. *Id.*: "Any books, records, and minutes may be in written form or in any other form capable of being converted into written form within a reasonable time."

14. *Id.* art. 2.44(B):

Any person who shall have been a holder of record of shares for at least six (6) months immediately preceding his demand, or shall be the holder of record of at least five percent (5%) of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person or by agent, accountant, or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes, and record of shareholders, and to make extracts therefrom.

Included in the terms of art. 2.44(B) are all of the types of records that art. 2.44(A) requires a corporation to keep. One commentator, however, has suggested that art. 2.44(B) should be broadly construed to avoid limiting inspection to only the types of records specifically listed in the provision. See 20 R. HAMILTON, *BUSINESS ORGANIZATIONS* § 804 (Texas Practice 1973). An early decision lends some support to this view. See *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 153 (Tex. Civ. App.—Amarillo 1930, writ ref'd). Other provisions of the TBCA make specific types of documents subject to inspection under art. 2.44(B) even though

nial of inspection rights in the form of a cause of action against a recalcitrant corporation,¹⁵ which, if successful, can result in the recovery by the stockholder of the costs of enforcing his rights plus any additional damages.¹⁶ Finally, article 2.44(D) provides that common law rights of inspection in existence prior to the enactment of article 2.44 retain their vitality.¹⁷ In order to enforce his statutory inspection rights under article 2.44(B) a stockholder must first make demand on the corporation; the corporation then decides whether to permit or deny the inspection.¹⁸ If the corporation denies the stockholder's request, the stockholder may sue for a writ of mandamus compelling the corporation to allow the inspection;¹⁹ mandamus is the exclusive remedy.²⁰

B. Delaware

Delaware's General Corporation Law²¹ is a comprehensive body of statutory law devoted solely to corporate matters. Enacted in 1967, section 220 of the General Corporation Law deals with the stockholder's right to inspect corporate records. Section 220(b) creates the right to inspect a corporation's stock ledger, stockholder list, and other records and also contains standards for administration of the inspection right.²² Section 220(c) allows a stockholder who has been denied access to corporate records to apply to the Delaware Court of Chancery²³ for an order compelling the corporation to allow

they are not listed in art. 2.44(B). See TBCA art. 2.30 (Vernon 1980) (voting trusts and other stockholder voting agreements).

15. TBCA art. 2.44(C) (Vernon 1980). For a discussion of the penalty see *infra* text accompanying notes 195-200.

16. TBCA art. 2.44(C) (Vernon 1980).

17. *Id.* art. 2.44(D). Thus art. 2.44 has been characterized as having enacted the common law with some modifications. 15 TEX. JUR. 3D *Corporations* § 157 (1981). For the text of art. 2.44(D) and discussion of the common law right of inspection see *infra* notes 179-88 and accompanying text.

18. TBCA art. 2.44(B) (Vernon 1980). For a discussion of the written demand requirement see *infra* notes 115-17 and accompanying text.

19. See *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 817 (Tex. Comm'n App. 1933, judgment adopted); *Yelverton v. Brown*, 412 S.W.2d 325, 330 (Tex. Civ. App.—Tyler 1967, no writ); *Roberts v. Munroe*, 193 S.W. 734, 736 (Tex. Civ. App.—Austin 1917, writ dismissed).

20. See *Rex Ref. Co. v. Morris*, 72 S.W.2d 687, 691 (Tex. Civ. App.—Dallas 1934, no writ) (request to appoint a receiver in inspection suit denied; mandamus is proper legal remedy).

21. DEL. CODE ANN. tit. 8, §§ 101-398 (1983) [hereinafter cited as DCA].

22. *Id.* tit. 8, § 220(b):

Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

23. Delaware's court system reflects the traditional common law distinction between law and equity; the court of chancery is an equity court.

the examination.²⁴ As in Texas, a stockholder who desires to inspect corporate records must first make demand on the corporation; only in the event that a demand has been made and denied may the stockholder seek redress through the courts.²⁵ Section 220(c) gives the courts broad power to order an examination subject to such conditions or limitations as they see fit.²⁶ Section 220(c) also contains specific details concerning the procedural administration of a section 220 suit.²⁷

C. MBCA

Chapter 16, subchapter A of the MBCA consists of four sections, which together establish and administer stockholders' inspection rights.²⁸ These provisions are detailed and comprehensive, yet thanks to excellent draftsmanship are clear and easily understandable. Section 16.01²⁹ requires a corporation to maintain specific types of records that fall into five general

24. DCA tit. 8, § 220(c) (1983) states:

If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The Court may summarily order the corporation to permit the stockholder to inspect the corporation's stock ledger, an existing list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court deems appropriate.

In view of the existence of the statutory remedy, older cases refusing relief due to the unavailability of the writ of mandamus are now irrelevant. E. FOLK, *THE DELAWARE GENERAL CORPORATION LAW* § 200 comment 1 (1972).

25. See DCA tit. 8, § 220(c) (1983).

26. *Id.* states:

The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper. The Court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon such terms and conditions as the order may prescribe.

27. See *id.* For discussion of allocation of the burden of proof on the issue of proper purpose see *infra* notes 81-84 and accompanying text.

28. Chapter 16, subchapter A is codified as MBCA §§ 16.01-.04 (1985).

29. MBCA § 16.01 (1985) provides that:

- (a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.
- (b) A corporation shall maintain appropriate accounting records.
- (c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.
- (d) A corporation shall maintain its records in written form or in another form capable of conversion into written form within a reasonable time.

categories: (1) minutes and other records of management and stockholder activities;³⁰ (2) lists of stockholders, officers, and directors;³¹ (3) accounting records;³² (4) organizational documents related to the formation of the corporation and changes in its capital structure;³³ and (5) financial reports and other communications that have been prepared by the corporation and sent out to all stockholders.³⁴ Certain of these records must be kept at the corporation's principal office.³⁵ Section 16.02 creates two separate inspection rights, each operating with respect to different records and according to different standards. Under section 16.02(a) a stockholder may seek to obtain copies of any records listed in section 16.01(e),³⁶ these records being directly related to the stockholder's interest in the corporation. Under section 16.02(b) the stockholder may inspect other corporate records provided the stockholder can meet the requirements of section 16.02(c) regarding his purpose, the form of his demand, and the scope of the proposed examination.³⁷

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- (e) A corporation shall keep a copy of the following records at its principal office:
- (1) its articles or restated articles of incorporation and all amendments to them currently in effect;
 - (2) its bylaws or restated bylaws and all amendments to them currently in effect;
 - (3) resolutions adopted by its board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;
 - (4) the minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years;
 - (5) all written communications to shareholders generally within the past three years under section 16.20;
 - (6) a list of the names and business addresses of its current directors and officers; and
 - (7) its most recent annual report delivered to the secretary of state under section 16.22.

30. *Id.* § 16.01(c), (e)(4).

31. *Id.* § 16.01(c), (e)(6).

32. *Id.* § 16.01(b).

33. *Id.* § 16.01(e)(1)-(3).

34. *Id.* § 16.01(e)(5).

35. *Id.* § 16.01(e). All of these documents directly relate to the stockholder's interest in the corporation.

36. *Id.* § 16.02(a) provides that, subject to § 16.03(c):

A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in section 16.01(e) if he gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy.

37. *Id.* § 16.02(b), (c) provides:

(b) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

- (1) excerpts from minutes of any meeting of the board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders, and records of action

Section 16.04 contains remedy provisions, which are designed to complement the dual-right scheme of section 16.02. In a suit under section 16.02(a) the court has power to enter a summary order for inspection and copying of records at corporate expense,³⁸ and in a suit under section 16.02(b) the court may, after expedited proceedings, order inspection and copying.³⁹ In either case the court may also order the corporation to reimburse the stockholder for the costs of his suit.⁴⁰ In order to protect the corporation from potential harm that could result from a stockholder inspection, the court also has the power to place reasonable limitations and restrictions on the stockholder's use and dissemination of information gained in the course of the examination.⁴¹ Section 16.03 gives an inspecting stockholder the right to use agents and also clarifies the stockholder's copying rights.⁴²

II. PRINCIPAL ISSUES

All three statutes considered in this Article provide essentially the same right of inspection, and so, not surprisingly, similar issues arise under each. The MBCA, as merely a model act, has generated no case law. An examination of Texas and Delaware cases, however, discloses that disputes under the Texas and Delaware statutes usually center around two basic issues: standing

taken by the shareholders or board of directors without a meeting, to the extent not subject to inspection under section 16.02(a);

(2) accounting records of the corporation; and

(3) the record of shareholders.

(c) A shareholder may inspect and copy the records described in subsection (b) only if:

(1) his demand is made in good faith and for a proper purpose;

(2) he describes with reasonable particularity his purpose and the records he desires to inspect; and

(3) the records are directly connected with his purpose.

In addition to the statutory rights of inspection, the MBCA also provides for the retention of any preexisting common law inspection rights. *See id.* § 16.02(e). For discussion of the common law right of inspection see *infra* notes 192-94 and accompanying text.

38. MBCA § 16.04(a) (1985) provides:

If a corporation does not allow a shareholder who complies with section 16.02(a) to inspect and copy any records required by that subsection to be available for inspection, the [name or describe court] of the county where the corporation's principal office (or, if none in this state, its registered office) is located may summarily order inspection and copying of the records demanded at the corporation's expense upon application of the shareholder.

39. *Id.* § 16.04(b) provides:

If a corporation does not within a reasonable time allow a shareholder to inspect and copy any other record, the shareholder who complies with section 16.02(b) and (c) may apply to the [name or describe court] in the county where the corporation's principal office (or, if none in this state, its registered office) is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

40. *Id.* § 16.04(c). For discussion of the penalty see *infra* notes 203-04 and accompanying text.

41. MBCA § 16.04(d) (1985) provides: "If the court orders inspection and copying of the records demanded, it may impose reasonable restrictions on the use or distribution of the records by the demanding shareholder."

42. *Id.* § 16.03. For discussion of the use of agents see *infra* notes 159-60 and accompanying text, and for discussion of copying rights see *infra* notes 174-78 and accompanying text.

under the statute to claim inspection privileges, and the statutory requirement that a stockholder seeking inspection have a proper purpose.

A. *Who May Inspect?*

With the rise in popularity of beneficial forms of stock ownership⁴³ some question has arisen concerning the form of ownership required to entitle the holder of stock to exercise inspection rights appurtenant to that stock. On the one hand, the requirement of record ownership of stock as a prerequisite to the exercise of inspection rights is administratively efficient, since such a requirement eliminates the need to analyze various forms of beneficial ownership in order to determine who, as the true owner of the stock, should have inspection privileges. On the other hand, the beneficial owner actually receives the benefit from stock ownership, so he of all people should have access to corporate records in order to protect his interests. Texas and Delaware have taken opposing positions on this issue, with the MBCA occupying the middle ground.

