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# Disinterested Director Committees and the Shareholder Derivative Suit

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# Disinterested Director Committees and the Shareholder Derivative Suit

## INTRODUCTION

In the past few years, an increasingly popular method of terminating burdensome shareholder derivative suits has been to create a special litigation committee, composed of "disinterested" directors, which evaluates the merits of the suit and recommends dismissal if the suit is deemed not to be in the best interests of the corporation.<sup>1</sup> The trend in both federal and state courts has been to accept the decision of the committee as a business judgment and thus non-reviewable by a court of law.<sup>2</sup> This trend, however, has been widely criticized as rapidly destroying the effectiveness of the stockholder derivative suit as a check on the abuses perpetrated by corporate insiders.<sup>3</sup>

In response to this criticism, the Supreme Court of Delaware<sup>4</sup>

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<sup>1</sup> See, e.g., *Gaines v. Haughton*, 645 F.2d 761, 771 (9th Cir. 1981); *Lewis v. Anderson*, 615 F.2d 778, 782-83 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980); *Abbey v. Control Data Corp.*, 603 F.2d 724, 730 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); *Cramer v. General Tel. & Elec. Corp.*, 582 F.2d 259 (3d Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *Grossman v. Johnson*, 89 F.R.D. 656, 662-63 (D. Mass. 1981); *Genzer v. Cunningham*, 498 F. Supp. 682, 687 (E.D. Mich. 1980); *Auerbach v. Bennett*, 393 N.E.2d 994, 999-1000 (N.Y. 1979).

<sup>2</sup> See, e.g., *Gaines v. Haughton*, 645 F.2d 761; *Abbey v. Control Data Corp.*, 603 F.2d 724; *Grossman v. Johnson*, 89 F.R.D. 656; *Auerbach v. Bennett*, 393 N.E.2d 994. *Contra* *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713, 718 (E.D. Va. 1980); *Maher v. Zapata Corp.*, 490 F. Supp. 348, 353 (S.D. Tex. 1980); *Maldonado v. Flynn*, 413 A.2d 1251, 1256 (Del. Ch. 1980), *rev'd sub nom.*, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981); *Sonics Int'l, Inc. v. Dorchester Enters.*, 593 S.W.2d 390, 392 (Tex. Civ. App. 1980).

<sup>3</sup> See, e.g., *Dent, The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 Nw. U.L. REV. 96 (1980); *Stegemoeller, Derivative Actions and the Business Judgment Rule: Directorial Power to Compel Dismissal*, 69 ILL. B.J. 338 (1981); Note, *The Business Judgment Rule in Derivative Suits Against Directors*, 65 CORNELL L. REV. 600 (1980) [hereinafter cited as *Business Judgment*]; Note, *The Business Judgment Rule and the Litigation Committee: The End of a Clear Trend in Corporate Law*, 14 IND. L. REV. 617 (1981).

<sup>4</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981). This decision by the Delaware Supreme Court applies to all entities incorporated under the laws of the State of Delaware. Due to the large number of non-resident Delaware corporations and the consequent federal diversity jurisdiction, the decision will have wide impact in the federal courts.

has adopted a novel approach which operates as a compromise between a blind application of the business judgment rule<sup>5</sup> and an absolute rejection of the use of special litigation committees.<sup>6</sup> The approach appears to be drawn primarily from a very thorough article on the subject by George W. Dent, Jr.<sup>7</sup> The purpose of this Note is to summarize the state of the law in Kentucky,<sup>8</sup> to compare the approach taken by the Delaware Supreme Court with that suggested by Dent,<sup>9</sup> and to propose an alternative which could be adopted when the issue arises in this state.<sup>10</sup>

As background, it is necessary to summarize the problem and briefly highlight its various components. Stockholder derivative suits are brought by one or more shareholders on behalf of the corporation. Any recovery is usually split between the attorney of the shareholder-plaintiff and the corporation.<sup>11</sup> The shareholder receives no tangible benefit other than any marginal increase in the value of his investment resulting from an award to the corporation.<sup>12</sup>

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<sup>5</sup> A blind application of the business judgment rule occurs when the court refuses to review a questioned business decision without first verifying that all the requirements of the business judgment rule have been satisfied. See the text accompanying notes 53-62 *infra* for a discussion of the requirements of the business judgment rule.

<sup>6</sup> The Delaware Chancery Court had concluded that a shareholder has an individual right to sue, independent of the corporation, which vests upon the directors' refusal of a demand. This approach in effect rejects the usefulness and authority of special litigation committees. *Maldonado v. Flynn*, 413 A.2d 1251.

<sup>7</sup> Dent, *supra* note 3.

<sup>8</sup> See the text accompanying notes 63-105 *infra* for a discussion of the relevant aspects of Kentucky corporation law.

<sup>9</sup> See the text accompanying notes 106-35 *infra* for a discussion of these two approaches.

<sup>10</sup> See the text accompanying notes 136-60 *infra* for an analysis leading to the proposed alternative.

<sup>11</sup> This has engendered skepticism and distrust of derivative suits by the corporate bar. One commentator noted:

According to the party line, such [derivative] actions are not typically instigated by shareholders who truly believe their corporation has been wronged, but by lawyers who, to promote fees, spend their time reviewing SEC filings and, when they detect even the slightest hint of impropriety, find a shareholder willing to lend his name to a complaint.

Swann, *Current Issues Between Corporations and Shareholders: Shareholder Litigation*, 36 BUS. LAW. 783, 783 (1981).

<sup>12</sup> See generally H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 358, at 749 (2d ed. 1970).

As a prerequisite to bringing the suit, among other requirements,<sup>13</sup> the shareholder must first demand that the directors of the corporation file suit themselves.<sup>14</sup> If the directors accept and file suit themselves, the shareholder suit is precluded.<sup>15</sup> The directors' refusal to sue lies at the heart of the special litigation committee problem.

It is generally agreed that the decision to sue or not to sue is dependent on an evaluation of many complex variables, including an assessment of the probabilities of successful litigation, costs of litigation, effects on business relationships and effects on internal management.<sup>16</sup> Given the nature of the variables, courts have been hesitant to second-guess directors and have considered the decision to sue as one within the realm of the business judgment rule, subject to review only if the requirements of the rule have not been met.<sup>17</sup> Because one such requirement is that the directors making the decision be independent—that they have nothing to gain or lose personally as a result of the decision made,<sup>18</sup> a special litigation committee has often been implemented to circumvent or satisfy the rule in cases where directors are named as defendants. Defendant-directors can hardly be

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<sup>13</sup> See generally *id.* at 761.

<sup>14</sup> *Id.* at 770. See the text accompanying notes 34-52 *infra* for a discussion of demand requirements.

<sup>15</sup> *Id.* at 772. Once the directors accept the demand and bring suit themselves they are held to the standard of care imposed by their fiduciary duty as directors of the corporation. Accordingly, the shareholders are not without remedy if the directors proceed with the suit in a manner detrimental to the corporation. The directors can be sued for a breach of fiduciary duty. *Id.* at 457-61. See also *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49, 52 (5th Cir. 1980), *cert. denied*, 450 U.S. 955 (1981).

<sup>16</sup> Swann, *supra* note 11, at 786.

<sup>17</sup> This principle is generally attributed to the following quote from *United Copper Sec. Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 263-64 (1917):

Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors, in the absence of instruction by vote of the stockholders. Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment . . . .

<sup>18</sup> See the text accompanying notes 53-62 *infra* for a discussion of the requirements of the business judgment rule.

considered independent in deciding whether or not to sue themselves,<sup>19</sup> but the board transforms the decision of whether to sue particular directors into an "independent" judgment by delegating it to a "disinterested" committee consisting of directors who have not been named as defendants in the suit. The committee evaluates the merits of the suit,<sup>20</sup> determines whether it is in the corporation's best interest to pursue legal action and almost always recommends against suit.<sup>21</sup> This Note will address the question of whether such a negative recommendation may effectively terminate the shareholder suit.

