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THE ALASKA CORPORATIONS CODE: THE FORTY-NINTH STATE CLAIMS THE MIDDLE GROUND

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THE ALASKA CORPORATIONS CODE: THE FORTY-NINTH STATE CLAIMS THE MIDDLE GROUND

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I. INTRODUCTION

On July 1, 1989, slightly more than a year after enactment, the new Alaska Corporations Code ("ACC") achieved its effective date.¹ The delay was symbolic of the more than ten year struggle to craft a statutory framework for profit seeking corporate enterprise which would respond to the challenges and opportunities facing Alaskans. Within the state, the content of the new code will be studied by businesspersons and their legal advisors for the obvious reason that it now governs their affairs. Beyond the business community, Alaskans will find strong evidence of a social contract articulated by a legislature fully conscious of both the costs and benefits of corporate enterprise. The terms of this contract will pose special interest for Native Alaskans whose embrace of the corporate form and future was mandated when Congress enacted the Alaska Native Claims Settlement Act ("ANCSA") in 1971.² Alaskans generally and specifically affected

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1. 1988 Alaska Sess. Laws ch. 166, § 7 provides:

(a) Except as otherwise expressly provided, the provisions of this Act apply on and after July 1, 1989 to:

- (1) a domestic corporation organized under the former Alaska Business Corporations Act [ALASKA STAT. §] 10.05 existing on July 1, 1989;
- (2) a foreign corporation that is authorized to do or does business in the state on or after July 1, 1989;
- (3) actions by a director, officer, or shareholder of a corporation described in (1) and (2) of this subsection on and after July 1, 1989.

2. 43 U.S.C. §§ 1601-1628 (1986). In 1987, the Report of the Committee on Interior and Insular Affairs set the background for an Act Amending the Alaska Native Claims Settlement Act to Provide Alaska Natives with Certain Options for the Continued Ownership of Lands and Corporate Shares Received Pursuant to the Act, and for Other Purposes. The Committee explained the imposition of the corporate

will find the ACC the most significant accomplishment to date of the Alaska Code Revision Commission ("the Commission"), a permanent

form upon the Natives of Alaska in the greater context of a sweeping land settlement scheme:

The Alaska Native Claims Settlement Act was passed in 1971 to settle the long-standing claims of the Indians, Eskimos, and Aleuts of Alaska based upon aboriginal use and occupancy. The Native rights to lands in Alaska had been recognized and preserved in the treaty with Russia acquiring Alaska; the Territorial Enabling Act; and the Alaska Statehood Act.

Between the Treaty of Cession of 1967 [sic] [1867] and the enactment of ANCSA in 1971, Congress acted on at least six occasions to protect the Native use of lands. In the 1884 Organic Act establishing a civil government for Alaska, Congress provided that:

the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

In 1891, Congress established a reservation for the Metlakatla Indians in southeast Alaska. In 1906, Congress passed the Alaska Native Allotment Act permitting Natives of Alaska to select tracts of lands to be held in trust for them by the United States. To further protect Native use of lands, Congress enacted, in 1926, the Native Townsite Act which provided for the conveyance of public lands to trustees representing village people. In 1936, Congress amended the Indian Reorganization Act to make several provisions of that Act applicable to Alaska Natives. Finally, in 1958, Congress passed the Alaska Statehood Act which provided that the State of Alaska disclaimed all rights in

any lands or other property (including fishing rights), the right or title to which may be held by any Indian, Eskimo or Aleut . . . or is held by the United States in trust for said Natives.

In addition, the Statehood Act provides that State land selections could be made only from "vacant, unappropriated, and unreserved" public lands.

The existence of Native land rights and claims presented an obstacle to the settlement and development of Alaska. As a consequence, Congress began consideration of legislation to resolve the outstanding land claims conflicts, resulting in the enactment of ANCSA in 1971. ANCSA extinguished the aboriginal title of Natives to lands in Alaska. In return, ANCSA provided for the conveyance to the natives of approximately 44,000,000 acres of land and payment of \$962,000,000 as a monetary settlement.

To provide a framework for the implementation of the provisions of the Act and for the administration of Native lands and funds, Congress departed from the conventional method of dealing with Indian tribes and settling tribal land claims. ANCSA adopted the corporate structure as the system to carry into effect the terms of the settlement.

Alaska was divided into twelve geographic regions, with each region being composed, as far as practical, of Natives and Native villages having a common language and heritage and sharing common interests. These regions approximated areas covered by the operations of then-existing Native associations and organizations. The Act required the Natives of each region to incorporate under Alaska State law [as] a regional Corporation to conduct

commission of the legislature established in 1976.³ The Commission functions to provide the Alaska Legislature with background studies, analysis, and statutory formulations facilitating what the late Ben W. Heineman termed "continuous private law reform."⁴

business for profit. The articles of incorporation of these Regional Corporations were required to include provisions necessary to carry out the provisions of ANCSA.

In addition, ANCSA provided that Native villages within each region which met certain standard[s] were entitled to share in the settlement provisions and were required to establish profit or non-profit corporations under Alaska State law.

The Act required the Secretary of the Interior to prepare a roll of all Natives, one-fourth or more Alaska Indian, Eskimo, or Aleut blood, who were born on or before, and living, on December 18, 1971. With certain exceptions not here relevant, each Native on that roll had to be enrolled to one of the twelve regions and, were [sic] appropriate, to one of the several villages within such region.

The Regional Corporation was required by the Act to issue to each Native enrolled in that region 100 shares of the stock of the corporation. Except for transfers pursuant to a court decree of separation, divorce or child support, the Act provided that these shares of stock would be inalienable for a period of twenty years after the date of enactment of ANCSA, i.e., until December 18, 1991. Stock issued by a Native village corporation was made subject to the same restrictions on alienation.

Finally, ANCSA [provided] for the distribution of the land and monetary settlement among the twelve regions and, within each region, between the regional corporation and its several village corporations. Through this process, Alaska natives became shareholders in regional and village corporations which, in turn, were to hold title to lands conveyed under the Act.

H.R. REP. NO. 100-31, 100th Cong., 1st Sess. 2-3 (1987).

3. ALASKA STAT. § 24.20.075 (1985). The Commission consists of a member of each house of the legislature, three public members who are not employees of the state government, a designee of the governor, a designee of the chief justice of the supreme court, and a designee of the Alaska Bar Association. The enabling legislation obligates the Commission to "examine the statutes of the state and judicial decisions to discover defects and anachronisms in the law; . . . [and to] recommend changes in law needed to eliminate antiquated and inadequate rules of law and to bring the law into harmony with current needs and conditions." *Id.* § 24.20.075(c)(1),(4).

Subsection (f) declares that:

The commission shall submit its reports and recommendations, and draft legislation as to revision of law, to the Legislative Council and shall distribute them to the governor, members of the legislature, and the chief justice of the supreme court. Each draft of legislation submitted by the commission shall be accompanied by a sectional analysis. The commission shall prepare the sectional analysis using language that is understandable to a layman.

Id. § 24.20.075(f).

4. More than forty years ago, Heineman called for the creation of a law revision commission in Illinois.

Analysis must proceed with the recognition that without self-created assistance the legislature is incapable of engaging in continuous private law reform. The ever increasing complexity of our society has converted the modern legislature into a great public service institution. The three R's of

The new code may prove of interest outside of Alaska because it departs from the current vogue of adopting off-the-rack model legislation. The Alaska Legislature did not, however, set about to reinvent the wheel or fail to take advantage of the fruits of recent statutory revisions in major jurisdictions, as well as of the work of the American Bar Association Section on Corporation, Banking and Business Law and the American Law Institute. Corporate statutes in Delaware,⁵ New York⁶ and California⁷ cast major influence over the evolved content of the ACC. So, too, did the original Model Act upon which

modern legislation — roads, revenues, and regulation — preempt its time. It is also widely recognized that the legislature does not initiate legislation. It accepts and rejects, with or without modification, but the sources of the law lie elsewhere. These sources are today well understood. In the main, they consist of the administrative departments, units of local government and the lobby. In the field of public law the deficiencies in this method of selecting the subjects of legislation are not insurmountable. The administrative departments are well qualified to bring to the attention of the legislature defects or the need for innovation in the statutes with whose daily administration they are charged. . . . And with respect to affirmative proposals by private interests, there are available in the administrative departments or among the other governmental agencies informed persons to advise the legislative committees with respect to the effect of proposed legislation. In the public law field there is, therefore, a regular flow from external sources of proposed legislation upon which the legislature is able to exercise its modern functions of acceptance, modification or rejection.

But once we leave the domain of public law and enter the field of private law, these sources are wholly inadequate. Not only is there no regular and selective flow of grist to the legislative mill, but as to what there is, the legislature in general is not able to obtain the benefit of a disinterested, informed scrutiny. What has been everybody's business has become nobody's business. Before the legislature will revise the substantive private law, it must be satisfied not merely that a defect exists, but that the proposed cure is not worse than the disease. If substantive revision is to meet with regular legislative success, its proponents must be disinterested, skilled, and acceptable to the legislature. What is needed, in short, is a public agency having the responsibility for continuous review of private law, equipped both in terms of personnel and facilities to discharge its responsibilities, and conducting itself in such a fashion as to insure the maximum acceptance of its ultimate recommendations by the legislature, the bar and the public.

Heineman, *A Law Revision Commission for Illinois*, 42 ILL. L. REV. 697, 701-02 (1948) (footnotes omitted).

5. Del. Gen. Corp. Law (West 1969). The Delaware General Corporation Law ("DGCL") underwent its most recent major revision in 1953. 8 Del. C. 1953.

6. N.Y. Bus. Corp. Law (McKinney 1986). The New York Business Corporation Law ("BCL") was substantially revised in 1961 and became a law on Apr. 24, 1961. Like the ACC, the BCL was given a delayed effective date and went into effect on Sept. 1, 1963. N.Y. Bus. Corp. Law § 2001 (McKinney 1986).

7. Cal. Gen. Corp. Law (West 1977). The California General Corporation Law ("GCL") was completely revised in 1975, and given an effective date of Jan. 1, 1977. 1975 CAL. STAT. ch. 682, § 7.

Alaska's original Business Corporation Act had been predicated.⁸ Both the Revised Model Business Corporation Act ("RMBCA") and the American Law Institute's ("ALI") Principles of Corporate Governance were formulated after the ACC was already in substantial draft form.⁹ A fortunate consequence of the long gestation period was the opportunity to compare the treatment given in the RMBCA and the ALI recommendations to the proposed content of the ACC.¹⁰ Numerous revisions were incorporated reflecting the consensus that these sources presented superior analytical or drafting approaches. Notwithstanding, the ACC retains the distinct quality of bespoke legislation.

A. The Target of Revision: The Alaska Business Corporation Act

After achieving statehood, Alaska functioned with a version of the Model Business Corporation Act. From the original Model Act, the former Alaska Business Corporation Act inherited two distinctively dysfunctional qualities. The first centered on content: what had been included and omitted from statutory coverage. The second arose from the disorganized manner in which the included materials were expressed.

Though probably inadequate on the day that it was adopted in a new state with no common law treatment of business problems, by 1979 the Commission had no difficulty in concluding that the Alaska Business Corporation Act was short on answers to a growing list of

8. The original Alaska Business Corporation Act was enacted by the first legislature as chapter 126 of the Alaska Session Laws of 1957. By the time the Alaska Code Revision Commission began its study, the memories of members who had served in that session some twenty-two years earlier united on the premise that Oregon's existing corporation code was used as the basis, if not the text, of the original Alaska legislation. This may be so. It is clear that Oregon had adopted the then infant Model Act as the basis for its 1953 revision of what became Chapter 57 of the Oregon Revised Statutes dealing with Private Corporations. Letter from John W. Abbott to Senator Bettye Fahrenkamp (Apr. 10, 1987). The transmittal letter was printed along with the official comments in the House and Senate Joint Journal Supplement. H. & S. JT. JOURNAL SUPP., No. 9, at 1 (May 15, 1987).

9. The RMBCA was adopted by the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association in mid-1984. An exposure draft was circulated in 1983, approximately two years after the circulation of the first exposure draft of the ACC.

10. The one year delay in the effective date of the ACC provided an opportunity for the Alaska Code Revision Commission to review the first eight tentative drafts of the American Law Institute's Principles of Corporate Governance: Analysis and Recommendations. The Commission recommended amending section 10.06.450 to give statutory expression to the business judgment rule set forth in section 4.01(c) of Tentative Draft No. 4. The amendment, proposed as section 39 of Combined Senate and House Bill 204, 16th Leg., 1st Sess. (Mar. 27, 1989), was stricken in the House Judiciary Committee.

recurrent legal problems. The situation can probably be traced to the strategies employed in devising the Model Business Corporation Act and to the circumstances which surrounded its creation. As explained in an official publication of the American Bar Foundation, the Committee on Corporate Laws prepared the Model Act working from the 1946 revision of the Illinois Business Corporation Act of 1933.¹¹ It followed in the wake of thirty years of failed efforts to secure acceptance of a Uniform Business Corporation Act. Between 1928 and 1950, the proposed uniform legislation managed to gain adoption in Louisiana and Washington and exerted a major influence over the 1929 revision of Idaho's corporate code. The Uniform Act was withdrawn in 1958.¹² Whether influenced by the failure to gain acceptance of uniform legislation respecting corporate entities, or by its premise on the statutory law of Illinois, a jurisdiction with a sizeable body of decisional business law, the Model Act was an erratic statute affording lavish coverage of some areas, while virtually ignoring important topics of corporate governance and social accountability.¹³ Whatever virtue these gaps may have afforded in deferring to local statutory or judicially crafted rules, the importation of such a product into Alaska was devoid of such supplements. As a result, both the lay and legal communities were frequently forced to guesstimate an Alaska position on an issue which was not covered in the Alaska statute, and upon which the decisional laws of neighboring states might well be in substantial disagreement!¹⁴

The structure of the Model Act frequently hampered the reader. Though the Act was organized under eleven major topics, the reader

11. MODEL BUSINESS CORP. ACT ANN., § 1 comment 4.02 (1960).

12. *Id.* § 1 comment 4.03.

13. Sometimes the elaborate treatment was devoted to rather insignificant topics. Fully nine of the eighty-eight sections of Article 1, Substantive Provisions, of the Alaska Business Corporation Act were devoted to the corporate name. ALASKA STAT. §§ 10.05.021-.042 (1985) (repealed 1988). By contrast, the shareholder's derivative action was totally omitted from the coverage of the Act.

The mere numbers of sections do not reflect the very significant expansion in statutory treatment of corporate topics afforded by the ACC. The new code consists of 247 substantive provisions. By contrast, the supplanted Alaska Business Corporation Act ("ABCA") contained 274 sections. In actuality, the seemingly expansive scope of the ABCA was accomplished by taking the 145 sections of the Model Act and simply breaking them down into short sections expressing the content of what had been a single, more comprehensive treatment in the Model Act.

14. A ready example may be found in the recurrent business problem addressed in former Alaska Statutes section 10.05.810. There we find that persons who assume to act as a corporation without authority are jointly and severally liable for the debts and liabilities incurred or arising as a result of such action. The language had been taken from section 146 of the Model Business Corporation Act and added to the ABCA by section 152 of chapter 126 of the Alaska Session Laws of 1957. Although it was

could never be certain that all of the provisions relating to the indicated topic had been included within the organizational structure. The Alaska version did not escape this defect. Provisions dealing with shares and corporate capital were strewn from the middle through the concluding sections interrupted by statutory treatment of directors, books, and records and shareholder rights.¹⁵ An even more glaring defect was found in the separation, by nearly two hundred sections, of the basic rules on voting of shares¹⁶ and the provision on supermajority voting requirements at the shareholder level.¹⁷

B. The Policies and Goals of the Code Revision Commission

The challenge inherent in crafting a new corporations code was not limited to technical questions of plain expression and clear organization. The decades following statehood raised major social issues respecting the corporate entity and its role in society. The Commission's survey of the corporation statutes of California, Delaware, New York, Oregon, and Washington revealed a major philosophical debate over shareholder rights versus management prerogatives. The polar positions in that debate were clearly occupied by California and Delaware. California's General Corporation Code continues a tradition in that state of enhancing the rights of shareholders while curtailing the structural position of incumbent management.¹⁸ By contrast, Delaware is

literally positioned several hundred sections following the statutory provisions on corporate formation, the confusion which this section invited only began by its odd placement.

Section 146 has been interpreted by the Washington Court of Appeals as having codified the common law on promoter's liability. *Heintze Corp. v. Northwest Tech-Manuals, Inc.*, 7 Wash. App. 759, 502 P.2d 486 (1972). Two years later, the Oregon Supreme Court read the identical Model Act language and concluded that section 146 had nothing to do with promoter's liability but was aimed at extinguishing the doctrine of de facto incorporation! *Sherwood & Roberts-Oregon v. Alexander*, 269 Or. 389, 525 P.2d 135 (1974). On the day it was repealed in favor of Alaska Statutes section .220, effective July 1, 1989, there had never been an Alaska appellate interpretation. During this entire period, what was an Alaska practitioner or trial judge to do?

15. *See, e.g.*, ALASKA STAT. § 10.05.060 (1957) (repealed 1988) (concerning the creation, division into classes, and issuance of shares). Fifty-one sections later, the reader encountered section 10.05.204, which detailed the treatment of outstanding classes with respect to the payment of dividends.

16. ALASKA STAT. § 10.05.156 (1957) (repealed 1988).

17. ALASKA STAT. § 10.05.801 (1957) (repealed 1988). Similar befuddlement awaited anyone consulting the Act for coverage of actions by shareholders. The section on meetings of shareholders was found at section 10.05.138. More than two hundred sections and ten articles later the reader would discover section 10.05.807 which governed actions by shareholders without a meeting.

18. A few examples will suffice to establish the bias of the California position. Contrary to the content of the overwhelming majority of state statutes, California has insisted on limiting director terms to a single year while prohibiting the classification

widely viewed as maintaining a statute sympathetic to the concerns and interests of incumbent management.¹⁹ The position of the

of the board. By contrast, the overwhelming majority of state statutes contain provisions such as section 8.06 of the RMBCA, which permits a board containing nine or more directors to be divided into three classes with directors serving staggered three year terms. The ability of a disgruntled majority of the shares to alter the control of a board with which the shareholders are disenchanted is never more than 364 days away in California. In jurisdictions which provide for classified boards and staggered director terms it may take two full years before a similar opportunity to replace a majority of the incumbent directors is at hand.

In 1989 the California Legislature amended the General Corporation Law to permit any "listed corporation" to amend its articles or bylaws to provide for a classified board and staggered director terms. The major concession is extended only to those corporations formed under the GCL which have outstanding shares listed on the New York or American Stock Exchanges or with securities designated as qualified for trading as national market security on the National Association of Security Dealers Automatic Quotation System. CAL. CORP. CODE §§ 301, 301.5 (Deering 1977 & Supp. 1990).

California was the first state to require by statute that a director could be removed by the shareholders at any time and for any reason agreeable to a majority of the share interest. This concept has enjoyed a favorable response in other states, but is generally an optional as opposed to mandatory condition. In 1989 the California Legislature amended the GCL to add protection to directors elected to a classified board of a listed corporation. CAL. CORP. CODE § 303 (Deering 1977 & Supp. 1990).

