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Business Associations

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BUSINESS ASSOCIATIONS

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Agency and Partnership

Although several cases involving issues of agency and partnership law were reported during the one-year period addressed in this article, roughly August 1987 to August 1988, the courts broke little new ground. The agency cases generally involved applications of well-established rules of implied and apparent authority,[1] and the partnership cases dealt primarily with the interpretation of particular partnership contracts for purposes of determining the amounts owed to partners who had withdrawn from the partnership.[2]

The Louisiana Supreme Court, however, has granted writs for review of three important cases. In the first, a five-judge panel of the second circuit held, in a 3-2 vote, that "the doctrine of apparent authority is inappropriate in the realm of sales and mortgages of real estate."[3] In the second, the Louisiana fifth circuit stated in dictum that transfers of interests in partnerships which own immovable property must be carried out in accordance with the "requisites of form" and, apparently, the recordation requirements applicable to sales of immovable property.[4]

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1. Seago v. State Farm Mut. Auto. Ins. Co., 521 So. 2d 674 (La. App. 1st Cir. 1988); Kobuszewski v. Scriber, 518 So. 2d 524 (La. App. 2d Cir. 1987); Hawthorne v. Kinder Corp., 513 So. 2d 509 (La. App. 2d Cir. 1987); Good v. Fisk, 524 So. 2d 203 (La. App. 4th Cir. 1988); Suave Heirs, Inc. v. National Business Consultants, Inc., 522 So. 2d 686 (La. App. 5th Cir. 1988); Kemna v. Warren, 514 So. 2d 237 (La. App. 5th Cir. 1987).

2. Quinn-L Corp. v. Elkins, 519 So. 2d 1164 (La. App. 1st Cir. 1987), writ granted, 520 So. 2d 415 (1988); Herques v. Houma Medical and Surgical Clinic, 518 So. 2d 1119 (La. App. 1st Cir. 1987); Sims v. Hays, 521 So. 2d 730 (La. App. 2d Cir. 1988) (buyout of partner in connection with dissolution-related dispute); Marek v. Medical Arts Group, 517 So. 2d 855 (La. App. 3d Cir. 1987).

3. Tedesco v. Gentry Dev., Inc., 521 So. 2d 717, 724 (La. App. 2d Cir.), writ granted, 523 So. 2d 1313 (1988).

4. D'Spain v. D'Spain, 527 So. 2d 309, 312 (La. App. 5th Cir.), writ granted, 528 So. 2d 152 (1988).

In the third case, the Louisiana fifth circuit, relying upon a 1973 personal injury case,[5] held a disclosed agent personally liable to a third party in connection with the negotiation and administration of a contract between the third party and the agent's employer-principal.[6] A lengthy discussion of these cases would be premature at this point, however, since the supreme court will render a decision in them soon.

CORPORATIONS

Name Requirements Changed

Act 96 amended Louisiana Revised Statutes 12:23 A and B to prohibit the use of the phrase "doing business as" or the abbreviation "d/b/a" in a corporate name, and to change the standard of prohibited similarity between a new corporate name and those already registered from "the same or deceptively similar" to "distinguishable." The latter amendment adopts the position taken by the Revised Model Business

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5. Canter v. Koehring, 283 So. 2d 716 (La. 1973).

6. 9 to 5 Fashions, Inc. v. Spurney, 520 So. 2d 1276 (La. App. 5th Cir.), writ granted, 524 So. 2d 513 (1988). Another case used the same theory to hold a sole shareholder liable to an auctioneer where the shareholder had disrupted an auction that the corporation had hired the auctioneer to conduct. Hemphill-Kunstler-Buhler v. Davis Wholesale Elec. Supply Co., 516 So. 2d 402 (La. App. 1st Cir. 1987), 520 So. 2d 751 (1988). This was so even though Louisiana is not supposed to recognize the tort of intentional or negligent interference with contract. See, e.g., Professional Answering Serv., Inc. v. Central Louisiana Elec. Co., 521 So. 2d 549 (La. App. 1st Cir. 1988); Baton Rouge Bldg. and Constr. Trade Council AFL-CIO v. Jacobs, 804 F.2d 879, 884 (5th Cir. 1986).

Besides *9 to 5* and *Hemphill*, seven other cases have considered the use of *Canter*, 283 So. 2d 716, to impose personal liability on disclosed agents for breach of contractually-imposed duties. However, six of the seven have either rejected the theory or found that its requirements had not been met. H.B. "Buster" Hughes, Inc. v. Bernard, 318 So. 2d 9 (La. 1975); Dutton & Vaughn, Inc. v. Spurney, 496 So. 2d 1126 (La. App. 4th Cir. 1986), writ denied, 501 So. 2d 208 (1987); Fine Iron Works v. Louisiana World Exposition, Inc., 472 So. 2d 201 (La. App. 4th Cir.), writ denied, 477 So. 2d 104 (1985); Donnelly v. Handy, 415 So. 2d 478 (La. App. 1st Cir. 1982); Ashley v. Volkswagen of Am., Inc., 380 So. 2d 702 (La. App. 4th Cir. 1980); Unimobil 84, Inc. v. Spurney, 797 F.2d 214 (5th Cir. 1986). Only one has actually imposed liability based on the *Canter* theory. Scariano Bros., Inc. v. Hammond Constr., 428 So. 2d 564 (La. App. 4th Cir. 1983). Another opinion which is consistent with the imposition of this kind of liability, though it does not cite *Canter*, is Fryar v. Westside Habilitation Center, 479 So. 2d 883 (La. 1985). That case may be interpreted narrowly as a finding of sufficient personal contacts to exert long-arm jurisdiction, and not as an imposition of liability. See Morris, Developments in the Law, 1985-1986—Business Associations, 47 La. L. Rev. 235, 242-45 (1986).

As the United States Fifth Circuit Court of Appeals has recognized, *Canter* was based on policies of personal injury law, and it ought not be applied to resolve commercial contract disputes. *Unimobil*, 797 F.2d at 217. See also, *Fine Iron Works*, 472 So. 2d at 203 (*Canter* inapplicable in commercial disputes). In these types of disputes, the analysis of the first circuit in *Donnelly*, 415 So. 2d at 481-82, seems correct.

Corporation Act that a proposed corporate name need only be distinguishable from other names in order to be registerable,[7] and it very sensibly eliminates the impression created by the former language that some factual finding was being made about potential consumer deception or unfair competition every time a new corporate name was registered (or its registration was denied) by the secretary of state's office. The secretary of state's office has never conducted the types of hearings that would be necessary to make such findings, and the jurisprudence has always insisted that principles of trade name law, not corporate law, are controlling in actions to enjoin the actual use of a corporate name in business dealings.[8] The elimination of the old language thus gives statutory recognition to legal principles that were already recognized in practice. Moreover, the provision of the new standard, "distinguishability," should be sufficient to give the secretary of state's office the power it needs to refuse to register a name that is likely to cause mixups or confusion in the office's corporate records.

Unfortunately, a reference to the repealed standard of similarity, "same or deceptively similar," was retained in section 23 B (1), which permits a new corporation to use a name that is deceptively similar to the name of another corporation provided that the latter is about to change its name or discontinue its business in this state and gives its written consent. Since deceptive similarity no longer prevents the use of a corporate name that meets the new standard of distinguishability, it no longer makes any sense to require written consent to the use of a deceptively similar name. And if a proposed name is indistinguishable from a name already registered, the Secretary of State's office should be able to refuse to register the new name until one of the two names is changed enough to make it distinguishable from the other.

It would also have made sense to modify the language in section 23 F. That provision gives any person affected the right to sue to enjoin the use of a corporate name that has been taken in violation of the provisions of Louisiana Revised Statutes section 23. As it now reads, this provision unwisely suggests that private persons may have an interest in enforcing the record-keeping policies underlying the distinguishability requirement. Although they certainly would have an interest in preventing another person from expropriating the use of a name that they have

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7. Under § 4.01 of the Rev. Model Bus. Corp. Act (R.M.B.C.A.), the corporate name must be "distinguishable upon the records of the secretary of state."

