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An Appraisal of "Fair Value" in the Revised Corporate Appraisal Statute Section 1.01

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AN APPRAISAL OF "FAIR VALUE" IN THE REVISED CORPORATE APPRAISAL STATUTE SECTION 1.01

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"I conceive that great part of the miseries of mankind are brought upon them by the false estimates they have made of the value of things . . . ."[1]

I. INTRODUCTION

The Florida Legislature extensively amended the provisions of the Florida Business Corporation Act ("FBCA") dealing with rights of appraisal first in 2003,[2] then again in 2004,[3] and 2005.[4] The FBCA adopts, verbatim, the

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1. Benjamin Franklin, *The Whistle*, *in* THE OXFORD BOOK OF AMERICAN ESSAYS 4, 6 (Brander Matthews ed., 1914) (emphasis added).

2. Act effective Oct. 1, 2003, ch. 2003-283, §§ 21-44, 2003 Fla. Laws 2902, 2914–31.

language of the Revised Model Business Corporation Act ("RMBCA") amendments with certain significant exceptions. The RMBCA amendments in 1998 made major changes to appraisal procedures and terminology.[5] For example, the RMBCA's new formulation does not use the term "dissenter" and requires shareholders to "perfect" their claim by sending a "certification" plus their stock certificates.[6]

The key distinction this article will address is that, whereas the RMBCA explicitly states that "fair value" shall be computed "without discounting for lack of marketability or minority status,"[7] the FBCA limits this language to apply only to a corporation with ten or fewer shareholders.[8]

This could create an inference that in appraisal proceedings involving corporations with more than ten shareholders, such discounts should apply. As amended in 2003, the Florida statute eliminated the language concerning discounting, breaking completely with the RMBCA model on this issue.[9] Additionally, in 2005, the FBCA included RMBCA's concept of denying discounts in appraisal proceedings, but only for corporations with ten or fewer shareholders.[10]

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3. Act effective June 24, 2004, ch. 2004-378, 2004 Fla. Laws 2881.

4. Act effective June 20, 2005, ch. 2005-267, 2005 Fla. Laws 2425.

5. *See* Committee on Corporate Laws, Section of Business Law, *Proposed Changes in the Model Business Corporation Act—Appraisal Rights*, 54 BUS. LAW. 209, 209 (1998).

6. *Id.* at 238–39.

7. MODEL BUS. CORP. ACT § 13.01(4)(iii) (2005).

8. FLA. STAT. § 607.1301(4)(c) (2005).

9. Act Effective Oct. 1, 2003, ch. 2003-283, § 21, 2003 Fla. Laws 2902, 2914-15 (amending FLA. STAT. § 607.1301).

10. MODEL BUS. CORP. ACT § 13.01(4)(iii) (2005); FLA. STAT. § 607.1301(4)(c) (2005). There was concern over the issue of appraisal rights by Florida Governor John Ellis "Jeb" Bush that the change proposed to eliminate minority discounts was designed to affect the outcome of a certain pending lawsuit. Letter from Jeb Bush, Governor, State of Florida, to Glenda E. Hood, Secretary of State, Florida Department of State (June 20, 2005), *available at* http://www.flabuslaw.org/index.php?//list.committees=4/1 (follow "Gov. Bush 6/20/05 Letter re SB 1056/HB 595" hyperlink under "Committee Documents") [hereinafter Bush Letter]. He was assured by State Represenative J. Dudley Goodlette that the legislation was not designed to do that, but rather, as Representative Goodlette wrote:

> I am comforted by the fact that provisions substantially like those amendments, derived from the Revised Model Business Corporation Act, had been unsuccessfully introduced in earlier legislative sessions and the Florida Bar's Business Section was only attempting to gain their passage this time around. In fact, I was one of the sponsors of that earlier legislation. Thus, I am assured that this was the sole motivation of the Florida Bar members involved in the drafting, analysis and editing of the amendments.

Letter from J. Dudley Goodlette, Representative, District 76, State of Florida, to Jeb Bush, Governor, State of Florida (June 17, 2005), *available at* http://floridataxlawyers.org/pdf/goodlette_SB1056HB595_business_entities.pdf [hereinafter Goodlette letter].

