The Fair Market Value-Fair Value Dichotomy:

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Many business owners offer some form of minority equity—real equity, not phantom arrangements (e.g., stock appreciation rights)—in their companies either in exchange for investment funding or as awards to key employees or important independent contractors. Minority ownership can also be created through sales or gifts to family members. Minority ownership, also referred to as noncontrolling ownership, is usually defined under state law as ownership of 50 percent or less. Providing equity ownership may seem prudent to anchor in a potential investor or key employee; however, minority ownership can result in unexpected turmoil and disruption. As discussed below, minority owners have legal rights in certain shareholder buyout situations. Valuation of a minority shareholder's stake in a company has been the key issue in many shareholder litigation matters and court cases. Many of these cases involve whether, under state law, minority discounts and marketability discounts ("valuation discounts") are permissible in determining the value of a minority shareholder's interest in the company.

This article discusses a 2022 Connecticut court case dealing with valuation discounts in a dispute involving the buyout of a minority shareholder. It also examines and compares recent disputes in other jurisdictions where valuation discounts became an issue in calculating the appropriate value of minority shares under a fair value standard.

Valuation Discounts in Recent Shareholder Dissent Cases

Overview of State Law

In most states, minority shareholders have certain statutory rights that manifest in protective appraisal rights in situations where the minority shareholder is dominated by a controlling shareholder or shareholders. These rights are typically referred to as shareholder appraisal rights or dissenters' rights. In essence, the state appraisal rights statutes allow minority shareholders who disagree with certain corporate structural changes to compel a buyout of their shares. Many of these state statutes provide for minority shares to be valued at "fair value" rather than "fair market value." The concept of fair value is intended to inject a certain amount of fairness in valuing minority shares due to the diminished bargaining or negotiating power of a minority shareholder. Although not explicit in many of these state statutes, the courts often hold that, unlike the fair market value standard, the fair value standard does not allow minority and marketability discounts.

Model Acts

In order to provide a degree of uniformity in corporate and business law among the states, and to assist companies that transact multistate commerce, the American Bar Association (ABA) and the American Law Institute (ALI) have promulgated model corporate statutes. These model statutes serve to guide state legislatures in enacting state-specific corporate laws. Both the ABA and ALI have promulgated model statutes addressing the definition of fair value. The context in which the term fair value is most widely encountered involves cases dealing with minority shareholder appraisal rights and other actions dealing with minority shareholder oppression. In these cases, minority shareholders are compelled to sell their equity stakes. Fair value is a valuation benchmark designed to ensure that minority shareholders receive adequate value for their ownership regardless of their minority ownership status in situations where they have no choice whether to retain or dispose of their equity.

The ABA's definition of fair value is incorporated into the Model Business Corporation Act (MBCA), which defines the term as follows:

> "Fair value" means the value of the corporation's shares determined:
>
> (i) immediately before the effectiveness of the corporate action to which the shareholder objects;
>
> (ii) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
>
> (iii) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the articles of incorporation pursuant to section 13.02(a)(4).[1]

First, it should be noted that this model statute applies only to corporations and not to other entity types, such as limited liability companies (LLCs). Second, the MBCA emphasizes that fair value is determined using customary valuation concepts and techniques. It does not require any particular valuation methodology. Third, marketability and minority shareholder discounts generally should not be taken into account in fair value determinations. Nevertheless, the MBCA does leave the door open for such discounts in its "except, if appropriate" language.

The ALI has also provided guidance in determining fair value, defining it as the value of shares "without any discount for minority status or, absent extraordinary circumstances, lack of marketability."[2] Interestingly, the ALI provides an exception for applying a marketability discount in extraordinary circumstances (see *R.D. Clark & Sons, Inc. v. Clark* and *Devivo v. Devivo* below for a discussion of what constitutes "extraordinary circumstances").

1 Model Business Corporation Act (2016), § 13.01 (Definitions).

2 ALI Principles of Corporate Governance: Analysis and Recommendation ("ALI Principles"), § 7.22 (1994).

Buccieri v. New Hope Realty, Inc. (Connecticut, October 2022)

A recent Connecticut court case[3] addressed the issue of determining fair value in a dissolution proceeding under Connecticut General Statutes (CGS) § 33-896. In *Buccieri*, the plaintiff shareholders owned 50 percent of the shares of New Hope Realty, Inc. ("New Hope"). New Hope is a real estate holding company that owns and operates commercial and industrial property. The plaintiff shareholders brought a dissolution action in accordance with CGS § 33-896 due to shareholder discord and disagreement over the management of New Hope. The plaintiffs alleged a deadlock resulting in a dysfunctional company. There was a shareholders agreement in place that called for the shares to be valued at fair market value, not fair value as required under the dissenting shareholders statute. The defendants subsequently filed an election pursuant to CGS § 33-900 to acquire the plaintiffs' shares. The parties could not agree on the shares' fair value under the statute and filed an application for a judicial determination.