8. Couhig's Pestaway Co., Inc. v. Pestaway, Inc., 278 So. 2d 519, 521 (La. App. 3d Cir. 1973); Metalock Corp. v. Metal-Locking of Louisiana, Inc., 260 So. 2d 814, 819 (La. App. 4th Cir. 1972). Louisiana's trade name statute is found at La. R.S. 51:211-300 (1987).

been using in their business, this protection is provided by trade name law.[9]

MERGER AND ANTITAKEOVER ENACTMENTS

Foreign Corporations

Act 173 enacted several new statutory sections, Louisiana Revised Statutes 12:140.11 through 140.17, and made appropriate conforming amendments to sections 51 C and 75 A. The new provisions were copied almost verbatim from the Control Share Acquisition statute that had been adopted by the legislature in 1987,[10] but with one important change. In contrast to the 1987 legislation, which applies only to certain Louisiana corporations, the 1988 provisions apply exclusively to certain foreign corporations—those conducting business in Louisiana and having a specified connection to the state through Louisiana-resident share ownership or employment.[11]

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9. See supra note 8. The other name requirements such as the prohibition of the use of certain words such as "bank" (La. R.S. 12:23 E, as amended by 1988 La. Acts No. 96) and the prohibition of names that falsely suggest a charitable nature (La. R.S. 12:23 I (Supp. 1988)) perhaps ought to remain subject to private enforcement.

10. 1987 La. Acts No. 62 (codified at La. R.S. 12:135-40.2 (Supp. 1988)).

11. Under new La. R.S. 12:140.11 (4), as enacted by 1988 La. Acts No. 173, a corporation is subject to the requirements of the new provisions if it is a foreign corporation that (i) is required to obtain a certificate of authority to transact business in Louisiana, (ii) has 100 or more shareholders, (iii) has its principal place of business, its principal office, or directly or through one or more subsidiaries, substantial assets or real property within Louisiana [it is not clear whether the real property has to be "substantial," but if so that would make the separate listing of "real property" redundant], and (iv) has one or more of the following characteristics:

a. More than 10% of its shareholders reside in Louisiana;
b. More than 10% of its shares are owned by Louisiana residents;
c. 10,000 of its shareholders reside in Louisiana; or
d. 2,000 of its employees reside in Louisiana.

The 1988 statute also differed from the 1987 enactment in the following two respects:

a. Management of the corporation can opt in and out of the new enactment at will, as the new statute allows the statute to be made applicable or inapplicable by simple amendment of the articles or bylaws. La. R.S. 12:140.12, as enacted by 1988 La. Acts No. 173. Bylaws are typically subject to amendment by the board of directors of a corporation, without a vote of shareholders. See, e.g., La. R.S. 12:28 A (1969); Mod. Bus. Corp. Act § 27. But see, Rev. Model Bus. Corp. Act §§ 2.06, 10.02, 10.03 (restricting directors' control over bylaws to initial bylaws and to certain minor changes listed); and

b. The provisions in last year's enactment concerning the rights of dissenting shareholders, and the ability of the corporation to buy back control shares if authorized in the corporation's bylaws or articles, see La. R.S. 12:140.2 (Supp. 1988), were not included in this year's enactment for foreign corporations. (It is not clear why these provisions were dropped, unless it was thought that

Because the statute adopted in 1987 was copied virtually without change[12] from an Indiana statute[13] that had been upheld by the United States Supreme Court in *CTS Corp. v. Dynamics Corp. of America*,[14] Louisiana was clearly safe, constitutionally, in adopting it. However, Louisiana's 1988 legislation, which purports to regulate *foreign* corporations, rests on much shakier ground, and it seems most unlikely that it could survive a constitutional challenge. Despite the superficial resemblance between the 1987 and 1988 Louisiana enactments, from a constitutional standpoint the new legislation may actually have less in common with last years law than with an Illinois statute that was struck down by the Supreme Court in 1982.[15]

The unconstitutional Illinois statute provided, among other things, that no matter where incorporated, a company with certain ties to the state of Illinois could not be acquired by means of a tender offer—a highly effective takeover device[16]—unless the bidder complied with certain disclosure and approval procedures set out in the statute. In *Edgar v. MITE Corp.*, the United States Supreme Court held that this scheme

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dissenters rights might interfere with management's flexibility if an initially hostile bid had become friendly. Cutting off the bidder's ability to engage in front-end loading, as these provisions would have done, is an important protection to have given up.)

12. The copying was so complete that the Louisiana statute used an important term, "voting group," as the Indiana statute had, without a definition. Compare La. R.S. 12:135, 140 (Supp. 1988) with Ind. Code §§ 23-1-42-1 to -4, 23-1-42-9 (Burns Supp. 1988). The difference was that the Indiana corporate statute defines "voting group" in its general definitional section, while Louisiana law does not. Compare La. R.S. 12:1 (1969 & Supp. 1988) with Ind. Code § 23-1-20-28 (Burns Supp. 1988). The Indiana definition is based on § 1.40 (26) of the Rev. Model Bus. Corp. Act. The Model provision reads:

> "Voting Group" means all shares of one or more classes or series that under the articles of incorporation or this Act are entitled to vote and be counted together collectively on a matter at a meeting of shareholders. All shares entitled by the articles of incorporation or this Act to vote generally on the matter are for that purpose a single voting group.

13. Ind. Code §§ 23-1-42-1 to 23-1-42-11. (Burns Supp. 1988).

14. 107 S. Ct. 1637 (1987).

15. Edgar v. MITE Corp. 457 U.S. 624, 102 S. Ct. 2629 (1982).

16. Although not defined by statute or regulation, a tender offer is generally understood to be a publicly-announced offer to purchase a large number of shares of a publicly traded company, generally at a large premium over current market prices, under the terms and conditions described in the offer. Shares that are "tendered" to the agent of the offeror in accordance with the offer, and not withdrawn, are purchased when the conditions stated in the offer have been satisfied (for example, financing or regulatory approvals have been obtained and the required minimum number of shares have been tendered). Tender offers are subject to federal regulation principally under § 14 (d) & (e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78n (d) & (e) (1982). For cases construing the term "tender offer" for purposes of these provisions, see, e.g., Hanson Trust, PLC v. SCM Corp., 774 F.2d 47, 54-57 (2d Cir. 1985); SEC v. Carter-Hawley Hale Stores, Inc., 760 F.2d 945, 950-53 (9th Cir. 1985).

imposed an excessive indirect burden on interstate commerce.[17] In so holding, the Court rejected Illinois' argument that its interest in regulating the internal affairs of non-Illinois companies should be taken into account in applying the balancing test used by the Court to determine whether this statute imposed an excessive burden on interstate commerce in corporate securities. The Court noted that in matters of internal corporate governance, such as the relations among or between the corporation and its officers, directors, and shareholders, the laws of the incorporating state traditionally were considered controlling. This was so, the Court said, "because otherwise a corporation could be faced with conflicting demands."[18] However, said the Court, "Illinois has no interest in regulating the internal affairs of foreign corporations." The court acknowledged that Illinois had a legitimate interest in protecting Illinois investors, but pointing out that similar protections were already afforded by federal law, concluded that the statute "impose[d] a substantial burden on interstate commerce which outweigh[ed] its putative local benefits."[19]

Three of the nine justices argued that the Illinois statute was preempted by the federal law governing tender offers, and four concluded that the statute amounted to an unconstitutional *direct* regulation of interstate commerce.[20] But Justice Powell, who provided the crucial fifth vote on the indirect commerce clause challenge refused to go along with either of those two theories. He made it clear in a concurring opinion that he approved of the indirect commerce clause theory, but only that theory, because it "le[ft] some room for state regulation of tender offers."[21] In Justice Powell's view, the indirect burden theory would permit the court in future cases to balance the putative state interest in enacting takeover-related legislation with the federal policy of free interstate commerce in securities.

