Louisiana Law Review

Volume 75 | Number 4
*Summer 2015*

# Model Business Corporation Act as Adopted in Louisiana

Glenn G. Morris
*Louisiana State University Law Center*

# Model Business Corporation Act as Adopted in Louisiana

*Glenn G. Morris*[*]

## INTRODUCTION

Effective January 1, 2015, Louisiana adopted a customized version of the Model Business Corporation Act.[1] The new Act replaces the former Louisiana Business Corporation Law (LBCL)[2] and makes several coordinating changes in other areas of the law.[3] The author served as the Reporter and Chair of the Corporations Committee of the Louisiana State Law Institute, the Committee that considered and modified the Model Act for adoption in Louisiana. Louisiana's modifications to the Model Act were designed to do three things: (1) to adapt the Model Act to Louisiana's legal system and terminology, (2) to retain some of the desirable features of existing law, and (3) to make what the Committee judged to be corrections or improvements in the Model Act provisions.

This Article summarizes the ways in which the new Act changes the law as well as those in which the law remains largely unchanged. This Article also points out the areas in which the Louisiana version of the Act differs from the Model Act, either by retaining the earlier Louisiana law on the subject, or by offering some new solution to the problem.

Louisiana's adoption of the Model Act returns it to the mainstream of American corporation law, much as the LBCL did when it was adopted in 1968.[4] The Model Act is the foundation of

---



* J. Dawson Gasquet Professor of Law and Vinson & Elkins Professor of Law, LSU Paul M. Hebert Law Center.

1. Act No. 328, §§ 1, 7, 2014 La. Acts.
2. *Id.* § 5.
3. The other changes affected provisions concerning the prescriptive periods applicable to business organizations, *see* LA. REV. STAT. ANN. §§ 12:1501–1502 (Supp. 2015); the conversion of business organizations, *id.* §§ 12:1601–1604; filing methods and secretary-of-state-records provisions, *id.* §§ 12:1701–1704; filing fees chargeable by the secretary of state, *id.* § 49:222; and the derivative action provisions of the Code of Civil Procedure, LA. CODE CIV. PROC. art. 611 (2015).
4. As one of my Committee colleagues noted, Louisiana's corporation law has been designed to fit into the mainstream of American corporate law since at least 1928. Louisiana's 1928 corporation statute was based on a then-proposed Uniform Business Corporation Act, which influenced the Model Business Corporation Act that later took its place. The 1968 statute was designed to combine the best features of the 1928 statute with the best features of the corporate laws of many other states, and it included some provisions from the

the corporation law of 30 other states, including all southern states east of the Mississippi River.[5] The Model Act is the product of the Committee on Corporate Laws of the Section of Business Law of the American Bar Association and is subject to continuous revision by that body to deal with developments in corporate law and practice as they occur.[6]

The new Act goes a step further in the direction of mainstream law than did the LBCL. Unlike the LBCL, the new Act adopts not just the substance of mainstream American corporation law, but the leading mainstream law itself, by name.[7] This approach should make it easier to explain Louisiana's position on corporation law to lawyers and business executives in other states. Louisiana is not just similar in its corporate law to a Model Act state; it is a Model Act state. This simple point should save Louisiana lawyers and business owners many hours of detailed explanation and reassurance to their out-of-state colleagues and clients. Of course, some differences will still exist between Louisiana's version of the Model Act and the versions enacted in other states. However, these differences will operate as exceptions rather than the rule.

Louisiana's adoption of the Model Act will also make it easier to find persuasive authority on interpretive issues that have not yet been addressed by Louisiana courts and to keep up with future developments in the law.[8] When Louisiana had its own unique corporation statute, the corporate law decisions rendered in other states were less likely to be relevant. Earlier efforts to update the LBCL by inserting Model Act provisions sometimes created

---

Model Act as it existed at the time. *See* Richard P. Wolfe, *The Fiduciary Duty of Directors and Officers Under the Louisiana Business Corporation Act of 2014*, 60 LOY. L. REV. 523, 528–30 (2014).

5. MODEL BUS. CORP. ACT ix (2011). Including the District of Columbia, the count is 31 other jurisdictions. Of those 31 jurisdictions, Alaska, New Mexico, and the District of Columbia have statutes based on the 1969 version of the Model Act, rather than the more modern version that was first promulgated in 1984. *Id.* at n.2.

6. *Id.* at ix–x.

7. Ironically, the last time that Louisiana took that step, when it adopted the Uniform Business Corporation Act in 1928, it was apparently too far ahead of the curve in modernizing its law. Only two other states adopted the Uniform Act. *Id.* at xi.

8. The Reporter for the Committee on Corporate Laws oversees the publication of an annotated version of the Model Act, and the Committee has appointed state liaisons that report regularly on corporate law developments in their state. At the time this article was written, the author was serving as the liaison for Louisiana.

unintended technical problems and interpretative issues.[9] That will no longer be true. When the Model Act is amended at the national level, Louisiana will be able to easily adopt those changes in a way that works technically with its existing corporation statute.

The Committee that worked on the new Act included representatives of the secretary of state's office,[10] corporate law practitioners from various regions of the state,[11] and four law professors in the field of corporation law, one from each of the state's four law schools.[12] Working with the Committee was one of the highlights of the author's professional career. Committee members knew the existing law, took great care in reviewing the proposed new law, expressed their views candidly but also respectfully and fairly, and worked cooperatively to find constructive solutions to the problems at hand.

The Committee did not expect its work to be perfect or final. Drafting errors are nearly inevitable in a statute as long and complex as the new Act, and the legal issues faced by corporations will almost surely continue to evolve. Hence, the Committee plans to remain active and make proposals for corrections and improvements to the new Act as needed.

The remainder of this Article provides a summarized comparison between the new Act and the LBCL, taking up issues in the order in which they are covered in the new Act.

---

9. Louisiana copied an Indiana anti-takeover provision in the late 1980s that utilized an important Model Act term, "voting group," that had no meaning under the Louisiana statute. *See* GLENN G. MORRIS & WENDELL H. HOLMES, BUSINESS ORGANIZATIONS § 39.04, *in* 8 LOUISIANA CIVIL LAW TREATISE 365 n.29 (West 1999). In 2005, modified versions of the share certificate provisions of the Model Act were enacted but in a way that combined a limited Louisiana version of the Model Act rule with another, unmodified, Model Act provision that effectively undercut the effects of the earlier, limited provision. *Id.* § 10.13, at 30 n.1. The certificate provisions also failed to take account of the fact that Louisiana law, unlike the Model Act, still retained the par-value system of corporate capital. *Id.* at n.3.

10. Steve Windham served when Jay Dardenne was Secretary of State. He was replaced on the committee by Carla Bonaventure after Tom Schedler became Secretary of State. The Committee was assisted by two other staff members in the secretary's office, Steve Hawkland and Mandy Hamilton.

11. The practitioners were Virginia Boulet, James C. Crigler, Jr., Joshua A. Decuir, Maureen Brennan Gershanik, Regina N. Hamilton, Lee Kantrow, Rick J. Norman, Robert M. Walmsley, Jr., Charles S. Weems, III, and Richard P. Wolfe.

12. The professors were Onnig Dombalagian, of Tulane University Law School; Lloyd "Trey" Drury, III, of Loyola University New Orleans College of Law; Glenn G. Morris, of the LSU Paul M. Hebert Law Center; and Roederick White, of the Southern University Law Center.

GENERAL FILING RULES

The new Act (or "Louisiana's Act") provides a unified set of rules for the execution, filing, and effective dates of all documents that the Act requires or permits to be filed with the secretary of state.[13] It will no longer be necessary to consult separate sets of execution and filing rules for each type of filing-eligible document covered by the new Act. All may be executed and filed in the same way; they will differ only in their required content. However, if the secretary of state's office prescribes a particular form for a document (and the Act gives only limited authority for such forms, such as the annual report[14]), the document must be in or on the prescribed form.[15]

The requirements for dual signatures or for the signatures of specified officers on some of the documents filed under the LBCL[16] are eliminated by the new Act. Just one signature, by the chairman of the board of directors or by any officer of the corporation, is required for all documents.[17] Still, contrary to the Model Act, Louisiana did retain the requirement that this signature be acknowledged or that the document be executed by authentic act,[18] unless the document is to be filed electronically or in person at the secretary of state's office.[19]

As under the LBCL, if the secretary of state files a document, the document (and the act or transaction that the document is being filed to carry out) generally becomes effective as of the time that the secretary's office indicates that it was received for filing.[20] That general rule is subject to two exceptions that are similar, but not identical, to the analogous exceptions in the LBCL. The first

---

13. LA. REV. STAT. ANN. § 12:1-120 (Supp. 2015).
14. *Id.* § 12:1-121.
15. *Id.* § 12:1-120(I).
16. *See, e.g.*, former LA. REV. STAT. ANN. §§ 12:112(D), 113(A)(2) (repealed 2015).
17. LA. REV. STAT. ANN. § 12:1-120(F) (Supp. 2015). The dual-signature requirement was retained, however, for share certificates. *Id.* § 12:1-625(D). The Model Act says only that the certificates are to be signed by two officers designated in the bylaws or by the board of directors. MODEL BUS. CORP. ACT § 6.25(d) (2011). While Louisiana follows the Model Act's lead in permitting the bylaws or board to designate any two officers, it also specifies two officers (the president and secretary) whose signatures will suffice in the event that no such designation is made. *See* LA. REV. STAT. ANN. § 12:1-625(D) cmt. d (Supp. 2015).
18. *Id.* § 12:1-120(H).
19. *See id.*; *see also id* § 12:1701 (discussing filing methods).
20. *Compare* LA. REV. STAT. ANN. §§ 12:1-123(A)(1), 1-123(D), 1-125(B) (Supp. 2015), *with*, *e.g.*, former LA. REV. STAT. ANN. §§ 12:25(C), 12:32(B), 12:114(A) (repealed 2015).

exception is for a delayed effective date, as specified in the filed document. Like the LBCL, the new Act permits the effective date of the document to be delayed as specified, but the permissible period of delay has been extended from 30 days under the LBCL[21] to 90 days under the new Act, measured from the time that the document is received by the secretary of state.[22]

The second exception is based on the five-day grace period that the LBCL made available for most filed documents.[23] Under that exception, a document became effective upon its proper execution, ahead of its filing, as long as it was received for filing[24] by the secretary of state within five days, excluding legal holidays, of the date that it was executed. The new Act retains the five-day grace period only for a corporation's initial articles of incorporation; it eliminates the period for all other filed documents.[25] The grace period was eliminated for the other documents to allow third parties to rely on a corporation's filed documents as stating a corporation's legally operative provisions accurately, without the risk that unfiled changes in those provisions had already taken effect. Because initial articles of incorporation do not pose that danger, and because the immediate creation of a new corporation may be useful in allocating the risks involved in a new business venture or transaction, the grace period for that one type of document was retained.[26]

---

21. *See, e.g.*, former LA. REV. STAT. ANN. § 12:25(A)(3) (repealed 2015); *id.* § 12:32(B).

22. *See* LA. REV. STAT. ANN. § 12:1-123(C) (Supp. 2015).

23. The Model Act contains no such grace period. *See* MODEL BUS. CORP. ACT § 1.23 (2011).

24. The "received-for-filing" phrase is using the terminology of the new Act. *See* LA. REV. STAT. ANN. § 12:1-123(A)(1), (B)(1) (Supp. 2015). Under the LBCL, the term for this event was "filed with the secretary." *See, e.g.*, former LA. REV. STAT. ANN. § 12:25(C) (repealed 2015). But the new Act does not use the word "filed" in the same sense at it was used under the LBCL. Under the new Act, the "filing" of a document is something that only the secretary of state's office is empowered to do. The term refers to the act of recording the document as "filed" in the records of the secretary of state, which ordinarily occurs only after the secretary's staff (or the office's computer programming) determines that the document complies with the requirements for filing it. *See* LA. REV. STAT. ANN. §§ 12:1-123(D), 1-125(B) (Supp. 2015). Until this recordation by the secretary occurs, the document may be "delivered for filing" to the secretary, and the secretary may "receive" the document for filing, but the document is not "filed" as that term is used in the new Act.

25. LA. REV. STAT. ANN. § 12:123(B) (Supp. 2015).

26. *Id.* § 12:1-123 cmt. a.

INCORPORATION

As under the LBCL, any one or more persons capable of contracting may act as incorporators.[27] An incorporator's principal role is to execute and file the required incorporation documents, and to appoint the corporation's initial directors.[28] If a corporation has not yet named initial directors or issued shares, an incorporator may also approve an amendment to the articles of incorporation[29] or authorize the termination of the corporation.[30] However, Louisiana rejected a Model Act rule that would have empowered an incorporator to adopt bylaws and appoint officers at a required organizational meeting for a new corporation.[31] Louisiana's Act requires the incorporators to appoint initial directors to complete the organization of the corporation.[32]

Under the LBCL, three documents had to be filed to create a new corporation:[33] articles of incorporation, an initial report, and a notarized affidavit of acceptance by the person named in the initial report as the corporation's registered agent.[34] Following the approach of the Model Act, the new Act eliminates the initial report as one of the required documents and so reduces the number of required documents to two.[35] The items that were previously

---

27. *Compare* former LA. REV. STAT. ANN. § 12:21 (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-201 (Supp. 2015). Revision Comment (a) to section 12:1-201 explains that the "capable-of-contracting" requirement was retained to prevent unemancipated minors and others without capacity from acting as incorporators, but was not intended to suggest that the incorporators became parties to a contract by virtue of executing and filing the incorporation documents.

28. LA. REV. STAT. ANN. §§ 12:1-201, 1-202(B)(1), 1-205(A)(2) (Supp. 2015).

29. *Id.* § 12:1-1002.

30. *Id.* § 12:1-1441(B).

31. MODEL BUS. CORP. ACT § 2.05(a)(1) (2011).

32. LA. REV. STAT. ANN. § 12:1-205(A)(2) (Supp. 2015). The initial directors are not required to adopt bylaws, however, as the new Act retains the earlier Louisiana rule making bylaws optional. *Id.* §§ 12:1-206(A), 1-1020(B).

33. It was possible to combine two of the documents, such as the initial report and the registered agent's affidavit of acceptance, into a single physical document, so the number of physical documents could vary. The text is treating the documents as separate because they were subject to different content and execution requirements.

34. Former LA. REV. STAT. ANN. § 12:25(A)(1) (repealed 2015).

35. The registered agent's acceptance of appointment is now called a "statement of acceptance" rather than a "notarized affidavit of acceptance." Whether the statement must be notarized (through an acknowledgement or execution of the statement by authentic act) is covered by the same rule that applies to the execution formalities imposed on all filed documents under the new Act. *See* LA. REV. STAT. ANN. § 12:1-120 (Supp. 2015).

covered by the initial report,[36] such as the registered office and registered agent,[37] are now made part of the initial articles of incorporation.[38]

The required content of a corporation's articles of incorporation has been changed. In addition to the initial-report types of items mentioned above, the articles must also state whether the corporation accepts, limits, or rejects the protection against monetary liability that is now provided by statutory default to the officers and directors of the corporation.[39] But the articles need not state either the purpose of the corporation or the par value of its shares as required under prior law.[40] Those items are dropped because the new Act itself provides the "all-lawful-purposes" rule by default,[41] and, like the Model Act, eliminates the traditional par-value-based rules of corporate capital.[42] The new Act also formally eliminates the "required"

---

36. The general statement in the text concerning the coverage of initial report items by the articles of incorporation is subject to one theoretical exception: the new Act, like the Model Act, treats the naming of a corporation's initial directors as an optional item in a corporation's initial articles of incorporation. LA. REV. STAT. ANN. § 12:1-202(B)(1) (Supp. 2015). Under the LBCL, the initial directors were supposed to be named either in the initial report or in a supplemental report filed as soon as they had been selected. Former LA. REV. STAT. ANN. § 12:25(A)(2) (repealed 2015). But this theoretical requirement was not enforced in practice. The only enforcement mechanism available was a monetary penalty, collectible by the Attorney General, that could be triggered by the secretary of state sending a written request that the supplemental report be filed. *See id.* § 12:172(A). This author has confirmed with a knowledgeable staff member in the secretary's office that no such requests were sent in at least the last 25 years of the LBCL's reign.

37. The new Act, like the Model Act, adds a new type of office, the "principal office," to the list of items that are to be covered in a corporation's initial filing, at least if the principal office is different from the registered office. LA. REV. STAT. ANN. § 12:1-202(A)(3) (Supp. 2015). The principal office is the office designated in a corporation's annual report (or in its articles until an annual report is filed) where the principal executive offices of the corporation are located. *Id.* § 12:1-140(17).

38. The articles contain only the initial designations of those items. The initial designations may be changed without any amendment to the articles, by the simple filing of an annual report or change form with the secretary of state, or, in the case of initial directors, by means of a subsequent election of new directors by the shareholders. *Id.* §§ 12:1-502 (change report), 1-805(A) (election of new directors), 1-1621(A) (annual report). Once those changes have been made, the board of directors may amend the articles, without any vote by shareholders, to formally delete the initial statements concerning those items. *Id.* § 12:1-1005(2)–(3).

39. *Id.* § 12:1-202(A)(5).

40. *Id.* § 12:1-202(A). *See* former LA. REV. STAT. ANN. § 12:24(B)(2), (5) (repealed 2015) (stating earlier requirements).

41. LA. REV. STAT. ANN. § 12:1-301(A) (Supp. 2015).

42. *Id.* § 12:1-621(A)–(D); MODEL BUS. CORP. ACT § 6.21 cmt. (2011).

statement of the corporation's taxpayer identification number, which was already optional in practice anyway.[43]

The new Act is unlikely to change the fact that most closely held corporations will use standardized forms of articles that vary from company to company by little more than the name chosen for the new corporation. So, the naming rules will continue to receive much of the attention devoted to the formation of a new corporation. The new Act continues most of the naming rules contained in the former LBCL,[44] including the requirement that a new name be "distinguishable" from other business entity and trade names.[45] That requirement is potentially more demanding than the Model Act standard, which requires only that a new name be distinguishable "upon the records" of the secretary of state.[46]

The secretary of state has interpreted Louisiana's broader distinguishability standard to require a name to be distinguishable not only on the secretary's records, but also in pronunciation. So, for example, while "B.C. Corporation" would be distinguishable from "Bee See Corporation" on the records of the secretary, the two names would be pronounced in the same way and so would not be treated as distinguishable by the Louisiana Secretary of State's office.[47] The Official Comment to the retained distinguishability provision explicitly acknowledges this practice and says that the retention of the existing standard is designed to allow that practice to continue.[48]

However, the Comment explains that the principal function of the distinguishability standard is still to promote accuracy in record-keeping, not to resolve trade name disputes.[49] Like the Model Act,

43. The failure to include the number did not invalidate the articles or give the secretary of state grounds to reject them. Former LA. REV. STAT. ANN. § 12:24(B)(8) (repealed 2015).

44. Those rules include the required designation of corporate status, the prohibition of the use of listed words that suggest the corporation will operate some kind of financial or insurance business, the prohibition on language falsely suggesting a charitable, nonprofit or governmental character, and the requirement of prior approval from a state licensing body for the use of words suggesting a financial, engineering or architectural function. LA. REV. STAT. ANN. § 12:1-401(A), (F), (G), (H) (Supp. 2015).

45. *Id.* § 12:1-401(B).

46. MODEL BUS. CORP. ACT § 4.01(b) (2011). The Official Comment to this provision explains that the stated standard is designed principally to avoid confusion in the secretary of state's records, and to provide for accuracy in the naming and serving of corporate defendants in litigation. Thus, the appropriate test for distinguishability is "confusion in an absolute or linguistic sense." *Id.* cmt. 2.

47. LA. REV. STAT. ANN. § 12:1-401 cmts. e, f (Supp. 2015).

48. *Id.*

49. *Id.*

the new Act in Louisiana provides that the Act "does not control the use of fictitious, assumed, or trade names."[50] Indeed, the new Act narrows each reference in the Model Act to the "use" of a corporate name to a use of the name "in [the corporation's] filings with the secretary of state."[51] The narrower phrase is designed to avoid any suggestion that the "use" mentioned in the statute relates to the use of a name in a corporation's business dealings.[52] Moreover, the new rules eliminate the availability under the corporate statute of an injunction against the use of a name that does not satisfy the distinguishability standard.[53] The Comments explain that competing claims to the use of the same or a similar name in business dealings are governed by trade name and unfair competition law, not corporation law.[54]

Certificates of incorporation are not issued under the Act. Rather, the secretary returns a copy of the articles of incorporation, stamped with the filing date to show that it has been filed.[55] The filing itself is conclusive proof that the corporation is duly incorporated.[56] The new Act eliminates the requirement under former law that a multiple original or a certified copy of the incorporation documents be filed with the recorder of mortgages in the parish where the corporation's registered office is located.[57] However, the new Act retains the provision in former law[58] that makes a corporation's existence retroactive to the date that immovable property is acquired in the name of the corporation, subject to the interests of third persons acquired in the interim between the acquisition of the property and the date that the corporation is duly incorporated.[59] The new Act also continues the approach of the former law[60] to issues of de facto corporations and estoppel-to-deny-corporate-existence arguments.[61]

---

50. *Id.* § 12:1-401(E); MODEL BUS. CORP. ACT § 4.01(e) (2011).
51. LA. REV. STAT. ANN. §§ 12:1-401(C)–(D), 1-402(A) (Supp. 2015).
52. *Id.* § 12:1-401 cmt. g.
53. *Id.* § 12:1-401(A)(4), cmt. h.
54. *Id.* § 12:1-401 cmt. f.
55. *Id.* § 12:1-125(B). If a certificate is needed, any person may apply to the secretary of state to obtain a certificate of corporate existence and good standing. *Id.* § 12:1-128(A). That certificate operates as conclusive evidence that the corporation is in existence and, if the certificate so states, that the corporation is in good standing. *Id.* § 12:1-128(C).
56. *Id.* § 12:1-203(B).
57. Former LA. REV. STAT. ANN. § 12:25(D) (repealed 2015).
58. *See id.* § 12:25.1 (formerly governing relationship between retroactive existence of corporation and acquisition of immovable property).
59. *See* LA. REV. STAT. ANN. § 12:1-203(C) (Supp. 2015). The Revision Comments attribute the source of section 12:1-203 to former Louisiana Revised Statute section 12:25.1. *See id.* § 12:1-203 cmt.
60. *See* former LA. REV. STAT. ANN. § 12:26 cmt. (repealed 2015).
61. LA. REV. STAT. ANN. § 12:1-204 cmt. (Supp. 2015).

Unlike the former law, the new Act explicitly requires that the initial directors of the corporation hold an organizational meeting for the new corporation at which officers are appointed and any other business brought before the meeting is carried out.[62] Despite the reference to a "meeting" in the relevant provision, directors actually may take the contemplated actions (or any other action that would otherwise require a meeting) by means of unanimous written consent in lieu of a meeting, unless the articles of incorporation or bylaws provide otherwise.[63] Among the other business that would typically be taken up in an organizational meeting (or in the equivalent written consents) would be the issuance of shares and the adoption of bylaws. But bylaws are not actually required, because the new Act, like the former law,[64] makes bylaws optional.[65]

### PURPOSES AND POWERS; EMERGENCY POWERS

The provisions of the new Act concerning a corporation's purposes and powers, and the effects of the ultra vires doctrine, are essentially the same as those in the former law. The former law required that a statement of purposes be included in the articles of incorporation, but then suggested the "all lawful purposes" phrase that was most commonly used: to engage in any activity for which a corporation could be formed under the LBCL.[66] The new Act makes a similar "all lawful business or activity" rule apply by default. Thus, the new Act requires a statement of purpose in the articles of incorporation only if the incorporators (or the shareholders through a later amendment) wish to impose some limitation on the broad purposes authorized by the default rule.[67]

---

62. *Id.* § 12:1-205(A)(1). If initial directors are not named in the articles of incorporation, the incorporators are required to call an organizational meeting at which a board of directors is elected, and that board is then required to complete the organization of the corporation. *Id.* § 12:1-205(A)(2).

63. *Id.* § 12:1-821(A). No similar rule of general applicability applies to actions by incorporators, so the provision on the organizational meeting itself allows the incorporators to elect the board of directors by unanimous written consent in lieu of a meeting. *Id.* § 12:1-205(B).

64. Former LA. REV. STAT. ANN. § 12:28 (repealed 2015) (noting that "board of directors may make and alter" bylaws).

65. LA. REV. STAT. ANN. §§ 12:1-206, 1-1020(B) (Supp. 2015) (noting that board of directors "may" adopt bylaws).

66. Former LA. REV. STAT. ANN. § 12:24(B)(2) (repealed 2015).

67. LA. REV. STAT. ANN. § 12:1-301(A) (Supp. 2015). The source provision in the Model Act refers only to any lawful business, without mentioning activities. The Louisiana drafters added the word "activity" to the provision to make it consistent with the existing rule, and to recognize that a business corporation could be used for purposes, such as holding assets, that might not be considered a "business" in the usual sense of that term. *Id.* § 12:1-301(A) cmt.

The new Act also supplies an "all powers" clause and a non-exclusive listing of specific powers that are intended to supply the corporation with all powers "necessary or convenient" to carry out its business and affairs.[68] The new Act omits a provision from the former law that recognized the power of a corporation to provide inter-corporate guarantees among a parent corporation and its wholly-owned subsidiaries.[69] But a Revision Comment explains that the earlier rule was dropped to avoid the unintended negative implication that a corporation possesses the power to issue inter-corporate guarantees in that setting only.[70]

The new Act covers emergency powers differently from the former law. The former law merely empowered the board of directors to adopt emergency bylaws and focused on emergencies arising from such Cold War concerns as an attack upon the United States or an atomic or nuclear disaster.[71] The new Act contains self-operative provisions that certainly could be triggered by a nuclear disaster, but the new provisions were drafted in the aftermath of Hurricanes Katrina and Rita and are thus more focused on the disruptive effects of those more familiar types of disasters.

The new provisions make no attempt to predict the types of actions that the management of a corporation may need to take in response to an emergency.[72] Instead, the emergency rules are designed to overcome the communication and transportation difficulties that often arise in connection with catastrophic events, and empower the board to take action with as much compliance with the usual notification and quorum rules as it is practicable to achieve under the circumstances. Moreover, in view of the relatively short-term nature of the communication disruptions caused even by major hurricanes, the new rules are designed to

---

68. *Id.* § 12:1-302.