CGS § 33-896 provides in part that a Connecticut court may dissolve a corporation in a shareholder proceeding "if it established that (i) the directors are deadlocked in the management of corporate affairs and (ii) the shareholders are unable to break the deadlock … ."[4] In a proceeding under CGS § 33-896 to dissolve the corporation, CGS 33-900 provides that the corporation or the shareholders may elect to purchase all the shares owned by the petitioning shareholders at their fair value.[5] Connecticut's definition of fair value is similar to the MBCA model statute. Under Connecticut law, fair value is determined:

> (A) Immediately before the effectuation of the corporate action to which the shareholder objects,
>
> (B) using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal, and
>
> (C) without discounting for lack of marketability or minority status except, if appropriate, for amendments to the certificate of incorporation pursuant to subdivision (5) of subsection (a) of section 33-856.[6]

The plaintiffs' valuation expert determined the value of New Hope's shares using the net asset method because the assets consisted principally of real estate. Applying the fair value standard, the plaintiffs' valuation expert did not reduce the value of the shares for any discounts. The defendants' valuation expert also determined the value of New Hope's shares using the net asset method. Contrary to the plaintiffs' valuation expert, the defendants' valuation expert reduced the fair value of the shares by a 10 percent discount for lack of control and a 20 percent discount for lack of marketability.

The court addressed several issues in this case, including whether the proper standard for valuing the shares was fair value or fair market value, and whether discounts for lack of control and lack of marketability should be applied. The court held that the appropriate standard of value in this case was fair value because (1) the shareholders agreement was not triggered since there was no offer for sale of the shares and (2) CGS § 33-900 was applicable in this case, requiring the fair value standard.[7]

Citing CGS § 33-855 and *R.D. Clark & Sons, Inc. v. Clark*,[8] the court held that discounts for lack of marketability and lack of control were inappropriate in this case.[9] In *R.D. Clark & Sons*, in a counterclaim action, the defendant, a minority shareholder, sought dissolution of the corporation pursuant

3 Buccieri v. New Hope Realty, Inc., FST CV 6047540 S, LEXIS 2230 (Conn. Super. 2022).
4 CGS § 33-896(a)(1)(A)(i) and (ii).
5 CGS § 33-900(a).
6 CGS § 33-855(3) (Definitions).
7 *Buccieri* at *17.
8 R.D. Clark & Sons, Inc. v. Clark, 194 Conn. App. 690, 698–99 (2019).
9 *Buccieri* at *18.

to CGS § 33-896, alleging that the "individual plaintiffs engaged in illegal, oppressive, and/or fraudulent conduct to his detriment."[10] Despite Connecticut's statutory definition of fair value in CGS § 33-855, which disallowed both minority and marketability discounts, the plaintiffs argued that both discounts should be allowed to reduce the value of the shares. The plaintiffs argued that the majority shareholders did not engage in oppressive conduct and, therefore, a minority discount should be allowed. The appellate court upheld the trial court's determination that the plaintiff engaged in oppressive conduct by failing to justify a disparity among the shareholders in distributions to pay Subchapter S shareholder tax liabilities.[11] Consequently, the appellate court upheld the trial court's disallowance of the minority discount. Regarding the marketability discount, the plaintiff argued that the corporation's financial difficulties and the financial burden of a shareholder buyout at full value should justify the marketability discount due to extraordinary circumstances. The appellate court rejected this argument for lack of evidence and, therefore, rejected plaintiff's claim for a marketability discount.[12] As a result, no discounts were allowed in determining the fair value of the defendant's minority shares.

Returning to the *Buccieri* case, the marketability discount typically reflects the lack of liquidity of shares in a closely held corporation. The *Buccieri* defendants' valuation expert argued that the provisions of the shareholders agreement should control because the shares cannot be sold on the open market.[13] The court countered that the defendants themselves represent a market for the shares.[14] Hence, the court would not depart from the majority view that a marketability discount is not allowable in this case.[15] The defendants also argued that a marketability discount was applicable under the extraordinary circumstances rationale of *Devivo v. Devivo*.[16] The court noted that in *Devivo*, also a fair value case, a marketability discount of 35 percent was allowed due to extraordinary circumstances.[17] The value of minority shares in *Devivo* was 1.6 times the corporation's net worth, more than 2.76 times its operating cash flow, and more than seven times its net income.[18] The *Devivo* court concluded that "such a value would 'represent an unfair wealth transfer from the remaining shareholders to respondent because it places unrealistic financial demands on the corporation ... and in all probability strips [it] of necessary cash flow and earnings for future growth."[19] Also, the *Devivo* court noted that the company had significant debt due to the required repeated acquisition of new equipment.[20] The company also was faced with intense competition and expected a slower growth rate.[21]