1. *Texas.*

Article 2.44(B) grants the statutory right of inspection to record stockholders who have held shares for at least six months immediately preceding the demand for inspection, or to record holders of at least five percent of all outstanding shares of a corporation.⁴⁴ Thus, this statute establishes a two-part test to determine who is qualified to examine corporate records; a person seeking an inspection must be a holder of record, and he must also meet the minimum stock ownership requirements.⁴⁵

The requirement that a person seeking to inspect corporate records be a record holder of stock places great emphasis on the corporation's list of stockholders, as this list determines record ownership.⁴⁶ Case law supports a strict interpretation of article 2.44(B) regarding the record ownership requirement,⁴⁷ but beneficial owners of stock may be able to use article

43. "Street name" and nominee ownership are examples of beneficial forms of stock ownership. See 19 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8981 (rev. perm. ed. 1975).

44. TBCA art. 2.44(B) (Vernon 1980).

45. Article 2.44(D), however, imposes neither of these requirements on a stockholder whose suit for inspection is based on common law rights. *Id.* art. 2.44(D). For discussion of the common law right of inspection see *infra* notes 179-88 and accompanying text.

46. Although other evidence may be considered, the corporation's stock book is prima facie evidence of stock ownership. *Turner v. Cattleman's Trust Co.*, 215 S.W. 831, 833 (Tex. Comm'n App. 1919, judgment adopted).

47. The leading case in point is *Texas Infra-Red Radiant Co. v. Erwin*, 397 S.W.2d 491 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.), in which a beneficial owner of stock sought to examine the books of the defendant corporation under art. 2.44. Margaret Erwin, who sought the inspection, had in a divorce action been awarded a 10% beneficial interest in her husband's stock in the defendant corporation. The stock was registered on the corporate books in the husband's name alone. The court noted that art. 2.44(B) by its terms required record ownership and thus the statute was not available to Mrs. Erwin, her remedy lying instead at common law. *Id.* at 493. Article 2.44(D) protects this common law right. See *infra* notes 179-88 and accompanying text.

A later case, *Fort Worth KJIM, Inc. v. Walke*, 604 S.W.2d 362 (Tex. Civ. App.—Fort

2.44(D) and common law inspection rights to obtain access to corporate records.⁴⁸

The Texas statute's minimum stock ownership requirements are unique among the three bodies of law under consideration. These requirements are designed to insure that only those persons who have a true stake in corporate affairs are allowed to examine corporate records. Persons who buy one or two shares of stock merely to harass the corporation or gain access to its secrets would not be able to qualify for inspection pursuant to article 2.44(B) and so would be relegated to article 2.44(D), which imposes a more difficult burden of proof requirement concerning the purpose of the inspection.⁴⁹ The minimum ownership requirements are straightforward and do not appear to have been litigated to date.⁵⁰

2. Delaware.

Delaware's statute grants inspection rights to any stockholder,⁵¹ but defines the term "stockholder" as a stockholder of record.⁵² Thus in Delaware, as in Texas, the corporation's record of stockholders determines who

Worth 1980, no writ), contradicts *Texas Infra-Red* on this point, granting art. 2.44(B) record ownership status to a beneficial owner of stock. The court, however, reached this result due to a peculiar set of facts; the stockholder had for some time owned 35% of all shares in the closely held defendant corporation, but prior to his request for inspection he had pledged his stock as collateral on an obligation of the corporation. Pursuant to the terms of the pledge agreement the corporation's records were changed to reflect legal ownership of the shares by the pledgee, and so at the time of the inspection request the stockholder was clearly a beneficial owner. The court emphasized that the stockholder made the pledge for the benefit of the corporation and that at all times all parties acknowledged him as being the true owner of the pledged stock. The court therefore held that on these facts the stockholder was a record owner for purposes of art. 2.44(B). *Id.* at 363. The only issue in the appeal was the trial court's award of attorneys' fees to the stockholder pursuant to art. 2.44(C). Such an award is only available to a stockholder suing under art. 2.44(B), see *infra* notes 195-200 and accompanying text, so the court's decision appears to have been result-oriented.

In view of its seemingly incorrect result *KJIM* should have little precedential value, and the *Texas Infra-Red* decision, which appears to be theoretically sound, should be regarded as the controlling authority. See also *Dreyfuss & Son v. Benson*, 239 S.W. 347, 349 (Tex. Civ. App.—Dallas 1922, writ ref'd) (stockholder retains ownership of stock despite having received letter indicating that option to purchase his stock would be exercised).

48. See *infra* notes 179-88 and accompanying text. A holder of voting trust certificates representing shares of stock placed into a voting trust that meets the requirements of the TBCA is not relegated to art. 2.44(D), however, because such a holder is expressly made a record owner for purposes of art. 2.44 and so can make use of art. 2.44(B) inspection rights. TBCA art. 2.44(F) (Vernon 1980).

49. For discussion of art. 2.44(D) burden of proof requirements see *infra* text accompanying note 181.

50. This lack of litigation is probably due to the availability of common law inspection rights under art. 2.44(D). For discussion of art. 2.44(D) and the common law right of inspection see *infra* notes 179-88 and accompanying text.

51. DCA tit. 8, § 220(b) (1983).

52. *Id.* § 220(a). This section represents a codification of the common law. See *Trans World Airlines, Inc. v. State ex rel. Porterie*, 54 Del. 582, 183 A.2d 174, 175 (1962); *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 13 A.2d 453, 455-56 (Super. Ct. 1940). In both of these cases the courts also said that since only record owners could inspect, the fact that a stockholder requesting inspection was merely a nominee acting for another was irrelevant.

has statutory inspection privileges.⁵³ The Delaware courts have closely followed the statute on this point, denying inspection privileges to nonrecord owners, and the statute itself makes no provision for the preservation of common law inspection rights of beneficial owners of stock.⁵⁴

The Delaware courts have also refused to look behind record ownership status and examine the acquisition of the stock upon which a suit for inspection is based. The Delaware Supreme Court has held that, in a section 220 suit, once record ownership has been established evidence concerning potential illegality or wrongdoing related to the acquisition of the stock becomes irrelevant and will not be considered.⁵⁵ In one section 220 action, a corporation involved in a takeover battle with the defendant corporation purchased stock in the defendant in order to gain a right of inspection. The corporation hoped to obtain information through inspection that would be of assistance in developing its takeover strategy. The court considered the aggressor corporation's actions to be irrelevant in the section 220 action since record ownership had been shown.⁵⁶

Delaware courts have addressed a few other considerations related to the record ownership requirement. The legal status of the defendant corporate entity can affect a stockholder's inspection rights under section 220; in one case the Delaware Supreme Court held that when a defendant corporation has been legally dissolved, stockholders of record entitled to section 220 rights by definition no longer exist.⁵⁷ One court has held that when a corpo-

53. In Delaware the stock ledger is the only evidence of stock ownership. DCA tit. 8, § 219(c) (1983).

54. In *State ex rel. Crowder v. Sperry Corp.*, 41 Del. 84, 15 A.2d 661 (Super. Ct. 1940), the court held that a stockholder who had placed his stock into a voting trust was a beneficial owner who was not entitled to inspection privileges. 15 A.2d at 664. More recently, in *Lenahan v. National Computer Analysts Corp.*, 310 A.2d 661 (Del. Ch. 1973), the court held that a beneficial owner who was also a director of the defendant corporation was not entitled to inspection rights under § 220. *Id.* at 662. Nevertheless, a beneficial owner of stock may, at least theoretically, sue for common law inspection privileges since § 220 by its terms does not eliminate common law inspection rights. See E. FOLK, *supra* note 24, § 220 comment 7 and discussion *infra* notes 189-91 and accompanying text.

55. *Western Air Lines, Inc. v. Kerkorian*, 254 A.2d 240, 242 (Del. 1969). In this case the court barred evidence concerning a possible violation of the Federal Aviation Act with respect to the stockholder's acquisition of stock in the defendant corporation. The court relied on its decision in *General Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968). 254 A.2d at 242. The court's reliance on *General Time* was erroneous, however, because *General Time* holds only that such evidence becomes irrelevant to the issue of purpose once a proper purpose has been shown, and does not consider the effect of such evidence on record ownership status under § 220. 240 A.2d at 756. It is axiomatic, however, that the law of *General Time* is whatever the Delaware Supreme Court in *Western Air Lines* says it is, and so *Western Air Lines* may be regarded as sound precedent. For a discussion of *General Time* in the context of the proper purpose requirement see *infra* note 86 and accompanying text.

56. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969).

57. *Willard v. Harrworth Corp.*, 267 A.2d 577, 579 (Del. 1970). In this case the existence of the defendant corporation had, prior to suit, been legally terminated pursuant to a reorganization agreement under which stockholders were to receive stock in a new corporate entity in exchange for their stock in the defendant. The plaintiff, who for some reason failed to trade in his stock during the time allowed, wanted to inspect the records of the defendant corporation to determine if the corporation had any cash that should be distributed to the plaintiff during the winding up of the defendant's affairs. The plaintiff's quest for an inspection was unsuccessful.

ration has redeemed all the shares of a stockholder, but the redemption is subsequently determined to have been invalid, the stockholder retains his status as a holder of record and so still has inspection rights.⁵⁸ Finally, one court has noted that section 220 makes no distinctions among record stockholders based on the class of stock held by them, and so a stockholder of record is entitled under section 220 to obtain a list of all stockholders and not just a list of those holding stock of the same class as his.⁵⁹

The Delaware statute imposes no minimum ownership requirements of any kind; therefore, for a relatively small investment one can gain access to valuable information.⁶⁰ This feature makes section 220 a particularly useful tool in the context of corporate takeover bids.⁶¹ This no-barrier policy has been reinforced by court holdings voiding corporate charter and bylaw provisions that impose minimum ownership requirements or other similar restrictions on stockholders for purposes of inspection of corporate records.⁶²

3. *MBCA.*

Like the Delaware statute, the MBCA grants the statutory right of inspection to a shareholder.⁶³ The MBCA defines the term "shareholder" as a record owner of shares or a beneficial owner of shares if a nominee certificate granting inspection rights is on file with the corporation, and thus allows at least some beneficial owners to have access to corporate records if a nominee certificate granting them that right has been filed.⁶⁴ Beneficial owners who are not protected by a nominee certificate may still be able to exercise common law inspection rights, since the MBCA does not displace any such rights that may exist.⁶⁵

The MBCA imposes no minimum ownership requirements upon a stockholder seeking to examine corporate records. The MBCA also makes it clear that stockholders' inspection rights created by the Act cannot be abolished or restricted in any way by provisions contained in a corporation's

58. See *State ex rel. Waldman v. Miller-Wohl Co.*, 42 Del. 73, 28 A.2d 148, 153 (Super. Ct. 1942).

59. See *Western Pac. Indus., Inc. v. Liggett & Myers, Inc.*, 310 A.2d 669, 671 (Del. Ch. 1973).

60. As a practical matter, however, in evaluating the purpose of a stockholder who seeks inspection of corporate records a court should consider both the size and the age of the stockholder's holdings. For discussion of the proper purpose requirement see *infra* notes 67-114 and accompanying text.