69. Former LA. REV. STAT. ANN. § 12:41(C) (repealed 2015).

70. LA. REV. STAT. ANN. § 12:1-302 cmt. f (Supp. 2015).

71. Former LA. REV. STAT. ANN. § 12:28(C) (repealed 2015). The former provision did include a more general reference to "any catastrophe or other similar emergency condition," but it specifically listed only the Cold War types of events as examples of the emergencies it contemplated. *Id.*

72. Subsection (a) of the source Model Act provision does appear to address particular steps the board may wish to take, such as relocating the corporation's principal office, but those are steps that the board could take without regard to whether an emergency existed. MODEL BUS. CORP. ACT § 3.02(a) (2011). Although the provisions of model subsection (a) seemed unnecessary, they also seemed harmless, so they were retained as part of the new Act in Louisiana, both to harmonize the Louisiana law with the Model Act and to avoid any implication that the listed steps were being rejected in some way. LA. REV. STAT. ANN. § 12:1-302(A) (Supp. 2015). The rules that really do make a difference in the event of an emergency are provided in subsections (B) and (C) of section 1-302.

work only when and for as long as they are needed, to minimize the risk that an emergency might be used as an excuse to usurp control over a corporation that was actually capable of managing its affairs under the normal rules.

### SHARES—PERMISSIBLE TERMS, ISSUANCE, TRANSFER RESTRICTIONS

The new Act is permissive and enabling in its approach to the terms that may be included as part of an investor's share contract with the corporation. Among the permitted terms for shares under the Act are those that deny, limit, or provide special forms of voting rights;[73] entitle the holder to distributions that are calculated in any manner and with preference over any other class or series;[74] or make the shares redeemable or convertible at the option of the corporation, the shareholder, or another person.[75] And like the LBCL, the new Act authorizes what are sometimes called "blank" shares or "blank check" shares, i.e., shares with terms that may be established by the board under a special rule that allows the board to adopt the appropriate amendment of the articles of incorporation on its own without a vote of the corporation's existing shareholders.[76]

The closest that this part of the Act comes to mandatory rules are its requirements (1) that any differences in the otherwise identical rights of shares be stated in the articles of incorporation before any shares of the affected class or series are issued,[77] (2) that a distinguishing designation (such as Class A and Class B, or common and preferred) be stated in the articles if the corporation does choose to authorize the issuance of shares with differing rights,[78] and (3) that the articles of incorporation authorize shares

73. LA. REV. STAT. ANN. § 12:1-601(C)(1) (Supp. 2015). The denial of voting rights by the terms of the articles of incorporation is overridden in some cases by statutory rules that provide voting rights for certain decisions even if the affected shares are otherwise not entitled to vote. For example, if a proposed amendment of the articles of incorporation would change the rights or preference of a class or series of shares, the amendment would require the approval of that class or series, voting as a separate voting group, even if the shares of that class held no voting rights under the terms of the articles of incorporation. *Id.* § 12:1-1004(A)(3), (D).

74. *Id.* § 12:1-601(C)(3)–(4).

75. *Id.* § 12:1-601(C)(2).

76. *Id.* § 12:1-602.

77. *Id.* § 12:1-601(A).

78. *Id.*

that, taken together, hold unlimited voting rights and the right to receive the net assets of the corporation upon dissolution.[79]

The first two rules are mandatory only in the sense that they state what must be done to change the default rule that would otherwise provide identical rights to all shares. The third rule is arguably mandatory in the more normal sense of imposing a duty on the corporation.[80] Still, it is difficult to see how the rule actually could be enforced in practice,[81] except as a rule of construction that would operate similarly to the first two rules. To the extent that any voting or distributional rights were left unassigned as a formal matter, the rights would be allocated identically, by the default rule, among those shares that were not excluded from participation in the relevant rights by the applicable terms of the articles of incorporation.

The new Act is similar to the LBCL in giving the board of directors the power to determine when, to whom, and for what consideration to issue the corporation's shares.[82] In most other

---

79. *Id.* § 12:1-601(B).

80. The Official Comment to this provision in the Model Act appears to treat the provision as mandatory. The Comment says that the provision "requires" every corporation to comply with it, and that the provision "ensures that there is always in existence one or more classes or series of shares which share in the ultimate residual interests in the corporation and which are entitled to elect a board of directors and make other fundamental decisions with respect to the corporation." MODEL BUS. CORP. ACT § 6.01 cmt. 2 (2011).

81. Although it is theoretically possible that the secretary of state's office could reject the filing of articles that did not allocate a corporation's voting and distributional rights in the exhaustive way required by the statute, it is nearly inconceivable that it would ever do so. The issue would arise only in the context of a corporation with classified share provisions that were so complicated that the drafting lawyers had mistakenly failed to allocate all rights exhaustively. To trigger a rejection, the clerical employees in the secretary's office who were processing the filing of the document would first have to engage in a substantive interpretation of the document (something they could not reasonably be expected to do), and then catch the error that the drafting lawyers had missed. Alternatively, a shareholder in the corporation might attempt to obtain a writ of mandamus that ordered the corporation to engage in the allocation of rights required by the statute. But again, it is nearly inconceivable that a court would order the board of directors and the shareholders of a corporation to adopt amendments of the corporation's articles of incorporation that would allocate formally undistributed rights in some fashion for which no legal standard of allocation exists, except for the identical rights rule. And if the identical rights rule were the controlling standard, the court would be far more likely to resolve the issue by interpreting the existing articles and the statute in accordance with that rule than to issue a writ that would order the board and shareholders to implement the default rule by means of a formal amendment of the articles.

82. LA. REV. STAT. ANN. § 12:1-621 (Supp. 2015). The shareholders hold the share issuance power only if it is reserved to them in the articles of incorporation. *Id.* § 12:1-621(A). The LBCL provided similar rules in former

respects, however, the share-issuance rules in the new Act differ markedly from those in the LBCL. The board is no longer required, as it was under the LBCL, to issue shares for at least their par value,[83] to state a dollar value for the consideration received,[84] to allocate the consideration received between the required stated capital and capital surplus accounts,[85] or to reject consideration consisting of promissory notes or contracts for future services.[86] Under the new Act, the board may authorize the issuance of shares in exchange for any form of property or benefit to the corporation, explicitly including the promissory notes and contracts for future services that were unlawful forms of consideration under earlier corporation law.[87] The board is required only to determine that the consideration to be received for the shares is "adequate."[88] Once the board-approved consideration is received by the corporation, the shares are considered to be fully paid and nonassessable.[89]

Unless prohibited by the articles of incorporation, the board of directors may also issue shares without any consideration as part of a share dividend in which shares are issued pro rata to the corporation's existing shareholders.[90] If the shares being issued as a dividend are of a different class or series from those held by the shareholder receiving the shares, then the dividend must be

---

Revised Statutes section 12:52(A). *See* former LA. REV. STAT. ANN. § 12:52 (repealed 2015). In one type of share-issuance transaction, the new Act does add a shareholder-approval requirement that did not exist under the LBCL. Shareholders are required to approve an issuance transaction if shares, or other securities convertible into or exercisable for shares, are to be issued in exchange for something other than cash or cash equivalents and if the shares or securities to be issued (assuming full conversion or exercise of the non-share securities) will comprise more than 20% of the voting power of the shares that were outstanding immediately prior to the transaction. LA. REV. STAT. ANN. § 12:1-621(F) (Supp. 2015).

83. *See* former LA. REV. STAT. ANN. § 12:52(A) (repealed 2015).
84. *Id.*
85. *See id.* § 12:61(A).
86. *See id.* § 12:52(C).
87. LA. REV. STAT. ANN. § 12:1-621(B) (Supp. 2015).
88. *Id.* § 12:1-621(C).
89. *Id.* § 12:1-621(D).
90. *Id.* § 12:1-623(A). Although this type of pro-rata share issuance is ordinarily called a "share dividend," it is not subject to the legal requirements applicable to what the new Act calls a "distribution," i.e., a dividend of cash or property or a share repurchase. The term "distribution" is defined to exclude a transfer by a corporation of its own shares. *Id.* § 12:1-140(6). This is a change in the law. Under the LBCL, because of the need under the par-value-based system to allocate consideration to the stated capital account for all issued shares, a dividend of shares was subjected to the same rules as were dividends of cash or property. *See* former LA. REV. STAT. ANN. § 12:63(A) (repealed 2015).

approved by shareholders of the class or series to be distributed, unless the articles of incorporation provide otherwise or unless no shares of that class or series are outstanding at the time of the dividend.[91]

In one respect, the new share-issuance rules are more restrictive than those in the LBCL. Under prior law, it was possible for the board to issue authorized shares without shareholder approval even in a transaction that would result in a change of control of the company. A smaller company, for example, could act as the nominal buyer of a larger company's assets, issuing shares to the selling company in exchange for the seller's assets. The nominal seller in this transaction could end up receiving enough shares to give it control over the nominal buyer, as it would be contributing a majority of the value to the combined firm.[92] In economic reality, the nominal seller would be acquiring the smaller company, but the smaller company's shareholders would not have been entitled to vote on the transaction under the LBCL.[93] The new Act gives shareholders the right to vote in this and other similar types of transactions. Shareholders are entitled to vote on the issuance of shares[94] if the shares are to be issued in exchange for something other than cash or cash equivalents and if the number of shares to be issued in the transaction[95] is greater than 20% of the shares that were outstanding immediately before the transaction.[96]

---

91. LA. REV. STAT. ANN. § 12:1-623(B) (Supp. 2015).

92. Consider this example: Buyer Corporation, with a total net worth of $5 million, agrees to buy substantially all of the assets (and to assume substantially all of the liabilities) of Seller Corporation, which has a total net worth of $15 million. Buyer Corporation pays for the assets of Seller Corporation through the issuance of Buyer Corporation shares worth $15 million. When this transaction is carried out, Seller Corporation will own three times as many shares in Buyer Corporation as all of Buyer's other shareholders, thus making Buyer a 75% owned subsidiary of Seller.

93. If the selling company was selling substantially all of its assets, its own shareholders would have been entitled to vote. But shareholders were entitled to vote in this type of transaction only if their company was acting as a seller, not buyer. Former LA. REV. STAT. ANN. § 12:121(B) (repealed 2015). This difference in voting rights made it a simple matter to deny voting rights to shareholders in the smaller firm, simply by treating it as the buyer in the transaction. Some states recognize a de facto merger doctrine that would preclude that result. *See, e.g.*, Farris v. Glen Alden Corp., 143 A.2d 25, 31 (Pa. 1958). Delaware, by contrast, has rejected the use of the de facto merger theory for that purpose. *See, e.g.*, Hariton v. Arco Elecs., Inc., 188 A.2d 123, 125 (Del. 1963). Louisiana courts have not ruled on the question.

94. LA. REV. STAT. ANN. § 12:1-621(F)(1) (Supp. 2015). The same rule is triggered by the issuance of other types of securities that are convertible into or exercisable for voting shares. *Id.*

95. The rule also applies to a series of integrated transactions. *Id.* § 12:1-621(F)(1). A series of transactions is integrated if consummation of one

The new Act deals with preemptive rights[97] in much the same way as did the LBCL, but the new Act changes a few details and adds a few new rules to deal with issues on which the former law was silent. The rights continue to be "opt in," i.e., available only if the articles of incorporation provide for them.[98] And corporations formed before January 1, 1969—when the law provided automatically for preemptive rights unless a company's articles rejected them—continue to be covered by a grandfathering provision that deems the articles of pre-1969 companies to provide for preemptive rights.[99] Under the default statutory rules, the rights apply only to shares issued for money.[100] If the rights apply, they require existing shareholders to be given a brief period within which to purchase the shares, and then allow the corporation to sell any shares not purchased by the shareholders at the same or a higher price for a one-year period after the shares were offered to the shareholders.[101]

However, the preemptive period provided under the new Act will generally be longer than the 15-day period specified in the LBCL.[102] Under the new Act, the corporation must provide a "fair and reasonable opportunity" to the shareholders to exercise their

---

transaction is made contingent on the consummation of one or more other transactions. *Id.* § 12:1-621(F)(2)(b).

96. *Id.* § 12:1-621(F)(1)(b).

97. Preemptive rights entitle existing shareholders to the first opportunity to purchase a proportionate part of a new issue of shares. *See id.* § 12:1-630(B)(1).

98. *Compare* LA. REV. STAT. ANN. § 12:1-630(A) (Supp. 2015), *with* former LA. REV. STAT. ANN. § 12:72(A) (repealed 2015).

99. The placement of the relevant provision differs. In the new Act, it is placed in the provision dealing with preemptive rights themselves, and not, as in the LBCL, in a provision dealing generally with permissible provisions in a corporation's articles of incorporation. *Compare* LA. REV. STAT. ANN. § 12:1-630(A) (Supp. 2015), *with* LA. REV. STAT. ANN. § 12:24(C)(1) (repealed 2015). The change in placement was designed to make it more likely that the relevant provision would be found.

100. *Compare* LA. REV. STAT. ANN. § 12:1-630(B)(3)(d) (Supp. 2015), *with* former LA. REV. STAT. ANN. § 12:72(A)(2)(a) (repealed 2015). Both the new and former laws provided other exceptions, such as shares issued as compensation for services and shares issued upon conversion of another security, but the additional exceptions just provided specific examples of the more general principle that limited preemptive rights to shares not issued for cash. *Compare* LA. REV. STAT. ANN. § 12:1-630(B)(3) (Supp. 2015), *with* former LA. REV. STAT. ANN. § 12:72(A)(2) (repealed 2015).

101. *Compare* LA. REV. STAT. ANN. § 12:1-630(B)(6) (Supp. 2015), *with* former LA. REV. STAT. ANN. § 12:72(A)(3) (repealed 2015).

102. Former LA. REV. STAT. ANN. § 12:72(A)(1) (repealed 2015). Because common shares typically do have voting power and preferred shares often do not, the former voting shares rule could have had some effect on cross-class preemptive rights.

preemptive rights, subject to a safe-harbor rule that deems a period of at least 45 days to satisfy the statutory standard.[103] The new Act also deals with what might be called "cross-class" preemptive rights with greater detail than the LBCL. Under the LBCL, preemptive rights were held only by the owners of voting shares, and they applied only to the issuance of voting shares.[104] The new Act effectively grants preemptive rights only to holders of common shares and then only for other common shares. Common shareholders are denied preemptive rights on preferred shares (unless the preferred shares are convertible into common shares),[105] and preferred shareholders are denied preemptive rights altogether.[106] The new Act also adopts new (and shorter) prescriptive and peremptive periods for preemptive rights.[107]

The new Act largely retains the share-certificate and transfer-restriction provisions from the LBCL, as the LBCL was itself amended in 2005[108] to adopt a modified version of the Model Act provisions that were adopted again as part of the new Act.[109]

---

103. LA. REV. STAT. ANN. § 12:1-630(B)(1) (Supp. 2015). An official Revision Comment explains that the corporation would bear the burden of proving that a period shorter than 45 days did provide a fair and reasonable opportunity to the shareholders to exercise their preemptive rights. *Id.* cmt. b.

104. Former LA. REV. STAT. ANN. § 12:72(A)(1) (repealed 2015).

105. LA. REV. STAT. ANN. § 12:1-630(B)(5) (Supp. 2015).

106. *Id.* § 12:1-630(B)(4). The new Act avoids the use of the terms "common" and "preferred" shares, because of the large variation that may exist in the contractual rights of shares denominated either way in practice. MODEL BUS. CORP. ACT § 6.01 cmt. (2011). The text is using the term "common" shares to mean shares that are described in the relevant preemptive rights provision as holding general voting rights, but no preferential rights to distributions or assets. LA. REV. STAT. ANN. § 12:1-630(B)(5) (Supp. 2015). The term "preferred" shares is used to refer to shares without general voting rights, but with preferential rights to distributions or assets. *Id.* § 12:1-630(B)(4).

107. LA. REV. STAT. ANN. § 12:1-630(D) (Supp. 2015). The new periods become effective on January 1, 2016. *Id.*

108. *See* Act No. 97, 2005 La. Acts 1109.

109. Former LA. REV. STAT. ANN. §§ 12:57, 58 (repealed 2015). The LBCL contained a technical error that created a conflict between subsections (A) and (G) of former section 12:57. Unlike its counterpart in the Model Act, subsection (A) of the Louisiana provision dropped the traditional requirement of share certificates only for corporations that were participants in the Direct Registration System, or its successor, the Depository Trust & Clearing Corporation (essentially, publicly traded corporations using a book-entry system of share ownership documentation). *Compare* MODEL BUS. CORP. ACT § 6.26 (2011), *with* former LA. REV. STAT. ANN. § 12:57(A) (repealed 2015). But subsection (G) overlooked the limitation of subsection (A), and simply provided without limitation that a corporation's board of directors could issue some shares with certificates and other shares without certificates. Former LA. REV. STAT. ANN. § 12:57(G) (repealed 2015). Subsection (G) was a virtual copy of section 626 of the Model Act, which was designed simply to make the point in the Model Act that the corporation was not required to make the same choice about share

Louisiana's version of the Model Act provisions imposes a limitation that is not present in the Model Act. The Model Act allows all corporations to choose whether to utilize share certificates to represent their issued shares,[110] but the analogous Louisiana provisions provide this choice only to corporations that are participants in the Direct Registration System of the Depository Trust & Clearing Corporation, or in a similar book entry system used in the trading of shares of public corporations.[111]

Because most Louisiana corporations are closely held, the practical effect of this limitation on the Model Act rule is to require most Louisiana corporations to continue to issue certificates for their shares. The certificate requirement was retained for closely held corporations because the certificates provide a convenient and reliable means of perfecting security interests in the shares and of notifying third parties of any transfer restrictions applicable to the shares.[112] However, the Revision Comments point out that the statutory requirement of share certificates is a duty imposed by law on the corporation, not a defense that may be asserted by the corporation against a person who genuinely owns shares for which the corporation has failed to issue a certificate.[113]

### DISTRIBUTIONS—DIVIDENDS AND SHARE REPURCHASES

Like most corporation statutes adopted before 1980, the LBCL imposed financial restrictions both on the payment of dividends and on the repurchase of shares that were based in major part on the par-value-based system of corporate capital. Under that system,

---

certificates for all of its shares; some shares could be represented by certificates while others were not. *Compare* MODEL BUS. CORP. ACT § 6.26 (2011), *with* former LA. REV. STAT. ANN. § 12:57(G) (repealed 2015). The lack of any restriction on the application of this freedom-of-choice rule in the Model Act provision was consistent with the Model Act approach, which allowed all corporations to issue shares without certificates, but inconsistent with Louisiana's decision to limit this freedom of choice to certain publicly traded corporations. The new Act corrects this error by limiting the operation of the analogous new provision to those corporations that are eligible to issue shares without certificates. LA. REV. STAT. ANN. § 12:1-626(A) (Supp. 2015). Language was also modified to change the reference to a possible "successor" registration system to a "similar" registration system, to prevent the rule from being technically narrower than was justified by the underlying purpose of the rule. LA. REV. STAT. ANN. § 12:1-625(A) (Supp. 2015).

110. MODEL BUS. CORP. ACT § 6.25(a) (2011).
111. LA. REV. STAT. ANN. § 12:1-625(A) (Supp. 2015).
112. *Id.* cmt. b.
113. *Id.* cmt. c.

a statement about par value was required in a corporation's articles of incorporation,[114] par value shares could not be sold for less than par value (paid in an acceptable form of consideration),[115] and the aggregate of the par value of all issued shares had to be included in a statutorily required stated capital account.[116] The stated capital account then restricted the amount a corporation could lawfully pay to shareholders either in dividends or in share repurchases. Payments of that kind were lawful only to the extent that the payments did not cause the net worth of the company to become less than the amount of its stated capital account.[117] In effect, a corporation could pay a dividend only to the extent that its net worth exceeded the aggregate of the par value of its issued shares.

In early practice, when shares were generally sold at par value, the effect of the par-value-based system was to prevent shareholders from taking back any of the capital that they had invested in the corporation through the payments they made for their shares.[118] The share payments created an "equity cushion" for the benefit of creditors: If the corporation lost money, it was the shareholders'

---

114. Former LA. REV. STAT. ANN. § 12:24(B)(5) (repealed 2015). The statement did not have to establish a par value; it could say that the corporation's shares were "without par value." *Id.* But that approach did not avoid application of the par-value-based system of corporate capital. When shares without par value were issued, the board was required to allocate some part of the consideration to the stated capital account, in much the same way that the sale of par value shares would result in the allocation of the par value portion of the consideration received to the stated capital account. *Id.* § 12:61(A). Nominal par was the better approach, practically speaking, as it eliminated the risk that the board would overlook the need to allocate at least a minuscule portion of the issuance price to stated capital. The use of no-par shares did eliminate the need to meet a minimum price requirement (par value) on the issuance of the shares. But nominal par would set the minimum price so low—say, at a penny—that the minimum price was practically irrelevant.

115. *Id.* § 12:52(A), (C).

116. *Id.* §§ 12:1(B), 12:1(T), 12:61(A).

117. Dividends could be paid only out of "surplus." *Id.* § 12:63(A). "Surplus" was defined as assets minus the sum of liabilities and stated capital. *Id.* § 12:1(V). Assets minus liabilities alone would have produced total net worth. Subtracting stated capital as well made that part of the corporation's total net worth unavailable for dividends. In addition to the surplus requirement, the corporation was also required to comply with a cash-flow solvency test: after taking the dividend or share repurchase into account, the corporation had to be able to pay its debts as they became due in the usual course of business. *Id.* §§ 12:1(L), 12:63(A).

118. The stated capital account did not assure creditors that the corporation actually had a net worth at least as large as that account. The corporation certainly could suffer losses in its operations that resulted in the corporation's having a negative net worth. The stated capital account merely restricted the ability of shareholders to take money out of the corporation in the form of dividends and share repurchases.

money that was lost first. Whatever was left of the shareholders' investments after those losses would still be available to pay the creditors' claims.

However, corporations eventually came to realize that they could avoid the restrictions imposed by the par value system by issuing shares with only nominal par values—say, $0.01 per share, for shares that were sold for $100 each. The same rules still applied, but they applied to amounts of money that were so small that the rules became economically meaningless.

The widespread adoption of nominal-par-value shares led to the Model Act's elimination of the mandatory par value system in 1980.[119] Corporations were no longer required to state a par value for their shares, to maintain a stated capital account, or to limit dividends or share repurchase transactions to the amount by which the company's net worth exceeded the amount in the stated capital account. Corporations were also permitted to accept promissory notes and contracts for future services in exchange for their shares.

The new Act in Louisiana adopts all of those Model Act changes. The traditional dual-solvency test (requiring both cash-flow and net worth solvency) still applies but now without any adjustment of the net worth, or "balance sheet," part of the test to take account of stated capital. If a corporation is able to pay its debts as they become due in the usual course of business, after taking the dividend or share repurchase into account,[120] then it may lawfully make those payments to the full extent of its net worth.[121] For corporations with nominal-par shares,[122] this change will make

119. MODEL BUS. CORP. ACT § 6.21 cmt. (2011).

120. LA. REV. STAT. ANN. § 12:1-640(C)(1) (Supp. 2015).

121. *Id.* § 12:1-640(C)(2). If the corporation has preferred shares outstanding, i.e., shares with preferential rights to distributions upon dissolution, the dividend or share repurchases are subject to an additional limitation that is designed to protect the liquidation preferences of the preferred shares in much the same way that the normal net worth test protects the interests of creditors. The corporation's net worth available for dividends is calculated by subtracting from the value of the corporation's assets both liabilities and the liquidation preferences owed to any class of shares whose preferences are senior to those of the class receiving the distribution. In effect, the liquidation preferences are treated as liabilities for purposes of calculating the net worth available for distribution to more junior classes of shares. *Id.* The LBCL provided a similar rule in the case of share repurchases, but, curiously, not in the case of dividends. *See* former LA. REV. STAT. ANN. §§ 12:55(A), 12:63(A) (repealed 2015). Because the new Act treats both dividends and share repurchases as "distributions" that are subject to the same financial restrictions, the new Act applies the liquidation preference rule to both forms of payment. *See* LA. REV. STAT. ANN. §§ 12:1-140(6), 1-640(C) (Supp. 2015).

122. If the articles of a corporation stated that its shares were without par value, the board was still required to allocate some part of the purchase price to

little financial difference, as it makes only a nominal amount of additional money available for dividends. But that is the very reason that the Model Act abolished the par value system: The old system required careful attention to a number of complicated statutory rules that served little to no practical purpose.[123] Under the Model Act approach, which is now adopted in Louisiana, most corporations will achieve about the same result as under the old rules, but in a far simpler fashion.

The new approach also abolishes the need to deal with "treasury shares" and "nimble dividends." Treasury shares were issued shares that had been repurchased by the corporation but not cancelled.[124] When shares were cancelled, stated capital was reduced by the par value of the cancelled shares, and the shares returned to unissued status.[125] Because cancelled shares became unissued, when the corporation sold them again, it was considered to be "issuing" the shares and thus had to comply with the minimum-price and form-of-consideration rules that applied to that kind of transaction.[126] In contrast, when a corporation resold uncancelled "treasury shares," it was not issuing the shares—treasury shares retained their status as issued shares and their par value was already reflected in the stated capital account—so the corporation could "dispose" of the shares for any consideration fixed from time to time by the board of directors.[127] Because the Model Act abolishes the par value and form-of-consideration rules that led to the need to distinguish treasury shares from repurchased and cancelled shares, it also eliminates treasury shares. Under the new Act, all repurchased shares will become unissued shares.[128]

---

stated capital. Former LA. REV. STAT. ANN. § 12:61(A) (repealed 2015). In that case, the statement in the text would apply in any case in which only a nominal portion of the purchase price for the shares was allocated to stated capital.

123. MODEL BUS. CORP. ACT § 6.21 cmt. (2011) ("Practitioners and legal scholars have long recognized that the statutory structure embodying 'par value' and 'legal capital' concepts is not only complex and confusing but also fails to serve the original purpose of protecting creditors and senior security holders from payments to junior security holders. Indeed, to the extent security holders are led to believe that it provides this protection, these provisions may be affirmatively misleading.").

124. Former LA. REV. STAT. ANN. § 12:1(X) (repealed 2015).

125. *Id.* §§ 12:61(D), 12:55(D).