## I. HISTORY OF THE SHAREHOLDER DERIVATIVE SUIT

The shareholder derivative suit was originally developed as an equitable remedy to allow shareholders to recover funds fraudulently applied by a corporation's board of directors.<sup>22</sup> The concept was based on an analogy to the law of trusts and recognized a fiduciary responsibility running from the directors and officers of the corporation to the shareholders.<sup>23</sup> Although the corporation always was considered a necessary party to the suit, there was originally no indication that the shareholders' rights were to be considered secondary or derivative.<sup>24</sup> Apparently, the

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<sup>19</sup> As one court stated, "[w]here the directors themselves are subject to personal liability in the action [they] cannot be expected to determine impartially whether [the suit] is warranted." *Abbey v. Control Data Corp.*, 603 F.2d at 727.

<sup>20</sup> The committee generally hires outside counsel, examines documents, conducts interviews, takes depositions of directors and management, and prepares a report supporting its decision whether or not to pursue the suit. See *Maldonado v. Flynn*, 485 F. Supp. 274, 284 (S.D.N.Y. 1980); *Rosengarten v. International Tel. & Tel. Corp.*, 466 F. Supp. 817 (S.D.N.Y. 1979).

<sup>21</sup> *But see Joy v. North*, 519 F. Supp 1312 (D. Conn. 1981) (special litigation committee recommended continuing litigation against seven of fifteen named defendant directors, and this action was cited by the court as indicative of good faith on the part of the committee).

<sup>22</sup> Prunty, *The Shareholders' Derivative Suit: Note on its Derivation*, 32 N.Y.U. L. REV. 980, 985-87 (1957). Prunty notes that popular credit for the founding of the derivative suit is attributed to *Robinson v. Smith*, 3 Paige Ch. 222 (N.Y. Ch. 1832). He concludes, however, that the real genesis of the idea came from Chancellor Kent in *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 371, 389-90 (N.Y. Ch. 1817). The first Kentucky case concerning the issue, *Jones v. Johnson*, 73 Ky. (10 Bush) 649 (1875), also credited *Robinson*. See generally H. HENN, *supra* note 12, at 749.

<sup>23</sup> Prunty, *supra* note 22, at 988. See also H. HENN, *supra* note 12, at 749.

<sup>24</sup> Prunty, *supra* note 22, at 989.

shareholders' rights were viewed as "an individual or class action parallel rather than tangential to the corporate right."<sup>25</sup>

The shareholders' rights were not construed to be derivative until the concept was expanded to allow a shareholder suit against a third party—specifically, against a creditor of the corporation.<sup>26</sup> In such a setting, the corporate right was deemed to be exclusive and the shareholder's right became secondary,<sup>27</sup> exercisable only after the corporation refused to bring suit on its own behalf. Eventually the requirement of a demand on the corporation, as well as the concept of the shareholder's right to bring suit as being secondary or derivative, carried over into the shareholder-management suits as well.<sup>28</sup>

Judicial acquiescence in the use of special litigation committees to terminate shareholder suits occurs primarily because of the dangers in allowing such suits and because of the history of shareholders abusing the suit.<sup>29</sup> "Strike" suits may be totally without merit, commenced solely for their settlement value and with no expectation of securing money for the corporation.<sup>30</sup> Moreover, the costs of litigation, not to mention the adverse effects on internal "morale" or on the business relationship between the corporation and the party to be sued, may outweigh any potential recovery. To safeguard against the various dangers of the shareholder suit, courts and legislatures have imposed requirements before such suits may be brought, including demands on directors and/or shareholders,<sup>31</sup> contemporaneous and/or continual share ownership<sup>32</sup> and the posting of security for ex-

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<sup>25</sup> Prunty concludes that the corporation was originally included as a "passive recipient of the proceeds" primarily to prevent double recovery (additional recovery by the corporation itself in independent subsequent litigation) and to protect creditors from an unjust distribution of corporate capital. *Id.*

<sup>26</sup> There seems to be no similar concept in the law of trusts. A beneficiary of a trust could not sue a third party unless the trustee wrongfully refused to sue. 3 A. SCOTT, *THE LAW OF TRUSTS* § 282 (2d ed. 1956).

<sup>27</sup> See the text accompanying notes 34-52 *infra* for a discussion of demand requirements.

<sup>28</sup> Prunty, *supra* note 22, at 991.

<sup>29</sup> *E.g.*, *Zapata Corp. v. Maldonado*, 430 A.2d at 786-87.

<sup>30</sup> See *Dent*, *supra* note 3, at 137.

<sup>31</sup> See the text accompanying notes 34-52 *infra* for a discussion of making a demand on the directors.

<sup>32</sup> *E.g.*, KY. REV. STAT. ANN. § 271A.245 (Bobbs-Merrill 1981) [hereinafter cited as

penses.<sup>33</sup>

## II. DEMAND ON DIRECTORS

The demand on directors requirement was judicially created,<sup>34</sup> but it is now codified both in the Federal Rules of Civil Procedure (through FRCP 23.1)<sup>35</sup> and in most states via statute<sup>36</sup> or state rules of civil procedure.<sup>37</sup> The requirement is grounded in principles of judicial abstinence and judicial economy. The original purpose of the demand requirement was "to prevent courts from interfering with the internal affairs of private corporations until all intra-corporate remedies [had] been exhausted."<sup>38</sup> The requirement is consistent with the realization that the corporation is truly the preferable party to coordinate the suit, since the shareholder has little knowledge of the facts and no access to corporate books and records. If the corporation complies with the demand and sues on its own behalf, corporate resources are then available; in addition, to prosecute it effectively the board of directors must direct the suit subject to a fiduciary duty. Imposing such a duty on the board arguably engenders better representation for both the shareholders and the corporate entity. By di-

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KRS] (requiring that the plaintiff have been an owner of shares at the time of the transaction of which he complains); FED. R. CIV. P. 23.1 (also requiring the plaintiff to be a shareholder at the time of the transaction). See generally H. HENN, *supra* note 12, at 753.

<sup>33</sup> E.g., N.Y. BUS. CORP. LAW § 627 (McKinney Supp. 1981); See generally H. HENN, *supra* note 12, at 781, 798.

Ownership and security requirements which have been imposed by statute and/or procedural rule do not enter into this analysis except, perhaps, as a reminder to courts that there are procedural safeguards against abuses by potential plaintiff-shareholders.

<sup>34</sup> See *Hawes v. Oakland*, 104 U.S. 450 (1882); *Shawhan v. Zinn*, 79 Ky. 300 (1881).

<sup>35</sup> FED. R. CIV. P. 23.1 provides in part: "The [derivative action] complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort."

<sup>36</sup> In Kentucky the relevant statute is KRS § 271A.245 (1981). See note 35 *supra* for the language of FED. R. CIV. P. 23.1 (which is virtually mirrored by the Kentucky statute).

<sup>37</sup> E.g., COLO. R. CIV. P. 23.1; DEL. CH. CT. R. 23.1; OHIO R. CIV. P. 23.1. See also Havdek, *The Settlement and Dismissal of Stockholders' Actions—Part I*, 22 Sw. L.J. 767, 767 n.3 (1968).

<sup>38</sup> Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. CHI. L. REV. 168, 171 (1976).

rectly involving the corporation, the possibility that the grievance may be resolved without litigation is enhanced, thus easing the burden on the courts. A further advantage of the demand requirement is that it may often result in a reduction in expense and time for the shareholder-plaintiff<sup>39</sup> since the requirement generally involves simply mailing a copy of the complaint to the directors with a notice advising that the plaintiff will sue if the directors do not.<sup>40</sup>

As noted, FRCP 23.1 and the comparable provisions of most states require that the shareholder-plaintiff make demand on the directors, or state with particularity why no demand was made.<sup>41</sup> The criteria for excusing demand vary widely from court to court and have led some commentators to conclude that the necessity for demand actually lies solely within the sound discretion of the court.<sup>42</sup> The application of such discretion varies widely in the federal courts, from a very liberal excuse of demand in the Fifth Circuit<sup>43</sup> to a very strict requirement of particularity in the First Circuit.<sup>44</sup> Enforcement of the demand requirement appears to be equally discretionary in the state courts.<sup>45</sup>

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<sup>39</sup> *Id.* at 172.