61. See *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969).

62. See *Loew's Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 81 (Del. Ch. 1968) (voiding 25%-of-stock minimum ownership requirement in articles of incorporation); see also *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 259 (1926) (en banc) (holding void certificate of incorporation provision giving company right to deny inspection); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. (1 Boyce) 379, 77 A. 16, 19 (1910) (holding void a bylaw vesting in directors absolute and final discretion to allow inspection); *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 172 (Super. Ct. 1931) (shareholder need not prove particular exigency to inspect).

63. See MBCA § 16.02(a), (b) (1985).

64. *Id.* § 1.40(22) & comment 6.

65. *Id.* § 16.02(e). See *infra* note 192 and accompanying text.

charter or bylaws.⁶⁶ Thus, like the Delaware statute, the MBCA is open to uses for which it was not intended.

B. *The Proper Purpose Requirement*

Beyond a doubt the centerpiece of the law of stockholders' inspection rights is the requirement that a stockholder have a proper purpose for making his inspection. By implementing this requirement the law seeks to strike a workable balance between the need of stockholders to police their investment and corporate management's need to conduct corporate affairs free from harassment or unnecessary interference. The proper purpose test is a simple one in the abstract, but its application has generated considerable litigation. Texas, Delaware, and the MBCA all employ the concept of proper purpose as the principal limitation on the right of stockholders to examine corporate records. The three statutes differ in this regard only in terms of degree and relative sophistication.

1. *Texas.*

Under Texas law a stockholder wishing to examine corporate records of any type must have a proper purpose for the inspection; this requirement is imposed under both article 2.44(B)⁶⁷ and article 2.44(D).⁶⁸ The proper purpose requirement is not a recent development; Texas common law prior to the enactment of the TBCA required a proper purpose for stockholder inspections.⁶⁹ No attempt is made in article 2.44 or elsewhere in the TBCA to define what constitutes a proper purpose, thus leaving that thorny matter to the courts.

Given the pivotal nature of the issue of proper purpose, allocation of the burden of proof is critical since the allocation can have a tremendous impact on the stockholder's chances of gaining access to corporate information. The language of article 2.44(B) is vague as to where the burden of proof lies, and no case has yet squarely considered the question. The general view among commentators is that once the stockholder has alleged a proper purpose under article 2.44(B), the corporation then has the burden of proving that purpose to be improper.⁷⁰ Article 2.44(D) does not suffer from the

66. MBCA § 16.02(d) (1985); see *infra* note 152 and accompanying text.

67. TBCA art. 2.44(B) (Vernon 1980) provides that "[a]ny person . . . shall have the right to examine, . . . for any proper purpose, . . . books and records of account, minutes, and record of shareholders"

68. *Id.* art. 2.44(D) provides:

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof of proper purpose by a beneficial or record holder of shares . . . to compel the production for examination by such holder of the books and records of account, minutes, and record of shareholders of a corporation.

For discussion of art. 2.44(D) and the common law right of inspection see *infra* notes 179-88 and accompanying text.

69. See, e.g., *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818 (Tex. Comm'n App. 1933, judgment adopted); *Guaranty Old Line Life Co. v. McCallum*, 97 S.W.2d 966, 967 (Tex. Civ. App.—Dallas 1936, no writ); *Roberts v. Munroe*, 193 S.W. 734, 736-37 (Tex. Civ. App.—Austin 1917, writ dismissed).

70. See 20 R. HAMILTON, *supra* note 14, § 804 (Texas Practice 1973 & Supp. 1984); Ham-

same lack of clarity; it clearly lodges the burden of proof with the stockholder.⁷¹

When a corporation, in resisting a stockholder's demand for inspection, alleges an improper purpose in its pleadings, to place the matter at issue successfully the corporation must also allege specific facts in support of the allegation.⁷² Once the issue of proper purpose has been joined, the corporation has the right to a jury trial on the issue.⁷³ The corporation may, however, waive this right.⁷⁴

Texas courts have had scant occasion to address the question of what constitutes a proper purpose, but some pre-TBCA decisions do exist. A desire to inform other stockholders of the inspecting stockholder's reasons for dissatisfaction with the management of the corporation is a proper purpose for obtaining a stockholder list.⁷⁵ Hostility of an inspecting stockholder toward corporate management is alone insufficient to place the stockholder in bad faith or render his purpose improper.⁷⁶

2. Delaware.

Delaware law on the subject of proper purpose is much more refined and sophisticated than Texas law because of Delaware's long-standing status as the leading American authority on corporate matters.⁷⁷ Section 220(b) provides that any stockholder inspection must be for a proper purpose,⁷⁸ and describes a proper purpose as one reasonably related to the stockholder's

ilton, *Corporations and Partnerships*, 36 Sw. L.J. 227, 249 (1982); Lebowitz, *supra* note 2, at 727; Sierk, *supra* note 10, at 25; Comment, *supra* note 4, at 76.

71. TBCA art. 2.44(D) (Vernon 1980). For this reason a stockholder may prefer to bring suit under art. 2.44(B) if at all possible. For discussion of the burden of proof under art. 2.44(D) see *infra* note 181 and accompanying text.

72. *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). The court stated:

If this were not required, a corporation that desired to defeat the right of its stockholders to inspect the books, could do so by alleging the "magic words" that the stockholder had "improper purposes for wanting to inspect the books."

Thus a corporation could obtain a jury trial on proper purpose, resulting in lengthy delays in the determination of the stockholder's rights to the inspection.

Mandamus would be effectively destroyed under such circumstances.

Id. at 809-10.

73. *Uvalde Rock Asphalt Co. v. Loughridge*, 425 S.W.2d 818, 820 (Tex. 1968); *Guaranty Old Line Life Co. v. McCallum*, 97 S.W.2d 966, 968 (Tex. Civ. App.—Dallas 1936, no writ); *Roberts v. Munroe*, 193 S.W. 734, 737 (Tex. Civ. App.—Austin 1917, writ dismissed).

74. *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 808-09 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.). In this case the court held that the defendant corporation waived its right to a jury trial by its failure to remit the required \$5.00 jury fee in a timely manner and by its failure to appear at a subsequent hearing.

75. See *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818 (Tex. Comm'n App. 1933, judgment adopted); *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 154 (Tex. Civ. App.—Amarillo 1930, writ ref'd); *Grayburg Oil Co. v. Jarratt*, 16 S.W.2d 319, 320 (Tex. Civ. App.—El Paso 1929, no writ).

76. See *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818 (Tex. Comm'n App. 1933, judgment adopted); *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 154 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

77. Delaware has been the state of incorporation of a large number of corporations. See Arshst, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1, 1 (1976).

78. DCA tit. 8, § 220(b) (1983) provides that "[a]ny stockholder . . . shall . . . have the

interest as a stockholder.⁷⁹ The enactment of the statute in 1967 had the effect of codifying the common law on this point.⁸⁰

Section 220(c) specifically allocates the burden of proof on the issue of proper purpose, and it makes the allocation dependent upon the type of inspection sought. When the stockholder is seeking to obtain a stockholder list, he is required only to allege a proper purpose; the corporation then bears the burden of proving the purpose to be improper.⁸¹ As a practical matter, therefore, the stockholder list is readily available to a record holder of stock.⁸² Obtaining access to other corporate records is not as easy, however, because under section 220(c) the stockholder seeking such an inspection has the burden of proving his purpose to be proper.⁸³ Regardless of where the burden of proof lies, mere allegations of proper or improper purpose are insufficient to place the matter at issue; the stockholder or corporation must allege specific facts in support.⁸⁴

The establishment of the stockholder's purpose as proper⁸⁵ has an important procedural effect in a section 220 lawsuit. The Delaware Supreme Court has ruled that once a court finds a stockholder's primary purpose to be proper, all secondary purposes or motives become irrelevant to the issue, and evidence of a secondary purpose will not be considered.⁸⁶ Thus, once a

right . . . to inspect for any proper purpose the corporation's stock ledger, a list of its stockholders, and its other books and records"

79. This definition appears to be calculated to prevent persons from making use of § 220 for reasons unrelated to corporate business, such as an attempt to coerce the corporation to act in conformance with the stockholder's personal political views.

80. See, e.g., *Trans World Airlines, Inc. v. State ex rel. Porterie*, 54 Del. 582, 183 A.2d 174, 176 (1962); *Insuranshares Corp. v. Kirchner*, 40 Del. 105, 5 A.2d 519, 521 (1939); *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773, 775 (1922); *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941).

81. DCA tit. 8, § 220(c) (1983).

82. *But see State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773, 779 (1922) (record owner of stock not allowed to obtain copy of stockholder list because his avowed purpose was to sell list to others; stockholder's purpose was improper).

83. DCA tit. 8, § 220(c) (1983).

84. See, e.g., *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 172 (Super. Ct. 1931); *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. 570, 101 A. 433, 436 (Super. Ct. 1917); *State ex rel. National Bank v. Jessup & Moore Paper Co.*, 27 Del. 248, 88 A. 449, 450 (Super. Ct. 1913).

85. Under Delaware law exclusive jurisdiction over stockholder inspection suits is vested in the Delaware Court of Chancery. DCA tit. 8, § 220(c) (1983). Since the court of chancery is an equity court, the parties have no right to a jury trial in matters coming before it. See *Park Oil, Inc. v. Getty Ref. & Mktg. Co.*, 407 A.2d 533, 535 (Del. 1979); *Pennzoil Co. v. Getty Oil Co.*, 473 A.2d 358, 360 (Del. Ch. 1984); see also 27 AM. JUR. 2D *Equity* § 238 (1966 & Supp. 1985) (equity court may choose to submit fact issues to jury). Thus a jury trial is not available in a § 220 suit.

