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Achieving the Proper Remedy for a Dissenting Shareholder in Today's Economy: *Yuspeh v. Koch*

INTRODUCTION

Louisiana Revised Statutes 12:131 provides rights to a shareholder dissenting from certain corporate actions including mergers, consolidations, share exchanges, and sales of assets to which the corporation is a party. These rights, known as dissenters' or appraisal rights, give the dissenting shareholder the right to demand payment from the corporate issuer of his shares at their "fair cash value."¹ Since the general rule in Louisiana is that corporations have no responsibility to repurchase the shares of an investor who wishes to recede from the firm, intuition tells one that dissenters' rights are therefore valuable assets to all dissenting shareholders.² However, these appraisal rights may provide inadequate compensation to the shareholders who are being forced or "freed-out" of a corporation.³ Freeze-out mergers, which began to arise in the early 1970s, are corporate transactions in which the majority expels the minority stockholders from the company and requires them to accept cash, notes, or other property for their shares.⁴ The question has been raised whether the dissenting shareholders of a corporate action are limited to the rights dictated by Louisiana Revised Statutes 12:131, or instead, may they pursue other legal remedies?⁵ Though unresolved in Louisiana before *Yuspeh v. Koch*,⁶ other states have held, both jurisprudentially and statutorily, that dissenting shareholders can maintain a breach of fiduciary duty suit in lieu of the statutory dissenters' rights action.⁷

This casenote analyzes the decision of *Yuspeh v. Koch* in which the Louisiana Fifth Circuit Court of Appeal declared, first, that Louisiana's dissenters' rights were not exclusive and, second, that a

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1. La. R.S. 12:131(C)(2) (2004).
2. Wendell H. Holmes & Glenn G. Morris, Business Organizations § 38, in 8 Louisiana Civil Law Treatise 296 (1999).
3. *Id.* at 324.
4. See Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 Geo. L.J. 1, 3-4 (1995).
5. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, writ denied, 847 So. 2d 1277 (La. 2003).
6. See *Levy v. Billeaud*, 443 So. 2d 539 (La. 1983) (The Court ruled a dissenting shareholder can bring a breach of fiduciary duty claim, but there was no explicit discussion of "exclusivity.").
7. See, e.g., *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099 (Del. Supr. 1985); 805 Ill. Comp. Stat. Ann. 5/11.65(a)(b) (West 1985); *Perl v. IU Int'l Corp.*, 607 P.2d 1036 (Haw. 1980); *Roussel v. Payne*, 352 So. 2d 1364 (Ala. Civ. App. 1977); *Victor Broadcasting Co. v. Mahurin*, 365 S.W.2d 265 (Ark. 1963).

minority shareholder's interests were properly valued as a proportionate part of the corporation. The court's decision allowed the dissenting shareholders to receive equitable monetary recovery for their shares of stock and demonstrated that Louisiana courts understand the serious inequities of dissenters' rights in freeze-out transactions. The court did not hold that freeze-out transactions are necessarily an evil way of doing business. In fact, the court supports freeze-out transactions as long as the minority shareholders receive a fair and evenhanded valuation for their shares of stock.

Part I of this casenote explains the factual and procedural background of the *Yuspeh* case and details the court opinion. Part II describes the pertinent history of dissenters' rights in American corporate law, in order to ascertain the original purposes of the statute. This description also explains how the dissenters' rights statute is now being used for purposes that it was never designed to accomplish.⁸ This second section includes a description of the two main problems with dissenters' rights today: complicated and demanding procedural rules, and share valuation problems that undervalue the dissenters' shares. These particular troubles have led many courts, including the court in *Yuspeh*, to allow minority shareholders to pursue other causes of action outside dissenters' rights.

Part III outlines: (A) why dissenters' rights should not be the exclusive remedy with freeze-out mergers; (B) Delaware's approach to the issue of exclusivity of dissenters' rights; and (C) that Louisiana followed the correct approach with the *Yuspeh* decision. This section establishes that dissenters' rights are incapable of providing an equitable remedy to a minority shareholder. Therefore, it is nonsensical to relegate these former shareholders to this ill-equipped remedy. Part IV describes the court's valuation of an exiting minority shareholder in a freeze-out transaction as a proportionate part of the whole company. This valuation methodology was a break from the precedent set in *Shopf v. Marina Del Ray Partnership*,⁹ but remains the correct decision. However, the court made certain assumptions that allowed it to avoid discussing this adverse precedent. Though the decision to avoid precedent provided a correct result for the plaintiffs in *Yuspeh*, it has left the jurisprudence muddled. Finally, part V argues that Louisiana should amend its current dissenters' rights statute to deal with the problems that freeze-out mergers have caused under the present structure of the appraisal remedy. This amendment can be properly achieved by following the American Law

8. Thompson, *supra* note 4, at 5.

9. 549 So. 2d 833 (La. 1989) (ruling that a minority's interest in the corporation was of less value to third persons and, as a result, should be discounted).

Institute's guidance. Specifically the American Law Institute (ALI) recommends removing minority and marketability discounts when shares are being sold between shareholders in a closely-held corporation,¹⁰ simplifying the complicated appraisal remedy procedures,¹¹ and specifying exactly when dissenters' rights should be applied exclusively.¹²

I. *YUSPEH V. KOCH*

A. *Factual and Procedural Background*

Charles Yuspeh, Wallace Murphy, and Michael Ditcharo founded Certified Security Systems, Incorporated (CSS) in 1983.¹³ Yuspeh effectively owned seventy percent of the common stock of CSS.¹⁴ Of this ownership percentage, eighteen percent represented the shares of stock that were held in his two daughters' names.¹⁵ Murphy owned exactly twenty-five percent of CSS and Ditcharo owned the remaining five percent interest.¹⁶ In 1990, Yuspeh attracted two new investors, Hansen and David Koch, to invest \$1.5 million in secured notes and \$500,000 in 500 shares of preferred stock in CSS.

Eventually in 1993, the Kochs' loan to CSS became overdue. The loan was subsequently restructured, through which the Kochs lent additional money to CSS and the 500 shares of preferred stock were exchanged for new common shares worth fifty-one percent of CSS's issued and outstanding common stock.¹⁷ Consequently, the Kochs began to control the corporation by a majority vote. This transaction left Yuspeh, Murphy, and Ditcharo with 34.3%, 12.25%, and 2.5% ownership interests respectively. Also, the shareholders of CSS amended the articles of incorporation to require a 60% vote of the shareholders to reorganize the company.¹⁸ The corporate articles had previously required 67% of the shareholders to agree to reorganization.

CSS struggled with profitability, upsetting the Kochs, the new majority owners. In 1994, Hansen Koch fired the president, Yuspeh,

10. 2 American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations*, §§ 7.01–7.25, at 314–15 (1994) [hereinafter *American Law Institute*].

11. *Id.* at 335–37.

12. *Id.* at 347–48.

13. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 44, *writ denied*, 847 So. 2d 1277 (La. 2003).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 45.

for falsifying the corporation's true financial condition and subsequently promoted himself as the President and Chief Operation Officer of CSS. Murphy, head of the sales department, eventually quit CSS in 1996 because he was dissatisfied with his employment terms.¹⁹

The Kochs later attempted to purchase Murphy's new 12.5% ownership of common stock for \$50,000, which Murphy declined to accept.²⁰ Subsequently, in December of 1997 the Kochs, who now controlled the corporation with a majority ownership interest, caused the board of directors to issue them thirty-four authorized, but previously unissued shares of common stock from CSS for \$50 per share.²¹ The plaintiffs, consisting of Yuspeh and other minority shareholders, were never notified of the Kochs purchase of these thirty-four shares of stock. This transaction raised the Kochs ownership percentage to approximately 67.6%, giving them the sixty percent ownership interest necessary to reorganize CSS.

The Kochs reorganized, over objections by Yuspeh and the other minority shareholders, and created a new corporation wholly owned by them. The Kochs merged CSS into this new company, leaving them with a 100% ownership interest in the new firm, and requiring Yuspeh and the other minority shareholders to relinquish their CSS shares for \$50 a share.²²

The plaintiffs believed that the merger did not set their stock at fair market value. The \$50 per share price set by the plan of merger was much lower than the \$2000 per share value the Kochs had earlier offered Murphy for his 12.25% ownership interest. The plaintiffs would have been entitled to exercise appraisal rights, had they complied with the statutorily prescribed procedures.²³ Instead, they filed a suit alleging that the majority shareholders committed fraud and a breach of fiduciary duty by purchasing the thirty-four unissued shares and abusing the leverage those thirty-four shares gave them by forcing the minority shareholders out of the corporation in a freeze-out merger.²⁴

The district court in Jefferson Parish, Louisiana entered a verdict in favor of the minority shareholders, and the defendants appealed to the Louisiana Fifth Circuit Court of Appeal.²⁵

19. *Id.*

20. *Id.*

21. *Id.* at 45-46.