In *Buccieri*, the defendants argued that New Hope's net asset value was 12 times its net income and eight times its earnings before interest and taxes. Thus, the company's cash flow would not support the asset value.[22] The court rejected the extraordinary circumstances argument because the defendants did not provide sufficient "substantial or quantitative evidence on the subject."[23]

With respect to the lack of control or minority discount, the defendants' expert applied the minority discount under the common sense theory that a minority share is generally less valuable than a controlling share.[24] The court rejected this argument, however, because a minority discount should not be applied when the buyer owns the rest of the equity, is subsequently in control, and no third parties are involved.[25]

In summary, the court did not allow either the marketability or minority discount in determining the value of the minority shares of New Hope.

10 *R.D. Clark & Sons, Inc.*, 194 Conn. App. at 695.
11 Ibid. at 708. R.D. Clark & Sons, Inc. was an S corporation.
12 Ibid. at 715–716.
13 *Buccieri* at *19.
14 Ibid.
15 Ibid.
16 Conn. Superior Court, Docket No. CV 98 05181020, 2001 WL 57702 (2001).
17 *Buccieri* at *22, quoting Devivo v. Devivo, 2001 WL 577072 at *8.
18 Ibid.
19 Ibid., quoting *Advanced Communication Design v. Follett,* 615 N.W.2d 285, 293 (Minn.2000).
20 Ibid.
21 Ibid.
22 Ibid. at *27.
23 Ibid. at *28.
24 Ibid. at *20.
25 Ibid. at *19–20, citing Siracusa v. Siracusa, 30 Conn. App. 569–570 (1993).

Discounts in Fair Value Cases in Other Jurisdictions

Following are summaries of cases in several other jurisdictions that address the issue of whether discounts are appropriate in determining fair value.

Alabama

In *Offenbecher v. Baron Services, Inc.*,[26] the Court of Civil Appeals of Alabama held that a marketability discount was not appropriate in determining the fair value of minority stock in a "squeeze-out" merger. In a squeeze-out merger (also referred to as a "freeze-out" merger), a corporation is merged into another corporation, denying the minority shareholders ownership in the surviving corporation. Hence, the minority shareholders are forced to sell their shares. In *Offenbecher*, the board of directors of Baron Services Inc. ("Baron") approved a plan of merger whereby Baron would be merged into a separate Delaware corporation (with the same name).[27] The plan of merger included a cash-out provision whereby shareholders with less than 150 shares would receive a cash payment for their shares with no ownership opportunity in the Delaware corporation.[28] Offenbecher owned 130 shares and demanded payment for his shares at fair value.[29] The parties disagreed over the value, leading to litigation.

The trial court allowed a 50 percent marketability discount in determining the fair value of the shares. Offenbecher appealed the trial court's ruling and objected to the allowance of the marketability discount. The appeals court cited § 10-2B-13.02(a) of the Alabama Code (1975) which corresponded to the Revised MBCA (adopted by the Alabama legislature). This section provided that in certain corporate actions, including mergers, the shareholders are entitled to dissent and obtain payment of the fair value of the shares.[30] The appeals court noted that "such a statutory right to receive 'fair value' of one's shareholder interest provides a remedy for actual or threatened oppression of minority shareholders ... ."[31] The appeals court further observed that the majority of courts in other jurisdictions do not allow any discounting, offering the following succinct rationale for disallowing such discounts:

> A majority of the courts conclude that no discounts should be taken in determining fair value, reasoning that for most purposes the enterprise should be valued as an entity and any discounts should be taken at the enterprise level. The market value of the enterprise should already be determined, and providing for further discounts at the shareholder level is inherently unfair to the minority who did not pick the timing of the transaction and is not in the position of a willing seller.[32]

In addition, the appeals court noted that the MBCA expressly provides that discounts should not be applied in calculating fair value.[33] The appeals court reversed the trial court and remanded the case to calculate the fair value without regard to the 50 percent marketability discount.[34]

26 874 So. 2d 532 (Ala. Civ. App. 2002).
27 Ibid. at 533.
28 Ibid.
29 Ibid. at 534.
30 Ibid. at 535.
31 Ibid.
32 Ibid. at 536–537, quoting Thomas J. Bamonte, "Measuring Stock Value in Appraisals Under the Illinois Business Corporation Act," 80 Ill. B.J. 236, 237–38 (1992).
33 Ibid. at 537.
34 Ibid. at 539.