The official commentary to the RMBCA states that the statutory appraisal remedy for shareholders should be available:

> only when two conditions co-exist. First, the proposed corporate action as approved by the majority will result in a fundamental change in the shares to be affected by the action. Second, uncertainty concerning the fair value of the affected shares may cause reasonable persons to differ about the fairness of the terms of the corporate action.[11]

This means, generally, that the appraisal remedy is available in mergers, share exchanges, and dispositions of assets other than in the ordinary course of business.[12] Moreover, the new provisions reinstall a market exception for publicly traded companies.[13] Specifically, the new provisions deny appraisal rights in connection with any class of shares that is "[l]isted on the New York Stock Exchange [NYSE] or the American Stock Exchange [AMEX] or designated as a national market system security . . . by the National Association of Securities Dealers [Automated Quotations] [NASDAQ]," or that is held by 2000 or more shareholders and has a public float (number of shares that are outstanding) "of at least $10 million, exclusive of the value of such shares held by its subsidiaries, senior executives, directors, and beneficial

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11. MODEL BUS. CORP. ACT § 13.01 cmt. 1 (2005). Florida first adopted a modified version of the Model Business Corporation Act, former *Florida Statutes* Chapter 607, in 1975. FLA. STAT. ch. 607 (1975). Chapter 89-154, Laws of Florida, created the Florida Business Corporation Act, the current *Florida Statutes* Chapter 607. *See* FLA. STAT. ch. 607 (2005). This legislation, effective July 1990, revised, updated, and organized *Florida Statutes* Chapter 607. *Id.* It substantially followed the provisions of the Revised Model Business Corporation Act ("RMBCA") adopted by the American Bar Association in 1984. Chapter 607 was amended several times during the 1990s and early part of 2000. Specifically, Florida's dissenter's rights statute granted by *Florida Statutes* Chapter 607 was intended to protect shareholders against coercion, in majority-approved transactions that radically altered the nature of their investment in a corporation, by enabling them to dissent formally from certain fundamental corporate changes and demand payment from the corporation for the fair value of the shares. The then revised statute, which set forth what corporate actions gave rise to dissenter's rights, was based in part on existing *Florida Statutes*, and incorporated certain provisions of the RMBCA and the Georgia Business Corporation Code. Generally, the revised dissenter's rights statute filled the procedural gap left in the prior statute by providing procedures and time limits for both the corporation and the dissenting shareholder. If the dissenting shareholders fail to comply with the statutory requirements, their right to determine fair value of their shares terminates and they are bound by the corporate action. *See generally* Michael V. Mitrione, *Dissenters' Rights*, *in* FLORIDA CORPORATE PRACTICE § 11.1 (4th ed. 2002).

12. FLA. STAT. § 607.1302(1) (2005).

13. § 607.1302(2)(a).

shareholders owning more than 10 percent of such shares."[14] The reason is that with such liquidity the minority shareholders have a ready market for their shares.

II. FLORIDA'S RIGHT OF APPRAISAL

A Florida statute carving out corporations with ten or fewer shareholders does not make sense. There is likely no market for shares in a corporation with eleven, twenty, or fifty shareholders. The logical distinction is whether there is an established market for the shares to ensure liquidity. This is the distinction drawn by the RMBCA.[15] If there is a ready market, there is no need for the appraisal remedy; if there is not, there should be no minority or marketability discounts applied.

A. *Dissenter's Right Application*

Under Florida Law, the right to appraisal applies to the following types of corporate actions: first, the consummation of a merger or conversion requiring a shareholder vote;[16] second, upon disposition of assets requiring a shareholder vote with certain exceptions;[17] third, "[c]onsummation of a share exchange;"[18] fourth, amendment to the articles which reduces the shareholder's ownership interest to a fractional share;[19] fifth, upon certain amendments to the articles of incorporation merger and the like;[20] finally, with respect to a class of shares existing prior to October 1, 2003, which negatively affects the shareholder in specified ways.[21]

Under section 607.1302(1), shareholders who are entitled to vote on a corporate action—whether because such shareholders have general voting rights or because group voting provisions are triggered—are not entitled to appraisal if the change will not alter the terms of the class or series of securi-

14. *Id.* Note that the RMBCA uses a $20 million float. MODEL BUS. CORP. ACT § 13.02(b)(1)(ii) (2005). Delaware law contains a market exception that is quite similar to the 1998 amendments to the RMBCA except that Delaware law contains no float requirement. There are several important exceptions to the market exception under the RMBCA and the *Florida Statutes*. *See generally* FLA. STAT. § 607.1302(2)(c)-(d) (2005); Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127 (2001).