Five years later, in *CTS Corp. v. Dynamics Corp. of America*,[22] the court did indeed balance the state and national interests differently, as it upheld an Indiana statute which imposed significant new restrictions on certain takeover related activity. The Indiana statute, which after *CTS* became the model for Louisiana's 1987 antitakeover law, was one of several "second generation" statutes enacted in response to the *MITE*

17. *MITE*, 457 U.S. at 643-46, 102 S. Ct. at 2641-43. Three of the nine justices concluded that the statute was preempted by federal law concerning tender offers, and four of the nine would have held that the statute constituted a direct interference with interstate commerce.

18. Id. at 645, 102 S. Ct. at 2642.

19. Id. at 645-46, 102 S. Ct. at 2642-43.

20. Id. at 626, 630-43, 102 S. Ct. at 2632, 2634-41.

21. Id. at 646, 102 S. Ct. at 2642.

22. 106 S. Ct. 1637 (1987).

decision.[23] It was designed to take advantage of the suggestions in *MITE* that a statute which imposed less onerous burdens on the takeover transactions, or which furthered traditionally-recognized state interests in regulating the internal corporate governance of companies chartered in that state, might tip the balance between local and national interests enough to survive constitutional challenge. The Indiana statute applied only to Indiana corporations,[24] and it purported to do little more than to let "disinterested" shareholders vote on whether major new shareholders, or shareholders engaging in major new acquisitions of stock, should be allowed to exercise voting power with respect to the newly acquired shares.[25] The statute did grant shareholders powerful new dissenters' rights,[26] but dissenters' rights, like voting rights, were matters traditionally governed by the laws of the company's state of incorporation.[27]

The court rejected *CTS*'s argument that the Indiana statute was invalid under the commerce clause because it would subject corporations to inconsistent regulation. The Court pointed out that

> [s]o long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the

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23. For a discussion of the various approaches used since 1982, see Pinto, The Constitution and the Market for Corporate Control: State Takeover Statutes After *CTS Corp.*, 29 Wm. & Mary L. Rev. 699, 709-18 (1988); Kramer, Developments in State Takeover Regulation: MITE and Its Aftermath, 40 Bus. Law. 671 (1984); V. Brudney, M. Chirelstein, Corporate Finance 980-86 (1987). Indiana's statute fit the "Ohio," control share acquisition model of the second generation statutes.

24. Ind. Code §§ 23-1-20-5 and 23-1-42-4 (Burns Supp. 1988) (defining "corporation" and "issuing public corporation," respectively); see *CTS*, 107 S. Ct. at 1651 (interpreting Indiana statute to apply only to corporations incorporated in Indiana).

25. The statute created three new thresholds of voting power (i.e., one fifth, one third, and majority) and then eliminated the voting power of all shares acquired in a transaction in which any one of those voting thresholds was passed (or in any other transaction in the preceding ninety days), except to the extent that voting rights were granted for those shares by a vote of "disinterested" shareholders (those other than the bidder and certain members of management). Ind. Code §§ 23-1-42-1, 2, 3, 5, 9 (Burns Supp. 1988).

26. Ind. Code § 23-1-42-11 (Burns Supp. 1988).

27. In the practical effect, the Indiana statute forced a hostile bidder for a major new interest in an Indiana corporation to engage in a proxy fight before making a tender offer. See supra note 25. That obviously increased the expense of the takeover effort and made the outcome much more uncertain. Furthermore, as a result of the dissenters' rights afforded to shareholders in the event that the hostile bidder was successful in his proxy fight, a bidder for the majority of a corporation's stock had to be prepared to purchase *all* of the company's stock immediately; he could not expect to use a two-step transaction to reduce the average per-share cost of the acquisition, or to reduce the amount of financing he must secure in order to acquire control. For a brief discussion of the mechanics and advantages of a two-stage acquisition, see Morris, Developments in the Law, 1984-1985—Business Associations, 46 La. L. Rev. 413, 421-23 (1986).

> law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate *domestic* corporations, including the authority to define the voting rights of shareholders.[28]

The Supreme Court criticized the lower court for failing to attribute enough importance to the incorporating state's regulation of corporations. It quoted Chief Justice Marshall's observation that "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. . . . [It] possesses only those properties which the charter of its creation confers upon it . . . ."[29] The Court went so far as to state that the free interstate market for corporate securities "depends at its core upon the fact that a corporation—except in the rarest situations—is organized under, and governed by, the law of a single jurisdiction, traditionally the corporate law of its state of incorporation."[30]

In holding this statute constitutional, *CTS* implied that the states could do a great deal to impede takeovers if they adopted an "internal corporate governance" stance in their legislation, and if they were careful not to get too close to the heavily pro-management and openly extra-territorial features of the Illinois statute.[31] But there is little in either MITE or *CTS* that would support a state's regulating the voting power of the shares of a foreign corporation.

It is true that the Court has been careful so far not to elevate to constitutional status the traditional choice of law rule which gives the state of incorporation exclusive control over matters of internal corporate governance. However, the court did say in *CTS* that the national interest in a free interstate market for corporate securities "depend[ed] at its core" on the fact that a single state governed the internal affairs of a corporation, and it refused in *MITE* to give any weight whatsoever to Illinois' interest in regulating the internal affairs of a foreign corporation, even a foreign corporation with substantial connections to the state. While the connections themselves, i.e., Illinois' resident investors, were thought to give the state a legitimate regulatory interest, the local interest in the protection of investors was not permitted to override the important national interest in free interstate commerce in corporate securities. It would seem to follow, therefore, that a statute such as Louisiana's

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28. *CTS*, 107 S. Ct. at 1649 (emphasis added).

29. Id. at 1649-50.

30. Id. at 1640.

31. Justice White, who wrote the plurality opinion in *MITE*, was highly critical of the Illinois statute on three separate grounds. In contrast, the majority opinion in *CTS* was written by Justice Powell, who had concurred in the "indirect interference" portion of White's opinion expressly because it would allow a future balancing more sensitive to legitimate state concerns. See text accompanying supra notes 21-22.

would be held unconstitutional, for it attempts to protect local interests[32] by striking at single-state regulation of internal corporate affairs, the very thing identified by the Court in *CTS* as being at the core of the free interstate market in corporate securities.[33]

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32. Unlike the unconstitutional Illinois statute, the Louisiana statute applies where, among other things, the corporation has at least 2000 Louisiana-resident employees, but the connection between resident share voting power and employee interests is so tenuous that it seems unlikely that this would tip the constitutional balance very far in favor of enforceability.

33. A federal district court recently entered a temporary restraining order against an Oklahoma statute nearly identical to the Louisiana enactment on grounds that it was "facially unconstitutional" because of the undue risk it posed of inconsistent regulation of voting power in corporations having substantial connections to several different states. TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022, 1033 (W.D. Okla. 1987). An even more recent decision, Campeau Corp. v. Federated Dep't Stores, 679 F. Supp. 735 (S.D. Ohio 1988), struck down an Ohio statute that purported to protect both Ohio and non-Ohio corporations against acquisitions by certain corporations incorporated outside the United States. The court held the statute unconstitutional not only because it discriminated between intrastate and interstate businesses, id. at 738, but also because the statute purported to apply to non-Ohio corporations having certain connections to the state, e.g., $5 million in assets in Ohio or 500 employees. The court said that this posed a risk of inconsistent regulation that "render[ed] it invalid under the Commerce Clause." Id. at 739.

For a scholarly argument in support of the constitutionality of antitakeover regulations directed at foreign corporations, see Pinto, supra note 23, at 754-74. Among other things, Professor Pinto points out that the mere danger of inconsistent regulation should not render a statute unconstitutional, and that the courts should wait to see whether the states do, in fact, adopt inconsistent statutes. Professor Pinto seems to assume that these types of statutes are inconsistent only if they take away voting rights in different ways. But it is clear that a vote-based antitakeover statute will not do anyone any good unless it takes away voting rights that would otherwise be recognized by the incorporating state. Thus, the only way that this type of statute can be considered to pose a "mere danger" of inconsistency is to assume that the incorporating state intends simply to provide minimum standards for voting, and then to leave other states free to impose more rigorous requirements as they see fit. This theory seems better suited to federal-state relations (where Congress often regulates without "occupying the field"), than to relations among the states themselves, especially in the field of corporation law, where the law of the state of incorporation has always been viewed as controlling, exclusively and completely, the internal affairs of the corporation. In light of the long history of exclusive charter-state governance of internal corporate affairs, it simply is not plausible to suppose that the incorporating state really would not mind if one or more of its sister states joined with it in deciding who should be treated as a voting stockholder and who should not be. Thus, the conflicts posed by the Louisiana style statutes are not merely "potential" or "possible," they are automatic and unavoidable.