22. *Id.* at 46.

23. See *infra* text accompanying notes 67-74.

24. *Yuspeh*, 840 So. 2d at 43.

25. *Id.* at 44.

B. Summary of the Defendants' Arguments

The defendants, Hansen and David Koch, argued two assignments of error worthy of discussion. First, the defendants argued that the trial court erred in failing to treat the statutory dissenters' rights as the plaintiffs' sole remedy, which the plaintiffs had lost by their failure to comply with the statutory procedures required by Louisiana Revised Statutes 12:131.²⁶ Second, the Kochs contended that the trial court had erred in recognizing causes of action for fraud and a breach of fiduciary duty based on the issuance of the thirty-four new shares without notice to the minority shareholders and on the subsequent merger.²⁷

C. Summary of the Louisiana Court of Appeal's Decision

i. Argument that the Trial Court Failed to Rule that Louisiana Revised Statutes 12:131w as the Minority Shareholders' Sole Remedy

In the court's view, the facts of *Yuspeh* squarely posed the following question: are dissenting shareholders of a corporation allowed to bring actions against the company outside of the dissenters' right statute, or are the shareholders exclusively limited to the statutory dissenters' remedy?²⁸ The court answered this question by noting that there was nothing in the text of Louisiana Revised Statutes 12:131, or even prior jurisprudence, which stated that this statute is a minority shareholder's sole remedy for attempting to receive a "fair value" for his shares.²⁹ Moreover, the judges recognized that the statute was completely silent on fraud or breach of fiduciary duty claims. As such, the court declared that the minority shareholders were not exclusively limited to the dissenters' rights described in Louisiana Revised Statutes 12:131.³⁰

ii. Argument of No Cause of Action for Fraud or Breach of Fiduciary Duty

In determining the strength of the no cause of action argument, the court used Black's Law Dictionary to define a fiduciary as "a person having duty [sic], created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. A

26. *Id.* at 46.

27. *Id.*

28. *Id.* at 47.

29. *Id.*

30. *Id.* (citing *Levy v. Billeaud*, 443 So. 2d 539 (La. 1983)).

term [sic] to refer to a person having duties involving good faith, trust, special confidence, and candor towards another."³¹ The court then cited Louisiana Revised Statutes 12:91, which states that officers and directors of a company are presumed to stand in a fiduciary relation to the shareholders of the corporation. This provision requires corporate officers and directors to perform their obligations to the corporation in "good faith," and with the same "diligence, care, judgment, and skill" that a reasonable person would perform them.³²

The court compared the Kochs' secretive purchase of the thirty-four shares for \$50 per share to these requirements.³³ The court noted that only months before the Kochs had offered Murphy approximately \$2,000 per share to buy out his ownership.³⁴ The judges concluded that the sole purpose of the issuance of the shares was simply to obtain the adequate voting percentage to allow the majority shareholders to perform the freeze-out merger and force the minority shareholders out of the corporation. This determination led the court to ultimately conclude that the Kochs committed fraud and breached their fiduciary duty to the corporation by purchasing the thirty-four shares of stock without notice to the minority shareholders.³⁵

iii. The Court of Appeal's Determination of the Value of the Stock

After the court concluded that a dissenting minority shareholder is not exclusively limited to the statutory remedies provided in Louisiana Revised Statutes 12:131, it nevertheless looked to that statute for guidance in determining the proper valuation of the minority shares. In subsection (c)(2) the statute states that this determination is based on "fair cash values" of the minority shareholders' shares the day before the merger vote is taken. Because the freeze-out merger proposal was decided on December 30, 1997, the evaluation date for fair cash value was December 29, 1997.

The court considered various expert witnesses to determine fair cash value. After reviewing all of the valuation methods, the court concluded that the jury erred in its valuation of CSS's stock.³⁶ The court ruled that recurring monthly revenues (RMR) is the "initial cornerstone" in determining CSS's value.³⁷ The court found RMR to be \$120,000, and multiplied this amount by forty-six, which was the

31. *Id.* at 49–50.

32. *Id.* at 50 (citing La. R.S. 12:91).

33. *Id.* at 50.

34. *Id.*

35. *Id.*

36. *Id.* at 53.

37. *Id.*

most consistently recited multiplier elicited from various expert witnesses.³⁸ This initially set CSS's total assets value at \$5.4 million. After adding back certain receivables and subtracting debts, \$783,300 remained to be divided up among the shareholders according to investment percentages before the Kochs' secretive purchase of the thirty-four shares.³⁹

Therefore, Yuspeh and his daughters received \$268,750 (for their 34.3% ownership), and Murphy received \$96,033 (for his 12.26% ownership).⁴⁰ This resulted in an award of approximately \$3,840 per share, which was well above both the \$2,000 per share⁴¹ offer made by the Kochs to purchase Murphy's shares just months earlier and the \$50 per share⁴² given to the minority shareholders in the freeze-out merger. Now that an understanding of the *Yuspeh* decision has been attained, it is necessary to delve into the pertinent history of dissenters' rights. The next section demonstrates that dissenters' rights were never designed for "freeze-out" mergers.⁴³ As a result, dissenters' rights can be an inadequate remedy for a dissenting shareholder and should not be treated as the shareholder's sole remedy when being forced out of the corporation in a freeze-out transaction.

II. PERTINENT HISTORY OF DISSENTERS' RIGHTS

Until the late nineteenth century, American corporate law declared that shareholder consent was a fundamental prerequisite for a company to engage in a merger.⁴⁴ The principle behind this concept was that since every shareholder possessed a property right in the corporation, they should not be required to exchange this asset for a property right in a different merged company.⁴⁵ This approach allowed minority shareholders to block corporate actions that were

38. *Id.* at 52–53. The court used the market value method to value CSS, which figures a gross sales price by multiplying the RMR by a multiple. *Id.*

39. *Id.* at 54.

40. *Id.*

41. *Id.* at 50.

42. *Id.* at 45–46.

43. Thompson, *supra* note 4, at 4.

44. Michael G. Schinner, *Dissenting Shareholder's Statutory Right to Fair Cash Value*: *Armstrong v. Marathon Oil Co.*, 22 Akron L. Rev. 261, 265 (1989) (citing *Armstrong v. Marathon Oil Co.*, 513 N.E.2d 776, 781–82 (1987)).

45. Henry F. Johnson & Paul Bartlett, Jr., *Is a Fistful of Dollars the Answer? A Critical Look at Dissenters' Rights Under the Revised Model Business Corporation Act*, 12 J.L. & Com. 211, 212 (1993) (citing Anthony G. Amsterdam, *Recent Developments: Corporate Fusion by Sale of Assets and Dissolution Held Free From Delaware Statutory Right of Appraisal Despite Claims of DeFacto Merger*, 63 Colum. L. Rev. 1135 (1963)).

considered beneficial by the majority shareholders.⁴⁶ In a large corporation, with thousands or millions of shareholders, shareholder consents of this kind were impossible to obtain.

Legislatures, in the late 1800s and early 1900s, concluded that one shareholder should not be able to veto important corporate actions (e.g., mergers) desired by a majority of shareholders. As a result, Congress began giving broader powers to majority shareholders to perform corporate transactions, even over a minority objection.⁴⁷

In exchange for this broadened power given to the majority, dissenters were given the right to receive fair cash value for their ownership interests, and judicial appraisal was mandated where the fair cash value of the stock was in dispute.⁴⁸ This new compromise was designed to balance the majority interest in proceeding with corporate transactions against the interests of the minority shareholders, who needed a way to ensure that they could safely exit a corporation that was making a transactional decision with which they did not agree.⁴⁹

In sum, the dissenters' rights statutory remedy was created to give dissenting shareholders liquidity for their shares of stock while facilitating desirable corporate transactions.⁵⁰ In Louisiana, a dissenters' rights statute (currently Louisiana Revised Statutes 12:131) was put into effect on July 18, 1928. Today, the liquidity purpose of the dissenters' rights statute is almost completely obsolete in large publicly traded corporations. There are now large securities markets that give dissatisfied corporate investors an easy opportunity to liquidate their corporate stock in arms-length transactions.⁵¹ However, the liquidity purpose is still prevalent for dissenting shareholders in closely held corporations,⁵² especially in states such as Louisiana where most corporations are not publicly traded.