15. *See* MODEL BUS. CORP. ACT § 13.02 cmt. 2 (2005).

16. FLA. STAT. § 607.1302(1)(a) (2005).

17. § 607.1302(1)(c).

18. § 607.1302(1)(b).

19. § 607.1302(1)(d).

20. § 607.1302(1)(e).

21. § 607.1302(1)(f).

ties that they hold.[22] Thus, statutory appraisal rights are not available for shares of any class of the surviving corporation in a merger or any class of shares that is not included in a share exchange.

B. *General Considerations*

A voluntary dissolution will not trigger an appraisal remedy because such an action does not affect liquidation rights—the only rights that are relevant following a shareholder vote to dissolve. Moreover, the new provisions also eliminate appraisal in connection with amendments to the articles of incorporation, with some grandfathering.[23] Instead, the amended statute permits corporations to delineate a list of transactions for which the corporation may voluntarily choose to provide appraisal by permitting a provision in the articles of incorporation that eliminates, in whole or in part, statutory appraisal rights for preferred shares.[24]

Generally, the value of a corporation as a whole should be determined on the basis of what a willing purchaser, in an arms-length transaction, would pay for the entity as an operating business.[25] However, valuation should take into account all relevant "factors, such as market value, asset value, [going concern value and] future earning prospects . . . . After these factors have been [evaluated] . . . they should then be weighed as to their relative bearing upon the ultimate question of the fair value of the stock."[26] A shareholder "usually has a statutory right of . . . appraisal" in a statutory merger.[27] "That is, a stockholder [typically holding a minority interest] who objects to the terms of a merger may demand to be paid in cash the fair value of his or her shares exclusive of any gain or loss that may arise from the merger itself."[28]

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22. *See* § 607.1302(1).

23. § 607.1302(1)(e)-(f) (discussing a class of shares prescribed in the articles of incorporation prior to October 1, 2003).

24. *Id.*

25. 12B WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.120 (perm. ed., rev. vol. 2000). *See generally*, Timothy K. Bronza, Reg'l Dir., Mgmt. Planning, Inc., Business Valuation for Corporate Law Practice (Feb. 16, 2005) (presentation to Corporate Finance class at Nova Southeastern University), http://www.nsulaw.nova.edu/faculty/courses.cfm?ID=17 (follow "Business Valuation of the Corporate Law Practice" hyperlink).

26. 12B FLETCHER, *supra* note 25, § 5906.120.

27. *See* Booth, *supra* note 14, at 127.

28. *Id.*

C. *Appraisal Remedy Purpose*

The purpose of an appraisal is to ensure that "the price paid in a merger is a fair one."[29]

> Most courts and commentators seem to agree that it is inappropriate to apply a minority discount in the context of an appraisal proceeding even though the fair market value of minority shares may be less than the going concern value of those shares. . . . Thus the appraisal remedy is founded on the possibility that market prices may be wrong. As the Delaware Supreme Court has stated, the goal of an appraisal proceeding should be to determine the value of the corporation as a whole, not the value of particular shares, and to award the found value per share to all dissenting stockholders.[30]

Thus, Delaware does not apply discounts in corporate appraisal proceedings.[31] Moreover, the *ALI Principles of Corporate Governance* defines fair value as the value of the shareholder's "proportionate interest in the corporation, without any discount for minority status or, absent extraordinary circumstances, lack of marketability."[32]

Minority shareholders are still shareholders.[33] The fact that a shareholder is unlikely to exercise control is no reason to ascribe a diminished value to her shares in a transaction which is involuntary as to such shareholder.

In contradistinction to commentators, numerous state legislatures, and state judicial interpretations, Florida's new statutory definition of "fair value" omits the Model Act's proscription of a minority or marketability discount except with respect to corporations with ten or fewer shareholders.[34] This has opened the door to a multitude of disadvantageous results for the minority shareholder seeking an appraisal remedy. Florida's revised statute clearly goes against the overwhelming trend not to apply discounts in appraisal proceedings generally.

> Although many courts and commentators use the terms *minority discount* and *marketability discount* more or less interchangeably, the two

29. *Id.*
30. *Id.*
31. *See* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144–45 (Del. 1989).
32. 2 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (1992).
33. Booth, *supra* note 14, at 127.
34. *See* Act effective June 20, 2005, ch. 2005-267, § 2, 2005 Fla. Laws 2425, 2434.