126. *Id.* § 12:52(A), (C).

127. *Id.* § 12:52(A).

128. LA. REV. STAT. ANN. § 12:1-631(A) (Supp. 2015). If the articles of incorporation prohibit the reissuance of repurchased shares, the number of authorized shares is reduced by the number of shares that were repurchased. *Id.* § 12:1-631(B).

Although the statute did not use the term "nimble dividends," that term was commonly used to describe dividends that could be made out of current or recent earnings despite the lack of sufficient surplus.[129] But even nimble dividends could be paid only to the extent of the corporation's positive net worth.[130] So, in effect, what was special about nimble dividends was that they operated as an exception to the normal rule that dividends could not be paid if such a payment would "invade" or "impair" stated capital, i.e., cause the corporation's net worth to fall below the amount in its stated capital account (or further reduce net worth that was already below that amount). Because the new Act makes no attempt to create or protect a stated capital account, and because dividends are always permissible to the full extent of the corporation's net worth (assuming the cash flow and preferred share rules are also satisfied),[131] the new Act contains nothing like the old nimble dividend rule.

The new Act makes two other important changes to the dividend and share-repurchase rules. First, the Act explicitly permits something that was at least questionable under traditional corporate capital rules: to make a decision about the lawfulness of a dividend on the basis of something other than the corporation's accounting statements. The new Act permits the board to determine the corporation's compliance with the statutory dividend restrictions based *either* on financial statements that are prepared using reasonable accounting practices and principles,[132] *or* on a "fair valuation or other method that is reasonable in the

129. *See* MORRIS & HOLMES, *supra* note 9, § 25.06, at 641–42.

130. Former LA. REV. STAT. ANN. § 12:63(B) (repealed 2015). Nimble dividends were also subject to a rule protecting the liquidation preference of preferred shares, something that otherwise applied only to share repurchases, not ordinary dividends. *Id.*

131. The payment is also subject to the cash-flow solvency test and to the protection of the liquidation preferences of preferred shares, if any. LA. REV. STAT. ANN. § 12:1-640(C) (Supp. 2015).

132. The "reasonableness" standard is designed not to require that the statements be prepared in accordance with generally accepted accounting principles, or "GAAP." The Official Comment to the source provision in the Model Act explains that GAAP statements are always "reasonable in the circumstances," and that boards of directors should "in all circumstances" be entitled to rely upon GAAP financial statements. MODEL BUS. CORP. ACT § 6.40 cmt. 4(A) (2011). However, the comment notes that many smaller and closely held corporations do not prepare GAAP financial statements, and that the statutory standard of reasonableness is designed to provide "a reasonable degree of flexibility and to accommodate the needs of the many different types of business corporations which might be subject to [the dividend] provisions, including in particular closely held corporations." *Id.*

circumstances."[133] The effect of the "fair valuation" approach is to break the connection between a corporation's net worth for dividend purposes from the "historic cost" approach taken to the recordation of asset values under most accounting principles. The Model Act approach, which is now adopted in Louisiana, permits the use of appraisal and current-value methods to determine the amount available for distribution.[134]

The second of the two changes is the provision concerning the time at which the compliance of a distribution with the statutory net worth and cash flow solvency tests is to be determined. In most cases, when a dividend is paid shortly after it is authorized by the board, the timing question will not matter; the corporation's financial condition will be substantially the same at both the time of payment and the time of authorization. However, recall that a repurchase of shares is subject to the same financial restrictions as a dividend. In the case of a share repurchase, particularly of a large percentage interest in a closely held corporation, the corporation may not have the cash available to make an immediate payment in full for the repurchased shares. In that situation, the shareholder may agree to sell his shares in exchange for a promissory note that calls for installment payments to be made over the course of several years.

The question then can arise whether the dividend tests to be applied when the share-repurchase note is first issued, or each time that any payment under the note is made. If the tests apply to each payment, the selling shareholder-turned-creditor may find that the corporation has a statutory defense to the enforcement of the note. The shareholder's interest as creditor of the corporation may be automatically (and surprisingly) subordinated to the claims of all other corporate creditors.

Unfortunately for selling shareholders, the limited jurisprudence on this issue that was decided under the LBCL held that the dividend tests were indeed to be applied to each payment.[135] The new Act, like the Model Act, rejects that approach. Under the new Act, when indebtedness is issued in a share repurchase transaction,

---

133. LA. REV. STAT. ANN. § 12:1-640(D) (Supp. 2015). The Official Comment to the source provision in the Model Act makes it clear that the board is entitled to rely upon reasonably current financial statements prepared using generally accepted accounting principles in making its determination. MODEL BUS. CORP. ACT § 6.40 cmt. 4(A) (2011).

134. MODEL BUS. CORP. ACT § 6.40 cmt. 4(B) (2011).

135. *See* Sec. Ctr. Prot. Servs., Inc. v. All-Pro Sec., Inc., 650 So. 2d 1206, 1212 (La. Ct. App. 1996); Collins v. Universal Parts Co., 260 So. 2d 702, 705 (La. Ct. App. 1972); *In re* La. Indus. Coatings, Inc., 31 B.R. 688, 693–94 (Bankr. E.D. La. 1983).

the compliance of that distribution with the statute's financial standards is determined at the earlier of the time that the indebtedness is distributed or the time that the shareholder ceases to be a shareholder of the acquired shares.[136] Moreover, the indebtedness distributed to the shareholder in such a transaction is declared to be "at parity" with the corporation's other general, unsecured debt, except to the extent that it is subordinated by agreement.[137]

## SHAREHOLDER LIABILITY

The LBCL organized its liability rules for various kinds of corporate participants—shareholders, directors, and officers—into a separate section devoted specifically to liability rules.[138] Like the Model Act, the new Act addresses the liability of each type of participant in the part of the Act that addresses that type of actor. The rules concerning shareholder liability are provided in section 1-622.[139]

The most important of the shareholder liability rules, of course, is the basic rule against shareholder liability. The new Act expresses this rule simply and without exception: A shareholder is not personally liable for the acts or debts of the corporation.[140] The simplicity of this statement was designed to avoid the enormous confusion and uncertainty that has been created by the non-liability provisions of the limited liability company law.[141] The drafters of the LLC statute attempted to draft an all-encompassing non-liability rule for all types of LLC participants—not just owners—that has ended up backfiring and actually weakening the protections provided by the LLC statute.[142]

The Louisiana version of the non-liability rule deletes two phrases from the source Model Act provision. The first would have made the non-liability rule subject to contrary provisions in the articles of incorporation. Louisiana deleted this phrase because it also deleted the provision that permits personal liability to be undertaken by

136. LA. REV. STAT. ANN. § 12:1-640(E)(1) (Supp. 2015). A similar rule applies to a distribution of indebtedness as a dividend, i.e., without any surrender by the recipients of shares, except that only one date applies: the date that the debt is distributed. *Id.* § 12:1-640(E)(2).

137. *Id.* § 12:1-640(F).

138. Former LA. REV. STAT. ANN. §§ 12:91–96 (repealed 2015).

139. LA. REV. STAT. ANN. § 12:1-622 (Supp. 2015).

140. *Id.* § 12:1-622(A).

141. *Id.* § 12:1320. *See* Ogea v. Merritt, 130 So. 3d 888 (La. 2013); *see also* Thomas Bourgeois, Comment, *Mirror, Mirror: Amending Louisiana's LLC Statutes Related to Personal Liability of Members to Match Corporate Couterparts after* Ogea v. Merritt, 76 LA. L. REV. (forthcoming 2016).

142. *See, e.g.*, *Ogea*, 130 So. 3d 888; *see also* Bourgeois, *supra* note 141.

shareholders through provisions in the articles of incorporation.[143] The drafting committee recognized that the shareholders of a closely held corporation often do undertake personal liability for their corporation's debts, through personal guarantees, but they did not want to create the risk that this type of liability could be assumed inadvertently through unusual provisions in the corporation's articles of incorporation.[144]

The second phrase deleted from the Model Act provision would have stated an "exception" to the general rule of non-liability.[145] The exception stated that a shareholder could become liable by reason of his own acts or conduct.[146] That phrase was deleted to avoid the confusion about personal liability that has arisen as a result of similar language in Louisiana's LLC statute. The Revision Comments explain that the deletion of the phrase was not intended to reject the idea that a shareholder could become personally liable in connection with acts carried out in operating the corporation's business.[147] However, that liability would not arise from the imposition of the corporation's debt on the shareholder. Rather, the liability would arise from personal duties imposed under other bodies of law, such as tort law and contract law, and so would not operate as an exception to the simple corporate law rule that a shareholder is not personally liable for the debts of the corporation.[148]

## SHAREHOLDER MEETINGS AND CONSENTS

The provisions of the new Act concerning shareholder meetings, or written consents in lieu of a meeting, make few

---

143. LA. REV. STAT. ANN. § 12:1-622 cmt. b (Supp. 2015).
144. *Id.* § 12:1-202 cmt. b.
145. MODEL BUS. CORP. ACT § 6.22(b) (2011).
146. *Id.*
147. LA. REV. STAT. ANN. § 12:1-622 cmt. c (Supp. 2015).
148. *Id.* This distinction is not a matter of theoretical nitpicking. The rejection of the personal conduct "exception" is designed to make it clear that a shareholder may be held liable for his or her own personal conduct only if that liability could be imposed, based on the same conduct, on someone who was not a corporate shareholder. To recover under this approach, a claimant should be required to prove all of the elements of a legal claim against the defendant, entirely outside of corporate law, and without relying on the misguided notion that the corporation statute itself imposes personal liability on a corporate shareholder merely because the shareholder has engaged in "personal conduct" in operating the corporation's business. If the corporation statute were to impose liability in that vague and open-ended fashion, only passive investors really could count on the statute's "normal" rule against shareholder liability. The more typical, actively engaged owner/manager of a closely held corporation would be exposed to personal liability fairly routinely, in connection with all of the corporate acts and debts in which his personal conduct had played some role.

changes to the substance of the former law. Shareholders must make their collective decisions either through properly convened[149] and properly noticed[150] meetings at which a quorum of shareholders is present in person or by proxy,[151] or through properly executed and submitted written consents,[152] which must be unanimous unless the articles of incorporation provide otherwise.[153] Unless directors are elected by written consent in lieu of an annual meeting, the corporation must hold an annual meeting each year for the election of directors.[154] If an annual meeting is not held for a period of 18 months or more, any shareholder may require that such a meeting be conducted.[155] Shareholders may also require a special meeting to be called if they own a sufficient percentage of the corporation's shares, but the new Act reduces the percentage required from 20% of total voting power[156] to 10% of the votes entitled to be cast on the issue proposed to be considered at the special meeting.[157]

The new Act does introduce a new term—"voting group"—that was not used in the LBCL. The new term is used to deal with what the LBCL called "class voting." The chief difference between class voting under the LBCL and the new voting group approach is how

---

149. *Compare* former LA. REV. STAT. ANN. § 12:73(A)–(B) (repealed 2015), *with* LA. REV. STAT. ANN. §§ 12:1-701(A), 1-702(A) (Supp. 2015).

150. *Compare* former LA. REV. STAT. ANN. § 12:73(D) (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-705 (Supp. 2015).

151. *Compare* former LA. REV. STAT. ANN. § 12:74 (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-725 (Supp. 2015).

152. *Compare* former LA. REV. STAT. ANN. § 12:76 (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-704 (Supp. 2015). The new Act does add a formal requirement to the written consents that were not part of the LBCL: the consents must not only be signed, but also dated. LA. REV. STAT. ANN. § 12:1-704(A) (Supp. 2015). The dating requirement is tied to a new rule that is designed to prevent the gathering of written consents over an excessively long time. An action by written consent is ineffective unless the required number of consents is delivered to the corporation no later than 60 days after the date that the first-delivered consent was signed. *Id.* § 12:1-704(C).

153. *Compare* former LA. REV. STAT. ANN. § 12:76(A)–(B) (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-704(A)–(B) (Supp. 2015).

154. *Compare* former LA. REV. STAT. ANN. § 12:73(A) (repealed 2015), *with* LA. REV. STAT. ANN. §§ 12:1-701(A), 1-805(B) (Supp. 2015).

155. *See* LA. REV. STAT. ANN. § 12:1-701(D) (Supp. 2015). The LBCL allowed any shareholder to call this meeting, to be held at the corporation's registered office, but did not say how the shareholder was supposed to satisfy the requirement that notice of the meeting be sent to all shareholders. *See* former LA. REV. STAT. ANN. § 12:73(A) (repealed 2015). The new Act changes the direct-call rule to a rule that allows a shareholder to demand that the secretary of the corporation call the meeting and send the required notices. LA. REV. STAT. ANN. § 12:1-701(D) (Supp. 2015).

156. Former LA. REV. STAT. ANN. § 12:73(B) (repealed 2015).

157. LA. REV. STAT. ANN. § 12:1-702(A)(2) (Supp. 2015).

the lines are drawn between the various classes of stock and the various voting groups entitled to vote separately on some proposed corporate action. Under the LBCL, several classes with substantially the same interests in a proposed corporate action might have been entitled to several separate votes, thus giving each similarly situated class the power to veto a proposal that was favored by a majority of the shares of the larger, similarly situated group. Under the new Act, all shares that are entitled to vote generally on a given matter—even those denominated with differing class or series designations—are for purposes of that matter a single voting group.[158] In dealing with amendments of the articles of incorporation in particular, the Act provides that all classes and series of shares that would be affected in substantially the same way by a proposed amendment must be treated as a single voting group.[159]

The new Act also adds some new provisions that lend statutory support for several widely accepted practices in conducting shareholder meetings. A chair must be selected to preside at each meeting of shareholders, as provided in the bylaws or by the board of directors.[160] This chair is empowered to determine the order of business and to establish rules for the conduct of the meeting.[161] The rules must be fair to shareholders.[162]

Rules are also provided to allow the corporation to resolve issues concerning the corporation's acceptance or rejection of votes represented by signatures on a vote, consent, waiver, or proxy appointment. If the name signed on the document corresponds to the name of the shareholder, the corporation is entitled, in good faith, to accept it.[163] However, the corporation is also entitled to reject a vote,

158. The language of the new Act should not be interpreted to prohibit the articles of incorporation from specifying that a particular class or series is to have the right to be treated as a separate voting group for one or more described issues, as that feature of the shares would itself distinguish the rights of that class from other classes that were otherwise similar. But the simple provision of voting power on some matter to a particular class or series would not by itself cause that class or series to be treated as a separate voting group from other classes or series having substantially the same voting rights with respect to that matter.

159. LA. REV. STAT. ANN. § 12:1-1004(C) (Supp. 2015). The rule concerning amendments of the articles also applies to other types of transactions, such as mergers, that propose an amendment of the articles of incorporation of the surviving corporation that would require approval by a separate voting group under section 1-1004. *See, e.g.*, *id.* § 12:1-1104 (6)(a)(ii).

160. *Id.* § 12:1-708(A).

161. *Id.* § 12:1-708(B).

162. *Id.* § 12:1-708(C).

163. *Id.* § 12:1-724(A). If the name does not correspond, but purports to be that of someone with the power to exercise the shareholder's vote, the

consent, waiver, or proxy appointment if the secretary or other corporate agent authorized to tabulate votes, acting in good faith, has reasonable basis to doubt the validity of the signature on the document or the signatory's authority to sign for the shareholder.[164] Finally, all corporations are authorized (and public corporations are required) to appoint one or more inspectors of election to tabulate votes on the corporation's behalf.[165]

The new Act changes some of the details governing shareholder proxies. The first change is in the terminology used. The Official Comments to the Model Act explain that the term "proxy" can be used to refer to three distinct things: the grant of authority to exercise a vote, the document through which the authority is granted, and the person who holds that authority.[166] Like the Model Act, the new Act in Louisiana uses the term "proxy" to refer strictly to the person holding the voting authority.[167] The terms "appointment form" and "electronic transmission" are used to refer to the document, or its electronic equivalent, through which the authority is granted.[168] And finally, the word "appointment" is used to describe the grant of authority itself.[169]

The new Act retains the LCBL's default term of eleven months for a proxy appointment, but it eliminates the old maximum term limit of three years.[170] The new Act also replaces the old rule that made all proxy appointments revocable at will "unless otherwise validly provided"[171] with a new rule that states more clearly when irrevocability can indeed be validly provided. Under that new rule, a proxy appointment can be made irrevocable by a statement to that effect in the appointment document or transmission, if the appointment is "coupled with an interest."[172] The Act then lists five appointments that would be deemed to qualify for irrevocability,

---

corporation is entitled to accept the vote or consent involved in good faith in a number of common, statutorily described situations, and to require in many of those cases that evidence be provided of the signing person's authority to exercise the vote. *Id.* § 12:1-724(B).

164. *Id.* § 12:1-724(C).
165. *Id.* § 12:1-729.
166. MODEL BUS. CORP. ACT § 7.22 cmt. 1 (2011).
167. LA. REV. STAT. ANN. § 12:1-722 (Supp. 2015).
168. *Id.*
169. *Id.*
170. *Compare* LA. REV. STAT. ANN. § 12:1-722(C) (Supp. 2015), *with* former LA. REV. STAT. ANN. § 12:75 (C)(3) (repealed 2015).
171. Former LA. REV. STAT. ANN. § 12:75(C)(3) (repealed 2015).
172. LA. REV. STAT. ANN. § 12:1-722(D) (Supp. 2015). An appointment that is validly made irrevocable under this provision is revoked by operation of law when the interest with which it is coupled is extinguished. *Id.* § 12:1-722(F).

including the appointment of a pledgee or creditor who extended credit under terms requiring the appointment.[173] Considered together, the new Act's greater clarity concerning the types of proxy appointments that may be made irrevocable, and its abolition of the old three-year term limit on appointments, should make proxy appointments a more valuable and reliable tool in facilitating business and financial transactions.

### VOTING AGREEMENTS, VOTING TRUSTS AND UNANIMOUS GOVERNANCE AGREEMENTS

The LBCL was silent on the subject of voting agreements among shareholders and provided rules concerning voting trusts that reflected the traditional mistrust of those types of devices. In contrast, the new Act explicitly authorizes agreements among shareholders concerning the manner in which they will vote their shares, makes them specifically enforceable, and provides that such an agreement does not constitute a voting trust, rejecting an old Delaware case[174] to the contrary.[175] It also eliminates the traditional term limits on voting trusts[176] and leaves the terms of the trust to the participating shareholders, without the relatively detailed set of governing rules contained in the LBCL.[177]

More important, however, is the new Act's provision concerning a new form of governance document, which it defines and calls a "unanimous governance agreement."[178] This provision makes a major change in the law. The LBCL had been interpreted not to change the early jurisprudential rule that invalidated on public policy grounds any agreement among shareholders that interfered with the unfettered discretion of the board of directors to manage the corporation as the board saw fit.[179] In sharp contrast, the new

---

173. *Id.* § 12:1-722(D).

174. Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441 (Del. 1947).

175. *See* LA. REV. STAT. ANN. § 12:1-731 (Supp. 2015).

176. *Compare* former LA. REV. STAT. ANN. § 12:78(A) (repealed 2015) (limiting voting trust term to one fifteen-year term, plus one ten-year extension), *with* LA. REV. STAT. ANN. § 12:1-730(C) (Supp. 2015) (placing limit on duration of trust controlled by terms in the voting trust, but a transition rule preserves the term limits for voting trusts executed before the January 1, 2015 effective date of the new Act).

177. Former LA. REV. STAT. ANN. § 12:78(B)–(G) (repealed 2015).

178. LA. REV. STAT. ANN. § 12:1-732(A) (Supp. 2015).

179. The leading case nationally on the subject was the 1934 decision of the Court of Appeals of New York in *McQuade v. Stoneham*, 189 N.E. 234 (N.Y. 1934). The Supreme Court of Louisiana issued a similar decision in 1937. *See* Williams v. Fredericks, 175 So. 642 (La. 1937). Section 29 of the LBCL

Act explicitly permits a unanimous governance agreement to govern the kinds of decisions normally left to the board, such as distribution decisions, and even allows the board of directors to be eliminated altogether.

Indeed, a unanimous governance agreement can do what no other governance document can do, not even the articles of incorporation: It can override rules in the new Act that would otherwise be considered mandatory.[180] Unanimous governance agreements are to be enforced in accordance with the principle of freedom of contract. The only limitation imposed on this freedom is that of public policy. This vague limitation might seem susceptible to the same sort of circular argument that limited shareholder agreements under the LBCL.[181] But the statute plainly rejects the foundation of that argument—the notion that public policy requires all corporations, even closely held ones, to be managed by a board of directors. The new Act explicitly allows a unanimous governance agreement to call for a corporation to be managed by "one or more shareholders or other persons."[182]

---

allowed "any lawful provision regulating the affairs of a corporation [that was not required to be placed in the articles of incorporation]" to be placed in an agreement among all of the shareholders who would be entitled to vote on such a provision if placed into the articles of incorporation. Former LA. REV. STAT. ANN. § 12:29(A) (repealed 2015). Such agreements were declared "binding" on all persons who were then shareholders or who later became shareholders of the corporation. *Id.* Unfortunately, one of the members of the committee who had worked on drafting the LBCL published an article in the Louisiana Bar Journal that explained that the new section 29 agreement recognized only "lawful" provisions, and that provisions that interfered with directorial discretion were not lawful. He even suggested that Louisiana was a "particularly hostile jurisdiction" toward such agreements. His views on the subject were quoted with approval in *Goldblum v. Boyd*, 341 So. 2d 436, 446 (La. Ct. App. 1976), thus raising serious doubts whether a shareholders' agreement under section 29 could lawfully provide for such things as dividend policies and the identities and compensation of the corporation's officers.

180. LA. REV. STAT. ANN. § 12:1-732(B) (Supp. 2015).

181. Although the language of the former provision seemed to provide expansive powers to shareholder agreements to regulate the affairs of the corporation by "any lawful provision"—suggesting that they could indeed encroach on matters that would otherwise be left to the discretion of the board of directors—a provision was considered not be "lawful" within the meaning of this rule if it interfered with the directors' managerial power or discretion. The reason? Because, as everyone who understood corporate law knew, it was against public policy to let shareholders interfere with the directors' managerial power and discretion. *See* former LA. REV. STAT. ANN. § 12:29 (repealed 2015); *Goldblum*, 341 So. 2d at 448.

182. LA. REV. STAT. ANN. § 12:1-732(B)(6) (Supp. 2015).

What, then, is the intended meaning of the public policy limitation? Certainly, it means at least the same thing for unanimous governance agreements as it does for any other kind of contract. So, for example, a provision in a unanimous governance agreement that required the corporation to supply illegal drugs to its shareholders would certainly be void as against public policy. But the more difficult question is whether the law should recognize some implied public policy in corporate law itself that would invalidate an otherwise lawful provision in a unanimous governance agreement.

The Official Comment to the source provision in the Model Act explains that its listing of seven specifically approved types of departures from the statutory norm is intended to be illustrative, and that the public policy limitation in the catch-all provision on "other provisions" should be interpreted in accordance with the *ejusdem generis* rule of construction.[183] Hence, the "other provisions" clause is not intended to validate all forms of other provisions, but only those that are similar in some way to the provisions validated by the seven specific clauses.[184] So, the Comment explains, an effort to eliminate a director's duties of care and loyalty would probably not be sufficiently similar to the seven illustrative provisions to be included as a permissible "other provision" under the catch-all rule.[185] Similarly, an effort to exculpate a director more broadly than statutorily allowed would not "likely" be allowed because of the serious public policy concerns underlying the limitations on exculpation.[186]

Not all of the Model Act's Official Comments on this subject are relevant to the language adopted in Louisiana. The freedom of contract principal expressed in the Louisiana provision is not part of the Model Act. It was borrowed deliberately from Louisiana's LLC statute to provide to corporate shareholders, acting through a unanimous governance agreement, as much freedom of contract in governing their corporation's affairs as LLC members enjoy in governing their LLC's affairs.[187] Moreover, Louisiana's opt-out rule on the protection of directors[188] from monetary liability expresses a more director-protecting policy than that expressed through the

---

183. MODEL BUS. CORP. ACT § 7.32 cmt. 1 (2011).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Compare* LA. REV. STAT. ANN. § 12:1-732(B) (Supp. 2015), *with id.* § 12:1367(B) (1994).
188. Officers are protected also, but the text is comparing the Model Act rule on directors to the analogous rule in Louisiana.

Model Act.[189] Hence, it is difficult to say that an elimination of the duty of care through a unanimous governance agreement would be ineffective, based either on public policy or an *ejusdem generis* construction of the list of permissible provisions, insofar as the elimination of the duty affected only shareholders.

Still, the Comments to the Model Act are not entirely inapposite to the interpretation of the Louisiana provision. It does seem unlikely that a unanimous governance agreement could eliminate a director's duty of care in determining whether a distribution to shareholders complies with the statutory requirements of cash-flow and net-worth solvency. Those requirements are imposed for the protection of creditors, not shareholders. The shareholders' freedom of contract should not extend to contracting away the statutory rights of nonconsenting creditors. Less clear is whether shareholders should be entitled to give up their own rights to enforce a director's duty of loyalty. As I have written elsewhere, the issue is controversial and is not well-suited to an abstract, across-the-board position.[190] But it is at least questionable whether such a provision could be enforced, especially against an unsophisticated shareholder who had no actual knowledge of the provision[191] or who lacked the sophistication or experience to understand the provision in any case.

In addition to its differences on the freedom-of-contract issue, the Louisiana provision on unanimous governance agreements differs from the Model Act source provision in another important way. Under the Model Act, no name is given to the extraordinary form of governance device that Louisiana calls a unanimous governance agreement; the Model Act refers to such a device as an agreement that complies with the requirements of the relevant

---

189. The rule applies unless it is varied by provisions in the articles of incorporation, the reverse of the opt-in approach taken in the Model Act, and, unlike the Model Act, it explicitly rejects the Delaware rule that egregious forms of carelessness may amount to disloyalty that is not subject to exculpation. LA. REV. STAT. ANN. § 12:1-832(A), (C), cmts. a, d (Supp. 2015).