<sup>40</sup> *Id.* But see *Greenspun v. Del E. Webb Corp.*, 634 F.2d 1204, 1209 (9th Cir. 1980) (addressing the sufficiency of authority of those to whom demand is presented).

<sup>41</sup> See note 35 *supra* for the relevant portion of the text of FED. R. CIV. P. 23.1. See also KRS § 271A.245 (1981).

<sup>42</sup> *E.g.*, 38 J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.1.19, app. at 23.1.83 (2d ed. 1976); Comment, *supra* note 38, at 170.

<sup>43</sup> *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49 (holding that naming controlling shareholders as defendants raised a presumption of "futility of demand"); *Liboff v. Wolfson*, 437 F.2d 121, 122 (5th Cir. 1971) (based on liberal pleading requirements; mere allegations that a majority of the board of directors participated in, approved of, and acquiesced in the challenged transactions satisfied FRCP 23.1 and excused demand).

<sup>44</sup> *In re Kauffman Mut. Fund Actions*, 479 F.2d 257 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973) (holding that the mere allegation of domination and control by directors, unsupported by underlying facts, did not satisfy the requirement of particularity under FRCP 23.1). In the Sixth Circuit, a bare allegation of futility of demand is insufficient without allegations of fact showing how and why the demand would be futile. *Lucking v. Delano*, 117 F.2d 159, 160 (6th Cir. 1941). See generally Annot., 99 A.L.R.3d 1034 (1980).

<sup>45</sup> The following cases are examples of courts construing futility liberally: *Berger v. General United Group*, 268 N.W.2d 630, 635-36 (Iowa 1978) (holding that a general allegation of futility is sufficient if other assertions of fact in the petition are detailed enough to demonstrate that a demand would have been unavailing); *Newton v. Hornblower, Inc.*,



The variety of excuses for failing to make demand on directors includes: (1) allegation that the directors are controlled by the alleged wrongdoer;<sup>46</sup> (2) allegation that the directors have a conflict of interest and could not exercise independent judgment in the decision to sue; (3) allegation that directors participated in the transactions attacked;<sup>47</sup> (4) allegation that a majority of the directors were among the alleged wrongdoers; (5) allegation that demand would result in irreparable harm to the corporation; and (6) allegation of obvious director opposition to the suit.<sup>48</sup>

A shareholder may be required to demand that the other shareholders bring suit if the demand on the directors was fruitless.<sup>49</sup> This action is generally necessary when the wrong to be redressed is capable of being ratified by disinterested shareholders.<sup>50</sup> Because shareholder demand requirements are rarely applicable in situations involving special litigation committees,<sup>51</sup> further discussion of this device is beyond the scope of this Note.<sup>52</sup>

### III. THE BUSINESS JUDGMENT RULE

The business judgment rule is a judicially created *defensive*

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582 P.2d 1136, 1141 (Kan. 1978). On the other hand, *Zauber v. Murray Sav. Ass'n.*, 591 S.W.2d 932, 938 (Tex. Civ. App. 1979) (requiring the pleading of specific facts and particularized reasons for failing to make demand) is notable for construing futility strictly. For an example of its construction in the Kentucky courts, see *Maas v. Tyler*, 316 S.W.2d 211, 213-14 (Ky. 1958) ("Where it appears that a demand for action would be unavailing or, if granted, litigation would be in unfriendly hands, such a demand is not a condition precedent to the right of shareholders to sue on behalf of a corporation.").

<sup>46</sup> *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d at 49.

<sup>47</sup> *Liboff v. Wolfson*, 437 F.2d at 122.

<sup>48</sup> See Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 HARV. L. REV. 746, 753-54 (1959-60); Comment, *supra* note 38, at 173-82.

<sup>49</sup> FED. R. CIV. P. 23.1 requires demand on shareholders "if necessary." This is also true of KRS § 271A.245 (1981).

<sup>50</sup> H. HENN, *supra* note 12, at 772-74. In Kentucky the demand requirement on shareholders appears to be based on a futility standard similar to that required for director demand. See *Security Trust Co. v. Dabney*, 372 S.W.2d 401, 405 (Ky. 1963).

<sup>51</sup> But see *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. at 718 (holding that shareholder ratification of the allegedly wrongful action by defendant directors could bar plaintiff's complaint in a special litigation committee case).

<sup>52</sup> See generally *Leavell, The Shareholders as Judges of Alleged Wrongs by Directors*, 35 TUL. L. REV. 331 (1961); Note, *The Nonratification Rule and the Demand Re-*

rule designed to insulate corporate directors and officers when they make either honest mistakes of judgment or unpopular business decisions. One writer has analogized the rule to the protection afforded other professionals in suits for malpractice.<sup>53</sup> Built into the rule are four basic criteria: (1) independence and a lack of self-dealing or other personal interest; (2) the exercise of due care in ascertaining the relevant and available facts; (3) a reasonable belief that the transaction was in the best interests of the corporation; and (4) good faith or lack of improper motive.<sup>54</sup>

Many courts have applied the business judgment rule to special litigation committee decisions blindly, without insuring that the requirements of the rule have actually been satisfied.<sup>55</sup> Some courts have limited inquiry to the independence of committee members and the adequacy of their investigation.<sup>56</sup> Nevertheless, other courts have allowed inquiry into the reasonableness of the business judgment of the decision not to sue.<sup>57</sup>

Additional problems in applying the business judgment rule to special litigation committee decisions concern allocation of the burdens of proof and the scope of discovery to be allowed the plaintiff-shareholder. The courts have generally held that the business judgment rule raises a presumption that the directors "exercised, in good faith, their best business judgment in what they believed to be the corporation's best interests."<sup>58</sup> Thus, in most special litigation committee cases, the burden of proving lack of good faith, independence or reasonable investigation has been placed on the plaintiff-shareholder.<sup>59</sup>

Courts vary widely in the extent to which they allow discovery by plaintiff-shareholders prior to a dismissal based on the de-

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quirement: *The Case for Limited Review*, 63 COLUM. L. REV. 1086 (1963); Note, *supra* note 48, at 754-59, 760-62; Comment, *supra* note 38, at 182-91.

<sup>53</sup> Arsht, *The Business Judgment Rule Revisited*, 8 HOFSTRA L. REV. 93, 97 (1979).

<sup>54</sup> *Id.* at 111-12.

<sup>55</sup> Courts have failed to inquire into the independence of the persons on the committee, the standard of care exercised by the members or the good faith of the members. See Dent, *supra* note 3, at 101 n.28.

<sup>56</sup> E.g., *Gaines v. Haughton*, 645 F.2d 761; *Lewis v. Anderson*, 615 F.2d 778.

<sup>57</sup> E.g., *Cramer v. General Tel. & Elec. Corp.*, 582 F.2d 259; *Zapata Corp. v. Maldonado*, 430 A.2d 779.

<sup>58</sup> Arsht, *supra* note 53, at 130.