California

In *Goles v. Sawhney*,[35] Mark and Karen Goles ("the Goles") owned a 36.7 percent minority interest in Katana Software, Inc. ("Katana"). The Goles were founding shareholders of Katana and were employed by the company.[36] The Goles were terminated after they solicited another company executive to take Katana's client list and intellectual property for a new start-up venture.[37] The Goles (plaintiffs) sued for the involuntary dissolution of Katana pursuant to California Corporations Code ("Cal. Corp. Code") § 1800. To avoid a dissolution, the defendants brought a motion to appraise the fair value of the company and to acquire the plaintiffs' interests pursuant to Cal. Corp. Code § 2000.[38]

The defendants' valuation experts applied a discount for lack of control (minority discount). The court noted, however, that Cal. Corp. Code § 2000 did not permit a minority discount to determine fair value. The court further reasoned that "[t]he rule justifying the devaluation of minority shares in closely held corporations for their lack of control has little validity when shares are to be purchased by someone who is already in control of the corporation. In such a situation, it can hardly be said that the shares are worth less to the purchaser because they are noncontrolling."[39] The court remanded the case to the trial court to determine the fair value without a lack of control or minority discount.[40]

Interestingly, in a pair of California involuntary dissolution cases dealing with interests in LLCs rather than corporations, the fair market value standard was applied rather than the fair value standard. In *Cheng v. Coastal L.B. Assocs., LLC*,[41] the plaintiff, a 25 percent LLC member, filed an involuntary dissolution action pursuant to Cal. Corp. Code § 17707.03. Under § 17707.03(c)(1), any member of an LLC can file an action to dissolve the LLC in certain circumstances, including a deadlocked management or a management subject to internal dissension, fraud, mismanagement, or abuse of authority.[42] To avoid dissolution, the defendants elected to purchase plaintiff's interests pursuant to Cal. Corp. Code § 17707.03.[43]

The trial court permitted a 27 percent minority interest discount in valuing the plaintiff's interest in the LLC in accordance with the California statute, which provides in pertinent part: "The court shall appoint three disinterested appraisers to appraise the *fair market value* of the membership interests owned by the moving parties … ."[44]

The plaintiff appealed and argued that no discounts should be permitted under the corporate equivalent, Cal. Corp. Code § 2000, which provides for valuing the minority shares at fair value rather than fair market value. The court disagreed, noting that unlike the corporate statute, the LLC statute plainly provides for fair market value, which permits discounts and premiums.[45] The difference in statutory language signals a difference in legislative intent.[46] The court allowed the discounts and concluded that "'[f]air value,' as defined in section 2000, does not apply to purchases of limited liability membership interests under section 17707.03."[47]

35 5 Cal. App. 5th 1014 (Cal. App. 2016).
36 Ibid. at 1017.
37 Ibid.
38 Ibid.
39 Ibid. at 1019, quoting Brown v. Allied Corrugated Box Co., 91 Cal. App. 3d 477, 486, 154 Cal Reptr. 170 (1979).
40 Ibid. at 1021.
41 69 Cal. App. 5th 112, 284 Cal. Rptr. 3d 270 (Cal. App. 2021).
42 Ibid. at 119, citing Cal. Corp. Code § 17707.03(a).
43 Ibid. at 117.
44 Cal. Corp. Code § 17707.03 (emphasis added).
45 *Cheng* at 123–124. Presumably, LLCs that elect S status under federal tax law would be governed under the state law LLC statute.
46 Ibid. at 124.
47 Ibid.

Similarly, in *Pourmoradi v. Gabbai*,[48] the plaintiffs, 50 percent members of an LLC, filed for judicial dissolution under Cal. Corp. Code § 17707.03. The defendants' appraiser applied both a lack of control discount and a marketability discount in computing the company's value. The trial court disallowed both discounts and the defendants appealed. The appeals court reversed the trial court's ruling, noting that § 17707.03[49] "continued to use the term 'fair market value' throughout and continued to omit the section 2000 reference to the liquidation value of the interest being purchased or any other definition of 'fair market value.'"[50] The appeals court also noted that "the trial court ignored the Legislature's command to use a market-based standard and instead focused on the relationship of the parties to the dissolution proceeding."[51]

Colorado

In *Pueblo Bancorporation v. Lindoe, Inc.*,[52] the Colorado Supreme court wrestled with an ambiguous Colorado statute that did not define the term "fair value," specifically with respect to whether discounts should be permitted in determining fair value. Pueblo Bancorporation ("Pueblo") was a bank holding company with 38 shareholders, including Lindoe, Inc.[53] In 1997, the tax law changed, permitting a larger number of shareholders in S corporations. Pueblo was a C corporation.[54] Pueblo's board of directors voted to convert Pueblo from a C corporation to an S corporation. Under the tax law, certain shareholders, including Lindoe, Inc., would be ineligible to become shareholders in an S corporation. Consequently, Pueblo devised a plan whereby a new corporation was formed that elected S status. Pueblo was merged into the new S corporation. Pursuant to the merger, only eligible shareholders became shareholders, and the ineligible shareholders, including Lindoe, Inc., received a cash payment in exchange for their shares.[55] Lindoe, Inc. disagreed with the amount of the share buyout and dissented. Colorado's dissenters' rights statute required that the shares be purchased at fair value.[56] Pueblo initiated an action under Colorado law to obtain the court's determination of the share's fair value.[57]