86. See *General Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755 (Del. 1968). In this case the stockholder sought inspection for the purpose of soliciting proxies. The lower court held the purpose to be proper. The corporation continued to resist, however, on the ground that the stockholder was actually involved in an illegal conspiracy against the corporation. The court held that the stockholder was entitled to the inspection, stating that "[w]e think . . . that any further or secondary purpose in seeking the list is irrelevant. Once the status of a stockholder is established under § 220, he is entitled to the list if his primary purpose is [proper]." *Id.* at 756. The court has since reaffirmed its position on this question. See *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982); *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691, 692 (Del. 1972); *Western Air Lines, Inc. v. Kerkorian*, 254 A.2d

proper purpose has been established, evidence of illegal behavior or ulterior motive on the part of the stockholder or evidence that the stockholder is using section 220 as a weapon in a takeover struggle will not affect the stockholder's right to an inspection.⁸⁷ Also, once the stockholder has shown that he has a proper purpose, evidence that the stockholder could possibly acquire the same information through discovery in another lawsuit becomes irrelevant.⁸⁸ Furthermore, evidence that the stockholder's proxy materials, for the mailing of which he seeks to obtain a list of stockholders, have not been approved by the Securities Exchange Commission becomes irrelevant once a proper purpose has been shown.⁸⁹

The Delaware courts approach the issue of proper purpose on a case-by-case basis,⁹⁰ balancing the rights of the stockholder seeking the inspection against the rights of the corporation and its other stockholders.⁹¹ While surrounding circumstances are important, a proper purpose does not require the presence of some particular exigency that makes the inspection necessary.⁹² The purpose must, however, be bona fide.⁹³ Examples of proper purposes include: a desire to examine corporate records in order to place a value on shares of corporate stock;⁹⁴ a desire to gain information which would enable the stockholder to decide whether to sell his stock or to buy more;⁹⁵ a desire to investigate specific transactions that aroused suspicion concerning the behavior of corporate management;⁹⁶ a desire to conduct a

240, 241 (Del. 1969). The *General Time* rule has also been followed by lower courts. See *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 678 (Del. Ch. 1978); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976). In one case the chancery court expanded the rule, holding that *General Time* did not require proof that a stockholder's primary purpose was proper, and that once any proper purpose on the part of the stockholder was shown, evidence of any other purpose became irrelevant. See *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 858 (Del. Ch. 1969).

87. See *Western Air Lines, Inc. v. Kerkorian*, 254 A.2d 240, 241 (Del. 1969); *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969).

88. See *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941) (ongoing derivative action suit).

89. *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 353 (Del. Ch. 1981); *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969); *Loew's Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 81 (Del. Ch. 1968).

90. See *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *General Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976).

91. See *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982); *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 260 (1926) (en banc); *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. 570, 101 A. 433, 437 (Super. Ct. 1917).

92. *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 172 (Super. Ct. 1931); see also *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 352 (Del. Ch. 1981) (lack of imminence of annual meeting irrelevant to right of stockholder to inspect and copy stockholder list).

93. *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350, 352 (Del. Ch. 1981).

94. See, e.g., *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *State ex rel. Waldman v. Miller-Wohl Co.*, 42 Del. 73, 28 A.2d 148, 153, 156 (Super. Ct. 1942); *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 171-74 (Super. Ct. 1931).

95. See *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 173-74 (Super. Ct. 1931).

96. See *Nodana Petroleum Corp. v. State ex rel. Brennan*, 50 Del. 76, 123 A.2d 243, 246 (1956).

general investigation based on fears of mismanagement;⁹⁷ a desire on the part of a stockholder who is hostile to management to evaluate the overall condition of the corporation;⁹⁸ a desire to obtain the stockholder list so that other stockholders may be contacted regarding management improprieties and a possible change in the composition of the board of directors;⁹⁹ a desire to obtain the stockholder list so that other stockholders may be contacted regarding a derivative suit against corporate management;¹⁰⁰ a desire to obtain the stockholder list in order to offer to buy out other stockholders;¹⁰¹ a desire to obtain the stockholder list in order to solicit proxies;¹⁰² and a desire to obtain a stockholder list when the inspecting stockholder is attempting to take control of the defendant corporation.¹⁰³

Examples of improper purposes include: speculation or idle curiosity;¹⁰⁴ a desire to gain information with which to aid a competitor of the corporation;¹⁰⁵ a desire to obtain the stockholder list in order to sell the list to others;¹⁰⁶ a mere difference of opinion with management concerning a particular business transaction;¹⁰⁷ a desire to inspect which is rooted in personal hostility to management;¹⁰⁸ a desire to harass management;¹⁰⁹ and a desire to use inspection rights as leverage to force either the corporation or its other stockholders to buy out the stockholder seeking the inspection.¹¹⁰ One court, however, held that when the stockholder seeking inspection failed to attend stockholder meetings at which some of the requested information had been made available, failed to vote at stockholder meetings, and refused to accept management's tender of edited information as a substitute for an inspection, such behavior was not enough to place the stockholder in bad faith

97. See *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 679-80 (Del. Ch. 1978); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 211 (Del. Ch. 1976).

98. See *Henshaw v. American Cement Corp.*, 252 A.2d 125, 129 (Del. Ch. 1969).

99. See *Insuranshares Corp. v. Kirchner*, 40 Del. 105, 5 A.2d 519, 521 (1939); *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941); *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 13 A.2d 453, 456 (Super. Ct. 1940).

100. See *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941).

101. See *E.L. Bruce Co. v. State ex rel. Gilbert*, 51 Del. 252, 144 A.2d 533, 534 (1958); *Western Pac. Indus., Inc. v. Liggett & Myers, Inc.*, 310 A.2d 669, 671 (Del. Ch. 1973); *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969).

102. See *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691, 692 (Del. 1972); *Western Air Lines, Inc. v. Kerkorian*, 254 A.2d 240, 241 (Del. 1969); *General Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968).

103. See *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856-57 (Del. Ch. 1969).

104. See, e.g., *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *State ex rel. Waldman v. Miller-Wohl Co.*, 42 Del. 73, 28 A.2d 148, 153 (Super. Ct. 1942); *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941).

105. See *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. (1 Boyce) 379, 77 A. 16, 22 (1910).

106. See *State ex rel. Theile v. Cities Serv. Co.*, 31 Del. 514, 115 A. 773, 778-79 (1922).

107. See *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 174 (Super. Ct. 1931).

108. *Id.* at 173-74.

109. See, e.g., *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 679 (Del. Ch. 1978); *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. (6 Boyce) 570, 101 A. 433, 437 (Super. Ct. 1917).

110. See *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 679-80 (Del. Ch. 1978); *State ex rel. Linihan v. United Brokerage Co.*, 29 Del. (6 Boyce) 570, 101 A. 433, 436-37 (Super. Ct. 1917).

or render the stockholder's purpose improper.¹¹¹

3. *MBCA.*

The MBCA, like its Texas and Delaware counterparts, imposes the proper purpose requirement, but administers it in a unique manner. When a stockholder wishes to exercise his right under section 16.02(a) to obtain certain types of records directly related to his status as a stockholder, no showing of proper purpose is required since the stockholder's right to these records is absolute.¹¹² When the stockholder seeks access to other corporate records pursuant to section 16.02(b), however, section 16.02(c)(1) requires a showing of good faith and proper purpose.¹¹³ The MBCA makes no express provision concerning allocation of the burden of proof on this issue, but the language of section 16.02(c)(1) seems to indicate that the stockholder should bear the burden of proof.¹¹⁴

III. SECONDARY ISSUES

In addition to the two principal issues discussed above, other questions concerning the nature of the required written demand, the proper scope of a stockholder inspection, and attempts by corporations to restrict stockholder inspection rights have occasionally arisen under the inspection rights statutes. Questions have also arisen concerning privileges incidental to the right of inspection, such as the use of agents to assist in inspection, the timing of an inspection, and the copying of corporate records.

A. *The Written Demand Requirement*

Texas, Delaware, and the MBCA all require as a prerequisite to suit that a stockholder wishing to examine corporate records submit to the corporation a written demand that sets out the purpose of the desired inspection. This requirement is designed to give the corporation notice of the stockholder's intent to exercise his right and of his purpose for so doing, in order that the corporation may determine whether or not to contest the inspection. This demand/response system avoids the unnecessary waste of time and money by providing an opportunity for the stockholder and the corporation to come to an agreement concerning the inspection without going to court. Problems have arisen concerning the form of the demand and the degree of specificity required in order to convey notice of purpose properly.

111. See *State ex rel. National Bank v. Jessup & Moore Paper Co.*, 27 Del. (4 Boyce) 248, 88 A. 449, 451-53 (Super. Ct. 1913). In this case the stockholder, a bank, acquired its stock through default of a note on which the stock was pledged as collateral.

112. See MBCA § 16.02(a) (1985). For discussion of the operation of § 16.02(a) and § 16.01(e) see *supra* note 36 and accompanying text.

113. MBCA § 16.02(c)(1) (1985) provides that "[a] shareholder may inspect and copy the records described in subsection (b) only if: (1) his demand is made in good faith and for a proper purpose" The phrase "proper purpose" was deliberately chosen by the drafters of the MBCA due to its traditional and generally understood meaning. See *id.* § 16.02(c) comment.

114. See *id.* § 16.02(c)(1). The official comment sheds no light on this question.

1. Texas.

Under the terms of article 2.44(B) a stockholder wishing to examine corporate records must submit a written demand to the corporation stating the purpose of his inspection. The language of the statute indicates that satisfaction of this requirement is a prerequisite to bringing suit.¹¹⁵ Under Texas law prior to the enactment of the TBCA a written demand, though often employed, was not required.¹¹⁶ The courts have not yet dealt with issues concerning the contents of a demand; in order to be safe, the written demand should state the demanding stockholder's qualifications under article 2.44(B) and his purpose for inspection, and should specify the particular records sought in addition to making a general demand.¹¹⁷

2. Delaware.

Like Texas, Delaware requires that a stockholder seeking inspection submit to the corporation a written demand stating the purpose of the inspection.¹¹⁸ The Delaware statute goes further in that it requires the stockholder to make the demand under oath and direct the demand to the corporation at its registered office in Delaware or at its principal place of business.¹¹⁹ Section 220(c) requires the stockholder to make a written demand before bringing suit.¹²⁰

Unlike Texas, Delaware has developed a body of case law on the issue of what constitutes a demand specific enough to effectively give notice to the corporation of the stockholder's claim of right. The Delaware Supreme Court has laid down a general rule that the demand must state the stock-

115. TBCA art. 2.44(B) (Vernon 1980) provides that "[a]ny person . . . , upon written demand stating the purpose thereof, shall have the right to examine . . . relevant books and records of account" See *Yelverton v. Brown*, 412 S.W.2d 325, 330 (Tex. Civ. App.—Tyler 1967, no writ).

116. See *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 152 (Tex. Civ. App.—Amarillo 1930, writ ref'd). Under *Johnson Ranch* a written demand may not be required as a prerequisite to a suit for common law inspection rights under art. 2.44(D). For discussion of art. 2.44(D) see *infra* notes 179-88 and accompanying text.

117. 20 R. HAMILTON, *supra* note 14, § 804. For a suggested form of demand letter see *id.* § 807.

118. DCA tit. 8, § 220(b) (1983) provides that "[a]ny stockholder . . . shall, upon written demand . . . stating the purpose thereof, have the right . . . to inspect . . . the corporation's . . . books and records"

119. *Id.* One court has held that mere technical defects will not render a demand insufficient. *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674 (Del. Ch. 1978). In *Skouras* the stockholder submitted a sworn general demand and an unsworn letter detailing the purpose of the inspection. The court found the failure to swear to the letter to be a mere technical defect and therefore not fatal. *Id.* at 677.