<sup>59</sup> Dent, *supra* note 3, at 133.

cision of a special litigation committee. Some courts have dismissed for failure to allege lack of independence on the part of committee members<sup>60</sup> and some have permitted only limited discovery,<sup>61</sup> whereas other courts would have allowed the plaintiff-shareholder the full scope of discovery procedures.<sup>62</sup>

#### IV. DETERMINING STATE LAW

To the extent it is not inconsistent with federal statutes, state law dictates when disinterested committees can be utilized to terminate shareholder derivative suits brought in federal court.<sup>63</sup> In Kentucky, it is clear that the applicable law is the law of the state of incorporation of the corporation on whose behalf the suit is initiated.<sup>64</sup>

Alabama,<sup>65</sup> New York<sup>66</sup> and, as discussed below, Delaware<sup>67</sup> are the only states in which the disinterested committee issue has been expressly resolved in the state judicial system. Federal courts, following the direction of the United States Supreme Court in *Burks v. Lasker*,<sup>68</sup> have made their best estimate of how California,<sup>69</sup> Connecticut,<sup>70</sup> Maryland,<sup>71</sup> Michigan,<sup>72</sup> Ohio,<sup>73</sup> Texas<sup>74</sup> and Virginia<sup>75</sup> would resolve the issue. The issue has

<sup>60</sup> *E.g.*, *Abbey v. Control Data Corp.*, 460 F. Supp. 1242, 1244 (D. Minn. 1978), *aff'd*, 603 F.2d 724 (8th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980) (plaintiff conceded good faith and independence of committee); *Auerbach v. Bennett*, 393 N.E.2d 994 (plaintiff raised no question as to independence or adequacy of investigation of committee).

<sup>61</sup> *E.g.*, *Gall v. Exxon Corp.*, 418 F. Supp. 508 (S.D.N.Y. 1976).

<sup>62</sup> *E.g.*, *Cramer v. General Tel. & Elec. Corp.*, 582 F.2d at 278 (dictum).

<sup>63</sup> *Burks v. Lasker*, 441 U.S. 471, 486 (1979).

<sup>64</sup> *See Nelson v. Gammon*, 478 F. Supp. 630, 635 (W.D. Ky. 1979); *United States Cast Iron Pipe & Foundry Co. v. Henry Vogt Mach. Co.*, 206 S.W. 806, 812 (Ky. 1918). *See generally* Annot., 93 A.L.R.2d 1354 (1964).

<sup>65</sup> *Roberts v. Alabama Power Co.*, 404 So. 2d 629 (Ala. 1981).

<sup>66</sup> *Auerbach v. Bennett*, 393 N.E.2d 994.

<sup>67</sup> *Zapata Corp. v. Maldonado*, 430 A.2d 779.

<sup>68</sup> 441 U.S. 471 (1979).

<sup>69</sup> *Gaines v. Haughton*, 645 F.2d 761.

<sup>70</sup> *Joy v. North*, 519 F. Supp. 1312.

<sup>71</sup> *Grossman v. Johnson*, 89 F.R.D. 656.

<sup>72</sup> *Genzer v. Cunningham*, 498 F. Supp. 682.

<sup>73</sup> *Galef v. Alexander*, 615 F.2d 51 (2d Cir. 1980).

<sup>74</sup> *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49 (entire board voted to dismiss). Note also that the lower Texas courts had already addressed the issue. *See Zauber v. Murray Sav. Ass'n.*, 591 S.W.2d 932.

<sup>75</sup> *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. 713.

never been addressed by the courts of the Commonwealth or by a federal court attempting to interpret Kentucky law.

The state and federal courts which have addressed the disinterested committee issue have each taken the same basic approach in interpreting state law. Four questions have been answered: (1) Does state law allow a board of directors to initiate *and* terminate litigation on behalf of the corporation? (2) Does state law allow the board of directors to delegate authority regarding litigation to board committees? (3) Does the state recognize some version of the business judgment rule? (4) Should the business judgment rule be applied to allow the committee to terminate a shareholder derivative suit?

In determining whether state law allows a board of directors to initiate and terminate corporate litigation, courts have uniformly answered in the affirmative. This is only logical given the fact that the corporation can only act through its directors.<sup>76</sup> In Kentucky, the general scope of directorate power is set forth in Kentucky Revised Statutes (KRS) section 271A.175 which states that "[t]he business and affairs of a corporation shall be managed by a board of directors . . . ."<sup>77</sup> The precise issue framed is whether "business and affairs" includes the initiation and termination of corporate litigation. Four courts have been confronted with language identical to that embodied in the Kentucky statute and have concluded that it does.<sup>78</sup> Other courts have reached a similar conclusion by reasoning from language found in *United Copper Securities Co. v. Amalgamated Copper Co.*: "Whether or not a corporation shall seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management . . . ."<sup>79</sup> These courts have then concluded that the power to discontinue a suit is a logical extension of the power to institute the action.<sup>80</sup> When the issue is

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<sup>76</sup> 2 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 505, at 527-28 (rev. perm. ed. 1969).

<sup>77</sup> KRS § 271A.175 (1981).

<sup>78</sup> *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49 (interpreting TEX. BUS. CORP. ACT. ANN. art. 2.31 (Vernon 1980)); *Joy v. North*, 519 F. Supp. 1312 (interpreting CONN. GEN. STAT. ANN. § 33-313(a) (West Supp. 1981)); *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. at 713 (interpreting VA. CODE § 13.1-35 (1978)); *Roberts v. Alabama Power Co.*, 404 So. 2d 629 (interpreting ALA. CODE § 10-2A-57 (1975)).

<sup>79</sup> 244 U.S. 261, 263 (1917). *See e.g.*, *Galef v. Alexander*, 615 F.2d at 57.

<sup>80</sup> *E.g.*, *Joy v. North*, 519 F. Supp. at 1318.

raised, Kentucky courts will probably hold that directors have the power to terminate litigation.<sup>81</sup>

The second issue, whether authority regarding litigation can be delegated, is easily resolved. KRS section 271A.210 allows a board of directors to delegate *all* of the authority of the board to a committee *if* the articles of incorporation or the bylaws so provide.<sup>82</sup> Three points should be emphasized. First, delegation is possible *only* if the articles of incorporation or the bylaws expressly provide for delegation. If the articles or bylaws are silent on the issue, a disinterested committee cannot be utilized. Second, if the articles or bylaws do so provide, all the authority of the board, with a few specified exceptions, can be delegated to a committee. Standard statutory construction leads to the conclusion that issues concerning corporate litigation can be delegated. Third, the statute designates no minimum number of members to be assigned to a committee. Arguably, a committee of one disinterested director could make decisions concerning corporate lit-

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<sup>81</sup> In *Shawhan v. Zinn*, 79 Ky. 300 (1881), the Court specifically stated that directors have the power to institute and to dismiss actions on behalf of the corporation. *Id.* at 304. The age of the case, however, could affect the weight assigned to it in a modern decision.

Fletcher states that "[t]he board of directors of a private business corporation institute, prosecute, compromise, or appeal suits at law and in equity which the corporation brings or which are brought against it, provided, of course, the directors act as a body and not as individuals in authorizing an action." 2 W. FLETCHER, *supra* note 76, § 535, at 579-80. Fletcher's views on shareholder derivative suits were followed in *Security Trust Co. v. Dabney*, 372 S.W.2d at 403; thus it is reasonable to assume that his views might be followed in this regard as well.

<sup>82</sup> KRS § 271A.210 (1981) provides:

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the full board of directors, may designate from among its members an executive committee and one or more other committees each of which, to the extent provided in such resolution or in the articles of incorporation or the bylaws of the corporation, shall have and may exercise all the authority of the board of directors, but no such committee shall have the authority of the board of directors in reference to amending the articles of incorporation, adopting a plan of merger or consolidation, recommending to the shareholders the sale, lease, exchange or other disposition of all or substantially all the property and assets of the corporation otherwise than in the usual and regular course of its business, recommending to the shareholders a voluntary dissolution of the corporation or a revocation thereof, or amending the bylaws of the corporation.