Colorado Revised Statutes (CRS) § 7-113-101(4) defined "fair value" as follows:

> 'Fair value,' with respect to a dissenter's shares, means the value of the shares immediately before the effective date of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action except to the extent that exclusion would be inequitable.[58]

There is no specific language in the statute with respect to discounts.

The court found that the term "fair value" was ambiguous based upon the plain language of the statute.[59] Relying on legislative intent, the Colorado dissenters' rights statute's underlying purpose, and the national trend, the court interpreted "fair value" as not synonymous with "fair market value" and thus held that discounts are not to be applied.[60]

48 No. B301009 (Cal. App. 2021) (unpublished).
49 In 2014, the California legislature repealed and replaced former section 17351 with 17707.03, without substantive change. See *Pourmaradi* at *5.
50 *Pourmoradi* at *5.
51 Ibid. at *6.
52 63 P.3d 353 (Colo. 2003).
53 Ibid. at 354.
54 C corporations are subject to double taxation. S corporations are subject to single taxation at the shareholder level. S corporation status is elective provided that the corporation is eligible for S status. One of the eligibility requirements is that all the shareholders must be individuals, estates, or certain trusts. A corporation is not an eligible S corporation shareholder. See Internal Revenue Code § 1361(b).
55 *Pueblo Bancorporation* at 357.
56 Ibid. at 358.
57 Ibid. at 357.
58 Ibid. at 358.
59 Ibid. at 359.
60 Ibid. at 361–363, 369.

Florida

In *Erp v. Erp*,[61] a husband and wife each owned 40 percent of a recreational vehicle dealership in Florida. The remaining 20 percent of the company was owned equally by the husband's son from a previous marriage and the wife's son from a previous marriage.[62] The husband and wife sought a dissolution of marriage, and the valuation of the company was at issue to determine an equitable division of marital assets. The trial court awarded the husband the joint 80 percent interest in the company. In arriving at the value of the company, the trial court did not allow a minority discount, but it did allow a 10 percent marketability discount.

The wife appealed, arguing that no marketability discount should be allowed. She asserted that "a marketability discount is never appropriate in a dissolution of marriage action that effectively results in a corporate buyout of one spouse."[63] As support for her argument, she cited Florida Statutes § 607.1301(4) (2005), which "defines the 'fair value' of a corporation in the context of a shareholder's right to appraisal"[64] and specifically denies both minority and marketability discounts.[65]

The appeals court rejected the wife's argument, finding that this was not a case of shareholder oppression. There was no involuntary change in the "fundamental nature of the corporation."[66] Further, the appeals court noted that certain aspects of shareholder oppression or appraisal rights cases are not necessarily appropriate in a dissolution of marriage case, where trial courts have discretion, based on the evidence, to determine whether discounts are acceptable.[67] Therefore, the appeals court allowed the marketability discount in this case.[68]

Iowa

Northwest Investment Corp. v. Wallace[69] presented a different twist. In this case, the court did not address the applicability of discounts in arriving at fair value for minority shareholders. Rather, it examined whether minority shareholders were entitled to additional consideration in the form of a control premium. River Cities Investment Company reduced its outstanding shares of common stock in a reverse stock split, which resulted in fractional shares that were not permitted under the company's amended articles of incorporation. Fractional shares would be purchased for cash, effectively forcing the minority shareholders to have their shares redeemed by the corporation.[70]

61 976 So.2d 1234 (Fla. App. 2008).
62 Ibid. at 1235.
63 Ibid. at 1237.
64 Ibid. at 1238.
65 Ibid. at 1238. The definition of "fair value" for purposes of appraisal rights can currently be found in Florida Statutes § 607.1301(5).
66 Ibid. at 1239.
67 Ibid.
68 Ibid.
69 741 N.W. 2d 782 (Iowa 2007).
70 Ibid. at 784.

The minority shareholders disagreed with the offering price and demanded their appraisal rights. The corporation offered $33.23 per share, while the minority shareholders demanded $64 per share. The trial court awarded the minority shareholders $64 per share, which included a control premium.[71] The premium reflected the additional amount a buyer would pay to own a controlling interest in the corporation.