19. For a view that Delaware has been leading a "race for the bottom" in its efforts to cater to the aspirations of incumbent management, see Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). Professor Cary's recommended solution was federal legislation establishing minimum standards of managerial responsibility on corporate directors and officers. *Id.* at 700-13.

The Cary position provoked considerable debate. For an argument that, at least for publicly traded entities, securities markets would operate in a self-corrective reaction against the abuse of shareholders, see Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977). For additional perspectives and analysis, see Dodd & Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. L. 259 (1980).

In the opinion of Professor Daniel R. Fischel, Professor Cary and his adherents have fundamentally misunderstood the corporate form of firm organization. Fischel rejects the view that corporate law should center on shareholders as the "owners" of the corporation. Instead, he opts for the view that a corporate entity "serves as a nexus for a set of contractual relationships among individuals. The individuals include the 'owners' of labor, material and capital inputs and also the consumers of the firm's output." Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 917-18 (1982). Given his differing perspective, it is not surprising that Fischel does not view statutory or decisional law which sees management as having obligations to a variety of constituencies as racing for the "bottom." Indeed, he suggests that for publicly traded corporations re-incorporation in Delaware seems to actually benefit the financial returns to shareholder investors. *Id.* at 920.

Fischel goes beyond the attempt to refute Professor Cary. He suggests that the adverse commentary which Cary began threatens a long-term negative impact upon investor interests. The vehicle for imparting this harm is the destabilization of Delaware decisional law in terms of its precedential value. Fischel provides an analysis of

Commission was set forth in the letter of transmittal from Chairman John W. Abbott to the Alaska Legislative Council:²⁰

An initial decision of the Commission was to avoid mandating either the Delaware or California extremes. Instead, the Commission sought to design a statute that was first and foremost understandable to the average individual desiring to do business in the corporate form. Both the organization and content of the new act are designed to clearly impart the minimum requirements established by the state as a price tag for the privilege of doing business in the corporate form; to set forth the choices which ought to be made by each group seeking incorporation with respect to the division of powers between shareholders and directors; and to standardize the methods of essential reporting on corporate activities made to shareholders and the state.²¹

To vindicate those policy choices the Commission set three goals which were to shape the revision effort.

First, the new code had to be organized in a manner which a layperson could comprehend and which gathered into a disciplined framework all provisions relating to general topics.

Second, within that framework there had to be a fulsome statutory expression of legal policy on issues likely to confront persons desiring to do business in the corporate form in Alaska. As a jurisdiction

three decisions: *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), *Lynch v. Vickers Energy Corp.*, 383 A.2d 278 (Del. 1977), *on remand*, 401 A.2d 5 (Del. Ch. 1979), *rev'd*, 429 A.2d 497 (Del. 1981), and *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981). While raising specific objections to the result in each case, Fischel asserts that their collective vice is that the Supreme Court of Delaware seems more interested in refuting the idea that the jurisdiction is anti-shareholder than in providing a predictable result given longstanding precedent. Fischel, *supra*, at 923-42.

20. Letter from John W. Abbott to Senator Bettye Fahrenkamp (Apr. 10, 1987), *reprinted in* H. & S. JT. JOURNAL SUPP., No. 9, at 1-9 (May 15, 1987).

21. *Id.* at 3. The position espoused in Chairman Abbott's letter of transmittal closely parallels the views of then professor and now United States Court of Appeals Judge Ralph K. Winter.

Intervention in private transactions which impose no social cost can be justified only as a means of reducing the costs to the private parties. Thus, a prime function of state corporation codes is to supply standard terms which reduce the transaction costs, and thereby increase the benefits, of investing by eliminating costly bargaining which might otherwise accompany many routine corporate dealings. But substituting a mandatory legal rule for bargaining also may impose a cost in the form of the elimination of alternatives which the parties might prefer.

Winter, *supra* note 19, at 259.

The ACC is not totally permissive. In the article on corporate finance the new code establishes mandatory rules respecting the circumstances in which the corporation may engage in a distribution of its assets to equitable owners. *See* ALASKA STAT. §§ 10.06.358-365 (1989) and the discussion of prohibited distributions. The rationale for this departure is one unlikely to draw objection from Judge Winter — that the "parties" in question include nonconsenting corporate creditors.

with a small body of common law addressing corporate problems, Alaska could not afford a bare bones statute confident of case law supplementation. The commissioners were insistent that, while the business community could adjust to a clear affirmative or negative answer to nearly any question, neither social policy nor business efficiency could be achieved by leaving the conclusion in doubt.²² The challenge was to pursue the goal of comprehensive legislative expression while maintaining a philosophical neutrality. The solution was to legislate default rules which would operate in the absence of specific provisions of the articles or bylaws.²³

Finally, there were to be comprehensive commentaries written for each section of the ACC which would identify the scope of the provision and the change, if any, which it worked in former Alaska law.²⁴ Given the frequent instances in which the new code would continue

22. The involuntary posture of Native Alaskans with respect to their dependence upon the corporate model conferred an extra urgency in the agenda to make the law as clear and comprehensive as possible. *See supra* note 2.

23. This solution builds upon the successful experiment begun more than half a century ago with section 18 of the Uniform Partnership Act. The Act declares that "[t]he rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules . . ." UNIF. PARTNERSHIP ACT § 18, 6 U.L.A. 213 (1914).

24. The official comments are especially useful when the new provision is without precedent in former Alaska law and has been premised upon a statute in another jurisdiction. If the Alaska version differs from the source, or if there are judicial interpretations of the source statute which are not considered desirable, the comments explain the differences and iterate legislative disapproval of the decisional law. The following example is typical of the Commission's work:

Official Comment to ACC Section 10.06.325.

REDEMPTION OF SHARES; CREATION OF SINKING FUND; REPURCHASE AGREEMENTS.

SCOPE: ACC sec. 325 covers three crucial questions:

(1) it establishes the right of the corporation to create classes or series of shares which are redeemable at the option of the corporate issuer; (2) it forbids (subject to an exception for an open-end investment company) the creation of shares which vest a right to demand redemption in the shareholders; and (3) it permits the creation outside of the terms of the articles agreements which provide for the redemption or repurchase of shares of the corporate issuer.

The first and second of the topics covered by sec. 325 are sufficiently detailed as to clearly indicate the disposition of the legislature toward case law. The third topic, covered by the provisions of sec. 325(c), address[es] a matter of some complexity and disparate case law development. In general the ACC treats either the redemption or repurchase of shares by the corporate issuer as a "distribution" and thus makes it subject to the financial restraints of Article 4, secs. 358-90.

Beyond these limitations it is the intention of the legislature to subject the decision to redeem or repurchase shares to the duties of care and loyalty otherwise imposed upon directors and corporate officers. Such concepts have been clearly recognized by the Supreme Court of Alaska as impacting

the policies of established law, the "scope notes" were to resolve conflicts between lines of decisional law which had grown up outside Alaska respecting the same or similar statutory language.²⁵

upon those who de jure or de facto exercise the powers of corporate management. See *Wolf v. Arctic Bowl, Inc.*, 560 P.2d 758, 770 (Alaska 1977).

Granting full recognition to such fiduciary duties does not support the conclusion that either redemption or repurchase must, in all circumstances, be employed on a pro rata basis to all shares of the class or series. Cases such as *General Inv. Co. v. American Hide & Leather Co.*, 98 N.J. Eq. 326, 331, 129 A. 244, 246 (1925), to the extent that they would establish such an absolute proposition, are disapproved.

If those vested with the powers of corporate management can establish a valid business purpose for the entry into an agreement to redeem or repurchase some but not all of the shares of a given class or series those who are not extended the terms of such a transaction have no complaint. See *Martin v. American Potash & Chemical Corp.*, 33 Del. Ch. 234, 92 A.2d 295, 302 (Del. Super. Ct. 1952).

CHANGE IN FORMER ALASKA LAW: ACC sec. 325 is new and has no precedent in former Alaska law. It is taken from GCL Section 402(a), (b) and (d), with the deletion of subsection (c) which makes explicit the requirement that in every corporation there be at least one class or series of shares which bear the ultimate financial risks of the enterprise and are thus nonredeemable. This provision was considered unnecessary in the former California Act, has never been litigated, and is deemed implicit in the ACC without the need of further expression.

H. & S. JT. JOURNAL SUPP., No. 9, at 45-46 (May 15, 1987).

25. The legislative expression of approval or disapproval of lines of case authority should go a long way in guiding both the bar and the trial judiciary in interpreting language with a Model Act heritage. The following Comment is typical:

Official Comment to ACC Section 10.06.333.

FORFEITURE OF SHARES FOR DEFAULT IN PAYMENT.

SCOPE: ACC sec. 333 establishes the general rights of the corporate issuer in the event of default by a subscriber in the payment obligation for shares. The scheme is to recognize that the payment obligation has the dignity of any debt due and owing to the corporation and as such may be asserted in any general civil process. In addition, the bylaws may have provided further remedies which are subject to the general policy of the law that consequences are to be remedial rather than punitive in character. The test for punitive qualities would be an exaction of any sum greater than the consequential and incidental damages inflicted upon the corporate issuer by virtue of the breach.

Sec. 333 reflects the legislature's appreciation that shares allotted to a subscriber who has breached his contract inhibit the corporate efforts to raise capital; thus there is an explicit provision for the forfeiture of rights upon the observance of the statutory notice and grace period. There is a split among common law authorities as to whether a corporate issuer which has exercised a right to forfeit the subscriber's interest in shares may seek further recovery in the event of a deficiency after resale of the shares.

In furtherance of the general policy aimed at compensation of the aggrieved issuer, damages which are not recoverable through forfeiture and resale may be asserted against the breaching subscriber. Cases such as *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 56 N.W. 858 (1893), are

C. The Implementation

The first decision of the Alaska Code Revision Commission was to adopt the organizational scheme of the New York Business Corporation Law. As a result the new code is compiled in thirteen articles, each of which has sought to exhaust the statutory treatment of major topics. The scheme is roughly chronological in terms of the formation, operation and dissolution of a corporate entity:

- Article 1. Corporate purposes and powers
- Article 2. Name and service of process
- Article 3. Formation of corporations
- Article 4. Corporate finance
- Article 5. Shareholders
- Article 6. Directors and officers
- Article 7. Amendments and changes
- Article 8. Organic change
- Article 9. Dissolution
- Article 10. Foreign corporations
- Article 11. Reports, fees, and penalties
- Article 12. Miscellaneous provisions
- Article 13. General provisions²⁶

Following article 13 are specific transitional provisions and modifications to the Alaska Court Rules.

II. SIGNIFICANT PROVISIONS IN THE NEW ALASKA CORPORATIONS CODE

What follows is a summary of the significant provisions of the ACC relating to the formation of corporations and the new restraints upon the distribution of corporate assets. A more detailed analysis of

approved and those typified by *American Well & Prospecting Co. v. Blake-more*, 184 Cal. 343, 193 P. 779 (1920) are disapproved.

CHANGE IN FORMER ALASKA LAW: ACC sec. 333 is a reenactment of former [Alaska Statutes section] 10.05.093 which was premised upon Section 17 of the MBCA. There is no substantive change. The terms "penalties" and "penalty" have been changed to "remedies" and "remedy" to reflect the approved case law construction.

H. & S. JT. JOURNAL SUPP., No. 9, at 47-48 (May 15, 1987).

26. The Commission's first exposure draft placed the general provisions at the beginning of the statute as article 1. Their current placement at the end of the lengthy statute results from a standard drafting practice in Alaska from which the new code was not excepted. Fortunately, this standard does not apply to scriptural expression in Alaska lest Genesis and the account of creation be reserved as a final surprise for the reader.

these points, as well as those not discussed in this article, may be found by consulting the official comments.²⁷

A. Corporate Purposes and Powers

Article 1 contains no major departures from the content of the former Alaska Business Corporation Act and related common law. There are, however, some important refinements. Section .010 contains an expression which alerts the reader that, while the default norm is that a corporation will enjoy all of the powers of a natural person, such powers may be curtailed, modified, or eliminated by aptly drafted provisions in the articles of incorporation.²⁸

27. A preliminary set of official comments was printed in the *House and Senate Joint Journal Supplement* of May 15, 1987. The 1989 amendments are noted in the *Joint Journal Supplement* of Mar. 6, 1989. Official comments reflecting the content of the 1989 amendments in their final form have been prepared and are in the custody of the Legislative Affairs Agency.

28. The 1989 amendments, contained in section 1 of chapter 82 of the Alaska Session Laws of 1989, created a potentially significant amendment to section .010(17). As amended, subsection (17) confers upon a corporation formed under the ACC the powers of a limited or general partner or a party to a joint venture. The original text had granted corporations the powers of a limited or general partnership or venturer. The amended language conforms section .010 to former Alaska Statutes section 10.05.009(18). In what might strike some as a strange manifestation of governmental concern, the change was motivated by fear that, as originally enacted, the ACC language might be interpreted to restrict the ability of Alaska corporations to expose their assets to manipulation or control by persons who were neither directors nor shareholders. This danger is very real and is courted by a corporate election to participate in a partnership or joint venture. To the extent that partnership or venture assets prove insufficient, the corporate partner is jointly or severally liable to firm creditors or tort victims. See UNIF. PARTNERSHIP ACT §§ 13, 14, 15, 6 U.L.A. 163, 173, 174 (1914). The fact that the corporate partner dissented from decisions of a majority of the partners which generated the third party claims provides no defense. A drafting lawyer who has pointed these dangers out to a client contemplating incorporation or a corporate investment may minimize the risk by placing apt provision in the corporate articles forbidding such association.

There is an important issue upon which neither the original nor amended provisions of the ACC take any position. In the event that a corporation is used as a general partner in the formation and operation of a limited partnership, do limited partners who participate in their capacity as officers or agents of the corporate general risk loss of their personal limited liability? Courts which pondered this question in the context of section 7 of the Uniform Limited Partnership Act have reached diametrically opposing conclusions. The Supreme Court of Texas has squarely held that limited partners who function as officers of a corporate general take part in "control of the business" and forfeit their limited liability. They are liable as general partners under section 15 of the Uniform Partnership Act. *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543 (Tex. 1975). In 1976 the Court of Appeals of Washington refused to follow *Delaney* and expressly declined to find a loss of limited liability. *Frigidaire Sales Corp. v. Union Properties, Inc.*, 14 Wash. App. 634, 544 P.2d 781 (Ct. App. 1976). The non-uniform content of section 303 of the Revised Uniform Limited Partnership Act adopted in California, Washington, and Colorado suggests the belief of

The issues of ultra vires activity, limitations on authority of corporate agents, and unauthorized contracts or conveyances binding domestic and foreign corporations are either given redrafted or initial statutory expression in the new code. The default grant to a corporation of all the powers of a natural person dramatically reduces the potential that a given transaction will be beyond corporate powers. However, to the extent that drafters of corporate articles take advantage of the invitation in section .010 to limit the powers of a specific corporate entity, transactions that transgress those limitations must be addressed.²⁹ The general policy of ACC section .015 is to severely restrict the ability of the corporation to use the doctrine of ultra vires in either a defensive or offensive manner.³⁰ Such a transaction is valid notwithstanding the fact that the corporation was without capacity or power to do the act or make or receive the transfer.³¹ A similar policy operates to protect the interest of third parties if the defect in the transaction lies in the authority of the corporate agent rather than the powers of the entity. ACC sections .020 and .025 resolve the rights and liabilities of the betrayed corporate entity when faced with an unauthorized contract or conveyance. Section .020 recognizes that the real authority of a corporate agent may be conferred by, or implied from, the articles, bylaws or action of the board. If the transaction is

those legislatures that *Delaney* is not inconsistent with the provisions of the new limited partnership statute. See D. FESSLER, *ALTERNATIVES TO INCORPORATION FOR PERSONS IN QUEST OF PROFIT* 264-67 (2d ed. 1986).

29. Under the ACC a provision limiting or restricting the business in which the corporation may engage or the powers of the corporate entity must be placed in the articles or be totally without legal effect. ALASKA STAT. § 10.06.210(1)(G) (1989).

30. A defensive use would assert the plea of ultra vires to declare that the contract with a third party was either void or voidable on grounds that the corporate party acted beyond its powers. It has been more than one hundred years since courts were hospitable to such claims. See *Ashbury Ry. Carriage & Iron Co. v. Riche*, L.R. 7 H.L. 653 (E. & I App. 1875). The new code regulates the standing, procedures and remedies that may flow from defensive use of the doctrine. ACC section .015(a)(1) would permit a shareholder to commence a derivative action seeking to enjoin the doing of an act or transfer which is beyond the powers of the entity. In such an equitable proceeding the court is empowered, if all the parties to the contract are parties to the suit, to set aside and enjoin performance. Damages of a reparatory nature may be allowed to an innocent third party, but he may not be awarded an expectation interest in the form of anticipated profits.

An affirmative or offensive use of the doctrine is also permitted under the ACC. Subsection (a)(2) permits the corporate entity either directly or derivatively to seek damages against any former or incumbent director, officer, or incorporator for any loss or damage arising from that individual's unauthorized act.

The ACC continues the Alaska practice of investing the supervisory authority of the state in the Commission for Commerce and Economic Development rather than the Attorney General. To that end, the traditional *quo warranto* proceeding, articulated in section .015(a)(3), is vested in the commissioner.

31. ALASKA STAT. § 10.06.015(a) (1989).

not covered by express or implied real authority, the betrayed corporation is disabled from directly asserting the defect.³² Under section .025, if the transaction was within the apparent authority of an agent it is binding upon both the entity and the third party.³³ This same ACC provision expressly recognizes ratification as an independent basis for establishing the liability and rights of the corporate principal for an unauthorized contract or conveyance.³⁴

32. *Id.* However, both a shareholder and the state are given standing to assert the lack of authority in seeking injunctive relief. Such relief is conditioned upon the third party not having acquired rights under section .025(a). For all practical purposes, this means that the corporate agent acted with apparent authority. Section .020(3) clearly establishes the right of a shareholder to bring a derivative action against the officers or directors of the corporation either for acting as a faithless agent or for so conducting the affairs of the corporation as principal that it is liable to a third party under the terms of section .025(a).

33. While the principle has been erroneously formulated in many judicial opinions, the Alaska Supreme Court has been consistent in understanding the elements which must be established to shift the burden of a faithless agent's activity from the deceived third party to the betrayed principal. "Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Perkins v. Willacy*, 431 P.2d 141, 142 (Alaska 1967) (quoting RESTATEMENT (SECOND) OF AGENCY § 27 (1958)). *Accord Bruton v. Automatic Welding & Supply Corp.*, 513 P.2d 1122, 1125 (Alaska 1973).

Apparent authority shifts the burden of the unauthorized transaction on the basis of relative fault. For this reason, the appearance that the agent had sufficient real authority must be traced to the acts or omissions of the negligent principal. It cannot arise from the statements, acts, or representations of the faithless agent. In establishing the fault of the principal, the third party must also prove more than a subjective good faith belief in the real authority of the agent. In Alaska, such belief must also be proven to have been "reasonable."