190. MORRIS & HOLMES, *supra* note 9, § 2.17, at 97–99.

191. Although a unanimous governance agreement must be approved by all shareholders, or in the absence of shareholders, by all incorporators, at the time the agreement is executed, that does not mean that everyone who becomes a shareholder of the corporation actually will have agreed to the nominally unanimous terms. *See* LA. REV. STAT. ANN. § 12:1-732 (A), (G) (Supp. 2015). The share certificates of a corporation must contain a statement that discloses the existence of the unanimous governance agreement, and purchasers of shares represented by certificates without such a statement may rescind their purchases during a brief rescission period. But the agreement is enforceable against shareholders, subject only to the brief right of rescission, even if they were actually unaware of it when they purchased their shares. *Id.* § 12:1-732(C).

provision.[192] Indeed, under the Model Act, such an agreement might actually be deemed to exist based either on a separate written agreement signed by all of the persons who were shareholders at the time, or on the corporation's articles of incorporation or bylaws, provided that the pertinent provisions in the articles or bylaws were adopted unanimously by the shareholders at the time.[193]

The treatment of articles of incorporation and bylaws as possible unanimous agreements was especially troubling to the Louisiana drafting committee. Closely held corporations are typically managed both informally and by consensus, making it possible to claim that many provisions in the company's articles and bylaws constitute unanimous agreements that are not governed by the ordinary rules of corporation law. The shareholders may not intend that result, or even recognize it when it occurs. Moreover, someone who was reviewing a company's articles and bylaws might have no practical means of knowing which provisions had been approved unanimously (or would be alleged to have been so approved).[194] That would mean that the reviewing person would have no practical means of knowing which of the provisions under review were ordinary articles and bylaws, and which had been transformed into super-provisions, capable of overriding the usual rules, and subject to an entirely separate set of rules on how the provisions were to be changed, terminated and disclosed.[195]

The Louisiana provision on unanimous governance agreements gives the agreements that distinctive name and defines the term in a way that makes it virtually impossible to trigger the special rules inadvertently. It also specifically excludes the possibility that provisions in a corporation's articles of incorporation or bylaws could qualify as a unanimous governance agreement. A unanimous governance agreement is defined as a written agreement—other than

---

192. MODEL BUS. CORP. ACT § 7.32(a) (2011).

193. *Id.* § 7.32(b).

194. At a minimum, the reviewer would need to review the minutes of all meetings at which the provisions were approved to determine whether they have been approved unanimously. If the minutes were silent on whether the approval had been unanimous, the reviewer would be subject to the risk of factual disputes on that point.

195. An agreement that met the requirements of the unanimous shareholder agreement provision could be amended only with the approval of all persons who were shareholders at the time of the agreement. MODEL BUS. CORP. ACT § 7.32(b)(2) (2011). Note that the unanimity requirement for an amendment of a unanimous governance agreement in Louisiana is merely a default rule. LA. REV. STAT. ANN. § 12:1-732(I)(3) (Supp. 2015). But if it were possible to construe a provision in the articles as subject, inadvertently, to the special unanimous agreement rule, it is unlikely that the default statutory rule on unanimous amendments would have been considered, much less amended.

the articles of incorporation or bylaws—that governs the management of the business and affairs of the corporation, that is approved in one or more writings, signed by all persons who are shareholders at the time of the agreement, and states either that it is a unanimous governance agreement or that it is governed by the provision on unanimous governance agreements.

As the Revision Comments explain, this distinctive-definition approach allows a deliberate choice to be exercised about the placement of various customized governance provisions.[196] Those provisions that vary what are otherwise mandatory statutory provisions will work only if placed in a unanimous governance agreement, while those changing merely suppletive rules may be placed either in the normal governance documents, if the rules governing those documents seem appropriate, or in a unanimous governance agreement, if the rules governing those types of documents are preferred.

## SHAREHOLDER DERIVATIVE PROCEEDINGS

The new Act changes the law governing shareholder derivative actions, which are now called "derivative proceedings."[197] The changes are relevant mainly to derivative proceedings brought against the management of public corporations. The new rules are unlikely to make major substantive changes in the approach taken by Louisiana courts to derivative litigation in closely held corporations.

Louisiana state courts have not considered the power of a so-called "special" or "independent" litigation committee to have a derivative suit dismissed on grounds that the committee has determined the suit not to be in the best interests of the corporation. However, the United States Court of Appeals for the Fifth Circuit has predicted that the Supreme Court of Louisiana would follow the lead of most other states on this issue and recognize this kind of litigation-committee power in the context of a derivative suit filed on behalf of a publicly traded corporation.[198] The Fifth Circuit decision distinguished the Louisiana decisions that seemed hostile to the exercise of this kind of managerial power on grounds that those decisions involved derivative suits filed on behalf of closely held corporations, where all shareholders were named parties to the

196. LA. REV. STAT. ANN. § 12:1-732 cmts. b, e (Supp. 2015).
197. *Id.* § 12:1-740(1).
198. Atkins v. Hibernia Corp., 182 F.3d 320, 325 (5th Cir. 1999).

litigation, either as plaintiffs seeking the recovery or as defendants against whom the recovery was sought.[199]

The new Act effectively adopts through legislation what the Fifth Circuit predicted the Louisiana Supreme Court would rule if presented with the question in a public-corporation suit. Under the new Act, a court is required to dismiss a derivative proceeding on motion by the corporation if a "qualified" group of directors has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the proceeding is not in the best interests of the corporation.[200] This rule is not limited by its terms to publicly traded corporations, but it is only in the publicly traded corporation that a board is likely to have a sufficient number of "qualified" directors to satisfy the requirements of the rule.[201]

To be qualified to recommend dismissal as contemplated by the new Act, a director cannot have either a "material interest" in the decision to seek dismissal or a "material relationship" with someone else who has such an interest.[202] A "material interest" is defined as any actual or potential benefit or detriment, distinct from those of the corporation or shareholders generally, that would reasonably be expected to impair the objectivity of the director's judgment concerning the decision to be made.[203] A "material relationship" is any kind of relationship, whether familial, financial, professional, employment, or "other," that reasonably would be expected to impair the objectivity of the director's judgment in making the relevant decision.[204]

Most derivative actions filed on behalf of closely held corporations are filed by minority shareholders on grounds that the

---

199. *Id.* at 324–25.

200. LA. REV. STAT. ANN. § 12:1-744(A) (Supp. 2015).

201. In theory, a similar motion to dismiss could be filed by a panel of one or more individuals appointed by the court. *Id.* § 12:1-744(E). But then the defendant directors would not be choosing their own judges by appointing their fellow directors and friends to a litigation committee. Instead, they would be allowing the court to appoint someone with a role similar to that of a special master or hearing officer. It seems unlikely that many directors will see enough value in that approach to pursue it. True, there is some value, theoretically—the panel, unlike the court, could recommend dismissal even of a legally meritorious suit if it determined the suit was not in the best interests of the corporation. But the odds that a court-appointed panel really would recommend dismissal of a legally meritorious action seems so small that this theoretical advantage would seldom justify the added delay, expense, and unpredictability of the panels' investigative approach—which might not be constrained by ordinary rules of procedure, discovery, and evidence.

202. *Id.* § 12:1-143(A)(1).

203. *Id.* § 12:1-143(B)(2).

204. *Id.* § 12:1-143(B)(1).

controlling shareholders are causing the corporation to overpay them for their services. Louisiana courts have not yet considered whether this type of personal interest is sufficient to disqualify a director from controlling the disposition of a derivative suit. But that is only because the courts have been disqualifying directors on much simpler, less compelling grounds, based on nothing more than their status as defendants in the suit. As one court has explained, "the fact that the directors being sued constitute a majority of the [corporation's] board of directors is dispositive."[205]

The new Act abrogates that aspect of the Louisiana jurisprudence. The simple fact that a director is named as a defendant in a derivative action, or approved the conduct being challenged in the suit, is not enough by itself to cause the director to become disqualified to decide whether the corporation should move to dismiss the suit.[206] However, a direct, personal, financial self-interest in the transaction under attack in the suit is considered sufficient to disqualify a director under the Model Act,[207] and it is even sufficient under Delaware's decidedly pro-management approach to the issue.[208] There seems little doubt that Louisiana courts, which have sarcastically rejected the very idea that any director named as a defendant in a derivative suit could ever be entrusted with the decision whether to let the suit proceed,[209] would be willing to endorse the widely accepted idea that a director who held a personal financial stake in the transaction that is the subject of a derivative action is not qualified to decide for the corporation whether the suit should be dismissed. Hence, in the typical derivative suit filed in the context of an excessive compensation claim against most or all of the directors of the corporation, it is unlikely that the corporation will be able to satisfy the minimum statutory requirement that at least two "qualified"

---

205. Robinson v. Snell's Limbs & Braces, 538 So. 2d 1045, 1047 (La. Ct. App. 1989). The *Robinson* court was considering the question in the context of the so-called "demand futility" issue, not a litigation committee, but it seems unlikely that a court would allow the defendant directors to do through a litigation committee what it would not let them do through the demand rule. The new Act does away with the demand futility issue, as it always requires demand to be made. LA. REV. STAT. ANN. § 12:1-742 cmt. (Supp. 2015). The qualification of directors to make a controlling decision about a derivative action will no longer be made in the context of a demand futility argument, but rather in the context of a motion to dismiss filed under section 1-744.

206. LA. REV. STAT. ANN. § 12:1-143(C)(3) (Supp. 2015).

207. MODEL BUS. CORP. ACT § 1.43 cmt. 1 (2011).

208. *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

209. *See* Smith v. Wembley Indus., Inc., 490 So. 2d 1107, 1108 (La. Ct. App. 1986) (characterizing defendant's position as an argument that the plaintiffs should be required to ask the defendants for an "'independent, disinterested, and impartial' decision to sue themselves").

directors approve the corporation's filing of a motion to dismiss the suit.[210]

It is possible that a board could work around the disqualification of most or all of the directors serving at the outset of an excessive compensation derivative action by amending the bylaws to increase the number of directors by two and then filling the vacancies so created with two new outside directors. The two new outside directors could then be appointed to a litigation committee that would engage in the required inquiry and make the decision on the corporation's behalf to dismiss the suit. That approach would make the disqualification of the new directors less obvious, at least if Delaware's strong rejection of the so-called "structural bias argument" is accepted.

But Delaware's approach (along with the approach of the Model Act) must be understood in the context of derivative litigation against the management of publicly traded corporations.[211] Louisiana courts have been wise not to apply this approach in the context of derivative litigation in closely held corporations, [212] and they should continue to reject it under the new Act. The technical grounds for their decision will now need to change, from consideration of demand to consideration of director qualification to act for the corporation in filing a motion to dismiss. But a director may be found not to be qualified under the new Act if he has a relationship of any kind with a conflicted, unqualified director that would reasonably be expected to impair the objectivity of the new director's judgment about the suit.[213]

---

210. LA. REV. STAT. ANN. § 12:1-744(B) (Supp. 2015). As mentioned earlier, the motion to dismiss could also be filed based on the decision of a court-appointed panel, but it is unlikely that the directors will request the appointment of such a panel. *See supra* note 201.

211. Glenn G. Morris, *Shareholder Derivative Suits: Louisiana Law*, 56 LA. L. REV. 583, 621–24, 629–30, 633–35 (1986).

212. Robinson v. Snell's Limbs & Braces, 538 So. 2d 1045, 1047 (La. Ct. App. 1989); Smith v. Wembley Indus., Inc., 490 So. 2d 1107, 1108 (La. Ct. App. 1986).

213. It is true that the mere appointment of the new director by the disqualified director is not enough by itself to disqualify the new director. LA. REV. STAT. ANN. § 12:1-143(C)(1) (Supp. 2015). But the kinds of personal and familial relationships likely to exist among the directors of closely held businesses are different from those among the outside directors of publicly traded corporations, making it more likely that the appointment itself will not be the only kind of relationship that would call the appointee's objectivity into question. *See* MODEL BUS. CORP. ACT § 1.43 cmt. 2 (2011) (citing Delaware Supreme Court decision rejecting mere casual social acquaintance as a material relationship, in case involving a publicly traded corporation, Martha Omnimedia, Inc., in which the CEO of Sears was accepted as disinterested despite his alleged personal friendship with controlling shareholder Martha Stewart). Moreover, the

The new Act's greatest impact on derivative litigation involving closely held corporations in Louisiana is likely to come not from its derivative litigation provisions but from its new withdrawal remedy for shareholder oppression. Under prior law, minority shareholders had virtually no prospect of having a court order the payment of dividends, or the employment of the plaintiff, or the buying out of the plaintiff's interest in the corporation. Hence, a shareholder who wished to put pressure on the controlling shareholders to buy his shares would have to resort to a suit alleging that the controlling shareholders were causing the corporation to pay them excessive compensation. The plaintiff could not recover this amount personally, of course, because it was the corporation, not the plaintiff, that paid the allegedly excessive compensation. Still, this kind of suit might make sense if it helped to persuade the controlling shareholders to eliminate this kind of litigation, once and for all, by buying out the plaintiff's shares in the corporation.

Now that the new Act provides a direct right to a minority shareholder[214] to be paid the full, undiscounted value of his shares if he proves oppression, it seems likely that much of the energy formerly devoted to excessive compensation suits is going to be directed instead at oppression litigation. Nevertheless, the derivative suit will remain available to address alleged misconduct that does not rise to the level of oppression.

## BOARD OF DIRECTORS—POWERS, COMPOSITION, ELECTION & REMOVAL

The new Act retains most of the substance of the LBCL concerning a corporation's board of directors. A corporation is required to have a board of directors[215] that consists of one or more individuals.[216] All corporate powers must be exercised by or under

---

"appointment-alone" rule is designed to let the board of a public corporation find new outside directors to deal with litigation brought against the existing board where it is likely that the new outside directors will better represent the interests of the corporation's thousands of passive shareholders than will the plaintiff's lawyer. *See id.* § 1.43 cmt. 3. In the closely held corporation setting, where all shareholders typically are named parties to the litigation, there is no more reason to let the defendants' appointed colleagues dismiss the suit over the plaintiff's objection than to let the defendants themselves do so.

214. The remedy is not limited to minority shareholders, but controlling shareholders seldom oppress themselves.

215. LA. REV. STAT. ANN. § 12:1-801(A) (Supp. 2015).

216. *Id.* § 12:1-803(A). The LBCL used the term "natural person" rather than individual. Former LA. REV. STAT. ANN. § 12:81(A) (repealed 2015). But the term "individual" is defined by the new Act to mean a natural person. LA. REV.

the authority of the board, and the corporation must be managed by or under the supervision and oversight of the board.[217] Except for the initial directors named in the corporation's articles of incorporation or elected by its incorporators,[218] directors are elected by shareholders at their first annual meeting and at each annual meeting thereafter.[219] Cumulative and separate classified share voting for directors is permitted only as provided in the articles of incorporation.[220] Directors are elected by plurality vote[221] and may be removed with or without cause[222] at a special meeting of shareholders called for that purpose.[223] The vote required for removal is a majority of the shares entitled to be cast in the election of directors, [224] or, in the

---

STAT. ANN. § 12:1-140(13) (Supp. 2015). Note that corporation law differs from LLC and partnership law in its requirement that the persons holding managerial power must be individuals. General partners hold managerial power in a partnership, and any person, natural or juridical, may be a partner. LA. CIV. CODE arts. 2801, 2807, 2814 (2015). Similarly, members of an LLC ordinarily hold managerial powers in an LLC, and any person may be a member of an LLC. *See* LA. REV. STAT. ANN. § 12:1301(A)(13) (Supp. 2015); *id.* §§ 12:1311–1312. Moreover, even if the LLC is managed by managers, the LLC law does not require the managers to be individuals. *Id.* §§ 12:1301(A)(12), 1312.

217. *Id.* § 12:1-801(B). The language of the new Act concerning the board's role does acknowledge and approve of something that was well-understood in practice, but not explicitly covered by the LBCL: the fact that the board's role in exercising corporate powers and managing the corporation may be indirect. Corporate powers need not be exercised, or managerial decisions made, directly by the board. Officers, agents, and employees may manage the corporation and exercise corporate powers under the authority, supervision, and oversight of the board of directors. *See* MODEL BUS. CORP. ACT § 8.01 cmt. (2011). The new Act also includes a Model Act provision that describes the oversight responsibilities of the board of directors of a public corporation. LA. REV. STAT. ANN. § 12:1-801(C) (Supp. 2015).

218. LA. REV. STAT. ANN. § 12:1-205(A) (Supp. 2015).

219. *Id.* § 12:1-803(C). The terms of the initial directors expire at the first shareholders' meeting at which directors are elected. *Id.* § 12:1-805(A).

220. *Id.* §§ 12:1-728, 1-804.

221. *Id.* § 12:1-728(A).

222. The "with or without cause" rule is subject to a provision in the articles of incorporation that allows a director to be removed only for cause. *Id.* § 12:1-808(A). Louisiana rejected a Model Act provision that would have allowed directors to be removed from office by a court, as that kind of remedy seemed better suited to publicly traded corporations than to the types of closely held businesses that dominate corporate practice in Louisiana. MODEL BUS. CORP. ACT § 8.09 (2011); LA. REV. STAT. ANN. § 12:1-809 (Supp. 2015) (indicating that section number as "reserved").

223. LA. REV. STAT. ANN. § 12:1-808(D) (Supp. 2015). The notice of the meeting must state that a purpose of the meeting is to remove the director. *Id.*

224. *Id.* § 12:1-808(C). The Model Act rule would have allowed removal based on a majority of the votes cast on the issue. MODEL BUS. CORP. ACT § 8.08(C) (2011).

case of directors elected by classified share or cumulative voting, by a vote that reflects that different form of voting.[225]

The LBCL rules concerning the determination of the number of directors were retained in the new Act.[226] However, the new Act effectively changes the maximum term of a director from five years[227] to three years[228] and allows terms longer than one year[229] only if the articles of incorporation provide for the staggering of the directors' terms.[230] The new Act also contains what is sometimes called a "holdover director" provision, similar to that in the LBCL.[231] This kind of provision allows a director to serve even after the expiration of the director's term until either the director's successor is elected and qualifies or there is a decrease in the number of directors.[232]

### BOARD DECISION-MAKING PROCEDURES

As with the composition, powers, and election of the board, the new Act retains most of the substance of the LBCL concerning the

---

225. If the director to be removed was elected by a separate voting group of shares, then only the shares in that voting group may participate in the removal vote. LA. REV. STAT. ANN. § 12:1-808(B) (Supp. 2015). If directors are elected by cumulative voting, a director may not be removed if the number of votes to elect that director cumulatively is voted against removal. *Id.* § 12:1-808(C).

226. *Compare id.* § 12:803(A), *with* former LA. REV. STAT. ANN. § 12:81(A) (repealed 2015). The order in which the number is determined (with sources earlier in the list controlling over those later in the list) first from the articles, then the bylaws, then the number elected from time to time by the shareholders, and, finally, to the number named in the articles of incorporation (or, formerly, in the initial report).

227. *See* former LA. REV. STAT. ANN. § 12:81(A) (repealed 2015).

228. *See* LA. REV. STAT. ANN. § 12:1-805(B) (Supp. 2015).

229. Technically, the term of a director is not exactly one year. Rather, a director's term lasts until the next annual meeting of shareholders. *Id.* § 12:1-805(B).

230. *See id.* §§ 12:1-805(B), 1-806.

231. *See* former LA. REV. STAT. ANN. § 12:81(A) (repealed 2015).

232. *See* LA. REV. STAT. ANN. § 12:1-805(E) (Supp. 2015). The basic statement of a term of a director effectively has a holdover rule built into it, but the effect of this new term statement is to extend the term itself rather than to rely on the holdover rule. Under the LBCL, the normal term of a director was one year. Former LA. REV. STAT. ANN. § 12:81(A) (repealed 2015). That rule caused a director's term to expire before the next annual meeting if the next meeting was held more than one year after the one before. In that case, the director remained a director only by virtue of the holdover rule. Under the new Act, the basic term statement is tied to annual meeting itself, so there is less need to resort to the holdover rule. LA. REV. STAT. ANN. § 12:1-805(B) (Supp. 2015). This basic term rule also contains an exception that the LBCL did not. This exception allows the corporation to have a bylaw that effectively forces a director out of office, thus creating a vacancy, if the director receives more votes against than for his re-election. *Id.* §§ 12:1-805(E), 1-1022.

procedures through which a board of directors takes action. A board acts either through the affirmative vote of a majority of directors present at a regular[233] or properly noticed special meeting[234] where a quorum[235] exists[236] or by means of unanimous written consent.[237] Unless the articles or bylaws say otherwise, a board may conduct a meeting, or allow directors to participate in a meeting, through any means of communication that allows all of the directors to simultaneously hear each other, and a director participating in that fashion is deemed to be present in person at the meeting.[238]

---

233. Unless the articles of incorporation or bylaws provide otherwise, a regular meeting of the board may be held without notice. *Id.* § 12:1-822(A).

234. Unless the articles of incorporation or bylaws provide a longer or shorter period, a special meeting must be preceded by at least 48 hours' notice of the date, time, place, and, unless the articles or bylaws say otherwise, the purpose of a special meeting. *Id.* § 12:1-822(B). Directors may waive notice in writing, either before or after a meeting. *Id.* § 12:1-823(A). Directors are generally deemed to waive notice of a meeting if they attend the meeting. *Id.* § 12:1-823(B). Under the LBCL, a director's physical presence at a meeting (a different rule applied to presence through telephone) waived notice without exception. *See* former LA. REV. STAT. ANN. § 12:81(C)(6)(b)–(10) (repealed 2015). The new Act allows a director to preserve an objection as to notice, despite attendance, if he objects properly. The objection (and notice) is deemed to be waived, however, with respect to any item of business that the director votes to approve. *See* LA. REV. STAT. ANN. § 12:1-823(B)–(C) (Supp. 2015).

235. A quorum ordinarily consists of a majority of the board of directors, subject to provisions in the articles of incorporation or bylaws that increase the number required for a quorum, or reduce it to as few as one-third of the directors. LA. REV. STAT. ANN. § 12:1-824(A)–(B). Different quorum rules apply, however, for such things dealing with decisions in which some members have some conflicting interest that disqualifies them from participating in the decision. *See, e.g.*, *id.* § 12:1-853(C)(1)(a) (requiring a vote to authorize advance expense payment to a director). If a quorum is present when a meeting is convened, the board may continue to act, despite the withdrawal of some directors from the meeting, if the action is approved by a number of affirmative votes not fewer than the number that would have been required had the quorum not been lost (in effect, the minimum number of votes required at which a minimal quorum is present). *See id.* § 12:1-824(C)(2).

236. *Id.* § 12:1-824(C)(1). The quorum rule may be relaxed by specific rules in the Act. *See, e.g.*, *id.* § 12:1-810(A)(3) (filling vacancies by vote of remaining directors even if not a quorum).

237. *Id.* § 12:1-821. The LBCL could have been interpreted to allow directors to act by written consent that was less than unanimous if so permitted by the articles of incorporation or bylaws. *See* former LA. REV. STAT. ANN. § 12:81(C) (repealed 2015) (unanimous written consents covered by item 9 in a list introduced by the phrase "[e]xcept as otherwise prescribed in the articles or bylaws"). The language of the new Act is not susceptible of that interpretation. To act by written consent, the delivery to the corporation of a written consent from "each" director is required to authorize an action by written consent. LA. REV. STAT. ANN. § 12:1-821(A) (Supp. 2015).

238. *Id.* § 12:1-820(B).

Louisiana's unusual rule, permitting directors to vote by proxy if permitted by the articles of incorporation, was retained in the new Act through a new, non-model provision. The new provision allows the appointment only of other directors as proxies[239] (changing the former rule that allowed either shareholders or directors to serve as proxies for directors[240]) and provides a one-meeting default term limitation for the appointment of a director's proxy.[241]

A board may establish committees[242] as before,[243] but the creation, appointment of members, and the authority of committees is regulated in new ways.[244] Committees may now be created, and committee members appointed,[245] only with the approval of a majority of all directors in office at the time of the creation and appointment.[246] Moreover, a committee may no longer be used to authorize distributions (except under formulas or limits prescribed by the board), approve or propose actions that require shareholder approval, fill vacancies on the board or its committees, or change the bylaws.[247]

### OFFICERS

The LBCL required all corporations to appoint three officers—a president, secretary, and treasurer.[248] However, except for some litigation-related authority,[249] the LBCL provided no description of the role or authority of any of the required officers. All officers and agents had only such duties and authority as prescribed in the bylaws or by the board.[250] In contrast, the new Act requires the appointment of just one officer, the corporate secretary,[251] and provides that the

---

239. *Id.* § 12:1-812(B).
240. Former LA. REV. STAT. ANN. § 12:81(E) (repealed 2015).
241. LA. REV. STAT. ANN. § 12:1-812(C) (Supp. 2015).
242. *Id.* § 12:1-825(A). The power to appoint committees is subject to contrary provisions in the articles of incorporation or bylaws. *Id.*
243. Former LA. REV. STAT. ANN. § 12:81(C)(8) (repealed 2015).
244. LA. REV. STAT. ANN. § 12:1-825 (Supp. 2015).
245. Louisiana added a non-model second sentence to section 1-825(A) to make it clear that any non-directors appointed to a committee serve in an advisory capacity only. The sentence was added to deal with the potentially ambiguous status of a corporate officer or employee who is asked to participate in some way in the work of a board committee.
246. *Id.* § 12:1-825(B)(1). If an even greater number than that which is required under the corporation's own articles or bylaws, then that greater number controls over the statutory minimum. *Id.* §§ 12:1-824, 1-825(B)(2).
247. *Id.* § 12:1-825(E).
248. Former LA. REV. STAT. ANN. § 12:82(A) (repealed 2015).
249. *Id.* § 12:82(G).
250. *Id.* § 12:82(D).
251. LA. REV. STAT. ANN. § 12:1-840(A) (Supp. 2015).

secretary has the authority and responsibility for preparing minutes of meetings and for maintaining and authenticating the statutorily required records of the corporation.[252] With respect to other officers, however, the new Act takes much the same approach as the LBCL, except that it does not require the appointment of any particular officers, other than the secretary. It is up to the corporation's bylaws or board of directors to say both what officers are to be appointed[253] and what duties and authority they are to hold.[254] The same individual may simultaneously hold more than one office.[255]

Unlike the LBCL, which required all officers to be elected or appointed by the board of directors,[256] the new Act allows the appointment of officers either by the board or by another officer who is given the necessary authority by the board.[257] In other respects, however, the appointment and removal rules are much the same. The appointment of an officer does not by itself create contract rights;[258] an officer may be removed by the board (or by an authorized officer) with or without cause,[259] but the removal of an officer does not affect any contract rights the officer may have with the corporation.[260]

## DUTIES AND LIABILITIES OF DIRECTORS AND OFFICERS

For many years, a tension has existed in corporation law between the ostensibly demanding, statutorily described standards of conduct for directors, on the one hand, and the far more lenient and deferential "business judgment" standards that were used by courts to determine whether a director could actually be held liable for

252. *Id.* § 12:1-840(C).
253. *Id.* § 12:1-840(A).
254. *Id.* § 12:1-841.
255. *Id.* § 12:1-840(D). The LBCL allowed two (but implicitly not three) of the required three offices to be held by the same person, and did not permit a person holding two offices to sign a document twice, in two different capacities, when the law required the signature of two officers. Former LA. REV. STAT. ANN. § 12:82(A) (repealed 2015). The new Act contains neither of these restrictions. The dual-signature restriction would be irrelevant under the new Act for filings with the secretary of state, as those required just a single signature. LA. REV. STAT. ANN. § 12:1-120(F) (Supp. 2015). Share certificates do still require two signatures. *Id.* § 12:1-625(D). The better practice would be to follow the former rule prohibiting dual signatures by the same person on those certificates, as the dual-signature requirement would otherwise be rendered meaningless.
256. Former LA. REV. STAT. ANN. § 12:82(A)(1), (B) (repealed 2015).
257. LA. REV. STAT. ANN. § 12:1-840(A) (Supp. 2015).
258. *Id.* § 12:1-844(A).
259. *Id.* § 12:1-843(B). The LBCL allowed removal only by the board. *See* former LA. REV. STAT. ANN. § 12:82(E) (repealed 2015).
260. LA. REV. STAT. ANN. § 12:1-844(B) (Supp. 2015).

damages, on the other. The LBCL reflected this tension in former Louisiana Revised Statutes section 12:91.