> are really quite distinct from each other. The idea of a minority discount does not properly refer to the fact that minority shares ordinarily will trade at a price that is less than the price that a controlling stockholder might command in a sale of control. Rather, the term minority discount as properly understood refers to a discount from the price that would be set for non-control shares in an active market simply because they are minority shares and have no power to influence the governance of the corporation . . . .[35]

Conversely, "a marketability discount refers to a discount from what a fair trading price would be if there were an active market for the shares."[36] Marketability discounts can also affect owners of large blocks of shares due to a difficulty in the resale process "without affecting the market price."[37]

The 1998 Revised Model Business Corporation Act (RMBCA) states, among other things, that discounts are inappropriate in appraisal transactions as a whole.[38] The RMBCA defines fair value as:

> the value of the corporation's shares determined:
>
> (i) immediately before the effectuation of the corporate action to which the shareholder objects;
>
> (ii) using customary and current valuation concepts and techniques generally employed for similar business in the context of the transaction requiring appraisal; and
>
> (iii) *without discounting for lack of marketability or minority status* . . . .[39]

The drafters of the Model Act determined that discounts for marketability or minority status are unsuitable because transactions which trigger appraisal rights are those affecting the entire corporation, and such transactions could not be prevented by minority shareholders.[40] This would result in a double-whammy for the unfortunate minority shareholder. Not only can she not prevent the transactions, such as a merger, but she is subject to a diminishment in the proportional value of her shares in what is effectively a forced sale. Additionally, "the lead-in language . . . is . . . designed to adopt the more modern view that appraisal should generally award a shareholder his or

35. Booth, *supra* note 14, at 130–31.
36. *Id.* at 131.
37. Id.
38. MODEL BUS. CORP. ACT § 13.01 cmt. 2 (2005).
39. MODEL BUS. CORP. ACT § 13.01(4) (emphasis added).
40. MODEL BUS. CORP. ACT § 13.01 cmt. 2.

her proportional interest in the corporation after valuing the corporation as a whole, rather than the value of the shareholder's shares when valued alone."[41]

The discounts can have a profound impact. For example, a combined thirty percent minority interest discount and forty percent discount for lack of marketability, which may be applied by appraisals, would render an eight-share valued at $10 to be valued at $4.20. For example:

$10.00	Control Value per share
-3.00	Less minority interest discount (.30 x $10.00).
$7.00	Marketable minority value
-2.80	Less lack of marketability discount (.40 x $7.00)
$4.20	Per share value of non-marketable minority shares[42]

D. *American Law Institute Principles of Corporate Governance*

The *ALI's Principles of Corporate Governance* states "that the fair value of shares in an appraisal proceeding should be determined 'without any discount for minority status or, absent extraordinary circumstances, lack of marketability.'"[43] It also states that the value should be determined "in the context of the transaction giving rise to appraisal"[44] and further states that "'[t]his standard does not necessarily imply . . . that fair value should be determined by the presumed outcome of a hypothetical competitive auction.'"[45] The ALI's official comment states that the "role of the appraisal remedy is to assist shareholders to police conflicts of interest that may arise in connection with the sale or disposition of [a] firm. In the absence of a conflict of interest, less policy justification exists for upsetting the bargain reached between [the buyer and seller.]"[46] Typically a court would not reform a contract to disturb the price set by the contracting parties, absent unconscionability.[47]

41. *Id.* "If, however, the corporation voluntarily grants appraisal rights for transactions that do not affect the entire corporation—such as certain amendments to the articles of incorporation—the court should use its discretion in applying discounts if appropriate." *Id.*

42. *See* Linda B. Trugman, Trugman Valuation Assocs. Inc., Business Valuation, http://nsulaw.nova.edu/faculty/syllabi/Novalawcorpfintrugman.ppt (last visited Mar. 11, 2006).

43. Booth, *supra* note 14, at 136 (quoting 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (1992)).

44. 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (1992).

45. *Id.* at 136–37 (quoting 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 cmt. d (1992)).

46. 2 PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 cmt. c (1992).