120. DCA tit. 8, § 220(c) (1983) states:

If the corporation . . . refuses to permit an inspection sought by a stockholder . . . pursuant to subsection (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection.

Note that the corporation is given five business days to respond to the demand, and that corporate inaction during that five-day period is interpreted as a refusal of the request. In addition, to succeed in a suit to inspect records other than the stockholder list, the stockholder must prove that he has made a proper demand. *Id.*

holder's purpose with enough specificity to enable the corporation and the courts to evaluate its propriety.¹²¹ In applying this rule the courts will read the demand in light of the circumstances and events leading up to its submission; when those circumstances and events together with the contents of the demand are enough to have fully informed the corporation as to the stockholder's purpose, the demand will be held to be sufficiently specific.¹²²

3. MBCA.

Like its Texas and Delaware counterparts the MBCA requires the submission of a written demand by the stockholder; however, requirements concerning the contents of that demand vary according to the types of records sought. When the stockholder seeks, under section 16.02(a), to obtain certain documents directly related to his interest as a stockholder, he need only submit a formal demand for those records; the stockholder does not need to state his purpose for the inspection since his right to those documents is absolute.¹²³ When, however, the stockholder seeks to inspect other corporate records under section 16.02(b), the demand, under section 16.02(c), must set out the stockholder's purpose with reasonable particularity and also must specify the records the stockholder desires to examine.¹²⁴ The MBCA does not require that the demand be under oath, be in any particular form, or be directed to a specific place.¹²⁵

121. *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 260 A.2d 428, 429 (Del. 1969). The stockholder's demand stated: "The purpose of this request is to enable the B.F. Goodrich Company to communicate with the other stockholders of your company with reference to a special meeting of the stockholders of your company." *Id.* at 428. The court held this statement to be insufficient because it did not say why the stockholder desired to communicate with other stockholders, and so the propriety of the stockholder's purpose could not be determined from the statement. *Id.* at 429. One dissenting judge would have held the demand to be specific enough. *Id.*

122. See *Weisman v. Western Pac. Indus., Inc.*, 334 A.2d 267, 269 (Del. Ch. 1975) (demand insufficient; no surrounding circumstances existed to support an "expanded reading"); see also *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691, 692 (Del. 1972) (demand sufficient when stated purpose is to solicit proxies); *Western Air Lines, Inc. v. Kerkorian*, 254 A.2d 240, 241 (Del. 1969) (same); *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 678 (Del. Ch. 1978) (demand sufficient when contained in part in sworn demand and in part in letter); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 210 (Del. Ch. 1976) (demand sufficient when specified categories of documents included); *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 856 (Del. Ch. 1969) (demand sufficient when purpose to solicit offers to exchange stock in one corporation for stock in another). These cases are consistent with the earlier supreme court decision in *Nodana Petroleum Corp. v. State ex rel. Brennan*, 50 Del. 76, 123 A.2d 243, 246 (1956). In *Nodana* the court held a demand to be sufficient in light of a letter from the stockholder to the corporation several days after the stockholder sent the demand. The letter detailed the reasons for the inspection.

123. MBCA § 16.02(a) (1985). For discussion of the operation of § 16.02(a) and § 16.01(e) see *supra* note 36 and accompanying text. Section 16.02(a) does not require the stockholder to have a proper purpose. For discussion of the proper purpose requirement see *supra* notes 112-14 and accompanying text.

124. See MBCA § 16.02(c)(2) (1985).

125. Section 16.02(a) and § 16.02(b) both require that the stockholder submit a demand at least five days before the date of the desired inspection, thus giving the corporation time to respond. *Id.* § 16.02(a), (b). A corporation's failure to respond within a reasonable time will be interpreted as refusal. *Id.* § 16.04(b).

B. Scope of the Examination

Once a stockholder has secured permission, or a court order, to make an inspection of corporate records, a question then arises concerning how broad an examination the stockholder is entitled to make.

1. Texas.

The language of article 2.44(B) limits the scope of any inspection thereunder to relevant records, including books and records of account, corporate minutes, and lists of shareholders.¹²⁶ Thus, while all forms of corporate records are potentially subject to examination,¹²⁷ only those records that are relevant to the stockholder's purpose may actually be inspected.¹²⁸ While no case authority directly on point exists, one court has gone so far as to allow a stockholder in a corporation to examine the records of that corporation's wholly owned subsidiary.¹²⁹

2. Delaware.

Section 220 is silent concerning the scope of a stockholder's examination of corporate records. Delaware courts follow the rule that a stockholder may only examine those records that are essential to his purpose,¹³⁰ thus, Delaware law resembles Texas law on this point. Corporate management may not unilaterally determine which records meet the essentiality test,¹³¹ but under section 220(c) the courts may limit the scope of the examination

126. TBCA art. 2.44(B) (Vernon 1980).

127. See *supra* note 14.

128. The word "relevant" was added to art. 2.44(B) by amendment in 1973; this addition was designed to cut down the expansive statements in *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815 (Tex. Comm'n App. 1933, judgment adopted), which seemed to indicate judicial tolerance of stockholder "fishing expeditions." See Lebowitz, *supra* note 2, at 729.

Article 2.44(D) does not by its terms limit inspection thereunder to "relevant" records. For discussion of art. 2.44(D) see *infra* notes 179-88 and accompanying text.

129. *Williams v. Freeport Sulphur Co.*, 40 S.W.2d 817 (Tex. Civ. App.—Galveston 1930, no writ). In *Williams* a Texas corporation was wholly owned by a holding company organized under Delaware law. Stockholders in the holding company sought to examine the books of the Texas subsidiary, but the holding company refused. The court first held that the holding company, through its subsidiary, was doing business in Texas and was therefore subject to Texas law. *Id.* at 824-25. The court then held that the denial of inspection privileges to the stockholders violated the law, and that inspection rights could not be denied on the fictional grounds that the Texas subsidiary was a separate and distinct legal entity. *Id.* at 825. The court stated:

The authorities fully sustain the proposition that courts should disregard the legal fiction of corporate entity in any case in which the recognition of such entity would protect fraud or a violation of public or private obligations, or when one corporation is organized, exists, and operates as a mere instrumentality of another.

Id. The court emphasized the fact that the subsidiary was wholly owned and its affairs were dominated by the parent company, and upheld the grant of mandamus. *Id.*

130. See, e.g., *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 210-11 (Del. Ch. 1976); *State ex rel. Waldman v. Miller-Wohl Co.*, 42 Del. 73, 28 A.2d 148, 156-57 (Super. Ct. 1942).

131. See *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 210-11 (Del. Ch. 1976).

as they see fit.¹³² The issue of what records are essential to a stockholder's purpose is a question of fact, and the findings of a trial court on this issue will not be overturned on appeal unless they are clearly incorrect.¹³³

A survey of the cases reveals several other points concerning the scope of a stockholder's inspection. In an appropriate case the equitable doctrine of laches may operate to limit the scope of an inspection under section 220.¹³⁴ A stockholder seeking to obtain a stockholder list is entitled to a list of all stockholders and is not limited to just a list of those holding stock of the same class as that held by the inspecting stockholder.¹³⁵ An inspecting stockholder is also entitled to the same stockholder information as is available to the defendant corporation.¹³⁶ Finally, when one corporation controls another corporation, a stockholder of the parent corporation may in some cases be allowed access to the records of the subsidiary.¹³⁷

132. DCA tit. 8, § 220(c) (1983); see *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793-94 (Del. 1982); *Henshaw v. American Cement Corp.*, 252 A.2d 125, 129-30 (Del. Ch. 1969).

133. *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 793 (Del. 1982).

134. See *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674 (Del. Ch. 1978). In this case the stockholder seeking inspection had been a director of the family-owned-and-operated defendant corporation until 1967. During the period of time in which the stockholder served as a director he had been suspicious of management behavior but had never investigated. His suit for inspection, however, was based on these same fears of mismanagement and self-dealing. The court held that since the stockholder, while serving as a director, had had ample opportunity, as well as a duty, to investigate his fears but failed to do so, the equitable doctrine of laches would operate to bar him from examining records of any corporate transactions occurring at any time prior to or during 1967. *Id.* at 682.

135. See *Western Pac. Indus., Inc. v. Liggett & Myers, Inc.*, 310 A.2d 669, 671 (Del. Ch. 1973).

136. *Hatleigh Corp. v. Lane Bryant, Inc.*, 428 A.2d 350 (Del. Ch. 1981). In this case according to the defendant corporation's records a number of its shares were held in "street name" by a large central certificate depository that was three times removed from the actual beneficial owners of the stock. The plaintiff, who wished to send out proxy materials, discovered that the corporation had the right to acquire from the depository a list breaking down the depository's holdings and indicating the individual brokerage houses for whom the stock was held. These brokerage houses in turn could, if contacted by the plaintiff, lead him to the actual beneficial owners of the stock to whom he desired to deliver his proxy materials. Thus, the plaintiff sued for inspection and argued that the corporation should be required to obtain and give to him the ownership breakdown list. The court agreed, holding that under § 220 whatever stockholder information is available to a corporation must also be made available to an inspecting stockholder who requests it. *Id.* at 354.

137. This question was first considered in the early case of *Martin v. D.B. Martin Co.*, 10 Del. Ch. 211, 88 A. 612 (1913), in which the stockholder sought the appointment of a receiver for the defendant holding company on grounds that the company was being grossly mismanaged and that management was wasting and misappropriating corporate assets. In the discovery phase of the suit the stockholder sought to have the records not only of the defendant corporation but also of the several allied or subsidiary corporations controlled by the defendant corporation produced for his examination. The defendant corporation contested on grounds that it could not compel the other corporations to produce their records since each was a separate legal entity. The court first noted that in cases where the fiction of a separate corporate entity is used to promote fraud, the legal existence of the corporate entity may be disregarded, and then stated that this doctrine of "piercing the corporate veil" was generally available to wronged stockholders. *Id.* at 614. The court then held that on the set of facts before it the stockholder could pierce the veil since the subsidiary corporations were effectively controlled, financed, and operated as one organization by the defendant holding company. *Id.* at 615-16. Thus the stockholder was allowed to discover the records of the subsidiary corporations as well as those of the parent.

The next case to consider the issue was *State ex rel. Rogers v. Sherman Oil Co.*, 31 Del. 570,

3. *MBCA.*

The MBCA approaches the scope of inspection issue in a manner parallel to its approach toward the written demand and proper purpose requirements. Inspection, under section 16.02(a), of certain records directly related to the interest of a stockholder in the corporation is limited to records specifically listed in section 16.01(e).¹³⁸ When the stockholder seeks inspection of other corporate records under section 16.02(b), section 16.02(c)(3) limits the scope of that inspection to records directly related to the inspecting stockholder's purpose.¹³⁹

C. Attempts to Restrict Inspection Rights

Occasionally corporate management or corporate organizers will attempt to restrict stockholder access to corporate records even in cases when all statutory requirements have been fulfilled. These attempts may take the form of restrictive corporate charter or bylaw provisions, or other restrictive corporate action. Perhaps the truest measure of the worth of stockholder inspection rights in any jurisdiction is the degree of tolerance that jurisdiction has shown regarding such attempted restrictions.