The original, demanding form of standards was expressed in the first part of subsection (A), which was enacted as part of the original statute in 1968. It said that directors are required to act "in good faith, and with that diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances in like positions."[261] But after a Louisiana First Circuit Court of Appeal decision took this language seriously and interpreted it to say what it indeed appeared to say—that directors could be held liable for simple negligence in their corporate decisions[262]—the Legislature responded quickly with extensive additions to section 12:91. The additions adopted a version of the business judgment rule[263] and protected directors against monetary liability for all but reckless breaches of the duty of care.[264]

The new Act accepts the Model Act approach[265] to this historic tension between demanding duties and forgiving liability standards, but the new Act then takes a few steps farther in providing protection to directors and officers against liability. The protection against liability—sometimes called "exculpation"—that is available

---

261. Former LA. REV. STAT. ANN. § 12:91(A) (repealed 2015).

262. Theriot v. Bourg, 691 So. 2d 213, 222 (La. Ct. App. 1998). The corporation in *Theriot* had not adopted the type of exculpatory provision in its articles that had been permitted in Louisiana beginning in 1987. Act No. 261, § 1, 1987 La. Acts 260 (enacting former LA. REV. STAT. ANN. § 12:24(C)(4) (repealed 2015)). Had it done so, its directors would have been protected under a standard even more protective than that adopted through the later legislation. The new Act takes a step beyond, making that kind of even greater protection available automatically under Louisiana Revised Statutes section 12:1-832.

263. Act No. 1253, 1999 La. Acts 3301 (adding new subsections (B), (C), (E), and (F), and the portion of (A) following the semi-colon in the first sentence, to former Revised Statutes section 12:91).

264. Former LA. REV. STAT. ANN. § 12:91(A), (B) (repealed 2015). Nominally, directors could be held liable for "gross negligence," but that term was defined to mean a reckless disregard of the best interests of the corporation. *Id.* § 12:91(B). A director could also be held monetarily liable for breaching his or her duty of loyalty.

265. The Model Act provides standards of conduct in one section, a breach of which is necessary, but not sufficient, to result in liability. MODEL BUS. CORP. ACT § 8.30 (2011). The imposition of liability for a breach of the duties is covered by a separate section, which conditions liability on, among other things, the absence of exculpation for the relevant conduct under the "opt in" exculpation permitted by the Act. *Id.* § 8.31(a)(1). If exculpation is provided, the remaining requirements imposed by the section become moot. If exculpation is not provided, the plaintiff is required to establish that the challenged conduct fit one of the listed grounds for liability under subsection (a)(2) and that the breach of duty proximately caused harm to the corporation or its shareholders, or otherwise justifies the remedy being sought. *Id.* § 8.31(a)(2), (b).

under the Model Act only if the articles of incorporation provide it[266] is provided automatically by the new Louisiana Act.[267] A corporation that wishes to provide less protection must modify or reject the default rules in its articles of incorporation.[268] Louisiana also applies the same exculpatory rules to officers that it applies to directors,[269] while the Model Act limits its opt-in version of exculpation to the protection of directors.[270] Finally, Louisiana rejects a Delaware jurisprudential rule that makes the exculpation provided by statute unavailable to breaches of the duty of care so severe that, in the view of the Delaware courts, the carelessness is transformed into disloyalty.[271]

Unlike the LBCL, which covered the fiduciary duties of officers and directors in the same provision, using a single standard for both,[272] the new Act accepts the Model Act's separate treatment of the two related, yet distinct, subjects. The standards of conduct for directors are expressed in more limited terms that reflect the distinctive and often part-time, supervisory, outsider roles that directors are expected to play in the management of the corporation. The duty of care owed by directors, for example, is limited to becoming informed in connection with their decision-making function and in devoting attention to their oversight function.[273] In

266. *Id.* § 2.02(b)(4).

267. LA. REV. STAT. ANN. § 12:1-832 (Supp. 2015). Because exculpation is provided automatically under Louisiana law, unless the articles of incorporation say otherwise, the first issue in most breach-of-duty actions under Louisiana law will be whether the conduct is covered by the statutory exculpation provision. If so, the remainder of section 12:1-831 becomes moot. No liability may be imposed even if the remaining standards are satisfied. The prior provision that protected officers and directors against monetary liability (former section 12:91 (A), (B)) was dropped from the new Act because the default exculpatory rule in the new Act provides even greater protection than the prior law, and because the prior law provided no mechanism for shareholders to change the protective rule. If shareholders do wish to expose their officers and directors to liability on less-forgiving terms than those provided automatically by the statute (and they can find individuals willing to take positions in the corporation under those terms), they are entitled under the new Act to change the default statutory rules through appropriate provisions in the articles of incorporation.

268. *Id.* §§ 12:1-202(A)(5), (B)(4), 1-832(A).

269. *Id.* § 12:1-832(A). Because most Louisiana corporations are closely held, informally managed, and commonly have the same individuals serving as officers and directors, the practical value of the statutory protective rules would be sharply diminished—perhaps to the vanishing point—if they applied only to conduct that an active owner/manager could prove was carried out in his capacity as a director rather than officer.

270. MODEL BUS. CORP. ACT § 2.02(b)(4) (2011).

271. LA. REV. STAT. ANN. § 12:1-832(C) cmt. d (Supp. 2015).

272. Former LA. REV. STAT. ANN. § 12:91 (repealed 2015).

273. LA. REV. STAT. ANN. § 12:1-830(B) (Supp. 2015).

contrast, the standards of conduct for officers are expressed in a much more generalized and potentially demanding way, similar to that imposed on officers and directors under the LBCL. Officers owe a general duty to act with the care that a person in a similar position would reasonably exercise under similar circumstances.[274]

Less distinction is drawn between directors and officers when it comes to the rules governing the imposition of liability. Indeed, no separate rule is provided. The liability rule that is applicable to directors is simply made applicable to officers also, to the extent that the principles of that rule "have relevance" to an officer's liability.[275] But the more important similarity under the Louisiana Act is the fact that officers are covered by precisely the same exculpatory provision as directors.[276] That provision will protect officers against monetary liability for all breaches of duty not excluded by the terms of the rule—principally, breaches of the duty of loyalty.[277]

### CONFLICTING INTEREST & BUSINESS OPPORTUNITY TRANSACTIONS

The new Act, like the Model Act, makes major changes in the statutory approach to what used to be called "self-dealing" or "interested director" transactions. However, the practical importance of those changes will probably be limited in the context of most closely held corporations.

The interested-director provision in the LBCL was designed to deal with an early jurisprudential rule that made transactions between a corporation and one of its directors automatically voidable at the option of the corporation.[278] For that reason, the LBCL provision stated the circumstances under which a transaction of that kind would not be void or voidable: when the transaction was fair at the time it

---

274. *Compare id.* § 12:1-842(A)(2), *with* former LA. REV. STAT. ANN. § 12:91(A) (repealed 2015) (officers and directors required to discharge the duties of their positions "with that diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances in like positions"). A Model Act rule that would have required an officer to inform the officer's superiors or the board of information within the scope of the officer's functions, and of actual or probable material violations of law, was omitted from the Louisiana Act as ill-suited to the closely held corporations that dominate practice in Louisiana. *See* LA. REV. STAT. ANN. § 12:1-842 cmt. (Supp. 2015).

275. LA. REV. STAT. ANN. § 12:1-842(D) (Supp. 2015).

276. *Id.* § 12:1-832.

277. *Id.* § 12:1-832(A)(1). The exception in the exculpation rule for a violation of section 12:1-833 is irrelevant to officers, as that provision imposes liability strictly on directors for authorizing an unlawful distribution.

278. MODEL BUS. CORP. ACT ch. 8, subch. F, intro. cmt. 1 (2011); MORRIS & HOLMES, *supra* note 9, § 22.03, at 553 n.3.

was approved by the board, or when it had been approved following full disclosure of all relevant facts, either by disinterested members of the board or by the shareholders.[279]

This approach created two problems. One is addressed by the new Act, while the other, almost unavoidably, is left unchanged. The problem that is addressed by the new Act might be called the "ineffectual" problem: The old provision did not actually validate or invalidate any transaction. If all the proper statutory procedures were followed—if disinterested approval of the transaction was provided following full disclosure to the approving persons of all the relevant facts—the transaction was thereby relieved by the old provision only from being automatically voidable. According to the Delaware courts, at least, an unfair transaction could be struck down under this kind of provision even if the required procedures had been followed.[280] Conversely, even if the procedures had not been followed, a fair transaction could nevertheless be upheld.[281]

Although Louisiana courts never addressed the effects of the old provision in the same way as the Delaware courts, that was

---

279. Former LA. REV. STAT. ANN. § 12:84 (repealed 2015). The statute imposed the disinterestedness requirement only in in the director-approval rule, not in the shareholder rule, but the courts understandably imposed the disinterestedness requirement on shareholder approvals as well, based on the requirement that the shareholders approve the transaction "in good faith." *See, e.g.*, Woodstock Enters. v. Int'l Moorings & Marine, Inc., 524 So. 2d 1313, 1316 (La. Ct. App. 1988).

280. Fliegler v. Lawrence, 361 A.2d 218, 222 (Del. 1976).

281. Marciano v. Nakash, 535 A.2d 400, 404 (Del. 1987). It may seem odd that a court would view a decision to uphold a fair transaction as falling outside the terms of the statute, given that one of the three statutory tests even in the old statute was fairness. But the language of the statute, unfortunately, tied fairness to the time that the corporation had formally approved the transaction, through action of the board, a board committee, or shareholders. *See* former LA. REV. STAT. ANN. § 12:83(A)(3) (repealed 2015). Although this rule seemed designed to serve purely a timing, "no hindsight" function, it could not be satisfied literally if no formal board, committee, or shareholder approval had ever been provided. So, in the case of a deadlock, as in *Marciano*, or tacit acquiescence (as in many closely held corporations), the statutory fairness test technically could not be satisfied. *See Marciano*, 535 A.2d at 404. The new Act corrects this problem by divorcing the concept of fairness from the formality of the methods through which the corporation becomes a participant in the transaction. Fairness is to be judged "at the relevant time." LA. REV. STAT. ANN. § 12:1-861(B)(3) (Supp. 2015). And "relevant time," for purposes of the fairness test, is defined to mean the time when the corporation, or an entity controlled by the corporation, became legally obligated to consummate the transaction. *Id.* § 12:1-860(3). Hence, the lack of formal board approval will no longer block resort to the protection offered by the statute to fair transactions. Under the new Act, a Louisiana court should not have to confront the issue that faced the Delaware court in *Marciano*.

because they had little chance to do so. Louisiana courts seldom received a case in which they found someone had complied with either of the statute's disinterested-approval tests.[282] Hence, all that was left for the court to consider was fairness, which is something the courts handled through a jurisprudential rule, not the statute. A corporate director who was engaged in self-dealing with his or her corporation was required to prove the fairness of the self-dealing transaction under rigorous judicial scrutiny.[283] If the old self-dealing provision was cited, it was usually for the simple proposition that a fair transaction could be upheld.[284]

The new Act does two things to address the ineffectual problem. First, it provides a detailed and limiting definition of what it calls a "director's conflicting interest transaction."[285] A transaction that falls outside the statutory definition is protected against a conflicting-interest claim[286] automatically, without any need to prove the fairness of the transaction or to comply with the statutory approval procedures.[287] A transaction that does fit the definition can obtain a similar level of protection[288] if the statutory standards of fairness, or of approval by disinterested directors or shareholders (now called "qualified" directors or shareholders[289]), is obtained.[290]

---

282. *See, e.g.*, *Woodstock*, 524 So. 2d at 1316 (finding statute violated where approving shareholders were not disinterested). *But see* Church Point Wholesale Beverage Co. v. Voitier, 706 So. 2d 1015, 1021 (La. Ct. App. 1998) (finding compliance with the disinterested approval rule, but court did not appear to attach any independent significance to that fact; director was held to have satisfied his burden of proving the good faith and fairness of the transaction, the same rule that would have applied in the absence of disinterested director approval).

283. *See, e.g.*, Levy v. Billeud, 443 So. 2d 539, 543 (La. 1983).

284. *See, e.g.*, Nalty v. D.H. Holmes Co., 882 So. 2d 1, 10 (La. Ct. App. 2004); *Church Point*, 706 So. 2d at 1021 (imposing fairness tests despite disinterested director approval); Hingle v. Plaquemine Oil Sales Corp., 399 So. 2d 646, 651 (La. Ct. App. 1981).

285. LA. REV. STAT. ANN. § 12:1-860(2) (Supp. 2015).

286. A transaction is protected against challenges only "on the ground that the director has an interest respecting the transaction." *Id.* § 12:1-861(A). A transaction obviously could be vulnerable to attack on other grounds, such as lack of proper authorization.

287. *Id.*

288. The protection provided is against damages, sanctions, or any form of equitable relief, in any proceeding by a shareholder, or by or in the right of the corporation (i.e., a derivative suit), on the ground that a director had an interest respecting the transaction. *Id.* § 12:1-861(B).

289. The definition of a "qualified director" for purposes of this provision is stated in section 12:1-143(A)(3). The definition of "qualified shares" is provided in section 12:1-863(C)(2).

290. *Id.* § 12:1-861(B).

This basic three-part, disjunctive approach, in which the benefits of the statute can be obtained by establishing (1) disinterested director approval, (2) disinterested shareholder approval, or (3) fairness, is similar to the old approach in the LBCL. But the new approach differs from the old one in two complementary ways. On the one hand, it provides much greater detail, and greater regulatory content, concerning the meaning of critical terms and the procedures to be followed in obtaining the required disinterested (or "qualified") approval.[291] On the other hand, once those more detailed and demanding procedures are followed, the new Act fully protects the transaction against any form of legal remedy that is based on a director's conflicting interest in the transaction.[292]

The problem that is not addressed by the new Act, and one that probably cannot be addressed without skewing the Act too far in favor of management and controlling shareholders, is the difficulty in the context of closely held corporations of finding enough directors or shareholders who qualify to provide the approvals needed to obtain the validation offered by the Act. Of course, the statute does also protect transactions that are fair, even if they are not approved as required by qualified directors or shareholders.[293] However, that places an unavoidable litigation risk on the conflicted director: He cannot be sure that the transaction will be upheld if attacked because of the conflict. Rather, he will have to be prepared to defend the transaction as fair, after it may have turned out badly for the corporation,[294] before a judge or jury unlikely to be experienced in the kind of transaction at issue.

The value of the advance validation of the transaction is that it minimizes that litigation risk.[295] Though, it is available only if at least two directors of the corporation not only lack any personal

291. *See id.* § 12:1-860 (including definitions of "fair to the corporation," "related person," "relevant time" and "required disclosure"); *id.* § 12:1-862 (describing procedures for director approval); *id.* § 12:1-863 (describing procedures for shareholder approval).

292. *Id.* § 12:1-861(B).

293. *Id.* § 12:1-861(B)(3).

294. Business transactions typically involve an element of risk and a rate of return that is commensurate with the risk. If a conflicting-interest transaction turns out to be of great benefit to the corporation—if the risks work out heavily in the corporation's favor—the transaction is unlikely to be attacked. But if the risks go the other way, and the transaction causes losses (or substandard profits) to the corporation, it is far more likely that the transaction will be attacked, and pose the danger that hindsight bias will cause the factfinder to conclude that the deal was unfair from the start.

295. Obviously, the risk cannot be eliminated entirely, as compliance with the statute can be disputed, and a court's interpretation of the statute may be surprising.

interest in the transaction but also lack any one of many common types of relationship to the directors who have those personal interests.[296] If the corporation does not have at least two of these qualified directors, it would have to turn to the owners of qualified shares for approval. Shares held by the conflicted director or by any "related person" of the director are not qualified shares.[297]

Some transactions in closely held corporations may be subject to approval in the required ways, but many will not be. The types of familial, employment, and other relationships that are common among the directors of closely held corporations make it unlikely that corporations of that kind will have two directors who qualify to provide the required approvals. And a director may be reluctant to place the fate of an important transaction in the hands of shareholders who may be passive investors at best and disaffected, contentious minority shareholders at worst. In situations of that kind, the conflicted director is likely to end up in much the same place as he did under the LBCL. He will have to accept the risk, if the transaction is carried out and challenged, of proving its fairness under rigorous, probably hindsight-affected, judicial scrutiny.

The new Act addresses the issue of corporate opportunities through a provision that piggybacks on the approval provisions provided for director conflicting interest transactions. The corporate opportunity doctrine holds that a director's duty of loyalty does not allow the director to divert the corporation's business opportunities to himself for his own personal gain.[298] The Louisiana Supreme Court has recognized the doctrine, but the few Louisiana decisions that discuss the doctrine use only the most conservative, director-favoring approaches to describe the types of opportunities that should be covered by the no-diversion rule.[299]

Like the Model Act,[300] the new Louisiana Act makes no effort to define what is meant by a "corporate" opportunity. But it does provide a mechanism through which a director can have the corporation disclaim any interest in the opportunity and thus protect the director against a later claim that the director's taking the opportunity personally was a breach of the director's duty of loyalty.[301] The disclaimer of the corporation's interest in the

296. LA. REV. STAT. ANN. §§ 12:1-862(A), 1-860(1)(A)–(C), (5), 1-143(A)(3), (B)(1) (Supp. 2015).
297. *Id.* § 12:1-863(C)(2).
298. *See* MORRIS & HOLMES, *supra* note 9, § 22.05, at 562; MODEL BUS. CORP. ACT § 8.70 cmt. (2011).
299. *See* MORRIS & HOLMES, *supra* note 9, § 22.05, at 562; MODEL BUS. CORP. ACT § 8.70 cmt. (2011).
300. MODEL BUS. CORP. ACT (2011).
301. LA. REV. STAT. ANN. § 12:1-870(A) (Supp. 2015).

transaction is provided in the same way that the directors or the shareholders of a corporation would approve a director's conflicting interest transaction.[302] However, in contrast with the rules governing conflicting interest transactions, in which the approvals may be provided either before or after the transaction is consummated, the corporate opportunity disclaimer must occur before the director becomes legally obligated with respect to the opportunity.[303]

### INDEMNIFICATION & ADVANCEMENT OF LITIGATION EXPENSES

Although the new Act retains the basic structure of the indemnification and advancement-of-expenses scheme under the LBCL, it also makes a number of significant changes. The most fundamental of the changes deal with the scope and exclusivity of the new provisions. The LBCL contained a non-exclusivity provision that allowed a corporation to provide broader forms of indemnification than those contemplated by the default statutory rules, subject only to a prohibition against the indemnification of someone for the results of that person's "willful or intentional misconduct."[304] The LBCL also permitted a corporation to "self-insure" its indemnity payments under a provision that lifted all constraints on the terms of this so-called "self-insurance" that did not amount to "actual fraud."[305] In sharp contrast, the new Act drops the old self-insurance provision[306] and provides explicitly that a corporation may not indemnify or advance expenses to an officer or director except as permitted by the relevant subpart of the Act.[307]

Conversely, the new Act neither requires indemnification[308] nor limits a corporation's power to provide indemnification voluntarily to its employees and agents.[309] The LBCL, in contrast, had simply included employees and agents in the list of persons—directors, officers, employees, and agents—to whom its indemnity and advancement-of-expense provisions applied, thus making all of them subject to the same rules.[310] The Official Comments to the

---

302. *Id.*
303. *Id. See* MODEL BUS. CORP. ACT § 8.70 cmt. 1 (2011).
304. Former LA. REV. STAT. ANN. § 12:83(E) (repealed 2015).
305. *Id.* § 12:83(F).
306. LA. REV. STAT. ANN. § 12:1-857 cmt. b (Supp. 2015).
307. *Id.* § 12:1-859.
308. *Id.* §§ 12:1-852, 1-856(C).
309. *Id.* § 12:1-858(E). Those employees and agents who are also directors or officers do remain subject to the rules applicable to them as directors or officers, of course.
310. Not all the rules applied in the same way, of course. They placed constraints on the power of directors to authorize their own indemnification that

Model Act explain that the neutrality of the new Act with respect to the indemnity rights of employees and agents is not due to any substantive position on whether such rights may or must be recognized—that is left to other bodies of law, such as contract and agency[311] law—but rather to a judgment about the appropriate scope of the Act.[312] The Act deals with the indemnity rights of directors and officers because those rights pose important questions about corporate governance.[313] Similar rights for employees and agents do not pose issues of that kind, so the Act excludes them from its coverage.[314]

The new Act also permits its nominally mandatory indemnification rules to be limited by the articles of incorporation.[315] Otherwise, the mandatory indemnification provision in the new Act[316] differs from that in the LBCL in just two ways. First, like all other indemnity provisions in the new Act, it excludes employees and agents from its coverage.[317] Second, the provision no longer makes mandatory indemnification available "to the extent" that a director is successful in the defense of a proceeding but, instead, only when the director's defense is "wholly successful." The latter change is designed to avoid the result in a 1974 Delaware decision in which the court ordered a corporation to indemnify several directors who were successful in defending only some of the counts in a criminal

---

had no relevance to indemnitees that were not directors. *See* former LA. REV. STAT. ANN. § 12:83(C)(1) (repealed 2015).

311. The Civil Law analogue to agency is representation, which includes the nominal contract of mandate. LA. CIV. CODE arts. 2985–3032 (2015). Article 3013 of the mandate provisions requires a principal to compensate the mandatary of loss that the mandatary sustains as a result of the mandate, except for loss caused by the fault of the mandatary.

312. MODEL BUS. CORP. ACT ch. 8, subch. E, intro. cmt. 1 (2011); *id.* § 8.58 cmt.

313. *Id.* at ch. 8, subch. E, intro. cmt. 1.

314. *Id.*

315. LA. REV. STAT. ANN. § 12:1-858(D) (Supp. 2015) (allowing articles to limit any rights to indemnification or advance of expenses "created by or under this Subpart"). The limitations may not be applied retroactively, however, to conduct that occurs before the adoption of the provision that imposes the limitation. *Id.* § 12:1-858(B).

316. *Id.* § 12:1-852.

317. *Id.* Although the language of section 1-852 itself mentions only directors, and not officers, another section of the Act gives officers the same right to mandatory indemnification as directors. *See id.* § 12:1-856(C). Note that employees and agents could make a claim for indemnification under the principle expressed in Civil Code article 3013 or under any contractual obligation of the company, if enforceable by the employee or agent, to provide that benefit.

indictment against them.[318] Note that this change in the law affects mandatory indemnification only; it does not diminish the power of the corporation to provide permissible indemnification if the requirements for that form of indemnification are satisfied.

The rules governing permissible indemnification under the new Act are more restrictive toward directors than non-director officers. The prospect of the directors' approval of their own or their fellow directors' indemnification poses conflicting interest and "structural bias" issues that are not present in dealing with the indemnification of officers who are not also directors.[319] So, the new Act allows a corporation to indemnify and advance expenses to non-director officers not only under the rules applicable to directors but, beyond that, to any further extent that the corporation chooses, through a contract, board resolution, or provision in the corporation's articles of incorporation or bylaws.[320] The only limitations imposed on a corporation's indemnification of its non-officer directors are those imposed by the "anti-circularity" rule in connection with derivative litigation[321] and the prohibition of the indemnification of expenses

---

318. Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 138 (Del. Super. Ct. 1974). *See* MODEL BUS. CORP. ACT § 8.52 cmt. (2011).

319. Louisiana rejected a Model Act provision that would have allowed a person who was both a director and an officer to be indemnified under the more liberal standards for officers if the conduct being challenged in the proceeding was carried out in the indemnitee's role as an officer. LA. REV. STAT. ANN. § 12:1-856 cmt. b (Supp. 2015).