The court addressed whether a control premium was permissible under Iowa Code § 490.1301(4), which defined fair value in shareholder appraisal rights cases. Under that section, which was modeled after the MBCA, discounting for lack of marketability or minority status was expressly prohibited in determining fair value. The section was silent with respect to whether a control premium was permitted in determining fair value. The court held that a control premium may be considered in determining fair value if supported by the evidence.[72] In support of its conclusion, the court quoted from the MBCA's official comments, which stated that "appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole rather than the value of the shareholder's shares when valued alone."[73] The court reasoned that "if an appraiser is valuing the corporation as a whole, then a control premium is certainly proper. A control premium is the additional consideration an investor would pay over the value for a minority interest in order to own a controlling interest in the common stock of a company."[74]

Kansas

In *Estate of Hjersted*,[75] the Supreme Court of Kansas reversed the Kansas Court of Appeals and remanded an estate valuation case to the lower district court. During his lifetime, the decedent (Norman) transferred his entire ownership in a closely held corporation, Midland Resources, Inc. (MRI), to a family limited partnership. Norman owned 96 percent of the limited partnership interests and subsequently transferred those interests to a revocable trust.[76] Three years later, Norman sold/gifted his 96 percent limited partnership interest to his son (Lawrence) from a previous marriage. Approximately 13 months after the sale, Norman died. Norman's wife, Maryam, filed a petition with the court to determine her elective share of the estate. She disagreed with the fair market valuation of the pre-death sale of the limited partnership interest (which included the MRI stock) to Lawrence.

Maryam's appraiser applied a 10 percent marketability discount to the MRI stock. Lawrence's appraiser applied both minority and marketability discounts, totaling 32.5 percent. The district court held in favor of Maryam, rejecting Lawrence's appraiser's 32.5 percent combined discount and included the entire value of the limited partnership interest in the estate. The district court ruled in Maryam's favor because she did not consent to the limited partnership transfer.[77] The court of appeals upheld the district court's ruling.[78]

The Kansas Supreme Court reversed the court of appeals and remanded the case to the district court to reconsider the discounting issue. In its directions to the district court, the Supreme Court requested that the district court consider whether Maryam is comparable to a minority shareholder in the same context as one who is entitled to appraisal rights where fair value (without any discounts) is the appropriate valuation metric.[79] However, the Supreme Court cautioned the district court that it should consider comment e to ALI Principles § 7.22, which it had cited previously in *Arnaud*:

71 Ibid. at 785.
72 Ibid. at 788.
73 Ibid. at 787, quoting MBCA § 13.01 cmt. 2 at 13-10.
74 Ibid. at 787.
75 175 P.3d 810 (Kan. 2008).
76 Ibid. at 813.
77 Ibid. at 815.
78 Ibid. at 816.
79 Ibid. at 822, citing Arnaud v. Stockgrowers State Bank, 268 Kan. 163, 992 P.2d 216 (1999), involving a corporation's reverse stock split forcing the minority shareholders to sell their fractional share holdings.

> The valuation principles adopted by § 7.22 are those that are appropriate for appraisal [of fair value of shares for corporate transactions giving rise to appraisal rights] and they do not necessarily apply in other contexts such as valuation of stock for tax or ERISA purposes. The standard of valuation should reflect the purpose served by the law in that context, and thus § 7.22 is not intended to imply that in other contexts discounts attributable to minority status or non-marketability are necessarily inappropriate.[80]

Missouri

In a heavily fact-dependent case, the Missouri Supreme Court upheld the application of minority and marketability discounts in determining fair value in a shareholder oppression case. In *Robinson v. Langenbach*,[81] the Perma-Jack Company ("Perma-Jack") was equally owned by three siblings, including Joan Robinson ("Robinson"), the plaintiff/appellant.[82] For many reasons, the other two shareholders were dissatisfied with Robinson's work performance and voted to remove her as president and treasurer.[83] Robinson sued the other two shareholders and Perma-Jack to dissolve Perma-Jack under Missouri Revised Statutes (MRS) § 351.494 for acting in a manner that is illegal, oppressive, or fraudulent.[84]

The circuit court ruled that the defendants committed shareholder oppression, but did not order dissolution of the company. Instead, it ordered the defendants to purchase Robinson's shares at fair value.[85] The circuit court applied a 10 percent marketability discount and a 15 percent minority discount to determine fair value.[86] In a cross-appeal, among other issues, Robinson argued that the circuit court erred in applying discounts to determine fair value.[87]

Robinson argued that MRS § 351.455 provides that a dissenting shareholder is entitled to appraisal rights and its shares purchased at fair value. The statute is silent regarding the allowance of any discounts. In support of her position, she cited Missouri case law in which the forced sale of a minority shareholder's shares did not permit discounting to arrive at fair value.[88]