47. *See id.*

Accordingly, the ALI principles provide that "the court should give substantial deference to the board's judgment [as to price per share] unless the plaintiff can show by clear and convincing evidence that the board undervalued the firm."[48]

III. OPPRESSION STATUTES

With the notable exception of Florida, almost all states have passed legislation to provide remedies to shareholders who are opposed, including the possibility of seeking dissolution.[49] The corporate statute that most states adopt is the RMBCA "which focuses on the 'illegal, oppressive, or fraudulent' actions by the majority shareholders."[50] A remedy for oppression has been deemed appropriate in most states because oppressed minority shareholders have no liquidity or other means of redeeming their equity in closely-held corporations.[51] In addition, there are a number of court-created definitions of oppression, some broad and some more narrow.[52] Moreover, the case law is usually very fact specific which leads to unpredictability for minority shareholders seeking a remedy.[53]

Because of the nature of a closely-held corporation, "some courts have imposed a [partnership-like] fiduciary duty among [the] shareholders."[54] The same dilemma of ascertaining "fair value" arises in the context of a buyout "[w]hen a majority shareholder is ordered (or elects) to buy out the shares of an oppressed minority shareholder."[55] The dilemma of the "fair value" of the minority stake is presented in the same manner as with an appraisal action.[56] While "there is widespread support for a fair value buyout as a[n] . . . oppression remedy, there is significant disagreement [as to] what fair value means."[57]

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48. *Id.*

49. *See* Joseph W. Bartlett & Kevin R. Garlitz, *Fiduciary Duties in Burnout/Cramdown Financings*, 20 J. CORP. L. 593, 614 (1995).

50. *Id.* (citation omitted).

51. *See id.*

52. *Id.*

53. *Id.*

54. Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 DUKE L.J. 293, 304 (2004).

55. *Id.* at 310.

56. *Id.* at 310–11.

57. *Id.* at 310.

A. *Florida Law*

The Florida Legislature revised Florida Business Corporations Act's ("FBCA") definition of fair value in 2003.[58] Prior to that revision, the FBCA defined fair value as "the value of the shares as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable."[59] The 2003 revised definition mirrored that of the RMBCA version; however, it excluded the express proscription of discounts for lack of marketability or minority status.[60] The act, as revised, defined fair value as:

> [T]he value of the corporation's shares determined:
> (a) Immediately before the effectuation of the corporate action to which the shareholder objects.
> (b) Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable to the corporation and its remaining shareholders.[61]

In examining both versions, it is quite apparent that the 2003 Florida legislature did not follow the overwhelming trend with regard to the minority/marketability discount issue.

In 2004, the Florida Second District Court of Appeal held in a dissenter's rights action that "'Florida's dissenters' rights statutes are based, in part, on the [RMBCA] . . . [t]herefore, we may look . . . to cases from other jurisdictions that have adopted the provisions of the RMBCA in substantially the same form."[62] While one can argue that, based on the foregoing, one could look to other jurisdictions for guidance as to whether marketability/minority discounts should apply, a counter-argument could be made un-

58. *See* FLA. STAT. § 607.1301(4) (2003).

59. FLA. STAT. § 607.1301(2) (2002).

60. *See* MODEL BUS. CORP. ACT § 13.01(4) (2005); Act effective Oct. 1, 2003, ch. 2003-283, § 21, 2003 Fla. Laws 2902, 2914.

61. FLA. STAT. § 607.1301(4) (2005).

62. Boettcher v. IMC Mortgage Co., 871 So. 2d 1047, 1052 n.5 (Fla. 2d Dist. Ct. App. 2004) (citation omitted). While this case involved the interpretation of the fair value as defined under § 607.1301, it was limited to the "'appreciation or depreciation in anticipation of the corporate action'" element of the definition. *Id.* at 1052 (quoting FLA. STAT. § 607.1301(2) (1999)).

der the statutory interpretative cannon of *expressio unius est exclusio alteris*, expressing one item of an associated group or series to another left unmentioned. In its 2003 revision, the Florida legislature generally adopted the RMBCA definition of "fair value" with the significant exception of its exclusion of its proscription against minority/marketability discounts.[63] Obviously, this was no oversight by the Florida Legislature.

In fact, the Florida House of Representatives Judiciary Committee Substitute for House Bill 1623 as initially proposed in 2003, included the current definition of "fair value" with the following addition: "(c) Without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles of incorporation pursuant to s. 607.1302(1)(e) or circumstances in which not discounting for marketability would be inequitable to the corporation and its remaining shareholders."[64] In other words, as originally proposed, Florida's language followed the RMBCA by eliminating discounting by statute; however a subsequent amendment removed the text from the proposed bill.[65] The reason for this remarkable change in 2003 is not evident from the official legislative history.