When dissenters' rights were created they were intended for what are termed "freeze-in" mergers. Freeze-in mergers occur when all shareholders at the time of a transaction are treated equally and receive a corresponding ownership interest in the new corporate

46. *Id.* (citing F. Hodge O'Neal & Robert B. Thompson, O'Neal's Oppression of Minority Shareholders § 5.03 (2d ed. 1991)).

47. *Id.* at 213.

48. *Id.* (citing Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 Cornell L.Q. 420, 421 (1930)).

49. *Id.*; Schinner, *supra* note 44, at 265-66.

50. Thompson, *supra* note 4, at 3-4.

51. Dissenters' rights are not even generally available under Louisiana law for shareholders of publicly-traded corporations. *See* La. R.S. 12:131 (2004).

52. *See, e.g.,* Yuspeh v. Koch, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, *writ denied*, 847 So. 2d 1277 (La. 2003).

formation.⁵³ They are called freeze-in mergers because under the plan the shareholders are required to accept stock in the new merged entity regardless of whether they would prefer to exit the newly merged corporation by selling their shares. In the 1970s a new form of corporate transaction phenomenon developed with the advent of "freeze-out" mergers.⁵⁴ Freeze-out mergers, on the other hand, are corporate transactions in which the majority kicks the minority stockholders out of the company and requires them to accept cash, notes, or other property for their shares.⁵⁵ The vast majority of the dissenters' rights asserted today result from freeze-out transactions.

As dissenters' rights were designed for freeze-in transactions, they were planned to be used to protect a minority shareholder from being forced to stay in a merged corporation when that shareholder really wanted out. The appraisal remedy was not designed for a freeze-out transaction, in which the statutory remedy would be used to protect a minority shareholder who wanted to stay with the corporation from being forced out of the company.⁵⁶ The big difference is that in a freeze-in merger the same deal is proposed for all shareholders. Therefore, there is no self-dealing by the majority because every shareholder is treated equally.

On the other hand, in a freeze-out merger there is a large conflict of interest between the majority, who will stay in the new corporation, and the minority, who will be forced to exit the corporation by selling their shares of stock. The majority will want to buy out the minority shareholders at the lowest possible price. Consequently, in these freeze-out scenarios the appraisal remedy's purpose has been altered to regulating what amounts to be a partition of co-owned property (e.g., the shares of stock). This new purpose is to "serve as a check against opportunism by a majority shareholder in [freeze-out] transactions."⁵⁷ While there have been few Louisiana cases discussing this issue, the 1983 Delaware Supreme Court's opinion in *Weinberger v. UOP, Inc.* depicts how that Court tried to reform the Delaware appraisal rights to take account of their new role regarding freeze-out transactions.⁵⁸ Judging from the later decision of *Rabkin v. Phillip A. Hunt Corp.*,⁵⁹ this reform was not viewed as entirely successful. Even after

53. Holmes & Morris, *supra* note 2, at 324.

54. *Id.* at 309.

55. *Id.* at 324.

56. *See id.*

57. Thompson, *supra* note 4, at 4 ("[L]ess than one in ten of the litigated cases illustrate the liquidity/fundamental change concern of the classic appraisal remedy.").

58. 457 A.2d 701 (Del. 1983).

59. 498 A.2d 1099 (Del. 1985).

reform, dissenters' rights were not exclusive, and they remain so in the state of Delaware.

In essence, in Louisiana and all over the country, dissenters' rights statutes are now being used for purposes that they were never designed to accomplish.⁶⁰ Not surprisingly, there are now serious concerns with the application of this statutory remedy. The court in *Yuspeh v. Koch* does not speak explicitly about any of this history or the concerns now present in Louisiana's appraisal statute. However, one must fully understand this information before one can comprehend what most likely led the court to its conclusion. The following sections illustrate why dissenters' rights are no longer an effective remedy for a dissenting shareholder. The first section describes how the required dissenters' rights procedures may cause a dissenter to lose those rights rather easily.⁶¹ The succeeding section discusses how there are unfavorable share valuation problems that arise when the dissenting shareholders receive "fair cash value."⁶²

A. Cumbersome Procedural Rules that Can Take away Dissenters' Rights

There are numerous procedures that a dissenting shareholder must accurately and precisely follow in order to properly assert their dissenters' rights. Failure to comply creates the risk of losing the statutory remedy altogether. In Louisiana, Louisiana Revised Statutes 12:131 contemplates that eight detailed steps must be followed exactly before the rights will be recognized.⁶³

The following rules are general and can differ depending on the type of merger.⁶⁴ First, the corporation must give its shareholders notice of the meeting in which shareholder approval will be obtained for a corporate transaction.⁶⁵ Second, the dissenting shareholder must file a written objection of the corporate transaction with the company.⁶⁶ Third, the dissenter must actually vote against the proposed transaction when it is submitted for vote.⁶⁷ Fourth, the

60. Thompson, *supra* note 4, at 5 ("The appraisal remedy remains caught between one function that is no longer needed and another that it is inadequately equipped to perform.")

61. See Holmes & Morris, *supra* note 2, at 315–23 (describing eight specific procedures that a dissenting shareholder must follow).

62. *Id.* at 327–34.

63. *Id.* at 315–23.

64. See, e.g., La. R.S. 12:112(G) (2004) (short form mergers require different procedures).

65. Holmes & Morris, *supra* note 2, at 315 (simplifying the procedures listed in La. R.S. 12:131).

66. *Id.* at 316.

67. *Id.*

transaction must receive the required affirmative vote of the shareholders.⁶⁸ Fifth, after the transaction is completed, the corporation must send “prompt” notice to the dissenting shareholders.⁶⁹ Sixth, within “twenty days” of the mailing of the merger notice, the dissenting shareholder must (1) escrow their stock certificates in a bank that is in the same location of the parish where the corporation’s registered office is located, and (2) make written demand for the payment of the escrowed shares.⁷⁰ Seventh, the corporation must reply to the dissenting shareholder’s demand within twenty days of receiving it or pay the value demanded by the minority shareholder.⁷¹ Finally, if the corporation disagrees as to the amount of payment, as is usually the case, then the shareholder must file a valuation suit within “sixty days” of the date he received the corporation’s reply in step seven.⁷² Only after this process is complete will the court determine the proper amount that the corporation is required to pay for the shares of stock. However, if the shareholder does not file the valuation suit within sixty days, that shareholder becomes bound by what the corporation thought the payment should be, which could even be zero.⁷³ If any of these eight rules are violated, it is possible that the appraisal remedy will be precluded.⁷⁴

Obviously, these procedures are extremely complicated. One slight mistake in these procedures and the statutory remedy may be lost. One may ask, why is the law so demanding in declaring shareholders ineligible for dissenters’ rights when they make minimal procedural errors?⁷⁵ The answer lies in the fact that appraisal remedies were a legislatively created device that represented a compromise between the majority and minority shareholders. The majority wanted strict appraisal terms so that frivolous lawsuits against beneficial corporate transactions by minority shareholders would be deterred.⁷⁶ With freeze-in transactions, these strict procedures make sense because the minority has the option to stay

68. *Id.* at 316–17.

69. *Id.* at 317–20.

70. *Id.* at 320–21.

71. *Id.* at 321–22.

72. *Id.* at 322–23.

73. *Id.*

74. *See, e.g.,* *McCall v. McCall Enterprises, Inc.*, 578 So. 2d 260 (La. App. 3d Cir.), *writ denied*, 581 So. 2d 708 (La. 1991). The court read the procedures strictly and precluded the shareholders’ right to dissent, stating that a shareholder who failed to meet the twenty-day deadline (Step #6) was presumed to have acquiesced in the transaction. *Id.*

75. *See, e.g.,* *Gibson v. Strong Co.*, 708 S.W.2d 603, 604–05 (Ark. 1986) (appraisal remedy denied because minority objection one-half hour after the vote).