The ACC does not define the standard of inquiry or care attributed to the reasonable person. The official comment to section .025 declares an intent to "embrace cases demanding proof that a reasonable person, situated as was the third party and exercising reasonable prudence in evaluating not only the indications of the principal's consent but also those which would warn of lack of authority, would have formed a belief as to the real authority of the agent." H. & S. JT. JOURNAL SUPP., No. 9, at 17 (May 15, 1987). Such a standard is in accord with the one adopted by the Alaska Supreme Court in *City of Delta Junction v. Mack Trucks, Inc.*, 670 P.2d 1128 (Alaska 1983). The court adopted the following formulation: "'Apparent authority may . . . arise because the agent has been placed in such a position that a person of ordinary prudence, who was conversant with the nature of the particular business and its usages, would be justified in believing that the agent was authorized.'" *Id.* at 1129 (quoting W. SELL, AGENCY § 35, at 26 (1975)).

34. For an excellent definition and application of the doctrine of ratification by a betrayed principal, see *Bruton v. Automatic Welding & Supply Corp.*, 513 P.2d 1122 (Alaska 1973).

The ACC expressly extends its policy on both ultra vires transactions and unauthorized contracts and conveyances to foreign corporations doing business or having property situated in Alaska.³⁵

B. Formation of Corporations

Article 3 contains important statutory innovations concerning the corporate articles, and a very specific policy upon the commencement of corporate existence which will directly determine the liability of those who engage in transactions in the name of a non-existent corporate entity. Another important provision sets up the default rights of both the directors and shareholders to adopt, amend or repeal provisions of the corporate bylaws.

1. *Defective Formation and Pre-incorporation Transactions.* For decades courts have been vexed by litigation occasioned by defective corporate formation. The cases fall into two broad categories. The first deals with persons who transact business with third parties in the name of a corporation which they believe to have been formed but which, under applicable law, has yet to achieve a corporate existence.³⁶ The second involves the contract dealings of corporate promoters who, prior to corporate formation, consciously act to contract for the benefit of the after-arising entity.³⁷

35. ALASKA STAT. §§ 10.06.015(c), .025(b) (1989).

36. To illustrate the confusion, in 1964 the high courts of adjacent jurisdictions decided nearly identical fact patterns construing functionally identical provisions of the then Model Act, and yet reached opposite results.

Cranson v. IBM, 234 Md. 477, 200 A.2d 33 (1964), reversed a judgment obtained by a creditor against an individual who sought to form and thereafter occupy the position of president of Real Estate Service Bureau, Inc. Unknown to Cranson on the day he contracted in the name of the corporation to purchase office equipment, his attorney had failed to file the articles of incorporation. Notwithstanding that fact, the court of appeals held that the expectations of the third party seller had sought nothing more than corporate liability. Despite the total absence of evidence that the seller had contracted with knowledge that the articles had not been filed, the court held IBM estopped to deny the corporate existence of Real Estate Service Bureau. At approximately the same time, the court of appeals for the District of Columbia held an enterpriser personally liable under a fact pattern one would have thought more likely to attract judicial sympathy. Levy had filed corporate articles six days before he sought to contract signing himself as "president" of his new corporation. Unfortunately, the articles were returned by the District authorities who had discovered irregularity in their content. The court concluded that sections 50 and 139 of the Model Act had abolished the doctrines of de facto incorporation and corporation by estoppel. *Robertson v. Levy*, 197 A.2d 443 (D.C. 1964).

37. Such transactions involve at least three extraordinary elements of risk: (1) that the contemplated corporation will not be formed; (2) that though technically formed it will be still-born never functioning as a business entity; and (3) that though formed and functional it will decline to adopt the pre-formation contract. The classic case is *O'Rorke v. Geary*. 207 Pa. 240, 56 A. 541 (1903). A more modern version of

As of the effective date of the ACC such questions will no longer trouble the citizens or judiciary of Alaska. On and after July 1, 1989, corporate existence begins with the issuance by the commissioner of the certificate of incorporation. This bright line event is critical, for section .218 expressly abolishes the doctrines of de jure compliance, de facto corporations, and corporations by estoppel.³⁸

the fact pattern, in which the court was strongly influenced by section 326 of the Restatement (Second) of Agency, may be found in Stanley J. How & Associates v. Boss, 222 F. Supp. 936 (S.D. Iowa 1963).

38. ALASKA STAT. § 10.06.218 (1989). The bright line event in section .218 continues the basic policy of former Alaska Statutes section 10.05.261 which had been predicated upon section 56 of the former Model Act. Under the ACC, the filing of corporate articles is accomplished by delivery of an original and exact copy to the commissioner for processing under section .910. ALASKA STAT. § 10.06.213 (1989). A certificate is not immediately issued, but follows upon an administrative determination that the articles are in compliance with statutory requirements.

At about the same time that the Alaska Code Revision Commission was concluding that all doctrines short of crossing the bright line of formation should be abolished, the framers of the RMBCA were recommending provisions designed to exceed their laxity. Under RMBCA section 2.03(a), corporate existence begins when the articles are filed. There is no specific provision dealing with rejection for statutory irregularity. REV. MODEL BUSINESS CORP. ACT § 2.03(a) (1984). However, section 2.04 appears to assert that persons who act as or on behalf of a corporation which does not exist will be exposed to personal liability only if they "know" of the failure to obtain incorporation. *Id.* § 2.04. The official comment justifies this position by asserting that "[a]nalogous protection has long been accorded under the uniform limited partnership acts to limited partners who contribute capital to a partnership in the erroneous belief that a limited partnership certificate has been filed." *Id.* § 2.04 Official Comment (citing UNIF. LTD. PARTNERSHIP ACT § 12 (1916); REV. UNIF. LTD. PARTNERSHIP ACT § 304 (1976)).

There are both conceptual and technical problems with this statement. First, the author must have been contemplating section 11 of the Uniform Limited Partnership Act and not section 12. Section 11 of the 1916 Uniform Act and section 304 of the Revised Act both deal with the status of persons who erroneously believe themselves to be limited partners. Under the 1916 Uniform Act such a person can become a general partner only by promptly renouncing her interest in the profits of the business. UNIF. LTD. PARTNERSHIP ACT § 11 (1916); see *Vidricksen v. Grover*, 363 F.2d 372 (9th Cir. 1966). Under the Revised Act the ersatz limited partner is not a general partner if, on ascertaining the mistake, he either causes the appropriate certificate to be filed or withdraws from future equity participation in the enterprise. No emphasis is placed on the necessity of taking either step "promptly." REV. UNIF. LTD. PARTNERSHIP ACT § 304(a) (1976). However, in the meantime there is liability as a general partner to any third party who enters a transaction with the firm in the belief that the investor is a general partner. *Id.* § 304(b).

Second, the author of the comment is simply wrong in leaving an impression that persons who fail to file a certificate of limited partnership are spared the pains of general partner liability. Recent judicial decisions are split. *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel* imposed the liability of general partners on all investors:

Limited partnerships were unknown at common law and are purely creatures of statute. Parties seeking the protection of limited liability within the

Section .220(a) completes coverage of both defective and pre-formation transactions by fixing joint and several liability upon persons who presume to act as a corporation for which there has been no issuance of a certificate of incorporation. Consistent with the desire to give individuals the greatest freedom to bargain over risk, section .220(b) declares that the terms of a written contract between a third party and an individual purporting to act on behalf of a non-existent corporation may modify or preclude the liability created by subsection (a).³⁹ Together, sections .218 and .220 remove the doubt and occasion for litigation implicit in hinging corporate liability privileges upon arguments over good faith formation efforts or the expectations of third parties.

2. *The Articles of Incorporation.* The mandatory content of the articles of any corporation formed under the ACC are detailed in section .208. The enunciated goal of the new code is to require that fundamental decisions concerning the purpose for which the entity is formed, its stated duration, and the number and types of shares into which the ownership claims will be divided be set forth in the articles. The policy protects both prospective and existing shareholders. A potential shareholder need inspect only one document to gain knowledge

context of a partnership must follow the statutory requirements. To form a limited partnership, a certificate of limited partnership must be drafted and filed with the county clerk While our courts no longer require literal compliance with the statute at one's peril, the statute does contemplate at least "substantial compliance with the requirements." Here, there was no compliance with the statute at the time of contracting and the certificate of limited partnership was not filed until several months later.

21 Wash. App. 929, 934, 587 P.2d 191, 194 (Ct. App. 1978) (citations omitted). The court concluded that creditors had a right to rely upon statutory compliance. For that reason, the third party's knowledge concerning the status of a limited partnership was irrelevant. *Id.* at 935-36, 587 P.2d at 195. Precisely the opposite conclusion was reached in *Garrett v. Koepke*, 569 S.W.2d 568, 570 (Tex. Civ. App. 1978).

Finally, even in those cases in which the ersatz limited partners are given continued protection from general partner liability, there must be at least one general partner who faces the claims of third party creditors with a total exposure of personal assets. In the instance of defective corporate formation, permitting the enterprisers to escape personal liability if they did not subjectively know that their corporation had not been formed permits them to shift all loss to totally innocent third party creditors. This result simply cannot obtain in the case of a defectively-formed limited partnership.

39. ALASKA STAT. § 10.06.220 (1989). However, an oral promise, agreement, or understanding is declared incompetent to preclude or modify the personal liability of persons who assume to act as or for a corporation for which no certificate has been issued. *Id.* at § 10.06.220(c).

of the basic information needed to evaluate an investment decision.⁴⁰ Once shares are outstanding the relative difficulty encountered in attempts to amend or repeal provisions of the articles assures a degree of stability with respect to these basic predicates.

The significant innovation concerning the articles of incorporation is found in section .210, which contains a lengthy list of basic corporate decisions which can only be governed by provisions in the articles.⁴¹ Any attempt to regulate an included subject in the bylaws, board resolution, or shareholder agreement is totally ineffective.⁴² Again, the goal of the new code is to make the articles the single repository of fundamental decisions which shape the corporate governance structure as well as the rights and liabilities of shareholders. An individual contemplating corporate formation under the ACC will find in section .210(1) an occasion to ponder the following issues:

Sec. 10.06.210. Articles of incorporation; optional provisions.

The articles of incorporation may set out

(1) any of the following provisions, that are not effective unless expressly provided in the articles:

- (A) a provision granting, with or without limitations, the power to levy assessments upon the shares or class of shares;
- (B) a provision removing from shareholders preemptive rights to subscribe to any or all issues of shares or securities;
- (C) special qualifications of persons who may be shareholders;
- (D) a provision limiting the duration of the corporation's existence to a specified date;
- (E) a provision restricting or eliminating the power of the board or of the outstanding shares to adopt, amend, or repeal provisions of the bylaws as provided in [Alaska Statutes section] 10.06.228;
- (F) a provision requiring, for any corporate action except as provided in [Alaska Statutes section] 10.06.460 and [Alaska Statutes section] 10.06.605, the vote of a larger proportion or of all of the shares of a class or series, or the vote or quorum for taking action of a larger proportion or of all of the directors, than is otherwise required by this chapter;
- (G) a provision limiting or restricting the business in which the corporation may engage or the powers that the corporation may exercise or both;

40. Note that unlike former Alaska Statutes section 10.05.225 the new code omits all reference to "par value." The concept has been eliminated with reference to corporate financial accounting. A statement of par value may still be set forth in the articles but it will no longer determine the accounting treatment given to investor funds.

41. ALASKA STAT. § 10.06.210 (1989).

42. *Id.*

- (H) a provision conferring upon the holder of an evidence of indebtedness, issued or to be issued by the corporation, the right to vote in the election of directors and on any other matters on which shareholders may vote;
- (I) a provision conferring on shareholders the right to determine the consideration for which shares shall be issued;
- (J) a provision requiring the approval of the shareholders or the approval of the outstanding shares for a corporate action, even though not otherwise required by this chapter;
- (K) a provision that one or more classes or series of shares are redeemable as provided in [Alaska Statutes section] 10.06.325;
- (L) [Repealed 1989.],⁴³
- (M) a provision that confers or imposes the powers, duties, privileges, and liabilities of directors upon delegates under [Alaska Statutes section] 10.06.450;
- (N) a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders [shareholders] for monetary damages for the breach of fiduciary duty as a director; the articles of incorporation may not eliminate or limit the liability of a director for (i) a breach of a director's duty of loyalty to the corporation or its stockholders [shareholders]; (ii) acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law; (iii) wilful or negligent conduct involved in the payment of dividends or the repurchase of stock from other than lawfully available funds; or (iv) a transaction from which the director derives an improper personal benefit; the provisions of this paragraph do not eliminate or limit the liability of a director for an act or omission that occurs before the effective date of the articles of incorporation or of an amendment to the articles of incorporation authorized by this paragraph. . . .⁴⁴

43. 1989 Alaska Sess. Laws ch. 82, § 59. The 1989 amendments repealed the original content of section .210(1)(L) so as to conform to the amended content of Alaska Statutes section 10.06.433(a). As a result, corporations with fewer than 100 shareholders of record are relieved of the obligation to prepare and distribute an annual report. This exemption may be waived and an obligation to prepare such a report may be imposed by a provision of the articles or bylaws. ALASKA STAT. § 10.06.433(a) (1989).

44. ALASKA STAT. § 10.06.210(1) (1989). The mandatory provisions of section .210 will initially apply to corporations formed on and after the effective date of the ACC. Existing corporations, formed under the former Alaska Business Corporation Act, are given a five year grace period until July 1, 1994, before they must bring their articles into full compliance with sections .208 and .210. In the meantime they are free to amend their articles to bring them into compliance with the provisions of the new code. 1988 Alaska Sess. Laws ch. 166, § 9.

A careful examination of these optional provisions is the simplest way of learning the major default norms which govern a corporation in the absence of the specific provisions in its articles.⁴⁵

3. *Bylaws.* If the articles are analogous to the constitutional framework of a corporate entity, the bylaws provide the statutory structure regulating the board and the relationship between management and the shareholders. Viewed from this perspective, it is evident that few powers are more important than the right to adopt, amend or

45. Section .210(1)(A) protects the expectation of a purchaser of shares that once the purchase price has been paid in full there is no further liability by way of financial assessments. Cases such as *Watson v. Santa Carmelita Mut. Water Co.*, 58 Cal. App. 2d 709, 714, 137 P.2d 757, 760 (1943), holding a purchaser of stock in a water corporation to be charged with knowledge of the inherent assessability of his shares, are reversed. Under section .210(1)(A) the articles must affirmatively permit assessability for the power to exist.

Section .210(1)(B) continues former Alaska Statutes section 10.05.255(8), which required that preemptive rights obtain unless explicitly removed by a provision in the articles. *See also* ALASKA STAT. § 10.06.428 (1989).

Section .210(1)(C) establishes that, absent an express provision in the articles, corporations may not create special qualifications for persons who may be shareholders.

Section .210(1)(D) requires that, absent an express limitation on the duration of the corporation being set forth in the articles, the corporation is to endure until dissolved pursuant to the ACC.

Section .210(1)(E) requires that if there is to be restriction or elimination of the concurrent, independent power of the board and the outstanding shares to adopt, amend, or repeal bylaws such provision must be made in the articles.

Simple majority voting requirements at the board level are the norm under the ACC. Shareholder voting requirements default to specific provisions which require either approval of the shareholders or approval of the outstanding shares. In the case of the former, approval is gained by a simple majority of the shares voting at a meeting at which a quorum is present. ALASKA STAT. § 10.08.990(6) (1989). Approval of the outstanding shares is more difficult, requiring an absolute majority of the outstanding shares. *Id.* § 10.06.990(5) (1989). If supermajority or even unanimous voting requirements are to be imposed at the board or shareholder level, they must be expressly created by provision in the articles. *Id.* § 10.06.210(1)(F) (1989).

In the absence of aptly defined limitations upon the business which the corporation may pursue, the extent and nature of corporate business activities rest within the business judgment of the board. Activities beyond any express limitations would be *ultra vires* to the corporation. *See supra* note 29 and accompanying text.

Absent an express provision in the articles, holders of corporate debt instruments do not have voting rights with respect to the election of directors or other matters committed by the ACC to shareholder decision. Provisions of the articles are competent to extend such voting rights. ALASKA STAT. § 10.06.210(H) (1989).

Section .210(1)(I) furthers the policy of section .335 in recognizing that absent an express provision in the articles, the board, and not the shareholders, shall determine the consideration to be received for the issuance of shares.

Section .210(1)(J) reflects the policy of section .450(a) which vests control and management of the corporation in the board of directors. However, by the terms of an express provision in the articles, any corporate action may be subjected to a prior

repeal bylaw provisions. Under the former Alaska Business Corporation Act, such power was vested exclusively in the board unless reserved to the shareholders in the articles of incorporation.⁴⁶ Under the new code the shareholders have coequal power with the board. The norm is not mandatory, and section .228 expressly recognizes that the articles are competent to restrict or eliminate the power of either the board or the outstanding shares.⁴⁷ Individuals drafting corporate articles have three options: (1) concurrent, independent power in the board and the outstanding shares (the default rule); (2) an article provision restricting or eliminating the power of the outstanding shares; or (3) an article provision restricting or eliminating the power of the board.⁴⁸

Under the terms of section .228 if the shareholders are to act with respect to the content of the bylaws they must achieve an absolute majority of the shares voting in favor of the proposed change.

Former Alaska law required that the number of directors be established in the initial articles.⁴⁹ Such an arrangement remains possible but is no longer mandatory under the new code. The relative

requirement that it receive the approval of the shareholders, *see id.* § 10.06.990(6) (1989), or the approval of the outstanding shares. *See id.* § 10.06.990(5) (1989).

Absent an affirmative provision under section .210(1)(K), a corporation is without power to redeem its shares as provided in section .325.

Section .210(1)(L) requires that any delegation of board powers, duties, or privileges to delegates, as permitted by section .450, be set forth in an explicit provision in the articles.

Directors of corporations formed or operated under provisions of the ACC are disciplined by fiduciary duties of care and loyalty. Section .210(1)(N) permits a corporation to adopt an article provision which would eliminate or limit the liability of a director for breach of the duty of care but not of loyalty. Note that such a provision is not competent to limit the liability of a director who consents to an unauthorized distribution of corporate assets or who has received any improper personal benefit.

46. ALASKA STAT. § 10.05.135 (1957) (repealed 1988).

47. Under the terms of section .210(1)(F) only an optional provision of the articles may alter the default norm established in section .228.

48. During the five year grace period which expires on July 1, 1994, corporations formed under the former Alaska Business Corporation Act may continue to observe the machinery and procedures for adopting, amending and repealing bylaws. On July 1, 1994, if the corporation has not amended its articles to restrict or eliminate the powers conferred by section .228, the shareholders will automatically retain concurrent, independent power over the content of the bylaws. 1988 Alaska Sess. Laws ch. 166, § 9(b).