IV. JUDICIAL INTERPRETATION

A. Pueblo Bancorporation v. Lindoe, Inc.

In 2003, in *Pueblo Bancorporation v. Lindoe, Inc.*,[66] the Supreme Court of Colorado addressed the meaning of fair value in determining shareholders' interest under its state corporation statute.[67] Like Florida, Colorado based its statute largely on the Model Business Corporation Act.[68] This case provides an excellent discussion of the applicability of discounts in appraisal proceedings.[69] The Colorado statute at bar was not the recently updated RMBCA definition of "fair value," but rather the older, more general version that did not explicitly address marketability/minority discounts.[70] In rendering its decision, the court held that: 1) "the meaning of 'fair value' is a question of law, not an issue of fact to be [determined] . . . on a case-by-case basis;"[71] 2) fair value under the state statute is not fair market value;[72] 3) "fair

63. FLA. STAT. § 607.1301(4) (2003).
64. Fla. CS for HB 1623, § 21 (2003) (proposed amendment to FLA. STAT. § 607.1301).
65. *See id.*
66. 63 P.3d 353 (Colo. 2003).
67. *Id.* at 356.
68. *Id.* at 368.
69. *See id* at 360.
70. *See id.* at 358–60.
71. *Pueblo Bancorporation*, 63 P.3d at 360.

value is the shareholder's proportionate interest in the value of the corporation;"[73] and 4) "a marketability discount should not be applied at the shareholder level to determine the 'fair value' of the dissenter's shares."[74]

In *Pueblo*, the plaintiff brought an action to determine the fair value of a minority shareholder's interest under the state statute, challenging the value assigned after the lower court applied a minority and marketability discount in a cash-out merger.[75] In holding that the meaning of fair value is a question of law, the court rejected the case-by-case approach stating that it was "too imprecise to be useful to the business community."[76] This imprecision creates a problem for parties because they may not know what the trial court is, in fact, valuing.[77] For example, does the trial court, seeking to determine what is "fair," award the shareholder the value of proportionate interest in the corporation or the value of his minority shares? In an arms-length transaction, willing buyer-willing seller situation, the buyer would likely seek discounts for both marketability and minority status. However, should that apply to the transaction, triggering the appraisal remedy transaction, which is involuntary as far as the minority shareholders are concerned?

The differences between the two measures is the most significant variable between the two measures (i.e., proportional or based on specific shares) in the appraisal process; however, the Colorado court said that "the [trial] court's choice of which interpretation to adopt is largely determined by" the most persuasive expert.[78] Both corporations and dissenting shareholders are disadvantaged by the case-by-case approach which is subjective, unpredictable, and encourages unnecessary, costly litigation.[79] The court also held that the legislature could not have intended the definition of fair value to vary from court to court.[80] In holding that the Colorado legislature did not intend "fair value" to be synonymous with "fair market value" it stated that "[i]n the sixty year history of Colorado's dissenters' rights statute, the measure of compensation has changed from 'value' to 'fair value,' but the legislature has never required that dissenters to be paid 'fair market value.'"[81]

72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 356.
76. *Pueblo Bancorporation*, 63 P.3d at 361.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Pueblo Bancorporation*, 63 P.3d at 361.

Since Colorado's adoption of the MBCA standard of fair value and subsequent revisions, the definition has remained intact.[82] In holding "that the proper interpretation of fair value is the shareholder's proportionate ownership interest in the value of the corporation, without discounting for lack of marketability," the court held that the object of the dissenters' rights statute should be to compensate the minority shareholders for what they lost, which is their proportionate interest in the whole corporation as a going concern.[83] The Court thus held that "[a] marketability discount is inconsistent with this interpretation."[84] Moreover, the court also determined that a discount for minority status was also inappropriate.[85] "'Such a rule would inevitably encourage corporate squeeze-outs.'"[86] The court also looked to other jurisdictions for the interpretation of fair value and found that most determined "fair value" in the appraisal context as a proportion of ownership without discounts.[87]

The Colorado court found that, because the language at bar from the MBCA was nearly identical to that in many other statutes and because such language is based on a Model Act designed to promote uniformity among state corporation laws, the interpretation by other state courts on this issue was particularly persuasive.[88] Citing "the leading case regarding discounts," the court concluded that:

> [T]he appraisal process is not intended to reconstruct a pro forma sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred. Discounting individual share holdings injects into the appraisal process speculation on the various factors which may dictate the marketability of minority shareholdings. More important, to fail to accord to a minority shareholder the full proportionate value of his shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.[89]

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82. *Id.* at 368. "Fair market value is typically defined as the price at which property would change hands between a willing buyer and a willing seller when neither party is under an obligation to act." *Id.* at 362 (citations omitted).