*Id.*

igation.<sup>83</sup>

Similar statutes were addressed in *Lewis v. Anderson*,<sup>84</sup> *Zapata Corp. v. Maldonado*<sup>85</sup> and *Genzer v. Cunningham*.<sup>86</sup> Each court concluded that litigation decisions can be properly delegated. This conclusion also is supported both by commentators<sup>87</sup> and the legislative history of KRS section 271A.210.<sup>88</sup>

Turning now to the third issue as to whether Kentucky recognizes some version of the business judgment rule, it is relatively clear that Kentucky is among those states that do. The rule has been applied in cases ranging from simple errors of business judgment<sup>89</sup> to allegations of excessive salaries paid to officers and directors.<sup>90</sup> The Kentucky courts have applied the rule rigidly, interfering with the management of a corporation only upon a

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<sup>83</sup> Compare N.Y. BUS. CORP. LAW § 712 (McKinney Cum. Supp. 1981) (a minimum of three directors is required on each committee) with KRS § 271A.210 (1981). A Kentucky corporation has an advantage in this regard in that it should be easier to find one disinterested director than to find three.

<sup>84</sup> 615 F.2d 778, 782-83 (9th Cir. 1979) (interpreting CAL. CORP. CODE § 311 (West 1977)).

<sup>85</sup> 430 A.2d 779, 785 (Del. 1981) (interpreting DEL. CODE ANN. tit. 8, § 141(c) (1974)).

<sup>86</sup> 498 F. Supp. 682, 687-88 (E.D. Mich. 1980) (interpreting MICH. COMP. LAWS ANN. §§ 450.1527-.1528 (1973)).

<sup>87</sup> "The directors . . . can certainly delegate authority to act for and represent the corporation . . . , even in matters involving the exercise of judgment and discretion, when they are expressly authorized to do so by appointment of committees . . ." 2 W. FLETCHER, *supra* note 76, § 495, at 510. While Fletcher notes that the power to delegate is not unlimited, he implies that he is referring to a limit on the delegation of *total* power. There appears to be no limit on the delegation of power, other than that imposed by the terms of the statute, concerning any one transaction. *See id.*

<sup>88</sup> *See Note, Statutory Treatment of Directors and Officers under the Kentucky Business Corporation Act*, 61 Ky. L.J. 115, 138-39 (1972-73). A sentence was deleted from the House version of the bill which would have arguably imposed liability on non-committee directors for the negligent and fraudulent acts of a committee. *Id.* at 139. This attempt to buffer the board at large from the acts of the committee can also be read as an attempt to insulate the committee itself from the board, and adds credence to the theory behind an independent special litigation committee.

<sup>89</sup> *E.g.*, *Levitan v. Stout*, 97 F. Supp. 105 (W.D. Ky. 1951). In dismissing a suit brought against directors for having authorized investment of corporate funds in plywood whiskey kegs and plywood toilet seats, the court stated that "although the stockholders do not assume the risk that directors will be disloyal, they do assume the risk that directors will make mistakes." *Id.* at 116.

<sup>90</sup> *E.g.*, *Venus Oil Corp. v. Gardner*, 50 S.W.2d 537 (Ky. 1932); *Carter v. Louisville Ry.*, 36 S.W.2d 836 (Ky. 1931).

showing of bad faith, actual fraud or constructive fraud.<sup>91</sup> Probably the most extreme view of the rule is that set forth in *Carter v. Louisville Railway*.<sup>92</sup> In upholding the authority of directors to pass bylaws authorizing themselves to grant directors fees even to salaried director-officers, the Court stated that “[i]t is well established that the courts will not interfere with the discretion of a board of directors in exercising its legal powers by acting within the limits of its charter, and without fraud, actual or constructive, upon the stockholders, *regardless of motives*.”<sup>93</sup>

Since the courts recognize the business judgment rule, the only remaining issue is whether they will interpret the rule to allow the termination of a shareholder derivative suit by a committee of directors. It does not necessarily follow that the rule may be relied upon to allow such a termination. The reasoning that leads to the conclusion that the business judgment rule permits such a termination is as follows: (1) the derivative suit is brought on behalf of and for the benefits of the corporation; (2) the determination of whether the pursuit of the action is beneficial to the corporation necessitates consideration of many factors (including a consideration of the probability of success on the legal merits); (3) most of these factors are of a business nature and are capable of being evaluated only by the directors themselves; (4) there should be some method for terminating the suit if it will cost the corporation more than it will gain through continuing the suit; and (5) the directors' responsibilities and the presence of more business than legal considerations dictate that the directors, not the courts, are better qualified to evaluate the advantages of the suit.

The courts that reject this chain of logic do so on the theory that the shareholder has an *individual* right to bring a suit that is somehow separate from the corporate rights upon which the derivative suit is based.<sup>94</sup> They hold that any rights which the direc-

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<sup>91</sup> See *Cumberland Publishing Co. v. Adams Real Estate Corp.*, 432 S.W.2d 808, 812 (Ky. 1968) (“The general rule is that courts will not interfere with the management of a majority, unless there is actual fraud, or such a wasting of the corporate property as practically amounts to fraud.”); *Security Trust Co. v. Dabney*, 372 S.W.2d at 406 (“Absent fraud, actual or constructive, the courts will not interfere with the management of a private corporation.”).

<sup>92</sup> 36 S.W.2d 836 (Ky. 1931).

<sup>93</sup> *Id.* at 838 (emphasis added).

<sup>94</sup> *E.g.*, *Maldonado v. Flynn*, 413 A.2d 1251.

tors may have over the suit are lost when demand is refused, or excused as being futile.<sup>95</sup> This reasoning could easily be rejected by a Kentucky court on the basis of language in *Security Trust Co. v. Dabney*,<sup>96</sup> in which the Kentucky Court of Appeals stated:

While an injury to the corporation resulting from wrongdoing, fraud or negligence of corporate officers operates, indirectly, as an injury to stockholders, the injury to stockholders is secondary and the injury to the corporation is primary. A stockholder cannot, as an individual as distinguished from a representative of the corporation, sue directors or other corporate officers for mismanagement, negligence, or the like, on a cause of action which belongs to the corporation.<sup>97</sup>

This language is clearly premised on the assumption that the corporate right is primary and inseparable from any individual right vested in the shareholder.

At least two courts have found state legislative history to support the application of the business judgment rule to disinterested committee decisions.<sup>98</sup> The court in *Genzer v. Cunningham*<sup>99</sup> concluded that Michigan would apply the business judgment rule in the disinterested committee context because it provides both flexibility in corporate governance and reasonable insulation from attack by dissident shareholders.<sup>100</sup> A similar conclusion was reached in *Joy v. North*.<sup>101</sup> The court in *Joy* held that application of the business judgment rule was consistent with the continual expansion of the discretionary powers available to directors reflected in the version of the Model Business Corporation Act adopted by Connecticut.<sup>102</sup>

Language very similar to that found in Michigan and Con-

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<sup>95</sup> See *Abella v. Universal Leaf Tobacco Co.*, 495 F. Supp. at 717. Note, however, that the court went on to state that subsequent shareholder ratification of the challenged director decisions would act as a bar to the shareholders' right to sue on behalf of the corporation. *Id.* at 718.

<sup>96</sup> 372 S.W.2d 401 (Ky. 1963).

<sup>97</sup> *Id.* at 403.

<sup>98</sup> *Joy v. North*, 519 F. Supp. at 1317-18; *Genzer v. Cunningham*, 498 F. Supp. at 687.

<sup>99</sup> 498 F. Supp. 682 (E.D. Mich. 1980).

<sup>100</sup> *Id.* at 687.

<sup>101</sup> 519 F. Supp. 1312 (D. Conn. 1981).