49. ALASKA STAT. § 10.05.177(a) (1957) (repealed 1988). Though fixed initially in the articles, the number of directors could be increased or decreased by amending the bylaws. When one recalls that the default arrangement under the former Act placed the power of amending the articles within the exclusive province of the board, the potential for manipulation was frightening. Under the new code, if the number of directors is fixed in the articles it may only be changed by amending the articles.

stability of an article provision may be attained by the simple expedient of fixing the number of directors in an optional provision of the articles under section .210(4) of the new code. If such a step is not taken, section .230 mandates that the bylaws state the number of directors or state that the number of directors may be fixed within a specified minimum and maximum, by approval of the board or the shareholders.⁵⁰

Amendments adopted in 1989, prior to the effective date of the ACC, eliminated the original content of section .230(a) which required a minimum of three directors unless the corporation had fewer than three shareholders, in which case the number of directors did not have to exceed the number of shareholders. As currently amended, the number of directors may be fixed at one irrespective of the number of shareholders.⁵¹

C. Corporate Finance

Article 4 of the new code collects the statutory provisions relating to the creation of equitable interests in the corporation and the circumstances under which the board has discretion to make a distribution of corporate assets to those equitable owners.⁵² As amended during the pre-effective period, the ACC makes available potentially significant innovations respecting the use of electronic data-keeping by the corporation, abolishing the need for physical share certificates and facilitating communication between the corporate issuer and the beneficial owner of shares held "in street name." Although these provisions are useful, the significant law reform lies in the abolition of legal accounting concepts and the substitution of easily understood and applied tests for determining the circumstances under which the board has discretion to distribute corporate assets.

1. *Creation and Regulation of Equitable Interests.*

a. The creation of senior shares. The ACC substantially reenacts the provisions of the former act which granted a corporate issuer great

50. If the articles or bylaws establish a formula under which the board may set the number of directors, this power must be exercised by a majority of the entire board and may not be used to shorten the term of any incumbent director. ALASKA STAT. § 10.06.453(b) (1989).

51. 1989 Alaska Sess. Laws ch. 82, §§ 5, 59. The amendment follows the content of the Revised Model Business Corporation Act section 8.03(a). Corporate articles or bylaws which pursue this latitude do so at the expense of any possible minority representation of the corporate board.

52. Article 4 governs the distribution of corporate assets to beneficial owners during the life of the entity. The issues of residual claims to such assets in the event of a cessation of corporate existence are addressed in Article 9, Dissolution.

flexibility in designing its financial structure.⁵³ Subject only to the implicit requirement that there be one class of common shares which has full voting and redemption rights, Alaska corporations are free to create classes of senior shares or series within the same class.⁵⁴

b. Corporate option to redeem one or more classes or series of senior shares. Prior to the effective date of the ACC, Alaska had no statutory law governing the redemption of shares by the corporate issuer. The matter is now given comprehensive treatment in section .325. Two limitations must be initially observed. A corporation has no right to acquire, through purchase or otherwise, its common shares once they have become outstanding in the hands of investors. Thus, redemption rights exist only for "senior shares." Under section .325(a) not even that right exists absent an affirmative provision in the articles of incorporation.⁵⁵

Unless the corporation is an open-ended investment company registered under the United States Investment Company Act of 1940,⁵⁶ section .325(b) flatly prohibits the issuance of any class or series of shares which purports to grant redemption at the option of the shareholder.

Assuming an apt provision in the corporate articles, section .325(c) recognizes the right of the corporate issuer to bargain with the holders of senior shares over the issue of redemption "to the extent

53. ALASKA STAT. § 10.06.305 (1989) (creation, classes, and issuance of shares); *id.* § 10.06.308 (issuance of preferred or special classes of shares); *id.* § 10.06.310 (issuance of shares in series); *id.* § 10.06.315 (series rights and preferences established by the board); *id.* § 10.06.318 (manner of establishing series).

Note that section .305(a) contains an important procedural restriction. Before a corporation may issue more than one class of shares or divide that class into a series, the articles must either state the basic attributes of the classes or series or expressly delegate the determination of such rights and preferences to the board. Section .305(b) adds a further substantive limitation that all shares of the same class or of the same series shall have identical rights, privileges, and restrictions. The formulation of these statutory restrictions is adapted from the California General Corporation Law, but they work no substantive change over former sections 10.05.060 and 10.05.069 of the Alaska Statutes.

54. As detailed in section .308, preferred or special classes of shares are distinguished from the residual common stock by any or all of the following characteristics: (1) being subject to a right of redemption by the corporate issuer; (2) entitling the holders to a dividend preference which may be cumulative, noncumulative, or partially cumulative; (3) having a liquidation preference in the distribution of net corporate assets in the wake of either voluntary or involuntary corporate dissolution; or (4) being convertible into shares of another class or series with junior claims upon dividends or liquidation.

55. Under section .210(1)(K) a provision that one or more classes or series of shares are redeemable is totally ineffective unless expressed in the optional content of the articles.

56. Investment Company Act of 1940, 15 U.S.C. § 80a-1 (1989).

permitted by this chapter.”⁵⁷ This limiting phrase is important, for under the new code the repurchase of its own senior securities is treated as a distribution of corporate assets subject to the limitations set forth in sections .358-.383.⁵⁸

c. Stock rights and options. Prior to July 1, 1989, the legal capacity of an Alaska corporation to issue stock rights or options was unclear. The former act was totally silent, and the topic had not been squarely addressed by the Alaska Supreme Court.⁵⁹ Members of the Code Revision Commission deemed this a serious omission given the utility of both rights and options as a source of corporate capital in general, and in creating deferred compensation schemes for corporate employees.

Unless prohibited or restricted in the articles of incorporation, section .343 grants a corporation, acting through its board, broad powers to create and issue rights or options covering any class or series of authorized but unissued stock. The only substantive command is that if such rights or options are to be made available to directors, officers, or employees of the corporation or any subsidiary, and not to the shareholders generally, their issuance must have been approved by

57. ALASKA STAT. § 10.06.325(c) (1989).

58. The official comment to section .325 asserts a legislative intention to invoke another set of protective restraints:

[I]t is the intention of the legislature to subject the decision to redeem or repurchase shares to the duties of care and loyalty otherwise imposed upon directors and corporate officers. Such concepts have been clearly recognized by the Supreme Court of Alaska as impacting upon those who de jure or de facto exercise the powers of corporate management. *See Wolf v. Arctic Bowl, Inc.*, 560 P.2d 758, 770 (Alaska 1977).

Granting full recognition to such fiduciary duties does not support the conclusion that either redemption or repurchase must, in all circumstances, be employed on a pro rata basis to all shares of the class or series. Cases such as *General Inv. Co. v. American Hide & Leather Co.*, 98 N.J. Eq. 326, 331, 129 A. 244, 246 (1925), to the extent that they would establish such an absolute proposition, are disapproved.

If those vested with the powers of corporate management can establish a valid business purpose for the entry into an agreement to redeem or repurchase some but not all of the shares of a given class or series those who are not extended the terms of such a transaction have no complaint. *See Martin v. American Potash & Chem. Corp.*, 33 Del. Ch. 234, 244, 92 A.2d 295, 301 (1952).

H. & S. JT. JOURNAL SUPP., No. 9,-at 45-46 (May 15, 1987).

59. On at least three occasions the court has made footnote reference to stock options. In none of these cases were options at issue, and the inclusion of the language could not be relied upon as judicial recognition that an inherit right to issue them was being proclaimed. *Stevens ex rel. Park View Corp. v. Richardson*, 755 P.2d 389, 392 n.3 (Alaska 1988); *Laing v. Laing*, 741 P.2d 649, 651 n.2 (Alaska 1987); *Alaska Plastics, Inc. v. Coppock*, 621 P.2d 270, 275 n.7 (Alaska 1980).

an affirmative vote of an absolute majority of the outstanding shares or consistent with a plan so approved or ratified.⁶⁰

d. Shares without certificates. Section .349, included within the package of pre-effective date amendments, affords both existing and newly formed corporate issuers an option to issue some or all of the entity's shares without certificates.⁶¹ Such power exists and is exercised within the discretion of the board unless extinguished or restricted by a provision in the articles or corporate bylaws. If shares are issued without certificates, section .349(b) directs that a written notice be used to impart the information regarding rights, privileges and limitations or the notice of a shareholder agreement. Such information is normally disclosed by compliance with the ACC requirements for notice or statement on the share certificate.⁶²

e. Shares held by nominees. Another influence of the RMBCA is found in section .356, which establishes a corporate option to set up machinery for communication with the beneficial owner of shares held in "street name" by a nominee.⁶³ While under no obligation to inaugurate such procedures, the affirmative corporate decision may be reflected in provisions of the articles, bylaws or board resolution.

2. *Distributions to Shareholders.* Few aspects of the law reform effort proved of more active interest to members of the Commission than devising a workable statutory scheme to regulate distributions of corporate assets to holders of common stock. Recognizing that the directors owe their election and continuation in office to the holders of the common stock, the goal was to balance the legitimate desire of management for flexibility against the needs of corporate creditors and the holders of shares with either a dividend or liquidation preference. Both groups are threatened by such a distribution and are almost certain to be without representation on the board.⁶⁴ Repeatedly, the

60. Unless preemptive rights have been eliminated or curtailed by an optional provision of the corporate articles, section .210(1)(B), the decision by the board to create rights or options in unissued stock would be subject to the preemptive rights of existing shareholders. If the offering is restricted to directors, officers or employees of the corporation pursuant to a shareholder approved plan, there are no preemptive rights. ALASKA STAT. § 10.06.428(b)(1)(A) (1989).

61. 1989 Alaska Sess. Laws ch. 82, § 8. Section .349 is premised on RMBCA section 6.26. REV. MODEL BUSINESS CORP. ACT § 6.26 (1984).

62. ALASKA STAT. §§ 10.06.350, .424 (1989).

63. RMBCA section 7.23 served as the basis for Alaska Statutes section 10.06.356. It was added to the ACC by section 11 of chapter 82 of the Alaska Session Laws of 1989.

64. The inherently opposed postures of creditors and equitable owners, as well as society's interest in the well-being of each are aptly set forth by Dean Bayless Manning:

Commissioners insisted that for any reform to succeed the new legislation would have to be easy for a businessperson to comprehend and straightforward to apply. If those goals were achieved, a derivative advantage to both the courts and the populace would be easy detection and proof of violations.

a. An historical perspective. In late 1979, the Commission directed that the results of a survey of existing caselaw and statutory approaches be summarized. The historical overview which I prepared

In the usual case . . . it will be a matter of major concern to the creditor of the corporation to seek four objectives — precisely as in the case of the lender to an individual debtor.

(1) The creditor will be happier if his corporate debtor has substantial assets in the corporate till at the time he extends credit and thereafter;

(2) The creditor will want to prevent the corporation from incurring debts to other general creditors with whom he may have to share the corporation's limited assets;

(3) The creditor will want the corporate assets to remain free and unencumbered of any lien interests by a prior (secured) creditor; and

(4) The creditor will want to preserve a cushion of protective assets, and will want to see to it that no claimants who rank junior to him (usually shareholders, but sometimes subordinated debt holders) make off with assets of the corporation while the creditor's claim is still outstanding and unpaid.

. . . .

The ideal world as conceived by the creditor of the corporation is a world that is normally wholly unacceptable to the shareholder. The investor who buys shares of stock in the incorporated enterprise and the investor who lends money to the incorporated enterprise are, as a matter of economics, engaged in the same kind of activity and are motivated by the same basic objectives. They are both making a capital investment; they both expect or hope to get their money back in the long run, either by liquidating pay-out or by sale of the security; and they both expect and hope to receive income from their investment in the interim before their capital is returned to them in full. In the stereotypic model transaction, the investor, who chose to take a shareholder's position rather than a creditor's position in a particular transaction, simply made a calculated economic judgment that he could make more money by relinquishing to creditor investors a "prior" claim for interest and a fixed principal payment on maturity, and, by opting for uncertain "dividends" and the residual claim to the assets of the enterprise that would remain after all creditors, with their fixed claims, had been paid off. The shareholder's willingness to admit the "priority" of the creditor's interest claim and claim for principal payment on maturity, does *not* imply, however, that the shareholder is willing to stand by chronologically until such time as the creditors have been paid in full. The shareholder will insist, in general, that if, as he hopes, the enterprise makes money (and perhaps even if it does not), the shareholders will receive some return on (or of) their investment from time to time, regardless of the fact that there are creditor claims outstanding. Such periodic payments to shareholders are characterized as "dividends"; and, in the usual and normal case of the healthy incorporated enterprise, it is assumed that some assets will be regularly paid out from the corporate treasury to the shareholder investors in dividend form.

B. MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 7-9 (2d ed. 1981) (footnote omitted).

has subsequently been incorporated by the legislature as a general section of its official comments to sections .358-.383 of the ACC.⁶⁵

Prior law, whether statutory or judge-made, has proven less than a match for directors bent upon dissipation of corporate assets. The initial position was that a distribution of assets which rendered the corporation bankrupt was a fraud upon the rights of creditors. Since this test was applied only after the fact, it had little value as a deterrent.

In the 1870's there emerged a refinement of the insolvency test. It was recognized that the assets of a corporation should be divided into two categories: fixed assets for which there was no ready ability of the market to convert them into cash; and "liquid or current assets" which could easily be exchanged for money. The dissipation of assets in the form of dividends directly drew down the cash reserves of the corporation. In so doing, it threatened to leave the corporation unable to meet its current liabilities in the normal course of business.

A corporation which could not pay its debts as they became due was "equitably insolvent" and a faithless debtor. Creditors were forced to either postpone repayment or force the corporate debtor into bankruptcy. It was a no win situation viewed from the perspective of the public interest: disappointed creditors might default upon their own obligations; bankruptcy of the entity produced unemployment and eliminated a competitor from the marketplace.

New York was among the first jurisdictions to build a statutory scheme beyond the insolvency test. Still in use in that jurisdiction, it has come to be known as the "Balance Sheet Surplus Test." This legislation forbade a distribution to shareholders unless the assets of the corporation exceeded its liabilities to all third parties and an amount attributable to "stated capital." When the balance sheet test was first promulgated, it sought security for creditors by taking advantage of a popular custom to issue corporate stock with a high "par value."

Par value was a tricky concept at best. Many investors showed a preference for high par value on the theory that it

65. For a more thoroughly researched presentation of the historical evolution of restraints upon the distribution of corporate assets in decisional, charter and statutory law, see Hackney, *The Financial Provisions of the Model Business Corporation Act*, 70 HARV. L. REV. 1357, 1359-63 (1957) (collecting authorities). Hackney concludes that credit for devising the balance sheet surplus test belongs to Ohio and the 1927 revision of its General Corporation Act. *Id.* at 1360-61.

somehow reflected an intrinsic worth for the new issue. What it in fact did was play into the hands of the New York legislation. "Stated capital" was an accounting entry equal to that fraction of the total sum of the monies received by the corporate issuer amounting to the "par value" of the shares. If the corporation sold the shares for a price above the "par value" such additional consideration was carried on the books as "paid-in surplus" (referred to as "capital surplus" in other jurisdictions following essentially the same legislative scheme).

The board of directors was free to declare and pay dividends out of assets attributable to paid-in surplus, but they could licitly go no further. The net effect of the balance sheet surplus test was to create a cushion for creditors and holders of senior securities. Their protection was founded in the command that the assets of the corporation could not be drawn down to the point where they were no longer equal to total liabilities and stated capital.

No sooner was this statute in place than ways were devised to minimize, if not mock, its effectiveness. The Great Depression inadvertently helped by disabusing the public of the notion that there was much to the concept of "par value." Gilt-edged certificates with a par value of \$1,000 were used to paper not a few bathrooms. In the post-World War II expansion of the economy, the public showed a willingness to purchase low or nominal par stock. The impact of this appetite created a remarkably thin cushion in the form of a stated capital account.

In the 1950's, "no par" stock gained acceptance. The New York legislation was adjusted so that the board was given power to allocate the consideration received for no par shares between stated capital and paid-in surplus accounts. Such license permitted the board to make only a nominal attribution to state[d] capital, reducing the protection afforded creditors to de minimis dimensions.

By the time no par stock had come on the scene, many critics were calling for replacement of the balance sheet surplus test with a more meaningful statutory scheme. The result was the creation of the "Earned Surplus Test." Illinois was one of the first jurisdictions to adopt this approach and the Model Act, expanding upon the Illinois scheme, spread the new test. The gist of the new test was the belief that the

board should have an unfettered discretion to distribute assets to common shareholders only so long as such assets were taken from the net corporate earnings.

Thus the assets realized from the sale of stock were not to be distributed to shareholders because such a move was correctly perceived as a partial liquidation — a return *of* as opposed to *on* shareholders' investments. In its most vigorous form, the earned surplus test would have denied the board discretion to pay a dividend unless corporate assets exceeded total liabilities to third parties and a further sum equal to the total consideration for the sale of shares.

If the earned surplus tests had been maintained without exceptions it would have gone far beyond the balance sheet surplus test in constructing a cushion for creditors and the holders of senior securities. Instead, the test has been riddled with exceptions.

Under Section 46 of the MBCA, a corporation was permitted to make a distribution of assets notwithstanding the fact that there were no net earnings during the accounting period. Such a distribution could be charged against capital surplus (funds attributable to the sale of shares) if the holders of a majority of the outstanding shares affirmatively voted for the distribution; or, if the articles contained a provision empowering the board to make distributions chargeable against capital surplus. If there was an outstanding class of preferred (senior) shares there could be no distribution chargeable to capital surplus without first having paid all accrued preferential dividends. This limitation functioned to protect the interests of senior securities while leaving creditors helpless to protest unless the distribution from capital surplus threatened equitable insolvency.

A further exception proved useful if the corporation had experienced a net operating loss. One might suppose that such a loss would have to be made up in future years before the board could gain the discretion to pay further dividends. The Model Act was more generous. Under Section 70, the board was able to meet this adversity by simply passing a resolution to apply any part or all of its capital surplus to the reduction or elimination of the deficit arising from such a loss. If in the succeeding accounting period there were net profits, dividends could be paid out of this "earned surplus." There was no requirement that the capital surplus account ever be restored to its original dimension. A return of capital

had been accomplished and the creditor's cushion reduced for all times.

If business reverses were so severe that operating losses reduced assets below the total of liabilities plus stated capital, the board was without power to pay a dividend unless, pursuant to Section 69 of the Model Act, the shareholders were to concur in the generation of a "reduction surplus." The essence of this scheme was a permanent reduction in stated capital. The "surplus" so generated would become "capital surplus" and available for distribution as such.

The only limitation was a command that stated capital could not be reduced to an amount less than the aggregate amounts payable to all shares having preferential right in the assets of the corporation in the event of involuntary liquidation, plus the aggregate par value of all issued shares having no such preferential rights. When it is recalled that par value of such shares was likely to be nominal it can be seen that the interests of creditors were protected by little more than the insolvency prohibition.

If the board was unable to gain the concurrence of the shareholders (including the voting by class of any holders of senior securities) in the creation of a reduction surplus, it was forced to enter the succeeding accounting period with "impaired stated capital." There would be no further licit dividends until future net earnings increased the assets of the corporation to the point at which they again exceeded total liabilities plus stated capital. Directors in such circumstances were likely candidates for defeat in the next election by disappointed shareholders.