320. LA. REV. STAT. ANN. § 12:1-856(A) (Supp. 2015).

321. The anti-circularity rule prohibits a corporation, without court approval, from indemnifying a director or officer for the very amount recovered by the corporation from the officer or director in a suit against the officer or director that is brought by or in the right of the corporation. Only litigation expenses may be reimbursed in connection with that type of proceeding unless a court orders otherwise. *Id.* §§ 12:1-851(D)(1), 1-856(A)(1). Although the rule is not limited to derivative suits technically, that is where the rule will nearly always apply as a practical matter. Recall that the anti-circularity rule is limiting permissible indemnification. Absent some unusual change in control of the indemnifying corporation, it is highly unlikely that a board of directors really will vote first to direct the corporation to file suit against an officer or director, and then, later, to indemnify the officer or director not only for the costs of defending the very suit that the corporation itself filed, but also to repay to the defendants any recovery the corporation may have received from them as a result of its filing the suit. Hence, realistically, it is only in the derivative suit setting that the anti-circularity rule is likely to matter. In that setting, a shareholder will be pursuing an action in the right of the corporation, over the directors' opposition, so that the directors will be disposed to indemnify everything they can—all expenses and all liability. There, the function of the anti-circularity rule is to remove the board's power, absent court approval, to indemnify anything more than litigation expenses.

arising out of the kind of misconduct that would not be subject to exculpation under the statutory exculpation rule.[322]

The rules governing the permissible indemnification of directors allow the corporation to indemnify a director for liability[323] incurred in a proceeding[324] in which the indemnitee is a party because he or she is a director,[325] provided that an adequately disinterested decision-maker determines that the indemnitee met the minimum standard of conduct set by the statute. An adverse result in the proceeding itself does not necessarily mean that the director failed to meet the required standard of conduct for indemnification,[326] as the grounds for the imposition of liability in the proceeding may be quite different from those required to authorize the indemnification.[327] Instead, that determination must be made by the vote of a majority of the "qualified"[328] members of the board—or of a board committee—if

---

322. *Id.* § 12:1-856(A)(2). The exception provided in the exculpation provision for liability arising from the authorization of an unlawful distribution is not included in the list of limitations on non-director officer indemnification because non-director officers hold no power to authorize a distribution.

323. Liability is defined to include both the obligation to pay a judgment, settlement, penalty, or fine, and the litigation expenses associated with the proceeding. *Id.* § 12:1-850(3). However, in a proceeding by or in the right of a corporation—typically a derivative proceeding—court approval is required for the indemnification of anything other than litigation expenses. *Id.* §§ 12:1-851(D)(1), 1-856(A)(1).

324. Proceeding is defined to mean any kind of action, suit or proceeding, including civil, criminal, administrative, arbitrative or investigative proceedings. *Id.* § 12:1-850(6).

325. The terms "director" and "officer" (recall that officers may be indemnified at least to the same extent as directors) are defined to include service in some capacity for another entity or an employee benefit plan at the request of the indemnifying corporation. *Id.* § 12:1-850(2). The Official Comments to the Model Act note that it is a good practice to evidence this type of request through some kind of writing. MODEL BUS. CORP. ACT § 8.50(2) cmt. 2 (2011).

326. LA. REV. STAT. ANN. § 12:1-851(C) (Supp. 2015).

327. MODEL BUS. CORP. ACT § 8.51 cmt. 3 (2011). If a director's failure to exonerate himself in a proceeding were enough by itself to cut off the director's right to indemnification, it would become impossible to do what the statute plainly authorizes: to indemnify a director for liability incurred in a proceeding.

328. A director is "qualified" for purposes of the permissible indemnification provisions if neither the director nor a person with whom the director has a material relationship is either a party to the proceeding of a conflicted or disclaimer-seeking director in a conflicting-interest or business-opportunity transaction that is being challenged in the proceeding. LA. REV. STAT. ANN. § 12:1-143(2) (Supp. 2015). Because a director is disqualified automatically if the director is a party to the proceeding, it will be rare in the context of most close-corporation derivative litigation for the corporation to meet the "two qualified directors" requirement for a direct determination by the board of the indemnitees' satisfaction of the statutory standards of conduct. That means the critical decision must be made either by special legal counsel or by a vote of

the corporation has at least two qualified board members;[329] by "special legal counsel," preferably selected by the qualified members of the board, if at least two members are qualified;[330] or by a vote of shares not owned or controlled by a non-qualified director.

The required standards of conduct in the new Act are similar to those in the LBCL, but the new Act differs from the LBCL in drawing a distinction between the non-criminal[331] situations in which its higher standard governs—a reasonable belief that the conduct was "in the best interests" of the indemnifying corporation[332]—and those in which its more forgiving standard applies—a reasonable belief that the relevant conduct was "at least not opposed" to the best interests of the indemnifying corporation.[333] Under the LBCL, those two standards applied indiscriminately.[334]

Under the new Act, the higher standard applies to conduct in the indemnitee's capacity as a director or officer for the indemnifying

---

shares not owned or controlled by directors who are parties to the proceeding. Faced with this choice, it will be rare for the defendant directors to turn the matter over to shareholders, as most or all of the shares eligible to vote on the question will be owned by the minority shareholders who brought the suit. Hence, the most likely outcome is that the directors, even though not qualified to make the decision themselves, will exercise their power under section 1-855(B)(2)(b) to appoint "special legal counsel" to make the decision for them. Only an impossibly unperceptive lawyer could fail to understand in those cases that the directors are hiring him to find that they met the statutory standard.

329. *Id.* § 12:1-855(B)(1).

330. *Id.* § 12:1-855(B)(2). If the board does have at least two qualified directors, then the qualified directors, rather than the full board, must make the selection. *Id.* § 12:1-855(B)(2)(a). But the full board may make the decision if it does not have at least two qualified directors. *Id.* § 12:1-855(B)(2). Because a board with at least two qualified directors could make the required decision itself, it seems unlikely that special legal counsel will be hired by qualified directors in very many cases. It might occur, however, where the board's qualified directors had at least serious doubt about the wisdom or propriety of providing the requested indemnification, and wished to hire someone else to take responsibility for that difficult decision.

331. For indemnification to be permissible in connection with a criminal proceeding, the director or officer must not have had any reasonable cause to believe that his or her conduct was unlawful. *Id.* § 12:1-851(b). The LBCL had the same rule. *See* former LA. REV. STAT. ANN. § 12:83(A) (repealed 2015).

332. LA. REV. STAT. ANN. § 12:1-851(A)(1)(a)(i) (Supp. 2015).

333. *Id.* § 12:1-851(A)(1)(a)(ii). A third standard applies in a criminal proceeding. In that case, the director or officer must have had no reasonable cause to believe his or her conduct was unlawful. *Id.* § 12:1-851(A)(1)(b).

334. Former LA. REV. STAT. ANN. § 12:83(A)(1) (repealed 2015). Arguably, but paradoxically, an even lower standard may have applied in derivative suits. *Id.* § 12:83(A)(2). That different and lower standard has been dropped by the new Act.

corporation itself.[335] The lower standard applies only where the conduct was carried out on behalf of some other entity, such as an affiliate of the indemnifying corporation.[336] In those cases, the director or officer may owe duties to the affiliate to act in that entity's best interests. Hence, the new Act allows the director or officer to comply with those duties without forfeiting his eligibility for indemnification, subject only to the requirement that he reasonably believe that the relevant conduct is at least not opposed to the best interests of the indemnifying corporation.

An even more liberal rule is provided in connection with service with respect to an employee benefit plan. A director or officer who acts in a way that he reasonably believes serves the best interests of the plan beneficiaries is deemed by operation of law to satisfy the more liberal of the two standards of conduct,[337] regardless of whether the conduct actually would meet that standard in the absence of the special statutory rule. As the Official Comments to the Model Act explain, the federal statute governing employee benefit plans requires that plan fiduciaries discharge their duties "solely" in the interests of plan beneficiaries, which may mean that a plan fiduciary may be required to act in some situations in a way that would not meet even the more liberal of the statutory standards for permissible indemnification.[338] Still, in a larger sense, the corporation has effectively decided that the establishment of such a plan, governed by a federal statute requiring strict fidelity to plan beneficiaries, would serve the corporation's best interests.[339] In that larger sense, the new Act declares that corporate officers and directors who help administer the plan as required by law are, at a minimum, not harming the corporation's best interests.[340]

In addition to indemnifying an officer or director, a corporation may also voluntarily advance litigation expenses to them, without making any determination concerning their compliance with the standards of conduct that apply to indemnification itself.[341] However, the advances must be repaid by the officer or director if it is ultimately determined that the officer was not entitled to exculpation or indemnification, and the officer or director must provide the corporation with a written undertaking to repay the funds in that

335. LA. REV. STAT. ANN. § 12:1-851(A)(1)(a)(i) (Supp. 2015).
336. *Id.* § 12:1-851(A)(1)(a)(ii). *See* MODEL BUS. CORP. ACT § 8.51 cmt. 1 (2011).
337. LA. REV. STAT. ANN. § 12:1-851(C) (Supp. 2015).
338. MODEL BUS. CORP. ACT §§ 8.50 cmt. 2, 8.51 cmt. 2 (2011).
339. *Id.* § 8.51 cmt. 2.
340. LA. REV. STAT. ANN. § 12:1-851(B) (Supp. 2015).
341. *Id.* § 12:1-853(A).

event.[342] In a change from the LBCL, the director or officer now must also provide the corporation with a written affirmation of his good faith belief that his conduct met the requirements for exculpation or indemnification.[343]

An advance of expenses may be authorized by any one of three groups: the "qualified" members of the board, if there are at least two; by the full board, if the board has fewer than two "qualified" members; or by a vote of shares not owned or controlled by a non-qualified director.[344] The second of those three groups—the full, unqualified board—is the one most likely to make the controlling decision in most derivative actions filed on behalf of closely held corporations.

The corporation may change the statutory rules for permissible indemnification and advancement of expenses in two ways:[345] it may limit them through provisions in its articles of incorporation,[346] or it may effectively make them mandatory by committing in advance to make the payments that the rules themselves merely permit.[347] Unlike the limitations, which must be stated in the articles of incorporation, the advance commitments may be made in a variety of ways: in the articles of incorporation, in the bylaws, or in a resolution or contract approved by the board.[348] Once adopted, the commitments may not be eliminated or impaired with respect to conduct that occurs before the change in the commitment is made.[349]

## AMENDMENTS OF THE ARTICLES OF INCORPORATION AND BYLAWS

The most important change made by the new Act with respect to amending the articles of incorporation is the one that alters the vote of shares required to approve an amendment. The LBCL

---

342. *Id.* § 12:1-853(A)(2). The undertaking need not be secured, and the corporation may accept it as satisfying the statutory requirement without regard to the ability of the officer or director to make the contemplated repayment. *Id.* § 12:1-853(B).

343. *Compare* former LA. REV. STAT. ANN. § 12:83(D) (repealed 2015) (requiring only undertaking to repay), *with* LA. REV. STAT. ANN. § 12:1-853(A) (Supp. 2015) (requiring both undertaking to pay and written affirmation).

344. LA. REV. STAT. ANN. § 12:1-853(C) (Supp. 2015).

345. The corporation may also purchase insurance for its officers and directors that provides indemnification-like coverage for conduct that does not meet the statutory standards for exculpation, indemnification or advancement of expenses. An LBCL provision that allowed a corporation to provide this type of coverage through "self insurance" was not carried over into the new Act. *Id.* § 12:1-857 cmt. b.

346. *Id.* § 12:1-858(D).

347. *Id.* § 12:1-858(A).

348. *Id.*

349. *Id.* § 12:1-858(B).

required, as a default rule, the vote of two-thirds of the shares present at a lawful meeting at which a quorum of shares—normally a majority—was present in person or by proxy.[350] The new Act requires a majority of the shares entitled to vote on the amendment, unless the articles of incorporation require a greater vote.[351]

Depending on the number of shares represented at a meeting, this change in the required number of votes could amount to either a decrease or an increase in the vote required to approve an amendment. If the holders of most or all of a corporation's shares were present or represented at a meeting, a majority of the shares entitled to vote would be fewer than two-thirds of the shares present. But if a bare quorum of shares were present at a meeting, say just one share more than 50%, then a majority of all shares entitled to vote, 50% plus one, would represent a considerably larger number of shares than the 34% or so that would have satisfied the two-thirds-of-shares-present standard under the LBCL.

The voting requirement in the Louisiana Act is more demanding than that in the Model Act. The Model Act would have permitted a vote of a majority of the shares cast to approve an amendment, provided that a quorum of at least a majority of shares was present or represented at the meeting.[352] The Louisiana drafting committee

---

350. Former LA. REV. STAT. ANN. § 12:31(B) (repealed 2015). If the change had an adverse effect on the rights of a particular class or series of shares, the approval of that class or series was separately required in addition to the overall two-thirds vote. *Id.* § 12:31(C). For an amendment to have an adverse effect, it had to be included in a list of six statutorily defined effects. *Id.*

351. LA. REV. STAT. ANN. § 12:1-1003(A)(3) (Supp. 2015). If an amendment would affect a class or series of shares in any of the ways listed in section 12:1-1004(A) (a list comparable to the LBCL's exclusive listing of what it called an adverse effect), the separate approval of each of the voting groups that would be affected in such a way is required in addition to the approval of all shares entitled to vote on the amendment. *Id.* If several classes or series would be affected in substantially the same way, however, all of those classes and series would constitute just one separate voting group. Each similarly-affected class or series would not be treated as its own separate voting group, with a separate veto power over the amendment. *Id.* § 12:1-1004(C). The new Act also authorizes the board of directors, without shareholder approval, to restate the articles of incorporation (without any new amendment), *id.* § 12:1-1007, or to amend the articles of incorporation in connection with a reorganization ordered by a federal court under federal law (i.e., a bankruptcy reorganization), *id.* § 12:1-1008, or to make certain technical or routine types of changes, such as deleting the provisions that provided the names and addresses of the corporation's initial directors and initial registered agent and office.

352. MODEL BUS. CORP. ACT §§ 7.25(c), 10.03(e) (2011). This default rule, like the one in Louisiana, is subject to a provision in the articles of incorporation that requires a greater vote. Unfortunately, Louisiana's drafting committee retained the rule that allowed the articles of incorporation to provide only for a greater, not a lesser vote, failing to consider that a different rule was probably

agreed with the spirit behind the Model Act's rejection of a super-majority requirement for an amendment of the articles of incorporation, but the committee believed that the majority-of-votes cast standard was more appropriate for public corporations than for the more typical, closely held Louisiana corporation.

In a closely held corporation, the proponents of an amendment should find it relatively easy to muster at least a majority of shares entitled to vote on any amendment that does not face substantial opposition. However, when substantial opposition to an amendment does exist, the voting requirements of the statute should not create incentives, as the Model Act standard would have done, to arrange the meeting in a way that makes it difficult for opponents of the amendment to participate.[353] Although the Louisiana Committee did agree that a simple majority of shares should be able to approve an amendment of the articles of incorporation, it also believed that the required majority in a closely held corporation should be a true majority of shares and not the fairly small minority of shares that could approve an amendment under the Model Act approach.[354]

The new Act makes one other change in the Model Act amendment rules to take account of the closely held nature of most Louisiana corporations. Under the Model Act, an amendment of the articles of incorporation may not be approved by shareholders until it is first approved and recommended for shareholder approval by the board of directors.[355] Under the Louisiana Act, that rule applies only to public corporations.[356]

---

justified in light of the more demanding default standard that was adopted. The author plans to seek an amendment of the new Act to permit the articles of incorporation either to increase the required vote, or to decrease it, down to a statutory minimum of a majority of the votes cast.

353. If a bare majority of shares were present or represented at the relevant meeting, and five or ten percent of those present abstained from voting, a majority of shares actually cast in favor of an amendment could be considerably less than 25% of the shares entitled to vote on the amendment.

354. As indicated in note 352, *supra*, the Committee did not consciously decide that no corporation should ever be permitted to reduce the required majority to that provided by the Model Act. It simply failed to consider the possibility that the enlarge-only form of customization permitted by the Model Act might not be the appropriate rule once the default standard was increased from the minimal Model Act level to the more demanding level adopted in Louisiana.

355. MODEL BUS. CORP. ACT § 10.03(a), (b) (2011). The requirement that the board recommend shareholder approval of an amendment is subject to an exception for cases in which the board has conflicting interests or the corporation has agreed to submit a matter for shareholder approval even if the board of directors has determined that it can no longer recommend that the matter be approved. The latter exception permits corporations to include so-

For closely held corporations, the new Act retains the LBCL approach[357] by allowing amendments of the articles of incorporation with shareholder approval alone.[358] As a practical matter, if there is a genuine and substantial difference in identity between the members of the board and the shareholders of a closely held corporation, it will be difficult for shareholders, without the board's cooperation, to draft an amendment and then call and provide the required notice of the meeting of shareholders—or to obtain sufficient written consents—necessary to approve an amendment. But in many closely held corporations, particularly those owned by just one person, a requirement that the board approve an amendment before the shareholders do would amount to nothing more than a requirement that the same individuals provide the same approval twice, once as directors and then again as shareholders.

The rules of the new Act concerning bylaws are similar in most respects to both the Model Act and the LBCL. The new Act does retain the LBCL rule that bylaws are optional, rejecting the Model Act mandate that bylaws always be adopted.[359] But like the Model Act[360] and the LBCL,[361] it permits the board to adopt bylaws[362] and for either the board or the shareholders to change or repeal them.[363] The main differences between the LBCL and the new Act with respect to bylaws are found in several Model Act provisions that were included in the new Act to deal with issues that have arisen in the context of public corporations. In that setting a board may seem less responsive to shareholder concerns than some shareholder activists believe it ought to be. To address those issues, the Model Act, and

---

called "force the vote" provisions in merger and acquisition agreements. Louisiana adopted those exceptions, along with the normal requirement of board approval and recommendation, for public corporations. LA. REV. STAT. ANN. § 12:1-1004(B)(1), (2) (Supp. 2015).

356. LA. REV. STAT. ANN. § 12:1-1003(A)–(B) (Supp. 2015). A public corporation is defined as a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association.

357. Former LA. REV. STAT. ANN. § 12:31(B) (repealed 2015).

358. LA. REV. STAT. ANN. § 12:1-1003(A) (Supp. 2015).

359. *Id.* §§ 12:1-206(A), 1-1020(B). The Model Act requires that bylaws be adopted, but does not specify any required content for the required document. MODEL BUS. CORP. ACT § 2.06 (2011). Louisiana's drafting committee saw no point in changing existing law to require the adoption of a document that would have an entirely optional content.

360. MODEL BUS. CORP. ACT § 2.06(a) (2011). The Model Act would also allow incorporators to adopt initial bylaws for a corporation.

361. Former LA. REV. STAT. ANN. § 12:28(A) (repealed 2015).

362. LA. REV. STAT. ANN. §§ 12:1-206(A), 1-1020(B) (Supp. 2015).

363. *Id.* § 12:1-1020(A), (B).

now the Louisiana Act, includes provisions that empower shareholders to adopt bylaw amendments that may not be changed by the board,[364] or to vote against the election of a director in a binding way, as distinguished from voting in favor of a competing candidate.[365] Those provisions are unlikely to be important in most closely held corporations, where the shareholders who have the voting power to adopt such director-disabling bylaws really do not need them, as they already have the votes to fill the board with candidates of their choice.

### MERGERS AND MERGER-SUBSTITUTES

Traditionally, corporation statutes provided for three types of business combination transactions: mergers, consolidations, and sales of substantially all assets.[366] However, modern statutes, including the LBCL as amended in its later years, have added a variety of other similar transactions that can be used to achieve objectives that were formerly accomplished through mergers. For example, the acquisition of a target company as a wholly-owned subsidiary could be carried out through a transaction known as a reverse triangular merger.[367] However, modern law invented a new form of transaction, called a share exchange, that allows an acquirer to achieve the same end result without a merger.[368] Similarly, a corporation that wished to change its state of incorporation could create a new shell corporation in the target state, and then merge the existing corporation into the new corporation. Modern law has created a new type of transaction, called a "domestication" under the Model Act, that may be used to accomplish the same thing, without a merger and without any change in the legal identity of the corporation involved.[369]

Following the Model Act structure,[370] the new Act deals with the more recently invented merger substitute transactions, such as

---

364. *Id.* §§ 12:1-1020(b)(1)–(2), 1-1021(A)–(B).

365. *Id.* § 12:1-1022.

366. As originally enacted, the LBCL recognized only those three forms of business combination transactions. Act No. 105, § 1, 1968 La. Acts 266 (enacting former LA. REV. STAT. ANN. §§ 12:111–121 (1969) (repealed 2015)). The first alternative form of transaction, the share exchange, was enacted in 1990. *See* Act No. 849, § 1, 1990 La. Acts 1983. *See also* MORRIS & HOLMES, *supra* note 9, § 36.01, at 235 n.12.

367. *See* MORRIS & HOLMES, *supra* note 9, § 36.01, at 234–35.

368. *Id.*

369. LA. REV. STAT. ANN. §§ 12:1-920 to 12:1-924 (Supp. 2015).

370. For some reason, probably based on accidents of placement in earlier versions of the law, the Model Act places Chapter 10, on amending the articles of incorporation and bylaws in between Chapter 9, dealing with merger-

domestications and entity conversions, in Part 9; mergers and share exchanges, in Part 11; sales of substantially all assets, in Part 12; and appraisal rights, in Part 13. This Article will compare and contrast the various forms of transaction in a more historically organized way, beginning with the traditional forms of merger and similar transactions and then moving to the more recently invented substitutes. It will then take up appraisal rights, which are available if certain requirements are met, in connection with both the traditional and more recently created forms of transaction.

All of the merger and merger-substitute transactions are subject to similar approval and filing requirements. With one exception,[371] all must be approved first by the board of directors and then by the shareholders of at least one of the affected corporations.[372] If the transaction would result in the equivalent of an amendment of the articles of incorporation, which would require separate voting group approval if proposed as an amendment, similar separate voting group approval would be required of the transaction.[373] Two types of the transactions, an entity conversion and a nonprofit conversion, require separate approval by each class or series of shares in every case.[374] And if shareholders are to incur personal liability

---

substitute transactions, and Chapters 11, 12, and 13, dealing with mergers, share exchanges, sales of substantially all assets, and appraisal rights. Logically, the chapter concerning amendments would precede all of the merger-related chapters. The chapter on mergers and share exchanges would come next, then the merger-substitute transactions, then sales of assets, and, finally, appraisal rights. *See generally* MODEL BUS. CORP. ACT (2011).

371. The exception is known as a "short form merger," in which a parent company that owns at least 90% of a subsidiary merges with the subsidiary, or causes one or more of the 90%-or-greater subsidiaries to merge with one another. *See* LA. REV. STAT. ANN. § 12:1-1105 (Supp. 2015).

372. *See id.* § 12:1-1104 (mergers—board and shareholders of all merging corporations except certain survivor corporations and share exchanges—by board and shareholders of classes of shares being acquired); *id.* § 12:1-1202 (sale of substantially all assets not exempted by section 1-1201–board and shares of selling corporation); *id.* § 12:1-921 (board and shareholders of Louisiana corporation becoming a foreign corporation; approved as required by foreign law for foreign corporation to become Louisiana corporation); *id.* § 12:1-931 (conversion of Louisiana business corporation into a Louisiana or foreign nonprofit corporation–board and shareholders); *id.* § 12:1-941 (conversion of foreign nonprofit corporation into domestic business corporation–approval as required under the law governing the foreign nonprofit corporation); *id.* § 12:1-952 (entity conversion–board and shareholders of converting domestic business corporation); *id.* § 12:1-953(B) (unincorporated entity conversion–approval as required by the law governing another form of domestic entity that is converting into another form of domestic entity or into a domestic business corporation).

373. *Id.* §§ 12:1-921(6)(b)–(c), 1-1104(6)(a)(ii).

374. *Id.* §§ 12:1-931(5), 1-952(5).

based simply on their ownership position in the entity that survives or results from the transaction—if, for example, a corporation is proposing to merge or convert into a general partnership—each shareholder who would bear this so-called "owner liability"[375] must consent in writing to the transaction.[376]

The transactions differ from one another primarily in the effects they create. In a merger, one or more existing corporations or other "eligible entities"—i.e., non-corporate business entities[377]—combine into a single surviving firm. All but one of the combining firms is extinguished, and the assets and liabilities of all of the combining firms are owned or owed by the surviving entity.[378]

In a share exchange, all of the shares of one or more classes of shares are exchanged by operation of law for whatever consideration is specified in the plan of exchange.[379] In most cases, the shares to be acquired will be the common shares of an acquisition target, which results in the target company's becoming a wholly owned subsidiary of the other party to the transaction. Unlike a merger, a share exchange does not create or extinguish the existence or juridical personality of any of the parties to the transaction.[380]

A sale of assets does not require any special approvals if it occurs in the corporation's usual and ordinary course of business or if it fits one of three other excluded types of transaction.[381] A sale of assets triggers merger-like approval requirements if it is outside the ordinary course of business and leaves the corporation "without a significant continuing business activity."[382] In that type of transaction, the corporation typically sells all or substantially all of its operating assets to another entity for some agreed consideration.[383] Like the share exchange, a sale of assets has no direct effect on the juridical personalities of the parties, although

375. *Id.* § 12:1-140(15C).
376. *Id.* §§ 12:1-952(7), 1-1104(9).
377. *Id.* § 12:1-140(7D).
378. *Id.* § 12:1-1107(A).
379. *Id.* § 12:1-1107(B).
380. *Compare id.* § 12:1-1105, *with id.* § 12:1-1107(A)–(B).
381. *Id.* § 12:1-1201. The three excluded transactions are (1) a mortgage, pledge, or dedication of assets to the repayment of indebtedness; (2) a transfer of assets to a wholly owned subsidiary; and (3) a pro rata distribution of assets to the holders of one or more classes or series of the corporation's shares. *Id.*
382. *Id.* § 12:1-1202(A). A corporation is deemed to retain a significant business activity if it retains assets that represented at least 25% of its total assets at the end of the most recent fiscal year and 25% of either operating revenues or pre-tax income. *Id.*
383. In theory, the assets could be sold to an individual, but that virtually never happens as a practical matter. The buyer is not going to want to operate the acquired business as a sole proprietor.

the selling corporation may choose to dissolve and wind up its affairs after the asset sale.[384]

A domestication is a transaction through which a corporation changes its state of incorporation.[385] And despite the name, a domestication transaction can be either incoming—a foreign corporation becomes a Louisiana corporation—or an outgoing—a Louisiana corporation becomes a foreign corporation.[386] Like a merger, a domestication has its effects at the level of the entity—changing the juridical entity in some way—but, unlike a merger, a domestication involves only one corporation and does not result in the termination of any juridical personality.

When a domestication takes effect, the subject corporation is deemed to be the very same corporation as before, just one that has changed its state of incorporation.[387] Indeed, the chief difference between a domestication and a merger into a new shell entity in the target state lies precisely in the fact that a merger extinguishes the existence of the "old" corporation,[388] but a domestication is viewed as one continuing corporation simply changing its state of incorporation.[389] That approach to the transaction allows the domesticating corporation to avoid any argument that any transfer or assignment of personal or other nonassignable assets has occurred as a result of the transaction.