1. Texas.

Article 2.44 by its terms contemplates no restrictions on stockholders' in-

117 A. 122 (Super. Ct. 1922). In *Rogers* the stockholder sought to examine the records of both the defendant corporation and its subsidiary for the purpose of determining the value of his stock in the defendant. The defendant corporation was organized under Delaware law, and the subsidiary was an Oklahoma corporation. The defendant corporation owned 94% of the stock of the subsidiary. The defendant corporation contended that it did not have the power to produce the records of its subsidiary since that company was a separate and distinct legal entity. The court stated that the focus should be on the legal power of the defendant corporation to compel its subsidiary to produce its records rather than on the practical possibility that it could persuade the subsidiary to accede to the stockholder's request. *Id.* at 125. The court held that on the facts before it the defendant corporation did not have such authority and so could not be ordered to produce the records of the subsidiary. *Id.* The court specifically noted that the defendant corporation alleged that it had acquired the subsidiary corporation as an investment and so had little to do with its control, financing, or operations. *Id.* Taking these allegations as true, as required under the old mandamus procedure, the court distinguished the *Martin* case on the ground that in *Rogers* the corporations maintained their separate existences and were not operated as one organization. *Id.* at 126.

The only other case considering this particular problem is *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674 (Del. Ch. 1978), a suit for inspection under § 220 in which the stockholder sought access to the records of the defendant corporation and its affiliate corporations, which were all owned and controlled by the defendant and the same family members. The corporations all maintained separate books and each had its own board of directors. The corporations, however, all used the same accounting firm, and a close relationship clearly existed between the corporations with regard to management and policymaking. After discussing both *Martin* and *Rogers*, the court held that on these facts *Rogers* controlled, stating that "[a]bsent a showing of fraud or that a subsidiary is in fact the mere alter ego of the parent, a common central management alone is not a proper basis for disregarding separate corporate existence." *Id.* at 681. Thus, the stockholder's request for an inspection order was denied.

138. For discussion of the operation of § 16.02(a) and § 16.01(e) see *supra* note 36 and accompanying text.

139. MBCA § 16.02(c)(3) (1985).

spection rights other than those contained in article 2.44(B),¹⁴⁰ and Texas courts have been hostile to the creation of any further barriers. Restrictions imposed by a corporation that go beyond the terms of the statute are probably not valid.¹⁴¹ Some courts have held that audited financial information prepared at the request of corporate management and distributed by it to the stockholders is no substitute for the stockholders' legal right to conduct their own examination of corporate records,¹⁴² one court stating that corporate officers cannot barter away the stockholders' statutory inspection right.¹⁴³

2. Delaware.

Delaware law regarding unilaterally imposed restrictions on the inspection right is more biased toward corporate management than is that of Texas, although Delaware law does provide stockholders with at least a minimum level of protection. The fact that the board of directors is charged by law with the management of corporate affairs does not prevent a stockholder from using his statutory right of inspection to police the directors' actions.¹⁴⁴ Likewise, the board does not have discretion in the exercise of its business judgment to deny a stockholder's request for an inspection,¹⁴⁵ although management does have discretion to permit a stockholder inspection that would otherwise be improper.¹⁴⁶ Since section 220 contains no minimum

140. For discussion of art. 2.44(B) stock ownership restrictions see *supra* notes 44-50 and accompanying text.

141. See *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150 (Tex. Civ. App.—Amarillo 1930, writ ref'd). This case was decided under the predecessor to art. 2.44, which contained even less restrictive language than the current statute. In *Johnson Ranch* the corporation granted the stockholders' request to audit corporate records subject to conditions concerning the extent of the audit, who would perform the audit, how and when the audit would be conducted, who would bear the expense of the audit, and the posting of a bond by the stockholders to cover any losses of corporate records during the audit. The stockholders, finding some of the conditions to be unacceptable, brought suit for mandamus. The court held that the conditions in question went beyond the terms of the statute and could not be enforced, since the stockholders' right of inspection granted by the statute was absolute. *Id.* at 152-53. This is a sound decision and should still be viable under art. 2.44.

142. *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 819 (Tex. Comm'n App. 1933, judgment adopted); *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 153 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

143. *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815 (Tex. Comm'n App. 1933, judgment adopted). The court stated:

The right given the stockholders by the statute is an absolute one. They cannot be required to accept a substitute in the way of financial statements and auditor's reports which may be believed by the corporation's officers to be just as good as the statutory right of examination. The right thus granted by the statute cannot be bartered away by the officers of the corporation.

Id. at 819.

144. *State ex rel. Waldman v. Miller-Wohl Co.*, 42 Del. 73, 28 A.2d 148, 153 (Super. Ct. 1942).

145. *Insuranshares Corp. v. Kirchner*, 40 Del. 105, 5 A.2d 519, 521 (1939).

146. *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, 17 Del. Ch. 325, 154 A. 457, 460-61 (1931). In this case one group of stockholders sought to make use of a stockholder derivative action to overturn the decision of the corporation's board of directors allowing another group of stockholders to conduct an examination of corporate records even though the inspection was for an allegedly improper purpose. The court decided that the board could, in the exercise of its business judgment, allow such an inspection, and denied the requested injunctive relief. *Id.*

ownership requirements, a corporation may not impose such conditions on the inspection rights of its stockholders through provisions of its charter or bylaws.¹⁴⁷ In addition, when a stockholder seeks a stockholder list in order to mail out proxy materials a corporation may not successfully resist the stockholder's request for the list by showing that the corporation has already sent the stockholder's proxy materials to all of the stockholders.¹⁴⁸

Delaware courts, however, may refuse to permit a stockholder inspection if the corporation can show that allowing the inspection would be adverse to the corporation's interests.¹⁴⁹ The courts have also been tolerant regarding the tender of information by management to a stockholder in lieu of allowing the stockholder to conduct his own examination of corporate records. Although information supplied to a stockholder by management does not substitute for the stockholder's right of inspection,¹⁵⁰ when the corporation can show that it has supplied the stockholder with all the information relevant to his request for inspection, the court may refuse to permit the examination.¹⁵¹ This rule in effect allows management to determine unilaterally what records a stockholder may see, and then argue in court that the stockholder has received everything to which he is entitled. Thus management can arbitrarily inject yet another issue into a section 220 lawsuit and create an extra barrier for the stockholder to overcome.

3. *MBCA.*

The MBCA, in section 16.02(d), specifically provides that the statutory right of the stockholders to inspect corporate records cannot be limited or abolished by provisions placed in a corporation's charter or bylaws.¹⁵² This MBCA provision does not prevent the use of the articles of incorporation or bylaws to modify other provisions of the MBCA.¹⁵³

147. *Loew's Theatres, Inc. v. Commercial Credit Co.*, 243 A.2d 78, 81 (Del. Ch. 1968) (holding void 25%-of-outstanding-stock minimum ownership requirement for inspection rights contained in certificate of incorporation); *see also State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 259-60 (1926) (en banc) (holding void certificate of incorporation provision granting stockholders' review only at board's discretion); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. (1 Boyce) 379, 77 A. 16, 20 (1910) (same); *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 173 (Super. Ct. 1931) (same).

148. *See Kerkorian v. Western Air Lines, Inc.*, 253 A.2d 221, 225 (Del. Ch. 1969), *aff'd*, 254 A.2d 240 (Del. 1969).

149. *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *Skouras v. Admiralty Enter., Inc.*, 386 A.2d 674, 678 (Del. Ch. 1978); *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976). Note that it is the interests of the corporation, and not the interests of its management, which are protected.

150. *See State ex rel. National Bank v. Jessup & Moore Paper Co.*, 27 Del. (4 Boyce) 248, 88 A. 449, 452-53 (Super. Ct. 1913).

151. *CM&M Group, Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982); *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 260 (1926) (en banc); *Mercantile Trading Co. v. Rosenbaum Grain Corp.*, 17 Del. Ch. 325, 154 A. 457, 460 (1931); *State ex rel. Miller v. Loft, Inc.*, 34 Del. 538, 156 A. 170, 172 (Super. Ct. 1931).

152. MBCA § 16.02(d) (1985) provides that "[t]he right of inspection granted by this section may not be abolished or limited by a corporation's articles of incorporation or bylaws."

153. *Id.* § 16.02 comment 4.

D. *The Use of Agents*

In the context of modern business the right to inspect corporate records would be useless without the attendant right to have the benefit of expert assistance in conducting the examination. Due to the complexity and sheer volume of financial data contained in corporate records, the assistance of accountants, attorneys, and other agents is often invaluable to the inspecting stockholder. Texas, Delaware, and the MBCA all permit the use of agents by an inspecting stockholder to assist him in conducting his examination.

1. *Texas.*

Article 2.44(B) provides that an inspecting stockholder may conduct his examination with the assistance of an agent, accountant, or attorney.¹⁵⁴ In this respect article 2.44(B) codified the common law existing at the time of its enactment.¹⁵⁵

2. *Delaware.*

Delaware's section 220(b) provides that a stockholder may conduct his inspection of corporate records in person or through an attorney or other agent.¹⁵⁶ The statute requires, however, that when an agent is to be employed in an inspection a written authorization of agency be submitted to the corporation along with the written demand for inspection.¹⁵⁷ In some cases the court may restrict the stockholder's choice of agents when such a restriction is necessary to protect the interests of the corporation.¹⁵⁸

3. *MBCA.*

The MBCA in section 16.03(a) provides that the stockholder's agent has the same inspection and copying rights as the inspecting stockholder himself.¹⁵⁹ The MBCA thus follows other statutes, including those of both

154. TBCA art. 2.44(B) (Vernon 1980).

155. See *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 152-53 (Tex. Civ. App.—Amarillo 1930, writ ref'd). This decision insures that stockholders seeking inspection via the common law right preserved by article 2.44(D) will also be able to make use of agents. For discussion of article 2.44(D) and the common law right of inspection see *infra* notes 179-88 and accompanying text.

156. DCA tit. 8, § 220(b) (1983).

157. *Id.* provides:

In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder.

In *Henshaw v. American Cement Corp.*, 252 A.2d 125 (Del. Ch. 1969), the court held that this language required a power of attorney only where the agent himself, acting in his capacity as the agent of the stockholder, made demand upon the corporation for inspection. *Id.* at 127-28. The statutory provision allowing the use of agents codified the common law in existence at the time of its enactment. See *State ex rel. Bloch v. Sentry Safety Control Corp.*, 41 Del. 480, 24 A.2d 587, 590 (Super. Ct. 1942).