The latest step in relaxing the earned surplus test was the creation of a concept aptly termed "nimble dividends." For the directors of a corporation with impaired stated capital it came as manna from heaven. Under an optional version of Section 45 of the Model Act, if a corporation has net earnings for two consecutive fiscal years, then, notwithstanding a continued impairment of stated capital, a dividend could be declared by the board and charged against the current net earnings.

While a rationale may be offered in support of each of these exceptions, their net effect upon the earned surplus test has been characterized by critics as the creation of a watch dog with no bite and little bark.⁶⁶

66. H. & S. JT. JOURNAL SUPP., No. 9, at 54-58 (May 15, 1987).

b. *The Alaska Business Corporation Act.* The “financials” of the new Alaska Corporations Code can best be understood against the background of the attempted regulation under the Alaska Business Corporation Act. Once the exception-ridden version of the earned surplus test has been exposed, the reader can appreciate the competing influences represented by the reform efforts undertaken in the California General Corporation Law and Revised Model Business Corporation Act.

Reflecting the influence of a generic mid-1950s version of the Model Act and its specific Oregonian roots, the Alaska Business Corporation Act suffered from virtually every loophole which riddled the earned surplus test. The former Alaska Act began by imposing equitable insolvency injunctions on the payment of dividends as well as the redemption and repurchase of shares.⁶⁷ Assuming that this test could be met, dividends could be declared and paid in cash or property “only out of the unreserved and unrestricted earned surplus of the corporation, except as otherwise provided in this section.”⁶⁸ Sadly, that statement was very misleading. The very next section permitted the board to declare and distribute cash or property to the holders of common stock “in partial liquidation . . . out of stated capital or capital surplus. . . .”⁶⁹ Section 46 of the Model Act authorized distributions

67. ALASKA STAT. §§ 10.05.201, .207, .012, .309 (1957) (repealed 1988). The language of the former Act was less than ideal. In each of the above referenced sections, the reader was told that the corporate distribution could not take place if the “corporation is insolvent, or when the [distribution] would render the corporation insolvent” It would be possible to interpret this language as imposing merely an ultimate or “bankruptcy” insolvency test. Under that reading if the total assets of the corporate entity equalled total liabilities following the distribution it would be licit though the relationship of cash and other liquid assets to current liabilities would find the corporation unable to meet its debts as they mature in the ordinary course of business.

68. ALASKA STAT. § 10.05.204(1) (1957) (repealed 1988). The exceptions referenced in section .204 were directed at wasting assets, at corporations which were generally exempt, and at the payment of stock dividends. No limitations were placed on the board’s discretion to declare and pay a dividend using previously issued and reacquired shares. If the stock was authorized but previously unissued, then a stock dividend had to be reflected in an increase in the “stated capital” of the corporation by an amount equal to the par value of the distributed shares. If the stock was without par value, the directors were to fix a value attributable to stated capital. ALASKA STAT. § 10.05.204(4)(A)(B) (1957) (repealed 1988).

69. ALASKA STAT. § 10.05.207 (1957) (repealed 1988). From the vantage point of investors who owned shares with dividend or distribution preferences, section .207 was not devoid of protective measures. Unless the articles contained a provision empowering the board to declare distributions in partial liquidation, the procedure was dependent upon the prior authorization of an affirmative vote of two-thirds of each outstanding class of stock. If the shares of a particular class or series did not have voting rights, they were granted in this extraordinary situation by the statute. If dividends for the holders of senior shares were in arrears, no dividend in partial liquidation could be paid to junior shares until the shares entitled to the dividend preference

from capital surplus, an account representing the receipt by the corporation of assets in exchange for the original issuance of shares which exceeded the par value or board-determined stated capital attributed to those shares.⁷⁰ Permission to directly impair stated capital in the course of a distribution to the holders of common stock appears to have originated in Oregon.⁷¹ Once accorded access to the stated capital account, the various strategies permitted by the Model Act to approach it by indirection would seem superfluous. Nevertheless, the Alaska Business Corporation Act contained all but a nimble dividends

had been fully paid. Nor could a distribution be made that would so reduce the assets of the corporation that, in the event of dissolution, the entity would be unable to meet the liquidation preference of any class or series of shares. Finally, each distribution in partial liquidation had to be identified to the recipient as a return *of* rather than *on* an investment.

Useful as these measures might be in guarding the dividend and distribution preferences of senior shares, one looked in vain for a protective concern for the interests of corporate creditors.

70. MODEL BUSINESS CORP. ACT § 46 (1971).

71. OR. REV. STAT. § 57.221 (1953) (repealed 1987).

feature.⁷² Capital surplus could be reduced so as to eliminate a deficit arising from net business losses;⁷³ so, too, could stated capital.⁷⁴

From the vantage point of corporate creditors, the former Alaska Business Corporation Act was merely more candid in reaching the result permitted under the amended Model Act. The cushion for creditors secured under New York's original statutory balance sheet surplus requirement, and the later earned surplus requirement, was pragmatically reduced to an insecurity blanket. The use of low par stock or no par stock, followed by a minimum allocation of sale proceeds to "stated capital," made the cushion remarkably devoid of padding. The ability to thereafter reduce stated capital (Model Act) or

72. Alternative section 45(a) of the Model Business Corporation Act provided:

(a) Dividends may be declared and paid in cash or property only out of the unreserved and unrestricted earned surplus of the corporation, or out of the unreserved and unrestricted net earnings of the current fiscal year and the next preceding fiscal year taken as a single period

Had Alaska adopted this alternative formulation in former Alaska Statutes section 10.05.204(1), the board could have declared a dividend charged against recent short term business profits notwithstanding that historical losses left the corporation with total assets which exceeded total liabilities by an amount less than stated capital.

For a general discussion of the financial restraints imposed by the Model Act, see Hackney, *supra* note 65. For the view that such restraints afforded precious little protection to creditors and holders of investment interests not represented on the board, see Harris, *The Model Business Corporation Act — Invitation to Irresponsibility?*, 50 NW. U.L. REV. 1 (1955). To Harris, the most insidious feature of the then newly promulgated Model Act and its commentary was the failure to warn of the significant shift away from shareholder protection embodied in both its terms and in what had been deliberately excluded from its coverage.

Many legislators and others, not familiar with the technical operation and ultimate effects of the recommended model provisions, will rely on the forewords and prefaces published with the Model Acts. Unfortunately, however, the explanatory forewords and prefaces to the Model Acts do not call attention to the specific changes nor give any explanation of the reason for the trend of the successive drafts toward liberality and protection to management and toward relaxation of safeguards to stockholders, creditors and the public.

Harris, *supra*, at 2.

The answer which Harris did not find in the Model Act or its explanatory materials may have been furnished by writers who view corporations as an umbrella or tent within which a number of important contractual relationships may interact. Owners of equity interests are but one of the contracting parties, and management must somehow balance the interests of all. See Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980).

73. ALASKA STAT. § 10.05.369 (1957) (repealed 1988).

74. *Id.* § 10.05.348. Section .360 afforded protection to the holders of a class or series of shares having a liquidation preference. If the entity had such a class or series of outstanding shares no reduction could be made which would reduce the amount of stated capital to an amount equal to or less than the aggregate preferential amounts payable in the event of involuntary liquidation. *Id.* § 10.05.360.

directly charge distributions against it (Alaska Act) meant that what may have begun as a thin cushion could wind up as a doily.

c. California and Model Act reform efforts. Within six months of taking up the issue of distributions, the Commission prepared a draft which proposed that Alaska join California in a statutory repudiation of both the content and concepts of "legal capital" and "legal accounting."⁷⁵ Several months after that draft was in place, the Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association dropped what Dean Bayless Manning was to term "the big bomb."⁷⁶ Their proposed substitute section 45 sought to eliminate legal capital and surplus. If the California and model legislation began from the same premise, their solutions differed with respect to both ends and means. In essence, California attempted to put mandatory padding in the creditor cushion.⁷⁷ The framers of the Revised Model Act abandoned the effort.

The California solution was both simple and direct. Unless the corporation was, or giving prospective effect to the proposed distribution would be, unlikely to meet its liabilities as they mature, the directors were free to make any distribution to shareholders which could be charged against retained corporate earnings.⁷⁸ If the retained earnings

75. In 1975 the California Legislature was the first to act on the view that both the balance and earned surplus concepts had become so riddled with exceptions that they afforded no meaningful protection to corporate creditors and the holders of preferred stock if the owners of the common stock were determined to distribute corporate assets to themselves. Neither the idea that reform was needed nor the means selected by the California Legislature was of recent origin. Both had been clearly identified in the 1930s. See Littleton, *A Substitute for Stated Capital*, 17 HARV. BUS. REV. 75 (1938); Ballantine & Hills, *Corporate Capital and Restrictions Upon Dividends Under Modern Corporation Laws*, 23 CALIF. L. REV. 229 (1935); Hills, *Model Corporation Act*, 48 HARV. L. REV. 1334 (1935).

76. Manning, *supra* note 64, at 171.

77. Dean Manning's view of the California reforms is a mixture of admiration and doubt:

These changes are a sensible move away from the conceptual and toward the realities of economic and business analysis. At the same time, one must entertain a certain skepticism as to whether the introduction of indenture-like ratio provisions is warranted in a general corporation statute or will prove administrable. The most likely outcome, one fears, is that the new provisions will prove too technical for many purposes and too primitive for others. And it is hard to muster confidence in a future role of California state courts as accounting tribunals.

Manning, *supra* note 64, at 165.

78. CAL. CORP. CODE § 500(a) (Deering 1977 & Supp. 1990) contains the basic permission to make distributions so long as the amount of retained earnings immediately prior thereto equals or exceeds the amount of the proposed distribution. Though given subsequent legislative expression, section 501's formulation of the "equitable

of the corporate entity did not equal or exceed the proposed distribution, it would still be licit provided that, immediately after it was made, two statutorily defined ratios between corporate assets and liabilities could be met. First, the total sum of corporate assets must exceed the total sum of corporate liabilities by a ratio of 1.25 to 1.⁷⁹ Put simply, the corporation must still have five dollars in assets for every four dollars in liabilities. In addition, the current assets of the corporation must at least equal its current liabilities.⁸⁰ The goal of these twin ratio/assets surplus tests was clearly to mandate a cushion for the protection of corporate creditors.⁸¹

The means of achieving this goal involved the abolition of all concepts of "par value"⁸² and "surplus" invented by lawyers, and mandating that financial statements, balance sheets, income statements and statements of changes in financial condition of a corporation be prepared or determined in accordance with generally accepted accounting principles ("GAAP") then applicable.⁸³ Two reforms were instantly achieved with the passage of this mandate. First, the legal profession ceded dominion over both the terminology and techniques

insolvency" test takes precedence in the sense that it will preclude a distribution permitted under section 500(a) or (b) if the corporation is, or as a result of the distribution, would be rendered likely unable to meet its liabilities as they mature.

79. *Id.* § 500(b)(1). For purposes of this computation only, goodwill, capitalized research and development expenses and deferred charges are excluded from the balance sheet. *Id.*

80. *Id.* § 500(b)(2). There was an important exception for highly leveraged corporations or any entity struggling to service its debt. "[I]f the average of the earnings of the corporation before taxes on income and before interest expense for the two preceding fiscal years was less than the average of the interest expense of the corporation . . .," then the ratio of current assets to current liabilities had to be at least 1.25 to 1. *Id.*

81. The liquidation preference of the holders of senior shares in a corporation with more than one class or series of stock was achieved by section 502. The dividend preference of such senior shares is addressed by the requirement that any distribution to junior shares be charged against retained earnings. CAL. CORP. CODE § 503 (Deering 1977 & Supp. 1989).

For a view that the California financials fail to go far enough in protecting the interests of creditors, see Ben-Dror, *An Empirical Study of Distribution Rules Under California Corporations Code Section 500: Are Creditors Adequately Protected?*, 16 U.C. DAVIS L. REV. 375 (1983), discussed *infra* note 91.

82. The par value concept was preserved by the CGLC for the purpose of enabling corporations formed under its terms to be taxed by statutes or regulations predicated the computation upon par value. For such purposes only, all authorized shares are deemed to have a nominal par value of \$1 per share. If any state or federal statute or regulation requires par value for any other purpose, the CGLC authorizes the board to satisfy the requirement by fixing a par value. CAL. CORP. CODE § 205 (Deering 1977 & Supp. 1989).

83. *Id.* § 114. All references to assets, liabilities, earnings, retained earnings and similar accounting terms must also conform to generally accepted accounting principles ("GAAP"). *Id.*

of accounting to the accounting profession. Second, the law was tied to an evolutionary, non-static norm. Indeed, the idea that the accounting profession is constantly seeking improved principles and practices was cited by the framers of the Revised Model Business Corporation Act to justify their refusal to mandate their observance.⁸⁴

The proposed revision of section 45 of the Model Act followed the California legislation in abandoning the concepts and terminology of legal accounting.⁸⁵ It did not seek to join California in crafting a third generation statutory cushion for the protection of corporate creditors.⁸⁶ Instead, the Model Act recommended that statutory reform revert to the position of the common law of the 1880s wherein the twin concepts of equitable insolvency and bankruptcy or absolute insolvency would be the legal constraints upon the board's discretion to distribute corporate assets to equitable owners.⁸⁷ Three years later, the drafters of the RMBCA elected to adhere to this preliminary judgment.⁸⁸ The official comment to section 6.40 declared:

The reformulation of the statutory standards governing distributions is another important change made by the 1980 revisions to the financial provisions of the Model Act. It has long been recognized that the traditional "par value" and "stated capital" statutes do not provide significant protection against distributions of capital to shareholders. While most of these statutes contained elaborate provisions establishing "stated capital," "capital surplus," and

84. Official comment 4(a) to RMBCA section 6.40 declares:

The widespread controversy concerning various accounting principles, and their continuous reevaluation, suggest that a statutory standard of reasonableness, rather than of generally accepted accounting principles, is appropriate.

REV. MODEL BUSINESS CORP. ACT § 6.40 comment 4(a) (1985).

85. The official comment, tracing the historical development of the 1980 amendments, declared:

The 1980 financial amendments were based on the premise that the complex structure of rules established by earlier versions of the Model Act did not provide realistic protection to creditors or senior securities holders. These rules were extremely technical and complex, and subject to manipulation so that the protections provided by them often proved to be more apparent than real. . . .

MODEL BUS. CORP. ACT ANN. 484 (Supp. 1989).

86. The explanation for failing to embrace the California requirement of a ratio/assets surplus is not to be found in the official comments or statutory comparison published by the framers of the RMBCA. Indeed, the significant difference in both goals and strategies is passed off with the comment that "California provides a treatment of distributions that differs significantly from that provided in section 6.40." *Id.* at 489.

87. Dean Manning, a member of the group which drafted the 1980 revision of the Model Act, expressed satisfaction that there had been no effort to "put a new statutory system in place that would seek to give creditors a stronger position." Manning, *supra* note 64, at 179.

88. See REV. MODEL BUSINESS CORP. ACT § 6.40(c) (1985).

"earned surplus" (and often other types of surplus as well), the net effect of most statutes was to permit the distribution to shareholders of most or all of the corporation's net assets — its capital along with its earnings — if the shareholders wished this to be done. However, statutes also generally imposed an equity insolvency test on distributions that prohibited distributions of assets if the corporation was insolvent or if the distribution had the effect of making the corporation insolvent or unable to meet its obligations as they were projected to arise.

The financial provisions of the revised Model Act, which are based on the 1980 amendments, sweep away all the distinctions among the various types of surplus but retain restrictions on distributions built around both the equity insolvency and balance sheet tests of earlier statutes.⁸⁹

While Dean Manning lauded the reliance upon the dual insolvency tests,⁹⁰ others saw in it a dysfunctional, half-completed legislative agenda. A visiting Israeli scholar observed:

The dual insolvency test as it appears in the new Model Act has the merit of simplicity, but is deficient in two major respects. First, the dual insolvency test provides no consistent rule for determining the amount of allowable distributions. Second, the dual insolvency test merely serves to ascertain, rather than predict, bankruptcy and is therefore useful only after the fact as a tool for litigation, not planning. Diligent creditors, unwilling to rely upon litigation in order to collect debts, will be forced to exercise considerable preventive supervision over corporate debtors and will incur substantial costs monitoring the debtors' financial developments.⁹¹

89. REV. MODEL BUSINESS CORP. ACT § 6.40 official comment at 123 (1985). The term "balance sheet test" as utilized in the official comment to section 6.40 is potentially confusing. It clearly means insolvency in the absolute or bankruptcy sense in which total assets no longer equal or exceed total corporate liabilities. It has no relationship to the "balance sheet surplus" test utilized in New York and other jurisdictions to assure some excess of total assets over total liabilities as a cushion for creditors.

90. Manning, *supra* note 64, at 170-71, 179.

91. Ben-Dror, *supra* note 81, at 381 (footnotes omitted). Concluding that more is needed than a concept of dual insolvency, Dr. Ben-Dror determined that the California approach also fails to go far enough to provide meaningful protection to creditors. In Part III of his article, the author sets forth the goals and methodology of his empirical study:

In order to examine the effectiveness of the California distribution rules, an empirical study was conducted. This study applied the financial ratios required by Section 500(b) to the financial statements of one hundred corporations that went bankrupt between 1970 and 1976. The application of Section 500(b) for one, two, and three years prior to bankruptcy tested the section's successful bankruptcy prediction rate during those years, or, in other words, tested how often Section 500(b) would have prohibited distributions by corporations that subsequently went bankrupt.

Similarly, the study applied Section 500(b) to the financial statements of a control group of 2451 solvent corporations during the same period in order to test the incidence of overprediction by Section 500(b), that is, how often

The framers of the RMBCA also rejected California's decision to mandate observance of generally accepted accounting practices. Instead, section 6.40(d) declared:

The board of directors may base a determination that the distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.⁹²

The official comment expresses belief that requiring the observance of GAAP is excessively rigid, though their use would be per se "reasonable in the circumstances."⁹³ The concluding phrase, "or other method that is reasonable in the circumstances," is touted as deliberately suggesting "the wide variety of possibilities that might not be considered to fall under a 'fair valuation' or 'current value' method but might be reasonable in the circumstances of a particular case."⁹⁴

d. The financials of the new Alaska Corporations Code. The financial provisions of the ACC can be summarized as containing the substantive restraints espoused in the California statute wedded to the

the section would have prohibited distributions by corporations that continued to be solvent. The study also tested the sensitivity of Section 500(b) to the size and industrial category of the corporation to which it was applied. Finally, the study examined whether Section 500(a), the alternative test which allows distributions to the extent of retained earnings, is by itself a sufficient indicator of future solvency, and whether the efficiency of Section 500 would be improved if Sections 500(a) and 500(b) were applied cumulatively rather than as alternative tests.

Id. at 390-92 (footnotes omitted).