A nonprofit conversion is a transaction through which a domestic business corporation becomes a domestic or foreign nonprofit corporation.[390] As with a domestication, the theory is that the corporate personality of the corporation engaged in the transaction is not extinguished and replaced by that of a new corporation. Rather, the old business corporation continues in existence, with the same juridical personality after the transaction as before but as a nonprofit rather than business corporation.[391] Note that a nonprofit conversion changes a business corporation into a nonprofit. It cannot be used to do the reverse, i.e., convert a nonprofit corporation into a business corporation.[392]

---

384. But it may also stay in existence and reinvest the proceeds of the sale into a new business or, if it received other assets in exchange for the sold assets, may utilize those assets in new business operations.
385. LA. REV. STAT. ANN. §§ 12:1-920(A)–(B), 1-924(A)(6) (Supp. 2015).
386. *Id.* § 12:1-920(A)–(B).
387. *Id.* § 12:1-924(A)(6).
388. *Id.* § 12:1-1107(A)(2).
389. *Compare id.* § 12:1-1105, *with id.* § 12:1-924(A)(6).
390. *Id.* § 12:1-930(A)(B).
391. *Id.* § 12:1-934(A)(6).
392. *See id.* § 12:1-930. The nonprofit conversion can be used only to carry out the types of transactions contemplated by section 12:1-930(A)–(B).

In contrast, in a transaction called a "foreign nonprofit domestication and conversion," the new Act leaves it to the law of the foreign jurisdiction to decide whether[393] and how[394] that jurisdiction's nonprofit corporations may be converted into a Louisiana business corporation. If such a transaction is permitted by the foreign jurisdiction, the new Act provides recognition for such a transaction as a matter of Louisiana law and treats the converted and domesticated business corporation as being the same corporation as the formerly foreign nonprofit corporation that carried out the transaction.[395]

In an entity conversion, a domestic business corporation may become a domestic or foreign unincorporated entity, a domestic unincorporated entity may become another kind of domestic unincorporated entity, or a foreign unincorporated entity may become a domestic business corporation.[396] Like the other kinds of merger-substitute transactions, an entity conversion differs from the merger of one kind of entity into another in its treatment of the surviving entity as the same entity as the one that initiated the transaction as the converting entity.[397]

The Model Act limits entity conversions to transactions in which a domestic business corporation is either the converting or surviving entity.[398] But Louisiana law already provided a set of entity conversion rules that covered not only conversions from or into a Louisiana business corporation but also conversions from one form of domestic unincorporated entity into another.[399] The drafting committee decided that it did not make sense to provide different rules for similar transactions, so it broadened the entity conversion provisions in the new Act to include both the conversions covered by the Model Act, and those covered by the earlier Louisiana law.[400]

## APPRAISAL RIGHTS

"Appraisal rights" is the term used in the new Act to refer to what used to be called "dissenters' rights."[401] The basic idea behind appraisal rights is the same as that behind dissenters' rights:

393. *Id.* § 12:1-940.
394. *Id.* § 12:1-941(A).
395. *Id.* § 12:1-942(A)(6).
396. *Id.* § 12:1-950(A)–(D).
397. *Id.* § 12:1-955.
398. MODEL BUS. CORP. ACT ch. 9, intro. cmt. (2011); *id.* § 9.50.
399. LA. REV. STAT. ANN. § 12:1-950 cmt. a (Supp. 2015).
400. *Id.*
401. Former LA. REV. STAT. ANN. § 12:131 (repealed 2015). *See also* MORRIS & HOLMES, *supra* note 9, § 38.01, at 296.

A shareholder who objects to the terms of certain transactions, such as a merger or merger-substitute, is entitled, if the statutory procedures for the exercise of the rights are followed, to require the corporation to buy all of the objecting shareholder's shares for their fair value, paid in cash.[402]

The traditional form of statutory appraisal rights has been criticized as too widely available by corporate management and as both procedurally and substantively unfair by dissenting shareholders.[403] The new Act changes the traditional rules in ways that are designed to address both concerns. The overbreadth concern is addressed by restricting appraisal rights to shares that are exchanged, or whose rights are changed,[404] by some transaction either outside a public market for the shares[405] (which provides liquidity and price competition[406]) or in an "interested transaction"[407] in which normal price competition may not occur.[408] This narrowing of the scope of appraisal rights will not affect the availability of those rights in what may be the most common form of triggering transaction in Louisiana corporations: a merger that forces dissident minority shareholders out of a closely held corporation. Those kinds of transactions will continue to trigger appraisal rights because they do force the minority shareholders to exchange their shares for something else (typically cash), the shares involved are not traded in a public securities market, and the merger will constitute an "interested transaction" as defined in the new Act.

So, the truly important changes made by the new Act with respect to appraisal rights are those that improve the applicable procedures and the valuation principles from the perspective of the minority shareholder. Under the LBCL, it was possible to carry out a short form, cash-out merger without even notifying the cashed-out shareholder that appraisal rights were available.[409] The shareholder then had only 20 days from the date that an unexplained copy of the certificate of merger was *mailed* to him—the 20-day period ran from mailing, not receipt—to make demand for what the shareholder believed was the fair value of the shares that had been

402. MORRIS & HOLMES, *supra* note 9, § 38.01, at 296–97.
403. MODEL BUS. CORP. ACT § 13.01 cmt. 1 (2011).
404. LA. REV. STAT. ANN. § 12:1-1302(A) (Supp. 2015) (denying appraisal rights with respect to shares that are not exchanged or remain outstanding after the transaction); MODEL BUS. CORP. ACT §§ 13.01 cmt. 1, 13.02 cmt. 1 (2011).
405. LA. REV. STAT. ANN. § 12:1-1302(B) (Supp. 2015).
406. MODEL BUS. CORP. ACT § 13.02 cmt. 2 (2011).
407. LA. REV. STAT. ANN. §§ 12:1-1301(5.2), 1-1302(B)(3) (Supp. 2015).
408. MODEL BUS. CORP. ACT § 13.02 cmt. 3 (2011); LA. REV. STAT. ANN. § 12:1-1301 cmt. (Supp. 2015).
409. Former LA. REV. STAT. ANN. § 12:131(C)(4) (repealed 2015).

expropriated from him through the merger.[410] The shareholder was also required during that period to find a bank, located in the same parish as that of the corporation's registered office, that would be willing to act as an escrow agent for the certificates representing the affected shares, deposit the certificates with the bank, get the bank to provide a letter that acknowledged that the certificates had been placed in escrow, and then deliver the escrow acknowledgement letter, along with the demand for fair value, to the corporation.[411]

If by some miracle the shareholder managed to jump through all of those hoops in the 20 days after the mailing of the unexplained certificate of merger, the corporation could simply reject the shareholder's demand.[412] That put the onus back on the shareholder to file an appraisal suit within 60 days after the corporation's rejection of the shareholder's demand.[413] While this litigation was pending, the corporation could withhold all compensation for the expropriated shares, even the compensation that the corporation itself had set through the terms of the plan of merger.[414] Finally, the valuation of the shares was likely to be reduced by minority and marketability discounts.[415]

The new Act changes every one of those rules.[416] The Act requires a statutory form of notice to shareholders concerning their appraisal rights in all transactions in which the appraisal rights may be available.[417] The notice summarizes what the shareholder must do, and refrain from doing, to preserve the shareholder's appraisal rights.[418]

---

410. *Id.*

411. *Id.*

412. The corporation had 20 days after its receipt of the demand (not its mailing) to send a written notice to the shareholder rejecting the demand. *Id.* § 12:131(D).

413. *Id.* § 12:131(E).

414. The corporation could place the amount it contended was due into the registry of the court and thereby shift the costs of the proceeding to the shareholder if the court determined that the fair value of the shares was not greater than the amount deposited. *Id.* § 12:131(G). The shareholder relinquished all his rights as a shareholder upon his demand for payment, even though he received no payment until the litigation was concluded. *Id.* § 12:13(H).

415. McMillan v. Bank of the S., 514 So. 2d 227 (La. Ct. App. 1987); MORRIS & HOLMES, *supra* note 9, § 38.08, at 327–31.

416. The new Act also eliminates the old rule that made dissenters' rights unavailable (except in a short form merger) if the transaction to which the shareholder was dissenting was approved by at 80% of the voting power in the corporation. *See* former LA. REV. STAT. ANN. § 12:131(A) (repealed 2015).

417. LA. REV. STAT. ANN. § 12:1-1320 (Supp. 2015).

418. The requirements vary depending on whether the transaction is to be approved at a shareholders' meeting, *id.* § 12:1-1320(A)(1), through the solicitation of written consents of shareholders, *id.* § 12:1-1320(C)(1), or has

The corporation, not the shareholder, is then required to make suitable arrangements for the deposit of the relevant share certificates, tell the shareholder how to submit the certificates, and send the shareholder a simple form that is to be completed and returned to the corporation to initiate the appraisal process.[419] The corporation is also required to send specified financial information to the shareholder to assist the shareholder in calculating the amount that the shareholder should demand for his shares.[420] Within 30 days of the corporation's receipt of the appraisal form, it must pay to the shareholder the amount that the corporation calculates to be the fair value of the affected shares.[421] This up-front payment rule means that any appraisal litigation will delay only the payment of the difference, if any, between the amount that the corporation concedes to be fair and a higher amount that a court may determine in the appraisal proceeding to be fair.

If the corporation rejects the shareholder's valuation figure, it is the corporation, not the shareholder, that must initiate the judicial appraisal action within 60 days of receiving a demand for payment that remains unresolved.[422] The corporation must join in the proceeding all other shareholders whose demands for payment remain unresolved.[423] The court may appoint an appraiser to file a written report on the fair value of the shares,[424] and the costs of the proceeding, including the compensation and expenses of the appraiser, are to be assessed against the corporation. Costs may be

---

instead already been approved through written consents, followed by a notice of the *fait accompli* to the minority shareholders, *id.* § 12:1-1320(C)(2).

419. *Id.* § 12:1-1322.

420. *Id.* § 12:1-1320(D).

421. *Id.* § 12:1-1324(A). An exception is provided that permits the corporation not to make this kind of advance payment for what are called "after-acquired shares." *Id.* § 12:1-1325(A). Those are shares that have been purchased after the public announcement of the transaction that gives rise to the appraisal rights. After-acquired shares are relevant only in the context of public corporations, where someone can buy into an appraisal rights suit by purchasing shares after an appraisal-triggering transaction is publicly announced. *Id.* § 12:1-1322(C)(1) cmt. The payment rule stated in the text is the one that will almost always apply in the typical cash-out merger transaction in a closely held corporation.

422. *Id.* § 12:1-1330(A).

423. *Id.* § 12:1-1330(C).

424. *Id.* § 12:1-1330(D). Under the Model Act, the appraiser functions something like a hearing officer for the court. The appraiser is empowered to receive evidence and to make a recommendation on fair value to the court. MODEL BUS. CORP. ACT § 13.30(d)(2) (2011). Under the Louisiana Act, the appraiser is treated as an expert witness who may be deposed, examined, and cross-examined. LA. REV. STAT. ANN. § 12:1-1330(D) (Supp. 2015).

assessed against the shareholders only to the extent that the court finds it equitable to do so, on grounds that the shareholders have acted arbitrarily, vexatiously, or not in good faith in connection with their assertion of appraisal rights.[425] Finally, and perhaps most importantly, the shares are to be valued using customary and current valuation techniques for similar businesses in similar transactions, without discounting for lack of marketability or minority status.[426]

The new Act does make one change that is favorable to management in connection with a cash-out merger. It makes appraisal rights the exclusive remedy in connection with transactions in which the remedy is available, but only if the corporation allows the shareholder to assert appraisal rights without an advance notice to the corporation of his intent to do so.[427] This change was not considered by the Louisiana State Law Institute. Rather, it was drafted it in response to a legislator's request after the Law Institute had completed its work.[428]

---

425. LA. REV. STAT. ANN. § 12:1-1331(A) (Supp. 2015).

426. *Id.* § 12:1-1301(4).

427. *Id.* § 12:1-1340(B)–(D).

428. I was willing to support the change only if I could remove what I saw as the one remaining trap in the appraisal process: the requirement that a shareholder provide advance notification to the corporation of his intention to assert appraisal rights in connection with any appraisal-triggering transaction that is to be voted upon at a meeting of the corporation's shareholders. This notification requirement was first placed into statutory appraisal proceedings back when the triggering transaction was imagined to be a share-for-share merger in which the complaining shareholder had the same opportunity to participate as every other shareholder. In those kinds of transactions, the requirement of advance notification served the function of letting management know what kind of cash-payment obligations the corporation would face if the transaction were approved over the objections of the shareholders who had provided the required notifications. But in modern practice, particularly in closely held corporations, a share-for-share merger is seldom the kind of transaction that gives rise to appraisal rights. Rather, the typical triggering transaction is a cash-out merger in which a minority shareholder is forced to relinquish his shares in the corporation for whatever price the board and majority shareholders decide to insert into their self-approved plan of merger.

In that kind of transaction, the corporation is perfectly aware of the number of shares that will be receiving cash rather than stock in the surviving corporation, as it is the corporation's management and controlling shareholders who make that very determination as part of the plan of merger they themselves decide to adopt. The entire purpose of the transaction is to force the disfavored minority shareholders to exchange their shares for cash (or for other less valuable consideration that will almost surely trigger an assertion of appraisal rights), and it is the minority shareholder, not the corporation, who is kept in the dark until the trigger is pulled on the transaction.

The rule of exclusivity would work unfairly if the only remedy available for a freezeout merger could be lost easily, simply by failing to notify the corporation of something that the corporation already knew. But if appraisal

DISSOLUTION AND TERMINATION

The new Act takes a middle position between the LBCL and Model Act approaches to corporate dissolution. Under the LBCL, a corporation that chose to dissolve had to appoint a liquidator, who then assumed control over the winding up of the corporation's affairs.[429] After the liquidator completed the liquidation of the corporation, he was required to file a certificate to that effect with the secretary of state.[430] The secretary of state was then required to notify two or three state agencies about the certificate of liquidation and dissolution[431] and subsequently wait for certification from the agencies that the corporation had paid all amounts owed to them.[432] When those certifications were received, the secretary of state issued a certificate of dissolution[433]—a document that sounded confusingly like the certificate that initiated the dissolution process and the one

---

rights truly are available, the remaining procedures and valuation principles in the appraisal rights part of the new Act provide a fair way of resolving the conflicts between the majority and minority shareholders that motivated the majority shareholders to engage in the cash-out merger. The Act provides a similar, partition-like remedy to a minority shareholder who proves oppression, and that remedy, too, is exclusive. *Id.* § 12:1-1435(L). I do plan to raise the issue with the Louisiana State Law Institute and to follow its direction in connection with any future amendment or repeal of the exclusivity rule.

429. Former LA. REV. STAT. ANN. § 12:141(B)–(C) (repealed 2015). Involuntary dissolutions were possible, too, *id.* §§ 12:141(B)(2), 12:143, but for the sake of simplicity in drawing comparisons between the two laws, the text is discussing only voluntary dissolutions.

430. *Id.* § 12:148(A)–(B).

431. *Id.* § 12:148(B). Two agencies always had to be notified: the Department of Revenue and the administrator of Louisiana Employment Security Law. A third one, the Department of Environmental Quality, had to be notified only if the activities of the liquidated corporation were subject to regulation by that agency. *Id.* It was not clear how the employees in the secretary of state's office were supposed to tell whether a corporation was subject to regulation by the environmental agency, so it seems likely that that agency was routinely notified. The notifications made little sense, as they were provided only after the corporation had already been fully liquidated. Had any of the agencies discovered any unpaid bills, they would have been asserting their claims against a corporation that no longer had any assets. Theoretically, they could have pursued unlawful distribution claims against any shareholders who had received liquidating distributions that were in excess of the amount that could have been distributed lawfully, but those claims were related to unlawful distributions themselves, not to the existence of the corporation. Keeping the empty corporate shell in existence did nothing to strengthen any such claim.

432. Note that the agencies were notified about the liquidation and asked about any unpaid debts owed to them only when it was too late to do much good—after all corporate assets had already been distributed by the liquidator.

433. *Id.* § 12:148(B)(1).

filed by the liquidator that declared the process to have been completed. When that certificate was issued, the existence of the corporation was terminated,[434] and any assets that may have been overlooked in the liquidation process were vested in the liquidator for the benefit of the persons entitled to those assets.[435] An alternative form of simplified dissolution was also made available—dissolution by affidavit—but it operated largely as a trap for the unwary, as it resulted in the imposition of personal liability on shareholders for the liquidated corporation's debts.[436]

Given this choice between a complicated, control-divesting form of dissolution in which three state agencies could hold up the final dissolution indefinitely, and a simplified form of dissolution that imposed personal liability on shareholders for any overlooked corporate debts, many well-advised corporations opted out of both forms of dissolution. When the owners of an incorporated business wished to shut it down, they could simply pay the corporation's remaining debts, distribute the remaining assets to themselves, and then stop filing their annual reports. The secretary of state was then required by law to revoke the corporation's charter after three years' failure to file.[437] In contrast with a dissolution, the charter revocation was simple, free of charge, and did not impose personal liability on the shareholders for any unpaid, pre-revocation corporate debts. Moreover, if the shareholders came to regret their decision to trigger the charter revocation, they were entitled to reinstate the corporation, with retroactive effect, for an indefinite period after the revocation of the corporation's charter.[438] Reinstatement was available for a corporation dissolved by affidavit only by court order, and no grounds for the issuance of such an order were specified.[439] All things considered, the LBCL practically punished owners who tried to comply with the law's formal dissolution requirements, while rewarding those who ignored them and instead dissolved by deliberately violating the law's annual reporting requirements.

The Model Act's dissolution provisions could hardly be more different from those in the LBCL. Under the Model Act, a

434. *Id.* § 12:148(C).

435. *Id.* § 12:148(D).

436. *Id.* § 12:142.1. The shareholders became liable in proportion to their ownership of shares in the dissolved corporation. *Id.* § 12:142.1(A).

437. *Id.* § 12:163(A).

438. *Id.* § 12:163(E). The name of the revoked corporation was reserved for three years, so the corporation took the risk that it would have to change its name if it reinstated after three years. But the statute permitted a reinstatement under a new name with no apparent time limitation. *Id.* § 12:163(E)(3).

439. *Id.* § 12:142.1(B).

corporation dissolves by filing articles of dissolution.[440] However, the effect of filing the articles of dissolution under the Model Act is simply to change the object of corporate management from the continued operation of the corporation's business to the winding up of the corporation's affairs.[441] The corporation's existing managerial personnel remain in charge of the corporation, and the same corporate governance rules continue to apply, except for the change in the object and purpose of the corporation's managerial decisions.[442] Moreover, those limited effects remain in place perpetually. The corporation's existence is never ended as a result of a dissolution under the Model Act, and no mechanism exists for the corporation to file a document that declares its liquidation to be complete or for its existence as a juridical person to be terminated.

Louisiana's new Act embraces two key features of the Model Act scheme: the elimination of the required transfer of managerial authority to a liquidator, and the perpetual existence of the dissolved corporation for the limited purpose of conceptualizing the person who owns or owes any corporate assets or debts that may be overlooked during a corporation's liquidation. Unlike the Model Act, though, the new Louisiana Act rejects the idea that ordinary rules of corporate governance should continue to apply forever to a dissolved corporation. Louisiana agrees that those are the appropriate rules to apply during the period in which the corporation is actively engaged in winding up its affairs. But once management believes that the liquidation has been completed, all debts paid or provided for, and all remaining assets distributed to shareholders, no further acts of management are really going to take place. Shareholders are not going to meet, directors are not going to be elected, and officers are not going to be appointed or continue to go to work at the corporate offices.

As a practical matter, then, a fully liquidated, dissolved corporation really is not going to continue to exist as a functional business organization. If someone should discover years later that the dissolved corporation failed to deal with some of its assets or liabilities in the process of liquidating, it does make sense to think of those assets and liabilities as still being vested in the liquidated corporation itself, rather than in the liquidator as under the LBCL. But it does not make sense to rely on ordinary rules of corporate governance to identify the persons who have power to deal with those overlooked items, perhaps many years after anyone last held a managerial position in the liquidated company.

---

440. MODEL BUS. CORP. ACT § 14.03 (2011).
441. *Id.* § 14.05(a).
442. *Id.* § 14.05(b) cmt.

For those reasons, the Louisiana Act adds a new subpart to deal with what it calls the "termination" of a corporation.[443] A termination, unlike a dissolution, does not merely initiate the process of winding up a corporation's affairs. Instead, it marks the point at which the existence of the corporation ends, except for the limited purposes of dealing with matters, such as the distribution of overlooked assets, that the liquidation process, if any, left unresolved.[444]

If a corporation decides to go through a formal liquidation process, it initiates the process by filing articles of dissolution.[445] The filing of the articles of dissolution under the Louisiana Act has the same effect as under the Model Act: it leaves existing management in place and simply changes the object of management from normal operations to a winding up of the corporation's affairs.[446] The filing of the articles of dissolution also has the benefit of enabling the corporation to establish deadlines for the submission of claims against it[447] by sending written notices to its known creditors[448] and by publishing a notification in a newspaper to deal with unknown creditors.[449]

The claims of the properly notified, known creditors are perempted if they are not submitted to the corporation by the deadline stated in the notice, which must be at least 120 days after the effective date of the notice.[450] If the claim is submitted timely, but the claim is rejected by the corporation, the claim is perempted unless the claimant commences a proceeding to enforce the claim by the deadline stated in the rejection notice, which must be at least 90 days after the effective date of the corporation's notice of

443. Introductory Comments to Subpart D, Part 14 of LA. REV. STAT. ANN. tit. 12, ch. 1 (Supp. 2015).

444. LA. REV. STAT. ANN. § 12:1-1443 (Supp. 2015).

445. *Id.* § 12:1-1403(A). The LBCL rule that the secretary of state notify three state agencies about a corporation's filing a document that declared the corporation's liquidation complete, and then await their certification that the empty corporate shell owed them no money before ending the corporation's existence, has been changed by the new Act into a required notification at the beginning of the dissolution process. The agencies need no longer certify no amounts are owed, however. What steps the agencies choose to take to identify and enforce any debts owed to them by the dissolved corporation are left to the discretion of the state agencies. *Id.* § 12:1-1403(D) cmts. b–c.

446. *Id.* § 12:1-1405.

447. Only a "dissolved" corporation may take advantage of these provisions, *id.* §§ 12:1-1406(A), 1-1407(A), 1-1408(A), and a corporation is not "dissolved" until the secretary of state files its articles of dissolution. *Id.* § 12:1-1403(B)–(C).

448. *Id.* § 12:1-1406.

449. *Id.* § 12:1-1407.

450. *Id.* § 12:1-1406(B)(3), (C)(1).

rejection.[451] The corporation is permitted to cut off the claims of unknown creditors, and other creditors not actually notified through the 120-day notice process, by publishing a newspaper ad that states the required information concerning the dissolution of the corporation and the method for submitting claims. The effect of the newspaper ad is to perempt any claim not already perempted if a proceeding to enforce the claim is not commenced within three years after the date that the ad is published.[452] Claims that are not perempted by any of the claim-peremption rules are enforceable against the corporation, to the extent of its undistributed assets, and against shareholders who have received assets in the liquidation, to the extent of their pro-rata share of the claim or of the distributed assets, whichever is less.[453]

The new Act, like the Model Act,[454] adds a new procedure for dealing with claims that are contingent, based on post-dissolution events, or otherwise reasonably estimated by the corporation to arise after the effective date of its dissolution.[455] The new procedure allows a corporation to obtain a court's determination of the amount and form of security that should be provided to satisfy any contingent or post-dissolution claims that are expected to arise between the date of dissolution and the end of the three-year peremptive period that is triggered by the publication of a newspaper notice of dissolution.[456] The corporation's provision of the amount and form of security ordered by the court at the conclusion of the proceeding satisfies the corporation's obligations with respect to those claims.[457] As a result, the claims may not be enforced either against the undistributed assets of the dissolved corporation or against the shareholders to whom the assets of the dissolved corporation have been distributed.[458]

The dissolution and winding up procedures in the new Act are substantially the same as those in the Model Act. The differences arise after the active dissolution process has ended. Under the Model Act, nothing happens at that point; the corporation simply continues to exist perpetually as a dissolved corporation. Under the Louisiana Act, in contrast, the corporation is permitted to deliver to the secretary of state for filing articles of termination that declare

---

451. *Id.* § 12:1-1406(C)(2).
452. *Id.* § 12:1-1407(C).
453. *Id.* § 12:1-1407(D)(2). A shareholder's total liability for all such claims may not exceed the total amount assets distributed to that shareholder. *Id.*
454. MODEL BUS. CORP. ACT § 14.08 (2011).
455. LA. REV. STAT. ANN. § 12:1-1408(A) (Supp. 2015).
456. No provision is required for claims that are anticipated to arise after the end of the three-year peremptive period. *Id.* § 12:1-1408(A).
457. *Id.* § 12:1-1408(D).
458. *Id.*

the liquidation of the corporation to be complete.[459] The filing of the articles of termination by the secretary of state then terminates the legal existence of the corporation[460] for all purposes other than those listed in the statute.[461]

The statutory exceptions to the general rule of non-existence for a terminated corporation all involve the treatment of the terminated corporation as the person that continues to own or owe unresolved assets or debts and to act as the proper party to any unresolved claim or litigation. The Act makes it clear that shareholders do not automatically succeed to the ownership of undistributed corporate assets, assume liability for unpaid corporate debts, or become substitute plaintiffs or defendants in corporate litigation as a result of a corporation's termination.[462] Rather, it is the corporation itself that continues to occupy those positions. Hence, the problem posed by the corporation's termination with respect to unresolved matters is not one of finding appropriate substitutes for the corporation in connection with those matters but rather that of finding someone with authority to act for the corporation in its continuing role.[463]

The new Act includes two mechanisms for providing managerial authority for a terminated corporation. First, the retroactive reinstatement mechanism that used to be available following a charter revocation under the LBCL is now available for three years following any form of corporate termination other than one resulting from a judicially ordered dissolution.[464] So, if the owners and managers of the terminated corporation are still available and wish to resume their former roles, they may cause the corporation to be fully reinstated and then deal with the unresolved matter in accordance with the normal rules of corporate governance. If, on the other hand, this form of full-blown reinstatement is either not desired or not possible, then the second mechanism for providing managerial authority for the terminated corporation is to appoint a liquidator.[465]

In addition to the termination that is available following the completion of a formal dissolution process, the new Act provides two other forms of termination. The first is called a simplified termination.