76. Thompson, *supra* note 4, at 40.

with the corporation and be treated equally instead of asserting the appraisal remedy.⁷⁷ That is to say, the legislature obviously knew that the exercise of the appraisal remedy would cost corporations large amounts of cash, and so they decided to place the procedural burden on the minority shareholders.⁷⁸

However, this casenote has discussed how appraisal remedies are no longer being used for their originally constructed purposes. Therefore, applying these strict procedural requirements to minority shareholders today is illogical. When the minority is being effectively shut out of a corporation, frivolous abuse of the dissenters' rights remedy seems much less plausible. *Yuspeh v. Koch* does not deal with any procedural requirements of dissenters' rights. In fact, the plaintiffs in *Yuspeh* did not even assert their dissenters' rights. However, these strict procedural requirements for a freeze-out merger may have been one of the reasons that the plaintiffs decided to pursue remedies outside the scope of appraisal rights. By recognizing a separate breach of fiduciary duty claim, the court permitted the plaintiffs to avoid these strict procedural requirements.

B. Unfavorable Share Valuation Problems with Dissenter's Rights

Before discussing why dissenters' rights provide unfavorable share valuation issues, it is important to recall one of the original purposes of the statute with respect to the dissenting shareholders. That purpose, which is still present today in closely-held corporations, is to allow the shareholders to exit the corporation and to easily receive money for their shares of stock.⁷⁹ In freeze-out transactions, dissenters' rights do give exiting shareholders money for their stock, but at extremely unfavorable discounts.⁸⁰

Discounts are applied to the minority shareholders' stock essentially on two major bases: (1) lack of marketability; and (2) minority status of those shares.⁸¹ The theory behind the marketability discount is that when the corporation decides to freeze-out the minority shareholders, there is usually no established market for the minority to be able to sell their shares.⁸² This can lead to possible risks and expenses that cause the marketability discount to be applied.

77. *Id.*

78. *See id.*

79. Johnson & Bartlett, *supra* note 45, at 213.

80. *See Shopf v. Marina Del Ray P'ship*, 549 So. 2d 840 (La. 1989) ("A minority interest may be uniquely valuable to the owner, but may have considerably less value to an independent third party, because the interest is relatively illiquid and difficult to market.").

81. Holmes & Morris, *supra* note 2, at 328.

82. *Id.*

The proponents of the marketability discount rationalize it by arguing that because this discount is allocated equally among all classes of stock, it is treating all classes of stockholders equally and fairly.⁸³ However, the commentators in the *Louisiana Civil Law Treatise* point out that this idea of equality is simply an illusion.⁸⁴ It is only the minority shareholders who are trying to sell their shares of stock for the proper price. The rest of the corporate stockholders could truly care less what any expert declares the value of their stock to be at the moment of the freeze-out merger.

Furthermore, the minority discount can be applied on top of the marketability discount. This minority discount has been based on the premise that the minority's stock is only representative of a non-controlling portion of the company. Therefore, the stock's value should be worth less than its "proportionate share" of the corporation's fair value.⁸⁵ Opponents of the minority discount think it is unfair to allow the majority shareholders to effectively penalize the minority shareholders for lack of control.⁸⁶ They believe that each shareholder should receive their proportionate share of the whole corporation's value.⁸⁷

Even if one concludes that there are logical reasons for applying the discounts to the minority shareholders' stock, serious problems remain for determining when and how to calculate these discounts. In a freeze-out merger the officers and directors of the existing corporation produce experts who testify as to why the discounts should apply and how much the discounts should be.⁸⁸ There is absolutely no statistical basis from which to measure these experts' calculations. Also, no expert can ever be proven wrong because in closely-held corporations no market exists to determine the true worth of the minority shares.⁸⁹ Therefore, there is no real way to ever accurately determine whether these discounts should be applied, and if so, whether the discount percentage is correct. Even more troubling is that this seemingly unclear and presumably biased system is then protected even further after the trial court decides that the discounts should apply. This is because the discounts have been held to be factual questions that are reviewed under the manifest error

83. *Id.* at 333.

84. *Id.*

85. American Law Institute, *supra* note 10, at 324.

86. Holmes & Morris, *supra* note 2, at 333 (citing *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1141 (Del. 1989)).

87. *Id.* at 333 (citing *In re Valuation of Common Stock of McLoon Oil Co.*, 565 A.2d 997, 1005 (Me.1989)).

88. *Id.* at 329.

89. *Id.* at 328-30.

standard.⁹⁰ Under this standard a trial court's ruling on the proper discount can be overturned by the appellate court only if it deems the discount clearly unreasonable. In effect, this puts too much power in the hands of a trial court, which is questionably equipped to accurately value minority shares.

III. APPRAISAL RIGHTS AS AN EXCLUSIVE REMEDY?

One of the most important questions when dealing with dissenters' rights is whether the statutory rights available are the exclusive remedy to shareholders who might wish to pursue other shareholder claims, including a breach of fiduciary duty. Most states' dissenters' rights statutes, including Louisiana's, simply declare what remedies a minority shareholder possesses when dissenting from a corporate transaction.⁹¹ A strictly literal reading of these statutes lends support to the argument that since the appraisal remedy declares what rights a dissenting shareholder possesses, then this legal remedy is the minority shareholder's sole remedy. This argument has some logic to it because most dissenters' rights statutes, including Louisiana's, simply make no mention of exceptions for fraud or breach of fiduciary duty.⁹² This strict constructionist reading concludes that if there were supposed to be exceptions to the dissenters' rights statutes, then the legislature would have added such exceptions. On the other hand, one could also argue that the statutory remedy is just one of many remedies available to a dissenting minority shareholder. The statute does not specifically state that the appraisal remedy is the only remedy to a dissenting shareholder, so why should the shareholder not have the ability to pursue other causes of action, including a breach of fiduciary duty.

The majority of states across the nation seem to be heeding the American Law Institute's (ALI) suggestion that, until the statutory remedy is altered to take account of freeze-out mergers, then the courts should allow shareholders to pursue certain other causes of action.⁹³ All of the problems with dissenters' rights statutes

90. *E.g.*, *McMillan v. Bank of the South*, 514 So. 2d 227 (La. App. 5th Cir. 1987), writ denied, 516 So. 2d 131 (1987) (holding that the trial court had based its determination of the value of the stock on the testimony and evidence of experts and had made no manifest error).

91. *See, e.g.*, La. R.S. 12:131 (2004).

92. *See id.*

93. *See, e.g.*, American Law Institute, *supra* note 10, at 358-79. The recommendations listed all fifty states' approaches to the issue of exclusivity in 1994. Only Florida ruled the statute exclusive at all times. Three other states had exclusive statutes, but courts allowed for certain exceptions, including when a corporation is controlled and a shareholder elects not to pursue appraisal remedy

previously discussed, which have arisen because of the advent of freeze-out mergers, simply make the principle of exclusivity unfair to minority shareholders. The Principles of Corporate Governance, published by the American Law Institute, state “exclusivity is justified only if (1) the procedures applicable to the appraisal remedy minimize those barriers that now inhibit its exercise by eligible shareholders, and (2) some limited exceptions to exclusivity are recognized in those circumstances where conflicts of interest are most apparent.”⁹⁴ In a sense, the American Law Institute, like the Revised Model Business Corporation Act (R.M.B.C.A.), wants to make the appraisal rights exclusive, but only if certain exceptions are allowed. The R.M.B.C.A. provides that “[a] shareholder [entitled to dissent and obtain payment for his shares under appraisal rights] may not challenge a completed corporate action . . . unless such corporate action . . . was procured as a result of fraud or material misrepresentation.”⁹⁵ Essentially, this rule is “exclusive unless it shouldn’t be exclusive.”⁹⁶ The following sections of this casenote analyze whether applying the appraisal remedy exclusively should vary with the type of corporate transaction involved, the significance of Delaware’s approach to exclusivity, and Louisiana’s brief history with exclusivity, as well as *Yuspeh*’s impact on this issue.

A. Should Dissenters’ Rights be Ruled as an Exclusive Remedy in Both “Freeze-in” and “Freeze-out” Transactions?

Applying dissenters’ rights exclusively only seems to make sense when it is done to shareholders in a freeze-in transaction.⁹⁷ In a freeze-in transaction it is the minority shareholder’s assertion of the appraisal remedy that triggers the loss of shareholder rights (e.g., voting rights, dividend rights, etc.).⁹⁸ In this situation, if the dissenters’ rights are lost in any way,⁹⁹ then the dissenter is reinstated with all of his shareholder rights and responsibilities.¹⁰⁰ The shareholder either gets to receive fair cash value for his shares of

(California); when there are claims against officers based on their own conduct (Connecticut); and when the court rules there is no valid purpose for the merger (Indiana). *Id.*

94. *Id.* at 295.