83. *Id.* at 363.

84. *Id.* at 364.

85. *Pueblo Bancorportation*, 63 P.3d at 364.

86. *Id.* (citation omitted).

87. *Id.* at 364–65, 367.

88. *Id.*

89. *Id.* at 365–66 (quoting Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989)).

B. Munshower v. Kolbenheyer

In 2004, the Florida Third District Court of Appeal held in a dissolution action that the fair value of shares of a corporation "rests on determining what a willing purchaser in an arm's length transaction would offer for an interest in [a] business."[90] In rendering its decision, the court held that "Florida case law neither define[d] 'fair value' nor provide[d] criteria by which 'fair value' may be measured."[91]

To date, only one Florida appeals court has addressed the issue of marketability discounts. In 1999, in *Munshower v. Kolbenheyer*,[92] the Florida Third District Court of Appeal affirmed a marketability discount, applied by the trial court, to reflect the lack of liquidity of the shares in a dissolution context.[93] In *Munshower*, the plaintiff appealed a final judgment as to ascertaining the fair value of shares owned in a closely held corporation, determining the value of shares of Munshower's stock, and imposing a lack of marketability discount of twenty percent.[94] In rendering its decision, the court followed a New York decision, *Blake v. Blake Agency, Inc.*,[95] which held that "[a] discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market."[96]

V. CONCLUSION

As amended, the Florida Business Corporation Act's definition of "fair value" in the appraisal context departs from the latest version of the RMBCA. The legislation is flawed by under-inclusion. Of course, this does not preclude a court from determining, on a case-by-case basis, whether or not to apply a minority or marketability discount in a Florida corporation with more than ten shareholders. However, "[t]he clear majority trend is to interpret fair value as the shareholder's proportionate ownership of a going concern and not to apply discounts at the shareholder level."[97] Moreover, the

90. G & G Fashion Design, Inc. v. Garcia, 870 So. 2d 870, 871 (Fla. 3d Dist. Ct. App. 2004). This case centered around a dissolution action not involving the issue of minority or marketability discounts. *See id.*

91. *Id.*

92. 732 So. 2d 385 (Fla. 3d Dist. Ct. App. 1999).

93. *Id.* at 385–86 (this case was decided prior to the 2003 revision of the FBCA); *see* Mitrione, *supra* note 11.

94. *Munshower*, 732 So. 2d at 385–86.

95. 486 N.Y.S.2d 341 (N.Y. App. Div. 1985).

96. *Id.* at 349.

97. Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 367 (Colo. 2003).

FBCA departs from the RMBCA in at least one other significant way. Unlike the RMBCA, the FBCA does not include "oppression" as a ground for judicial dissolution or other remedy.[98] Florida is in a shrinking minority of states that do not include oppression as grounds for statutory relief.[99] Taken together, these two departures from the RMBCA signify that the FBCA is exceptionally inhospitable, indeed antagonistic, to the interests of minority shareholders. Counsel should consider this statutory anti-minority shareholder tilt when determining whether to incorporate clients in Florida or in some other state. At the least, counsel for minority shareholders should attempt to address the concerns raised herein in a carefully drafted shareholders' agreement.

98. *See* Jeffrey M. McFarland, *Florida Corporation Law: Proposed Statutory Relief for Oppressed Minority Shareholders in Florida*, 46 FLA. L. REV. 149, 158 (1994); Marilyn B. Cane, *Oppressive Conduct: Should It Be Grounds for Judicial Dissolution?*, Fla. B. Bus. L. Sec., Q. Rep., Dec. 1993, at 20.

99. *See generally* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS: PROTECTING MINORITY RIGHTS IN SQUEEZE-OUTS AND OTHER INTRACORPORATE CONFLICTS § 3:2 (rev. 2d ed. 2004); Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties and Reasonable Expectations*, 28 J. CORP. L. 371, 373 (2003).