The author found an overprediction rate for section 500(b) of 9.14%, which was greater than certain cited theoretical models. *Id.* at 400. Section 500(a) was found to be a fallible indicator of future solvency. The stealth fact pattern was a corporation with insufficient retained earnings to replace "resources, including obsolete plant and equipment, which are necessary to sustain profitable operations — a dilemma particularly acute during inflationary periods." *Id.* at 407. Significant improvement in the prediction of future bankruptcy resulted from the application of section 500(a), (b) as cumulative rather than alternative restraints upon the board's discretion to make a distribution of corporate assets. *Id.* at 409. The author's conclusion and recommendation was that the California Legislature consider amending section 500 to make the two criteria one cumulative test. *Id.* at 413.

92. REV. MODEL BUSINESS CORP. ACT § 6.40(d) (1985).

93. MODEL BUSINESS CORP. ACT ANN. 479-80 (Supp. 1989).

94. *Id.* at 480. The use of the term "case" may well be prophetic, for it will require litigation to ascertain the "reasonable" quality of any creative accounting principles or practices employed by or relied upon by any given board. Dean Manning had declared it "hard to muster confidence in a future role of California state courts as accounting tribunals." Manning, *supra* note 64, at 165. With deference, at least California courts would function in the context of an ascertainable norm. One marvels at his assumed greater level of confidence in the ability of trial courts in a jurisdiction adopting the RMBCA to perform such tasks in the subjective context of management created innovations.

procedural flexibility recommended by the RMBCA. Alaska thus becomes the second jurisdiction to adopt the ratio/assets surplus test in a positive effort to afford a measure of protection for creditors.⁹⁵ As initially enacted, the new code partially followed California in mandating observance of GAAP for the purpose of certain determinations only.⁹⁶ Amendments during the pre-effective date period have repealed that position.⁹⁷ Like the Model Act, financial records, statements and determinations need not conform to GAAP.⁹⁸ Unlike the Model Act, however, the amended provisions of the ACC contain a standard to which any accounting practice or procedure must conform and allocate the burden of proof in demonstrating its attainment.⁹⁹

Shareholders seeking, or directors contemplating, a distribution¹⁰⁰ of corporate assets should think of the ACC as imposing two

95. ALASKA STAT. § 10.06.358(a)(2) (1989). In addition to providing restraints upon the discretion of the board to make distributions to shareholders, the ACC provides an option which will give a measure of participatory security to holders of structured debt. An optional provision in the articles may confer upon the holders of debt instruments the right to vote in the election of directors and on any other matters on which shareholders may vote. *Id.* § 10.06.210(1)(H). The provision is modeled upon section 204(a)(7) of the California Corporate Code. CAL. CORP. CODE § 204(a)(7) (West 1977 & Supp. 1990).

Unfortunately, trade creditors, employees, and others who must rely upon the assets of the corporation as a contract debtor lack the structured relationship necessary to gain board representation under such an optional provision in the articles.

Further protections for both creditors and the holders of shares with dividend or liquidation preference may be crafted in the articles, bylaws, share indentures or corporate contracts. Section 10.06.375 of the Alaska Statutes declares that the financials of the new code are a statutory minimum, and that nothing prohibits additional restrictions upon the declaration of dividends or the purchase or redemption of a corporation's own shares.

96. See *infra* note 120 and accompanying text.

97. See *infra* note 121 and accompanying text.

98. ALASKA STAT. § 10.06.358(e) (1989); see also *infra* notes 122-23 and accompanying text.

99. See *infra* note 123 and accompanying text.

100. The term "distribution" is defined in Alaska Statutes section 10.06.990(17): "[D]istribution to its shareholders" means the transfer of cash or property by a corporation or its subsidiary to its shareholders without consideration, whether by way of dividend or otherwise, except a dividend in shares of the corporation, or the purchase or redemption of its shares for cash or property;"

This language is potentially confusing. At first glance it appears to state that a redemption of shares for cash or property is being excepted from the statutory definition of a distribution. This is the exact opposite from the intended meaning as is clarified in the balance of the provision fixing the time for the distribution. There we find that "the time of a distribution by purchase or redemption of shares is the date cash or property is transferred by the corporation. . . ." ALASKA STAT. § 10.06.940(17) (1989).

There is an exception to the restrictions imposed by sections .358-.365 for the purchase or redemption of the shares of a deceased shareholder. If the corporation has purchased insurance on the shareholder's life to fund an obligation to purchase or

hurdles, each designed to safeguard the fiscal viability of the entity in the wake of such a step. The first is the determination of equitable solvency: the ability of the entity to meet its debts as they mature in the ordinary course of business. Assuming that equitable insolvency is not deemed a likely consequence, the dividend must pass muster as chargeable against retained earnings or assets in excess of the twin assets/surplus requirements.

(1) *Equitable insolvency.* Section .360 contains the formulation of the equitable insolvency test:

A corporation or subsidiary of a corporation may not make a distribution to the corporation's shareholders if the corporation or the subsidiary making the distribution is, or as a result of the distribution would be, likely to be unable to meet its liabilities as they mature.¹⁰¹

There are two important changes in prior law.¹⁰² The equitable insolvency restraint in the former Alaska Business Corporation Act prohibited distributions by a corporation which was insolvent or would be rendered insolvent by such a step.¹⁰³ The new test errs on the side of caution by prohibiting a distribution that would likely leave the corporation in such a condition.¹⁰⁴ Section .360 also makes explicit reference to the "subsidiary of a corporation,"¹⁰⁵ a factor which takes on greater significance given the content of section .970, which contains the general rules of construction and interpretation to be followed under the ACC.¹⁰⁶ Section .970(5)(c) requires that if a corporation has subsidiaries, all determinations must be made on a consolidated basis taking into account the prospective effect of the distribution on the financial viability of the entire corporate family, not merely its most sound member.¹⁰⁷

(2) *The ratio/assets surplus test.* The new code defines "retained earnings" as "the account of the corporation representing undistributed and uncapitalized net profits, income, gains, and losses from the

redeem such shares, then to the extent that the proceeds from the policy exceed the total amount of premiums paid, the funds may be freely used to carry out the corporate obligation. *Id.* § 10.06.368.

101. ALASKA STAT. § 10.06.360 (1989). Section .360 is adapted from section 501 of the California Corporate Code. CAL. CORP. CODE § 501 (Deering 1977 & Supp. 1989).

102. Section .360 replaces former section 10.05.210 of the Alaska Statutes.

103. ALASKA STAT. § 10.05.210 (1957) (repealed 1988).

104. ALASKA STAT. § 10.06.360 (1989). An effort to secure the repeal of this feature of section .360 was unsuccessful in the Sixteenth Legislature. Section 16 of Combined Senate and House Bill 204 was deleted in the House Judiciary Committee.

105. *Id.*

106. ALASKA STAT. § 10.06.970 (1989).

107. *Id.* § 10.06.970(5)(c).

date of incorporation.”¹⁰⁸ This definition is crucial in determining the ability of the corporation to qualify the proposed distribution under section .358.

(a) A corporation or a subsidiary of the corporation may not make a distribution to the corporation’s shareholders, as defined in [Alaska Statutes section] 10.06.990 [17], unless

(1) the amount of the retained earnings of the corporation immediately before the distribution equals or exceeds the amount of the proposed distribution; or

(2) immediately after giving effect to the distribution the

(A) sum of the assets of the corporation, exclusive of goodwill, capitalized research and development expenses, evidences of debts owing from directors or officers or secured by the corporation’s own shares, and deferred charges, would be at least equal to one and one-fourth times its liabilities, not including deferred taxes, deferred income, and other deferred credits; and

(B) current assets of the corporation would be at least equal to its current liabilities or, if the average of the earnings of the corporation before taxes on income and before interest expenses for the two preceding fiscal years was less than the average of the interest expense of the corporation for those fiscal years, at least equal to one and one-fourth its current liabilities.

(b) For purposes of this section,

(1) in determining the amount of the assets of the corporation, profits derived from an exchange of assets may not be included unless the assets received are currently realizable in cash;

(2) “current assets” may include net amounts that the board has determined in good faith may reasonably be expected to be received from customers during the 12-month period used in calculating current liabilities under existing contractual relationships obligating the customers to make fixed or

108. *Id.* § 10.06.990(36).

periodic payments during the term of the contracts after in each case giving effect to future costs not then included in current liabilities but reasonably expected to be incurred by the corporation in performing the contracts.¹⁰⁹

Assuming that there is no threat of equitable insolvency, section .358(a) defines two circumstances in which a distribution to shareholders by the corporation or its subsidiary is permitted.

Section .358(a)(1) concedes to the corporation discretion to make any distribution so long as it can be charged against retained earnings. The test is prospective in that immediately prior to this step the retained earnings of the corporation must equal or exceed the proposed distribution. A corporation with insufficient retained earnings may still make a distribution provided that immediately afterwards it is able to meet the twin ratio requirements for assets and liabilities set forth in section .358(a)(2).

Under the first requirement, the sum of the corporate assets must exceed the total of corporate liabilities by a ratio of 1.25 to 1. Thus, as in California,¹¹⁰ following the distribution the corporation must have at least five dollars in assets for every four dollars in liabilities. To insure the soundness of this calculation, certain "assets" may not be included because of their ephemeral quality or their unlikelihood of being realized in cash. Also excluded from the asset calculation are debts owing from directors or officers or any debt which is secured by the corporation's own shares.¹¹¹

The second criterion focuses upon the prospective liquidity of the corporation. The current assets must be at least equal to current corporate liabilities.¹¹² If the entity is highly leveraged, so that its earnings in the two preceding fiscal years were less than the cost of debt service during that period, that corporation must pass a more stringent ratio whereby current assets exceed current liabilities by 1.25 to 1.¹¹³

(3) *Accounting principles and practices to be observed under the ACC.* The current content of the ACC evolved in three distinct

109. *Id.* § 10.06.358.

110. *See supra* note 78 and accompanying text.

111. ALASKA STAT. § 10.06.358(a)(2)(A) (1989). The mandate to exclude debts of corporate insiders is unique to Alaska law. Under the ACC, loans to directors, officers and employees are treated as distributions. *See id.* § 10.06.485(b). By the same token, in calculating the total of corporate liabilities, deferred taxes, deferred income, and deferred credits need not be reckoned. *Id.* § 10.06.358(a)(2)(A).

112. *Id.* § 10.06.358(a)(2)(B).

113. *Id.*

stages, each representing interaction among the Commission, the legislature, and critics who viewed the legislation as an "accountants' full-employment bill."

In 1982, the Commission secured the initial introduction of the ACC in the Alaska Senate.¹¹⁴ The requirement that all financial statements, balance sheets, income statements, statements of change in financial condition, and the like be prepared and determined in accordance with GAAP was set forth in section .970(5).¹¹⁵ Neither this general requirement, nor the more specific provisions respecting corporate distributions, had drawn adverse comment during the circulations period on the Commission's exposure draft. The Commission was prepared for, and indeed encouraged, debate concerning its controversial proposal which would have created secondary liability in corporate directors and officers for the claims of certain unsecured corporate creditors.¹¹⁶ It was not disappointed. A withering opposition soon was marshalled which branded the section on secondary liability as blatantly anti-capitalist. Disaffection also was manifest over provisions mandating GAAP. They were assailed on the predicate of a cost/benefit analysis. Critics pointed out that the great majority of corporate entities in Alaska were small both in terms of the number of

114. S.B. 873, 12th Leg., 2nd Sess. (1982).

115. S.B. 246, 13th Leg., 1st Sess. 150-51 (1983). Section .970 as then proposed, and now adopted, contains the basic rules of construction and interpretation which govern the ACC. Subsection (5) originally declared:

(5) References in this chapter to financial statements, balance sheets, income statements, and statements of changes in financial position of a corporation and references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation mean financial statements or items prepared or determined in accordance with generally accepted accounting principles then applicable, and fairly presenting the matters that they purport to present, subject to any specific accounting treatment required by a particular section of this chapter. Unless otherwise expressly stated, references in this chapter to financial statements mean, in the case of a corporation that has subsidiaries, consolidated statements of the corporation and those of its subsidiaries as are required or permitted to be included in the consolidated statements under generally accepted accounting principles then applicable, and all references to these accounting items mean items determined on a consolidated basis in accordance with consolidated financial statements.

Id. at 150-51.

Section .358(c) of Senate Bill 256 specifically mandated that the amount of a distribution payable in property be determined on the basis of the value of the property as carried on the corporation's financial statements in accordance with GAAP.

Id. at 28.

116. Section .488 concerning the secondary liability of directors and officers was ultimately withdrawn by the Commission and does not appear in the ACC as enacted in 1988. Both its terms and fate are discussed *infra* in Part III.

participants and business receipts. For such entities, the cost of professional accounting services was projected to outweigh the benefit to either the immediate entity or the public.

The failure of the code to advance in the Twelfth Legislature had been anticipated. The introduction came late on what was an already overcrowded agenda. In April, 1983, the legislation was reintroduced in the first session of the Thirteenth Legislature.¹¹⁷ Extensive hearings revealed substantial controversy regarding the provision on secondary liability and the accounting features.¹¹⁸ More than a year later, enactment seemed no closer at hand. In the fall of 1984, the Commission faced the prospect that unless a compromise could be crafted, there was little reason for optimism that the Fourteenth Legislature would overcome the reluctance displayed by its immediate predecessors and embrace the new code.

As they approached their November meeting, the commissioners were aware of the exposure draft of the RMBCA. The decision by framers of the Model Act not to recommend mandatory adherence to GAAP lent weighty support to the pragmatic arguments against the content of section .970. Yet the formulation contained in RMBCA section 6.40(d) was rejected as excessively vague. As they pondered the matter, a consensus formed that the goal of statutory reform was to secure corporate books, records, and statements which fairly and reasonably presented their purported content. Mandatory observance of GAAP had never represented a goal, merely the means to attain the broader objective. Viewed in this light, section .970 was redrafted:

(5) subject to a specific accounting treatment required by a particular section of this chapter,

(A) references in this chapter to financial statements, balance sheets, income statements, and statements of changes in financial

117. S.B. 246, H.B. 478, 13th Leg., 1st Sess. (1983).

118. There was also substantial support. On the day the code was introduced in both houses, the President of the Alaska Federation of Natives wrote to the Chairman of the Code Revision Commission with a copy to legislative leaders:

I would like to take this opportunity to thank the Commission for fully providing the AFN with the opportunity to review and comment on the proposed Alaska Corporations Code. The AFN now supports passage of Senate Bill No. 246 and House Bill No. 343.

The proposed Corporations Code is a comprehensive and generally careful legislative scheme of good quality. Further, it is accompanied by a technical commentary which can serve to reduce Native corporations' extensive litigation costs. The finance section is an important reform, making possible some distributions from capital, but not jeopardizing creditors' security. If you need us to testify on behalf of the Bill, we will do so.

Letter from Janie Leask to John W. Abbott (Apr. 8, 1983).

position of a corporation and references to assets, liabilities, earnings, retained earnings, and similar accounting items of a corporation mean financial statements or items prepared fairly and reasonably to present the purported matters;

(B) financial statements prepared or determined in accordance with generally accepted accounting principles then applicable are fair and reasonable;

(C) references in this chapter to financial statements mean, in the case of a corporation that has subsidiaries, consolidated statements of the corporation and its subsidiaries, and all references to accounting items determined on a consolidated basis in accordance with consolidated financial statements. . . .¹¹⁹

In this amended form, section .970 was enacted by the Fifteenth Legislature.¹²⁰ Notwithstanding this general concession, the enacted provisions of the ACC required the observance of GAAP in determining whether a distribution to shareholders was licit under the terms of section .358.¹²¹

The third and final evolutionary stage of the ACC position on accounting practices and procedures was attained during the pre-effective period. Three amendments revised the language of subsections (c) and (d), and added subsections (e) and (f).¹²² Their net effect replaces insistence upon the use of GAAP with a requirement that financial determinations and statements be made according to practices and principles fair and reasonable in the circumstances. Directors and officers are given clear warning as to the consequence of homemade accounting strategies. Moreover, management will find a safe harbor in the use of GAAP. Under subsection (f) they are per se fair and reasonable. The fair and reasonable quality of statements or determinations prepared or arrived at under other practices and principles shall, in the event they are challenged, be proved by the corporation.¹²³

119. ALASKA STAT. § 10.06.970(5) (1989).

120. 1988 Alaska Sess. Laws ch. 166, § 1.

121. *Id.*

122. 1989 Alaska Sess. Laws ch. 82, §§ 12, 13, 14.

123. ALASKA STAT. § 10.06.358(f) (1989). In its final evolved form, section .358 provides:

(a) A corporation or a subsidiary of the corporation may not make a distribution to the corporation's shareholders, as defined in [Alaska Statutes section] 10.06.990(17), unless

(1) the amount of the retained earnings of the corporation immediately before the distribution equals or exceeds the amount of the proposed distribution; or

(2) immediately after giving effect to the distribution the
(A) sum of the assets of the corporation, exclusive of goodwill, capitalized research and development expenses, evidences of debts owing from directors or officers or secured by the corporation's own shares, and deferred charges, would be at least equal to one and one-fourth

(4) *The protection of senior shares.* Section .365 applies only to corporations with more than one class or series of shares outstanding, one of which has a dividend preference. In such circumstances the corporation may not make a distribution to the holders of the junior shares unless it can be charged against retained earnings which, immediately prior to the proposed distribution, equal or exceed the amount of the distribution plus the aggregate amount of the cumulative dividends in arrears on the senior shares.¹²⁴ Ironically, the new code affords greater discretion to the board than was permitted under the former act. Section .365 merely requires that the post-distribution amount of corporate retained earnings equal or exceed the amount by which any dividend owed to senior shares is in arrears. Under the

times its liabilities, not including deferred taxes, deferred income, and other deferred credits; and

(B) current assets of the corporation would be at least equal to its current liabilities or, if the average of the earnings of the corporation before taxes on income and before interest expenses for the two preceding fiscal years was less than the average of the interest expense of the corporation for those fiscal years, at least equal to one and one-fourth its current liabilities.

(b) For purposes of this section,

(1) in determining the amount of the assets of the corporation, profits derived from an exchange of assets may not be included unless the assets received are currently realizable in cash;

(2) "current assets" may include net amounts that the board has determined in good faith may reasonably be expected to be received from customers during the 12-month period used in calculating current liabilities under existing contractual relationships obligating the customers to make fixed or periodic payments during the term of the contracts after in each case giving effect to future costs not then included in current liabilities but reasonably expected to be incurred by the corporation in performing the contracts.

(c) For the purposes of this chapter, the amount of a distribution payable in property shall be determined on the basis of the value at which the property is carried on the corporation's financial statements in accordance with this section.

(d) Only a corporation that classifies its assets as current assets and fixed assets in accordance with this section is governed by (a)(2)(B) of this section.

(e) For the purposes of this section, the board of directors may base a determination that a distribution is not prohibited either on financial statements prepared in accordance with generally accepted accounting principles or on the basis of accounting practices and principles that are fair and reasonable in the circumstances.

(f) Financial statements and determinations prepared or arrived at in accordance with generally accepted accounting principles are fair and reasonable. The fair and reasonable quality of statements and determinations prepared under other practices and principles shall be proved by the corporation.

Id. § 10.06.358.