95. Revised Model Business Corp. Act §13.02(d) (2002) [hereinafter R.M.B.C.A.]

96. Holmes & Morris, *supra* note 2, at 346.

97. *See id.* at 324.

98. *Id.* at 323.

99. See text accompanying notes 67–74 for one possible way to lose your dissenters’ rights, which includes not properly following the procedures detailed in the dissenters’ rights statute.

100. La. R.S. 12:131(H) (2004).

stock under the appraisal remedy, or he is simply put back to his position in the surviving corporation with similar rights as the remaining shareholders.¹⁰¹ Under these circumstances, it is the minority shareholder's choice to assert dissenters' rights. Hence, it is also their choice to relinquish control of their shareholder rights, including the right to bring a claim for fraud and a breach of fiduciary duty. Therefore, it makes sense to apply the dissenters' rights exclusively thereby limiting the minority shareholder's right to other remedies.

Alternatively, applying the dissenters' rights exclusively in a freeze-out transaction does not seem as logical.¹⁰² In this situation, it is the actual freeze-out merger, which is beyond their control, that causes the minority shareholder to lose their corporate shareholder rights. Accordingly, the appraisal remedy provides these shareholders who have been ousted from the company with a judicial remedy because they have been stripped of their shareholder rights.

However, unlike the freeze-in transaction, the dissenters' rights of a minority shareholder in a freeze-out transaction are not reinstated upon losing their appraisal rights.¹⁰³ Otherwise, the dissenter could purposefully relinquish their dissenters' rights and become reinstated as a corporate shareholder. It would frustrate the whole purpose of allowing the majority shareholders to force the minority out in a transaction. Under these circumstances, if the appraisal remedy is applied exclusively it is highly possible that a minority shareholder may be left with no remedy at all if he does not properly follow the appraisal remedy procedures.¹⁰⁴ This is exactly what happened in *McCall v. McCall Enterprises, Inc.*¹⁰⁵ In that case, the minority had lost their dissenters' rights and their ability to bring a derivative action because they had asserted the appraisal remedy. In a freeze-out transaction it seems illogical and unfair to apply the appraisal remedy exclusively. In the *McCall* decision, the minority shareholders received no judicial review whatsoever of the fairness of the freeze-out merger terms (e.g., price) that were being imposed upon them.

As previously discussed, *Yuspeh v. Koch* does not apply the dissenters' rights exclusively.¹⁰⁶ However, the court was not simply

101. Holmes & Morris, *supra* note 2, at 324.

102. *Id.*

103. *Id.* at 325.

104. See La. R.S. 12:131(H) (2004); These complicated procedures were never designed for freeze-out transactions.

105. 578 So. 2d 260 (La. App. 3d Cir. 1990), *writ denied*, 581 So. 2d 708 (La. 1991) (stating that it is possible for a dissenting shareholder to lose both his appraisal remedy, because of non-compliance with procedures, and his shareholder's rights).

106. See *supra* text accompanying note 32.

giving the minority shareholders back full corporate shareholder rights after those rights were lost in a freeze-out merger. The court realized that allowing the minority shareholders to have full corporate rights (e.g., right to dividends and voting rights) would be detrimental to the majority interests in the corporation. Therefore, the court only allowed the shareholders to bring the breach of fiduciary duty and fraud claims, which are quite narrow rights compared to corporate shareholder rights as a whole. This decision by the court in *Yuspeh* seems to properly balance the majority's concern of ousting the minority with the minority's concern of getting proper judicial remedies for their shares of stock. Had the minority shareholders received a proper judicial remedy with the appraisal rights, the court in *Yuspeh* would have been extremely reluctant to not apply the dissenters' right exclusively. This decision is the correct solution to the problem of exclusivity with dissenters' rights in freeze-out transactions and corrects the inadequacy of the *McCall* decision.

B. Delaware's Exclusive Appraisal Rights Statute with Judicial Exceptions

The majority of publicly traded companies in the United States are incorporated in the state of Delaware. Consequently, that state's approach to various corporate issues is closely watched by the rest of the nation for guidance. Delaware's approach to exclusivity of dissenters' rights is no exception, as legal commentators frequently cite Delaware jurisprudence for support.¹⁰⁷ While the Delaware approach to exclusivity is far from clear, the state has taken various stances on the issue of exclusivity that can provide helpful direction to other states.¹⁰⁸

In 1977, the Supreme Court of Delaware, in *Singer v. Magnavox Company*, allowed a breach of fiduciary duty claim to proceed outside of the state's dissenters' rights statute.¹⁰⁹ Essentially, the Court stated that in a freeze-out merger the corporation's majority stockholders and directors were breaching their fiduciary duty to the minority unless the freeze-out was for a "valid business purpose" and was "entirely fair" to the minority shareholders.¹¹⁰ Discussing whether "freeze-outs" meet these conditions commentators, Victor

107. See, e.g., Holmes & Morris, *supra* note 2, at 342–46; Johnson & Bartlett, *supra* note 45, at 214; Thompson, *supra* note 4, at 23–24, 43–49; Schinner, *supra* note 44, at 267–68.

108. Holmes & Morris, *supra* note 2, at 342.

109. 380 A.2d at 977 (Del. 1977) ("Defendants cannot meet their fiduciary obligations to plaintiffs simply by relegating them to a statutory appraisal proceeding.")

110. *Id.* at 976–80. See also Holmes & Morris, *supra* note 2, at 342.

Brudney and Marvin A. Chirelstein have stated “[f]reezeouts, by definition, are coercive: minority stockholders are bound by majority rule to accept cash or debt in exchange for their common shares, even though the price they receive may be less than the value they assign to those shares.”¹¹¹ However, these commentators are quick to point out that there really is no breach of fiduciary duty claim unless the majority proceeds in a self-dealing or other unacceptable fashion. The *Singer* Court held that a freeze-out merger, while legally authorized by statute, could nonetheless be seen as a breach of fiduciary duty if the merger was not “entirely fair” to the minority shareholders.¹¹² Therefore, the Court looked at the true reasons for the freeze-out merger, found those reasons unacceptable, and concluded that the minority shareholders at issue should not be forced to deal with the problems of dissenters’ rights which have been previously discussed.

The *Yuspeh* decision appears to show that Louisiana has adopted this exclusive, absent fraud or a breach of fiduciary duty, rule that was demonstrated in *Singer*. Currently, Louisiana possesses no exceptions to its dissenters’ rights. However, the court in *Yuspeh* noted, “[n]othing in the language of Louisiana Revised Statutes 12:131 or case law states that §12:131 is a minority shareholders’ exclusive remedy for contesting the value of his shares in a merger.”¹¹³

Eventually, Delaware’s stance on this issue changed dramatically with the decision of *Weinberger v. UOP, Incorporated*,¹¹⁴ and then again with the ruling in *Rabkin v. Philip A. Hunt Chemical Coporation*.¹¹⁵ In *Weinberger*, the Delaware Supreme Court changed its mind on what is the correct approach to appraisal remedies. The Court declared that the appraisal remedy would be the dissenting shareholders sole financial remedy in a freeze-out merger.¹¹⁶ However, the Court did allow for significant alterations to the valuation standards that allocated dissenting shareholders value for the shares of stock.¹¹⁷

Two years later, the Delaware Court overruled *Weinberger* with the *Rabkin* decision.¹¹⁸ There, the Court stated that, while appraisal

111. Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 Yale L.J. 1354, 1357 (1978).

112. *Singer*, 380 A.2d 977, 976–80.

113. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, writ denied, 847 So. 2d 1277 (La. 2003).

114. 457 A.2d 701 (Del. 1983) (holding that valuation remedies should be liberalized, but then making the appraisal remedy exclusive).

115. 498 A.2d 1099 (Del. 1985).

116. *Weinberger*, 457 A.2d at 715.

117. *Id.* at 714–15.