Professor Pinto also argues that even if the constitution requires that a single state regulate matters of internal corporate governance, the selection of that state might more sensibly be based on practical considerations (such as the number of shareholders and other contacts with the regulating state) than on the purely formal connection between a corporation and its chartering state. But that argument overlooks the fact that only the state of incorporation has a connection to the corporation that is unquestionably unique.

Management Wish-List of Antitakeover and Merger Provisions

Act 455 amended numerous provisions of the Louisiana Business Corporation Law in a way that increased the power of incumbent management both to fend off unwanted takeovers and to carry out management-supported mergers and recapitalizations without the approval of shareholders.

Management-Controlled Options; Poison Pills Facilitated

Louisiana Revised Statutes 12:51 C and 56 B were amended to add an exception to the "equal rights" that had formerly been granted to each share, subject only to provisions of the articles of incorporation and earlier-enacted statutory antitakeover provisions.[34] Under this amendment, the equal rights are also subject to contrary provisions in any rights or options issued by the corporation.[35] This change shifts power to the management of the corporation, as it is the board of directors, and not the shareholders, which controls the issuance of these rights or options.[36]

These changes are particularly noteworthy because "poison pill" plans, which have become popular as antitakeover devices, typically rely on the issuance of options or rights that discriminate among shareholders, and that contain provisions which would dilute the interests of any

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Any other test for the choice of law would pose complicated factual and legal issues concerning the existence, size and importance of the corporation's contacts with a given state. Those issues would almost surely be resolved differently in different proceedings, and their proper resolution would change over time as a corporation's contacts changed. It seems unlikely that the Supreme Court, recognizing the importance of single-state regulation of corporate governance, would adopt a test for choosing that single state which might be satisfied from time to time, or even at the same time, by several different states. And it is nearly inconceivable that any lower court would adopt so novel an idea without Supreme Court guidance.

34. 1988 La. Acts No. 455. Before amendment, section 12:51 C had stated, "Except as provided in R.S. 12:136 [a key provision in the 1987 control share acquisition statute], and except as otherwise provided in the articles, each share shall be in all respects equal to every other share."

35. La. R.S. 12:51 C as amended by 1988 La. Acts No. 455 § 1. The new provision permits inequalities created "in any right or option created and issued pursuant to R.S. 12:56(A)." Id. Section 12:56 A (1969) allows the creation of options and warrants to convert or acquire shares of the corporation, and section 12:56 B, as amended by 1988 La. Acts No. 173 & 455, allows these rights to be created by the board of directors of the corporation.

36. La. R.S. 12:51 B (1969). Formerly, the shareholders were entitled to vote on the issuance of "naked" rights—rights issued independently of any related share or other security of the corporation—unless the rights were to be issued to someone who was not a director or 10% or greater shareholder, and the issuance was approved by 2/3 of the directors. This language was eliminated by 1988 La. Acts No. 455.

takeover bidder who carried out a merger of the corporation without having acquired management's approval in the early stages of his takeover effort. By expanding the board's power to create these unequal rights, the legislature increased the board's power to block unwanted takeovers, and removed one of the arguments that a takeover bidder might make in opposition to such a plan.

Support for "Social Responsibility" Excuses for Opposing a Takeover

By adding a new subsection G to Louisiana Revised Statutes 12:92, Act 455 explicitly authorized corporate directors to take social factors into account in evaluating a tender offer or proposed business combination involving their corporation. The board may consider, among other things:

- economic and social factors that might be depressing the price of the company's stock;[37]
- the "social and economic effects" of the proposed transaction on "the corporation,[38] its subsidiaries, or their employees, customers, creditors, and the communities in which the corporation and its subsidiaries do business";[39] and
- the competence, integrity, experience, and prospective financial capabilities of the bidder.[40]

Although legal scholars have long advocated the view that corporate managers, in making decisions for the corporation, should heed the corporation's social responsibilities,[41] management advocates are now beginning to embrace these social concerns as a means of avoiding, rather than accepting, corporate accountability.[42] Consistent with this

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37. La. R.S. 12:92 G (1), as enacted by 1988 La. Acts No. 455.

38. The idea that the "corporation's" interests may be taken into account, as if the corporation was a single person that had a single set of interests, glosses over the conflicting interests and rights of the various participants in the corporation. The interests of a majority shareholder are different from those of a minority shareholder, and the interests of employees, creditors, customers, and the community may as easily conflict as coincide. Thus, by permitting the board to take account of everyone's inconsistent or even conflicting interests, the statute permits the board to defend a breach of duty to one group as necessary, in the business judgment of the board, to serve the interests of another group.

39. La. R.S. 12:92 G (2), as enacted by 1988 La. Acts No. 455.

40. La. R.S. 12:92 G (4), as enacted by 1988 La. Acts No. 455.

41. The seminal articles in the debate over corporate social responsibilities are Berle, Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931) and Dodd, For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145 (1932).

42. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (justifying defensive maneuver as necessary to protect variety of corporate "constituencies"); Lipton, Takeover Bids in the Target's Boardroom, 35 Bus. Law. 101 (1979) (discussing manage-

new-found role for social concerns, the new amendment does not *require* corporate directors to take the listed factors into account, it just lets them do so, if they wish.

This listing of optional concerns, particularly when combined with the business judgment rule,[43] should mean that directors will seldom be left without some excuse to oppose a takeover that they do not wish to see occur. In justifying resistance to a takeover, directors will probably not have to prove that they can manage the company more profitably for shareholders, or even that they have a reasonable basis for believing that they can. They now appear to be authorized by statute to oppose a takeover as long as they have some reason to believe that their opposition will help them protect employees, customers, creditors, or even the community in general, from the adverse effects that the takeover might cause.[44]

Elimination of Requirement that Merger Agreement be Filed

As amended by Act 435, Louisiana Revised Statutes 12:112 F (old subsection G)[45] permits the filing of a certificate of merger or consolidation in lieu of filing a certified copy of the merger agreement itself. The certificate of merger must set forth certain basic information concerning the merger, such as the date the merger occurred, the corporate

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ment's "responsibility" to consider the effects of a takeover on variety of groups). But see Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 862-65 (1981) (criticizing use of social responsibility theory as grounds for defensive maneuvering).

43. The business judgment rule is a rather circular bit of doctrine that expresses the policy of nonintervention by courts into the affairs of a corporation. The rule's benefit, nonintervention, is typically conditioned on proof that there is no need for intervention. A typical statement of the rule is that a court will not "second guess" a decision by directors where the decision was not an abuse of discretion, and where it was made with due care and "in good faith in the lawful and legitimate furtherance of corporate purposes." See D. Block, N. Barton and S. Radin, The Business Judgment Rule 4-9 (1987).

44. See *Unocal*, 493 A.2d at 954-54; Moran v. Household Int'l, Inc., 500 A.2d 1346, 1350, 1356-57 (Del. 1985). But see Hanson Trust PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 277-83 (2d Cir. 1986) (emphasizing board's duty to maximize takeover price for shareholders); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182-83 (Del. 1986) (board's regard for nonshareholding "constituencies" in the corporation must be "rationally related" to benefits to shareholders; where board has abandoned effort to save corporation as going enterprise, and has decided to break it up and sell it, duty is to sell it to highest bidder).

45. The language of old subsection D of section 12:112 was deleted by the 1988 La. Acts No. 455, so that the designation of all succeeding subsections was changed.

parties, and the name of the surviving corporation.[46] The certificate need not include the details of the financial and management provisions of the merger transaction, information that normally would have become part of the public record under old section 112 G as a result of the filing of a copy of the merger agreement.