Nevertheless, the Missouri Supreme Court upheld the circuit court's allowance of the discounts. It reasoned that considering the particular and unique facts of this case, the circuit court had the authority and broad discretionary power to "shape and fashion relief to fit the particular facts, circumstances and equities of the case before it."[89]

New Jersey

Parker v. Parker[90] involved two brothers, Richard and Steven Parker, who co-owned (50 percent each) several companies. The brothers sued and counterclaimed each other alleging they are each an oppressed shareholder and alleging shareholder deadlock under New Jersey Statutes § 14A:12-7. After wading through numerous allegations in the complaints, the trial court found that Richard Parker was an oppressed shareholder and that Steven Parker was not an oppressed shareholder.[91]

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80 Ibid. at 823, quoting *Arnaud* at 170.
81 599 S.W. 3d 167 (Mo. 2020).
82 Ibid. at 173.
83 Ibid. at 174.
84 Ibid. at 175.
85 Ibid. at 175–176.
86 Ibid. at 176.
87 Ibid.
88 Ibid. at 185, citing Swope v. Siegel-Robert, Inc., 243 F.3d 486, 492–93 (8th Cir. 2001).
89 Ibid. at 186.
90 No. UNN-C-108-13 (Super. NJ 2016) (unpublished).
91 Ibid. at *12, *20.

The court applied the fair value legal standard of valuation in a shareholder oppression suit. Although the term fair value is not defined in the New Jersey statute,[92] under New Jersey case law, neither marketability nor minority discounts are to be applied absent extraordinary circumstances.[93] The court ordered Steven Parker to sell his shares to Richard Parker for fair value, allowing a 25 percent marketability discount due to Steven Parker's wrongful acts that, the court said, caused an extraordinary circumstance. The court did not allow a minority discount, however, because neither party had a controlling interest warranting an adjustment for lack of control.[94]

New Mexico

In contrast to *Northwest Investment Corp. v. Wallace*[95] (Iowa) discussed above, the New Mexico Court of Appeals rejected a claim for a control premium. In *N.M. Banquest Investors v. Peters Corp.*,[96] a dissenting shareholder action, the parties disagreed regarding the computation of the fair value of a minority shareholder's interest under the New Mexico appraisal rights statute.[97] Regarding discounts, the lower district court found that the determination of fair value is computed based upon the shareholder's proportionate interest in the corporation without any minority or marketability discount. The minority shareholder, the Peters Group, appealed the district court's decision and argued that fair value should include a control premium to reflect ownership control.[98] More specifically, it argued that under a publicly traded companies valuation approach to determine fair value, there is a built-in minority discount that needs to be adjusted. The Peters Group maintained that this method relies upon multiples derived from trading information for minority blocks of comparable companies.[99] The appeals court rejected this argument, stressing that the amount of a control premium is a "question of fact determined on a case-by-case basis."[100] Further, sale of control was not at issue in this case.[101] Therefore, the appeals court held that there was no evidence to support a control premium.[102]

92 Ibid. at *27.
93 Ibid. at *28, citing Brown v. Brown, 348 N. J. Super. 483 (App. Div. 2002).
94 Ibid. at *35.
95 See n. 69.
96 159 P.3d 1117 (NMCA 2007).
97 Ibid. at 1122.
98 Ibid. at 1121–1122.
99 Ibid. at 1122.
100 Ibid. at 1124.
101 Ibid. at 1125.
102 Ibid.

New York

In *Ferolito v. Arizona Beverages USA LLC*,[103] John Ferolito and the other plaintiffs (collectively, the "Ferolito parties") commenced an action to dissolve Beverage Marketing USA, Inc. (BMU) under New York's Business Corporation Law (BCL) § 1104-a. The defendant, Domenick Vultaggio ("Vultaggio") elected under BCL § 1118 to purchase Ferolito's shares. The Ferolito parties together owned 50 percent of BMU.[104] An owner's agreement restricted Ferolito from selling his shares to certain persons or entities not specified in the agreement without Vultaggio's consent.[105] Ferolito claimed that BMU was worth $3.2 billion. Vultaggio countered that BMU was worth only $426 million and that any recovery by the Ferolito parties should be further reduced because of allegedly improper actions.[106]

BCL § 1104-a provided for Ferolito's shares to be purchased at fair value, which was not defined under the statute.[107] In determining fair value, Vultaggio argued for a 35 percent discount for lack of marketability. Ferolito argued that no discount was necessary because BMU had been successful and other companies were interested in acquiring it.[108] The court agreed with Vultaggio, but only allowed a 25 percent discount for lack of marketability. The court held that a marketability discount was appropriate in this case, noting that there were no bona fide offers for the company and that the shareholders will continue to have difficulties liquidating their shares.[109]