118. *Rabkin*, 498 A.2d 1099.

rights were the exclusive remedy with respect to ensuring that the minority shareholders receive a “fair price” for their shares, the appraisal rights are not exclusive with respect to ensuring that the minority shareholders are entirely dealt with fairly.¹¹⁹ “Strangely, the *Rabkin* Court seems to have been saying that minority shareholders could be injured in a cashout merger even though they were ultimately going to get a fair price as a result of the liberalized appraisal proceedings that *Weinberger* had authorized.”¹²⁰

To sum up Delaware’s approach to the issue of exclusivity today, the rule is exclusive, unless the jurisprudential exception promulgated in *Rabkin* applies. The *Rabkin* exception attaches when majority shareholders unfairly deal with the minority shareholders. Essentially, Delaware concluded that the liberalized valuation methodologies that were formulated in *Weinberger* to protect minority interests are unsatisfactory in cases involving the majority shareholders’ unfair dealing.

C. Louisiana’s History with Exclusivity

Louisiana’s history with an exclusivity analysis is quite brief. It begins in 1983 with the Louisiana Supreme Court case of *Levy v. Billeaud*.¹²¹ In *Levy*, the Court implied that the statutory remedies were not exclusive by using a breach of fiduciary duty theory to overcome a procedural requirement that prevented the dissenters from using their appraisal rights.¹²² Louisiana Revised Statutes 12:131(A) provides that if 80% of the shareholders approve of the corporate transaction, then the minority can be denied their dissenters’ rights. In *Levy*, over 80% of the shareholders approved of the corporate transaction.¹²³ Therefore, if the Court ruled that the dissenters’ rights were exclusive, then the minority shareholders faced the risk of

119. *Id.* at 1100–07. See also Holmes & Morris, *supra* note 2, at 344 n.18. The plaintiffs in *Rabkin* claimed to not have been dealt with fairly because there was a lack of full disclosure to the minority shareholders. 498 A.2d 1099. The acquiring corporation had purchased the majority shareholders stock for \$25 per share. Then, the acquiring company agreed with the minority shareholders that they would pay at least \$25 per share should they acquire the remaining shares in the target corporation within one year of the original purchase from the majority shareholders. It was later revealed that the acquiring corporation had planned all along to simply wait for longer than one year and purchase the remaining shares at a price less than \$25 per share. *Id.*

120. Holmes & Morris, *supra* note 2, at 344.

121. 443 So. 2d 539 (La. 1983).

122. *Id.* at 543.

123. *Levy v. Billeaud*, 424 So. 2d 1249, 1255 (noting “[i]n the present case the corporate action was taken prior to liquidation and was approved by approximately 95% of the total voting power. Thus, no right to dissent is available unto plaintiffs.”).

receiving no remedy. The Court decided to allow the minority shareholders to proceed on a breach of fiduciary duty claim against the majority.¹²⁴ However, the Court never mentioned that it was adopting a non-exclusivity rule in Louisiana. As a result, until *Yuspeh*, no one knew whether the Louisiana courts really favored non-exclusivity, or whether the *Levy* Court simply wanted to find a way in that case, for the dissenter to receive some type of remedy.

In *Yuspeh*, the court clearly stated that it would not limit minority shareholders exclusively to dissenters' rights.¹²⁵ Nevertheless, the question remains whether the court was concerned that the shareholders would receive nothing if they were not allowed to pursue their action under the breach of fiduciary duty claim. Under 12:131(C)(2), if a dissenting shareholder does not file a demand in writing with the corporation for the fair cash value of his shares within twenty days of the mailing of the notice of merger, then the appraisal remedy is lost.¹²⁶ In *Yuspeh*, this twenty day period probably passed by the time the minority shareholders decided to bring suit. By allowing the plaintiffs to pursue a distinct fiduciary duty claim, the court provided a means of circumventing this rule.

One could argue that after the *Yuspeh* decision, Louisiana courts believe that the dissenters' rights are exclusive, yet they will nonetheless allow exceptions in instances of fraud and a breach of fiduciary duty by the majority shareholders. If this is true, it would push Louisiana closer to the ALI and R.M.B.C.A. rule of making dissenters' rights exclusive unless there is a compelling reason to not make the rights exclusive.¹²⁷ The *Yuspeh* court should be commended for following the lead of several other states and not solely delegating dissenting shareholders to Louisiana Revised Statutes 12:131 in cases of fraud or breaches of fiduciary duty. The previously outlined problems with dissenters' rights undoubtedly influenced the decision.

However, one must remember that allowing non-exclusivity does not come without costs. Allowing shareholders to pursue other claims, including breach of fiduciary duty and fraud, will increase litigation costs and exposure for corporations. Nevertheless, while keeping these costs low was part of the compromise between the majority and minority shareholders when the dissenters' rights were originally written, it is only fair that corporations accept these costs.

124. *Levy*, 443 So. 2d at 544–45.

125. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, writ denied, 847 So. 2d 1277 (La. 2003).

126. See *supra* text accompanying notes 67–74, for discussion of the procedural requirements of La. R.S. 12:131.

127. See *supra* text accompanying note 96 for the ALI rule. See *supra* text accompanying note 97 for the R.M.B.C.A. rule.

These costs only develop because of the possibility that the majority shareholders are reaping too much power when they oust minority shareholders out of the surviving corporation in a freeze-out transaction.

IV. THE LOUISIANA FIFTH CIRCUIT COURT OF APPEAL'S DETERMINATION OF THE STOCK'S VALUE

After the court in *Yuspeh* decided to not exclusively limit the shareholders to dissenters' rights, the court then ruled that the minority shareholders' stock should be valued with no discount.¹²⁸ This was a break from prior jurisprudence, but was definitely the correct decision.¹²⁹ The court could have been much more pronounced in this decision, but most likely did not cite applicable prior jurisprudence in its discussion because it did not want to follow such precedent.

In 1989, in *Shopf v. Marina Del Ray Partnership*, the Louisiana Supreme Court ruled that a minority interest discount would be applied to an exiting partner.¹³⁰ In *Shopf*, a partner sought a determination of the sum due to him for his proportionate share in the partnership. The Court looked to the price paid to a different terminating partner just three months earlier to help determine what sum the exiting partner should be paid. However, the Court's analysis cannot strictly be viewed as looking to only arms-lengths transactions in order to determine a value for the exiting partner's interest. This is because the Court ultimately concluded that a minority interest discount should be applied to the former arms-length transaction and rendered a judgment for the partner in that amount.¹³¹ The Court, in its reasons for judgment, stated:

The determination of the value of a fractional share in a business entity involves more than fixing the value of the business and multiplying by the fraction being evaluated, especially when the share is a minority interest. A minority interest may be uniquely valuable to an owner, but may have considerably less value to an independent third party because the interest is relatively illiquid and difficult to market.¹³²

Another case, which when combined with *Shopf v. Marina Del Ray*, that seemed to possibly be establishing *jurisprudence*

128. *Yuspeh*, 840 So. 2d at 51–54.

129. See *supra* Part II.B for a discussion of why marketability and minority discounts are improper in “freeze-out” transactions of closely-held corporations.

130. 549 So. 2d 833, 840 (La. 1989).

131. *Id.* at 840.

132. *Id.*

*constante*¹³³ for applying the discounts on an exiting member of a business entity was *McMillan v. Bank of the South*.¹³⁴ In *McMillan*, a bank sought to reorganize and offered to buy the plaintiffs' stock for a certain price. The plaintiffs declined the offer and sought to enforce their rights under Louisiana Revised Statutes 6.376.¹³⁵ The court concluded that it would ascertain the stock's fair cash value by eliciting expert testimony. This standard for determining fair cash value is identical to the determination under appraisal rights discussed earlier. The experts' testimony of the value of the shares had a ten percent discount for size and thirty-five percent discount for lack of marketability. In other words, while the Louisiana courts never had evaluated fair cash value for a dissenting corporate shareholder or a shareholder asserting a breach of fiduciary duty, as in *Yuspeh*, it indicated that it would still use minority and marketability discounts.¹³⁶

However, in 1998, the Louisiana Second Circuit Court of Appeal decided *Scurria v. Hodge*.¹³⁷ In *Scurria*, the court did not apply a discount to the valuation of shares when the continuing corporation purchased the deceased one-third shareholder's stock from his successor.¹³⁸ The court did not discuss the discounting issue or state that it was overruling any of the prior jurisprudence that favored minority and marketability discounts. However, *Scurria* is distinguishable because it involved a whole company sale of the corporation pending at the time that the corporate stock interests of the successor were valued. The successor of *Scurria*'s stock, a one-third interest of the corporation, was purchased for just \$100,000 in September of 1984.¹³⁹ In May of 1985, the whole corporation was sold for \$1,900,000.¹⁴⁰ After subtracting debt, the net value of the

133. A civil law term defined in Black's Law Dictionary as: "The doctrine that a court should give great weight to a rule of law that is accepted and applied in a long line of cases, and should not overrule or modify its own decisions unless clear error is shown and injustice will arise from continuation of a particular rule of law." Black's Law Dictionary 859 (7th ed. 1999).