Under the new language, the merger agreement itself need only be on file at the principal place of business of the surviving corporation, and it need only be made available to shareholders of the corporate parties to the merger.[47] It is not clear whether the purpose of the change in the filing requirements was principally to reduce the recordkeeping burdens on the secretary of state's office, or to make it more difficult for persons other than shareholders of the parties to the merger to obtain a copy of the merger agreement. The statute would seem to have both effects, at least for companies without reporting obligations under federal securities law.[48]

Merger Approval Requirements Changed

Louisiana Revised Statutes 12:112 C, both before and after the 1988 amendment, set out certain notice requirements for meetings at which a shareholder vote on a proposed requirement would be taken. Each shareholder who was a shareholder of record on the record date fixed for the meeting *and* who was entitled to vote on the proposed merger was entitled to receive notice.[49] Act 455 expanded the requirement of notice to all record shareholders, whether or not the shareholder is entitled to vote at the meeting.[50]

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46. La. R.S. 12:112 F, as amended by 1988 La. Acts No. 455 (formerly section 112 G). Technical changes were also made to amended sections 12:112 F & G to change references to a "copy" of the certificate of merger "certified" by the secretary of state to a "duplicate original" of the certificate "issued" by the secretary of state. The same technical changes were made in the provisions of sections 12:243 F & G and 12:311, concerning mergers and consolidations involving nonprofit and foreign corporations, respectively. These changes were made in 1988 La. Acts No. 101.

47. La. R.S. 12:112 F, as enacted by 1988 La. Acts No. 455.

48. Copies of the merger agreement would have to be filed with the SEC if the company was a 34 Act registered company and wished to solicit proxies in order to obtain shareholder approval of the merger. See Exchange Act Schedule 14A, Item 14 (a) (3), 17 C.F.R. § 240.14a-101 (1988) (form of proxy statement, requiring summary of terms of proposed merger transaction in proxy statement, and requiring the filing with the SEC of written documents which set forth the terms of the proposed transaction); Exchange Act Rule 14a-3 (a), 17 C.F.R. § 240.41a-3 (a) (1988) (prohibiting proxy solicitations without furnishing security holders with proxy statement); Exchange Act Rule 14a-6 (c), § 240.14a-6 (c) (1988) (requiring filing of proxy materials with the SEC and with national securities exchanges on which any class of the subject corporation's securities are listed and registered).

49. La. R.S. 12:112 C, as amended by 1988 La. Acts No. 455.

50. La. R.S. 12:112 C (Supp. 1988) (before amendment by 1988 La. Acts No. 455).

Under Louisiana Revised Statutes section 112 E, as amended by Act 455 (old subsection F), the existing "small scale" merger provisions were liberalized. Formerly, these provisions permitted a merger without the vote of the shareholders of the surviving corporation only if the merger did not result in either the amendment of the articles of the surviving corporation or in the issuance of shares representing more than 15% of the shares of that class that were outstanding before the merger.[51] In effect, under the former language, a large corporation was permitted to absorb a much smaller one without a vote of the larger company's shareholders.

Under the new rules, a merger is allowed without a vote of the surviving corporation's shareholders if

- the articles are not amended;
- each share outstanding before the merger is to be either outstanding or a treasury share after the merger; and
- any authorized but unissued common shares or treasury common shares that are issued under the merger agreement, when added together with any common shares that will be "initially issuable"[52] upon conversion of any convertible securities that are issued under the merger agreement, do not exceed 15% of the common shares outstanding before the merger.[53]

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51. La. R.S. 12:112 F (before modified and redesignated by 1988 La. Acts No. 455).

52. Because a convertible security is usually convertible just one time (e.g., a debenture or preferred share is convertible just one time into a share of common), it is difficult to understand what common shares are meant to be excluded by the term "initially issuable." All common shares issuable upon conversion of a convertible security would seem to be shares "initially issuable" upon such a conversion. Perhaps the drafters meant to exclude all shares issued as a result of all conversion transactions after the first transaction in which *any* of the convertible securities were converted, or more likely, that in counting the number of shares of common stock issuable upon conversion of the convertible security, the number issuable should be determined as of the date the the *convertible security* was issued (and not as the language seems to suggest, the date of conversion). The latter interpretation would make sense as a means of excluding from the count of common shares outstanding (or obtainable) immediately after the merger, those increases in the number of common shares that would be obtainable upon conversion if circumstances arising some time *after* the merger triggered the one or more "anti-dilution" features in the terms of the convertible security. For example, the terms of a convertible debenture might provide that ten shares of stock would be issued for each $1000 in face amount of debenture surrendered, but that if a stock split were to occur before the conversion, the number of shares issuable upon conversion of the debenture would be increased to take account of the split. If the "anti-dilution" interpretation of the statutory phrase "initially issuable" is correct, then these additional shares issuable as a result of the operation of the anti-dilution feature would not be counted in determining the number of common shares outstanding or "initially issuable" as of the date of the merger.

53. La. R.S. 12:112 E, as amended by 1988 La. Acts No. 455 (formerly section 112 F).

These changes seem designed to eliminate shareholder voting in mergers in which the true size of the transaction is obscured either through two-step structures, in which the size of the transaction is made artificially smaller by converting outstanding shares into treasury shares as part of the merger,[54] or through the use of securities other than common stock.[55] In either case, substantial recapitalizations and changes in control could occur under the amended statute without shareholder approval, something inconsistent with the small-scale merger theory that has traditionally been used to justify this type of exception to the normal shareholder voting requirement.

Section 112 E (old subsection F) was also amended by Act 455 to provide that no vote of shareholders is required to approve the merger of a corporation that had no shares issued at the time the merger was approved by the corporation's board of directors. This allows a corporation to be set up and a merger approved before the corporation has shareholders, and binds future shareholders to this pre-issuance approval. The purpose of this provision is uncertain, because getting votes of shareholders of shell companies set up to facilitate mergers is a simple matter.[56] Perhaps the provision was written as a savings provision for a merger that had already been consummated without compliance with the statutory requirement of a shareholder vote.

Act 455 made one other curious change in the merger voting requirements. Under old section 112 H, a so-called "short form" merger—a merger between a parent company and one or more of its 90% or greater subsidiaries—did not require an approving vote by the shareholders of the parent company if that company survived the merger.[57] New section 112 G kept the "surviving parent" exception to the normal voting requirements, but it added language that now permits a short-form merger without a vote of the shareholders of a *nonsurviving* parent company, if no vote would be required under the provisions of section

54. For example, corporation with 100 common shares issued and outstanding could, as part of the plan of merger, buy back 80 shares and then deliver only 15 of these shares to the merged company's shareholders. That would be 15% of the shares outstanding immediately prior to the merger, but it would represent 42.8% of the shares issued and outstanding after the merger. The remaining 65 shares could remain treasury shares not issued or delivered under the merger agreement.

55. Preferred shares with enormous voting and financial rights could be issued without crossing the 15% common share size limit, as the increase of 15% now applies only to common shares; under the old rules the 15% cap applied to each class of shares.

56. The controlling persons of a corporation without shareholders could very easily cause the corporation to issue one or more shares to themselves. They then could vote these shares in favor of the merger.

57. La. R.S. 12:112 H (Supp. 1988) (prior to amendment by 1988 La. Acts No. 455).

112 E, as amended.[58] The purpose of this added language is uncertain because the shareholder approval is excused for a *nonsurviving* company under section 112 E only if it has not issued any shares prior to the board's approval of the merger agreement,[59] and that exception seems to apply, even without the language added to subsection (G), to *all* companies, whether or not they are 90% parent companies carrying out a short-form merger.

Amendments of Merger Agreements

Act 455 deleted old subsection D from Louisiana Revised Statutes section 112, which had given shareholders the power to adopt amendments to a merger agreement through the same vote as that required for the approval of the agreement itself.[60] The Act then modified old subsection I (now H) to provide new power to the boards of directors of the constituent corporations to adopt amendments to the merger agreement after the agreement has been approved by shareholders. As long as the postapproval amendments would not, among other things, "adversely affect" the rights of the shareholders of the corporation involved, the board may incorporate the changes into the merger agreement without resubmitting it to the shareholders.[61] Both changes, of course, increase the power of management to control the terms of the merger, and decrease the power of shareholders.