124. *Id.* § 10.06.365.

former act, such dividends had to be fully paid to the holders of the senior shares before any distribution could be made to the holders of a junior class or series.¹²⁵

It should be noted that nothing in the ACC directly protects the dissolution preference of any class or series of shares from being imperiled by a distribution to the common shares. A measure of protection is derived from the requirement that if the distribution cannot be charged to retained earnings, then it cannot be made unless the total assets of the corporation exceed its total liabilities by a ratio of 1.25 to 1. By contrast, section 6.40(c)(2) of the RMBCA directly guards the dissolution preference of any class or series of shares.¹²⁶

125. ALASKA STAT. § 10.05.207(3) (1957) (repealed 1988) ("A distribution may not be made to the holders of a class of shares unless all cumulative dividends accrued on all preferred or special classes of shares entitled to preferential dividends have been fully paid.").

By contrast, section .365 would appear to remit holders of senior shares to a contract claim if the board refuses to pay a dividend notwithstanding the presence of adequate retained earnings. It does not appear that the Alaska Supreme Court has ever been asked to pass upon such a claim. On the day it does, it will find precedent in other jurisdictions which, from the investor perspective, is not promising. There is widespread agreement that as between the corporation and a class or series of preferred shares the rights of the investors are essentially contractual in nature. Unless the share indenture clearly mandates payment of a preferred dividend whenever such a step is licit under the controlling statute, the holders of such securities will learn a bitter lesson.

When a man buys stock instead of bonds he takes a greater risk in the business. No one suggests that he has a right to dividends if there are no net earnings. But the investment presupposes that the business is to go on, and therefore even if there are net earnings, the holder of stock, preferred as well as common, is entitled to have a dividend declared only out of such part of them as can be applied to dividends consistently with a wise administration of a going concern.

Wabash Ry. Co. v. Barclay, 280 U.S. 197, 203-04 (1930). Attempts by the holders of preferred shares to compel the declaration and payment of a dividend are doomed absent a showing that the refusal of the board is a fraud or gross abuse of discretion. *Baron v. Allied Artists Pictures Corp.*, 337 A.2d 653, 658-59 (Del. Ch. 1975). The point is extensively discussed in *Burton v. Exxon Corp.*, 583 F. Supp. 405, 418-19 (S.D.N.Y. 1984). Most recently, Delaware law has been reviewed and restated in *Jedwab v. MGM Grand Hotels*, 509 A.2d 584, 593-94 (Del. Ch. 1986).

126. REV. MODEL BUSINESS CORP. ACT § 6.40(c)(2) (1985). If the corporation has such a class or series outstanding, the balance sheet insolvency test is augmented by requiring that the total assets be at least equal to the total liabilities of the corporation plus the amount that would be needed, if the corporation were to dissolve at the time of the dissolution, to satisfy the preferential rights upon dissolution of the senior shares. *Id.*

Ironically, the RMBCA totally abandons any protection of the dividend preference of senior shares. Under the terms of section 46(c) of the Model Act, no dividends could be paid out of capital surplus unless all cumulative dividends accrued on all preferred or special classes of stock and had been paid in full. MODEL BUSINESS CORP. ACT ANN. 938 (1971).

III. SECONDARY LIABILITY FOR OFFICERS AND DIRECTORS: THE CRITICAL OMISSION FROM THE ACC

Nearly one hundred years ago, Sir Mackenzie Chalmers issued a warning to those who would codify any area of the law. His message can be reduced to four words: never try anything new. Violation of that norm, Chalmers warned, is certain to result in every clause of the proposed code being "looked at askance, and it is sure to encounter opposition."¹²⁷ Chalmers was right. As they contemplated the opportunity to rethink the social contract implicit in a corporations code, the commissioners sought a modest reform of a recurrent failure of the legal system. The selected target was the plight of small creditors who lack any pragmatic means of protecting themselves against an abuse of the norm of limited liability. The suggested solution took the form of section .488 of the exposure draft. Its retention in the legislation introduced in the Twelfth and Thirteenth Legislatures proved an insurmountable obstacle to favorable consideration. Its removal produced an atmosphere of constructive criticism and cooperation that eventually resulted in passage of the new code. In the relative quiet of hindsight, a brief summary of the debate may prove instructive. To the extent that the Commission was correct in its belief that there is an

127. Burdick, *A Revival of Codification*, 10 COLUM. L. REV. 118, 120 (1910) (quoting Judge Chalmers). Chalmers' admonitions and strategies crossed the Atlantic in 1910:

Judge Chalmers tells us that the idea of codifying the law of negotiable instruments was first suggested by the Digest of the Law of Evidence; and he ascribes the success of his Bill to the

wise lines laid down by Lord Herschell, who insisted that the Bill should be introduced in a form which did nothing more than codify existing law, and that all amendments should be left to Parliament. A Bill," he adds, "which merely improves the form, without altering the substance, of the law creates no opposition, and gives very little room for controversy. . . . I am sure that further codifying measures can be got through Parliament, if those in charge of them will not attempt too much, but will be content to follow the lines laid down by Lord Herschell. Let a codifying Bill in the first instance simply reproduce existing law, however defective. If the defects are patent and glaring it will be easy to get them amended. If an amendment be opposed, it can be dropped without sacrificing the Bill. The form of the law at any rate is improved, and its substance can always be amended by subsequent legislation. If a Bill when introduced proposes to effect changes in the law, every clause is looked at askance, and it is sure to encounter opposition.

Id.

Lord Herschell, the individual quoted by Chalmers, was a distinguished Victorian parliamentarian who served in the House of Commons and later, after a brief stint as Lord Chancellor, in the House of Lords. His career had an indirect bearing on Alaska. Toward the end of his distinguished public service, he represented Great Britain in the disputes between Canada and the United States over fishing rights and boundaries.

unaddressed social problem, the answer must still be sought. To those who may be contemplating recodification of corporate codes in other jurisdictions, the history of the rise and fall of section .488 may prove a useful footnote to the Chalmers admonition.

A. Limiting Limited Liability: A Common Law Perspective

No English-speaking jurisdiction regards the concept of limited liability for the equitable owners of a corporation as inviolate.¹²⁸ The real issues are when, where, and under what circumstances the law will look beyond the insufficient assets of a corporate debtor or tortfeasor to impose broader liability. Unfortunately, some of the sternest formulations of this possibility have been the least precise in predicting its appropriate application. In what is perhaps the most frequently cited general formulation an impatient federal district judge declared:

A corporation, from one point of view, may be considered an entity, without regard to its shareholders, yet the fact remains self-evident that it is not in reality a person or thing distinct from its [constituent] parts. The word corporation is but a collective name for the members who compose the association. If any general rule can be laid down, in the present state of authority, it is that a corporation will be looked upon as a legal entity as a general rule, and until sufficient reason to the contrary appears; but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons. . . .¹²⁹

Twenty years later, Judge Cardozo surveyed briefs trading such labels as "alias," "dummy," and "agent" and declared the issue to be lost in "the mists of metaphor."¹³⁰ The subsequent contribution of terms such as "instrumentality" and "alter ego" has done little to clarify the matter. Appropriately, even the exercise which the language is designed to predict is shrouded in euphemism. Courts speak of whether or not to "pierce the corporate veil."

Seeking to do better, one set of casebook editors recently advanced the following thesis:

[T]here are a variety of factors that may lead a court to impose liability on a shareholder for the obligations of the corporation.

128. There is abundant classical literature. F. POWELL, *PARENT AND SUBSIDIARY CORPORATIONS* (1933); I. WORMSER, *THE DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS* (1927); Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12 (1925); Latty, *The Corporate Entity as a Solvent of Legal Problems*, 34 MICH. L. REV. 597 (1936); Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932).

129. *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255 (C.C.E.D. Wis. 1905) (Sandborn, D.J.) (citations omitted).

130. *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

They fall generally into two classes: (1) insufficient attention to corporate formalities and (2) "abuse" of the corporate entity by pushing its advantages to extremes. A third category, perhaps best exemplified in California, is to determine whether the corporation is "undercapitalized."¹³¹

Two other sets of factors appear to influence the outcome of any particular case: the identity of the plaintiff and the nature of the relief sought. Tort victims may succeed where a contract claimant will fail. The obvious factor is the inability of the former to have bargained for a liability beyond the assets of the corporate tortfeasor.¹³² Courts appear relatively comfortable in granting "enterprise reorganization" wherein a parent is held answerable for the debts of a corporate subsidiary or the assets of corporate siblings are exposed to liability.¹³³ It is quite another matter to expose the personal assets of individual shareholders to claims generated against the corporation.¹³⁴ When this is done, efforts are made to distinguish between active shareholders who controlled the entity, as opposed to those who were merely passive investors.¹³⁵

It was not until the mid-1970s that such questions began to trouble the Alaska Supreme Court. The early results were not promising from the vantage point of the plaintiffs' bar.

The court's first encounter with a bid to "pierce the corporate veil" was brought by a tort victim, a plaintiff most likely to succeed, seeking enterprise reorganization only, the prayer for relief most likely to be granted. The plaintiff lost. In *Jackson v. General Electric Co.*,

131. L. SOLOMON, D. SCHWARTZ & J. BAUMAN, CORPORATIONS LAW AND POLICY 241 (2d ed. 1988).

132. *Weisser v. Mursam Shoe Corp.*, 127 F.2d 344, 347 n.6 (2d Cir. 1942).

In a different context Learned Hand captured the essence of the objection to using legal doctrine to assist contract claimants who bypassed opportunities for self-protection. "[I]n commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves." *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933). Of course Hand's position is dependent upon the assumption that there was a meaningful opportunity to bargain over the risk which has now befallen the party seeking judicial relief. If the economics of the exchange or the circumstances of the marketplace preclude such an opportunity the plea for legal redress is made by a victim rather than a fool.

133. *Walkovsky v. Carlton*, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966). In *Walkovsky* the majority concluded that the plaintiff tort victim had not stated a claim against the sole shareholder even though the court assumed the sufficiency of the complaint seeking enterprise reorganization. See also P. BLUMBERG, THE LAW OF CORPORATE GROUPS (1987); Landers, *A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy*, 42 U. CHI. L. REV. 589 (1975).

134. *Walkovsky*, 18 N.Y.2d 414, 223 N.E.2d 6, 276 N.Y.S.2d 585 (1966).

135. Even California, which may be the most aggressive jurisdiction in seeking to impose liability on the owners of thinly capitalized corporations which inflict tort injuries, seeks to exempt passive investors. See *Minton v. Cavaney*, 56 Cal.2d 576, 579-80, 15 Cal. Rptr. 641, 643, 364 P.2d 473, 475 (1961) (collecting authorities).

the court refused to hold a parent liable for an intentional tort committed by a subsidiary.¹³⁶

There are a number of well-recognized exceptions to the rule that ordinarily the parent corporation will not be held liable for the wrongs of its wholly-owned subsidiary. For instance a parent corporation may be held liable for its subsidiary's conduct when the parent uses a separate corporate form to defeat public convenience, justify wrong, commit fraud, or defend crime. The parent corporation may also be liable for the wrongful conduct of its subsidiary when the subsidiary is the mere instrumentality of the parent. Liability is imposed in such instances simply because the two corporations are so closely intertwined that they do not merit treatment as separate entities.¹³⁷

Although the court did not cite to it, its first ground — the “big wrong” — was lifted directly from Judge Sanborn's opinion in *United States v. Milwaukee Refrigerator Transit Co.*¹³⁸

The court was more explicit in its attitude toward the instrumentality theory and in providing guidance to the trial courts. It expressly adopted as its own a test devised by Professor Frederick Powell evaluating eleven criteria to determine whether a subsidiary was to be properly regarded as a “mere instrumentality of its parent.”¹³⁹

136. *Jackson v. General Elec. Co.*, 514 P.2d 1170, 1173-74 (Alaska 1973).

137. *Id.* at 1172-73 (footnotes omitted). The court noted that apart from these doctrines another road to the parent's liability was to demonstrate that the subsidiary acted in an agency capacity for the principal parent. The court pointed out that such a result had nothing to do with “veil-piercing” since under classical agency concepts a principal is liable for the torts of its agent. *Id.* at 1173 n.8.

138. *United States v. Milwaukee Refrigerator Transit Co.*, 142 Fed. 247, 255 (C.C.E.D. Wis. 1905). The immediate language adopted in *Jackson* was from *Steven v. Roscoe Turner Aeronautical Corp.* *Jackson*, 514 P.2d at 1173 n.7 (citing *Steven*, 324 F.2d 157, 169 (7th Cir. 1963)). Nor did the court give a label to its first theory. I have appended the “big wrong” to impart the view that the plaintiff's success was dependent upon demonstrating some significant transgression by the defendant in the use of the corporate creature.

139. *Jackson*, 514 P.2d at 1173. The eleven criteria were:

- (a) The parent corporation owns all or most of the capital stock of the subsidiary.
- (b) The parent and subsidiary corporations have common directors or officers.
- (c) The parent corporation finances the subsidiary.
- (d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.
- (e) The subsidiary has grossly inadequate capital.
- (f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.
- (g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.
- (h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent

The court first addressed the issue in the context of a contract claimant in 1978. In *Shepherd v. Bering Sea Originals*,¹⁴⁰ a secured creditor of a bankrupt corporation complained that the proceeds from a life insurance policy on the corporation's former president should have been applied to reduce the amount owed to a senior creditor rather than being used for the benefit of the corporation's sole shareholder, the president's widow. In seeking that shareholder's personal liability, the complaint alleged both undercapitalization and a failure on the part of the defendant to observe a distinction between her personal affairs and corporate business.

In effect, Ms. Shepherd asks us to disregard the distinction between the corporation and the sole shareholder and consider the insurance benefits paid to Ms. Chase as though they belonged to the corporation. There are many decisions in which courts have pierced the "veil of corporate fiction" and have held stockholders personally liable for corporate obligations. As required in the interests of justice, corporate assets have been regarded as assets of an individual, and an individual's assets have been held to inure to the benefit of a corporation. Generally speaking, such decisions have been based on the requirements of justice or to prevent fraud, bad faith or other wrong. Where the stockholders have themselves disregarded the corporate entity, the courts will sometimes do the same. Ms. Shepherd bases her attack on the contention that the corporation was

corporation, or its business or financial responsibility is referred to as the parent corporation's own.

- (i) The parent corporation uses the property of the subsidiary as its own.
- (j) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.
- (k) The formal legal requirements of the subsidiary are not observed.

Id.

Four years after *Jackson* was decided tort victims failed to gain the liability of controlling shareholders sought on the "alter ego" theory. In *Elliott v. Brown*, two employees sued their corporate employer and supervisor to recover for injuries sustained when they were assaulted by the supervisor. The supervisor happened to own 50% of the stock of Paxson Lodge, Inc., and was in daily control of its activities. The plaintiffs sought to go beyond a workmen's compensation award to reach personal assets of stockholders. The court concluded that workmen's compensation was not an exclusive remedy. Indeed, it suggested a direct tort claim against the bellicose supervisor. But it saw no occasion to disregard the limited liability presumptively raised by the presence of the corporation.

Whatever these facts might suggest concerning Brown's control of the corporation, they do not present a contested issue of fact concerning the application of the alter ego doctrine. This doctrine requires considerably more than mere control; it exists to prevent a party from an advantage through deceptive or manipulative conduct.

569 P.2d 1323, 1326 (Alaska 1977).

140. 578 P.2d 587 (Alaska 1978).

inadequately capitalized and the further fact that the distinction between the corporation and Ms. Chase was not maintained with reference to the insurance policies in question.¹⁴¹

The court reversed a grant of the defendant's motion for summary judgment and remanded the cause for trial. The claim of thin capitalization was dismissed on grounds that the plaintiff had participated in the formation of the entity. The trial was to focus upon the manner in which the sole shareholder had comported herself in distinguishing personal from corporate matters.

In 1982, less than two months after the Commission secured the introduction of its proposed code with its provision for secondary liability, the court decided *Uchitel Co. v. Telephone Co.*¹⁴² The telephone company commenced a claim seeking loss of bargain damages for breach of a contract to fabricate and install a custom business telephone system. The contract was in the form of a lease with an option to purchase the equipment. The plaintiff named as defendants the corporate purchaser, Visions, Ltd., Uchitel Co., and Robert Uchitell. Robert Uchitel was the part owner and chief executive officer of Visions, and the sole owner of Uchitel Co. It was conceded that he had negotiated the contract with the telephone company and had the dominant role in the daily running of Visions. The trial court granted a judgment against all three defendants.

On appeal, the Alaska Supreme Court affirmed the exposure of Uchitel Co.¹⁴³ However, the judgment as to the personal liability of Robert Uchitel was reversed. The court found no evidence that Robert Uchitel had ever represented to the telephone company that he would be personally liable. Thus his personal assets could be attacked only if the corporate existence of Visions were disregarded and Uchitel were reached as a controlling shareholder.¹⁴⁴ Citing *Elliott v. Brown*,¹⁴⁵ the court asserted that proof of control standing alone was an insufficient predicate. "[T]he veil may be pierced only if the corporate form is used 'to defeat public convenience, justify wrong, commit fraud, or defend crime.'"¹⁴⁶ The court then acknowledged that in *Jackson* an alternative rationale, the instrumentality theory, had been established. While that analysis had been developed in the context of

141. *Id.* at 590.

142. 646 P.2d 229 (Alaska 1982).

143. *Id.* at 233. While neither a parent nor subsidiary of Visions, Ltd., the lease and option agreement had both featured Uchitel Co. as an apparent party. It was also admitted that much of the equipment was to be housed in Uchitel Co.'s offices.

144. *Id.* at 234.

145. 569 P.2d 1323, 1326 (Alaska 1977).

146. *Uchitel*, 646 P.2d at 234 (quoting *Elliott*, 569 P.2d at 1326 (quoting *Jackson*, 514 P.2d at 1172-73)).

the parent-subsidary, it could be reformulated as a "quantitative approach" in determining liability in a shareholder-corporation setting.

In adapting the quantitative approach from the parent-subsidary cases to the individual shareholder-corporation context the following factors should be considered: (a) whether the shareholder sought to be charged owns all or most of the stock of the corporation; (b) whether the shareholder has subscribed to all of the capital stock of the corporation or otherwise caused its incorporation; (c) whether the corporation has grossly inadequate capital; (d) whether the shareholder uses the property of the corporation as his own; (e) whether the directors or executives of the corporation act independently in the interest of the corporation or simply take their orders from the shareholder in the latter's interest; (f) whether the formal legal requirements of the corporation are observed.¹⁴⁷

Finding that none of these elements suggested the personal liability of Robert Uchitel, the court reversed the judgment.¹⁴⁸

Once again the defendant prevailed and the corporate integrity was a barrier to shareholder liability. But the supreme irony was that with the plaintiff's defeat in *Uchitel*, coupled with the court's express recollection of its initial position in *Jackson*, the seeds of future plaintiff victories had flowered. In *Uchitel*, after spending nearly a decade pondering an ill-defined area of the law, the court found terminology and criteria with which it was comfortable. It preferred the "quantitative approach" in determining enterprise reorganization or the personal liability of individual shareholders. The criteria differed, but each instance featured an inquiry into the adequacy of capitalization, the existence or non-existence of an independent economic identity of the entity, and the observance of both formal and functional aspects of a corporate identity.