---

459. *Id.* § 12:1-1440(A). The corporation is permitted, but not required, to file articles of termination. If a dissolved corporation completes its liquidation and then simply stops filing any further documents with the secretary of state, it soon will be terminated administratively for the failure to file its annual report. *Id.* § 12:1-1442.

460. *Id.* § 12:1-1443(A).

461. *Id.* § 12:1-1443(B)–(C).

462. *Id.* § 12:1-1443(C), cmts. b, c, f–h.

463. *Id.* § 12:1-1443 cmt. f.

464. *Id.* § 12:1-1444.

465. *Id.* § 12:1-1445.

It replaces the old dissolution by affidavit under the LBCL. The requirements for a simplified termination are essentially the same as for a dissolution by affidavit,[466] but the new form of termination does not impose personal liability on shareholders for the debts of a corporation that utilizes this method of termination. The legal effects of a simplified termination are exactly the same as those of the termination that is available to a corporation that has gone through a more formal liquidation process after filing articles of dissolution.[467] The same rights of reinstatement are available as well.[468] In effect, the new Act eliminates most of the reasons that shareholders saw under the LBCL to terminate their corporations through charter revocations, rather than the filing of a simple statement of termination.[469]

The final form of termination provided by the new Act is called an "administrative termination."[470] It replaces the old charter revocation under the LBCL.[471] The existence of a corporation may be terminated administratively if the corporation fails for 90 consecutive days either to maintain a registered agent and registered office as required by the Act or to file its annual report by the date the report is due.[472] The new 90-day grace period for

---

466. *Compare* former LA. REV. STAT. ANN. § 12:1-142.1(A) (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-1441 (Supp. 2015). The new provision adds one disjunctive qualifier that was borrowed from the Model Act's provision on the dissolution of a corporation that has not issued shares or begun to engage in business. *Compare* MODEL BUS. CORP. ACT § 14.01 (2011), *with* LA. REV. STAT. ANN. § 12:1-1441(C)(4) cmt. a (Supp. 2015). The effect is to allow the simplified termination procedure to be used in the same situations in which the Model Act would permit the dissolution of an incompletely organized corporation. But the real importance of the simplified termination will be in its application to corporations that have indeed engaged in business, but have since shut down the business and informally liquidated. Corporations that liquidate in that informal fashion do not obtain the benefits of the peremption and claims-satisfaction rules in sections 12:1-1406 through 12:1-1408, but if they know what debts they owe, and simply pay them, the simplified form of termination allows the legal existence of the corporation to be ended, subject to reinstatement, in a simple and inexpensive manner.

467. LA. REV. STAT. ANN. § 12:1-1443 (Supp. 2015).

468. *Id.* § 12:1-1444.

469. The one incentive that still exists to use the charter revocation (which is now called an "administrative termination") is the filing fee that is charged to file articles of termination. The termination resulting from a corporation's failure to file its annual reports is still free (although the missed annual report fees must be paid if reinstatement is sought). *Id.* § 12:1-1444(F)(2).

470. *Id.* § 12:1-1442.

471. Former LA. REV. STAT. ANN. § 12:163 (repealed 2015).

472. LA. REV. STAT. ANN. § 12:1-1442(A) (Supp. 2015). The secretary of state must provide at least 30 days' advance notice of the secretary's intention to

the filing of an annual report replaces what amounted to a three-year grace period under the LBCL.[473] The change was made to eliminate the widespread practice of filing what were supposed to be annual reports only every third year—or even less frequently if the reinstatement period was utilized on top of the three-year grace period.[474] The new, shorter period is likely to result in the administrative termination of many corporations that have grown accustomed to ignoring their annual reporting obligations. However, reinstatement[475] is available to those corporations while they adjust to the new 90-day rule.

## SHAREHOLDER OPPRESSION

The LBCL provided little protection to the interests of minority shareholders in closely held corporations. The majority shareholders in the company were capable of compensating themselves in the form of salaries and other benefits of employment by the corporation, without ever declaring a dividend or otherwise making any financial benefit of share ownership available to the minority shareholders. Minority shareholders caught in that kind of position would find it virtually impossible to sell their shares, as no rational investors would be willing to pay good money for shares that had virtually no prospect of ever generating any financial return. Moreover, the corporation had no obligation to buy back the minority investor's shares.

The minority shareholders were left to sue the controlling shareholders not for what they really wanted—some payment to themselves—but rather for alleged overpayments to the majority shareholders. The excessive compensation cases did raise issues of self-dealing that were not subject to the highly deferential business judgment rule. But they did still involve the kinds of routine, private business decisions that most courts were reluctant to usurp to themselves. And even if a court did find the challenged compensation to exceed permissible amounts, the minority shareholder held no personal right to recover the excessive amount for himself. Rather, it would have to be returned to a corporation that was still controlled by the majority-shareholder defendants, who were unlikely to share the benefits of the recovery that they were forced to pay with the person

---

terminate the corporation, and may not terminate the corporation if the cause of termination is eliminated by the end of that 30-day period. *Id.* § 12:1-1442(B).

473. Former LA. REV. STAT. ANN. § 12:1-163(A) (repealed 2015).

474. LA. REV. STAT. ANN. § 12:1-1442 cmt. (Supp. 2015).

475. *Id.* § 12:1-1444.

who had forced them to pay it. The only thing the minority shareholder could really hope to achieve through the excessive compensation suit was to give the majority shareholders an incentive to buy out his interest in the corporation, which would eliminate his standing to file such suit.

The Model Act provides a direct remedy to a minority shareholder who is treated so badly that it amounts to what the Act calls "oppression." The Model Act does not define the term, but the oppression remedy is a judicially ordered dissolution of the corporation, unless within 90 days of the filing of the action for judicial dissolution, the corporation or other shareholders elect irrevocably to buy all of the complaining shareholders' shares in the corporation at their fair value.[476]

The Committee that drafted Louisiana's version of the Model Act agreed that a remedy should be provided for oppression. But the Committee believed that the term "oppression" should be defined, and that the order of oppression remedies should be reversed.[477] The Committee believed that the corporation should be able to contest the complaining shareholders' allegations of oppression without risking the involuntary dissolution of the corporation and that the statutory remedy for oppression should fit the nature of the remedy that most courts dealing with oppression cases have actually ordered, namely, a buyout of the oppressed shareholder.[478]

The statutory buyout remedy (unless the corporation chooses to dissolve) is the exclusive remedy available under the new Act on grounds of oppression itself.[479] The exclusivity rule concerning oppression does not affect a shareholder's right to obtain other remedies for other breaches of duties if the requirements for those remedies are satisfied.[480] However, a corporation is not required to fight on multiple fronts when a shareholder has initiated an oppression proceeding, while also pursuing one or more derivative or direct claims that allege managerial breaches of duty to the corporation or to the shareholder, as a shareholder. After a shareholder sends the corporation a notice that he is withdrawing from the corporation on grounds of oppression, the corporation is entitled to obtain a stay of any other litigation of that kind.[481] If the shareholder succeeds in his oppression action, he will lose his standing to continue the other litigation after the corporation buys

476. MODEL BUS. CORP. ACT §§ 14.30(a)(2), 14.34(a)–(b) (2011).
477. LA. REV. STAT. ANN. § 12:1-1435 cmts. a, d (Supp. 2015).
478. *Id.* § 12:1-1435 cmt. b.
479. *Id.* § 12:1-1435(L).
480. *Id.* § 12:1-1435 cmt. *l*.
481. *Id.* § 12:1-1437.

his shares.[482] If the shareholder loses the oppression action, he is entitled to have the stay lifted and to continue to pursue the other suits.[483]

Oppression is defined in the new Act in a way that combines the two leading tests of oppression that is used in the case law of other states: the "reasonable expectations" test and the "departure from the standards of fair dealing" test.[484] The use of these tests is designed to permit Louisiana courts to utilize oppression cases in other states as persuasive authority in interpreting that term under Louisiana law.[485] However, as the Revision Comments to the relevant provision explain, the Louisiana Act defines the term in a way that rejects several features of the oppression doctrine that have been adopted by some of the decisions in other states.[486]

Louisiana defines "oppression" as practices by the corporation that, taken as a whole over an appropriate period of time, are "plainly incompatible with a genuine effort on the part of the corporation to deal fairly and in good faith" with the shareholder who is alleging oppression.[487] But to avoid a focus wholly on the alleged mistreatment of the complaining shareholder, without also considering the legitimate interests of other shareholders, the Act provides that both the conduct of the complaining shareholder and the reasonable expectations of all shareholders in the corporation are relevant in assessing whether the corporation has acted fairly and in good faith toward the shareholder who is seeking to withdraw.[488]

The Revision Comments explain that a failure by the majority shareholders over an extended period of time to provide a minority owner with any reasonable level of participation in the financial benefits of a successful business will be difficult to reconcile with the required effort to treat the minority shareholder fairly.[489] However, the Comments also say that the majority shareholders owe no duty to sacrifice their own legitimate interests or to make payments or provide benefits to a minority owner that are out of proportion to the value of the contributions made to the business by that owner (or by those who originally purchased the relevant shares).[490] The guiding principles are those appropriate to the interpretation of a contract that

---

482. *Id.* § 12:1-1437 cmt. b.
483. *Id.* § 12:1-1437(A).
484. *Id.* § 12:1-1435 cmt. d.
485. *Id.*
486. *Id.*
487. *Id.* § 12:1-1435(B).
488. *Id.* § 12:1-1435(B)(1), (2), cmt. d(3).
489. *Id.* § 12:1-1435 cmt. d(2).
490. *Id.*

calls for cooperation and fair dealing among all parties in the operation of a business that entails uncertainty and risk.[491]

A shareholder who wishes to withdraw from the corporation on grounds of oppression initiates the process by sending the corporation a notice that the shareholder is withdrawing from the corporation on grounds of oppression.[492] The notice operates as an offer by the shareholder to the corporation, irrevocable for 60 days, to sell all of the shareholder's shares to the corporation at their fair value. [493] The shareholder may state a proposed price in the notice but is not required to do so.[494]

The corporation may accept the shareholder's offer by giving the shareholder notice of its acceptance during the 60-day period that the offer is irrevocable.[495] The acceptance of the offer does not operate as an admission or as evidence that the corporation actually did engage in oppression of the shareholder.[496] It simply obligates the corporation to buy the shares at their fair value or, if a shareholder's proposed price was also accepted, at the price proposed.[497] If the corporation accepts the offer to sell at a stated price, a contract of sale is formed and terminates the shareholder's ownership of the shares.[498] The corporation is then obligated to pay the agreed price in cash, and the former shareholder is bound by the warranties of a seller of investment securities and must deliver any certificates issued by the corporation for the sold shares or a certificate that the certificates have been lost, stolen, or destroyed.[499] If the former shareholder fails to deliver the certificate representing the purchased shares, he is required to indemnify the corporation if it is later obliged to recognize the ownership interests of someone who presents the formerly missing certificate.[500]

If the corporation accepts only the offer to sell, but not the price, another delay of 60 days is provided to allow the parties to negotiate an agreed price or other settlement of their dispute.[501] If no agreement is reached, either party may commence a summary proceeding after the expiration of the 60-day period to determine the fair value of the

---

491. *Id.*
492. *Id.* § 12:1-1435(D). The rules that govern the notice, and that determine when it takes effect, are provided in section 12:1-141.
493. *Id.*
494. *Id.*
495. *Id.* § 12:1-1435(E).
496. *Id.*
497. *Id.*
498. *Id.* § 12:1-1435(F), cmt. j.
499. *Id.*
500. *Id.* §§ 12:1-1435(F), 1-1436(F).
501. *Id.* § 12:1-1436(A)(1).

shares and to order their sale at that price.[502] The same definition of fair value applies in an oppression proceeding as in an appraisal proceeding,[503] which means the shares must be valued without the imposition of marketability or minority discounts.[504]

If the corporation fails to accept the shareholder's offer to sell within the 60-day period of irrevocability, the shareholder is entitled to file an action to prove that he is entitled to withdraw on grounds of oppression.[505] This action is treated as an ordinary action,[506] and a judgment in that action that recognizes the shareholder's right to withdraw is treated as a partial judgment under Louisiana Code of Civil Procedure article 1915(B).[507]

If the partial judgment is not appealed, the oppression proceeding is stayed for at least 60 days to allow the parties to negotiate a price and payment terms or other settlement of their dispute.[508] After that stay is lifted or expires, either party may file a motion to initiate the same kind of summary proceeding as that available when the corporation voluntarily accepts the shareholder's offer to sell, in which the court determines the fair value and terms of the purchase of the oppressed shareholder's shares.[509]

One of two judgments is available at the conclusion of the valuation proceeding, regardless of whether that proceeding follows the corporation's voluntary acceptance of the shareholder's offer to sell or the court's partial judgment establishing that the shareholder is entitled to withdraw from the corporation on grounds of oppression. The normal judgment is an ordinary money judgment against the corporation, enforceable in the usual way, for the full amount of the fair value of the oppressed shareholder's shares.[510] However, if the corporation proves that an immediate payment of that amount in full would either violate the statutory restrictions on shareholder distributions or would cause undue harm to the corporation or its creditors, the court may instead order the corporation to pay for the

---

502. *Id.* The right to file such an action expires one year after the expiration of the 60-day period. *Id.* If neither party files a valuation action within that period, the effects of the shareholder's notice of withdrawal, and the corporation's acceptance of the offer to sell made through that notice, are terminated. But the shareholder may initiate the same process again by sending another notice of withdrawal on grounds of oppression. *Id.*

503. *Id.* § 12:1-1435(C).

504. *Id.* § 12:1-1301(4).

505. *Id.* § 12:1-1435(G).

506. *Id.*

507. *Id.*

508. *Id.* § 12:1-1436(B).

509. *Id.*

510. *Id.* § 12:1-1436(D).

shares through delivery of a negotiable promissory note with a term of up to 10 years.[511]

At any time before the final valuation and payment judgment is rendered in the suit,[512] the corporation may convert the oppression proceeding into a court-supervised dissolution.[513] The court may appoint a liquidator to carry out the liquidation, or it may approve a plan under which the corporation's management would do so.[514] Because a corporation ordinarily dissolves by filing shareholder-approved articles of dissolution,[515] it is possible that the corporation's management would attempt to circumvent the requirement that the dissolution be court-supervised. However, the corporation would be required to provide notice to the minority shareholder either of the meeting at which the dissolution was to be approved[516] or of its approval by less than unanimous written consent, if that form of consent is authorized in the corporation's articles of incorporation.[517] A shareholder who learned of the attempted dissolution without court supervision is entitled to obtain court supervision of the dissolution by filing an appropriate motion in the oppression proceeding.[518]

It is also possible for the board and majority shareholders of the corporation to approve a cash-out merger to force the shareholder out of the corporation while an oppression action is pending.[519] However, such a tactic would result in the shareholder's receiving appraisal rights that would provide the same fair value judgment as in an oppression proceeding[520] but without the prospect of a 10-year promissory note in lieu of a money judgment.[521] A corporation that wished to force out a shareholder who was claiming oppression would be wiser to simply accept the shareholder's offer to sell at the beginning of the oppression process.

---

511. *Id.* § 12:1-1436(E).
512. *Id.* § 12:1-1438(B).
513. *Id.* § 12:1-1438(A).
514. *Id.* § 12:1-1438(A)(4).
515. *Id.* § 12:1-1403.
516. *Id.* § 12:1-1402(D).
517. *Id.* § 12:1-704(B), (F). The failure to provide the required notice does not automatically invalidate the action taken, but a court may fashion any appropriate remedy in favor of a shareholder adversely affected by the lack of notice. *Id.* § 12:1-704(G).
518. *Id.* § 12:1-1438(C).
519. *See id.* §§ 12:1-1102, 1-1104.
520. *Id.* §§ 12:1-1302(a)(1), 1-1301(4).
521. *Compare id.* § 12:1-1330(E) (shareholder entitled to judgment for fair value of shares in appraisal proceeding), *with id.* § 12:1-1436(E) (permitting sale of oppressed shareholder's shares for promissory note with term up to ten years).

## QUALIFICATION OF FOREIGN CORPORATIONS

Chapter 15 of the Model Act deals with the qualification of foreign business corporations but not nonprofit corporations. Existing Chapter 3 of Title 12 deals with that subject for both business and nonprofit corporations in much the same way as the Model Act and in a way with which practitioners and the secretary of state's office are already familiar. For those reasons, Louisiana did not adopt Chapter 15. Hence, the qualification of foreign corporations to do business in this state continues to be governed by the same law as before.[522]

## RECORDS AND RECORDS INSPECTION

Much like the LBCL, the new Act requires a corporation to maintain three types of records: accounting records;[523] records of the actions taken by its board of directors and shareholders, either through meetings or through written consents;[524] and a record of its shareholders.[525] The new Act rejects a Model Act rule that requires a corporation to send financial statements to its shareholders

522. The new Act does contain a name reservation provision that has some connection with the prospective qualification of a foreign corporation. It permits a foreign corporation to register its name (if the name is available) on an annually renewable basis, so that the name will be available if it does choose to qualify in Louisiana. *Id.* § 12:1-403. This type of name registration is different from the shorter-term name reservation that was available under the LBCL (former section 12:23(G)), and that continues to be available under the new Act. *Id.* § 12:1-402. The shorter-term name provision allows anyone to register any name that is currently available for a period of 120 days. *Id.* The annually renewable name registration is available only to foreign corporations and only for the foreign corporation's own name (or that name with added distinguishing characteristics if the name alone is not distinguishable from other names already in use). *Id.* § 12:1-403(A). The annually renewable registration of the foreign corporation's name allows the foreign corporation to keep the name available for possible future use, without having to create a new, shell corporation just to hold the name.

523. The LBCL described the types of accounting records required, while the new Act says simply that a corporation must maintain "appropriate accounting records." *Compare* former LA. REV. STAT. ANN. § 12:103(A)(1) (repealed 2015) ("books and accounts showing the amounts of its assets and liabilities, receipts and disbursements, and gains and losses"), *with* LA. REV. STAT. ANN. § 12:1-1601(B) (Supp. 2015) ("appropriate accounting records").

524. *Compare* former LA. REV. STAT. ANN. § 12:103(A)(2) (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-1601(A) (Supp. 2015).

525. *Compare* former LA. REV. STAT. ANN. § 12:103(B) (repealed 2015), *with* LA. REV. STAT. ANN. § 12:1-1601(C) (Supp. 2015).

annually,[526] and instead retains the rule in the LBCL[527] that permits a shareholder to obtain those statements on request once per year.[528]

The records-inspection provisions of the new Act are an amalgam of the Model Act and LBCL rules on the subject. The Model Act lists certain basic corporate governance documents and records, such as the articles, bylaws, and minutes of shareholders' meetings, and makes those records freely available for inspection by any shareholder during regular business hours and on proper notice.[529] It then lists other records, such as minutes of board and committee actions and accounting records, that are available for inspection by any shareholder only if the shareholder's demand for inspection is made in good faith, for a proper purpose described with particularity in the demand, and if the records to be inspected are "directly connected" with that stated purpose.[530]

The LBCL, in contrast, did not distinguish one type of record from another (except for shareholder lists that were available for inspection at a shareholders' meeting[531]). It gave much broader inspection rights to "any and all" records and accounts, but only to shareholders who had met the percentage ownership provisions stated in the statute for at least six months.[532] The required percentages were 5% for most shareholders[533] and 25% for competitors of the corporation.[534] Those inspection rights were limited to purposes that were "reasonable and proper,"[535] and a court could deny the right to inspect with respect to "confidential matters."[536]

The new Act accepts the Model Act approach to the basic corporate governance records,[537] but it rejects the Model Act's restrictions on other records subject to inspection. It continues to

---

526. MODEL BUS. CORP. ACT § 16.20(a) (2011).
527. Former LA. REV. STAT. ANN. § 12:102(B) (repealed 2015).
528. LA. REV. STAT. ANN. § 12:1-1620(A) (Supp. 2015).
529. MODEL BUS. CORP. ACT §§ 16.01(e), 16.02(a) (2011).
530. *Id.* § 16.02(c), (d).
531. Former LA. REV. STAT. ANN. § 12:73(E) (repealed 2015).
532. *Id.* § 12:103(D). The ownership of several shareholders acting together could be combined to reach the 5% level. *Id.*
533. *Id.* § 12:103(D)(1)(a).
534. *Id.* § 12:103(D)(2).
535. *Id.* § 12:103(D).
536. *Id.* § 12:103(D)(3)(a).
537. LA. REV. STAT. ANN. §§ 12:1-1601(E), 1-1602(A) (Supp. 2015). The new Act also adopts a Model Act provision that deals properly with a situation that is unlikely to actually arise in Louisiana practice: someone who becomes a shareholder of record for purposes of voting at a shareholders' meeting after the record date for the sending of notices for that meeting. That type of shareholder is entitled under this provision to obtain from the corporation on request a copy of the notice of the meeting and of any other information sent by the corporation to the shareholders in connection with the meeting. *Id.* § 12:1-1602(B).

make "any and all" records of the corporation subject to inspection but only by shareholders who meet the 5%-for-6-months minimum ownership test.[538] Because the new Act also retained the rule that allowed a court to deny inspection rights as to confidential matters, the old 25% test for inspection of records by shareholders who were also competitors was eliminated.[539] The new Act did adopt the Model Act's requirements that the shareholder's inspection request under the "any and all" provision be made in good faith and for a proper purpose described with reasonable particularity in the demand for inspection.[540] And like the LBCL[541] and the Model Act,[542] the new Act also provides that the records inspection rights of shareholders do not affect the discovery rights of shareholders who are engaged in litigation with the corporation.[543]

In addition to its rules concerning the inspection of corporate records by shareholders, the new Act provides explicit new records-inspection rights to the directors of a corporation.[544] A director is entitled to inspect and copy the books, records, and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties.[545] The director may not inspect books and records for any other reason or in any manner that would violate any duty owed by the director to the corporation.[546]

## REPORTING OBLIGATION OF CORPORATION CONTRACTING WITH THE STATE

The LBCL required a corporation that contracted with the state to file a statement acknowledging that fact and disclosing the names and addresses of all persons or corporate entities that held an ownership interest or voting power of 5% or more.[547] The old requirement was stated as part of the rules governing the incorporation process,[548] as if the statement were connected in some way with that process. The new Act retains the substance of that

538. *Id.* § 12:1-1602(C). It remains possible to aggregate the ownership percentages of several shareholders to satisfy the 5% threshold. *Id.*

539. *Id.* § 12:1-1602 cmt. b.

540. *Id.* § 12:1-1602(D). The shareholder may inspect only those records "directly connected" with the shareholder's stated purpose. *Id.*

541. Former LA. REV. STAT. ANN. § 12:103(D)(3)(b) (repealed 2015).

542. MODEL BUS. CORP. ACT § 16.02(f)(1) (2011).

543. LA. REV. STAT. ANN. § 12:1-1602(F)(1) (Supp. 2015).

544. The LBCL was silent on the subject.

545. LA. REV. STAT. ANN. § 12:1-1605(A) (Supp. 2015).

546. *Id.*

547. Former LA. REV. STAT. ANN. § 12:25(E) (repealed 2015).

548. *Id.*

requirement but moves it from the incorporation provisions of the statute to Part 16, which concerns records and reports.[549]

The new provision[550] changes the wording of the requirement slightly, eliminating the word "corporate" from the phrase "persons or corporate entities," as used to describe the ownership or voting percentages that trigger a reporting obligation. The qualifying adjective is eliminated because it is not relevant to the indirect ownership information that the statute is designed to collect. The entire reference to ownership through other entities could have been eliminated as a technical matter, as the term "person" is defined broadly enough under the new Act to include both natural persons and all forms of business entities.[551] But the separate reference to ownership through entities was retained to avoid any suggestion that the statute had been amended to eliminate the reporting obligation associated with that form of ownership.

## TRANSITION AND APPLICABILITY

The new Act applies to all domestic corporations in existence on its effective date that were incorporated under Louisiana law for a purpose or purposes for which a corporation could be formed under the new Act.[552] That means the new Act will apply only to Louisiana business corporations[553] and not to nonprofit, insurance, or banking corporations, as those are not the types of corporations that may be formed under the new Act. Each of those other forms of corporation is governed by a separate statute. However, because professional corporations, such as professional medical corporations and professional law corporations, are themselves specialized forms of business corporations, the new Act applies to those corporations as well.

The new Act contains a savings provision that is based on a provision of the Uniform Statutory Construction Act.[554] Under that provision, the repeal of the LBCL does not affect the operation of the LBCL, or any action taken or right, remedy, privilege, obligation, or

549. LA. REV. STAT. ANN. § 12:1-1622 cmt. (Supp. 2015).
550. *Id.* § 12:1-1622.
551. *Id.* § 12:1-140(9), (13), (16).
552. *Id.* § 12:1-1701.
553. The new Act does not apply to foreign corporations except where it makes express reference to that form of corporation. *Id.* § 12:1-1702. Examples of such references include the provision that permits a foreign corporation to register its name, *id.* § 12:1-403, and the various forms of merger and merger-substitute transactions governed by Parts 9 and 11 of the Act.
554. MODEL BUS. CORP. ACT § 17.03 cmt. (2011).

liability created under it, before its repeal.[555] Moreover, any proceeding, reorganization, or dissolution that was commenced under the LBCL before its repeal may be completed in accordance with the LBCL as if it had not been repealed.

## CONCLUSION

This Article could not have covered all of the many interpretive issues that may arise under the new Act. However, the author hopes that the summary provided will help lawyers, judges, and business owners familiarize themselves with the key points of the new law.

555. LA. REV. STAT. ANN. § 12:1-1703(A)(1), (2) (Supp. 2015). Similarly, the repeal of the LBCL does not affect any violation of the LBCL that occurred before its repeal, or any penalty, forfeiture or punishment incurred before its repeal. But if the new Act reduces a penalty or punishment, and the penalty or punishment has not yet been imposed, the newer, reduced punishment is to be applied. *Id.* § 12:1-1703(A)(3), (B).