Dissenters' Rights in Short Form Mergers

Although this was probably inadvertent, the effect of the redesignating of subsections required by the deletion of old subsection D[62] was to change the subsection letter for short form mergers from H to G. Section 131 had provided for dissenters' rights in short form mergers by referring to mergers approved under section 112 H, which before the 1988 revisions had described the procedures for carrying out these types of mergers.[63] The short form merger language, however, is now set forth in section 112 G. As amended, the dissenters' rights language

58. La. R.S. 12:112 G, as amended by 1988 La. Acts No. 455 (formerly section 112 H).

59. See supra text accompanying note 56.

60. La. R.S. 12:112 D (1969) (before repeal by 1988 La. Acts No. 455).

61. La. R.S. 12:112 H, as amended by 1988 La. Acts No. 455 (formerly section 112 I).

62. La. R.S. 12:112 D (1969) (before repeal by 1988 La. Acts No. 455).

63. La. R.S. 12:131 A (1969). There is another cross reference in La. R.S. 12:131 C (Supp. 1988), which excuses the requirement normally imposed on dissenting shareholders to notify the corporation in advance of their intention to dissent at an upcoming meeting, and to vote their shares in opposition to the action with respect to which they are asserting dissenters' rights. La. R.S. 12:131 C (Supp. 1988).

now refers to a subsection in the merger provisions that deals with the power of the boards of directors of constituent corporations to terminate and modify merger agreements. Thus, the cross reference in section 131 has been rendered technically ineffective to trigger the dissenters' rights that it had earlier provided.

Effective Date of Merger

Act 455 also modified Louisiana Revised Statutes section 114 to provide for a five-day relation back period for the filing of certificates of merger. The new period for merger agreements is similar to the five-day periods permitted for the filing articles of incorporation or contracts of partnership.[64]

Change in Description of Acceptable Merger Consideration

For some reason, the language of old subsection J (now I), which had described the consideration that may be provided to the shareholders of the constituent corporations in a merger, was changed. The legislation added "property rights" as an acceptable form of payment, but dropped the seemingly broader phrase "or other consideration." The order of the sentence was also changed so that it now may be argued that any cash or property rights issued in the merger must be the cash or property right of a business, nonprofit, or foreign corporation.[65]

1984 Antitakeover Statute Amended

The antitakeover statute enacted in 1984 imposed supermajority voting requirements on second-stage merger transactions that are virtually impossible for "interested shareholders" to meet.[66] Act 455 amends the definition of "interested shareholder" to delete from its coverage any of the corporation's employee plans or related trusts.[67] This allows shares that are generally voted in management's favor to participate in voting that is supposed to exclude the votes of persons having an interest in the transaction.

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64. Compare La. R.S. 12:114, as amended by 1988 La. Acts No. 455, with La. R.S. 12:25 C (Supp. 1988) (corporations) and La. R.S. 9:3408 (1983) (partnerships).

65. La. R.S. 12:112 I, as amended by 1988 La. Acts No. 455 (formerly section 112 J.). The original order of the sentence was superior from a technical standpoint, because it did not allow for the misconstruction suggested in the text.

66. La. R.S. 12:132-34 (Supp. 1988). For a discussion of these provisions, see Morris, Developments in the Law, 1984-1985—Business Associations, 46 La. L. Rev. 413, 420-30 (1986).

67. La. R.S. 12:132 (9) (a), as amended by 1988 La. Acts. No. 455.

1987 Antitakeover Statute Amended

The "Control Share Acquisition" statute that was adopted by the legislature in 1987[68] was also amended by Act 455. Louisiana Revised Statutes 12:135 (4), which describes the corporations that are subject to the statute, was amended to add one more connection to Louisiana that might subject a corporation to the requirements of the statute. Formerly, the control share statute applied to a corporation only if, among other things, the corporation had its principal office, principal place of business or "substantial assets" located in Louisiana.[69]

The amendment changes "substantial assets" to "substantial assets or real estate" in Louisiana, owned either directly or through one or more wholly-owned subsidiaries.[70] Assuming that the word "substantial" was not intended to modify the words "real estate,"[71] this change amounts to a reduction in the importance of the connections to Louisiana that the statute requires in order to subject a corporation to its terms. However, it seems unlikely that this change would weaken the statute very much from a constitutional standpoint because the statute is applicable to a corporation only if it is also incorporated in Louisiana and meets certain other statutory requirements concerning share ownership.[72]

The statute was also amended to permit management to delay calling the meeting that a prospective bidder may request in order to obtain a shareholder vote on the bidder's rights to vote. Under the statute as originally drafted, a shareholder could force management to call a

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68. La. R.S. 12:135-140.2 (Supp. 1988 & as amended by 1988 La. Acts No. 455). See supra text accompanying notes 11 to 33.

69. La. R.S. 12:135 (4) (b) (Supp. 1988) (prior to amendment by 1988 La. Acts No. 455).

70. La. R.S. 12:135 (4) (b), as amended by 1988 La. Acts No. 455. In the new control share acquisition statute for foreign corporations (see supra text accompanying notes 11 to 33), assets or real property owned by *any* subsidiary, not just those wholly-owned, are taken into account. It is not clear why the more generous language was not also used in La. R.S. 12:135 (Supp. 1988 & as amended by 1988 La. Acts No. 455), dealing with Louisiana-chartered corporations.

71. Because the addition of the words "real property" to the statute would be rendered meaningless if the language were interpreted to mean that "substantial" real estate had to be owned (real estate would already have qualified as an asset, so that substantial real estate would already have satisfied the original language), it is likely that the drafters intended that the ownership of *any* real estate be sufficient for purposes of that part of the statute.

72. La. R.S. 12:135(4)(a), (c), as amended by 1988 La. Acts No. 455 (requiring the corporation to have at least one hundred shareholders and to meet one of the following requirements: (a) more than 10% of its shareholders resident in Louisiana, (b) more than 10% of its stocks owned by Louisiana residents, or (c) 10,000 or more shareholders resident in Louisiana). For a discussion of the constitutional issues, see supra text accompanying notes 11-33.

meeting of shareholders for purposes of considering his voting rights within fifty days of the date that he filed the proper form of disclosure document if he requested the meeting when he filed his disclosure document and provided an undertaking to pay the costs of the meeting within ten days thereafter.[73] The Supreme Court noted the importance of this provision in upholding the Indiana statute in *CTS*.[74]

The 1988 legislation, however, provides that for companies subject to federal rules on proxy solicitations, the fifty-day period is to be measured not from the date that the meeting is requested properly by the bidder, but instead from the date that definitive proxy materials are filed with the Securities and Exchange Commission by *both* the bidder and the board of directors of the target corporation.[75] In addition, the board is permitted by new section 138 A (2) not to call the meeting at all unless the bidder's proposed acquisition "will be lawful" and the bidder has furnished the target company with "copies of commitments for financing of any cash portion of the consideration to be paid with respect to the acquisition or otherwise has demonstrated that [he] has the financial capacity to make the acquisition."[76]

These new delay provisions make this statute much more favorable to management and much more difficult to reconcile with federal law and free interstate commerce than was the Indiana statute approved by the Supreme Court in 1987.[77] By attempting to improve on the protections

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73. La. R.S. 12:138 A, B, as amended by 1988 La. Acts No. 455. Cf. Ind. Code § 23-1-42-7 (Burns Supp. 1988).

74. *CTS*, 107 S. Ct. at 1647. In distinguishing the Illinois statute that a plurality of the Court would have struck down in *MITE* on preemption grounds, Justice Powell observed:

> The plurality argued only that the offeror "should be free to go forward without *unreasonable* delay." [citation omitted]. In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after the commencement of the offer. This period was within the 60-day maximum period Congress established for tender offers in 15 USC § 78n(d)(5). We cannot say that a delay within that congressionally determined period is unreasonable.

Id. (emphasis in original).

75. La. R.S. 12:138B, as amended by 1988 La. Acts No. 455. The statute requires the board of the corporation to file its proxy materials "as promptly as practicable following receipt of the request." Id.