<sup>102</sup> *Id.* at 1317-18.



necticut is present in the legislative history of Kentucky's version of the Model Business Corporation Act, adopted in 1972. The previous corporation law was replaced in an attempt to encourage corporations to organize under Kentucky law or to locate their principal business offices in the state.<sup>103</sup> The new Act was also intended to make Kentucky law more responsive to the demands of the modern corporate world.<sup>104</sup> The adoption of the business judgment rule in the disinterested committee setting is very favorable to the corporate entity for it provides management with a very effective method of dispensing with vexatious shareholder suits. The only real questions are whether it affords too much protection to the directors, and whether it can be used to emasculate the most effective—and often the only—method available to minority stockholders “to call directors and controlling stockholders to account for mismanagement and fraudulent manipulation.”<sup>105</sup>

The root of the problem lies in the conflicting goals of the two underlying legal concepts. The shareholder derivative suit is often the only remedy available to a shareholder challenging directorial abuse. On the other hand, the business judgment rule provides needed insulation to directors who have committed simple errors of judgment. In theory, the concepts should never conflict; the shareholder has no cause of action where the director makes a simple error of judgment, and the business judgment rule is not applicable to breaches of fiduciary duty and other director misfeasance for which an action on behalf of the corporation does exist. The problem arises in extending the business judgment rule into areas where a corporate cause of action *does* exist, but where it is still not cost beneficial for the corporation to pursue the suit. The recognition that application of the business judgment rule in this setting can be abusive of shareholder rights lies at the heart of both the Dent and Delaware approaches.

## V. THE DENT APPROACH

Dent first argues that the business judgment rule is irrelevant

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<sup>103</sup> See Ham, *Kentucky Adopts A New Business Corporation Act*, 61 Ky. L.J. 73, 74 (1972-73).

<sup>104</sup> *Id.* at 78.

<sup>105</sup> *Security Trust Co. v. Dabney*, 372 S.W.2d at 403.

because the derivative suit does not seek to impose liability on the directors for their decision not to sue. Accordingly, application of the business judgment rule not only fails to satisfy the basic policy rationale behind the rule but also subjects it to potential abuse by directors and courts.<sup>106</sup>

Dent then divides shareholder derivative suits into three basic categories: suits against third parties, suits in which a majority of the corporation's board of directors are named as defendants, and suits in which a minority of the corporation's board of directors are named as defendants.<sup>107</sup> He concludes: (1) that the business judgment rule is properly applicable to a board's decision not to sue a third party;<sup>108</sup> (2) that a suit implicating a majority of directors should never be dismissed based upon the decision of a special litigation committee;<sup>109</sup> and (3) that a suit implicating a minority of directors should be dismissed on the basis of a special litigation committee decision only after a careful review of the independence of the committee members,<sup>110</sup> the adequacy of the committee's investigation,<sup>111</sup> and the cogency of its explanation for the decision not to sue.<sup>112</sup>

Dent's distinction between the types of suits is based primarily upon his perceptions of internal pressures and his estimates of the probability that directors will be able to engage in dispassionate consideration of the merits of the suits. In a third party suit (*i.e.*, against persons unaffiliated with the corporation), the internal pressures are theoretically minimal and the directors should be able to weigh the pros and cons of the proposed litigation without influence.<sup>113</sup> Application of the business judgment rule, subject to its various conditions and safeguards, is therefore appropriate. On the other hand, in a suit involving a majority of the corporation's directors, there is pressure both on the inside directors *and* even on the outside directors who have not been named as defendants to seek dismissal of a suit against their co-

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<sup>106</sup> Dent, *supra* note 3, at 135-36.

<sup>107</sup> *See id.* at 110-34.

<sup>108</sup> *Id.* at 110-22.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 124-28.

<sup>111</sup> *Id.* at 128-29.

<sup>112</sup> *Id.* at 129-30.

<sup>113</sup> *Id.* at 110.

directors. In such a situation, Dent suggests that a conflict of interest must be presumed and that dismissal should never be allowed.<sup>114</sup>

The most difficult situation is that in which only a minority of the directors are implicated. Arguably, there is less pressure for dismissal and greater probability of a dispassionate decision. Given the dangers of strike suits, Dent concludes that the courts should evaluate the credibility of the committee's decision and defer to that decision if satisfied that proper safeguards have been met. All committee members should be non-affiliated/non-implicated outside directors, and should—if possible—be selected by other non-affiliated/non-implicated directors.<sup>115</sup> The court also should attempt to identify the controlling factions of the corporation in order to insure that the committee members are truly independent of any factions that may be implicated in the suit.<sup>116</sup>

In evaluating the adequacy of the investigation performed by the committee, Dent feels that the court should permit discovery by the plaintiff-shareholder in order to insure that the investigation was performed with due care<sup>117</sup> and that all reasonable avenues of investigation were pursued. To facilitate the evaluation of the cogency of the explanation for a decision not to sue, the court should require the committee to describe with particularity the facts and assumptions underlying each reason not to sue.<sup>118</sup> The decision should be evaluated in light of the procedures per-

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<sup>114</sup> *Id.* at 111-22.

<sup>115</sup> *Id.* at 126.

<sup>116</sup> Dent concedes that determining who controls a corporation can be difficult. Factors to consider when attempting to determine whether implicated persons could potentially "control" or influence committee members include the number of shares owned, the number of representatives on the board and their demonstrated influence, corporate offices held, positions held on various board committees, and power to direct and control the corporate proxy machinery. *Id.* at 126-27.

<sup>117</sup> The due care standard required by the business judgment rule is that care and skill expected of a reasonably prudent person in similar circumstances. See Arsh, *supra* note 53, at 118-21. Dent would require a higher standard. He argues that while the business judgment rule is designed to require reasonable care by directors, the circumstances of a special litigation committee demand a standard which will ensure that every line of inquiry capable of producing material evidence is pursued. A lesser standard would allow opportunity for inadequate investigation. Dent, *supra* note 3, at 128.

<sup>118</sup> Dent, *supra* note 3, at 129.

formed and the nature of the alleged wrong. Courts should scrutinize proposed dismissals of cases involving allegations of self-dealing or other breaches of fiduciary duty much more closely than decisions to dismiss other types of claims.<sup>119</sup> Dent advocates allowing full discovery to the plaintiff-shareholder,<sup>120</sup> but somewhat inconsistently concludes that it should be limited to "relevant matter overlooked by the nonimplicated directors."<sup>121</sup> Dent also believes that, because of superior corporate access to information and greater corporate resources, the burden of proof regarding independence and the adequacy of investigation should be on the corporation rather than on the plaintiff-shareholder.<sup>122</sup>

## VI. THE DELAWARE APPROACH

In *Zapata Corp. v. Maldonado*,<sup>123</sup> Maldonado, a stockholder of Zapata, brought a derivative action on behalf of the corporation against the directors, alleging a breach of fiduciary duty. He did not first demand that the board bring action. The board created a litigation committee which recommended that the action be dismissed. The Supreme Court of Delaware held that the trial court should inquire into the independence and good faith of the committee in determining whether to accept the corporation's decision.<sup>124</sup> The court, however, appeared to restrict its decision to situations where demand on the directors is excused. The court stated: "a board decision to cause a derivative suit to be dismissed as detrimental to the company, after demand has been made and refused, will be respected unless it was wrongful."<sup>125</sup> Wrongfulness is to be determined by reference to the business judgment rule.<sup>126</sup>

In cases where demand is excused, the shareholders may initiate the derivative action, but the board can still terminate the

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<sup>119</sup> *Id.* at 130.

<sup>120</sup> *Id.* at 132.

<sup>121</sup> *Id.* at 133.

<sup>122</sup> *Id.* at 133-34.

<sup>123</sup> 430 A.2d 779 (Del. 1981).

<sup>124</sup> *Id.* at 788-89.

<sup>125</sup> *Id.* at 784.

<sup>126</sup> *Id.* at 784 n.10.

action via the special litigation committee. The *Zapata* court determined that excusing demand does not strip the board of the power, authorized by Delaware law, to make decisions regarding corporate litigation.<sup>127</sup> Citing a Delaware statute which authorizes the delegation of all authority to one or more committees,<sup>128</sup> the court ruled that a board of directors could terminate, by use of a special litigation committee, derivative suits that would be detrimental to the corporation. The court then set forth the criteria by which the committee's decision not to sue was to be evaluated.