Uchitel was decided on June 18, 1982. Its impact was almost immediate. On August 6, 1982, the court handed down its decision in *Eagle Air, Inc. v. Corroon and Black/Dawson & Co.*¹⁴⁹ Corroon, the plaintiff, brought contract claims totalling nearly \$300,000 for insurance premiums which his company had advanced on open account. The immediate corporate debtor, Eagle Air, Inc., was an Alaska corporation acquired in 1975 as the northern tip of a corporate iceberg controlled by Stanley Taggares in his capacity as president and owner of 998 of the 1000 shares in Taggares Helicopters, Inc. Taggares Helicopters was a Washington corporation which at one time pursued an aviation career but had receded to the status of a holding company. The picture was completed with the formation of Taggares Leasing, Inc., an Oregon corporation formed for tax purposes.

147. *Id.* at 235 (citing *Jackson*, 514 P.2d at 1173).

148. *Id.*

149. 648 P.2d 1000 (Alaska 1982).

Plaintiff had a history of business dealings with Eagle Air prior to its acquisition by Taggares Helicopters. He functioned as the insurance broker obtaining insurance coverage and then billing Eagle Air for the premiums. In the meantime he fronted the premium amounts to the carriers. Within less than a year of the sale to Taggares, Eagle Air had run up an open account balance of nearly \$200,000. Stanley Taggares eventually executed a promissory note covering this debt in his capacity as president of Eagle Air and Taggares Leasing. He specifically refused to execute the note in his individual capacity. After making a few installment payments, the makers defaulted on the note, but not before Eagle had managed to run up an additional tab of more than \$113,000 with Corroon's agency.

The plaintiff commenced an action for the unpaid balance on the note and the open account. His complaint sought to go beyond the assets of Eagle Air to claim the funds of Taggares Helicopters, Taggares Leasing, Stanley Taggares, and his marital estate. The trial judge found that Stanley Taggares had drained off the assets of Eagle Air and Taggares Leasing through what the court described as "complex financial transactions."¹⁵⁰ It also found that Eagle and the other Taggares corporations were mere instrumentalities of Stanley Taggares. Accordingly, it judged each of the defendants jointly and severally liable for the full amount of the note and account balance.

On appeal, Stanley Taggares contended that there had been no proof of anything beyond his "control" of the corporate entities, a factor which under prior Alaska decisions had been deemed insufficient to warrant disregard of shareholder limited liability. His great misfortune was to raise this contention in the immediate wake of the court's identification of its "quantitative approach."¹⁵¹ The Alaska Supreme Court noted that the trial judge had correctly applied the eleven criteria in his quantitative approach to the parent-subsidiary issues, and had correctly used the six criteria enunciated in *Uchitel* to determine the issue of shareholder liability. Justice Connor was forced to acknowledge that there were Alaska cases which had "relegated the 'quantitative' approach to secondary importance" in favor of a test which sought evidence of the use of a corporate entity "to defeat public convenience, justify wrong, commit fraud, or defend crime."¹⁵² To the extent that these cases still mattered, the court deemed the finding of draining off the assets of Eagle Air a sufficient wrong.¹⁵³ The "big wrong" was being deflated.

150. *Id.* at 1004.

151. *Id.* at 1003-04.

152. *Id.* at 1004 (quoting *General Constr. Co. v. Tyonek Timber, Inc.*, 629 P.2d 981, 983 (Alaska 1981)).

153. *Id.* at 1005.

Less than a year after the decision in *Eagle Air* the court noted in *McKibben v. Mohawk Oil Co.*¹⁵⁴ that in order to impose liability on a corporate parent under the quantitative approach it was not necessary that each of the eleven criteria be satisfied.¹⁵⁵ Chief Justice Burke noted that in Alaska a plaintiff could choose between two instrumentality theories: proof that the defendant had used the corporate entity to “defeat public convenience, justify wrong, commit fraud, or defend crime,” or the quantitative approach which disregarded the corporate existence “simply because the two corporations are so closely intertwined that they do not merit treatment as separate entities.”¹⁵⁶ It surely came as no surprise to the court that the plaintiff asserted its bid under the quantitative approach.

In 1987, the court moved to make the increasingly-abandoned “proof of serious wrong” alternative more attractive.¹⁵⁷ Employees of a resort hotel sued their corporate employer and its sole shareholder. Their claim was for back wages and refusal to pay a promised bonus. Since the plaintiffs had not satisfied the express condition precedent to the bonus obligation, they sought damages on a theory that the defendant had breached an implied covenant of good faith and fair dealing. The trial court awarded the disputed sums and pierced the corporate veil of Klondike Industries Corporation so as to reach the assets of Wiley Beaux, the sole shareholder. On appeal, the court reversed that aspect of the judgment which pertained to the alleged breach of the covenant of good faith dealing. It affirmed the disregard of the corporate existence of Klondike Industries and the imposition of personal liability on Wiley Beaux. It noted that prior Alaska precedent sanctioned such liability if a shareholder had used a corporation “to defeat public convenience, justify wrong, commit fraud, or defend crime.”¹⁵⁸ It now held that proof that Beaux had transferred operating funds into and out of Klondike in circumstances which made the plaintiffs monthly salaries “occasionally unavailable [amounted to] prejudice . . . sufficient to uphold the trial court’s decision to pierce the corporate veil.”¹⁵⁹ The “big” had gone out of the “wrong.”

B. Section .488: Secondary Liability for Directors and Officers

From *Jackson* to *Klondike Industries*, neither the terms nor the goals of section .488 were directly implicated. And yet each of the

154. 667 P.2d 1223 (Alaska 1983).

155. *Id.* at 1230.

156. *Id.* at 1229-30 (quoting *Jackson v. General Elec. Co.*, 514 P.2d 1170, 1173 (Alaska 1973)).

157. *Klondike Indus. Corp. v. Gibson*, 741 P.2d 1161 (Alaska 1987).

158. *Id.* at 1171 (quoting *Eagle Air, Inc. v. Corroon and Black/Dawson & Co.*, 648 P.2d 1000, 1004-05 (Alaska 1982)).

159. *Id.* at 1171-72.

failed corporate entities almost certainly left unpaid employees, materialmen, and suppliers for whom the court's evolving attitudes on the "big wrong" versus the "quantitative approach" were academic, because their claims were not for hundreds of thousands but for hundreds or a few thousand dollars. The costs of litigation placed the exercise of veil piercing beyond their means. If the commissioners needed "text" from which to call for the redress of this situation, they could not have improved on the words of a trial judge who had spoken years earlier on the social costs of an allied problem:

The steady recurrence of conditional sales problems, while not involving in any instance a large sum, is of seeming importance in that they constantly touch many lives, causing some financial hardship; but, beyond the money loss, their judicial treatment in some instances has left a vivid sense of injustice lingering with the lowly, who, for the most part, are not capable of subtle legalistic analysis.¹⁶⁰

In the view of the commissioners, the plight of small creditors of corporations was worse. The barrier they faced was created by the state. Without the positive provision of law, no person enjoys "limited liability." Further, their grievance was not with the tone of their judicial treatment. It was a cost structure which placed the judiciary beyond their reach.

On March 24, 1982, Senate Bill 873 was introduced in the Second Session of the Twelfth Legislature. It contained the following provision:

Sec. .488. SECONDARY LIABILITY OF DIRECTORS AND OFFICERS.

(a) Except as exempted in (b) of this section and limited in (c) of this section, incorporators, directors, other than a provisional director appointed under [Alaska Statutes section] 10.06.640, or individuals exercising the authority of directors as permitted in [Alaska Statutes section] 10.06.450(a), and the president, secretary and treasurer, or individuals performing the functions of these offices in a domestic or foreign corporation doing business in this state, are, to the extent that the assets of the corporate entity prove insufficient, jointly and severally liable for the contract indebtedness, whether formal or otherwise, for materials, supplies, inventory, or services furnished in the state during their period of service.

(b) The terms of a written contract between a corporation and a third party may modify or preclude the liability created by this section.

160. *Buffalo Indus. Bank v. DeMarzio*, 162 Misc. 742, 744, 296 N.Y.S. 783, 784 (N.Y. City Ct. (Buffalo) 1937), *rev'd on other grounds*, 6 N.Y.S.2d 568 (N.Y. Sup. Ct., Erie County 1937).

(c) Notwithstanding division by assignment or otherwise, the total secondary liability created by this section for the benefit of a creditor under (a) of this section may not exceed \$25,000 exclusive of costs of collection.

(d) A party against whom a claim is asserted under this section is entitled to contribution from other persons enumerated in (a) of this section.¹⁶¹

The idea of imposing secondary liability upon the directors and certain corporate officers is without precedent in corporate law. As indicated, it seeks to provide relief to a class of creditors who are beyond the pale of traditional common law restraints on limited liability. It is important to recognize that section .488 would not have mandated such liability. It could either be reduced or totally eliminated by the terms of any written contract between the corporate entity and the third party. Thus, the relief was in default of the corporate actors having taken steps to bargain over the matter. Further, the liability created by section .488 is identical to the one faced by every proprietor, partner, and joint venturer each day she steps into the marketplace. Indeed, such persons face no ceiling of \$25,000 per claimant, the original proposal in section .488.¹⁶²

If the imposition of secondary liability on certain officers and corporate directors is novel, imposing such liability on shareholders is not. In both New York and Wisconsin there literally has never been a day in which such liability has not existed in favor of employee claims for unpaid wages. In New York, the current statute imposes secondary liability upon the ten largest shareholders in any corporation not publicly trading its equity shares.¹⁶³ Wisconsin makes shareholders liable for an amount equal to the par value of their shares, or the consideration paid for shares without par value for all debts owed to employees of the corporation for services performed in the preceding six months.¹⁶⁴

161. S.B. 873, 12th Leg., 2d Sess. 64-65 (1982).

162. *Id.* at 65. In 1987, the Commission proposed reducing the ceiling on liability from \$25,000 to \$2,500 per creditor. The compromise won few converts. Legislative supporters of section .488 were disappointed at the prospect of reducing its pragmatic impact. Opponents continued to resist the idea that, absent some demonstration of "fault," directors and the designated corporate officers should have any liability at all.

163. N.Y. BUS. CORP. LAW § 630 (McKinney 1986). The liability is joint and several. *Sasso v. Gallucci* contains a discussion of the means employed to ascertain the identity of the ten largest shareholders. 112 Misc. 2d 865, 447 N.Y.S.2d 618 (N.Y. Sup. Ct., Nassau County 1982).

164. WIS. STAT. ANN. § 180.40(6) (West 1957 & Supp. 1989). See *Joncas v. Krueger*, 61 Wis. 2d 529, 213 N.W.2d 1 (1973). The Wisconsin Supreme Court has held that the liability is not limited by the necessity that the employee services have been performed within that state. *Clokus v. Hollister Min. Co.*, 92 Wis. 325, 66 N.W. 398

The initial proposal considered by the Commission would have followed the New York precedent while expanding it to include liability for claims of creditors for materials, supplies, inventory and services extended on open account. Such extenders of credit are traditionally unsecured in the marketplace, and the debt obligations are not reflected in formal written contracts. The idea was abandoned given the perception that shareholders who might drift into and out of the "top ten" might be individuals who had little pragmatic opportunity to discipline those in control of the corporation. Yet, it is clear that control lies with directors and officers. It was for that reason that they replaced shareholders in the formulation of section .488. Under the terms of section .488(b) liability would arise only for debts or obligations incurred during their tenure in office.¹⁶⁵

The liability which would have been created by section .488 could not be evaded by the expedient of seeking foreign incorporation of a business which would then operate in Alaska.¹⁶⁶

Tort claimants were excluded from section .488 on grounds that contingent fee arrangements would normally suffice to guarantee an audience in court.

IV. CONCLUSION

Lord Herschell was no foe of law reform conducted through legislation. He simply cautioned against the advisability of attempting its accomplishment in the context of codification. Aside from his tactical advice, he expressed optimism that if a defect is "patent and glaring it will be easy to get [the code] amended."¹⁶⁷ The ACC is now in place. In it much was accomplished. Ultimately the strengths and deficiencies in both the arguments over the need for reform, and the wisdom of the path indicated by section .488, are determinations for a future Alaska Legislature.

(1896). Nor is there any necessity that the employee first obtain an unsatisfied judgment against the corporate employer. *Sleeper v. Goodwin*, 67 Wis. 577, 31 N.W. 335 (1887).

165. S.B. 873, 12th Leg., 2d Sess. 65 (1982).

166. Under section .488(a) liability would have been imposed upon the president, secretary and treasurer of an Alaska or foreign corporation or upon individuals performing the functions of those offices in a foreign corporation.

167. *Burdick*, *supra* note 127.

APPENDIX

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
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ARTICLE 1. CORPORATE PURPOSES AND POWERS

.005	P	X				
	X					
.010	X	X				P
.015	P	P	P	P		X
.020		X				

ARTICLE 2. NAME AND SERVICE OF PROCESS

.105	X	X				X
.110	X	X				X
.115	X	X				X
.120	X	X				X
.125	X	X				X
.130	X	X				P
.135	X	X				X
.140	X	X				X
.145	X	X				X
.150	X	X				X
.160	X					
.165	X	X				X
.170	X	X				P
.175	X	X			ORE	X

ARTICLE 3. FORMATION OF CORPORATIONS

.205	X					
.208	X	X	X			
.210	X	X	X		DEL	
.213	X	X				
.215	X	X				
.218	X	X				P
.220	X	X				P
.223	X	X				X
.225			X		DEL	X
.228			X		DEL	P
.230			X			P
.233			X			

ARTICLE 4. CORPORATE FINANCE

.305	X	X	X			X
.308	X	X				X
.310	X	X				P
.313	X	X				P
.315	X	X				P

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.318	X	X				P
.320	X	X				P
.323	X	X				P
.325			X			P
.328	X	X				X
.330	X	X				X
.333	X	X				X
.335	X	X				X
.338	X	X				X
.340	X	X				X
.343		X				P
.345	X	X				P
.348	X	X				P
.349						X
.350	X	X				P
.355	X	X				X
.356						X
.358			X			P
.360			X			P
.363			X			P
.365			X			P
.368			X			
.370			X			
.373	X	X				
.375	X					X
.380			X			
.383			X			
.385			X			P
.388			X			X
.390	X					

ARTICLE 5. MEETINGS OF SHAREHOLDERS

.405		X	P			P
.408		P				X
.410	X	X				X
.413	X	X				X
.415	X	X	P			X
.418			X			X
.420		X	P			P
.421						X
.423	X	X	P			P
.424						X
.425	X	X	P			P
.428		X				

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.430	X	X				P
.433			X			P
.435		P		P		P
.438	X	X				X
ARTICLE 6. DIRECTORS AND OFFICERS						
.450		X				P
.453				P		P
.455		X				
.458			X			
.460			X			P
.463			X			X
.465			X			P
.468		X				X
.470			X			X
.473	X	X				X
.475	X	X				X
.478			X			X
.480	X	X				X
.483			X	X		X
.485		X	X			
.490	X	X				
ARTICLE 7. AMENDMENTS AND CHANGES						
.502	X	X	X			X
.504	X	X	X			P
.506	X	X				P
.508			X			X
.510	X					
.512	X					X
.514	X	X				P
.516	X					P
.518	X					P
.520	X					P
.522		X				X
.524		X				X
.526		X				X
ARTICLE 8. ORGANIC CHANGE						
.530	X	X				X
.532	X	X				X
.534	X	X				
.536	X	X				X
.538	X	X				X

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.540	X	X				X
.542			X			
.544		X				P
.546	X	X				X
.548	X	X				X
.550		X				X
.552	X	X				X
.554		X				X
.556		X				X
.558		X				X
.560		X				P
.562		X				X
.564	X					
.566		X				X
.568		X				P
.570	X	X				P
.572	X	X				P
.574	X	X				P
.576		X				X
.578		X				P
.580	X	X				P
.582		X				P
.584			X			P
.586	X	X				
ARTICLE 9. DISSOLUTION						
.605	X		X			P
.608	X	X	X			X
.610	X	X	X			P
.613	X	X				P
.615			X			X
.618	X	X	X			P
.620			X			
.623	X	X				
.625	X	X				
.628			X			P
.630			X			
.633	X	X				P
.635	X				ORE	X
.638	X	X				
.640			X			P
.643	X	X	X			
.645			X			
.648			X			X

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.650			X			P
.653			X			X
.655			X			
.658	X	X				P
.660			X			
.663			X			
.665			X			
.668			X			
.670			X			
.673			X			X
.675			X			X
.678	X	X				

ARTICLE 10. FOREIGN CORPORATIONS

.705	X	X				X
.708	X	X				X
.710	X	X				X
.713	X	X				X
.715	X					X
.718	X	X				X
.720	X	X				X
.723	X	X				X
.725	X	X				X
.728	X	X				X
.730	X	X				X
.733	X	X				X
.735	X	X				X
.738	X	X				P
.740	X	X				X
.743	X	X				P
.745	X	X				X
.748	X	X				X
.750	X	X				X
.753	X	X				X
.758	X	X				X
.760	X	X				X
.763	X	X				P
.768	X	X				
.770	X	X				
.773	X	X				
.775	X	X				
.778	X	X				X
.780	X	X				P
.783	X	X				

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.785	X	X				X
.788	X	X				X
ARTICLE 11. REPORTS, FEES, AND PENALTIES						
.805	X	X				P
.808	X	X				P
.811	X	X				X
.813	X					
.815	X	X				
.818	X	X				
.820	X	X				
.823	X	X				P
.825	X	X				P
.828	X	X				P
.830	X	X				P
.833	X	X				P
.835	X	X				P
.838	X	X				P
.840	X	X				P
.843	X	X				P
.850	X	X				
.853	X	X				
.855	X	X				
.858	X	X				
.860	X					
.683	X	X				X
.865	X					
.868	X	X				P
ARTICLE 12. MISCELLANEOUS PROVISIONS						
.905			X			
.910	P					X
.915	X	X				P
.920				X		X
.925	P	P		P		P
.930				X		
.935	X	X				X
ARTICLE 13. GENERAL PROVISIONS						
.950	X	X	X			
.953	X					
.955			P	P		X
.958			X			
.960	X					

ACC	ABCA	MBCA	CGCL	NYBCL	OTHER	RMBCA
.963				X		X
.965	X	X		P		X
.968			X			
.970			X			
.990	P	P	P			P
.995	P					P

“X” indicates the presence of identical or functionally identical statutory language.

“P” indicates the presence of partial congruence between the ACC and the source code or the RMBCA. The “origin” and “comparison” discussion for each section of the ACC should be consulted in order to determine the differences.

ACC: The Alaska Corporations Code, Alaska Statutes 10.06

ABCA: The Alaska Business Corporations act, former Alaska Statutes 10.05

MBCA: Model Business Corporations Act

CGCL: California General Corporations Law

NYBCL: New York Business Corporations Law

RMBCA: Revised Model Business Corporations Act