76. La. R.S. 12:138A(2), as enacted by 1988 La. Acts No. 455.

77. It is virtually standard practice for the management of a company facing a hostile takeover effort to contend that the bidder's proposed acquisition is unlawful, usually on grounds that the bidder has violated federal securities law by failing to disclose adequately the terms of his offer, his plans for the company, or matters concerning the bidder's managerial competence or personal integrity. Even if management's decisions not to call

afforded to the management of publicly-traded Louisiana corporations, the legislature may have endangered the more moderate, clearly constitutional protections that were already in place.

Protection for Directors Relying on Reports Liberalized

In addition to all of the merger-related amendments provided by Act 455, this legislation also amended Louisiana Revised Statutes 92 E of the corporations statute to provide that a corporate director is to be "fully protected" in relying in good faith on a variety of different reports or records, including any report, opinion, or statement by any person "as to matters the director reasonably believes are within such person's professional or expert competence and which person is selected by the board of directors or any committee thereof with reasonable care." The new language expands the scope of the "good faith reliance" defense in two ways, first, by making it available against all theories of director liability, and second, by including a broader array of statements and reports within the defense. This provision obviously has importance outside the takeover field, and it represents an improvement over the earlier language, which had seemed unnecessarily narrow in some respects.

Before it was amended by Act 455, the "reliance on records" language of section 92 E provided protection only against liability under other subsections of section 92 itself. Section 92 imposes liability on directors only for certain unlawful dividends and stock issuance transactions; it certainly does not exhaust the theories under which a corporate director might be held liable for a breach of his duties to the corporation or its shareholders. The source of the director's general duties of care and loyalty is not section 92, but section 91. Thus, strictly interpreted, section 92 E protected directors against liability only in connection with the particular types of misconduct listed in the narrowly-drawn subsections of section 92. In contrast, under the new provision, a director is "fully protected," in relying in good faith on the specified reports and statements, with no stated limitation on the theory of liability from which he is being protected.

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shareholders meetings on grounds of such "unlawfulness" are subject to judicial review and reversal, the very delay involved in litigating the question of the lawfulness of the proposed acquisition is likely to postpone the meeting for several days or weeks. Thus, it could very well become impossible for a bidder to comply with both the Louisiana statute and with the 60-day federal period after which tenders of stock become subject to withdrawal by the offerees (15 U.S.C. § 78n (d) (5) (1982)). This is a serious impediment for a bidder who wishes (as he most surely would) to condition his obligation to purchase shares in the tender offer upon his obtaining the power to vote those shares in accordance with the antitakeover statute.

The second major difference between old section 92 E and the new provision concerns the types of reports and statements on which the director may rely under the protection of the statute. Old section 92 E limited its protections to reports prepared by certain listed types of persons, such as directors, board committees, corporate officials, and petroleum engineers. As amended, section 92 E contains no limitation on the occupation or position held by the person making the report. All statements and reports may be relied on in good faith as long as the person making the statement or report was chosen by the board (or a committee of the board) with reasonable care, and so long as the director relying on the report "reasonably believes" that the statement or report is within the professional or expert competence of the person making the report or statement.

Valuation of Stock: Management-Controlled Freezeout Merger for Cash-Bank Stock

In a 1987 decision, *McMillan v. Bank of The South*,[78] the Louisiana fifth circuit approved a theory of stock valuation that allows shareholders of two-thirds or more of the stock of a corporation to expropriate the stock held by the remaining shareholders at a discount price.[79] *McMillan* is not responsible for the expropriation power itself—that is provided by statute[80]—but *McMillan* supports a discounting of the price paid for the expropriated stock by treating the valuation of the stock as a factual issue controlled only by the vague standard that the price paid be equal to the "fair market value or fair cash price for which the stock can be sold on the open market."[81] The effect of treating valuation purely

78. 514 So. 2d 227 (La. App. 5th Cir.), writ denied, 516 So. 2d 131 (1987).

79. Although, technically, *McMillan* involved an interpretation only of La. R.S. 6:376 C (3) (1986), which concerns state-chartered banks, the language that the court interpreted is identical to that in La. R.S. 12:131 C (Supp. 1988), which concerns business corporations.

Prior to *McMillan*, there had been only one reported decision in Louisiana that interpreted the pertinent language, and the court cited it. *McMillan*, 514 So. 2d at 230 (citing Wainwright v. Lingle, 236 La. 854, 109 So. 2d 444 (1959)). However, in that case the statute was not actually applicable. It was used only by analogy to determine the payment that a shareholder should have received in connection with a corporate liquidation. *Wainwright*, 236 La. at 859, 109 So. 2d at 446. More importantly, the court in *Wainwright* used the statute to justify a *proportionate* distribution of the proceeds of the liquidation (which is what the plaintiffs had sought in this case), and not the type of disproportionate allocation of values approved of in *McMillan*.

The court also cited Harman v. Defatta, 182 La. 463, 162 So. 44 (1935), in support of its pro-majority interpretation. But *Harman* concerned the valuation of immovable property for purposes of determining whether a fraudulent conveyance had occurred, and had nothing whatever to do with the valuation of corporate stock.

80. See infra text accompanying notes 83-86.

81. *McMillan*, 514 So. 2d at 230.

as a factual issue was to permit a discounting of the minority shareholder's interest based on expert testimony that such discounts were normally taken in open market transactions. In this case, the court appeared to accept expert testimony that a 45% discount was appropriate.[82]

To understand *McMillan*, it is necessary to understand the role that judicial valuations play in the economics of so-called "freezeout" mergers. Like the Model Business Corporations Act, the Louisiana corporation statute sets forth no substantive restrictions on the terms of mergers; it simply says that mergers may be carried out in accordance with merger agreements approved by the boards of directors and shareholders of the constituent corporations.[83] Subject to certain contrary provisions in the articles of incorporation, the level of shareholder approval required for a merger is two-thirds of the voting power present at a properly convened meeting of shareholders.[84] This means that shareholders controlling two-thirds or more of the stock in a corporation control the terms under which that corporation will merge with another corporation. Although it may at first seem unlikely that the shareholders of the first corporation could find another corporation whose shareholders were willing to help them squeeze out their troublesome minority shareholders, the search for a willing accomplice is actually quite simple. For if the two-thirds shareholders do not already control another corporation that they can use as the second party to the merger, they can easily set up a new one and cause it to issue all its stock to them or their agents.

Since the two-thirds shareholders then have sufficient votes in both corporations to approve the plan of merger on any terms they desire, they can adopt a plan of merger which provides that they are to receive shares of the corporation which survives the merger, but that the minority shareholders are to receive cash, promissory notes or other forms of property. In practical effect, therefore, the two-thirds shareholders can force the minority shareholders to relinquish their investment at whatever

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82. The plaintiff's expert had testified that the stock was worth $75 per share, while the defendant's expert testified that the stock was worth, at best, $35 to $37 per share, and that it was his opinion that in view of the discounts that would properly be applied in valuing minority stock that was thinly traded, the actual fair cash value of the stock was $29.11 per share. The defendant's expert said that the value of the stock, presumably its proportionate value based on the value of the corporation as a whole, should be discounted 10% because of its minority status and 35% because of the thin market, for a total discount of 45%. The trial court set the value at $41 per share, apparently applying the defendant's 45% discount to the plaintiff's $75 figure. The appellate court affirmed, finding no manifest error of fact. Id.

83. La. R.S. 12:112 A, as amended by 1988 La. Acts No. 455. See Model Bus. Corp. Act § 71.

84. La. R.S. 12:112 C, as amended by 1988 La. Acts No. 455.

price, paid in whatever form, that the dominant shareholders decide to specify in the plan of merger.

The only statutory protection afforded to minority shareholders against ill treatment in this type of transaction is the right that each shareholder is given to dissent from it. By dissenting, the minority shareholder can force the surviving corporation to pay him the "fair cash value" of his stock, either as negotiated by the dissenter and the corporation or, failing settlement on an agreed amount, as judicially determined.[85] Thus, despite the terms of the plan of merger, if a shareholder carefully follows the procedures set out in the statute,[86] he can stop the dominant shareholders from taking his stock at too low a price, or on too liberal a set of payment terms. He still cannot stop the expropriation itself, but he can at least force the surviving corporation to pay him, in cash, the fair value of what was expropriated.