The court stated that "[f]irst, the [trial] Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions."<sup>129</sup> The court noted that *limited* discovery may be warranted to facilitate this inquiry.<sup>130</sup> The burden of proving independence, good faith and reasonable investigation is on the corporation. The standard of proof to be met by the corporation is that applied in motions for summary judgment—if there is no genuine issue as to any material fact, the moving party is entitled to a dismissal as a matter of law.<sup>131</sup> The court expressly left open the issue of whether a separate trial on the issues of independence, good faith and reasonable investigation may be warranted.<sup>132</sup>

If satisfied that the committee has met the foregoing requirements, the *Zapata* decision indicates that the trial court may, *in its discretion*, proceed to the second step of the test, apply its own business judgment to the procedures performed and determine whether the derivative action should proceed.<sup>133</sup> In making such

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<sup>127</sup> *Id.* at 785-86.

<sup>128</sup> *Id.* at 785 (citing DEL. CODE ANN. tit. 8, § 141(c) (1974)). In summary, this statute authorizes the delegation of authority to committees of one or more directors. The committees may be delegated most of the power and authority that the board of directors would have sitting as a whole.

<sup>129</sup> 430 A.2d at 788.

<sup>130</sup> *Id.* See the text accompanying notes 117-121 *supra* for a discussion concerning the amount of discovery allowable under the Dent approach.

<sup>131</sup> *Zapata Corp. v. Maldonado*, 430 A.2d at 788-89.

<sup>132</sup> *Id.* at 787 n. 15. Compare Dent, *supra* note 3, at 133 (separate trial would not be worthwhile) with Comment, *supra* note 38, at 198-200 (separate trial would be useful in determining the issue of plaintiff's standing). At least one federal court has ordered a separate trial of the good faith issue. See *Lewis v. Anderson*, 615 F.2d at 780.

<sup>133</sup> *Zapata Corp. v. Maldonado*, 430 A.2d at 789. Compare this conclusion with that

a decision, the trial court should consider the corporation's best interests in light of applicable law and public policy.<sup>134</sup> This second step is apparently intended to serve as an "equitable out" for the trial court should a committee meet the technical requirements of independence, good faith and reasonable investigation yet not appear to meet the spirit of the rule.<sup>135</sup>

## VII. ANALYSIS

The Dent and Delaware approaches differ in several respects. First, Dent begins with the premise that demand has been required and properly made, but refused.<sup>136</sup> The court in *Zapata* draws a distinction between cases in which demand is required and those in which demand is excused; the court advocates a straight application of the business judgment rule where demand is made and refused, but suggests the use of its novel approach where demand is excused. The distinction, in effect, places the burden of proving lack of good faith and independence on the shareholder in cases where demand is required,<sup>137</sup> yet shifts the burden of proving good faith and independence to the corporation where demand is excused.<sup>138</sup> The Dent approach, in contrast, places the burden on the corporation without reference to

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of the Third Circuit which would allow the court to conduct its own analysis of the reasonableness of the business judgment where the shareholder-plaintiff contends that the decision not to sue is "outside the permissible bounds of the directors' sound discretion." *Cramer v. General Tel. & Elec. Corp.*, 582 F.2d at 279.

<sup>134</sup> *Zapata Corp. v. Maldonado*, 430 A.2d at 789.

<sup>135</sup> *Id.* The spirit of the rule is apparently to balance the interest of the stockholder in policing the board of directors against the interest of the corporation in avoiding meritless or harmful litigation. Accordingly, if the trial court feels that, even though the technical requirements are met, it is not to the benefit of the corporation to terminate the derivative action, the court may, in its discretion, implement the second part of the test to avoid such a termination. *Id.* at 787, 789.

<sup>136</sup> See Dent, *supra* note 3, at 105.

<sup>137</sup> This conclusion stems from the presumption of good faith by directors which is built into the business judgment rule. See Arsht, *supra* note 53, at 130. The *Zapata* court's approach treats the refusal as a business judgment which will be respected if the requirements of the rule are met. See 430 A.2d at 784 n.10. Accordingly, the burden of proving wrongful refusal—bad faith, lack of independence, or self dealing—is placed on the shareholder.

<sup>138</sup> Where demand is excused, the corporation can seek dismissal through the special

demand.

The extent to which the *Zapata* approach will differ in effect from the Dent approach depends upon how strictly the demand requirement is enforced. Under *Zapata*, a strict enforcement of the demand requirement will necessarily result in more cases being decided at the demand refusal stage than would be decided if liberal excuse of demand were granted. For example, a court which requires demand if a minority of directors is implicated would apply the straight business judgment rule to the board's refusal to sue, but a court which *excuses* demand if *any* directors are implicated would apply the *Zapata* approach. The burden would be on the shareholder in the former case, yet on the corporation in the latter. The *Zapata* court is thus, in essence, hinging the fate of the derivative suit on a nebulous procedural requirement—the demand—a device which was originally adopted primarily in the interest of judicial economy and restraint.<sup>139</sup>

Although the goals of the demand requirement are closely related to those of the business judgment rule,<sup>140</sup> they are not congruent. The demand requirement is primarily intended to serve as a vehicle for judicial economy and should be enforced even in instances where suit by directors is unlikely.<sup>141</sup> The business judgment rule, however, is primarily intended to provide directors with protection from simple errors in judgment. The independence standard under the demand requirement can be less strict than under the business judgment rule, and still accomplish the primary goals of judicial economy and abstinence.<sup>142</sup> Thus the

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litigation committee. The burden of proving independence, good faith and reasonable investigation is on the corporation. *Zapata Corp. v. Maldonado*, 430 A.2d at 788.

<sup>139</sup> See the text accompanying notes 34-52 *supra* for a general discussion of the demand requirement.

<sup>140</sup> See *Cramer v. General Tel. & Elec. Corp.*, 582 F.2d at 274-75.

<sup>141</sup> Kentucky appears to have adopted a very strict demand requirement. Demand is required unless, if granted, the litigation would be in unfriendly hands. *Maas v. Tyler*, 316 S.W.2d 211, 213-14 (Ky. 1958). One federal court applying Kentucky law declared that demand was *not* futile even though three of six directors and shareholders owning 40% of the corporation were defendants in the suit. *Levitan v. Stout*, 97 F. Supp. at 114. The court held that where the defendants own less than half of the voting stock and include "only" three directors from a board ordinarily composed of seven (the seventh seat was to be filled at the next shareholders meeting—possibly by a director favoring suit), the chance that the board might opt to induce action in order to avoid the necessity of a long complicated trial is enough to require demand. *Id.*

<sup>142</sup> See *Galef v. Alexander*, 615 F.2d at 59.

best approach may be to adopt a strict version of the demand requirement<sup>143</sup> in the interest of judicial economy, but to allow the shareholder-plaintiff to proceed with the suit in spite of the directors' subsequent refusal to sue.

Another difference in the two approaches is Dent's conclusion that decisions of special litigation committees should never be allowed to terminate suits implicating a majority of directors,<sup>144</sup> contrasted with the *Zapata* court's conclusion that such termination is indeed permissible. Dent's conclusion is based primarily on the inherently suspect influences to which minority director/committee members could be subjected throughout the decision-making process. The *Zapata* court focused on the board's authority to delegate responsibility to committees under state law and on the potential abuses by single shareholders who could "incapacitate an entire board of directors merely by leveling charges against them."<sup>145</sup> The court compensated for inherent internal influences or structural bias<sup>146</sup>—perceived as crucial by Dent<sup>147</sup>—by giving the trial court discretion to apply a business judgment analysis of its own.