134. 514 So. 2d 227 (La. App. 1st Cir. 1987), *writ denied*, 516 So. 2d 131 (La. 1987).

135. Louisiana Revised Statutes 6:376 is essentially identical to the dissenters' rights provision which allocates fair cash value to a dissenting shareholder.

136. *See, e.g.,* Shopf v. Marina Del Ray P'ship, 549 So. 2d 833 (La. 1989); *McMillan*, 514 So. 2d 227.

137. 31-207 (La. App. 2d Cir. 1998), 720 So. 2d 460, *writ denied*, 739 So. 2d 782 (La. 1999).

138. *Id.* at 467 ("We have utilized the full market value of the corporation for the determination of the value of the succession's minority share position.").

139. *Id.* at 462.

140. *Id.* at 467.

corporation was \$1,550,000.¹⁴¹ The court ruled that the succession was owed \$516,667, which is one-third of the \$1,550,000 net value of the corporation.¹⁴² In *Scurria*, it seems that the court was able to bypass applying any discount because it was able to view the stock being purchased from the succession as a portion of the total sale price of the corporation.¹⁴³ If the court had not looked to the proportionate share to determine the minority interests' value, then the inequities of the minority discounts would have become evident.

Nevertheless, just because the inequities in a discounting system are more readily apparent in some cases than others does not mean that the evils of discounting, previously discussed, are any less likely to occur.¹⁴⁴ It is illogical that the discounting cases have viewed the minority shareholder's stock being sold as just the stock itself, while in other cases the court has viewed the stock as a proportionate part of the company's worth when sold to an outside buyer.¹⁴⁵ Obviously, the court's view of the minority shareholder's stock as proportionate part of the company will give the shareholders more cash for their ownership interests because there would be no discounts applied. Thus, the proportionate share interest of the company should be applied even in situations in which there is no pending sale of the whole company. This was precisely the approach taken by the court in *Yuspeh*.

Yuspeh did not mention any of these prior cases, but began its valuation analysis by stating, "Although we have determined that Louisiana Revised Statutes 12:131 is not a dissenting shareholder's exclusive remedy, we look to the statute for guidance in establishing the value of a dissenter's stock."¹⁴⁶ The court then proceeded to determine what the plaintiffs should receive for their stock based on the fair cash value of Louisiana Revised Statutes 12:131.¹⁴⁷ Though the court did mention the proposed purchase by the Kochs of Murphy's stock for almost \$2,000 per share only months before the purchase of the unissued thirty-four shares of stock for \$50 per share in its breach of fiduciary duty analysis,¹⁴⁸ it did not discuss this transaction in its valuation of the plaintiffs' stock.

However, the court did determine the fair cash value of the plaintiffs' stock by simply dividing the net value of the company by

141. *Id.*

142. *Id.*

143. *Id.* See also Holmes & Morris, *supra* note 2, at 28–29 (Supp. 2003).

144. See Holmes & Morris, *supra* note 2, at 28–29 (Supp. 2003).

145. *Id.*

146. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, writ denied, 847 So. 2d 1277 (La. 2003).

147. *Id.* at 51–52.

148. *Id.* at 50.

the plaintiffs' proportionate percentage interest in the company.¹⁴⁹ Net value of the company was assessed as recurring monthly revenues (RMR) times a multiplier of forty-five.¹⁵⁰ Here, the court in *Yuspeh* has taken the *Scurria* decision one step further. In *Scurria*, there was a whole company sale closely following the company's purchase of the succession's minority stock.¹⁵¹ Therefore, it was easy for the court to determine the proportionate part of the interests of the minority shareholders to the company as a whole. However, in *Yuspeh*, there was no whole company sale that was pending, and so it was more difficult to determine the minority shareholders proportionate part of CSS. Nevertheless, the judges used expert testimony to determine the net value of the company as \$783,300 and then divided each plaintiff's interests by their proportionate share, which awarded each plaintiff \$3,840 per share.¹⁵² This excellent analysis by the court in *Yuspeh* allowed the minority shareholders to avoid the inequities of the minority and marketability discounts. Awarding \$3,840 per share was fair because the court calculated this amount by using the most consistent recurring monthly revenues (RMR) and multipliers recited by the expert witnesses.

While the court's determination of the value of the minority shareholder's interests was correct, their complete avoidance of the *Shopf* Louisiana Supreme Court decision is questionable. The court in *Yuspeh* simply avoided the minority interest discounts that were used by the court in *Shopf*, by distinguishing the sale of the minority shareholders' interests as a "proportionate share" sale of the whole company.

There are two differences in the *Shopf* and *Yuspeh* cases. First, the *Shopf* decision dealt with a sale of partnership interests while *Yuspeh* dealt with a sale of corporate interests. However, this distinction is not relevant because the case for discounting would be weaker, not stronger, in the partnership setting. Second, in *Yuspeh* the whole value of CSS was easier to determine than the whole value of the partnership in *Shopf*. This second reason could be the distinguishing factor between when discounts should, or should not, apply to minority interests. However, this is unclear, because the court did not explicitly address the distinctions.

149. *Id.* at 52.

150. See *supra* note 40. As previously noted, these numbers were simply what the court deemed to be the most consistent evidence from the expert testimonials.

151. *Scurria v. Hodge*, 31-207 (La. App. 2d Cir. 1998), 720 So. 2d 460, *writ denied*, 739 So. 2d 782 (La. 1999).

152. See *supra* Part I.C.3.

The court in *Yuspeh* assumed that proportionate interests were the proper way to value the corporation.¹⁵³ The court likely made this assumption so that they did not have to follow the precedent set in *Shopf*. Once again, this was the best valuation for the court to choose, but the fact that *Shopf* is still valid leaves the jurisprudence muddled. After *Yuspeh*, it is still unclear which valuation, proportionate part or discounting, a court should use if the corporation's value was not as easy to determine as in *Yuspeh* or *Scurria*. Therefore, in light of the previously outlined accuracy of the valuation method used in *Yuspeh*, the *Shopf* case is ripe to be overruled.

V. IMPROVING DISSIDENTERS' RIGHTS IN LOUISIANA BY FOLLOWING THE AMERICAN LAW INSTITUTE

This section of the casenote is dedicated to uncovering how the dissenters' rights statute in Louisiana can be improved to account for the new problems that were created by freeze-out mergers. The court in *Yuspeh* declared that dissenters' rights will not be an exclusive remedy to dissenting shareholders who possess breach of fiduciary duty and fraud claims.¹⁵⁴ While *Yuspeh* was only a Fifth Circuit Court of Appeal case, it is possible that Louisiana courts may continue to decide that, like Delaware,¹⁵⁵ it will allow a judicial exception to the exclusivity of dissenters' rights. However, the Louisiana legislature should amend its dissenters' rights statute to provide more clarity for these, and other circumstances, in which the statutory remedy does not provide for a clear result. Without this clarity, there is still room for lower courts to distinguish cases on factual issues and reach incongruous results. Allowing the current statute to prevail would ultimately result in increased appeals in our already litigious society. These following paragraphs offer three suggestions for improving the current dissenters' rights statute in Louisiana by following the current framework of the American Law Institute.

One way to improve Louisiana's dissenters' rights statute is to simplify some of the cumbersome procedures which can cause a

153. *Yuspeh*, 840 So. 2d 41, 53-54.

154. *Id.* at 47.