158. See *Henshaw v. American Cement Corp.*, 252 A.2d 125, 130 (Del. Ch. 1969) (court barred the inspecting stockholder from selecting as his agents persons involved in pending litigation against the corporation).

159. MBCA § 16.03(a) (1985).

Texas and Delaware, in allowing inspecting stockholders to make use of agents.¹⁶⁰

E. *The Timing of the Inspection*

After a stockholder receives permission or a court order to make an inspection of corporate records, issues arise concerning when the stockholder may conduct the inspection and whether the stockholder must conduct the inspection continuously until its conclusion.

1. *Texas.*

Texas statutory law provides only that a stockholder shall conduct the inspection of corporate records at a reasonable time or times.¹⁶¹ Case law adds that a stockholder's inspection should be conducted in a manner calculated not to interfere with the business of the corporation.¹⁶² The inspection does not have to take place within a single day or be continuous in order to be reasonable.¹⁶³

2. *Delaware.*

The Delaware statute provides that a stockholder's examination of corporate records is to take place during normal business hours¹⁶⁴ and gives the courts broad discretion to limit the inspection.¹⁶⁵ The courts have held that an inspection must be conducted at a reasonable time so as not to unreasonably interfere with corporate business.¹⁶⁶ In addition, the Delaware Supreme Court has held that when a stockholder seeks an inspection for the purpose of placing a value on his stock, the stockholder may be entitled to periodically update his information until the need for such information has passed.¹⁶⁷

160. *Id.* § 16.03 comment.

161. TBCA art. 2.44(B) (Vernon 1980).

162. *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 153 (Tex. Civ. App.—Amarillo 1930, writ ref'd).

163. In *Smith v. Trumbull Farmers Gin Co.*, 89 S.W.2d 829 (Tex. Civ. App.—Waco 1936, no writ), the inspecting stockholder examined the corporation's books over three days, locked the books in a desk in the corporation's office and left. After seven days passed, the company's manager broke the lock on the desk and retrieved the books, which had been partially destroyed by rats during the period of storage. When the stockholder returned the corporation refused further access to the corporate books. The stockholder brought suit for mandamus. The court held that although a stockholder's right of inspection is limited to reasonable times the right is not limited to any one occasion. *Id.* at 830-31. The court remanded the matter for retrial. *Id.*; see also *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 153 (Tex. Civ. App.—Amarillo 1930, writ ref'd) (lower court's requirement that stockholders continuously conduct inspection until finished more than law justifies).

164. DCA tit. 8, § 220(b) (1983).

165. *Id.* § 220(c).

166. See *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 260 (1926) (en banc); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. (1 Boyce) 379, 77 A. 16, 19 (1910); *State ex rel. Rogers v. Sherman Oil Co.*, 31 Del. 570, 117 A. 122, 125 (Super. Ct. 1922).

167. See *CM&M Group, Inc., v. Carroll*, 453 A.2d 788, 794 (Del. 1982).

3. *MBCA.*

The MBCA provides that a stockholder may conduct his examination of corporate records during regular business hours.¹⁶⁸ This provision is designed to equitably protect both corporations and inspecting stockholders by insuring that corporations will not be required to open their principal offices outside normal business hours and that stockholders will nevertheless have adequate opportunity to conduct an inspection.¹⁶⁹

F. Copying of Records

A stockholder, or the agent of a stockholder, who is conducting an examination of corporate records often desires to make copies of or extracts from the records he inspects. By means of copies of or extracts from corporate records the stockholder or his agent can conduct a full and detailed examination of the records at a more leisurely pace and inspect the records without time pressure. Further, copies or extracts provide the inspecting stockholder with a permanent record of corporate transactions should any questions later arise.

1. *Texas.*

The terms of article 2.44(B) expressly allow an inspecting stockholder to make "extracts" from the corporate records he examines.¹⁷⁰ The term "extracts" is vague, but should be interpreted to include copies. No litigation on this provision of the Texas statute has been reported to date.

2. *Delaware.*

In Delaware the right of an inspecting stockholder to make copies of or extracts from the records he examines has long been recognized.¹⁷¹ Section 220(b) now provides for the making of copies or extracts,¹⁷² and section 220(c) gives the courts authority to order that copies be made when circumstances warrant.¹⁷³

168. See MBCA § 16.02(a), (b) (1985). Note, however, that the location at which the inspection may take place differs depending on the type of records the stockholder wishes to inspect. If the stockholder seeks, under § 16.02(a) and § 16.01(e), to inspect records that are directly related to his interest as a stockholder, the inspection may occur at the corporation's principal office. MBCA § 16.02(a) (1985). For discussion of the operation of § 16.02(a) and § 16.01(e) see *supra* note 36 and accompanying text. If the stockholder seeks other corporate records under § 16.02(b), the corporation may specify a reasonable location at which the examination will take place. MBCA § 16.02(b) (1985).

169. Cf. *supra* note 161 and accompanying text (Texas requires inspection at reasonable times) and note 164 and accompanying text (Delaware allows examination during normal business hours).

170. TBCA art. 2.44(B) (Vernon 1980).

171. See *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. (1 Boyce) 379, 77 A. 16, 19 (1910); *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 13 A.2d 453, 454 (Super. Ct. 1940); *State ex rel. Rogers v. Sherman Oil Co.*, 31 Del. 570, 117 A. 122, 126 (Super. Ct. 1922).

172. DCA tit. 8, § 220(b) (1983).

173. *Id.* § 220(c).

3. MBCA.

The MBCA is more detailed than either its Texas or Delaware counterpart concerning the copying of corporate records by an inspecting stockholder. In an inspection under either section 16.02(a) or section 16.02(b) the stockholder has the right to make copies of the records he examines,¹⁷⁴ and section 16.03(b) expressly provides that the right to make copies includes the right to make use of modern copying technologies.¹⁷⁵ The corporation has the option of using its own facilities to make the copies requested by the stockholder and charging him a reasonable fee for the costs of the copies; this fee may not exceed the estimated costs of copying.¹⁷⁶ Additionally, when the stockholder seeks to inspect the stockholder list, the corporation may comply by simply providing the stockholder with a copy of a stockholder list compiled on or after the date of the request.¹⁷⁷ The MBCA also gives courts the authority to order copying where appropriate.¹⁷⁸

IV. COMMON LAW RIGHTS OF INSPECTION

In view of the enactment of inspection rights statutes such as the three considered in this Article, the continuing vitality of common law rights of inspection has in some instances come into question. Both the Texas statute and the MBCA specifically provide for retention of the common law right. The Delaware statute, however, does not speak to this issue.

A. Texas

Article 2.44(D) expressly provides for the retention of any common law right of a stockholder to inspect corporate records.¹⁷⁹ This statute by its

174. MBCA § 16.02(a), (b) (1985).

175. *Id.* § 16.03(b) provides: "The right to copy records under section 16.02 includes, if reasonable, the right to receive copies made by photographic, xerographic, or other means."

176. *Id.* § 16.03(c) provides: "The corporation may impose a reasonable charge, covering the costs of labor and material, for copies of any documents provided to the shareholder. The charge may not exceed the estimated cost of production or reproduction of the records." This provision is sensible, but dangerous in that it gives corporate management the opportunity to discourage stockholder inspections by insisting on the use of corporate facilities for copying and intentionally padding its estimate of the costs so that the stockholder has to pay a large fee. While the statute seeks to avoid this problem by keying the amount of the charge to actual cost and subjecting the charge to the test of reasonableness, management may still be able to force the stockholder to go back to the court for protection, thus wasting more time and incurring more expense.

177. *Id.* § 16.03(d) provides: "The corporation may comply with a shareholder's demand to inspect the record of shareholders under section 16.02(b)(3) by providing him with a list of its shareholders that was compiled no earlier than the date of the shareholder's demand."

178. Under § 16.04(a) the court has power to enter a summary order for inspection and copying of certain records at corporate expense, and under § 16.04(b) the court may order that copies be made of records to which the stockholder is entitled. *See id.* § 16.04(a), (b). If the court orders inspection and copying of records, the court may also impose reasonable restrictions on the stockholder's use or distribution of those copies. *See id.* § 16.04(d). For the text of § 16.04(d) see *supra* note 41.

179. TBCA art. 2.44(D) (Vernon 1980) provides:

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof of proper purpose by a beneficial or record holder of shares, irrespective of the period of time during which such holder shall have

terms seems to gut article 2.44(B) since stockholders who cannot qualify for inspection privileges thereunder may nevertheless be able, under article 2.44(D), to gain access to corporate records.¹⁸⁰ Article 2.44(D), however, is actually a tougher provision than article 2.44(B) since article 2.44(D) places the burden of proof regarding proper purpose on the stockholder rather than on the corporation.¹⁸¹ Another disadvantage of article 2.44(D) is that a stockholder suing thereunder may not be able to make use of the penalty provisions of article 2.44(C) to recoup the costs of enforcing his rights in the courts.¹⁸² Article 2.44(D) does not by its terms require the submission of a written demand,¹⁸³ nor does it limit the scope of a stockholder inspection.¹⁸⁴ The same rules as under article 2.44(B), however, should apply regarding use of agents,¹⁸⁵ timing of the inspection,¹⁸⁶ the making of copies,¹⁸⁷ and attempts by corporate management to restrict inspection rights.¹⁸⁸

B. Delaware

Section 220 makes no provision for the retention of common law rights of

been a beneficial or record holder and irrespective of the number of shares held by him, to compel the production for examination by such holder of the books and records of account, minutes, and record of shareholders of a corporation.

180. One court has noted that stockholders who do not qualify for inspection under art. 2.44(B) may make use of art. 2.44(D). *Texas Infra-Red Radiant Co. v. Erwin*, 397 S.W.2d 491, 493 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.). For discussion of *Texas Infra-Red* see *supra* note 47.

181. TBCA art. 2.44(D) (Vernon 1980); *Texas Infra-Red Radiant Co. v. Erwin*, 397 S.W.2d 491, 493 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.). For discussion of the burden of proof under art. 2.44(B) see *supra* notes 70-71 and accompanying text.

182. One commentator believes that only a stockholder who qualifies for the art. 2.44(B) statutory right may make use of the art. 2.44(C) statutory penalty and that the sole remedy for other stockholders is mandamus. See 20 R. HAMILTON, *supra* note 14, § 804 (Texas Practice 1973 & Supp. 1984); Hamilton, *supra* note 70, at 249. *Fort Worth KJIM, Inc. v. Walke*, 604 S.W.2d 362 (Tex. Civ. App.—Fort Worth 1980, no writ), lends support to this position. In *KJIM* the corporation appealed the trial court's award of attorneys' fees under art. 2.44(C), contending that the stockholder was a beneficial owner of stock who could not qualify under art. 2.44(B) and so could not make use of art. 2.44(C). The court, stretching a point, held that the stockholder did qualify under art. 2.44(B) and so was entitled to the fee award under art. 2.44(C). *Id.* at 363. The court's holding that the stockholder qualified under art. 2.44(B) was incorrect. See *supra* note 47.