North Carolina

In *Mason v. Mason*,[110] the plaintiff (wife) sought judicial dissolution of Multiflora Greenhouses, Inc. (MGI) and the parties agreed that the defendant (husband) had elected to purchase her shares at fair value pursuant to North Carolina General Statutes (NCGS) § 55-14-13.[111] The plaintiff and defendant were married but legally separated at the time of this proceeding. The plaintiff filed a motion for summary judgement[112] regarding the determination of her shares' fair value.[113]

The plaintiff and defendant each owned 39.65 percent of MGI.[114] The defendant's expert appraiser valued the plaintiff's shares and applied a 20 percent minority discount and a 30 percent marketability discount. In her motion for summary judgment, the plaintiff accepted the defendant's valuation of the entity as a whole, but argued for elimination of the minority and marketability discounts.[115]

103 2014 NY Slip Op 32830(U) (N.Y. Sup. Ct. 2014).
104 Ibid. at *2.
105 Ibid. at *4.
106 Ibid. at *2.
107 Ibid. at *13.
108 Ibid. at *33–34.
109 Ibid.
110 No. 17 CVS 1724, 2022 NCBC 24 (N.C. Super. Ct. 2022).
111 Ibid. at *1.
112 In general, a motion for summary judgment is appropriate when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law.
113 *Mason v. Mason* at *1.
114 Ibid. at *2.
115 Ibid. at *8.

Although the North Carolina statute did not define fair value,[116] the court noted that the legislature did not limit fair value to market value and did not limit other factors to be considered in the determination of fair value.[117] The plaintiff did not offer her own expert appraiser, but simply asked the court to disregard the two discounts.[118] The court denied the plaintiff's motion, holding that she did not carry her burden of proving, for summary judgment purposes, that the court should disregard the two discounts.[119]

Oregon

In *Ybarra v. Dominguez Family Enterprises*,[120] the plaintiff appealed the trial court's ruling that determined fair value by allowing a minority discount and a marketability discount. The plaintiff, a child of the founder, owned 7.98 percent of Dominguez Family Enterprises (DFE), a distributor of tortilla chips.[121] In 2018, the plaintiff filed a complaint against DFE and the other shareholders alleging "illegal, oppressive or fraudulent acts and misapplication of corporate assets."[122] The plaintiff asserted that the following acts were committed:

1. Permitting DFE to make large interest-free loans to other board members without adequate security and without adequate efforts to obtain repayment;
2. Permitting DFE to loan large sums to a Washington company without adequate security and without adequate efforts to obtain repayment;
3. Authorizing the creation of a new LLC—C&H RE Holdings, LLC, in which each shareholder except plaintiff was a member—to hold real properties purchased with company funds; and
4. Restricting distributions, even though the company had retained earnings, while providing bonuses to the other shareholders.[123]

The plaintiff argued that discounts for lack of marketability and lack of control should not be applied to determine fair value in minority shareholder oppression cases. The defendant argued that the plaintiff was unable to prove oppressive conduct and both discounts should be applied.[124] The Oregon statute is silent regarding the application of discounts to determine fair value. Based on an analysis of case law precedent, the appeals court concluded that the application of discounts is a case-specific determination and that minority and marketability discounts are not appropriate in determining fair value where the minority shareholder is the victim of oppressive conduct.[125] The appeals court rejected the trial court's conclusion that discounts must be applied in the absence of a finding of oppression.[126] Rather, discounts are to be considered based upon all of the relevant facts of the case.[127] The appeals court remanded the case to the trial court to determine whether discounts were appropriate taking into consideration the circumstances of the case.[128]

116 Ibid. at *12.
117 Ibid.
118 Ibid. at *13.
119 Ibid. at *14.
120 322 Or. App. 798 (2022).
121 Ibid. at 799–800.
122 Ibid. at 800.
123 Ibid.
124 Ibid. at 801.
125 Ibid. at 804.
126 Ibid. at 807.
127 Ibid.
128 Ibid. at 808.

Fair value is not necessarily the same as fair market value, although it can be under certain circumstances. It is incumbent on valuation experts to familiarize themselves with applicable state law before rendering an opinion on fair value.

Conclusion

Fair value is not necessarily the same as fair market value, although it can be under certain facts and circumstances. In many states, fair value, rather than fair market value, is the valuation standard in cases involving appraisal rights where minority shareholders are either forced to sell their shares or are the victims of oppression. As discussed above, fair value is not always clearly defined in state statutes. In states with a clear definition of fair value, discounts for lack of control and marketability generally are not permitted. In other states, the determination of fair value is more flexible and depends on the relevant facts of the case. Therefore, it is incumbent on valuation experts to familiarize themselves with applicable state law before rendering an opinion on fair value. Further, as illustrated by the California cases dealing with LLCs, it is crucial for valuation experts to understand the type of business entity being valued and the language of the applicable statute in determining whether discounts are appropriate. VE

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