155. See *Rabkin v. Philip A. Hunt Chemical Corp.*, 498 A.2d 1099 (Del. 1985). Delaware's exception to exclusivity is narrower than the exception declared in *Yuspeh*. After *Rabkin*, only fair dealing may be challenged outside an appraisal proceeding. The decision in *Yuspeh* simply declares that dissenters' rights are not exclusive when there is a breach of fiduciary duty or fraud imposed on the minority shareholders.

dissenting shareholder to lose his appraisal remedy altogether.¹⁵⁶ The ALI accomplishes this task. The first procedure under the ALI is that the corporation must notify each shareholder of the right to exercise the appraisal remedy before the date on which the transaction is to be voted upon by the shareholders.¹⁵⁷ Second, the shareholder shall have a "reasonable time" in which to elect to dissent from the time the notice is sent by the corporation in step one.¹⁵⁸ Third, the corporation should pay to each dissenting shareholder the amount it reasonably determines to be the fair value of the shares plus any interest due.¹⁵⁹ If the dissenting shareholder believes that he did not receive fair value for his shares then he can petition to the court to have the corporation pay all costs and expenses of the appraisal proceeding,¹⁶⁰ and he can also obtain injunctive relief.¹⁶¹ All in all, the ALI approach simply relaxes the required procedures for a shareholder to assert his dissenters' rights, and helps to ensure that dissenters receive an equitable remedy.¹⁶² Louisiana should follow the ALI's guidance in this area and amend its current dissenters' rights statute accordingly.

Another way to improve Louisiana's dissenters' rights statute is to liberalize the valuation procedures so that discounts are not unnecessarily imposed. The ALI achieves this by partitioning all corporations based on each shareholder's proportionate share as the court did in *Yuspeh*.¹⁶³ The ALI emphasizes that no discount should be imposed on the valuation of the stock because of minority status or, unless there are unusual circumstances, because of a lack of marketability.¹⁶⁴ In closely-held corporations, like CSS in *Yuspeh v. Koch*, this proposal results in discounts virtually never being applied to the minority shareholders' stock. While the court in *Yuspeh* correctly declined to apply any discounts to the shareholders' stock,

156. See *supra* Part II.A.

157. American Law Institute, *supra* note 10, at 335.

158. *Id.* But see R.M.B.C.A., *supra* note 95, at § 13.22(b)(2)(ii). A dissenting shareholder has a maximum of sixty days to respond to the appraisal notice and form or he is presumed to have acquiesced in the transaction. However, sixty days would most likely be viewed by most courts as a "reasonable time" period to respond. *Id.*

159. American Law Institute, *supra* note 10, at 336.

160. *Id.* But see R.M.B.C.A., *supra* note 95, at § 13.26. A shareholder who is dissatisfied with payment must notify the corporation of the amount the shareholder deems due within thirty days, or that shareholder waives the right to demand further payment. *Id.*

161. American Law Institute, *supra* note 10, at 342.

162. See, e.g., *id.* at 338 ("[T]he shareholder is not required both to elect before the vote and then to make a further demand after the vote or forfeit eligibility.").

163. *Id.* at 349.

164. *Id.* See also R.M.B.C.A. *supra* note 95, at § 13.01(4)(iii). No discounting for lack of marketability or minority status is allowed. *Id.*

it would provide much needed clarity to specify in Louisiana's current dissenters' rights statute that these discounts will not be allowed.

Finally, Louisiana could improve its appraisal remedy statute by stating whether or not it is a dissenting shareholder's exclusive remedy. Once again, following the ALI's guidance on this issue would help to improve the dissenters' rights statute in Louisiana.¹⁶⁵ The ALI attempts to make the dissenters' rights the exclusive remedy, while still allowing for limited exceptions.¹⁶⁶ Essentially, the ALI makes the dissenters' rights exclusive in publicly traded corporations or where there is no conflict of interest of a controlling shareholder or executive.¹⁶⁷ In a closely-held corporation, like CSS in *Yuspeh*, if a controlling shareholder does not fulfill his obligation of fair dealing then the dissenters' rights will not be exclusive.¹⁶⁸ The burden of proof is on the controlling shareholders in a freeze-out merger to prove that the transaction is fair to the minority shareholders. If adopted, the ALI rule would actually be an improvement over the decision declared in *Yuspeh* because in *Yuspeh*, the court did not shift the burden of proof to the controlling shareholders. In *Yuspeh*, the court essentially requires the minority shareholders to display why they were not treated fairly.

Also in dealing with exclusivity, the ALI focuses on whether full disclosure is made to the shareholders when soliciting their approval of corporate transactions and whether the transactions were approved in accordance with applicable laws.¹⁶⁹ In fact, the ALI states, "[b]ecause it is shareholder approval of the combination that serves to relegate the shareholders to an appraisal remedy, the exceptions to exclusivity should focus on the quality of the process by which shareholder approval was obtained."¹⁷⁰ This approach is preferable over simple exceptions to exclusivity for fraud or unlawful conduct

165. American Law Institute, *supra* note 10, at 335–37. This simplification of the complicated procedural rules includes extending the time period that the minority shareholder possesses to assert the statutory remedy of twenty days to a "reasonable period." *Id.*

166. *Id.* at 295.

167. *See id.*

168. *See id.* at 347–48. "The availability of an appraisal remedy does not preclude a proceeding against a director, officer, controlling shareholder, or an associate of any of the foregoing, for a violation of Part V, Duty of Fair Dealing." *Id.* at 348.

169. *Id.* at 349.

170. *Id.* *But see* R.M.B.C.A., *supra* note 95, at § 13.02(d) (permitting exceptions to exclusivity for fraud, material representations, or when a corporate transaction was not completed in accordance with applicable law). The ALI's approach does not simply focus on the vague term fraud, but instead focuses on whether full disclosure has been made to the shareholders. American Law Institute, *supra* note 10, at 349.

because those terms are too vague and subject to various judicial interpretations.¹⁷¹

Ideally, it would be best to improve the statutory remedy in such a way that the rights could be made completely exclusive. However, because of the possible conflicts of interest in freeze-out transactions, some exceptions to a strict application of exclusivity need to be maintained in the statute. Still, this proposed statutory amendment will solve many of the problems that freeze-out mergers have caused to occur. To summarize, the present law of dissenters' rights in Louisiana is not treating all minority shareholders fairly. If Louisiana amended its dissenters' rights to more closely follow the ALI's approach in dealing with procedures, share valuation, and exclusivity it would move Louisiana closer towards fixing the problems presently existing with dissenters' rights.

CONCLUSION

Across the nation dissenters' rights statutes are being used for purposes for which the statutes were not initially designed to accomplish.¹⁷² As a result, courts should not rule that dissenters' rights are the sole remedy available to a minority shareholder who has dissented from a freeze-out transaction. In *Yuspeh v. Koch*, the Louisiana Fifth Circuit Court of Appeal made an excellent decision when it explicitly declared that appraisal rights are not an exclusive remedy to a dissenting shareholder.¹⁷³ Louisiana has essentially followed Delaware's approach to exclusivity by providing precedent through which a dissenting shareholder may circumvent their appraisal remedy in search of other causes of action.

The court in *Yuspeh* should also be commended for estimating the fair cash value of the minority shareholder's stock as a proportionate part of the corporation as a whole. Applying minority or marketability discounts would be reasonable if the minority shareholders were selling their stock to third parties. However, as between the controlling and minority shareholders in a freeze-out transaction, there is no reason to penalize the minority shareholders for lack of control by applying discounts to their stock. This part of the decision is accurate, although the court's mere avoidance of the *Shopf v. Marina Del Ray Partnership*¹⁷⁴ is questionable. The court in *Yuspeh* simply bypassed the *Shopf* precedent by assuming that the

171. See, e.g., R.M.B.C.A., *supra* note 95, § 13.02(b) (allowing exceptions to exclusivity based on fraud or unlawful conduct.).

172. Thompson, *supra* note 4, at 4.

173. *Yuspeh v. Koch*, 2002-698 (La. App. 5th Cir. 2003), 840 So. 2d 41, 47, writ denied, 847 So. 2d 1277 (La. 2003).

174. 549 So. 2d 833 (La. 1989).

minority shareholders' stock should be valued as a proportionate part of the corporation as a whole. While this was the correct valuation of the stock for reasons previously discussed, it is unclear whether future decisions will follow *Yuspeh's* assumption, or alternatively, will follow the *Shopf* precedent of applying discounts to the minority shareholders' stock.

The decision in *Yuspeh* shows that Louisiana is already in agreement with many of the promulgated rules suggested by the ALI. Louisiana should continue to follow the ALI's guidance and amend its current dissenters' rights statute to ease the cumbersome procedural rules, to dictate that discounts should not apply to minority stock in a closely-held corporation, and to be able to explicitly require the application of the remedy exclusively with limited exceptions. Louisiana Revised Statutes 12:131 is problematic in its current form, and the Louisiana legislature needs to amend the statute to fully address the troubles that freeze-out mergers cause to minority shareholders.

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