183. See *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 152 (Tex. Civ. App.—Amarillo 1930, writ ref'd). For discussion of written demand requirements see *supra* notes 115-17 and accompanying text.

184. Article 2.44(D) contemplates a right of inspection based on the common law, and the common law shows a tolerance for broad examinations of corporate records. See *Moore v. Rock Creek Oil Corp.*, 59 S.W.2d 815, 818-19 (Tex. Comm'n App. 1933, judgment adopted); *Johnson Ranch Royalty Co. v. Hickey*, 31 S.W.2d 150, 152-53 (Tex. Civ. App.—Amarillo 1930, writ ref'd). This is the reason the word "relevant" was inserted in art. 2.44(B) in 1973. For discussion of the scope of inspection under art. 2.44(B) see *supra* notes 126-29 and accompanying text.

185. For discussion of use of agents under art. 2.44(B) see *supra* notes 154-55 and accompanying text.

186. For discussion of timing of the inspection see *supra* notes 161-63 and accompanying text.

187. For discussion of copying rights under art. 2.44(B) see *supra* note 170 and accompanying text.

188. For discussion of attempts by corporate management to restrict inspection rights see *supra* notes 140-43 and accompanying text.

inspection, but the statute does not expressly negate the existence of these rights. In view of the detailed nature of section 220 and the fact that Delaware corporate law is regularly and thoroughly updated, one can reasonably assume that not much remains of common law inspection rights. Nevertheless, while the common law right of inspection may be limited by statute, courts will not hold the right to have been extinguished in the absence of express language or a necessary implication to that effect,¹⁸⁹ so common law rights may theoretically still exist.¹⁹⁰ Regardless of the status of common law inspection rights, section 220 does not affect the power of the Delaware Court of Chancery to order discovery of corporate records in the course of a lawsuit between a stockholder and a corporation when such inspection is not the primary relief sought.¹⁹¹

C. MBCA

The MBCA expressly provides that the statutory right of inspection created therein does not displace common law rights.¹⁹² The statutory right is independent of any common law right to inspect.¹⁹³ The MBCA does not create or recognize any new common law inspection rights.¹⁹⁴

V. PENALTIES FOR CORPORATE INTRANSIGENCE

Corporate management does not always willingly allow a stockholder to delve into corporate records. Since the object of a stockholder's investigation is often to obtain information that will aid him in an attempt to remove incumbent management, some reluctance on the part of management to allow the inspection is understandable. When a stockholder has satisfied all legal requirements, however, corporate management should not be able to freely discourage the stockholder's exercise of inspection rights by arbitrarily refusing the demand and forcing him to go through the trouble and expense of enforcing his rights through the courts. In order to prevent this sort of behavior some jurisdictions, including Texas, have adopted statutory provisions designed to penalize corporations for wrongfully denying a stockholder's request for inspection. Other jurisdictions, such as Delaware, which are more oriented toward protecting the interests of corporate management,

189. See *State ex rel. Cochran v. Penn-Beaver Oil Co.*, 34 Del. 81, 143 A. 257, 259-60 (1926) (en banc); *State ex rel. Healy v. Superior Oil Corp.*, 40 Del. 460, 13 A.2d 453, 454 (Super. Ct. 1940).

190. E. FOLK, *supra* note 24, at 255.

191. See *Parrish v. Commonwealth Trust Co.*, 21 Del. Ch. 121, 181 A. 658, 659 (1935); *Martin v. D.B. Martin Co.*, 10 Del. Ch. 211, 88 A. 612, 616 (1913); *State ex rel. Foster v. Standard Oil Co.*, 41 Del. 172, 18 A.2d 235, 238 (Super. Ct. 1941); *State ex rel. Crowder v. Sperry Corp.*, 41 Del. 84, 15 A.2d 661, 664 (Super. Ct. 1940).

192. MBCA § 16.02(e) (1985) does not affect "(1) the right of a shareholder to inspect records under section 7.20 or, if the shareholder is in litigation with the corporation, to the same extent as any other litigant; (2) the power of a court, independently of this Act, to compel the production of corporate records for examination."

193. *Id.* § 16.02 comment 4.

194. *Id.*

continue to allow corporations arbitrarily to deny valid stockholder requests for inspection without fear of punishment.

A. Texas

The 1973 amendments to the TBCA included a new article 2.44(C), which was designed to discourage wrongful denial of stockholder inspection requests.¹⁹⁵ Article 2.44(C) creates a cause of action for wrongful denial of inspection rights; a stockholder successfully asserting this claim may recover from the corporation a sum equal to the costs and expenses, including attorneys' fees, incurred by him in enforcing his inspection rights,¹⁹⁶ and may also recover any other damages allowed by law.¹⁹⁷ The statute lists specific defenses that the corporation may assert against this action: the corporation will not be liable under article 2.44(C) if the corporation can show (1) that, within two years prior to the inspection request, the stockholder seeking inspection sold, attempted to sell, or assisted another in selling or attempting to sell a stockholder list or list of voting trust certificate holders obtained from any corporation, or (2) that the stockholder seeking inspection misused information obtained through a prior examination of the records of any corporation, or (3) that the stockholder seeking inspection did not act in good faith and for a proper purpose in making his demand.¹⁹⁸ Whether a stockholder suing for common law inspection under article 2.44(D) may make use of article 2.44(C) to recover his costs is unclear;¹⁹⁹ the only two cases reported have upheld awards of attorneys' fees under article 2.44(C) without discussing the operation of the statute.²⁰⁰

195. See TBCA art. 2.44 comment (Vernon 1980); Lebowitz, *supra* note 2, at 727. Old art. 2.44(C) is now art. 2.44(D).

196. TBCA art. 2.44(C) (Vernon 1980) provides:

Any corporation which shall refuse to allow any such shareholder or his agent, accountant or attorney, so to examine and make extracts from its books and records of account, minutes, and record of shareholders, for any proper purpose, shall be liable to such shareholder for all costs and expenses, including attorneys' fees, incurred in enforcing his rights under this Article in addition to any other damages or remedy afforded him by law.

197. *Id.*

198. *Id.* provides that:

It shall be a defense to any action for penalties under this section that the person suing therefor has within two (2) years sold or offered for sale any list of shareholders or of holders of voting trust certificates for shares of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders or of holders of voting trust certificates for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders or of holders of voting trust certificates for shares of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

199. For discussion of access to art. 2.44(C) see *supra* note 182.

200. See *Chavco Inv. Co. v. Pybus*, 613 S.W.2d 806, 810 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Forth Worth KJIM, Inc. v. Walke*, 604 S.W.2d 362, 363 (Tex. Civ. App.—Fort Worth 1980, no writ).

B. Delaware

Delaware's section 220 contains no provision for penalizing a corporation that wrongfully denies a stockholder access to its records. The statute does give the courts broad discretion to craft a remedy,²⁰¹ but the Delaware Supreme Court has indicated that awards of attorneys' fees to stockholders successfully enforcing their inspection rights under section 220 are not favored.²⁰²

C. MBCA

The MBCA contains penalty provisions similar to those found in Texas's article 2.44(C). In any case in which a court grants an inspection, the MBCA instructs the court also to award to the stockholder the costs and expenses, including attorneys' fees, incurred by him in enforcing his rights.²⁰³ The corporation, however, may avoid such an award by showing that it denied the requested inspection in good faith due to a reasonable doubt concerning the stockholder's right to conduct the examination.²⁰⁴

VI. CONCLUSION

The manner in which the balance between stockholders and corporate management is struck is at the heart of differences between Texas law, Delaware law, and the MBCA concerning the treatment of stockholders' inspection rights. The MBCA is intended to represent the ideal balancing of stockholder and management interests, and does in fact appear to take an evenhanded, rational approach to the problem of stockholders' inspection rights. On the other hand, the biases of Texas and Delaware law in this area reflect the respective policies of each state regarding the proper balance to be struck. Texas law is considerably more favorable to the stockholder than is the law of Delaware. The Texas statute allows beneficial holders of stock the opportunity to inspect and provides a penalty designed to discourage arbitrary denials of stockholder inspection requests, and Texas courts have gen-

201. See DCA tit. 8, § 220(c) (1983).

202. See *CM&M Group, Inc. v. Carroll*, 453 A.2d 788 (Del. 1982), a suit for inspection in which the court, while noting the traditional power of a court of equity to award attorneys' fees to the prevailing party when justice requires, held that the general rule is that attorneys' fees are not awarded, and that this case did not present facts sufficient to support the creation of a new exception to that rule. *Id.* at 795. Note that the door is left open for such an award when the corporation's denial of inspection privileges is blatantly wrongful.

203. MBCA § 16.04(c) (1985) provides that:

If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.

204. *Id.* Earlier versions of the MBCA contained monetary penalty provisions that, like those of the Texas statute, were only available to a stockholder who met minimum stock ownership requirements. Under the revised MBCA, however, the penalty provision is available to all stockholders and is keyed directly to costs of enforcement. This change reflects the drafters' belief that such a penalty is more realistic and does not discriminate against small investors. See *id.* § 16.04 comment.

erally been hostile to attempts by management to restrict stockholder access to corporate records when those attempts have gone beyond the terms of the statute. In addition, the burden of proof allocation on the issue of proper purpose and the availability of a jury trial on that issue are factors that distinguish Texas as being a pro-stockholder jurisdiction on the issue of inspection rights. Delaware law, on the other hand, reflects a clear bias toward corporate management in that it allows only record holders of stock to inspect, does not penalize management for wrongfully denying inspection privileges, and is tolerant of management attempts to restrict a stockholder's exercise of inspection rights. Perhaps the principal vice of Delaware law in the area of inspection rights is the broad discretion granted by statute to the Delaware courts; in view of Delaware's traditional pro-corporation bias one might suspect that more often than not the Delaware courts exercise their discretion in favor of corporate management.

In terms of development and sophistication, Delaware law on the issue of inspection rights is clearly superior to that of Texas; the Delaware legislature and courts have over many years developed a detailed and comprehensive body of jurisprudence concerning stockholders' inspection rights. The MBCA also shows a high degree of sophistication, substituting comprehensive, well-drafted statutory provisions in place of judicial development. The most glaring weakness in Texas law on stockholders' inspection rights is the relative lack of development by the courts.

As a result of the lack of development in Texas law on this issue, many aspects of stockholders' inspection rights in Texas remain cloudy and uncertain. As the Texas economy continues to expand and diversify, however, the courts should have ample opportunity to introduce clarity and predictability into Texas law on this subject. It is to be hoped that, as development of Texas corporate law in this area proceeds over the ensuing years, both the legislature and the courts will bear in mind the vices inherent in bias toward either corporate management or stockholders, and will instead adopt a balanced approach, like that of the MBCA, oriented toward fairness for both sides rather than advantage for either.