Obviously, with this kind of system, the minority shareholders' statutory protection is only as effective as the courts allow it to be. If the courts construe "fair cash value" generously, then the statute provides generous protections. But if the courts do what this court did, deem "fair value" to permit a deep discounting of the value of the minority shareholder's stock, then they are interpreting the statute as being designed to give the dominant shareholders of a corporation a very attractive purchase option on the minority shareholders' stock.

Unfortunately, neither the *McMillan* court nor the Louisiana Supreme Court appeared to understand the significance of the issue with which they were dealing. The appellate court permitted the discounting by affirming the trial court's "factual" finding,[87] and the supreme court refused to review that decision.[88]

Although the valuation of a corporation, as a whole, is undoubtedly a factual issue, it seems erroneous to treat the issue of discounting the stock also as a factual issue, for whether and how much the stock should be discounted determines the degree to which the dissenters' rights afforded by statute are to be effective in the protection of minority shareholder interests. Arguments can certainly be made that share discounts are sometimes appropriate.[89] But it seems wrong to say, as this

85. La. R.S. 12:131 (1969 and Supp. 1988).

86. Id.

87. *McMillan*, 514 So. 2d at 230.

88. McMillan v. Bank of the South, 516 So. 2d 131 (La. 1987).

89. Compare, Easterbrook & Fischel, Corporate Control Transactions, 91 Yale L.J. 698, 703-15 (1982) (challenging the traditional assumption that all shareholders should be treated equally in allocating takeover-related profits; using a free-market contract theory to suppose that shareholders would not desire a rule that discouraged takeovers by making them less profitable to the takeover bidder) with Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 Colum. L. Rev. 1403 (1985) (criticizing the "nexus of contracts" theory and defending traditional, fiduciary-duty rules).

court did, that the legislature actually intended to provide protection to minority shareholders only to the extent of the "fair cash price for which [their] stock [could] be sold on the open market."[90]

Had the legislature really intended to limit the dissenters' remedy to a true market price, it could have saved everyone a great deal of trouble by eliminating the dissenters' rights altogether, for the statute would give the dissenters nothing that they could not obtain for themselves in the marketplace. Consider the possibilities. If the market for the dissenters' stock was active and healthy, the stock could be sold at a good price without resort to litigation.[91] And if a market did not exist for the stock, then the right to sue for the price at which the stock could actually be sold in the market would be virtually worthless, for the stock could not be sold for more than a nominal price.[92] Finally, in between the two extremes, a "thin" market might exist, as recognized in *McMillan*. But if a court accepted market discounts for the "thinness" of the market, as the *McMillan* court seemed to do, then the shareholder would still be better off selling his stock in the marketplace than he would be litigating its value in a dissenters' proceeding. He could save himself thousands of dollars in litigation expense, and still end up with the same price for his stock.

It is possible, of course, that even under a *McMillan* test a dissenter could do better in litigation than in the marketplace, for he might be able to convince a court that the "true" market price for his stock was higher than it actually was. But it seems unlikely that the statutory dissenters' remedy was really intended to provide protection to a dissenter only to the extent that he was able to lead a court to an erroneous factual conclusion. It seems much more likely that the legislature intended for the phrase "fair cash value" to be interpreted, openly and candidly, as providing a standard of stock valuation that would protect a minority shareholder, whose stock was being taken from him against his will, from being relegated to one of just two low-priced alternatives: the majority-dictated terms of the freezeout merger or the deeply discounted prices that the minority stock would actually bring in the open market, if such a market existed.

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90. *McMillan*, 514 So. 2d at 230.

91. Indeed, consistent with lack of need for dissenters' rights where the shares are actually traded, the law denies such rights, except in cases of freezeout mergers, where the shares are traded on a national securities exchange. La. R.S. 6:376 B (1986) (banks); La. R.S. 12:131 B (3) (Supp. 1988) (business corporations).

92. In one recent case, an expert testified that 49% of the stock in a closely held "S" corporation might actually have a negative value, because corporate income would trigger a personal tax liability for the 49% shareholder without any guarantee that funds sufficient to pay the taxes would be distributed. Combs v. Howard, 481 So. 2d 179, 182 (La. App. 3d Cir. 1985), writ denied, 484 So. 2d 671 (1986).

If, as logic would suggest, the legislature did intend for the statutory dissenters' provisions to have some positive, practical impact, then the legislature's intention can be given effect in freezeout mergers only by interpreting the statutory phrase "fair case value" as providing a standard for valuation that would permit a court to apply lower-than-market discounts to the value of the dissenters' shares. Just *how much* lower-than-market the values ought to be is an issue that a court would have to resolve without much legislative guidance. But it would seem appropriate for the court to consider both the need to reward risk-taking and effort by majority shareholders as well as the competing need to protect, and thereby to encourage, investments of capital by noncontrolling shareholders. And the court should recognize that the size of the appropriate discount might even vary from case to case, depending on how the facts of a particular case fit the perceived purposes of the law. But no matter how difficult and uncertain the task of fair valuation might be it still seems erroneous to conclude that the legislature intended for these difficult questions of policy to be resolved as questions of fact.

One possibility exists for planning around *McMillan*: the plaintiffs pursued an argument on appeal that the earlier case of *Levy v. Billeaud*[93] required the defendants to prove the "good faith of the fiction of merger [and] also to show its eminent fairness to the minority shareholders."[94] The court did not reject this argument, it simply said that it had not been adequately raised at trial.[95]

Levy did say that a corporate liquidator had the burden of proving the "inherent fairness" of his plan of liquidation "from the viewpoint of both the majority and minority investors," and that a plan of merger could not be "unduly oppressive" of the minority investors.[96] Although *Levy* involved a "freeze-in" transaction,[97] the opposite of the problem in this case, the reasoning in *Levy* that fiduciary duties of fairness might temper the power of majority shareholders to carry out transactions otherwise authorized by statute might be used in freezeout transactions too. However, Delaware's experience with this vague fiduciary duty/

93. 443 So. 2d 539 (La. 1983).

94. *McMillan*, 514 So. 2d at 230.

95. Id. at 231.

96. *Levy*, 443 So. 2d at 541.

97. Rather than forcing a minority shareholder out of the business, over his objections, the majority shareholders in *Levy*, acting through the corporate liquidator, sought to force the minority investor to remain *in* the business over his objections. 443 So. 2d at 541-42. The corporate statute appeared to permit the controlling shareholders to do precisely what they did, without conferring dissenters' cash-out rights on the minority investors. 443 So. 2d at 545-46 (dissenting opinion of Justice Blanche). Thus, the theory of *Levy* could be used to restrict the power of two-thirds shareholders to carry out freezeout mergers, which now seems subject only to the statutory requirements of procedure and payment of "fair cash values" to dissenting shareholders.

"fairness" formulation in connection with merger-related problems[98] suggests that the Louisiana courts would be better off focusing on the real economic issue in these types of cases: to what share of the total value of the corporation are minority shareholders entitled when the controlling shareholders of the corporation choose to expropriate the minority's stock?

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98. See, e.g., Singer v. Magnavox Co., 380 A.2d 969, 975-77 (Del. 1977) (using fiduciary duty restrictions on power to engage in freezeout mergers to impose "business purpose" and "entire fairness" requirements); Tanzer v. International Gen. Indust., Inc., 379 A.2d 1121 (Del. 1977) (virtually eliminating "business purpose" requirements by permitting the majority shareholder's business purpose to suffice); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (formally overruling business purpose requirement and suggesting, with some hedging, that fairness requirement was met through the payment of a fair price); Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985) (UOP, supra, interpreted not to mean that payment of a fair price satisfied majority shareholder's obligation of "entire fairness"; not entirely fair to execute a fixed-term "best price" covenant in first stage of acquisition, with undisclosed intention to wait out the period before buying the remaining stock).