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<sup>143</sup> Given the ease and lack of expense in making demand, even though demand may be futile virtually nothing is lost to the plaintiff-shareholder. On the other hand, there is always a possibility that the threat of litigation may prod the corporate directors into resolving and rectifying the problem. Accordingly, unless there is some immediate risk of damage which may stem from demand, demand requirements should be strictly enforced. The court has nothing to lose and much to gain by such strict enforcement.

<sup>144</sup> Dent, *supra* note 3, at 110.

<sup>145</sup> 430 A.2d at 785.

<sup>146</sup> See *Business Judgment*, *supra* note 3, at 601 n.14, for a definition of structural bias.

<sup>147</sup> Dent, *supra* note 3, at 111-17. Simply put, internal influences are those imposed on directors as a result of their essentially "political" position relative to other directors, management and controlling shareholders. The ability to "weigh dispassionately" the merits of the suit is largely dependent on the security of the director's position on the board and in the company. *Id.* at 110. It is also a function of the enemies and/or friends to be made in the decision to sue or not to sue the named defendants. If the defendants are third parties (outside the corporate group), the decision should be relatively untainted. Therefore, it makes sense for the court to defer to the judgment of the directors as long as the essential elements of the business judgment rule are satisfied. The more directors and other corporate insiders involved in the defendant group, the more likely it is that the decision will be less than dispassionate. See Comment, *A Procedural Treatment of Derivative Suit Dismissals by Minority Directors*, 69 CALIF. L. REV. 885, 894-900 (1981), for a criticism of the use of even non-defendant outside directors on special litigation committees.



The question then becomes whether the discretion granted to the trial court satisfies the fears set forth by Dent: that fellow directors are too close financially, socially, and philosophically to make an independent decision to sue one another; that even if the directors are actually independent of the majority, the appearance of impropriety is detrimental to the entire corporate governance system; and that, given the destructive nature of a decision to sue a fellow director, the committee member will be reluctant to act absent overwhelming evidence of wrongdoing.<sup>148</sup>

Dent would preclude a committee from investigating the problem and would require litigation from start to finish. The *Delaware* approach allows the corporation the opportunity to resolve its own problems, yet provides for judicial discretion to review procedures and to evaluate decisions. This approach appears to reflect the basic policy considerations behind the demand and business judgment rule requirements—judicial abstinence and judicial economy. By giving the committee an opportunity to resolve the problem without litigation, while allowing the plaintiff-shareholder an opportunity both for discovery and for production of evidence that could challenge the independence, good faith and reasonableness of the directors' procedures and business conclusions, the court retains the power to make an educated deferral to business judgment.

The other major difference between the two approaches concerns the scope of discovery allowable to the plaintiff-shareholder. Dent favors allowing the plaintiff-shareholder full discovery,<sup>149</sup> while the court in *Zapata* specifically authorized only limited discovery.<sup>150</sup> The precise limitations on the discovery proposed by the court are difficult to ascertain. The Court implied that the full discovery advocated by Dent was not to be allowed.<sup>151</sup> The scope of "limited" discovery, however, varies from full discovery<sup>152</sup> to discovery limited to the issues of good faith and independence.<sup>153</sup>

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<sup>148</sup> Dent, *supra* note 3, at 111-17.

<sup>149</sup> *Id.* at 132-33.

<sup>150</sup> 430 A.2d at 788.

<sup>151</sup> *Id.* at 788 n.16.

<sup>152</sup> *Maldonado v. Flynn*, 485 F. Supp. at 285-86.

<sup>153</sup> *Gall v. Exxon Corp.*, 418 F. Supp. at 520.

The discovery allowable should be left to the discretion of the trial court; this would dovetail with its discretion to review the business judgment of the committee. If the trial court finds that the decision of the committee fails to satisfy the spirit of the rule or that the corporate action would terminate a stockholder grievance prematurely, the trial court should have the discretion to expand the scope of discovery. A scale should be developed varying the scope of discovery according to the nature of the situation involved. For example, more discovery could be permitted in situations where the majority of directors are implicated than in situations where only a minority are implicated and the probability of internal influence is low.

Dent concedes that unlimited discovery can be unduly disruptive to the corporation, and thus he maintains that it should be limited to areas not investigated by the directors.<sup>154</sup> This limitation is reasonable both because of the plaintiff's ability to analyze the investigative procedures employed by the committee and because the burden of proving independence, good faith and reasonableness of procedures is on the corporation.

### CONCLUSION

Kentucky law regarding disinterested director committees is so ambiguous that a Kentucky court could adopt either approach. Kentucky's lack of "strike suit" protection afforded by other states<sup>155</sup> shifts the balance toward the adoption of a pro-corporate approach in Kentucky. Since the express purpose of the Kentucky Business Corporation Act is to attract business to the state, the likelihood of the outcome increases.<sup>156</sup> The optimal ap-

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<sup>154</sup> Dent, *supra* note 3, at 132-33.

<sup>155</sup> Michigan law provides for reasonable costs, including attorney's fees, upon a determination by the court that the suit was brought without reasonable cause. MICH. COMP. LAWS ANN. § 450.1493(2) (1973). In Kentucky, the only protection against "strike suits," other than directed verdicts and summary judgment motions, is the last sentence in KRS § 271A.245 (1981), which provides that "[n]o such derivative action shall be dismissed or compromised without the approval of the court, and notice . . . to shareholders . . . as the court directs." *Id.* The theory is that, since the shareholder will not bring a suit which he knows has no settlement value, minimizing the settlement value by requiring court approval as a prerequisite to settlement will discourage frivolous suits.

<sup>156</sup> Ham, *supra* note 103, at 74.

proach would be one that enforced a strict demand requirement, allowed the suit to continue, and then coordinated the business judgment rule, the burden of proof and the scope of discovery.

Once demand has been refused and the shareholder has initiated suit, the corporation should still be permitted to take steps to terminate burdensome or unprofitable litigation. This could be attempted through action of the entire board, or via a disinterested litigation committee if some or even a majority of directors are implicated.

The committee should be composed of outside independent directors. If the committee were to conclude that the suit should be terminated, it should be required to provide the court with detailed lists of the procedures undertaken to investigate the merits of the claim and detailed explanations supporting its decision that continuation of the derivative action would be detrimental to the best interests of the corporation. Given the structural biases, the burden of proving independence, good faith and the reasonableness of the investigative procedures should all be on the corporation. The court should have the discretion to order and establish the scope of allowable discovery, to probe into the reasonableness of the decision not to sue and to perform a limited business judgment analysis of its own.

The scope of the burden of proof, the amount of allowable discovery and the extent to which the court will probe into the reasonableness of the decision not to sue should be based on a sliding scale used by the trial judge within his discretion but documented and supported by factors such as the number of implicated directors,<sup>157</sup> the composition of the committee,<sup>158</sup> the extent of the procedures employed to investigate the claim<sup>159</sup> and

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<sup>157</sup> As the number of directors implicated increases so should the level of scrutiny to be applied by the court.

<sup>158</sup> The presence on the committee of inside rather than outside directors may require closer scrutiny by the court. *See Dent, supra* note 3, at 111-17. The court should also consider any indirect involvement that the committee directors may have had in the transaction—involvement insufficient to create a lack of independence but sufficient to raise some suspicion.

<sup>159</sup> Investigative procedures performed by a reputable law firm not otherwise involved with the corporation, or by a national certified public accounting firm, should be subject to less scrutiny than procedures performed either by the directors themselves or by corporate employees under the direction of the directors.

the nature of the claim.<sup>160</sup>

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<sup>160</sup> The decision is more suspect if the directors are implicated for some act in which they allegedly made personal gains. *See, e.g., Zapata Corp. v. Maldonado*, 430 A.2d 779 (allegations of manipulation of stock option exercise dates to minimize personal income tax of director option holders). The committee decision is less suspect where the alleged act involved no personal gain to directors. *See, e.g., Gaines v. Haughton*, 645 F.2d 761 (allegations of questionable payments to foreign governments).

